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Civil Procedure—Availability of Class Actions to Consumers for Fraudulent Misrepresentation by Seller

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CIVIL PROCEDURE—AVAILABILITY OF CLASS ACTIONS TO CONSUMERS FOR FRAUDULENT MISREPRESENTATION BY SELLER

Since January 1, 1966, the Bay Area Meat Company[1] had sold a quantity of freezers and accompanying stocks of frozen food products to an estimated 200 California residents in San Joaquin and Stanislaus counties. To finance the purchases, customers had executed two retail installment sales contracts—one in payment of the freezer, the other for the food—which were assigned to three area finance companies. Thirty-seven consumers subsequently initiated a class action on behalf of themselves and other unnamed customers seeking rescission of the contracts and punitive damages for fraudulent misrepresentation by Bay Area and naming the finance companies as codefendants. The complaint alleged, *inter alia,* that defendant's salesmen had represented the freezers to be reasonably priced and of high quality and had described the frozen food products to be a seven-month supply offered at wholesale rates. Plaintiffs asserted that these misrepresentations were a part of a standard sales monologue which each salesman had been trained to memorize and recite by rote to individual customers. Defendants' demurrer was sustained by the Circuit Court of San Joaquin County insofar as the complaint alleged a class action but was overruled as to the thirty-seven named plaintiffs.[2] A writ of mandate seeking to compel the trial court to vacate its order and allow prosecution of the fraud as a class action was granted by the California Supreme Court.[3] *Held,* consumers who have bought merchandise under installment sales contracts may under certain conditions maintain a class action for fraudulent misrepresentation seeking rescission of the contracts against both the seller of a product and the finance company to which the contracts were assigned. *Vasquez v. Superior Court of San Joaquin County,* 4 Cal. 3d 800, 484 P.2d 964, 94 Cal. Rptr. 796 (1971).

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1. Hereinafter referred to as Bay Area.

2. After analyzing California decisional law, the trial court apparently concluded that past cases which had been unsympathetic to consumer class actions may be outmoded, but that the appellate courts were better suited to rule on this question. Vasquez v. Superior Court of San Joaquin County, 4 Cal. 3d 800, 806 n.2, 484 P.2d 964, 967 n.2, 94 Cal. Rptr. 796, 799 n.2 (1971).

3. Vasquez v. Superior Court of San Joaquin County, 4 Cal. 3d 800, 484 P.2d 964, 94 Cal. Rptr. 796 (1971) [hereinafter cited as instant case].

A class action, or representative suit, is a legal proceeding in which one or more members of a group having similar claims or defenses represent the entire group in litigation.[4] The action is, therefore, an exception to the general jurisdictional rule that all parties whose rights are to be determined in a legal action must appear before the court.[5] By establishing a technique whereby the claims of numerous parties can be simultaneously resolved, however, the class suit promotes jural economy by eliminating repetitious litigation. Further, the type of injury which tends to affect the rights or interests of many persons simultaneously is also apt to involve complicated factual situations and intricate legal relationships. Redress in such situations is likely to involve expense totally disproportionate to any individual claims.[6] Here the class suit provides a remedy for the group wrong by allowing aggregated claims to be prosecuted by group representatives on behalf of all members. While joinder frequently serves as an adequate vehicle for pursuit of multiple claims, it is often impracticable to bring all injured parties before the court. Indeed, it is generally said that the class action originated in the courts of equity to mitigate the strict joinder requirements.[7] The United States Supreme Court has noted that:

> Where the parties interested in the suit are numerous, their rights and liabilities are so subject to change and fluctuation by death or otherwise, that it would . . . oftentimes prevent the prosecution of the suit to a hearing. For convenience, therefore, and to prevent failure of justice, a court of equity permits a portion of the parties in interest to represent the entire body . . . .[8]

Representatives of the group may assert the rights of all without soliciting the presence or consent of others.[9] A judgment, whether

4. Z. CHAFEE, SOME PROBLEMS OF EQUITY, chs. VI & VII (1950).

5. This rule can be traced to language in Pennoyer v. Neff, 95 U.S. 714 (1878), and constitutional notions of due process. U.S. CONST. amend. XIV, § 1. Of course in rem jurisdiction would attach if a res in which a party may have legal rights was brought under a court's jurisdiction. Pennoyer v. Neff, *supra*.

6. Kalven & Rosenfield, *The Contemporary Function of the Class Suit*, 8 U. CHI. L. REV. 684 (1941).

7. *Id.* at 707-08.

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

9. It should be noted that some jurisdictions require notice of pendency of suit to absentee group members before a class action can be maintained. *See, e.g.*, ARIZ. R. CIV. P. 23 (c) (2), reported in 16 ARIZ. REV. STAT. ANN. (1956). In federal courts, rule 23 (c) (2) requires "individual notice to all members who can be identified through reasonable effort." FED. R. CIV. P. 23 (c) (2).

favorable or otherwise, applies to the entire group represented including those *in absentia*.[10]

This adjudication of the rights of absentee members raises the question of res judicata. The binding effect of class action judgments was affirmed in *Supreme Tribe of Ben-Hur v. Cauble*.[11] But the constitutional requirement of due process[12] demands that the named representatives must be such as will fairly insure adequate representation of class members to prevent "fraudulent and collusive sacrifice of the rights of absent parties . . . ."[13] The adequacy test necessitates that the interest of the representatives coincide with those of the group insofar as the questions and issues in litigation are concerned. Quality of representation is more important than quantity, and a single class representative may be sufficient in a proper case.[14]

The evolution of representative suits can be traced to the English chancery courts.[15] As the procedure was translated into American jurisprudence, common law application was blended with statutory enactment. The existing requirements for maintenance of class suits are dependent upon the approach adopted in a particular jurisdiction. These fall into four basic classifications: (1) the common law approach; (2) statutes based on a Field Code amendment; (3) statutes patterned after rule 23 of the Federal Rules of Civil Procedure as adopted in 1938; and (4) statutes emulating Federal Rule 23 as amended in 1966.[16]

The common law approach is based on principles of equity which parallel those of English chancery. Acccording to Justice Story, class suits are permitted:

> (1) Where the question is one of common or general interest, and one or more sue, or defend for the benefit of the whole; (2) Where the parties form a voluntary association for public or private purposes, and those, who sue, or defend, may fairly be presumed to represent the rights and interests of the

10. The United States Supreme Court has said that as to the members of a represented class, a decree "binds all of them the same as if all were before the court." Smith v. Swormstedt, 57 U.S. (16 How.) 288, 303 (1853) (dictum).

11. 255 U.S. 356 (1921). *See* Homburger, *State Class Actions and the Federal Rule*, 71 COLUM. L. REV. 609, 611 (1971).

12. U.S. CONST. amend. XIV, § 1.

13. Hansberry v. Lee, 311 U.S. 32, 45 (1940).

14. *See* cases cited in C. WRIGHT, LAW OF FEDERAL COURTS § 72 n.31 (2d ed. 1970).

15. Supreme Tribe of Ben-Hur v. Cauble, 255 U.S. 356, 366 (1921).

16. Starrs, *The Consumer Class Action—Part II: Considerations of Procedure*, 49 B.U.L. REV. 407, 425 (1969).

> whole; (3) Where the parties are very numerous, and although they have, or may have, separate, distinct interests; yet it is impracticable to bring them all before the court.[17]

Two key elements which can be abstracted from these criteria are the requirements of a common interest and a class or numerous body of persons. In the common law system, as distinguished from the statutory jurisdictions, class suits are permitted only in equity and not in law.[18] Seven states which have no class action statutes are guided by these principles.[19]

The Field Code approach is modelled on a class action provision first appended to the Field Commission recommendations by the New York legislature which read:

> [A]nd when the question is one of a common or general interest to many persons, or when the parties are very numerous and it may be impracticable to bring them all before the court, one or more may sue or defend for the benefit of the whole.[20]

This provision is still in effect in New York[21] and, with minor alterations of wording, in fourteen other states including California.[22]

Federal jurisdictions recognized the maintenance of representative suits with the adoption of the Federal Rules of Civil Procedure in 1938.[23] The rule established three categories of class actions based primarily on the jural relationships of the

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17. J. STORY, EQUITY PLEADINGS § 97, at 96 (2d ed. 1840).

18. Starrs, *supra* note 16, at 427.

19. These include Illinois, Massachusetts, Mississippi, New Hampshire, Tennessee, Vermont and Virginia. Kirkpatrick, *Consumer Class Litigation*, 50 ORE. L. REV. 21, 22 n.8 (1970).

20. [1848] N.Y. SESS. LAWS ch. 438, § 119.

21. N.Y. CIV. PRAC. LAW § 1005 (a) (McKinney 1963).

22. CAL. CIV. PRO. CODE § 382 (West 1954). For listing of other states with similar statutory provisions, see Homburger, *supra* note 11, at n.31.

23. Rule 23 of the Rules of Civil Procedure, as adopted in 1938, provides in part:

> (a) Representation. If persons constituting a class are so numerous as to make it impractical to bring them all before the court, such of them, one or more, as will fairly insure the adequate representation of all may, on behalf of all, sue or be sued, when the character of the right sought to be enforced for or against the class is
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> (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;
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> (2) several, and the object of the action is the adjudication of claims which do or may affect specific property involved in the action; or
>
> (3) several, and there is a common question of law or fact affecting the several rights and a common relief is sought.

parties involved and the substantive rights asserted by or against them. Each category determined the binding effect of a decree awarded. The chief draftsman of the rule, Professor Moore, labeled each action as either "true," "hybrid" or "spurious."[24] In the "true" class action the named or unnamed parties were either necessary or indispensable to prosecution of the action and a judgment would bind the entire class.[25] A "hybrid" class suit was prosecuted by persons having interest in a common property, and thus the decree rendered bound the rights of the class only in respect to that property involved.[26] "Spurious" actions arose when various parties having several rights and a common interest in a question of law or fact sought a judicial remedy by class action for a common relief.[27] In effect, the "spurious" action was a permissive joinder device binding only those members who participated directly in the suit.[28] Although the Moore system purported to offer a definitive guide to the propriety of prosecution by representative suits, the designated nomenclature proved obscure and uncertain. Nor did the rule generally provide an adequate basis for ascertaining the limits of class action judgments. Criticism directed at the rule's inadequacies[29] and confused judicial application heralded its ultimate doom. But before the rule was amended in 1966, fifteen states had adopted class action statutes designed after Professor Moore's scheme.[30]

The amended rule 23 completely abandons classification of actions according to jural relations and substitutes a terse outline of occasions appropriate for maintenance of class suits. Four prerequisites outlined in the opening section of the rule which *must* be met in order to pursue a class action are: (1) a class so numerous that joinder of all members is impracticable; (2) questions of law or fact common to the class; (3) claims or defenses by the representatives which are typical of the claims or defenses of the class; and (4) representative parties that will fairly

24. 3B J. MOORE, FEDERAL PRACTICE ¶¶ 23.08-23.11 (2d ed. 1969).
25. *Id.* at ¶ 23.11[2].
26. *Id.* at ¶ 23.11[4].
27. *Id.* at ¶ 23.11[3].
28. *Cf.* California Apparel Creators v. Wieder of California, Inc., 162 F.2d 893 (2d Cir.), *cert. denied,* 332 U.S. 816 (1947).
29. *See* Z. CHAFEE, *supra* note 4, at 243-95; Kalven & Rosenfield, *supra* note 6, at 695-714.
30. *See* Homburger, *supra* note 11, at 626 n.94.

and adequately protect the interests of the class.[31] These elements, while necessary to the class action, are not alone sufficient. The subsequent section delineates situations which justify allowance of a representative suit. Of particular interest is the provision enumerated in section (b) (3) which authorizes class suits when the four above mentioned prerequisites are met and

> the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy.[32]

The section's generality wisely allows judicial discretion in determining the propriety of prosecuting a claim as a class action. Courts are specifically granted the opportunity to consider questions of policy and expediency. It is significant that section (b) (3) actions, together with civil rights cases, represent the greater share of class litigation within the federal court system.[33] The amended version of the rule has also spawned its share of emulous state statutes, which now number eleven.[34]

The class suit has been employed to secure civil rights,[35] to reapportion legislatures,[36] and to challenge welfare eligibility rules.[37] More recently this procedure has become attractive to consumer protection advocates seeking defensive weapons with which to equalize the advantages held by giant retailing and advertising industries in the commercial arena.[38] Illicit trade practices have the potential to affect every consumer. Yet losses to the *individual* from consumer abuses are likely to be small in proportion to the expense of pursuing legal redress.[39] By allowing aggregated claims to be prosecuted by representatives, the class action countervails the individual consumer's lack of incentive to

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31. FED. R. CIV. P. 23(a)(1)-(4).

32. *Id.* 23(b)(3).

33. *See* Homburger, *supra* note 11, at 635.

34. *Id.* at n.133.

35. *See* Brown v. Board of Educ., 347 U.S. 483 (1954).

36. *See* Baker v. Carr, 369 U.S. 186 (1962).

37. *See* King v. Smith, 392 U.S. 309 (1968).

38. *See, e.g.,* Daar v. Yellow Cab Co., 67 Cal. 2d 695, 433 P.2d 732, 63 Cal. Rptr. 724 (1967); Hall v. Coburn Corp. of America, 26 N.Y.2d 396, 259 N.E.2d 720, 311 N.Y.S.2d 281 (1970).

39. *See* Kalven & Rosenfield, *supra* note 6.

sue.[40] It is argued that class suits, with attendant damage awards both punitive and compensatory, would make such wrongful business conduct unprofitable, thus having a "therapeutic effect" on business activities.[41]

While all jurisdictions have statutory or common law provisions for the maintenance of class suits,[42] differences in court interpretation and application have affected their potency. In federal jurisdictions, a serious restriction has recently been imposed. Federal courts have competency to decide class suits where diversity of citizenship is involved, but claimants proceeding under such an action must meet the $10,000 minimum amount in controversy requirement.[43] In the recent case of *Snyder v. Harris*,[44] the United States Supreme Court held that plaintiffs having "separate and distinct claims" against a common defendant may not aggregate these claims so as to establish the necessary $10,000 in controversy. It would appear that this decision has effectively foreclosed the possibility of consumer actions in federal class suits. An additional limitation involves the Federal Rules of Civil Procedure. Rule 23 (c) (2) requires "individual notice to all class members who can be identified through reasonable effort" when initiating a class suit under rule 23 (b) (3).[45] Cost of such notice is often prohibitive and has proven to be a serious obstacle to class suits in the federal courts.[46]

A comparison of decisional law among the states reveals that judicial interpretation of class action statutes has created vast differences in receptiveness to class suits. The divergence existing between the Field Code states of New York and California provides a particularly apt illustration. New York evidences a restrictive attitude. Much of New York's case law reflects the posture assumed by the early case of *Society Milion Athena, Inc. v.*

40. Dole, *Consumer Class Actions Under Recent Consumer Credit Legislation*, 44 N.Y.U.L. REV. 80, 81 (1969).

41. Dolgow v. Anderson, 43 F.R.D. 472, 485 (E.D.N.Y. 1968), *rev'd on other grounds*, 438 F.2d 825 (2d Cir. 1971).

42. For an exhaustive compilation and assessment of class action statutes in each state, see Starrs, *supra* note 16.

43. 28 U.S.C. § 1332 (1964).

44. 394 U.S. 332 (1969).

45. FED. R. CIV. P. 23(c)(2).

46. *See, e.g.*, Eisen v. Carlisle & Jacquelin, 391 F.2d 555 (2d Cir. 1968), where plaintiff would have had to pay over $400,000 in costs for individual notice to other class members in order to pursue his $70 claim.

National Bank of Greece[47] in which Judge Lehman held that "[s]eparate wrongs to separate persons, though committed by similar means and even pursuant to a similar plan, do not alone create a common or general interest in those who are wronged."[48] Following that definitional point of view concerning the common interest requirement for class suit, New York cases have limited class actions almost exclusively to those situations in which a common fund or a "privity" among class members exists.[49] Class members must seek identical remedies,[50] and while declaratory or injunctive relief may effectively be sought, award of money damages is often denied.[51] A recent disappointment to consumers was the case of *Hall v. Coburn Corp. of America*[52] wherein plaintiffs, in a class action, sought to recover a statutory penalty against a finance company which had supplied contracts printed in type size smaller than that specified by the New York Retail Installment Sales Act.[53] The court dismissed the action, failing to find the requisite common interest and reaffirming the line of cases which has limited class suits to the "closely associated relationships growing out of trust, partnership or joint venture and ownership of corporate stock."[54] Another New York court has more recently indicated that the aversion toward class suits is likely to continue, declaring that "[c]lass actions are to be approached warily since by nature they deprive non-appearing parties, bound by the plaintiff position, of their separate personal day in court, as well as their choice of remedy."[55] Thus even though New York led the way to codified class action statutes, it has resisted any liberalization, and has continued to apply the most restrictive interpretations of class action statutes.[56]

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47. 281 N.Y. 282, 22 N.E.2d 374 (1939).

48. *Id.* at 292, 22 N.E.2d at 377.

49. *See, e.g.*, Gaynor v. Rockefeller, 15 N.Y.2d 120, 204 N.E.2d 627, 256 N.Y.S.2d 584 (1965). For an excellent discussion of the privity concept as established in Field Code jurisdictions, see Homburger, *supra* note 11.

50. Gaynor v. Rockefeller, 15 N.Y.2d 120, 129-30, 204 N.E.2d 627, 631, 256 N.Y.S.2d 584, 590 (1965). *But cf.* Lichtyger v. Franchard Corp., 18 N.Y.2d 528, 223 N.E.2d 869, 277 N.Y.S.2d 377 (1966).

51. Kovarsky v. Brooklyn Union Gas Co., 279 N.Y. 304, 18 N.E.2d 287, 3 N.Y.S.2d 581 (1938).

52. 26 N.Y.2d 396, 259 N.E.2d 720, 311 N.Y.S.2d 281 (1970).

53. N.Y. PERS. PROP. LAW §§ 401-18 (McKinney 1962).

54. 26 N.Y.2d at 402, 259 N.E.2d at 722, 311 N.Y.S.2d at 284.

55. Summers v. Wyman, 64 Misc. 2d 67, 71, 314 N.Y.S.2d 430, 434 (Sup. Ct. 1970).

56. Starrs, *supra* note 16, at 458.

But in states where courts are amenable to prosecution of claims by representative suits, experience has revealed that this device offers great potential for protection of consumer rights. California, as an example, has recognized that class actions are among "the most potent . . . weapons in the consumer's arsenal."[57] The extent to which judicial application has influenced this progress is realized when one considers that the California class action statute is substantially similar to its New York counterpart.[58] Indeed, early decisions in both states reflect some similarity. Thus in *Carey v. Brown*,[59] the community of interest required to maintain a class suit meant compulsory joinder as necessary parties. This strict requirement was eliminated in the leading case, *Weaver v. Pasadena Tournament of Roses Association*,[60] wherein a class action was brought against promoters of the Rose Bowl seeking recovery of a statutory penalty for wrongful refusal of admission to a public place of amusement.[61] Plaintiffs alleged that the promoters had advertised the sale of 7,500 tickets and distributed numbered stubs to potential buyers, but that on the day of the game only 1,500 tickets were available and admission stub holders were denied entry. After a review of California case law, the court concluded that the plaintiffs' claims were separate and distinct and refused to allow the action. While group members need not be so united in interest as to be necessary parties, still "the fact that 'numerous parties' have separate and distinct claims against the same person . . . will not alone suffice to sustain a representative suit where there is no community of interest."[62] Because each plaintiff would have to prove his individual participation and ultimate refusal of admission, the requisite community of interest was not established. Any liberalization caused by the elimination of necessary parties in

57. Tydings, *The Private Bar—Untapped Reservoir of Consumer Power*, 45 NOTRE DAME LAW. 478, 483 (1970).

58. CAL. CIV. PRO. CODE § 382 (West 1954) provides in part:

> [W]hen the question is one of a common or general interest, of many persons, or when the parties are numerous, and it is impracticable to bring them all before the Court, one or more may sue or defend for the benefit of all.

For a comparison of the corresponding New York provision, see *supra* notes 20-21 and accompanying text.

59. 58 Cal. 180 (1881).

60. 32 Cal. 2d 833, 198 P.2d 514 (1948).

61. CAL. CIV. CODE § 54 (West 1954).

62. 32 Cal. 2d at 842, 198 P.2d at 519.

Weaver was restrained by the announcement that class suits must seek common relief.[63]

The community of interest notion was further explored in *Fanucchi v. Coberly-West Corp.*[64] There, several cotton growers initiated a class suit against a cotton gin operator alleging that through improper computation of seed weight, the operator had failed to pay for $2,000,000 of seed. Citing the extensive review of class suits in *Weaver*, the court determined that the essential element in all cases was a common property interest or common fund of some sort. Finding such a common fund in the improperly retained seed payments, the court allowed the action even though plaintiffs' claims arose through a series of separate transactions.

Five years later, the California Supreme Court in *Chance v. Superior Court of Los Angeles County*[65] upheld a class suit by victims of a land fraud scheme who were holders of deeds of trust on more than 2,000 lots in a subdivision. The court rejected the common fund notion of *Fanucchi* by equating common fund with, and thus reinstating, the concept of community of interest. This term was clarified with the suggestion that where each class member must establish his right to recover on the basis of facts peculiar to his own case, community of interest is lacking.

The recent case of *Daar v. Yellow Cab Co.*[66] has gone far in liberalizing the requirements for maintenance of a class action. The plaintiff sued on behalf of himself and all other persons who had patronized the defendant cab company within a four year period, alleging that defendant's rate meters had been set to charge fares in excess of those allowed by the Public Utilities Commission. In allowing the action the court opened up new consumer remedies and established certain judicial prerequisites for sustaining a class action: (1) an ascertainable class; and (2) a well-defined community of interest among the class members in the questions of law and fact involved.[67] Finding an ascertainable class is not dependent upon identification of individual members but "depends . . . upon the community of interest among class members in the

63. *Id.*
64. 151 Cal. App. 2d 72, 311 P.2d 33 (1957).
65. 58 Cal. 2d 275, 373 P.2d 849 (1962).
66. 67 Cal. 2d 695, 433 P.2d 732, 63 Cal. Rptr. 724 (1967).
67. *Id.* at 704, 433 P.2d at 739, 63 Cal. Rptr. at 731.

questions of law and fact involved."[68] It is therefore the existence, not the identity of a class, which must be determined to meet the court's requirements. As to the previously required necessity of seeking common relief the court concluded that it has "no compelling importance and its absence presents no insuperable difficulties."[69]

In the instant case, the court adopted the two requirements outlined in *Daar* for maintenance of class suits. Dismissing the ascertainability of the class as "no serious obstacle,"[70] the opinion considered "whether there are issues common to the class as a whole sufficient in importance so that their adjudication on a class basis will benefit both the litigants and the court."[71] The mere fact that each purchase represented a separately consummated transaction could not itself defeat the class suit, so long as each class member would not be required to establish a right to recover based on facts peculiar to his own case. Plaintiffs must demonstrate a community of interest as to the elements of their claim of fraud. Recovery, therefore, depends on proof of false representations made with intent to induce reasonable reliance and of damages suffered thereby. Defendants' demurrer was deemed to admit plaintiffs' allegation that the misrepresentations were contained in standard sales monologues memorized by Bay Area's salesmen and recited by rote to each customer. The court found that proof of these allegations at trial would raise an inference that the representations were made to each class member.[72] The falsity of the representations could also be shown on a common basis, since proof of allegations regarding the price and quality of products purchased by the named plantiffs would supply proof as to all. Since California case law does not require direct evidence to show reliance upon false representations, the court held 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."[73] As regards damages, *Daar* illustrated that a class action may be maintained even though each class member would ultimately be required to establish the extent of his

68. *Id.* at 706, 433 P.2d at 740, 63 Cal. Rptr. at 732.
69. *Id.* at 709, 433 P.2d at 742, 63 Cal. Rptr. at 734.
70. Instant case at 810, 484 P.2d at 970, 94 Cal. Rptr. at 802.
71. *Id.* at 811, 484 P.2d at 970, 94 Cal. Rptr. at 802.
72. *Id.* at 812, 484 P.2d at 971, 94 Cal. Rptr. at 803.
73. *Id.* at 814, 484 P.2d at 973, 94 Cal. Rptr. at 805.

individual injury. The opinion concluded that sufficient allegation of the requisite community of interest had been made so that the plaintiffs "should . . . be afforded the opportunity to demonstrate that proof of most of the important issues as to the named plaintiffs will supply the proof as to all."[74]

In deciding the *Vasquez* case, the court has broadened the applicability of the doctrines established in *Daar* in two respects: (1) the availability of class suits has been extended to consumer fraud situations; and (2) at least as applied to the particular facts involved, the propriety of naming assignees of installment contracts as parties to a suit for fraudulent misrepresentations is upheld. The instant case thus registers a new victory for consumer protection advocates.

The introductory remarks of the court's opinion evidence a great concern for the plight of the consumer, citing consumer protection as "an exigency of the utmost priority in contemporary society."[75] Because mass production is dependent upon an equivalent mass consumption, the potential for consumer abuse increases with the pace of economic development. Expenditures for consumer goods in 1969 were up $39.4 billion over the previous year, reaching a total figure of $576 billion.[76] Enticed by these statistics, the disreputable merchant has found a lucrative enterprise in the practice of fraudulent business schemes. While the individual losses from such practices are usually relatively small, the aggregate return to the businessman can be substantial. Even a small overcharge, when extracted from many customers, can amount to thousands of dollars in illicit profits. Individual losses are also apt to be small in proportion to the cost of legal redress, thus discouraging prosecution of violators. A study conducted under the auspices of the University of Pennsylvania[77] concluded that "[t]he number of consumers having no redress because the amount lost is not commensurate with the attorney fee constitutes the vast majority." The study further suggested that businesses engaged in consumer exploitation appreciate this and "[i]n many instances fraudulent operators carefully avoid cheat-

74. *Id.* at 815, 484 P.2d at 973, 94 Cal. Rptr. at 805.

75. *Id.* at 808, 484 P.2d at 968, 94 Cal. Rptr. at 800.

76. S. BOOTH, 1970 FINANCE FACTS YEARBOOK 34.

77. *See* Comment, *Translating Sympathy for Deceived Consumers into Effective Programs for Protection*, 114 U. PA. L. REV. 395, 409 (1966).

ing individuals out of large sums of money because they realize that 'no one bilked out of fifty dollars is going to pay a lawyer to get his money back.' "[78] The class action represents a valuable method of consumer redress by aggregating claims that may otherwise not be prosecuted individually.

While consumer frauds of the type described in the instant case are a most frequent commercial abuse, courts have had difficulty finding the community of interest required for maintenance of a class action. Consider an early annotation which indicated that:

> Class or representative suits to obtain the rescission of transactions based on similar frauds practiced by one defendant upon various, and commonly numerous, persons, have so often been held not maintainable that one may well doubt whether under any circumstances such a suit will lie.[79]

The failure of courts to find the community of interest centered about the requirement of proving reliance of fraudulent representations. When separate transactions with various parties are involved, statements made to each purchaser and reliance thereon would seem to vary from one purchaser to another. Thus proof of reliance as to named plaintiffs could not provide proof as to the whole class represented. Even when the false representations made to class members were exactly the same, the various class members may have acted upon different opinions and beliefs as to the facts.

By employing the element of inference, the court in *Vasquez* relaxed strict reliance requirements and allowed proof of material misrepresentations to give rise to "at least an inference of reliance" as to the entire class. While class action advocates are undoubtedly pleased by implementation of this device, its full utility cannot be readily determined. The instant case poses a situation in which alleged misrepresentations were incorporated within standard sales monologues, memorized and recited verbatim. Were the facts altered slightly and, for instance, the monologues provided were merely suggested for salesmen's use, the application of reliance by inference would be questionable.

Nor is the denial of holder in due course defenses to the finance companies in the *Vasquez* case to be taken as an established

78. *Id.*
79. Annot., 114 A.L.R. 1015, 1016 (1938).

rule in consumer fraud class action suits. The opinion labels as a "Pyrrhic victory" any judgment rendered against a seller alone. Certainly it is common for businesses engaged in consumer fraud practices to be thinly capitalized, and judgments against such parties often remain unsatisfied. But the relief sought in the instant case includes a claim for punitive damages. Holding a seller's assignee liable to such claims for fraudulent practices by the seller alone hints at the kind of vicarious liability being urged by consumer protection groups. It is argued that such liability will cause assignees to more carefully investigate sellers' practices before accepting commercial paper.[80] The logical conclusion of such thinking is that sellers employing fraudulent practices will soon lose assignment outlets and be forced out of the market. Should a commercial abuse occur the contract assignee is financially more able to bear the costs of reparation than are the consumers to absorb losses. It must, however, be conceded that stripping finance companies of holder in due course privileges may involve certain injurious ramifications. Additional costs incurred by these companies for labor necessarily expended in policing sellers' activities may be communicated to consumers as increased financing or service charges. Regardless of the temptation to interpret the instant case as leading toward some kind of strict liability doctrine, the decision was placed on much simpler grounds. The court was careful to state and reiterate that the finance companies involved were being made party to the action because of allegations that they had knowledge, either actual or constructive, of Bay Area's fraudulent proctices. Thus it would appear that by maintaining only minimum contacts with seller-assignors, finance companies can avoid incurring liability under the decision in the instant case.

The *Vasquez* case is, nevertheless, a significant judicial response to the exigent contemporary problem of consumer abuse. While the limits of the decision's effectiveness have not been firmly delineated, it is likely that its underlying reasoning will prove attractive to courts in other jurisdictions. Because of the similarity in statutory provisions relating to class suits, Field Code states are especially adaptable to a development

80. *See* Smit, *Are Class Actions for Consumer Fraud a Fraud on the Consumer*, 26 BUS. LAW. 1053, 1057 (1971).

in the use of class actions which would parallel California's progressive model. Restrictive approaches in states such as New York fail to recognize the substantial public benefit which can accrue by a more liberal application of the class action to consumer fraud situations. Where joinder of parties is impracticable a court's refusal to allow prosecution of claims by class suit may, practically speaking, leave the injured consumer without legal recourse. But as one observer has recently noted, when "[f]aced with the choice of letting wrongdoers retain the fruits of illegal conduct or venturing into problem areas of class litigation, the [Field Code] courts all too often have chosen the former alternative."[81] The state of commercial affairs demands that the courts of New York and similar jurisdictions abandon the strict adherence to decisional precedent which denies class actions when "separate wrongs to separate persons" are involved. If common interest among class members must be found, the *Vasquez* opinion offers a more reasonable and equitable standard in recognition of the obvious similarity in questions of law and fact among injured consumers. Only through acknowledgment of consumers' rights will the norm of responsibility in the giant retailing and advertising industries be significantly improved.

DAVID A. SANDS

CONSTITUTIONAL LAW—CONVERSION OF FINE INTO TERM OF IMPRISONMENT FOR OFFENDERS FINANCIALLY UNABLE TO PAY FINE HELD VIOLATIVE OF EQUAL PROTECTION CLAUSE

Preston Tate, an indigent, was convicted of various traffic offenses which were punishable by fine only. Accordingly, he was fined a total of $425. Since he was unable to pay the fine, Texas law required that he be imprisoned for a period of time sufficient to "serve-out" his fine at the rate of $5 per day. Thus Tate was sent to prison and after serving 21 days he applied for a writ of habeas corpus, alleging that he was unable to pay the fine due to his indigency. The County Criminal Court of Harris County denied the writ and the Court of Criminal Appeals of Texas affirmed, rejecting the appellant-petitioner's contention that his impri-

81. Homburger, *supra* note 11, at 617.