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Q&A With Bradley Arant's Mike Pennington

Law360, New York (November 16, 2010) -- Michael R. Pennington is a partner in the Birmingham, Ala., office of Bradley Arant Boult Cummings LLP and chairman of the firm's class action and complex litigation practice team. Pennington's primary areas of practice include class action defense, complex litigation, opt-out litigation and commercial litigation. Much of his practice is devoted to defending insurance and financial services litigation in Alabama and throughout the Southeast.

Q: What is the most challenging case you've worked on, and why?

A: The one I'm working on now, because if I'm still working on it, I haven't solved the client's problem. That has to be your mindset if you're a litigator.



Michael R. Pennington

That said, when I was a young lawyer in the early 90s, I was thrown into the middle of a class action crisis and forced to sink or swim. It was a time when the torts were in full bloom in Alabama, and when the Alabama Supreme Court was widely perceived as among the country's most favorable for the plaintiffs' bar. Drive-by class certifications and multimillion-dollar punitive damage verdicts were occurring with the frequency of a cheap ham radio.

A company I can now call one of my longtime clients found itself facing one of the most formidable trial lawyers in the country, in a certified class action brought by cancer insurance policyholders in what was then the most notorious venue in Alabama. At the same time, some 2,000 individuals — many of them cancer victims — were seeking to pursue separate punitive damage actions on the same theory in various other courts across the state.

Although defending these claims would have been challenging in any state, in Alabama at that time it was literally a bet-the-company proposition. I had very little class-action experience back then, but my solution was to turn all the disadvantages we faced into advantages by negotiating a 23(b)(2) no-opt-out class settlement built around a combination of reformation and restitution which the company could afford. In essence, the settlement retroactively reformed the policies to cure the actual harm claimed, in exchange for protection from the actual and potential punitive damage claims of 400,000 class members.

It worked.

The settlement was approved over the hard-fought objections of the 2,000 individual objectors. They were represented by most of the best firms in the state, and fought the settlement tooth and nail in both the Alabama Supreme Court and the United States Supreme Court. Much of what I know about class actions started with that trial by fire, as did my valued relationships of mutual respect with many of the lawyers on both sides of the fight.

Q: What accomplishment as an attorney are you most proud of?

A: Earning not only the respect but the friendship of several clients who have repeatedly entrusted me with their work over many years. That kind of relationship is increasingly rare in today's competitive environment, where in-house counsel find themselves under tremendous pressure to send their work to the lowest bidder. When clients resist that pressure and continue to send their work to you whether or not you are the lowest bidder, because they believe you will provide the best value as opposed to the lowest nominal price, that is a lawyer's highest reward. Practicing law is not about personal accomplishments. It is about accomplishing results that serve the client's objectives. The best measure of that is whether clients who hired me before continue to hire me now.

Q: What aspects of law in your practice area are in need of reform, and why?

A: The grant or denial of class certification continues to be the dispositive issue in most class cases. Because of the large stakes involved in litigating the claims of a certified class to final judgment, class certification often forces the defendant to settle rather than waiting to appeal the certification decision after final judgment. In federal court, Rule 23(f) grants only a discretionary appeal from class certification; in many circuits, this is granted only in rare cases. This is not good enough. The grant or denial of class certification should be appealable as of right in both the federal system and in the state systems.

Whether or not a case will proceed as a class affects the rights of not only the named litigants, but thousands or even millions of absent class members. It is an issue that is important enough and decisive enough to warrant immediate appeal as of right.

Q: Where do you see the next wave of cases in your practice area coming from?

A: I see several waves. Creative class actions related to the Gulf oil spill will be filed for years to come. Many insurance companies will soon face class litigation over benefit payment methods that allow the company to earn investment income off the benefits after they become due. One such practice is sending the beneficiaries "checkbooks" to draw down benefits over time, rather than paying the benefits out immediately in one lump sum. This has recently attracted the attention of various state regulators, and that inevitably spawns private litigation.

Next, expect more class actions under federal statutes such as RESPA, which eliminate the barrier of state law variations from the class certification analysis. Finally, *Shady Grove Orthopedic Associates v. Allstate*, 130 S.Ct. 1431 (2010) throws open the doors of federal courts for class actions seeking recovery of statutory penalties under state deceptive trade practices acts and the like, even if the state statute purports to prohibit class recovery. Expect plaintiffs' lawyers to accept that invitation.

Q: Outside your own firm, name one lawyer who's impressed you and tell us why.

A: Former Alabama Attorney General (and former Lieutenant Governor) Bill Baxley [Baxley Dillard Dauphin McKnight & James]. When he was a younger man, he had the courage to prosecute KKK members for the infamous bombing of the 16th Street Baptist Church in Birmingham, at a time when doing so was not as politically popular in the South as it should have been. For many years since, he has consistently applied the same courage of his own convictions in defending his clients in civil litigation, often employing strategies that defy conventional wisdom but nevertheless prevail.

Q: What advice would you give to a young lawyer interested in getting into your practice area?

A: Always look for the solution that best achieves the client's overall objectives. That is not necessarily found on the beaten path.