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Trial Practice and Procedure

John O'Shea Sullivan

Ashby K. Fox

Tala Amirfazli

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by John O'Shea Sullivan*
Ashby K. Fox**
and Tala Amirfazli***

I. INTRODUCTION

The 2013 survey period yielded noteworthy decisions relating to federal trial practice and procedure in the United States Court of Appeals for the Eleventh Circuit, several of which involved issues of first impression.[1] This Article analyzes recent developments in the Eleventh Circuit, including significant rulings in the areas of statutory interpretation, subject matter jurisdiction, arbitration, and civil procedure.

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* Partner in the firm of Burr & Forman, LLP, Atlanta, Georgia. University of Georgia (A.B.J., 1991); Mercer University, Walter F. George School of Law (J.D., cum laude, 1992). Member, Mercer Law Review (1993-1994); Managing Editor (1994-1995). Member, State Bars of Georgia and North Carolina.

** Partner in the firm of Burr & Forman, LLP, Atlanta, Georgia. Vanderbilt University (B.A., magna cum laude, 2000) (Phi Beta Kappa); Emory University School of Law (J.D., with honors, 2003). Member, Emory International Law Review (2001-2002); Notes and Comments Editor (2002-2003). Member, State Bar of Georgia.

*** Associate in the firm of Burr & Forman, LLP, Atlanta, Georgia. University of Georgia (B.A., cum laude, 2010); Georgia State University College of Law (J.D., with honors, 2013). Member, Georgia State Law Review (2011-2013); Legislative Editor (2012-2013). Member, State Bar of Georgia.

1. For an analysis of trial practice and procedure during the prior survey period, see John O'Shea Sullivan, Ashby Kent Fox & Amanda E. Wilson, *Trial Practice and Procedure, Eleventh Circuit Survey*, 64 MERCER L. REV. 991 (2013).

II. REMOVAL UNDER THE CLASS ACTION FAIRNESS ACT: WHETHER DEFENDANTS CAN REMOVE SEPARATE LAWSUITS AS "MASS ACTIONS" UNDER CAFA IF THE LAWSUITS IN THE AGGREGATE CONTAIN 100 OR MORE PLAINTIFFS WHOSE CLAIMS INVOLVE COMMON QUESTIONS OF LAW OR FACT, BUT THE PLAINTIFFS HAVE NOT PROPOSED THAT THE CLAIMS BE TRIED JOINTLY

In *Scimone v. Carnival Corp.*,[2] the Eleventh Circuit held, as a matter of first impression, that a defendant cannot remove separate lawsuits under the mass-action provision of the Class Action Fairness Act of 2005 (CAFA),[3] even if the lawsuits in the aggregate contain 100 or more plaintiffs whose claims involve common questions of law or fact, if the plaintiffs have not proposed that the claims be tried jointly.[4] The lawsuits giving rise to this appeal arose out of the Carnival Costa Concordia shipwreck. The plaintiffs were passengers, and the defendants included Carnival and its related corporate entities. The plaintiffs filed two separate actions against Carnival in the Circuit Court of the Eleventh Judicial Circuit of Florida, with one action including fifty-six plaintiffs and the other including forty-eight plaintiffs. The complaints in both actions contained the same allegations and involved common questions of law and fact.[5]

Carnival removed both actions to the United States District Court for the Southern District of Florida under CAFA's mass-action provision.[6] The plaintiffs moved to remand, arguing that the district court lacked subject matter jurisdiction because each action involved less than 100 plaintiffs (the number required for removal under CAFA's definition of a "mass action"), and the plaintiffs had not proposed that the actions be

2. 720 F.3d 876 (11th Cir. 2013).

3. Pub. L. No. 109-2, 119 Stat. 4 (2005) (codified in scattered sections of U.S.C. tit. 28). The mass-action provision of CAFA is codified at 28 U.S.C. § 1332(d)(11). *Scimone*, 720 F.3d at 880.

4. *Scimone*, 720 F.3d at 878-79.

5. *Id.* The plaintiffs asserted claims against Carnival for "negligence, professional negligence on the part of the ship's architect, and intentional torts." *Id.* at 879.

6. *Id.* at 879. Carnival also argued that the federal district court had exclusive jurisdiction over the cases because they raised "substantial issues of federal common law relating to foreign relations." *Id.* Carnival subsequently filed motions to dismiss in each case based on the forum-selection clause of the plaintiffs' contracts and the doctrine of forum non conveniens. *Id.*

tried together.[7] The district court agreed that removal was improper under CAFA's mass-action provision, and granted plaintiffs' motions to remand.[8] The Eleventh Circuit permitted Carnival to appeal the remand orders.[9]

Affirming the district court's findings, the Eleventh Circuit confirmed that removal of the lawsuits was improper under CAFA's mass-action provision.[10] Citing CAFA's definition of "mass action" as a civil action in which "claims of 100 or more persons are proposed to be tried jointly,"[11] the court held that because each case contained less than 100 plaintiffs, removal was improper unless the two cases were "proposed to be tried jointly" prior to removal.[12] Noting that CAFA's "passive syntax makes it somewhat ambiguous who can make the proposal for joint trial," the court held that "the statute must be referring to a proposal made by the plaintiff, by the defendant, or perhaps by the state court acting sua sponte."[13] Because CAFA expressly bars removal of actions where the claims are joined upon motion of a defendant, and because neither party in *Scimone* argued that the state court had ordered or suggested a joint trial, the court identified the essential question as whether the plaintiffs had proposed a joint trial of their claims in state court.[14]

The court held its interpretation of CAFA to be consistent with four longstanding removal principles: (1) jurisdictional facts must be assessed

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7. *Id.* at 879-80. CAFA defines the term "mass action" as "any civil action . . . in which monetary relief claims of 100 or more persons are proposed to be tried jointly on the ground that the plaintiffs' claims involve common questions of law or fact." 28 U.S.C. § 1332(d)(11)(B)(i) (2012). The plaintiffs also argued that the district court lacked subject-matter jurisdiction because the cases did not raise substantial issues implicating foreign relations. *Scimone*, 720 F.3d at 880.

8. *Scimone*, 720 F.3d at 880. The district court held that the "problem for removal jurisdiction under [] CAFA is that neither suit has 100 plaintiffs alone. It is also a problem that the Plaintiffs have not proposed for the cases to be tried jointly. Therefore, [] CAFA does not supply a basis for removing these two identical lawsuits." *Id.* The district court also rejected Carnival's argument that the cases raised substantial issues of "federal common law regarding foreign policy." *Id.*

9. *Id.*

10. *Id.*

11. *Id.* (quoting 28 U.S.C. § 1332(d)(11)(B)(i)).

12. *Id.* at 881 (quoting 28 U.S.C. § 1332(d)(11)(B)(i)).

13. *Id.*

14. *Id.* "We leave open the possibility that the state trial judge's sua sponte consolidation of 100 or more persons' claims could satisfy the jurisdictional requirements of § 1332(d)(11)(B)(I). Since neither party has suggested that the state court ordered or even raised the possibility of a joint trial, we have no occasion to, and do not decide that question." *Scimone*, 720 F.3d at 881.

at the time of removal;[15] (2) plaintiffs are free to structure their complaints so as to avoid federal jurisdiction;[16] (3) the burden of establishing federal jurisdiction rests with the removing defendant;[17] and (4) the right to remove must be strictly construed, with all uncertainties being resolved in favor of remand.[18]

Based on this analysis, the court held that removal was improper because Carnival, as the removing defendant, could not demonstrate that the plaintiffs had proposed a joint trial of their claims.[19] The plaintiffs chose to file two separate complaints in state court with each naming less than 100 plaintiffs, and they never sought to consolidate the lawsuits or proposed a joint trial of their claims.[20] Thus, the court held that "nothing in how the plaintiffs structured their complaints amounted to a 'proposal'" under CAFA's mass action provision, "[n]or did plaintiffs' subsequent litigation conduct amount to a proposal to try 100 or more persons' claims jointly."[21] In support of its findings, the Eleventh Circuit noted that "[e]very other court of appeals confronted with this question has come to the same conclusion: that plaintiffs have the ability to avoid § 1332(d)(11)(B)(i) jurisdiction by filing separate complaints naming less than 100 plaintiffs and by not moving for or otherwise proposing joint trial in the state court."[22] In sum, the holding in

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15. *Scimone*, 720 F.3d at 882. "This principle, when read along with the statutory language, necessarily means that the defendant cannot propose joint trial because the proposal must be made in the state court prior to the defendant's attempt to remove the case, and—pursuant to 28 U.S.C. § 1332(d)(11)(B)(ii)(II)—the defendant cannot move for consolidation in state court and subsequently take advantage of federal removal jurisdiction." *Scimone*, 720 F.3d at 882 (emphasis omitted).

16. *Scimone*, 720 F.3d at 882. The court stated, "We permit this so long as the method of avoidance is not fraudulent." *Id.*

17. *Id.* (quoting Lowery v. Ala. Power Co., 483 F.3d 1184, 1208 (11th Cir. 2007) ("CAFA did not alter the 'longstanding, near-canonical rule' that the burden of proving jurisdictional requirements rests with the removing defendant.")).

18. *Id.*

19. *Id.*

20. *Id.* at 883.

21. *Id.* (quoting 28 U.S.C. § 1332(d)(11)(B)(i)).

22. *Id.* at 884. The Eleventh Circuit rejected Carnival's argument that the plaintiffs were using artful pleading to defeat Carnival's right to a federal forum, and that the court was ignoring the purpose of CAFA, which was to expand federal jurisdiction and facilitate removal of mass actions. *Id.* at 885. In response, the court held as follows:

> The problem with the first objection is that Carnival presupposes that which it first has to prove: that it is entitled to a federal forum for two complaints that, on their face, each involve less than 100 claims. Carnival is only entitled to a federal forum if the plaintiffs filed a single complaint in state court that involved 100 or more persons' claims or otherwise proposed a joint trial for multiple complaints that in the aggregate contain 100 or more plaintiffs. The problem with the second

Scimone provides plaintiffs with a mechanism for avoiding removal under CAFA's mass-action provision by filing separate actions with less than 100 plaintiffs and not seeking a joint trial of their claims.

III. ARBITRATION: WHETHER AN ARBITRATOR EXCEEDED HIS POWERS UNDER THE FAA BY CONSTRUING AN ARBITRATION CLAUSE TO ALLOW FOR CLASS ARBITRATION AND CERTIFYING A CLASS WHERE THE ARBITRATION CLAUSE CONTAINS NO REFERENCE TO CLASS ARBITRATION

In *Southern Communications Services v. Thomas*,[23] the Eleventh Circuit addressed whether, under the United States Supreme Court's holdings in *Oxford Health Plans LLC v. Sutter*[24] and *Stolt-Nielsen S.A. v. AnimalFeeds International Corp.*,[25] an arbitrator exceeded his powers under § 10(a)(4) of the Federal Arbitration Act (FAA)[26] in construing an arbitration clause to allow for class arbitration and in certifying a class when the arbitration clause was silent on the issue of class arbitration.[27] The dispute in *Thomas* arose between a wireless provider (SouthernLINC) and its customer (Thomas) over early termination fees that Thomas was charged when he cancelled his cell-phone service.[28] Thomas's contract with SouthernLINC contained an arbitration clause that "contained no reference to class arbitration."[29] Thomas, for himself

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objection is that there is no indication that Congress's purpose in enacting CAFA was to strip plaintiffs of their ordinary role as masters of their complaint and allow defendants to treat separately filed actions as one action regardless of plaintiffs' choice.

Id.

23. 720 F.3d 1352 (11th Cir. 2013).

24. 133 S. Ct. 2064 (2013).

25. 559 U.S. 662 (2010).

26. 9 U.S.C. §§ 1-307 (2012).

27. *Thomas*, 720 F.3d at 1354, 1356.

28. *Id.* at 1354-55.

29. *Id.* at 1355. The arbitration clause, which was included in SouthernLINC's standard contract, stated:

> The parties will make good faith attempts to resolve any disputes. If the parties cannot resolve the dispute within 60 days after the matter is submitted to them, then, unless otherwise agreed, the parties will submit the dispute to arbitration. The parties will request that arbitrator(s) hold a hearing within 60 days following their designation, and render a final and binding resolution within 30 days after the hearing. The parties will conduct the arbitration in Atlanta, Georgia pursuant to applicable Wireless Industry Arbitration Rules of the American Arbitration Association.

Id.

"and a nationwide class of consumers," filed a demand for arbitration with the American Arbitration Association (AAA), arguing that SouthernLINC's early termination fees were unlawful penalties under state and federal law.[30] Thomas also moved for a Clause Construction Award to allow class action treatment pursuant to the AAA's rules.[31]

The arbitrator issued a Partial Final Clause Construction Award, finding that the arbitration clause in SouthernLINC's contract permitted class arbitration because: (1) "the arbitration clause did not expressly bar class treatment," and class treatment was permitted under Georgia law; (2) Georgia law permits class treatment "when individual class member[s'] claims are meager;" and (3) class treatment "presents an efficient mechanism for dispute resolution."[32] The arbitrator then granted Thomas's motion for class certification.[33]

SouthernLINC petitioned the United States District Court for the Northern District of Georgia to vacate the arbitration awards pursuant to FAA § 10(a)(4), which permits vacatur "where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made."[34] The district court denied SouthernLINC's motion, finding that

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30. *Id.* at 1355-56. Thomas claimed that the early termination fees were unlawful penalties pursuant to Georgia law, and were "unjust, unreasonable, and unlawful" pursuant to the Federal Communications Act. *Id.* (citing O.C.G.A. § 13-6-7 (2010) and 47 U.S.C. § 201(b)(2006)). Thomas sought "a declaration that the fees he paid were unlawful; an injunction on behalf of the class . . . to prevent SouthernLINC from engaging in deceptive, unjust, and unreasonable practices; statutory, consequential, and incidental damages; disgorgement of all termination fees; additional appropriate declaratory relief; and interest." *Id.* at 1356.

31. *Id.* at 1356. Thomas sought the Clause Construction Award pursuant to Rule 3 of the AAA's Supplementary Rules for Class Arbitrations.

32. *Id.* (alteration in original).

33. *Id.* SouthernLINC moved for reconsideration of the Clause Construction Award based on the Supreme Court's decision in *Stolt-Nielsen*. *Id.* In *Stolt-Nielsen*, the Supreme Court held that an arbitrator exceeded his authority under § 10(a)(4) of the FAA where, when interpreting a contract that was silent as to class arbitration and a stipulation between the parties that they had reached no agreement on that issue, the arbitrator came to a decision without "identifying and applying a rule of decision derived from the FAA" or applicable law. *Thomas*, 720 F.3d at 1358 (quoting *Stolt-Nielsen*, 559 U.S. at 676). Upon reconsideration, the arbitrator held that although the first and third grounds for finding class treatment permissible under the arbitration clause were improper under *Stolt-Nielsen*, his second ground "satisfied the rigorous requirements set forth in *Stolt-Nielsen*" because, by relying on Eleventh Circuit interpretation of Georgia law in reaching his conclusion that Georgia law favored class treatment when the amount in controversy was very small and class certification was needed to "vindicate [the members'] rights," he based his award "on a rule of law or rule of decision as *Stolt-Nielsen* requires." *Id.* at 1356.

34. *Thomas*, 720 F.3d at 1357-58 (quoting 9 U.S.C. § 10(a)(4)).

"an arbitrator's 'incorrect legal conclusion is not grounds for vacating or modifying [an] award,'"[35] and that it did not have jurisdiction to vacate an award "even in the event of an arbitrator's manifest disregard of the law."[36] SouthernLINC appealed.[37]

On appeal, the Eleventh Circuit relied on the Supreme Court's holding in *Sutter*, which addressed whether an arbitrator exceeded his powers under the FAA in determining that parties affirmatively agreed to authorize class arbitration "based solely on their use of broad contractual language precluding litigation and requiring arbitration of any dispute arising under their contract."[38] In that case, a doctor (Sutter) sued an insurance company (Oxford) on behalf of himself and a proposed class of doctors under contract with Oxford. Oxford moved to compel arbitration, and the parties agreed that whether the contract authorized class arbitration should be the decision of the arbitrator.[39] Although the arbitration clause was silent on the issue of class arbitration, the arbitrator decided that the provision "expresse[d] the parties' intent that class arbitration can be maintained."[40] Oxford moved to vacate the arbitrator's findings both before and after the Supreme Court's decision in *Stolt-Nielsen,* wherein the Court held that an arbitrator exceeded his authority under § 10(a)(4) where, when considering a contract silent as to class arbitration and the parties' stipulation that they had not reached an agreement on that issue, the arbitrator reached a decision without "identifying and applying a rule of decision derived from the FAA" or applicable law.[41] The Supreme Court in *Sutter* distinguished *Stolt-Nielsen* on the grounds that, in *Sutter*, the parties had "bargained for the arbitrator's construction of their agreement" and that "an arbitral decision 'even arguably construing or applying the contract' must stand,

35. *Id.* at 1357 (alteration in original) (quoting White Springs Agric. Chems., Inc. v. Glawson Invs. Corp., 660 F.3d 1277, 1280 (11th Cir. 2011)).

36. *Id.* The district court further held that the arbitrator "engaged in the exact analysis" required by *Stolt-Nielson* because he "identified generally applicable contract law principles to determine whether the parties implicitly authorized class arbitration . . . . [H]e identified legal principles governing the situation: state law governing contract formation and interpretation." *Id.* (alteration in original) (quoting S. Commc'n Servs., Inc. v. Thomas, 829 F. Supp. 2d 1324, 1339 (N.D. Ga. 2011)).

37. *Id.* at 1354.

38. *Id.* at 1357. Because *Sutter* was before the Supreme Court while the case of *Thomas* was pending before the Eleventh Circuit, the Eleventh Circuit stayed the case pending the Supreme Court's decision in *Sutter*. *Id.*

39. *Id.* at 1358 (citing *Sutter*, 133 S. Ct. at 2067).

40. *Id.* (alteration in original) (citing *Sutter*, 133 S. Ct. at 2067).

41. *Id.* (quoting *Stolt-Nielsen*, 559 U.S. at 676).

regardless of a court's view of its (de)merits."[42] Thus, the Court in *Sutter* held that "'the sole question' a court should ask under the exacting standards of § 10(a)(4) 'is whether the arbitrator (even arguably) interpreted the parties' contract, not whether he got its meaning right or wrong.'"[43]

In *Thomas*, SouthernLINC argued that because there was no "textual indication of agreement to class arbitration" in the contract or otherwise between the parties, the arbitrator lacked any basis for finding an agreement to allow class arbitration, and the standards in *Stolt-Nielsen* rather than *Sutter* applied.[44] Rejecting this argument, the Eleventh Circuit held that "SouthernLINC gave the question of whether the contract allowed for class arbitration to the arbitrator through its choice of rules and by failing to 'dispute th[e] [a]rbitrator's jurisdiction to decide this threshold issue.'"[45] Thus, the court relied on *Sutter* in finding that "under § 10(a)(4), if 'the arbitrator (even arguably) interpreted the

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42. *Id.* (quoting *Sutter*, 133 S. Ct. at 2068) (internal citation omitted). The court in *Sutter* distinguished *Stolt-Nielsen*, noting that the absence of any reference to class arbitration in the arbitration provision coupled with the parties' stipulation that they had never reached an agreement on class arbitration "meant necessarily that 'the arbitral decision [in *Stolt-Nielsen*] . . . lacked any contractual basis for ordering class procedures'" such that "in setting aside the arbitrators' decision, we found not that they had misinterpreted the contract, but that they had abandoned their interpretive role." *Id.* (emphasis omitted) (quoting *Sutter*, 133 S. Ct. at 2070).

43. *Id.* at 1359 (quoting *Sutter*, 133 S. Ct. at 2068). The Supreme Court did note in *Sutter* that the result may have been different

> if Oxford had argued below that the availability of class arbitration is a so-called "question of arbitrability." Those questions—which "include certain gateway matters, such as whether parties have a valid arbitration agreement at all or whether a concededly binding arbitration clause applies to a certain type of controversy"—are presumptively for courts to decide . . . . [T]his Court has not yet decided whether the availability of class arbitration is a question of arbitrability . . . [b]ut this case gives us no opportunity to do so because Oxford agreed that the arbitrator should determine whether its contract with Sutter authorized class procedures.

Id. at 1358 n.6 (alteration in original). Like the Supreme Court, the Eleventh Circuit noted in *Thomas* that

> we also have not decided whether the availability of class arbitration is a question of arbitrability. However, as in *Sutter*, this case does not give us the opportunity to consider the question, because here SouthernLINC gave the question of whether the contract allowed for class arbitration to the arbitrator through its choice of rules and by failing to "dispute th[e] [a]rbitrator's jurisdiction to decide this threshold issue."

Id. (alterations in original).

44. *Id.* at 1359.

45. *Id.* at 1358 n.6 (alterations in original).

parties' contract,' a court must end its inquiry and deny a § 10(a) motion for vacatur."[46] The court further held that

> [i]t is only in the rare instance where a court finds that a contract "lack[s] any contractual basis for ordering class procedures" . . . that it must proceed to the analysis directed by *Stolt-Nielsen* and ask whether the arbitrator "identif[ied] and appl[ied] a rule of decision derived from the FAA" or other applicable body of law or, alternatively, merely "imposed its own policy choice and thus exceeded its powers."[47]

In applying the holding in *Sutter* to the facts of *Thomas*, the Eleventh Circuit held that because the arbitrator relied on the language of the parties' contract and arguably interpreted that contract in issuing his awards, he did not "stray[] from his delegated task of interpreting a contract."[48] Accordingly, the court held that "[i]t is not for us to opine on whether or not that task was done badly, for '[i]t is the arbitrator's construction [of the contract] which was bargained for. . . .' The arbitrator's construction holds, however good, bad, or ugly."[49] In so holding, the Eleventh Circuit affirmed the district court's denial of SouthernLINC's motion to vacate, finding that "[u]nder the highly deferential standard of §10 (a)(4), the arbitrator did not exceed his authority in his issuance either of the clause construction award or of the class determination award."[50] The holding in *Thomas* implies that if there is any evidence that the parties agreed that the arbitrator should determine whether their contract allows for class arbitration, then the arbitrator's decision on that issue will stand.

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46. *Id.* at 1359.

47. *Id.* (alterations in original) (quoting *Sutter*, 133 S. Ct. at 2069; *Stolt-Nielsen*, 559 U.S. at 676-77).

48. *Id.* at 1360 (alteration in original) (quoting *Sutter*, 133 S. Ct. at 2070).

49. *Id.* (first two alterations in original) (quoting *Sutter*, 133 S. Ct. at 2070-71).

50. *Id.* SouthernLINC argued that the class certification award should be vacated because the arbitrator erroneously applied the class certification standards in certifying the class. The Eleventh Circuit rejected this argument, noting again that this Circuit does not recognize an "incorrect legal conclusion" or a "manifest disregard of the law" as grounds for vacating an arbitration award under § 10(a)(4). *Thomas*, 720 F.3d at 1360 (internal citations omitted) (quoting *White Springs*, 660 F.3d at 1280; Frazier v. Citifinancial Corp., LLC, 604 F.3d 1313, 1323 (11th Cir. 2010)). The court noted earlier in the opinion that, based upon the Supreme Court's decision in *Hall Street Associates, LLC v. Mattel, Inc.*, 552 U.S. 576, 581 (2008), §§ 10 and 11 of the FAA provided the exclusive grounds for vacatur and modification of arbitration awards, such that "judicially[]created bases for vacatur" that the Eleventh Circuit formerly had recognized were no longer valid. *Thomas*, 720 F.3d at 1358.

IV. CIVIL PROCEDURE

A. Whether the District Court Can Convert the Unpaid Remainder of an Equitable Disgorgement Order, Stemming from a Compensatory Civil Contempt Sanction, into a Money Judgment

In *FTC v. Leshin*,[51] the Eleventh Circuit held, as a matter of first impression, that a district court could convert the unpaid remainder of an equitable disgorgement order, emerging from a compensatory civil contempt sanction, into the legal remedy of a money judgment after the contemnor had disgorged as much money as he could currently pay.[52] The dispute in *Leshin* arose out of a prior lawsuit between the parties, which was settled through a stipulated injunction.[53] Leshin violated the injunction, and the United States District Court for the Southern District of Florida held him in civil contempt and entered a disgorgement order against him as a compensatory sanction.[54] The disgorgement order stated that "[a]fter disgorgement and any attendant contempt enforcement are complete, the FTC may apply to the Court to convert any unpaid balance of this civil contempt remedy to a money judgment."[55]

Leshin did not comply with the disgorgement order, and the district court held him to be in contempt of that order. The court ordered Leshin to pay $92,671 of the $594,987.90 original disgorgement amount or face jail time. Leshin purged the second contempt by paying the $92,671, but the original disgorgement order (less the $92,671) remained in effect. The FTC moved to have the unpaid remainder of the disgorgement order

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51. 719 F.3d 1227 (11th Cir. 2013) (*Leshin II*).

52. *Id.* at 1229. The court noted that "this case is unusual, as the lack of precedent on the subject indicates." *Id.*

53. *Id.* In *FTC v. Leshin*, 618 F.3d 1221, 1227-31 (11th Cir. 2010) (*Leshin I*), the court detailed the facts underlying the dispute. *Leshin II*, 719 F.3d at 1229. In *Leshin I*, the FTC filed suit against Randall Leshin and his co-appellants for deceptive marketing practices and other violations of the Federal Trade Commission Act committed by Leshin's debt-consolidation business. *Id.* The parties settled the earlier action, and the district court entered a stipulated injunction embodying the parties' settlement. *Id.*

54. *Leshin II*, 719 F.2d at 1229. Specifically, the district court ordered Leshin to disgorge the gross receipts of his business during the relevant time frame, in the total amount of $594,987.90. *Id.* Leshin appealed this order in *Leshin I* and a panel of the Eleventh Circuit affirmed the district court's power to require disgorgement of a business's gross receipts in a civil contempt proceeding. *Id.* The Court further held that the disgorgement of gross receipts did not render the sanction punitive and thereby transform the proceedings from civil to criminal contempt. *Id.* at 1229-30.

55. *Id.* at 1229.

converted into a money judgment, and the district court granted the motion.[56]

Leshin appealed, arguing that the district court abused its discretion by converting the unpaid remainder of the disgorgement order, an equitable remedy, into a money judgment, a legal remedy.[57] Disagreeing with Leshin and affirming the district court's findings, the Eleventh Circuit first noted that district courts have "extremely broad and flexible powers" in the area of civil contempt.[58] Next, the court noted that because the district court could have granted a money judgment as the remedy for Leshin's civil contempt in the first place,[59] there was no reason why the district court could not convert the disgorgement order into a money judgment to satisfy "the requirements of full remedial relief."[60] The court rejected Leshin's argument that the conversion violated the doctrine of election of remedies because the remedies were not inconsistent and did not allow for double recovery given that the money judgment only covered the unpaid remainder of the disgorgement order.[61] Thus the Eleventh Circuit held that the district court did not

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56. *Id.* at 1229-30. The district court held that $92,671 was the total amount that Leshin was able to pay at that time. The purpose of this second contempt order was coercive, not compensatory. *Id.*

57. *Id.* at 1230, 1231.

58. *Id.* at 1231.

59. *Id.* Leshin never disputed this fact, and conceded the same in his briefs by stating that "[t]he FTC could have sought a contempt sanction of a compensatory money judgment, but instead specifically asked for disgorgement," and "[t]he FTC says that the district court could have entered a money judgment all along." *Id.* Further, the Eleventh Circuit held that "[a]lthough we have found no case squarely on point, the Supreme Court and at least one court of appeals have acknowledged that a court can issue a money judgment as a remedy for civil contempt." *Id.* (quoting De Beers Consol. Mines, Ltd. v. United States, 325 U.S. 212, 220 (1945) (containing dicta regarding "process [that] conceivably may be issued for satisfaction of a money judgment for contempt"); *In re* Prof'l Air Traffic Controllers Org., 699 F.2d 539, 542 (D.C. Cir. 1983) (describing how one party "registered its three civil contempt money judgments")).

60. *Id.* at 1232 (quoting McComb v. Jacksonville Paper Co., 336 U.S. 187, 193 (1949)). The court noted that while "this bifurcation of remedies [is] unusual, courts in other contexts regularly grant both equitable and legal relief" and "we are at a loss to see why the district court lacked the power to grant both the equitable remedy and the legal one so long as it did not permit double recovery." *Id.* (emphasis omitted).

61. *Id.* at 1233.

> In this case, the district court's conversion of the remainder of the disgorgement order into a money judgment does not run afoul of the election of remedies doctrine. Plainly, the two remedies are not inconsistent—they rely on precisely the same set of facts—and do not allow double recovery; the roughly $90,000 that the FTC obtained under the disgorgement order has been deducted from the original contempt award, and the money judgment covers only the remainder.

Id.

abuse its "considerable discretion" by "merely [doing] what it could have done from the beginning of the contempt proceeding"—granting a compensatory contempt remedy in the form of a money judgment.[62]

B. Are a Testifying Expert's Notes and Communications with Non-Lawyers Discoverable After the 2010 Amendments to Federal Rule of Civil Procedure 26?

In *Republic of Ecuador v. Hinchee*,[63] the Eleventh Circuit held that a testifying expert is required to produce personal notes and communications with other experts, although draft expert reports and communications with the party's counsel are properly shielded under Federal Rule of Civil Procedure 26[64] from discovery.[65] The underlying litigation giving rise to the appeal in *Hinchee* started in 1993 when a group of Ecuadorian plaintiffs filed a class action lawsuit against a predecessor of Chevron, alleging that oil exploration in the Amazonian rain forest caused pollution that was responsible for the plaintiffs' oil-related health problems and environmental contamination. After the 1993 litigation in New York was dismissed for forum non conveniens, the plaintiffs filed similar claims in Ecuador in 2003. The Ecuadorian court entered judgment in 2011 awarding the plaintiffs $18.2 billion in damages against Chevron.[66]

Chevron objected to the litigation in Ecuador and sought arbitration against the Republic of Ecuador (the Republic) in the Permanent Court of Arbitration in The Hague, Netherlands. Chevron argued that the Republic violated the Ecuador-United States Bilateral Investment Treaty (the Treaty) by failing to recognize a settlement agreement between Chevron and the Republic, failing to indemnify Chevron in connection with the civil litigation, and other issues relating to the civil case.[67]

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62. *Id.* at 1235. Leshin argued that he purged the entirety of his original civil contempt order when he paid the $92,671 pursuant to the second contempt order. *Id.* at 1233. The court disagreed, finding that the payment only purged the second, coercive contempt order which was entered after the original disgorgement order. *Id.* Leshin also argued that he purged the original order when he paid the $92,671 because that was all he had the ability to pay. *Id.* The court also rejected this argument, noting that while the inability to pay was a "complete defense" to a coercive contempt sanction, inability to pay was no defense to a compensatory contempt sanction. *Id.*

63. 741 F.3d 1185 (11th Cir. 2013).

64. FED. R. CIV. P. 26 (2012).

65. *Hinchee*, 741 F.3d at 1189.

66. *Id.* at 1186-87; *see also* Jota v. Texaco Inc., 157 F.3d 153, 155-56 (2d Cir. 1998). An appellate court reduced this judgment to $9.1 billion. *Hinchee*, 741 F.3d at 1187.

67. *Hinchee*, 741 F.3d at 1187.

In connection with the Treaty arbitration, Chevron sought materials and documents in the possession of experts who testified for the plaintiffs in the Ecuadorian litigation, including experts residing in the United States. Similarly, the Republic sought discovery from Chevron's expert witnesses, including from Dr. Robert Hinchee, a Florida resident.[68] The Republic requested that the United States District Court for the Northern District of Florida issue a subpoena to Dr. Hinchee for a deposition and production of documents pursuant to 28 U.S.C. § 1782,[69] which allows the district court to issue orders to give "[a]ssistance to foreign and international tribunals and to litigants before such tribunals."[70] Hinchee was an "environmental engineer and an expert in the assessment and remediation of petroleum contaminated sites," and Chevron relied on his expert reports in the Ecuadorian litigation and the Treaty arbitration.[71]

After the district court granted the Republic's request for the subpoena, Hinchee and Chevron produced approximately 94,000 pages of documents, but asserted work-product protection over 1200 documents. The Republic moved to compel production of the remaining 1200 documents and requested an in camera review, and the district court ordered Chevron to submit 40 of the withheld documents for the in camera review. After the in camera review, the district court ruled that 39 of the 40 documents were not privileged—the only protected document was a draft of an expert report.[72] The remaining 39 documents consisted of Hinchee's notes and his communications with "one or more individuals who were neither attorneys nor members of an attorney's staff."[73] Some of those communications were between Hinchee and other expert witnesses testifying for Chevron, while others were communications between Hinchee and Chevron employees who were not attorneys.[74] The district court held that the 39 documents ordered to be produced were not protected by the work-product doctrine, which the court held "[does] not protect a testifying expert's own notes or communications with another testifying expert."[75]

On appeal, Chevron argued that Hinchee's notes and communications that the district court ordered to be produced were protected, either

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68. *Id.*

69. 28 U.S.C. § 1782 (2012).

70. *Hinchee*, 741 F.3d at 1187. Chevron intervened in the district court action to also oppose the subpoena of Hinchee. *Id.*

71. *Id.*

72. *Id.* at 1187-88.

73. *Id.* at 1188.

74. *Id.*

75. *Id.* (alteration in original).

under Federal Rule of Civil Procedure 26(b)(3)(A), or alternatively, Federal Rule of Civil Procedure 26(a)(2)(B), as amended in 2010.[76] The Eleventh Circuit analyzed both arguments using the Advisory Committee's notes to the Rules, the history of the Rules, and rules of statutory construction to find that Hinchee's notes and communications with non-attorneys were not entitled to work-product protection and had to be produced.[77]

1. Federal Rules of Civil Procedure 26(b)(3)(A) and (b)(4). The Eleventh Circuit began its analysis in *Hinchee* with a review of Rule 26(b)(1), which describes the general scope of discovery, and held that because Hinchee's notes and communications with non-attorneys were relevant, the Republic was entitled to discover them unless Chevron and Hinchee could establish that a privilege or work-product protection exempted them from discovery.[78] The court quickly ruled out privilege because the communications did not involve Chevron's attorneys, so the only issue for analysis was protection under the work-product doctrine.[79] Analyzing Rule 26(b)(3)(A), the court discussed the Rule's enactment in 1970 as a codification of the United States Supreme Court's decision in *Hickman v. Taylor*,[80] a seminal case.[81] Chevron and Hinchee's argument was that Rule 26(b)(3)(A) protects Hinchee's materials because Hinchee was Chevron's "representative," making the materials "prepared by or for a representative" as stated in the Rule.[82] Alternatively, Chevron and Hinchee argued that the materials were covered by Rule 26(b)(3)(A) because they were "prepared for a party."[83]

The Eleventh Circuit considered the threshold question on this issue to be whether Rule 26(b)(3)(A) applies to a testifying expert and held that it did not.[84] The court held that the Rule's failure to include the word "expert" in the list of persons who create work-product materials indicates that the work-product doctrine in Rule 26(b)(3)(A) does not include experts.[85] This conclusion is confirmed by the enactment of Rule 26(b)(4)(A) in 1970, which addresses the discovery of facts known

76. *Id.* at 1193.
77. *Id.* at 1195.
78. *Id.* at 1189.
79. *Id.*
80. 329 U.S. 495 (1947).
81. *Hinchee*, 741 F.3d at 1189.
82. *Id.* at 1190 (quoting FED. R. CIV. P. 26(b)(3)(A)).
83. *Id.* (quoting FED. R. CIV. P. 26(b)(3)(A)).
84. *Id.*
85. *Id.*

and opinions held by testifying experts.[86] Because the 1970 version of Rule 26(b)(4)(A) permitted interrogatories requesting a testifying expert's facts and opinions, and because the 1970 Advisory Committee Notes explained that the new Rule 26(b)(4) was intended to reject the case law that sought to bring expert information within the work-product doctrine, the Rules indicate the intent that testifying experts' work product not come under the work-product doctrine.[87] The court also discussed the 2010 amendment to Rule 26(b)(4), which was "added to provide work-product protection under Rule 26(b)(3)(A) and (B) for drafts of expert reports or disclosures."[88] Because the 2010 amendment to Rule 26(b)(4)(C) was added to provide work product protection for attorney-expert communications, the amendment was not intended to "impede discovery about the opinions to be offered by the expert or the development, foundation, or basis of those opinions."[89]

The court then turned to rules of statutory construction and noted that because the drafters explicitly addressed work-product claims with respect to experts in Rule 26(b)(4) but never mentioned experts in 26(b)(3), Chevron's argument that Rule 26(b)(3)(A) would apply to all testifying expert materials in general was incorrect.[90] Reading these rules together, Chevron's argument would render parts of Rule 26(b)(4) superfluous as they apply specifically to testifying experts.[91] The court concluded that the drafters' omission of all testifying expert materials, such as notes and communications with non-attorneys, from work-product protection reflects a "calculated decision" to not extend work-product protection to a testifying expert's notes and communications with non-attorneys.[92]

The court also emphasized the purpose of the work-product doctrine, which is to protect a lawyer's work and mental impressions and the need for attorneys to maintain some privacy in their work, a purpose that is not infringed by the production of an expert's notes and communications with non-lawyers.[93] The court also held significant the 2013 opinion from the United States Court of Appeals for the Tenth Circuit in a similar proceeding between the Republic and Chevron with respect to a subpoena to another of Chevron's experts in Colorado where the Tenth

86. *Id.*
87. *Id.*
88. *Id.* (quoting FED. R. CIV. P. 26 advisory committee's note).
89. *Id.* at 1191 (quoting FED. R. CIV. P. 26 advisory committee's note).
90. *Id.*
91. *Id.*
92. *Id.* at 1191-92.
93. *Id.* at 1192; *see also* United States v. Nobles, 422 U.S. 225 (1975) (holding that a federal trial court may compel production of an investigator's report).

Circuit held that the work-product protection of Rule 26(b)(3) did not extend to materials prepared by or for Chevron's testifying expert.[94]

2. Protection for Testifying Experts' Materials Under Rule 26(a)(2)(B) and the 2010 Amendments to the Federal Rules of Civil Procedure. Chevron and Hinchee also argued that the 2010 amendments to the Federal Rules of Civil Procedure narrowed the expert disclosure requirements of 26(a)(2)(B) and thus shielded Hinchee's notes and communications with non-attorneys from disclosure.[95] As with Rule 26(b)(3) and (b)(4), the court analyzed the history of Rule 26(a), beginning with the 1993 amendments, which added the mandatory requirements for testifying expert reports that required "a complete statement of all opinions to be expressed and the basis and reasons therefor; the data or other information considered by the witness in forming the opinions; any exhibits to be used as a summary of or support for the opinions."[96] The opinions following the 1993 amendments concluded that Rule 26 "created a bright-line rule requiring disclosure of all information provided to testifying experts, including attorney opinion work-product."[97] The broad interpretation of the language "other information" in Rule 26(a)(2)(B) undermined the protection of attorney opinion work product provided by Rule 26(b)(3).[98]

To alter this line of cases arising out of the 1993 amendments, the drafters changed the Rule again in 2010, accomplishing two things: first, Rules 26(b)(4)(B) and (C) were enacted to protect draft expert reports and attorney-expert communications as work product, and second, Rule 26(a)(2)(B) changed the language "data or other information" to "facts or data."[99] With reference to the 2010 Advisory Committee Notes, the court held that the amendments preserved the desire to protect the opinion work product of attorneys in the context of expert discovery, while continuing to allow discovery of the "facts or data" considered by the expert without impeding upon the core opinion work product of attorneys.[100]

The court held that because Hinchee's personal notes and communications with other experts did not constitute draft reports or communica-

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94. *Hinchee*, 741 F.3d at 1192-93 (citing Carrion v. For the Issuance of a Subpoena Under 28 U.S.C. § 1782(a) (*In re* Republic of Ecuador), 735 F.3d 1179, 1183-85 (10th Cir. 2013)).

95. *Id.* at 1193.

96. *Id.* (quoting FED. R. CIV. P. 26(a)(2)(B) (1993)).

97. *Id.*

98. *Id.* at 1194.

99. *Id.* (quoting FED. R. CIV. P. 26(a)(2)(B)).

100. *Id.* at 1194-95.

tions with attorneys, and because they did not contain the "core opinion work-product of Chevron's attorneys," the 2010 amendments did not create an exception under the work-product doctrine for Hinchee's notes and communications with non-attorneys.[101]

While the opinion in *Hinchee* appears to be well-reasoned and logical under the facts of that case, questions remain as to the practical application of the holding. Just as attorneys altered their practices and procedures following the 1993 Rules to emphasize oral, not written, communications with experts and a limited number of draft reports to minimize material available for discovery, the *Hinchee* opinion is likely to promote testifying experts' use of draft reports for note-taking, as well as restrict the expert's communications to the party's attorneys to ensure that otherwise discoverable communications remain non-discoverable.

C. Can a Party's Self-serving Testimony Create a Fact Issue Requiring the Denial of Summary Judgment?

In *Feliciano v. City of Miami Beach*,[102] the Eleventh Circuit held that the plaintiff's "self-serving" sworn statements that contradicted the defendant's versions of the facts were sufficient to require the denial of summary judgment to the defendants because they created a genuine issue of material fact, notwithstanding that the plaintiff's statements might have been conclusory and asserted only in her self interest.[103] The plaintiff in *Feliciano* sued four Miami police officers for various claims under 42 U.S.C. § 1983,[104] alleging that the officers violated her Fourth Amendment rights when they conducted a warrantless entry and search of her home. The sole claim on appeal was the alleged Fourth Amendment violation for the entry and search of the plaintiff's home without a warrant and the officers' motion for summary judgment on their defense of qualified immunity.[105]

The qualified-immunity defense was based mostly on the arrest report and deposition testimony of one officer in which he stated that he smelled marijuana emanating from the plaintiff's apartment when the officers arrived. He testified that he saw a man smoking a joint as he walked out of the bedroom, and then saw the man attempt to conceal the

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101. *Id.* at 1195. The court noted that to the extent any attorney core opinion work product was embedded in the 1200 documents at issue, Chevron and Hinchee were entitled to redact such portions and describe them in a privilege log in accordance with Rule 26(b)(5) to be submitted for in camera review if requested by the Republic. *Id.*

102. 707 F.3d 1244 (11th Cir. 2013).

103. *Id.* at 1253.

104. 42 U.S.C. § 1983 (2006).

105. *Feliciano*, 707 F.3d at 1247.

joint by lowering his hand and hiding it in his palm. The plaintiff "adamantly disputed" the officers' account, testifying that the man had nothing in his hands when he emerged from the bedroom, that neither the plaintiff nor the man was smoking marijuana, and that there was no smell of marijuana in the apartment when the officers arrived. The United States District Court for the Southern District of Florida denied the officers' motion for summary judgment, but not based on the two different factual versions presented by the plaintiff and the officers. Instead, the district court held that the scope of the officers' search while inside the apartment violated the plaintiff's Fourth Amendment rights.[106] Thus, the district court accepted the officers' assertions that they smelled and saw marijuana to conclude that they had "arguable probable cause and arguable exigent circumstances" that justified their immediate entry into the apartment without consent.[107]

On appeal, the Eleventh Circuit, reviewing the summary judgment order de novo, focused on the differences in the versions of the facts as presented by the plaintiff and the officers.[108] The Eleventh Circuit affirmed the denial of summary judgment to the officers, but for a different reason than the one articulated by the district court.[109]

The Eleventh Circuit held that

> the district court improperly discounted [the plaintiff's] sworn statements about what the officers could have observed before they entered the apartment, failed to construe the facts in the light most favorable to [the plaintiff], and impermissibly credited the officers' assertions that they noticed the smell of marijuana coming from the apartment and saw [the man] smoking or holding a joint.[110]

The Eleventh Circuit held that even if a district court "believes that the evidence presented by one side is of doubtful veracity, it is not proper to grant summary judgment on the basis of credibility choices."[111] The court explained that "credibility determinations and the weighing of evidence 'are jury functions, not those of a judge.'"[112] The Eleventh Circuit criticized the district court for accepting "as uncontroverted" and

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106. *Id.* at 1249-50. The district court acknowledged the plaintiff's testimony that contradicted the officers' version, but found that her "bare assertions" did not suffice to create a genuine issue of material fact about the officers' observations because her testimony was "conclusory" and was not supported by any objective evidence. *Id.*

107. *Id.* at 1250.

108. *Id.* at 1247.

109. *Id.* at 1251-52.

110. *Id.* at 1252.

111. *Id.* (quoting Miller v. Harget, 458 F.3d 1251, 1256 (11th Cir. 2006)).

112. *Id.* (quoting Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986)).

"effectively undisputed" the officers' assertions that before entering the apartment, they smelled marijuana and saw a joint in the man's hand, but dismissing the plaintiff's directly contradictory testimony as "bare," "conclusory," and "unsupported" by objective evidence.[113] The Eleventh Circuit held that the plaintiff's testimony did not consist of "conclusory and unsubstantiated allegations of fabrication of evidence," which are proper for the district court to disregard, and instead constituted "non-conclusory descriptions of specific, discrete facts of the who, what, when, and where variety."[114] The court held that because the plaintiff's testimony was not conclusory, and because it directly contradicted the officers' assertions about what they observed before and after they entered the apartment, the conflicting testimony presented "a classic swearing match" requiring a jury trial.[115]

The court went to some lengths to try to distinguish between testimony that is entitled to be disregarded by the district court on summary judgment and testimony that is required to be considered on summary judgment, although the opinion fails to provide much guidance for recognizing testimony that should be disregarded and testimony that should be considered.[116] The legal issue to which the testimony pertained in *Feliciano* applied to the standard for "arguable probable cause," which the court said existed when "reasonable officers in the same circumstances and possessing the same knowledge as the [d]efendants could have believed that probable cause existed."[117] Because the standard for arguable probable cause focuses on the officers' observations, knowledge, and belief in the circumstances, it is unclear as to how the plaintiff's admittedly self-serving testimony could create a factual issue as to the officers' observations, knowledge, and beliefs at the scene.[118] Nevertheless, the court appropriately pointed out that although the plaintiff's sworn statements were self-serving, they were "no more conclusory, self-serving, or unsubstantiated by objective evidence than the officers' assertions that they smelled marijuana coming from her apartment and saw [the man] smoking or holding a joint."[119]

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113. *Id.*

114. *Id.* at 1252-53 (quoting Kingsland v. City of Miami, 382 F.3d 1220, 1227 n.8 (11th Cir. 2004)).

115. *Id.* at 1253.

116. *Id.* at 1253-54.

117. *Id.* at 1251 (quoting Swint v. City of Wadley, 51 F.3d 988, 996 (11th Cir. 1995)).

118. *See id.*

119. *Id.* at 1253.

V. STATUTORY INTERPRETATION

A. Whether an Award of Liquidated Damages is Mandatory or Discretionary Under the Retaliation Provision of the FLSA

In *Moore v. Appliance Direct, Inc.*,[120] the Eleventh Circuit, as a matter of first impression, joined the United States Courts of Appeals for the Sixth and Eighth Circuits in ruling that the retaliation provision of 29 U.S.C. § 216(b)[121] of the Fair Labor Standards Act (FLSA)[122] gives district courts discretion to award liquidated damages in retaliation cases when doing so is appropriate under the facts of the case.[123] The dispute in *Moore* began when the plaintiff employees (delivery-truck drivers) sued their employer and its CEO for alleged violations of the FLSA's overtime provisions. While the overtime lawsuit was pending, the defendants began changing the employment status of their delivery-truck drivers from employees to independent contractors. The plaintiffs in the overtime lawsuit did not receive offers to become independent contractors, and they lost their jobs as a result. The plaintiffs then filed a separate action in the United States District Court for the Middle District of Florida, alleging that the defendants retaliated against them for filing the overtime lawsuit in violation of a provision of the FLSA. At trial, a jury held in favor of the plaintiffs and awarded damages. The plaintiffs filed a post-trial motion asking that liquidated damages be added to the jury's damage awards. The district court denied the motion, and the plaintiffs appealed.[124]

At issue on appeal was "whether the district court was required to award the [p]laintiffs liquidated damages in addition to the economic damages awarded by the jury."[125] The plaintiffs argued that 29 U.S.C.

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120. 708 F.3d 1233 (11th Cir. 2013).

121. 29 U.S.C. § 216(b) (2012).

122. 29 U.S.C. §§ 201-219 (2012).

123. *Moore*, 708 F.3d at 1242-43.

124. *Id.* at 1235-36. Pak, the CEO of the defendant employer Appliance Direct and the only defendant left in the retaliation case after Appliance Direct filed bankruptcy, also cross-appealed on various issues that are unrelated to the retaliation provision of the FLSA and thus are not discussed herein. *Id.*

125. *Id.* at 1238. The Eleventh Circuit noted that

> [t]his presents our court with a question of first impression: Does the FLSA mandate the imposition of liquidated damages after a finding of liability for retaliation, unless excused by proof of reasonable good faith of the employer, the same as it does after a finding of liability for unpaid minimum wages and overtime, or are liquidated damages discretionary in a retaliation case?

§ 216(b) mandates an award of liquidated damages in retaliation cases, just as in minimum wage and overtime cases under the FLSA, absent proof of the reasonable good faith of the employer.[126] The court discussed 29 U.S.C. § 216(b), which governs the award of liquidated damages in FLSA cases and provides in pertinent part as follows:

> Any employer who violates the provisions of section 206 or section 207 of this title [minimum wage or overtime provisions] shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages. Any employer who violates the provisions of section 215(a)(3) of this title [retaliation provision] shall be liable for such legal or equitable relief as may be appropriate to effectuate the purposes of section 215(a)(3) of this title, including without limitation employment, reinstatement, promotion, and the payment of wages lost and an additional equal amount as liquidated damages.[127]

The plaintiffs relied on decisions from the United States Courts of Appeals for the Fifth and Seventh Circuits that held, without analyzing the statutory language, that liquidated damages were mandatory in FLSA retaliation cases.[128] The defendant relied on cases from the Sixth and Eighth Circuits that held that the "as may be appropriate" language in § 216(b) gave the district court discretion in awarding liquidated damages in retaliation cases.[129] The Eleventh Circuit

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Id.

126. *Id.* at 1239. The reasonable good faith exception found in 29 U.S.C. § 260 provides that:

> In any action . . . to recover unpaid minimum wages, unpaid overtime compensation, or liquidated damages, under the Fair Labor Standards Act of 1938, as amended . . . if the employer shows to the satisfaction of the court that the act or omission giving rise to such action was in good faith and that he had reasonable grounds for believing that his act or omission was not a violation of the [FLSA], the court may, in its sound discretion, award no liquidated damages or award any amount thereof not to exceed the amount specified in section 216 of this title.

Moore, 708 F.3d at 1239 (alteration in original).

127. *Moore*, 708 F.3d at 1238 (alterations in original) (quoting 29 U.S.C. § 216(b)).

128. *Id.* at 1239 (citing Avitia v. Metro. Club of Chicago, Inc., 49 F.3d 1219, 1223 (7th Cir. 1995) (holding that an award of liquidated damages was mandatory under 29 U.S.C. § 216(b) without analyzing statutory language or purpose); Lowe v. Southmark Corp., 998 F.2d 335, 337-38 (5th Cir. 1993) (holding that an award of liquidated damages was mandatory under 29 U.S.C. § 216(b) without an analysis of the statutory language or purpose)).

129. *Id.* (citing Braswell v. City of El Dorado, 187 F.3d 954, 958 (8th Cir. 1999) (holding that the statutory language in the retaliation provision of 29 U.S.C. § 216(b) modified the

"join[ed] the Sixth and Eighth Circuits in holding that the second sentence in section 216(b), which allows such damages 'as may be appropriate to effectuate the purposes of [the retaliation provision],' creates a separate, discretionary, standard of damages for retaliation claims."[130] The court found support for its holdings in the plain language of 29 U.S.C. § 216(b), which provides in the first sentence that, for violations of the minimum wage or overtime provisions of the FLSA, the employer "*shall* be liable . . . in the amount of . . . unpaid minimum wages, or . . . unpaid overtime compensation . . . *and in an additional equal amount as liquidated damages.*"[131] In contrast, the second sentence provides that, for violations of the retaliation provision, the employer "*shall* be liable for such . . . relief *as may be appropriate to effectuate the purposes of section 215(a)(3) of this title*, including without limitation . . . an additional equal amount as liquidated damages."[132]

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mandatory language for an award of liquidated damages in wage and overtime cases and gave the district court discretion to award liquidated damages based on the facts of the retaliation case); Blanton v. City of Murfreesboro, 856 F.2d 731, 737 (6th Cir. 1988) (holding that an award of liquidated damages is discretionary in a retaliation case and should only be granted if it effectuates the purposes of the retaliation provision of the FLSA)). The district court in *Moore* applied the analysis employed in both *Braswell* and *Blanton*, and held that an award of $30,000 for economic damages was "sufficient to effectuate the purposes of section 215(a)(3) and that no award of liquidated damages was necessary." *Id.* at 1241.

130. *Id.* at 1242-43 (second alteration in original). The Eleventh Circuit held the decisions of the Sixth and Eighth Circuits to be persuasive because they "dealt directly with whether liquidated damages are mandatory or discretionary in retaliation cases, analyzed the statute, and emphasized the different language in the retaliation provision of section 216(b) as compared to the minimum wages and overtime provision." *Id.* at 1240.

131. *Id.* at 1241 (quoting 29 U.S.C. § 216(b)).

132. *Id.* (quoting 29 U.S.C. § 216(b)). The court noted that

> [t]his second sentence [of section 216(b)] was added by amendment in 1977 to provide damages in private causes of action to enforce the anti-retaliation provisions of the FLSA, and clearly was for the purpose of allowing separate and more extensive relief to an employee in case of retaliation. And, it is just as clear that the extent of that separate relief is discretionary, requiring a finding that any such relief, even relief not mentioned in the non-exclusive examples, is appropriate to effectuate the purposes of the retaliation section of the law.

Id. The court rejected the plaintiffs' argument that the reasonable good faith exception in § 260 made clear that an award for liquidated damages must also be mandatory (subject to the reasonable good faith exception) for retaliation claims. *Id.* The court held that § 260 already existed when § 216(b) was amended in 1977 to include a reference to retaliation, and if Congress wanted to mandate an award of liquidated damages in retaliation cases (subject to the reasonable good faith exception), it would and could have done so at that time. *Moore*, 708 F.3d at 1241-42. The court also rejected the plaintiffs' argument that finding the language of the second sentence to be discretionary would require the overturning of two of the court's prior panel decisions because "no issue was discussed as to whether liquidated damages were mandatory or discretionary" in those cases. *Id.* at

Accordingly, the court held "that the retaliation provision of 29 U.S.C. § 216(b) gives the district court discretion to award, or not to award, liquidated damages, after determining whether doing so would be appropriate under the facts of the case."[133]

B. Whether a District Court Retains Original Jurisdiction Over Pendent State Law Claims Against Non-FDIC Parties in a Case Removed by the FDIC if the FDIC Is Later Dismissed

In *Lindley v. FDIC*,[134] the Eleventh Circuit joined the United States Courts of Appeals for the Second, Fifth, and Eighth Circuits in holding that, when the FDIC is a party to a lawsuit and the FDIC removes the case to federal court, the district court maintains original jurisdiction over pendent state law claims against the non-FDIC parties, even after the FDIC is dismissed from the case.[135] The lawsuits giving rise to the consolidated appeal in *Lindley* arose out of the failed renovation of a building. The plaintiffs were tenants who had leased or purchased floor space in the building, and the defendants included the plaintiffs' bank and various real estate developers and contractors. The plaintiffs filed suit in state court and asserted state law claims for negligent misrepresentation, fraud, breach of contract, and breach of warranty.[136]

After the lawsuits were filed, the defendant bank failed and the FDIC, as receiver, was substituted as a party in the lawsuits.[137] The FDIC removed the cases to the district court under 12 U.S.C. § 1819(b)(2)

1242. In fact, the court held that

> these earlier cases point to the need for the court in this case to establish a clear answer to the question of whether in an FLSA retaliation case a district court in this circuit *must* award liquidated damages in the absence of proof of a reasonable good faith exception, or *may* do so in its discretion if that would "be appropriate to effectuate the purposes of" the retaliation section.

Id.

133. *Moore*, 708 F.3d at 1243.

134. 733 F.3d 1043 (11th Cir. 2013).

135. *Id.* at 1058; *see generally* Adair v. Lease Partners, Inc., 578 F.3d 238 (5th Cir. 2009); Casey v. FDIC, 583 F.3d 586 (8th Cir. 2009), FDIC v. Four Star Holding Co., 178 F.3d 97 (2d Cir. 1999).

136. *Lindley*, 733 F.3d at 1048. The plaintiffs' claims against the bank were based solely on a letter written by a bank officer that contained statements regarding when funds would be made available for the renovation of the building and the amount of funds supposedly guaranteed by the bank to be available. The letter was not presented to, or approved by, the bank's board of directors, and the plaintiffs never confirmed the veracity of the letter with anyone else at the bank. The plaintiffs also did not enter into any formal agreements with the bank relating to the subject funds or the renovation. *Id.* at 1048-49.

137. *Id.* at 1049.

(B),[138] which provides that "the [FDIC] may . . . remove any action, suit, or proceeding from a [s]tate court to the appropriate United States district court."[139] The plaintiffs moved to remand, citing an exception to the FDIC's removal authority for cases in which "only the interpretation of the law of [the] [s]tate is necessary" to resolve the case.[140] The FDIC opposed the motions to remand and moved for summary judgment on all claims, arguing that federal law compelled dismissal of the plaintiffs' claims pursuant to the doctrine established by the United States Supreme Court in *D'Oench, Duhme & Co. v. FDIC*,[141] known as the D'Oench Doctrine.[142] The district court denied the plaintiffs' motions to remand, granted the FDIC's motions for summary judgment, and dismissed all claims against the FDIC.[143] Then, assuming that it lacked original jurisdiction over the plaintiffs' pendent state law claims against the non-FDIC defendants, the district court chose not to exercise supplemental jurisdiction under 28 U.S.C. § 1367(c)(3)[144] and dismissed the plaintiffs' remaining claims.[145]

On appeal, the non-FDIC defendants argued that the district court should not have dismissed the remaining claims because the district court "ha[d] original jurisdiction over [the remaining] state law claims

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138. 12 U.S.C. § 1819(b)(2)(B) (2012).

139. *Lindley*, 733 F.3d at 1049, 1050 (first alteration in original) (emphasis omitted) (quoting 12 U.S.C. § 1819(b)(2)(B)).

140. *Id.* at 1049 (first alteration in original) (quoting 12 U.S.C. § 1819(b)(2)(D) (2012)). "The sole exception to the FDIC's authority to remove a case once it becomes a party is triggered when: (1) a state authority appointed the FDIC as receiver; (2) the litigation involves only the pre-closing rights against the failed institution; and (3) only state law need be interpreted." *Id.* at 1051.

141. 315 U.S. 447 (1942).

142. *Lindley*, 733 F.3d at 1049. The FDIC argued that in addition to the state law issues presented, federal law compelled dismissal of the claims against the FDIC under the D'Oench Doctrine and the statutes that incorporate and codify it. *Id.* (citing 12 U.S.C. §§ 1823(e) (2012) and 1821(d)(9)(A) (2012)). The D'Oench Doctrine is a rule that provides,

> In a suit over the enforcement of an agreement originally executed between an insured depository institution and a private party, a private party may not enforce against a federal deposit insurer any obligation not specifically memorialized in a written document such that the agency would be aware of the obligation when conducting an examination of the institution's records.

Id. at 1051 (quoting Baumann v. Savers Fed. Sav. & Loan Ass'n, 934 F.2d 1506, 1515 (11th Cir. 1991) (citing *D'Oench*, 315 U.S. at 459)). The D'Oench Doctrine is codified at 12 U.S.C. § 1823(e) and prevents bank customers from relying on agreements outside the documents contained in the bank's records to defeat a claim of the FDIC. *Lindley*, 733 F.3d at 1051-52.

143. *Lindley*, 733 F.3d at 1049.

144. 28 U.S.C. § 1367(c)(3) (2012).

145. *Lindley*, 733 F.3d at 1049.

against non-FDIC defendants [even] after the FDIC [was] dismissed from the case."[146] The non-FDIC defendants argued that federal courts have original jurisdiction over all civil actions arising under the laws of the United States under 28 U.S.C. § 1331,[147] and that "all suits of a civil nature at common law or in equity to which the [FDIC], in any capacity, is a party shall be deemed to arise under the laws of the United States" under 12 U.S.C. § 1819(b)(2)(A).[148] Noting that "[w]hether a federal court has jurisdiction over a pendent state law claim that the FDIC has removed to the [d]istrict [c]ourt when the FDIC is later dismissed from the case is an issue of first impression in our Circuit," the court held that "this question turns on the meaning of § 1819(b)(2)-(A), and, in particular, the term 'is a party' as used in that statute."[149]

Finding the statutory language ambiguous, the court looked to the legislative history to determine whether the term "is a party" meant that the FDIC need only be a party when the suit is filed to create jurisdiction over all claims, or whether the FDIC must remain a party throughout the case to maintain federal jurisdiction over pendent state law claims.[150] The legislative history indicates that § 1819(b)(2) was enacted as part of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989[151] to provide a federal forum for FDIC enforcement actions and actions brought by non-FDIC plaintiffs.[152]

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146. *Id.* (alterations in original). On cross-appeal, the plaintiffs alleged that: (1) the district court lacked jurisdiction over their state law claims and therefore erred in denying their motions to remand; and (2) even assuming it had subject matter jurisdiction, the district court erred in granting the FDIC's motion for summary judgment under the D'Oench Doctrine. *Id.* The Eleventh Circuit rejected the first argument, citing the "special provisions" that provide federal courts with original jurisdiction over "all suits of a civil nature . . . to which the [FDIC], in any capacity, is a party shall be deemed to arise under the laws of the United States." *Id.* at 1049-50 (alteration in original) (quoting 12 U.S.C. § 1819(b)(2)(A); Castleberry v. Goldome Credit Corp., 408 F.3d 773, 781 (11th Cir. 2005)). The court further held that the state law exception to the FDIC's removal authority did not apply because the FDIC asserted a federal defense—the D'Oench Doctrine—that was not only colorable, but dispositive. *Id.* at 1051. Regarding the plaintiffs' second argument, the court held that because the plaintiffs had failed to establish any exception to the application of the D'Oench Doctrine, the district court correctly granted summary judgment in favor of the FDIC. *Id.* at 1052-55.

147. 28 U.S.C. § 1331 (2012).

148. *Lindley*, 733 F.3d at 1055 (alteration in original) (emphasis omitted) (quoting 12 U.S.C. 1819(b)(2)(A)).

149. *Id.*

150. *Id.* at 1056.

151. Pub. L. No. 101-73, 103 Stat. 183 (1989).

152. *Lindley*, 733 F.3d at 1056 (quoting *Castleberry*, 408 F.3d at 788 ("[T]he terms of 12 U.S.C. § 1819 evince a clear congressional intent to provide a federal forum when the FDIC is made a party to state court litigation")).

Thus, the court held that these goals were better served if the statute's use of "is a party" means that the FDIC need only be a party when the lawsuit is filed to establish jurisdiction over all claims.[153] The court also held this interpretation of § 1819(b)(2)(A), which creates federal jurisdiction at the time of the filing, to be consistent with other longstanding principles of statutory construction.[154] Accordingly, the Eleventh Circuit concluded that "when the FDIC is a party to a civil suit and removes that case to federal court, the [d]istrict [c]ourt has original jurisdiction over claims against non-FDIC defendants, and this jurisdiction is not lost if the FDIC is later dismissed from the case."[155] Based on this conclusion, the court in *Lindley* held that even though the only remaining claims were state law claims involving non-FDIC parties, the district court erred in declining to exercise supplemental jurisdiction over the plaintiffs' claims against the non-FDIC defendants under 28 U.S.C. § 1367(c)(3) because 12 U.S.C. § 1819(b)(2)(A) created original jurisdiction over those claims.[156]

VI. CONCLUSION

This survey period yielded several noteworthy decisions, many of which concerned issues of first impression in the Eleventh Circuit. While this Article is not intended to be exhaustive, the Authors have attempted to provide material that will be useful to practitioners by providing them with relevant updates in the area of federal trial practice and procedure in the Eleventh Circuit.

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153. *Id.*

154. *Id.* at 1057 (finding that "relevant canons of construction support an interpretation of § 1819(b)(2)(A) that creates federal jurisdiction over pendent state law claims at the time the FDIC becomes involved in the litigation").

155. *Id.* at 1058. The court held this conclusion to be supported by the legislative history of the statute, other canons of statutory construction, its own prior precedent, and "the weight of persuasive authority from other Circuits." *Id.*

156. *Id.* at 1059.