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The 1979 Civil Procedure Rules

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COMMENTS

COMMENT: THE 1979 CIVIL PROCEDURE RULES

*James W. Spears**

I. INTRODUCTION

A recent, noteworthy action of the Arkansas Supreme Court is embodied in Per Curiam Order No. 78-54, dated December 18, 1978, whereby the court, acting under authority of Arkansas Act 38 of 1973¹ and its constitutional and inherent powers to regulate practice, adopted, with some modifications, a set of rules of procedure for civil cases submitted to it by its Civil Procedure Revision Committee headed by Judge Andrew G. Ponder of Newport, Arkansas. The complete set of rules consists of three major sections designated Rules of Civil Procedure, Rules of Appellate Procedure, and Rules for Inferior Courts. Because the effective date of the rules is July 1, 1979, the full set will be referred to herein as the 1979 Civil Procedure Rules.²

This commentary is confined to some of the more interesting features of the Rules of Civil Procedure for circuit, chancery, and probate courts which are based on the Federal Rules of Civil Procedure [Fed. R. Civ. P.]. More detailed analysis will be appropriate as the bench and bar gain experience under the new rules. Readers interested in the history of Arkansas procedures are referred to Dean Ralph Barnhart's excellent article on the subject.³

Much of the new procedure will be familiar to Arkansas law-

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1. ARK. STAT. ANN. §§ 22-245 to 249 (Cum. Supp. 1977).

2. There has been some difficulty with citation form. The only reference to the full set of rules seems to be "RULES OF CIVIL PROCEDURE" or "ARKANSAS RULES OF CIVIL PROCEDURE" which more properly refers to the section governing circuit, chancery, and probate courts and which is abbreviated "ARCP" in Rule 85. This and "ARKANSAS RULES OF APPELLATE PROCEDURE" found in Rule 1 of the appellate rules appear to be the only court-approved citation forms at this time. The advance copy from Michie Bobbs-Merrill, the publisher of the Arkansas Statutes Annotated, uses the following designations: "RCP" for the rules of civil procedure, "RAP" for the appellate rules, and "RIC" for the inferior court rules; these are designated herein as ARK. R. CIV. P., ARK. R. APP. P., and ARK. R. INF. C., respectively. The entire collection of rules is designated as the 1979 CIVIL PROCEDURE RULES.

3. Barnhart, *Pleading Reform in Arkansas*, 7 ARK. L. REV. 1 (1952). Notwithstanding the passage of 27 years, this treatment remains the leading reference on Arkansas procedure, especially from an historical point of view.

yers. Our procedures were "modernized" in 1869 by the adoption of a code similar to the "Field Codes"⁴ of New York, Alabama, and particularly Kentucky.⁵ Some of the provisions of the Civil Code of 1869 are now found in title 27, chapter 6 of the Arkansas Statutes Annotated, which deals with venue; they will remain in effect due to the slightly differing scope of the 1979 Rules.⁶ In addition, portions of the Fed. R. Civ. P., having been added to our procedural rules from time to time, are already in force in Arkansas. Because of the piecemeal adoption of provisions, however, some of the federal models engrafted into Arkansas procedure were older versions of federal rules while others were adopted without considering their frame of reference. Most of these limitations are cured by the new code.

II. FEDERAL RULES INCORPORATED INTO ARKANSAS PRACTICE

Among the Federal Rules already in force in Arkansas are Fed. R. Civ. P. 14⁷ (Third Party Practice) and 56⁸ (Summary Judgments) which differ from the Arkansas enactments only by the elimination of portions that apply to federal practice. In addition, Fed. R. Civ. P. 16 (Pretrial Conference) adopted in the new rules, differs somewhat in wording and organization from the prior Arkansas enactment,⁹ but the differences appear to be more in form than in substance.

The former Arkansas discovery rules¹⁰ were based on an early version of the federal rules while those in the new code are patterned on the 1970 version. The differences, however, are primarily in the

4. These codes were named after David Dudley Field, the leading draftsman of the first such code which was enacted in New York in 1848. See also Barnhart, *supra* note 3, at 14.

One copy of the 1869 Arkansas version of the Field Code can be found in the UALR-Pulaski County Law Library in a volume entitled ARKANSAS CODE. This volume contains both the civil and criminal codes. Hereafter, the collection will be cited as ARKANSAS CODE (1869), while the civil portion will be designated *Civil Code* (1869).

5. Barnhart, *supra* note 3, at 14. See also ARKANSAS CODE (1869). Remnants of this nineteenth-century code can be found in title 27 of the Arkansas Statutes Annotated under the heading "Civil Code," located in the history commentary.

6. This may be due to the fact that, like the Field Code in New York, the *Civil Code* (1869) was implemented by statute rather than by court order. See Barnhart, *supra* note 3, at 14; ARKANSAS CODE (1869).

7. ARK. STAT. ANN. § 27-1134.1 (Cum. Supp. 1977). Prior to 1975 the only such provision was ARK. STAT. ANN. § 34-1007 (1962) which provided only for impleader of joint tortfeasors. That section is not among those specifically superseded by the 1979 Rules.

8. ARK. STAT. ANN. § 29-211 (1962 & Cum. Supp. 1977).

9. ARK. STAT. ANN. §§ 27-2401 to 2403 (1962).

10. ARK. STAT. ANN. §§ 28-348 to 361 (1962).

nature of reorganization and codification of matters which had previously been the subject of interpretation by case law. The new rules codify an expanded version of the *Hickman v. Taylor*¹¹ "work product" privilege which has been recognized in Arkansas¹² and the discoverability of liability insurance coverage which appears to be new to Arkansas practice.¹³

Arkansas Rules of Civil Procedure [Ark. R. Civ. P.] 31 provides for depositions upon written questions and supersedes a portion of the Arkansas statute dealing with depositions on written interrogatories.¹⁴ Apparently retained are provisions in the same statute for interrogatories annexed to pleadings¹⁵ and for deposition on interrogatories¹⁶ where the parties are out of state or numerous

11. 329 U.S. 495 (1945).

12. See *Dritt v. Morris*, 235 Ark. 40, 357 S.W.2d 13 (1962).

13. ARK. R. CIV. P. 26(b)(2) and Reporters' Note 1 to Rule 26.

14. ARK. STAT. ANN. § 28-353(1) (1962).

15. ARK. STAT. ANN. § 28-353(3) (1962), which provides as follows:

(3) Interrogatories Annexed to Pleadings in the Circuit, Chancery and Probate Courts of This State.

(a) Interrogatories to Adverse Parties. In all proceedings in the Circuit, Chancery and Probate Court [Courts], either party may annex to the complaint, answer or reply, written interrogatories to any one or more of the adverse parties, concerning any of the material matters in issue in the proceeding. The answers to which, on oath, may be read by either party, as a deposition between the party interrogating and the party answering.

(b)

(c) Time for Answering. Where the interrogatories are annexed to the complaint, they shall be answered at the same time the party is required to answer the complaint; where annexed to the answer or reply, then in twenty (20) days after notice shall be given of the filing thereof to the adverse party or his attorney; but if answered twenty (20) days before the action stands regularly for trial, the action shall not be postponed on account of their not being sooner answered.

(d) Trial of Cause after Failure to Answer. The trial of an action shall not be postponed on account of the failure to answer the interrogatories, if the party interrogated is present in court at the trial so that he may be orally examined; nor in case of his absence, without an affidavit showing the facts the party believes will be proved by the answers thereto, and that the party has not filed the interrogatories, nor omitted to file them for the purpose of delay. Whereupon, if the party will consent that the facts stated in the affidavit shall be considered as admitted by those interrogated, the trial shall not be postponed for that cause.

16. ARK. STAT. ANN. § 28-353(2) (1962) which states as follows:

(2) When Service Cannot Be Obtained on the Other Party in Proceedings in the Circuit, Chancery and Probate Courts of this State.

(a) Grounds. The court, on motion of either party, may permit depositions to be taken upon interrogatories,

(1) Where the party against whom the depositions are to be read is absent from the State and has not appointed an agent or attorney in the county where the action is pending, known to the party taking a deposition, or

(2) Where the parties against whom the deposition is to be read are numerous

and have not designated local agents or attorneys for service of notice. Both provisions were added to the Arkansas counterpart of Fed. R. Civ. P. 31 pertaining to what is now called "deposition on written questions,"¹⁷ and the context of the reference to deposition on interrogatories previously referred to clearly indicates that the reference is to deposition on written questions, not interrogatories. On the other hand, the provision for interrogatories annexed to pleadings refers to a form of interrogatories to parties now covered in Ark. R. Civ. P. 33, but it differs in the manner of service and in the consequences of failure to answer.¹⁸ While both provisions are omitted from the table of superseded statutes, it is possible that they are covered by the general supersession rule since they touch upon the subject matter of other rules. The question of the continuing vitality of the rule is murky since at least one of them adds to the provisions of a rule which might supersede it.

The provision for interrogatories annexed to pleadings¹⁹ can have consequences similar to those under Ark. R. Civ. P. 36 where the interrogatories are accompanied by the requisite affidavit and the other party does not answer, but this provision goes further by permitting the court to rule that the claim or defense which is the subject of the affidavit has been established by the adverse party's failure to answer the interrogatories.²⁰ The consequence of failure to respond under Ark. R. Civ. P. 36, on the other hand, is limited to admission of the specific matters covered in the request for admission. Some admissions could, of course, be dispositive of the case and a similar result might be reached under Ark. R. Civ. P. 37(b)(2)(A)²¹ for failure to respond to other discovery orders. It is

and have not designated agents or attorneys residing in the county on whom notice may be served.

17. ARK. STAT. ANN. § 28-353 (1962) uses older terminology which has been changed in the 1979 CIVIL PROCEDURE RULES to correspond with the language of the 1970 federal discovery rules. No doubt, that change was prompted by the propensity of the old language for confusion with interrogatories to parties.

18. Compare ARK. STAT. ANN. § 28-353(d) (1962), *supra* note 15, with ARK. R. CIV. P. 33(a) which provides that the party submitting the interrogatories may move for an order under ARK. R. CIV. P. 37(a) with respect to a failure to answer. See text at note 20 *infra*.

19. See the statute quoted note 15 *supra*.

20. ARK. STAT. ANN. § 28-353(3)(d) (1962).

21. ARK. R. CIV. P. 37(b)(2)(A) states as follows:

(2) *Sanctions By Court In Which Action Is Pending.* If a person or an officer, director or managing agent of a party or a person designated under Rule 30 (b)(6) or 31 (a) to testify on behalf of a party fails to obey an order to provide or permit discovery, including an order made under subdivision (a) of this rule or Rule 35, the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following:

also recognized that several provisions in the present discovery statutes which are clearly covered by the new code have been omitted from the list of statutes specifically superseded;²² nevertheless, until there has been a clear holding to the contrary, this writer will assume that at least the provision for interrogatories annexed to pleadings has not been superseded.

III. A FEDERAL RULE RESTORED TO PROPER CONTEXT

The most obvious instance of a federal rule previously adopted out of context is the one patterned on the pre-1966 Federal Rule governing permissive joinder of parties.²³ The context problem arises because many multiple-parties situations also involve multiple claims; therefore, the state adoption of Fed. R. Civ. P. 20²⁴ must be

(A) An order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;

22. *E.g.*, ARK. STAT. ANN. §§ 28-348 (depositions pending action), -349 (perpetuation of testimony), -350 (persons before whom depositions may be taken) (1962).

23. ARK. STAT. ANN. §§ 27-806, -807 (1962) which provided as follows:

27-806. Who May Join as Plaintiffs or Defendants.—All persons may join in one action as plaintiffs if they assert any right to relief jointly, severally, or in the alternative in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all of them will arise in the action. All persons may be joined in one action as defendants if there is asserted against them jointly, severally, or in the alternative, any right to relief in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to *all of them* will arise in the action. A plaintiff or defendant need not be interested in obtaining or defending against all the relief demanded. Judgment may be given for one or more of the plaintiffs according to their respective rights to relief, and against one or more defendants according to their respective liabilities.

(Emphasis added).

27-807. Preventing Improper Joinder—Separate trials.—The court may make such orders as will prevent a party from being embarrassed, delayed, or put to expense by the inclusion of a party against whom he asserts no claim and who asserts no claim against him, and may order separate trials or make other orders to prevent delay or prejudice.

24. FED. R. CIV. P. 20 provides as follows:

PERMISSIVE JOINDER OF PARTIES

(a) Permissive Joinder. All persons may join in one action as plaintiffs if they assert any right to relief jointly, severally, or in the alternative in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to *all these persons* will arise in the action. All persons (and any vessel, cargo or other property subject to admiralty process in rem) may be joined in one action as defendants if there is asserted against them jointly, severally, or in the alternative, any right to relief in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all defendants will arise in the

accompanied by adoption of Fed. R. Civ. P. 18,²⁵ the joinder of actions section, if the aim of liberal joinder is to reach its full potential.²⁶ Previously, Arkansas had an older type of Field Code joinder of actions provision which, among other things, restricted joinder to actions falling within one of seven categories described in the rule.²⁷ The addition of a "transaction clause" in 1967²⁸ probably liberalized joinder enough to permit crossing the barriers between categories in most cases in which it would be desirable to do so, but the new Ark.

action. A plaintiff or defendant need not be interested in obtaining or defending against all the relief demanded. Judgment may be given for one or more of the plaintiffs according to their respective rights to relief, and against one or more defendants according to their respective liabilities.

(b) Separate Trials. The court may make such orders as will prevent a party from being embarrassed, delayed, or put to expense by the inclusion of a party against whom he asserts no claim and who asserts no claim against him and may order separate trials or make other orders to prevent delay or prejudice.

As amended Feb. 28, 1966, eff. July 1, 1966 (emphasis added).

25. FED. R. CIV. P. 18 provides as follows:

JOINDER OF CLAIMS AND REMEDIES

(a) Joinder of Claims. A party asserting a claim to relief as an original claim, counterclaim, cross-claim, or third-party claim, may join, either as independent or as alternate claims, as many claims, legal, equitable, or maritime, as he has against an opposing party.

(b) Joinder of Remedies; Fraudulent Conveyances. Whenever a claim is one heretofore cognizable only after another claim has been prosecuted to a conclusion, the two claims may be joined in a single action; but the court shall grant relief in that action only in accordance with the relative substantive rights of the parties. In particular, a plaintiff may state a claim for money and a claim to have set aside a conveyance fraudulent as to him, without first having obtained a judgment establishing the claim for money.

As amended Feb. 28, 1966, eff. July 1, 1966.

26. See Barnhart, *supra* note 3, at 21.

27. ARK. STAT. ANN. § 27-1301 (1962) states as follows:

What Causes of Action May Be Joined.—Several causes of action may be united in the same complaint, where each affects all the parties to the action, may be brought in the same county, be prosecuted by the same kind of proceedings, and all belong to one of the following classes:

First. Claims arising out of contracts, express or implied.

Second. Claims for the recovery of specific real property, and the rents, profits and damages for withholding the same.

Third. Claims for the recovery of specific personal property, and damages for the taking or withholding the same.

Fourth. Claims for partition of real or personal property, or both.

Fifth. Claims arising from injuries of character.

Sixth. Claims arising from injuries to person and property.

Seventh. Claims against a trustee by virtue of a contract or by operation of law.

28. ARK. STAT. ANN. § 27-1301 (Cum. Supp. 1977). This amendment added an eighth category of actions which could be joined; it is as follows: "Eighth. Claims arising out of the same transaction or transactions connected with the subject of action, whether in contract, tort, either, both or otherwise."

R. Civ. P. 18(a), which is the same as its federal counterpart in this respect,²⁹ has completed the task by eliminating the categories altogether.

Arkansas' adoption of the current Fed. R. Civ. P. 19 and 20 may have another liberalizing effect. Suppose a plaintiff wanted to join three co-makers of a single promissory note in an action on the note. It is fairly clear that even the most restrictive joinder requirements would be satisfied; joinder might even be required in some jurisdictions. Suppose, however, that the plaintiff also wants to state a claim on a separate promissory note against only one of the three defendants. Problems of interpretation of the language used in the pre-1966 version of Fed. R. Civ. P. 18(a),³⁰ which referred back to Fed. R. Civ. P. 20,³¹ led some courts to interpret Fed. R. Civ. P. 20(a) as requiring the "common question" to exist not only between the defendants joined but also between the actions joined.³² Under this interpretation, the tacking on of additional claims against a single defendant was not permissible; the same result would seem to have been mandated under the Arkansas requirement that the

29. See the rule quoted note 25 *supra*.

30. Prior to 1966, FED. R. CIV. P. 18(a) read as follows:

(a) Joinder of Claims. The plaintiff in his complaint or in a reply setting forth a counterclaim and the defendant in an answer setting forth a counterclaim may join either as independent or as alternate claims as many claims either legal or equitable or both as he may have against an opposing party. *There may be a like joinder of claims when there are multiple parties if the requirements of Rules 19, 20, and 22 are satisfied.* There may be a like joinder of cross-claims or third-party claims if the requirements of Rules 13 and 14 respectively are satisfied.

(Emphasis added).

31. Prior to 1966, FED. R. CIV. P. 20 read as follows:

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

(b) Separate Trials. The court may make such orders as will prevent a party from being embarrassed, delayed, or put to expense by the inclusion of a party against whom he asserts no claim and who asserts no claim against him, and may order separate trials or make other orders to prevent delay or prejudice.

(Emphasis added).

32. See C. WRIGHT, FEDERAL COURTS, § 78 (3d ed. 1977) (citing *Federal Hous. Adm'r v. Christianson*, 26 F. Supp. 419 (D. Conn. 1939)).

actions joined affect all the parties.³³ Liberal joinder being favored, the federal rules were amended in 1966 to eliminate language problems and the necessity for cross referencing Rules 20 and 18(a). As a result of the 1966 amendment, tacking on as previously described would be permissible. The new Ark. R. Civ. P. 20(a)³⁴ and 18(a)³⁵ follow the post-1966 federal rules in this respect³⁶ and presumably adopt the intent of the 1966 amendments as well.³⁷

While it can safely be said that Arkansas has now completed its joinder reform by adopting Fed. R. Civ. P. 18, there are a few language differences which should be considered. The first of these appears in Ark. R. Civ. P. 18(a)³⁸ and (b)³⁹ relating to the split

33. The introductory paragraph to ARK. STAT. ANN. § 27-1301 (Cum. Supp. 1977) stated as follows: "Several causes of action may be united in the same complaint, *where each affects all the parties to the action . . .*" (emphasis added).

34. ARK. R. CIV. P. 20 provides as follows:

PERMISSIVE JOINDER OF PARTIES

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

(b) *Separate Trials.* The court may make such orders as will prevent a party from being embarrassed, delayed, or put to expense by the inclusion of a party against whom he asserts no claim and who asserts no claim against him and may order separate trials or make other orders to prevent delay or prejudice.

(Emphasis added). Compare the federal rule quoted note 24 *supra*.

35. ARK. R. CIV. P. 18(a), a modified version of FED. R. CIV. P. 18(a), provides as follows:

JOINDER OF CLAIMS AND REMEDIES

(a) *Joinder of Claims.* A party asserting a claim for relief as an original claim, counterclaim, cross-claim, or third-party claim may join, either as independent or as alternative claims, as many claims as he may have against an opposing party, provided, that nothing herein shall affect the obligation of a party under Rule 13 (a).

36. ARK. R. CIV. P. 20 also omits some maritime references which were added to the federal version when the admiralty practice was incorporated into the federal rules, but, since maritime actions in state courts are tried as civil actions, this omission may be disregarded.

37. See C. WRIGHT, *supra* note 32. See also the Advisory Committee's comments to the 1966 amendments to FED. R. CIV. P. 18.

38. See the Arkansas rule quoted note 35 *supra*.

39. ARK. R. CIV. P. 18(b) provides as follows: "*Severance and Transfer.* The trial court may make appropriate orders affecting severance of claims and may transfer claims between courts of law and equity on appropriate jurisdictional grounds."

between law and equity in Arkansas, but, since severance and transfer of claims are contemplated rather than a preclusion of joinder at the outset, these differences present no cause for concern. There is, however, a final clause in Ark. R. Civ. P. 18(a)⁴⁰ which indicates that the permissive language of Ark. R. Civ. P. 18(a) does not relieve litigants from the compulsory counterclaim requirements of Ark. R. Civ. P. 13(a).⁴¹ This clause may be more far reaching than it at first appears.

Ordinarily, a plaintiff is not required to join related claims against a defendant, but a defendant is required to assert related counterclaims and is permitted to assert others.⁴² Suppose a defendant asserts a permissive counterclaim and the plaintiff has unfiled claims which relate to that counterclaim. Is the plaintiff now required to counterclaim against the counterclaim? While the authorities seem scarce, at least one federal case seems to have proceeded on that assumption⁴³ and the final clause in Ark. R. Civ. P. 18(a)⁴⁴ seems to reinforce that argument. This might have been regarded as intolerable under the previous Arkansas practice which regarded all counterclaims as compulsory,⁴⁵ but it is at least an arguable possibility under the new Ark. R. Civ. P. 13(a) and (b)⁴⁶ which

40. See the Arkansas rule quoted note 35 *supra*.

41. ARK. R. CIV. P. 13(a) provides as follows:

COUNTERCLAIM AND CROSS-CLAIM

(a) *Compulsory Counterclaims.* A pleading shall state as a counterclaim any claim which, at the time of filing the pleading, the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction. But the pleader need not state the claim if (1) at the time the action was commenced the claim was the subject of another pending action, or (2) the opposing party brought suit upon his claim by attachment or other process by which the court did not acquire jurisdiction to render a personal judgment on that claim, and the pleader is not stating any counterclaim under this Rule 13.

42. "Related," in this context, refers to the type of relationship described in ARK. R. CIV. P. 13(a) as a test for determining whether a counterclaim is compulsory. See the Arkansas rule quoted note 41 *supra*.

43. See *Great Lakes Rubber Corp. v. Herbert Cooper Co.*, 286 F.2d 631 (3d Cir. 1961).

44. See the Arkansas rule quoted note 35 *supra*.

45. ARK. STAT. ANN. § 27-1121 (1962) as interpreted by the Arkansas Supreme Court in *May v. Exxon Corp.*, 256 Ark. 865, 512 S.W.2d 11 (1974). While criticized as a correct but unfortunate decision, see 29 ARK. L. REV. 122 (1975), the *May* view of counterclaims at least provided an element of certainty that some lawyers may miss in the new ARK. R. CIV. P. 13(a) and (b). The federal approach, while not confined to federal practice, is more or less mandated by jurisdictional considerations which are inapplicable to state practice. If a distinction between compulsory and permissive counterclaims is to be recognized, however, the federal approach would seem to be the best choice.

46. ARK. R. CIV. P. 13(b) states as follows: "*Permissive Counterclaim.* A pleading may

adopts the federal and generally prevailing distinction between compulsory and permissive counterclaims.

Even under the 1979 Civil Procedure Rules a required election of remedy may dictate the form of the action and, thus, restrict the application of the joinder provision. In *Rastle v. Marion County School District No. 1*,⁴⁷ a school teacher sued for damages for breach of the contract and, in the alternative, for mandamus to compel the payment of his salary. The Arkansas Supreme Court held that the actions could not be joined because mandamus involved a special procedure⁴⁸ which conflicted with the procedures governing ordinary civil actions.⁴⁹ *Rastle* was decided under the former Arkansas joinder of actions statute⁵⁰ which contained a requirement that actions joined be triable by the same proceedings. Although the new Ark. R. Civ. P. 18⁵¹ does not contain that express requirement, under Ark. R. Civ. P. 81(a) the new procedure rules do not apply to those remedies in which statutes prescribe a different procedure; thus, the result under the new rules would be the same as in *Rastle* if an attempt were made to join a remedy which was subject to a procedure in conflict with the procedure for the alternative relief sought.

IV. PROVISIONS DIFFERING FROM THE FEDERAL RULES

Most of the deviations from the Fed. R. Civ. P. are simply adaptations of the federal rules to state practice through the elimination of provisions that relate only to the federal courts.⁵² Other differences merely express a preference for the current state practice, while still others seem to be dictated by limitations in the scope of the enabling act or imposed by the Arkansas Constitution, or a combination of these reasons. The reason is not always clear on the face of the provision.

Among the deviations from the federal pattern apparently im-

state as a counterclaim any claim against an opposing party not arising out of the transaction or occurrence that is the subject matter of the opposing party's claim."

47. 260 Ark. 740, 543 S.W.2d 923 (1976).

48. No adequate definition of "special proceedings" is found in either the present or the new rules. Compare ARK. STAT. ANN. §§ 27-105 to 107 (1962) with ARK. R. CIV. P. 1, 2, and 81. It is fairly clear, however, that a special proceeding, as distinguished from an ordinary "civil action," is a remedy or proceeding governed by special statutory procedures. Many of these are found in titles 31 through 36 of the Arkansas Statutes Annotated.

49. *Rastle v. Marion County Rural School Dist. No. 1*, 260 Ark. 740, 543 S.W.2d 923 (1976).

50. ARK. STAT. ANN. § 27-1301 (Cum. Supp. 1977). See the quoted statute in notes 27 and 28 *supra*.

51. See notes 35 and 39 *supra*.

52. *E.g.*, references to admiralty and maritime practice.

posed by limitations in the enabling act are the retention of separate law and equity courts.⁵³ Curiously enough, Arkansas, like most Field Code states, had merged law and equity courts but with separate law and equity proceedings.⁵⁴ Recognition of this can be found in the Arkansas Constitution.⁵⁵ Eventually, however, separate chancery courts were created in various counties and in 1903 a separate system of chancery courts was created by statute.⁵⁶ Since Arkansas Act 38 of 1973 did not extend to court reorganization, the separate chancery courts remain. The separation is probably more apparent than real, however, since the same rules of procedure are applicable to both courts,⁵⁷ and an action filed in the wrong forum is subject to transfer rather than dismissal.⁵⁸

One deviation probably influenced by limitations imposed by the Arkansas Constitution is the provision in Ark. R. Civ. P. 51 that the judge instruct the jury before arguments of counsel, as in the previous Arkansas practice,⁵⁹ rather than after argument as in the federal version. This rule seems to recognize the fact that, in the federal system, the judge may comment on the evidence⁶⁰ and thus make his instructions clearer to the jury; whereas in Arkansas the judge may only instruct the jury on the law⁶¹ and thus leave to counsel the job of relating the evidence to the instructions.

The reasons for some deviations are not so clear, however. Recognizing that a party at the pleading stage may not be certain of the exact facts,⁶² Fed. R. Civ. P. 18(e)(2) explicitly permits pleading claims or defenses alternately or hypothetically and without regard to consistency. The version adopted for Arkansas, however, omits that language and therefore revives doubts concerning the permissibility of pleading inconsistently at a time when the Arkansas Su-

53. ARK. R. CIV. P. 2.

54. See, e.g., ARK. STAT. ANN. §§ 27-204 (civil actions divided into law and equity), -205 (equity jurisdiction), -206 (remedy at law), -208 (error as to proceeding) (1962).

55. ARK. CONST. art. 7, § 15.

56. ARK. STAT. ANN. § 22-401 (1962); see also Smith & Nixon, *La Dolca Vita—Law and Equity Merged At Last!*, 24 ARK. L. REV. 162, 165-72 (1970). This otherwise good article is marred by a title suggesting that the courts of law and equity have recently been merged in Arkansas. In fact, the article dealt with the provision for merger contained in the proposed Arkansas Constitution of 1970, which was defeated subsequent to publication of the article.

57. ARK. STAT. ANN. § 27-103 (1962); ARK. R. CIV. P. 1.

58. ARK. STAT. ANN. §§ 22-405, 27-208 (1962); see ARK. R. CIV. P. 12(h)(3), 15(b).

59. ARK. STAT. ANN. § 27-1727 (1962).

60. F. JAMES & G. HAZARD, CIVIL PROCEDURE, § 7.14 (2d ed. 1977).

61. ARK. CONST. art. 7, § 23.

62. See generally Barnhart, *supra* note 3.

preme Court seemed to have moved in the direction of permitting inconsistent pleading when done in good faith.⁶³

V. PROPOSED ARKANSAS RULES MODIFIED BY THE ARKANSAS SUPREME COURT

Possibly the most noteworthy deviations from the federal rules are those provisions in which the Arkansas Supreme Court revised the proposals submitted by the Committee. One revision deals with class actions and their prerequisites.⁶⁴ The traditional class action is predicated on a community of interest among the class in the sense of a right which is common to the class. This view reflects its historical origin as a device for coping with necessary parties where the number is large or unascertainable.⁶⁵ The 1966 version of Fed. R. Civ. P. 23 also recognized a class based on rights which were several but involved a predominating common question of law or fact. The Civil Procedure Revision Committee proposed a condensed version,⁶⁶ patterned after the rule adopted in Massachusetts and Rhode Island, which seemed to recognize the so-called "common question class" without recognizing the privilege of opting out, as under the federal version, when the rights involved were several.⁶⁷ The Arkansas Supreme Court, however, revised the pro-

63. See *Allen v. First Nat'l Bank*, 230 Ark. 201, 321 S.W.2d 750 (1959). Alternate contentions that a testator was incompetent to make a will or that, if he were competent, the other claimants had chosen to take only a small part of the estate were upheld against a motion to require an election because of inconsistency. The court stated that inconsistent theories were permissible in equity under the proper circumstances, such as not knowing at the pleading stage which contention was correct. *Allen* was relied on by the court in *Odom v. Odom*, 232 Ark. 229, 535 S.W.2d 301 (1960) where, in a partition suit by a widow who claimed through deeds from heirs of her deceased husband, she was allowed to join an alternate count that she be declared owner as survivor of an estate by the entirety. An election of remedies was not required. While neither case involved an outright contradiction of fact, the reasoning of the *Allen* case would seem to permit it under proper circumstances. In a like manner there seems to be no good reason to restrict the *Allen* holding to equity cases since the present code and the 1979 Rules of Civil Procedure apply to both circuit and chancery practice.

64. ARK. R. CIV. P. 23.

65. See generally F. JAMES & G. HAZARD, *supra* note 60, at § 10.18.

66. Arkansas Rules of Civil Procedure, Proposal to the Supreme Court by the Civil Procedure Revision Committee, Rule 23 (1978).

67. See FED. R. CIV. P. 23(c)(2) which states as follows:

(c) Determination by Order Whether Class Action to be Maintained; Notice; Judgment; Actions Conducted Partially as Class Actions.

(2) In any class action maintained under subdivision (b)(3), 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 advise each member that (A) the court will exclude him

posed Ark. R. Civ. P. 23(a) by restoring the language of the present Arkansas class action statute⁶⁸ and, presumably, the gloss which had been applied to it. At least one case can be cited for having rejected the common question class in Arkansas practice,⁶⁹ and the case apparently remains precedent.

The basis for another revision implemented in the new rules is difficult to discern. Arkansas formerly had a typical Field Code requirement that a complaint state "facts constituting the plaintiff's cause of action,"⁷⁰ a reasonable requirement liberally applied. The problem is that the word "facts" and the phrase "cause of action" have developed unfortunate connotations which tended to defeat the purpose of simplified pleading envisioned by the framers.⁷¹ One of the problems posed by the concept "facts" was that it became necessary to distinguish between pleading "evidence," "facts," and "conclusions of law" for the purpose of determining whether a complaint was insufficient.⁷² This, of course, meant that demurrers were often decided more on the basis of the technicalities of pleading than on what the pleading showed about the merits of the pleader's case. For example, in one Arkansas case the plaintiff was injured while examining defendant's automobile which started to roll and knocked plaintiff to the ground. In his complaint, plaintiff alleged that his injuries were caused by defendant's negligent failure to tell him that the automobile had not been placed in gear and that the emergency brake had not been set. The court sustained the demurrer to the complaint, holding that plaintiff had stated conclusions rather than facts. Plaintiff's failure to allege that defendant had knowledge of these defects as well as his failure to allege what caused the car to roll rendered his complaint demurrable.⁷³ Although plaintiff certainly did not allege all the "facts" which he

from the class if he so requests by a specified date; (B) the judgment, whether favorable or not, will include all members who do not request exclusion; and (C) any member who does not request exclusion may, if he desires, enter an appearance through his counsel.

68. ARK. STAT. ANN. § 27-809 (1962).

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

70. ARK. STAT. ANN. § 27-1113 (1962).

71. See F. JAMES & G. HAZARD, *supra* note 60, at §§ 2.5 to 2.9; Barnhart, *supra* note 3, at 16.

72. *Id.*

73. *Vandevier v. Chapman*, 255 Ark. 1039, 505 S.W.2d 495 (1974). At the other extreme, pleading of evidence seems not to have been treated so harshly. In one case, the pleader stated all of the facts necessary to constitute ratification but did not use that specific word. The court held that this was not objectionable where the adverse party had notice of the pleader's position. *City of Fort Smith v. Bates*, 260 Ark. 777, 544 S.W.2d 525 (1976).

would have to prove in order to recover, it appears that he said enough to identify the action for purposes of *res judicata* and determination of the legal basis for his claim. The framers of the federal rules apparently substituted the phrase "a short and plain statement of the claim showing that the pleader is entitled to relief" in order to overcome the judicial construction of the phrase "facts constituting a cause of action."⁷⁴ Even under the more liberalized federal approach it appears that the pleader must state more than a grievance, but as to how much more, two schools of thought have arisen.⁷⁵ One view⁷⁶ considers a complaint sufficient only if it has alleged enough of the circumstances, even though sketchily, to bring compensability within the realm of probable cause.⁷⁷ The other view⁷⁸ would sustain the complaint unless it showed on its face that the pleader had no compensable claim. The Arkansas case previously described would certainly satisfy the second test and probably the first.

The version of rule 8(a) proposed by the Civil Procedure Revision Commission used the language, "a statement in ordinary and concise language of the *claim* showing that the pleader is entitled to relief,"⁷⁹ which is essentially the same as the federal version. The citation to *Conley v. Gibson*⁸⁰ in the reporter's notes⁸¹ suggests that the second view of the test of sufficiency discussed earlier was intended to apply. The Arkansas Supreme Court, however, modified the proposed language to read, "a statement in ordinary and concise language of *facts* showing that the pleader is entitled to relief,"⁸² and thus the court retained the previous Arkansas construction of "facts." The retention without change of the reporter's notes referring to *Conley*, however, seems to indicate that some liberalization is intended.⁸³ Time will tell. While a verbatim adoption of the language of Fed. R. Civ. P. 8(a) and the gloss that went with it would

74. F. JAMES & G. HAZARD, *supra* note 60, at § 2.11; see also C. WRIGHT, FEDERAL COURTS, § 67 (3d ed. 1976).

75. F. JAMES & G. HAZARD, *supra* note 60, at § 2.11.

76. *Id.* (citing *Hoshman v. Esso Stand. Oil Co.*, 263 F.2d 499 (5th Cir. 1959)).

77. See *Garcia v. Hilton Hotels Int'l, Inc.*, 97 F. Supp. 5 (D.P.R. 1951). A defamation complaint which failed to allege publication was upheld on a motion to dismiss because it was sufficiently implied that the plaintiff would attempt to prove publication.

78. F. JAMES & G. HAZARD, *supra* note 60, at § 2.11 (citing *Conley v. Gibson*, 355 U.S. 41 (1957)).

79. (Emphasis added).

80. 355 U.S. 41 (1957).

81. See ARK. R. CIV. P. 8, Reporters' Note 1.

82. ARK. R. CIV. P. 8(a) (emphasis added).

83. ARK. R. CIV. P. 8, Reporters' Note 1.

certainly have been desirable from the standpoint of clarity, a less permissive approach is not necessarily bad. Applied intelligently, this would at least give the parties an opportunity to secure a ruling as to what the plaintiff will have to prove in order to recover and should cause no hardship if amendments are freely allowed. The arguments to the contrary usually assume that all of this can be done through other pretrial devices and discovery, but this can be expensive. In any event, the abandonment of the phrase "cause of action" in this section would seem to give the court some room to improve the previous law regarding sufficiency of pleadings.

VI. CONCLUSION

As noted earlier, this comment is not a comprehensive review of the 1979 Civil Procedure Rules; it merely highlights some of the changes that are embodied in the Rules of Civil Procedure for circuit, chancery, and probate courts. Priority has been given to features which might not be apparent on the face of the 1979 Rules of Civil Procedure or the Reporters' Notes thereto. Special emphasis has been placed on certain court modifications of the Civil Procedure Revision Committee's proposals. Some of these changes include the expansion of the rules to include discovery of liability insurance coverage, the revision of the rules that relate to deposition upon written questions, and the simplification of the permissive joinder rules.

The differences between the 1979 Civil Procedure Rules and their federal counterparts, for the most part, are based on a desire to retain former Arkansas practices and to accommodate Arkansas statutory and constitutional limitations. The new rules retain not only the separation of law and equity but also the trial procedure whereby jury instructions are given prior to argument of counsel. Likewise, the Federal Rule which governs class actions has been modified to follow former Arkansas procedure. Because of the retention of Arkansas rules which differ from their federal counterparts, the transition to the 1979 Rules of Civil Procedure may be made more easily by the Arkansas practitioner.

