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Class Actions

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The United States Court of Appeals for the Eleventh Circuit's 2023 class-action decisions[1] continued to grapple with Article III[2] standing requirements while also demonstrating, in two decisions, the court's longstanding generally permissive posture toward approval of class-action settlements. A significant deviation from the latter tendency is the court's increasingly isolated position on payment of incentive awards to class representatives. Alone among the circuits, the court prohibits such payments, creating an inter-circuit conflict that seems inevitably headed to the Supreme Court. In the meantime, within the circuit, class counsel face a unique hurdle in crafting settlements and dealing with class representatives.

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1. For an analysis of class-action topics during the prior survey period, *see* Thomas M. Byrne & Stacey McGavin Mohr, *Class Actions*, *Eleventh Circuit Survey*, 74 MERCER L. REV. 1351 (2023), https://digitalcommons.law.mercer.edu/jour_mlr/vol74/iss4/6/ [https://perma.cc/J5TG-L8UG].

2. U.S. CONST. art. III.

I. CLASS CERTIFICATION REQUIREMENTS

A. Predominance and Reliance: Tershakovec v. Ford Motor Company

The Eleventh Circuit reversed and remanded class certification of most claims brought by a group of consumers who alleged their Ford Mustang Shelby GT350s were not "track ready" as advertised.[3] The court's decision in *Tershakovec v. Ford Motor Company*[4] focused on the reliance element of the consumers' claims, concluding that whether a damages class may be certified under Federal Rule of Civil Procedure 23(b)(3)[5] depends on the applicable state-law standard for proving reliance, including whether the relevant state law presumes reliance.[6]

The *Tershakovec* plaintiffs were individual residents of a number of different states who had purchased Ford Mustang Shelby GT350s advertised as "track ready."[7] This turned out to be false, the plaintiffs claimed, because their cars would overheat and decelerate on long track runs. They further alleged that this problem existed for two particular trim packages that did not come with the "cooler" necessary to prevent overheating.[8]

The consumers filed a putative class action bringing state-law claims based on common-law fraud theories and consumer-protection statutes.[9] The United States District Court for the Southern District of Florida granted their motion for certification of a Rule 23(b)(3) damages class as to almost all claims.[10] To manage the varying states' laws that would apply to the respective consumers' claims, the district court certified multiple state subclasses within the single class.[11]

The Eleventh Circuit granted Ford's application for discretionary appeal and reversed certification as to most of the claims, concluding that the district court did not properly analyze the predominance requirement for Rule 23(b)(3) certification.[12] Specifically, the district court did not appropriately consider the varying standards for reliance under the

3. 79 F.4th 1299, 1304 (11th Cir. 2023). Judge Kevin Newsom authored the opinion for the court.

4. 79 F.4th 1299 (11th Cir. 2023).

5. FED. R. CIV. P. 23(b)(3).

6. 79 F.4th at 1304.

7. *Id.*

8. *Id.* at 1305.

9. *Id.*

10. *Id.* at 1305; FED. R. CIV. P. 23(b)(3).

11. *Tershakovec*, 79 F.4th at 1305–06.

12. *Id.* at 1306, 1315; FED. R. CIV. P. 23(b)(3).

respective state laws, or what evidence would be needed to prove each claim.[13]

In analyzing predominance, the Eleventh Circuit explained, a district court must first identify the plaintiffs' claims and the elements of those claims to determine whether those elements may be adjudicated with common evidence.[14] In other words, the court must "predict[] how the parties will prove" common and individual questions at trial.[15]

The elements common to the state-law fraud claims were a misrepresentation or omission, materiality, reliance, causation, and injury.[16] Because the parties focused on the reliance element—that is, how reliance must be proven—so did the Eleventh Circuit.[17]

The district court's error was leaning too heavily on the notion that reliance can be presumed.[18] This was an overgeneralization, because any presumption depends on the applicable state law.[19] The district court acknowledged that the presumption did not exist in every state, but it went no further in its analysis.[20]

What the district court should have done, the Eleventh Circuit held, was analyze how the relevant state laws differ on whether proof of reliance is necessary at all and, if so, how it can be established.[21] First, however, the court considered and rejected the plaintiffs' argument that reliance always is presumed because their claims involve material omissions, not misrepresentations.[22] This argument relied on the Supreme Court's decision in *Affiliated Ute Citizens of Utah v. United States*,[23] which held, in the circumstances of the Rule 10b-5[24] securities case before it, which involved primarily a failure to disclose—*i.e.*, an omission as opposed to a misrepresentation—proof of reliance may be presumed.[25] The Eleventh Circuit found *Affiliated Ute* inapplicable, because the plaintiffs in *Tershakovec* alleged false statements in marketing and advertising, not omissions from them.[26]

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13. *Tershakovec*, 79 F.4th at 1315.
14. *Id.* at 1306.
15. *Id.*
16. *Id.*
17. *Id.* at 1307.
18. *Id.*
19. *Id.*
20. *Id.*
21. *Id.*
22. *Id.* at 1309.
23. 406 U.S. 128 (1972).
24. 17 CFR § 240.10b-5 (1951).
25. *Tershakovec*, 79 F.4th at 1308; *Affiliated Ute Citizens of Utah*, 406 U.S. at 153.
26. *Tershakovec*, 79 F.4th at 1308; *Affiliated Ute Citizens of Utah*, 406 U.S. at 128.

Turning to the state-law standards for reliance, the court divided the claims into three groups: (1) claims requiring no proof of reliance at all (here, consumer-protection statutes in Florida, Missouri, New York, and Washington); (2) claims requiring proof of reliance with no presumption (here, claims under the common law of New York, Tennessee, and Washington, as well as under the Texas consumer-protection statute); and (3) claims that require reliance but for which reliance may sometimes be presumed (here, California statutory and common-law claims).[27]

For the first two groups, the predominance question was straightforward. For group one—no proof of reliance required—common questions would predominate, and the class was properly certified.[28] For group two—reliance is required and not presumed—individual questions would predominate, and the class should not have been certified.[29] For group three, the answer would require a deeper analysis of each state's laws to determine whether and when reliance could be presumed.[30] The court therefore remanded to the district court the question of whether common questions would predominate as to the claims in this third group.[31]

The court also considered the plaintiffs' warranty claims. As to claims for violation of the federal Magnuson-Moss Warranty Act,[32] because this statute merely supplements state law, the certification question would follow the answer under the relevant state law.[33] As to the state-law implied-warranty claims, these claims were remanded for further consideration by the district court.[34]

Finally, the court briefly considered Ford's argument that Rule 23(b)(3)'s superiority requirement was not met because the class action would be unmanageable.[35] The district court had found the case would be manageable, rejecting Ford's argument that jurors would lose track of the various state laws and the proof required for each.[36] The Eleventh Circuit agreed with Ford and instructed the district court to

27. *Tershakovec*, 79 F.4th at 1310.
28. *Id.*
29. *Id.* at 1312.
30. *Id.* at 1314.
31. *Id.* at 1315.
32. 15 U.S.C. § 2308 (1975).
33. *Tershakovec*, 79 F.4th at 1315.
34. *Id.*
35. *Id.* at 1316; FED. R. CIV. P. 23(b)(3).
36. *Tershakovec*, 79 F.4th at 1316.

reevaluate this question now that the class claims would be narrower.[37] The court also forewarned the district court to articulate a clearer plan for managing this issue.[38]

Judge Tjoflat concurred in part, explaining, in a lengthy opinion, the reasons why he would deny certification as to all of the claims.[39] He colorfully summarized his opinion as follows:

> My reasoning derives from lifting the hood and examining the various parts of the law before this Court on appeal. At first glance, the six claims with which I disagree with the Majority look ready to drive off the lot, but in fact, they are lemons. Here is the User's Manual for this opinion as we engage in a multi-point diagnostic. This opinion (1) begins by surveying the consumer protection scheme provided by the Federal Trade Commission Act (the "FTC Act"); (2) compares and contrasts that scheme to the mechanisms established by Florida, New York, Missouri, Washington, and California's respective consumer protection statutes; (3) identifies the inherent causal mechanism required for misrepresentation causes of action; (4) outlines four constitutional defects—First Amendment, due process, Article III standing, and separation of powers—inherent in allowing certification of claims under these statutes; and (5) explains why none of the cases cited by the Majority ought to bind or persuade this Court.[40]

Tershakovec's methodical analysis should serve as a useful roadmap for courts and litigants confronting a multi-state product-liability and consumer-protection class action. For plaintiffs, the path, while not entirely hopeless, is littered with so many pitfalls that the quest may not be worth the investment.

B. Predominance and Standing: Green-Cooper v. Brinker International

As data-breach class actions have become increasingly frequent in recent years, courts continue to grapple with whether, and to what extent, these cases meet the requirements for certification of a damages class under Rule 23(b)(3).[41] In its latest such case, *Green-Cooper v. Brinker International*,[42] the Eleventh Circuit vacated and remanded in part certification of a nationwide class of consumers of Chili's restaurants

37. *Id.*

38. *Id.*

39. *Id.* at 1316–44 (Tjoflat, J., concurring in part and dissenting in part).

40. *Id.* at 1317 (Tjoflat, J., concurring in part and dissenting in part).

41. FED. R. CIV. P. 23(b)(3).

42. 73 F. 4th 883 (11th Cir. 2023), *cert. denied*, No. 23-648, 2024 WL 1839101 (Apr. 29, 2024). The court's opinion was authored by Senior Judge Gerald Tjoflat.

after Chili's suffered a large-scale cyberattack.[43] The court parted ways with the United States District Court for the Middle District of Florida on the related issues of standing and predominance, while affirming the district court's determination that the plaintiffs presented an adequate model for calculating damages on a classwide basis. [44]

In the spring of 2018, Chili's was hit with a cyberattack in which customers' credit and debit card information was accessed and published on the dark web.[45] Information for approximately 4.5 million payment cards was posted on a site called "Joker Stash," an online marketplace for stolen payment data.[46]

Separate putative class actions (later consolidated) were brought against Chili's owner, Brinker International, by three different plaintiffs: (1) a Texas resident who had five unauthorized charges made on her compromised card, incurred time in disputing them, cancelled her card, and closely monitored her credit as a result; (2) a California resident who had two unauthorized charges on his account, cancelled his card, spent hours on the phone with his bank, and spent time going to Chili's locations to get his receipts; and (3) a Nevada resident who experienced no unauthorized charges but cancelled his credit card and spent time calling Chili's restaurants and corporate office, his bank, and the credit reporting agencies.[47]

The consolidated complaint asked for injunctive relief and damages and sought certification under Rule 23(b)(3) of two damages classes: a nationwide class, with claims for negligence; and a California class for violation of the California consumer-protection statute.[48] The proposed class definition included all consumers who made a credit or debit card purchase at any affected Chili's location during the period of the data breach.[49]

The district court certified both classes but narrowed the class definition.[50] Under the district court's order, the classes were limited to consumers who both (1) had their data accessed and (2) either incurred reasonable expenses or spent time mitigating the consequences of the data breach.[51]

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43. *Id.* at 886.
44. *Id.* at 892–93, 894.
45. *Id.* at 886.
46. *Id.* at 886–87.
47. *Id.* at 887.
48. *Id.*; FED. R. CIV. P. 23(b)(3).
49. *Green-Cooper*, 73 F.4th at 887–88.
50. *Id.* at 888.
51. *Id.*

The Eleventh Circuit granted Brinker's application for immediate appeal under Rule 23(f).[52] Brinker raised three issues on appeal: the plaintiffs lacked Article III standing; their claims would require individual mini-trials; and they presented no reliable methodology for determining damages on a classwide basis.[53] The court vacated the decision in part, dismissing the claims of two of the three named plaintiffs for lack of standing and remanding to the district court for further analysis of Rule 23(b)'s predominance requirement, specifically as to the standing of absent class members.[54]

The majority first considered whether the three named plaintiffs had actual standing to seek injunctive relief, focusing on the requirements for injury-in-fact and causation.[55] All three of the plaintiffs had suffered the necessary concrete injury.[56] Although the Supreme Court in *TransUnion LLC v. Ramirez*[57] held that the mere risk of future harm cannot confer standing, the plaintiffs here showed more than risk.[58] The plaintiffs' information had been "exposed for theft and sale on the dark web" when it was posted on Joker Stash.[59] The posting of the information constituted the "misuse" that was absent in the court's previous decision in *Tsao v. Captiva MVP Rest. Partners*,[60] which held that an increased threat of identity theft could not confer standing.[61]

But the Article III analysis does not stop at injury. A plaintiff must show that their injury was "fairly traceable to"—in other words, caused by—the defendant's conduct.[62] Here, the California and Nevada plaintiffs could not show that their injuries were caused by the data breach, because they each visited Chili's outside the affected time period for the respective locations.[63] Although the complaint alleged that they had visited during the relevant time, discovery showed otherwise.[64] But, even

52. *Id.*; FED. R. CIV. P. 23(f).

53. *Green-Cooper*, 73 F.4th at 888.

54. *Id.* at 890; FED. R. CIV. P. 23(b).

55. *Green-Cooper*, 73 F.4th at 889.

56. *Id.* at 890.

57. 594 U.S. 413 (2021).

58. *Green-Cooper,* 73 F.3d at 889; 594 U.S. at 434.

59. *Green-Cooper*, 73 F.4th at 889 (internal quotation marks omitted).

60. 986 F.3d 1332 (11th Cir. 2021). For an analysis of *Tsao* during the 2021 survey period, *see* Thomas M. Byrne & Stacey McGavin Mohr, *Class Actions*, *Eleventh Circuit Survey*, 73 MERCER L. REV. 1133, 1142–45 (2022), https://digitalcommons.law.mercer.edu/jour_mlr/vol73/iss4/7/ [https://perma.cc/V7VX-SUPK].

61. *Green-Cooper*, 73 F.3d at 889 (citing *Tsao*, 986 F.3d at 1344).

62. *Id.* at 890 n.10.

63. *Id.* at 890–91.

64. *Id.* at 891.

with only one named plaintiff with standing, the injunctive-relief claims could proceed.[65]

Because the plaintiffs also sought classwide damages, however, they must establish Article III standing as to each absent class member.[66] Standing therefore becomes an element of the Rule 23(b)(3) predominance analysis: the district court must consider whether establishing injury for each class member will require individualized inquiries that would predominate over common ones.[67] This is where the district court erred.[68]

The class definition as certified was too broad and would include class members without standing.[69] To exclude those without a concrete injury, the class must be limited to consumers whose information was posted on the dark web (for example, on Joker Stash) or had fraudulent charges made on their account.[70] The Eleventh Circuit therefore remanded the case to the district court to clarify its predominance finding.[71] The district court could deal with this either by refining the class definition or by analyzing predominance given the current class definition.[72]

Finally, the court affirmed the district court's finding that individual damages issues did not predominate.[73] As the court explained, individual questions of damages generally will not defeat predominance unless the questions are so complex and fact-specific that answering them would place an intolerable burden on the judicial system, or unless the damages would bear on liability.[74]

The plaintiffs' expert presented a common methodology that would provide a standard amount for each class member based on the average value for three separate types of injuries: lost opportunity for rewards points; cardholder time; and out-of-pocket damages.[75] The methodology did not provide an average for actual damages sustained by misuse, which would be individualized.[76] The court concluded that this

65. *Id.*
66. *Id.*
67. *Id.* at 891–92.
68. *Id.* at 892.
69. *Id.*
70. *Id.*
71. *Id.*
72. *Id.*
73. *Id.* at 894.
74. *Id.* at 893.
75. *Id.*
76. *Id.* at 893 n.14.

methodology was sufficient because it did not enlarge class members' substantive rights, so there was no abuse of discretion.[77]

Judge Branch dissented in part, disagreeing with the majority's decision that the plaintiffs presented an adequate model for classwide damages.[78] She concluded that the damages model was not tied to each class member's injury, because it would award each class member damages for all three types of injuries even if that class member had not sustained each of those injuries.[79] As to standing, Judge Branch concurred but based on a different theory of injury.[80]

II. STANDING

A. Injury from Unwanted Text Message: Drazen v. Pinto

In an unusual showing of unanimity, the full Eleventh Circuit held that a single unwanted text is enough to confer Article III standing to assert a claim under the Telephone Consumer Protection Act (TCPA).[81] The *en banc* court's decision in *Drazen v. Pinto*[82] replaced the original panel opinion,[83] which had vacated the United States District Court for the Southern District of Alabama's approval of the class settlement.[84]

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77. *Id.* at 894.

78. *Id.* (Branch, J., concurring in part and dissenting in part).

79. *Id.* at 897, 899 (Branch, J., concurring in part and dissenting in part).

80. *Id.* at 894 (Branch, J., concurring in part and dissenting in part). In another recent case in which class certification turned on establishing predominance of common issues, the United States Court of Appeals for the Third Circuit relied on the Eleventh Circuit's decision in *Cordoba v. DIRECTV, LLC* to hold that a class of Fair Debt Collection Practices Act plaintiffs could not be certified without first determining whether each had sufficient injury to confer Article III standing and how burdensome potentially individualized proof of standing would be. *Huber v. Simon's Agency, Inc.*, 84 F.4th 132 (3d Cir. 2023) (citing 942 F.3d 1259, 1277 (11th Cir. 2019)).

Predominance of individual issues concerning liability for breach of contract also led to the reversal of class certification in *Sampson v. United Services Automobile Association*, in which the court held that one published source for determining actual cash value of totaled vehicles for insurance purposes could not be deemed conclusive because it did not take into account, among other things, the extent of damage to individual vehicles. 83 F.4th 414, 420 (5th Cir. 2023) ("USAA has the due process right to argue, for each individual plaintiff, that damages should be determined by a different legally permissible method that would produce lower damages than NADA (or no damages at all).")).

81. Drazen v. Pinto, 74 F.4th 1336, 1345–46 (2023) (en banc). Judge Robin Rosenbaum wrote the opinion for the court. 47 U.S.C. § 227 (2019).

82. 74 F.4th 1336 (2023).

83. 41 F.4th 1354 (2022), *vacated* 61 F.4th 1297 (2023).

84. For an analysis of the *Drazen* panel opinion during the prior survey period, *see* Byrne & McGavin, *supra* note 1, at 1354–56.

Drazen arose from a proposed class settlement of a putative nationwide TCPA class action alleging unwanted texts and cell phone calls from GoDaddy.com, LLC.[85] The parties reached a class settlement and requested the district court's approval.[86] The district court had asked for briefing on the application of *Salcedo v. Hanna*,[87] which held that receipt of a single text in violation of the TCPA was not an injury sufficiently concrete to confer Article III standing.[88] The district court then concluded that only the named class representatives must have standing, and that only 7% of the absent class members may have only received a single text message.[89] Although that amounted to 91,000 class members with no standing, the district court granted preliminary approval of the settlement.[90] An objector then appeared and argued, among other things, that the settlement involved GoDaddy vouchers which, he contended, were coupons and thus fell under 28 U.S.C § 1712(e),[91] part of the Class Action Fairness Act (CAFA).[92] Use of coupons generally restricts the amount of attorneys' fees that may be awarded in a proposed settlement.[93] The district court ultimately disagreed that the settlement was a coupon settlement but did reduce the attorneys' fees award to $7 million.[94] The objector appealed.[95]

On appeal, the original panel vacated approval of the settlement and remanded to give the parties an opportunity to revise the class definition so as not to encompass class members with no standing.[96] The panel began with the principle that "[e]very class member must have Article III standing to recover individual damages."[97] The panel went on to hold that "when a class seeks certification for the sole purpose of a damages settlement under Rule 23(e), the class definition must be limited to those individuals who have Article III standing."[98] The panel did not reach the

85. 74 F.4th at 1339–40.
86. *Id.* at 1340.
87. 936 F.3d 1162 (11th Cir. 2019).
88. *Id.* at 1172.
89. *Drazen*, 74 F.4th at 1340.
90. *Id.* at 1341.
91. 28 U.S.C. § 1712(e) (2005).
92. *Drazen*, 74 F.4th at 1341.
93. *Id.*
94. *Id.*
95. *Id.*
96. *Id.* at 1342.
97. *Id.* at 1341 (internal quotation marks omitted).
98. 41 F.4th at 1361.

unbriefed question of the threshold for standing under Article III, leaving that to the district court on remand.[99]

On rehearing *en banc*, the unanimous court began with what it saw as the question at the core of the appeal, "whether the plaintiffs who received a single unwanted, illegal telemarketing text suffered a concrete injury."[100] The answer turned on "whether the harm from receiving such a text message share[d] a close relationship with a traditional harm" recognized as providing the basis for a lawsuit in an American court.[101] The relationship must be in kind, not degree.[102] The court noted that the Second, Third, Fourth, Fifth, Sixth, Seventh, Ninth, and Tenth Circuits declined to consider the degree of offensiveness required to state a claim for intrusion upon seclusion at common law.[103] Instead, these courts have held that unwanted texts and phone calls resemble the kind of harm associated with intrusion upon seclusion.[104] This was a sufficient common-law comparator to confer Article III standing.[105] Like the panel, the court declined to reach the CAFA coupon issues and remanded the case for consideration of those issues in the district court.[106]

B. Future Injury: Williams v. Reckitt Benckiser

In another standing decision arising from a class settlement, *Williams v. Reckitt Benckiser LLC*,[107] the court vacated approval of a settlement that included, as an integral part, injunctive relief that no class representative had Article III standing to seek.[108] *Williams* was brought on behalf of a class of individuals who purchased "brain performance supplements" under the brand name Neuriva.[109] The five named plaintiffs alleged that the defendants used false and misleading

99. *Id.* at 1363.

100. 74 F.4th at 1339.

101. *Id.*

102. *Id.* at 1343.

103. *Id.* at 1344 (citing Melito v. Experian Mktg. Sols., Inc., 923 F.3d 85, 93 (2d Cir. 2019); Thorne v. Pep Boys Manny Moe & Jack, Inc., 980 F.3d 879, 890 (3d Cir. 2020); Krakauer v. Dish Network, LLC, 925 F.3d 643, 654 (4th Cir. 2019); Perez v. McCreary, Veselka, Bragg & Allen, P.C., 45 F.4th 816, 822 (5th Cir. 2022); Ward v. NPAS, Inc., 63 F.4th 576, 580–81 (6th Cir. 2023); Robins v. Spokeo, Inc., 867 F.3d 1108, 1115 (9th Cir. 2017); Lupia v. Medicredit, Inc., 8 F.4th 1184, 1192 (10th Cir. 2021)).

104. *Id.*

105. *Id.* at 1345.

106. *Id.* at 1346.

107. 65 F.4th 1243 (11th Cir. 2023). The court's opinion was authored by Senior Judge Stanley Marcus.

108. *Id.* at 1261.

109. *Id.* at 1247.

statements to give the impression that their products' active ingredients had been clinically tested to improve brain function, "in violation of Florida, California, and New York consumer protection laws."[110]

Before any formal discovery or motion practice, the parties agreed to a class settlement.[111] Ted Frank, a prominent objector to class-action settlements, objected to the settlement, which was nonetheless approved. Frank argued that the stated $8 million settlement value was inflated by the parties, who knew that few claims would be filed.[112] The settlement provided that class members who could provide proof of purchase would be able to recover up to $32.50 per claim, with a maximum of two claims, for a total potential recovery of $65.00. Without proof of purchase, class members could recover only $5.00 per claim, with a maximum of four claims, for a total potential recovery of $20.00.[113] Frank also argued that the injunctive relief involving marketing practices provided for by the settlement was meaningless and provided no relief to past users of products, in any event. The attorneys' fees award of $2.9 million also was disproportionate to the settlement value, according to Frank's objection.[114] Under the settlement agreement, if the award of attorneys' fees by the court was less than $2.9 million, the difference would revert to the defendants.[115]

On appeal, the Eleventh Circuit did not reach the merits of Frank's objections, at least not directly.[116] The court concluded that the named plaintiffs lacked standing to seek injunctive relief because they did not allege that they would purchase the product again.[117] The United States District Court for the Southern District of Florida therefore abused its discretion in approving a settlement that included as a central feature injunctive relief that the plaintiffs had no standing to seek.[118] The complaint's allegations of past injuries did not suffice to establish standing to seek injunctive relief against future injuries.[119] And vague claims that the plaintiffs would like to purchase products in the future if

110. *Id.*
111. *Id.*
112. *Id.*
113. *Id.* at 1249.
114. *Id.* at 1247.
115. *Id.* at 1249.
116. *Id.* at 1247.
117. *Id.*
118. *Id.*
119. *Id.* at 1254.

the products truly improve brain performance were insufficiently concrete.[120]

The parties had challenged Frank's standing to object, even though he purchased the product and fell literally within the class definition.[121] The court rejected that challenge, noting that, as a class member, Frank's claims would be released by the settlement if the approval stood, which is enough to confer standing.[122]

The court decided that some coaching for the parties and district court was appropriate in advance of remand. First, the court pointed out that at least one named plaintiff must have standing to assert each claim made on behalf of the class prior to approving any class settlement or granting class certification.[123]

Second, the district court must "determine whether to certify a class and, if so, enter an appropriate certification order before deciding whether to approve class-wide relief."[124] The district court previously had overlooked this step.[125]

Third, the court pointed out that under the 2018 amendments to Rule 23, a district court ruling on the fairness of a proposed class-action settlement must examine "'the effectiveness' of the settlement's 'method of distributing relief to the class,'"[126] as well as "whether the proposed attorneys' fees are disproportionately large compared to the amount of relief reasonably expected to be provided to the class."[127]

III. CLASS SETTLEMENTS

A. Class Benefit: Ponzio v. Pinon

Standing was not the only issue the Eleventh Circuit addressed in reviewing class settlements. The objectors in *Ponzio v. Pinon*[128] claimed that a class settlement was unfair because it would leave 80% of class members with no benefit whatsoever.[129] The Eleventh Circuit rejected this objection and affirmed approval, providing needed guidance on how

120. *Id.*
121. *Id.* at 1251–52.
122. *Id.* at 1251.
123. *Id.* at 1253.
124. *Id.* at 1260.
125. *Id.*
126. *Id.* at 1261 (quoting FED. R. CIV. P. 23(e)(2)(C)(ii)).
127. *Id.*
128. 87 F.4th 487 (11th Cir. 2023). The panel's opinion was written by Judge Adalberto Jordan.
129. *Id.* at 491.

courts are to analyze the fairness of a class settlement under the 2018 amendments to Rule 23(e) as well as the burden on settlement objectors.[130]

The objections in *Ponzio* stemmed from a battle between two groups of the plaintiffs' counsel, who had filed competing class actions against the same defendants on behalf of different named plaintiffs.[131] Both cases alleged that a certain color of paint (590 Mars Red) used by Mercedes Benz USA and Daimler AG would deteriorate on some cars by bubbling and peeling. The case that led to the Eleventh Circuit appeal was filed by Ms. Pinon and other named plaintiffs in the United States District Court for the Northern District of Georgia. These plaintiffs brought federal and state-law claims for the design, manufacturing, marketing, and sale of defective vehicles. They sought certification of a nationwide class of vehicle owners and lessors whose vehicles were painted in 590 Mars Red with this "latent defect."[132]

Two weeks prior, another group of plaintiffs (including Mr. Ponzio), represented by different counsel, had brought similar claims in the United States District Court for the District of New Jersey.[133] Whatever cooperation originally may have existed between the Pinon lawyers and the Ponzio lawyers quickly fell apart.[134]

In the Georgia case, the parties settled, and the plaintiffs moved for preliminary approval.[135] The settlement offered money to reimburse class members for some portion of previous and future repairs. A key component of the settlement was that the amount of the reimbursement would decrease as the age and mileage of the vehicle increased, starting at 100% and decreasing to zero for cars that were over fifteen years old or had over 150,000 miles at the time of the repair. The settlement put no limit on the total amount the defendants would have to pay to the class.[136]

The district court granted preliminary approval, and class notice was sent out.[137] The notice produced ten opt-outs and four objections lodged by eleven individuals. The New Jersey plaintiffs moved to intervene and appeared at the fairness hearing, along with one other objector. The New Jersey plaintiffs' primary objections were that the settlement did not

130. *Id.*
131. *Id.* at 492.
132. *Id.* at 491–92.
133. *Id.* at 492.
134. *Id.* at 493.
135. *Id.*
136. *Id.* at 495–96.
137. *Id.* at 493.

include any compensation for diminished value and further that 80% of class members would not be compensated at all. The district court overruled the objections and granted final approval, specifically rejecting the contention that 80% of the class would receive no benefit.[138]

The Eleventh Circuit affirmed, similarly rejecting the 80% figure as unsupported by the evidence.[139] The court first noted that the 2018 amendment to Rule 23(e), which specified factors to be considered in approval of class settlements,[140] did not erase the factors the court in *Bennett v. Behring Corp*[141] set out almost forty years ago.[142] That is, along with the four core factors specified in Rule 23(e), the district court should consider the following *Bennett* factors:

> (1) the likelihood of success at trial; (2) the range of possible recovery; (3) the point on or below the range of possible recovery at which a settlement is fair, adequate and reasonable; (4) the complexity, expense and duration of litigation; (5) the substance and amount of opposition to the settlement; and (6) the stage of proceedings at which the settlement was achieved.[143]

"At the end of the day, the district court acts 'as a fiduciary for the class.'"[144] With that in mind, the court held that the 2018 amendment to Rule 23(e)(2) was "not meant 'to displace' the factors previously identified by courts in reviewing class action settlement agreements, but 'rather to focus the court and the lawyers on the core concerns of procedure and substance that should guide the decision whether to approve the proposal.'"[145] While the four core concerns set out in Rule 23(e)(2) "provide the primary considerations in evaluating proposed agreements," the *Bennett* factors can inform the analysis of those core concerns.[146]

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138. *Id.*

139. *Id.* at 501, 509.

140. FED. R. CIV. P. 23(e)(2)(C)(ii) advisory committee's note to 2018 amendment.

141. 737 F.2d 982 (11th Cir. 1984).

142. *Ponzio*, 87 F.4th at 494–95.

143. *Id.* at 494; *Bennett*, 737 F.2d at 986.

144. *Ponzio*, 87 F.4th at 494 (quoting *In re Equifax Inc.*, 999 F.3d at 1265); *see also id.* (citing 7B CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE & PROCEDURE § 1797 (3d ed. & Apr. 2023 update) ("The purpose of subdivision (e) is to protect the nonparty class members from unjust or unfair settlements affecting their rights when the representatives become fainthearted before the action is adjudicated or are able to secure satisfaction of their individual claims by a compromise, abandoning the claims of the absent class members.")).

145. *Ponzio*, 87 F.4th at 494–95 (quoting FED. R. CIV. P. 23(e)(2)(C)(ii) advisory committee's note to 2018 amendment).

146. *Ponzio*, 87 F.4th at 495.

The court also took "the opportunity to set out some parameters" as to the burden that must be carried by objectors to a proposed class action settlement.[147] While the proponents of a class action settlement have the burden to develop a record establishing that a settlement is "fair, reasonable, and adequate," objectors also have their own obligation.[148] Rule 23(e)(5)(A)[149] requires objectors to state "with specificity the grounds for an objection," meaning the objections "must provide sufficient specifics to enable the parties to respond to them and the court to evaluate them."[150] And objections based on facts and evidence cannot be conclusory.[151] Then, only once proper objections are lodged, the burden shifts back to the proponents of the settlement, who must show "that the matters raised do not affect the fairness, reasonableness, or adequacy of the agreement."[152]

Turning to the objections raised by the New Jersey plaintiffs, the court concluded that the district court properly used its discretion in finding that the objectors did not meet this burden.[153] First, the court analyzed in detail the objectors' contention that 80% of the class would receive no benefit whatsoever.[154] The objectors' rationale had shifted throughout the proceedings, and their calculation was significantly flawed.[155] Among other things, they ignored portions of the settlement terms and relied on faulty assumptions.[156] For example, the mathematical equation they used to arrive at 80% included two variables that they conceded could not even be determined.[157] Depending on those variables, the percentage of class members not eligible for relief could range from 0.0003%–80.03%.[158] The objectors' other arguments were rejected in large part because they were based on the faulty 80% number.[159]

Overall, the district court properly applied the Rule 23(e)(2) core considerations and the *Bennett* factors.[160] The class representatives and

147. *Id.* at 499.

148. *Id.*

149. FED. R. CIV. P. 23(e)(5)(A).

150. *Ponzio*, 87 4th at 499–500 (quoting FED. R. CIV. P. 23(e)(2)(C)(ii) advisory committee's note to 2018 amendment).

151. *Id.* at 500.

152. *Id.*

153. *Id.* at 501.

154. *Id.*

155. *Id.*

156. *Id.*

157. *Id.* at 501–02.

158. *Id.* at 503.

159. *Id.* at 507.

160. *Id.* at 506.

class counsel were adequate.[161] The negotiations were arms-length and not a reverse auction; the settlement was the product of mediation by a former judge, who submitted declaration affirming as much and also that the topics of attorneys' fees and incentive awards had not been discussed until after the class relief was settled.[162] Finally, the settlement was not a coupon settlement because the defendants would make direct cash payments.[163]

B. Antitrust Class Settlements: In re Blue Cross Blue Shield Antitrust Litigation

The court further elaborated on the principles governing class settlements generally—and antitrust class actions particularly—in *In re Blue Cross Blue Shield Antitrust Litigation*.[164] *Blue Cross* affirmed the United States District Court for the Northern District of Alabama's approval of a $2.67 billion class settlement of an antitrust multidistrict litigation brought against Blue Cross Blue Shield Association and its local member plans, alleging Sherman Act[165] violations in restrictions on the member plans' ability to compete.[166]

The litigation began more than a decade ago.[167] Subscribers to Blue Cross plans alleged that Blue Cross allocated territories in a way that limited member plans' competition by mandating minimum percentages of business under the Blue Cross brand for each member, restricting the right of member plans to be sold to companies outside Blue Cross, and imposing other ancillary restraints on competition. The subscribers sought monetary damages and injunctive relief. In 2018, the district court granted partial summary judgment for the subscribers, concluding that the aggregation of competitive restraints alleged amounted to a *per se* violation of the Sherman Act.[168]

After prolonged negotiations, a settlement agreement was reached.[169] The settlement divided the subscriber-plaintiffs into two groups: a Rule 23(b)(3) damages class and a Rule 23(b)(2)[170] injunctive-relief class. The damages class included individual members, insured groups, and

161. *Id.* at 507.
162. *Id.* at 507–08.
163. *Id.* at 508.
164. 85 F.4th 1070 (11th Cir. 2023). The decision was written by Chief Judge Bill Pryor.
165. 15 U.S.C. § 1 (2004).
166. *In re Blue Cross Blue Shield Antitrust Litig.*, 85 F.4th at 1083.
167. *Id.*
168. *Id.*
169. *Id.* at 1084.
170. FED. R. CIV. P. 23(b)(2).

self-funded accounts. The two classes were almost completely congruent in membership, the main difference being that the injunctive relief class—but not the damages class—included beneficiaries and dependents of employees. During the negotiations, the court-appointed a class representative to represent separately the self-funded accounts, which did not buy health insurance but instead primarily purchased administrative services and self-insured health care costs for employees. Most other class members were fully insured by Blue Cross.[171]

The damages class was predicated on a plan of distribution from a common fund of $2.67 billion.[172] The plan allocated 93.5% of the net settlement fund to the fully-insured claimants and 6.5% to the self-funded claimants.[173] This allocation was based on several factors, "including the relative volume of payments[,] . . . the strength of the respective claims, the shorter self-funded damages period,"[174] and the differences in payments for fully-insured coverage versus administrative fees borne by the self-funders. The plan also included a method for divvying up the settlement proceeds between claiming employers and employees. The settlement agreement provided for up to 25% of the common fund to be allocated to attorneys' fees and expenses. The subscribers' counsel unsurprisingly sought the full amount.[175]

The settlement released all claims based upon or relating in any way to the "factual predicates" of the subscriber actions, as described in the complaints; any issue raised in the subscriber actions by pleading or motion; or "mechanisms, rules, or regulations" adopted by Blue Cross that were within the scope of the settlement structural relief and approved by a monitoring committee established as part of the injunctive relief.[176] Subscribers retained their rights to pursue most claims relating to coverage and benefits.[177]

After two fairness hearings, the court overruled numerous objections and approved the settlement and the fee application.[178] In the course of the proceedings, the court denied—based on common-interest privilege—an objector's request for discovery of communications between the

171. *In re Blue Cross Blue Shield Antitrust Litig.*, 85 F.4th at 1084.
172. *Id.* at 1085.
173. *Id.*
174. *Id.*
175. *Id.* at 1085–86.
176. *Id.* at 1086.
177. *Id.*
178. *Id.* at 1086–87.

fully-insured claimants' counsel and the self-funded claimants' expert witness.[179]

Four objectors appealed approval of the settlement, on various grounds.[180] The court's resolution of the objections sets out a number of rules governing class action settlements.[181]

1. Prospective Releases are Permissible in Some Circumstances.

One of the objectors, Home Depot, argued that the settlement's release provision violated public policy because it released future claims.[182] The court rejected this argument, noting that releases of future claims are important in many settlement agreements and had been approved by the Eleventh Circuit in antitrust cases.[183] Other circuits had approved and enforced prospective releases in antitrust cases, where the releases involved claims based on conduct central to the underlying litigation.[184] Such releases were not categorically prohibited by public policy.[185] As the court saw it, the public enforcement of antitrust laws would not be affected by the release.[186]

The court also rejected a related argument that the settlement perpetuates "clearly illegal conduct" by Blue Cross in allowing the continuation of its exclusive service area policy.[187] A settlement agreement in an antitrust case "may perpetuate conduct when its illegality is uncertain" but not clear.[188] Here, the court discerned no evidence that the exclusive service area policy was itself a violation of the Sherman Act.[189] The district court's finding of a *per se* violation was instead based on an aggregation of conduct, not any single restraint on competition.[190] The Eleventh Circuit agreed with the district court that the post-settlement system, including the exclusive service area policy, would not be clearly illegal under the antitrust laws.[191]

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179. *Id.* at 1086.
180. *Id.* at 1086–87.
181. *Id.* at 1087–88.
182. *Id.* at 1088.
183. *Id.* at 1087.
184. *Id.* at 1088.
185. *Id.*
186. *Id.* at 1089.
187. *Id.*
188. *Id.*
189. *Id.* at 1090; 15 U.S.C. § 1.
190. *In re Blue Cross Blue Shield Antitrust Litig.*, 85 F.4th at 1090.
191. *Id.*

Finally, the court rejected Home Depot's argument that the release violated the rule that a class-action release may not exceed the identical factual predicate underlying the claims made in the class action.[192] In practice, the court pointed out, the doctrine permits the release of claims that share a common nucleus of operative fact with the claims in the underlying litigation.[193] The release did not exceed that limit.[194]

2. The Same Plaintiffs and the Plaintiffs' Counsel May Represent Injunctive Relief and Damages Classes Without a Conflict Sufficient to Render Them Inadequate Under Rule 23(a)(4).

Home Depot also argued that the settlement violated Rule 23[195] and the Due Process Clause of the Fifth Amendment[196] because the same named plaintiffs and counsel represented the injunctive-relief class and the damages class, even though the classes had competing settlement priorities.[197] The court concluded that there was no categorical prohibition of this simultaneous representation.[198] To render a representation inadequate, the conflict must be substantial and fundamental to the specific issues in controversy, such as where some members claim to have been harmed by the same conduct that benefited other members of the class.[199] In finding no fundamental conflict, the court noted that most of the class members were eligible for both forms of relief.[200]

3. Rule 23(e)(2)(D) Does Not Require that All Class Members be Treated Equally so Long as They Are Treated Equitably.

Another objector, Topographic, argued that the district court misapplied Rule 23(e)(2)(D)[201] by approving the allocation of settlement funds to self-funded claimants.[202] Rejecting this argument, the Eleventh Circuit began with the text of the rule (amended in 2018) requiring that a settlement be approved only if the court finds that the proposed

192. *Id.*
193. *Id.*
194. *Id.*
195. FED. R. CIV. P. 23(a)(4).
196. U.S. CONST. amend. V.
197. *In re Blue Cross Blue Shield Antitrust Litig.*, 85 F.4th at 1091.
198. *Id.*
199. *Id.*
200. *Id.* at 1091–92.
201. FED. R. CIV. P. 23(e)(2)(D).
202. *In re Blue Cross Blue Shield Antitrust Litig.*, 85 F.4th at 1092.

settlement "treats class members equitably relative to each other."[203] The district court had considered the differences between self-funded claimants and fully-insured claimants—such as differing litigation risks and incurred costs—before concluding that the two were treated equitably.[204]

The district court also had not presumed that the settlement was reasonable merely because it was negotiated at arm's length.[205] And the court rejected Topographic's argument that the settlement required careful judicial scrutiny because it favored named plaintiffs.[206] That standard applied only where named plaintiffs received a benefit at the expense of the absent class members.[207] Here, the self-funded plaintiffs had their own counsel and class representatives, which was not facially unfair.[208] The court rejected the related arguments that a separate analysis of damages for the self-funded claimants was necessary before approval could be given and that the district court had improperly relied on an economist's expert report in approving the settlement allocation.[209]

The court also turned away Topographic's argument that it should have been permitted discovery into the self-funded claimant's expert's communications with the fully insured claimant's counsel during the litigation.[210] The object of the discovery would have been to determine if the fully-insured claimant's counsel had input into the expert's report concerning the allocation.[211] But the court held that the substantially similar interests of the two groups in the litigation against Blue Cross and in the settlement negotiations was sufficient to allow the self-funded claimants' expert and the fully-insured claimant's counsel to invoke the common interest privilege against disclosure.[212] Moreover, even if this was not a proper application of that privilege, Topographic made no showing of harm beyond a suggestion of potential collusion, without evidence of it.[213] The court found no abuse of discretion in that ruling, or in assigning a shorter damages period (based on the pleadings), or in approving the 6.5% allocation to the self-funded claimants.[214]

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203. *Id.* at 1092–93.
204. *Id.* at 1093.
205. *Id.*
206. *Id.*
207. *Id.*
208. *Id.* at 1093–94.
209. *Id.* at 1094.
210. *Id.* at 1096.
211. *Id.*
212. *Id.*
213. *Id.*
214. *Id.* at 1096, 1098.

Another objector contended that the court violated Rule 23(e)(2)(D) in approving a distribution of unclaimed funds that differently allocated the unclaimed funds of the fully insured employers and the unclaimed funds of those employers' employees.[215] The court rejected this argument on the same grounds, concluding that the plan of distribution might be unequal but was not inequitable.[216]

4. The Decision to Divide a Class (or Not) with Potentially Adverse Interests into Subclasses is Within the Discretion of the District Court.

Topographic also argued that settlement funds should have been distributed to all subscribers on the same basis and that the court created a fundamental intra-class conflict by creating two subclasses.[217] The court responded that the conflict might have arisen if the district court failed to create the two subclasses.[218] In any event, however, the court detected no abuse of discretion in dividing the class into two subclasses.[219]

5. In a Common Fund Settlement, a Court Need Not Employ a Lodestar Methodology in Determining Attorneys' Fees to be Awarded, Even if the Lodestar Methodology Would Have Been Required if the Plaintiffs Had Prevailed Without a Settlement.

Another objector argued that the district court erred in awarding attorneys' fees on account of injunctive relief by employing a percentage-of-the-common-fund methodology rather than the lodestar approach required under Section 16 of the Clayton Antitrust Act,[220] which governed the injunctive class's claims.[221] The court rejected this argument, citing its precedents indicating that a fee award falling between 20%–25% is presumptively reasonable.[222] Under the twelve factors specified in *Johnson v. Georgia Highway Express, Inc.*,[223] the request for a higher percentage than that range requires an evaluation.[224] The court noted approvingly that the district court here

215. *Id.* at 1100; FED. R. CIV. P. 23(e)(2)(D).
216. *In re Blue Cross Blue Shield Antitrust Litig.*, 85 F.4th at 1101.
217. *Id.* at 1098–99.
218. *Id.* at 1099.
219. *Id.*
220. 15 U.S.C. § 26 (1995).
221. *In re Blue Cross Blue Shield Antitrust Litig.*, 85 F.4th at 1099.
222. *Id.* at 1100.
223. 488 F.2d 714, 717–19 (5th Cir. 1974).
224. *In re Blue Cross Blue Shield Antitrust Litig.*, 85 F.4th at 1100.

performed the *Johnson* analysis, even though the fee request was less than 25% of the common fund.[225] The district court also "used the lodestar to confirm the reasonableness of the [requested] percentage."[226] The Eleventh Circuit concluded that there was no abuse of discretion to be found in the court's "thorough analysis."[227]

Blue Cross illustrates the heavy practical burden facing the objectors to an arms-length class-action settlement approved after a conscientious examination by a district judge that avoids familiar tripwires to approval. A settlement that resolves multidistrict litigation pending for more than a decade also arrives on appeal with express-train momentum that may be overwhelming, even for arguments that, in another case, might have found some traction.[228]

IV. ARBITRATION ENFORCEMENT

The Eleventh Circuit addressed the enforcement of an arbitration agreement—and class-action waiver—in *Bedgood v. Wyndham Vacation*

225. *Id.*

226. *Id.*

227. *Id.*

228. By way of contrast, the United States Court of Appeals for the Third Circuit in *In re Wawa, Inc. Data Security Litigation*, recently overturned approval of an attorneys' fee award to class counsel. 85 F.4th 712, 727 (3d Cir. 2023). The court remanded the case for a determination whether the funds potentially made available to class members rather than the amount actually claimed was the best measure of the reasonableness of attorneys' fees, particularly in light of "clear sailing" (no objection by the defendant) and reversionary clauses in the settlement agreement. *Id.* at 725–26. The latter would have returned any court-ordered reduction in the fee award to the defendant, rather than to the class. *Id.* at 726. Although that provision was removed, after objection, by amendment of the settlement agreement, the Third Circuit questioned whether its presence during the negotiation process made the fee request unreasonable and directed the district court to examine that issue as well on remand. *Id.* at 726–27.

Another settlement approval was nixed, in *Moses v. New York Times Co.*, because the district court failed to abide by Rule 23(e) when it reviewed the substantive fairness of a proposed settlement without considering in tandem the terms of the settlement and the attorneys' and incentive-fee awards encompassed in the settlement agreement. 79 F.4th 235, 243 (2d Cir. 2023).

Perhaps the most egregious recent example of a settlement failing to meet Rule 23(e) standards was in *Lowery v. Rhapsody International, Inc.*, in which the district court approved a settlement that allowed class counsel to receive thirty times more in fees in the amount actually paid the class. 75 F.4th 985, 988 (9th Cir. 2023). The United States Court of Appeals for the Ninth Circuit emphatically rejected that result. *Id.* "In determining the value of this 'claims-made' class action settlement, the court should consider its actual or anticipated value to the class members, not the maximum amount that hypothetically could have been paid to the class." *Id.* at 988–89.

Resorts, Inc.[229] The court held that the defendant was not aggrieved by the plaintiffs' failure to arbitrate—and thus was not entitled to an order staying litigation and compelling arbitration—where the plaintiffs had sought arbitration but the American Arbitration Association (AAA) refused to take their cases because of the defendant's own noncompliance with AAA rules.[230]

The plaintiffs in *Bedgood* had entered into timeshare-purchase agreements with one of three related companies: Wyndham Vacation Resorts (Resorts), Wyndham Resorts Development (Development), and WorldMark, The Club (WorldMark).[231] All of the agreements included nearly identical arbitration provisions designating the AAA as administrator; calling for individual arbitration; and incorporating the AAA's "Consumer Arbitration Rules," which in turn incorporate the AAA Consumer Due Process Protocol. The agreements also specified Orange County, Florida, as the sole venue for arbitration absent agreement otherwise, and they limit a buyer's damages to the total amount paid under the agreement.[232]

Three buyers sought to institute arbitration proceedings against Resorts, alleging breach of contract and fraudulent inducement.[233] Before appointing an arbitrator, the AAA refused to administer the claims because Resorts "failed to comply with the AAA's policies."[234] The AAA letter did not specifically identify those failures, but in their district court briefing, the defendants said that the AAA took issue with the arbitration agreements' forum-selection and limitation-of-damages provisions. The AAA said it might consider handling future Resorts disputes, but Resorts would have to register its arbitration clause with the AAA before that would happen. So, the plaintiffs sued in federal court, bringing their case as a putative class action against Resorts, Development, and WorldMark.[235]

The defendants moved to stay the litigation and compel arbitration.[236] The United States District Court for the Middle District of Florida denied the motion as to all three of the defendants, holding that: (1) it lacked

229. 88 F.4th 1355 (11th Cir. 2023). Judge Kevin Newsom authored the opinion for the court.

230. *Id.* at 1370.

231. *Id.* at 1359–1360.

232. *Id.* at 1360.

233. *Id.*

234. *Id.*

235. *Id.* at 1361 n.2.

236. *Id.* at 1361.

authority to stay the case under 9 U.S.C. § 3[237] because the defendants were "in default" with the AAA; (2) "the plaintiffs hadn't 'fail[ed], neglect[ed], or refus[ed]' to arbitrate," as required by 9 U.S.C. § 4;[238] and (3) the defendants were not entitled to appointment of a substitute arbitrator under 9 U.S.C. § 5,[239] because the AAA would have been available "if . . . not for [the] [d]efendants' negligent failure to follow the AAA's rules."[240] The defendants filed an interlocutory appeal under 9 U.S.C. § 16(a),[241] which permits an appeal from an order refusing to grant a stay under § 3 or denying a petition under § 4.[242]

The Eleventh Circuit affirmed as to Resorts, but not the other two defendants.[243] The court began by affirming the district court's determination that Resorts was "in default" in proceeding with arbitration within the meaning of 9 U.S.C. § 3.[244] Resorts claimed that the question had to be decided by an arbitrator, rather than by an AAA administrator, and that the district court therefore erred in relying on the rejection letter written by an AAA administrator.[245] But the AAA's Consumer Rules, which Resorts had incorporated into its agreement, expressly delegated policy-compliance determinations to the AAA's administrator.[246] Those rules also distinguish between the administrative aspects of an arbitration and merits determinations, which are reserved for arbitrators.[247] While the administrator's determination of noncompliance was not a legal opinion or a determination of the enforceability of the arbitration agreement, the district court did not err in relying on the administrative decision in concluding that Resorts was "in default" with the AAA.[248] This conclusion was unchanged by the fact that the arbitration agreement included a delegation clause reserving questions of "enforcement, interpretation, or validity" of the agreement to the arbitrator, because, again, the administrative determination was a matter of compliance with AAA rules: "the AAA merely determined that the arbitration clause—irrespective of its 'enforcement, interpretation, or validity'—violated

237. 9 U.S.C. § 3 (1947).
238. 9 U.S.C. § 4 (1954).
239. 9 U.S.C. § 5 (1947).
240. *Begood*, 88 F.4th at 1361–62.
241. 9 U.S.C. § 16(a) (1990).
242. *Begood*, 88 F.4th at 1362; 9 U.S.C. § 16(a)(1)(A)–(B); 9 U.S.C. § 3; 9 U.S.C. § 4.
243. *Begood*, 88 F.4th at 1368, 1371.
244. *Id.* at 1365; 9 U.S.C. § 3.
245. *Begood*, 88 F.4th at 1365.
246. *Id.*
247. *Id.*
248. *Id.* at 1366.

AAA policies and thus declined to open its forum to the parties." [249] Accordingly, though the district court was not required to accept the AAA's determination that Resorts' clause violated AAA rules, there was no reversible error in its doing so.[250]

For many of the same reasons, the court affirmed the district court's determination that Resorts was not "aggrieved by [another party's] failure, neglect, or refusal" to arbitrate, as required by 9 U.S.C. § 4.[251] One group of plaintiffs had tried, unsuccessfully, to arbitrate.[252] Other plaintiffs, who had not attempted arbitration but had joined the litigation later, had arbitration agreements with Resorts identical to those which the AAA had deemed noncompliant.[253] As such, if Resorts was "aggrieved," it was aggrieved not by the plaintiffs but instead by the failure of its own clause to meet AAA requirements.[254]

As for Resorts' argument that the district court should at least have appointed a substitute arbitrator under 9 U.S.C. § 5, the court determined that it lacked appellate jurisdiction to review that issue.[255] Section 16 authorizes interlocutory appeals of orders under § 3 and 4, but says nothing about § 5.[256] And the § 5 decision was not "inextricably intertwined" with the appealable decisions so as to bring it within the court's pendent appellate jurisdiction.[257]

The court did, however, reverse the district court with respect to the other two defendants, Development and WorldMark.[258] While those companies' arbitration agreements were similar (but not identical) to Resorts's agreement—and "common sense suggests that the AAA would reject" claims against those companies, too—there was "no solid evidence to that effect."[259] Accordingly, and in view of "the Supreme Court's emphasis on the liberal enforcement of arbitration agreements,"[260] the district court erred in denying the motion to stay and compel arbitration as to Development and WorldMark.[261]

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249. *Id.* at 1365.
250. *Id.* at 1366.
251. *Id.*; 9 U.S.C. § 4.
252. *Begood*, 88 F.4th at 1366.
253. *Id.* at 1367.
254. *Id.*
255. *Id.*; 9 U.S.C. § 5.
256. *Begood*, 88 F.4th at 1367; 9 U.S.C. § 16.
257. *Begood*, 88 F.4th at 1367–68.
258. *Id.* at 1369.
259. *Id.*
260. *Id.* at 1370.
261. *Id.*

V. FLSA COLLECTIVE ACTIONS

In *Wright v. Waste Pro USA, Inc.*,[262] the United States Court of Appeals for the Eleventh Circuit dealt with collective actions brought under the Fair Labor Standards Act (FLSA)[263] and their tolling effect.[264] The court held that FLSA's statute of limitations is not tolled when a plaintiff files an FLSA action that is later dismissed and then files a new, untimely action.[265] The court also rejected the plaintiff's request for equitable tolling and affirmed summary judgment for the defendants.[266]

Wright was employed in Florida as a driver for Waste Pro of Florida, Inc., a subsidiary of Waste Pro USA, Inc., until November 2015.[267] In October 2017, he and two other named plaintiffs (employed by Waste Pro subsidiaries in North Carolina and South Carolina, respectively) brought a putative FLSA collective action in a federal district court in South Carolina. In July 2019, before any motion to conditionally certify the collective action was filed, the court dismissed the claims against Waste Pro of Florida and Waste Pro USA for lack of personal jurisdiction and dismissed Wright's claims.[268]

Wright then filed a new FLSA action in the United States District Court for the Southern District of Florida.[269] This action also failed, this time on the court's grant of summary judgment to the defendants on the basis that the action was filed outside the applicable statute of limitations.[270]

Wright appealed, arguing that the statute of limitations should have been tolled while the South Carolina case was pending.[271] The Eleventh Circuit disagreed.[272] For purposes of a limitations period, the court explained, an action that is dismissed without prejudice is treated as never filed so that a later action filed outside of the limitations period is untimely.[273]

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262. 69 F.4th 1332 (11th Cir. 2023).

263. 29 U.S.C. § 216 (2022).

264. *Wright*, 69 F.4th at 1335.

265. *Id.* at 1336.

266. *Id.* at 1340.

267. *Id.* at 1335.

268. *Id.* at 1335–36.

269. *Id.* at 1336.

270. *Id.* The statute of limitations for FLSA violations is two years, or three years for willful violations. 29 U.S.C. § 255(a) (1974).

271. *Wright*, 69 F.4th at 1336.

272. *Id.*

273. *Id.* at 1337.

The court rejected Wright's argument that this general rule does not apply to FLSA claims because of the statutory language.[274] The court also noted that Wright's position was different from that of an FLSA opt-in plaintiff, whose claim is considered commenced at the time of the filing of their written consent.[275] In that instance, the limitations period may be tolled for a dismissed opt-in plaintiff, just as the commencement of a class action under Rule 23 tolls the limitations period for unnamed members of the putative class until class certification is denied.[276] This rule has nothing to do with an original plaintiff like Wright, whose claims are treated the same as any other plaintiff who sues on his own behalf.[277]

The court also rejected Wright's request for equitable tolling.[278] Wright did not meet his burden to show entitlement to this "extraordinary remedy."[279] He did not act with reasonable diligence, failing to pursue available legal remedies to preserve his claims.[280] He could have, for example, filed a protective action in Florida prior to expiration of the statute of limitations.[281] Or he could have moved for reconsideration in the South Carolina case and asked for a transfer to Florida rather than dismissal.[282] He did neither, and any harm to him was the consequence of his own failure to pursue his remedies, in the court's view.[283]

274. *Id.*
275. *Id.* at 1338.
276. *Id.* at 1340; FED. R. CIV. P. 23.
277. *Wright*, 69 F.4th at 1340.
278. *Id.*
279. *Id.*
280. *Id.* at 1340–41.
281. *Id.* at 1341.
282. *Id.*
283. *Id.*