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March 31, 2011

Via E-Mail & 1st Class Mail

Mr. Corbin R. Davis
Supreme Court Clerk
Michigan Supreme Court
P.O. Box 30052
Lansing, MI 48909

Re: ADM File No. 2008-18, Proposed Amendment of Rule 3.501 of the Michigan Court Rules

Dear Mr. Davis:

I am writing in response to the Court's request for public comment on the proposed revision of MCR 3.501, the court rule governing class actions. I am a licensed Michigan attorney in good standing.

I adopt the attached letter and thoughts as expressed by my colleague, Lance Young.

Very truly yours,

Jason J. Thompson

JJT:dan
Enclosure

Law Office of Lance C. Young
Class Actions & Complex Litigation

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March 30, 2011

Via E-Mail and First Class Mail

Mr. Corbin R. Davis
Supreme Court Clerk
Michigan Supreme Court
P.O. Box 30052
Lansing, MI 48909

Re: ADM File No. 2008-18, Proposed Amendment of Rule 3.501 of the Michigan Court Rules

Dear Mr. Davis:

I am writing in response to the Court's request for public comment on the proposed revision of MCR 3.501, the court rule governing class actions. I am a licensed Michigan attorney in good standing and I am a Council Member of the Antitrust, Franchising & Trade Regulation Section of the State Bar of Michigan.

For the last seventeen years, I have represented investors, employees, consumers and other injured persons in class actions involving violations of federal and state securities laws, antitrust laws and consumer protection laws. Prior to forming the Law Office of Lance C. Young, I worked for ten years as part of the boutique class action law firm Elwood S. Simon Associates, P.C. in Birmingham Michigan. I was also recently of counsel for several years to the New York law firm Garwin, Gerstein & Fisher, LPP, and I currently work under contract for the commercial litigation firm Sommers Schwartz, P.C. in Southfield, Michigan. The views expressed herein are my own.

I believe the proposed changes to Rule 3.501 are confusing and unnecessary. *See specifically* ADM File No. 2008-18, Alternatives A & B. Implicit in the 91 day moving requirement of MCR 3.501 is a policy determination that class certification should be decided as early as possible. The necessary counterpart of this rule always has been that class certification decisions may be subsequently modified or revoked by a court, either *sua sponte* or on motion of any interested person for good cause shown.

Imposing a 21 day temporal limit on the filing of "a supplemental motion for certification of a class" is not by itself objectionable. However, the "knew or should have known" language contained in Alternative A (B)(1)(c) is too restrictive. Due process requires that class certification orders be modifiable whenever necessary to protect the interests of absent class

members, even where raised by a supplemental motion. Additionally, and to be fair and consistent, the 21 day limitation also should be extended to "a motion to revoke or amend the certification." *See* Alternative A (B)(1)(d). A suggested revision of the relevant provisions is attached Exhibit 1.

I also believe that Alternative A as presently drafted may lead to confusion about a court's ability to act *sua sponte*. A key phrase "[a]fter granting a motion to certify a class action, the court may amend or revoke the certification" is included in Alternative B, but not Alternative A. This drafting discrepancy could be viewed as an intentional, substantive change in procedure meaning that courts no longer have authority to modify or revoke class certification *except* on "a supplemental motion for certification, or a motion to revoke or amend certification." *Compare* the language of Alternative A (B)(3)(b) with Alternative B (B)(3)(b). Another similar concern is that Alternative A (B)(1)(c) & (d) as presently drafted allows the filing of a motion to modify or revoke class certification only by "[a] party." The attached suggested revision addresses both of these concerns and makes it clear that a modification or revocation of class certification may be initiated by any interested person, including a court, a non-party or any absent class member.

Alternative B, which proposes limiting a plaintiff to a single class motion, also should be rejected. Again, due process requires that class certification orders be modifiable whenever necessary to protect the interests of absent class members, even where raised by a supplemental motion. This is especially true in Michigan where class motions by rule are due during the first 91 days of litigation. Additionally, adopting a formalistic rule that limits a trial court's ability to resolve the wide range of issues that emerge in complex litigation is counterproductive.

Finally, limiting a plaintiff to "*one and only one*" class motion could be easily misconstrued as prohibiting: (1) a renewed or secondary motion for class certification following appellate remand; (2) a later motion for certification of a separate or previously unknown class or subclass; or (3) a later motion for certification of settlement class. In a practice area that is already contentious and fraught with complexity, imposing any new ambiguity or uncertainty should be avoided.

For the reasons set forth above, I oppose the proposed amendment of MCR 3.501and believe that neither Alternative should be adopted without significant revisions.

Respectfully submitted,

Lance C. Young

jmy/LCY

Attachment

EXHIBIT 1

[Additions are indicated by underlining and deletions are indicated by strikeover.]

Rule 3.501 Class Actions

(A) [Unchanged]

(B) Procedure for Certification of Class Action.

(1) Motion; Supplemental Motions; Motion for Revocation or Amendment.

(a) Within 91 days after the filing of a complaint that includes class action allegations, the plaintiff must move for certification that the action may be maintained as a class action.

(b) A party or any other interested person may file a supplemental motion for class certification, or a motion to revoke or amend certification, if the circumstances surrounding the initial motion for certification have substantially changed following the filing of the initial motion. A supplemental motion for class certification, or a motion to revoke or amend certification, must be filed within 21 days of the date when the movant learned ~~knew or should have known~~ of the changed circumstances.

(c)~~(b)~~ The time for filing ~~the~~ a motion for class certification, or a supplemental motion for class certification, or a motion to revoke or amend certification may be extended by order on stipulation of the parties or on motion for cause shown.

(2) Effect of Failure to File Motion. If the plaintiff fails to file a certification motion within the time allowed by subrule (B)(1)(a), the defendant may file a notice of the failure. On the filing of such a notice, the class action allegations are deemed stricken, and the action continues by or against the named parties alone. The class action allegations may be reinstated only if the plaintiff shows that the failure was due to excusable neglect.

(3) Action by Court.

(a) Except on motion for good cause, the court shall not proceed with consideration of the motion to certify until service of the summons and complaint on all named defendants or until the expiration of any unserved summons under MCR 2.102(D).

(b) The court may allow the action to be maintained as a class action, may deny the motion, or may order that a ruling be postponed pending discovery or other preliminary procedures. After granting a motion to certify a class action, the court may amend or revoke the certification. The court also may consider a supplemental motion for class certification, or a motion to revoke or amend the certification.

(c) In an order certifying a class action, the court shall set forth a description of the class.

(d) When appropriate the court may order that

(i) the action be maintained as a class action limited to particular issues or forms of relief, or

(ii) a proposed class be divided into separate classes with each treated as a class for purposes of certifying, denying certification, or revoking a certification.

(e) If certification is denied or revoked, the action shall continue by or against the named parties alone.

(C)-(I)[Unchanged]

Sally LaCross - Fwd: ADM File No. 2008-18

From: Clerk Info
To: LaCross, Sally
Date: 3/31/2011 3:04 PM
Subject: Fwd: ADM File No. 2008-18
Attachments: Ltr. re Rule 3.501.pdf

>>> "Thompson, Jason" <JThompson@sommerspc.com> 3/31/2011 11:16 AM >>>

Please forward the attached correspondence re: ADM File No. 2008-18 to the Supreme Court Clerk.

Debbie Nichols
Assistant to Jason J. Thompson
and Leonard B. Schwartz

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