



1998

Civil Procedure—The End of the Class Action in Multi-Taxpayer Litigation Seeking Refunds of State Taxes. *ACW Inc. v. Weiss*, 329 Ark. 302, 947 S.W.2d 770 (1997).

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Recommended Citation

Joey Nichols, *Civil Procedure—The End of the Class Action in Multi-Taxpayer Litigation Seeking Refunds of State Taxes. ACW Inc. v. Weiss*, 329 Ark. 302, 947 S.W.2d 770 (1997), 21 U. ARK. LITTLE ROCK L. REV. 151 (1998).

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I. INTRODUCTION

In *ACW, Inc. v. Weiss*,¹ the Arkansas Supreme Court revisited the issue of whether a class action lawsuit can be used by taxpayers to seek a refund of an improperly collected tax.² The case weighs the policy concerns in favor of taxpayer class action suits against the state's right to protection against lawsuits in its own courts under the doctrine of sovereign immunity.³ While the court has addressed this problem previously, this case signals a fundamental break from past precedents.⁴ After the decision in *ACW*, it will be almost impossible to use a class action to sue the State of Arkansas to gain a tax refund.⁵

This note begins Part II with a brief description of the relevant facts of *ACW, Inc. v. Weiss*. Part III explores the development of the case law leading up to this decision. Part IV of the note is devoted to an analysis of the court's reasoning in the majority and the dissenting opinions. Finally, Part V discusses the significance and possible future ramifications of this decision.

II. FACTS

The Arkansas legislature passed a new corporate taxing scale⁶ during the 1991 session in response to an emergency need for additional revenue.⁷ The new tax tables caused those corporations with gross income of more than \$100,000 to pay a greater percentage of the tax than those corporations with total income of less than \$100,000.⁸

1. 329 Ark. 302, 947 S.W.2d 770 (1997).

2. *See id.*

3. *See id.* at 314, 947 S.W.2d at 776.

4. *See id.*

5. *See id.*

6. *See* Act of Apr. 9, 1991, No. 1052, 1991 Ark. Acts 3280 (codified at ARK. CODE ANN. § 26-51-205 (Michie 1992)). Act 1052 establishes graduated corporate tax rates for income less than \$100,000 and a flat rate of 6.5 % on all income in excess of \$100,000. *See* ARK. CODE ANN. § 26-51-205 (Michie 1992).

7. *See* *ACW, Inc. v. Weiss*, 329 Ark. 302, 307, 947 S.W.2d 770, 772 (1997). "[T]he General Assembly . . . [determined] . . . that additional funds were necessary to provide higher quality education programs which are accessible by all segments of the population . . ." *Id.*

8. *See* ARK. CODE ANN. § 26-51-205 (Michie 1992).

(a) Every corporation organized under the laws of this state shall pay annually an income tax with respect to carrying on or doing business on the entire net income of the corporation, . . . received by such corporation during the income year, on the following basis:

(1) On the first \$3000 of net income or any part thereof 1%
On the second \$3000 of net income or any part thereof 2%

The plaintiffs were all corporations that reported taxable income in excess of \$100,000.⁹ After first seeking refunds individually, the plaintiffs filed a class action claim against the state seeking a refund of the overpaid taxes on the first \$100,000 of taxable income.¹⁰ These corporations brought suit against the directors of the Arkansas Department of Finance and Administration.¹¹ Plaintiffs structured their claim as a class action lawsuit so as to include all others whom the tax affected adversely.¹²

The Pulaski County Chancery Court originally heard the case.¹³ The chancery court upheld the class certification the plaintiffs established;¹⁴ however, the court agreed with the defendants in interpreting the tax as imposing a flat rate on all income for those corporations with greater than \$100,000 in income.¹⁵ The plaintiffs appealed the chancery court's decision to the Arkansas Supreme Court.¹⁶ Defendants responded by cross-appealing the decision of the chancery court to certify the class action, arguing that the

On the next \$5000 of net income or any part thereof.	3%
On the next \$14,000 of net income or any part thereof.	5%
On the next \$75,000 of net income or any part thereof, but not exceeding \$100,000	6%
(2) On net income exceeding \$100,000, a flat rate of six and one-half (6 ½%) percent shall be applied to the entire net income.	

Id.

9. See *ACW*, 329 Ark. at 305, 947 S.W.2d at 771. The named parties in the certified class of plaintiffs were ACW, Inc., Phillips Development Company, and United Wholesale Florists, Inc. See *id.*

10. See *ACW*, 329 Ark. at 302, 947 S.W.2d at 770. The named plaintiffs filed the class action claim in chancery court after they had exhausted all of their administrative remedies available in seeking a tax refund. See *id.* at 306, 947 S.W.2d at 771.

11. See *id.* at 302, 947 S.W.2d at 770. The named defendants were Richard Weiss, Director of the Department of Finance and Administration, and John Theis, Assistant Commissioner for Policy and Legal. See Brief for Appellees at 1, *ACW, Inc. v. Weiss*, 329 Ark. 302, 947 S.W.2d 770 (1997) (No. 96-00894).

12. See *ACW*, 329 Ark. at 302, 947 S.W.2d at 770.

13. See *id.* Judge Ellen B. Brantley of the Fifth Division of the Pulaski County Chancery Court originally heard the case. See Appellant's Reply Brief, *ACW, Inc. v. Weiss*, 329 Ark. 302, 947 S.W.2d 770 (1997) (No. 96-00894).

14. See *ACW*, 329 Ark. at 306, 947 S.W.2d at 771.

15. See *id.* The court determined that the new tax met the constitutional requirements of Article V, section 38 of the Arkansas Constitution, which requires that the passage of a tax act be in response to an emergency need for funds. See ARK. CONST. art. V, § 38 (1992). The ambiguity in the Act's wording was best resolved in favor of the Commissioner of the Department of Finance and Administration's interpretation. See *ACW*, 329 Ark. at 306, 947 S.W.2d at 772. The court's ruling required those corporations with over \$100,000 of taxable income to pay 6.5% in state income tax on all of their income. See *id.*

16. See *ACW*, 329 Ark. at 306, 947 S.W.2d at 772. Appellants contended that (1) no emergency existed under ARK. CONST. art. V, section 38 giving the General Assembly the right to enact the tax; (2) the Act should be interpreted to apply the graduated tax rates to the first \$100,000 or the Act is ambiguous; (3) the Act violates the Equal Protection Clause; (4) the Act results in a confiscatory tax. See *id.*

doctrine of sovereign immunity protects the state from taxpayer suits of this nature.¹⁷ The Arkansas Supreme Court affirmed the chancery court's finding that the tax met the requirements of the Arkansas Constitution,¹⁸ but reversed the chancery court's interpretation of the statute in favor of the taxpayers.¹⁹ The court also found that the chancery court erred in certifying the class, and reversed the certification.²⁰

III. BACKGROUND

Arkansas courts have struggled with the conflict created between the policy reasons for allowing taxpayer class action suits and the State's right to sovereign immunity.²¹ Arkansas is not alone in having tremendous difficulty creating a reasonable solution to this problem.²² Courts across the country disagree about whether and under what circumstances taxpayers may use a class action lawsuit in seeking a tax refund.²³ Many states, including Arkansas, have statutory procedures that must be followed by the taxpayer in order to obtain a tax refund.²⁴ Most of these statutes do not mention whether class action claims are permitted.²⁵ Other states will allow class action suits by taxpayers when common legal questions are involved and when the relief sought is appropriate to all members.²⁶ The remainder of this section will review Arkansas case law dealing with these issues and summarize the current status of the law in other jurisdictions.

17. See Appellee's Brief at 27, *ACW* (No. 96-00894).

18. See *ACW*, 329 Ark. at 310, 947 S.W.2d at 774.

19. See *id.* at 314, 947 S.W.2d at 776. The Court interpreted the tax in favor of the corporate taxpayers in finding that the tax imposed graduated rates on the first \$100,000 of income for all corporations. See *id.* at 315, 947 S.W.2d at 776.

20. See *id.* at 315, 947 S.W.2d at 776.

21. See, e.g., *Pledger v. Bosnick*, 306 Ark. 45, 811 S.W.2d 286 (1991) (upholding a class certification order by the chancery court for a group of taxpayers seeking a refund); *State Dep't of Fin. & Admin. v. Staton*, 325 Ark. 341, 942 S.W.2d 804 (1996) (reversing the chancery court's certification of a class of taxpayers seeking refund of a state sales tax); *State Dep't of Fin. & Admin. v. Tedder*, 326 Ark. 495, 932 S.W.2d 755 (1996) (reversing the lower court's certification of a class of taxpayers seeking a tax refund).

22. See Philip M. Tatarowicz, *Right to a Refund for Unconstitutionally Discriminatory State Taxes and Other Controversial State Tax Issues Under the Commerce Clause*, 41 TAX LAW. 103, 123 (1987).

23. See *id.*

24. See ARK. CODE ANN. § 26-18-507(e)(2)(A) (Michie 1992).

25. See *id.*

26. See 4 B.E. WITKIN, CALIFORNIA PROCEDURE, Plead § 272 (4th ed. 1997). See also *Thom v. Jefferson County*, 375 So. 2d 780 (Ala. 1979); *Santa Barbara Optical Co. v. State Bd. of Equalization*, 47 Cal. App. 3d 244 (1975); *Ware v. Idaho State Tax Comm'n*, 567 P.2d 423 (Idaho 1977); *Fiorito v. Jones*, 236 N.E.2d 698 (Ill. 1968).

A. Arkansas' Application of the Doctrine of Sovereign Immunity in Taxpayer Class Action Suits

This section of the note will first examine the requirements that must be followed to file for a tax refund under Arkansas law. The next part of this section will be devoted to an outline of the general requirements that must be established in order to maintain a class action lawsuit in Arkansas. The last portion of this section will provide a historical outline of the case law in Arkansas dealing with the certification of taxpayer class action suits against the state.

1. *Arkansas Tax Refund Procedure*

The State of Arkansas has established statutory procedures citizens must follow in order to seek a refund of improperly collected taxes.²⁷ A detailed description of these procedures is laid out in section 26-18-507 of the Arkansas Code.²⁸ If the Arkansas Department of Finance and Administration either denies a refund request or fails to respond within six months, the taxpayer may file suit to obtain the refund.²⁹ By following these procedures, the taxpayer has nullified the defense of sovereign immunity.³⁰ Uncertainty as to how the courts should treat a case arises when only the named plaintiffs in a class action lawsuit actually follow the statutory refund procedures.³¹ The issue is whether the court should treat this adherence to the law by the named plaintiffs as waiving the State's sovereign immunity for the entire class of plaintiffs or only for those that followed the statutory requirements.

2. *Requirements for Maintaining a Class Action Suit in Arkansas*

The Arkansas Rules of Civil Procedure lay out the requirements for forming a class action in Rule 23.³² This rule was not made part of the Arkansas Rules until 1979.³³ Since its enactment, the courts in Arkansas have

27. See ARK. CODE ANN. § 26-18-507 (e)(2)(A) (Michie 1992).

28. See *id.*

29. See *id.* The taxpayer may seek judicial relief after a denial of the refund claim by the director or the director's failure to issue a written decision within a period of six months after the claim has been filed. See *id.* Any written decision of the director on a refund suit becomes final and not subject to judicial relief 91 days after issued. See *id.*

30. See *Staton*, 325 Ark. at 344, 942 S.W.2d at 805.

31. See *id.* at 345, 942 S.W.2d at 808.

32. See ARK. R. CIV. P. 23.

33. See Kenneth S. Gould, *New Wine In An Old Bottle—Arkansas's Liberalized Class Action Procedure—A Boon to the Consumer Class Action*, 17 U. ARK. LITTLE ROCK L.J. 1, 2 (1994). The Arkansas class action procedure used prior to 1979 was derived directly from the

increasingly liberalized their interpretation of the rule so that the class action format can now be used in many new ways.³⁴ Currently, there are four general requirements for forming a class action.³⁵ First, the class of parties must be so numerous that normal joinder of all members would not be practicable.³⁶ Second, there must be questions of law or fact that are common to all members of the class.³⁷ Third, the claims and defenses of the representative parties must be typical of those of the rest of the class.³⁸ Finally, the representative parties and their counsel must fairly and adequately protect the interests of the class.³⁹

Once the four requirements discussed above have been met, certification is not automatic.⁴⁰ The court still has some discretion in deciding whether to grant class certification; however, if the court feels that the questions of law or fact that are common to all members of the class predominate over any questions affecting only individual members, it should grant the class certification.⁴¹ Courts in Arkansas have been some of the most generous in the country in interpreting Rule 23 generously to allow the certification of classes in a variety of cases.⁴²

3. *History of Arkansas Case Law*

The Arkansas Supreme Court's first opportunity to test the limits of the State's sovereign immunity against taxpayer suits came in 1991 with *Pledger v. Bosnick*.⁴³ In *Bosnick*, a group of retirees brought a class action suit against the State of Arkansas, charging that the state income tax favored retired state

common law doctrine of virtual representation developed in equity. *See id.*

34. *See id.* at 1; *International Union of Elec., Radio & Mach. Workers v. Hudson*, 295 Ark. 107, 747 S.W.2d 81 (1988) (holding that the presence of individual remedies amongst the members of the class would not prevent the court from using the class action to resolve those issues common to the class such as defendant's liability); *Arkansas Louisiana Gas Co. v. Morris*, 294 Ark. 496, 744 S.W.2d 709 (1988) (allowing the use of a class action despite the fact that individual questions particular to each case could later cause the case to split into a number of individual suits).

35. *See* ARK. R. CIV. P. 23(a).

36. *See id.*

37. *See id.* This requirement was changed significantly with the addition of the new Rule 23 in 1979. *See* Gould, *supra* note 33, at 24. The old language required that the party establish that there were "common questions of law and fact" rather than the current language requiring a "common question of law or fact." *See* Gould, *supra* note 33, at 24. This allowed the use of the class action in many cases that otherwise would not meet the requirements. *See* Gould, *supra* note 33, at 24.

38. *See* ARK. R. CIV. P. 23(a).

39. *See id.*

40. *See* ARK. R. CIV. P. 23(b).

41. *See id.*

42. *See* Gould, *supra* note 33, at 15.

43. 306 Ark. 45, 811 S.W.2d 286 (1991).

employees over all other retirees who did not work for the state and was therefore unconstitutional.⁴⁴ The lower court certified the class of taxpayers and ruled in their favor on the substantive issues of the lawsuit.⁴⁵ On appeal, the Arkansas Supreme Court upheld the lower court's decision to certify the class of taxpayers despite the fact that few of the members of the class had followed the statutory refund requirements.⁴⁶ Rather than strictly construe the refund requirements of section 26-18-507 of the Arkansas Code, the court looked to the general requirements for bringing a class action suit, as well as the ways other states had treated these issues.⁴⁷ While the court wrote little as to its analysis, it is clear that it relied on the general requirements for bringing a class action suit in Arkansas and found that the plaintiffs had met these requirements.⁴⁸

The Arkansas Supreme Court revisited the issues raised by *Bosnick* again in 1996 in *State Department of Finance and Administration v. Staton*.⁴⁹ *Staton* was a class action suit brought on behalf of taxpayers to recover improperly collected taxes on the sale of automobiles.⁵⁰ When the Arkansas Supreme Court originally heard the case, the court followed the reasoning and precedent established by *Bosnick* and allowed the certification of the class of taxpayers despite the fact that many of the class members had not filed refund claims.⁵¹ Remarkably, after granting the State's Motion for Rehearing in the *Staton* case,

44. See *id.* at 47, 811 S.W.2d at 288. Ark. Code Ann. section 26-51-307 provided a full exemption from state income tax for all income received by Arkansas Public Employees, Teachers, State Police, and Highway Employees Retirement Systems while only allowing an exemption for the first \$6000 of income for all others. See ARK. CODE ANN. § 26-51-307 (Michie 1992). While relief in *Bosnick* was sought under the taxpayer refund statute, Ark. Code Ann. section 26-18-507, the Arkansas Constitution also contains a provision governing relief to taxpayers suing to prevent the enforcement of an unconstitutional tax. See ARK. CONST. art. 16, § 13.

45. See *Bosnick*, 306 Ark. at 47, 811 S.W.2d at 288.

46. See *id.* at 57, 811 S.W.2d at 293.

47. See *id.* at 56, 811 S.W.2d at 293. As authority for its decision to uphold the class certification, the Arkansas Supreme Court cited the following cases, all of which allowed certification of a class of taxpayers: *Thorn v. Jefferson County*, 375 So. 2d 780 (Ala. 1979); *Santa Barbara Optical Co. v. State Bd. of Equalization*, 47 Cal. App. 3d 244 (Cal. Dist. Ct. App. 1975); *Ware v. Idaho State Tax Comm'n*, 567 P.2d 423 (Idaho 1977); *Fiorito v. Jones*, 236 N.E.2d 698 (Ill. 1968). See *id.*

48. See *Bosnick*, 306 Ark. at 57, 811 S.W.2d at 293.

49. 325 Ark. 341, 942 S.W.2d 804 (1996).

50. See *id.* at 343, 942 S.W.2d at 804. Taxpayers claimed that the payment of state sales tax on the extended service contract purchased along with an automobile was unconstitutional. See *id.* They further argued that the language of the sales tax statute, section 26-52-301 of the Arkansas Code, provided no basis for the taxation of extended service contracts. See *id.*

51. See *id.* at 343, 942 S.W.2d at 807.

the Arkansas Supreme Court reversed its earlier decision and ruled against the certification of the class of taxpayers.⁵²

The majority opinion in *Staton* places great importance on the principles of strict construction.⁵³ The court stated that the State's sovereign immunity was a defense that should be enforced rigidly and only waived in very limited circumstances.⁵⁴ The court cited other prior case law establishing the majority's view that when a statute authorizes a means of protest, that method of protest is meant to apply individually to all plaintiffs.⁵⁵ The majority reasoned that a strict construction of the sovereign immunity waiver was necessary because a statutory refund procedure puts the government on notice that it may be required to refund those taxes, so that it can make appropriate allowances.⁵⁶ Otherwise, tax revenues that may have to be paid back to all members of the class of taxpayers later would be allocated to the general unrestricted revenues of the government, rather than a fund set aside for those taxpayers who pay the tax under protest.⁵⁷

Along with the notice requirements discussed above, the majority in *Staton* also looked back to *Pledger v. Bosnick* as further precedent for not allowing the use of a taxpayer class action suit.⁵⁸ In *Bosnick*, the State of Arkansas never brought up the defense of sovereign immunity in attempting to overturn the certification of the class of taxpayers.⁵⁹ The *Staton* court reasoned that since *Bosnick* did not address the issue of sovereign immunity in

52. See Dierdre White, *Arkansas Supreme Court Decertifies Class But Rules Extended Service Warranties Not Taxable; Only One Person Entitled To Refund*, West's Legal News, 1996 WL 636616 (1996). The original opinion of the Arkansas Supreme Court in this case, which was published in the advance sheets at 934 S.W.2d 478, was withdrawn from the bound volume and will be republished with an appendix to Justice Newbern's dissenting opinion. See *id.*

53. See *Staton*, 325 Ark. at 344, 942 S.W.2d at 807.

54. See *id.* (citing *Arkansas Dep't of Human Servs. v. State*, 312 Ark. 481, 850 S.W.2d 847 (1993)).

55. See *id.* at 344, 942 S.W.2d at 806. "When recovery is authorized by statute upon payment 'under protest,' we literally require a payment 'under protest.'" *Id.* at 345, 942 S.W.2d at 806 (citing *Hercules Inc. v. Pledger*, 319 Ark. 702, 894 S.W.2d 576 (1995)).

56. See *Staton*, 325 Ark. at 345, 942 S.W.2d at 806. "If we were to allow refunds for taxes voluntarily paid in previous years, it would jeopardize current and future governmental operations because current and future funds might be necessary for the refund." *Id.* (citing *Mertz v. Pappas*, 320 Ark. 368, 370, 896 S.W.2d 593, 594 (1995)).

57. See *id.* at 346, 942 S.W.2d at 807.

While a payment which is not made under protest is deposited into general revenues and becomes available for immediate use by the state, a payment made under protest only becomes available for the state's use after the taxpayer fails to file suit within the one year period or after judicial determination that the deficiency assessment was valid.

Id. (quoting *Hercules, Inc. v. Pledger*, 319 Ark. 702, 707, 894 S.W.2d 576, 578 (1995)).

58. See *id.* (citing *Pledger v. Bosnick*, 306 Ark. 45, 811 S.W.2d 286 (1991)).

59. See *id.* at 344, 942 S.W.2d at 807.

taxpayer class action suits, that decision was not controlling.⁶⁰ Because the State did not waive its sovereign immunity with regard to the unnamed plaintiffs, only Debora Staton had sought a refund properly, and the court denied her refund claim alone.⁶¹

Despite the change in philosophy in the Arkansas Supreme Court's decision in *Staton*, the court is far from agreement on the issue of the waiver of sovereign immunity.⁶² Three justices opposed the ruling in *Staton*, believing very strongly that the majority was in error in favoring sovereign immunity over the principles governing the use of class actions.⁶³ Justice Brown noted that even if the taxpayers were allowed to sue the state without first going through the appropriate refund procedures, they would still have to prove they were eligible for a refund after the lawsuit was finalized.⁶⁴ Justice Brown also argued that if a taxpayer is forced to pay a tax that is found to be illegal, that person deserves a reasonable opportunity for a refund.⁶⁵ The simplest and most efficient manner for dealing with these refund claims is in a single action rather than requiring all of the members of the class to bring suit.⁶⁶ Denial of the class action is going to leave most taxpayers who may be owed refunds ignorant of that fact because of lack of notice.⁶⁷ Justice Newbern saw the notice procedures for class actions, governed by Rule 23(c) of the Arkansas Rules of Civil Procedure, as the best alternative for giving taxpayers the best possible notice of their claim.⁶⁸ Both justices stated that the class action was the only way to treat all taxpayers equally and give all those who have paid an unconstitutional tax a reasonable opportunity to obtain a refund.⁶⁹

60. *See id.*

61. *See id.*

62. *See Staton*, 325 Ark. at 344, 942 S.W.2d at 807 (Newbern, J., dissenting). *See also id.* at 354, 942 S.W.2d at 814 (Brown, J., dissenting).

63. *See id.* (Newbern, J., dissenting). *See also id.* at 354, 942 S.W.2d at 814 (Brown, J., dissenting).

64. *See id.* at 354, 942 S.W.2d at 815 (Brown, J., dissenting). Each class member of the prevailing class action would still have to prove his or her claim to the State after the court rendered a decision. *See id.* (Brown, J., dissenting).

65. *See id.* (Brown, J., dissenting).

66. *See id.* at 344, 942 S.W.2d at 808 (Newbern, J., dissenting).

67. *See id.* at 354, 942 S.W.2d at 815 (Brown, J., dissenting).

68. *See Staton*, 325 Ark. at 344, 942 S.W.2d at 808 (Newbern, J., dissenting).

69. *See id.* (Newbern, J., dissenting). *See also id.* at 354, 942 S.W.2d at 815 (Brown, J., dissenting).

The effect of the majority opinion . . . is to suggest that [the Department of Finance and Administration] may sit by smugly and entertain the claims of the one or two taxpayers who may have information about the possible illegality of the tax in question, knowing all the while that there are thousands of others who may be owed but with whom it will never have to reckon.

Id. at 344, 942 S.W.2d at 808 (Newbern, J., dissenting).

B. Synopsis of the General State of the Law in Other Jurisdictions

Courts in other states are also having difficulties in establishing the availability of class action suits by taxpayers seeking a refund of a tax they believe to be applied incorrectly or unconstitutionally.⁷⁰ This inherent conflict between the principles governing the use of class actions and the protection given to the state through sovereign immunity has led to a variety of different results with no consistent analysis.⁷¹

1. *Determination Based on Statutory Construction*

A large number of states have tax refund procedures established by statutes that are very similar to those in Arkansas which set out the procedural requirements for taking any tax dispute to court.⁷² The majority of these statutes give the taxpayer the right to sue and also waive the state's sovereign immunity in its own courts, making no mention of whether the use of a class action lawsuit is permitted.⁷³ In interpreting the legislative intent of these statutes, a number of courts have treated the omission of any reference to the use of "class actions" as a sign that they are not applicable to these refund statutes.⁷⁴ Courts examined the particular wording of the statutes to see if the refund rights given to a person, which included a group or combination acting as a unit might be used to bring classes of plaintiffs within this definition of person.⁷⁵ This analysis of the wording of the statutes, along with concern with protecting the state's financial interest in the potential large loss in revenues to tax refunds, has led many courts to interpret the refund statutes to require full compliance on the part of all taxpayers.⁷⁶

70. See Gregory A. Nowak, *A Tale of Two Forums: Litigating State Taxes*, 69 MICH. B.J. 826, 828 (1990).

71. See *id.*

72. See, e.g., *Henderson v. Carter*, 195 S.E.2d 4 (Ga. 1972) (upholding Georgia refund statute which requires adherence to refund procedures in order to waive sovereign immunity); *State ex rel. Sampson v. Kenny*, 175 N.W.2d 5 (Neb. 1970) (upholding Nebraska's refund statute which requires each taxpayer to file a refund claim).

73. See *Sampson*, 175 N.W.2d at 7.

74. See, e.g., *Henderson*, 195 S.E.2d at 6; *Blackmon v. Georgia Indep. Oilmen's Ass'n*, 198 S.E.2d 896 (Ga. Ct. App. 1973); *Hooks v. Comptroller of Treasury*, 289 A.2d 332 (Md. 1972).

75. See, e.g., *Charles v. Spradling*, 524 S.W.2d 820 (Mo. 1975). The court determined that the definition of "person" did not refer to a class of unrelated individuals, and thus did not permit a representative of such a class to make a refund claim on behalf of the entire class. See *id.* at 823.

76. See *Tatarowicz*, *supra* note 22, at 117.

2. *Determination Based on the General Principles Governing Class Action Suits*

Another approach some states have used in resolving whether a class action claim is appropriate is to fall back on the general principles that govern the certification of a class action group.⁷⁷ Rather than apply a general statutory analysis to cover all taxpayer suits, the court in *Whaley* examined each attempt to certify a class on its own merits to see if the requirements for forming a class action have been met.⁷⁸ The court was very interested in determining whether there is a well-defined community of interest among the members of the class.⁷⁹

Other factors the courts will consider are whether the relief is appropriate to all and whether all members of the class are pursuing a common legal question.⁸⁰ Many taxpayer class action suits meet these requirements since all of the members of the class are likely to be concerned with a common legal question.⁸¹ All members of the class are also likely to be seeking the same relief—a refund of taxes paid.⁸² Courts have also used the size of the individual claims of the class members as a factor.⁸³ In cases in which the amount in dispute for each individual plaintiff is small, it is often not economically feasible for plaintiffs to challenge the validity of the tax in court on their own.⁸⁴ Without the availability of the class action, these taxpayers would have no recourse.⁸⁵

3. *The "Test Case" Approach*

Another approach that is not widely recognized is the use of a "test case" to decide the particular tax issue, rather than the use of a class action.⁸⁶

77. See *Whaley v. Commonwealth*, 61 S.W. 35 (Ky. Ct. App. 1901) (using equitable principles of fairness and judicial economy in allowing the certification of a class of taxpayers).

78. See *id.* at 37.

79. See *id.*

80. See *State ex rel. Devlin v. Dickinson*, 305 So. 2d 848 (Fla. Dist. Ct. App. 1974); See also *Tatarowicz*, *supra* note 22, at 117.

81. See *Tatarowicz*, *supra* note 22, at 117.

82. See *Tatarowicz*, *supra* note 22, at 117.

83. See Bruce R. Braun & W. Gordon Dobie, *Litigating the Yankee Tax: Application of the Lodestar to Attorneys' Fee Awards in Common Fund Litigation*, 23 FLA. ST. U. L. REV. 897, 914 (1996).

84. See *id.* "Individuals who have small amounts at stake . . . will not be able to find counsel to accept the representation [and] . . . will find it economically unfeasible to pursue such litigation individually." *Id.*

85. See *id.* The individual taxpayer's right to maintain an action at law to recover an illegal tax is described as an inadequate and imperfect remedy in many cases. See, e.g., *Whaley*, 61 S.W. at 37.

86. See *Nowak*, *supra* note 70, at 827. The Attorney General would select one of the

Proponents have argued that a "test case" would provide a more prompt and efficient resolution of the conflict without the need for costly class action procedures and related attorney's fees.⁸⁷ Proponents of the class action format argue that the "test case" approach fails to provide all parties with an assurance of adequate representation as well as proper notice of all matters which affect their rights.⁸⁸

4. *Prospectivity Doctrine*

Another question that has come up in the area of taxpayer suits is whether the state has a right to prospectively restrict refunds.⁸⁹ States concerned with the potentially enormous revenue losses that could be realized if a tax is invalidated came up with a theory known as the "prospectivity doctrine"⁹⁰ to deny these refund claims.⁹¹ The states argue that they should only be obligated to refund revenue that was taken in after the tax was found unconstitutional.⁹² The argument behind such reasoning is that great importance should be placed on the ability of the state government to maintain financial solvency.⁹³ This approach, while very favorable to the state, provides the injured taxpayer with no remedy for the state's constitutional violations.⁹⁴ Presently, the prospectivity doctrine has been applied only to those cases where the court's decision as to the tax creates new law.⁹⁵ The most recent trend has been to severely limit the use of the prospectivity doctrine in most tax refund cases.⁹⁶

many cases pending in state court at random to be tried on the merits. *See* Nowak, *supra* note 70, at 827. The other cases would be held in abeyance awaiting the decision of the test case. *See* Nowak, *supra* note 70, at 827.

87. *See* Nowak, *supra* note 70, at 827. *See also* Steven Shapiro, *Multitaxpayer Litigation*, 43 TAX LAW. 719, 721 (1990) (providing a description of the test case approach as used in federal multitaxpayer disputes).

88. *See* Nowak, *supra* note 70, at 827.

89. *See* Tatarowicz, *supra* note 22, at 117.

90. Courts created this doctrine to allow tax refunds for only the period of time after the tax is found to be unconstitutional. *See* Tatarowicz, *supra* note 22, at 117.

91. *See* Tatarowicz, *supra* note 22, at 117. "[T]he prospectivity issue is essentially a balancing of two interests, . . . the state's sovereign right to preserve its treasury and the competing interest of taxpayers to a clear and certain remedy for constitutional violations." Nowak, *supra* note 70, at 827.

92. *See* Tatarowicz, *supra* note 22, at 117.

93. *See* Tatarowicz, *supra* note 22, at 117.

94. *See* Tatarowicz, *supra* note 22, at 117.

95. *See* David F. Shores, *Recovery of Unconstitutional Taxes: A New Approach*, 12 VA. TAX REV. 167, 187 (1992).

96. *See* Mark R. Brown, *The Demise of Constitutional Prospectivity: New Life for Owen?*, 79 IOWA L. REV. 273, 282 (1994).

IV. REASONING OF THE COURT

The majority opinion in *ACW Inc. v. Weiss* examines in detail the constitutional validity of Act 1052 of 1991, the appearance of ambiguity in the wording of the statute, and the validity of the chancery court's class certification.⁹⁷ The court first looked closely at the Arkansas Constitution to determine whether the General Assembly possessed the requisite power to enact this tax.⁹⁸ The court gave great deference to the legislature in determining whether a sufficient emergency existed to justify the passage of a new tax.⁹⁹ Another factor the court considered in determining the constitutionality of the Act was the overwhelming presumption that statutes are constitutionally valid unless proven otherwise.¹⁰⁰ Based on these premises and a close examination of the legislature's reasoning behind the passage of the tax, the majority concluded that the Arkansas Constitution did not preclude Act 1052.¹⁰¹

Another major concern the majority examined in detail was whether the wording of Act 1052 was ambiguous.¹⁰² The court reached the same opinion as the chancery court in determining that the statute was in fact capable of multiple interpretations.¹⁰³ Rather than choose the most likely interpretation on its own, the court looked back to the Act's passage to determine the drafters' legislative intent.¹⁰⁴ In examining the legislative history of the tax, the majority found persuasive evidence of Act 1052's proper interpretation.¹⁰⁵ The court

97. See *ACW*, 329 Ark. at 315, 947 S.W.2d at 776.

98. See *id.* at 307, 947 S.W.2d at 773. Article V, section 38 of the Arkansas Constitution limits the General Assembly's power to levy taxes without voter approval to those cases where a sufficient emergency exists and the tax is approved by three-fourths of the General Assembly. See ARK. CONST. art. V, § 38 (1992).

99. See *ACW*, 329 Ark. at 310, 947 S.W.2d at 774. The court determined that the plaintiffs failed to meet their burden of proof in establishing that no emergency existed to give the General Assembly the authority to enact the tax. See *id.*

100. See *id.* at 310, 947 S.W.2d at 774 (citing *Ports Petroleum Co. v. Tucker*, 323 Ark. 680, 916 S.W.2d 749 (1996)).

101. See *ACW*, 329 Ark. at 310, 947 S.W.2d at 774.

102. See *id.* at 311, 947 S.W.2d at 774. "[A] statute is ambiguous where it is open to two or more constructions, or where it is of such obscure or doubtful meaning that reasonable minds might disagree or be uncertain as to its meaning." *Id.* at 312, 947 S.W.2d at 775 (citing *City of Little Rock v. Arkansas Corp. Comm'n*, 209 Ark. 18, 189 S.W.2d 382 (1945)).

103. See *ACW*, 329 Ark. at 312, 947 S.W.2d at 775. The court determined that the language set forth in the second subsection of the statute when read in conjunction with the first subsection is capable of being interpreted to require the payment of a flat 6.5% rate on all income for corporations with income greater than \$100,000 and can also be interpreted as requiring those corporations with over \$100,000 of income to pay the lower prescribed graduated rates on the first \$100,000. See *id.*

104. See *id.* at 313, 947 S.W.2d at 775.

105. See *ACW*, 329 Ark. at 313, 947 S.W.2d at 775. "Act 1052—Increases the corporate income tax on corporations with net income exceeding \$100,000. The new tax is a flat 6.5% on the net taxable income that exceeds \$100,000." *Id.* (quoting Official Biennial Budget of the

also followed prior Arkansas precedents that gave the taxpayer the benefit of the doubt when the express words of a statute are ambiguous.¹⁰⁶ The Arkansas Supreme Court reversed the chancery court's decision by finding for the taxpayers on the interpretation of the statute's ambiguous language.¹⁰⁷

After resolving the fundamental disputes as to the meaning and effect of Act 1052, the majority addressed the State's cross-appeal on class certification.¹⁰⁸ In making its decision to reverse the chancery court's class certification, the majority relied heavily on the doctrine of sovereign immunity.¹⁰⁹ As a general rule, sovereign immunity prohibits lawsuits against the state.¹¹⁰ This rule is not absolute, however, since the law provides a number of instances in which the State may waive its sovereign immunity.¹¹¹ One way that sovereign immunity is waived is by the taxpayer's filing of a tax refund request with the state and then having the state deny the refund request.¹¹² In this case, only the named plaintiffs in the class actually filed for a refund of their corporate tax before they filed the lawsuit.¹¹³ The court therefore reasoned that as to the other approximately 3100 members of the certified class, the State of Arkansas had not waived its protections under sovereign immunity and the court reversed the class certification.¹¹⁴

The majority's strict construction as to the rules of sovereign immunity was the subject of disagreement in Justice Brown's dissent.¹¹⁵ Justice Brown viewed the use of a class action lawsuit as the only practical means for challenging such a tax.¹¹⁶ The amount at stake for each of the member corporations of the class is not enough to justify challenging the tax through the administrative and judicial procedures.¹¹⁷ Justice Brown also reasoned that the

State of Arkansas, 1991-1993).

106. See *ACW*, 329 Ark. at 314, 947 S.W.2d at 776 (citing *Leathers v. Active Realty Inc.*, 317 Ark. 214, 876 S.W.2d 583 (1994)).

107. See *ACW*, 329 Ark. at 314, 947 S.W.2d at 776. The court interpreted the Act in agreement with the taxpayers' contention in requiring payment of a graduated percentage tax on income up to \$100,000 and a flat 6.5% only on that portion of income above \$100,000. See *id.*

108. See *id.*

109. See *id.*

110. See *id.* "The State of Arkansas shall never be a defendant in any of her courts." ARK. CONST. ART. V, § 20.

111. See *ACW*, 329 Ark. at 314, 947 S.W.2d at 776.

112. See ARK. CODE ANN. § 26-18-507 (Michie 1992).

113. See *ACW*, 329 Ark. at 315, 947 S.W.2d at 776.

114. See *id.*

115. See *id.* (Brown, J., concurring in part, dissenting in part).

116. See *id.* (Brown, J., concurring in part, dissenting in part).

117. See *id.* (Brown, J., concurring in part, dissenting in part). Plaintiffs estimated that each individual member corporation within the class had approximately \$1,060 at risk in the litigation. See *id.* (Brown, J., concurring in part, dissenting in part).

majority's decision to deny class certification gives the State every reason to take the most aggressive position against the taxpayer since they are unlikely to meet any resistance.¹¹⁸

V. SIGNIFICANCE

The decision the majority reached in *ACW, Inc. v. Weiss*¹¹⁹ effectively eliminates the class action lawsuit as a possibility in most taxpayer refund suits.¹²⁰ By requiring strict compliance with the refund requirements by all of the parties in the class to waive sovereign immunity, the court has eliminated the only effective remedy in many cases.¹²¹ Many tax refund disputes, like the one in question in *ACW*, involve only a small amount at stake on behalf of each taxpayer.¹²² It is often not economically feasible to spend thousands of dollars in court litigating a refund claim of only a few hundred dollars.¹²³ The class action offers a solution to this problem by spreading the cost of litigating the issue over the entire class.¹²⁴

While the court in *ACW* did not totally eliminate the availability of the class action, it would be next to impossible to establish certification in most cases. In ruling that any refund procedure which waives the State's sovereign immunity is to be interpreted strictly, the court required that every taxpayer in the class follow the refund procedures laid out in section 26-51-205 of the Arkansas Code.¹²⁵ In most cases, the taxpayer is likely to have no idea that the tax is illegal, and therefore have no reason to file a refund claim.¹²⁶ Even after the taxpayer files the refund claim, the State is simply going to deny the claim based on the assumption that the tax in question is valid.¹²⁷

The court's decision to favor the protection of sovereign immunity over the use of class actions is somewhat peculiar given the court's recent tendency

118. *See id.* (Brown, J., concurring in part, dissenting in part). "The bottom line is that the State has every motivation to take the most aggressive stance on a given tax statute, for it is now a virtual certainty that even the most extreme interpretation will reap the bounty of illegal tax revenue." *Id.* at 315-16, 947 S.W.2d at 776. (Brown, J., concurring in part, dissenting in part).

119. 329 Ark. 302, 947 S.W.2d 770 (1997).

120. *See id.* at 314, 947 S.W.2d. at 776.

121. *See id.* at 316, 947 S.W.2d at 777 (Brown, J., concurring in part, dissenting in part).

122. *See id.* at 315, 947 S.W.2d at 776 (Brown, J., concurring in part, dissenting in part).

123. *See* Braun & Dobie, *supra* note 83, at 914. *See also ACW*, 319 Ark. at 315, 947 S.W.2d at 776 (Brown, J., concurring in part and dissenting in part).

124. *See ACW*, 329 Ark. at 316, 947 S.W.2d at 777 (Brown, J., concurring in part and dissenting in part).

125. *See id.* at 315, 947 S.W.2d at 776.

126. *See* State Dep't of Fin. & Admin. v. Staton, 325 Ark. 341, 354, 942 S.W.2d 804, 815 (1996) (Brown, J., dissenting).

127. *See id.* (Brown, J., dissenting).

to broaden the application of the class action lawsuit.¹²⁸ Most class action refund suits, like the one in *ACW*, fit the class action requirements perfectly since they normally involve a large number of plaintiffs who are all concerned with the same legal question. The majority in *ACW* obviously felt that protecting the taxpayer's financial interest was not as important as protecting the State's coffers from potentially large class action claims.¹²⁹ With such a major financial interest at stake for both the taxpayers as well as the State of Arkansas, it may be time for the legislature to consider making some changes to the present tax refund law. Since the present statute does not determine whether class actions are appropriate for tax refund suits, all interpretation of the law and the intent of the legislature has been left in the hands of the courts.

In conclusion, it is important to note that three justices favored allowing the class action to proceed where only the named plaintiffs followed the refund procedures.¹³⁰ Thus, with a change in composition, the court might reverse itself if given the opportunity. History and past precedents would indicate this is possible since the Arkansas Supreme Court has already done so one time on this issue with the reversal of *Pledger v. Bosnick*¹³¹ in this case.

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128. See Gould, *supra* note 33, at 1.

129. See *ACW*, 329 Ark. at 315, 947 S.W.2d at 776 (Brown, J., concurring in part, dissenting in part).

130. See *id.* Justices Brown, Newbern, and Glaze all dissented on the issue of whether the State's tax refund procedures require every taxpayer to comply with refund procedures before sovereign immunity can be waived by the State to allow a class action refund suit. See *id.* (Brown, J., concurring in part, dissenting in part); See also *id.* at 316, 947 S.W.2d at 777 (Glaze, J., dissenting).

131. 306 Ark. 45, 811 S.W.2d 286 (1991).

