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Keynote Address

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SYMPOSIUM: U.S. ARBITRATION LAW IN THE WAKE OF *AT&T MOBILITY V. CONCEPCION*

KEYNOTE ADDRESS

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First I want to thank Dean McConnaughay for his very generous and charitable introduction, which I appreciate very much. I also want to thank the editors of the *Yearbook*; I'm honored to have been asked to be part of this program. I'm aware of this law school and its history, and I really thank you for thinking that I was worthy to be part of this program in the role that I was asked to play.

I am also honored to dedicate my remarks, such as they are, in memory of the late Professor Hans Smit. I remember not too long ago, he did a program at Fordham Law School, and I recall how soothing and calming he was in dealing with a lot of difficult issues. I couldn't help but think, as I thought about him the last few days, how important he would be right now in making sense of all these issues that we're dealing with in terms of this case of April of 2011.

I also would like to dedicate my remarks to my two mentors who pushed me into the field of arbitration—the late Leslie Arps, who was the founding partner of Skadden Arps, and William Meagher. And, I want to acknowledge the important role that the American Arbitration Association has played in my life, in introducing me to the field of arbitration in so many different ways. I also wish to acknowledge Tom Carbonneau, who I met many years ago, too many I suppose, when he was a Visiting Professor at Fordham Law School. It was really a delight for me to come to know Tom at that time.

In thinking about this case, I've done nothing else actually, in the last few weeks, than think about it and read it and read it again, to see if I understood it. I had the good pleasure of a colleague I teach with at Fordham, Joel Davidson, who picked me up yesterday, and we drove down from Westchester County, and it won't surprise you that we spent almost five hours in the car talking about the case. I suspect when today's program is over, and when we go back—we're going to be talking about it. I almost feel like, as I look at the distinguished faculty that you have assembled, the boy who survived the Johnstown Flood. He just kept talking about surviving the flood, and he arrives at heaven and St. Peter says, "You are entitled to one wish." The boy said, "Well, I want to talk about the Johnstown Flood," and Peter says, "Ok, your wish is granted, talk about it, but keep in mind, Noah is in the audience." There are a lot of Noahs here when it comes to this case and understanding the case.

I'm going to assume that most of you have read the case and are familiar with the case. In *AT&T Mobility*, the contract provided for arbitration but prohibited class action arbitration.[1] A California case, *Discover Bank*,[2] prohibited class action waivers in court or in arbitration and the Supreme Court, by a five to four vote, which won't surprise you, held that the California *Discover Bank* rule was preempted by the federal arbitration statute and, therefore, the waiver

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[1] AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740, 1744 (2011).

[2] Discover Bank v. Superior Court of Los Angeles, 113 P.3d 1100 (Cal. 2005).

was enforceable in a contract of adhesion as written. The dissent believed that the *Discover Bank* rule was valid and should have been enforced.[3] In short, the case limited the role of the state, federalism, in protecting consumers and decided that class action arbitrations were suspect, as I see it.

How to view *AT&T Mobility*—its meaning and significance? To some extent, it depends on a number of questions. But before going to the questions that for me are suggested by the case, I think it's important to take account of the fact that arbitration has been with us for a long time.

One can find evidence of arbitration systems in ancient times, and there's a lot of reference to arbitration in the scripture, in the writings and moralizing of Aristotle and Cicero, and of many other people. Arbitration has been used historically for all kinds of private and public disputes. Indeed, you find it in the United Nations Charter as a means for resolving disputes among nations. As we know, fifty years ago, fifty-one years ago, a year before I graduated from law school, the United States Supreme Court decided three cases known as the Steel Workers Trilogy,[4] under the Labor Management Relations Act[5]—the labor statute. And those cases still today are prevalent and celebrated in a sense because of, and there have been tributes in the past year or two that ties to its fiftieth anniversary, the important role they have played certainly in the field of labor law, but far beyond the field of labor law in the field of arbitration generally. They gave a broad sweep to arbitration and subjects to be covered in arbitration; suggested that doubts about whether something was covered by an arbitration clause or not should be referred to the arbitrator to decide and gave support as well to decisions by arbitrators in the form of arbitration awards.

And of course we have the FAA,[6] it came along in 1925 and in the period that the Trilogy played itself out; the FAA became a much more serious foundational basis for arbitration as a result of decisions by the United States Supreme Court. Without those cases, I'm not so sure that we'd be talking about the FAA in the terms we are at the present time. But it was the Supreme Court that sort of took the generality of that statute and made it so important in supporting the field of arbitration. So you've got those two statutes, and in response to those statutes, law schools have added courses and programs, bar associations, also. ADR provider organizations have come along to educate, to train, and to prepare people for roles as arbitrators. We all know arbitrators today handle the most difficult of controversies in terms of dollars, in terms of the significance of cases, and in terms of industry. And so a view of arbitration that suggest that it is not a very important part of our system of justice, largely a private justice system, but not exclusively, would be unfaithful to the history of what's happened with respect to the subject of arbitration. I can't believe it has expanded the way it has, and I've seen it for fifty years both as a practicing attorney and as a legal educator.

Now, how to view the case? To some extent, its meaning and significance depends on how one asks questions concerning its import. If the decision simply means a court should enforce arbitration agreements according to their terms, then the case adds little to the realm of arbitration. You've got an agreement and *the* agreement—the arbitration agreement is enforced

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[3] *Concepcion*, 131 S. Ct. at 1757 (Breyer, J., dissenting).

[4] United Steelworkers of Am. v. Am. Mfg. Co., 363 U.S. 564 (1960), United Steelworkers of Am. v. Warrior & Navigation Co., 363 U.S. 574 (1960), United Steelworkers of Am. v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960).

[5] Labor Management Relations Act, 29 U.S.C. §§ 141-181 (2011) (the Taft-Hartley Act).

[6] Federal Arbitration Act, 9 U.S.C. §§ 1-16 (2011).

according to its terms. That's the question. If the decision means that consumers can have at least some significant substantive and procedural rights impaired by contracts of adhesion—that sparks a different discussion. If the case means that the courts are hostile to class action arbitration, to class actions in general, yet another debate can result. If it means that the states have no legitimate right or ability to promote fairness in arbitration—that poses issues involving the Commerce Clause of the Constitution and federalism. If the case has created a situation where consumers can be deprived of their right to sue in court and be deprived of any meaningful right to vindicate statutory rights in arbitration, we could become embroiled in a high stakes political debate. If the case is viewed as a narrow holding, that it does not prevent a court from intervening to facilitate or preserve the prosecution of claims based on statutory rights, then the case may not mean much at all. If *AT&T Mobility* gives courts the ability to protect the vindication of some statutory claims, say federal statutory claims, but perhaps not state statutory claims, one can readily argue that such is not a well-reasoned result.

If the case is read as courts interpreting Section 2 of the Federal Arbitration Act, including defenses of arbitration based on unconscionability, there are arguments that the case is departing from major prior law. It is also possible that the case means that if the parties provide for construction of the arbitration clause under the Federal Arbitration Act, as opposed to state law, different decisions can result from factually similar issues.

If *AT&T Mobility* applies only to the consumer contract arbitration clause and not to employment law cases or contracts which are actually negotiated by the parties, it seems to me that one finds unwarranted differentiation between different types of cases. If *AT&T Mobility* reflects only a judicial hostility toward class actions—is that judicial hostility likely to impact future decisions involving other aspects of the construction of the Federal Arbitration Act?

I'm just saying that these questions would make a very good exam question, and frankly I don't think I'd have any other questions if I was putting together an exam for law students. Now, I tend to approach judicial decision making cautiously, and I'm supported in that view by Justice Cardozo's *The Nature of the Judicial Process*.[7] You may have a statement of law, a rule of law, but key to it all is going to be the application of that rule to facts.

There was a television show when I was growing up that said, "You know, what are the facts? Give me the facts." Judge-made law takes rules and applies them to facts, and if we know anything about the history of American law, in my opinion, is that it's a law that evolves. It's a law that adapts to changes in the social order, to changes in the economy, to changes in one's way of life. So, I hesitate rushing to condemn the Court for this decision. I tend not to be a protestor anyway. I do my protesting in expressing my views on different subjects. When I read the case, as I've done too many times, it can be viewed much more narrowly than read by some of the very esteemed persons to which reference has already been made. You know their view. And who knows who's right? You just have got to give it time. Yogi Berra tells us, predicting—it's sort of risky business. But, you've got to stake out a view, or otherwise you're not living.

So when I read the case, what is it I see? I'm not going into the whole factual record and whether there's a factual basis for what the majority said. What the majority said, as I read it in a number of places, was the California *Discover Bank* rule was a rule that was hostile to arbitration clauses and to arbitration agreements. The Court cites two cases in recent years. One case,

[7] BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS (Yale Univ. Press 1964) (1921) (containing a series of lectures delivered by Justice Cardozo in 1921 as part of the William L. Storrs Lecture Series at Yale Law School).

involving a Montana rule, a Supreme Court case—*Doctor's Associates*,[8] said that when it comes to the arbitration provision in a contract, it has to be highlighted. If it is not highlighted, that arbitration clause is gone. The Supreme Court came along, and determined that this Montana rule is preempted.

And then there's the other case, the *Perry* case.[9] The California courts' approach to arbitration has had a history that one could study. That history may be relevant in some nuanced way to the outcome in this case, I don't know. The *Perry* case, as I read it, says that a state statutory claim that requires you first to have an administrative adjudication before you can have arbitration for that claim, even though the arbitration clause applied to the claim, is stricken—preempted.[10]

Now yesterday, another opinion dealing with federalism in this context was handed down.[11] A West Virginia state rule that barred arbitration agreements in the nursing home area was preempted. I haven't read the case yet, but my colleague, Joel Davidson, read the case overnight and he shared with me that the case goes back to state court because it says, "Even though we've stricken the state rule that said you can't have arbitration in the nursing home industry, because that's preempted, it doesn't mean that that clause might not be subject to another analysis that would lead to its invalidity based on law that's not geared to arbitration as such." Very significant case.

The Justices, they knew this program was taking place today, and so the Court wanted to introduce that case into the program. So I see, as a possible reading, that what the Court did here was follow what it was doing in other cases, such as the ones I just discussed. So, you can't get too excited about the *AT&T Mobility* decision; we just don't know enough about it and its significance.

I see in the Court's opinion, that they did view the *Discover Bank* rule as going after arbitration clauses and invalidating them. Class action waiver clauses, they said, "Can't do that." And then they had a lot of discussions about the difference between bilateral arbitration and class action arbitration. Now whether or not the court should have gotten into interpreting the clause to begin with, rather than the arbitrators, is another issue. I think you can find in *Prima Paint*[12] and *Southland*[13] and other cases, support for the view that the court should have let this question go to the arbitrator. Who knows?

So the second thing is that the result here should not surprise us. In April of 2010, the Supreme Court in the *Stolt-Nielsen* case said that a class action which resulted in that matter, should have had a clause in the contract, an express clause, in the context of that case.[14] The Court basically said, "There's no clause in the contract that's supportive of a class action, and that arbitration is a matter of agreement." And the parties themselves said, "We had not agreed that there could be a class action, or that the contract covered class actions." So the Court took that as a statement that the contract had nothing in it to support an interpretation that there was an agreement by the parties to have a class action as a possibility. And the Court said, "Well there may be certain circumstances where a contract does not have an express clause but that we still

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[8] Doctor's Assoc.'s, Inc. v. Casarotto, 517 U.S. 681 (1996).
[9] Perry v. Thomas, 482 U.S. 483 (1987).
[10] *Id*. at 489-90.
[11] Marmet Health Care Ctr., Inc. v. Brown, 132 S. Ct. 1201 (2012).
[12] Prima Paint Corp. v. Flood & Conklin Mfg., 388 U.S. 395, 403-04 (1967).
[13] Southland Corp. v. Keating, 465 U.S. 1, 11-12 (1984).
[14] Stolt-Nielson S.A. v. AnimalFeeds Int'l Corp., 130 S. Ct. 1758, 1775 (2010).

could find in that contract through implication, maybe through custom and practice in the industry, a basis for class action." Of course we're not dealing with such a contract here, we're dealing with a class action waiver, but there's not enough to say to anybody that has been following this area, "What will be the next step." Something like a class action is possible through context.

Another way to look at the case is to take a look at the underlying contract provision. Yes, it is quite a long provision, but it's not a bad clause on its face. Now, I recognize that for somebody with a $30 claim, one might say, "Unless I have a class action, no system is going to work for me." But when you look at the contract in terms of the employer picking up the cost, and in terms of venue, venue is where the consumer is, the consumer has an option to go to small claims court. The consumer is not stuck with the arbitration provision. We know there is no jury trial in small claims court, but the Court says that there are a lot of incentives to use this process. This is not a tainted process; it depends on how you look at it.

The way I looked at it, having seen many terrible contract clauses and arbitration systems in my judgment, is that this one is pretty good. One problem, however, is that if you have a $30 claim, you are probably not going to spend time on this system. So, that becomes part of the difficulty of the case and its outcome.

My view is that you have got to give it some time to see how this case is going to play out. After learning of yesterday's *Marmet* case, my remarks haven't changed. You've got federal statutory claims, people have signed contracts, and they can't pursue those claims in the processes of those statutes because they've agreed to arbitration. So, arbitration becomes the forum, and it has certainly been my view of the law, of the practice, that when people give up federal statutory claims because there's an arbitration provision, the process has to be adequate for an effective vindication of those claims. The Second Circuit has several cases, and one in early February, where they have not been accepting the wisdom of the *AT&T Mobility* case, which says these class action waiver provisions are enforceable. Therefore, you have to go through an individual arbitration. The Second Circuit, dealing with statutory claims, has said if you can't get an effective vindication via arbitration, then that class action waiver clause goes.

So, we've got some testing going on. We've got some developments going on to watch. The Labor Management Relations Act has a section that gives employees the ability to have concerted action,[15] and there's been a view that you can't take that away from them simply because there's an arbitration provision. I think we've got a lot more to see before we can draw conclusions on this case.

Now I am worried about federalism. In a court that appeared to have some history in federalism, in terms of the majority—where is federalism after *AT&T Mobility*? Well, I think with federalism, we've got some evidence. While there's no opinion in the West Virginia *per curiam* opinion,[16] it says, "Go back to figure out what's there in the state." It is still alive! So, those are my reflections.

I would like to end my remarks, and I look forward to learning more about this subject from the great, great faculty that you have assembled. In my final analysis, I am reminded of the nature of the judicial process, the evolution of law, and its application to the facts of cases. Justice Cardozo in his classic work, he was our Chief Judge in New York, as you're well aware,

[15] Labor Management Relations Act, 29 U.S.C. §§ 141-181 (2011) (the Taft-Hartley Act).
[16] *Marmet*, 132 S. Ct. 1201.

and served on the United States Supreme Court, gave a series of lectures at Yale Law School[17] that still remain, in my judgment, among the most important literature out there having to do with the nature of the judicial process. He said that the application of the rule of law makes up the bulk of the business of the courts. The facts are important to the litigants involved in them. They call for intelligence and patience and reasonable discernment on the part of the judges who decide these cases where you're applying a rule to facts. But, they leave the jurisprudence where it stood before when applying rules to facts. That's what he said. It is a process, he said, of search and comparison, requiring the balancing of judgment and the testing and sorting of considerations of analogy, and logic, and integrity, and utility, and fairness. I end with a note that a private justice system such as arbitration, not acting on principles of fairness, is a system not worthy of the title, "Justice."

Thank you very much.

[17] William L. Storrs Lecture Series; *see* CARDOZO, *supra* note 6.