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Trial Practice and Procedure

by John O'Shea Sullivan *

and Kevin R. Stone **

I. INTRODUCTION

The 2020 survey period yielded noteworthy decisions relating to federal trial practice and procedure in the United States Court of Appeals for the Eleventh Circuit, several of which involved issues of first impression.¹ This Article analyzes recent developments in the Eleventh Circuit, including significant rulings in the areas of statutory interpretation, subject matter jurisdiction, civil procedure, class actions, and other issues of interest to the trial practitioner.

II. STATUTORY INTERPRETATION AND REMOVAL

A. *New Parties Added to Civil Actions Are Not “Defendants” and Are Ineligible to Remove Under 28 U.S.C. § 1441*

In *Bowling v. U.S. Bank National Assoc.*,² the Eleventh Circuit reversed the United States District Court for the Northern District of Alabama's denial of a motion to remand a case after removal of the case by parties who were not originally sued by the plaintiff, but had been added to the litigation by the original defendant as “Third-Party

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¹ For an analysis of last year's trial practice law during the survey period, see John O'Shea Sullivan, et al., *Trial Practice and Procedure, 2019 Eleventh Circuit Survey*, 71 MERCER L. REV. 1087 (2020).

² 963 F.3d 1030 (11th Cir. 2020).

Counterclaim Defendants.”³ The court admitted the case did not involve a “riveting topic.”⁴ However, a Supreme Court of the United States’ opinion,⁵ published after the district court’s denial of the motion to remand, changed the law and abrogated case law decided in the former Fifth Circuit that was binding in the Eleventh Circuit,⁶ which had stood as the law for more than forty years.⁷

The litigation started in state court in Alabama where a purchaser of real property in a foreclosure sale sued the occupants and mortgagors, the Bowlings, for ejection. The Bowlings filed their “Answer and Counterclaim” which added three new parties as Third-Party Counterclaim Defendants, the lender and servicers on the foreclosed loan. The Bowlings’ claims against the Third-Party Counterclaim Defendants included a mix of state and federal law claims, including claims for alleged violations of the federal Truth in Lending Act, the Fair Credit Reporting Act, and others. The Third-Party Counterclaim Defendants removed the entire case to federal court, citing 28 U.S.C. §§ 1441(a) and 1441(c) as grounds.⁸

The Bowlings moved to remand the case to state court, however, under the former Fifth Circuit’s decision in *Carl Heck Engineers, Inc. v. Lafourche Parish Police Jury (Carl Heck)*,⁹ and 28 U.S.C. § 1441(c),¹⁰ the district court denied the motion, finding removal was proper.¹¹ On appeal, the Eleventh Circuit carefully analyzed *Carl Heck*.¹² In *Carl Heck*, the district court refused to remand a case removed by a third-party defendant and the former Fifth Circuit affirmed, finding that the third-party claim was a “separate and independent claim which if sued upon alone could have been brought properly in federal court.”¹³ The Eleventh Circuit stated that it was understandable that in 2014 the district court, in *Bowling*, concluded that the Third-Party Counterclaim

³ *Id.* at 1032.

⁴ *Id.*

⁵ *Home Depot U.S.A, Inc. v. Jackson (Home Depot)*, 139 S. Ct. 1743 (2019).

⁶ *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (holding all Fifth Circuit decisions issued before October 1, 1981, are binding precedent in the Eleventh Circuit).

⁷ *Bowling*, 963 F.3d at 1036.

⁸ *Id.* at 1033.

⁹ 622 F.2d 133, 135 (5th Cir. 1980). The district court’s denial of the motion to remand was decided on April 25, 2014. *See* 18 F. Supp. 3d 1288 (N.D. Ala. 2014).

¹⁰ 28 U.S.C. § 1441(c).

¹¹ *Bowling*, 963 F.3d at 1033–34. The district court’s denial of the motion to remand was decided on April 25, 2014. *See* *WGB, LLC v. Bowling*, 18 F. Supp. 3d 1288 (N.D. Ala. 2014).

¹² *Bowling*, 963 F.3d at 1034. *See also* 28 U.S.C. § 1441(c) (1976).

¹³ *Carl Heck*, 622 F.2d at 136.

Defendants' claims were removable under 28 U.S.C. § 1441(c) in light of the decision in *Carl Heck*.¹⁴

By the time *Bowling* made it to the Eleventh Circuit on appeal, the law on removal had changed substantially. In what the Eleventh Circuit called a “removal game-changer,”¹⁵ the Supreme Court decided *Home Depot U.S.A, Inc. v. Jackson*.¹⁶ *Home Depot*, decided in 2019, abrogated the holding in *Carl Heck* and held that the removal statute does not permit removal by any counterclaim defendant, including parties brought into the lawsuit for the first time by counterclaim.¹⁷

As it did with *Carl Heck*, the Eleventh Circuit carefully analyzed *Home Depot* and the current text of 28 U.S.C. §§ 1441(a) and (c).¹⁸ Discussing six things that led to the high Court's holding in *Home Depot*, the Eleventh Circuit concluded that the law on removal is now that “a third-party counterclaim defendant is not a ‘defendant’ who can remove under § 1441(a).”¹⁹ But because the case at bar involved § 1441(a), and not § 1441(c), the Eleventh Circuit still needed to determine whether the principles announced in *Home Depot* applied to the situation involving removal of federal and state law claims under § 1441(c).²⁰

The court held that “[e]very analytical tool the Supreme Court relied on in *Home Depot* to conclude that counterclaim defendants may not remove a civil action under § 1441(a) applies with equal force to § 1441(c).”²¹ The court looked to the definition of “defendants” as used in § 1441(a) and § 1441(c) to find that “identical words and phrases used in the same statute should normally be given the same meaning.”²² Having found that “defendants” in § 1441(a) means the original defendants to the action, not later-added parties, the court held that § 1441(c)'s use of “defendants” has the same meaning to allow § 1441(c) to provide additional criteria for a certain subset of civil actions.²³ The court

¹⁴ *Bowling*, 963 F.3d at 1035.

¹⁵ *Id.*

¹⁶ 139 S. Ct. 1743 (2019).

¹⁷ *Bowling*, 963 F.3d at 1036.

¹⁸ *Id.* at 1036–38.

¹⁹ *Id.* at 1038 (quoting *Home Depot*, 139 S. Ct. at 1749).

²⁰ *Bowling*, 963 F.3d at 1038.

²¹ *Id.*

²² *Id.* (quoting *SEC v. Levin*, 849 F.3d 995, 1003 (11th Cir. 2017)). See also SCALIA & GARNER, *READING LAW* § 25, at 170 (2012) (“[a] word or phrase is presumed to bear the same meaning throughout a text” unless context requires otherwise).

²³ *Bowling*, 963 F.3d at 1038. The court also looked to the title or caption of § 1441 “Removal of *civil actions*” to corroborate the textual analysis. The court found that the change from former § 1441's use of “claims” to current § 1441's use of “civil actions” is

concluded by declaring that *Carl Heck* is “no longer good law,” and after *Home Depot*, third-party counterclaim defendants and other parties not originally sued by the plaintiff cannot remove a “civil action” under 28 U.S.C. § 1441(c).²⁴

B. Interpretation of “Mass Action” Jurisdiction Statutes

In *Spencer v. Specialty Foundry Products Inc.*,²⁵ a products liability case, the Eleventh Circuit engaged in a grueling exercise of statutory interpretation to assess whether a complaint adequately alleged an “event or occurrence” so as to fall within the “local event” exception to removal under the Class Action Fairness Act of 2005 (CAFA) and ultimately held that the exception did not apply.²⁶

In *Spencer*, former workers at a foundry in Alabama claimed they were harmed by exposure to hazardous and harmful chemicals released and formed at the foundry. They filed suit in Alabama state court against ten entities that manufactured, sold, supplied, and distributed the products they believed harmed them. One defendant removed the case to federal court under CAFA’s “mass action” provision, which authorizes original federal jurisdiction over actions seeking more than \$5 million in monetary relief with more than 100 minimally diverse plaintiffs whose claims involve common questions of law or fact.²⁷ The Plaintiffs moved to remand the case to state court, citing two reasons, only one of which was at issue on appeal.²⁸ Specifically, they contended that the case did not qualify as a “mass action” under CAFA because “all of the claims arise from an event or occurrence in the State in which the action was filed,”

further reason that for determining removability, it is only the original plaintiff’s claims that can provide a basis for removal. *Id.* at 1038–39.

²⁴ *Id.* at 1040.

²⁵ 953 F.3d 735 (11th Cir. 2020).

²⁶ *Id.* at 739.

²⁷ *Id.* at 737–38; see 28 U.S.C. § 1332(d)(2):

The district courts shall have original jurisdiction of any civil action in which the matter in controversy exceeds the sum or value of \$5,000,000, exclusive of interest and costs, and is a class action in which—(A) any member of a class of plaintiffs is a citizen of a State different from any defendant; (B) any member of a class of plaintiffs is a foreign state or a citizen or subject of a foreign state and any defendant is a citizen of a State; or (C) any member of a class of plaintiffs is a citizen of a State and any defendant is a foreign state or a citizen or subject of a foreign state.

See also 28 U.S.C. § 1332(d)(11)(B)(i):

As used in subparagraph (A), the term ‘mass action’ means any civil action . . . in which monetary relief claims of 100 or more persons are proposed to be tried jointly on the ground that the plaintiffs’ claims involve common questions of law or fact”

²⁸ *Spencer*, 953 F.3d at 738.

and this event or occurrence “allegedly resulted in injuries in that State.”²⁹ In other words, “mass actions” are removable, but not if “all of the claims in the action arise from *an event or occurrence* in the State in which the action was filed, and that allegedly resulted in injuries in that State or in States contiguous to that State.”³⁰ “This carve-out to federal jurisdiction is called the ‘local event exception.’”³¹

The district court remanded to state court, finding that, “because the foundry was located in Alabama, the plaintiffs worked in Alabama, the alleged injuries occurred in Alabama, and the sole purchaser of the defendants’ products was the foundry, this case is ‘truly local’ such that CAFA jurisdiction would be improper under the local event exception.”³² The focus of the appeal was the local event exception, specifically the phrase an “event or occurrence.”³³ “If the allegations in the complaint constitute[d] ‘an event or occurrence,’ the [d]istrict [c]ourt was correct in remanding the case back to state court.”³⁴ If, however, the allegations were not an event or occurrence, then removal was proper and remand was improper.³⁵ The Eleventh Circuit reversed, holding that the exception did not apply, and the federal court had CAFA jurisdiction.³⁶

Not surprisingly, the parties disagreed as to the scope of the term, “an event or occurrence” and offered their preferred meanings of the phrase.³⁷ The Eleventh Circuit disagreed with the parties’ respective definitions and arrived at its own meaning of “an event or occurrence.”³⁸ The court started with the axiom that it must look to the plain language of the text of the statute and because the statute does not define the term “an event or occurrence,” the court looked to dictionaries for guidance to interpret the statute’s “words in accordance with their plain and ordinary meaning.”³⁹ Dictionaries define “event” and “occurrence” essentially the

²⁹ *Id.* at 738 (quoting 28 U.S.C. § 1332(d)(11)(B)(ii)(I)).

³⁰ 28 U.S.C. § 1332(d)(11)(A) (“For purposes of this subsection . . . a mass action shall be deemed to be a class action removable under paragraphs (2) through (10) if it otherwise meets the provisions of those paragraphs”); 28 U.S.C. § 1332(d)(11)(B)(ii)(I):

As used in subparagraph (A), the term ‘mass action’ shall *not* include any civil action in which—all of the claims in the action arise from *an event or occurrence* in the State in which the action was filed, and that allegedly resulted in injuries in that State or in States contiguous to that State (emphasis added).

³¹ *Spencer*, 953 F.3d at 738.

³² *Id.* at 739.

³³ *Id.* at 739 (citing 28 U.S.C. § 1332(d)(11)(B)(ii)(I)).

³⁴ *Spencer*, 953 F.3d at 739.

³⁵ *Id.*

³⁶ *Id.* at 744.

³⁷ *Id.* at 739.

³⁸ *Id.* at 740.

³⁹ *Id.*

same.⁴⁰ Moreover, the court concluded that the phrase “is broad enough to include a solitary happening that occurs in a single moment in time and (in some cases at least) a continuing set of related circumstances.”⁴¹

With that broad definition of the two main words in hand, the court then discussed the meaning of the word “an” preceding the term “event or occurrence.”⁴² The court concluded that, although the use of “an” implies one series of connected circumstances, “it would be a misreading of the statute to restrict the local event exception to events or occurrences that are concentrated in a single point in time.”⁴³ A salient example of this, explained the court, is the World Series—it is “an event” that encompasses many different occurrences (games, pitches, strikeouts) over a long, but set, period of time, with the same teams playing.⁴⁴ With those definitions and examples, the court concluded that the text was clear, so the district court erred by resorting to analysis of the legislative history.⁴⁵

After analyzing interpretations of the statute by the Third,⁴⁶ Fifth,⁴⁷ and Ninth Circuits,⁴⁸ the Eleventh Circuit ultimately held that “the local event exception applies to a singular harm-causing moment in time, as well as a contextually connected series of incidents that culminates in that harm-causing event or occurrence.”⁴⁹ From there, the court explained that the allegations in the complaint did not fall within the local event exception because there was not a sufficient connection among the defendants, there was not a culminating event, and there were no allegations that would reasonably constitute one “event or occurrence.”⁵⁰

First, the acts that led to the harm-causing event or occurrence were not “collective” and “related.”⁵¹ The products were used in different ways and caused different harms.⁵² Second, the complaint did not “allege a single culminating event that caused their harm.”⁵³ Instead, the

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.* at 741.

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Abraham v. St. Croix Renaissance Grp., L.L.P.*, 719 F.3d 270 (3d Cir. 2013).

⁴⁷ *Rainbow Gun Club, Inc. v. Denbury Onshore, L.L.C.*, 760 F.3d 405 (5th Cir. 2014).

⁴⁸ *Nevada v. Bank of America Corp.*, 672 F.3d 661 (9th Cir. 2012); *Allen v. Boeing Co.*, 784 F.3d 625 (9th Cir. 2015).

⁴⁹ *Spencer*, 953 F.3d at 742–43.

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.*

complaint alleged “a string of events over time and later-resulting harm.”⁵⁴ Finally, the complaint failed to show how the defendants’ “conduct came together to create one event or occurrence.”⁵⁵ There were no allegations connecting the defendants’ conduct or pointing to a culminating event as required for the exception.⁵⁶ In short, because the complaint did not fit within the Eleventh Circuit’s definition of “event or occurrence”—*i.e.*, because it did not allege “a continuous, related course of conduct culminating in one harm-causing event or occurrence”—the court held that it did not fall within the local event exception, and remand was improper.⁵⁷

III. CLASS ACTIONS

A. *Class Action Incentive Awards Are Unlawful and Attorney Fee Petitions in Class Actions Must Be Filed Before Objections to Such Fees Are Due*

In a move to curb errors that have become “commonplace in everyday class-action practice,” the Eleventh Circuit in *Johnson v. NPAS Sols., LLC*,⁵⁸ held (1) that a motion requesting attorney fees must be filed before objections to such fees are due; and (2) that incentive awards that compensate a class representative for his time and rewards him for bringing a lawsuit are unlawful.⁵⁹ Although the law has been clear on these issues, courts have been ignoring it.⁶⁰ The holdings in *Johnson* put a stop to that.

In *Johnson*, the plaintiff, Charles Johnson—on behalf of himself and a putative class—sued, alleging violations of the Telephone Consumer Protection Act (TCPA), 47 U.S.C. § 227. The case quickly proceeded to the settlement phase. The parties jointly filed a notice of settlement, Johnson moved to certify the class, the district court preliminarily approved the settlement, certified the class for settlement purposes, and appointed Johnson as the class representative and his lawyers as class counsel. The district court also ruled that Johnson could “petition the Court to receive an amount not to exceed \$6,000 as acknowledgment of his role in prosecuting this case on behalf of the class members,” and set March 19 as the deadline for class members to opt out of the settlement

⁵⁴ *Id.*

⁵⁵ *Id.* at 744.

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ 975 F.3d 1244 (11th Cir. 2020).

⁵⁹ *Id.* at 1252–53.

⁶⁰ *Id.* at 1259.

and to file objections to the settlement.⁶¹The district court also set April 6th—eighteen days after the opt out/objection deadline—as the date by which class counsel had to submit a petition for attorneys’ fees and costs.⁶²

No class member opted out, but one objected to the settlement and challenged, among other things, (1) the district court’s decision to set the objection deadline before the deadline for class counsel to file their attorneys’ fee petition, which she contended violated Fed. R. Civ. P. 23⁶³ and the Due Process Clause; and (2) that Johnson’s \$6,000 incentive award contravened Supreme Court precedent and created a conflict of interest between Johnson and other class members.⁶⁴ The district court overruled the objection and approved the settlement.⁶⁵

On appeal, as to the first issue, the Eleventh Circuit relied simply on the plain language of Rule 23(h) to reach a fairly obvious decision.⁶⁶ Rule 23(h) provides, in part, as follows:

In a certified class action, the court may award reasonable attorney’s fees and nontaxable costs that are authorized by law or by the parties’ agreement. The following procedures apply:

(1) A claim for an award must be made by motion under Rule 54(d)(2), subject to the provisions of this subdivision (h), at a time the court sets. Notice of the motion must be served on all parties and, for motions by class counsel, directed to class members in a reasonable manner.

(2) A class member, or a party from whom payment is sought, may object to the motion.⁶⁷

Although Johnson argued that class members were adequately informed of the fees sought via the class notice—which preceded the objection deadline and stated that class counsel sought a 30% fee—the court could not ignore the plain language of the statute, which required class members have the opportunity to object to the fee motion itself, not the notice that such a motion would be filed.⁶⁸ Aside from the requirements of the text of the statute, the court also noted that this rule

⁶¹ *Id.* at 1249.

⁶² *Id.*

⁶³ FED. R. CIV. P. 23.

⁶⁴ *Johnson*, 975 F.3d at 1250.

⁶⁵ *Id.*

⁶⁶ *Id.* at 1251.

⁶⁷ FED. R. CIV. P. 23(h).

⁶⁸ *Johnson*, 975 F.3d at 1252.

made good “practical sense.”⁶⁹ First, it allows class members to have full information when deciding whether to object to a fee request.⁷⁰ For example, the class notice would not contain the same information regarding “the details of class counsel’s hours and expenses and the rationale for the fee request,” whereas the petition for fees would.⁷¹

Second, this timing requirement allows the district court to ensure that the adversarial process is fully tested.⁷² Notwithstanding class counsel’s fiduciary duty to the class, there is an inherent conflict in class counsel’s desire to get paid as much as possible out of a settlement and obtaining the largest possible recovery for class members.⁷³ Understandably then, the district court must “assume the role of fiduciary for the class plaintiffs and ensure that the class is afforded the opportunity to represent its own best interests.”⁷⁴ Of course, this cannot happen if the court requires objections to the fee award to be filed *before* class counsel has filed its fee petition. As a result, the Eleventh Circuit reversed the district court holding that “by requiring class members to object to an award of attorneys’ fees before class counsel had filed their fee petition, the district court violated Rule 23(h).”⁷⁵

Following the Eighth Circuit, the court then went on to determine whether the error was harmless, “by asking whether the complaining party’s substantial rights have been affected,” a doctrine the Eleventh Circuit had not yet applied to a Rule 23(h) violation.⁷⁶ If the district court’s misapplication of the Rule “doesn’t deny a party the opportunity to present arguments that would have changed the outcome, the error is harmless.”⁷⁷ The appellant filed a detailed objection to the attorney fee award and, at the fairness hearing—after having had ample opportunity to review the fee petition that was filed after her objection—raised essentially the same arguments.⁷⁸ Because the arguments raised both before and after the filing of the fee petition were the same, the court

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.* (internal punctuation omitted) (quoting *Redman v. RadioShack Corp.*, 768 F.3d 622, 638 (7th Cir. 2014)).

⁷² *Id.*

⁷³ *Id.* at 1252–53.

⁷⁴ *Id.* at 1253 (internal quotation marks omitted) (quoting *In re Mercury Interactive Corp. Sec. Litig.*, 618 F.3d 988, 994 (9th Cir. 2010)).

⁷⁵ *Id.* The court also noted that the Seventh, Eighth, and Ninth Circuits had explicitly reached the same holding and that the Third Circuit had implied as much in dicta. *Id.* at 1253 n.5.

⁷⁶ *Id.* at 1253.

⁷⁷ *Id.* at 1254.

⁷⁸ *Id.*

failed to see how the appellant was “deprived of the opportunity to present’ additional objections” and held that the error was harmless.⁷⁹

As to the next issue, regarding the district court’s approval of a \$6,000 “incentive payment” to Johnson as the class representative, the Eleventh Circuit relied on two cases from the 1880s, *Trustees v. Greenough*,⁸⁰ and *Central Railroad & Banking Co. v. Pettus*,⁸¹ in holding that such an award is unlawful.⁸² *Greenough* and *Pettus* are the “seminal cases establishing the rule . . . that attorneys’ fees can be paid from a ‘common fund’ . . . [and they] establish limits on the types of awards that attorneys and litigants may recover from the fund.”⁸³ The court found that in recent years, however, this established rule has been “largely overlooked.”⁸⁴

In *Greenough*, the most important case, the class representative engaged in litigation with “great vigor and at much expense,” and as a result, secured and saved a large amount of a trust fund on behalf of the class.⁸⁵ The class representative “bore the whole burden of this litigation himself, and he advanced most of the expenses which were necessary for the purpose of rendering it effective and successful.”⁸⁶ He then sought “an allowance out of the fund to cover his expenses and services.”⁸⁷ He was therefore allowed an award of “necessary expenditures, including what amounted to attorneys’ fees and litigation expenses” such as railroad fares and hotel bills and “an allowance of \$2,500 a year for ten years of personal services.”⁸⁸

On appeal, the Supreme Court held that the district court could properly reimburse the class representative for “his reasonable costs, counsel fees, charges, and expenses incurred in the fair prosecution of the suit, and in reclaiming and rescuing the trust fund.”⁸⁹ The reasoning made sense—the class representative had sued on behalf of the class, the members of which benefited from the proceedings, and he spent “a large amount of money.”⁹⁰ He was therefore entitled to be compensated out of the fund; otherwise, the other class members would have been unjustly

⁷⁹ *Id.* at 1254–55 (quoting *Restigouche, Inc. v. Town of Jupiter*, 59 F.3d 1208, 1213 (1995)).

⁸⁰ 105 U.S. 527 (1882).

⁸¹ 113 U.S. 116 (1885).

⁸² *Johnson*, 975 F.3d at 1255.

⁸³ *Id.* at 1255–56.

⁸⁴ *Id.*

⁸⁵ *Id.* (quoting *Greenough*, 105 U.S. at 529).

⁸⁶ *Id.* (internal punctuation omitted).

⁸⁷ *Id.* 1256 (quoting *Greenough*, 105 U.S. at 529).

⁸⁸ *Id.* at 1256.

⁸⁹ *Id.* (internal punctuation omitted) (quoting *Greenough*, 105 U.S. at 537).

⁹⁰ *Id.* at 1257 (quoting *Greenough*, 105 U.S. at 532).

enriched.⁹¹ His allowance for “personal services and private expenses,” however, was “decidedly objectionable,” because such an allowance “would present too great a temptation to parties to intermeddle in the management of valuable property or funds in which they have only the interest of creditors.”⁹²

The Eleventh Circuit concluded that “[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.”⁹³ As a result, “the modern-day incentive award for a class representative is roughly analogous to a salary—in *Greenough*’s terms, payment for ‘personal services’”—and is improper.⁹⁴ In fact, the court noted that such an award presents “even more pronounced risks today than the salary and expense reimbursements disapproved in *Greenough* [because they] are intended not only to compensate class representatives for their time (*i.e.*, as a salary), but also to promote litigation by providing a prize to be won (*i.e.*, as a bounty).”⁹⁵

The court acknowledged that such awards have become routine and explained that such routineness cannot negate Supreme Court precedent.⁹⁶ The court held it was time to get back on track.⁹⁷ “To the extent that incentive awards are common, they are like dandelions on an unmowed lawn—present more by inattention than by design.”⁹⁸ The court “remand[ed] the case so that the district court can adequately explain its fee award to class counsel, its denial of Dickenson’s objections, and its approval of the settlement.”⁹⁹

⁹¹ *Id.*

⁹² *Id.* (quoting *Greenough*, 105 U.S. at 537–38). Three years later, the Supreme Court decided *Pettus*, which “broke new ground” as the first Supreme Court case to recognize that attorneys “had a claim to fees payable out of a common fund which has been created through their efforts” and that “a fee could be awarded based upon a percentage of the fund recovered for the class.” *Id.* (internal punctuation omitted) (quoting *Camden I Condo. Ass’n, Inc. v. Dunkle*, 946 F.2d 768, 771 (11th Cir. 1991)).

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.* at 1258.

⁹⁶ *Id.* at 1259.

⁹⁷ *Id.* at 1260.

⁹⁸ *Id.* at 1259–60 (quoting *In re Dry Max Pampers Litig.*, 724 F.3d 713, 722 (6th Cir. 2013)).

⁹⁹ *Id.* at 1264.

IV. CIVIL PROCEDURE

A. The Plaintiff's Voluntary Dismissal Without Prejudice Under Fed. R. Civ. P. 41(a)(2)¹⁰⁰ is a "Final Decision" That Provides Appellate Jurisdiction

In *Corley v. Long-Lewis, Inc.*,¹⁰¹ the court was required to sort through precedent the Chief Judge called an "egregious mess"¹⁰² to determine whether a plaintiff's voluntary dismissal constitutes a "final decision" under 28 U.S.C. § 1291¹⁰³ for appellate jurisdiction.¹⁰⁴ The court held that the district court's grant of the plaintiffs' motion for voluntary dismissal to create a "final judgment with respect to all claims asserted in this action" was a final decision, under § 1291, that provided the Eleventh Circuit jurisdiction.¹⁰⁵

The procedural history in *Corley* was unusual and complicated. The Corleys filed the asbestos lawsuit in Alabama state court against dozens of companies that allegedly supplied products containing asbestos that caused Mr. Corley's mesothelioma. The defendants removed to the United States District Court for the Northern District of Alabama, and then the Judicial Panel on Multidistrict Litigation (MDL) transferred it to the Eastern District of Pennsylvania. The Pennsylvania district court granted summary judgment in favor of many of the defendants based on the statute of limitations. After the case had been whittled down to two remaining defendants, the MDL remanded the suit back to the Northern District of Alabama which dismissed the remaining two defendants with prejudice.¹⁰⁶

The plaintiffs appealed the rulings of the Pennsylvania district court to the Eleventh Circuit,¹⁰⁷ but two defendants then filed suggestions of bankruptcy in that appeal revealing that the plaintiffs' claims against

¹⁰⁰ FED. R. CIV. P. 41(a)(2).

¹⁰¹ 965 F.3d 1222 (11th Cir. 2020).

¹⁰² *Id.* at 1236 (Pryor, C.J., concurring) (quoting *Williams v. Siedenbach*, 958 F.3d 341, 355 (5th Cir. 2020)).

¹⁰³ 28 U.S.C. § 1291.

¹⁰⁴ *Corley*, 965 F.3d at 1225.

¹⁰⁵ *Id.* at 1227.

¹⁰⁶ *Id.* at 1225–26.

¹⁰⁷ *Id.* at 1225. The Eleventh Circuit's "territorial jurisdiction" to hear an appeal of a district court order outside the Eleventh Circuit was also a subject of the opinion. The Eleventh Circuit found that it did indeed have territorial jurisdiction to hear an appeal of an order from the Eastern District of Pennsylvania under 28 U.S.C. § 1294, which itself was the subject of an intracircuit split of authority. *Id.* at 1231–33.

them had not been adjudicated below and remained pending.¹⁰⁸ Thus, the Eleventh Circuit remanded to the district court where the plaintiffs moved to voluntarily dismiss the claims, without prejudice under Rule 41(a)(2), against those bankrupt defendants.¹⁰⁹ The district court granted the motion to dismiss the two defendants in what it called a “final judgment with respect to all claims asserted in this action.”¹¹⁰ The plaintiffs appealed again seeking review of the Pennsylvania court’s grant of summary judgment.¹¹¹

The Eleventh Circuit held that it did have jurisdiction under 28 U.S.C. § 1291 for “final decisions.”¹¹² The Court recognized that the case law in the Eleventh Circuit on this issue where voluntary dismissals are involved is splintered and “the canvas looks like one that Jackson Pollock got to first.”¹¹³ The court held that the divergent decisions are traced to two decisions of the former Fifth Circuit: *LeCompte v. Mr. Chip, Inc.*,¹¹⁴ which held, under its facts, that the voluntary dismissal was a final judgment for appeal, and *Ryan v. Occidental Petroleum Corp.*,¹¹⁵ which held, under its facts, that a voluntary dismissal of a remaining substantive paragraph of the plaintiff’s complaint was not a final judgment for appeal.¹¹⁶

In 1995, the conflict on this issue in the Eleventh Circuit arose in *Mesa v. United States*¹¹⁷ involving an order granting a voluntary dismissal without prejudice.¹¹⁸ The Eleventh Circuit held in *Mesa* that under *Ryan*, a voluntary dismissal without prejudice cannot be considered final because “without prejudice” means the plaintiff can re-file those claims, and this became the understanding of finality in this Circuit thereafter.¹¹⁹ After analyzing various other Circuit opinions involving

¹⁰⁸ *Id.* at 1226.

¹⁰⁹ *Id.* at 1226–27.

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² *Id.* at 1231. As mentioned above, the court also analyzed the “territorial jurisdiction” issue created by the review of an out-of-circuit district court. The court also analyzed and determined, *sua sponte*, whether the plaintiffs had standing to appeal an order they requested—dismissal of the two bankrupt defendants. The court found that although the plaintiffs were “not adverse” to the dismissal they requested, they were adverse to the orders on summary judgment which the court found were “just as much a part of the final judgment as the voluntary-dismissal order.” *Id.* at 1233–34.

¹¹³ *Id.* at 1228 (quoting *Gunn v. Minton*, 568 U.S. 251, 258 (2013)).

¹¹⁴ 528 F.2d 601 (5th Cir. 1976).

¹¹⁵ 577 F.2d 298 (5th Cir. 1978).

¹¹⁶ *Corley*, 965 F.3d at 1228–29.

¹¹⁷ 61 F.3d 20, 21 (11th Cir. 1995).

¹¹⁸ *Corley*, 965 F.3d at 1229–30.

¹¹⁹ *Id.*

voluntary dismissals and appellate jurisdiction, the court held that the Eleventh Circuit decisions cannot be harmonized so the “earliest-precedent rule” applies.¹²⁰ Finding that the 1992 opinion in *McGregor v. Board of Commissioners*¹²¹ both pre-dates *Mesa* and is consistent with prior precedent, it controls.¹²² Thus, the court held that “an order granting a motion to voluntarily dismiss the remainder of a complaint under Rule 41(a)(2) ‘qualifies as a final judgment for purposes of appeal.’”¹²³

B. District Courts Have the Power to Grant or Deny Sanctions Even When it Lacks Subject Matter Jurisdiction Over the Underlying Case

In *Hyde v. Irish*,¹²⁴ the court determined that even when a district court lacks subject matter jurisdiction over the underlying case or controversy, the court still has the power to decide “collateral” matters including things like the imposition of costs, attorneys’ fees, and contempt sanctions “to ensure the maintenance of orderly procedure.”¹²⁵ *Hyde* involved a failed real estate project in the Florida Keys where investors in the failed venture sued the developer, alleging fraud, breach of fiduciary duty, among other things including an allegation that the developer had used investor funds for things other than the joint venture.¹²⁶

¹²⁰ *Id.* at 1231.

¹²¹ 956 F.2d 1017, 1020 (11th Cir. 1992).

¹²² *Corley*, 965 F.3d at 1231.

¹²³ *Id.* (quoting *McGregor*, 956 F.3d at 1020). Judge William Pryor, who authored the opinion, also submitted a concurring opinion criticizing the use of Rule 41 dismissals to create appellate jurisdiction. Judge Pryor noted that most other Circuits have similar intracircuit splits of authority on this issue and suggested that litigants or district courts use alternatives to Rule 41 dismissals to create appellate jurisdiction. For example, he suggested that district courts employ Fed. R. Civ. P. 54(b) to designate decisions on the merits as final that decide or resolve fewer than all claims or parties. He also suggested that district courts may sever a party’s remaining claims under Fed. R. Civ. P. 21, among other possibilities including allowing the plaintiff leave to amend the complaint to drop lingering claims under Fed. R. Civ. P. 15(a)(2) or the district court itself could drop parties under Fed. R. Civ. P. 21. While Judge Pryor claimed to express no opinion on the need for avoiding Rule 41 and employing the alternative methods, he clearly expressed frustration about the less-than-clear precedent and what he apparently considers to be unnecessary litigation to achieve the jurisdictional appellate goals of many litigants. *See Corley*, 965 F.3d at 1235–38 (Pryor, C.J., concurring).

¹²⁴ 962 F.3d 1306 (11th Cir. 2020).

¹²⁵ *Id.* at 1309–10.

¹²⁶ *Id.* at 1308.

The district court granted summary judgment to the defendant developer who sought sanctions against the plaintiffs for what he contended were knowingly false allegations in the complaint about the misuse of investor funds.¹²⁷ On appeal of the summary judgment ruling, the Eleventh Circuit questioned subject matter jurisdiction which had been based on diversity of citizenship.¹²⁸ On remand to address the subject matter jurisdiction question, the district court found that the court did in fact lack subject matter jurisdiction and dismissed the case.¹²⁹ While subject matter jurisdiction was being investigated, the defendant filed a motion for sanctions, claiming that the plaintiffs knew or should have known the allegations about the misuse of funds were false.¹³⁰ The district court denied the motion for sanctions.¹³¹

On appeal, before deciding whether the denial of the motion for sanctions was proper, the Eleventh Circuit had to determine whether the district court had jurisdiction over the sanctions dispute when it lacked subject matter jurisdiction for the underlying case.¹³² Relying on Supreme Court precedent governing sanctions under Rule 11,¹³³ the court held that sanctions and attorney or party misconduct issues, including the court's powers under § 1927, are "collateral" matters.¹³⁴

The court discussed the distinction between the underlying case or controversy and certain "collateral" matters to analyze the jurisdictional requirements.¹³⁵ While the underlying case or controversy includes the merits of the dispute and procedural questions, there is a limited set of issues that are "collateral to the merits" of the case, including "the imposition of costs, attorney's fees, and contempt sanctions."¹³⁶

Finding "collateral" matters to be important to ensuring the maintenance of orderly procedure, many such collateral matters involve the power to enforce compliance with the rules and standards that keep the judiciary running smoothly.¹³⁷ The court concluded that even if the court lacks jurisdiction to hear the merits of a case—something required

¹²⁷ *Id.* at 1308–09.

¹²⁸ *Id.* See also 28 U.S.C. § 1332.

¹²⁹ *Hyde*, 962 F.3d at 1308.

¹³⁰ *Id.* at 1308–09.

¹³¹ *Id.* at 1309. The basis for the sanctions motion was the district court's inherent powers or 28 U.S.C. § 1927. Fed. R. Civ. P. 11 was not at issue on the issue of sanctions.

¹³² *Id.*

¹³³ See *Willy v. Coastal Corp.*, 503 U.S. 131, 137–39 (1992).

¹³⁴ *Hyde*, 962 F.3d at 1310.

¹³⁵ *Id.* at 1309.

¹³⁶ *Id.* at 1309 (citing *Willy*, at 137–39; and then *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 395 (1990)).

¹³⁷ *Id.* at 1309–10 (citing *Willy*, 503 U.S. at 137).

by the constitution for a case or controversy—a ruling on collateral matters does not signify a court’s assessment of the legal merits of the case, such as in a Rule 11 challenge.¹³⁸ Instead, a ruling on collateral matters concerns a collateral issue: “whether the attorney has abused the judicial process” which does not improperly consider the “‘case or controversy’ over which it lacks jurisdiction.”¹³⁹ Also, exercising jurisdiction over a collateral matter such as sanctions promotes having rules of procedure obeyed—an interest that outlives the merits of a case.¹⁴⁰ The Eleventh Circuit concluded that otherwise, “parties who abuse the judicial procedures could get off scot-free anytime it turned out that the district court lacked subject matter jurisdiction.”¹⁴¹ The court announced that it joins several other Circuits in holding that district courts in the Eleventh Circuit “may address a sanctions motion based on its inherent powers or § 1927 even if it lacks jurisdiction over the underlying case.”¹⁴²

C. Forum Non Conveniens Does Not Have a “Foreign Investment” Standard and Does Not Turn on Whether Foreign Plaintiffs Outnumber Domestic Plaintiffs

In *Otto Candies, LLC v. Citigroup, Inc.*,¹⁴³ the Eleventh Circuit engaged in a thorough analysis of the doctrine of *forum non conveniens* and held that neither (1) the choice of two American plaintiffs to invest in a foreign entity, nor (2) the fact that thirty-seven foreign plaintiffs outnumbered the two American plaintiffs eroded the deference owed to their choice of forum.¹⁴⁴

The complex Racketeer Influenced and Corrupt Organizations Act (RICO) case involved two American plaintiffs, thirty-seven foreign plaintiffs, one American defendant, and an allegedly fraudulent scheme that took place in America and in Mexico, with the American defendant

¹³⁸ *Id.* at 1309.

¹³⁹ *Id.* (quoting *Willy*, 503 U.S. at 138).

¹⁴⁰ *Id.* at 1310 (internal punctuation omitted).

¹⁴¹ *Id.*

¹⁴² *Id.* See also *Ratliff v. Stewart*, 508 F.3d 225, 231 n. 7 (5th Cir. 2007); *Red Carpet Studios Div. of Source Advant., Ltd. v. Sater*, 465 F.3d 642, 645 (6th Cir. 2006); *In re Jaritz Indus.*, 151 F.3d 93, 96–97 (3d Cir. 1998); *Fidrych v. Marriott Int’l, Inc.*, 952 F.3d 124, 137–38 (4th Cir. 2020); *Zerger & Mauer LLP v. City of Greenwood*, 751 F.3d 928, 931 (8th Cir. 2014). The opinion was authored by Judge Amul R. Thapar, United States Circuit Judge for the Sixth Circuit, sitting by designation. The Sixth Circuit is one of the other Circuits in agreement with the rule announced in *Hyde*.

¹⁴³ 963 F.3d 1331 (11th Cir. 2020).

¹⁴⁴ *Id.* at 1335.

allegedly engaging in fraudulent activity in the United States.¹⁴⁵ Faced with these allegations, the district court granted the defendant's motion to dismiss for *forum non conveniens*.¹⁴⁶ The Eleventh Circuit reversed, holding that "the district court mistakenly gave only 'reduced' deference to the American plaintiffs' choice of forum" and that "the American defendant—which had the burden of persuasion—did not support its claims that most of the relevant documents and witnesses [were] located in Mexico."¹⁴⁷

The underlying factual allegations were complex, but distilled to their essence, were that a lender (Citigroup) provided fraudulent cash advances to a Mexican company that lured the plaintiffs "into investing in or contracting with" the company and that Citigroup knowingly misrepresented the company's financial stability.¹⁴⁸ Although the scandal began unfolding in Mexico, it "reverberated in the United States."¹⁴⁹ Specifically, "[t]he plaintiffs allege that some of the misrepresentations were made during meetings in the United States, on telephone calls to and from the United States, in emails located on servers in the United States, and in written materials reviewed, revised, or approved by Citigroup personnel in the United States."¹⁵⁰ Even so, the district court granted Citigroup's motion to dismiss for *forum non conveniens*.¹⁵¹

Forum non conveniens is a common law doctrine, which provides that a district court has the power to decline to hear a case even when jurisdiction and venue are proper.¹⁵² It is flexible and designed to prevent litigation that would be oppressive and vexatious to a defendant.¹⁵³ "Because the plaintiff's forum choice 'should rarely be disturbed,' a *forum non conveniens* dismissal is subject to three conditions."¹⁵⁴ Pertinent to this article, one of the factors is that "the balance of the relative private and public interests must weigh in favor of dismissal to justify invocation of the doctrine."¹⁵⁵

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ *Id.* at 1337.

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ *Id.* at 1338. See *Otto Candies, LLC v. Citigroup, Inc.*, No. 16-cv-20725-GAYLES, 2018 U.S. Dist. LEXIS 14646, at *3 (S.D. Fla. June 15, 2018).

¹⁵² *Otto Candies*, 963 F.3d at 1338.

¹⁵³ *Id.* at 1338.

¹⁵⁴ *Id.* (internal citations omitted) (quoting *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508 (1947)).

¹⁵⁵ *Id.*

In a lengthy opinion, the court examined all factors, but two stood out. First, with respect to the private interest factor, the court held that “investment in a foreign entity or country alone is not enough to dilute the threshold presumption that an American citizen has chosen the most convenient forum.”¹⁵⁶ Overcoming that threshold is a heavy burden for the defendant.¹⁵⁷ The defendant must offer “‘positive evidence of unusually extreme circumstances,’ and the district court must be ‘thoroughly convinced that material injustice is manifest before exercising any such discretion as may exist to deny a United States citizen access to the courts of this country.’”¹⁵⁸

Citigroup failed to offer such positive evidence, and the Eleventh Circuit was not convinced that Citigroup would suffer material injustice by having to litigate in its home country.¹⁵⁹ Important to the analysis was the fact that, although the claims arose from business dealings in Mexico, the plaintiffs did not complain that the conduct or injuries occurred primarily in Mexico.¹⁶⁰ Even though Citigroup insisted that “the fraud against the plaintiffs was really perpetrated by Mexican entities in Mexico,” the dispute focused on Citigroup’s conduct in the United States, as several of the allegedly fraudulent communications occurred in the United States.¹⁶¹ Moreover, Citigroup, a United States resident, was the only defendant.¹⁶² For those reasons, the Eleventh Circuit did not find persuasive Citigroup’s argument that a trial here would be inconvenient to it.¹⁶³

Disposing of that issue, the court then turned to Citigroup’s argument that “where foreign plaintiffs significantly outnumber domestic plaintiffs, diminished deference should be applied to all of the plaintiffs’ forum choice.”¹⁶⁴ The court noted that “the Ninth Circuit rejected the argument that *Piper Aircraft* stands for the proposition that ‘when both domestic and foreign plaintiffs are present, the strong presumption in

¹⁵⁶ *Id.* at 1340.

¹⁵⁷ *Id.* at 1339.

¹⁵⁸ *Id.* (quoting *SME Racks, Inc. v. Sistemas Mecanicos Para Electronica*, 382 F.3d 1097, 1101 (11th Cir., 2004)).

¹⁵⁹ *Id.* at 1341–43.

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

¹⁶² *Id.*

¹⁶³ *Id.* (“When an American plaintiff sues an American defendant for conduct allegedly occurring in the United States, it should not be easy for the defendant to obtain a *forum non conveniens* dismissal.”).

¹⁶⁴ *Id.*

favor of the domestic plaintiff's choice of forum is somehow lessened.”¹⁶⁵ In addition to agreeing with the Ninth Circuit on that point, the court found no “practical or doctrinal basis to reduce deference to domestic plaintiffs who sue alongside foreign plaintiffs, particularly when they all sue a single American defendant for conduct that they allege occurred in the United States.”¹⁶⁶ This is because “the presence of foreign plaintiffs does not change the otherwise domestic nature of a complaint—here, that Citigroup committed wrongs in or from the United States, where it is based.”¹⁶⁷

Finally, addressing the potential inconvenience of Citigroup having to travel to Mexico for dozens of depositions, the court noted that “[t]he district court has broad discretion over the location of depositions and the general rule is that plaintiffs are required to make themselves available for examination in the district in which they bring suit,”¹⁶⁸ while, in contrast, the foreign plaintiffs would not be able to “drag Citigroup to all corners of the globe to take corporate depositions, as there is a presumption that a defendant will be deposed in the district of its residence or principal place of business.”¹⁶⁹ Thus, “the ratio of domestic to foreign plaintiffs does not necessarily have a bearing on Citigroup’s convenience.”¹⁷⁰

In sum, it was inappropriate for the district court to discount or reduce the deference owed to the chosen forum of the American plaintiffs based on their decision to invest or transact business abroad. Nor was there any other reason to deviate from the normal rule that an American plaintiff suing in the United States is presumed to have chosen the most convenient forum. A remand is therefore warranted.¹⁷¹

The court cautioned, however, that its holding was narrow and that “[t]he plaintiff-friendly, facial reading of the complaint leads only to an *initial* presumption.”¹⁷² In fact, “[t]hat presumption is not dispositive, and a defendant can always marshal positive evidence to overcome it.”¹⁷³

¹⁶⁵ *Id.* at 1344 (quoting *Carijano v. Occidental Petroleum Corp.*, 643 F.3d 1216, 1228 (9th Cir. 2011)).

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

¹⁶⁸ *Id.* (internal citations omitted).

¹⁶⁹ *Id.* at 1344–45. As an aside, with the proliferation of remote video depositions, such an issue is likely become less significant over time. *See generally* FED. R. CIV. P. 30(b)(4).

¹⁷⁰ *Otto Candies*, 963 F.3d at 1345.

¹⁷¹ *Id.* at 1345–46.

¹⁷² *Id.*

¹⁷³ *Id.*

V. SHAREHOLDER CLAIMS

A. Federal Courts Should Look to State Law to Decide Whether a Shareholder's Claim Brought Under a Federal Statute is Direct or Derivative

In *Freedman v. magicJack Vocaltec Ltd.*,¹⁷⁴ the Eleventh Circuit addressed an issue of first impression—whether federal courts should look to state law to decide whether a shareholder's claim brought under a federal statute is direct or derivative.¹⁷⁵ Ultimately, the court held “that federal courts should look to state law to decide the issue.”¹⁷⁶

The plaintiff, a shareholder of magicJack Vocaltec Ltd. (magicJack) filed a putative class action against magicJack and individuals who were current or former magicJack directors. He alleged that magicJack issued two proxy statements that contained material misrepresentations about (1) the valuation and financial prospects of a company (Broadsmart) that magicJack had previously acquired; and (2) a compensation package for magicJack executives. After the two proxy statements were issued, magicJack entered into a sale agreement providing that magicJack would be sold for \$8.71 per share. Freedman claimed, on behalf of himself and the putative class, to have suffered injuries based on misleading information contained in the proxies (*i.e.*, they were denied the ability to exercise an informed vote). He also claimed that he and the other shareholders were injured due to the share price, which was allegedly less than an earlier non-binding, pre-due diligence offer.¹⁷⁷

The complaint contained a count for alleged violation of Section 14(a) of the Securities and Exchange Act of 1934¹⁷⁸ (the Act) and SEC Rule 14a–9. magicJack moved to dismiss, arguing that the claims were derivative in nature and Plaintiff had not made the required demand on the corporation before asserting the derivative claim.¹⁷⁹

Although an issue of first impression for the Eleventh Circuit, the court noted that the Second,¹⁸⁰ Sixth,¹⁸¹ Seventh,¹⁸² Eighth,¹⁸³ and

¹⁷⁴ 963 F.3d 1125 (11th Cir. 2020).

¹⁷⁵ *Id.* at 1130.

¹⁷⁶ *Id.* at 1134.

¹⁷⁷ *Id.* at 1128–29.

¹⁷⁸ Securities and Exchange Act, 15 U.S.C. § 78n(a) (1934).

¹⁷⁹ *Freedman*, 963 F.3d at 1130.

¹⁸⁰ *AHW Inv. P'ship v. Citigroup, Inc.*, 806 F.3d 695, 699 (2d Cir. 2015).

¹⁸¹ *Casden v. Burns*, 306 F. App'x 966, 974 (6th Cir. 2009).

¹⁸² *In re Abbott Labs. Derivative Shareholders Litig.*, 325 F.3d 795, 803 (7th Cir. 2003); *Boland v. Engle*, 113 F.3d 706, 715 (7th Cir. 1997).

¹⁸³ *Kokocinski ex rel. Medtronic, Inc. v. Collins*, 850 F.3d 354, 359 n.4 (8th Cir. 2017).

Ninth¹⁸⁴ Circuits have all held that, “although federal law provides the rule of decision, federal courts should look to state law in deciding the issue of whether a particular suit is direct or derivative.”¹⁸⁵ This is because, “when a federal court fills gaps in a federal statute with state law, the ‘state law is incorporated into federal common law.’ So, we look to the law of the state (or place) of incorporation to determine whether an action is direct or derivative.”¹⁸⁶ There were two reasons for this. “First, ‘corporate law is overwhelmingly the province of the states.’”¹⁸⁷ This provides “certainty and predictability of result while generally protecting the justified expectations of parties with interests in the corporation.”¹⁸⁸ Second, when “private parties have entered into legal relationships with the expectation that their rights and obligations would be governed by state-law standards”—such as corporations, which are creatures of state law—“there is a presumption that state law should be incorporated into federal common law.”¹⁸⁹ For those reasons, the Eleventh Circuit held for the first time that “federal courts should look to state law to decide the issue of whether a claim brought under a federal statute is direct or derivative.”¹⁹⁰

VI. CONCLUSION

The 2020 survey period yielded several noteworthy decisions, many of which concerned issues of first impression in the Eleventh Circuit. While the survey is not intended to be exhaustive of all noteworthy cases decided by the Eleventh Circuit in 2020, the authors have attempted to provide material that will be useful to practitioners with relevant updates in the area of federal trial practice and procedure in the Eleventh Circuit.

¹⁸⁴ *Lapidus v. Hecht*, 232 F.3d 679, 682 (9th Cir. 2000).

¹⁸⁵ *Freedman*, 963 F.3d at 1132.

¹⁸⁶ *Id.* (internal citations and punctuation omitted) (quoting *Kamen v. Kemper*, 500 U.S. 90, 98 (1991)).

¹⁸⁷ *Id.* (internal quotation marks omitted) (quoting *Marsh v. Rosenbloom*, 499 F.3d 165, 176 (2d Cir. 2007)).

¹⁸⁸ *Id.* (internal quotation marks omitted) (quoting *First Nat’l City Bank v. Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611, 621 (1983)); see also FED. R. CIV. P. 17(b).

¹⁸⁹ *Id.* at 1132–33 (internal quotation marks omitted) (quoting *Kamen*, 500 U.S. at 98).

¹⁹⁰ *Id.* at 1134. Applying the rule to the case, the court held that it was a direct action, regardless of the label plaintiff put on it, because he “failed to allege that he suffered damages independent of the damages that magicJack (and all of its shareholders) suffered”—the key issue in determining whether a claim is derivative. *Id.* at 1137.