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The Election of Remedies Doctrine in Arkansas*

Howard W. Brill**

The doctrine of election of remedies provides that if a party has two or more inconsistent remedies for a single cause of action, or arising from a single transaction, only one remedy may be ultimately pursued and only one remedy satisfied.1 The classic, and perhaps most frequent, illustration of the doctrine is presented in contract cases in which the plaintiff alleges that he was fraudulently induced to enter into the transaction. The buyer of the property must choose whether to keep the goods and sue for damages for fraud, thus affirming the contract, or to rescind the contract for fraud and return the property, thus disaffirming the contract. The remedies are inconsistent; the plaintiff may have one or the other, but not both.

Such a simple example fails to expose the complexities of the doctrine: the standard of inconsistency, the exceptions to the basic rule, the confusion between the doctrine and parallel, but distinct, doctrines, and the doctrine’s relationship to contemporary procedural techniques in both federal and Arkansas courts. The example also ignores the harshness of the doctrine: the unintentional election, the irrevocable election through commencement of litigation, the premature election and the good faith election through acts of ownership.

After reviewing related defensive doctrines and the policy factors behind the election of remedies doctrine, this article will examine the standard of consistency that is applied

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** Professor of Law, University of Arkansas; Member, Arkansas Bar. The author expresses his gratitude to the Arkansas Bar Foundation whose summer research grant made this article possible.
1. Odom v. Odom, 232 Ark. 229, 335 S.W.2d 301 (1960); Eastburn v. Galyen, 229 Ark. 70, 313 S.W.2d 794 (1958).
to multiple remedies, the nature and timing of both extra-
legal and courtroom elections, and the exceptions that allow
a second remedy, although inconsistent with the first, to be
pursued. Finally, a suggestion for the judicial future of the
doctrine will be offered.

I. The Doctrine—What It Isn’t and What It Is

The doctrine may be defined by comparing it with re-
lated doctrines. For example, laches is a doctrine that bars a
plaintiff from a court of equity when his unreasonable delay
in commencement of an action has resulted in detriment or
prejudice to the defendant.2 Certainly the election of reme-
dies doctrine may involve elements of unreasonable delay
and detriment to the defendant; but it is not limited to courts
of equity, it may be appropriate when no delay has occurred,
and it may apply even in the absence of detriment to the
defendant.3 Likewise the election of remedies doctrine is
distinct from the statute of limitation defense.

Similarly, the affirmative defense of waiver involves a
voluntary surrender or relinquishment of a known right,
with full knowledge of the right and the consequences of its
surrender.4 In the initial example, the plaintiff might volun-
tarily and knowingly waive the right to rescind a contract
fraudulently induced. But the broader doctrine of election
of remedies may apply even if the plaintiff acted uninten-
tionally or unknowingly.

The doctrine of equitable estoppel is related to waiver.
This doctrine is designed to prevent an injustice to a party
who has relied in good faith, and to his detriment, upon the
actions of another.5 A party whose conduct, speech, or fail-

2. Gordon v. Wellman, 265 Ark. 914, 582 S.W.2d 22 (1979); Rice v. McKinley,
state has defined estoppel as follows:
The essential elements of an equitable estoppel as related to the party estop-
apel are: (1) Conduct which amounts to a false representation or conceal-
ment of material facts, or, at least, which is calculated to convey the
ure to speak under circumstances when he should have spoken, induces or misleads another into conduct which that party would not otherwise have undertaken is estopped from asserting a right to the detriment of the person misled. For example, if the wronged party affirmatively indicates an intention to rescind the contract, and the opposing party incurs expenses or changes position in expectation of rescission, the wronged party will be estopped to affirm the contract and seek damages. In sharp contrast, the Arkansas version of the election of remedies doctrine may be applicable even if the opposing party has not been prejudiced and has not even relied on any affirmative indication made by the other party.

An obvious, though typically unexpressed, principle is that a party should not be entitled to double recovery. A party can not expect to both rescind the contract and simultaneously recover damages for the fraud in the contract. But the operation of the election of remedies doctrine may prevent any recovery, instead of merely eliminating double recovery.

Res judicata, or "claim preclusion" in contemporary terminology, may overlap with the election of remedies. The affirmative defense of res judicata applies when the merits of an issue have been finally adjudicated, without fraud or collusion, by a court of competent jurisdiction. The impression that the facts are otherwise than, and inconsistent with, those which the party subsequently attempts to assert; (2) intention, or at least expectation, that such conduct shall be acted upon by the other party; (3) knowledge, actual or constructive, of the real facts. As related to the party claiming the estoppel, they are: (1) lack of knowledge and of the means of knowledge of the truth as to the facts in question; (2) reliance upon the conduct of the party estopped; and (3) action based thereon of such a character as to change his position prejudicially.

7. See infra text accompanying notes 107-11.
8. E.g., Harrison v. Fulk, 128 Ark. 229, 193 S.W. 532 (1917).
9. See, e.g., Eastburn v. Galyen, 229 Ark. 70, 313 S.W.2d 794 (1958). The buyer of a cheese plant defended an action for the balance by alleging fraud and seeking rescission. Following an order in favor of the seller, the buyer commenced a separate action alleging fraud and seeking damages. The buyer's action was rejected by the trial court under res judicata principles and by the supreme court on election of remedies principles.
defense is limited to those matters litigated or to those which were necessarily within the issues and therefore might have been litigated.\textsuperscript{10} A buyer who seeks damages for fraud and loses on the merits is barred by principles of res judicata from seeking to rescind because of fraud. The Second Restatement of Judgments, which applies the transactional approach to preclusion, emphasizes that splitting a claim is not justified or permitted merely because the remedies sought in the second action are different from those in the first action.\textsuperscript{11} In contrast, if the buyer dismisses without prejudice his action for damages, principles of res judicata do not bar a subsequent suit for either remedy.\textsuperscript{12} Such a dismissal, however, does not automatically save the action from the election of remedies doctrine. A binding and irrevocable election may have been made by the mere commencement of an action\textsuperscript{13} or even by actions out of court.\textsuperscript{14}

Finally, the election of remedies doctrine is frequently, and incorrectly, viewed as an integral aspect of outdated formalistic pleading. Under code pleading, which governed in Arkansas from 1868 to 1979, the election of remedies doctrine and the limitations on joinder of claims were not interchangeable. Distinct claims that had to be separated under the strict joinder rules were not necessarily barred by the election doctrine.\textsuperscript{15}

Some older cases did require an election between differ-

\textsuperscript{10} Wells v. Ark. Pub. Serv. Comm’n, 272 Ark. 418, 616 S.W. 2d 718 (1981). \textit{Res judicata}, as used by the Arkansas courts, is broadly defined to include what would be described as collateral estoppel in other jurisdictions: "[T]he true test of whether a particular point, question or right has been concluded by a former suit and judgment is whether such point, question or right was distinctly put in issue, or should have been put in issue, and was directly determined by such former suit and judgment." JeToCo Corp. v. Hailey Sales Co., 268 Ark. 340, 346, 596 S.W.2d 703, 706 (1980). \textit{See also} Dobbs, \textit{Recent Developments in the Law of Judgments in Arkansas}, 10 Ark. L. Rev. 468, 480-81 (1956).

\textsuperscript{11} \textit{Restatement of Judgments} §§ 61-61.1 (Tent. Draft No. 5, 1978).

\textsuperscript{12} Benedict v. Arbor Acres Farm, Inc., 265 Ark. 574, 579 S.W.2d 605 (1979).

\textsuperscript{13} \textit{See infra} text accompanying notes 107-11.

\textsuperscript{14} \textit{See infra} text accompanying notes 67-103.

\textsuperscript{15} \textit{See, e.g.,} Kapp v. Bob Sullivan Chevrolet Co., 232 Ark. 266, 335 S.W.2d 819 (1960), discussed \textit{infra} at notes 32-34. \textit{See} MFA Mutual Ins. Co. v. Bradshaw, 245 Ark. 95, 431 S.W.2d 252 n.1 (1968).
ent causes of action. More recently, although prior to the adoption of the Arkansas Rules of Civil Procedure, the court held that a discharged school teacher could not, in a single lawsuit, seek a money judgment and a writ of mandamus compelling the school district to pay his salary, because the remedies were procedurally incompatible. The assertion of inconsistent positions in one’s pleadings may be incorrect procedure but unless the remedies sought are inconsistent, the doctrine is not involved. The Arkansas Rules of Civil Procedure should eliminate these procedural difficulties and permit the court to focus more directly on the election issue.

It is important to note that the availability of contemporary pleading does not eliminate the election of remedies doctrine. The Arkansas Rules permit a party to join as many claims as he has against a defendant, either as independent claims, alternate claims, or claims seeking different remedies. The plaintiff must, however, avoid an out of court election of affirmance or disaffirmance of the fraudulently induced contract. Only if such an election is not made is he procedurally permitted to seek either rescission or affirmance. By invoking the cleanup doctrine, both remedies may be jurisdictionally sought in chancery court, though the right to a jury trial for damages will be lost. The crucial

16. Railway Express Agency Inc. v. H. Rouw Co., 197 Ark. 1142, 1149, 127 S.W.2d 251, 255 (1939) (producer of strawberries compelled to sue shipper either on contract or in tort, but could not assert both theories).
17. Rastle v. Marion County Rural School District No. 1, 260 Ark. 740, 543 S.W.2d 923 (1976). The court emphasized that one remedy permitted a jury, while the other didn’t. On the merits, the court held that mandamus was inappropriate, but refused to permit the trial court the alternative remedy of a money judgment, even though the goal of both remedies was a monetary recovery from a court of law.
19. See infra text at notes 112-33.
question becomes the timing and the exercise of the trial judge's authority to demand an election between the two remedies.21

Despite its partial similarity to waiver, laches, estoppel, double recovery, res judicata and procedural techniques, the election of remedies doctrine is not synonymous with any of them.22 In broad terms the election doctrine precludes a party from one remedy if the party has previously "chosen" an inconsistent remedy.23 If a party has two or more remedies that are concurrent and consistent, the party may pursue all of them until satisfaction is had,24 for the doctrine does not apply. If the remedies arise out of separate causes of action25 or separate factual situations,26 the doctrine likewise does not apply and both remedies may be appropriate. While the doctrine is sometimes described as procedural,27 it is more appropriately viewed as substantive in that it involves whether an integral part of the substantive claim, namely the remedy, is still available or has been lost. "An election of the substantive right to affirm extinguishes the substantive right to disaffirm . . . [A]n attempt to invoke the remedy of rescission . . . may fail . . . because the plaintiff

22. An early critic denounced the lack of principle behind the election doctrine:

The modern rule of election of remedies is a weed which has recently sprung up in the garden of the common law, its roots stretching along the surface of obiter dicta but not reaching the subsoil of principle. The judicial gardeners through whose carelessness it has crept in should be able to eliminate it, or at least prevent its further growth.


23. The language is intentionally broad to contrast the Arkansas version of the doctrine and those of other authorities. See, e.g., 1B J. Moore, J. Lucas & T. Carri
er, Moore's Federal Practice § 0.405[7], at 233 (2d ed. 1983) [hereinafter J. Moore]. "The election rule is that by asserting a choice of inconsistent claims for relief in a judicial proceeding, a litigant is precluded, in subsequent litigation, from advancing inconsistent claims."

27. "The doctrine is not a rule of substantive law, but rather is a technical rule of procedure or judicial administration." 25 Am. Jur. 2d Election of Remedies § 1 (1966).
no longer has the substantive right to disaffirm."28

Similarly, a vendee, ready and eager to consummate the purchase of real property from a non-willing vendor, has two available causes of action: he may assert a cause of action for breach of contract and seek specific performance in a court of equity, or he may seek damages for breach of contract and waive any rights in the land. The specific remedy sought is an aspect of the cause of action. Although the nature of the remedy falls between the essential elements of the cause of action and the procedural steps to be taken to enforce that cause of action, the remedy is conceptually more akin to an element of the substantive law definition of the cause of action. The remedy is governed by common law or statute, not by court rules; the remedy is governed by state law, even though a federal court hearing the case is not necessarily limited to the state remedy;29 the failure of a single element, including the availability of the remedy, bars relief on that cause of action, and that alone.

II. CONSISTENT OR INCONSISTENT REMEDIES

In determining whether the doctrine is applicable, the initial question is whether the remedies are consistent. Only on a case-by-case basis is it possible to determine what remedies are inconsistent. If the relationship of the parties and the rights asserted in the pleadings indicate that one action alleges that which the other denies, the remedies are inconsistent.30 Similarly, if the allegation in one is necessarily repugnant to the other, they are inconsistent. It is inconsistency in the demands that bar the second action, not

28. 1B J. Moore ¶ 0.405[7], at 237 (2d ed. 1982). See also CLARK, HANDBOOK OF THE LAW OF CODE PLEADING 494 (2d ed. 1947) [hereinafter cited as CLARK]. "... [W]hile the rule is currently stated as applying to remedies, it is almost wholly limited to election as a choice of substantive rights."

29. See Guaranty Trust Co. of New York v. York, 326 U.S. 99, 106 (1945): "State law cannot define the remedies which a federal court must give simply because a federal court in diversity jurisdiction is available as an alternative tribunal to the State's courts. Contrariwise, a federal court may afford an equitable remedy for a substantive right recognized by a State even though a State Court cannot give it."

inconsistency in the procedure or the cause of action.\textsuperscript{31}

For example, an employee alleging that he has rendered services and has not been paid may assert theories of express contract, a contract implied in fact, and a contract implied in law or unjust enrichment.\textsuperscript{32} Similarly, a store customer seeking a monetary judgment for personal injuries suffered in an escalator accident may proceed on grounds of negligence, strict liability, or res ipsa loquitur. In both examples, a plaintiff seeks a single recovery and the remedies are consistent. Although inconsistent theories or inconsistent factual allegations may raise procedural issues of joinder or pleading in the alternative, the election of remedies doctrine is not an issue. If the plaintiff proceeds on one ground and fails, however, principles of res judicata would bar another action asserting another theory, even though viewed as consistent under the election doctrine.

In contrast, if a friend borrows a sailboat and refuses to return it, the owner has an option of three remedies, all based in a court of law: recovery of the item under the replevin statute, compensatory and possibly punitive damages under the tort of conversion, or recovery under an unjust enrichment or restitutionary basis. The remedies vary significantly on such matters as rights to the earnings of the defendant, attorneys’ fees, punitive damages and repossession. Because the goals of each theory are different, the remedies are properly viewed as inconsistent.\textsuperscript{33}

The Arkansas courts have delineated which remedies are not inconsistent. For example, under the superseded procedure an action in tort could not be joined in the same

\textsuperscript{31} Id. See Ebner v. Haverty Furniture Co., 138 S.C. 74, 78, 136 S.E. 19, 20 (1926): “A remediable right is a legal conclusion from a certain state of facts; a remedy is the appropriate legal form of relief by which that remedial right may be enforced.” Unlike election of remedies, any election of remedial rights, or causes of actions, is a matter of procedural joinder or res judicata.

\textsuperscript{32} See, e.g., Griffin v. Erickson, 277 Ark. 433, 442, 642 S.W.2d 308, 313 (1982).

\textsuperscript{33} See Annot., 3 A.L.R.2d 218, 231. While conversion, replevin and unjust enrichment might be viewed as three distinct causes of action and thus presenting an issue of proper joinder, the view that is more appropriate in light of the Arkansas emphasis on examination of the pleadings (see text at notes 34-39) is that although the causes of action may be distinct (see text, note 11 and note 116), the remedies that flow from the separate claims are far more sharply defined.
suit with an action on a contract. Despite that now-repealed procedural limitation, the two theories were held not to be inconsistent when both arose out of a defective automobile seat belt. In *Kapp v. Bob Sullivan Chevrolet Co.*, the plaintiff first sued for personal injury damages, alleging negligence in the installation of seat belts in the automobile. Barred from amending the complaint to join another theory, the plaintiff nine months later commenced a separate action in the same court against the same parties, seeking personal injury damages for breach of express and implied warranties in the sale of the seat belts.

Certainly the court was correct in holding that both actions were permitted. Both sought the same relief, an assessment of monetary damage for personal injuries, and the evidence to support recovery on one theory would also, in part, support it on another. Consistency required an examination of "the relation of the parties with reference to the right sought to be enforced as asserted by the pleadings." Essentially, the court concluded that since both actions depended upon an affirmation of the contract, the actions were not inconsistent. The straightforward rationale of the court provides a basis for resolving issues of consistency in other contractual settings.

Another example of consistency as demonstrated by the ultimate goal of the pleader is *Thompson v. Phillips*. The plaintiff sued a corporation for the value of work performed under a contract and included in the action the president of the corporation, who was sued individually on a guaranty. A subsequent amendment to the complaint alleged that the

36. Today the case would be procedurally different. Under Ark. R. Civ. P. 18 the court could assert both theories in a single action, although it is unclear whether the Arkansas definition of res judicata compels such a result. If the plaintiff sues on a single theory, as Kapp did, the second action would be subject to dismissal under Ark. R. Civ. P. 12(b)(8), as an action between the same parties arising out of the same transaction was pending.
individual defendant was primarily liable on the contract. The court found that the election of remedies doctrine was not appropriate, for in every step of the pleadings the plaintiff had consistently demonstrated his intention to hold the individual liable. The flexible amendment provisions of the current Arkansas Rules of Civil Procedure would further support the conclusion of the court.\textsuperscript{39}

Similarly, an injured plaintiff may attempt to recover for personal injuries by alleging both respondeat superior and negligent entrustment.\textsuperscript{40} The objective is the same under both theories, whether alleged as separate counts in one action or as independent actions. In seeking a single recovery for personal injuries the plaintiff may consistently proceed on a negligence theory against the driver of the other vehicle and against his employer on both a respondeat superior and negligent entrustment theory.\textsuperscript{41}

Another instance in Arkansas in which the plaintiff consistently sought a single goal involved a successful personal injury suit on behalf of a minor. Upon reaching majority, the minor first sought, unsuccessfully, to recover his share of the award from his putative guardian. That action did not bar a subsequent action against the attorneys for the minor who had allegedly wrongfully disposed of the minor’s share to the putative guardian.\textsuperscript{42} The minor consistently asserted the theory that the property was rightfully his.

Remedies are also consistent if they arise from separate and distinct facts that create several causes of action. For example, a widow may seek to quiet title in herself by virtue of an alleged deed to tenants by the entirety and simultaneously seek partition of the same property from other heirs.\textsuperscript{43} Although the same property is involved in both causes, one claim arises out of the deed and the other out of intestate probate proceedings. A double recovery is an impossibility,

\textsuperscript{39} Ark. R. Civ. P. 15(a).
\textsuperscript{40} Elrod v. G & R Construction Company, 275 Ark. 151, 628 S.W.2d 17 (1982).
\textsuperscript{42} Wood v. Clairborne, 82 Ark. 514, 102 S.W. 219 (1907).
\textsuperscript{43} 232 Ark. 229, 335 S.W.2d 301 (1960).
since she seeks either complete title to the land or her share of the tract.\textsuperscript{44}

In some instances, consistency may depend upon the procedural context in which the case arises. The defensive posture of the defendant\textsuperscript{45} or the plaintiff’s inability to predict how the burden of proof might be established\textsuperscript{46} may authorize the assertion of pleadings that could, in the abstract, be considered inconsistent.

Distinct but consistent remedies may be pursued either concurrently or independently,\textsuperscript{47} and multiple judgments may be granted unless the timing of the judgment would present res judicata problems. The satisfaction of the claim by one remedy, however, precludes the other remedies or judgments.\textsuperscript{48} For example, an injured plaintiff might obtain separate judgments against both the driver of the other vehicle on a negligence theory and against the employer of that driver on a respondeat superior theory, but once he satisfies one judgment for his personal injuries, the other judgment becomes uncollectible. On the other hand, if the plaintiff had proceeded against the same defendant in both actions, as with the defective seat belts, the mere granting of the first judgment would foreclose the second action under res judicata principles.

In contrast with the preceding examples of consistency, when a seller refuses to deliver title under a real estate contract, a buyer may seek damages or specific performance. The buyer’s objectives are inconsistent. By seeking damages he acknowledges that he has relinquished any further interest in Blackacre and will settle for monetary compensation. By seeking the discretionary equitable remedy of specific performance he forcefully demands the unique property bar-

\textsuperscript{44} Arguably her goal is inconsistent. \textit{See infra} note 56.
\textsuperscript{45} Elrod v. G & R Construction Company, 275 Ark. 151, 628 S.W.2d 17 (1982).
\textsuperscript{47} Davis v. Lawhorn, 186 Ark. 51, 52 S.W.2d 887 (1932) (creditor may consistently foreclose a mortgage and, during the pendency of the foreclosure suit, probate his claim against the estate in another county); Craig v. Meriwether, 84 Ark. 298, 105 S.W. 585 (1907) (creditor may sue on a promissory note without waiving the mortgage lien).
\textsuperscript{48} Kapp v. Bob Sullivan Chevrolet Co., 232 Ark. 266, 335 S.W.2d 819 (1960).
gained and contracted for. At some appropriate time he must choose between the objectives.49

Similarly inconsistent remedies include affirmance or disaffirmance of a fraudulent transaction,50 recovery of personal property through replevin suit or action for its value in conversion,51 recovery by the vendor of the property or a suit on the debt,52 and reinstatement of an insurance policy or damages for wrongful cancellation.53 The buyer of personal property who fails to make the payments called for in an installment contract, and whose replevin action accordingly fails, may not sue in equity to reform the terms of the contract.54 Actions to enforce or reform a single contract are inconsistent.55

A creditor who has filed a claim against a bankrupt's estate may not consistently assert a claim against the bank that accepted and allegedly guaranteed the bankrupt's checks.56 Similarly, a creditor who first obtains a money judgment against a merchant for goods purchased may not, when the judgment is returned unsatisfied, seek to set aside under the Bulk Sales Act a sale of merchandise by the

49. See Bigger v. Glass, 226 Ark. 466, 290 S.W.2d 641 (1956); Belding v. Whittington, 154 Ark. 561, 243 S.W. 808 (1922).


52. Bell v. Old, 88 Ark. 99, 113 S.W. 1023 (1908) (when the vendor has reserved title).


54. Washington v. Sander, 167 Ark. 420, 268 S.W. 604 (1925). This decision is easily defensible because the first action had terminated in a final judgment. If, on the other hand, the first action was still pending, then, without any showing of reliance by the defendant, barring the plaintiff from dismissing the action and commencing another is harder to justify.


Having first waived the fraud of the Act and obtained a personal money judgment, the creditor cannot consistently seek an equitable remedy for fraud.

Other instances in which the courts have found inconsistency are not as obvious. For example, in *Miller v. Empire Rice Mills, Inc.* the court concluded that the actions for partition and to quiet title were inconsistent. The plaintiff first sued for partition, alleging that both parties owned an undivided one-half interest. Six years later, before final judgment, the plaintiff amended the complaint to substitute a claim to quiet title to the entire tract, arguing that the disputed language in the deed was only a convenant and not a conveyance with a reversionary interest. Since the plaintiff had first conceded that the defendant had a one-half interest in the land, the plaintiff was barred from later contending that the defendant had no interest at all. The decision is questionable for several reasons. The substituted complaint was to comply with a recent supreme court decision that clarified the interpretation of the disputed language, and the plaintiff attempted to argue mistake of law as an exception to the election doctrine. In addition, the substitution did not merely seek a different remedy for the same substantive right, but instead amended the pleadings to assert a separate and distinctive substantive right to take title to real property free from the conflicting claims of others.

Some examples of inconsistency represent outdated approaches to substantive or procedural law and should not be followed. In 1907 the court suggested that a creditor could either sue the debtor or proceed against a third party who has received money from the debtor to be forwarded to the

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57. Butler Brothers v. Hames, 193 Ark. 77, 97 S.W.2d 622 (1936). *See generally Annot., 15 A.L.R.2d 937 (1951).*

58. 228 Ark. 1161, 312 S.W.2d 925 (1958). *But compare Odom v. Odom, 232 Ark. 229, 335 S.W.2d 301 (1960) and the dissent in Miller (only an assertion of entirely different substantive right).*

59. *See infra* text at notes 149-55.

60. The author of the dissenting opinion in *Miller v. Empire Rice Mills, Inc.*, 228 Ark. 1161, 312 S.W.2d 925 (1958), was the author of the unanimous majority opinion in Odom v. Odom, 232 Ark. 229, 335 S.W.2d 301 (1960), discussed *supra* in text at notes 40-41. Although presenting a similar factual situation, the latter opinion did not mention *Miller* in reaching an opposing conclusion.
creditor.\textsuperscript{61} The creditor must elect whether to proceed against the debtor or against the debtor's property. Given the consistent objective of the creditor and the presence of alternative defendants, the creditor should be free to pursue both remedies so long as he recovers only once.

III. EXTRA-JUDICIAL ELECTION

An aspect of the election of remedies doctrine which links it with laches, waiver, and estoppel, but distinguishes it from res judicata, the prohibition against double recovery and modern pleading, is that extra-judicial acts\textsuperscript{62} may constitute a binding election. Although not extensively developed in Arkansas case law, out-of-court elections pose a significant risk to plaintiffs.

A. Acts of Ownership

An act of ownership may constitute an extra-judicial but still binding election. This election most commonly presents itself in instances where a buyer of real or personal property has available the remedy of rescission. Rescission is an attempt by one or both parties to abandon and recede from a contract which the parties now recognize that they did not intend to make or do not intend to execute.\textsuperscript{63}

Contracts may be rescinded for mistake,\textsuperscript{64} undue influence or imposition,\textsuperscript{65} fraud,\textsuperscript{66} a violation of law or public policy,\textsuperscript{67} entire or substantial failure of consideration,\textsuperscript{68} or

\textsuperscript{61} Wood v. Clairborne, 82 Ark. 514, 520, 102 S.W. 219, 220 (1907).
\textsuperscript{62} The contractual relationship of the parties, as well as extra-judicial acts, may limit the remedies. As a general rule the parties to a contract may exclude particular remedies in case of default, Edwards v. Perdue, 177 Ark. 241, 6 S.W.2d 20 (1928). See Annot., 84 A.L.R. 2d 322 (1962).
\textsuperscript{63} Aetna Life Ins. Co. v. May, 217 Ark. 215, 229 S.W.2d 238 (1950).
\textsuperscript{64} Glasgow v. Greenfield, 9 Ark. App. 224,--- S.W.2d --- (1983) (contract for purchase of liquor store rescinded for mutual mistake of fact as to buyer's ability to obtain liquor license).
\textsuperscript{65} Killian v. Badgett, 27 Ark. 166 (1871).
\textsuperscript{66} Universal C.I.T. Credit Corp. v. Hudgens, 234 Ark. 668, 1127, 356 S.W.2d 658 (1962).
\textsuperscript{67} Tallman v. Lewis, 124 Ark. 6, 186 S.W. 296 (1916).
substantial non-performance. The parties may rescind the contract by mutual consent or rescission may be implied from the acts of the parties. Contractual rights may also be abandoned by conduct that clearly indicates that purpose.

If the party continues to treat the property as his own, or acts as if the transaction is still binding, he waives any objection. He has in effect made an election to affirm the contract; his only available remedy, then, is to sue for damages. Acts of ownership constituting an election to affirm the contract may include changing the nature of a business, leasing real property, cultivating farmland, and making improvements or alterations in property.

Such acts constitute a binding election only if made with knowledge of the right to rescind the contract. Acts of ownership that are essential to maintain the value of the property in order to permit restoration status quo ante do not bar rescission. If the actions of the buyer (the injured party) are viewed as reasonable and necessary steps to preserve the property or business for the one ultimately declared the owner, rescission is still available.

The status of a defrauded buyer who continues to operate a business or maintain property while having knowledge of the right to rescind is that of a gratuitous bailee. Any profits generated belong to the true owner; likewise, any rea-

70. Afflick v. Lambert, 187 Ark. 416, 60 S.W.2d 176 (1933).
72. Hicks v. Woodruff, 238 Ark. 481, 382 S.W.2d 586 (1964). See also Lide v. Carothers, 570 F.2d 253 (8th Cir. 1978).
77. 267 Ark. at 585, 595 S.W.2d at 643.
sonable expenses incurred are the responsibility of the owner. But the defrauded buyer, with the right to rescind, may not operate the business at a loss and expect to recover that loss upon rescission.80

B. Delay

The mere passage of time may constitute an election. An injured party is entitled to a reasonable amount of time, after discovering the relevant facts, to consider alternatives, seek legal advice and decide how to proceed, but an attempted disaffirmance of a transaction must be made within a reasonable time after the facts supporting the right of rescission or a similar option become known.81 The question of timeliness is one of fact.82 The failure to act with reasonable diligence may be a waiver of the right to rescind.83 For example, failure to act for twelve months after discovering a faulty installation has been held to be an unreasonable delay and a waiver of the right to rescind for breach of contract.84 Similarly, in an action to rescind the purchase of a framing business, a delay of two months in notifying the seller of the intention to rescind was found to be untimely.85

Courts in other jurisdictions have been increasingly reluctant to impose the election of remedies doctrine merely because of the passage of time unless the delay resulted in prejudice to the opposing party. The passage of time may be

81. Jones v. Gregg, 226 Ark. 595, 293 S.W.2d 545 (1956). A consumer may be granted more time than a merchant in electing an option. Restatement (Second) of Contracts § 381 comment a (1981).
85. 267 Ark. at 586, 585 S.W.2d at 643. See also Hegg v. Dickens, 270 Ark. 641, 606 S.W.2d 106 (Ark. App. 1980) (rescission of motel purchase barred due to the passage of time and other factors). Compare Miller v. Empire Rice Mills, Inc., 228 Ark. 1161, 312 S.W.2d 925 (1958) (substitutes remedy barred, not because it was six years after the original complaint, but because it was inconsistent); Glasgow v. Greenfield, 9 Ark App. 224. — S.W.2d — (1983) (three month delay did not bar action for rescission of purchase of liquor store).
justified, for example, by good faith settlement discussions.\textsuperscript{86} Of course, the opposing party is allegedly the wrongdoer. Therefore the judicial approach is, properly, unsympathetic to a party who has placed the plaintiff in the predicament of making a choice. The defendant has the burden of showing prejudice, that is, affirmatively demonstrating that the harsh doctrine should bar the plaintiff.

C. Inability to Accomplish Restoration Status Quo Ante

The party seeking rescission must return what he has received under the contract;\textsuperscript{87} otherwise, he is limited to an action for damages.\textsuperscript{88} At a minimum the party must offer to restore the opposing party to his former position.\textsuperscript{89} If, because of changed circumstances, the parties cannot be restored to the status quo, rescission is not available unless the clearest equity demands it.\textsuperscript{90} For example, the Arkansas Court of Appeals refused to permit rescission of a contract for purchase of a motel when the buyer was unable to restore the property to the same condition it was in at the time of the purchase.\textsuperscript{91}

Restoration status quo ante is not an absolute requirement.\textsuperscript{92} Mere depreciation in market value will not bar rescission.\textsuperscript{93} Similarly, the acts of the wrongful party in preventing restitution cannot bar rescission.\textsuperscript{94} If the goods are worthless, restitution may not be required.\textsuperscript{95} Finally, equitable factors may estop the defendant from raising the defense of election of remedies.\textsuperscript{96}

\textsuperscript{87} Rhodes v. Survant, 209 Ark. 742, 192 S.W.2d 880 (1946).
\textsuperscript{88} Stanford v. Smith, 163 Ark. 583, 260 S.W. 435 (1924).
\textsuperscript{89} Herrick v. Robinson, 267 Ark. 576, 585, 595 S.W.2d 637, 634 (1980).
\textsuperscript{91} Hegg v. Dickens, 270 Ark. 641, 606 S.W.2d 106 (Ark. App. 1980).
\textsuperscript{93} \textit{Restatement (Second) of Contracts} § 384 comment a (1981).
\textsuperscript{94} 428 F. Supp. at 826.
\textsuperscript{95} \textit{Restatement (Second) of Contracts} § 384 (1981).
\textsuperscript{96} See 102 F. Supp. at 853 (applying federal law).
D. Tender

A party who has available the remedy of rescission may exercise it in either of two distinct procedural formats. Rescission in equity commences with an action asking the court to decree that remedy, and indicating the willingness of the plaintiff to make restitution of goods and property received from the defendant. If the court does not decree the equitable remedy, the plaintiff has no obligation to tender the goods received and an action at law for damages may commence.

In sharp contrast is rescission at law, which typically occurs prior to the intervention of attorneys. If the wronged party complains of fraud or breach of warranty or consideration, returns the purchased item to the seller, and demands a refund of the purchase price, rescission at law has occurred. If the seller does not refund the money, the plaintiff's options in a court of law are replevin or an action for the money in assumpsit, which is unjust enrichment in contemporary terminology. The rescission itself occurs without the assistance of the court.

The binding extra-judicial election may occur if the buyer unilaterally returns the item to the seller, demands his money back, and promises to return the next day to see the manager. Suppose he changes his mind and wishes to keep the item and seek damages for its inferior quality. Is his unilateral act a binding election, even absent any response or reliance by the seller? The strict Arkansas rule, which does not require any prejudice to the opposing party, suggests an affirmative answer.

E. Manifested Intent

Words or conduct by an opposing party unequivocally manifesting an intention to select one option rather than the

98. See Dobbs, supra note 97, at 341-42. A complete discussion of the tender requirements, with recommendations for reform, is found at pages 346-49.
99. See infra text at notes 107-11.
other, inconsistent remedy may constitute a binding election. For example, the buyer of real property writes a letter indicating his intention to retain the property, although it lacks the well that was falsely represented to be on the land, and sue for the difference in the fair market value of the land. Is the letter a binding election?\footnote{100}

Certainly, if the seller acts in reliance upon that letter, the letter is binding upon estoppel principles.\footnote{101} Without that prejudice to the defendant, though, the question is less clear and demands an examination of several factors.

The decision as to whether the letter is binding may depend upon which option is selected. The Restatements\footnote{102} and the case law\footnote{103} treat a decision to affirm as more binding in that it creates "a new contract" rather than a decision to disaffirm. But some Arkansas authority suggests that an election to disaffirm a contract must be made more promptly, and may be more binding, than an election to affirm.\footnote{104} Once the decision to rescind is announced, the party must adhere to that election.\footnote{105}

The substantive basis that supports the remedy of rescission may also influence the binding nature of the letter. For example, if the ground for rescission is fraud, the court may be inclined to view the letter (or similar verbal or non-verbal manifestations of intent) as less binding in view of the willfulness of the defendant. But if the cause of action shifts to failure of consideration or to mutual mistake, the court's sympathy toward the defendant may correspondingly shift, with the result that the manifestation is treated as being more binding.

\footnote{100} See generally Dobbs, \textit{supra} note 97, at 331-34.
\footnote{102} \textit{Restatement of Restitution} § 68(1) (1937); \textit{Restatement (Second) of Contracts} § 380 (1981).
\footnote{103} \textit{See infra} text at notes 104-05.
\footnote{104} First Nat'l Bank v. Coffin, 184 Ark. 396, 404, 42 S.W.2d 402, 406 (1931).
\footnote{105} Herrick v. Robinson, 267 Ark. 576, 585, 595 S.W.2d 637, 643 (1980). The cases are divided on whether the notice of rescission is binding when the other party denies the right to rescind and refuses to restore the goods received. \textit{See Annot., 1 A.L.R.2d} 1084 (1948).
In any event, the plaintiff who, with knowledge of the wrongful acts of the defendant manifests an intent to seek one remedy from the defendant, may be foreclosed from seeking the other, even if the defendant has not relied upon, and even if the plaintiff is unaware of the availability of the other remedy.

F. Completion of the Transaction

Completing the transaction after discovery of the grounds for rescission of the transaction is an election of affirmance that cannot be avoided. For example, a buyer who makes the final payment on the purchase of a boat while complaining he was induced fraudulently into purchasing may have lost his right to rescind. A party may also elect one remedy over another by accepting a beneficial performance from the other. The presence of a binding waiver or election is an issue of fact presenting questions of discovery of the grounds, awareness of the legal right, and status of the parties.

IV. ELECTION—IN COURT

If the plaintiff has two inconsistent remedies, sues for one and is victorious, all jurisdictions would agree that the merger principles of res judicata and the prohibition against a double recovery bar a second suit. Similarly, if the plaintiff sues for one remedy and loses on the merits in a court of competent jurisdiction, then a second suit for the alternative remedy is barred by res judicata.

When the first suit has not been definitively resolved on the merits, but perhaps dismissed without prejudice, the states divide. Some jurisdictions inquire as to the nature of the first action. For example, an action for rescission which

106. Dobbs, supra note 97, at 332.
108. Dobbs, supra note 97, at 332. See also Restatement of Restitution § 68 comment b (1937).
is dismissed without prejudice may be followed by an action for damages but the dismissal of an action for damages may not be followed by an action for rescission.\textsuperscript{110} The commencement of an action for damages becomes, in effect, a new agreement, whereas an initial action for rescission is only part of the original and still disputed contractual relationship.\textsuperscript{111}

A more modern approach is to ask, instead of which remedial action was filed first, whether the commencement of the action resulted in prejudice to the opponent. In the absence of prejudice, some jurisdictions permit the second remedy to be added by amendment or substitution.\textsuperscript{112}

The Arkansas approach is distinctive. The commencement of a lawsuit by a party for specific performance is an irrevocable election, and bars later conversion of the suit into one for damages for breach of contract.\textsuperscript{113} Similarly, the commencement of a lawsuit for damages is an irrevocable election that prevents a subsequent suit for specific performance,\textsuperscript{114} even if the first action is dismissed without prejudice.\textsuperscript{115} In Arkansas, even if there is no prejudice to the opposing party,\textsuperscript{116} the filing of an action for one remedy bars the subsequent seeking of an inconsistent remedy. The irrevocability of the commencement of a lawsuit is perhaps the primary reason the doctrine is frequently described as

\begin{footnotesize}
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\item \textsuperscript{111} See Dobbs, supra note 97, at 332-33.
\item \textsuperscript{112} \textit{i.e.,} Melby v. Hawkins Pontiac, 13 Wash. App. 745, 537 P.2d 807 (1975) (action for damages replaced by action for rescission of purchase of luxury automobile on grounds of breach of warranty).
\item \textsuperscript{113} Bigger v. Glass, 226 Ark. 466, 290 S.W.2d 641 (1956). Other states adhering to code pleading did follow the "well-recognized" privilege of the plaintiff to dismiss an action before a final judgment and to start another. CLARK, supra note 28, at 495. But by virtue of suing for specific performance, the buyer is not committed to purchasing the property. He may still withdraw from the litigation entirely and drop the transaction completely. Foundation Securities Corp. v. Pittard, 247 Ark. 618, 447 S.W.2d 324 (1969).
\item \textsuperscript{114} Belding v. Whittington, 154 Ark. 561, 243 S.W. 808 (1922).
\item \textsuperscript{115} Sutterfield v. Burbridge, 223 Ark. 854, 268 S.W.2d 900 (1954).
\end{itemize}
\end{footnotesize}
This approach may have been rejected by the adoption of the Arkansas Rules of Civil Procedure in 1979. The Rules permit an amendment to pleadings to be made at any time without leave of court, although the court may strike pleadings that would result in prejudice to the opposing party.\textsuperscript{118} If the claim asserted in the amended pleading arises out of the same conduct or transaction set forth in the original pleading, the amendment relates back to the date of the original pleading, removing any statute of limitations objection to the amendment.\textsuperscript{119} A case decided just prior to the effective date of the new rules hints at the impact the rules may have on the election of remedies doctrine.

In \textit{White v. Cliff Peck Chevrolet, Inc.}\textsuperscript{120} the plaintiff sued in equity for specific performance of a contract for the purchase of an “Indianapolis Pace Car” Corvette. Seven months after commencing the action, and toward the close of the trial, the plaintiff moved to substitute a prayer for relief for damages. The Court of Appeals held that the trial court erred in not allowing the amendment, even though the plaintiff had known that specific performance of the automobile sale would not be available. The amendment did not assert a new cause of action,\textsuperscript{121} but only sought a different remedy.

The adoption of the new rules of civil procedures expanded the principle of this case. The courts now are not concerned with whether the amendment expresses the same cause of action, but whether it arises out of the same transaction.\textsuperscript{122} Under the new rules a plaintiff is permitted, after seeking one remedy, to amend his theory and seek an inconsistent remedy, provided that the amendment or its timing does not result in prejudice to the defendant.

Under the present rules, as well as under the prior

\textsuperscript{117} Owens v. Bill & Tony’s Liquor Store, 258 Ark. 887, 529 S.W.2d 354 (1975).
\textsuperscript{118} ARK. R. CIV. P. 15(a).
\textsuperscript{119} ARK. R. CIV. P. 15(c).
\textsuperscript{120} 266 Ark. 942, 587 S.W.2d 606 (Ark. App. 1979).
\textsuperscript{121} “The term ‘cause of action’ is difficult to define, and we will say only that it consists of facts showing entitlement to relief.” \textit{Id.} at 944, 587 S.W.2d at 607.
\textsuperscript{122} Cox & Newbern, \textit{supra} note 20, at 31.
law, the plaintiff is free to dismiss an action without prejudice at any time before final submission of the case to the fact finder. He may then file again within one year. This flexible policy further supports the conclusion that a plaintiff should be permitted to seek one remedy, dismiss the action pursuant to the rules, and file a new action seeking the alternative remedy. Admittedly, this procedural flexibility and the inflexible election doctrine were not viewed as incompatible prior to 1979, but their continuation in connection with the other provisions of the rules militates for a change in the election doctrine.

Even without an amendment a prudent attorney can easily avoid the danger that the older principles of the election of remedies will be applied by suing in the alternative. Suppose the defendant is a seller who refused to comply with a contract for the sale of land. Acting promptly, the plaintiff may seek both specific performance and, in the alternative, damages for the failure to convey. The plaintiff may seek both remedies because he recognizes the equitable discretion present with a remedy such as specific performance, or perhaps because he is undecided as to which remedy is more desirable. The plaintiff immediately confronts a jurisdictional issue, depending on where he files.

If he files in circuit court to preserve his right to a jury on the fundamental question of whether the contract has been breached, the plaintiff may rely on Rule 18 which seems to permit such joinder. Circuit judges, however, are often reluctant to have anything to do with a claim that seeks, even alternatively, specific performance. The defendant is likely to move to dismiss, to transfer, or to sever and

123. Cox & Newbern, supra note 20, at 55-56.
126. See Pierce-Odom, Inc. v. Evenson, 5 Ark. App. 67, 632 S.W.2d 247 (1982). The chancellor granted the buyers' petition for specific performance of a mobile home purchase contract. Finding that the mobile home was not a unique chattel under the Uniform Commercial Code, the court of appeals remanded for a determination of damages, although the buyers had not sued in the alternative.
127. Ark. R. Civ. P. 18(a) (Reporter's Note 1).
transfer to equity. Conversely, by filing the entire action in a court of chancery, as both the clean-up doctrine and the Arkansas Rules permit, the plaintiff almost certainly avoids dismissal or severance and transfer, but has no right to a jury trial.

Filing separate actions in law and equity is not a plausible alternative. The Rules authorize a motion to dismiss when another action growing out of the same transaction or occurrence is pending between the same parties, which certainly would be true if the remedies are truly inconsistent.

If the plaintiff files a single action with multiple counts, and if a timely motion to transfer is not made, the issue is simply whether and when the trial judge will require the plaintiff to make an election. The election of remedies doctrine is an affirmative defense. As such, it must be raised in the responsive pleading and affirmatively established by the opponent to the action. The failure to raise the defense in this fashion is a waiver. A judge would be

128. "The trial court may make appropriate orders affecting severance of claims and may transfer claims between courts of law and equity on appropriate jurisdictional grounds." Ark. R. Civ. P. 18(b).
129. Cox & Newbern, supra note 20, at 34-35.
131. For example, an action seeking either replevin of personal property or damages for conversion would be filed in a court of law. See, e.g., Lake Village Implement Co. v. Cox, 252 Ark. 224, 478 S.W.2d 36 (1972). See also supra note 17.
132. The failure to timely file a motion to transfer is a waiver of any objection to the assertion of equity jurisdiction based on the inadequacy of a legal remedy. Titan Oil & Gas v. Shipley, 257 Ark. 278, 517 S.W.2d 210 (1974); Reid v. Karoley, 232 Ark. 261, 337 S.W.2d 648 (1960). If the equity court is wholly incompetent to grant the relief sought, the right to seek a transfer to law is not waived. McIlvenny v. Horton, 227 Ark. 826, 302 S.W.2d 70 (1957). Other objections to subject matter jurisdiction are not waived and may be raised at any time. Ark. R. Civ. P. 12(b)(3).
133. See Ark. R. Civ. P. 8(c)("any other matter constituting an avoidance or affirmative defense"). See generally Annot., 99 A.L.R.2d 1315 (1965).
134. Although not discussed in Arkansas, some authority in other jurisdictions holds that mutuality is not essential to the operation of the doctrine, permitting defense to be raised by strangers to the original litigation. 1 B. J. Moore, § 0.405[7], at 234 (2d ed. 1983).
135. Southern Farmers Ass'n v. Wyatt, 234 Ark. 649, 353 S.W.2d 531 (1962). In Wingfield v. Page, 278 Ark. 276, 644 S.W.2d 940 (1983), the plaintiff sued in equity to rescind a construction contract for faculty workmanship and then amended to substitute a claim for damages; the defendant apparently did not object to either the substitution or the transfer to a court of law; the election of remedies issue was not
reluctant to raise the issue sua sponte.\textsuperscript{136}

If the defendant timely moves for the plaintiff to elect the remedy, the trial judge has several options. He can require election during the pleadings or at the conclusion of the pleading stage, election after the completion of discovery, election prior to trial, or election after factual determination by the jury.

Recent authority suggests that it is improper for the trial judge to demand an election before a considered evaluation of the pleadings and the presentation of at least some evidence. When a vendee sought specific performance or damages for failure to convey real property, the Arkansas Court of Appeals held that the chancellor erred in requiring an election prior to trial without first determining whether specific performance was appropriate.\textsuperscript{137} In other words, if the plaintiff sues in the alternative, and jurisdiction over the entire case lies in chancery under the clean-up doctrine, then a judicially compelled election of remedies prior to trial is not appropriate. The plaintiff may on his own volition drop a demand for one of the requested remedies but, even if the plaintiff does nothing, he is assured that the damages remedy for breach of contract remains when he sues in the alternative in a court of equity and has made no extra-judicial election.

If the inconsistent remedies fall within the jurisdiction of a single court as, for example, the remedies of replevin or damages for conversion in a court of law,\textsuperscript{138} or actions to quiet title or for partition in a court of equity,\textsuperscript{139} the plaintiff should similarly be permitted to develop the pleadings and proceed toward trial before being compelled to make an election. Only when a substantial risk of unfairness, confu-

\textsuperscript{136} E.g., Wingfield v. Page, 278 Ark. 276, 644 S.W.2d 940 (1983).


\textsuperscript{138} Lake Village Implement Co. v. Cox, 252 Ark. 224, 229, 478 S.W.2d 36, 40 (1972).

\textsuperscript{139} Miller v. Empire Rice Mills, Inc., 228 Ark. 1161, 312 S.W.2d 925 (1958).
sion, inefficiency, or prejudice is present should the election be compelled early in the proceedings. As the judicial process moves forward other factors should be considered. For example, punitive damages may be awarded for conversion, but not under the replevin statute; the plaintiff should not be permitted to submit both theories to the jury and then select the theory on which the jury grants a more generous recovery.

Certain actions made in the presence of the court may constitute an election. A farmer whose equipment had been seized sued in the alternative for replevin of the equipment or damages for breach of contract. His testimony at trial that he was seeking only damages was an election, without a formal demand by the court.140

The actions of the defendant may constitute a forced election. If two remedies are consistent, the plaintiff may sue on both of them even though they seek a single recovery. But if the defendant admits liability on one claim, does the defendant's unilateral action foreclose the other remedy? The Arkansas Supreme Court has held in at least one instance that it does. When confronted with claims of both respondeat superior and negligent entrustment, the defendant's admission of liability on the former claim barred the plaintiff from admitting evidence to support the claim of negligent entrustment.141 In this fashion, a defendant may manage to exclude some evidence that would support an award of punitive damages against the parent, employer, or other entrustor.142 If, on the other hand, the employer disputes liability on both theories, both may be presented to the jury.143 Although there are two theories available, only one

140. Lake Village Implement Co. v. Cox, 252 Ark. 224, 229, 478 S.W.2d 36, 40 (1972). A victorious plaintiff who accepts a remittitur of the verdict rather than face a new trial is permitted to cross appeal when the defendant has filed a direct appeal. The plaintiff's challenge to the remittitur order is not an impermissible election of remedies. Morrison v. Lowe, 274 Ark. 358, 625 S.W.2d 452 (1981).
143. Breeding v. Massey, 378 F.2d 171 (8th Cir. 1967); Ozan Lumber Co. v. McNeely, 214 Ark. 657, 217 S.W.2d 341 (1949). See Woods, Negligent Entrustment:
cause of action is asserted and only one recovery is permitted.

If the action is filed in federal court, the court, under the *Erie* doctrine, applies its own rules of procedure, but follows state substantive law. Arkansas case law would control on whether the parties had made a binding out-of-court election, but federal procedure would control the power and the timing of the federal trial court to require an election once the action was filed. Some federal courts have held that an election must be made at the pre-trial conference or during the trial. Other federal courts have permitted all counts supported by proof to be submitted to the jury. The flexible pleading and amendment provisions of the Federal Rules, combined with the merged law and equity jurisdiction have made the doctrine much less prevalent in the federal courts.

V. EXCEPTIONS

Even if the remedies are inconsistent, a second action for the alternative remedy may be permitted under a number of exceptions.

A. Court's Authority in First Action

The jurisdiction of the original court may be decisive in determining whether the doctrine is applicable. For exam-

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147. *E.g.*, *In re* King Enterprises, 678 F.2d 73 (8th Cir. 1982) (case properly submitted to jury on alternative theories of express contract and quantum meruit).

ple, a widow who elected to take against the will and received a life estate in one-third of the real property in probate court was not barred from subsequently seeking to have the property partitioned because the probate court lacked authority to order partition.149

B. Availability of Both Remedies

For the doctrine to be applicable, both remedies must be in existence when the first action is brought.150 One example involves a woman who challenged her ex-husband’s borrowing against life insurance policies as being in violation of their property settlement. She was allowed to initiate an action after his death against the insurance company for the full value of the policies.151 Even if the remedies were inconsistent, the second was not available when the first was sought.

In another case, although defendant’s answer mentioned a promissory note from the plaintiff, defendant was not barred from subsequently amending his answer to assert a counterclaim for foreclosure.152 The original answer was not a fatal election; the defendant had not alleged default or sought acceleration or judgment because the note was not then in default.

The selection of a remedy that was legally unavailable at the time should not bar the plaintiff from correcting his error and bringing a new action.153 If the remedy elected is later declared unconstitutional, the party has made only a mistake, not an irrevocable election of remedies, and is free to seek the alternative.154

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C. Mistake

Another exception to the election of remedies doctrine which is frequently mentioned but is rarely a factor in the outcome is that of mistake.\textsuperscript{155} Ignorance of the material facts in making the election will bar application of the doctrine.\textsuperscript{156} A party that is ignorant or confused about the facts may be permitted to seek an inconsistent remedy.\textsuperscript{157} Seeking a remedy that does not exist is not an election, but a mistake,\textsuperscript{158} regardless of whether it is characterized as a mistake of fact or of law.\textsuperscript{159} Furthermore, a binding election cannot be based on imputed knowledge, for the doctrine is based on the conscious exercise of a choice between two inconsistent remedies.\textsuperscript{160} Still, a party is bound by the knowledge possessed by its officers, agents, and attorneys when an election

\textsuperscript{155} Belding v. Whittington, 154 Ark. 561, 243 S.W. 808 (1922). The issue of mistake has arisen in an interesting context in a series of recent cases in Texas. An injured worker settles her Workers' Compensation claim, but then commences an action against a private insurer, alleging inconsistently with her settlement that she was not injured during employment, but that her medical expenses resulted from a non-occupational disease. Reversing earlier case law, the Texas Supreme Court has held the second action was permitted because the plaintiff lacked the necessary knowledge to make an informed election. Bocanegra v. Aetna Life Ins. Co., 605 S.W.2d 848 (Tex. 1980). Although the decision may be limited to disputed and complex matters of medicine, and instances in which the settlement was for less than the full claim, see Mendelsohn, Election of Remedies and Settlement—New Lyrics to an Outworn Tune, 12 St. Mary's L.J. 367, 393-94 (1980), the court uses language that the election doctrine is a barrier only "when . . . one successfully exercises an informed choice . . . between two or more remedies, rights, or states of facts . . . which are so inconsistent as to . . . constitute manifest injustice." 605 S.W.2d at 851. If the worker does recover from the second carrier, the Workers' Compensation carrier should be entitled to subrogation, on grounds of unjust enrichment, against the injured worker to recover the funds mistakenly paid. Such a procedure prevents the claimant from receiving a double recovery. See Mendelsohn, supra at 401-03. See Lee v. Doe, 274 Ark. 467, 626 S.W.2d 353 (1981) (analysis of similar facts from an estoppel perspective).

\textsuperscript{156} Craig v. Meriwether, 84 Ark. 298, 105 S.W. 585 (1907); Dudley E. Jones Co. v. Daniel, 67 Ark. 206, 53 S.W. 890 (1899).

\textsuperscript{157} E.g., Allen v. First Nat'l Bank of Batesville, 230 Ark. 201, 321 S.W.2d 750 (1959).

\textsuperscript{158} Sharp v. Stodghill, 191 Ark. 500, 86 S.W.2d 934 (1935).

\textsuperscript{159} Williams v. Westinghouse Credit Corp., 250 Ark. 1065, 468 S.W.2d 761 (1971).

\textsuperscript{160} City Nat'l Bank v. McCann, 193 Ark. 967, 106 S.W.2d 195 (1937); Craig v. Meriwether, 84 Ark. 298, 105 S.W. 585 (1907).
D. Uniform Commercial Code

The Uniform Commercial Code rejects the doctrine of election of remedies as a fundamental policy, emphasizing that the remedies available for breach of contract are cumulative in nature. Extra-judicial acts, however, may still cause the court to conclude that the party has elected one remedy before seeking judicial assistance. For example, the written statement of a buyer that he no longer intends to go through with the purchase of an item might limit his options to an action for damages. The Code provides that a buyer who intends to rescind a contract must do so within a reasonable time after discovering the grounds for rescission and before any substantial change in the condition of the goods. Continued use of the chattel after discovery may constitute an act of ownership barring rescission under the Code.

E. Remedies Pursued Against Different Parties

Although mentioned by the Supreme Court in a footnote, the issue of whether the doctrine of election of remedies is applicable when the remedies are pursued against different persons has not been addressed by the Arkansas courts. The fact that remedies are pursued against different individuals may suggest that the remedies are consistent. The remedy pursued against the first party may have been mistaken, and the doctrine inapplicable for that reason.

164. See Anheuser v. Oswald Refractories Co., 541 S.W.2d 706 (Mo. 1976).
166. Ingle v. Marked Tree Equipment Co., 244 Ark. 1166, 428 S.W.2d 286 (1968).
Although unlikely for various reasons and despite authority to the contrary, the general rule is that the pursuit of one remedy against one party may bar pursuit of the other remedy against a different defendant. For example, a successful action against the obligor on a promissory note bars an action against the guarantor, though such a result is explained more properly on principles preventing a double recovery than election of remedies. The election of remedies question would arise more sharply if the action against the obligor were dismissed without a final judgment. The mere commencement of an action should not be held to constitute an election barring a subsequent action against the guarantor.

F. Workers' Compensation

An injured employee may file a common law action against his employer for an intentional assault and subsequently seek recovery under the Workers' Compensation statute. Emphasizing the harshness of the election of remedies doctrine, the court in Owens v. Bill & Tony Liquor Store rejected "... a slavish recognition of the doctrine and ... a mechanical application of a fictional legal theory ..." to Workers' Compensation claims. Although both claims arose out of the same transaction and sought a monetary recovery, the underlying relationship of the parties varied. The dissent argued that the employee had a fundamental choice: he could continue the employment relationship and seek recovery pursuant to the statutory scheme, or he could terminate the relationship and thereby seek actual and perhaps punitive damages under the common law.
G. Public Policy

It is difficult to reconcile all the cases. In *Talley v. Blackmon*, 175 after the plaintiff dismissed his action in circuit court for recovery of the unpaid balance of a loan because of an insurmountable Statute of Frauds barrier, he filed an action in equity for the debt and the declaration of an equitable mortgage. Without citing authority or logic, the Arkansas Court of Appeals held that, in light of the pleading and the circumstances, the chancery suit and the circuit court suit were not in conflict. An unwritten public policy requiring sons-in-law who borrow money to repay aged parents may have been the unexpressed circumstance underlying the result.

VI. CONCLUSION

The election of remedies doctrine has justly been described as harsh. The election is irrevocable, may be invoked without regard to reliance by or prejudice to the other party, and may occur out of court or by the commencement of an action. Recent case law in Arkansas and the adoption of the new Rules of Civil Procedure, with their pleading, amending and joinder provisions, indicate the evolving standards of the election doctrine. The Arkansas courts should adopt a test that provides, in general terms, that if a party has more than one remedy available, his manifestation of a choice of one of them by commencement of an action, delay, acts of ownership or otherwise is not a bar to another remedy unless the remedies are inconsistent and the other party materially changes his position in reliance on the manifestation. 176

Such a rule, limited by exceptions for mistaken election or overriding public policy, and limited by the requirement that only the action of a court of competent jurisdiction ruling on the merits of the action constitutes a binding judicial

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175. 271 Ark. 494, 609 S.W.2d 113 (Ark. App. 1980).
176. This language is loosely based on *Restatement (Second) of Contracts* § 378 (1981).
ELECTION OF REMEDIES

election, would properly reflect the estoppel policy that has been recognized as the basis of the doctrine.\textsuperscript{177} The controlling element, within or without the court, should be the impact upon the opposing party of the acts of the plaintiff, in whatever form manifested. Under the civil procedure rules as interpreted, the trial judge should require an election between remedies only when essential to aid trial preparation or to prevent a substantial risk of delay, confusion or prejudice.\textsuperscript{178} Any doubts as to whether the doctrine applies should be resolved in favor of permitting a decision on the merits.\textsuperscript{179} Judicial modification of the common law rule would accomplish the legitimate and worthy objectives of the doctrine, while providing consistency with the changes in procedure that have occurred in Arkansas.

\textsuperscript{177} See Miller v. Empire Rice Mills, Inc. 228 Ark. 1161, 1169, 312 S.W.2d 925, 930 (1958) (Smith, J. dissenting).

\textsuperscript{178} An alternative approach is that the plaintiff may be compelled to elect after the defendant answers the complaint when all material facts may be ascertained from the pleadings. Jacobson v. Yaschik, 249 S.C. 577, 155 S.E.2d 601 (1967) (election compelled between equitable accounting and damages in stockholder's derivative actions that alleged only a single cause of action and the same set of facts).