Class Actions

by Thomas M. Byrne*

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The past year saw a mix of results in class-action litigation in the United States Court of Appeals for the Eleventh Circuit. with both plaintiffs and defendants notching victories in class certification controversies.[1] Of significance to class-action practice was the court's first foray into applying the challenging new Article III[2] standing decision of the Supreme Court of the United States, *Spokeo, Inc. v. Robins*.[3] The court also continued to address arbitration issues arising in putative class actions, while the prospects for curbing the availability of arbitration as an alternative to class litigation appeared to fade with the changing political climate.[4]

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1. For an analysis of class actions during the prior survey period, see Thomas M. Byrne & Stacey McGavin Mohr, *Class Actions, Eleventh Circuit Survey*, 67 MERCER L. REV. 841 (2016).

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

3. 136 S. Ct. 1540 (2016).

4. The Consumer Financial Protection Bureau published a proposed regulation on May 24, 2016, that would generally prohibit the use of class action waivers in consumer credit contracts subject to the Bureau's jurisdiction. Arbitration Agreements, 81 Fed. Reg.

I. CLASS CERTIFICATION AND PREDOMINANCE: *Brown v. Electrolux* AND *Carriuolo v. General Motors Co.*

The Eleventh Circuit handed Electrolux a major victory in *Brown v. Electrolux Home Products, Inc.*[5] when it vacated the classes certified in an opinion authored by Judge William Pryor.[6] The opinion was not an unqualified victory, however, as the court was unwilling to adopt key arguments made by Electrolux and remanded the case for further class certification proceedings without a great deal of direction on certain key issues.[7]

The case came to the court from the United States District Court for the Southern District of Georgia by interlocutory appeal under Rule 23(f) of the Federal Rules of Civil Procedure.[8] The district court had certified separate California and Texas classes consisting of persons who had purchased Frigidaire front-loading washing machines of a particular type. The underlying claim was one of a series of actions brought against manufacturers of front-loading washing machines, which have been plagued by allegations that they are subject to mildew that stains clothes and creates odors. The plaintiffs asserted claims for breach of warranty and claims under the respective unfair and deceptive trade practice statutes of the two states. The complaint sought money damages in the form of a refund or the difference in resale value of the washing machines, plus compensation for any injuries caused by the mildew.[9]

One of the issues facing the Eleventh Circuit arose in a pair of cases that came before the Supreme Court of the United States in 2013. In light of *Comcast v. Behrend,*[10] both *Butler v. Sears, Roebuck & Co.*[11] and *In re Whirlpool Corp. Front-Loading Washer Products Liability Litigation*[12] were vacated and remanded by the Supreme Court.[13] The circuit courts

32830 (proposed May 24, 2016) (to be codified at 12 C.F.R. pt. 1040). When or if that rule will become final remains uncertain. The Supreme Court also has granted certiorari to resolve a circuit split on whether the National Labor Relations Board's position that class-action waivers are prohibited in employment arbitration agreements by the National Labor Relations Act, 29 U.S.C §§ 151-169 (2012), is valid. NLRB v. Murphy Oil USA, Inc., 808 F.3d 1013 (5th Cir. 2015), *cert. granted*, No. 16-307, 2017 U.S. LEXIS 680 (Jan. 13, 2017).

5. 817 F.3d 1225 (11th Cir. 2016).

6. *Id.* at 1129. The other members of the panel were Judge Chuck Wilson and District Judge Susan C. Bucklew of the Middle District of Florida, sitting by designation. *Id.*

7. *Id.* at 1241.

8. FED. R. CIV. P. 23(f).

9. *Brown*, 817 F.3d at 1230-31.

10. 133 S. Ct. 1426 (2013).

11. 727 F.3d 796 (7th Cir. 2013).

12. 722 F.3d 838 (6th Cir. 2013).

13. *Id.* at 845, 854.

in each of these cases later reaffirmed the certification of plaintiff classes, and the Supreme Court ultimately denied further review.[14] The overarching issue raised by these cases is the extent to which uninjured class members may be included in a certified class. The issue has prompted proposed legislation requiring each class member to have suffered an injury of the same type and scope as the class representatives.[15]

In the course of certifying the two classes in *Brown*, the district court stated that it resolved doubts related to class certification in favor of certifying the class and that it accepted the allegations of the complaint as true.[16] Both statements clashed with well-settled law from the Supreme Court and from the Eleventh Circuit. On appeal, Electrolux argued that the district court articulated the wrong standard for class certification and that the plaintiffs could not satisfy the predominance requirement of Rule 23(b)(3).[17] The plaintiffs conceded the errors in the district court's description of the standard for class certification but argued that they were harmless.[18] The Eleventh Circuit, however, took the occasion to elaborate on the errors, pointing out that the party seeking class certification has the burden of proof and citing the Supreme Court's decision in *Comcast* for the proposition that

> [a]ll else being equal, the presumption is against class certification because class actions are an exception to our constitutional tradition of individual litigation. A district court that has doubts about whether 'the requirements of Rule 23 have been met should refuse certification until they have been met.[19]

The court then pounced on the district court's statements that it accepts all allegations of the complaint as true for class certification purposes and draws all inferences in a light most favorable to the plaintiffs, pointing out that the party seeking class certification has more than a burden of pleading: it bears a burden of proof that often entails factual inquiry. "[I]f a question of fact or law *is* relevant to that determination,

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14. Sears, Roebuck & Co. v. Butler, 727 F.3d 796 (7th Cir. 2013), *cert. denied*, No. 13-430, 2014 U.S. LEXIS 1507 (Feb. 24, 2014); Whirlpool Corp. v. Glazer, 722 F.3d 838 (6th Cir. 2013), *cert. denied*, No. 13-431, 2014 U.S. LEXIS 1484 (Feb. 24, 2014).

15. *See* Fairness in Class Action Litigation and Furthering Asbestos Claim Transparency Act of 2016, H.R. 1927, 114th Cong. (2016). An expanded version of this bill was introduced in the new Fairness in Class Action Litigation Act of 2017, H.R. 985, 115th Cong. (2017) (approved by the H. Comm. on the Judiciary, Feb. 15, 2017).

16. *Brown*, 817 F.3d at 1232.

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

18. *Brown*, 817 F.3d at 1232.

19. *Id.* at 1233-34 (citation omitted) (quoting *Comcast*, 133 S. Ct. at 1432).

then the district court has a duty to actually decide it and not accept it as true or construe it in anyone's favor."[20]

The court held that the district court abused its discretion in assessing predominance.[21] The opinion is the court's most significant treatment of predominance since its landmark opinion in *Sacred Heart Health Systems, Inc. v. Humana Military Healthcare Services, Inc.*[22] In considering predominance in *Brown*, the Eleventh Circuit instructed that the district court should "first identify the parties' claims and defenses and their [respective] elements. The district court should then classify these issues as common questions or individual questions by predicting how the parties will prove them at trial."[23]

Furthermore, the district court is to determine whether the common questions predominate over the individual ones. To guide this determination, the court quoted from its prior opinion in *Klay v. Humana, Inc*:[24]

> [I]f common issues truly predominate over individualized issues in a lawsuit, then the addition or subtraction of any of the plaintiffs to or from the class [should not] have a substantial effect on the substance or quantity of evidence offered . . . . If, on the other hand, the addition of more plaintiffs leaves the quantum of evidence introduced by the plaintiffs as a whole relatively undisturbed, then common issues are likely to predominate.[25]

The court noted, however, that predominance requires a qualitative assessment, as well, and that the relative importance of the common versus individual questions also matters.[26]

Applying this standard, the court concluded that the claim under California's Unfair Competition Law[27] could not be certified because the class representative admitted he never saw any false advertisements from the defendant.[28] As for the Texas Deceptive Trade Practices[29] claim, the court found that the required detrimental reliance on the defendant's conduct could not be established by presumption, contrary to the district court's reasoning.[30]

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20. *Id.* at 1234.
21. *Id.*
22. 601 F.3d 1159 (11th Cir. 2010).
23. *Brown*, 817 F.3d at 1234.
24. 382 F.3d 1241 (11th Cir. 2004).
25. *Brown*, 817 F.3d at 1234-35 (alteration in original) (quoting *Klay*, 382 F.3d at 1255).
26. *Id.* at 1235.
27. CAL. BUS. & PROF. CODE div. 7, pt. 2, ch. 5 (Deering 2017).
28. *Brown*, 817 F.3d at 1236.
29. TEX. BUS. & COM. CODE ANN. tit. 2, ch. 17, subch. E (West 2017).
30. *Brown*, 817 F.3d at 1236.

The Eleventh Circuit then turned to the breach of warranty claims and held that the district court could not properly decide predominance without first deciding whether California and Texas laws required presuit notice, an opportunity to cure, and manifestation of the defect. The court pointed out that these questions were not common questions that could be decided after class certification.[31] Instead, they needed to be resolved to determine whether the class could be certified. The court remanded the case to the district court for these determinations without expressing any view of the answers.[32]

Electrolux also argued that none of the plaintiffs' claims could satisfy the predominance requirement because the damages would require individual proof, citing *Comcast*.[33] Here, Electrolux ran into resistance. The Eleventh Circuit endorsed a statement from *Newberg on Class Actions*[34] that "individual damage calculations generally do not defeat a finding that common issues predominate."[35] The court then elaborated that "relatively speaking, individual issues of damages are sometimes easy to resolve because the calculations are formulaic."[36] The court rejected Electrolux's argument that *Comcast* altered "the black-letter rule that individual damages do not always defeat predominance."[37] The court noted this rule has always been subject to the exceptions articulated in *Klay*, where the task of computing damages is "so complex, fact-specific, and difficult that the burden on the court system would be simply intolerable."[38]

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31. *Id.* at 1237-38.

32. *Id.* at 1238.

33. *Id.*

34. WILLIAM B. RUBENSTEIN, NEWBERG ON CLASS ACTIONS § 4:54 (5th ed. 2016).

35. *Brown*, 817 F.3d at 1239 (quoting RUBENSTEIN, *supra* note 34, at § 4:54).

36. *Id.*

37. *Id.*

38. *Id.* at 1240 (quoting *Klay*, 382 F.3d at 1260). The court returned to this subject in an unpublished opinion in *Herrera v. JFK Medical Center Limited Partnership*. 648 F. App'x 930 (11th Cir. 2016). There, the court reversed the district court's order granting a motion to strike class allegations on the pleadings in a case involving alleged overcharges for various medical services provided to patients who were insureds under Florida's no-fault personal injury protection law. *Id.* at 931. The court held that at least limited discovery would be required to determine if the requirements for class certification could be met, again citing *Klay* for the standard for determining whether the complexity of damage calculations could preclude a predominance finding under Rule 23(b)(3). *Id.* at 935-36. The court granted a Federal Rule of Civil Procedure 23(f) petition to hear the case, finding the granting of a motion to strike class allegations to be the equivalent of the denial of class certification. *Id.* at 933 & n.1.

The court cited a controversial United States Court of Appeals for the Second Circuit case, *In re Visa Check/MasterMoney Antitrust Litigation*,[39] for the roster of tools the district court may use to decide individual damage questions, including bifurcating liability and damages, appointment of a special master, and decertifying the class after the liability trial. The court did not have occasion to indicate what constitutional limits might apply to these practices.[40]

Electrolux also argued that the warranty claims could not satisfy predominance because causation cannot be established without individual proof. The Eleventh Circuit disagreed with the district court that product misuse could be proven classwide, but the court did agree that "individual affirmative defenses generally do not defeat predominance."[41] The court stated that "affirmative defenses could apply to the vast majority of class members and raise complex, individual questions"[42] that would preclude class certification, but it also observed that "affirmative defenses are often easy to resolve."[43] Ultimately, the court expressed no view on the outcome of the predominance determination, leaving it for the district court on remand.[44]

The issue of individualized damages determinations also arose in *Carriuolo v. General Motors Co.*,[45] a decision affirming the district court's partial grant of a motion for class certification.[46] The plaintiffs' motion in the district court involved four classes relating to four claims, but the district court denied certification of three and only granted class certification of the Florida class relating to a claim under the Florida Deceptive and Unfair Trade Practices Act (FDUTPA).[47] General Motors petitioned

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39. 280 F.3d 124, 141 (2d Cir. 2001). The opinion from a divided Second Circuit panel seems clearly at odds with the United States Supreme Court's subsequent opinion in *Comcast*, which requires that a party seeking class certification establish that damages are capable of measurement on a classwide basis. And *Visa Check's* key premise earlier was expressly rejected by the Second Circuit itself. *In re* Initial Pub. Offerings Sec. Litig., 471 F.3d 24, 42 (2d Cir. 2006) ("we . . . disavow the suggestion in *Visa Check* that an expert's testimony may establish a component of a Rule 23 requirement simply by being not fatally flawed").

40. *Brown*, 817 F.3d at 1230.

41. *Id.* at 1240.

42. *Id.* at 1241.

43. *Id.* at 1240-41 (citing Smilow v. S. Bell Mobile Sys., Inc., 323 F.3d 32 (1st Cir. 2003); Waste Mgmt. Holdings, Inc. v. Mowbray, 208 F.3d 288 (1st Cir. 2000)). The court's reliance on pre-*Comcast*, out-of-circuit cases on the damages and affirmative defenses points is rather surprising.

44. *Id.* at 1241.

45. 823 F.3d 977 (11th Cir. 2016).

46. *Id.* at 990.

47. FLA. STAT. § 501.204(1) (2016).

the Eleventh Circuit for review of the district court's partial grant of class certification under Rule 23(f) of the Federal Rules of Civil Procedure. The district court's denials were not considered in the appeal.[48]

Carriuolo purchased a new 2014 Cadillac CTS sedan. When Carriuolo bought the vehicle, it had a General Motors-provided window sticker that allegedly contained inaccurate safety information. The sticker was a standardized "Monroney" window sticker containing safety ratings assigned by the National Highway Traffic Safety Administration (NHTSA) on a five-star scale in six categories. When Carriuolo purchased his vehicle, the sticker indicated that the CTS had received perfect five-star ratings in three categories and had not been rated in the other categories. In fact, the NHTSA had not yet rated the CTS at all at the time Carriuolo made his purchase. General Motors then sent a letter to Carriuolo acknowledging the inaccurate safety data and enclosing a corrected label, one that indicated the vehicle had not been rated.[49]

An FDUTPA claim requires proof of (1) a deceptive act or unfair practice, (2) causation, and (3) actual damages.[50] According to the court, the first element relies on an objective test of whether the practice would likely deceive a consumer acting reasonably in the same circumstances.[51] The damages in a FDUTPA case are measured by the difference between the market value of the product or service as received compared to the condition required by the parties' contract. Carriuolo's claim, therefore, required a showing that a consumer acting reasonably would have been deceived by the inaccurate window sticker and that the CTS with the alleged safety ratings would have a higher market value than the CTS before it was rated.[52]

General Motors argued on appeal that the common issues of law or fact did not predominate as required by Rule 23(b)(3) (under which the district court had certified the class) because liability determinations and damage calculations would necessarily be highly individualized based on the individual experiences of each purchaser, including price negotiations, knowledge of the inaccuracy of the sticker prior to purchase, and differences between institutional and individual purchasers.[53]

The Eleventh Circuit explained, however, that the district court had not abused its discretion in certifying the class because the claimant's

48. *Carriuolo*, 823 F.3d at 983.
49. *Id.* at 981-82.
50. *Id.* at 983.
51. *Id.* at 983-84.
52. *Id.* at 986.
53. *Id.* at 985.

subjective knowledge of the unfair or deceptive trade practice is not relevant to a FDUTPA claim.[54] According to the court, the basis of the injury in a FDUTPA claim is simply diminution of market value.[55] The court, therefore, held that plaintiffs would need to prove only that a vehicle with three perfect safety ratings was more valuable than a vehicle that had not yet been rated, regardless of what the ratings were later.[56] Essentially, because the vehicle's market value can be measured objectively, the court held that the damage done to individual purchasers is not likely affected even if they negotiated different prices.[57] Even if damage determinations ultimately were to require individualized calculations, the court elaborated that the district court could revisit the certification question when necessary because certification is always provisional and that other issues could be dealt with as they arise through refinement of the class or the creation of subclasses.[58] The Eleventh Circuit concluded that, given the flexible nature of the district court's certification decision, certifying the class at this stage did not constitute an abuse of discretion.[59]

II. STANDING UNDER *Spokeo*: *Nicklaw v. CitiMortgage, Inc.*

The Supreme Court's 2016 decision in *Spokeo, Inc. v. Robins*[60] established that an alleged violation of a statutory right, standing alone, does not necessarily confer Article III standing to bring a claim in federal court.[61] Applying the decision has roiled the lower federal courts.[62] In *Nicklaw v. CitiMortgage, Inc.*,[63] the court dismissed an appeal for lack of jurisdiction where the plaintiff alleged that his mortgage bank failed to file a certificate of satisfaction of the mortgage within the time allowed by New York law, but the complaint included no allegation that the plaintiff had been harmed by the tardy filing or even that he had been aware of the delay until after the satisfaction was filed.[64]

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54. *Id.*

55. *Id.* at 987.

56. *Id.*

57. *Id.*

58. *Id.* at 988.

59. *Id.*

60. 136 S. Ct. 1540 (2016).

61. *Id.* at 1552.

62. *Compare* Van Patten v. Vertical Fitness Gr., LLC, 847 F.3d 1037, 1043 (9th Cir. 2017) (standing established by allegations of unsolicited text messages received by plaintiff) *with* Hancock v. Urban Outfitters, Inc., 830 F.3d 511, 513 (D.C. Cir. 2016) (no standing to sue for retailer's request for zip codes).

63. 839 F.3d 998 (11th Cir. 2016).

64. *Id.* at 1000.

The New York law at issue required CitiMortgage to file the certificate of satisfaction within thirty days after the obligation was satisfied. But CitiMortgage failed to file the certificate until more than ninety days had elapsed. After that, Nicklaw learned that the filing had been late and filed a putative class action against the bank, alleging that the bank violated the New York law and that he was entitled to statutory damages for the violation. However, Nicklaw's complaint did not allege that he or any other member of the putative class was aware of the tardy filing, or suffered any harm because of it. After the case was transferred from the United States District Court for the Eastern District of Missouri to the Southern District of Florida, the Southern District dismissed the case based on prior litigation between the parties. Nickshaw appealed, and the bank moved to dismiss the appeal for lack of jurisdiction.[65]

In a decision written by Judge Bill Pryor, the Eleventh Circuit granted the motion.[66] Applying *Spokeo*'s holding that "a plaintiff does not 'automatically satisf[y] the injury-in-fact requirement whenever a statute grants a person a statutory right and purports to authorize that person to sue to vindicate that right,'"[67] the court held:

> Nicklaw alleges neither a harm nor a material risk of harm that the district court could remedy. His complaint does not allege that he lost money because CitiMortgage failed to file the certificate. It does not allege that his credit suffered. It does not even allege that he or anyone else was aware that the certificate of discharge had not been recorded during the relevant time period. And Nicklaw did not file this action until more than two years *after* CitiMortgage recorded the satisfaction of mortgage. Nicklaw fails to allege even a material risk of harm at this late date.[68]

The court noted that Nicklaw might have an actionable claim in a New York court, but he failed to allege an injury sufficient to confer Article III standing in federal court.[69] A petition for rehearing *en banc* was denied, but not without an unusual exchange between members of the court. [70] Judge Beverly Martin vigorously dissented from the denial at some length, concluding, "We are silencing the voice of the legislature by making it impossible to enforce a law enacted to address a harm it identified."

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65. *Id.* at 1000-01.

66. *Id.* at 1003 (quoting *Spokeo*, 136 S. Ct. at 1549).

67. *Id.* at 1002.

68. *Id.* at 1003.

69. *Id.*

70. Nicklaw v. CitiMortgage, Inc., No. 15-14-14216-FF, 2017 WL 1548204 (11th Cir. May 1, 2017).

This prompted a pointed response from Judge Bill Pryor, joined by Judge Stanley Marcus, defending the panel's decision.

In a previous, unpublished per curiam opinion in *Church v. Accretive Health, Inc*,[71] the Eleventh Circuit rejected a *Spokeo*-based challenge in a Fair Debt Collection Practice Act (FDCPA)[72] case alleging a failure to provide required disclosures.[73] The *Church* panel analogized the case before it to the standing inquiry in Fair Housing Act[74] "tester" cases: "Just as the tester-plaintiff had alleged injury to her statutorily-created right to truthful housing information, so too has Church alleged injury to her statutorily-created right to information pursuant to the FDCPA."[75] Several subsequent district court decisions around the country have followed *Church*'s reasoning,[76] but others have rejected it.[77]

III. CAFA JURISDICTION: *Wright Transportation v. Pilot Corp.*

The Eleventh Circuit confirmed the strength of CAFA jurisdiction in *Wright Transportation v. Pilot Corp.*[78] holding that district court with original subject-matter jurisdiction over state-law claims under the Class Action Fairness Act (CAFA) retains that jurisdiction even when the class claims are dismissed before the class is certified.[79] Wright Transportation, a trucking company that had contracted to purchase fuel from Pilot, brought a class action against Pilot and several affiliated entities alleging

71. 654 F. App'x 990 (11th Cir. 2016).

72. 15 U.S.C. §§ 1692-1692p (2012).

73. *Church*, 654 F. App'x at 995.

74. 42 U.S.C. § 3601 (2012).

75. *Church*, 654 F. App'x at 993-94.

76. *E.g.*, Quinn v. Specialized Loan Servicing, LLC, No. 16 C 2021, 2016 LEXIS 107299 (N.D. Ill. Aug. 11, 2016); Sayles v. Advanced Recovery Sys., Inc., No. 3:14-CV-911-CWR-FKB, 2016 LEXIS 114718 (S.D. Miss. Aug. 26, 2016), *appeal docketed*, No. 16-60640 (5th Cir. Sept. 23, 2016); Irvine v. I.C. Sys., Inc., 198 F. Supp. 3d 1232 (Colo. 2016).

77. Nokchan v. Lyft, Inc., No. 15-cv-03008-JCS, 2016 U.S. Dist. LEXIS 138582 (N.D. Cal. Oct. 5, 2016); Dolan v. Select Portfolio Servicing, No. 03-CV-3285 (PKC) (AKT), 2016 U.S. Dist. LEXIS 101201 (E.D.N.Y. Aug. 2, 2016).

78. 841 F.3d 1266 (2016). The opinion of the court was authored by Judge Beverly Martin.

79. CAFA jurisdiction also was addressed in *Hill v. National Insurance Underwriters, Inc.*, 641 F. App'x 899 (2016), which dealt with the standard to be applied in evaluating remand under CAFA's local-controversy exception. The court reversed the district court's order remanding a class-action to state court under the local-controversy exception, concluding that the district court neglected to hold the plaintiff, as the party seeking remand, to its burden to establish the "significant basis" prong of the exception. *Id.* at 907 (citing 28 U.S.C. § 1332(d)(4)(A)(i)(II)(bb)).

that Pilot shortchanged Wright and other trucking companies by failing to give them agreed-upon benefits.[80]

The original complaint, filed in the United States District Court for the Southern District of Alabama, included claims federal RICO[81] claims as well as a number of state-law claims.[82] Wright alleged that jurisdiction was proper over the state-law claims on four separate bases: (1) diversity jurisdiction under 28 U.S.C. § 1332(a); CAFA jurisdiction under 28 U.S.C. § 1332(d); and supplemental jurisdiction under 28 U.S.C. § 1367.[83] The district court subsequently dismissed in part the defendants' motion to dismiss, including dismissal of the federal RICO claims as well as all class claims asserted in the complaint.[84] The class claims were dismissed because a rival, nationwide class-action lawsuit that previously had been filed in the United States District Court for the Eastern District of Arkansas had reached a court-approved settlement.[85]

After Wright's lawsuit was consolidated into multidistrict litigation (MDL) in the United States District Court for the Eastern District of Kentucky, the MDL court remanded the case back to the Alabama District Court, finding that new-found information had deprived it of diversity jurisdiction.[86] Specifically, a filing by one of the Pilot defendants, Pilot Travel Centers LLC, in an unrelated case in the Middle District of Florida revealed that a "sub-sub-sub-sub-member" of the LLC was a citizen of Alabama, making the LLC (now and at the time of the filing of the complaint) also a citizen of Alabama, the same state in which Wright is incorporated and has its principal place of business, and ruining complete diversity.[87] On remand to the Alabama District Court, Wright moved to dismiss the claims without prejudice so that it could re-file its claims in Alabama state court, while Pilot urged that the federal court retained jurisdiction under CAFA. The district court agreed with Wright, concluding that, because all claims over which the court had original jurisdiction had been dismissed, the court had discretion to decline to exercise supplemental jurisdiction over the remaining state-law claims, which it did, dismissing the claims without prejudice.[88]

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80. *Id.* at 1268.
81. 18 U.S.C. § 1962.
82. *Wright*, 841 F.3d at 1268.
83. *Id.*
84. *Id.*
85. *Id.* at 1269.
86. *Id.*
87. *Id.*
88. *Id.* at 1269-70.

On appeal, the Eleventh Circuit reversed, concluding that CAFA conferred original jurisdiction over all of Wright's claims at the time of filing and that, once this jurisdiction was conferred by CAFA, it was not defeated by subsequent events, including the dismissal of the class claims.[89]

In reaching this conclusion, the court relied on its earlier opinion in *Vega v. T-Mobile USA, Inc.*,[90] which held that the failure to show numerosity, a requirement for certification of a class under Federal Rule of Civil Procedure 23, "does not divest the federal courts of subject matter jurisdiction under [] CAFA," because "jurisdictional facts are assessed at the time of removal; and post-removal events (including non-certification, decertification, or severance) do not deprive federal courts of subject matter jurisdiction."[91] The court noted that this reasoning has been adopted by every circuit court to consider the question, because "federal jurisdiction under the Class Action Fairness Act does not depend on certification."[92] Although claims brought to federal court under CAFA may be dismissed for lack of jurisdiction if the claims involve "frivolous attempts to invoke CAFA jurisdiction or lack the expectation that a class may be eventually certified," in those cases "the federal court never had jurisdiction in the first place; they do not mean that jurisdiction existed and was then lost."[93] Following the rule in conventional diversity cases—that diversity is not destroyed by post-filing changes to party citizenship—"CAFA jurisdiction is not easily defeated."[94]

The court noted that the current case was different from *Vega* and related precedent because those cases all dealt with removal, whereas Wright had initiated the action in federal court under CAFA and not wished to re-file in state court.[95] In removal cases, courts should be concerned with attempts at forum manipulation, such as where "a plaintiff whose case has been removed to federal court and who then amends its pleadings in an attempt to manipulate its way back into state court."[96] When, on the other hand, the plaintiff has chosen federal court and then amends the complaint, those concerns are not present, and the court

89. *Id.* at 1270.

90. 564 F.3d 1256 (11th Cir. 2009).

91. *Wright*, 841 F.3d at 1271 (alteration in original) (quoting *Vega*, 564 F.3d at 1268 n.12).

92. *Id.* (quoting Cunningham Charter Corp. v. Learjet, Inc., 592 F.3d 805, 806 (7th Cir. 2010)).

93. *Id.*

94. *Id.* at 1272.

95. *Id.*

96. *Id.*

would look to the amended complaint to determine the existence of subject-matter jurisdiction.[97] The court concluded that it did not have to decide the question of "whether a plaintiff's amendments after filing in federal court can divest that court of CAFA jurisdiction," because there was no suggestion that any action by Wright divested the court of jurisdiction—that was done by the district court in dismissing the class claims.[98] Because the post-filing action dismissing the class claims was not an amendment to the complaint, the court saw no reason to treat cases filed in federal court from those removed to federal court.[99]

IV. AMERICAN PIPE TOLLING: *Dusek v. JPMorgan Chase & Co.*

Is a statute of repose subject to tolling? Although its holding was limited to the applicability of *American Pipe & Construction Co. v. Utah*[100] tolling created by the commencement of a class action to the five-year statute of repose under section 20(a) of the Securities Exchange Act of 1934,[101] the Eleventh Circuit discussed the issue in broad terms in its opinion in *Dusek v. JPMorgan Chase & Co.*,[102] affirming the district court's dismissal of two federal claims.[103] The case concerned the liability of JPMorgan Chase & Co. and two of its employees stemming from their banking relationship with Bernie Madoff and his company and from the defendants' access to the company's accounts. The district court granted the defendants' motion to dismiss plaintiffs' second amended complaint thereby dismissing, with prejudice, an alleged violation of § 20(a) of the Securities Exchange Act as barred by the statute of repose, and a federal Racketeer Influenced and Corrupt Organizations Act (RICO)[104] claim as barred by the Private Securities Litigation Reform Act (PSLRA).[105] The district court then declined to exercise supplementary jurisdiction over the only remaining claims, all based in state law claims, dismissing them without prejudice.[106]

Dusek, the named plaintiff and class representative, argued that the statute of repose was tolled by the pendency of another class action filed against JPMorgan in the Southern District of New York. Dusek sought

97. *Id.*
98. *Id.*
99. *Id.*
100. 414 U.S. 538 (1974).
101. 15 U.S.C. § 78t (2012).
102. 832 F.3d 1243 (11th Cir. 2016).
103. *Id.* at 1246.
104. 18 U.S.C. §§ 1960-1968 (2012).
105. 15 U.S.C. § 78U-4 (2012).
106. *Dusek*, 832 F.3d at 1245, 1246.

to apply the Supreme Court's decision in *American Pipe* to the statute of repose in the Securities Exchange Act.[107] To do so, though, Dusek needed to distinguish recent Supreme Court precedent in *CTS Corp. v. Waldburger*,[108] which differentiated statutes of repose from statutes of limitations based on their "different purposes and objectives" and stated that statutes of repose "generally may not be tolled, even in cases of extraordinary circumstances beyond a plaintiff's control."[109] Dusek argued that *American Pipe* had addressed *legal* tolling as opposed to equitable tolling and their claims, therefore, were not precluded by *CTS*. The present case is more analogous to *American Pipe* because both addressed the effect of Rule 23 on limitations periods applied to later suits brought by members or would-be members in an earlier class action.[110]

The court identified conflicting precedent as to whether the rule in *American Pipe* relied (1) on a theory of legal tolling, effectively created by Rule 23 because without tolling the principal function of the class suit—to avoid a multiplicity of activity—would be frustrated, or (2) on a theory of equitable tolling, whereby courts have the equitable authority to toll statutes of limitations.[111] Dusek assumed that, if *American Pipe* established a rule of legal tolling, then the same rationale, protecting the principal function of Rule 23, would apply to statutes of repose as much as to statutes of limitations. This conclusion, Dusek argued, was supported by the United States Court of Appeals for the Tenth Circuit decision in *Joseph v. Wiles*[112] that *American Pipe* tolling applied to the statute of repose in § 13 of the Securities Act because it was a rule of legal tolling derived from Rule 23.[113]

JPMorgan argued, however, that precedent from the Second Circuit was more persuasive.[114] The Second Circuit, in *Police & Fire Retirement System of the City of Detroit v. IndyMac MBS, Inc.*,[115] held that it did not matter whether the rule in *American Pipe* was one of legal or equitable tolling because, even if it was a legal tolling rule, the Rules Enabling Act[116] bars courts from enlarging or modifying substantive rights; thus, Rule 23 cannot form the basis for allowing an untimely complaint after

107. *Id.* at 1247.
108. 134 S. Ct. 2175 (2014).
109. *Id.* at 1283.
110. *Dusek*, 832 F.3d at 1247.
111. *Id.*
112. 223 F.3d 1155 (10th Cir. 2000).
113. *Dusek*, 832 F.3d at 1247.
114. *Id.* at 1248.
115. 721 F.3d 95 (2d Cir. 2013).
116. 28 U.S.C. § 2072(b) (2012).

the period of repose has run.[117] The Eleventh Circuit also cited "a well-reasoned discussion of why the Rules Enabling Act would prohibit tolling of a statute of repose"[118] in *Stein v. Regions Morgan Keegan Select High Income Fund, Inc.*[119] In *Stein*, the United States Court of Appeals for the Sixth Circuit found "[t]hat statutes of repose vest a substantive right in defendants to be free of liability is underscored by the Supreme Court's analogies in *CTS* between statutes of repose and the ability to discharge debts in bankruptcy or to be free of double jeopardy in criminal proceedings."[120] The Eleventh Circuit also quoted the remark in *Stein* that the Tenth Circuit decision in *Joseph* pre-dated the Supreme Court's *CTS* analysis of the differences between statutes of repose and statutes of limitations.[121]

Despite discussing this conflicting precedent at some length and apparently favoring the Second and Sixth Circuit cases that would not allow any tolling of a statute of repose based on a court-created rule like Rule 23, the court went on to affirm the district court's narrower rulings that *American Pipe* created a rule of equitable tolling and that it does not apply to the statute of repose in § 20(a) of the Securities Exchange Act.[122] Because the statute of repose was never tolled, it expired, at the latest, on December 11, 2013, five years after Madoff was arrested and his company closed. The statute, therefore, ran before Dusek filed the complaint in March of 2014.[123]

The Eleventh Circuit also summarily affirmed the district court ruling that the PSLRA barred Dusek's RICO claim because the alleged conduct was actionable as securities fraud, which is conduct specifically exempted from the RICO Act by PSLRA.[124]

V. FLSA COLLECTIVE ACTIONS: *CALDERONE V. SCOTT*

In *Calderone v. Scott*,[125] the Eleventh Circuit joined the United States Courts of Appeals for the Second, Third, Seventh, Ninth, and D.C. Circuits in holding that employees may bring a collective action against their employer under section 216(b) of the Fair Labor Standards Act (FLSA)[126]

117. *Dusek*, 832 F.3d at 1248.
118. *Id.*
119. 821 F.3d 780 (6th Cir. 2016).
120. *Id.* at 794.
121. *Dusek*, 832 F.3d at 1248.
122. *Id.* at 1249.
123. *Id.*
124. *Id.*
125. 838 F.3d 1101 (11th Cir. 2016).
126. 29 U.S.C. §§ 201-19, 216(b) (2012).

in the same proceeding in which they seek Rule 23(b) certification of state-law claims.[127] The district court found § 216(b) and Rule 23(b)(3) to be "mutually exclusive and irreconcilable" because § 216(b) requires plaintiffs to opt in to a class while Rule 23(b)(3) requires plaintiffs to opt out.[128]

The Eleventh Circuit took note of this procedural difference between § 216(b) and Rule 23(b)(3) but ultimately determined that the difference was not "irreconcilable."[129] FLSA's text does not indicate that a collective action cannot be maintained simultaneously with a class action. In fact, the court pointed out that FLSA has an express savings clause clarifying that FLSA does not supplant state labor laws.[130] The court also cited the comments of the Advisory Committee on Civil Rules[131] that make clear that § 216(b) was not meant to be affected by the opt-out requirement of Rule 23(b)(3).[132]

VI. COMPELLING ARBITRATION: *Collado v. J. & G. Transport, Inc.* AND *Parm v. National Bank of California*

In *Collado v. J. & G. Transport, Inc.*,[133] the Eleventh Circuit held that a defendant's waiver through litigation of the right to arbitrate claims under the FLSA did not extend to state-law claims asserted by a later amendment to the complaint.[134] Enrique Collado, a former truck driver for J. & G., filed a collective action lawsuit against the company for failure to pay overtime in violation of the FLSA. After the close of discovery, but before trial was set to begin, Collado moved to amend his complaint to add state-law claims for breach of contract and quantum meruit. The motion was granted over J. & G.'s objections, and J. & G. moved to dismiss the state-law claims or, in the alternative, to compel arbitration of those claims. J. & G. conceded that it had waived arbitration of the FLSA claim but argued that the amendment revived its right to elect arbitration of the state-law claims because those claims unexpectedly broadened the scope of the case. The district court denied the motion, concluding that, although the amendment altered the theory of the case, alteration

127. *Calderone*, 838 F.3d at 1103.

128. *Id.* at 1102-03.

129. *Id.* at 1106.

130. *Id.* at 1105.

131. FED. R. CIV. P. 23(b)(3) advisory committee's note to 1966 amendment.

132. *Calderone*, 838 F.3d at 1106.

133. 820 F.3d 1256 (11th Cir. 2016). The published opinion was issued per curiam by Chief Judge Ed Carnes, Judge William Pryor, and Senior Judge Peter Fay. *Id.* at 1257.

134. *Id.* at 1261.

was not unexpected, and fairness did not compel reviving J. & G.'s right to arbitrate.[135]

On appeal, J. & G. again argued that the amendment unexpectedly changed the scope or theory of the litigation, while Collado argued that this change was not unexpected.[136] These arguments were based on the court's decision in *Krinsk v. SunTrust Banks, Inc.*[137] on revival of a waived right to arbitrate: "In limited circumstances, [] where a party has waived the right to compel arbitration, an amended complaint can revive that right 'if it is shown that the amended complaint unexpectedly changes the scope or theory of the plaintiff's claims.'"[138]

The court, however, took a different approach.[139] In *Krinsk*, the issue was whether the right to arbitrate, once waived, had been revived by an amendment to the complaint substantially increasing the size of the plaintiff class—the court concluded it had.[140] Here, on the other hand, "it is more accurate to say that there was never a waiver of the right to arbitrate the state claims in the first place."[141] Further, it did not matter whether the amendment was foreseeable: "A defendant is not required to litigate against potential but unasserted claims. By the same token, a defendant will not be held to have waived the right to insist that previously unasserted claims be arbitrated once they are asserted."[142]

In *Parm v. National Bank of California, N.A.*,[143] an arbitration provision in a payday loan agreement was held unenforceable[144] because the

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135. *Id.* at 1258-59.

136. *Id.* at 1259.

137. 654 F.3d 1194 (11th Cir. 2011).

138. *Collado*, 820 F.3d at 1259.

139. *Id.*

140. *Krinsk*, 654 F.3d at 1204.

141. *Collado*, 820 F.3d at 1260.

142. *Id.* at 1261.

143. 835 F.3d 1331 (11th Cir. 2016).

144. The court also refused to enforce a purported arbitration agreement in *Bazemore v. Jefferson Capital Systems, LLC*, 827 F.3d 1325 (11th Cir. 2016). The issue, as framed by the district court, was whether an arbitration agreement included in a credit cardholder agreement covered claims made under the FDCPA arising from collection of resulting credit card debt. The district court held that the collection claim, brought as a putative class action against the debt holder, fell outside the scope of the cardholder agreement's arbitration provision. But the Eleventh Circuit declined to reach this question, holding instead that the evidence was insufficient to support a finding that an arbitration agreement had been formed in the first place. *Id.* at 1325.

The court first determined that state law, here Georgia law, governed whether an enforceable agreement to arbitrate exists. *Id.* at 1329. Under Georgia law, it became the defendant's burden to establish that an agreement existed. The court deemed the declara-

provision's exclusive designated arbitrator, the Cheyenne River Sioux Tribal Nation, was unavailable and no substitute could be appointed.[145] The lender, Western Sky Financial, conceded that the designated arbitrator was unavailable, given the court's earlier holding to that effect in *Inetianbor v. CashCall, Inc.*,[146] a case involving a similar arbitration provision.[147] The lender argued that the provision before the court was distinguishable from the *Inetianbor* provision because it permitted the American Arbitration Association (AAA) or Judicial Arbitration and Mediation Services (JAMS) to administer the arbitration. But the court rejected that argument, citing contractual language that mandated that the arbitration be conducted by a representative of the tribe, even if administered by AAA or JAMS.[148] The court also declined to appoint a substitute arbitrator under section 5 of the Federal Arbitration Act (FAA),[149] finding that the named forum was an integral part of the agreement to arbitrate.[150] In this respect, too, the court found *Inetianbor* to be indistinguishable.[151]

Section 5 of the FAA was also the subject of the unpublished opinion in *Flagg v. First Premier Bank*,[152] in which the court held that the una-

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tion from the defendant's employee "woefully inadequate" on this score. *Id.* at 1330. Although the declaration stated that the employee was able to ascertain that the plaintiff had applied for a credit card over the internet, there was no documentary proof of this assertion and no indication of the terms governing her account. There also was no evidence concerning what, if any, "clickwrap" agreement appeared on the plaintiff's computer screen when she applied for the card. *Id.* at 1329-31.

The court stated that it had not addressed in a published opinion the standard for determining whether a trial is necessary to determine the existence of an arbitration agreement, but it also noted that several other circuits have likened the standard to the one for summary judgment. *Id.* at 1333. The court concurred that a "summary judgment-like standard" is appropriate and found that the defendant had not raised any genuine issue of fact concerning the existence of an agreement that would require a trial. *Id.* This is not the only recent case in which a defendant has had difficulty proving the existence and terms of an arbitration agreement entered into online. *See, e.g.*, Sgouros v. TransUnion Corp., 817 F.3d 1029 (7th Cir. 2016) (finding box that plaintiff clicked failed to indicate that he was entering into an agreement).

145. *Parm*, 835 F.3d at 1338.

146. 768 F.3d 1346 (11th Cir. 2014).

147. *Parm*, 835 F.3d at 1335.

148. *Id.* at 1135, 1336.

149. 9 U.S.C. §§ 1-16 (2012).

150. *Parm*, 835 F.3d at 1338.

151. *Id.* The court applied *Parm* in a subsequent unpublished opinion, *Parnell v. Western Sky Financial LLC*, No. 16-11369, 2016 LEXIS 20774 (11th Cir. Nov. 21, 2016), which it found to be indistinguishable.

152. 644 F. App'x 893, 897 (11th Cir. 2016).

vailability of the National Arbitration Forum (NAF) precluded enforcement of an arbitration agreement between a borrower and lender.[153] The court affirmed the district court's refusal to order a substitute arbitrator under § 5 because it found that the selection of the NAF was integral to the arbitration agreement.[154] The Second Circuit later agreed with *Flagg* in its published opinion in *Moss v. First Premier Bank.*[155]

153. *Id.* at 897. The Georgia Court of Appeals reached the same result in *Miller v. GGNSC Atlanta, LLC*, 323 Ga. App. 114, 120-21, 746 S.E.2d 680, 686 (2015).

154. *Flagg*, 644 F. App'x at 894.

155. 835 F.3d 260 (2d Cir. 2016).