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Trial Practice and Procedure

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I. INTRODUCTION

The 2022 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.[1] This Article analyzes recent trial practice developments in the Eleventh Circuit, including significant rulings in the areas of consumer debt collections, arbitration, copyrights, Federal Rule of Civil Procedure 54,[2] and a rule change regarding party disclosures.

II. IMPORTANT FAIR DEBT COLLECTION PRACTICES ACT CASE BECOMES MORE IMPORTANT PRECEDENT ON ARTICLE III STANDING

In last year's Survey, we discussed the "potentially dangerous ruling" that the United States Court of Appeals for the Eleventh Circuit acknowledged "runs the risk of upsetting the status quo in the

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1. For an analysis of last year's Trial Practice and Procedure during the Survey period, see John O'Shea Sullivan & Leesa M. Guarnotta, *Trial Practice and Procedure*, *Eleventh Circuit Survey*, 73 MERCER L. REV. 1333 (2022).

2. FED. R. CIV. P. 54.

debt-collection industry."[3] At the time of the deadline for last year's Article, the Eleventh Circuit had vacated its "potentially dangerous" opinion in the original *Hunstein v. Preferred Collection & Management Services, Inc.*[4] and issued a new opinion, which reached the same conclusion,[5] but ordered a rehearing en banc days later.[6] The en banc opinion, issued in September 2022, decided only the Article III standing issue, but did not address the substantive Fair Debt Collection Practices Act (FDCPA)[7] issues that were a large part of the original, "potentially dangerous" *Hunstein I* opinion.[8]

The background facts are discussed in more detail in last year's Article,[9] but by way of summary, a consumer, Hunstein, received a "dunning" or demand letter about a past due medical bill he incurred for his son's medical treatment.[10] The complaint alleged the debt collector (Preferred Collection) had electronically sent data about Hunstein's debt, including his name, outstanding balance, the fact that the debt arose from his son's medical treatment, and his son's name, to the debt collector's third-party vendor (Compumail) hired to create and mail the demand letter to the consumer.[11] When the consumer sued alleging the violation of the provision of the FDCPA that prohibits debt collectors from communicating consumers' personal information to third parties "in connection with the collection of any debt," the United States District Court for the Middle District of Florida rejected the consumer's reading of the FDCPA and dismissed the case.[12]

In the first of three opinions from the Eleventh Circuit, the appellate court reversed the district court and held a debt collector's transmittal of a consumer's personal information to its "dunning vendor" constituted a

3. Sullivan & Guarnotta, *supra* note 1, at 1333–37 (discussing Hunstein v. Preferred Collection & Mgmt. Servs., Inc., 994 F.3d 1341, 1352 (11th Cir. 2021) [hereinafter *Hunstein I*]).

4. 994 F.3d 1341 (11th Cir. 2021).

5. Hunstein v. Preferred Collection & Mgmt. Servs., Inc., 17 F.4th 1016 (11th Cir. 2021) [hereinafter *Hunstein II*]. The court stated that it was reissuing its opinion in light of the Supreme Court of the United States' intervening opinion in TransUnion LLC v. Ramirez, 141 S. Ct. 2190 (2021), which directly addressed the Article III standing issues at issue in *Hunstein*. *Id*. at 1020.

6. Hunstein v. Preferred Collection & Mgmt. Servs., Inc., 17 F.4th 1103 (11th Cir. 2021) [hereinafter *Hunstein III*].

7. Fair Debt Collection Practices Act, 15 U.S.C. §§ 1692–1692p.

8. Hunstein v. Preferred Collection & Mgmt. Servs., Inc., 48 F.4th 1236, 1240 (11th Cir. 2022) [hereinafter *Hunstein IV*].

9. Sullivan & Guarnotta, *supra* note 1, at 133–37.

10. *Hunstein IV*, 48 F.4th at 1240.

11. *Hunstein I*, 994 F.3d at 1344.

12. *Id*. at 1345.

communication that violates section 1692c(b)[13] of the FDCPA.[14] The court, *sua sponte*, ordered a rehearing and reissued its opinion of the three-judge panel, again reversing the district court's dismissal, this time analyzing *TransUnion LLC v. Ramirez*,[15] an opinion newly-issued by the Supreme Court of the United States.[16] With considerable disagreement among the judges of the Eleventh Circuit panel, the court voted to hear the case en banc. The ensuing third opinion in this case from the Eleventh Circuit changed direction from the first two panel opinions and affirmed the district court's dismissal, holding, in a spirited and passionate opinion from the majority, concurrence, and dissent, that Hunstein lacked standing under Article III of the United States Constitution.[17]

What started as a controversial FDCPA opinion that threatened to change the way debt collectors regularly do business ended as an important precedent for all plaintiffs suing in the Eleventh Circuit for statutory violations. The en banc majority opinion held that Hunstein lacked standing to sue because, even though he alleged a violation of the FDCPA, he did not allege a "concrete harm" arising from the alleged violation.[18] The majority characterized the analysis for Hunstein's case as "an exercise in simplicity," even though it took three appellate reviews, oral arguments, and dozens of pages of rulings, concurrences, and dissents to finally reach this conclusion.[19]

The core of the legal debate between the majority and dissent was how to determine whether allegations of the violation of a federal statute give rise to a concrete injury necessary to meet the constitutional minimum of standing.[20] The opinion summed up the question as follows: "Many of these cases spring from an allegation that a party has violated a federal statute—but not every statutory wrong causes an injury capable of supporting standing."[21] The court stated that "an injury in law is not an injury in fact,"[22] and only an alleged harm that is "concrete and particularized" and "actual or imminent, not conjectural or hypothetical"

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13. 15 U.S.C. § 1692c(b).
14. *Hunstein I*, 994 F.3d at 1352.
15. 141 S. Ct. 2190 (2021).
16. *Hunstein II*, 17 F.4th 1016, 1020 (11th Cir. 2021) (analyzing *TransUnion LLC*, 141 S. Ct. at 2190).
17. *Hunstein IV*, 48 F.4th at 1250; U.S. CONST. amend. III.
18. *Hunstein IV*, 48 F.4th at 1250.
19. *Id.* at 1245.
20. *Id.* at 1242 (citing Lujan v. Defs. of Wildlife, 504 U.S. 555, 560–61 (1992)).
21. *Hunstein IV*, 48 F.4th at 1242.
22. *Id.* (quoting *TransUnion LLC*, 141 S. Ct. at 2205).

is sufficient to show "a case or controversy rather than, say, a strong and abiding interest in an issue, or a desire to obtain attorney's fees."[23]

The majority opinion determined that the best method of determining whether an alleged statutory violation has created a concrete injury sufficient for standing is to ask "whether an alleged intangible harm has a close relationship to a harm that has traditionally been regarded as providing a basis for a lawsuit in English or American courts."[24] The court, relying heavily on the Supreme Court opinions in *Spokeo, Inc. v. Robins*[25] and *TransUnion, LLC*, and the Eleventh Circuit's own opinion in *Muransky v. Godiva Chocolatier, Inc.*,[26] discussed this approach as one where a party could show the harm caused by a statutory violation has a "close relationship" to a common law tort.[27] The court announced that the reason to consider traditional torts is because of the harm-to-harm comparison that it engenders and elucidates.[28]

Hunstein's complaint did not allege what harm he suffered from the alleged sending of his information to a mail vendor which used the information to create and send the demand letter to Hunstein, nor did Hunstein argue on appeal that he suffered any tangible injury such as financial loss or personal injury.[29] Instead, Hunstein likened the statutory violation of sharing his information with the mail vendor to the tort of public disclosure.[30] After a lengthy and detailed discussion of the tort of public disclosure and a comparison of it to the alleged violation of the FDCPA at bar, the court held that the FDCPA violation caused no concrete injury because, unlike public disclosure, the FDCPA violation did not result in a publication of Hunstein's information.[31] In other words, while the court recognized that only a person "who gives *publicity* to a matter concerning the private life of another" is liable for public disclosure, the alleged FDCPA violation did not result in any publicity about Hunstein's private information to the public.[32] The court concluded that with the differences between Hunstein's facts and the traditional tort of public disclosure, including primarily that there was no public

23. *Hunstein IV*, 48 F.4th at 1242 (first quoting *Lujan*, 504 U.S. at 560; then quoting Muransky v. Godiva Chocolatier, Inc., 979 F.3d 917, 924 (11th Cir. 2020)).

24. *Hunstein IV*, 48 F.4th at 1243 (quoting Spokeo, Inc. v. Robins, 578 U.S. 330, 341 (2016)).

25. 578 U.S. 330 (2016).

26. 979 F.3d 917 (11th Cir. 2020).

27. *Hunstein IV*, 48 F.4th at 1243 (quoting *Muransky*, 979 F.3d at 931).

28. *Hunstein IV*, 48 F.4th at 1244.

29. *Id.* at 1245.

30. *Id.*

31. *Id.* at 1245–50.

32. *Id.* at 1245 (quoting RESTATEMENT (SECOND) OF TORTS, § 652D (AM. L. INST. 1977)).

dissemination of any of Hunstein's information, he could not have suffered any concrete harm and therefore lacked standing.[33]

The series of three Hunstein opinions within one calendar year reveals sharp disagreements among the judges on the Eleventh Circuit. The dissent in the final opinion accused the majority of intentionally ignoring some of the complexities of the issues to reach a result, rather than properly analyzing the law.[34] The dissent's primary criticism of the majority opinion was what the dissent characterized as the majority's strict adoption of comparison to traditional tort claims approach, which the dissent stated requires "exact duplication" under the majority's opinion, when "close enough" should be adequate, especially at the pleadings stage.[35] The dissent promoted, instead, a "kind-degree" framework, which it contended the majority side-stepped by refusing to engage it.[36] The dissent closed by accusing the majority opinion of adopting the "very 'exact duplicate'" standard for determining standing to sue for statutory violations, which the dissent claims is on the minority side of a 7–1 circuit split.[37]

III. SECURED LENDERS IN FLORIDA BEWARE: YOUR UCC-1 FINANCING STATEMENT MUST PERFECTLY NAME THE DEBTOR OR YOUR LIEN IS NOT PERFECTED

In a case governed by Florida state law, albeit interpreting a uniform statute adopted throughout the United States Court of Appeals for the Eleventh Circuit, the court held that a secured lender had not properly perfected its security interest in the debtor's personal property because the financing statement filed to perfect the lien was "seriously misleading."[38] The discrete issue in *1944 Beach Boulevard, LLC v. Live*

33. *Hunstein IV*, 48 F.4th at 1250.

34. *Id.* at 1256 (Newsom, J. dissenting).

35. *Id.* at 1258 (Newsom, J. dissenting).

36. *Id.* at 1267 (Newsom, J. dissenting). Judge Newsom defined the kind-degree test as follows: "A plaintiff suing on a statutory cause of action must show that his alleged injury is similar in *kind* to the harm addressed by a common-law cause of action, but not that it is identical in *degree*." *Id.* at 1264 (Newsom, J. dissenting).

37. *Id.* at 1272. The majority answered the claim of the 7–1 circuit split, calling it "manufacture[d]" and pointing out that six of the eight cases cited by the dissent were decided after the Supreme Court's opinion in *TransUnion*, and none of them addressed the problem in *Hunstein IV*: "a pleading that completely fail[ed] to allege an element essential to the harm set out as a common-law comparator." *Id.* at 1249.

38. 1944 Beach Boulevard, LLC v. Live Oak Banking Co., 50 F.4th 979, 981 (11th Cir. 2022) [hereinafter *1944 Beach Boulevard III*]. The case is also reported under the name *In re NRP Lease Holdings, LLC*. *Id.*

Oak Banking Co.[39] arose in a bankruptcy case from a priority dispute between the debtor's secured lender (Live Oak) and the bankruptcy trustee acting as a "hypothetical lien creditor"[40] to avoid Live Oak's security interest.[41] The issue was whether Live Oak's financing statement filed to perfect its lien was properly perfected when it named the borrower/debtor as "1944 Beach Blvd., LLC" instead of its legal name, "1944 Beach Boulevard, LLC."[42]

The issue presented should have been answered by the secured transactions portion of the Uniform Commercial Code as adopted in Florida.[43] But the Eleventh Circuit panel needed to certify certain questions of Florida law to the Supreme Court of Florida.[44] In considering the federal court's certified questions, the Supreme Court of Florida determined a different threshold issue was dispositive but not certified by the Eleventh Circuit: "Is the filing office's use of a 'standard search logic' necessary to trigger the safe harbor protection of section 679.5061(3) [of the Florida Statutes]?"[45] To understand this "threshold issue" and the meaning of "standard search logic" and what the safe harbor was, a quick refresher on the UCC rules for perfection are necessary.

Florida Statute § 679.5011[46] requires a creditor to file a financing statement with the Florida Secured Transaction Registry (the Registry), which must, among other things, provide the name of the debtor.[47] Florida Statute § 679.5031(1)[48] specifies that to correctly name a debtor that is a registered organization like a limited liability company, the financing statement must "provide the name that is stated to be the registered organization's name on the public organic record most recently filed with or enacted by the registered organization's jurisdiction of

39. 20 F.4th 746 (11th Cir. 2021) [hereinafter *1944 Beach Boulevard II*].

40. 11 U.S.C. § 544(a).

41. *1944 Beach Boulevard III*, 50 F.4th at 982–83.

42. *Id.* at 982. For the reader asking "what's the difference?," the financing statement abbreviated "Boulevard" as "Blvd.," which the trustee argued made it "seriously misleading."

43. FLA. STAT. §§ 679.1011–679.1101 (2001). This is Florida's adoption of the Uniform Commercial Code (AM. L. INST. & UNIF. L. COMM'N).

44. *1944 Beach Boulevard II*, 20 F.4th at 758.

45. *1944 Beach Boulevard III*, 50 F.4th at 981 (quoting 1944 Beach Boulevard, LLC v. Live Oak Banking Co., 346 So. 3d 587, 588 (Fla. 2022) [hereinafter *1944 Beach Boulevard I*]). FLA. STAT. § 679.5061(3) (2001).

46. FLA. STAT. § 679.5011 (2002); *see also* U.C.C. § 9-501 (AM. L. INST. & UNIF. L. COMM'N 2023).

47. *1944 Beach Boulevard III*, 50 F.4th at 983 (citing FLA. STAT. § 679.5011).

48. FLA. STAT. § 679.5031(1) (2013); *see also* U.C.C. § 9-503 (AM. L. INST. & UNIF. L. COMM'N 2023).

organization."[49] Errors in the financing statement are tolerated, but it depends on the error. Florida Statute § 679.5061[50] governs errors in the financing statement and contains three subsections, summarized as follows: subsection (1) allows minor errors or omissions as long as they do not render the financing statement "seriously misleading"; subsection (2) creates a "zero-tolerance" rule where it is automatically "seriously misleading" if the statement fails to name the debtor as required under § 679.5031(1); and subsection (3) creates the safe harbor exception to the "zero-tolerance" rule by providing that a financing statement with an error in naming the debtor will still be effective so long as "'a search of the records of the filing office under the debtor's correct name, using the filing office's standard search logic, if any, would disclose [the] financing statement."[51]

Having reviewed the rules in the Uniform Commercial Code as adopted by Florida for perfection of security interests by financing statement, the Eleventh Circuit turned to whether the financing statement naming the debtor as "1944 Beach Blvd., LLC" was "seriously misleading" for the debtor actually named "1944 Beach Boulevard, LLC."[52] The court, following the Florida Supreme Court's answer to the certified questions, held that because Florida's Registry lacks a "standard search logic," the search contemplated in the safe harbor provision of § 679.5061(3) is impossible, meaning that all secured parties filing financing statements in Florida are left with § 679.5061(2)'s[53] zero-tolerance rule.[54] In other words, because Florida's computer system used to file and search UCC-1 financing statements lacks certain functionality, the safe harbor given to secured lenders by the Florida Legislature is no safe harbor at all since the state lacks the proper computer system to measure the degree of misleadingness in an error identifying the debtor.[55] Perhaps the Supreme Court of Florida does not believe in the rule of statutory interpretation that requires all words and provisions of a statute be given meaning, and that requires not reading a statute in a way to nullify or remove provisions of a statute, but *1944 Beach Boulevard III* confirms that Florida's statute providing lenders a safe harbor for minor mistakes in naming the debtor in a financing

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49. *1944 Beach Boulevard III*, 50 F.4th at 983 n.2.

50. FLA. STAT. § 679.5061 (2001); *see also* U.C.C. § 9-506 (AM. L. INST. & UNIF. L. COMM'N 2023).

51. *1944 Beach Boulevard III*, 50 F.4th at 983 (quoting *1944 Beach Boulevard I*, 346 So. 3d at 591).

52. *1944 Beach Boulevard III*, 50 F.4th at 982–84.

53. FLA. STAT. § 679.5061(2) (2001).

54. *1944 Beach Boulevard III*, 50 F.4th at 985.

55. *Id.*

statement is not applicable in Florida.[56] Thus, Live Oak's error naming its debtor "1944 Beach Blvd., LLC" instead of "1944 Beach Boulevard, LLC" was deemed "seriously misleading," and despite the Florida Legislature intending that Live Oak benefit from a safe harbor for such a technical and minor error, neither Live Oak nor any other lender to debtors with Florida collateral are entitled to use the safe harbor.[57]

Although *1944 Beach Boulevard III* applies only to secured transactions in Florida, the issue could arise in Alabama and Georgia as well. The operative provisions of Article 9 of Georgia's Commercial Code[58] and Alabama's Commercial Code[59] are identical to Florida's statutory language, except for internal references. The question will arise whether Georgia's and Alabama's high courts will follow Florida's lead and allow an important safe harbor for lenders to be read completely out of the statute, or if the high courts will read the safe harbor statute to give it meaning for what is obviously a minor mistake in a system designed and intended to tolerate minor mistakes.

IV. AVOIDING POSSIBLE FDCPA LIABILITY WHILE COMPLYING WITH THE TRUTH IN LENDING ACT'S (TILA)[60] REQUIREMENTS

In a case of first impression in this circuit, the United States Court of Appeals for the Eleventh Circuit held that certain disclosures required under TILA are also required to comply with the FDCPA, even if compliant with TILA.[61] By way of background, TILA requires a creditor or servicer of a residential mortgage loan to send a statement to its borrower every billing cycle.[62] The statement must include information such as the loan's principal amount, current interest rate, and applicable fees, among other items.[63] The FDCPA, on the other hand, establishes the rules and disclosures debt collectors must follow when attempting to collect debts.[64] The court's holding in *Daniels v. Select Portfolio Servicing, Inc.*[65] could impact liability for mortgagees who are debt collectors given the FDCPA's requirements for "communication[s] in connection with

56. *Id.*
57. *Id.*
58. *See* O.C.G.A. §§ 11-9-503(a)(1) (2023), 11-9-506(a)–(c) (2023).
59. *See* ALA. CODE § 7-9A-503 (2023); ALA. CODE §§ 7-9A-506(a)–(c) (2023).
60. 15 U.S.C. §§ 1601–1693r.
61. *See generally* Daniels v. Select Portfolio Servicing, Inc., 34 F.4th 1260 (11th Cir. 2022).
62. 15 U.S.C. § 1638(f)(1).
63. *Id.*
64. *See* 15 U.S.C. §§ 1692–1692p.
65. 34 F.4th at 1260.

debt collection."[66] The Eleventh Circuit's reasoning provides guidance to aid mortgagees in avoiding conversion of their TILA notifications to FDCPA "communications in connection with the collection of a debt."[67]

The pertinent facts involved a series of monthly mortgage statements that Daniels received from her mortgage servicer Select Portfolio Servicing, Inc. (Select Portfolio).[68] According to the court, the monthly mortgage statements varied in format, language, and amounts. The court focused on what Daniels claimed was the most problematic of the statements—the November 2016 statement. The November 2016 statement included basic information about the loan (namely the loan due date, amount due, etc.).[69] The November 2016 statement also contained traditional debt collection statements, including that the statement was an "attempt to collect a debt," that Daniels was "late on [her] mortgage payments," and that Select Portfolio "completed the first notice or filing required to start a foreclosure."[70]

Daniels claimed the November 2016 statement "significantly misstated" the balances and the payment due.[71] She also claimed that, despite the statement's representation that there were six delinquent payments, there was no delinquency at all. Daniels, through her attorney, attempted to correct the errors and demanded an accounting for the stated balance by letters to the debt collector in October and December 2017. Select Portfolio did not respond to the letters.[72] Daniels filed suit claiming the monthly mortgage statements "were harassing, false, and misleading, and that by sending them Select Portfolio engaged in unfair practices in connection with the collection of a debt in violation of the FDCPA."[73] Select Portfolio moved to dismiss the claims on the grounds that the monthly mortgage statements were not "communications in connection with the collection of a debt."[74] The United States District Court for the Middle District of Florida agreed with Select Portfolio and dismissed Daniels's Complaint.[75]

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66. 15 U.S.C. § 1692c.

67. *See generally Daniels*, 34 F.4th at 1267–75.

68. *Id.* at 1264–66.

69. *Id.* at 1265.

70. *Id.* at 1264–65.

71. *Id.* at 1265.

72. *Id.*

73. *Id.* Daniels also brought claims under the Florida Consumer Collection Practices Act, which are not discussed here.

74. *Id.* at 1266.

75. *Id.* at 1265–66.

On appeal, the Eleventh Circuit held that a promissory note secured by a mortgage on the property constitutes a debt under the FDCPA.[76] The court also held that the monthly mortgage statements fall within the "broad" definition of "communication" under the FDCPA.[77] The question remained whether the statements communications "in connection with the collection of a debt."[78] According to Select Portfolio, because the monthly mortgage statements were required under TILA, the answer to this question must be no.[79] The court disagreed.[80]

First, the court acknowledged that communications can have "dual purposes."[81] Thus, it is possible that a communication could be informational, while simultaneously seeking to collect a debt.[82] The dual role of such communication does not remove it from the FDCPA's coverage.[83]

Next, the court rejected Select Portfolio's argument that because the monthly mortgage statements were sent in compliance with TILA, the FDCPA did not apply.[84] The court emphasized the fact that none of the three sample forms provided by TILA's regulations include the words "this is an attempt to collect a debt."[85] The court held that this fell under the FDCPA, because the debt collector added the "collection of a debt" language (which is not required under TILA), requested payment of the amounts due by a certain date, and provided for a late fee, among other things.[86]

Finally, the court analyzed the Consumer Financial Protection Bureau's (CFPB) *Implementation Guidance for Certain Mortgage Servicing Rules*,[87] which it declined to extend.[88] The court stated that the bulletin dealt with the specific scenario of a consumer choosing the "cease communications" option under the FDCPA.[89] Thus, there was nothing in the bulletin to indicate that the CFPB sought to provide an advisory

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76. *Id.* at 1266.
77. *Id.*
78. *Id.* at 1267.
79. *Id.*
80. *Id.* at 1274.
81. *Id.* at 1268.
82. *Id.*
83. *Id.*
84. *Id.*
85. *Id.* at 1269.
86. *Id.* at 1270–71.
87. CFPB, *Implementation Guidance for Certain Mortgage Servicing Rules*, CFPB BULLETIN 2013-2 (Oct. 15, 2013), 2013 CFPB Guidances LEXIS 12.
88. *Daniels*, 34 F.4th at 1272.
89. *Id.*

opinion excluding all TILA-required periodic mortgage statements from FDCPA coverage no matter the circumstances.[90]

V. Opening the Door to Mandatory Arbitration by Estoppel

Outokumpu Stainless USA, LLC v. Coverteam SAS[91] gave the United States Court of Appeals for the Eleventh Circuit an opportunity expand the category of cases subject to arbitration. Specifically, *Outokumpu Stainless USA, LLC* presented the question of whether a nonsignatory to a contract could compel arbitration subject to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention)[92] on the basis of equitable estoppel.[93] Although the majority declined to answer this novel question for the Circuit, Judge Tjoflat's special concurrence cracked the window for later expansion.[94]

Outokumpu Stainless arises out of three contracts between Outokumpu Stainless USA, LLC (Outokumpu) and Fives (formerly known as F.L. Industries, Inc.).[95] The contracts required that Fives (the seller) provide Outokumpu (the buyer) with cold rolling mills and required arbitration of "[a]ll disputes arising between both parties in connection with or in the performance of the Contract[.]"[96] The contracts defined "seller" to include subcontractors unless expressly stated otherwise.[97] Subcontractor was defined as "any person (other than the Seller) used by the Seller for the supply of any part of the Contract Equipment, or any person to whom any part of the Contract has been sub-let by the Seller[.]"[98]

The contracts also included a list of preferred subcontractors, one of which was GE Energy Conversion France SAS (GE Energy) (formerly known as Coverteam SAS).[99] Fives subcontracted with GE Energy to

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90. *Id.*

91. Outokumpu Stainless USA, LLC v. Coverteam SAS, No. 17-10944, 2022 U.S. App. LEXIS 18846 (11th Cir. 2022) [hereinafter *Outokumpu Stainless II*].

92. Convention on the Recognition and Enforcement of Foreign Arbitral Awards, *opened for signature* June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 38, *implemented by* 9 U.S.C. §§ 201–208 (1970).

93. *See generally id.*

94. *Outokumpu Stainless II*, 2022 U.S. App. LEXIS 18846, at *10–18 (Tjoflat, J., specially concurring).

95. *Id.* at *1.

96. *Id.*

97. *Id.*

98. *Id.*

99. *Id.*

supply the motors for the cold rolling mills.[100] Within three years, the motors started to fail. The parties were unable to resolve the issues relating to the motors, prompting Outokumpu to sue in Alabama state court.[101] GE Energy removed the case on the basis of subject matter jurisdiction under 9 U.S.C. § 205[102] and diversity jurisdiction[103] and moved to dismiss and compel arbitration.[104] Outokumpu argued the arbitration clause did not apply to the dispute with GE Energy because "both parties" meant only the signatories to the contracts.[105] GE Energy argued that "both parties" meant "buyer" and "seller," which included subcontractors.[106]

The United States District Court for the Southern District of Alabama granted the motion to compel arbitration,[107] but the Eleventh Circuit reversed because the New York Convention required an "agreement in writing . . . 'signed by the parties.'"[108] The Eleventh Circuit also held that GE Energy could not compel arbitration through estoppel for the same reasons.[109] The Supreme Court of the United States reversed the Eleventh Circuit on the basis that the New York Convention was silent on the issue of nonsignatory enforcement.[110] The Supreme Court stated that, in light of the reversal, the question of whether GE Energy could enforce arbitration by estoppel could be addressed on remand.[111]

On remand to the Eleventh Circuit, the majority elected not to address equitable estoppel.[112] Instead, the court held that the arbitration clause expressly included GE Energy.[113] Judge Tjoflat agreed with this

100. Outokumpu Stainless USA, LLC v. Coverteam SAS, 902 F.3d 1316, 1321 (11th Cir. 2018), *rev'd and remanded sub nom.* GE Energy Power Conversion France SAS, Corp. v. Outokumpu Stainless USA, LLC, 140 S. Ct. 1637 (2020) [hereinafter *Outokumpu Stainless I*].

101. *Id.* at 1322.

102. 9 U.S.C. § 205 (1970). This provision of Chapter 2 of the Federal Arbitration Act (9 U.S.C. §§ 201–208) authorizes the removal of state court actions when the action "relates to an arbitration agreement or award falling under the [New York] Convention," even if not apparent on the face of the complaint. *Id.*

103. 28 U.S.C. § 1332 (2011).

104. *Outokumpu Stainless I*, 902 F.3d at 1322.

105. *Outokumpu Stainless II*, 2022 U.S. App. LEXIS 18846, at *3.

106. *Id.*

107. *Id.*

108. *Id.*

109. *Outokumpu Stainless I*, 902 F.3d at 1326–27.

110. GE Energy Power Conversion France SAS, Corp. v. Outokumpu Stainless USA, LLC, 140 S. Ct. 1637, 1645 (2020).

111. *Id.* at 1648.

112. *Outokumpu Stainless II*, 2022 U.S. App. LEXIS 18846 , at *8–9.

113. *Id.*

conclusion but did not think that the majority complied with the mandate rule.[114] Judge Tjoflat reasoned that the Supreme Court directed the Eleventh Circuit to address whether GE Energy could enforce the arbitration clause under equitable estoppel, and sought to do just that, but the majority dodged the question.[115]

Analyzing whether equitable estoppel applied, Judge Tjoflat reviewed the Supreme Court's two-part test for determining whether federal common law should apply or whether state law should apply.[116] First, he determined that the case presented a "quintessential 'uniquely federal interest'" in ensuring the United States complied with the Convention's obligations as an international treaty.[117] He then determined allowing differing jurisdictions' laws on the threshold question of arbitrability would frustrate the specific objective of having uniform standards under the Convention and Chapter 2 of the Federal Arbitration Act.[118] Thus, the concurrence concluded federal common law should be applied to determine whether GE Energy could compel arbitration through equitable estoppel.[119]

Judge Tjoflat then turned to the ultimate question: can GE Energy compel arbitration through equitable estoppel even though it was not a signatory to the agreement?[120] He answered this question in the affirmative,[121] exploring the two scenarios where nonsignatories can compel arbitration.[122] The first scenario was when a signatory must rely on the written agreement to assert claims against a non-signatory.[123] And second scenario was when a signatory claims collusive misconduct between other signatories and a nonsignatory.[124] Judge Tjoflat determined that because Outokumpu's claims derive entirely on the contracts with Fives, this case fit under the first scenario.[125] Thus, GE Energy could compel arbitration of Outokumpu's claims against it

114. *Id.* at *4 (Tjoflat, J., specially concurring).

115. *Id.* (Tjoflat, J., specially concurring).

116. *Id.* at *6 (Tjoflat, J., specially concurring) (discussing Boyle v. United Technologies Corp., 487 U.S. 500, 506–07 (1988)).

117. *Outokumpu Stainless II*, 2022 U.S. App. LEXIS 18846 , at *6 (Tjoflat, J., specially concurring).

118. *Id.* (Tjoflat, J., specially concurring) (citing 9 U.S.C. §§ 201–208).

119. *Outokumpu Stainless II*, 2022 U.S. App. LEXIS 18846 , at *6 (Tjoflat, J., specially concurring).

120. *Id.* at *7 (Tjoflat, J. specially concurring).

121. *Id.* (Tjoflat, J. specially concurring).

122. *Id.* (Tjoflat, J. specially concurring).

123. *Id.* (Tjoflat, J. specially concurring).

124. *Id.* (Tjoflat, J. specially concurring).

125. *Id.* (Tjoflat, J. specially concurring).

through estoppel.[126] Although *Outokumpu Stainless II* does not create binding precedent, it signals the Eleventh Circuit's continued favor of arbitration, even when a non-party to an arbitration agreement wishes to compel arbitration.

VI. THE ELEVENTH CIRCUIT CONFIRMS THERE WILL NOT ALWAYS BE A "PREVAILING PARTY"

Federal Rule 54(d)(1)[127] allows the prevailing party to recover its costs.[128] But is it possible that a case could end without a prevailing party? The answer to this question, which has not been addressed by the Supreme Court of the United States, is split among the Circuits.[129] The United States Court of Appeals for the Eleventh Circuit decided there is not always a prevailing party in *Royal Palm Properties, LLC v. Pink Palm Properties, LLC*.[130]

This case involved Pink Palm's alleged trademark infringement and Pink Palm's efforts to cancel Royal Palm Properties' trademark.[131] At trial, a jury found that Pink Palm did not infringe on the trademark. The jury also found that the trademark was not invalid. The United States District Court for the Southern District of Florida—despite the finding of the jury—entered judgment as a matter of law (JMOL) that the trademark was invalid, and granted Pink Palm's motion for bill of costs under Rule 54(d)(1).[132] On the initial appeal, the JMOL was reversed, but Pink Palm still sought costs under Rule 54 and attorney's fees under the Lanham Act,[133] both of which would require a finding that Pink Palm was the prevailing party.[134] The district court found that Pink Palm was no longer considered the prevailing party since it brought and lost significant claims.[135]

On appeal, the Eleventh Circuit analyzed the Supreme Court's prevailing party requirements.[136] In short, "the party" must (1) "be awarded some relief on the merits of its claim," and (2) show a material

126. *Id.* (Tjoflat, J. specially concurring).
127. FED. R. CIV. P. 54(d)(1).
128. *Id.*
129. Royal Palm Props., LLC v. Pink Palm Props., LLC, 38 F.4th 1372, 1378 (11th Cir. 2022).
130. 38 F.4th 1372 (11th Cir. 2022).
131. *Id.* at 1374.
132. *Id.* at 1373–75.
133. FED. R. CIV. P. 54(d)(1); Lanham Act, 15 U.S.C. §§ 1051–1072.
134. *Royal Palm Props., LLC*, 38 F.4th at 1374.
135. *Id.* at 1374–75.
136. *Id.* at 1375–77.

alteration of the parties' legal relationship based on a resolution of the dispute.[137] First, the Eleventh Circuit ruled out the possibility that there could be multiple prevailing parties based on the use of the phrase "the . . . party" (as opposed to "parties" or "a party") by the Supreme Court and Rule 54.[138] The court refused to give the term a different meaning across different rules, including fee shifting statutes unrelated to Rule 54.[139] But the question remained: must there be a single prevailing party, or is it possible there can be no prevailing party at all?

The Eleventh Circuit's answer is that there are times where there will be no prevailing party at all (meaning no possibility of costs under Rule 54).[140] The court noted that the other alternative (that there must be a prevailing party) does not account for those cases without a material alteration in the legal relationship of the parties.[141] In other words, if both parties are unsuccessful and the status quo is essentially restored, there is no prevailing party.[142] In fact, the Supreme Court has rejected such a conclusion in other contexts.[143]

The Eleventh Circuit then applied this standard to the facts at bar.[144] The court first stated that neither party "won" on their claims.[145] Thus, the question became whether a successful defense amounted to "winning." However, because both parties won their defenses, there was no way to say which was the prevailing party.[146] Essentially, the court ruled this was a "legal tie."[147] Although the court acknowledged that such a legal tie will only be "occasional[,]"[148] *Royal Palm Properties* should cause defendants to carefully analyze the likelihood of success of their counterclaims and the value of those counterclaims. Litigants should also consider *Royal Palm Properties*' implications beyond Rule 54 when seeking costs or attorney's fees under alternative statutes that require a showing of a prevailing party.

137. *Id.* at 1376.

138. *Id.* at 1378; FED. R. CIV. P. 54(d)(1).

139. *Royal Palm Props., LLC*, 38 F.4th at 1378.

140. *Id.* at 1379.

141. *Id.*

142. *Id.*

143. *Id.* at 1380 (citing Buckhannon Bd. & Care Home, Inc. v. WV Dep't of Health & Hum. Res., 532 U.S. 598, 605 (2001)) (analyzing attorneys' fees under the Fair Housing Amendments Act of 1988, 42 U.S.C. §§ 3601 *et seq.* and Americans with Disabilities Act, 42 U.S.C. §§ 12101 *et seq.*).

144. *Id.* at 1380–81.

145. *Id.* at 1381.

146. *Id.*

147. *Id.*

148. *Id.* at 1382.

VII. A PLAINTIFF MUST MEET A FIRST AND SECOND SCIENTER REQUIREMENT FOR A VIABLE CLAIM UNDER § 1202(B) OF THE DIGITAL MILLENNIUM COPYRIGHT ACT

In a case of first impression, the United States Court of Appeals for the Eleventh Circuit decided an appeal of the grant of summary judgment to the defendant on a claim the defendant had violated § 1202(b) of the Digital Millennium Copyright Act (DMCA).[149] The plaintiff in the case was a limited liability company owned and operated by a professional photographer who specialized in photographing hotels and resorts.[150] While the photographer took and provided photographs of hotels for the hotels' use, he registered his photographs with the Copyright Office and his LLC held those copyrights by written assignment from him.[151]

Before sending the photographs to the hotels and resorts, the photographer inserted his name, his job title, the copyright notice, his contact information, and the rights usage terms into the metadata of the image files.[152] Such information "is commonly referred to as copyright management information (CMI)."[153] The plaintiff provided broad licenses to the hotels to use the photographs; for example, the plaintiff had no restrictions on how the CMI on the photographs could be manipulated or removed, and he allowed the hotels to use the photographs on their own websites or on third-party booking websites (OTAs).[154]

The defendant, Shiji, "act[ed] as an intermediary between hotel chains . . . and OTAs by receiving copies of photographs from the hotels and making them available to OTAs."[155] Shiji contracted with two of the hotel chains to which plaintiff had licensed photographs. In providing copies of photographs to OTAs, Shiji's software would convert and optimize the images for display on OTA websites. Sometimes in the optimization process, metadata on the image, such as CMI, would be stripped from the photograph. The plaintiff alleged it inserts CMI into the metadata to be able to search the internet for copyright violations.[156] Using such methods, the plaintiff found unauthorized copies of his

149. 17 U.S.C. § 1202(b); *see* Victor Elias Photography, LLC v. Ice Portal, Inc., 43 F.4th 1313, 1315–16 (11th Cir. 2022).
150. *Victor Elias Photography, LLC*, 43 F.4th at 1316.
151. *Id.*
152. *Id.*
153. *Id.*
154. *Id.* at 1316–17.
155. *Id.* at 1317.
156. *Id.*

photographs being used on "non-party, non-OTA websites without his CMI."[157]

In the amended complaint, the plaintiff alleged Shiji had violated the DMCA, 17 U.S.C. § 1202(b), by removing the CMI in its copyrighted photographs.[158] Shiji moved for summary judgment, and the United States District Court for the Southern District of Florida, relying on an opinion by the United States Court of Appeals for the Ninth Circuit, found the plaintiff could not satisfy the second scienter requirement of the statute, and the plaintiff appealed.[159]

Section 1202(b) of the DMCA reads as follows:

> (b) Removal or alteration of copyright management information. No person shall, without the authority of the copyright owner or the law—
>
>> (1) intentionally remove or alter any copyright management information, [or]
>>
>> . . .
>>
>> (3) distribute, import for distribution, or publicly perform works, copies of works, or phonorecords, knowing that copyright management information has been removed or altered without authority of the copyright owner or the law, knowing, or . . . having reasonable grounds to know, that it will induce, enable, facilitate, or conceal an infringement of any right under this title.[160]

The Eleventh Circuit began by analyzing the plain language of the statute.[161] The court stated, "the statute requires proof that the defendant, knew, or had reasonable grounds to know, that its conduct 'will' induce, enable, facilitate, or conceal an infringement. Use of the word 'will' indicates a degree of likelihood or certainty."[162]

The court also examined decisions from the United States Courts of Appeals for the Second and Ninth Circuits in interpreting the statute:

> The Second Circuit has held that, to establish a violation of Section 1202(b)(3), a plaintiff must prove: (1) the existence of CMI in connection with a copyrighted work; and (2) that a defendant "distribute[d] . . . works [or] copies of works"; (3) while "knowing that copyright management information has been removed or altered without authority of the copyright owner or the law"; and (4) while

157. *Id.* at 1318.
158. *Id.*
159. *Id.* at 1318–19 (relying on Stevens v. Corelogic, Inc., 899 F.3d 666 (9th Cir. 2018)).
160. 17 U.S.C. § 1202(b).
161. *Victor Elias Photography, LLC*, 43 F.4th at 1319.
162. *Id.* at 1319–20.

> "knowing or . . . having reasonable grounds to know that such distribution will induce, enable, facilitate, or conceal an infringement."[163]

The last two of those four requirements have been dubbed the "double-scienter requirement" because the defendant has to have actual knowledge that CMI was removed or altered without permission by the copyright owner, and have actual or constructive knowledge that distribution of the work "will induce, enable, facilitate, or conceal an infringement."[164] The Eleventh Circuit agreed with its sister Circuits' plain language interpretation of § 1202(b)(1) and (3) and with the scienter requirement necessary to prove a violation thereof.[165]

The plaintiff presented three pieces of evidence that it alleged created a genuine dispute of material fact as to whether the defendant "knew or had reason to know that its action [would] 'induce, enable, facilitate, or conceal infringement' of copyrighted works."[166] The plaintiff's principal piece of evidence was a 2016 arbitration proceeding between Shiji and one of its competitors. Shiji's competitor alleged that Shiji had improperly accessed the competitor's image database, downloaded images without the competitor's consent, processed the images with Shiji's software to remove the CMI, and then republished the images for financial gain.[167] The competitor alleged Shiji's act of removing CMI from the images violated "[s]ection 1202(b) of the DMCA because they 'induced, enabled, facilitated, or concealed [the defendant's] infringement of the copyrighted images.'"[168]

The Eleventh Circuit noted an important fact: the competitor's DMCA claim rested on the competitor's CMI in the images, but the competitor was not the owner or copyright holder of the images.[169] The DMCA claim was dismissed by the arbitration panel on multiple grounds, one of the most important reasons being the competitor was not the copyright holder. The plaintiff in the matter before the Eleventh Circuit argued that the competitor's claims put Shiji on notice and imbued a mental state to violate § 1202(b) as the claims should have made it reasonably foreseeable to Shiji that it could be challenged by a copyright holder for

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163. *Id.* at 1320 (quoting Mango v. Buzzfeed, Inc., 970 F.3d 167, 170–71 (2d Cir. 2020)) (punctuation omitted).

164. *Victor Elias Photography, LLC*, 43 F.4th at 1320 (quoting *Mango*, 970 F.3d at 171) (internal punctuation omitted).

165. *Victor Elias Photography, LLC*, 43 F.4th at 1320.

166. *Id.* at 1321.

167. *Id.*

168. *Id.*

169. *Id.*

removing CMI.[170] While the court acknowledged it would be a "tempting inference to make," the plaintiff's argument about the arbitration was insufficient to create a genuine issue of material fact under the second scienter requirement.[171]

The court differentiated the arbitration proceeding in several ways from the plaintiff's case.[172] First, in the arbitration, the competitor claimed Shiji had gone further than just running images through its software and making those images available on its site.[173] Rather, Shiji allegedly accessed its competitor's database without authorization, took copyrighted images from the database, ran those images through its scrubber, and then republished the images for its own gain.[174] Thus, the competitor was alleging that Shiji's actions induced, enabled, facilitated, or concealed its own copyright infringement.[175] The plaintiff was not alleging that Shiji had infringed plaintiff's copyright but rather had facilitated copyright infringement by others.[176] The Eleventh Circuit also noted that nothing in the record indicated the arbitration would create a reason for Shiji to know its software's removal of CMI "would make copyright infringement 'likely, albeit not certain' to occur."[177] At most, the claim gave Shiji notice that its software was scrubbing CMI from some of its images.[178]

Lastly, the court noted that while it may have been reasonable for Shiji to presume after the arbitration that the next DMCA challenge it faced would come from a copyright holder, it did not follow that Shiji would know its conduct violated the law.[179] The court did not hold that prior litigation or arbitration of a DMCA claim could not provide the requisite knowledge needed, but rather, the facts in that arbitration case were insufficient to satisfy the second scienter requirement in the case at bar.[180]

The plaintiff's next piece of evidence to support its argument was that it used the CMI in the images to search for instances of copyright infringement.[181] But the court held that there was no indication that Shiji

170. *Id.* at 1321–22.
171. *Id.* at 1322.
172. *Id.*
173. *Id.*
174. *Id.*
175. *Id.*
176. *Id.*
177. *Id.*
178. *Id.*
179. *Id.*
180. *Id.*
181. *Id.* at 1323.

knew at the time that copyright owners used CMI to search for copyright infringement, thus the plaintiff could not show Shiji "knew or had reason to know that removal of CMI could conceal an infringement."[182] This was especially true because a copyright infringer could remove CMI on its own without the need for an intermediary.[183]

The last piece of evidence offered by the plaintiff was the allegation Shiji had a *modus operandi* of removing CMI from images knowing the removal of the CMI had "likely directly resulted in infringement of the" plaintiff's images.[184] To support this claim, the plaintiff pointed to the copies of his work that had been found on non-party websites that had been stripped of his CMI.[185] But the court noted that the fundamental problem with such argument was that there was no evidence linking Shiji's removal of the CMI to the infringed works found on the internet.[186] The infringers could have removed the CMI themselves, and the plaintiff admitted he did not know where the infringers got the images.[187]

"In short, the statute's plain language requires some identifiable connection between the defendant's actions and the infringement or the likelihood of infringement."[188] Thus, the Eleventh Circuit held that summary judgment had properly been granted to Shiji because the plaintiff could not produce evidence to create any fact issue on the second scienter requirement.[189]

VIII. RULE CHANGE REQUIRES MORE ROBUST PARTY DISCLOSURES IN DIVERSITY JURISDICTION CASES

On December 1, 2022, Federal Rule of Civil Procedure 7.1[190] was amended in two significant ways. First, Rule 7.1(a)(1) was amended to include nongovernmental corporations seeking to intervene as those required to file disclosure statements. Second, Rule 7.1(a)(2) drastically expanded, primarily for limited liability company parties, the requirements for disclosure statements in diversity cases where jurisdiction is based on 28 U.S.C. § 1332(a).[191] The new Rule 7.1(a)(2) requires, in diversity cases, a "party or intervenor" to file a disclosure

182. *Id.*
183. *Id.*
184. *Id.*
185. *Id.*
186. *Id.*
187. *Id.* at 1324.
188. *Id.* at 1325.
189. *Id.*
190. FED. R. CIV. P. 7.1.
191. 28 U.S.C. § 1332(a).

statement identifying the citizenship of every individual or entity whose citizenship is attributed to the party or intervenor.[192] This requirement is not limited to the time of filing or removal but is a continuing obligation whenever there is a change to such information.[193]

According to the Advisory Committee, this change is intended to determine diversity jurisdiction at an early stage.[194] For example, limited liability companies are considered citizens of every state of every one of its members.[195] Where the members of limited liability companies are themselves limited liability companies, then the inquiry follows through all members until the inquiry reaches an entity with no limited liability company owners, or a natural person.[196]

Now, perhaps, parties may take comfort in pleading citizenship of the limited liability company based upon information and belief (although this was largely the unofficial practice prior to the 2022 amendment).[197] This is because, while a plaintiff or removing defendant may not have access to the membership of its opponents, much less their citizenships and the citizenships of all of their members, the defendant(s) or removed plaintiff(s) are now required to disclose the citizenship information at the outset of the litigation or at the time of removal rather than allowing the lawsuit to go on for months or years only to find out later there was never proper subject matter jurisdiction in federal court. Instead of risking dismissal or remand due to insufficient pleading or spending thousands of dollars on jurisdictional discovery, litigants may take comfort that it will now be the defendant's or removed plaintiff's burden to disclose its members and their citizenships in the disclosure statement required in all cases except where a court order relieves the parties of filing it.[198]

The Advisory Committee notes add that the new amendment does not necessarily eliminate the need for jurisdictional discovery in every instance.[199] For example, there may still be questions as to "the completeness of a disclosure's list of persons or the accuracy of their described citizenships."[200] The Advisory Committee also discuss the

192. Fed. R. Civ. P. 7.1(a)(2).
193. FED. R. CIV. P. 7.1 (b)(2).
194. FED. R. CIV. P. 7.1. advisory committee's notes to 2022 amendments.
195. *See* Rolling Greens MHP, LP v. Comcast SCH Holdings, LLC, 374 F.3d 1020, 1022 (11th Cir. 2004).
196. *See* Carden v. Arkoma Assocs., 494 U.S. 185, 195 (1990).
197. FED. R. CIV. P. 7.1. advisory committee's notes to 2022 amendments.
198. 17 U.S.C. § 1202.
199. FED. R. CIV. P. 7.1. advisory committee's notes to 2022 amendments.
200. *Id.*

court's authority to limit the disclosures.[201] Examples provided by the committee include as follows:

> [A] party reveals a citizenship that defeats diversity jurisdiction. Or the names of identified persons might be protected against disclosure to other parties when there are substantial interests in privacy and when there is no apparent need to support discovery by other parties to go behind the disclosure.[202]

The 2022 rule amendment should allow for timely answers to diversity jurisdiction questions or concerns, especially those involving limited liability companies. However, the Advisory Committee's notes invite questions about the precise scope of the court's authority to limit disclosures, potentially opening a new area of case law. For the time being, trial lawyers should be sure to check their district's local rules for specific guidance or requirements in the disclosure statements as well as updated disclosure statement forms.

IX. CONCLUSION

The 2022 Survey period yielded several decisions of first impression and of importance in the United States Court of Appeals for 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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201. *Id.*
202. *Id.* at 121.