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# Class Actions

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After an uneventful 2013 on the class action front, the United States Court of Appeals for the Eleventh Circuit tackled an assortment of class action issues during 2014, which often required the court to navigate around a recent wave of Supreme Court precedents affecting that area.

## I. MOOTNESS: PONDERING *SYMCZYK*

Courts have struggled for decades with the intersection of Article III[1] mootness and class actions. The Supreme Court of the United States recently seemed poised to resolve one long-festering issue in *Genesis HealthCare Corp. v. Symczyk*[2] but ultimately demurred.[3] A sharply divided Court instead held that if an unaccepted offer of judgment does moot an individual claim, then the individual's would-be collective action under the federal Fair Labor Standards Act of 1938 (FLSA)[4] is also moot.[5] The narrowly framed, 5–4 majority opinion by Justice Thomas dodged what had seemed to be the central question presented by the case: does an unaccepted offer pursuant to Rule 68 of the Federal Rules of Civil Procedure[6] moot an individual claim?[7] The Court acknowl-

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1. U.S. CONST. art. III, § 2, cl. 1.
2. 133 S. Ct. 1523 (2013).
3. *Id.* at 1532.
4. 29 U.S.C. §§ 201-219 (2014).
5. *Symczyk*, 133 S. Ct. at 1531-32.
6. FED. R. CIV. P. 68.

edged the circuit split on this question but noted that all parties had assumed in the lower courts that the answer to the question was yes.[8] So the Court assumed, without deciding, that Symczyk's individual claim was mooted by an offer of judgment to which she did not reply.[9]

From that premise, the Court stated that whether the action remained justiciable turned on "[a] straightforward application of well-settled mootness principles."[10] The Court held that Symczyk lacked any cognizable personal interest in representing others in the action.[11] The Court distinguished *United States Parole Commission v. Geraghty*,[12] which held that a named plaintiff, whose claim became moot after denial of class certification, could still appeal the denial because there was a decision on class certification to which the appeal could relate back while the named plaintiff's claim was alive.[13] In *Symczyk*, there was not even a conditional certification under FLSA to which to relate back.[14] Moreover, the Court held that "a putative class acquires an independent legal status once it is certified under Rule 23."[15] FLSA conditional certification confers no such status, the Court explained, and only authorizes the sending of notice to employees.[16] The Court also held that Symczyk's claim was not of an "inherently transitory" nature, like pretrial detention challenges, which warrant relating back to the filing of the complaint.[17] Finally, the Court distinguished its decision in *Deposit Guaranty National Bank v. Roper*,[18] which held that named plaintiffs who prevailed by offer of judgment (over their objection) could still appeal the denial of certification.[19] The Court saw *Roper* both as turning on its specific facts–in which the plaintiffs retained an economic interest in shifting attorneys' fees and expenses to successful class litigants–and as "tethered to the unique significance of certification

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7. *See Symczyk*, 133 S. Ct. at 1526.
8. *Id.* at 1528-29.
9. *Id.* at 1529.
10. *Id.*
11. *Id.*
12. 445 U.S. 388 (1980).
13. *Id.* at 404 n.11.
14. *Symczyk*, 133 S. Ct. at 1530.
15. *Id.* A collective action differs from an ordinary class action under Federal Rule of Civil Procedure 23 in that each class member must decide, after being notified of the action, whether or not to "opt-in." In an ordinary class action, the absent class members, after receiving notice, must affirmatively exclude themselves, or "opt-out," to not be bound by the class judgment. FED. R. CIV. P. 23.
16. *Symczyk*, 133 S. Ct. at 1530.
17. *Id.* at 1531.
18. 445 U.S. 326 (1980).
19. *Id.* at 340.

decisions in class-action proceedings."[20] Justice Kagan's notably brusque dissent, joined by Justices Ginsburg, Breyer, and Sotomayor, took the majority to task for not deciding whether an unaccepted offer of a full-relief judgment renders a claim moot.[21]

The Eleventh Circuit answered *Symczyk*'s undecided question in 2014 as Justice Kagan advocated. The case was *Stein v. Buccaneers Limited Partnership*.[22] The six named plaintiffs brought a proposed nationwide class action against the Tampa Bay National Football League team alleging that they had received unsolicited faxes in violation of the federal Telephone Consumer Protection Act of 1991.[23] After removal of the case to federal district court, the defendant served each named plaintiff with a Rule 68[24] offer of judgment.[25] The defendant promptly moved to dismiss the case for lack of jurisdiction on the ground of mootness. The plaintiffs responded by filing a motion for class certification, which the district court denied as premature. The plaintiffs did not accept the offers of judgment, and the stated deadline for acceptance passed. The district court then dismissed the case as moot.[26]

On appeal, the Eleventh Circuit identified two issues of first impression in the circuit: (1) whether an unaccepted offer of judgment that would provide full relief to the plaintiff moots his individual claim; (2) if so, and if the offer precedes a motion for class certification, whether the plaintiff may go forward with class certification.[27] The court concluded that to give controlling effect to an unaccepted Rule 68 offer of judgment would be "flatly inconsistent with the rule."[28] The text of the rule, the court reasoned, states its effect: An offer not accepted is deemed withdrawn, and the plaintiff may proceed with the case.[29] The court noted that the four justices in *Symczyk* who reached the issue "adopted precisely this analysis."[30] The court went on to note that dismissal of the named plaintiffs' claims was entirely improper anyway,

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20. *Symczyk*, 133 S. Ct. at 1532.
21. *Id.* at 1532, 1537 (Kagan, J., dissenting).
22. 772 F.3d 698 (11th Cir. 2014). The court's opinion was authored by District Judge Robert L. Hinkle of the United States District Court for the Northern District of Florida, sitting by designation. *Id.* at 700.
23. *Id.* at 700; 47 U.S.C. § 227(b)(1)(C) (2012).
24. FED. R. CIV. P. 68.
25. *Stein*, 772 F.3d at 700.
26. *Id.* at 701.
27. *Id.* at 702.
28. *Id.*
29. *Id.*
30. *Id.*

since Rule 68 would call for entry of judgment in accordance with the offer, not dismissal.[31]

The court held, alternatively, that even if the offer of judgment somehow rendered the individual claims moot, the class action claims would remain live and the named plaintiffs would be permitted to pursue them.[32] The timing of the motion for class certification was irrelevant.[33] The court relied on a series of Supreme Court decisions, beginning with *Sosna v. Iowa*[34] and *Gerstein v. Pugh*,[35] for the principle that a class action may not be moot when individual claims become moot before certification.[36] In the court's view, whether the motion to certify is filed first was not significant:[37]

> What matters is that the named plaintiff acts diligently to pursue the class claims . . . . [A] named plaintiff need not file a class-certification motion with the complaint or prematurely; it is enough that the named plaintiff diligently takes any necessary discovery, complies with any applicable local rules and scheduling orders, and acts without undue delay.[38]

In this respect, the court found there was no deficit in the *Stein* plaintiffs' performance.[39] It further noted a circuit split on this issue and sided with the majority of circuits reaching the question.[40] Finally, the court distinguished the *Symczyk* holding as applicable only to FLSA

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31. *Id.* at 703.
32. *Id.* at 704.
33. *Id.* at 708.
34. 419 U.S. 393 (1975).
35. 420 U.S. 103 (1975).
36. *Stein*, 772 F.3d at 706-07.
37. *Id.* at 707.
38. *Id.*
39. *Id.*
40. *Id.* at 707-08. As the court explained, most other circuits addressing the issue have held that "a Rule 68 offer of full relief to the named plaintiff does not moot a class action, even if the offer precedes a class-certification motion, so long as the named plaintiff has not failed to diligently pursue class certification." *Id.* at 707 (citing Pitts v. Terrible Herbst, Inc., 653 F.3d 1081 (9th Cir. 2011); Lucero v. Bureau of Collection Recovery, Inc., 639 F.3d 1239 (10th Cir. 2011); Sandoz v. Cingular Wireless LLC, 553 F.3d 913 (5th Cir. 2008); Weiss v. Regal Collections, 385 F.3d 337 (3d Cir. 2004)). The Seventh Circuit, on the other hand, while "recogniz[ing] that an offer of full relief to a named plaintiff before a class is certified does not always moot the case," held "that if the offer to the named plaintiff is made before the plaintiff moves to certify a class, the named plaintiff cannot go forward." *Id.* at 708 (citing Damasco v. Clearwire Corp., 662 F.3d 891 (7th Cir. 2011)). The Eleventh Circuit noted that the decision in *Damasco* has led to a common practice in the Seventh Circuit of filing a premature certification motion with the complaint. *Id.*

collective actions and not to Rule 23[41] class actions, though it did note some tension between its own holding and dicta in the majority opinion.[42]

*Stein*'s approach sweeps a bit too broadly. Simply applying the text of Rule 68 does not necessarily answer the Article III question posed by an offer of complete surrender that a plaintiff rejects, as even the *Symczyk* dissenters acknowledged.[43] Litigating in federal district court is a privilege not afforded to a plaintiff who will not take yes for an answer. The court's alternative holding tackled the more difficult issues of whether, assuming that an unaccepted offer of judgment can moot a plaintiff's claim does it moot his putative class action and does the answer depend on when the plaintiff moves for class certification?[44] Here, the court acknowledged that its holding could be at odds with *Symczyk* but concluded that the tension was not direct enough to warrant the different result suggested by a former Fifth Circuit precedent.[45] The court's failure to cite, much less discuss, the Supreme Court's decision in *Roper*–the decision seemingly most supportive of its alternative holding–is intriguing. Nonetheless, whatever its blemishes, *Stein* definitively resolves the Rule 68 mootness issue within the Eleventh Circuit, at least until the Supreme Court returns to the issue.[46] That return may be imminent, given that the Court recently granted certiorari in a case that affords the Court an opportunity to revisit the *Symczyk* mootness issue.[47] The case will be argued during the Court's October 2015 Term.

The Eleventh Circuit faced another class action mootness issue in *Lakeland Regional Medical Center, Inc. v. Astellas US, LLC*.[48] The plaintiff, a medical center, brought a putative Sherman Antitrust Act[49] class action against the manufacturer of a pharmaceutical product, charging that the defendant unlawfully tied a patented right to perform

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41. FED. R. CIV. P. 23.

42. *Stein*, 772 F.3d at 708–09.

43. *See Symczyk*, 133 S. Ct. at 1536 (Kagan, J., dissenting).

44. *Stein*, 772 F.3d at 704.

45. *Id.*; *see generally* Zeidman v. J. Ray McDermott & Co., 651 F.2d 1030 (5th Cir. 1981).

46. The Eleventh Circuit has applied *Stein* in summary fashion in subsequent cases. *See* Barr v. Harvard Drug Grp., LLC, 591 F. App'x 928 (11th Cir. 2015); Barr v. Int'l Dental Supply Co., 586 F. App'x 580, 581 (11th Cir 2014); Keim v. ADF Midatlantic, LLC, 586 F. App'x 573, 574 (11th Cir. 2014).

47. Campbell-Edward Co. v. Gomez, No. 14-857, *cert. granted*, May 18, 2015.

48. 763 F.3d 1280 (11th Cir. 2014). The opinion for the court was authored by Judge David M. Ebel of the United States Court of Appeals for the Tenth Circuit, sitting by designation. *Id.* at 1282.

49. 15 U.S.C. §§ 1–7.

a cardiac test to the purchase of an unpatented drug.[50] The would-be class was defined to include all healthcare providers who purchased the drug during a four-year period.[51] The district court denied class certification on the grounds that the plaintiff lacked antitrust standing because of the direct purchaser requirement[52] to bring a damages claim and because the declaratory and injunctive relief claims were both moot or insufficiently articulated.[53] The Eleventh Circuit affirmed the antitrust standing holding and reasoned that, given that the plaintiff lacked standing, there was no abuse of discretion in denying the plaintiff's bid to represent a damages class.[54] Turning to the injunctive and declaratory relief claims, the court, after noting that the direct purchaser requirement did not preclude these claims, rejected the district court's view that the claims became moot as a result of the Food and Drug Administration's approval of a generic version of the drug.[55] First, the court pointed out that the generic drug did not become available during the time the case remained pending in the district court and that there was nothing in the record to demonstrate that it had become available subsequently.[56] Second, the court found nothing in the record to demonstrate what effect the generic drug's presence might have in the marketplace.[57] But the court nevertheless concluded that the district court had not abused its discretion in denying class certification of the declaratory and injunctive relief claims.[58] Noting it was the plaintiff's burden to demonstrate that class certification of such claims is appropriate under Rule 23(b)(2), the court held that the plaintiff had failed to carry that burden in two respects: first, by never identifying exactly what injunctive or declaratory relief it was seeking; and second, by failing to prove that whatever order it was seeking would provide relief to each class member.[59]

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50. *Lakeland*, 763 F.3d at 1283.

51. *Id.*

52. "Under the direct purchaser rule, only the customer who purchased the goods or services at issue directly from the alleged antitrust violator can recover damages." *Id.* at 1285 (emphasis omitted).

53. *Id.* at 1283.

54. *Id.* at 1289.

55. *Id.* at 1290.

56. *Id.*

57. *Id.*

58. *Id.*

59. *Id.* at 1291-92.

## II. CAFA REMOVAL: APPLYING *DART*

In two 2014 decisions, the court considered whether removing defendants had satisfied the $5 million amount-in-controversy requirement[60] established under the Class Action Fairness Act of 2005 (CAFA).[61] *South Florida Wellness, Inc. v. Allstate Insurance Co.*[62] involved a claim on behalf of a class for declaratory relief only.[63] The plaintiff treated an Allstate insured who had personal injury protection coverage in her auto policy. The plaintiff took an assignment of the policy benefits and sought payment of 80% of the amount it had billed the insured.[64] Allstate instead paid 80% of certain amounts set out in a statutory fee schedule. The plaintiff contended that Florida law required any insurer adhering to that statutory fee schedule to state so clearly and umambiguously in the policy. The requested declaration on behalf of the class was that the language used in the Allstate policy did not meet the statutory requirements. Allstate removed the case to federal court under CAFA, supported by an affidavit showing that an additional $68 million in policy benefits would be owed if the declaration were entered. The plaintiff moved to remand because the complaint itself did not seek damages and the financial consequences of a declaratory judgment were too speculative. The district court agreed and granted the motion to remand. Allstate appealed.[65]

The Eleventh Circuit reasoned that CAFA requires, for jurisdictional purposes, that the amount in controversy presented by a request for declaratory relief is the monetary value that would flow to the entire class if the relief is granted.[66] The court noted that the monetary value must be "sufficiently measurable and certain" to establish the jurisdictional amount.[67] Allstate, the court concluded, had carried its burden of establishing the amount in controversy, and its affidavit of the

60. *See* Dudley v. Eli Lilly & Co., 778 F.3d 909 (11th Cir. 2014); S. Fla. Wellness, Inc. v. Allstate Ins. Co., 745 F.3d 1312 (11th Cir. 2014).

61. 28 U.S.C. § 1332(d)(2) (2012).

62. 745 F.3d 1312 (11th Cir. 2014).

63. *Id.* at 1313. The opinion for the court was authored by Chief Judge Ed Carnes. *Id.*

64. *Id.* at 1313-14. As the court explained, "The general rule for PIP [personal injury protection] coverage in Florida is that an insurance policy must cover 80% of all reasonable costs for medically necessary treatment resulting from an automobile accident, subject to certain limits." *Id.* at 1314.

65. *Id.* at 1313-15.

66. *Id.* at 1316.

67. *Id.* (quoting Morrison v. Allstate Indem. Co., 228 F.3d 1255, 1269 (11th Cir. 2000) (internal quotation marks omitted).

jurisdictional amount was unrebutted.[68] The plaintiff argued that multiple events would have to occur to result in recovery of money from Allstate in the event the class obtained its declaratory judgment.[69] The court tartly responded that the assumption underlying this argument–that class members would not seek out the additional payment after they obtained the declaratory judgment–was "contrary to human nature and the nature of lawyers."[70] The court further admonished that "[e]stimating the amount in controversy is not nuclear science; it does not demand decimal-point precision."[71] The large size of the calculated amount made it "easier . . . to be confident that collection contingencies should not count for much."[72]

The court's pragmatic approach to assessing the amount in controversy should discourage gamesmanship in framing the prayer for relief, which is consistent with the Supreme Court's CAFA precedents.[73] *South Florida Wellness, Inc.* suggests that a similar outcome would result from the valuation of an attempt to certify a single issue under Rule 23(c)(4).[74]

The second CAFA removal case, *Dudley v. Eli Lilly & Co.*,[75] came shortly after an important Supreme Court decision, *Dart Cherokee Basin Operating Co. v. Owens*,[76] which held that a removing defendant is not required to attach or present evidence of the amount in controversy with its notice of removal.[77] *Dart* relieved decades of uncertainty concerning the filing requirements for removal of cases to federal court from state court by holding that a defendant is required only to file "a short and plain statement" containing a "plausible allegation" that the jurisdictional amount in diversity cases is satisfied.[78] No evidence need be recited in the notice or attached to it.[79] The Court's ruling applies in all diversity cases, including would-be class actions removed under CAFA. Lack of uniformity in the case law and limited appellate review had

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68. *Id.*
69. *Id.*
70. *Id.*
71. *Id.* at 1317.
72. *Id.*
73. *See, e.g.*, Standard Fire Ins. Co. v. Knowles, 133 S. Ct. 1345 (2013) (refusing to give effect to complaint's limitation of class damages).
74. *See generally* Laura J. Hines, *The Unruly Class Action*, 82 GEO. WASH. L. REV. 718 (2014).
75. 778 F.3d 909 (11th Cir. 2014). The opinion for the court was authored by Judge Stanley Marcus. *Id.* at 910.
76. 135 S. Ct. 547 (2014).
77. *Id.* at 551.
78. *Id.* at 553–54.
79. *Id.* at 551.

prompted some attorneys to file supporting affidavits with their removal notices and to spend hours drafting code-pleading style "petitions for removal." *Dart* makes clear that the notice of removal is governed by federal notice-pleading standards.[80]

In a holding specific to CAFA cases, the Supreme Court also rejected any "presumption against removal," which the district court had invoked: "We need not here decide whether such a presumption is proper in mine-run diversity cases. It suffices to point out that no antiremoval presumption attends cases invoking CAFA, which Congress enacted to facilitate adjudication of certain class actions in federal court."[81]

*Dudley* was brought by a sales employee who claimed to be owed certain incentive compensation. She sued on behalf of the class of similarly situated employees. Lilly removed the case to the United States District Court for the Middle District of Florida under CAFA. The district court granted the plaintiff's motion to remand on the ground that Lilly had not proven that the amount in controversy exceeds $5 million, CAFA's jurisdictional threshold.[82] The Eleventh Circuit granted Lilly permission to appeal[83] under 28 U.S.C. § 1453(c)(1).[84]

On appeal, the Eleventh Circuit acknowledged that *Dart* had overruled circuit case law that had instructed that removal statutes were to be strictly construed and all doubts resolved in favor of remand.[85] The court held that any presumption in favor of remand was no longer operative in CAFA cases.[86] As in its pre-*Dart* cases,[87] the court applied the preponderance of the evidence standard, noting that the removing party bears the burden of proof.[88] In attempting to prove the jurisdictional amount, Lilly offered affidavits from a sales executive concerning the sales incentive programs in question. The affidavits stated the number of sales representatives eligible to receive incentive payments and provided a range of the amounts potentially due. The plaintiff challenged Lilly's proof by pointing out that not all employees were eligible for all of the incentive payments and that Lilly failed to show which payments would have been due to those who were eligible.[89] The district court upheld this objection, and the Eleventh Circuit

80. *Id.* at 555.
81. *Id.* at 554.
82. *Dudley*, 778 F.3d at 910-11.
83. *Id.* at 911.
84. 28 U.S.C. § 1453(c)(1) (2012).
85. *Dudley*, 778 F.3d at 912.
86. *Id.*
87. *See, e.g.*, Miedema v. Maytag Corp., 450 F.3d 1322, 1330 (11th Cir. 2006).
88. *Dudley*, 778 F.3d at 913.
89. *Id.* at 915.

affirmed the district court's findings as not clearly erroneous.[90] Lilly countered that it should not have to concede liability at so early a stage of the litigation or provide detailed, sale-by-sale proof as to each former employee.[91] The Eleventh Circuit responded that it agreed with these points but "we cannot see how the district court could generally infer the amount in controversy from this record."[92] The court faulted Lilly for not providing the district court with more information from its employment records about the amount of compensation allegedly denied the class members, without conceding liability or being unduly burdened.[93] The court pointedly noted that if the jurisdictional amount was established later in the litigation, then another removal attempt could be made.[94]

The case illustrates that, despite *Dart*, a removing defendant still must provide a detailed evidentiary showing to withstand a motion to remand, even in CAFA cases.[95] Depending on the class definition, this showing may entail some discomfiture concerning possible admissions of liability. Usually, these concerns can be addressed with express reservations and denials of liability. Any concerns, moreover, must be weighed against the disadvantages of proceeding in state court that presumably prompted removal in the first place. *Dudley* also reminds defendants of their lifeline: If the amount in controversy escalates or becomes clearer later in the litigation, then the defendant may try again.

## III. CLASS CERTIFICATION: APPLYING *HALLIBURTON II* AND *COMCAST*

The Eleventh Circuit considered certification-related issues in cases arising under the securities laws and in the consumer class action context.[96] In *Local 703, I.B. of T. Grocery & Food Employees Welfare Fund v. Regions Financial Corp.*,[97] the court considered an interlocutory appeal presenting several issues related to certification of a securities-fraud class action,[98] a subject of recent Supreme Court attention in

90. *Id.* at 915-16.
91. *Id.* at 917.
92. *Id.*
93. *Id.*
94. *Id.*
95. *See id.* at 912.
96. *See* Local 703, I.B. of T. Grocery & Food Emps. Welfare Fund v. Regions Fin. Corp., 762 F.3d 1248 (11th Cir. 2014); Bussey v. Macon Cnty. Greyhound Park, Inc., 562 F. App'x 782 (11th Cir. 2014).
97. 762 F.3d 1248 (11th Cir. 2014). The opinion of the court was authored by Judge Beverly B. Martin. *Id.* at 1252.
98. *Id.* at 1252.

*Halliburton Co. v. Erica P. John Fund, Inc. (Halliburton II)*.[99] In *Local 703*, the district court had certified a class action based on alleged misrepresentations by Regions about its financial health before and during the recent recession. The plaintiffs alleged that Regions's failure to accurately represent the company's financial situation in statements to analysts and in required disclosures resulted in an artificially high stock price, allowing it to avoid the precipitous decline in stock price that would have otherwise resulted during the recession.[100]

On Regions's appeal, the Eleventh Circuit first considered the applicable standard for invocation of the presumption established by *Basic Inc. v. Levinson*,[101] which allows plaintiffs a rebuttable presumption of class-wide reliance based on the fraud-on-the-market theory.[102] To establish the presumption, plaintiffs must prove certain elements, such as "that the alleged misrepresentations were publicly known . . ., that the stock traded in an efficient market, and that the relevant transaction took place between the time the misrepresentations were made and the time the truth was revealed."[103] The district court found that the plaintiffs met these requirements, but Regions argued on appeal that the evidence was not sufficient to conclude that the stock traded on an efficient market.[104] Regions argued that the court was required to analyze market efficiency under the factors set out in *Cammer v. Bloom*,[105] which has been approved by several other circuit courts.[106] The Eleventh Circuit agreed with Regions that the plaintiffs had "not established a comprehensive analytical framework for determining whether the market for a particular stock is efficient," but it did not "see this as a problem."[107] The court held,

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99. 134 S. Ct. 2398 (2014).

100. *Local 703*, 762 F.3d at 1252.

101. 485 U.S. 224 (1988).

102. *Id.* at 250. "According to that theory, the market price of shares traded on well-developed markets reflects all publicly available information, and, hence, any material misrepresentations." *Local 703*, 762 F.3d at 1254 (quoting Erica P. John Fund, Inc. v. Halliburton Co. (*Halliburton I*), 131 S. Ct. 2179, 2185 (2011)) (internal quotation marks omitted). "The theory thus allows us to presume 'that an investor relies on public misstatements whenever he buys or sells stock at the price set by the market.'" *Id.* (quoting *Halliburton I*, 131 S. Ct. at 2185).

103. *Local 703*, 762 F.3d at 1254 (quoting *Halliburton I*, 131 S. Ct. at 2185).

104. *Id.* at 1252.

105. 711 F. Supp. 1264 (D.N.J. 1989).

106. *Local 703*, 762 F.3d at 1255; *see, e.g., In re DVI, Inc. Sec. Litig.*, 639 F.3d 623, 634 n.16 (3d Cir. 2011) (noting that seven of the twelve Circuit Courts have done so).

107. *Local 703*, 762 F.3d at 1254.

> By not setting forth a mandatory framework, we have given District Courts the flexibility to make the fact-intensive inquiry on a case-by-case basis. Beyond that, the flexible approach will allow District Courts in the future to consider new factors yet unknown to this Court that market theorists might consider to indicate market efficiency.[108]

The court noted, however, that it has given guidance, identifying "some major, general characteristics of an efficient market," such as "high-volume trading activity facilitated by people who analyze information about the stock or who make trades based upon that information," but that those characteristics may not be required in every case.[109] The court also made clear that although it has rejected use of *Cammer*'s factors as mandatory, district courts are free to apply them.[110]

The court also rejected Regions's argument that invocation of the presumption "always requires proof that the alleged misrepresentations had an immediate effect on the stock price."[111] In some cases, confirmatory information will not cause a change in the stock price, but will instead merely slow down its decline.[112] While the court agreed that there is no per se rule that stocks traded on a national market are traded on an efficient market, it is a factor.[113]

The court–as well as all parties–did agree, however, that remand was proper in light of the Supreme Court's recent decision in *Halliburton II*, which made clear that defendants may introduce price impact evidence at the class certification stage, both to undermine the plaintiff's case for market efficiency and to rebut the *Basic* presumption once it has been established.[114] Because the district court did not fully consider this evidence under the state of the law pre-*Halliburton II*, the court ordered a limited remand so that the district court *may* consider price evidence, although "*Halliburton II* by no means holds that in every case in which such evidence is presented, the presumption will always be defeated," particularly when the case involves confirmatory information.[115]

Turning to typicality, the court noted that this requirement "may be satisfied despite substantial factual differences . . . when there is a

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108. *Id.* at 1254–55.
109. *Id.* at 1255.
110. *Id.*
111. *Id.* at 1256.
112. *Id.*
113. *Id.* at 1257.
114. *Id.* at 1258.
115. *Id.* at 1259.

strong similarity of legal theories."[116] The court specifically rejected Regions's arguments that the various class representatives were not typical because one plaintiff sold some of its stock at the inflated prices during the class period and made post-disclosure purchases while the other plaintiff bought shares late in the class period and retained shares long after the corrective disclosure.[117] The court agreed with the Fifth Circuit that "[r]eliance on the integrity of the market prior to disclosure of alleged fraud (i.e. during the class period) is unlikely to be defeated by post-disclosure reliance on the integrity of the market."[118] The court did note, however, that the greater the time between the purchase and the sale, the more likely it is that different factors caused the loss, which the district court could revisit on remand.[119] The court rejected the argument that the use of investment advisers rendered the plaintiffs atypical, noting that large institutional investors, who are more likely to use investment advisers, are preferred as class representatives.[120] It stated, "Even sophisticated investment advisers . . . rely on the integrity of the market . . . even if they do not incorporate particular informational disclosures into their investment strategies."[121]

Regions also argued that the district court erred in establishing the class period.[122] The court rejected the argument that the class period cannot begin with the filing of the 2007 Form 10-K when plaintiffs do not allege any wrongdoing in 2007.[123] "All of Regions's conduct in 2007 may be perfectly innocent, but if it misrepresented the value of its 2007 assets in 2008, then it would have violated the Securities Exchange Act, and the class period can begin at that time on that basis."[124] The court did, however, offer Regions a small consolation by concluding that the district court erred in establishing the end date for the class period

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116. *Id.* (alteration in original) (quoting Williams v. Mohawk Indus., Inc., 568 F.3d 1350, 1357 (11th Cir. 2009)). The court's reiteration of this statement is consistent with its precedents, but it arguably is inconsistent with the Supreme Court's interpretation, in *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011), of the overlapping Rule 23(a)(2) requirement of commonality. An allegation of the same legal theory does little to establish commonality under the *Dukes* regime and seems unlikely to do much to establish typicality either.

117. *Local 703*, 762 F.3d at 1260.

118. *Id.* (alteration in original) (quoting Feder v. Elec. Data Sys. Corp., 429 F.3d 125, 138 (5th Cir. 2005)) (internal quotation marks omitted).

119. *Id.* at 1260 & n.8. Loss causation is an element of a Rule 10b-5 securities fraud claim under *Dura Pharmaceutical, Inc. v. Broudo*, 544 U.S. 336 (2005).

120. *Local 703*, 762 F.3d at 1260.

121. *Id.*

122. *Id.* at 1261.

123. *Id.*

124. *Id.*

as January 20, 2009–based on the record, people who purchased shares on January 20 should be excluded because the corrective disclosure was made before the market opened that day.[125]

Although the grant of class certification was vacated and remanded, *Local 703* makes clear that district courts continue to have flexibility in evaluating class-wide reliance in securities-fraud actions. Indeed, on remand, the district court found that the price-impact evidence, considered in light of *Halliburton II*, did not change the analysis and again certified the class, although this time with the class period ending January 19.[126] *Local 703* also demonstrates that the abuse-of-discretion review standard remains a meaningful obstacle to appellate relief in class actions in the Eleventh Circuit.[127]

In *Bussey v. Macon County Greyhound Park, Inc.*,[128] the Eleventh Circuit considered other aspects of Rule 23: ascertainability and predominance.[129] *Bussey*, which is unpublished,[130] involved a putative class action by electronic bingo players against the operator of a gaming facility and the manufacturers, owners, and operators of the gaming machines, seeking to recover money lost while playing the machines, which they alleged were illegal under Alabama law.[131] The district court certified a class of "[a]ll persons who, at any time during the period . . ., while using their Q-Club cards, lost money or value playing electronic 'bingo' at Macon County Greyhound Park."[132] Although all defendants asked for permission to appeal under Rule 23(f), the court granted appeal only to the game manufacturers, concluding that the district court abused its discretion in finding that the class was ascertainable and that common issues predominated.[133]

The mechanics of the use and tracking of the gaming machines is relevant to these issues. To play the gaming machines, a customer had to insert a stored-value card or ticket, but the customer also could, but was not required to, insert a "Q-Card," which had no value but tracked use by specific customers for various bonuses and perks. Although a Q-Card was tied to a specific person, others could use someone's card, and

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125. *Id.*

126. Local 703, I.B. of T. Grocery & Food Emps. Welfare Fund v. Regions Fin. Corp., No. CV 10-J-2847-S, 2014 U.S. Dist. LEXIS 162403, at *7, *31 (N.D. Ala. Nov. 19, 2014).

127. *See Local 703*, 762 F.3d at 1253.

128. 562 F. App'x 782 (11th Cir. 2014).

129. *Id.* at 787-88.

130. *See* 11th Cir. R. 36-2 ("Unpublished opinions are not considered binding precedent, but they may be cited as persuasive authority.").

131. *Bussey*, 562 F. App'x at 784.

132. *Id.*

133. *Id.* at 784, 788.

customers with cards, including the named plaintiffs, often did not use them when playing. The gaming facility tracked players' wins and losses through an "Advantage Tracking System," but the system would have win/loss data for a particular individual only if he had used his Q-Card, and the system only showed wins and losses for a full session, not per game. Another spreadsheet showed, for each Q-Card user, the total amount lost on each manufacturer's machines, but payments to the gaming facility by each manufacturer were not based on wins and losses or tied to Q-Card use.[134]

Turning to Rule 23, the court noted that although not mentioned in the rule, it is implicit in the analysis that the proposed class be "adequately defined and clearly ascertainable."[135] "An identifiable class exists if its members can be ascertained by reference to objective criteria."[136] Ascertainability also must be "administratively feasible," meaning that "identifying class members is a manageable process that does not require much, if any, individual inquiry."[137] Here, the class, as defined, was not ascertainable because it included Q-Card holders who had losses at a game level, even if not at a session level, but the reports generated showed only session-level losses, requiring refining of the class definition.[138]

Moreover, the district court's finding of predominance was an abuse of discretion in light of the Supreme Court's recent decision in *Comcast Corp. v. Behrend*,[139] which was decided two days before the district court opinion.[140] According to *Bussey*, *Comcast* "reiterated that class certification is an *evidentiary* question, not just an analysis of the pleadings."[141] The district court must conduct a "rigorous analysis," which frequently will "overlap with the merits of the plaintiff's underlying claim."[142] Here, although the district court acknowledged the *Comcast* decision, "it nonetheless failed to conduct the 'rigorous analysis' required by that decision–instead deferring resolution of important questions bearing on the class certification analysis to the merits stage of the case."[143] Specifically, the "shortcomings in the

134. *Id.* at 784-86.
135. *Id.* at 787 (quoting Little v. T-Mobile USA, Inc., 691 F.3d 1302, 1304 (11th Cir. 2012)).
136. *Id.* (quoting Fogarazzo v. Lehman Bros., Inc., 263 F.R.D. 90, 97 (S.D.N.Y. 2009)).
137. *Id.* (citation omitted) (internal quotation marks omitted).
138. *Id.* at 788.
139. 133 S. Ct. 1426 (2013).
140. *Bussey*, 562 F. App'x at 790.
141. *Id.*
142. *Id.* (quoting *Comcast*, 133 S. Ct. at 1432).
143. *Id.*

data" bear directly and significantly on the predominance issue.[144] The plaintiffs identified no method for quantifying game-level losses, which is what they were seeking, and they identified no method for allocating damages among the manufacturers and the facility because damages were not tied to individual sessions or Q-Cards.[145] The Eleventh Circuit noted that "[i]t remains unclear, therefore, how the district court would ever be able to allocate liability and damages among the various defendants."[146] The court therefore remanded for a new class definition and for the district court to conduct the required rigorous analysis "regarding whether calculation of the class members' damages would necessitate such individual inquiry that individual issues would predominate over common ones," noting that the district court "may wish to allow some discovery on the damages issue."[147]

Although unpublished, *Bussey* reaffirms the rigor of the predominance analysis, as well as the importance of ascertainability, even if a foray into the merits is required. The case may be a prelude to a precedential ruling on the ascertainability requirement, the application of which is a subject of some controversy,[148] in a future decision. District courts should allow ample discovery and conduct a close examination of the evidence, both on how class membership will be established and how individual claims will be proven.

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144. *Id.*

145. *Id.*

146. *Id.* "concluding that plaintiffs' expert's model for damages 'falls far short of establishing that damages are capable of measurement on a classwide basis,' and finding that '[q]uestions of individual damage calculations will inevitably overwhelm questions common to the class'" (quoting *Comcast*, 133 S. Ct. at 1433).

147. *Id.* at 791 & n.8.

148. *See* Carrera v. Bayer Corp., No. 12-2621, 2014 U.S. App. LEXIS 15553, at *5-6 (3d Cir. May 2, 2014) (Ambro, J., dissenting) ("Even if, as I believe, the ability to identify class members is a set piece for Rule 23 to work, how far we go in requiring plaintiffs to prove that ability at the outset is exceptionally important and requires a delicate balancing of interests. It merits not only *en banc* review by our Court but also review by the Judicial Conference's Committee on Rules of Practice and Procedure."), noting the substantial controversy regarding the application of the court's decision on ascertainability in *Marcus v. BMW of North America, LLC*, 687 F.3d 583, 592–93 (3d Cir. 2012). The nature and extent of an implied ascertainability requirement is one issue pending before the Ninth Circuit in *Jones v. ConAgra Foods, Inc.*, *appeal docketed*, No. 14-16327 (9th Cir. July 15, 2014). In *Jones*, the district court denied certification of a consumer class in part based on a broad application of an independent ascertainability requirement. No. C 12-01633 CRB, 2014 U.S. Dist. LEXIS 81292, at *45 (N.D. Cal. June 13, 2014).

## IV. ARBITRATION: APPLYING *COMPUCREDIT* AND *ITALIAN COLORS*

The Eleventh Circuit continued to examine the relationship between the class mechanism and contractually selected arbitration, which is now commonplace in employment and consumer agreements. In *Walthour v. Chipio Windshield Repair, LLC*,[149] the court held that, under the Federal Arbitration Act (FAA),[150] an arbitration agreement that waives an employee's ability to bring a collective action under the FLSA is enforceable.[151] The plaintiffs, who were former employees, entered into separate, identical arbitration agreements at the time of employment, which provided that any employment dispute would be submitted to binding arbitration and any claims could be brought only individually and not as a class. The agreement explicitly recognized that employees were giving up their rights to participate in a class or other representative action. When the plaintiffs sued under the minimum wage, overtime, and records provisions of the FLSA, the defendants filed a motion to compel arbitration and dismiss or, alternatively, to stay the proceedings pending arbitration. The district court granted the motions and dismissed the complaint.[152]

On appeal, the Eleventh Circuit reiterated the liberal federal policy in favor of arbitration embodied in the FAA, stating that courts must "rigorously enforce arbitration agreements according to their terms, including terms that specify *with whom* [the parties] choose to arbitrate their disputes."[153] Because there was no question regarding the scope and applicability of the agreements at issue, the FAA standing alone would require individual, not collective, arbitration.[154] The plaintiffs argued, however, that the agreements were an unenforceable waiver of rights under FLSA § 16(b), overriding the FAA.[155]

In rejecting this argument, the court began with the proposition that the FAA's requirement can be overridden by contrary congressional intent, where a statute "evince[es] an intention to preclude a waiver of [collective]-action procedure,"[156] as laid out by the Supreme Court in

149. 745 F.3d 1326 (11th Cir. 2014). The opinion of the court was authored by Judge Frank M. Hull. *Id.* at 1327.

150. 9 U.S.C. §§ 1-16 (2014).

151. *Walthour*, 745 F.3d at 1327.

152. *Id.* at 1328-29.

153. *Id.* at 1329-30 (alteration in original) (quoting Am. Express Co. v. Italian Colors Rest., 133 S. Ct. 2304, 2309 (2013)).

154. *Id.* at 1330.

155. *Id.*

156. *Id.* at 1331 (alterations in original) (quoting *Italian Colors Rest.*, 133 S. Ct. at 2309) (internal quotation marks omitted).

*American Express Co. v. Italian Colors Restaurant*[157] and, more recently, in *CompuCredit Corp. v. Greenwood*,[158] which determined there was no contrary congressional command in the antitrust laws or in the Credit Repair Organizations Act (CROA),[159] respectively.[160] As the Eleventh Circuit noted, the Supreme Court in *CompuCredit* held that the CROA did not preclude enforcement of an arbitration agreement "[b]ecause the CROA is silent on whether claims under the Act can proceed in an arbitrable forum."[161] The Court's opinion did not consider the legislative history or any inherent conflict between the CROA and the FAA, but instead "relied on the text of the CROA,"[162] noting that when Congress had previously prohibited arbitration clauses, "it ha[d] done so with a clarity that far exceeds the claimed indications in the CROA."[163] *CompuCredit* therefore "suggests that the Supreme Court would focus primarily on the statutory text of the FLSA to determine whether that text precludes a waiver of the statutory right to bring a collective action."[164] "Indeed, '[i]n every case the Supreme Court has considered involving a statutory right that does not explicitly preclude arbitration, it has upheld the application of the FAA.'"[165]

Turning to the text of the FLSA, the Eleventh Circuit examined section 16(b),[166] which provides that an employee may bring an action "for and in behalf of himself . . . and other employees similarly situated."[167] The court focused on the fact that "an action brought by a plaintiff employee does not become a 'collective' action unless other plaintiffs affirmatively opt into the class by giving written and filed consent,"[168] also noting that "the right" provided by section 16(b) "shall

157. 133 S. Ct. 2304 (2013).

158. 132 S. Ct. 665 (2012).

159. 15 U.S.C. §§ 1601-1616 (2014).

160. *See Walthour*, 745 F.3d at 1331.

161. *Id.* (alteration in original) (quoting *CompuCredit*, 132 S. Ct. at 673).

162. *Id.*; *see also CompuCredit*, 132 S. Ct. at 672-73.

163. *Walthour*, 745 F.3d at 1331 (alteration in original) (quoting *CompuCredit*, 132 S. Ct. at 672). The concurring justices further observed there was "nothing in the legislative history or purpose" of the CROA that would preclude enforcement. *Id.* (quoting *CompuCredit*, 132 S. Ct. at 675 (Sotomayor, J., concurring)).

164. *Id.* at 1331-32.

165. *Id.* at 1332 (alteration in original) (quoting D.R. Horton, Inc. v. NLRB, 737 F.3d 344, 357 n.8 (5th Cir. 2013)).

166. 29 U.S.C. § 216(b) (2014).

167. *Id.*

168. *Walthour*, 745 F.3d at 1332 (quoting Cameron-Grant v. Maxim Healthcare Servs., Inc., 347 F.3d 1240, 1249 (11th Cir. 2003)) (internal quotation marks omitted).

terminate if the Secretary of Labor files a complaint" under specified sections.[169]

Moreover, the collective action language of section 16(b) was expressly adopted in the Age Discrimination in Employment Act (ADEA),[170] which was interpreted by the Supreme Court in *Hoffman-La Roche Inc. v. Sperling*[171] and *Gilmer v. Interstate/Johnson Lane Corp.*[172] *Gilmer*, specifically, involved the enforceability of an arbitration agreement "and speaks somewhat more to the issue here."[173] Because the plaintiff in *Gilmer* "conceded that nothing in the text of the ADEA or its legislative history explicitly precluded arbitration," the Court looked at whether "compulsory arbitration of ADEA claims was 'inconsistent with the statutory framework and purposes of the ADEA.'"[174] The Court "found no inherent inconsistency between (1) enforcing arbitration agreements as to ADEA claims and (2) the ADEA's important social policies concerning promoting employment of older persons and prohibiting arbitrary age discrimination."[175] The plaintiff in *Gilmer* also argued, among other things, that arbitration procedures cannot adequately further the purposes of the ADEA because they do not provide for class actions.[176] Although the Court concluded that the arbitration rules that would apply to *Gilmer* would provide for collective proceedings, it opined that even assuming enforcement of the arbitration agreement would result in parties forgoing proceeding collectively, "the fact that the ADEA provides for the possibility of bringing a collective action does not mean that individual attempts at conciliation were intended to be barred."[177] The Court also rejected the argument that arbitration agreements related to ADEA claims were unenforceable due to unequal bargaining power between employees and employers.[178] The Court later relied on *Gilmer* in *Italian Colors Restaurant*, rejecting claims that the waiver of class arbitration barred "effective vindication" of federal statutory rights under antitrust laws by removing plaintiffs' economic incentive to bring claims, because an individual plaintiff could

169. *Id.*
170. 29 U.S.C. § 626(b) (2014).
171. 493 U.S. 165 (1989).
172. 500 U.S. 20 (1991).
173. *Walthour*, 745 F.3d at 1333.
174. *Id.* (quoting *Gilmer*, 500 U.S. at 27).
175. *Id.* (citing *Gilmer*, 500 U.S. at 27).
176. *Id.* (citing *Gilmer*, 500 U.S. at 30, 32).
177. *Id.* (quoting *Gilmer*, 500 U.S. at 32) (internal quotation marks omitted). The Court, in *Gilmer*, also noted that the Equal Employment Opportunity Commission (EEOC) would still be able to bring actions for class-wide relief. *Gilmer*, 500 U.S. at 32.
178. *Walthour*, 745 F.3d at 1333.

still pursue its own statutory remedies.[179] *Italian Colors Restaurant* reaffirmed that the Court in *Gilmer* "had no qualms in enforcing a class waiver in an arbitration agreement even though the federal statute at issue, the [ADEA] expressly permitted collective actions."[180]

Examining "the FLSA's text, legislative history, purposes, and these Supreme Court decisions," the Eleventh Circuit found "no 'contrary congressional command' that precludes the enforcement of plaintiffs' Arbitration Agreements and their collective action waivers," citing six separate, although overlapping grounds.[181] First, the FLSA contains no explicit provision preventing arbitration or the right to a collective action under § 16(b).[182] Second, the Supreme Court has already rejected a similar argument in *Gilmer*, and because the ADEA adopts the collective action provisions of the FLSA, "[t]he Supreme Court's decision in *Gilmer*, as interpreted by *Italian Colors Restaurant*, . . . applies with equal force to the FLSA."[183] Accordingly, the Court stated, "[T]he text of FLSA § 16(b) does not set forth a non-waivable substantive right to a collective action."[184] The court agreed with the Eighth Circuit that even if there were some "right" to collective actions created by the FLSA, the fact that a plaintiff must affirmatively opt in to any such action meant that "surely the employee has the power to waive participation in a class action as well."[185]

Third, the FLSA legislative history does not indicate that the collective action provision is essential to the effective vindication of the FLSA's rights.[186] Fourth, enforcement of collective action waivers in arbitration agreements is not inconsistent with the FLSA.[187] Fifth, all of the circuits to address the issue have concluded that § 16(b) does not permit a non-waivable, substantive right to a collective action.[188] Finally, the court did not find it significant that Congress explicitly provided for the right to bring a collective action in the FLSA rather than leaving it to the Federal Rules of Civil Procedure:

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179. *Id.* at 1334.

180. *Id.* (alteration in original) (quoting *Italian Colors Rest.*, 133 S. Ct. at 2311) (internal quotation marks omitted).

181. *Id.*

182. *Id.*

183. *Id.* at 1335.

184. *Id.*

185. *Id.* (quoting Owen v. Bristol Care, Inc., 702 F.3d 1050, 1053 (8th Cir. 2013)).

186. *Id.*

187. *Id.*

188. *Id.* at 1336 (citing the Second, Eighth, Fifth, and Fourth Circuits).

> Congress's decision to specifically include the procedural right to a collective action in the FLSA does not somehow transform that procedural right into a substantive right. Rather than expand a plaintiff's substantive rights, Congress's decision to enact the collective action provision actually limited a plaintiff's existing procedural rights set forth in Rule 23. Were it not for § 16(b), a plaintiff could bring a representative FLSA action even without the prior consent of similarly situated employees.[189]

The court addressed the Supreme Court's 1945 decision, *Brooklyn Savings Bank v. O'Neil*,[190] which held that a plaintiff cannot waive the right to liquidated damages in an FLSA settlement when there is no genuine dispute that the plaintiff is entitled to them.[191] *O'Neil* addressed the waiver of a substantive right–the right to recover liquidated damages for FLSA violations–but this case addresses only the waiver of a litigation mechanism–the right to bring a collective action on behalf of others.[192]

Although the Eleventh Circuit, following the Supreme Court, has broadly enforced arbitration agreements in recent years, the court continues to require that parties raise arbitration rights early in litigation or risk waiver.[193] In *In re Checking Account Overdraft Litigation*,[194] the court held that by waiting too long to invoke it, the defendant, KeyBank, waived the arbitration agreement's "delegation clause," which directed that the arbitrator would decide the validity of the arbitration agreement.[195] After the plaintiff, a bank customer, sued for excessive overdraft fees, KeyBank asked the district court to

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189. *Id.*

190. 324 U.S. 697 (1945).

191. *Walthour*, 745 F.3d at 1336-37; *see also O'Neill*, 324 U.S. at 706.

192. *Walthour*, 745 F.2d at 1337. Note that at least one other circuit has limited this analysis to FLSA collective-action waivers in arbitration agreements. In *Killion v. KeHE Distributors, LLC*, the Sixth Circuit invalidated a collective-action waiver contained in a severance agreement, noting that it was not part of an arbitration agreement and distinguishing *Walthour* and other circuit decisions on that basis. 761 F.3d 574, 591-92 (6th Cir. 2014).

193. One narrow exception, adopted by the court in *Krinsk v. SunTrust Banks, Inc.*, is when the plaintiff files an amended complaint that "unexpectedly changes the scope or theory of the plaintiff's claims," which may revive a previously waived right to compel arbitration. 654 F.3d 1194, 1202 (11th Cir. 2011). *Krinsk* is analyzed in the 2011 survey. *See* Thomas M. Byrne & Stacey McGavin Mohr, *Class Actions, 2011 Eleventh Circuit Survey*, 63 MERCER L. REV. 1183, 1190-91 (2012).

194. Johnson v. KeyBank National Ass'n (*In re* Checking Account Overdraft Litig., 754 F.3d 1290 (11th Cir. 2014). The opinion of the court was authored by Judge Stanley Marcus. *Id.* at 1291.

195. *Johnson*, 754 F.3d at 1291-92.

compel arbitration in accordance with his deposit agreement but failed to raise the delegation clause.[196] The district court refused to enforce the arbitration agreement as unconscionable, but the Eleventh Circuit vacated and remanded that decision in light of recent Supreme Court and circuit precedent.[197] On remand, KeyBank raised the delegation clause for the first time, arguing that the district court never should have conducted the threshold inquiry of arbitrability. After a hearing, the district court granted KeyBank's renewed motion to compel arbitration, ordering arbitration on the question of arbitrability.[198]

On appeal, the Eleventh Circuit held that two of its prior decisions, *Barras v. Branch Banking & Trust Co.*[199] and *Hough v. Regions Financial Corp.*,[200] both of which arose out of the same multidistrict litigation as the present case,[201] compelled the conclusion that KeyBank waived enforcement of the delegation clause.[202] In all three cases, the bank made no mention of a delegation clause in its initial motion to compel arbitration and raised the issue only after an initial, unfavorable unconscionability ruling from the district court.[203]

The Eleventh Circuit first rejected KeyBank's argument that it should review the district court's factual findings for clear error and infer unstated factual findings consistent with the court's decision, because the summary-judgment-like nature of a motion to compel arbitration requires de novo review.[204] Turning to the merits, the court reiterated that waiver of arbitration rights occurs when a party substantially participates in litigation to a point inconsistent with an intent to arbitrate, resulting in prejudice to the opposing party.[205] The court reviewed the binding decisions in *Barras* and *Hough*–where the banks

196. *Id.* at 1292.

197. *Id.* at 1292-93 (citing AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740 (2011); Rent-A-Center, West, Inc. v. Jackson, 561 U.S. 63 (2010); Cruz v. Cingular Wireless, LLC, 648 F.3d 1205 (11th Cir. 2011)). The Court in *Rent-A-Center* held that where an arbitration agreement contains a delegation clause, challenges to the enforceability of the agreement as a whole are for the arbitrator. 561 U.S. at 71-72. *Cruz*, and its interpretation of *Concepcion*, are analyzed in the 2011 survey. *See* Byrne & Mohr, *supra* note 194, at 1187-90.

198. *Johnson*, 754 F.3d at 1293.

199. 685 F.3d 1269 (11th Cir. 2012).

200. 672 F.3d 1224 (11th Cir. 2012). Both *Barras* and *Hough* are discussed in the 2012 survey. *See* Thomas M. Byrne & Stacey McGavin Mohr, *Class Actions, 2011 Eleventh Circuit Survey*, 64 MERCER L. REV. 873, 884-87 (2013).

201. *Johnson*, 754 F.3d at 1294.

202. *Id.* at 1295.

203. *Id.* at 1294-95.

204. *Id.* at 1294.

205. *Id.*

were "similarly situated" and "waived similar delegation clause arguments"[206]–and concluded this case is "materially indistinguishable from *Barras* and *Hough*, and the two-pronged *Morewitz* waiver analysis yields the same result here."[207] The court rejected KeyBank's various attempts to distinguish *Barras* and *Hough*, including the argument that while KeyBank raised the delegation clause in a Rule 62.1[208] motion during its pending appeal, the banks in the previous cases waited to raise the clause until after their first motions to compel were appealed and remanded.[209] Because, however, the clause was not raised until "after [the plaintiff] had borne the costs of contesting the initial motion to compel arbitration and after KeyBank had engaged the apparatus of appeal," the plaintiff was prejudiced by "the expense of twice fighting the unconscionability battle in federal court."[210]

The court also refused to enforce an arbitration agreement in *Billingsley v. Citi Trends, Inc.*[211] *Billingsley* involved claims under the FLSA for which the defendant argued collective-action rights had been waived in the employees' arbitration agreements. The district court, however, refused to enforce the agreements, finding that the defendant improperly coerced potential opt-in plaintiffs, who were current employees, to sign arbitration agreements after the litigation was pending.[212] Citing the district court's "broad authority . . . to manage parties and counsel in an FLSA collective action," the Eleventh Circuit affirmed the district court's denial of the motion to compel arbitration.[213]

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206. *Id.*

207. *Id.* at 1295.

208. Fed. R. Civ. P. 62.1.

209. *Johnson*, 754 F.3d at 1297-98. The court also rejected KeyBank's argument that the earlier remand for consideration of *Rent-A-Center*, *Concepcion*, and *Cruz* had compelled a particular result below, and further concluded that *Rent-A-Center* did not work an intervening change in the law that would annul any waiver. *Id.* at 1296-97. This conclusion is consistent with *Garcia v. Wachovia Corp.*, where the court concluded that the intervening *Concepcion* decision did not revive a previously waived right to arbitration. *Garcia*, 699 F.3d 1273, 1278 (11th Cir. 2012); *see also* Byrne & Mohr, *supra* note 201, at 881–82.

210. *Johnson*, 754 F.3d at 1298. On remand, the district court again found the arbitration agreement to be substantively unconscionable, even when not considering the class action waiver as instructed by *Concepcion*. *In re* Checking Account Overdraft Litigation, __ F. Supp. 3d __, No. 1:10-CV-21176-JLK, 2015 U.S. Dist. LEXIS 13570, at *26-27 (S.D. Fla. Feb. 3, 2015).

211. 560 F. App'x 914 (11th Cir. 2014). The opinion of the court was authored by Judge Frank M. Hull. *Id.* at 915.

212. *Id.* at 915, 919.

213. *Id.* at 922, 924.

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