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Trial Practice and Procedure

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I. INTRODUCTION

The 2006 survey period yielded several noteworthy decisions in the Eleventh Circuit Court of Appeals relating to federal trial practice and procedure, many of which involved issues of first impression. This Article analyzes several recent developments in the Eleventh Circuit, including significant rulings in the areas of class actions, subject matter jurisdiction, statutory interpretation, judicial estoppel, civil procedure, and other issues of interest to the trial practitioner.

II. CLASS ACTION PRACTICE UNDER THE CLASS ACTION FAIRNESS ACT OF 2005 ("CAFA")[1]

A. Determining Which Party Should Bear the Burden of Proof in Establishing CAFA's "Local Controversy" Exception to Federal Subject Matter Jurisdiction

In *Evans v. Walter Industries, Inc.*,[2] the Eleventh Circuit held, as a matter of first impression in all circuits, that the party seeking remand bears the burden of proof if it seeks to avail itself of any express statutory exception to federal jurisdiction, such as the "local controversy"

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1. Pub. L. No. 109-2, 119 Stat. 4 (2005) (codified in scattered sections of 28 U.S.C.).
2. 449 F.3d 1159 (11th Cir. 2006).

exception, granted under CAFA.[3] The court further concluded that the sixty-day period within which the court must complete all action on an appeal, including rendering judgment, begins to run on the date when the appellate court grants the appellant's application to appeal, not the date on which the application for appeal was filed.[4]

The plaintiffs filed this putative class action in Alabama state court, asserting property damage and personal injury claims against numerous defendants who operated manufacturing facilities in Anniston, Alabama. The plaintiffs attributed their alleged injuries to the defendants' release of various waste substances over an approximately eighty-five-year period.[5] After certain defendants removed the case under CAFA, the plaintiffs moved to remand, arguing that the case fell within CAFA's "local controversy" exception to federal jurisdiction because more than two-thirds of the plaintiff class were Alabama citizens, and at least one Alabama defendant was a "significant" defendant within the meaning of CAFA.[6] The United States District Court for the Northern District of Alabama agreed and remanded the case to state court. The removing defendants appealed.[7]

Before reaching the merits of the appeal, the court first had to interpret CAFA's sixty-day rule governing the review of remand orders to determine when its ruling on the appeal would be due.[8] If the circuit court accepts an appeal, CAFA requires the court to complete all action on the appeal, including rendering judgment, within sixty days from the date "'on which such appeal was filed.'"[9] The court concluded that an appeal should be deemed "filed," and the sixty-day period should thus begin to run, on the date the court grants the application to appeal, noting that CAFA provides for an "application," rather than a "notice" of appeal.[10] The court also noted the language in 28 U.S.C. § 1453(c)-

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3. *Id.* at 1164. "Congress enacted CAFA on February 18, 2005. Under CAFA, federal courts now have original jurisdiction over class actions in which the amount in controversy exceeds $5,000,000 and there is minimal diversity (at least one plaintiff and one defendant are from different states)." *Id.* at 1163 (citing 28 U.S.C.A. § 1332(d)(2) (2006)).

4. *Id.* at 1162-63.

5. *Id.* at 1161.

6. *Id.* CAFA's "local controversy" exception provides a narrow exception to federal jurisdiction for cases that are "truly local in nature" and requires a court to decline to exercise jurisdiction over a class in which more than two-thirds of the putative class members are citizens of the forum state and at least one defendant, whose alleged conduct forms a significant basis for the putative plaintiffs' claims, is also a citizen of the forum. *Id.* at 1163 (citing 28 U.S.C.A. § 1332(d)).

7. *Id.* at 1161.

8. *Id.* at 1162.

9. *Id.* (quoting 28 U.S.C.A. § 1453(c) (2006)).

10. *Id.* at 1162-63 (citing 28 U.S.C.A. § 1453(c)(1)).

(2), which indicated that the sixty-day period should begin after the "appeal was filed," not after the "application" was filed.[11] The court further concluded that Federal Rule of Appellate Procedure 5,[12] which governs discretionary appeals, could apply to requests for appeals under CAFA and provides that "[t]he date when the order granting permission to appeal is entered serves as the date of the notice of appeal for [purposes of] calculating time . . . ."[13] Accordingly, the court held that the sixty-day period begins to run from "the date that the court of appeals accepts the appeal, and thus file[d] the appeal."[14]

Having determined its deadline under CAFA's sixty-day rule,[15] the court then addressed whether the case fell within CAFA's "local controversy" exception to federal subject matter jurisdiction.[16] Because CAFA's language and structure contemplated broad federal jurisdiction over class actions, the court emphasized that statutory exceptions should be construed narrowly so as not to create "jurisdictional loophole[s]."[17] Determining that "[n]o other Circuit appears to have addressed the specific question of which party should bear the burden of proof on CAFA's local controversy exception," the court addressed "as a question of first impression the issue of who bears the burden of proving the local controversy exception, once the removing defendants have proved the amount in controversy and the minimal diversity requirement, and thus have established federal court jurisdiction under § 1332(d)(2)."[18] The court noted that CAFA did "not change the traditional rule that the party seeking to remove the case bears the burden of establishing federal jurisdiction,"[19] but it affirmed the district court's finding that the plaintiffs, who sought remand under CAFA's local controversy exception,

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11. *Id.* at 1162 (quoting 28 U.S.C.A. § 1453(c)(2)).

12. FED. R. APP. P. 5.

13. *Evans*, 449 F.3d at 1162 (citing FED. R. APP. P. 5).

14. *Id.* at 1162-63. In so holding, the Eleventh Circuit "agree[d] with the resolution of every other court of appeals which has ruled on this issue." *Id.* at 1163 (citing Patterson v. Dean Morris, LLP, 444 F.3d 365, 367 (5th Cir. 2006); Amalgamated Transit Union Local 1390 v. Laidlaw Transit Servs., Inc., 435 F.3d 1140, 1144-45 (9th Cir. 2006)); *see also* Pritchett v. Office Depot, Inc., 420 F.3d 1090, 1093 (10th Cir. 2005).

15. *Evans*, 449 F.3d at 1163 ("In this case, the appellants filed their application for appeal on March 24, 2006, and this court granted their application on March 30, 2006. Therefore, this court's ruling is due within 60 days of March 30, 2006.").

16. *See id.*

17. *Id.* at 1163-64 (citing S. REP. NO. 109-14, at 39 (2005), *reprinted in* 2005 U.S.C.C.A.N. 3, 37).

18. *Id.* at 1165.

19. *Id.* at 1164, 1165 (citing Brill v. Countrywide Home Loans, Inc., 427 F.3d 446, 448-49 (7th Cir. 2005); Abrego Abrego v. Dow Chem. Co., 443 F.3d 676, 678 (9th Cir. 2006) (per curiam)).

should bear the burden of proving that the case falls within this narrow exception.[20]

In the absence of any precedent in the CAFA context, the Eleventh Circuit looked to its prior holdings that addressed the removal of actions involving the Federal Deposit Insurance Corporation ("FDIC").[21] In those instances, the court held that once the FDIC met the statutory prerequisites for removal, the burden of establishing the statutory "state action" exception to federal jurisdiction shifted to the party objecting to removal.[22] Comparing CAFA's "local controversy" exception to the statutory framework at issue in the FDIC cases, the court held that the plaintiffs, as the parties objecting to removal after the prerequisites for removal jurisdiction under CAFA had been met, bore the burden of proving that their case fell within the local controversy exception.[23]

B. Removing Defendant Bears Burden of Establishing Federal Subject Matter Jurisdiction Under CAFA

In *Miedema v. Maytag Corp.*,[24] the Eleventh Circuit affirmed the decision of the United States District Court for the Southern District of Florida, which had "not[ed] the existence of disagreement among courts as to which party bears the burden of establishing subject matter jurisdiction under CAFA," but "adhered to the traditional rule in the CAFA context that a removing defendant bears the burden of establishing subject matter jurisdiction."[25] The court further concluded that CAFA did not change federal courts' long-standing practice of construing removal statutes strictly and resolving all doubts in favor of remand.[26]

The plaintiff, Leslie Miedema, filed suit against Maytag Corporation ("Maytag") in Florida state court on behalf of herself and a putative class of "'[a]ll purchasers of Maytag ranges/ovens, in the State of Florida, bearing [certain model numbers].'"[27] Miedema alleged that various ranges and ovens designed and manufactured by Maytag contained a defective door latch assembly that allowed heat to escape and damage

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20. *Id.* at 1164-65.

21. *Id.* at 1164 (citing Castleberry v. Goldone Credit Corp., 408 F.3d 773, 785 (11th Cir. 2005); Lazuka v. FDIC, 931 F.2d 1530, 1539 (11th Cir. 1991), *superseded by statute*, 12 U.S.C. § 1819 (2000) (analogy to *Evans* not affected)).

22. *Id.* (citing *Castleberry*, 408 F.3d at 785; *Lazuka*, 931 F.2d at 1538).

23. *Id.* at 1165. Under the facts at issue, the court determined that the plaintiffs had not met this burden and thus failed to prove that their case fell within the "local controversy" exception. *Id.* at 1168.

24. 450 F.3d 1322 (11th Cir. 2006).

25. *Id.* at 1325.

26. *See id.* at 1328-31.

27. *Id.* at 1324-25.

other range and oven components.[28] Maytag removed the case to the United States District Court for the Southern District of Florida under CAFA, alleging that Miedema and Maytag were of diverse citizenship and the putative class consisted of thousands of Floridians, making the amount in controversy exceed $5 million.[29] Miedema moved to remand, arguing that Maytag had the burden of establishing subject matter jurisdiction by a preponderance of the evidence and that Maytag had failed to do so with respect to the amount in controversy.[30]

"[N]oting the existence of disagreement among courts as to which party bears the burden of establishing subject matter jurisdiction under CAFA," the district court ordered additional briefing on this issue to help determine whether the amount in controversy requirement had been satisfied.[31] After receiving the additional submissions, the district court "adhered to the traditional rule in the CAFA context that a removing defendant bears the burden of establishing subject matter jurisdiction."[32] Acknowledging that the breadth of Miedema's complaint contributed to the uncertainty surrounding the amount in controversy, the district court nonetheless held that Maytag had not met its burden and that it was required to resolve all doubts in favor of remand. Maytag petitioned for permission to appeal the remand order pursuant to 28 U.S.C. § 1453(c).[33]

Before addressing the merits of Maytag's appeal, the Eleventh Circuit recalled its holding in *Evans v. Walter Industries, Inc.*[34] regarding the timeliness of Maytag's application for appeal under CAFA.[35] The court noted that CAFA permits a court of appeals to accept an application to appeal if the application is made to the appellate court "'*not less than* 7 days after entry of the [district court's] order' granting or denying a motion to remand."[36] Acknowledging that it had not directly addressed

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28. *Id.* at 1324.

29. *Id.* at 1325 (citing 28 U.S.C.A. §§ 1332(d), 1453(a), (b) (2006)).

30. *Id.* In support of its argument regarding the amount in controversy, Maytag submitted a declaration by its information analyst that declared she had researched the range and oven models identified in Miedema's description of the putative class; that the number of ranges and ovens bearing the alleged model numbers had been sold to nearly 7000 Floridians; and that the total value of those ranges and ovens exceeded $5 million. *Id.*

31. *Id.* Miedema deposed Maytag's information analyst and submitted her deposition as further evidence that Maytag could not meet its burden with respect to the amount in controversy. *Id.*

32. *Id.*

33. *Id.* at 1325-26.

34. 449 F.3d 1159 (11th Cir. 2006).

35. *Miedema*, 450 F.3d at 1326.

36. *Id.* (quoting 28 U.S.C.A. § 1453(c)(1)).

CAFA's seven-day application rule, the Eleventh Circuit noted that several circuits had declined to read the "not less than" language literally, finding it to be a typographical error or that a literal reading would produce an absurd result.[37] Reaffirming the construction of § 1453(c)(1) that it had taken in *Evans*,[38] the court held that Maytag's application for appeal was timely because it was made within seven days of the district court's remand order.[39]

Turning to the merits of Maytag's appeal, the court rejected Maytag's claim that the district court erred by applying the traditional rule that the removing defendant bears the burden of establishing subject matter jurisdiction in the CAFA context.[40] Although Maytag conceded that CAFA's text does not address which party has the burden of proof in establishing federal jurisdiction, Maytag argued that CAFA's legislative history "expresses a clear intent to require that an objecting plaintiff demonstrate removal was improvident, i.e., that all applicable jurisdictional requirements were *not* met."[41] Maytag argued that the district court should have placed the burden on Miedema to prove that subject matter jurisdiction was lacking.[42] Maytag pointed to a Senate Committee report which provided, in pertinent part, that "if a federal court is uncertain about whether 'all matters in controversy' in a purported class action 'do not in the aggregate exceed the sum or value of $5,000,000' the court should err in favor of exercising jurisdiction over the case."[43]

The Eleventh Circuit disagreed with Maytag, pointing to opinions from the Seventh and Ninth Circuits that had expressly rejected Maytag's arguments.[44] For instance, in *Brill v. Countrywide Home Loans, Inc.*,[45] the Seventh Circuit held that "CAFA's 'naked legislative history' [did] not alter the well-established rule that a proponent of subject matter jurisdiction bears the burden of persuasion on the amount in controversy."[46] In *Abrego Abrego v. Dow Chemical Co.*,[47] the Ninth

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37. *Id.* (citing *Pritchett*, 420 F.3d at 1093 n.2 ("The statute should read that an appeal is permissible if filed 'not more than' seven days after entry of the remand order")).

38. *Evans*, 449 F.3d at 1162.

39. *Miedema*, 450 F.3d at 1326 ("[T]o read [§ 1453(c)(1)] literally would produce an absurd result: there would be a front-end waiting period (an application filed 6 days after entry of a remand order would be premature), but there would be no back-end limit (an application filed 600 days after entry of a remand order would not be untimely")).

40. *Id.* at 1327-28.

41. *Id.* at 1328.

42. *Id.* at 1327-28.

43. *Id.* (citing S. REP. NO. 109-14, at 42 (2005), *reprinted in* 2005 U.S.C.C.A.N. 4, 40; 151 CONG. REC. H723, H727 (daily ed. Feb. 17, 2005) (statement of Rep. Sensenbrenner)).

44. *Id.* at 1328.

45. 427 F.3d 446 (7th Cir. 2005).

46. *Miedema*, 450 F.3d at 1328 (quoting *Brill*, 427 F.3d at 448).

Circuit held that "'CAFA's silence, coupled with a sentence in a legislative committee report untethered to any statutory language, does not alter the longstanding rule that the party seeking federal jurisdiction on removal bears the burden of establishing that jurisdiction.'"[48] Finally, the Eleventh Circuit cited its decision in *Evans*,[49] which concurred with the Seventh and Ninth Circuits in holding that "'CAFA does not upset the traditional rule that the removing party bears the burden of proof with regard to establishing federal court jurisdiction.'"[50]

The court also rejected Maytag's argument that the district court should have resolved any doubts about the amount in controversy in favor of finding jurisdiction.[51] Maytag argued that adherence to these rules ran contrary to "one of the overriding purposes" of CAFA, which Maytag characterized as "'fixing the flaw in 28 U.S.C. § 1332 and throwing open the doors of the federal judiciary to defendants who are sued in state court class actions.'"[52] Although CAFA is also silent on this issue, the court noted that the rule of construing removal statutes strictly and resolving doubts in favor of remand remained well-established.[53] The court further noted that Congress presumably legislated against the backdrop of established principles, and could have expressly imposed a special rule of construction on CAFA's provisions had it wanted to alter these longstanding rules for purposes of class action removals.[54] Therefore, the court determined that Maytag's "generalized appeals to CAFA's 'overriding purpose' are unavailing in the face of CAFA's silence on the traditional, well-established rules that govern the placement of the burden of proof and the resolution of doubts in favor of remand."[55] Thus, the Eleventh Circuit concluded that the district court did not err by placing the burden of establishing subject matter

47. 443 F.3d 676 (9th Cir. 2006) (per curiam).

48. *Miedema*, 450 F.3d at 1328 (quoting *Abrego*, 443 F.3d at 686).

49. *Evans*, 449 F.3d at 1164.

50. *Miedema*, 450 F.3d at 1328 (quoting *Evans*, 449 F.3d at 1164). The court further relied on its prior opinion in *United States v. Thigpen*, 4 F.3d 1573 (11th Cir. 1993), which held that "'[w]hile a committee report may ordinarily be used to interpret unclear language contained in a statute, a committee report cannot serve as an independent statutory source having the force of law.'" *Id.* at 1577 (quoting Int'l Bhd. of Elec. Workers Local Union No. 474 v. NLRB, 814 F.2d 697, 712 (D.C. Cir. 1987)).

51. *Miedema*, 450 F.3d at 1328.

52. *Id.* at 1329 (internal punctuation omitted).

53. *Id.* at 1328 (citations omitted).

54. *Id.* at 1329 (citations omitted).

55. *Id.* at 1329-30.

jurisdiction on Maytag, the removing defendant, or by applying the general rule that doubts are to be resolved in favor of remand.[56]

C. Whether Federal or State Law Determines When an Action is "Commenced" for Purposes of Determining the Applicability of CAFA

In *Tmesys, Inc. v. Eufaula Drugs, Inc.*,[57] the Eleventh Circuit addressed two more issues of first impression regarding CAFA: (1) whether the court has jurisdiction to review an order remanding a case based on a finding that CAFA did *not* apply and (2) what law determines when an action has "commenced" for purposes of CAFA.[58]

The plaintiff and appellant, Eufaula Drugs, Inc. ("Eufaula"), filed a complaint against Tmesys, Inc. in Alabama state court on February 14, 2005, and summonses were not issued until February 28, 2005. Tmesys removed the case pursuant to CAFA, and Eufaula moved to remand.[59] The United States District Court for the Middle District of Alabama remanded the case, finding that when Eufaula "'filed its complaint on February 14, 2005, it had the specific intent that the complaint be served on that day.'"[60] Accordingly, the district court found that it lacked subject matter jurisdiction because under Alabama law, the case had commenced prior to CAFA's effective date of February 18, 2005.[61]

Noting that it generally did not have jurisdiction to review remand orders under 28 U.S.C. § 1447(d),[62] the Eleventh Circuit acknowledged that CAFA provided it with discretionary jurisdiction to review such orders in cases that were "commenced" on or after CAFA's enactment.[63] The court further held, as a matter of first impression, that it had jurisdiction to review a district court's remand order when that order is based on a determination that CAFA does not apply, at least to the extent of re-examining that jurisdictional issue.[64] Addressing yet

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56. *Id.* at 1330. Further determining that Maytag had not established by a preponderance of the evidence that the amount in controversy exceeded the statutory minimum of $5 million as required by CAFA, the Eleventh Circuit affirmed the district court's judgment remanding the matter for lack of subject matter jurisdiction. *Id.* at 1330-31.

57. 462 F.3d 1317 (11th Cir. 2006).

58. *Id.* at 1319.

59. *Id.* at 1318.

60. *Id.* (quoting Eufaula Drugs, Inc. v. Tmesys, Inc., 432 F. Supp. 2d 1240, 1249 (M.D. Ala. 2006)).

61. *Id.*

62. 28 U.S.C. § 1447(d) (2000).

63. *Tmesys, Inc.*, 462 F.3d at 1318-19 (citing 28 U.S.C.A. § 1453(c)(1)).

64. *Id.* at 1319 (citing Patterson v. Dean Morris, LLP, 448 F.3d 736, 739 (5th Cir. 2006) ("We may review orders of remand for asserted errors in the application of CAFA"); Ecee, Inc. v. Fed. Energy Regulatory Comm'n, 611 F.2d 554, 555 (5th Cir. 1980) ("[W]e always

another issue of first impression, the court agreed with the "consensus among circuits" in determining that state law determines when an action is commenced for purposes of CAFA.[65] Accordingly, the Eleventh Circuit upheld the district court's application of Alabama law, which established that the action was commenced prior to the effective date of CAFA, thereby depriving the district court and the court of appeals of subject matter jurisdiction to consider the matter under CAFA.[66]

III. STATUTORY INTERPRETATION

A. Whether The Social Security Act Permits an Award of Attorney Fees for Past-Due Benefits Awarded to a Claimant After Remand

In *Bergen v. Commission of Social Security*,[67] the Eleventh Circuit held, as a matter of first impression, that the Social Security Act, 42 U.S.C. § 406(b)(1)(A),[68] permits an award of attorney fees when a district court remands a case to the Commissioner of Social Security (the "Commissioner") for further proceedings and the Commissioner subsequently awards the claimant past-due benefits on remand.[69] Section 406(b)(1)(A) provides, in pertinent part, as follows:

> Whenever a court renders a judgment favorable to a claimant under this subchapter who was represented before the court by an attorney, the court may determine and allow as part of its judgment a reasonable fee for such representation, not in excess of 25 percent of the total of the past-due benefits to which the claimant is entitled by reason of such judgment, and the Commissioner of Social Security may . . . certify the amount of such fee for payment to such attorney out of, and not in addition to, the amount of such past-due benefits.[70]

This consolidated appeal came before the court after claimants Donald Bergen and James Taylor (the "Claimants") filed applications with the Social Security Administration ("SSA") for disability benefits. The Claimants' claims were denied initially and then on reconsideration, and they requested administrative hearings. After an Administrative Law

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have jurisdiction to determine our jurisdiction")).

65. *Id.* (citing Natale v. Pfizer, Inc., 424 F.3d 43, 43 (1st Cir. 2005) (per curiam); Braud v. Transp. Serv. Co. of Ill., 445 F.3d 801, 803 (5th Cir. 2006); Pfizer, Inc. v. Lott, 417 F.3d 725, 726 (7th Cir. 2005); Plubell v. Merck & Co., 434 F.3d 1070, 1071 (8th Cir. 2006); Bush v. Cheaptickets, Inc., 425 F.3d 683, 686 (9th Cir. 2005)).

66. *Id.*

67. 454 F.3d 1273 (11th Cir. 2006) (per curiam).

68. 42 U.S.C. § 406(b)(1)(A) (2000).

69. *Bergen*, 454 F.3d at 1274.

70. 42 U.S.C. § 406(b)(1)(A).

Judge ("ALJ") determined that the Claimants were not entitled to benefits because they were not disabled, they filed complaints in the United States District Court for the Middle District of Florida, seeking review of the Commissioner's final decision. The Claimants were represented by attorney Richard Culbertson under a contingency fee agreement providing for payment of a reasonable fee not to exceed twenty-five percent of the total past-due benefits the Claimants would be entitled to recover if the district court entered judgment in their favor.[71]

The district court reversed the Commissioner's decision and remanded the case pursuant to 42 U.S.C. § 405(g).[72] Bergen then moved for attorney fees under the Equal Access to Justice Act, 28 U.S.C. § 2412 ("EAJA"),[73] and the motion was granted.[74] An ALJ subsequently awarded Bergen past-due benefits as a result of his disability.[75] The district court also remanded Taylor's case after reversing the Commissioner's decision, and an ALJ also awarded Taylor past-due disability benefits.[76] However, when Culbertson filed for authorization to charge a reasonable fee for representing the Claimants before the district court pursuant to 42 U.S.C. § 406(b),[77] the district court denied the petition.[78] Specifically, the district court found that 42 U.S.C. § 406(b) did not authorize an award of attorney fees because the district court's prior judgment did not amount to a victory for the Claimants, but simply reversed and remanded their cases to the SSA for further consideration. Under the district court's literal interpretation of § 406(b), an award of attorney fees was unavailable unless the district court's judgment expressly entitled the claimant to an award of past-due benefits and included an award of attorney fees under § 406(b). The Claimants appealed.[79]

Acknowledging that it had never addressed the precise issue of whether § 406(b)(1)(A) authorizes an award of attorney fees when the district court's judgment remanding the case to the Commissioner does

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71. *Bergen*, 454 F.3d at 1274.
72. 42 U.S.C. § 405(g) (2000); *Bergen*, 454 F.3d at 1274-75.
73. 28 U.S.C. § 2412 (2000).
74. *Bergen*, 454 F.3d at 1275.
75. *Id.*
76. *Id.* Taylor also filed a petition for an award of attorney fees under the EAJA, but the district court denied the petition on the ground that the Commissioner's position was substantially justified. *Id.*
77. 42 U.S.C. § 406(b) (2000).
78. *Bergen*, 454 F.3d at 1275.
79. *Id.*

not explicitly mention attorney fees,[80] the Eleventh Circuit joined "the unanimous view of the Courts of Appeals that have addressed the issue to find that § 406(b) authorizes attorney's fees where a district court orders a remand to the Commissioner of Social Security for further proceedings, and the Commissioner awards benefits on remand."[81] Specifically, the court held that the district court's literal reading of the statute frustrated the congressional intent behind § 406(b), which was in part to "'encourag[e] effective legal representation of claimants by insuring lawyers that they will receive reasonable fees directly through certification by the Secretary.'"[82] Rather, the court held that limiting § 406(b) fees to cases in which the court itself awards past-due benefits would discourage counsel from requesting a remand in cases where it was appropriate.[83] Therefore, the court agreed with its sister circuits' interpretation of § 406(b)—that "a judgment favorable to the claimant is merely a prerequisite to a fee award under the statute."[84]

In support of this conclusion, the court cited the holding in *Smith v. Bowen*,[85] in which the Seventh Circuit held that in reading the statute as a whole:

> [it did] not believe that Congress meant that the only time at which fees could be awarded is the time of the judgment. By authorizing the attorney to be paid directly out of the claimant's past-due benefits, Congress intended to make it easier, not harder for attorneys to collect their fees.[86]

The court also cited the Fourth Circuit's opinion in *Conner v. Gardner*,[87] which held that § 406(b)(1) permits an award of attorney fees

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80. *Id.* at 1276.

81. *Id.* at 1278.

82. *Id.* at 1277 (quoting Dawson v. Finch, 425 F.2d 1192, 1195 (5th Cir. 1970)). The court also noted that one of § 406(b)'s goals was to protect claimants by limiting the amount that attorneys could collect. *Id.* at 1276 (citing Shoemaker v. Bowen, 853 F.2d 858, 860-61 (11th Cir. 1988)).

83. *Id.*

84. *Id.* at 1276 (citing Smith v. Bowen, 815 F.2d 1152, 1155 (7th Cir. 1987) (per curiam). *Contra* McGraw v. Barnhart, 370 F. Supp. 2d 1141, 1144 (N.D. Okla. 2005) ("A judgment which merely remands the action for further proceedings by the Social Security Administration does not equate to a claimant being entitled to past due benefits 'by reason of' the Court's judgment"); *see* McPeak v. Barnhart, 388 F. Supp. 2d 742, 746 n.2 (S.D. W. Va. 2005) ("[The *McGraw* court is] reading [§ 406(b)] too narrowly without considering the sorts of judgments which Congress has allowed Courts to make in social security cases").

85. 815 F.2d 1152, 1155 (7th Cir. 1987) (per curiam).

86. *Bergen*, 454 F.3d at 1277 (quoting *Smith*, 815 F.2d at 1155).

87. 381 F.2d 497 (4th Cir. 1967).

when a remand results in an administrative award of benefits.[88] The Eleventh Circuit also reasoned that it and its sister circuits had generally assumed, without addressing the issue, that fees were available under § 406(b) because past-due benefits had been conspicuously awarded without objection by the SSA.[89] Finally, the court noted the Supreme Court's holding that a remand from the district court to the SSA under 42 U.S.C. § 405(g) is a favorable judgment for the claimant.[90]

The Eleventh Circuit also disagreed with the district court's reasoning that the availability of attorney fees to a successful claimant under the subsequently enacted EAJA made § 406(b) attorney fees unnecessary.[91] Under the EAJA, fees were available only when the government's position was not "substantially justified" and were, therefore, not available every time a claimant prevailed on remand.[92] Moreover, the court noted that Congress had not amended § 406(b)(1)(A) following the EAJA's enactment, and the Supreme Court had concluded that "Congress harmonized awards for attorney's fees under the EAJA with awards under § 406(b) by requiring the claimant's attorney to refund to the claimant the amount of smaller fee."[93] Therefore, the Eleventh Circuit joined its sister circuits in holding that § 406(b) authorizes an award of attorney fees when a district court orders a remand to the Commissioner for further proceedings and the Commissioner awards past-due benefits to the claimant on remand.[94]

B. Whether the Secretary of Health and Human Services May, Pursuant to Part B of the Medicare Act, Require Suppliers of Durable Medical Equipment to Submit Additional Proof of Medical Necessity Even After a Certificate of Medical Necessity Has Been Submitted

The appeal in *Gulfcoast Medical Supply, Inc. v. Secretary, Department of Health & Human Services*[95] presented an issue of first impression in

88. *Bergen*, 454 F.3d at 1276. The court in *Bergen* noted that "to permit counsel to receive a reasonable fee for [services rendered in the district court] will not defeat [§ 406(b)'s] purpose, but will serve to advance it." *Id.* (citing *Conner*, 381 F.2d at 500).

89. *Id.* at 1277 (citing McGuire v. Sullivan, 873 F.2d 974, 975 (7th Cir. 1989); Straw v. Bowen, 866 F.2d 1167, 1168-69 (9th Cir. 1989); *Shoemaker*, 853 F.2d at 859-61; MacDonald v. Weinberger, 512 F.2d 144, 145-46 (9th Cir. 1975)).

90. *Bergen*, 454 F.3d at 1276 (citing Shalala v. Schaefer, 509 U.S. 292, 301-02 (1993)).

91. *Id.* at 1277.

92. *Id.* (citing Pierce v. Underwood, 487 U.S. 552, 566 & n.2 (1988)).

93. *Id.* (quoting Gisbrecht v. Barnhart, 535 U.S. 789, 796 (2002)) (internal punctuation omitted).

94. *Id.* at 1277-78.

95. 468 F.3d 1347 (11th Cir. 2006) (per curiam).

the Eleventh Circuit and all circuit courts: whether, under the Medicare Prescription Drug, Improvement, and Modernization Act of 2003,[96] a supplier of durable medical equipment ("DME") unequivocally establishes that such equipment is medically "reasonable and necessary," and thus covered by Part B of the Medicare Act, by submitting a "certificate of medical necessity," or whether the Secretary of Health and Human Services (the "Secretary") can require the supplier to submit additional evidence of medical necessity.[97] Concluding that the Secretary was authorized to require additional submissions, the Eleventh Circuit affirmed the decision reached by the United States District Court for the Middle District of Florida.[98]

Part B of the Medicare Act is a federally subsidized, voluntary enrollment health insurance program that pays a substantial portion of the health care costs incurred by those enrolled in the program. These costs include the cost of DME, such as wheelchairs.[99] Part B is administered by the Center for Medicare and Medicaid Services ("CMS"), a division supervised by the Secretary of Health and Human Services.[100] Only those medical services that are medically "reasonable and necessary" for the beneficiary are covered by the program.[101]

CMS contracts with private insurance carriers who act as claims processors that administer, validate, and pay Part B claims.[102] The carrier must decide "whether the claimed services 'were medically necessary, whether the charges are reasonable, and whether the claim is otherwise covered by Part B'" when the carrier receives a claim for payment.[103] Medicare will not pay a claim unless a physician certifies that the medical services were medically required.[104]

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96. Pub. L. No. 108-173, 117 Stat. 2066 (2003) (codified in scattered sections of 42 U.S.C.).

97. *Gulfcoast,* 468 F.3d at 1348. The court noted that two district courts had addressed this issue: MacKenzie Medical Supply, Inc. v. Leavitt, 419 F. Supp. 2d 766 (D. Md. 2006) and Maximum Comfort, Inc. v. Thompson, 323 F. Supp. 2d 1060 (E.D. Cal. 2004). *Gulfcoast,* 468 F.3d at 1348 n.1.

98. *Gulfcoast,* 468 F.3d at 1348.

99. *Id.* at 1348-49 (citing 42 U.S.C. §§ 1395j to 1395w-4, 1395x(n) (2000 & Supp. III 2003); 42 C.F.R. § 410.38(a)-(c) (2006)).

100. *Id.* at 1349 (citing United States v. R&F Props. of Lake County, Inc., 433 F.3d 1349, 1351-52 (11th Cir. 2005)).

101. *Id.* (citing 42 U.S.C. § 1395y(a) (2000 & Supp. III 2003); 42 C.F.R. § 411.15(k)(1) (2006)).

102. *Id.* (citing 42 U.S.C. § 1395u (2000 & Supp. III 2003); *R&F Properties,* 433 F.3d at 1351).

103. *Id.* (quoting Schweiker v. McClure, 456 U.S. 188, 191 (1982) (citing 42 U.S.C. §§ 1395l, 1395y(a); 42 C.F.R. § 405.803 (1980)).

104. *Id.* (citing 42 U.S.C. § 1395n(a)(2)(B) (2000 & Supp. III 2003)).

To facilitate claims processing, the Medicare Act permits DME suppliers to distribute to physicians a "Certificate of Medical Necessity" ("CMN"),[105] which is defined as "'a form or other document containing information required by the carrier to be submitted to show that an item is [medically] reasonable and necessary.'"[106] To reduce the administrative burden on physicians who only supply the medical information on the CMN, suppliers are permitted to fill in certain portions of the form in advance, including: "(1) identifying information about the supplier and the beneficiary, (2) a description and product code for the medical equipment supplied, and (3) other administrative information not related to the beneficiary's medical condition."[107] As long as the claims do not contain "glaring irregularities," carriers will typically authorize payment immediately upon receipt of a claim and will later conduct a post-payment audit to verify that the payment was proper.[108] If an overpayment is discovered, the carrier may suspend or recoup the payment.[109] A supplier may appeal a carrier's rejection of a claim through a statutory administrative appeals process.[110] After exhausting this administrative remedy, the supplier may seek judicial review in a federal district court.[111]

Appellant Gulfcoast Medical Supply ("Gulfcoast"), a supplier of DME which included motorized wheelchairs, had Part B claims that were administered by Palmetto Government Benefit Administrators ("Palmetto"), a Medicare carrier. After receiving consumer complaints and suspicious results from statistical analyses of Gulfcoast claims, Palmetto audited Gulfcoast in June of 2002. Palmetto determined that numerous patients for whom Gulfcoast had submitted claims for Medicare reimbursement did not meet the necessary criteria and concluded that Gulfcoast had been overpaid by $280,573.68. A Medicare fair hearing officer affirmed the overpayment assessment, and Gulfcoast appealed to an Administrative Law Judge ("ALJ"), arguing that because it had submitted a CMN signed by a physician for each of the challenged claims, Palmetto lacked discretion to reject those claims on the basis of requiring additional evidence. The ALJ disagreed, finding that the audited claims reflected a pattern of erroneous billing and that

105. *Id.* (citing 42 U.S.C. § 1395m(j)(2)(A) (2000 & Supp. III 2003)).
106. *Id.* (quoting 42 U.S.C. § 1395m(j)(2)(B) (2000 & Supp. III 2003)).
107. *Id.* (citing 42 U.S.C. § 1395m(j)(2)(A)).
108. *Id.* (citing 42 U.S.C. § 1395u; 42 C.F.R. § 421.200(a)(2) (2006)).
109. *Id.* (citing 42 C.F.R. § 405.371(a) (2006)).
110. *Id.* (citing 42 U.S.C. § 1395ff(b)(1)(A) (2000 & Supp. III 2003); 42 C.F.R. § 405.801 (2006)).
111. *Id.* (citing 42 U.S.C. § 1395ff(b)(1)(A)).

overpayments were correctly assessed in a majority of the challenged claims. Gulfcoast appealed to the United States District Court for the Middle District of Florida, which affirmed the ALJ's ruling.[112]

On appeal to the Eleventh Circuit, Gulfcoast argued that as a matter of statutory construction, Part B did not allow carriers or the Secretary to require a supplier to submit additional medical documentation beyond the CMN to prove medical reasonableness and necessity.[113] Relying on the statutory definition of a CMN, Gulfcoast argued that Part B unambiguously mandated that a CMN alone establishes the reasonableness and necessity of medical equipment, and that a CMN signed by the physician was legally sufficient to validate a claim under Plan B.[114] Gulfcoast contended that because it submitted a signed CMN for each of the disputed claims, the Secretary lacked discretion to reject those claims based on additional records procured or interviews conducted by the carrier.[115]

The Eleventh Circuit disagreed with Gulfcoast and held that the Medicare Act did not preclude the Secretary from requiring a supplier to submit information beyond a CMN to prove medical reasonableness and necessity.[116] First, the court held that § 1395m(j)(2)(B) did not unequivocally state that a CMN is the only documentation that may be required to show medical necessity—it simply defined a CMN as a "form or other document" containing information showing medical necessity.[117] The court noted Gulfcoast's failure to cite to any other section of the Medicare Act that stated, or even suggested, that the Secretary may not require a supplier to supplement a CMN with other documentation.[118] The court further noted that neither § 1395m(j)(2) nor any other provision of the Medicare Act even required a supplier to submit a CMN to the carrier.[119] On the contrary, the court held that the

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112. *Id.* at 1349-50.

113. *Id.* at 1350.

114. *Id.* at 1350-51 (citing 42 U.S.C. § 1395m(j)(2)(B) (defining a CMN as "a form or other document containing information required by the carrier to be submitted to show that an item is reasonable and necessary for the diagnosis or treatment of illness or injury or to improve the functioning of a malformed body member")).

115. *Id.* at 1350. Gulfcoast relied on the holding in *Maximum Comfort*, 323 F. Supp. 2d at 1067-68 (holding that § 1395m(j)(2)(B) "plainly specifies that Congress intended that whatever information may be required by carriers from suppliers to show the medical necessity and reasonableness of DME must be contained in a CMN"). *Gulfcoast*, 468 F.3d at 1351.

116. *Gulfcoast*, 468 F.3d at 1351.

117. *Id.* (citing 42 U.S.C. § 1395m(j)(2)(B)).

118. *Id.* at 1351-52.

119. *Id.* at 1352. The court held that "[i]t would be incoherent to construe § 1395m-(j)(2), a subsection restricting the use of CMNs and clearly indicating that they are

auditing provisions of Part B, which "empower[ed] carriers to 'make such audits of the records of providers of services as may be necessary to assure that proper payments are made,'" unambiguously contemplated the Secretary's authority to require suppliers to submit medical evidence beyond a CMN to prove medical reasonableness and necessity.[120] The Eleventh Circuit thus concluded that "when the Medicare Act is read as a whole, it unambiguously permits carriers and the Secretary to require suppliers to submit evidence of medical necessity beyond a CMN."[121]

The court further held that even if the Medicare Act were ambiguous on this issue, § 1395ff(a) of the Medicare Act gave the Secretary discretion to make determinations with respect to benefits under Part B, and the Secretary's interpretation of this authority was permissible.[122] Accordingly, the court concluded that "[g]iven the Secretary's discretion under § 1395ff(a), as well as the language of § 1395(m)(j)(2) and the carriers' authority to conduct post-payment audits pursuant to § 1395(a)-(1)(C), Palmetto and the Secretary acted reasonably in assuming the authority to require additional documentation from Gulfcoast."[123]

C. Whether the Fair Credit Reporting Act Requires Disclosure of the Complete Consumer File Following a Reinvestigation of Disputed Items of a Consumer's Credit History

The interlocutory appeal in *Nunnally v. Equifax Information Services, LLC*[124] presented one issue: whether the Fair Credit Reporting Act ("FCRA"), 15 U.S.C. § 1681i(a)(6)(B)(ii),[125] requires a credit reporting agency ("CRA") to provide a consumer with his or her complete file following a reinvestigation of disputed items of the consumer's credit history.[126] Holding that the FCRA's plain language does not require disclosure of the complete consumer file following a reinvestigation, the Eleventh Circuit reversed the district court's holding "that a 'consumer report' that follows a reinvestigation refers to the consumer's 'full file.'"[127]

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voluntary, to also make CMNs the exclusive means for proving medical necessity." *Id.* (citing 42 U.S.C. §§ 1395m(j)(2), 1395x(n)).

120. *Id.* (citing 42 U.S.C. § 1395u(a)(1)(C); 42 C.F.R. § 421.200(e) (2006) (requiring that "[t]he carrier must audit the records of providers to whom it makes Medicare Part B payments to assure that payments are made properly")).

121. *Id.*

122. *Id.*

123. *Id.* at 1352-53.

124. 451 F.3d 768 (11th Cir. 2006).

125. 15 U.S.C. § 1681i(a)(6)(B)(ii) (2000).

126. *Nunnally*, 451 F.3d at 770.

127. *Id.*

The FCRA requires a CRA to provide a free reinvestigation of a consumer's file if "'the completeness or accuracy of any item of information contained in a consumer's file . . . is disputed by the consumer.'"[128] After a reinvestigation, the CRA "'shall provide written notice to a consumer of the results of a reinvestigation.'"[129] The FCRA further provides that "'[a]s part of, or in addition to, the notice . . ., a consumer reporting agency shall provide . . . a consumer report that is based upon the consumer's file as that file is revised as a result of the reinvestigation.'"[130]

The plaintiffs, Leroy Nunnally, Jr., Gladys Nunnally, and Arlene M. Rhodes, filed a putative class action in the United States District Court for the Northern District of Alabama against Equifax Information Services, LLC ("Equifax"), a CRA, alleging that Equifax failed to comply with the FCRA when it did not send them each a "complete copy" of their consumer reports following reinvestigations into disputed items of their credit histories.[131] Rather than sending copies of the plaintiffs' complete consumer files, Equifax sent each of the plaintiffs letters that reported the results of the reinvestigations and described the changes that had been made to their consumer files. Equifax moved to dismiss, arguing that the letters it sent to the plaintiffs complied with § 1681i-(a)(6)(B)(ii), which required Equifax to provide the plaintiffs with a "consumer report."[132] The district court denied Equifax's motion, finding that because § 1681i(a)(6) requires that a "consumer report" must be provided to the consumer "as part of" or "in addition to" the notice of the results of the reinvestigation, the "consumer report" must be the consumer's complete file, which is "something over and above the mere results" of the reinvestigation.[133]

To determine whether Equifax satisfied its statutory obligations to the plaintiffs, the Eleventh Circuit had to decide whether the "consumer report" that a CRA provides to a consumer following a reinvestigation is the consumer's complete file or just a description of the revisions to the

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128. *Id.* at 771 (quoting 15 U.S.C. § 1681i(a)(1)(A) (Supp. IV 2004)).

129. *Id.* (quoting 15 U.S.C. § 1681i(a)(6)(A) (2000)).

130. *Id.* at 771-72 (quoting 15 U.S.C. § 1681i(a)(6)(B) (2000)).

131. *Id.* at 770-71 (citing 15 U.S.C. § 1681i(a)(6) (2000)). The putative class consisted of all persons who had requested reinvestigation but had not received a "free and complete copy" of their consumer report from Equifax following the reinvestigation. *Id.* at 771.

132. *Id.* at 770-71.

133. *Id.* at 771 (citing Nunnally v. Equifax Info. Servs., LLC, 366 F. Supp. 2d 1119, 1132-33 (N.D. Ala. 2005)). The district court also found that the letters Equifax sent were excluded from the definition of "consumer report" because those letters were communications relating solely to transactions between the plaintiffs and Equifax. *Id.* (citing *Nunnally*, 366 F. Supp. 2d at 1132).

file which were made as a result of the reinvestigation.[134] Equifax argued that no section of the FCRA required disclosure of the consumer's complete file. Equifax also asserted that the district court erroneously interpreted the term "consumer report" on two grounds. Equifax first contended that the language of § 1681(i) and the definitions of "consumer report" and "file" in § 1681(a) demonstrated that a CRA was not required to provide a consumer with his complete file following a reinvestigation.[135] Equifax then argued that other provisions of the FCRA required a CRA to provide consumers with their complete files in different circumstances, and that "the contrast of those provisions support[ed] an interpretation that § 1681(i) does not require disclosure of the consumer's complete file."[136] In response, the plaintiffs argued that the purpose of the FCRA requires CRAs to provide more information to consumers following a reinvestigation than Equifax provided to the plaintiffs, and that both the text and purpose of the FCRA supported disclosure of the consumer's complete file.[137]

1. The FCRA Does Not Require Disclosure of the Consumer's Complete File After Reinvestigation. The Eleventh Circuit began its analysis with the FCRA's definitions of the terms "consumer report" and "file."[138] Under the FCRA, a "consumer report" is "'any written, oral, or other communication of any information by a [CRA] bearing on a consumer's credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living.'"[139] The definition of "consumer report" excludes "'any [] report containing information solely as to transactions or experiences between the consumer and the person making the report.'"[140] The FCRA defines "file" as "'all of the information on that consumer recorded and retained by a [CRA] regardless of how the information is stored.'"[141]

Based on these definitions, the Eleventh Circuit agreed with Equifax, determining that the district court had erroneously concluded that § 1681a(d)(2)(A)(i)'s definition of "consumer report," which specifically excludes "'any report containing information solely as to transactions or experiences between the consumer and the person making the report,'" excluded the type of information Equifax provided to the plaintiffs in its

134. *Id.* at 772.
135. *Id.*
136. *Id.*
137. *Id.*
138. *Id.*
139. *Id.* (quoting 15 U.S.C. § 1681a(d)(1) (2000)).
140. *Id.* (quoting 15 U.S.C. § 1681a(d)(2)(A)(i) (2000)).
141. *Id.* (quoting 15 U.S.C. § 1681a(g) (2000)).

letters.[142] Because Equifax's letters to the plaintiffs provided information reported to Equifax by third parties, and did not contain information solely about Equifax's "transactions and experiences" with the plaintiffs, the Eleventh Circuit held that Equifax's letters were not excluded from the definition of a "consumer report."[143]

The Eleventh Circuit also disagreed with the district court's conclusion that the language of § 1681i(a)(6)(B) required disclosure of the consumer's complete file following reinvestigation.[144] Rather, the court held that § 1681i(a)(6)(B)'s language, which provided that the "consumer report" shall be "part of, or in addition to" the written notice of the reinvestigation, allowed a CRA two methods by which to provide the consumer report to the consumer: "(1) as part of the written document that is the notice of the results of the reinvestigation or (2) in a separate document."[145] The court also agreed with Equifax's argument that § 1681i(a)(6)(B)'s requirement that the consumer report be "'based upon the consumer's file as that file is revised'" established that the consumer report following a reinvestigation was different than the consumer's complete file.[146] The court was further persuaded by Equifax's argument that the phrase "as that file is revised" does nothing more than require the consumer report to be based on the revisions to the consumer's file that resulted from the reinvestigation.[147] Thus, the court concluded that the language of § 1681i(a)(6)(B) does not require that a consumer report consist of the consumer's complete file.[148]

2. The Use of the Terms "Consumer Report" and "File" in Other Sections of the FCRA Suggests That § 1681i Does Not Require Disclosure of the Complete File After Reinvestigation. The Eleventh Circuit also determined that other sections of the FCRA, which plainly referred to disclosure of a consumer's complete file in other circumstances, supported its holding that § 1681i did not require disclosure of the complete file after reinvestigation.[149] The

142. *Id.* at 773 (quoting 15 U.S.C. § 1681a(d)(2)(A)(i)).
143. *Id.*
144. *Id.* at 773-74.
145. *Id.*
146. *Id.* at 772-73 (quoting 15 U.S.C. § 168(i)(a)(6)(B)) (emphasis omitted). "As Equifax correctly explains, 'a report is not "based upon" the consumer's file if it is the entire file.' To conflate the meaning of 'consumer report' with 'file' would make the terms redundant." *Id.* at 773.
147. *Id.* at 773.
148. *Id.* at 774.
149. *Id.*

court noted that under § 1681g,[150] which was the FCRA's "pivotal section regarding the disclosure of the consumer's complete file," a CRA was required to disclose "all information in the consumer's file" upon a consumer's request.[151] Noting that Congress did not refer to § 1681g in § 1681i's requirements for a report following a reinvestigation, although it was cross-referenced in other sections of the FCRA,[152] the court concluded that Congress did not intend to require disclosure of the consumer's complete file as the "consumer report" following reinvestigation.[153]

The plaintiffs pointed to § 1681i(d),[154] which provides that a consumer may request the credit reporting agency "to furnish notification . . . to any person specifically designated by the consumer who . . . received a consumer report . . . which contained the deleted or disputed information" to support their claim that a CRA must provide the consumer's complete file following a reinvestigation.[155] The plaintiffs argued that disclosure of the complete file was required because consumers would need to "specifically designate" which persons needed to receive the updated information, and consumers could only do so if they had been provided with the identity of all persons who had reviewed the inaccurate information.[156]

Disagreeing, the court determined that it was clear from other sections of the FCRA that ordinarily a consumer would know when a third party has reviewed an erroneous consumer report because (1) a consumer may annually receive a free copy of his complete file which discloses all inquiries about the consumer, and (2) the majority of circumstances in which a consumer report may be furnished to a third party require

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150. 15 U.S.C. § 1681g (2000 & Supp. IV 2004).

151. *Nunnally*, 451 F.3d at 774 (citing 15 U.S.C. § 1681g(a)(1)).

152. *Id.* Specifically, the court noted that 15 U.S.C. §§ 1681j and 1681m (2000 & Supp. IV 2004) also refer to the disclosure requirement of a consumer's complete file under 15 U.S.C. § 1681g. *Nunnally*, 451 F.3d at 774. For instance, § 1681(j)(a)(1)(A) requires that all consumer reporting agencies "shall make all disclosures pursuant to section 1681g once during any 12-month period," and the disclosure is defined as the consumer's complete file. *Id.* Similarly, § 1681m required users of consumer reports that had taken adverse actions against a consumer to notify the consumer of his right to obtain "a free copy of a consumer report on the consumer" if the adverse action is based on information contained in the consumer report. *Id.* The court noted that § 1681m states that the consumer's right to a free consumer report is exercised under § 1681j, which cross-references § 1681g. *Id.* However, these cross-references to § 1681g are not included in § 1681i, the section concerning reinvestigations. *Id.*

153. *Id.*

154. 15 U.S.C. § 1681i(d) (2000).

155. *Nunnally*, 451 F.3d at 775 (quoting 15 U.S.C. § 1681i(d)).

156. *Id.*

notice to, or permission from, the consumer, or involve transactions in which the consumer would know that his consumer report would be sought.[157] The court further noted that § 1681m required third parties to inform consumers of any "adverse actions," as defined in § 1681a-(k),[158] that the third party has taken based on information contained in the consumer report, meaning that the consumer would know that the third party had reviewed the consumer's report.[159] Although consumers would not know of third parties who received the inaccurate report but took no adverse action against the consumer, the court noted that this lone exception to the general rule involved negligible harm to the consumer and would not justify requiring a CRA to inform consumers of all persons who reviewed the inaccurate file in contravention of the plain language of the FCRA.[160]

3. The FCRA's Purpose Does Not Require Disclosure of a Consumer's Complete File Following Reinvestigation. Finally, the plaintiffs argued that the FCRA's purpose would be undermined by permitting CRAs to only give a summary of the changes made as a result of the reinvestigation.[161] The Eleventh Circuit disagreed with the plaintiffs' assumption that more information is better and disclosure of the complete file would better enable consumers to detect inaccuracies.[162] Because the revisions may not be apparent to a consumer in a review of his or her complete file, the court determined that the summary letters Equifax sent highlighted the changes made to the consumers' files and provided a simple method to determine whether each of the contested items had been appropriately addressed.[163]

The court further concluded that the plaintiffs' argument was contrary to the FCRA's plain text.[164] Congress stated in the FCRA what information it considered necessary for consumers to verify the accuracy

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157. *Id.* (citing 15 U.S.C. §§ 1681j, 1681g(a)(3)(A), 1681b(a)(1), 1681b(a)(2), 1681b(a)-(3)(B)-(D), 1681b(a)(3)(F)(i), and 1681b(a)(4) (Supp. IV 2004)).

158. 15 U.S.C. § 1681a(k) (2000).

159. *Nunnally*, 451 F.3d at 775 (citing 15 U.S.C. § 1681m(a)(1)).

160. *Id.* The court also noted that a CRA's failure to identify third parties who requested an erroneous consumer report did not prevent the consumer from taking advantage of the notification right in § 1681i(d). *Id.* For instance, following receipt of the consumer report, the consumer could ask the credit reporting agency to notify every person who had received an erroneous report about the corrections to the consumer's file. *Id.* Such a consumer request appeared to satisfy the consumer's burden of specific designation referred to under § 1681i(d). *Id.*

161. *Id.* at 775-76.

162. *Id.* at 776.

163. *Id.*

164. *Id.*

of their complete files, and Congress had determined that a "consumer report based on the file as that file is revised" satisfied the FCRA's purpose.[165] Therefore, the court held that the FCRA did not require a disclosure of the complete consumer file following a reinvestigation, and that Equifax had satisfied its obligation to send the plaintiffs a "consumer report" when it informed the plaintiffs of the changes it had made to their respective files as a result of the reinvestigations.[166] The court also held that Equifax satisfied the FCRA's notice requirement when it informed the plaintiffs that it had reinvestigated their complaints and determined that their complaints were valid.[167] Accordingly, the Eleventh Circuit reversed the district court's decision and remanded the case with instructions to grant Equifax's Motion to Dismiss.[168]

IV. LEGAL STANDARDS

A. Good Faith for Purposes of Fair Use Defense in Trademark Infringement Cases

In *International Stamp Art, Inc. v. United States Postal Service*,[169] the Eleventh Circuit was required to determine, as an issue of first impression, the appropriate legal standard for good faith with respect to a fair use defense in a trademark infringement case.[170] The Eleventh Circuit joined four other circuits in holding that the legal standard is the same as for any other trademark infringement inquiry into good faith—that is, whether the alleged infringer intended to benefit from the goodwill associated with the holder of the mark.[171]

The plaintiff and appellant, International Stamp Art, Inc. ("ISA"), appealed a grant of summary judgment in favor of the defendant and appellee, the United States Postal Service ("USPS"), with respect to the USPS's assertion of a fair use defense in response to ISA's allegation of trademark infringement.[172] ISA produced and sold greeting cards and other stationery that oftentimes used a perforated border design evoking

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165. *Id.* (quoting 15 U.S.C. § 1681i(a)(6)(B)).
166. *Id.* (citing 15 U.S.C. §§ 1681i(a)(6)(B)(ii), 1681a(d) (2000 & Supp. IV 2004)).
167. *Id.* (citing 15 U.S.C. § 1681i(a)(6)(A)).
168. *Id.*
169. 456 F.3d 1270 (11th Cir. 2006) (per curiam).
170. *Id.* at 1271.
171. *Id.* As discussed *infra*, the Eleventh Circuit joined the Second, Third, Seventh, and Ninth Circuit Courts of Appeal on this issue. *See id.* at 1274-75 (citations omitted).
172. *Id.* at 1273.

the functional, flat-edged perforation of the older postage stamps.[173] Since 1996 ISA's perforated border design had been federally registered as a trademark for use on printed note cards and greeting cards.[174]

Almost from its inception, ISA was a nonexclusive licensee of the USPS, and the parties entered into a series of license agreements between 1985 and 1997 wherein the USPS licensed use of its "stamp designs," which included all United States postage stamps to which the USPS owned the copyright. Images of the stamps were transmitted to licensees on transparencies, which depicted the entire stamp (including any perforated edges) and were marked as copyright protected. The USPS retained rights of approval over all licensed products.

As a licensee, ISA sought to sell its products at USPS locations nationwide and made several proposals to the USPS to that end. In the late 1980s to the early 1990s, a few USPS stores carried ISA products. Although the parties discussed possibly expanding such sales to USPS stores nationwide in the mid-1990s, nothing further came of the discussions, and the USPS did not respond to any of ISA's subsequent proposals to handle distribution and management of ISA's products.[175]

In the late 1990s, the USPS retail division began offering its own line of stamp art cards, most of which included the perforated border of the original stamp as part of the stamp's image. The USPS also occasionally licensed or produced cards that incorporated the art depicted in its stamps without the perforated border. Most of the USPS's stamp art cards included the stamp's value designation and the "USA" mark as they appeared on the stamp, but these elements did not appear in other cards that incorporated the art but not the entire stamp image. The USPS's choice about whether to depict entire stamp images or the underlying stamp art alone often reflected the extent of the USPS's ownership interests in the stamp image. In the case of jointly-owned stamp designs in which the copyright interest in the underlying artwork was held by another, the USPS was often limited to reproducing the entire stamp image with all of its constituent elements (including the "USA" mark, the price designation, and the perforated borders) because it was not licensed to reproduce the underlying art alone.[176]

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173. *Id.* at 1271.

174. *Id.* at 1272. For purposes of the appeal, both parties stipulated that the mark was incontestable, meaning that its validity could not be challenged on the grounds that it is merely descriptive even if the challenger showed that the mark was improperly registered initially. *Id.* at 1272 n.1 (citing 15 U.S.C. § 1065 (2000); Dieter v. B&H Indus. of Sw. Fla., Inc., 880 F.2d 322, 328 (11th Cir. 1989)).

175. *Id.*

176. *Id.* at 1272-73.

In September 2002 ISA sued the USPS alleging unlawful infringement of its perforated border mark with respect to those USPS cards depicting the entire image of a stamp. The USPS moved for summary judgment, arguing, among other things, that it did not use ISA's mark and that its use of the perforated border in depicting images of its stamps fell within the law's "fair use" exception.[177] Because a trademark is defined as "'any word, name, symbol or device, or any combination thereof [used] to identify and distinguish [one's] goods . . . from those manufactured or sold by others and to indicate the source of the goods,'" in order to prevail on a trademark infringement claim, ISA had to show that the USPS had adopted an identical or similar mark that consumers were likely to confuse with ISA's trademark.[178] The parties stipulated that ISA's mark was incontestable, and the district court found that the USPS stamp art products did incorporate a perforated border similar to ISA's mark. Accordingly, the question was whether the USPS's use of the perforated border was permissible as a "fair use" of ISA's mark.[179]

A fair use defense is established if a defendant proves that its use of the mark is: "'(1) other than as a mark, (2) in a descriptive sense, and (3) in good faith.'"[180] In essence, the fair use defense prevents a trademark owner from appropriating a descriptive term for its exclusive use, thereby preventing others from accurately describing a characteristic of their goods.[181] The United States District Court for the Northern District of Georgia granted summary judgment in USPS's favor on the basis of fair use, finding that the USPS had used the disputed border but that it had used it "'other than as a mark, in a descriptive manner, and in good faith.'"[182] ISA appealed the grant of summary judgment, arguing that the district court erred in finding no genuine issue of material fact as to the USPS's good faith in using the border.[183]

On appeal, the Eleventh Circuit acknowledged that it "ha[d] not yet established a legal standard for good faith for purposes of a fair use defense in the context of trademark infringement."[184] The court then agreed with its sister circuits that had concluded that the standard for good faith for fair use was the same as the legal standard for good faith

177. *Id.* at 1273.

178. *Id.* at 1274 (quoting Gift of Learning Found., Inc. v. TGC, Inc., 329 F.3d 792, 797 (11th Cir. 2003) (per curiam)).

179. *Id.*

180. *Id.* (quoting EMI Catalogue P'ship v. Hill, Holliday, Connors, Cosmopulos, Inc., 228 F.3d 56, 64 (2d Cir. 2000)).

181. *Id.* (citing Soweco, Inc. v. Shell Oil Co., 617 F.2d 1178, 1185 (5th Cir. 1980)).

182. *Id.* at 1273.

183. *Id.*

184. *Id.* at 1274.

in any other trademark infringement context, which asked "whether the alleged infringer intended to trade on the good will of the trademark owner by creating confusion as to the source of the goods or services."[185]

In applying this standard to the facts at issue, the Eleventh Circuit first observed that the overwhelming majority of stamps produced by the USPS had long included perforated edges, and that the images of those stamps that were copyrighted and licensed by the USPS included the perforated edge when the original stamps were produced.[186] The USPS also provided affirmative evidence of good faith by showing that it prominently placed its own familiar "eagle" and other trademarks on the back of its stamp art products, thereby identifying them as USPS products rather than the products of ISA or anyone else.[187] On the contrary, there was no evidence that the USPS had created any card that added a perforated border to the image of one of the few stamps it had produced without any perforations; that the USPS, by depicting its stamps' edges as part of the image of each stamp, intended to create confusion as to the source of its stamp art cards; or that the USPS sought to mislead or confuse consumers into thinking that the source of the cards it produced was ISA or anyone other than USPS.[188]

Although ISA argued that "a fair use analysis need not stop at whether the subsequent user intended to trade on the goodwill of the trademark owner," ISA failed to articulate what further inquiry, relevant to trademark law, ought to be pursued.[189] ISA also argued that the USPS had a noninfringing, commercially viable alternative (i.e., to produce cards depicting the stamp art alone, rather than the image of the entire stamp, which included the perforated edge) and that the USPS's failure to employ this alternative raised a fact issue as to its good faith.[190] Disagreeing with ISA, the Eleventh Circuit held that this was not a "true alternative" because it did not provide USPS with an alternative manner of depicting its stamps, but rather prevented the USPS from depicting the stamp images at all.[191] This argument also

185. *Id.* at 1274-75 (citing *EMI Catalogue*, 228 F.3d at 66; Inst. for Scientific Info., Inc. v. Gordon & Breach, Sci. Publishers, Inc., 931 F.2d 1002, 1009-10 (3d Cir. 1991); Zatarains, Inc. v. Oak Grove Smokehouse, Inc., 698 F.2d 786, 796 (5th Cir. 1983); Packman v. Chicago Tribune Co., 267 F.3d 628, 642 (7th Cir. 2001); Sierra On-Line, Inc. v. Phoenix Software, Inc., 739 F.2d 1415, 1423 (9th Cir. 1984)).

186. *Id.* at 1275.

187. *Id.*

188. *Id.* at 1273, 1275.

189. *Id.* at 1275.

190. *Id.* at 1276.

191. *Id.*

failed to account for the fact that that the USPS may not be able to employ the stamp art alone in instances where the copyright to the underlying art was held by another.[192] The court further concluded that the USPS's failure to consult counsel prior to producing cards depicting its stamps did not constitute evidence of bad faith because the USPS was entitled to use the perforated border descriptively, as part of the image of its products.[193]

Finally, ISA argued that the USPS acted in bad faith because it had knowledge of ISA's registration of the mark, had been warned about its infringing cards, and had deliberately misappropriated ISA's concept of selling paper products containing the image of postage stamps.[194] Although the court agreed that knowledge, under certain circumstances, could raise a fact issue as to good faith, it concluded that "knowledge alone, in the context of a nontrademark, descriptive use—particularly when there was affirmative evidence of an intent not to confuse," was insufficient to raise a fact issue.[195] The court further noted that trademark law did not protect against misappropriation of business concepts, and although this evidence may raise an issue as to good faith in business relations, this case was best understood by placing the emphasis on the uncontested fact that the USPS's use of the perforated border in its postage stamp greeting cards involved a nontrademark use of ISA's mark.[196] As such, the USPS's use of ISA's mark could not constitute infringement.[197]

V. JUDICIAL ESTOPPEL

A. Whether a Debtor's Failure to Timely Disclose Potential Truth in Lending Act Claims as Contingent Assets in a Bankruptcy Proceeding Amounts to Taking of Inconsistent Positions Within Meaning of Judicial Estoppel Doctrine

The appeal in *Ajaka v. BrooksAmerica Mortgage Corp.*[198] required the court to determine whether the debtor and plaintiff Temidayo Ajaka should be judicially estopped from asserting claims for rescission and damages under the Truth In Lending Act ("TILA")[199] against his

192. *Id.*
193. *Id.*
194. *Id.*
195. *Id.*
196. *Id.* at 1276-77.
197. *Id.* at 1277.
198. 453 F.3d 1339 (11th Cir. 2006).
199. 15 U.S.C. §§ 1601-1667f (2000).

mortgagee, BrooksAmerica Mortgage Corporation ("BrooksAmerica"), and the alleged assignees of his mortgage as a result of Ajaka's failure to timely disclose his TILA claims as contingent assets in his pending Chapter 13 bankruptcy proceeding.[200] Ajaka obtained a loan from BrooksAmerica on April 14, 2000, which was secured by a second mortgage on his home.[201] Two years later, on August 2, 2002, Ajaka filed a Chapter 13 bankruptcy proceeding in the United States Bankruptcy Court for the Northern District of Georgia.[202] The court noted that "under Chapter 13, a creditor has 180 days to object to confirmation of the reorganization plan on the basis of fraud."[203] Ajaka was not aware of any potential TILA claim arising out of his loan at the time he filed for bankruptcy or at the time his Chapter 13 Reorganization Plan was confirmed on December 7, 2002.[204]

Ajaka did not become aware of his potential TILA claim until January 3, 2003, when he met for the first time with a new attorney who represented him in connection with his TILA claims and ultimately on appeal. The attorney informed Ajaka at their first meeting that his bankruptcy schedules would have to be amended to disclose the TILA claim as an asset in the bankruptcy proceeding. Two weeks later, on January 18, 2003, Ajaka's counsel sent a rescission demand on Ajaka's behalf to BrooksAmerica, the original holder of Ajaka's note and security deed.[205] Pursuant to 15 U.S.C. §1635(b),[206] BrooksAmerica was required to respond within twenty days after receipt of the demand, which it did by advising Ajaka on or around February 13, 2003, that it had assigned its interest in Ajaka's note and security deed to another company.[207] Ajaka claimed that BrooksAmerica never notified him of the assignment of his note and security deed, and because the deed records did not show any assignments, Ajaka claimed that neither he nor his counsel could immediately determine the assignee against whom the TILA claim should be asserted. Ajaka also claimed that his counsel

200. *Ajaka*, 453 F.3d at 1342-44.
201. *Id.* at 1342.
202. *Id.*
203. *Id.* (citing 11 U.S.C. § 1330(a) (2000)).
204. *Id.*
205. *Id.*
206. 15 U.S.C. §1635(b) (2000).
207. *Ajaka*, 453 F.3d at 1342. BrooksAmerica did not identify the entity to whom Ajaka's mortgage had been assigned, but BrooksAmerica did state that it had provided Ajaka with the proper TILA disclosures and that Ajaka did not have the right to rescind. *Id.* at 1342-43.

requested the name of the assignee from BrooksAmerica in a follow-up communication but never received a response.[208]

On or about March 26, 2003, Ajaka's counsel informed Ajaka's bankruptcy lawyer that a TILA claim should be listed as a potential asset in Ajaka's bankruptcy proceeding.[209] Two days later, convinced that either Residential Funding Corporation ("RFC") or Homecomings Financial Network, Inc. ("Homecomings") had taken assignment of Ajaka's mortgage, Ajaka's counsel sent a statutory rescission demand to RFC.[210] On April 11, 2003, Ajaka filed suit alleging TILA violations against the defendants, BrooksAmerica, RFC, and Homecomings, in the United States District Court for the Northern District of Georgia.[211]

On April 21, 2003, which was still within the 180-day time period for creditors to object to confirmation of Ajaka's reorganization plan, RFC filed a declaratory judgment action in Ajaka's bankruptcy proceeding, alleging, among other things, that the TILA claim was barred by judicial estoppel.[212] On June 20, 2003, after the 180-day time period expired, Ajaka filed a formal amendment to his bankruptcy action that disclosed his TILA claim as a contingent asset.[213] The defendants subsequently moved for summary judgment in Ajaka's TILA action, arguing that Ajaka's TILA claim was barred by judicial estoppel because he failed to timely disclose it as an asset in his bankruptcy proceeding. The district court granted the summary judgment motions and Ajaka appealed.[214]

Disagreeing with the district court's findings, the Eleventh Circuit first noted that the doctrine of judicial estoppel, which was meant to preclude parties from "'asserting a claim in a legal proceeding that is inconsistent with a claim taken by that party in a previous proceeding,' is "'an equitable concept intended to prevent the perversion of the judicial process.'"[215] Therefore, the court determined that it must "'take into account all of the circumstances of [the] case'" before applying

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208. *Id.* at 1343.

209. *Id.*

210. *Id.* RFC received the demand letter on April 2 and was required to respond to the demand within twenty days of receipt. *Id.*

211. *Id.*

212. *Id.* RFC had not been served with the summons and complaint in Ajaka's TILA action at the time it filed its declaratory judgment action. *Id.*

213. *Id.* The amendments also reclassified the mortgage from a secured debt to an unsecured debt, assuming Ajaka was successful on his TILA claim. *Id.*

214. *Id.*

215. *Id.* at 1344 (quoting Burnes v. Pemco Aeroplex, Inc., 291 F.3d 1282, 1285 (11th Cir. 2002)).

judicial estoppel to bar a claim.[216] The court began with a consideration of two primary factors in determining whether to apply judicial estoppel—"'[f]irst, the allegedly inconsistent positions must have been taken under oath in a prior proceeding, and second, they must have been calculated to make a mockery of the judicial system.'"[217] Although the court noted that these factors were not "inflexible or exhaustive," it noted that one pertinent factor was "'whether the present position is clearly inconsistent with the earlier position and whether the party successfully persuaded a court to accept the earlier position, so that judicial acceptance of the inconsistent position in a later proceeding creates the perception that either court was misled.'"[218]

As to the first prong of the judicial estoppel analysis, the court determined that there was "no question that Ajaka failed to timely amend his Chapter 13 reorganization plan to reflect his contingent TILA claim and that he therefore 'took inconsistent positions . . . under oath in a prior proceeding.'"[219] The court stated that application of the doctrine rested on Ajaka's intent—if Ajaka's failure to timely incorporate the TILA claim into his bankruptcy proceeding was "'calculated to make a mockery of the judicial system,'" then judicial estoppel should bar him from taking advantage of the TILA claim in the district court.[220]

In evaluating Ajaka's intent to manipulate the judicial system, the Eleventh Circuit noted that although the party invoking judicial estoppel was not required to show prejudice, prejudice did serve an important role in determining whether the doctrine should apply.[221] Noting that the purpose of judicial estoppel was to stop litigants from deliberately changing positions after the fact to gain an unfair advantage, the court pointed out that RFC's adversary proceeding in the bankruptcy court, which was filed in response to Ajaka's rescission demand, put all of Ajaka's creditors, including the defendants, on notice of Ajaka's potential

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216. *Id.* (quoting Palmer & Cay, Inc. v. Marsh & McLennan Cos., 404 F.3d 1297, 1307 n.16 (11th Cir. 2005)).

217. *Id.* (quoting *Palmer*, 404 F.3d at 1307 n.16).

218. *Id.* (quoting *Burnes*, 291 F.3d at 1285-86; citing New Hampshire v. Maine, 532 U.S. 742, 751 (2001) (holding that "[a] third consideration is whether the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped")).

219. *Id.* (citing 11 U.S.C.A. § 521(a)(1) (2004 & Supp. 2006); 11 U.S.C. § 541(a)(7) (2000)).

220. *Id.* at 1345. "When considering a party's motive and intent and whether it justifies applying judicial estoppel, we require that the intent be 'cold manipulation and not an unthinking or confused blunder.'" *Id.* at 1345 n.7 (quoting Johnson Serv. Co. v. Transamerica Ins. Co., 485 F.2d 164, 175 (5th Cir. 1973)).

221. *Id.* at 1345 (citing *Burnes*, 291 F.3d at 1286).

TILA claim.[222] In other words, although Ajaka did not amend his bankruptcy schedules to reflect the TILA claim until after the 180-day period under § 1330(a) had expired, all of Ajaka's creditors were already aware of the TILA claim and therefore could have challenged Ajaka's failure to previously amend his schedule within the context of the ongoing bankruptcy proceeding.[223] The court also held that there was significant evidence that Ajaka did not intend to conceal his TILA claim from his creditors, and that Ajaka's counsel had informed his bankruptcy attorney that the schedules should be amended to reflect the TILA claims before any of the defendants raised the issue of judicial estoppel.[224] Because a genuine issue of material fact existed as to whether Ajaka had the motivation and intent to manipulate the judicial system, the court reversed the district court's grant of summary judgment to the defendants.[225]

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222. *Id.*

> [T]here is no question that, due to RFC's filing, all of the creditors were on notice of the potential TILA claim by April 21, 2003, if not before. As such, all of Ajaka's creditors had more than six weeks from the time they learned of his TILA claim to the expiration of the 180-day period for objecting to confirmation of his Chapter 13 reorganization plan and, if they so desired, seeking conversion of Ajaka's bankruptcy from Chapter 13 to Chapter 7.

Id. at 1343.

223. *Id.* at 1345. The court distinguished its decision in *Burnes*, where the debtor filed a Chapter 13 bankruptcy petition six months before he filed a discrimination charge with the EEOC against his employer, which, unlike the situation in *Ajaka*, was not a party to the bankruptcy proceeding. *Id.* In that case, "almost one year later, but while his bankruptcy remained pending, the debtor filed an employment discrimination suit against his employer in federal district court. The debtor did not amend his bankruptcy schedules or statement of financial affairs to include this lawsuit," later converted his bankruptcy case from Chapter 13 to Chapter 7, and again failed to include the pending discrimination suit on his amended schedules. *Id.* The debtor subsequently received a "no asset" discharge. *Id.* However, "[n]either the Chapter 7 trustee, nor any of the debtor's creditors, ever knew about the employment discrimination lawsuit." *Id.* The district court granted the defendant employer's motion for summary judgment on the basis of judicial estoppel and the Eleventh Circuit affirmed, noting that the creditors relied on the debtor's disclosure statements in determining whether to consent to the no asset discharge, and the bankruptcy courts relied on the accuracy of these disclosure statements when considering whether to approve the no asset discharge. *Id.* at 1345-46 (citing *Burnes*, 291 F.3d at 1286).

224. *Id.* at 1346. Although the bankruptcy attorney inexplicably delayed in amending the schedules, he ultimately amended the schedules to include the TILA claim about three months after being advised to do so and less than two months after the TILA lawsuit was filed. *Id.*

225. *Id.*

VI. WAIVER

A. Whether an Employee's Failure to Object to a Union Representative's Alleged Bias Before an Administrative Grievance Panel Results in a Waiver of the Issue in a Subsequent Lawsuit

In *Bianchi v. Roadway Express, Inc.*,[226] as a matter of first impression, the Eleventh Circuit held that an employee's failure to raise an objection to a union representative's alleged bias and bad faith before an administrative grievance panel constituted a waiver of the employee's right to raise that issue in a subsequent claim or on appeal.[227] Plaintiff Amadeo Bianchi's employment was terminated after thirty-six years as a tractor-trailer driver for the defendant, Roadway Express, Inc. ("Roadway"). Bianchi was a long-time member of the International Brotherhood of Teamsters, Local 390 (the "Union"), and he had served as a union steward and was very active in union politics. Bianchi was fired for fraud and dishonesty when Roadway determined that he helped another employee file a fraudulent injury report. After Bianchi was discharged, he filed a grievance regarding his discharge and was represented at the local and panel grievance hearings by the Union's business agent for Roadway, Don Marr.[228]

Marr and Bianchi had a long history of political and personal animosity, and Bianchi had filed several complaints against Marr and the union leadership over the years. However, at the close of his grievance panel hearing, Bianchi represented to the panel, which was comprised of two Union members and two Roadway representatives, that Marr had represented him properly and fully and that Marr had presented all of the evidence in his favor. Bianchi never expressed to the panel any reservations that he may have had about Marr's bias or the bias of any panelist.[229]

After the panel upheld his termination, Bianchi filed a hybrid action against Roadway under § 301 of the Labor Management Relations Act, also known as the Taft-Hartley Act,[230] in the United States District Court for the Southern District of Florida.[231] Bianchi also asserted claims for breach of a collective bargaining agreement ("CBA") and sued the Union for breaching its duty of fair representation ("DFR"), claiming

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226. 441 F.3d 1278 (11th Cir. 2006) (per curiam).
227. *Id.* at 1279.
228. *Id.* at 1279-80.
229. *Id.* at 1279-81.
230. 29 U.S.C. § 185(a) (2000).
231. *Bianchi*, 441 F.3d at 1279.

that the Union, through Marr, mishandled his grievance based on political and personal animosity and in retaliation for Bianchi's membership in a dissident union organization.[232] Bianchi claimed that "Marr's hostility towards him caused Marr to represent him at his grievance panel hearing in bad faith and in an arbitrary and discriminatory manner."[233]

Before trial, Roadway filed a motion in limine claiming that Bianchi had waived his argument that Marr was biased by failing to raise this issue before the grievance panel.[234] The district court denied the motion and the case proceeded to trial, where a jury found that Roadway had fired Bianchi in violation of its CBA and that the Union, through Marr, had represented Bianchi arbitrarily, discriminatorily, or in bad faith, or all three, at Bianchi's grievance hearing in breach of its DFR.[235] Although Roadway moved for judgment as a matter of law, renewing its contention that Bianchi had waived his bad faith or bias argument, the district court denied the motion without explanation and entered judgment for Bianchi in accordance with the jury verdict.[236] Roadway appealed, contending that Bianchi, with full knowledge of all the relevant facts, had waived any argument that Marr was biased or had represented him in bad faith because Bianchi chose not to raise this issue at the grievance panel before he received an adverse ruling from the panel.[237]

On appeal, Bianchi contended that there was no waiver for two reasons: first, although Bianchi admitted that he lied to the panel about his satisfaction with Marr's representation, he claimed that his fear of "'mak[ing] the union part of the panel mad' excused him from bringing up the bias issue at his hearing."[238] Second, Bianchi claimed that "he did not realize Marr's bad faith until it 'dawned on him' *after* he lost the panel hearing."[239] When asked at trial what made him believe he did not get a fair hearing, Bianchi pointed to Marr's conduct at the hearing and his suspicion in hindsight that the proceeding had been fixed from

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232. *Id.*

233. *Id.* at 1282 (citing Tedford v. Peabody Coal Co., 533 F.2d 952, 957 (5th Cir. 1976)).

234. *Id.* at 1281.

235. *Id.* at 1279, 1281.

236. *Id.* at 1281.

237. *Id.* at 1279.

238. *Id.* at 1283. Bianchi also contended he had no reason to believe that the panel was "fixed" before the date of the hearing and that, at best, he was only concerned about one particular panelist, although the presence of that panelist did not cause him to believe that he could not get a fair hearing. *Id.*

239. *Id.*

the beginning.[240] However, prior to Bianchi's hearing, a coworker informed Bianchi that Marr was only "pretending" to help him.[241] Bianchi later testified at trial that he had been uncomfortable with Marr throughout, believing that Marr was only "acting" or "going through the motions" of representing him.[242] Bianchi also admitted that Marr's preparation for the panel hearing left him worried about Marr's advocacy as Marr refused to call live witnesses, refused to push for a joint hearing with the employee that Bianchi allegedly assisted (whose termination was overturned), and made numerous errors in preparation of an exhibit packet that Bianchi allegedly caught and fixed prior to the hearing. Despite these facts, Bianchi never asked for a different union representative, and when a panel member asked Bianchi whether Marr had represented him properly and fully, Bianchi replied in the affirmative.[243]

On appeal, the burden was on Roadway to prove waiver.[244] To prove this, Roadway had to show that Bianchi had "'full knowledge of the fact[s]' underlying his bias claim."[245] Finding no Eleventh Circuit case on point, Roadway principally relied on *Early v. Eastern Transfer*[246] and *Hazard v. Southern Union Co.*[247] in support of its argument that Bianchi should not be allowed to sit silent on the bias issue and later object to an adverse ruling on that basis.[248] In *Early* the First Circuit refused to consider the bad faith or bias arguments of two hybrid § 301 plaintiffs against a union representative on the panel because of the plaintiffs' "failure to have raised the issue of the [union representative's] purported bias before the joint committee."[249] The court in *Early* determined that "[i]n the absence of exceptional circumstances, we will

240. *Id.* at 1283-84. Bianchi likened his case to Achilli v. John J. Nissen Baking Co., 989 F.2d 561 (1st Cir. 1993), where the First Circuit upheld a finding of bad faith against a union in a hybrid § 301 case. *Bianchi,* 441 F.3d at 562. However, the Eleventh Circuit determined that this case was inapplicable to the issue in *Bianchi* because it did not address the issue of waiver (and indeed never used the word "waiver" or "estoppel"), but rather discussed the DFR issue in the context of whether the evidence supported a finding that the union breached its DFR. *Id.* at 1283, 1286 & n.11.

241. *Id.* at 1280.

242. *Id.*

243. *Id.* at 1280-81.

244. *Id.* at 1285 (citing Lambert v. Travelers Fire Ins. Co., 274 F.2d 685, 687-88 (5th Cir. 1961)).

245. *Id.* (citing Middlesex Mut. Ins. Co. v. Levine, 675 F.2d 1197, 1204 (11th Cir. 1982)).

246. 699 F.2d 552 (1st Cir. 1983).

247. 275 F. Supp. 2d 214 (D.R.I. 2003).

248. *Bianchi*, 441 F.3d at 1284.

249. *Early*, 699 F.2d at 558.

not entertain a claim of personal bias where it could have been but was not raised at the hearing to which it applies."[250] In *Hazard* the Rhode Island District Court applied this principle in a hybrid § 301 case to a biased union representative in Marr's position and found that the "[p]laintiff waived his argument that the union representative was biased 'because plaintiff knew of the alleged bias at the time of an arbitration proceeding and failed to raise the issue during that proceeding.'"[251]

Agreeing with Roadway, the Eleventh Circuit concluded that by remaining silent and by failing to raise the issue of bad faith or bias at his panel hearing, Bianchi waived his right to raise that issue in his district court action against Roadway.[252] Concluding that *Early* was persuasive, the court determined that the key to ruling on the waiver issue was that all of the facts now argued to the court regarding Marr's bias were known to Bianchi at the time of the grievance panel hearing, and not only did Bianchi fail to raise the issue at that time, he affirmatively represented to the panel that he had been "'properly represented.'"[253] In rejecting Bianchi's arguments, the Eleventh Circuit adopted the court's reasoning in *Early* that

> "[w]hile it may be unpleasant to have to choose between possibly alienating a decisionmaker in advance by objecting and waiving the issue of bias, we cannot accept that parties have a right to keep two strings in their bow—to seek victory before the tribunal and then, having lost, seek to overturn it for bias never before claimed."[254]

Finally, the court concluded that Bianchi's second rationale of "hindsight" was not supported by the record, which reflected that Marr's personal and political animosity, suggesting bad faith and bias, were well known to Bianchi before the adverse decision by the grievance panel, and that Bianchi learned and was advised before the panel hearing that Marr was allegedly "fixing the hearing against him and only going through the motions of helping him."[255] As a result, the court determined that Bianchi "'made a calculated decision not to object to the alleged bias'" and, "[i]n doing so, he lost the right to keep two

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250. *Id.*

251. *Hazard*, 275 F. Supp. 2d at 225 n.13.

252. *Bianchi*, 441 F.3d at 1279.

253. *Id.* at 1285 (quoting *Early*, 699 F.2d at 558).

254. *Id.* (quoting *Early*, 699 F.2d at 558). "If a Union member fails to utilize the grievance procedure under the CBA to air his grievances, then a district court should not allow him to make such arguments for the first time." *Id.* (citing Hines v. Anchor Motor Freight, Inc., 424 U.S. 554, 563 (1976)).

255. *Id.* at 1286.

strings in his bow."[256] Determining that Bianchi had waived his objection of bad faith or bias by failing to raise it before his grievance panel, and that the evidence at trial was insufficient to support a finding that the union had breached its DFR, the Eleventh Circuit vacated the jury verdict in favor of Bianchi and granted Roadway's judgment as a matter of law.[257]

B. Whether the Equitable Doctrine of In Pari Delicto Can Bar a Bankruptcy Trustee From Recovering on RICO Claims Against a Debtor's Alleged Co-Conspirators

In *Official Committee of Unsecured Creditors of PSA, Inc. v. Edwards*,[258] the court had to determine, as an issue of first impression in the Eleventh Circuit, whether the equitable doctrine of *in pari delicto*, which provides that "a plaintiff who has participated in wrongdoing may not recover damages resulting from the wrongdoing,"[259] can bar a trustee's claims on behalf of a bankrupt debtor for violations of the Federal Racketeer Influenced and Corrupt Organizations Act ("RICO").[260] Holding that the defense of *in pari delicto* does bar recovery by a central and active violator of RICO, the Eleventh Circuit affirmed the dismissal of the trustee's complaint.[261]

Daryl S. Laddin served as the trustee in bankruptcy for the debtor, ETS Pay Phones, Inc. ("ETS"), a company that operated a massive Ponzi scheme that defrauded thousands of investors out of hundreds of millions of dollars.[262] Laddin filed suit in the United States District Court for the Northern District of Georgia, asserting RICO, aiding and abetting, and avoidance claims against the defendants, who were several large holders of individual retirement accounts, alleging that the defendants aided ETS in defrauding investors by funneling investor IRA funds into ETS investments.[263] The defendants moved to dismiss

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256. *Id.* (citing Swift Indep. Packing Co. v. Dist. Union Local One, United Food & Commercial Workers Int'l Union, 575 F. Supp. 912, 916 (N.D.N.Y. 1983); *Early*, 699 F.2d at 558).

257. *Id.*

258. 437 F.3d 1145 (11th Cir. 2006).

259. BLACK'S LAW DICTIONARY 806 (8th ed. 2004).

260. *Edwards*, 437 F.3d at 1148 (citing 11 U.S.C. § 541(a) (2000); 18 U.S.C. § 1964(c) (2000)). The court also had to determine whether the trustee could maintain a claim for aiding and abetting a breach of fiduciary duties under Georgia law. *Id.*

261. *Id.*

262. *Id.*

263. *Id.* Laddin claimed that "'by failing to conduct appropriate due diligence and/or ignoring the facts altogether,'" the defendants "'enabled thousands of investors to partake of the ETS scheme and caused ETS to incur millions of dollars in additional debt.'" *Id.*

Laddin's complaint, arguing inter alia that the doctrine of *in pari delicto* barred Laddin's claims.[264] The district court agreed and granted the defendants' motions to dismiss, finding in pertinent part that as a result of ETS's wrongdoing, the doctrine of *in pari delicto* barred Laddin's claims against ETS's alleged co-conspirators because the "'legal and equitable interests of the debtor' in bankruptcy are only as strong as the debtor's claim against defendants at the commencement of the bankruptcy."[265] Laddin appealed the dismissal.[266]

1. The Trustee Is Subject to All Defenses that Were Available Against the Debtor. Affirming the district court's findings, the Eleventh Circuit first addressed whether a bankruptcy trustee was subject to an *in pari delicto* defense that might have been asserted against the debtor.[267] Although the Eleventh Circuit agreed with the district court that the trustee had standing to bring claims based on alleged injuries to the debtor estate,[268] the debtor's wrongdoing was still relevant to the claims that the trustee could assert.[269] Laddin contended that because the doctrine of *in pari delicto* depends on the "'personal malfeasance of the individual seeking to recover,'" the debtor's wrongs should not be imputed to him as the bankruptcy trustee.[270]

In support of his position, Laddin cited the legislative history of the Bankruptcy Code which explained that "[t]o the extent . . . an interest is limited in the hands of the debtor, it is equally limited in the hands of the estate except to the extent that defenses which are personal against the debtor are not effective against the estate."[271] However,

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264. *Id.* at 1148-49. The Eleventh Circuit held that it need not reach the issue of whether the doctrine of *in pari delicto* barred Laddin's aiding and abetting claims because Georgia courts did not recognize a cause of action for aiding and abetting a breach of fiduciary duties in the first place. *Id.* at 1156-57 (citing Munford, Inc. v. Valuation Research Corp., 98 F.3d 604, 613 (11th Cir. 1996); Monroe v. Bd. of Regents of Univ. Sys. of Ga., 268 Ga. App. 659, 664, 602 S.E.2d 219, 224 (2004) (holding that "Georgia has never recognized a claim for aiding and abetting a breach of fiduciary duty.")).

265. *Id.* at 1149 (quoting 11 U.S.C. § 541(a)).

266. *Id.*

267. *Id.*

268. *Id.* "A trustee, as the representative of the estate, succeeds into the rights of the debtor-in-bankruptcy and has standing to bring any suit that the debtor corporation could have brought outside of bankruptcy." *Id.* (citing 11 U.S.C. § 323 (2000); O'Halloran v. First Union Nat'l Bank, 350 F.3d 1197, 1202 (11th Cir. 2003)).

269. *Id.* at 1149-50. "'[A]n analysis of standing does not include an analysis of equitable defenses, such as *in pari delicto*.'" *Id.* at 1149 (citing Official Comm. of Unsecured Creditors v. R.F. Lafferty & Co., 267 F.3d 340, 346 (3d Cir. 2001)).

270. *Id.* at 1150.

271. *Id.* (quoting 124 CONG. REC. 32399 (daily ed. Sept. 28, 1978)).

the court determined that it was unnecessary to resort to legislative history because under the plain, unambiguous meaning of § 541(a), the debtor estate includes all "'legal or equitable interest *of the debtor* [. . .] as of the commencement of the case.'"[272] Noting nothing in the text of the Bankruptcy Code that the trustee acquired rights or interests greater than those of the debtor, the court held that if the debtor's claim would have been subject to an *in pari delicto* defense at the commencement of the bankruptcy, then that same claim, when asserted by the trustee, is subject to the same defense.[273]

The court also disagreed with the trustee's argument "that his recovery would ultimately inure to the benefit of innocent creditors instead of the wrongful debtor."[274] Specifically, the court determined that Laddin's argument ignored the likelihood that individual creditors damaged by the debtor's Ponzi scheme could separately pursue claims against the defendants outside of the bankruptcy and free from the bar of *in pari delicto*.[275] If the trustee was allowed to pursue the debtor's claims, his recovery would become part of the bankruptcy estate to be apportioned among all of the debtor's creditors, without regard to whether they were harmed by the defendants.[276] In contrast, if the creditors sued the defendants separately and outside of bankruptcy, those creditors would not risk a dilution of their recovery through apportionment to senior creditors or unharmed creditors of equal priority.[277]

Although this was an issue of first impression in the Eleventh Circuit, the court noted that it was "not alone in concluding that the defense of *in pari delicto* may be asserted against a bankruptcy trustee" and that

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272. *Id.* (quoting 11 U.S.C. § 541(a)). The court determined that the trustee's argument would fail even if legislative history was considered because the portion of the legislative history quoted by the trustee was inapplicable to the interpretation of "'property of the debtor estate'" under § 541(a). *Id.*

273. *Id.* (citing *O'Halloran*, 350 F.3d at 1202; *see also* 11 U.S.C.A. § 362(a) (2004 & Supp. 2006)). The court also held its reading of § 541(a) to be consistent with the purposes of the Bankruptcy Code, which provides for an automatic stay freezing the rights of parties to the bankruptcy, both debtor and creditors, upon the commencement of the bankruptcy case. *Id.* at 1150-51. Under the trustee's erroneous interpretation of 11 U.S.C. § 541, the court determined that a postpetition event such as the appointment of a trustee could undermine the automatic stay and alter the nature of the legal and equitable interests of the debtor estate. *Id.*

274. *Id.* at 1151.

275. *Id.*

276. *Id.* (citing 11 U.S.C.A. §§ 507, 1129(b)(2) (2004 & Supp. 2006)).

277. *Id.* In other words, creditors whose legal interests were actually harmed by the defendants could rightfully recover more outside of the bankruptcy because they would not compete with the trustee's claims on behalf of the debtor estate. *Id.*

its sister circuits had unanimously concluded that *in pari delicto* applies with equal force to a trustee-in-bankruptcy and a debtor outside of bankruptcy.[278] Against this weight of authority, Laddin erroneously relied, inter alia, on a Seventh Circuit decision that applied *in pari delicto* to bar recovery for a receiver who brought a fraudulent conveyance action under Illinois law.[279] However, determining that Laddin's appeal was governed by the Bankruptcy Code, not by the law of receiverships or fraudulent conveyances under state law, the Eleventh Circuit held:

> Both the text and the purposes of the Bankruptcy Code support the conclusion of the district court that Laddin's complaint is subject to the same defenses that were available against a complaint filed by the debtor at the commencement of the bankruptcy. "The equitable defense of *in pari delicto* is available in an action by a bankruptcy trustee against another party if the defense could have been raised against the debtor."[280]

2. The Doctrine of *In Pari Delicto* Bars a RICO Claim by a Conspirator. Having held that the equitable defense of *in pari delicto* is available in an action by a bankruptcy trustee, the court turned to yet another issue of first impression in the Eleventh Circuit: whether the *in pari delicto* defense bars a complaint under RICO.[281] First noting that "[t]here is a paucity of federal caselaw regarding whether the doctrine of *in pari delicto* bars a complaint under RICO, and none of our sister circuits have squarely decided the issue," the court looked to two United States Supreme Court cases that had considered the application of the *in pari delicto* doctrine in antitrust and securities cases.[282] The court first looked to *Perma Life Mufflers, Inc. v. International Parts Corp.*,[283] which appeared to preclude the use of *in pari delicto* against a federal RICO claim because the Supreme Court had held "'that the doctrine of

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278. *Id.* (citing Official Comm. of Unsecured Creditors of Color Tile, Inc. v. Coopers & Lybrand, LLP, 322 F.3d 147, 158-66 (2d Cir. 2003); *R.F. Lafferty & Co.*, 267 F.3d at 356-57; Terlecky v. Hurd (*In re* Dublin Sec., Inc.), 133 F.3d 377, 380 (6th Cir. 1997); Grassmueck v. Am. Shorthorn Ass'n, 402 F.3d 833, 837 (8th Cir. 2005); Sender v. Buchanan (*In re* Hedged-Invs. Assocs., Inc.), 84 F.3d 1281, 1285 (10th Cir. 1996)).

279. *Id.* (citing Scholes v. Lehmann, 56 F.3d 750, 754 (7th Cir. 1995)).

280. *Id.* at 1152 (quoting *Grassmueck*, 402 F.3d at 836).

281. *Id.*

282. *Id.* at 1152-53.

283. 392 U.S. 134 (1968), *overruled on different grounds by* Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752 (1984).

in pari delicto, with its complex scope, contents, and effects, is not to be recognized as a defense to an antitrust action.'"[284]

The plaintiffs in *Perma Life Mufflers* were franchisees who alleged that their franchisor had conspired with other individuals and entities to restrain trade and engage in illegal price discrimination.[285] However, the Supreme Court held that the franchisees were, at worst, "passive violators" of the antitrust laws and reasoned that because "in pari delicto literally means 'of equal fault,' the doctrine should not deny recovery to injured parties *merely because they have participated* to the extent of utilizing illegal arrangements formulated and carried out by others."[286] Because the franchisees' participation in the alleged antitrust conspiracy was not voluntary in any meaningful sense, the Supreme Court held that the *in pari delicto* doctrine did not bar the franchisees from recovery, although the Court explicitly left open the question whether complete involvement in an antitrust violation, "wholly apart from the idea of in pari delicto," would bar a plaintiff from bringing an antitrust claim.[287]

In its later decision in *Bateman Eichler, Hill Richards, Inc. v. Berner*,[288] the Supreme Court also refused to apply the doctrine of *in pari delicto* to bar the tippee-plaintiffs from recovery for insider trading under federal securities laws.[289] In *Bateman Eichler*, the tippees alleged that a securities broker and company official had induced them to purchase company stock by providing them with materially false insider information, and that they suffered damages when a stock price fell as a result of the false information.[290] As in *Perma Life Mufflers*, the Supreme Court concluded that *in pari delicto* would not apply to bar the tippees' claims because the tippees were not active participants in the alleged violations of federal law.[291] The Court explained that "[i]n its classic formulation, the *in pari delicto* defense was narrowly limited to situations where the plaintiff truly bore at least substantially equal responsibility for his injury."[292]

Based on the holdings in *Perma Life Mufflers* and *Bateman Eichler*, the Eleventh Circuit held that "the application of the defense of *in pari delicto* to causes of action created by federal statutes depends on two

284. *Edwards*, 437 F.3d at 1153 (quoting *Perma Life Mufflers*, 392 U.S. at 140).
285. *Perma Life Mufflers*, 392 U.S. at 135.
286. *Id.* at 138.
287. *Id.* at 140.
288. 472 U.S. 299 (1985).
289. *Id.* at 319.
290. *Id.* at 301-02.
291. *See id.*
292. *Bateman Eichler*, 472 U.S. at 306-07.

factors: (1) the plaintiffs' active participation in the violation *vel non* and (2) the policy goals of the federal statute."[293] The court further noted that both of those factors supported the application of the *in pari delicto* defense with respect to Laddin's RICO claims.[294] First, the court determined that it was "beyond doubt" that the allegations contained in Laddin's complaint rendered ETS in active participation with the defendants, and in fact the principal wrongdoer in the fraudulent Ponzi scheme.[295] Moreover, federal RICO violations require affirmative wrongdoing rather than passive acquiescence as a matter of law.[296] This "logically compel[led] the conclusion that ETS had 'substantially equal responsibility for [its] [injury].'"[297]

Second, the court determined that applying *in pari delicto* to bar the trustee's complaint advanced the policy of civil liability under the federal RICO statute—to help eradicate organized crime by divesting the association of the fruits of ill-gotten gains.[298] In the instant case, the trustee's recovery under RICO would not divest the RICO violators of their ill-gotten gains, but rather would result in a simple wealth transfer among similarly situated co-conspirators.[299] Because ETS was an active participant in the fraudulent scheme, the court concluded that application of the defense of *in pari delicto* furthered the policy of the federal RICO statutes, and accordingly held that because a complaint brought by ETS against other members of its RICO conspiracy, outside of bankruptcy, would have been barred by the doctrine of *in pari delicto*, the trustee was likewise barred from recovery within bankruptcy.[300]

VII. CONCLUSION

The 2006 survey period yielded several noteworthy decisions, many of which concerned issues of first impression in the Eleventh Circuit.

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293. *Edwards*, 437 F.3d at 1154 (citing Pinter v. Dahl, 486 U.S. 622, 632-33 (1988)).

294. *Id.* at 1154-55.

295. *Id.* at 1155.

296. *Id.* at 1155-56. "*Perma Life Mufflers* explicitly left open the possibility that a defense of active involvement could bar a complaint about an antitrust conspiracy, and our sister circuits have accordingly barred antitrust claims where the plaintiff was completely involved in the antitrust conspiracy." *Id.* at 1156 (citations omitted).

297. *Id.* at 1155 (quoting *Bateman Eichler*, 472 U.S. at 308-09).

298. *Id.* (citing Genty v. Resolution Trust Corp., 937 F.2d 899, 910 (3d Cir. 1991)). "The doctrine of *in pari delicto* is based on the policy that 'courts should not lend their good officers to mediating disputes among wrongdoers[,]' and 'denying judicial relief to an admitted wrongdoer is an effective means of deterring illegality.'" *Id.* at 1152 (quoting *Bateman Eichler*, 472 U.S. at 306).

299. *Id.* at 1155.

300. *Id.* at 1156.

While this survey is not intended to be exhaustive, the Authors have attempted to provide material that will be useful to practitioners by providing relevant updates in the area of federal trial practice and procedure in the Eleventh Circuit.

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