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A Group of Consumers Who Have Bought Merchandise under Installment Contracts May Maintain a Class Action Seeking Recission of the Contracts for Fraudulent Misrepresentations on Behalf of Themselves and Others Similarly Situated.

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School desegregation cases are necessarily complicated, each case presenting a wide variation of facts and problems to be solved. The Supreme Court by granting the lower courts "broad remedial powers" hoped to overcome the problem of varying local conditions. In *Texas III* the court used its "broad equitable powers" to require the Texas Education Agency to prepare a "statewide" plan subject to the court's approval for the elimination of the dual school system.

"It is hoped that the full implementation of the Order in this case and its consistent enforcement through the years will result in an end to Federal intrusion into what should rightfully be a State function . . . ."[39] Only time will reveal whether this will prove to be true, or whether it is simply another step to further federal intervention.

David B. Lobingier

CLASS ACTIONS—FRAUD—RESCISSION OF INSTALLMENT CONTRACTS —A GROUP OF CONSUMERS WHO HAVE BOUGHT MERCHANDISE UNDER INSTALLMENT CONTRACTS MAY MAINTAIN A CLASS ACTION SEEKING RESCISSION OF THE CONTRACTS FOR FRAUDULENT MISREPRESENTATIONS ON BEHALF OF THEMSELVES AND OTHERS SIMILARLY SITUATED. *Vasquez v. Superior Court of San Joaquin County,* 484 P.2d 964 (Cal. 1971).

Approximately two hundred persons purchased freezers and frozen food from Bay Area Company under installment contracts which later were assigned to defendant finance companies. Thirty-seven of these consumers, on behalf of themselves as well as the others, alleged that they were induced to enter into the contracts by fraudulent misrepresentations, and that the same misrepresentations were made to each plaintiff by Bay Area's salesmen who memorized a standard statement and recited it by rote to each of them. A class action was attempted for rescission of the contracts based on fraud.[1] The trial court sustained defendants' demurrers insofar as the complaint alleged a class action for fraud. Plaintiffs sought a writ of mandate to compel the trial court to vacate its order sustaining the demurrers and order the court to allow them to proceed to try the cause of action for fraud

39 United States v. Texas, 321 F. Supp. 1043, 1058 (E.D. Tex. 1970).

1 Vasquez v. Superior Court of San Joaquin County, 484 P.2d 964 (Cal. 1971). Plaintiffs also sought return of the amounts they had paid on the contracts, less the value of the food they had consumed, plus damages for injury to their credit rating, storage fees for the unused freezers, and punitive damages. The court did not discuss these allegations, however, and considered only the prayer for rescission of the contracts in its decision.

as a class. Held—*Writ granted.*[2] A group of consumers who have bought merchandise under installment contracts may maintain a class action seeking rescission of the contracts for fraudulent misrepresentations on behalf of themselves and others similarly situated.

The basis for class actions (also called class suits and representative suits) can be found in equity's willingness to "interfere and take cognizance of a matter in order to prevent a multiplicity of suits . . . ."[3] To avoid a multiplicity of suits, equity required the joinder of all those whose rights would be adjudicated.[4] However, cases arose in which the number of parties would make joinder impracticable.[5] In these cases the policy of avoiding multiple suits was all the more applicable since the greater number of parties would necessitate even more suits. So, an exception (which later became known as a class suit), was developed to the compulsory joinder rule.[6] The rule of compulsory joinder "was dispensed with where it was inconvenient, difficult or impracticable, on account of the number or situation of the parties, to unite them in one suit."[7] In such circumstances the class suit allowed one or more to sue or defend for the benefit of all.[8] These equitable proceedings have been incorporated into various codes of civil procedure.[9]

The extent to which, and the circumstances under which, a class action will be allowed is the subject of much controversy.[10] Some cases have limited class actions to those instances where joinder would have been proper, but was made impracticable by the number of potential parties.[11] In some codes the provisions for class actions have been

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2 *Id.* The court found that a writ of mandate was the appropriate remedy rather than an appeal since appeal may only be taken from a final judgment which disposes of all the causes of action, and here the trial court overruled defendants' demurrers to a second cause of action. The court also found, in the way of dictum, that under the allegations of the complaint the defendant finance companies would not be entitled to payment as holders in due course, and that the limitations on a buyer's rights set forth in § 1804.2 of the California Civil Code would not apply in this case.

3 1 J. POMEROY, EQUITY JURISPRUDENCE § 244 (5th ed. 1941).

4 6 STAN. L. REV. 120, 121 (1953).

5 Hansberry v. Lee, 311 U.S. 32, 41, 61 S. Ct. 115, 118, 85 L. Ed. 22, 27 (1940). *See* Eisen v. Carlisle, 391 F.2d 555 (2d Cir. 1968) (allowing class action on behalf of 3,750,000 people).

6 6 STAN. L. REV. 120, 121 (1953).

7 Newcomb v. Horton, 18 Wis. 594, 596 (1864).

8 *Id.*

9 *E.g.*, CAL. CODE CIV. PROC. ANN. § 382 (Deering 1959):

> Of the parties to the action, those who are united in interest must be joined as plaintiffs or defendants; but if the consent of any one who should have been joined as a plaintiff cannot be obtained, he may be made a defendant, the reason thereof being stated in the complaint; and when the question is one of a common or general interest, of many persons, or when the parties are numerous, and it is impracticable to bring them all before the court, one or more may sue or defend for the benefit of all.

See also Heffernan v. Bennet & Armour, 243 P.2d 846 (Cal. Ct. App. 1952). The provisions of the California code are typical.

10 1 J. POMEROY, EQUITY JURISPRUDENCE § 244 (5th ed. 1941).

11 Brenner v. Title Guarantee & Trust Co., 11 N.E.2d 890, 892 (N.Y. 1937).

included in the rule for compulsory joinder, which led to the holding that the members of the class must have been necessary parties within that rule before a class action could be maintained.[12] It has been held that this interpretation is too restrictive.[13] In order to maintain a class action there must be: (1) the existence of an ascertainable class, and (2) a community of interest in the question of law and fact.[14]

The requirement of establishing the existence of an ascertainable class does not necessitate identifying each individual class member before a class action can be brought.[15] Rather, it appears to require that the members of the class are capable of being made certain or proven. Moreover, this requirement is not completely separable from the second requirement since the existence of "an ascertainable class depends in turn upon the community of interest . . . in the questions of law and fact involved."[16] Thus, the crucial consideration came to be whether there was in fact such a community of interest.

In many cases the community of interest requirement was met when the claims resulted from the same unauthorized, unlawful or illegal act.[17] However, this unity has not always been controlling or essential, and class actions have been allowed where the claims arose from separate transactions occuring at different times.[18] Early cases required a common fund or property.[19] A community of interest in a fund or property was thought to mean a common right or title.[20] Later it was said that a common fund is not a requirement.[21] Instead, a community of interest in the questions of law and fact apparently means that each plaintiff's claim, and consequently the defendant's liability, would depend upon the resolution of the same questions.[22] If each person's right to recover is based on questions which are distinct, a class action cannot be maintained.[23]

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12 Carey v. Brown, 58 Cal. 180, 184 (1881).

13 Darr v. Yellow Cab Co., 433 P.2d 732, 741 (Cal. 1967); Weaver v. Pasadena Tournament of Roses, 198 P.2d 514, 518 (Cal. 1948).

14 Daar v. Yellow Cab Co., 433 P.2d 732, 741 (Cal. 1967); Slakey Brothers Sacramento, Inc. v. Parker, 71 Cal. Rptr. 269, 271 (Ct. App. 1968). *See also* 1 J. POMEROY, EQUITY JURISPRUDENCE § 269a (5th ed. 1941).

15 Daar v. Yellow Cab Co., 433 P.2d 732, 740 (Cal. 1967).

16 *Id.*

17 1 J. POMEROY, EQUITY JURISPRUDENCE § 269 (5th ed. 1941).

18 *Id.*

19 Watson v. Santa Carmelita Mutual Water Co., 137 P.2d 757, 762 (Cal. Ct. App. 1943).

20 Illinois Cent. R.R. v. Garrison, 32 So. 996, 997 (Miss. 1902).

21 Daar v. Yellow Cab Co., 433 P.2d 732 (Cal. 1967); Slakey Brothers Sacramento, Inc. v. Parker, 71 Cal. Rptr. 269, 271 (Ct. App. 1968). *But see* Hall v. Coburn Corp. of America, 259 N.E.2d 720, 722 (N.Y. 1971). "The real sanction accorded by this court to class suits has been in the closely associated relationships growing out of trust, partnership or joint venture, and ownership of corporate stock."

22 *See* Fanucchi v. Coberly-West Co., 311 P.2d 33 (Cal. Ct. App. 1957) (finding the requisite community of interest where, "The basic facts necessary to establish liability on the part of the defendants were all exactly the same with respect to each grower [plaintiff] . . . .").

23 Daar v. Yellow Cab Co., 433 P.2d 732, 741 (Cal. 1967); Slakey Brothers Sacramento,

This difficulty in arriving at a community of interest among all class members has led to a reluctance of courts to permit class actions based on fraud or misrepresentation. In order to recover for fraud one must show that the defendant knowingly made false representations intending that plaintiff be induced through reliance thereon to enter the contract, and that plaintiff reasonably relied on the misrepresentations.[24] The peculiarities of each plaintiff's circumstances did not meet the requirement of a community of interest in the questions of law and fact.[25]

However, in *Vasquez v. Superior Court of San Joaquin County*, the Supreme Court of California found that the plaintiffs had met the requirements of an ascertainable class and community of interest and held that a class action could be maintained based on fraud.[26] The court had little difficulty finding that there was an ascertainable class. In doing so, the court relied upon the reasoning that if the members of the class were within defendant's knowledge and could be identified from his books or records, an ascertainable class existed. In *Vasquez* this requirement was met since the names of each class member could be found in defendants' books.[27]

However, the real difficulty encountered in attempting a class action for fraud was in showing a community of interest in the questions of law and fact. The problem was thought to be that it could not be shown without individual proof that the same false representations were made to, and relied on by each member of the class.

> . . . the case of each person who has been deceived by a misrepresentation is peculiar to himself, and must depend upon its own circumstances.[28]

If this were true, there could not be a class action for fraud since there would not be a community of interest.[29] However, in *Vasquez* it was alleged that Bay Area's salesmen memorized a standard statement that was recited by rote to each plaintiff. The court held that if this were proven, an inference would arise that the same misrepresentations were

Inc. v. Parker, 71 Cal. Rptr. 269, 271 (Ct. App. 1968). "[W]hen each individual's right to recover depends upon facts peculiar to his own case, the individuals cannot be brought under the umbrella of a class action."

24 Ach v. Finkelstein, 70 Cal. Rptr. 472, 477 (Ct. App. 1968), *cf.* 12 S. WILLISTON, CONTRACTS § 1487 (3d ed. 1970); 1 H. BLACK, RESCISSION OF CONTRACTS AND CANCELLATION OF WRITTEN INSTRUMENTS § 24 (1916).

25 Hallows v. Fernie, L.R. 3 Ch. 467, 471 (1868).

26 484 P.2d 964 (Cal. 1971).

27 *Id.* at 970.

28 Hallows v. Fernie, L.R. 3 Ch. 467, 471 (1868). *But cf.* Hightower v. Crawford, 36 So. 82, 83 (Miss. 1904). Although not dealing specifically with class actions, it was held that where fifty-seven persons were allegedly induced by fraud to execute notes, all of the plaintiffs' claims grew out of the same transaction and depended upon the same principles of law.

29 Daar v. Yellow Cab Co., 433 P.2d 732, 741 (Cal. 1967).

made to all. The court then went on to hold that the falsity of the representations concerning the quality and value of the freezers made to the named plaintiffs would show falsity as to all.[30] Thus, the existence of the representations and their falsity would be amenable to proof on a common basis, and these issues would not be peculiar to each individual.

Similarly, the issue of reliance, one of the elements of fraud, was also thought to be a stumbling block to class actions, since each individual would have to testify to his reliance on the misrepresentations. The court was able to surmount this obstacle reasoning that reliance may be inferred from the circumstances of the transactions and where the misrepresentations were material, reliance may be inferred where action is taken.[31] Thus, it was held that if material misrepresentations were made to the class members, at least an inference of reliance would arise as to the entire class.[32] Therefore, this issue too could be determined on a common basis and it would be a common question within the community of interest rule.[33]

Finally, the court held that the fact that each member of the class may be required to prove his individual damages did not preclude a class action.[34] Therefore, since the questions which must be tried separately were not numerous or substantial in comparison with those which may be tried jointly, it would be advantageous to the parties and the court to allow a class action.

In reaching its decision the court cited the policy of protecting consumers from unfair practices. It found that a class action would be an appropriate means of attaining that end since numerous consumers frequently are ". . . exposed to the same dubious practice by the same seller so that proof of the prevalence of the practice as to one consumer would provide proof for all."[35] If the earlier cases had found, as this court did, that proof for one would provide proof for all, then, presumably, they would have had little difficulty allowing the maintenance of a class action. Seemingly, the biggest objection to class actions for fraud was that the elements of fraud would have to be proven on an individual basis.[36] This objection was overcome in the instant case.

30 Vasquez v. Superior Court of San Joaquin County, 484 P.2d 964, 971 (Cal. 1971).

31 *Id.* at 972, *citing* 12 S. WILLISTON, CONTRACTS § 1515 (3d ed. 1970); Hunter v. McKenzie, 239 P. 1090, 1094 (Cal. 1925).

32 Vasquez v. Superior Court of San Joaquin County, 484 P.2d 964, 973 n.9 (Cal. 1971). The court also found that reasonable reliance could be shown on a class basis. "If the court finds that a reasonable man would have relied upon the alleged misrepresentations, an inference of justifiable reliance by each class member would arise."

33 *See* Fanucchi v. Coberly-West Co., 311 P.2d 33 (Cal. Ct. App. 1957).

34 Vasquez v. Superior Court of San Joaquin County, 484 P.2d 964, 973 (Cal. 1971).

35 *Id.* at 968.

36 *See* Brenner v. Title Guarantee & Trust Co., 11 N.E.2d 890, 891 (N.Y. 1937); Hallows v. Fernie, L.R. 3 Ch. 467, 471 (1868).

However, there are other objections to a class suit based on fraud that the court did not raise. One of these objections is that, "[t]he law offers a choice of remedies to a person who has been induced to act in reliance upon false representations."[37] Generally, there is a choice between the remedies of: (1) Damages for being induced to enter the contract, (2) rescission of the contract, or (3) enforcement of the contract as the person represented it to be.[38] The problem is that the choice of remedies is for each plaintiff individually.[39] However, if the class action proceeds to final judgment, it may be held to be res judicata in subsequent actions by class members, and therefore binding upon the absent parties.[40] Thus, if it is held to be res judicata, the absent parties would not have the opportunity of choosing their remedy. Following this reasoning, if the plaintiffs who actually brought the action seek and are awarded rescission (and this disposition is later held to be res judicata), the absent parties would have to be satisfied with rescission regardless of their possible desire to seek damages or enforcement of the contract as it was purported to be.

In the instant case the court did not speak about this objection. However, the same court in *Daar v. Yellow Cab Co.* intimated that the res judicata effect of the decree may be collaterally attacked by absent parties, which would call for a closer scrutiny of the community of interest among the parties.[41] It may further be inferred from *Daar* that if the common questions are of sufficient importance to provide "substantial" benefits to the parties and the court, a judgment binding on the absent parties may be justified.[42] Thus, it would seem that the plaintiffs would be allowed to proceed with their class action unless and until one of the non-present parties objects to the choice of remedies, at which time the class action could either be abandoned entirely, or the objecting party would be allowed to withdraw his claim from the action. As a practical matter, it is questionable whether a consumer who learns that he has been fraudulently induced to pay for something which he did not get would object to having his contract rescinded, relieving him of the duty to continue paying for the item, returning that which he had already paid, and offering him the possibility of receiving damages. Moreover, a contract induced by fraud is not void, but merely voidable, and if nothing is done the contract stands, fixing the rights and duties of the parties.[43] While the judg-

37 Brenner v. Title Guarantee & Trust Co., 11 N.E.2d 890, 891 (N.Y. 1937).
38 12 S. WILLISTON, CONTRACTS § 1523 (3d ed. 1970).
39 Brenner v. Title Guarantee & Trust Co., 11 N.E.2d 890, 891 (N.Y. 1937).
40 433 P.2d 732, 740, 745 (Cal. 1967).
41 *Id.* at 740.
42 *Id.* at 745.
43 12 S. WILLISTON, CONTRACTS § 1526 (3d ed. 1970); *accord, e.g.*, Associated Hardware Supply Co. v. Big Wheel Distributing Co., 355 F.2d 114, 120 (3d Cir. 1966) (contract in-

ment rescinding the contracts may be binding on all class members thereby rescinding all the contracts, it is doubtful that any finance company would object if any of the consumers decided to stand by his contract and continue paying the installments due.

A further objection to consumer class actions generally is that these privately brought suits are not necessary because public agencies may provide adequate protection.[44] However, the instant case found that this is not true in this particular jurisdiction. The court noted that the Attorney General supported the necessity of privately brought suits because his office could not afford adequate protection to consumers.[45] Protection of consumers by public agencies has generally proved to be inadequate.[46] Furthermore, the court found support in a recent legislative enactment providing for consumer class actions under specified circumstances.[47]

Just how far the decision of this case may be extended, and what analogous situations may properly be the basis for class actions under the holding of this case is not immediately ascertainable. In reaching its decision the court stayed strictly within the factual situation presented. The court relied heavily on the allegation that the same exact statements were made in the same manner to each plaintiff because the statements were memorized and repeated by rote. Certainly there are consumer products other than freezers, such as encyclopedias and vacuum cleaners, that are sold to the public through the utilization of the same technique employed by the Bay Area salesmen. Presumably, if fraudulent representations were made and relied on in those situations, a class action would be available under the rationale of this case. Perhaps television or billboard advertising may be held to present different situations. In the instant case the false representations were made by the seller's *salesmen*. The recitation of facts is silent on the point, but it may be reasonable to infer that the representations were made by the salesmen from whom the plaintiffs purchased the goods and upon whom they relied at the time they entered the contract. In the case of television advertisements, for example, generally the representations are not made by the salesman from whom the consumer purchases, nor at the time they purchase. Also, advertisements, depending

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duced by fraud is voidable, not void); Milbank Mutual Insurance Co. v. Schmidt, 304 F.2d 640, 642 (8th Cir. 1962); Lloyd v. Williams, 38 Cal. Rptr. 849, 851 (Cal. Dist. Ct. App. 1964).

44 Hall v. Coburn Corp. of America, 259 N.E.2d 720, 723 (N.Y. 1970).

45 Vasquez v. Superior Court of San Joaquin County, 484 P.2d 964, 974 n.14 (Cal. 1971).

46 *See* Eckhardt, *Consumer Class Actions*, 45 N.D.L. 663, 667 (1970) (author discusses problems public agencies have in attempting to protect consumers, citing a case in which it took the Federal Trade Commission twenty-nine years to bring a company to task for deceptive practices).

47 Vasquez v. Superior Court of San Joaquin County, 484 P.2d 964, 975 (Cal. 1971).