Mississippi Sees Significant Improvements in Civil Justice Fairness and Predictability

*By David W. Clark**

Dramatic changes in Mississippi over the last two years will improve the state's civil justice system. These changes include the defeat of a notoriously pro-plaintiff state Supreme Court justice; decisions and rules changes from that court to eliminate or restrain the more unfair practices used against defendants; the election of a pro-tort reform Governor; and significant statutory tort reform from two special sessions of the legislature.

A. Changes from the Court

In November 2002, the voters soundly defeated a Mississippi Supreme Court justice who had been staunchly pro-plaintiff and anti-business, and a controversial and influential presence on the court. He was defeated by a respected defense lawyer, Jess Dickinson.

In January 2003, the Supreme Court adopted MRCP Rule 35, authorizing independent medical examinations for the first time in state court practice.[1] In May 2003, the Court amended MRE 702 (to make it identical to FRE 702) and tightened the requirements for expert witnesses and opinions, adopting the *Daubert* tests and gate-keeper function for the trial judge, discarding the more lenient *Frye* standard.[2]

In 2004, the state Supreme Court issued several significant decisions. In a series of decisions,[3] the court has effectively eliminated the abusive practice, allowed in the state's courts over the last several years, of joining hundreds or even thousands of plaintiffs in a single case in a selected county if only one of the plaintiffs lived there. This "mass joinder" procedure had stretched the requirements of Mississippi's joinder rule[4] to allow joinder of even "similar" claims or claims arising from the same "pattern of conduct."[5] This broad mass joinder of different claims was utilized by plaintiffs' counsel to reap large verdicts or extort exorbitant settlements by packing high-verdict, plaintiff-friendly counties with the claims of vast numbers of plaintiffs who had no connection to the county or even the state.

The state Supreme Court also issued a significant order in 2004, amending rules 20, 42, and 82 of the Mississippi Rules of Civil Procedure.[6] The court amended the comments to Rule 20 and 42 to reflect the atmosphere within the court against the practice of "mass joinder." The court amended Rule 82 by adding subpart (e), which recognized the doctrine of forum non-conveniens in state practice, allowing transfer of a case or claim to a more convenient county within the state. Along with the changes made to these rules, the Supreme Court sponsored a symposium, along with the Court of Appeals and Mississippi College School of Law, to explore the possibility of adopting a class action rule. Currently, Mississippi is one of only two or three states that did not adopt Rule 23 (or other class action procedure) as part of their rules of civil procedure.

The Mississippi Supreme Court's 2004 rulings, together with the reforms passed by the legislature in the 2004 special session on tort reform, should end this mass joinder practice.

The outrageous verdicts have slowed, if not ceased; while there had been a spate of enormous verdicts from 1995 through 2001, there were only two verdicts over $10 million in 2002, and none in 2003 or so far in 2004.

B. Changes from the Legislature

In an 83-day special session in late 2002, the legislature adopted several significant measures: 1) absolute limits (caps) on punitive damage awards, based upon the net worth of the defendant; 2) a limit on non-economic damages in medical malpractice cases; and 3) the repeal of the 15 percent penalty imposed upon defendants who appealed unsuccessfully.

The 2004 special legislative session—House Bill 13 was signed into law June 16—enacted even more significant reforms.[7] Now, for all actions filed on or after September 1, 2004:

1.Venue Reform

a.Each plaintiff must independently establish venue.
b.For medical providers, venue will be proper only where the alleged act or omission occurred.
c. The trial judge can change venue for convenience of the parties and witnesses (forum non-conveniens).

These reforms, following the Supreme Court's recent rulings noted above, are significant and address a major problem in the state's courts. Plaintiffs often seek to file lawsuits in places some plaintiffs' lawyers have called "magic jurisdictions"–the same places that the American Tort Reform Association has called "judicial hellholes." Frequently, plaintiffs' counsel have joined parties in lawsuits purely to fix (and keep) jurisdiction in state court and venue in certain counties. As noted, Mississippi's joinder and venue rules had allowed plaintiff's counsel to join hundreds or thousands of plaintiffs in the same case in such a "select" county.

Mississippi House Bill 13 ("HB 13"), adopted by the legislature on June 3, 2004, amends Mississippi law to prevent such forum manipulation and mass misjoinder. For the first time, HB 13 requires that venue must be proper for each plaintiff. The legislation reinforces and extends the Supreme Court's recent venue and joinder rulings.

The general rule is that a civil suit may be filed in the county where the defendant resides (in the case of a corporation, the county of its principal place of business) or in the county where a "substantial alleged act or omission occurred or where a substantial event that caused the injury occurred." If venue cannot be asserted against a nonresident defendant under the above criteria, the plaintiff may file in the county where he or she lives.

In medical negligence cases, venue is narrower; it will be proper only in the county where the alleged act or omission occurred, i.e., where the medical provider provided service.

If a claim would be more properly decided in another state, the trial court must dismiss the claim or action. If the claim would be more properly decided in another county within the state, the case must be transferred to the appropriate county. A case may not be dismissed until all defendants agree to waive the right to raise a statute of limitations defense in all other states in which the claim would not have been time-barred at the time the claim was filed in Mississippi. This will allow plaintiffs a fair opportunity to refile their cases in other states without fear that the statutes of limitations may expire on their claims while they are pending in Mississippi.

2. Non-Economic Damage Limitations

a. There is a $500,000 per plaintiff limit in medical malpractice cases.
b. There is a $1 million per plaintiff limit for all other cases.

Noneconomic damages cover nonmonetary losses, such as pain and suffering, inconvenience, physical impairment, disfigurement, mental anguish, injury to reputation, loss of society and companionship, loss of consortium, humiliation or embarrassment. In the lengthy special session in 2002, the legislature enacted changes to Mississippi's medical malpractice laws, including the establishment of a $500,000 cap on noneconomic damages.

HB 13 maintains the current medical malpractice cap at $500,000 per plaintiff, and extends a cap on noneconomic damages to other civil defendants. Under HB 13, noneconomic damages are capped at $1 million for any civil defendant (other than a health care liability defendant). The cap applies to any civil claim filed on or after September 1, 2004.

3. Innocent Seller Protection

a. Seller cannot be held liable unless it had control over design, testing, packaging or labeling of product, or had actual or constructive knowledge of the defect.
b. The provision (from 2002) that allowed a seller to be retained as a defendant even though "innocent," has been eliminated.

Mississippi law, as applied by the courts, currently allows plaintiffs to join and keep local product sellers (e.g., wholesalers, distributors, and retailers) in tort actions for the purpose of trying to defeat federal diversity-of-citizenship jurisdiction over claims that otherwise could be heard in federal court, or setting state court venue in a particular county. Mississippi has permitted innocent sellers to be indemnified by product manufacturers that are determined to be at fault. However, that approach created removal obstacles for primary target defendants seeking to have their cases heard in federal courts. Plaintiff lawyers could continue to name innocent sellers as pseudo-parties just to get Mississippi jurisdiction and venue in a "magic jurisdiction."

HB 13 insulates innocent sellers who are not actively negligent, but instead are mere conduits of a product. Under the bill, the seller of a product (other than a manufacturer) will not be liable unless the seller exercised substantial control over the harm-causing aspect of the product, the harm was caused by a

seller's alteration or modification of the product, the seller had actual knowledge of the defective condition at the time the product was sold, or the seller made an express warranty about the aspect of the product that caused the plaintiff's harm.

4. Punitive Damage Caps

a. The 2002 session enacted absolute caps on punitive awards, for cases filed after December 31, 2002.
b. The 2004 statute decreased the absolute limits on caps for all but the largest net worth defendants. The caps now range from a low of 2% of net worth for a defendant with a net worth of $50 million or less, to a top limit of $20 million for a defendant with net worth of $1 billion or more.

The U.S. Supreme Court has expressed concern that punitive damages are "skyrocketing" and have "run wild." Mississippi has been the site of a number of multimillion-dollar punitive damages awards, most coming since 1995. Many times, the cases have not received appellate review, either because the defendant could not afford to post the 125% supersedeas bond or the plaintiffs offered an enticing settlement (still exorbitant, and acceptable only in light of the outrageous verdict) that the defendant could not afford to pass up. In the cases in the last several years that have been appealed, the Mississippi Supreme Court has been applying the U.S. Supreme Court decisions that seek to place some reasonable limit on such awards.

As part of the special session in 2002, the legislature imposed "sliding caps" on punitive damages based on the net worth of the defendant. HB 13 lowers some of those caps. Now, punitive damages awards in Mississippi cannot exceed (in a single case):

· $20 million for a defendant with a net worth of $1 billion;
· $15 million for a defendant with a net worth between $750 million and $1 billion;
· $5 million for a defendant with a net worth of more than $500 million but not more than $750 million (new cap under HB 13 – reduced old cap by ½);
· $3.75 million for defendants between $100 million and $500 million (new cap under HB 13 – reduced old cap by ½);
· $2.5 million for defendants worth $50 million but not more than $100 million (new cap under HB 13 – reduced old cap by ½); or
· Two percent of the defendant's net worth for a defendant with a net worth of $50 million or less (new cap under HB 13 – reduced old cap by ½).

5. Premises Liability

Under HB 13, civil liability is abolished for premises owners for death or injury to independent contractors or their employees if the contractor knew or reasonably should have known of the danger that caused the harm.

6. Joint Liability Eliminated

a. Each defendant is responsible only for the damages it caused (allocated to it by jury).
b. Liability will be "several" only (unless defendants consciously and deliberately pursued a common plan or design to commit tortuous act).
c. There is no reallocation of fault assigned to an immune tort-feasor (one whose liability is limited by law).

Joint liability provides that if one defendant cannot satisfy its portion of a judgment, the remaining at-fault defendants may be required to pay the uncollectible share. In the 2002 special session, the legislature abolished joint liability for noneconomic damages. For economic damages, joint liability was abolished for any defendant found to be less than thirty percent at fault. Joint liability continued to apply to any defendant found to be thirty percent or more at fault, but only to the extent necessary for the claimant to recover fifty percent of his or her recoverable damages.

HB 13 abolishes joint and several liability for all defendants. Defendants are not responsible for any fault that the finder of fact allocated to an immune tortfeasor or a tortfeasor whose liability is limited by law.

7. Jury Service Revisions

HB 13 incorporated many provisions of the Jury Patriotism Act. The measure seeks to make jury service more "user friendly" and less of a financial burden by more clearly defining hardship exemptions and by establishing a fund to supplement or replace lost wages for jurors in civil cases who serve for more than ten days. The legislation seeks to encourage wider

jury participation by limiting exemptions from jury service. Jurors who fail to appear and obtain a postponement of jury service may be held in civil contempt of court and fined up to $500 or three days imprisonment, or both. In the alternative, the court may require the prospective juror to perform community service for a period no less than if the person would have completed jury service, and provide proof of completion of this community service to the court.

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Footnotes

[1] The court had omitted Rule 35 when it adopted the text of almost all of the other Federal Rules of Civil Procedure in 1982.

[2] Miss. Transportation Com. v. McLemore, 863 So.2d 31 (Miss.2003).

[3] Janssen Pharmaceutica, Inc. v. Armond., MS Sup. Ct., No. 2003-IA-OO398-SCT, February 19, 2004 ; Janssen Pharmaceutica, Inc. v. Grant., No. 2003-IA-00174-SCT, May 13, 2004 ; Janssen Pharmaceutica, Inc. v. Bailey, No. 2002-CA-00736-SCT, May 13, 2004; Harold's Auto Parts, Inc., et al. v. Flower Mangialardi, et al., No. 2004-IA-01308-SCT, August 26, 2004. (While *Armond* had suggested there might be an exception from the requirements of Rule 20 for "mature torts" such as asbestos claims, the court in *Harold's Auto Parts* made it clear there is no exception or exemption from the joinder requirements.)

[4] Mississippi's rule for joinder of parties, MRCP Rule 20, has the same language as FRCP Rule 20, allowing joinder of parties with claims "arising out of the same transaction or occurrence" and having "at least one common question of law or fact."

[5] American Bankers Ins. Co. v. Alexander, 818 So.2d 1073 (Miss. 2001).

[6] MS. Order 04-01, Order Amending Rule 20, 42, 82, and the Comments of the Rules of Civil Procedure, (Miss. 2004).

[7] The Governor in 2002 was Ronnie Musgrove. Musgrove was defeated in November 2003 by Haley Barbour, who had made tort reform a high-profile campaign issue. Governor Barbour strongly supported such reforms in the regular legislative session, and when nothing passed, he promptly called a special session to deal with the issue.