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The Great Escape: How One Plaintiffs Sidestep of a Mandatory Arbitration Clause Was Applied to a Class in *Bickerstaff v. SunTrust Bank*

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The Great Escape: How One Plaintiff's Sidestep of a Mandatory Arbitration Clause Was Applied to a Class in *Bickerstaff v. SunTrust Bank*·

I. INTRODUCTION

For decades, class action lawsuits have played an integral role in the American legal system because of their ability to combine a large number of small claims into an action large enough to garner the attention of both defendants and courts.[1] While class actions have undoubtedly provided a crucial service to many Americans, several key questions have persisted regarding the authority of the named party or class representative. Specifically, courts have struggled to define the named party's ability to assemble the class and launch the action. In both the federal courts and the

* I would like to extend my sincere gratitude to Professor Patrick Longan for his immensely helpful advice. This Casenote benefited greatly from his input. I would also like to thank Shannon, Mom, Dad, and Ethan for their constant support.

1. For a general discussion of class actions in Georgia, including policy concerns and practical application, see Jeffrey G. Casurella & John R. Bevis, *Class Action Law in Georgia: Emerging Trends in Litigation, Certification, and Settlement*, 49 MERCER L. REV. 39 (1997) (arguing that class actions can fill a vacuum created when courts and legislatures fail to pursue causes of action that adversely affect certain segments of society). *See also* MARTIN H. REDISH, WHOLESALE JUSTICE: CONSTITUTIONAL DEMOCRACY AND THE PROBLEM OF THE CLASS ACTION LAWSUIT 1, 21 (2009) (arguing that class actions can have potentially massive benefits to society, though they can also be used as engines of chaos in the legal system).

courts of Georgia, a trend towards giving more power to the named plaintiff has emerged. In *Bickerstaff v. SunTrust Bank*,[2] the Georgia Supreme Court was given an opportunity to continue this trend, and it did just that.

In *Bickerstaff*, the court was presented with a case of first impression as it dealt with the question of whether a party who files suit and attempts to certify a class may satisfy a contractual limitation period for "opting out" of a mandatory arbitration clause on behalf of absent class members. The court answered with a resounding "yes," and in doing so, it greatly increased the power the named representative to a class action possesses. This trend will have lasting effects, even in spite of the Supreme Court of the United States' arbitration-friendly ruling in *AT&T Mobility LLC v. Concepcion*,[3] where the Court held that the Federal Arbitration Act[4] preempts many state law challenges to arbitration clauses. The importance of *Bickerstaff* is further evidenced by SunTrust Bank's (SunTrust) unsuccessful appeal to the Supreme Court of the United States.

II. FACTUAL BACKGROUND

SunTrust included a mandatory arbitration agreement in every contract it entered into with depositors.[5] In 2010, these arbitration agreements were deemed unconscionable by the United States District Court for the Southern District of Florida.[6] As a result of this judgment, SunTrust elected to amend its mandatory arbitration clause.[7] The new contract allowed depositors to opt out of the mandatory arbitration agreement if they sent SunTrust a written notification which expressed that desire within a certain window of time.[8]

However, just before SunTrust altered the terms of its contract, Mr. Jeff Bickerstaff, Jr. (Bickerstaff), a SunTrust customer and depositor,

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2. 299 Ga. 459, 788 S.E.2d 787 (2016).

3. 563 U.S. 352 (2011).

4. 9 U.S.C. §§ 1-16 (2012).

5. *Bickerstaff*, 299 Ga. at 459, 788 S.E.2d at 789.

6. *See In re* Checking Account Overdraft Litig., 734 F. Supp. 2d 1279, 1292 (S.D. Fla. 2010). However, as the court in *Bickerstaff* points out, this case was subsequently overturned in *In re Checking Account Overdraft Litigation, MDL No. 2036*, 459 F. App'x 855, 857 (11th Cir. 2012), and in the landmark case, *AT&T*, 563 U.S. at 352, the Supreme Court of the United States held that a class action waiver in a contract arbitration clause is enforceable, and any state law ruling that such a clause is unconscionable is preempted by the Federal Arbitration Act. *See Bickerstaff*, 299 Ga. at 460, 788 S.E.2d at 789 n.2.

7. *Bickerstaff*, 299 Ga. at 459-60, 788 S.E.2d at 789.

8. *Id.* at 460, 788 S.E.2d at 789.

filed a complaint against SunTrust. Bickerstaff claimed the bank's overdraft fee amounted to usury, and he filed suit on behalf of himself and all others similarly situated. After this complaint was filed, SunTrust notified all of its depositors, including Bickerstaff, that there was a new contract, and this new document would control all future dealings. Bickerstaff was not aware of the new arbitration provision or the window of time available to reject it when he filed his lawsuit.[9]

Upon receiving Bickerstaff's complaint, SunTrust immediately filed a motion to compel arbitration. The trial court denied this motion, holding that Bickerstaff had substantially complied with the new deposit contract's notification requirements by filing his complaint. Bickerstaff then moved to certify a class of all Georgia citizens with a SunTrust deposit agreement who had at least one overdraft of under $500 resulting from an ATM transaction, and who paid an overdraft fee on that transaction in the last four years. This motion was denied.[10]

Both SunTrust and Bickerstaff appealed the trial court's ruling.[11] SunTrust argued the trial court erred when it declined to compel Bickerstaff to arbitrate his claim, but the Georgia Court of Appeals affirmed the trial court's holding that Bickerstaff's complaint satisfied the notice requirement. Bickerstaff, on the other hand, appealed from the trial court's denial of his motion for class certification. The court of appeals affirmed the trial court's denial of class certification, holding that Bickerstaff's avoidance of the mandatory arbitration clause applied to him and him alone, and, because the other potential members of Bickerstaff's class had almost certainly not opted out of the arbitration agreement within the allotted time, Bickerstaff's class would be a class of one. Because such a result is unallowable under the numerosity requirement of section 9-11-23 of the Official Code of Georgia Annotated (O.C.G.A.),[12] the attempt to

9. *Id.*

10. *Id.* at 461, 788 S.E.2d at 790.

11. *See* Bickerstaff v. SunTrust Bank, 332 Ga. App. 121, 124, 128, 770 S.E.2d 903, 907, 909 (2015).

12. O.C.G.A. § 9-11-23 (2015 & Supp. 2016). See Part III for more discussion on this statute and its application in Georgia. In deciding that Bickerstaff's proposed class was defunct, the court of appeals looked to the numerosity requirement, and held that, because only Bickerstaff had escaped the arbitration clause, he was the only class member, and thus the class lacked numerosity. *Bickerstaff*, 299 Ga. at 462, 788 S.E.2d at 790-91. For a more detailed analysis of the operation of § 9-11-23, see *Georgia-Pacific Consumer Products, LP v. Ratner*, 295 Ga. 524, 762 S.E.2d 419 (2014).

certify a class failed according to the court of appeals.[13] Bickerstaff appealed from the court of appeals judgment, and the Georgia Supreme Court granted certiorari.[14]

III. LEGAL BACKGROUND

A. Strength in Numbers: O.C.G.A. § 9-11-23

In the state of Georgia, class actions are governed by O.C.G.A. § 9-11-23.[15] This code section was based on Federal Rule of Civil Procedure 23,[16] and its language mimics that of Rule 23 almost without deviation.[17] This uniformity means Georgia state courts often analyze federal courts' interpretations of Rule 23 in adjudicating questions regarding O.C.G.A. § 9-11-23.[18] O.C.G.A. § 9-11-23(a) sets out four requirements that must be satisfied in order for a class action to be appropriate: (1) the parties must be so numerous that joinder would not be practicable; (2) there must be questions of law or fact common to the class; (3) the claims or defenses of the representative parties must be typical of the claims or defenses of the class; and (4) the representative parties must be able to fairly and adequately protect the interests of the class.[19] Additionally, O.C.G.A. § 9-11-23(b) provides a list of situations where class actions are appropriate vehicles for remedy.[20] First, a class action may be appropriate when separate actions might result in inconsistent judgments, or when these individual judgments might impair or impede the interests of the other parties.[21] Second, a class action may be appropriate when the party opposing the class has acted or refused to act in a manner generally applicable to the class as a whole, making class-wide judgment proper.[22] Third, a class action may be appropriate when the court finds that the common questions of law or fact predominate over any individual concerns, and a class action is the best way to provide a remedy when the situation is viewed in light of the interests of the individual members in controlling the litigation, the extent of any already ongoing litigation, the

13. *Bickerstaff*, 299 Ga. at 462, 788 S.E.2d at 790-91.
14. *Id.* at 461, 788 S.E.2d at 790.
15. *See* O.C.G.A. § 9-11-23.
16. FED. R. CIV. P. 23.
17. *Compare* O.C.G.A. § 9-11-23, *with* FED. R. CIV. P. 23.
18. *Ratner*, 295 Ga. at 525, 762 S.E.2d at 421 at n.3.
19. O.C.G.A. § 9-11-23(a).
20. *See* O.C.G.A. § 9-11-23(b).
21. O.C.G.A. § 9-11-23(b)(1).
22. O.C.G.A. § 9-11-23(b)(2).

desire to keep the litigation in a particular forum, and the difficulties likely to be encountered pertaining to the management of the class.[23]

B. For Whom the Statute Tolls: The Power of Class Representatives to Toll the Statute of Limitations for the Whole Class in American Pipe & Construction Co. v. Utah

In the landmark case *American Pipe & Construction Co. v. Utah*,[24] the Supreme Court of the United States began the trend of granting more power to the named plaintiff, as the Court held that the named party's commencement of the class action suspends or "tolls" the running of the statute of limitations for all asserted members of the class.[25]

In 1964, the United States filed civil complaints against American Pipe & Construction Co. for conspiring to restrict the trade of steel and concrete piping. After lengthy negotiations, a final judgment was agreed to on May 24, 1968, and this agreement enjoined the defendant from violating antitrust laws.[26] Almost a year later, on May 13, 1969, the state of Utah launched a class action against American Pipe & Construction Co., alleging the company had conspired to rig prices of concrete and steel. Utah claimed its suit represented various public bodies, including state and local agencies who had used the pipes provided by the defendant. This suit was found to be within the applicable statute of limitations, as it was filed less than a year after the original judgment. However, the defendants moved for an order stating that the plaintiffs could not proceed as a class. The district court judge granted the motion, holding that the class did not satisfy the numerosity requirement of Rule 23 because there were not enough state and local entities that could demonstrate injury to justify the class.[27] Eight days later, more than sixty towns, municipalities, and water districts in Utah filed motions under Rule 24(a)(2)[28] to intervene as plaintiffs as of right, or, alternatively, to intervene by permission under Rule 24(b)(2).[29] Each of these parties had been claimed as members of the original failed class, and the district court denied these motions, holding that the statute of limitations had run, and

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23. O.C.G.A. § 9-11-23(b)(3).

24. 414 U.S. 538 (1974).

25. *Id.* at 554.

26. Before these civil complaints were filed, the defendant plead nolo contendere after a grand jury indicted it for restricting the trade of steel and concrete piping. *See id.* at 540-41.

27. *Id.* at 541-43.

28. FED. R. CIV. P. 24(a)(2).

29. FED. R. CIV. P. 24(b)(2); *American Pipe*, 414 U.S. at 543-44.

the filing of the class action had not tolled the running of the limitations period. The United States Court of Appeals for the Ninth Circuit affirmed the denial of intervention as of right, but it reversed the denial of permissive intervention.[30] The Supreme Court granted certiorari.[31]

Writing for the majority, Justice Stewart first traced the history of Rule 23, highlighting a number of problems that had existed under the rule as it stood before its substantial reworking in 1966.[32] Specifically, Justice Stewart drew attention to how, under the older version of the rule, courts had been divided as to whether parties should be allowed to join or intervene as members of a class once the statute of limitations had run, even when the initial class action had begun at a proper time.[33] According to Justice Stewart, that confusion was not present under the updated version of Rule 23, as there were "no conceptual or practical obstacles in the path of holding that the filing of a timely class action complaint commences the action for all members of the class as subsequently determined."[34] The Court argued this was the case because, unlike under the previous rule, a class action is not an invitation to joinder, but a legal vehicle designed to get rid of redundant filings.[35] Justice Stewart then argued this same standard applied to members of the class who did not know the suit existed, as Rule 23 does not give class members a duty to take note of the suit or fulfill any responsibilities regarding it until the existence and limits of the class have been established and notice of membership has been extended.[36]

Turning to the facts before the Court in *American Pipe*, the Court held that, because the district court only denied class certification due to a lack of numerosity (as opposed to lack of standing, bad faith, or a frivolous complaint), there was no reason to allow the expiration of the statute of limitations to keep the plaintiffs from intervening under Rule 24.[37] Moreover, the Court held that this in no way encouraged a potential plaintiff to "sleep on his rights," because a defendant to a class action must still be notified of the action against him, and such an interpretation of Rule 23 is essential if the efficiency and economy the Rule was

30. *American Pipe*, 414 U.S. at 543-45.
31. *Id.* at 545.
32. *Id.* at 545-46.
33. *Id.* at 549-50.
34. *Id.* at 550.
35. *Id.*
36. *Id.* at 551-52.
37. *Id.* at 552-53.

intended to create is to survive.[38] In *Kornberg v. Carnival Cruise Lines, Inc.*,[39] the United States Court of Appeals for the Eleventh Circuit dealt with a similar issue, but this time the issue was whether the class representative could satisfy a contractual requirement.[40]

C. Rule 23 and Contractual Notice: Kornberg v. Carnival Cruise Lines, Inc.

In *Kornberg*, two plaintiffs, Albert and Laura Kornberg, initiated a class action against Carnival Cruise Lines after they allegedly suffered damages from faulty sanitary systems on a cruise ship. The district court denied class certification because the class was not numerous enough and the plaintiffs were not typical of the class. This was because the contract the plaintiffs entered into when they bought the cruise ship tickets contained a provision requiring notice of a claim to be filed within 185 days. The district court found that not all of the potential class members had complied with this requirement, and even though the named plaintiffs had complied with this requirement, the court held that the class was not numerous enough, as the named plaintiff's complaint and notice did not serve as notice on behalf of the other potential plaintiffs. After the district court's denial of class certification, the defendant moved for summary judgment, and the district court dismissed the plaintiff's suit because of certain disclaimers in the contract.[41]

After dealing with the disclaimer issue, the Eleventh Circuit turned to the district court's denial of class certification.[42] Writing for the court, Judge Roney first acknowledged that the court of appeals would only reverse the district court's decision not to allow certification if it had abused its discretion.[43] Judge Roney stated that under *American Pipe*, the filing of a class action commences the suit for the entire class for purposes of the statute of limitations.[44] Importantly, Judge Roney took this thought a step further and argued "[t]here is no essential difference between contractual and statutory limitations," and therefore the plaintiffs had satisfied the numerosity requirement.[45] After discussing typicality of the

38. *Id.* at 553.

39. 741 F.2d 1332 (11th Cir. 1984).

40. *Id.* at 1333-34.

41. *Id.*

42. *Id.* at 1335. The court held that the disclaimers relied on by the defendants did not apply, reversing the district court's grant of summary judgment. *Id.* at 1336.

43. *Id.*

44. *Id.* at 1336-37.

45. *Id.* at 1337.

class, the court vacated the district court's denial of class certification and remanded the case for further consideration.[46]

D. State Statutory Notice Requirements: Barnes v. City of Atlanta

In the 2006 case, *Barnes v. City of Atlanta*,[47] the Georgia Supreme Court was tasked with determining whether the named plaintiffs in a class action could satisfy a written notice requirement dealing with the exhaustion of administrative remedies on behalf of the whole class. Continuing the trend of granting more power to the named plaintiff, the court held that named plaintiffs could satisfy statutory notice provisions on behalf of the class as a whole.[48]

Barnes arose out of a dispute between a group of attorneys and the City of Atlanta (the City). In 1999, the attorneys demanded a refund of occupation taxes, which the city had imposed on them for three years. Over a year later, those same attorneys became the named plaintiffs in a class action against the City, and that action sought tax refunds and argued the tax was an unconstitutional regulation of the practice of law. The trial court granted class certification, but it divided the class into Class I and Class II. Members of Class I had only asked for the refunds as part of the class action complaint, but members of Class II had demanded the refunds a year earlier in addition to the more recent class action.[49]

After weaving its way through the Georgia court system,[50] the case reappeared at the trial court on remand. There, the court held that Class I members—who had not used administrative remedies before joining Class II members in the class action—must exhaust their administrative remedies. Nonetheless, Class I was recertified so class counsel could request tax refunds on behalf of Class I members, but Class I could only recover refunds for the three years before the recertification because, in the trial court's opinion, the limitations period was not tolled when the

46. *Id.*

47. 281 Ga. 256, 637 S.E.2d 4 (2006).

48. *Id.* at 258, 637 S.E.2d at 6.

49. *Id.* at 256, 637 S.E.2d at 5.

50. *See* City of Atlanta v. Barnes, 276 Ga. 449, 578 S.E.2d 110 (2003). The trial court granted summary judgment to the plaintiffs on the constitutional issue, and the supreme court agreed that the tax ordinance was unconstitutional to the extent that it included lawyers, and a class action for tax refunds was appropriate. *See Barnes*, 281 Ga. at 256-57, 637 S.E.2d at 5.

complaint was filed.[51] The court of appeals affirmed,[52] and the supreme court granted review.[53]

Writing for the court, Justice Carley stated that any tax payer whom the named plaintiffs represent should be thought of as having brought a suit for a refund at the same time as the named plaintiffs.[54] While the court acknowledged the existence of statutory provisions detailing ways for taxpayers to seek refunds, it also made clear that the generally applicable rules pertaining to class actions must also be taken into account, such as the rule that where "exhaustion of administrative remedies is a precondition for [the] suit," the named plaintiff's satisfaction of this condition means that each class member will not need to satisfy this requirement individually.[55] Thus, when the case went back to the trial court on remand, the trial court correctly amended its certification order to include the refund claims of the Class I plaintiffs.[56] Nonetheless, the trial court erred when it failed to recognize that when Class II filed its refund claims, it satisfied the exhaustion requirement on behalf of the Class I plaintiffs.[57] Therefore, just as courts allowed the statute of limitations to be tolled in *American Pipe* and contractual notice requirements to be tolled in *Kornberg*, the Georgia Supreme Court in *Barnes* allowed named plaintiffs to satisfy statutory notice provisions on behalf of the class as a whole, continuing the trend of granting more power to the named plaintiff in a class action.[58]

E. Schorr v. Countrywide Home Loans, Inc.

In 2010, the Georgia Supreme Court addressed a similar question in *Schorr v. Countrywide Home Loans, Inc.*[59] There, the court held that the named plaintiff could satisfy a statutory pre-suit written demand requirement on behalf of potential class members.[60] The controversy in *Schorr* arose out of a dispute between homebuyers (the Schorrs, who later

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51. *Barnes*, 281 Ga. at 257, 637 S.E.2d at 5.

52. *See* Barnes v. City of Atlanta, 275 Ga. App. 385, 620 S.E.2d 846 (2005).

53. *Barnes*, 281 Ga. at 257, 637 S.E.2d at 5.

54. *Id.* at 257, 637 S.E.2d at 6.

55. *Id.* at 257-58, 637 S.E.2d at 6 (quoting ALBA CONTE & HERBERT B. NEWBERG, 2 NEWBERG ON CLASS ACTIONS § 5:15, at 438 (4th ed. 2002)).

56. *Id.* at 260, 637 S.E.2d at 7.

57. *Id.*

58. *See id.*

59. 287 Ga. 570, 697 S.E.2d 827 (2010).

60. *Id.* at 573, 697 S.E.2d at 829.

became the named plaintiffs) and Countrywide Home Loans, Inc. (Countrywide). The Schorrs bought a home and financed the purchase through a security deed which was eventually assigned to Countrywide. The Schorrs repaid the loan in full, and, pursuant to a Georgia statute then in effect,[61] demanded in writing that Countrywide cancel the security deed. At the time, that code section stated that if the holder of a security deed failed to cancel the deed upon written demand, that entity would be liable to the grantor (in this case, the Schorrs) for $500 in liquidated damages.[62] However, the grantors also had to send a written demand for the $500 in liquidated damages.[63] Countrywide failed to cancel the security deed, and the named plaintiffs sent a written demand for the $500. Countrywide failed to pay the liquidated damages, and the named plaintiffs filed a class action in federal court on behalf of Countrywide customers whose security deeds had not been cancelled properly. Countrywide then moved to dismiss the claims of putative class members because they argued the complaint failed to allege that they had made written demands for the liquidated damages. The district court sent a certified question to the Georgia Supreme Court, asking whether named plaintiffs could satisfy pre-suit written demand requirements for liquidated damages on behalf of the putative class members.[64]

Again writing for the court, Justice Carley began the court's analysis by pointing to the court's rationale in *Barnes*, arguing that the holding in that case (that class representatives could satisfy exhaustion of administrative remedies requirements on behalf of a class) was just one example of an action a class representative could take.[65] Justice Carley then cited a case from the Supreme Court of Massachusetts as persuasive authority for the idea that "[m]ultiple [pre-suit] demands . . . need not be filed on behalf of all the members of the class."[66] Continuing to rely on *Barnes*, Justice Carley asserted that there was no difference between the liquidated damages issue in the present case and the administrative remedies issue in *Barnes*, as both of these requirements were absolutely essential, and recovery would have been completely barred but for the satisfaction

61. O.C.G.A. § 44-14-3 (1999) (current version at O.C.G.A. § 44-14-3 (2002 & Supp. 2016)).

62. *Id.*

63. *Id.*

64. *Schorr*, 287 Ga. at 571, 697 S.E.2d at 828.

65. *Id.*

66. *Id.* at 572, 697 S.E.2d at 828 (quoting Baldassari v. Pub. Fin. Trust, 369 Mass. 33, 42, 337 N.E.2d 701, 707 (1975)).

of each.[67] Despite this importance, the court argued that, just like the administrative remedies requirement in *Barnes*, the liquidated damages requirement in *Schorr* could be satisfied by the named parties, as the defendant would still be given sufficient notice of the suit, the cause of action, and the size of the class.[68]

In each of these cases, there is a noticeable trend towards granting greater power to the named plaintiff. This trend began with courts giving the named plaintiffs the ability to control litigation regarding statute of limitations issues in *American Pipe*,[69] and it continued in *Kornberg*,[70] *Barnes*,[71] and *Schorr*,[72] where courts gave named plaintiffs that same power in contractual and statutory written notice issues. With this history in mind, the Georgia Supreme Court was poised to expand the named plaintiff's responsibilities and authority even more in *Bickerstaff v. SunTrust Bank*, as it dealt with plaintiffs' attempts to avoid an arbitration clause.[73]

IV. COURT'S RATIONALE

At its core, the issue in *Bickerstaff v. SunTrust Bank* was one of notice.[74] While SunTrust grudgingly acknowledged that Bickerstaff avoided the arbitration clause by filing his lawsuit, it argued the lawsuit could not proceed as a class action, as the filing of the lawsuit did not reject the arbitration agreement on behalf of the whole class.[75] The court of appeals agreed with this argument, and held that Bickerstaff's purported class was a class of one and therefore lacked numerosity. Writing for the unanimous supreme court, Justice Benham disagreed and held that the filing of Bickerstaff's complaint tolled the time in which the potential class members were required to notify SunTrust of their desire to reject the arbitration agreement.[76]

Justice Benham began his analysis of the case by turning to *American Pipe & Construction Co. v. Utah*.[77] In both *American Pipe* and *Bickerstaff*,

67. *Id.* at 573, 697 S.E.2d at 829.
68. *Id.*
69. 414 U.S. at 550.
70. 741 F.2d at 1336.
71. 281 Ga. at 260, 637 S.E.2d at 7.
72. 287 Ga. at 573, 697 S.E.2d at 829.
73. 299 Ga. at 462-63, 788 S.E.2d at 791.
74. *Id.* at 459, 788 S.E.2d at 789.
75. *Id.*
76. *Id.* at 462-63, 788 S.E.2d at 791.
77. *Id.* at 462, 788 S.E.2d at 791.

the classes were initially denied certification due to numerosity, though the class in *American Pipe* was eventually allowed to proceed (as the Court held that the statute of limitations was tolled).[78] Here, the court recognized that Bickerstaff's proposed class numbered at least 1000 people, and so the only thing that could stop it from meeting the numerosity requirement of O.C.G.A. § 9-11-23 would be Bickerstaff's inability to evade the arbitration agreement on behalf of the whole class.[79]

Next, Justice Benham provided examples of situations where Georgia courts allowed named plaintiffs to satisfy various conditions and requirements on behalf of the class by citing *Schorr, Resource Life Insurance Co. v. Buckner*,[80] and *Barnes*.[81] Specifically, the court asserted that there was no reason for the contractual notice requirements placed upon depositors by SunTrust to be treated differently than the notice requirements placed on taxpayers in *Barnes*.[82] However, the court conceded that it had never examined the issue that *Bickerstaff* presented, as the aforementioned cases dealt with statutory or contractual notice requirements, while *Bickerstaff* featured a time-based contractual limitations period.[83] As the case was one of first impression, Justice Benham looked outside of Georgia to two federal court cases which had examined similar issues in disputes between passengers and cruise lines.[84] In those cases, the federal courts held that since the filing of a class action begins the suit for the entire class, the same rule can be applied to contractual issues.[85] With this authority in mind, the supreme court turned to the issue of whether this rationale might be congruent with Georgia contract law.[86]

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78. *Id.*; *American Pipe*, 414 U.S. at 543.

79. *Bickerstaff*, 299 Ga. at 462-63, 788 S.E.2d at 791.

80. 304 Ga. App. 719, 698 S.E.2d 19 (2010). In this case, the court of appeals took part in the trend towards giving more power to the named plaintiff, as it held that, in a case involving form insurance contracts that included a written notice requirement for refunds, the named plaintiff could satisfy such a notice requirement on behalf of a class. *Id.* at 727, 698 S.E.2d at 28.

81. *Bickerstaff*, 299 Ga. at 463, 788 S.E.2d at 791.

82. *Id.*

83. *Id.* at 463, 788 S.E.2d at 792.

84. *Id.* at 463-64, 788 S.E.2d at 792 (discussing Freeman v. Celebrity Cruises, Inc., 1994 U.S. Dist. LEXIS 17455 (S.D.N.Y. Dec. 8, 1994) and Latman v. Costa Cruise Lines, N.V., 758 So. 2d 699 (Fla. Dist. Ct. App. 2000)).

85. *Id.* at 464, 788 S.E.2d at 792.

86. *Id.*

SunTrust's arbitration clause stated, "[y]ou may reject this arbitration agreement," and it defined "you" as the "owner of the account."[87] SunTrust contended that, because of the plain language of the agreement, an attorney for the named plaintiff could not simply reject arbitration on behalf of other people by filing the named plaintiff's complaint.[88] The court of appeals had examined this issue in terms of privity and had concluded that Bickerstaff could not act on behalf of the potential class members because he was not in privity with them.[89] The supreme court, however, declined to abide by this "faulty reasoning," and instead viewed the issue in terms of agency law, as the "entire class action scheme is based upon the premise that a member of a class may act as a representative of the other purported class members."[90] Under Georgia contract law, contractual obligations may be performed by an agent.[91] Moreover, the court rejected SunTrust's contention that Bickerstaff would illegally abridge other's rights if he were allowed to reject arbitration on their behalf.[92] Rejecting this, the court stated unequivocally that Bickerstaff's complaint only tolled the contractual period only for the purpose of allowing potential class members to elect to join the class or not, and did not abridge other's rights.[93]

Next, the court turned to the issue of notice, as SunTrust stringently asserted that each class member must provide the bank with individual notice of an intent to reject arbitration.[94] The court of appeals had concluded that Bickerstaff would be able to bind class members to a rejection of the arbitration clause until the class was certified, and the members could then opt out.[95] Justice Benham fervently disagreed, contending

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87. *Id.*

88. *Id.*

89. *Id.* at 465, 788 S.E.2d at 792.

90. *Id.* at 465, 788 S.E.2d at 792-93.

91. *Id.* at 465, 788 S.E.2d at 793. *See also In re* Charter Co., 876 F.2d 866, 873 (11th Cir. 1989) (holding that "the representative in a class action is an agent for the class members.").

92. *Bickerstaff*, 299 Ga. at 465-66, 788 S.E.2d at 793. SunTrust was specifically concerned with the issue of attorney fees. The arbitration clause granted prevailing parties (at arbitration) the right to collect attorney fees and costs, and SunTrust asserted that Bickerstaff could keep people from getting these fees if he was allowed to reject the arbitration agreement on behalf of other people against their will. *Id.*

93. *Id.* at 466, 788 S.E.2d at 793.

94. *Id.* at 466, 788 S.E.2d at 793-94. Specifically, SunTrust would have required each class member to send the bank their name, address, account name, account number, and the depositor's signature. *Id.*

95. *Id.* at 467, 788 S.E.2d at 794.

that the court of appeals reasoning demonstrated a "fundamental misconception about the way class actions work," as the entire purpose of class actions is that all putative class members benefit from the class representative's filing of the complaint.[96] Indeed, Bickerstaff's complaint only tolled the time in which other people might opt in or out of the class, and did not bind others to rejection of the clause.[97]

Finally, the court determined that when potential class members elect to join the class, they would automatically ratify the filing of the complaint, which would relate back to the timely notice Bickerstaff made upon filing his complaint.[98] Justice Benham held that this is a necessary element of the class action process, and by opting in to Bickerstaff's class, a new member displays her intent to sue SunTrust and reject the requirement to arbitrate.[99] Indeed, "[t]olling and the notion of relation back are simply two sides of the same coin."[100] For these reasons, the court reversed the court of appeals decision, and held that Bickerstaff's class action complaint tolled the contractual limitation for rejecting the arbitration clause on behalf of all putative class members, and therefore, the numerosity requirement of O.C.G.A. § 9-11-23(a)(1) was met.[101]

V. IMPLICATIONS

A. By Allowing Plaintiffs to Toll Contractual Notice Requirements, Has the Georgia Supreme Court Also Tolled the Death Knell for Opt-Out Provisions in Georgia?

The Georgia Supreme Court's ruling in *Bickerstaff v. SunTrust Bank* could greatly affect both SunTrust and other corporations like it, which undoubtedly led to SunTrust's unsuccessful appeal to the Supreme Court of the United States on October 6, 2016.[102] Perhaps the most obvious consequence of *Bickerstaff* is that many more lawsuits will be able to proceed as class actions than was previously the case. Indeed, any time one person is able to escape from a corporation's mandatory arbitration clause, that entity will be leaving itself open to attack from multiple plaintiffs, as that one person will be able to buy other people more time to reject the arbitration agreement themselves. While this certainly is good news for

96. *Id.* at 468, 788 S.E.2d at 794.
97. *Id.* at 468, 788 S.E.2d at 795.
98. *Id.* at 469, 788 S.E.2d at 795.
99. *Id.* at 470, 788 S.E.2d at 796.
100. *Id.*
101. *Id.*
102. *See* Petition for a Writ of Certiorari, *Bickerstaff*, No. 16-459 (Oct. 6, 2016).

plaintiffs (and their attorneys), it could leave some corporations in dire straits. Specifically, any entity which gives its customers the chance to opt out of an arbitration agreement within a given amount of time is now running the risk of class actions being filed against it, and these actions could easily include plaintiffs who did not satisfy the notice requirements. As SunTrust pointed out in it its petition for a writ of certiorari before the Supreme Court of the United States, over 100 million households use a checking account, and more than a quarter of these agreements allow their customers to opt out of arbitration.[103] Therefore, it is likely that corporations across the state will be taking a hard look at their own contracts to determine if *Bickerstaff* leaves them vulnerable. For all practical reasons, will *Bickerstaff* signal the demise of opt-out clauses in Georgia? As SunTrust puts it, "why would any rational company take the risk of including an opt-out clause?"[104] While the court's decision in *Bickerstaff* may have benefited the plaintiffs in that specific case, it is foreseeable that future plaintiffs could be deprived of a way out of these clauses as an unintended consequence of *Bickerstaff*. Conversely, could a future court use *Bickerstaff* to grant even more power to the named plaintiff, extending the current trend even more?

B. How Can Bickerstaff be Reconciled with AT&T Mobility LLC v. Concepcion?

A more difficult question arises in situations more like Bickerstaff's, where the only reason he was able to opt out of the arbitration clause was because the clause was found to be unconscionable.[105] Any discussion of arbitration unconscionability must be had in light of the Supreme Court's ruling in *AT&T Mobility LLC v. Concepcion*.[106] In *AT&T*, the Court reversed a finding by the United States Court of Appeals for the Ninth Circuit that a mandatory arbitration clause used by AT&T was unconscionable on California state law grounds.[107] Writing for the majority, Justice Scalia found the arbitration clause could not be deemed unconscionable on state law grounds, because the rule the Ninth Circuit relied on was preempted by the Federal Arbitration Act (FAA).[108] This holding severely circumscribed plaintiffs' abilities to use state law to have arbitration

103. *Id.* at 37.

104. *Id.* at 38-39.

105. *Bickerstaff*, 299 Ga. at 460, 788 S.E.2d at 789.

106. 563 U.S. 333 (2011).

107. *Id.* at 338, 352. The Ninth Circuit specifically relied on *Discover Bank v. Superior Court*, 113 P.3d 1100 (Cal. 2005). *AT&T*, 563 U.S. at 338.

108. *AT&T*, 563 U.S. at 352; 9 U.S.C. §§ 1-16 (2012).

clauses declared unconscionable.[109] With regards to *Bickerstaff*'s consequences, if *AT&T* means the FAA always preempts state law claims—thus making it immensely difficult to declare an arbitration clause unconscionable—*Bickerstaff's* holding will be limited. In appealing to the Supreme Court of the United States, SunTrust's main argument was that the Georgia Supreme Court's decision in *Bickerstaff* is "egregious," because it flies in the face of *AT&T*.[110]

The Court's holding in *AT&T* is by no means airtight, and some courts have found ways around it by utilizing the "savings clause" of the FAA.[111] One example can be seen in *In re Checking Account Overdraft Litigation MDL No. 2036*,[112] where the Eleventh Circuit used the savings clause of the FAA to hold that generally applicable contract defenses such as fraud, duress, and unconscionability might still be used to avoid arbitration clauses if the challenge to the clause centers on the way it was formed, rather than the mere fact that it is an arbitration clause.[113] Due to the murkiness of the Supreme Court's holding in *AT&T* (made murkier by *Bickerstaff*), Georgia businesses have found themselves in a state of limbo. Should they rewrite their arbitration clauses in such a way as to make them undeniably conscionable, so as not to incur the sting of the savings clause of the FAA and watch as one plaintiff turns into a thousand through *Bickerstaff*? Interestingly, a court could find that a lack of an opt-out clause makes a contract unconscionable on its face, which would allow *Bickerstaff* to open the floodgates no matter what Georgia businesses do.

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109. For a detailed discussion of *AT&T* (and one of its exceptions), see Jacob Johnson, Note, Barras v. BB&T: *Charting a Clear Path to Apply* Concepcion *Through a Quagmire of Divergent Approaches*, 64 MERCER L. REV. 591 (2013) This article argues that, in the aftermath of *AT&T*, four approaches to the Court's holding have developed: "(1) *Concepcion* represents a narrow exception that preempts state standards based on the policy that plaintiffs ought to have incentives to litigate; (2) arbitration provisions can never be grounds for substantive unconscionability unless the provision would inhibit bilateral arbitration; (3) arbitration provisions are never substantively unconscionable, requiring extreme procedural unconscionability; and (4) all unconscionability of arbitration is preempted." *Id.* at 598.

110. Petition for a Writ of Certiorari at 23, *Bickerstaff*, No. 16-459 (Oct. 6, 2016).

111. 9 U.S.C. § 2. This statute states that arbitration agreements shall be valid, irrevocable, and enforceable "save upon such grounds as exist at law or in equity for the revocation of any contract." *Id.*

112. 685 F.3d 1269 (11th Cir. 2012).

113. *Id.* at 1277.

VI. CONCLUSION

On December 2, 2016, the Georgia Supreme Court declined to grant SunTrust a writ of Certiorari.[114] This means *Bickerstaff v. SunTrust Bank* is now the law in Georgia, and possibly thousands of Georgia businesses will need to put serious thought into how to protect themselves. Had the case been accepted and reversed, questions about the reach of *AT&T Mobility LLC v. Concepcion* would remain. It may take some time for the full ramifications of *Bickerstaff* to be known, but for now, Georgia courts across the state may be faced with an influx of class actions, as businesses contemplate how to protect themselves and move forward.

DAVID CROMER

114. Denial of Petition for Certiorari, *Bickerstaff*, No. 16-459 (Dec. 2, 2016), 2016 U.S. LEXIS 7351.