Appellate Practice and Procedure

by Robert G. Boliek, Jr.*

In 2011 the United States Court of Appeals for the Eleventh Circuit decided a number of cases of first impression for the circuit that are of interest to the appellate practitioner. These cases include the following: (1) an appeal addressing whether a severance under Federal Rule of Civil Procedure 21 is an appealable collateral order; (2) an appeal addressing whether *Budinich v. Becton Dickinson & Co.*[1] applies in bankruptcy cases; (3) a number of appeals addressing the preservation and presentation of error; and (4) two appeals addressing standards of review.

One of the more interesting cases, however, is not a case of first impression at all, but is instead a case that extensively discusses the rarely invoked "civil plain error rule"–a matter of some interest to the appellate practitioner who is in the unenviable position of having to argue an issue that has not been properly preserved before the district court. This case, *In re Lett*,[2] is discussed below in Part III of this Article.[3]

Before turning to *In re Lett*, however, this Article will first discuss the cases of note that raise issues of appellate jurisdiction. Then, after discussing *In re Lett*, this Article will turn to other noteworthy cases addressing the preservation and presentation of error before closing with the cases that break new ground in the Eleventh Circuit with respect to standards of review.

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1. 486 U.S. 196 (1988). *Budinich* held that an award of attorney fees is collateral to the merits, and thus, a decision on the merits is immediately appealable even if the fee issue remains pending. *Id.* at 202-03. *See infra* notes 19-32 and accompanying text.

2. 632 F.3d 1216 (11th Cir. 2011).

3. *See infra* notes 33-61 and accompanying text.

I. APPELLATE JURISDICTION: ORDER OF SEVERANCE UNDER FEDERAL RULE OF CIVIL PROCEDURE 21 IS NOT A COLLATERAL ORDER

As the Eleventh Circuit has recently noted, "for this Court to exercise jurisdiction over an appeal, [its] jurisdiction must be both (1) authorized by statute and (2) within constitutional limits."[4] As a practical matter, the first requirement for the exercise of appellate jurisdiction usually means that the decision from which the appeal is taken must be a "final" decision for purposes of 28 U.S.C. § 1291.[5] Section 1291 is the work-horse jurisdictional statute for the appellate courts, "generally vest[ing] [them] with jurisdiction over appeals from final decisions of the district courts."[6]

It is well settled that "[a] final decision is one that ends the litigation on the merits and leaves nothing more for the court to do but execute the judgment."[7] Notwithstanding this definition, a limited number of decisions are considered final for purposes of § 1291 despite the fact that they do not end the litigation on the merits.

Among such final decisions are those that qualify as "collateral orders" under the "collateral order doctrine."[8] The collateral order doctrine is a "practical construction of the final decision rule [that] permits appeals from a small category of decisions that, although they do not end the litigation, must nonetheless be considered final."[9] The doctrine had its origin in *Cohen v. Beneficial Industrial Loan Corp.*[10] In *Cohen*, the United States Supreme Court held that "an order is appealable if it (1)

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4. OFS Fitel, LLC v. Epstein, Becker & Green, P.C., 549 F.3d 1344, 1355 (11th Cir. 2008).

5. *See* 28 U.S.C. § 1291 (2006). While "[i]n general, the final judgment rule permits an appeal to the circuit court only from a final judgment," some statutes provide that appeals of interlocutory decisions "are permissible . . . in certain limited situations." 19 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE § 202.05[1](3d ed. 2011). A familiar example would be an appeal from orders relating to injunctive relief authorized by 28 U.S.C. § 1292(a)(1)(2006). Various other statutes also permit appeals– final, interlocutory, or both–in particular instances. Perhaps the most familiar example of an appealable judgment that does not actually end the litigation on the merits is a creature of the Federal Rules of Civil Procedure–a judgment properly certified as final under Federal Rule of Civil Procedure 54(b).

6. W.R. Huff Asset Mgmt. Co. v. Kohlberg, Kravis, Roberts & Co., 566 F.3d 979, 984 (11th Cir. 2009) (quoting Cunningham v. Hamilton Cnty., 527 U.S. 198, 203 (1999)).

7. Carpenter v. Mohawk Indus., Inc., 541 F.3d 1048, 1052 (11th Cir. 2008) (quoting McMahon v. Presidential Airways, Inc., 502 F.3d 1331, 1338 (11th Cir. 2007)), *affirmed sub nom.* 130 S. Ct. 599 (2009).

8. McMahon v. Presidential Airways, Inc., 502 F.3d 1331, 1338 (11th Cir. 2007).

9. *Id.* (quoting Swint v. Chambers Cnty. Comm'n, 514 U.S. 35, 42 (1995)).

10. 337 U.S. 541 (1949).

conclusively determines the disputed question; (2) resolves an important issue completely separate from the merits of the action; and (3) is effectively unreviewable on appeal from a final judgment."[11]

In a case of apparent first impression, the Eleventh Circuit held in *Hoffman v. De Marchena Kaluche & Asociados*,[12] that an order of severance under Rule 21 of the Federal Rules of Civil Procedure is not an appealable order under the collateral order doctrine.[13] In *Hoffman*, the United States District Court for the Southern District of Florida was confronted with a case in which 232 plaintiffs sought relief against a number of defendants for an allegedly fraudulent real estate scheme. The district court concluded that the claims were misjoined in a single action and ordered the plaintiffs to file separate claims.[14]

In holding that the plaintiffs had failed to show that *Cohen's* third element had been established (that the order of severance was effectively unreviewable on appeal), the Eleventh Circuit first observed that a "severed claim under Rule 21 proceeds as a discrete suit and results in its own final judgment from which an appeal may be taken" and ultimately that "[p]laintiffs ha[d] made no showing that reviewing the severance order after final judgment would destroy their legal rights."[15] As such, the Eleventh Circuit was unwilling to delay what was "already a slow-moving case" by allowing for the appeal of each separate severance order.[16]

Hoffman thus extends a recurring theme in the Eleventh Circuit's jurisprudence of the collateral order doctrine: many such orders are called–or at least "nominated" by litigants hoping for immediate appellate review–but few are chosen.[17] In short, the Eleventh Circuit

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11. *Carpenter*, 541 F.3d at 1052 (citing *Cohen*, 337 U.S. 541).
12. 642 F.3d 995 (11th Cir. 2011).
13. *Id.* at 998.
14. *Id.* at 997.
15. *Id.* at 998-99.
16. *Id.* at 999. The Eleventh Circuit also relied on a number of analogous orders that were treated as interlocutory rather than collateral in reaching its decision, finding them analytically indistinguishable from orders of severance. *See id.* at 998 (discussing, for example, orders granting and denying consolidation under Federal Rule of Civil Procedure 42(a)).
17. *See* Hoffman, 642 F.3d at 998-99. Litigants have argued on a number of occasions over the past five years that orders of various types were candidates for collateral order treatment but only two collateral orders that were previously unrecognized as such in the Eleventh Circuit have been elected to receive such treatment, and one of those was for the shortest possible term-for the duration of that single appeal. *See* Romero v. Drummond Co., 480 F.3d 1234, 1247-48 (11th Cir. 2007) (determining that free lance journalist-intervenor's appeal of order requiring sealing of documents accorded collateral order treatment to vindicate common law right of access to court proceedings); *McMahon*, 502

has apparently taken to heart the Supreme Court's admonition that "the class of collaterally appealable orders must remain narrow and selective in its membership" in order to avoid overburdening the appellate courts with piecemeal appeals.[18]

II. PROCEDURAL ISSUES IN THE TAKING OF AN APPEAL: *BUDINICH* APPLIES TO BANKRUPTCY APPEALS

Even when jurisdiction exists under a statute and there is no constitutional bar to the exercise of the Eleventh Circuit's jurisdiction,[19] the procedural requirements for taking an appeal must be carefully observed. As is demonstrated by *DeLauro v. Porto (In re Porto)*,[20] another case of first impression for the circuit,[21] these requirements can also raise jurisdictional issues. *In re Porto* presented the question of whether a creditor timely filed a notice of appeal of the United States District Court for the Middle District of Florida's order affirming a bankruptcy court's decision to deny the creditor's objection to the discharge of a debt.[22] The Eleventh Circuit explained that the threshold issue is whether the court of appeals had jurisdiction, which depended on the timeliness of the notice of appeal.[23]

F.3d at 1338-40, 1339 n.6, 1340 n.7 (denying derivative *Feres* immunity to military contractor accorded collateral order treatment and holding that such immunity was improper, rendering future appeals of such orders untenable under collateral order doctrine); *see also W.R. Huff Asset Mgmt. Co.*, 566 F.3d at 986-87 (order granting leave to amend complaint substituting parties that had effect of destroying subject matter jurisdiction not a collateral order); Miccosukee Tribe v. South Fla. Water Mgmt. Dist., 559 F.3d 1191, 1200 (11th Cir. 2009) (stay order issued by district court deferring decision until such time as Eleventh Circuit decided appeal in related case not a collateral order); *Carpenter*, 541 F.3d at 1052 (order compelling disclosure of documents allegedly protected by the attorney-client privilege not a collateral order); United States v. Snipes, 512 F.3d 1301, 1302 (11th Cir. 2008) (order denying change of venue in criminal case not a collateral order); ConArt, Inc. v. Hellmuth, Obata + Kassabaum, Inc., 504 F.3d 1208, 1211 (11th Cir. 2007) (order refusing to enjoin arbitration not a collateral order).

18. Mohawk Indus., Inc. v. Carpenter, 130 S. Ct. 599, 608-09 (2009) (quoting Will v. Hallock, 546 U.S. 345, 350 (2006)).

19. In contrast to recent surveys, the Eleventh Circuit did not appear to address any novel questions relating to the constitutional limitations on the exercise of its jurisdiction, i.e., the question primarily of "justiciability." "Justiciability is the term of art employed to give expression to th[e] . . . limitation placed upon federal courts by the case-and-controversy doctrine." United States v. Rivera, 613 F.3d 1046, 1049 (11th Cir. 2010) (third alteration in original) (quoting Flast v. Cohen, 392 U.S. 83, 95 (1968)).

20. 645 F.3d 1294 (11th Cir. 2011).

21. *See id.* at 1299.

22. *Id.* at 1298.

23. *Id.*

The creditor argued that the notice was timely, given that the district court did not rule upon a related order of sanctions awarding attorney fees against the creditor for filing the objection until some months later.[24] According to the creditor, because the notice of appeal was filed within the thirty-day limit set forth in Rule 4(a)(1) of the Federal Rules of Appellate Procedure with respect to the order awarding fees, the notice was timely as to the order affirming the denial of the objection to the discharge as well.[25]

The Eleventh Circuit disagreed, relying on the Supreme Court's decision in *Budinich v. Becton Dickinson & Co.*,[26] explaining that "the Supreme Court has established a bright line rule that the issue of attorney[] fees is always collateral to the merits, and a decision on the merits, even if the attorney[] fees issue remains unresolved, is immediately appealable under 28 U.S.C. § 1291."[27]

The Eleventh Circuit noted that

> [a]lthough we have applied *Budinich* to appeals under 28 U.S.C. § 1291 and appeals from administrative agency decisions, this is the first time we have had occasion to apply that decision to cases appealed to this Court from a district court exercising appellate review of a bankruptcy court's order under 28 U.S.C. § 158(a).[28]

The Eleventh Circuit squarely held that "[t]here is no reason not to apply *Budinich* to appeals from the district court in bankruptcy cases,"[29] agreeing with the other circuits that have addressed the issue.[30]

Importantly, however, the Eleventh Circuit was careful to distinguish *In re Porto* from cases in which "attorney[] fees are awarded pursuant to a contract or are computed as part of the damages award."[31] Where the latter conditions exist, an unresolved issue of attorney fees will prevent an order from being considered "final."[32]

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24. *Id.*
25. *Id.*
26. 486 U.S. 196 (1988).
27. *In re Porto*, 645 F.3d at 1299; *see also* 28 U.S.C. § 1291 (2006).
28. *In re Porto*, 645 F.3d at 1299; *see also* 28 U.S.C. § 158(a) (2006).
29. *In re Porto*, 645 F.3d at 1299.
30. *Id.* at 1299-1300 (determining that "[t]he circuits that have considered this issue have held that *Budinich* applies to appeals brought under 28 U.S.C. § 158(d) where, as here, the district court entered a final order on the merits of the underlying dispute but left unresolved the issue of attorney[] fees").
31. *Id.* at 1300.
32. *Id.* at 1301.

III. PRESERVATION AND PRESENTATION OF ERROR

A. The Civil Plain Error Rule

Issues not properly preserved in the district court or issues preserved but not presented in the briefs on appeal are generally waived,[33] although a well-recognized exception exists in the criminal context for the preservation of certain "plain errors" that affect substantial rights.[34] Much less well known is the infrequently invoked "civil plain error rule," which the Eleventh Circuit may, in its discretion, apply to excuse an appellant's failure to preserve error in five situations:

> First, an appellate court will consider an issue not raised in the district court if it involves a pure question of law, and if refusal to consider it would result in a miscarriage of justice. Second, the rule may be relaxed where the appellant raises an objection to an order which he had no opportunity to raise at the district court level. Third, the rule does not bar consideration by the appellate court in the first instance where the interest of substantial justice is at stake. Fourth, a federal appellate court is justified in resolving an issue not passed on below . . . where the proper resolution is beyond any doubt. Finally, it may be appropriate to consider an issue first raised on appeal if that issue presents significant questions of general impact or of great public concern.[35]

In *Alabama Department of Economics & Community Affairs v. Lett (In re Lett)*,[36] the Eleventh Circuit addressed the issue of whether the district court had properly declined to apply the civil plain error rule in an appeal from the bankruptcy court.[37] The court of appeals extensively discussed the nature of the rule, including placing the Eleventh Circuit's approach in context with that of the Supreme Court.[38] The court explained that "[o]rdinarily an appellate court does not give

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33. *See, e.g.*, Action Marine, Inc. v. Cont'l Carbon, Inc., 481 F.3d 1302, 1312 n.8 (11th Cir. 2007).

34. *See, e.g.*, United States v. Lewis, 492 F.3d 1219, 1223 (11th Cir. 2007) (recognizing the distinction between unintentional "forfeitures" of substantial rights by a failure to timely object, which are entitled to plain error review, from intentional "waivers," which are not).

35. Ala. Dep't of Econ. & Comm. Affairs v. Lett (*In re* Lett), 632 F.3d 1216, 1227 n.22 (11th Cir. 2011) (quoting Princeton Homes, Inc. v. Virone, 612 F.3d 1324, 1329 n.2 (11th Cir. 2010)).

36. 632 F.3d 1216 (11th Cir. 2011).

37. *Id.* at 1220.

38. *Id.*

consideration to issues not raised below."[39] However, the Eleventh Circuit noted that "this principle is not unyielding; [t]here may always be exceptional cases . . . which will prompt a reviewing or appellate court, where injustice might otherwise result, to consider questions of law which were neither pressed nor passed upon by the court . . . below."[40] The panel writing for the court then noted that "[t]he Eleventh Circuit has embraced this conception of the civil plain error rule."[41]

Ultimately, however, the Eleventh Circuit reversed the district court's decision for a reason that did not require application of the civil plain error rule itself.[42] In particular, the Eleventh Circuit concluded that the issue sought to be raised under the civil plain error rule–which involved the application of the absolute priority rule in a Chapter 11 "cram down" proceeding–had of necessity been raised in substance, if not by name, given the nature of such proceedings.[43] Thus, "the requirements of [the bankruptcy code] in a cram down proceeding sufficiently present the absolute priority rule in the bankruptcy court as to preserve the issue for review and obviate the civil plain error rule in this narrow context."[44]

Although this precise holding arguably means that *In re Lett's* extensive elaboration upon the nature and purpose of the civil plain error rule is technically dicta,[45] it is at least very strong dicta, and should provide valuable guidance to appellate practitioners who may desire to present issues on appeal that otherwise have not been properly raised in the district court.[46]

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39. *Id.* at 1226-27 (quoting Hormel v. Helvering, 312 U.S. 552, 556 (1941)) ("[O]ur procedural scheme contemplates that parties shall come to issue in the trial forum vested with authority to determine questions of fact. This is essential in order that parties may have the opportunity to offer all the evidence they believe relevant to the issues which the trial tribunal is alone competent to decide; it is equally essential in order that litigants may not be surprised on appeal by final decisions there of issues upon which they have had no opportunity to introduce evidence.").

40. *Id.* at 1227 (quoting Hormel v. Helvering, 312 U.S. 552, 557 (1941)).

41. *Id.* (footnote omitted).

42. *Id.* at 1229-30.

43. *Id.*

44. *Id.* at 1230.

45. *See, e.g.*, United States v. Kaley, 579 F.3d 1246, 1253 n.10 (11th Cir. 2009) (noting that "[w]hat matters in discerning whether a rule of law expounded by a court is in fact holding is whether it was *necessary* to the result reached, or, in the alternative, could be discarded without impairing the foundations of the holding").

46. Although the rule is infrequently invoked, it cannot be said that it is *never* invoked, as at least two cases from 2010 reveal. In *Princeton Homes, Inc. v. Virone*, the Eleventh Circuit reached an issue not otherwise preserved on the basis that it presented a "pure

B. Intervening Change of Law

Of course, the better practice is to unambiguously preserve whatever issues are likely to be addressed on appeal by making the appropriate record in the district court. This includes such "pure issues of law" as are embraced by the civil plain error rule, as the case of *Douglas Asphalt Co. v. Quore, Inc.*[47] makes abundantly clear.

In *Douglas Asphalt Co.*, the appellant argued that an intervening change in the law rendered the United States District Court for the Southern District of Georgia's decision to dismiss a RICO[48] claim erroneous, an issue of first impression for the circuit.[49] Unfortunately, the appellant presented this argument for the first time on appeal without ever asking the district court to reconsider its decision in light of the change in the law.[50] After noting that "[i]t is well settled that issues not raised in the district court in the first instance are forfeited," the Eleventh Circuit went on to conclude that, "[t]hough [it had] not addressed these particular circumstances–a change in controlling law after the district court disposes of a claim–[the court saw] no reason not to apply that principle here."[51]

C. Harmless Error

Even properly preserved errors need not lead to a reversal where such errors are "harmless,"[52] as the Eleventh Circuit reminded criminal defendants in two cases arising in the context of sentencing decisions. Thus, in *United States v. James*,[53] the Eleventh Circuit held, in a case of first impression, that a district court's failure to "strictly comply" with the requirement in 21 U.S.C. § 851(b)[54]–that it engage in a colloquy with a defendant as to prior convictions before imposing an enhanced sentence–was harmless error where the record showed substantial

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question of law, in which the proper resolution is beyond any doubt." 612 F.3d 1324, 1329 n.2 (11th Cir. 2010). *See also* Brown v. Ala. Dep't of Transp., 597 F.3d 1160, 1186 (11th Cir. 2010) (quoting Narey v. Dean, 32 F.3d 1521, 1526-27 (11th Cir. 1994)) (reaching issue on the basis that its "proper resolution [was] beyond any doubt").

47. 657 F.3d 1146 (11th Cir. 2011).

48. 18 U.S.C. §§ 1961-1968 (2006).

49. *Douglas Asphalt Co.*, 657 F.3d at 1151-52.

50. *Id.*

51. *Id.* at 1152.

52. *See* 28 U.S.C. § 2111 (2006) (stating that "[o]n the hearing of any appeal . . . the court shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties").

53. 642 F.3d 1333 (11th Cir. 2011).

54. 21 U.S.C. § 851(b) (2006).

compliance with the requirement.[55] This was true notwithstanding some question under the precedent case of *United States v. Weaver*[56] as to the applicability of a harmless error analysis when the convictions in question were less than five years old.[57]

Similarly, in *United States v. Willis*,[58] also involving a matter of first impression,[59] the Eleventh Circuit concluded that issues concerning the timeliness of the disclosure of pre-sentence investigation reports, as required by 18 U.S.C. § 3552(d),[60] were subject to a harmless error analysis as well.[61]

IV. STANDARDS OF REVIEW

A. *Involuntary Medication*

Assuming the existence of the appellate court's jurisdiction and that such procedural requirements as the timely filing of a notice of appeal or the appropriate petition have been satisfied, few issues are more critical to the success of an appeal than the standard of review.[62] In *United States v. Diaz*,[63] the Eleventh Circuit was called upon to decide the standard of review to be applied to the appeal of the United States District Court for the Northern District of Georgia's order requiring the involuntary medication of a defendant in an attempt to render him competent to stand trial under the standards enunciated in *Sell v. United States*[64] by the Supreme Court.[65] As explained by the Eleventh Circuit,

> *Sell* laid out these four standards the government must satisfy for involuntary medication to render a defendant competent to stand trial:

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55. *James*, 642 F.3d at 1340-41.

56. 905 F.2d 1466 (11th Cir. 1990).

57. *See James*, 642 F.3d at 1339-43 (noting that "[a]lthough [the Eleventh Circuit has] not published an opinion following the other *Weaver* holding–i.e., that substantial compliance with § 851(b) is sufficient where § 851(a) is fully complied with [such that] a defendant is timely apprised of the underlying convictions to be considered to enhance his sentence–[the court does] so today").

58. 649 F.3d 1248 (11th Cir. 2011).

59. *Id.* at 1257.

60. 18 U.S.C. § 3552(d) (2006).

61. *Willis*, 649 F.3d at 1257.

62. *See* News-Press v. U.S. Dep't of Homeland Sec., 489 F.3d 1173, 1187 (11th Cir. 2007) ("In even moderately close cases, the standard of review may be dispositive of an appellate court's decision.").

63. 630 F.3d 1314 (11th Cir. 2011).

64. 539 U.S. 166 (2003).

65. *Diaz*, 630 F.3d at 1319.

> (1) important government interests must be at stake, (2) involuntary medication must significantly further the state interests in assuring a fair and timely trial, (3) involuntary medication must be necessary to further the state interests, and (4) administration of the medication must be *medically appropriate, i.e.,* in the patient's best medical interest in light of his medical condition.[66]

Although the question was one of first impression for the circuit,[67] the Eleventh Circuit noted that "[t]he majority of circuits that have considered the issue [have] concluded that the first *Sell* factor . . . is a legal question subject to *de novo* review, while the last three *Sell* factors present factual questions subject to clear error review."[68] Accordingly, the Eleventh Circuit agreed with its sister circuits.[69]

B. Choice of Forum Clauses

Another question of first impression was addressed in *Rucker v. Oasis Legal Finance, L.L.C.*[70] There, the Eleventh Circuit was confronted with the issue of what standard of review was to apply on the appeal of the United States District Court for the Northern District of Alabama's decision to enforce a forum selection clause contained in a contract of domestic–as opposed to international–scope.[71]

The issue was framed in this manner because the Eleventh Circuit had previously held that a *de novo* standard of review applied to interpretations of forum selection clauses in international contracts,[72] but the plaintiffs in *Rucker* submitted that a domestic contract was distinguishable to the extent that such contracts did not raise the "quintessentially legal" questions of "fundamental fairness and public policy" that were inherent in venue provisions contained in international agreements.[73] Instead, the plaintiffs argued that the district court's refusal to enforce the clause should be reviewed under the "abuse of discretion" standard applicable to dismissals for improper venue in general.[74]

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66. *Id.* (quoting *Sell*, 539 U.S. at 180-81).
67. *Id.* at 1330.
68. *Id.*
69. *Id.* at 1331.
70. 632 F.3d 1231 (11th Cir. 2011).
71. *Id.* at 1235.
72. *Id.* (citing Lipcon v. Underwriters at Lloyd's, London, 148 F.3d 1285, 1290-91 (11th Cir. 1998)).
73. *See id.* (quoting Lipcon v. Underwriters at Lloyd's, London, 148 F.3d 1285, 1290-91 (11th Cir. 1998)).
74. *Id.*

The Eleventh Circuit declined to so distinguish forum selection clauses contained in domestic contracts, explaining as follows:

> The enforceability of a forum selection clause in a domestic contract is just as much a question of law as the enforceability of a forum selection clause in an international contract. We review questions of law *de novo*, and we have concluded, like many of our sister circuits, that the wiser course of action is to apply that standard here.[75]

Accordingly, the Eleventh Circuit concluded that a *de novo* standard is the appropriate standard of review for all district court appeals related to contractual forum selection clauses, whether international or domestic.

75. *Id.*

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