

IN THE SUPREME COURT OF MISSISSIPPI**IN RE:
AMENDMENTS TO THE MISSISSIPPI RULES
OF APPELLATE PROCEDURE****NO. 89-R-99027****MOTION TO AMEND RULE 23 OF THE
MISSISSIPPI RULES OF CIVIL PROCEDURE**

COMES NOW the undersigned attorney, Richard T. Phillips, a practicing member of the Mississippi Bar and partner in the law firm of Smith Phillips Mitchell Scott & Nowak, LLP, and pursuant to Mississippi Rule of Appellate Procedure 27(f) respectfully moves this Honorable Court to amend the Mississippi Rules of Civil Procedure by amending Rule 23 of said Rules, which currently reads “Class Actions [Omitted],” to read as set forth in “Exhibit A” attached hereto.

The purpose of this request is to provide a Rule 23 Class Action procedure to afford citizens of the State of Mississippi a procedure by which the contract and other legal issues which arise today may be resolved in a viable and practical manner in the State Court legal system. As the Mississippi Rules of Civil Procedure currently stand, in Mississippi – alone among the states – legal issues requiring class status are forced by the absence of a Rule 23 state class action procedure into the federal system for “Erie Guesses” regarding state law by the federal court of appeals. The amendment to provide a Rule 23 class procedure in Mississippi is needed in 2017 in order that the Mississippi Court of Appeals and the Mississippi Supreme Court may serve, as a practical manner, as the interpreters of Mississippi law.

In support of the motion, the undersigned respectfully submits as follows:

The Mississippi Rules of Civil Procedure, like those of most other states throughout the nation, are based upon and follow generally the order and numbering of the Federal Rules of Civil Procedure. With regard to Rule 23, however, the Mississippi Rules read: “Rule 23. Class Actions [Omitted].” *See* MISS. R. CIV. P. 23.

Whatever the reason for the omission of Rule 23 class action procedures when the Mississippi Rules were adopted 36 years ago, it is respectfully submitted that in light of (a) the social changes in Mississippi since that time and (b) the epic changes wrought during the ensuing decades by the transformation of society from an Industrial Age to a computerized, post-industrial Information Age, Mississippi citizens and businesses and the Mississippi court system need Rule 23 class action procedures in the state court system today.

Mississippi is the only state in the nation in which there are no class actions available to its citizens in the state court system. The absence of a class action procedure in Mississippi denies, as a practical matter, the Mississippi courts, including this the Mississippi Supreme Court, the ability to address the rapidly increasing number of disputes and issues involving state law which arise from contracts and other transactions. In Mississippi, alone among the 50 states, that authority is ceded exclusively to the federal court system.

Rule 23 was intentionally omitted from the Mississippi Rules when they were adopted in 1981. Advancing technology, and social and business changes in the ensuing 30-plus years since the adoption of the Mississippi Rules, however, have wrought epic changes in the manner in which business is conducted.

The existing Mississippi procedures were designed for the “one-on-one” transactions of the 20th Century. Such transactions have been usurped today by computerized, standardized, data-generated and **metrics-driven** practices and procedures. The vast majority of contracts in 2017 involve (a) one party for whom it is a single transaction and (b) another party, the drafter and issuer of the contract, which has hundreds or thousands of identical transactions. The result of these changes has been a drastic decline in the number of individual “one on one” transactions for which the legal procedures of the 19th and 20th Centuries were designed.

Without a state court class action procedure, Mississippi citizens and businesses are often left with no economically viable way to adjudicate contractual disputes in the Mississippi state court system. One party to the dispute – an insurance company and its local representatives, for example, or the maker or distributor of products sold through today’s standardized procedures – is able to render enforcement of the rights of any single party too expensive to litigate on an individual basis.

Even where a Mississippi holder of a contract has thousands of dollars at stake in a dispute, the national or international drafter and issuer has thousands of identical contracts throughout Mississippi, all handled pursuant to standardized practices and procedures. As a result, there are millions of dollars at stake for the contract issuer on the legal question presented by the claim of a single Mississippi individual or business. As a practical matter, what such a defendant does is defend the individual cases in a manner appropriate to the aggregate amount it has at risk on the issue with regard to all individuals or businesses with such contracts throughout the state – thereby rendering prosecution of the issue by a single contract holder economically unviable.

In every other state – except Mississippi – the parties to a contract in such a situation may address and resolve disputed state law issues on a **class basis** in their state courts, where their state supreme courts make the final determination of state law. In Mississippi, alone among the states, the federal court system is the only practical alternative by which to address such issues. In issues of contract law – which today impact more and more Mississippians on an aggregate basis – a state Rule 23 procedure is needed to enable the Mississippi Supreme Court to serve as the effective, timely decider of legal issues which impact hundreds of Mississippians.

The absence of state court Rule 23 class actions results in an abdication of the power of the Mississippi Supreme Court to interpret, and control the application of, Mississippi law in post-industrial age transactions. A state class action procedure is needed to afford Mississippi citizens and businesses the rights enjoyed by those of every other state, where issues of state contract law are resolved and determined on an aggregate basis in the state court system. Adoption of a Rule 23 procedure would afford this Court the ability to perform that function. Such adoption, it is respectfully submitted, is appropriate and in the interests of justice.

Attached hereto, pursuant to Rule 27(f) of the Mississippi Rules of Appellate Procedure, and marked “Exhibit A” is a proposed Rule 23. The text set out in “Exhibit A” is based upon Rule 23 of the Federal Rules of Civil Procedure, as are the texts of many of the states throughout the nation. This proposal, as a practical matter, would give the Mississippi court system a wealth of decades of study, application, modification, trial and error, and improvement of class procedures under the laws and procedures of the federal courts, as well as individual states throughout the nation which follow this format.

WHEREFORE, PREMISES CONSIDERED, the undersigned movant respectfully requests pursuant to Rule 27(f) of the Mississippi Rules of Appellate Procedure, and other applicable rules, that this Court undertake the study of a Rule 23 class action procedure for the Mississippi state court system, and adopt a Rule 23 procedure for the Mississippi Rules of Civil Procedure as set forth in “Exhibit A,” or in such other form as this Court deems appropriate.

Respectfully submitted, this the 20th day of April, 2017.

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EXHIBIT A

Rule 23. Class Actions

- (a) **Prerequisites.** One or more members of a class may sue or be sued as representative parties on behalf of all members only if:
- (1) the class is so numerous that joinder of all members is impracticable;
 - (2) there are questions of law or fact common to the class;
 - (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and
 - (4) the representative parties will fairly and adequately protect the interests of the class.
- (b) **Types of Class Actions.** A class action may be maintained if Rule 23(a) is satisfied and if:
- (1) prosecuting separate actions by or against individual class members would create a risk of:
 - (A) inconsistent or varying adjudications with respect to individual class members that would establish incompatible standards of conduct for the party opposing the class; or
 - (B) adjudications with respect to individual class members that, as a practical matter, would be dispositive of the interests of the other members not parties to the individual adjudications or would substantially impair or impede their ability to protect their interests;
 - (2) the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole; or
 - (3) the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy. The matters pertinent to these findings include:
 - (A) the class members' interests in individually controlling the prosecution or defense of separate actions;
 - (B) the extent and nature of any litigation concerning the controversy already begun by or against class members;
 - (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and
 - (D) the likely difficulties in managing a class action.
- (c) **Certification Order; Notice to Class Members; Judgment; Issues Classes; Subclasses.**
- (1) *Certification Order.*
 - (A) **Time to Issue.** At an early practicable time after a person sues or is sued as a class representative, the court must determine by order whether to certify the action as a class action.
 - (B) **Defining the Class; Appointing Class Counsel.** An order that certifies a class action must define the class and the class claims, issues, or defenses, and must appoint class counsel under Rule 23(g).
 - (C) **Altering or Amending the Order.** An order that grants or denies class certification may be altered or amended before final judgment.
 - (2) *Notice.*
 - (A) **For (b)(1) or (b)(2) Classes.** For any class certified under Rule 23(b)(1) or (b)(2), the court may direct appropriate notice to the class.

- (B) For (b)(3) Classes. For any class certified under Rule 23(b)(3), the court must direct to class members the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice must clearly and concisely state in plain, easily understood language:
 - (i) the nature of the action;
 - (ii) the definition of the class certified;
 - (iii) the class claims, issues, or defenses;
 - (iv) that a class member may enter an appearance through an attorney if the member so desires;
 - (v) that the court will exclude from the class any member who requests exclusion;
 - (vi) the time and manner for requesting exclusion; and
 - (vii) the binding effect of a class judgment on members under Rule 23(c)(3).

(3) *Judgment.* Whether or not favorable to the class, the judgment in a class action must:

- (A) for any class certified under Rule 23(b)(1) or (b)(2), include and describe those whom the court finds to be class members; and
- (B) for any class certified under Rule 23(b)(3), include and specify or describe those to whom the Rule 23(c)(2) notice was directed, who have not requested exclusion, and whom the court finds to be class members.

(4) *Particular Issues.* When appropriate, an action may be maintained as a class action with respect to particular issues.

(5) *Subclasses.* When appropriate, a class may be divided into subclasses that are each treated as a class under this rule.

(d) Conducting the Action.

(1) *In General.* In conducting an action under this rule, the court may issue orders that:

- (A) determine the course of proceedings or prescribe measures to prevent undue repetition or complication in presenting evidence or argument;
- (B) require—to protect class members and fairly conduct the action—giving appropriate notice to some or all class members of:
 - (i) any step in the action;
 - (ii) the proposed extent of the judgment; or
 - (iii) the members' opportunity to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or to otherwise come into the action;
- (C) impose conditions on the representative parties or on intervenors;
- (D) require that the pleadings be amended to eliminate allegations about representation of absent persons and that the action proceed accordingly; or
- (E) deal with similar procedural matters.

(2) *Combining and Amending Orders.* An order under Rule 23(d)(1) may be altered or amended from time to time and may be combined with an order under Rule 16.

(e) Settlement, Voluntary Dismissal, or Compromise. The claims, issues, or defenses of a certified class may be settled, voluntarily dismissed, or compromised only with the court's approval. The following procedures apply to a proposed settlement, voluntary dismissal, or compromise:

- (1) The court must direct notice in a reasonable manner to all class members who would be bound by the proposal.

- (2) If the proposal would bind class members, the court may approve it only after a hearing and on finding that it is fair, reasonable, and adequate.
- (3) The parties seeking approval must file a statement identifying any agreement made in connection with the proposal.
- (4) If the class action was previously certified under Rule 23(b)(3), the court may refuse to approve a settlement unless it affords a new opportunity to request exclusion to individual class members who had an earlier opportunity to request exclusion but did not do so.
- (5) Any class member may object to the proposal if it requires court approval under this subdivision (e); the objection may be withdrawn only with the court's approval.

(f) Appeals. A court of appeals may permit an appeal from an order granting or denying class-action certification under this rule if a petition for permission to appeal is filed with the circuit clerk within 14 days after the order is entered. An appeal does not stay proceedings in the district court unless the district judge or the court of appeals so orders.

(g) Class Counsel.

- (1) *Appointing Class Counsel.* Unless a statute provides otherwise, a court that certifies a class must appoint class counsel. In appointing class counsel, the court:
 - (A) must consider:
 - (i) the work counsel has done in identifying or investigating potential claims in the action;
 - (ii) counsel's experience in handling class actions, other complex litigation, and the types of claims asserted in the action;
 - (iii) counsel's knowledge of the applicable law; and
 - (iv) the resources that counsel will commit to representing the class;
 - (B) may consider any other matter pertinent to counsel's ability to fairly and adequately represent the interests of the class;
 - (C) may order potential class counsel to provide information on any subject pertinent to the appointment and to propose terms for attorney's fees and nontaxable costs;
 - (D) may include in the appointing order provisions about the award of attorney's fees or nontaxable costs under Rule 23(h); and
 - (E) may make further orders in connection with the appointment.
- (2) *Standard for Appointing Class Counsel.* When one applicant seeks appointment as class counsel, the court may appoint that applicant only if the applicant is adequate under Rule 23(g)(1) and (4). If more than one adequate applicant seeks appointment, the court must appoint the applicant best able to represent the interests of the class.
- (3) *Interim Counsel.* The court may designate interim counsel to act on behalf of a putative class before determining whether to certify the action as a class action.
- (4) *Duty of Class Counsel.* Class counsel must fairly and adequately represent the interests of the class.

(h) Attorney's Fees and Nontaxable Costs. In a certified class action, the court may award reasonable attorney's fees and nontaxable costs that are authorized by law or by the parties' agreement. The following procedures apply:

- (1) A claim for an award must be made by motion under Rule 54(d), subject to the provisions of this subdivision (h), at a time the court sets. Notice of the motion must be served on all parties and, for motions by class counsel, directed to class members in a reasonable manner.
- (2) A class member, or a party from whom payment is sought, may object to the motion.

- (3) The court may hold a hearing and must find the facts and state its legal conclusions under Rule 52(a).
- (4) The court may refer issues related to the amount of the award to a special master, as provided in Rule 53.

Rule 23.1. Derivative Actions

- (a) **Prerequisites.** This rule applies when one or more shareholders or members of a corporation or an unincorporated association bring a derivative action to enforce a right that the corporation or association may properly assert but has failed to enforce. The derivative action may not be maintained if it appears that the plaintiff does not fairly and adequately represent the interests of shareholders or members who are similarly situated in enforcing the right of the corporation or association.
- (5) The complaint must be verified and must:
 - (b) **Types of Class Actions.** allege that the plaintiff was a shareholder or member at the time of the transaction complained of, or that the plaintiff's share or membership later devolved on it by operation of law;
 - (b) **Types of Class Actions.** allege that the action is not a collusive one to confer jurisdiction that the court would otherwise lack; and
 - (b) **Types of Class Actions.** state with particularity:
 - (4) any effort by the plaintiff to obtain the desired action from the directors or comparable authority and, if necessary, from the shareholders or members; and
 - (B) the reasons for not obtaining the action or not making the effort.
- (B) **Compromise.** A derivative action may be settled, voluntarily dismissed, or compromised only with the court's approval. Notice of a proposed settlement, voluntary dismissal, or compromise must be given to shareholders or members in the manner that the court orders.

Rule 23.2. Actions Relating to Unincorporated Associations

This rule applies to an action brought by or against the members of an unincorporated association as a class by naming certain members as representative parties. The action may be maintained only if it appears that those parties will fairly and adequately protect the interests of the association and its members. In conducting the action, the court may issue any appropriate orders corresponding with those in Rule 23(d), and the procedure for settlement, voluntary dismissal, or compromise must correspond with the procedure in Rule 23(e).