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I. Introduction

Class actions have been described in various ways, depending upon one's perspective. One writer suggests they are..."the most controversial of all the proposed judicial remedies for consumer grievances." Another calls them "...one of the most socially useful remedies..." Legislative history concerning the federal rule of civil procedure governing class actions indicates that one the proponents argued that "making illegal practices unprofitable as a result of class actions for damages is one of the most effective ways to stop these practices." On the other hand, some critics have labeled class actions "legalized blackmail."[1]

Regardless of one's viewpoint concerning the propriety of the class action in the context of consumer litigation, it has become firmly entrenched in Arkansas civil practice, and has found a particular application in natural resources disputes. Most of the class actions have centered on the method and manner of royalty payments. Whether a particular industry practice is legally correct or not, one thing is reasonably constant - the method of payment of royalties is normally uniform within a particular company. Thus, an oil or gas producer is vulnerable to royalty class litigation where its method of payment deviates from requirements imposed by law. Although the deviation may be minor with respect to one royalty owner, when multiplied by the many hundreds or even thousands of royalty owners to whom a producer is typically accountable, the class action lawsuit can create a problem of major import.

II. The Development of the Class Action

Class litigation in its most rudimentary form existed hundreds of years ago at common law. It was originally a creature of equity – still a powerful concept in Arkansas jurisprudence,

notwithstanding the adoption of Amendment 80 to the Arkansas Constitution. Early chancery courts provided a remedy under circumstances in which it was impossible to join as parties all those persons whose interests might be affected by a judgment. Courts of equity had originally imposed a compulsory joinder rule so that complete relief might be afforded to all litigants. However, as this evolved, the compulsory joinder rule resulted in the problem of hundreds of individuals being joined in the same case, creating an impossible administrative problem. Thus, the class action was developed, so that representative members could virtually represent all persons similarly situated, which could result in a judgment binding on the entire class.[2]

Statutory authority allowing class actions in Arkansas has been in place since 1869, the effective date of the Arkansas Code of Practice in Civil Actions, adopted by the General Assembly in 1868. Appearing in earlier compilations of Arkansas statutory law, that Act ultimately found its way to Ark. Stat. Ann. § 27-809, which provided:

> 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.

Notwithstanding the text of the Act itself, which would appear to allow "consumer" class actions, the Arkansas Supreme Court equated it with the equitable doctrine of virtual representation.[3] In fairness, however, it appears that the Arkansas Supreme Court was seldom presented with an opportunity to apply the class action statute in consumer cases. Early examples of the application of the statute were fairly limited. In 1894, the earliest Arkansas example of a "class" case, the Supreme Court tacitly recognized the right of a plaintiff to bring

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[1] *See generally,* Newberg, *Newberg on Class Actions,* 3d Ed. § 1.01, at 1-3 (1992).
[2] *Id.*, § 1.09.
[3] See, *Ross v. Arkansas Communities, Inc.,* 258 Ark. 925, 529 S.W.2d 876 (1975).

an action on behalf of himself and others who were interested.[4] The court acknowledged a similar principle a few years later.[5] Later, the statute was employed to allow class actions in illegal exaction disputes,[6] and other disputes with municipalities in which the citizens had a commonality of interest.[7]

However, in the litigation spawned by the statute, at least insofar as the reported decisions, the consumer class action as it has developed in more recent years was not to be found. This was to change after the adoption of the Arkansas Rules of Civil Procedure. Rule 23, patterned after the federal rule, confers broad discretion upon trial courts in class litigation. The rules became effective in 1979.

In the initial decisions following adoption of Rule 23, the Arkansas Supreme Court indicated a hesitancy to embrace consumer class actions. In *Ross, supra,* the Court made clear that it would not resolve doubts in favor of class actions. It repeated that mantra even after the effective date of Rule 79. The Court expressed doubts about class actions, particularly where a defendant showed that there were individual issues which would need to be litigated. The Court expressed its fear that this would result in a "splintering" of class actions into many individual suits, thus finding that the class action method was not superior for the fair and efficient adjudication of controversies. This attitude of the Court was displayed in its final form in *Ford Credit Co. v. Nesheim.*[8] The Court reversed a class action certification, finding that the common questions did not predominate over the individual ones, and that the class method would not be superior to individual litigation. At issue was Ford Motor Credit's retail installment contracts,

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[4] *Cantwell v. Pacific Express Co.*, 58 Ark. 487, 25 S.W. 503 (1894). As an illustration of how the passage of one hundred years changes things, it is interesting to note that in *Cantwell*, the Supreme Court considered and reversed an action by the plaintiff to recover the sum of ten dollars.

[5] *St. Louis, I. M. & S. Ry. Co. v. Cumbie*, 101 Ark. 172, 141 S.W. 838 (1911).

[6] *Crain v. St. Francis Levy Dist., et al*, 189 Ark. 721, 74 S.W. d 970 (1934).

[7] *See, e.g., C.K. Lancaster, et al v. Incorporated Town of Mountain View, et al*, 227 Ark. 596, 300 S.W. 2d 603 (1957).

and whether they were usurious. It is doubtful whether the Court would reach the same result today if confronted with the same facts.

In 1988, the Arkansas Supreme Court effectively opened the door to the class action as it now exists in *Arkansas Louisiana Gas Co. v. Morris, et al.*[9] Only one month later, the court extended its liberalized vision of consumer class actions in *International Union of Electrical, Radio & Machine Workers v. Hudson.*[10] In *Morris* Justice Hickman, in his concurrence, pointed out that, in his judgment, the Court was effectively overruling *Ford Motor Credit Co. v. Nesheim.*[11] In *Hudson,* the court expressly overruled *Nesheim.* In *Hudson* the court plainly noted its recognition that the law had been changed to liberalize the class action, and that previous holdings, requiring that there may be commonality of questions both of law *and* fact, refusing to certify classes on the basis of individual defenses, and expressing a position that doubtful cases would be resolved against certification, were all changed by Rule 23.

Thus, it is now evident that the touchstone case which dramatically changed class action litigation in Arkansas arose from the oil patch. In *Morris, supra*, Arkla perfected an interlocutory appeal from the Chancellor's order certifying a class of several hundred royalty owners whose leases called for the payment of royalties based on a fixed or stipulated price rather than on the basis of the proceeds received by the lessee. The court concluded that the class certification order should be affirmed. The previous, somewhat hostile attitude by the Supreme Court to this type of litigation had completely changed, based upon its interpretation of Ark. R. Civ. P. 23. Rejecting arguments by Arkla that individual questions related to several class members should defeat class action status, the court held that those individual questions

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[8] 287 Ark. 78, 696 S.W. 2d 732 (1985).
[9] 294 Ark. 496, 744 S.W. 2d 709 (1988).
[10] 295 Ark. 107, 747 S.W. 2d 81 (1988).
[11] 287 Ark. 78, 696 S.W. 2d 732 (1985).

could be deferred until the end of the case, after the court had first disposed of the questions common to the class.[12]

IV. Significant Class Actions Since 1988

Many of the subsequent class actions have been certified pursuant to an agreed order, after it became clear that the Arkansas Supreme Court interpreted Ark. R. Civ. P. 23 favorably to class certification. The writer and his firm have been counsel of record in nine class actions involving natural resources disputes, including *Morris*, and have represented both royalty owners and industry.

Subsequent to the Supreme Court's decision, *Morris* was tried in the Franklin County Chancery Court, where the Chancellor, in a bifurcated proceeding, decided the liability issues in favor of the plaintiff class. The case was then settled prior to trial on the damage issues. Since the *Morris* decision, several class actions involving natural resources disputes have been litigated.

In *Klein, et al v. Jones, et al*,[13] defendants removed the action from the Chancery Court of Franklin County. The United States District Judge certified a class of royalty owners who had been leased to Arkoma Production Company, formerly owned by Jerry Jones and Mike McCoy. The class alleged that Arkoma, Arkla, and others, had deprived the plaintiff class of their right to share in considerations paid Jones and McCoy for the resolution of issues related to a gas purchase contract obligating the purchaser to take a minimum amount of gas or pay the value thereof - - a so-called "take-or-pay" contract. In its favorable ruling, the Eighth Circuit Court of Appeals held that the plaintiff class was entitled to recover as a matter of equity, pursuant to the doctrine of unjust enrichment. It also noted Ark. Code Ann. § 15-74-705, which essentially

[12] *Arkansas Louisiana Gas Co. v. Morris,* 294 Ark. at 499.
[13] 980 F.2d 521 (8th Cir. 1992).

establishes Arkansas public policy by requiring a fair distribution of proceeds received by lessees as they produce oil and gas.

The unusual history of the *Klein* case has been the subject of much discussion at this Institute. Notwithstanding the favorable ruling from the Eighth Circuit, on remand, Chief Judge Hendren conducted a trial, followed by entry of judgment against the plaintiff class, which again successfully appealed. *Klein, et al v. Arkoma Production Company, et al.*[14] The second decision left no doubt of the Eighth Circuit's position regarding take-or-pay payments or settlements received by the lessee. It clearly held as a matter of law that royalty was owed by the lessee to the lessor on any such considerations.

The two *Klein* cases provided the backdrop for the Arkansas Supreme Court to consider a similar issue. In *Seeco, Inc., et al v. Hales, et al,*[15] the Supreme Court affirmed a substantial judgment in favor of the plaintiff class, which contended they were entitled to the benefit of royalties based on the higher pricing scheme of a gas purchase contract between their lessee and the purchaser, rather than royalties which had been paid on the basis of proceeds received by their lessee. Unlike other recent class litigation, the defendants in *Seeco* challenged class certification in an interlocutory appeal, but failed to persuade the Supreme Court the class should not have been certified.[16]

Normally, appeals can only be taken from final judgments of lower courts. There are several exceptions to this general rule, however, and a class certification order is one of them. An aggrieved party may perfect an appeal from an order either granting or denying class certification.[17] In its decision, the first of four reported decisions in the Arkansas Supreme Court

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[14] 73 F.3d 779 (8th Cir. 1996).
[15] 341 Ark. 673, 22 S.W.3d 157 (2000).
[16] *Seeco, Inc., et al v. Hales, et al*, 330 Ark. 402, 954 S.W.2d 234 (1997).
[17] Ark. R. App. P. 2(a)(9).

dealing with the same dispute, the court issued an important ruling concerning class certification. Against Seeco's argument that the trial court erred in finding that common questions predominated over individual ones, the court restated the principle of *Arkla Gas Co. v. Morris*, *supra*, again finding that the common questions were predominant, and that should the trial court later find that individual questions should be presented, those questions could be deferred until after a final disposition of the questions common to the class.

The primary principle of the case, however, is more basic. The court clearly stated that review of class certification orders is based on an abuse of discretion standard. Thus, an order certifying a class, or denying certification, rests within the sound discretion of the trial court, and will not be disturbed absent a showing of abuse of that discretion. Even in the face of testimony reflecting individual issues concerning fraud, reliance, and other matters, the court found that although defenses of lack of reliance and diligence may be arguments raised by the appellants, "these challenges will not override the common question relating to the allegation of a scheme perpetrated by the appellants. The overarching issue which must be the starting point in the resolution of this matter relates to the existence of the alleged scheme."[18]

To say that the reach of the *Seeco* case is extensive is a gross understatement. It is beyond the scope of this presentation to review it in detail, but a careful reading of the case, and Thomas A. Daily's thorough treatment of it in a previous Institute,[19] will convince the reader of the potential problems created for industry in the wake of the Supreme Court's final decision.

IV. Class Certification Requirements

Ark. R. Civ. P. 23 establishes several prerequisites to class certification to establish a class, the court must find:

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[18] *Seeco, Inc. v. Hales*, 330 Ark. at 414.

1. That the class is so numerous that joinder of all members is impracticable (numerosity);

2. There are questions of law or fact common to the class (commonality);

3. The claims or defenses of the representative parties are typical of the claims or defenses of the class (typicality); and

4. The representative parties will fairly and adequately protect the interests of the class (adequate representation).

The class certification order should address all four of these prerequisites and should make separate findings on each. As noted previously, whether to certify an action as a class action is a matter addressed to the sound discretion of the trial court, and will not be disturbed in the absence of an abuse of that discretion.

The numerosity requirement is satisfied where a class is so numerous that joinder would be difficult or inconvenient – not impossible. There is not a rigorous rule as to the number of putative class members required. The court has affirmed a class of only 184 potential members,[20] but has rejected a proposed class of only 17.[21] The remaining prerequisites - commonality of questions of law or fact, typicality of claims or defenses, and adequacy of representation by the representative parties - are perhaps easier to address than the numerosity requirement. This seems particularly true in royalty litigation, because of the uniform method of royalty payments. For example, if a particular post production charge is deducted from one royalty owner's payment, it is doubtless deducted from all. Thus, the propriety of that deduction is a question that is common to all royalty owners, who could join together in a class, and easily

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[19] Daily, Recent Developments in Natural Resources Law Circa 2000-01, 40th Annual Natural Resources Law Institute (2001).

[20] *Cooper Communities, Inc. v. Sarver*, 288 Ark. 6, 701 S.W.2d 364 (1986).

meet the numerosity test, as well as the other prerequisites to class certification. It is the uniform treatment of royalty owners which establishes commonality. In *Arkansas Louisiana Gas Co. v. Morris, supra*, the court stated:

> We are able to determine from the record a common question of fact that all "fixed price" lessors in the Cecil Field have been treated identically by the defendant lessees for a number of years. The parties have for some reason ignored the royalty amount fixed in the original leases and have paid and accepted royalties of different amounts. It is apparent that the common question of law in this case is whether the defendants' course of conduct gives rise to a cause of action in favor of the "fixed price" lessors in the Cecil Field. There is no requirement that the trial court find that the facts as to each individual of a class action must in every respect be identical with that of all members of the class. It is enough to show that a common question of law or fact predominates over other questions affecting only individual members.[22]

Indeed, this uniformity is what makes industry particularly vulnerable to class litigation. Assuming the prerequisites of Rule 23(a) are satisfied, the court must then only find that the common questions of law or fact predominate over questions affecting individual class members and that class litigation is superior to other available methods for the fair and efficient adjudication of the controversy.[23]

With respect to the issue of the superiority of the class action as a method for adjudication of disputes, the Arkansas Supreme Court has likewise been a friendly forum for class litigants. The class method of adjudication is superior where "it is more economical to pursue the action as a class instead of individually."[24] As previously noted, Ark. R. Civ. P. 23 is patterned after Fed. R. Civ. P. 23. In construing that rule, the United States Supreme Court has detailed the substantial advantages that class actions may afford:

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[21] *City of North Little Rock v. Vogelgesang*, 273 Ark. 390, 619 S.W. 2d 652 (1981). In both *Sarver* and *Vogelgesang*, the court affirmed the trial court's action.
[22] *Id.*, 294 Ark. at 499, 744 S.W. 2d at 710.
[23] *See* Rule 23(b).
[24] *Megalife & Health Ins. Co. v. Jacola*, 330 Ark. 261, 274, 954 S.W.2d 898, 903 (1997).

> The use of the class-action procedure for litigation of individual claims may offer substantial advantages for named plaintiffs; it may motivate them to bring cases that for economic reasons might not be brought otherwise. Plainly there has been a growth of litigation stimulated by contingent-fee arrangements and an enlargement of the role this type of fee arrangement has played in vindicating the rights of individuals who otherwise might not consider it worth the candle to embark on litigation in which the optimum result might be more than consumed by the cost. The prospect of such fee arrangements offers advantages for litigation by named plaintiffs in class actions as well as for their attorneys. For better or worse, the financial incentive that class actions offer to the legal profession is a natural outgrowth of the increasing reliance on the "private attorney general" for the vindication of legal rights; obviously this development has been facilitated by Rule 23. The aggregation of individual claims in the context of a classwide suit is an evolutionary response to the existence of injuries unremedied by the regulatory action of government. Where it is not economically feasible to obtain relief within the traditional framework of a multiplicity of small individual suits for damages, aggrieved persons may be without any effective redress unless they may employ the class-action device.[25]

An earlier California decision employed even more direct language:

> Frequently numerous consumers are exposed to the same dubious practice by the same seller so that proof of the prevalence of the practice as to one consumer would provide proof for all. Individual actions by each of the defrauded consumers is often impracticable because the amount of individual recovery would be insufficient to justify bringing a separate action; thus an unscrupulous seller retains the benefits of its wrongful conduct. A class action by consumers produces several salutary by-products, including a therapeutic effect upon those sellers who indulge in fraudulent practices, aid to legitimate business enterprises by curtailing illegitimate competition, and avoidance to the judicial process of the burden of multiple litigation involving identical claims. The benefit to the parties and the courts would, in many circumstances, be substantial.[26]

The Arkansas Supreme Court's affirmance of the class certification in *Seeco*, *supra*, indicates the same attitude. Where a large number of persons (royalty owners) are treated in a uniform method by an operator, then irrespective of the small amount per person that the exposure might represent, there is quite a large problem when it is spread across hundreds, and sometimes thousands, of litigants who can unite in one action. And, as was made painfully clear by the court's final *Seeco* decision, the price of being wrong in one's business judgment can be

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[25] *Deposit Guaranty National Bank v. Roper*, 445 U.S. 326, 338-39 (1980).

enormous. The court affirmed a finding of fraud on the basis of correspondence from Seeco presenting an offer to purchase mineral interests, and "misleading" royalty check details. The court found the class had proved reliance simply because class representatives testified "they had no reason to question" the statements contained in the correspondence or in the royalty check details.

In considering whether to certify a class, the court cannot inquire into the merits of the case, but is authorized only to consider the prerequisites set forth in Rule 23.[27] A consideration of the merits of the action in a certification motion is an abuse of discretion that warrants reversal of an order failing to certify a class.[28]

To complicate matters further, a defendant in a potential class action is forbidden from contacting putative class members, even those who are not named as potential class representatives:

> ...[W]e are persuaded by the reasoning of the Federal District Court in *Hampton, supra*, that precertification communications with potential class members which attempt to substantially reduce member participation in the class action, or which otherwise indicate a likelihood of coercion or a serious potential for harm to the interests of the class action, should be restricted or prohibited when brought to the attention of the trial court.[29]

And, if there was any doubt about the warm embrace of the Arkansas Supreme Court for class actions, the Court also stated in *Fraley* that "where the numerosity question is a close one, the balance should be struck in favor of a finding of numerosity in light of the trial court's option to later decertify."[30] With its decision to reverse the trial court's refusal to certify a class in *Fraley*, the Supreme Court made abundantly clear its preference for class actions, and that it would, in

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[26] *Vasquez v. Superior Court*, 4 Cal. 3d 800, 808, 484 P. 2d 964, 968 (1971).
[27] *Mega Life & Health Ins. Co. v. Jacola*, 330 Ark. 261, 954 S.W.2d 898 (1997); *Farm Bureau Mutual Ins. Co. v. Farm Bureau Policyholders & Members*, 323 Ark. 706, 918 S.W.2d 129 (1996).
[28] *Fraley v. Williams Ford Tractor & Equipment Company*, 339 Ark. 322, 5 S.W.3d 423 (1999).
[29] *Id.* 339 Ark. at 340.

the future, resolve doubts in favor of class certification, which is a complete reversal of its pre-*Morris* holdings.

In the post-*Morris* era, there have been several class actions which have been tried and which were not the subjects of appeal, and others which were resolved without the necessity of trial. They primarily centered on alleged failure by the lessee properly to pay royalties pursuant to Arkansas law, or failure to pay royalties on the basis of an appropriate gas purchase contract. Generally, these cases turn on whether the lessee paid one-eighth of the proceeds received, as required by law.[31]

In the wake of *Arkansas Louisiana Gas Co., et al v. Morris, et al, supra*, one writer welcomed what he characterized as the liberalization of Arkansas class action procedure.[32] He further noted the predominance of state court class actions as opposed to those in federal court. The principal reason for this is the difficulty of establishing federal court jurisdiction. Federal diversity jurisdiction extends to civil actions in which there is complete diversity of citizenship between the plaintiffs and defendants, and the amount in controversy exceeds the sum of $75,000.00.[33] Formerly, to sustain diversity jurisdiction in class actions, a federal court was required to find the requisite amount in controversy with respect to each named plaintiff, unless their interests were "common and undivided." In *Zahn v. International Paper Co.*,[34] the Court held that each class member must satisfy the jurisdictional amount requirement independently, regardless of whether there are other sufficient claims to which insufficient claims might be considered pendent or ancillary. Later, however, as party of the Judicial Improvements Act of

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[30] *Id.* 339 Ark. at 344.
[31] Act 272 of 1985, Ark. Code Ann. § 15-72-305.
[32] See, Gould? *New Wine in an Old Bottle – Arkansas' Liberalized Class Action Procedure – A Boon to the Consumer Class Action,* 17 UALR Law Journal 1 (1994).
[33] 28 U.S.C. § 1332(a).
[34] 414 U.S. 291 (1973).

1990, Congress provided that federal district courts have supplemental jurisdiction over all claims so related to claims within the court's original jurisdiction that they constitute a part of the same case or controversy. In other words, if a claim properly invokes federal jurisdiction, the court has supplemental jurisdiction over claims related to it.[35] The current view is, therefore, that Congress intended legislatively to overrule *Zahn,*[36] and allow class actions to proceed in federal court even where the claims of the individual class members do not exceed the sum of $75,000.00, so long as a representative member of the class does possess a claim satisfying the minimum amount in controversy.

The defendant in the potential class action case must at the outset determine whether it wishes to litigate in federal court, assuming the necessary jurisdictional requirements are present. Removal would not have been available to Seeco, for example, since the principal place of business of the corporate defendants was in Arkansas, and there was at least one Arkansas resident who was a named class representative. Therefore, there was no diversity of citizenship.

Most class actions will likely be found in the state courts. And, in light of the final Supreme Court decision in *Seeco*, it may be that potential class litigants and attorneys desiring to pursue those actions will gravitate toward Arkansas, which Professor Gould describes as a forum that is "among the most favorable in the nation for potential consumer class action plaintiffs."[37] Of course, for many litigants, this is the "worst case" scenario – a target defendant with enormous exposure because of the possibility of class certification, required to litigate in state court.

As is usually the case, of course, industry is not without responses to this situation. One obvious place to respond is in the Legislature, which might be called upon to enact stricter

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[35] 28 U.S.C. § 1367.
[36] See generally, *5 Moore's Federal Practice*, 3d Ed. (1999).

prerequisites for class certification. This seems unlikely, however, since Rule 23, as all other rules of civil procedure, has been adopted by the Arkansas Supreme Court. The Supreme Court adopted the rules initially in December 1978 pursuant to the enabling legislation provided by Act 38 of 1973. In other words, the General Assembly authorized the Supreme Court to adopt the Rules of Civil Procedure, and any changes to those Rules must be put in place by the Supreme Court. It is doubtful that after 30 years, the Legislature would attempt to interfere.

A more basic approach would be to persuade the Legislature to enact legislation that would remedy particular problems anticipated by industry. This is precisely what was done in the last session with the introduction of the so-called Natural Gas Royalty Act. That Act would have provided several substantive changes and would have (arguably) legislatively overruled the two *Klein* cases and *Seeco*. It passed the Senate, but failed in a House committee at the end of the session.

When a putative class action is filed, another proactive approach which is available to a defendant is to participate aggressively in drafting the class certification order. By presenting an agreed order, the defendant has input in defining the issues, characterizing the action, and identifying the class. Often, it is necessary for subclasses to be established, so many of the individual issues which otherwise might be overlooked at later stages in a contested proceeding can be addressed at the outset.

One remedy which has been successfully employed by Stephens Production Company is a defendant class action. Stephens initiated such an action in May 2001 against three individuals and one limited liability company,[38] all of whom who had been plaintiff class representatives in a previous action against Stephens which was concluded by settlement. Stephens alleged that it

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[37] *Gould, supra,* at 38.

had entered into a contract with Arkansas Oklahoma Gas Corporation which obligated it to deliver and gave AOG the right to purchase, certain volumes of gas. It further alleged that AOG paid a "demand charge" to Stephens in consideration for services Stephens provided, and its commitments to deliver specified gas volumes. Stephens also asserted that the royalty owners who derive royalty from the wells and other points of delivery into AOG's system were over three thousand in number. Stephens sought declaratory relief from the court that would legitimize the demand charge, and approve Stephens' practice of not paying royalty on it. The defendant class representatives engaged their counsel who had represented them in a previous case. The defendants filed an answer and counterclaim, and the parties participated in discovery. Ultimately, the case was settled by representatives of the defendant class and counsel for Stephens. The parties then agreed upon a provisional class certification order which was entered by the court for purposes of providing notice of the settlement, which was subsequently approved.

The Stephens defendant class action is an example of another creative way a company may have to exercise some control over class litigation. It was somewhat unusual in that Stephens served the complaint on defendants who were simultaneously plaintiff class representatives in another class action against Stephens. However, there is nothing to prohibit a company from selecting appropriate lessors who are royalty owners and who would be adequate class representatives, from pursuing this type of class action, in order to seek declaratory relief. Rule 23 expressly authorizes a defendant class action ("one or more members of a class may sue *or be sued* as representative parties...").[39] There is scant case authority for such actions. However, an Arkansas case which predates Rule 23 authorized an action brought by a trustee in

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[38] *Stephens Production Company, a Division of Stephens Group, Inv. v. Harold W. Jones, et al*, Sebastian County Circuit No. CIV-2001-390.

bankruptcy against certain named defendants as representatives of a burial association which had over 1,600 members.[40] This proceeding should be employed with great caution, and should only be pursued by a plaintiff which realizes it has a problem that needs to be resolved in such a manner that all future claims will be cut off as a result of a class certification order and ultimate judgment.

Whether it is accomplished by a defendant class action, or by simply cooperating with plaintiff class counsel in drafting an appropriate class certification order, there are some advantages for industry in the class method of adjudication. Foremost among the advantages, the issues of fact and law which are common can be developed for an entire class, which would give binding effect to any judgment. The judgment may be favorable to the operator, which would have the effect of cutting off future litigation on the same issue, under traditional principles of *res judicata.*.

> When adequate representation is present, then the essential adjudicatory characteristic of representative litigation can be realized, to-wit, the adjudication of common questions, whether favorable or not, will be binding on class members. The class representative stands in judgment for the class.[41]

Even if the industry defendant is not successful in pretrial rulings such as motions for partial summary judgment, a settlement of a class dispute will ordinarily convey great economic benefits. The settlement, once approved by the court, is binding on all class members, and results in complete termination of the litigation. No class member can intervene for the purpose of perfecting an appeal. The Supreme Court has expressly ruled that a class member who was not a class representative lacks standing to pursue an appeal.[42] Although class action settlements are always negotiated in light of whether they will be approved by the court and accepted by the

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[39] Ark. R. Civ. P. 23(a).
[40] *Massey v. Rogers*, 232 Ark. 110, 334 S.W.2d 664 (1960).
[41] Newberg, *Newberg on Class Actions,* 3d Ed., § 1.07 (1992).

great majority of the class, it is rare, at least in this writer's experience, for class members to opt out of a settlement.[43] Thus, a settlement which is negotiated in good faith and approved by the court will be binding on many individuals, and will save a company from piecemeal litigation.

V. Conclusion

Class litigation of royalty disputes has not yet run its course. Royalty owners in Arkansas are much more sophisticated today than they were as recently as twenty years ago. While not as litigious, perhaps, as royalty owners in Texas, there can still be disastrous consequences for companies who take for granted that questionable practices may not be discovered, or if discovered, will not be pursued by royalty owners in litigation.

If a class action is filed, industry is not without many resources. The best course in today's legal climate is to aggressively become part of the certification procedure, whereby industry can craft the most appropriate class certification order so that the *res judicata* effect of any final judgment is as thorough as it can be, while at the same time narrowing the issues or even bifurcating the issues for trial purposes,[44] so that maximum control is maintained over a potentially disastrous cause of action.

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[42] *Haberman v. Lile, et al*, 318 Ark. 177, 884 S.W. 2d 262 (1994).
[43] In the settlement of Stephens' class action concerning the "demand charge," over 5000 notices of the class action settlement were mailed to class members. Only four opted out, and one of the four was the Minerals Management Service of the United States Department of Agriculture.
[44] *See,* Ark. R. Civ. P. 42(b), which expressly allows bifurcation.