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Deposing Unnamed Plaintiffs in Class Actions: Southern California Edison Co. v. Superior Court

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DEPOSING UNNAMED PLAINTIFFS IN CLASS ACTIONS: *SOUTHERN CALIFORNIA EDISON CO. v. SUPERIOR COURT*[1]

Discovery and class actions are two of the most important procedural devices in present California legal practice.[2] Although they are often assumed to be fairly modern developments, both can trace their ancestory back to at least 1851 when the original Practice Act was enacted in California.[3] Section 14 of that Act[4] is practically identical to section 382 of the present Code of Civil Procedure,[5] the modern statutory basis for class actions. Other sections of the 1851 statutes are related to various discovery devices including depositions.[6] The discovery statutes, unlike the class action statute, have undergone massive changes since 1851, the most important occurring in 1957 when the entire discovery procedure was revamped using the federal discovery rules as a model.[7] Despite the admitted importance of these two devices, it was not until 1972 that the California Supreme Court considered the application of any type of discovery procedure to unnamed plaintiffs in a class action. In a unanimous decision, the court in *Southern California Edison Co. v. Superior Court*[8] held that a defendant in a class action has the right to force the named plaintiffs to obtain the attendance of unnamed plaintiffs at depositions by the same notice procedure used in individual actions, that is, by merely serving plaintiff's attorney with notice of the proposed taking of the deposition. But the court also held that plaintiff's attorney could avoid the impact of the procedure if he could demonstrate that "good cause" existed for the issuance of a protective order shifting the burden of discovery to the de-

1. 7 Cal. 3d 832, 500 P.2d 621, 103 Cal. Rptr. 709 (1972).

2. *See*, Grossman, *Class Actions: Manageability and the Fluid Recovery Doctrine*, 47 L.A.B. BULL. 415 (1972); Committee on Administration of Justice, *Discovery*, 31 CAL. ST. B.J. 204 (1956); 20 STAN. L. REV. 594 (1968).

3. Ch. 5 [1851] Cal. Stat. 51.

4. *Id.* § 14.

5. CAL. CODE CIV. PROC. § 382 (West Supp. 1973).

6. Ch. 5, §§ 428-31 [1851] Cal. Stat. 118-19. Section 428-1st, allowed the deposition of a person "for whose immediate benefit the action or proceeding is prosecuted or defended" to be taken in "special proceedings." See text accompanying notes 11-16 *infra*.

7. Ch. 1904 [1957] Cal. Stat. 3321; *see* Committee on Administration of Justice, *Discovery*, 31 CAL. ST. B.J. 204 (1956).

8. 7 Cal. 3d 832, 500 P.2d 621, 103 Cal. Rptr. 709 (1972).

fendant. The court proceeded to define "good cause" in a way which should insure that named plaintiffs will seldom be required to obtain the attendance of unnamed plaintiffs for depositions.

The five named plaintiffs in *Edison* owned boats moored in King Harbor at Redondo Beach. They commenced an action for damages in nuisance and trespass, bringing suit on behalf of themselves and all those similarly situated. Plaintiffs alleged that Edison, in the course of operating an electrical power generation plant, had discharged large quantities of particulate matter and pollutants which had damaged their boats. The complaint further alleged that there were approximately 1500 other boat owners so situated and that the issues raised were of common and general interest to all.[9]

Edison answered and then began discovery proceedings. Plaintiffs supplied a list[10] of the names and last known addresses of approximately 500 members of the King Harbor Boat Association, from which Edison picked twenty names at random and served notice of the taking of their depositions on the attorneys for the named plaintiffs, taking the position that section 2019(a)(4) of the Code of Civil Procedure[11] required the named plaintiffs to produce the deponents at the noticed time and place. Section 2019 describes the procedure for the taking of oral depositions. These may be had from any person, irrespective of his relation to the action. The party seeking discovery is required to give notice of the taking of the deposition to all other parties, and usually must serve a subpoena on the deponent in order to compel his attendance, but subsection (a)(4) provides that subpoenas need not be served on three categories of deponents: (a) parties, (b) officers, directors, and managing agents of parties, and (c) persons "for whose immediate benefit an action or proceeding is prosecuted or defended." The burden of compelling attendance of a person falling

9. *Id.* at 835-36, 500 P.2d at 622, 103 Cal. Rptr. at 710.

10. This list was apparently supplied in response to interrogatories, but the reports are not clear on this point.

11. CAL. CODE CIV. PROC. § 2019(a)(4) (West Supp. 1973):

In the case of depositions of a party to the record of any civil action or proceeding or of anyone who at the time of taking the deposition is an officer, director or managing agent of any such party, the service of a subpoena upon any such deponent is not required if proper notice of the taking of such deposition is given to the attorney for such party or to the party, if he has no attorney. In the case of depositions of a person for whose immediate benefit an action or proceeding is prosecuted or defended or of anyone who at the time of taking the deposition is an officer, director or managing agent of any such person, the service of a subpoena upon any such deponent is not required if proper notice of the taking of such deposition is given to the attorney of the party prosecuting or defending the action or proceeding for the immediate benefit of the deponent or to such party, if he has no attorney.

within one of these categories is on the attorney representing the interest associated with that person. When the attorney receives proper notice of the deposition, it is his responsibility to insure that the deponent appears at the noticed time and place.

Section 2019 is the only discovery section which makes special provision for discovery from persons "immediately benefited" by the action. The other sections are limited in their application to parties,[12] parties and agents of parties,[13] or "any person" without reference to the person's relation to the action.[14] Thus, while neither "party" nor "person immediately benefited" are defined in the California codes, the inclusion of the category of "persons immediately benefited" in section 2019 and its omission from the other discovery sections indicates that the legislature viewed persons in these various categories as bearing different relationships to the action and thereby deserving of differing treatment.[15] Edison claimed that unnamed plaintiffs are immediately benefited by the action within the meaning of section 2019(a)(4) and that the attorney for the named plaintiffs therefore had the burden of securing the attendance of the unnamed class members at the depositions.[16]

Although the plaintiffs disagreed with this application of the section, they did attempt to cooperate in the production of the unnamed plaintiffs. They were able to produce only two of the twenty persons on Edison's list: the rest could not be contacted, were unable to attend, or refused to attend. Thereupon, Edison noticed the taking of the depositions of twenty more of the class members, and "announced its intention to exclude"[17] from the class all those who did not appear.

Plaintiffs moved for a protective order under section 2019(b)(1), claiming that this practice was subjecting them to "annoyance, embarrassment, and oppression."[18] The motion requested an order limiting the use of the notice procedure to the five named plaintiffs. The

12. *Id.* §§ 2030 (interrogatories), 2031 (inspection of records and entry upon property), and 2033 (requests for admissions).

13. CAL. CODE CIV. PROC. § 2032 (West 1967) (physical or mental examination).

14. *Id.* § 2020 (depositions upon written interrogatories).

15. The same distinction is made elsewhere in the California codes. *See, e.g.*, CAL. CODE CIV. PROC. § 2016 (West 1967), § 2034 (West Supp. 1973); CAL. EVID. CODE § 776 (West 1968).

16. 7 Cal. 3d at 836, 500 P.2d at 622-23, 103 Cal. Rptr. at 710-11.

17. *Id.*, 500 P.2d at 623, 103 Cal. Rptr. at 711. The claim of a "right" to exclude non-appearing class members was based on CAL. CODE CIV. PROC. § 2034(d) (West Supp. 1973). See text accompanying notes 76-79 *infra*.

18. 7 Cal. 3d at 836, 500 P.2d at 623, 103 Cal. Rptr. at 711, *quoting* CAL. CODE CIV. PROC. § 2019(b)(1) (West Supp. 1973).

trial court granted the motion in part, quashing Edison's notices of deposition but holding that if Edison first served subpoenas on the deponents, the depositions could be taken.[19] As noted previously, this is the procedure normally required when the deponent does not fall within one of the categories exempted from the subpoena provision by subsection (a)(4).[20] The trial court reasoned that since "it is an unwarranted and improper burden upon counsel for the plaintiff[s] to require that he produce them on pain of a forfeiture to those persons if the counsel cannot produce them,"[21] the unnamed plaintiffs should not be considered as within the ambit of section 2019(a)(4), and therefore the defendants were required to serve subpoenas on those unnamed plaintiffs they wished to depose.

Edison filed a petition with the court of appeal. That court issued a preemptory writ vacating the lower court's protective order, ruling that unnamed plaintiffs are persons "for whose immediate benefit an action . . . is prosecuted" within the meaning of section 2019(a)(4), and, as such, their depositions could be required on mere notice. Furthermore, the court of appeal was of the opinion that there was no other basis for issuing a protective order since plaintiffs had not provided good cause.[22] The supreme court granted a hearing.

Apparently the sole question raised by the parties was whether the unnamed plaintiffs were persons "for whose immediate benefit" the action was being prosecuted.[23] They reasoned that if the unnamed plaintiffs came within this category, the lower court's protective order was erroneous; if they did not, it was correct.

Edison, relying on the test enunciated in *Waters v. Superior Court*,[24] argued that since class members would have an immediate right to share pro rata in any judgment for the plaintiffs, they were immediate beneficiaries.[25] In *Waters*, plaintiff brought an action for legal fees allegedly due from the Hughes Tool Company. In the course of the proceedings, he served notice of the taking of Howard Hughes' deposition on the attorney for the defendant, who then moved for a protective order requiring the service of a subpoena on Hughes. Plaintiff argued that since Hughes was the sole shareholder of the company, any

19. 7 Cal. 3d at 836-37, 500 P.2d at 623, 103 Cal. Rptr. at 711.

20. See text accompanying notes 11-16 *supra*.

21. 7 Cal. 3d at 837 n.4, 500 P.2d at 623 n.4, 103 Cal. Rptr. at 711 n.4.

22. 23 Adv. Cal. App. 3d 568, *vacated*, 7 Cal. 3d 832, 500 P.2d 621, 103 Cal. Rptr. 709 (1972)).

23. 7 Cal. 3d at 840, 500 P.2d at 625, 103 Cal. Rptr. at 713.

24. 58 Cal. 2d 885, 377 P.2d 265, 27 Cal. Rptr. 153 (1962).

25. 7 Cal. 3d at 837-38, 500 P.2d at 624, 103 Cal. Rptr. at 712.

judgment for the company would be for his immediate benefit. The supreme court disagreed, holding that before a person could be considered one for whose immediate benefit an action is prosecuted or defended, he must be one "who would have an immediate right to the amount recovered or some portion of it as soon as it was recovered by the nominal party,"[26] and that a sole shareholder was not such a person when the action was against the company.

The plaintiffs in *Edison* replied that the *Waters* test should be limited to a situation in which a person prosecutes or defends an action purely as a nominal party, for the immediate benefit of another. In such a context, the statute would serve a useful purpose since the benefited person would usually be more knowledgeable of the underlying facts of the case than the nominal party. In a class action, however, the converse is true because the party seeking the information would normally be able to obtain little from unnamed plaintiffs that he could not otherwise obtain from the named plaintiffs.[27]

The plaintiffs further maintained that allowing depositions to be taken from unnamed plaintiffs on mere notice with the sanction of exclusion from the class if they did not appear, would destroy the usefulness of the class action as an effective method of litigation and adjudication.[28] While the supreme court recognized these considerations to be forceful arguments, it could not accept an application of the *Waters* test in a class action setting:[29]

> [W]e find it impossible to reject the application of the *Waters* holding to the instant case. At the outset it is manifest that the *Waters* interpretation, as an abstract proposition, makes sense: Persons "immediately benefited" by the prosecution of an action are indeed those "who would have an immediate right to the amount recovered or some portion of it as soon as it was recovered by the nominal plaintiff." There is probably no better way to construe "immediate benefit" than as an immediate share in the recovery.[30]

As the court pointed out, the Federal Rules of Civil Procedure do not use the phrase, so the persuasive authority of federal decisions was not available.[31] Furthermore, there is no legislative history concerning

26. 58 Cal. 2d at 897, 377 P.2d at 271, 27 Cal. Rptr. at 159.

27. 7 Cal. 3d at 838, 500 P.2d at 624, 103 Cal. Rptr. at 712.

28. *Id.* at 838-39, 500 P.2d at 624, 103 Cal. Rptr. at 712.

29. *Id.* at 840, 500 P.2d at 625, 103 Cal. Rptr. at 713.

30. *Id.* at 839, 500 P.2d at 625, 103 Cal. Rptr. at 713.

31. *Id.*, 500 P.2d at 624-25, 103 Cal. Rptr. at 712-13. For the use of federal precedents in discovery matters, *see* Coy v. Superior Court, 58 Cal. 2d 210, 218, 373 P.2d 457, 461, 23 Cal. Rptr. 393, 397 (1962). In the class action context, *see* La Sala v.

section 2019(a)(4), so recourse to this interpretative aid was likewise unavailable.[32] Thus, by necessity, the court's construction of the phrase "immediate benefit" was based entirely on the *Waters* precedent.

The plaintiffs' approach to this question implied that if the *Waters* test was applicable in class actions, the unnamed plaintiffs would clearly fall within the category of persons "immediately benefited" by the action. In support of this proposition the court placed reliance on *La Sala v. American Savings & Loan Association,*[33] in which it was stated:

> When a plaintiff sues on behalf of a class, he assumes a fiduciary obligation to the members of the class . . . . Even if the named plaintiff receives all the benefits that he seeks in the complaint, such success does not divest him of the duty to continue the action for the benefit of others similarly situated.[34]

The court stated that this holding concerning the "essential nature" of class actions "impelled" them to conclude that, under the *Waters* test, unnamed plaintiffs do belong to the category of persons immediately benefited by a class action.[35]

La Sala seems to be dubious authority for this holding. The case concerned the named plaintiffs' duty to the class but did not involve the

Am. Sav. & Loan Ass'n, 5 Cal. 3d 864, 871-72, 489 P.2d 1113, 1116-17, 97 Cal. Rptr. 849, 853-54 (1971); Vasquez v. Superior Court, 4 Cal. 3d 800, 815, 484 P.2d 964, 973, 94 Cal. Rptr. 796, 805 (1971).

32. Paragraph (4) of subdivision (a) was added to section 2019 by 1959 amendment. Ch. 1590, § 2 [1959] Cal. Stat. 3920. While there is no legislative history explaining the phrase "persons immediately benefited by the action" in section 2019 (a)(4), it does have a long history dating back to Lord Denham's Act of 1843, 687 Vict., c. 85, § I. That act was designed to be a liberalization of the rules of evidence by allowing persons who had an interest in the action to be competent witnesses; however, it excluded from its operation certain categories of interested persons, one of which was "any Person in whose immediate and individual Behalf any Action may be brought or defended, either wholly or in part." *Id.* The New York Statutes of 1849, ch. 438, §§ 396, 398 [1849] N.Y. Stat. —, and the California Practice Act of 1851, ch. 5, §§ 392, 393, 422, 428-1st [1851] Cal. Stat. 113, also used the phrase. While the early cases construing the phrase were concerned with the competency of witnesses, the holdings were generally consonant with the *Waters* holding. *See, e.g.*, Freeman v. Spalding, 12 N.Y. 261, 2 Kern. 373 (1855); Fitch v. Bates, 11 Barb. 471, 480 (N.Y. Sup. Ct. 1851); Vanduzen v. Worrel, 18 Barb. 409 (N.Y. Sup. Ct. 1851). The test enunciated in *Waters* was taken from one of these early cases, Butler v. Patterson, 13 N.Y. 393, 3 Kern. 292, 294 (1855), in which the phrase was construed to apply only to those persons who "would have a right to the amount recovered, or some portion of it, as soon as it should be recovered by the nominal plaintiff." *Id.*

33. 5 Cal. 3d 864, 489 P.2d 1113, 97 Cal. Rptr. 849 (1971).

34. *Id.* at 871, 489 P.2d at 1116, 97 Cal. Rptr. at 852.

35. 7 Cal. 3d at 840, 500 P.2d at 625, 103 Cal. Rptr. at 713.

class members' right to recovery. The plaintiffs in *La Sala* alleged that a clause in the standard trust deeds used by the defendant constituted an invalid restraint on alienation. The defendant waived the clause as to the named plaintiffs, then moved for a dismissal of the action on the ground that they were no longer representative of the class. The court rejected the defendant's contention on the basis that the named plaintiffs had a continuing duty to represent the class even though their particular claims may have been satisfied.[36]

Apparently no cases address the precise question of the immediacy of a class member's right of recovery, but *Daar v. Yellow Cab Co.*[37] and *Vasquez v. Superior Court*[38] both indicate that class members must come forward and individually prove their damages.[39]

It could be argued, in view of this requirement, that the unnamed plaintiffs' right of recovery is *not* in fact "immediate" in the sense required by section 2019(a)(4). Some early cases construing the phrase "immediate benefit" support this argument, although they defined the phrase in the context of resolving a different question, namely, the competency of witnesses to testify. For instance, in *Butler v. Patterson,*[40] the case from which the *Waters* court took the "immediate right to a pro rata share" test,[41] the challenged witness was the child of an intestate decedent. The action involved the child's right to share in the estate, yet he was found competent to testify. The *Butler* court concluded that although the child would not have to do anything after the action was concluded to establish his claim, his right was not immediate since it was qualified by the administrator's prior right to use the assets of the estate in its administration.[42] The heir's right to the proceeds in this case would appear to be more "immediate" than the claim of unnamed plaintiffs in class actions, since they will usually have to establish their individual damages after the action has been concluded.[43]

36. 5 Cal. 3d at 871-72, 489 P.2d at 1117, 97 Cal. Rptr. at 853.
37. 67 Cal. 2d 695, 433 P.2d 732, 63 Cal. Rptr. 724 (1967).
38. 4 Cal. 3d 800, 484 P.2d 964, 94 Cal. Rptr. 796 (1971).
39. *Id.* at 809, 484 P.2d at 969, 94 Cal. Rptr. at 801.
40. 13 N.Y. 393, 3 Kern. 292 (1855).
41. See note 32 *supra.*
42. 13 N.Y. at 394, 3 Kern. at 295 (1855).
43. It is not necessary in every class action that the members of the class come forward to prove their claims, since in some cases it is possible to determine the members of the class and their individual damages from other sources. *See, e.g.,* San Francisco v. Pub. Util. Comm'n, 6 Cal. 3d 119, 490 P.2d 798, 98 Cal. Rptr. 286 (1971) (company forced to give rebates on telephone bills to all its subscribers).

The factual settings of these prior cases suggest another argument against interpreting the phrase to include unnamed plaintiffs: in all these cases, the person benefited had some close, personal, and substantial interest in the litigation.[44] Thus, implicit in the phrase "immediate benefit" would seem to be a requirement that the person to whom the phrase is applied must have a "close," i.e., immediate, relationship to the action. In the traditional context, such a close relationship would be inherent in the possibility of a benefit flowing from the action, and it is not surprising, therefore, that such a requirement was not articulated in the earlier cases. The problem arises only in class actions.

If, however, the *Edison* court had used either of these arguments to exclude unnamed plaintiffs from the category of "persons immediately benefited," defendants would be forced to assume a heavy burden in class actions, irrespective of whether the factual setting of the case justified the imposition. By ruling that unnamed plaintiffs fall within section 2019(a)(4), the court made it possible for the burden of discovery to remain on the named plaintiffs in those situations where justice to the defendant requires it.

Unlike the parties, the court felt that its determination that class actions are prosecuted for the immediate benefit of unnamed plaintiffs did not dispose of all the issues. A protective order had been issued by the trial court pursuant to section 2019(b)(1), and the scope of that section had to be considered. The section states, in relevant part:

> Upon motion reasonably made by any party or by the person to be examined . . . for good cause shown, the court in which the action is pending may make an order that the deposition shall not be taken, or that it may be taken only at some designated time or place other than stated in the notice . . . or the court may make any other order which justice requires to protect the party or witness from annoyance, embarrassment, or oppression.[45]

Under this section the issue was whether plaintiffs had shown good cause for the protective order. If they had, the trial court had not

44. *Waters* and *Butler* are both good examples of the usual "closeness" of the person alleged to be benefited by the action. Another common situation in the cases discussed in note 32 *supra,* was one in which a creditor had made an assignment of a debt due him, and the assignee, in an action to recover the amount due, called the assignor as a witness. In both Fitch v. Bates, 11 Barb. 471 (N.Y. Sup. Ct. 1851) and Vanduzen v. Worrell, 18 Barb. 409 (N.Y. Sup. Ct. 1854), such a witness was determined to be incompetent.

45. 7 Cal. 3d at 840, 500 P.2d at 626, 103 Cal. Rptr. at 714.

abused its discretion by requiring the defendant to use subpoenas to compel the unnamed plaintiffs' attendance at the depositions.

The court stated[46] that the proper test to determine whether good cause has been shown should be that given in *Greyhound Corp. v. Superior Court*:[47]

> In the exercise of its discretion the court should weigh the relative importance of the information sought against the hardship which its production might entail, and it must weigh the relative ability of the parties to obtain the information before requiring the adversary to bear the burden or cost of production, keeping in mind the statutory admonition of entering an order consistent with justice.[48]

The portion of the *Greyhound* test applied in *Edison* is the relative ability of the parties to obtain the information sought.[49] It is a basic tenet of discovery practice that when both parties have equal ability to obtain the information, the one seeking it must bear the burden of producing it. If such equal ability exists, imposing the burden on the party who is not seeking the information is essentially forcing him to do the other party's work. As stated in *Bunnell v. Superior Court*:[50]

> [W]hen the material to be "discovered" consists . . . solely of information available to both parties, it defeats the purpose of the Discovery Act to compel one party to perform another party's research, whether such be laborious or not.[51]

Forcing one party to do another's work would result in the type of "annoyance, embarrassment, or oppression" contemplated by section

46. *Id.* at 841, 500 P.2d at 626, 103 Cal. Rptr. at 714.

47. 56 Cal. 2d 355, 364 P.2d 266, 15 Cal. Rptr. 90 (1961).

48. *Id.* at 383-84, 364 P.2d at 280, 15 Cal. Rptr. at 104. The trial court did not actually exercise its discretion. Rather, it made an erroneous ruling concerning the meaning of the language of section 2019(a)(4) and based its subsequent action on that interpretation. This makes little difference, because if the facts of the case support the trial court's action in issuing or denying a particular order, the appellate court will sustain the order irrespective of the trial court's rationale. *Id.* at 384, 364 P.2d at 280, 15 Cal. Rptr. at 104; West Pico Furniture Co. v. Superior Court, 56 Cal. 2d 407, 418, 364 P.2d 295, 300, 15 Cal. Rptr. 119, 124 (1961).

49. The court explicitly stated that the trial court need not consider the *importance* of the information sought, i.e., the first portion of the quoted test from *Greyhound*:

> [T]he [trial] court decided that the burden of producing the unnamed plaintiffs for deposition should rest with defendant—without reaching the question of whether the information sought by Edison is relevant to the class allegation, the claims for damages on their merits, or both. 7 Cal. 3d at 842, 500 P.2d at 627, 103 Cal. Rptr. at 715.

The trial court did not need to reach this question since it did not deny Edison the *information*, it merely required Edison to use subpoenas instead of mere notice to obtain the information from the unnamed plaintiffs.

50. 254 Cal. App. 720, 62 Cal. Rptr. 458 (1967).

51. *Id.* at 724, 62 Cal. Rptr. at 461-62.

2019(b)(1). Therefore, a showing of "equal ability" is equivalent to a showing of "good cause" for the purposes of a protective order under this section.[52]

In the *Edison* context, the "ability to obtain the information" criterion translates into an "ability to compel attendance" test.[53] The named plaintiffs' ability to compel the attendance of unnamed plaintiffs was dependent on the "control" they had over them.[54] Since the class was "loosely knit," and the unnamed plaintiffs were no more involved with the named plaintiffs than they were with Edison, the named plaintiffs' ability to compel their attendance through informal methods was no better than Edison's.[55]

The court commented on the "loosely knit" aspect of the class in a footnote to its opinion:

> Our view concerning the proper allocation of the burden of discovery might be different if the class alleged were a closely organized group, where the members generally knew each other *and* participated together in the planning of the lawsuit.[56]

This language implies that the burden of producing the deponents could remain with the named plaintiffs only if both factors are present, i.e. the members (1) generally know each other and (2) plan the lawsuit together. If this implication is followed, there will be few class actions in which the plaintiffs will be unable to obtain a protective order since there will be a minimal number of class actions in which the criterion that all the class members plan the lawsuit together is present.[57] Indeed, the concept of "unnamed plaintiffs" inherently implies non-involvement. Whether this is a valid interpretation of the footnote can be disputed, however, since neither factor was present in *Edison*.[58] In a proper case either element alone should provide the control necessary to justify leaving the burden with the plaintiff.[59]

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52. *See* 7 Cal. 3d at 841-42, 500 P.2d at 626-27, 103 Cal. Rptr. at 714-15; 254 Cal. App. 2d at 724, 62 Cal. Rptr. at 461-62.

53. 7 Cal. 3d at 841-42, 500 P.2d at 626-27, 103 Cal. Rptr. at 714-15.

54. *Id.* at 842, 500 P.2d at 627, 103 Cal. Rptr. at 715.

55. *Id.* at 841-42, 500 P.2d at 626-27, 103 Cal. Rptr. at 714-15.

56. *Id.* at 841 n.7, 500 P.2d at 626 n.7, 103 Cal. Rptr. at 714 n.7. (emphasis added).

57. Apparently no reported cases in California meet this requirement.

58. The factual situation in *Edison* also tends to weaken any too literal reading of the case: Edison was clearly attempting to use the discovery procedures to exclude class members from the action. Had this abuse not been present, the court may not have used terms quite as restrictive as those found in the footnote in question.

59. Clearly, if the second element, i.e., that all the members planned the lawsuit together, is present; the attorneys for the named plaintiffs will have the requisite control over all the class members. Furthermore, if the class members generally know one

In any event, it is clear that in *Edison* neither party had any effective method of informally compelling the attendance of unnamed plaintiffs for depositions. In such a situation, the parties' ability was as equally balanced as is possible.

The court could have based its decision sustaining the trial court's order on the "equal ability" point alone. Instead, the court proceeded to a discussion of the "new importance" of class actions as a litigation tool, stating that this consideration requires that class actions be protected from the "chilling effects"[60] which Edison's practices, if sustained, would create.[61]

The "new importance" of class actions is based in part on considerations outlined in *Vasquez v. Superior Court,*[62] one of two cases the *Edison* court cited as "presaging" this new importance.[63] In *Vasquez,* the action was brought on behalf of approximately two hundred persons who had bought food freezers and meat on installment sales contracts. The complaint alleged that these contracts were procured through fraudulent misrepresentations on the part of the seller.[64] The defendant claimed that the action could not be maintained as a class action since plaintiffs would have to show that the same misrepresentations were made to each member of the class.[65] In rejecting defendant's contention, the court stated:

> Protection of unwary consumers from being duped by unscrupulous sellers is an exigency of the utmost priority in contemporary society. . . . State laws governing relations between consumers and merchants are generally utilized only by informed, sophisticated parties, affording little practical protection to low income families. The alternatives of multiple litigation (joinder, intervention, consolidation, the test case) do not sufficiently protect the consumer's rights because the devices "presuppose 'a group of economically powerful parties who are obviously able and willing to take care of their own interests individually through individual suits or individual decisions about joinder or intervention.' "[66]

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another, the class is probably small, and the members are probably aware of the action and the reasons for bringing it. In such a case, it is a reasonable assumption that the named plaintiffs will have less difficulty than the defendants in obtaining by informal means the class members' attendance at depositions.

60. 7 Cal. 3d at 842, 500 P.2d at 627, 103 Cal. Rptr. at 715.

61. *Id.*

62. 4 Cal. 3d 800, 484 P.2d 964, 94 Cal. Rptr. 796 (1971).

63. 7 Cal. 3d at 842, 500 P.2d at 627, 103 Cal. Rptr. at 715.

64. 4 Cal. 3d at 805-06, 484 P.2d at 966-67, 94 Cal. Rptr. at 798-99.

65. *Id.* at 811, 484 P.2d at 970, 94 Cal. Rptr. at 802.

66. *Id.* at 808, 484 P.2d at 968, 94 Cal. Rptr. at 800 (citations omitted), *quoting* Dolgow v. Anderson, 43 F.R.D. 472, 484 (E.D.N.Y. 1968).

The second case cited by the *Edison* court in support of the proposition that class actions have gained a new importance was *Daar v. Yellow Cab Co.*,[67] in which the plaintiffs contended that the cab company had overcharged its customers by incorrectly setting the mileage meters. The defendant attempted to avoid the class action by arguing that it would be almost impossible to identify the members of the class, as well as to determine the amount of damages incurred by each individual. As in *Vasquez*, the court rejected defendant's contentions and allowed maintenance of the suit.[68] The policy consideration suggested by *Daar* is that the class action device is necessary to insure that large companies will answer for injuries to the public where the damages sustained by each individual are so small that suit might not be brought because it would be economically unfeasible.[69]

While the economic factors delineated in *Daar* and *Vasquez* are not as evident in the *Edison* setting,[70] *Edison* involves other considerations of public importance supporting the court's protective attitude. The case has overtones of a "private attorney general"[71] suit in which the plaintiff acts to protect an important public interest in an area where the state either cannot or will not act. Edison was allegedly polluting—conduct obviously a subject of public interest.[72] Of course, plaintiffs' action was one for their own damages, but if it were suc-

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

68. *Id.* at 716-17, 433 P.2d at 747, 63 Cal. Rptr. at 739.

69. *Id.* at 715, 433 P.2d at 746, 63 Cal. Rptr. at 738.

70. As a class, it is unlikely that boat owners belonging to a boat association and mooring their boats in a marina are "unsophisticated" or belong to "low income families." The *Vasquez* considerations, therefore, do not apply. Furthermore, the amount of damages being sought was $5,000,000 compensatory and $5,000,000 exemplary, to be shared by a class of 1500 persons, or roughly $6,600 per person. 7 Cal. 3d at 836, 500 P.2d at 622, 103 Cal. Rptr. 710. Clearly, the amount of individual damages being sought was more than minimal. Thus *Daar* economic considerations were also absent in *Edison*, and the court did not discuss them.

71. The phrase "private attorney general" was coined by Judge Frank in Associated Indus. v. Ickes, 134 F.2d 694 (2d Cir. 1943), *vacated on suggestion of mootness*, 320 U.S. 707 (1943). It has been used most often in the context of whether a private individual has standing to sue on a cause of action in which his *legal* injury is no different than that sustained by the public at large. *See* Sierra Club v. Morton, 405 U.S. 727 (1972); Flast v. Cohen, 392 U.S. 83 (1968); Scripps-Howard Radio, Inc. v. FCC, 316 U.S. 4 (1942); FCC v. Sanders Bros. Radio Station, 309 U.S. 470 (1940); K. DAVIS, ADMINISTRATIVE LAW TREATISE § 22.09-6, at 750 (Supp. 1970); L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 517 (1965); Note, *Standing And Environmental Litigation*, 6 LOY. L.A.L. REV. 128, 142 n.105 (1973).

72. In 1971, the California legislature enacted Government Code section 12,600 which is a statement of California's policy favoring protection of the environment. CAL. GOV. CODE ANN. § 12,600 (West Supp. 1973).

cessful the public would benefit incidentally. The effect of the pollution could not possibly have been limited to damage of the boats in the marina, and a substantial monetary recovery by the plaintiffs would tend to make Edison less likely to pollute in the future. Considerations of this nature are indicative of the strong public interest in maintaining the class action as a viable litigation tool.[73]

The court found that Edison's discovery procedures could undermine the viability of class actions in two ways, "either by imposing impossibly expensive burdens on the named plaintiffs or by chipping away at the size of the class through exclusion of the unnamed plaintiffs."[74]

The threat of exclusion of non-appearing class members arises under the provisions of Code of Civil Procedure section 2034(d), which states, in part:

> If a party or a person for whose immediate benefit the action . . . is prosecuted or defended . . . willfully fails to appear before the officer who is to take his deposition, after said party or his attorney has been served with a proper notice in accordance with the provisions of subdivision (a)(4) of Section 2019 . . . the court on motion and notice may . . . dismiss the action or proceeding or any part thereof, or enter a judgment by default against that party, or impose such other penalties of a lesser nature as the court may deem just.[75]

Since this power to exclude can be exercised only where the failure to appear is willful,[76] the trial court in *Edison* could not have excluded

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73. A wide variety of policy considerations outside the consumer protection and environmental fields can be served by class actions. *See, e.g.*, Collins v. Rocha, 7 Cal. 3d 232, 497 P.2d 225, 102 Cal. Rptr. 1 (1972) (nine named plaintiffs, on behalf of themselves and thirty-five others, sought recovery from a farm labor contractor who had induced them to travel approximately 400 miles with the promise of at least one week of work, then gave them only three hours of work); Serrano v. Priest, 5 Cal. 3d 584, 487 P.2d 1241, 96 Cal. Rptr. 601 (1971) (seeking declaration that state public school financing methods were unconstitutional, brought on behalf of the school children of the state); Los Angeles Fire & Police Protective League v. City of Los Angeles, 23 Cal. App. 3d 67, 99 Cal. Rptr. 908 (1972) (action to collect overtime worked, but not paid, brought on behalf of all Los Angeles city policemen); Reaves v. Superior Court, 22 Cal. App. 3d 587, 99 Cal. Rptr. 156 (1971) (attacking the superior court's procedures for handling extraordinary writs, brought on behalf of all those who had sought, might have sought, will seek, and might seek, such writs in the defendant court). *See also* Note, *The Cost-Internalization Case for Class Actions*, 21 STAN. L. REV. 383 (1969).

74. 7 Cal. 3d at 842, 500 P.2d at 627, 103 Cal. Rptr. at 715.

75. CAL. CODE CIV. PROC. § 2034(d) (West Supp. 1973).

76. *See, e.g.*, Palmer v. Moore, 266 Cal. App. 2d 134, 71 Cal. Rptr. 801 (1968), in which it was stated:

> [Defendant] could not be located . . . [and] consequently, his failure to answer

those members of the class who could not be contacted, and probably could not have excluded those who could not appear. Where the failure is willful, as it apparently was with those who "refused to appear,"[77] it is within the trial court's discretion to determine whether or not the sanction should be imposed. In individual actions, the imposition of such a sanction is considered to be a drastic measure to be used only in the most extreme circumstances.[78] Therefore, even prior to *Edison*, the threat of a defendant "chipping away" at the size of the class through the use of section 2034(d) seemed more apparent than real. The *Edison* court's discussion of the need to avoid the "chilling" of class actions which the exclusion of class members undoubtedly would have, forcefully emphasizes the drastic nature of the sanction in the class action context and makes the possibility of imposing the sanction even less likely than it might be in individual actions.[79]

The second "chilling" effect the court discussed was that which could occur by placing "impossibly expensive" burdens on the named plaintiffs.[80] Since the number of possible deponents in a class action could be quite large, the amount of time and money required to insure their attendance at depositions could easily become prohibitive. In the instant case, the named plaintiffs' counsel had expended "extraordinary time and effort to round up" the unnamed members of the class involved, and yet had been required to reach only twenty of 1500 possible deponents.[81] Had the court left the burden on the named

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the interrogatories was not wilful. And the section in question [2034(d)] requires, before there can be a default, that such failure must be wilful. *Id.* at 141, 71 Cal. Rptr. at 806.

77. 7 Cal. 3d at 836, 500 P.2d at 623, 103 Cal. Rptr. at 711.

78. *See, e.g.*, Scherrer v. Plaza Marina Commercial Corp., 16 Cal. App. 3d 520, 94 Cal. Rptr. 85 (1971).

79. A literal reading of section 2034(d) indicates that if an *unnamed* plaintiff wilfully fails to appear for the deposition, the trial court could in its discretion, enter a default against the *named* plaintiffs. This would result in more than merely "chipping away" at the class: it would destroy the present action entirely, although it is doubtful that such a default would have any effect on the ability of other members of the class to bring a later action. Nonetheless, the chilling effect which the imposition of such a sanction could have is obvious. In every large class, it would be reasonable to expect that there would be at least one obstinate individual who would "willfully fail to appear" for the deposition, and thus cause a default to be entered against the named plaintiffs. Of course, the likelihood of a court imposing this sanction is at best remote, and after *Edison*, likely non-existent.

80. 7 Cal. 3d at 842, 500 P.2d at 627, 103 Cal. Rptr. at 715.

81. *Id.*, 500 P.2d at 627, 103 Cal. Rptr. at 715. It should be noted that in a pure discovery context, a showing of burden alone is not sufficient to shift the burden of discovery to the other party. As was stated in West Pico Furniture Co. v. Superior Court, 56 Cal. 2d 407, 364 P.2d 295, 15 Cal. Rptr. 119 (1961):

Each of the [discovery] sections grants the power to make such [protective] orders

plaintiffs, many prospective plaintiffs and attorneys would carefully avoid instigating any class action involving a substantial number of class members. Such a result might indeed have a "chilling" effect on class actions. In light of the court's protective attitude toward class actions, this threat justified the trial court's issuance of the protective order.

As a final argument on appeal, the plaintiffs requested the court to rule that in class actions the defendant should always have the burden of showing good cause for the taking of depositions.[82] This the court refused to do. The refusal was based on the language of section 2019(b)(1) which squarely places this burden on the *Edison* plaintiffs: "Upon motion reasonably made . . . by the party to be examined [and] for good cause shown, the court in which the action is pending may make a protective order." The court stated:

> This is a statute whose language clearly indicates that the burden of showing "good cause" . . . for a protective order rests on the party seeking to deny the other's discovery right. We will not reverse this statutorily created burden . . . .[83]

The practical importance of this holding is to some degree dependent on the weight given to the footnote in the court's opinion which implied that a protective order shifting the burden of discovery to the defendant would issue unless the class is "closely knit" in the sense that the class members generally know one another and plan the lawsuit together.[84] If the footnote is given this interpretation, the court's refusal has little effect: the plaintiffs' ability to obtain a protective order is virtually guaranteed.[85] On the other hand, if the statement in the

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as justice requires, but none of them so much as refers to "burden." This indicates a legislative acknowledgment that some burden is inherent in all demands for discovery. The objection of burden is valid only when that burden is demonstrated to result in injustice. Hence, the trial court is not empowered to sustain an objection *in toto*, when the same is predicated upon burden, unless such is the only method of rendering substantial justice. *Id.* at 418, 364 P.2d at 300, 15 Cal. Rptr. at 124.

In *Edison*, the finding that the plaintiffs had expended "extraordinary time and effort" in trying to meet their obligations under section 2019(a)(4) probably would have satisfied the *West Pico* test even if *Edison* had been an individual action, and, therefore, a protective order would have been appropriate. On the question of a showing of burden as good cause for a protective order, *see* Hauk v. Superior Court, 61 Cal. 2d 295, 391 P.2d 825, 38 Cal. Rptr. 345 (1964); Pantzalas v. Superior Court, 272 Cal. App. 2d 499, 77 Cal. Rptr. 354 (1969); Alpine Mut. Water Co. v. Superior Court, 259 Cal. App. 2d 45, 66 Cal. Rptr. 250 (1968).

82. 7 Cal. 3d at 842, 500 P.2d at 627, 103 Cal. Rptr. at 715.

83. *Id.*, 500 P.2d at 628, 103 Cal. Rptr. at 716.

84. See text accompanying notes 56-58 *supra*.

85. See note 57 and text accompanying notes 56-58 *supra*. Plaintiff will have to make a factual showing that the class members did not plan the lawsuit together, but

footnote is given less emphasis, the plaintiffs' burden of showing good cause could become somewhat greater. They might be required to show that they have little, if any, control over the class members and cannot compel their attendance by informal means. While this would be an easy burden in most class actions, there are at least some situations where the plaintiffs arguably could not meet it.[86] But under either interpretation of the footnote, there will be a far greater number of cases where the plaintiffs can sustain this burden than where they cannot. While the court, as a matter of judicial discretion, would not reverse this statutorily created burden of showing good cause, the practical effect of the decision will be to force *defendants* to compel the attendance of deponents in all but the most extreme situations.

But where does this leave the defendant who legitimately needs information from and about unnamed plaintiffs?[87] It is unlikely that he

this requirement does not seem to make his task any more onerous than resisting a demurrer to the bringing of a typical class action as such. The requirement of a factual showing of good cause is discussed in Carlson v. Superior Court, 56 Cal. 2d 431, 440, 364 P.2d 308, 313, 15 Cal. Rptr. 132, 137 (1961). *See also* Rosen v. Superior Court, 244 Cal. App. 2d 586, 53 Cal. Rptr. 347 (1966). Code of Civil Procedure section 2036(a) states: "A party required to show 'good cause' to obtain discovery . . . shall show specific facts justifying discovery." CAL. CODE CIV. PROC. § 2036(a) (West Supp. 1973). While this section does not on its face apply to *Edison* since it is limited to situations where good cause must be shown to *obtain* discovery, whereas in *Edison denial* of discovery was sought, the *Edison* court seemed to feel that the section was applicable nonetheless. 7 Cal. 3d at 843, 500 P.2d at 628.

86. *See, e.g.*, Collins v. Rocha, 7 Cal. 3d 232, 497 P.2d 225, 102 Cal. Rptr. 1 (1972) in which there were only thirty-five unnamed plaintiffs, all of whom appeared to be at least acquaintances of the named plaintiffs.

87. This question assumes that unnamed plaintiffs can in fact supply useful information to the defendant: "Defendants [in class actions aimed at business practices] are disadvantaged in discovery since there are usually very few questions they can ask." Masterson, *Class Actions—The Defense Viewpoint*, 47 L.A. B. BULL. 425, 430 (1972). But the recent experiences of the federal courts seem to indicate that some useful information is available. In certain federal cases, it has been the court itself which solicited the information, not the parties. The rule relied on, when one is given, is Rule 23(d)(2) of the Federal Rules of Civil Procedure rather than the discovery rules (Rules 26-37). Rule 23 authorizes and defines class actions, and subsection (d)(3) allows the court in such an action to make orders providing for notice to members of the class in order to protect their interests during the conduct of the action. Using this rule as justification, the federal courts have, during the pretrial period, sent "Proof of Claim" forms to the unnamed plaintiffs requesting information concerning the individual's claim and status within the class. (For criticism of this practice, *see* 7A WRIGHT & MILLER, FEDERAL PRACTICE AND PROCEDURES 158-61 (1972); *cf.* 3B MOORE, FEDERAL PRACTICE 23-1161 (2d ed. 1969)). In short, federal courts are using discovery-like devices to obtain from unnamed plaintiffs, information useful to some aspect of the case, either procedural or substantive. For instance, in Korn v. Franchard Corp., 50 F.R.D. 57 (S.D.N.Y. 1970), *later ruling*, CCH FED. SEC. L. REP. ¶ 92,845, at 90,167 (1970), *rev'd*, 456 F.2d 1206 (2d Cir.

will wish to subpoena them for depositions; the burden will be as heavy on him as it would have been on the plaintiffs in *Edison*. One solution might be to direct interrogatories to the unnamed plaintiffs; however, the code section relating to interrogatories limits their use to "other parties." The defendant will be blocked from using this approach unless the court is willing to consider unnamed plaintiffs as "parties" for discovery purposes, a possibility that seems quite unlikely.[88]

The function of class actions is to provide an efficient method of handling a large number of comparatively small claims based on similar facts and questions of law. Inherent in this concept is the notion that unnamed plaintiffs should not be required to retain counsel, appear before the court, or otherwise become actively involved in the prosecution of the case. In discussing the federal rule which authorizes class actions, the federal district court in *Fischer v. Wolfinbarger*[89] explained:

1972), the court found, through the use of Proof of Claim forms, that a large number of prospective class members had signed releases of liability, thus bringing into focus the substantive question of the validity of the releases. In Arey v. Providence Hosp., 55 F.R.D. 62 (1972), in which the defendant was being sued for alleged discriminatory hiring and promotion practices, the court stated:

> [T]his court believes feedback from the known class members would be instructive and aid the court by providing information as to the scope of the class and the scope and diversity of discrimination claims, thereby allowing the court to rule more intelligently in future determinations regarding the boundaries of the class, the need for sub-classes, or even a re-evaluation of the class status designation itself. *Id.* at 71.

While the type of information the *Arey* court was seeking is usually available to the defendant directly from the named plaintiffs, he would clearly benefit if he, like the *Arey* court, could go directly to the ultimate source of the information, i.e., the unnamed plaintiffs. *See also* Mack v. General Elec. Co., 15 FED. RULES SERV. 2d 23c. 22 at 799 (E.D. Pa. Nov. 18, 1971); Minnesota v. United States Steel Corp., 44 F.R.D. 559 (D. Minn. 1968); Philadelphia Elec. Co. v. Anaconda Am. Brass Co., 43 F.R.D. 452 (E.D. Pa. 1968); Harris v. Jones, 41 F.R.D. 70 (D. Utah 1966)

88. The federal court of appeals for the 7th circuit seems to have done so, however. While not actually stating that unnamed plaintiffs are "parties," that court, in Brennan v. Midwestern United Life Ins. Co., 450 F.2d 999 (7th Cir. 1971), sustained the use of interrogatories directed to the unnamed plaintiffs even though the federal rule authorizing interrogatories (FED. R. CIV. P. 33) limits their use to "parties." *Brennan* has received a great deal of criticism. *See, e.g.*, Wainwright v. Kraftco Corp., 54 F.R.D. 532 (N.D. Ga. 1972); 1971 DUKE L.J. 1007; 40 FORDHAM L. REV. 969 (1971). The court in Arey v. Providence Hosp., 55 F.R.D. 62 (1972), commented:

> The court specifically refrains from delving into the procedural quagmire created by a quite recent case [*Brennan*] dealing with affirmative action requirements for non-present class members. *Id.* at 71 n.16.

89. 15 FED. RULES SERV. 2d 23d.5, at 905 (W.D. Ky. Oct. 5, 1971).

> [The federal class action rule] is designed to provide a fair and efficient procedure for handling claims where the claims or defenses of the represented parties are typical of the claims or defenses of the class, where there are questions of law or fact common to the class, and where it is fair to conclude that the representative parties will fairly and adequately protect the interests of the class. It is not intended that members of the class should be treated as if they were parties plaintiff, subject to the normal discovery procedures, because if that were permitted, then the reason for the rule would fail.[90]

If the court were to hold that unnamed plaintiffs are parties for the purpose of discovery, allowing the defendant to direct interrogatories to them, the entire concept of the class action could be subverted. Only an attorney could properly advise the unnamed plaintiffs as to the relevance, importance, and purpose of the questions being asked. Thus, the unnamed plaintiffs would be forced to become involved in the entire process of answering interrogatories and perhaps seeking protective orders. Furthermore, the attorneys for the plaintiffs would be faced with the added burden of actively advising the unnamed plaintiffs.[91] These considerations make it highly unlikely that the court would conclude that unnamed plaintiffs are "parties," especially in light of the "new importance" of class actions in California.[92]

The one remaining method by which the defendant may be able to obtain information about unnamed plaintiffs' individual claims is to direct interrogatories to the named plaintiffs with the hope that they will obtain the information from the other class members. The *Edison* court made reference to this method when it approved the holding in *Alpine Mutual Water Co. v. Superior Court*:[93]

> We agree with the following statements in [*Alpine*] . . . : "Absent some specific showing by the objecting party to justify a contrary rul-

90. *Id.* at 907.

91. Even if the unnamed plaintiffs are considered "parties" within the meaning of Code of Civil Procedure section 2030 and are therefore persons to whom interrogatories can be directed, the court would probably hold that the representative attorney is the attorney of record for all members of the class who do not indicate otherwise, in order to protect the class members' interests in the action. In such a situation, the defendant could not go directly to the unnamed plaintiffs without the permission of the representative attorney. Otherwise, unadvised class members might fail to answer at all or unsuspectingly answer to their detriment. This would clearly pose a threat of abuse and harassment to the class members. On the obligation to communicate through the adversary's counsel, *see* Turner v. State Bar, 36 Cal. 2d 155, 222 P.2d 857 (1950); CAL. BUS. & PROF. CODE ANN. foll. § 6076, Rule 12 (West 1962); ABA CODE OF PROFESSIONAL RESPONSIBILITY § DR 7-104 (1969).

92. See text accompanying notes 62-73 *supra.*

93. 259 Cal. App. 2d 45, 66 Cal. Rptr. 250 (1968).

> ing, such as privilege, a representative plaintiff can be compelled to supply his adversary with the information about his class *which is in his possession or readily available to him and which is not equally available to an adversary.* A representative plaintiff cannot be compelled to supply information concerning members of his class or their interests in the action *which is neither in his possession nor control, unless the interrogatory is directly related to his own standing to maintain the action, to the existence of an ascertainable class, or to the existence of that community of interest which is required to sustain a class action.* A representative cannot be compelled to respond to interrogatories about any class member's separate claim as distinguished from the common claim of the class which may be tried with or as a part of the class action."[94]

The language quoted from *Alpine* indicates that if the information is either in the possession of or readily available to the named plaintiffs, and is not equally available to the defendant, then the named plaintiffs can be forced to provide it upon request by the defendant, *even if the information concerns unnamed plaintiffs' individual claims.* Thus, information in the named plaintiffs' possession is clearly discoverable as it is in individual actions,[95] but if the information is not in the named plaintiffs' actual possession, they will be able to obtain it only by going to the unnamed plaintiffs themselves. Then the "control" argument developed in *Edison* becomes applicable: practically speaking, the information is "readily available" to the named plaintiffs only if the class is "closely knit". Thus, the "readily available" standard enunciated in *Alpine* can be said to limit the use of interrogatories for obtaining information about unnamed plaintiffs' individual claims to the same situation where depositions on mere notice to the named plaintiffs were proper and not unduly burdensome in *Edison.*[96] On the other hand, if the information is not in the control or possession of the named plaintiffs, the *Alpine* opinion indicates the defendant will still be able to force the named plaintiffs to obtain information, but *only* if the information sought relates to the plaintiffs' own standing to maintain the action, the existence of an ascertainable class, or the community of interest necessary to sustain the class action. The *Alpine* court *expressly excluded* interrogatories concerning individual claims from falling within this exception;[97] thus again the defendant who seeks specific

94. 7 Cal. 3d at 841 n.7, 500 P.2d at 626-27 n.7, 103 Cal. Rptr. at 714-15 n.7. (emphasis added and citations omitted by *Edison* court).

95. See text accompanying notes 11-16 *supra.*

96. See text accompanying notes 56-60 *supra.*

97. 259 Cal. App. 2d at 54-55, 66 Cal. Rptr. at 256.

information about the unnamed class members will be blocked from doing so.

The *Edison* court clearly reached the proper result. The ability of the parties to compel the attendance of unnamed plaintiffs was equal, and, therefore, the party seeking the information should have been left, as he was, with the burden of discovery; however, a defendant who wishes to obtain information about unnamed plaintiffs will find himself in a difficult position, despite the fact that the *Edison* court upheld his abstract "right of discovery" on mere notice. When the discovery statutes and the nature of class actions are considered together, the defendant is left with only one effective method of discovery from unnamed plaintiffs: he must subpoena and depose each class member from whom he desires non-class information.[98]

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98. The defendant in *Edison* in fact attempted to use a subpoena procedure to compel the attendance of unnamed plaintiffs at depositions. The subpoenas were to be accompanied by a letter explaining the underlying cause of action and by a "Declaration Waiving Claim." By signing this Declaration, the unnamed plaintiff to whom the subpoena was directed would both waive his claim and avoid the necessity of appearing at his deposition. The named plaintiffs again sought a protective order, which the trial court refused to grant. The court of appeal in Carlson v. Superior Court, 33 Cal. App. 3d 640, 109 Cal. Rptr. 240 (1973), reversed. The apparent rationale for reversal was that:

> the either/or nature of the notice used here, reinforced as it is by inclusion of the waiver form, which encourages unnamed plaintiffs to "opt out" of the class at the discovery stage rather than to submit to deposition proceedings (*id.* at 651, 109 Cal. Rptr. at 247),

was designed to "chip away at the size of the class," a motive which the court felt was disallowed by *Edison*. *Id.* at 649, 109 Cal. Rptr. at 245.

The *Carlson* decision is wrong. Justice Allport, in dissent, noted that the procedure Edison was attempting to use provided a convenient, quick, and inexpensive method by which unwilling class members could opt out of the action. He further noted that without allowing the unnamed plaintiffs to opt out in this manner, they have no choice but to attend the deposition, and that a refusal to do so will subject them to all the liabilities associated with the refusal to obey a subpoena, including the possibility of contempt and dismissal of the action with respect to the individual's claim. *Id.* at 651-53, 109 Cal. Rptr. at 247-48. Also see note 79, *supra*.

Furthermore, if the decisions are to be consistent, a logical extension of the *Carlson* decision would be that no one could be allowed to mention the class member's right to opt out in the subpoena or accompanying documents. After all, the reason the court gave for reversal was that the Declaration "encouraged" unnamed plaintiffs to opt out. Certainly, if their right to do so is mentioned in the subpoena, they will still be "encouraged" to opt out, although it might require a phone call or even writing a letter instead of just signing a form. If this is in fact a proper interpretation of *Carlson*, then the decision *requires* that unnamed plaintiffs *not* be informed of their rights. The ludicrous nature of this suggestion certainly strengthens the force of Justice Allport's dissent.

Another point indicating the erroneous nature of the decision is that the holding will, in all probability, have only a slight effect on the ultimate size of the class. At some time during the pre-trial period, the unnamed plaintiffs are going to learn that they have a right to opt out of the class, despite the *Carlson* court's attempt to keep this information from them. Most of those who would have exercised this right via the Declaration Waiving Claim will still do so, either because they feel they have no claim, or because they wish to avoid the litigation in which they will be involved, assuming the named plaintiffs are successful on the merits, when it comes times to prove their individual claims. See note 43 *supra* and accompanying text. Thus, the court's "chipping away at the size of the class" argument has no valid basis.