2018 Year-to-Date Federal Decisions of Note
Presented to the Tuscaloosa County Bar Association CLE
April 27, 2018

Wilson F. Green
Fleenor & Green LLP
1657 McFarland Blvd. N, Ste. G2A
Tuscaloosa, Alabama 35406
wgreen@fleenorgreen.com

Contents:

FROM THE UNITED STATES SUPREME COURT

HABEAS; JUROR BIAS
Tharpe v. Sellers, No. 17-6075 (U.S. Jan. 8, 2018): Juror affidavit attesting to juror's racial prejudices compelled reopening of federal habeas corpus proceedings' jurists of reason could debate whether inmate has shown by clear and convincing evidence that the state court's factual determination was wrong.

SUPPLEMENTAL JURISDICTION; TOLLING OF STATUTE OF LIMITATIONS FOR STATE LAW CLAIMS
Artis v. District of Columbia, No. 16-460 (U.S. Jan. 22, 2018)**:** When a district court dismisses all claims independently qualifying for the exercise of federal jurisdiction, it ordinarily also dismisses all related state claims. See §1367(c)(3). Section 1367(d) provides that the "period of limitations for" refiling in state court a state claim so dismissed "shall be tolled while the claim is pending [in federal court] and for a period of 30 days after it is dismissed unless State law provides for a longer tolling period." Held: "tolled" in section 1367(d) means suspended, i.e., the statute of limitations stops running while the federal action is pending.

QUALIFIED IMMUNITY
District of Columbia v. Wesby, No. 15-1485 (U.S. Jan. 22, 2018): Officers who responded to a complaint about loud music and illegal activities in a vacant house, finding the house nearly barren and in disarray, smelling marijuana and observing beer bottles and cups of liquor on dirty floors, then finding a make-shift strip club in the living room, and a naked woman and several men in an upstairs bedroom, had probable cause to arrest partygoers and were entitled to qualified immunity on false arrest claims. Even if officers lacked actual probable cause to arrest the partygoers, they are entitled to qualified immunity because, given circumstances, they reasonably but mistakenly concluded that probable cause was present.

SUPPLEMENTAL JURISDICTION; TOLLING OF STATUTE OF LIMITATIONS
Artis v. District of Columbia, No. 16-460 (U.S. Jan. 22, 2018)
When a district court dismisses all claims independently qualifying for the exercise of federal jurisdiction, and dismisses all related state claims under 28 U.S.C. §1367(c)(3), section 1367(d) provides that the "period of limitations for" refiling in state court a state claim so dismissed "shall be tolled while the claim is pending [in federal court] and for a period of 30 days after it is dismissed unless State law provides for a longer tolling period." Held: the word "tolled" in section 1367(d) means suspended, i.e.,

the statute of limitations stops running while the federal action is pending, and begins running again once the federal action is dismissed.

QUALIFIED IMMUNITY
District of Columbia v. Wesby, No. 15-1485 (U.S. Jan. 22, 2018): Officers who responded to a complaint about loud music and illegal activities in a vacant house, finding the house nearly barren and in disarray, smelling marijuana and observing beer bottles and cups of liquor on dirty floors, then finding a make-shift strip club in the living room, and a naked woman and several men in an upstairs bedroom, had probable cause to arrest partygoers and were entitled to qualified immunity on false arrest claims, but at the very least had "arguable" probable cause which would trigger qualified immunity.

COLLECTIVE BARGAINING
*CNH Industrial NV v. Rees*e, No. 17-515 (U.S. Feb. 20, 2018: In *M&G Polymers USA, LLC v. Tackett*, 574 U. S. ___ (2015), the Court held that collective-bargaining agreements according to "ordinary principles of contract law." Before Tackett, the Sixth Circuit had applied a series of so-called "*Yard-Man* inferences," under which courts presumed, in a variety of circumstances, that collective-bargaining agreements vested retiree benefits for life. In this case, the Sixth Circuit held that the same *Yard-Man* inferences it once used to presume lifetime vesting could now be used to render a collective bargaining agreement ambiguous as a matter of law, thus allowing courts to consult extrinsic evidence about lifetime vesting. The Supreme Court reversed, holding that the inference drawn by the Sixth Circuit could not be reconciled with the "ordinary principles of contract law" rule of *Tackett*.

PRISONER SECTION 1983 CASES; ATTORNEYS FEES
Murphy v. Smith, No. 16-1067 (U.S. Feb. 21, 2018): When a prisoner wins a section 1983 case and is awarded fees under section 1988, 42 U. S. C. §1997e(d)(2) requires that "a portion of the [prisoner's] judgment (not to exceed 25 percent) shall be applied to satisfy the amount of attorney's fees awarded against the defendant." In this case, the district court ordered Murphy to pay 10% of his judgment toward the fee award, leaving defendants responsible for the remainder. The Seventh Circuit reversed, holding that §1997e(d)(2) required the district court to exhaust 25% of the prisoner's judgment before demanding payment from the defendants. The Supreme Court affirmed, holding that in cases governed by §1997e(d), district courts must apply as much of the judgment as necessary, up to 25%, to satisfy an award of attorney's fees.

SECURITIES
Digital Realty Trust v. Somers, No. 16-1276 (U.S. Feb. 21, 2018): The anti-retaliation provision in the Dodd-Frank Act does not extend to an individual who has not reported a violation of the securities laws to the SEC.

EFFECT OF PLEA
Class v. US, No. 16-424 (U.S. Feb. 21, 2018): Defendant's guilty plea, by itself, does not bar challenge to constitutionality of the statute of conviction on direct appeal.

IMMIGRATION
Jennings v. Rodriguez, No. 15-1204 (U.S. Feb. 28, 2018): 8 U.S.C. §§1225(b), 1226(a), and 1226(c) do not give detained aliens the right to periodic bond hearings during the course of their detention.

SEPARATION OF POWERS
Patchak v. Zieke, No. 16-498 (U.S. Feb. 28, 2018): Jurisdiction-stripping statute, in which Congress passes

a law depriving federal courts of jursidiction over a pending lawsuit, is a change in the law which can be applied retroactively without violating separation of powers principles.

BANKRUPTCY

Merit Mgmt. Gp. LP v. FTI Consulting, Inc., No. 16-784 (U.S. Feb. 28, 2018): The Bankruptcy Code allows trustees to set aside and recover certain transfers for the benefit of the bankruptcy estate, including certain fraudulent transfers "of an interest of the debtor in property." 11 U. S. C. §548(a). There are limits on the exercise of these avoiding powers, including the securities safe harbor, which provides that "the trustee may not avoid a transfer that is a . . . settlement payment . . . made by or to(or for the benefit of) a . . . financial institution . . . or that is a transfer made by or to (or for the benefit of) a . . . financial institution . . . in connection with a securities contract." §546(e). The Court held in this case that the only relevant transfer for purposes of the §546(e) safe harbor is the transfer that the trustee seeks to avoid.

BANKRUPTCY; MIXED QUESTIONS OF LAW AND FACT

US Bank, NA v. The Village at Lakeridge LLC, No. 15-1509 (U.S. March 5, 2018): The heart of this appeal is the appropriate standard of review applied to a Bankruptcy Court's determination that a transaction occurred at arms' length. The question was mixed of law and fact; the Ninth Circuit reviewed the transaction's status under "clear error" review rather than *de novo*. The Supreme Court affirmed unanimously, holding that "the standard of review for a mixed question depends on whether answering it entails primarily legal or factual work." In this case, the nature of the specific question (whether the parties were acting more or less as strangers in a transaction) required the evaluation of witnesses, etc. and thus was more factual than legal, and therefore was properly reviewed only for clear error.

SECURITIES

Cyan v. Beaver County Employees Retirement Fund, No. 15-1439 (U.S. March 20, 2018): SLUSA did not strip state courts of their longstanding jurisdiction to adjudicate class actions brought under the 1933 Act.

CONSOLIDATION; APPEALS

Hall v. Hall, No. 16-1150 (U.S. March 27, 2018): When one of several cases consolidated under Rule 42(a) is finally decided, that decision confers upon the losing party the immediate right to appeal, regardless of whether any of the other consolidated cases remain pending.

QUALIFIED IMMUNITY

Kisela v. Hughes, No. 17-467 (U.S. April 2, 2018): Reversing the Ninth Circuit, the Supreme Court in a per curiam opinion concluded that Kisela (officer) was entitled to qualified immunity for using deadly force and killing Hughes. When Kisela fired weapon, Hughes was holding a large kitchen knife, had taken steps toward another woman standing nearby, and had refused to drop the knife after at least two commands to do so**.** The Court rejected the Ninth Circuit's view that the shooting violated "clearly established" law, which was based on the Ninth Circuit's application of it own purportedly analogous precedents. Justices Sotomayor and Ginsburg dissented.

FLSA

Encino Motorcars, Inc. v. Navarro, No. 16-1362 (U.S. April 2, 2018): Service advisors at auto dealership's service department are "salesm[e]n . . . primarily engaged in . . . servicing automobiles," and so they are exempt from the FLSA's overtime-pay requirement. This is a 5-4 decision.

FROM THE ELEVENTH CIRCUIT COURT OF APPEALS

BANKRUPTCY
In re: Horne, No. 16-16789 (11th Cir. Dec. 5, 2017): Bankruptcy Code authorizes payment of attorneys' fees and costs incurred by debtors in successfully pursuing an action for damages resulting from the violation of the automatic stay and in defending the damages award on appeal.

TELEMARKETING SALES RULE (FTC ACT)
FTC v. WV Universal Mgmt, LLC, No. 16-17727 (11th Cir. Dec. 15, 2017): Independent of the "common enterprise" standards, party can be held jointly and severally liable with another party for violation of Telemarketing Sales Rule (TSR) for providing substantial assistance to the other party, to the extent of unjust gains.

EMPLOYMENT
Lewis v. City of Union City, No. 15-11362 (11th Cir. Dec. 15, 2017): Lewis was terminated abruptly from her position after about ten years of service, ostensibly because she was absent without leave - notwithstanding that she had only days earlier been placed on indefinite administrative leave. She sued for alleged unlawful disability and/or racial or gender discrimination. Held: genuine issues of material fact concerning the stated reason for the discharge precluded summary judgment.

COPYRIGHT
Roberts v. Gorday, No. 16-12284 (11th Cir. Dec. 15, 2017): This is a copyright infringement action. The creators of a rap song "Hustlin'" (an encomium or paean to the craft of drug distribution, with the refrain "Every day I'm hustlin'"), brought it against the creators of Party Rock Album regarding its creation and Kia Motors' use of the Party Rock Anthem as the soundtrack for one of its now equally famous dancing-hamsters commercials (the alleged infringement is that Party Rock Album's "beat drop" is "every day I'm shufflin'"). District court granted summary judgment based on alleged invalidity of copyright registrations and failure to demonstrate ownership, which district court had raised *sua sponte*. The Eleventh Circuit reversed, holding that lack of ownership or registration invalidity was an affirmative defense which could not properly be raised *sua sponte*, and that undisputed evidence demonstrated that any errors in registration were done in good faith and not with any intent to defraud, thus not impacting validity of registration.

ROOKER-FELDMAN
May v. Morgan County, Georgia, No. 17-11030 (11th Cir. Dec. 21, 2017): May sued the County, contending that she had a "grandfathered" right to engage in short-term rental use of certain real property, despite an intervening regulation which prohibited such use. In prior litigation, Georgia state courts determined that May was barred from contesting the enforceability of the regulation for failure to challenge it within 30 days of passage, as required by Georgia law, and that her action was barred for failing to exhaust her administrative remedies by not seeking a rezoning and conditional use permit from the County before filing suit. In this second suit, the district court dismissed the case based on issue preclusion and the *Rooker-Feldman* doctrine. The Eleventh Circuit affirmed dismissal of the entire case on *Rooker-Feldman* grounds, holding that the claims in the second case were inextricably intertwined with the issues raised in the prior case, such that a ruling in her favor in this case would effectively nullify the state court's judgment in the first case.

QUALIFIED IMMUNITY
Brand v. Casal, No. 16-10256 (11th Cir. Dec. 19, 2017): Homeowners (parents of arrestee) sued two

deputy sheriffs under section 1983 for excessive force and related claims arising from execution of arrest warrant on arrestee. The district court granted summary judgment based on qualified immunity (QI) on some claims but not others, and further split its decision as to the two deputies. The Eleventh Circuit affirmed in part and reversed in part, holding: (1) both deputies were entitled to QI on unlawful entry claim, because entry into a residence is reasonable in executing an arrest warrant if the arresting officer has a reasonable belief [1] that the location to be searched is the suspect's dwelling, and [2] that the suspect is within the residence at the time of entry; here there was both; (2) district court properly denied summary judgment on excessive force claim based on tasing of homeowner, because in the Eleventh Circuit, use of taser on one not violent or aggressive and was not resisting arrest violates "clearly established law"; (3) deputy was entitled to qualified immunity on claim arising from protective sweep of residence, given prior violent encounter and potential presence of someone in rear of home; and (4) qualified immunity was properly denied on bodily privacy claim, because forcing plaintiff to lie in floor for an hour with exposed breasts violated clearly established law.

RULE 25

Lizarazo v. Miami-Dade Corrections, No. 17-12280 (11th Cir. Dec. 29, 2017): District courts have discretion to extend the 90-day deadline (running from the filing of a suggestion of death) within which a substitution of a deceased party must be made.

FALSE CLAIMS ACT

King v. US, No. 15-12031 (11th Cir. Jan. 3, 2018): Section 3705 of the False Claims Act (31 U.S.C. § 3705), under which Plaintiff contended the US was liable for secretly settling his FCA claim without paying him his statutory share, does not waive the US's sovereign immunity.

SHOTGUN PLEADINGS

Vibe Micro, Inc. v. Shabanets, No. 16-15276 (11th Cir. Jan. 3, 2018): District court was within its discretion in dismissing, as being in violation of Rule 8, a "shotgun" pleading (in the form of a Second Amended Complaint, ordered after the first complaint was also deemed non-compliant) of 70 pages with 160 pages of exhibits, containing numerous irrelevancies and inconsistencies.

EXPERT EVIDENCE

Commodores Entertainment Corp. v. McClary, No. 16-15794 (11th Cir. Jan. 9, 2018): District court did not abuse its discretion in excluding expert testimony from an attorney who proffered only legal conclusions.

QUALIFIED IMMUNITY; MONELL LIABILITY

Simmons v. Bradshaw, No. 16-10876 (11th Cir. Jan. 10, 2018): Because it is not the jury's role to determine entitlement to qualified immunity, which is a legal issue, jury instruction relating to excessive force claim was erroneous (thus requiring new trial) for failure to account for the possibility that there could be excessive force and Lin could nonetheless be entitled to qualified immunity.

AMENDMENTS TO PLEADINGS

Cita Trust v. Fifth Third Bank, No. 16-15580 (11th Cir. Jan. 16, 2018): Proper procedure for seeking leave to amend complaint as alternative to dismissal is for plaintiff to seek leave to amend. Where a request for leave to file an amended complaint simply is imbedded within an opposition memorandum, the issue has not been raised properly.

DEFAMATION (FLORIDA LAW)

Turner v. Wells, No. 16-15692 (11th Cir. Jan. 18, 2018): Former professional football coach for the Miami Dolphins is a public figure; his defamation claim failed for inadequate pleading that Defendants acted with malice in publishing allegedly libelous Report.

IDEA; STANDING
LMP v. Broward County School Bd., No. 16-16412 (11th Cir. Jan. 19, 2018): Because their children's IEPs included ABA-based modeling, Appellants, who were Parents of disabled children, lacked standing to assert claim that School Board maintained a policy of never including any ABA-based method or strategy in a child's IEP, in violation of the IDEA, 20 U.S.C. §§ 1400-1482.

FIRST AMENDMENT
Keister v. Bell, No. 17-11347 (11th Cir. Jan. 23, 2018): Touchstone test for determining limited vs. traditional public fora is whether University intended to open area up for non-student use, and not the physical characteristics of the locale.

FIRST AMENDMENT
Keister v. Bell, No. 17-11347 (11th Cir. Jan. 23, 2018)
Intersection of University Boulevard and Hackberry Lane is a limited public forum within UA's campus; test for determining limited vs. traditional public fora is whether UA intended to open this area up for non-student use, not the physical characteristics of the locale.

FALSE CLAIMS ACT
Marsteller v. Tilton, No. 16-11997 (11th Cir. Jan. 29, 2018): The Court vacated the district court's dismissal of an implied certification claim under the False Claims Act and remanded for the district court to reconsider its decision based on *Universal Health Services, Inc. v. United States ex rel. Escobar*, 136 S. Ct. 1989 (2016).

MEDICAL DEVICES; PREEMPTION
Godelia v. Zoll Services, LLC, No. 17-10736 (11th Cir. Feb. 8, 2018): Express and implied preemption for medical device claims under the Medical Device Amendments leave a "narrow gap" through which plaintiffs making medical device claims must proceed. To make it through, a plaintiff has to sue for conduct that violates a federal requirement (avoiding express preemption), but cannot sue only because the conduct violated that federal requirement (avoiding implied preemption). Claims in this case were largely not preempted.

ROOKER-FELDMAN
Target Media Partners, Inc. v. Specialty Marketing Corp., No. 16-10141 (11th Cir. Feb. 5, 2018)
The Court reversed the district court's dismissal of defamation-based claims, regarding litigant's post-state-court litigation statements concerning litigation adversary. Claims were not barred by *Rooker-Feldman* because they were not seeking to undermine a prior state-court judgment, but rather did not accrue until after the statements were made following judgment.

COLLATERAL SOURCE RULE
ML Healthcare Services, Inc. v. Publix Super Markets, Inc., No. 15-13851 (11th Cir. Feb. 7, 2018): Though the case concerns Georgia collateral source law, it discusses at length the Eleventh Circuit's handling of Alabama collateral source issues under Alabama's former common-law regime, and in a footnote marks Alabama's statutory overruling of the common-law regime.

DESEGREGATION
Stout v. Jefferson County Bd. of Educ., No. 17-12338 (11th Cir. Feb. 14, 2018): Proposed "splinter" school district (Gardendale) sought relief from County School System desegregation order to form and operate school system. The district court, after trial, found that discriminatory intent was a motivating factor in the formation of the splinter system, and that allowing splinter system to form would substantially interfere with incumbent system's ability to achieve unitary status. Nevertheless, the district court allowed the proposed splinter district to operate two schools for limited time. The Eleventh Circuit reversed, holding that under established Circuit law, finding of discriminatory intent and frustration of achieving unitary status required that splinter district be denied any right to separate.

ARBITRATION
Dasher v. PNC Bank, No. 15-13871 (11th Cir. Feb. 13, 2018): Three years into pending litigation in which arbitration was being contested by Dasher, RBC unilaterally sent all account holders, including Dasher, a proposed additional term to its account agreements which added arbitration under a "negative option" provision in the account agreement. Dasher did not respond, but the communication of the arbitration agreement by RBC was sent directly to Dasher, even though RBC knew Dasher had counsel. The district court denied arbitration. The Eleventh Circuit affirmed.

EMPLOYMENT
Bowen v. Manheim Remarketing, Inc., No. 16-17237 (11th Cir. Feb. 21, 2018): Bowen sued Manheim under the Equal Pay Act and Title VII, alleging that Manheim discriminated against her by paying her less than her male predecessor. The district court granted summary judgment to Manheim. The Eleventh Circuit reversed, reasoning that a jury could find that prior salary and prior experience alone did not explain Manheim's disparate approach to Bowen's salary over time, especially once Bowen established herself as an effective arbitration manager.

ATTORNEYS FEES; LANHAM ACT
Labinick v. Institute for Neuralogical Recovery, Inc., No. 16-16210 (11th Cir. March 8, 2018): The "exceptional case" standard for awarding attorney's fees in Patent Act cases, as articulated by the Supreme Court's recent decision in *Octane Fitness, LLC v. ICON Health & Fitness, Inc.*, 134 S. Ct. 1749 (2014), also applies to Lanham Act cases.

QUALIFIED IMMUNITY
Shaw v. City of Selma, No. 17-11694 (11th Cir. March 7, 2018): Officer using deadly force was entitled to qualified immunity on all claims, reasonable officer could have believed that decedent posed a serious threat when he was close to and advancing on officer, had a hatchet in his hand, and had ignored more than two dozen orders to drop the weapon.

ALLEN CHARGES
Burkhart v. R.J. Reynolds Tobacco Co., No. 14-14708 (11th Cir. March 7, 2018): District court's providing a "watered down" *Allen* charge to the jury after an initial indication of deadlock, followed later by the giving of the 11th Circuit pattern *Allen* charge, was not an abuse of discretion and did not amount to improper jury coercion.

QUALIFIED IMMUNITY
Gates v. Khokhar, No. 16-15118 (11th Cir. March 13, 2018): Officers were entitled to qualified immunity for alleged arrest without probable cause, where Plaintiff was arrested for violating Georgia's mask

statute, O.C.G.A. § 16-11-38, for donning and refusing to remove a mask during a protest in downtown Atlanta; officers had probable cause, much more than "arguable" probable cause needed for immunity.

EMPLOYMENT
EEOC v. Exel, Inc., No. 14-11007 (11th Cir. March 16, 2018): Punitive damages can be assessed against the employer on a Title VII claim where "either that the discriminating employee was high[] up the corporate hierarchy, or that higher management countenanced or approved [his] behavior[,]" *Dudley v. Wal-Mart Stores, Inc.*, 166 F.3d 1317, 1323 (11th Cir. 1999). *Dudley* remains Circuit law despite its apparent conflict with the multi-factor analysis adopted by the Supreme Court in *Kolstad v. Am. Dental Ass'n*, 527 U.S. 526, 535 (1999). Judge Tjoflat wrote a lengthy dissent. (Ed.: this case seems destined for *en banc* review).

CARMACK AMENDMENT
Essex Ins. Co. v. Barrett Moving & Storage, Inc., No. 16-11526 (11th Cir. March 21, 2018)
Question of first impression in this Circuit: what is the proper test for distinguishing "brokers" from "carriers" under the Carmack Amendment (the latter is liable)? Held: a accepts legal responsibility to transport the shipment.

DISMISSAL; OPPORTUNITY TO AMEND
Woldeab v. Dekalb County Bd. of Educ., (11th Cir. March 23, 2018): District court abused its discretion in dismissing complaint with prejudice without opportunity to amend; it should have advised plaintiff, proceeding *pro se*, of his complaint's deficiency and given him the opportunity to amend to name the proper defendant before the court dismissed with prejudice.

CRIME-FRAUD EXCEPTION TO PRIVILEGE
Drummond Co. v. Conrad & Scherer, LLP, Nos. 16-11090 (11th Cir. March 23, 2018): Crime-fraud exception defeats work product protection when a lawyer and law firm are found to have engaged in a crime or fraud, even if there is no crime or fraud finding as to the client or clients the lawyer(s) or the firm represented.

ERISA
Metropolitan Life & Annuity Co. v. Akpele, No. 16-15677 (11th Cir. March 29, 2018): Party who is not a named beneficiary of an ERISA plan may not sue the plan for any plan benefits.

INFORMED CONSENT
Looney v. Moore, No. 15-13979 (11th Cir. March 30, 2018): Under Alabama law, plaintiff who claims that he did not give informed consent to medical treatment provided as part of a clinical study must show that he was injured as a result of that treatment.

BANKRUPTCY
Caldwell v. Kaufman, Englett & Lynd, PLLC, No. 17-10810 (11th Cir. March 30, 2018): Attorney violates 11 U.S.C. § 526(a)(4) if he instructs a client to pay his bankruptcy-related legal fees using a credit card.

TELECOMMUNICATIONS
Athens Cellular, Inc. v. Verizon Communications, Inc., No. 15-12067 (11th Cir. April 2, 2018): Under the Telecommunications Act of 1996, the denial of a request for authorization to construct a cellular communications tower, if made in derogation of the § 332(c)(7)(B) limitations, is subject to challenge in federal court. "Any person adversely affected by any final action by a State or local government . . . that

is inconsistent with [§ 332(c (7)(B)'s limitations] may, within 30 days after such action . . . , commence an action in any court of competent jurisdiction." 47 U.S.C. § 332(c)(7)(B)(v). The issue in this appeal is whether the TCA's statute of limitations began to run when the Clerk entered a document in the Ordinances and Resolutions books or when the Board formally approved the minutes of the meeting at which it had voted to deny the application. The District Court chose the former event. The Eleventh Circuit reversed.

DPPA

Baas v. Fewless, No. 17-11225 (11th Cir. April 2, 2018): Sheriff's Captain obtained driver license and booking photos of members of a Motorcycle Club who were likely to support a bill pending in the Florida Legislature which would permit open carry of firearms. Captian Fewless determined that presenting Florida's Senate Judiciary Committee with photos of the Club members would "shock the Committee" and bolster support against the Bill's passage. Held: qualified immunity bars Club Members' claims under the Drivers Privacy Protection Act against Captain, where Captain was engaged in authorized acts of lobbying.

FALSE CLAIMS ACT; STATUTE OF LIMITATIONS

USA v. Cochise Consultancy, Inc., No. 16-12836 (11th Cir. April 11, 2018): A civil action alleging an FCA violation to be brought within the later of: (1) "6 years after the date on which the violation . . . is committed," 31 U.S.C. § 3731(b)(1), or (2) "3 years after the date when facts material to the right of action are known or reasonably should have been known by the official of the United States charged with responsibility to act in the circumstances, but in no event more than 10 years after the date on which the violation is committed," id. § 3731(b)(2). In this case, the Relator brought the action more than six years after the alleged violation occurred, but within three years of the time the relator became aware of the claim and communicated the same to the government - though the Complaint was silent on when the government otherwise might have become aware of the claim. Issue of first impression: whether § 3731(b)(2)'s three-year limitations period applies to a relator's FCA claim when the United States declines to intervene in the qui tam action. The district court held that subsection (b)(2) is inapplicable in such cases, dismissing the complaint under the six-year imitation of subsection (b)(1). The Eleventh Circuit reversed, holding that subsection (b)(2) can apply in relator cases where the government declines to intervene. And, because the FCA provides that this period begins to run when the relevant federal government official learns of the facts giving rise to the claim, when the relator learned of the fraud is immaterial for statute of limitations purposes. Here, it is not apparent from the face of Hunt's complaint that his claim is untimely because his allegations show that he filed suit within three years of the date when he disclosed facts material to the right of action to United States officials and within ten years of when the fraud occurred.

LABOR

Transit Connection, Inc. v. NLRB, No. 17-10294 (11th Cir. April 13, 2018): TCI, which operates a public bus service on Martha's Vineyard, appealed an NLRB order directing that it cease and desist from refusing to recognize a Union for drivers previously certified by the NLRB. TCI acknowledged that it refused to recognize and bargain, but claimed that the NLRB abused its discretion in certifying the Union. The Eleventh Circuit, noting that it had appellate jurisdiction under 29 U.S.C. 160(e) and (f) because TCI also does business in Florida, affirmed the NLRB's Union recognition. At the heart of the appeal is the NLRB's Excelsior rule, from Excelsior Underwear, Inc., 156 NLRB 1236 (1966); the issue turned on the provision of "residential" addresses for eligible voters. The NLRB hearing officer found that forty-six percent of the residential addresses TCI provided were "inaccurate or incomplete" given that at least eighteen out of

thirty-nine mailings were returned as undeliverable, and invalidated an election on that basis for non-compliance with the Excelsior rule.

FLSA

Mickles v. Country Club, Inc., No. 16-17484 (11th Cir. April 18, 2018)
Under *Hipp v. Liberty Nat'l Life Ins. Co.*, 252 F.3d 1208, 1216 (11th Cir. 2001), district courts are advised to follow a two-step certification process in FLSA collective actions; in the first, the court evaluates similarly-situated status based on a motion for conditional certification (based almost solely on the pleadings), and then in a second stage, after a fully-developed record, the court typically considers a motion to decertify. In this case, the district court did not follow Hipp because plaintiff didn't timely move for conditional certification (plaintiff waited until the close of discovery in violation of a local rule); nevertheless, several parties filed section 216(b) "opt in" requests. Issue (a question of first impression in every circuit): whether those who filed consents or "opt-in" forms before conditional certification was granted could be considered "parties" to the case. Answer: yes; under 29 U.S.C. § 216(b), an opt-in plaintiff is required only to file a written consent in order to become a party plaintiff.

IDEA; DISABILITY LAW

Durbrow v. Cobb County School Dist., No. 17-11400 (11th Cir. April 17, 2018): Issue 1: whether appellants' claims of disability-based discrimination under § 504 of the Rehabilitation Act ("§ 504"), 29 U.S.C. § 794, and Title II of the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12131 et seq., must be administratively exhausted under the Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. § 1400 et seq. Held: yes. Issue 2: whether the IDEA compels a public school district to provide special education to a student with Attention Deficit Hyperactivity Disorder who displays vast academic potential but struggles to complete his work. Held: child was entitled to neither an IDEA evaluation nor special education because he did not qualify as a "child with a disability," given that (1) he had undisputed academic potential, (2) none of his teachers testified that he was in need of special education, the fact that similar students had the same time-management struggles, (3) he did not exhibit especially alarming conduct warranting special education; and (4) he demonstrated he was learning, while displaying some weaknesses not readily amenable to special-education remediation.