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STATE COURT CLASS ACTIONS IN MISSISSIPPI: WHY ADOPT THEM NOW?

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In 2004, there was discussion of whether the state wished to implement a class action procedure.[2] This article discusses how the subject of class actions arose, how class actions relate to "Rule 20 mass joinder," how the absence of class actions became a false justification for such mass joinder, and how there has been no adequate justification presented for adopting state class actions. At the end of the day, class actions are not appropriate procedural devices for the cases for which many seek to use them: multiple tort cases with individual issues of exposure, causation, damages, reliance, and reliability. Likewise, there has been no demonstration that a state class action mechanism is appropriate, much less necessary, for any other claims.

I. MISSISSIPPI SUPREME COURT ADOPTS MOST FEDERAL RULES, BUT FREQUENTLY OMITS RULE 23

When the Mississippi Supreme Court first adopted the Mississippi Rules of Civil Procedure in 1981, which were patterned on the Federal Rules of Civil Procedure,[3] the court specifically omitted Rule 23. The court noted that there was great dissatisfaction with Federal Rule 23:

> Few procedural devices have been the subject of more widespread criticism and more sustained attack—and equally spirited defense—than practice under Federal Rule 23 and its state counterparts. The dissatisfaction focuses primarily on Rule 23(b)(3), which permits suits on the part of persons whose only connection is that one or more common issues characterize their position in relation to an adverse party.[4]

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2. *See, e.g.*, Jerry Mitchell, *New Attitude for Miss. Supreme Court*, CLARION-LEDGER, Oct. 30, 2004, at 1A; Keith R. Raulston, Comments from the Mississippi Supreme Court Class Action Symposium 2, (June 14, 2004) (on file with Mississippi College Law Review). As noted *infra* Part III, the issue was raised as early as February 2000, in oral argument before the supreme court, but there was little if any public discussion of the topic for the next four years.

3. Class actions in federal court were implemented, in the present Federal Rule of Civil Procedure 23, in 1937. There were class devices available even earlier, such as under former Equity Rule 38, but these tended to be more limited in application. FED. R. CIV. P. 23 advisory committee's note to subdivision (a).

4. MISS. R. CIV. P. 23 (omitted) cmt.

The Mississippi Supreme Court noted that there had been a recent (1976) National Conference that had discussed class action practice and had referred the topic for further study and action.[5] As the court noted in 1981: "Aside from general proposals . . . , no meaningful reforms have as yet been developed to render class action practice a more manageable tool."[6]

Rule 23 was not the only Federal Rule of Civil Procedure that the Mississippi Supreme Court declined to adopt, but it was the only one of which the court was specifically critical.[7]

II. MISSISSIPPI PRACTICE DID NOT MISS CLASS ACTIONS: 1981 TO THE MID-1990'S

No one seemed to need or miss a state rule 23. There was no serious discussion during the 1980's or 1990's of reconsidering whether Mississippians or Mississippi state practice needed a Rule 23.

While there was no talk of class actions, other things began to change in the mid- to late-1990's.[8] First, there were a few large verdicts; then, as the decade neared end large verdicts became more common. Before 1995, no jury in Mississippi had returned a verdict over $9,000,000 in actual or punitive damages.[9] However, from 1996 to 2001, Mississippi juries returned at least twenty-one verdicts of $9,000,000 or more, including seven that equaled or exceeded $100,000,000 each.[10] There is no record of how many enormous *settlements* these verdicts spawned. These extremely high "recoveries" provided an incentive for out-of-state lawyers and plaintiffs to bring their cases in Mississippi.[11] Out-of-state lawyers rushed to the state, with ever-increasing numbers becoming members of the Bar and filing lawsuits.[12]

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5. *Id.*

6. *Id.* (citations omitted).

7. For example, the Mississippi Supreme Court originally adopted a form of Rule 14 that became effective with the other rules on January 1, 1982. *See* MISS. R. CIV. P. 14 cmt. However, the Court withdrew Rule 14 four months later, effective May 1, 1982. *See* MISS. R. CIV. P. 14 advisory committee historical note. The new Rule 14 was adopted effective July 1, 1986. *Id.*

8. The background of the mass tort lawsuits in Mississippi from the mid-1990's to 2001, as well as recommendations for change, is discussed in detail in David W. Clark, *Life in Lawsuit Central: An Overview of the Unique Aspects of Mississippi's Civil Justice System*, 71 MISS. L.J. 359 (2001).

9. Jimmie E. Gates, *Stats Erode State's 'Jackpot Justice' Image*, CLARION-LEDGER, Mar. 8, 2004, at 1A.

10. *See* Jimmie E. Gates, *Clinton Pair Awarded $23M in Suit*, CLARION-LEDGER, Oct. 9, 2001, at 1B; Jimmie E. Gates, *$100M Verdict: Propulsid at Fault*, CLARION-LEDGER, Sept. 29, 2001, at 1A; Jerry Mitchell, *Staggering Jury Verdicts Draw Calls For Tort Reform*, CLARION-LEDGER, Oct. 30, 2001, at 1A; Robert Pear, *Mississippi Gaining as Lawsuit Mecca*, N.Y. TIMES, Aug. 20, 2001, at A1.

11. *See* Jerry Mitchell, *Hitting the Jackpot*, CLARION-LEDGER, June 17, 2001, at 1A. The number of Alabama lawyers, for example, who obtained admission to the Mississippi bar tripled from 1999 to 2000. *See* Tracy Dash, *Mississippi Viewed as Ripe for Tort Reform*, SUN HERALD (Biloxi, Miss.), July 1, 2001, at A1.

12. The out-of-state lawyers becoming members of the Mississippi Bar significantly increased beginning in 2000. By 2002, 32.6% of those admitted to the Mississippi Bar were lawyers living out of state; for 2003, that percentage was 34%. Author's analysis of Mississippi Bar Association's listings of attorneys admitted to the Mississippi Bar from 1999–2003 (bar listings on file with the Mississippi College Law Review).

Mississippi achieved a national reputation for the "worst" (least fair) judicial system among the fifty states.[13] Several of our counties were featured among the worst "judicial hellholes" in the country.[14]

III. "MASS JOINDER" LAWSUITS AROSE AND PROLIFERATED—BUT THEY WERE NOT REQUIRED OR JUSTIFIED BY THE ABSENCE OF A STATE CLASS ACTION DEVICE

In the late 1990's, a few circuit courts in the state, and even a chancery court or two, began allowing the joinder of numerous—hundreds, sometimes even thousands—plaintiffs under Mississippi Rule of Civil Procedure 20. These lawsuits tended to be product liability/personal injury—asbestos exposure, phen fen, pharmaceuticals—but also included cases for financial fraud. These cases tended to concentrate in particular counties, where certain judges allowed the cases to proceed. Frequently, only one or a few of the joined plaintiffs were residents of the forum county, and most of the plaintiffs were not even residents of Mississippi.

As will be seen, these "mass joinder" cases were not a substitute or a replacement for class actions. In fact, most of those that applied for federal class action treatment were denied class certification.

Some lawyers and judges have suggested that the unregulated mass joinder arose, and for a time was allowed, because Mississippi did not have class actions.[15] However, most if not all of the cases in this state that certain trial courts—and even the Mississippi Supreme Court for a time—allowed to proceed as "mass joinders" under Rule 20 of the Mississippi Rules of Civil Procedure, would not meet typical standards for class certification.[16]

The first "mass joinder" case under Rule 20 to reach the Mississippi Supreme Court was *American Bankers Insurance Co. v. Alexander*.[17] In *American Bankers*, the approximately 1371 borrowers brought claims against a collateral protection insurance company to recover for alleged

13. Harris Interactive, Inc., State Liability Systems Ranking 8 (Mar. 8, 2004) (surveys of senior corporate counsel conducted by Harris for the U.S. Chamber of Commerce and the U.S. Institute for Legal Reform, showing Mississippi as having the worst state liability system in 2003 and 2004, on file with the Mississippi College Law Review), *available at* http://www.instituteforlegalreform.com/pdfs/ILR%20Harris%20Poll.pdf; Harris Interactive, Inc., U.S. Chamber of Commerce State Liability Systems Ranking Study 14, 53 (Jan. 11, 2002) (surveys conducted from November 7–December 11, 2001, on file with Mississippi College Law Review), *available at* http://www.instituteforlegalreform.org/resources/012202.pdf.

14. *See, e.g.*, American Tort Reform Association, Bringing Justice to Judicial Hellholes 2003 15, *available at* http://www.weldinginfonetwork.com/tort/2003_ATRAreport.pdf (on file with Mississippi College Law Review); American Tort Reform Association, Bringing Justice to Judicial Hellholes 2002 10-11, *available at* http://www.sickoflawsuits.org/content/pdfs/report.pdf (on file with Mississippi College Law Review).

15. *See, e.g.*, Clark, *supra* note 8, at 369 n.47.

16. *Id.* at 369–72 nn.47-60.

17. 818 So. 2d 1073 (Miss. 2001), *overruled in part by* Capital City Ins. Co. v. G.B. "Boots" Smith Corp., 889 So. 2d 505, 517 (Miss. 2004).

premium overcharges in connection with a scheme to defraud the borrowers.[18] The central issue was whether the borrowers could be joined under Rule 20 as plaintiffs in the same actions.[19]

This was the first Mississippi Supreme Court decision that permitted "mass joinder" of parties and claims under Rule 20. Joinder is permitted in Mississippi when claims arise "out of the same transaction, occurrence, or series of transactions or occurrences."[20] Neither federal courts nor Mississippi courts have come up with a bright line rule for determining when parties' claims "arise out of the same transaction or occurrence."[21]

American Bankers was a consolidated interlocutory appeal of two judges' joinder rulings in five separate lawsuits, each with numerous plaintiffs, eventually reaching a total of nearly 1400 plaintiffs.[22] The defendants contended that the plaintiffs' separate claims did not "arise out of the same transaction or occurrence" and therefore, joinder under Rule 20 of the Mississippi Rules of Civil Procedure was improper.[23] The plaintiffs in all of the cases asserted that the defendants defrauded American Bankers' customers by charging the maximum insurance premiums in violation of American Bankers' internal guidelines.[24] American Bankers filed an interlocutory appeal, asserting that the claims were improperly joined.[25] The Mississippi Supreme Court held that joinder of the multiple plaintiffs' claims in each case was proper under Rule 20.[26]

At the oral argument in *American Bankers*, in February 2000, plaintiffs' counsel described the "mass joinder" under Rule 20 as the "poor man's class action."[27] Chief Justice Lenore Prather was a member the oral argument panel in *American Bankers*, and she inquired of counsel whether the court should reconsider adopting a class action rule.[28] The suggestion by counsel was plainly that if Mississippi had state court class actions, there might be no reason to have "mass joinder" under Rule 20.

And a year later that's exactly how the court, without Chief Justice Prather, ruled.[29] Justice McRae, writing for the court in the 5-4 decision, said that the state does not have class actions and that, as a result, our

18. *Id.* at 1074, 1075.

19. *Id.* at 1074.

20. MISS. R. CIV. P. 20(a).

21. CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 1653 (2d ed. 1986).

22. *See* 818 So. 2d at 1074. All of these claims originated as proposed class actions in federal court, and when the federal courts declined to rule that the 1400 claims could be brought as class actions, the claims were re-filed in five separate state court lawsuits. *See infra* note 38.

23. *Am. Bankers*, 818 So. 2d at 1076.

24. *See id.* at 1075.

25. *Id.* at 1074.

26. *See id.* at 1074-75.

27. The author personally observed the oral arguments before the Mississippi Supreme Court in *American Bankers*.

28. *Id.*

29. 818 So. 2d at 1075–76. Although the appeal was argued in February 2000, there was no ruling by November of that year, when Justice Prather was defeated for re-election. There was no ruling by the time her replacement, Justice Easley, was sworn in during January 2001. Three weeks later the court ruled, and Justice Easley participated and created the 5–4 majority.

courts have "liberalized the rules of civil procedure" to allow broader joinder under Mississippi's joinder rule, Rule 20 of the Mississippi Rules of Civil Procedure.[30]

The difficulties and confusion created by this decision began with the court's implication that because the class action rule does not exist in Mississippi, joinder may be used as a substitute. The court stated that it has "taken notice of the unavailability of class actions and has liberalized the rules of civil procedure at times in order to better accommodate parties who are consequently shut out of the legal system."[31] The court said, essentially, that because class actions did not exist in Mississippi, joinder rules would be "liberalized" to accommodate mass litigation that could otherwise have been brought as a class action.

However, there are numerous problems with the court's approach.[32] The first is that this result was never intended by the Mississippi Supreme Court when it declined to adopt a rule allowing class actions. Former Chief Justices Armis Hawkins and Lenore Prather have both stated that the supreme court did not intend for Rule 20 to be used as a substitute for class action litigation.[33] The goal in declining to adopt a rule permitting class actions was to avoid the type of mass litigation that Mississippi courts are now witnessing. Former Chief Justice Lenore Prather stated that the justices wanted to avoid class actions because the actions are "burdensome, and our courts are not equipped to handle them."[34]

The second problem with the court's statement in *American Bankers* is that, as practice from the late 1990's until early 2004 demonstrated, joinder and class actions are distinct procedural devices—one cannot simply liberalize the rules of one to make up for a lack of the other. Joinder, both under the Federal Rule of Civil Procedure and the identical Mississippi Rule of Civil Procedure, allows everyone with a claim to join in the same action if they assert claims "arising out of the same transaction, occurrence, or series of transactions or occurrences, and if any question of law or fact common to all these persons will arise in the action."[35] When claims of two or more parties are joined, the claims become part of the same action. Although the claims will have some overlapping questions of law or fact, the judge or jury in these cases must consider the claims of each party, and apportion damages as to each party.

Class actions, by contrast, have more procedural hurdles to join claims together, but present more judicial efficiency if the claims are certified as a

30. *Id.* at 1078.

31. *Id.*

32. There is a detailed discussion of the many problems with the *American Bankers* decision, including its mangling the language of Mississippi Rule of Civil Procedure 20, and its avoiding the only feasible interpretation of that language, in Clark, *supra* note 8, at 373–77. This article will deal only with the problems generated by the court's confusion of (i) a class action rule, with (ii) simply loosening the requirements for joinder under Rule 20.

33. *See* Mitchell, *supra* note 11.

34. *Id.* (quoting former Mississippi Supreme Court Chief Justice Lenore Prather).

35. FED. R. CIV. P. 20(a); MISS. R. CIV. P. 20(a).

class. Under Rule 23 of the Federal Rules of Civil Procedure and many state rules patterned after the Federal Rule, before a class is certified, the plaintiffs must demonstrate that: joinder is impractical; there are common questions of law or fact; the claims or defenses of the representative parties are typical of those of the class; and the representatives will fairly and adequately represent the interests of the class.[36] The plaintiffs must also show that the common questions of law or fact predominate and that class action is the superior method for resolving the controversy.[37] Thus, meeting all of the requirements for bringing a class action is more difficult than making the "same transaction or occurrence" showing required for joinder. Once the class is certified however, a class action is much easier to try than a joined action. Since the claims of the entire class must be very similar, if not identical, they are tried through the class representatives, and the judge and jury are required to sort through the law and the facts only as they pertain to the class representatives. Because in class actions all of the claims are adjudicated on the basis of the representatives' claims, trying 1000 plaintiffs' claims as a class action may promote judicial efficiency. In contrast, binding together thousands of claims in a joined action is unlikely to promote judicial economy in the same way because each plaintiff's claim must be individually heard.

A third problem is that the class action option *would have been available* to the plaintiffs in *American Bankers, if they had met the requirements* for a class action. Indeed, the five cases involved in the *American Bankers* appeal were re-filed in state court only after their claims could not be certified as class actions in federal court because they involved individualized circumstances and elements of proof.[38] The class action vehicle was available; the claims and claimants just did not meet the requirements to certify the class. This was true under the federal class action rule; and, it would have been true under any state class action rule as well. Thus, the absence of a state court class action procedure had not "shut [anyone] out of the legal system."[39]

A fourth problem is that even if a class action was not feasible, not one of the plaintiffs was "shut out" of the legal system. Each, if he or she had a claim, could have filed his or her own suit. Both the federal and the state procedural rules allow joinder to accommodate claims that are so closely related and overlapping that it is efficient, while being fair to all parties, to

36. *See* FED. R. CIV. P. 23(a).

37. FED. R. CIV. P. 23(b)(3). In the alternative, plaintiffs may show that there is a risk of "varying adjudications which would establish incompatible standards of conduct for the party opposing the class." FED. R. CIV. P. 23(b)(1)(A). This section of Rule 23 is generally used, for example, in cases such as employment discrimination.

38. *See* Brief of Appellant American Bankers Insurance Company of Florida at 3, 3 n.3, Am. Bankers Ins. Co. v. Alexander, 818 So. 2d 1073 (Miss. 2001) (Nos. 98-IA-0046, 97-IA-01271) (citing Sims v. Fidelity Fin., No. 2:96-CV-160PG (S.D. Miss.); Thomas v. Fidelity Fin., No. 3:96-CV-35-LN (S.D. Miss.); Wilks v. Sunstar Acceptance Corp., No. 1:96-CV-220-GR (S.D. Miss.)). The three federal class action lawsuits were re-filed from March 6 to September 2, 1997, as the five cases involved in the *American Bankers* appeal. *See id.* at 5–6.

39. *American Bankers*, 818 So. 2d at 1078.

join the claims for discovery or trial. There is no legal right to join non-identical claims into an unmanageable, inefficient, or unfair mass suit.

So, in *American Bankers*, the absence of a class action procedure, whether in state or federal court, had nothing to do with whether the mass action claims could or should have been allowed to proceed joined under Mississippi Rule of Civil Procedure 20. And, the end of the run for mass action lawsuits has provided no justification for creating class actions in this state.

Mississippi's experience was not unique. Just as the "mass joinder" device has been shown to be unworkable, and contrary to the rules, class actions have been shown to be completely unworkable in multiple tort cases. Virtually every court that has considered the question has concluded that such cases, which arise out of individual factual circumstances and involve individual issues of exposure, causation, damages, reliance, or liability, are not suited for class treatment.[40]

IV. MISSISSIPPI CORRECTS ITS JUDICIAL CLIMATE, JUDICIALLY AND STATUTORILY

In 2004, the Mississippi Supreme Court and the Mississippi Legislature took major steps to correct problems in the civil justice system, including eliminating the mis-reading and the mis-application of Mississippi Rule of Civil Procedure 20 that had led to the proliferation of "mass joinder" lawsuits. In a series of decisions,[41] the court effectively eliminated the abusive practice of joining hundreds, or even thousands of plaintiffs in a single case in a selected county if only one of the plaintiffs lived there. The court returned the interpretation of Rule 20 to that of other jurisdictions with the same rule, including the federal courts. To be joined, claims again had to arise out of the same transaction or occurrence; the claims had to have some common "litigable event."[42]

Some have suggested that the plaintiff bar's support for a state class action mechanism is the result of the judicial and legislative reforms, particularly in 2004. However, there is nothing in these reforms—these statutes or decisions to correct mis-applications of law or other abuses—that suggests the need for state class actions.[43]

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40. *See e.g.*, Amchem Prods., Inc. v. Windsor, 521 U.S. 591 (1997); Bell Atl. Corp. v. AT&T Corp., 339 F.3d 294 (5th Cir. 2003); McManus v. Fleetwood Enter., Inc., 320 F.3d 545 (5th Cir. 2003); Stirman v. Exxon Corp., 280 F.3d 554 (5th Cir. 2002); Castano v. Am. Tobacco Co., 84 F.3d 734 (5th Cir. 1996).

41. *See* Wyeth-Ayerst Labs. v. Caldwell, No. 2003-IA-01390-SCT, 2005 WL 171387 (Miss. Jan. 27, 2005); 3M Co. v. Johnson, No. 2002-CA-01651-SCT, 2005 WL 107134 (Miss. Jan. 20, 2005); Harold's Auto Parts, Inc. v. Mangialardi, 889 So. 2d 493 (Miss. 2004); Jansen Pharm., Inc. v. Bailey, 878 So. 2d 31 (Miss. 2004); Jansen Pharm., Inc. v. Grant, 873 So. 2d 100 (Miss. 2004); Jansen Pharm., Inc. v. Armond, 866 So. 2d 1092 (Miss. 2004).

42. *Bailey*, 878 So. 2d at 46.

43. Of course, one does not have to be too cynical to see a monetary motivation for the new interest in class actions. With the "mass joinder" money maker being shut down, the litigation machine may need a new engine.

Also in 2004, as well as in 2003, the Mississippi Supreme Court made other changes to improve the state's civil justice system; though, not one that anyone has suggested might provide an emphasis to adopting class actions. For example:

- In January 2003, the court adopted Mississippi Rule of Civil Procedure 35, authorizing independent medical examination for the first time in state court practice.[44]
- In May 2003, the court amended Mississippi Rule of Evidence 702 (making it identical to Federal Rule of Evidence 702), and tightened the requirements for expert witness opinions by adopting the *Daubert* test and discarding the more lenient *Frye* standards.[45]
- The court amended Mississippi Rules of Civil Procedure 20 and 42 to make it clear that unrestricted joinder was no longer permitted under the Rules.[46]
- The court amended Mississippi Rule of Civil Procedure 82, to recognize the doctrine of forum non-conveniens in state practice, thereby allowing transfer of a case or claim to a more convenient county "within the state."[47]

The Mississippi Legislature passed significant measures to end abusive practices in the courts, including unrestricted "mass joinder." After battling unsuccessfully in the 2002 legislative session, achieving only very limited reform in an 83-day special session in 2002,[48] and passing nothing on civil justice reform in 2003 or 2004, the Mississippi legislature made its mark in the first special session in June 2004.

House Bill 13, signed into law June 16, legislated an end to "unrestricted mass joinder" litigation in this state.[49] On venue, the legislation required that each plaintiff must establish venue.[50] No longer could hundreds of claimants file in a selected county only because one of them was a resident there.[51]

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44. The court had omitted Rule 35 when it adopted the text of almost all of the other Federal Rules of Civil Procedure, effective January 1, 1982. *Cf.* Order Adopting the Mississippi Rules of Civil Procedure, 395–97 So. 2d 1 (Miss. May 26, 1981).

45. *See* Mississippi Transp. Comm'n v. McLemore, 863 So. 2d 31, 35 (Miss. 2003).

46. *See* Order Amending Rule 20, 42, 82, and the Comments of the Rules of Civil Procedure, 867–69 So. 2d XV (Miss. Feb. 20, 2004).

47. *See* MISS. R. CIV. P. 82(e).

48. H.B. 19, 2002 3d Ex. Sess. (Miss. 2002). In the 83-day Special Session in late 2002, the Legislature adopted: (1) absolute monetary limits on punitive damages awards, based upon the net worth of the defendant; (2) a $500,000 limit on non-economic damages in medical malpractice cases; and (3) the repeal of the 15 percent penalty imposed upon defendants who appeal any judgment unsuccessfully. *See id.*

49. *See* H.B. 13, 2004 1st Ex. Sess. (Miss. 2004).

50. *See id.*

51. *See id.* House Bill 13 made the general rule for venue in a civil suit the county where the defendant resides (in the case of a corporation, the county of its principal place of business) or in the county where a "substantial alleged act or omission occurred or where a substantial event that caused the injury occurred." *See id.* If venue could not be asserted against a non-resident defendant on these two criteria, the plaintiff may file in the county where he or she lives. *See id.*

Of course, the 2004 Special Session resulted in other significant reforms[52]—changes that have been called "one of the most comprehensive legal reform bills in the nation"[53]—but, no one has suggested that any of these changes might justify the introduction of a state class action procedure.

V. HAS ANY REASONABLE JUSTIFICATION BEEN OFFERED FOR INTRODUCING STATE CLASS ACTIONS IN MISSISSIPPI?

Since class actions will do nothing to replace the mis-applied "mass joinder" cases, what possible justification, much less necessity, could there be for introducing state law class actions? Thus far, no meritorious or reasonable one has been provided.

A. Existing Law Provides Adequate Remedies for Justiciable Wrongs

Some are saying that "every wrong must have a remedy," and that without class actions there will be wrongs without remedies. But, is there any substance to this contention in Mississippi today? Or is it merely a request for more litigation?

Federal and Mississippi law provide a full panoply of civil enforcement tools to remedy various wrongs. Federal law, whether by use of the federal class action or otherwise, provides injunctive relief and money damages for discrimination claims, whether based upon race, sex, age, disability, medical leave or various other rights.[54] Federal courts also provide remedies for, among many other things: violations of securities laws,[55] violation of the antitrust laws,[56] violation of wage and hour laws,[57] wrongful withholding of employee benefits,[58] and breach of warranty on consumer products.[59]

Class actions are available in federal court, regardless of the dollar amount in controversy, when the claims are based upon federal law.[60] Likewise, Mississippi substantive law "provides an array of civil enforcement mechanisms to remedy virtually every conceivable wrong in consumer transactions."[61] It would be hard for anyone who has observed the

52. Some of the other changes included in House Bill 13 were (1) non-economic damage limitations in all cases; (2) protection from liability for sellers who did not contribute to the alleged defect of product; (3) punitive damages limitations (some revised downward from the 2002 Special Session legislative session); (4) protection from liability for premises owners in certain situations; and (5) joint liability was eliminated, and each defendant is responsible only for the damages they caused. *See id.*

53. *Mississippi Tort Triumph*, WALL ST. J., June 16, 2004, at A14.

54. *See* Raulston, *supra* note 2, at 6 (citing 42 U.S.C. § 2000(e) (civil rights); 29 U.S.C. § 621 (age discrimination); 38 U.S.C. § 2021 (veterans' benefits); 29 U.S.C. § 2601 (family and medical leave); 31 U.S.C. § 3730 (false claims)).

55. *See, e.g.*, 15 U.S.C. §§ 77l, 78j, 78u-4 (2000); 17 C.F.R. § 240.10b-5 (2005).

56. *See, e.g.*, 15 U.S.C. § 15 (2000).

57. *See* Raulston, *supra* note 2, at 6 (citing 29 U.S.C. § 216(b)) (held unconstitutional by *Alden v. Maine*, 527 U.S. 706, 712 (1999).

58. *Id.*

59. *Id.* (citing 15 U.S.C. § 2310).

60. *See* 28 U.S.C. § 1331 (2000); FED. R. CIV. P. 23.

61. *See* Raulston, *supra* note 2, at 6.

practice in our state courts for the last decade to find a type of claim that is recognized in other jurisdictions but is not available in this state. Even the United States Court of Appeals for the Fifth Circuit has recognized that Mississippi has expanded available remedies and that its state "courts have become a mecca for plaintiffs' claims against out-of-state businesses."[62]

Mississippi statutory law provides a wide range of claims and remedies for harm or potential harm, both to private citizens and to the Attorney General. For example, sections of the Mississippi Code sometimes referred to as the "Consumer Protection Act,"[63] prohibit a wide range of "unfair methods of competition" and "unfair or deceptive trade practices."[64] The Act even establishes an "Office of Consumer Protection" within the Attorney General's office which carries out the provisions of the Act.[65] The Attorney General is given specific authority to "remedy wrongs" by suing to obtain temporary or permanent injunctive relief whenever that office "has reason to believe that any person is using, has used, or is about to use a method, act or practice prohibited by" the Act.[66] Further, if that were not remedy enough, the Act specifically provides for private rights of action for money damages, as a claim or set-off.[67]

Mississippi law also specifically provides multiple remedies for violations of state antitrust and securities statutes.[68] These statutes provide for injunctive relief by the State,[69] as well as penalties and private rights of action for money damages.[70]

Moreover, one must not forget the ultimate state-approved remedy, criminal sanctions. While this remedy may provide no attorney's fees or monetary recovery, the criminal laws are available as a remedy, including punishment. Our state has made illegal a wide range of conduct, including (but certainly without limitation) unauthorized use of leased property;[71] removal of personal property subject to lien;[72] cutting trees on another person's land;[73] procuring money, goods or services by fraud with the use of a credit card;[74] obtaining money or property by obtaining another person's signature to a written instrument by false pretense;[75] selling encumbered

62. Arnold v. State Farm Fire & Cas. Co., 277 F.3d 772, 774 (5th Cir. 2001).

63. MISS. CODE ANN. §§ 75-24-1 to 27 (2004).

64. MISS. CODE ANN. § 75-24-5(1) (2004).

65. MISS. CODE ANN. § 75-24-1 (2004).

66. MISS. CODE ANN. § 75-24-9 (2004).

67. MISS. CODE ANN. § 75-24-15(1) (2004). The Legislature has expressly prohibited class actions under the Consumer Protection Act, and also has provided that "every private action must be maintained in the name of and for the sole use and benefit of the individual person." MISS. CODE ANN. § 75-24-15(4).

68. *See, e.g.*, MISS. CODE ANN. §§ 75-21-1, 75-71-501, 75-71-701 (2004).

69. *See* MISS. CODE ANN. §§ 75-25-1, 75-71-715 (2004).

70. *See* MISS. CODE ANN. §§ 75-21-1, 75-21-7, 75-21-9, 75-71-717 (2004).

71. MISS. CODE ANN. § 97-17-64 (2004).

72. MISS. CODE ANN. § 97-17-75 (2004).

73. MISS. CODE ANN. § 97-17-81 (2004).

74. MISS. CODE ANN. § 97-19-21 (2004).

75. MISS. CODE ANN. § 97-19-39 (2004).

property without disclosing a lien;[76] deceptive advertising;[77] and, willfully printing or circulating information to interfere with the business or trade of another.[78]

Finally, some have suggested that a class action mechanism is needed to pursue claims which many individuals may have, but which are too small to justify (or to interest a lawyer in bringing) individual lawsuits, now that "mass joinder" lawsuits are not available.[79] The main problem with this argument is that when the Rule 20 "mass joinder" remedy was available, no one used it to bring such "small claims" that could be joined under Rule 20. Instead, it was used to join claims for which large amounts, and even punitive damages, were sought for each plaintiff.

If there really were a concern for such small claims, as the objective or basis of class actions, that concern could easily be met by a requirement that any state class action could be maintained only where the individual claims were below a certain dollar threshold, say, $500 or $1,000. But, there have been no such proposals.[80] Moreover, there is no historical support for such "small claim" concerns. Lawsuits for relatively small amounts are often brought, and many times those claims have been accompanied by requests for punitive damages and attorney's fees.

B. State Class Actions, of the Type Sought by Plaintiff's Counsel in Mississippi, Would not Encourage Judicial Efficiency

Our state now has had ample experience with aggregation of claims, and it has not been a pretty scene. It would be no different if these claims—whether for personal injury, misrepresentation or other situations in which the common questions of law and fact do not plainly predominate—were allowed to be maintained together as class actions. The aggregation of such claims does not promote judicial economy; rather, it expands litigation.

First, there is no way there could be one trial of such claims, as there could be with claims legitimately brought as a class action under the federal rules. The "common issues" for such personal injury or fraud claimants do not predominate over the other issues. Likewise, there is no economy in the discovery as it relates to the plaintiffs. The most critical and important facts are individual to each plaintiff.

Second, allowing the claims to be aggregated actually encourages the filing of meritless claims by those who, in this procedural context, know their claims will never be scrutinized. This is because this aggregation of claims for money damages frequently confronts defendants with a situation

76. MISS. CODE ANN. § 97-19-51 (2004).

77. MISS. CODE ANN. § 97-23-3 (2004).

78. MISS. CODE ANN. § 97-23-33 (2004).

79. Indeed, the suggestion that "mass joinder" is needed for small claims—"the poor man's class action"—was raised in 2000, in oral argument in *American Bankers*, as why mass joinder or class actions were needed. *See supra* notes 27–28 and accompany text.

80. Neither have there been any proposals that there would be no opt-out option for any state class actions similar or identical to those actions allowed by Federal Rule of Civil Procedure 23(b)(3).

in which they have little if any choice but to settle. With this mass of individual claims for damages, in a selected court, the loss in a single case could drive the defendant company into bankruptcy.[81]

Third, if such class actions were allowed under a state rule 23 analogous to Federal Rule of Civil Procedure 23(b)(3), plaintiffs could opt out of the class action and bring their own individual cases. As has been seen in this state, even with certifiable class actions (such as those relating to the WorldCom bankruptcy), the surrounding publicity, class notices, and inevitable advertising for claimants, generates a large number of opt-outs who might never have considered filing individual suits. The result is the generation of multiple lawsuits where there would have been none.

C. *Nationally, There is a Move Against (or to Limit) Class Actions*

It is ironic that there is discussion of introducing a new class action remedy in our state at the same time as there is national recognition that class actions, particularly state class actions, have been abused and need to be restrained.

In the years leading up to 2000, companies in the United States reported a 300% increase in class actions and a 1000% increase in state class actions filed against them.[82]

The Class Action Fairness Act of 2005,[83] was one of the first bills introduced in Congress in 2005. The Act had significant bi-partisan support, quickly passed, and was signed into law in February. Senate Bill 5 recites the abuses that gave rise to the legislation:

> (2) Over the past decade, there have been abuses of the class action device that have-
>
> (A) harmed class members with legitimate claims and defendants that have acted responsibly-
>
> (B) adversely affected interstate commerce; and
>
> (C) undermined public respect for our judicial system.

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81. *See, e.g.*, Commentaries, *Tobacco Lawyers' Roundtable: A Report from the Front Lines*, 51 DEPAUL L. REV. 543, 545 (2001) (Richard Scruggs, a plaintiff's lawyer, noting that in such cases in "magic jurisdictions," a defendant could not go to trial; it was simply too big a risk.). Mr. Scruggs later described a "magic jurisdiction" as one:

> [W]here the judiciary is elected with verdict money. The trial lawyers have established relationships with the judges that are elected. . . . They've got large populations of voters who are in on the deal. . . . And so, it's a political force in their jurisdiction, and it's almost impossible to get a fair trial if you're a defendant in some of these places. . . . Any lawyer fresh out of law school can walk in there and win the case[;] so it doesn't matter what the evidence or the law is.

Jim Copland, *The Tort Tax*, WALL ST. J., June 11, 2003, at A16 (internal quotation omitted).

82. Copland, *supra* note 81 (reporting the increase from 1997 to 2000); *see* DEBORAH HINSLER ET AL., PRELIMINARY RESULTS OF THE RAND STUDY OF CLASS ACTION LITIGATION 15 (RAND Corp. ed., 1997); Federalist Society, ANALYSIS: CLASS ACTION LITIGATION-A FEDERALIST SOCIETY SURVEY, 1 CLASS ACTION WATCH 1 (1999) (reporting an over-300% federal increase and an over-1,000% state increase from 1988 to 1998), *available at* http://www.fed-soc.org/Publications/classactionwatch/volume1issue1.htm.

83. S. 5, 109th Cong. (2005).

(3) Class members often receive little or no benefit from class actions, and are sometimes harmed, such as where-
   (A) counsel are awarded large fees, while leaving class members with coupons or other awards of little or no value;
   (B) unjustified awards are made to certain plaintiffs at the expense of other class members; and
   (C) confusing notices are published that prevent class members from being able to fully understand and effectively exercise their rights.
(4) Abuses in class actions undermine the national judicial system, the free flow of interstate commerce, and the concept of diversity jurisdiction as intended by the framers of the United States Constitution, in that State and local courts are-
   (A) keeping cases of national importance out of Federal court;
   (B) sometimes acting in ways that demonstrate bias against out-of-state defendants; and
   (C) making judgments that impose their view of the law on other states and bind the rights of the residents of those states.[84]

Among other things, the recently enacted legislation restricts state court class actions by making any purported class action removable to federal court if the amount in controversy exceeds $5,000,000 and if there is *any* (minimal) diversity of state or national citizenship among the plaintiffs and defendants.[85] There is little reason for Mississippi to be rushing into the class action stadium just as the public inside has realized that they were being ripped off, that the only winners were the lawyers bringing (and, to some extent, those defending) such actions, and that it is time to head for the exits.

VI. CONCLUSION

No reasonable justification has been offered for introducing state class actions to Mississippi law or procedure. The reasons given by the proponents, primarily plaintiff's counsel, have been shown to be baseless.

It would be curious and tragic if Mississippi—having taken major steps to eliminate the "unfair" practice and reputation of its civil justice system—now took a major step to tarnish its significantly improved reputation and business climate. Our recent problems have resulted, in large part, from allowing the almost unlimited joinder of claimants into a single case in a selected county with which few of the plaintiffs and none of the defendants

84. S. 5, § 2(a)(2)-(4).
85. S. 5, § 4(a)(2).

has any connection (and which usually happens to be seen as plaintiff-oriented and prone to large verdicts). Adopting a class action procedure now would almost certainly be seen, nationally and locally, as substituting one abusive legal procedure for another. Mississippi could see its progress undone, its improved reputation for "fairness" severely damaged, and its improved opportunity for economic development and job creation ended.