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David W. Clark

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LIFE IN LAWSUIT CENTRAL: AN OVER-VIEW OF THE UNIQUE ASPECTS OF MISSISSIPPI'S CIVIL JUSTICE SYSTEM*

*David W. Clark***

I. INTRODUCTION

Mississippi has developed an infamous national reputation as a "mecca" for civil litigation.[1] In 2001, the Washington Post, the New York Times, the Wall Street Journal and even the London Financial Times, featured articles reporting on lawsuit abuse in Mississippi.[2] Articles regarding litigation in Mississippi have also appeared in other newspapers across the country such as the Chicago Tribune, the Los Angeles Times, the St. Louis Post-Dispatch and the Houston Chronicle.[3] Locally, Mississippi's Clarion-

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** David W. Clark is a partner in the Jackson, Mississippi, office of Bradley Arant Rose & White L.L.P., where he practices a wide range of civil litigation. He graduated with a B.A. from Millsaps College, cum laude with high honors, in 1970, earned an M.A. from Harvard University in 1971 and received his J.D. from the University of Michigan Law School in 1974. Mr. Clark, a past Chair of the Litigation Section of the Mississippi Bar, is active in the Mississippi and American Bar Associations. He is a member of the American Law Institute, and has served on the adjunct faculty of the Mississippi College School of Law.

1. Mark Ballard, *Mississippi Becomes a Mecca for Tort Suits*, NAT'L L.J., Apr. 30, 2001, at A1 (discussing plaintiffs' lawyers use of unique Mississippi laws to secure jurisdiction over multinational corporations in Jefferson County, Mississippi); Robert Pear, *Mississippi Gaining as Lawsuit Mecca*, N.Y. TIMES, Aug. 20, 2001 at A1, 2001 WL 26417393 (stating that plaintiffs' lawyers view Mississippi state courts as an advantageous forum for clients).

2. *See, e.g.*, Kenneth Bredemeier, *Unhappy Clients Bite Back*, WASH. POST, Aug. 27, 2001, at E1, 2001 WL 23189853 (stating Mississippi jury ordered American Management Systems, Inc. to pay State of Mississippi $474.5 million in contract dispute); Queena Sook Kim, *Court Dismisses Owens Corning Tobacco Lawsuit*, WALL ST. J., May 25, 2001 at B6, 2001 WL-WSJ 2864597 (noting Mississippi state court dismissed Owens Corning's lawsuit seeking reimbursement from tobacco companies for billions of dollars paid in personal injury lawsuits); Betty Liu, *The Poor Southern County That's Big on Lawsuits, Fin.* TIMES, Aug. 20, 2001 at 5, 2001 WL 25578228 (stating more than 21,000 plaintiffs have sued in Jefferson County since 1995 even though the county contains less than 10,000 residents); Pear, *supra* note 1.

3. *See, e.g.*, Deborah Bulkeley, *Heartburn Drug's Liability Curtailed*, CHI. TRIB., Oct. 1, 2001 at N16, 2001 WL 4120792 (reporting Mississippi Circuit Judge Lamar Pickard refused to allow jury to consider punitive damages in cases involving drug Propulsid made by Johnson & Johnson); *Diet-Drug Suits Settled, but AHP Merger Still in Trouble*, L.A. TIMES, Dec. 23, 1999 at C3, 1999 WL 26208230 (noting American Home Products settled hundreds of diet-drug cases in Mississippi in attempt to save planned merger with Warner-Lambert Co.); Ron Nissimov, *Fen-phen Firm Oks $8 Million Settlement*, HOUS. CHRON., Feb. 12, 2000 at A1, http:// www.chron.com/content/archive/index.mpl (stating Mississippi jury recently awarded $150 million to five Fen-phen patients); *Tobacco Was Real Culprit, Asbestos Firms Say in Suits*, ST. LOUIS POST-DISPATCH, Feb. 18, 2001 at A4, 2001 WL 4445009 (reporting asbestos companies filed lawsuits in Jefferson County against various tobacco giants).

Ledger ran a series of articles in 2001 called "Hitting the Jackpot in Mississippi Courtrooms," which discussed the proliferation of lawsuits and the huge verdicts and settlements produced in Mississippi in recent years.[4]

Even the Fifth Circuit Court of Appeals has recognized that Mississippi state courts "have become a mecca for plaintiffs' claims against out-of-state businesses."[5]

A National Harris poll of 824 general counsel and senior corporate attorneys, administered between November 7 and December 11, 2001, ranked Mississippi courts the worst in the country.[6] Of nine categories applicable to Mississippi courts, these national corporate counsel ranked Mississippi dead last—fiftieth—in eight. These included the worst in treatment of tort and contract litigation, punitive damages, timeliness of summary judgment/dismissal, scientific and technical evidence, judges' impartiality, judges' competence, juries' predictability and juries' fairness. Mississippi courts ranked next to the worst (forty-ninth) in discovery.[7]

Mississippi has been called "a magnet for liability lawsuits,"[8] "a mecca for frivolous lawsuits, with unlimited damages,"[9] a "dumping ground for lawsuits from other states"[10] and "a system gone awry" with "widespread judge and jury shopping."[11] Jefferson County, in particular, has been

4. *See, e.g.*, Beverly Pettigrew Kraft, *Good Drug Blamed For Troubles*, CLARION-LEDGER (Jackson, Miss.), June 17, 2001, at 17A (discerning twenty-seven lawsuits filed against manufacturer of the drug Rezulin in Mississippi Circuit Courts in 2000); Beverly Pettigrew Kraft, *Pharmacies Often in the Middle*, CLARION-LEDGER (Jackson, Miss.), June 17, 2001 at 16A (describing effects of continuous lawsuits against the only pharmacy in Jefferson County) [hereinafter Kraft, *Pharmacies*]; Jerry Mitchell, *$1.2B Drug Lawsuit Opens in Jefferson*, CLARION-LEDGER (Jackson, Miss.), June 18, 2001 at 1A (reporting first Propulsid drug case in nation took place in Jefferson County, Mississippi); Jerry Mitchell, *Jefferson County Ground Zero for Cases*, CLARION-LEDGER (Jackson, Miss.), June 17, 2001 at 1A (reporting that the number of lawsuits in Jefferson County rose from 178 in 1999 to 629 in 2000) [hereinafter Mitchell, *Ground Zero*]; Jerry Mitchell, *Out-of-State Cases, In-State Headaches*, CLARION-LEDGER (JACKSON, MISS.), June 17, 2001 at 1A (noting that favorable procedural rules and increased severity of jury verdicts have attracted trial lawyers from other states to Mississippi) [hereinafter Mitchell, *Headaches*].

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

6. *See* Harris Interactive, *U.S. Chamber of Commerce State Liability Systems Ranking Study: Final Report* at 9-10, 16-17 (Jan. 11, 2002); [hereinafter *State Liability Systems Ranking Study*]. The report, which totals ninety-nine pages, provides this "Methodological Overview" at page 6:

> All interviews for The State Liability Systems Rating Study were conducted by telephone among a nationally representative sample of senior attorneys at companies with annual revenues of at least $100 million. Of this sample, 44% of the respondents were from companies with annual revenues of $1 billion and over. Interviews averaging 15 minutes in length were conducted with a total of 824 respondents and took place between Nov. 7 and Dec. 11, 2001. The sample was segmented into two main groups. Of the 824 respondents, 86 were from insurance companies, with the remaining 738 interviews being conducted among public corporations.

See also State's Legal Climate "Worst" in Nation, THE GREENWOOD COMMONWEALTH (Grenwood, Miss), Jan. 30, 2002; *Survey Lends Support to Tort Reform*, HATTIESBURG AMERICAN (Hattiesburg, Miss), Jan. 24, 2002.

7. *See State Liability Systems Ranking Study*, *supra* n.6.

8. Pear, *supra* n.1.

9. *Id.* (quoting Senate Republican Leader Trent Lott of Mississippi).

10. *Id.* (quoting Roger W. King, Mayor of Fayette, Mississippi).

11. Steve Stewart, *Mississippi Insurance Commissioner Talks Premiums*, CLARKSDALE PRESS REG. (Clarksdale, Miss.), Jan. 24, 2002.

called "the center for the redistribution of wealth"[12] and "ground zero" for lawsuits.[13] A well-known Mississippi plaintiffs' lawyer has pronounced it one of the "magic jurisdictions."[14]

As this article will demonstrate, Mississippi is perceived as an unusual jurisdiction, where the procedural and substantive laws depart from the mainstream rules found in most other states, and runaway jury verdicts encourage plaintiffs to bring claims in the hope of hitting "jackpot justice." This article will show that this perception is a reality, and will touch on some of the reasons why the current Mississippi civil litigation system is bad for Mississippians. In addition, the article will discuss the unique aspects of Mississippi law that have contributed to the state's unwanted reputation as an unfair forum for civil defendants. First, the article will look at how Mississippi's unique procedural rules, including the rules concerning joinder of plaintiffs and venue, encourage out-of-state attorneys to flock to Mississippi to file lawsuits. Second, the article will show how Mississippi's substantive laws work in tandem with the state's procedural rules to produce astronomical verdicts. For example, the article will review how the lack of limits on punitive damages and the lack of product seller fairness legislation differ from the law in many other states, ultimately hurting Mississippi consumers. Finally, the article will suggest some changes that could help return justice and honor to Mississippi's courtrooms and reform the state's status as "lawsuit central." By creating a more favorable business climate, Mississippi will be in a better position to attract job-creating businesses and taxpayers into the state and to encourage the growth of job-creating businesses in the state.

Mississippi faces enough obstacles to economic progress as it is. It does not need to add to those impediments the unnecessary burden of a national reputation as the state whose courts are the most unfriendly and unfair to business.

Fortunately, there is something that can be done. Fairness can be returned to our court system, thus improving the economic prospects for the state, while ensuring easy access to the courts for those with legitimate claims.

II. How the Proliferation of Lawsuits Hurts Mississippi

As a preliminary matter, it is important to recognize that Mississippi is not just like any other state. Before 1995, no jury in Mississippi had returned a verdict over $9 million in actual or punitive damages. Since 1995, Mississippi juries have returned at least twenty-one verdicts of $9 million or more, including seven that equaled or exceeded $100 million each.[15] These

12. Mitchell, *Ground Zero*, *supra* n.4.

13. *Id.*

14. Richard Scruggs, Esq., *Tobacco Lawyers' Roundtable: A Report from the Front Lines*, 51 DePaul L. Rev. 543, 545 (2001).

15. *See* Jimmie E. Gates, *$100M Verdict: Propulsid at Fault*, Clarion-Ledger (Jackson, Miss.), Sept. 29, 2001, at 1A (reporting on Claiborne County, Mississippi, lawsuit against makers of Propulsid,

extremely high verdicts, which are out of step with the rest of the country, provide an incentive for out-of-state lawyers and plaintiffs to bring their cases in Mississippi.[16] Lawyers are spending increasingly large amounts of money to lure potential Mississippi plaintiffs, particularly plaintiffs in some of the counties known for high jury verdicts.[17] Out-of-state lawyers are rushing to the state in ever-increasing numbers to become members of the bar and to file lawsuits in the state.[18] Races for seats on the State Supreme Court have become multi-million-dollar campaigns, as both personal injury lawyers and businesses seek like-minded judges in this increasingly high-stakes enterprise.

The National Law Journal has reported national studies of the percentage of verdicts in each state's courts that exceeded $1 million. For the period from 1994 to 2000, Mississippi had the second highest percentage of jury verdicts over $1 million of all the fifty states.[19] This placed Mississippi—with its comparatively small population, lack of large businesses, and one of the nation's lowest per capita incomes—far "ahead" of 48 other states, passing all except New York in this dubious category. Mississippi was second highest both for total awards and for compensatory awards alone, and Mississippi's percentage of such extraordinary verdicts was twice the national average, 24% versus 12%.[20]

The detrimental effects of Mississippi's litigation system reach beyond businesses and also hurt consumers. For example, in 2001, George R. Dale, Mississippi's insurance commissioner, approved a 65% increase in premiums for malpractice insurance sold to doctors.[21] By the summer of 2001, at least forty-four insurance companies had left Mississippi or stopped selling

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Janssen Pharmaceutical, Inc. and its parent company, Johnson & Johnson) [hereinafter Gates, *$100M Verdict*]; Jimmie E. Gates, *Clinton Pair Awarded $23M in Suit*, CLARION-LEDGER (Jackson, Miss.), Oct. 9, 2001 at 1B (discussing medical malpractice case against Jackson HMA, Inc.); Jerry Mitchell, *Staggering Jury Verdicts Draw Calls for Tort Reform*, CLARION-LEDGER (Jackson, Miss.), Oct. 30, 2001 (outlining debate over Mississippi tort reform); Pear, *supra* note 1 at A14.

16. *See* Mitchell, *In-State Headaches*, *supra* note 4. The number of Alabama lawyers, for example, who obtained admission to the Mississippi bar tripled from 1999 to 2000. *See Advocacy Group Wants to STOP Lawsuit Abuse*, DAILY CORINTHIAN (Corinth, Miss.), July 1, 2001.

17. *See* Jimmie E. Gates, *Critics Link Lawyer Ads, Big Awards*, CLARION-LEDGER (Jackson, Miss.), June 18, 2001, at 4A (reporting lawyers' use of television and newspaper advertisements to attract clients to possibly sue pharmaceutical companies).

18. For example, the number of Mississippi Bar admittees living in Alabama has increased 650% over the last two years, going from six in 1999 to forty-five in 2001. Mississippi Board of Bar Admissions listing of those admitted to Bar, 1999-2000; Mississippi Board of Bar Admissions listing of those passing the bar in 2001.

19. *Current Award Trends in Personal Injury*, 2001, JURY VERDICT RESEARCH SERIES (LRP Publications, 2002), at 35-36 [hereinafter *Current Award*]. That represented an increase from just a year earlier, reflecting the state of the spate of huge verdicts in 1995. For the period from 1993 to 1999, Mississippi had the fourth highest percentage of such large verdicts in the nation. *See* Andrew Harris, *Report Maps Million Dollar Verdict States but Trial Lawyers Are Skeptical of the New Study's Award Data*, NAT'L L.J., Feb. 12, 2001 at A4. For the 1993 to 1999 period, Mississippi's percentage of $1 million verdicts was approximately 22% and Alabama's 15%. Alabama's serious tort reform took effect in 1999-2000. *Id.*

20. *Current Award supra* note 19 at 35-38.

21. *See* Pear, *supra* n.1.

certain kinds of insurance because of large jury verdicts in the state.[22] Certainly more joined the exodus in the following year. This is leading to a lack of competition in the marketplace and higher prices for Mississippians. While several factors may drive up the cost of insurance premiums, Commissioner Dale notes that one factor that the state legislature can affect is the increasingly anti-business legal climate.[23]

Moreover, with insurance rates increasing, more and more doctors will be encouraged to take their practices to other states. In Greenville, Mississippi, 60% of doctors have seen a 20% increase in their insurance rates, and another 30% have seen insurance rates increase by 75%.[24] A spokesperson for one insurance company related the increase directly to higher jury awards and settlements in the state.[25] The increase in insurance may explain why, by the summer of 2001, 324 doctors have stopped delivering babies in Mississippi over the last ten years.[26] In 2001, at least nine physicians in the Mississippi Delta stopped delivering babies when their insurance premiums jumped 20% to 400% (premiums ranging from $40,000 to $110,000) in just one year.[27] Some fear that obstetrics will disappear from the rural areas of the state.[28]

In addition, health insurance for individuals is now more expensive than it was a few years ago. For example, a couple of years ago, a healthy twenty-five-year-old could obtain health insurance for $60 per month, but that same policy cost $150 in the Fall of 2001.[29]

In Tupelo, the largest non-metropolitan hospital in the country is losing physicians because of the litigation climate, and it can no longer recruit qualified specialists to replace them. The region is losing physicians who simply cannot afford the rising number of suits and rising malpractice insurance premiums.[30]

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22. *See* Reed Branson, *Miss. Tort System in the Balance*, COM. APPEAL (Memphis, Tenn.), Oct. 16, 2001, at B1, 2001 WL 25855937 (commenting that through judicial appointments to the Mississippi Supreme Court, Mississippi Governor Ronnie Musgrove has tremendous power to influence the ongoing battle between business and plaintiffs' attorneys); Jerry Mitchell, *More Firms Exit Mississippi*, CLARION-LEDGER (Jackson, Miss.), June 17, 2001 at 1A.

23. Stewart, *supra* n.11.

24. *See* Cassandra Perry, *Lawsuit Abuse Affects Medical Care*, DELTA DEMOCRAT TIMES (Greenville, Miss.), June 24, 2001 at A1.

25. *See* Pear, *supra* note 1; John Porretto, *Many Mississippi Doctors Giving Up Obstetrics in the Face of Rising Insurance Costs*, NEW ORLEANS TIMES-PICAYUNE, Nov. 19, 2001, 2001 WL 30246759 (reporting that rural Mississippi doctors blame the state's high jury verdicts and settlements for doctors rising insurance costs).

26. *See* Perry, *supra* n.24.

27. Jimmie E. Gates, *Malpractice Insurance Rates Forcing Out Some Physicians*, CLARION-LEDGER (Jackson, Miss.), Nov. 19, 2001 at 1A (reporting on drastic increase in medical liability insurance rates for Mississippi obstetricians).

28. *Id.*; Porretto, *supra* n.25.

29. *See* Joey Bunch, *Lawsuit-Limit Campaign Launched*, SUN HERALD (Biloxi, Miss.), Oct. 12, 2001, at A2, http:// www.sunherald.com/mld/sunherald/archives (concerning National Federation of Independent Businesses' push for tort reform).

30. Reed Branson, *Musgrove Tells Doctors Help Is Coming*, COM. APPEAL (Memphis, Tenn), May 22, 2002.

On the employment front, manufacturing jobs in Mississippi have declined from 260,000 in 1994 to 221,500 in May of 2001.[31] That means 15% of manufacturing jobs have left the state in the past few years. The state's reputation as a "tort mecca" has played a role in the job exodus.[32]

Plainly, the unbalanced judicial system is hurting the state and the prospects for more and better jobs, better incomes and available healthcare. W.G. Holliman, Jr., the chairman, president and CEO of the largest manufacturer of residential furniture in the world, based in Tupelo, told business leaders that Mississippi's civil justice system is seriously damaging the state's economy. Holliman announced that while he loves his home state and would like to expand the division of his company that is located in Mississippi, the "crisis" in the state's legal system prevents it.[33] Furthermore, if Mississippi-based businesses will not expand because of the judicial climate, what does that say about the state's chances to attract new industry? As Mr. Holliman told Mississippi's business leaders: "[I]f you think you are going to attract other business to this state—run by people who don't already feel the passion for Mississippi that we all feel—well, you'd better think again."[34]

Small businesses in Mississippi report that the large verdicts and increased insurance costs are hurting many such companies in the state. According to one report, "[s]ome of these people are [just] getting by month to month."[35]

No one can say how many potential new employers, with new jobs, have decided not to locate in Mississippi because of the state's reputation for lawsuits and the resulting unfavorable business climate. No one knows how many business expansions have been cancelled. Mississippi remains at the bottom of the economic and new jobs list. Similarly, no one can say how much the increased insurance rates raise every Mississippian's cost of living.

What can be said is that many of those in a position to know believe that Mississippi's legal climate is the worst for business in the entire country. In addition to a comprehensive national survey of corporate counsel,[36] a 2002 publication by the American Tort Reform Association entitled *Bringing Justice to Judicial Hellholes* listed three Mississippi counties (Copiah, Claiborne, and Jefferson) as among the most unfair state court forums found anywhere in the United States.[37]

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31. *See* John Porretto, *Rural County Known for Huge Verdicts*, SUN HERALD (Biloxi, Miss.), July 2, 2001 at A1.

32. *See* John Porretto, *NFIB Planning to Push Tort Reform*, CLARION-LEDGER (Jackson, Miss.), Oct. 22, 2001 at 4B (reporting National Federation of Independent Businesses will lobby for tort reform in 2002 legislative session).

33. W.G. "Mickey" Holliman, Keynote Speech at the Mississippi Economic Council Annual Meeting (May 21, 2002) http:// www.msmec.com/programs/2002AnnMeet/KeynoteSpeech052102.html.

34. *Id.*

35. *See* Porretto, *supra* n.25.

36. *State Liability Systems Ranking Study*, *supra* n.6 at 9-10, 16-17.

37. American Tort Reform Association, *Bringing Justice to Judicial Hellholes* at 10 (2002), www .atra.org (last visited Oct. 1, 2002).

So who pays for these huge jury awards and the unfair judicial system, and how? Mississippi and its citizens, "through higher prices, through the absence of essential services, or—in the final analysis—through a shrinkage in payrolls from one end of this state to the other."[38]

III. MISSISSIPPI'S UNIQUE PROCEDURAL LAWS

Mississippi has a handful of procedural rules that, as recently interpreted by our courts, make it a favorable jurisdiction for plaintiffs to bring suit.[39] To appreciate the effect of these rules, imagine that you are a plaintiff with a claim against a large corporate defendant that does business in each of the fifty states. You could bring your lawsuit in any number of states, but you learn that if you bring your lawsuit in Mississippi, your chances for a very high award are better than in almost any other state, and your claim is likely to be resolved more quickly. Wouldn't you, as a plaintiff, come to Mississippi under those circumstances? Out-of-state plaintiffs' lawyers can hardly be criticized for coming to Mississippi to litigate when liberal joinder and venue rules present the best forum for huge awards for their clients' alleged injuries.[40]

In addition, the joinder and venue rules allow a plaintiffs' attorney to file in the county of his choosing.[41] In a very poor state by national standards, plaintiffs' lawyers are bringing a disproportionate number of their cases in a few of the poorest counties, in which the unemployment rates are far above the state average, and the educational levels are below it.[42] Whether or not these counties provide the best juries to evaluate complicated technical, scientific, or other medical information, juries in these counties certainly have returned the big verdicts.[43]

A successful personal injury lawyer in the state says that by suing large corporations in one of these "magic jurisdictions," you "raise the stakes so

38. Holliman, *supra* n.33. Holliman referred to the crisis in our civil justice system as "that noose . . . around the necks of our entrepreneurs" in the state. *Id.*

39. *See* MISS. R. CIV. P. 20, 82.

40. *See id.*

41. *See id.*

42. *See, e.g.*, Labor Mkt. Info. Dep't, Miss. Employment Sec. Comm'n, Labor Market Info.: Quick Reference Data by County 4, 7 (Aug. 2001) www.mesc.state.ms.us/lmi/files/alf/primalf2001.pdf. In August 2001, as in the previous month, two of the favorite venues for the mass joinder lawsuits, Jefferson and Holmes Counties, led the state with the highest unemployment rates. *Id.* Holmes County's unemployment rate was 16.9%, the highest in the state; Jefferson County was second with 16.1%. *Id.* Both of these were several times the state unemployment rate for the same period, 5.1%. *Id.* Those counties also have among the lowest educational levels. *See id.* In 1990, the last year for which comprehensive census results are available, only 48% of the adults (those over age twenty-five) in Holmes County, and only 53% of those in Jefferson County, had graduated from high school. Bureau of the Census, U.S. Dep't of Commerce, Holmes DP-2, 1990 Census of the Population: Social Characteristics (1990) http://factfinder.census.gov/servlet/QTTable?ds_name=D*geo_id=05000US28051&qr_name=DEC_1990_STF3_DP2&_lang=en (Holmes County); Bureau of the Census, U.S. Dep't of Commerce, http://factfinder.census.gov/servlet/QTTable?ds_name=D&geo_id=05000US28063&qr_name=DEC_1990_STF3_DP2_lang=en (Jefferson County).

43. *See* Mitchell, *supra* n.15 (discussing a recent verdict of $150 million to six plaintiffs in an asbestos case and $100 million to ten plaintiffs in a Propulsid case).

high that they can't afford to lose or can't afford to go to trial."[44] He further states that "companies that . . . find themselves in the bull's-eye of mass [tort] litigation have very little choice now between bankruptcy . . . or trench warfare . . . in some of these magic jurisdictions."[45]

A. Joinder

1. The Abuse of Rule 20 Joinder

While Mississippi is a good place to litigate for lone plaintiffs, the benefits of Mississippi's liberal procedural rules are even more tangible for a group of several hundred or several thousand plaintiffs who want to bring "similar" claims in the same case. In Mississippi, groups of plaintiffs have been allowed to bring claims as "mass joinder actions" under much less stringent procedural rules than would be imposed on the same type of cases in other states. These mass joinder cases have permitted plaintiffs to join numerous claims that no court outside of Mississippi would deem to be "arising out of the same transaction, occurrence, or series of transactions or occurrences."[46]

There have been suggestions that this unregulated mass joinder has been allowed because Mississippi does not have class actions.[47] In fact, however, many of the cases which the courts in this state have been allowing to proceed as "mass joinders" under Rule 20 of the Mississippi Rules of Civil Procedure would not meet typical standards for class certification.[48] Therefore, in Mississippi today, plaintiffs can aggregate claims that would not be aggregated anywhere else in the country, either under joinder rules or as class actions.

2. The Difference Between Class Actions and Rule 20 Joinder

In *American Bankers Co. v. Alexander*,[49] the Mississippi Supreme Court said that the state does not have class actions and that, as a result, courts have "liberalized the rules of civil procedure" to allow broader joinder under Rule 20 of the Mississippi Rules of Civil Procedure.[50] There are several problems with this. First, the five cases involved in the American Bankers appeal were re-filed in state court after they could not be certified as class actions in federal court because they involved individualized circumstances and elements of proof.[51] The class action vehicle was available;

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44. Scruggs, *supra* n.14 at 545.

45. *Id.*

46. Miss. R. Civ. P. 20.

47. *See* Am. Bankers Ins. Co. v. Alexander, 818 So. 2d 1073, 1080 (Miss. 2001) (noting that the rules of civil procedure have been "liberalized" to compensate for the lack of a class action rule), cert. denied 122 S. Ct. 324 (2001).

48. *See infra* notes 73, 81.

49. 818 So. 2d 1073 (Miss. 2001).

50. *Id.* at 1078.

51. The three federal class action lawsuits were Sims v. Fidelity Fin. & Am. Bankers, No. 2:96-CV-160PG (S.D. Miss.); Thomas v. Fidelity Fin. & Am. Bankers, No. 3:96-CV-35-LN (S.D. Miss.); and Wilks v. Sunstar Acceptance Corp. & Am. Bankers, No. 1:96-CV-220-GR (S.D. Miss.). These cases

the claims and claimants just did not meet the requirements to certify the class in federal court.[52]

Second, confusing "mass joinder" with class actions is problematic because joinder and class actions are two procedurally distinct devices. Joinder, both under the Federal Rules 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 [same] action."[53]

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 class.[54] 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.[55] 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.[56] 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 plaintiffs' claim must be individually heard.

The cases filed as mass joinders in Mississippi demonstrate that "mass joinder" does not promote judicial economy. One example, American

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were re-filed from March 6 to September 2, 1997, as the five cases involved in the American Bankers appeal. *See also* Appellant's Brief at 3, *Am. Bankers*, 818 So. 2d at 1073.

52. Appellant's Brief at 3, *Am. Bankers*, 818 So. 2d at 1073.

53. FED. R. CIV. P. 20; MISS. R. CIV. P. 20.

54. *See* FED. R. CIV. P. 23.

55. 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," or that the defendant has acted or refused to act with respect to the class in general, and injunctive or declaratory relief is sought. *Id.*

56. *Id.*

Bankers, is discussed below. Two asbestos-exposure actions also provide recent and powerful examples of how mass joinder fails to promote judicial economy.

In *Stephens v. Combustion Engineering, Inc.*, the court permitted joinder of over 2500 claimants suing over 100 defendant product manufacturers.[57] Each of the plaintiffs claimed exposure to asbestos from at least one defendant's product or products, but none of the plaintiffs claim to have been exposed to all defendants' products.[58] Similarly, the plaintiffs did not all work in the same workplace or work over the same period of time.[59] It is difficult to understand how judicial economy could be served by joining claims involving different parties that took place over different periods of time. Yet, this case has been filed as a "mass joinder" and, at this writing, is proceeding.[60]

A similar example is *Johnson v. ACandS*,[61] a 154-plaintiff case against over 100 defendants.[62] Plaintiffs' counsel selected ten of the plaintiffs as the first "trial group," and the case proceeded to trial on October 4, 2001.[63] The allegations were that the trial group plaintiffs were exposed to asbestos from some of the defendants' products.[64] None of the trial group plaintiffs had claims against all of the defendants.[65] Some of the defendants were in the case only because one or two of the trial group plaintiffs made claims against them.[66] The products to which each plaintiff was exposed were different; the employment history (i.e., place of exposure) was different for the plaintiffs; and the type and duration of exposure to different products was different for each plaintiff.[67] Yet, all of the evidence was presented against all of the defendants. When would the other 144 plaintiffs' claims be tried? The plaintiffs' attorneys' hope is that a shocking verdict for the

57. No. 11-0010 (Cir. Ct. Jasper County., Miss. filed Jan. 30, 2001).

58. *Id.*

59. *Id.*

60. This case provides a good example of how the "mass joinder," as allowed to proceed by several state courts, is not functional or efficient. When a special master appointed by the court required the plaintiffs to provide "core discovery"—including each plaintiff's place of residence (i.e., state and county) and workplace(s) where he/she claimed to have been exposed to one or more of defendants' products—before plaintiffs could proceed to trial with any of the plaintiff "trial groups," the plaintiffs changed course. In a Motion to Dismiss Enumerated Plaintiffs, served February 6, 2002, plaintiffs' counsel proposed to dismiss the vast majority of the plaintiffs, "leaving a smaller group of three hundred plaintiffs who share several jobsites." Motion to Dismiss Enumerated Plaintiffs at 1, *Stephens*, No. 11-0010 (filed Feb. 6, 2002).

61. No. 2000-181 (Cir. Ct. Holmes County, Miss. argued Oct. 4, 2001).

62. *Id.* Unlike many of the mass joinder cases, thanks to extensive advertising and "screening" of potential plaintiffs in Holmes County, most of the plaintiffs, including seven of the ten in the "first trial group," lived in Holmes County. Thanks also to the intensive plaintiff-solicitation in the county, several of the members of the venire had actually been screened or tested or had attended one of the several "information sessions" held by personal injury lawyers at night in the very courthouse and courtroom in which this case was being tried. *See* Defendant's Petition for Interlocutory Appeal, *ACandS*, No. 2001-M-1588 (Oct. 8, 2001).

63. *ACandS*, No. 2000-181.

64. *See id.*

65. *Id.*

66. *Id.*

67. *Id.*

trial group plaintiffs, or the possibility of this happening, will force the defendants to settle the remaining cases, as well as other cases handled by those attorneys for other claimants.[68]

Another indication that "mass joinder" does not promote judicial economy is the fact that, in the federal system, joinder is not used to aggregate hundreds of claims into one action. The point at which federal courts have found joinder to be impractical is far below the number of claims that are often joined in Mississippi.[69] While there is no magic number at which joinder becomes impractical, in general, federal courts have held that in cases with more than forty plaintiffs, joinder becomes impractical; the judicial economies created by joining parties in one action are outweighed by the confusion created by having such a large number of plaintiffs in a single action.[70] Federal court practice provides a powerful statement about judicial economies in cases involving more than forty people.[71]

3. How the Court in *American Bankers* Misapplied Rule 20 and increased Confusion as to the Proper Standard for Joinder in Mississippi

Joinder is permitted in Mississippi when claims "aris[e] out of the same transaction, occurrence, or series or transactions or occurrences."[72] 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."[73]

In 2001, the Mississippi Supreme Court attempted to provide some guidance on the joinder issue in *American Bankers Co. v. Alexander*.[74] Unfortunately, the *American Bankers* case ultimately raised more questions than it answered. The case was a consolidated interlocutory appeal of judges' joinder rulings in five separate lawsuits, each with numerous plaintiffs, with a total of nearly 1400 plaintiffs.[75] The defendants argued that the plaintiffs' various claims did not "aris(e) out of the same transaction or occurrence," and, therefore, joinder under Rule 20 of the Mississippi Rules of Civil Procedure was improper.[76] The plaintiffs in all of the cases asserted that the defendants defrauded American Bankers' customers by

68. *Id.* Indeed, the threat of such an irrational verdict led all but three of the defendants to settle, either prior to or during trial.

69. *See* 5 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE ¶ 23.22 (3)(a) n.10 (3d ed. 1997) (citing cases from the Third, Fourth, Seventh, Ninth, Tenth and District of Columbia Circuits in which joinder was found to be impractical where there were forty or more plaintiffs).

70. *Id.*

71. It is worth noting that even the exceptions to the federal forty-person general guideline do not include more than 100 joined individuals. *See id.* ¶ 23.22(3)(a) n.12.

72. MISS. R. CIV. P. 20.

73. 3 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1653 at 408 (3d ed. 2001).

74. 818 So. 2d 1073 (Miss. 2001).

75. *See id.* at 1074. All of these claims originated as one proposed class action in federal court; however, when the federal court declined to rule that the 1400 claims could be brought as a class action, the claims were re-filed in five separate state court lawsuits. See *supra* note 68 and accompanying text.

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

charging the maximum insurance premiums in violation of American Bankers' internal guidelines.[77] American Bankers filed an interlocutory appeal, asserting that the claims were improperly joined.[78] The Mississippi Supreme Court held that joinder of the multiple plaintiffs' claims in each case was proper under Rule 20 of the Mississippi Rules of Civil Procedure.[79]

The confusion created by this decision begins 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."[80] The court was essentially saying that since class actions do not exist in Mississippi, joinder rules will be "liberalized" to accommodate mass litigation that would otherwise be brought as a class action.

There are at least five problems with the court's approach. 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.[81] The goal in not adopting a rule permitting class actions was to avoid the type of mass litigation that Mississippi courts are now witnessing. Former Chief Justice Prather stated that the justices wanted to avoid class actions because they are "burdensome, and our courts [are not] equipped to handle them."[82]

The second problem with the court's statement in *American Bankers* is that, as discussed above, 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.

A third problem is that the class action option was, in fact, available to the plaintiffs in *American Bankers* if they had met the federal class action requirements. Indeed, the plaintiffs had initially filed their claims in federal courts as a class action, but the court would not certify the claims as a Rule 23 class action. Thus, the absence of a state court class action procedure did not "shut [anyone] out of the legal system."[83]

A fourth problem is that, even if a class action was not feasible, none of the plaintiffs was "shut out" of the legal system. Each, if he or she had a claim, could file 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 join the

77. *Id.* at 1075.
78. *Id.* at 1074.
79. *Id.* at 1079.
80. *Id.* at 1078.
81. Mitchell, *Headaches*, *supra* n.4.
82. *Id.*
83. *Am. Bankers*, 818 So. 2d at 1078.

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

A fifth problem with the *American Bankers* decision is that the court seemed to rest its holding on the fact that there was one master insurance policy covering all of the plaintiffs and that the only differences in the plaintiffs' cases were due to their outstanding loan balances.[84] That is useful for future cases involving insurance policies but somewhat less useful in the tort context. Is the manufacture or distribution of a product a "pattern of conduct" sufficient to permit joinder? In another section of the opinion, the court suggests perhaps not. The court distinguished American Bankers from a tobacco case in which three plaintiffs were not permitted to join their claims, noting that in the tobacco litigation "each plaintiff's claim arose out of a unique set of facts and circumstances."[85] In most, if not all, product liability or environmental exposure cases, the same will also be true: plaintiffs will have been variously exposed to the product(s) or environmental hazard(s); plaintiffs will claim widely varying injuries; and issues relating to the plaintiffs' or defendants' conduct may be relevant.[86]

Another area of confusion in *American Bankers* comes from the court's statement that joinder was appropriate because all of the claims arose of out the same "pattern of conduct."[87] The phrase "pattern of conduct" is broader than the language of the joinder rule, which refers to a "series of transactions or occurrences."[88] The latter connotes interrelated events, in which the same facts may be at issue, while the former ("pattern of conduct") implicates a much broader set of circumstances. To illustrate, consider two examples of civil claims against a defendant who has committed multiple batteries. Under the language of the rule, it would seem that two or more plaintiffs could join in an action only if their injuries result from assaults at the same time and place. That is, claims could be joined if the defendant injured the two plaintiffs in the same attack as they were walking down the street. Under the broader "pattern of conduct" rule, however, it is possible that many plaintiffs who suffered injuries in different times and places could join in the same suit against the defendant if the defendant's pattern of conduct in committing the acts was similar. Thus, the "pattern of conduct" language is much broader than what is found in the rule itself, and by using this language the Mississippi Supreme Court has greatly expanded the scope of claims that may be joined in one case.

B. Venue Rules

Another way in which Mississippi's procedural rules differ from other states' rules is found in Mississippi's venue rule. The relevant Mississippi Rule of Civil Procedure provides that when several parties have been

84. *See id.* at 1076, 1079.
85. *Id.* at 1076; *see* Insolia v. Phillip Morris, Inc., 186 F.R.D. 547, 550 (W.D. Wis. 1999).
86. *See, e.g.*, Castano v. Am. Tobacco Co., 84 F.3d 734, 742 n.15 (5th Cir. 1996).
87. *Am. Bankers*, 818 So. 2d at 1079.
88. MISS. R. CIV. P. 20; *Am. Bankers*, 818 So. 2d at 1079.

joined in one action, venue is proper for all of the parties if it would have been proper for any of the parties.[89] This allows plaintiffs' counsel to extort exorbitant settlements from corporate defendants by grouping hundreds or even thousands of claims in what a prominent plaintiffs' lawyer has called the "magic" counties.[90]

By contrast, venue rules in other states such as Texas and Alabama provide that when several plaintiffs are joined, venue must be proper as to each plaintiff.[91] Requiring venue to be proper for each plaintiff, as the Texas and Alabama rules do, has a direct impact on cases where out-of-state plaintiffs try to bring suit and on cases where plaintiffs from different counties want to select a particular venue or judge they believe will be more favorable to their claims.

In both Texas and Alabama, a plaintiff may only bring an action either (i) in the county where a substantial portion of the events giving rise to the claim occurred, or (ii) in the county where the plaintiff resided, or (iii) in the county of the defendant's principal office in the state if the defendant is a corporation.[92] In a products liability case involving out-of-state plaintiffs, the plaintiff may bring his or her case only in the county where the interaction with the product occurred or the county where the corporation's principal office is located.[93] If the exposure to the product occurred outside of the state, the out-of-state plaintiffs are limited to the principal place of business as the only place where they may bring suit.[94] If a similar rule existed in Mississippi, then 5000 plaintiffs would not be allowed to bring their lawsuits in a particular "magic jurisdiction" unless that is where the injury occurred or that is where the corporation's principal office is located. The combined effect of the current joinder and venue rules in Mississippi is that thousands of plaintiffs may join together in a single case, even if the venue is proper for only one of those individuals.

IV. SUGGESTIONS FOR CHANGE IN MISSISSIPPI'S PROCEDURAL RULES

A. Clarify and Reform Appeal Bond Requirements

Supersedeas (appeal) bonds provide security that if a defendant appeals an adverse trial judgment, the defendant will have sufficient assets to satisfy the judgment if the appeal is ultimately unsuccessful. Just as appeal bond rules protect plaintiffs during an appeal, however, appeal bond rules

89. *See* MISS. R. CIV. P. 82.

90. Scruggs, *supra* n.14.

91. *E.g.*, ALA. CODE § 6-3-7(c) (1993 & Supp. 2002); TEX. CIV. PRAC. & REM. CODE ANN. § 15.003(a) (Vernon 1986 & Supp. 2002).

92. ALA. CODE §§ 6-3-2(a)(3), 6-3-7(a); TEX. CIV. PRAC. & REM. CODE ANN. § 15.002(a). In Alabama, a plaintiff can choose to bring the action in the county of the plaintiff's residence. ALA. CODE § 6-3-7(a)(2). Furthermore, the Texas and Alabama rules contain exceptions through which a plaintiff who does not otherwise meet the venue requirement may still be joined in the case if he or she demonstrates that allowing him or her to join in the case is not unfair and promotes judicial economy. *See* ALA. CODE § 6-3-7(c); TEX. CIV. PRAC. & REM. CODE ANN. § 15.003(a).

93. ALA. CODE § 6-3-7(a); TEX. CIV. PRAC. & REM. CODE ANN. § 15.002(a).

94. *See* ALA. CODE § 6-3-7(a); TEX. CIV. PRAC. & REM. CODE ANN. § 15.002(a).

must be written so that they do not make it impossible for a defendant to pursue an appeal.

Defendants should have full access to a state's appellate court system to challenge an adverse judgment, just as losing plaintiffs have the ability to test their case on appeal. The defendant's right to an appeal is particularly important if the verdict contradicts settled legal principles, is based on novel and untested theories of liability, is the product of bias or prejudice or is so large as to "shock the conscience" and violate constitutional due process protections.[95]

When faced with an exorbitant judgment and an equally exorbitant bond requirement to stay the judgment pending appeal, many defendants (even large corporations) may be unable to post the bond necessary to pursue an appeal, lest they face bankruptcy. This hypothetical situation became a reality in Mississippi when the Loewen Group was forced to settle because it could not afford to post $625 million to appeal the $500 million judgment that had been levied against it by a Mississippi jury.[96]

1. Recent Reform

The Mississippi Supreme Court in 2001 recognized the need for appeal bond reform in the state when it amended the rule governing the amount of a supersedeas bond that an appellant must post to stay a punitive damages judgment during appeal.[97] Unfortunately, the amended rule lacks clarity and does not go far enough. As written, the rule states that a defendant must post the lower of 125% of the total amount of a punitive damages award or 10% of the defendant's net worth, if the defendant can show that the full bond amount would threaten its financial security.[98] The rule also states that "[a]bsent unusual circumstances, the total amount of the required bond . . . as to punitive damages shall not exceed $100[million]."[99]

The first problem with the amendment is that neither the rule nor the comments to the rule explain what is considered "unusual circumstances." With no guidance in this regard, trial courts may find many "unusual circumstances" that justify requiring more than $100 million for an appeal bond as to punitive damages. Second, another section of the rule requires defendants who seek to benefit from the $100 million punitive damages bond cap to provide information to the court regarding the financial condition of the defendant.[100] It is not clear, though, why a defendant's financial condition is at all relevant if the cap applies, as the language suggests, in all situations except "unusual circumstances." Further, as a practical matter,

95. *See* generally Mark A. Behrens & Donald J. Kochan, *Protecting the Right to Appellate Review in the New Era of Civil Actions: A Call for Bonding Fairness*, 29 PROD. SAFETY & LIAB. REP. (BNA) No. 21 at 515 (May 21, 2001).

96. See Michael I. Krauss, *NAFTA Meets the American Torts Process: O'Keefe v. Loewen*, 9 GEO. MASON L. REV. 69, 83-86 (2000).

97. MISS. R. APP. P. 8(b).

98. *See id.* at 8(b)(2)(a)-(b), 8(b)(3).

99. *See id.* at 8(b)(2)(c).

100. *Id.* at 8(b)(4).

while the amendment is a step in the right direction, a bond of $100 million on a punitive damages award is still high enough to threaten many companies with insolvency.

2. A Better Proposal

In fact, there are excellent arguments that there should be no bonding required for punitive damage awards. The purpose of a supersedeas bond is to ensure that, after appeal, the plaintiff will still be able to recover from the defendant the amounts to which the plaintiff is entitled, even if the defendant in the interim has become unable to pay that amount. Punitive damages, however, are not something to which a plaintiff is "entitled"; the purposes of those damages are to punish the defendant and to deter the defendant from repeating such conduct. If, after appeal, the defendant has gone bankrupt or is in such financial condition that it cannot pay the award of punitive damages, the purposes of punitive damages have been met. The defendant has been punished. The plaintiff has lost nothing to which he or she was "entitled."[101]

If the Mississippi Supreme Court does not eliminate bonding altogether for punitive awards, it should, at a minimum, revise the appeal bond rule to clarify that the $100 million cap is a ceiling on the amount of the bond that may be required in any judgment (punitive as well as compensatory) and that it applies in all cases. Moreover, the Mississippi Supreme Court should consider lowering the maximum amount of an appeal bond that a defendant may be required to pay to $1 million for judgments valued over $1 million and cap the appeal bond at $25 million for judgments valued over $100 million. These limits would serve the essential purpose of appeal bonds while ensuring that defendants have meaningful opportunities to appeal adverse judgments.

B. Return Rule 20 Joinder to Its Requirements and Its Intended Use

There is no need to "liberalize" and thus misapply Rule 20 joinder simply because the state does not have state court class actions. The Mississippi Supreme Court should insist that Rule 20 joinder be applied according to its terms. This is what other courts, both federal and state, in the rest of the country have done. The Mississippi Supreme Court should announce that *American Bankers* is no longer the law and that Mississippi courts should follow the pre-*American Bankers* cases as well as Rule 20 joinder decisions of the federal courts and courts of other states.

101. The United States Supreme Court's holding in *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424 (2001) may lend further support to the idea that appeal bonds are not necessary for punitive damages. The Court held in Cooper that appellate courts must engage in a de novo review to determine whether a punitive damages award is unconstitutionally excessive. *Cooper Indus.*, 532 U.S. at 436. This means that an appellate court should give no deference to a jury's assessment of an amount of punitive damages; instead, the appellate court will be making its own determination of how much, if any, punitive damages should have been awarded. *Id.* at 436 n.9.

C. *Reform the Venue Rule*

The Mississippi Supreme Court or the Legislature should amend the venue rule to bring it more into line with the rules in other states. Specifically, the rule should be amended to require that, when plaintiffs have joined together in one action, venue must be proper as to each plaintiff. The Texas and Alabama rules are useful models of the type of legislation that could be adopted by the Mississippi Legislature to curb forum-shopping.[102]

D. *Consider Adopting a Carefully Limited Class Action Rule*

One change that some believe would address some of the problems in Mississippi has already been suggested by Mississippi Supreme Court Chief Justice Ed Pittman. In a recent bar journal article, Chief Justice Pittman suggested that Mississippi might adopt a new class action procedural rule.[103] Several members of Mississippi's legal community have expressed doubt that instituting a class action rule will solve Mississippi's mass litigation problem.[104] The arguments against class actions usually rest on one or more of three bases: that class actions are themselves subject to serious abuse, that only the lawyers benefit from class action settlements (particularly "coupon settlements"), or that a class action rule might permit the same mass actions that are currently brought under the joinder rule, only under a different name.[105] Some of these problems could be addressed by a class action rule in Mississippi, if the rule (i) has the same requirements as the federal class action rule, (ii) includes a reasonable limitation on participation in class actions by out-of-state parties, and (iii) is carefully monitored by available access to appellate court review.

While nonresidents may use Mississippi's courts, the state is not required to expend its resources to make available a forum and remedy to a plaintiff in another state. Class actions in Mississippi courts should be limited to Mississippi claimants. The sole exceptions to this might be: (1) if the defendant or defendants could be found only in Mississippi; (2) if a putative class member could show that a substantial portion of the events giving rise to his or her claim occurred in Mississippi and he or she would be unfairly prejudiced by litigating the claim in his or her home state; or (3) if the putative class members were harmed in the same accident at a single point in time at a discrete location, such as a building fire, a bus accident or an airplane crash.

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102. *See* ALA. CODE § 6-3-7 (1983 & Supp. 2000); TEX. CIV. PRAC. & REM. CODE ANN. § 15.003 (Vernon 1986 & Supp. 2002).

103. *See* Chief: State Supreme Court Might Adopt Class-Action Rule, MISS. L. WEEK, Aug. 26-Sept. 1, 2001 at 1.

104. *See id.*

105. *Id.*

To avoid abuse of the class action process, any class action rule adopted in Mississippi should have the protection of early and easy appellate review. For example, to limit perceived abuse of the class action process in Alabama, the state in 1999 adopted statutes specifying the class certification procedure[106] and making any trial court's certification order, whether certifying a class or refusing to certify, immediately appealable.[107]

1. Criticism of Class Actions

The current state court class action system is not without criticism.[108] The critics of the current certification process complain that classes are not examined rigorously enough by many state courts before being certified. Currently in Mississippi, however, there is virtually no review of the parties or claims before they are permitted to be joined. Thus, any level of judicial review before certification of a class would provide more scrutiny than occurs under the current liberal joinder rule. Class action critics are comparing a system with some judicial review to a system they would prefer with more judicial review. In Mississippi, we are still working to put in place the requirements that are subject to review in other states.

2. Class Actions in Mississippi

Other critics maintain that a class action rule in Mississippi would simply result in the substitution of one type of mass action (i.e., class action) for another (i.e., the joinder rule as currently applied). This should not necessarily be the case, however, because a class action rule would provide more guidance to trial courts than the current joinder rule. One of the factors contributing to lawsuit abuse in Mississippi is the dearth of Mississippi jurisprudence on what constitutes proper joinder. As explained above, the Mississippi Supreme Court's most recent statement on joinder in *American Bankers* was contrary to the law in other jurisdictions, as well as in all federal courts, and it created more questions than it answered for trial judges regarding what constitutes the "same transaction or occurrence."

A class action rule, properly drawn, could ameliorate this problem in several ways. First, by giving judges a list of criteria that plaintiffs must meet before a class may be joined, judges would have clearer guidance regarding when certification is appropriate. Second, adopting a rule substantially similar to the federal rule could allow judges to use federal jurisprudence and guidance in certification decisions. If Mississippi had a class action rule like the federal rule, judges could look to the vast number

106. ALA. CODE § 6-5-641 (Supp. 2001).

107. *See id.* at § 6-5-642.

108. *See, e.g.*, Victor E. Schwartz & Leah Lorber, *State Farm v. Avery: State Court Regulation Through Litigation Has Gone Too Far*, 33 CONN. L. REV. 1215, 1227-30 (2001) (discussing the problems that result when classes are not rigorously analyzed before certification); *see also* John H. Beisner & Jessica Davidson Miller, *They're Making a Federal Case Out of It . . . in State Court*, CIV. JUST. REP. (Manhattan Inst. for Policy Research, New York, N.Y.), Sept., 2001, http://www.manhattan-institute.org/cjr_03.pdf (noting that interstate class action lawsuits result in the application of one state's law to citizens of other states).

of decisions made by the federal courts to assist them in determining if certification is proper.[109] Of course, the state courts would need to recognize and apply this outside jurisprudence; we would be no better off if our courts ignore jurisprudence from federal and other state courts, as has sometimes been the case with the application of Rule 20 joinder. Third, the availability of a state class action procedure would remove the supposed "unavailability of class actions" justification for "liberalizing" the application of Rule 20 joinder.[110]

V. How the Substantive Law of Mississippi Helps Attract Lawsuits

Mississippi's procedural rules provide a substantial incentive for plaintiffs, and their lawyers, to bring their lawsuits in the state. The procedural rules do not, however, fully explain the current litigation crisis in Mississippi courts. The substance of Mississippi law is also powerful in attracting litigants to Mississippi courts.

A. Punitive Damages

1. The Nature of the Problem

The United States Supreme Court has recognized that, in recent years, punitive damages awards in this country have "run wild."[111] The problem is particularly acute in Mississippi, where at least twelve juries have awarded punitive damages in excess of $5 million from 1996 to the summer of 2001.[112] Punitive damages are awarded in addition to economic damages (i.e., lost wages or hospital bills) and noneconomic damages (e.g., awards for "pain and suffering"). They exist, as their name suggests, to punish defendants for wrongful conduct.[113] One of the first principles of punishment, however, is that the punishment should fit the crime.[114] But unlike the criminal context in which there are guidelines for the punishment, in the civil context there are relatively few guidelines for the imposition of punitive damages. As former United States Supreme Court Justice Lewis Powell wrote: "It is long past time to bring the law of punitive damages into conformity with our notions of just punishment."[115] One reason it is so difficult for jurors to assess reasonable punitive damages is that they

109. *See, e.g.*, Amchem Prods., Inc, v. Windsor, 521 U.S. 591 (1997); Castano v. Am. Tobacco Co., 84 F.3d 734, 746 (5th Cir. 1996); In re Rhone-Poulenc Rorer, Inc., 51 F.3d 1293, 1297-98 (7th Cir. 1995).

110. *See* discussion *supra* n.69.

111. Pac. Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 18 (1991).

112. Mitchell, *Headaches*, *supra* n.4.

113. See Victor E. Schwartz et al., *Reining in Punitive Damages "Run Wild": Proposals for Punitive Damages Reform by Courts and Legislatures*, 65 Brook. L. Rev. 1003, 1004 (2000).

114. *See* Solem v. Helm, 463 U.S. 277, 284 (1983) ("The principle that a punishment should be proportionate to the crime is deeply rooted and frequently repeated in common-law jurisprudence."); Weems v. United States, 217 U.S. 349, 366-67 (1910) (holding it is "a precept of the fundamental law" as well as "a precept of justice that punishment should be graduated and proportioned to [the] offense").

115. Lewis Powell, *The 'Bizarre Results' of Punitive Damages*, Wall St. J., Mar. 8, 1995 at A21, 1995 WL-WSJ 2117474.

have no yardstick by which to measure whether punitive damages should be awarded and if so, what amount is appropriate. As Professor Jeffrey Jackson of the Mississippi College School of Law has stated, asking jurors what amount of money is appropriate for punitive damages is like asking them, "On a scale of one to 10 billion, how bright is the light in your office?"[116]

Guidelines for punitive damages are also necessary because jurors in recent years have taken it upon themselves to change the focus of punitive damages. Although punitive damages are intended to punish the defendant in that case for the conduct at issue in that case, jurors often use punitive damages awards to "send a message" to entire industries.[117] One study found over 700 cases since 1990 in which jurors have stated that they intended their verdicts to have an impact beyond their individual cases.[118] The anti-democratic effects of this behavior are clear. Twelve men and women who are neither elected by the public, nor even appointed by the governor, are effectively creating policies that may have a national and industry-wide effect.

2. Proportionality: A Better Approach

Approximately one-quarter of the states have enacted legislation to address the problem of excessive punitive damages.[119] One way in which some of these states have reformed excessive punitive damages is by passing legislation that requires punitive damages to be proportional to the compensatory damages in a case.[120] Academic and professional groups, including the American Bar Association and the American College of Trial Lawyers, have also recommended limits on punitive damages awards.[121] The United States Supreme Court has stated that one indicia of whether a

116. Mitchell, *Headaches*, *supra* note 4.

117. *See* Mark Curriden, *Power of 12*, A.B.A. J., Aug. 2001 at 36.

118. *See id.* at 38.

119. *See* ALA. CODE § 6-11-21 (1993 & Supp. 2000); ALASKA STAT. § 09.17.020(f)-(h) (Michie 2000); COLO. REV. STAT. § 13-21-102(1)(a) (2001); CONN. GEN. STAT. ANN. § 52-240b (West 1991 & Supp. 2001); FLA. STAT. ANN. § 768.73(1)(b) (West 1997 & Supp. 2002); IND. CODE ANN. § 34-51-3-4 (Michie 1998 & Supp. 2001); KAN. STAT. ANN. § 60-3701 (1994); N.J. STAT. ANN. § 2A:15-5.14 (West 2000 & Supp. 2001); N.C. GEN. STAT. § 1D-25 (2000); N.D. CENT. CODE § 32-03.2-11(4) (1996 & Supp. 2001); OKLA. STAT. ANN. tit. 23, § 9 (West 1987 & Supp. 2002); TEX. CIV. PRAC. & REM. CODE ANN. § 41.008 (Vernon 1997 & Supp. 2002); VA. CODE ANN. § 8.01-38.1 (Michie 2000 & Supp. 2001).

120. See, e.g., ALASKA STAT. § 09.17.020(f)-(h); FLA. STAT. ANN. § 768.73; IND. CODE ANN. § 34-51-3-4; NEV. REV. STAT. ANN. § 42.005 (Michie 1996); N.J. STAT. ANN. § 2A:15-5.14; N.C. GEN. STAT. § 1D-25; N.D. CENT. CODE § 32.03.2-11(4); TEX. CIV. PRAC. & REM. CODE ANN. § 41.008.

121. *See* American College of Trial Lawyers, *Report on Punitive Damages of the Committee on Special Problems in the Administration of Justice* 15 (1989) (proposing that punitive damages be awarded up to two times a plaintiff's compensatory damages or $250,000, whichever is greater); Special Committee on Punitive Damages, Section of Litigation, American Bar Ass'n, Punitive Damages: A Constructive Examination 6-11, 8-3 (1986) (recommending that punitive damages awards in excess of three-to-one ratio to compensatory damages be considered presumptively "excessive"); *see also* 2 A.L.I., Reporters' Study, Enterprise Responsibility for Personal Injury, 258-59 (1991) (endorsing concept of ratio coupled with alternative monetary ceiling).

punitive damages award is constitutional is the ratio of punitive damages to compensatory damages.[122]

The Mississippi Legislature should enact a reform that would limit punitive damages awards to two times the amount awarded to the claimant for economic and noneconomic losses, or $250,000, depending on the size of the defendant business. Where the defendant is a large business, the rule should require the defendant to pay the greater of the two amounts, whereas punitive damages against small businesses should be limited to the lesser of the two amounts (that is, for small businesses, $250,000 would be the maximum amount). Mississippi's small businesses need the lower requirement because a punitive damages award exceeding $250,000 could bankrupt many of them.

Under this proposed reform, juries would still be able to punish defendants for their conduct; the law would simply require that plaintiffs do so in a way that is rationally related to the injury in the case. In addition, such a reform would help curb the self-appointed role juries have increasingly assumed for themselves in regulating entire industries through excessive and possibly unconstitutional punitive damages verdicts.

B. Limits on Noneconomic Damages

Limits on punitive damages, while an important first step in mending Mississippi's civil justice system, may not be enough. Extremely high jury verdicts indicate that limits on noneconomic damages are also appropriate in Mississippi. For example, in October of 2001, a Holmes County jury awarded $150 million to six plaintiffs ($25 million per plaintiff) who had been exposed to asbestos.[123] Not one of the plaintiffs in the case actually had cancer or asbestosis or any other disease caused by exposure to asbestos.[124] None of the plaintiffs was treated by a physician for his "illness," or even seen by one prior to the "screening" by medical personnel hired by plaintiffs' counsel. According to their lawyer, the plaintiffs were healthy enough that they "have not missed a day of work in their lives."[125] This extraordinary verdict was obtained by plaintiffs who allegedly had "precursors" of disease and suffered from an "increased risk of developing lung cancer."[126] In other words, the plaintiffs will receive millions of dollars each because they might become sick in the future.

Noneconomic damages are very difficult to quantify. If limits are placed on punitive damages but not noneconomic damages, it is possible that jurors will express their disapproval of a defendant's conduct by

122. *See* BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 580 (1996).

123. *See* Margaret Cronin Fisk, *Verdict of the Week: Jury Awards Six Asbestos Plaintiffs $25 Million Each*, NAT'L L.J., Nov. 12, 2001 at B1; Mitchell, *supra* note 15.

124. Fisk, *supra* n.123; Mitchell, *supra* n.15.

125. Theresa Kiely, *Asbestos Case Leads to $150M Jury Award*, CLARION-LEDGER (Jackson, Miss.), Oct. 28, 2001 at 5B.

126. *Id.*

awarding extremely high noneconomic damages. This is what plainly appears to have happened in two recent verdicts of identical $10 million awards to ten co-plaintiffs in one case, and identical $25 million awards to the six co-plaintiffs in another.[127] Allowing juries to use noneconomic damages to "punish" defendants would defeat the purpose of limiting punitive damages. Therefore, Mississippi should limit noneconomic damages in civil cases.

Several states already have laws limiting noneconomic damages that could serve as a model for Mississippi. For example, Alaska limits noneconomic damages to the greater of $400,000, or the injured person's life expectancy multiplied by $8000.[128] Idaho and Maryland have placed limits on noneconomic damages that increase each year to account for wage and price increases.[129] Kansas places a $250,000 limit on noneconomic damages.[130] Hawaii limits noneconomic damages to $375,000.[131] In addition to limits that have been placed on damages in all personal injury cases, a number of states, including our neighbor Louisiana, have capped noneconomic damages in medical malpractice cases.[132] Any of these laws would provide a good model for Mississippi legislation.

C. The Substantive Law Regarding Innocent Product Sellers in Mississippi

Under the Restatement (Second) of Torts, everyone involved in the manufacture and distribution of a product is "strictly liable" if the product possesses a defect that results in injury to consumers.[133] Under Mississippi law, product sellers—including wholesalers, distributors, and retailers—are potentially liable for defects that they are neither aware of nor able to discover.[134] The rationale for the rule is that between an innocent manufacturer and an injured consumer, public policy functions against placing the burden on a consumer who might not otherwise receive compensation for his or her injury. However, the problems faced by retailers such as the Bankston Drug Store in Fayette, Mississippi, exemplify the negative results for local retailers due to this rule. The Bankston Drug Store is regularly

127. Gates, *$100M Verdict*, *supra* n.15; Kiely, *supra* n.125.

128. ALASKA STAT. § 9.17.010(b) (Michie 2000).

129. IDAHO CODE § 6-1603 (Michie 1998) (providing that the limit on noneconomic damages may be increased or decreased depending on the adjustment of average annual wage in Idaho); MD. CODE ANN., CTS. & JUD. PROC. § 11-108 (2001) (increasing the limit on noneconomic damages $15,000 each year).

130. KAN. STAT. ANN. § 60-19a01 (1994).

131. *See* HAW. REV. STAT. ANN. § 663-8.7 (Michie 1993 & Supp. 2000).

132. *See, e.g.*, CAL. CIV. CODE § 3333.2 (1997); IND. CODE ANN. § 34-18-14-3 (Michie 1998); LA. REV. STAT. ANN. § 40:1299.42 (West 2001); MASS. GEN. LAWS ANN. ch. 231, S60-H (2000); MONT. CODE ANN. § 25-9-411 (2000); N.M. STAT. ANN. § 41-5-6 (Michie 1996); VA. CODE ANN. § 8.01-581.15 (Michie 2000); W. VA. CODE ANN. § 55-7B-8 (Michie 2000).

133. *See* RESTATEMENT (SECOND) OF TORTS § 402A cmt. f (AM. LAW INST. 1965).

134. *See* Coca-Cola Bottling Co. v. Reeves, 486 So. 2d 374, 378 (Miss. 1986).

joined as a co-defendant in pharmaceutical products liability litigation,[135] even though the store's owner has never been found liable in such a case.[136]

Local retailers are almost never joined in product actions so that the plaintiffs can be guaranteed compensation. In fact, the retailer rarely pays damages because in over 95% of the cases where any liability is present, the product's manufacturer is held responsible for the harm.[137] "Based on this showing, the seller receives contribution or indemnity from the manufacturer, and the manufacturer ultimately pays the damages."[138] In Mississippi, the current law provides that a manufacturer must indemnify a seller for the costs of litigation and damages unless the seller had control over the design, testing or manufacture of the product, the seller altered the product or the seller had actual knowledge of the product's defective condition.[139] Even though sellers may ultimately receive indemnification, involving the seller in litigation generates substantial and unnecessary legal costs, which are ultimately passed on to Mississippi consumers in the form of a "tort tax."

To be candid, the plaintiff's goal in joining a local retailer is almost always to help the plaintiff "forum-shop" for a verdict-friendly state court venue. First, joinder of the innocent local retailer usually defeats federal diversity-of-citizenship jurisdiction, ensuring that the case will not be removed to and heard in federal court. Second, joinder of the innocent seller— from whom the plaintiffs never really seek or recover damages at trial—may allow for proper venue in a county that otherwise has nothing to do with the dispute between the plaintiffs and the other defendants.[140]

Mississippi has not always punished innocent sellers. In *Sam Shainberg Co. v. Barlow*,[141] the Mississippi Supreme Court held that a seller who sells a product exactly as it came from the manufacturer (or distributor as the case may be) is not liable for defects that may exist in the product.[142] The facts of Shainberg were quite simple. The plaintiff purchased a pair of shoes at the defendant's store one day at lunch and wore them that afternoon.[143] That evening she fell and injured herself while wearing the shoes, noticing that the heel had come off one shoe.[144] She sued the shoe's manufacturer and retailer, claiming that the shoe was defectively manufactured.[145] The Mississippi Supreme Court noted that any defect that may

135. *See* Kraft, *Pharmacies*, *supra* n.4.

136. *See* Pear, *supra* n.1.

137. *See* S. Rep. No. 105-32 at 33 (1997).

138. *Id.*

139. Miss. Code Ann. § 11-1-63(g)(i) (Supp. 2001).

140. *See* Kraft, *Pharmacies*, *supra* n.4. According to Bankston Drug Store pharmacist Traci Swilley, her neighbors were told "'You're not hurting the pharmacy. This isn't against Traci.' They're told that they are suing the huge pharmaceutical companies." Ballard, *supra* n.1.

141. 258 So. 2d 242 (Miss. 1972).

142. *Id.* at 244-45.

143. *Id.* at 242.

144. *Id.* at 243.

145. *Id.* at 243-44.

have been present was a latent defect, and the retailer had no way of discovering the defect.[146] The court, therefore, held that where a product is transmitted from the manufacturer to the distributor without any change, and from the distributor to the retailer in the exact same condition, the retailer is not liable for any latent defects in the product.[147]

In *Coca-Cola Bottling Co. v. Reeves*,[148] the Mississippi Supreme Court retreated from its holding in Shainberg, holding that a seller or distributor of a product is liable to the same extent as a manufacturer.[149] In *Reeves*, the bottom of a Coca-Cola carton collapsed, causing the glass bottle in the carton to fall to the floor and shatter.[150] The plaintiff was injured when one of the pieces of shattered glass struck him in the eye. He sued, naming the distributor of the drink as a co-defendant. The distributor argued that, based upon the Shainberg rule, it could not be held liable for a product it did not manufacture.[151] The court disagreed, holding that the product distributor could be held liable for the injuries that the plaintiff sustained, essentially overruling the Shainberg rule. That is why in Mississippi today, the Bankston Drug Store in Fayette, which does nothing other than sell pharmaceuticals, is dragged into numerous drug cases each year. The store is named as a co-defendant in litigation purely to defeat federal diversity jurisdiction and to allow venue to be fixed in a proven corporation-hostile, big-verdict state court.

The Mississippi Legislature should correct the problems that have been created by the reversal of the *Shainberg* rule. The current rule is bad for small businesses in Mississippi and fails to ultimately benefit consumers. "(T)he unfairness and illogic of imposing 'strict' liability upon retailers and wholesalers who neither participate in the design process for products they sell, nor create warnings or instructions for a product" should be reversed.[152] Product sellers should be subject to liability only if they are directly at fault for a harm (e.g., mis-assembling the product or failing to convey appropriate warnings to customers), unless the manufacturer of the product is out of business or otherwise not available to respond in a lawsuit.[153] Product seller fair treatment statutes have worked well in other

146. *Id.* at 244

147. *Id.* at 244-45.

148. 486 So. 2d 374 (Miss. 1986).

149. *Id.* at 379-80. Although the court in *Reeves* stated that it was not overturning its *Shainberg* holding, the court did go so far as to say that its *Shainberg* holding was "anomalous if not irrational." *Id.* In addition, federal courts in Mississippi apply *Reeves* as if it overruled *Shainberg*. *See, e.g.*, Clark v. Williamson, 129 F. Supp. 2d 956, 959-60 (S.D. Miss. 2000).

150. *Reeves*, 486 So. 2d at 376.

151. *Id.* at 378-79. It is worth noting that the plaintiff in *Reeves* did not sue the local convenience store where the subject product was purchased. Because the store was not a party to the action the court did not reach the question of the store's liability. One wonders, however, how the court might have treated the convenience store, which is more closely analogous to the "innocent retailer" in *Shainberg*.

152. M. Stuart Madden, *The Vital Common Law: Its Role in a Statutory Age*, 18 U. ARK. LITTLE ROCK L.J. 555, 570 (1996).

153. *See id.*

states that have enacted them. Twenty-one other states have enacted product seller fair treatment laws, and none has been repealed.[154]

Product seller fair treatment laws can be drafted so that the seller is excused from liability only if there is a manufacturer who is solvent and subject to jurisdiction in the state.[155] Thus, a product seller fairness law would not affect a plaintiff's ability to recover compensation. Furthermore, the law would not adversely affect the manufacturer, who is required to eventually indemnify the retailer anyway. The effect of the product seller fair treatment law would be felt only by small businesses like the Bankston Drug Store in Fayette. If a product seller fair treatment law were enacted, the store could no longer be joined in every pharmaceutical liability action in Jefferson County, and Mississippi consumers would no longer suffer from the burdensome "tort tax."

VI. CONCLUSION

Mississippi's reputation as a "lawsuit mecca" hurts Mississippians.[156] It is leading industries that create jobs to avoid the state, discouraging new industrial growth, contributing to a rise in insurance rates and raising the cost of living for every Mississippian. Moreover, attention from the national media leaves the rest of the country with the impression that Mississippi is a backwater jurisdiction. This is a reputation that no one wants for our state.

We can improve the perceived and actual fairness of our state's court system without preventing or impeding the fair litigation of any legitimate claim. Joinder and venue reform, additional appeal bond reform, punitive damages limits, noneconomic damages limits, the return of the *Shainberg* rule for product sellers and possibly a carefully drawn class action rule could drastically change the litigation climate in Mississippi. The reforms suggested in this article may not completely eradicate Mississippi's status as "lawsuit central." They would, however, contribute to eliminating Mississippi's unfavorable business reputation, return a sense of fairness to the state's judicial system, and increase the state's chances of creating and attracting more and better jobs for all Mississippians.

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154. *See* COLO. REV. STAT. § 13-21-402 (2001); DEL. CODE ANN. tit. 18, § 7001 (1999); GA. CODE ANN. § 51-1-11.1 (2000); IDAHO CODE § 6-1407 (Michie 1998); 735 ILL. COMP. STAT. ANN. 5/2-621 (1992); IOWA CODE ANN. § 613.18 (1999); KAN. STAT. ANN. § 60-3306 (1994); KY. REV. STAT. ANN. § 411.340 (Michie 1992); LA. REV. STAT. ANN. § 9:2800.53 (1997); MD. CODE ANN., CTS. & JUD. PRO. § 5-405 (1998); MICH. COMP. LAWS ANN. § 600.2947(6) (2000); MINN. STAT. ANN. § 544.41 (2000); MO. ANN. STAT. § 537.762 (2000); NEB. REV. STAT. § 25-21,181 (1995); N.J. STAT. ANN. § 2A:58C-9 (2000); N.C. GEN. STAT. § 99B-2 (1999); N.D. CENT. CODE § 28-01.3-04 (Supp. 2001); OHIO REV. CODE ANN. § 2307.78 (Anderson 2001); S.D. CODIFIED LAWS § 20-9-9 (Michie 1995); TENN. CODE ANN. § 29-28-106 (2000); WASH. REV. CODE ANN. § 7.72.040 (1992).

155. *See, e.g.*, KY. REV. STAT. ANN. § 411.340 (Michie 1992); MO. ANN. STAT. § 537.762 (2000). Both Kentucky's and Missouri's statutes condition the seller's immunity on the existence of a manufacturer as a defendant in the lawsuit.

156. Ballard, *supra* n.1; Pear, *supra* n.1.