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Consumer Law -- Class Actions -- Waiver of Defense Clauses -- Vasquez v. Superior Court of San Joaquin County

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governing bodies to implement subtle schemes of economic discrimination; it also ignores the relationship between the location of a person's home and the availability of public and private services fundamental to the attainment of economic and social equality. For the foregoing reasons, the Supreme Court should reconsider the rationale of *Valtierra*. The federal low-income housing policy and future construction of low-income housing will be jeopardized if, by referendum, a community can exclude all federally assisted low-income housing projects. The implications of such a proposition are far-reaching for, without federal funds, the housing needs of the poor will never be met. It is therefore urged that decisions pertaining to low-income housing, like the open-housing legislation in *Hunter*, should be removed from the requirements of mandatory referenda approval.

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Consumer Law—Class Actions—Waiver of Defense Clauses—*Vasquez v. Superior Court of San Joaquin County*.[1]—The petitioners, purchasers of food freezers and frozen food plans, brought a class suit, on behalf of themselves and all other purchasers similarly situated, against the seller and several assignee finance companies,[2] seeking rescission of the sales contracts and damages. The petitioners charged common law fraud[3] and violations of the California Retail Installment Sales Act (Unruh Act).[4] They alleged that salesmen of the seller, using a memorized sales presentation, had fraudulently represented that (1) the seller's freezers were guaranteed for life; (2) the freezers were being sold at reasonable retail prices; and (3) the frozen food plans provided a seven-month food supply at one-seventh the normal retail price. The petitioners contended that a class action[5] for fraud was appropriate because identical misrepresentations concerning the price and quality of the goods sold had been made to all class members and because all class members had suffered similar damage.[6]

[1] 4 Cal. 2d 800, 484 P.2d 964, 94 Cal. Rptr. 796 (1971).

[2] The installment sales contracts of the defendant meat company had been routinely assigned to three finance companies named as defendants. Id. at 806, 484 P.2d at 966-67, 94 Cal. Rptr. at 798-99.

[3] See Ach v. Finkelstein, 264 Cal. App. 2d 667, 674, 70 Cal. Rptr. 472, 477 (1968), for discussion of the California requirements for a fraud action.

[4] Cal. Civ. Code §§ 1801 et seq. (West Supp. 1971). This statute regulates consumer financing practices and prescribes specific civil penalties for violations. The violation alleged in the principal case was that the seller had required the execution of two sales documents, a practice prohibited by § 1803.2 of the Unruh Act, which requires that every retail installment contract be contained in a single document.

[5] Cal. Code Civ. Pro. § 382 (West 1954). This section authorizes a representative action in California.

[6] In addition, the petitioners contended that a class action was the only suit they could feasibly bring because of the small size of each individual claim. 4 Cal. 3d at 816, 484 P.2d at 974, 94 Cal. Rptr. at 806.

The defendant seller maintained that the factual uniformity requisite to a class action was lacking because a wide variety of freezers and food plans had been sold to the plaintiffs. In the alternative, the seller asserted that the Consumer Legal Remedies Act (CLRA),[7] a recently enacted consumer remedies statute, precluded the traditional class action sought by the petitioners. The defendant assignee finance companies contended that a waiver of defense clause in the assigned contracts rendered the contracts negotiable; that the assignees were thus holders in due course under Section 3-302 of the Uniform Commercial Code (UCC); and that they were therefore insulated from the plaintiffs' claims. Alternatively, the assignees contended that Section 1804.2 of the Unruh Act barred an affirmative suit by consumers against the assignees of contracts containing waiver of defense clauses.[8]

The trial court overruled the seller's demurrer to the class action based on the Unruh Act violation. However, the court sustained the demurrer to the fraud action, insofar as the *unnamed* plaintiffs were concerned, on the grounds that a consumer class action for fraud was impermissible under existing California law.[9] On petition for a writ of mandamus[10] to compel the trial court to vacate its order sustaining the demurrer to the fraud action, the Supreme Court of California HELD: the class action based on common law fraud should be rein-

[7] Cal. Civ. Code §§ 1750 et seq. (West Supp. 1971). This statute proscribes specific misrepresentations by merchants and allows consumers to bring individual and class actions, but only after the consumer has afforded the alleged wrongdoer an opportunity to make reparation. If restitution is made, no action for damages will lie. Injunctive relief, however, is not limited by the same requirement. Cal. Civ. Code § 1782 (West Supp. 1971). This provision appears to reflect a legislative intent that California consumers should seek injunctions rather than large damage recoveries. This approach is of doubtful validity because an injunction, at best, merely cancels the consumer's remaining obligation; it does not make the consumer whole. See Starrs, The Consumer Class Action, 49 B.U.L. Rev. 407, 420 (1969), and Homburger, State Class Actions and the Federal Rule, 71 Colum. L. Rev. 609 (1971), for discussion of the relative merits of injunctive, as opposed to damage, relief.

[8] Cal. Civ. Code § 1804.2 (West Supp. 1971). Section 1804.2 provides in relevant part:

> An assignee of the seller's rights is subject to all claims and defenses of the buyer against the seller . . . notwithstanding an agreement to the contrary [a waiver of defense clause,] but the assignee's liability may not exceed the amount of the debt owing to the assignee at the time that the defense is asserted against the assignee. *The rights of the buyer under this section can only be asserted as a matter of defense to a claim by the assignee* (emphasis added).

[9] Vasquez v. Karp, No. 97734 (Cal. Super., filed September 23, 1969). The issue of the alleged Unruh Act violation was not before the California Supreme Court. The trial court's sustaining of the demurrer on the fraud cause of action as to unnamed plaintiffs had the effect of making it a multiple plaintiff action for the named plaintiffs rather than a class action. The trial court, although sympathetic to the plaintiffs' claims, indicated that an appellate court was in a better position to permit a precedential class action for fraud. 4 Cal. 3d at 806, 484 P.2d at 967, 94 Cal. Rptr. at 799.

[10] California law does not permit an interlocutory appeal to be taken from a trial court's judgment when only one of two causes of action has been dismissed. Cal. Code Civ. Pro. § 963 (West 1955) (now Cal. Code Civ. Pro. § 904.1) (West Supp. 1971).

stated because there existed a reasonable possibility that plaintiffs could prove the existence of a "community of interest" among all the class members, named and unnamed, on the issue of fraud.[11]

The *Vasquez* court found that the memorized representations used by the seller's door-to-door salesmen, and their use of a standardized formula to compute the amount of food sold to each plaintiff, had rendered the transactions similar enough to create an ascertainable class having a well-defined community of interest in questions of law and fact.[12] The court also noted that a class action was proper in *Vasquez* because in the event the class action was successful, the unnamed plaintiffs would not have to litigate numerous and substantial questions in order to collect their share of the class judgment. The court determined that the CLRA was inapplicable because the class action had been brought before that statute took effect.[13]

Furthermore, the *Vasquez* court affirmed the trial court's ruling that the finance companies were proper party defendants,[14] stating that even if the contracts were negotiable, the plaintiffs' allegation that the finance companies had had notice of the seller's fraudulent practices, if proven, would deprive the assignees of their holder in due course status under UCC Section 3-302(1)(c).[15] As to the assignees' claim of insulation under Unruh Act Section 1804.2, the court concluded that this provision would not be applicable if the assignees had had notice of the buyers' claims against the seller, or had worked in concert with the seller. According to the court, if section 1804.2 were held applicable, consumers attempting to sue assignees would be placed in a less advantageous position than merchant buyers; the latter enjoy the protection of UCC Section 9-206,[16] which validates a

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11 4 Cal. 3d at 813, 484 P.2d at 972, 94 Cal. Rptr. at 804.

12 Id. at 809, 484 P.2d at 969, 94 Cal. Rptr. at 801. An ascertainable class and a community of interest are the two principal class action requirements under California law. See Darr v. Yellow Cab Co., 67 Cal. 2d 695, 704, 433 P.2d 732, 739, 63 Cal. Rptr. 724, 731 (1967).

13 4 Cal. 3d at 818, 484 P.2d at 975, 94 Cal. Rptr. at 807. The court emphasized that the CLRA was intended to be an exclusive remedy only for practices enumerated in the statute. However, the court did not specifically indicate that the *Vasquez* allegations would not be subject to the Act's provisions. Determining whether the allegations of a consumer complaint sufficiently conform to the practices proscribed in the CLRA may present some difficulty. The situation will occur when consumer plaintiffs seek to avoid the cumbersome features of the CLRA—a statute which appears to present more problems than the traditional class action. *Vasquez* did not resolve this difficulty.

14 Id. at 822, 484 P.2d at 978, 94 Cal. Rptr. at 810.

15 Id.

16 Id. at 824, 484 P.2d at 980, 94 Cal. Rptr. at 812. Section 9-206 of the UCC validates waiver of defense clauses if the assignee takes for value, in good faith and without notice of the buyer's claims against the seller. As enacted in California, section 9-206 provides:

> Subject to any statute which establishes a different rule for . . . [consumers,] an agreement by a buyer . . . that he will not assert against an assignee any claim or defense which he may have against the seller . . . [a

waiver of defense clause only if the assignee takes without notice of the buyer's claims against the seller.

Although jurisdictions vary as to the prerequisites for a class action,[17] all jurisdictions require that a community of interest exist within the class; that is, that the plaintiffs' allegations have a certain degree of factual uniformity.[18] The *Vasquez* court was able to discern a community of interest sufficient to justify a class action, despite the existence of a multiplicity of separate transactions, by stressing the fact that the salesmen had used a memorized, standard sales monologue in making the misrepresentations. Furthermore, the court emphasized that the different food plans had all been calculated from the same "standard formula."[19]

While the memorized sales representations as to the quality and price of freezers might indicate sufficient uniformity among those representations to bind the class together,[20] the court's conclusion that the use of a "standard formula" for calculations had rendered the food plan representations sufficiently similar appears tenuous. This finding stressed the uniform elements but minimized the effect of the disparate elements of the food plan representations.[21] By tak-

waiver of defense clause] is enforceable by an assignee who takes his assignment for value, in good faith and without notice of a claim or defense . . . . Cal. Comm. Code § 9-206 (West Supp. 1971).

17 Courts normally will allow a class action in order to prevent a multiplicity of lawsuits when numerous parties seek to litigate common questions of law and fact. Class actions have opened the courts to plaintiffs having relatively small claims because the consolidation of claims allows the costs of the lawsuit to be distributed among a group of plaintiffs. Consumer grievances, in particular, lend themselves to class actions because current mass marketing techniques often cause substantially similar harm to a large group of consumers. 4 Cal. 3d at 808, 484 P.2d at 968-69, 94 Cal. Rptr. at 800-801.

18 When the facts underlying the claims of the class substantially differ as to individual plaintiffs, the burden placed on the parties, and the court, to litigate a number of distinct factual or legal issues may negative the utility of a class action. For this reason, courts require a community of interest among the plaintiffs.

19 4 Cal. 3d at 813, 484 P.2d at 972, 94 Cal. Rptr. at 804.

20 See Contract Buyers League v. F. & F. Investment, 48 F.R.D. 7 (N.D. Ill. 1969), where a group of black real estate purchasers were held to have the requisite community of interest for a class action despite the defendant's allegation that there were sixty-nine distinct issues of fact among the class members. The plaintiffs had alleged, inter alia, that the defendant had made fraudulent representations as part of a "blockbusting" scheme. The court noted that the same violations were alleged in each transaction and that an overall conspiracy of blockbusting seemed to be at work. In granting the action, the court stated that "there are undoubtedly individual questions with respect to particular contracts, and . . . though these individualized questions will relate primarily to damages, they may also, to a lesser degree, pertain to liability." 48 F.R.D. at 12. But see Slakey Brothers Sacramento, Inc. v. Parker, 65 Cal. App. 2d 205, 71 Cal. Rptr. 269 (1968) where the plaintiff-creditors brought a class action for deceit against a defendant-debtor who had allegedly conspired to conceal his financial instability in order to delay the creditors' foreclosure efforts. The court held that a class action would not lie because the misrepresentations had been communicated in a variety of ways, and because the subjective element of the action, the debtor's state of mind, was a particularly individual factor.

21 Varying proportions of meat, vegetables and juices were included in several different food plans. Each plaintiff apparently advised the salesman of his own food costs.

ing such an approach, the court appears to have resolved any existing doubt in favor of the class plaintiffs in order to provide them a reasonable opportunity to prove their allegations. This approach results in an expansion of the community of interest concept.[22]

In finding the requisite community of interest, the court relied heavily on *Darr v. Yellow Cab Co.*[23] In that case, several thousand taxi cab riders had brought a class action in order to recover numerous illegally overcharged fares of an identical percentage. The California Supreme Court found a community of interest among the class by focusing on the *post-judgment* stage of the class action, and not on the similarity of the plaintiffs' claims. The *Darr* court assumed arguendo that the class action would be successful and then attempted to determine what new facts and issues each unnamed class member would need to litigate in order to execute his share of the judgment. It found that the unnamed plaintiffs could recover their portion of the judgment without additional litigation and that, therefore, there existed the community of interest requisite for a class action.[24]

The *Vasquez* court employed the approach taken in *Darr* but interpreted that case as providing a wide latitude in establishing a community of interest. The court stated:

> The mere fact that separate transactions are involved does not of itself preclude a finding of the requisite community of interest so long as every member of the alleged class would not be required to litigate *numerous* and *substantial* questions to determine his individual right to recover subsequent to the rendering of any class judgment. . . .[25]

Under this test, only the existence of several significant collateral issues would foreclose the class action to some or all of the unnamed class members,[26] whereas, under *Darr*, the need to litigate *any* addi-

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The salesmen then made individual calculations, using a standard formula. The uniformity in these representations, found by the court on the strength of this standard formula, appears to go beyond the uniformity found with respect to the representations made regarding the freezers. The latter representations did not involve individual computations, only a choice of models. 4 Cal. 3d at 812-13, 484 P.2d at 971-72, 94 Cal. Rptr. at 803-04.

[22] It must be remembered, however, that each class action must be taken on its own facts in order to determine whether there is sufficient uniformity to show a community of interest. Hence the court is vested with substantial discretion in deciding this issue.

[23] 67 Cal. 2d 695, 433 P.2d 732, 63 Cal. Rptr. 724 (1967).

[24] Id. at 704-05, 433 P.2d at 739, 63 Cal. Rptr. at 731.

[25] 4 Cal. 3d at 809, 484 P.2d at 969, 94 Cal. Rptr. at 801 (emphasis added).

[26] 4 Cal. 3d at 815, 484 P.2d at 973-74, 94 Cal. Rptr. at 805-06. Such a result appears to place the burden of persuasion on the defendant rather than the plaintiffs. A lack of factual uniformity within the class may lead to intraclass disagreement concerning offers of settlement or the actual conduct of the action. A factually deviant subclass might, for example, seek to advance broader allegations to encompass its claims while core class members, those with a high degree of uniformity in their fact pattern, might want to advance narrower claims to limit their evidentiary burden. For a discussion of this point see Starrs, supra note 7, at 501-03. See also Darr v. Yellow Cab

tional issues would apparently bar the action. *Vasquez*, then, signals an important expansion in the availability of the class action. Use of the "numerous and substantial" criterion to determine community of interest may well open the courts to many borderline cases having considerable factual deviation.

The real utility of pretrial speculation concerning the practicability of post-judgment execution is that this approach enables the court to look beyond the question of factual uniformity to determine whether the law would treat the plaintiffs uniformly in their execution of the class judgment.[27] By analyzing the execution potential before the trial, the court is better able to judge whether the class is held together tightly enough to litigate the common issues fairly and effectively, without need for relitigation. The flexibility of the *Vasquez* approach is a salutary departure from the reluctance of other courts to find a community of interest in situations even more clearly uniform than that in the principal case.[28]

In ruling that the finance companies were proper party defendants,[29] the *Vasquez* court considered a recurring problem in consumer law—the validity and effect of a waiver of defense clause, in which the buyer agrees not to raise against an assignee any claims or defenses he may have against the seller. The finance companies contended that, because waiver of defense clauses existed in the assigned contracts, the companies were free of the plaintiffs' claims and therefore were not proper party defendants. The court, however, determined that the plaintiffs' allegations that the assignees had had notice of the buyers' claims and had acted in concert with the seller, if proven, would invalidate the waiver of defense clauses, thereby making the assignees proper defendants.

In a nonconsumer commercial transaction, the standards of Section 9-206 of the UCC are applied to determine the validity of a waiver of defense clause. These standards require that the assignee take in

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Co., 67 Cal. 2d 695, 709, 433 P.2d 732, 742-43, 63 Cal. Rptr. 724, 734-35 (1967); Chance v. Superior Court of Los Angeles County, 58 Cal. 2d 275, 284, 373 P.2d 849, 853-54, 23 Cal. Rptr. 761, 765-66 (1962); Note, Developments In The Law—Multiparty Litigation In The Federal Courts, 71 Harv. L. Rev. 874, 939 (1958); Chafee, Some Problems of Equity 209, 223 (1st ed. 1950).

[27] This approach also more clearly separates matters of substance and procedure. The substance of the claims is not examined directly; rather, the court examines how easily an execution could be granted to each claimant, assuming the substantive correctness of the class' claims. But see Berman v. Narragansett Racing Ass'n, 414 F.2d 311, 317 (1st Cir. 1969), where the court rejected prejudgment speculation as to the execution potential of all the class members.

[28] See Hall v. Coburn Corp. of America, 26 N.Y.2d 396, 259 N.E.2d 720, 311 N.Y.S.2d 281 (1970), where the court refused to find a community of interest despite allegations that identical statutory violations appeared in all the defendant's contracts.

[29] Although the trial court held that the finance companies were proper defendants, and the issue was technically not on appeal, it had been "extensively briefed" and would "undoubtedly arise at the trial" so the California Supreme Court discussed it for purposes of clarification. 4 Cal. 3d at 821 n.18, 484 P.2d at 978 n.18, 94 Cal. Rptr. at 810 n.18.

good faith and without knowledge of a buyer's claim or defense against the seller. Section 9-206, however, provides that it will be "subject to" any consumer statute which establishes a "different rule" for waiver of defense clauses. The assignees in *Vasquez*, in an attempt to avoid the standards of section 9-206, asserted that Section 1804.2 of the Unruh Act, established such a "different rule." Section 1804.2 invalidates waiver of defense clauses but precludes the buyer from asserting his rights against the assignee in an affirmative suit. In effect then, section 1804.2 invalidates a waiver of defense clause only when an assignee sues the buyer. Consequently, if section 1804.2 alone were found applicable in *Vasquez*, the plaintiffs would not be able to assert that the waiver of defense clauses were invalid for the reason that the assignees lacked good faith and had had knowledge of the buyers' claims against the seller. However, this clearly would be possible under UCC Section 9-206, which specifically states that waiver of defense clauses are valid only if the assignee takes in good faith and without knowledge of the buyer's claims against the seller. Furthermore, the provision does not state that the purchaser's rights against the assignee can be asserted only in defense to the assignee's claim.

Faced with this conflict, the court concluded that the standards of section 9-206 would apply and that the assignees were therefore proper party defendants. The court determined that if it held section 1804.2 to be a "different rule" applicable to these assignees, it would "bestow upon them immunities . . . against consumers unavailable to . . . [assignees] in the ordinary commercial transaction."[30] This result would be detrimental to consumers and contrary to the policy expressed in the Unruh Act.[31] The court also noted that section 1804.2 had been modeled after a section[32] of the Uniform Consumer Credit Code (UCCC) intended to bar affirmative *product liability* suits against financial institution assignees, but not fraud actions for contract rescission and damages.[33]

The *Vasquez* court appears to have applied section 9-206 correctly. The UCC Official Comment to section 9-206 states that this provision is "expressly made subject to any statute . . . which may *restrict the waiver's effectiveness in the case of a* [*consumer*]."[34]

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[30] 4 Cal. 3d at 832-24, 484 P.2d at 979, 94 Cal. Rptr. at 811.

[31] The court also indicated that, because a judgment against the seller is often meaningless, consumers must have access to credit institution assignees that either participate or acquiesce in the seller's fraudulent practices. 4 Cal. 3d at 821-22, 484 P.2d at 978, 94 Cal. Rptr. at 810.

[32] Uniform Consumer Credit Code § 2-404, Alternative A [hereinafter cited as UCCC].

[33] This suggested interpretation was made in an amicus brief which asserted that the drafters of the UCCC had not discussed the possibility that this limitation might apply in an action to rescind a contract fraudulently induced. 4 Cal. 3d at 824, 484 P.2d at 979, 94 Cal. Rptr. at 811.

[34] UCC § 9-206, Comment 1 (emphasis added). An earlier version of § 9-206 invalidated the waiver of defense clause. See Murphy, Another "Assault on the Citadel": Limiting the Use of Negotiable Notes and Waiver-of-Defense Clauses in Consumer Sales,

Thus it would seem illogical to hold another statute as supplying a "different rule" for consumers, one which does not restrict, but rather appears to expand, the effectiveness of waiver of defense clauses in affirmative consumer suits. In enacting both section 1804.2 and section 9-206, the legislature did not make its intended policy on waiver of defense clauses clear.[35] The *Vasquez* court thus gave its own interpretation of the legislative intent behind the enactment of the Unruh Act.[36] The court ruled that an interpretation of a specific provision of this consumer protection statute antipathetic to consumer claims would be inconsistent with the overall legislative purpose of the Act.

The issues settled in *Vasquez* are far-reaching. In the controversial area of class actions, the California Supreme Court commendably has indicated a willingness to entertain a class suit for common law fraud despite the difficult and subjective evidentiary problems involved. The court's expansion of the community of interest concept will serve to make the class action a more effective means of obtaining consumer relief. In the equally controversial area of waiver of defense clauses, the court has resolved an ambiguous legislative position which appeared to immunize assignees of consumer sales contracts containing such clauses against affirmative suit by consumers. The court's holding requires finance companies to investigate their assignors and affirms "the insistence of the law that honesty and enterprise must remain compatible."[37]

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29 Ohio St. L.J. 667, 679 (1968). Pre-UCC law of assignment in California was, in part, governed by American Nat'l Bank of San Francisco v. A.G. Sommerville, Inc., 191 Cal. 364, 216 P. 376 (1923), where the court refused to validate a waiver of defense clause that would have precluded defenses of fraud and failure of consideration. See Project: California Chattel Security and Article Nine of the Uniform Commercial Code, 8 U.C.L.A. L. Rev. 806, 970-72 (1961) for an analysis of § 9-206 in relation to *Sommerville* and the Unruh Act.

[35] See Hogan, Integrating the UCCC and the UCC—Limitations of Creditors' Agreements and Practices, 33 Law & Contemp. Prob. 686 (1968), for a discussion of the interaction between UCC Section 9-206 and UCCC Section 2-404, Alternative A. See also Jordan and Warren, The Uniform Consumer Credit Code, 68 Colum. L. Rev. 387, 436-38 (1968).

[36] While the *Vasquez* court found Unruh Act Section 1804.2 inapplicable because it allowed the assignee to be insulated from affirmative suit despite his lack of good faith and knowledge of the buyer's claims against the seller, there does exist a statute in California which specifically insulates the assignee despite his lack of good faith. See the Automobile Sales Finance Act, Cal. Civ. Code § 2983.5 (West Supp. 1971), which provides that an assignee is insulated "whether or not he acquires the contract in good faith . . . ."

[37] 4 Cal. 3d at 825, 484 P.2d at 980, 94 Cal. Rptr. at 812.