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CIVIL PROCEDURE—CLASS ACTIONS—TRIAL COURTS HAVE BROAD DISCRETION TO CERTIFY CLASSES. *International Union of Electric Radio and Machine Workers v. Hudson*, 295 Ark. 107, 747 S.W.2d 81 (1988).

On October 7, 8, and 9, 1985, members of the International Union of Electrical, Radio and Machine Workers (Union) went on strike at the Sanyo plant in Forrest City, Arkansas. The company planned to continue minimal production so that any salaried or hourly employee would have work to do. However, before the night shift on October 7 the Sanyo Company closed the plant because of the risk to employees created by the crowd of picketers.

Seven Sanyo employees brought an action against the Union, their Local 1106, and some named union members. The plaintiffs alleged that the defendant Union was responsible for striking picketers who prevented them from entering the Sanyo plant to work. The plaintiffs claimed loss of pay on days when the plant was closed due to the strike. Some of the plaintiffs claimed damages for personal injuries and property damage sustained when they crossed or attempted to cross the picket line.

The plaintiffs' complaint asserted that they were bringing their action on behalf of themselves and other employees similarly situated and requested that the trial court certify it as a class action. The St. Francis Circuit Court held a hearing in response to that request, at which the plaintiffs presented affidavits of thirty-four employees who suffered property damage. The plaintiffs also presented petitions of thirty-five employees who alleged that they "had been affected by the conduct of the defendants in such a manner as to qualify them as a member of the class described in the complaint."¹

After the hearing, the trial judge certified the action as a class action pursuant to Rule 23 of the Arkansas Rules of Civil Procedure. The trial judge described two classes:

- (1) All salaried and nonunion hourly employees who the defendants allegedly deprived of the right to work at Sanyo Manufacturing Corporation on October 7, 8 and 9, 1985, because of the plant closing.
- (2) All salaried and nonunion hourly employees receiving motor

1. *International Union of Electric, Radio and Machine Workers v. Hudson*, 295 Ark. 107, 110, 747 S.W.2d 81, 83 (1988).

vehicle and/or personal damages when crossing or attempting to cross the picket line during the Sanyo strike on October 7, 8 and 9, 1985.²

The Union appealed from the order certifying the class action, asserting four arguments: (1) the trial court abused its discretion in certifying the class action; (2) the number of persons seeking relief was too small to meet the requirements of Rule 23;³ (3) there were not predominant common questions of law or fact as required by the rule; and (4) the court should not allow a tort action to proceed as a class action.⁴ The Arkansas Supreme Court addressed and rejected each of these arguments and held that the trial court did not abuse its discretion in certifying the case as a class action. *International Union of Electric, Radio and Machine Workers v. Hudson*, 295 Ark. 107, 747 S.W.2d 81 (1988).

The forerunner of the modern class action was a procedure known as the bill of peace.⁵ The English Chancery Courts used the bill as early as the 17th century to facilitate settling disputes involving common questions and multiple parties in a single action.⁶ Because the bill of peace⁷ originated in the English Chancery Courts, class suits in the United States were originally brought only in courts of equity.⁸ The fusion of law and equity in the federal courts in 1983 made equity class action procedure applicable to actions at law.⁹

Since its development, the class action has been one of the most controversial procedural devices.¹⁰ Commentators and judges have described it as everything from "one of the most socially useful reme-

2. *Id.* at 109, 747 S.W.2d at 82.

3. ARK. R. CIV. P. 23.

4. 295 Ark. at 109, 747 S.W.2d at 82.

5. 7A C. WRIGHT, A. MILLER & M. KANE, FEDERAL PRACTICE AND PROCEDURE § 1751 (1986).

6. Homberger, *State Class Actions And The Federal Rule*, 71 COLUM. L. REV. 609, 611 (1971).

7. In English law the usual and orderly method of beginning an equitable action was by filing a bill. This was an original statement of the plaintiff's cause of action. Under State and Federal Rules of Civil Procedure, the bill has been replaced by the complaint. 2 W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 339-40 (4th ed. 1936).

Specifically, bills of peace were developed in chancery to decide common questions in a single action where there were multiple parties. Joinder of all interested parties was required under the bill of peace. *Comment, Developments in the Law—Multiparty Litigation in the Federal Courts*, 71 HARV. L. REV. 874, 928 (1958).

8. See 7A C. WRIGHT, A. MILLER & M. KANE, *supra* note 5, at § 1751.

9. *Id.*

10. C. WRIGHT, LAW OF FEDERAL COURTS § 72 (4th ed. 1983).

dies in history”¹¹ to a “Frankenstein monster.”¹² The justifications for bringing class suits¹³ and the basic philosophy of class actions have remained the same throughout the centuries. In his law review article, Professor Adolf Homburger describes the philosophy of class suits:

Self-interest, the motivating force that sparks the adversary system, also sustains the doctrine of class actions. We may trust man to help his fellow man if by doing so he helps himself—particularly if *only* by helping others will he be able to protect and promote his own interests. Building on that simple premise, the device provides for the use of man’s natural instinct to act in his own best interest in order to achieve justice and procedural efficiency in mass litigation.¹⁴

The Arkansas legal system incorporated the class action when the General Assembly adopted its civil code in 1869.¹⁵ The code was substantially similar to one then in use in Kentucky,¹⁶ which, in turn, was a direct descendant of the New York Field Code.¹⁷ The code simplified and liberalized the rules of the complex common law system of pleading.¹⁸

The language of the civil code’s class action provision was retained when Arkansas adopted the Arkansas Statutes Annotated in 1947.¹⁹ However, Arkansas’ original class action statute was

11. *Id.* (quoting Pomerantz, *New Developments in Class Actions—Has Their Death Knell Been Sounded?*, 25 BUS. LAW. 1259 (1970)).

12. The term was used first by Chief Judge Lombard in his dissenting opinion in *Eisen v. Carlisle & Jacquelin*, 391 F.2d 555, 572 (2d Cir. 1968).

13. The justifications traditionally offered concern disputes which involve a common or general interest or many persons or when the class is so numerous that it would be impracticable to bring all members before the court. 7A C. WRIGHT, A. MILLER & M. KANE, *supra* note 5, at § 1751.

14. Homburger, *supra* note 6, at 609-10.

15. ARKANSAS CODE § 33 (1869). The code section read as follows:

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.

16. See generally Barnhart, *Pleading Reform in Arkansas*, 7 ARK. L. REV. 1 (1952); Cox & Newbern, *New Civil Procedure: The Court that Came in From the Code*, 33 ARK. L. REV. 1 (1979); Homburger, *State Class Actions and the Federal Rule*, 71 COLUM. L. REV. 609 (1971); Spears, *Comment: The 1979 Civil Procedure Rules*, 2 UALR L.J. 89 (1979).

17. Barnhart, *supra* note 16 at 13-14. “Code pleading” began with the enactment of a code of procedure in New York in 1848. The New York Code was largely attributable to the work of David Dudley Field, a member of the New York bar. Hence, it is generally referred to as the “Field Code.”

18. *Id.* at 14.

19. Act of Mar. 26, 1941, No. 334, § 2, 1941 Ark. Acts 868 (codified as ARK. STAT. ANN. § 27-809 (1947)).

superceded when the Arkansas Supreme Court adopted the Arkansas Rules of Civil Procedure in 1978.²⁰

The first Arkansas case recognizing what amounted to a class action was *St. Louis, I.M. & S. Ry. Co. v. Cumbie*,²¹ decided in 1911. The Arkansas Supreme Court held that where a contract of shipment was made by the plaintiff as agent for several shippers, the plaintiff could bring suit on behalf of the principals.²² *Cumbie* was an action at law for damages, but later Arkansas cases held that class actions could be maintained only in courts of equity.²³ It was not until 1968, in *Thomas v. Dean*,²⁴ that the Arkansas Supreme Court ruled that class actions could be brought at law.

Thomas removed one obstacle to class actions, but two other barriers have continued to plague would-be Arkansas class action litigants in modern cases: (1) the requirement that a party seeking class certification show common questions of law *and* fact; and (2) the refusal of courts to certify class actions where a potential existed for splintering the action into individual claims or defenses as the litigation progressed.

The Arkansas Supreme Court imposed the "and fact" requirement in *Ross v. Arkansas Communities, Inc.*²⁵ Construing Arkansas' original class action statute,²⁶ the court held that a party seeking class action certification had to show that there were "common questions of law *and* fact"²⁷ applicable to all class members.²⁸ The requirement

20. *Re: Rules of Civil Procedure*, 264 Ark. 964 (1978) (per curiam). The rules took effect July 1, 1979. ARK. R. CIV. P. 86.

21. 101 Ark. 172, 141 S.W. 939 (1911).

22. *Id.* at 179, 141 S.W. at 941.

23. *Baskins v. United Mine Workers*, 150 Ark. 398, 234 S.W. 464 (1921). *Baskins* held that class actions, which were seen as being based in the equitable doctrine of virtual representation, could not be brought at law. *Id.* The doctrine of virtual representation was "an exception to the rule that all persons having an interest in the subject matter of an equity suit must be made parties." ANN. CAS. 1913 C at 654.

24. 245 Ark. 446, 432 S.W.2d 771 (1968).

25. 258 Ark. 925, 529 S.W.2d 876 (1975). In *Ross* a purchaser of two lots in a subdivision brought a class action against a real estate development company alleging that installment contracts were usurious and violated the Truth in Lending Act. The court held that the purchaser did not have commonality of questions of law and fact with other purchasers of lots involving 833 separate transactions and negotiations.

26. Act of Mar. 26, 1941, No. 334, § 2, 1941 Ark. Acts 868 (codified as ARK. STAT. ANN. § 27-809 (1947)).

27. 258 Ark. at 930, 529 S.W.2d at 880 (emphasis added).

28. Practical considerations also contributed to the court's reluctance to certify the case as a class action. The court mentioned the considerable time and expense involved if it allowed the case to proceed as a class action—the limited chancery court staff would have to take care of the necessary proceedings, answer the inquiries for further information of the sales contract

that classes have common questions of law and fact limited class action cases to those where all members of the class have a common injury or a legal interest in the very same item or relationship in dispute. Few cases satisfied the requirement of common questions of law and fact. The law and fact requirement rendered class actions of little practical utility, since, in cases meeting this test, the plaintiffs almost invariably could be joined under section thirty of the civil code.²⁹

When the Arkansas Supreme Court adopted the Arkansas Rules of Civil Procedure in 1978, Arkansas Rule 23 superceded the original class action statute.³⁰ Rule 23(b), in effect, overruled the holding in *Ross* by providing that a class action may be maintained if the court finds that questions of law *or* fact common to the members of the class predominate over any questions affecting only individual members.³¹

After the Arkansas Rules of Civil Procedure eliminated the law/fact dilemma, Arkansas courts found another barrier to class action certification. In both *Drew v. First Federal Savings & Loan Association*³² and *Ford Motor Credit Co. v. Nesheim*,³³ the Arkansas Supreme Court reversed a class certification based upon the possibility that the plaintiffs' claims would present varied defenses that would require separate trials. In each case the court feared this "splintering" would make the actions both unmanageable by the court and unfair to the defendants.³⁴

In *Drew*, the plaintiffs challenged an assumption fee charged by First Federal on a mortgage and sought to have the case certified as a class action.³⁵ In denying class certification, the Arkansas Supreme Court expressed concern that First Federal might have different defenses with respect to each assumption which should be raised individually.³⁶ Class actions, said the court, must not only be efficient but fair, both to the class and the defendant.³⁷ Because the plaintiffs did

transactions of the 833 class members and keep those members advised as to the status of the case. 258 Ark. at 930, 529 S.W.2d at 880.

29. ARKANSAS CODE § 30 (1869). Section 30 provided: "All persons having an interest in the subject of an action, and in obtaining the relief demanded, may be joined as plaintiffs, except where it is otherwise provided in this Code." This section was supplanted by ARK. R. CIV. P. 20, which currently governs permissive joinder procedure.

30. ARK. STAT. ANN. § 27-809 (1947).

31. ARK. R. CIV. P. 23(b) (emphasis added).

32. 271 Ark. 667, 610 S.W.2d 876 (1981).

33. 287 Ark. 78, 696 S.W.2d 732 (1985).

34. *Drew*, 271 Ark. at 669, 610 S.W.2d at 878; *Nesheim*, 287 Ark. at 81, 696 S.W.2d at 735.

35. 271 Ark. at 668, 610 S.W.2d at 876.

36. *Id.* at 671, 610 S.W.2d at 878.

37. *Id.*

not show that a class action would be superior to individual remedies for fair and efficient adjudication of the controversy, the court held class action certification to be inappropriate.³⁸

The court reached a similar result in *Nesheim*, holding that common questions did not predominate over individual ones.³⁹ The suit, which the Pulaski County Chancery Court had certified as a class action, involved allegations of usury in connection with automobile sales contracts.⁴⁰ On appeal, the Arkansas Supreme Court compared the case to *Drew*,⁴¹ noting the potential for varied defenses against the class members.⁴² The court concluded that if certified as a class action, the case would splinter into many individual suits thereby creating problems of manageability.⁴³ In reversing the chancery court's class action certification, the court mentioned that, unlike the federal courts, it does not resolve doubts in favor of class actions.⁴⁴

In 1988, a turning point⁴⁵ in the Arkansas courts' stance of disfavoring class actions occurred in *Arkansas Louisiana Gas Co. v. Morris*.⁴⁶ In *Morris* the problems of "splintering" and manageability that the court articulated in *Drew*⁴⁷ and *Nesheim*⁴⁸ were directly addressed and eliminated as a barrier to the certification of class actions.⁴⁹ *Morris* involved a class of plaintiffs who had granted "fixed price" mineral

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

39. 287 Ark. at 82, 696 S.W.2d at 734. In a predecessor case to *Nesheim*, the Arkansas Supreme Court denied a writ of prohibition which would have prevented a chancellor from trying a suit as a class action. The basis for the petition was that Arkansas Rule 23 violates due process because, unlike its federal counterpart, it does not require that notice be given to individual class members. The court held the petitioner, who was one of the defendants, had no standing to challenge the constitutionality of the rule. *Ford Motor Credit Co. v. Rogers*, 285 Ark. 64, 685 S.W.2d 145 (1985). The order certifying the class action was appealed in *Nesheim*.

40. 287 Ark. at 79-80, 696 S.W.2d at 733-34.

41. 271 Ark. 667, 610 S.W.2d 876 (1981).

42. 287 Ark. at 82, 696 S.W.2d at 735.

43. *Id.*

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

45. One prior case that might have appeared to be a deviation from the Arkansas courts' traditional reluctance to certify class actions was *Cooper Communities, Inc. v. Sarver*, 288 Ark. 6, 701 S.W.2d 364 (1986). The action was brought by property owners and realtors challenging the validity of a gatehouse lease. The Arkansas Supreme Court upheld class certification; however, the court did not reach beyond its traditional rigid policy against class actions. In *Cooper*, the court could easily find a commonality of interest (the class members' legal interest in the gatehouse lease) that would have satisfied the requirement of law and fact set forth in *Ross v. Arkansas Communities, Inc.*, 258 Ark. 925, 529 S.W.2d 876 (1975), under the original class action statute.

46. 294 Ark. 496, 744 S.W.2d 709 (1988).

47. 271 Ark. 667, 610 S.W.2d 876 (1981).

48. 287 Ark. 78, 696 S.W.2d 732 (1985).

49. 294 Ark. at 499, 744 S.W.2d at 710.

leases to Arkansas Louisiana Gas Company.⁵⁰ The Arkansas Supreme Court found a common question of fact regarding the action, although there were also questions affecting only individual members.⁵¹ It held there was no requirement that the facts as to each individual be identical to those pertaining to all members of the class.⁵² Further, the court indicated that if the evidence raises questions affecting individual members only, those questions could be deferred until questions common to the class had been resolved.⁵³ By discounting the significance of "splintering," *Morris* initiated a course toward the liberalization of Arkansas class action certification.⁵⁴

With Rule 23 having eliminated the "and fact" obstacle⁵⁵ and *Morris* having minimized the concern over the "splintering" problem,⁵⁶ the stage was set for *International Union of Electrical, Radio and Machine Workers v. Hudson*,⁵⁷ where the Arkansas Supreme Court, in affirming certification of a class,⁵⁸ significantly liberalized Arkansas class action law. The class in *Hudson* consisted of employees who brought suit alleging that the defendant unions were responsible for personal injuries and property damage sustained by class members as they attempted to cross picket lines.⁵⁹ The court considered and rejected several arguments against class action certification under Arkansas Rule 23, concluding that Arkansas Rule 23 should be interpreted in the liberal spirit of Federal Rule 23⁶⁰ and that trial judges have broad discretion in determining whether to allow a case to proceed as a class action.⁶¹

The *Hudson* court discussed its holding in *Drew*⁶² regarding the management of class actions when there is a potential for "splintering" into separate cases because of individual claims within the class.⁶³ It acknowledged the unfairness in requiring a defendant to present his defenses to the claims of some, but not all of the plaintiff

50. *Id.* at 497, 744 S.W.2d at 709.

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

52. *Id.*

53. *Id.*

54. In concurrence, Justice Hickman took the position that *Morris* overruled *Nesheim*. *Id.* at 500, 744 S.W.2d at 711 (Hickman, J., concurring).

55. See *supra* notes 25-31 and accompanying text.

56. See *supra* notes 45-54 and accompanying text.

57. 295 Ark. 107, 747 S.W.2d 81 (1988).

58. *Id.* at 121, 747 S.W.2d at 89.

59. *Id.* at 109, 747 S.W.2d at 82.

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

61. *Id.* at 117, 747 S.W.2d at 86.

62. 271 Ark. 667, 610 S.W.2d 876 (1981).

63. 295 Ark. at 117, 747 S.W.2d at 86.

class.⁶⁴ Therefore, the court held that it would be improper if the unions in *Hudson* could not present all their defenses to the individual claims of the plaintiffs.⁶⁵ However, the court said that if there is a question common to all, the trial court can achieve real efficiency by considering it as a class action.⁶⁶ If the common question is answered in the negative, then the case is over except for the claims against the named individual defendants.⁶⁷ If the question is answered affirmatively, there will be "splintered" cases to try, but efficiency will still have been advanced by deciding the common question in one action.⁶⁸

The court concluded this procedure would not be unfair to the defendant unions because they would be able to defend fully on the basic liability claim.⁶⁹ Moreover, if their liability is established in the first phase of the trial, the unions will have the opportunity to present individual defenses to the claims of individual class members.⁷⁰

Related to the issues of class action management and the splintering of individual claims,⁷¹ the defendant unions argued that if the court was to comply with its holding in *Nesheim*,⁷² which had the same type of predominant common question as *Hudson*, it would have to reverse the trial court's order.⁷³

In *Nesheim* the court reversed a class certification order, holding that common questions did not predominate over individual claims and noting that, if certified, the case would splinter into many individual ones.⁷⁴ The *Hudson* court agreed with the union's argument and overruled *Nesheim* to the extent that the case was inconsistent with its holding in *Hudson*.⁷⁵ The court then repeated its position that once the predominant issue is resolved, the class will have to be decertified

64. *Id.*

65. *Id.*

66. *Id.* at 117, 747 S.W.2d at 87.

67. *Id.*

68. *Id.*

69. *Id.*

70. *Id.*

71. In conjunction with this, the defendant unions raised the issue that tort claims that are not "disaster" cases, where one event is responsible for injuries to a class of persons, should not be permitted to proceed as a class action. The union pointed out that the events in *Hudson* occurred over a three day period, and thus, were unlike the mass disaster cases where a cataclysmic event inflicts similar harm on a group of people. Disagreeing with that argument, the court referenced specific cases in which other jurisdictions have permitted tort class actions where the wrong alleged was not a disaster case, it occurred over a period longer than three days, and involved separate damage claims. *Id.* at 120, 747 S.W.2d at 88.

72. See *supra* notes 39-44 and accompanying text.

73. 295 Ark. at 119, 747 S.W.2d at 87.

74. *Ford Motor Credit Co. v. Nesheim*, 287 Ark. 78, 81, 696 S.W.2d 732, 734 (1985).

75. 295 Ark. at 119, 747 S.W.2d at 88.

and the individual claims allowed to proceed.⁷⁶

The court also considered that each class member's claims were too small to permit pursuing them individually.⁷⁷ It mentioned that the sole fact that the claims are small is not a reason to permit a class action;⁷⁸ however, it is a factor other courts have considered in determining whether the class action is superior to other forms of relief.⁷⁹ The court ultimately determined that a class action, in this particular case, was superior to other forms of relief.⁸⁰

The *Hudson* court also considered the issue of numerosity.⁸¹ Numerosity occurs "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."⁸² The defendant unions in *Hudson* contended that the plaintiffs had not satisfied the requirement of numerosity.⁸³ The court held that the class was not limited or defined by the thirty-five persons who filed affidavits indicating a desire to be a class member.⁸⁴ The court noted that seventy-three property damage estimates were made.⁸⁵ Further, with respect to the wage loss subclass, testimony revealed that the Sanyo plant was closed for two days and that hourly employees were paid only for the time they worked.⁸⁶ Thus, the court defined the class as nonstrikers who suffered property damage and those who lost work time and pay during the strike.⁸⁷ Therefore the class would include at least several hundred employees.⁸⁸ Although it did not define an acceptable number of class members that would meet the numerosity requirement,⁸⁹ the court stated that there was a question of common or gen-

76. *Id.* at 120, 747 S.W.2d at 88.

77. *Id.* at 118, 747 S.W.2d at 87.

78. Contrary to the discretion given state courts of whether to consider the size of the plaintiff's claims, *Zahn v. International Paper Co.*, 414 U.S. 291 (1973), set forth the requirement that each plaintiff must meet the \$10,000 amount in controversy requirement in federal diversity actions. *Id.* at 301.

79. 295 Ark. at 118, 747 S.W.2d at 87.

80. *Id.*

81. *Id.*

82. ARK. R. Civ. P. 23(a).

83. 295 Ark. at 118, 747 S.W.2d at 87.

84. *Id.* at 118-119, 747 S.W.2d at 87.

85. *Id.* at 119, 747 S.W.2d at 87.

86. *Id.*

87. *Id.*

88. *Id.*

89. The Arkansas Supreme Court in *Hudson* did not define an exact number of class members that would fulfill the numerosity requirements of Rule 23(a). However, the court did mention that in *City of North Little Rock v. Vogelsang*, 273 Ark. 390, 619 S.W.2d 652 (1981), it had held seventeen not to be a sufficient number, whereas in *Cooper Communities, Inc. v.*

eral interest to "many persons."⁹⁰ No Arkansas court has articulated a specific number of plaintiffs sufficient to meet the requirement of numerosity under Rule 23(a).⁹¹

The court in *Hudson* compared and contrasted Federal Rule 23⁹² to Arkansas Rule 23.⁹³ The court stated "[w]hile it is true that subsection (a) of our rule differs from that of the federal rule, the difference is one of language only."⁹⁴ Justice Newbern, who wrote the *Hudson* opinion, previously stated in a law review article that the Arkansas rule is basically a repetition of Federal Rule 23(a), but is condensed.⁹⁵ The court noted that both Federal Rule 23(a) and Arkansas Rule 23(a) address the same basic requirements to class actions.⁹⁶

While the court noted similarities between the federal and Arkansas rules,⁹⁷ it also noted that differences exist.⁹⁸ Significantly, early in its opinion,⁹⁹ the court specifically referred to the absence of a notice provision in Arkansas Rule 23 which Federal Rule 23¹⁰⁰ embodies. The absence of such a provision raises questions regarding the constitutionality of Arkansas Rule 23.¹⁰¹ Though not mentioned by the court, Federal Rule 23(b)(1) and (b)(2) authorize specific class action suits whereas Arkansas Rule 23 does not.¹⁰² Despite these dif-

Sarver, 288 Ark. 6, 701 S.W.2d 364 (1986), 184 were found to be enough. 295 Ark. at 118, 747 S.W.2d at 87.

90. 295 Ark. at 119, 747 S.W.2d at 87.

91. ARK. R. CIV. P. 23(a) lists numerosity as a prerequisite to a class action.

92. FED. R. CIV. P. 23.

93. 295 Ark. at 115-16, 747 S.W.2d at 85-86.

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

95. Cox & Newbern, *New Civil Procedure: The Court that Came in from the Code*, 33 ARK. L. REV. 1 (1979).

96. 295 Ark. at 116, 747 S.W.2d at 86.

97. *Id.*

98. *Id.* When asked why Arkansas Rule 23 was not copied verbatim from Federal Rule 23, Walter Cox, an attorney in Fayetteville, Arkansas, and reporter to the Arkansas Supreme Court Committee on Rules of Procedure in Civil Cases, replied that one reason why the committee changed the language was to streamline and condense the rule because the members felt the federal rule was stated in a cumbersome way. He explained that their intention was not to change or deviate from the meaning of the federal rule or to change prior law. Telephone interview with Walter Cox, Attorney-at-Law, Davis, Cox and Wright, Fayetteville, Arkansas, and Reporter and Project Director, Arkansas Supreme Court Committee on Rules of Procedure in Civil Cases (June 27, 1988). Reporter's Notes (as modified by the Court) to Rule 23: Class Actions in Arkansas have been governed by ARK. STAT. ANN. § 27-809 (1962) which provided minimum procedural rules. This rule does not change prior law.

99. 295 Ark. at 112, 747 S.W.2d at 84.

100. FED. R. CIV. P. 23(c)(2).

101. See *Ford Motor Credit Co. v. Rogers*, 285 Ark. 64, 685 S.W.2d 145 (1985) (holding that the petitioner had no standing to question the constitutionality of Rule 23's failure to require notice to class members on behalf of the potential class members).

102. Compare FED. R. CIV. P. 23(b)(1)(2) with ARK. R. CIV. P. 23.

ferences, the intent of Arkansas Rule 23 was to maintain the same meaning as the federal rule.¹⁰³ The court reasoned that the omitted portions of the federal rule do not affect the question of whether class actions should be favored.¹⁰⁴ The court then indicated that Arkansas Rule 23 should be applied as liberally as Federal Rule 23, stating: "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 prerule tradition may have been inconsistent with the rule."¹⁰⁵

Ultimately it will be left to the trial courts to determine how liberally Arkansas Rule 23 will be interpreted in individual cases. This is because the theme of the opinion in *Hudson* is that trial judges have broad discretion to certify an action as a class action.¹⁰⁶ The court noted that beginning with *Drew*¹⁰⁷ and through *Morris*,¹⁰⁸ it has recognized the broad discretion of the trial judge as extending not only to protection of the absent class members¹⁰⁹ but also to the question of whether the class action should proceed.¹¹⁰

Hudson is significant for several reasons. First, *Hudson* shows that the Arkansas Supreme Court has adopted a more liberal stance toward class actions, confirming that *Arkansas Louisiana Gas Co. v. Morris*¹¹¹ was not an aberration. Prior to *Morris* the court discouraged class action certification in cases where the potential existed for individual claims or defenses to arise.¹¹² *Morris* suggested that individual questions could be deferred until questions common to the class were decided. *Hudson* was more explicit on this point, stating that, so long as there is a common question of law or fact, the trial court could certify the action as a class action for trial of the common question, then try the individual issues separately.¹¹³ By approving certification of cases which may involve individual questions of law or fact, the court made a much broader range of cases susceptible to class action treatment.

103. See *supra* note 98.

104. 295 Ark. at 116, 747 S.W.2d at 86.

105. 295 Ark. at 116, 747 S.W.2d at 86. See *supra* notes 9-13 and accompanying text.

106. The court mentioned the discretion afforded to trial courts six times.

107. See *supra* notes 32-37 and accompanying text.

108. See *supra* notes 45-54 and accompanying text.

109. The court was articulating a position expressed in the Reporter's Notes (as modified by the court) to Rule 23. 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 FED. R. CIV. P. 23.

110. 295 Ark. at 117, 747 S.W.2d at 86.

111. 294 Ark. 496, 744 S.W.2d 709 (1988).

112. See *supra* notes 32-44 and accompanying text.

113. 295 Ark. at 117, 120, 747 S.W.2d at 87, 88.

This method of handling class actions is instrumental to implementing the central premise of *Hudson*—that trial courts have broad discretion to certify a class action. Though the thrust of *Hudson* was to liberalize class actions, the court made it clear that this discretion cuts both ways. The court said the trial judge in *Hudson* could have refused to certify the action as a class action and it “might well” have upheld him in that exercise of his broad discretion.¹¹⁴ Because the United States Supreme Court has placed severe limitations on the availability of federal class actions by requiring that each member of the class meet the \$10,000 amount in controversy requirement,¹¹⁵ the ability to bring a class action in a state court is of great importance, especially where the plaintiffs’ claims are too small to pursue individually. Although the court agreed with the defendant union that the sole fact that the claims are small is not a reason to permit a class action, the *Hudson* opinion supported the propriety of considering those small claims when a court determines whether a class action is superior to other forms of relief.¹¹⁶ Therefore, *Hudson* is important because it has opened the doors for state class actions where the federal courts are gradually closing theirs.

In addition, the court in *Hudson* indicated that Federal Rule 23 and Arkansas Rule 23 were very similar in meaning.¹¹⁷ This similarity presents an opportunity for attorneys to argue more persuasively that cases interpreting Federal Rule 23 are relevant authority in resolving class action issues where no Arkansas authority exists.

Finally, while the court was not required to discuss the constitutionality of the lack of a notice requirement in Arkansas Rule 23, it did mention that there may be problems with it.¹¹⁸ Under *Mullane v. Central Hanover Bank & Trust*,¹¹⁹ sufficient notice is required to give absent class members an opportunity to participate in or challenge a suit.¹²⁰ *Mullane* held that, for the class involved in the controversy, a published “legal notice” was not adequate.¹²¹ The United States

114. *Id.* at 121, 747 S.W.2d at 88-89.

115. *Zahn v. International Paper Co.*, 414 U.S. 291, 301 (1973).

116. 295 Ark. at 118, 747 S.W.2d at 87.

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

118. *Id.* at 112, 747 S.W.2d at 84.

119. 339 U.S. 306 (1950). *Mullane* dealt with the constitutional sufficiency of notice to beneficiaries of judicial settlement of accounts by the trustee of a common trust fund.

120. In *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974), the Supreme Court held that in a Rule 23(b)(3) class action it is mandatory that individual notice must be provided to those members of the class who are identifiable through reasonable effort. Notice by publication is not permissible even where the cost of individual notice is prohibitively high. *Id.* at 173-77.

121. *Mullane*, 339 U.S. at 319-20.

Supreme Court in *Mullane* said:

An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. The notice must be of such nature as reasonably to convey the required information, and it must afford a reasonable time for those interested to make their appearance

122

Therefore, the lack of a notice provision may portend future due process problems for the Arkansas class action rule.

The court's decision in *Hudson* liberalized case treatment under Arkansas Rule 23 by granting trial judges broad discretion to certify a class action. The certification requirements for class actions under the Arkansas rule are similar to those under the federal rule.¹²³ However, the necessity that each class member meet the \$10,000 amount in controversy requirement in federal diversity cases¹²⁴ and the need for individual notice under the federal rule¹²⁵ make the Arkansas state courts a more attractive forum for class actions involving small claims and numerous class members. Of course, tactical or other considerations¹²⁶ may dictate an attorney's choice of whether to bring a class action in a state or federal court. In choosing which courthouse to enter, attorneys should consider the implicit invitation extended in *Hudson* to file in state court.

Sarah Wilson

122. *Id.* at 314 (citations omitted).

123. *See supra* note 95 and accompanying text.

124. *See supra* note 115 and accompanying text.

125. *See supra* notes 119-21 and accompanying text.

126. 3 H. NEWBERG, *NEWBERG ON CLASS ACTIONS* §§ 13.02, 13.03 (1985). In choosing a state or federal forum there are several factors to consider. Judges on the federal bench are more experienced with class actions and there is more case precedent because Federal Rule 23 has been in existence longer than its state counterparts. Federal courts offer wider jurisdiction and venue and broader service of process. Attorney's fees are often expressly provided for in federal laws. However, there are also advantages to suing in state court. Cases in which state or local issues are primary or where local opinion is supportive may be better filed in state court. State courts are not as likely to dismiss cases for venue reasons when a suit is brought in the state of incorporation.

