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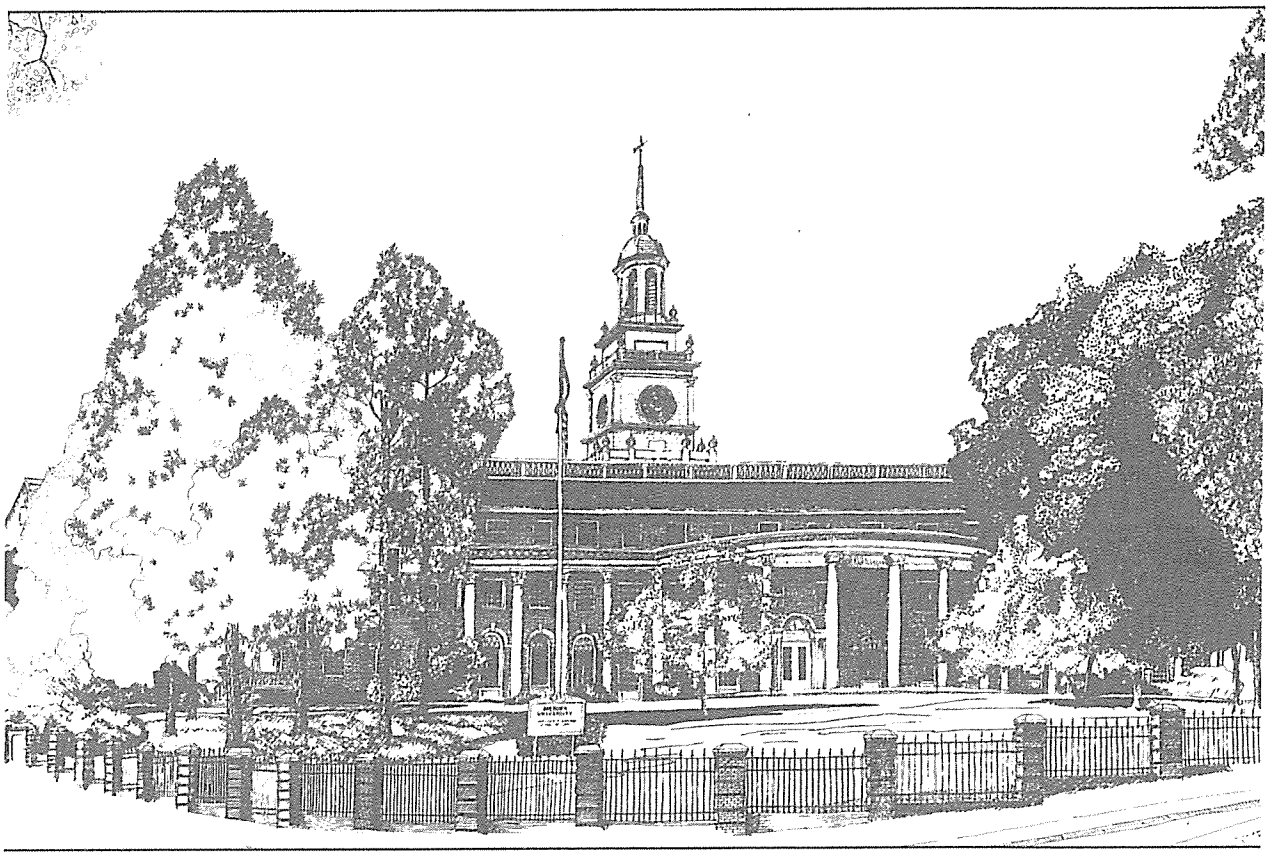

Class Actions

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Class Actions

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During 2017, the United States Court of Appeals for the Eleventh Circuit continued to address a familiar set of recurring issues in contemporary class action law, including the scope of jurisdiction under the Class Action Fairness Act (CAFA),[1] class action settlement controversies, and the impact of arbitration agreements on class actions.[2]

I. EXCEPTIONS TO CAFA JURISDICTION

In *Blevins v. Aksut*,[3] the Eleventh Circuit reinstated a federal Racketeer Influenced and Corrupt Organizations Act (RICO)[4] case and approved the denial of a motion to remand the case to state court under CAFA. The court's opinion confirms that CAFA's local-controversy

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1. 28 U.S.C. § 1332(d) (2017).
2. For a review of class actions during the prior survey period, see Thomas M. Byrne & Stacey McGavin Mohr, *Class Actions, Eleventh Circuit Survey*, 68 MERCER L. REV. 951 (2017).
3. 849 F.3d 1016 (11th Cir. 2017).
4. 18 U.S.C. §§ 1961–1968 (2017).

exception does not strip federal courts of jurisdiction over supposedly local class actions that include claims under federal law.[5]

Blevins involved allegations that the defendants violated RICO by performing and billing patients for unnecessary heart surgeries in Alabama. The defendants removed the case from state court on the basis of the federal RICO claims, and the United States District Court for the Southern District of Alabama denied the plaintiffs' motion to remand before dismissing the case on the ground that RICO excludes claims for personal (i.e., medical) injuries.[6]

Among other things, CAFA confers federal subject matter jurisdiction over all class actions with minimally diverse parties and more than $5 million in controversy.[7] But the statute creates an exception to that rule by directing federal district courts to "'decline to exercise [CAFA] jurisdiction' . . . over class actions that involve local parties and controversies."[8] This "local-controversy" exception applies where (1) greater than two-thirds of the proposed class members are citizens of the state in which the action was originally filed, (2) at least one defendant is a citizen of that state, (3) the local defendant's conduct forms a significant basis for the claims, (4) significant relief is sought from that defendant, (5) the principal injuries occurred in that state, and (6) no other similar class action against any of the defendants was filed in the preceding three years.[9]

The plaintiffs in *Blevins* argued on appeal that the local-controversy exception required the district court to remand the case to state court. Despite their federal RICO claims, the plaintiffs maintained that CAFA required the district court to decline jurisdiction over their "local" class action.[10] The Eleventh Circuit disagreed.[11] Because the local-controversy provision is an exception to CAFA's extension of federal diversity jurisdiction under 28 U.S.C. § 1332,[12] "when the requirements of federal-question jurisdiction are met, district courts may exercise jurisdiction over class actions, even if they involve only local parties."[13] Accordingly, the court affirmed the denial of the plaintiffs' remand motion.[14]

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5. *Blevins*, 849 F.3d at 1018.
6. *Id.*
7. 28 U.S.C. § 1332(d)(2) (2017).
8. *Blevins*, 849 F.3d at 1019 (quoting 28 U.S.C. § 1332(d)(4)).
9. 28 U.S.C. § 1332(d)(4)(A).
10. *Blevins*, 849 F.3d at 1020.
11. *Id.*
12. 28 U.S.C. § 1332 (2017).
13. *Blevins*, 849 F.3d at 1020.
14. *Id.*

The court of appeals was more forgiving with respect to the potential merits of the underlying RICO claims. The district court had dismissed those claims (and declined to exercise supplemental jurisdiction over the rest of the case)[15] because private civil RICO claims are limited to injuries to "business or property."[16] The Eleventh Circuit vacated the dismissal order on the ground that "[i]n the context of unnecessary medical treatment, payment for the treatment may constitute an injury to property."[17] The court acknowledged that personal injuries and economic losses flowing from them fail to provide a basis for a RICO claim, citing its previous decision in *Grogan v. Platt*.[18]

In *Life of the South Insurance Co. v. Carzell*,[19] the Eleventh Circuit, in denying a petition for interlocutory review, essentially affirmed the grant of a motion to remand to state court a class action against two insurance companies.[20] The court held that federal diversity jurisdiction does not exist under CAFA if all defendants and plaintiff class members are citizens of a single state—regardless of whether corporate defendants are deemed "citizens" of multiple states or whether some plaintiffs have dual citizenship in foreign countries.[21] After the initial complaint was removed to federal court and then voluntarily dismissed, the plaintiffs refiled their complaint in state court, as allowed by Georgia law,[22] asserting only state law claims and limiting their putative class to citizens of Georgia.[23] The defendant insurers, both of which were incorporated in Georgia but had principal places of business in Florida, then removed the case to federal court, invoking two of CAFA's minimal diversity provisions.[24]

First, the defendants relied on 28 U.S.C. § 1332(d)(2)(A),[25] which gives federal district courts diversity jurisdiction over otherwise-qualifying large class actions in which "any member of a class of plaintiffs is a citizen of a State different from any defendant."[26] Despite their incorporation in Georgia, the defendants argued that maintaining their principal places of businesses in Florida meant that they were citizens of a different state

15. *Id.* at 1018.
16. 18 U.S.C. § 1964(c) (2017).
17. *Blevins*, 849 F.3d at 1021.
18. 835 F.2d 844, 847 (11th Cir. 1988).
19. 851 F.3d 1341 (11th Cir. 2017).
20. *Id.* at 1343.
21. *Id.* at 1348.
22. O.C.G.A. § 9-2-61 (2017).
23. *Carzell*, 851 F.3d at 1343.
24. *Id.*
25. 28 U.S.C. § 1332(d)(2)(A) (2017).
26. *Id.*

from the class action's Georgia plaintiffs.[27] Second, the defendants relied on 28 U.S.C. § 1332(d)(2)(B),[28] which confers jurisdiction over large class actions in which "any member of a class of plaintiffs is . . . a citizen or subject of a foreign state and any defendant is a citizen of a State."[29] The defendants based this argument on the assertion that some of the Georgia citizens in the plaintiffs' proposed class maintained foreign dual citizenship.[30]

The district court and the Eleventh Circuit rejected these arguments. The district court remanded to state court, and the Eleventh Circuit then denied the defendants' petition for interlocutory review for lack of jurisdiction.[31] With respect to the defendants' corporate citizenship, the court held that "the defendants' dual citizenship is an insufficient basis to create federal diversity jurisdiction under CAFA when the defendants share a state of citizenship with all of the plaintiffs."[32] The court thus read § 1332(d)(2)(A) "to bar corporate defendants from relying on only one citizenship when their other citizenship would destroy minimal diversity."[33] As for the defendants' assertion that some of the putative class members were really foreign citizens, the court held that "[i]t does not matter that some class members may hold dual citizenship with another country."[34] The court further noted that, "under either complete or CAFA minimal diversity, alienage jurisdiction is not available to the dual citizen who is American and thus would not suffer real or perceived bias in the state courts."[35]

In a third 2017 CAFA decision, *Hunter v. City of Montgomery*,[36] the Eleventh Circuit affirmed the lower court's remand order under another CAFA exception—the "home state" exception.[37] The central issue was whether one of the defendants—which had different citizenship from most of the proposed plaintiff class—was one of the "primary defendants" within the meaning of the exception.[38] The case centered on a red-light

27. *Carzell*, 851 F.3d at 1343.
28. 28 U.S.C. § 1332(d)(2)(B) (2017).
29. *Carzell*, 851 F.3d at 1346 (quoting 28 U.S.C. § 1332(d)(2)(B) (2017)).
30. *Id.* at 1346–47.
31. *Id.* at 1348.
32. *Id.* at 1346.
33. *Id.* at 1345.
34. *Id.* at 1346.
35. *Id.* at 1348.
36. 859 F.3d 1329 (11th Cir. 2017).
37. *Id.* at 1337; *see* 28 U.S.C. § 1332(d)(4)(B) (2017).
38. The home-state exception (which is distinct from the local-controversy exception discussed above, see text accompanying *supra* note 9), requires a court to decline to exercise CAFA jurisdiction where "two-thirds or more of the members of all proposed plaintiff

camera program operated by Montgomery, Alabama, and American Traffic Solutions, Inc. (Traffic Solutions). The original plaintiff, Charles Hunter, sued Montgomery and Traffic Solutions in Alabama state court, alleging violations of the Alabama Constitution, state law, and 42 U.S.C. § 1983,[39] seeking damages (refunded fines) from Montgomery and declaratory and injunctive relief against both Montgomery and Traffic Solutions. Traffic Solutions removed the action to federal court based on both the federal claims and diversity jurisdiction under CAFA. Hunter then amended his complaint, adding a second plaintiff, Mike Henderson, and dropping the federal-law claims. Ten months after the removal, the United States District Court for the Middle District of Alabama requested supplemental briefing on the issue of its subject matter jurisdiction. The plaintiffs then claimed that both CAFA's local-controversy and home-state exceptions applied, which would require the court to remand the case to the Alabama state court. The district court agreed that both exceptions applied and remanded the case.[40]

The Eleventh Circuit began by assessing its own jurisdiction to review the lower court's remand order.[41] The court determined that 28 U.S.C. § 1447(d)[42] did not bar it from reviewing the remand order because the order (1) had not been based on a timely motion—it was on the court's own initiative—and (2) had not been based on a lack of subject matter jurisdiction—it was rather a CAFA bar to the exercise of otherwise legitimate subject matter jurisdiction.[43] After determining that it had appellate jurisdiction, the Eleventh Circuit concluded that the home-state exception applied and did not reach the issue of the local-controversy exception.[44] The home-state exception applies where both two-thirds of the proposed plaintiff class and the "primary defendants" are citizens are citizens of the forum state.[45] The parties agreed that two-thirds of the plaintiff class and Montgomery were both citizens of Alabama and that Traffic Solutions was not.[46] So the dispositive issue was "whether Traffic Solutions [was] a 'primary defendant' under CAFA."[47] The court held that, where the class action seeks monetary

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classes in the aggregate, and the primary defendants, are citizens of the State in which the action was originally filed." 28 U.S.C. § 1332(d)(4)(B) (2017).

39. 42 U.S.C. § 1983 (2017).
40. *Hunter*, 859 F.3d at 1332–33.
41. *Id.* at 1333.
42. 28 U.S.C. § 1447(d) (2017).
43. *Hunter*, 859 F.3d at 1334.
44. *Id.* at 1337.
45. *Id.* at 1335.
46. *Id.*
47. *Id.*

relief, the "primary defendants" are those that have "substantial exposure . . . [or] would incur most of the loss if damages are awarded."[48] Because the plaintiffs sought damages only from Montgomery, Traffic Solutions was not a "primary defendant" under CAFA and remand was proper.[49]

II. ARBITRATION AGREEMENTS AND CLASS ACTIONS

In the continuing arbitration wars implicating class actions, 2017 was an eventful year. The Consumer Financial Protection Bureau issued a final rule on July 19, 2017, generally prohibiting class action waivers in arbitration agreements subject to the bureau's jurisdiction.[50] Invoking the Congressional Review Act,[51] Congress overturned that rule.[52] Meanwhile, the Supreme Court of the United States heard argument on October 2, 2017, in three consolidated cases involving the issue of whether the National Labor Relations Act (NLRA)[53] prohibited class action waivers in employment agreements.[54] The Court ultimately held, in *Epic Systems Corp. v. Lewis*,[55] that agreements by employees to arbitrate their claims on an individual basis may be enforced, notwithstanding the NLRA.

Amidst these tectonic developments, courts plugged away, applying existing law. In *Larsen v. Citibank FSB*,[56] the Eleventh Circuit reversed the United States District Court for the Southern District of Florida's denial of a motion to compel arbitration of a consumer debt class action.[57] The plaintiff, David Johnson, filed a putative class action alleging that defendant KeyBank had improperly changed the sequence of debit card transactions to maximize overdraft fees charged to the account. Johnson was a longtime KeyBank customer, having opened his first checking account with the bank in 1991. In October 2001, he opened a 2001 Signature Card.[58] The 2001 Signature Card Agreement specified that "all

48. *Id.* at 1336.

49. *Id.* at 1337.

50. Arbitration Agreements, 82 Fed. Reg. 33210 (July 19, 2017).

51. 5 U.S.C. §§ 801–900 (2017).

52. Disapproval of Rule Relating to Arbitration Agreements, Pub. L. No. 115–74, 131 Stat. 1213 (2017).

53. 29 U.S.C. §§ 151–69 (2017).

54. Ernst & Young v. Morris, 137 S. Ct. 809 (2017); Epic Sys. Corp. v. Lewis, 137 S. Ct. 809 (Jan. 13, 2017); NLRB v. Murphy Oil (USA), Inc., 137 S. Ct. 809 (2017).

55. 2018 WL 2292444 (May 21, 2018).

56. 871 F.3d 1295 (11th Cir. 2017).

57. *Id.* at 1300.

58. *Id.* at 1300–01.

accounts opened under this Plan are subject to [KeyBank's] Deposit Account Agreement."[59] At that time, the referenced Deposit Account Agreement was KeyBank's 1997 Agreement, which contained an arbitration provision and preserved KeyBank's ability to make unilateral amendments to the terms of the Agreement.[60]

KeyBank moved to compel arbitration of Johnson's claims, contending that Johnson agreed to arbitrate by executing the 2001 Signature Card Agreement, which incorporated the 1997 Agreement.[61] The Eleventh Circuit agreed with KeyBank, holding that the 2001 Signature Card Agreement sufficiently incorporated the 1997 Agreement.[62] Johnson argued that the creation of the 2001 account was a continuation of his 1991 account, which predated the arbitration agreement.[63] The Eleventh Circuit rejected this argument because the 2001 Agreement made clear that the 2001 Signature Card was a new account incorporating KeyBank's deposit account agreement.[64] Further, the court reasoned that Johnson knew that KeyBank retained the ability to make unilateral amendments to the terms of the Agreement, including the ability to modify the arbitration provision.[65] Johnson also presented an argument that he had not received a copy of the Agreement,[66] which the Eleventh Circuit dismissed as "lean[ing] on a very thin reed."[67]

The Eleventh Circuit also held that the arbitration provision was not unconscionable.[68] First, the agreement was not procedurally unconscionable because a "meaningful choice" was present.[69] The fact that the agreement was a contract of adhesion did not make it unconscionable *per se*.[70] Second, the court held that the arbitration provision was not, as a whole, substantively unconscionable.[71] However, the court did sever a confidentiality provision contained within the arbitration agreement.[72] The court held the confidentiality clause to be unconscionable because it put KeyBank at an informational advantage

59. *Id.* at 1301.
60. *Id.*
61. *Id.* at 1301–02.
62. *Id.* at 1307–08.
63. *Id.* at 1306.
64. *Id.*
65. *Id.* at 1307–08.
66. *Id.* at 1306–07.
67. *Id.* at 1307.
68. *Id.* at 1309.
69. *Id.* at 1310, 1312–13.
70. *Id.* at 1310.
71. *Id.* at 1314.
72. *Id.* at 1320.

at the outset of every dispute, because only KeyBank would have information about previous arbitrations.[73]

In another case, *Jones v. Waffle House, Inc.*,[74] the Eleventh Circuit enforced an employment-related arbitration agreement's provision delegating to the arbitrator "gateway" questions of arbitrability.[75] The majority rejected the notion, adopted by the United States Courts of Appeals for the Fifth, Sixth, and Federal Circuits, that a court may except from the delegation analysis claims the court considers "wholly groundless."[76] Jones unsuccessfully applied for a job at a Florida Waffle House in 2014. He filed a putative class action against Waffle House in the United States District Court for the Middle District of Florida, claiming that Waffle House had failed to provide him with copies of his background checks in violation of the Fair Credit Reporting Act (FCRA).[77] While that case was pending, Jones got a job at another Waffle House in Kansas City, Missouri. When he accepted that job, he signed an arbitration agreement that covered "all claims and controversies . . . past, present, or future, arising out of any aspect of or pertaining in any way to [his] employment." The agreement further provided that "[t]he Arbitrator, and not any federal, state, or local court or agency, shall have authority to resolve any dispute relating to the interpretation, applicability, enforceability or formation of this Agreement." Jones did not tell his Florida lawyers about his new job or tell his new employers in Kansas City that he was suing Waffle House in Florida. When Waffle House discovered that Jones had signed an arbitration agreement, it promptly moved to compel arbitration of his claims in the Florida case. The district court denied the motion, and Waffle House appealed.[78]

The Eleventh Circuit began its analysis with the principle—"now basic hornbook law"—that the Federal Arbitration Act (FAA)[79] reflects "both a 'liberal federal policy favoring arbitration,' . . . and 'the fundamental principle that arbitration is a matter of contract.'"[80] The Supreme Court's decision in *Rent-A-Center, West, Inc. v. Jackson*[81] established that parties may agree to arbitrate "gateway" questions about the scope, applicability,

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73. *Id.* at 1319.

74. 866 F.3d 1257 (11th Cir. 2017).

75. *Id.* at 1262.

76. *Id.* at 1268–69. The opinion was written by Judge Marcus and joined by Judge Hull and visiting Judge Clevenger of the Federal Circuit. *Id.* at 1261, 1261 n.*.

77. 15 U.S.C. §§ 1681–1681x (2017).

78. *Jones*, 866 F.3d at 1262–63.

79. 9 U.S.C. §§ 1–16 (2017).

80. *Jones*, 866 F.3d at 1263–64 (quoting AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 339 (2011)).

81. 561 U.S. 63 (2010).

and enforceability of an arbitration agreement.[82] When the parties have agreed to a provision delegating gateway issues to an arbitrator, a court's jurisdiction extends only to challenges to the delegation provision.[83] A court will "examine a challenge to a delegation provision only if the claimant 'challenged [that] provision directly' . . . and not just the agreement as a whole."[84]

The Eleventh Circuit noted that it was "not clear to us" that Jones's arguments in the district court were "sufficiently focused" on the delegation provision.[85] Even assuming that Jones had directly challenged the delegation provision, his challenges failed on the merits.[86] First, the provision was not unconscionable, procedurally or substantively.[87] "[U]nder Georgia law," the court noted, "an adhesion contract is not per se unconscionable."[88] The provision in Jones's agreement was in clear language and readable type. Jones had been given at least three hours to read and sign his employment paperwork. Further, he knew that his case against Waffle House was pending in Florida when he signed the arbitration agreement. Jones argued that because the agreement was pre-signed by Waffle House's vice president and general counsel, the agreement was procedurally unconscionable, and the district court agreed.[89] But the Eleventh Circuit rejected that argument, reasoning that "whether or not it was advisable for Waffle House's vice president to pre-sign the agreements, doing so was not 'abhorrent to good morals and conscience,' nor is there any evidence that Waffle House was seeking to take fraudulent advantage of Jones."[90] The court similarly rejected Jones's argument that the delegation provision was substantively unconscionable because it "terminated his previously filed class action without explicitly saying so."[91] The court noted that the agreement did not itself terminate the litigation—and Jones had signed it voluntarily and with full knowledge of his pending case, in any event.[92] "In this situation, Jones had the upper hand."[93]

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82. *Id.* at 68–69.
83. *Jones*, 866 F.3d at 1264.
84. *Id.*
85. *Id.*
86. *Id.* at 1265.
87. *Id.* at 1266–67.
88. *Id.* at 1265.
89. *Id.*
90. *Id.*
91. *Id.*
92. *Id.*
93. *Id.*

Having determined that the delegation provision was valid, the court examined the language of the provision to determine "whether the parties have manifested a clear and unmistakable intent to arbitrate gateway issues."[94] Indeed they had, the court concluded, because the delegation provision referred to "all disputes," and its language was similar to that of provisions previously held to show the requisite intent to delegate gateway issues.[95] So the next question was whether the court would consider, as the Fifth,[96] Sixth,[97] and Federal Circuits[98] had, applying a "wholly groundless" exception to its delegation analysis.[99] That exception, as explained by the Federal Circuit, allows a court to deny a motion to compel arbitration where "the court concludes that the parties to the agreement did clearly and unmistakably intend to delegate the power to decide arbitrability to an arbitrator," but "the assertion of arbitrability is 'wholly groundless.'"[100] The Eleventh Circuit joined the First, Second, Fourth, Eighth, Ninth, Tenth, and D.C. Circuits in rejecting the idea of a "wholly groundless" exception,[101] finding that the exception "runs counter to the Supreme Court's mandate"[102] in *AT&T Technologies, Inc. v. Communications Workers of America*[103] that "[w]hether 'arguable' or not, indeed even if it appears to the court to be frivolous," a claim validly delegated to the arbitrator is to be decided by the arbitrator.[104]

Finally, the court was unpersuaded by Jones's argument that the arbitration agreement was an impermissible communication with him, because of the pendency of the class action and because he was represented in the Florida case by counsel.[105]

> [T]here is not the slimmest shred of evidence that the arbitration agreement was part of a purposeful attempt to communicate with putative class members, nor is there anything in this record even

94. *Id.* at 1267.
95. *Id.*
96. Douglas v. Regions Bank, 757 F.3d 460 (5th Cir. 2014).
97. Turi v. Main St. Adoption Servs., LLP, 633 F.3d 496 (6th Cir. 2011).
98. Qualcomm, Inc. v. Nokia Corp., 466 F.3d 1366 (Fed. Cir. 2006).
99. *Jones*, 866 F.3d at 1268.
100. *Qualcomm*, 466 F.3d at 1371.
101. *Jones*, 866 F.3d at 1268.
102. *Id.* at 1270.
103. 475 U.S. 643 (1986).
104. *Id.* at 649–50.
105. *Jones*, 866 F.3d at 1272.

> remotely suggesting that Waffle House contacted any putative class members and tried to get them to sign arbitration agreements.[106]

Nor was the agreement an impermissible *ex parte* communication with a represented party; the arbitration agreement did not mention the FCRA or the ongoing lawsuit, and there was no evidence that the vice president and general counsel who signed for Waffle House knew that the agreement would be presented to someone represented by counsel in a pending case.[107]

III. PRECLUSIVE EFFECT OF PRIOR ACTION: ANOTHER ANGLE ON *ENGLE*

In *Graham v. R.J. Reynolds Tobacco Co.*,[108] the Eleventh Circuit, sitting en banc, declined to overrule *Walker v. R.J. Reynolds Tobacco Co.*,[109] a 2013 decision. In *Graham*, the court held (again) that a jury's findings of negligence and strict liability against a tobacco company in a class action lawsuit[110] may be given preclusive effect, without violating due process, in subsequent individual cases.[111] The court also held that the jury's findings were not preempted by federal law.[112]

The majority opinion, written by Judge Bill Pryor, began by reviewing the issues presented in "Phase I" of the *Engle* trial in Florida state court.[113] The jury heard evidence that all of the cigarettes manufactured by the various defendants contained carcinogens and that nicotine is addictive. The trial court instructed the jury about the plaintiffs' strict liability and negligence claims without regard to specific brands of cigarettes, and the verdict form included a series of yes-or-no questions. Among other things, the jury was asked whether smoking caused various diseases (to which the jury answered "yes" for twenty diseases); whether nicotine is addictive ("yes"); whether each tobacco company was strictly liable ("yes" for each defendant); and whether each tobacco company was negligent ("yes" for each defendant). The jury also answered "yes" to the question of whether the tobacco companies' actions entitled the class to punitive damages.[114] On appeal, the Florida Supreme Court affirmed the Phase I class certification and said that the jury's findings that the

106. *Id.*
107. *Id.* at 1273.
108. 857 F.3d 1169 (11th Cir. 2017).
109. 734 F.3d 1278 (11th Cir. 2013).
110. *See* R.J. Reynolds Tobacco Co. v. Engle, 672 So. 2d 39 (Fla. Dist. Ct. App. 1996).
111. *Graham*, 857 F.3d at 1174.
112. *Id.*
113. *Id.* at 1175.
114. *Id.* at 1175–77.

defendants acted negligently and sold defective products "will have res judicata effect" in subsequent individual actions.[115]

Later, the Florida Supreme Court clarified that its statement about "res judicata" meant claim preclusion, not issue preclusion, and held that the jury findings from Phase I "conclusively establish[ed]" common elements of class members' claims, including that the tobacco companies manufactured defective products, that they were negligent, and general causation.[116] All individual plaintiffs had left to prove was their membership in the class, legal causation in each of their individual cases, and damages.[117] In *Walker*, the Eleventh Circuit held that giving the findings preclusive effect did not violate the defendants' due process rights, because even if due process requires that an issue be "actually decided" in the prior litigation, the relevant issues had been "actually decided" in *Engle I*, regardless of whatever terminology the Florida Supreme Court used in describing the preclusive effect.[118]

In *Graham*, one of the subsequent cases to *Engle*, the district court entered a judgment of $825,000 for the plaintiff. A panel of the Eleventh Circuit reversed, holding that the *Engle* findings were preempted by federal law. The plaintiff's petition for hearing en banc was granted, and the parties were allowed to brief both the preemption and due process issues.[119]

The Eleventh Circuit confirmed its holding in *Walker* that there was no due process violation.[120] The court again assumed, without deciding, that due process requires that the relevant issue be "actually decided" in one case before it is given preclusive effect in another.[121] "Based on our review of the *Engle* proceedings, we are satisfied that the *Engle* jury actually decided common elements of the negligence and strict liability of [the defendants]."[122] In support of that conclusion, the court cited the defendants' admissions that the *Engle* plaintiffs had presented common proof that nicotine is addictive and that cigarettes cause disease, in addition to brand-specific evidence.[123] Indeed, the court noted, the defendants' closing arguments in *Engle* had framed the issue as whether

115. Engle v. Liggett Grp., 945 So. 2d 1246, 1269–70 (Fla. 2006).
116. *Id.*
117. Philip Morris USA, Inc. v. Douglas, 110 So. 3d 419, 430 (Fla. 2013).
118. *Walker*, 734 F.3d at 1289.
119. *Graham*, 857 F.3d at 1180–81.
120. *Id.* at 1185–86.
121. *Id.* at 1181.
122. *Id.*
123. *Id.* at 1182.

"all cigarettes that contain nicotine" are addictive.[124] The verdict form was "most naturally read," the court determined, to convey findings as to all cigarettes, regardless of brand.[125] The court rejected the defendants' argument that the use of the phrase "res judicata" in *Douglas* suggested that, at least as far as the Florida Supreme Court was concerned, the issues were not "actually decided" in *Engle*:

> The Due Process Clause does not require a state to follow the federal common law of res judicata and collateral estoppel. . . .
>
> We recognize that the *Engle* Court defined a novel notion of res judicata, but we cannot say that the substance of that doctrine or its application in these trials was so unfair as to violate the constitutional guarantee of due process.[126]

As long as the parties have had notice and an opportunity to be heard, due process is satisfied.[127]

The court also rejected the defendants' argument that the *Engle* jury's findings were preempted by federal law.[128] The six tobacco-specific federal laws in question, the court noted, all concerned labeling and warnings.[129] "Nothing in these six statutes reflects a federal objective to permit the sale or manufacture of cigarettes," such that the *Engle* verdict would conflict with federal law.[130]

In a lengthy dissent, Judge Tjoflat disagreed with what he characterized as the majority's "false narrative of *Engle III*"—that is, the 2006 decision from the Florida Supreme Court[131]—and with the conclusion that the defendants had been afforded an opportunity to be heard "on whether their unreasonably dangerous product defect(s) or negligent conduct caused Ms. Graham's death."[132] Judge Wilson also dissented, observing the following:

> The defendants have no doubt been provided notice and some degree of opportunity to be heard in court, but like Judge Tjoflat, I am not content that the use of the *Engle* jury's highly generalized findings in

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124. *Id.*
125. *Id.* at 1182–83.
126. *Id.* at 1184–85.
127. *Id.* at 1185.
128. *Id.* at 1186.
129. *Id.* at 1186–87.
130. *Id.* at 1188.
131. *Engle*, 945 So. 2d 1246.
132. *Graham*, 857 F.3d at 1194 (Tjoflat, J., dissenting).

> other forums meets "the minimum procedural requirements of the . . . Due Process Clause in order to qualify for . . . full faith and credit."[133]

Judge Julie Carnes joined the majority on the preemption issue but dissented as to the due process claim.[134] "Chief Judge Ed Carnes recused himself and did not participate in th[e] decision."[135]

IV. POLICING CLASS ACTION SETTLEMENTS

An unseemly squabble between rival class action firms drew the attention of the Eleventh Circuit in *Technology Training Associates v. Buccaneers Ltd. Partnership*.[136] The court remanded the case for further combat over approval of an approximately $20 million class action settlement in a Telephone Consumer Protection Act (TCPA)[137] case against the Tampa Bay Buccaneers, who allegedly sent out over 180,000 unsolicited faxes concerning tickets.[138] The case originated in a class action brought by the Anderson + Wanca (A + W) law firm. No settlement could be reached, and cross-motions for summary judgment were denied.[139]

With a motion for class certification pending and millions at stake, the imperfect agency problem that plagues class actions emerged fully into view after an A + W lawyer decamped for another firm, Bock Hatch. Once there, according to internal emails quoted by the court, the departed lawyer allegedly proposed to his new colleagues to find another would-be class representative and settle the case out from under his former firm. Soon thereafter, his new firm surfaced with a plaintiff and filed a second class action, followed promptly by a proposed settlement that was preliminarily approved by the Middle District of Florida. In the settlement, the Buccaneers agreed to waive a statute of limitations defense regarding the second action. Bock Hatch was to receive up to 25% of the settlement as a fee.[140]

A + W and its clients reacted to this development by moving to intervene to object to what they characterized as a "reverse auction" settlement, but the district court denied intervention on the ground that the class was adequately represented by existing counsel, who could be

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133. *Id.* at 1314–15 (Wilson, J., dissenting) (alterations in original).
134. *Id.* at 1191 (Carnes, J., concurring in part and dissenting in part).
135. *Id.* at 1169 n.*.
136. 874 F.3d 692 (11th Cir. 2017).
137. 47 U.S.C. § 227 (2017).
138. *Buccaneers*, 874 F.3d at 694–95, 698.
139. *Id.* at 695.
140. *Id.* at 695.

eligible for a share of the settlement to cover their fees.[141] In an opinion by Chief Judge Ed Carnes, the Eleventh Circuit vacated that order and directed that intervention of right under Federal Rule of Civil Procedure 24(a)(2)[142] be permitted.[143] The court observed that "[i]t is plain from the record that during the negotiations the interests of the named plaintiffs and of Bock Hatch [(the second firm)] were aligned with those of Buccaneers and adverse to the movants' interests."[144]

V. CLASS CERTIFICATION

A district court's rejection of a class action settlement led to one of the Eleventh Circuit's two unpublished decisions reviewing denials of class certification of claims brought under the Fair Debt Collection Practices Act (FDCPA).[145] In *Landeros v. Pinnacle Recovery, Inc.*,[146] the Eleventh Circuit affirmed the Southern District of Alabama's denial of "preliminary class certification and mooting [of a] joint motion for approval of a settlement agreement."[147] The plaintiffs alleged that Pinnacle Recovery violated the FDCPA by attempting to collect a debt through a false, misleading, or deceptive communication.[148] The communication at issue was a form letter notifying its recipients that their real estate was in the foreclosure process and further purported to explain the tax consequences of a foreclosure as follows:

> If the foreclosure of your interest is completed, the foreclosure will be reported to the credit bureaus and this "forgiveness of debt" will be reported to the Internal Revenue Service (IRS). . . . The IRS treats the forgiven debt as income, on which you may owe income tax.[149]

The plaintiffs alleged that this statement was false in that it implies that a foreclosure always results in forgiveness of debt and therefore tax liability. After discovery, which revealed (among other things) that approximately 13,614 letters had been sent, the parties sought approval of a proposed settlement and moved for preliminary certification of a class.[150]

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141. *Id.*
142. FED. R. CIV. P. 24(a)(2).
143. *Buccaneers*, 874 F.3d at 694, 696.
144. *Id.* at 698.
145. 15 U.S.C. § 1692–1692p (2017).
146. 692 F. App'x 608 (2017) (per curiam).
147. *Id.* at 609.
148. *Id.* at 609–10.
149. *Id.* at 610.
150. *Id.*

The district court denied the motion for preliminary certification, and after the plaintiffs appealed, the Eleventh Circuit affirmed.[151] The court concluded that the district court correctly determined that the proposed class did not meet the predominance requirement of Rule 23(b)(3),[152] because "whether the contents of the letter were false, deceptive, or misleading turns on the unique factual circumstances of each individual who received the letter."[153] Specifically, the court relied on the fact that, at the hearing in the district court, the plaintiffs' counsel "admitted that he did not know whether the absent class members had in fact had debt forgiven or would have been subject to taxes for any such forgiven debt."[154] Based on that information, the court reasoned that even if "a creditor is not obligated to forgive a deficiency and there are exceptions regarding the tax liability of debt forgiveness," there was no showing that this may be true as to all class members.[155] Overall, the court held that "a determination about whether the contents of the Pinnacle letter violated the FDCPA is not possible without inquiry into the factual circumstances of each recipient's indebtedness and the intentions of Pinnacle as to that particular recipient."[156]

The court also rejected the plaintiffs' argument that the "least sophisticated consumer" standard negated the need for individualized inquiry.[157] Under this standard, adopted in *Jeter v. Credit Bureau, Inc.*,[158] "the court should evaluate whether certain statements by debt collectors are deceitful by considering how the least sophisticated consumer rather than a reasonable consumer would perceive them."[159] In other words, "even when a reasonable consumer would know that a particular statement was false and would not be deceived by it, the statement can still violate the FDCPA if it would deceive the least sophisticated consumer."[160]

However, the court noted, this standard has no application in a case where, as here, "the merits of the claims depend on the objective factual circumstances unique to each recipient's indebtedness."[161] That is, "the

151. *Id.* at 609.
152. FED. R. CIV. P. 23(b)(3).
153. *Landeros*, 692 F. App'x at 610–11.
154. *Id.* at 612.
155. *Id.*
156. *Id.*
157. *Id.* at 613.
158. 760 F.2d 1168 (11th Cir. 1985).
159. *Landeros*, 692 F. App'x at 612.
160. *Id.*
161. *Id.* at 613.

potential falsity or tendency to deceive has nothing to do with that person's sophistication" but instead "depends solely upon objective facts or the intentions of Pinnacle, which may vary from class member to class member."[162] Therefore, the district court was correct in determining that the proposed class did not satisfy the predominance element of Rule 23(b)(3) and that the class settlement could not be approved.[163]

In another FDCPA class action, the Eleventh Circuit reversed the district court's denial of class certification, this time considering the adequacy and superiority requirements of Rule 23(a)(4) and (b)(3), respectively.[164] *Dickens v. GC Services Ltd.*[165] dealt with claims for violation of § 1692g[166] of the FDCPA, governing the content of certain written notices.[167] Specifically, subsection (a)(4) of the statute requires that debt collectors "provide consumers with 'a statement that if the consumer notifies the debt collector in writing within a thirty-day period that the debt, or any portion thereof, is disputed, the debt collector will obtain verification of the debt or a copy of a judgment against the consumer.'"[168] And subsection (a)(5) "requires debt collectors to provide consumers with 'a statement that, upon the consumer's written request within a thirty-day period, the debt collector will provide the consumer with the name and address of the original creditor, if different from the current creditor.'"[169] The letters sent by GC Services did inform consumers that they could dispute the debt or request the original creditor's information within thirty days, but the letters did not state that the dispute or request had to be in writing.[170] This was because it was GC Services's policy to provide verification of the debt even if the consumer made the dispute by "non-written means" and, similarly, to provide information on the original creditor "even if the consumer requested it by non-written means."[171]

In a slightly unusual procedure, the United States District Court for the Southern District of Florida granted the plaintiff's motion for summary judgment as to GC Services's liability, denied the motion for class certification, and *sua sponte* assessed the plaintiff's entitlement to

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162. *Id.*
163. *Id.*
164. Dickens v. GC Servs. Ltd., 706 F. App'x 529, 534 (11th Cir. 2017) (per curiam).
165. 706 F. App'x 529 (11th Cir. 2017).
166. 15 U.S.C. § 1692g (2017).
167. *Dickens*, 706 F. App'x at 531.
168. *Id.* (quoting 15 U.S.C. § 1692g(a)(4) (2017)).
169. *Id.* at 532 (quoting 15 U.S.C. § 1692g(a)(5) (2017)).
170. *Id.* at 531–32.
171. *Id.* at 532.

statutory damages at $1.[172] As to damages, the district court found the following:

> [T]hat GC Services' FDCPA violations were likely "benign in . . . effect" and "had the . . . practical effect . . . to save debtors time and trouble when disputing their debts" [and] further noted that it had "grave doubts that GC Services' violations adversely affected" the putative class members.[173]

The district court's denial of class certification was tied closely to this damages assessment.[174] As to adequacy, the court concluded that the requirement was not met because the plaintiff "sought only statutory—and not actual—damages, while some class members may have suffered actual damages," and superiority was not met "because the cost of administering a class action would likely dwarf the nominal statutory damages to which the class would be entitled."[175]

On appeal, the Eleventh Circuit first reversed the district court's damages assessment, concluding that the amount of FDCPA damages—whether actual or statutory—was a question that should have been submitted to the jury.[176] As to class certification, the court first set the stage by reiterating the district court's conclusions about the damages likely suffered by the class:

> As a result, the district court concluded that the putative class members would likely be awarded one dollar each in statutory damages. In the district court's view, it was likely the case that (1) all 9,862 putative class members who received letters omitting the "in-writing" language had a legal claim identical to Dickens's, and (2) most—if not all—class members could claim only statutory and not actual damages. Consequently, the overwhelming majority of the class—including Dickens—likely had identical legal claims for which they could receive identical damages.[177]

Against this backdrop, the Eleventh Circuit concluded the district court's rulings on adequacy and superiority were an abuse of discretion.[178] As to adequacy, there was no "substantial conflict of

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172. *Id.* at 532–33.

173. *Id.* at 533 (quoting Dickens v. GC Servs., 202 F. Supp. 3d 1312, 1325 (M.D. Fla. 2016)).

174. *Id.*

175. *Id.*

176. *Id.*

177. *Id.* at 535.

178. *Id.*

interest" between the plaintiff and the class created by the fact that the plaintiff sought only statutory damages while other class members might have suffered actual damage.[179] In light of the district court's "grave doubts" that anyone was injured by GC Services's failure to meet the "in writing" requirements, any actual damage by other class members was "a remote possibility," creating at most a "minor conflict."[180] As the district court explained, "[t]he existence of minor conflicts alone will not defeat a party's claim to class certification: the conflict must be a 'fundamental' one going to the specific issues in controversy."[181] The district court improperly relied on the Eleventh Circuit's previous decision in *Cooper v. Southern Co.*,[182] "which held that there is a conflict between the named plaintiff and absent class members where the class representative seeks only a form of relief that might not be of the utmost importance to absent class members."[183] *Cooper* dealt with a situation where the plaintiff sought only injunctive relief, but, for many of the class members, "the monetary damages requested might be of far greater significance than injunctive relief, stated at a high order of abstraction, that simply directs the defendants not to discriminate."[184] That was not the situation here, where the district court determined "that absent class members likely suffered only statutory and no actual damages."[185] Moreover, "any conflict between Dickens and class members who have suffered actual damages is especially minimal given that in the rare circumstance in which a class member suffered actual damages, the class member could simply opt out of the class and pursue litigation on his own."[186]

The Eleventh Circuit also rejected GC Services's argument that the plaintiff was an inadequate representative because some class members likely benefitted from the conduct that allegedly harmed him.[187] This argument relied on a statement from the court's opinion in *Valley Drug Co. v. Geneva Pharmaceuticals Inc.*,[188] that "[a] fundamental conflict exists where some party members claim to have been harmed by the

179. *Id.*

180. *Id.*

181. *Id.* (quoting Valley Drug Co. v. Geneva Pharm., Inc., 350 F.3d 1181, 1189 (11th Cir. 2003)).

182. 390 F.3d 695, 721 (11th Cir. 2004), *overruled on other grounds by* Ash v. Tyson Foods, Inc., 546 U.S. 454, 457 (2006).

183. *Dickens*, 706 F. App'x at 535–36.

184. *Id.* at 536 (quoting *Cooper*, 390 F.3d at 721).

185. *Id.*

186. *Id.*

187. *Id.* at 536–37.

188. 350 F.3d 1181 (11th Cir. 2003).

same conduct that benefitted other members of the class."[189] Not only was there no record evidence of any such benefit but, more importantly, "while some consumers *may* have benefitted from GC Services' lenient policy, no consumer could have benefitted from its FDCPA violation"—namely, the "failure to mention the 'in writing' requirement, which could have led consumers to unwittingly waive their rights."[190]

Finally, the court concluded that the district court's superiority analysis was essentially backward.[191] The district court found that a class action would not be a superior method of adjudication because the small amount of statutory damages ($1 per class member) would be dwarfed by the costs of administering the class.[192] However, this analysis "applied the incorrect legal standard by considering the cost of a class action in a vacuum, as opposed to the cost compared to alternative adjudicative methods."[193] The proper "analysis considers 'the relative advantages of a class action suit over whatever other forms of litigation might be realistically available to the plaintiffs.'"[194] The district court failed to take into account "the ways in which the high likelihood of a low per-class-member recovery militates in favor of class adjudication," which is a common consideration in the traditional superiority analysis.[195] The court reiterated its previous statement of this standard from *Klay v. Humana*:[196]

> Class actions often involve an aggregation of small individual claims, where a large number of claims are required to make it economical to bring suit. The plaintiff's claim may be so small, or the plaintiff so unfamiliar with the law, that he would not file suit individually. This consideration supports class certification in cases where the total amount sought by each individual plaintiff is small in absolute terms. It also applies in situations where, as here, the amounts in controversy would make it unlikely that most of the plaintiffs, or attorneys working on a contingency fee basis, would be willing to pursue the claims individually. This is especially true when the defendants are corporate behemoths with a demonstrated willingness and proclivity for drawing

189. *Dickens*, 706 F. App'x at 536 (quoting *Valley Drug Co.*, 350 F.3d at 1189).

190. *Id.* at 536–37.

191. *Id.* at 537.

192. *Id.*

193. *Id.*

194. *Id.* (quoting Sacred Heart Health Sys. v. Humana Military Healthcare Servs., 601 F.3d 1159, 1184 (11th Cir. 2010)).

195. *Id.* at 538.

196. 382 F.3d 1241 (11th Cir. 2004).

> out legal proceedings for as long as humanly possible and burying their opponents in paperwork and filings.[197]

As a related consideration, "absent class adjudication, defendants in cases where individual damages are low would be able to break the law with impunity, as most victims 'would be without effective strength to bring their opponents into court at all.'"[198] The court remanded the case to the district court for a new class action decision based on these legal standards.[199]

Dickens and *Landeros* demonstrate the challenges faced by lower courts—and litigants—in navigating the proliferation of class actions involving alleged statutory violations with little, if any, showing of harm to the plaintiff or to potential class members. Courts continue to wrestle with the Article III standing implications of such cases in light of the Supreme Court's 2016 decision in *Spokeo, Inc. v. Robins*.[200] A case in point is the Eleventh Circuit's 2017 decision denying rehearing en banc in *Nicklaw v. CitiMortgage, Inc.*,[201] which prompted a heated dissent from Judge Beverly Martin and a defense of the decision from Judge Bill Pryor, joined by Judge Stanley Marcus, both members of the original panel.[202]

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197. *Dickens*, 706 F. App'x at 538 (quoting *Klay*, 382 F.3d 1270–71, *abrogated in part on other grounds by* Bridge v. Phoenix Bond & Indem. Co., 553 U.S. 639 (2008)) (internal quotes and citations omitted).

198. *Id.* (quoting Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 617 (1997)).

199. *Id.* at 539.

200. 136 S. Ct. 1540 (2016).

201. 839 F.3d 998 (11th Cir. 2016), *reh'g denied*, 855 F.3d 1265 (11th Cir. 2017). *Nicklaw* is discussed in last year's Survey. *See* Byrne & Mohr, *supra* note 2, at 958–60.

202. *See generally* Nicklaw v. CitiMortgage, Inc., 855 F.3d 1265 (11th Cir. 2017).