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# Trial Practice and Procedure

John O'Shea Sullivan\*

Leesa M. Guarnotta\*\*

## I. INTRODUCTION

The 2021 Survey period yielded decisions involving issues of first impression relating to federal trial practice and procedure in the United States Court of Appeals for the Eleventh Circuit. This Article analyzes recent trial practice developments in the Eleventh Circuit, including significant rulings in the areas of consumer debt collections, removal, jurisdiction and abstention, arbitration, and sanctions.<sup>1</sup>

## II. LIABILITY UNDER THE FAIR DEBT COLLECTION PRACTICES ACT

In a potentially dangerous ruling that the Eleventh Circuit acknowledged “runs the risk of upsetting the status quo in the debt-collection industry[,]”<sup>2</sup> the court held that a debt collector’s transmittal of a consumer’s personal information to its “dunning vendor” constituted a communication that violates section 1692c(b)<sup>3</sup> of the Fair Debt Collection Practices Act (FDCPA).<sup>4</sup> The facts in *Hunstein v. Preferred Collection* are common and routine in the consumer debt collection industry: a debt collector electronically sent data about a consumer’s debt, including his name, outstanding balance, the fact that

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1. For analysis of last year’s trial practice and procedure during the Survey period, see John O’Shea Sullivan & Kevin R. Stone, *Trial Practice and Procedure, Eleventh Circuit Survey*, 72 MERCER L. REV. 1239 (2021).

2. *Hunstein v. Preferred Collection & Mgmt. Servs., Inc.*, 994 F.3d 1341, 1352 (11th Cir. 2021), *vacated*, 17 F.4th 1103 (11th Cir. 2021).

3. 15 U.S.C. § 1692c(b) (1977).

4. *Hunstein*, 994 F.3d at 1352.

the debt arose from his son's medical treatment, and his son's name, to the debt collector's own third-party vendor hired to create and mail a dunning letter to the consumer.<sup>5</sup> When the consumer sued alleging violations of provisions of the FDCPA that prohibit debt collectors from communicating consumers' personal information to third parties "in connection with the collection of any debt,"<sup>6</sup> the United States District Court for the Middle District of Florida rejected this reading of the FDCPA and dismissed the case.<sup>7</sup>

On appeal, the Eleventh Circuit had to consider, as a threshold matter, whether a violation of section 1692c(b) of the FDCPA gives rise to a concrete injury in fact under Article III,<sup>8</sup> and on the merits, whether the debt collector's communications with its vendor was "in connection with the collection of any debt."<sup>9</sup> The court decided both questions in the affirmative, reversed the dismissal of the case, and remanded to the district court.<sup>10</sup>

After finding that Hunstein alleged facts to constitute a concrete injury, the court had to decide whether the debt collector's communications with its own vendor constituted a communication "in connection with the collection of any debt."<sup>11</sup> The FDCPA generally prohibits a debt collector's communications, in connection with the collection of any debt, with anyone other than the consumer, with several exceptions.<sup>12</sup> The debt collector in this case, Preferred Collection, sent Hunstein's personal information to Preferred Collection's dunning vendor, Compumail. The parties agreed that Preferred Collection was a debt collector, that Hunstein was a consumer, and that the transmittal of Hunstein's personal information to Compumail constituted a "communication" under the FDCPA.<sup>13</sup> Thus, the sole question for the court was whether the communication with Compumail was "in connection with the collection of any debt"

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5. *Id.* at 1344.

6. 15 U.S.C. § 1692c(b).

7. *Hunstein*, 994 F.3d at 1344–45.

8. U.S. CONST. art. III, § 2, cl. 1. The analysis of whether there was a concrete injury in fact under Article III was a question of the plaintiff's standing and necessary for the court to satisfy itself that it had subject matter jurisdiction. After a long discussion of the Article III considerations for a finding of standing, the court concluded that Congress intended that violations of § 1692c(b) constitute a concrete injury which confers standing on aggrieved consumers. *Hunstein*, 994 F.3d at 1345–49.

9. *Hunstein*, 994 F.3d at 1344–45.

10. *Id.* at 1352.

11. *Id.* at 1344–45.

12. *Id.* at 1349 (discussing 15 U.S.C. § 1692c(b)).

13. *Id.* at 1349; *see also* 15 U.S.C. § 1692a(2) (2010) (defining "communication").

such that it violated section 1692c(b).<sup>14</sup> Hunstein focused on the plain meaning of the phrase to argue it was. Preferred Collection argued that the court should adopt a factor-based analysis that shows that the communication with Compumail was not in connection with the collection of any debt.<sup>15</sup>

After quickly finding under the plain meaning of the words that Preferred Collection's communications with Compumail were made "in connection with the collection of any debt," the court turned to Preferred Collection's arguments based on various factors and case law construing various other provisions of the FDCPA.<sup>16</sup> Preferred Collection's first argument was that "in connection with the collection of any debt" entailed a demand for payment, based on the court's interpretation of the same phrase in section 1692e<sup>17</sup> of the FDCPA in other cases.<sup>18</sup> The court rejected this reasoning based on a review of the exceptions in section 1692c(b), most of which the court found would never involve a demand for payment,<sup>19</sup> and the court's finding that Preferred Collection's reading would render another portion of section 1692c(b) meaningless.<sup>20</sup> The court found that by requiring a demand for payment, the phrase "in connection with the collection of any debt" would instead mean "to collect any debt."<sup>21</sup> While communications under section 1692e might always involve demands for payment, since that statute applies to communications received by debtors from debt collectors, the broader situation addressed by section 1692c(b) does not always involve communications to the debtor.<sup>22</sup>

The court then discussed Preferred Collection's argument that the Eleventh Circuit should adopt the multifactor balancing test<sup>23</sup> that was discussed by the United States Court of Appeals for the Sixth Circuit in

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14. *Hunstein*, 994 F.3d at 1344–45.

15. *Id.* at 1349.

16. *Id.* at 1349–52.

17. 15 U.S.C. § 1692e (1996).

18. *Hunstein*, 994 F.3d at 1350–51 (first discussing *Reese v. Ellis, Painter, Ratterree & Adams, LLP*, 678 F.3d 1211, 1217 (11th Cir. 2012); and then discussing *Carceras v. McCalla Raymer, LLC*, 755 F.3d 1299, 1301–03 (11th Cir. 2014)).

19. The court found that a communication with a consumer reporting agency, the creditor, the attorney for the creditor, and the attorney for the debt collector, all of which are excepted from section 1692c(b), would never involve a demand for payment thereby undermining Preferred Collection's argument. *Id.* at 1350.

20. *Id.* at 1351–52.

21. *Id.* at 1351.

22. *Id.* at 1350.

23. *Hunstein*, 994 F.3d at 1351.

an unpublished opinion in *Goodson v. Bank of America, N.A.*<sup>24</sup> The *Goodson* case involved an analysis of section 1692e, not section 1692c(b), and announced seven factors to take into account in analyzing the “in connection with the collection of any debt” language in section 1692e, as follows:

(1) the nature of the relationship of the parties; (2) whether the communication expressly demanded payment or stated a balance due; (3) whether it was sent in response to an inquiry or request by the debtor; (4) whether the statements were part of a strategy to make payment more likely; (5) whether the communication was from a debt collector; (6) whether it stated that it was an attempt to collect a debt; and (7) whether it threatened consequences should the debtor fail to pay.<sup>25</sup>

The court declined to adopt the balancing test in *Goodson* for two reasons.<sup>26</sup> First, *Goodson* was decided under section 1692e which the court already distinguished from any analysis under section 1692c(b), and which it found the *Goodson* test illustrates.<sup>27</sup> Second, the court found that the phrase “in connection with the collection of any debt” in the context of section 1692c(b) “has a discernible ordinary meaning that obviates the need for resort to extratextual ‘factors.’”<sup>28</sup> The court held that “[p]arties to FDCPA-governed transactions . . . are entitled to guidance about the scope of permissible activity. They are likelier to get it even from broadly framed statutory language than from a judge-made gestalt.”<sup>29</sup>

The decision in *Hunstein* has been met with alarm and protest in the financial services industry. As the court noted, the opinion suddenly turns the routine practices of debt collectors in the ordinary course of business for years into a violation of federal law requiring substantial changes in the way they do business, and at great cost, for a benefit to the consumer that the court admits would not amount to much.<sup>30</sup> The opinion was vacated and the case remains in the Eleventh Circuit on an en banc rehearing, where the docket reflects multiple *amici curiae*

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24. 600 F. App'x. 422 (6th Cir. 2015).

25. *Hunstein*, 994 F.3d at 1351 (quoting *Goodson*, 600 F. App'x. at 431).

26. *Id.* at 1351.

27. *Id.* at 1351–52.

28. *Id.* at 1352.

29. *Id.*

30. *Id.* at 1350.

briefs and oral argument held on February 22, 2022.<sup>31</sup> The court's decision may very well be modified in 2022, but for now, debt collectors engaged in activities in the Eleventh Circuit must be cautious not to violate the FDCPA by sharing consumer information with their vendors.<sup>32</sup>

### III. FEDERAL JURISDICTION

It is a longstanding principle that all courts must always ensure that they have subject matter jurisdiction.<sup>33</sup> In 2021, the Eleventh Circuit narrowed the scope of cases with subject matter jurisdiction under the Administrative Procedures Act (APA)<sup>34</sup> and on the basis of abstention under the Declaratory Judgments Act<sup>35</sup> and *Burford* abstention. The court also limited the scope of some cases that might have otherwise been remanded after removal.

#### *A. Limits on Subject Matter Jurisdiction Under the APA*

In *Hakki v. Secretary, Department of Veterans Affairs*,<sup>36</sup> the Eleventh Circuit held that under the APA and the Veterans' Benefits Act (VBA),<sup>37</sup> federal courts lack subject matter jurisdiction to review the decisions of the Department of Veterans Affairs (VA) to terminate employees.<sup>38</sup>

After more than twenty years as a VA urologist, plaintiff Said I. Hakki (Dr. Hakki) made several requests for leave without pay to allow him to assist the Department of Defense in developing government and healthcare systems in Iraq as a part of the Iraqi Red Crescent.<sup>39</sup> In Dr. Hakki's fifth year of leave, the VA learned that Dr. Hakki was no longer

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31. *Hunstein v. Preferred Collection & Mgmt. Servs., Inc.*, 17 F.4th 1103, 1104 (11th Cir. 2021).

32. The authors, who were not involved in the litigation in any way, wonder why Compumail, as Preferred Collection's vendor, was not considered Preferred Collection's agent for purposes of receiving the communications about the consumer. It seems that a debt collector communicating with its own agent would not be a communication at all since the agent may be fairly considered as merely an extension of the debt collector itself, the same as if Compumail was one of Preferred Collection's employees working on the file.

33. *Cf. Mallory & Evans Contractors. & Eng'rs, LLC v. Tuskegee Univ.*, 663 F.3d 1304 (11th Cir. 2011).

34. 5 U.S.C. §§ 551–559 (2011).

35. 28 U.S.C. § 2201 (2020); 28 U.S.C. § 2202 (1948).

36. 7 F.4th 1012 (11th Cir. 2021).

37. 38 U.S.C. § 7461 (2017).

38. *Hakki*, 7 F.4th at 1016. The Eleventh Circuit also addressed the plaintiff's due process claims and mandamus claims which are not addressed here.

39. *Id.* at 1016–17.

assisting in Iraq and notified him that he was expected to return to work. Dr. Hakki was twice granted extensions in response to his grievances that claimed he needed to remain in Iraq to refute false criminal charges. But the VA denied Dr. Hakki's third grievance, which was on the same grounds, because there was no "certainty regarding the date of [Dr. Hakki's] return" or VA interest as required by the VA handbook.<sup>40</sup>

On the last day of his approved leave, Dr. Hakki responded that his grievance provided a return date of July 1, 2009 and filed a union grievance challenging the denial.<sup>41</sup> Dr. Hakki did not appear at the VA and was considered absent without leave (AWOL), which continued when the VA denied Dr. Hakki's union grievance. The union requested arbitration of the grievance denial. Although the VA proposed a settlement, Dr. Hakki rejected it and filed an unfair labor practice charge with the Federal Labor Relations Authority, which did not issue a complaint. Dr. Hakki also filed a new request for leave, to which the VA did not respond.<sup>42</sup>

Dr. Hakki did not return to the VA during his challenges, so the VA proposed discharge for being AWOL for twenty-six weeks.<sup>43</sup> Dr. Hakki challenged the proposal with the appointed Human Resources advisor, who recommended upholding the discharge because of the frequency of Dr. Hakki's absences without leave. Dr. Hakki challenged this decision to the Veterans Integrated Service Networks Region 18 Network Director, who recommended denial to the VA Deputy. Dr. Hakki then sought review of his discharge from the VA in the United States District Court for the Middle District of Florida under the APA and the Mandamus Act, based on alleged violations of his due process. The district court remanded the case to the VA to require an opportunity for cross-examination as mandated by VA procedure. The VA ultimately upheld the discharge.<sup>44</sup> Dr. Hakki's claims in the lawsuit argued that "the decision was arbitrary, capricious, and abuse of discretion, and otherwise not in accordance with law."<sup>45</sup> The district court granted the VA's motion for summary judgment based on lack of jurisdiction under the APA because the VBA is the exclusive remedy for disciplined VA employees.<sup>46</sup>

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40. *Id.*

41. *Id.* at 1018.

42. *Id.*

43. *Id.* at 1019.

44. *Id.* at 1019–21.

45. *Id.* at 1024.

46. *Id.* at 1022.

On appeal, the Eleventh Circuit first noted that the court's evaluation should be on a "factual attack" standard under Federal Rule of Civil Procedure 12(b)(1)<sup>47</sup> instead of summary judgment.<sup>48</sup> A factual attack allows consideration of extrinsic evidence even at the pleadings stage.<sup>49</sup> In evaluating jurisdiction, the court compared<sup>50</sup> the VBA to the Supreme Court of the United States' treatment of the Civil Service Reform Act (CSRA) in *United States v. Fausto*.<sup>51</sup> In *Fausto*, the Court held that the CSRA precluded APA review of non-preference excepted employees because of a deliberate exclusion in the comprehensive system for reviewing personnel action against federal employees based on the act's purpose, text, and structure of review.<sup>52</sup> The Eleventh Circuit also analyzed its decision in *Lee v. Hughes*<sup>53</sup> where it held that the VBA evidenced "a congressional intent to preclude certain VA employees from recovering pursuant to a *Bivens* action for damages."<sup>54</sup>

The Eleventh Circuit then reasoned that the VBA provides a comprehensive scheme of four statutory sections governing VA employee discipline, including two grievance processes for VA employees.<sup>55</sup> Because Dr. Hakki's termination did not involve professional conduct or competence, his review process was guided by section 7463 of the United States Code,<sup>56</sup> which is silent on any issues other than: (1) the right to representation, (2) the right to formal review by an impartial VA agent, (3) the right to a prompt report of findings and recommendations, and (4) the right to prompt review by a higher-level VA official.<sup>57</sup> Whereas the separate review process for actions involving professional conduct and competence expressly provides for judicial review, reviews of actions of mixed questions of professional conduct/non-professional conduct are expressly entitled to review by the Disciplinary Appeals Board.<sup>58</sup>

The court rejected the APA as an alternate ground for judicial review.<sup>59</sup> This is because both the APA and VBA allow review for

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47. FED. R. CIV. P. 12(b)(1).

48. *Hakki*, 7 F.4th at 1022–23.

49. *Id.* at 1023.

50. *Id.* at 1024.

51. 484 U.S. 439 (1988).

52. *Id.* at 1275.

53. 145 F.3d 1272 (11th Cir. 1998).

54. *Hakki*, 7 F.4th at 1024.

55. *Id.* at 1024–25.

56. 38 U.S.C. § 7463 (2018).

57. *Hakki*, 7 F.4th at 1027.

58. *Id.*

59. *Id.* at 1029.

decisions that are arbitrary, capricious, and involve an abuse of discretion, or are otherwise not in accordance with law.<sup>60</sup> The court reasoned that, due to the overlap in reasons for review, allowing for APA review here “would ‘turn’ the VBA’s disciplinary structure of review ‘upside down’” and would “thwart the will of Congress.”<sup>61</sup> Accordingly, the court affirmed the dismissal.<sup>62</sup>

*B. District Court Authority to Decline Cases*

**1. Remanding Cases After Removal Based on Diversity Jurisdiction**

In *Shipley v. Helping Hands Therapy*,<sup>63</sup> the Eleventh Circuit decided an issue of first impression: “whether a district court has authority to remand a case based on a procedural defect in removal when (1) a motion to remand for lack of subject matter jurisdiction is filed within [thirty] days of the notice of removal, but (2)” the motion to remand fails to raise the issue of a procedural defect until a reply brief filed after the thirty-day statutory time limit.<sup>64</sup> The court held that the United States District Court for the Southern District of Alabama exceeded its authority in remanding in these circumstances because the procedural defect was not raised until fifty-four days after the removal.<sup>65</sup>

The *Shipley* action was filed in Alabama state court alleging injuries suffered during physical therapy sessions conducted at the defendants’ office.<sup>66</sup> The defendants removed the action to the district court 364 days after the filing of the case in state court.<sup>67</sup> Shipley timely moved to remand, within thirty days of the removal, arguing there was no subject matter jurisdiction because the parties lacked complete diversity of citizenship, but she did not argue that there was any procedural defect in the removal.<sup>68</sup> After the defendants responded to the motion to remand, Shipley filed a reply brief fifty-four days after the removal where she argued for the first time that the removal had a procedural

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60. *Id.* at 1028.

61. *Id.* at 1028–29.

62. *Id.* at 1038.

63. 996 F.3d 1157 (11th Cir. 2021).

64. *Id.* at 1158.

65. *Id.* at 1160.

66. *Id.* at 1158.

67. The opinion did not shed any light on why the defendants waited to remove the case until one day shy of the one-year anniversary of the filing of the lawsuit.

68. *Id.* at 1158 n.1. The appellate court noted here that it was clearly established that there was indeed complete diversity under 28 U.S.C. § 1332.

defect—the defendants failed to remove within the statutory timeframe. The district court granted the motion to remand finding that the removal was defective.<sup>69</sup>

The question on appeal was whether the defendants' objection to the removal, on procedural grounds based on timeliness, was valid when first asserted fifty-four days after the removal although the defendant had timely moved to remand within thirty days of the removal.<sup>70</sup> The Eleventh Circuit first noted that other circuits are split on the issue, with the United States Court of Appeals for the Fifth Circuit finding remand permissible, while the United States Court of Appeals for the Ninth Circuit has held that remand is improper under these circumstances.<sup>71</sup> The court then turned to the plain text of the pertinent statute, section 1447(c) of the United States Code,<sup>72</sup> and found that the language of the statute requires a remand order under section 1447(c) must be “‘openly based’ on (1) lack of subject matter jurisdiction, or (2) ‘a motion to remand the case filed within [thirty] days of the notice of removal which is based upon a defect in the removal procedure.’”<sup>73</sup>

The court held that Shipley's remand motion was timely but based on lack of subject matter jurisdiction, not a procedural defect.<sup>74</sup> Shipley's reply brief, filed more than thirty days after the notice of removal, raised a procedural defect (timeliness of the removal), but the procedural defect argument was raised fifty-four days after removal and was outside the thirty-day timeframe set in the statute.<sup>75</sup> Because Shipley's motion to remand and reply brief were neither a motion to remand on the basis of a defect other than subject matter jurisdiction nor made within thirty days after the filing of the notice of removal, the district court erred in remanding the case based on a procedural defect not raised within thirty days of removal.<sup>76</sup>

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69. *Id.* at 1158–59. The district court remanded the case by overruling the Magistrate Judge's Report and Recommendation that the motion to remand be denied because Shipley's objection to the timeliness of the removal was itself untimely. *Id.* at 1159.

70. *Id.* at 1158.

71. *Id.* at 1159 (citing *BEPCO, L.P. v. Santa Fe Minerals, Inc.*, 675 F.3d 466, 471 (5th Cir. 2012); and then *Northern Cal. Dist. Council of Laborers v. Pittsburgh-Des Moines Steel Co.*, 69 F.3d 1034, 1038 (9th Cir. 1995)).

72. 28 U.S.C. § 1447(c) (2011).

73. *Shipley*, 996 F.3d at 1160 (quoting *In re Bethesda Mem'l Hosp., Inc.*, 123 F.3d 1407, 1409 (11th Cir. 1997)).

74. *Id.* at 1160.

75. *Id.* (citing 28 U.S.C. § 1447(c)).

76. *Id.* (quoting *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 712 (1996)).

## 2. Declining Declaratory Judgment Actions

In *National Trust Insurance Company v. Southern Heating and Cooling, Inc.*,<sup>77</sup> the Eleventh Circuit, as a matter of first impression, held, *inter alia*, that (1) the existence of parallel state court proceedings is not required for a district court to refuse a declaratory judgment action, and (2) the similarity between concurrent state court proceedings and a federal declaratory judgment action is not a threshold factor for a district court to refuse to hear a declaratory judgment action.<sup>78</sup> In *National Trust*, the plaintiff, Hodge, sued Southern Heating and Cooling, Inc. (Southern Heating) in Alabama state court following his parents' death from carbon monoxide poisoning. National Trust, Southern Heating's commercial liability insurer, filed a declaratory judgment action in federal court arguing it had no duty to defend or indemnify Southern Heating in the state court action. Hodge and Southern Heating sought to dismiss the declaratory judgment action because the issue whether carbon monoxide is a pollutant (and excluded under the policy) was unresolved under state law and required a factual determination. The United States District Court for the Northern District of Alabama declined to exercise jurisdiction and dismissed the action without prejudice because (1) the Alabama state court action was parallel to the declaratory judgment action, and (2) the factors for hearing a declaratory judgment action weighed in favor of dismissal.<sup>79</sup>

On appeal, the Eleventh Circuit enumerated the non-exclusive factors for deciding whether to adjudicate, dismiss, or stay declaratory judgment actions as follows: (1) State interest in deciding the issues; (2) Whether the federal declaratory judgment will settle the controversy; (3) Whether the federal action would be useful to clarifying the legal relations at issue; (4) Whether the declaratory remedy merely provides for federal jurisdiction or federal res judicata; (5) Whether the declaratory judgment action would encroach on state jurisdiction or otherwise increase tensions between state and federal authority; (6) Whether an alternate remedy is more effective; (7) Whether the underlying factual issues are important to an informed resolution of the case; (8) Whether the state court is better positioned to evaluate factual issues; and (9) Whether there is a close nexus between the factual and

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77. 12 F.4th 1278 (11th Cir. 2021).

78. *Id.* at 1283.

79. *Id.* at 1281–82.

legal issues and state law/public policy or whether federal law dictates the declaratory judgment action.<sup>80</sup>

The Eleventh Circuit refused to create a bright-line rule requiring a parallel state court proceeding as a prerequisite to the *Ameritas* analysis.<sup>81</sup> The court stated that nowhere in section 2201(a) is there a mention of “parallel proceedings.”<sup>82</sup> Further, although the Supreme Court of the United States addressed parallel proceedings in other actions dealing with a district court’s discretion under the Declaratory Judgment Act, those references were based purely on the procedural posture of those cases.<sup>83</sup> The Supreme Court’s discussion of parallel proceedings within the procedural context of specific cases is not the creation of a new requirement for federal courts to retain declaratory judgment actions.<sup>84</sup>

The Eleventh Circuit also refused to add the similarity of parallel proceedings as a discrete factor for determining whether a district court will hear a declaratory judgment action.<sup>85</sup> Instead, the court reasoned that the similarity between actions is already considered in the nine existing *Ameritas* factors on the totality of the circumstances.<sup>86</sup> The court noted that to have a threshold parallel-proceeding factor, the court would have to set a single definition of “parallel proceedings.”<sup>87</sup> But the court reasoned that a framework based on a technical definition of significant weight could preclude consideration of the degree of similarity.<sup>88</sup> Additionally, some state laws would always prevent a parallel proceeding (such as Florida’s preclusion of actions directly against insurers), which would essentially allow state law to supersede district court discretion in determining its jurisdiction under the Declaratory Judgment Act.<sup>89</sup>

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80. *Id.* at 1282–83 (citing *Ameritas Variable Life Ins. Co. v. Roach*, 411 F.3d 1328, 1331 (11th Cir. 2005)).

81. *Id.* at 1283.

82. *Id.* at 1284.

83. *Id.*

84. “We do not attempt at this time to delineate the outer boundaries of that discretion in other cases, for example, cases raising issues of federal law or cases in which there are no parallel state proceedings.” *Id.* (quoting *Wilton v. Seven Falls*, 515 U.S. 277, 290 (1995)).

85. *Id.* at 1285.

86. *Id.* at 1285–86.

87. *Id.* at 1287.

88. *Id.*

89. *Id.* at 1288.

### 3. Declining Jurisdiction in Cases Involving State Policy

While *National Trust* expanded district courts' authority to decline cases otherwise within their jurisdiction, the Eleventh Circuit's opinion in *Deal v. Tugalo Gas Co.*<sup>90</sup> reinforces the limits of the district courts' authority to utilize *Burford* abstention.<sup>91</sup> *Burford* abstention permits a court to decline to adjudicate a case otherwise within its jurisdiction where the case involves issues of state policy.<sup>92</sup> In *Deal*, the United States District Court for the Northern District of Georgia invoked *Burford* abstention to abstain from adjudicating the plaintiff's judicial-dissolution, accounting, and auditor-appointment claims.<sup>93</sup> On appeal, the Eleventh Circuit found the abstention improper.<sup>94</sup> The court found that *Burford* abstention permits a federal court to decline a case otherwise under its jurisdiction in very narrow circumstances such as the following: (1) difficult questions of state law regarding public policy of substantial public import, which transcend the specific case; or (2) federal review would disrupt state efforts to "establish a coherent policy" of substantial public concern.<sup>95</sup>

The question whether a federal court may dissolve a state-chartered corporation where there was no prior state action to dissolve the corporation—as presented in *Deal*—did not satisfy these limited circumstances.<sup>96</sup> Accordingly, the case was remanded for the district court to consider the issues on which the court had abstained.<sup>97</sup>

#### C. Appellate Jurisdiction

Public access to the courts, including judicial records, is "crucial to [American] tradition and history [and] continued public confidence in [the American justice system]."<sup>98</sup> Nevertheless, trial courts across the country, regardless of the subject matter of the case, are often forced to balance the importance of public access with the privacy concerns of individuals and businesses alike. The Eleventh Circuit evaluated the

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90. 991 F.3d 1313 (11th Cir. 2021).

91. *Id.*

92. *Burford v. San Oil Co.*, 319 U.S. 315, 334 (1943).

93. *Deal*, 991 F.3d at 1326.

94. *Id.*

95. *Id.* (quoting *New Orleans Pub. Serv., Inc. v. Council of City of New Orleans*, 491 U.S. 350, 361 (1989)).

96. *Id.*

97. *Id.* at 1327.

98. *Callahan v. United Network for Organ Sharing*, 17 F.4th 1356, 1359 (11th Cir. 2021).

timing for appellate review of such decisions in *Callahan v. United Network for Organ Sharing*.<sup>99</sup>

*Callahan* involved the claims of several hospitals to enjoin the development of a new liver allocation policy by the Department of Health and Human Services (HHS) and the United Network for Organ Sharing (UNOS).<sup>100</sup> The documents at issue included emails with personal opinions about the development of the new policy by UNOS's top-level personnel and policymakers. The United States District Court for the Northern District of Georgia provisionally placed under seal the briefing on the hospitals' request for preliminary injunction, which incorporated the documents, and the documents themselves, and excluded those documents from the administrative record in a related action involving a claim against HHS. After the trial court denied the preliminary injunction, the plaintiffs moved to unseal the briefs and documents. The trial court granted the motion and UNOS appealed.<sup>101</sup>

In evaluating whether the trial court abused its discretion in unsealing the documents, the Eleventh Circuit first addressed its subject matter jurisdiction.<sup>102</sup> To appeal something other than a final judgment that resolves all litigation on the merits, an appeal must satisfy the collateral order doctrine.<sup>103</sup> Under the doctrine, the decision must: "(1) conclusively determine the disputed question, (2) resolve an important issue completely separate from the merits of the action, and (3) be effectively unreviewable on appeal from a final judgment."<sup>104</sup>

Ultimately, the court held, as a matter of first impression, that orders unsealing documents—like orders granting motions to seal and orders denying motions to unseal—are reviewable as collateral orders.<sup>105</sup> This is because "once information is revealed, it cannot be made secret again."<sup>106</sup> Thus, if UNOS had to wait until full resolution of the action, the documents would be allowed to enter public circulation and appeal would be moot.<sup>107</sup>

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99. *Id.* at 1360.

100. *Id.* at 1359.

101. *Id.* at 1359–60.

102. *Id.* at 1360.

103. *Id.*

104. *Id.*

105. *Id.* at 1365.

106. *Id.* at 1361.

107. *Id.* Nevertheless, the court affirmed the trial court's unsealing because the documents were used in connection with merits briefing, making them judicial records and because there was no compelling reason to keep the documents under seal. *Id.* at 1363–64.

## IV. LIMITING FEES ON COUNSEL

In *Peer v. Liberty Life Assurance Co. of Boston*,<sup>108</sup> the Eleventh Circuit, considering a matter split within its district courts, held the fee-shifting provision in the Employee Retirement Income Security Act (ERISA)<sup>109</sup> does not permit attorney's fees awards against counsel.<sup>110</sup>

In this ERISA action, the plaintiff filed several amended complaints in violation of local rules, none of which cured a mooted action.<sup>111</sup> Accordingly, the United States District Court for the Southern District of Florida dismissed the case and the appellate court affirmed. On remand, the district court granted attorney's fees against plaintiff's attorney, not plaintiff herself, pursuant to ERISA's fee-shifting provision. The court justified this allocation because had the attorney acknowledged the moot claims and not left the court in a state of "confusion," the case would have ended sooner and with less waste of resources.<sup>112</sup> The plaintiff's attorney appealed, arguing that the plaintiff, not her counsel, should have paid the fees.<sup>113</sup>

The Eleventh Circuit agreed, vacated the award against the lawyer, and remanded the matter to the district court.<sup>114</sup> The Eleventh Circuit evaluated several common law principles.<sup>115</sup> First, it noted that courts do not have "roving authority . . . to allow counsel fees . . . whenever the courts might deem them warranted."<sup>116</sup> Instead, such authority must come from Congressional mandate.<sup>117</sup> In other words, where a statute—like ERISA—"does not explicitly permit a fee award against counsel," the presumption is that such an award is not permitted.<sup>118</sup>

In addition to this common law principle, the court looked to longstanding principles of the attorney-client relationship.<sup>119</sup> The court reasoned that allowing for such sanctions would cause friction in the attorney-client relationship and would also conflict with "the longstanding rule that clients are responsible for the actions of their

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108. 992 F.3d 1258 (11th Cir. 2021).

109. 29 U.S.C. § 1132(g)(1) (2014).

110. *Peer*, 992 F.3d at 1260.

111. *Id.* at 1261.

112. *Id.* at 1261–62.

113. *Id.* at 1262.

114. *Id.* at 1265.

115. *Id.* at 1262–63.

116. *Id.* at 1262 (alteration in original).

117. *See id.*

118. *Id.* at 1263.

119. *Id.* at 1264.

lawyers, not the other way around.”<sup>120</sup> The court also reasoned that ERISA’s purpose is not to punish misconduct, but to protect employees and their beneficiaries and to promote uniform administration of employee benefit plans.<sup>121</sup> Allowing sanctions against attorneys would actually inhibit these goals because “[q]ualified attorneys might reject ERISA cases . . . because of the heightened personal risk.”<sup>122</sup> Beyond these foundational principles, the court reasoned that the five-factor test for ERISA attorney’s fees focus on the parties, not their attorneys.<sup>123</sup>

Accordingly, the court held that courts must use the proper authority for punishing attorney misconduct such as section 1927 of the United States Code<sup>124</sup> and Federal Rule of Civil Procedure 11(c),<sup>125</sup> and may not use the ERISA fee-shifting provision as a shortcut.<sup>126</sup>

#### V. ARBITRATION

In *Hearn v. Comcast Cable Communications, LLC*,<sup>127</sup> the Eleventh Circuit declined to address the permissible scope of an arbitration agreement.<sup>128</sup> Nevertheless, the court adopted an expansive interpretation in favor of arbitration, further evidencing the breadth of the preference in federal courts for arbitration.<sup>129</sup>

This putative class action against Comcast Cable Communications LLC (Comcast) focused on the following language in a December 2016 Subscriber Agreement in which the putative class representative, Michael Hearn (Hearn), agreed to arbitrate:

Any claim or controversy related to Comcast, including but not limited to any and all: (1) claims for relief and theories of liability, whether based in contract, tort, fraud, negligence, statute, regulation, ordinance, or otherwise; (2) claims that arose before this or any prior Agreement; (3) claims that arise after the expiration or termination of this Agreement; and (4) claims that are currently the

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120. *Id.*

121. *Id.* at 1263–64.

122. *Id.* at 1264.

123. *Id.*

124. 28 U.S.C. § 1927 (1980).

125. FED. R. CIV. P. 11(c).

126. *Peer*, 992 F.3d at 1265.

127. 992 F.3d 1209 (11th Cir. 2021).

128. *Id.* at 1215.

129. *See id.*

subject of purported class action litigation in which you are not a member of a certified class.<sup>130</sup>

Hearn terminated his Comcast services in April 2017.<sup>131</sup>

In March 2019, Hearn inquired into pricing and services at the same address through a telephone call to Comcast.<sup>132</sup> The parties disputed whether this call was for new services or reconnected services. Not in dispute is the fact that the Comcast representative on the call pulled Hearn's credit without his knowledge, which lowered Hearn's credit score. Thus, Hearn filed this action for violations of the Fair Credit Reporting Act.<sup>133</sup> Comcast moved to compel arbitration under the 2016 Subscriber Agreement.<sup>134</sup> The United States District Court for the Northern District of Georgia denied the motion finding that Hearn's claim was outside of the 2016 Subscriber Agreement's scope because the suit arose out of new services instead of reconnected services. Comcast then filed the present appeal.<sup>135</sup>

In reaching its decision, the Eleventh Circuit recounted the Federal Arbitration Act's (FAA)<sup>136</sup> liberal policy in favor of arbitration and that any doubts about scope should favor arbitration.<sup>137</sup> Thus, the court has upheld "arbitration agreement[s] [that] reach beyond the matters addressed in the underlying contract."<sup>138</sup> The 2016 Subscriber Agreement, however, is broader than any previous arbitration agreement enforced by the Eleventh Circuit because it expressly applies to all disputes between the parties even if the agreement was terminated at the time the dispute arose.<sup>139</sup> The court declined to address whether such a broad provision is enforceable, reasoning, instead, that Hearn's claim related to the 2016 Subscriber Agreement.<sup>140</sup>

The court based its decision on the fact that Comcast only had the information it needed to conduct the credit check through its prior relationship with Hearn.<sup>141</sup> The court also noted the 2016 Subscriber

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130. *Id.* at 1211.

131. *Id.*

132. *Id.*

133. 15 U.S.C. § 1681b (2021).

134. *Hearn*, 992 F.3d at 1212.

135. *Id.*

136. 9 U.S.C. §§ 1–14 (2021).

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

138. *Id.*

139. *Id.* at 1214.

140. *Id.*

141. *Id.*

Agreement's specific provisions relating to credit inquiries, including a provision that "[r]econnection of the Service(s) is subject to our credit policies."<sup>142</sup> The court rejected Hearn's argument that reconnection under the 2016 Subscriber Agreement was limited to late or non-payments.<sup>143</sup> Regardless, the court reasoned, this exact situation was anticipated by the 2016 Subscriber Agreement and the credit provisions directly relate to Hearn's claim.<sup>144</sup> Accordingly, the court reversed the district court's decision and remanded for further consideration.<sup>145</sup>

Although the Eleventh Circuit declined to reach the first impression issue presented in *Hearn*, it did address the first impression arbitration issue presented in *McLaurin v. Terminix International Co.*<sup>146</sup> In *McLaurin*, the court analyzed the plain language of the FAA, which "explicitly authorizes a party to file a motion to confirm at any time during the year immediately following an arbitration award."<sup>147</sup> Nevertheless, the FAA grants a district court "*discretion*" to stay such confirmation.<sup>148</sup> The Eleventh Circuit made clear that this discretion does not create a mandatory stay of an arbitration for any length of time or for any reason, regardless of whether the court has notice of a losing party's intent to challenge the award.<sup>149</sup>

## VI. CONCLUSION

The 2021 Survey period yielded several decisions of first impression and importance in the Eleventh Circuit. While the Survey is not intended to be exhaustive, the Authors have attempted to provide material that will be useful to practitioners by selecting relevant updates in the area of federal trial practice and procedure in the Eleventh Circuit.

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142. *Id.*

143. *Id.*

144. *Id.* at 1215.

145. *Id.* at 1216.

146. 13 F.4th 1232 (11th Cir. 2021).

147. *Id.* at 1240.

148. *Id.* (emphasis in original).

149. *Id.*