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COMMENTS ON A CLASS ACTION RULE FOR MISSISSIPPI

Howard M. Erichson*

In my primary contribution to this Symposium,¹ I address whether Mississippi ought to adopt a class action rule. In that article, I show that the lack of a class action rule prevents neither mass disputes nor mass aggregate litigation. I argue that for some mass disputes, class actions provide a superior mechanism for dispute resolution, and that Mississippi therefore should adopt a rule permitting class actions.

There is another important question, however, which is what such a rule should contain if adopted. Indeed, the questions of whether to permit class actions and what a class action rule should contain are inseparable for at least two reasons. First, several of the arguments in favor of adoption presume certain contents of the rule, such as judicial control over settlements, fees, and appointment of counsel.² Second, some participants in the symposium expressed concerns about whether a class action rule, in the hands of Mississippi lawyers and judges, would work unfairness. These concerns can be addressed, at least to some extent, by careful drafting of the rule and accompanying measures.

I will comment first on the wisdom of following the model of Federal Rule of Civil Procedure 23 as a starting point. Second, I will offer an argument in favor of permitting opt-outs in most money damages class actions, notwithstanding David Rosenberg and John Scanlon's thought-provoking proposal to the contrary.³ Third, I will address a number of specific aspects of class action rule-drafting, commenting on the positions taken by Robert Klonoff.⁴ Finally, I will offer suggestions on how to address what may be the greatest obstacle to adoption of a class action rule in Mississippi – mistrust of judicial authority and a reluctance to expand judicial power.

I. THE FEDERAL MODEL

Despite the inherent pleasure in reinventing the wheel, there is much to be said for following the model of the federal rule. Federal Rule of Civil Procedure 23 was adopted in its modern form in 1966, and since 1990 it has been the subject of careful review by the federal Advisory Committee on Civil Rules. As revised in 2003, the federal rule provides a framework for addressing many of the issues that courts confront in class actions. While

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1. See Howard M. Erichson, *Mississippi Class Actions and the Inevitability of Mass Aggregate Litigation*, 24 Miss. C. L. REV. 285 (2005).

2. See *id.* at 296-301.

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

4. See Robert H. Klonoff, *The Adoption of a Class Action Rule: Some Issues for Mississippi to Consider*, 24 Miss. C. L. REV. 261 (2005).

no one would say that Rule 23 works perfectly in all cases, the rule provides a reasonable framework for assessing whether a class should be certified,⁵ for providing notice and the right to opt out,⁶ for interlocutory appeal,⁷ for evaluating class settlements,⁸ for appointment of class counsel,⁹ and for the award of counsel fees.¹⁰ I agree with Professor Klonoff that “Federal Rule 23 has worked reasonably well and with a fair degree of flexibility since its adoption almost forty years ago.”¹¹ The rule sensibly does not purport to address every detail of class action procedure, much of which can be worked out by the courts on a case-by-case basis.

When a state adopts a new rule on a matter as fraught with difficulty as class actions, courts interpreting the new rule benefit by looking to cases in federal court and other state courts. Adopting a rule with similar language and structure facilitates this process.¹² The Mississippi Supreme Court has made it clear that absent Mississippi precedent, it looks to federal court decisions for guidance in interpreting rules of procedure.¹³ As Professor Klonoff notes, “by adopting the federal model – as most states have done – Mississippi would secure the advantage of a wide body of precedent.”¹⁴

State experimentation in the law sometimes can be fruitful, but the usefulness of experimentation in this case is probably outweighed by the benefit of procedural uniformity, at least as to the general contours of the rule. The classic statement of the value of state experimentation comes from Justice Brandeis: “It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.”¹⁵ Mississippi, in fact, did conduct a revealing experiment in mass litigation – its decision not to adopt a class action rule,

5. See FED. R. CIV. P. 23(a), 23(b).

6. See FED. R. CIV. P. 23(c).

7. See FED. R. CIV. P. 23(f).

8. See FED. R. CIV. P. 23(e).

9. See FED. R. CIV. P. 23(g).

10. See FED. R. CIV. P. 23(h).

11. Klonoff, *supra* note 4, at 267 (10).

12. 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, 384-85 (2002) (“[A]dopting a rule substantially similar to the federal rule could allow judges to use federal jurisprudence and guidance in certification decisions. If Mississippi had a class action rule like the federal rule, judges could look to the vast number of decisions made by the federal courts to assist them in determining if certification is proper.”) (citations omitted).

13. See *Shaw v. Shaw*, 603 So. 2d 287 (Miss. 1992); *Shows v. Watkins*, 485 So. 2d 288 (Miss. 1986); see also Pat H. Scanlon, *Parties*, in MISSISSIPPI CIVIL PROCEDURE § 6:36 (Jeffrey Jackson ed., 2004) (noting that the court looks to federal decisions for guidance in the absence of precedent, and that Mississippi Rules of Civil Procedure 17, 19, 20, 24, and 25 “are patterned after the same numbered Federal Rules of Civil Procedure”).

14. Klonoff, *supra* note 4, at 267 (10). Professor Klonoff criticizes certain aspects of the federal rule, and shows that a unitary rule would have some advantages, but concludes that “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 the criticisms of that rule.” *Id.* at 268 (11).

15. *Newstate Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

and its subsequent liberalization of the permissive joinder rule to fill the gap. I have suggested that a primary finding of Mississippi's experiment was that mass aggregate litigation occurs regardless of the unavailability of any particular procedural mechanism, and that in the absence of appropriate formal mechanisms, mass litigation occurs informally and without clear ethical guidelines or adequate judicial supervision.¹⁶ It is time for Mississippi to move on from that experiment. Given that Mississippi's adoption of a new class action rule would be, in this sense, an outcome of its experiment, I suggest that the adoption of a new rule should not be an occasion for further drastic experimentation.

II. OPT-OUTS AND RULE 23(B) CATEGORIES

Professor Klonoff highlights the difference between the federal rule, with its four categories of class actions, and the unitary rule model embodied in the Uniform Class Actions Act.¹⁷ One advantage of following the federal model, as stated above, is simply to have the benefit of the body of precedent that has developed under it, rather than facing each interpretive issue as a question of first impression. But beyond that, it makes sense to treat different types of class actions differently, particularly with regard to whether opt-outs should be permitted.

Some critics of the federal class action rule advocate abolishing the class action categories established by Rule 23(b). Interestingly, the critics come from different directions, and propose diametrically opposed solutions. David Rosenberg and John Scanlon, in this symposium, urge that class actions should be mandatory – *i.e.*, that they should not permit opt-outs.¹⁸ John Bronsteen and Owen Fiss have made the opposite argument. According to Bronsteen and Fiss, all class actions should permit opt-outs, and class members should not be bound by a settlement unless they have affirmatively opted into it.¹⁹

While there may be room to improve upon the language of the Federal Rule 23(b) categories, the central idea of that rule, combined with the opt-out provision of Rule 23(c), is sound: most class actions for money damages should permit opt-outs, but certain narrow categories of class actions should not. The opt-out right, while exercised relatively infrequently by class members, remains a useful check on inadequate representation and an opportunity for class members to exercise some autonomy, especially if their claims are large enough to justify individual litigation or if they have idiosyncratic preferences concerning which remedies to pursue. Thus,

16. See Erichson, *supra* note 1, at 291-96 (11-17).

17. See Klonoff, *supra* note 4, at 262-68 (3-11).

18. See Rosenberg & Scanlon, *supra* note 3. See also David Rosenberg, *Mandatory-Litigation Class Action: The Only Option for Mass Tort Cases*, 115 HARV. L. REV. 831 (2002).

19. See John Bronsteen & Owen Fiss, *The Class Action Rule*, 78 NOTRE DAME L. REV. 1419 (2003).

while there remains some appeal to a class action rule with less rigid categories than the current federal rule,²⁰ Mississippi would be wise to avoid adopting a rule that goes either to the extreme of eliminating non-opt-out class actions, or to the other extreme of eliminating opt-outs.

A. *The Rule Should Include Mandatory Class Actions*

Mississippi should not adopt a rule that requires that opt-outs be permitted in every class action. In certain class actions, the absent class members can be understood as necessary parties because of the interconnectedness of the claims. If those necessary parties are so numerous as to make it impracticable to join all of them as parties, then it makes sense to order a mandatory (non-opt-out) class action. For example, in a true limited fund class action²¹ or a true incompatible standards class action,²² permitting class members to exclude themselves can work serious unfairness. It is important, therefore, to provide for mandatory class actions in some circumstances, particularly those that fall within subparts 23(b)(1)(A) and 23(b)(1)(B) of the federal rule.

B. *The Rule Should Include Opt-Out Class Actions*

Not all class actions should be mandatory, however. Money damages class actions ordinarily should give class members the opportunity to exclude themselves and to pursue their claims independently. The mandatory class action proposal by Professor Rosenberg and Mr. Scanlon has a powerful logic behind it, but only as part of a thorough overhaul of the tort system. They propose a decoupling of the deterrence and compensation functions of tort law, and in connection with this change, they see mandatory class actions as a logical way to impose aggregate liability on defendants.²³ It is beyond the scope of the present article to debate whether the goals of tort law would be better served by separating liability from compensation. Given the direction of Mississippi tort reform in recent years,²⁴ it suffices to say that, for the foreseeable future, the likelihood

20. In 1995, the federal Advisory Committee on Civil Rules considered a draft revision of Rule 23 – sometimes referred to as the Pointer Draft because it was advanced by Judge Sam Pointer – that would have replaced the Rule 23(b) categories with a more flexible set of criteria to consider for class certification, and with greater discretion for trial judges to decide what notice and opt-out or opt-in procedures would be used in any particular class action. See Edward H. Cooper, *Rule 23: Challenges to the Rule Making Process*, 71 N.Y.U. L. REV. 13, 13-14, 64-67 (1996) (providing the Civil Rules Advisory Committee's draft revision of Rule 23); see also Klonoff, *supra* note 4, at 265-67 (discussing the 1995 proposal).

21. See FED. R. CIV. P. 23(b)(1)(B). See also *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 *passim* (1999) (describing situations that qualify as limited fund class actions).

22. See FED. R. CIV. P. 23(b)(1)(A). See also, e.g., *Van Gemert v. Boeing Corp.*, 259 F. Supp. 125 (S.D.N.Y. 1966) (certifying a class action of debenture holders to determine the right of conversion to common stock).

23. See Rosenberg & Scanlon, *supra* note 3.

24. Among other things, from 2002 to 2004, Mississippi adopted tort reform measures that limited medical malpractice claims, restricted product liability claims against sellers, abolished joint and several liability, capped punitive and non-economic damages, and tightened both venue and joinder.

that Mississippi will make a revolutionary move toward aggregate liability is slim.

Even in the absence of decoupling liability and compensation, part of Professor Rosenberg and Mr. Scanlon's argument against opt-outs holds some force. They argue that opt-outs should be prohibited in order to encourage optimal investment in litigation by plaintiffs' counsel.²⁵ The greater the aggregation of claims, the more time and money plaintiffs' counsel are willing to invest in the litigation. By enhancing the stakes for plaintiffs' counsel, aggregation tends to level the field with large defendants in mass litigation. As Professor Rosenberg and Mr. Scanlon correctly point out, "the defendant invests a large amount of money in the litigation and then spreads the cost over however many cases are ultimately brought."²⁶ It would be a mistake, however, to adopt a class action rule that never permits class members to exclude themselves. Professor Rosenberg and Mr. Scanlon overestimate the danger of opt-outs, and underestimate their value.

1. Opt-Outs Do Not Destroy Optimal Deterrence

Professor Rosenberg and Mr. Scanlon suggest that opt-outs must be prohibited in order to achieve optimal deterrence.²⁷ According to their account, "nothing short of complete collectivization of all claims assures that civil liability can accomplish its law enforcement mission of optimally deterring unreasonable risk."²⁸ This logic does not hold up, for several reasons.

Professor Rosenberg and Mr. Scanlon appear to assume that any inefficiency on the plaintiffs' side results in an unfair advantage for defendants.²⁹ It must be remembered, however, that defendants do not achieve optimal efficiency, either. First, mass litigation generally involves multiple defendants, and the finger-pointing and maneuvering among those co-defendants can make it difficult for a defendant to focus solely on defending against the plaintiffs. Second, each defendant in mass litigation generally hires multiple law firms to conduct the defense, sometimes involving hub-and-spoke structures of national, regional, and local counsel. Representation by multiple firms, while often a sensible approach to managing mass litigation, nonetheless creates unavoidable redundancies and inefficiencies. Finally, even aside from inter-defendant squabbles, defendants in mass litigation often must fight battles on two fronts: one against the plaintiffs, and the other against the defendants' liability insurers, who often seek to limit or avoid coverage.

For a summary of these and other tort reform measures, see American Tort Reform Association, Mississippi Reforms, at <http://www.atra.org/states/MS> (last visited Apr. 21, 2005) (on file with the Mississippi College Law Review).

25. See Rosenberg & Scanlon, *supra* note 3, at 163-70.

26. *Id.* at 163.

27. See *id.* at 168-71, 180-81.

28. *Id.* at 159.

29. See *id.* at 163-70.

Furthermore, permitting opt-outs in money damages class actions does not necessarily weaken the deterrent effect on potential defendants. Ordinarily, few class members opt out. Particularly in small-claims class actions, it makes little sense for most class members to pursue their claims outside of the class action. In any event, class members who opt out do not thereby disappear from the litigation. Some opt-outs pursue their claims individually. Indeed, they may obtain higher damages than they would have received in the class action – a motivating assumption behind many decisions to opt out. Some plaintiffs, after opting out of a class, are represented collectively by counsel outside of the class action.³⁰ It is mistaken to assume that opt-outs lack all of the scale economies and negotiating leverage of aggregated claims. In sum, Professor Rosenberg and Mr. Scanlon draw an unrealistically stark contrast between defendants, who litigate based on aggregate risks, and plaintiffs, who “must individually shoulder the entire cost of litigating both common and non-common questions in the individualized, case-by-case system of adjudication.”³¹ In mass litigation, even outside of class actions, plaintiffs do not “shoulder the entire cost” individually, but rather spread costs through collective representation and non-class formal and informal aggregation.

Moreover, opt-outs sometimes strengthen plaintiffs’ overall strategic position. Contrary to Professor Rosenberg and Mr. Scanlon’s assertion that fractional aggregation weakens plaintiffs’ position and gives defendants an unfair edge, the existence of multiple lawsuits actually provides important strategic advantages for plaintiffs. Plaintiffs gain an asymmetric advantage from duplicative discovery, particularly the ability to depose defense witnesses multiple times and the opportunity to seek favorable privilege and relevance rulings in multiple forums. Multiple lawsuits give coordinating plaintiffs’ counsel an opportunity to gain an advantage by pushing stronger cases to trial first. The possibility of offensive nonmutual issue preclusion, too, gives plaintiffs an asymmetric advantage. Thus, although aggregation generally has a leveling effect that works to plaintiffs’ advantage in mass litigation, plaintiffs’ lawyers also find it strategically powerful to move forward against a defendant on multiple fronts. Thus, from plaintiffs’ perspective, the partial aggregation of an opt-out class action may offer a stronger strategic position than the total aggregation of a mandatory class action. Therefore, it is a mistake to think that the right to

30. One Mississippi law firm newsletter, for example, reports representing 100 clients who opted out of a class action against Direct General Corporation for insurance violations. See *Direct General Clients Opt Out of Proposed Settlement*, COLOM REP. (Colom Law Firm), Fall 2003, at 3, available at <http://www.colom.com/documents/fall2003.pdf>. (last visited February 19, 2006). The same firm represented multiple clients who opted out of a Massachusetts settlement class action against sub-prime lender Fairbanks Capital. See *Fairbanks Capital Cheats Mortgage Clients*, COLOM REP. (Colom Law Firm), Spring 2004, at 2, available at <http://www.colom.com/documents/spring2004.pdf>. (last visited February 19, 2006). The firm urges its clients to opt out of class settlements, and proceeds to represent large numbers of plaintiffs pursuing “individual” claims. See, e.g., *id.* at 3 (“To better serve the interests of the victims, The Colom Law Firm is urging its clients to opt out of a proposed class-action settlement in the case against former telecommunications giant Worldcom.”).

31. Rosenberg & Scanlon, *supra* note 3, at 163.

opt out diminishes the aggregate strength of plaintiffs' position, or that it weakens the deterrent effect on defendants.

2. Opt-Outs Serve Useful Functions

Even if, in general, few class members exercise the right to opt out, the opt-out right is valuable. Not only does the opt-out right allow some plaintiffs to exercise a preference for greater autonomy, but in the context of settlement opt-outs, it also creates an incentive for both class counsel and defendants to negotiate a fair settlement.

Although most plaintiffs in mass litigation rationally prefer the efficiency and collective strength that comes with aggregation, several considerations may lead a plaintiff to prefer individual, or at least non-class, representation.³² Plaintiffs with high value claims sometimes decide that they maximize the value of their claims by avoiding massive group representation and pursuing a more individualized strategy.³³ Even if collective representation would maximize the monetary value of a claim, a particular plaintiff may have different preferences as to remedies, relationships, or process values. By opting out of a class action, a plaintiff may exercise greater control over which remedies to pursue, may develop a stronger client-lawyer relationship, and may have greater opportunity for expression through pleadings, at trial, or otherwise.³⁴

In some class actions, class members are given the right to opt out after they know the terms of a proposed class settlement. Generally, this occurs in settlement class actions, *i.e.*, cases in which the parties jointly seek class certification solely for purposes of effectuating a class settlement. It also can occur in a litigation class action, but only if the court provides a second opt-out opportunity at settlement.³⁵ Whenever class members have the right to exclude themselves from a settlement, the very existence of that opportunity provides a powerful incentive for both class counsel and the defendants to negotiate a fair settlement. Class settlement without settlement opt-out presents agency problems because class counsel shares an interest with defendant in getting the deal done even if it does not maximize the class recovery, and just as importantly, because neither class counsel nor defendants have any strong incentive to ensure a fair allocation of settlement proceeds.

The right to opt out cures some of these agency problems. Despite the serious information problems that face class members, it is reasonable to expect as a general matter that for any given plaintiff, the likelihood of opting out is greater for an inadequate settlement than for an adequate one. As to the overall amount of a class settlement, class counsel have an

32. For a discussion of the client's choice to retain autonomy in mass litigation, see Howard M. Erichson, *Beyond the Class Action: Lawyer Loyalty and Client Autonomy in Non-Class Collective Representation*, 2003 U. CHI. LEGAL F. 519, 551-53 (2003).

33. See Steve Baughman, Note, *Class Actions in the Asbestos Context: Balancing the Due Process Considerations Implicated by the Right to Opt Out*, 70 TEX. L. REV. 211, 222-23 (1991).

34. See Erichson, *supra* note 32, at 552.

35. See *infra* text accompanying note 45.

incentive to negotiate a strong enough settlement so that they do not lose class members. Defendants, likewise, have an incentive to agree to a settlement that will not lose class members, because the greater the number of opt-outs, the less peace for defendants. As to the allocation of a settlement, the opt-out right gives class counsel and especially defendants an incentive to negotiate a fair allocation. As with the overall adequacy of a settlement, class counsel know that an unfairly allocated settlement will encourage opt-outs and thus decrease the size of the class and the total settlement. Defendants, more importantly, know that if they negotiate an unfairly allocated settlement, they are virtually guaranteed to overpay. Those class members who would receive less than their fair share are more likely to opt out, while those who would receive more than their fair share are less likely to opt out. The end result of an unfairly allocated class settlement, if opt-outs are permitted, is that defendants obtain releases from a disproportionately high number of overpaid plaintiffs, while achieving settlements with a disproportionately low number of underpaid plaintiffs.³⁶

The right to opt out thus serves useful functions, particularly for class settlements. Moreover, the right to opt out does not undermine the deterrent effect of class actions. Therefore, if Mississippi adopts a class action rule, the rule should give class members the right to exclude themselves except in a narrow group of mandatory class actions.

III. SPECIFIC RULE-DRAFTING ISSUES

Professor Klonoff has done a superb job laying out a number of issues that bear on how to draft an effective class action rule,³⁷ and I agree with most of his evaluation. I will highlight several points of disagreement, as well as those points of agreement that warrant particular emphasis because they involve diverging from the federal rule.

On the requirements for class certification, Professor Klonoff asks “why are ‘superiority’ and ‘predominance’ required only for (b)(3) classes?”³⁸ I agree that superiority should be required for all class actions, including mandatory class actions. If a class action would not be a superior means for resolving a controversy than the realistic alternatives, then a court ought not to certify the class. As to predominance, I agree with Professor Klonoff that, in general, “mandatory class actions [should] require even more cohesiveness than opt-out classes.” One exception, however, is the limited fund class action under Rule 23(b)(1)(B). Indeed, if mandatory class actions are properly limited to situations in which class members are necessary parties, superiority in those cases is implicit and predominance ought not be required.

Professor Klonoff points to confusion about the burden of proof on class certification, and proposes that the rule explicitly should place the

36. See Erichson, *supra* note 32, at 571-73.

37. See Klonoff, *supra* note 4.

38. *Id.* at 264.

burden on the movant to establish each of the prerequisites for class certification.³⁹ This is a sound proposal, and would constitute an improvement over simply adopting the federal rule verbatim. In light of concerns that have been raised that some Mississippi judges may be over-eager to certify classes, an explicit burden of proof provision, combined with a process for interlocutory appeal, may be a particularly sensible idea for Mississippi. An interlocutory appeal provision, which has been part of the federal rule since 1998, clearly should be included in any Mississippi class action rule.⁴⁰ For dealing with the thorny problem of relitigation of class certification issues, Professor Klonoff proposes a smart compromise – rather than either prohibiting relitigation or ignoring prior class certification denials, the rule could require courts “to consider, as a factor in ruling on certification, any prior ruling refusing to certify the same or a similar class.”⁴¹

I endorse Professor Klonoff’s recommendation that Mississippi adopt a provision along the lines of Federal Rule 23(h), setting out procedures for awarding attorneys’ fees.⁴² On the question of whether fees should be awarded based on the actual value or the face value of a settlement or judgment, however, Professor Klonoff is surprisingly noncommittal.⁴³ To the extent class recovery matters in setting fees – either for purposes of a percent-of-outcome analysis or for purposes of a lodestar multiplier – fee calculations should be based on actual value. If funds are unclaimed by class members and revert to the defendant, they accomplish neither deterrence nor compensation. If a settlement provides for vouchers or coupons rather than money damages, the value of the settlement depends on the extent to which vouchers or coupons are claimed by class members, and the extent to which those vouchers or coupons are actually redeemed. Coupons that remain unclaimed or unredeemed, like unclaimed funds from a monetary judgment or settlement, accomplish neither deterrence nor compensation and are irrelevant when weighing class counsel’s accomplishment. The best way to ensure that class counsel will negotiate settlements that provide real value to class members is to base fees on actual value. If counsel fees were based on actual rather than face value, many of the concerns about coupon settlements would dissipate. Counsel would have a fee incentive to negotiate for coupons that carry enough real value for class members so that class members would claim and use them. Better yet, counsel would have an incentive to facilitate a secondary market in the coupons, which would decrease the number of unclaimed coupons (and

39. *Id.* at 270.

40. *See* FED. R. CIV. P. 23(f). *See also* Klonoff, *supra* note 4, at 280-81.

41. Klonoff, *supra* note 4, at 284.

42. *Id.* at 272-73. I agree, as well, with the suggestion that Mississippi include a provision along the lines of federal Rule 23(g) on selection of class counsel. *See id.* at 271-72.

43. *See id.* at 275 (“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 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.”).

which would greatly enhance the court's ability to determine the actual value of the settlement).

For some of the reasons stated earlier with regard to permitting opt-outs in most money damages class actions,⁴⁴ I agree with Professor Klonoff's position that Mississippi should include a version of the new federal Rule 23(e)(3), which allows courts to give class members a chance to opt out at the settlement stage.⁴⁵ Such settlement opt-outs create an incentive for both class counsel and defendants to negotiate settlements that provide real value to the class and that allocate the settlement fairly among the class members.

IV. MITIGATING JUDICIAL ABUSE

During the Symposium, one concern that emerged was that class actions, in the hands of Mississippi lawyers and judges, might be subject to abuse. To whatever extent this concern is more pronounced in Mississippi than elsewhere – bearing in mind that Mississippi is currently the only state not to permit class actions – the concern must be understood in light of criticisms of the judicial selection process. Mississippi's experience with judicial elections seems to support the notion that when judicial campaigns are infused with big money, the selection process becomes troublingly polarized.⁴⁶ Judges who adopt pro-plaintiff positions attract support and contributions from plaintiffs' lawyers and from trial lawyer groups. Judges who adopt pro-defendant positions attract support and contributions from businesses, insurance companies, and the Chamber of Commerce. The danger is that the most balanced judges may not attract sufficient support. When one's constituency is everybody, as it should be for a good judge, then perhaps nobody is sufficiently invested to contribute heavily to a campaign. If that occurs, then a state's judiciary may itself become polarized, with some judges strongly supportive of plaintiffs in civil litigation, other judges strongly supportive of business interests, and relatively few judges in the middle.

If this describes some perceptions of the Mississippi judiciary, then it is understandable that some Mississippians would worry about the effect of a class action rule. Above all, it is understandable that some would worry that plaintiffs' lawyers would file class actions in counties where the judges are perceived as likely to certify class actions and render pro-plaintiff legal rulings, and where the jury pool is perceived as likely to favor plaintiffs and award high damages. The most important answers to this problem involve reform of the judicial selection process itself. Here, however, I address a narrower question, which is how a carefully drafted class action rule and

44. See *supra* text accompanying notes 32-36.

45. See Klonoff, *supra* note 4, at 279-80.

46. See American Judicature Society, Mississippi: Judicial Campaigns and Elections (noting the large amounts spent on recent judicial campaigns in Mississippi, including large amounts of "soft money" spent by business interests and trial lawyers), at http://www.ajs.org/js/MS_elections.htm (last visited Apr. 21, 2005) (on file with the Mississippi College Law Review).

related provisions might mitigate these concerns sufficiently so that fears of judicial abuse do not stand in the way of accomplishing the good that class actions can achieve.

I suggest a three-pronged solution. First, venue for class actions should be restricted to limit the opportunity for parties to pick particularly favorable judges or jury pools. Second, appellate review should be facilitated both by permitting interlocutory appeals and by drafting a class action rule with non-discretionary judicial obligations. Third, the scope of class actions can be limited to avoid the most egregious abuses of judicial power.

Several options are worth considering with regard to venue. Others are better positioned than I to evaluate which of these approaches would be most effective at preventing class action abuse in Mississippi, and to evaluate the political viability of the various options. The goal of any of these venue approaches would be to prevent a concentration of class action litigation in courts perceived as unduly favoring one side or the other. One option is to provide for class action venue solely in the county with the greatest concentration of class members, or where significant events giving rise to the claims occurred, or where the principal defendants are located.⁴⁷ A second option is to assign class action responsibilities to a designated class action court. A third option is for a panel, or the Supreme Court itself, to assign a judge for each particular class action, rather like the federal Judicial Panel on Multidistrict Litigation assigns multidistrict litigation to specific United States District Court judges.

These venue options raise several questions and concerns. To the extent venue measures would require legislative action rather than Supreme Court rulemaking, their adoptability must be considered. One would expect, however, that a number of legislators would find venue restrictions to prevent class action abuse politically appealing. Another question is whether these venue restrictions would solve the problem or exacerbate it. If class actions must be brought before a designated class action court, or before judges assigned by a designated class action panel, would the class action court or panel be subject to the same risks of politicization, polarization, and capture by business interests or by plaintiffs' lawyers that affects other judges? If designated class action judges were elected, one might expect their elections to be among the most contentious judicial elections in the state. If they were appointed by the Supreme Court, their selection itself could become a politicized issue. Similarly, the selection of panelists empowered with assigning class action judges could be subject to the influence of polarized interests. Despite these risks, it appears likely that specific venue provisions for class actions could at least mitigate some of the concerns about abuse resulting from class action forum-shopping.

47. Another option, although not likely one that would command much support, would be to assign venue randomly for any class action with a statewide or wider class. The main point is that for class actions, the judicial system need not defer to class counsel's choice of forum, and can avoid concentration of class actions in particular counties.

Another check on judicial abuse is appellate review. Of course, this check is helpful only if the trial courts engender greater concerns than those who decide appeals. As mentioned earlier, it makes sense for a Mississippi class action rule to include either a mandatory or discretionary provision for interlocutory appeal from grants or denials of class certification.⁴⁸

The availability of appellate review addresses some problems but not others. Interlocutory appeal of class certification decisions offers some protection against improper grants or denials of class certification. For example, if courts certify class actions for personal injury mass tort claims involving highly individualized causation issues, interlocutory review of the class certification decision permits decertification sufficiently early in the process. Appeal from final judgments approving settlements can address improper approval of blatantly inadequate or unfair class settlements. Appellate review, however, does little to protect against biased factual findings or discretionary legal rulings in a class trial, if the class action was properly certified.

As a check on class action abuse, appellate review's effectiveness depends in part on the content of the class action rule itself. The more the rule requires specific judicial processes and findings, the greater the power of appellate courts to check abuse. Thus, the rule should contain reasonably clear requirements for class certification, including a requirement that the court find that class action would be the superior mechanism for resolving the controversy.⁴⁹ The rule should require notice and a hearing to determine the fairness of a settlement, and state what findings the court must make to approve a settlement.⁵⁰ The rule should state what process and findings are required for appointment of class counsel, and for awarding attorneys' fees.⁵¹ While a class action rule must leave room for flexibility, and ultimately must rely heavily on the discretion and fairness of trial judges, it makes sense to include sufficiently clear process requirements to guide the trial courts and to enable appellate courts to exercise some control.

Finally, abuse can be curtailed by limiting the scope of class actions in the Mississippi state courts. While some may advocate adopting a class action rule limited to Mississippi class members, a hard and fast rule prohibiting any class actions with out-of-state class members probably goes too far. While state courts generally should be reluctant to certify multistate or nationwide class actions, some class actions may be sufficiently centered in a single state that it makes sense for the state court to hear a class action that includes out-of-state class members. To discourage certification

48. See *supra* text accompanying note 40; see also FED. R. CIV. P. 23(f).

49. See *supra* text accompanying note 38; see also FED. R. CIV. P. 23(a), (b).

50. See FED. R. CIV. P. 23(e).

51. See *supra* text accompanying note 42; see also FED. R. CIV. P. 23(g), (h).

of multistate or nationwide class actions, the rule could prohibit certification of such class actions unless the court makes a finding that the matter is of particular interest to Mississippi.⁵²

To a large extent, Congress has answered concerns about state court class actions by passing the Class Action Fairness Act of 2005,⁵³ which grants jurisdiction to the federal courts in most large-scale class actions. The federal legislation will reduce both the number of class actions in state courts and their magnitude. Class actions remaining in state court will be those with an aggregate amount in controversy below five million dollars, those that involve truly localized disputes, and those in which neither the plaintiffs nor the defendants opt for federal court. By passing legislation that diminishes the power of state class action judges, Congress has lowered the stakes of the debate over whether Mississippi should adopt a class action rule. In so doing, by reducing the opportunity for large-scale abuses of class action power, it has strengthened the argument in favor of Mississippi's adoption of a class action rule.

By following the basic model of the federal rule, but crafting aspects of the rule and related provisions to address particular concerns, Mississippi can gain the advantages of the class action procedure while reducing the possibility of abuse.

52. In California, courts have applied a requirement that, before certifying a nationwide class, the court must determine whether California has a "special obligation" to undertake the burden of a nationwide class action. See *Washington Mut. Bank v. Superior Court*, 15 P.3d 1071, 1084 n.11 (Cal. 2001); *Canon USA v. Superior Court*, 79 Cal. Rptr. 2d 897, 900-01 (Cal. App. 1998); *Osborne v. Subaru of America, Inc.*, 243 Cal. Rptr. 815, 824-26 (Cal. App. 1988). "In deciding whether California has a 'special obligation' to undertake the nationwide class action, certain factors must be considered, including whether the nationwide class would promote judicial economy in California courts, whether California claimants would be aided in their recovery by class litigation, and the extent of the connection the parties have with California." *Canon U.S.A., Inc.*, 74 Cal. Rptr. 2d. at 901.

53. Class Action Fairness Act of 2005, Pub. L. No. 109-2, 119 Stat. 4 (codified as amended in scattered sections of 28 U.S.C.).

