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The Progressive Transformation of Class Actions in California

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INTRODUCTION

Class suits are a ready vehicle for social change, providing a means to rectify the adverse effects of a complex array of corporations, associations and government agencies that complicate the lives of common citizens. This article traces the evolution of class actions in California, from 1850 to the present. The progressive transformation of judicial response to class actions, from procedural to remedial, will be discussed.

Originally, an exception to joinder requirements in common law, early class suits were strictly limited to specifically predictable situations. Contemporary cases, however, reflect a remedial view, wherein the courts manipulate the boundaries of class actions to provide a remedy for injured litigants. Within the remedial view, evolutionary transition has brought class actions almost full circle to the threshold of a new procedural outlook.

The application of judicial standards is necessarily an individual endeavor, dependant upon the factual presentation of each case. Yet, a definition and delineation of the parameters of proper representative suits has emerged. These parameters must be shown in order to avoid the frustration and the cost of a dismissal in future suits. If class actions are to deal effectively with the demands of society, it is imperative that the development of class actions be well understood.

THE EARLY PROCEDURAL VIEW

A fundamental principle of common law was that all those with a material interest in the subject matter of a lawsuit ought to be joined as parties to the litigation. In the context of class actions this compulsory joinder often thwarted the administration of justice, and compelled the courts to create exceptions to the general rule.

One such exception was promulgated by the California Supreme Court, in the case of *Von Schmidt v. Huntington.*[1] There the court allowed a bill to be brought by a few shareholders on behalf of themselves and other shareholders for the return of forfeited stock. The reasoning forwarded by the court was that an attempt to unite all of the shareholders would be inconvenient, while the delays that would develop from such an attempt would prove an injustice to those already before the court.

The equitable considerations of convenience and justice were the bedrock on which this early approach to class actions rested.[2] As a procedural mechanism, the class action suit enabled the courts to cope with parties having an interest in the subject matter of a suit, but who were too numerous to be effectively joined.

In 1872, section 382 of the California Code of Civil Procedure was enacted. This section set out the common law rule of compulsory joinder and outlined an exception for representative suits.[3] One of the first cases to deal with the statute was *Carey v. Brown,*[4] where the court stated that the unity of interest between the representative and those represented must be such as to make each of them necessary parties to the action.[5] This pronouncement restricted the use of class actions only to those situations where a single transaction affected the class in the same manner.[6]

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1. 1 Cal. 55 (1850).

2. Bernhard v. Wall, 184 Cal. 612, 194 P. 1040 (1921); Noroian v. Bennett, 179 Cal. 806, 179 P. 158 (1919); Carey v. Brown, 58 Cal. 180 (1881); Gorman v. Russell, 14 Cal. 531 (1860). For background to class actions, *see* Note, *Class Actions and Interpleader: California Procedure and the Federal Rules,* 6 STAN. L. REV. 120, 121-23 (1953); Note, *Parties: Right to Bring Spurious Type of Class Suit,* 30 CALIF. L. REV. 350 (1942).

3. CAL. CIV. PRO. CODE § 382 (West 1973). The portion concerning compulsory joinder has since been superseded by another section and therefore deleted from this section by amendment in 1971. It read: "Of the parties to the action, those who are united in interest must be joined as plaintiff or defendant. . . ."

4. 58 Cal. 180 (1881). In an action by a landowner to quiet title against a defendant who claimed the land adversely, the plaintiff was suing on behalf of himself and all others who derived title from the same grantor.

5. *Id.* at 183-84.

6. "The only question involved in this action is one of title to the land claimed by the plaintiff and the defendant adversely. It does not appear that anyone had a common or general interest with the plaintiff in that question. A judgment in his favor would simply quiet his title to land in which no one else had any interest." *Id.* at 183.

Subject Matter—Single Transaction

The necessary party rule was the keystone to the single transaction view. To find a single transaction, the courts needed to look to the subject matter of the suit for the common interest of the necessary parties. This approach provided a structural framework for subsequent cases. *Noroian v. Bennett*[7] is an example. In *Noroian*, the plaintiffs were a group of farmers who claimed to be victims of a fraud perpetrated by a company. The company promised the farmers certain benefits, including substantial credit allowances, if they would purchase one share of the company by signing a promissory note. The company assigned the promissory notes to the defendant, who then sought to collect them. The farmers found the shares to be worthless, and the credit was discontinued by the company.

Reasoning that a sufficient community of interest did not exist because the promises were solicited from the farmers at different times, the California Supreme Court refused to allow the issue of fraud to be settled in one trial. The court stated that there was no single fact which would "determine the rights of all the plaintiffs."[8] The causes of action were similar, but the facts were not the same.[9] Examples referred to by the court demonstrated a judicial preoccupation with the single transaction approach. Those owning ". . . separate rights in the water of a stream [and who] are injured by a diversion of the water higher up on the stream by another person, or where a single fraudulent conveyance operates to the injury of several separate judgment creditors . . . ."[10] would be proper parties for a class action. In *Noroian,* the court was unable to fit the plaintiffs into the necessary party mold, and for that reason rejected the class suit.

A similar situation arose in *Goodspeed v. Great Western Power Co. of California,*[11] where the plaintiffs sought to represent users of water supplied by the defendant. Allegedly representing that it was a mutual company, the defendant required the consumers to buy its stock. Although all the plaintiffs bought stock, they all did not buy from the defendant. Therefore, the court determined no single transaction occurred in which all of the plaintiffs were involved in the same manner.

Other cases reiterated the interest of the courts in the singular

7. 179 Cal. 806, 179 P. 158 (1919).
8. *Id.* at 809, 179 P. at 159.
9. *Id.*
10. *Id.*
11. 19 Cal. App. 2d 435, 65 P.2d 1342 (3d Dist. 1937).

characteristic of the wrong.[12] As an exception to the joinder requirements, class actions were considered to be only procedural in nature. The facts of each case had to fit the rule; the rule would not accommodate any action inching over the drawn line. The complaint had to fall within the judicial interpretation of section 382.

While maintaining the necessary party requirement, the court, in *Watson v. Santa Carmelita Mutual Water Co.*,[13] availed itself of a companion concept—the common fund. The question before the court was whether a complaint alleging separate fraudulant represenations to a class of plaintiffs stated a cause of action. The defendant company sold land to the plaintiffs and promised not to charge for water service if the landowners would retain stock in the company. Later, when the company levied a charge for its services, a suit was brought on behalf of 1,500 stockholders. The court of appeal refused to allow the plaintiff to proceed with the class action because "[b]y no principle of legalistic logic does it appear that the unnamed 1,500 are necessary to the prosecution by plaintiffs of their action."[14] The court also explained that there was a lack of any common ground on which the class might rest. Explaining that "[a] representative suit is proper only where the action is for the purpose of conserving a common fund . . . .,"[15] the court based its decision on *Carey* and *Ballin*. Yet emphasis on a common fund as a possible alternative went beyond those two cases. In a subsequent case,[16] the court added impetus to the single transaction approach and conspicuously allowed the subject matter to be brought as a class action because the class had been using water from a common source, which the defendant sought to remove. The court dismissed the defendant's argument that the plaintiffs must allege a contractual relationship with it. Noting

12. *See* Ballin v. Los Angeles County Fair, 43 Cal. App. 2d 884, 111 P.2d 753 (Super. Ct., App. Dep't. 1941). Defendant racetrack made errors in figuring breakage, and plaintiff sued for all those who suffered loss thereby. The court refused the action because injury to the plaintiffs occurred at numerous times. *See also* Farmers and Merchants Nat. Bank v. Peterson, 5 Cal. 2d 601, 55 P.2d 867 (1936). Appropriation of funds deprived creditors of payment.

13. 58 Cal. App. 2d 709, 137 P.2d 757 (2d Dist. 1943).

14. *Id.* at 719, 137 P.2d at 762.

15. *Id.* at 718-19, 137 P.2d at 762.

16. Marolda v. La Piner, 81 Cal. App. 2d 742, 185 P.2d 40 (4th Dist. 1947). [Hereinafter cited as Marolda].

that the defendant had failed to raise any prior objections to a possible misjoinder, the court stated that Civil Procedure Code section 382 precluded such objections on appeal.[17] Nothing more was said about necessary parties; the court rested its decision on the concept of a common fund.

The court's seeming disdain for the necessary parties rule was explained in the major case of *Weaver v. Pasadena Tournament of Roses Association.*[18] The court noted that *Carey, Ballin,* and *Watson* demanded a collective interest.[19] While agreeing that separate and distinct claims would not be sufficient to maintain a class action, the court disapproved the necessary party rule. With regard to section 382, Justice Spence wrote:

> The statute does not . . . provide [that the represented group must be so united with the named plaintiff as to make them necessary parties] and such interpretation would restrict its appropriate application in cases where 'many persons' or 'numerous parties', though not necessary litigants, nevertheless have a 'common or general interest' in the subject-matter of the controversy . . . .[20]

The court destroyed the foundation of a single transaction approach to class actions, and signalled the pending doom of class actions as mere procedural devices. No longer would the court be able to look at the subject matter alone to determine if a class action could be sustained. Beyond community of interest, *Weaver* did not expressly state what the new criteria for class actions would be.[21] In fact, by refusing to allow the action to be maintained, the court emphasized that each of the plaintiffs had separate and distinct actions.[22] By concluding that the defendant's refusal to sell tickets did not affect all the plaintiffs in the same manner, the court was unable to totally reject the single transaction approach.[23] *Weaver* did not touch the concept of common fund and gave the procedural device another, albeit temporary, chance to survive.

City and County of San Francisco v. Market Street Ry. Co.[24] illustrated the resiliance of the old view. There, the city was one of

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17. *Id.* at 744, 185 P.2d at 42.
18. 32 Cal. 2d 833, 198 P.2d 514 (1948). [Hereinafter cited as Weaver].
19. *Id.* at 840, 198 P.2d at 518.
20. *Id.* at 841, 198 P.2d at 519. A later reaffirmation of this point is in Heffernan v. Bennett and Armour, 110 Cal. App. 2d 564, 243 P.2d 846 (1st Dist. 1952).
21. Note, *Class Actions and Interpleader: California Procedure and the Federal Rules,* 6 STAN. L. REV. 120, 131 (1953); Note, *Pleadings—Parties—Representative Suits,* 23 S. CAL. L. REV. 285, 286 (1950).
22. 32 Cal. 2d at 839, 198 P.2d at 517.
23. *Id.*
24. 95 Cal. App. 2d 648, 213 P.2d 780 (1st Dist. 1950). [Hereinafter cited as Market St. Railway].

many parties having a cause of action against the railway company. When it became known that the defendant was liquidating and distributing its assets without making any provision to pay possible judgments that might be levied against it, the city sued for itself and all others holding causes of action in order to prevent this distribution. The defendant cited *Watson* as precedent and argued that no common fund existed in which the plaintiff had a common interest. The court, implying that no reason existed to allow the defendant to benefit from its wrong, extended the concept of "fund" to include the assets of the company.[25] This ingenious expansion of the notion of "fund" allowed the single transaction approach to limp on for a while longer.[26]

A shift in emphasis was apparent. In the last three major cases,[27] the court abandoned the necessary parties rule, striking an eventually fatal blow to the importance of the single transaction concept. Now, the common fund, as an alternative to necessary parties in providing the required interest to sustain class actions, could no longer bear the load. Besides convenience, judicial perceptions of elemental justice also gave early class actions life.[28] The narrow confines imposed by procedural rules and an unyielding emphasis upon the single transaction avoided the resolution of substanital controversies. The important matter was to right wrongs and the following case anticipated a broadened view of the class suit.

Fanucchi v. Coberly-West Co.[29] was a class action brought by cotton growers on behalf of themselves and others similarly situated to recover cotton seeds wrongfully withheld by the defendant. The normal practice was for the defendant to extract the seeds from the cotton, weigh them and return them to the plaintiffs according to a percentage formula based on the amount of cotton provided by each farmer. The plaintiffs alleged the formula was manipulated so that the defendant, Coberly-West, was able to retain an "overage" illegally.[30]

25. "Defendants claim that there is no 'fund' here. Strictly speaking that is true. However, all plaintiffs would have a common interest in the *total* assets of the railway company." *Id.* at 654, 213 P.2d at 784.
26. Price v. Communications Workers of America, 167 Cal. App. 2d 524, 334 P.2d 632 (2d Dist. 1959).
27. Marolda, Weaver, and Market St. Railway.
28. Von Schmidt v. Huntington, 1 Cal. 55 (1850).
29. 151 Cal. App. 2d 72, 311 P.2d 33 (4th Dist. 1957).
30. *Id.* at 74-77, 311 P.2d at 34-36.

The defendant argued that a class suit could be sustained only if its acts simultaneously created rights in a group of people and that in this case the rights in question were individual in nature. In essence, there was no single transaction between the defendant and the group of farmers. The court compared the mass of seeds contributed by the farmers to a fund and then, once and for all, destroyed the final vestiges of the single transaction approach that had been used since 1850. In the court's opinion,

> [W]hether the primary wrong for which redress is sought is the result of one act simultaneously affecting all the growers, or whether it results from a series of similar acts which affect such persons in the same way, is not the controlling element. In either case, the result is the same insofar as the interest of each grower is concerned and with respect to his right to relief.[31]

Regardless of how it came about, the important factor was the existence of a fund, or a common property interest. The court was upset because the defendant breached its fiduciary duty to the plaintiffs. Just as in *Market Street Railway*, the court was willing to create a fund out of the interests of the litigants, rather than subjecting those interests to a mechanical framework. The court wanted to be able to provide a remedy for those who were injured by the continuous actions of the defendant.[32]

The willingness to dig about in the facts, to find the common questions, to isolate them and to retain the action even for a portion of them, became the foundation of the next approach. Class actions were becoming good social policy—a way to correct massive injustices by providing a forum for those who are wronged. It is this expansive view of the subject matter of class actions, which is so crucial today. Before going into the effects of this gateway to accessibility, however, there is another important aspect of class actions—the "class" itself.

"Class"—Pre-existing Groups

Early class actions isolated the class from the subject matter of the suit. While the procedural perspective forced the single transaction to be a total approach, it also provided a similar status to the determination of the class. Simply stated, the extent of the class was defined by that characteristic which each of the members held in common. More accurate, however, is the view that courts refused to sustain a class action unless the "class" was a group that

31. *Id.* at 81, 311 P.2d at 39.
32. For a case where the court created a "fund" of sorts from the common interest of the plaintiff in the validity of a statute, *see* Haggerty v. Kings County, 117 Cal. App. 2d 470, 256 P.2d 393 (4th Dist. 1953).

was discernible without the benefit of litigation. The theory dovetailed nicely with the single transaction view in that the defendant's act could affect the group as a whole if the group pre-existed and did not arise as a result of the wrong.

The earliest recital of the permissible extent of the class was in *Von Schmidt v. Huntington*[33] wherein the court pointed out that joinder would not be necessary if the parties formed a voluntary association for public or private purposes. In that case, the plaintiffs represented stockholders of a company.[34] Other groups, such as creditors suing to obtain an accounting,[35] or beneficiaries of a trust seeking to remove a trustee[36] were easily recognizable by the courts and could be dealt with as a unit. The major concern was adequate representation. An action would not be allowed to continue if the rights of those who would be members, but as yet had no interest, were to be foreclosed.[37] Designated members of a class are bound by the judgment. Therefore, it is imperative that the defined class be fairly and in good faith represented.[38]

Noroian v. Bennett[39] demonstrated the interplay between the single transaction approach towards subject matter and the pre-existing group approach toward the class. The court spoke of a numerous body of separate claimants seeking to settle litigation on the weight of a single decisive fact, as a result of a single wrong affecting the body as a whole.[40] Without that single decisive fact, the court could not accept the farmers as a class. The following comparison of *Goodspeed v. Great Western Power Co. of California*,[41] and *Marolda v. La Piner*[42] helps illustrate this point.

In *Goodspeed*, those using water supplied by the defendant company were deemed to be unascertainable, whereas in *Marolda*, those

33. 1 Cal. 55 (1850).
34. *Id.* at 66; Gorman v. Russell, 14 Cal. 531 (1860).
35. Farmers and Merchants Nat. Bank v. Peterson, 5 Cal. 2d 601, 55 P.2d 867 (1936).
36. Peterson v. Donnelly, 33 Cal. App. 2d 133, 91 P.2d 123 (3d Dist. 1939).
37. Bernhard v. Wall, 184 Cal. 612, 194 P. 1040 (1921); Carey v. Brown, 58 Cal. 180 (1881); Gorman v. Russell, 14 Cal. 531 (1860).
38. Fallon v. Superior Court, 33 Cal. App. 2d 48, 90 P.2d 858 (1st Dist. 1939). Intervenor, as member of class, sought to set aside the judgment because of inadequate representation.
39. 179 Cal. 806, 179 P. 158 (1919).
40. *Id.* at 809, 179 P. at 159.
41. 19 Cal. App. 2d 435, 65 P.2d 1342 (3d Dist. 1937).
42. 81 Cal. App. 2d 742, 185 P.2d 40 (4th Dist. 1947).

using water from a common source *were* considered to be a proper class. While the classes seem to be similar in each case, the lack of a single transaction in *Goodspeed* blinded the court to the existence of an identifiable group.

In *Marolda,* the class was easily discernible because the subject matter was a single transaction, the deprivation of a common source of water by the defendant. Under the procedural view, if the class was neither pre-existing nor identifiable without the litigation, or if the subject of the suit was not a single wrong perpetrated equally upon a recognizable group, the conflict presented to the court could not be adjudicated by a class action.

The court seemed ready to depart from the pre-existing group viewpoint in *Weaver v. Pasadena Tournament of Roses Association.*[43] Explaining that a class need only to be ascertainable insofar as it relates to the matter in controversy, the court was poised to loosen the strictures on the definition of class. However, the creditors, stockholders, beneficiaries and bondholders alluded to as examples were no different than the allowable groups of the previous seventy-five years.[44] Without a single transaction, the class was very narrowly and rigidly defined.[45]

Obviously working against itself, the court dismantled the procedural device with one hand, while reassembling it with the other. Cases such as *Marolda, Weaver* and *Market Street Railway* eroded the relative isolation that had existed between class and subject matter of a suit. Yet, the pre-existing group approach to class remained alive, though somewhat scarred.[46] The weight of social policy would soon pull it down. Willingness to provide a forum for those who had been wronged and the realization that class actions were more than a mere exception to joinder could not help but to completely change the prior aproach.

The situation in *Barber v. California Employment Stabilization Commission*[47] helped liberalize the interrelationship between class and subject matter in the hands of the court. The plaintiff in *Barber,* brought an action against the defendant alleging an improper

43. 32 Cal. 2d 833, 198 P.2d 514 (1948).
44. *Id.* at 839, 198 P.2d at 518.
45. The *Weaver* opinion intimated that the lack of a single transaction affecting all the ticket holders doomed the action to failure. Had they been a somewhat united group, the results might have been different.
46. Rosicrucian Fellowship v. Rosicrucian Fellow, Etc., 39 Cal. 2d 121, 245 P.2d 481 (1952); Heffernan v. Bennett and Armour, 110 Cal. App. 2d 564, 243 P.2d 846 (1st Dist. 1952); Maxwell v. Brougher, 99 Cal. App. 2d 824, 222 P.2d 910 (2d Dist. 1950).
47. 130 Cal. App. 2d 7, 278 P.2d 762 (1st Dist. 1954).

refusal to grant unemployment benefits due to a maritime strike. He was suing for himself and all other maritime workers similarly situated. Though the court refused to recognize such an amorphous class, it attempted to find a boundary that could be drawn to define the class. The court looked, not to the body of the class, but to the *facts*. This attempt implied that a pre-existing body might not be necessary if the subject matter is right.[48]

The decision in *Fanucchi v. Coberly-West Co.*[49] picked up where *Barber* left off. The farmers in *Fanucchi* were not a pre-existing body, but they were sufficiently ascertainable because of the common fund in which they all had an interest. Unlike the farmers in *Noroian*, they were not hampered by the single transaction argument. While a throwback to an earlier time, the common fund was formed by the common interests of the class members. In essence, the class and the subject matter were coming closer and closer together.

THE REMEDIAL VIEW

The connection being forged between "class" and subject matter, coupled with the expanding view of the courts as to the purpose of class actions, would provide the springboard for the next judicial response to this type of suit. No longer a mere procedural device but a tool of social change, class actions could, and would be, used to alter the status quo. The doors of the court were opened to all who considered themselves to have been wronged. The courts, anxious to provide remedies, began to sift through the facts of each case with increasing care. Emphasis was placed upon finding the common interest—the key to defining the proper subject matter and determining the extent of the class.

Subject Matter—Multiple Transactions

Contrasted with the early procedural perspective, the drive to supply a remedy provided the foundation for the second stage of the evolving concept of class actions. The cornerstone of this method remained the subject matter of the suit, but the predominating common questions were derived from multiple transactions

48. *Id.* at 15, 278 P.2d at 767.
49. 151 Cal. App. 2d 72, 311 P.2d 33 (4th Dist. 1957).

between plaintiff and defendant rather than from a single transaction. In *Chance v. Superior Court*,[50] petitioners intervened and objected to the representative nature of a suit filed to foreclose on trust deeds that secured over 2,000 notes, because as members of the class they feared loss of their property. Petitioners claimed the class members lacked sufficient community of interest to allow the action to proceed because the notes were sold in separate transactions. In effect, the petitioners were attempting to use the old single transaction approach that had been disallowed in *Fanucchi*. The court admitted that a single transaction had not taken place but then went on to determine interests the class had in common. Explaining that the separate claims were not sufficient to preclude the action, the court stated:

> While the notes and trust deeds involved herein are separate; are secured by allegedly separate parcels of property, and were acquired . . . in apparently separate transactions, there are also present a number of questions common to all of these owners of notes . . . . [A]ll of the trust deeds are identical as to the conditions and provisions . . . and all of the allegedly separate 'lots' are situated within the same tract of land. . . . [I]t would not seem necessary for each member of the instant class to establish his right to recover . . . upon facts peculiar to his own case . . . .[51]

According to the court, all of the deed owners had a common interest in resisting debtor status in relation to the defendant. While the ideal class action would have no issues that were not common to all members of the class, the common questions here were sufficient to let the action proceed. If possible, the court intended to provide a remedy.[52]

The petitioners also argued that no common fund existed. This contention was a remnant of the single transaction approach. The court explicitly disapproved the need for a common fund, stating this element was nothing more than another way of expressing the necessary community of interest requirement and that the existence of an actual fund was irrelevant.[53]

Finding that the relationships between the plaintiff and defendant, as well as *all* the transactions between them are important, the *Chance* court moved away from the strict procedural arena of earlier cases. In order to provide a remedy for those wronged by a common malfactor, the court had to elucidate the predominating common question in every class action. Even the continuing in-

50. 58 Cal. 2d 275, 373 P.2d 849, 23 Cal. Rptr. 761 (1962).
51. *Id.* at 285-86, 373 P.2d at 855, 23 Cal. Rptr. at 767.
52. *Id.* at 284, 373 P.2d at 853-54, 23 Cal. Rptr. at 766 (J. Patton memorandum).
53. *Id.* at 288, 373 P.2d at 856, 23 Cal. Rptr. at 768.

terests of the litigants became an issue possible of resolution without repeated court appearances.[54] Willing to extend the benefits of class actions, the court practiced an open-door policy.[55] Illustrative of this policy is *Daar v. Yellow Cab Co.*[56]

In *Daar*, the plaintiff represented all those who were passengers in the defendant's cabs during the previous four years in order to recover excessive charges made by the cab company. The overcharging was due to the defendant's adjustment of the mileage rate meter in its cabs. The subject matter of the suit was based upon multiple transactions between the defendant and the plaintiff class. The court defined the predominating common questions and clearly manifested its intention to do justice:

> It is more likely that, absent a class suit, defendant will retain the benefits from its alleged wrongs. A procedure that would permit the allegedly injured parties to recover the amount of their overpayments is to be preferred . . . .[57]

The court was not adverse to tearing apart the facts and finding the common questions, as long as the common facts, when weighed against the individual claims, were predominant. Interested in finding sufficient common facts to point to liability, the court indicated that a general formula was not to be used, even though inconsistencies may crop up in subsequent cases.[58] Anticipating the possibility of inconsistent results in future cases, the *Daar* court promulgated a guidepost: If the burden to the court outweighs the benefit to the parties, then there is no reason to search for a preponderance of common questions because the action cannot proceed. The court noted that too many separate claims may defeat the class action, but:

> As we are not unmindful that substantial benefits resulting from class litigation, both to the litigants and to the court, should be found before the imposition of a judgment binding on absent parties can be justified, our determination depends upon whether the com-

54. Renken v. Compton City School Dist., 207 Cal. App. 2d 106, 24 Cal. Rptr. 347 (2d Dist. 1962).
55. California Sch. Employees Ass'n. v. Willits Unified Sch. Dist., 243 Cal. App. 2d 776, 52 Cal. Rptr. 765 (1st Dist. 1966).
56. 67 Cal. 2d 695, 433 P.2d 732, 63 Cal. Rptr. 724 (1967).
57. *Id.* at 715, 433 P.2d at 746, 63 Cal. Rptr. at 738.
58. *Id.* at 714, 433 P.2d at 745, 63 Cal. Rptr. at 737-38. For factual allegations that establish the necessary community of interest.

mon questions are sufficiently important to permit adjudication in a class action rather than in a multiplicity of separate suits.[59]

The vast changes wrought by the remedial view are apparent in the following comparison. In an attempt to recover the amount retained by a racetrack through the use of an erroneous figuring scheme, the plaintiff in *Ballin v. Los Angeles County Fair*[60] sought to represent all those who had bet at the track and were deprived of their proper winnings. As was the situation in *Daar*, where the defendant's meters were improperly set so as to result in a loss to each cab passenger, the error made by the racetrack was the same for each and every person in the class. Only the *total* recovery in each instance varied. Using the single transaction approach, the court in *Ballin* had refused to allow a representative suit,[61] while the *Daar* court used a multiple transaction approach in allowing the suit to proceed.[62] The court in *Ballin* made no mention of the defendant retaining the benefits of its wrong, but this aspect of the case had been of paramount importance to the *Daar* court.[63] The *Ballin* case, preceding *Daar* by twenty-five years, was a victim of the early procedural view, whereas *Daar* is the epitome of the modern remedial view. By weighing the common facts against the individual facts with an eye toward the benefit to be conferred, the court drastically altered the method by which the subject matter of class actions would be perceived.

"Class": The Group Formed By The Wrongful Act

While the strict procedural view of single transactions gave way to a remedial view, allowing multiple transactions where the subject matter was concerned, a similar change in the court's opinion toward the class was also evident. The pre-existing group approach is still viable,[64] but the relationship between the extent and exis-

59. *Id.* at 713, 433 P.2d at 745, 63 Cal. Rptr. at 737.
60. 43 Cal. App. 2d 884, 111 P.2d 753 (Super. Ct., App. Dep't. 1941).
61. *Id.* at 887, 111 P.2d at 756.
62. 67 Cal. 2d at 710, 433 P.2d at 742-43, 63 Cal. Rptr. at 735.
63. *Id.* at 715, 433 P.2d at 746, 63 Cal. Rptr. at 738.
64. This manner of determining class extent is still the most efficient to work with. It provides protection to the class, as well as to the defendants. *See* California Gasoline Retail v. Regal Petroleum Corp., 50 Cal. 2d 844, 330 P.2d 778 (1958); Haggerty v. Kings County, 117 Cal. App. 2d 470, 256 P.2d 393 (4th Dist. 1953); Parker v. Bowron, 40 Cal. 2d 344, 254 P.2d 6 (1953). Note the relation between the association and the authority of the representative to sue for the association. If the association, as an entity, is not injured, but only the members are, then the representative must allege he has the authority to represent. But if the association *itself* is injured, then this authority need not be alleged. *See also* Santa Clara County Con. and Home Ass'n. v. City of Santa Clara, 232 Cal. App. 2d 564, 43 Cal. Rptr. 86 (1st Dist. 1965).

tence of the class, and the subject matter of the suit is of primary importance. The predominating common questions provide factual parameters to define the extent of the class. The link, between subject matter and class, forged by *Fanucchi* grew stronger with each case. In order for class actions to become an effective tool, the definition of class must be flexible enough for varied use. The important fact is that the named plaintiff, in his or her zeal to enforce the rights of those allegedly injured, be a member of that class.[65] Proper representation will assure the absent members that their rights will not be foreclosed.[66]

None of the cases preceding *Daar v. Yellow Cab Co.*[67] allowed a group of people allegedly wronged by the continuous action of a defendant to stand as a class. The farmers in *Noroian* all held promissory notes by which they could be identified; in *Carey* the landowners all held deeds from the same grantor. The class in *Goodspeed* held stocks from the defendant company and in *Weaver* they held ticket stubs with a number issued by the defendant. Yet, none of them were deemed an ascertainable class. In *Bauman v. Harrison,*[68] the defendant had the names of every bondholder listed in its records, while the court in *Price v. Communications Workers of America,* refused to allow a large number of individuals, who might or might not have been interested in pursuing a remedy, to be considered a class.[69] The *Daar* court, however, advised that isolation of the class from the subject matter would no longer be tolerated.[70] There is no distinction between establishing the existence of a class and identifying the class. As a group of numerous persons who have been wronged or defrauded by another party, the class arises from the wrong and need not exist before the wrongful act. The interest in asserting the right to a remedy gives the class shape and defines its outer reaches. Common questions must predominate over individual claims in order

65. Price v. Communications Workers of America, 167 Cal. App. 2d 524, 334 P.2d 632 (2d Dist. 1959); Kennedy v. Domerque, 137 Cal. App. 2d 849, 290 P.2d 85 (Super. Ct., App. Dep't. 1955).

66. Daar v. Yellow Cab Co., 67 Cal. 2d 695, 433 P.2d 732, 63 Cal. Rptr. 724 (1967); Weaver v. Pasadena Tournament of Roses Ass'n., 32 Cal. 2d 833, 198 P.2d 514 (1948).

67. 67 Cal. 2d 695, 433 P.2d 732, 63 Cal. Rptr. 724 (1967).

68. 46 Cal. App. 2d 84, 115 P.2d 530 (4th Dist. 1941).

69. 167 Cal. App. 2d 524, 334 P.2d 632 (2d Dist. 1959).

70. 67 Cal. 2d at 706, 433 P.2d at 740, 63 Cal. Rptr. at 732.

for the case to be allowed into court as a class action. Should individual interests predominate,[71] or the recovery by each member be sufficient to warrant individual action,[72] the benefit of the class action to the litigants would be nil and the class non-existent in the eyes of the court. Under the remedial view, the court would endeavor to override factors that make the class action unattractive if there would be a substantial benefit for all. "Thus, whether there is an ascertainable class depends in turn upon the community of interest among the class members in the questions of law and fact involved."[73] The "class" and subject matter of a representative suit were now opposite sides of the same coin.

The Synthesis of Subject Matter and Class

Fraud had always been the nemesis of class actions because of its highly individual nature,[74] and this grated harshly against the court's newly avowed purpose for class actions. In *Vasquez v. Superior Court*,[75] suit was brought by 37 named plaintiffs on behalf of themselves and others who were residents of two counties and who purchased frozen food and freezers from the Bay Area Meat Company. The purpose of the suit was to rescind contracts which were entered into after fraudulent misrepresentations were made by the defendant to all of the members of the class.

Justice Mosk forcefully stated the reasons why class actions should be used to protect consumers. Comparing the consumers' plight to that of stockholders of thirty years ago, he said:

> [C]onsumers as a category are generally in a less favorable position than stockholders to secure legal redress for wrongs committed against them. For these reasons, the desirability of consumers suing as a class for fraud . . . has [been urged].[76]

Noting that most consumers are powerless to protect themselves, Justice Mosk implied that the procedural perspective of the past was inadequate to cope with the inequality of resources in a battle

71. Gerhard v. Stephens, 68 Cal. 2d 864, 442 P.2d 692, 69 Cal. Rptr. 612 (1968).

72. Slakey Brothers Sacramento, Inc. v. Parker, 265 Cal. App. 2d 204, 71 Cal. Rptr. 269 (3d Dist. 1968). *See also* Czap v. Credit Bureau of Santa Clara Valley, 7 Cal. App. 3d 1, 86 Cal. Rptr. 417 (1st Dist. 1970).

73. 67 Cal. 2d at 706, 433 P.2d at 740, 63 Cal. Rptr. at 732.

74. Slakey Brothers Sacramento, Inc. v. Parker, 265 Cal. App. 2d 204, 71 Cal. Rptr. 269 (3d Dist. 1968); Watson v. Santa Carmelita Mut. Water Co., 58 Cal. App. 2d 709, 137 P.2d 757 (2d Dist. 1943); Goodspeed v. Great Western Power Co., 19 Cal. App. 2d 435, 65 P.2d 1342 (3d Dist. 1937); Noroian v. Bennett, 179 Cal. 806, 179 P. 158 (1919).

75. 4 Cal. 3d 800, 484 P.2d 964, 94 Cal. Rptr. 796 (1971).

76. *Id.* at 807, 484 P.2d at 968, 94 Cal. Rptr. at 800.

between a consumer and a seller.[77] "Substantial benefits both to the litigants and to the court,"[78] will provide impetus for those class actions on the borderline of acceptance by the court. Since "[a] class action by consumers produces several salutary byproducts, including a therapeutic effect upon those sellers who indulge in fraudulent practices . . . and avoidance to the judicial process of the burden of multiple litigation . . . ,"[79] the court was convinced that *Vasquez* was the case in which the issue of fraud would be vanquished. Very definitely, the court had no intention of letting the defendants gain from their wrongdoing. It was imperative that sufficient common questions be found to outweigh the individual issues in order that the benefits of the resulting judgment extend to as large a class as possible under the circumstances. The court was relying on the foundation laid by *Daar,* but in the concerted effort to overcome the fraud issue, a variation was put forth. The court delved into each element of the cause of action in order to determine the predominating common questions in each.

As to the representations made to the plaintiffs, the court decided:

> [T]he salesmen employed by Bay Area memorized a standard statement containing the representations . . . and that this statement was recited by rote to every member of the class.[80]

The court also found that the existence of a formula, used by the defendant to determine approximate food consumption, would be sufficient commonality. The most important factor that the court considered was that the plaintiffs be given the opportunity to establish the necessary community of interest on the issue of misrepresentation.[81]

As to the reliance upon the misrepresentations, the court stated:

> It is sufficient for our present purposes to hold that if the trial court finds material misrepresentations were made to the class members, at least an inference of reliance would arise as to the entire class.[82]

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77. *Id.* at 808, 484 P.2d at 968, 94 Cal. Rptr. at 800.
78. *Id.* at 810, 484 P.2d at 969, 94 Cal. Rptr. at 801.
79. *Id.* at 808, 484 P.2d at 968-69, 94 Cal. Rptr. at 800-01.
80. *Id.* at 812, 484 P.2d at 971, 94 Cal. Rptr. at 803.
81. *Id.* at 813, 484 P.2d at 972, 94 Cal. Rptr. at 804; *See also* Louisell, Miller & West, *Comments on Vasquez v. Superior Court,* 18 U.C.L.A. L. REV. 1041, at 1058, n.15 (1971).
82. 4 Cal. 3d at 814, 484 P.2d at 973, 94 Cal. Rptr. at 805.

What was this *purpose* the court had in mind? The desirability of this particular type of action provoked the court to make class actions as available as possible, and to delay any final conclusive judgment on the validity of the action until it becomes clear that the sufficient benefits will not be derived. The court noted that the Consumer Legal Remedies Act[83] provided guidelines which trial courts should make use of, especially ". . . for a hearing, upon notice and motion, supported by affidavits, to determine if a class action is proper . . . ."[84]

The *Vasquez* case relied heavily on *Daar*. All those involved in the same set of facts provided an ascertainable class. Separate transactions were not important if sufficient common questions existed, to outweigh the individual claims.[85]

Proponents of class actions as a means of altering the status quo began to take advantage of the liberalizing effect of the remedial view.[86] In *Diamond v. General Motors Corp.*,[87] the named plaintiff sued on behalf of all the residents of Los Angeles County, seeking damages for air pollution, and injunctive relief to prevent the 293 named and 1,000 unnamed defendants from performing any activity that would contribute to pollution. The damages sought were over one *billion* dollars.

The court of appeal compared the case presented by the plaintiff to the fact situations of *Daar* and *Vasquez* and decided that the benefits of a group recovery were totally lacking. Viewing the action as one for public nuisance, the court explained:

> If we were to ignore the pleading problem and allow plaintiff to come into court with a single general allegation, the trial court's problems would be only beginning. Whether an individual has been specially injured in his person will depend largely upon proof

83. CAL. CIV. CODE § 1750 et. seq. (West 1973). *See* section 1781. This in itself gives weight to the change in policy toward class actions, for the only other area of California statutory law that allowed class actions was section 382 of the Code of Civil Procedure.

84. 4 Cal. 3d at 820, 484 P.2d at 977, 94 Cal. Rptr. at 809.

85. "[T]he applicable rule as stated in Daar is that the maintenance of the suit as a class action is not precluded so long as the issues which may be jointly tried, when compared to those requiring separate adjudication, justify the maintenance of the suit as a class action. *If the questions which must be litigated separately are not numerous or substantial, it would be advantageous to the parties and the judicial system to allow the named plaintiffs to sue on behalf of the class.*" 4 Cal. 3d at 815, 484 P.2d at 974, 94 Cal. Rptr. at 806 [emphasis added]. *See also* Gray v. Whitmore, 17 Cal. App. 3d 1, 94 Cal. Rptr. 904 (1st Dist. 1971); Adkins v. Leach, 17 Cal. App. 3d 771, 95 Cal. Rptr. 61 (1st Dist. 1971).

86. *See* Labowitz, *Class Actions in the Federal System and in California*, 8 J. BEV. HILLS BAR ASSOC. 7 (1974).

87. 20 Cal. App. 3d 374, 97 Cal. Rptr. 639 (2d Dist. 1971).

> relating to him alone—going to such matters as his general health, his occupation, place of residence and activities. . . . Thus the critical fact of injury would have to be litigated on distinct facts by each of the seven million residents . . . .[88]

The facts pointing toward liability were not common to the class as was the fact situation presented by *Daar* and *Vasquez*. The plaintiffs in *Daar* and *Vasquez* dealt with the defendant in an identifiable series of similar transactions, but the plaintiffs in this case aggregated individual tort claims. Delineating the reasons why class actions had become such a popular remedial tool, the court stated that, "[plaintiff's] position is that the present system of statutes and administrative rules is inadequate, and that the enforcement machinery is ineffective."[89]

Neither rejecting nor accepting the plaintiff's argument, the court refused to allow the action because of the lack of predominating common questions. In effect, the subject matter did not adequately define the extent of the class. With few substantial benefits to be had by a group recovery, the court was forced to use *Daar* and *Vasquez* as a restriction rather than an expansion.

RESTRICTION RATHER THAN EXPANSION

Daar, Vasquez and subsequent cases, such as *LaSala v. American Savings and Loan Association*[90] and *Beckstead v. Superior Court*,[91] foreshadowed a policy of allowing the class action plaintiffs to have their suit measured on its merits to determine whether the requisite benefits will flow from the action.

In *Collins v. Rocha*,[92] the Supreme Court vacated an earlier court of appeal decision[93] because of the influence of *Vasquez* and allowed an inference of reliance to exist in a fraud action because the members of the class had an interest in determining the intent of the defendant when he made the representations. The court emphasized that the representations were made at the same time to *all* of the class. Numbering approximately forty, the class would

88. *Id.* at 379, 97 Cal. Rptr. at 643.
89. *Id.* at 382, 97 Cal. Rptr. at 645.
90. 5 Cal. 3d 864, 489 P.2d 1113, 97 Cal. Rptr. 849 (1971).
91. 21 Cal. App. 3d 780, 98 Cal. Rptr. 779 (2d Dist. 1971).
92. 7 Cal. 3d 232, 497 P.2d 225, 102 Cal. Rptr. 1 (1972).
93. Collins v. Rocha, 11 Cal. App. 3d 1012, 90 Cal. Rptr. 224 (2d Dist. 1970).

benefit by having *one* action determine the defendant's liability. The court felt it necessary to point out the influence of one act of the defendant affecting the group as a whole, but nevertheless continued to balance the elements of the cause of action as *Vasquez* had done.

A similar method was employed by the court in *Stilson v. Readers Digest Association Inc.*,[94] a monstrous action with a class numbering at least 21 million. Suit was brought on behalf of all those who had their name used without permission by the defendant in connection with a sweepstakes. The court observed that the predominating common questions necessary to allow a class action must refer to the liability of the defendant, but in *Stilson*, only the singular claims referred to the liability of the defendant. Therefore, in order to sustain the action, each member of the class would have had to be able to show that he suffered mental anguish as well as financial loss as a result of the defendant's act. There were few benefits to be had by the plaintiffs, and because of the unwieldy nature of the case, certainly none for the court.

Liberalization of class actions originated from the willingness of the courts to provide a forum for those who were wronged to an extent that would not be conducive to individual legal action. When injured individuals can join together, with the egregious behavior of the defendant as a point of unification, what was once a relatively insignificant harm becomes a controversy of often great proportions. When any group can coalesce the miniscule abrasions that each and every one receives in life and rush to court demanding relief, utilization of the judicial process often becomes impossible. Courts are not equipped to cushion the mass of society from shocks and blows of a complex world. Though segments of the population are helpless to prevent interference by forces beyond their reach, and despite disillusionment with the effectiveness of legislated statutes, the court cannot do alone that which the whole of society is unable to do for itself. The class suit is not a panacea for the ills of an interdependent society and if misused it will render abuse and injustice on unsuspecting sectors of society to a degree unparalleled in judicial history. Great care must be taken to assure that class actions do not become a tool of destruction.

With this hazard in mind, the courts have, at least temporarily, halted the expansion of class actions. The present trend is to place emphasis upon the *merit* of the action and the relationship between the representative and those represented.[95] In *Payne v. United*

94. 28 Cal. App. 3d 270, 104 Cal. Rptr. 581 (1st Dist. 1972).
95. Anthony v. General Motors Corp., 33 Cal. App. 3d 699, 109 Cal. Rptr. 254 (2d Dist. 1973).

California Bank,[96] the court would not allow the action to proceed because the community of interest was not strong enough. The allegedly wrongful act of the defendant must affect the representative in the same manner as the rest of the class so that a similar situation exists between each concerning the subject matter of the suit. This has the eerie ring of the old procedural view.

Daar and *Vasquez* were used restrictively in *Devidian v. Automotive Service Dealers Association*.[97] The plaintiffs sought to recover damages resulting from a conspiracy to fix gasoline prices two cents above the prevailing rate. The class was described as all those who purchased gas from the defendants during the winter of 1966-67, when the defendants were overcharging. The court paid homage to *Daar* and *Vasquez* by stating, ". . . if the present case bears any substantial similarity to those cases we are bound to reach a similar result . . . ,"[98] and then proceeded to explain why *Devidian* was unlike either of them. Due to the impact of *Diamond* and *Stilson*, the court was wary of large classes.[99] *Daar* had many members in the represented class, but had only one defendant. *Vasquez* had 200 members and only three defendants. *Devidian* had approximately 1,000 defendants. Furthermore, *Daar* involved only a single computation of a single price differential—while *Vasquez* may have had more complex factors, the recovery was over $1,000 for each plaintiff.[100] In *Devidian,* however, the court expressed concern over the difficulty in determining the amount of the overcharge to each class member. The possibility of 265 million transactions was overwhelming.[101] Relying on *Stilson* as authority, the court advised that *Daar* and *Vasquez* do not allow plaintiffs to burden the court. "[A] class action must be viewed in light of the problems its institution creates for the courts."[102] The multiple transaction approach to subject matter, as espoused by *Daar* and *Vasquez*, takes into account the complexity of interactions between the parties. If predominating common questions define the

96. 23 Cal. App. 3d 805, 100 Cal. Rptr. 672 (1st Dist. 1972).
97. 35 Cal. App. 3d 978, 111 Cal. Rptr. 228 (5th Dist. 1973).
98. *Id.* at 981, 111 Cal. Rptr. at 230.
99. The court discovered, through population and census figures that the class would not be less than 265,000.
100. 35 Cal. App. 3d at 981, 111 Cal. Rptr. at 230.
101. *Id.* at 984, 111 Cal. Rptr. at 232.
102. *Id.* at 985, 111 Cal. Rptr. at 233.

extent of the class, the court in *Devidian* had no reason to find the class unascertainable. The remedial view provides a plaintiff with every opportunity to prove his allegations.[103] Nonetheless, the court refused to allow the action.

By separating class and subject matter, the court resurrected confinements reminiscent of the early procedural view of forty years before. The court could find neither a single transaction nor a pre-existing body within which the components of this action would fit.

After twenty years of expansion it is disappointing to discover cases such as *Daar* and *Vasquez* being used restrictively. The *Devidian* decision concerned itself with matters beyond proof of liability. The common interest of the class extended at least as far as the overcharging at a constant rate by the defendants. As defined by that allegation, the class was no more ephemeral than the class of taxi riders in *Daar*.

The shift in judicial emphasis after *Vasquez* is becoming apparent. Benefits of litigation must extend beyond the needs of the plaintiff, to the court. This was not the attitude before *Vasquez*.

Conclusion

Temporary stagnation of the remedial view has occurred since the *Vasquez* decision. If blame is to be assigned for this development, class action litigants must share a greater burden than the courts. Overzealous representatives often fail to appreciate the potential destructiveness of the class action suit. Almost impossible demands made upon the court have had the effect of dampening remedial enthusiasm.

As of yet, the full effect of the suggestion, in *Vasquez*, that the Consumer Legal Remedies Act[104] be used as a guideline has been indeterminable, though it recently has been used as a framework within which the action must fit.[105] The manipulation of conceptual boundaries, so characteristic of the remedial view, has given way to a more formalized approach. *Each* element of the cause of action must contain sufficiently predominant common questions in order for the suit to be allowed into court as a class action.[106] The

103. Vasquez v. Superior Court, 4 Cal. 3d 800; Daar v. Yellow Cab Co., 67 Cal. 2d 695.

104. Cal. Civ. Code § 1781(b) (West 1973).

105. Petherbridge v. Altadena Federal Savings and Loan Ass'n., — Cal. App. 3d —, 112 Cal. Rptr. 144 (4th Dist. 1974); Phillips v. Crocker-Citizens Nat. Bank, — Cal. App. 3d —, 113 Cal. Rptr. 688 (2d Dist. 1974).

106. Anthony v. General Motors Corp., 33 Cal. App. 3d 699; Vasquez v. Superior Court, 4 Cal. 3d 800.

complaint must allege facts that make it reasonably,[107] if not substantially,[108] certain to win. The evolutionary process seems to have come full circle. The law is on the verge of a plateau stage in the development of class actions: The threshold of another procedural era, replete with restrictions and confinements.

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107. Payne v. United California Bank, 23 Cal. App. 3d 850, 100 Cal. Rptr. 672 (1st Dist. 1972).
108. Petherbridge v. Altadena Federal Savings and Loan Ass'n., — Cal. App. 3d —, 112 Cal. Rptr. 144 (4th Dist. 1974).