Mississippi College Law Review

Volume 24
Issue 2 *Vol. 24 Iss. 2*

Article 7

2005

Mississippi Class Actions and the Inevitability of Mass Aggregate Litigation

Howard M. Erichson

Custom Citation
24 Miss. C. L. Rev. 285 (2004-2005)

MISSISSIPPI CLASS ACTIONS AND THE INEVITABILITY OF MASS AGGREGATE LITIGATION

*Howard M. Erichson**

INTRODUCTION

It's not about *whether* there will be mass aggregate litigation, but *how*.

As long as the economy features mass marketing, mass employment, mass entertainment, mass transportation, mass production of goods, and mass provision of services, disputes will arise in which a mass of claimants seek relief from a common defendant or set of defendants. Lawyers on both sides naturally handle such matters collectively rather than individually. With or without the judicial imprimatur of class certification, multi-claimant disputes routinely are litigated and resolved on a collective basis. The real question is not whether there will be mass litigation, but whether mass litigation will be subject to formal procedural safeguards or will instead proceed without clearly defined ethical duties or meaningful judicial supervision.

Mississippi does not permit class actions.[1] Yet Mississippi has been a hotbed of mass litigation, particularly mass tort litigation. Although recent tort reform legislation has reduced the amount of mass litigation in Mississippi by rendering the state's courts less appealing to plaintiffs, for a number of years Mississippi saw a tremendous concentration of large-scale litigation. How is it possible that the one state that prohibits class actions was an undisputed leader in mass aggregate litigation? The answer reveals much about mass dispute resolution, and shows why Mississippi ought to

* Professor, Seton Hall Law School. The author thanks Paul Rosenthal for his excellent research assistance. He appreciates the helpful comments of the participants in the Mississippi College Law Review symposium and in a faculty workshop at Vanderbilt Law School.

1. *See* MISS. R. CIV. P. 23 (omitted), cmt. *See also* Janssen Pharmaceutica, Inc. v. Armond, 866 So. 2d 1092, 1102 n.8 (Miss. 2004) (Graves, J., concurring) (citing Richard T. Phillips, *Class Action & Joinder in Mississippi*, 71 MISS. L.J. 447, 453 (2001), for the proposition that Mississippi is the sole state in the United States that does not permit class actions, and noting that Virginia, which lacks a class action rule, permits class actions in equity, and subsequent to the publication of Phillips' article, New Hampshire recently adopted a class action rule). Despite some prior uses of the "bill of peace" that resembled equitable class actions, *see* Leaf River Forest Products, Inc. v. Deakle, 661 So. 2d 188, 191-93 (Miss. 1995), the Mississippi Supreme Court has made it clear that not only are class actions unavailable under the rules of civil procedure, they are also unavailable in equity. *See* USF&G Ins. Co. v. Walls, No. 2002-IA-00185-SCT, 2004 Miss. LEXIS 657, at *3 (Miss. June 10, 2004) ("We granted USF&G's petition for interlocutory appeal, *see* M.R.A.P. 5, which asks one question: does Mississippi recognize 'equitable class actions' in chancery, despite an omission of Rule 23 from our Rules of Civil Procedure? After a review of the history of the law, we answer that question in the negative."); Am. Bankers Ins. Co. of Fla. v. Booth, 830 So. 2d 1205 (2002) ("[T]he rule is that Mississippi does not permit class actions, even equitable class actions in chancery court.").

permit representative litigation in the form of class actions. Mississippi declined to adopt a class action rule in order to avoid the burdens, controversies, and complexities of mass aggregate litigation, but mass aggregate litigation happened anyway.

When the Mississippi Supreme Court adopted the Mississippi Rules of Civil Procedure in 1981, modeled on the Federal Rules of Civil Procedure, it declined to adopt Rule 23 on class actions. The court saw the strong negative reactions that class actions engendered in some observers, and was concerned that class actions would be unmanageable for the Mississippi courts. The court explained its reasoning in an official comment:

> Class action practice is not being introduced into Mississippi trial courts at this time.
>
> Few procedural devices have been the subject of more widespread criticism and more sustained attack – and equally spirited defense – than practice under Federal Rule 23 and its state counterparts. The dissatisfaction focuses primarily on Rule 23(b)(3), which permits suits on the part of persons whose only connection is that one or more common issues characterize their position in relation to an adverse party.
>
> In 1976 the American Bar Association, the Conference of Chief Justices, and the Judicial Conference of the United States jointly sponsored the National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice. Class action practice was one of the topics considered by the National Conference (often referred to as the "Pound Conference," in deference to Roscoe Pound and his landmark address in 1906 entitled "The Causes of Popular Dissatisfaction with the Administration of Justice") and referred to the ABA for follow-up study and action.
>
> Aside from general proposals to provide jurisdictional "floors" and "ceilings" to regulate the size of class actions, greater judicial control over awards of attorneys' fees, and replacing the "opt-out" provisions with "opt-in" requirements, no meaningful reforms have as yet been developed to render class action practice a more manageable tool.[2]

The court apparently believed that by omitting class actions from its procedural repertoire, the Mississippi judicial system could avoid "widespread criticism" and "sustained attack." It apparently believed, as well, that the class action constitutes a less "manageable tool" than its alternatives.

This article explains why Mississippi needs a class action rule, by comparing the class action to its realistic alternatives. Part I explores how mass

2. MISS. R. CIV. P. 23 (omitted), cmt. (citations omitted).

aggregate litigation occurs in the absence of a class action rule. By examining the business of mass litigation and by reviewing the Mississippi experience, it shows that a state does not avoid mass litigation by prohibiting class actions. Rather, a prohibition on class actions channels mass disputes into other modes of formal and informal aggregate dispute resolution. Part II explains why, in some cases, class actions function better than other forms of aggregate litigation. Part III addresses two potential objections to a Mississippi class action rule, both of which involve the capacity of the court system to handle class actions, and concludes that neither objection justifies rejection of a class action rule.

I. MASS AGGREGATE LITIGATION WITHOUT CLASS ACTIONS

Too often, observers use the term "class action" as though it were synonymous with "mass aggregate litigation."[3] Overbroad use of the term "class action" makes it easy to lose sight not only of how class actions differ from other processes for aggregate litigation, but also of what class actions have in common with those other mechanisms. Class actions, as representative litigation with heightened judicial supervision, differ from other forms of aggregate litigation. These differences create not only risks, but also opportunities for superior resolutions of mass litigation, which this article will address in Part II.[4] First, however, it is necessary to focus on what class actions and other processes have in common – their ability to pull together related claims for purposes of collective dispute resolution – to understand the extent to which mass aggregate litigation occurs even in the absence of class actions.

A. The Business of Mass Litigation

The business of mass litigation, on both the plaintiff side and the defense side, drives lawyers to handle mass disputes on a collective rather than individual basis. Market forces, fee incentives, and the desire to litigate at a high level discourage lawyers from treating widespread disputes on an individual basis.

As I have described at greater length elsewhere, plaintiffs' law firms in mass torts or mass consumer litigation often represent hundreds or thousands of individual clients with similar claims,[5] and given the nature of mass disputes, such mass representation makes sense as a business strategy

3. Deborah Hensler puts it this way: "The term 'class action is sometimes treated as if it were synonymous with 'large scale litigation' or 'mass torts.' By 'large scale litigation,' I mean litigation comprising large numbers of like claims – hundreds, thousands, tens of thousands, or even more – pursued more or less collectively in what this conference's organizers have termed 'group litigation.'" Deborah R. Hensler, *Revisiting the Monster: New Myths and Realities of Class Action and Other Large Scale Litigation*, 11 DUKE J. COMP. & INT'L L. 179, 181 (2001).

4. *See infra* text accompanying notes 65-103.

5. *See* Howard M. Erichson, *Beyond the Class Action: Lawyer Loyalty and Client Autonomy in Non-Class Collective Representation*, 2003 U. CHI. LEGAL F. 519, 530-43 (describing various forms of non-class collective representation, including mass representation by a single firm).

for plaintiffs' firms.[6] Well-established advertising and referral networks facilitate such mass collective representation.[7] Likewise, law firm specialization in particular mass litigation enables firms to accumulate large numbers of clients with related claims.[8] In some cases, preexisting groups such as unions and homeowners' associations facilitate collective representation.

It makes business sense for plaintiffs' lawyers to take a collective approach when representing clients whose claims form part of a dispute involving many similarly situated claimants. Mass torts and other complex litigation require a significant investment if they are to be litigated effectively. To take large-scale discovery, hire leading experts, brief complex issues, and prepare for trial or settlement, plaintiffs' counsel must invest a large amount of time and money. One reason plaintiffs' counsel must invest so heavily in mass litigation is to level the field with defendants who can be expected to invest in the litigation in proportion to its aggregate stakes.[9] To justify the investment required to litigate such claims effectively, the business strategy of many plaintiffs' firms is to represent as many similarly situated clients as possible. By signing up large numbers of clients, a firm reduces the per-plaintiff cost of litigating, and maximizes its return on sunk costs.

Defendants' lawyers similarly approach mass disputes on a collective basis. When multiple plaintiffs assert claims against a defendant, that defendant views the stakes of the litigation – and thus the appropriate investment in defending against the claims – in terms of the aggregate stakes. Expert witnesses, for example, are retained with the expectation that their work can be used in numerous cases, which makes it economically viable for defendants to spend the time and money to find and retain experts who are leaders in their fields and whose testimony will be maximally beneficial for the defense. Similarly, in conducting factual investigation, handling complex legal issues, or preparing for trial, defendants in mass litigation benefit from the economies of scale that come from using the same work to solidify their defense against numerous claims. Defendants routinely organize their defense in mass litigation with a hub-and-spoke structure in which national counsel oversee the defense and handle common issues while regional or local counsel handle some of the day-to-day management of specific cases.[10]

If a defendant expects that mass liability is a serious risk, the defendant at some point can be expected to shift its strategy from defending absolutely against liability to seeking reasonable negotiated resolutions.

---

6. *See* Howard M. Erichson, *A Typology of Aggregate Settlements*, 80 NOTRE DAME L. REV. 1769 (2005).

7. *See* Erichson, *supra* note 5, at 532-39.

8. *See id.*

9. *See* David Rosenberg, *Adding a Second Opt-Out to Rule 23(b)(3) Class Actions: Cost Without Benefit*, 2003 U. CHI. LEGAL F. 19, 27-30.

10. For a more detailed account of the similarity between the hub-and-spoke structures on the plaintiffs' and defense sides, see Mitchell Lowenthal & Howard Erichson, *Modern Mass Tort Litigation, Prior-Action Depositions*, and Practice-Sensitive Procedure, 63 FORDHAM L. REV. 989 (1995).

At that point, particularly if the litigation has matured sufficiently for outcomes to be relatively predictable and for claims values to be stable,[11] defendants tend to prefer broadly inclusive resolutions. The search for inclusive resolutions is driven, in part, by the financial markets' demand that business defendants contain their liability risk.[12] As defense lawyer Andrew Berry has explained, "a mass tort defendant which accurately assesses its future liabilities by using an aggregated legal proceeding to 'capture' a large number of claimants makes Wall Street happy."[13] The capital markets value certainty and thus create an incentive for businesses to contain their liability risks by seeking broadly inclusive resolutions. A broad resolution has value in the capital markets because it allows a defendant to put the dispute behind it, get on with business, and quantify the remaining risk.

Because plaintiffs' lawyers and defense lawyers both approach mass litigation on a collective basis, and because many defendants favor inclusive resolutions, the endgame for much mass litigation is a series of aggregate settlements.[14] In an aggregate settlement, the claims of multiple plaintiffs are resolved as part of a broader deal. They require the informed consent of each participating client after disclosure of the full scope of the deal.[15] Aggregate settlements take a variety of forms, ranging from lump sum package deals to matrix settlements with complex claims mechanisms.[16] Defendants often favor aggregate settlements because such deals give them greater peace than individual settlements. Plaintiffs' lawyers often prefer aggregate settlements not only because such settlements resolve the claims of a large number of clients, but also because they sometimes allows plaintiffs to get higher amounts from defendants willing to pay a premium for a broader resolution. Moreover, a lawyer for a large group of plaintiffs may be able to obtain settlements for clients with weaker claims by negotiating a settlement that includes stronger claims. The particular incentives vary from case to case, and the modes of aggregate litigation and the structures of aggregate settlements vary as well. My point is not that every mass dispute is resolved the same way, but rather that even

11. *See generally* Francis E. McGovern, *Resolving Mature Mass Tort Litigation*, 69 B.U. L. REV. 659 (1989).

12. *See* Erichson, *supra* note 6.

13. Andrew T. Berry, *Comments on Aggregation: Some Unintended Consequences of Aggregative Disposition Procedures*, 31 SETON HALL L. REV. 920, 921 (2001).

14. Fred Misko, Jr., A Professional Responsibility Checklist for the Class Action and Mass Tort Practitioner 4 (Feb. 6, 1998) ("The mass tort bar prefers aggregate settlements.") (unpublished work submitted for the University of Texas School of Law's Ethics and Mass Torts Symposium, on file with the Mississippi College School of Law Review), *available at* http://www.misko.com/library/Ethics.pdf.

15. *See* MISS. R. PROF'L CONDUCT 1.8(g):

> A lawyer who represents two or more clients shall not participate in making an aggregate settlement of the claims of or against the clients, or in a criminal case an aggregated agreement as to guilty or nolo contendere pleas, unless each client consents after consultation, including disclosure of the existence and nature of all the claims or pleas involved and of the participation of each person in the settlement.

16. *See* Erichson, *supra* note 6.

without class actions, the business of mass litigation drives lawyers and parties to address the litigation on a collective basis, and to pursue negotiated resolutions that link the settlements of related claims.[17]

B. Non-Class Aggregate Litigation

Multi-party dispute resolution occurs in many forms. In both state and federal courts, a wide variety of formal procedural mechanisms are available for joining or gathering related claims.[18] In addition, lawyers in mass litigation often informally aggregate the claims by representing many similarly situated clients and by coordinating their efforts with other lawyers.

1. Formal Aggregation

Formal aggregation methods can be used for small-scale aggregation, such as joining an additional plaintiff or defendant to a two-party lawsuit, or for much larger aggregation. First and most importantly, the rule on permissive party joinder allows pleadings that aggregate claims of multiple plaintiffs and/or claims against multiple defendants.[19] For permissive party joinder under Rule 20, the claims must arise out of the same transaction, occurrence, or series of transactions or occurrences, and the claims must involve a common question of law or fact.[20] Most joinder is permissive, but in a narrow band of cases, the compulsory party joinder rule requires that certain parties be joined in the action.[21] After an action is commenced, non-parties may seek to intervene in the action either as of right[22] or by permissive intervention.[23]

Separately filed actions can be consolidated by the court, resulting in aggregate litigation.[24] Beyond case-by-case consolidation, some states provide for statewide consolidation or centralization of all cases pertaining to a

17. Samuel Issacharoff and John Witt have taken this idea even further, showing that even those claims that are not ordinarily perceived as "mass litigation" – auto accident litigation, for example – nonetheless are settled by insurance adjusters and other repeat players in ways that can be understood as aggregate settlements. *See* Samuel Issacharoff & John Fabian Witt, *The Inevitability of Aggregate Settlement: An Institutional Account of American Tort Law*, 57 VAND. L. REV. 1571 (2004).

18. *See* Hensler, *supra* note 3, at 182:

> In fact, in the United States, there are a variety of devices for pursuing large-scale litigation other than the class action, including multi-district litigation, formal consolidation, informal aggregation, and bankruptcy. Some of these devices have been established by statute, some by court rule, and some are the products of creative management by judges and lawyers.

19. *See* FED. R. CIV. P. 20; MISS. R. CIV. P. 20. *See also* Pat H. Scanlon, *Parties*, *in* MISSISSIPPI CIVIL PROCEDURE § 6:19 (Jeffrey Jackson ed., 2004) ("Suppose a truck runs into a school bus and hurts a number of persons. All of the bus passengers suffering personal injuries or property damage may join as plaintiffs in a single action under Rule 20, even though their respective claims are several rather than joint.").

20. *See* FED. R. CIV. P. 20(a); MISS. R. CIV. P. 20(a). The Mississippi Supreme Court in 2004 changed course from a very liberal interpretation of Rule 20 to a more restrictive interpretation. *See infra* text accompanying rules 48-51.

21. *See* FED. R. CIV. P. 19(a); Miss. R. Civ. P. 19(a).

22. *See* FED. R. CIV. P. 24(a); Miss. R. Civ. P. 24(a).

23. *See* FED. R. CIV. P. 24(b); Miss. R. Civ. P. 24(b).

24. *See* FED. R. CIV. P. 42(a); Miss. R. Civ. P. 42(a).

particular mass tort or other mass litigation,[25] just as the Judicial Panel on Multidistrict Litigation is empowered to transfer related federal court cases to a single federal district court for coordinated pretrial handling.[26]

2. Informal Aggregation

In addition to these formal procedural mechanisms for aggregation, informal channels have the effect of pulling claims together as well. A single lawyer or law firm may represent numerous clients with related claims against a defendant or group of defendants. For some lawyers, advertising and referral networks result in "inventories" of hundreds or thousands of similarly situated clients. Such mass collective representation allows the lawyers to handle the claims on a collective basis – both in litigation and in settlement negotiations – regardless of whether the claims are formally aggregated through any judicial mechanism such as class action, party joinder, or consolidation.[27]

When multiple lawyers or law firms represent clients with related claims, the attorneys may coordinate their efforts.[28] Such coordination among counsel, sometimes assisted by affiliations such as Association of Trial Lawyers of America litigation groups, achieves informal aggregation much like mass collective representation by a single firm. By pooling resources and sharing information, multiple firms achieve some of the economies of scale that a single firm obtains through mass collective representation. In some cases, coordinating firms jointly negotiate an aggregate settlement with a defendant on behalf of their clients.

In sum, litigation becomes aggregated in many ways. In addition to various mechanisms for formal aggregation, lawyers handle related claims on an aggregate basis through mass collective representation or through informal aggregation by coordinating counsel.

C. The Mississippi Experience: Mass Litigation Without Class Actions

For proof that mass litigation occurs even in the absence of class actions, one need look no further than Mississippi. Mississippi courts have handled cases in which hundreds or thousands of plaintiffs have joined their claims in a single action.[29] Observers have noted that the Mississippi courts, for a number of years, used the permissive joinder rule to allow

25. *See, e.g.*, CAL. CIV. PROC. CODE § 404 (West 2005); N.J. CT. R. 4:38; PA. R. CIV. P. 213, 213.1.

26. *See* 28 U.S.C. § 1407 (2000) (authorizing multidistrict litigation ("MDL") transfer in the federal courts). Certain aspects of formal aggregation – notably bankruptcy and MDL – occur only in the federal courts, but these mechanisms affect state court actions as well. Bankruptcy stays litigation including cases in state court, and enables the court to gather claims against the debtor. MDL, by affecting the overall course of a mass litigation, often has a significant impact on state court claims. On the relationship of MDL to state court claims, *see* MANUAL FOR COMPLEX LITIGATION (FOURTH) §§ 20.3, 22.4 (2004); William W Schwarzer et al., *Judicial Federalism in Action: Coordination of Litigation in State and Federal Courts*, 78 VA. L. REV. 1689 (1992).

27. *See* Erichson, *supra* note 5.

28. *See* Howard M. Erichson, *Informal Aggregation: Procedural and Ethical Implications of Coordination Among Counsel in Related Lawsuits*, 50 DUKE L.J. 381 (2000).

29. *See* Phillips, *supra* note 1, at 455.

mass litigation of the same scope as class actions,[30] and sometimes to allow mass litigation that would not have satisfied the requirements for class certification elsewhere. One Mississippi lawyer commented in 2002 that "in Mississippi today, plaintiffs can aggregate claims that would not be aggregated anywhere else in the country, either under joinder rules or as class actions."[31]

In 2001, the Mississippi Supreme Court decided *American Bankers Co. v. Alexander*,[32] in which it explained its broad view of permissive party joinder. In *American Bankers*, the court permitted 1371 plaintiffs to join in five mass actions over excessive insurance premiums.[33] The court acknowledged that it has "taken notice of the unavailability of class actions and has liberalized the rules of civil procedure at times in order to better accommodate parties who are consequentially shut out of the legal system."[34] Indeed, in taking a broad view of party joinder, the court cited the United States Supreme Court's class action decision in *Amchem Products v. Windsor* for the value of allowing plaintiffs to "overcome the problem that small recoveries do not provide incentive for any individual to bring a solo action prosecuting his or her rights."[35] After the *American Bankers* decision, a treatise on Mississippi civil procedure observed that "[E]ven though the Mississippi Supreme Court has never adopted a rule authorizing class actions, the opinion in the *American Bankers* case uses Rule 20 to create a class action in Mississippi."[36]

Whereas the federal courts and other state courts had used class actions to handle some mass litigation, the Mississippi courts used expansive party joinder under Rule 20, combined with judicial discretion under Rule 42 to structure the trial by combining or separating various issues, claims, and defenses. Until it was amended in 2004, the official comment to Rule 20 of the Mississippi Rules of Civil Procedure declared a policy of "virtually unlimited joinder": "The general philosophy of the joinder provisions of these rules is to allow virtually unlimited joinder at the pleading stage, but to give the court discretion to shape the trial to the necessities of the particular case."[37]

30. *See* Brian Herrington, *Mississippi State Court Class Action Proceedings*, 2005 A.B.A. SURV. ST. CLASS ACTION L. 1 ("[L]iberal joinder of claims and parties under the Mississippi Rules of Civil Procedure, Rule 20, furnishes a means for joining claims on a quasi-class basis.").

31. *See* David W. Clark, *Life in Lawsuit Central: An Overview of the Unique Aspects of Mississippi's Civil Justice System*, 71 MISS. L.J. 359, 369 (2002).

32. 818 So. 2d 1073 (Miss. 2001), *overruled in part by* Capital City Ins. Co. v. C.B. "Boots" Smith Corp., 889 So. 2d 505, 517 (Miss. 2004).

33. *Id.* at 1074.

34. *Id.* at 1078. *See also* Miss. High Sch. Activities Ass'n v. Coleman, 631 So. 2d 768, 773 (Miss. 1994) (expanding the state's mootness doctrine "to fill the gap left open by the unavailability of class actions in Mississippi").

35. *Am. Bankers*, 818 So. 2d at 1077-78 (citing Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 617 (1997)).

36. Pat H. Scanlon, *Parties*, *in* MISSISSIPPI CIVIL PROCEDURE § 6:20 (Jeffrey Jackson ed., 2004).

37. MISS. R. CIV. P. 20, cmt. (language deleted in 2004). *See also* Ill. Cent. R.R. v. Travis, 808 So. 2d 928, 931 (Miss. 2002) (quoting the official comment), *overruled in part by Capital City Ins. Co*, 889 So. 2d at 517.

In 2004, however, the Mississippi Supreme Court changed direction, and deleted the sentence about "virtually unlimited joinder" from its official comment to Rule 20.[38] Three months later, the court amended the Rule 20 comment to specify that the "transaction or occurrence" prerequisite for party joinder "requires that there be a distinct litigable event linking the parties."[39] The court also inserted a call for judges to consider whether individual issues make joinder inappropriate: "If the criteria of Rule 20 are otherwise met, the court should consider whether different injuries, different damages, different defensive postures and other individualized factors will be so dissimilar as to make management of the cases consolidated under Rule 20 impractical."[40]

It is interesting that even as the Mississippi Supreme Court veered away from liberally allowing mass joinder, the new requirements it imposed for its joinder rule resemble typical requirements for class certification in the federal courts and other state courts. The "individualized factors" consideration reflects precisely the same concerns as the predominance[41] and superiority[42] requirements of Rule 23(b)(3). The "distinct litigable event" requirement, while stricter than Rule 23(a)'s notions of commonality[43] and typicality,[44] bears a resemblance to those class certification prerequisites. Indeed, in the *Armond* case, Justice Graves wrote a special concurrence to suggest that Mississippi's Rule 20 "super-joinder" should be replaced by a class action rule.[45]

Before the recent changes, Mississippi's permissive approach to party joinder combined with other factors to give Mississippi a disproportionate share of mass litigation. The concentration of mass litigation in Mississippi was driven in part by liberal joinder and venue rules, and in part by Mississippi's reputation as a favorable forum for plaintiffs. Indeed, in 2002 and 2003, the American Tort Reform Association ("ATRA") listed several Mississippi counties among the top "judicial hellholes" in the nation.[46] The

38. MISS. R. CIV. P. 20, cmt. (as amended Feb. 20, 2004); *see also* Janssen Pharmaceutica, Inc. v. Armond, 866 So. 2d 1092 (Miss. 2004).

39. MISS. R. CIV. P. 20, cmt. (as amended Feb. 20, 2004).

40. *Id.*

41. *See* FED. R. CIV. P. 23(b)(3) ("questions of law or fact common to the members of the class predominate over any questions affecting only individual members").

42. *See* FED. R. CIV. P. 23(b)(3) ("a class action is superior to other available methods for the fair and efficient adjudication of the controversy"). The rule lists several matters pertinent to a finding of superiority, including "the difficulties likely to be encountered in the management of a class action." FED. R. CIV. P 23(b)(3)(D).

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

44. *See* 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").

45. *Armond*, 866 So. 2d at 1103-04.

46. American Tort Reform Foundation, Judicial Hellhole, 2004, 10 ("ATRA named Mississippi's 22nd Judicial Circuit, which includes Copiah, Claiborne, and Jefferson Counties, as a Judicial Hellhole in both 2002 and 2003, with Holmes and Hinds Counties joining the list last year.") (on file with the Mississippi College Law Review), *available at* http://www.atra.org/reports/hellholes/report.pdf.

ATRA report noted that "[o]ver the past decade, Mississippi became known as the 'lawsuit capital of the world.'"[47]

Recent tort reform in Mississippi, however, dramatically changed ATRA's impression of the state. According to ATRA's 2004 Judicial Hellholes Report, "Mississippi is well on its way to judicial – and economic – recovery."[48] The report praised all three branches of Mississippi's government for reforms over the past three years that made Mississippi's courts more hospitable to civil litigation defendants.[49] Among other things, the report praised the Mississippi Supreme Court's newly restrictive approach to venue and party joinder: "In five cases over a seven month period between February and September 2004, the Mississippi Supreme Court repeatedly acted to rein in the joining of numerous lawsuits into 'mass actions' and blatant forum shopping, which brought plaintiffs from around the nation into Mississippi courts."[50] As one national legal headline recently put it, "Mississippi No Longer a Mass Tort Haven."[51]

It remains to be seen how dramatically the recent reforms will affect case filings. Prior to 2004 Mississippi's courts saw a disproportionate number of asbestos claims, in particular. According to a 2002 RAND Institute for Civil Justice study of asbestos litigation, sixty-six percent of asbestos claims were filed in five states: Mississippi, New York, West Virginia, Ohio, and Texas.[52] Another account reported that eighty-five percent of asbestos claims were filed in ten jurisdictions, led by Mississippi, Texas, and West Virginia.[53] Mass joinder in Mississippi asbestos litigation reached such mammoth proportions in the Jackson County asbestos trial of 1993 that pretrial motion proceedings were held at the Jackson County fairgrounds to accommodate the crowds of attorneys.[54] This consolidated trial of common issues of law and fact included the claims of over six thousand plaintiffs against over one hundred defendants.[55]

There are plenty of other examples of mass litigation in Mississippi. A train derailment resulted in a lawsuit with over six hundred plaintiffs.[56]

47. *Id.* at 10 (quoting Tim Lemke, *Lawyers in Paradise: Mississippi has a Reputation as a Haven for Trial Lawyers Pursuing Mega-Lawsuits*, INSIGHT ON THE NEWS, Aug. 12, 2002).

48. *Id.* at 6.

49. *See id.* at 11.

50. *Id.*

51. David Hechler, *Mississippi No Longer a Mass Tort Haven*, NAT'L L.J., Jan. 10, 2005, *available at* http://www.law.com/jsp/article.jsp?id=1105364095734.

52. *See* STEPHEN J. CARROLL ET AL., ASBESTOS LITIGATION COSTS AND COMPENSATION: AN INTERIM REPORT vi (2002), *available at* http://www.rand.org/publications/DB/DB397/DB397.pdf.

53. *See* Robert J. Samuelson, *Asbestos Fraud*, WASH. POST, Nov. 20, 2002, at A25.

54. Guthrie T. Abbott & Pope S. Mallette, *Complex/Mass Tort Litigation in State Courts in Mississippi*, 63 Miss. L.J. 363, 370-71 (1994).

55. *Id. See also* Clark, *supra* note 31, at 371 (citing Stephens v. Combustion Engineering, Inc., No. 11-0010 (Cir. Ct. Jasper County, Miss. filed Jan. 30, 2001) (over 2,500 asbestos claimants suing over 100 defendants)).

56. Abbott & Pope, *supra* note 54, at 368 (citing Hathorn v. Ill. Cent. Gulf R.R., No. 7818 (Cir. Ct. Jefferson Davis County, Miss., filed Sept. 4, 1992)).

Mississippi has seen mass litigation over diet drugs,[57] defective tires,[58] insurance fraud,[59] and many other matters.

Plaintiffs' lawyers with thriving practices in Mississippi may represent hundreds or thousands of plaintiffs with related claims. One Columbus, Mississippi law firm, for example, reported in a newsletter to its clients that it "currently has over 1,000 asbestos clients, primarily auto mechanics, who suffered exposure to airborne asbestosis dust while doing brake work."[60] The same firm reported a settlement for thousands of Mississippi residents who lived near a creosote wood treatment plant.[61] The 2004 reforms have made it more difficult to use Mississippi Rule 20 for mass party joinder, but the business of mass litigation makes it almost certain that lawyers will continue to represent massive numbers of similarly situated clients, will continue to handle their claims on a collective basis as a practical matter with or without formal joinder under Rule 20, and will resolve many of those claims through aggregate settlements.

Lester Brickman, an outspoken critic of mass tort claims, recently described one of the reasons for Mississippi's centrality in mass litigation, and echoed the concerns of the earlier ATRA reports:

> The importance of Mississippi as a jurisdiction where asbestos litigation has reached its highest and most valuable form is further exhibited by a $160 million settlement in November 1999 with eighteen asbestos defendants involving 4000 plaintiffs from five states. While 2,645 residents of Ohio, Indiana and Pennsylvania received $14,000 apiece, and seven Texas plaintiffs received $43,500 apiece, the 246 plaintiffs from four 'magic' counties in Mississippi, who claimed similar injuries, received $263,000 apiece.[62]

Brickman also describes a 1998 case in Fayette, Mississippi in which twelve plaintiffs received a $48.5 million compensatory damages verdict, and after most of the claims were settled pending the punitive damages

57. *See, e.g.*, John H. Beisner et. al., *One Small Step for a County Court . . . One Giant Calamity for the National Legal System*, *in* CIVIL JUSTICE REPORT, at 19 (Ctr. for Legal Policy at the Manhattan Inst., No. 7, Apr. 2003), *available at* http://www.manhattan-institute.org/html/cjr_07.pdf (citing Jefferson v. Am. Home Prod. Corp., No. 2000-66 (Cir. Ct Jefferson County, Miss. filed May 9, 2000)).

58. *See, e.g. id.* (citing King v. Ford Motor Co., No. 2001-21 (Cir. Ct. Jefferson County, Miss. filed Jan. 31, 2001)).

59. *See, e.g., id.* (citing Barham v. First Family Fin. Servs. Inc., Case No. 2000-166 (Cir. Ct. Jefferson County, Miss. filed Oct. 16, 2000)).

60. *Ford and Chrysler Remove Asbestos Cases to Federal Court*, COLOM REP. (Colom Law Firm), Fall 2003, at 1, *available at* www.colom.com/documents/fall2003.pdf.

61. *Optouts Receive Kerr McGee Checks*, COLOM REP. (Colom Law Firm), Spring 2004, at 3, *available at* http://www.colom.com/documents/spring2004.pdf.

62. Lester Brickman, *On the Theory Class's Theories of Asbestos Litigation: The Disconnect Between Scholarship and Reality?*, 31 PEPP. L. REV. 33, 39-40 n.17 (2004) (internal citations omitted) (citing Stephen Labaton, *Top Asbestos Makers Agree to Settle 2 Large Lawsuits*, N.Y. TIMES, Jan. 23, 2000, at A22).

verdict, the judge informed the non-settling defendants that he was considering reconvening the same jury for the remaining 1700 claims.[63]

Whatever one thinks of the merits of any of these cases, or of the fairness of the verdicts and settlements, one thing is undeniable: the lack of a class action rule did not insulate Mississippi from mass aggregate litigation. If in 1981 the Mississippi Supreme Court thought that by avoiding class actions it could protect its judicial system from the burdens of mass aggregate litigation, the decades since have demonstrated the extent to which mass litigation thrives even in the absence of class actions. And if the court thought that by omitting the class action rule it could avoid the sort of "widespread criticism," "sustained attack," and "popular dissatisfaction" that class actions generate,[64] the intervening decades have proved it wrong with a vengeance, as Mississippi found itself on the receiving end of some of the most vehement criticisms leveled against any judicial system for perceived abuses in mass litigation.

II. PREFERABILITY OF CLASS ACTIONS IN APPROPRIATE CASES

If mass aggregate litigation occurs even in the absence of class actions, then what is the justification for a class action rule? The simplest justification for class actions is that in appropriate cases, they can resolve large numbers of claims more efficiently and consistently than a series of separate lawsuits.[65] An even more important answer, however, is that in certain cases, class actions are more likely to achieve just outcomes than other modes of formal or informal aggregate litigation. By providing judicial supervision over settlements and fees, offering some assurance of adequate representation, and enhancing access to the courts, class actions increase the likelihood that meritorious claims will reach sound outcomes.

A. Judicial Supervision

Because class actions bind non-parties, they are subject to greater judicial supervision than non-class cases. Enhanced judicial supervision may be the most significant procedural protection that distinguishes class actions from other litigation.[66]

First and most importantly, a class action cannot be settled without the court's approval. The federal rule provides that "[t]he court must approve

63. *Id.* (citing Roger Parloff, *The $200 Billion Miscarriage of Justice*, FORTUNE, Mar. 4, 2002, at 155).

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

65. *See* Edward F. Sherman, *Consumer Class Actions: Who are the Real Winners?*, 56 ME. L. REV. 223, 224 (2004) ("The class action serves the interests of economy by not having to try the same issues again and again in separate cases. It also serves the interests of consistency and finality by avoiding inconsistent outcomes in separate trials of similar cases and resolving all claims in a single case.").

66. David Clark notes that critics complain about inadequate judicial supervision of class actions. Discussing the class certification process, he responds sensibly that some supervision is better than none: "Currently in Mississippi, . . . there is virtually no review of the parties or claims before they are permitted to be joined. Thus, any level of judicial review before certification of a class would provide more scrutiny than occurs under the current liberal joinder rule." Clark, *supra* note 31, at 384.

any settlement, voluntary dismissal, or compromise of the claims, issues, or defenses of a certified class,"[67] and requires notice,[68] a hearing, and a finding that the settlement is "fair, reasonable, and adequate."[69] While the details of a Mississippi rule may vary from the federal model,[70] it is fair to assume, given the nature of representative litigation, that any serious proposal for a Mississippi class action rule must include a requirement of judicial approval of settlements.

The usual justification for requiring judicial approval of class settlements centers on the absence of consent and the agency problems inherent in representative litigation.[71] One court described its task as acting "as a fiduciary who must serve as a guardian of the rights of absent class members."[72] Unlike ordinary litigants, absent class members are bound by a settlement even though they did not affirmatively consent to it. In non-class litigation, the decision whether to settle belongs to the client,[73] and contract law provides the basis for binding parties to a settlement. In class actions, settlement negotiations are left to class counsel and, at least in theory, class representatives.[74] Thus, the argument goes, judicial approval is needed to ensure that absent class members are treated fairly.

Based on this reasoning, one might conclude that as long as representative litigation is not permitted, there is no need for judicial approval of settlements, and thus, the benefit of judicial settlement supervision does not provide any reason to favor adoption of a class action rule. This would be incorrect, however. In the absence of a class action rule, lawyers nonetheless reach settlements on a collective basis for numerous clients.[75] Non-class aggregate settlements are subject to ethical requirements of disclosure and informed consent,[76] but in the mass litigation context, disclosure and consent may not suffice to ensure that clients are treated fairly. No less

67. FED. R. CIV. P. 23(e)(1)(A).

68. FED. R. CIV. P. 23(e)(1)(B).

69. FED. R. CIV. P. 23(e)(1)(C).

70. For a suggestion of the wisdom of following the federal model, *see infra* Part IV.

71. *See, e.g.*, Amchem Prods. v. Windsor, 521 U.S. 591, 623 (1997) ("The inquiry appropriate under Rule 23(e), on the other hand, protects unnamed class members 'from unjust or unfair settlements affecting their rights when the representatives become fainthearted before the action is adjudicated or are able to secure satisfaction of their individual claims by a compromise.'") (quoting 7B WRIGHT ET AL., FED. PRAC. & PROC. § 1797, at 340-341); *In re* Prudential Ins. Co. of Am. Sales Prac. Litig., 148 F.3d 283, 316 (3d Cir. 1998) ("Rule 23(e) imposes on the trial judge the duty of protecting absentees, which is executed by the court's assuring the settlement represents adequate compensation for the release of the class claims."); Grove v. Principal Mut. Life Ins. Co., 200 F.R.D. 434, 442 (S.D. Iowa 2001) ("This task, which the Court undertakes at Part V of this Order, is not taken lightly as a substantial number of individuals, if the settlement is approved, will be deemed to have surrendered once and for all their rights for individual redress against the Defendant.").

72. Grunin v. Int'l House of Pancakes, 513 F.2d 114, 123 (8th Cir. 1975).

73. *See* MISS. R. PROF. CONDUCT 1.2(a); MODEL RULE OF PROF'L CONDUCT R. 1.2(a) (2002).

74. On the small weight sometimes placed on the role of class representatives in settlement, *see Parker v. Anderson*, 667 F.2d 1204 (5th Cir. 1982) (holding that a court may approve a class settlement recommended by counsel over the objections of class representatives).

75. *See supra* text accompanying notes 5-63.

76. *See* MISS. R. PROF. CONDUCT 1.8(g); Model Rule of Prof'l Conduct R. 1.8(g) (2002).

than in the class action setting, lawyers engaged in mass collective representation may face an incentive to sell clients' claims short in order to achieve a substantial and certain payoff in the aggregate,[77] as well as incentives to trade off some clients' claims against others.[78] This might not be a problem if most clients exerted significant control over their lawyers, or were knowledgeable enough about their claims to make informed decisions about settlements. In mass collective representation, however, clients often experience little or no individual relationship with their attorney, and exercise little or no meaningful control over the litigation.[79] Thus, without a class action rule, mass disputes are sometimes resolved through aggregate settlements with, as a practical matter, little involvement by the clients,[80] but without judicial supervision to compensate for the lack of meaningful client control. Given that mass disputes often end in aggregate settlements with little meaningful client control and with significant agency risks, the question is whether it is wise to have no required judicial supervision over those settlements, or whether the interests of justice are better served in at least some of those cases by requiring judicial approval.

Attorneys' fees are another area in which class actions provide greater regulation than non-class litigation. In non-class litigation, lawyers' fees ordinarily are determined by the contractual agreement between the parties, not by the court.[81] In class actions, however, the court awards attorneys' fees to class counsel.[82] Courts that exercise this power responsibly seek to provide sufficient compensation to reward successful counsel for their work and to provide adequate incentive for counsel in future class actions, but not to overpay counsel, taking into account the reduced per-plaintiff cost of litigating mass cases. In contrast, a lawyer handling mass non-class litigation receives a full fee – ordinarily a full contingent fee – from each client. While a full contingent fee may provide appropriate compensation in some high-risk or particularly complex mass cases, there are

77. As the United States Supreme Court reasoned in *Ortiz*, "In a strictly rational world, plaintiffs' counsel would always press for the limit of what the defense would pay. But with an already enormous fee within counsel's grasp, zeal for the client may relax sooner than it would in a case brought on behalf of one claimant." Ortiz v. Fibreboard Corp., 527 U.S. 815, 853 n.30 (1999).

78. For a discussion of the various client-client and client-lawyer conflicts presented by aggregate settlements, see Erichson, *supra* note 6.

79. *See* Erichson, *supra* note 5, at 532-39.

80. This is not to say that informed consent is irrelevant or should be abandoned as a requirement for aggregate settlements. For an argument that informed consent remains an important protection in aggregate settlements, see *id.* at 569-75.

81. An obvious exception is litigation governed by a statutory provision for court-awarded attorneys' fees to the prevailing party. *See, e.g.*, 42 U.S.C. § 1988 (2000).

82. *See* FED. R. CIV. P. 23(h). The Advisory Committee Note to Rule 23(h), a newly created subsection in 2003, describes the purpose of the rule:

> Fee awards are a powerful influence on the way attorneys initiate, develop, and conclude class actions . . . . This subdivision is designed to work in tandem with new subdivision (g) on appointment of class counsel, which may afford an opportunity for the court to provide an early framework for an eventual fee award, or for monitoring the work of class counsel during the pendency of the action.

FED. R. CIV. P. 23(h), Advisory Committee note.

other cases in which the economies of mass litigation – and the fee-multiplying effect of mass representation – make it reasonable for lawyers to receive lower fees per plaintiff while still receiving very substantial compensation in the aggregate.[83] Thus, another consideration when choosing whether to adopt a class action rule is the potential for regulating and reducing fees for lawyers engaged in mass representation.

B. Adequacy of Representation

In most settings, clients have little assurance of adequate legal representation. Of course, some protection is provided by the fact that lawyers must gain admission to the bar, and that lawyers are ethically obligated to provide competent and diligent representation and can be disciplined for their failure to do so.[84] In addition, a lawyer whose work falls below a minimal standard of care may be subject to malpractice liability if the lawyer's failure harms the client. Bar admission, professional obligation, and the threat of discipline or civil liability provide at least some protection against incompetent legal work, but can hardly be thought to assure clients of high-quality representation. The market for legal services, in theory, channels work to lawyers who provide higher quality representation than others, but most clients lack sufficient information when choosing a lawyer for the legal services market to operate perfectly. Concerns about adequate representation may be especially acute in the realm of mass litigation, because plaintiff clients in such litigation often have little interaction with their lawyers, and lawyers representing numerous similarly situated claimants face incentives to trade off client interests.

Class actions provide at least some additional assurances of adequate representation. A court may not certify a class unless it finds that the class representative and class counsel will adequately represent the interests of the absent class members.[85] This is not merely a requirement of the procedural rule, but a matter of constitutional due process,[86] and thus a necessary component of any state class action procedure. Without adequate representation, class members are not bound by the class judgment or settlement.[87] Significantly, the court must concern itself with class counsel's adequacy not only when deciding a motion for class certification, but throughout the litigation. One federal appeals court emphasized this point: "This court has several times commented on the trial court's continuing

83. On approaches courts have used to determine fee awards in class actions, see Third Circuit Task Force Report on Selection of Class Counsel, 208 F.R.D. 340, 356-58 (2002).

84. *See* MODEL RULES OF PROF'L. CONDUCT R. 1.1 Competence, R. 1.3 Diligence (2003).

85. FED. R. CIV. P. 23(a)(4); FED. R. CIV. P. 23(g).

86. *See* Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 812 (1985); Hansberry v. Lee, 311 U.S. 32, 40 (1940).

87. *Hansberry*, 311 U.S. at 40, Stephenson v. Dow Chemical Co., 273 F.3d 249, 260 (2d Cir. 2001), *aff'd in part, vacated in part*, 539 U.S. 111 (2003).

duty to undertake a stringent examination of the adequacy of representation by the named class representatives and their counsel at all stages of the litigation."[88]

The process of appointing class counsel can provide additional assurance of adequate representation. Under Federal Rule 23, as revised in 2003, "a court that certifies a class must appoint class counsel."[89] The rule instructs courts to consider counsel's experience, knowledge, and resources, as well as "the work counsel has done in identifying or investigating potential claims in the action."[90] Some putative class actions do not involve any competition among lawyers for the position of class counsel because no one other than the filing attorney seeks the position. In such cases the court's role is to determine counsel's adequacy.[91] If counsel's experience, knowledge, or resources are inadequate for the task, the court should decline to appoint that lawyer as counsel for the class[92] and should deny class certification on grounds of inadequate representation.[93] In other cases, multiple adequate lawyers or firms seek to represent the class. In that event, "the court must appoint the applicant best able to represent the interests of the class."[94] Courts have used various approaches for appointing class counsel, including bidding processes, with varying success.[95] While there is always a risk that judges will appoint class counsel for reasons other than the quality of their work, the judicial power to appoint class counsel, if exercised responsibly, provides an opportunity to provide some additional assurance of high quality representation in mass litigation.

Finally, despite all their ethical murkiness,[96] class actions provide a better-defined attorney role than non-class mass collective representation or informal aggregation.[97] In a class action, the lawyer for the class explicitly owes duties to all members of the class, not merely to the class representatives.[98] As importantly, class counsel's duty runs to the class as a whole. The Advisory Committee Note to the most recent set of Federal

88. *In re* General Motors Corp. Engine Interchange Litigation, 594 F.2d 1106, 1124 (7th Cir. 1979) (citing McDonald v. Chicago Milwaukee Corp., 565 F.2d 416, 419 (7th Cir. 1977); Susman v. Lincoln Am. Corp., 561 F.2d 86, 89-90 (7th Cir. 1977)).

89. FED. R. CIV. P. 23(g)(1)(A).

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

91. *See* FED. R. CIV. P. 23(g)(2)(B) ("When there is one applicant for appointment as class counsel, the court may appoint that applicant only if the applicant is adequate under Rule 23(g)(1)(B) and (C).").

92. *See id.*

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

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

95. *See* Third Circuit Task Force Report on Selection of Class Counsel, 208 F.R.D. 340, 349 (2002).

96. *See, e.g.,* G. Donald Puckett, Note, *Peering into a Black Box: Discovery and Adequate Attorney Representation for Class Action Settlements*, 77 TEX. L. REV. 1271, 1291 (1999) ("Although courts uniformly recognize the existence of these fiduciary duties [owed by class counsel to class members], they have struggled to define their specific content.").

97. For a more complete discussion of the problem of murky ethics in informally aggregated litigation, see Erichson, *supra* note 28, at 417-48.

98. *See, e.g., In re* Agent Orange Prod. Liab. Litig., 818 F.2d 216, 221 (2d Cir. 1987); Singer v. AT&T Corp., 185 F.R.D. 681, 690 (S.D. Fla. 1998).

Rule 23 amendments makes this duty explicit: "Appointment as class counsel means that the primary obligation of counsel is to the class rather than to any individual members of it."[99] In negotiating a settlement, for example, "class counsel must determine whether seeking the court's approval of a settlement would be in the best interests of the class as a whole."[100] By contrast, a lawyer representing numerous individual clients in a non-class setting theoretically owes a duty of loyalty to each client individually, but as a practical matter would – and should – feel significant pressure to pursue a litigation strategy and settlement negotiations in the manner that best advances the collective interests of the group. Elsewhere, I have advanced the argument that the duties of class action lawyers should inform our understanding of lawyers' duties in the less-explored realm of mass collective representation.[101] Here, my point is that in appropriate cases – *i.e.*, in cases suitable for class certification under a reasonably strict standard – one benefit of class actions is that they present the lawyer with an explicit duty to advance the collective interests of the group.

C. Small Claims

For mass disputes involving a large number of small claims, only representative litigation gives claimants access to justice. Inferior courts such as small claims court may be unsuitable for the types of problems raised in mass litigation, and plaintiffs cannot be expected to litigate complex legal and factual issues pro se. Claims that have negative expected value, after taking into account the cost of litigating the claims successfully, simply cannot attract lawyers. Some claims may be too small to litigate individually, but become economically viable when formally or informally aggregated with similar claims. Mass collective representation reduces the per-plaintiff cost of litigating, raises the aggregate stakes for plaintiffs' counsel, and tends to levels the field with defendants. Such mass representation, even without a class action, converts some negative expected value claims into positive expected value claims. Other claims, however, are so small that they cannot feasibly be pursued with each plaintiff as a named party, even with the efficiencies of formal or informal non-class aggregation. For such claims, only the class action can render the claims economically viable.

The United States Supreme Court has recognized the value of class actions as a tool to empower plaintiffs whose claims are too small to warrant the filing of non-class lawsuits:

> The aggregation of individual claims in the context of a classwide suit is an evolutionary response to the existence of injuries unremedied by the regulatory action of government. Where it is not economically feasible to obtain relief within

99. FED. R. CIV. P. 23(g)(1)(B) advisory committee's note.

100. *Id.*

101. *See* Erichson, *supra* note 5.

> the traditional framework of a multiplicity of small individual suits for damages, aggrieved persons may be without any effective redress unless they may employ the class-action device.[102]

The Court thus implicitly acknowledged not only the usefulness of class actions for redressing the injuries of small claimants, but also the regulatory function of class actions as a means to deter misconduct that might otherwise escape both the attention of regulatory authorities and the reach of ordinary litigation.

In sum, class actions have advantages both for litigation that would be brought anyway and for litigation that otherwise would not be pursued. In certain situations where claims would be litigated and settled on a mass collective basis anyway, regardless of the non-existence of class actions, class actions provide a better mechanism for achieving efficient justice. Judicial approval of settlements provides at least some protection against inadequate settlements and against unfair or collusive trade-offs. Judicial supervision of counsel fees, similarly, provides at least some protection against excessive fees that fail to account for the economies of scale of mass collective representation. Class counsel's duty of loyalty runs to the entire class, thus avoiding at least some of the ethical murkiness presented by informal aggregation and non-class mass collective representation. Moreover, class counsel must be appointed or approved by the court, providing at least some protection against inadequate representation. None of these procedural and ethical protections are foolproof, and it is not difficult to point to class actions in which courts approved questionable settlements, in which counsel received excessive fees, or in which counsel failed in their duty to represent the best interests of the class. The question is not whether class actions are perfect, but whether – in that narrow band of cases that are suitable for class certification – class actions provide greater protections than non-class mass litigation, and thus increase the likelihood of resolving the mass dispute fairly and efficiently.

In other situations, it cannot be said that the claims would be pursued in the absence of class actions, because the claims are not economically viable as individual lawsuits or even as claims of individually named plaintiffs in formally or informally aggregated non-class litigation. In these situations, whether class actions provide greater procedural and ethical protections than non-class litigation is beside the point, because non-class litigation is not viable. Rather, with regard to these small-claims mass disputes, the question is whether the claimants should have any access to the

---

102. Deposit Guaranty Nat'l Bank v. Roper, 445 U.S. 326, 339 (1980). *See also* Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 809 (1985):

> Modern plaintiff class actions follow the same goals, permitting litigation of a suit involving common questions when there are too many plaintiffs for proper joinder. Class actions also may permit the plaintiffs to pool claims which would be uneconomical to litigate individually. For example, this lawsuit involves claims averaging about $100 per plaintiff; most of the plaintiffs would have no realistic day in court if a class action were not available.

justice system – a question that I hope answers itself. As one newspaper editorial put it recently, "[t]he ability of ordinary citizens with similar injuries to band together to take on powerful corporate interests by utilizing the mechanism of class-action lawsuits is one of the shining aspects of the nation's civil justice system."[103]

III. Class Action Administration and Judicial Capacity

A. Administrative Capacity

Justices of the Mississippi Supreme Court, when asked why they did not adopt a class action rule, have responded that the Mississippi judicial system lacked the capacity to handle class actions. According to former Chief Justice Armis Hawkins, the court never intended to authorize the kind of quasi-class-action litigation that later developed under Rule 20.[104] Another former Chief Justice, Lenore Prather, connected the concern explicitly to the capacity of the courts: "We did not favor class-action suits for reasons that it was burdensome, and our courts weren't equipped to handle them."[105]

A state considering adoption of a class action rule understandably may worry about the burden on its courts, and about the administrative capacity of the courts to handle class actions, but several responses are in order. First, the burden on the judicial system may not be as onerous as the court feared. A RAND Institute for Civil Justice study of class actions found significant transaction costs in class actions, including legal fees, expenses, notice, settlement administration, masters, experts, and the time of judges and other court personnel.[106] Most of these transaction costs, however, are borne by the parties and their lawyers. The authors noted the difficulty of obtaining data on the expenditure of judicial resources,[107] but explained that "generally, court costs for civil litigation account for a very small fraction of total transaction costs."[108]

Second, many claims asserted in class actions would be asserted anyway. Without a class action rule, those claims are asserted as multiple individual lawsuits, consolidated cases, or party joinder, which Mississippi has

103. Editorial, *Class-Action Lawsuits*, N.Y. Times, Feb. 2, 2005, at A20.

104. *See* Jerry Mitchell, *Hitting the Jackpot*, Clarion-Ledger, June 17, 2001, at 1A.

105. *Id.*; *see also* Clark, *supra* note 31, at 375 (citing Mitchell, *supra* note 104):

> [T]his result was never intended by the Mississippi Supreme Court when it declined to adopt a rule allowing class actions. Former Chief Justices Armis Hawkins and Lenore Prather have both stated that the Supreme Court did not intend for Rule 20 to be used as a substitute for class action litigation. The goal in not adopting a rule permitting class actions was to avoid the type of mass litigation that Mississippi courts are now witnessing. Former Chief Justice Prather stated that the justices wanted to avoid class actions because they are "burdensome, and our courts [are not] equipped to handle them."

106. *See* Deborah R. Hensler et al., Class Action Dilemmas: Pursuing Public Goals for Private Gain 438 (RAND Corp. 2000) *available at* http://www.rand.org/publications/MR/Mr969/.

107. *See id.* ("Courts generally do not keep detailed records of time spent on specific lawsuits, so we do not have information about judges' and other court staff's time spent on the cases we studied.").

108. *Id.* (citing James Kakalik & Nicholas Pace, Costs and Compensation Paid in Tort Litigation (RAND 1986)).

experienced in its most extreme form.[109] For claims that would be asserted with or without a class action rule, the class action often provides a more efficient vehicle for resolving those claims.[110] Indeed, if in the court's judgment, a class action would not provide a superior means of resolving the dispute, the court may deny class certification.[111]

Third, to the extent class claims would not be asserted in the absence of a class action rule, because the claims are too small individually to be pursued except through representative litigation, class actions do impose additional burdens on the court system. Unless the courts abandon the goal of providing access to justice, however, it is difficult to see the argument in favor of saving costs by denying court access to plaintiffs with potentially meritorious – and in the aggregate, potentially very significant – claims.

B. Judicial Legitimacy

In addition to the capacity of the court system to absorb the costs of time and money to handle class actions as an administrative matter, there is another question of judicial capacity – the capacity of the courts to be trusted with the responsibility of supervising class certification, class settlements, and class counsel fees. If judges are untrustworthy or incompetent, then judicial supervision of settlements, fees, and counsel adds no meaningful protection. Indeed, if judges are untrustworthy or incompetent, the class action device not only fails to accomplish its intended goals, but provides an invitation to abuse of power. In the hands of an unscrupulous judge, a class action rule provides the opportunity to transfer wealth without sound legal basis and to expand the franchise of favored lawyers.

The Mississippi judiciary has received more than its share of criticism, particularly from business interests. Both the Chamber of Commerce and the American Tort Reform Association have launched pointed attacks against the Mississippi courts. The U.S. Chamber of Commerce ranked Mississippi last among the fifty states in its annual U.S. Chamber Institute for Legal Reform/Harris State Liability Ranking Study for three consecutive years,[112] and ATRA listed multiple Mississippi counties as "judicial hellholes."[113] In the past year, however, both organizations have praised Mississippi for recent legal reforms that left its courts less hostile to corporate defendants.[114]

---

109. *See supra* text accompanying notes 29-37.

110. *See supra* text accompanying note 65.

111. This assumes that the rule contains a "superiority" requirement along the lines of the federal rule for money damages class actions. *See* FED. R. CIV. P. 23(b)(3).

112. Press Release, U.S. Chamber of Commerce, U.S. Chamber Applauds Mississippi Governor and Legislature for passing Strong Legal Reform Bill (June 3, 2004) (on file with the Mississippi College Law Review), *available at* http://www.uschamber.com/press/releases/2004/june/04-75.htm.

113. *See* American Tort Reform Foundation, *supra* note 46.

114. *See* U.S. Chamber of Commerce, *supra* note 112; American Tort Reform Foundation, *supra* note 46.

Aside from partisan interests in how certain types of cases are decided, the American Judicature Society ("AJS") has raised more fundamental concerns about judicial elections in Mississippi. AJS materials on judicial selection point to large expenditures both by business interests and by trial lawyer groups, and note that "[t]he 2000 and 2002 judicial elections in Mississippi gained national attention because of the large amounts of money spent by both candidates and special interest groups."[115] Mississippi's legislature and high court adopted various reforms concerning judicial elections, most notably the 1999 enactment of limits on campaign contributions.[116] However, according to the AJS, "[t]he campaign finance regulations enacted in 1999 have had little impact on money in judicial races."[117] In addition to concerns with the way Mississippi judges are selected, some have pointed to problems with how judicial conduct in the state is monitored.[118]

Given the concerns that have been raised about Mississippi judges, it would be surprising not to hear arguments that a class action rule should be rejected because it would give too much power to the judiciary. But such arguments, I suggest, are misguided. Suppose critics are correct that some Mississippi judges ought not to be trusted with the power of class certification. First of all, if the point is that not all Mississippi judges are perfect, the same undoubtedly can be said of every state judiciary as well as the federal judiciary. Perhaps more to the point, some may contend that the

115. American Judicature Society, Judicial Selection in Mississippi: An Introduction, *at* http://www.ajs.org/js/MS.htm (last visited). Interestingly, [i]n 1832, Mississippi became the first state in the nation to establish popular elections for all judges . . . . *Id.* The state switched in 1868 to gubernatorial appointment with senate confirmation, but reinstated popular elections for judges in 1910 and 1914. *Id.*

116. *See id.*

117. American Judicature Society, Mississippi: Judicial Campaigns and Elections, *at* http://www.ajs.org/js/MS_elections.htm (last visited Feb. 21, 2006).

> In 2000, nine candidates for four seats raised nearly $3.4 million. The 2002 election saw the most expensive campaign in the state's history for a single seat on the Mississippi Supreme Court, with three candidates raising nearly $1.7 million. In addition, the 1999 legislation could not curb independent spending by special interest groups. In 2000, the U.S. Chamber of Commerce spent nearly $1 million on television advertising favoring four Mississippi Supreme Court candidates. Expenditures by trial lawyer groups brought the total in 'soft' money in the 2000 judicial elections to an estimated $1.5 million.

Id.

118. *See* Geoffrey P. Miller, *Bad Judges*, 83 TEX. L. REV. 431, 467 (2004) (citing Timothy R. Brown, *Increasing Number of Judges Being Judged in Mississippi Courts*, BATON ROUGE ADVOC., Jan. 3, 2002, at 5B (reporting on budget shortfalls at the Mississippi judicial commission)).

Perhaps the most intriguing attack on the integrity of the Mississippi judiciary came in a Mississippi lawyer's defense to a federal prosecution. The indictment charged a state supreme court justice, his former wife, two former judges, and a prominent lawyer with a judicial bribery scheme in which loans and gifts were exchanged for influence or favorable rulings. *See* Adam Liptak, Not *From a Grisham Novel, But One for the Casebook*, N.Y. TIMES, Mar. 15, 2004, at A14; Jerry Mitchell, *FBI Questions Law Clerks on Rulings in High Court Probe*, CLARION-LEDGER, Aug. 29, 2003, at 1B. The indictment understandably was viewed as a comment on the Mississippi judiciary. In the words of one news report, "Mississippi justice, the indictment suggests, is built on cozy relationships and fueled by bribes." Liptak, *supra.* But even more so, the defense seemed to indict the judicial system by contending, among other defenses, that the accusations merely reflect common practice. *See id.* ("A third [defense] is that what the defendants are accused of doing, everybody does."). The attorney for the lawyer defendant argued that "We're going to need a whole lot more jail cells" because the charges would criminalize what is routine conduct by Mississippi lawyers and judges. *Id.*

Mississippi judiciary is particularly unfit for class actions. But a state should not make procedural policy based on assumptions of fundamental corruption or incompetence. To establish a public dispute resolution system is to assume a basic level of judicial integrity. If that assumption proves false, then surely the solution is not to create procedural rules that assume judicial corruption or incompetence, but rather to address the problem of judicial corruption or incompetence directly.[119]

In other words, the fact that not all judges are angels should lead us to establish appropriate controls over the judiciary; it should not lead us to abandon the core objective of enabling those judges to resolve disputes fairly and efficiently. To borrow from *Federalist 51*:[120] If litigants were angels, no judges would be necessary. If judges were angels, no controls on the judiciary would be necessary. In framing a legal system in which human judges adjudicate human disputes, the great difficulty lies in setting up a system that not only enables the judges to handle the disputes, but also controls the judges themselves.

With that in mind, the task for Mississippi now is to adopt a class action rule that provides the benefits of representative litigation in appropriate cases, but that contains sufficient protections against judicial abuse to ensure that the benefits of the rule outweigh its dangers. A carefully drafted rule, accompanied by constraints on venue and provisions for interlocutory appeal, can address many of the concerns that stand in the way of adoption of a class action rule for Mississippi.[121]

CONCLUSION

Mississippi should adopt a rule permitting class actions in appropriate cases. Prohibiting class actions does not eliminate mass aggregate litigation. Rather, it channels mass litigation into other modes of formal and informal aggregative processes that, in some cases, are decidedly inferior to class actions.

Certain disputes are by their nature collective. Lawyers naturally make every effort to handle litigation over such disputes on a collective basis. Some collective disputes involve massive numbers of claimants, and in these situations, lawyers generally handle them on a mass collective basis. In the absence of a rule permitting class actions, or if class certification proves impossible for other reasons, lawyers find other mechanisms such as

119. The American Judicature Society, for example, has produced substantial reports on ways to improve judicial selection processes as well as on judicial ethics.

120. *See* Federalist No. 51 (James Madison):

> If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself.

121. In an accompanying article, I offer suggestions on the content of a class action rule for Mississippi, and I offer specific ideas on how to use venue provisions and appeals to mitigate the risk of judicial abuse. *See* Howard M. Erichson, *Comments on a Class Action Rule for Mississippi*, 24 MISS. C. L. REV. 309 (2005).

joinder and consolidation for formal aggregation of the claims. Even in the absence of any formal aggregation, related claims often are handled collectively through informal aggregation mechanisms. Individual lawyers or firms may represent numerous claimants, and handle the claims on a mass collective basis. Separate firms may coordinate their efforts and share information to achieve a similar collective representation across firms. Ultimately, not only are related claims litigated on a collective basis, many of them are resolved collectively through aggregate settlements.

Thus, the question for Mississippi is not whether there will be mass aggregate litigation, although the state's recent reforms have reduced the state's share of it. Rather, the question is whether Mississippi prefers to permit mass litigation through non-class procedural mechanisms and especially through mass collective representation by lawyers, or whether it prefers – in appropriate, class-certifiable cases – to enable parties to pursue representative litigation with judicial supervision. As a matter of both efficiency and justice, I suggest that it makes sense to provide the possibility of a class action. For those claims that would be asserted with or without a class action rule, and that in all likelihood would be litigated and settled on a mass collective basis, it makes sense to give the court the power to monitor the adequacy of counsel, to review the fairness of a settlement, and to determine an appropriate award of fees. In the absence of a class action rule, clients' claims in mass disputes often are treated by the lawyers on a collective basis, but without judicial supervision of representational adequacy, settlement fairness, or fees.

There are, of course, some claims that will be asserted through class actions that otherwise would not be brought. These are claims that individually are too small to warrant litigation, but that constitute substantial claims on a collective basis. To that extent, critics might argue that a class action rule will impose new burdens on the Mississippi courts, and should be rejected in the name of judicial economy. But whenever "judicial economy" is invoked, it is appropriate to ask the obvious question: What are we saving it for? Saving judicial resources is not an end in itself. The goal is to provide access to justice as efficiently as possible. It is difficult to see how that end is advanced by shutting the courthouse door to claimants with small but potentially meritorious claims.

Are class actions perfect? Of course not. Not every court satisfies its supervisory obligations, and critics rightly point to examples of unfair settlements in which defendants pay too much, plaintiffs receive too little, or both. Class actions constrain individual autonomy and impose some burdens on the courts. In designing dispute resolution processes, however, there is too much at stake to allow the perfect to become the enemy of the good.[122] Class settlements may be imperfect, and some are genuinely troubling, but given that mass litigation claims often are resolved through large-scale aggregate settlements, the question is whether it is preferable to

122. *Cf.* FRANÇOIS VOLTAIRE, DICTIONNAIRE PHILOSOPHIQUE (1764) ("Le mieux est l'ennemi du bien.").

have some judicial supervision of settlements or none. Class counsel fees may be excessive, but given that lawyers who represent numerous clients often reap efficiency benefits without passing the savings along to their clients in the form of reduced attorneys' fees, the question is whether it is preferable to have court-awarded fees or to permit attorneys to charge each client a full contingent fee. Class actions may deprive some plaintiffs of individual litigant autonomy, but given how little litigation autonomy plaintiffs possess even in non-class mass litigation, the question is whether the slight cost of decreased autonomy is justified by the large gain in access to justice for those with claims that could not practically be asserted individually. Finally, class actions may impose some burdens on the courts, but the question is whether, all things considered, class actions are more likely to improve or impair the courts' performance of their core business – the fair and efficient resolution of disputes. Mass disputes inevitably arise, and the absence of a class action rule cannot make those disputes disappear; it certainly has not done so in Mississippi.