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## Class Actions

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# Class Actions

Thomas M. Byrne\*  
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The United States Court of Appeals for the Eleventh Circuit's 2021 class-action work featured an important decision on the existence of an independent ascertainability requirement for class certification. In an abrupt reversal of two unpublished opinions acknowledging the existence of such a requirement, the court aligned itself with most circuits that have addressed the question in demoting the ascertainability of class membership to a factor to be considered in establishing the manageability of a class action, rather than an independent requirement. The court's other significant cases concerned class settlements and standing.<sup>1</sup>

## I. REQUIREMENTS FOR CLASS CERTIFICATION

### A. *Administrative Feasibility: Cherry v. Dometic Corp.*

The Eleventh Circuit joined with the majority of circuits in holding that a threshold determination that identifying class members is

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1. For an analysis of class action topics during the prior Survey period, see Thomas M. Byrne & Stacey McGavin Mohr, *Class Actions, Eleventh Circuit Survey*, 72 MERCER L. REV. 1049 (2021).

administratively feasible is not a separate requirement for class certification. The ruling, in the closely watched case of *Cherry v. Dometic Corporation*,<sup>2</sup> which attracted numerous *amicus* briefs, represents a minor victory for the plaintiffs' class-action bar. The issue before the court was framed in terms of the "ascertainability" requirement for membership in a class action.<sup>3</sup> The specific issue was whether the ascertainability requirement means not only that the members of a class are capable of being determined, but also that class membership can be determined without extensive factual inquiry.<sup>4</sup> In an opinion by Chief Judge William Pryor, the court held that Federal Rule of Civil Procedure 23<sup>5</sup> imposed no such heightened administrative feasibility requirement but that administrative feasibility may be considered in weighing the manageability criterion for Rule 23(b)(3) classes.<sup>6</sup> In so holding, the court rejected the unpublished opinions of two Eleventh Circuit panels that had held to the contrary, *Karhu v. Vital Pharmaceuticals, Inc.*<sup>7</sup> and *Bussey v. Macon County Greyhound Park, Inc.*<sup>8</sup>

The court's opinion tracks the reasoning of the leading opinion, rejecting the heightened ascertainability requirement, *Mullins v. Direct Digital, LLC*,<sup>9</sup> which forcefully counters the leading opinion to the contrary in *Carrera v. Bayer Corp.*<sup>10</sup> The court in *Cherry*, however, based its reasoning primarily on the text of Rule 23, while the *Mullins* court proceeded from the broader policymaking premise that certifying small-dollar class actions is a public good, a form of remedy for wrongdoing that may be imposed before any wrongdoing has actually been proven in accord with due process.<sup>11</sup>

Like the *Mullins* court, the court in *Cherry* posited that a class must be adequately defined and clearly ascertainable, based on objective

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2. 986 F.3d 1296 (11th Cir. 2021). Chief Judge William Pryor authored the opinion for the court.

3. *Id.* at 1300.

4. *Id.*

5. FED. R. CIV. P. 23.

6. *Cherry*, 986 F.3d at 1304–05.

7. 621 F. App'x 945 (11th Cir. 2015). For our analysis of the court's opinion, see Thomas M. Byrne & Stacey McGavin Mohr, *Class Actions*, 67 MERCER L. REV. 841, 849–53 (2016).

8. 562 F. App'x 782 (11th Cir. 2014); see also Thomas M. Byrne & Stacey McGavin Mohr, *Class Actions*, 66 MERCER L. REV. 903, 916–18 (2015).

9. 795 F.3d 654 (7th Cir. 2015).

10. 727 F.3d 300 (3d Cir. 2013).

11. *Mullins*, 795 F.3d at 658.

criteria.<sup>12</sup> No court disagrees. Like *Mullins*, *Cherry* rejects any additional requirement that class membership be determinable without extensive individual factual inquiry.<sup>13</sup> Both courts hold that administrative feasibility may be considered in determining whether a proposed class action is superior to other available methods of adjudication, but assume that the problems in identifying class members would not be relevant to determinations of commonality (as reinvigorated by *Wal-Mart Stores, Inc. v. Dukes*<sup>14</sup>) or typicality, under Rule 23(a).<sup>15</sup> Additionally, like *Mullins*, *Cherry* appears to give short shrift to class members' core due-process rights to notice and opportunity to opt out of the Rule 23(b)(3) class action.<sup>16</sup> If class members cannot be identified, then adequate notice to them is obviously problematic. The court in *Cherry* also seems to overestimate the rigor (or lack thereof) with which the superiority requirement has been applied historically in district courts.

Administrative infeasibility, of course, would be relevant as well to Rule 23(b)(3)'s requirement that common issues predominate over individual issues, but that is not directly addressed in the court's opinion.

The district court in *Cherry* had refused to certify a Rule 23(b)(3) product liability class involving claims that the defendant's refrigerators had a defect that posed a fire risk.<sup>17</sup> The proposed class consisted of all persons who had purchased the products in selected states since 1997. The district court agreed with the defendant that the plaintiffs failed to show that their proposed method of the identification of class members would be workable. The court then dismissed the case on erroneous jurisdictional grounds, based on the denial of class certification, which does not divest a district court of subject-matter jurisdiction under the Class Action Fairness Act (CAFA).<sup>18</sup> The Eleventh Circuit reversed and remanded for further proceedings consistent with its opinion.<sup>19</sup>

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12. *Cherry*, 986 F.3d at 1299.

13. *Id.* at 1304–05.

14. 564 U.S. 338 (2011).

15. *Cherry*, 986 F.3d at 1303.

16. *Id.* at 1304.

17. *Id.* at 1299–1301.

18. *Id.* at 1300; 28 U.S.C. §§ 1711–1715 (2005).

19. *Cherry*, 986 F.3d at 1305.

The Eleventh Circuit joined the Second, Sixth, Seventh, Eighth and Ninth Circuits in rejecting heightened ascertainability.<sup>20</sup> The First, Third and Fourth Circuits have adopted the requirement.<sup>21</sup> The deep circuit split seems overdue to be resolved by the Supreme Court of the United States. In 2021, the Supreme Court passed on an opportunity to consider the application of Rule 23's certification requirements to putative classes with unidentifiable class members. In *TransUnion LLC v. Ramirez*,<sup>22</sup> the Court did not reach the question of whether Rule 23(a)'s typicality requirement was met where few members of the putative class shared the named plaintiff's alleged injury. The Court instead ruled that the majority of class members did not have Article III standing and remanded for consideration of the propriety of certification on that basis.<sup>23</sup>

*B. Adequacy of Class Representative: Huang v. Equifax Inc. (In re Equifax Inc. Customer Data Security Breach Litigation)*

*Huang v. Equifax Inc. (In re Equifax Inc. Customer Data Security Breach Litigation)*<sup>24</sup> upheld the district court's approval of a class settlement arising out of the Equifax data breach—except for the incentive awards to the class representatives, as to which the court reversed the district court in light of the Eleventh Circuit's 2020 decision in *Johnson v. NPAS Solutions, LLC*.<sup>25</sup>

The settlement in question arose from “scores of class actions” filed in the wake of a 2017 data breach affecting Equifax and its affiliates.<sup>26</sup> The cases were consolidated in the United States District Court for the

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20. *In re Petrobras Sec. Litig.*, 862 F.3d 250, 267 (2d Cir. 2017); *Rikos v. P&G*, 799 F.3d 497, 525 (6th Cir. 2015); *Mullins*, 795 F.3d at 662; *Sandusky Wellness Ctr. v. MedTox Sci.*, 821 F.3d 992, 995–96 (8th Cir. 2016); *Briseno v. ConAgra Foods*, 844 F.3d 1121, 1123 (9th Cir. 2017).

21. *In re Nexium Antitrust Litig.*, 777 F.3d 9, 19 (1st Cir. 2015); *Carrera*, 727 F.3d at 307–08; *EQT Prod. Co. v. Adair*, 764 F.3d 347, 358–59 (4th Cir. 2014).

22. 141 S. Ct. 2190 (2021).

23. *Id.* at 2214.

24. 999 F.3d 1247, 1257 (11th Cir. 2021). The opinion for the court was authored by Judge Beverly Martin.

25. 975 F.3d 1244 (11th Cir. 2020). In *NPAS Solutions*, the court held that federal law prohibits such incentive payments to class representatives, even when part of an agreed settlement. A petition for rehearing en banc has been filed, supported by several *amicus* briefs. The court has not yet ruled on the petition but meanwhile has withheld issuance of the mandate. Order, *Johnson v. NPA Sols., LLC*, No. 18-12344 (11th Cir. Nov. 9, 2020). For further discussion of *NPAS Solutions* and its impact, see Byrne & Mohr, *supra* note 1, at 1050–52.

26. *In re Equifax Inc. Customer Data Sec. Breach Litig.*, 999 F.3d at 1256.

Northern District of Georgia, and the consolidated complaint filed on behalf of consumers included claims under the Fair Credit Reporting Act (FCRA) and various state consumer-protection and data-breach statutes, as well as claims for negligence and negligence per se. The settlement—which followed eighteen months of negotiations between the parties and with various state and federal regulators, as well as mediation before a retired federal judge—bound approximately 147 million class members and provided for reimbursement for documented out-of-pocket losses; compensation for up to twenty hours spent dealing with either identity theft or taking preventative measures; free credit monitoring and identity theft prevention services for ten years (with an option for alternative cash consideration); and seven years of identity restoration services. The settlement did not provide for any potential reversion to Equifax and further required that Equifax spend at least \$1 billion on data security over five years.<sup>27</sup>

The settlement drew objections from 388 class members, six of whom appealed following the district court’s approval of the settlement.<sup>28</sup> In a lengthy opinion, the Eleventh Circuit affirmed the district court’s approval of the settlement except with respect to the incentive awards to the class representatives.<sup>29</sup>

First, citing its recent en banc decision in *Muransky v. Godiva Chocolatier, Inc.*,<sup>30</sup> the court rejected the argument that class members who did not actually have their identities stolen lacked the injury-in-fact required to establish Article III standing.<sup>31</sup> The court similarly rejected the novel argument that the settlement of a class action ends the Article III “controversy” to strip the court of jurisdiction.<sup>32</sup>

Second, the court found no abuse of discretion in the district court’s requirement that each objector provide the objector’s name, address, signature, grounds for objection, previous objections in class actions, and potential deposition dates.<sup>33</sup> The requirements “were not particularly burdensome,” the court decided, and the district court had imposed them for the stated purpose of “avoiding a ‘chaotic process.’”<sup>34</sup> The court suggested that the sheer size of the class nudged these

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27. *Id.* at 1256–60.

28. *Id.* at 1257.

29. *Id.* at 1284.

30. 979 F.3d 917 (11th Cir. 2020). For an analysis of *Muransky*, see our Article in last year’s Survey. Byrne & Mohr, *supra* note 1, at 1056–60.

31. *In re Equifax Inc. Customer Data Sec. Breach Litig.*, 999 F.3d at 1263.

32. *Id.* at 1264.

33. *Id.* at 1267.

34. *Id.* at 1266.

measures, similar to some that have been criticized by other courts, into the realm of the court's discretion.<sup>35</sup>

Third, the court found no reversible error in the district court's adoption of an order "ghostwritten" by the plaintiffs' counsel.<sup>36</sup> "Ghostwriting" by litigants is generally disfavored, but the critical question is "whether 'the process by which the judge arrived at the order was fundamentally unfair.'"<sup>37</sup> Here, where the district court announced its ruling in court and then asked the plaintiffs' counsel to submit an order in accordance with that ruling, which the district court would "consider signing," the process was not fundamentally unfair.<sup>38</sup>

Fourth, the court upheld the district court's decision to approve the settlement, finding that the district court properly applied the factors set forth in *Bennett v. Behring Corp.*,<sup>39</sup> to determine that the settlement was fair, reasonable, and adequate.<sup>40</sup>

Fifth, the court rejected an objector's claim that the settlement class did not satisfy Rule 23's adequacy requirement.<sup>41</sup> The objector argued that there was a fundamental intraclass conflict because some class members had claims for state statutory damages and others did not.<sup>42</sup> The court found this difference less than fundamental, especially in light of the objector's failure to show that the statutory damages were actually valuable: In fact, the court noted, "[the objector] doesn't cite a single case in which a plaintiff recovered statutory damages under either [relevant state] statute in a data breach case."<sup>43</sup>

Sixth, the court affirmed the \$77.5 million attorney's fee award.<sup>44</sup> The district court determined that the requested fee was just over 20% of the \$380.5 million settlement fund, applying the percentage method described in *Camden I Condo. Assoc., Inc. v. Dunkle*.<sup>45</sup> The district court also used "the lodestar method as a cross-check."<sup>46</sup> On appeal, the Eleventh Circuit rejected an objector's argument that *Perdue v. Kenny*

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35. *Id.* at 1267.

36. *Id.* at 1269.

37. *Id.* (quoting *In re Colony Square Co.*, 819 F.2d 272, 276 (11th Cir. 1987)).

38. *In re Equifax Inc. Customer Data Sec. Breach Litig.*, 999 F.3d at 1269–70.

39. 737 F.2d 982 (11th Cir. 1984).

40. *In re Equifax Inc. Customer Data Sec. Breach Litig.*, 999 F.3d at 1277–78.

41. *Id.* at 1273–74.

42. *Id.* at 1275.

43. *Id.* at 1276.

44. *Id.* at 1278.

45. 946 F.2d 768 (11th Cir. 1991).

46. *In re Equifax Inc. Customer Data Sec. Breach Litig.*, 999 F.3d at 1278.

A.,<sup>47</sup> required that the district court use the lodestar rather than the percentage method, noting that *Perdue* involved a fee-shifting statute.<sup>48</sup> The holding from *Camden I*, still applies in common-fund cases: “The Supreme Court has never categorically prohibited the percentage method in common fund cases.”<sup>49</sup> The court also rejected another objector’s argument that the district court should have considered “economies of scale” as part of its evaluation of the settlement, given the size of the settlement fund (a “megafund,” as the objector called it): “We decline to add an additional factor requiring the District Court to expressly consider the economies of scale in a megafund case.”<sup>50</sup>

Finally, the court affirmed the district court’s imposition of a \$2,000 appeal bond on each objector, holding that the district court’s imposition of a bond requirement based on its determination under Federal Rules of Appellate Procedure Rule 7<sup>51</sup> that there was a “substantial risk” of nonpayment was permissible.<sup>52</sup>

The only settlement term not approved by the Eleventh Circuit was the incentive award provision, which the court held was prohibited by *NPAS Solutions*.<sup>53</sup> Notably, *NPAS Solutions* involved claims under a federal statute, while the remaining claims in *In re Equifax Inc. Customer Data Security Breach Litigation* at the time of settlement were all state-law claims. Still, the *In re Equifax Inc. Customer Data Security Breach Litigation* panel determined that “*NPAS Solutions* binds us here.”<sup>54</sup>

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47. 559 U.S. 542 (2010).

48. *In re Equifax, Inc. Customer Data Sec. Breach Litigation*, 999 F.3d at 1279.

49. *Id.*

50. *Id.* at 1280.

51. FED. R. APP. P. 7

52. *In re Equifax, Inc. Customer Data Sec. Breach Litigation*, 999 F.3d at 1283–84.

53. *NPAS Solutions*, 975 F.3d at 1244.

54. *In re Equifax, Inc. Customer Data Sec. Breach Litigation*, 999 F.3d at 1282. In light of *NPAS Solutions*, the distinction between federal and state-law claims has been one of the bases on which district courts had approved settlements. *See e.g., Roth v. GEICO Gen. Ins. Co.*, No. 16-cv-62942WPD, 2021 U.S. Dist. LEXIS 23105, at \*37 (S.D. Fla. Feb. 8, 2021) (affirming settlement with incentive award because “state law governs the issue of Service Awards” and *NPAS Solutions* therefore “is inapplicable to this case”). *NPAS Solutions* may yet be revisited by the court en banc.

The *NPAS Solutions* decision did nothing to diminish the court’s reputation as one of the more class-settlement-friendly circuits. Probably the most significant class settlement decision of 2021 came from the Ninth Circuit, in *Briseno v. Henderson*, 998 F.3d 1014 (9th Cir. 2021). *Briseno* vacated a district court’s approval of a class settlement in which class counsel would have received seven times more money than the class members. The settlement also featured an injunction that the court termed worthless, and a provision that the agreed amount of attorney’s fees to be paid by the defendant



*C. Class Certification Discovery: Rensel v. Centra Tech*

The court wasted no time in applying the court's holding in *Cherry*. In *Rensel v. Centra Tech, Inc.*,<sup>55</sup> the court vacated, as an abuse of discretion, a Florida district court's denial of class certification on the ground of lack of administrative feasibility.<sup>56</sup> The case was a putative securities fraud action premised on a cryptocurrency offering by Centra Tech, the co-founders of which wound up being charged with criminal securities law violations. An investor subsequently brought an action under the Securities Act of 1933,<sup>57</sup> and eventually, with a co-lead plaintiff, moved for certification of three subclasses of investors.<sup>58</sup> The plaintiffs proposed to identify class members using a spreadsheet cited by the government during the criminal case. But the district court found that means of identification to be inadequate under the then-prevailing *Karhu* holding, noting that the spreadsheet provided information on only one of the subclasses and there was no assurance that the prosecutors would grant the plaintiffs access to the spreadsheet in the first place.<sup>59</sup> In rejecting this reasoning, the Eleventh Circuit concluded that the proposed subclasses "easily meet the *Cherry* standard for ascertainability."<sup>60</sup> As for the two subclasses of direct purchasers, membership in those classes could be determined in part through the spreadsheet and, as the court theorized, could have been determined from additional company records or through "submission of claims forms verified by transaction records."<sup>61</sup> The court conceded that the subclass of open market purchasers may have presented some difficulty but held that the district court should have made further inquiry into whether membership in that subclass was capable of determination.<sup>62</sup>

The court also determined the abuse of discretion in the district court's alternative ground for denial of class certification was the failure

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would revert to the defendant if not approved by the court. The court held that the district court had failed to apply to Rule 23(e)(2) standard for approval of class settlements, which was revised in 2018.

55. 2 F.4th 1359 (11th Cir. 2021). The court's opinion was authored by Senior Judge Stanley Marcus.

56. *Id.* at 1361.

57. Securities Act of 1933, 15 U.S.C. §§ 77a–77aa (1933).

58. *Rensel*, 2 F.4th at 1363.

59. *Id.* at 1364.

60. *Id.* at 1370.

61. *Id.*

62. *Id.*

to timely move for it.<sup>63</sup> Under that Private Securities Litigation Reform Act (PSLRA),<sup>64</sup> the filing of a motion to dismiss results in a stay of all discovery. Relying on Federal Rule of Civil Procedure Rule 23(c)(1)(A)'s requirement that a class be certified "at an early practicable time," the district court found that the plaintiffs' certification motion, filed eighteen months after the initial complaint and six months after an amended complaint, was untimely.<sup>65</sup> The Eleventh Circuit acknowledged that "[d]istrict courts have broad discretion to control their dockets and surely may deny class certification motions as untimely, such as when unreasonable delay causes prejudice to the opposing party."<sup>66</sup> But the court noted that for fifteen of the eighteen months between the filing of the initial complaint and the filing of the motion to certify, the PSLRA automatic stay rule prevented the plaintiffs from conducting any discovery to support their motion for class certification.<sup>67</sup> On the facts of the case, the court concluded that the plaintiffs "were entitled to conduct some discovery before moving for class certification."<sup>68</sup> The district court also failed to set a deadline for filing the class certification motion.<sup>69</sup> The parties timely filed a Rule 26(f) joint discovery plan and conference report, but the district court did not enter a scheduling order, an omission which violated the Federal Rules of Civil Procedure and the Local Rules for the United States District Court for the Southern District of Florida.<sup>70</sup> The court determined that the plaintiffs had every reason to believe that their motion would be timely.<sup>71</sup>

*D. Interlocutory Review Under Rule 23(f): Progressive v. Paris*

In *Progressive American Insurance Co. v. Paris*,<sup>72</sup> the court denied a petition for interlocutory review under Rule 23(f) of the Federal Rules of Civil Procedure filed by insurance companies seeking review of certification of two classes of Florida insureds who claimed they were denied full payment for their total loss claims under Florida law.<sup>73</sup> After

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63. *Id.*

64. 15 U.S.C. § 78u-4 (2010).

65. *Rensel*, 2 F.4th at 1367.

66. *Id.* at 1365.

67. *Id.*

68. *Id.*

69. *Id.* at 1368.

70. *Id.*

71. *Id.*

72. No. 20-90028-D, 2021 U.S. App. LEXIS 38552 (11th Cir. Jan. 15, 2021).

73. *Id.* at \*2.

noting that interlocutory review is disfavored, the court explained that the insurers did not appear to argue that the most important criterion for such review—that the certification ruling is the death knell on the merits for either the plaintiff or the defendant—was present.<sup>74</sup> The insurers argued primarily that there was substantial weakness in the orders, but the court determined that they had failed to show the sort of weakness required for review before final judgment.<sup>75</sup> The court also noted that the stage of the litigation, after discovery had closed and with summary judgment motions pending that were likely to be dispositive, weighed against interlocutory review.<sup>76</sup>

## II. INJURY AND ARTICLE III STANDING

### A. *Risk of Identity Theft as Injury: Tsao v. Captiva*

In *Tsao v. Captiva MVP Restaurant Partners, LLC*,<sup>77</sup> the Eleventh Circuit took a stand on whether a substantial risk of identity theft, fraud, and other future harm constitutes Article III standing in data breach cases.<sup>78</sup> Affirming the district court's decision, the Eleventh Circuit held that the plaintiff, Tsao, lacked Article III standing because he could not demonstrate a substantial risk of identity theft and because he cannot manufacture standing.<sup>79</sup> The court dismissed the case without prejudice.<sup>80</sup>

The facts of this case are straightforward. Defendant PDQ Restaurant experienced a data breach on May 19, 2017, when a hacker exploited the defendant's point of sale system and gained access to customers' personal data, including credit and debit card information.<sup>81</sup> The defendant posted a notice to customers that it was the target of a cyber-attack, and that customers who patronized any PDQ location between May 19, 2017, and April 20, 2018, might be affected.<sup>82</sup> The notice provided that the customers' personal information that "may have been accessed" included: cardholder names; credit card numbers;

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74. *Id.* at \*2–3.

75. *Id.* at \*3–4.

76. *Id.* at \*6.

77. 986 F.3d 1332 (11th Cir. 2021). The court's opinion was authored by Senior Judge Gerald Tjoflat.

78. *Id.* at 1334–35.

79. *Id.* at 1337.

80. *Id.* at 1335.

81. *Id.*

82. *Id.*

card expiration dates; and CVVs.<sup>83</sup> The plaintiff patronized the defendant's restaurants at least two times in October 2017, using two different credit cards. When plaintiff learned of the possible breach in 2018, he cancelled his cards.<sup>84</sup>

Less than two weeks after the defendant's announcement of the cyber-attack, the plaintiff filed a class action complaint listing various injuries that PDQ customers allegedly suffered as a result of the breach, including "theft of their personal financial information, unauthorized charges on their debit and credit card accounts, and ascertainable losses in the form of the loss of cash back or other benefits."<sup>85</sup> The plaintiff further asserted that he and the class members were

[P]laced at an imminent, immediate, and continuing increased risk of harm from identity theft and identity fraud, requiring them to take the time which they otherwise would have dedicated to other life demands such as work and effort to mitigate the actual and potential impact of the Data Breach on their lives.<sup>86</sup>

In response to the defendant's motion to dismiss, the plaintiff focused on three types of injuries he allegedly suffered to mitigate a perceived risk of future identity theft: lost cash back or reward points; lost time he spent addressing the problems caused by the breach; and restricted card access resulting from cancelling his credit cards.<sup>87</sup> The plaintiff argued that he possessed standing for two independent reasons: first, he and the class were at an increased risk of identity theft; and, second, he proactively took steps to mitigate this risk. The district court dismissed the plaintiff's complaint without prejudice for lack of standing, reasoning that he never once alleged that his credit cards were used by a thief or that his identity was stolen, or that he or anyone else ever actually suffered from the alleged misuse of customer credit card information. The district court found that such conclusory allegations of harm were speculative at best, and insufficient to satisfy Article III standing.<sup>88</sup>

The Eleventh Circuit began its analysis with an overview of standing case law.<sup>89</sup> Quoting *Spokeo, Inc. v. Robins*,<sup>90</sup> the court observed that for

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83. *Id.*

84. *Id.* at 1335–36.

85. *Id.* at 1335. (internal quotes omitted).

86. *Id.* at 1335–36.

87. *Id.* at 1336.

88. *Id.* at 1336–37.

89. *Id.* at 1337.

a plaintiff to have Article III standing, it must have “(1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision.”<sup>91</sup> To establish injury in fact, the court noted that a plaintiff must set forth allegations that “plausibly and clearly allege a concrete injury.”<sup>92</sup> The court distilled two legal principles relevant to plaintiff’s claims.<sup>93</sup>

First, a plaintiff alleging a threat of harm does not have Article III standing unless the hypothetical harm alleged is either “certainly impending” or there is a “substantial risk” of such harm. Second, if the hypothetical harm alleged is not “certainly impending,” or if there is not a substantial risk of the harm, a plaintiff cannot conjure standing by inflicting some direct harm on itself to mitigate a perceived risk.<sup>94</sup>

The court acknowledged a circuit split regarding whether a plaintiff may establish injury in fact based solely on the increased risk of identity theft.<sup>95</sup> As the court noted, “the Sixth, Seventh, Ninth, and D.C. Circuits have all recognized—at the pleading stage—that a plaintiff can establish injury-in-fact based on the increased risk of identity theft.”<sup>96</sup> The Second, Third, Fourth, and Eighth Circuits have declined to find standing on that basis.<sup>97</sup> The Eleventh Circuit ultimately sided with the Eighth Circuit’s holding in *Alleruzzo v. SuperValu, Inc.*,<sup>98</sup> which found no standing based on an “increased risk of future identity theft” theory, even where the plaintiff alleges actual misuse of personal information.<sup>99</sup> The *SuperValu* court was influenced by a June 2007 United States Government Accountability Office (GAO) report,<sup>100</sup> which pointed out that compromised credit or debit card information, without personal identifying information, “generally cannot be used alone to open unauthorized new accounts.”<sup>101</sup>

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90. 578 U.S. 330 (2016).

91. *Id.* at 338.

92. *Tsao*, 986 F.3d at 1337.

93. *Id.* at 1339.

94. *Id.* (quoting *Clapper v. Amnesty Int’l USA*, 568 U.S. 398, 409, 416 (2012)).

95. *Id.* at 1340.

96. *Id.*

97. *Id.*

98. 870 F.3d 763 (8th Cir. 2017).

99. *Tsao*, 986 F.3d at 1342 (quoting *SuperValu*, 870 F.3d at 769).

100. U.S. Gov’t Accountability Off., GAO-07-737, Personal Information (2007).

101. *Tsao*, 986 F.3d at 1342 (quoting GAO report at page 30).

The Eleventh Circuit reasoned that, like the plaintiffs in *SuperValu*, Plaintiff Tsao alleged that hackers may have accessed and stolen credit card data.<sup>102</sup> And, although Tsao also cited the June 2007 GAO report, the court agreed with the Eighth Circuit that the report actually shows that there was no substantial risk of identity theft.<sup>103</sup> Plaintiff Tsao did not allege that social security numbers, birth dates, or driver's license numbers were compromised in the cyber-attack on PDQ.<sup>104</sup> The card information allegedly accessed by the PDQ hackers, therefore, could not be used alone to open a new account.<sup>105</sup> The plaintiff's conclusory allegations of increased identity-theft risk were not enough to confer standing, especially here, where the plaintiff effectively eliminated the risk of potential future fraud by immediately cancelling his cards.<sup>106</sup>

Finally, the court determined that the plaintiff's claims of actual, present injuries in his efforts to mitigate any risk of identity theft were insufficient to establish standing.<sup>107</sup> The plaintiff alleged that the cyber-attack required him to mitigate the harm, which resulted in three separate injuries: (1) lost opportunity to accrue cash back or rewards points on his cancelled cards; (2) costs associated with detection and prevention of identity theft and the lost time associated with cancelling his cards; and (3) restricted account access to preferred cards.<sup>108</sup> But the court concluded that these mitigation costs were voluntary and "inextricably tied to his perception of the actual risk of identity theft."<sup>109</sup> Because a plaintiff cannot manufacture standing by inflicting harm on himself in the face of hypothetical fear, the court again affirmed the district court's conclusion that the plaintiff failed to establish standing.<sup>110</sup>

#### *B. Standing for Declaratory Relief: Mack v. USAA*

In *Mack v. USAA Casualty Insurance Co.*,<sup>111</sup> the Eleventh Circuit dismissed for lack of an Article III "case or controversy," a putative class action in which the plaintiff sought a declaration that his insurer's

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102. *Id.* at 1343.

103. *Id.*

104. *Id.*

105. *Id.*

106. *Id.*

107. *Id.* at 1344.

108. *Id.*

109. *Id.* at 1344–45.

110. *Id.* at 1345.

111. 994 F.3d 1353 (11th Cir. 2021). Judge Andrew Brasher wrote the opinion for the court.

adjustment of total loss claims violates Florida law and money damages as corresponding “supplemental relief.”<sup>112</sup>

Leroy Mack brought an action against USAA in Florida state court following adjustment of his insurance claim for a totaled vehicle, seeking a declaration that the methodology USAA used to adjust his claim violated Florida law; a declaration that USAA was required to pay dealer fees as part of its settlement of the claim; and damages for unpaid title and license fees.<sup>113</sup> USAA removed the case, and the district court stayed the case pending appraisal under the terms of the insurance policy. Mack appealed that decision, and while the appeal was pending, the parties settled the claim for money damages. After that, the Eleventh Circuit requested supplemental briefing addressing whether Mack had Article III standing to pursue his remaining claims in federal court.<sup>114</sup>

The Eleventh Circuit dismissed the case for lack of subject-matter jurisdiction.<sup>115</sup> USAA, having invoked federal jurisdiction by removing the case, had the burden to establish the existence of a cognizable “case or controversy.”<sup>116</sup> The court “easily dispense[d] with the possibility that Mack has standing for prospective relief,” because his allegation that he and other class members “could reasonably anticipate suffering another total loss in the future” fell short of establishing a “substantial likelihood” of future injury.<sup>117</sup>

Turning to the question of standing to seek retrospective relief, the court held that Mack had not sought any such relief:

We will not construe Mack’s declaratory judgment claims as claims for retrospective relief for the purpose of assessing his standing . . . . Mack chose to frame his claims as seeking prospective relief through requests for declaratory judgments; he specifically chose not to pursue damages for the retrospective harm that he has also arguably alleged.<sup>118</sup>

This was unchanged by the fact that Mack would seek money damages as supplemental relief if his requested declaration were entered: “[T]he possibility of supplemental relief does not convert

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112. *Id.* at 1354.

113. *Id.* at 1355.

114. *Id.* at 1355–56.

115. *Id.* at 1359.

116. *Id.* at 1358.

117. *Id.* at 1357 (quoting *A&M Gerber Chiropractic LLC v. GEICO General Ins. Co.*, 925 F.3d 1205, 1215 (11th Cir. 2019)).

118. *Mack*, 994 F.3d at 1357.

Mack’s declaratory judgment claims into an effort to remedy past injuries.”<sup>119</sup>

The court distinguished its decision in *AA Suncoast Chiropractic Clinic, P.A. v. Progressive American Insurance Co.*,<sup>120</sup> which held that a claim seeking an injunction “restoring” insurance coverage limits should not have been certified for class treatment under Federal Rule of Civil Procedure Rule 23(b)(2) because the requested relief was “not an injunction at all.”<sup>121</sup> “Here, unlike in *AA Suncoast*, our inquiry is unrelated to whether Mack is entitled to the declaratory relief he seeks . . . . The issue before us now is whether Mack has alleged the type of harm necessary to establish his standing to bring declaratory judgment claims.”<sup>122</sup> Citing the principle that “all doubts about jurisdiction should be resolved in favor of remand to state court,”—a doctrine open to question, at least in CAFA cases, under *Dart Cherokee Basin Operating Co. v. Owens*,<sup>123</sup>—the court remanded the case with instructions that the unsettled claims be sent back to state court.<sup>124</sup>

### III. ENFORCEMENT OF ARBITRATION AGREEMENTS AND CLASS ACTION WAIVERS

#### A. Arbitration Agreement Defeating Class Action: *Hearn v. Comcast*

A Comcast arbitration agreement by which a former subscriber to the cable service agreed to arbitrate “any claim or controversy related to Comcast” was enforced by the court in *Hearn v. Comcast Cable Communications, LLC*,<sup>125</sup> overturning a contrary decision by the United States District Court for the Northern District of Georgia.<sup>126</sup> The arbitration agreement was included in Comcast’s subscriber agreement with the plaintiff, but the plaintiff terminated his service. A year and a half later, however, the plaintiff approached Comcast about renewing service.<sup>127</sup> In connection with that inquiry, Comcast made use of his

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119. *Id.* at 1358.

120. 938 F.3d 1170 (11th Cir. 2019).

121. *Id.* at 1175.

122. *Mack*, 994 F.3d at 1358.

123. 574 U.S. 81 (2014).

124. *Mack*, 994 F.3d at 1359 (quoting *Univ. of S. Ala. v. Am. Tobacco Co.*, 168 F.3d 405, 411 (11th Cir. 1999)).

125. 992 F.3d 1209 (11th Cir. 2021). The court’s opinion was authored by Judge Charles Wilson.

126. *Id.* at 1211.

127. *Id.*



credit report, which he claimed violated the Fair Credit Reporting Act (FCRA),<sup>128</sup> in a subsequent putative class action.<sup>129</sup>

The Eleventh Circuit began by noting that the court had previously held that an arbitration agreement governed by the Federal Arbitration Act (FAA)<sup>130</sup> can reach beyond matters addressed in the underlying contract.<sup>131</sup> But the court noted that the standard arbitration agreement typically covers disputes relating to the underlying contract.<sup>132</sup> The court deemed a “close question” to be presented by Comcast’s broad arbitration provision, but decided to leave it for another day.<sup>133</sup> Instead, the court reasoned that the plaintiff’s FCRA claim related to his subscriber agreement, for several reasons.<sup>134</sup> First, Comcast was able to conduct a credit check only because of the plaintiff’s previous relationship with Comcast. Second, the subscriber agreement included provisions dealing specifically with credit inquiries and reconnection. The plaintiff argued that he was not calling to reconnect services, because he had previously terminated them.<sup>135</sup> But the court concluded that the contract’s reconnection provision was broad enough to cover that eventuality and not just suspensions of service for delinquencies or failures in payment.<sup>136</sup> The court also noted that Comcast’s use of the information that it had on file concerning the plaintiff was foreseeable, and that the agreement’s credit inquiries provision directly related to his FCRA claim.<sup>137</sup> Interestingly, the scope of the arbitration agreement could have been committed by the agreement to the arbitrators, with an express delegation, but apparently was not, leaving the courts to decide scope questions.

Although the court remanded for a determination of other anti-arbitration arguments, including unconscionability, it does not appear that any of these issues were litigated in the district court.<sup>138</sup> After remand, the case had little activity for several months, until the district

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128. 15 U.S.C. §§ 1681–1681x (2021).

129. *Hearn*, 992 F.3d at 1211–12.

130. 9 U.S.C. §§ 1–16 (2021).

131. *Hearn*, 992 F.3d at 1213.

132. *Id.*

133. *Id.* at 1214.

134. *Id.*

135. *Id.*

136. *Id.* at 1214–15.

137. *Id.* at 1215.

138. *Id.* at 1216.

court entered a short order granting the motion to compel individual arbitration “pursuant to the mandate of the Court of Appeals.”<sup>139</sup>

*B. Class-Action Waivers and Mass Actions: McIntosh v. Royal Caribbean and Roman v. Spirit Airlines*

The Eleventh Circuit dealt with another type of contractual class-action avoidance mechanism in two cases, *McIntosh v. Royal Caribbean Cruises, Ltd.*<sup>140</sup> and *Roman v. Spirit Airlines, Inc.*<sup>141</sup> Both cases involved class-action waivers contained in passengers’ ticket contracts; the passengers’ attempts to circumvent these waivers by bringing a mass action; and the issue of whether the mass action could meet the amount in controversy required for diversity jurisdiction.

In *McIntosh*, the plaintiff was a would-be cruise passenger who brought a putative class action against the cruise line seeking damages arising from the last-minute cancellation of a cruise because of a hurricane.<sup>142</sup> After the district court ruled that the case could not proceed as a class action due to a class-action waiver in the cruise ticket contracts, the plaintiff and more than 100 other passengers filed a joint amended complaint bringing individual claims. The district court, however, dismissed the amended complaint, in part because of its *sua sponte* finding that the amended complaint did not plead damages sufficient under 28 U.S.C. § 1332<sup>143</sup> to meet the amount-in-controversy requirement.<sup>144</sup>

On appeal, the Eleventh Circuit reversed.<sup>145</sup> As to the amount in controversy, the court concluded that the district court erred both procedurally and substantively.<sup>146</sup> Procedurally, while it was proper for the court to take up the issue of its jurisdiction *sua sponte*, the court erred by not giving the parties “notice and an opportunity to be heard” on the issue before ruling.<sup>147</sup>

As to the substance of that ruling, although the district court may have been correct in ruling that the individual plaintiffs’ damages could not be aggregated, it should have gone on to “consider whether any

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139. Order, *Hearn v. Comcast Cable Comm’ns, LLC*, No. 1:19-CV-01198-TWT (N.D. Ga. Jan 19, 2022).

140. 5 F.4th 1309 (11th Cir. 2021).

141. No. 20–13699, 2021 U.S. App. LEXIS 28847 (11th Cir. Sept. 23, 2021).

142. *McIntosh*, 5 F.4th at 1311.

143. See 28 U.S.C. § 1332 (2011).

144. *McIntosh*, 5 F.4th at 1311.

145. *Id.* at 1315.

146. *Id.* at 1311–12.

147. *Id.* at 1312.

individual plaintiff had satisfied the \$75,000 amount-in-controversy requirement.”<sup>148</sup> The Eleventh Circuit cited *Exxon Mobil Corp. v. Allapattah Services*,<sup>149</sup> in which the Supreme Court held that

[W]here the other elements of jurisdiction are present and at least one named plaintiff in the action satisfies the amount-in-controversy requirement, . . . [a court may exercise] . . . supplemental jurisdiction over the claims of other plaintiffs in the same Article III case or controversy, even if those claims are for less than the jurisdictional amount specified in the statute setting forth the requirements for diversity jurisdiction.<sup>150</sup>

Because the complaint did not plead a specific amount of damages, the plaintiffs had “the burden of proving by a preponderance of the evidence that the claim on which jurisdiction is based exceeds the jurisdictional minimum.”<sup>151</sup> But the district court never gave the plaintiffs the opportunity to do so.<sup>152</sup> The Eleventh Circuit, however, on review of the record, was “convinced that at least some of the plaintiffs sufficiently pled damages over \$75,000,” and could meet the amount in controversy requirement.<sup>153</sup> The court noted, however, that there were questions about whether complete diversity existed, which the district court would need to explore on remand.<sup>154</sup> The Eleventh Circuit also chided the district court for dismissing the complaint with prejudice, noting, “[i]f subject-matter jurisdiction does not exist, dismissal must be without prejudice.”<sup>155</sup>

The defendant had better luck in *Roman*, a putative class action challenging a \$6 fee charged by Spirit Airlines for an allegedly bogus “Shortcut Security” service.<sup>156</sup> The plaintiff passengers brought various state-law claims and invoked diversity jurisdiction under the Class Action Fairness Act (CAFA),<sup>157</sup> because they sued on behalf of more than 100 class members with combined claims exceeding \$5 million.<sup>158</sup> The airline then moved to dismiss the action based on a class-action

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148. *Id.*

149. 545 U.S. 546 (2005).

150. *Id.* at 549.

151. *McIntosh*, 5 F.4th at 1312.

152. *Id.*

153. *Id.*

154. *Id.* at 1313.

155. *Id.*

156. *Roman*, 2021 U.S. App. LEXIS 28847, at \*1.

157. 28 U.S.C. § 1332(d) (2011).

158. *Roman*, 2021 U.S. App. LEXIS 28847, at \*2.

waiver contained in the contract of carriage that each passenger signed while booking his flights. Moreover, the airline argued, no plaintiff's individual claim based on the \$6 fee could meet the \$75,000 amount in controversy for traditional diversity jurisdiction. The district court agreed and dismissed the case.<sup>159</sup>

The Eleventh Circuit affirmed, rejecting the plaintiffs' argument that their claims did not fall within the class-action waiver.<sup>160</sup> The waiver in the contract of carriage read as follows: "No Class Action – Any case brought pursuant to this Contract of Carriage, Spirit's Tarmac Delay Plan, or Spirit's Guest Service Plan must be brought in a party's individual capacity and not as a plaintiff or class member in any purported class or representative proceeding."<sup>161</sup> Because the "Shortcut Security" service was listed as an "optional service" on the airline's website, and the contract of carriage discussed the purchase of optional services, "the plaintiffs' claims concerning that service were all brought pursuant to the contract of carriage[,] and therefore, "fell within the scope of the class-action waiver" and had to be brought individually.<sup>162</sup> With no individual claim exceeding \$75,000, the plaintiffs would have to proceed, if at all, in state court.

#### IV. CAFA JURISDICTION

Can class-action plaintiffs avoid federal court by relying on general economic studies and population statistics to prove that their case should be in state court? Not in the Eleventh Circuit. In *Smith v. Marcus & Millichap, Inc.*,<sup>163</sup> the court held that "studies, surveys, and census data—which do not directly involve the plaintiffs"—are not "sufficient to establish that a certain percentage of the plaintiff class are citizens of a particular state for the purposes of CAFA's local controversy and discretionary exceptions."<sup>164</sup>

CAFA provides for federal court jurisdiction over class actions involving more than \$5 million as long as the parties are minimally diverse—that is, at least one plaintiff resides and intends to remain in a different state than at least one defendant.<sup>165</sup> This grant, however, is subject to two exceptions: CAFA requires federal district courts to

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159. *Id.* at \*2–3.

160. *Id.* at \*5.

161. *Id.* at \*3.

162. *Id.* at \*5–6.

163. 991 F.3d 1145 (11th Cir. 2021). Judge Lisa Branch authored the opinion for the court.

164. *Id.* at \*2–3.

165. 28 U.S.C. § 1332(d)(2).

decline to exercise jurisdiction over certain cases in which more than two-thirds of the proposed class are citizens of the state where the case was filed (the “local-controversy” exception);<sup>166</sup> and permits district courts to decline jurisdiction over certain cases in which more than one-third of the proposed class are citizens of that state (the “discretionary” exception).<sup>167</sup>

The *Smith* plaintiffs were past and present residents of skilled-nursing facilities marketed and sold in Florida by an out-of-state defendant.<sup>168</sup> After the defendants removed the case to federal court under CAFA, the plaintiffs filed a motion to remand to state court under the statute’s local-controversy and discretionary exceptions. And in an effort to carry their burden of proving that one- or two-thirds of the proposed class were Florida citizens, the plaintiffs presented federal census data, economic studies, and population surveys, which—according to the district court—showed that residents of nursing facilities typically “hale from the proximate area” and that senior citizens do not often move out of state.<sup>169</sup> Having found that the plaintiffs had “shown by a preponderance of the evidence that two-thirds of the class members are citizens of Florida,” the district court remanded the case to state court under CAFA’s local-controversy exception.<sup>170</sup>

The Eleventh Circuit reversed.<sup>171</sup> The plaintiffs had not limited their proposed class to Florida citizens, and without such a limitation, the court held, “generalized evidence cannot be the sole basis of the citizenship determination.”<sup>172</sup> The court thus rejected the plaintiffs’ emphasis on “common sense” and supposedly “logical inferences,” and instead cited reasoning from the Ninth Circuit: “[T]here must ordinarily be at least some specific facts in evidence from which the district court may make findings regarding class members’ citizenship for purposes of CAFA’s local controversy exception.”<sup>173</sup> As the Eleventh Circuit held, “[w]e cannot rely only on a series of purportedly reasonable inferences

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166. *Id.* at (d)(4).

167. *Id.* at (d)(3).

168. *Smith*, 991 F.3d at 1148.

169. *Id.* at 1154.

170. *Id.* at 1154–55.

171. *Id.* at 1162–63.

172. *Id.* at 1157.

173. *Id.* at 1157–58 (quoting *Mondragon v. Capitol One Auto. Fin.*, 736 F.3d 880, 884 (9th Cir. 2013)).

to determine citizenship; we cannot base our determination of citizenship on ‘sensible guesswork.’”<sup>174</sup>

Although the court rejected the plaintiffs’ arguments about class citizenship, it also rejected one of the defendant’s arguments that he could not afford to pay a judgment and was therefore not a “significant” defendant for purposes of the local-controversy exception—which is further limited to actions in which the plaintiff seeks “significant relief” from an in-state defendant.<sup>175</sup> The court thus held that “CAFA does not require the district court to examine a defendant’s ability to pay based on the unambiguous plain meaning of the statute’s text.”<sup>176</sup>

Finally, in addressing CAFA’s discretionary exception—which is further limited to cases in which “the primary defendants are citizens of the State in which the action was originally filed”<sup>177</sup>—the court concluded that the plaintiffs’ assertion of significant claims against an out-of-state defendant “destroys plaintiffs’ ability to invoke the discretionary exception.”<sup>178</sup>

*Smith* shows that courts in the Eleventh Circuit will not allow plaintiffs to avoid CAFA jurisdiction by relying on mere assumptions about class citizenship: “[w]hile we do not hold that a district court may never consider evidence of a general nature in determining citizenship of the class, such generalized evidence cannot be the sole basis of the citizenship determination.”<sup>179</sup> On the contrary, class-action plaintiffs are more likely to satisfy CAFA’s citizenship-based exceptions by citing at least some “evidence relating directly to the putative class, such as declarations of class members’ intent to remain in Florida, property records, or tax records.”<sup>180</sup>

#### V. ENGLE PROGENY

In what may be one of the last *Engle* progeny cases<sup>181</sup> to reach the Eleventh Circuit, the court again upheld an award of punitive damages against the tobacco company defendant, rejecting Phillip Morris’s argument that the award—which was over three times the amount of

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174. *Id.* at 1158 (quoting *In re Sprint*, 593 F.3d 669, 674 (7th Cir. 2010)).

175. 28 U.S.C. § 1332(d)(4)(A)(i)(II)(aa).

176. *Smith*, 991 F.3d at 1161.

177. 28 U.S.C. § 1332(d)(3).

178. *Smith*, 991 F.3d at 1162.

179. *Id.* at 1157.

180. *Id.* at 1148.

181. *Byrne & Mohr*, *supra* note 1.

compensatory damages awarded to the individual plaintiff—was unconstitutionally excessive in violation of due process.<sup>182</sup>

The latest decision, in *Cote v. Phillip Morris USA, Inc. (Cote II)*, comes more than six years after a jury awarded the individual plaintiff \$6.25 million in compensatory damages and \$20.7 million in punitive damages—and more than two years after the Eleventh Circuit’s first decision to reinstate the punitive damages award.<sup>183</sup> In that opinion, the court reversed the district court’s grant of Phillip Morris’s motion for judgment as a matter of law on the two intentional-tort claims and accordingly remanded “the case to the district court for the entry of judgment in Plaintiff’s favor on [the intentional tort] claims . . . and for reinstatement of the jury’s corresponding punitive damages award.”<sup>184</sup>

On remand, the district court did just that, amending the judgment to include the jury’s \$20.7 million punitive damages award.<sup>185</sup> Phillip Morris, however, filed three motions contesting the judgment, one of which argued that the punitive damages award was unconstitutionally excessive in violation of due process. The district court denied the motion, and Phillip Morris appealed.<sup>186</sup>

The Eleventh Circuit affirmed,<sup>187</sup> analyzing the award under the three “guideposts” set out by the Supreme Court in *State Farm Mutual Automobile Insurance Co. v. Campbell*.<sup>188</sup> Each of these guideposts—the reprehensibility of the defendant’s conduct; the ratio of punitive damages to actual harm suffered; and the civil penalties authorized in comparable cases—indicated that the award was not unconstitutionally excessive.<sup>189</sup>

Phillip Morris’s appellate arguments focused primarily on the second guidepost, the ratio of punitive to compensatory damages.<sup>190</sup> Although the 3-to-1 ratio at issue was less than the “quadruple damages” ratio that *State Farm* noted “might be close to the line of constitutional

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182. *Cote v. Philip Morris USA, Inc.*, 985 F.3d 840, 843 (11th Cir. 2021) (hereinafter *Cote II*).

183. *Id.* at 843–44.

184. *Id.* at 845 (quoting *Cote v. R.J. Reynolds Tobacco Co.*, 909 F.3d 1094, 1110 (11th Cir. 2018) (hereinafter *Cote I*)); see also Thomas M. Byrne & Stacey McGavin Mohr, *Class Actions, Eleventh Circuit Survey*, 70 MERCER L. REV. 895 (2018).

185. *Cote II*, 985 F.3d at 843.

186. *Id.*

187. *Id.*

188. 538 U.S. 408 (2003).

189. *Cote II*, 985 F.3d at 847.

190. *Id.* at 848.

impropriety,” Phillip Morris argued that it nevertheless was excessive for two reasons, both of which the court rejected.<sup>191</sup>

First, the court dismissed, as based on dicta, Phillip Morris’s argument that a “substantial” compensatory damages award warrants “a lesser ratio, perhaps only equal to compensatory damages.”<sup>192</sup> Not only is this language from *State Farm* dicta, but it also is followed immediately by the caution that each case “must be based upon the facts and circumstances of the defendant’s conduct and the harm to the plaintiff.”<sup>193</sup> The court therefore declined to impose a “bright-line” rule “requiring a 1-to-1 ratio whenever a defendant asserts that the compensatory damages are ‘substantial.’”<sup>194</sup>

Second, the court rejected Phillip Morris’s comparisons of the award here to those in other *Engle*-progeny cases.<sup>195</sup> Previous cases finding awards with 3-to-1 ratios excessive were not determinative because, among other differences, those cases were against R.J. Reynolds Tobacco Co., not Phillip Morris.<sup>196</sup> Conversely, the court refused to impose a ceiling based on the 2-to-1 ratio<sup>197</sup> recently affirmed by the Eleventh Circuit in *Kerrivan v. R.J. Reynolds Tobacco Co.*<sup>198</sup> As the court explained, “[w]e are aware of no reason why two decisions in other *Engle*-progeny cases (there are thousands) as to the excessiveness of punitive damages in those cases should govern here.”<sup>199</sup>

Although the affirmance of yet another *Engle*-progeny verdict may not seem remarkable, two footnotes in *Cote II* offer some interesting insight into the progress of these cases. In footnote 2, the court noted the district court’s statement that Phillip Morris’s filing of post-trial motions “served no other purpose than to delay payment of the judgment,” and may warrant remedial sanctions.<sup>200</sup> Although the court declined to issue sanctions, it did “agree with the District Court’s admonition that further delay is not acceptable.”<sup>201</sup> Later in the opinion, the court also clarified that its opinion in *Cote I* did not preclude Phillip

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191. *Id.* at 848–49 (quoting *State Farm*, 538 U.S. at 425).

192. *Id.* at 849 (quoting *State Farm*, 538 U.S. at 425).

193. *Id.* (quoting *State Farm*, 528 U.S. at 425).

194. *Id.*

195. *Id.*

196. *Id.*

197. *Id.* at 849, n.9.

198. 953 F.3d 1196 (11th Cir. 2020); *see also* Byrne & Mohr, *supra* note 1.

199. *Cote II*, 985 F.3d at 849.

200. *Id.* at 844, n.2.

201. *Id.*



Morris's constitutional challenge to the punitive damages award, because that issue was not before the court in that appeal.<sup>202</sup>

And, in footnote 5, the court discussed Phillip Morris's arguments on the impact of the punitive damages awards in the *Engle*-progeny cases taken together, regardless of the guideposts' application in individual cases.<sup>203</sup> First, further "punitive damages are not necessary for deterrence or punishment."<sup>204</sup> Second, "any punitive damages award must be low enough such that the aggregate amount of punitive damages in all *Engle* litigation is not unconstitutionally excessive."<sup>205</sup> Conceding that these arguments were rejected and therefore foreclosed by *Kerrivan*, Phillip Morris nevertheless maintained them to "preserve its position for potential further review," presumably en banc or before the Supreme Court.<sup>206</sup>

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202. *Id.* at 845.

203. *Id.* at 847, n.5.

204. *Id.*

205. *Id.*

206. *Id.*