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THE ADOPTION OF A CLASS ACTION RULE: SOME ISSUES FOR MISSISSIPPI TO CONSIDER

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The symposium organizers have asked me to prepare a brief paper addressing the following question: Assuming Mississippi decides to adopt a class action rule, what terms should that rule contain?

A definitive answer to this question is beyond the scope of a short article. A class action rule could take a wide variety of approaches. To evaluate fully the pros and cons of each approach, the analysis would need to address not only the federal approach, but also all of the variations among the states, as well as numerous reform proposals that have been suggested but not enacted. Instead of offering and defending a precise proposed rule, this article will simply highlight several issues that the drafters should consider. It will not propose a "model" rule.

At the outset, I should note that I fully endorse Mississippi's adoption of a class action rule. Mississippi is the only state in the country without a class action procedure for *any* kind of lawsuit.[1] In many circumstances, a class action is the only vehicle for aggrieved individuals to seek redress.[2] In the absence of a class action rule, Mississippi litigants have attempted to squeeze mass actions into the state's joinder rules, particularly Mississippi Rule of Civil Procedure 20. As Justice Graves has noted, "[f]or too long our Rule 20 has been stretched and pulled in various directions, and forced to accomplish tasks it was never designed to do."[3] Thus, as Justice Graves

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1. Like Mississippi, Virginia does not have a global class action rule. *See* King v. Virginia Birth-Related Neurological Injury Compensation Program, 22 Va. Cir. 156, 159 (Va. Cir. Ct. 1990) ("[T]here is no provision in Virginia law which allows class actions."). Unlike Mississippi, however, Virginia permits class actions in certain defined circumstances. *See, e.g.*, VA. CODE ANN. § 55-384 (allowing a class action by an association of time-share owners); VA. CODE ANN. § 55-515(A) (allowing a class action by members of a property owners' association).

2. *See, e.g.*, Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 186 (1974) (Douglas, J., dissenting) ("The class action is one of the few legal remedies the small claimant has against those who command the status quo."); Owen M. Fiss, *The Political Theory of the Class Action*, 53 WASH. & LEE L. REV. 21, 24 (1996) ("[T]he class action could be viewed as a device to fund the private attorney general and is able to play that role because of the aggregation of the claims of a large number of persons who have similar or identical claims, none of which – standing alone – would justify the suit.").

3. Janssen Pharmaceutica, Inc. v. Armond, 866 So. 2d 1092, 1103 (Miss. 2004) (Graves, J., specially concurring).

correctly concluded, "[i]t is imperative that [Mississippi] modernize [its] rules of civil procedure by adopting a class action provision."[4]

APPROACHES FOR MISSISSIPPI TO CONSIDER

This article addresses several issues in connection with the drafting of a class action rule. *First*, it examines the two major structural approaches for a rule: (1) a unitary rule, in which all class actions would be determined under a single standard, and (2) a rule divided into various types of class actions, along the lines of the approach used in the Federal Rules of Civil Procedure. *Second,* the article addresses a variety of issues that commonly arise in connection with the class certification decision: whether merits issues may be considered; whether the burden of proof should be on plaintiff or on defendant; and whether a court may certify a class conditionally even when doubts exist about the appropriateness of certification. *Third*, the article addresses issues involving appointing class counsel and awarding attorneys' fees. *Fourth,* the article addresses two settlement-related issues: the certification standards applicable at the settlement stage; and whether a court should allow a second opt-out right when a settlement is announced. *Finally,* the article discusses issues relating to the review and binding effect of class certification rulings, *i.e.*, whether to permit interlocutory review of class certification rulings; and whether a previous ruling on class certification should preclude the filing of a new, substantially similar class.

I. BASIC STRUCTURE OF THE RULE: MULTIPLE CATEGORIES OR A UNITARY STANDARD?

A. Structure of the Current Federal Rule 23

The current federal class action rule dates back to 1966. It is the model for state class action rules in roughly two-thirds of the states.[5]

Federal Rule 23 provides for four kinds of classes: those under Rule 23(b)(1)(A), Rule 23(b)(1)(B), Rule 23(b)(2), and Rule 23(b)(3). Each of these four classes must satisfy the four requirements of Rule 23(a): numerosity,[6] commonality,[7] typicality,[8] and adequacy of representation.[9] Moreover, each of the four Rule 23(b) subcategories has its own additional requirements.

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4. *Id.*

5. *See* ROBERT H. KLONOFF & EDWARD K.M. BILICH, CLASS ACTIONS AND OTHER MULTI-PARTY LITIGATION: CASES AND MATERIALS 439 (West Group 2000) (discussing state breakdown). *See generally* Linda S. Mullenix, *State Class Actions: Practice and Procedure* (CCH 2000) (state-by-state review of class action rules).

6. FED. R. CIV. P. 23(a)(1) ("the class is so numerous that joinder of all members is impracticable").

7. FED. R. CIV. P. 23(a)(2) ("there are questions of law or fact common to the class").

8. FED. R. CIV. P. 23(a)(3) ("the claims or defenses of the representative parties are typical of the claims or defenses of the class").

9. FED. R. CIV. P. 23(a)(4) ("the representative parties will fairly and adequately protect the interests of the class").

In particular, a Rule 23(b)(1)(A) class is appropriate when the prosecution of separate, individual lawsuits would create a risk of "inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class . . . ."[10] The purpose of this provision is to protect the party opposing the class from being subject to conflicting court orders.[11] One example cited in the Advisory Committee Notes to the 1966 rule is litigation of "landowners' rights and duties respecting a claimed nuisance," a situation that "could create a possibility of incompatible adjudications."[12]

A Rule 23(b)(1)(B) class is appropriate when the prosecution of separate, individual lawsuits would create a risk of "adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests[.]"[13] Rule 23(b)(1)(B) is designed to protect the members of the class. As the Advisory Committee Notes to the 1966 version of Rule 23 indicate, an example of a (b)(1)(B) class is a limited fund, *i.e.*, "when claims are made by numerous persons against a fund insufficient to satisfy all claims."[14]

A Rule 23(b)(2) class is appropriate when "the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole[.]"[15] Rule 23(b)(2) is common in civil rights cases and other suits seeking primarily structural relief.

A Rule 23(b)(3) class is appropriate if (1) "the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members," and (2) "a class action is superior to other available methods for the fair and efficient adjudication of the controversy."[16] Rule 23(b)(3) is commonly used for claims seeking primarily monetary relief.

A critical distinction between a (b)(3) class on the one hand, and classes under (b)(1) and (b)(2) on the other, is that the former requires notice and opt-out rights (the right to exclude oneself from the class) while the

10. FED. R. CIV. P. 23(b)(1)(A).

11. Normally, the party opposing the class is the defendant, but in a suit brought against a class of defendants, the party on the opposite side of the class would be the plaintiff. *See* Robert H. Klonoff, *Class Actions and Other Multi-Party Litigation in a Nutshell* 289-98 (Thomson West 2004) (discussing defendant class actions).

12. FED. R. CIV. P. 23 advisory committee notes (1966).

13. FED. R. CIV. P. 23(b)(1)(B).

14. FED. R. CIV. P. 23 advisory committee notes (1966).

15. FED. R. CIV. P. 23(b)(2).

16. FED. R. CIV. P. 23(b)(3). Rule 23(b)(3) sets forth several criteria relevant to superiority, including manageability, *i.e.*, "the difficulties likely to be encountered in the management of a class action." FED. R. CIV. P. 23(b)(3)(D).

latter do not.[17] Put another way, unlike classes under Rule 23(b)(3), classes under Rule 23(b)(1) and (b)(2) are *mandatory*; a class member has no choice whether to participate.

B. Criticisms of the Current Federal Approach

The current federal class action rule has remained largely intact for almost forty years.[18] This longevity, however, does not mean that the federal approach is flawless. To the contrary, several criticisms can be mounted.

For instance, why are "superiority" and "predominance" required only for (b)(3) classes? Shouldn't courts consider superiority in all class actions, regardless of which subdivision of Rule 23(b) is at issue? And shouldn't predominance be considered in most class actions?[19] Indeed, with respect to predominance, shouldn't some mandatory class actions require even *more* cohesiveness than opt-out classes?[20] Courts have struggled with these issues. Some courts, for example, impose a "cohesiveness" requirement under Rule 23(b)(2) that is at least as stringent as (b)(3)'s "predominance" requirement.[21] Other courts, however, refuse to impose a predominance-like requirement outside of Rule 23(b)(3).[22]

Another criticism of Federal Rule 23 is that classes under (b)(1)(A), (b)(1)(B), and (b)(2) do not provide for notice and an opportunity to opt out, even when the action in question seeks significant monetary relief. According to these critics, due process requires notice and opt-out rights before monetary claims can be barred by res judicata.[23] Some courts have

17. *See* FED. R. CIV. P. 23(c)(2)(B) (requiring notice in a (b)(3) case including, *inter alia*, "that the court will exclude from the class any member who requests exclusion, stating when and how members may elect to be excluded"); FED. R. CIV. P. 23(c)(2)(A) ("For any class certified under Rule 23(b)(1) or (2), the court *may* direct appropriate notice to the class") (emphasis added).

18. As discussed on p. 262, *supra*, Federal Rule 23 has been amended in several ways since 1966. Those amendments, however, have not altered the basic structure of the rule.

19. Professor Erichson correctly notes that the predominance requirement should not apply to limited fund class actions. *See* Howard M. Erichson, *Comments on a Class Action Rule for Mississippi*, 24 MISS. C. L. REV. 309, 316 (2005).

20. *See, e.g.*, John C. Coffee, Jr., *Class Action Accountability: Reconciling Exit, Voice, and Loyalty in Representative Litigation,* 100 COLUM. L. REV. 370, 435 (2000) ("a more rigorous definition of class cohesion should apply in the case of the mandatory class action where the class member is essentially being coerced into participation").

21. *See, e.g.*, Barnes v. American Tobacco Co., 161 F.3d 127, 142 (3d Cir. 1998) ("[T]he cohesiveness requirement . . . extends beyond Rule 23(b)(3) class actions. Indeed, a (b)(2) class may require more cohesiveness than a (b)(3) class."), *cert denied*, 526 U.S. 1114 (1999); Santiago v. City of Philadelphia, 72 F.R.D. 619, 629 (E.D. Pa. 1976) (same). In *Barnes*, the court relied heavily on (b)(3) case law in holding that a putative medical monitoring class action comprised of cigarette smokers raised "too many individual issues to permit certification." 161 F.3d at 143.

22. *See, e.g.*, Walters v. Reno, 145 F.3d 1032, 1047 (9th Cir. 1998) ("Although common issues must predominate for class certification under Rule 23(b)(3), no such requirement exists under 23(b)(2).").

23. *See, e.g*, Molski v. Gleich, 318 F.3d 937, 948 (9th Cir. 2002) ("[C]ertain minimal procedural safeguards, such as notice and the right to opt-out, must be provided to bind absent class members when substantial monetary damages are involved.") (citing Brown v. Ticor Title Ins. Co., 982 F.3d 386, 392 (9th Cir. 1992), *cert. dismissed as improvidently granted*, 511 U.S. 117 (1994)); Jefferson v. Ingersoll Intl., Inc., 195 F.3d 894, 897 (7th Cir. 1999) ("in actions for money damages class members [in (b)(2) cases] are entitled to personal notice and an opportunity to opt out").

addressed this problem by requiring notice and opt-out rights in certain class actions under (b)(1) or (b)(2), relying on Federal Rule 23(d), which allows the court to enter "appropriate" procedural orders.[24] A recent amendment to Federal Rule 23 (adopted in 2003) provides that "[f]or any class certified under Rule 23(b)(1) or (2), the court may direct appropriate notice to the class."[25] This amendment makes clear that a court has discretion to require notice in a Rule 23(b)(1) or (b)(2) class action. The amendment does not, however, address the issue of opt-outs in such classes.

Another possible criticism of the current rule is that the four categories, while purportedly separate, overlap considerably.[26] For instance, it is arguably difficult to determine what purpose Rule 23(b)(1)(A) serves that is not also served by Rule 23(b)(2).

In sum, the division of Federal Rule 23 into four separate kinds of class actions has not been without problems or criticisms. These issues have led some to believe that a unitary approach would be preferable.

C. *The Unitary Approach*

States that have opted not to adopt the Federal Rule 23 model have taken a variety of approaches.[27] The alternative to Federal Rule 23 that has attracted the most attention, however, is the so-called unitary approach. Under that approach, only one test would apply in certifying a class, not the four alternative tests contained in Rule 23.

In 1995, the Advisory Committee on Civil Rules considered converting Rule 23 into a unitary rule. Under that proposal, the four separate categories of (b)(1)(A), (b)(1)(B), (b)(2), and (b)(3) would be eliminated. Instead, those four categories would simply be considered relevant factors in deciding whether a class action is "superior to other available methods for fair and efficient adjudication of the controversy."[28]

Specifically, under the proposed Rule 23(b), superiority would become a fifth criterion under a new Rule 23(a)(5), supplementing numerosity, commonality, typicality, and adequacy.[29] The original (b)(1)(A), (b)(1)(B), (b)(2), and (b)(3) criteria would become "matters pertinent in deciding under (a)(5) whether a class action is superior to other available methods

24. *See, e.g*, FED. R. CIV. P. 23(d)(2) (allowing "appropriate orders" requiring "notice be given in such manner as the court may direct"); FED. R. CIV. P. 23(d)(5) (allowing orders "dealing with similar procedural matters"). Courts using 23(d) to require notice and opt-out rights in classes under (b)(1) and (b)(2) include County of Suffolk v. Long Island Lighting Co., 907 F.2d 1295, 1304 (2d Cir. 1990); and Eubanks v. Billington, 110 F.3d 87, 96 (D.C. Cir. 1997).

25. FED. R. CIV. P. 23(c)(2)(A).

26. *See generally* Linda S. Mullenix, *No Exit: Mandatory Class Actions in the New Millennium and the Blurring of Categorical Imperatives*, 2003 U. CHI. LEGAL F. 177, 216 (2003).

27. *See* KLONOFF & BILICH, *supra* note 5, at 439.

28. *See* Feb. 1995 Proposed Rule 23(a)(5), *reprinted in* Edward H. Cooper, *Symposium: The Institute of Judicial Administration Research Conference on Class Actions: Class Actions and the Rulemaking Process: Rule 23: Challenges to the Rulemaking Process*, 71 N.Y.U. L.REV. 13, 64 (1996).

29. *Id.*, Feb. 1995 Proposed Rule 23(a)(5).

. . . ."[30] Thus, instead of being categories for four separate types of class actions (as under the current federal rule), those criteria would merely be factors in deciding whether the proposed class is superior to other devices for resolving the case. Because these factors serve only as guidance, the proposal would give trial judges considerable discretion in ruling on certification.

Under this proposed unitary approach, notice would be required for *all* classes certified.[31] Moreover, with respect to any class certified, the court would have the option to make the class a mandatory class, an opt-out class, or an opt-in class.[32] The proposed rule then lists matters relevant to whether to structure the class as mandatory, opt-out, or opt-in.[33]

Even prior to 1995, respected authorities had urged wide adoption of a unitary approach to class actions. Most importantly, in 1976, the National Conference of Commissioners on Uniform State Laws published the "Uniform Class Actions Act."[34] In many ways, the Uniform Act was the model for the federal proposal urged almost twenty years later. Section two of the Uniform Act provides that a class action may be certified if the requirements of numerosity, commonality, and adequacy are satisfied, and in addition, a class action will promote "the fair and efficient adjudication of the controversy." Section three, in turn, provides a non-exclusive list of thirteen criteria for the court to "consider" and "give appropriate weight to," in determining whether a class action would promote fairness and efficiency.[35] These criteria include the (b)(1)(A), (b)(1)(B), (b)(2), and (b)(3) criteria.[36] Most classes would be opt-out classes, but the Uniform Act proposal permits mandatory classes "in actions comparable to those under Federal Rule 23(b)(1)."[37]

Ultimately, neither the federal proposal nor the Uniform Act gained stature as a major alternative to the Federal Rule 23 model. By 1996, the

30. *Id.*, Feb. 1995 Proposed Rule 23(b). The proposed rule lists several other matters that a court should consider in evaluating superiority, including several criteria found in the existing Federal Rule 23(b)(3) – *e.g.*, predominance, interest of class members in individually controlling the litigation, and the extent of related litigation by or against members of the class. *See id.* at 64-65, Feb. 1995 Proposed Rule 23(b)(1)-(7).

31. *Id.* at 65-66, Feb. 1995 Proposed Rule 23(c)(2).

32. *See id.* at 65, Feb. 1995 Proposed Rule 23(c)(1)(A) (court must "determine whether, when, how, and under what conditions putative members may elect to be excluded from, or included in, the class").

33. *Id.* at 65, Feb. 1995 Proposed Rule 23(c)(1)(A)(i)-(v). Courts have held under existing Rule 23 that opt-in classes are forbidden. *See* Kern v. Siemens Corp., *et al.*, 393 F.3d 120, 124 (2d Cir. 2004) (noting "substantial legal authority" for the view that an opt-in procedure – whereby a person does not become a class member unless he or she affirmatively opts in – is "prohibited" by Rule 23).

34. Uniform Law Commissioner's Model Class Actions Act (National Conference of Commissioners on Uniform State Laws, final draft adopted Aug. 5, 1976), (hereafter the "Uniform Act").

35. *Id.* at § 3 (noting that court should consider the 13 criteria as well as "other relevant factors").

36. *Id.* Other criteria include, among others, whether "a joint or common interest exists," whether "the class action involves a claim that is or has been the subject of a class action, a government action, or other proceeding," and "whether any conflict of laws issues involved pose unusual difficulties[.]" *Id.*

37. *Id.* at § 8 Comment.

federal approach had essentially disappeared as a serious option. And in almost thirty years since the Uniform Act first appeared, only two states, Iowa and North Dakota, have adopted it.[38]

D. Analysis

Although few jurisdictions have actually adopted a uniform approach, it is nonetheless an option for Mississippi to consider. Given the various criticisms of the existing Federal Rule 23, Mississippi might view a unitary approach as an attractive alternative. Its chief advantage is that it gives trial courts flexibility to certify a class action if the efficiencies of such a device would be achieved. In addition, it gives courts flexibility to decide whether, based on the particular action, class members should be given the right to opt out. The unitary approach embraces the view that the dividing lines between classes under (b)(1)(A), (b)(1)(B), (b)(2), and (b)(3) are artificial and unnecessarily rigid. It also recognizes that the question whether to permit opt-outs should not depend solely on whether the court chooses to certify the case under (b)(3), as opposed to (b)(1) or (b)(2).

The existing federal rule, by contrast, focuses solely on whether the requirements of four specific categories are met. Only Federal Rule 23(b)(3) specifically asks whether common issues predominate and whether a class action is the superior mechanism for resolving the dispute, even though these issues would seem central to the vast majority of class actions. Moreover, under Federal Rule 23, whether notice and opt-out rights are required depends solely on whether the class is certified as a mandatory (b)(1) or (b)(2) class or an opt-out (b)(3) class. In short, a unitary approach would give Mississippi courts greater flexibility than exists under a strict application of Federal Rule 23. Nonetheless, despite the problems with the current Federal Rule 23, Mississippi might be justifiably concerned about undertaking a new, largely untested approach.

First, despite criticisms by some courts and commentators, Federal Rule 23 has worked reasonably well and with a fair degree of flexibility since its adoption almost forty years ago. For instance, as noted above,[39] a number of courts have dealt with problems of opt-out versus mandatory classes by holding that, under the existing rule, courts have discretion pursuant to Rule 23(d) to require notice and opt-out rights under (b)(1) and (b)(2).[40] And some courts, recognizing that class actions do not generally serve their purpose if individual issues predominate, have required cohesiveness even outside of Rule 23(b)(3).[41] Although the existing Federal Rule 23, unlike the 1995 proposal, does not allow for opt-in classes,[42] this

38. *See* IOWA CODE ANN. Rule 1.261-1.280; N.D. R. CIV. P. 23; Peterson v. Dougherty Dawkins, Inc., 583 N.W. 2d 626, 628 n.3 (N.D. 1998) (noting that only North Dakota and Iowa have adopted the Uniform Act approach).

39. *See* pp. 262-64, *supra.*

40. *See supra*, note 24 and accompanying text.

41. *See* p. 262, *supra.*

42. *See supra*, note 32 and accompanying text.

may not be a critical omission. As one recent decision explains, opt-in classes are generally unsound as a policy matter because most people will not take the necessary steps to affirmatively opt-in.[43] Indeed, no federal court has ever certified an opt-in class under Rule 23.[44]

Second, by adopting the federal model, as most states have done, Mississippi would secure the advantage of a wide body of precedent. Even though some of this precedent conflicts from one jurisdiction to another, this vast body of case law would be nonetheless a huge advantage for Mississippi. The Mississippi courts would have the benefit of almost four decades of federal jurisprudence under the current version of Federal Rule 23.[45] Moreover, with the opportunity for interlocutory review under Federal Rule 23(f), adopted in 1998,[46] an ever increasing body of federal appellate court precedent is now available. And because the vast majority of states have adopted the 1966 version of the federal rule, Mississippi would also have the benefit of case law in all of those states.[47]

Third, in contrast to the vast body of case law under Federal Rule 23, Mississippi would have little guidance in construing a unitary rule. As noted,[48] only Iowa and North Dakota have adopted the Uniform Act approach. Neither state has much pertinent case law.[49] Absent substantial guidance from other states, decisional conflicts would inevitably develop as Mississippi judges applied the new unitary rule, thus requiring frequent review by the Mississippi Supreme Court to resolve such conflicts.

In sum, although a unitary approach has attractive features, Mississippi may wish to opt for the more cautious approach of adhering to the basic structure of the current Federal Rule 23, even with all of the criticisms of that rule.

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43. *Kern*, 393 F.3d 120, 124 ("'Requiring the individuals affirmatively to request inclusion in the lawsuit would result in freezing out the claims of people – especially small claims held by small people – who for one reason or another, ignorance, timidity, unfamiliarity with business or legal matters, will simply not take the affirmative step.'") (quoting Benjamin Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (1)*, 81 HARV. L. REV. 356, 397 (1967)).

44. *Kern*, 395 F.3d. at 125 (noting absence of opt-in classes under Federal Rule 23). *Cf. id.* at 128 (noting that cases brought under the Fair Labor Standards Act, 29 U.S.C. § 216(b), are opt-in classes).

45. *See* David W. Clark, *Litigation in Mississippi Today: A Symposium: Life in Lawsuit Central: An Overview of the Unique Aspects of Mississippi's Civil Justice System*, 71 MISS. L.J. 359, 384-85 (2002) ("If Mississippi had a class action rule like the federal rule, judges could look to the vast number of decisions made by the federal courts to assist them in determining if certification is proper.").

46. *See* p. 280-81, *infra.*

47. Numerous states that have adopted the language of Federal Rule 23 explicitly look for guidance to case law under Federal Rule 23. *See, e.g.*, First Alabama Bank v. Martin, 425 So. 2d 415 (Ala. 1982); Johnson v. Moore, 496 P.2d 334 (Wash. 1972).

48. *See* p. 266-67, *supra.*

49. If anything, the few published class certification decisions from those states only confirm the wide discretion available to trial courts under the unitary approach. *See, e.g.*, Luttenegger v. Conseco Financial Servicing Corp., 671 N.W. 2d 425, 437 (Iowa 2003) (noting, with respect to the 13 factors, that "[t]he district court need not assign weight to any of [those] factors" and "need not make written findings as to each factor"); Bice v. Petro Hunt, 681 N.W. 2d 74, 79 (N.D. 2004) ("the trial court is not required to specifically address each of the thirteen factors but must weigh the competing factors, none of which is predominant").

II. THE CERTIFICATION DECISION

This section discusses a variety of important issues relevant to whether a class should be certified. These issues do not depend on whether Mississippi adopts a unitary approach or instead adheres to the Federal Rule 23 model.

A. Considering Merits Issues at the Class Certification Stage

The federal courts and many state courts are sharply divided over whether a court may consider merits related issues in ruling on class certification. The source of the debate is *Eisen v. Carlisle & Jacquelin*.[50] There, the Supreme Court held that a court may not make a preliminary evaluation of the merits of a case in deciding whether to shift the cost of notice to the defendants.[51] Many courts have applied *Eisen* to hold that consideration of merits issues at the class certification stage is improper even if those merits issues overlap with class certification issues.[52] As one appellate court stated in endorsing this position, "'a motion for class certification is not an occasion for examination of the merits of the case.'"[53]

In *Szabo v. Bridgeport Machines, Inc.*,[54] the Seventh Circuit analyzed this issue in detail and concluded that, in considering class certification, "a judge should make whatever factual and legal inquiries are necessary under Rule 23," including inquiries "relevant to both the merits and class certification."[55] According to the *Szabo* court, although *Eisen* prohibits a court from saying "'I'm not going to certify a class unless I think that the plaintiffs will prevail[,]'" nothing in Rule 23 or *Eisen* "prevents the district court from looking beneath the surface of a complaint to conduct the inquiries identified in [Rule 23] and exercise the discretion it confers."[56]

In my view, the Seventh Circuit has the preferable approach. Without the ability to consider issues that touch upon the merits, many facts critical

50. 417 U.S. 156 (1974).

51. *See id.* at 177–78.

52. *See, e.g.*, Daggett v. Blind Enterprises of Oregon, No. CV-95-421-ST, 1996 U.S. Dist. LEXIS 22465, at *60 (D. Or. Apr. 18, 1996) (refusing to consider argument at class certification stage that the representatives were subject to a collateral estoppel defense); Cook v. Rockwell Intl. Corp., 151 F.R.D. 378, 381 (D. Colo. 1993) ("'An inquiry into the merits of the claims of the representative or the class is inappropriate when making the decision whether the action should be certified under Rule 23.'") (quoting 7A Charles A. Wright, Arthur R. Miller & Mary Kay Kane, FEDERAL PRACTICE AND PROCEDURE § 1759 at 99 (1986). *See also* Robert H. Klonoff, *The Judiciary's Flawed Application of Rule 23's "Adequacy of Representation" Requirement*, 2004 MICH. ST. L. REV. 671, 680-82 (2004) (discussing case law in context of adequacy of representation).

53. In re VISA Check/MasterMoney Antitrust Litig., 280 F.3d 124, 135 (2d Cir. 2001), *cert. denied*, 536 U.S. 917 (2002) (quoting Caridad v. Metro-North Commuter R.R., 191 F.3d 283, 291 (2d Cir. 1999), *cert. denied*, 529 U.S. 1107 (2000)).

54. 249 F.3d 672 (7th Cir. 2001).

55. *Id.* at 676–77.

56. *Id.* at 677–78. Post *Szabo*, the courts remain divided with respect to the correctness of the Seventh Circuit's approach. *Compare, e.g.*, Unger v. Amedisys Inc., No. 03-30965, 2005 U.S. App. LEXIS 2778, at*11-*12 (5th Cir. 2005) (endorsing *Szabo* approach); Gariety v. Thorton, 368 F.3d 356, 366 (4th Cir. 2004) (same); Tardiff v. Knox County, 365 F.3d 1, 5 (1st Cir. 2004) (same), *with* Shook v. El Paso County, 386 F.3d 963, 968 (10th Cir. 2004) (adopting strict rule against considering merits issues); *In re VISA Check/MasterMoney Antitrust Litig.*, *supra* note 53, 280 F.3d at 135 (same).

to class certification would be off limits to the court deciding certification. For instance, if a class representative's claims were time barred, the representative would not be adequate or typical to represent a class of people with timely claims. Yet, by refusing to consider "merits" issues, a court would not address these serious adequacy and typicality concerns.

Mississippi should include language in its class action rule to make clear that a court addressing class certification is free to make all necessary factual and legal inquiries necessary to rule on certification, even if those inquiries relate to the merits of the claims as well as to certification.

B. Burden of Proof

In *General Telephone Co. of the Southwest v. Falcon*,[57] the United States Supreme Court made clear that, in ruling on class certification under Federal Rule 23, the court should certify a class only "after a rigorous analysis that the prerequisites of Rule 23(a) have been satisfied."[58] Many courts hold, consistent with *Falcon*, that the burden is on the plaintiff to satisfy each of the requirements for certifying a class under Federal Rule 23.[59] A surprising number of courts, however, have shifted the burden on class certification issues to the defendant.[60]

As *Falcon* recognizes, before a court invokes the machinery of a class action, plaintiffs should bear the burden of demonstrating that all of the prerequisites for certification have been satisfied. To make sure that Mississippi's trial courts take this approach, its class action rule should explicitly state that the burden is on the plaintiff to establish each of the prerequisites for a class action.

C. Elimination of Conditional Certification

Prior to the 2003 amendments, Federal Rule 23 permitted "conditional" certification.[61] This device permitted courts having doubts about the propriety of a class action to certify a class with the possibility of decertifying it later if the prerequisites for certification were ultimately not established.[62] Under conditional certification, many courts required all

57. 457 U.S. 147 (1982).

58. *Id.* at 161. *Accord, e.g.*, Retired Chicago Police Ass'n v. City of Chicago, 7 F.3d 584, 596 (7th Cir. 1993); Valentino v. Howlett, 528 F.2d 975, 978 (7th Cir. 1976); Poindexter v. Teubert, 462 F.2d 1096, 1097 (4th Cir. 1972).

59. *See, e.g.*, Berger v. Compaq Computer Corp., 257 F.3d 475, 481 (5th Cir. 2001); In re Ribozyme Pharms., Inc. Sec. Litig., 205 F.R.D. 572, 577 (D. Colo. 2001).

60. *See, e.g.*, Lichoff v. CSX Transp., Inc., 218 F.R.D. 564, 575 (N.D. Ohio 2003) (requiring defendant to prove the inadequacy of representation); Abby v. City of Detroit, 218 F.R.D. 544, 548 (E.D. Mich. 2003) (adequacy of representation presumed absent a contrary showing).

61. *See* Pre-2003 FED. R. CIV. P. 23(c)(1) (an order certifying a class "may be conditional").

62. *See, e.g.*, Central Wesleyan College v. W.R. Grace & Co., 6 F.3d 177, 186, 188, 190 (4th Cir. 1993) (noting "[t]he tentative, limited nature of the conditional certification" and upholding certification despite the "daunting number of individual issues" and "concern about the manageability of [the] litigation").

doubts to be resolved in favor of certification.[63] The 2003 amendments to Federal Rule 23 eliminate the concept of conditional certification. As the Advisory Committee Notes to those amendments point out, "[a] court that is not satisfied that the requirements of Rule 23 have been met should refuse certification until they have been met."[64] As of yet, only one state adopting the 1966 version of Federal Rule 23 has amended its rule to make this change.[65] Because the amendment to Federal Rule 23 took effect only in December of 2003, it is not surprising that other states have not yet adopted a corresponding amendment to their own class action rules. In any event, Mississippi should follow the approach of the 2003 amendments to make clear that a court should not certify a class unless and until the requirements for certification have been satisfied.[66]

III. APPOINTING CLASS COUNSEL AND THE DETERMINING OF ATTORNEYS' FEES

A. Appointing Class Counsel

In 2003, Federal Rule 23 was amended to add a new subdivision, Rule 23(g), addressing appointment of class counsel. Under Federal Rule 23(g), the court must appoint class counsel in all cases certified under Rule 23. In making that appointment, the court must consider counsel's (i) work in investigating potential claims, (ii) experience in handling "class actions, other complex litigation, and the claims of the type asserted in the action," (iii) knowledge of the governing law, and (iv) resources available for the case.[67] The court may also consider "any other matter pertinent to counsel's ability to fairly and adequately represent the interests of the class."[68] When only one applicant seeks appointment as counsel, "the court may appoint that applicant only if the applicant is adequate" under Rule 23(g)'s criteria.[69] As I have written elsewhere,[70] although case law will determine its ultimate impact, Rule 23(g) appears to be a positive step in ensuring adequacy of counsel. It focuses the court's attention squarely on counsel's fitness and qualifications to represent a class. Rule 23(g) recognizes that, just because a particular lawyer files a putative class action lawsuit does not mean that the lawyer has the qualifications or experience necessary to take on that important role.

63. Williams v. Empire Funding Corp., 183 F.R.D. 428, 433 (E.D. Pa. 1998) ("When doubt exists concerning certification of the class, the court should err in favor of allowing the case to proceed as a class action.").

64. FED. R. CIV. P. 23 advisory committee notes (2003).

65. *See* TEX. R. CIV. P. 42(c)(1).

66. Of course, even under such a rule, a court would have authority to decertify if circumstances later revealed that the reasons for the initial certification were no longer valid. See FED. R. CIV. P. 23(c)(1)(C) ("An order under Rule 23(c)(1) may be altered or amended before final judgment.").

67. FED. R. CIV. P. 23(g)(1)(C)(i).

68. FED. R. CIV. P. 23(g)(1)(C)(ii).

69. FED. R. CIV. P. 23(g)(2)(B).

70. Robert H. Klonoff, *The Judiciary's Flawed Application of Rule 23's "Adequacy of Representation" Requirement*, 2004 MICH. L. REV. 671, 689, 697, 699 (2004) (citing statistics indicating lax enforcement of adequacy of counsel requirement under Rule 23(a)(4) and discussing recent Rule 23(g)).

One commentator worries that under Rule 23(g), "no attorney or firm will go to the trouble of developing a class action if there is a significant chance that the court will not appoint him or her as class counsel[,]" and that "[w]orthy cases . . . may therefore be ignored."[71] I do not view this concern as justified. In my view, it is highly unlikely that Rule 23(g) will deter qualified counsel from investigating and pursuing "worthy cases." If counsel has concerns about his or her class action credentials, he or she need only associate a prominent plaintiff class action firm as co-counsel to allay possible objections by the court. Indeed, ten years ago Congress imposed similar rules for securities fraud class actions, and no slowdown in prosecuting such cases has resulted. Specifically, the Private Securities Litigation Reform Act of 1995 [hereinafter Reform Act][72] requires that, in securities fraud cases, the court shall select the "lead plaintiff" who is "most capable of adequately representing the interests of class members . . . ."[73] The lead plaintiff, in turn, selects class counsel, but that selection is "subject to the approval of the court."[74] Thus, under the Reform Act, as under Rule 23(g), there is no guarantee that an attorney who investigates possible securities fraud claims will be approved as class counsel. Yet, statistics on case filings under the Reform Act reveal no evidence that that Act has in any way deterred the prosecution of securities fraud cases.[75]

Only one state thus far has adopted the language of Federal Rule 23(g).[76] There can be no serious question, however, that Rule 23(g) is a worthy addition to Federal Rule 23 and that Mississippi should include this provision in its own class action rule.

B. Attorneys' Fees

1. Federal Rule 23(h)

Also in 2003, Federal Rule 23(h) took effect. Under Rule 23(h), a request for attorneys' fees must be made by motion,[77] and "[a] class member, or a party from whom payment is sought, may object to the motion."[78] Notice of "motions [for fees] by class counsel" must be "directed to class members in a reasonable manner."[79] In awarding fees, the court "must"

71. Note, *The Influence of Mass Toxic Tort Litigation on Class Action Rules Reform*, 22 VA. ENVTL. L.J. 249, 280 (2004).

72. Private Securities Litigation Reform Act of 1995, Pub. L. No. 104-67, 109 Stat. 737 (1995).

73. 15 U.S.C. § 78u-4(a)(3)(B)(i).

74. 15 U.S.C. § 78u-4(a)(3)(B)(v); *See also* Friedman v. Rayovac Corp., 219 F.R.D. 603, (W.D. Wis. 2002) (quoting § 78u-4(a)(3)(B)(v)); In re Milestone Scientific Sec. Litig., 187 F.R.D. 165, 175 (D.N.J. 1999) ("The decision to approve counsel selected by the lead plaintiff is a matter within the discretion of the district court.").

75. For the years 1992-1995, the average number of federal securities fraud class actions filed per year was 196. For the years 1996-2004, the average annual number of such cases was 239. *See* Stanford Law School Securities Class Action Clearinghouse, *available at* http://securities.stanford.edu/index.html (last visited April 21, 2005).

76. *See* TEX. R. CIV. P. 42(g).

77. FED. R. CIV. P. 23(h)(1).

78. FED. R. CIV. P. 23(h)(2).

79. FED. R. CIV. P. 23(h)(1).

make findings of fact and conclusions of law.[80] Although some courts followed similar procedures even before the adoption of Rule 23(h), others did not. As one commentator points out, the principal impact of Rule 23(h) is to focus the court on the need "to weigh the benefit actually achieved for class members against the class counsel's fee request."[81] Although notifying the class about an attorneys' fees motion will entail some delay and expense,[82] the benefits of Rule 23(h) would appear to outweigh the costs. Consequently, even though only one state has thus far adopted the language of Rule 23(h),[83] Mississippi should adopt this provision as part of its class action rule.

2. Basing Attorneys' Fees on Actual Recovery Claimed By Class Members

One controversial issue regarding attorneys' fees arises in class action settlements in which the funds unclaimed by class members revert to the defendant. That issue is whether attorneys' fees should be calculated based on the potential fund (the total amount available to the class if all class members file claims) or on only the actual portion of the fund claimed by members of the class.

For example, assume that the class and the defendant agree to create a $30 million fund to settle claims regarding a defective product. Assume further that, at the end of the claims process, class members have claimed only $2 million of that amount, and the other $28 million will revert to the defendant. Fees based on twenty percent of the total fund would be $6 million, three times the amount actually claimed by the class; fees based on the actual amount claimed would be only $400,000. The issue for purposes of this article is whether Mississippi's class action rule should explicitly endorse one approach or the other. I know of no class action rule that squarely addresses this question.[84] Instead, the issue has arisen under the case law in the context of specific fee awards.

Some courts have held that fees may be calculated based on the total fund created, regardless of the actual claims rate. These courts find that the class benefits from the total fund created, even if only a fraction of the fund is claimed. For instance, in *Waters v. International Precious Metals Corp.*,[85] the Eleventh Circuit approved fees based on a $40 million settlement fund without regard to the actual claims made against the fund. In so doing, it explained:

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80. FED. R. CIV. P. 23(h)(3).

81. Note, *The Influence of Mass Toxic Tort Litigation on Class Action Rules Reform*, 22 VA. ENVTL. L.J. 249, 281 (2004).

82. *See* FED. R. CIV. P. 23(h)(1) (notice of "motions [for fees] by class counsel" must be "directed to class members in a reasonable manner").

83. *See* TEX. R. CIV. P. 42(h).

84. Some class action rules regulate or limit attorneys' fees in other ways. *See, e.g.*, TEX. R. CIV. P. 42(i)(1) ("In awarding attorney fees, the court must first determine a lodestar figure by multiplying the number of hours reasonably worked times a reasonable hourly rate. The attorney fees award must be in the range of 25% to 400% of the lodestar figure.").

85. 190 F.3d 1291, 1297 (11th Cir. 1999), *cert. denied*, 530 U.S. 1223 (2000).

> Each class claimant benefited from having the total amount of the fund set at $40 million because the individual payment was based upon a percentage of the total fund. The amount of the total fund determined the amount of each class member's claim, regardless of the actual number of claims filed.[86]

One appellate court has gone so far as to find that a district court *abused its discretion* in calculating fees based on the actual payout ($10,000) instead of on the amount of the settlement fund made available for claims ($4.5 million).[87]

Not all judges agree with the soundness of awarding fees based on potential rather than actual payout. In the *Waters* case, for example, although the Supreme Court denied *certiorari*, Justice O'Connor issued a statement accompanying the denial of *certiorari*:

> Arrangements such as that at issue here decouple class counsel's financial incentives from those of the class, increasing the risk that the actual distribution will be misallocated between attorney's fees and the plaintiff's recovery. They potentially undermine the underlying purposes of class actions by providing defendants with a powerful means to enticing class counsel to settle lawsuits in a manner detrimental to the class. And they could encourage the filing of needless lawsuits where, because the value of each class member's individual claim is small compared to the transaction costs in obtaining recovery, the actual distribution to the class will inevitably be minimal.[88]

Surprisingly, despite the concerns raised by Justice O'Connor, this issue has not raised a groundswell of concern among commentators. One recent article, for example, notes that, although "calculating attorney's fees . . . as a percentage of the total fund carries the risk of encouraging collusion and frivolous lawsuits," that approach "creates a needed incentive for class counsel to bring small claim consumer class actions."[89]

The drafters of Mississippi's class action rule may wish to study this issue. They may conclude that the risks of collusion and baseless lawsuits are so serious that a blanket rule prohibiting fees based on unclaimed funds

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86. *Id.*

87. Williams v. MGM-Pathe Communications Co., 129 F.3d 1026, 1027 (9th Cir. 1997).

88. *Waters*, 530 U.S. 1223, 1224 (2000) (statement of Justice O'Connor). *See also* Strong v. Bell South Telecommunications, Inc., 137 F.3d 844, 852 (5th Cir. 1998) (no abuse of discretion in awarding fees based on actual payout instead of on total fund).

89. Hailyn Chen Comment, *Attorneys' Fees and Reversionary Fund Settlements in Small Claims Consumer Class Actions*, 50 UCLA L. REV. 879, 902 (2003).

is warranted. Alternatively, the drafters may conclude that a rule permitting fees based on the total fund, regardless of claims made, is necessary to encourage meritorious class action suits to be brought.[90]

A more cautious approach may be to leave this issue unsettled in the first instance and study it further in light of actual settlements and fee awards in Mississippi following the adoption of a class action rule. In the interim, trial judges would presumably have discretion to set fees under either approach, depending on the circumstances of the particular case.

IV. SETTLEMENT ISSUES

A. Certification Standards Governing Settlement

In drafting its class action rule, Mississippi will want to give serious consideration as to the standards that will apply in ruling on so-called "settlement classes." A settlement class is one in which the case has settled (subject to court approval), either upon the filing of the complaint or thereafter, but *before* the court has ruled on a contested motion for class certification. Because the case is settling, the question arises whether the class has to meet all of the requirements for certification that would apply if the case were going to trial (*e.g.*, for a (b)(3) class, the 23(a) criteria, predominance, and superiority). Or can the court take into account the fact of settlement and apply more relaxed criteria, focusing primarily on the fairness and reasonableness of the settlement? This issue has generated substantial debate and controversy. To understand the issues, some brief background is necessary.

In *Georgine v. Amchem Prods., Inc.*,[91] the Third Circuit held that when the parties simultaneously seek class certification and approval of a classwide settlement, the class must satisfy all the requirements of a class certified for trial, even though the settlement means that the case will not be tried. The court reviewed the text of Rule 23 and concluded, "we do not believe that the drafters of the present rule included a more liberal standard [for settlement classes] for 23(b)(3)."[92] According to the court, "each of [the] requirements [of Rule 23(a) and (b)(3)] must be satisfied without taking into account the settlement, and as if the action were going to be litigated."[93] Applying that analysis, the court struck down an asbestos class settlement that had been approved by the district court. The Third Circuit issued its decision on May 10, 1996.

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90. In considering a rule addressing this issue, the drafters would need to determine whether such a rule would be procedural or instead would be a substantive change in law requiring legislation. *See, e.g.*, Newell v. State, 308 So.2d 71, 76 (Miss. 1975) (noting "inherent power of [the Mississippi Supreme] Court to promulgate *procedural* rules") (emphasis added). The drafters might also wish to consider alternative ways of addressing the problem, such as the approach of the Texas class action rule. *See supra*, note 86 and accompanying text.

91. 83 F.3d 610 (3d Cir. 1996), *aff'd*, 521 U.S. 591 (1997).

92. *Id.* at 625.

93. *Id.* at 626.

On August 15, 1996, the Advisory Committee on Civil Rules published, for notice and comment, a proposed amendment to Rule 23 (Rule 23(b)(4)) that would permit a court in a (b)(3) class action to certify a class for settlement "even though the requirements of subdivision (b)(3) might not be met."[94] The Advisory Committee Notes to the proposed rule specifically cited *Georgine* and noted that it was in conflict with other decisions that had allowed the fact of settlement to be considered in ruling on the certification of a settlement class.[95] In explaining the proposal, the Advisory Committee Notes indicated that under the proposal, all of the requirements of Rule 23(a), and the predominance and superiority requirements of (b)(3), "must be satisfied."[96] Yet, somewhat inconsistently, the Notes went on to state:

> [I]mplementation of the factors that control certification of a (b)(3) class is affected by the many differences between settlement and litigation of class claims or defenses. Choice-of-law difficulties, for example, may force certification of many subclasses, or even defeat any class certification, if claims are to be litigated. Settlement can be reached, however, on terms that surmount such difficulties. Many other elements are affected as well. A single court may be able to manage settlement when litigation would require resort to many courts. And, perhaps most important, settlement may prove far superior to litigation in devising comprehensive solutions to large-scale problems that defy ready disposition by traditional adversary litigation. Important benefits may be provided for those who, knowing of the class settlement and the opportunity to opt out, prefer to participate in the class judgment and avoid the costs of individual litigation.[97]

Proposed Rule 23(b)(4) generated strong reactions, both positive and negative.[98]

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94. Proposed Rule 23(b)(4), reprinted in Linda Mullenix, *The Constitutionality of the Proposed Rule 23 Class Action Amendments*, 39 ARIZ. L. REV. 615, 640 (1997).

95. FED. R. CIV. P. 23(b)(4) Advisory Committee's note (1996), reprinted in Mullenix, *supra* note 94, at 644-45 (citing cases contrary to *Georgine* as including Weinberger v. Kendrick, 698 F.2d 61, 72-73 (2d Cir. 1982); and In re Beef Industry Antitrust Litig., 607 F.2d 167, 170-71, 173-78 (5th Cir. 1979)).

96. FED. R. CIV. P. 23(b)(4) Advisory Committee's note (1996), reprinted in Mullenix, *supra* note 94, at 645.

97. *Id.*

98. *See, e.g.*, Amchem Products, Inc. v. Windsor, 521 U.S. 591, 619 (1997) (noting controversy); Mullenix, *supra* note 94, at 622-39 (collecting and responding to various criticisms of proposed Rule 23(b)(4)); Christopher J. Willis, *Collision Course or Coexistence?* Amchem Products v. Windsor *and Proposed Rule 23(b)(4)*, 23 CUMB. L. REV. 13, 33-35 (1997/1998) (criticizing proposed rule for watering down Rule 23's protections of predominance, adequacy, and typicality, "each of which is a vital ingredient to protecting absent class members' rights"); Eric Green, *Symposium on Alternative Dispute Resolution: What Will We Do When Adjudication Ends? We'll Settle in Bunches: Bringing Rule 23 Into the Twenty-First Century,* 44 UCLA L. REV. 1773, 1798-99 (1997) (discussing extensive scholarly criticism

The Supreme Court granted certiorari in *Georgine* on November 1, 1996,[99] and on June 25, 1997, it issued its opinion, captioned as *Amchem Products, Inc. v. Windsor*.[100] Although the Supreme Court affirmed the judgment of the Third Circuit, its analysis was somewhat different. Specifically, the Court held that settlement *was* relevant to whether, under Rule 23(b)(3)(D), the case presents manageability problems. According to the Court, "a district court need not inquire whether the case, if tried, would present intractable management problems . . . for the proposal is that there be no trial."[101] With respect to the *other* requirements of Rule 23(a) and (b)(3), however, the Court stated that "undiluted, even heightened attention [is required] in the settlement context."[102] In other words, the requirements of adequacy, typicality, commonality, numerosity, predominance, and superiority (excluding manageability) apply fully (and perhaps to an even greater extent) in the settlement context.

After *Amchem*, the need for proposed Rule 23(b)(4) was uncertain. Some commentators read *Amchem*'s holding on manageability (*i.e.*, that manageability for trial is not relevant to a settlement class) as essentially adopting the approach of proposed Rule 23(b)(4).[103] Other commentators, however, were not so sure. Before *Amchem*, some courts had suggested that a settlement class could be approved if it was fair, even if it did not strictly comply with Rule 23(b)(3).[104] To the extent that Rule 23(b)(4) was designed to adopt the approach of such cases, the proposed rule was "in conflict with *Amchem*'s holding circumscribing settlement classes."[105] Under the latter interpretation of proposed Rule 23(b)(4), the proposal would not be rendered moot by *Amchem*. In all events, whether or not its proposal was completely mooted by *Amchem*, the Advisory Committee ultimately decided not to move forward with the (b)(4) approach.

The question for Mississippi, of course, is not whether to adopt the precise language of proposed Rule 23(b)(4), the scope of which is not entirely clear.[106] Instead, the question is whether Mississippi is comfortable

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of proposed Rule 23(b)(4) but concluding that the proposed amendment would "increase fairness and efficiency in class action litigation, reduce transaction costs, increase compensation to deserving plaintiffs, decrease ruinous exposures and bankruptcy to defendants, and provide a reasonable and fair tool in appropriate cases for federal courts to reduce the enormous drain on resources caused by multiple harms").

99. Amchem Prod, Inc. v. Windsor 519 U.S. 957 (1996).

100. 521 U.S. 591 (1997).

101. *Id.* at 620.

102. *Id.*

103. *See, e.g.*, Howard M. Erichson, *Mass Tort Litigation and Inquisitional Justice*, 87 GEO. L.J. 1983, 2001 (1999) (*Amchem* "rendered the proposed rule change unnecessary").

104. *See* cases cited in note 95, *supra*. *See also* Darren M. Franklin Note, *The Mass Tort Defendants Strike Back: Are Settlement Classes a Collusive Threat or Just a Phantom Menace?*, 53 STAN. L. REV. 163, 184-85 (2000) (discussing case law).

105. *Id.* at 185.

106. Louisiana has adopted language essentially identical to proposed Rule 23(b)(4). *See* LA. CODE CIV. PROC. ANN. art. 591B(4) (1960) ("The parties to a settlement [may] request certification under Subparagraph B(3) for purposes of settlement, even though the requirements of Subparagraph B(3) might not otherwise be met.") There are, however, no published opinions interpreting the Louisiana rule.

with the *Amchem* approach (which presumably would be embodied in Mississippi's adoption of Federal Rule 23 verbatim), or whether Mississippi would instead prefer a class action rule that permits a settlement class when it is fair and reasonable, even if it does not strictly satisfy the certification requirements of a litigation class. The latter approach would have at least two benefits.

First, by not requiring strict compliance with the rules for a litigation class, such an approach would permit some settlements that would not pass muster under *Amchem*. Put another way, as Professor Mullenix notes, requiring strict compliance with the criteria of 23(a) and (b) "will kill off the possibility of resolving mass tort litigation – and many other substantive class actions – through the auspices of classwide settlements."[107]

Second, a rule that does not require strict compliance with the requirements of Rule 23(a) and (b)(3) may encourage settlement by convincing otherwise reluctant defendants to settle. The reason for such reluctance is that *Amchem* poses a serious tactical dilemma for a defendant contemplating a classwide settlement: The defendant clearly wants to obtain approval of any settlement that it deems favorable, but it does not want to concede the viability of a class action in the event that the settlement is rejected, for whatever reason. Yet, if a settlement must comply with the requirements of a litigation class (excluding manageability), a defendant may have difficulty arguing in favor of the settlement but refusing to concede, for example, that common issues predominate.[108] Post-*Amchem*, many defendants fear that if they concede predominance or other certification requirements in seeking approval of a settlement, they will be bound by this concession even if the settlement falls through and defendant must ultimately contest class certification.[109] By contrast, if a defendant, in pursuing a settlement, need not concede that the requirements of Rule 23(a) and (b)(3) are satisfied, that defendant will not have to worry about its ability to contest class certification if the settlement is not approved.

For both of these reasons, an approach that permits settlement certification even absent strict compliance with Rule 23(a) and (b)(3) would enable more putative class action cases to settle. Such an approach raises potential concerns, however.

First, some commentators fear that, to the extent that the focus is on fairness rather than the Rule 23 criteria, the result may be to give insufficient attention to Rule 23 and due process issues of collusion and adequacy of representation.[110] "Fairness" is a subjective standard, and permitting

107. Linda Mullenix, *The Constitutionality of the Proposed Rule 23 Class Action Amendments*, 39 ARIZ. L. REV. 615, 637 (1997).

108. A defendant in a proposed settlement could simply take no position on whether the class would meet the requirements for certification as a litigation class. The district court, however, might press the defense to take a position one way or the other.

109. *See, e.g.*, Carnegie v. Household Int'l, Inc., 376 F.3d 656, 659-60 (7th Cir. 2004) (upholding class certification in part because defendant had previously proposed to settle case as a class action).

110. *See, e.g.*, Franklin, *supra* note 104, at 192 ("mass tort classes that are certifiable for settlement but not trial invite attorney collusion"); *but see* Mullenix, *supra* note 107 (summarizing and challenging

such a standard to be the main focus (as opposed to issues of adequacy, typicality, and predominance) may lead to collusion between class counsel and defendants.

Second, in light of *Amchem*, which allows courts to take settlement into account on the issue of manageability,[111] the need for a (b)(4) type procedure is not entirely clear. Some commentators believe that class settlements are still quite easily approved post-*Amchem*.[112]

In short, while the drafters of a Mississippi class action rule may feel inclined to take a position on the requirements for settlement classes, the most prudent approach may be to refrain from adopting special criteria for settlement classes unless and until such a need reveals itself once Mississippi's class action rule is in place. The rule can always be amended to ease the requirements for settlement classes if the criteria adopted by Mississippi lead to the rejection of meritorious settlements.

B. Second Opt-Out for Members of a Settlement Class

Federal Rule 23(e) was amended in 2003 to provide that, in a class previously certified under Rule 23(b)(3), "the court may refuse to approve a settlement unless it affords a new opportunity to request exclusion to individual class members who had an earlier opportunity to request exclusion but did not do so."[113] This provision (new Rule 23(e)(3)) deals with the situation in which the time to opt out of a class has already expired before the parties reach a proposed settlement.[114] Before the enactment of this provision, the only options for class members in such a situation were to accept the settlement or argue that the court should reject it. Class members could not opt out, having already had the opportunity to do so prior to the settlement. Now a federal court has the discretion to permit a second opt out at the settlement stage. As the Advisory Committee Notes state, "[a] decision to remain in the class is likely to be more carefully considered and is better informed when the settlement terms are known."[115]

Defendants obviously wish to minimize opt-outs when there is any likelihood that those opt-outs will pursue either individual or aggregate litigation. Indeed, many settlement agreements permit defendants to walk away if opt-outs exceed a specified number. The overarching purpose of a settlement, from a defendant's perspective, is to buy global peace. Significant opt-outs pose the risk of additional individual (or even class action)

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view of opponents to (b)(4) that "the settlement class mechanism would undermine the due process requirement for adequate class representation").

111. *See supra* note 103 and accompanying text.

112. *See, e.g.*, Franklin, 53 STAN. L. REV. at 189 ("[D]espite *Amchem*, federal district courts have continued to certify settlement classes in products liability suits") (citing examples).

113. FED. R. CIV. P. 23(e)(3).

114. The provision would not be needed for cases filed as settlement classes under (b)(3). In that circumstance, in which the parties request certification and approval of a settlement simultaneously, Rule 23(b)(3) itself would permit opt-outs at the time of settlement, so there would be no need for a second opt-out.

115. FED. R. CIV. P. 23 advisory committee notes (2003).

lawsuits. Knowing that another opportunity to opt-out may exist, defendants undoubtedly will attempt to make settlement proposals more attractive to class members, thereby discouraging additional opt-outs in the event that the court invokes Rule 23(e)(3) and allows a second opt-out period. This result has the salutary effect of helping class members to receive a fair settlement. Although only one state has thus far adopted the equivalent of new Rule 23(e)(3),[116] Mississippi should include a version of it in its class action rule.

V. REVIEW AND BINDING EFFECT OF CLASS CERTIFICATION RULINGS

A. Interlocutory Review of Class Certification Rulings

Federal Rule 23(f), added in 1998, permits a court of appeals, "in its discretion," to grant interlocutory review of an order "granting or denying class certification under [Rule 23]."[117] Interlocutory review of class certification orders is also available, as of right or on a discretionary basis, in a large number of states.[118]

Since the adoption of Rule 23(f) in 1998, the federal circuit courts have reviewed numerous class certification rulings.[119] Indeed, almost every federal circuit has granted review under Rule 23(f).[120]

The rationale of Rule 23(f) is that the class certification ruling is frequently the dispositive issue in the case. Thus, "[f]or some cases the denial of class status sounds the death knell of the litigation, because the representative plaintiff's claim is too small to justify the expense of litigation."[121]

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116. *See* TEX. R. CIV. P. 42(e)(3).

117. FED. R. CIV. P. 23(f).

118. *See, e.g.*, Alabama, ALA. CODE § 6-5-642 (1993 & Supp. 2004); Arkansas, ARK. R. APP. P.R. 2(a)(9); California, Darr v. Yellow Cab. Co, 433 P.2d 732, 735-37 (Ca. 1967) (denial of class certification is an appealable final judgment); Colorado, COLO. REV. STAT. § 13-20-901 (West 2004); Florida, FLA. R. APP. P. 9.130(a)(3)(C)(vii) and 9.130(a)(6); Georgia, GA. CODE ANN. § 9-11-23(f); Iowa, IOWA R. CIV. P. 1.264(3); Kansas, KAN. STAT. ANN. § 60-223(f) (as amended by H.R. 2764, Sess. Laws 21 (Kan. 2004)); Massachusetts, Dowel v. Comm'r of Transitional Assistance, 677 N.E.2d 213, 214 (Mass. 1997) (permitting direct appellate review of class certification decisions); New Mexico, N.M. Dist. Ct. R. Civ. P. 1-023(F); New York, Kidd v. Delta Funding Corp. 734 N.Y.S.2d 848 (N.Y. App. Div. 2001) (permitting appellate review of class action certification); North Carolina, Nobles v. First Carolina Comm., Inc., 423 S.E.2d 312, 315 (N.C. Ct. App. 1992) (finding that an order denying certification of a class action is appealable); North Dakota, N.D. R. Civ. P. 23(d)(3); Ohio, OHIO REV. CODE ANN. § 2505.02(B)(5); Oklahoma, OKLA. STAT. tit. 12 § 993(A)(6) (West 2000); Oregon, OR. REV. STAT. § 19.225 (2003); Pennsylvania, PA. R. APP. P. 1311; Texas, TEX. CIV. PRAC. & REM. CODE § 51.014(a)(3) (Vernon 1997); Vermont, VT. R. CIV. P. 23(f); West Virginia, Mitchem v. Melton, 277 S.E.2d 895, 901 (W. Va. 1981) ("an order denying class action standing under Rule 23 may be appealed").

119. A search of LEXIS on December 7, 2005, reveals that 88 appellate decisions have granted Rule 23(f) review.

120. *See, e.g.*, Garcia ex rel. G.A. Garcia & Sons Farm, 2004 U.S. App. LEXIS, No. 04-8008, 26406 (D.C. Cir. Dec. 16, 2004); Tardiff v. Knox County, 365 F.3d 1 (1st Cir. 2004); In re Visa Check/Mastermoney Antitrust Litig. v. Visa, United States, 280 F.3d 124 (2d Cir. 2001); In re Chiang, 385 F.3d 256 (3d Cir. 2004); Lienhart v. Dryvit Sys., 255 F.3d 138 (4th Cir. 2001); Robinson v. Tex. Auto. Dealers Ass'n, 387 F.3d 416 (5th Cir. 2004); Olden v. Lafarge Corp., 383 F.3d 495 (6th Cir. 2004); Carnegie v. Household Int'l, Inc., 376 F.3d 656 (7th Cir. 2004); Reinholdson v. State, 346 F.3d 847 (8th Cir. 2003); Poulos v. Caesars World, Inc., 379 F.3d 654 (9th Cir. 2004); Cliff v. Payco Gen. Am. Credits, Inc., 363 F.3d 1113 (11th Cir. 2004).

121. Blair v. Equifax Check Servs., Inc., 181 F.3d 832, 834 (7th Cir. 1999).

By the same token, "a grant of class status can put considerable pressure on the defendant to settle, even when the plaintiff's probability of success on the merits is slight."[122] Interlocutory review gives the appellate court a chance to review the certification decision before these severe consequences come into play. There would seem to be little downside and much benefit in Mississippi's including a provision for interlocutory review (either mandatory or discretionary) as part of its class action rule.

B. Preventing Relitigation of Class Certification

What happens when, after unsuccessfully seeking class certification in one court, the same or different attorneys attempt to seek certification of essentially the same class in another court? Lawyers may attempt to seek class certification under a new Mississippi class action rule after being rebuffed by other courts. Mississippi could, under that scenario, become inundated with class actions that have already been held inappropriate for certification. Mississippi needs to decide whether it will entertain suits in which certification has been previously rejected.

As a result of the recent enactment of the Class Action Fairness Act of 2005 [hereinafter CAFA],[123] this problem is somewhat less acute than it might otherwise have been. Prior to the CAFA, many nationwide class actions involving state law claims were filed in and remained in state court.[124] Under the CAFA, however, most multi-state class actions will be removable to federal court.[125] Nonetheless, classes that do not qualify for federal jurisdiction post-CAFA will still be brought in state court. In those cases, when class certification is denied by a court in another state, the defeated lawyers (or other lawyers) may attempt to bring essentially the same class action in Mississippi. In addition, the CAFA does not impact a separate potential problem: one Mississippi judge denies class certification and the same (or different) lawyers then seek certification of essentially the

122. *Id.*

123. Class Action Fairness Act of 2005, Pub. L. No. 109-3, 119 Stat. 4 (2005) [hereinafter CAFA].

124. In general, prior to the enactment of the CAFA, diversity jurisdiction in class actions existed only if (1) no class representative was a citizen of the same state as any defendant and (2) each class member satisfied the $75,000 jurisdictional amount in controversy (or, in the view of some courts, at least one class representative satisfied the $75,000 amount, allowing the court to exercise supplemental jurisdiction under 28 U.S.C. § 1367 over the remaining class members). *See generally* Klonoff *supra* note [?], at 188-94 (discussing diversity jurisdiction principles for class actions, including impact of supplemental jurisdiction statute, 28 U.S.C. § 1367); Exxon Mobile Corp. v. Allapattah Services, Inc., 125 S.Ct. 2611, 162 L.Ed. 2d. 502 (2005) (holding that, under 28 U.S.C. § 1367, only a class representative (as opposed to all class members) needs to satisfy the jurisdictional amount).

125. Under the CAFA, district courts have original jurisdiction in a class action when the *total* amount in controversy exceeds $5 million, even if individual class members are seeking less than $75,000 each. Pub. L. 109-2, 119 Stat. 4 (2005), Sec. 4(a)(2). Moreover, only minimal diversity is required (*i.e.*, the existence of at least one member of the proposed class who is a citizen of a different state than any defendant). *Id.*, Sec. 4(a)(2)(A). Under the Act, if fewer than one third of the class are from the same state, the federal court is required to accept jurisdiction (assuming minimal diversity and $5 million at issue). If more than two-thirds of the class are from the state where the suit was filed, and if at least one of the significant defendants is from that state, then the federal court must decline jurisdiction. *Id.*, Sec. 4(a)(2). When between one-third and two-thirds of the class are from the forum state and the primary defendants are from that state, the federal court has discretion to decline or accept jurisdiction, based on a variety of criteria set forth in the statute. *Id.*, Sec. 4(a)(3).

same class before another Mississippi judge. The issue in both of these circumstances (first suit filed outside Mississippi and first suit filed in Mississippi) is whether the prior ruling denying class certification is somehow binding on the later court faced with a request to certify essentially the same class.

Courts have taken a variety of approaches in deciding this issue. For instance, in *J.R. Clearwater, Inc. v. Ashland Chemical Co.*,[126] a putative class unsuccessfully sought class certification in federal court. Subsequently, the attorney for the class brought another suit in Texas state court asserting largely the same claims and again seeking class certification. Defendants asked the federal court that had previously denied certification to enjoin the state court from considering the certification issue. The district court refused to do so, and the Fifth Circuit affirmed. The Fifth Circuit reasoned that "[t]he denial of class certification is 'a procedural ruling,' and the decision as to whether to certify a class lies within the 'wide discretion' of the trial court."[127] The court added that the refusal of the district court to intervene was particularly justified because the second action involved the Texas class action rule—albeit, one modeled after Federal Rule 23—not Federal Rule 23 itself, and "a Texas court might well exercise [its] discretion in a different manner."[128]

Subsequently, in *In re Bridgestone/Firestone, Inc., Tires Products Liability Litigation,*[129] the Seventh Circuit took a different approach. In an earlier decision, the Seventh Circuit had held that a nationwide class of Firestone tire owners and Ford Explorer owners could not be certified because, *inter alia*, of the need to apply the laws of all of the U.S. states and territories.[130] After that ruling, plaintiffs' counsel filed putative class action suits in various state courts, seeking certification of nationwide classes similar to the one rejected by the Seventh Circuit. Defendants asked the district court to enjoin the state actions, but the court refused. On appeal, the Seventh Circuit, in an opinion by Judge Easterbrook, reversed. The court held that under collateral estoppel, the issue of class certification was fully litigated in the Seventh Circuit and thus could be given preclusive effect. It found that, for purposes of collateral estoppel, the unnamed class members should be deemed parties in the earlier action because they were adequately represented by the class representatives. The Seventh Circuit found no impediment under the Anti-Injunction Act,[131] which normally prevents federal courts from enjoining state court litigation, because an injunction was necessary to protect the federal court certification ruling. The court explained that, without preclusive effect, class counsel could keep litigating until they found a court willing to certify:

126. J. R. Clearwater, Inc. v. Ashland Chemical Co., 93 F.3d 176 (5th Cir. 1996).

127. *Id.* at 180 (citations omitted).

128. *Ashland*, 93 F.3d at 180.

129. In re Bridgestone/ Firestone, Inc., Tires Prod. Liab. Litig., 333 F.3d 763 (7th Cir. 2003).

130. *See* In re Bridgestone/Firestone, Inc., Tires Prod. Liab. Litig., 288 F.3d 1012 (7th Cir. 2002), *cert. denied*, 537 U.S. 1105 (2003).

131. 28 U.S.C. § 2283.

> Relitigation can turn even an unlikely outcome into reality. Suppose that every state in the nation would as a matter of first principles deem inappropriate a nationwide class covering these claims and products. What this might mean in practice is something like "9 of 10 judges in every state would rule against certifying a nationwide class" (in the federal courts, it has meant that 3 of 4 judges have ruled against the proposed nationwide classes). Although the 10% that see things otherwise are a distinct minority, one is bound to turn up if plaintiffs file enough suits – and, if one nationwide class *is* certified, then all the no-certification decisions fade into insignificance. A single positive trumps all the negatives. Even if just one judge in ten believes that a nationwide class is lawful, then if the plaintiffs file in ten different states the probability that at least one will certify a nationwide class is 65% (0.9 10 = 0.349). Filing in 20 states produces an 88% probability of national class certification (0.9 20 = 0.122). This happens whenever plaintiffs can roll the dice as many times as they please – when nationwide class certification sticks (because it subsumes all other suits) while a no-certification decision has no enduring effect. [The Anti Injunction Act] permits a federal court to issue an injunction that will stop such a process in its tracks and hold *both* sides to a fully litigated outcome, rather than perpetuating an asymmetric system in which class counsel can win but never lose.[132]

A Louisiana state appellate court, in *Duffy v. Si-Sifh*,[133] also has blocked attempts to relitigate the issue of class certification. After a putative class action involving insurance claims was rejected by a trial court in Jefferson Parish on the grounds that a class action was not appropriate under Louisiana's class action rule, the same lawyers filed essentially the same suit in Orleans Parish, seeking certification of the identically defined class but utilizing different named plaintiffs as the proposed class representatives. The trial court rejected defendants' argument that class certification was barred by the earlier ruling, but the court of appeal reversed on a supervisory writ. Applying res judicata, on the theory that a request for a class action is a claim, the court reasoned that "allowing the plaintiffs to relitigate the class action question in the instant case would encourage forum shopping, allowing the plaintiffs numerous 'bites' at the class action 'apple,' and frustrate the purposes of the res judicata doctrine."[134]

132. *In re Bridgestone/ Firestone, Inc.*, 333 F.3d at 766-67 (emphasis in original).

133. Duffy v. Si-Sifh, 726 So. 2d 438 (La. App. 4th Cir. 1999).

134. *Id.* at 443. The procedural context of *Duffy*, of course, is very different from that in *Bridgestone/Firestone*. In the latter case, the first court applied its ruling by enjoining later courts from certifying classes. In *Duffy*, by contrast, the second court relied on the first court's ruling rejecting class certification.

Mississippi could, if it chose, avoid this sort of forum shopping and relitigation by barring motions for class certification in cases in which the same (or virtually the same) class certification theories were rejected either in another Mississippi court or in a court in another state. A rule to this effect would prevent class action plaintiff lawyers from having "numerous 'bites' at the class action 'apple.'"

The problem with such an approach is that drafting a suitable, but not overly sweeping, rule (or statute) may be exceedingly difficult. For instance, if an earlier putative class action was rejected because of an inadequate representative, and if a new representative has been substituted, it would seem unwarranted to preclude the second suit from going forward. Similarly, if the first suit was a nationwide class and was not certified because of the difficulty in applying the laws of fifty states, that denial of certification should not automatically bar a statewide class action, brought under the law of a single state, from going forward. On the other hand, in cases such as *Duffy* and *Firestone*, it is arguably unfair to permit class counsel to refile the same class action lawsuit that was previously found ill-suited for certification.

The commentators addressing this issue have been skeptical of the *Firestone* approach and are inclined to permit class counsel to make multiple attempts at class certification.[135] One option for Mississippi, short of not addressing the issue at all in its class action rule, would be to enact a provision requiring a court to consider, as a factor in ruling on certification, any prior ruling refusing to certify the same or a similar class.[136] Such a provision would highlight to judges that they cannot simply ignore prior unsuccessful efforts to obtain class certification. Instead, those earlier rulings would be part of the mix of factors that a court would consider in ruling on class certification.

CONCLUSION

This article has identified a number of issues that Mississippi should consider as it contemplates the contours of a class action rule. The article is by no means exhaustive, but it does serve to highlight some important and contentious decisions that the drafters will have to face as they put pen to paper.

135. *See, e.g.*, Case Note on *Firestone*, 117 HARV. L. REV. 2031, 2038 (2004) ("[S]ome risk of duplication of litigation is an inevitable cost of a system in which federal district court judges have broad discretion to deny class certification and states are free to manage their own judicial systems with their own class action rules."); Alexander Moeser Note, *Precluding the Absent Claimant from Re-Arguing Class Certification: Pragmatism and the "Day in Court" Ideal*, 92 KY. L.J. 817, 839 (2004) ("courts must resist the blanket approach" of *Firestone*).

136. *Cf.* Case Note, *supra* note 135, at 2038 ("States could . . . adopt[ ] incremental reforms, such as class action rules that direct judges to take note of prior denials of certification by other courts.").