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The Supreme Court of California
1970-1971

Foreword: Adequacy of Representation in Class Actions

Ronan E. Degnan*

The annual product of the Supreme Court of California includes both public and private law. Some decisions consolidate movements of the past; others create prospects for future development. The decision in Vasquez v. Superior Court1 carried forward a development of several preceding years and created a base for elaboration in future terms. No single case can be a trend, but an examination of Vasquez's California antecedents and its most notable product, La Sala v. American Savings & Loan Association,2 shows definable movement. In the federal court system this local evolution is matched and confirmed by a nationwide outpouring of decisions with the same general tendencies. In the field of class actions there has been an explosion, with the resulting fallout hard to predict and difficult to control.

I

CALIFORNIA CLASS ACTIONS

The California chronology commences with Weaver v. Pasadena Tournament of Roses,3 decided in 1948. Emphasizing the long-traditional requirements that there be an "ascertainable class" having a "common or general interest," the court denied class representative status to four disappointed applicants for admission to the 1947 Rose Bowl game.4 The court viewed plaintiffs' common interest as restricted to reliance upon the same Civil Code provision5 authorizing damages.

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1. 4 Cal. 3d 800, 484 P.2d 964, 94 Cal. Rptr. 796 (1971).
2. 5 Cal. 3d 864, 489 P.2d 1113, 98 Cal. Rptr. 849 (1971).
3. 32 Cal. 2d 833, 198 P.2d 514 (1948).
4. Id. at 842-43, 198 P.2d at 520. California class actions are brought under section 382 of the Code of Civil Procedure. CAL. CODE CIV. PRO. § 382 (West 1954).
for wrongful exclusion from a place of public entertainment. To recover, each plaintiff would have to produce, independently, the necessary factual bases for recovery. Permitting the named plaintiffs to attempt to establish that a multitude of other disappointed ticket seekers had properly presented themselves at the Rose Bowl, entered a line in reliance on advertising, procured numbered identification stubs, waited out the line, tendered the purchase price of tickets, was a "sober, moral person," and was damaged in excess of the statutory minimum of $100 was a prospect too horrible to contemplate. The court emphasized the novelty of the class action device in these circumstances—such cases usually involved litigation over property claims held in common, such as beneficiaries under a common trust—giving this as the explanation why neither plaintiffs' brief nor independent research by the court had found

a single case in which it has been held that a representative or class suit was a proper or appropriate vehicle for the determination of alleged tort liability of defendants to numerous unnamed and unascertained persons.6

The next stage of development is ambiguous. Chance v. Superior Court7 involved mass foreclosure of deeds of trust numbering in the thousands. Looked at from the perspective of the Weaver standards, use of the class device here could be harmonized with previous decisions. Although class membership was large and identities then unknown, both number and identity were ascertainable, and the separateness of the causes of action was more apparent than real. All the documents were identical in form, were issued in a single transaction, and secured loans on contiguous parcels in substantially the same stage of development in one large tract.8 Thus, it resembled the common-property-interest cases Weaver relied upon to defeat the plaintiffs' effort to represent absent claimants.

In light of subsequent developments, however, Chance can be seen as a subtle departure from the past, a shift from purely property notions of commonality of interest to an appraisal of the probability of issue overlap at trial. Emphasis on the possibility of separateness leads to the Weaver catalog of how claims asserted under the same legal theory may vary; Chance emphasized their similarity.

Amended Federal Rule of Civil Procedure 239 became effective on July 1, 1966. It worked significant procedural changes in the con-

6. 32 Cal. 2d at 840, 198 P.2d at 518.
8. Id. at 285-86, 373 P.2d at 855, 23 Cal. Rptr. at 767.
9. FED. R. CIV. P. 23:
   (a) One or more members of a class may sue or be sued as representa-
   tive parties on behalf of all only if (1) the class is so numerous that joinder
duct of class actions brought under it and eventually became a functioning part of California law. The rule's approach reflected a shift from abstract legal description of the relationships necessary to maintain a class action to pragmatic commonality-of-interest standards.

of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

(b) An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition: . . .

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

(c) . . . .

(2) In any class action maintained under subdivision (b)(3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice shall advise each member that (A) the court will exclude him from the class if he so requests by a specified date; (B) the judgment, whether favorable or not, will include all members who do not request exclusion; and (C) any member who does not request exclusion may, if he desires, enter an appearance through his counsel.

(4) When appropriate (A) an action may be brought or maintained as a class action with respect to particular issues, or (B) a class may be divided into subclasses and each subclass treated as a class, and the provisions of this rule shall then be construed and applied accordingly.

(d) In the conduct of actions to which this rule applies, the court may make appropriate orders: . . . (2) requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of any step in the action, or of the proposed extent of the judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise to come into the action.

For the present purpose the important sections are those that govern the type of class action conducted under (b)(3). This has been the area of greatest use of the federal rule and the type of all the important cases discussed here.

There is almost complete parallel between rule 23 and the provisions of Cal. Cev. Code § 1781 (West Supp. 1971), a consumer protection provision that became effective January 1, 1971. Its application is discussed in Vasquez. 4 Cal. 3d at 817-19, 484 P.2d at 975-76, 94 Cal. Rptr. at 807-08.


At the same time the landmark case of Daar v. Yellow Cab Co.\(^1\) was being considered on appeal. On behalf of those who hired defendant's cabs in the city of Los Angeles, a single plaintiff sought rebate of fare overcharges accruing during the statutory period of limitations preceding the filing of suit. The opinion pointed out something that the court itself had not previously observed: a class can be "ascertainable" without all its members being identifiable either then or later.\(^2\) Identification is needed for claiming damages, but that occurs at the end of the case, not at the beginning. In addition, the court read Chance as dispensing with the common fund requirement, observing that community of interest can be found without it. Nor need the class members seek common relief.\(^3\) Without overruling Weaver, the court looked to rule 23, finding it "noteworthy" that the amended form eliminated the requirement of common relief. It was also "of interest" that the additional standards of the rule "are in substantial coincidence with our views, herein expressed, as to the applicable criteria under section 382."\(^4\)

The 1971 installment is Vasquez v. Superior Court.\(^5\) The case has independent importance despite its heavy reliance on Daar. It made more explicit the directive to look to Federal Rule 23 when procedural guidance is needed. And it approved the maintainance of a class suit that could never have survived a demurrer under Weaver.

An adroitly pleaded complaint alleged that 37 named plaintiffs and others similarly situated, described as residents of two specified counties, were induced by substantially identical false representations to purchase home food freezers and supplies of food. The complaint sought rescission and damages.\(^6\) Apparently the transactions were independent and the class members strangers to each other, but the court held that these facts were not dispositive unless each class member had to litigate numerous individual questions regarding his own right to recover.\(^7\)

The court's decision to uphold the class action rested as much on a judgment of its desirability as on the new legal tests:

Substantial benefits both to the litigants and to the court should be found before the imposition of a judgment binding on absent parties can be justified, and the determination of the question whether a class action is appropriate will depend upon whether the

13. Id. at 706, 433 P.2d at 740, 63 Cal. Rptr. at 732.
14. Id. at 707, 433 P.2d at 741, 63 Cal. Rptr. at 733.
15. Id. at 709, 433 P.2d at 742, 63 Cal. Rptr. at 734.
16. 4 Cal. 3d 800, 484 P.2d 964, 94 Cal. Rptr. 796 (1971).
17. Id. at 805, 815, 484 P.2d at 966, 973, 94 Cal. Rptr. at 798, 805.
18. Id. at 809, 484 P.2d at 969, 94 Cal. Rptr. at 801.
common questions are sufficiently pervasive to permit adjudication in a class action rather than in a multiplicity of suits. The court found substantial benefits: the individual claims were too small to be worth separate litigation; if they were litigated, they would clog already busy courts with repetitious retrial of identical claims, burdensome to the parties as well as to the system. Fraudulent sellers would not retain the benefits of their wrongful conduct, and honest businesses would be relieved of competition from defrauders. Considerations of this type, first offered in Daar and elaborated in Vasquez, are an entirely different kind of rule for class action eligibility. In addition to legal characterization of claims, they employ pragmatic tests balancing benefits and disadvantages to determine whether class proceedings are appropriate.

The transformation of class action tests in Vasquez highlights an additional element. When the class device was restricted to litigation concerning common interests in common funds, there was little need for concern over adequate representation. The permitted cases were narrow enough to ensure that the representative plaintiffs protected the rights of the absent class members to the same extent that they protected themselves. However, this development made possible class suits involving a large number of litigants with relatively tiny claims represented by only a few of them. Daar was able to allege only that he had "expended cash in excess of $100.00" on cab fare script books in the 4 years immediately preceding commencement of his action. Eliminating punitive damages and the like in the Vasquez complaint, the maximum claim asserted by a named plaintiff was $1,700, and most were less than $1,300. How much incentive is there for a class representative to press claims of that size in the face of predictably determined opposition? Defendant stands to lose many multiples of those sums and will defend vigorously.

This problem emerged clearly in La Sala v. American Savings & Loan Association. The trial court dismissed an otherwise proper

19. Id. at 810, 484 P.2d at 969, 94 Cal. Rptr. at 801.
20. Id. at 808, 484 P.2d at 968-69, 94 Cal. Rptr. at 800-01.
21. 67 Cal. 2d at 715, 433 P.2d at 746, 63 Cal. Rptr. at 738.
22. Id. at 703 n.8, 433 P.2d at 738 n.8, 63 Cal. Rptr. at 730 n.8 (quoting the complaint).
23. 4 Cal. 3d at 815 n.11, 484 P.2d at 973 n.11, 94 Cal. Rptr. at 805 n.11.
24. 5 Cal. 3d 864, 489 P.2d 1113, 97 Cal. Rptr. 849 (1971).
class action after defense counsel offered orally in open court to grant to the named plaintiffs the personal relief they requested in the class complaint. The judge ultimately dismissed on the ground that no representative plaintiff remained. The supreme court reversed, holding that the fiduciary obligations assumed by commencement of an action on behalf of a class do not terminate when the fiduciary plaintiff obtains the relief requested. He has a continuing obligation to those he sought to represent and thus may be able to continue the case despite his not being entitled to further relief. Whether he should so continue, however, is a matter for factual determination. Hence, the case was remanded for a finding on that point. If the finding is that the particular plaintiffs are not suitable representatives to continue, an opportunity to redefine the class or to substitute new plaintiffs must be allowed. Only if no suitable representative can be found should the action be dismissed, and then only after notice is sent to the class members.

These issues of La Sala turn upon questions of representation. With the automatic protections formerly generated by the confines of class action structure no longer available, the assurance of adequate class representation is the class suit's most urgent problem.

II

Representative Litigation Generally

Class actions are only one form of representative litigation. The simplest and most common form occurs whenever a person with a grievance retains an attorney to file suit on his behalf. Within very wide boundaries, the attorney conducts the litigation without more than informing the client of the steps taken. Only slightly more complex are those suits in which a representative appointed not by the beneficial interest but by some outsider conducts the litigation entirely on his own, without even informing the beneficially interested person or persons. Thus, trustees are appointed by settlors and replaced by judges; guardians are appointed by courts; testators and probate judges regularly appoint and replace executors and administrators. Insolvency receivers and bankruptcy trustees sue, and are sued, in their own name, making all important decisions without informing or consulting those on whose behalf they act despite their marginal financial stake in the outcome.

Although class actions are typically large, this alone does not distinguish them from other representative litigation. An example from the trust realm is Mullane v. Central Hanover Bank & Trust Co. 27

25. Id. at 870, 489 P.2d at 1116, 97 Cal. Rptr. at 852.
26. Id. at 871, 489 P.2d at 1116, 97 Cal. Rptr. at 852.
27. 339 U.S. 306 (1950). Mullane is the source of the obligation to give notice
Mullane was appointed guardian and attorney for the income beneficiaries of a New York common trust fund. His duty was to protect their interests in the course of a proceeding for settlement of accounts, to approve or disapprove the conduct of the trustee managing the pooled funds. He represented a large but unknown number of people—some New Yorkers, some not; some known and others known to exist but not identified; and, finally, some persons not yet in existence. The issue was what form of notice, if any, had to be provided to those beneficiaries to assure due process of law. But there was no challenge to Mullane's power to represent this very large and diverse group; the notice was to enable the beneficiaries to observe Mullane's performance on their behalf and to protest if they found it inadequate or conflicting.

This proceeding was not a class action in any ordinary employment of the term, yet it had most of the features discussed in the California decisions summarized above. Like Vasquez, Mullane involved a large, differentiated, and hard-to-ascertain class. Yet cases of the kind just described have consistently been permitted in the courts. The need to proceed and the measures and protections required to provide basic fairness have allowed courts to make binding adjudications of such claims. Exercising questionable history but sensible analogy, the supreme court in Weaver traced the California class action provision to the doctrine of virtual representation which "rests upon considerations of necessity and paramount convenience, and was adopted to prevent a failure of justice."

III

REPRESENTATION IN CLASS ACTIONS

The feature that distinguishes these familiar instances of uncontrolled but nevertheless binding representative litigation from class actions is the nature of the appointment. Plaintiff class action representatives are self-appointed protectors of the interests of others. They purport to sue on behalf of themselves and "all others similarly situated." The postulates of the adversary system that protected California class actions previously—that self-interest and greed provide reliable assurances of full adversary advocacy—are questionably present at various stages of the class action. This point will be developed briefly, and somewhat critically, in the concluding portion of this foreword. See notes 48-57 infra and accompanying text.

28. Id. at 317-18.
29. Id. at 307.
30. 32 Cal. 2d at 837, 198 P.2d at 516, quoting Bernhard v. Wall, 184 Cal. 612, 629, 194 P. 1040, 1048 (1921).
when plaintiffs appoint themselves guardians of others' interests.\textsuperscript{31}

The dangers that attend self-appointment are apparent; most class action legislation is an attempt to ensure adequate class representation. The key to California's approach is Federal Rule 23, which sets out the prerequisites to maintenance of a class action.\textsuperscript{32} The first, numerosity making joinder impracticable, is not a protection against poor or faithless representation but a statement of the conditions under which we are willing to run the risk of it. Unless it is necessary, we avoid the circumstance that creates the danger.\textsuperscript{33} The remaining prerequisites, elaborated upon in rule 23(b)(3) and supplemented by the provision in rule 23(c)(2) for notification of class members in rule 23(b)(3) cases, are directed to protection of absent members.

\textbf{A. Common Questions of Law and Fact}

The requirement of common questions of law and fact\textsuperscript{34} helps ensure that there will be true economy in the conduct of class or group litigation. If there is insubstantial commonality, putting dozens or even hundreds of different lawsuits in the same courtroom at the same time does not advance the interests of economy and multiplies the risk of confusion. Recent cases, both state and federal, by emphasizing the common questions over individual proof of damages, press this element to an extreme.\textsuperscript{35}

The more important reason for requiring commonality, however, is that only through it can we have assurance that representation by a few class members will inure to the benefit of all. When differing interests are present, the risk that the absent will suffer because their peculiar circumstances are not appreciated in the context of the litigation is

\textsuperscript{31} Even more suspicious is the circumstance in which the plaintiffs (class or not) select the representatives of a defendant class "similarly situated." The selfish motive then is to pick the weakest rather than the strongest possible representatives. For that reason, defendant class actions are few and far between. See Management T.V. Sys., Inc. v. National Football League, 52 F.R.D. 162 (E.D. Pa. 1971); C. Wright, \textsc{Federal Courts} 308 (2d ed. 1970).

\textsuperscript{32} See note 9 \textit{supra}, for the text of Federal Rule 23.

\textsuperscript{33} Vasquez v. Superior Court, 4 Cal. 3d 800, 810, 484 P.2d 964, 969, 94 Cal. Rptr. 796, 801 (1971). See the statement in the text accompanying note 19 \textit{supra}. It was made in the context of common questions of fact and law but applies even more strongly to the numerosity requirement.

\textsuperscript{34} \textsc{Fed. R. Civ. P. 23(b)(3)}. See note 9 \textit{supra}.

\textsuperscript{35} Commentators are beginning to observe that the search for common questions to justify the class action leads to subtle changes in substantive law. See \textit{Comment}, \textit{The Impact of Class Actions on Rule 10b-5}, 38 U. Chi. L. Rev. 337, 345-46 (1971), suggesting that the element of reliance on representations has been shifted from plaintiff proof to defendant proof in security fraud cases. See also the discussion of reliance in \textit{Vasquez} [4 Cal. 3d at 814, 484 P.2d at 872-73, 94 Cal. Rptr. at 804-05], and the adhesion contract argument in \textit{La Sala} [5 Cal. 3d at 876-77, 489 P.2d at 1120-21, 97 Cal. Rptr. at 856-57].
great. It becomes greater in direct proportion to the variety of claims encompassed in the so-called class. The federal rule directs itself to this phenomenon through express provision for subclasses, organized along lines of interest common to the subclass. But a class action will not be continued if the separate issues presented outweigh the common questions. In this circumstance adequacy of representation is impossible.

B. Typicality of Claims

An additional class action requirement is that the named plaintiffs possess, and press, claims typical of those held by the class. This breaks down into two distinct elements. First is the difficult question of whether the named plaintiffs need have any claim at all. The caption of the class complaint—plaintiff sues on behalf of himself and all others similarly situated—presupposes that plaintiff has a claim of some kind. But the reason for that assumption is less clear, although its desirability can be summarized shortly. Without a claim, the class litigant has no apparent motive to invest his time, money, and psychic energy prosecuting the action to a successful conclusion—one satisfactory to other class members and sufficiently protective of their interests to assure that their claims receive substantial justice.

Prior to La Sala California practice took a foolishly formalistic approach to the problem of unrepresentative class plaintiffs in the few instances in which it arose. For example, California Gas Retailers v. Regal Petroleum Corp. proceeded to final judgment before anybody realized that the named plaintiff was not a member of the class. As a membership corporation it was not entitled to affirmative relief for the alleged and proved wrongful conduct, although it was composed of members who were so entitled. Theoretically, the action should have been dismissed. Instead, a plaintiff entitled to relief was added by amendment, and the improper action was rectified nunc pro tunc. Equally illogical in the other direction is Greater Westchester Homeowners Association v. City of Los Angeles, a class action to recover for property damage from noise and fumes emitted by aircraft landing at Los Angeles International Airport. The association was only one of more than 600 named plaintiffs suing in their individual capacity and on behalf of unnamed persons similarly situated. The association was dismissed because it held no claim as a landowner damaged in its

36. FED. R. CIV. P. 23(c)(4). See note 9 supra.
38. 50 Cal. 2d 844, 330 P.2d 778 (1958).
39. Id. at 851, 330 P.2d at 782.
own right. The ruling is pointless, although relatively harmless in the circumstances. Even if the association is not entitled to a damage award, it does not follow that it lacked incentive to press vigorously the claims of its members and others with similar claims. And it might well have had the resources, the initiative, and the legal representation to do a better job than any individual homeowner.

This problem of representative plaintiffs was addressed directly in *La Sala v. American Savings & Loan Association.* 41 Involved was a clause included in defendant's deeds of trust that accelerated the balance on the secured loan, at American's option, if the borrower executed a junior security instrument. When counsel for the defendant orally waived the right to accelerate as to the named plaintiffs, the trial judge promptly dismissed as to them. Without them, there were no representatives of the class, and the class action could not proceed. The same result could be reached in many class actions, especially in modern cases that are justified on the ground that the amounts involved are so small that individual pursuit of the claims is uneconomic and otherwise impracticable.

At one point the *La Sala* opinion repeats without criticism the established California proposition that "a plaintiff seeking to maintain a class action must be a member of the class he claims to represent." 42 But in another place, and much more directly, it challenges that proposition and invites the trial judge to consider, on remand, the possibility that a paid-off plaintiff is nevertheless a relentless antagonist. The trial judge is also invited to consider alternatives if he finds that the named plaintiffs are no longer good representatives. Dismissal is the last choice; amendment to redefine the class must be permitted, if that would cure the defect, and substitution of new plaintiffs who still have active claims is preferable to outright dismissal. 43

If the opinion has a fault, it is not in posing alternatives for the trial judge to investigate, but the failure to make explicit the factors bearing upon the choices the judge must make. The cases cited by the court are misleading. The authorities used involve racial discrimination and do allow the named plaintiff to proceed although he has individually obtained everything sought on behalf of the class. These are powerful examples, but they are not what the opinion claims they are—indications of a "duty to continue the action for the benefit of others similarly situated." 44 Instead, they are manifestations of zeal and dedication to a cause that transcends the individual interest of the

41. 5 Cal. 3d 864, 489 P.2d 1113, 97 Cal. Rptr. 849 (1971).
42. Id. at 875, 489 P.2d at 1119, 97 Cal. Rptr. at 855.
43. Id. at 872, 489 P.2d at 1117, 97 Cal. Rptr. at 853.
44. Id. at 871, 489 P.2d at 1116, 97 Cal. Rptr. at 852.
More significant is the fact that of the three cases cited to support the "duty" discharge obligation, two show powerful affirmative motives to continue the cause despite satisfaction of the named plaintiffs' immediate claims. In the first, defendant school district mooted the case by admitting the black children named as plaintiffs to a school of their choice. The case was continued not merely for those similarly situated but for the attorneys as well; the court specifically held that the claim for attorneys' fees could still be pursued against the school district. In the second, a black doctor admitted to a hospital staff was permitted to continue his suit for others similarly situated who had not obtained the same privileges. The opinion fails to explain why he remained an adequate class representative, and there is no suggestion that attorneys' fees or costs of suit were allowable. But the report also shows that the counsel of record were NAACP attorneys.

In the small money claim cases that are common in class action litigation today the named plaintiffs' motives and sincerity do not determine whether the case will be pressed on to a resolution favorable to the absent class members after the named plaintiffs' claims are satisfied. The basic truth is that it is the attorney for the class litigant who is highly motivated. The tradition of the class action is to reward not the named plaintiffs but their attorney or attorneys with generous percentages of any damage award they obtain on behalf of the class. The classic incentive of the adversary system is operative on the attorney, although not clearly on the litigant. What is required is an appraisal of what the attorneys will do after the claims of their immediate clients have been favorably resolved. Will those attorneys have the dedication and the resources of time and money to press on? Although those things are necessary if the case is to continue, they do not determine that it will. There are no sure guides. A big fee in the offing is always very attractive, and it meets the traditional adversary demand for an economic carrot. And increasingly there are lawyers who do not depend on fees for their livelihood and who are motivated more by the cause they perceive in a case than by possible monetary reward for success. Pots of gold are not the only things that lie buried at the end of rainbows.

The La Sala opinion renders a positive disservice with its suggestion that lack of representative plaintiffs can be cured by substitution for those mooted and dismissed. That is the easiest solution, but to the wrong problem. If the key to adequate representation lies in the

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determination of the attorneys rather than the willingness of small
claimants to persevere, we must look at the attorneys rather than the
plaintiffs. However, no harm is done if the La Sala substitution device
is limited to use when individual claims are significant in amount.

The opinion notes that the defendant might frustrate a subsequent
action brought after dismissal by again giving all requested relief to
the named plaintiffs. But that can equally be done in the old action
that is merely refurbished by the substitution of new named plaintiffs.
Another problem is the exaggerated but still real objection that class ac-
tions are merely legalized ambulance chasing. Scouting out live plain-
tiffs that are but pro forma in any event can only serve to enhance this
misleading view of class actions, despite the claims of its practitioners
that the process justifies itself by helping people and only incidentally
makes lawyers rich.

That the plaintiff have some claim is not enough; it must also be
typical of the claims held by the class. Holding a claim, the plaintiff
is motivated. But is his concern solely for himself or for the un-
named class members? Again, the adversary system is confident that
it works well only when the litigant who does his best for himself
also inescapably benefits his fellow class members. Absolute identity
is not required, and even substantial disparity in the relief sought
is almost irrelevant. Basic principle tells us that if the claims asserted
do not have the same basic structure, the representation given to a few
of them will not be adequate for those that differ significantly.

C. The Notice Requirement

One other specific proposition relating to adequacy of repre-
sentation deserves mention. Rule 23 (c) (2) provides that in any
action maintained under subdivision (b)(3)—and all of the California
and most of the federal cases since the rule became effective are of
that type—"the court shall direct to the members of the class the
best notice practicable under the circumstances, including individual no-
tice to all members who can be identified through reasonable effort."48
Ordinary conceptions of fairness suggest that any person to be bound
by a judgment should be informed of that prospect before it happens.
And the rule specifies that at least the notice must inform the member
that he can be excluded from the class at his request; that he will
be bound, favorably or unfavorably, if he does not so request; and
that he may enter an appearance if he desires.49 These ideas are

47. 5 Cal. 3d at 873, 489 P.2d at 1118, 97 Cal. Rptr. at 854.
49. Id.
so congenial to the common law mind that they are thought to be constitutionally compelled and not merely minimal requirements of fairness.¹⁰

Experience in the federal courts has shown, however, that individual notice to all who can be identified is not synonymous with "the best notice practicable under the circumstances." When individual claims are very small but the class is large enough for a potentially high award, the cost of individual notification may cancel any benefit to individual class members. One federal judge indicated that although there were additional elements present, this fact alone was sufficient to rule a class action inappropriate.¹¹ The court of appeals, too, was "reluctant to permit actions to proceed where they are not likely to benefit anyone but the lawyers who bring them."¹² But it ultimately ruled that the need to punish and deter wrongdoers could warrant an action that would not financially benefit the victims because expenses of collection and administration exceed the recovery. The court then suggested that some substitute for individual mailed notices might suffice, aided by the defendants' proof that identification of individual class members was impracticable.¹³ On remand, the trial judge combined a blend of mailed notice to a small (2,000-plus) group of large-scale traders with a variety of other forms designed to inform many, although not all, of the 2,000,000-plus persons potentially comprising the class.¹⁴ The details of the plan are too extensive to be worth repeating here in full, but the opinion is a model of thoughtful adaption of the due process notice standard to litigation involving a multitude of small claims in a single case.

The notice provisions of rule 23 have influenced a vaste improvement over the pre-1966 federal procedure. Largely because of their presence, res judicata effect can apply against members of a losing class. Although this is not yet authoritatively decided,¹⁵ it is contemplated by the rule and should be its effect in operation.

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¹⁰. This seems to have been the position of the draftsmen themselves. See Advisory Comm. Note, Proposed Rules of Civil Procedure, 39 F.R.D. 69, 106-07 (1966). The implied assumption of the note was quickly attacked as both not constitutionally required and destructive of the best single use of class actions, litigation in one case of a multitude of tiny claims. See, e.g., Dolgow v. Anderson, 43 F.R.D. 472, 497-98 (E.D.N.Y. 1968), rev'd on other grounds, 438 F.2d 825 (2d Cir. 1971); Homburger, supra note 11, at 643-46.


¹³. Id. at 569.


¹⁵. The scope of res judicata as to unnamed class members prior to the amendment of the federal rule was uncertain, with the varying views well portrayed in the opinions of the divided court in Union Carbide & Carbon Corp. v. Nisley,
The supreme court has performed a valuable service for the trial courts and the bar of California by the explicit approving references to the federal rule procedures when courts are presented with open questions. The first California case to encounter a notice problem was *La Sala*, and the court indicated that an otherwise proper class action should not be dismissed for want of named plaintiffs without notice to class members prior to dismissal. Since no particular notice was specified, no harm has yet been done. But if California is to learn from the federal model of class litigation, it should learn from its mistakes as well as successes.

Important as notice may be, coupled as it is with traditional notions of fair play in the constitutional sense, it is still only one of the facets of fair and adequate representation. As courts focus more on

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300 F.2d 561 (10th Cir. 1961), *petition for cert. dismissed sub nom.* Wade v. Union Carbide & Carbon Corp., 371 U.S. 801 (1963). Two judges allowed unnamed members to take advantage of a judgment favoring the class, while the dissenter thought only named members could claim that benefit. It was then clear that unnamed members could not be hurt by an adverse judgment. The stated assumption of the amended rule is that unnamed members will be barred as well as benefitted by the judgment, and the notice required by rule 23(e)(2)(B) must tell them so. Is it possible that notice adequate for due process purposes under *Mullane* (see note 27 supra) will be deemed ineffective because it does not reach and inform individuals that they will be bound by the judgment?

*Vasquez* indicates that the Supreme Court of California shares the federal assumption about the binding effect of a judgment adverse to the class: “Substantial benefits both to the litigants and to the court should be found before the imposition of a judgment binding on absent parties can be justified. . . .” 4 Cal. 3d at 810, 484 P.2d at 969, 94 Cal. Rptr. at 801.

56. 5 Cal. 3d at 874, 489 P.2d at 1118-19, 97 Cal. Rptr. at 854-55. Notice of dismissal stands on a different footing than notices at other stages of class proceedings. In federal courts, the requirement derives from a section that is separate from the general notice section discussed previously and that is far more peremptory in tone. Fed. R. Civ. P. 23(e):

A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs.

Very few federal cases have advanced to this stage under the new rule. E.g., *Dolgow v. Anderson*, 53 F.R.D. 664 (E.D.N.Y. 1971). Earlier stages in this proceeding are chronicled in note 50 supra. In this latest phase, Judge Weinstein carefully phrased his dismissal order:

Since the dismissal of the class action aspect of the case is on the merits, no notice to prospective members of the class is required. Subdivision (e) of Rule 23 does provide that notice must be given of a “proposed dismissal or compromise.” This requirement does not apply to noncollusive involuntary dismissals.

*Id.* at 690.

*La Sala* differs in that the case was a proper class action, lacking only a proper representative plaintiff or plaintiffs. It raises the question of who should bear the initial cost and responsibility of notice if, ultimately, no proper representatives are found. It should not be imposed on *La Sala* and his coplaintiff, who were involuntarily turned out of court. The question probably will never be reached in the *La Sala* case, but it will arise in time.
other guarantees of adequacy, they can show less concern for literal compliance with the command to give "individual notice to all members who can be identified through reasonable effort."

The thesis advanced has been that the sequence of Daar, Vasquez, and La Sala makes sense only when considered as a cohesive unit. Their combined effect resolves most of the artificial restrictions that characterized class proceedings in the past. That progress reveals in sharp contrast the important and enduring problem of assuring adequate representation, a goal to which we would aspire even if fundamental conceptions of due process did not command us to.

57. The reporter for the federal advisory committee made this point very cogently. Kaplan, A Prefatory Note, 10 B.C. IND. & COM. L. REV. 497, 499 (1969). A class member who learns, through notice, that his small claim is being ill tended is less well off than one who is well represented but uninformed.

Good representation may be small consolation for class members who choose exclusion. For example, the notice in Katz v. Carte Blanche Corp., 53 F.R.D. 539, 547 (W.D. Pa. 1971), informed prospective class members that "you may be liable to share, proportionately, the costs of the action if it is unsuccessful. . . ."