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MEMORANDUM

**IS “DUE PROCESS” AFFORDED TO BUSINESS DEFENDANTS IN THE
CIVIL JUSTICE SYSTEM OF MISSISSIPPI -- AN ANALYSIS**

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I. INTRODUCTION & SUMMARY

Our Constitution expressly protects “life, liberty or property” against deprivation by federal or state government “without due process of law.” U.S. Const. Amends. V, XIV § 1. Those guarantees recognize that personal and property rights must be protected both against anarchistic and lawless infringement -- i.e., without “process of law” -- and against infringement under “color of law” -- i.e., without “due” process. History confirms the wisdom of this dual safeguard because many of the cruelest and most effective infringements of individual rights have been accomplished through misuse of the power of the state with the trappings of procedural regularity.¹

Private property is not constitutionally immune from appropriation by government through authorized taxation or from regulation in the public interest. Within their enumerated and delegated powers, the legislative and executive branches of federal and state government can properly affect property interests in providing for the public welfare under laws which afford equal protection to all citizens. Similarly, consistent with a legal tradition long antedating our Constitution, federal and state courts can command the transfer of property between private parties to remedy the damage caused by breach of a voluntarily-accepted promissory duty (contract), breach of a relationship of trust accepted under or created by law (fiduciary obligations), or breach of a duty of care imposed by general rules of law (tort). In effecting such transfers, however, both courts and the juries operating under their supervision exercise the power of the state and are bound by the same requirement to afford “due process of law” as the coordinate branches of government. See BMW of North America, Inc. v. Gore,

¹ Mississippi courts have a history of permitting the use of tort laws as a mechanism to infringe protected rights. See NAACP v. Claiborne Hardware Co., 458 U.S. 886 (1982) (setting aside tort judgment based on political boycott).

517 U.S. 559, 572 n.17 (“State power may be exercised as much by a jury’s application of a state rule of law in a civil suit as by a statute.”)

When the courts are petitioned to compel the transfer of property between private parties, legal history and Supreme Court rulings establish that certain basic protections are “due” to the party against whom deprivation is sought. The courts must act under ascertainable standards of liability which can be equally applied to all similarly-situated persons and which properly link the default at issue with the harm for which redress is sought. The courts must ensure that all parties have a reasonable opportunity to present their evidence and legal argument to the decisional authority, whether judges or juries, at all levels (trial or appellate) at which decisions are made and reviewed. The courts must supervise and control the actions of lay juries, and the evidence and argument presented to them by parties, to ensure that lay jurors exercise their judgment and discretion within the boundaries of proper legal rules rather than using their conferred power to become instruments of expropriation.

The responsibility of the courts to ensure that appropriate rules of law are both formulated and applied is at the core of the “due process” guarantee. Indeed, the founding fathers believed that the need for neutral and responsible judicial management of private controversies arising under state law was so important that they attempted to avoid the risk of partisan judiciaries by extending the Article III judicial power of the United States to “Controversies . . . between citizens of different States.” U.S. Const. Art. III, § 2. Failure to apply “due” and appropriate safeguards opens the way for the courts to become vehicles for arbitrary and episodic redistributive seizures of property, rather than redressing claims established under pre-existing neutral principles of law.

As the state courts of Mississippi have become what the U.S. Court of Appeals for the Fifth Circuit has labeled a “mecca for plaintiffs’ claims against out-of-state businesses” Arnold v. State Farm Fire & Casualty Co., 277 F.3d 772, 774 (5th Cir. 2001), concerns have increased that the basic elements of “due process” have been sacrificed. There has been outcry against ever-increasing civil judgments which merge the tenuously-connected claims of multiple plaintiffs and impose liability with, at best, fragmentary linkage between the defendants’ alleged breaches of legal duty and the harms allegedly inflicted. Questions have been raised about fiduciary responsibilities imposed after the fact in unconventional ways on commercial transactions previously considered to involve arms-length market conduct. Claims are made that trial courts have permitted unrestrained appeals to the passions of juries drawn from a predisposed constituency and that effective appellate review has been stymied by the overhang of huge jury verdicts and the onerous financial consequences of bonding requirements in excess of judgment amounts.

This memorandum examines these concerns and tests their legitimacy against generally-accepted standards of “due process.” It concludes that Mississippi’s state court system has seriously departed from those standards with respect to the legal rules employed to assess liability against business defendants, the lack of reasonable opportunity for business defendants to develop and present their factual and legal defenses and the protection of those defendants from verdicts rendered by predisposed jury pools and unsupervised by the state judiciary. These departures do not appear to arise from happenstance or even from jury elevation of the parochial interests of Mississippi plaintiffs over the rights of business defendants. Rather, they reflect the concerted efforts of a powerful and wealthy group of Mississippi “trial lawyers” who, having become through contingency fee barter the largest holders of Mississippi plaintiffs’ claims, have

used aggressive political tactics to create a network of legal rules which transform the state's civil judicial process into an instrument for maximizing the value of their asset pool.

II. MISSISSIPPI'S DEPARTURES FROM DUE PROCESS (LEGAL STANDARDS)

A fundamental flaw in Mississippi jurisprudence arises from the application of extraordinary broad and malleable standards of liability, causation and damages, all of which combine to provide little notice of what conduct may create liability and to what extent. The Supreme Court has stated that “[t]he fact that [the defendant] is a large corporation rather than an impecunious individual does not diminish its entitlement to fair notice of the demands that the several States impose on the conduct of its business. Indeed, its status as an active participant in the national economy implicates the federal interest in preventing individual States from imposing undue burdens on interstate commerce.” See BMW v. Gore, 517 U.S. at 585. Likewise, “[i]t is established that a law fails to meet the requirements of the Due Process Clause if it is so vague and standardless that it leaves the public uncertain as to the conduct that it prohibits or leaves judges and jurors free to decide, without any legally fixed standards, what is prohibited and what is not in each particular case.” Giacco v. State of Pennsylvania, 382 U.S. 399, 402 (1966) (emphasis added). The absence of ascertainable standards also is objectionable because of the potential for arbitrary deprivation of property by juries not constrained by legal standards. See, e.g., TXO Production Corp. v. Alliance Resources Corp., 509 U.S. 443, 476-78 (“Influences such as caprice, passion, bias, and prejudice are antithetical to the rule of law. If there is a fixture of due process, it is that a verdict based on such influences cannot stand. . . . [F]undamental fairness requires that impermissible influences such as bias and prejudice be discovered . . . by inference if not by direct proof.”) (O’Connor, J., dissenting); Honda Motor Co. v. Oberg, 512 U.S. 415, 432 (1994) (“Punitive damages pose an acute danger of arbitrary deprivation of property. Jury instructions typically leave the jury with wide discretion in

choosing amounts, and the presentation of evidence of a defendant's net worth creates the potential that juries will use their verdicts to express biases against big businesses, particularly those without strong local presences); see also Goldberg v. Kelly, 397 U.S. 254, 271 (1970) (due process requires that “the decisionmaker’s conclusion[s] . . . rest solely on the legal rules and evidence adduced at the hearing”). In Mississippi, as discussed below, the jury’s “wide discretion in choosing amounts” extends not only to punitive damages issues, but also to liability, causation, and compensatory damages.

A. Broad Standards of Liability

Mississippi Courts impose broad standards of liability, particularly in product liability and mass tort cases. In many respects, Mississippi product liability laws as set forth in the statutes and appellate decisions appear to be generally within the mainstream. See Miss. Code Ann. § 11-1-63; O’Flynn v. Owens-Corning, 759 So. 2d 526, 531 (Miss. App. 2000) (noting longstanding adoption of Restatement of Torts § 402A regarding strict liability). As evidenced by the verdicts, however, the application of these standards is leading to results that are far from mainstream.

For reasons discussed below, relatively few of the largest verdicts have been subject to appellate review. Thus, it appears that trial courts have been expanding standards of liability in ways that are essentially unreviewable. For example, in the “fen-phen” case tried in November 1999 (after being filed in April 1999), Judge Pickard discarded the established “learned intermediary” doctrine because American Home Products had used “direct to consumer” advertising. The result was a \$150,000,000 verdict of compensatory damages for five plaintiffs; the case was settled before a verdict was returned on punitive damages.² Every voluntary

² Of course, the settlement payment to the five plaintiffs whose case was tried represented just a fraction of the ultimate loss to American Home.

withdrawal of a regulated product from the market is taken at the trial court level as an essentially conclusive admission of liability, as the Propulsid case discussed below illustrates. In a recent decision, the Mississippi Supreme Court also broadly construed the duty to warn, reversing a summary judgment that had been entered in favor of drug manufacturers. Bennett v. Madakasira, 2002 WL 436992 (Miss. Nov. 21, 2002) (reversing summary judgment).

Broad standards of liability are not limited to product cases. In the business context, Mississippi courts also are prone to imposing -- after the fact -- unexpected fiduciary obligations and/or agency relationships, principally because the determinations are made by unsophisticated juries with only vague legal guidance. The Supreme Court of Mississippi has held that a “[f]iduciary relationship’ is a very broad term embracing both technical fiduciary relations and these informal relations which exist whenever one person trusts in or relies upon another.” Lowery v. Guaranty Bank & Trust Co., 592 So. 2d 79, 83 (Miss. 1991). Under these broad standards, numerous arm’s length relationships with consumers can be deemed to have fiduciary aspects, particularly in the eyes of a jury.³ Further, consistent with their general practices, the Mississippi appellate courts routinely have reversed determinations on summary judgment or in post-trial motions finding no agency relationship. See, e.g., Miller v. Shell Oil Co., 783 So. 2d 724, 729 (Miss. App. 2000) (en banc) (reversing summary judgment and remanding matter for trial).

Another problematic aspect of Mississippi law is its longstanding enforcement of a pure comparative negligence regime, which assures that plaintiffs can get before a jury even if it is

³ Somewhat surprisingly, in a recent 5-3 decision in the American Bankers case, the Mississippi Supreme Court reversed a finding of liability based on breach of fiduciary duties. American Bankers Ins. Co. v. Wells, No. 1999-CA-00523-SCT, 2001 Miss. LEXIS 312 (Miss. Dec. 6, 2001) (en banc). Justice McRae, joined by justices Diaz and Easley, dissented vigorously.

clear that their own negligence contributed to their injuries. The Mississippi Supreme Court repeatedly notes that “Mississippi led the nation at the turn of the century by being the first state to adopt a pure comparative negligence standard.” Tharp v. Bunge Corp., 641 So. 2d 20, 23 (Miss. 1994) (reversing judgment notwithstanding the verdict). The Mississippi statutes also expressly allocate all questions of negligence to the jury. Miss. Code Ann. § 11-7-17. In the Mississippi Supreme Court’s 1994 decision in Tharp, however, Justice McRae went even further and abolished, through the Court’s “inherent authority,” the prior defense of “an open and obvious” hazard. Thus, as the Court points out, even a plaintiff who is 99% negligent can still plead a case to the jury. 641 So. 2d at 24.

B. Lack of Causal Nexus

As noted above, a legitimate transfer of private property through assertion of a legal claim requires a showing of actual and ascertainable harm caused by the defendant to the plaintiff. In any case involving alleged physical injury, the condition of the plaintiff constitutes critical evidence with respect to both causation and the quantum of any damages. Thus, one aspect of the Mississippi Rules that is particularly problematic with respect to the establishment of causation (or lack of causation) is the absence of any provision permitting physical or mental examinations of plaintiffs. Rule 35 of the Federal Rules of Civil Procedure expressly provides a right to an examination, subject to the control of the court. However, while the Mississippi rules include provisions respecting depositions (Rules 30-31), interrogatories (Rule 33), and requests for productions of documents and things (Rule 34), they omit any provision equivalent to Rule 35. Thus, defendants lack the ability to examine independently supposedly injured parties.

The absence of a right to examine the plaintiff independently is exacerbated by the degree to which medical records generated by treating physicians are ordinarily shielded from discovery. The physician/patient privilege in Mississippi is established by Mississippi

Code § 13-1-21 and Rule 503 of the Mississippi Rules of Evidence. Under longstanding Mississippi precedent, the courts in Mississippi “view waiver of the physician/patient privilege as narrowly as possible.” Sessums v. McFall, 551 So. 2d 178, 181 (Miss. 1989). Rule 503(f) also essentially prohibits ex parte communications with the treating physician. Under the Mississippi Supreme Court’s decision in Scott v. Flynt, 704 So. 2d 998, 1007 (Miss. 1996), the results of any ex parte contacts are inadmissible. In view of these and other precedents, plaintiffs’ attorneys often are able to preclude discovery into relevant medical records. Moreover, in view of the absence of any equivalent to Rule 35, there is no mechanism by which to perform any independent analysis.

Trial practice in Mississippi exacerbates the already-tenuous requirement of causality in Mississippi tort law. In scientific cases, causality is most often established by expert testimony. In the last ten years, recognizing the potential for abuse inherent in such testimony for hire, the U.S. Supreme Court has cracked down on so-called “junk science” presented by supposed experts. Through defined standards, federal district courts have been assigned a “gatekeeper” role to prevent logically flawed analyses from reaching the jury, even if those analyses have been performed by otherwise properly credentialed expert. There is no counterpart effort in Mississippi.

Rule 702 of the Mississippi Rules of Evidence is identical to Rule 702 of the Federal Rules of Evidence at the time the United States Supreme Court issued its decision in Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993). In that decision, the United States Supreme Court held that Rule 702 superseded the former “general acceptance” test set forth in Frye v. United States, 293 F. 1013 (D.C. Cir. 1923), and set out a non-exhaustive list of issues that should be considered by the judge as a “gatekeeper” to insure the validity of the analysis by

the purported expert. 509 U.S. at 587, 593-94. Since Daubert, the Supreme Court has further refined the test and has clarified that it applies to all experts, not just those opining concerning scientific matters.

In contrast to the post-Daubert jurisprudence in the federal courts, the Mississippi Supreme Court has essentially opened the floodgates to expert testimony on all kinds of matters, including causation, although it has been careful not to do so explicitly. Early last year, in Kansas City Southern Railway Co. v. J.C. Johnson, No. 1999-CA-00505-SCT, 2001 Miss. LEXIS 26, at *21 (Miss. Feb. 8, 2001), the Mississippi Supreme Court expressly rejected any Daubert-type test, and instead purported to continue to apply the Frye “general acceptance” standard. In reality, however, the threshold for admissibility is minimal and, because the appellate courts review only for abuse of discretion, the decision of the trial judge is essentially final. This fact is exemplified by the result in Kansas City Southern, in which a purported expert was permitted to testify as to the “value of enjoyment of life” despite an “honest dispute as to whether [his] testimony was generally accepted in his field.” 2001 Miss. LEXIS at *22. It thus appears that, in Mississippi, seeking to exclude an expert is as futile as moving for summary judgment; if there is any argument for allowing the testimony, it will be permitted and the jury will decide.

C. Damages

Mississippi’s laws with respect to damages are among the most threatening in the country. Notwithstanding a nominal 1993 tort reform initiative, punitive damages still are completely uncapped. Thus, essentially the only limitations on the amount of punitive damages are those imposed under the Fourteenth Amendment by the decisions of the U.S. Supreme Court. See BMW of North America v. Gore, 517 U.S. 559, 574-75 (1996); Cooper Indus., Inc. v. Leatherman Tool Group, Inc., 532 U.S. 424, 121 S. Ct. 1678 (2001). Moreover, even as now

“reformed,” Rule 8 of the Mississippi Rules of Appellate Procedure contemplates bonding of punitive damage awards up to \$100,000,000, an amount that would be prohibitive for all but the largest concerns.

While the absence of a cap on punitive damages is problematic, recent verdicts demonstrate that Mississippi law regarding compensatory damages may be even more troubling. By virtue of the Supreme Court’s recent decisions in BMW and Cooper Industries, punitive damage awards at least theoretically are subject to fairly rigorous scrutiny at both the trial court and appellate court levels. In contrast, compensatory damages are assumed to “present[] a question of historical or predictive fact” to which a jury’s decision ordinarily is afforded substantial deference. Cooper Indus., 121 S. Ct. at 1685. Yet, under the law in Mississippi, and as seen in practice, these damages can become every bit as unpredictable, arbitrary and unconstrained as punitive damages historically have been. Moreover, plaintiffs’ attorneys have recognized that, as compensatory damages rise, the ratio of punitive damages to compensatory damages becomes less extreme, making large punitive awards more likely to survive scrutiny under Gore. As such, compensatory damages represent an important aspect of the breakdown of the rule of law in Mississippi.

Mississippi law recognizes (and even appears to encourage) virtually every form of damages, often in extremely large amounts that far outweigh any quasi-objective measures of damages such as medical care costs. The Court of Appeals recently affirmed an award of pain and suffering damages at a multiple of over 50 times the plaintiff’s medical bills. Cade v. Walker, 771 So. 2d 403, 408 (Miss. App. 2000); see also Kroger Co. v. Scott, No. 1999-CA-01981-COA, 2001 WL 647793, at *3 (Miss. App. June 12, 2001) (affirming pain and suffering damages of roughly 45 times the actual damages because such damages did not “shock the

conscience of the Court”). The Court of Appeals also affirmed an award of pain and suffering damages to a drunk driver involved in an accident at a level almost 19 times his medical damages. General Motors Corp. v. Pegues, 738 So. 2d 746, 755 (Miss. App. 1998).

In recent years, the Mississippi courts have expanded the available theories of damages. Traditionally, Mississippi courts had refused to award damages for emotional distress and mental anguish in breach of contract cases, at least absent proof of an independent intentional tort. This rule was rejected, however, by the Mississippi Supreme Court in 1996, when it held in Southwest Mississippi Regional Medical Center v. Lawrence, 684 So. 2d 1257, 1269 (Miss. 1996) (en banc), that such damages were permissible if they were found to be “reasonably foreseeable” in the discretion of the jury.⁴

Even more recently, the Supreme Court has elevated the status of “hedonic” or “loss of enjoyment of life” damages. As noted by the Court in its Kansas City Southern decision cited earlier, many jurisdictions either prohibit such damages altogether or include them as a component of pain and suffering. However, the Mississippi Supreme Court rejected these restrictions in favor of establishing hedonic damages as a distinct element of damages entitled to separate consideration by the jury. The Court stated that “[t]he loss of enjoyment of life should be fully compensated and should be considered on its own merits as a separate element of damages, not as a part of one’s pain and suffering.” 2001 Miss. LEXIS at *15. The Court then went on to note various enjoyable lifetime activities, presumably inviting future juries to award an arbitrary sum of money for the loss of each one of them. Id. at *16 (noting activities such as “going on a first date, reading, debating politics, the sense of taste, recreational activities, and

⁴ One of the few limitations recognized by the Mississippi Supreme Court in recent years is that a fear of future disease by itself is not a cognizable claim in Mississippi. Prescott v. Leaf River Forest Prods., Inc., 740 So. 2d 301, 309 (Miss. 1999) (en banc).

family activities”). Not surprisingly, Justice McRae, who leads the Court’s pro-plaintiff wing, concurred in the Court’s decision but wrote separately to emphasize the availability of hedonic damages in wrongful death cases as well. *Id.* at *25-26.

III. MISSISSIPPI’S DEPARTURES FROM DUE PROCESS (OPPORTUNITY TO BE HEARD)

In addition to imposing substantive limits, the Due Process Clause has the fundamental purpose of ensuring the use of fair judicial procedures when persons are subject to deprivation of protected property interests. *See, e.g., Greenholtz v. Inmates of the Nebraska Penal and Correctional Complex*, 442 U.S. 1, 13 (1979) (“The function of legal process, as that concept is embodied in the Constitution, and in the realm of factfinding, is to minimize the risk of erroneous decisions. Because of the broad spectrum of concerns to which the term must apply, flexibility is necessary to gear the process to the particular need; the quantum and quality of the process due in a particular situation depend upon the need to serve the purpose of minimizing the risk of error.”). As the Supreme Court has stated, (“[a] fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial cases. But our system of law has always endeavored to prevent even the probability of unfairness.” *In re Murchison*, 349 U.S. 133, 136 (1955). Moreover, “it is not disputed that a jury award may not be upheld if it was the product of bias or passion, or if it was reached in proceedings lacking the basic elements of fundamental fairness.” *Browning-Ferris Indus. of Vermont, Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 276 (1989). These fundamentally fair procedures are lacking in Mississippi.

A. Permissive Joinder/Venue

The defense and presentation of evidence pertaining to specific claims is hindered by the almost unlimited joinder of parties and claims permitted by the Mississippi Supreme Court under

its version of Rule 20, which is textually identical to Rule 20 of the Federal Rules of Civil Procedure. However, Mississippi lacks any counterpart to Fed. R. Civ. P. 23, which governs (and provides relatively strict limitations upon) class actions. The consequence of this omission, under the auspices of the plaintiff-friendly Mississippi Supreme Court, is that cases that are effectively class actions are permitted without any finding that questions of law or fact predominate over any particularized questions.⁵

Rule 20(a) of the Mississippi Rules of Civil Procedure provides that:

All persons may join in one action as plaintiffs if they assert any right to relief jointly, severally, or in the alternative, in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences, and if any question of law or fact common to all these persons will arise in the action. All persons may be joined in one action as defendants if there is asserted against them jointly, severally, or in the alternative, any right to relief in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences, and if any question of law or fact common to all defendants will arise in the action. A plaintiff or defendant need not be interested in obtaining or defending against all the relief demanded. Judgment may be given for one or more of the plaintiffs according to their respective rights to relief, and against one or more defendants according to their respective liabilities.

In an important case testing the limits of its pro-plaintiff bias, a majority of the en banc Mississippi Supreme Court early last year endorsed the virtually unlimited joinder of claims under Rule 20 practiced in the Mississippi trial courts. See American Bankers Ins. Co. v. Alexander, No. 98-1A-00046-SCT, 2001 Miss. LEXIS 19 (Feb. 1, 2001) (en banc), cert. denied, 122 S. Ct. 324 (2001). The American Bankers case involved 1,371 separate plaintiffs, each of whom allegedly had been defrauded. The Court noted American Banker's contention that

⁵ The broad ability to join parties also facilitates the addition of non-diverse defendants so as to defeat diversity jurisdiction. Thus, federal removal most often is not an available option, particularly in view of the very limited circumstances in which fraudulent joinder can be found.

“cumulative and otherwise inadmissible evidence [would be] admitted from multiple, separate, unrelated transactions. It claims that any benefits gained by the efficiency of joinder is not worth the cost of fairness.” Id. at *20. However, citing the liberal purpose of Rule 20, the majority stated that it “fathoms no valid notions that favor defendant’s motion to sever.” Id. at *21. The Court also raised the question of: “[w]hether the misjoinder of multiple plaintiffs in these cases threatens American Bankers’ constitutional right to a fair and impartial trial.” Id. at *19. Unfortunately, the Court failed to answer its own question, quickly changing the subject to venue. Moreover, the Court’s lone citation -- to a Louisiana federal court case involving only 7 plaintiffs (as opposed to 1,371) -- was hardly persuasive. As indicated by the lack of analysis, it is impossible to read the Court’s opinion as being anything other than result-driven. The majority never answered the dissent’s showing that the record lacked sufficient information about the plaintiffs’ claims to assess venue, nor did the majority answer the dissent’s showing that numerous plaintiffs were from out of state. The Court’s opinion strongly suggests that, to the group of five justices in the majority, the specifics of liability as to any plaintiff, and the harm allegedly suffered by any plaintiff, are wholly irrelevant so long as there is a broad claim that the same company did something wrong.

A decision earlier this year by the Mississippi Supreme Court confirms that the result in American Bankers is not an aberration. The Court allowed asbestos-related claims of a plaintiff to proceed in Mississippi notwithstanding the fact that she was a resident of Tennessee, her husband (who suffered the alleged exposure to asbestos) was a resident of Tennessee, and there was, at best, only a “possibility that he did some work in Mississippi.” Illinois Central R.R. Co. v. Travis, 808 So. 2d 928, 930 (Miss. 2002). In supporting its decision, the Court noted, among other things, that “[t]he general philosophy of the joinder provisions is to allow virtually

unlimited joinder at the pleading stage, but to give the Court discretion to shape the trial to the necessities of the particular case.” Id. at 931 (citing official comment to Rule 20). Unfortunately, however, the referenced “shaping” of the trial is most often illusory, with the result that defendants are hindered in their ability to present an effective defense and particularized issues are lost to a generalized appeal to teach the defendant a lesson.

Mississippi law also permits very effective steering of cases to preferred jurisdictions. Venue in Mississippi state courts is governed by Mississippi Code § 11-11-3 and Rule 82 of the Mississippi Rules of Civil Procedure. Subpart c of this Rule provides that “[w]here several claims or parties have been joined, the suit may be brought in any county in which any one of the claims could properly have been brought.” Miss. R. Civ. P. 82(c). This is known as the “good as to one, good as to all” rule. The Mississippi Supreme Court has recently reaffirmed the broad scope of this rule, stating that “in suits involving multiple defendants, where venue is good as to one defendant, it is good as to all defendants. This is true [even] where the defendant upon whom venue is based is subsequently dismissed from the suit.” Kansas City Southern, 2001 Miss. LEXIS 26, at *7 (remitting \$3,500,000 verdict to \$3,000,000).

With the combined effect of the joinder and venue rules, plaintiffs’ attorneys can steer large, multi-party cases to their favored pro-plaintiff counties, particularly Jefferson, Claiborne, Holmes, and Hinds. These counties represent an attractive target to plaintiffs’ lawyers. Among other things, the populations of these counties have relatively low incomes and high unemployment rates, so that jurors are responsive to empowerment arguments. Jurors in these counties are accustomed to reading about and rendering large verdicts and, because of the pharmaceutical and other mass tort cases, many prospective jurors have been plaintiffs

themselves and/or are related to someone who has been a plaintiff.⁶ Jurors also are exposed to extensive advertising from plaintiffs' attorneys. Finally, in each of these counties, there has been a consistently pro-plaintiff judiciary.

B. Discovery Limitations

The discovery rules in Mississippi also impose substantial impediments to development of an effective defense. Given the pro-plaintiff tendencies of Mississippi juries, defendants as a practical matter are required to disprove the theories of causation advanced by plaintiffs, even though the burden of proving causation technically is on the plaintiff. That task is made even more onerous by the limitations on discovery imposed by the Mississippi rules and practice.

Under Rule 4.04(A) of Mississippi's Uniform Circuit Court Rules, "[a]ll discovery must be completed within ninety days from service of an answer by the applicable defendant." There is no exception for scientifically complex cases or cases involving multiple parties. While trial courts retain discretion to extend discovery deadlines, they often refuse to, particularly in counties where pro-plaintiff tendencies are strongest. Moreover, because of the venue and joinder rules discussed above, plaintiffs' attorneys can steer cases to counties in which they know the Rule 4.04 deadline will be strictly enforced. In complicated cases or cases involving large numbers of plaintiffs, ninety days simply does not permit preparation of an effective defense, particularly in view of the other obstacles that the Mississippi rules impose on defendants.

⁶ According to an April 30, 2001 article in the National Law Journal, there were more than 21,000 plaintiffs in lawsuits filed in Jefferson County from 1995 through 2000, notwithstanding the fact that the county has fewer than 10,000 residents.

IV. MISSISSIPPI'S DEPARTURES FROM DUE PROCESS (INSULATION FROM JURY IRRATIONALITY)

In the context of civil jury awards, U.S. Supreme Court precedent makes clear that protection from arbitrary jury verdicts is a necessary element of due process protection. In Honda Motor v. Oberg, the Supreme Court found Oregon's preclusion of judicial review of punitive damages awards violated constitutional due process rights. 512 U.S. at 432-33. More recently, the U.S. Supreme Court also has confirmed the essential nature of appellate review of such awards, finding that the trial court's decision as to the constitutionality of a punitive damages award is entitled to de novo consideration by the appellate court. Cooper Industries, Inc. v. Leatherman Tool Group, Inc., 121 S. Ct. 1678 (2001). In Mississippi, however, there is little constraint on arbitrary jury awards; to the contrary, both the trial rules and local custom appear to invite such arbitrary awards. The Mississippi appellate courts also appear to be disinclined to impose necessary constraints, notwithstanding their role as the last line of defense against arbitrary verdicts.

A. Ineffective Summary Judgment

In the federal courts, summary judgment effectively constrains jury irrationality, because claims that lack sufficient legal support never reach the jury. Summary judgment is another respect in which Mississippi's rules are facially identical to the rules in the federal courts, but the practice is entirely different. While summary judgment is theoretically available in Mississippi, there is no trilogy of Supreme Court decisions affirming the integral nature of the summary judgment process; rather, there is a string of decisions reversing the relatively few summary judgments that are ever entered. See, e.g., Bennett v. Madakasira, 2002 WL 436992 (Miss. Nov. 21, 2002) (reversing summary judgment in pharmaceutical case and remanding for trial).

Reflecting the view of its Supreme Court, the Mississippi Court of Appeals has stated that “[a]ll motions for summary judgment should be viewed with great skepticism.” Mississippi Livestock Producers Ass’n v. Hood, 758 So. 2d 447, 450 (Miss. App. 2000). The Supreme Court itself has stated that “[t]he trial court should also deny summary judgment where full presentation of the evidence would ‘result in a triable issue.’” Hall v. Cagle, 773 So. 2d 928, 929 (Miss. 2000) (citations omitted). Remarkably, the Mississippi Supreme Court has even applied the criminal conviction standard for the granting of summary judgment: “[s]ummary judgment should only be granted when it is shown, beyond a reasonable doubt, that the non-movant would be unable to prove any facts to support his claim.” Downs v. Choo, 656 So. 2d 84, 85-86 (Miss. 1995) (emphasis added) (reversing summary judgment). A similar skepticism attaches to post-trial motions, although verdicts have become so excessive in some instances that remittiturs appear to be not uncommon.

B. No Limits on Argument

Beginning with the opening voir dire examination, Mississippi courts appear to place few, if any, limits on direct appeals to jury passion and prejudice, at least when the defendant is an out-of-state or non-U.S. corporation. Nor is there any apparent requirement that closing arguments pertain to the evidence in the case. Relying on Mississippi Supreme Court precedent, the Court of Appeals recently stated that

Counsel should be given wide latitude in their arguments to a jury. This is inherent in, and indispensable to, our adversary system. Courts should be very careful in limiting the free play of ideas, imagery and the personalities of counsel in their argument to a jury.

General Motors Corp. v. Peques, 738 So. 2d 746, 754 (Miss. App. 1998) (quoting Johnson v. State, 477 So. 2d 196, 209-10 (Miss. 1985)).

This “wide latitude” is exemplified by the proceedings in the Propulsid case tried in Claiborne County before Judge Pickard in September 2001. The 10 plaintiffs whose cases were selected to be tried complained of a range of maladies, ranging from minor to fairly major. (The evidence linking these maladies to Propulsid was virtually non-existent). Nevertheless, the jury made no attempt to distinguish among the supposed damages to each of the plaintiffs, awarding \$10,000,000 in compensatory damages to each of them. The plaintiffs’ closing argument -- to which Judge Pickard indicated in advance that objections would not likely be sustained -- invited this result, making punitive damages arguments in what was theoretically a bifurcated proceeding:

You remember I asked Mr. Oliver [the corporate representative], I said, Mr. Oliver, you had some time off, did you talk to your superiors about what was going on in this courtroom? He said, well, no, I talked to them about other business. Do they still care? I don’t know. But maybe they will after this trial. My clients can’t get their attention. We can’t make them pay attention to us, but you can. And the next time Mr. Oliver goes back home to talk to his superiors, when you make it right, when you make it right for my clients by giving them the damages that they are entitled to, next time, even before he gets back up there, Mr. Oliver is going to go to the phone and say, boss, we better listen because down Mississippi in Claiborne County, they are talking to us. They have given the people that we have hurt, they have given them the damages they deserve. Boss, we can’t ignore it anymore. They are telling us that we did wrong. Boss, I didn’t talk to you about it before, but I’m talking to you about it now. I want y’all to know that in Claiborne County, they found out about us, they know what we did, they understand.

* * *

That ought to be the message Mr. Oliver has to take back to his superiors this time. Don’t put him in a position where he has to go back and talk about something else other than what they did to my clients. Make them listen.

While there was no award of punitive damages in the Propulsid case, the conclusion is inescapable that essentially the same arbitrary result was reached through the award of

compensatory damages, because individualized proof of causation and damages simply was not required even in rendering a verdict of \$100,000,000.⁷

C. Limited Appellate Access/Review

The problems that arise in the discovery and trial phases of litigation in Mississippi are not ameliorated through vigorous scrutiny on appeal.

To begin with, bonding requirements may prevent defendants even from proceeding with appellate review. Until April 2001, Rule 8 of the Mississippi Rules of Appellate Procedure required judgment debtors to post a bond in the amount of 125% of the entire judgment sought to be reviewed. Thus, the Loewens Group, which in 1995 was the subject of a \$500,000,000 judgment (still the largest judgment to date in a Mississippi court), was required to post a bond of \$625,000,000 to proceed with an appeal; the courts refused Loewens' request for a discretionary reduction in this amount notwithstanding the fact that such a reduction was permitted by the governing rules. Because Loewens was unable to post such an extraordinary bond, it was eventually forced to settle for \$175,000,000 (\$75,000,000 more than the entire compensatory award, which itself was composed principally of damages for emotional distress) and driven into bankruptcy.⁸

In April 2001, over three dissents, the Mississippi Supreme Court amended Rule 8 to place a presumptive cap of \$100,000,000 on the bond requirement with respect to the portion of a judgment attributable to a punitive damages award. Thus, for Loewens Group, the bond under

⁷ On post-trial motion, this amount was reduced to \$48,000,000. While a significant reduction, the size of the award still is extraordinary.

⁸ The Loewens Group has brought a NAFTA claim against the United States based on events occurring during the course of the Mississippi litigation. The supporting papers detail numerous irregularities in the trial that Loewens never had the opportunity to raise on appeal.

the amended Rule 8 at least presumptively would have been a mere \$225,000,000, rather than \$625,000,000. However, in “unusual circumstances” an even higher amount may be required, per Miss. R. Civ. P. 8(b)(2)(c), and the requirement of posting a bond of 125% of the full compensatory award remains. Thus, the ability to obtain appellate review is subject to serious question; relatively few companies could maintain financial viability with a judgment or bond obligation of the magnitude frequently imposed in Mississippi. For this reason, among others, most of the largest Mississippi verdicts were not litigated through appeal.

Even when an appeal is perfected, the prospect for searching review is not great. Both the Mississippi Supreme Court and Court of Appeals afford extraordinary deterrence to jury determinations. See, e.g., Cade v. Walker, 771 So. 2d at 406 (“[e]ven if we think the amount awarded in the verdict is liberal, we are not allowed to supplant our judgment for that of the jury unless we conclude that there was insufficient evidence . . . or that the verdict was the product of bias, passion or prejudice”).⁹ Further, Mississippi appellate courts frequently reverse trial courts on the rare occasions on which they take issues away from the jury. See, e.g., Tharp v. Burge Corp., 641 So. 2d 20, 25 (Miss. 1994) (reversing judgment NOV and reinstating jury verdict). Thus, the Mississippi appellate courts as a matter of course do not impose the requisite legal discipline on jury determinations; jury verdicts almost invariably are affirmed.

⁹ There are certain rare exceptions. See American Bankers Co. v. Wells, 2001 Miss. LEXIS 312 (Miss. Dec. 6, 2001) (reversing verdict based on findings of fiduciary duty, fraud, emotional distress and award of punitive damages) (5-3 decision).

V. CONCLUSION

The cumulative effect of the changes brought to the Mississippi judicial system is apparent in the escalating number of verdicts exceeding ten million dollars. Reports from published sources reflect at least the following:

**SELECTED MISSISSIPPI JURY VERDICTS OVER TEN MILLION
DOLLARS¹⁰
(Dollars in millions)**

YEAR	COUNTY	CASE	ACTUAL	PUNITIVE	TOTAL
1995	Hinds	O'Keefe v. Loewen Group	\$100	\$400	\$500
1998	Holmes	Robinson v. Ford Motor Co.	\$25	\$120	\$145
1998	Jefferson	Cosey v. E.D. Bullard Co.	\$48	--	\$48
1999	Copiah	Haggan v. Jackson National Life Insurance Co.	\$.022	\$33	\$33
1999	Jefferson	Washington v. American Home Products	\$150	--	\$150
2000	Holmes	Hawkins v. Illinois Central Railroad	\$5	\$5	\$10
2000	Jackson	Kitzinger v. Crane Co.	\$1	\$15	\$16
2000	Hinds	Langley v. Mid-America Apartments	\$29	--	\$29
2000	Hinds	State of Mississippi v. American Management System	\$299	\$175	\$474

¹⁰ Various sources publish reports of jury verdicts. The verdicts cited herein are available through Lexis and/or Westlaw.

**SELECTED MISSISSIPPI JURY VERDICTS OVER TEN MILLION
DOLLARS¹⁰**

(Dollars in millions)

2001	Holmes	Baker v. Washington Mutual Finance Group LLC	\$2	\$69	\$71
2001	Jackson	Hayes v. Bush Hog, Inc.	\$12	--	\$12
2001	Copiah	Hico Inc. v. St. Paul Fire Insurance Co.	\$2	\$75	\$77
2001	Claiborne	Rankin v. Janssen Pharmaceuticals, Inc.	\$100	--	\$100
2001	Hinds	Johnston v. Jackson HMA, Inc.			\$23
2001	Holmes	Johnson v. AC&S Manufacturing, Inc.	\$150	--	\$150

As indicated by the four verdicts exceeding \$50,000,000 rendered in 2001, the trend shows no sign of abating. The Mississippi public already is beginning to experience the consequences of those verdicts. According to press reports, forty-four insurance companies have ceased providing certain lines of insurance and/or have pulled out of the state entirely as a direct consequence of what was termed the “volatile legal climate” in Mississippi. Medical malpractice insurance also has become difficult or impossible to obtain, particularly in some areas of specialization. Businesses and professionals are therefore being confronted with an increasingly difficult decision as to whether to do business in Mississippi. Thus, while “send a message to the foreign corporation” arguments obviously resonate with Mississippi juries, it is Mississippi residents that ultimately will be harmed by the capture of the judiciary system.

The prospect for internal reform is not great. In 1993, the Mississippi legislature imposed by statute certain procedural protections (but not a monetary cap) with respect to punitive damages. At around the same time, the United States Supreme Court articulated Fourteenth Amendment due process constraints on awards of punitive damages. These developments may have had some impact on punitive damages awards, although huge verdicts still are being rendered (for example, \$400,000,000 in punitive damages against the Loewen Group). The response from the plaintiffs' bar, however, has been an even greater focus on obtaining equally arbitrary awards of compensatory damages, such as pain and suffering, mental anguish, hedonic damages, and the like. The Mississippi legislature has shown no inclination to limit such awards.

A second potential avenue of reform is through the Mississippi courts themselves. There have been a number of modest changes since the outlandish verdicts in Mississippi began to draw media scrutiny. For example, as noted above, the requirement that an appellant post a bond in the amount of 125% of the entire judgment has been modified slightly with respect to the portion of the judgment attributable to punitive damages. Even this limited concession to rationality, however, was entered over the objection of three Supreme Court Justices. Thus, meaningful reform is unlikely unless and until the justices elected to the Supreme Court by the plaintiffs' bar are replaced by the voters.