CONSUMER CLASS ACTION - CAN BUSINESS EVER BE THE SAME

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In the class action the true majesty of the law is revealed, and awesome powers of the civil courts are exercised. The consumer class action developing under the direction of the California Supreme Court[1] shows within it the potential for shaping historic changes in the marketplace, and therefore changing our very society itself. The concept of the consumer class action evolves at a most appropriate time, for it serves as a dramatic illustration of the efficiency of our courts of law in affording broad remedial action that effects great multitudes of persons. The consumer class action is an outstanding example of judicial efficiency, and it arrives at a moment when unwarranted criticism is being leveled at our system of justice. The very recent evolution of the "Consumer Class Action" supplies us with an answer to those forces that think we function under an antiquated system.

It is the Consumer Class Action that is really something new. The class action device itself has long been an established tool of our law. As far back as 1853 the United States Supreme Court used the class action concept as a device to order an accounting be held upon the dissolution of a church whose membership was split over the issue of slavery. The church operated a publishing plant, and a few members of the group were allowed to represent some 1500 "traveling and worn out preachers" against 3800 other such preachers, and the Court at this early date observed that, " . . . The rule is well established, that where the parties interested are numerous and the suit is for an object common to them all, some of the body may maintain a bill on behalf of themselves and of the others; and a bill may also be maintained against a portion of a numerous body of defendants representing a common interest."[2] The case goes on to repeat many of the rules of class actions that we today like to think are an invention of our own era.

Even earlier than this in its very first term the California Supreme Court let it be known that the class action was a very well established procedural device for use in the then newly formed state. The very first recorded Supreme Court decision in California[3] was one where habeas corpus was granted to release a murder suspect pending his trial. The writ was given because there was no jail in which to house him, and the California courts were just established, and it might take quite a while for the judges to ride their circuit and reach the case for trial. Yet, even under primative conditions such as these, a few pages later in the first Volume of the California Reports we find California's first class action[4] and the California high court is dissolving a corporation and holding that an action might be brought by one person for all:

> "...where the persons interested are numerous, and it would be impracticable to join them without almost interminable delays and other inconveniences which would obstruct and probably deter the purpose of justice,...Where the question is one of common or general interest, suit would be, even if practicable, exceedingly inconvenient...."

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[1] In Vasquez vs. Superior Court of San Joaquin County (Karp) Cal. 3rd. (May 1971).

[2] Smith vs. Swormstedt (1853) 57 U.S. 288

[3] People vs. Smith 1 Cal. 9 (1850).

[4] Von Schmidt vs. Huntington, 1 Cal 55 at 66-68 (1850).

California's C.C.P. 382 was enacted in 1972 in similar words.

Clearly there is nothing new about the class action. It is only the new "Consumer Class Action" that excites the imagination. It is the application of this old invention of equity to the problems of today's consumer that brings us something novel. Revealed here is how the law in its grandeur will erect upon established principles a new framework to enable litigants to attain solutions to contemporary problems which could never have been conceived of in an earlier era. In the Consumer Class Action we see an ancient doctrine coming to the aid of vast numbers of consumers who might be damaged by some unjust trade practice.

We see the consumer class action as an answer to those who complain of delays in bringing a single case to trial and who make other such complaints of our allegedly antiquated court practices. Such criticism falls when confronted with the facts, the existence of courts capable of resolving in a single case problems common to hundreds, thousands and even millions of persons. That the consumer class action is capable of such far reaching results has already been demonstrated.

Class Actions by consumers to obtain injunctive or declaratory relief have for many years been recognized, and such relief can be obtained in most states.[1] But, the Consumer Class action for money damages is a recent innovation of our own California Supreme Court. Our court, for the first time, permitted a single representative to maintain an action in behalf of a vast number of unknown customers, most of whom admittedly could never be found and had minute claims[2] against a taxicab company which recorded some forty million taxicab riders' fares on allegedly inaccurate taximeters. The maintainance of the class action, dispite the difficulties obviously inherent in such a situation, was warranted in the judgement of the Supreme Court in order to uphold broader principles of preventing alleged unjust enrichment of the defendant. When weighing these problems the Supreme Court held:

> "Moreover, absent a class suit, recovery by any of the individual taxicab users is unlikely. The complaint alleges that there is a relatively small loss to each individual class member. In such a case separate actions would be economically unfeasible. Joinder of plaintiffs would be virtually impossible in this case. It is more likely that absent a class suit, defendant will retain the benefits from its alleged wrongs. A procedure that would permit the alleged injured parties to recover the amounts of their overpayments is to be preferred over the foregoing alternative."

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[1] See Kovarsky v. Brooklyn Gas Co. (N.Y. 1938) 18 N.E.2d 287, allowed in junction and declaratory relief.

Elston v. King County (Wash. 1934) 34 P. 2d 906, allowed relief as to a narrowly described class of persons.

Smith v. Kaspar Bank (Ill. 1956) 136 N.E. 2d 796.

Robnet v. Miller (Ohio 1957) 152 N.E. 2d 763 - class action to recind for fraud on behalf of buyers of food freezers - facts surprisingly similar to the Vasquez case.

[2] Daar vs. Yellow Cab (Calif. 1967) 67 Cal. 2d 695, 433 P.2d 732.

Actions such as the foregoing have been characterized to be "Consumer Class Actions" and these descriptive words "Consumer Class Action" are now adopted into the language of the California law in the Vasquez case. Now clearly in California[1] class actions can be maintained to remedy the damage that may be caused even by verbal misrepresentation made to a large group of consumers.

Yes, it is the Consumer Class Action that is new and exciting to the law. Class Action is made of old stuff. Yet, as the administration of justice moves forward by judicial decree in California and in various other states[2], consumers elsewhere find themselves without a remedy. In New York, with a statute almost identical to that of California, a totally different result has so far been obtained. While class actions for injunctions and declaratory judgments are no doubt permitted in both states,[3] New York has so far avoided the class action for money damages. With such rejection many feel adequate consumer remedies are not available in such states, and these decisions have been criticized.

An evaluation of the cases that have reached the New York Appellate Courts indicates to this observer that New York has not yet been confronted with a modern day consumer class action squarely presenting the judiciary with a case involving a substantial unjust enrichment. Such a compelling case would press the court to give a gravely wrong its remedy. The California rule developed in such a crucible of necessity when the Supreme Court was presented with compelling circumstances, and the law would have become a mockery if it stood idly by in the face of such grave allegation. It does not seem unlikely that the New York Courts will react much as did the California Court when the opportunity is presented.

In the Vasquez case, the California Supreme Court looks to Rule 23 of the Federal Courts for guidelines for the procedures to follow in such actions. These federal rules were developed by the judges of the courts themselves after many years of experience with the class actions that had come before them. The court also suggests an illustration that a trial judge may use the procedures set out in the Consumers Legal Remedies Act (Calif. 1970) Civil Code Section 1781 et seq., which provides for methods of giving notice, and other pretrial procedures. It would be preferable, for future guidelines for class actions to be drawn by the judiciary and the bar, who will have the only real experience in processing these cases. Rule 23 has thus evolved and appears to be successful. The legis-

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[1] In Vasquez vs. Superior Court of San Joaquin County (Karp) Cal. 3rd. (May 1971).

[2] In Illinois a class action was held properly maintained by one Montgomery Ward customer on behalf of some six million charge account customers, where it was alleged that defendant without prior authorization charged each account for credit insurance coverage.

Holstein v. Montgomery Ward (Cir. Ct. Cook County, Ill. 1969) 3CCH Consumer Credit Guide Sec. 99, 966.

[3] Kovarsky v. Brooklyn Gas Co. (NY 1938) 18 NE 2d 287 permitted a consumer class action for injunction against an overcharge by a utility company, but refused to permit an accounting for a refund of the overcharge due to an inadequacy in the pleading.

Hall v. Coburn (N.Y. 1970) 259 NE 2d 720 refused Consumer class action relief to recover a penalty under the Retail Installment Sales Act because the type set on a printed contract was the wrong size, and the action was brought against a single finance company, although the class members had dealt with many different sellers who had assigned the form contract to the one finance company.

lature cannot have any real insight into this area of specialized legal procedure,and further efforts in that arena to legislate procedures for class actions may well leave the field with wholly unexpected problems which were not intended by their creators, nor welcomed by litigants of either side.

For example the concept of giving notice to absent class members of the pendency of a class action surely belongs in the field of class actions. Many assume that it is required in all such actions. Yet, it is found that in actual practice in the Consumer Class Action field that notice may not be desired by either plaintiff or defendant.

If the defendant is faced with a claim which, because of its nature, is likely to find him burdened with multiple future actions, perhaps it might be in his best interest to use that form of notice which will help assure him that the judgment will be res judicata as to all absent members. However, we have found many defendants often fear that there is a somewhat derogatory implication in any notice being given that he may have done something wrong, and the possibility of business loss that might result, could conceivably be more than is at stake in the action from the defendants viewpoint. Notice might stir up other suits on related claims and create the attendant expenses of defense of more such litigation. The very last thing counsel for a corporate defendant would want for his client is wide-spread notice being given of a class action filed against the company. Upon reviewing the matter from the class action plaintiff's standpoint, we often find that he is not interested one way or the other of giving a class notice unless he feels he is in need of additional assistance from members of the class to support the expenses or other facets of the ligitation.

By way of example in Daar v. Yellow Cab (L.S. Superior Court No. 849598) after the case was remanded by the California Supreme Court for trial plaintiff moved the court for an order approving the form of a proposed class notice to be published, or asking in the alternative for an order dispensing with notice. The court, after reviewing the circumstances of the case, entered an order dispensing with any requirement for publication of notice to the class. The case then awaited assignment of its trial date. The case was eventually settled on the eve of the trial. The parties agreed that the defendant would pay the full amount of the alleged overcharge during the period of limitations involved, and the payment was effected by a reduction of taxicab fares to be spread over a period of years until the sum of 1.4 million dollars (less attorney fees) was paid to the taxicab riding public in the City of Los Angeles. Thus, from the standpoint of the parties to class actions notice is best left to their own judgment. If either side desires notice application can be made to the court.

In any event, notice is not necessarily required to be given in class actions in California, and it is discretionary.[1]

Under Federal Rule No. 23, notice is mandatory in certain types of class actions, -- others do not require notice be given and instead leave the giving of notice to the court's discretion. There are statements by dictum in federal cases to the affect that the giving of notice may be required to satisfy requirements of due process,[2] but analysis of the background information confirms

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[1]Consumer Legal Remedies Act, civic code section 1781 (c) (3).

[2]Eisen v. Carlisle and Jacquelin (2nd Cir. 1968) 391 F.2d 555, 564.

the fact that for Federal Courts notice is not a necessary ingredient of every class action.[1]

Now again, in Vasquez vs. Superior Court, the Supreme Court reaffirms the fundamental justification for the existance of the consumer class action is to prevent unscrupulous sellers from retaining the benefits of wrongful conduct. Prevention of unjust enrichment is the goal the court observes:

> "A class action by consumer produces several salutary by-products, including a therapeudic effect upon those sellers who indulge in fraudulent practices, aid to legitimate business enterprises by curtailing illegimate competition...."

Since prevention of unjust enrichment is the real goal of the consumer class action, there is no reason for most of industry to be concerned, since such goals are equally beneficial to industry and consumers.

In light of the fundamental therapeudic goal of the consumer class action hyper-technical requirements of form should be viewed liberally in favor of

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[1] Advisory Committee notes to Rule 23, 39 F.R.D. 102-107 points out that Rule 23d (2) allows discretionary notice, while under Rule 23 b (3) notice must be ordered, and is not merely discretionary "....to give the members in a subdivision (b) (3) class action an opportunity to secure exclusion from the class...". This then is seen to be the real reason for notice, to wit, to allow class members to opt out of the case so it can not later be argued that they were bound by the decision that might follow.

It is recognized in the advisory committee note, supra, that in some class actions, as for example those charging civil rights violations by discrimination (a type two case) the members of the class are "incapable of specific enumeration" and notice would be ineffectual.

The portion of the Vasquez decision _____Cal. 3d _____, commenting on procedure states that upon "....notice to the class members the court might find that an insufficient number of the class desires to participate in the suit to justify its maintenance as a class action and may determine that joinder or some other procedural device would be a more suitable method of proceeding ...." This would be a possibility in a class action involving a relatively small consumer group; but in any action involving a large class of members all the court could ever hope to accomplish by giving notice is to allow members to opt out. In the final analysis it has been wisely held that protection of the absent class members rights is best effected by insuring that the representative of the class adequately represents the class. And this means mainly that he will put up a good fight. One adequate representative is sufficient to maintain a class action on behalf of great numbers of class members, and if his representation was adequate the class is protected and thereby should be bound by the judgment.

The failure of any individual class member to come forward is as consistant with satisfaction with the representation as it is with disapproval of the action itself. It has been observed that to argue either that the individuals representation is inadequate because he stands alone, or that there obviously is no class because no others have chosen to join him is to ignore the normal apathy or ignorance of individuals in the face of what is to each a relatively small injury. (See 116 University of Pennsylvania Law Review 889 (1968))

permitting the maintenance of the action, and allowing the consumer class action to proceed. Indeed this is the case in the federal court. If the day ever came when a consumer class action prevailed and the court found itself giving a judgment in favor of a class so broad that not even a member can be expected to be found, then the broad goal of the consumer class action might still have been satisfied. The therapy would have been administered. Unjust enrichment would have been prevented. In California, the State has demonstrated that in such a situation it would be willing to accept the fruit of such therapy, under the unclaimed property law and escheat the funds.[1] Thus, if there existed a consumer wrong effecting a vast number of persons where the individual amounts wrongfully taken by the defendant were so small that the court could understand the failure of other class members to come forward, the action should still proceed if the real rationale of such cases is to prevent unjust enrichment.

The corporate defendant has a great advantage in any consumer class action in that the plaintiff faces an unusually difficult burden because of the mammouth nature of the litigation the plaintiff advocates, there immediate professional reaction against the claimants side that is difficult for him to overcome. This reaction is the judge in the case of Chance vs. Superior Court[2] That class action involved in the foreclosure of some 2,000 trust deeds in a single action as a result of the failure of a ten percenter second trust deed investment firm. The trial judge observed in his memorandum opinion:

> "As a result, perhaps, of a pre-conditioned professional reflex, I was originally of the tentative view that no group action of any kind would constitutionally be permitted to bind a dissident interested party who appears in the case. I am now persuaded that no such ironclad prohibition exists, and that we are freer to follow whichever procedure appears to offer the most practical approach to our problems..... We can assume that what any victim of this fantastic 'ten-pen-center' operation really wants most is to get as much of his money back as possible, and that, by his non-appearance, he manifests his indifference as to the particular methods we may follow to achieve that end.

The interesting inference that comes from the judge's statement is the fact that the first reaction of the judicial mind is to rebel at the concept of a class action that might effect 2,000 persons. This same "preconditioned professional reflex" is a difficult burden to be overcome by the consumer class action claimant in an action involving hundreds of thousands of persons.

The fact that the consumer class action remedy often attempts to solve problems effecting great numbers of persons perhaps causes the greatest problem at the trial court level. This unusual variation of the procedures normally encountered by trial courts is most ambitious, and tends to trigger this adverse "preconditioned professional reflex". Trial courts are legitimately concerned about their already congested calendars, and surely such complex new and novel actions as these do not serve to allieviate such anxiety. But, the courts should not recoil from these class actions for it is from them that perhaps the greatest prestige of our courts will emerge.

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[1] In Daar vs. Yellow Cab Co., Supra, the State intervened prior to trial and urged this was the proper disposition of any funds unclaimed by class members. This issue was never resolved since the case was settled and the benefits disbursed to taxicab riders through a reduction in rates for cab fares.

[2] Chance v. Superior Court, supra 58 Cal. 2d 275, 284 (1962).

Perhaps the most intricate series of class actions yet presented to a trial court are those sixteen cases recently transferred from all around the country to the Federal Court in Los Angeles. The multi-district litigation panel of the Federal Courts assigned the pre-trial phase of the civil smog conspiracy class actions against the major automobile manufacturers to a solitary U.S. District Court Judge. Clearly here are actions with vast implications. The classes are composed of exceptionally broad groups as for example an action involving all farmers in the United States. The defendants contended that the actions were so complex that they were totally unmanageable as class actions.

Judge Manual Real of the U.S. District Court rejected these arguments and observed:

> "Manageability of the classes alleged herein may certainly tax the imagination and ingenuity of the litigant counsel and the court. But until management is recognized as impossible or near impossible, the Court will depend upon the ingenuity and aid of counsel to solve the complex problems this litigation may bring. If successful, the economics of times, effort and expense will more than compensate the effort."
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> (In re Motor Vehicle Air Pollution Control Equipment)

CCH Trade Cases Para 73317, (C.D. Cal. 1970)

This type of imaginative approach has far reaching impact upon the law in its evolution of our new concept of justice, evidenced by broad class actions. These actions, perhaps for the first time, allow courts of law to transcend the ties of calendar congestion and overly restrictive procedures developed in other eras and permit the resolution of vast problems with a single brush stroke, and effect the rights of great numbers of persons.

It appears that one of the major complaints against the class action springs from the fact that defendants are concerned with the mammoth problems of discovery that may arise. The defendant complains of the burden it will be put to by the inquiries that will be made into its activities concerning large numbers of its customers. Some look for protection in the federal procedure which provides for a separate hearing[1] to determine whether the case may properly be maintained as a class action. But this preliminary hearing has at times developed into a complex trial in its own right, and in some cases has of necessity proved to be nearly as costly as one would have expected the trial itself to have been.[2]

There may well be cases that warrant a decision being made before trial as to whether they should be maintained as a class action; however, they are the rare cases. It would seem that too much is made of the class action implications of most cases. The parties lose sight of the reality that here before them is presented a case that the single plaintiff representative must win for himself. The class action allegations do not complicate every case. Many cases will go on to trial basically on the individual claims of the class representative, with very little more needed to substantiate a judgment for the class. If the individual representative can substantiate and prevail on his own claim, then and

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[1] Such a procedure has been proposed for California in a recent bill before the State Assembly. Hayes, AB 2454 (1971).

[2] In Dolgow v. Anderson 43 FRD 472 (NY 1968), United States, Judge Weinstein decided that an evidentiary hearing should be held to determine the propriety of the action proceeding as a class action. A formal hearing was held ending in approximately ten volumes of record, ten sets of interrogatories, depositions, and a great number of exhibits.

only then would the class action issues really be fully presented. The results of a preliminary hearing on the question of whether the class action should be allowed to be maintained does not resolve the problem. This is evidenced by a case in the Federal Court, where although it was not planned that way, the futility of the preliminary hearing procedure is revealed. The District Court in Hirschi vs. B & E Securities[1] refused to allow a case to be tried as a class action. The plaintiffs proceeded to trial as to their individual case and prevailed. The Circuit Court of Appeals disagreed with the trial judge and remanded the case to the trial court to proceed as to the rights of the class.[2] One would think that the results of such a trial was at the onset no more burdensome than any other single case before the court. It was only after the individual plaintiffs prevailed that the more complex class action aspects of the case were required to get underway. With the issues of liability already established, one would find the parties in a better position to appraise such a case for the class action issues that remained to be tried.

The effectiveness of the consumer class action is apparent, and superior to any conceivable system involving the use of regulatory boards, or public agencies. Such entities often find themselves hampered by inadequate staff, or are hampered by that lack of motivation that comes from not having an incentive stake in the outcome of a complicated litigation.

In Daar vs. Yellow Cab, supra, the allegations of the purported improper setting of taxi meters first were made before the City of Los Angeles Board of Public Utilities and Transportation. This was the board which governed the operations of the cab company. Extensive hearings were held, and testimony was taken. After the hearings were concluded no decision was made nor was any action on these allegations taken. The Board's legal counsel correctly advised the Board that under the then existing state of the law an action in behalf of all cab riders could not be maintained.

This law was only changed through a private consumer class action which ultimately led to the resolution of the problem through a settlement for the benefit of the taxi riders in Los Angeles. I submit that consumer rights are best protected in the arena of the civil courts where traditionally the rights of parties aggrieved are daily protected. Likewise in Vasquez vs. Superior Court, supra the California Attorney General pointed out the problems governmental agencies have in handling consumer problems, these the limited size of his staff hampered his office so that he felt that protection of consumer rights is best left to private enforcement.

Very substantial benefits ot the public flow from the consumer class action, and in the year 1970 alone such actions produced for the consumer actual dollar returns that should not go unnoticed. Some sixty-six antitrust class actions were consolidated from throughout the country and transferred to the Federal Court in New York. This action for alledged price fixing of antibiotic drugs, W.VA. vs. Chas. Phizer and Co.[3] is reported to have resulted in a settlement of some $82 million for consumers. In Illinois the case of Holstein vs. Montgomery Ward Co. resulted in a settlement of millions of dollars for charge customers who were billed for credit insurance without their consent. Daar vs. Yellow Cab produced more than a million dollars for the Los Angeles Cab riders. In a San Francisco case a class action taxpayers suit for writ of mandate compelled the Board of Supervisors to review properties assessed too low due to alleged wrongdoing of a convicted tax assessor. This action resulted in many millions for San Francisco taxpayers.

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[1] 41 FRD 64 (Utah 1966).

[2] Same case under title of Esplin vs. Hirschi, 402, Fzd 94(10th CIR 1968)

[3] C.C.H. Trade Cases para. 73, 240 (1970)

In light of the accomplishments for the consumer by the consumer class actions, and their kin, it is difficult for opponents of such class action to make a case for their arguments to limit the scope of these actions. It is a simple fact of life that these actions are good for the consumer. Some opponents cry out that such actions take too long to accomplish their result, "cases can go on for years," they say "the consumer gets too little from these actions, and lawyer get too much." But, these arguments beg the question, for it is common knowledge that the consumer had no adequate protection before these remedies were allowed, and courts are scrupulously protecting the rights of absent class members.

The goal of these legal principle involved in these actions is to promote corporate health and prevent unjust enrichment. These public policy reasons underlying consumer class actions are very closely allied to the reasons behind the existence of the antitrust and corporate securities laws. Proposals are being heard at national levels to substitute more complete regulatory schemes to aid the consumer and make these schemes a substitute for the class action. They propose to give the consumer a federal small claims court to go to with his individual grienvances, in place of the class action. Proposals such as these miss the mark when compared with the actual results we have seen obtained for the consumer with his class action. The consumer may need his small claims court, but not at the expense of his class action remedy.

When faced with the reality of what we have seen has been accomplished for the consumer through use of the class action device, all criticism of it must fall on deaf ears. There can be no question that the consumer has gained something of immense value.

From the defense standpoint the consumer class action is new, and in its beginning stages seems ominous, but, it is to be feared only for its potential to reach a just result. The burden upon the claimant in such litigation is so great that only a just cause of action could prevail. Certainly there will be some actions filed by overzealous advocates which will have no merit at all. The courts will promptly dispose of such cases.

Can business ever be the same? Perhaps not, but in the end perhaps better.