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Class Action Law in Georgia: 
Emerging Trends in Litigation, 
Certification, and Settlement 

by Jeffrey G. Casarella* 
and 
John R. Bevis**

The lawyers have twisted it into such a state of bedevilment that the original merits of the case have long disappeared from the face of the earth . . . . It's about nothing but Costs now. 

Charles Dickens 
BLEAK HOUSE

In the litigation world, few words trigger more attention and more debate than the term “class action.” At the term’s first appearance, the playing field is set. Plaintiffs urge that class actions are a necessary vehicle to litigate paltry and duplicitous claims otherwise inconvenient or uneconomical to prosecute. In response, defendants argue class actions constitute an abuse complicated by individuality and unmanageability. Rarely do the parties agree to the utility of class actions. Notwithstanding this classic disagreement, this type of litigation serves a useful purpose, filling a vacuum left otherwise empty when legislatures fail to legislate and attorneys general fail to prosecute matters that adversely affect certain segments of our society.

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Georgia's class action statute ("Georgia Rule 23"), is loosely modeled on rule 23 of the Federal Rules of Civil Procedure ("Rule 23"). Because there are so few definitive Georgia decisions interpreting Georgia Rule 23, Georgia courts historically rely upon federal decisional law for guidance. By virtue of this and through judicial fiat, the Georgia Supreme Court authorizes class actions in addition to the provisions of Georgia Rule 23 when there are common questions of law or fact involved and a common relief is sought. Still, there exists significant procedural differences between the state statute and its federal counterpart. How then will recent developments in federal class action jurisprudence play out in class actions brought in the Georgia courts?

Regardless of the advocacy, it is well established that the discretion of the trial judge in certifying or refusing to certify a class action is respected in all cases in which discretion is not abused. Like all jurisdictions, Georgia courts bear out the definitive ruling that class certification is strictly a procedural matter; the decision is not based on whether the complaint states a cause of action or whether the plaintiffs may ultimately prevail on the merits. The proper focus is whether numerosity, typicality, commonality, and adequacy of representation are satisfied.

I. ESTABLISHING THE REQUISITE ELEMENTS OF CLASS CERTIFICATION

Because the plaintiff bears the burden of showing the requisite elements for class certification, ethical and practical prefiling considerations mandate plaintiff's counsel to determine whether the circumstanc-
es of the case warrant class status and whether the client will serve as an adequate representative. The litigation revolves around these two considerations, for unlike a case on the merits, the failure to satisfy any one of the four requisites sounds a swift death knell to class certification and thus to the merits of the uniform practices being challenged.

A. Numerosity

There exists no bright-line test for determining numerosity. Although mere allegations are insufficient, plaintiffs are not required to establish the exact number of persons they seek to represent. A good-faith numerosity estimate of the number of individuals involved is sufficient. The final determination rests on the court's practical judgment in light of the particular facts of each case. With conditional certification comes a flexibility that "enhances the usefulness of the class action device" to ensure that "actual, not presumed, conformity with Rule 23(a)" exists. When the numerosity question is a close one, a balance is struck in favor of finding numerosity because the court has the option to decertify the class if the evidence does not yield sufficient numbers to satisfy numerosity. Notwithstanding these ethereal considerations, one reported decision in Georgia has upheld a finding of numerosity with as few as twenty-five class members.

B. Commonality and Typicality

The utility of a class action allows people of modest means a convenient way to recoup damages while, at the same time, prevents a multiplicity of suits based on a single wrong suffered by many but


8. Buford, 168 F.R.D. at 348; 1 Newberg & Comte, supra note 7, § 3.05, at 3-21 to 3-22 (citing Ventura v. New York City Health & Hosps. Corp., 125 F.R.D. 596 (S.D.N.Y. 1989)). Class actions have been approved by courts involving as few as twenty-five and forty class members. Sta-Power Indus., 134 Ga. App. 952, 216 S.E.2d 897.


11. 696 F.2d at 930; Foster v. Bechtel Power Corp., 89 F.R.D. 624 (E.D. Ark. 1981); accord, Tolbert, 56 F.R.D. at 113 (stating "the wise practice is to allow such cases to proceed, at least at the onset, as class actions").

common to all. For these reasons commonality and typicality tend to merge. Commonality relates to the mode of the challenged practice, and typicality relates to the similarity of the claims among the members. There must be a nexus between the class representative's claims or defenses and the common questions of fact or law that unite the class. Where there is not, commonality and typicality do not exist, and the case cannot proceed as a class action. Particular factual differences, differences in the amount of damages claimed, or even the availability of certain defenses against a class representative do not necessarily render a named plaintiff's claims atypical. Essentially, the class representative's claim is typical of the class claims if all arise from the "same event" or "pattern or practice" and are based on the same legal theory—as long as the plaintiffs and the class have an interest in prevailing on similar legal claims.

C. Adequacy of Representation

The individual ability of a plaintiff to represent a class of similarly injured persons is a paramount consideration. Two important aspects of the adequate representation requirement are (1) whether the plaintiff's counsel is experienced and competent and (2) whether the named plaintiff's interests are antagonistic to those of the class. To this end, courts permit inquiries into the personal characteristics and integrity of the proposed plaintiff and class counsel.

1. Competency of Counsel. In determining whether a plaintiff's counsel is competent, courts generally look to whether counsel is qualified, experienced, and generally able to conduct the proposed litigation. "The adequacy requirement mandates an inquiry into the zeal and competence of the representative's counsel and into the willingness and ability of the representative to take an active role in and

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20. Id.
control the litigation and to protect the interest of absentees. Most defendants, however, do not belabor the question of whether a plaintiff's chosen counsel will adequately represent the interests of the, class and seldom insist that plaintiff's counsel provide evidence setting forth qualifications and experience for the court to evaluate the ability of the lawyers to prosecute the action. There is no concurrent requirement to test the competence and experience of the defense counsel. Rather, the focus in the adequacy of representation requirement turns to the abilities and understandings of the persons proposed as the class representatives.

2. Ability of the Named Plaintiff to Represent the Class. The primary criterion for determining whether a named plaintiff will fairly and adequately represent the class is the forthrightness and vigor with which the representative party is expected to assert and defend the interests of the members of the class. The challenges most frequently made in this regard are to the named representative's understanding of the case and his or her ability to singly fund the litigation.

a. A Named Plaintiff's Understanding of the Case. To avoid the vesting of unbridled discretion and anointing of the class attorney as the true class representative, courts will consider the knowledge and willingness of the named plaintiff to measure that person's ability to adequately represent the class. Ironically, the very lack of sophistication and financial wherewithal that makes individuals vulnerable prey to sophisticated corporate practices often serves as the leading argument of why the class representative is inadequate. Courts harmonize this dichotomy by requiring a generalized, as opposed to a specific and detailed, understanding of the case. Indeed, a plaintiff's lack of detailed knowledge of all the facts and issues in the case has never been deemed to be proof of bad faith, frivolous proceedings, or maintenance by class counsel because reliance may rightfully be placed upon the attorney's

25. Consider the following statement:
An all-too-common defense ploy is to try to belittle the class representative by attempting to show through cross-examination that the plaintiffs do not have broad knowledge of the practices of the defendant and have what the defense argues is an inadequate understanding of the legal complexities of class action practice.
KENT SPRIGGS, REPRESENTING PLAINTIFFS IN TITLE VII ACTIONS § 23.21, at 287 (1994).
advice and investigation. Thus, many courts hold that the knowledge of a class representative is of minimal importance in highly complex matters. All that is required is that class representatives have a working knowledge of the case and understand their respective roles as class representatives.

b. Financial Ability of the Class Representative to Singly Fund the Litigation. Notwithstanding the general knowledge requirement, the mandate that a named plaintiff “fairly ensure the adequate representation of all” typically gives rise to an inquiry by a defendant whether the class representative has the financial ability to fund the case. This is perhaps one of the most fertile areas for a defendant to explore in crafting a response to a motion for class certification. In no other litigation arena is it possible to challenge standing based solely upon the plaintiff’s financial status. Despite this, it is routine for a defendant to advance the argument that a named plaintiff who is not able to singly fund the litigation cannot fairly and adequately represent the class. Though such an argument is frequently made, it has never been accepted as a sole basis to deny class certification.

Generally, courts eschew the question of whether litigants are rich or poor. “If financial capacity is emphasized, it may mean that poorer claimants will be prevented from maintaining class actions. Accordingly, discretion is required; although the ability to fund the case is a factor, it probably should not be a determinative factor.” Courts, therefore, normally will not permit an in-depth examination of the finances of the class representative, and although questions concerning the financial ability of the named plaintiff to fund the litigation is typically sought out

27. See Buford, 168 F.R.D. at 353 (1974), and the cases cited therein.
28. Id.
29. Eisen, 417 U.S. 156. Historically, courts are charged to ensure that access to the courts is not determinable on the basis of wealth or lack of wealth. However, because class representatives are ultimately responsible for the costs incurred in the litigation, including the high cost of adequate notice to the class members, exploration of a class representative’s financial status is often sought out by the defense as a means of demonstrating that the proposed representative cannot adequately represent the class.
30. When the defendant is successful, class certification efforts fail because the plaintiff has not satisfied the burden of establishing all the requisite elements for class certification.
32. Schatzman, 91 F.R.D. at 273 n.2 (citing Roper v. Consurve, Inc., 578 F.2d 1106, 1112 n.4 (5th Cir. 1978); ARTHUR R. MILLER, AN OVERVIEW OF FEDERAL CLASS ACTIONS: PAST, PRESENT AND FUTURE 32 (Federal Judicial Center 1977)).
in discovery, it has been held that a class representative's personal finances are not particularly important. Financial ability alone is never the determinative factor in class certification, and proper deposition preparation can limit the permissible scope of the defendant's exploration into the financial assets of the plaintiff.

In a well-reasoned and well-researched opinion, a New York appellate court summarized the law: "We share the concern of other courts and legal writers on the subject that such financial inquiry should not be allowed to degenerate into an oppressive means of discouraging the action, as well as a tactical defense to the class action prior to reaching the substantive issues." Noting that attorneys may ethically advance the costs of litigation, the court held that a class action defendant may legitimately inquire about a plaintiff's understanding of his ultimate liability to pay the expenses of the litigation. The court stated:

If the ... plaintiff believes he or she is free from ultimate liability, then the assets of [the] plaintiff might conceivably become relevant as evidence that the attorney is maintaining the suit ... However, since advancement [of litigation costs] by counsel with expectation of reimbursement later is a predictable element of many actions, including class actions, where a class plaintiff and the attorney for the class agree that the latter will advance all costs of litigation ... and the plaintiff will reimburse counsel for all expenses should plaintiff lose, questions concerning plaintiff's financial status become irrelevant on the issue of class certification.

Experience dictates that defense inquiries concerning a class representative's financial ability may be potentially abusive as an attempt to intimidate the class representative and to obtain detailed information about the financial arrangements between the plaintiff and counsel. Though "[p]recertification inquiries into the financial arrangements between the class representatives and their counsel respecting the expenses of litigation are rarely appropriate," the obvious interest a defendant has in discovering the information is to support a suspicion (and reason to oppose class certification) that the lawyer, and not the

37. Id. at 725.
38. Id. at 730-31.
plaintiff, is maintaining the case.\textsuperscript{40} Class actions are designed to provide a forum for people of all income levels and to enhance the efficacy of private actions by permitting citizens to combine their limited resources to achieve a more powerful litigation posture.\textsuperscript{41} Thus, when plaintiff's counsel is financially able and willing to advance all necessary costs, including the cost of notice, and the class representative understands his obligation to repay those expenses regardless of the outcome, courts and defendants at the certification stage have no ripened interest whether a representative plaintiff can reimburse the attorney for costs and expenses if an adverse judgment is entered.\textsuperscript{42} Thus, as tempting as it may be for a defendant to inquire into a named representative's financial standing, there is no legitimate basis, in the final analysis, to deny class certification due to a class representative's financial ability.

c. \textit{Standing Issues Concerning a Bankrupt Class Representative}. Occasionally, issues concerning a pending or previous bankruptcy of a class representative may become an issue. Defense counsel should be alerted to the proposition that in most cases bankrupt class representatives are technically prohibited from serving as adequate representatives of the class. Besides the underpinnings of their postbankruptcy ability to fund the case, standing may become an issue if the potential class claim was not identified in a bankruptcy arising before the class action was filed. The potential problem arises because the trustee of the bankrupt estate, not the class member, is the person who owns the claim and, accordingly, is the only one who has the right to pursue an action on the claim.\textsuperscript{43}

In \textit{United Technologies Corp. v. Gaines},\textsuperscript{44} the Georgia Court of Appeals held that "title" to a cause of action passes to the trustee.\textsuperscript{45} Absent a refusal by the trustee to assign or abandon the claim, the trustee acquires the sole right to prosecute the action.\textsuperscript{46} When a trustee holds title to a claim, "the debtor may not bring suit on that

\textsuperscript{40} This requirement is necessary to ensure that lawyers will not solicit plaintiffs to fictitiously stand in the class representative's shoes with no realistic expectation of the consequences of bringing a frivolous class action suit.
\textsuperscript{41} \textit{Hawaii v. Standard Oil Co.}, 405 U.S. 251, 266 (1972).
\textsuperscript{42} \textit{Stern}, 441 N.Y.S.2d at 727 (citing \textit{Sanderson}, 507 F.2d at 479-80). The class certification death-knell does not toll merely because the plaintiffs are not wealthy.
\textsuperscript{44} 225 Ga. App. 191, 483 S.E.2d 357 (1997).
\textsuperscript{45} \textit{Id.} at 191, 483 S.E.2d at 359.
\textsuperscript{46} \textit{Id.} at 192, 483 S.E.2d at 359.
action unless the property has been abandoned by the trustee." Justice Cardozo formulated the following rule in *Barletta v. Tedeschi*: When the trustee abandons estate property, the property stands as if no bankruptcy had been filed and the debtor enjoys the same claim to it as he held previous to filing of the bankruptcy.... Title reverts to the bankrupt, nunc pro tunc, so that he is treated as having owned it continuously.

The court in *Barletta* rejected the argument that Tedeschi did not have standing to sue because his claim was not abandoned until after suit was filed. The court ruled that the subsequent abandonment by the trustee stood as if no bankruptcy was filed. Likewise, if class counsel proposes a bankrupt plaintiff as an adequate representative of the class claim, special care must be taken before the certification process to ensure that the bankruptcy trustee has properly abandoned the claim so that the class representative's standing does not become an insurmountable impedance to class certification.

II. Practical Issues Governing Class Certification

Aside from the standard opposition to class certification on the basis of commonality, typicality, and adequacy of representation, defendants should, and usually do, advance whatever arguments are necessary to thwart the plaintiff's ability to maintain the case as a class action. When a case is certified as a class action, the odds in favor of the plaintiff prevailing on his claims in court or in obtaining a successful settlement rise dramatically. A case in which nominal claims become aggregated, by its very nature, lends to an air of officialdom and legitimacy. Conversely, in a single case, a defendant has the luxury of focusing on the peculiarities of the plaintiff or the specific facts giving rise to the claim, often concentrating on the paltriness of the individual claim or the plaintiff's lack of sophistication. Thus, in opposing class

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49. *Id.* at 673 (citing *Brown v. O'Keefe*, 300 U.S. 598 (1937)). See also *Sessions v. Romadka*, 145 U.S. 29 (1892) (holding abandonment prior to commencement of an action is not required when the claim is ultimately abandoned by the trustee); *Wallace v. Lawrence Warehouse Co.*, 338 F.2d 392 (9th Cir. 1964); *Rosenblum v. Dingfelder*, 111 F.2d 406, 409 (2d Cir. 1940) (holding the abandonment relates back so that the title stands as if no assignment had been made).
50. 121 B.R. at 674.
certification, defendants should focus on a myriad of other issues tangentially related to the requisites of class certification.

A. Considerations Regarding the Amount in Controversy

As a matter of strategy, it is no secret that corporate defendants prefer to litigate class action claims in a federal forum. The federal removal statute states that

any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending.\(^{51}\)

Even though a case may not implicate federal law, a state class action is nevertheless removable if it involves a dispute between citizens of different states and the amount in controversy exceeds seventy-five thousand dollars.\(^{52}\)

In most state class actions, individual compensatory damage claims rarely exceed seventy-five thousand dollars per member, exclusive of interests and costs. Under mandate of the United States Supreme Court, in a diversity action, class members cannot aggregate their claims to reach the amount in controversy requirement for removal to federal court; each individual class member must claim in excess of the jurisdictional amount.\(^{53}\) The only exception to this rule concerns members of the class who seek to vindicate a single title or right in which they have a common and undivided interest.\(^{54}\) Although compensatory damages cannot be aggregated, there is an emerging trend for a removing defendant to satisfy the threshold jurisdictional amount by arguing for aggregation of plaintiffs' punitive damages claims and attorney fees.

In the Eleventh Circuit, claims for punitive damages are now allowed to be aggregated to satisfy the amount in controversy. In Tapscott v. MS Dealer Service Corp.,\(^{55}\) the Eleventh Circuit aggregated the claim for punitive damages on the basis that plaintiffs had a common and

\(^{52}\) Id. § 1332(a) & (a)(1).
\(^{54}\) Zahn, 414 U.S. at 294 (citing Troy Bank v. G.A. Whitehead & Co., 222 U.S. 39, 40-41 (1911)).
undivided interest in obtaining damages from a common fund.\textsuperscript{56} Permitting aggregation, the court noted, “While the facts in this case result in an aggregation of punitive damages, other factual situations may dictate that punitive damages are non-aggregable.”\textsuperscript{57} The court in \textit{Tapscott} rejected plaintiffs' offer to amend the complaint on the grounds that events occurring after removal, such as attempted amendments, could not oust the federal court of jurisdiction once it attached.\textsuperscript{58} A different result is reached, however, when a plaintiff chooses to limit the amount of damages in the initial complaint.\textsuperscript{59} Following the rationale of the court in \textit{Tapscott}, a Georgia federal district court has set the stage seemingly to allow any case based on diversity to be removed when the plaintiffs seek an award of punitive damages.\textsuperscript{60}

\section*{B. Considerations Regarding Multiple Plaintiff/Multiple Defendant Class Actions}

Federal and state class action statutes unequivocally authorize class action treatment when claims arise from the “same event” or “pattern or practice” and are based on the “same legal theory.”\textsuperscript{61} However, improper joinder defenses may be asserted when not every plaintiff has a claim against every defendant. What then happens when multiple

\begin{itemize}
\item \textsuperscript{56} 77 F.3d at 1359.
\item \textsuperscript{57} \textit{Id.} The court further stated: “We note without embellishing that there may be cases where the punitive damages, albeit within a class action, would be determined on an individualized consideration of the egregiousness of the harm done to individual class members. In such a case, aggregation of punitive damages may very well be inappropriate.” \textit{Id.} at 1359 n.13. Though the court chose not to articulate what factual situations would prohibit aggregation of punitive damages, it noted several nonexhaustive factors used in \textit{Allen v. R & H Oil & Gas Co.}, 63 F.3d 1326 (5th Cir. 1995), to assess whether claims for punitive damages are always, by nature, common and undivided. 77 F.3d at 1359. Among those factors are (1) how the awards are distributed; (2) whether a defendant is disinterested in how the awards are distributed; and (3) whether the failure of one plaintiff's claim increases the award to the others. \textit{Id.} at 1359 & n.14.
\item \textsuperscript{58} 77 F.3d at 1359 n.15 (citing St. Paul Mercury Indem. Co. v. Red Cab Co., 303 U.S. 283, 293-94 (1938)).
\item \textsuperscript{59} In \textit{Hooks v. Associates Fin. Serus. Co.}, an Alabama district court recently rejected defendant's attempts to remove a class action because in the initial pleading, plaintiff limited the amount of damages each class member would accept or request. 966 F. Supp. 1098, 1100 (M.D. Ala. 1997). Because the individual plaintiff's self-limitation of damages fell below the threshold jurisdictional amount of seventy-five thousand dollars the case was remanded. \textit{Id.}
\item \textsuperscript{60} \textit{Turpeau}, 936 F. Supp. at 978.
\item \textsuperscript{61} \textit{Buford}, 168 F.R.D. at 350. Additionally, \textit{Fed. R. Civ. P. 23(b)(3)} permits class action treatment when, in addition to satisfaction of the prerequisites, it is convenient and desirable. Amchem Prods., Inc. v. Winsdor, 117 S. Ct. 2231, 2245 (1997).
\end{itemize}
plaintiffs unite for economy and convenience to challenge a uniform and systematic violation of the law by multiple but unrelated defendants?

Georgia's permissive joinder statute is virtually identical to rule 20 of the Federal Rules of Civil Procedure ("Rule 20"):  

(a) Permissive Joinder. All persons may join in one action as plaintiffs if they assert any right to relief jointly, severally, or in the alternative in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all of them will arise in the action .... A plaintiff or defendant need not be interested in obtaining or defending against all the relief demanded. Judgment may be given for one or more of the plaintiffs according to their respective rights to relief and against one or more of the defendants according to their respective liabilities.  

Thus, O.C.G.A. section 9-11-20 and its federal counterpart seem to authorize multiple plaintiff versus multiple defendant class action lawsuits even when every plaintiff does not have a claim against every defendant. This proposition also has support in law. For example, in Doss v. Long, the court held:

"In certain instances, where all members of the defendant class were connected by a common 'juridical link,' a plaintiff class versus a defendant class suit could be appropriate, even though no named plaintiff would have personal claims against most members of the defendant class. Such 'juridical links' would most often be found in instances where all members of the defendant class are officials of a single state and are charged with enforcing or uniformly acting in accordance with a state statute, or common rule or practice of statewide application ...."

Similarly, in Mosley v. General Motors Corp., the Eighth Circuit recognized the following:

No hard and fast rules have been established under [Rule 20] .... [But,] “transaction” is a word of flexible meaning. It may comprehend a series of many occurrences, depending not so much upon the immediateness of their connection as upon their logical relationship. .... The

64. Id. at 120 (quoting Mudd v. Busse, 68 F.R.D. 522, 527-28 (N.D. Ind. 1975); see also La Mar v. H & B Novelty & Loan Co., 489 F.2d 461, 469-70 (9th Cir. 1973)); Follette v. Vitanza, 658 F. Supp. 492, 507 (N.D.N.Y. 1987) (recognizing a “juridical link” is “some independent legal relationship which relates all defendants in a way such that single resolution of the dispute is preferred to a multiplicity of similar actions”); accord Thellins v. Community Currency Exch. Ass'n, 97 F.R.D. 668, 676 (N.D. Ill. 1983).
65. 497 F.2d 1330 (8th Cir. 1974).
analogous interpretation of the terms as used in Rule 20 would permit all reasonably related claims for relief by or against different parties to be tried in a single proceeding. 66

Illustrative of this general principle is the case of In re Itel Securities Litigation, 67 in which a court in California certified a defendant class consisting of 113 unrelated underwriters who, pursuant to material misrepresentations, made debenture offerings to many unrelated plaintiffs. 68 Obviously, not every plaintiff had a claim against every defendant. For economy and convenience, plaintiffs united to recover for the wrong suffered by and common to all. The court analyzed each component of Rule 23(a), noting that numerosity, commonality, typicality, and adequate representation were satisfied. 69 Determining that a defendant class could be certified pursuant to Rule 23(b)(3), the court held “questions common to the classes predominate over questions affecting only individual class members.” 70 Despite the missing joinder requirements of Rule 20, the class action proceeded. 71

For decades courts have consistently held that when a legal relationship between the defendants suggests that a single resolution of the dispute is preferable to multiple similar actions, joinder of those defendants is proper regardless of whether each plaintiff has a cause of action against each defendant. 72 This “juridical link” is defined as “some [independent] legal relationship which relates all defendants in

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66. Id. at 1333 (citations omitted).
68. Id. at 108.
69. Id. at 111-13.
70. Id. at 114.
71. Id. at 127.
72. See Thompson v. Board of Educ., 709 F.2d 1200, 1204-05 (6th Cir. 1983) (recognizing two exceptions to formal joinder requirements: “(1) Situations in which all injuries are the result of a conspiracy or concerted schemes between the defendants at whose hands the class suffered injury; and (2) Instances in which all defendants are juridically related in a manner that suggests a single resolution of the dispute would be expeditious.”). The court in Thompson did not allow a class of plaintiff teachers to join together a class of defendant school boards because there was no state statute or uniform policy being applied statewide by defendant school boards. Rather, each school board adopted its own maternity leave policies to be applied to teachers within that particular school district. As a result, plaintiff teachers as a class did not have standing to sue defendant school boards for which they had not worked, and class certification was inappropriate. Id. at 1205. See also Thillens, Inc. v. Community Currency Exch., 97 F.R.D. 668, 675 (N.D. Ill. 1983) (“The requirement that each named plaintiff must have a claim against each defendant may be waived where the defendant members are related by a conspiracy or ‘juridical link.’” (emphasis added)); La Mar, 489 F.2d at 466 (“Nor is it intended to apply in instances in which all defendants are juridically related in a manner that suggests a single resolution of the dispute would be expeditious.”).
a way such that single resolution of the dispute is preferred to a multiplicity of similar actions.\(^{73}\)

In Moore v. Comfed Savings Bank,\(^{74}\) an example of the juridical link line of cases, the Eleventh Circuit held that appellant banks were properly joined as defendants even though none of the defendants held any paper signed by any of the named class plaintiffs.\(^{75}\) In allowing defendants to be joined, the court stated the following:

> While all of these cases support plaintiffs' view that in the event there is a juridical link, it is appropriate to join as a defendant a party with whom the named class representative did not have a direct contact, each of them presents a situation in which there was either a contractual obligation among all defendants or a state or local statute requiring common action by the defendants.\(^{76}\)

In authorizing the injured plaintiffs to sue a class of defendants when each plaintiff did not have a cause of action against each defendant, the United States District Court for the Northern District of Georgia specifically endorsed the juridical link exception in Doss v. Long:\(^{77}\)

> The last issue raised regarding the motion for class certification involves a problem unique to bilateral plaintiff class—defendant class litigation. It is the Rubik Cube puzzle: each plaintiff does not have a cause of action against each defendant. In other words, Mary Doss (for example) does not have a cause of action against Hugh Allen. Whether this problem is analyzed in terms of standing, typicality, or commonality, it does not foil this action.\(^{78}\)

When common questions of law and fact exist as to all plaintiffs and all defendants, a single resolution of the dispute is preferable over individual and repetitious suits. Otherwise, the courts waste valuable time and resources hearing identical issues in one trial after another. It makes judicial sense to allow the common questions of law and fact to be resolved in a single proceeding to best achieve economies of time, effort, expense, and fairness. This practice also promotes uniformity of decision as to persons similarly situated without sacrificing procedural fairness to any of the parties.

Despite precedent that litigating duplicitous issues only once is best achieved by liberally applying the permissive joinder statutes, one

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73. Thillens, 97 F.R.D. at 676.
74. 908 F.2d 834 (11th Cir. 1990).
75. Id. at 839.
76. Id. at 838.
78. Id. at 119-20.
Georgia district court has limited the applicability of the juridical link line of cases to officials of the state who violate a single statute. In Turpeau v. Fidelity Financial Services, Inc.,79 seven plaintiffs united for economy and convenience to sue the respective insurance company and lender that sold and financed a policy of credit life insurance in connection with the installment purchase of an automobile.80 Suit was filed on the basis that even though different plaintiffs were involved, each defendant uniformly charged and financed credit life insurance premiums based on the total payments anticipated over the life of the loan rather than on the "approximate" or "exact" unpaid balance on any given day as required by O.C.G.A. section 33-31-4.81 Though different plaintiffs had claims against different defendants, the claims involved identical questions of law and fact—whether plaintiffs were sold more credit life insurance coverage than Georgia law allowed.82 Despite evidence that none of the premiums were calculated differently, the district court reasoned that because each credit transaction was made by different plaintiffs with different defendants, the transactions were not sufficiently related to permit joinder under Rule 20(a).83 The diverse defendants were removed.84 The district court rejected the juridical link line of cases on the grounds that the cases only apply when officials of the state are the defendants.85 The decision, however, raises serious equal protection implications because the court recognized a juridical link for one class (state officials) but not another (private citizens) without a rational basis for the disparate treatment.86

C. Considerations Regarding Potential Counterclaims That Might Be Asserted Against the Absent Class Members

Another impedance to class certification, and a defense commonly asserted in opposition to class certification, is the possibility for potential counterclaims against absent class members. Though the threat is often made, serious questions exist whether counterclaims of any type may be

80. Id. at 976.
81. Id. at 981 (citing O.C.G.A. § 33-31-4 (1996)).
82. Id. at 976.
83. Id. at 977.
84. Id. at 980.
85. Id. at 978-79.
86. Id. at 980. The court's holding applied only to three of the ten defendants. The seven remaining defendants were remanded to the State Court of Fulton County. Id. at 982.
asserted against absent class members.87 “The potential assertion of counterclaims against [a] few members of the proposed class cannot be allowed to defeat an otherwise valid class action when to do so would effectively deprive thousands of class members of the relief to which they are entitled.”88

Before asserting any counterclaims, a defendant must independently demonstrate that the court has personal jurisdiction and proper venue over the countersued individuals and must also satisfy the prerequisites of O.C.G.A. section 9-11-23.89 Just as mere allegations of numerosity, commonality, typicality, and adequacy of representation do not satisfy plaintiffs’ burden, the mere allegation that counterclaims might exist does not defeat predominance.

Assuming the threat of counterclaim is ever acted upon, cases are still manageable. Should a court conclude at any time that the entire group of counterclaims makes the causes of action in the complaint unmanageable, it can deny the compulsory counterclaims that were mature90 before the case was filed and, in its discretion, can deny any permissive counterclaims91 or dispose of the counterclaims for unclaimed balances in a separate proceeding.92 Alternatively, a court has authority to issue a supplemental order after certification to exclude the counterclaim defendants from the class, or it can separate and sever the class into two different classes—one with counterclaims and one without counterclaims.93 Thus, a bare allegation in opposition to class certification that there might be potential counterclaims provides no rational justification for denying class certification of the claims of thousands who may be legitimately before the court.94

D. Considerations of Whether Georgia Law Binds Absent Class Members to a Settlement

Georgia class action practice differs considerably from federal class action practice under the 1966 amended version of Rule 23. Though it has never been expressly stated, there is an argument that Georgia’s rules on class actions, unlike their federal counterparts, do not allow

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87. In Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 810 (1985), the Supreme Court observed that absent class members were almost never subject to counterclaims.
89. 1 NEWBERG & COMTE, supra note 7, § 5.30, at 5-31.
90. The mature claims are compulsory under O.C.G.A. § 9-11-13(a) (1993).
91. Permissive counterclaims are covered by O.C.G.A. § 9-11-13(b) (1993).
94. Id.
absent members to be bound by settlements about which they know nothing. The original class actions, created in 1938, are described as "an invention of equity... mothered by the practical necessity of providing a procedural device so that mere numbers would not disable large groups of individuals, united in interest, from enforcing their equitable rights nor grant them immunity from their equitable wrongs." Under the original version of Rule 23, class action suits were categorized based on the classification of the right of enforcement as follows:

1. *joint, or common, or secondary* in the sense that the owner of a primary right refuses to enforce that right and a member of the class thereby becomes entitled to enforce it [true class action];
2. *several*, and the object of the action is the adjudication of claims which do or may affect specific property involved in the action [*Hybrid Class Action*]; or
3. *several*, and there is a *common question of law or fact* affecting the several rights and a common relief is sought [*spurious class action*].

In true and hybrid suits, under the original federal rule on class actions, a judgment, whether favorable or unfavorable, is *res judicata* as to the class. However, in a spurious class action, when joinder is permissive, a judgment is binding only upon those who actually participate in the litigation. Therefore, the spurious class action is merely "an invitation to become a fellow traveler in the litigation... not a command performance;" the invitation to join may or may not be accepted. Rather than requiring the spurious class members to opt out

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95. Montgomery Ward & Co. v. Langer, 168 F.2d 182, 187 (8th Cir. 1948).
97. 1 NEWBERG & COMTE, supra note 7, § 1.10, at 1-28.
98. 7B WRIGHT ET AL., supra note 96, § 1789, at 240-41.
99. 233 Ga. at 5, 209 S.E.2d at 602 (citing Zahn v. International Paper Co., 414 U.S. 291 (1973)); see also 5 JAMES WM. MOORE ET AL., FEDERAL PRACTICE §§ 23.08-23.10 (3d ed. 1997). Moore provides a good summary of class actions under the original federal Rule 23: The "true class suit" is one wherein, but for the class action device, the joinder of all interested persons would be essential. This would be in cases where the right sought to be enforced was joint, common or derivative... [In the hybrid class suit] the class had a mutuality of interests in the question involved, still the rights of the members of the class were neither joint nor common; they were several. In addition to the question of fact common to all, there was, in lieu of joint or common interests, the presence of property which called for distribution or management... The spurious class suit was a permissive joinder device. The presence of numerous persons interested in a common question of law or fact warranted its use by persons desiring to clean up a litigious situation... There was no jural relationship between the members of the class; unlike, for example,
as contemplated by the amended federal rule, the pre-1966 federal rule required that plaintiffs opt into a spurious class action before they were bound by a settlement or judgment.

1. Spurious Class Actions Are Different Under Amended Federal Rule 23(b)(3). In 1966, under heavy criticism, original Rule 23 was completely and dramatically rewritten. By far, the most controversial and dramatic innovation is that all class actions, including the spurious type, now result in a binding judgment on all class members regardless of whether the judgment was favorable or unfavorable.100

The amended version of Rule 23(a)(3), formerly known as a spurious class action and currently known as a Rule 23(b)(3) class action, authorizes a class action when “the court finds that the questions of law or fact common to the member 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.”101 However, unlike the original version of Rule 23, a final judgment in a Rule 23(b)(3) class action now binds all members of a class who do not notify the court that they are opting out.102 Prior to the 1966 amendment, however, notice of the members’ right to opt out of a spurious class was not required because joinder was permissive rather than compulsory.103 The amended rule’s notice requirement contained in Rule 23(c)(2) attempted to strike a balance between the guarantees of due process and the efficiencies and advantages of a Rule 23(b)(3) class action. Without a detailed and strict notice requirement, all members of the class are bound by a judgment about which they know nothing, and Rule 23(b)(3) judgments can act as a sword against those uninformed members of the class. Therefore, Rule 23(b)(3) class

the members of an unincorporated association, they had taken no steps to create a legal relationship among themselves. They were not fellow travelers by agreement. The right or liabilities of each was distinct. The class was formed solely by the presence of a common question of law or fact. When a suit was brought by or against such a class, it was merely an invitation to joinder—an invitation to become a fellow traveler in the litigation, which might or might not be accepted. It was an invitation and not a command performance. Id. § 23.08, 23.09, 23.10, at 23-2505, 23-2571, 23-2601.

100. 1 NEWBERG & COMTE, supra note 7, § 1.10, at 1-26 to 1-27.

101. FED. R. CIV. P. 23(b)(3).

102. Id. Members of Rule 23(b)(1) and 23(b)(2) classes cannot opt out.

actions represent an entirely different procedure from the original Rule 23(a)(3) spurious class actions still followed by Georgia today.

2. The Controversy of Opting In Versus Opting Out. Though most Georgia courts consistently apply the ideologies of a Rule 23(b)(3) class action to state class actions, a question exists whether "common question" class members must opt in before they can be bound by settlement. Georgia specifically did not adopt the amended version of Rule 23. Instead, when enacting the Civil Practice Act of 1966 ("CPA"), the General Assembly expressly patterned Georgia's class action rules on the pre-1966 version of Rule 23. In this regard, and like the original version of Rule 23(a), the General Assembly chose to categorize class actions depending on the character of the right sought to be enforced as follows: (1) Joint, or common, or secondary in the sense that the owner of a primary right refuses to enforce that right and a member of the class thereby becomes entitled to enforce it; or (2) Several, and the object of the action is the adjudication of claims which do or may affect specific property involved in the action.104

The General Assembly omitted the so-called "spurious class action" by failing to include original Rule 23(a)(3). However, the Georgia Supreme Court wrote this mechanism back into the CPA in Georgia Investment Co. v. Norman.106 The same year, in Herring v. Ferrell,106 the Georgia Supreme Court stated, "In view of the fact that a 'spurious' class suit is merely an invitation to joinder[,] its absence in the statute is immaterial for the reason that the specific terms of invitation are spelled out in [O.C.G.A. section 9-11-24] on Intervention."107 In this regard, O.C.G.A. section 9-11-24(b)(2) demonstrates that, as in the original version of Rule 23(a)(3), spurious class action members must opt in rather than opt out to be bound by the judgment:

(b) Permissive Intervention. Upon timely application anyone may be permitted to intervene in an action:

. . . (2) When an applicant's claim or defense and the main action have a question of law or fact in common.

104. O.C.G.A. § 9-11-23(a).
105. 229 Ga. 160, 162, 190 S.E.2d 48, 50 (1972) (authorizing class actions to be based on common questions of law or fact). See Herring, 233 Ga. at 5-6, 209 S.E.2d at 602.
107. Id. at 6, 209 S.E.2d at 602.
In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.\textsuperscript{108} By statute, intervention is \textit{permissive} rather than compulsory, and courts must exercise discretion in allowing a party to intervene. Thus, in Georgia it is questionable whether spurious class action plaintiffs must opt into a class action before they are bound by the final judgment of the case.

This proposition was first raised thirteen years after \textit{Norman} by the Georgia Supreme Court in \textit{Tanner v. Brasher},\textsuperscript{109} in which the court expressed uncertainty surrounding the nature of a common class action created in \textit{Norman} and followed in \textit{Herring}:

\begin{quote}
Justice Hall, dissenting in \textit{Herring v. Ferrell}, interpreted the \textit{Norman} action and a "spurious" action based upon the 1938 Federal Rules of Civil Procedure. A number of other cases, following \textit{Sta-Power Industries v. Avant}, have relied upon federal precedent based upon Federal Rule 23(b)(3) in spite of Justice Nichols' disclaimer of federal precedent in \textit{Norman}. \textit{Sta-Power} itself, while expressly relying upon "(b)(3)" cases, clouded the issue by discussing a possible requirement that class members intervene in class suits in contravention of the opt-out procedure provided in (b)(3) cases. Justice Nichols himself based the \textit{Norman} action on language found in O.C.G.A. [section] 9-11-23(a)-(1).\textsuperscript{110}
\end{quote}

Though most cases have treated Georgia's "spurious class action" as a Rule 23(b)(3) class action, this question has been tacitly raised, and the rule in \textit{Norman} has remained undisturbed for twenty-four years. Therefore, today, Georgia's class action jurisprudence begs the question: Are absent members who did not opt into a class action bound by the settlement? The question remains unanswered and in due time will be ripe for resolution by the court or by the General Assembly.

\section*{III. Settlement Aspects of Class Actions}

On a national scale, pretrial settlement of class actions fuels a politically charged debate that class action lawsuits are an unwarranted abuse. To urge reform, critics consistently argue that the class action device merely enhances the pockets of lawyers; that the class members do not benefit; that the device raises the stakes of litigation beyond the

\footnotesize{\textsuperscript{108} O.C.G.A. § 9-11-24(b)(2) (1993). \textsuperscript{109} 254 Ga. 41, 326 S.E.2d 221 (1985). \textsuperscript{110} Id. at 44 n.4, 326 S.E.2d at 221 n.4 (citations omitted).}
financial capabilities of a defendant company; and that class actions only impose a greater burden upon the courts and parties. Though the misconceptions are widely perceived, they are largely unfounded.\textsuperscript{111} In advancing the cry for reform, little homage is paid to the underlying policy at the very core of the class action mechanism—to overcome the problem that because small recoveries do not provide an incentive for individuals to bring solo actions, the class action device allows aggregation of small claims into something worth someone's labor.\textsuperscript{112} Admittedly, criticism is a valid process of reform; however, the effectiveness, necessity, and utility of a class action device cannot be overlooked or understated. Given the limited but growing number of class action lawsuits in Georgia, there has been little effort or interest in overhauling Georgia's statutory class action scheme.\textsuperscript{113} As a consequence, Georgia case precedent dealing with the "problems" associated with class action settlements is scarce; for the most part, Georgia courts defer heavily to federal law interpreting rule 23 of the Federal Rules of Civil Procedure.

Because class actions are predominantly criticized in terms of their settlement, and not necessarily on the merits of the litigation, the solution lies not in abolishment or reigning of the device but rather in greater supervision and accountability among the attorneys, courts, and litigants who seek to vindicate the challenged class-wide practice. Indeed, class counsel need to be mindful of the fiduciary and ethical responsibilities that inherently remain a part of prosecuting and settling

\textsuperscript{111} Amid the lobbyist cry for class action reform, the Federal Judicial Center undertook a study of 150 class action cases to evaluate the need to amend rule 23 of the Federal Rules of Civil Procedure. Interestingly, the study negated many widely perceived criticisms. It found, among other things: that attorney fees in class actions generally fall in the traditional range of one-third of the total settlement; that only nine cases of 150 certified classes resulted in individual recoveries of less than one hundred dollars; that settlements are not coerced by the prospects of class certification; that the median recovery ranged from three hundred to five hundred dollars; and that "strike suits" or unmeritorious actions are generally junked early by summary judgment or dismissal motions. See generally T. Willging et al., Empirical Study of Class Actions in Four Federal District Courts: Final Report to the Advisory Committee on Civil Rules (1996).

\textsuperscript{112} Amchem Prods., Inc., 117 S. Ct. at 2246 (citing Mace v. Van Ru Credit Corp., 109 F.3d 338, 344 (7th Cir. 1997)).

\textsuperscript{113} Nevertheless, interest groups have on occasion lobbied the General Assembly to insert anti-class action provisions into various Georgia laws, thereby protecting business interests from the widespread reach of Georgia Rule 23. Anti-class action legislation is included in the Fair Business Practices Act of 1975, O.C.G.A. § 10-1-399(a) (1994 & Supp. 1997); the Georgia Industrial Loan Act, O.C.G.A. § 7-3-29(e) (1997); various provisions of the usury statute, O.C.G.A. §§ 7-4-5(b), 7-4-21 (1997); the Motor Vehicle Sales Finance Act, O.C.G.A. § 10-1-36.1(a) (1994); a law prohibiting discriminatory lending practices, O.C.G.A. § 7-6-2 (1997); and the Below Cost Sales Act, O.C.G.A. § 10-1-255(c) (1994).
a class action lawsuit, including the responsibility to advocate for those of modest means.  

A. Determination of Attorney Fees to Class Counsel  

Designed partly as a guardian mechanism against class action settlement abuses, Rule 23(e) requires the court's supervision and approval of any class action settlement.  

Georgia's counterpart is similar. As primary ammunition in opposition to the class action device, critics point generally to large awards of attorney fees as a motivating factor for the attorney to bring class actions. Whether true or not, the fees paid are not unilaterally declared by the plaintiffs' lawyers. The determination of fees is a joint effort agreed by the parties and ultimately approved by the court. Normally, attorney fees are not an issue until the preliminary or final settlement hearing that usually occurs after years of litigation. Ultimately, the trial court, not the plaintiffs' lawyers, determines whether the petitioned attorney fees are reasonable.

Like many jurisdictions, Georgia follows the "American Rule" in regard to the payment of attorney fees, calling for each party to bear its own

114. Georgia lawyers are under an ethical responsibility to make legal services available. EC 2-1 of the Georgia Rules on Ethics states, in relevant part: The need of members of the public for legal services is met only if they recognize their legal problems, appreciate the importance of seeking assistance, and are able to obtain the services of acceptable legal counsel. Hence, important functions of the legal profession are to educate laymen to recognize their legal problems, to facilitate the process of intelligent selection of lawyers, and to assist in making legal services fully available. GA. ST. BAR R. 3-102, EC 2-1 (1997).

115. FED R. Civ. P. 23(e) provides the following: "A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs."

116. O.C.G.A. § 9-11-23(c) provides the following: A class action shall not be dismissed or compromised without the approval of the court. If the right sought to be enforced is [joint, common, or secondary], notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs. If the right is [several and affects specific property], notice shall be given only if the court requires it.

117. ARTHUR R. MILLER, ATTORNEYS' FEES IN CLASS ACTIONS ch. 11 (Federal Judicial Center 1980).

118. Camden I Condominium Ass'n v. Dunkle, 946 F.2d 768, 771 (11th Cir. 1991).

119. 2 NEWBERG & COMTE, supra note 7, § 11.29, at 11-61 to 11-62.

120. Camden I, 946 F.2d at 771 (citing Central R.R. & Banking Co. v. Pettus, 113 U.S. 116, 127-28 (1885)). This is often ignored by the critics.
expenses of litigation.\textsuperscript{121} In the context of class actions, however, advancement of the American Rule is sharply criticized by those who believe it does not provide a complete legal remedy to a successful class action litigant because it does not allow for reimbursement of the high litigation costs of numerous, although nominal, claims.\textsuperscript{122} Furthermore, it is charged that the American Rule discourages meritorious class action litigation by the lower and middle class because only the affluent can afford to pay for and maintain a class action lawsuit against a wealthy corporate defendant.\textsuperscript{123}

Recognizing these criticisms as well as the public policy pronouncement to afford fairness and access to litigants of all stature, our courts and legislative bodies have created judicial and legislative exceptions to the American Rule in the context of class action litigation. The judicial exception, known as the "common fund" exception, is based on principles of equity and fairness. It is an acknowledgement that the American Rule does not provide a complete legal remedy to justify one's time and effort in representing the numerous but relatively small claims often asserted in a class action.\textsuperscript{124} On the other hand, the legislative


\textsuperscript{122} See generally James H. Cheek, \textit{Attorney's Fees: Where Shall the Ultimate Burden Lie?}, 20 Vand. L. Rev. 1216 (1967); Albert A. Ehrenzweig, \textit{Reimbursement of Counsel Fees and the Great Society}, 54 Cal. L. Rev. 792 (1966); Calvin A. Kuenzel, \textit{The Attorney's Fee: Why Not a Cost of Litigation?} 49 Iowa L. Rev. 75 (1963). It is axiomatic under Georgia law that "equity will not take cognizance of a plain legal right where an adequate and complete remedy is provided by law." O.C.G.A. § 23-1-4 (1982). Arguably, the converse of this equitable proposition may hold true: If a court of law does not provide a "complete" remedy, a successful litigant who seeks an award of attorney fees may petition a court of equity for redress.


\textsuperscript{124} For purposes of practice and pleading in the early days of class action lawsuits, the theory of unjust enrichment laid the basis for fee awards. In \textit{Trustees v. Greenough}, 105 U.S. 527 (1881), the United States Supreme Court held the following: [Where one of many parties having a common interest in a trust fund, at his own expense takes proper proceedings to save it from destruction and to restore it to the purposes of the trust, he is entitled to reimbursement, either out of the fund itself, or by proportional contribution from those who accept the benefit of his efforts. This has long been the rule in relation to proceedings for restoring property to the uses of a charity, which has been unjustly diverted therefrom. \textit{Id.} at 532-33. This principle was expanded in \textit{Central R.R. & Banking Co.}, 113 U.S. 116, in which the Supreme Court allowed fees to be directly awarded to attorneys based upon
exception is based upon "fee shifting" statutes that take into account the effort and complexity of the case.

Exceptions to the American Rule are applied differently when the trial courts seek to determine the reasonableness of fee award proposals. This different treatment was apparent in Blum v. Stenson, a 42 U.S.C. § 1983 class action lawsuit regarding the unlawful termination of Medicaid benefits. In Blum, attorney fees were petitioned pursuant to 42 U.S.C. § 1988 ("Section 1988"), a fee shifting statute. In cogent terms, the United States Supreme Court espoused its belief that the number of persons benefiting from the class action litigation was not a significant consideration in calculating fees under a fee shifting statute. Instead, the Court concluded:

Unlike the calculation of attorney's fees under the "common fund doctrine," where a reasonable fee is based on a percentage of the fund bestowed on the class, a reasonable fee under [Section] 1988 reflects the amount of attorney time reasonably expended on the litigation. Presumably, counsel will spend as much time and will be as diligent in their labors expended in securing the common fund. Id. at 127.


128. Though highly critical of large fee awards, few critics can argue that a class action is not difficult and complex work.

129. Id. at 900 n.16.
litigating a case that benefits a small class of people, or, indeed, in protecting the civil rights of a single individual.\textsuperscript{180}

Accordingly, the Court awarded a lesser amount of attorney fees than was petitioned.\textsuperscript{181} The Court also noted that one of the predominating factors in determining a fee award under fee shifting statutes such as Section 1988 is the reasonable amount of time expended by counsel multiplied by the prevailing market rates in the community in which the action was brought.\textsuperscript{182}

Therefore, in arguing for or against a certain fee award, party litigants must be cognizant of the basis on which class counsel seeks an award of attorney fees. Is the petition for the fee award based upon a common fund or is it based upon a fee shifting statute? The analysis that the court may employ to determine reasonableness is significantly impacted by whether the prayer for attorney fees is justified by a common fund, or a fee shifting statute.

B. Fees Awarded from a Common Fund

From an historical perspective, common fund fee awards are justified on the basis that those "who obtain the benefit of a lawsuit without contributing to its costs are unjustly enriched at the successful litigant's expense."\textsuperscript{183} A common fund is created from the proceeds of the total settlement to ensure that the expenses of litigation, including attorney fees, are apportioned equitably among all those who benefit from the action. To determine what constitutes the common fund award, it is well settled that courts look to the total potential benefit bestowed upon the class as a whole, not merely the number and amount of claims filed during settlement administration.\textsuperscript{184} It is not unusual for courts to apply the "common benefit doctrine" to place a value on nonpecuniary

\begin{itemize}
\item \textsuperscript{130} \textit{Id.}
\item \textsuperscript{131} \textit{Id.} at 902.
\item \textsuperscript{132} \textit{Id.} at 897 ("When, however, the applicant for a fee has carried his burden of showing that the claimed rate and number of hours are reasonable, the resulting product is presumed to be the reasonable fee contemplated by [Section] 1988."). Obviously, such a view does little to clarify the law and promote uniformity of decision and across-the-board guidance in cases when the "prevailing market rates" are not easily determinable. Thus, the Supreme Court has tacitly deferred to each circuit's notion of reasonableness and fairness in regard to awards made pursuant to fee shifting statutes. The consequences are obvious.
\item \textsuperscript{133} Boeing Co. v. Van Gemert, 444 U.S. 472, 478 (1980).
\item \textsuperscript{134} \textit{Id.} at 480-81; 2 NEWBERG & COMTE, supra note 7, § 11.29.
\end{itemize}
benefits to determine the total value of the common fund.\footnote{135} To justify larger common fund fee awards, the doctrine provides a natural incentive for class counsel to maximize both monetary and nonmonetary benefits to the class.\footnote{136}

As the concept of the common fund fee award has unfolded, a split within the federal courts as to the reasonableness of a fee award is emerging. The longstanding methodology, the "percentage of the common fund\footnote{137} approach, is dichotomous to the "lodestar" approach.\footnote{138} When employing the percentage of the common fund approach, some courts determine attorney fees by calculating the potential value of the common fund multiplied by a percentage determined on an ad hoc basis.\footnote{139} In regard to the lodestar approach, however, courts determine reasonableness of the award as a factor of the time and effort spent on the case multiplied by an hourly rate deemed reasonable for similarly complex noncontingent work.\footnote{140} The fixed amount is then adjusted up or down by certain multipliers such as the risk of contingency or the quality of the work performed.\footnote{141} Again, though it may be practical, the methodology does little to promote uniformity and guidance on how to best conclude a class action once the parties agree to settle the dispute.


\footnote{136} For example, in a case against an abusive or predatory lender, a nonmonetary benefit (often overlooked by critics) may contemplate the forgiveness of existing deficiencies. Under this scenario, individual monetary recovery may be nominal, but the overall nonmonetary benefits are significant.

\footnote{137} The court in Camden I, 946 F.2d at 771, stated the following: From the time of the Pettus \cite{113 U.S. 116} decision in 1885 until 1973, fee awards granted pursuant to the common fund exception were computed as a percentage of the fund. The amount of the fee was left to the district court's discretion, with the only standard being reasonableness under the circumstances of a particular case.


\footnote{139} Camden I, 946 F.2d at 771.

\footnote{140} Id. at 772.

\footnote{141} Id.
In *Camden I Condominium Ass'n v. Dunkle,* the Eleventh Circuit clarified that it will follow the percentage of the fund methodology. The court explained that because monetary results in a common fund class action case predominate over all other criteria, the desired goals are better achieved:

[to] provide fair and reasonable compensation to attorneys ... to discourage abuses and delays in the fee-setting process; to encourage early settlement or determination of cases; to provide predictability; to carry out the purposes underlying court-awarded compensation; to simplify the process by reducing the burdens it currently imposes on the courts and on litigants; and to arrive at fee awards that are fair and equitable to the parties and that take into account the economic realities of the practice of law.

These factors, along with a dearth of authority from the United States Supreme Court, led Judge Dubina to conclude that the methodology which applied the percentage of the common fund was the most reasonable approach.

In determining the percentage in this approach, the court indicated that most common fund fee award cases fall in the range of twenty percent to thirty percent of the fund with twenty-five percent constituting a benchmark. As a matter of judicial review, the factors announced in *Johnson v. Georgia Highway Express, Inc.,* are used to adjust percentage fee awards on a case by case basis. These factors, it was noted, should be analyzed by the trial court when selecting the percentage amount used to determine the award of attorney fees.

The standards articulated in *Camden I* appear to be more relaxed with respect to common fund attorney fee awards in Georgia courts. In *Georgia v. Private Truck Counsel,* the Georgia Supreme Court, in a
decision issued prior to Camden I upheld the notion that attorney fees may be awarded from a common fund class action lawsuit. In so holding, the court endorsed the percentage of the common fund approach to determine reasonable attorney fees by agreeing that the fees were not properly awarded pursuant to 42 U.S.C. § 1988, which necessarily employs the lodestar approach. Thus, like federal law in the Eleventh Circuit, Georgia precedent indicates a preference for the percentage of the common fund approach to determine the reasonableness of an attorney fee award.

C. Fee Award Based upon Fee Shifting Statutes

In the Eleventh Circuit, a fee shifting statute that entitles the prevailing party to attorney fees typically employs the lodestar methodology to determine reasonableness. This necessarily contemplates that the fees could be awarded not only to a prevailing plaintiff but also, in the court's discretion, to a prevailing defendant. Georgia courts remain silent on these specific issues.

D. Ethical Considerations Regarding Settlement Negotiations

Besides the obvious concerns governing monetary and nonmonetary benefits to class members, lawyers should be cognizant of an issue that arises in the context of negotiating fees under a fee shifting statute simultaneously with negotiating a class award. Due to potential public misunderstandings that may be cultivated in regard to the interests of the class, legitimate concern has been raised over the propriety of negotiating attorney fees before or in connection with the award for the class. Therefore, it is good practice, at least in the realm of a fee shifting statute, to resolve the issue of attorney fees after the propriety, merits, and damages of the class claims are resolved to satisfaction.

150. Id. at 534, 371 S.E.2d at 381.
151. Id. at 535, 371 S.E.2d at 381.
153. Camden I, 946 F.2d 768; see also Blum, 465 U.S. 886.
154. Christianburg Garment Co. v. EEOC, 434 U.S. 412, 412 (1978). The Court specified that a fee award to the defendant was proper if the plaintiff's action was "frivolous, unreasonable, or without foundation." Id.
155. In the absence of any controlling law, great weight is placed upon federal decisions. Accordingly, a plausible argument is that a fee shifting statute pled in a Georgia court deserves the same treatment as one in a federal court.
E. Cy Pres Funds

Cy pres, which stands for "next best use," is a method for class counsel, subject to court approval, to provide indirect benefits to the class by distributing the funds generated as a result of the litigation for their next best use.\footnote{157} Cy pres distributions arise when money is not distributed to or claimed by class members and is thereafter pledged to legal, governmental, charitable, or religious groups to further the interests of the class or for other important social concerns. Several examples, including one recent Georgia cy pres distribution,\footnote{158} show that courts are willing to approve many different sorts of payments. Among these are a payment to state agencies for use in public health programs,\footnote{159} a payment to area law schools or medical schools for general use, a payment to a newly formed foundation to study the biological effects of radiation exposure, escheatment to the State of Pennsylvania, and a payment to a nonprofit boys' ranch.\footnote{160} Although the possibility remains that class action counsel could abuse this process by moving the court to fund pet projects, it is ultimately up to the court with jurisdiction over the cy pres funds to approve, in equity and good conscience, the next best use of unclaimed funds.\footnote{161}

During the processes of negotiating a class action settlement, the subject of cy pres is often discussed. Experience dictates that stronger cases of liability and damages typically result in concessions made by

\footnote{157} See generally 2 Newberg & Comte, supra note 7, § 11.20 at 11-26. "The cy pres, or next best use, doctrine originated in the charitable trust field when courts took steps to prevent the failure of trusts." Id. (citing George G. Bogert, The Law of Trusts and Trustees §§ 431-450 (2d ed. 1964)).

\footnote{158} See Starr v. Fleet Finance Inc., No. 92-2314-06 (Cobb County Super. Ct., Mar. 27, 1996), a case involving predatory lending practices targeted upon low income homeowners. The superior court approved nearly $400,000 in cy pres funds to be distributed among groups such as the Atlanta Legal Aid Society’s Home Defense Program (a program within the Legal Aid Society that lends legal assistance to low income homeowners victimized by predatory lenders), the Neighborhood Assistance Corporation of America (a nonprofit corporation designed to help low income homeowners), the Consumer Law Center of the South (an entity whose mission is to promote reform in consumer rights through legislation), and the Congregation Shearith Israel Night Shelter (a bed shelter for homeless women). See H. Rothbloom, Cy Pres: Do the Right Thing, 2 The Consumer Advocate 26 (1996).


\footnote{161} See, e.g., Boeing, 444 U.S. at 488 n.4.
one or more defendants that cy pres funding to certain groups or projects be part of the settlement makeup. Likewise, weaker cases of liability or damages typically result in a reversion of any unclaimed or undistributed funds to the defendant. If the settlement agreement is silent with respect to cy pres funding, the substantive policies underlying the laws sued upon are better served by distributing the cy pres funds to groups or projects rather than allowing the money to revert to the defendants.

As a final consideration, due regard to the court's jurisdictional powers must be considered. Because the underpinnings of cy pres funding originate from the court's equitable powers, it is important to realize from the outset of filing a suit that only courts of equity, such as a Georgia superior court or a federal district court, can order a distribution of cy pres funds. Consequently, class counsel is advised to take this into consideration when filing suit. Failing to realize this could result in class counsel giving up a powerful tool in the settlement process as well as an important social benefit in recognition of a widespread wrong.

F. Practical Settlement Considerations

It is not unusual for the settlement of class action lawsuits to take months or even years. Once the parties have agreed to the parameters of a settlement, two hearings are customary—a preliminary settlement hearing and a final settlement hearing. The preliminary settlement hearing allows the parties to present the settlement for explanation to the trial court. Occasionally, if there is a dispute between the parties concerning any aspect of the settlement, it is appropriate at this hearing

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162. Id. In this situation, class counsel need to be on guard to prevent the perceived abuse that class members received virtually no nonmonetary benefit because the unclaimed funds reverted to the defendant. If nonmonetary benefits are assigned in a percentage of the common fund case, reversion has no bearing upon the fee award, and it outwardly appears as though the class counsel has not attempted to adequately protect the interests of the class.

163. 2 NEWBERG & COMTE, supra note 7, § 11.20, at 11-29.

164. GA. CONST. art. VI, § 4, para. 1 (superior courts have exclusive equity jurisdiction).

165. See Payne v. Hook, 74 U.S. 425 (1868). "The equity jurisdiction conferred on the Federal courts is the same that the High Court of Chancery in England possesses; is subject to neither limitation or restraint by State legislation, and is uniform throughout the different States of the Union." Id. at 430.

166. FED. R. CIV. P. 23(e) on settlement of class actions reads in its entirety: "A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs." There is no corresponding Georgia state law provision.
for the court to step in and resolve the disagreements. Likewise, any concerns the court may have regarding the settlement are addressed. Assuming that the court agrees with the settlement accord reached between the parties, an order approving the agreement is usually signed, and the mechanics of setting forth the notice requirements of a final settlement hearing begins.

In recent years substantial controversy in federal venues has surrounded the propriety of a court's approving a "settlement class action," which is a class action certified for settlement purposes only, versus a "litigation class action," which concerns a class action that has been certified by the court prior to submission for settlement.167 Although the difference seems subtle, a settlement class action allows the plaintiff, by virtue of the parties' agreement, to bypass the requirements of proving numerosity, commonality, typicality, and adequacy of representation and to submit the case and the proposed class for settlement. A litigation class action, on the other hand, generates no controversy towards settlement because the court has previously ruled on certification issues.

Critics of settlement class actions have charged that when courts fail to consider certification issues, court surveillance regarding the ultimate fairness of a class action could be compromised to the point that the parties could actually deceive the court in a "staged performance" in their request for approval of a settlement class.168 Proponents, on the other hand, argue that using the settlement class to resolve sprawling claims such as those presented in the asbestos litigation or in the breast implant cases is judicially efficient, economical, and very effective.169

The United States Supreme Court has now resolved this dispute. In *Amchem Products, Inc. v. Windsor,*170 the Court held that although settlement of a case is "relevant" in determining whether a settlement class should be approved, the factors underlying class certification

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168. *See, e.g., Kamilewicz v. Bank of Boston Corp.,* 100 F.3d 1348, 1352 (7th Cir. 1996) (Easterbrook, J., dissenting from denial of rehearing en banc) (parties "may even put one over on the court, in a staged performance"), *cert. denied,* 117 S. Ct. 1569 (1997). *See also* John C. Coffee, Jr., *Class Wars: The Dilemma of the Mass Tort Class Action,* 95 COLUM. L. REV. 1343, 1379-80 (1995) (class counsel confined to a settlement negotiation does not have the threat of litigation to press for a better offer).

169. Indeed, settlement classes have become a commonplace happening. *See T. Willging,* supra note 111, at 61-62.

cannot be ignored and must be addressed by the court when considering fairness. Consequently, parties in a federal forum must address certification factors when submitting a settlement class for approval to the court. It remains to be seen whether Georgia courts will follow suit.

Upon approval of a settlement at the preliminary hearing, it is customary for notice to be published to the class members to inform them of the settlement. This is typically done through the mail, the print media, web pages or other electronic media, or any combination. The notice is designed to adequately inform the class members of the settlement. The class members typically will have an opportunity to object to the settlement or decide whether to opt in or opt out depending on the type of action being litigated. A class member who decides not to participate in the class action may file a separate suit and seek individual damages.

IV. CONCLUSION

From a layman's point of view, it is easy to perceive that a class action overcompensates lawyers and undercompensates class members. Nevertheless, no one has proposed a better scheme to tackle the problems associated with litigation involving multiple persons and relatively small claims. No one can dispute that class action lawsuits, when properly used, effectively serve as a watchdog for breaches of business practices towards a company's unsuspecting customers. At little or no cost to consumers or taxpayers, the system encourages the civil prosecution of contract violations, actions concerning written fraud, civil RICO actions, truth-in-lending violations, skimming operations, and other consumer protection laws. Further, the legacy of product liability class action lawsuits has been to remove harmful products from the stream of commerce and to improve upon the designs for safer substitutes. In essence, this litigation gives citizens the opportunity to put into check certain conduct not otherwise tolerated under our system of jurisprudence.

171. Id. at 2248.