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NEW WINE IN AN OLD BOTTLE—ARKANSAS'S LIBERALIZED CLASS ACTION PROCEDURE—A BOON TO THE CONSUMER CLASS ACTION?

*Kenneth S. Gould**

I. INTRODUCTION

Prior to 1988, class action procedure in Arkansas was of limited utility.¹ Beginning in that year with its decision of *International Union of Electrical, Radio & Machine Workers v. Hudson*² and continuing through a series of subsequent decisions and a significant rewriting of the rule governing class action procedure, the Arkansas Supreme Court forged one of the most liberal state class action procedures in the United States.³ The evolution of Arkansas class action procedure from a state of near dormancy to the most dynamic development under the still young Arkansas Rules of Civil Procedure⁴ is a fascinating study in the process of procedural rule making and interpretation.

Examination of the evolution of Arkansas class action procedure is the initial concern of this article. Following examination of that evolution, the article will focus on application of Arkansas class action procedure, as evolved, to the consumer class action, the most controversial type of modern class action.⁵

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1. See *infra* part II.A, C.

2. 295 Ark. 107, 747 S.W.2d 81 (1988).

3. As noted by one of the leading civil procedure authorities, "The attitudes of state courts vary considerably from strong support for the evolving use of the class suit, particularly for relatively small consumer claims, to a restrictive reading of the statutes and rules." FLEMING JAMES, JR. ET AL., CIVIL PROCEDURE § 10.22, at 567 (4th ed. 1992).

4. The Arkansas Rules of Civil Procedure were effective July 1, 1979. See *infra* note 26.

5. See *infra* part III. For purposes of this article, a consumer class action involves use of the class action device for the joint assertion of claims by individual consumers having no jural connection other than their having been adversely affected by the same liability producing conduct. A consumer class action has also been described as:

[A] case in which the plaintiff sues on behalf of a large class of individual customers or consumers, who cannot be identified in advance and whose individual claims are too small to justify the cost of individual lawsuits. . . . Such an action may take on a multistate character because the injured

II. EVOLUTION OF ARKANSAS CLASS ACTION PROCEDURE

A. Arkansas Class Action Procedure Prior to the Arkansas Rules of Civil Procedure

Arkansas class action procedure prior to the 1979 adoption of Rule 23⁶ of the Arkansas Rules of Civil Procedure was derived directly from the doctrine of virtual representation.⁷ Virtual representation was a common law doctrine developed in equity.⁸ However, from the 1868 adoption of the Arkansas Civil Code to 1979, the doctrine was codified by statute in Arkansas.⁹ Indeed, as

class reside in a number of states or because . . . the defendants have their residence or business in states other than the forum.

Archibald v. Cinerama Hotels, 117 Cal. Rptr. 843, 848 (1974), *vacated*, 126 Cal. Rptr. 811 (1976).

For a comprehensive analysis of the history, philosophy, and procedural aspects of consumer class actions, see James E. Starrs, *The Consumer Class Action* (pts. 1 & 2), 49 B.U. L. REV. 211, 407 (1969). See also James R. McCall, *Due Process and Consumer Protection: Concept and Realities in Procedure and Substance - Class Action Issues*, 25 HASTINGS L.J. 1351 (1974); Robert C. Eckhardt, *Consumer Class Actions*, 45 NOTRE DAME L. REV. 663 (1969-70).

Other types of class actions include class actions under the federal antitrust laws, class actions in patent, copyright and trademark litigation, class actions under the bankruptcy laws, shareholder class and derivative suits, government benefit class actions, employment discrimination class actions, and class actions for persons accused of crimes who are challenging elements of the criminal justice process.

6. Rule 23 and the Reporter's Notes to the rule are set out in full in the Appendix to this article.

7. For Arkansas class action cases prior to 1979 applying the doctrine of virtual representation, see, e.g., *Ross v. Arkansas Communities, Inc.*, 258 Ark. 925, 529 S.W.2d 876 (1975); *Thomas v. Dean*, 245 Ark. 446, 432 S.W.2d 771 (1968); *Massey v. Rogers*, 232 Ark. 110, 334 S.W.2d 664 (1960); *Mixon v. Barton Lumber & Brick Co.*, 226 Ark. 809, 295 S.W.2d 325 (1956); *Smith v. Arkansas Motor Freight Lines, Inc.*, 214 Ark. 553, 217 S.W.2d 249 (1949); *Holthoff v. State Bank & Trust Co.*, 208 Ark. 307, 186 S.W.2d 162 (1945); *Conner v. Heaton*, 205 Ark. 269, 168 S.W.2d 399 (1943); *Howard-Sevier Road Imp. Dist. No. 1 v. Hunt*, 166 Ark. 62, 265 S.W. 517 (1924).

For Arkansas cases prior to 1979 declining to apply the doctrine of virtual representation, see, e.g., *Lightle v. Kirby*, 194 Ark. 535, 108 S.W.2d 896 (1937); *Crow Creek Gravel & Sand Co. v. Dooley*, 182 Ark. 1009, 33 S.W.2d 369 (1930); *District No. 21 United Mine Workers v. Bourlard*, 169 Ark. 796, 277 S.W. 546 (1925); *Baskins v. United Mine Workers*, 150 Ark. 398, 234 S.W. 464 (1921).

8. Although the doctrine of virtual representation was developed in equity, in 1968 the Arkansas Supreme Court held that Arkansas class action procedure applied to actions at law as well as to equitable proceedings. *Thomas*, 245 Ark. at 448-49, 432 S.W.2d at 773.

9. The Arkansas Code of Practice in Civil Actions was adopted by the Arkansas General Assembly on July 22, 1868 with an effective date of January 1, 1869. Except for the deletion of one word not affecting substance, from the 1868 adoption of the class action statute as section 33 of the Civil Code to its final codification

late as 1975, the Arkansas Supreme Court explained that the class action statute was but "a codification of the equitable doctrine of virtual representation."¹⁰

Ostensibly the language of the statute was sufficiently broad to establish a liberal class action procedure: "Where the question is one of a common or general interest of many persons, or where the parties are numerous, and it is impracticable to bring all before the court within a reasonable time, one or more may sue or defend for the benefit of all."¹¹ However, the court's equation of class action procedure with the doctrine of virtual representation meant that class action procedure in Arkansas under the statute would be of no benefit to consumer or other interests not linked by the degree of relationship required by the doctrine.

Under the doctrine of virtual representation as codified in the Arkansas class action statute, all members of the prospective class had to have a shared factual and legal interest in the subject matter of the litigation.¹² This type of commonality of interest in the subject matter of the litigation required by the doctrine of virtual representation is not present among the prospective class members in most consumer type class actions. The prospective class in the 1975 decision of *Ross v. Arkansas Communities, Inc.*¹³ is a good example of a consumer group among whom that interest is lacking. The *Ross* case also illustrates the pre-*Hudson* attitude of the Arkansas Supreme Court toward class actions.

In *Ross* a purchaser of a lot from a real estate development company sought to represent other purchasers in a class action suit against the developer. The representative plaintiffs claimed that the contracts for purchase of the lots were usurious and that improper late charges on installment payments for the property had been imposed.¹⁴ The Arkansas Supreme Court noted that the required

as title 27, section 809 of the 1947 Arkansas Statutes, the language of the statute remained unchanged. In its *per curiam* order of December 18, 1978 adopting the Rules of Civil Procedure, the Arkansas Supreme Court specifically deemed title 27, section 809 to be superseded by the rules. The rules became effective July 1, 1979. The Arkansas class action statute is derived from section 37 of the Kentucky Civil Code and section 119 of the original Field Code of New York.

10. *Ross v. Arkansas Communities, Inc.*, 258 Ark. 925, 929, 529 S.W.2d 876, 879 (1975).

11. ARK. CIVIL CODE § 33 (replaced in 1962 by ARK. STAT. ANN. § 27-809 (repealed 1978)). In the original Civil Code section 33, the word "where" followed "and" in the statute.

12. *Ross*, 258 Ark. at 930, 529 S.W.2d at 880.

13. 258 Ark. 925, 529 S.W.2d 876 (1975).

14. *Id.* at 927, 529 S.W.2d at 878.

commonality of interest in the subject matter was not present because each lot owner's legal interest was limited to his or her own property.¹⁵ In *Ross* and in other class action cases under the statute, the court characterized this aspect of class action procedure as a requirement that there be both common questions of law *and* common questions of fact applicable to all members of the class.¹⁶

Although the question was not specifically addressed by the court, the "common questions of law" part of the class action requirement was probably satisfied in *Ross*: if one contract for purchase was at a usurious interest rate, then other similar contracts would also have been usurious. However, there was no "common question of fact" as defined by the court because the lot owners had no legal interest in each others' lots:

The interest of appellant is the right to have the validity of her individual contract determined. She has no interest in the validity or invalidity of the contracts of any other purchaser. Similarly no other purchaser has any interest in her contract. Their rights being several there cannot be a class action as there is not a common bond or common claim and each will stand or fall on its own individual merit.¹⁷

In addition, the *Ross* court noted that use of class action procedure must be superior to the bringing of individual suits for the fair and efficient adjudication of the controversy.¹⁸ The view that class action procedure was not a method of adjudication superior to individual lawsuits was also typical of the pre-*Hudson* attitude of the Arkansas Supreme Court.¹⁹

B. Facilitating the Transition to a Liberalized Class Action Procedure: Interlocutory Appeal of Certification Decisions

Perhaps the most important factor facilitating the liberalization of Arkansas class action procedure was a seemingly insignificant ancillary procedural decision in the 1975 *Ross* case, the case previously noted as typifying the court's traditional near hostile attitude toward class action procedure.²⁰ As an initial matter in *Ross*, the Arkansas

15. *Id.* at 929-30, 529 S.W.2d at 879-80.

16. *Id.* at 930, 529 S.W.2d at 880.

17. *Id.* at 929, 529 S.W.2d at 879.

18. *Id.* at 930, 529 S.W.2d at 880.

19. *See Cooper Communities, Inc. v. Sarver*, 288 Ark. 6, 9, 701 S.W.2d 364, 365 (1986); *Ford Motor Credit Co. v. Nesheim*, 287 Ark. 78, 83-84, 696 S.W.2d 732, 736 (1985); *Drew v. First Fed. Sav. & Loan Ass'n*, 271 Ark. 667, 670, 610 S.W.2d 876, 877-78 (1981).

20. *See supra* text accompanying notes 13-19.

Supreme Court held that the trial court's order of dismissal prohibiting the suit from proceeding as a class action was a final and appealable order because "the action on behalf of the class members was ended."²¹ With the class action aspect of the case at an end, a "distinct and severable branch" of the case had been finally determined and the class certification decision was subject to interlocutory appeal.²²

21. *Ross v. Arkansas Communities, Inc.*, 258 Ark. 925, 927, 529 S.W.2d 876, 878-79 (1975); *see also* *Drew v. First Fed. Sav. & Loan Ass'n*, 271 Ark. 667, 669, 610 S.W.2d 876, 877 (1981).

22. *Ross*, 258 Ark. at 927, 529 S.W.2d at 878-79. As authority for its holding that the trial court's order declining to certify the case as a class action was subject to interlocutory appeal the Arkansas Supreme Court cited an Arkansas case, *Parker v. Murry*, 221 Ark. 554, 254 S.W.2d 468 (1953), and the United States Supreme Court's decision in *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974). *Eisen* is of limited authority for the proposition that decisions not to certify a class are subject to interlocutory appeal because the issue of the appealability of certification decisions was not considered in that case. The issue decided by the Court in *Eisen* was that the trial court's order imposing 90% of the costs of notice on the defendants was "a final disposition of a claimed right which is not an ingredient of the cause of action and does not require consideration with it" and thus appealable as a final, not interlocutory, order under 28 U.S.C. § 1291. *Id.* at 172 (quoting *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546-47 (1949)).

Four years after the *Eisen* decision, the United States Supreme Court held in *Coopers & Lybrand v. Livesay* that prejudgment orders denying class certification are not appealable in the federal court system. *Coopers & Lybrand v. Livesay*, 437 U.S. 463 (1978). Contrary to the view of the Arkansas Supreme Court, the United States Supreme Court found that orders passing on class certification do not "come within the 'small class' of decisions excepted from the final-judgment rule . . . the order must conclusively determine the disputed question, resolve an important issue completely separate from the merits of the action, and be effectively unreviewable on appeal from a final judgment." *Id.* at 468.

In *Ford Motor Credit Co. v. Nesheim*, 285 Ark. 253, 686 S.W.2d 777 (1985), the Arkansas Supreme Court addressed the question of whether trial court decisions certifying class actions were subject to interlocutory appeal. In holding that they were, the court said:

We did not adopt the federal rule of civil procedure pertaining to class actions. *See* Fed. R. Civ. P. 23. However, we believe it would be best to allow appeals from such orders [certifying class actions] and our reasoning is the same given by the United States Court of Appeals for the Second Circuit in *Eisen v. Carlisle & Jacquelin*, 479 F.2d 1005 (2d Cir. 1973): An order sustaining a class action allegation involves issues 'fundamental to the further conduct of the case'; . . . [sic] the order is also separable from the merits of the case; and irreparable harm to a defendant in terms of time and money spent in defending a huge class action when an appellate court many years later decides such an action does not conform to the requirements of Rule 23, is evident.

Id. at 254, 686 S.W.2d at 777.

The Second Circuit's doctrine allowing interlocutory appeals of class certification decisions was, as indicated above, rejected in 1978 by the United States Supreme Court in *Coopers & Lybrand v. Livesay*, 437 U.S. 463 (1978).

Contemporaneous with its decision in the *Nesheim* case, the Arkansas Supreme

Without provision for interlocutory appeal of decisions adverse to class certification, many consumer class action cases would not survive the decision not to certify. The decision not to certify would "sound the death knell"²³ of the class action case because as a practical matter there would not be sufficient economic incentives for the representative plaintiffs to proceed with the case on an individual basis to a final appealable judgment.²⁴

The provision for interlocutory appeal of trial court decisions not to certify class actions allowed presentation to the Arkansas Supreme Court of class action issues in many of the cases leading to the liberalization of Arkansas class action procedure. Absent provision for interlocutory appeal, those issues may never have reached the court because the representative plaintiffs would not have pursued the cases to final appealable judgment. In *Hudson* itself, the court noted that "the evidence so far shows that each putative class member has a claim that is too small to permit pursuing it economically."²⁵

Court amended Arkansas Rule of Appellate Procedure 2(a)(9) to allow interlocutory appeals of decisions both granting and denying class certification. The appealability of decisions in regard to class certification is one of several factors distinguishing Arkansas class action procedure from federal court class action procedure.

23. Prior to the United States Supreme Court's decision in *Coopers & Lybrand v. Livesay*, 437 U.S. 463 (1978), several Federal Circuit Courts of Appeals had held that an order denying class certification was appealable if it was likely to sound the "death knell" of the litigation. See *Ott v. Speedwriting Publishing Co.*, 518 F.2d 1143 (6th Cir. 1975); *Hartmann v. Scott*, 488 F.2d 1215 (8th Cir. 1973); *Eisen v. Carlisle & Jacquelin*, 370 F.2d 119 (2d Cir. 1966), *cert. denied*, 386 U.S. 1035 (1967). As explained by the United States Supreme Court, the "death knell" doctrine assumed that without the incentive of group recovery, the representative plaintiffs would not pursue the lawsuit to a final judgment and then seek appellate review of an adverse class determination. *Coopers & Lybrand*, 437 U.S. at 469-70. In *Coopers & Lybrand* the Court rejected the "death knell" doctrine for the federal courts.

24. In the 1991 decision of *Summons v. Missouri Pacific Railroad*, a class action involving a class of potentially 5,000 members, the Arkansas Supreme Court observed:

If a trial court's decision not to certify a class action in this type case is at all reviewable, then this is the time and the sort of case in which to review it. That is especially so when it is possible that a large number of persons who may have legitimate claims not worth pursuing because of the costs of our system of justice may lose those claims if they are not allowed to proceed together as a class. By not certifying a class, a trial court can cause the problem to "go away" to the extreme disadvantage of the claimants unless that decision is reviewable.

Summons v. Missouri Pac. R.R., 306 Ark. 116, 128, 813 S.W.2d 240, 246 (1991).

25. *International Union of Elec., Radio & Mach. Workers v. Hudson*, 295 Ark. 107, 118, 747 S.W.2d 81, 87 (1988). In *Hudson*, the defendants appealed the trial court's decision to certify the case as a class action.

C. Transition: Arkansas Class Action Procedure from Adoption of the Arkansas Rules of Civil Procedure to *Hudson*

From the last of the class action decisions prior to the 1979 adoption of the Arkansas Rules of Civil Procedure to the 1988 *Hudson* decision, the Arkansas Supreme Court's view of the efficacy of class action procedure shifted in almost imperceptible increments from a position of near disdain to one of full appreciation. The shift is an excellent example of the evolutionary process of common law interpretation resulting ultimately in the inversion of settled doctrine. In the case of Arkansas class action procedure, the process required a series of five decisions over the course of seven years.

Although not recognized at first, the evolution of Arkansas class action doctrine began on July 1, 1979, the effective date of the Arkansas Supreme Court's adoption of the Arkansas Rules of Civil Procedure.²⁶ This set of eighty-six rules was modeled after the Federal Rules of Civil Procedure²⁷ and was designed to address the need for a comprehensive and comprehensible body of procedural law governing the conduct of civil lawsuits in Arkansas.²⁸ The Rules of Civil Procedure replaced a hodgepodge of statutes and ad hoc rules adopted over the course of the history of the Arkansas court system.²⁹ One of the new rules, Rule 23, replaced the class action statute.

26. The Arkansas Rules of Civil Procedure were adopted by per curiam order of the Arkansas Supreme Court issued on December 18, 1978. The order recited that the Rules were adopted pursuant to legislative authority (Act 38 of 1973) and the court's "constitutional and inherent power to regulate procedure in the courts" 264 Ark. 964 (1978).

27. The Federal Rules of Civil Procedure were adopted by the United States Supreme Court effective September 16, 1938. 4 CHARLES A. WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1004, at 28 (1969).

28. See generally James W. Spears, *Comment: The 1979 Civil Procedure Rules*, 2 U. ARK. LITTLE ROCK L.J. 89 (1979); Walter Cox & David Newbern, *New Civil Procedure: The Court that Came in from the Code*, 33 ARK. L. REV. 1 (1979); Ralph C. Barnhart, *Pleading Reform in Arkansas*, 7 ARK. L. REV. 1 (1952-53).

29. The Arkansas Supreme Court's per curiam orders of December 18, 1978, at 264 Ark. 964, November 24, 1986, at 290 Ark. 616, and November 21, 1988, at 297 Ark. 632, deemed as specifically superseded numerous sections of the Arkansas statutes governing civil procedure. In addition, a general supersession rule adopted contemporaneously with the rules deemed as superseded all laws in conflict with the newly adopted rules of civil procedure. Recognizing that the Arkansas Rules of Civil Procedure had also supplanted the Uniform Rules for Circuit and Chancery Court, the court, by per curiam order of December 21, 1987, at 294 Ark. 664, 742 S.W.2d 551, abolished those rules effective March 14, 1988. By the same per curiam order and for similar reason, the court abolished Rule 83 of the Arkansas Rules of Civil Procedure which had authorized the adoption of supplemental rules by local chancery and circuit courts. The effect of that order was to abolish all local rules for chancery and circuit courts.

Although much of Rule 23 was a verbatim reiteration of the repealed statute, a potentially significant change in the class action standard of Rule 23 was that the conjunctive "common questions of law *and* fact" language was eliminated. Under the rule, cases could proceed as class actions if, after satisfying the other requirements of the rule, there were "questions of law *or* fact common to the members of the class."³⁰ The one word change proved to be the opening wedge through which the Arkansas Supreme Court eventually liberalized operation of the entire rule.

The first case to note the change of the common question of law-fact requirement from the conjunctive "and" to the disjunctive "or" was the 1981 decision of *Drew v. First Federal Savings & Loan Ass'n*.³¹ In *Drew* the plaintiffs sought to represent a class of persons whom the savings and loan had allegedly charged a usurious mortgage assumption fee.³² The Arkansas Supreme Court upheld the trial court's refusal to certify the proposed class. It noted that in decisions interpreting the repealed class action statute, doubts had not been resolved in favor of class actions; the statute had been interpreted restrictively; the court did not copy Federal Rule 23 in adopting the Arkansas Rules of Civil Procedure as it had done with many of the federal rules; and the language of the repealed statute had been adopted verbatim as subsection (a) of Arkansas Rule 23.³³ However, the court did recognize that:

On the other hand, we liberalized our restrictive holding in *Ross* by providing in subsection (b) that a class action may be maintained if the trial court finds that the questions of law *or* fact common to the members of the class predominate over any questions affecting only individual members and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy.³⁴

The court in *Drew* did conclude that the principal question of law in regard to the legality of the assumption fee was common to the members of the prospective class.³⁵ However, it found that because a number of issues individual to each member of the

30. Following 1991 amendments to Rule 23, the "law or fact" language is now found in both subdivisions (a)(2) and (b) of the rule. ARK. R. CIV. P. 23(a)(2), (b). Prior to the amendments, the language was found only in subdivision (b) of ARK. R. CIV. P. 23. Ark. R. Civ. P. 23(b) (1990).

31. 271 Ark. 667, 610 S.W.2d 876 (1981).

32. *Id.* at 668, 610 S.W.2d at 876.

33. *Id.* at 670, 610 S.W.2d at 877-78.

34. *Id.*

35. *Id.* at 670, 610 S.W.2d at 878.

prospective class would have to be determined, under Rule 23 “a class action would not be superior to individual remedies.”³⁶

In *Hudson* and later cases the court would recognize that the matter of “individual remedies” did not necessarily dictate non-certification of class status.³⁷ After *Hudson* the question of individual remedies could be taken up, if necessary, subsequent to the resolution of issues common to the class, such as the defendant’s liability.³⁸

The court in *Drew* also expressed concern as to whether the case proceeding as a class action would be “fair” to the defendant savings and loan.³⁹ Unfairness to the defendant was thought to stem from the possibility that in a class action the defendant would be precluded from presenting individual defenses to claims of class members.⁴⁰ In *Hudson* and its progeny, the concern of class action “fairness” to the defendant was turned on its head by the court’s concluding that a class action would be fairer to the defendant than relitigation of the same issues in individual suits brought by prospective class members.⁴¹

In the next case in the progression, the 1985 decision of *Ford Motor Credit Co. v. Nesheim*,⁴² the Arkansas Supreme Court reversed the trial court’s decision certifying the class. Factually the case was similar to *Drew*, and the court’s decisional process was also similar to that in *Drew*. Again, the issue was usury. Again, the court recited the history of class action procedure in Arkansas, relying on the pre-Rule 23 *Ross* case and *Drew* to note that both the repealed class action statute and Rule 23 had been strictly construed and that, “unlike the federal courts, we do not resolve doubts in favor of class actions.”⁴³

However, in *Nesheim* the court’s now compulsory declaration of aversion toward class action procedure was limited to a brief,

36. *Id.*

37. *See infra* part II.D-E.

38. *See infra* part II.D-E.

39. *Drew*, 271 Ark. at 670-71, 610 S.W.2d at 878.

40. *Id.* at 671, 610 S.W.2d at 878. In regard to the inability of the defendant to present individual defenses, the court illogically stated:

Undoubtedly First Federal itself treated the borrowers as a class in exacting a uniform fee for everyone, but its conduct was not fraudulent or criminal. Consequently we cannot fairly hold [by recognizing class status] that First Federal is somehow unable to present whatever defense or mitigation it may have in individual instances.

Id.

41. *See infra* text accompanying note 77.

42. 287 Ark. 78, 696 S.W.2d 732 (1985), *overruled by* International Union of Elec., Radio & Mach. Workers v. Hudson, 295 Ark. 107, 747 S.W.2d 81 (1988).

43. *Id.* at 83, 696 S.W.2d at 736.

final afterthought paragraph. In addition, the court clearly laid to rest its oft expressed concern of insufficient common legal interest connecting the members of a consumer class:

This Court has little difficulty finding that the prerequisites of subdivision (a) are satisfied here. Certainly, the parties are numerous, making it impracticable to bring all of them before the Court within a reasonable time. It can also be said that a common question exists as to whether Ford Motor Credit Company's actions in charging interest at a rate in excess of that allowed by law and then attempting to correct its contract to conform with the law gives rise to a cause of action in favor of its Arkansas customers.⁴⁴

In overruling the trial court's certification decision, the *Nesheim* court relied on the subsection (b) requirement of Rule 23 that the common questions predominate over questions affecting only individual members of the prospective class and that a class action be superior to other methods for the fair and efficient adjudication of the case.⁴⁵ The court found that the possibility of assertion of individual defenses and counterclaims by the defendant precluded a finding that the common question as to whether the rate of interest was usurious predominated over the individual questions.⁴⁶

The possibility that the individual questions would cause the case to "splinter" into many individual suits again led the court to the conclusion that a class action would not be a superior method of adjudication to individual suits by class members.⁴⁷ According to the court, the possibility of "splintering" was also cause for concern, first expressed in *Ross*, about practical problems of management of the class action:

The splintering of this action into a myriad of individual suits would, in turn, create serious problems of manageability. We recognized the importance of such considerations in *Ross v. Arkansas Communities, Inc.*, 258 Ark. 925, 529 S.W.2d 876 (1975), a purported class action, like this one, alleging usury. In *Ross*, we said: Moreover, this Court must be realistic in its appraisal of the situation, and we cannot ignore the serious practical problems which would arise if we allowed the case to proceed as a class action. Considerable expense would be involved.

44. *Id.* at 80-81, 696 S.W.2d at 734.

45. *Id.* at 81-82, 696 S.W.2d at 734.

46. *Id.* at 82, 696 S.W.2d at 735.

47. *Id.*

How could the limited staff of the Chancery Court take care of the necessary proceedings, answer the inquiries for further information on the 833 transactions and keep the members of the class advised as to the status of the case thereafter? It is apparent a maze of procedural difficulties would be encountered. The procedural problems would be compounded in this case, involving, as it does, 6,000 separate retail installment contracts.⁴⁸

Just six years later in *Security Benefit Life Insurance Co. v. Graham*,⁴⁹ the Arkansas Supreme Court would find the possibility that the law of thirty-nine states would have to be determined in regard to one issue in that class action case would "not seem a particularly daunting or unmanageable task for the parties or for the trial court."⁵⁰

In yet another example of a basic philosophic view of the value of the class action that would shortly be inverted, the court in *Nesheim* found that neither the prospective class members nor the defendant were harmed by failure of the case as a class action:

[I]t is significant that no one will be prejudiced by the denial of class certification. Appellees certainly will not be prejudiced, for they are perfectly free to pursue their individual claims in this action. Other similarly situated persons interested in penalizing Ford Credit are likewise free to file individual actions.⁵¹

The next way station along the road to *Hudson's* reformation of Arkansas class action procedure is a case that likely would have succeeded as a class action even under the repealed class action statute. In *Cooper Communities, Inc. v. Sarver*,⁵² property owners in a real estate development challenged the developer's use of a gate house as an office for the developer's real estate salespersons.⁵³ Because the gate house was owned by the property owners association and was leased by the association to the developer, all of the association members had the type of shared legal interest in the subject matter of the litigation required under the repealed class action statute.⁵⁴

The significance of *Sarver* in the progression toward *Hudson* is limited. However, *Sarver* was the first consumer class action

48. *Id.* at 82-83, 696 S.W.2d at 735.

49. 306 Ark. 39, 810 S.W.2d 943 (1991).

50. *Id.* at 44, 810 S.W.2d at 946.

51. *Ford Motor Credit Co. v. Nesheim*, 287 Ark. 78, 83, 696 S.W.2d 732, 736 (1985), *overruled by* International Union of Elec., Radio & Mach. Workers v. *Hudson*, 295 Ark. 107, 747 S.W.2d 81 (1988).

52. 288 Ark. 6, 701 S.W.2d 364 (1986).

53. *Id.* at 7-8, 701 S.W.2d at 364.

54. *Id.* at 9, 701 S.W.2d at 365.

recognized by the Arkansas Supreme Court under Rule 23.⁵⁵ In addition, the court specifically found that the questions common to class members would predominate over questions affecting only individual members and that a class action would be a superior method of adjudication to individual lawsuits by class members.⁵⁶ In *Drew and Nesheim* the predominance and superiority issues had been the major stumbling blocks precluding recognition of class status.⁵⁷

The final precursor to *Hudson, Arkansas Louisiana Gas Co. v. Morris*,⁵⁸ predates *Hudson* by little more than one month.⁵⁹ *Morris* involved a prospective class of lessors of several hundred mineral tracts in three western Arkansas counties.⁶⁰ The claim on behalf of the class was that royalty payments on certain natural gas wells should be based upon the proceeds from the sale of gas from the wells rather than on "fixed price" leases entered into in the 1940s and 1950s.⁶¹ In conclusory fashion the court found that the numerosity and common questions of law or fact requirements of Rule 23 were satisfied.⁶²

Relying on the concern expressed in *Nesheim* in regard to questions of fact predominating over questions common to the class,⁶³ the defendant in *Morris* contended that the plaintiffs' complaint raised individual questions of detrimental reliance, mutual mistake or unilateral mistake accompanied by fraud, and inequitable conduct that would predominate over the questions common to the class and would be better resolved through individual suits.⁶⁴ Based on the analysis in its previous class action decisions under Rule 23, the expected response of the Arkansas Supreme Court would have been agreement with defendant's argument, finding that the resolution of the individual questions would lead to the case splintering "into a myriad of individual suits."⁶⁵ However, in *Morris* the court matter of factly consigned the splintering concern to a position of secondary importance to the resolution of questions common to the class:

55. The Arkansas Rules of Civil Procedure were adopted July 1, 1979; *Sarver* was decided January 13, 1986.

56. *Sarver*, 288 Ark. at 9, 701 S.W.2d at 365.

57. See *supra* notes 36-40, 45-48 and accompanying text.

58. 294 Ark. 496, 744 S.W.2d 709 (1988).

59. *Morris* was decided on February 16, 1988; *Hudson* on March 21, 1988.

60. *Morris*, 294 Ark. at 497, 744 S.W.2d at 709.

61. *Id.*

62. *Id.* at 499, 744 S.W.2d at 710.

63. *Ford Motor Credit Co. v. Nesheim*, 287 Ark. 78, 81, 696 S.W.2d 732, 734-35 (1985), *overruled by* International Union of Elec., Radio & Mach. Workers v. *Hudson*, 295 Ark. 107, 747 S.W.2d 81 (1988).

64. *Morris*, 294 Ark. at 498, 744 S.W.2d at 710.

65. See, e.g., *Nesheim*, 287 Ark. at 82, 696 S.W.2d at 735.

If the trial court finds that the evidence presents individual questions of reliance or mistake, it could either defer those individual questions until after it disposed of the questions common to the class, or at any time prior to judgment, order an amendment of the pleadings eliminating therefrom all reference to representation of absent persons, and order entry of judgment in such form as to affect only the parties to the action and those who were adequately represented.⁶⁶

In *Hudson* and subsequent cases, deferral became the standard response to the individual questions concern.

In disposing of the splintering argument, the court eliminated the last remaining obstacle to the transformation of Arkansas class action procedure that was to be realized one month later in *Hudson*. Nevertheless, the court still felt obliged to close with its standard declaration of general antipathy toward liberal class action procedure:

Although our class action rule is patterned somewhat after the federal rule, there is a considerable difference in application. The federal rule leans toward allowing class actions whereas our position tends to discourage class actions if the matter can be handled by individual action. But in *Cooper Communities, Inc. v. Sarver . . .* and *Drew v. First Federal Savings & Loan Association of Fort Smith . . .*, we held that in determining the appropriateness of a class action, the trial judge has broad discretion.⁶⁷

Though the court apparently felt compelled to restate its conservative view of class action procedure, a subtle shift in attitude is reflected in that closing paragraph in *Morris*. This shift is evidenced in the following two ways. First, whereas seven years earlier in declining to allow class status in *Drew*, the court noted that, “[i]t is significant that when we adopted our Rules of Civil Procedure in 1978 we did not copy Federal Rule 23, as we did many of the federal rules,”⁶⁸ the court conceded in *Morris* that Arkansas Rule 23 “is patterned somewhat after the federal rule.”⁶⁹ Second, the court in *Morris* was willing to allow the case to proceed as a class action based, in part, on its deferral to the “broad discretion” of the trial judge in making the class certification decision.

D. Evolution Completed: *International Union of Electrical, Radio and Machine Workers v. Hudson*

The *Hudson* case was brought as a class action on behalf of “at least several hundred” nonunion workers at a Sanyo plant in

66. *Morris*, 294 Ark. at 499, 744 S.W.2d at 710-11.

67. *Id.* at 499-500, 744 S.W.2d at 711.

68. *Drew v. First Fed. Sav. & Loan Ass'n*, 271 Ark. 667, 670, 610 S.W.2d 876, 877-78 (1981).

69. *Morris*, 294 Ark. at 499, 744 S.W.2d at 710-11.

Forrest City against an international union and the union's local.⁷⁰ The claims asserted on behalf of the prospective class members were for property damage and personal injuries allegedly sustained by the nonunion workers as a result of union activities.⁷¹

In reviewing Arkansas class action procedure, the *Hudson* court admitted that the Arkansas Supreme Court had "not been clear in the interpretation of Rule 23."⁷² Addressing the extent to which Arkansas had adopted Federal Rule 23 and the change in the law-fact language in Rule 23 from the conjunctive "and" to the disjunctive "or," the court said:

It seems apparent that the spirit of the federal rule is to be found in our Rule 23 even if all the words are not. Our attempts to cling to our pre-rule tradition may have been inconsistent with the rule. Reporter's Note 1. states the rule was based on a superseded statute which contained few procedural guidelines and that it does not change prior law. While the note is correct in stating that the rule, like the statute, has a paucity of procedural directions, we recognized in the *Drew* case that the law has been changed to "liberalize" the class action, at least in one respect. Use of it will obviously be more extensive if there need no longer be common questions of law and fact.⁷³

That "the spirit of the federal rule is to be found in our Rule 23 even if all the words are not" is a remarkable conclusion from a court that only three years previously had contrasted class action procedure in the federal court system with that in the Arkansas courts by saying that "unlike the federal courts, we do not resolve doubts in favor of class actions" and also noting that the Arkansas rule had been given a "restrictive" interpretation.⁷⁴

In regard to liberalizing consumer type class action procedure in Arkansas, the *Hudson* case was also significant for confirming the shift in the court's attitude in recognizing class action procedure as being a method of adjudication superior to individual lawsuits by the potential class members. The pre-*Hudson* attitude had been that individual suits by potential class members would almost always be the superior method of adjudication for consumer type class

70. *International Union of Elec., Radio & Mach. Workers v. Hudson*, 295 Ark. 107, 109-10, 747 S.W.2d 81, 82-83 (1988).

71. *Id.*

72. *Id.* at 111, 747 S.W.2d at 83.

73. *Id.* at 116, 747 S.W.2d at 86.

74. *Ford Motor Credit Co. v. Nesheim*, 287 Ark. 78, 83-84, 696 S.W.2d 732, 736 (1985), *overruled by* *International Union of Elec., Radio & Mach. Workers v. Hudson*, 295 Ark. 107, 747 S.W.2d 81 (1988).

issues.⁷⁵ Individual suits would be a superior method of adjudication even if the case presented some common questions, such as whether the same legal standard should be applied to the liability issue in each individual case. A number of individual suits would be superior to one class action because individual questions, such as the amount of damages recoverable by each class member or defenses applicable only to some members of the class, would still have to be decided by the court on an individual basis even if some common issues could be determined for the entire class.⁷⁶

However, in *Hudson* the court found that its long expressed concern about the class action splintering into a series of separate, unmanageable cases was unwarranted:

By limiting the issue to be tried in a representative [class] fashion to the one that is common to all, the trial court can achieve real efficiency. The common question here is whether the unions can be held liable for the actions of their members during the strike. If that question is answered in the negative, then the case is over except for the claims against the named individual defendants which could not be certified as a class action. If the question is answered affirmatively, then the trial court will surely have "splintered" cases to try with respect to the damages asserted by each member of each of the subclasses, but efficiency will still be achieved, as none of the plaintiffs would have to prove the unions' basic liability.⁷⁷

In previous decisions the court had also expressed concern about the fairness to both the plaintiff and the defendant of a class action which might ultimately splinter into numerous individual cases on issues such as the damages to which each class member might be entitled. Addressing the "fairness issue" in connection with the possibility that the case could splinter into individual cases, the court in *Hudson* stated:

Is that [certification of the class] unfair? It is not unfair to the unions, as they will be able to defend fully on the basic liability claim, and they will have the opportunity to present individual defenses to the claims of individual class members if their liability has been established in the first phase of the trial. They lose nothing. Would it be fair to the class members to require them

75. See *supra* part II.A-B.

76. See, e.g., *Ross v. Arkansas Communities, Inc.*, 258 Ark. 925, 930-32, 529 S.W.2d 876, 880-81 (1975).

77. *Hudson*, 295 Ark. at 117, 747 S.W.2d at 87.

to sue individually? The evidence so far shows that each putative class member has a claim that is too small to permit pursuing it economically. If they cannot sue as a class, the chances are they will not sue at all. We agree with the unions' argument that the sole fact that the claims are small is not a reason to permit a class action, but it is a consideration which has appeared when other courts, as we must do, have considered whether the class action is superior to other forms of relief.⁷⁸

Again, the court's shift in attitude in the three years from *Nesheim* to *Hudson* is remarkable. In regard to the impact on putative class members of the failure to certify the class, that attitude shifted from the viewpoint expressed in *Nesheim* that no one will be prejudiced by the denial of class certification⁷⁹ because class members will be free to pursue individual actions to *Hudson's* concern that if class members "cannot sue as a class, the chances are they will not sue at all."⁸⁰

E. Post-*Hudson* Evolution of Arkansas Class Action Procedure

From *Hudson* in 1988 to the present, the Arkansas Supreme Court has considered six appeals challenging a trial court's certification decision.⁸¹ The cumulative effect of those decisions has been to make Arkansas's class action procedure among the most liberal in the United States.⁸²

78. *Id.* at 117-18, 747 S.W.2d at 87.

79. *See supra* text accompanying note 51.

80. *Hudson*, 295 Ark. at 117-18, 747 S.W.2d at 87; *see also supra* text accompanying note 77.

81. The six cases and indication of the specific dates of decisions are: *Union Nat'l Bank v. Barnhart*, 308 Ark. 190, 823 S.W.2d 878 (Feb. 3, 1992); *Summons v. Missouri Pac. R.R.*, 306 Ark. 116, 813 S.W.2d 240 (June 24, 1991); *Security Benefit Life Ins. Co. v. Graham*, 306 Ark. 39, 810 S.W.2d 943 (June 10, 1991); *Lemarco, Inc. v. Wood*, 305 Ark. 1, 804 S.W.2d 724 (Mar. 11, 1991); *First Nat'l Bank v. Mercantile Bank*, 304 Ark. 196, 801 S.W.2d 38 (Dec. 17, 1990); *International Union of Elec., Radio & Mach. Workers v. Hudson*, 295 Ark. 107, 747 S.W.2d 81 (Mar. 21, 1988).

82. The traditional state court view of the class action device in many states has been one approaching overt hostility. For example, Judge Bergan of the New York Court of Appeals in a 1970 decision said of the private class action suit: "without adequate public control they [class action suits] may become instruments of harassment benefiting largely persons who activate the litigation." *Hall v. Coburn Corp. of America*, 259 N.E.2d 720, 723 (N.Y. 1970). *See also* the assessment of state class action procedure in FLEMING JAMES, JR. & GEOFFREY C. HAZARD, JR., *CIVIL PROCEDURE* (3d ed. 1985):

The foregoing concerns [about the efficacy of class action procedure] may explain the hesitancy of many state courts to give as great effect to the

The most significant illustration of the court's philosophical shift in the post-*Hudson* cases is found in *Summons v. Missouri Pacific Railroad*.⁸³ *Summons* was a "mass tort" type class action brought on behalf of a class of several thousand persons⁸⁴ who were evacuated from their homes or businesses as a result of a railroad accident in which a chemical tank car overturned in North Little Rock, Arkansas.⁸⁵ The following elements of that decision reflect the Arkansas Supreme Court's continuing commitment to a fundamentally liberalized class action procedure:

1. Criticism of a New York class action case,⁸⁶ in which class certification was denied, as representing "a traditionally hostile interpretation of the New York class action rule of the sort from which we are willing to part."⁸⁷

2. Reversal of the trial court judge's decision not to certify the class even though in the class action cases from *Hudson* to *Summons* the court had consistently spoken of the trial court's "broad discretion" in making the certification decision.⁸⁸

3. Reversal despite the trial judge's finding that "[a] class action

class suit device as its historical possibilities and the [Federal] Rule 23 precedent have implied that it could have. Whatever the explanation, the fact is that at least until the 1970s state court interpretations of their class action rules tended toward a narrow construction of the permissible use of the device except in the situations where it had been recognized in equity before the codes . . . and [in] the injunction cases.

Id. § 10.22, at 573-74 (footnotes omitted).

83. 306 Ark. 116, 813 S.W.2d 240 (1991).

84. The potential class in *Summons* could have been as large as 3,500 to 5,000 persons. *Id.* at 118, 120, 813 S.W.2d at 241-42.

85. *Id.* at 117, 813 S.W.2d at 241. No member of the class suffered extensive damages as a result of the accident. As explained by the court:

The accident occurred mid-morning on July 8, 1987. A liquid substance was observed to be leaking from the overturned car which was carrying ethylene oxide, an allegedly highly volatile and toxic chemical. The evacuation began with an order by local emergency services personnel at approximately 10:40 a.m. The order was lifted at approximately 4:15 p.m. when it was determined that the liquid leaking from the car was not ethylene oxide, but a non-hazardous refrigerant which was part of the overturned car's container system.

Id. at 118, 813 S.W.2d at 241.

86. *Strauss v. Long Island Sports, Inc.*, 401 N.Y.S.2d 233 (N.Y. App. Div. 1978).

87. *Summons*, 306 Ark. at 124, 813 S.W.2d at 244.

88. *See, e.g.*, *International Union of Elec., Radio & Mach. Workers v. Hudson*, 295 Ark. 107, 116-17, 747 S.W.2d 81, 86 (1988). The primary point of Justice Steele Hays's dissent in *Summons* was that the court had failed to give proper deference to the broad discretion accorded to the trial court in making the class certification decision. *Summons*, 306 Ark. at 130-33, 813 S.W.2d at 247-49.

proceeding would result in indeterminate and chaotic litigation and would cause judicial extravagance rather than judicial economy.”⁸⁹

4. The court’s favorable view of class action procedure as enabling persons having claims too small to merit individual suit to gain access to the justice system:

[I]t is possible that a large number of persons who *may* have legitimate claims not worth pursuing because of the costs of our system of justice may lose those claims if they are not allowed to proceed together as a class. By not certifying a class, a trial court can cause the problem to “go away” to the extreme disadvantage of claimants unless that decision is reviewable. It is especially important that we review an order such as the one in this case given the newness of our decision in the *International Union* case and the recent changes in Rule 23(a).⁹⁰

5. The court’s reversal of the decision not to certify the class even though it recognized that with regard to Federal Rule 23, acknowledged by the court to be the primary source of the Arkansas class action rule, the Advisory Committee to the Federal Rules of Civil Procedure had commented that a class action is “ordinarily not appropriate” in “mass accident” torts such as those involved in the *Summons* case. The Federal Rules Advisory Committee viewed class action procedure as inappropriate for mass accident torts because it concluded that questions not only of damages but of liability and defenses to liability may affect different claimants in different ways. The Arkansas Supreme Court responded that “[t]he repeated litigation of the liability question and the attendant possibilities of inconsistent results in a case like this one outweigh the admitted fact that each claimant will have different damages evidence.”⁹¹

89. *Summons*, 306 Ark. at 119, 813 S.W.2d at 241.

90. *Id.* at 128, 813 S.W.2d at 246 (emphasis added).

91. *Id.* at 124, 813 S.W.2d at 244. In a jurisdiction recognizing offensive use of collateral estoppel, there would not necessarily be repeated litigation of the liability question in a “mass accident” tort case nor would there necessarily be inconsistent results even if the cases were filed as individual rather than class actions. Offensive use of collateral estoppel could estop the defendant from relitigating the liability issue in cases subsequent to a case in which it was found liable in regard to the same issue. Offensive collateral estoppel was adopted by the United States Supreme Court in *Parklane Hosiery Co. v. Shore*, 439 U.S. 322 (1979). The RESTATEMENT (SECOND) OF JUDGMENTS § 29 (1988) defines offensive collateral estoppel as follows:

ISSUE PRECLUSION IN SUBSEQUENT LITIGATION WITH OTHERS

A party precluded from relitigating an issue with an opposing party, in accordance with §§ 27 and 28, is also precluded from doing so with another person unless the fact that he lacked full and fair opportunity to litigate

6. In support of the court's thesis that the class action is the superior method of deciding the typical mass tort case, the court, quoting with approval from a leading law review article, said:

The case-by-case mode of adjudication magnifies this burden [the expense of litigating complex legal and factual issues] by requiring the parties and courts to reinvent the wheel for each claim. The merits of each case are determined *de novo* even though the major liability issues are common to every claim arising from the mass tort accident, and even though they may have been previously determined several times by full and fair trials.⁹²

the issue in the first action or other circumstances justify affording him an opportunity to relitigate the issue. The circumstances to which considerations should be given include those enumerated in § 28 and also whether:

- (1) Treating the issue as conclusively determined would be incompatible with an applicable scheme of administering the remedies in the actions involved;

- (2) The forum in the second action affords the party against whom preclusion is asserted procedural opportunities in the presentation and determination of the issue that were not available in the first action and could likely result in the issue being differently determined;

- (3) The person seeking to invoke favorable preclusion, or to avoid unfavorable preclusion, could have effected joinder in the first action between himself and his present adversary;

- (4) The determination relied on as preclusive was itself inconsistent with another determination of the same issue;

- (5) The prior determination may have been affected by relationships among the parties to the first action that are not present in the subsequent action, or apparently was based on a compromise verdict or finding;

- (6) Treating the issue as conclusively determined may complicate determination of issues in the subsequent action or prejudice the interests of another party thereto;

- (7) The issue is one of law and treating it as conclusively determined would inappropriately foreclose opportunity for obtaining reconsideration of the legal rule upon which it was based;

- (8) Other compelling circumstances make it appropriate that the party be permitted to relitigate the issue.

Although the Arkansas Supreme Court has not recognized offensive collateral estoppel, in the 1993 decision of *Fisher v. Jones*, 311 Ark. 450, 844 S.W.2d 954 (1993), the court apparently rejected the requirement of mutuality of estoppel. The mutuality requirement would stand as the primary obstacle to adoption of offensive collateral estoppel. In *Fisher* the court also noted that the United States Supreme Court had approved offensive use of collateral estoppel in the *Parklane Hosiery Co.* case, that offensive collateral estoppel is more controversial than defensive collateral estoppel, but that it was not an issue in the *Fisher* case. See also the Arkansas Court of Appeals decision in *First Nat'l Bank v. Adair*, 42 Ark. App. 84, 854 S.W.2d 358 (1993).

92. *Summons*, 306 Ark. at 127-28, 813 S.W.2d at 245 (quoting David Rosenberg, *Class Actions for Mass Torts: Doing Individual Justice by Collective Means*, 62 IND. L.J. 561, 563-64 (1986-87)).

7. In reference to the disparity in resources available to an individual pursuing a small claim against a large organization and the organization's resources, the *Summons* court quoted with favor from the same law review article:

Because of their costs-spreading advantages, a defendant firm typically can afford not only to invest more in developing the merits of the claim than the opposing plaintiff attorney, but also to finance a "war of attrition" through costly discovery and motion practice that depletes the adversary's litigation resources. The consequences of redundantly litigating common questions thus skews the presentation of the merits, promotes abusive strategic use of procedure, needlessly consumes public resources, and ultimately drains away a large amount of the funds available to redress, by judgment or settlement, victim losses.⁹³

In addition to the liberalizing effect of the Arkansas Supreme Court's decisions interpreting Rule 23, the rule has been further liberalized through amendments by the court.⁹⁴ The amendments to Rule 23, effective February 1, 1991, were made for several purposes:

1. To clarify the procedure by which the person instituting the class action suit is to give notice to class members of their rights in connection with the suit;⁹⁵

2. To insure that the notice procedure under the rule satisfies the requirements of the decision of the United States Supreme Court in *Phillips Petroleum v. Shutts*.⁹⁶ The new notice procedure was also added to address the concern of the Arkansas Supreme Court expressed in the *Hudson* case⁹⁷ in regard to the lack of a notice provision in the rule;⁹⁸ and

93. *Id.* at 127-28, 813 S.W.2d at 246 (quoting David Rosenberg, *Class Actions for Mass Torts: Doing Individual Justice by Collective Means*, 62 IND. L.J. 561, 571 (1986-87)).

94. The amendments to Rule 23 were adopted by per curiam order of the Arkansas Supreme Court issued on December 10, 1990. That order directed that the amendments were to become effective on February 1, 1991. The order and the amendments are found at 304 Ark. 733, 738-41 (1990).

95. See *Addition to Reporter's Note, 1990 Amendment*, 304 Ark. at 740-41.

96. *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985); see *Addition to Reporter's Note, 1990 Amendment*, 304 Ark. at 740-41. *Shutts*, a case under Kansas state class action procedure, held that when monetary relief is sought, class members must, as a matter of due process, be given notice and afforded the opportunity to "opt out" of the class action. *Shutts*, 472 U.S. at 798. The 1990 amendments establish such a procedure for class actions brought in Arkansas courts by creating a new subdivision (c) to the rule. 304 Ark. at 739.

97. *International Union of Elec., Radio & Mach. Workers v. Hudson*, 295 Ark. 107, 747 S.W.2d 81 (1988).

98. The Arkansas Supreme Court in *Hudson* stated, "[T]he lack of a notice

3. To further conform the provisions of the rule to those of Federal Rule 23.⁹⁹

These amendments also make the procedure more constitutionally sound. Section III.B. discusses the amendments further in a section-by-section analysis of revised Rule 23.¹⁰⁰ The post-*Hudson* cases other than *Summons* address more specific class action issues. The impact of those cases is factored into the analysis in Section III, below, applying the various sections of revised Arkansas Rule 23 to consumer class action cases.

III. CONSUMER CLASS ACTIONS UNDER ARKANSAS LAW

A. The Need For Liberalization of Arkansas Procedure: The Consumer Class Action Under Federal Law

The liberalization of Arkansas's class action procedure is of particular significance for consumer class actions following the near demise of the class action device for use in consumer cases in federal court.¹⁰¹ Tracing the history of the federal rule as a potential consumer protection device, Wright, Miller, and Kane note:

At the time the 1966 revision of Rule 23 was drafted, the extent of its possible applicability to consumer litigation was not fully appreciated. It has been in the years since the rulemakers completed their work that the so-called consumer revolution has come to the fore and the possible use of the class action for asserting the rights of buyers of goods and services has been recognized. Unfortunately, there are very few reported decisions in which Rule 23 has been utilized effectively by groups of consumers. . . .¹⁰²

The same authority concludes that despite arguments in favor of Rule 23's potential for serving as a device to vindicate consumer grievances:

[T]he federal courts generally have not been very receptive to the expansion of the consumer class action concept Until groups

provision in our rule may portend future problems, and it should not be ignored in any general review of our interpretation of the rule." *Id.* at 112, 747 S.W.2d at 84.

99. See *Addition to Reporter's Note, 1990 Amendment*, 304 Ark. at 740-41.

100. See *infra* part III.B.

101. For a discussion of the limitations of the class action device in federal courts, see 7B CHARLES A. WRIGHT ET AL., *FEDERAL PRACTICE AND PROCEDURE* § 1782 (1986).

102. WRIGHT ET AL., *supra* note 101, § 1782.

of consumers can overcome arguments [against use of Rule 23], the effectiveness of Rule 23 as a deterrent against undesirable or unsavory business practices will be relatively small.¹⁰³

The arguments cited by Wright, Miller, and Kane against the use of Federal Rule 23 as a consumer class action device¹⁰⁴ mirror those used by the Arkansas Supreme Court to deny class action status during the pre-*Hudson* era of hostility toward class actions.¹⁰⁵

Because there is no general federal consumer protection law creating a private right of action,¹⁰⁶ most consumer class actions in

103. WRIGHT ET AL., *supra* note 101, § 1782.

104. WRIGHT ET AL., *supra* note 101, § 1782.

105. See *supra* part II.A, C.

106. Although there is no general federal consumer protection statute authorizing a private right of action, some authorities and a few court decisions have attempted to construe § 43(a) of the Lanham Act (15 U.S.C. § 1125(a) (Supp. V 1993)) expansively to provide consumer protection at least against false advertising and other misrepresentations. The Lanham Act generally provides for federal trademark protection.

The primary basis for the expansive reading of § 43(a) is the provision in the statute granting a civil right of action to any person who believes that he is or is likely to be damaged by the use of any false description or representation as defined by the act. 15 U.S.C. § 1125(a) (Supp. V 1993). However, in the leading case, *Colligan v. Activities Club*, 442 F.2d 686 (2d Cir. 1971), *cert. denied*, 404 U.S. 1004 (1971), the United States Court of Appeals for the Second Circuit rejected the application of § 43(a) for the protection of purely consumer interests. *Serbin v. Ziebart Int'l Corp.*, 11 F.3d 1163 (3d Cir. 1993), in accord with the holding in *Colligan*, contains a comprehensive review of the authorities and court decisions construing § 43(a).

Under § 5 of the Federal Trade Commission Act (15 U.S.C. § 45 (1988)) "[u]nfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are declared unlawful." Section 12 of the Act (15 U.S.C. § 52 (1988)) declares that, "[i]t shall be unlawful for any person, partnership, or corporation to disseminate, or cause to be disseminated, any false advertisement . . ." Under those sections the Commission is authorized to seek cease and desist orders and other relief against persons using unfair methods of competition and unfair or deceptive acts or practices, including false advertisements. However, the Act does not create a private right of action.

A 1969 legislative proposal would have created a federal "Consumer Class Action Act." As explained by Senator Tydings, the legislation's sponsor in the Senate, the act would have amended the Federal Trade Commission Act to extend the protection against fraudulent or deceptive practices, condemned by the Act, to consumers through civil actions, including class actions. 115 CONG. REC. 32,142 (1969). The proposal would have amended § 5 of the Federal Trade Commission Act (15 U.S.C. § 45 (1988)) by adding the following: "Consumers who have been damaged by unfair or deceptive acts or practices in commerce are hereby authorized to bring consumer class actions for redress of such damages. . . ." S. 3092, 91st Cong., 1st Sess. (1969).

There are a number of federal statutes providing limited measures of consumer protection in specific substantive law areas. Class actions in federal court under those statutes may be possible pursuant to the court's federal question type juris-

federal court must be brought under diversity of citizenship type jurisdiction.¹⁰⁷ However, the United States Supreme Court has held that in diversity of citizenship type class actions each member of the class must satisfy the amount in controversy requirement.¹⁰⁸ This means that each member of the class must be able to claim damages in excess of \$50,000.¹⁰⁹ Most consumers who have more than \$50,000 at stake in a lawsuit will want to be in control of the litigation and will not desire to be subject to the litigational whims of the named plaintiffs and their counsel in a class action. As a result of the general negative federal court attitude toward class actions, the lack of a general federal consumer protection statute, and the amount in controversy limitation on diversity of citizenship class actions, very few consumer type class actions are now brought in federal court.¹¹⁰ The impact of the liberalized Arkansas class action procedure can be seen most clearly by applying the various provisions of revised Rule 23 to consumer class actions, the most controversial modern class action device.

B. Consumer Class Actions Under the Liberalized Arkansas Procedure

Application of Arkansas Rule 23 to a consumer class action is considered in the following section by section analysis of the rule.

1. *Class Must Be So Numerous That Joinder of All Members Is Impracticable*¹¹¹

The Arkansas Supreme Court has held that a potential class of as few as seventeen members is too small for class status.¹¹² However,

diction (28 U.S.C. § 1331 (1988)) or other specific federal jurisdictional statute. Federal statutes providing consumer protection in specific areas are: the Truth in Lending Act (15 U.S.C. §§ 1601-1667e (1988 & Supp. V 1993)); Fair Credit Reporting Act (15 U.S.C. §§ 1681-1681t (1988 & Supp. V 1993)); Fair Debt Collection Practices Act (15 U.S.C. §§ 1692-1692o (1988 & Supp. V 1993)); Fair Credit Billing Act (15 U.S.C. §§ 1666-1666j (1988)); Equal Credit Opportunity Act (15 U.S.C. §§ 1691-1691e (1988 & Supp. V 1993)); National Bank Act (12 U.S.C. § 85 (1988)); Racketeer Influenced and Corrupt Organizations Act (18 U.S.C. §§ 1961-1968 (1988 & Supp. V 1993)); and Magnuson-Moss Warranty Act (15 U.S.C. §§ 2301-2312 (1988)).

107. The federal diversity of citizenship statute is 28 U.S.C. § 1332 (1988).

108. Zahn v. International Paper Co., 414 U.S. 291, 294-95 (1973).

109. See 28 U.S.C. § 1332(a) (1988).

110. 7B CHARLES A. WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 1782, at 60 (1986); JACK H. FRIEDENTHAL, CIVIL PROCEDURE § 16.4, at 742-43 (1985); see also 7A CHARLES A. WRIGHT, FEDERAL PRACTICE AND PROCEDURE § 1756 (1986).

111. ARK. R. CIV. P. 23(a)(1).

112. City of North Little Rock v. Vogelgesang, 273 Ark. 390, 393-94, 619 S.W.2d 652, 654 (1981).

the size of the class in cases in which the court held class size to be sufficient has ranged from 184¹¹³ class members to at least 3,500 (potentially 5,000).¹¹⁴

Although the size of a consumer class action would depend on the circumstances of the case, almost any consumer class action imaginable would be composed of a sufficiently large class to satisfy the threshold numerosity standard indicated by the Arkansas Supreme Court. The court has not indicated that there is any maximum limit on class size.

In addition, the court has suggested in a number of cases that an unmanageably large class composed of members having somewhat divergent interests could be "splintered" into manageable subclasses having more closely related interests in common.¹¹⁵ The upshot is that a consumer class action would undoubtedly be sufficiently large to satisfy the numerosity requirement, and, even if the class were composed of thousands of members, the court could manage the case by creating various subclasses of persons having common interests.

2. *Questions of Law or Fact Common to the Class*¹¹⁶

Prior to the 1979 revision of Rule 23, the "common law and fact" requirement under the old class action statute would have precluded the possibility that members of a consumer class action could satisfy the prerequisite of commonality. Although it is likely that at least one legal issue in any consumer class action would have presented a question of law common to all class members,¹¹⁷ no class member would have had a legal interest in the factual basis of any other class member's claim. As a result, the prospective class would have failed to satisfy the "common fact" part of the test requiring that all class members share a legal interest in the subject matter of the litigation.¹¹⁸

However, with the change of Rule 23 to require only that a single question of law affect all class members¹¹⁹ and with the

113. *Cooper Communities, Inc. v. Sarver*, 288 Ark. 6, 9, 701 S.W.2d 364, 365 (1986).

114. *Summons v. Missouri Pac. R.R.*, 306 Ark. 116, 120, 813 S.W.2d 240, 242 (1991).

115. See *id.* at 121, 813 S.W.2d at 242; *Lemarco, Inc. v. Wood*, 305 Ark. 1, 4, 804 S.W.2d 724, 726 (1991); *Security Benefit Life Ins. Co. v. Graham*, 306 Ark. 39, 44, 810 S.W.2d 943, 945 (1991); *International Union of Elec., Radio & Mach. Workers v. Hudson*, 295 Ark. 107, 117, 747 S.W.2d 81, 87 (1988).

116. ARK. R. Crv. P. 23(a)(2) (Revision effective February 1, 1991).

117. The basis for the defendant's liability would be common to all class members in most class actions.

118. See *supra* part II.A, C.

119. See *supra* text accompanying notes 26-36.

transformation in attitude of the Arkansas Supreme Court to favor class actions,¹²⁰ an Arkansas court considering class certification in a consumer class action would almost certainly recognize the question of the basis of the defendant's liability as being a common question of law among the members of the purported class.

3. *Claims or Defenses of the Representative Parties Are Typical of the Claims or Defenses of the Class*¹²¹

Explaining the "typicality" requirement, the Arkansas Supreme Court, in the 1991 decision of *Summons v. Missouri Pacific Railroad*,¹²² and quoting the leading authority on class actions, said:

Typicality determines whether a sufficient relationship exists between the injury to the named plaintiff and the conduct affecting the class, so that the court may properly attribute a collective nature to the challenged conduct. In other words, when such a relationship is shown, a plaintiff's injury arises from or is directly related to a wrong to a class, and that wrong includes the wrong to the plaintiff. Thus, a plaintiff's claim is typical if it arises from the same event or practice or course of conduct that gives rise to the claims of other class members, and if his or her claims are based on the same legal theory. When it is alleged that the same unlawful conduct was directed at or affected both the named plaintiff and the class sought to be represented, the typicality requirement is usually met irrespective of varying fact patterns which underlie individual claims.¹²³

As previously indicated,¹²⁴ the *Summons* case involved claims of several thousand class members for various damages arising out of a chemical spill from an overturned railroad tank car in North Little Rock, Arkansas.¹²⁵ Although the named plaintiffs' claims were only for their inconvenience and fear in having to leave their homes and for the expense of dining out while other members of the class had claims for physical harm,¹²⁶ the court, under the liberal typicality standard stated above, found the named plaintiffs' claims to be typical of those of the class.¹²⁷ According to the court, the plaintiffs'

120. See *supra* part II.D, E.

121. ARK. R. Civ. P. 23(a)(3).

122. 306 Ark. 116, 813 S.W.2d 240 (1991).

123. *Id.* at 122, 813 S.W.2d at 243 (quoting HERBERT B. NEWBERG, NEWBERG ON CLASS ACTIONS § 3.13, at 166-67 (1985)).

124. See *supra* text accompanying notes 82-84.

125. *Summons*, 306 Ark. at 117-18, 813 S.W.2d at 241.

126. *Id.* at 121, 813 S.W.2d at 242.

127. *Id.* at 121, 813 S.W.2d at 243.

claims were typical "in the sense that they arise from the alleged wrong to the class which includes the wrong allegedly done to them, and that is sufficient."¹²⁸

The claims of the class members in consumer class actions are united primarily by the wrong done to all class members by the defendant. As a result, the claims of the named plaintiffs in a typical consumer class action should easily satisfy the liberal "typicality" test announced by the Arkansas Supreme Court in *Summons*.

4. *Representative Parties Fairly and Adequately Protect the Interests of the Class*¹²⁹

The adequacy of representation issue goes both to the ability of the named plaintiffs to serve as leaders and managers of the class action and to the competence of counsel employed to litigate the case on behalf of the class.¹³⁰ In a 1990 case, *First National Bank v. Mercantile Bank*,¹³¹ the Arkansas Supreme Court, citing a decision of the Federal District Court for the Western District of Arkansas,¹³² identified three requirements for service as class representative:

1. The representative counsel must be qualified, experienced, and generally able to conduct the litigation;¹³³

2. There must be no evidence of collusion or conflicting interest between the representative and the class;¹³⁴ and

3. The representative must display some minimal level of interest in the action, familiarity with the practices challenged, and ability to assist in decision making as to the conduct of the litigation.¹³⁵

The Arkansas Supreme Court considered the adequacy of class counsel issue in both the *Summons*¹³⁶ and *First National Bank*¹³⁷ cases. A review of those cases indicates that the court clearly views raising and establishing lack of adequacy of class counsel as part of the defendant's burden. In *First National Bank*, the court found

128. *Id.*

129. ARK. R. Civ. P. 23(a)(4).

130. *First Nat'l Bank v. Mercantile Bank*, 304 Ark. 196, 200, 801 S.W.2d 38, 40-41 (1990).

131. 304 Ark. 196, 801 S.W.2d 38 (1990).

132. *Gentry v. C & D Oil Co.*, 102 F.R.D. 490, 493 (W.D. Ark. 1984).

133. *First Nat'l Bank*, 304 Ark. at 200, 801 S.W.2d at 40-41.

134. *Id.* at 200, 801 S.W.2d at 41.

135. *Id.*; accord *Union Nat'l Bank v. Barnhart*, 308 Ark. 190, 198, 823 S.W.2d 878, 882 (1992).

136. *Summons v. Missouri Pac. R.R.*, 306 Ark. 116, 813 S.W.2d 240 (1991).

137. *First Nat'l Bank v. Mercantile Bank*, 304 Ark. 196, 801 S.W.2d 38 (1990).

class counsel to be adequate in large part because at the trial level the defendant did not contend that the class counsel was inadequate, inexperienced, or unable to conduct the litigation, nor did the defendant raise any allegations of unethical conduct on the part of class counsel or move to disqualify class counsel from conducting the litigation.¹³⁸ Similarly, in *Summons*, the court simply noted that the named plaintiffs had alleged that they were represented by competent counsel and that the defendant had given the court no reason to doubt that allegation.¹³⁹

Although the other prerequisites of Rule 23 could be satisfied with relative ease in a typical consumer class action, the adequacy of class counsel could be raised through an *ad hominem* attack on the named attorneys for the class. Because the Arkansas class action rule has only recently become viable for prosecution of consumer class actions, very few Arkansas lawyers can claim experience as class action attorneys. In addition, questions may be raised in regard to the attorney's initial attempts (or lack thereof) to notify class members and otherwise competently prosecute the case as a class action.¹⁴⁰ Questions may also be raised as to whether the attorney has the resources, both in terms of personnel and finances, to undertake what may well be quite expensive litigation without any certain prospect of recovery.¹⁴¹

However, in the most recent of the post-*Hudson* cases, the 1992 decision of *Union National Bank v. Barnhart*,¹⁴² the Arkansas Supreme Court upheld class certification despite allegations of improper conduct on the part of class attorneys. The action was brought to challenge the authority of the city of Fayetteville, Arkansas, to collect sanitation fees to pay for costs in connection with an aborted attempt to build a solid waste incinerator.¹⁴³ The allegations of impropriety by the attorneys were that the representative plaintiff was "a mere 'pawn in an action being maintained by counsel,'" and that counsel acted improperly by soliciting a plaintiff for financial gain and by providing financial assistance to a client.¹⁴⁴ In dismissing the allegations, the court gave scant consideration to the merits of the alleged misconduct:

138. *Id.* at 200, 801 S.W.2d at 41.

139. *Summons*, 306 Ark. at 122-23, 813 S.W.2d at 243.

140. *See supra* notes 95-98 and accompanying text for a discussion of the requirement of notification to the class.

141. *See infra* text accompanying notes 188-93 for discussion of costs of class notification.

142. 308 Ark. 190, 823 S.W.2d 878 (1992).

143. *Id.* at 192-93, 823 S.W.2d at 879.

144. *Id.* at 194-95, 823 S.W.2d at 880.

[A]bsent more egregious conduct on the part of the class attorneys, we do not believe the rights of the plaintiffs should be prejudiced by denying them class status. . . . Arkansas has not specifically addressed the issue, but the few cases in other jurisdictions in which class action status was denied as the result of an attorney's misconduct, also involved serious questions regarding the lawyer's competence, or deficiencies in meeting the other requirements for a class action.¹⁴⁵

The court, in effect, also held the misconduct allegations to be irrelevant to the class certification decision, saying:

When it otherwise appears that the representative plaintiff will "fairly and adequately protect the interests of the class," allegations of attorney misconduct are more appropriately addressed to the state disciplinary committee.¹⁴⁶

Similar questions may be raised as to the resources available to the named plaintiffs for prosecution of the case as a class action.¹⁴⁷ In addition, the interest of the named plaintiffs in prosecuting the litigation may be questioned.¹⁴⁸ The interest of the named plaintiffs in prosecuting the class action may be in doubt in many consumer class action cases because their enthusiasm for the case as a class action may be considerably less than that of the class counsel who may be anticipating a large legal fee in the event of settlement or recovery.¹⁴⁹ In addition, since recovery of the named plaintiffs will

145. *Id.* at 195, 823 S.W.2d at 880.

146. *Id.*

147. In finding that the representative parties in *Summons* were qualified, the court noted, "Mrs. Summons testified that she understood her obligations in undertaking representation of the class and the possible costs involved. She said she would do whatever was necessary in that respect." *Summons v. Missouri Pac. R.R.*, 306 Ark. 116, 122, 813 S.W.2d 240, 243 (1991).

148. *First Nat'l Bank v. Mercantile Bank*, 304 Ark. 196, 200-01, 801 S.W.2d 38, 41 (1990).

149. Although in general Arkansas follows the American rule "that attorney fees are not chargeable as costs in litigation unless specifically permitted by statute," the Arkansas Supreme Court has recognized an exception "where a plaintiff has created or augmented a common fund or where assets have been salvaged for the benefit of others as well as the plaintiff." *Millsap v. Lane*, 288 Ark. 439, 442, 706 S.W.2d 378, 379-80 (1986). Although to date the court has recognized the common fund doctrine as applying to the determination of attorneys' fees in illegal exaction cases, the underlying rationale for the doctrine should also apply to attorneys' fees in consumer class action cases. In the 1934 decision of *Marlin v. Marsh & Marsh*, 189 Ark. 1157, 76 S.W.2d 965 (1934), the court stated that rationale:

When many persons have a common interest in a fund, and one of them, for the benefit of all brings a suit for its preservation, and retains counsel

be on the same basis as members of the class generally, there may be a lack of enthusiasm for prosecution of the case on the part of the named plaintiffs.¹⁵⁰

at his own cost, a court of equity will order a reasonable amount paid to him out of the funds

Id. at 1157, 76 S.W.2d at 966.

In the leading Arkansas case, *Powell v. Henry*, 267 Ark. 484, 592 S.W.2d 107 (1980), the Arkansas Supreme Court upheld the trial court's award of attorneys' fees of \$95,884.31 for recovery of a fund of \$639,226.24 in an illegal exaction suit brought on behalf of electrical customers of the City of North Little Rock, Arkansas. The fee was calculated on the basis of 15% of the fund. In *Powell* the court commented on the factors to be considered in determining the amount of attorneys' fees in a common fund case:

While the time spent is an important element to be considered in determining the reasonable value of an attorney's services, it is not the controlling factor, and is sometimes a minor one. *Love v. U. S. F. & G. Co.*, 263 Ark. 925, 568 S.W.2d 746. We have recently had occasion to address our attention to the relationship of time records and the expenditure of time in relation to the allowance of attorney's fees in *Lytle v. Lytle*, 266 Ark. —, 583 S.W.2d 1. There we found that other factors were just as important as the time devoted to a case. In *Marlin v. Marsh*, *supra*, we pointed out that the amount of the recovery was important and indicated that the trial court properly took into consideration the ability of counsel, the nature and extent of the services rendered and the result obtained. The chancellor who made the allowance here, and whose action was reinstated by the regular chancellor, took these factors into consideration. Although such allowances should not be entirely on a contingent fee basis, they should be such that competent lawyers would not refuse to accept employment in cases of this sort. *Old Republic Insurance Co. v. Alexander*, 245 Ark. 1029, 436 S.W.2d 829. Naturally the uncertainty of ultimate recovery is an element to be considered in accomplishing this purpose.

Powell, 267 Ark. at 487-88, 592 S.W.2d at 109; *see also* *Pledger v. Bosnick*, 306 Ark. 45, 56-57, 811 S.W.2d 286, 293-94 (1991); *American Truck Ass'ns, Inc. v. Gray*, 295 Ark. 43, 47, 746 S.W.2d 377, 379 (1988); *Millsap v. Lane*, 288 Ark. 439, 442-43, 706 S.W.2d 378, 379-80 (1986); *Crittenden County v. Williford*, 283 Ark. 289, 292, 675 S.W.2d 631, 633-34 (1984).

The award of attorneys' fees in illegal exaction type class cases in Arkansas is now controlled by statute. Section 26-35-902 of the Arkansas statutes provides:

(a) It is the public policy of this state that circuit and chancery courts may, in meritorious litigation brought under Arkansas Constitution, Article 16, s 13, in which the court orders any county, city, or town to refund or return to taxpayers moneys illegally exacted by the county, city, or town, apportion a reasonable part of the recovery of the class members to attorneys of record and order the return or refund of the balance to the members of the class represented. . . .

Ark. Code Ann. § 26-35-902(a) (*Michie Supp.* 1993). In *Bahil v. Scribner*, 265 Ark. 834, 841, 581 S.W.2d 334, 338 (1979), the Arkansas Supreme Court held that 26-35-902 applies only to suits brought against counties, cities, or towns.

For a discussion of the standards for common fund fee awards generally, see *HERBERT NEWBERG & ALBA CONTE, NEWBERG ON CLASS ACTIONS* § 14.03, at 14-3 to 14-16 (1992).

150. A class action plaintiff is ordinarily ineligible for preferential recovery. As noted by the leading class action authority:

Another aspect of the "fair and adequate representation" requirement is that the class representative's interest must not be in conflict with that of other class members.¹⁵¹ The defendants in *Barnhart* attempted to defeat class certification by submitting affidavits of six residents of Fayetteville, members of the potential class, who felt that the class action would be harmful to their community and who thus opposed the class action.¹⁵² On the basis of that opposition, the defendants argued that the named plaintiff's interest conflicted with that of other members of the class.¹⁵³ Although the court did recognize that the adequate representation requirement may be jeopardized at some point if the interest of the named plaintiffs conflicts with that of other class members,¹⁵⁴ the court found that the opposition of six class members of a class of thousands did not justify decertification.¹⁵⁵

The normal rule in a class action is that a class representative may not obtain a disproportionate or preferential allocation from a lump sum class recovery but must be treated the same as all other absent members of the class. This rule applies even when the original class plaintiffs bear the obligation of litigation expenses in the event a class action is unsuccessful, and may be obligated to pay attorney's fees on a contingent contractual arrangement that may be higher than fees chargeable against recoveries by absent class members.

HERBERT NEWBERG & ALBA CONTE, *NEWBERG ON CLASS ACTIONS* § 21.20, at 21-40 (1992).

Newberg also notes other disadvantages for the named plaintiffs in a class action as compared with individual actions:

(1) The named plaintiffs will have additional responsibilities in the nature of a fiduciary duty for protecting class interests; (2) Pursuing relief on a class basis may delay individual relief; (3) Individual settlements may be more difficult after commencement of the class action; (4) The named plaintiffs may bear larger litigation expenses than other class members in unsuccessful class actions; (5) Counsel for class members may enter an appearance in the class action or class members may formally intervene, diminishing the named plaintiffs' control of the litigation; (6) More precise pleading of liability may be required; (7) The named plaintiffs may be exposed to a broader array of defense tactics; (8) The defendant may raise counterclaims against the class that would not be pursued in individual litigation; (9) The class action may diminish the named plaintiffs' latitude to choose the forum; and (10) The named plaintiffs and their counsel may be exposed to broader discovery on class issues.

HERBERT NEWBERG & ALBA CONTE, *NEWBERG ON CLASS ACTIONS* §§ 5.23-5.32, at 5-26 to 5-33 (1992).

151. At some point conflict of interests between the named class representatives and other class members can rise to the level of Constitutional due process considerations. The leading United States Supreme Court decision is *Hansberry v. Lee*, 311 U.S. 32 (1940).

152. *Union Nat'l Bank v. Barnhart*, 308 Ark. 190, 197, 823 S.W.2d 878, 881 (1992).

153. *Id.*

154. *Id.*

155. *Id.*

Though not effective at the time of the trial court's decision in *Barnhart*, revised Rule 23 allows class members opposed to the litigation or who feel they are not being fairly and adequately represented to avoid the binding effect of a judgment in a class action by exercising their right under 23(c)(2) to be excluded from the class.¹⁵⁶ To "opt out," the class member merely has to request exclusion by a specified date. No reason need be given. In a recent decision¹⁵⁷ involving the question of an unnamed class member's standing to appeal an order approving attorney's fees and costs in a class action, the Arkansas Supreme Court noted that unsatisfied class members have a number of alternatives in addition to "opting out":

An unsatisfied class member's options are to move to intervene as of right, collaterally attack the settlement approval by filing a separate suit challenging the adequacy of the class representation, or he may opt out. The rationale of the class action is to render manageable litigation involving numerous class members who would otherwise all have access to court via individual lawsuits. As was emphasized in *Croyden*, if each dissatisfied class member could appeal individually, litigation would be uncontrollable, and the purpose of class actions would be defeated.¹⁵⁸

Although, as suggested above, an attack on the adequacy of representation directed at either class counsel or the named plaintiffs may be successful, to date the attitude of the Arkansas Supreme Court toward such attacks has been to consider the problem of adequacy of representation a matter to be resolved through the trial judge's obligation to exercise discretion in managing and controlling the litigation. For instance, in *First National Bank v. Mercantile Bank*¹⁵⁹ the court summarized its conclusion that the class was adequately represented, saying that:

[A]t any stage of the litigation the court may impose terms that will fairly and adequately protect the interests of the class. "Whenever the representation appears to the court inadequate fairly to protect the interests of absent parties who may be bound by the judgment, the court may at any time" enter an order to eliminate any reference to representation of absent persons. Ark. R. Civ. P. 23(d). In this manner the trial court maintains constant control over the litigation.¹⁶⁰

156. The effective date of the "opt out" provision of Rule 23 was February 1, 1991.

157. *Haberman v. Lisle*, 317 Ark. 600, 879 S.W.2d 444 (1994).

158. *Id.* at 603, 879 S.W.2d at 445-46 (citing *Croyden Assoc. v. Alleco, Inc.*, 969 F.2d 675 (8th Cir. 1992)).

159. 304 Ark. 196, 801 S.W.2d 38 (1990).

160. *Id.* at 199-200, 801 S.W.2d at 40.

* * *

Thus, our affirmance today does not end the trial court's role with respect to this case. If at any time the court finds that the representation by [the named plaintiffs] or their counsel is inadequate, it may require additional terms and conditions to protect against any unfairness pursuant to Rule 23(d).¹⁶¹

As a result, even if substantial adequacy of representation issues in a consumer class action case could be raised, those issues might well be addressed by the trial court's modification of the class action structure or even by imposition of terms and conditions in regard to the prosecution of the case by class counsel and the named plaintiffs.

5. *Questions of Law or Fact Common to the Members of the Class Must Predominate Over Any Questions Affecting Only Individual Members*¹⁶²

This basic requirement of class actions adopts the previously discussed class action prerequisite that there be common questions of law *or* fact, and, in addition, requires that the common questions predominate over any questions that may affect only individual class members. In decisions of the Arkansas Supreme Court prior to the 1988 *Hudson*¹⁶³ case, class action treatment was frequently denied based on the court's finding that individual determinations of damages or defenses would preclude class treatment. Class treatment would be precluded because such individual questions would predominate over any common questions.¹⁶⁴

As with other aspects of the class action procedure, the Arkansas Supreme Court's attitude with regard to the "predominance" requirement shifted radically with the *Hudson* decision.¹⁶⁵ Now the emphasis of the court's approach is on resolving the common questions of law *or* fact by way of one trial. The thrust of recent Arkansas Supreme Court decisions requires the trial court to resolve differing defenses and claims for damages by creation of subclasses or by "splintering" the class action into individual cases.¹⁶⁶ As a result,

161. *Id.* at 201, 801 S.W.2d at 41.

162. ARK. R. CIV. P. 23(b).

163. *International Union of Elec., Radio & Mach. Workers v. Hudson*, 295 Ark. 107, 747 S.W.2d 81 (1988).

164. *See, e.g., Ross v. Arkansas Communities, Inc.*, 258 Ark. 925, 930-32, 529 S.W.2d 876, 880-81 (1975).

165. *Hudson*, 295 Ark. at 119-20, 747 S.W.2d at 87-88.

166. *Id.*; *see also Lemarco, Inc. v. Wood*, 305 Ark. 1, 4, 804 S.W.2d 724, 726 (1991); *Security Benefit Life Ins. Co. v. Graham*, 306 Ark. 39, 44, 810 S.W.2d

even though a consumer class action would surely involve individual questions of damages or defenses, those individual questions would not “predominate” over common questions such as the defendant’s liability.

6. *Class Action Must Be “Superior to Other Available Methods for the Fair and Efficient Adjudication of the Controversy”*¹⁶⁷

Although there is considerable overlap between this requirement and the “predominance of common questions of law or fact” requirement discussed above,¹⁶⁸ the Arkansas Supreme Court has used this aspect of the class action requirements to consider class action treatment of the case under a summary “fairness and efficiency” analysis.¹⁶⁹ What the court means by fairness in this context is whether class certification “would be fair to all the parties.”¹⁷⁰

In post-*Hudson* cases the court has invariably determined the “fairness” question in favor of class certification.¹⁷¹ Class certification has been found to be fair to the defendant because the defendant receives an opportunity to present a full, albeit single, defense to the common class claims.¹⁷² Furthermore, individual defenses to claims of individual class members can be preserved for subclass or individual determination if liability is established on the common claims.¹⁷³ The court has also pointed to the single defense factor as

943, 945 (1991); *Summons v. Missouri Pac. R.R.*, 306 Ark. 116, 120-25, 813 S.W.2d 240, 242-45 (1991). In addition, in *Arkansas Louisiana Gas Co. v. Morris*, decided fewer than two months prior to *Hudson*, the Arkansas Supreme Court affirmed the trial court’s certification of a class action, noting that individual questions could be deferred until after the court disposed of the question common to the class. *Arkansas La. Gas Co. v. Morris*, 294 Ark. 496, 499, 744 S.W.2d 709, 710 (1988).

167. ARK. R. CIV. P. 23(b).

168. See *supra* text accompanying notes 162-66.

169. *International Union of Elec., Radio & Mach. Workers v. Hudson*, 295 Ark. 107, 117-18, 747 S.W.2d 81, 86-87 (1988).

170. *Id.*

171. In each of the five class action cases considered by the Arkansas Supreme Court since the *Hudson* decision in 1988, the court has ruled in favor of class certification. Those decisions are: *Union Nat’l Bank v. Barnhart*, 308 Ark. 190, 823 S.W.2d 878 (1992); *Lemarco, Inc. v. Wood*, 305 Ark. 1, 804 S.W.2d 724 (1991); *Security Benefit Life Ins. Co. v. Graham*, 306 Ark. 39, 810 S.W.2d 943 (1991); *Summons v. Missouri Pac. R.R.*, 306 Ark. 116, 813 S.W.2d 240 (1991); *First Nat’l Bank v. Mercantile Bank*, 304 Ark. 196, 801 S.W.2d 38 (1990).

172. See *supra* part II.E.

173. See *supra* part II.E.

a benefit to the defendant. That is, the defendant will not be exposed to relitigation of common issues, particularly the liability question.¹⁷⁴

From the plaintiffs' standpoint, the court has repeatedly emphasized that, in consumer class action cases, each putative class member usually has a claim that is too small to be economically feasible to pursue on an individual basis.¹⁷⁵ As a result, if the affected consumers cannot sue as a class, they will probably not be able to have a potentially legitimate claim resolved at all.¹⁷⁶ Thus, in the court's view, refusing class certification would not be fair to the class members.¹⁷⁷

A 1991 decision of the Arkansas Supreme Court considered the related question of efficiency of adjudication for the parties and the court. In *Security Benefit Life Insurance Co. v. Graham*,¹⁷⁸ the defendant argued that resolution of one issue in the case would require exploration and possible application of the law of thirty-nine states, resulting in inefficient adjudication of the matter.¹⁷⁹ In response, the court found that reference to the laws of thirty-nine states would "not seem a particularly daunting or unmanageable task for the parties or for the trial court."¹⁸⁰

174. *Security Benefit Life Ins. Co. v. Graham*, 306 Ark. 39, 45, 810 S.W.2d 943, 946 (1991); see also *Summons v. Missouri Pac. R.R.*, 306 Ark. 116, 124, 813 S.W.2d 240, 244 (1991).

175. See, e.g., *Summons v. Missouri Pac. R.R.*, 306 Ark. 116, 128, 813 S.W.2d 240, 246 (1991). In *Summons* the class was composed of persons who were evacuated from their homes or businesses as the result of a railroad accident in which a chemical tank car overturned. Damage claims ranged from claims for compensation for medical treatment, pain and suffering, and loss of income to relatively nominal claims seeking reimbursement for money spent for food, clothing, and temporary shelter. *Id.* at 118-19, 813 S.W.2d at 241.

176. *Id.* at 128, 813 S.W.2d at 246.

177. See, e.g., *International Union of Elec., Radio & Mach. Workers v. Hudson*, 295 Ark. 107, 117-18, 747 S.W.2d 81, 87 (1988).

178. *Security Benefit Life Ins. Co. v. Graham*, 306 Ark. 39, 810 S.W.2d 943 (1991).

179. *Id.* at 44, 810 S.W.2d at 945.

180. *Id.* at 44, 810 S.W.2d at 946. Six years earlier the court had expressed grave concern about similar practical problems resulting from class certification:

[T]his Court must be realistic in its appraisal of the situation, and we cannot ignore the serious practical problems which would arise if we allowed the case to proceed as a class action. Considerable expense would be involved. How could the limited staff of the Chancery Court take care of the necessary proceedings, answer the inquiries for further information on the 833 transactions and keep the members of the class advised as to the status of the case thereafter? It is apparent a maze of procedural difficulties would be encountered. The procedural problems would be compounded in this case, involving, as it does, 6,000 separate retail in-

The court in *Graham* also decided that class certification would resolve several common questions and would be efficient for and fair to the parties.¹⁸¹ According to the court, the alternative of suits in thirty-nine states would be comparatively “inefficient, duplicative [of effort], and a drain on judicial resources.”¹⁸²

A summary statement of the present attitude of the Arkansas Supreme Court toward the superiority, fairness, and efficiency questions is that the defendant loses nothing through class certification, class members gain access to judicial determination of claims that would otherwise go unheard, and efficient use of judicial resources results through avoiding repeated litigation of common issues. Not all of the post-*Hudson* cases can be characterized as being “consumer class actions.”¹⁸³ However, there is no reason to think that the “fairness and efficiency” issues in a typical consumer class action suit would be sufficiently unique to result in different treatment of those issues.

7. Notice Must Be Given to Members of the Class¹⁸⁴

The requirement that notice be given to the class arises only after the case has been certified as a class action and, according to the terms of Rule 23(c), applies “in any class action in which monetary relief is sought, including actions for damages and restitution”¹⁸⁵ The notice must be given individually to all members of

stallment contracts.

Ford Motor Credit Co. v. Nesheim, 287 Ark. 78, 82-83, 696 S.W.2d 732, 735 (1985) (quoting *Ross v. Arkansas Communities, Inc.*, 258 Ark. 925, 930, 529 S.W.2d 876, 880 (1975)).

181. *Graham*, 306 Ark. at 44-45, 810 S.W.2d at 945-46.

182. *Id.* at 44-45, 810 S.W.2d at 946.

183. The class action cases decided subsequent to *Hudson* are *Union Nat'l Bank v. Barnhart*, 308 Ark. 190, 823 S.W.2d 878 (1992); *Lemarco, Inc. v. Wood*, 305 Ark. 1, 804 S.W.2d 724 (1991); *Security Benefit Life Ins. Co. v. Graham*, 306 Ark. 39, 810 S.W.2d 943 (1991); *Summons v. Missouri Pac. R.R.*, 306 Ark. 116, 813 S.W.2d 240 (1991); *First Nat'l Bank v. Mercantile Bank*, 304 Ark. 196, 801 S.W.2d 38 (1990).

184. ARK. R. CIV. P. 23(c).

185. Arkansas Rule 23 does not clearly indicate at what point notice is to be given. Wright, Miller, and Kane note that Federal Rule of Civil Procedure 23 also leaves unanswered the question of the timing of notice. 7B CHARLES A. WRIGHT ET AL., *FEDERAL PRACTICE AND PROCEDURE* § 1788, at 222 (1986). As to the point at which notice should be given to the class, Wright, Miller, and Kane state:

[N]otice must be sent long before the merits of the case are adjudicated and, indeed, probably should be sent as soon as possible after the action is commenced; as a practical matter, this means as soon as the court determines that the class action is proper under subdivision (c)(1).

Id. § 1788, at 222-23.

In regard to the timing of class certification, Arkansas Rule 23(b) provides that,

the class who can be identified through reasonable effort.¹⁸⁶ Under Rule 23(c) the contents of the notice must:

(1) [D]escribe the action and the members' rights in it; (2) advise each member that the court will exclude the member from the class if the member so requests by a specified date; (3) advise each member that the judgment, whether favorable or not, will include all members who do not request exclusion; and (4) state that any member who does not request exclusion may . . .

"As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained." ARK. R. CIV. P. 23(b).

186. ARK. R. CIV. P. 23(c). In "illegal exaction" class suits brought under Article 16, § 13 of the Arkansas Constitution individual notice may not be required. Article 16, § 13 provides:

Any citizen of any county, city or town may institute suit in behalf of himself and all others interested, to protect the inhabitants thereof against the enforcement of any illegal exactions whatever.

In *City of Little Rock v. Cash* the Arkansas Supreme Court held that Rule 23 applied to "illegal exaction" cases. *City of Little Rock v. Cash*, 277 Ark. 494, 510, 644 S.W.2d 229, 236 (1982). Since *Cash* arose before the 1991 amendments to Rule 23 requiring individual notice to all members of the class, whether the individual notice requirement would apply to illegal exaction cases is not clear. Because illegal exaction cases are generally brought on behalf of the citizens of a governmental entity to challenge illegal taxes or expenditures, if the individual notice requirement did apply, the costs of notice to all affected citizens could, in many instances, be prohibitive.

Justice Glaze, concurring in *Union Nat'l Bank v. Barnhart*, 308 Ark. 190, 823 S.W.2d 878 (1992), argued that the holding in *Cash* applying Rule 23 to illegal exaction cases should be reversed. In regard to the application of Rule 23's notice requirement to illegal exaction cases, Justice Glaze said:

I suggest that the application of Rule 23 to illegal exaction suits makes little sense except that the notice requirement afforded under Rule 23 does assure notice to all taxpayers, thus guarding against the so-called 'friendly lawsuit' filed by parties attempting to protect their private or vested interests in what is basically an action involving the public's interests. Such notice, however, can be afforded by a well-drafted rule or law without also requiring all the impediments presented under Rule 23. Clearly, an illegal exaction proceeding differs from the type class action contemplated under Rule 23 where the primary objective is a suit for damages.

Id. at 200, 823 S.W.2d at 883.

A narrower construction upholding the *Cash* case's application of Rule 23 to illegal exaction cases but without application of the individual notice requirement is possible. That construction would recognize that the individual notice requirement of subsection (c) by its terms does not apply to the type of relief sought in illegal exaction cases. Rule 23(c) applies only to class actions "in which monetary relief is sought, including actions for damages and restitution . . ." ARK. R. CIV. P. 23(c). The primary relief sought in an illegal exaction suit is the enjoining of an illegal act on the part of the governmental entity. The prospect of recovery of illegally collected taxes or illegally expended funds is an ancillary by-product of the relief sought "against the enforcement of" the illegal exaction. The remedy sought in illegal exaction cases is not in the nature of the compensatory type of relief contemplated by Rule 23(c).

participate in the litigation, either in person or through [his or her own] counsel.¹⁸⁷

The requirement that notice be given to each member of the class individually is in accord with the United States Supreme Court's holding on due process requirements in its 1985 decision of *Phillips Petroleum Co. v. Shutts*.¹⁸⁸

Under Rule 23, the cost of notice is to be borne initially by the named plaintiffs;¹⁸⁹ in a consumer class action, this can be prohibitively expensive. The cheapest form of acceptable notice is most likely to be certified mail with return receipt requested at a current cost of \$2.29, so, even if the notice could be sent for a total cost of \$3.00 per class member, the cost of notice to a class of relatively modest size would be considerably high.¹⁹⁰

Few consumers with a potential personal recovery of the small amount sought per class member in a typical consumer class action would be willing to risk an expenditure of several thousand dollars necessary for class notification: there would be no guarantee of recovery,¹⁹¹ and the case would not have been heard on its merits

187. ARK. R. CIV. P. 23(c).

188. 472 U.S. 797 (1985). The Court also held that a state may exercise jurisdiction over the claim of a nonresident member of a plaintiff class even though the class member "may not possess the minimum contacts with the [jurisdiction] which would support personal jurisdiction over a defendant." *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 811 (1985).

189. ARK. R. CIV. P. 23(c). The rule does provide that "the court may shift all or part of such cost to the opposing party or parties if the case is settled or the class representative substantially prevails on the merits." *Id.*

190. For instance, the class in *Summons v. Missouri Pac. R.R.*, 306 Ark. 116, 813 S.W.2d 240 (1991), could have been as large as 5,000 individuals. *Id.* at 118, 813 S.W.2d at 241. Assuming the cost of notice of \$3.00 per class member, the representative plaintiffs or their attorneys would possibly have had to expend \$15,000 for the cost of notice alone before any judicial consideration of the merits of their claim.

191. In *Summons* the Arkansas Supreme Court noted that a decision to certify a case as a class action does not reflect in any way on the wholly different question of whether the class should recover. At the close of its opinion in *Summons* the court stated:

We conclude this opinion with a caveat; the only issue we have addressed is whether the class should have been certified. We have not intimated, nor have we meant to intimate, that any of the class members will or should recover. The question of liability is not at all before us.

Summons, 306 Ark. at 129, 813 S.W.2d at 247.

Similarly, the court has also recently noted that "[a]n inquiry into the merits has been held inappropriate in determining whether an action may be maintained as a class action under Fed. Rule 23." *First Nat'l Bank v. Mercantile Bank*, 304 Ark. 196, 201, 801 S.W.2d 38, 41 (1990) (quoting *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974)).

at the time before trial when the class would have to be notified.¹⁹²

As a practical matter, counsel for the named plaintiffs will have to initially bear the cost of giving notice to the class.¹⁹³ Few attorneys would be willing to incur that expense knowing that the prospects of ultimate recovery and the resultant shifting of the cost of notice to the defendant¹⁹⁴ would be speculative. In addition, litigation could be very expensive to pursue, and any return on investment would most likely require years to realize.

IV. CONCLUSION

Because federal court is generally unavailable for class action plaintiffs in consumer cases, potential class litigants and attorneys desiring to bring class actions on behalf of consumers will gravitate to state court systems in states that have liberal class action provisions. The decisions of the Arkansas Supreme Court since 1988 construing Rule 23 of the Arkansas Rules of Civil Procedure have made Arkansas class action procedure among the most favorable in the nation for potential consumer class action plaintiffs. That liberalization of Arkansas class action procedure is reflected in the following actions of the court:

192. *First Nat'l Bank*, 304 Ark. at 201, 801 S.W.2d at 41.

193. In regard to the attorney paying costs associated with the litigation, such as notice to the class, Rule 1.8(e) of the Arkansas Model Rules of Professional Conduct provides:

A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation, except that:

(1) a lawyer may advance court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter

....
ARK. RULES OF PROFESSIONAL CONDUCT Rule 1.8(e) (1985). Addressing the same subject, the leading authority on class action procedure comments:

[I]t is unrealistic, as well as a compromise of Rule 23, to assume that any plaintiff, especially one who could not afford to bring an individual action, would be able to support the often burdensome costs of notice and other expenses in exchange for her or his share of a possible recovery. Courts "cannot condone a policy which would effectively limit class action plaintiffs to corporations, municipalities, or the rich." This approach may only produce well-prepared testimony by the class representative, who may fully expect to be unable ever to reimburse counsel.

HERBERT NEWBERG & ALBA CONTE, *NEWBERG ON CLASS ACTIONS* § 15.21, at 15-64 (1992).

194. Rule 23(c) requires that the cost of notice initially be borne by the plaintiffs. However, under the rule, if the case is settled or the plaintiffs prevail, the court may impose the cost of notice on the defendants:

The cost of such notice shall be borne by the representative parties; provided, however, that the court may shift all or part of such cost to the opposing party or parties if the case is settled or the class representative substantially prevails on the merits.

ARK. R. CIV. P. 23(c).

1. The court replaced the requirement that all members of the prospective class have a shared factual and legal interest in the subject matter of the litigation¹⁹⁵ with a requirement that there be only some question of either law or fact common to the class.¹⁹⁶

2. The court reduced the Rule 23(a)(3) prerequisite that the claims or defenses of the representative parties be typical of those of the class¹⁹⁷ to a baseline “typicality” requirement that the defendant’s unlawful conduct adversely affect both the representative parties and the class.¹⁹⁸

3. The court adopted a pragmatic and permissive interpretation of the Rule 23(a)(4) requirement that the representative parties fairly and adequately protect the interests of the class.¹⁹⁹ This interpretation is reflected in the court’s:

(a) acknowledging that conflict between the interests of the class representative and some class members is inevitable but does not necessarily jeopardize the maintenance of the case as a class action;²⁰⁰

(b) recognizing that some protection is afforded class members dissatisfied with class representation through the alternatives of opting out of the class action, formally intervening in the class action through their own counsel, and collaterally attacking the settlement or judgment;²⁰¹

(c) placing the burden in regard to the issue of competence of class counsel on the defendant;²⁰²

(d) considering most questions of misconduct of class counsel as matters to be addressed through the attorney disciplinary process rather than as bases for denying certification of the class under the adequacy of representation standard;²⁰³ and

(e) viewing a trial court determination that the representation is inadequate as a matter normally to be addressed by the court’s requiring additional terms and conditions to protect against any unfairness rather than as cause for dismissal.²⁰⁴

195. See *supra* text accompanying note 12.

196. See *supra* text accompanying note 30.

197. See *supra* part III.B.3.

198. See *supra* part III.B.3.

199. See *supra* part III.B.4.

200. See *supra* text accompanying notes 151-55.

201. See *supra* text accompanying notes 156-58.

202. See *supra* text accompanying notes 136-39.

203. See *supra* text accompanying note 146.

204. See *supra* text accompanying notes 159-61.

4. The court replaced the concern that class actions will splinter into numerous individual cases²⁰⁵ with the view that the trial court can flexibly manage the case by creating subclasses of members having more closely related interests in common.²⁰⁶ Similarly, a trial court's fear that individual issues will predominate over class issues²⁰⁷ can be addressed by first trying the common issues affecting all class members and leaving individual issues for later determination.²⁰⁸ The flexibility to deal with individual issues by creating subclasses or by leaving those issues for later determination has led the Arkansas Supreme Court to conclude, in direct contradistinction to its previous attitude, that a class action will frequently be the superior means of adjudication.²⁰⁹

5. The court allowed interlocutory appeals of class certification decisions.²¹⁰

6. The court's concern about practical problems stemming from class actions, such as lack of judicial and court staff resources, has diminished.²¹¹

7. The court replaced concern about the fairness to the defendant of a class action²¹² with concern that failure to allow the case to proceed as a class action would be unfair to the prospective members of the plaintiff class.²¹³

8. Perhaps most important, the court's attitude of near hostility to class actions has shifted to a position that could be fairly characterized as sympathetic to class actions.²¹⁴

Although Arkansas class action procedure has been greatly liberalized, as a practical matter both sides in a case brought as a consumer class action case may feel a very strong impetus to settle the suit if a class is certified. The named plaintiffs and their counsel may be wary of investing the resources, including the cost of notifying the class, required to prosecute the case through trial and possible appeal, and the defendant will be concerned that an ultimate judg-

205. See *supra* text accompanying notes 47-48.

206. See *supra* text accompanying notes 65-66, 75-77.

207. See *supra* text accompanying notes 33, 34, 45, 46, 55-57; see also *supra* part III.B.5.

208. See *supra* text accompanying notes 33, 34, 45, 46, 55-57; see also *supra* part III.B.5.

209. See *supra* part II.C-E.

210. See *supra* part II.B.

211. See *supra* text accompanying notes 47-50, 178-82.

212. See *supra* text accompanying notes 39-41.

213. See *supra* text accompanying notes 78-80.

214. See *supra* part II.D-E.

ment awarding even a relatively nominal recovery to each member of the class could be staggering.

Can the liberalization of Arkansas class action procedure be characterized as a sound procedural development in the same sense as the generally accepted soundness of the abolition of common law pleading or the development of modern discovery? Unlike nearly every other area of procedural law, the answer depends on the political perspective of the person supplying the answer. As noted by one of the leading authorities on civil procedure, "[t]he class action . . . has been described as everything from 'one of the most socially useful remedies in history' to 'legalized blackmail.'"²¹⁵ However, for those who believe, as does the Arkansas Supreme Court, that "it is possible that a large number of persons who may have legitimate claims not worth pursuing because of the costs of our system of justice may lose those claims if they are not allowed to proceed together as a class"²¹⁶ and that "[b]y not certifying a class, a trial court can cause the problem to 'go away' to the extreme disadvantage of the claimants . . .,"²¹⁷ the liberalization of Arkansas class action procedure is indeed a welcome development.

215. CHARLES A. WRIGHT, *LAW OF FEDERAL COURTS* 507 (5th ed. 1994) (quoting Pomerantz, *New Developments in Class Actions—Has Their Death Knell Been Sounded?*, 25 *BUS. LAW.* 1259 (1970) ("one of the most socially useful remedies in history"); Handler, *The Shift from Substantive to Procedural Innovations in Antitrust Suits*, 71 *COLUM. L. REV.* 1, 9 (1971) ("legalized blackmail")).

216. *Summons v. Missouri Pac. R.R.*, 306 Ark. 116, 128, 813 S.W.2d 240, 246 (1991).

217. *Id.*

Appendix

Arkansas Rules of Civil Procedure

Rule 23. Class Actions

(a) *Prerequisites to Class Action.* One or more members of a class may sue or be sued as representative parties on behalf of all 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) *Class Actions Maintainable.* An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. An order under this section may be conditional and it may be altered or amended before the decision on the merits.

(c) *Notice.* In any class action in which monetary relief is sought, including actions for damages and restitution, the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice shall: (1) describe the action and the members' rights in it; (2) advise each member that the court will exclude the member from the class if the member so requests by a specified date; (3) advise each member that the judgment, whether favorable or not, will include all members who do not request exclusion; and (4) state that any member who does not request exclusion may, if the member desires, participate in the litigation, either in person or through counsel. The cost of such notice shall be borne by the representative parties; provided, however, that the court may shift all or part of such cost to the opposing party or parties if the case is settled or the class representative substantially prevails on the merits.

(d) *Orders in Conduct of Actions.* In the conduct of actions to which this rule applies, the court may make appropriate orders: (1) determining the course of proceedings or prescribing measures to prevent undue repetition or complication in the presentation of

evidence or argument; (2) requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of any step in the action, or of the proposed extent of the judgment, or of the opportunity of the members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise come into the action; (3) imposing conditions on the representative parties or on intervenors; (4) requiring that the pleadings be amended to eliminate therefrom allegations as to representation of absent persons, and that the action proceed accordingly; and (5) dealing with similar procedural matters. The orders may be combined with an order under Rule 16 and may be altered or amended from time to time as may be desirable.

(e) *Dismissal or Compromise.* A class action shall not be dismissed or compromised without the approval of the court. In cases where the court has entered an order that an action shall be maintained as a class action, notice of such proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs.

Reporter's Notes (as modified by the Court) to Rule 23: 1. Class actions in Arkansas have been governed by Ark. Stat. Ann. 2-809 (Repl. 1962) which provide minimum procedural rules. This rule does not change prior law.

2. Rule 23 confers broad discretion upon the trial court to dictate such terms as are necessary to protect the rights of absent class members. This discretion is also conferred upon the federal courts by FRCP 23.

3. In Arkansas, many of the class action cases have involved actions brought by and against members of unincorporated associations such as labor unions. *Thomas v. Dean*, 245 Ark. 446, 432 S.W.2d 771 (1968); *International Brotherhood v. Blassingame*, 226 Ark. 614, 293 S.W.2d 444 (1956). *See also Massey v. Rogers*, 232 Ark. 110, 334 S.W.2d 664 (1960). Such actions shall henceforth be brought pursuant to Rule 23.2.

4. Under prior Arkansas law, class actions could be maintained in either law or equity. *Thomas v. Dean*, *supra*. This rule does not affect jurisdiction and thus such actions may still be maintained in either court.

Addition to Reporter's Note, 1990 Amendment: Subdivision (a) has been completely rewritten to set out the requirements for numerosity, commonality, typicality, and adequate representation. As revised, subdivision (a) is identical to the corresponding federal rule. Former

subdivision (c) has been modified slightly and redesignated as subdivision (e). Under the revised version, which is based on the corresponding federal rule, notice of a proposed dismissal or compromise is mandatory rather than discretionary. New subdivision (c) requires that the best practicable notice of the pendency of class actions seeking monetary relief, whether legal or equitable, be given to all class members. Among other things, the notice must advise class members of their right to participate in or be excluded from the litigation. When monetary relief is sought, class members must, as a matter of due process, be given such notice and afforded the opportunity to "opt out" of the class action. See *Phillips Petroleum v. Shutts*, 472 U.S. 797 (1985). It is not clear from *Shutts* whether due process requires such notice when the class action involves only injunctive or declaratory relief. *Id.* at 811, n.3. Subdivision (c) does not impose such a requirement in such circumstances, but the trial court may, pursuant to subdivision (d), order that notice be given. The last sentence of subdivision (c) makes clear that the class representatives must initially bear the cost of the notice, though such cost may ultimately be shifted to the opposing parties. This practice is followed in the federal courts. See *Eisen v. Carlisle and Jacquelin*, 417 U.S. 156 (1974). Subdivision (d) has been revised to take into account the foregoing changes and to spell out in further detail the trial court's discretion in the management of a class action. It is virtually identical to the corresponding federal rule.