

Class Actions

by Thomas M. Byrne*

For class action practitioners, 2007 was an eventful year in the Eleventh Circuit, marked by important doctrinal shifts in areas thought to be settled and a reprise of an old favorite. The year also included three decisions in collective action employment cases, reflecting the surge in employment class actions in recent years.

I. *LOWERY V. ALABAMA POWER CO.*

In probably its most controversial class action decision of 2007, *Lowery v. Alabama Power Co.*,¹ the Eleventh Circuit affirmed a district court's remand of a toxic tort mass action originally filed in Alabama state court, concluding that the district court lacked jurisdiction to hear the case under the Class Action Fairness Act of 2005 ("CAFA").² In *Lowery* the court announced new ground rules for determining the amount in controversy in *all* diversity cases, rules tending to make removal more difficult whenever the plaintiff opposes it.³ As the court summarized its holding:

We think it highly questionable whether a defendant could ever file a notice of removal on diversity grounds in a case such as the one before us—where the defendant, the party with the burden of proof, has only bare pleadings containing unspecified damages on which to base its

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

1. 483 F.3d 1184 (11th Cir. 2007). Judge Gerald B. Tjoflat authored the opinion, joined by Judge Rosemary Barkett and Judge Stanley Marcus. *See id.* at 1187.

2. *Id.* at 1212; Pub. L. No. 109-2, 119 Stat. 4 (codified in scattered sections of 28 U.S.C.).

3. *Lowery*, 483 F.3d at 1213 n.63.

notice—without seriously testing the limits of compliance with Rule 11.⁴

Lowery was originally brought in Alabama state court, before CAFA's effective date, by 9 plaintiffs against 12 corporations and 120 fictitious entities. The plaintiffs claimed the defendants had discharged particulates and gases into the atmosphere and ground water, and the plaintiffs sought damages for personal injuries and loss of the use and enjoyment of their property, as well as punitive damages. The original complaint also included a per-plaintiff demand for compensatory and punitive damages of \$1,250,000 each.⁵

The plaintiffs amended their complaint three times in state court, each time asserting the same substantive claims and ultimately demanding unspecified compensatory and punitive damages in excess of the state court's jurisdictional limit. They also added roughly 400 plaintiffs as well as additional defendants, including Alabama Power Company. Alabama Power, added as a defendant after CAFA's effective date, removed the case to the United States District Court for the Northern District of Alabama as a "mass action" under 28 U.S.C. § 1332(d)(11).⁶

The plaintiffs filed a motion to remand, asserting (among other things) that Alabama Power had not met its burden of proof to establish federal jurisdiction under CAFA. In response, Alabama Power filed a supplement to its notice of removal, pointing out that there were more than 400 plaintiffs whose claims would need to yield only \$12,500 each to reach \$5,000,000 and that plaintiffs in recent Alabama mass toxic tort cases had received either jury verdicts or settlements in excess of \$5,000,000. Alabama Power also filed a motion to serve limited jurisdictional discovery in the event there was a question about the presence of the requisite amount in controversy. The district court, however, granted the plaintiffs' motion to remand.⁷

Alabama Power appealed the remand order pursuant to 28 U.S.C. § 1453(c)(1).⁸ Before turning to the question of whether the case was properly remanded for lack of the requisite amount in controversy, the Eleventh Circuit addressed two preliminary questions.⁹ First, the court held that Alabama Power's notice of removal effected the removal of the claims against *other* defendants, including defendants who had been made parties to the action before CAFA's effective date: "[R]emoval

4. *Id.*

5. *Id.* at 1187-88.

6. *Id.* at 1188; 28 U.S.C. § 1332(d)(11) (Supp. V 2005).

7. *Lowery*, 483 F.3d at 1189-91.

8. *Id.* at 1192; 28 U.S.C. § 1453(c)(1) (Supp. V 2005).

9. *Lowery*, 483 F.3d at 1195-96, 1205.

under the statute encompasses all the claims in the ‘action’ as a whole, not simply the claims against a removing defendant.”¹⁰ Second, the court clarified that CAFA’s definition of “mass action” requires, with respect to the amount in controversy, only that \$5,000,000 be at stake in the action; it does not impose an additional requirement that each plaintiff in the mass action have a \$75,000 claim, as the district court had found.¹¹

The court began its evaluation of the amount in controversy by reiterating the rule that the removing defendant has the burden of proof in establishing the amount in controversy and that “in the removal context where damages are unspecified, the removing party bears the burden of establishing the jurisdictional amount by a preponderance of the evidence.”¹² While acknowledging “the peculiar implications of applying the preponderance of the evidence standard . . . [to] naked pleadings,” the court held that it was bound to adhere to its prior decisions adopting the standard.¹³ Quickly following that nod to precedent, however, was the court’s admonition that “any attempt to engage in a preponderance of the evidence assessment at this juncture would necessarily amount to unabashed guesswork, and such speculation is frowned upon.”¹⁴

Against that backdrop, the court held that the “scope of evidence” to be considered by a court assessing the propriety of removal is limited to the “removing documents,” which necessarily include at least one document from each party: the defendant’s notice of removal and whatever document the defendant received from the plaintiff that led the defendant to conclude that the case was removable.¹⁵ In a footnote, the court noted an exception to this limitation for situations in which damages arise “from a source such as a contract provision,” in which case the defendant might also attach the contract to its notice of removal “whether or not the defendant received the contract from the plaintiff.”¹⁶ A defendant’s hope of establishing the jurisdictional amount in a breach of contract action by reference to the contract, however, may be limited to cases in which the relevant potential damages figure is

10. *Id.* at 1196.

11. *Id.* at 1205.

12. *Id.* at 1208-09.

13. *Id.* at 1209-10.

14. *Id.* at 1211.

15. *Id.* at 1211-13 (citing 28 U.S.C. §§ 1446(b), 1447(c) (2000)).

16. *Id.* at 1214 n.66.

liquidated or otherwise discernible, without dispute, from the contract itself.¹⁷

Next, the court held that despite its prior reference to the preponderance of the evidence standard, the removing documents themselves must “unambiguously establish” the existence of federal jurisdiction.¹⁸ The court also foreclosed any post-removal jurisdictional discovery:

Post-removal discovery disrupts the careful assignment of burdens and the delicate balance struck by the underlying rules. A district court should not insert itself into the fray by granting leave for the defendant to conduct discovery or by engaging in its own discovery. Doing so impermissibly lightens the defendant’s burden of establishing jurisdiction. A court should not participate in a one-sided subversion of the rules. The proper course is remand.¹⁹

Applying this framework, the Eleventh Circuit affirmed the remand order.²⁰ The original complaint—with its \$1,250,000 per-plaintiff demand—did not unambiguously establish jurisdiction because it had been superseded by the later amended complaints.²¹ And the operative complaint, which substituted a nonspecific demand for the \$1,250,000 figure, did not establish jurisdiction, according to the court, because the revision to the demand necessarily indicated a revision of the plaintiffs’ good-faith estimation of the amount at issue.²² Evidence of results in other cases also did not support removal because the evidence was “not received from the plaintiffs” and told the court “nothing about the value of the claims in this lawsuit.”²³ Moreover, Alabama Power’s common sense argument that each of the 400 plaintiffs would need only \$12,500 at stake for the mass action to meet the \$5,000,000 threshold would require “impermissible speculation—evaluating without the benefit of any evidence the value of individual claims.”²⁴

The court in *Lowery* held that for a diversity case to be successfully removed to federal court, the removing documents, including some document (likely the complaint) “received from the plaintiff,” must

17. *See id.* (“When a plaintiff seeks unliquidated damages and does not make a specific demand, therefore, the factual information establishing the jurisdictional amount must come from the plaintiff.”).

18. *Id.* at 1213.

19. *Id.* at 1218 (footnote omitted).

20. *Id.* at 1221.

21. *See id.* at 1219.

22. *Id.* at 1220.

23. *Id.* at 1221.

24. *Id.* at 1220.

unambiguously establish jurisdiction.²⁵ Can this standard be met, at least in tort cases, absent a concession from the plaintiff that the requisite amount is at stake? The court's remand in *Lowery* illustrates that in the case of dueling allegations concerning the amount in controversy, the defendant—as the party with the burden of proof—faces long odds.

Three of the holdings in *Lowery* warrant closer examination. First, the court reasoned that the standard for ascertaining that a case has become removable—the triggering event for second-chance, thirty-day removal window under the second paragraph of 28 U.S.C. § 1446(b)²⁶—is the only permissible standard for assessing removability.²⁷ The court cited two cases discussing the second paragraph of § 1446(b),²⁸ the paragraph that applies “[i]f the case stated by the initial pleading is not removable.”²⁹ Both cases, *Bosky v. Kroger Texas, LP*,³⁰ and *Huffman v. Saul Holdings, LP*,³¹ concerned challenges to the timeliness of removal after the receipt of a post-complaint “other document.”³² Both held that under the second paragraph of § 1446(b), some “unequivocal” indication of removability must be present before removability becomes ascertainable,³³ and it is at that time that the defendant's thirty-day

25. *Id.* at 1213 & n.63, 1221.

26. 28 U.S.C. § 1446(b) (2000). Section 1446(b) provides the following:

The notice of removal of a civil action or proceeding shall be filed within thirty days after the receipt by the defendant, through service or otherwise, of a copy of the initial pleading setting forth the claim for relief upon which such action or proceeding is based, or within thirty days after the service of summons upon the defendant if such initial pleading has then been filed in court and is not required to be served on the defendant, whichever period is shorter.

If the case stated by the initial pleading is not removable, a notice of removal may be filed within thirty days after receipt by the defendant, through service or otherwise, of a copy of an amended pleading, motion, order or other paper from which it may first be ascertained that the case is one which is or has become removable, except that a case may not be removed on the basis of jurisdiction conferred by section 1332 of this title more than 1 year after commencement of the action.

Id.

27. See *Lowery*, 483 F.3d at 1213 & n.63 (citing 28 U.S.C. § 1446(b)).

28. *Id.* at 1213 n.63.

29. 28 U.S.C. § 1446(b).

30. 288 F.3d 208 (5th Cir. 2002).

31. 194 F.3d 1072 (10th Cir. 1999).

32. See *Bosky*, 288 F.3d at 209; *Huffman*, 194 F.3d at 1076.

33. *Huffman*, 194 F.3d at 1078 (“If the statute is going to run, the notice ought to be unequivocal.” (quoting *DeBry v. Transamerica Corp.*, 601 F.2d 480, 489 (10th Cir. 1979))); *Bosky*, 288 F.3d at 211 (quoting this portion of *Huffman*).

clock begins to run.³⁴ But the court in *Lowery* adopted the standard enunciated in *Bosky* and *Huffman* to circumscribe the universe of evidence to be considered in assessing federal jurisdiction.³⁵ Thus, under *Lowery*, the requirement in § 1446(b) for the *timeliness* of removal, as construed in cases like *Bosky* and *Huffman*, supplies the unambiguous establishment requirement for the *propriety* of removal.³⁶ The distinction is real; the United States Court of Appeals for the Fifth Circuit in *Bosky* stated explicitly that its requirement of an unequivocal demonstration of removability was unique to the *second* paragraph of § 1446(b).³⁷ The Fifth Circuit also clarified that its holding with respect to the thirty-day time limit for removability did not change the substantive standard for removability:

Nor do we believe the standard we adopt today conflicts with our cases holding that a defendant can still show a case to be removable on the basis of a state court complaint which does not explicitly state a demand for damages exceeding the threshold amount in controversy. Those holdings are not relevant here because the timeliness requirement of the second paragraph of section 1446(b) does not play unless “the case stated by the initial pleading is not removable.”³⁸

Under *Lowery*, however, a case apparently cannot be removed unless and until the “ascertainability” standard is met.

Second, the court in *Lowery* also used Alabama Rule of Civil Procedure 11³⁹ (“Alabama Rule 11”) to support its holding, discussing the rule’s application to both a plaintiff’s complaint and a defendant’s notice of removal.⁴⁰ With respect to the plaintiffs’ complaint in *Lowery*, the court rejected Alabama Power’s argument that the plaintiffs’ third

34. See *Huffman*, 194 F.3d at 1078; *Bosky*, 288 F.3d at 211.

35. See *Lowery*, 483 F.3d at 1213 n.63, 1213-14.

36. *Id.* at 1213 (citing § 1446(b) as providing the standard for “assessing the propriety of removal”).

37. 288 F.3d at 211. The Fifth Circuit explained:

“Setting forth,” the key language of the first paragraph [of § 1446(b)], encompasses a broader range of information that can trigger a time limit based on notice than would “ascertained,” the pivotal term in the second paragraph. To “set forth” means to “publish” or “to give an account or statement of.” “Ascertain” means “to make certain, exact, or precise” or “to find out or learn with certainty.” The latter, in contrast to the former, seems to require a greater level of certainty or that the facts supporting removability be stated unequivocally.

Id. (footnotes omitted).

38. *Id.* at 212 (footnote omitted) (quoting *Chapman v. Powermatic, Inc.*, 969 F.2d 160, 161 (5th Cir. 1992)).

39. ALA. R. CIV. P. 11.

40. *Lowery*, 483 F.3d at 1220.

amended complaint could be read consistently with their earlier \$1,250,000 per-plaintiff demand for the same claims, which would have satisfied the amount in controversy requirement.⁴¹ The court reasoned that the two complaints could *not* be read consistently—that is, the third amended complaint could not be read as merely a less detailed version of the first—because the plaintiffs, mindful of Alabama Rule 11, must have substantively revalued the damages at stake.⁴² The unstated premise is that Alabama Rule 11, which tracks the prior version of the federal rule, somehow requires not only that a plaintiff’s allegations have a good-faith basis but also that a plaintiff affirmatively include in his or her complaint the most precise damages demand that is consistent with the good-faith standard.

With respect to a removing defendant, the court in *Lowery* reinforced its holding that the removing documents must unequivocally establish jurisdiction by suggesting that Federal Rule of Civil Procedure 11⁴³ (“Federal Rule 11”) already required as much:

Indeed, the defendant, by removing the action, has represented to the court that the case belongs before it. Having made this representation, the defendant is no less subject to [Federal] Rule 11 than a plaintiff who files a claim originally. Thus, a defendant that files a notice of removal prior to receiving *clear evidence* that the action satisfies the jurisdictional requirements, and then later faces a motion to remand, is in the same position as a plaintiff in an original action facing a motion to dismiss

. . . .
. . . . The defendants’ request for discovery is tantamount to an admission that the defendants do not have a factual basis for believing that jurisdiction exists.⁴⁴

But Federal Rule 11 requires only that factual allegations “have evidentiary support or, if specifically so identified, will likely have evidentiary support after a reasonable opportunity for further investigation or discovery,” not that the allegations be supported by “clear evidence” when the notice of removal is filed.⁴⁵

Third, the court in *Lowery* paired its requirement that the removing documents themselves unambiguously establish federal jurisdiction if the case is to stay in federal court with a prohibition on jurisdictional

41. *Id.*

42. *Id.* at 1219-20.

43. FED. R. CIV. P. 11.

44. *Lowery*, 483 F.3d at 1217 (emphasis added) (footnote omitted).

45. FED. R. CIV. P. 11(b)(3).

discovery in federal court.⁴⁶ The origins of the court's bar on jurisdictional discovery are inscrutable. The court referred to Federal Rules of Civil Procedure 8(a)⁴⁷ and 11 in support of its holding⁴⁸ but cited no precedent for a prohibition on jurisdictional discovery after removal, and there is precedent to the contrary.⁴⁹ The absolute bar on discovery conflicts with the unmistakable emphasis of the Federal Rules of Civil Procedure and accompanying jurisdictional statutes on reaching the merits of an issue rather than relying on earlier code-pleading word-smithing of pleadings. The court's refusal to engage in what it termed "speculation" concerning the jurisdictional amount seems to be an entirely contrived dilemma. Limited jurisdictional discovery would allow the court to resolve jurisdictional facts and still avoid resorting to guesswork. The court even acknowledged that "post-removal jurisdictional discovery may appear to present a viable option for a court examining its jurisdiction," but it still concluded that "[s]ound policy and notions of judicial economy and fairness . . . dictate that we not follow this course."⁵⁰ The court seemed to rest its fairness assessment on a hypothetical diversity case in which a plaintiff filed a complaint that the defendant challenged for lack of jurisdiction:

Despite the plaintiff's representation and our assumption of good faith, if a material element required for either the substantive claim or the court's subject matter jurisdiction is missing from the complaint, the defendant may move to dismiss. If the plaintiff's counsel concedes that the plaintiff lacks the *evidence* necessary to cure the deficiency, the court may dismiss the action for failure to state a claim or want of jurisdiction. In either case, without further discovery, counsel cannot in good faith amend the complaint to provide the missing element. *In our hypothetical diversity case, should the plaintiff request leave to conduct discovery to support its assertion that the case is properly before the court, the court would deny such a request.* In such a situation, the

46. *Lowery*, 483 F.3d at 1221.

47. FED. R. CIV. P. 8(a).

48. *See Lowery*, 483 F.3d at 1217 & n.74.

49. *See, e.g., Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 351 n.13 (1978) ("[W]here issues arise as to jurisdiction or venue, discovery is available to ascertain the facts bearing on such issues."); *Majd-Pour v. Georgiana Cmty. Hosp., Inc.*, 724 F.2d 901, 903 (11th Cir. 1984). In *Majd-Pour* the court held that the district court abused its discretion in dismissing the complaint for lack of subject matter jurisdiction without first allowing discovery in support of the plaintiff's claimed jurisdictional bases, including diversity. *Id.* The court stated, "[A]lthough the plaintiff bears the burden of proving the court's jurisdiction, the plaintiff should be given the opportunity to discover facts that would support his allegations of jurisdiction." *Id.*; *see also* 6 DANIEL R. COQUILLETTE ET AL., *MOORE'S FEDERAL PRACTICE* § 26.41[11][a] (3d ed. 2007).

50. *Lowery*, 483 F.3d at 1216.

court would not reserve ruling on the motion to dismiss in order to allow the plaintiff to look for what the plaintiff should have had—but did not—before coming through the courthouse doors, even though the court would have the inherent power to do so. In deciding if dismissal is proper, a court would look only to the facts as alleged in the complaint and would not waste limited judicial resources by directing its inquiry elsewhere.⁵¹

Reinforcing the point, the court asserted that to allow a removing defendant jurisdictional discovery would be to “impermissibly lighten[] the defendant’s burden of establishing jurisdiction,” which would amount to a “one-sided subversion of the rules” by the district court.⁵²

The problem with the court’s analogy to a plaintiff facing a motion to dismiss is the conflation of a motion to dismiss for lack of *subject matter jurisdiction* with a motion to dismiss for failure to *state a claim*. A plaintiff facing a motion to dismiss for lack of subject matter jurisdiction arguably would have to produce evidence to avoid dismissal. However, contrary to the suggestion in *Lowery*, the plaintiff generally would be allowed some jurisdictional discovery, at least where the jurisdictional facts challenged by the defendant were entirely within the defendant’s knowledge, such as the facts concerning the defendant’s citizenship.

A plaintiff facing a motion to dismiss may not be allowed discovery to cure deficiencies in his complaint, but he would not be required to produce *evidence* to withstand the motion. All that is required are allegations consistent with Rule 11 and any other applicable pleading standard, even the most stringent of which does not require production of evidence—much less unambiguous evidence—at the pleadings stage.⁵³ By treating the two kinds of motions to dismiss together, the court in *Lowery* suggested that plaintiffs must establish jurisdiction without discovery,⁵⁴ although that is not, in fact, the general rule. This faulty hypothetical, however, appears to have been the foundation for the court’s invocation of “fairness” in rejecting post-removal discovery.⁵⁵

The court also characterized post-removal discovery as “fishing expeditions [that] would clog the federal judicial machinery.”⁵⁶ This and other similar rhetoric suggests a frustration with current removal practice and is possibly a reaction to CAFA’s expansion of a defendant’s removal rights. Faced with the untidy fact that the district judge

51. *Id.* (emphasis added).

52. *Id.* at 1218.

53. *See, e.g.*, FED. R. CIV. P. 11.

54. *See Lowery*, 483 F.3d at 1216.

55. *See id.*

56. *Id.* at 1217.

himself asked for the plaintiffs in *Lowery* to confirm certain jurisdictional facts, the Eleventh Circuit went so far as to bar a district court from conducting this discovery “on its own initiative.”⁵⁷ Tacitly acknowledging the awkwardness of this direction, the court added a footnote to clarify that “questioning a plaintiff’s counsel in open court about the value of the plaintiff’s claims” was still permissible, with no explanation of any principle distinguishing permissible questions about jurisdictional facts from impermissible judicial discovery into them.⁵⁸ If the facts are relevant to an issue before the court, then either option should be at the court’s disposal.

Although the court’s interpretations of CAFA in *Lowery* are themselves noncontroversial, the court’s foray into general removal procedure wanders far from the mainstream. The court’s refusal to permit any jurisdictional discovery and its four-corners-of-the-pleadings approach are an unwelcome relapse into legal formalism.⁵⁹ Petitions for rehearing en banc and for certiorari, however, were denied.⁶⁰

II. CLASS ACTION WAIVERS; ARBITRATION

The Eleventh Circuit signaled a shift in direction in evaluating the enforceability of consumer arbitration provisions in *Dale v. Comcast Corp.*⁶¹ In *Dale* the court refused to enforce an arbitration provision that the cable television provider had included in the “Policies and Procedures” it gave to each subscriber.⁶² The arbitration provision contained a class action waiver and a clause providing that invalid provisions could not be severed.⁶³ The subscribers asserted a claim under the Cable Communications Policy Act of 1984⁶⁴ concerning franchise fees. Comcast sought to enforce the arbitration provision. The

57. *Id.* at 1221.

58. *Id.* at 1218 n.75.

59. *Id.* at 1215-16. Judge Acker—the district judge who issued the remand order in *Lowery*—has since opined “that the day of the knee-jerk removal of diversity tort cases from state to federal court within the three states comprising the Eleventh Circuit came to an end on April 11, 2007,” when *Lowery* was decided. *Constant v. Int’l House of Pancakes, Inc.*, 487 F. Supp. 2d 1308, 1308-09 (N.D. Ala. 2007). “Knee-jerk” or not, removals based on diversity jurisdiction are likely to be more difficult after *Lowery*.

60. *Lowery v. Alabama Power Co.*, No. 06-16324-CC, 06-16325-CC, 2008 WL 41327 (11th Cir. Jan. 3, 2008), *petition for cert. denied*, No. 07-1246 (U.S. June 2, 2008).

61. 498 F.3d 1216 (11th Cir. 2007). The opinion was authored by Judge Susan H. Black and joined by Judge Joel F. Dubina and a visiting judge, Judge Jane A. Restani, from the United States Court of International Trade, sitting by designation. *See id.* at 1216 & n.*.

62. *Id.* at 1224.

63. *Id.* at 1218, 1219 n.3.

64. Pub. L. No. 98-549, 98 Stat. 2279 (1984) (codified in scattered sections of 47 U.S.C.).

subscribers argued that the class action waiver was unenforceable under applicable Georgia law.⁶⁵ Comcast relied on the Eleventh Circuit's prior decision in *Caley v. Gulfstream Aerospace Corp.*,⁶⁶ which rejected a claim that a class action waiver was unconscionable under Georgia law.⁶⁷ The court noted that the holding in *Caley* was limited to the facts of that case.⁶⁸ The court distinguished *Caley* as well as two other cases in which it had appeared to categorically reject objections to the enforcement of consumer arbitration provisions.⁶⁹ The court recognized two important differences between those cases and the case before it.⁷⁰ First, in *Dale* "a remedy was effectively foreclosed because of the negligible amount of recovery when compared to the cost of bringing an arbitration action."⁷¹ Second, and more importantly, a review of the claims in *Caley* and the other two cases showed that each provided for the recovery of attorney fees, expert costs, or both should the plaintiff prevail.⁷² The court concluded that the potential recovery of attorney fees and litigation costs in certain circumstances under a Georgia statute to be insufficient because the statute "does not provide the same incentive for an attorney to represent an individual plaintiff as the automatic, or likely, award of fees and costs available to a prevailing plaintiff."⁷³ In further support of its decision, the court cited a First Circuit case that held a similar Comcast arbitration provision barring class arbitration to be unenforceable.⁷⁴

The court closed with the admonition that "[c]orporations should not be permitted to use class action waivers as a means to exculpate themselves from liability for small-value claims."⁷⁵ The court concluded that "the enforceability of a particular class action waiver . . . must be determined on a case-by-case basis, considering the totality of the facts and circumstances."⁷⁶ While the court appeared in prior decisions to

65. *Dale*, 498 F.3d at 1218.

66. 428 F.3d 1359 (11th Cir. 2005).

67. *Id.* at 1377-79. For a discussion, see Thomas M. Byrne, *Class Actions*, 57 MERCER L. REV. 1031, 1034-36 (2006).

68. *Dale*, 498 F.3d at 1221.

69. *See id.* at 1221-22 (citing *Jenkins v. First Am. Cash Advance of Ga., LLC*, 400 F.3d 868, 877-78 (11th Cir. 2005); *Randolph v. Green Tree Fin. Corp.-Ala.*, 244 F.3d 814, 819 (11th Cir. 2001)).

70. *See id.* at 1221-22.

71. *Id.* at 1221.

72. *Id.* at 1221-22.

73. *Id.* at 1223 (citing O.C.G.A. § 13-6-11 (2007)).

74. *Dale*, 498 F.3d at 1223-24 (citing *Kristian v. Comcast Corp.*, 446 F.3d 25, 61 (1st Cir. 2006)).

75. *Id.* at 1224.

76. *Id.*

give carte blanche endorsement to the enforceability of class action waivers in arbitration provisions, the decision in *Dale* signifies an unquestionable shift in the degree of scrutiny for these waivers.

III. CLASS NOTICE

In *Adams v. Southern Farm Bureau Life Insurance Co.*,⁷⁷ the court considered what due process requires for a class notice to bind absent class members to a settlement.⁷⁸ The appeal was brought by a group of Mississippi state court plaintiffs who had been enjoined by the United States District Court for the Middle District of Georgia from prosecuting claims against an insurance company that the district court concluded were released by a prior class settlement and thus barred by res judicata.⁷⁹ In 1999 the district court had approved the class settlement of the original claims, which were based on allegedly fraudulent and deceptive conduct concerning the marketing and sale of flexible premium and universal life insurance policies. In 2005 the appellants filed two separate actions against the insurance company in Mississippi state court. The insurance company, relying on subsection (a) of the All Writs Act,⁸⁰ responded by filing a motion to enforce the district court's prior class action judgment by permanently enjoining the appellants from prosecuting the state court cases. The insurance company contended that the present claims were nearly identical to the claims that had been settled and released in the class action. The district court agreed and enjoined the prosecution of the claim.⁸¹

On appeal, the appellants contended that the class action notice afforded to them was constitutionally defective.⁸² The Eleventh Circuit rejected that claim, concluding that the forty-eight page notice in the class action was thorough, clear, and comprehensible.⁸³ Moreover, the insurance company published the notice in a national newspaper, distributed the notice via multiple first class mailings, and provided a toll-free telephone number, a website, and a mailing address to field queries from class members.⁸⁴ These actions constituted the best notice

77. 493 F.3d 1276 (11th Cir. 2007). The opinion was authored by Judge Stanley F. Birch, Jr. and was joined by Circuit Judges J.L. Edmondson and Charles R. Wilson. *See id.* at 1278.

78. *See id.* at 1285-89.

79. *Id.* at 1278.

80. 28 U.S.C. § 1651(a) (2000 & Supp. V 2005).

81. *Adams*, 493 F.3d at 1282-85.

82. *Id.* at 1285.

83. *Id.* at 1287.

84. *Id.*

practicable under the circumstances, as required by Federal Rule of Civil Procedure 23(c).⁸⁵ The court held that the notice was broad enough to encompass the appellants' "increasing premium" claims, even though that phrase was not used in the notice.⁸⁶ The court also rejected the appellants' related argument that their claims were not covered by the class release.⁸⁷ The court specifically concluded that the two claims implicated identical policies and that the release also covered causes of action "that have been, could have been, . . . or could be alleged or asserted now or in the future."⁸⁸

The court's decision is a useful primer on the requirements for the contents of class settlement notices. In particular, the court approved the "Q & A" format for class notices that is favored by many class settlement administrators, particularly following the 2003 amendment to Rule 23(c) requiring that the class notice be presented "clearly and concisely . . . in plain, easily understood language."⁸⁹

IV. CLASS CERTIFICATION APPEALS

In *Jenkins v. BellSouth Corp.*,⁹⁰ the Eleventh Circuit considered whether a district court is empowered to revive a lapsed right to seek an interlocutory appeal under Federal Rule of Civil Procedure 23(f)⁹¹ by vacating a class certification order and reentering it.⁹² As Judge Pryor colorfully put it in his opinion for the court, "[t]he question in this putative class action is whether a district court is empowered to sponsor a revival of a right to seek an interlocutory appeal of its decision about class certification as frequently and spontaneously as an evangelical preacher leads a revival for a congregation,"⁹³ a question that seemed to prophesy the court's negative answer. The case was a race discrimination action by BellSouth employees. The district court entered an order denying class certification, and the employees filed a motion for reconsideration, which was also denied. The employees subsequently filed a Rule 23(f) petition for permission to appeal the order, but they did so after the ten-day period that the rule provides for such petitions.⁹⁴

85. *Id.*; FED. R. CIV. P. 23(c).

86. *Adams*, 493 F.3d at 1290, 1291 (internal quotation marks omitted).

87. *Id.* at 1290-91.

88. *Id.* at 1290 (internal quotation marks omitted).

89. *Id.* at 1286, 1291; FED. R. CIV. P. 23(c)(2)(B).

90. 491 F.3d 1288 (11th Cir. 2007).

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

92. *Jenkins*, 491 F.3d at 1289.

93. *Id.*

94. *Id.*; see FED. R. CIV. P. 23(f). Federal Rule 23(f) provides that

Thus, the Eleventh Circuit dismissed the petition as untimely.⁹⁵ The employees then moved the district court to vacate and reenter its order denying the employees' motion to reconsider, citing excusable neglect caused by an alleged mistake made by a courier service. The court granted the motion and reentered the order. The employees subsequently filed a second Rule 23(f) petition.⁹⁶

In dismissing the second petition, the Eleventh Circuit noted that the ten-day window under Rule 23(f) "closes quickly to promote judicial economy."⁹⁷ The employees pointed to the general statutory process for interlocutory appeals in 28 U.S.C. § 1292(b)⁹⁸ and argued that the district court had the authority to renew their opportunity to appeal after the original deadline had expired.⁹⁹ The Eleventh Circuit rejected that argument, noting that Rule 23(f) differs from § 1292(b) in two significant ways.¹⁰⁰ First, unlike § 1292(b), Rule 23(f) "does not require that the district court certify the [class] certification ruling for appeal," because under Rule 23(f), only the court of appeals makes that call.¹⁰¹ Second, while § 1292(b) prescribes limited criteria for interlocutory appeals, Rule 23(f) does not.¹⁰² The court also noted that the Seventh Circuit has held that appellants may not use § 1292(b) to circumvent the ten-day deadline in Rule 23(f).¹⁰³ The court also cited other circuits that have held that a district court has no authority to grant an extension of time under Rule 23(f)¹⁰⁴ and that a late or successive motion to reconsider does not revive the ten-day deadline.¹⁰⁵ The court concluded that Rule 23(f) provides a single opportunity for

[a] court of appeals may [in its discretion] permit an appeal from an order [of a district court] granting or denying class-action certification under this rule if a petition for permission to appeal is filed . . . within 10 days after the order is entered. An appeal does not stay proceedings in the district court unless the district judge or the court of appeals so orders.

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

95. *Jenkins*, 491 F.3d at 1289 (citing FED. R. CIV. P. 23(f)).

96. *Id.* at 1289-90.

97. *Id.* at 1290 (citing FED. R. CIV. P. 23(f) advisory committee's note).

98. 28 U.S.C. § 1292(b) (2000 & Supp. V 2005).

99. *Jenkins*, 491 F.3d at 1290.

100. *Id.* at 1291.

101. *Id.* (quoting FED. R. CIV. P. 23(f) advisory committee's note).

102. *Id.* (citing 28 U.S.C. § 1292(b); FED. R. CIV. P. 23(f)).

103. *Id.* (citing *Richardson Elecs., Ltd. v. Panache Broad. of Pa., Inc.*, 202 F.3d 957, 959 (7th Cir. 2000)).

104. *Id.* (citing *Delta Airlines v. Butler*, 383 F.3d 1143, 1145 (10th Cir. 2004)).

105. *Id.* (citing *McNamara v. Felderhof*, 410 F.3d 277, 281 (5th Cir. 2005); *Gary v. Sheahan*, 188 F.3d 891, 893 (7th Cir. 1999)).

parties to seek interlocutory review.¹⁰⁶ In consolation, the court offered that the employees still had another opportunity to seek review after final judgment.¹⁰⁷ For most who suffer an adverse class certification ruling but miss the interlocutory appeal deadline, that consolation is small indeed.¹⁰⁸

V. CERTIFICATION VS. MERITS ISSUES

The year also afforded the court an opportunity to write another chapter in its *Culpepper v. Irwin Mortgage Corp.*¹⁰⁹ saga, involving a would-be class action under the Real Estate Settlement Procedures Act of 1974 (“RESPA”).¹¹⁰ The plaintiffs alleged that the defendant, a mortgage lender, had acted illegally by paying yield spread premiums to its mortgage brokers.¹¹¹ Specifically, the plaintiffs contended that the yield spread premium payments violated section 8(a) of RESPA,¹¹² which prohibits the payment of “any fee, kickback, or thing of value pursuant to any agreement or understanding, oral or otherwise, that business incident to or a part of a real estate settlement service involving a federally related mortgage loan shall be referred to any person.”¹¹³ In *Culpepper v. Inland Mortgage Corp. (Culpepper I)*,¹¹⁴ the Eleventh Circuit held that the yield spread premium payment in the plaintiffs’ case violated RESPA as an illegal referral fee.¹¹⁵ The court rejected the argument that the fee was bona fide compensation for a

106. *Id.* at 1292.

107. *Id.*

108. Also pertinent to class action appellate procedure was *Main Drug, Inc. v. Aetna U.S. Healthcare, Inc.*, 475 F.3d 1228 (11th Cir. 2007), in which the court held that mere filing of a notice of appeal was not sufficient to properly perfect a Federal Rule 23(f) appeal of an order remanding a case that was removed under CAFA. *Id.* at 1230. The court found that Rule 5 of the Federal Rules of Appellate Procedure, FED. R. APP. P. 5, governed appeals under 28 U.S.C. § 1453(c)(1), so that a petition for permission to appeal must be filed with the circuit court within the time specified in the statute. *Main Drug, Inc.*, 475 F.3d at 1230. The opinion was authored by Judge Ed Carnes and joined by Judge William H. Pryor, Jr., and Judge Jerome Farris from the United States Court of Appeals for the Ninth Circuit, sitting by designation. *See id.* at 1229.

109. The *Culpepper* line of cases is as follows: *Culpepper v. Irwin Mortgage Corp. (Culpepper IV)*, 491 F.3d 1260 (11th Cir. 2007); *Culpepper v. Irwin Mortgage Corp. (Culpepper III)*, 253 F.3d 1324 (11th Cir. 2001); *Culpepper v. Inland Mortgage Corp. (Culpepper II)*, 144 F.3d 717 (11th Cir. 1998); *Culpepper v. Inland Mortgage Corp. (Culpepper I)*, 132 F.3d 692 (11th Cir. 1998).

110. 12 U.S.C. §§ 2601-2617 (2000 & Supp. V 2005).

111. *Culpepper IV*, 491 F.3d at 1262.

112. *Id.*

113. 12 U.S.C. § 2607(a) (2000 & Supp. V 2005).

114. 132 F.3d 692 (11th Cir. 1998).

115. *Id.* at 697.

service performed by the broker that would exempt it from liability.¹¹⁶ The court also vacated the district court's denial of class certification.¹¹⁷ In *Culpepper v. Inland Mortgage Corp. (Culpepper II)*,¹¹⁸ the court clarified its ruling in *Culpepper I* as not establishing liability conclusively and held that the district court had acted prematurely in granting summary judgment as a matter of law for the plaintiff.¹¹⁹ In *Culpepper v. Irwin Mortgage Corp. (Culpepper III)*,¹²⁰ the issue was whether the district court, on remand, had erred in certifying a class action. To decide the class certification issue, the court accepted the parties' contention that it could determine whether class certification was appropriate only if it settled the liability rule under RESPA, which had been called into question by an intervening statement of policy¹²¹ by the Department of Housing and Urban Development ("HUD").¹²² After clarifying the liability question, the court affirmed class certification.¹²³ In the wake of *Culpepper III*, HUD issued a second statement of policy,¹²⁴ disagreeing with the standard of liability set forth in *Culpepper III*.¹²⁵ Subsequently, in *Heimmermann v. First Union Mortgage Corp.*,¹²⁶ the court held that the clarified HUD interpretation was entitled to judicial deference and overruled *Culpepper III*.¹²⁷ The court in *Heimmermann* held that the HUD standard of liability also precluded class certification because it was necessary to determine whether compensable services were provided by the broker and whether the total amount of broker compensation was reasonable in light of the circumstances of each loan.¹²⁸

In *Culpepper v. Irwin Mortgage Corp. (Culpepper IV)*,¹²⁹ the district court had granted the mortgage company's motion to decertify the

116. *Id.*

117. *Id.* at 698.

118. 144 F.3d 717 (11th Cir. 1998).

119. *Id.* at 718-19.

120. 253 F.3d 1324 (11th Cir. 2001).

121. Real Estate Settlement Procedures Act (RESPA) Statement of Policy 1999-1 Regarding Lender Payments to Mortgage Brokers, 64 Fed. Reg. 10080 (1999).

122. *Culpepper III*, 253 F.3d at 1327-29.

123. *Id.* at 1332.

124. Real Estate Settlement Procedures Act Statement of Policy 2000-1: Clarification of Statement of Policy 1999-1 Regarding Lender Payments to Mortgage Brokers, and Guidance Concerning Unearned Fees Under Section 8(b), 66 Fed. Reg. 53052 (2001).

125. *See Culpepper IV*, 491 F.3d at 1267.

126. 305 F.3d 1257 (11th Cir. 2002).

127. *Id.* at 1264.

128. *Id.*

129. 491 F.3d 1260 (11th Cir. 2007).

class.¹³⁰ After rejecting a contention that its ruling in *Culpepper III* was not the law of the case (and therefore did not bind the court to the earlier liability standard), the court affirmed summary judgment in favor of the mortgage company.¹³¹ On the class certification issue, the court noted that the standard of review in decertification cases is abuse of discretion.¹³² The court concluded that in light of HUD's statement of policy and the court's decision in *Heimmermann*, an individualized, case-by-case assessment is required, making class certification inappropriate for section 8 RESPA claims.¹³³ The court observed that this holding was in line with other circuits and also held that there was no abuse of discretion.¹³⁴

The *Culpepper* quartet is notable because the Eleventh Circuit concluded that it was necessary to determine an important question on the merits of the case before making a decision about a class certification. Exactly when a district court may make a merits determination regarding class certification remains controversial.¹³⁵ *Culpepper* is the best example within the Eleventh Circuit of why it is necessary for the district court to determine the standard of liability before deciding whether to grant or deny class certification.

VI. COLLECTIVE ACTIONS

In three cases, the court turned to the requirements for a "collective" action,¹³⁶ a species of class action permitted by the Fair Labor Standards Act of 1938 ("FLSA")¹³⁷ and the Age Discrimination in Employment Act of 1967.¹³⁸ A collective action differs from an ordinary class action under Federal Rule of Civil Procedure 23¹³⁹ in that each class member must decide, after being notified of the action, whether or not to "opt-in."¹⁴⁰ In an ordinary class action, the absent class members,

130. *Id.* at 1274-75.

131. *Id.* at 1274, 1275 n.8.

132. *Id.* at 1275.

133. *Id.* at 1276.

134. *Id.* at 1276-77. In early 2008, the court returned to RESPA class actions in *Busby v. JRHBW Realty, Inc.*, 513 F.3d 1314 (11th Cir. 2008).

135. *See, e.g., In re Initial Pub. Offerings Sec. Litig.*, 471 F.3d 24 (2d Cir. 2006); *Szabo v. Bridgeport Machs., Inc.*, 249 F.3d 672 (7th Cir. 2001).

136. *See Albritton v. Cagle's, Inc.*, 508 F.3d 1012 (11th Cir. 2007); *De Leon-Granados v. Eller & Sons Trees, Inc.*, 497 F.3d 1214 (11th Cir. 2007); *Anderson v. Cagle's, Inc.*, 488 F.3d 945 (11th Cir. 2007).

137. 29 U.S.C. §§ 201-219 (2000 & Supp. V 2005).

138. 29 U.S.C. §§ 621-634 (2000 & Supp. V 2005).

139. FED. R. CIV. P. 23.

140. *Anderson*, 488 F.3d at 950 n.3 (citing 29 U.S.C. § 216(b) (2000 & Supp. V 2005)).

after receiving notice, must affirmatively exclude themselves, or “opt-out,” to not be bound by the class judgment.¹⁴¹ The effect of the difference is to reduce the size of collective actions because, for a variety of reasons, many eligible class members elect not to opt-in.¹⁴²

In the first case, *Anderson v. Cagle's, Inc.*,¹⁴³ the plaintiffs appealed the district court's order decertifying their collective action under the FLSA. The cause of action was a so-called “donning and doffing” claim under the FLSA. Specifically, the plaintiffs contended that they had not received compensation due to them for the time they spent donning and doffing protective clothing. Although the district court initially certified the collective action and facilitated the notice to would-be opt-in plaintiffs, the district court ultimately granted the defendants' motion to decertify the collective action.¹⁴⁴ On appeal, the Eleventh Circuit reasoned that the district court had properly followed its prior decision in *Hipp v. Liberty National Life Insurance Co.*,¹⁴⁵ which set forth the two-stage procedure for determining whether a collective action could be certified.¹⁴⁶ In the “fairly lenient” first stage, the district court decides certification based primarily on pleadings and affidavits.¹⁴⁷ In the second stage, which the court in *Anderson* noted is “typically precipitated by a [defendant's] motion for decertification . . . usually filed after discovery . . . the court has much more information on which to base its decision, and makes a factual determination on the similarly situated question.”¹⁴⁸ Relying heavily on the abuse of discretion standard of review, the court in *Anderson* concluded that the district court's view of the evidence was reasonable, and its findings were not clearly erroneous.¹⁴⁹ The district court decertified the class because the named plaintiffs could not “fairly and adequately represent the variously assigned employees, the wide variety of work assignments and varied compensation structures affecting the purported class.”¹⁵⁰

141. *Id.*

142. *See* 29 U.S.C. § 216(b).

143. 488 F.3d 945 (11th Cir. 2007). The opinion was authored by Judge Joel F. Dubina, joined by Judge Emmett R. Cox and District Judge Harvey E. Schlesinger from the United States District Court for the Middle District of Florida, sitting by designation. *See id.* at 948-49, 948 n*.

144. *Id.* at 949-50.

145. 252 F.3d 1208 (11th Cir. 2001).

146. *See Anderson*, 488 F.3d at 952-53 (citing *Hipp*, 252 F.3d at 1218). The court also cited *Grayson v. K Mart Corp.*, 79 F.3d 1086 (11th Cir. 1996).

147. *Anderson*, 488 F.3d at 953 (quoting *Mooney v. Aramco Servs. Co.*, 54 F.3d 1207, 1214 (5th Cir. 1995)).

148. *Id.* (internal quotation marks omitted) (quoting *Mooney*, 54 F.3d at 1214).

149. *Id.* at 954.

150. *Id.* at 952 (internal quotation marks omitted).

In a second, related case, *Albritton v. Cagle's, Inc.*,¹⁵¹ the issue before the court was whether the opt-in notices received by the plaintiffs in *Anderson* (notices received before the action was decertified) provided sufficient authorization to initiate a new lawsuit on behalf of the opt-in parties, who were permissively joined under Federal Rule of Civil Procedure 20(a).¹⁵² The district court granted the employer's motion to dismiss, finding that the opt-in form specifically provided that the unnamed plaintiffs elected to opt-in to the first lawsuit but did not authorize any new or additional suits to be brought in their names.¹⁵³ The Eleventh Circuit affirmed the district court's ruling.¹⁵⁴ The court rejected the plaintiffs' attorneys' argument that they sent follow-up letters to the unnamed plaintiffs, giving the unnamed plaintiffs an opportunity to affirmatively opt-out of the two lawsuits.¹⁵⁵ According to the court, "The problem with that argument, of course, is that § 216(b) requires that would-be plaintiffs affirmatively opt in, and that they do so in writing, and that the writing be filed in court before they can be included in the lawsuit."¹⁵⁶

In the third collective action case, *De Leon-Granados v. Eller & Sons Trees, Inc.*,¹⁵⁷ the defendant employers appealed the district court's grant of class certification. The plaintiffs were employees who claimed that their employers had violated their rights under the Migrant and Seasonal Agricultural Worker Protection Act¹⁵⁸ ("AWPA") and the FLSA.¹⁵⁹ The class certified by the district court consisted of more than 1500 migrant workers admitted into the United States under the H-2B temporary foreign worker visa program.¹⁶⁰ The Eleventh Circuit accepted the employers' interlocutory appeal under Federal Rule of Civil Procedure 23(f).¹⁶¹ The employers' lead argument on appeal was that the action was based on the FLSA and therefore had to be adjudicated as an opt-in collective action, rather than as an opt-out Rule 23(b)(3)

151. 508 F.3d 1012 (11th Cir. 2007).

152. *Id.* at 1014; FED. R. CIV. P. 20(a).

153. *Albritton*, 508 F.3d at 1016.

154. *Id.* at 1019.

155. *Id.* at 1017.

156. *Id.*

157. 497 F.3d 1214 (11th Cir. 2007). The opinion was authored by Judge Susan H. Black and joined by Judges Joel F. Dubina and a visiting judge from the United States Court of International Trade, sitting by designation. *See id.* at 1216, 1216 n.*.

158. 29 U.S.C. §§ 1801-1872 (2000 & Supp. V 2005).

159. 29 U.S.C. §§ 201-219 (2000 & Supp. V 2005).

160. *De Leon-Granados*, 497 F.3d at 1216.

161. *Id.* at 1218 n.1; FED. R. CIV. P. 23(f).

class action.¹⁶² The Eleventh Circuit concluded that the AWPA and FLSA claims both sought unpaid wages but were not identical.¹⁶³ The workers' AWPA claims thus were not "FLSA claims in disguise" and could properly be brought in a Rule 23(b)(3) class action.¹⁶⁴ The court noted that the workers had other AWPA claims that did not concern unpaid wages and that these claims were also appropriate for Rule 23 certification.¹⁶⁵

The employers alternatively argued that even if Rule 23 class certification was permissible, the court abused its discretion in certifying the class. Specifically, the employers challenged the adequacy of the class's representation by the named plaintiffs on the grounds that they invoked their Fifth Amendment rights during their depositions when asked if they worked for other employers in the United States.¹⁶⁶ The Eleventh Circuit pointed out that the district court acknowledged a potential adequacy of representation problem in view of the privilege claims but decided to revisit the issue after its relevance was resolved.¹⁶⁷ The Eleventh Circuit deferred to the district court's commitment to reexamine the issue and concluded there was no abuse of discretion in finding adequate representation.¹⁶⁸ The employers also argued that a highly individualized assessment of facts would be necessary to determine the amount of hours each employee worked compared with the amount recorded.¹⁶⁹ The court termed this a "valid concern" but again found no abuse of discretion, noting that the AWPA permits workers to recover either actual or statutory damages, so that "it is within the district court's discretion to award statutory damages where proof of actual damages is scarce."¹⁷⁰ According to the court, the availability of statutory damages eliminates the need to determine individualized damages based on actual hours worked.¹⁷¹

162. *De Leon-Granados*, 497 F.3d at 1218.

163. *Id.* at 1219.

164. *Id.*

165. *Id.*

166. *Id.* at 1220.

167. *Id.*

168. *Id.* at 1221.

169. *Id.*

170. *Id.*

171. *Id.*