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Love It or Leave It; An Examination of the Need for and Structure of a Class Action Rule in Mississippi

Deborah J. Challener

FOREWORD: LOVE IT OR LEAVE IT; AN EXAMINATION OF THE NEED FOR AND STRUCTURE OF A CLASS ACTION RULE IN MISSISSIPPI

*Deborah J. Challener**

I. INTRODUCTION

Today, Mississippi is the only state without a class action rule. When the Mississippi Supreme Court adopted the Mississippi Rules of Civil Procedure (MRCP) on May 26, 1981,[1] the court modeled the rules on the Federal Rules of Civil Procedure (FRCP).[2] Unlike the drafters of the FRCP, however, the court did not adopt a class action rule.[3] Indeed, in an official comment to the newly enacted MRCP, the court specifically stated, "Class action practice is not being introduced into Mississippi trial courts at this time."[4]

While the Mississippi Supreme Court did not adopt a class action rule in 1981, it did adopt a permissive joinder rule, MRCP 20,[5] patterned on FRCP 20.[6] Lacking a formal class action rule, plaintiffs began to employ MRCP 20 to aggregate greater and greater numbers of claims and parties. Over time, "a type of 'super-joinder' arose," resulting in "massive and unwieldy actions" in Mississippi trial courts.[7] In 2004, however, the Mississippi Supreme Court severely restricted the use of MRCP 20 as a vehicle

* Assistant Professor of Law, Mississippi College School of Law. B.A., Oberlin College, 1990; M.P.P., Vanderbilt University, 1995; J.D., University of Tennessee College of Law, 1998. The author would like to thank Judy Johnson, Gregg Kettles, and Mark Modak-Truran for their thoughtful comments on earlier drafts of this Foreword.

1. *See* ORDER ADOPTING THE MISSISSIPPI RULES OF CIVIL PROCEDURE, *available at* http://www.mssc.state.ms.us/rules/RuleText.asp?RuleTitle=ORDER+ADOPTING+THE+MISSISSIPPI+RULES+OF+CIVIL+PROCEDURE&IDNum=2 (last visited February 21, 2006).

2. *Compare* FED. R. CIV. P. with MISS. R. CIV. P.

3. *See* FED. R. CIV. P. 23; MISS. R. CIV. P., Official Comment to Omitted Rule 23 (May 26, 1981).

4. MISS. R. OF CIV. P., Official Comment to Omitted Rule 23 (May 26, 1981) (citations omitted). Prior to the adoption of the MRCP, class actions were permitted in equity, but the Mississippi Supreme Court "did not look with favor on class actions and allowed them only under rare circumstances." American Bankers Ins. Co. v. Booth, 830 So. 2d 1205, 1211 (Miss. 2002). After the adoption of the MRCP, it was unclear whether equitable class actions were still viable until the Mississippi Supreme Court stated definitively in 2002 that "Mississippi does not permit class actions, even equitable class actions." *Id.* at 1214.

5. MRCP 20(a) provides in pertinent part: "All persons may join in one action as plaintiffs if they assert any right to relief . . . in respect of or 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." MISS. R. CIV. P. 20(a).

6. Janssen Pharmaceutica, Inc. v. Armond, 866 So. 2d 1092, 1102 (Miss. 2004) (en banc) (Graves, J., specially concurring).

7. *Id.* at 1103 (Graves, J., specially concurring).

for mass aggregate litigation in two cases, *Janssen Pharmaceutica, Inc. v. Armond*[8] and *Janssen Pharmaceutica, Inc. v. Bailey*.[9]

Significantly, in both *Armond* and *Bailey* individual Mississippi Supreme Court Justices called for the adoption of a state class action rule. In a special concurrence in *Armond*, Justice Graves, joined by Justice Easley, stated, "It is imperative that we modernize our rules of civil procedure by adopting a class action provision."[10] He argued that by limiting the joinder of claims and parties under MRCP 20 and at the same time refusing to consider the adoption of a class action rule, the majority simply created new problems.[11] Justice Graves was particularly concerned that the majority's opinion would result in multiple inconsistent judgments and "actually encourage[ ] multiple litigation" rather than "deter[ring] frivolous litigation or the abuse of joinder."[12]

Similarly, in *Bailey*, Justice Easley dissented on the ground that like the majority's decision in *Armond*, the majority's decision in *Bailey* left too many unanswered questions.[13] He argued that together *Armond* and *Bailey* will "clog[ ] [Mississippi's] court systems, strain our judicial staff and resources, and place an added cost burden on the taxpayer by increasing the litigation and subsequent court costs."[14] Justice Easley concluded that the court should "seriously consider" adopting a state class action rule.[15]

Given Mississippi's unique status as the only state without a class action rule, the recent developments in Mississippi joinder law, and the suggestions in *Armond* and *Bailey* that Mississippi should adopt a class action rule, scholars and practitioners from around the country gathered in Jackson, Mississippi on February 18, 2005, to debate two issues. First, should Mississippi now adopt a class action rule? Second, how should such a rule be structured? The articles in this Symposium represent the final written product of this debate. This Foreword organizes the articles by issue, provides an overview of each article, and identifies key points of agreement and dispute among the authors.

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8. *See generally id.*

9. 878 So. 2d 31 (Miss. 2004) (en banc). In addition, one day after the court decided *Armond* it amended the official comment to MRCP 20 to provide that "[t]he phrase 'transaction or occurrence' requires that there be a distinct litigable event linking the parties." MISS. R. CIV. P. 20 cmt. (2004); *see also Bailey*, 878 So. 2d at 46. The Mississippi legislature also enacted laws in 2004 that are designed to address the problem of mass aggregate litigation in Mississippi trial courts. *See* Howard M. Erichson, MISSISSIPPI CLASS ACTIONS AND THE INEVITABILITY OF MASS AGGREGATE LITIGATION, 24 Miss. C. L. Rev. 285, 293 (2005); *see also* Mark A. Behrens & Cary Silverman, *Now Open for Business: The Transformation of Mississippi's Legal Climate*, 24 MISS. C. L. REV. 393, 415-16 (2005) (citing H.B. 13, 2004 Leg., 2d Ex. Sess. (Miss. 2004)).

10. *Armond*, 866 So. 2d at 1103 (Graves, J., specially concurring).

11. *See id.* (Graves, J., specially concurring).

12. *Id.* at 1104 (Graves, J., specially concurring).

13. *Bailey*, 878 So. 2d at 64 (Easley, J., dissenting).

14. *Id.* (Easley, J., dissenting).

15. *Id.* (Easley, J., dissenting).

II. SHOULD MISSISSIPPI ADOPT A CLASS ACTION RULE?

Professors Linda S. Mullenix and Howard M. Erichson, along with attorneys John W. Christopher, David W. Clark, Mark A. Behrens, and Cary Silverman address whether Mississippi should adopt a class action rule. Without taking a position, Professor Mullenix "set[s] forth at least ten considerations" that Mississippi rulemakers should contemplate in deciding whether to adopt a class action rule.[16] Throughout her article, Professor Mullenix emphasizes the need for empirical research to determine whether a class action rule is necessary.[17] In essence, she argues that the rulemakers should study whether the benefits to Mississippi's bench, bar, and citizens outweigh the costs of adopting a class action rule.[18] Professor Mullenix also recommends that the rulemakers consider whether the new federal Class Action Fairness Act (CAFA)[19] moots any effort by Mississippi to adopt its own class action rule since CAFA "may substantially eviscerate the ability to pursue state class action litigation anywhere in the United States."[20]

While Professor Mullenix does not take a position on whether Mississippi should enact a class action rule, Professor Erichson urges Mississippi to adopt such a rule.[21] Professor Erichson asserts that mass aggregate litigation will occur despite recent changes to Mississippi's joinder law and regardless of whether Mississippi adopts a class action rule.[22] He argues, however, that in appropriate cases, class actions are preferable to comparatively unregulated mass aggregate litigation because they "are more likely to achieve just outcomes."[23] Professor Erichson further contends that

16. Linda S. Mullenix, *Should Mississippi Adopt a Class Action Rule—Balancing the Equities: Ten Considerations That Mississippi Rulemakers Ought to Take Into Account in Evaluating Whether to Adopt a State Class Action Rule*, 24 MISS. C. L. REV. 217, 259 (2005).

17. *Id.* at 224-59.

18. *Id.*

19. Class Action Fairness Act of 2005, Pub. L. No. 109-2, 119 Stat. 4 (codified in scattered sections of 28 U.S.C.A.) (hereinafter "CAFA"). President Bush signed CAFA into law on February 18, 2005, ironically the same day that this Symposium took place in Jackson, Mississippi. Professor Mullenix concisely summarizes CAFA as "essentially . . . a modification of federal statutes relating to federal court original diversity jurisdiction. . . . . It provides federal courts with original diversity jurisdiction over any class action when: (1) the aggregate amount in controversy exceeds $5 million (exclusive of interests and costs); (2) the number of putative class members is at least 100; and (3) any class member is a citizen of a state or foreign country different than any defendant." Mullenix, *supra* note 16, at 53; *see* 28 U.S.C. § 1332(d)(2005). She notes that CAFA "provides for both mandatory and discretionary exercise of federal jurisdiction for class actions that meet the threshold requirements of minimal diversity and $5 million aggregate damages." Mullenix, *supra* note 16, at 253; *see* 28 U.S.C. § 1332(d). Professor Mullenix characterizes the "net effect" of CAFA as "expand[ing] federal court jurisdiction for large scale, multistate class actions and . . . eliminat[ing] previous impediments to federal jurisdiction over such class actions. Mullenix, *supra* note 16, at 253. For a discussion of CAFA, *see* Linda S. Mullenix & Paul D. Rheingold, *Impact of the Class Action Fairness Law*, N.Y. L.J. 5 (Mar. 3, 2005), *cited in* Mullenix, *supra* note 16, at 252 n.206.

20. Mullenix, *supra* note 16, at 252; *see also id.* at 252-56.

21. *See generally* Erichson, *supra* note 9.

22. *Id.* at 287-296.

23. *Id.* at 296 ("By providing judicial supervision over settlements and fees[ ] [and] offering some assurance of adequate representation . . . class actions increase the likelihood that meritorious claims will reach sound outcomes."); *see also id.* at 296-303.

"[f]or mass disputes involving a large number of small claims"[24] which are not individually economically viable, only class actions "give[ ] claimants access to justice."[25] Echoing Professor Erichson's small claims argument, Mr. Christopher, a Mississippi lawyer, also advocates a state class action rule.[26]

In contrast, Mr. Clark, another Mississippi practitioner, asserts that Mississippi should not adopt a class action rule.[27] In particular, he rejects the argument that a class action rule is necessary to provide litigants with small claims access to state courts.[28] In addition, Mr. Clark argues, inter alia, that a class action rule is unnecessary because "most if not all" of the cases that proceeded as "mass joinders" under MRCP 20 prior to the Mississippi Supreme Court's decisions in *Armond* and *Bailey* "would not meet typical standards for class certification."[29]

Mr. Behrens and Mr. Silverman, both of whom practice law in Washington, D.C., also oppose the enactment of a class action rule in Mississippi.[30] They contend that recent reforms by the judicial, executive and legislative branches of state government have led to "a more balanced and fair civil justice system" in Mississippi.[31] They conclude that Mississippi has already begun "to reap some of the benefits of [its] improving legal climate,"[32] and suggest that the adoption of a state class action rule would merely turn the clock back to a time when Mississippi was "the poster child of litigation abuse."[33]

III. How Should a Mississippi Class Action Rule Be Structured?

John K. Rabiej; Professor Robert H. Klonoff; Professor David Rosenberg and his co-author, John Scanlon; and Professor Howard M. Erichson address the structure of a Mississippi class action rule. Mr. Rabiej, Chief of the Rules Committee Support Office in the Administrative Office of the United States Courts,[34] reviews the extensive public records of the Advisory Committee on Civil Rules' deliberations regarding the 1966, 1998, and

24. *Id.* at 305.

25. *Id.*

26. John W. Christopher, *Tort Reform By the Mississippi Supreme Court*, 24 Miss. C. L. Rev. 429, 10 (2005).

27. David W. Clark, *State Court Class Actions in Mississippi: Why Adopt Them Now?*, 24 Miss. C. L. Rev. 439 (2005).

28. *Id.* at 447-49.

29. *Id.* at 441; *see also id.* at 444 ("[T]he five cases involved in . . . *American Bankers* [Ins. Co. v. Booth, 830 So. 2d 1205 (Miss. 2002)] . . . were re-filed in state court only after their claims could not be certified as class actions in federal court . . . . The class action vehicle was available; the claims and claimants just did not meet the requirements to certify the class.").

30. See generally Behrens & Silverman, *supra* note 9.

31. *Id.* at 419; *see also id.* at 419-424.

32. *Id.* at 419; *see also id.* at 424-27.

33. *Id.* at 397; *see also id.* at 427.

34. John K. Rabiej, *The Making of Class Action Rule 23—What Were We Thinking?*, 24 Miss. C. L. Rev. 325, 325 n. 1 (2005).

2003 amendments to FRCP 23.[35] He describes "the basic themes and overarching issues that have emerged from the committee's study"[36] and offers guidance to the drafters of a Mississippi class action rule.[37]

Professor Klonoff suggests that the rulemakers first decide whether to adopt a rule modeled on FRCP 23, which is divided into different categories of class actions, or "a unitary rule, in which all class actions would be determined under a single standard."[38] Regardless of which approach Mississippi chooses, however, Professor Klonoff recommends that the rule contain several specific elements found in FRCP 23: (1) a prohibition on conditional certification,[39] (2) appointment of class counsel by the court,[40] (3) a requirement that lawyers request attorneys' fees by motion,[41] (4) a provision for a second opt-out at the settlement stage within the court's discretion,[42] and (5) interlocutory review of certification decisions.[43]

Professor Klonoff also recommends that the rule include two provisions that are not found in FRCP 23: one that permits the court to make merits-related inquiries if necessary to rule on certification[44] and one which "explicitly state[s] that the burden is on the plaintiff to establish each of the prerequisites for a class action."[45] Finally, Professor Klonoff proposes that the rulemakers study the "controversial issue" of "whether attorneys' fees should be calculated based on the potential fund (the total amount available to the class if all members file claims) or on only the actual portion of the fund claimed by members of the class."[46]

While Professor Klonoff endorses several provisions of FRCP 23, Professor Rosenberg and Mr. Scanlon argue that "Mississippi should reject the [FRCP] 23 model and strike out on a new path."[47] They propose a mandatory class action procedure that is designed to maximize the deterrence and compensation effects of class actions.[48] "Mandatory" class actions, as defined by Professor Rosenberg and Mr. Scanlon, would require automatic certification and would not permit opt-outs.[49] The basic premise

35. *See generally id.*

36. *Id.* at 390.

37. *See generally id.*

38. Robert H. Klonoff, *The Adoption of a Class Action Rule: Some Issues for Mississippi to Consider*, 24 MISS. C. L. REV. 261, 262-68 (2005).

39. *Id.* at 270-71 (citing FED. R. CIV. P. 23 advisory committee notes (2003)).

40. *Id.* at 271-72 (citing FED. R. CIV. P. 23(g)).

41. *Id.* at 272-73 (citing FED. R. CIV. P. 23(h)).

42. *Id.* at 279-80 (citing FED. R. CIV. P. 23(e)(3)).

43. *Id.* at 280-81 (citing FED. R. CIV. P. 23(f)).

44. *Id.* at 269-71.

45. *Id.* at 270.

46. *Id.* at 273; *see also id.* at 273-75.

47. David Rosenberg & John Scanlon, *Class Actions in Mississippi: To Be or Not To (B)(3)*, 24 MISS. C. L. REV. 153, 174 (2005).

48. *See generally id.*

49. *Id.* at 155.

underlying the mandatory model is that "nothing short of complete collectivization of all claims assures that civil liability can accomplish its law enforcement mission of optimally deterring unreasonable risk and, when appropriate, optimally insuring harm from reasonable risk."[50]

Lastly, in his second contribution to this Symposium, Professor Erichson addresses the content of a Mississippi class action rule.[51] Like Professor Klonoff, Professor Erichson recommends that Mississippi adopt a class action rule largely modeled on FRCP 23.[52] Professor Erichson strongly opposes Professor Rosenberg's and Mr. Scanlon's argument that all class actions should be mandatory.[53] He disagrees with the proposition that "opt-outs must be prohibited in order to achieve optimal deterrence"[54] and asserts that "opt-outs sometimes strengthen plaintiffs' overall strategic position,"[55] as well as serving other "useful functions."[56] Thus, Professor Erichson contends that "most class actions for money damages should permit opt-outs."[57]

With regard to the specific elements of a Mississippi class action rule, Professor Erichson agrees with most of Professor Klonoff's recommendations.[58] On the issue of whether attorneys' fees should be awarded based on the potential or actual value of the fund, however, Professor Erichson objects to Professor Klonoff's "noncommittal" approach.[59] Professor Erichson asserts unequivocally that "[t]o the extent class recovery matters in setting fees . . . fee calculations should be based on actual value."[60]

Finally, Professor Erichson notes that during the Symposium in Jackson, Mississippi, participants expressed concern that Mississippi judges might abuse a class action rule.[61] This "mistrust of judicial authority," Professor Erichson contends, "may be the greatest obstacle to adoption of a class action rule in Mississippi."[62] He argues that regardless of whether this concern is legitimate or "more pronounced in Mississippi than elsewhere," it stems from Mississippi's selection of judges through an electoral process.[63] Although Professor Erichson asserts that reform of the judicial selection process may be the ultimate solution to this problem,[64] he recommends that the rulemakers focus on how they can carefully draft a class action rule "so that fears of judicial abuse do not stand in the way of

50. *Id.* at 158.
51. Howard M. Erichson, *Comments On a Class Action Rule For Mississippi*, 24 MISS. C. L. REV. 309 (2005).
52. *Id.* at 309-11.
53. *Id* at 311-316.
54. *Id.*
55. *Id.* at 315.
56. *Id.* at 316.
57. *Id.* at 311.
58. *Id.* at 316-318.
59. *Id.* at 317.
60. *Id.*
61. *Id.* at 318.
62. *Id.* at 309.
63. *Id.* at 318.
64. *See id.* at 319.

accomplishing the good that class actions can achieve."[65] To that end, Professor Erichson proposes that a Mississippi class action rule restrict venue, facilitate appellate review, and limit the scope of class actions.[66]

IV. CONCLUSION

Although the articles in this Symposium represent the final written product of the class action debate that occurred in Jackson, Mississippi on February 18, 2005, undoubtedly they are not the final word on the subject. Only time will tell whether Mississippi will adopt a class action rule and, if so, how that rule will be structured.

65. *Id.*; *see also id.* at 318-19.
66. *Id.* at 318-21.