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Class Actions

Thomas M. Byrne

Stacey McGavin Mohr

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**by Thomas M. Byrne*
and Stacey McGavin Mohr****

The United States Court of Appeals for the Eleventh Circuit encountered some of the most controversial issues in class action law during 2015, including several that required the court to apply recent United States Supreme Court decisions or to choose sides on issues that have divided the circuit courts of appeal.[1]

I. AN EVEN SHADIER GROVE

Shady Grove Orthopedic Associates, P.A. v. Allstate Insurance Co.,[2] an important *Erie*[3] decision issued by a divided Supreme Court, set the stage for the Eleventh Circuit's decision in *Lisk v. Lumber One Wood*

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*. Partner in the firm of Sutherland Asbill & Brennan LLP, Atlanta, Georgia. University of Notre Dame (A.B., cum laude, 1978; J.D., magna cum laude, 1981). Law clerk to the Hon. Robert A. Ainsworth, Jr. of the United States Court of Appeals for the Fifth Circuit and to the Hon. Morey L. Sear of the United States District Court for the Eastern District of Louisiana. Member, State Bar of Georgia.

**. Associate in the law firm of Sutherland Asbill & Brennan LLP, Atlanta, Georgia. Emory University (B.A., 2001); Duke University School of Law (J.D., magna cum laude, 2007). Law clerk to the Hon. Karen Nelson Moore of the United States Court of Appeals for the Sixth Circuit. Member, State Bar of Georgia.

1. One issue affecting class actions considered by the court in 2014 was decided by the Supreme Court this term. In *Stein v. Buccaneers Ltd. Partnership*, the court held that a plaintiff's complaint is not rendered moot by an unaccepted offer of judgment. 772 F.3d 698, 709 (11th Cir. 2014); *see also* Floyd v. Sallie Mae, Inc., 601 F. App'x 919, 919 (11th Cir. 2015) (unpublished per curium, applying *Stein*); Walker v. Fin. Recovery Servs., Inc., 599 F. App'x 359, 369 (11th Cir. 2015) (same as *Floyd*); Barr v. Harvard Drug Grp., LLC, 591 F. App'x 928, 928-29 (11th Cir. 2015) (same as *Floyd*); Thomas M. Byrne & Stacey McGavin Mohr, *Class Actions, Eleventh Circuit Survey*, 66 MERCER L. REV. 903, 905-08 (2015) (analyzing *Stein*). The court's holding was adopted by the Supreme Court in *Campbell-Ewald Co. v. Gomez*, 136 S. Ct. 663, 670 & n.4 (2016).

2. 559 U.S. 393 (2010).

3. Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938).

Preserving, LLC,[4] probably the Eleventh Circuit's most significant decision in class action law during 2015. *Shady Grove* held that the New York class action statute's general prohibition on certification of a class in an action to recover statutorily imposed penalties[5] does not supplant Rule 23 of the Federal Rules of Civil Procedure[6] in federal district court.[7] The Supreme Court could not agree, however, on the ultimate rationale for its decision. A majority of the Court agreed with the late Justice Antonin Scalia's opinion to the extent of its holding that Rule 23 conflicted with the New York statute and the conflict could not be reconciled.[8] Thus, an issue under *Erie Railroad Co. v. Tompkins*[9] and the Federal Rules Enabling Act[10] was presented.[11] The Scalia plurality would have held that what matters under the Rules Enabling Act is simply the substantive or procedural nature of the federal rule.[12] In this view, Rule 23 does not abridge a defendant's rights or change a plaintiff's entitlements to relief; it merely alters how the claims are processed. Justice John Paul Stevens concurred in the result but with a narrower rationale.[13] Justice Stevens opined that application of a federal rule that effectively enlarges or modifies a state-created right or remedy violates the Rules Enabling Act.[14] In his view, however, "[t]he mere fact that a state law is designed as a procedural rule suggests it reflects a judgment about how state courts ought to operate and not a judgment about the scope of state-created rights and remedies."[15] Justice Stevens pointed out that the New York statute applied not only to claims based on New York substantive law but also to claims based on federal law or the law of any other state.[16] "It is therefore hard to see how § 901(b) could be understood as a rule that, though procedural in form, serves the function of defining New York's rights or remedies."[17] Justice Ruth Bader Ginsburg, joined by three other justices,

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4. 792 F.3d 1331 (11th Cir. 2015). The court's opinion was authored by U.S. District Judge Robert L. Hinkle of the Northern District of Florida, sitting by designation. *Id.* at 1333.
5. N.Y. C.P.L.R. LAW § 901(b) (2014).
6. FED. R. CIV. P. 23.
7. 559 U.S. at 399.
8. *See id.* at 395-96.
9. 304 U.S. 64.
10. 28 U.S.C. § 2072 (2012).
11. *Shady Grove*, 559 U.S. at 406.
12. *Id.* at 410.
13. *Id.* at 416 (Stevens, J., concurring in part and concurring in the judgment).
14. *Id.* at 431.
15. *Id.* at 432.
16. *Id.*
17. *Id.*

would have reversed on the general grounds that Rule 23 and section 901(b) did not conflict and that displacing state law limitations on state-created remedies in a diversity action is, in any event, improper.[18]

The Eleventh Circuit in *Lisk* applied *Shady Grove* in considering whether a prohibition on consumer class actions found in the Alabama Deceptive Trade Practices Act (ADTPA)[19]—but not in Alabama's civil procedure rules—applied in a federal district court. The case involved a would-be class action brought against a manufacturer of insect-treated wood. On behalf of a putative nationwide class, the named plaintiff asserted an ADTPA claim and a breach of warranty claim.[20] The district court granted the manufacturer's motion to dismiss in part because the ADTPA claim could only be brought as an individual claim, which, the court reasoned, meant that there would be no basis under the Class Action Fairness Act[21] for federal jurisdiction.[22]

On appeal, the Eleventh Circuit characterized the case as presenting "a nearly identical issue" to *Shady Grove*.[23] The court acknowledged that no single rationale attracted five votes in *Shady Grove*.[24] But the court focused on what it saw as *Shady Grove*'s holding—that applying Rule 23 to allow a class action for a statutory penalty created by New York law did not abridge or modify a substantive right and thus did not violate the Rules Enabling Act.[25] The court conceded that the New York prohibition on statutory penalty class actions was included in a procedural statute.[26] Yet the court dismissed this distinction as unimportant: "[H]ow a state chooses to organize its statutes affects the analysis not at all."[27] The court then went on to hold that dismissal of the breach of warranty claim on the pleadings misconstrued Alabama law.[28]

Lisk represents a substantial extension of *Shady Grove*. *Lisk*'s premise—that to authorize a federal court in a diversity case to override

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18. *Id.* at 436, 457-58 (Ginsberg, J., dissenting).
19. ALA. CODE § 8-19-1 to -15(f) (LexisNexis 2002).
20. *Lisk*, 792 F.3d at 1336.
21. Pub. L. No. 109-2, 119 Stat. 4 (codified in scattered sections of 28 U.S.C.). Whether the district court actually lost subject matter jurisdiction is debatable. *See* Vega v. T-Mobile USA, Inc., 564 F.3d 1256, 1268 n.12 (11th Cir. 2009); Samuel v. Universal Health Servs., 805 F. Supp. 2d 284, 287-88 (E.D. La. 2011).
22. *Lisk*, 792 F.3d at 1333.
23. *Id.* at 1334.
24. *Id.* at 1335.
25. *Id.* at 1336.
26. *Id.*
27. *Id.*
28. *Id.* at 1339.

state law limitations on suits in a representative capacity does not modify a substantive right—seems dubious. The litigants, for one, would value a potential class action much differently than an individual action, perhaps dramatically so, depending on the number of class members. The key distinctions that prompted Justice Stevens to concur in the result in *Shady Grove*, moreover, are absent in *Lisk*. The ADTPA's limitation on class actions is not found in a general procedural rule or statute but in the ADTPA itself, which limits the scope of the action that may be brought to enforce the rights that it bestows. And the New York procedural rule at issue in *Shady Grove* applied to claims brought in New York state courts under any statute from any jurisdiction, not simply to claims under the statute creating the substantive right itself. Not surprisingly, several district courts have disagreed with *Lisk*'s approach.[29] The holding calls into question, at least, the efficacy of similar limitations on suits in a representative capacity found in many state laws[30] and vests a federal procedural rule with a potently preemptive power. *Lisk* seems likely to promote federal forum shopping, the discouragement of which is a central tenet of the *Erie* doctrine,[31] and consequently seems unlikely to be the last word on this issue.

II. PRE-CERTIFICATION CLASS ACTIONS

In the decades since the federal class action rule was modernized in 1966,[32] courts have struggled with the status of the pre-certification class action. Is it to be treated simply as an individual action, with class allegations ignored until certification? (That is seldom how the litigants view it.) Or is it something more, some hybrid? The issue of the proper characterization of the uncertified class arises frequently: in pre-certification settlements;[33] in pre-certification communications with

29. Phillips v. Philip Morris Cos., 290 F.R.D. 476, 481 (N.D. Ohio Mar. 21, 2013) (finding restriction on class actions in Ohio Consumer Sale Practices Act not preempted by Fed. R. Civ. P. 23); Williams v. Chesapeake La., Inc., No. 10-1906, 2013 U.S. Dist. LEXIS 34778, at *6-7 (W.D. La. Mar. 11, 2013) (holding that Louisiana law, precluding mineral royalty class actions, must be applied under Rules Enabling Act); McKinney v. Bayer Corp., 744 F. Supp. 2d 733, 749 (N.D. Ohio 2010) (same as *Phillips*). *Contra* Suchanek v. Sturm Foods, Inc., 311 F.R.D. 239, 262-63 (S.D. Ill. 2015) (following *Lisk*).

30. *E.g.*, Georgia Retail Installment and Home Solicitation Sales Act, O.C.G.A. § 10-1-15(f) (2009); Georgia Motor Vehicle Sales Finance Act, O.C.G.A. § 10-1-36.1 (2009); Georgia Fair Business Practices Act, O.C.G.A. § 10-1-399(a) (2009); Tennessee Consumer Protection Act, TENN. CODE ANN. § 47-18-109(a)(1) (2013).

31. Hanna v. Plumer, 380 U.S. 460, 468 (1965).

32. *See* FED. R. CIV. P. 23 advisory committee's note to 1966 amendment.

33. The 2003 amendment of Fed. R. Civ. P. 23(e) now makes clear that the rule does not apply to individual settlements. This issue had divided courts. *Compare* Glidden v.

class members;[34] in pre-certification discovery issues;[35] and in evaluating the validity of any pre-certification action purportedly taken on behalf of putative class members by the would-be class representatives.[36]

In re Checking Account Overdraft Litigation[37] presented the Eleventh Circuit with a pre-certification question, and the court exercised its prerogative under existing case law not to answer it.[38] The appeal arose from five putative class actions brought against Wells Fargo Bank claiming that the plaintiffs were unlawfully charged overdraft fees for their checking accounts.[39] In a prior decision, the court held that Wells Fargo waived its right to compel arbitration of the named plaintiffs' claims on account of the bank's delay in seeking arbitration.[40] On remand, the district court took up the question of class certification. Wells Fargo sought to enforce arbitration agreements with the named class members, moving to dismiss their claims in the event the court certified a class. Wells Fargo also opposed class certification on other grounds. Without ruling on class certification, the district court entered an order denying Wells Fargo's conditional motion to dismiss or for a stay pending arbitration, on the grounds that the court had not certified a class, so the unnamed class members had not technically brought any claims against Wells Fargo. Accordingly, the court reasoned that Wells Fargo lacked standing to assert any right against them. Wells Fargo proceeded with an appeal.[41]

The Eleventh Circuit agreed that before certification there was no justiciable controversy between Wells Fargo and the unnamed class members.[42] To the extent that the district court appeared to rule that arbitration of the unnamed class members' claims could not be raised in the future, the court deemed the ruling an impermissible advisory opinion.[43] The named plaintiffs argued that the district court's denial

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Chromalloy Am. Corp., 808 F.2d 621, 625-28 (7th Cir. 1986) (stating Rule 23(e) did apply to individual settlements), *with* Shelton v. Pargo, Inc., 582 F.2d 1298, 1304-16 (4th Cir. 1978) (articulating Rule 23(e) did not apply to individual settlements).

34. *See* Gulf Oil Co. v. Bernard, 452 U.S. 89, 101-02 (1981).

35. *See* MANUAL FOR COMPLEX LITIGATION § 21.14, at 255 (4th ed. 2004).

36. *E.g.*, Barnes v. City of Atlanta, 281 Ga. 256, 257-58, 637 S.E.2d 4, 6 (2006).

37. 780 F.3d 1031 (11th Cir. 2015). The opinion for the court was authored by Judge Gerald Bard Tjoflat. *Id.* at 1033.

38. *Id.* at 1037.

39. *Id.* at 1034.

40. Garcia v. Wachovia Corp., 699 F.3d 1273, 1280 (11th Cir. 2012).

41. *In re Checking Account Overdraft Litig.*, 780 F.3d at 1033-34, 1034, 1035-36.

42. *Id.* at 1037.

43. *Id.*

of Wells Fargo's conditional motion to dismiss should be read as an application of non-mutual collateral estoppel and a holding that Wells Fargo waived its right to compel arbitration as to unnamed class members.[44] But the Eleventh Circuit rejected this argument because the named plaintiffs lacked standing to advance the argument on behalf of putative class members.[45] "Whether or not Wells Fargo is precluded from asserting arbitration rights against *other* individuals has no legal relevance to the named plaintiffs."[46]

The opinion is a rather rigid application of standing rules to a pre-certification class action. The district court appeared inclined to avoid enforcing arbitration rights in any way that could be justified and, accordingly, simply deflected the arbitration question. The Eleventh Circuit's opinion accomplished even less, leaving the litigants just as the court found them. An opinion deciding what appears to be a critical and inescapable question relevant to the class certification decision—namely how many class members are bound by an agreement to arbitrate their individual claims and thus ineligible to participate in a class action—could have moved the litigation towards a resolution.

After remand, the United States District Court for the Southern District of Florida issued an opinion certifying a nationwide class with hundreds of thousands of class members.[47] On alternative grounds, the district court rejected the bank's argument that numerosity could not be established because absent class members were required by their account agreements to submit to arbitration: first, that the arbitration provision was permissive rather than mandatory;[48] and second, that the absent class members were not before the court until the point of class certification.[49] This latter holding seems at least incongruous since, in the same order, the court certified a nationwide class with numerous subclasses. Within two days of issuance of the court's opinion, however, the bank moved to dismiss the claims of all class members (other than the class representatives) in favor of arbitration.[50] The Eleventh Circuit denied the bank's petition for interlocutory review of the district court's class certification order under Rule 23(f) of the Federal Rules of

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44. *Id.* at 1038.
45. *Id.*
46. *Id.*
47. *In re* Checking Account Overdraft Litig., 307 F.R.D. 656, 667 (S.D. Fla. 2015).
48. *Id.*
49. *Id.*
50. Defendants Motions to Dismiss All Claims of Unnamed Class Members in Favor of Arbitration, *In re* Checking Account Overdraft Litig., No. 1:09-MD-02036-JLK (S.D. Fla. June 10, 2015), ECF Nos. 4182, 4183.

Civil Procedure.[51] In its order, however, the court noted that its denial was without prejudice to a later appeal of the bank's motions to dismiss in favor of arbitration.[52] So the checking overdraft saga continues, with a likely return to the Eleventh Circuit for Wells Fargo in a probable quest for the ruling it sought in vain during its most recent visit.

III. STACKING CLASS ACTIONS

In *Ewing Industries Corp. v. Bob Wines Nursery, Inc.*,[53] the court deepened an existing circuit split on the propriety of "piggyback" or "stacked" class actions. The court had previously held in *Griffin v. Singletary*[54] that the pendency of a previous class action does not toll the limitations period for subsequent class claims.[55] The question arose in light of the Supreme Court's decisions in *American Pipe & Construction Co. v. Utah*[56] and *Crown, Cork & Seal Co. v. Parker*,[57] which together hold that the filing of a class action tolls the limitations period applicable to the *individual* claims of putative class members until class certification is denied or reversed.[58] As noted in *Ewing*, *Griffin*'s holding that *American Pipe* tolling does not apply to subsequently filed class claims has been disagreed with or distinguished by several other circuits.[59] The Seventh Circuit and other courts have drawn a line between cases such as *Griffin*, where certification of the previous class failed under Rule 23(a) or (b), in which case the limitations period is not tolled; and cases where the previous action failed for some reason other than the validity of the class itself, such as the suitability of the plaintiff, in which case *American Pipe* tolling does apply.[60] This is the distinction unsuccessfully urged by the *Ewing* plaintiff.

In *Ewing*, the previously filed class action alleged that the defendants, Bob Wines Nursery and its principal, violated the Telephone Consumer

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51. Order Denying Petition for Permission to Appeal, Wells Fargo Bank N.A. v. Garcia, No. 15-90026-A (11th Cir. Dec. 1, 2015).

52. *Id.*

53. 795 F.3d 1324 (11th Cir. 2015), *cert. denied*, 136 S. Ct. 1379 (2016). The opinion of the court was authored by Judge Emmett Ripley Cox. *Ewing*, 795 F.3d at 1325.

54. 17 F.3d 356 (11th Cir. 1994).

55. *Id.* at 361.

56. 414 U.S. 538 (1974).

57. 462 U.S. 345 (1983).

58. *Griffin*, 17 F.3d at 360; *see also Crown, Cork & Steel Co.*, 462 U.S. at 354; *American Pipe & Constr. Co.*, 414 U.S. at 552-53.

59. *Ewing*, 795 F.3d at 1328 (citing cases from the Third, Sixth, Seventh, Eighth, and Ninth Circuits).

60. *Id.* (quoting Sawyer v. Atlas Heating & Sheet Metal Works, Inc., 642 F.3d 560, 564 (7th Cir. 2011), and other cases).

Protection Act (TCPA)[61] by sending unsolicited facsimiles. The state court in that case granted summary judgment to the defendants on the basis that the named plaintiff, Aero Financial, Inc., lacked standing as the alleged faxes were not sent to Aero, and the attempted assignment of the claim to Aero was invalid. Because the summary judgment ruling effectively ended the case, the court never ruled on class certification. A little over a month later, Ewing Industries filed a putative class action in federal court against the same defendants and based on similar allegations as the dismissed state-court action.[62] Although over four years had passed since the conduct at issue,[63] Ewing's complaint alleged that the statute of limitations was tolled by the state-court action. On the defendants' motion, however, the district court struck the class allegations as time-barred.[64]

On appeal, Ewing argued that "when a class action fails due to the inadequacy of the class representative—rather than due to defects in the class itself—the statute of limitations is tolled."[65] The court disagreed and declined to distinguish *Griffin*.[66] Although, unlike *Ewing*, *Griffin* concerned a previous class action that had been certified by the district court and then decertified on appeal, and the reason for decertification was that "none of the three named plaintiffs were proper representatives"—two of the plaintiffs because they lacked constitutional standing and the third plaintiff because he had not properly exhausted his administrative remedies.[67] According to the *Ewing* court, *Griffin* therefore "concluded that it does not matter whether the first purported class action fails due to the inadequacy of the class representative or due to defects in the class itself."[68] The court rejected the reading of *Griffin* urged by Ewing: "While it is true that *Griffin* [] involved claims that had reached the class certification stage and been decertified on appeal, the reason for decertification was the inadequacy of the class representatives, not the defectiveness of the class itself."[69] The court reiterated the firm rule established in *Griffin*:

> The plaintiffs may not "piggyback one class action onto another" *and thereby engage in endless rounds of litigation in the district court and*

61. 47 U.S.C. § 227 (2012).
62. *Ewing*, 795 F.3d at 1325.
63. *See* 28 U.S.C. § 1658(a) (2012) (providing a four-year statute of limitations).
64. *Ewing*, 795 F.3d at 1326.
65. *Id.*
66. *Id.* at 1328.
67. *Id.* at 1327.
68. *Id.*
69. *Id.* at 1327-28.

> *in this Court over the adequacy of successive named plaintiffs to serve as class representatives.* This case illustrates the wisdom of the rule against piggybacked class actions. Fifteen years after the Griffin lawsuit was filed, the class action issues are still being litigated, and we decline to adopt any rule that has the potential for prolonging litigation about class representation even further.[70]

Therefore, although *Griffin* dealt with a class that failed at the class certification stage, the court "was concerned about the very issue" confronted in *Ewing*: "the potential for multiple rounds of litigation as the class seeks an adequate class representative."[71]

Given the circuit split described above and the court's adherence to its prior holding in *Griffin*, it is no surprise that Ewing filed a petition for certiorari.[72] The Court, however, denied the petition and also denied certiorari in a case from the Sixth Circuit, *Phipps v. Wal-Mart Stores, Inc.*,[73] which considered a class action filed by members of the class decertified in *Wal-Mart Stores, Inc. v. Dukes*.[74] Distinguishing *Griffin*, the Sixth Circuit held that *American Pipe* tolling does apply to a subsequent class action where "a previous court has not made a determination as to the 'validity of the class.'"[75] But unless and until the Supreme Court holds otherwise, it would appear that stacking is not a strategy available to class action plaintiffs in the Eleventh Circuit.

IV. MANAGING ASCERTAINABILITY

Another class action issue roiling the federal courts is the existence and stringency of an implicit requirement of Rule 23 that the class members be "ascertainable." Although the Eleventh Circuit has yet to issue a published opinion[76] exploring the contours of the requirement, this year's unpublished decision in *Karhu v. Vital Pharmaceuticals, Inc.*[77] reaffirms an unpublished decision from last year, *Bussey v.*

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70. *Id.* at 1328 (quoting *Griffin*, 17 F.3d at 359).

71. *Id.*

72. *See Ewing*, 136 S. Ct. 1379.

73. 792 F.3d 637 (6th Cir. 2015), *cert. denied*, 136 S. Ct. 1163 (2016).

74. 564 U.S. 338 (2011).

75. *Phipps*, 792 F.3d at 647 (quoting *In re* Vertrue Inc. Mktg. & Sales Practices Litig., 719 F.3d 474, 480 n.2 (6th Cir. 2013)).

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

77. 621 F. App'x 945 (11th Cir. 2015) (unpublished). The court's opinion was authored by Judge Richard W. Goldberg, United States Court of International Trade Judge, sitting by designation. *Id.* at 946.

Macon County Greyhound Park, Inc.,[78] applying a robust ascertainability standard.[79] *Karhu* involved false-advertising claims brought against the marketer of a dietary supplement called "Meltdown." The plaintiff moved to certify a nationwide class of purchasers as well as a New York subclass. The district court denied the motion on the basis that the proposed class failed to satisfy the ascertainability requirement as well as the requirements listed in Rule 23(b)(2) and (3).[80] Under *Bussey*, "a class is not ascertainable unless the class definition contains objective criteria that allow for class members to be identified in an administratively feasible way," which requires "a 'manageable process that does not require much, if any, individual inquiry.'"[81] The district court found that, although the class definition put forth by Karhu contained objective criteria, Karhu "failed to propose a realistic method of identifying the individuals who purchased Meltdown."[82] Because Meltdown was sold primarily through marketers and distributors, Karhu's proposal to use the defendant's sales data would not be useful to determine the identities of class members—the consumers who had purchased the product. The district court also considered (apparently sua sponte) and rejected a method by which class members would come forth and identify themselves through sales receipts or affidavits: most class members would not have retained a proof of purchase because of Meltdown's low cost, which would have meant that an acceptance of affidavits without verification would deprive the defendant of his due-process right to contest each claim while, on the other hand, allowing the defendant to contest each claim would have required a series of mini-trials to determine class membership.[83] Moreover, acceptance of affidavits "would also invite fraudulent submissions and could dilute the recovery of genuine class members."[84] Karhu moved for reconsideration, arguing that class members could be identified by subpoenaing sales data from third-party retailers, but the court found no grounds for reconsideration as this method had previously been available and could have been raised in the class-certification motion.[85]

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78. 562 F. App'x 782 (11th Cir. 2014). *Bussey* is analyzed in the 2014 survey. *See* Byrne & Mohr, *supra* note 1, at 916-18.

79. *Karhu*, 621 F. App'x at 946.

80. *Id.*

81. *Id.* (quoting *Bussey*, 562 F. App'x at 787).

82. *Id.*

83. *Id.* at 946-47.

84. *Id.* at 947.

85. *Id.*

On appeal, the Eleventh Circuit affirmed, concluding that the district court had not abused its discretion.[86] Citing *Bussey*, district court decisions, and the Third Circuit decision *Carrera v. Bayer Corp.*,[87] the court laid out a comparatively demanding standard for plaintiffs in attempting to establish ascertainability.[88] First, "[a] plaintiff cannot establish ascertainability simply by asserting that class members can be identified using the defendant's records; the plaintiff must also establish that the records are in fact useful for identification purposes, and that identification will be administratively feasible."[89] "Similarly, a plaintiff cannot satisfy the ascertainability requirement by proposing that class members self-identify (such as through affidavits) without first establishing that self-identification is administratively feasible and not otherwise problematic."[90] As the court explained:

> The potential problems with self-identification-based ascertainment are intertwined. On the one hand, allowing class members to self-identify without affording defendants the opportunity to challenge class membership "provide[s] inadequate procedural protection to . . . [d]efendant[s]" and "implicate[s their] due process rights." On the other hand, protecting defendants' due-process rights by allowing them to challenge each claimant's class membership is administratively infeasible, because it requires a "series of mini-trials just to evaluate the threshold issue of which [persons] are class members." A plaintiff proposing ascertainment via self-identification, then, must establish how the self-identification method proposed will avoid the potential problems just described.[91]

Under this standard, the district court did not abuse its discretion.[92] Karhu's "sales data" proposal "was incomplete, insofar as Karhu did not explain how the data would aid class-member identification," and no identification procedure (such as the later-proposed subpoena method) was obvious.[93] Further, the district court had no basis on which to accept the affidavit method as Karhu had not established how the potential problems with such a method would be avoided.[94]

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86. *Id.*
87. 727 F.3d 300, 306-07 (3d Cir. 2013).
88. *Kahru*, 621 F. App'x at 947-48.
89. *Id.* at 948.
90. *Id.*
91. *Id.* at 948-49 (alteration in original) (citations omitted) (quoting Fisher v. Ciba Special Chems. Corp., 238 F.R.D. 273, 302 (S.D. Ala. 2006) and Perez v. Metabolife Int'l Inc., 218 F.R.D. 262, 269 (S.D. Fla. 2003)).
92. *Id.* at 949.
93. *Id.*
94. *Id.*

The court also rejected Karhu's argument that the court has too strictly construed the ascertainability requirement.[95] The court distinguished between the requirement that the class be "manageably" ascertainable with manageability concerns under Rule 23(b)(3), which the court held in *Klay v. Humana, Inc.*[96] "will rarely, if ever, be in [themselves] sufficient to prevent certification of a class."[97] While "*Klay* addressed manageability concerns that a court might face *after* class members have already been identified—for example, concerns about whether particular class members are entitled to relief in light of individualized reliance, causation, and damages issues," the "manageability" concern that ascertainability addresses is whether the class members can be identified at all in a manageable way, and "is prior to, hence more fundamental than, the manageability concern addressed in *Klay*."[98] The court also rejected Karhu's argument "that a strict ascertainability requirement will eradicate small-dollar class-action claims."[99] The court pointed out that Karhu had actually proposed an administratively feasible method for ascertaining the identity of class members—subpoenaing of sales data from third-party retailers—but simply had not proposed that method in his class-certification papers.[100] Instead, "Karhu's bare proposal that the district court ascertain class members through [the defendant's] 'sales data' was insufficient to satisfy the ascertainability requirement."[101]

While agreeing "with the majority that [] Karhu failed to sufficiently make a self-identification argument at the class-certification stage," Judge Beverly B. Martin wrote separately to urge against a rule under which a class is not ascertainable if class members can be identified only through self-identification.[102] Such a rule, her concurring opinion argued, would erode the purpose of the class action to vindicate "the rights of groups of people who individually would be without effective strength to bring their opponents into court at all."[103] The ascertainability requirement has traditionally been a "narrow" one, as illustrated

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95. *Id.* at 949-50.

96. 382 F.3d 1241 (11th Cir. 2004). *Klay* is analyzed in the 2004 survey. Thomas M. Byrne & Suzanne M. Alford, *Class Actions, Eleventh Circuit Survey*, 56 MERCER L. REV. 1219, 1220-26 (2005).

97. *Karhu*, 621 F. App'x at 950 (alteration in original) (quoting *Klay*, 382 F.3d at 1272).

98. *Id.*

99. *Id.*

100. *Id.*

101. *Id.*

102. *Id.* at 951 (Martin, J., concurring).

103. *Id.* (quoting Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 617 (1997)).

by the Eleventh Circuit's opinion in *Fitzpatrick v. General Mills, Inc.*,[104] which approved the district court's certification of a class of purchasers of probiotic yogurt despite the likely difficulty of identifying consumers who purchased the yogurt.[105] Although Karhu had failed to articulate such an argument to the district court, Judge Martin opined that "[t]he record here indicates that Mr. Karhu could have made a good case for the ascertainability of his proposed class based on consumer affidavits."[106] Specifically, the small value of the claims would be unlikely to invite fraud while the uniqueness of the Meltdown product made it likely that potential class members could accurately identify themselves, overcoming common issues with self-identification.[107]

In reviewing courts' varying treatment of ascertainability, the Seventh Circuit has noted that *Karhu* "applied a fairly strong version of an ascertainability requirement."[108] That court rejected such a strict requirement in *Mullins v. Direct Digital, LLC*,[109] and the Sixth Circuit, like the Seventh, applied a more lenient ascertainability requirement in *Rikos v. Procter & Gamble Co.*[110] Given the clear split among the circuit courts, the issue appeared primed for a decision from the Supreme Court. The Court, however, denied cert. petitions in both *Mullins*[111] and *Rikos*.[112] Until the Court takes up the issue, or at least until the Eleventh Circuit issues a published opinion on the subject, class-action plaintiffs should be prepared to thoroughly articulate at an early stage how class members will be identified in a manageable way.

V. CHALLENGING DELEGATION OF ARBITRABILITY

Another issue affecting the availability of class treatment that has been the subject of recent Supreme Court action is the requirement that a party desiring to challenge an arbitration agreement in court raise a

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104. 635 F.3d 1279 (11th Cir. 2011). *Fitzpatrick* was analyzed in the 2011 survey. Thomas M. Byrne & Stacey McGavin Mohr, *Class Actions, 2011 Eleventh Circuit Survey*, 63 MERCER L. REV. 1183, 1196-97 (2012).

105. *Fitzpatrick*, 635 F.3d at 1282; *see also Korhu*, 621 F. App'x at 952 (Martin, J., concurring).

106. *Karhu*, 621 F. App'x at 952 (Martin, J., concurring).

107. *Id.* at 953.

108. Mullins v. Direct Digital, LLC, 795 F.3d 654, 661 n.2 (7th Cir. 2015), *cert. denied*, 136 S. Ct. 1161 (2016).

109. 795 F.3d 654 (7th Cir. 2015).

110. 799 F.3d 497, 525-26 (6th Cir. 2015), *cert. denied*, 84 U.S.L.W. 3544 (U.S. Mar. 28, 2016) (No. 15-835).

111. *Mullins*, 136 S. Ct. 1161.

112. *Rikos*, 84 U.S.L.W. 3544 (U.S. Mar. 28, 2016) (No. 15-835).

specific challenge to a delegation provision. The Eleventh Circuit addressed this question in *Parnell v. CashCall, Inc.*,[113] holding that, when an arbitration agreement contains a provision delegating to the arbitrator the question of arbitrability, the party resisting arbitration must specifically challenge the delegation provision, and absent such direct challenge, the district court is required to compel arbitration.[114] The plaintiff in *Parnell*, who had taken out a high-interest loan, brought claims under federal and state banking laws against the bank to which the loan had been assigned.[115] Parnell had executed a consumer loan agreement containing the following arbitration agreement:

> WAIVER OF JURY TRIAL AND ARBITRATION.
> PLEASE READ THIS PROVISION OF THE AGREEMENT CAREFULLY. Unless you exercise your right to opt-out of arbitration in the manner described below, any dispute you have with Western Sky or anyone else under this loan agreement will be resolved by binding arbitration. Arbitration replaces the right to go to court, including the right to have a jury, to engage in discovery (except as may be provided in the arbitration rules), and to participate in a class action or similar proceeding. In Arbitration, a dispute is resolved by an arbitrator instead of a judge or jury. Arbitration procedures are simpler and more limited than court procedures. Any Arbitration will be limited to the dispute between yourself and the holder of the Note and will not be part of a class-wide or consolidated arbitration proceeding.
> *Agreement to Arbitrate.* You agree that any Dispute, except as provided below, will be resolved by Arbitration, which shall be conducted by the Cheyenne River Sioux Tribal Nation by an authorized representative in accordance with its consumer dispute rules and the terms of this Agreement.
> *Arbitration Defined.* Arbitration is a means of having an independent third party resolve a Dispute. A "Dispute" is any controversy or claim between you and Western Sky or the holder or servicer of the Note. The term Dispute is to be given its broadest possible meaning and includes, without limitation, all claims or demands (whether past, present, or future, including events that occurred prior to the opening of this Account), based on any legal or equitable theory (tort, contract, or otherwise), and regardless of the type of relief sought (i.e. money, injunctive relief, or declaratory relief). A Dispute includes, by way of example and without limitation, any claim based upon marketing or solicitations to obtain the loan and the handling or servicing of my account whether such Dispute is based on a tribal, federal or state

113. 804 F.3d 1142 (11th Cir. 2015). The opinion of the court was authored by Judge Charles R. Wilson. *Id.* at 1144.

114. *Id.*

115. *Id.* at 1144-45.

> constitution, statute, ordinance, regulation, or common law, and including any issue concerning the validity, enforceability, or scope of this loan or the Arbitration agreement . . . .[116]

After Parnell filed his suit in Georgia state court, the bank removed to federal court and moved to compel arbitration. The district court denied the motion, determining that Parnell had articulated a challenge to the arbitration provision in the loan agreement and that the arbitration provision was unconscionable.[117]

The Eleventh Circuit reversed due to Parnell's failure to specifically challenge the delegation provision: "We hold that the Loan Agreement contains a delegation provision and, though Parnell challenged the validity of the arbitration provision, he did not articulate a challenge to the delegation provision specifically."[118] The Federal Arbitration Act (FAA),[119] therefore, required that the court "treat the delegation provision as valid, enforce the terms of the Loan Agreement, and leave to the arbitrator the determination of whether the Loan Agreement's arbitration provision is enforceable."[120]

Citing the Supreme Court's decisions in *Rent-A-Center, West, Inc. v. Jackson*[121] and *Buckeye Check Cashing, Inc. v. Cardegna*,[122] the court noted that "parties may agree to commit even threshold determinations to an arbitrator, such as whether an arbitration agreement is enforceable," and that such "delegation provisions" have been upheld as valid and "are severable from the underlying agreement to arbitrate."[123] Moreover, "[w]hen an arbitration agreement contains a delegation provision and the plaintiff raises a challenge to the contract *as a whole*, the federal courts may not review his claim because it has been committed to the power of the arbitrator,"[124] and *Rent-A-Center* requires that the plaintiff must "challenge[ ] the delegation provision *specifically*."[125] Therefore, unless the plaintiff has made "a challenge to the delegation provision itself," the court must treat that provision "as valid under § 2 [of the FAA], and must enforce it under §§ 3 and 4,

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116. *Id.* at 1145 (alteration in original). Parnell signed the loan agreement digitally from his computer. After paying off the $1000 loan at an annual percentage rate of 232.99%, Parnell paid a total of $4905.56 in twenty-five installments. *Id.* at 1144-45.

117. *Id.* at 1145-46.

118. *Id.* at 1146.

119. 9 U.S.C. §§ 1-14 (2012).

120. *Parnell*, 804 F.3d at 1146.

121. 561 U.S. 63 (2010).

122. 546 U.S. 440 (2006).

123. *Parnell*, 804 F.3d at 1146.

124. *Id.*

125. *Id.* (alterations in original) (quoting *Rent-A-Center*, 561 U.S. at 72).

leaving any challenge to the validity of the Agreement as a whole for the arbitrator."[126]

Noting that courts should not assume the parties have agreed to arbitrate the issue of arbitrability absent "clear and unmistakable evidence that they did so," the court looked to Georgia law on contract interpretation.[127] Applying the rule that "plain, unambiguous" language "must control,"[128] the court concluded that the loan agreement's definition of "Dispute" as including "*any issue concerning the validity, enforceability, or scope of this loan or the Arbitration agreement*" expressed "the parties' intent to submit to an arbitrator the threshold issue of arbitrability."[129] The court also rejected Parnell's argument that no delegation provision existed because the relevant language appeared within a string citation of examples: "there is no requirement that a delegation provision be offset from other contractual language or solely discuss arbitration of arbitrability in order to be valid."[130]

In the face of the delegation provision, the court concluded that the federal court only had jurisdiction to challenge that provision itself.[131] Without such a challenge, the court "must treat the delegation provision as valid and allow the arbitrator to determine the issue of arbitrability."[132] Because Parnell's complaint challenged the arbitration provision generally, it "falls short of the *Rent–A–Center* pleading requirement."[133] Parnell's complaint challenged the arbitration agreement as in violation of a Georgia statute that "'[a]n arbitration clause in a payday loan contract shall not be enforceable *if the contract* is unconscionable' and lists a variety of factors the courts should consider when evaluating unconscionability under state law."[134] The complaint went on to argue that the loan agreement itself was unconscionable based on the usurious interest rate, the designation of tribal law and jurisdiction, the prohibitive expense of arbitration, and the agreement's prohibition on class actions.[135] Because these allegations addressed the validity of the underlying agreement, Parnell did not specifically challenge the

126. *Id.* at 1146-47 (quoting *Rent-A-Center*, 561 U.S. at 72).

127. *Id.* at 1147 (quoting First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938, 944 (1995)).

128. *Id.* (quoting City of Decatur v. DeKalb Cnty., 289 Ga. 612, 614, 713 S.E.2d 846, 849 (2011)).

129. *Id.* at 1147-48.

130. *Id.* at 1148.

131. *Id.*

132. *Id.*

133. *Id.*

134. *Id.* (alterations in original) (quoting O.C.G.A. § 16-17-2(c)(2) (2011)).

135. *Id.* at 1148-49.

delegation provision: "Rather, he asks us to review the validity of the arbitration agreement as a whole, a task which the delegation provision expressly commits to an arbitrator."[136] While the court did not outline precisely what such a specific challenge would look like, it disagreed with Parnell that the court's holding will "require future plaintiffs to file one challenge to an agreement as a whole, followed by a challenge to a certain clause, followed by challenges to single sentences, followed by challenges to words tacked onto conjunctions at the end of a sentence."[137]

Parnell appears to be a literal application of *Rent-A-Center*, and its broad interpretation of the loan agreement to contain a "clear and unmistakable" delegation provision also is in line with the Supreme Court's December 2015 decision in *DirectTV, Inc. v. Imburgia*,[138] which emphasized that state law of contract interpretation must be "consistent with the Federal Arbitration Act."[139] Indeed, the Court recently granted certiorari and remanded, in light of *DirectTV*, the decision of the West Virginia Supreme Court of Appeals in *Schumacher Homes of Circleville, Inc. v. Spencer*,[140] which adopted a more narrow reading of language delegating arbitrability.[141] While recognizing *Rent-A-Center*'s requirement that a delegation provision be specifically challenged, the West Virginia court concluded that a provision referring to the arbitrator questions of "arbitrability" did not "'clearly and unmistakably' confer authority to the arbitrator to decide the gateway questions regarding the validity, revocability, and enforceability of the arbitration clause."[142] The court noted that "arbitrability" is "a nebulous term that has legally been limited to mean questions about whether a particular dispute is within the scope of an arbitration agreement" and, given the specific arbitration agreement in that case "would mean the ultimate issue in dispute."[143] Although such a provision would appear to be sufficient for delegation under *Parnell* and *DirectTV*, parties desiring strong delegation provisions should be as clear as possible and avoid such "nebulous" words such as "arbitrability."

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136. *Id.* at 1149.
137. *Id.* (internal quotation marks omitted).
138. 136 S. Ct. 463 (2015).
139. *Id.* at 468.
140. 774 S.E.2d 1 (W. Va. 2015), *cert. granted, judgment vacated*, 136 S. Ct. 1157 (2016).
141. *Schumacher*, 774 S.E.2d at 13.
142. *Id.*
143. *Id.*

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