Class Actions

by Thomas M. Byrne*

Multimillion-dollar awards hung in the balance in class action decisions reviewed by the United States Court of Appeals for the Eleventh Circuit during 2008. Probably the court's most noteworthy class action decision during the year, *Busby v. JRHBW Realty, Inc.*,[1] however, did not involve review of a final judgment.[2] *Busby* was an interlocutory appeal under Rule 23(f) of the Federal Rules of Civil Procedure,[3] in which the court reversed, as an abuse of discretion, the district court's denial of class certification.[4] The case involved an alleged violation of subsection 8(b) of the Real Estate Settlement Procedures Act of 1974 (RESPA).[5] The plaintiff claimed that she was charged an "Administrative Brokerage Commission fee" at her real estate closing for which no service was performed, in violation of the statute.[6] Citing Rule 23(b)(3) of the Federal Rules of Civil Procedure,[7] the district court denied her class certification motion on the ground that individual factual issues presented by each class member's claim would predominate over common legal issues.[8]

On appeal, the Eleventh Circuit began by distinguishing its prior class action decisions in several RESPA cases as having involved a different

---

* Partner in the firm of Sutherland Asbill & Brennan LLP, Atlanta, Georgia. University of Notre Dame (A.B., cum laude, 1978; J.D., magna cum laude, 1981). Law Clerk to the Hon. Robert A. Ainsworth, Jr. of the United States Court of Appeals for the Fifth Circuit; Hon. Morey L. Sear of the United States District Court for the Eastern District of Louisiana. Member, State Bar of Georgia.

1. 513 F.3d 1314 (11th Cir. 2008). Judge J. Owen Forrester of the United States District Court for the Northern District of Georgia, sitting by designation, authored the opinion for the court. *Id.* at 1318 n.*.
2. *See id.* at 1320.
3. FED. R. CIV. P. 23(f).
4. *Busby*, 513 F.3d at 1327.
5. *Id.* at 1320; 12 U.S.C. § 2607(b) (2006).
6. *Busby*, 513 F.3d at 1319.
7. FED. R. CIV. P. 23(b)(3).
8. *Busby*, 513 F.3d at 1320.

subsection of the statute, subsection 8(a),[9] and challenges to "yield spread premiums" under that subsection.[10] Under the substantive law, claims under subsection 8(a), the court explained, entailed case-by-case analysis of each transaction.[11] Thus, the court had previously held that class adjudication of those claims was inappropriate.[12] The claim Busby made under subsection 8(b), however, was different, according to the court.[13] Subsection 8(b) is violated if a fee is charged but no services are performed.[14] The question presented by each subsection 8(b) claim requires "a simple binary determination of 'any services' or 'no services.'"[15] The Eleventh Circuit concluded that the district court erred in holding that the substantive law required a determination of the reasonableness of the charge for services.[16] When the proper legal standard was applied, the case was appropriate for class certification.[17] The court also held that the defendant could not invoke an equitable estoppel affirmative defense based on the circumstances.[18] The defendant presented no evidence, the court noted, that this defense could be factually established as to a single class member.[19] The court also rejected the availability of a potentially class-defeating waiver defense as a matter of law.[20]

Turning to the adequacy of representation of the class, the court brushed aside a challenge that was grounded in the allegedly improper solicitation of the class representative by proposed class counsel, who had served as her real estate closing attorney.[21] The court agreed with a decision by the United States Court of Appeals for the Seventh Circuit,

---

9. 12 U.S.C. § 2607(a) (2006).

10. *Busby*, 513 F.3d at 1320-21.

11. *Id.* at 1321.

12. *Id.* (citing Heimmermann v. First Union Mortgage Corp., 305 F.3d 1257, 1264 (11th Cir. 2002)). The court's prior class action decisions under subsection 8(a) have been previously discussed in the *Mercer Law Review Eleventh Circuit Survey*. *See* Thomas M. Byrne, *Class Actions*, 59 MERCER L. REV. 1117, 1131-32 (2008).

13. *Busby*, 513 F.3d at 1323.

14. *Id.*

15. *Id.* at 1324. In another RESPA case, *Friedman v. Market Street Mortgage Corp.*, the court again held that subsection 8(b) of RESPA did not create a cause of action for excessive settlement service fees. 520 F.3d 1289, 1297-98 (11th Cir. 2008). The court reversed the district court's class certification, noting that the "law of the case" doctrine precluded revisiting the issue of whether any services were performed in exchange for the fee in question. *Id.* at 1298.

16. *Busby*, 513 F.3d at 1324.

17. *Id.*

18. *Id.* at 1326-27.

19. *Id.*

20. *Id.* at 1327.

21. *See id.* at 1323.

concluding that when improper client solicitation is alleged, "'[o]nly the most egregious misconduct'" by proposed class counsel would warrant denial of class certification.[22] Discerning no such misconduct, the court declined to decide whether or not the Alabama Rules of Professional Conduct had been violated in some lesser respect and determined there was no abuse of discretion in the adequacy-of-representation finding by the district court.[23]

Busby's significance lies in its methodology for deciding class certification. First, taken together with the court's other class action decisions in RESPA cases, *Busby* marks the final resting place for any argument in the Eleventh Circuit that a district court may not decide the merits in connection with ruling on a class certification motion. This is in accord with recent precedent from other circuits.[24] The origin of the argument that a district court must not decide the merits in addressing class certification was a holding by the United States Supreme Court in *Eisen v. Carlisle & Jacquelin,*[25] in which the Court held that the costs of class notice could not be shifted from the plaintiff to the defendant until the merits had been decided.[26] This led many cases to recite that any consideration of the merits before deciding class certification was forbidden territory, and the holding consequently produced many superficial analyses of certification requirements.

But this interpretation of *Eisen* fell into conflict with the Supreme Court's later decision in *General Telephone Co. of the Southwest v. Falcon*[27]—requiring a "rigorous analysis" of whether or not the requirements for class certification are met[28]—and a decades-long rhetorical struggle ensued between advocates for these two irreconcilable positions. Gradually, the circuit courts[29] recognized that the merits often must be

---

22. *Id.* (quoting Halverson v. Convenient Food Mart, Inc., 458 F.2d 927, 932 (7th Cir. 1972)).

23. *Id.* at 1324.

24. *See, e.g., In re* Hydrogen Peroxide Antitrust Litig., 552 F.3d 305, 316-20 (3d Cir. 2009); Teamsters Local 445 Freight Div. Pension Fund v. Bombardier, Inc., 546 F.3d 196, 202-03 (2d Cir. 2008); *In re* New Motor Vehicles Canadian Exp. Antitrust Litig., 522 F.3d 6, 26 (1st Cir. 2008) ("[W]hen a Rule 23 requirement relies on a novel or complex theory as to injury, as the predominance inquiry does in this case, the district court must engage in a searching inquiry into the viability of that theory and the existence of the facts necessary for the theory to succeed.").

25. 417 U.S. 156 (1974).

26. *Id.* at 178-79.

27. 457 U.S. 147 (1982).

28. *Id.* at 161.

29. *See* cases cited *supra* note 24; Blades v. Monsanto Co., 400 F.3d 562, 575 (8th Cir. 2005); Gariety v. Grant Thornton, LLP, 368 F.3d 356, 366 (4th Cir. 2004); Szabo v. Bridgeport Machs., Inc., 249 F.3d 672, 676 (7th Cir. 2001).

determined in deciding whether a class can be certified. As the United States Court of Appeals for the Third Circuit observed in a recent significant decision, "a district court errs as a matter of law when it fails to resolve a genuine legal or factual dispute relevant to determining the [class certification] requirements."[30] If factual questions must be resolved in the course of deciding class certification, the court must resolve them, though its findings of fact are not ultimately binding on the merits.[31]

Without delving into an analysis of its own methodology in *Busby*, the Eleventh Circuit tackled several RESPA substantive law questions that shaped the issues in the case; deciding those questions ultimately dictated whether or not the case was eligible for class treatment.[32] The court also decided that no factual support had been presented for the possible existence of individualized defenses that might have precluded class certification.[33] This approach, involving an evaluation of class certification in the context of the merits, seems consistent with other circuits. Any remaining *Eisen* shackles on addressing the merits when class certification and merits issues overlap now appear to be finally broken.

In *Owner-Operator Independent Drivers Ass'n v. Landstar System, Inc.*,[34] the court had to navigate around its own precedent in considering whether the predominance of individualized damage questions is sufficient to justify denial of class certification.[35] The underlying action was brought by owner-operators of trucks who entered into leases with Landstar, a motor carrier. The owner-operators' basic claim was that Landstar failed to disclose certain banking and third-party vendor charges in the weekly settlement statements provided to them showing the amounts that were due. The putative class action alleged that Landstar violated the Department of Transportation's "Truth-in-Leasing" regulations.[36] The owner-operators alleged that the regulations were violated because Landstar did not disclose the deductions from payments to them for fees and failed to disclose or document mark-ups and profits made on other items charged back to the owner-operators.[37]

---

30. *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d at 320.

31. *Id.* at 318; *In re* Initial Pub. Offerings Sec. Litig., 471 F.3d 24, 41 (2d Cir. 2006).

32. *See Busby*, 513 F.3d at 1321-22.

33. *Id.* at 1325-26.

34. 541 F.3d 1278 (11th Cir. 2008). The opinion for the Court was authored by Senior Judge Arthur L. Alarcón of the United States Court of Appeals for the Ninth Circuit, sitting by designation. *Id.* at 1281 n.*.

35. *See id.* at 1296-97.

36. *Id.*; 49 C.F.R. § 376.12(d) & (h) (2008).

37. *Landstar System*, 541 F.3d at 1281-83.

The district court certified a class of owner-operators who had entered into leases with Landstar but later decertified that class as to money damage claims. After a bench trial, both parties appealed. The owner-operators appealed from the district court's decertification of the class for money damages.[38] The district court had concluded that determination of actual damages on a classwide basis would be "unfeasible, unmanageable, and would not be superior to individual actions."[39] Upon review, the Eleventh Circuit noted that it had previously affirmed decertification of a Truth-in-Lending Act (TILA)[40] class because actual damages had to be proven by each putative class member.[41] The court acknowledged, however, that in another case, *Klay v. Humana, Inc.*,[42] it had observed that the need for individual damage computations could defeat class certification only in "'extreme cases in which computation of each individual's damages will be so complex, fact-specific, and difficult that the burden on the court system would simply be intolerable . . . but we emphasize that such cases rarely, if ever, come along.'"[43] The court apparently concluded, without elaboration, that the owner-operators presented just such a rarity, determining there was no abuse of discretion by the district court in decertifying the actual damage class because "the Owner-Operators failed to establish that actual damages can be easily calculated for all class members."[44] The Eleventh Circuit also cited precedent that counterclaims are properly considered in determining the complexity of damage computations for class certification purposes.[45]

It seems quite likely that the court was influenced by the fact that proof of damages would involve not only a calculation, or even a complex calculation, but a determination of causation, one similar to the reliance question that was the decisive factor in its holding that actual damage claims under TILA would not be a proper subject for class certification.[46] *Landstar System* is a further indication that *Klay*'s "only in extreme cases" nostrum is probably applicable only in cases in which the

38. *Id.* at 1296.
39. *Id.* (internal quotation marks omitted).
40. 15 U.S.C. §§ 1601-1667f (2006).
41. *Landstar System*, 541 F.3d at 1296-97 (citing Turner v. Beneficial Corp., 242 F.3d 1023, 1028 (11th Cir. 2001) (en banc)).
42. 382 F.3d 1241 (11th Cir. 2004).
43. *Landstar System*, 541 F.3d at 1296 (ellipsis in original) (quoting *Klay*, 382 F.3d at 1260).
44. *Id.* at 1297.
45. *Id.* at 1296 (citing Heaven v. Trust Co. Bank, 118 F.3d 735, 738 (11th Cir. 1997)).
46. *See id.* at 1296-97.

damage questions involved are purely computational and not mixed with causation or reliance issues.

In a decision with significant class action implications, the Eleventh Circuit held in *Christ v. Beneficial Corp.*[47] that TILA did not permit actions for private injunctive relief.[48] The consequences of that ruling in *Christ* were dramatic: the district court had awarded $22 million in restitution or disgorgement to the plaintiff class, an award vacated by the Eleventh Circuit.[49] The court's opinion, written by Judge Tjoflat, probably the court's leading voice in class action law, traced TILA's history through several amendments[50] and determined that the statutory silence on the availability of injunctive relief for private litigants was decisive.[51] While TILA's remedy provision specifies particular forms of available remedies for private litigants, it does not mention injunctive relief.[52]

Christ means that in TILA cases brought by private litigants class certification of Rule 23(b)(2) class actions will be precluded. Given the court's previous holding that TILA claims for actual damages require a showing of reliance that defeats class certification,[53] the only TILA money damages class that appears to be possible now in the Eleventh Circuit is a class for statutory damages, which are limited in a class action to $500,000.[54]

In *Mills v. Foremost Insurance Co.*,[55] the Eleventh Circuit reviewed the dismissal of a complaint and the denial of class certification in an action brought by mobile home owners against their property insurer. The complaint alleged that the insurer failed to compensate the plaintiffs for contractors' overhead and profit charges and sales taxes incurred by the insureds in having their hurricane-damaged property repaired or replaced.[56] The court reversed the dismissal of the complaint,[57] reasoning that the district court had misinterpreted the insurance policy by concluding that it required the insureds to complete repair of their damaged property and submit a replacement cost claim

47. 547 F.3d 1292 (11th Cir. 2008).
48. *Id.* at 1299.
49. *Id.* at 1299-1300.
50. *See id.* at 1297-99.
51. *Id.* at 1299.
52. *Id.* at 1297-98.
53. *Turner*, 242 F.3d at 1028.
54. *See* 15 U.S.C. § 1640(a)(2)(B) (2006).
55. 511 F.3d 1300 (11th Cir. 2008). The opinion for the court was authored by Judge Frank M. Hull. *Id.* at 1302.
56. *Id.* at 1302.
57. *Id.* at 1311.

to have standing to sue and be entitled to recover the disputed amounts.[58] The Eleventh Circuit also concluded, contrary to the district court, that "the cost to repair or replace property with new materials would necessarily include state and local taxes on the materials" and a contractor's overhead and profit charges.[59] The court determined that the district court's ruling—that the claims made were not appropriate for class action treatment because common issues would not predominate—could not be made without inquiry beyond the complaint.[60] Acknowledging that in some instances the class certification determination could properly be made from the face of the pleadings, the court noted that "pleadings alone are often not sufficient to establish whether class certification is proper, and the district court will need to go beyond the pleadings and permit some discovery and/or an evidentiary hearing to determine whether a class may be certified."[61] The insurer argued that whether or not general contractor overhead and profit are properly owing to the insured would depend on whether the services of the general contractor would be reasonably required under the circumstances. This would require the in-depth analysis of thousands of claims files, according to the insurer. The plaintiffs pointed out, however, that the insurer's own estimates could provide proof of whether a general contractor's services and sales taxes were reasonably likely to be incurred and that the class would accept those estimates, eliminating the need for examination of each class member's circumstances.[62] The Eleventh Circuit concluded that given these "vastly differing claims," the district court should have permitted some discovery in determining whether an evidentiary hearing was needed.[63]

At stake in the Eleventh Circuit's sixty-three-page opinion in *Morgan v. Family Dollar Stores, Inc.*[64] was a judgment after a jury trial for approximately $35 million against Family Dollar on behalf of an opt-in class of 1424 store managers. The case was a collective action for overtime pay certified by the district court under the Fair Labor

58. *Id.* at 1305.

59. *Id.* (internal quotation marks omitted) (citing FLA. ADMIN. CODE ANN. R. 12A-1.051, -1.006(18) (1990)).

60. *Id.* at 1309.

61. *Id.*

62. *Id.* at 1310.

63. *Id.* at 1311.

64. 551 F.3d 1233 (11th Cir. 2008). The opinion for the court was authored by Judge Frank M. Hull. *Id.* at 1239.

Standards Act of 1938 (FLSA).[65] The Eleventh Circuit affirmed the denial of the defendant's motion to decertify the class.[66] The court began its analysis by acknowledging that it had sanctioned a two-stage procedure for management of FLSA collective actions.[67] The first is a notice stage in which the court determines whether similarly situated employees should be notified of the case and of their chance to opt-in.[68] The court noted that the certification standard for the notice stage has been previously described as "'fairly lenient.'"[69] The second, more rigorous stage is the employer's almost inevitable motion for decertification, based on a full record, after discovery.[70]

The court determined that the district court did not abuse its discretion in denying the motion for decertification based on a fully developed record after more than three years of discovery, including 250 depositions of opt-in plaintiffs.[71] The court held that the district court's factual findings that the store managers were similarly situated were amply supported by the evidence.[72] The Eleventh Circuit rejected Family Dollar's contention that, given the size of the class and the individualized application of the "executive exemption" defense to overtime pay obligations, any collective action would be "inherently unfair."[73] The court observed that "generally speaking, the size of an FLSA collective action does not, on its own, compel the conclusion that a decision to collectively litigate a case is inherently unfair."[74] The court also rejected an argument that representative testimony of seven of the store managers out of the 1424 plaintiffs was too small a sample size on which to base a verdict.[75] The court pointed out that the parties presented an abundance of trial evidence, including testimony from other witnesses and documentary evidence.[76] The court also noted

---

65. 29 U.S.C. §§ 201-219 (2006); *see Morgan*, 551 F.3d at 1239-40. A collective action differs from an ordinary class action under Federal Rule of Civil Procedure 23 in that each class member must decide, after being notified of the action, whether or not to "opt-in." In an ordinary class action, the absent class members, after receiving notice, must affirmatively exclude themselves, or "opt-out," to not be bound by the class judgment.

66. *Morgan*, 551 F.3d at 1265.

67. *Id.* at 1260.

68. *Id.*

69. *Id.* at 1260-61 (quoting Hipp v. Liberty Nat'l Life Ins. Co., 252 F.3d 1208, 1218 (11th Cir. 2001)).

70. *Id.* at 1261.

71. *Id.* at 1262.

72. *Id.*

73. *Id.* at 1263-64.

74. *Id.* at 1265.

75. *Id.*

76. *Id.* at 1277.

that Family Dollar "shoulder[ed] the burden of proof" on the executive exemption defense.[77] "Family Dollar cannot rely on an insufficient number of witnesses being called by the [p]laintiffs to meet Family Dollar's burden of proof on its own affirmative defense."[78]

77. *Id.* at 1278.
78. *Id.*

***