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Class Dismissed? The Potential Unavailability of Class Actions Under Mineral Code Article 137 in Louisiana Federal Courts

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INTRODUCTION

Louisiana state courts and Louisiana federal courts differ concerning the availability of class notice under Mineral Code article 137, which requires mineral lessors to give 30 days' notice before receiving the right to sue for unpaid or underpaid mineral royalties.[1] Unfortunately, the Louisiana legislature was unclear on Mineral Code article 137's applicability to class actions, leading to judicial interpretation. The Louisiana state courts hold that notice under Mineral Code article 137 is satisfied when a single plaintiff gives notice on behalf of the entire class.[2] These cases reason that Mineral Code article 137's "notice as a prerequisite" requirement intends to give the lessee reasonable warning of the nature of the demand for unpaid or underpaid royalties, which a single demand letter by a class representative successfully accomplishes.[3] Therefore, a class may be analyzed for certification even though the unnamed class plaintiffs do not give notice under Mineral Code article 137.

On the other hand, Louisiana federal courts hold that the Louisiana state courts' interpretation of Mineral Code article 137 is incorrect. They reason that, if the Louisiana Supreme Court heard the issue, it would strictly read Mineral Code article 137's text to not allow class notice in mineral royalty lawsuits.[4] Thus, under the Louisiana federal courts' interpretation, unnamed class plaintiffs who fail to provide notice under Mineral Code article 137 may not participate in a class action. This interpretation has serious ramifications for the utility, and possibility even the availability, of mineral royalty class actions in Louisiana federal courts.

In early 2013, the Western District of Louisiana confronted the necessary question of whether Mineral Code article 137, as interpreted by Louisiana federal courts, applies in federal court because its prohibition of class notice creates tension with Federal Rule of Civil Procedure 23, which governs class actions in federal

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1. LA. REV. STAT. ANN. §§ 31:137–31:138 (2013).
2. Lewis v. Texaco Exploration & Prod. Co., 698 So. 2d 1001, 1011 (La. App. 1 Cir. 1997); Duhé v. Texaco, Inc., 779 So. 2d 1070, 1087 (La. App. 3 Cir. 2001).
3. *Lewis,* 398 So. 2d at 1011. *See also Duhé*, 779 So. 2d at 1086.
4. Chevron USA, Inc. v. Vermillion Parish Sch. Bd., 128 F.Supp.2d 961, 969 (W.D. La. 2001). *See also* Williams v. Chesapeake La., Inc., No. 10-1906, 2011 WL 1868750, at *1, *9 (W.D. La. 2011).

court.[5] Under a line of cases after the Supreme Court of the United States' *Erie Railroad Co. v. Tompkins* decision, a federal court must conduct a special analysis to determine whether a federal rule or a colliding state rule applies to the issue at hand.[6] Moreover, although *Hanna v. Plumer* provides the proper analytical framework for resolving potential conflicts between state rules and the Federal Rules of Civil Procedure, the Court has not conclusively explained how to determine whether a collision exists.[7] The Court's fractured decision in *Shady Grove Orthopedic Associates, P.A. v. Allstate Insurance Co.* demonstrates this notion.[8]

Confronted with this difficult jurisprudence, the Western District of Louisiana applied the narrowest *Shady Grove* opinion,[9] concluding that the federal courts' interpretation of Mineral Code article 137 indeed applied.[10] However, considering the tenuousness of the *Shady Grove* decision,[11] as well as the fact that the Louisiana Supreme Court has yet to speak on the proper interpretation of Mineral Code article 137 as it relates to class notice, this problem remains an open issue.

Therefore, this comment will accomplish two goals. First, it will demonstrate that the proper interpretation of Mineral Code article 137 does not allow class notice by applying Louisiana principles of statutory interpretation to derive the proper interpretation of Mineral Code article 137. Second, this comment will conclude that the federal courts should apply the proper interpretation of Mineral Code article 137 despite apparent conflict with Rule 23 of the Federal Rules of Civil Procedure because Mineral Code article 137 and Rule 23 perform completely different functions. This will be accomplished by demonstrating that, while the Louisiana federal courts were correct in their assertion that Mineral Code article 137 and Rule 23 do not cover the same

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5. Williams v. Chesapeake La., Inc., No. 10-1906, 2013 WL 951251, at *1, *6 (W.D. La. 2013).

6. 304 U.S. 64 (1938) (standing for the proposition that the Rules of Decision Act—and federalism principles—requires federal courts to apply the rules of decision of the state providing the cause of action).

7. 380 U.S. 460 (1965). *Hanna* is part of a line of cases referred to as the "procedural *Erie* doctrine." Readers unfamiliar with, or who need a refresher on the doctrine, should refer to Part IV, particularly note 132 and accompanying discussion.

8. 559 U.S. 393 (2010). *Shady Grove* was a plurality opinion with a Justice count of 4 plurality-1 concurring-4 dissenting. Moreover, the concurring Justice, Justice Stevens, has since retired from the Court, and we have yet to discover Justice Kagan's stance on this doctrine.

9. *See infra* note 68 and accompanying discussion.

10. *Williams*, 2013 WL 951251 at *10–12.

11. *See supra* note 8.

ground, there are additional reasons for such a conclusion. Also, this comment will demonstrate that *Shady Grove* did not affect the collision analysis as it pertains to Mineral Code article 137.

Part I of this comment briefly discusses Louisiana Mineral Code article 137 and the Mineral Code as a whole. Part II discusses the problem this comment intends to resolve: the divergence between Louisiana state courts and Louisiana federal courts on the issue of class notice under Mineral Code article 137. Part III conducts a statutory analysis of Mineral Code article 137, employing principles of Louisiana statutory interpretation, in order to unearth the correct interpretation of Mineral Code article 137. Part IV discusses the development of the procedural *Erie* doctrine from *Erie* to *Shady Grove*. Finally, Part V demonstrates that the proper interpretation of Mineral Code article 137 does not collide with Federal Rule 23 and will survive a proper application of the *Erie/Hanna* analysis.

I. THE LOUISIANA MINERAL CODE AND MINERAL CODE ARTICLE 137

The Louisiana Mineral Code is intended to be "supplementary . . . to the Louisiana Civil Code."[12] Because the mineral laws of Louisiana devolved from the Civil Code, the Louisiana Legislature intended the Mineral Code to be a "specialized extension of the Civil Code," even though such provisions are part of Louisiana's Revised Statutes.[13] Further, the comment to Mineral Code article 2 explicitly states that an "additional purpose of Article 2 is [to] prevent . . . the inappropriate transfer of the principles of the Mineral Code . . . to resolve questions that are properly governed by the general principles of the Civil Code."[14]

Louisiana Mineral Code article 137 is the crux of the set of rights and procedures—collectively found in Mineral Code articles 137-141—that Louisiana offers to parties to sue for past-due or underpaid mineral lease royalties. Mineral Code article 137 requires a mineral lessor who "seeks relief for the failure of his lessee to make timely or proper payment of royalties [to give] his lessee

12. LA. REV. STAT. ANN. § 31:2 (2013).

13. *Id*. at cmt. *See also* LA. REV. STAT. ANN. § 31:1 cmt. (2013) ("Although the authorized forms of citation include reference to provisions of this code by using the traditional form for citation of the Revised Statutes, it is hoped that because of the relationship of this code to the Civil Code and the attempt to structure it more in the style of a code than a statute, the preferred practice will grow to be that of citing particular provisions as articles of the Mineral Code.").

14. LA. REV. STAT. ANN. § 31:2 cmt. (2013) This demonstrates that the provisions of the Mineral Code are to be interpreted using the Civil Code's interpretative methods, which is discussed *infra* Part III.A–B.

written notice of such [failure to pay] as a prerequisite" to bringing a lawsuit.[15] After the lessor waits a minimum of 30 days for the lessee's response, he then receives the right to file a lawsuit seeking remedies that are based on the response—or lack thereof—from the lessee.[16] Further, the lessee's response directly affects the remedies the lessor may seek.[17]

II. LOUISIANA'S JURISPRUDENTIAL DIVIDE REGARDING ARTICLE 137

Louisiana courts, state and federal alike, agree that plaintiffs "have no right to proceed" with a mineral royalty action if they fail to comply with the requirements of Mineral Code article 137's notice prerequisite.[18] However, the Louisiana state courts and Louisiana federal courts *do* disagree on whether a named class plaintiff can provide article 137 notice on behalf of unnamed mineral lessors who are purported class plaintiffs.

A. Louisiana State Court Jurisprudence

Sans one case,[19] Louisiana state courts have held that class notice is acceptable under article 137.[20] In *Lewis v. Texaco Exploration &*

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15. LA. REV. STAT. ANN. § 31:137 (2013) ("[W]ritten notice . . . [is a] prerequisite to a judicial demand for damages or dissolution of the lease.") [hereinafter article 137].

16. LA. REV. STAT. ANN. § 31:138 (2013) ("The lessee shall have thirty days after receipt of the required notice . . . to pay the royalties due or to respond by stating in writing a reasonable cause for nonpayment. The payment or nonpayment of the royalties or stating or failing to state a reasonable cause for nonpayment . . . has the following effect on the remedies of dissolution and damages."). LA. REV. STAT. ANN. §§ 31:138.1–31:141 (2013) stipulate the different remedies available, depending on whether and how the lessor responds.

17. *Id*. *See also* LA. REV. STAT. ANN. §§ 31:138.1–31:141 (2013) (discussing the types of remedies offered based on how the lessee responds to article 137 notice).

18. *See, e.g.*, Rebstock v. Birthright Oil & Gas Co., 406 So. 2d 636, 642–43 (La. App. 1 Cir. 1981). Louisiana federal courts also agree with the notion that lack of Mineral Code article 137 notice is an *absolute bar* to seeking a mineral royalty claim. *See also* Williams v. Chesapeake La., Inc., No. 10-1906, 2011 WL 1868750, at *1, *6 (W.D. La. 2011) (citing Chevron USA, Inc. v. Vermillion Parish Sch. Bd., 128 F.Supp.2d 961, 965 (W.D. La. 2001)).

19. *See* Stoute v. Wagner & Brown, 637 So. 2d 1199, 1201 (La. App. 1 Cir. 1994) (adopting the findings of the trial court as its own, which found that "only those royalty owners who have written a demand for past royalties may sue their gas producers . . . therefore, there are a limited number of royalty owners who have the right to sue").

20. *See* Lewis v. Texaco Exploration & Prod. Co., 698 So. 2d 1001 (La. App. 1 Cir. 1997), *writ denied*, 706 So. 2d 454 (La. 1997); Duhé v. Texaco, Inc., 779 So. 2d 1070 (La. App. 3 Cir. 2001), *writ denied*, 791 So. 2d 637 (La. 2001).

Production Company, five lessors sent Texaco, the mineral lessee, two demand letters demanding proceeds from a contract dispute settlement between Texaco and another oil company.[21] One demand letter was on behalf of all mineral lessors, while the other was on behalf of themselves, as individual plaintiffs.[22] Texaco objected, arguing that article 137 "does not permit a written demand for royalty payments to be made on behalf of unnamed lessors."[23] In its analysis, the court recognized that "the notice requirements set forth in [article 137] are an indispensible prerequisite to a judicial demand . . . ."[24]

The court found that "[n]owhere in the statute is there a requirement that . . . notice be given by each and every mineral lessor individually."[25] The court also found that article 137's use of "he" and "lessor" in the singular is not indicative of legislative intent to require individual notice because Louisiana interpretative techniques allow the singular and the plural to be interchangeable.[26] Finally, the court found that the "obvious purpose" of article 137 notice is to give the lessee reasonable notice of a deficient payment and reasonable time to correct it after an appropriate investigation.[27] The court reasoned that, because the representative plaintiffs' class demand letter fully apprised Texaco of (1) the nature of the claim for unpaid royalties, (2) the identity of the lessors for whom the demand was made, and (3) what contracts were in dispute, Texaco was able to conduct a reasonable investigation into the claims and adequately respond under Mineral Code article 138.[28] Thus, the class was subsequently certified as a class action under Louisiana law.[29]

However, the three-judge panel produced one dissent.[30] Judge Parro explained that article 137 is "clear and unambiguous," requiring "*each* lessor [to] give written notice to his lessee based on the individual contractual relationship between the lessor and the lessee."[31] He further reasoned that article 137 does not authorize one

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21. 698 So. 2d at 1006.
22. *Id*.
23. *Id*. at 1007. In other words, Texaco argued that there was no such thing as a "'class action' demand letter" under article 137. Thus, those plaintiffs who had not individually given article 137 notice had no right of action.
24. *Id*. at 1009.
25. *Id*.
26. *Id*. The court seemed to believe that allowing Texaco to investigate each plaintiff's claim was more important than meeting the requirements for a class action.
27. 698 So. 2d at 1010.
28. *Id*. at 1011.
29. *Id*. at 1016.
30. *Id*. (Parro, J., dissenting).
31. *Id*. (Parro, J., dissenting) (emphasis in original).

lessor to give notice on behalf of another lessor, whether named or unnamed.[32] He refuted the majority's contention that no jurisprudence exists on the adequacy of notice by pointing out that the same court's 1994 opinion in *Stoute v. Wagner & Brown* strictly interpreted the language of article 137 to find that class notice is prohibited by the plain meaning of the article.[33] Although Judge Parro did not rule out the possibility of class actions so long as each individual class plaintiff gives individual notice, he noted that he would have held that the plain language of article 137 does not allow one class representative (or a few class representatives) to give notice on behalf of other, unnamed plaintiffs.[34]

In a similar case, *Duhé v. Texaco*, a unanimous panel cited *Lewis*' holding and reasoning with approval.[35] In *Duhé*, Texaco argued that the district court erred in certifying the class because not all class members made individual, written demands pursuant to article 137.[36] Mirroring the *Lewis* decision, the *Duhé* court rejected Texaco's argument, and instead, the court concluded article 137 does not require individual notice in a multiple-plaintiff lawsuit, such as a class action.[37] Moreover, the court reasoned that it is "sufficient if the notice fully and completely notifies the lessee of the demands of the named plaintiffs, as well as the intention of those named plaintiffs to demand royalty payments on behalf of a class of royalty owners."[38]

Louisiana courts tend to allow class representatives to give notice on behalf of unnamed class plaintiffs in mineral royalty class actions. However, while the Louisiana jurisprudence provides some indication that article 137 notice can be given by a class representative (or by multiple class representatives) on behalf of a class of mineral lessors, the Louisiana federal courts reject this line of jurisprudence in reaching the exact opposite conclusion. Additionally, Louisiana federal courts reject the notion that class

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32. *Id*. (Parro, J., dissenting).

33. 698 So. 2d at 1016 (Parro, J., dissenting) (citing Stoute v. Wagner & Brown, 637 So. 2d 1199, 1201 (La. App. 1 Cir. 1994)). The majority cited *Stoute* in its opinion also, but only for the class certification analysis, not for the class notice analysis. *See also* Willis v. Franklin, 420 So. 2d 1243, 1245 (La. App. 3 Cir. 1982). Although *Willis* concerned multiple plaintiffs and did not give rise to a class action, its individual notice analysis was likewise applicable in *Lewis*.

34. *Lewis*, 698 So. 2d at 1017 (Parro, J., dissenting).

35. Duhé v. Texaco, 779 So. 2d 1070, 1087 (La. App. 3 Cir. 2001).

36. *Id*. at 1075.

37. *Id*. at 1087 (affirming the district court's certification of the class because article 137's notice prerequisite was met, as well as the class certification prerequisites under Louisiana law).

38. *Id*.

notice satisfies article 137 and require that each individual lessor give his lessee notice, regardless of whether the defendant lessee is the same for each purported class plaintiff.[39]

B. Louisiana Federal Court Jurisprudence

Two Louisiana federal court cases considered the issue of class notice under article 137: *Chevron USA, Inc. v. Vermillion Parish School Board*[40] and *Williams v. Chesapeake Louisiana., Inc*.[41] In both of these cases, the federal court ruled that the plain language of article 137 does not permit class notice.[42] However, the opinions do not explicitly hold whether the plain language of article 137 completely prohibits class actions or merely prohibits class actions where each class plaintiff has not given individual notice.

In *Vermillion*, Chevron and other oil company lessees sought a declaratory judgment, arguing that (1) the demand letters sent by the class representatives on behalf of a class of mineral lessors were insufficient to satisfy article 137's requirement, and (2) the demand letters failed to reasonably put the oil companies on notice of the individual claims of either the class representatives or the unnamed class plaintiffs.[43] The district court found that each class

39. The route the Louisiana federal courts follow mirrors the Louisiana state court decision of Stoute v. Wagner & Brown, 637 So. 2d 1199, 1201 (La. App. 1 Cir. 1994), and Judge Parro's dissent in Lewis v. Texaco, 698 So. 2d 1001,1016 (La. App. 1 Cir. 1997) (Parro, J., dissenting).

40. The *Vermillion* case has a tumultuous procedural history. The relevant decisions for the purposes of this comment are found in three different citations, all with the title *Chevron USA, Inc. v. Vermillion Parish School Board*. The court of first instance was the United States District Court for the Western District of Louisiana. 128 F.Supp.2d 961 (W.D. La. 2001). Then, the case was referred to the United States Fifth Circuit Court of Appeals, which made a ruling and certified a question to the Louisiana Supreme Court. 364 F.3d 607 (5th Cir. 2004). After the Louisiana Supreme Court declined to answer the certified question, 872 So. 2d 533 (La. 2004), the case returned to the Fifth Circuit. 377 F.3d 459 (5th Cir. 2004).

41. Similar to the *Vermillion* case, the *Williams* case also has a turbulent procedural history. The three relevant decisions for this comment are unreported decisions out of the Western District of Louisiana. Williams v. Chesapeake La., Inc., No. 10-1906, 2011 WL 1868750, at *1 (W.D. La. 2011); Williams v. Chesapeake La., Inc., No. 10-1906, 2013 WL 951251, at *1 (W.D. La. 2013); Williams v. Chesapeake La. Inc., 2013 No. 10-1906, 2013 WL 5295692 (W.D. La. 2013).

42. *Vermillion*, 128 F.Supp.2d at 967-68. *See also Williams*, 2013 WL 951251 at *2 ("The court is satisfied with its interpretation of Louisiana law, this is, [article 137] requires notice to the lessee as a prerequisite to suit.").

43. *Vermillion*, 128 F.Supp.2d at 961.

plaintiff must give article 137 notice[44] because such a rule is clear, unambiguous, and produces no absurd consequences.[45] Because of the Louisiana Supreme Court's silence regarding the availability of class notice under article 137, the court reasoned that the Louisiana Supreme Court would follow the *Stoute* decision, reject the *Lewis* majority,[46] and preclude class notice under article 137.[47] However, recognizing the importance of the issue, the district court certified its decision to the Fifth Circuit to either certify the question to the Louisiana Supreme Court or dispose of the issue itself.[48]

After receiving the certified issue, the Fifth Circuit in turn certified the question to the Louisiana Supreme Court,[49] which declined to answer the certified question.[50] When the case returned

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44. *Id*. at 968. The district court looked to the *Stoute* case, which held that only those lessors that sent timely article 137 notice could proceed with the lawsuit and decided that the Louisiana Supreme Court would adopt the interpretation of *Stoute*.

45. *Id.* at 967–68. The district court found that the royalty owners' demand letters were "legally insufficient" to serve as written notice on behalf of unnamed royalty owners under article 137, "and, therefore, class action relief [was] unavailable under such circumstances." The district court's phrasing is curious because it says "class action relief is unavailable under *such* circumstances" (emphasis added). This raises the question of whether the court intended to rule that class notice is unavailable at all times under article 137 or unavailable only when each class member fails to give individual notice. While it is hard to envision a situation where representatives of a class of plaintiffs can argue that every "similarly situated" plaintiff possible gave individual notice, the court here approved of Stoute v. Wagner & Brown, 637 So. 2d 1199, 1201 (La. App. 1 Cir. 1994), which found "a limited number of royalty owners . . . have the right to sue" in reference to the class representatives who gave individual notice. This indicates that class actions are likely available as long as each class plaintiff gives notice pursuant to article 137. This contemplates that the unnamed class plaintiffs that give article 137 notice are removed from the class, and those that gave article 137 notice may proceed with the class action if pursuing it is still desirable.

46. The district court would follow Judge Parro's *Lewis* dissent. Lewis v. Texaco, 698 So. 2d 1001,1016 (La. App. 1 Cir. 1997) (Parro, J., dissenting). *See also* Part II.A.

47. *Id*. at 968-69. The district court justified taking an "*Erie* guess" as to what the Supreme Court of Louisiana would decide if it heard the case. Under *Erie*, the federal courts are to apply the substantive law of the forum state. When a state supreme court has not issued a ruling on the issue, a federal court may essentially sit as a state high court and consider a wide range of sources and policy considerations to arrive at the proper construction of the state law. Commissioner v. Estate of Bosch, 387 U.S. 456 (1967).

48. *Id*. at 969. The court did this in accordance with Rule 50 of the Federal Rules of Civil Procedure.

49. Chevron USA, Inc. v. Vermillion Parish Sch. Bd., 364 F.3d 607 (5th Cir. 2004).

50. Chevron USA, Inc. v. Vermillion Parish Sch. Bd., 872 So. 2d 533 (La. 2004). The Louisiana Supreme Court could have resolved the issue by devising the proper construction of article 137 as it relates to class notice. Instead, the

to the Fifth Circuit, the court encountered the choice of either accepting the Louisiana state courts' interpretation of article 137, or affirming the district court's interpretation of article 137. The court chose the latter option, holding that it was not bound by any Louisiana state court decision because the "jurisprudence ha[d] not developed to the status of *jurisprudence contstante*,"[51] and the plain language of the statute led to the conclusion that class notice is not compatible with article 137.[52]

The Fifth Circuit also considered the context of article 137 with Mineral Code articles 138-141 and properly understood that article 137 bore a significant relationship to the rights and remedies that arose depending on how the lessee responds to article 137 notice.[53] The Fifth Circuit provided three reasons why this relationship is both "incompatible with allowing notice to be given on a class basis"[54] and thwarts the power balance the Louisiana Legislature intentionally created by providing lessors a method to vindicate their royalty claims, while giving lessees a reasonable delay to avoid the "harsh remedy" of cancellation.[55]

First, permitting class notice in this type of statutory framework would deprive the lessee of any realistic chance to reasonably respond within the 30-day timeframe.[56] Second, it was

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court abdicated its judgment to the U.S. Fifth Circuit, leading to the divergence this comment discusses and seeks to resolve.

51. Chevron USA, Inc. v. Vermillion Parish Sch. Bd., 377 F.3d 459, 462 (5th Cir. 2004). *See*, *e.g.*, Doerr v. Mobil Oil Corp., 774 So. 2d 119, 128 (La. 2000), which illustrates the application of *jurisprudence constante*. *Jurisprudence constante* is a civil law principle that embodies a fundamental difference between the common law and the civil law. Succinctly put, case law does not have the same precedential effect as it does at common law, which allows civilian judges to disregard past decisions that are not "a constant stream of uniform . . . rulings having the same reasoning." This means that legislation is the supreme source of law, and case law merely is "evidence" of what the legislation means. Thus, case law does not have the controlling effect on decisions that legislation possesses. This is why the Fifth Circuit was comfortable with ignoring the few Louisiana cases interpreting article 137 in favor of the district court's interpretation.

52. *Vermillion*, 377 F.3d at 461.

53. *Id*. at 462.

54. *Id*. at 463.

55. *Id*. at 464 (citing LA. REV. STAT. ANN. § 31:137 cmt. (2013)). The court found that the Louisiana legislature was concerned with striking the balance between giving lessors the right to a judicial remedy for unpaid mineral royalties and limiting judicial dissolution of complex, economically-impactful, mineral leases by promoting settlement before any litigation occurs.

56. *Id.* at 464. In this case, the intended class would have been made up of each of Chevron's mineral lessors in the entire state of Louisiana. The court clearly was concerned about Chevron needing to go through every lease it had with Louisiana residents to determine how to proceed.

"questionable" whether the putative class representatives could make an article 137 demand for lessors who do not know that demand is being made on their behalf, or even want demand to be made on their behalf.[57] Third, it was unclear to the court to whom the lessees should respond under Mineral Code article 138.[58] The third consideration is the most important because it is unclear what the proper remedies are or who would receive the payments because the statutory framework does not contemplate class actions in mineral royalty lawsuits.

The most recent Louisiana federal court case that tackles the issue of class notice under article 137 is *Williams v. Chesapeake Louisiana., Inc*.[59] In *Williams*, many mineral lessors sued Chesapeake for underpaid mineral royalties after the named plaintiff purportedly sent notice on behalf of the putative class. Like other courts that assessed the issue, the district court understood the strong policy consideration underlying the notice and reply framework of article 137, et seq.[60] With this in mind, the district court followed the Fifth Circuit's *Vermillion* decision, holding that "as a matter of law" the notice letter the lead plaintiff sent on behalf of herself and the other mineral lessors, was insufficient to fulfill the others' article 137 notice requirement.[61]

However, *Williams* went further than *Vermillion*, explicitly holding that "the putative class members did not have a *substantive right of action* to seek unpaid mineral royalties" as a class under article 137.[62] The notion that the mineral lessors that failed to provide article 137 notice had no right of action was not explicitly mentioned in any previous article 137 class notice case. However, in *Vermillion*, the district court subscribed to the notion of "no notice, no right."[63] This demonstrates the court read article 137 notice to trigger a substantive right of action to claim unpaid or

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57. *Id*.

58. *Vermillion*, 377 F.3d at 464.

59. Williams v. Chesapeake La., Inc., No. 10-1906, 2011 WL 1868750, at *1–2 (W.D. La. 2011) (finding that a mineral royalty lawsuit was proper because "[im]proper payment," such as underpayment, is a reason to provide notice under article 137). *See also* LA. REV. STAT. ANN. § 31:137 (2013).

60. *Williams*, 2011 WL 1868750 at *5. *See also Vermillion*, 377 F.3d at 464.

61. *Vermillion*, 377 F.3d at 464*11.

62. *Id*. (emphasis added). The closest a Louisiana court got to this notion was that article 137 notice is an absolute prerequisite to suit. Rebstock v. Birthright Oil & Gas Co., 406 So. 2d 636, 642–43 (La. App. 1 Cir. 1981). *See also supra* note 18 and accompanying discussion.

63. *Williams*, 2011 WL 1868750 at *5–6 (W.D. La. 2013) ("The Court is satisfied with its interpretation of Louisiana law, that is, La. Rev. Stat. Ann. §31:137 requires notice to the lessee as a prerequisite to suit.").

underpaid mineral royalties, which the unnamed class members had failed to satisfy.[64]

In March 2013, the *Williams* court addressed the class notice issue again, this time after recognizing a conflict between article 137 and Rule 23 of the Federal Rules of the Civil Procedure.[65] Here, the district court denied the plaintiffs' motion for class certification for the same reasons as set forth in its previous order.[66] However, the court recognized the real issue in the motion at bar was whether article 137's prohibition of class notice[67] or Federal Rule 23, which has no notice requirement, applied to the case. To analyze this issue, the Western District turned to Justice Stevens' concurrence in *Shady Grove Orthopedic Associates, P.A. v. Allstate Insurance Co.*[68] Applying Justice Stevens' *Shady Grove* principles,[69] the district court found that the properly-interpreted Louisiana rule must control.[70]

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64. This notion is supported by *Rebstock*, 406 So. 2d at 642–43, as well as Lewis v. Texaco Exploration & Prod. Co., 698 So. 2d 1001, 1006 (La. App. 1 Cir. 1997). *See also supra* notes 18 and 21 and accompanying discussion.

65. *Williams*, 2011 WL 951251 at *2 ("[T]he issue before the Court is how to resolve the conflict between this Louisiana statute and [Rule 23].").

66. *Id.* at *5–6 ("The Court is satisfied with its interpretation of Louisiana law, that is, La. Rev. Stat. Ann. §31:137 requires notice to the lessee as a prerequisite to suit.").

67. *Id*. at *6. In other words, the correct interpretation of article 137, as the Louisiana federal courts and this comment contend.

68. Shady Grove Orthopedic Assoc., P.A. v. Allstate Ins. Co., 559 U.S. 393, 416 (2010) (Stevens, J., concurring). *Shady Grove* involved a fractured Supreme Court employing three different methods to obtain two separate results, producing a plurality opinion. The district court used Justice Stevens' concurrence because it provided the crucial fifth vote and concurred on the narrowest ground. *Williams*, 2013 WL 951251 at *11 (citing Garman v. Campbell County Sch. Dist. No. 1, 630 F.3d 977, 983 n.6 (10th Cir. 2010) (citing Marks v. United States, 430 U.S. 188, 193 (1977)).

69. According to the *Williams* court, Justice Stevens found that the federal rules must follow the Rules Enabling Act's requirement to not abridge, enlarge, or modify any substantive right granted by state law. *Williams*, 2013 WL 951251 at *9 (citing *Shady Grove*, 559 U.S. at 418). A federal rule that appears to do so must be reasonably interpreted to avoid that result. *Id*. (citing *Shady Grove*, 559 U.S. at 424–25). If the federal rule cannot be reasonably interpreted to avoid abridgment, enlargement, or modification of any substantive right, thus displacing a state law that looks procedural, but is nevertheless intertwined with a state-created right, the state rule must be applied. *Id*. (citing *Shady Grove*, 559 U.S. at 423–24). The district court found that Rule 23 "'categorically'" entitles plaintiffs to pursue a class action in federal court when the four prerequisites are met. Thus, a collision existed between Rule 23 and article 137. *Id*. (citing *Shady Grove*, 559 U.S. at 398 (Scalia, J.)). However, the district court held that applying Rule 23 alters Louisiana substantive law, which is outside the authorization of the Rules Enabling Act, and, therefore, the court was required to apply article 137's prohibition of class notice to the mineral royalty lawsuit. *Id*. at *15–16. In other words, the district court found Rule 23 prevented article

As demonstrated by the history of article 137 class notice in both the Louisiana state and federal courts, a two-question inquiry is required in order to determine the availability and utility of class actions for Louisiana mineral royalty claims. First, does the proper interpretation of article 137 preclude class notice? Second, is article 137's notice requirement applicable in Louisiana federal courts in light of Rule 23?

III. THE PROPER CONSTRUCTION OF ARTICLE 137 PRECLUDES CLASS NOTICE

A. The Tenets of Louisiana Statutory Interpretation

Louisiana law is unique in that its civilian tradition dictates that attorneys and judges look to a plain-language reading of legislation, rather than the jurisprudence, in arguing and deciding cases.[71] The fundamental tenets of civil law dictate that judges are to extract as much meaning out of the text of a Code article or statute in determining its proper construction because the legislature, not the judiciary, is the governmental body elected to make law.[72] Only after a judge thoroughly analyzes the text of a law may he proceed to other forms of statutory interpretation, such as legislative intent.[73] The Mineral Code, as a supplement to the Civil Code, should be interpreted in a similar fashion as Code articles.[74]

137's no class notice rule from operating. The prohibition of class notice is "so interwoven with [Louisiana's] substantive law governing the payment of mineral royalties in Louisiana that it is a substantive rule," as demonstrated in Chevron USA, Inc. v. Vermillion Parish Sch. Bd., 377 F.3d 459, 462 (5th Cir. 2004). *See also supra* note 554 and accompanying discussion.

70. *Williams*, 2013 WL 951251 at *13–15.

71. LA. CIV. CODE ANN. art. 1 (2013) ("The sources of [Louisiana] law are legislation and custom."). *See also id*. cmt. c ("In Louisiana, legislation is superior to any source of law."). Jurisprudence, on the other hand, is just evidence of what the law is and expounds on the proper interpretations of legislation. *See also* cases cited *supra* note 51.

72. P. RAYMOND LAMONICA & JERRY G. JONES, LEGIS. LAW & PROC. COMPANION HANDBOOK § 7.4, (2014 ed.) (internal citations omitted) [hereinafter LAMONICA & JONES].

73. *Id.* at § 7.6 ("It is only when the meaning of the words cannot be determined from the legislation itself or through resort to statutes specifically addressing the meaning of words used in the legislation . . . that there is a need to look *beyond* the specific legislation." (emphasis in original)).

74. *See supra* note 12 and accompanying discussion.

Articles 9 through 13 of the Louisiana Civil Code codify the fundamental principles of Louisiana statutory interpretation.[75] First, when the applicable law is clear and unambiguous and its application does not lead to absurd results, the law must be applied as written.[76] A court may interpret no further, such as seeking legislative intent, if application of the plain language produces a result that is within the purpose of the law.[77] However, if the applicable law is susceptible to different meanings, and the plain language approach fails, then the law must be interpreted as having the meaning that best conforms to the purpose of the law.[78] Further, laws on the same subject matter must be interpreted in reference to each other.[79] Finally, as stipulated in the Louisiana Revised Statutes, the singular and plural are interchangeable when interpreting Louisiana law.[80]

Only after the court fully attempts to extract the proper, plain reading from the applicable law may the judge use legislative history, along with logic and reason, in order to arrive at the proper construction of the applicable law.[81] Scholars call this type of statutory interpretation, one that goes beyond the text into legislative history and legislative purpose of the applicable law, the "historical approach."[82] If the judge can ascertain the "broad statutory policy"

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75. The techniques described above form what scholars call the exegetical method of statutory interpretation.

76. LA. CIV. CODE ANN. art. 9 (2013).

77. *Id*. *See also* LAMONICA & JONES, *supra* note 72 at § 7.4. The test for determining if an "absurd consequence" arises through applying plain meaning is to assess whether a "factual result so inappropriate as to be deemed outside the 'purpose' of the law" occurs. If so, then the court may use other interpretative methods, such as reason and legislative intent to reach the correct construction of the law.

78. LA. CIV. CODE ANN. art. 10 (2013); LA. CIV. CODE ANN. art. 12 (2013); LAMONICA & JONES, *supra* note 722 at § 7.6.

79. LA. CIV. CODE ANN art. 10 (2013). *See also* LAMONICA & JONES, *supra* note 722 at § 7.7 ("[S]tatutes on the same subject matter should be interpreted in reference to each other, if such is necessary to determine the meaning of words or phrases in a particular statute."). This is called interpreting statutes *in pari materia*.

80. LA. REV. STAT. ANN. § 1:7 (2013).

81. LA. CIV. CODE ANN. art. 4 (2013) ("To decide equitably, resort is made to justice, reason, and prevailing usages.").

82. For a full discussion on civilian statutory interpretation outside the text of an applicable statute *see* LAMONICA & JONES, *supra* note 722 at §§ 7.8-7.9. It suffices to say that the civilian tradition recognizes that the political, social, and economic context of the applicable statute is valuable in discovering the purpose of the statute. Further, legislative history is not the same as legislative intent, although documents that comprise legislative history are great indicators of legislative intent, or the purpose of the legislation.

behind the applicable law, then he has gone a long way in identifying "'legislative intent' or 'legislative purpose.'"[83]

The Louisiana state courts clearly failed to apply these interpretative methods properly in interpreting article 137 and its related provisions. One can only reach the conclusion that article 137 does not offer class notice in mineral royalty lawsuits by employing these interpretative tenets to both the plain language and the policy behind Article 137.

B. Applying the Tenets of Louisiana Statutory Interpretation to Article 137

Both the Louisiana state courts and the Louisiana federal courts agree that notice is an absolute prerequisite to bringing a mineral royalty lawsuit.[84] This point of agreement narrows the issue to whether article 137 allows class notice. Article 137 does not allow class notice, but not merely for the reasons that the Louisiana federal courts offer in their interpretation of article 137.[85]

The *Lewis*/*Duhé* analysis—the one employed by the Louisiana state courts—is insufficient for multiple reasons.[86] First, although the Louisiana courts correctly recognized that the plain language approach led to two different interpretations because the singular and the plural are interchangeable, the court failed to read article 137 with the other royalty demand articles.[87] If the court had done so, it would have found that absurd results occur with its conclusion that class notice is allowed under article 137, because different remedies arise depending on how the lessor responds.[88] In this way, the Louisiana courts created a rule that requires a mineral lessor to either (1) respond to one of the class representatives and be bound to whatever remedy corresponds with the particular response given that

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83. HETZEL, ET AL., LEGISLATIVE LAW AND STATUTORY INTERPRETATION: CASES AND MATERIALS, 565 (3d ed. 2001, Lexis Publishing).

84. *See, e.g.*, Rebstock v. Birthright Oil & Gas Co., 406 So. 2d 636, 643 (La. App. 1 Cir. 1994). Both the Louisiana state courts and federal courts cited to *Rebstock* for this proposition. *See also* Williams v. Chesapeake La., Inc., No. 10-1906, 2011 WL 1868750, at *1, *11 (W.D. La. 2011). *See also supra* note 62 and accompanying discussion.

85. *See supra* Part I.B.

86. *See supra* Part I.A.

87. This is required by the Louisiana Civil Code. *See* LA. CIV. CODE ANN. art. 10 (2013). Correctly applying Civil Code article 10's requirement would have led to the proper construction of the plain language of article 137 to in fact read the word "he" and "mineral lessor" in the singular because the other notice and response Mineral Code articles would not allow otherwise without an absurd result occurring.

88. *See* LA. REV. STAT. ANN. §§ 31:138.1–140 (2013).

class representative or (2) send different responses to each individual plaintiff in the proposed class after conducting a rushed investigation into hundreds, if not thousands, of mineral leases.[89] Since article 137 notice is a process performed entirely before litigation, the only way for mineral lessees to avoid either making a rushed settlement or falling into one of the two aforementioned response problems would be to seek a declaratory judgment.[90] Forcing the mineral lessee to endure litigation expenses, rather than having a fair chance to enjoy their pre-litigation rights under a statutory framework, is clearly outside the intent of article 137.[91]

It stands to reason that, in *Lewis*, Texaco believed that the five class representatives had no claim to royalty payments, so it responded by giving reasons for nonpayment.[92] Thus, Texaco was placed in the position of not responding to the unnamed class members because it only responded to the five lessors who sent demand.[93] However, such a response does not adequately respond to the claims of other mineral lessors in the lawsuit because Texaco could then be liable to the unnamed lessors for dissolution and/or hefty damages. Just because Texaco, or another mineral lessor in the same position, responds one way to the class representatives does not lead to the conclusion that Texaco or another mineral lessor would respond in kind to the others. This result is inequitable

89. The investigation must be done within 30 days under the threat of the vesting of the plaintiffs' right to sue in court. Moreover, the lessee is left guessing as to whom he is supposed to send a response. Further, no rational plaintiff's attorney would grant an oil company an extension that would delay the vesting of his client's right of action, even assuming it were possible to do so under the Mineral Code or some other Louisiana law. The possibility of extending the time within which to give a response under Mineral Code article 138 is beyond the scope of this comment.

90. This is exactly what Chevron did in Chevron USA, Inc. v. Vermillion Parish Sch. Bd., 128 F.Supp.2d 961 (W.D. La. 2001). Massive class action damages can be extremely damaging to a company's bottom line, which is incentive to settle to avoid these damages plus the costs of defending a class action. Pair this fact with Louisiana's history as a state rich in oil, gas, and other minerals, the Louisiana courts' interpretation of article 137 will increase the financial risk of doing business in Louisiana.

91. *See supra* note 555 and accompanying discussion. *See also* LA. REV. STAT. ANN. § 31:137 cmt. (2013) ("The total effect of these articles, then, is to provide a spur to timely payment of royalties due while giving lessees a reasonable way to avoid the harsh remedy of cancellation. The spur is the special remedy.").

92. *See* Lewis v. Texaco Exploration & Prod. Co., 698 So. 2d 1001, 1006 (La. App. 1 Cir. 1997).

93. *See id.*

because Texaco had no way of knowing whether it had to respond to all of the lessors individually or only the five class representatives.[94]

Second, the Louisiana state court's analysis discounts the fact that article 137 notice is a statutory prerequisite to the formation of a right of action granted under Louisiana law.[95] Certainly, a proponent of the Louisiana state courts' interpretation would argue that article 137 notice can be given by a class representative on behalf of unnamed class plaintiffs because the hallmark of a class action is indeed a named plaintiff, or plaintiffs, asserting rights of other plaintiffs that cannot, or choose not to, assert those rights alone.[96] However, this argument exaggerates the similarities between the vesting of the right to bring a mineral royalty lawsuit in Louisiana to the vesting of other claims that are traditionally brought as a class action.[97] In other words, for "traditional" mass claims, each plaintiff's right of action rises with the defendant's tortious action or breach of contract without requirements similar to article 137 before the right to bring the claim rises. For example, if consumers bring a traditional tort or contract class action against a leading electronic developer, there are rarely any statutory impediments to the vesting of each plaintiff's right to sue. Reading article 137 to allow one plaintiff to effectively create another's right of action by merely suggesting they could potentially make up a class with a common claim leads to an absurd result outside the purpose of article 137.

Moreover, neither Rule 23, nor its Louisiana Code of Civil Procedure analogue, requires plaintiffs to give notice to defendants as a prerequisite to filing a class action.[98] Rather, article 137 provides that prerequisite because it triggers a plaintiff's substantive right to bring a mineral royalty lawsuit, and Federal Rule 23 and Louisiana Code of Civil Procedure article 591 provide the mechanism through which the Louisiana-granted right may be enforced as a class action.[99] While a mineral lessee might engage in

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94. *See* Standard Fire Ins. Co. v. Knowles, 133 S.Ct. 1345, 1349 (2013) ("[A] plaintiff who files a proposed class action cannot legally bind members of the proposed class before the class is certified.") (internal citations omitted). This notion would lead mineral lessors to believe that the class representatives cannot act on behalf of other mineral lessors prior to litigation, which includes giving article 137 notice.

95. *See* discussion *supra* Parts II, II.B.

96. In essence, the "notice" would be filing a lawsuit, which effectively says, "I am suing you, and all these other people might have the same claim as me." However, this is not how article 137's framework is designed or intended to operate.

97. For example, a mass tort or mass breach of contract.

98. FED. R. CIV. P. 23 *accord* LA. CODE CIV. PROC. ANN. art. 591 (2013).

99. *See, e.g.*, Andry v. Murphy Oil, U.S.A., Inc., 710 So. 2d 1126, 1128-29 (La. App. 1 Cir. 1998) ("A class action is no more than a procedural device; it confers no

a policy to not pay its lessors, and thus be a prime circumstance for a class action,[100] this wrongful act differs from a mass tort or mass contractual breach that can be brought as a class action because such actions do not require the plaintiffs to give the defendants notice prior to receiving the right to sue.[101] However, article 137 operates to require potential plaintiffs to give potential defendant lessees pre-litigation notice, which allows the lessee to investigate and/or settle the claim, before the right to sue develops.

Finally, the doctrine of vicarious exhaustion does not apply by analogy to article 137 notice. Vicarious exhaustion allows a class representative who properly exhausted his administrative remedies prior to filing a lawsuit to pursue a class action on behalf of other class plaintiffs who have not exhausted administrative remedies.[102] If vicarious exhaustion is extended to article 137 notice, then a class representative who effected article 137 notice may be able to pursue a mineral royalty class action on behalf of unnamed plaintiffs who did not give notice.

Although it seems article 137 may be similar to an exhaustion requirement because it requires a plaintiff to satisfy a requirement before filing a lawsuit, article 137 notice differs from an exhaustion requirement because the rationales and policies underlying the doctrine of exhaustion do not apply to article 137.[103] Unlike cases that implicate Title VII, the Social Security Act, or other laws that require exhaustion of administrative remedies, article 137 does not have an administrative process that must be respected in order for

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substantive rights."); Deposit Guaranty Nat'l Bank v. Roper, 445 U.S. 326, 332 (1980) ("[T]he right of a litigant to employ Rule 23 is a procedural right only, ancillary to the litigation of substantive claims.").

100. *See* FED. R. CIV. PRO. 23 *and* LA. CODE CIV. PRO. ANN. art. 591 (2013).

101. The uniquely civil law concept of placing the obligor in default before having the right to obtain contractual breach damages does not bar a class action for breach of contract because filing a lawsuit is the same as putting an obligor in default. SAUL LITVINOFF, OBLIGATIONS § 1.11, in 6 LOUISIANA CIVIL LAW TREATISE 220 (2d ed. 2001). There is no such requirement at common law. Article 137's requirements are more stringent than the traditional method of putting the obligor in default.

102. Elizabeth S. Hess, *Administrative Exhaustion and Class Actions: Rules, rights, Requirements, Remedies, and the Prison Litigation Reform Act Issue Resolved*, U. CHI. LEGAL F. 773, 784 (2003) (citing Albemarle Paper Co. v. Moody, 422 U.S. 405, 414 n. 8 (1975)). Certain federal statutes, like Title VII of the Civil Rights Act, require plaintiffs to first bring their claim through an appointed federal agency before suing in court. This is called an exhaustion requirement. *Albamarle*, and many other cases, stand for the proposition that exhaustion for one class plaintiff meets the exhaustion requirement for the other plaintiffs.

103. *Id*. Among those rationales are judicial efficiency and respecting the administrative scheme.

the parties and the judicial system to benefit and to promote the interests of justice.[104] Rather, the purpose of article 137 is to delay the creation of a right of action to promote the policy goal of pre-litigation settlement. However, with Title VII, the Social Security Act, and other laws that require administrative exhaustion, the right is present but must be tested via an administrative method before troubling the court. Thus, article 137 is a statutory prerequisite to a right to sue, rather than an exhaustion requirement.

Further, even if article 137 were an exhaustion requirement, the doctrine of vicarious exhaustion has been refused in cases under the Federal Tort Claims Act (FTCA), where plaintiffs are required to file an administrative claim prior to suing in federal court.[105] Although one such case allowed those class plaintiffs who satisfied the administrative prerequisite to proceed with the class, those who failed to exhaust were dismissed from the potential class.[106] The court reasoned that "the purpose and the language of the statute requires claimants to have separately and individually satisfied all . . . requirements . . . ."[107] In this way, the FTCA operates in the same way as article 137.[108] The court further reasoned that the exhaustion requirement was intended to "improve and expedite disposition of . . . claims against the [defendant] by establishing a system of pre[-]litigation settlement, to enable consideration of claims by the agency having the best information concerning the incident, and to ease court congestion and avoid unnecessary litigation."[109] Promoting pre-litigation settlement and avoiding unnecessary litigation are exactly

104. *Id.* (citing Weinburger v. Salfi, 422 U.S. 749, 765 (1975) ("Exhaustion is generally required as a matter of preventing premature interference with agency processes, so that the agency may function efficiently . . . to afford the parties and the courts the benefit of its experience and expertise, and to compile a record which is adequate for judicial review.")).

105. *See, e.g.*, Lunsford v. United States, 570 F.2d 221, 224 (8th Cir. 1977). However, if the named plaintiffs can show that they have the authority to act on behalf of the unnamed plaintiffs, the requirement would be satisfied. In *Lunsford*, the court found it was not because the named plaintiffs failed to demonstrate that they had authority to settle on behalf of the unnamed plaintiffs. *Id*. at 225-226. Undoubtedly, named article 137 plaintiffs would face the same difficulty with a class action.

106. *Id.* The court also noted that many circuits, including the Fifth Circuit, have held that administrative exhaustion is an "absolute prerequisite" to filing a lawsuit under the FTCA. *See, e.g.*, Molinar v. United States 515 F.2d 246, 249 (5th Cir. 1975).

107. *Lunsford*, 570 F.2d at 225 (internal citation omitted). This is similar to the proper interpretation of article 137.

108. *See supra* notes 18 and 62 and accompanying discussion.

109. *Lunsford*, 570 F.2d at 224 (internal citation omitted).

the same policy goals of article 137.[110] Thus, even if article 137 notice can be considered an exhaustion requirement, the fact that article 137 is more analogous to the FTCA than other actions with exhaustion requirements indicates that vicarious exhaustion would still be unavailable.

As the Louisiana federal courts have recognized,[111] the comment to article 137 provides "the total effect"—in other words, the policy—of the mineral royalty notice framework is "to provide a spur to timely payment . . . while giving lessees a reasonable way in which to avoid the harsh remedy of cancellation."[112] Thus, the Louisiana state courts' interpretation of article 137 defeats the purpose of article 137 and its brethren articles.[113] Although the plain language of the statute seems clear at first, the fact that the singular and the plural can be interchanged provides the potential for ambiguity. Continuing along the plain language textual analysis and reading article 137 with the other notice and remedy provisions, the only choice is to construe the plain language of article 137 to mean that each individual lessor must give his own notice. Allowing class notice leads to absurd results because unsatisfactory problems remain, such as (1) to whom the lessee's response is owed; (2) what remedies result from responding to either one, a few, or all of the class plaintiffs; (3) pre-litigation settlement difficulties; and (4) the fact that a lessee has to sift through hundreds of mineral leases to determine how he is going to respond to each. Moreover, a mineral royalty class action cannot be equated to a "traditional" class action, such as a mass tort or contract class action, and the doctrine of vicarious exhaustion cannot apply by analogy to allow for vicarious notice under article 137.

Had the state courts read article 137 with reference to the other articles in the notice and response scheme,[114] they would have found that the plain language approach led only to the conclusion that using "he" in the singular was the appropriate interpretation in order to avoid absurd results,[115] as well as to match article 137's policy.[116]

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110. *See supra* in this Part. Litigation might be unnecessary under Mineral Code articles 137-141 if the investigation revealed that the mineral lessee indeed correctly paid the lessor. This is a tremendous benefit that article 137's pre-litigation process offers.

111. *See supra* notes 18 and 62 and accompanying discussions.

112. LA. REV. STAT. ANN. § 31:137, cmt. (2013).

113. *See supra* note 78 and accompanying discussion.

114. This is required by the Civil Code. *See supra* note 79.

115. *See supra* in this Part.

116. *See* Lewis v. Texaco Exploration & Prod. Co., 698 So. 2d 1001, 1016 (La. App. 1 Cir. 1997) (Parro, J., dissenting). Judge Parro recognized that previous cases required each individual plaintiff to provide notice, even in those cases where there were more than merely two or three plaintiffs. Even though these cases are not the

The fact that the remedy is determined based on the response given by the lessor, the problems that class notice causes to the lessee's giving a response, and the fact that the non-notifying lessors do not have a right to sue should have led the state courts to determine that both the text of the statute and the policy behind it lead to the prohibition of class notice in mineral royalty suits. Therefore, the proper construction of article 137, as it relates to class notice, is that each individual mineral lessor is required to provide his lessee with individual notice.[117]

C. The Proper Construction of Article 137 Potentially Conflicts With Federal Rule 23

As demonstrated in *Williams v. Chesapeake Louisiana, Inc.*, the correct interpretation of article 137, which disallows class notice, presents a potential conflict with Rule 23 of the Federal Rules of Civil Procedure.[118] The proper interpretation of article 137 prohibits class notice,[119] whereas Rule 23 does not require class plaintiffs to give notice to the defendant.[120] Because of possible tension between the Louisiana rule and Rule 23, it is crucial to determine whether article 137's proper interpretation survives a procedural *Erie* doctrine collision analysis in the wake of *Shady Grove*.[121]

IV. THE DEVELOPMENT OF THE PROCEDURAL *ERIE* DOCTRINE

The law surrounding whether federal courts are to apply a state rule that seemingly collides with a Federal Rule endures a tumultuous history to say the least. The doctrine's origins can be traced to *Erie* and, for the time being, culminates with the *Shady Grove* opinion.

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law, as discussed *supra* note 51, they are evidence of the proper construction of article 137.

117. Although irrelevant for the scope of this comment, the Louisiana state courts ought to apply this interpretation of article 137 as well.

118. Williams v. Chesapeake La., Inc., No. 10-1906, 2013 WL 951251, *1, *6 (W.D. La. 2013). *See also supra* Part II.B.

119. *See supra* Part III.B.

120. *Compare* LA. REV. STAT. ANN. § 31:137 (West 2013) *with* FED. R. CIV. P. 23(c)(2). Rule 23(c)(2) merely requires class members to receive knowledge of a class action. Brief research reveals that cases which discuss Rule 23(c)(2) contemplate class representatives giving notice to members *of the same class* in order to maintain a class action in court, which is drastically different than article 137's pre-litigation requirement that potential plaintiffs give notice to potential defendants in order to receive the right to sue in court.

121. Indeed, the *Williams* court diagnosed a conflict and applied the procedural *Erie* doctrine accordingly.

Many scholars consider *Erie Railroad v. Tompkins* to be among the watershed cases in Supreme Court jurisprudence.[122] The *Erie* opinion redefined the federal courts' position in the constitutional structure, particularly focusing on what law federal courts must apply when state law provides the cause of action.[123] *Erie* involved a plaintiff from Pennsylvania suing a railroad company, incorporated and operating out of New York, in diversity for negligence after he was hit by a protruding piece of the train while walking along the tracks.[124] Unlike the common law of Pennsylvania, which placed a duty on railroads only for willful and wanton injury to people walking along their tracks, New York had no rule regarding a railroad's duty to keep the area clear from hazards.[125] Because neither Pennsylvania nor New York had a state statute that determined the railroad's duty, the district court was able to determine the existence of duty on its own accord under the so-called "general law."[126] Thus, the district court ruled that the railroad had a duty of simple negligence to the plaintiff because the court was free to determine the railroad's duty as a matter of the general commercial law, rather than applying Pennsylvania's high negligence standard.[127]

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122. 304 U.S. 64 (1938).

123. *See id.* at 71. Also, the Rules of Decision Act of 1789 required that state law, except where the Constitution, treaties, or statutes of the United States otherwise preempt, be the rules of decision in trials at common law in the federal courts.

124. *Id.* at 69. The plaintiff sued in district court in New York, although being a Pennsylvania citizen and injured in that state. The strategy behind this decision is irrelevant for this comment.

125. *Id.* at 80.

126. *Id.* at 70. The concept of the "general law" developed from *Swift v. Tyson*, which held that federal courts sitting in diversity need not apply the common law of the state as declared by its highest court because of "free[dom] to exercise . . . independent judgment as to what the common law of the state is—or should be" in the absence of state, statutory law on the subject. *Id*. at 71 (summarizing the holding of Swift v. Tyson, 41 U.S. 1 (1842)). This concept allowed federal courts sitting in diversity to make federal common law in areas in which the neither states, nor Congress, has spoken through statutory law, regardless of whether a state's common law spoke on the matter at issue. *See also* Allan Ides, *The Supreme Court and the Law to Be Applied in Diversity Cases*: *A Critical Guide to the Development and Application of the* Erie *Doctrine and Related Problems*, 163 F.R.D. 19, 22 (1995) (noting that, according to the *Swift* Court, the Rules of Decision Act did not require federal courts to follow state common law in diversity cases; rather, they were only bound to follow state statutory law that governs the decision.) [hereinafter Ides].

127. *Erie*, 304 U.S. at 70. The appellate court affirmed the district court's finding that the railroad had a duty to the plaintiff under the general law. Both the district and appellate court refused to consider the applicability of Pennsylvania law because the general law applied.

When the case reached the Supreme Court, Justice Brandeis, writing for the majority, took the opportunity to abolish the *Swift* doctrine and reconfigure the federal court system to its correct place in the constitutional structure.[128] Justice Brandeis found that "no clause in the Constitution purports to confer" the power to either the federal court or Congress to declare substantive rules of common law applicable in a state.[129] Further, echoing the Rules of Decision Act, the Court held that, in "*any* case," the law to be applied in federal courts, except in matters in which federal law preempts, is the law of the state that provides the cause of action.[130] Justice Brandeis concluded by saying that the *Swift* doctrine "invaded rights which . . . are reserved by the Constitution to the several states" and adopted Justice Holmes' noteworthy *Black & White Taxicab Co. v. Brown & Yellow Taxicab Co.* dissent, claiming "'the voice adopted by the State as its own (whether it be of its Legislature or of its Supreme Court) should utter the last word.'"[131]

Because of *Erie* and the enactment of the Federal Rules of Civil Procedure, two types of *Erie* doctrine cases developed over the decades: (1) cases that involved conflicts with state law and federal common law and (2) cases that involved conflicts between state rules and the Federal Rules of Civil Procedure.[132] Although *Erie* clarified that the federal courts must apply the law of the state that gives rise to the lawsuit, it was unclear whether a federal court must employ the *Erie* doctrine when a state rule collided with the newly enacted Federal Rules of Civil Procedure.[133] The Federal Rules of Civil Procedure seek to provide a uniform system of procedural rules for the federal courts, and the Rules Enabling Act (REA) delegated Congress' Article III power to create and administer rules for the federal courts to the Supreme Court.[134] However, this

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128. Ides, *supra* note 126 at 24–26, provides a more in-depth discussion of Justice Brandeis' denouncement of the *Swift* doctrine than is warranted in this comment.

129. *Erie*, 304 U.S. at 78.

130. *Id.* (emphasis added).

131. *Id.* at 79 (quoting Black & White Taxicab Co. v. Brown & Yellow Taxicab Co., 276 U.S. 518, 532–36 (1928) (Holmes, J., dissenting)).

132. *Compare* Byrd v. Blue Ridge Rural Elec. Coop., Inc., 356 U.S. 529 (1958) *with* Sibbach v. Wilson & Co., 312 U.S. 1 (1941).

133. *See* Ides, *supra* note 126, at 29 ("Of course the *Erie* decision had no direct bearing on the legitimacy of the federal rules . . . Congress, pursuant to Articles I and III and the necessary and proper clause, has ample power to provide rules of procedure for federal courts.").

134. U.S. CONST. art. III, § 1 ("The judicial power of the United States, shall be vested in one Supreme Court, and in such inferior courts *as the Congress . . . may establish*." (emphasis added)); Sibbach v. Wilson & Co., Inc., 312 U.S. 1, 9-10 (1941); Ides, *supra* note 126, at 29.

delegation of power comes with the caveat that the Federal Rules may not "abridge, enlarge or modify any substantive right."[135] This second type of *Erie* doctrine cases developed the "procedural *Erie* doctrine."

The first post-*Erie* Supreme Court case to tackle a collision problem was *Sibbach v. Wilson & Co., Inc*.[136] In *Sibbach*, the plaintiff refused to submit to a physical examination, supporting this refusal with a state rule that prohibited compulsion of a physical examination; however, Federal Rule 35 permits compulsion of physical examinations in federal court cases.[137] In holding that Rule 35 applied, the Court reasoned that if the "rule really regulates procedure," then the Federal Rule is within the ambit of the Court's delegated powers under the REA and must apply because of the Constitution's Supremacy Clause.[138] Because of this reasoning, the first collision analysis necessarily assessed whether the Federal Rule that conflicted with the state rule was "procedural," rather than "substantive," in a way that would alter a substantive right, which would violate the REA.[139] If the Federal Rule indeed "really regulated procedure," then it would apply in the face of a conflicting state rule.

Then, in 1965, the Supreme Court's *Hanna v. Plumer* decision applied the *Sibbach* test with crucial nuances, establishing the modern framework for analyzing potential conflicts between state rules and the Federal Rules of Civil Procedure.[140] In *Hanna*, the plaintiff completed domiciliary service upon the executor of the defendant's estate pursuant to Rule 4; however, Rule 4 did not mirror the state rule, which required personal service on the executor.[141] In holding that Rule 4 controlled, the *Hanna* court first found the REA requires a contrary state law to yield to a Federal Rule if the Federal Rule "'really regulates procedure'" and does not violate the REA's state substantive rights protection.[142] Next, and most important for this comment, *Hanna* recognized that *Erie* did not "command . . . displacement of a Federal Rule," but rather required an analysis into whether the Federal Rule was even broad

135. 28 U.S.C.A. § 2072(b) (West 2014).
136. 312 U.S. 1 (1941).
137. *Id.* at 6–7. Therefore, the Court had to determine whether the state rule or Rule 35 applied to this diversity case in federal court.
138. *Id.* at 16.
139. *Id.* at 15.
140. 380 U.S. 460, 463 (1965) (citing *Sibbach*, 312 U.S. at 14). *Sibbach*'s test is referred to as the "really regulates procedure" test.
141. *Id.* at 461–62.
142. *Id.* at 464–65 (citing *Sibbach*, 312 U.S. at 14).

enough to cover the point in dispute.[143] *Hanna* is an important case because it also provides the modern analysis for resolving conflicts between state law and federal law.[144]

In *Walker v. Armco Steel Co*.,[145] a unanimous Supreme Court understood that the *Hanna* test was premised on a direct collision between a state rule and federal rule, and the state rule applied if there was no collision.[146] *Walker* involved a conflict between a state rule, which deemed an action "commenced" when service was effectuated, and Federal Rule 3, which commences the action when suit is filed.[147] Finding no collision between the state rule and Rule 3 because both could coexist, the Court held that the state rule determined when the action commenced.[148]

Decades of procedural *Erie* jurisprudence reached a climax in *Shady Grove.* In this decision, the Supreme Court was unable to reach a majority, leaving courts, such as the district court in *Williams v. Chesapeake*, to use Justice Stevens' analysis by virtue of the *Marks* rule.[149] To understand how substantial the rift among the

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143. *Id.* at 470 (citing Palmer v. Hoffman, 318 U.S. 109, 117 (1953)). In *Palmer*, a unanimous Supreme Court completely avoided a conflict by reading Rule 8(c) to not cover the same issue as a state rule. *Palmer* involved a dispute over which party bore the burden of proving contributory negligence. The plaintiff argued that Rule 8(c) makes contributory negligence an affirmative defense that the defendant must prove. Rejecting this argument, the Court held that *Erie* required application of state burden of proof law since Rule 8(c) "covers only the manner of pleading," not the burden of proof.

144. According to Ides, *supra* note 126, at 74–87, the *Hanna* framework functions as follows: (1) Determine whether a federal statute or state statute applies; (2) If the Constitution, a federal statute, or treaty applies, then the Supremacy Clause operates to make the federal law function; (3) Determine whether there is a collision between the state rule and Federal Rule, and apply the Federal Rule if the REA is not violated; (4) If no Federal Rule applies, apply the "outcome determinative" test, which analyzes whether failing to apply a state rule in federal court changes the outcome of the case merely because it is brought in federal court over state court. Application of the test should keep in mind *Erie*'s twin aims of preventing forum shopping and keeping the results the same in federal court as it would be in state court. This comment focuses on step 3.

145. 446 U.S. 740 (1980).

146. *Id.* at 749. *See also* Burlington Northern R.R. Co. v. Woods, 480 U.S. 1, 4–5 (1987), which was a companion case to *Walker* ("The initial step [in analyzing whether a state rule and Federal Rule collide] is to determine whether, when fairly construed, the scope of [the] Federal Rule . . . is 'sufficiently broad to cause a 'direct collision' with the state law or, implicitly, to 'control the issue' before the court, thereby leaving no room for the operation of that law.").

147. *Walker*, 466 U.S. at 743.

148. *Id.* at 750–53. The Court also found Rule 3 gives "no indication that the Rule was intended to toll a state statute of limitations."

149. *See supra* note 68. *See also* Marks v. United States, 430 U.S. 188, 193 (1977) ("When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed

Shady Grove Justices really was, it is essential to acknowledge how much the plurality deviated from the lower courts. Moreover, *Shady Grove* failed to make any sense of the inconsistent approaches to determine whether there is a collision between a state rule and a Federal Rule.[150]

Shady Grove involved a group of doctors who sued Allstate after the insurer failed to reimburse them for medical services rendered to its insureds.[151] Allstate objected to removal to federal court as a class action under the Class Action Fairness Act[152] because a New York statute precluded class actions for claims with statutory damages, which the *Shady Grove* doctors' claim involved.[153] The New York rule created tension with Federal Rule 23, which governs class actions and does not have such a limitation; instead providing, Rule 23 stipulates prerequisites to filing and maintaining a class action in federal court.[154]

Both the district court and the appellate court decided that New York's rule applied, finding that the legislative purpose of § 901(b) does not lead to the conclusion that the New York rule collides with Rule 23.[155] The Second Circuit, in finding that New York's rule

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as that position taken by those Members who concurred in the judgments on the narrowest grounds . . .'") (internal citation omitted).

150. *See* Adam N. Steinman, *Our Class Action Federalism*: Erie *and the Rules Enabling Act After* Shady Grove, 86 NOTRE DAME L. REV. 1131, 1135–36 (2011) (noting—and providing examples—that the Supreme Court has used "an array" of different tests to articulate the standard for determining if there is an unavoidable collision between a state rule and Federal Rule) [hereinafter Steinman]. Resolving this issue is outside the scope of this comment.

151. Shady Grove Orthopedic Assoc., P.A. v. Allstate Ins. Co., 559 U.S. 393, 397 (2010). The *Shady Grove* doctors added others who Allstate allegedly failed to pay and made it a class action.

152. *See* 28 U.S.C.A. § 1332(d)(2) (West 2014) (providing minimal diversity plus $5 million amount in controversy federal jurisdiction requirements in order to promote removal of state class action claims to federal court).

153. *Shady Grove*, 559 U.S. at 397. *See also* N.Y. C.P.L.R. § 901(b) (2013) ("[If] a statute creating or imposing a penalty, or a minimum measure of recovery specifically authorizes the recovery thereof in a class action, an action to recover a penalty, or minimum measure of recovery created or imposed by statute *may not be maintained as a class action*." (emphasis added)).

154. *Id.* at 396. Also, *compare* N.Y. C.P.L.R. § 901(b) (2013) *with* FED. R. CIV. P. 23.

155. Shady Grove Orthopedic Assoc., P.A. v. Allstate Ins. Co., 466 F.Supp.2d 467, 472 (E.D. N.Y. 2006) ("This [statute] was 'designed to discourage massive class actions for statutory violations where it would be difficult to identify the members of the class and where recovery of the statutory minimum by each member results in a 'annihilatory punishment.'"). *See also* Shady Grove Orthopedic Assoc., P.A. v. Allstate Ins. Co., 549 F.3d 137, 143 (2d Cir. 2008) ("Every district court to

applied because it was "no analogue" to Rule 23,[156] employed the collision test from *Burlington Northern* and *Walker*,[157] but prudently indicated that the "Federal Rules should be given their plain meaning."[158] Conducting this analysis, the Second Circuit found that: (1) Rule 23, plainly read, is "not sufficiently broad" to cause a direct collision with a plain reading of § 901(b),[159] (2) allowing the plaintiffs to pursue this action as a class in federal court would "circumvent" New York's "state policy" to make the class action device unavailable in suits involving statutory penalties because the incentivizing element of the class action device was not present,[160] and (3) application of the New York rule does not threaten any essential characteristic of the federal court system.[161]

When the Supreme Court decided *Shady Grove*, the lower courts' prudent reasoning only remained undisturbed inside Justice Ginsburg's dissenting opinion. The Scalia plurality rejected the lower courts' proper application of procedural *Erie* doctrine, whereas Justice Stevens believed that, while Ginsburg's dissent and the lower courts' framework was correct, it was misapplied. Therefore, *Shady Grove* produced a plurality decision that held that Rule 23 applied to the case over a New York rule, but no particular analysis was able to carry the day as binding precedent for certain guidance.[162]

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consider this question in any detail has concluded that there is no conflict. We agree.").

156. *Shady Grove*, 549 F.3d at 143.

157. *Id.* at 142 ("In analyzing whether a state rule conflicts with a Federal Rule of Civil Procedure, we must "determine whether, when fairly construed, the scope of [the Federal Rule] is 'sufficiently broad' to cause a 'direct collision' with the state law or, implicitly, to 'control the issue' before the court, thereby leaving no room for the operation of that law." (internal citations omitted)). *See also supra* note 146 and accompanying discussion.

158. *Id.* (internal citation omitted).

159. *Id.* at 143 ("Rule 23 does not control the issue to which substantive causes of action may be brought as class actions or which remedies may be sought by class action plaintiffs.").

160. *Id.* at 144–45 ("[Precluding class actions in cases that impose statutory damages] makes sense, given that class actions are designed in large part to incentivize plaintiffs to sue when the economic benefit would otherwise be too small, particularly when taking into account the court costs and attorneys' fees typically incurred.").

161. *Id.* at 145. Although "the *Erie* doctrine does not require a federal court to apply a state rule where it would pose a threat to '[a]n essential characteristic of [the federal court] system,'" the Second Circuit found no reason to believe the "availability of a class action device in all circumstances is an 'essential characteristic' of the federal court system, particularly where the very cause of action that Shady Grove seeks to assert is a creature of New York state statute."

162. Moreover, because Justice Stevens has since retired from the Court and our lack of knowledge of how Justice Kagan will stand on this issue, we are still

The *Shady Grove* Court split over three issues: (1) whether § 901(b) and Rule 23 collided, (2) whether federal courts ought to diagnose collisions between state rules and the Federal Rules of Civil Procedure with "sensitivity to state interests," and (3) how to determine whether or not a Federal Rule falls within the ambit of the REA's authorization.[163] Writing for a plurality, Justice Scalia applied *Burlington Northern*'s collision test that asked whether the Federal Rule controls the question in dispute.[164] Justice Scalia made quick work of the initial collision analysis, claiming that a plain reading of Rule 23 "creates a categorical rule entitling a plaintiff whose suit meets the specified criteria to pursue his claim as a class action."[165] Because of this "categorical rule," and the fact that § 901(b) "answer[s] the same question," it cannot apply in diversity suits unless Rule 23 exceeds the REA's authorization.[166] In finding a direct collision, Justice Scalia found the statute's clear text determines whether there is a collision with the Federal Rule.[167] Since he found a collision existed, Justice Scalia proceeded to the next part of *Hanna*'s analysis,[168] which assesses whether the Federal Rule is within the REA's authorization.[169] Justice Scalia elected to strictly apply *Sibbach*'s "really regulates procedure" test to determine that Rule 23 governs the manner and the means by which litigants' rights are enforced, which does not violate the REA's prohibition on substantive rights infringement.[170] Therefore, Justice Scalia found Rule 23 to apply over § 901(b).

"left hanging" on what the proper analysis is or should be. *See also* Steinman, *supra* note 150 (noting the different collision analyses before *Shady Grove*). The fractured plurality *Shady Grove* decision certainly failed to sort this issue out. This comment will not opine on which Justice's opinion was proper.

163. Although this comment does not directly consider issues 2 and 3, Professor Margaret Thomas offers interesting insight on them. Margaret S. Thomas, *Constraining the Federal Rules of Civil Procedure Through the Federalism Canons of Statutory Interpretation*, 16 N.Y.U. J. LEGIS & PUB. POL'Y 187 (2013).

164. Shady Grove Orthopedic Assoc., P.A. v. Allstate Ins. Co., 559 U.S. 393, 398 (2010) (citing Burlington Northern R.R. Co. v. Woods, 480 U.S. 1, 4–5 (1987)).

165. *Shady Grove*, 559 U.S. at 398.

166. *Id.* at 399. Justice Scalia found that § 901(b) answered the question of what actions may be brought and sustained as class actions in federal court, which was exactly what Rule 23 answers.

167. *Id*. at 403.

168. *See* Ides *supra* note 128, at 74–87. The applicability of the *Hanna* framework is one of the only things the *Shady Grove* Court unanimously agreed upon.

169. *Shady Grove*, 559 U.S. at 406 ("We must therefore confront head-on whether Rule 23 falls within the statutory authorization.").

170. *Id.* at 407.

Justice Stevens, while agreeing with the plurality's result, took a different route in finding that Rule 23 controls over § 901(b).[171] To determine whether a collision between § 901(b) and Rule 23 existed, Justice Stevens' inquiry opted to apply a blend of *Burlington Northern*'s "leaves no room for the operation of [state] law" test and *Walker*'s acceptance of coexisting state rule and Federal Rule, so long as a plain reading of both rules aloows for such coexistence.[172] Unlike Justice Scalia, Justice Stevens believed that a Federal Rule violates the REA if the Federal Rule displaces a state rule conferring a "state right or remedy that . . . functions to define the scope of the state-created right[s]."[173] Notwithstanding his agreement with Justice Ginsburg on many issues, Justice Stevens found that Rule 23 applies whenever a federal court is asked to certify a class action.[174] He also did not see enough proof of substantive, state policy goals or the conferring of a right in finding that applying Rule 23 in this case would overcome § 901(b) and violate the REA.[175]

Justice Ginsburg, with three other justices, dissented and applied the same analysis and reached the same conclusion as the district court and the Second Circuit.[176] Her analysis centered around one crucial question: "Is this conflict really necessary?"[177] Justice Ginsburg recounted the legislative history of § 901(b), which she concluded successfully demonstrated New York's purpose in passing § 901(b) to preclude class actions in suits with statutory damages to "prevent the exorbitant inflation of penalties [through the class action device]—remedies the New York Legislature created with individual suits in mind."[178] In other words, New York sought to enforce a policy of restricting particular lawsuits to individual plaintiffs, rather than classes of plaintiffs, in order to rescue particular defendants from paying out massive class action damages. Therefore, Justice Ginsburg found that "Rule 23 describes a method of enforcing a [class action] claim for relief, while §

171. *Id.* at 416 (Stevens, J., concurring).
172. *Id.* at 421 (Stevens, J., concurring).
173. *Id.* at 423 (Stevens, J., concurring).
174. *Id.* at 429–30 (Stevens, J., concurring). On this crucial point, Justice Stevens agreed with Justice Scalia.
175. *Shady Grove*, 559 U.S. at 432–33 (Stevens, J., concurring) ("It is . . . hard to see how § 901(b) . . . serves the function of defining New York's rights or remedies . . . The legislative history, moreover, does not clearly describe a judgment that § 901(b) would operate as a limitation on New York's statutory damages." Justice Stevens' perceived lack of legislative judgment for § 901(b) to be a right or remedy under New York law proved to be a deciding factor in the *Shady Grove* decision).
176. *See supra* note 1555 and accompanying discussion.
177. *Shady Grove*, 559 U.S. at 437 (Ginsburg, J., dissenting).
178. *Id.* at 445 (Ginsburg, J., dissenting).

901(b) defines the dimensions of the claim itself."[179] In the lack of a collision, § 901(b) should have applied.

V. ARTICLE 137 AND FEDERAL RULE 23 DO NOT COLLIDE

Clearly, *Shady Grove*'s fractured opinion thrust a wrench into applying *Hanna*'s initial collision inquiry.[180] Luckily, for the purposes of the sustainability of article 137's preclusion of class notice, the *Shady Grove* opinion does not matter. While the Justices disagreed on how to apply the collision analysis, all would certainly agree with the proposition that a rule that governs pre-litigation behavior and a rule that governs the requirements for a class action do not collide.[181] Notwithstanding the Justices' differing opinions regarding the application of the initial collision inquiry, all agreed that *Hanna*, *Walker*, and *Burlington Northern*'s framework is the proper analysis.[182] Thus, the only relevant issue left for this comment is to demonstrate that article 137 and Federal Rule 23 in no way collide because article 137 is pre-litigation and Rule 23 is contemporaneous with litigation.

Article 137 is a pre-litigation rule that prevents a right of action from developing until it is satisfied, whereas Rule 23 enumerates the requirements to maintain a class action in a federal court.[183] Moreover, § 901(b) precludes certain claims from being brought as class actions even though the plaintiffs have a right to bring the claim,[184] whereas article 137 restricts class actions only to those plaintiffs who give article 137 notice and trigger their right to sue.[185] No right of action is present and vicarious exhaustion does not apply

179. *Id.* at 447 (Ginsburg, J., dissenting). *See also id*. at 446 (Ginsburg, J., dissenting) ("The Court, I am convinced, finds conflict where none is necessary. Mindful of the history behind § 901(b)'s enactment, the thrust of our precedent, and the substantive-rights limitation in the Rules Enabling Act, I conclude, as did the Second Circuit and every District Court to have considered the question in detail, that Rule 23 does not collide with § 901(b).").

180. Moreover, Justice Stevens has since retired from the Supreme Court, and we have yet to discover Justice Kagan's stance on this issue. This raises questions as to the viability of *Shady Grove*'s take on the procedural *Erie* doctrine.

181. *See supra* Part IV.

182. *See id*.

183. This avoids falling into Justice Scalia's "categorical rule" trap, which Justice Stevens agreed with, and would certainly satisfy Justice Ginsburg. Moreover, even if there was a collision, it is arguable that article 137 confers a Louisiana-created right, and thus operates over Rule 23 under Justice Stevens' analysis. *See id.*

184. *See* N.Y. C.P.L.R. § 901(b) (2013).

185. *See supra* Part III.B.

by analogy to allow class representatives who actually gave notice to satisfy the requirement for the unnamed plaintiffs who did not.[186]

Moreover, article 137 avoids the pitfalls that § 901(b) fell into with Justice Scalia's and Stevens' opinions because, whereas § 901(b) specifically precludes already-vested claims from being brought as a class action under New York law,[187] article 137 imposes no such limit to class actions. Instead, article 137's proper interpretation provides a requirement that prevents a mineral royalty claim from vesting in order to promote pre-litigation settlement and allow mineral lessees to conduct a fair investigation into the lessor's complaints without the looming specter of a damaging class action lawsuit.[188]

Article 137 limits class actions in a drastically different way than § 901(b) did in *Shady Grove*. Article 137 does not confer the original right to sue until each plaintiff performs a particular action. It thus follows that a class action cannot be filed on behalf of those who did not satisfy that requirement.[189] On the other hand, § 901(b) restricts class actions even after each plaintiff obtains the right to bring an action under that law. It is this feature of § 901(b), which article 137 does not possess, that brought it within the scope of the plurality's collision finding.[190]

Therefore, unlike the collision that occurred in *Shady Grove*, Rule 23 is not broad enough to cover the pre-litigation activity that article 137 regulates. Because the proper interpretation of article 137 does not fall anywhere near the scope of Rule 23, it must be applied in federal courts.

CONCLUSION

The concepts discussed in this comment compel the conclusion that the proper interpretation of article 137 does not collide with Rule 23 of the Federal Rules of Civil Procedure.[191] Thus, the

186. *See id.*
187. *See* N.Y. C.P.L.R. § 901(b) (2013).
188. *See supra* Part III.B.
189. *See id*. The inability of vicarious exhaustion being a suitable analogy precludes vicarious notice.
190. In other words, Rule 23 is not broad enough to cover the pre-litigation activity that article 137 regulates. *See also* notes 153 and 166 and accompanying discussions. It is beyond the scope of this comment to opine on which *Shady Grove* opinion was correct, including whether § 901(b) indeed collided with Rule 23. It is enough to know that article 137 is nowhere near colliding with Rule 23, unlike § 901(b).
191. It is beyond the scope of this comment to opine on the propriety of employing the class action device in mineral royalty suits when each individual plaintiff must provide article 137 notice.

proper interpretation should apply in Louisiana federal courts. Because of this, mineral royalty class actions are substantially restricted to those class plaintiffs that successfully effectuate article 137 notice.[192]

This comment fills the void the Louisiana Supreme Court left when it declined to answer the Fifth Circuit's certified question of whether article 137 offers class notice. Although this comment provides an interpretation of article 137 that is in line with the tenets of Louisiana statutory construction, potential action of Louisiana's highest court nevertheless remains. Further, the Supreme Court of the United States, especially with the retirement of Justice Stevens and placement of Justice Kagan, could offer authoritative procedural *Erie* doctrine in this post-*Shady Grove* era.[193] However, at this juncture, the proper interpretation of article 137 survives a proper procedural *Erie* analysis, leading to the conclusion that class notice is unavailable in Louisiana federal courts in mineral royalty class actions, which restricts these classes to plaintiffs who successfully effectuate article 137 notice.

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192. *See supra* note 45 and accompanying discussion.

193. Particularly in the realm of the initial collision inquiry, which is the focus of this comment.

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