Shattered Class: Looking Beyond Certification in Arkansas Class Actions

By Jess Askew III and Andrew King

This article examines several open questions about Arkansas class-action practice after a class is certified, including whether individualized trials are required, the finality of a judgment from a trial on common issues, class counsel's obligations after a class-wide trial on common issues, and whether notice to class members should describe the trial plan.

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More than 30 years ago, the Arkansas Supreme Court liberalized the state's class action procedure[1] to allow class certification if a predominant common issue exists, even if bifurcated or "splinter" proceedings are later necessary to adjudicate individualized issues.[2] To the authors' knowledge, this procedure has not actually been used in any Arkansas court; no case has been tried on class-wide, common issues and then splintered into individual trials on non-common issues of damages, defenses, and the remaining elements of the claim.[3]

While the phrase "certify now, worry later" may describe Arkansas class-action practice,[4] after 30 years the time has come to understand what "later" holds. This article discusses unresolved questions that lie beyond a class-wide trial on common issues where individualized issues remain. In many instances, a class-wide trial will result in an inconclusive, limited adjudication of common issues and no final or collectible money judgment. This suggests that in splintered cases, the architecture of the entire case is more consequential than the decision on class certification. In some circumstances, defendants should be willing to take a class action to trial on a common issue and then deal with the individualized issues that remain for each class member, if the class prevails on the common question.

The splinter trial hypothesis

In 1988, the Supreme Court held in *International Union of Elec., Radio & Machine Workers v. Hudson* that it would no longer prohibit class certification out of concern that a defendant's right to present defenses to individual claims would "splinter" the action into separate cases.[5] The Court relied on the trial court's "substantial power to manage a class action" under Rule 23 of the Arkansas Rules of Civil Procedure, even if damages and individual defenses to the claims of each class member would have to be tried in a "splintered" second phase of trial.[6] The Court's holding in *Hudson* was foreshadowed by its decision in *Arkansas Louisiana Gas Co. v. Morris* one month

earlier, in which it affirmed certification of common questions on "eight or ten different theories of recovery" despite individual questions of detrimental reliance as to an estoppel theory.[7] In *Hudson* and *Morris*, the Court accepted the premise that a *prima facie* case of liability on certain class-wide claims could be established through aggregate proof. So long as the defendants had the opportunity to litigate individual damages, defenses, and elements after the common claims, the efficiency purposes of the Rule 23 class-action procedure were satisfied.[8]

Eight years later, in *SEECO, Inc. v. Hales* ("*Hales I*"), the Court discussed *Hudson* and *Morris* as part of a five-case "compendium" in which it "established a procedure of handling the common issues first, recognizing that the trial court, in its discretion, could later resolve the individual questions."[9] The other cases in the "compendium" turned on whether individualized proof was necessary to establish class-wide liability, even if damages and proximate cause would be determined individually.[10] The Court concluded that the class-wide claims for fraud were properly certified, even though "lack of reliance and diligence" may be raised by the defendants.[11] The Court further noted that the case could be splintered for the trial of individual issues, if necessary.[12]

Along with relaxing the Rule 23 standard in *Hales I* to permit certification where some elements of class-wide claims could require individualized proof, the Supreme Court increasingly restricted the level of inquiry that a trial court could put into the merits of the plaintiff's cause of action in deciding whether to certify.[13] Citing the United States Supreme Court's decision in *Eisen v. Carlisle & Jacquelin*,[14] the Arkansas Supreme Court in 1996 emphasized that for a class certification ruling, "it is totally immaterial whether the petition will succeed on the merits or *even if it states a cause of action*."[15] A 1999 decision went further, holding that affirmative defenses should not be considered at the class certification stage.[16] Consistent with *Hudson* and *Hales I*, the Court's decisions continued to note that a trial court could "decertify should the action become too unwieldy" but declined "to speculate on the questions of bifurcated trials" with respect to the constitutional rights to a jury trial or due process.[17] Over the course of 30 years since *Hudson*, the Arkansas Supreme Court's approach to class actions has diverged substantially from federal procedure, which requires a "rigorous analysis" of the Rule 23 standards, permits consideration of the merits of the underlying claims, and encourages the trial court to evaluate a plan for actually trying the case, all at the class-certification stage.[18]

Hales went to trial, resulting in a jury verdict on class-wide liability and damages.[19] On appeal, the Supreme Court rejected the defendants' argument that splinter trials were required by its decision in *Hales I*. The Court deferred to the trial court's discretion not to hold separate trials because there was common evidence in the form of monthly royalty statements and two letters sent to all class members.[20] To date, there is no Arkansas appellate case in which a class action was certified, tried on class-wide issues, and then bifurcated, severed, or de-certified for splinter trials on individualized issues.[21]

When are individualized trials required?

Assuming the possibility of splinter trials is more than a mirage, then there must be some circumstances where individualized trials are not only permitted as a matter of discretion, but necessary to protect a defendant's right to a fair trial. After all, in many other jurisdictions, the need for individualized determinations of fact or law would result in denial of class certification.[22] But the problems with aggregate proof also affect the structure of the trial process. Where individualized issues exist, courts have found it impermissible to use representative trials for a few class members and extrapolate from those results an outcome that can be applied to each class member's claim.[23]

While "trial by extrapolation" or "trial by formula" is not *per se* prohibited,[24] such a procedure cannot be employed as a substitute for individualized proof for individu-

alized injuries.[25] There are three primary problems with an extrapolation approach that could apply in an Arkansas court:[26] (1) due process concerns, both from the perspective of the defendant[27] and absent class members;[28] (2) the constitutional right to a jury trial which requires nine of 12 jurors to agree to a verdict,[29] and may bar a second jury from re-examining a decision by a first jury;[30] and (3) the separation of powers between the judicial and legislative branches, to the extent that extrapolation may result in modifying the substantive law and elements of proof for a cause of action.[31] For these reasons, "courts have largely abandoned trial by extrapolation, as it is strongly disfavored and arguably unconstitutional."[32]

Where "trial by extrapolation" is not a legally valid procedure, then a class-wide trial should not be conducted on any issue where the class-wide evidence would be insufficient in an individual action to meet the plaintiff's burden of proof.[33] This is because class members who do not opt out of a case are bound by the outcome of class-wide proceedings.[34] A class representative's failure to meet the burden of proof on any element of a claim could expose the individual class members to a *res judicata* bar against their claims, even if some common issues were established on a class-wide basis.[35]

To address this risk to class members, the trial court should determine, early on, whether separate splinter trials on individualized issues will be necessary. Moreover, as discussed further in this article, we believe that the issue of individualized trials should be decided *before* notice of the class action is sent to class members, so that they can be fully informed as to what is at stake and what "splinter later" means for them if they do not exercise the right to opt out.

What happens after a class-wide determination of common issues?

Supposing a case is tried on common issues but individualized issues remain, two outcomes are possible. The first possibility, a defense verdict on the common issues, will result in a final judgment that "wipe[s] out the possibility of a claim for every class member."[36] In the event of a verdict for the class on common issues, the "individual class members will still have to prove the fact and extent" of individualized elements.[37] Presumably the trial court will have discretion as to whether the "splinter trials" are tried in a second phase of trial within the same case,[38] severed into a multitude of individual actions,[39] or decertified so that class members can file individual actions if they so choose.[40] Under Arkansas case law, it is an open question whether the same jury must sit for both phases of trial;[41] however, separate juries are generally permitted in the federal system as long as the second jury does not second-guess any fact issues decided by a previous jury.[42]

Whichever approach the trial court takes, the outcome of the first phase of trial will not, by itself, result in a final, collectible judgment.[43] But the distinctions between bifurcation, severance, and decertification could have a significant effect on whether the common-issue determination results in an appealable order. If the trial court bifurcates the case, the common-issue verdict will not be appealable until the subsequent phase or phases of the trial are held.[44] A decertification or severance, on the other hand, should be followed by a final judgment as to the class representative's individual claims once they are fully adjudicated.[45]

The question of bifurcation, severance, or decertification could also affect whether class counsel has a continuing obligation to prosecute claims on behalf of class members. In the instance of bifurcation or severance, class counsel would likely have a continuing obligation to pursue the individual issues unless the trial court permits withdrawal.[46] For decertification, however, the class counsel would probably be relieved of obligations to the class, but may claim a lien on the class members' future recoveries.[47] In either situation, it would be appropriate for a new notice to be sent to class members that explains the outcome of the first phase of trial and their rights going forward.[48]

Should the notice to class members contain details about the splinter-trial plan?

Rule 23(c) of the Arkansas Rules of Civil Procedure requires that in any class action where monetary relief is sought, the trial court must direct "the best notice practicable under the circumstances" to all class members who can be identified through reasonable effort. The rule further requires a clear and concise statement of the nature of the action, the class definition, the right to exclusion, and the binding effect of a class judgment on class members.[49] The notice is an integral part of class members' due process right to decide whether they will participate and be bound by the outcome of the case, win or lose.[50] In Arkansas, the order prescribing notice to class members is "fundamental to the further conduct of the action and, thus, immediately appealable as a matter of right."[51]

In a splinter-later class action, the binding effect of a class-wide trial on common issues depends on the architecture of the case and what comes later, that is: Which issues will be tried in a common trial? Which issues will be left to individualized determinations? How and when will the individualized determinations be made? For a class member, this information is necessary not only to understand the binding effect of the class-wide outcome, but also to understand what must be proven on the individual elements after a successful class-wide outcome, and to gather and preserve supporting evidence. In a situation where the trial court proposes to determine individualized issues through extrapolation (despite the significant problems presented by such an approach), the class member should be adequately informed of the risk of a *res judicata* bar due to a failure of proof at trial.

Not every class action is "too big to try"

An early determination of the scope of a class-wide trial will also permit defendants to make a more informed decision whether to take the common issues to trial. In some instances, defendants may find that the action is not "too big to try."[52] For example, the certified class in *Arkansas Department of Veterans Affairs v. Okeke* had 297 members[53] over a three-year class period with potential claims for unpaid overtime for working during their 30-minute lunch breaks.[54] Therefore there was a natural "ceiling" to the amount of class-wide damages under the Arkansas Minimum Wage Act.

Beneath that ceiling, the total amount of class-wide damages was further limited by arithmetic. That is, even if an employee worked during every lunch break in a five-day work week, there was no overtime claim if the employee worked 37.5 regular hours or less the rest of that week.[55] So, even if the class-wide allegations of lunch-break overtime violations had been proven in *Okeke*, the damages calculation would necessarily exclude every week for every employee who worked 37.5 hours or less.[56] But rather than risk a class-wide trial, the defendant in *Okeke* settled the case.[57]

Conclusion

The "certify now, splinter later" logic for class certification has its roots in the trial court's ability to manage a case under Rule 23. As a result of Arkansas' relaxed class-certification standard, the trial court's trial management plan and order directing class notice in splinter cases will often turn out to be more consequential than its decision on class certification. Even if the class won on common issues, most certified cases would not reach a conclusive class-wide judgment under the splinter-trial framework. For more than 30 years, litigants and scholars have contemplated these points with limited guidance from the appellate process.[58] The time has come for Arkansas courts and litigants to develop a realistic and fair class-action trial process for splinter cases that protects the rights of both absent class members and defendants.

Endnotes:

1. 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, 1 (1994); *see also* John J. Watkins, *A "Different" Top Ten List: Significant Differences Between State and Federal Procedural Rules*, 45 Ark. Law. 12, 14 (2010).
2. *BNL Equity Corp. v. Pearson*, 340 Ark. 351, 362, 10 S.W.3d 838, 844 (2000).
3. To test this point, the authors engaged in legal database research and surveyed other members of the Arkansas legal community who are knowledgeable about class-action practice. None of the individuals surveyed could recall a class action that was tried on common issues and then splintered for individualized proceedings.
4. Watkins, *supra* note 1, at 14–15; F. Ehren Hartz, Comment, *Certify Now, Worry Later: Arkansas's Flawed Approach to Class Certification*, 61 Ark. L. Rev. 707 (2009).
5. *Int'l Union of Elec., Radio & Machine Workers v. Hudson*, 295 Ark. 107, 116–18, 747 S.W.2d 81, 86–87 (1988) (citing *Drew v. First Fed. Savings & Loan Ass'n of Ft. Smith*, 271 Ark. 667, 610 S.W.2d 876 (1981)); *see also Arkansas La. Gas Co. v. Morris*, 294 Ark. 496, 500, 744 S.W.2d 709, 711 (1988) (Hickman, J., concurring) ("I think the court has moderated its view regarding class actions."); Gould, *supra* note 1, at 12–13.
6. *Hudson*, 295 Ark. at 117–18, 747 S.W.2d at 87.
7. 294 Ark. 496, 497–99, 744 S.W.2d 709, 709–10 (1988).
8. *Hudson*, 295 Ark. at 120, 747 S.W.2d at 88; *Morris*, 294 Ark. at 499, 744 S.W.2d at 710–11.
9. 330 Ark. 402, 409, 954 S.W.2d 234, 238 (1997).
10. *Id.* at 409–12, 954 S.W.2d at 238–40 (citing *Lemarco, Inc. v. Wood*, 305 Ark. 1, 804 S.W.2d 724 (1991), *Summons v. Mo. Pac.* R.R., 306 Ark. 116, S.W.2d 240 (1991), and *Arthur v. Zearley*, 320 Ark. 273, 895 S.W.2d 928 (1995)).
11. *Hales*, 330 Ark. at 414, 954 S.W.2d at 241.
12. *Id.* at 414–15, 954 S.W.2d at 241.
13. *See First Nat'l Bank of Fort Smith v. Mercantile Bank of Jonesboro*, 304 Ark. 196, 201, 801 S.W.2d 38, 41 (1990) (citing *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974)).
14. 417 U.S. 156 (1974).
15. *Farm Bureau Mut. Ins. Co. of Ark., Inc. v. Farm Bureau Policy Holders and Members*, 323 Ark. 706, 709, 918 S.W.2d 129, 130 (1996) (citing *Eisen* and *Miller v. Mackey Int'l, Inc.*, 452 F.2d 424 (5th Cir. 1971)).
16. *Fraley v. Williams Ford Tractor & Equip. Co.*, 339 Ark. 322, 336, 5 S.W.3d 423, 432 (1999) (discussing numerosity requirement); *see also BNL Equity Corp.*, 340 Ark. at 357, 10 S.W.3d at 841 (declining to consider affirmative defenses as to any class certification requirement). The wisdom of this approach is beyond the scope of this article.
17. *Teris, LLC v. Chandler*, 375 Ark. 70, 83–84, 289 S.W.3d 63, 73 (2008) (quoting *BNL Equity Corp.*, 340 Ark. at 362, 363–64, 10 S.W.3d at 845); *see also, e.g., GGNSC Arkadelphia, LLC v. Lamb ex rel. Williams*, 2015 Ark. 253, at 16, 18–19, 465 S.W.3d 826, 834–35, 836; *Arkansas Media, LLC v. Bobbitt*, 2010 Ark. 76, at 11, 360 S.W.3d 129, 136–37; *Rosenow v. Alltel Corp.*, 2010 Ark. 26, at 11–12, 358 S.W.3d 879, 887–88.
18. *General Telephone Co. v. Falcon*, 457 U.S. 147, 161 (1982); *see also* Gould, *infra* note 52, at 23, 40; Watkins, *supra* note 1, at 15; Hartz, *supra* note 4, at 726–28.
19. *SEECO, Inc. v. Hales*, 341 Ark. 673, 683, 22 S.W.3d 157, 163 (2000) ("*Hales II*").
20. *Id.* at 709, 22 S.W.3d at 179. Sixteen years later, a federal court certified a similar class action against SEECO, Inc. based on claims of fraud and breach of contract. *Smith v. SEECO, Inc.*, Case No. 4:14CV00435 BSM, 2016 WL 10586286, at *5 (E.D. Ark. Apr. 11, 2016). The case was tried to a jury and resulted in a defense verdict. *See Smith v. SEECO, Inc.*, 2017 WL 5639951, at *1 (E.D. Ark. Oct. 31, 2017). Along with five other firms, the authors served as counsel to defendants in the *Smith* case and parallel state-court litigation. *See SEECO, Inc. v. Snow*, 2016 Ark. 444, 506 S.W.3d 206; *SEECO, Inc. v. Stewmon*, 2016 Ark. 435, 506 S.W.3d 828.
21. *See supra* note 3. *See also, e.g., Arkansas Department of Veterans Affairs v. Okeke*, 2015 Ark. 275, at 12, 466 S.W.3d 399, 406 (noting that "the class can be decertified after common questions have been litigated, if the circuit court decides it is appropriate to do so"), and *Okeke v. Ark. Dep't of Veteran Affairs*, Case No. 60CV13-2403, Order ¶ 2 (Pulaski County Cir. Ct. Jun. 30, 2016) (denying bifurcation because "requiring 297 class members to appear for and testify at trial would be inefficient and defeat the purpose of class certification").
22. *See, e.g., Wal-Mart Stores, Inc. v. Dukes*,

564 U.S. 338, 366 (2011) (reversing class certification under Fed. R. Civ. P. 23(b)(2) because "Wal-Mart is entitled to individualized determinations of each employee's eligibility for backpay").
23. See William B. Rubenstein, Newberg on Class Actions § 11:21, at 72 (5th ed. 2014).
24. *Id.; Hickory Secs. Ltd. v. Republic of Argentina*, 493 Fed. App'x 156, 159 (2d Cir. 2012).
25. *Dukes*, 564 U.S. at 361 ("claims for *individualized* relief do not satisfy" Fed. R. Civ. P. 23(b)(2)); *Hickory Secs.*, 493 Fed. App'x at 160 ("[I]f an aggregate approach cannot produce a reasonable approximation of the actual loss, the district court must adopt an individualized approach."); *Windham v. Am. Brands, Inc.*, 565 F.2d 59, 72 (4th Cir. 1977) ("[D]ifficulties inherent in proving individual damages [cannot] be avoided by the use of a form of 'fluid recovery.'").
26. Rubenstein, *supra* note 23, at 76–82.
27. *State Farm Mut. Auto Ins. Co. v. Campbell*, 538 U.S. 408, 416–17 (2003) ("The Due Process Clause of the Fourteenth Amendment prohibits the imposition of grossly excessive or arbitrary punishments on a tortfeasor. . . . To the extent an award is grossly excessive, it furthers no legitimate purpose and constitutes an arbitrary deprivation of property."); *Advocat, Inc. v. Sauer*, 353 Ark. 29, 54, 111 S.W.3d 346, 360 (2003) (citing *Campbell*, 538 U.S. 408) (in context of punitive damages, due process prohibits an award that "was neither reasonable nor proportionate to the wrong committed"); *see also Philip Morris USA v. Williams*, 549 U.S. 346, 353–54 (2007) (due process forbids punishing a defendant for injuries to persons the plaintiff does not represent).
28. *See Dukes*, 564 U.S. at 363; *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 812 (1985); *Mazzei v. Money Store*, 829 F.3d 260, 268 (2d Cir. 2016).
29. Ark. Const. art. 2, § 7.
30. *Gasoline Prods. Co. v. Champlin Refining Co.*, 283 U.S. 494, 497 (1931) (applying re-examination clause of Seventh Amendment to U.S. Constitution); *Cimino v. Raymark Indus., Inc.*, 151 F.3d 297, 320 (5th Cir. 1998); *see Teris, LLC*, 375 Ark. at 84, 289 S.W.3d at 73 (declining to address separate jury issue in appeal from class certification).
31. *See* Ark. Const. amend. 80, § 3 (rules of practice and procedure "shall not abridge, enlarge or modify any substantive right"); *Dukes*, 564 U.S. at 367 (applying federal Rules Enabling Act, which forbids interpretation of rule to modify substantive rights); *In re Fibreboard Corp.*, 893 F.2d 706, 711 (5th Cir. 1990) (holding that separation of powers bars court from avoiding individualized trials of individual issues); *Southwestern Refining Co. v. Bernal*, 22 S.W.3d 425, 438 (Tex. 2000) ("Aggregating claims can dramatically alter substantive tort jurisprudence.").
32. Rubenstein, *supra* note 23, at 82 (citing Alexandra D. Lahav, *The Case for "Trial by Formula,"* 90 Tex. L. Rev. 571, 609 (2012)).
33. *Tyson Foods, Inc. v. Bouaphakeo*, 136 S. Ct. 1036, 1048 (2016) ("[T]he study here could have been sufficient to sustain a jury finding as to hours worked if it were introduced in each employee's individual action."); *Mazzei*, 829 F.3d at 268 (decertifying class because class representative failed to meet burden of proof "through class-wide evidence at trial"); *Engle v. Liggett Group, Inc.*, 945 So. 2d 1246, 1267–68 (Fla. 2006) (decertifying case after Phase I trial for "individualized issues such as legal causation, comparative fault, and damages").
34. *Smith v. Bayer Corp.*, 564 U.S. 299, 314 (2011); *Hall v. Equity Nat'l Life Ins. Co.*, 730 F. Supp. 2d 936, 945–46 (E.D. Ark. 2010) (holding that *res judicata* and collateral estoppel bar re-litigation of case settled as a class action in an Arkansas court); *Smith v. Philip Morris Cos.*, 335 P.3d 644, 661 (Kan. Ct. App. 2014) ("[A] defendant in a class action case is entitled to be protected against later suits by plaintiffs who failed to opt out of the class and who later assert claims identified in the class certification order and notice to the prospective class members."); *Ross v. Ark. Communities, Inc.*, 258 Ark. 925, 929, 529 S.W.2d 876, 879–80 (1975).
35. Arkansas law does not permit a judgment in favor of a plaintiff who fails to meet the burden of proof before the close of the plaintiff's evidence. Ark. R. Civ. P. 50(a); *see Williamson v. Elrod*, 348 Ark. 307, 312, 72 S.W.3d 489, 493 (2002) (permitting the plaintiff to cure failure to meet the burden of proof after the time for a directed verdict motion would essentially shift the burden of proof to the defendant).
36. *GGNSC Arkadelphia, LLC*, 2015 Ark. 253, at 15, 465 S.W.3d at 834 (quoting *Farmers Ins. Co. v. Snowden*, 366 Ark. 138, 149–50, 233 S.W.3d 664, 672 (2006)).
37. *Mejdrech v. Met-Coil Sys. Corp.*, 319 F.3d 910, 912 (7th Cir. 2003); *In re Copley Pharm., Inc.*, 158 F.R.D. 485, 492 (D. Wyo. 1994).
38. Ark. R. Civ. P. 42(b)(1); *see, e.g., In re Vivendi Universal, S.A. Sec. Litig.*, 765 F. Supp. 2d 512, 586 (S.D.N.Y. 2011) (suggesting that question of reliance would be decided during a second phase of trial).
39. Ark. R. Civ. P. 18(b). This option seems to be the least desirable of the three, and the Reporter's Note to the 2001 amendment suggests that the procedure should be "used sparingly."
40. *See Engle*, 945 So. 2d at 1269 (decertifying for class members to file individual actions).
41. *Hales I*, 330 Ark. at 414, 954 S.W.2d at 241; David Newbern et al., 2 Arkansas Practice Series: Arkansas Civil Practice & Procedure § 25:3 n.9 (5th ed. 2010).
42. *In re Rhone-Poulnec Rorer Inc.*, 51 F.3d 1293, 1302 (7th Cir. 1995) (under the Seventh Amendment, "the district judge must carve at the joint" when bifurcating a trial).
43. *John Cheesman Trucking, Inc. v. Dougan*, 305 Ark. 49, 51, 805 S.W.2d 69, 70 (1991) (holding that an order finding liability in first phase of a bifurcated trial is not a final judgment); *see also In re Vivendi Universal*, 765 F. Supp. 2d at 583.
44. *See John Cheesman Trucking*, 305 Ark. at 52, 805 S.W.2d at 71 (holding that Ark. R. Civ. P. 54(b) "does not provide a mechanism for appeal from bifurcated trials of liability/damages issues").
45. Ark. R. Civ. P. 23(b) (allowing the class certification order to "be altered or amended at any time before the court enters final judgment"); *cf. Mazzei*, 829 F.3d at 265 (awarding a money judgment to class representative and decertifying class).
46. Ark. R. Civ. P. 64(b).
47. Ark. Code Ann. § 16-22-304.
48. *See* Ark. R. Civ. P. 23(c).
49. Ark. R. Civ. P. 23(c)(2).
50. *Shutts*, 472 U.S. at 811–12 ("If the forum State wishes to bind an absent plaintiff concerning a claim for money damages or similar relief at law, it must provide minimal procedural due process protection."); *Spano v. The Boeing Co.*, 633 F.3d 574, 584 (7th Cir. 2011) ("If the unnamed members of the class have received constitutionally adequate representation, then the judgment in the class action will resolve their claims, win or lose.").

51. *U.S. Bank, N.A. v. Milburn*, 352 Ark. 144, 152, 100 S.W.3d 674, 680 (2003).
52. *Cf.* Kenneth S. Gould, *A Dynamic Development Under the Arkansas Rules of Civil Procedure: Arkansas's Favorable Approach to Class Actions*, 45 Ark. Law. 20, 21 (2010) ("[T]he defendant may be faced with the prospect of a judgment resulting from a single trial that, because of the class size, could be overwhelming.").
53. *Okeke, supra* note 21, Order ¶ 2 (Pulaski County Cir. Ct.).
54. *Okeke*, 2015 Ark. 275, at 4, 466 S.W.3d at 402.
55. Ark. Code Ann. § 11-4-211(a); *Okeke*, 2015 Ark. 275, at 5, 466 S.W.3d at 403. Five 30-minute lunch breaks is 2.5 hours, so if an employee otherwise worked 37.5 hours or fewer, he or she would not have an overtime claim. (2.5 + 37.5 = 40) According to the United States Bureau of Labor Statistics, the average work-week in the United States is 34.5 hours. See United States Dep't of Labor, Bureau of Labor Statistics, *The Employment Situation—January 2019* at 3, USDL-19-0140 (Jan. 2019), *available at* https://www.bls.gov/news.release/pdf/empsit.pdf (last visited Feb. 14, 2019).
56. This reasoning led to the reversal of a class certification order in a similar case, *Arkansas Department of Veteran Affairs v. Mallett*, 2015 Ark. 428, at 8, 474 S.W.3d 861, 866 ("A determination of [the defendant]'s liability under [the Arkansas Minimum Wage Act] would require a highly individualized inquiry as to each employee's hours worked during a given week, because, if the employee did not work through lunch, and if the employee failed to work more than forty hours in a given work week, there could be no liability on the part of the [defendant]."). The Supreme Court later dismissed the case because the minimum wage claim against the Department of Veteran Affairs, as a state agency, was barred by sovereign immunity. *Arkansas Dep't of Veteran Affairs v. Mallett,* 2018 Ark. 217, at 2–3, 549 S.W.3d 351, 352.
57. *Okeke v. Ark. Dep't of Veteran Affairs*, Case No. 60CV13-2403, Order on Joint Motion for Approval of Class-Action Settlement (Pulaski County Cir. Ct. Aug. 1, 2016).
58. *See* Watkins, *supra* note 1, at 15; *Hales II*, 341 Ark. at 709, 22 S.W.3d at 179. ■