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Georgia Investment Company v. Norman: The Supreme Court creates a New Form of Class Action for Georgia

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GEORGIA INVESTMENT COMPANY v. NORMAN—THE SUPREME COURT CREATES A NEW FORM OF CLASS ACTION FOR GEORGIA

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INTRODUCTION

The recent decision of the Georgia Supreme Court in *Georgia Investment Co. v. Norman*[1] has raised a number of interesting and difficult questions about the maintenance of class actions in the Georgia courts. The *Norman* decision could have serious ramifications for courts, lawyers and litigants in Georgia, and if its rationale should find acceptance in other jurisdictions the effects could be much broader in scope.

The class action device can be an efficient and relatively inexpensive method for the adjudication of similar claims of a large number of persons in one proceeding. At its best, the class suit can work to the advantage of both plaintiffs and defendants and it can ease the growing problems of judicial administration. Small claimants who might not be able to afford the expense of individual litigation may be able to obtain redress through a class suit. The class action may also serve as an enforcement tool for various statutes. The economic pressures of a large class action may act as a deterrent to other potential defendants. The defendant has the advantage of being able to litigate only once and thus is freed from the problems of a multiplicity of lawsuits. Likewise, the courts may be freed from the administrative difficulties of handling many separate suits.

But at its worst, the class action device can create monumental problems for everyone involved. A class suit with thousands of people can be an expensive administrative nightmare for the courts and the litigants and prove lucrative only to the lawyers who are working on an hourly fee basis. The federal courts have been subjected to so many class actions recently that some judges are becoming increasingly suspicious of the motives of the lawyers for the class and of the validity of many of the claims which are presented.

> Today, however, many claims which simply did not exist have been brought to life by our courts through the judicial act of allowing a class action to be maintained. Although some courts say these claims are

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1. 229 Ga. 160, 190 S.E.2d 48 (1972).

> not brought because plaintiffs believe the potential recovery would be too small to justify the time and expense of litigation, the plain truth is that in many cases Rule 23(b)(3) is being used as a device for the solicitation of litigation. This is clearly an 'undesirable result' which cannot be tolerated.[2]

Judge Edenfield's comments, quoted above, were directed to actions brought under the federal class action rule,[3] which provides specific guidelines for the maintenance of class suits. The *Norman* case, however, presents Georgia courts with the possibility of a multiplicity of class actions without the benefit of a rule nearly as comprehensive as the federal rule. If the federal courts are having problems, then the Georgia courts can certainly be expected to have their share.

The purpose of this article is to examine some of the questions raised by the *Norman* decision and to suggest ways in which the Georgia courts might handle these problems. A number of other states have class action rules similar to the Georgia rule. Hopefully, their courts will take a more careful approach before plunging in as deeply as the Georgia Supreme Court.

CLASS ACTIONS—A BRIEF HISTORY IN THE FEDERAL COURTS AND IN GEORGIA PRACTICE

Class suits had their genesis in English equity practice at least as early as the seventeenth century.[4] The purpose was to handle litigation in which so many persons were interested that joinder was impracticable. The class bill in equity found its way across the Atlantic and was discussed with approval by Justice Storey in his *Commentaries on Equity*.[5] The United States Supreme Court gave its blessings to the equitable class suit almost 120 years ago.

> The rule is well established, that where the parties interested are numerous, and the suit is for an object common to them all, some of the body may maintain a bill on behalf of themselves and of the others; and a bill may also be maintained against a portion of a numerous body of defendants, representing a common interest.[6]

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2. Buford v. American Fin. Co., 333 F. Supp. 1243, 1251 (N.D. Ga. 1971).

3. FED. R. CIV. P. 23.

4. How v. Tenants of Broomsgrove, 1 Vern. 23, 23 Eng. Rep. 277 (1681). Other equity cases of the period also recognized the class suit as a possible alternative to joinder. *See* Brown v. Vermuden, 1 Ch. Cas. 272, 22 Eng. Rep. 796 (1676); Brown v. Booth, 1 Eq. Cas. Abr. 164, 21 Eng. Rep. 960 (1690).

5. For a comprehensive treatment of early class action history and practice *see* Z. CHAFEE, SOME PROBLEMS OF EQUITY (1950) and 1 J. POMEROY, EQUITY JURISPRUDENCE (4th ed. 1918).

6. Smith v. Swormstedt, 57 U.S. (16 How.) 288, 302 (1853). This suit arose from the split of

When the 1938 federal rules were adopted, rule 23 was specifically devoted to class actions. With the merger of law and equity in the federal courts, class suits were then available for both legal and equitable relief.[7]

The 1938 federal rule divided class suits into three categories, which, thanks to Professor Moore, came to be known as "true," "hybrid," and "spurious" class suits.[8] Moore's terminology was based on the nature of the juridical rights asserted by the members of the class and the res judicata effects of a judgment in each of the three categories. Thus in a true class suit the interest of the class members were "joint or common"[9] and the judgment was binding on all members of the class.[10] In a hybrid action the interests of the class members were several, but the object of the suit was to adjudicate claims relating to specific property.[11] The judgment in a hybrid suit was binding only with respect to the common property in question.[12] The spurious class suit was little more than a permissive joinder device. The interests of the class were several, and the members were bound together only by a "common question of law or fact" and a desire for common relief.[13] The binding effect of a spurious suit extended only to the members of the class who were actually before the court.[14]

Criticism of the classification scheme of the 1938 rule was legion.[15] The critics generally found the classifications to be vague and abstract.[16]

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the Methodist Church into northern and southern divisions. Plaintiff, who represented all traveling preachers of the Methodist Church South, sought an accounting of a fund that had previously belonged to the whole church.

7. *See generally* 2 W. BARRON & A. HOLTZOFF, FEDERAL PRACTICE AND PROCEDURE 256 *et seq.* (1961) [hereinafter cited as BARRON & HOLTZOFF].

8. Moore, *Federal Rules of Civil Procedure: Some Problems Raised by The Preliminary Draft*, 25 GEO. L.J. 551, 570 *et seq.* (1937).

9. Orig. Federal Rule 23(a)(1), 28 U.S.C. (1958).

10. 3B J. MOORE, FEDERAL PRACTICE, ¶ 23.08 at 23-2505 *et seq.* [Hereinafter cited as "3B MOORE"]; 2 BARRON & HOLTZOFF § 3562.1, at 266-71.

11. Orig. Federal Rule 23(a)(2), 28 U.S.C. (1958).

12. 3B MOORE, ¶ 23.09 at 23-2571 *et seq.*; 2 BARRON & HOLTZOFF § 562.2, at 272-73.

13. Orig. Federal Rule 23(a)(3), 28 U.S.C. (1958).

14. 3B MOORE, ¶ 23.10 at 23-2601 *et seq.* 2 BARRON & HOLTZOFF § 562.3, at 274-85.

15. Even the praise was damning:

> It may be admitted that the terminology shocks the aesthetic sense and the succession of adjectives before the noun shows the poverty of imagination in choice of terms characteristic of the legal profession. But back of the unedifying nomenclature there is substance. Pentland v. Dravo Corp., 152 F.2d 851, 852 (3d Cir. 1945).

16. *See, e.g.*, Z. CHAFEE, SOME PROBLEMS OF EQUITY, 245-65 (1950); Kalven & Rosenfield, *The Contemporary Function of the Class Suit*, 8 U. CHI. L. REV. 684 (1941); Weinstein, *Revision of Procedure: Some Problems in Class Actions*, 9 BUFFALO L. REV. 433, 470 (1960); Note: *Binding Effect of Class Actions*, 67 HARV. L. REV. 1059 (1954); Advisory Committee's Note to FED. R. CIV. P. 23, 39 F.R.D. 69, 98 *et seq.* (1965) [Hereinafter cited as Advisory Committee's Note].

Courts were often involved in lengthy controversies over classification with the result that the merits of a particular claim were often lost in a procedural morass.[17] Rule 23 was completely rewritten in 1966, and a more pragmatic and functional approach to classification was substituted for the former categories.[18]

In order to maintain a class suit under the new rule, subdivision (a) establishes four general prerequisites: (1) the class must be so numerous that joinder of all members is impracticable;[19] (2) there must be questions of law or fact common to the class; (3) the defenses or claims of the representative parties must be fairly typical of the defenses or claims of the class; and (4) the representatives must be such as will adequately represent the interests of the class.

Once an action meets the general requirements of subdivision (a), it then must also meet the more specific requirements of one of the three classifications of subdivision (b). The classifications of subdivision (b) bear some resemblance to the categories of the former rule, but there are major differences.[20] The new classifications are not based on the nature of the juridical rights asserted by the members of the class, and the res judicata effects of a judgment extend to all class members except those who affirmatively request exclusion from an action maintained under rule 23(b)(3).[21]

Revised rule 23(b)(1) permits a class suit to be maintained where the prosecution of separate actions would result in the danger of: (1) "inconsistent of varying" standards for the members of the class or for the class' opponent, or (2) adjudications which would, in effect, be dispositive of the interests of other class members.

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17. *See, e.g.*, Dickinson v. Burnham, 197 F.2d 973 (2d Cir.), *cert. denied*, 344 U.S. 875 (1952); and the frustrating series of opinions in Deckert v. Independence Shares Corp., 27 F. Supp. 763 (E.D. Pa.), *rev'd*, 108 F.2d 51 (3rd Cir. 1939), *rev'd*, 311 U.S. 282 (1940), *on remand*, 39 F. Supp. 592 (E.D. Pa.), *rev'd sub nom.*, Pennsylvania Co. for Ins. on Lives v. Deckert, 123 F.2d 979 (3rd Cir. 1941).

18. FED. R. CIV. P. 23. For a good and early judicial discussion, *see, e.g.*, Alvarez v. Pan American Life Ins. Co., 375 F.2d 992 (5th Cir.), *cert. denied*, 389 U.S. 827 (1967).

19. Numerosity is a fairly flexible requirement. If a class suit seems to be the most efficient method for the litigation, then even a small group is sufficient. *See, e.g.*, Local 246, Utility Workers v. Southern Cal. Edison Co., 13 FED. RULES SERV. 2d 23a.2, Case 1 (C.D. Cal. 1969)—A class of eight present members and another of two were sufficiently large to maintain a class suit charging sexual discrimination in hiring practices because the classes also included all potential applicants for jobs; Swanson v. American Consumer Indus., Inc., 415 F.2d 1326 (7th Cir. 1969)—A class of forty was sufficiently large where the members of the class were widely scattered and their interests too small to warrant individual actions; Cypress v. Newport News Gen. and Nonsectarian Hosp., 375 F.2d 648 (4th Cir. 1967)—No specific number of persons is necessary for a class.

20. *See* Note, *Proposed Rule 23: Class Actions Reclassified*, 51 VA. L. REV. 629, 670 (1965).

21. FED. R. CIV. P. 23(c)(3).

Rule 23(b)(2) authorizes a class suit when "a party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole." The (b)(2) subdivision was written largely for the benefit of civil rights litigants,[22] but it is not designed exclusively for civil rights cases and may well be used by other class litigants.[23] For example, a group of consumers might file a class suit against a merchant who used standardized fraudulent schemes to cheat or otherwise to mistreat groups of consumers in the same manner.[24]

Finally, rule 23(b)(3) authorizes a class suit where "the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy." Matters to be weighed by the court in determining whether an action is properly maintainable as a class suit under subdivision (b)(3) include: (1) the interests of individual members of the class in prosecuting separate claims, (2) the extent of any other litigation already commenced by or against the class or its members, (3) the desirability of concentrating the litigation in a particular forum, and (4) the problems likely to be incurred in the management of a class action. The court must also direct notice to absentee members of a (b)(3) class to advise them that they will be included in the judgment if they do not affirmatively request exclusion by a certain date and that, if they wish, they can enter an appearance through counsel.[25]

Georgia, following the English lead and that of the United States Supreme Court, also early recognized the utility of the equitable class suit. *Bates v. Houston*,[26] an 1880 decision, involved a dispute over the possession and use of church property. The African Methodist Episcopal Church in Savannah had broken up, and the two sides were arguing over who should have the church property. Not all of the interested parties were able to appear in court for the simple reason that there were too many of them, and the Georgia Supreme Court reiterated the principle that "where numerous parties have a common interest a few may sue representing the whole."[27]

22. Advisory Committee's Note at 104; 2 BARRON & HOLTZOFF § 562, at 81 (Supp. 1969); Cohn, *The New Federal Rules of Civil Procedure*, 54 GEO. L.J. 1204, 1216 (1966).

23. Advisory Committee's Note at 104.

24. Dole, *Consumer Class Actions Under the Uniform Deceptive Trade Practices Act*, 1968 Duke L.J. 1101, 1121.

25. FED. R. CIV. P. 23(c)(2)(A)-(C).

26. 66 Ga. 198 (1880).

27. *Id.* at 202.

Other cases followed the same line as *Bates v. Houston.* The leading one was *The Macon and Birmingham Railroad Co. v. Gibson.*[28] The charter of the railroad company had been amended by the General Assembly to provide that the line should be constructed through the City of Thomaston. The owners of the railroad, however, wanted to skirt Thomaston and build the line through an open area rather than through a built up urban area. The Thomaston citizenry wanted the line to come through the town for economic and commercial reasons, so two of them sued on behalf of all the citizens of Thomaston to enjoin the railroad from building its line out in the country. The supreme court held that the whole community had a common interest in the location of the railroad and that the action could be maintained on behalf of them all by the two representatives.[29] The court specifically noted that it was important that the representatives be such as would be adequate to represent the interests of the whole class. It found that these two gentlemen were adequate.[30] The *Macon Railroad* decision was codified in Ga. Code Ann. § 37-1002 (Rev. 1962) as follows: "Members of a numerous class may be represented by a few of the class in litigation which affects the interests of all."

Although limited to the equity side of the courts, the old Georgia class suit was given liberal treatment in the Georgia courts as indicated by the following passage from a 1938 supreme court decision—the same year that the federal rules were adopted.

> [A] few of the members of an unincorporated association, such as a trade union, may sue in the name or in behalf of all the members, where all by virtue of their membership have a common right or interest in the contract or other subject-matter of the suit. The fact that the individual interests of the plaintiffs may in some respects differ, or that all do not have an interest in all the matters embraced in such an equitable suit, will not, as to individual plaintiffs, render the petition multifarious or subject to attack for misjoinder of parties or causes of action, if each of the plaintiffs has an essential interest common to all, with a common connection and right against the defendant. Equity, taking jurisdiction, will determine all of the matters in the controversy and grant appropriate relief, equitable or legal, so as to do complete justice between the parties.[31]

The Georgia courts, like their federal counterparts, often used the

28. 85 Ga. 1, 11 S.E. 442 (1890).
29. *Id.* at 22-23, 11 S.E. at 446.
30. *Id.* at 24, 11 S.E. at 446.
31. O'Jay Spread Co. v. Hicks, 185 Ga. 507, 512, 195 S.E. 564, 566 (1938).

words "joint" and "common" without really coming to grips with what they meant. The 1907 opinion in *White v. North Georgia Electric Co.*[32] did attempt to make some sense of the meaning of "common" rights, and although it is an old equity case, its rationale should be applicable today. In equity, distinct and separate claims could not be joined in a single action, but where one was asserting a "common" right against many, or many against one, equity would determine the whole matter in one action.[33] The supreme court in the *White* case had to determine whether the plaintiff's bill in equity was "demurrable for multifariousness." (The streamlined modern rules of procedure will never be a match for the colorful language of the courts of Lords Coke and Ellsmere and their descendants.) It stated that a "common right" may refer to (1) a joint interest in a cause of action or, (2) separate interests in the particular subject matter of the suit.[34] As an example of the first category, the court described a suit upon a promissory note payable to several persons instituted by the payees. For the second category, the court gave as an example a suit by several creditors, each with a separate claim, against an insolvent debtor for the purpose or marshalling the assets of the debtor.[35]

With such an understanding of the definition of "common" rights, "joint" rights and "separate" rights as can be gleaned from cases such as *White*, the General Assembly in 1966 adopted the old federal rule with its juridical right classifications as part of the new Civil Practice Act. The Georgia rule is identical to the old federal rule in all respects but one—the "spurious" class action is wholly absent. For whatever reasons, that section simply does not exist in the Georgia CPA, and while one may also question the rationale for adopting the old instead of the new federal rule, the principal question here is whether the *Norman* decision has created a "spurious" action in Georgia anyway—or maybe even a (b)(3) type action.

THE BACKGROUND OF NORMAN

In a routine transaction similar to hundreds that occur every day

32. 128 Ga. 539, 58 S.E. 33 (1907).

33. GA. CODE ANN. § 37-1007 (Rev. 1962).

34. 128 Ga. at 541, 58 S.E. at 33.

35. *Id.* Georgia equity courts also recognized a quite permissive rule of joinder for parties and claims. "There is no misjoinder of parties or of causes of action even if the petition concerns things of a different nature against several defendants whose rights are distinct, if it sets forth one connected interest among them all, centering in the point in issue in the case. Hermann v. Mobley, 172 Ga. 380, 158 S.E. 38 (1931). *See also*, Knox v. Reese, 149 Ga. 379, 100 S.E. 447 (1919); Brown v. Wilcox, 147 Ga. 546, 94 S.E. 993 (1918); and East Atlanta Land Co. v. Mower, 138 Ga. 380, 75 S.E. 418 (1912).

across the country, Nathaniel Norman borrowed $2,000 from a small commercial loan company. He executed a standard form promissory note and gave the loan company a deed to secure debt on certain real estate as security for the loan. Small loan companies have traditionally charged high interest rates and have acquired a somewhat unsavory reputation over the years, a reputation which is not wholly justified. Whatever the morals of charging high rates for the use of money—and our society has always frowned on "money-lenders" and "usurers" as being low characters—the truth is that such loan companies do perform a significant economic function. They make money available to persons who otherwise would not be able to obtain it because of their precarious financial condition. The equities of each individual case of a lender-borrower controversy will vary, but the loan company may not always be the "bad guy." Mr. Norman's loan trnasaction was in most respects very routine and not at all out of the ordinary. The main purpose here is to discuss Mr. Norman's *procedure*, not the merits of his case.

Mr. Norman made a few payments, but he soon filed suit against the lender and asked for various forms of relief. Among his prayers was one that the note and the deed to secure debt both be declared null and void, that he receive back all monies which he had paid and that he be awarded punitive damages. Norman attacked the note and deed as "usurious," as being a "contract of adhesion," and as being violative of the Georgia Industrial Loan Company Act.[36] He claimed that the defendant had been in a superior bargaining position and had been able to impose oppressive terms on him because of this superior position. Most important for the purposes of our discussion here, Norman claimed to represent a class of all customers of the defendant who were similarly situated.

The defendant immediately moved to strike the class action allegations, but the Hall County Superior Court denied the motion. The court of appeals affirmed, and this led to the supreme court's enigmatic and troublesome opinion.

The question presented to the supreme court, as framed by the court itself, was whether the Georgia class action rule "permits class actions, where the rights of the alleged class are not derivative and are not joint rights, but are merely common in that there are common questions of law or fact involved and a common relief is sought."[37] As framed, the question basically is whether the Georgia rule permits a class suit that

36. GA. CODE ANN. ch. 25 (Rev. 1971).
37. 229 Ga. at 161, 190 S.E.2d at 49.

would most properly fit under subdivision (b)(3) of the federal rule. The court answered the question with a unanimious "yes," and, through Justice Nichols, left lawyers, judges and commentators with the following illuminating rationale.

> The character of the right sought to be enforced may be common although the facts may be different as to each member of the alleged class. The rights may be several in that each member of the alleged class is dependent upon a different factual situation to establish his right to prevail, yet they may be of a common character. To hold that a class action would not apply in a case where the right relied upon is of a common character, unless the class of action is also joint, would be to limit class actions to those situations where a permissive joinder is authorized, but a mandatory joinder is not required.[38]

The defendant-appellant sought a rehearing but its motion was denied. The motion for rehearing relied heavily on *Harrison v. Jones*.[39] In that case DeKalb County had refused to turn on the water to the plaintiff's house because the prior owner had left without paying his water bills and plaintiff refused to pay the delinquent bills. The superior court granted a writ of mandamus ordering the county to turn on the water and also enjoined the county from refusing to give water to any other persons who were similarly situated. On appeal the supreme court reversed and as to the class action aspects of the case said,

> The complaint in this case does not qualify as a class action in any particular and for this additional reason the trial judge erred in his rulings extending his findings to all inhabitants of DeKalb County occupying a position similar to the complainant.[40]

Justice Nichols dissented from the decision of the court without opinion.

The original action in *Harrison v. Jones* was not framed as a class suit and there was not any real discussion of the appropriateness of class treatment at the supreme court level. The appellants in *Norman* argued, however, that the court had impliedly, if not expressly, held in *Harrison* that the Georgia statutes did not recognize a "common question" class suit. Despite the brevity of the opinion in *Harrison* and the lack of any citations of authority or analysis, the import of the decision would certainly appear to be that such a class suit was not, at that time, recognized in Georgia. If ever there were a case where class treatment

38. *Id.* at 162, 190 S.E.2d at 50.
39. 226 Ga. 344, 175 S.E.2d 26 (1970).
40. *Id.* at 346, 175 S.E.2d at 28.

might have been appropriate, *Harrison* was certainly it. The action sounded partly in equity and class suits are themselves creatures of equity. The class was clearly defined and limited in size—every person residing in DeKalb County who was denied water by the county solely because the previous owner of his home or the previous tenant in his apartment had failed to pay his water bills. I hesitate to use the key words "joint," "common," or "several," but suffice it to say that all such persons shared a single interest, *i.e.* water. They all had a single problem, *i.e.* the previous occupant had not paid his bills. The legal issues were all the same, and, for the most part, the factual issues were the same.

Interestingly, the *Norman* opinion was written by Justice Nichols, the lone dissenter in *Harrison*. On the motion for a rehearing, the court in an unsigned opinion dismissed *Harrison* as not binding because it conflicted with the CPA.

> The contention is made upon motion for rehearing that the case of *Harrison v. Jones*, 226 Ga. 341 (175 S.E. 2d 26) was overlooked by the court in rendering the opinion in this case. Such case, while a physical precedent, is in conflict with the provisions of the Civil Practice Act, dealt with in the opinion and does not refer to such statutory provisions. Where there is a conflict between a decision of this court and an Act of the General Assembly, the Act controls.[41]

Harrison has, therefore, been effectively overrruled insofar as it related to class actions.

The brief opinion which accompanied the denial of the motion for rehearing went on to sweep aside the second major thrust of the appellant's arguments in three short sentences. The appellant had argued that the *Norman* decision was unclear and inconsistent with the history of the Georgia class action rule and that for those reasons it could wreak havoc with the administration of justice in the Georgia courts. The appellant expressed concern that *Norman* would spawn a host of specious class actions that would present enormous and expensive problems of management to the courts. The supreme court quickly dismissed such concerns and passed the buck to the General Assembly.

> The briefs filed in support of the motion for rehearing in this case also point out that the decision could create havoc with the judicial system by flooding the courts with class actions which could clog the wheels of justice. Assuming that such statements are true, the answer lies with the General Assembly and not with the Courts. The legislation as

41. 229 Ga. at 162, 190 S.E.2d at 50.

> passed by the General Assembly is clear and any other construction would require judicial legislation.[42]

The Orwellian newspeak of the last quoted sentence is where the supreme court and this writer completely part company. I would agree that the legislation passed by the General Assembly is clear in that the Assembly clearly enacted into law the 1938 federal rule *sans* the spurious class action. The Assembly clearly did *not* enact the 1966 federal rule and it clearly and specifically did not enact the old spurious action. What is not clear is what the supreme court decided in the *Norman* decision. In fact, *Norman* is a good example of the problems which arose under the old federal rule with its juridical right classifications and which led to the pragmatic, functional approach of the 1966 rule. The seven justices obviously were not completely sure of the meanings of "joint" or "common" rights, but that is nothing to be ashamed of because they are in distinguished company. Professors Chafee, Kalven, Rosenfeld, Wright, Keefe, Levy and Donovan; Supreme Court Justices Fortas and Douglas;[43] and the advisory committee on the federal rules, just to name a few, all found the old rule with its "joint" and "common" classifications to be confusing and difficult to apply.

If *Norman* had been a federal case, then it most likely would have fallen under the (b)(3) classification of the 1966 rule as raising common questions of law or fact. The basic issue was whether the defendant's standard form contracts were legal. Insofar as the question of legality went to the forms used generally by the defendant, a common question of law was clearly raised. On the other hand, the questions of usury, extra charges and "oppressive" tactics all raised questions that were peculiarly several and not common. Whether a federal court would have found *Norman* to be appropriate for class treatment under the 1966 rule cannot squarely be answered because not enough facts have been divulged fror a reasoned determination to be made. The point of major concern for Georgia courts, Georgia litigants and Georgia lawyers is how are cases like *Norman* to be handled at the trial level without further guidance from the supreme court or from the General Assembly. Five serious questions are immediately apparent:

1. What will be the res judicata effects of decisions in cases following *Norman* on the absentee members of the class?
2. Will absentee members of the class be given the option to exclude

42. *Id.* at 163, 190 S.E.2d at 50-51.

43. *See* their dissenting opinion in Snyder v. Harris, 394 U.S. 332 (1969).

themselves from the class or freely to enter an appearance or intervene in the litigation?
3. Must notice be directed to absentee members of the class? If so, what kind of notice? How will it be sent? Who will pay for it?
4. What will be the effect of the commencement of a *Norman* type class action on relevant statutes of limitation?
5. What will be the guidelines for the management of a large *Norman* type class action at the trial level with respect to such matters as discovery and damage claims?

Neither the *Norman* opinion nor the Georgia rule itself offers any answers to the above questions. There have been very few Georgia class action cases and none of the magnitude of *Norman*. Therefore, it will probably be most helpful to look to the federal courts for guidance. They have had an opportunity to confront a bewildering array of class actions of all sizes, shapes and dimensions, particularly since the passage of the 1966 amendments.

Norman, Res Judicata, Due Process and Notice to Absentees

One of the advantages of a class suit is that it decides an issue involving a number of different people in a single proceeding. Those members of the class who are not actually before the court as parties to the litigation are, as a general rule, bound by the judgment in the case the same as if they had instituted separate lawsuits on their own. If absentee class members were not bound by the judgment, there would be little point in even having a class action. Permissive joinder of parties would accomplish the same results. Indeed, one of the serious shortcomings of the old spurious action of the 1938 federal rule was that it only bound those members actually before the court.

The courts must be careful with class actions that are binding on absentees whose rights are being protected only by those who have proclaimed themselves as "representatives" of the class. The American judicial systems, both federal and state, have always been very concerned with the protection of the "due process" rights of individuals who have some legal grievance. The class action presents the court with the difficulty of trying to insure that these rights are protected vicariously. The response of the federal system has been to require notice to absentees in class actions where the class is not bound together by a close cohesion of interests. The supreme court in *Norman* did not address itself to the question of the res judicata effects of class actions in Georgia, but it did imply that Georgia class actions should be more than simple joinder devices. And, in fact, it wouldn't make much sense to

have a class action that doesn't bind anybody other than the representative parties.

Since notice is inextricably bound up with the due process issues, the next question is whether notice should now be required in Georgia class suits. If notice is required, then a host of other questions still remain about the form of notice, the timing of its issuance, and the allocation of its cost. Once again, it is helpful to look at the federal experience. Subdivision (c)(2) of the federal rule requires that "In any action maintained under subdivision (b)(3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort." The rule goes on to say that the notice will advise each member of the class that he may either exclude himself from the proceedings or that he may make an appearance through counsel. The judgment in a (b)(3) "common question" action is binding upon all members of the class, save those who choose to opt out of the proceedings.

The notice requirement is an attempt to strike a balance between the guarantees of due process and the efficiencies and advantages of the class action. The United States Supreme Court has recognized, at least since *Smith v. Swormstedt*, in 1853,[44] that a representative suit may be binding on absentee members of a class where the parties plaintiff (or, conversely, the parties defendant) provide fair and adequate representation of the interests of the class.

> For convenience, therefore, and to prevent a failure of justice, a court of equity permits a portion of the parties in interest to represent the entire body, and the decree binds all of them the same as if all were before the court. The legal and equitable rights and liabilities of all being before the court by representation, and especially where the subject matter of the suit is common to all, there can be very little danger but that the interest of all will be properly protected and maintained.[45]

Notice to absentees is one way in which competent representation of the interests of the class may be assured, for if absentees in a (b)(3) action believe that their interests are not being protected, they can either exclude themselves or enter an appearance.[46]

The pre-1966 federal rule did not provide for notice to absentees. The

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44. *See* note 6 *supra*.

45. *Smith v. Swormstedt*, 57 U.S. (16 How.) 288, 303 (1853).

46. *See generally* Advisory Committee's Note at 107.

general feeling was that the classification scheme itself provided all the necessary procedural due process safeguards for absentees.[47] The spurious class suit was binding only on those persons who were actually before the court as parties; hence there could be no adverse res judicata effects on absentees. Of course, there might have been absentees who would have liked to join the litigation as parties had they been made aware of it. Persons whose claims were too small to warrant protracted individual litigation but who could have benefitted from joining a class suit may in this manner have been denied an opportunity to litigate. But there was certainly no constitutional requirement that absentees be notified as they were not to be bound by the judgment. In the "true" class suit there was a cohesion of interests that made any member of the class an adequate representative of the interests of the entire class. Likewise, in the "hybrid" class suit, where the judgment was res judicata only with respect to the specific property in question, there was a cohesion of interests with respect to the common property which made notice generally unnecessary.[48]

The modern (b)(3) action is quite different from the classifications of the old rule. The members of the class are joined together only by common questions of law or fact. There may often be a lack of cohesion in the group; the size of the group may be enormous; and in federal cases the members of the group may be spread all over the country or even the world. Unless an absentee affirmatively asks to be excluded from the class, he will be bound by the judgment in the case. Thus, there are compelling reasons for making every effort to protect the interests of absentees.

The advisory committee on the federal rules[49] believed that notice was an absolute prerequisite in a common question class suit because of the Supreme Court's decisions in *Hansberry v. Lee*,[50] and *Mullane v. Central Hanover Bank & Trust Co.*[51]

In *Hansberry* there had been a state court class judgment on the same subject matter as the federal litigation, and the question was whether that judgment was res judicata as to the members of the class in the federal action. The Supreme Court acknowledged that the Constitution might permit a judgment in a class suit to bind absentees.[52] However,

47. *See* 49 B.U.L. REV. 682, 683 (1969).
48. 3B MOORE, ¶¶ 23.10, 23.55.
49. Advisory Committee's Note at 107.
50. 311 U.S. 32 (1940).
51. 339 U.S. 306 (1950); *and see*, Fraser, *Jurisdiction by Necessity—An Analysis of the Mullane Case*, 100 U. PA. L. REV. 305 (1951).
52. 311 U.S. at 42.

the Court determined that the absentees in the state action had not been adequately represented by the parties before the court because the interests of the absentees and of the representatives were not wholly consistent. Because of the lack of adequate representation the Court held that the state class action was not binding on the absentees.[53] The *Hansberry* decision did not specifically hold that notice must be sent to absentees. It only held that a judgment could not be res judicata as to absentees unless those absentees had had the benefits of full due process of law.

The *Mullane* case was not even a class action; rather, it was a proceeding by the trustee of a common trust for an accounting. The issue before the Supreme Court was the constitutionality of a state statute which provided only for notice by publication of a proceeding for a trust accounting. The statute was held to violate the fourteenth amendment in that it did not provide a method for the notification of interested persons who were within the jurisdiction of the court and who were readily identifiable. The Court went on to say that notice by publication might be sufficient in certain instances but only for persons whose whereabouts were unknown or whose interests were conjectural.[54] Under *Mullane*, the requirements of due process can only be met by giving to interested persons notice that is

> reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. The notice must be of such nature as reasonably to convey the required information, and it must afford a reasonable time for those interested to make their appearance (citations omitted).[55]

The combination of *Hansberry* and *Mullane* led the advisory committee to suggest that individual notice to all absentees was necessary in a common question class suit.[56] Subdivision (c)(2) of the rule does not, by its terms, require individual notice and there is dispute among the commentators about whether *Mullane* and *Hansberry* require such notice.[57] Those who argue against making individual notice an absolute constitutional requirement in common question class actions believe that the federal rule contains enough other procedural safeguares to protect the

53. *Id.* at 44, 45.
54. 339 U.S. at 320.
55. *Id.* at 314.
56. Advisory Committee's Note at 107.
57. *See, e.g.*, Note, *Class Actions Under Federal Rule 23(b)(3)—The Notice Requirement*, 29 MD. L. REV. 139 (1969); Comment, *Adequate Representation, Notice and the New Class Action Rule: Effectuating Remedies Provided by the Securities Laws*, 116 U. PA. L. REV. 889 (1968).

interests of absentees either with or without notice.

> . . . The court, consistent with due process, might sanction a rule which did not include any notice requirement, as long as it guaranteed that the interests of the absentees were adequately represented.[58]

In Georgia, the *Norman* decision does not mention notice and the rule does not require it. Is notice, such as that required by subdivision (c)(1) of the federal rule or by the decisions of the Supreme Court in *Hansberry* and *Mullane*, necessary in Georgia class actions? There may be some room for disagreement about the form of notice or the manner in which it should be issued, but there seems to be little doubt that the Georgia Constitution[59] and the case law both require some kind of notice to absentees in a class such as the one in the *Norman* case.

The Georgia courts have consistently held that notice and an opportunity for a hearing are the most fundamental requirements of due process. Without them there is no safeguarding of the private interests of persons who may be affected by the governmental proceeding, be it legislative, administrative or judicial. No specific procedure is guaranteed by the due process clause. It is enough that a person has "reasonable notice and opportunity to be heard and to present his claim or defense, due regard being had to the nature of the proceeding and the character of the rights which may be affected by it."[60] There should be no doubt that a lawsuit affects an interested person's rights in one way or another, and, therefore, any absentee member of a class should be entitled to some sort of notice so that he may determine for himself whether his rights are being adequately protected.

Common sense dictates that notice is necessary in an action like *Norman* for the protection of both the plaintiff class and the defendant and for the administration of the case. The defendant is entitled to know what he is up against in the litigation so that he can plan his defenses. He should know whether the class is made up of fifty or five hundred persons and generally where they are located. The class representative could provide such information without directing notice to absentees, but notice would help to define the class and to give the court itself a

58. Comment, 116 U. PA. L. REV., *supra* note 57 at 911. The author was relying on language from Hansberry v. Lee, 311 U.S. 32.

59. GA. CONST. art. I, ¶III, provides that "No person shall be deprived of life, liberty, or property, except by due process of law." GA. CONST. art. I., ¶ IV, provides that "No person shall be deprived of the right to prosecute or defend his own cause in any of the courts of this State, in person, by attorney, or both."

60. *See, e.g.*, Zorn v. Walker, 206 Ga. 181, 56 S.E.2d 511 (1949); City of Macon v. Benson, 175 Ga. 502, 508, 166 S.E.26, 29 (1932).

clearer understanding of the exact nature of the class. Some of the absentees might not agree with the representative's definition of the class and might feel that they should be excluded or that the class should be enlarged. If the *Norman* case does, in fact, allow common question class actions, then if the judgment in such an action is to be binding on absentee members of the class, it is imperative that they be given some notice or some opportunity to be heard.

If notice is to be directed to absentee members of a class, several questions immediately present themselves. What sort of notice is required? Who should bear the administrative burden of providing the notice? How should the costs of notice be allocated? When should the notice be given? Is notice necessary in all class actions or just those which are similar to the *Norman* case?

The federal courts have been struggling with the notice problem for about six years now, and the case law has developed enough so that it is possible to see some guidelines which can be followed and applied. The federal courts have dealt with some enormous antitrust and securities fraud cases, and their experience should certainly be useful to Georgia courts which may be faced with similar problems.

The classic case which has caught the attention of all the commentators is *Eisen v. Carlisle & Jacquelin*,[61] which has been considered in considerable detail by the Court of Appeals for the Second Circuit and by the United States District Court for the Southern District of New York.[62] Mr. Eisen brought an action in 1966 against the New York Stock Exchange and certain brokerage houses on behalf of himself and all purchasers of "odd lots" of securities during the years 1962-1966 for alleged antitrust violations. The class was composed of several millions of persons who resided in every state in the union and in "most of the non-communist countries in the world."[63] Some two million members of the class were readily identifiable from the records of certain of the

61. In its most recent posture, 54 F.R.D. 565 (S.D.N.Y. 1972), but that decision is now on appeal to the Second Circuit.

62. When the case was first brought, the district court decided that a class suit was not maintainable. 41 F.R.D. 147 (S.D.N.Y. 1966). The Second Circuit then held that the denial of a class action was appealable, 370 F.2d 119 (2d Cir. 1966), *cert. denied* 386 U.S. 1035 (1967). Later the Second Circuit, indicating that a class suit might be appropriate, sent the case back to the district court for further findings on the class action question. 391 F.2d 555 (2d Cir. 1968). On remand, the district court requested further information from the parties. 50 F.R.D. 471 (S.D.N.Y. 1970). The court then found a class suit to be maintainable and decided on the notice discussed in the body of the paper. 52 F.R.D. 253 (S.D.N.Y. 1971). After a preliminary hearing, the court allocated the costs of notice. 54 F.R.D. 565 (S.D.N.Y. 1972).

63. 52 F.R.D. at 258.

brokerage firms.[64] Sending notice to each of them by first class mail would have been prohibitively expensive at the rate of ten cents per letter. Mr. Eisen's claim was only for seventy dollars and the claims of other members of the class were also comparatively small. For such small claims it hardly made economic sense to spend $200,000 on individual notice. The court's response was an interesting and novel procedure.

1. The plaintiff offered to send individual notice to all member firms of the New York Stock Exchange and to all commercial banks with large trust departments. The court agreed that this might give at least indirect notice to a large number of class members.

2. The court further ordered individual notice to be mailed to the two thousand or so class members who had ten or more transactions during the relevant period, and to five thousand other class members selected at random.

3. Finally, the court directed that a one-fourth page advertisement should be run once a month for two months in the national edition of the *Wall Street Journal*, and in the financial sections of the *New York Times*, the *San Francisco Chronicle*, the *San Francisco Examiner* and the *Los Angeles Times*.[65]

The court placed most of the administrative burden of sending the notice on the plaintiff. Despite the attempts of the court to lessen the costs of the notice, it still presented a bill of over $20,000, and the court had to make some determination about payment. This presented a dilemma.

> If the expense of notice is placed upon plaintiff, it would be the end of a possibly meritorious suit, frustrating both the policy behind private antitrust actions and the admonition that the New Rule 23 is to be given a liberal rather than a restrictive interpretation . . . On the other hand, if costs were arbitrarily placed upon defendants at this point, the result might be the imposition of an unfair burden founded upon a groundless claim. In addition to the probability of encouraging frivolous class actions, such a step might also result in defendant's passing on to their customers, including many of the class members in this case, the expenses of defending these actions.[66]

The dilemma was so great that Judge Tyler could not decide the issue and ordered a preliminary hearing on the merits of the case to enable

64. *Id.* at 257.
65. *Id.* at 267-68.
66. *Id.* at 269.

him to make a judgment one way or the other about allocating costs. At the preliminary hearing the merits appeared on the surface to be with the plaintiff, and the judge ordered the defendants to bear ninety per cent of the cost of notice.[67]

Many other courts have also considered the notice problem in some detail. They have come up with a variety of solutions, and although few have been faced with problems as monstrous as those in *Eisen*, no set guidelines have yet been formulated. In some cases, courts have required individual notice by first class mail to all absentees; but in those cases, the classes have usually been fairly small and the identities of the absentees readily ascertainable.[68] Where it has been determined that the identities of some, or all, of the members of the class are not readily ascertainable, then the general trend has been to allow notice by publication, or in the alternative, to mail notice to those who may be reached easily and to publish notice for the remainder.[69]

The federal rule itself does not provide any specific guidelines for the form of notice so long as it is the "best practicable under the circumstances." One commentator has suggested a range of five possibilities which can be tailored to fit a variety of fact situations: (1) individual notice to all absentees, (2) individual notice only to those absentees readily ascertainable from a mailing list in the possession of a party, (3) individual notice to a random sample of absentees, (4) individual notice to all those who have a claim above a certain amount set by the court, and (5) notice by publication.[70] To these five should be added the sixth possibility of a combination of two or more forms of notice, *e.g.* publication plus individual notice to a random sample.

The notice itself should identify the parties and include a brief description of the complaint and the answer and of the procedure to be followed in the litigation. In all cases, the language of the notice should be as neutral as possible.

The courts have not come up with a clear answer to the question of who should bear the administrative burden of issuing notice. There is

67. 54 F.R.D. 565 (S.D.N.Y. 1972).

68. *See, e.g.*, Herbst v. Able, 47 F.R.D. 11 (S.D.N.Y. 1969), a consolidated hearing of five securities cases. In four of them notice by mail was ordered with supplemental notice by publication. In the fifth case, identification of the absentees was difficult; hence, publication alone was ordered. *Id.* at 21. *See also*, Weiss v. Tenney Corp., 47 F.R.D. 283 (S.D.N.Y. 1969), Contract Buyers League v. F. & F. Inv. Co., 300 F. Supp. 210 (N.D. Ill. 1969), Illinois v. Harper & Row Publishers, Inc., 301 F. Supp. 484 (N.D. Ill. 1969) and Bragalini v. Biblowitz, 13 FED. RULES SERV. 2d 23b.3, Case 8 (S.D.N.Y. 1969).

69. *See, e.g.*, Booth v. General Dynamics Corp., 264 F. Supp. 465, 472 (N.D. Ill. 1967).

70. Comment, 116 U. PA. L. REV., *supra* note 57 at 918.

general agreement that the court should keep the issuance of notice under close scrutiny in order to avoid the possibility of actual or apparent solicitation on the part of one or the other party.[71] In most instances, the representative party of the class in question should probably handle the mechanics of notice,[72] although at least one court seems to think that even the mechanical functions of notice should be handled by the court itself in order to insure an air of "detached impartiality."[73] Sometimes the clerical work should logically shift to the class' opponent where, for instance, the opponent has in his possession a mailing list of the class members and the clerical machinery to send out notice.[74] If individual notice is required and the court orders one of the parties to handle the administrative details, then the notice statement prepared by the responsible party is usually submitted to the opposing party for objections. Upon agreement of the parties and the court as to wording, it is usually sent out upon court stationery.[75]

The mechanical and clerical problems of preparing and issuing notice may be of considerable inconvenience to both the parties and the court, but costs are a much larger problem. As pointed out above, the estimated costs of sending individual notice by mail to the absentees in *Eisen* were some $200,000. For a plaintiff with a seventy dollar claim, that is a rather stiff price to pay for the privilege of maintaining a class action. Likewise, it is a rather stiff price for a defendant to have to pay, especially when there has been no hearing on the merits, and when, even if the defendant should prevail, his chances of reimbursement are slim. *Eisen* is, of course, an extreme example, but even in a more manageable case notice can be quite expensive.[76]

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71. Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure*, 81 HARV. L. REV. 356, 398 (1967).

72. Frankel, *Some Preliminary Observations Concerning Civil Rule 23*, 43 F.R.D. 39, 44 (1967).

73. School District v. Harper & Row Publishers, Inc., 267 F. Supp. 1001, 1005 (E.D. Pa. 1967).

74. *See, e.g.*, Dolgow v. Anderson, 43 F.R.D. 472, 498 (E.D.N.Y. 1968).

75. *See, generally* cases cited note 68 *supra*. This procedure is in general accord with the suggestions of Professor Wright. *See*, Proceedings of the Twenty-Ninth Annual Judicial Conference, Third Judicial Circuit of the United States, 42 F.R.D. 437, 565 (1967).

76. For instance, in Berland v. Mack, 48 F.R.D. 121 (S.D.N.Y. 1969), a (b)(3) action under the Securities Exchange Act of 1934, the class had about 16,000 members. Costs of individual notice were figured at $2,500. Publication of a one-eighth page advertisement in both the *New York Times* and the *Wall Street Journal* once a month for three successive months was estimated to cost $9,700. The outcome in the Berland case was amicable enough. The plaintiffs were able to bear the cost of the mailing, and since both sides were desirous of a class action, the court ruled that if publication was later deemed necessary, then the adversaries would share publication costs equally.

However, not all plaintiffs with meritorious claims would be able to muster up $2,500, or even a

There seems to be no set standard for the allocation of the costs of notice. *Eisen* is one approach, although there Judge Medina of the Second Circuit had earlier indicated in a dictum that the representative party should bear the costs.[77] Judge Medina's rule seems too strict and inconsistent with the desired flexibility of federal rule 23. It could be disastrous for the small claimant who does not have large financial resources. In some cases the costs of notice might have to be allocated to the class' opponent if the class action is to be maintained. One court has suggested a flexible standard, which is not free from difficulties itself, but which leaves the question largely in the discretion of the trial judge.

> Where the claim appears to be a meritorious one and defendants desire it to be prosecuted through a class action, it does not seem unreasonable to require the corporate defendant to share the cost of notice, particularly in a case where the plaintiffs may be able to reimburse the corporation if the claim is dismissed. On the other hand, where the claim's merit is doubtful, the cost of notice is high, the defendants have no particular desire to gain the advantages of class res judicata, and plaintiffs would be unable in the event of dismissal to reimburse the corporation, plaintiffs should be required to pay out the initial expense rather than obtain a 'free ride' at the corporation's expense.[78]

When faced with burdensome notice problems, some courts have reacted by dismissing the class action.[79] It is certainly appropropriate to weigh the burdens of notice in determining whether a class suit is properly maintainable,[80] but the court should be careful not to allow notice to be its only or its major concern. Rather, the trial judge should

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much lesser amount. Publication costs might be lower in less prestigious newspapers out in the provinces, but they could still be relatively high. One is also faced with the old problem of the effectiveness of legal ads of any sort. No cost-benefit analysis of newspaper notices has been made as far as this author knows, but common sense would indicate that the cost-efficiency ratio of such ads would be quite low, especially if the class were to consist of lower income members who were not avid newspaper readers. The logical outcome of this line of thinking is that if individual notice is impracticable, then perhaps random sample notice might be the only feasible alternative.

77. 391 F.2d at 564.

78. Berland v. Mack, 48 F.R.D. at 132. Such a test does, however, require the trial judge to make some determination as to the merits of a particular claim very early in the proceedings.

79. *See, e.g.*, Richland v. Cheatham, 272 F. Supp. 148, 156 (S.D.N.Y. 1967) and School District v. Harper & Row, 267 F. Supp. 1001. In neither of these cases was the burden of notice the only reason for dismissing the class suit but notice problems did weigh very heavily in the final decisions of the courts.

80. *See, e.g.*, Philadelphia Elec. Co. v. Anaconda American Brass Co., 43 F.R.D. 452 (E.D. Pa. 1968); and Note, *The Use of Federal Rule 23 in Private Antitrust Enforcement*, 20 SYRACUSE L. REV. 949, 962 (1969).

look to the various procedural safeguards which are available to insure the protection of the interests of the absentees in a manner that is consonant with the requirements of due process.[81] Unfortunately, the Georgia rule does not offer any guidelines, nor does the *Norman* opinion.

Another commentator has suggested four basic considerations to be weighed by a federal judge in determining whether a class action should be dismissed because of the burdens of notice: (1) the expense of notice, of whatever form, as compared with the recovery sought; (2) the nature of the suit—Is it likely that any number of the class have an especially large stake (individual notice might be sent to them); (3) Is it likely that a great many absentees would opt out? (If so, that may be an indication of a specious claim or of inadequate representation.); and (4) Is there any likelihood that the cause of action would ever be brought as anything other than a class action if dismissed now?[82] A fifth consideration would also seem to be of importance—the desirability of wide res judicata effects for the respective parties. All of these considerations would seem applicable to a *Norman* case.

There is also a question in the federal courts about the necessity of notice to absentees in (b)(1) and (b)(2) actions. A dictum in one of the *Eisen* opinions indicates that due process requires notice in all class suits whether they fall into the (b)(1), (b)(2) or (b)(3) classification.[83] By requiring notice in (b)(1) and (b)(2) actions, it may be possible to avoid subsequent collateral attacks on the judgment for mis-classification.[84] Several courts have indicated their general agreement with the *Eisen* dictum.[85]

By the terms of the rule, notice is manadatory only in (b)(3) actions, although the court does have the discretion to require notice in any action.[86] It would seem advisable to avoid raising notice in (b)(1) and (b)(2) actions to the level of a constitutional due process requirement.[87] There is no apparent need to extend or to exacerbate the problems of

81. Comment, 116 U. PA. L. REV., *supra* note 57 at 918.

82. Note 47 *supra* at 692.

83. 391 F.2d at 364-65.

84. Note 47 *supra* at 706.

85. Fowles v. American Export Lines, Inc., 300 F. Supp. 1293, 1295, n.1 (S.D.N.Y. 1969); Clark v. American Marine Corp., 297 F. Supp. 1305, 1306 (E.D. La. 1969); Cranston v. Freeman, 290 F. Supp. 785, 787 (N.D.N.Y. 1968).

86. FED. R. CIV. P. 23(d)(2); *and see*, Johnson v. Georgia H'way Express, Inc., 417 F.2d 1122 (5th Cir. 1969).

87. Northern Nat. Gas Co. v. Grounds, 292 F. Supp. 619, 636 (D. Kan. 1968), 3B MOORE, ¶ 23.55; Advisory Committee's Note at 106.

notice when due process can be adequately protected under the existing provisions of the rule. As pointed out previously, the interests of the members of a (b)(1) or (b)(2) class generally are more cohesive than the interests of the members of a (b)(3) class. The need for notice to absentees is, therefore less as the class representatives are less likely to be inadequate. "We think that the essential requisite of due process as to absent members of the class is not notice, but the adequacy of representation of their interests by named parties."[88]

Of course, Georgia does not have a (b)(1) or a (b)(2) classification. Notice was not required by the 1938 federal rule in true and hybrid actions for reasons previously discussed. If an action clearly fits into the mold of an old fashioned true or hybrid class suit, notice is probably not necessary, but for *Norman* type actions, the federal (b)(3) guidelines seem most appropriate. This merely points up another problem with *Norman*—the trial court has to go through a categorization procedure at the outset before any of the merits of the suit are reached.

There are several ways in which the notice problems could be ameliorated. A recent article suggested that subdivision (c)(2) of the federal rule be amended to strike the word "identified" and to substitute therefor the word "notified," so that individual notice would only be required for absentees who could be "*notified* [rather than identified] through reasonable effort."[89]

Eisen and other securities cases come immediately to mind. As a general rule, brokerage houses have mailing lists of their customers and corporations have mailing lists of their shareholders, thereby making identification of absentees relatively simple. But it is the cost of notification which usually presents the largest problems. By making the "reasonable effort" standard applicable to "notification" rather than "identification," it would be easier for the trial court to dispense with individual notice in cases where the costs would be prohibitive.

There is also the possibility of using alternative forms of notice,[90] such as publication. In some instances, however, publication may be more expensive than individual notice and certainly it is less effective.[91] The

88. Northern Nat. Gas Co. v. Grounds, 292 F. Supp. at 636; *and see* Dole, *supra* note 24 at 1127.

89. Note, 29 MD. L. REV., *supra* note 57 at 154.

90. *See, e.g.*, Minnesota v. United States Steel Corp., 44 F.R.D. 559, 577 (D. Minn. 1968). "[This] court does not interpret this [(c)(2)] as requiring personal notice from the court itself but as permitting the court to direct one or some of the parties to give notice in such form as the court may approve."

91. *See, e.g.*, Berland v. Mack, 48 F.R.D. 121.

trial judge in one securities case took judicial notice of the widespread publicity concerning the suit in financial circles and took it into consideration in ruling on the notice question.[92] By analogy, if the members of a class all belong to some form of cooperative organization, or if they all live in the same neighborhood, then "intra-group channels of communication" may make it possible to provide only minimal official notice.[93] Random sample notice has already been suggested as one possibility. Other alternatives might include spot announcements in magazines that may be read by large numbers of the class. There is no real reason for judges to feel absolutely confined to individual notice or to the publication of an easily missed legal advertisement in a newspaper.

In order to soften the costs of notice, one judge has suggested that the court itself should bear the expense of issuing notice in situations where it would be inequitable or impossible for either party to do so.[94] But it is questionable whether the courts, either in Georgia or elsewhere, could afford the cost of notice without greater appropriations.

The questions of notice and of adequate representation are both directly related to due process and are so closely intertwined that discussion of one leads necessarily to discussion of the other. There is no substantial difference between the old and the new federal rules or the Georgia rule except that the 1966 federal rule puts an increased emphasis on adequate representation in its formal language due to the expanded res judicata effects of class judgments.[95] The requirement of adequate representation of course, becomes much more important as the binding effects of a class judgment are expanded. The United States Supreme Court said in *Hansberry v. Lee*:

> It is one thing to say that some members of a class may represent other numbers in a litigation where the sole and common interests of the class in the litigation is either to assert a common right or to challenge an asserted obligation [citations omitted]. It is quite another to hold that all those who are free alternatively either to assert rights or to challenge them are of a single class so constituted, may be deemed adequately to represent any others of the class in litigating their interests in either alternative. Such a selection of representatives for purposes of litigation, whose substantial interests are not necessarily or even probably the same as those whom they are deemed to represent,

92. Herbst v. Able, 47 F.R.D. 11.
93. Dole, *supra* note 24 at 1127.
94. Berland v. Mack, 48 F.R.D. at 132.
95. 3B MOORE, ¶ 23.07(1)-(2); 2 BARRON & HOLTZOFF § 567, at 108 (Supp. 1969).

> does not afford that protection to absent parties which due process requires.[96]

It would be impossible to set any hard and fast rules about what constitutes adequate representation because of the great factual variances among class units, and neither the federal nor the Georgia rule attempts to do so. The matter should be primarily within the discretion of the trial judge, and over the years the courts have developed some general guidelines. The courts must be particularly careful about settlements in class suits so that the rights of absentees are not prejudiced by greedy representatives and their lawyers.

The representative party must be a member of the class that he purports to represent.[97] For instance, in some instances organizations have sought standing to sue as class representatives of their members for the redress of alleged individual injuries to the members. But the courts have generally held that an organization may sue as a class representative only when there has been an injury to the organization itself as well as to the individual members of the group.[98] This does not mean that an organization cannot serve to define the bounds of the class when individual members sue on behalf of all other members of the organization.[99]

The interests of the representatives must be coextensive with the interests of the class members and the representatives must not have interests that are antagonistic to those of the absentees.[100] One of the reasons that the Supreme Court refused to extend the binding effects of the state court class judgment in *Hansberry* was that the interests of the plaintiff representatives in the first suit were antagonistic to the interests of the absentees. Common sense should make it apparent that a party cannot adequately represent the interests of absentees if his own interests in the litigation are contrary to those of some, or all, of the absentees. Under the federal rule the trial judge may require the parties to reframe the issues in such a way that antagonisms are removed, or he may require the intervention of additional representative parties. He should have the

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96. 311 U.S. at 44-45.

97. *See, e.g.*, Wilson v. Kelley, 294 F. Supp. 1005 (N.D. Ga. 1968); Norwalk Core v. Norwalk Redev. Agency, 42 F.R.D. 617 (D. Conn. 1967).

98. *See, e.g.*, National Welfare Rights Org. v. Wyman, 304 F. Supp. 1346 (E.D.N.Y. 1969); Wisconsin State Employees Council 24 v. Wisconsin Nat. Resources Bd., 298 F. Supp. 339 (W.D. Wis. 1969).

99. *See, e.g.*, Contract Buyers League v. F & F Inv. Co., 300 F. Supp. 210 (E.D. Ill. 1969).

100. *See, e.g.*, Herbst v. Able, 47 F.R.D. 11; Dolgow v. Anderson, 43 F.R.D. 472; Pelelas v. Caterprillar Tractor Co., 113 F.2d 629 (7th Cir.), *cert. denied*, 311 U.S. 700 (1940).

authority to do the same in Georgia but, once again, neither the rule nor *Norman* says anything.

Finally, most courts have required that the representatives have competent counsel who are capable of handling a sizable class action.[101] Since there are obviously no fixed standards for determining the competency of counsel, the trial court is left with considerable latitude. One commentator has suggested that it might be more relevant to look to the financial abilities of the counsel.[102] The economic burdens of a large and lengthy class suit could be heavy on a lawyer, especially a lawyer with impecunious clients.

In the past, some courts applied a quantitative test to determine the adequacy of representation. For instance, if the class were numerous, then it was felt that a fairly sizable number of representatives should be before the court. Likewise, it was thought that the claims of the representatives should reflect in quantity, as well as in kind, the average claims of the class.[103] In addition to quantitative factors, courts have also considered silence on the part of absentees, a failure of anyone else to bring an action, the failure of absentees to intervene, and the failure of absentees to make any response after having been served with notice to be relevant factors to consider in determining whether the parties before the court were adequate representatives.[104]

The trend in the federal courts seems to be toward the broadest possible qualitative tests for adequacy of representation. A single individual may be an adequate representative of a tremendous class with huge cumulative claims.[105] If absentees inform the court of their displeasure with the representation, then the court has to make a more searching inquiry, "but the representative party cannot be said to have an affirmative duty to demonstrate that the whole or a majority of the class considers his representation adequate."[106] As examples, it has been held that a single taxpayer was an adequate representative of all taxpayers in a given political subdivision,[107] that five franchises were adequate representatives of a class of some 650 franchises in an antitrust suit,[108]

101. *See, e.g.*, 300 F. Supp. 210; 47 F.R.D. 11; Shulman v. Ritzenberg, 47 F.R.D. 202 (D.D.C. 1969); 113 F.2d 629.

102. 47 N.C.L. REV. 393, 398 (1969).

103. *See, e.g.*, Berger v. Purolator Prods. Inc., 41 F.R.D. 542 (S.D.N.Y. 1966); 113 F.2d 629.

104. *See, e.g.*, Shulman v. Ritzenberg, 47 F.R.D. 202; Hohmann v. Parkard Instrument Co., 399 F.2d 711, 714 (7th Cir. 1968), *rev'g* 43 F.R.D. 192 (N.D. Ill. 1967); Booth v. General Dynamics Corp., 264 F. Supp. 465.

105. *Eisen* is clearly among the more extreme cases.

106. 391 F.2d at 563.

107. Booth v. General Dynamics Corp., 264 F. Supp. 465.

108. Siegel v. Chicken Delight, Inc., 271 F. Supp. (N.D. Cal. 1967).

and that four plaintiffs could represent a class of over 200,000 members in a securities fraud case.[109]

One of the primary purposes of notice in federal "common question" class suits is to inform absentees that they can opt out of the litigation if they so desire and thus be able to avoid the res judicata effects of the judgment. *Norman* doesn't say anything about self-exclusion nor does the Georgia rule. If the *Norman* decision has in fact opened up a common question class action—and it certainly seems to have done so—then the courts and the General Assembly should give serious consideration to the opt-out privilege. There is no better judge than the individual himself when it comes to a decision about when, where, how and whether to litigate. It would seem grossly unfair in a common question class suit not to let a person make up his own mind about whether he wants to be represented by the parties before the court.

Notice to absentees can pose large problems, particularly if the parties before ths court are not wealthy. It does seem, however, to be a requisite in large class actions, and the Georgia courts must face up to the problems and borrow ideas from the federal courts to find feasible solutions. Unless the notice problems are overwhelming, notice alone should not be an excuse for denying class treatment to an action which meets the standards of *Norman*—albeit those standards are vague enough.

STATUTES OF LIMITATIONS

From time to time the federal courts had some difficulties with the application of relevant statutes of limitation under the 1938 class action rule. The major question was whether or not the commencement of a class suit halted the running of the statute as to all members of the class. The federal practice should give Georgia courts some guidance at least with respect to true and hybrid actions, and it may offer some clues about the effect of *Norman* on tolling statutes of limitation.

Under the 1938 rule, the commencement of a true class suit tolled the statute and the commencement of a hybrid action tolled any statute relative to the common property in question.[110] It would seem that the same should logically hold true in Georgia.

The spurious class suit presented the problem of one way intervention, a problem which was one of the justifications for doing away with the spurious action in 1966. Because the judgment in a spurious action was

109. Dolgow v. Anderson, 43 F.R.D. at 498.

110. *See generally* 2 BARRON & HOLTZOFF § 568.

binding only on the named parties, absentees, would often wait until the last moment to see which way the action was likely to go before intervening to join in the spoils.[111] The courts split on the question of tolling in spurious actions. Some required each intervenor to be able to satisfy the statute of limitations at the time of his intervention.[112] Others held that the commencement of a spurious action tolled the statute for all subsequent intervenors.[113]

The 1966 rule tries to solve the one way intervention problem by extending the binding effects of a judgment to absentees. The logical result should be that, except for those who choose to opt out of (b)(3) actions, the statutes of limitation are tolled for all class members by the commencement of a class suit.[114] The weight of recent opinion certainly substantiates this view.[115] If the statute were not tolled, then class members might be forced to intervene or to file cautionary suits. Such a procedure would be wasteful, expensive and time consuming for litigants and courts. Not surprisingly, the *Norman* opinion failed to discuss or to consider the issue of statutes of limitation. If the Georgia courts should adopt broad res judicata standards for class suits such as *Norman*, then it is hoped that they would also follow the sensible approach of the federal courts and hold that the commencement of a class suit tolls the relevant statutes of limitation.

What will happen if, after the commencement of a class suit, it is determined that the action should not proceed in class form? The advisory committee's note on the 1966 federal rule was not too helpful on this point.

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111. *See generally* 32 U. CHI. L. REV. 768, 772 (1965).

112. P. W. Husserl, Inc. v. Simplicity PatternCo., 25 F.R.D. 264 (S.D.N.Y. 1960) (dictum); Athas v. Day, 161 F. Supp. 916 (D. Colo. 1958); Pennsylvania Co. for Ins. on Lives v. Deckert, 123 F.2d 979 (3rd Cir. 1941).

113. Escott v. Barchris Constr. Corp., 340 F.2d 731 (2d Cir. 1965); Union Carbide & Carbon Corp. v. Nisley, 300 F.2d 561 (10th Cir.), *cert. denied sub. nom.*, Wade v. Union Carbide & Carbon Co., 371 U.S. 801 (1962); Kam Koon Wan v. E. E. Black, Ltd., 75 F. Supp. 553 (D. Hawaii 1948); Wright v. U.S. Rubber Co., 69 F. Supp. 621 (S.D. Iowa 1946); York v. Guaranty Trust Co., 143 F.2d 503 (2d Cir. 1944) (dictum), *rev'd on other grounds*, 326 U.S. 79 (1945); *and see*, Keefe, Levy, and Donovan, *Lee Defeats Ben-Hur*, 33 CONN. L.Q. 327, 339-42 (1948).

114. *See*, 3B MOORE ¶ 23.90(3). The time for intervention, however, is not unlimited since all interventions are required to be "timely" by rule 24, and the court can set a reasonable time limit for intervention. *See*, Philadelphia v. Morton Salt Co., 385 F.2d 122 (3rd Cir. 1967), *cert. denied*, 390 U.S. 995 (1968).

115. *See*, Minnesota v. United States Steel Corp., 44 F.R.D. 559, 574 (D. Minn. 1968); Philadelphia Elec. Co. v. Anaconda American Brass Co., 43 F.R.D. 452 (E.D. Pa. 1968); Esplin v. Hirschi, 402 F.2d 94, 101, n. 14 (10th Cir. 1967); 2 BARRON & HOLTZOFF § 568, at 115-17 (Supp. 1969); Cohn, 54 GEO. L.J. *supra* note 22, at 1224, n. 86; *but cf.* Comment, *Class Actions Under New Rule 23 and Federal Statutes of Limitations: A Study of Conflicting Rationale*, 13 VILL. L. REV. 370 (1968).

> [T]he question whether the intervenors in the nonclass action shall be permitted to claim . . . the benefit of the date of the commencement of the action for the purposes of statutes of limitation [is] to be decided by reference to the laws governing . . . limitations as they apply in the particular contexts.[116]

If the statute in such a situation is not tolled, class litigants might again be faced with the possible need to file a precautionary individual action. On the other hand, tolling might give unscrupulous plaintiffs the chance to file a specious class suit in order to harass the defendant and to gain time for the preparation of an individual action. The latter problem seems somewhat more remote than the former, which would face all potential class litigants, scrupulous as well as unscrupulous.

It has been suggested by one commentator that putative class members who have relied in good faith on the commencement of a class suit to toll the statute should be allowed the benefit of tolling if that action is dismissed as a class suit.[117] Of course, the running of the statute would be halted only from the time of the commencement of the action to the time of its dismissal as a class suit. One court has proposed a more refined test. If the action is dismissed because of an absence of the essential requisites of a class suit, then class members would not receive any tolling benefits. Conversely, if the action meets the fundamental requirements of a class suit but is dismissed for reasons of "judicial housekeeping," *i.e.*, it presents too many administrative problems, then class members would receive the benefits of tolling.

General Management of the Class Suit

The 1966 federal rule and the decisions under it have given the federal courts the basic guidelines necessary for the management of large class suits. Because neither the Georgia rule nor *Norman* give much guidance, the Georgia courts will have to fashion their own guidelines on a case by case basis until the General Assembly or the supreme court clarifies matters. Some of the more serious problems have already been discussed, but the Georgia courts will be faced with practical problems of handling discovery, settlement, damage claims, lawyers' fees and the like.

Discovery in a large class suit will always be a problem, no matter what the courts do. The federal courts have sometimes appointed a special master to handle discovery. This has worked well in an antitrust

116. Advisory Committee's Note at 104.
117. 35 FORD. L. REV. 295, 308-09 (1966).

class action in which this author is now involved, and a similar technique might be used by the state courts. The federal courts, of course, have considerable leeway under subdivision (d) of rule 23 to make orders in the conduct of class action to make the litigation run more smoothly.[118] If "common question" class suits are to be maintained in Georgia, the General Assembly really should consider the amendment of the rule to provide local judges with the discretionary powers their federal counterparts have under subdivision (d).

Damages often present the most difficult problems of discovery and proof in large class suits. The question of liability may be fairly simple, but there may be several thousand class members with differing damages and differing proof. The federal courts have adopted a sort of delaying tactic. An action, otherwise maintainable as a class suit, will not be dismissed simply because damages will be hard to prove. Rather, the courts will try the liability issue first, and then, if plaintiffs win, the damages questions will be considered.[119] This eminently sensible approach means that the damages issues may be avoided altogether if defendants prevail on the merits of the litigation. Even if plaintiffs win at the trial level, the defendants may still win the liability issue on appeal and everyone will be spared the damages problem.

Lawyers' fees are tied in with the question of improper solicitation, one of the matters with which Judge Edenfield of the Northern District of Georgia was concerned in the case quoted in the introduction of this paper. Class suits can have a great appeal for the lawyer who is looking to make a fat litigation fee, if his fee is based on a percentage of the entire recovery. Protracted litigation can be a great financial burden for a lawyer, and if he wins for the whole class, he should be entitled to a good fee. However, there are many ethical problems involved in communications between lawyers and absentees regarding fees and the general setting of fees for a lawyer who is, in theory, counsel to one litigant, but who, in fact, represents many litigants. The Georgia courts will have to be wary of unscrupulous attorneys who may be tempted by the lure of a large fee to violate the ethical standards of the bar. The potential for solicitation and improper use of the judicial process may, in fact, be reason enough for the denial of class treatment for some litigation.[120]

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118. *See generally*, Newberg, *Orders in the Conduct of Class Actions. A Consideration of Subdivision (d)*, 10 B.C. IND. & COM. L. REV. 577 (1968).

119. *See* American Trading & Prod. Corp. v. Fischbach & Moore, Inc., 47 F.R.D. 155 (N.D. Ill. 1969).

120. *See* Hobbs v. Northeast Airlines, Inc., 50 F.R.D. 76 (E.D. Pa. 1970); Advisory Committee's Note at 103; Manual for Complex and Multidistrict Litigation § 1.61.

Finally, the Georgia courts or the General Assembly must fashion some way to handle settlements in class suits. In any large class suit, it is probable that the question of settlement will arise at some time in the litigation. The federal courts have authority to review settlement agreements and to take whatever action is necessary to protect the absentees' interests.[121] It is especially important to be careful that the representative parties adequately represent the interests of the absentees when settlement talks come up. The court is the only agency that is finally responsible for the protection of the rights of absentees, and it must be sure that the representative litigants do not compromise those rights.

CONCLUSION

In the final analysis, the supreme court in *Norman* has created a species of class suit in Georgia that did not exist before and which the General Assembly probably never intended to exist. In doing so, the court did not face up to any of the problems created by its new class suit and made no attempt to fashion guidelines for the lower courts. In this paper some of the problems created by *Norman* have been identified and briefly discussed. For the sake of the courts, of lawyers, and of litigants, the supreme court must clarify its decision in *Norman* or the General Assembly must amend the Georgia class action rule so that the courts will have some means of handling the host of problems which *Norman* is likely to spawn.

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121. FED. R. CIV. P. 23(e).