THE QUARTERLY JOURNAL

Chattanooga Chapter of the Federal Bar Association

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AT&T MOBILITY V. CONCEPCION

Did The Supreme Court Just Kill The Class Action?

By Brian T. Fitzpatrick

I suspect the most important decision of the Supreme Court in many years may prove to be last term's decision in *AT&T Mobility v. Concepcion*. Although many commentators have noted that this case may be significant—many have warned that the decision could lead to the end of consumer class actions—I think these warnings have understated its importance: in my view, it is possible that the decision could lead to the end of *all* class actions against businesses.

The case involved a consumer fraud class action filed in federal court. AT&T moved to dismiss and compel arbitration because the Concepcions signed a pre-dispute arbitration agreement. The Concepcions argued that the agreement was unconscionable because it also waived their ability to join a class action. The Supreme Court held 5-4 along ideological lines that the Federal Arbitration Act ("FAA") preempted California's unconscionability law and that the class action waiver was therefore enforceable.

I believe it is possible this case could lead to the end of all class actions against businesses because the only class actions businesses face these days are brought by people with whom businesses are in transactional relationships: consumers, employees, and shareholders. People in transactional relationships are people who can be asked to agree to pre-dispute arbitration. Indeed, in the consumer and employment context, pre-dispute arbitration agreements are already routine and enforced. This is not the case with regard to shareholders—almost no publicly-traded companies ask their shareholders to arbitrate disputes—but I am not sure how much longer this will be the reality. Most commentators seem to believe that there is nothing in federal law that says shareholder securities fraud claims cannot be arbitrated.

If businesses can enter into pre-dispute arbitration agreements with these people, then businesses can also insist that they waive their ability to join a class action. Moreover, after *Concepcion*, it is difficult to see how anything in state law can stop businesses from doing so. To the extent that businesses can be stopped, they will have to be stopped by something in federal law. But it is hard to find anything that might do it.

Some commentators and lower courts believe that the FAA deputizes federal courts with common law powers to decide which provisions in arbitration agreements are worth enforcing and which are not, and, as such, perhaps the FAA itself might bar class action waivers in at least some contexts. The Supreme Court has occasionally said things to support these beliefs, but I doubt the current Supreme Court will embrace them. The FAA commands that arbitration agreements shall be enforceable, and I suspect the textualist, separation-of-powers majority on the current Court will decline to enforce a provision of an arbitration agreement only if there is some other federal statute that irreconcilably conflicts with the FAA and some canon of statutory interpretation that suggests the other statute should thereby trump the FAA. But finding a conflicting statute is difficult. Almost no federal statute under which class action suits are brought even *mentions* class actions, and none of them grant access to class actions; indeed, most of them were enacted well before the opt-out class action was even *created* in 1966. It is true the National Labor Relations Board recently concluded otherwise under a federal labor statute granting employees rights to engage in "concerted activities," but I doubt this decision will be upheld.

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INSIDE THIS EDITION

RULE OF THE DAY

By Katharine Gardner
Law Clerk to United States Magistrate Judge William B. Mitchell Carter

Rules, rules, rules! There are so many: the Rules of Evidence, the Rules of Civil Procedure, the rules for electronic filing and the local rules, just to name a few. I used to consider these rules as a necessary evil, but with experience I have learned they are the legal equivalent of the laws of physics, bringing order to chaos. I'm not so nerdy that I *love* the rules, but I have developed a deep respect for them. In each "Rule of the Day" column, I will spotlight a rule in what I hope will be a humorous or at least interesting way in order to encourage the rule's greater understanding and correct usage. I begin with my favorite rule. (Yes, I have a favorite, and that *is* nerdy.)

My favorite rule is Rule 1 of the Federal Rules of Civil Procedure. Rule 1 states in relevant part that the Federal Rules of Civil Procedure "should be construed to secure the just, speedy, and inexpensive determination of every action and proceeding." In other words, the Rules of Civil Procedure are carefully crafted tools for the efficient administration of justice. They are not weapons of warfare and attempting to use them in this manner can backfire. Let me give you an example.

Several years ago, a discovery dispute was brought to the magistrate judge. Plaintiff was represented by counsel local in this geographical area and defendant was represented by counsel practicing in a boutique firm from a very large Midwestern city. Plaintiff's counsel had emailed defendant's counsel asking for a couple more weeks to respond to written discovery requests because either he or his client (I can't remember which) had been ill. Defendant's counsel refused the extension and when the responses were one week late, defendant filed a motion to compel and demanded attorney's fees and costs. The magistrate judge held a hearing and Defendant's counsel argued vigorously that time was of the essence and that plaintiff should be sanctioned for being late.

Examination of the record revealed discovery was in the early stages with plenty of time left for additional discovery, and plaintiff promised to produce responses shortly. Plaintiff's reasons for the delay appeared genuine. Defendant's counsel's vigorous pursuit of the motion to compel and especially sanctions was puzzling until plaintiff's counsel handed the magistrate judge a printed page from the website of the defendant's law firm. In this website, defendant's counsel boasted to potential clients that it would vigorously represent its clients by "delivering SWAT Team-like blows" to the other side. Then it was clear – defendant's counsel was attempting to use the Rules of Civil Procedure solely to bludgeon the plaintiff – in violation of Rule 1. Defense counsel not only lost its motion but also credibility with the magistrate judge who enjoyed a hearty laugh at defense counsel's expense.

The Clerk's Corner

—Tips From Behind the Computer—

When filing documents in support of motions, remember to file each separately as the event, "Filings in Support of Motion."

Be sure to open your documents before filing to verify that you are attaching the correct document.

Failure to Redact Personal Identifiers:
-See Rules 5.2 and 49.1
The responsibility for redacting personal identifiers rests solely with counsel and the parties.

Stipulations which do not require a judge's signature should be filed using the "Stipulation" event under other documents. Do not file this type of document as a "Motion."

Choosing the Wrong Event:
- If you make this mistake, you will be required to re-file your pleading.
-If you are unsure what event to use, please call the clerk's office.
-Tip: Use the search function to find the correct event.

A Certificate of Corporate Disclosure/Interest is required by all *nongovernmental* corporate parties and must be filed with the first appearance, pleading, petition, motion, response or other request addressed to the court.

LABOR PAYNE

Pickled Eggs and Boiled Hot Dogs

A baby lawyer reflects upon his first steps as a federal practitioner.

By William H. Payne IV
Associate, Burnette, Dobson & Pinchak

At the start of this year, I ate a boiled hot dog in a convenience store in order to get ready for a federal trial. It was my first – trial, that is, and I also ate two pickled eggs.

The hot dog was genuinely good. In fact, the witness, whom I was prepping for trial, provided me with credible proof of the hot dog's goodness in the form of a framed "review" from the *Atlanta Constitution-Journal* praising the store's boiled hot dog quality.

This wasn't a hot dog trial – I'm not going into the facts – but it immediately became not a non-hot dog trial for me. And the pickled eggs, if not genuinely good, were genuine to be sure. I ate them in the car because you can't just drive around with a pair of pickled eggs in a zip lock bag on your passenger seat.

Thinking back on the eggs, I received them as a sort of an *Alice in Wonderland* trope to shrink me down or make me tall enough to understand a basic truth about trial: there is a point at which the law stops and the facts come back, boiled, pickled, credible and incredible.

Any given timeline or client backstory contains too many facts to fit in the fact corral. Philosopher Jacque Lacan refers to this overabundance of factual impression generated by the world as the 'Real,' with a capital R. The Real is always trying to squeeze through the cracks of our preconceptions and destroy the safety of our daily myopia. As lawyers, our job is to compress, tame, subdue, and then repackage the Real into an especially palatable format that will stand politely in the path of stare decisis.

Our clients come in the door overflowing with facts. We pare them down on legal pads, shrink them into discovery responses, stuff them into accordion folders, test drive them on Westlaw or Lexis, and then spit them out in the form of an 8 ½ x 11 inch rectangle of bleached paper to be judged "as a matter of law." Boom! Your facts fit the law (sort of)!

At least, that's how the job feels right up until you experience your first trial, where the facts come bursting back out like pickled eggs in a zip lock bag. People are real and messy and who knows what they are going to say? What if the narrative you worked so hard to superimpose on other people's memories, other people's lives, melts, thaws, and resolves itself into a dew?

As science fiction guru, Philip K. Dick, observed, reality is that which, when you stop believing in it, doesn't go away. At trial, no matter what was actually happening out there in the great wide open while you were writing briefs, you have to face the music. To misquote Donald Rumsfeld: you go to war with the facts you have.

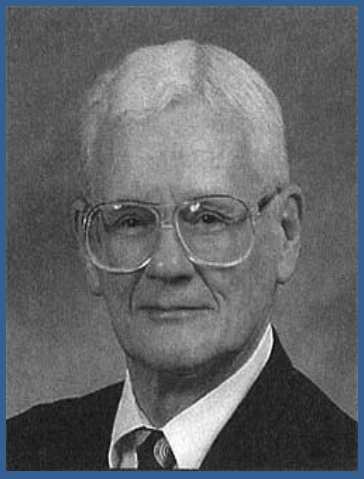
This realization dawned on me gradually as trial approached and then hit me all of a sudden at one very particular moment:

After *voire dire,* when the final jury was seated, I tried looking at them to discern their thoughts, to judge the outcome, to put myself in their shoes as Atticus Finch would have us do.

But it didn't work, because I realized, as I cut my eyes in their direction, that they were looking at me, at us, at our client. Impassive, they were judging us with the same hidden calculation that we might judge a client who has just walked in the door. Our facts became the property of their imaginations, and our foibles became the fodder for their private choices.

All of this is just to say that I hope I get to participate in more trials. (For the free hot dogs?) Also, it strikes me that trial provides the necessary "comes around" to "what goes around." As civil trials become scarcer, we run the risk of compressing our clients' cases into streamlined sugar cubes for pin cite purposes without tasting the pickled egg of someone else's cold, slippery surmise.

IN MEMORIAM
THE HONORABLE JUDGE JOHN Y. POWERS



August 1, 1929 – March 29, 2012

TALENTED TENTH LEADERSHIP PROGRAM

Howard School of Academics and Technology

The Chattanooga Chapter of the FBA is a proud co-sponsor and participant supporting the Talented Tenth Leadership Program at Howard High School. The mission of this program is to empower high school aged youth to influence their peers, their government and their economy as agents of social change. The students involved at Howard are creating a plan to transform their high school into a Pre-K through Twelth grade, year-round, career-technical institution. The students are planning to present their plan to presidential appointees at the justice department and officers at the department of education. They have already given a persuasive presentation to executives at Volkswagon in an attempt to procure a technical school partnership. If you would like to become involved in the program, please contact chapter members Katharine Gardner or Terra Bay.

ATTENTION MEMBERS WHO PRACTICE IN THE WINCHESTER DIVISION

Due to budgetary concerns, the federal government is considering closing up to 60 court sites across the country. The only courthouse in the Eastern District of Tennessee that may be affected is the Winchester Divisional Office. If you are a practitioner who litigates in Winchester and you would be significantly impacted, you may contact your Congressman to express your concerns. Contact information for Chuck Fleischmann, 3rd Congressional District Representative, may be found at https://fleischmann.house.gov/contact-me. If you are in the 4th Congressional District, contact information for Representative Scott DesJarlais is available at http://desjarlais.house.gov/Contact/.

Concepcion, cont'd

In other words, it is hard to overstate the potential significance of *Concepcion*. Any rational business would like to insulate itself from class action liability. After *Concepcion*, it is difficult to see why businesses won't be able to do so with respect to suits brought by consumers, and it may very well be the case that businesses can now do so with regard to suits by employees as well. It is even possible businesses may eventually be able to do so with respect to suits by shareholders.

In short, unless Congress amends the FAA, I predict we will look back in a few years and conclude that the Supreme Court has just handed the business community its biggest victory in a very long time.

Brian T. Fitzpatrick is an Associate Professor of Law at Vanderbilt Law School. His recent study of class actions is entitled *An Empirical Study of Class Actions and Their Fee Awards*, 7 J. Empirical L. Stud. 811 (2010).

A MESSAGE FROM THE CHAPTER PRESIDENT

by Christopher T. Varner

The Chattanooga Chapter of the Federal Bar Association is expecting to have a big year in 2012 and would like for all of YOU to be involved! There are many opportunities for volunteers to participate in Chapter activities.

Currently, the Chattanooga Chapter is assisting the Howard High School Talented Tenth program as those high school students formulate business proposals and practice public speaking. If you are interested in participating, please contact Kathy Gardner with the Court or Terra Bay with the U.S. Attorney's office to learn more.

Would you like to be involved in giving tours of the Joel W. Solomon Federal Building to groups of students? Spencer Elg at Husch Blackwell is spearheading the coordination of volunteers to meet the requests for tour group leaders.

Are you interested in participating in the Constitution Day event in September that the Chattanooga Chapter holds for area high school students? If so, please contact Gary Henry at Gearhiser Peters Elliott & Cannon for additional details.

Do you have a particular area of expertise that would allow you to present a CLE event for other area attorneys? If so, please feel free to discuss that with Kevin Hudson at Miller & Martin.

Would you like to help organize a social event for members of the Chattanooga Chapter? Jeff Matukewicz of Baker Donelson is the chair of our social committee and could use your assistance.

The Chattanooga Chapter would like to congratulate its Judicial Liaison, the Honorable Susan K. Lee on her recent retention for another term as United States Magistrate Judge. She was recently sworn in for her new eight-year term, which begins in July of 2012.

UPCOMING EVENTS

MAY 17

-NEW ADMISSIONS CEREMONY/FEDERAL PRACTICE SEMINAR

MAY 28

-MEMORIAL DAY HOLIDAY

JULY 4

-AMERICAN INDEPENDENCE DAY

Our July edition will feature a cover story penned by Tom Greenholtz, Adjunct Professor of Political Science at the University of Tennessee at Chattanooga and Shareholder at Chambliss, Bahner & Stophel, P.C. In addition to having developed a thriving and successful litigation practice, Mr. Greenholtz has lectured on, authored, and presented a number of distinguished pieces revolving around Constitutional law topics.

FOR MORE INFORMATION ABOUT THE CHATTANOOGA CHAPTER OF THE FBA, TO BECOME A MEMBER, OR TO RENEW YOUR MEMBERSHIP, CONTACT CHATTANOOGAFBA@GMAIL.COM.

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The Sixth Circuit Judicial Conference is being held in Lexington, Kentucky on April 24-27, 2012. While the deadline for on-line registration has passed, the Conference is accepting walk-up registrations, on a first-come first-serve basis. For more information, please visit http://www.ca6.uscourts.gov/internet/judicial_conference/2012/contact.html.

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