

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

NO. 89-R-99001

IN RE:  
AMENDMENTS TO THE MISSISSIPPI  
RULES OF CIVIL PROCEDURE

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COMMENTS OF THE INTERNATIONAL ASSOCIATION OF DEFENSE COUNSEL  
OPPOSING THE PENDING MOTION TO AMEND MISS. R. CIV. P. 23

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INTRODUCTION

The International Association of Defense Counsel (“IADC”) is an invitation-only, peer reviewed association comprised of approximately 2500 corporate and insurance defense attorneys and insurance executives from around the world. Its members are partners in large and small law firms, senior counsel in corporate law departments, and corporate and insurance executives. Members represent the largest corporations around the world, including the majority of companies listed in the Fortune 500. IADC members handle cases in all jurisdictions and have been involved in many precedent setting decisions and appeals. They have been appointed to federal and state judgeships and elected to numerous local, state, and federal government positions. Members are leaders of hundreds of important legal, corporate, industry, and non-profit organizations. The IADC has been serving its members since the 1920s, and its activities are designed to benefit not only its members and their clients, but also the civil justice system and the legal profession. The IADC takes a leadership role in many areas of legal reform and professional development.

The IADC, including more specifically a consensus of its Mississippi membership, opposes the proposed adoption of a class action procedure for Mississippi state courts by the

amendment of Mississippi Rule of Civil Procedure 23.<sup>1</sup> A substantive Rule 23 in Mississippi state courts would likely be good primarily for out-of-state lawyers who would have a new avenue to come into Mississippi and attack Mississippi businesses. Such a rule would be detrimental, however, to the Mississippi justice system, employers who choose to do business here, and the Mississippi economy. Experience also tells us that a state court class action procedure likely will not actually address the issues it is supposed to remedy. The current federal court class action procedure is adequate for any “class action needs” Mississippi citizens have, and our state court judges should not be burdened with the extra work that would result from a state court class action procedure. In support of this opposition, the IADC offers the following observations and comments.

## **OPPOSITION**

### **I. Class actions would be an unnecessary burden on Mississippi state trial courts in the face of an adequate opportunity to bring class actions in the Mississippi federal courts.**

#### *A. The Burden on State Courts*

While improved from the days when parts of Mississippi were regularly listed by the American Tort Reform Foundation as Judicial Hellholes and the state in general was referred to as the “Lawsuit Capital of the World,”<sup>2</sup> the state courts' dockets remain very active. In 2016, over 114,000 civil cases were filed in circuit, chancery, and county courts, and filings appear to be on the rise - up approximately 8% from the approximately 105,000 cases filed in 2015. With

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<sup>1</sup> The current Rule 23 is a placeholder noting the rule is omitted in Mississippi practice.

<sup>2</sup> Tim Lemke, *Lawyers in Paradise: Mississippi has a Reputation as a Haven For Trial Lawyers Pursuing Mega-Lawsuits*, Insight On The News, Vol 18, No. 29, Aug. 12, 2002; see also Mark A. Behrens and Cary Silverman, *Building on the Foundation: Mississippi's Civil Justice Reform Success and a Path Forward*, 34 Miss. C. L. Rev. 113 (2015) David F. Maron and Samuel D. Gregory, *A Decade Examined: A Review Of The Recovery Under Mississippi's Civil Justice Reforms*, 34 Miss. C. L. Rev. 203 (2015)

82 counties and 139 trial judges for those courts, that equates to an average of 820 cases per trial judge.<sup>3</sup>

That work load is more than four times greater than the current workload of the federal judiciary in Mississippi. In 2016, 2612 cases were filed in the Northern and Southern Districts of Mississippi to be handled by approximately 14 district judges (an average of 187 cases per trial judge) with nine magistrate judges to help carry significant portions of the case load.<sup>4</sup> Adding class actions to the workload of Mississippi state court judges would significantly increase their already heavy burden. Many class actions remain on courts' dockets for years and require significant court involvement.<sup>5</sup> It is not at all uncommon for individual litigants to have to wait many months to have pre-trial matters addressed or to get trial dates. That delay will likely increase if class actions are introduced and further overload the state judicial system.

Further exacerbating that burden is the fact that the state court judiciary has significantly fewer financial resources and thus a relative inability to hire staff such as law clerks, court administrators, or special masters that would likely be needed to handle a significant increase in their workload. The total budget for the Mississippi judiciary for the 2016-2017 fiscal year ending June 30, 2017 was \$82 million. By comparison, the 2017 appropriated federal judiciary budget was approximately \$7.6 billion, exclusive of self-generated money (e.g., filing fees).

Adding to the burden of our already underfunded and overworked state courts would be bad for the Mississippi judicial system, Mississippi citizens, and companies who choose to do business here.

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<sup>3</sup> Supreme Court of Mississippi, 2016 Annual Report, *available at* <https://courts.ms.gov/reports/SCTAnnRep2016.pdf>

<sup>4</sup> <http://www.uscourts.gov/statistics-reports/fed-eral-judicial-caseload-statistics-2016>.

<sup>5</sup> *Do Class Actions Benefit Class Members? An Empirical Analysis of Class Actions*, *available at* <https://www.mayerbrown.com/files/uploads/Documents/PDFs/2013/December/DoClassActionsBenefitClassMembers.pdf>

*B. Adequate Federal Class Action Opportunities Available*

Placing this additional work burden on Mississippi state court judges seems all the more unnecessary in light of the fact that a class action procedure already exists in Mississippi federal court pursuant to Fed. R. Civ. P. 23. That procedure provides more than adequate opportunity for Mississippi citizens to pursue class actions.

If the case involves a federal question, Mississippi citizens can file any type of class action lawsuit they wish against both Mississippi and non-Mississippi defendants. 28 U.S.C. § 1331. There are federal statutes in place that protect Mississippi citizens from any number of wrongful acts including age discrimination, racial discrimination, unfair lending practices, unfair credit reporting practices, inappropriate use of personal data, etc. The list goes on and on. It is difficult to imagine a wrong that would merit a class action that does not implicate a federal question of some sort.

Additionally, using diversity jurisdiction, Mississippi citizens have ready access to file class actions against non-Mississippi defendants for state law-based claims when the amount in controversy exceeds \$75,000 (which, in light of the federal court's supplemental jurisdiction does not require that every class member claim \$75,000 in damages). 28 U.S.C. §§ 1332 and 1367. While it admittedly has several exceptions that can limit access to class actions in certain circumstances, on the whole, the Class Action Fairness Act of 2005 ("CAFA") expanded Mississippi citizens' access to diversity jurisdiction-based class actions even further by relaxing the diversity requirements to require only minimal diversity (one plaintiff diverse from one defendant) if the class consists of 100 or more persons and at least \$5,000,000 is at stake in the aggregate. 28 U.S.C. §§ 1332(d), 1453, and 1711–1715. Thus, as pointed out by one commentator, under the federal rules and diversity statutes currently in place, even if no federal

question is involved, Mississippi citizens have the ability to file any type of class action in Mississippi federal courts against all of the current Fortune 500 companies, not to mention the 50 largest banks in the country, the 100 largest property and casualty insurance companies in the country, and the 50 largest life insurance companies in the country.<sup>6</sup> None of these companies are Mississippi citizens for diversity purposes.

In the end, with all the class action options already available to Mississippi citizens via Mississippi federal courts, advocating to add a state court class action procedure is the equivalent of advocating for an additional pathway to ensure that Mississippi businesses can be sued in state courts by (likely predominantly out of state) lawyers who perceive their chances of winning in state court as better than their chances of winning in federal court. This type of forum shopping is not an adequate basis to justify the implementation of state court Rule 23.

## **II. Class actions are fraught with the potential for abuse, particularly by lawyers.**

### *A. Filing Cases Primarily to Benefit Lawyers*

While redress for injured Mississippi citizens is supposed to be the primary reason to allow class action lawsuits, Congress has recognized that very often the injured citizens receive little or no benefit or are even harmed while lawyers receive large fees. Class Action Fairness Act of 2005, Public Law 109-2, § 2. Data on the payouts in class actions is often a closely guarded secret (perhaps to prevent just this kind of exposure), but an empirical study of a sample of class actions filed in or removed to federal courts in 2009 revealed limited publicly available data showing often minimal settlement awards with even more abysmal distribution rates to class members which ranged from a low of 0.000006% of the class to a high of 12% of the class.<sup>7</sup>

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<sup>6</sup> William F. Ray, *Mississippi Does Not Need State Court Class Actions*, The Miss. Law., Winter 2017, at 18-24.

<sup>7</sup> *Do Class Actions Benefit Class Members? An Empirical Analysis of Class Actions*, available at <https://www.mayerbrown.com/files/uploads/Documents/PDFs/2013/December/DoClassActionsBenefitClassMembers.pdf>; see also Daniel Fisher, "Study Shows Consumer Class-Action Lawyers Earn Millions, Clients Little," Forbes online



This reality makes class actions a procedure ripe for abuse by lawyers themselves.

Consider, as just one example, a recent privacy class action settlement involving Google in which the plaintiffs challenged Google's storage and use of the search history of persons who had voluntarily used its free web searching algorithms. *In re Google Referrer Header Privacy Litigation*, No. 15–15858, 2017 WL 3601250 (9th Cir. Aug. 22, 2017). The case settled, before class certification, for \$8.5 million dollars. *Id.* at \*3. The settlement released the claims of approximately 129 million people who had performed Google searches over an approximately eight year time period. *Id.* at \*2. Class members (other than the named 3 plaintiffs who received \$5,000 each) received no money at all. Google was not required to change its practices, but simply to disclose on its website how users' search terms are shared with third parties. *Id.* at \*2, \*9. Class counsel, on the other hand, received approximately \$2.145 million in fees and expenses. *Id.* at \*8. After administrative expenses were paid, the remaining \$5.3 million (all of the rest of the money) was allocated to six *cy pres* recipients, which agreed to fund various initiatives to promote internet privacy. *Id.* at \*2. And as it turns out, three of the *cy pres* recipients previously received Google settlement funds in other cases, and three of the *cy pres* recipients were organizations housed at class counsel's alma maters. *Id.* at \*5.<sup>8</sup>

Indeed, Congress's motivation for passing CAFA and expanding federal jurisdiction over class actions was to address state court class action abuses which Congress characterized as adversely affecting interstate commerce and undermining public respect for the judicial system.

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(Dec. 11, 2013), available at <http://www.forbes.com/sites/danielfisher/2013/12/11/w-ith-consumer-class-actions-lawyers-are-mostly-paid-to-do-nothing/#54db1dc063c0>.

<sup>8</sup> See also *Lane v. Facebook, Inc.*, 696 F.3d 811, 819 (9th Cir. 2012) (Class members who had personal data leaked to Facebook friends received no money while Facebook set up a charity to educate people on digital privacy and counsel received \$3,000,000 in attorneys' fees); *In re Online DVD-Rental Antitrust Litig.*, 779 F.3d 934 (9th Cir. 2015) (Class members, allegedly overcharged by Netflix due to an allegedly collusive agreement with WalMart, each got a \$12 gift card which would have been a \$1.50 gift card if all class members had participated. Plaintiffs' class counsel received \$8,500,000 in fees).

*Id.* More recently, groups including the IADC, the Defense Research Institute, and the U.S. Chamber Institute for Legal Reform have called for additional legislation to address abuses that have emerged since CAFA was enacted, such as the problem of overly broad “no injury” class actions. These are cases in which a named plaintiff with a concrete injury brings a lawsuit seeking to represent a class that includes countless others that have suffered no injury at all.<sup>9</sup>

Creating a new litigation procedure that is ripe for abuse and primarily benefits only lawyers, many of whom will flock to Mississippi from elsewhere, would be bad for the citizens of Mississippi, the Mississippi justice system, and companies who choose to do business here.

*B. Intrastate Forum Shopping That Will Deprive Other Judges of Jurisdiction*

Intrastate forum shopping is another specific area of potential abuse that a state court class action procedure would encourage, and it is one with which Mississippi is all too familiar. Before this court curtailed abuses of the state’s court joinder and venue rules, mass tort plaintiffs’ lawyers (again, many from out of state) joined together hundreds of plaintiffs and filed suit on their behalves before a single state court judge with whom the plaintiffs’ lawyers believed, whether right or wrong, that they had a distinct, unfair advantage.

A state court class action procedure may very well resurrect similar intrastate forum shopping issues. Assuming a class member from the desired venue can be found, the proposed Mississippi Rule 23 would allow plaintiffs’ lawyers to file a class action before one circuit judge or chancellor in one county. That judge would then essentially have complete jurisdiction over an issue for the entire class, and strip all other circuit judges and chancellors in the state of the

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<sup>9</sup> *The State of Class Actions Ten Years After the Enactment of the Class Action Fairness Act, Hearing Before the Subcomm. on the Constitution and Civil Justice of the H. Comm. on the Judiciary*, 114<sup>th</sup> Cong. (2015) (statement of John Parker Sweeney, President, Defense Research Institute) available at <https://judiciary.house.gov/wp-content/uploads/2016/02/Sweeney-02272015.pdf>; *In Support of H.R. 1927, the “Fairness in Class Action Litigation Act of 2015,” Hearing Before the Subcomm. on the Constitution and Civil Justice of the H. Comm. on the Judiciary*, 114<sup>th</sup> Cong. (2015) (statement of Mark A. Behrens on behalf of the IADC).

ability to decide the question. That, in turn, would undermine the democratic principles on which our courts are based because the forum judge would not be elected by, and would not be responsive to, members of the class from other counties. And the lawyer who brought the class action would similarly displace all other lawyers in the state whose clients might have an interest in the issue.

This practice would be detrimental to the full and fair development of state law and certainly creates a large temptation to forum shop for a judge who appears to share the plaintiff's point of view. The judge, once chosen, would have the power to resolve disputes that had nothing or little to do with his jurisdiction. This practice has the potential to undo the hard work Mississippi has done, through the revision of its joinder rules and otherwise, to eliminate intrastate forum shopping. Undoing those reforms would be bad for the citizens of Mississippi, the Mississippi justice system, and companies who choose to do business here.

### **III. Class actions do not actually remedy the issues they are supposedly designed to address.**

#### *A. Small Wrongs*

The standard argument offered to justify a class action procedure is that collective or representative actions are necessary to address “small wrongs” that are too small to justify separate lawsuits. As discussed above in section II regarding class action abuses, past experience tells us that class actions are not a particularly good way to right small wrongs. Generally, at the cost of the defendant, the lawyers on both sides are enriched, and the class members see very little benefit or remedy. The empirical study discussed in section II above revealed the harsh reality of what plaintiff class members often receive (or rather, do not receive) from class actions. Of the sample resolved cases studied, 31% were dismissed on the merits (i.e., plaintiffs got nothing); 35% were dismissed voluntarily by plaintiffs (i.e., at best only the named class



representative received payment); 33% were settled on a class basis (a settlement rate lower than individualized cases) and as noted earlier, the available data demonstrated that only a paltry number of class members (Low: 0.000006% of the class; High: 12% of the class) ultimately received actual distributions.

The Mississippi Legislature apparently shares in this Court's sentiment that class actions are not the best way to protect the citizens of Mississippi from small wrongs. The Mississippi Consumer Protection Act, Miss. Code Ann. § 75-24-1 et seq., is designed specifically to protect Mississippi citizens from unfair methods of competition affecting commerce and unfair or deceptive trade practices in or affecting commerce, and it expressly prohibits class actions. Miss Code Ann. § 75-24-15(4) (2017). The same is true of the statute that protects Mississippi consumers from pyramid schemes. Miss. Code Ann. §§ 75-24-53 and -57. The statute designed to protect the public health and environment of Mississippi citizens while providing for reasonable use of individual on-site wastewater disposal systems contains a similar prohibition against class actions. Miss. Code Ann. §§ 41-67-1, -28(3)(b).

If the goal of class actions is to protect and compensate Mississippi citizens and perhaps to disgorge corporate profits or deter corporate conduct, there are other, existing and more effective ways to accomplish those goals that seem more likely to provide benefit, financial or otherwise to Mississippi citizens. Both the Attorney General and the Secretary of State have broad enforcement powers which includes the power to impose monetary penalties in certain cases.<sup>10</sup> As just one example, in 2016, the Mississippi Attorney General received a \$150 million payment (part of a \$750 million settlement Mississippi will receive over a number of years) from

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<sup>10</sup> See David Clark, *State Court Class Actions in Mississippi: Why Adopt Them Now?*, 24 Miss. C. L. Rev. 437, 445 (2005).

BP from a settlement related to the Deepwater Horizon oil spill.<sup>11</sup> In 2016 alone, the Attorney General also entered into multi-million dollar settlements with MoneyGram<sup>12</sup>, Volkswagen<sup>13</sup>, all three major Credit Reporting Bureaus (Experian/Transunion/Equifax)<sup>14</sup>, and HSBC<sup>15</sup> which collectively provide tens of millions of dollars, as well as other significant benefits, to Mississippi citizens.

Federal regulators also have the power to impose huge penalties more likely to achieve these goals. For example, in 2016, the U.S. Department of Justice reached a settlement of over \$10 million with a Mississippi bank to address allegedly discriminatory underwriting and pricing of certain mortgage loans.<sup>16</sup> The settlement terms included the bank's agreement to establish a \$2.78 million settlement fund; to extend credit offers to unlawfully denied applicants; to amend its pricing and underwriting policies; to further develop strong internal standards to ensure compliance with fair lending obligations; and to provide fair lending training to its employees, senior management, and board of directors.

These existing types of actions and the resulting large financial recoveries seem just as likely, if not more so, to benefit victims than class action settlements which usually yield only pennies-on-the-dollar, and they place no additional burden on the Mississippi state courts.

*B. Development of Mississippi Contract Law in Mississippi State Courts*

The pending motion to amend Rule 23 presents a second, more unique basis to justify the

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<sup>11</sup> <http://www.ago.state.ms.us/releases/attorney-general-jim-hood-announces-150-million-payment-to-mississippi-in-compensation-from-bp/>

<sup>12</sup> <http://www.ago.state.ms.us/releases/attorney-general-jim-hood-announces-settlement-with-moneygram/>

<sup>13</sup> <http://www.ago.state.ms.us/releases/ag-jim-hood-announces-settlement-with-volkswagen-over-emissions-fraud-mississippi-to-receive-2-5-million-in-compensation/>

<sup>14</sup> <http://www.ago.state.ms.us/releases/attorney-general-jim-hood-announces-that-experian-transunion-and-equifax-will-overhaul-credit-reporting-practices-and-end-deceptive-marketing-in-mississippi/>

<sup>15</sup> <http://www.ago.state.ms.us/releases/attorney-general-jim-hood-reaches-470-million-joint-state-federal-settlement-with-hsbc-to-address-mortgage-loan-origination-servicing-and-foreclosure-abuses/>

<sup>16</sup> <https://www.justice.gov/opa/pr/justice-department-and-consumer-financial-protection-bureau-reach-settlement-bancorpsouth>

need for a Mississippi state court class action procedure – i.e., that Mississippi contract law should be decided by Mississippi state court judges, not by federal judges. This justification makes no real sense.

The pending motion offers no basis for this bias against federal judges who are “Mississippi” judges just as state court judges are. The Mississippi lawyers appointed to the Mississippi federal bench are equally qualified to decide state law issues. Certain of those judges have the power to certify issues of Mississippi law, contract or otherwise, to the Mississippi Supreme Court to decide if they deem that appropriate. Miss. R. App. P. 20.

More importantly, the notion that class actions will permit Mississippi state court judges to determine Mississippi contract law is based on the fallacy that substantive case law is usually addressed in class actions. Such is rarely the case. In the empirical study described in section III(A) above, the researchers found that not one of the sample of class actions studied went to trial before a judge or a jury.<sup>17</sup> Instead, class actions almost always settle, very often before any substantive issues of law are ever adjudicated.<sup>18</sup>

## CONCLUSION

There is only arguably a small benefit to be gained from creating a new pathway for plaintiffs (and their predominantly out of state lawyers) to sue Mississippi citizens and Mississippi businesses. That small arguable benefit is substantially outweighed by the

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<sup>17</sup> *Do Class Actions Benefit Class Members? An Empirical Analysis of Class Actions*, available at <https://www.mayerbrown.com/files/uploads/Documents/PDFs/2013/December/DoClassActionsBenefitClassMembers.pdf>

<sup>18</sup> William B. Rubenstein, *Understanding the Class Action Fairness Act of 2005*, UCLA Program on Class Actions; Brian Fitzpatrick, *An Empirical Study of Class Action Settlements and Their Fee Awards*, J. of Empirical Legal Stud., Vol. 7, Issue 4 (December 2010) (“[E]ven more so than individual litigation, virtually all cases certified as class actions and not dismissed before trial end in settlement.”); Emory G. Lee, III and Thomas E. Willging, *Impact of the Class Action Fairness Act on the Federal Courts: Preliminary Findings from Phase Two's Pre-CAFA Sample of Diversity Class Actions* (Federal Judicial Center 2008) (study of over 250 class actions observing that all class actions where a class was actually certified ended in settlement).

detrimental effects described in these comments. For many years, this Court has properly refrained from introducing a state court class action procedure in Mississippi. There has been no significant change in the environment that would call this Court's past wisdom into question. The fact that "every other state does it" is not a proper rationale for change. And the experiences of other states, and even of the federal courts, should be not only a cautionary tale to Mississippi, but an affirmation that this Court made the correct decision each time in the past that it rejected a state court class action procedure.

Respectfully submitted, this the 29th day of September 2017.

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