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## Class Actions

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# Class Actions

by Thomas M. Byrne \*

and Stacey McGavin Mohr \*\*

A major decision outlawing “incentive” or “service” awards to named class representatives in settlements highlighted the United States Court of Appeals for the Eleventh Circuit’s class-action work during 2020. The court became the first court to prohibit such awards, disrupting settlement negotiations across the circuit—if not elsewhere—while challenging courts and litigants to identify the precise scope of the new doctrine. In other cases this year, the court tackled issues related to class settlements, standing, and exceptions to Class Action Fairness Act (CAFA) jurisdiction, and decided what looks to be the beginning of the end of the Florida tobacco-litigation appeals that have come to be known as the “*Engle* progeny.”

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## I. INCENTIVE AWARDS AND OTHER CLASS-SETTLEMENT CONSIDERATIONS

A. *Class Representative Incentive Awards: Johnson v. NPAS*

In *Johnson v. NPAS Solutions, LLC*,<sup>1</sup> the Eleventh Circuit held that federal law prohibits so-called “incentive payments” to class representatives, even as part of an agreed settlement. The court acknowledged that it was forging a new path, identifying errors that it said “ha[d] become commonplace in everyday class-action practice” and noting that the district court had “handled the class-action settlement here in pretty much exactly the same way that hundreds of courts before it have handled similar settlements.”<sup>2</sup> But the Eleventh Circuit nevertheless held that the district court had “ignored on-point Supreme Court precedent prohibiting such awards” when it approved a settlement that included a \$6,000 incentive payment to the lead plaintiff.<sup>3</sup>

*Johnson* was a class action under the Telephone Consumer Protection Act (TCPA).<sup>4</sup> The named plaintiff alleged that the defendant (a debt collector) had unlawfully used an automatic telephone-dialing system to call his cell phone without his consent. The case was certified for settlement purposes, and the district court approved the settlement over the objections of a single class member. Among other things, the class member objected to the setting of the objection deadline before the deadline for class counsel to file their fee petition and the \$6,000 incentive to be paid to the class representative.<sup>5</sup>

The Eleventh Circuit vacated the settlement on appeal.<sup>6</sup> First, the court concluded that Federal Rule of Civil Procedure “23(h)’s plain language requires a district court to sequence filings such that class counsel file and serve their attorneys’-fee motion *before* any objection pertaining to fees is due.”<sup>7</sup> Setting an objection deadline after the class notice goes out, but before the fee petition itself has been filed, is insufficient to give potential objectors full information and ensure that the fee petition “has been tested by the adversarial process.”<sup>8</sup> That said,

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<sup>1</sup> 975 F.3d 1244 (11th Cir. 2020). The court’s opinion was authored by Judge Kevin Newsom.

<sup>2</sup> *Id.* at 1248–49.

<sup>3</sup> *Id.* at 1248.

<sup>4</sup> 47 U.S.C. § 227 (2021).

<sup>5</sup> *Johnson*, 975 F.3d at 1249–50.

<sup>6</sup> *Id.* at 1263.

<sup>7</sup> *Id.* at 1252.

<sup>8</sup> *Id.*

the court concluded that the specific error in that regard was harmless on the record.<sup>9</sup>

As for the \$6,000 incentive award, the court looked to Supreme Court precedent dating back to the nineteenth century on paying attorneys' fees from a "common fund."<sup>10</sup> Under that authority, "[a] plaintiff suing on behalf of a class can be reimbursed for attorneys' fees and expenses incurred in carrying on the litigation, but he cannot be paid a salary or be reimbursed for his personal expenses."<sup>11</sup> The Eleventh Circuit reasoned that "modern-day incentive awards present even more pronounced risks" because they "are intended not only to compensate class representatives for their time (*namely*, as a salary), but also to promote litigation by providing a prize to be won (*that is*, as a bounty)."<sup>12</sup> Nor could the court "see why paying an incentive award isn't tantamount to giving a 'preferred position' to a class representative 'simply by reason of his status'"—in violation of the general principle that named plaintiffs who choose to sue on behalf of a class "disclaim[] any right to a preferred position in the settlement" of their claims.<sup>13</sup>

The court was similarly unimpressed by the observation that incentive awards are "routine:" "[S]o far as we can tell, that state of affairs is a product of inertia and inattention, not adherence to law . . . . Needless to say, we are not at liberty to sanction a device or practice, however widespread, that is foreclosed by Supreme Court precedent."<sup>14</sup>

Judge Beverly Martin authored a separate opinion dissenting in part, "disagree[ing] with the majority's decision to take away the incentive award," and noting "the practical effect of requiring named plaintiffs to incur costs well beyond any benefits they receive from their role in leading the class."<sup>15</sup> Instead, Judge Martin would have adhered to the "fairness analysis" undertaken by other courts to determine whether a lead plaintiff's incentive award is fair to the class as a whole.<sup>16</sup> Judge Martin also expressed concern that the panel majority had departed from the Eleventh Circuit's prior precedent and "take[n] our court out of the mainstream."<sup>17</sup>

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<sup>9</sup> *Id.* at 1255.

<sup>10</sup> *TRS. v. Greenough*, 105 U.S. 527, 529 (1881); *Cent. R.R. & Banking Co. of Ga. v. Pettus*, 113 U.S. 116 (1885).

<sup>11</sup> *Johnson*, 975 F.3d at 1257.

<sup>12</sup> *Id.* at 1258.

<sup>13</sup> *Id.* at 1258–59 (quoting *Kincade v. General Tire & Rubber Co.*, 635 F.2d 501, 506 (5th Cir. 1981)).

<sup>14</sup> *Id.* at 1259–60.

<sup>15</sup> *Id.* at 1264 (Martin, J., dissenting).

<sup>16</sup> *Id.* at 1267–68.

<sup>17</sup> *Id.* at 1268.

The *Johnson* panel opinions, however, may not be the end of the matter. The named plaintiff and the objector both filed petitions for rehearing en banc, with the plaintiff arguing that the majority's opinion "effects a sea change in class-action practice" and "opens a conflict with every other circuit."<sup>18</sup> In addition, the plaintiff's petition has been supported by six separate amicus briefs, submitted on behalf of over forty legal and advocacy organizations and individuals, including the current author of *Newberg on Class Actions*,<sup>19</sup> the treatise cited in the *Johnson* majority opinion.<sup>20</sup>

Meanwhile, district courts have struggled with *Johnson*'s implications for approval of class settlements, including many that were negotiated and filed before the opinion was published. Some courts have disallowed such awards before final approval of the settlement.<sup>21</sup> In other cases, courts have distinguished *Johnson* and allowed payments, on the basis that the class claim arose under state law,<sup>22</sup> for example, or that the payment was not really an incentive award.<sup>23</sup> In what seems the most pragmatic approach, courts have deferred ruling on requested incentive awards, approving other aspects of the settlement but retaining jurisdiction to consider that issue pending the outcome of *Johnson*.<sup>24</sup>

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<sup>18</sup> Pl.-Appellee Charles T. Johnson's Pet. for Reh'g En Banc, at 5, 8, filed Oct. 22, 2020, No. 18-12344 (11th Cir.). The objector, for her part, sought rehearing as to the portion of the decision regarding attorneys' fees, urging the Eleventh Circuit to require common-fund awards of attorneys' fees to be calculated either on a lodestar basis (limited to actual billings) or as a more "modest" 5% to 10% of the common fund. Appellant Jenna's Dickenson's Pet. for Reh'g or for Reh'g En Banc, at 1, filed Oct. 22, 2020, No. 18-12344 (11th Cir.).

<sup>19</sup> William B. Rubenstein, *Newberg on Class Actions* (5th ed. 2011).

<sup>20</sup> Order, filed Nov. 5, 2020, No. 18-12344 (11th Cir.) (granting motions for leave to file amicus briefs).

<sup>21</sup> *Drazen v. GoDaddy.com, LLC*, No. 1:19-cv-00563-KD-B, 2020 WL 8254868, at \*14 (S.D. Ala. Dec. 23, 2020) (denying approval of requested service award of \$5,000 per lead plaintiff on settlement of TCPA claims); *Jairam v. Colourpop Cosmetics, LLC*, No. 0:19-cv-62438-RAR, 2020 WL 5848620, at \*7 (S.D. Fla. Oct. 1, 2020) (same); *Smith v. KFORCE Inc.*, No. 8:19-cv-02068-CEH-CPT, 2020 WL 7250603, at \*2 (M.D. Fla. Dec. 9, 2020) (preliminarily approving settlement without service award); *Kuhr v. Mayo Clinic Jacksonville*, No. 3:19-cv-453-J-34MCR, 2020 WL 5912350, at \*8 (M.D. Fla. Oct. 6, 2020) (same).

<sup>22</sup> *Roth v. GEICO Gen. Ins. Co.*, No. 0:16-cv-62942-WPD, slip. op. at 29, ¶ 67 (S.D. Fla. Feb. 8, 2021).

<sup>23</sup> *Miller v. Creative Hairdressers, Inc.*, No. 8:20-cv-00912-CEH-TGW, 2021 WL 231347, at \*1 (M.D. Fla. Jan. 4, 2021) (payment to representative plaintiff "was not an incentive award, but compensation for her distinct claim for two weeks' of unpaid PTO"), *report and recommendation adopted*, 2021 WL 229607, at \*1 (M.D. Fla. Jan. 22, 2021).

<sup>24</sup> See e.g., *Mosley v. Lozano Ins. Adjusters, Inc.*, No. 3:19-cv-00379-TJC-JRK, 2021 WL 289031, at \*1 (M.D. Fla. Jan. 28, 2021); *Metzler v. Medical Mgmt. Int'l*, No.

*B. Counsel's Duties to the Class Representative and the Class:  
Oppenheim*

In another decision involving a TCPA class settlement, *Medical & Chiropractic Clinic, Inc. v. Oppenheim*,<sup>25</sup> the Eleventh Circuit held that counsel for a proposed class does not owe the named class representatives a heightened fiduciary duty relative to other class members. This decision marked the court's return to an unseemly and protracted controversy stemming from TCPA claims against the Tampa Bay Buccaneers.<sup>26</sup> In the earlier case, *Technology Training Associates v. Buccaneers Ltd. Partnership*,<sup>27</sup> the court had reversed a district court's decision not to allow a class member to intervene in a class action in which a settlement had been proposed.

*Tech Training* and *Oppenheim* both arose from a struggle between competing would-be class counsel over a \$20 million settlement with the Buccaneers. Before either case was filed, there had been another putative class action bringing TCPA claims against the Buccaneers, in which the parties (including plaintiff Medical & Chiropractic Clinic) had reached an impasse in mediated settlement negotiations. One of the plaintiffs' lawyers (Mr. Oppenheim) then left for another firm, and that firm soon filed another putative class action raising the same TCPA claims against the Buccaneers, this time with Tech Training as the named plaintiff. Within two months, a settlement was reached and preliminarily approved by the court in the *Tech Training* case. The ensuing appeal permitted Medical & Chiropractic Clinic, represented by Oppenheim's now-rival counsel, to intervene and object to the settlement.<sup>28</sup> On

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8:19-cv-02289-VMC-CPT, 2020 WL 5994537, at \*3 (M.D. Fla. Oct. 9, 2020); *see also* Fruitstone v. Spartan Race Inc., No. 1:20-cv-20836-BB, 2021 WL 354189, at \*7 (S.D. Fla. Feb. 2, 2021) (granting preliminary approval for purposes of class notice but noting that jurisdiction would be retained as to the issue at the time of final approval); Harvey v. Hammel & Kaplan Co., No. 3:19-cv-00640-TJC-JRK, 2020 WL 7138568, at \*3 (M.D. Fla. Dec. 7, 2020) (same); Brockman v. Mankin Law Grp., P.A., No. 8:20-cv-00893-MSS-JSS, 2020 WL 6106890, at \*1 (M.D. Fla. Oct. 14, 2020) (granting preliminary approval but noting that the parties "shall be prepared to discuss at the final fairness hearing the propriety of the \$2,000 award to Plaintiff in light of" *Johnson*).

<sup>25</sup> 981 F.3d 983 (11th Cir. 2020). The court's opinion was authored by Judge R. David Proctor, United States District Judge for the Northern District of Alabama, sitting by designation.

<sup>26</sup> *Id.* at 986.

<sup>27</sup> 874 F.3d 692 (11th Cir. 2017). For an analysis of the *Tech Training* decision, see our 2017 survey, Thomas M. Byrne & Stacey McGavin Mohr, *Class Actions, Eleventh Circuit Survey*, 69 Mercer L. Rev. 1065, 1078–79 (2018).

<sup>28</sup> *Oppenheim*, 981 F.3d at 986–88.

remand, the objection was upheld, and the *Tech Training* class was decertified.<sup>29</sup>

But Medical & Chiropractic Clinic did more than thwart the settlement. It also filed a separate action in state court, alleging claims for breach of fiduciary duty against Oppenheim and his new law firm.<sup>30</sup> The case was removed to federal district court, which granted summary judgment for the defendants, finding that Oppenheim did not owe an individual fiduciary duty to the class representative in the first case. Alternatively, the court held that plaintiff had failed to show a breach of any fiduciary duty that might exist or prove damages. The plaintiff appealed.<sup>31</sup>

On appeal, the Eleventh Circuit first noted that the parties agreed that putative class counsel owed fiduciary duties to the class as a whole.<sup>32</sup> But the plaintiff contended that Oppenheim owed a heightened fiduciary duty to the putative class representative, distinct from the duty owed to the class. The court rejected this argument.<sup>33</sup> While noting that counsel in class actions have different ethical duties to their clients than in ordinary cases, one “cardinal rule” defines the scope of counsel’s ethical obligations: “class counsel owes a duty to the class as a whole and not to any individual member of the class.”<sup>34</sup>

The court also characterized the filing of the case in state court as a thinly veiled attempt to make an end run around the ongoing proceedings in the *Tech Training* case.<sup>35</sup> As the court put it, “[t]here is only one gatekeeper under Rule 23 and it was wholly inappropriate for [the plaintiff] and its counsel to go to state court in an attempt to employ another one.”<sup>36</sup> The plaintiff “crossed a line” by attempting to litigate their objections in another court.<sup>37</sup>

This second ground for the court’s holding could—and probably should—have been the only basis for the court’s affirmance. The state court action was plainly a collateral attack against aspiring class counsel filed in the wrong court. It is a truism that class counsel owes fiduciary duties to the entire class, but the court’s opinion only hinted at the difficulties in application of that doctrine, such as individual pre-

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<sup>29</sup> *Id.* at 988.

<sup>30</sup> *Id.*

<sup>31</sup> *Id.* at 989.

<sup>32</sup> *Id.* at 990.

<sup>33</sup> *Id.*

<sup>34</sup> *Id.* at 991.

<sup>35</sup> *Id.* at 993.

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

certification settlements, litigation of class representatives' individual claims along with claims of the class, varying strength of claims among class members, and so on. The existence of a fiduciary duty to all class members may not be in controversy, but the exercise of those duties presents many difficult problems. *Oppenheim* may end up being cited, likely unhelpfully, by both sides in future controversies where the scope of class counsel's obligations are genuinely in issue.

*C. Release of Claims and Res Judicata: TVPX v. Genworth*

The court probed the limitations of a class-action release in *TVPX ARS, Inc. v. Genworth Life & Annuity Ins. Co.*<sup>38</sup> Virtually every class action settlement includes a broad release of claims by the class members, which is almost always broader in stated scope than the mere *res judicata* effect of the judgment entered when the settlement is approved by the court. In *TVPX*, the plaintiff brought a punitive class action in 2018 in the Eastern District of Virginia against Genworth Life alleging that it violated the terms of its life insurance policies by imposing inflated cost of insurance charges on its insureds. Genworth responded by claiming that the case was precluded by a prior class action settlement, approved in 2004 by the United States District Court for the Middle District of Georgia, involving the same claims.<sup>39</sup> So the case turned on whether the 2018 claims were different from those settled in 2004. Genworth brought an action in the Middle District of Georgia under the All Writs Act<sup>40</sup> to enjoin the 2018 suit. The district court agreed with Genworth and enjoined the 2018 action on *res judicata* grounds.<sup>41</sup>

On appeal, the court reversed the district court and remanded for further factual development on whether the 2018 claims were truly different.<sup>42</sup> The court assumed that the defense of release and the defense of *res judicata* were of the same scope and turned on whether the prior release and the new complaint involved an identical factual predicate.<sup>43</sup> The court rejected Genworth's argument that the release defense was broader in scope than *res judicata*, an argument that may have warranted further development. In reversing, the court relied on the plaintiff's amended allegations that Genworth had engaged in new impermissible practices since the 2004 settlement. This allegation, the

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<sup>38</sup> 959 F.3d 1318 (11th Cir. 2020). Judge Beverly Martin authored the opinion for the court.

<sup>39</sup> *Id.* at 1321.

<sup>40</sup> 28 U.S.C. § 1651 (2021).

<sup>41</sup> *TVPX*, 959 F.3d at 1324.

<sup>42</sup> *Id.* at 1321.

<sup>43</sup> *Id.* at 1328.



court opined, was entitled to further factual development before enjoining the 2018 action. At oral argument, Genworth's counsel conceded that nothing in the record established, one way or another, whether its practices as to the relevant charges remained unchanged since 2004.<sup>44</sup> The court, however, rejected the plaintiff's argument that its new claims were carved out of the original 2004 settlement.<sup>45</sup>

## II. STANDING OF CLASS REPRESENTATIVES AND CLASS MEMBERS

The court again addressed the question of Article III standing in putative class actions, continuing to grapple with the Supreme Court's 2016 decision in *Spokeo, Inc. v. Robins*<sup>46</sup> and related issues.

### A. Statutory Injury: *Muransky Redux*

As discussed in our 2018 survey, a divided panel of the Eleventh Circuit that year affirmed a district court's order approving a class-action settlement, rejecting arguments that the plaintiff lacked Article III standing under *Spokeo*.<sup>47</sup> The original panel opinion in that case, *Muransky v. Godiva Chocolatier, Inc.*,<sup>48</sup> was vacated by a superseding panel opinion,<sup>49</sup> which in turn was vacated when the court voted to rehear the case en banc. In 2020, the en banc court, in a similarly divided opinion, reversed the district court's order and directed that the case be dismissed because the plaintiff lacked standing sufficient to establish subject-matter jurisdiction.<sup>50</sup>

Muransky had filed a putative class action against Godiva alleging that the chocolatier had willfully violated the Fair and Accurate Credit Transactions Act (FACTA)<sup>51</sup> by including on customers' receipts more than the last five digits of their credit card numbers. The inclusion of additional digits, Muransky claimed, exposed class members "to an

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<sup>44</sup> *Id.* at 1327–28.

<sup>45</sup> *Id.* at 1329. Since the case returned to the district court in June 2020, the parties have engaged in a series of scheduling and discovery disputes, starting with "dueling scheduling proposals to resolve a very simple issue for which the Court of Appeals ordered remand," Order, Dkt. 280, No. 4:00-cv-00217-CDL (M.D. Ga. July 17, 2020), and including a motion to compel, a hearing on that motion, and a motion to quash, *see id.* Dkts. 289, 298, 308.

<sup>46</sup> 136 S. Ct. 1540 (2016).

<sup>47</sup> Thomas M. Byrne & Stacey McGavin Mohr, *Class Actions, Eleventh Circuit Survey*, 70 MERCER L. REV. 895, 911–15 (2019).

<sup>48</sup> 905 F.3d 1200 (11th Cir. 2018).

<sup>49</sup> 922 F.3d 1175 (11th Cir. 2019).

<sup>50</sup> *Muransky v. Godiva Chocolatier, Inc.*, 979 F.3d 917 (11th Cir. 2020) (en banc). The majority opinion for the en banc court was authored by Judge Britt Grant.

<sup>51</sup> 15 U.S.C. § 1681a(g).

elevated risk of identity theft’.”<sup>52</sup> The parties ultimately agreed to settle the action on a classwide basis and moved for preliminary approval of the proposed settlement.<sup>53</sup> The settlement featured a \$6.3 million settlement fund, from which attorneys’ fees, costs, and class members would be paid.<sup>54</sup>

Following the mailing of class notices, several class members objected to the settlement on various grounds. At the fairness hearing, one of the objectors raised a new objection: that Muransky lacked Article III standing.<sup>55</sup> The district court overruled the objections, including the one about lack of standing, and approved the settlement.<sup>56</sup>

The objectors appealed, and a panel of the Eleventh Circuit affirmed. An objector filed a petition for rehearing en banc, which the court granted.<sup>57</sup> A divided en banc court held that Muransky’s allegations were insufficient to establish his standing to bring the FACTA claim.<sup>58</sup>

Judge Britt Grant, writing for the majority, framed the critical question as a matter of separation of powers: “whether the judiciary must assume that whenever Congress creates a legal entitlement, any violation of that entitlement causes a concrete injury.”<sup>59</sup> The majority’s answer to that question was no. A plaintiff can plead (and then establish) standing in two ways, the court explained: by showing that a statutory violation directly caused a harm, tangible or otherwise, or by showing that the violation “created a ‘risk of real harm.’”<sup>60</sup> *Spokeo* establishes that the risk of future harm must be “material,” while explaining that “[w]hatever ‘material’ may mean, conceivable and trifling are not on the list.”<sup>61</sup> “A conclusory statement that a statutory violation caused an injury is not enough,” the court continued, “so neither is a conclusory statement that a statutory violation caused a risk of injury.”<sup>62</sup>

Muransky’s complaint (filed prior to *Spokeo*) had disclaimed any recovery for “personal injury,” but he argued to the court that the appearance of too many digits on his credit card receipt nevertheless constituted a sufficiently concrete harm.<sup>63</sup> First, Muransky argued that

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<sup>52</sup> *Muransky*, 979 F.3d at 922.

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

<sup>55</sup> *Id.* at 922–23.

<sup>56</sup> *Id.* at 923.

<sup>57</sup> *Id.*

<sup>58</sup> *Id.* at 936.

<sup>59</sup> *Id.* at 923–24.

<sup>60</sup> *Id.* at 926–27.

<sup>61</sup> *Id.* at 927.

<sup>62</sup> *Id.* at 928.

<sup>63</sup> *Id.*

Muransky had a “substantive right” to receive a properly truncated receipt, such that his failure to receive such a receipt itself constituted an injury; but “[n]othing in FACTA suggests some kind of intrinsic worth in a compliant receipt,” the court said, “nor can we see any.”<sup>64</sup> Second, Muransky argued that the time spent safeguarding the receipt constituted a sufficiently concrete injury. The court rejected that argument, too, observing that Muransky’s complaint included no allegation about affording the Godiva receipt any special treatment—and that even if Muransky had made such an allegation, guarding against an insufficiently concrete risk of harm could not create standing; “plaintiffs ‘cannot manufacture standing merely by inflicting harm on themselves.’”<sup>65</sup> Third, citing *Spokeo*, Muransky argued that the claim bore “a ‘close relationship’ to a traditionally redressable harm,” namely the tort of breach of confidence.<sup>66</sup> The court disagreed, noting that breach of confidence requires a confidential relationship and disclosure to a third party, neither of which was present in Muransky’s case.<sup>67</sup>

The court also rejected Muransky’s argument that his complaint sufficiently alleged a material risk of future harm.<sup>68</sup> FACTA itself, Muransky argued, demonstrates Congress’s determination that printing more than the permitted number of digits on a receipt creates a real risk of identity theft. The court rejected that argument, viewing it as an invitation “to abandon our judicial role.”<sup>69</sup> “Although the judgment of Congress is an ‘instructive and important’ tool to identify Article III injuries, we cannot accept Muransky’s argument that once Congress has spoken, the courts have no further role.”<sup>70</sup> Muransky’s conclusory allegation that he faced an elevated risk of identity theft, the court added, “is simply not enough.”<sup>71</sup>

Noting its conclusion that Muransky had failed sufficiently to allege standing was in accord with decisions from the United States Court of

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<sup>64</sup> *Id.* at 929.

<sup>65</sup> *Id.* at 931 (quoting *Clapper v. Amnesty Int’l USA*, 568 U.S. 398, 416 (2013)).

<sup>66</sup> *Id.* (citing *Spokeo*, 136 S. Ct. at 1549).

<sup>67</sup> *Id.* at 932.

<sup>68</sup> *Id.* at 934.

<sup>69</sup> *Id.* at 932.

<sup>70</sup> *Id.* at 933 (quoting *Spokeo*, 136 S. Ct. at 1549).

<sup>71</sup> *Id.*

Appeals for the Second,<sup>72</sup> Third,<sup>73</sup> and Ninth<sup>74</sup> Circuits, the court vacated the district court's order approving the settlement.<sup>75</sup> The court also directed that the case be dismissed without prejudice, noting that Muransky had been on notice throughout the case that his standing was in question, but never requested leave to amend his complaint.<sup>76</sup>

Three judges wrote dissenting opinions. Judge Charles Wilson concluded that "Muransky plausibly alleged that Godiva's FACTA violation elevated his risk of identity theft the moment the receipt was printed," because "FACTA protects his concrete interest in using his credit or debit card without incurring a heightened risk of identity theft."<sup>77</sup> Judge Wilson added that the majority's contrary conclusion "all but ensures that consumers in the Eleventh Circuit must now allege, support, and prove that they suffered actual identity theft (or at least soon will) because of a defendant's FACTA violation in order to avail themselves of the law's protections."<sup>78</sup>

Judge Martin, who had written the panel opinion in the case, wrote that the majority's opinion "ignore[d] the judgment of Congress," which, in her view "established the point of intolerable risk at more than the last five digits being displayed on a receipt."<sup>79</sup> "[T]here is nothing incompatible with the court satisfying itself of an injury's concreteness, and considering the judgment of Congress at the same time," the judge added.<sup>80</sup> Judge Martin also disagreed with the majority as to the relevance of the tort of breach of confidence, finding sufficient commonality between that tort and Muransky's claim to confirm his standing.<sup>81</sup>

Judge Adalberto Jordan joined these two dissents but also wrote separately, objecting to the majority's dismissal of the action on the ground that it unfairly deprived Muransky of an opportunity to amend

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<sup>72</sup> *Katz v. Donna Karan Co.*, 872 F.3d 114, 117, 121 (2d Cir. 2017).

<sup>73</sup> *Kamal v. J. Crew Grp., Inc.*, 918 F.3d 102, 106, 119 (3d Cir. 2019). For another recent Third Circuit decision finding no standing to assert a statutory violation, *see also* *Thorne v. Pep Boys Manny Moe & Jack Inc.*, 980 F.3d 879 (3d Cir. 2020) (claimed violation of National Traffic and Motor Vehicle Safety Act of 1966).

<sup>74</sup> *Noble v. Nevada Checker Cab Corp.*, 726 F. App'x 582, 583–84 (9th Cir. 2018). For another recent Ninth Circuit decision finding no standing under *Spokeo*, *see* *McGee v. S-L Snacks Nat'l*, 982 F.3d 700 (9th Cir. 2020).

<sup>75</sup> *Muransky*, 979 F.3d at 936.

<sup>76</sup> *Id.* at 935–36.

<sup>77</sup> *Id.* at 937–38 (Wilson, J., dissenting).

<sup>78</sup> *Id.* at 937.

<sup>79</sup> *Id.* at 947 (Martin, J., dissenting).

<sup>80</sup> *Id.* at 952 (Martin, J., dissenting).

<sup>81</sup> *Id.* at 955–56 (Martin, J., dissenting).

his complaint.<sup>82</sup> Judge Jordan also expressed the view that standing should be viewed in the context of a distinction between public and private rights. English and American courts, he wrote, historically “heard suits involving private rights,” like the FACTA-created rights at issue, “regardless of whether the plaintiff suffered actual damage.”<sup>83</sup>

Aside from vacating the panel opinion that found standing, the ultimate impact of *Muransky* may be somewhat limited. The complaint in the case relied on statutory violations and indeed expressly disclaimed any attempt to recover for “personal injury.” After *Spokeo*, plaintiffs’ lawyers have attempted to include allegations of particularized injury and avoid framing claims as pure statutory violations.

*B. Statutory Violations and Particularized Injury: Trichell v. Midland Funding*

Two such attempts were rejected by the Eleventh Circuit in *Trichell v. Midland Credit Management, Inc.*<sup>84</sup> The appeal in *Trichell* stemmed from two separate lawsuits—one filed in Alabama and one in Georgia—claiming violations of the Fair Debt Collection Practices Act (FDCPA).<sup>85</sup> In each case, the plaintiffs’ complaint alleged that he (and a class of similarly situated individuals) received debt-collection letters that were misleading, although neither alleged that he was actually misled by the letter. And, in each case, the district court dismissed the complaint for failure to state a claim under the FDCPA, concluding the letters were not misleading, and the plaintiff appealed.<sup>86</sup>

Although no party raised standing in their appellate briefs, the Eleventh Circuit *sua sponte* ordered the parties to address the issue at argument.<sup>87</sup> The court ultimately concluded that neither complaint sufficiently alleged Article III standing and remanded the cases to be dismissed for lack of subject-matter jurisdiction.<sup>88</sup>

The alleged FDCPA violations arose from collection letters related to credit-card debt on which each plaintiff had defaulted several years prior—that is, so long before that any claims on the debt would be time-

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<sup>82</sup> *Id.* at 957 (Jordan, J., dissenting).

<sup>83</sup> *Id.* at 971 (Jordan, J., dissenting).

<sup>84</sup> 964 F.3d 990 (11th Cir. 2020). The court’s opinion was authored by Judge Gregory G. Katsas of the United States Court of Appeals for the D.C. Circuit, sitting by designation, and joined by Judge Bill Pryor. Judge Beverly Martin wrote a separate opinion concurring in part and dissenting in part.

<sup>85</sup> 15 U.S.C. § 1692 (2021).

<sup>86</sup> *Trichell*, 964 F.3d at 995.

<sup>87</sup> *Id.*

<sup>88</sup> *Id.* at 1005.

barred under applicable state law. Each letter offered the recipient seemingly attractive repayment options “designed to save you money” and urged the recipient to “[a]ct now to maximize your savings and put this debt behind you.”<sup>89</sup> As to the statute-of-limitations issue, each letter contained a disclaimer stating, “[t]he law limits how long you can be sued on a debt and how long a debt can appear on your credit report. Due to the age of this debt, we will not sue you for it or report payment or non-payment of it to a credit bureau.”<sup>90</sup>

One plaintiff, Mr. Trichell, alleged that the collection letters were misleading and unfair in falsely suggesting that he could be sued or that the debt could be reported to credit-rating agencies. The other plaintiff, Mr. Cooper, described the problem slightly differently, alleging that the letter was misleading by failing to warn recipients that making a partial payment on the debt could constitute a new promise to pay and actually give rise to a new limitations period.<sup>91</sup>

After a thorough review of *Spokeo*, Supreme Court and Eleventh Circuit standing precedent, and Congress’s intent as set forth in the FDCPA, the court concluded that neither of plaintiff’s allegations set forth a particularized injury sufficient for Article III standing.<sup>92</sup> Specifically, the court pointed to the fact that neither plaintiff alleged reliance on any misrepresentation, much less any damage thereby.<sup>93</sup> The court also rejected the plaintiffs’ assertions of standing based on risk and informational injuries.<sup>94</sup> Overall, the court concluded, neither plaintiff “suffered an injury in fact when they received allegedly misleading communications that did not mislead them.”<sup>95</sup>

Judge Martin (who had authored the then-vacated panel opinion finding standing in *Muransky*) dissented as to one of the plaintiffs.<sup>96</sup> Judge Martin agreed with the majority that plaintiff Trichell failed to allege any particularized harm but would have held that plaintiff Cooper had done so by claiming that, “if he had responded to the letter by making a payment on the time-barred debt, he would have unwittingly restarted the statute of limitations.”<sup>97</sup>

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<sup>89</sup> *Id.* at 995.

<sup>90</sup> *Id.*

<sup>91</sup> *Id.*

<sup>92</sup> *Id.* at 1005.

<sup>93</sup> *Id.* at 998–1000.

<sup>94</sup> *Id.* at 1000–05.

<sup>95</sup> *Id.* at 1005.

<sup>96</sup> *Id.* (Martin, J., dissenting).

<sup>97</sup> *Id.* A few weeks after *Trichell* was decided, Judge Martin joined in a per curiam opinion that similarly concluded a putative class representative lacked standing to pursue FDCPA claims. *Cooper v. Atl. Credit & Fin. Inc.*, 822 F. App’x 951 (11th Cir. 2020). The

*C. Standing of Unnamed Class Members: Cordoba*

Courts coping with overbroad class definitions that include uninjured class members have produced a cacophony of opinions. A first question often addressed in these opinions is whether the problem is one of Article III standing or of meeting Rule 23's class certification requirements, or both. The Supreme Court faced the issue in *TransUnion LLC v. Ramirez*,<sup>98</sup> in which it granted certiorari on the question of "[w]hether either Article III or Rule 23 permits a damages class action where the vast majority of the class suffered no actual injury, let alone an injury anything like what the class representative suffered."<sup>99</sup>

In reserving the Rule 23 question, the Supreme Court cited the Eleventh Circuit's late 2019 decision in *Cordoba v. DIRECTV, LLC*,<sup>100</sup> which held that standing of absent class members—not just the class representative—must be examined at the certification stage as part of the predominance requirement for certification of a Rule 23(b)(3) class.<sup>101</sup> *Cordoba* was a TCPA action brought by a plaintiff claiming that he had received telemarketing calls from DirecTV that violated the statute. Specifically, the allegation was that DirecTV had failed to maintain a list of individuals who asked not to receive calls—a so-called internal do-not-call list required by an FCC implementing regulation.<sup>102</sup> *Cordoba* alleged that DirecTV failed to maintain this list and continued to call individuals who asked not to be contacted.<sup>103</sup> After the district court certified a class of all persons who received more than one telemarketing call on behalf of DirecTV due to its failure to maintain an internal do-not-call list, the Eleventh Circuit granted DirecTV's petition for interlocutory review

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court in *Cooper* concluded that the injuries alleged there were "just as inchoate, if not more so" than those in *Trichell*:

[Plaintiff] does not allege that, without the purportedly confusing language in the second letter, she would have disputed the debt or sought validation of the debt within the thirty-day validation period, that she had any doubt regarding the validity of the debt, or that she would have accepted one of the payment options in the second letter. Nor does she allege that she suffered any harm beyond the alleged statutory violations, or that Atlantic and Midland ever made any further attempts to collect the debt at issue . . . .

*Id.* at 954–55.

<sup>98</sup> 141 S.Ct. 2190 (2021).

<sup>99</sup> Petition for Cert. at i, *Transkim*, 141 S.Ct. 2190 (No. 20-297), 2020 WL 7366280.

<sup>100</sup> 942 F.3d 1259 (11th Cir. 2019). Judge Stanley Marcus authored the opinion for the court.

<sup>101</sup> 141 S.Ct. at 2207 n.4.

<sup>102</sup> *Id.* at 1264–65.

<sup>103</sup> *Id.* at 1266.

under Rule 23(f).<sup>104</sup> But the Court decided the case on Article III grounds and reserved the Rule 23 question.<sup>105</sup>

On appeal, the Eleventh Circuit vacated class certification, concluding that unnamed members of the would-be class who did not ask DirecTV to stop calling them—and so would not have been on the list even if it had been maintained—were not injured by the failure to maintain the list.<sup>106</sup> This was so even though the class representative had Article III standing. As the court put it, “the fact that many, perhaps most, members of the class may lack standing is extremely important to the class certification decision.”<sup>107</sup>

In the case of a Rule 23(b)(3) class, the individualized inquiry necessary to determine whether each class member asked the telemarketer to stop calling would preclude a finding of the requisite predominance of common issues over individual issues.<sup>108</sup> “The essential point . . . is that at some time in the course of the litigation the district court will have to determine whether each of the absent class members has standing before they could be granted any relief. That is an individualized issue . . . .”<sup>109</sup> Would-be class members who did not ask to be put on the no-call list lack standing due to their failure to establish that their injuries are traceable to the challenged action of the defendant. Even though the receipt of a single phone call was enough to establish the requisite injury, according to the court, it was not enough to establish traceability.<sup>110</sup> The court distinguished its recent holding in *Salcedo v. Hanna*,<sup>111</sup> in which a single unlawful text message was held to be insufficient to establish injury, based on the relatively greater intrusiveness of a phone call.<sup>112</sup>

Wherever it appears that a large portion of a proposed class may lack standing, the court held that a district court must consider, before certification under Rule 23(b)(3), whether individualized issues of standing will predominate over common issues.<sup>113</sup> The mere possibility of standing problems for a few class members, the court noted, would not necessarily preclude class certification; the court could decide to deal

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<sup>104</sup> *Id.* at 1266–67.

<sup>105</sup> 141 S.Ct at 2214.

<sup>106</sup> *Id.* at 1277.

<sup>107</sup> *Id.* at 1264.

<sup>108</sup> *Id.* at 1274–75.

<sup>109</sup> *Id.* at 1274.

<sup>110</sup> *Id.* at 1270–72.

<sup>111</sup> 936 F.3d 1162 (11th Cir. 2019).

<sup>112</sup> *Id.* at 1165.

<sup>113</sup> *Cordoba*, 942 F.3d at 1267–68.



with that problem later on in the proceeding, before it awarded any relief.<sup>114</sup> “But there is a meaningful difference between a class with a few members who might not have suffered an injury traceable to the defendants and a class with potentially many more, even a majority, who do not have Article III standing.”<sup>115</sup> The court noted that a blanket rule precluding class certification if any individuals in the class lack standing would likely run the risk of promoting so-called “fail-safe” classes, in which membership is defined on the basis of having a meritorious claim.<sup>116</sup> This practice, universally recognized as improper, is no remedy for an overbroad class.

Since there was nothing in the record to allow determination on appeal of the makeup of the internal do-not-call list class, the court remanded the case for further proceedings.<sup>117</sup> *Cordoba* seems likely to align with the Supreme Court’s upcoming decision in *TransUnion*, which should provide a new starting line for class-action standing controversies. *TransUnion* may do for the underdeveloped Rule 23 typicality requirement what *Wal-Mart Stores, Inc. v. Dukes*<sup>118</sup> did for the rule’s commonality requirement—mandate a new, invigorated inquiry.

### III. CAFA JURISDICTION

The Eleventh Circuit also opined on one of the less-commonly invoked provisions of the Class Action Fairness Act<sup>119</sup> (CAFA), clarified the scope of the “local event exception” to federal-court jurisdiction over “mass actions” in *Spencer v. Specialty Foundry Products Inc.*<sup>120</sup> The court interpreted the exception narrowly—that is in favor of federal jurisdiction—concluding that claims by former foundry employees against manufacturers and distributors of products used at the foundry were not within the exception.<sup>121</sup>

The plaintiffs were 230 former workers at a now-closed Alabama foundry. They worked in different jobs at different times, but all claimed harm from exposure to hazardous chemicals during their employment. The defendants were unrelated companies that manufactured (and in some cases distributed) chemical products used at the foundry, including

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<sup>114</sup> *Id.* at 1277.

<sup>115</sup> *Id.*

<sup>116</sup> *Id.* at 1276–77.

<sup>117</sup> *Id.* at 1277.

<sup>118</sup> 564 U.S. 338 (2011).

<sup>119</sup> Class Action Fairness Act of 2005, Pub. L. No. 109-2, 119 Stat. 4 (2005) (codified in scattered sections of 28 U.S.C.).

<sup>120</sup> 953 F.3d 735 (11th Cir. 2020).

<sup>121</sup> *Id.* at 739–40.

sands, resins, gases, and other substances of various formulations.<sup>122</sup> The plaintiffs' complaint, originally filed in state court, included several claims arising from the allegation that the "normal and foreseeable use of the [d]efendants' products at the foundry [caused] the formation and release of hazardous and carcinogenic chemical substances," which harmed them.<sup>123</sup>

One defendant removed the case to federal court under CAFA's "mass action" provision, which provides, generally, that an action brought by 100 or more plaintiffs collectively seeking over \$5,000,000 may be considered a class action under CAFA.<sup>124</sup> The plaintiffs moved to remand, on two bases. First, they argued that the case is not a "mass action" removable under CAFA because it falls under the so-called "local event exception" to the definition of "mass action," in that "all of the claims . . . arise from an event or occurrence in the State in which the action was filed" and the event or occurrence "allegedly resulted in injuries in that State or in States contiguous to that State."<sup>125</sup> Second, the plaintiffs argued that the case should be remanded under CAFA's "local controversy exception," which requires remand if two-thirds of the plaintiffs and a significant defendant are citizens of the state in which the case was filed, and the principal injury or related conduct occurred there.<sup>126</sup> The district court granted the motion to remand based on the local event exception, and therefore did not consider the local controversy exception.<sup>127</sup>

The Eleventh Circuit vacated the remand order.<sup>128</sup> The critical question was whether the plaintiffs' allegations constituted "an event or occurrence" within the meaning of the local event exception.<sup>129</sup> The defendants argued that the exception applies only to a single, discrete event, while the plaintiffs argued it also applies to a continuing set of "truly local" circumstances.<sup>130</sup> The Eleventh Circuit concluded that "'an event or occurrence' refers to a series of connected, harm-causing incidents that culminate in one event or occurrence giving rise to plaintiffs' claims."<sup>131</sup> The court found support for this conclusion in the

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<sup>122</sup> *Id.* at 737–38.

<sup>123</sup> *Id.* at 738.

<sup>124</sup> *Id.*

<sup>125</sup> *Id.*

<sup>126</sup> *Id.*

<sup>127</sup> *Id.*

<sup>128</sup> *Id.* at 744.

<sup>129</sup> *Id.* at 739.

<sup>130</sup> *Id.* at 739–40.

<sup>131</sup> *Id.* at 740.

dictionary definitions of “event” and “occurrence,” and noted that while the article “an” indicates singularity, a connected series can constitute a single item.<sup>132</sup>

The Eleventh Circuit’s construction of the phrase is similar to those of the United States Court of Appeals for the Third and Fifth Circuits, in *Abraham v. St. Croix Renaissance Group*<sup>133</sup> and *Rainbow Gun Club, Inc. v. Denbury Onshore, L.L.C.*<sup>134</sup> respectively, but differs from the Ninth Circuit’s in *Allen v. Boeing Co.*,<sup>135</sup> under which the phrase an “event or occurrence” refers to a “single happening.”<sup>136</sup>

Applying its definition to the foundry employees’ allegations, the Eleventh Circuit found the allegations insufficient to fall within the exception for three reasons. First, the defendants manufactured (or distributed) different products, used in different ways, alleged to have caused different types of harm.<sup>137</sup> Second, the plaintiffs failed to allege a single “culminating event,” as opposed to a “string of events over time and later-resulting harm.”<sup>138</sup> Third, the plaintiffs’ allegations fell short of claiming that the defendants somehow came together to cause a single “event or occurrence. The foundry was open for decades, but the [p]laintiffs do not say when the [d]efendants committed the alleged torts or how and when the [p]laintiffs were harmed.”<sup>139</sup>

#### IV. ENGLE PROGENY

The Eleventh Circuit’s November 2020 opinion in *Harris v. R.J. Reynolds Tobacco Co.*<sup>140</sup> begins with the auspicious observation that this *Engle* case is “one of the last that we’re likely to see.”<sup>141</sup> Correct or not, the comment evokes the long history in the Eleventh Circuit of the progeny of the Florida Supreme Court’s landmark decision in *Engle v. Liggett Group*.<sup>142</sup> As the Eleventh Circuit explains,

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<sup>132</sup> *Id.* at 740–41. Here, the court employed a baseball analogy: an inning, a baseball game, and the World Series each can be described as “an event,” even though there are multiple innings in a game and multiple games in the Series. *Id.*

<sup>133</sup> 719 F.3d 270 (3d Cir. 2013).

<sup>134</sup> 760 F.3d 405 (5th Cir. 2014).

<sup>135</sup> 784 F.3d 625 (9th Cir. 2015).

<sup>136</sup> *Id.* at 629.

<sup>137</sup> *Spencer*, 953 F.3d at 743.

<sup>138</sup> *Id.*

<sup>139</sup> *Id.* at 744.

<sup>140</sup> 981 F.3d 880 (11th Cir. 2020).

<sup>141</sup> *Id.* at 882.

<sup>142</sup> 945 So. 2d 1246 (Fla. 2006).

*Engle*” refers to an entire generation’s worth of litigation in which Florida-resident smokers (or, as in this case, their personal representatives) have sought recovery from tobacco companies for cigarette-related injuries . . . . [F]or present purposes, suffice it to say that the litigation has unfolded in three “Phases”: In Phase I, a state-court jury determined, with respect to an entire class of smokers, that in manufacturing and marketing nicotine-based cigarettes the tobacco companies engaged in tortious misconduct. In Phase II, the same jury found that the companies’ misconduct injured each of three representative plaintiffs and awarded them damages. Then, in Phase III—following decertification of the class—thousands of individual smokers brought suits for their own injuries.<sup>143</sup>

The court dealt with a number of issues arising from Phase III *Engle* cases this year, including the definition for class membership (and entitlement to the preclusive effect of the jury’s Phase I findings), excessiveness of damages awards, and the severability of punitive damages from liability.

*A. Class Membership and Preclusion: Harris*

In *Harris*, the court considered whether Gerald Harris was a member of the *Engle* class, as argued by his wife as personal representative, such that the Phase I *Engle* jury’s findings of tortious misconduct by the tobacco companies would have preclusive effect.<sup>144</sup> A plaintiff is considered a class member if he can show that he suffered from a medical condition that was both (1) caused by cigarette addiction and (2) manifested on or before November 21, 1996.<sup>145</sup>

Mr. Harris had smoked most of his life and suffered from heart disease, oral cavity cancer, vocal cord cancer, and lung cancer.<sup>146</sup> Although the jury found that Mr. Harris’s heart disease was not caused by cigarette addiction and that his oral cavity cancer did not manifest itself by the cut-off date, the district court nevertheless proceeded as though Mr. Harris was a class member, allowing the jury to conclude that the defendants’ conduct injured Mr. Harris and that he was entitled to damages. The defendants moved for judgment in accordance with the jury’s verdict, arguing that because the jury found no medical condition

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<sup>143</sup> *Harris*, 981 F.3d at 882. We have analyzed the court’s *Engle* progeny opinions in prior years’ surveys. See Byrne & Mohr, *supra* note 47, at 917–21; Byrne & Mohr, *supra* note 27, at 1075–78; Thomas M. Byrne & Stacey McGavin Mohr, *Class Actions, Eleventh Circuit Survey*, 63 MERCER L. REV. 1183, 1199 n.139 (2012); Thomas M. Byrne & Stacey McGavin Mohr, *Class Actions, Eleventh Circuit Survey*, 62 MERCER L. REV. 1107, 1122–24 (2011).

<sup>144</sup> *Harris*, 981 F.3d at 883.

<sup>145</sup> *Id.* at 883–84.

<sup>146</sup> *Id.* at 884.

that satisfied both of the prongs to establish class membership, Mr. Harris was not a class member, and Mrs. Harris was not entitled to a finding that the defendants engaged in tortious conduct. And, because Mrs. Harris had not proven that the defendants behaved tortiously, the defendants were entitled to judgment as a matter of law. The district court denied the motion as well as the defendants' renewed motion for judgment as a matter of law and motion for new trial.<sup>147</sup>

The Eleventh Circuit reversed the district court's denial of the motion for judgment in accordance with the verdict.<sup>148</sup> Because the jury did not find that Mr. Harris had a medical condition that both was caused by his cigarette addiction and manifested on or before November 21, 1996, he was not a member of the *Engle* class.<sup>149</sup>

The district court's conclusion that Mr. Harris qualified as a class member had relied on an improper reading of the Florida Supreme Court's discussion of one of the named *Engle* plaintiffs, Angie Della Vecchia, to infer that the *Engle* class included anyone who had at least one medical condition that was caused by cigarette addiction and at least one condition that manifested on or before the cut-off date.<sup>150</sup> But the Eleventh Circuit pointed out that the *Engle* jury found that Ms. Della Vecchia's lung cancer was caused by cigarette addiction and that the lung cancer also manifested itself before the cut-off date.<sup>151</sup> Further, the Florida Supreme Court stated in its opinion that Ms. Della Vecchia's COPD was "tobacco related" (which the Eleventh Circuit interpreted to mean it was caused by cigarettes) and manifested itself prior to the cut-off date.<sup>152</sup> The Florida Supreme Court's opinion therefore demonstrated that, although Ms. Della Vecchia had two different conditions, each one independently satisfied both requirements for class membership.<sup>153</sup>

The court also pointed out that the Florida Supreme Court's discussion of Ms. Della Vecchia's class membership status was dicta because the issue was not raised or litigated, and Ms. Vecchia was a named plaintiff.<sup>154</sup> Finally, to uphold the district court's reading of *Engle* would produce bizarre results: a plaintiff could be considered a class member so

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<sup>147</sup> *Id.* at 884–85.

<sup>148</sup> *Id.* at 889.

<sup>149</sup> *Id.* at 886.

<sup>150</sup> *Id.* at 886–87.

<sup>151</sup> *Id.* at 887.

<sup>152</sup> *Id.*

<sup>153</sup> *Id.*

<sup>154</sup> *Id.* at 888.

long as the plaintiff had some qualifying medical condition by the cut-off date even if it was wholly unrelated to smoking.<sup>155</sup>

*B. Damages Awards: Kerrivan*

Earlier in 2020, the Eleventh Circuit affirmed denial of motions for judgment as a matter of law against R.J. Reynolds Tobacco Co. and Philip Morris USA Inc. in *Kerrivan v. R.J. Reynolds Tobacco Co.*,<sup>156</sup> upholding multi-million dollar jury verdicts against the defendants.

The plaintiff, Mr. Kerrivan, became an addicted serial smoker at an early age, suffered increasingly serious medical diagnoses as a result, and made repeated unsuccessful attempts to quit. The plaintiff eventually quit smoking but has required an oxygen tank to assist his breathing ever since.<sup>157</sup> After the jury awarded \$15.8 million in compensatory damages and \$25.3 million in punitive damages on various fraud and conspiracy claims, the tobacco companies renewed motions for judgment as a matter of law and filed a motion for new trial or remittitur. Both companies argued that the compensatory damages award was excessive, that the punitive damages award was unconstitutional, and that the evidence of reliance was insufficient to support the fraudulent concealment and conspiracy claims. The motions were denied, and the defendants appealed.<sup>158</sup>

As to compensatory damages, the focus of the appeal was whether the award was excessive in that it resulted from passion. The Eleventh Circuit concluded that it was not, unfazed by the fact that the award was higher than those in other *Engle*-progeny cases, which the court said were “simply different.”<sup>159</sup> Nor was the award excessive because it was more than what the plaintiff’s counsel requested from the jury.<sup>160</sup>

The Eleventh Circuit also upheld the punitive damages award as constitutional under *State Farm Mutual Automobile Insurance Co. v. Campbell*.<sup>161</sup> The tobacco companies’ conduct was particularly reprehensible: they repeatedly concealed evidence that cigarettes containing nicotine were addictive and caused serious health conditions, and they developed filtered and light products to deceive smokers into believing that these products were safer.<sup>162</sup> These findings demonstrated

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<sup>155</sup> *Id.*

<sup>156</sup> 953 F.3d 1196 (11th Cir. 2020).

<sup>157</sup> *Id.* at 1201–02.

<sup>158</sup> *Id.* at 1203–04.

<sup>159</sup> *Id.* at 1206–07.

<sup>160</sup> *Id.* at 1208.

<sup>161</sup> 538 U.S. 408 (2003).

<sup>162</sup> *Kerrivan*, 953 F.3d at 1208–09.

a “high level of indifference and reckless disregard for the health and safety of smokers.”<sup>163</sup> While the defendants debated whether the correct ratio of punitive-to-compensatory damages was 2:1 or 1.6:1, depending on whether the award should be examined with regard to the defendants individually or collectively, the court noted that the Supreme Court has held that single-digit multipliers are likely to comport with due process, and this was a very low single-digit multiplier either way.<sup>164</sup>

On the question of whether Kerrivan presented sufficient evidence of fraudulent concealment under Florida law, the court found evidence of the tobacco industry’s sustained and pervasive disinformation campaign. Kerrivan had presented evidence about advertisements influencing his own decision to switch to filtered cigarettes to cut out the nicotine, the very claim the industry had made in marketing filtered cigarettes.<sup>165</sup> Florida law did not require evidence of reliance on a particular statement of the defendant.<sup>166</sup>

### *C. New Trial for Punitive Damages: Sowers*

The jury’s damage award also was at the heart of the appeal in *Sowers v. R.J. Reynolds Tobacco Co.*,<sup>167</sup> the primary issue in the case being whether the plaintiff would have to risk a multi-million dollar award of compensatory damages in order to seek punitive damages in a new trial.

Like many *Engle* cases, *Sowers* involved claims against a cigarette manufacturer brought by the widow (and personal representative) of a decades-long smoker who died of lung cancer. A jury found the manufacturer, R.J. Reynolds, liable for Mr. Sowers’s death and awarded compensatory damages, resulting in a judgment of \$2.125 million.<sup>168</sup> The jury was not presented with the question of punitive damages, because the district court had ruled, based on a decision by a Florida intermediate appellate court, that Ms. Sowers could not seek such damages on her claims for negligence and strict liability—the only claims on which she prevailed at trial.<sup>169</sup>

R.J. Reynolds appealed seeking a new trial, and Ms. Sowers cross-appealed.<sup>170</sup> The Eleventh Circuit rejected R.J. Reynolds’s grounds for

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<sup>163</sup> *Id.* at 1209.

<sup>164</sup> *Id.* at 1210.

<sup>165</sup> *Id.* at 1211.

<sup>166</sup> *Id.* at 1212.

<sup>167</sup> 975 F.3d 1112 (11th Cir. 2020).

<sup>168</sup> *Id.* at 1117.

<sup>169</sup> *Id.* at 1117 (citing *Soffer v. R.J. Reynolds Tobacco Co.*, 160 So. 3d 456, 460–61 (Fla. 1st DCA 2012)).

<sup>170</sup> *Sowers*, 975 F.3d at 1117.

appeal but granted Ms. Sowers's request for a new trial on the issue of punitive damages.<sup>171</sup> Ms. Sowers's right to pursue punitive damages was dictated by an intervening decision from the Florida Supreme Court, which clarified that *Engle* plaintiffs could pursue punitive damages on "all claims properly raised in their subsequent individual actions."<sup>172</sup> R.J. Reynolds therefore did not contest the request for a new trial on punitive damages, but it did contest the scope of that trial—and, consequently, when it would have to pay the \$2.125 million in compensatory damages.<sup>173</sup>

Specifically, R.J. Reynolds contended that any new trial on punitive damages also would have to include the liability issue, which, as the Eleventh Circuit explained, "would put at risk all of the compensatory damages [Ms. Sowers] was awarded in the first trial."<sup>174</sup> The court disagreed, analyzing the issue under the Reexamination Clause of the Seventh Amendment<sup>175</sup> and concluding that "the punitive damages issues to be tried before a new jury on remand are 'so distinct and separable' from the issues decided by the first jury 'that a trial of [punitive damages] alone may be had without injustice.'"<sup>176</sup>

Prior to its thorough discussion of the Reexamination Clause, however, the Eleventh Circuit made clear the stakes involved in R.J. Reynolds's insistence on Ms. Sowers having to retry her liability case along with punitive damages:

Actually, what the company wants to do is pressure the elderly widow, whose husband its products killed, out of exercising her right to seek punitive damages from it for that. The amount of pressure that strategy employs is shown by the fact that Mrs. Sowers has stated through her attorneys that if she is forced to retry the liability and compensatory damages issues as the cost of seeking punitive damages, she will forsake her right to seek them.<sup>177</sup>

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<sup>171</sup> *Id.*

<sup>172</sup> *Soffer v. R.J. Reynolds Tobacco Co.*, 187 So. 3d 1219, 1221 (Fla. 2016).

<sup>173</sup> *Sowers*, 975 F.3d at 1126.

<sup>174</sup> *Id.* at 1117.

<sup>175</sup> U.S. CONST. amend. VII. The Reexamination Clause is the second clause of the Seventh Amendment, which states,

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

*Id.*

<sup>176</sup> *Sowers*, 975 F.3d at 1133 (quoting *Gasoline Prods. Co. v. Champlin Refining Co.*, 283 U.S. 494, 500 (1931)).

<sup>177</sup> *Sowers*, 975 F.3d at 1127.



Not only did the Eleventh Circuit not allow “R.J. Reynolds to force that difficult choice on” Ms. Sowers,<sup>178</sup> but the court also took the additional step of specifically directing the district court “to order execution on the compensatory damages part of the judgment immediately after issuance of the mandate in this appeal.”<sup>179</sup>

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<sup>178</sup> *Id.*

<sup>179</sup> *Id.* at 1138.