Smith Phillips

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SUPREME COURT
COURT OF APPEALS

Presiding Justice Michael K. Randolph
Presiding Justice Jess H. Dickinson
Justice Josiah Dennis Coleman
Supreme Court Rules Committee on
Civil Practice and Procedure
Mississippi Supreme Court
Post Office Box 249
Jackson, Mississippi 39205

Re: Submission for Proposed Rules Changes:
Need for Rule 23 Mississippi Class Action
Procedure in MRCivP for the Mississippi Court
System in the 21st Century

Gentlemen:

We noticed the enclosed letter of December 22, 2015 was mailed to the Court's regular Post Office Box, P.O. Box 117, instead of the Post Office Box on the notice. Enclosed is a copy of the letter we are respectfully submitting.

Sincerely,

Richard T. Phillips

RTP/nm
Enclosure

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December 22, 2015

Presiding Justice Michael K. Randolph
Presiding Justice Jess H. Dickinson
Justice Josiah Dennis Coleman
Supreme Court Rules Committee on
Civil Practice and Procedure
Mississippi Supreme Court
Post Office Box 117
Jackson, Mississippi 39205

Re: Need for Rule 23 Mississippi Class Action Procedure in MRCivP for the Mississippi Court System in the 21st Century

Gentlemen:

This letter is in response to the request of the Mississippi Supreme Court Rules Committee on Civil Practice and Procedure for proposals for consideration by the Committee regarding revisions to the Mississippi Rules of Civil Procedure. I am in receipt of a copy of Presiding Justice Dickinson's letter of September 30, 2015, asking attorneys and judges to submit proposed topics for revisions, which letter was accompanied by a copy of the Justice's brief article, REVISITING THE MISSISSIPPI RULES OF CIVIL PROCEDURE. Thank you for soliciting input on this matter of importance to the Court and, I believe, to all Mississippians both current and future.

I am writing to request that this Court study, and consider adoption of, a Rule 23 procedure for the Mississippi Rules to enable *this* Court to address, as a practical matter, the issues of economic importance to Mississippi individuals and businesses in the new world and economy of the 21st Century.

Mississippi has certainly been a hotbed of nationwide discussion, controversy and dispute over the past fifteen years regarding its unique position on State Court class actions, mass torts, and procedures for the aggregation of claims. The problems giving rise to those discussions have been laid to rest and are NOT the subject of this letter. Neither are they the reason for my concerns about the absence of a class action procedure in our state court system today.

My concerns relate not to tort law – that creature of U.S. civil litigation which arose to address the social and economic issues of a newly industrializing nation throughout the "American Century" of the 1900's. My concerns **today** relate to the absence of a Rule 23 feature in the Mississippi sate court system of **2016**, and the impact of that absence on the growing

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inability of Mississippi businesses and citizens, as a practical matter, to enforce important contract rights in our state court system. My concerns relate, also, to the historical importance of the state/federal legal system to the tremendous economic success of this large, geographically and economically diverse nation – and the significance to *our state* of the role of the *Mississippi Supreme Court,* and courts operating under its supervision, in interpreting and applying Mississippi law as the we enter the 21st Century.

For the following reasons, I respectfully request that the Rules Committee and the Court undertake a review of the need for, and take action on the establishment of, a State Rule 23 procedure for the aggregation of claims in the Mississippi court system in the 21st Century.

- Importance of the Practical Ability to Enforce Contracts in the 21st Century Legal System

The important ability to enforce *contract rights* is, and has been since our Nation's founding, an economic foundation of the success of the United States of America which rests upon, and is guarded by, our legal system.[1] The state/federal legal system in the United States has provided and protected this foundation of our Nation since its birth in the 1700's and throughout its changes as an agrarian and then industrial power in the 19th and 20th Centuries. For this reason, the practical ability of citizens of *every* state to enforce those rights according to the laws of their respective states was largely taken for granted as the 21st Century dawned.

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[1] This historical significance is colorfully recognized in both academic and popular literature. *See, e.g.* John Steel Gordon's AN EMPIRE OF WEALTH: THE EPIC HISTORY OF AMERICAN ECONOMIC POWER [Harper Collins, 2004], where Gordon states: "The story of the empire of wealth is an epic. . . powered by uncountable millions pursuing their self-interests within the rule of law. . ." ; *See, also,* Tom Bethell's THE NOBLEST TRIUMPH: PROPERTY AND PROSPERITY THROUGH THE AGES [St. Martin's Press, 1998], where Bethell recounts the oft' repeated story of early German immigrants to America who in the year 1763 wrote back to relatives in Germany marveling that here "the law of the land is so constituted that every man is secure in the enjoyment of his property" and that under the laws of the new colonies "even the *meanest* person (*i.e.* he with the *least means*) is out of reach of oppression from the most powerful." The importance of the *practical ability to enforce contract rights* is discussed in legal publications such as Professor James Ely, Jr.'s THE GUARDIAN OF EVERY OTHER RIGHT: A CONSTITUTIONAL HISTORY OF PROPERTY RIGHTS [Oxford University Press], and recognized in recent lay best sellers such as Alan Greenspan's THE AGE OF TURBULENCE: ADVENTURES IN A NEW WORLD [Penguin Press, 2007], where Greenspan comments: "In my experience, the most important factor [in the economic success of the United States] is the nature of our rule of law. . . . To have had, for more than two centuries, unrivaled protection of individual [contract] rights . . . is a profoundly important contributor to our prosperity."

Mississippi, of course, is unique in its position as the only state in 21st Century America with no procedure for class actions in its state court system.[2]

Since adoption of the initial Mississippi Rules of Civil Procedure in 1981, massive changes in business and personal transactions have been wrought by the Internet, new technology and computerization. The nation and the world have moved rapidly from an Industrial Age into the Information Age of the 21st Century. The results of those changes impact every area of life, including the issues I hope this Committee and the Court will address.

One result of the technological changes of the first 15 years of the 21st Century is a drastic decline of individual "one on one" transactions for which the legal procedures of the 1800's and 1900's were designed. In today's world, and in Mississippi in 2016 and beyond, the vast majority of transactions and/or contracts between any two parties involve *one* party to whom it is a single transaction or incident – and *another* party with hundreds or thousands of identical transactions. The old "one on one" disputes for which our 19th and 20th Century court procedures were designed are relatively few and far between. There are, on the other hand, thousands of *significant* contracts and transactions conducted daily on a standardized basis among Mississippi individuals and businesses.

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[2]Linda Mullenix, of the University of Texas School of Law, in her presentation at the 2005 Symposium "An Examination of the Need For and Structure Of a Class Action Rule in Mississippi," at Mississippi College School of Law, corrected my error in *Class Actions and Joinder in Mississippi*, 71 MISS. L.J. 447, 453, n, 14 (2001) where I stated that Mississippi was the only state in the United States which had no procedure for class actions today because all but **two** of the other states [Virginia and New Hampshire] have State Court Rules providing the same – and that those two, Virginia and New Hampshire, both allow for equitable class actions in their state courts. As Ms. Mullenix correctly pointed out, New Hampshire, in fact, does have a Rule 23-like procedure elsewhere in its State Rules, as well as the equitable procedure. *"Should Mississippi Adopt a Class-Action Rule – Balancing the Equities: Ten Consideration that Mississippi Rulemakers Ought to Take Into Account in Evaluating Whether to Adopt a State Clas-Action Rule"* 24 MISSISSIPPI COLLEGE LAW REVIEW 217 (2005), n. 2. Among the facts on which Professor Mullenix and I agree is that the State of **Mississippi is today the *only* state in the union where there is NO procedure - either equitable or by Rules - for class actions in its state courts.** Any questions about remaining viability of equitable class actions in Mississippi were laid to rest over ten years ago in *USF&G v. Walls*, 911 So.2d 463, 468 (Miss. 2004) ["This court has the exclusive power to make rules of practice, procedure, and evidence. Accordingly, as we have not made a rule which provides for class actions, they are not a part of Mississippi practice–chancery, circuit, or otherwise."]

Seldom are the *issues* which arise from a business transaction or contract dispute today unique. In more and more disputes, at issue for Party A is $ *X*, while at issue for Party B, who has thousands of similar transactions, is *thousands of times $ X*. This disparity skews the dispute and resolution process. In 2015, every other state except Mississippi addresses this problem in its state court system for the benefit of its citizens and businesses through a state court class action procedure. Mississippi, alone, lacks such a procedure.

It has been speculated that a reason for the absence of Rule 23 and a class action procedure in Mississippi state law at the time of the initial adoption by the Court of the Mississippi Rules of Civil Procedure in 1981 was the frequent use of Rule 23 Class Actions during the mid-20th Century with regard to civil rights and social changes occurring in American society at and before the time of the Mississippi Court's consideration and omission of the Rule. Whatever the reason for its initial absence 35 years ago, it is respectfully submitted that Mississippi and the Mississippi court system need Rule 23 and a state court procedure for class actions in the world of today.[3]

- A wealth of academic study and practical information on the subject is available today.

Over the past twenty years, issues regarding class actions and the aggregation of claims in the Mississippi state court system have been thoroughly examined and debated. The "mass joinder" procedures that arose in the absence of Rule 23 class actions in our state have given rise to national focus on litigation in Mississippi. The upside of the painful "mass tort" experience

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[3]From a personal perspective, the process of the Mississippi Supreme Court's consideration and initial adoption of the Mississippi Rules during the period of the late-1970's through 1981 seems only a few years back. The massive changes that have taken place in the 35 years since that time, however, as illustrated in Justice Dickinson's examples in the first paragraph of his recent paper REVISITING THE MISSISSIPPI RULES OF CIVIL PROCEDURE, makes one aware of "how time flies." The perspective also makes one less critical of the initial omission of the class action rule – whatever the reasons might have been – when we consider today that, from the perspective of the initial adopters, 35 years back would have been 1946. The period of 1946 through 1981 (a period as recent to the initial adopters of the Rules as 1981 seems to us today) was a period of turbulent social times and change in Mississippi and throughout the nation. It was also a period of wide use of the civil litigation system, and class actions particularly, in the U.S. court systems for purposes of imposing social change, as opposed to addressing traditional economic and contract issues. Whatever the factors being considered by the members of the Court in the late 1970's, there are a whole new set of factors for consideration in 2016 regarding class actions in today's transactional system and economic world – and the place of both the State of Mississippi and the Mississippi court system in that world.

of litigation in the absence of Rule 23 in Mississippi has been a valuable body of meaningful academic study, professional debate and empirical materials, based on "hands-on" experience in Mississippi and throughout the nation, regarding issues of the aggregation of claims in the 21st Century legal system.[4]

The verbiage of some of the academic articles is certainly less than flattering to our state. Professor Linda Mullenix, for instance, notes: "All forty-nine other states, even including the District of Columbia - which is not even a state - have class action rules. This places the state of Mississippi in the rather unique company of Guam, the Northern Marianna Islands, the Virgin Islands, and Puerto Rico: all jurisdictions and territories that (like Mississippi) lack their own class-action rule, but nonetheless are subject to the federal class-action rule."[5] Howard Erichson of Seton Hall Law School, says "what may be the greatest obstacle to adoption of a class acton rule in Mississippi [is] mistrust of judicial authority and a reluctance to expand judicial power."[6]

The academics, whether "pro" or "con" mass torts in the old debates however, make good points as to why Mississippi needs a Rule 23 procedure, under *this* Court's supervision in cases involving Mississippi state law in the Mississippi state court system in today's post-industrial economy and environment. Their materials, from all sides, are beneficial to the Court in its efforts today.

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[4]*See, e.g.* Guthrie Abbott and Pope Mallette, "Complex/Mass Tort Litigation in State Courts in Mississippi," 63 MISSISSIPPI LAW JOURNAL 363 (1994); the entire Spring 2005 issue of the Mississippi College Law Review, 24 MISSISSIPPI COLLEGE LAW REVIEW 145- 450 (2005) including papers such as "Class Actions: To Be or Not to(B)(3)?" by David Rosenberg and John Scanlon; "Should Mississippi Adopt a Class Action Rule – Balancing the Equities: Ten Considerations That Mississippi Rulemakers Ought to Take Into Account in Evaluating Whether to Adopt a State Class Action Rule," by Linda S. Mullenix; "The Adoption of a Class Action Rule: Some Issues for Mississippi to Consider," by Robert H. Klonoff; Mississippi Class Actions and the Inevitability of Mass Aggregate Litigation," by Howard Erichson; "Now Open for Business: The Transformation of Mississippi's Legal Climate," by Mark Behrens and Cary Silverman; and State Court Class Actions in Mississippi: Why Adopt Them Now?" by David W. Clark, among others; and my own contribution from the 2001 litigation symposium at the University of Mississippi School of Law, "Class Action & Joinder in Mississippi," 2001 Symposium, Litigation in Mississippi Today, 71 MISSISSIPPI LAW JOURNAL 447 (2001), among many other studies and opinions.

[5]24 MISSISSIPPI COLLEGE LAW REVIEW 217-18 (2005)

[6]*Id*, 309.

- Concerns of abuse of state class actions have been eliminated by the Federal Class Action Fairness Act of 2005.

A significant factor in eliminating objections to Mississippi having a class action rule to address issues of Mississippi state law arising from business as conducted in the new world of digital and computerized transactions was the adoption by Congress of the Federal Class Action Fairness Act in 2005.

The federal Class Action Fairness Act (CAFA), adopted by Congress and signed into law by George W. Bush in 2005, has eliminated the concern that Mississippi would be overwhelmed by out-of-state claimants who view Mississippi as a favorable venue for litigation. Pursuant to the Act, federal removal jurisdiction extends to class actions including more than 100 class members. 28 U.S.C. § 1332(d)(5)(B). Under the "minimal diversity" jurisdictional requirements of CAFA, federal diversity jurisdiction exists as long as one member of the class is a citizen of a different state from any defendant. 28 U.S.C. § 1332(d)(2). Today, attempted nationwide or multi-state class actions filed in Mississippi under a Mississippi state court class action rule would be subject to removal into federal court. Thus, CAFA's expansion of federal jurisdiction over class actions virtually eliminates the possibility that numerous out-of-state class members could be included in a Mississippi state court class action.

- The state court system has been, and remains, an "Invisible Foundation" of the economic success of this Nation.

There are important reasons that this nation's state/federal court system has worked to contribute, over the past two centuries, to creation of the economic powerhouse of the United States. There were at the time of the founding of the country, and there remain today, economic issues of *different* importance and impact to *each* of the various states. While many issues impact the citizens and businesses of all states equally, there are important economic issues of different impact to those of New York and those of Mississippi, or to those in Delaware and those in New Mexico. The importance of matters of state law being determined by judges chosen by the citizens of the individual states pursuant to the procedures of their own state is not merely academic.

Granted, there are serious issues of "federalism" involved, as Guff Abbott and Pope Mallette noted in their 1994 MLJ article.[7] As Abbott and Mallette point out, "The handling of such cases sets the stage for development or refinement of substantive state law as well as the study and potential alteration of a state's system of civil procedure. State judges should be the decision-makers and authors in matters of such importance in a state."[8]

The absence of a state court procedure for the resolution *in the state court system in Mississippi* of important issues of economic consequence to Mississippi citizens and businesses in the 21st Century world, however, is not merely academic. To remain *today* the only State without such a procedure, it is respectfully submitted, would be an abdication of this Court's authority to determine Mississippi law in accordance with such issues. As it now stands, with no viable procedure for addressing such issues in the Mississippi court system on a class basis, they must be litigated in the federal system. As a consequence, the law of Mississippi is developed and determined, with increasing frequency, by federal appellate judges appointed by the President and Congress, who can not help but bring their various views based on their experience from other states.[9]

The current situation with Mississippi as the only state with no state court procedure for class actions, it is respectfully submitted, puts Mississippi businesses and citizens at a disadvantage today, 15 years into the 21st Century. The other states are content with their knowledge, based on experience, that Mississippi will remain the poorest state according to all types of economic measurements. "Thank God for Mississippi" is the perennial sigh of elected leaders of every other state in the bottom third as economic statistics are released. For over 100 years, they have rested with the comfort of knowledge that Mississippi will score lower in all economic comparisons. While *somebody* has to be last economically, we *should not be content*, it is respectfully submitted, with it remaining Mississippi.

Certainly, if there is something the Mississippi Supreme Court can do about the current situation – such as put our state on equal ground with every other state with regard to who

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[7]Abbott & Mallette, *supra* note 4, at 385.

[8]*Id.*

[9]In today's rapidly changing world, the procedure for having substantive issues of first impression determined in the federal system *re-addressed and corrected* by this Court has become *increasingly impractical*, again because of the disparity of economic interests of the respective parties with regard to the status quo.

interprets the state laws that form an "invisible economic foundation" of the State and its citizens, both corporate and individual – then this Court should do so.

- Conclusion

For the reasons discussed above, and other which I hope the Court will explore, I respectfully urge the Rules Committee and the full Court to consider, craft and adopt a Rule 23 Class Action procedure for the Mississippi state court system whereby state law in Mississippi is interpreted and applied, on a regular on-going basis, for Mississippi citizens both corporate and individual, by this, the highest Court in this state – as it is in every other state in the union – rather than by members of the federal appellate judiciary who are appointed through the federal system.

Thank you for the opportunity you have afforded the members of the State Bar, and the citizens and businesses of Mississippi, to provide input on the many matters of great significance regarding this Court and the rules by which our State Court System operates . I applaud your efforts and believe your work will be of benefit to our children, our grandchildren, and all citizens of Mississippi who will carry this state forward throughout the 21st Century.

Sincerely,

Richard T. Phillips

RTP/ss