Consumer Class Actions in California: A Practical Approach to the Problem of Notice

Charlotte E. Hemker-Smith
University of the Pacific; McGeorge School of Law

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Consumer Class Actions In California:
A Practical Approach To The Problem Of Notice

The class action device was developed by the courts of equity as a method of joinder, and has achieved recognition by California courts as a “valuable medium of litigation.” By allowing numerous plaintiffs to assert their common claim in a single suit, the class action serves a number of purposes, which were expressly recognized by the California Supreme Court in Daar v. Yellow Cab Co. The class action is a valuable method of securing redress for numerous plaintiffs with small individual damages, who might otherwise lack the individual financial ability to seek individual remedies. In addition, this device serves as a means of punishment and deterrence for the wrongdoing defendant by recovering from him all of the benefits accrued from his illegal activity, and aids legitimate businesses and the public by curtailing illegitimate and fraudulent business practices. Finally, the class action serves to protect the interests of the judicial system by lessening the threat of multiplicity of litigation arising from a transaction common to all class members.

The purposes served by the class action suit are especially important in the area of consumer actions, where consumers exposed to illegal business practices often lack the individual economic power to control deceptive sellers. The importance of the consumer class action as a remedy and a deterrent was emphasized by the California Supreme Court in Vasquez v. Superior Court. In that case, the court stated that

5. Vasquez v. Superior Court, 4 Cal. 3d 800, 808, 484 P.2d 964, 968-69, 94 Cal. Rptr. 796, 800-01 (1971).
6. Id.; 67 Cal. 2d at 714-15, 433 P.2d at 746, 63 Cal. Rptr. at 738.
7. 4 Cal. 3d 800, 484 P.2d 964, 94 Cal. Rptr. 796.
alternative methods of multiple litigation, such as joinder, intervention, and consolidation, are insufficient remedies for the average consumer, since use of such alternatives requires "a group of economically powerful parties who are obviously able and willing to take care of their own interests individually through individual suits or individual decisions about joinder or intervention."\(^8\)

Despite the widespread interest in class action suits, the only statutory authority for such suits in California prior to 1970 was contained in Section 382 of the California Code of Civil Procedure, which provides in part:

> 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.

Further statutory authority for consumer class actions was provided in 1970, when the California Legislature enacted the Consumers Legal Remedies Act.\(^9\) A portion of that Act, Section 1781(a) of the Civil Code, states:

> Any consumer entitled to bring an action under Section 1780 may, if the unlawful method, act, or practice has caused damage to other consumers similarly situated, bring an action on behalf of himself and such other consumers to recover damages or obtain other relief as provided for in Section 1780.\(^10\)

\(^8\) Id. at 808, 484 P.2d at 968, 94 Cal. Rptr. at 800, citing Dolgow v. Anderson 43 F.R.D. 472, 484 (E.D.N.Y. 1968).

\(^9\) CAL. STATs. 1970, c. 1550, §1, at 3157.

\(^10\) CAL. CIV. CODE §1780 provides:

(a) Any consumer who suffers any damage as a result of the use or employment by any person of a method, act, or practice declared to be unlawful by Section 1770 may bring an action against such person to recover or obtain any of the following:

1. Actual damages, but in no case shall the total award of damages in a class action be less than three hundred dollars ($300).

2. An order enjoining such methods, acts or practices.

3. Punitive damages.

4. Any other relief which the court deems proper.

(b) Such action may be commenced in the county in which the person against whom it is brought resides, has his principal place of business, or is doing business, or in the county in which the transaction or any substantial portion thereof occurred.

If within any such county there is a municipal or justice court, having jurisdiction of the subject matter, established in the city and county or judicial district in which the person against whom the action is brought resides, has his principal place of business, or is doing business, or in which the transaction or any substantial portion thereof occurred, then such court is the proper court for the trial of such action. Otherwise, any municipal or justice court in such county having jurisdiction of the subject matter is the proper court for the trial thereof.

In any action subject to the provisions of this section, concurrently with the filing of the complaint, the plaintiff shall file an affidavit stating facts showing that the action has been commenced in a county or judicial district described in this section as a proper place for the trial of the action. If a plaintiff fails
Section 1781 also sets forth procedural guidelines which vest great discretion in the court,\textsuperscript{11} indicating that the legislature recognized the desirability of giving the trial court flexibility in dealing with the problems that arise in maintaining consumer class actions.\textsuperscript{12}

In addition to the California statutory provisions for class action suits, the California Supreme Court has also suggested that the trial courts may employ Rule 23 of the Federal Rules of Civil Procedure in the event of a procedural "hiatus."\textsuperscript{13} Although the California courts are not bound by the rule \textit{per se},\textsuperscript{14} the California Supreme Court has recognized its utility in some situations.\textsuperscript{15} Nevertheless, the court has refrained from flatly requiring observance of the rule in all instances,\textsuperscript{16} perhaps in the realization that Rule 23, as construed, tends to diminish the efficacy of the class action device.\textsuperscript{17}

In summary, the class action trial court has basic statutory authority for the maintenance of a class action from Section 382 of the Code of Civil Procedure, but this section contains no procedural requirements. Section 1781 of the Civil Code, which may be adopted by the trial court in other than consumer actions,\textsuperscript{18} contains procedural guidelines which vest great discretion in the court to carefully consider the circumstances and decide the procedural requirements for each case on a pragmatic basis. The courts may also refer for procedural guidance to Rule 23 of the Federal Rules of Civil Procedure. However, the fact that neither the California Supreme Court nor the California Legislature has placed \textit{mandatory} procedural requirements on the trial courts for use in class action suits indicates that both are continuing to "rely upon the ability of trial courts to adopt innovative procedures which will be fair to the litigants and expedient in serving the judicial process."\textsuperscript{19}

Innovative procedures are especially important when the court is determining whether the judgment in a consumer class action should be binding on all class members and, if so, the procedural devices by which a binding effect can be achieved. This problem has acquired increasing importance, since the federal courts have apparently taken

\begin{itemize}
\item to file the affidavit required by this section, the court shall, upon its own motion or upon motion of any party, dismiss any such action without prejudice.
\item See Cal. Civ. Code §1781(d); see text accompanying notes 136-140 infra.
\item See 4 Cal. 3d at 821, 484 P.2d at 977, 94 Cal. Rptr. at 809.
\item Id.
\item Id.
\item 50 Cal. App. 3d at 970 n.16, 124 Cal. Rptr. 376, 383 n.16 (1975).
\item 15. 4 Cal. 3d 800, 821, 484 P.2d 964, 977-78, 94 Cal. Rptr. 796, 809-10.
\item 16. 50 Cal. App. 3d at 970 n.16, 124 Cal. Rptr. at 383 n.16.
\item See text accompanying notes 44-49 infra.
\item 18. See 4 Cal. 3d at 820, 484 P.2d at 977, 94 Cal. Rptr. at 809; Home Sav. & Loan Ass'n v. Superior Court, 42 Cal. App. 3d 1006, 1014, 117 Cal. Rptr. 485, 490 (1974).
\item 19. 4 Cal. 3d at 821, 484 P.2d at 977, 94 Cal. Rptr. at 809.
\end{itemize}
the view that a class action may not proceed unless the judgment will bind all class members.\textsuperscript{20} However, requiring individual notice to each class member in a consumer class action for the purpose of ensuring a res judicata judgment will probably result in defeat of the action prior to trial, since the financial burden of such notice is likely to overwhelm a plaintiff consumer who has sustained relatively small individual damages.

This comment will initially discuss the statutory notice\textsuperscript{21} and due process\textsuperscript{22} requirements which must be satisfied if the judgment is to be binding on absentee class members in a class action brought in federal courts. In addition to the federal requirement of individual notice in Rule 23(b)(3) class actions, adequate representation will be considered not only as an inherent due process requirement, but also as a possible means of ensuring that the judgment will be binding even if individual notice is not given to all members of the class.

The second section will consider the approach of the California courts to the problem of ensuring binding judgments in consumer class actions, in the absence of express notice requirements in California statutes authorizing class actions. Again, adequate representation will be considered as a means of ensuring that the due process requirements have been fulfilled, allowing the judgment to be extended to absentee class members.

In the final section, this comment will contend that the trial court's primary consideration should not be the binding effect of the final judgment at all, since the danger of multiple litigation arising if the judgment does not bind the entire class is so slight as to be essentially nonexistent. Rather, it will be argued, the California courts should look to the purposes underlying the class action device and allow the action to proceed where those purposes are served, even though all members may not be bound by the final judgment.

Since federal due process requirements are obligatory on the state courts, and Rule 23 of the Federal Rules of Civil Procedure has persuasive effect, it may be useful to begin the discussion with an analysis of class actions in the federal courts.


\textsuperscript{21} Fed. R. Civ. Proc. 23(a)(4) requires that the representative parties fairly and adequately protect the interests of the class; Fed. R. Civ. Proc. 23(c)(2) requires that in a class action maintained under 23(b)(3), the class action most typical of consumer class actions, the court shall direct the best notice practicable under the circumstances to the members of the class, including individual notice to all members identifiable through reasonable effort.

FEDERAL NOTICE REQUIREMENTS

A. Original Rule 23 Class Designations

Prior to its 1966 amendment, Rule 23 of the Federal Rules of Civil Procedure distinguished between three types of class actions, each with its own specific binding effect on the class members. An analysis of the pre-1966 rule may be helpful to an understanding of the present requirements.

The types of class actions established by the 1938 rule were designated "true," "hybrid," and "spurious." A "true" class action was one involving a right which was joint or common, or derivative, in which the plaintiffs had an undivided interest in a single claim. Thus, adjudication of the claim would effectively determine the rights of all parties, whether or not the parties were individually before the court. The "true" class action was the only one in which, if the representation were adequate, the entire class was bound by the judgment, whether or not the individual members joined in the action.

The "hybrid" action was one in which all class members had an interest in the specific property before the court, much in the manner of an in rem or quasi in rem action at law. A judgment in this action would determine all rights of all parties to the property, thus binding absentees and parties before the court alike as to that property. However, as to any other issues before the court, the judgment would bind only those parties who actually participated in the action.

The "spurious" action was the one in which the class members were loosely bound, in that their claims against the defendant were "several."

27. Foster, supra note 1, at 21.
28. Id.
29. Id.
but involved a common question of law or fact. This type of action has been referred to as merely an expansion of the "permissive joinder" device, in which a judgment bound only those parties who intervened in the action prior to a determination of the merits, thus preserving mutuality of judgment by avoiding one-way intervention of plaintiffs after a judgment favorable to the class. For this reason, the "spurious" class action was criticized as lessening the social utility of the class action device, since multiplicity of litigation was not avoided unless individual class members took affirmative steps to intervene in the action. Few plaintiffs would voluntarily join in an action in which the outcome was uncertain and where the possibility existed that they would be bound by an unfavorable judgment and liable for costs of the litigation. Therefore, if the outcome of the action were favorable to the class, there was a distinct possibility of further actions since the non-intervening plaintiffs, not bound by the judgment in the prior action, would be encouraged to bring their own actions after others similarly situated had managed to recover against the defendant. It should be recalled that the real effectiveness of a class action lies not merely in facilitating recovery of damages by individual plaintiffs, but also in requiring the defendant to give up the gains of his wrongful activity. The judgment in a "spurious" class action served only the first goal, that of recovery by individual plaintiffs. The second goal was not realized until all the plaintiffs injured by the defendant had taken the initiative either by intervening or by bringing their own separate actions.

B. Amended Rule 23 Requirements

The conceptual distinctions between "true," "hybrid," and "spurious" actions created difficulties in application, and in 1966 Rule 23 was amended to abolish these categories. In place of the old categories,

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30. An example of a spurious class action is a suit in which A, B, and C sue the defendant for damage resulting from defendant's tortious act. If X suffered damage resulting from the same act (i.e. the questions of law or fact are common to X as well as to A, B, and C), X could join in the action, and the judgment would bind A, B, C, and X as to the liability of the defendant. However, if X did not join in the action brought by A, B, and C, he would not be bound and could proceed independently against the defendant. Moore, supra note 23 at 574-76.

31. Foster, supra note 1, at 21-22.


34. See Vasquez v. Superior Court, 4 Cal. 3d 800, 808, 484 P.2d 964, 968-69, 94 Cal. Rptr. 796, 800-01 (1971); Daar v. Yellow Cab Co., 67 Cal. 2d 695, 714-15, 433 P.2d 732, 746, 63 Cal. Rptr. 724, 738 (1967).

35. Foster, supra note 1, at 21-23; Kalvin and Rosenfield, supra note 33, at 707 & n.73; 39 F.R.D. 69, 98 (1966).
the amended rule now sets forth the following requirements for main-
tenance of the action as a class action:

(a) . . . One or more members of a class may sue or be sued as
representative parties on behalf of all only if (1) the class is so
numerous that joinder 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. 36

In the case of typical consumer class actions which seek damages rather
than injunctive or declaratory relief, Rule 23(b)(3) also requires that
(1) the questions of law or fact common to the members of the class
predominate over any questions affecting the members individually,
and that (2) a class action be superior to other available methods for
the fair and efficient adjudication of the controversy. 37

Rule 23(b)(3) is similar to the former "spurious" action since both
are based on plaintiffs' rights which are separate and distinct and yet
involve a common question of law or fact, 38 and thus the amended sec-
tion presents the same problems as to the imposition of judgment bind-
ing on absentee class members. In attempting to meet this problem,
the drafters of Rule 23, considering the dictates of procedural due
process, 39 decided to mandate notice to class members, 40 forcing those
who wish exclusion from the judgment to "opt out." This mandate,
contained in Rule 23(c)(2), 41 is an apparent reversal of the old Rule
23 requirement that class members must intervene in order to be bound
by the judgment in a "spurious" action. 42 The rule now requires posi-
tive action by absentees in order to avoid being bound by the judg-
ment. 43 While theoretically a solution to the problem of ensuring a

38. Rule 23(b)(3) actions, like the "spurious" class actions, encompass a loose
collection of plaintiffs with no pre-existing relationship, and federal class action trial
courts face the same problem of imposing a binding judgment on all members of the class
as was faced with the "spurious" class actions. See Dam, Class Action Notices: Who
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 rea-
sonable 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 judg-
ment, 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 de-
sires, enter an appearance through his counsel.
42. See text accompanying note 32 supra.
binding judgment, the requirement for individual notice in Rule 23(b)(3) actions has raised practical difficulties, since the representative plaintiff with a small individual claim may be required to bear the financial burden of notice to a huge class or, alternatively, face dismissal of the action.

C. Eisen Notice Requirements: Due Process Mandate or Interpretation of Rule 23?

The leading case construing the Rule 23(c)(2) notice requirement for Rule 23(b)(3) actions is Eisen v. Carlisle & Jacquelin. In that case, Eisen brought a class action under Rule 23 on behalf of himself and all similarly situated odd-lot traders on the New York Stock Exchange for a certain period, charging the defendant brokerage firms with violating the antitrust and securities laws by monopolizing odd-lot trading and setting the odd-lot differential, a surcharge imposed on odd-lot investors in addition to the standard brokerage commission, at an excessive level. Eisen sought damages (including treble damages for the amount of the overcharge), attorneys' fees, and an injunction against future excessive fees. The action was determined to be a Rule 23(b)(3) action, and in delineating the notice requirements for Eisen's class, the United States Supreme Court interpreted the "unmistakable" language of Rule 23(c)(2) to require individual notice to be sent to all class members whose names and addresses could be ascertained through reasonable effort. Unfortunately for the plaintiff Eisen, he was able to identify through reasonable effort some two and a quarter million members of the six-million member class, and the cost of postage alone (estimated by the district court to be $225,000) was prohibitive to the continuation of the suit in which Eisen's individual damages were only $70.

The judgment in an action maintained as a class action under subdivision (b) (1) or (b) (2), whether or not favorable to the class, shall include and describe those whom the court finds to be members of the class. The judgment in an action maintained as a class action under subdivision (b) (3), whether or not favorable to the class, shall include and specify or describe those to whom the notice provided in subdivision (c) (2) was directed, and who have not requested exclusion, and whom the court finds to be members of the class.


44. 417 U.S. 156 (1974).
45. Id. at 160.
46. Id. at 159-61.
47. Id. at 163-64.
48. Id. at 173.
49. Id. at 167.
50. The plaintiff is traditionally required to bear the costs of notice to the class. However, CAL. CIV. CODE §1781(d) allows the trial court to direct either party in a
The question of whether the Court's basis for requiring notice in *Eisen* was merely interpretation of Rule 23(c)(2), or whether it rested on due process considerations, is important not only to future federal class actions, but also to state class actions since constitutional due process requirements are binding on the state courts where the Federal Rules would not be, unless adopted by the state. If it be a due process decision, legislation to lessen the effect of the decision by amendment to Rule 23(c)(2) may be unconstitutional. Further, if notice is constitutionally required in a Rule 23(b)(3) action, there may be a possibility that the Supreme Court will find such notice to be required as well in some Rule 23(b)(1) and 23(b)(2) actions, where the class is loosely bound and thereby resembles the class in a 23(b)(3) action.

On the state court level, if the *Eisen* notice requirements are based on due process considerations, the state courts will have to order notice to the class in all class actions which are similar to the federal Rule 23(b)(3) type class actions, including consumer class actions seeking damages. This will diminish, if not destroy, the effectiveness of the class action device as a remedy in large consumer class actions. If, for example, the plaintiff is required to bear the cost of individual notice to class members whose names and addresses are ascertainable through "reasonable effort" from the defendant's computer mailing lists, the costs of giving such notice will preclude the continuation of the action, as in *Eisen*. Thus, although the consumer with small individual damages is the one most likely to benefit through a Rule 23(b)(3) type class action in the state courts, he is also the one to whom the remedy would most likely be denied by the financially oppressive individual notice requirements of Rule 23(c)(2) if state courts are constitutionally required to order individual notice in such actions.

Although the Court's interpretation of Rule 23 in *Eisen* was rein-
forced by due process considerations, the Court further stated that, due process requirements aside, the express language and intent of Rule 23(c)(2) require that individual notice be provided. Thus, the inference from a strict reading of the opinion is that the notice requirement is based on the literal interpretation of Rule 23(c)(2), despite the due process considerations which were included in the opinion and developed in the earlier United States Supreme Court case of Mullane v. Central Hanover Bank & Trust Co.

1. Mullane: Notice and Due Process

In Eisen, the Court considered the due process requirements which are necessary to ensure the res judicata effect of a judgment on absentee class members, as set forth in Mullane v. Central Hanover Bank & Trust Co. Mullane had been appointed special guardian and attorney to represent the interests of all persons in the income of a common trust fund. In accordance with a New York State statute, the respondent Bank published notice of the pending accounting of the fund in a local newspaper. Mullane made a special appearance in the state court, contending that the court lacked jurisdiction because the beneficiaries of the fund, many of whom were not residents of New York, had not been afforded adequate notice as required by the fourteenth amendment. The state court overruled Mullane’s objections to the statutory notice and entered a final decree, which was affirmed by the Appellate Division of the Supreme Court of New York.

On appeal, the United States Supreme Court reversed, stating:

An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and to afford them an opportunity to present their objections.

The Court went on to determine that in this action, since the names and addresses of known beneficiaries were on hand, there was no reason to use a means less likely to reach them than the mail to inform

54. 417 U.S. at 173-74.
55. Id. at 175. "The express language and intent of Rule 23(c)(2) leave no doubt that individual notice must be provided to those class members who are identifiable through reasonable effort."
57. Id.; 417 U.S. at 173-75.
58. 339 U.S. at 310.
59. Id. at 309-10.
60. Id. at 311.
61. Id.
62. Id. at 314.
them of the action.\textsuperscript{63}

The draftsmen of Rule 23 and the \textit{Eisen} Court\textsuperscript{64} both interpreted the \textit{Mullane} requirements of notice without considering the \textit{Mullane} Court's treatment of class actions involving unknown or conjectural beneficiaries. The procedural questions raised by such actions are much more relevant to Rule 23(b)(3) class actions in which the class may at best be merely ascertainable, than to the situation actually before the \textit{Mullane} Court, which involved 113 \textit{ascertained} trust fund holders whose interests were defined and who were ordinarily notified by mail by the trustees.\textsuperscript{65} The \textit{Mullane} Court specifically stated that it did not consider it unreasonable for the state to dispense with more certain notice to those beneficiaries whose interests are either conjectural or future or, although they may be discovered upon investigation, do not in due course of business come to the knowledge of the common trustee.\textsuperscript{66}

In dealing with such conjectural or unknown class members, the \textit{Mullane} Court felt statutory notice (\textit{i.e.} notice by publication under the New York State statute regarding accounting of trust funds) was sufficient, because although it was not likely to reach such members, it was not likely to be any less efficient than other alternatives.\textsuperscript{67} The \textit{Mullane} Court extended this to beneficiaries who could be discovered upon investigation but who would ordinarily not be known to the trustee who was required to give notice in that action.\textsuperscript{68}

The \textit{Mullane} Court expressly recognized the practical difficulties and expense involved in attempting to determine the status of large numbers of class members whose interests may be so remote as to be \textit{"ephemeral."}\textsuperscript{69} Such expense, if required by due process, would “impose a severe burden on the plan, and would likely dissipate its advantages.”\textsuperscript{70} Requiring such expense is not in keeping with the Court's test of balancing the state's interest in providing a remedy to its citizens against the individual interest to be protected by due process.\textsuperscript{71} Rather, the implication of this balancing test is that in cases in which individual damages are \textit{de minimis}, the state's interest in pro-

\textsuperscript{63.} \textit{Id.} at 318.
\textsuperscript{64.} 417 U.S. at 173-75; 39 F.R.D. 69, 107 (1966).
\textsuperscript{65.} 339 U.S. at 318.
\textsuperscript{66.} \textit{Id.} at 317.
\textsuperscript{67.} \textit{Id.}
\textsuperscript{68.} \textit{Id.}
\textsuperscript{69.} \textit{Id.}
\textsuperscript{70.} \textit{Id.} at 318.
\textsuperscript{71.} \textit{Id.} at 313-14.
Providing a remedy and in ensuring a binding judgment through the class action device could outweigh the interest in individual notice to each member of the class, where such members are “missing or unknown” or where the expense of individually notifying each member would preclude bringing the action at all. Therefore, in light of the balancing of interests approach utilized in *Mullane* and the Court’s careful consideration of the practicalities of notice, it is difficult to see how the draftsmen of Rule 23 could have interpreted *Mullane* as requiring individual notice in a class action in which the number of potential class members could create the “practical difficulties and costs” which the *Mullane* Court recognized were “not required in the name of due process.”

The *Mullane* Court also expressly considered the res judicata issue which so concerned the draftsmen of Rule 23, and decided that a final decree foreclosing the rights of persons “missing or unknown” is not constitutionally barred by use of “an indirect and even a probably futile means of notification.” It is difficult to see how such express language so fitting to the circumstances of a Rule 23(b)(3) type class action such as *Eisen* would have been overlooked by the *Eisen* Court if that Court were in fact addressing the due process requirements of notice.

2. **Hansberry: Adequate Representation and Due Process**

There is further reason to believe the *Eisen* Court was not predicated the notice requirements on due process considerations in that the Court did not consider the decision in *Hansberry v. Lee,* which dealt with the due process requirement of adequate representation. Petitioner Hansberry had been sued in the Illinois state court for breach of a racially restrictive covenant. Hansberry claimed as a defense that the covenant was invalid and unenforceable because a condition precedent to enforcement, signature of the covenant by 95% of the

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72. *Id.* at 317.
73. *Id.* at 314.
74. *Id.* at 317-18.
76. 339 U.S. at 317.
77. 311 U.S. 32 (1940).
78. *Id.* at 37-38.
homeowners, had not been performed. The Illinois Supreme Court found, however, that Hansberry was collaterally estopped from asserting this defense because performance of the condition precedent had been stipulated in a prior suit. This former suit was held to be representative in character, and thus was res judicata in the later action against Hansberry, although he had not been a party to the prior suit. Hansberry then appealed to the United States Supreme Court, contending that the application of the doctrine of res judicata to him deprived him of due process of law because he was not a party in the prior action, nor was it a class or representative suit which would allow a binding effect on members of the class who were not parties to the action.

The Supreme Court stated that persons need not be before the court in a class action or representative action in order to be bound by the judgment where there is adequate representation of absentees' rights and interests by parties who are present. The Court defined the judgment in a class or representative suit as a "recognized exception" to the general rule that a judgment in personam is not binding on one who is not a party in the litigation. This "recognized exception" was found to comport with the requirements of due process when absent class members are in fact adequately represented by parties who are present, or when the interest of the absent members is joint with the interest of the parties before the court. Thus, if the interests of the representative party are not necessarily or even probably the same as those of the absent members, the due process requirement of adequate representation is absent. In Hansberry, the interests of the landowners affected by the covenant were not sufficiently "joint" for the action to be a class or representative action, since those who attempted to enforce the covenant "could not be said to be in the same class with or represent those whose interest was in resisting performance."

79. Id. at 38.
80. Id. at 39-40.
81. Id.
82. Id. at 38.
83. Id. at 42-43.
84. Id. at 41.
85. Id. at 40.
86. Id. at 42-43.
87. Id. at 45.
88. Id. at 44.
Without the requisite joint interest, a party who is present in the first action is not entitled to bind absent parties by the judgment. Thus, the Court found that the important consideration in determining whether due process requirements had been fulfilled, in order for the judgment in the action to be binding on absent members, was whether the class members before the court adequately represented the interests of absent members.  

Returning to the question of whether the Court in *Eisen* was considering due process requirements or was merely interpreting Rule 23, it may be observed that the *Hansberry* Court's recognition of the relationship between due process and adequate representation is conspicuously absent from *Eisen*. If in fact the question under consideration in *Eisen* were the protection of the interests of absentee members through due process, the statements of the *Hansberry* Court that identity of interests and adequacy of the representation by the class representatives were essential to due process would probably have been far more apparent in the *Eisen* decision. That the *Hansberry* decision contained no reference to notice leads to the inference that the Court might, on a consideration of due process requirements alone, sanction a rule which did not include any notice requirement so long as the interests of the absentees were found to be adequately represented.  

Instead of considering the petitioner's contention that adequate representation is the touchstone of due process, the *Eisen* Court swept by adequate representation and concentrated on the requirements of Rule 23(c)(2). Had the Court been concerned with the fundamentals of due process rather than mere interpretation of Rule 23(c)(2), it surely would have considered the fact that *Eisen*, with his tiny $70 claim, was attempting to adequately represent a huge class in a suit dealing with complex antitrust and securities issues. The Court noted, and apparently accepted...
without discussion, the district court’s finding⁹³ that Eisen, as the representative plaintiff, satisfied the Rule 23(a)(4) requirement of adequate representation.⁹⁴ The finding of adequate representation in Eisen avoided a basic problem attending the class action suit in Mullane, in which adequate representation was absent because representation of the interests of the class of beneficiaries was by a court-appointed attorney,⁹⁵ not by a representative member of the class as in Eisen. Thus, notice in Mullane was required to protect the rights of absentee class members by ensuring adequate representation.

If the Court in Eisen had been concerned with due process rather than Rule 23 requirements,⁹⁶ after finding adequate representation to be present it arguably would have gone on to analyze the interests of the absent class members as being sufficiently conjectural, in view of the potentially small individual interests of such members, to allow the notice by publication which the Mullane Court recognized as adequate for such interests.⁹⁷ But rather than accepting the Mullane Court’s statement that “[a] construction of the Due Process Clause which would place impossible or impractical obstacles in the way could not be justified”⁹⁸ as guidance, the Eisen Court based its holding on “the express language and intent of Rule 23(c)(2),”⁹⁹ thereby showing that the Court’s interpretation of notice requirements in Eisen was apparently based on interpretation of Rule 23 procedures, rather than on due process requirements.

Regardless of whether the individual notice requirement of a Rule 23(b)(3) class action as propounded in Eisen is based on interpretation of the language of Rule 23(c)(2) or is based on constitutional due

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⁹⁴. 417 U.S. at 165.
⁹⁵. 339 U.S. at 313; see also Dam, supra note 38, at 113.
⁹⁶. Class action suits brought under Federal Rule 23(b)(1) or (b)(2) may proceed to a judgment which will be binding on the class without notice of any sort to the class, as long as the requirements of Rule 23(a) are fulfilled.
⁹⁷. See text accompanying notes 69-70 supra; Jacoby and Cherkasky, supra note 43, at 14-15 & n.76.
⁹⁹. 417 U.S. at 175.
process requirements, the federal class action which comes under Rule 23(b)(3) is bound by this requirement. California courts, however, need not consider themselves bound by the federal notice requirement in the absence of a clear constitutional ruling.

THE CLASS ACTION IN CALIFORNIA

Even if the United States Supreme Court in *Eisen* were interpreting the requirements for Federal Rule 23(c)(2) and not dictating constitutional requirements for notice, California trial courts in class action suits must nevertheless ensure that the due process requirements delineated by the Supreme Court in *Mullane* and *Hansberry* are satisfied before the resulting judgment may be extended to bind the entire class, including absent members. Only under such circumstances will the action fulfill one of the principal purposes of the class action device—reducing a multiplicity of litigation arising from the same act.

When dealing with the typical consumer class action in which the class may extend to many members with individual damages which are *de minimus*, the danger of an inflexible requirement of individual notice to all class members who may be discovered through reasonable effort is immediately apparent, since the financial burden of such notice may make the maintenance of such an action economically impossible. If such a requirement were imposed, the manifold benefits of such an action would remain unavailable to the court, the injured parties, and the public. However, the basic function of the class action device, which is to allow some parties to litigate the rights of all similarly situated, requires that the rights and interests of the absent parties be somehow protected through due process concepts if the judgment is to be fairly extended to include the absent parties. Thus, the problem of whether both adequate representation and notice to the class are required to ensure the protection of due process, or whether adequate representation is sufficient alone or with a form of notice less than individual notice, is of great importance to the future of consumer class actions in California.

Before a class action suit may be maintained in California, it must meet the requirements of Code of Civil Procedure Section 382, which

100. Cartt v. Superior Court, 50 Cal. App. 3d, 960, 968, 124 Cal. Rptr. 376, 381 (1975). "... if the United States Supreme Court had desired to hold that such notice was constitutionally required, it certainly could have phrased its holdings [in *Eisen*] in less Delphic language."
101. See text accompanying notes 3-8 supra.
102. See *Hansberry v. Lee*, 311 U.S. 32, 42-43 (1940); see text accompanying notes 108-110 infra.
provides the basic statutory authorization for class actions in California. This statute reads in part:

[W]hen 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.103

Judicial interpretation of this statute has determined two requirements—an ascertainable class and a well-defined community of interest.104 Although these two requirements were historically interpreted in a very restrictive sense, this approach has been gradually eased. Currently, the class members no longer have to be necessary parties,105 and there need no longer be a common fund.106

Section 382 has been interpreted by the California Supreme Court in Daar v. Yellow Cab Co.107 to require an ascertainable class and a "well-defined community of interest in the questions of law and fact involved affecting the parties to be represented."108 The court stated that Section 382 was based upon the equitable doctrine of virtual representation, which allows maintenance of a suit by some parties on behalf of themselves and others, where the interested parties are numerous and the suit is for an objective common to all parties, whether present or not.109 The doctrine of virtual representation, in turn, is based upon necessity and convenience, and was adopted by Section 382 "to prevent a failure of justice."110

When the class action has been found to satisfy the requirements of Section 382, the trial court must determine what procedural steps are required in the action, since Section 382 itself contains no procedural guidelines. The trial court has two procedural schemes from which it can fashion a procedure to satisfy due process requirements for absent class members: the provisions of Rule 23 of the Federal Rules of Civil Procedure,111 and Section 1781 of the California Civil Code.112

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103. CAL. CODE CIV. PROC. §382.
107. 67 Cal. 2d 695, 433 P.2d 732, 63 Cal. Rptr. 724.
108. Id. at 704, 433 P.2d at 739, 63 Cal. Rptr. at 731.
109. Id. at 703-04, 433 P.2d at 739, 63 Cal. Rptr. at 731.
110. Id. at 703-04, 433 P.2d at 738-39, 63 Cal. Rptr. at 730-31.
111. See Vasquez v. Superior Court, 4 Cal. 3d 800, 821, 484 P.2d 964, 977, 94 Cal. Rptr. 796, 809 (1971).
112. Id. at 818, 484 P.2d at 975, 94 Cal. Rptr. at 807. The procedure outlined in the Consumers Legal Remedies Act has been held to be mandatory where applicable;
A. Procedural Provisions of Federal Rule 23

If the trial court has adopted the federal rule as a guide, individual notice to each member of the class who can be identified through reasonable effort is required by Rule 23(c)(2) for a Rule 23(b)(3) type class action. The moment this decision is made, however, the danger arises that the class action will fail if the plaintiff is required to furnish individual notice to all class members identifiable through reasonable effort, since the financial burden of such notice will very probably be beyond the plaintiff's resources.

However, if the Supreme Court's decision in Eisen is not based on due process requirements, California courts are not bound by the individual notice requirement propounded by that Court, but can consider the notice plan proposed for Rule 23(b)(3) actions by the District Court in Eisen III, and can set up a similar notification scheme which will ease the financial burden of notice on the plaintiff and still comply with Mullane due process requirements.

Another method which the court can use is to divide the class into subclasses, and proceed to trial with the subclass rather than with the entire class. Individual notice to each member of the subclass would not be as onerous as notice to the entire class. The subclass method of notice may be used by the court when (1) the class is of such great size that the maintenance of the action as a class action creates manageability problems insofar as individual notice to the entire class is financially impossible, and (2) the court is assured that the

"class actions by consumers brought under section 1770 of the act . . . must be brought under the provisions of the act." Id.

113. This comment will focus on consumer class actions in which the recovery sought is money damages. This type of action resembles most closely the federal Rule 23(b)(3) type class action, in which the class members are loosely connected by common questions of law or fact, with no pre-existing relationship between them, and in which money damages is the primary remedy sought. The federal rules, as interpreted by Eisen, mandate individual notice to all class members who can be identified through reasonable effort. 417 U.S. 156 (1974); see text accompanying notes 47-48 supra. Therefore, California trial courts using Rule 23 as a model would be bound to require individual notice by Rule 23(c)(2).


115. See generally text accompanying notes 45-100 supra.

116. Even a strict adherence to the Supreme Court's requirements in Eisen of individual notice to all class members identifiable through reasonable effort does not prohibit such procedures as enclosing notice in the same envelope as the defendant uses for billing, with the plaintiff bearing the costs of printing and stuffing such notice. See 417 U.S. at 180 n.1 (Douglas, J., dissenting).


118. 339 U.S. at 317. "This Court has not hesitated to approve of resort to publication as a customary substitute in another class of cases where it is not reasonably possible or practicable to give more adequate warning."

119. FED. R. CIV. PROC. 23(c)(4)(B).

120. 417 U.S. at 179-85 (Douglas, J., dissenting).
representative plaintiff will continue to adequately represent the subclass.\textsuperscript{121} If the entire class is defined in the original complaint, there is no statute of limitations problem for the later subclasses, since the filing of the original complaint would toll the statute,\textsuperscript{122} and the defendant would be informed of the full extent of his potential liability.\textsuperscript{123}

Another alternative to requiring the plaintiff to bear the full burden of the expense of notice is to impose part of the cost on the defendant.\textsuperscript{124} The District Court in \textit{Eisen III}, after a hearing at which it determined that the plaintiff would probably prevail at trial, allotted 90\% of the cost of notice to the defendant.\textsuperscript{125} Although the Supreme Court later held that "nothing in either the language or the history of Rule 23 . . . gives a court any authority to conduct a preliminary inquiry into the merits of a suit in order to determine whether it may be maintained as a class action,"\textsuperscript{126} California courts do have statutory authority for such procedure.\textsuperscript{127} California case law also shows acceptance of such a procedure, as demonstrated by \textit{Cartt v. Superior Court},\textsuperscript{128} in which the court considered the use of a mini-hearing to determine the probable outcome of the suit as a means of ordering the defendant to pay the costs of notice under Civil Code Section 1781(d) without running a substantial risk of a due process challenge.\textsuperscript{129}

Even if the court proceeds under the Rule 23 procedure and requires notice in Rule 23(b)(3) type actions, it is not, absent a constitutional mandate, frozen into any particular form of notice.\textsuperscript{130} This concept was reflected by the California Supreme Court in \textit{City of San Jose v. Superior Court},\textsuperscript{131} where the court observed that "[n]otice is mandatory under the federal rules . . . and should be ordered as soon

\begin{itemize}
  \item \textsuperscript{121} FED. R. CIV. PROC. 23(a)(4).
  \item \textsuperscript{122} American Pipe & Const. Co. v. Utah, 414 U.S. 538, 551 (1974).
  \item \textsuperscript{123} If there is a final judgment on the merits of the action of the first subclass, this judgment may be asserted against the defendant by later subclasses if the issues presented by the later subclasses are identical to those determined in the first action. See text accompanying note 190 infra.
  \item \textsuperscript{124} See CAL. CT. RULES, Manual for Conduct of Pretrial Proceedings in Class Actions, §427.6(c)(iii), at 20 (1974). This section allows the court to consider which party should bear the cost of notice, or whether and in what manner the cost should be divided between the parties.
  \item \textsuperscript{125} Eisen v. Carlisle & Jacquelin, 54 F.R.D. 565, 567 (1972).
  \item \textsuperscript{126} 417 U.S. at 177.
  \item \textsuperscript{127} CAL. CIV. CODE §1781(c)(3).
  \item \textsuperscript{128} 50 Cal. App. 3d 960, 124 Cal. Rptr. 376 (1975).
  \item \textsuperscript{129} Id. at 974-75, 124 Cal. Rptr. at 386-87.
  \item \textsuperscript{130} See CAL. CT. RULES, Manual for Conduct of Pretrial Proceedings in Class Actions, §427.6(c)(ii), at 20 (1974). This section allows the court, at the hearing of the issue of notice, to consider the manner in which notice, if ordered, should be given. The party who submits a motion for an order concerning the giving of or dispensing with notice must submit a statement of the proposed methods of notifying the class, an estimate of the cost of each such method, and the percentage of class members likely to receive knowledge of the action through each method.
  \item \textsuperscript{131} 12 Cal. 3d 447, 525 P.2d 701, 115 Cal. Rptr. 797 (1974).
\end{itemize}
as possible after the court determines the class action appropriate.Ô 132 However, the court added that the form of the notice could be determined in later proceedings before the trial court.Ô 133

Therefore, if the trial court looks to Rule 23 for procedural guidance, some form of notice to class members in a Rule 23(b)(3) type action is required, although the court may adopt a method whereby the heavy financial burden of individual notice may be mitigated. However, California trial courts have another procedural scheme available which affords much more flexibility.

B. Procedural Provisions of California Civil Code Section 1781

In 1970, the Consumers Legal Remedies Act was adopted to provide remedies for any consumer who suffers injury as a result of a deceptive practice declared by the Act to be unlawful.Ô 134 The consumer may obtain actual damages, injunctive relief, punitive damages, or such other or inclusive relief as the court may deem proper.Ô 135 Section 1781(a) allows recovery to be sought through a class action:

Any consumer entitled to bring an action under Section 1780 may, if the unlawful method, act, or practice has caused damage to other consumers similarly situated, bring an action to recover damages or obtain other relief as provided for in Section 1780.

The requirements for maintenance of a class action under this section are set forth in Section 1781(b), which provides that the action may be maintained as a consumer class action if all the following conditions exist:

(1) It is impracticable to bring all members of the class before the court.
(2) The questions of law or fact common to the class are substantially similar and predominate over the questions affecting the individual members.
(3) The claims or defenses of the representative plaintiffs are typical of the claims or defenses of the class.
(4) The representative plaintiffs will fairly and adequately protect the interests of the class.

These requirements for maintenance of a consumer class action are

132. Id. at 525 P.2d at 705, 115 Cal. Rptr. at 801.
133. Id.
134. Cal. Civ. Code §1750 et seq.; see also Vasquez v. Superior Court, 4 Cal. 3d 800, 484 P.2d 964, 977, 94 Cal. Rptr. 796, 809 (1971), which authorizes the trial court to consider the procedures in the Consumers Legal Remedies Act, Cal. Civ. Code §1781, even in an action to which the Act is not directly applicable.
almost identical to the requirements of Rule 23(a) for the maintenance of a class action in federal courts, indicating that the California Legislature may have intended that Rule 23\textsuperscript{136} be used as a guide for construing the application of Section 1781. However, even though the legislature apparently considered Rule 23, the provisions of Section 1781 regarding notice and the binding effect of the judgment in an action do not include the definite requirements of individual notice included in Rule 23(c)(2) for Rule 23(b)(3) type actions. Instead, Section 1781(d) provides:

If the action is permitted as a class action, the court may direct either party to notify each member of the class of the action. The party required to serve notice may, with the consent of the court, if personal notification is unreasonably expensive or it appears that all members of the class cannot be notified personally, give notice as prescribed herein by publication in accordance with Section 6064 of the Government Code in a newspaper of general circulation in the county in which the transaction occurred.

Thus, in using the procedure outlined in the Consumers Legal Remedies Act, the court has discretion to determine whether notice is to be given,\textsuperscript{137} in what form the notice, if required, is to be given,\textsuperscript{138} if published notice is necessary,\textsuperscript{139} and which party is to bear the burden of the notice costs.\textsuperscript{140}

Even though the United States Supreme Court had not, at the time this statute was enacted, delineated the requirements for notice in Rule 23(b)(3) actions, the mandate of Rule 23(c)(2) directing the court to order individual notice to all members of the class who can be identified through reasonable effort was not adopted by the legislature, although the requirements of Rule 23(c)(2) as to what the notice, if given, must include, were adopted almost verbatim in Section 1781(e).\textsuperscript{141} The legislature's purposes, "to protect consumers against

\textsuperscript{136} FED. R. CIV. PROC. 23(a).
\textsuperscript{137} CAL. CIV. CODE §1781(d).
\textsuperscript{138} CAL. CIV. CODE §1781(d).
\textsuperscript{139} CAL. CIV. CODE §1781(c)(2).
\textsuperscript{140} CAL. CIV. CODE §1781(d).
\textsuperscript{141} FED. R. CIV. PROC. 23(c)(2) reads in part:
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.
unfair and deceptive business practices and to provide efficient and economical procedures to secure such protection," were recognized by the California Supreme Court in *Vasquez v. Superior Court*. These purposes are furthered by allowing discretionary notice and, if notice is found to be required, allowing the court to place the burden of notice on either party.

However, nothing in the Consumers Legal Remedies Act itself dictates when the court should direct notice and, if ordered, when individual notice would be so "unreasonably expensive" as to allow the ordered notice to be by publication. Further, there are no judicially determined guidelines, since the courts have not yet expressly dealt with the issue of when notice to the class may be entirely dispensed with prior to judgment except in cases involving unusual circumstances.

C. Code of Civil Procedure Section 382: Is Notice Required?

In delineating the procedural requirements for class action suits, Section 382 may be considered indicative of the importance of notice and its relationship to the requirement of adequate representation in ensuring due process protection of the interests of absent class members. Nothing in the language of Section 382 refers to notice or any requirements for notice. However, there is the requirement that the question be one of "common or general interest," which would entitle the members of the class who are present to stand in judgment for absent members, since protection is afforded to the absent members by adequate representation. The California Supreme Court's statement in

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*Cal. Civ. Code §1781(e) reads:*

The notice required by subdivision (d) shall include the following:

1. The court will exclude the member notified from the class if he so requests by a specified date.
2. The judgment, whether favorable or not, will include all members who do not request exclusion.
3. Any member who does not request exclusion may, if he desires, enter an appearance through counsel.

*142. Cal. Civ. Code §1760 (emphasis added).*
143. 4 Cal. 3d at 807-08, 484 P.2d at 968-69, 94 Cal. Rptr. at 800-01.
144. Cal. Civ. Code §1781(d). The constitutional difficulties inherent in a proceeding which allows the court to require the defendant to bear the cost of notice prior to a determination of the merits of the suit have already been recognized by the courts. See Cartt v. Superior Court, 50 Cal. App. 3d 960, 974-75, 124 Cal. Rptr. 376, 386 (1975).
146. See Colwell Co. v. Superior Court, 50 Cal. App. 3d 32, 123 Cal. Rptr. 228 (1975). The court held that where the defendant, for nonfrivolous reasons, stipulates to trial of the issue of liability prior to determination of the class action issues, no legal detriment accrues to the class by permitting trial of the issue of liability before the class is notified.
147. *Hansberry v. Lee*, 311 U.S. 32, 43 (1940). When the only circumstance defining the class is that the determination of the rights of its members turns upon a single issue of fact or law, a state [may]
Daar v. Yellow Cab Co.\textsuperscript{148} that Section 382 is based on the doctrine of virtual representation\textsuperscript{149} implies that the court thought that adequate representation, not notice, was of primary importance in determining if the judgment in the action would be res judicata as to absentees as well as parties. This implication is strengthened by the court's exhaustive discussion of the requirement of a common interest, not only in Daar but also in earlier cases in which class action status had been denied because there was not a sufficient community of interest present.\textsuperscript{150} The court's emphasis on this requirement is again very similar to the Hansberry Court's insistence on adequate representation through parties whose interests are joint.\textsuperscript{151} Otherwise, "a selection of representatives . . . whose substantial interests are not necessarily or even probably the same as those whom they are deemed to represent, does not afford that protection to absent parties which due process requires."\textsuperscript{152}

A further indication that the court in Daar was concerned more with adequate representation through identity of interests than with notice as the essential element to ensure that a judgment binding as to absentees would comport with due process is the fact that this court, like the Hansberry Court, did not even mention notice. Instead, the court stated that "[i]f the existence of an ascertainable class has been shown, there is no need to identify its individual members in order to bind all members by the judgment."\textsuperscript{153} If the individual members are not identified prior to a binding judgment, individual notice to such members prior to identification is of course impossible. Nevertheless, the court did not seem concerned with the lack of notice to such persons prior to the judgment, but rather stated that the judgment in the action would be res judicata as to all persons to whom the common questions of law and fact pertained.\textsuperscript{154} Additionally, in dealing with the possibility of a collateral attack on the judgment by an absentee, the court stated that in such a case "a more careful scrutiny of" the action's "representative character may be made in determining whether it is res judicata."\textsuperscript{155} Thus, in the court's consideration of the entire course of the action, from establishing the class through determining who is bound by the

\begin{itemize}
\item \textsuperscript{148} 67 Cal. 2d 695, 433 P.2d 732, 63 Cal. Rptr. 724 (1967).
\item \textsuperscript{149} See text accompanying notes 108-110 supra.
\item \textsuperscript{150} 67 Cal. 2d at 710-11, 433 P.2d at 743-44, 63 Cal. Rptr. at 735-36.
\item \textsuperscript{151} 311 U.S. at 43.
\item \textsuperscript{152} Id. at 45.
\item \textsuperscript{153} Id. at 706, 433 P.2d at 740, 63 Cal. Rptr. at 732.
\item \textsuperscript{154} Id.
\item \textsuperscript{155} Id. (emphasis added).
\end{itemize}
judgment, to and including the possibility of a collateral attack on such judgment by an absentee, adequate representation through an identity of interests is apparently the major due process consideration, rather than notice to absentee class members.

In *Chance v. Superior Court*, an earlier class action brought under Section 382, the court considered the issue of adequacy of representation. The named plaintiffs’ representation of the action was challenged by class members who had filed the same action in the federal district court and wished to proceed there. The California Supreme Court stated that although due process of law may not be fulfilled where individual plaintiffs obtain a judgment on behalf of a class which includes persons whose interests are directly opposite to those of the representative plaintiff, a mere difference of opinion between class members as to the remedy to be sought is not sufficient to destroy the requisite community of interest. The court went on to state that “the essentials of due process of law in class suits would appear to be afforded by fair representation in the assertion of claims of class members against the opposing parties in any lawsuit, and notice of the pending suit.” The notice requirement here, in light of the facts of this case, is arguably related to adequate representation. The court, in its consideration of whether notice was given by a reliable method, stated that notice would give the absent class members an opportunity to decide whether to appear and argue for any and all appropriate or available remedies which they individually desired. This would ensure adequate representation in a class action in which class members may wish to pursue different remedies, although the action itself includes the requisite community of interest to allow adjudication of the liability issues as a class action under Section 382. Thus, despite the consideration of notice in the *Chance* case, the court apparently did not mean to imply that Section 382 itself required notice to fulfill the due process requirements of a class action, but rather that notice would ensure adequate representation in a case where class members wished to pursue different remedies.

The inference from the interpretation of the requirements of Section 382 in *Daar* and *Chance* is that the California courts consider adequate representation, rather than notice, to be the important means of ensuring that due process is afforded to absent members of the class so that

156. 58 Cal. 2d 275, 373 P.2d 849, 23 Cal. Rptr. 761 (1962).
157. *Id.* at 278, 282-83, 373 P.2d at 850, 853, 23 Cal. Rptr. at 762, 765.
158. *Id.* at 289, 373 P.2d at 858, 23 Cal. Rptr. at 769.
159. *Id.* at 290, 373 P.2d at 858, 23 Cal. Rptr. at 770.
160. *Id.*
the judgment may be constitutionally binding as to absentees. This conclusion remains even though the class action in *Daar* would have been a Rule 23(b)(3) type action under the federal rules,\textsuperscript{161} which would require individual notice to all class members ascertainable through reasonable effort had it been brought in the federal courts.\textsuperscript{162}

The *Daar* court did not have the *Eisen* decision to guide it in its consideration of procedural requirements, but it did consider the requirements of Rule 23, and found the requirements of bringing an action under Rules 23(a) and 23(b)(3) to be substantially the same as those for bringing an action under Section 382 of the Code of Civil Procedure.\textsuperscript{163} The court, however, did not take the additional step of considering the express notice requirements of Rule 23(c)(2) for such actions, a step it could have taken to ensure, according to the draftsmen of Rule 23, that due process requirements would be fulfilled,\textsuperscript{164} allowing the judgment to be binding on the entire class. It would be difficult to understand why the court did not consider this issue if in fact it thought adequate representation was insufficient to ensure such an effect.

The focus of the California courts on the requirement of adequate representation rather than notice\textsuperscript{165} as ensuring that due process is afforded to absent members so that the judgment may be binding on them raises the further question of whether adequate representation is assured without notice to the class. If the absent class members would have additional claims against the defendant which would be waived by a binding judgment in the class action including such members, or when the amounts are sufficiently large that individual members would obtain a substantial benefit from the opportunity to determine whether

\textsuperscript{161} The *Daar* court stated that Rule 23 criteria for the maintenance of a class action suit were substantially similar to the court's view of the applicable criteria of Section 382. 67 Cal. 2d at 709, 433 P.2d at 742, 63 Cal. Rptr. at 734. The court then found that under Section 382 there must be "substantial benefits" from the class action to both the court and the litigants, and that the common questions must be "sufficiently important" to permit a class action rather than multiple suits. Id. at 713, 433 P.2d at 745, 63 Cal. Rptr. at 737. This requirement is very similar to the Rule 23(b)(3) requirement that the common questions of law or fact predominate over questions affecting only individual class members, and that the class action be superior to other available methods for the fair and efficient adjudication of the controversy. Fed. R. Civ. Proc. 23(b)(3).


\textsuperscript{163} 67 Cal. 2d at 709, 433 P.2d at 742, 63 Cal. Rptr. at 734; see also Comment, Comments on Vasquez v. Superior Court, 18 U.C.L.A. L. Rev. 1041, 1059-61 (1970-71).

\textsuperscript{164} See 39 F.R.D. 69, 107.

\textsuperscript{165} That notice is not considered indispensible to a California class action is shown by CAL. CT. RULES, Manual for Conduct of Pretrial Proceedings in Class Actions, §427.6, at 19 (1974). "Although as a general rule notice to the class of the pendency of the action shall be ordered, notice to the class is not necessary in all actions, and an order may be made, on motion of a party, dispensing with the requirement that the class be notified of the action." Id.
to appear and argue for additional remedies, representation without notice sufficient to ensure that such members are apprised of the action may not be adequate, even if there is a sufficient community of interests to allow the action to proceed as a class action. However, if the court finds the interests of the representative plaintiff and the absent members to be identical, adequacy of representation may be ensured even without notice to the class. The courts have not delineated any test for determining whether or not the class is adequately represented; rather, a finding that adequate representation is present in a particular case depends upon the circumstances of that case. Thus, if the circumstances in a particular case indicate that there is adequate representation, there is no need to notify the class in order to protect this requirement of due process.

Although the primary due process consideration in a consumer class action in which the individual damages are small would appear to be adequate representation, California trial courts may still feel that in order to constitutionally extend the judgment to absentee class members, those members must have the additional protection of notice to apprise them of their interests and to afford them an opportunity to be heard. However, a preoccupation with ensuring that the judgment is binding on absent class members may result in the “failure of justice” which the class action device under California Code of Civil Procedure Section 382 was designed to prevent.

**IS RES JUDICATA NECESSARY?**

If the principal reason for requiring notice to all members of the class in a consumer class action is that such notice makes a binding judgment possible on all class members and the defendant, the trial court should consider whether adequate representation alone, absent statutory or constitutional requirements to the contrary, is enough without notice to ensure that due process requirements are satisfied so that the judgment may be extended to absentee as well as to parties before the court. The crucial question underlying the whole due process

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167. 58 Cal. 2d at 290, 373 P.2d at 858, 23 Cal. Rptr. at 770.
168. 67 Cal. 2d at 710, 433 P.2d at 743, 63 Cal. Rptr. at 735.
169. This may have been the purpose of the California Legislature in allowing discretionary notice in CAL. CIV. CODE §1781(d), while at the same time requiring that the representative plaintiff adequately and fairly protect the interests of the class, in §1781(b)(4).
170. 67 Cal. 2d at 703-04, 433 P.2d at 738-39, 63 Cal. Rptr. at 730-31.
problem is, however, whether the trial court must require the assurance that the judgment will be res judicata to the entire class as a prerequisite to the maintenance of the action as a class action.

In dealing with this question, the California courts have come to conflicting results. In *Home Savings v. Superior Court*\(^\text{172}\) the Second Division of the Second District Court of Appeal stated that aside from the recognized use of notice as a method of protecting the class by ensuring adequate representation, the defendant in a class action suit is entitled to a judgment that will be meaningful.\(^\text{173}\) Otherwise, the defendant in an action in which the entire plaintiff class was not given notice would be subject to further suits by class members who were neither parties nor notified by parties in the first suit.\(^\text{174}\) The circumstances of the *Home Savings* case could be distinguished, however, from circumstances likely to be present in a typical consumer class action. In *Home Savings*, there were seven other comparable class action suits seeking damages for allegedly illegal late charges already pending against the defendant. Further, the individual damages sought by the named plaintiffs alone were $530.88, plus interest.\(^\text{175}\) Where individual damages are more than *de minimis*, the individual class members are more likely to litigate in order to recover such damages, and the threat of multiplicity of litigation is a possibility which should be considered by the trial court in determining whether or not assurance of a res judicata effect of judgment is a necessary pre-requisite to maintenance of the class suit.\(^\text{176}\)

In a typical consumer class action, however, where individual damages are *de minimis*, and the goals of deterring illegal practices by the defendant and securing redress to the class as a whole would be best served by a class action suit, the later argument of the Fifth Division of the Second District Court of Appeal in *Cartt v. Superior Court*\(^\text{177}\) is much more persuasive.\(^\text{178}\) In *Cartt*, the court maintained that a defendant who has victimized hundreds of thousands of class members has no constitutional right to be subjected to only one lawsuit,\(^\text{179}\) and further, that the court is not required to assure such defend-

\(^{173}\) Id. at 1012, 117 Cal. Rptr. at 488.
\(^{174}\) Id. at 1014, 117 Cal. Rptr. at 490.
\(^{175}\) Id. at 1008-09, 117 Cal. Rptr. at 486.
\(^{178}\) The Fifth Division of the Second District Court of Appeal has recently reiterated this argument. See Cooper v. American Sav. & Loan Ass'n, 55 Cal. App. 3d 274, 284-85, 127 Cal. Rptr. 579, 585 (1976).
\(^{179}\) 50 Cal. App. 3d at 968, 124 Cal. Rptr. at 381-82.
ant that the class action will not proceed unless the defendant can be reassured in advance that, if he is successful, all class members will be foreclosed by the judgment. Rather, the interest being protected by the res judicata effect of the judgment is the integrity and purposes of the class action device itself, as an instrument for redress of small individual damages, as a method of deterrence and punishment for fraudulent practices inflicted on consumers, and as a method of ensuring for practical purposes that the court will not be inundated with a multiplicity of suits arising from the same transaction.

The court in Cant weighed the economic realities of requiring individual notice against the benefits of allowing the class action suit to proceed, and recognized that case law in California has indicated that such class actions should be permitted "where the economic realities involved in giving 'adequate' notice, compared to the small individual losses of class members, would effectively negate any class action." The court suggested that in such a case a distinction could be made between the maintenance of the suit and the binding effect of its judgment on absent parties. If the judgment resulting from the class action is later attacked by an absent party, at that time "a more careful scrutiny of its representative character may be made in determining whether it is res judicata."

The court's rationale in this case assumed, arguendo, that the definition of notice requirements in Eisen was based on constitutional requirements of ensuring that the judgment be binding on all class members. The court went further, however, and drew a distinction between settling the action for all practical purposes and settling it for theoretical purposes. In the typical consumer class action, in which the individual damages of each class member are de minimis, the remote theoretical possibility that a class member with such de minimis damages will bring another suit if not bound by individual notice in the class action is far outweighed by the benefits to be obtained through the use of the class action device in such situations.

180. Id. at 968, 124 Cal. Rptr. at 381.
181. Id.
182. Id. at 971, 124 Cal. Rptr. at 384.
183. Id.
184. Id.
185. Id. at 968, 124 Cal. Rptr. at 381.
186. Id. at 968, 124 Cal. Rptr. at 381-82.
187. See id. at 973, 124 Cal. Rptr. at 385.
188. Id. at 969, 124 Cal. Rptr. at 382; Cooper v. American Sav. & Loan Ass'n, 55 Cal. App. 3d at 284-85, 127 Cal. Rptr. at 385.
189. See Vasquez v. Superior Court, 4 Cal. 3d 800, 808, 484 P.2d 964, 968-69, 94 Cal. Rptr. 796, 800-01 (1971); see also text accompanying note 5 supra.
Thus, in a class action suit in which the plaintiff class is successful, class members who did not receive individual notice and who bring a later action, claiming they were not bound by the original judgment, may assert the doctrine of collateral estoppel on the issue of liability against the defendant, who in the original complaint would have been apprised of the extent of his potential liability by the definition of the entire class. Further, class members bringing a later suit would have the benefit of the practical effect of *stare decisis* to the extent that the facts in the later case are substantially the same as those in the former case and the same issue is in controversy. If the defendant were successful against the class, the possibility that he would be subjected to further suits by class members claiming they were not bound by the original judgment is extremely small. Therefore, in a case in which individual damages are slight, the trial court, in determining whether the action should proceed if individual notice is economically impossible, need not focus on “what, as a practical matter, may be the least important of the factors which will discourage future litigation: the res judicata effect of the pending action on particular class members surfacing after this case is history.” On the other hand, if the damages per individual member are large:

- class members . . . [are] much less likely to abandon their claims,
- and, absent personal notice to assure that the matter would be res judicata to the remaining class members, any advantages in the class action mechanism would be negatived by the likelihood that the issue would surface again.

In a class action in which the class members’ individual damages are


191. 50 Cal. App. 3d at 969, 124 Cal. Rptr. at 382.


194. 50 Cal. App. 3d at 970, 124 Cal. Rptr. at 383.

195. Id. at 972, 124 Cal. Rptr. at 385.
insufficient to threaten further litigation if the entire class is not bound by individual notice, the practical effect of the judgment may have been a factor which the legislature intended the courts to consider in determining whether personal notification is unreasonably expensive.\textsuperscript{196} If the individual damages do not merit the expense of individual litigation, and the cost of individual notice is so great that it would preclude the action being brought as a class action, individual notice may be considered unreasonably expensive.\textsuperscript{197} Section 1781(g) permits the judgment to bind absentee class members in cases in which individual notice is not given, and even in cases in which no notice at all is given. This section describes the judgment in such an action as including not only those to whom notice was directed and who have not requested exclusion, but also those whom the court finds to be members of the class.\textsuperscript{198}

If no notice is given to the class, the fluid recovery scheme implemented in \textit{Daar} is a method of solving the problem of notification if the class is huge, ascertainable, but unidentified, and the class members are repeating consumers of the defendant. In \textit{Daar}, the class was ascertainable but unidentifiable (taxicab users within a certain defined period of time), and the court stated that “no one may recover his separate damages until he comes forward, identifies himself and proves the amount thereof.”\textsuperscript{199} In order to return the benefits of the class

\begin{footnotesize}
\textsuperscript{196} CAL. CIV. CODE §1781(d) is admittedly ambiguous. In a literal reading of a statement within that section that “the court may direct either party to notify each member of the class,” the argument could be made that notice is required, and the court's discretion extends only to determining which party shall be required to give such notice. However, the “California Supreme Court's positive and encouraging attitude towards consumer class actions,” 50 Cal. App. 3d at 966, 124 Cal. Rptr. at 380, and the stated intent of the legislature in drafting the Consumers Legal Remedies Act “to provide affirmative remedies for consumers which will protect them from unscrupulous business practices... by providing the consumer with a lawsuit for himself or on behalf of all other similarly situated consumers,” Reed, \textit{Legislating for the Consumer: An Insider's Analysis of the Consumers Legal Remedies Act}, 2 Pac. L.J. 1, 25 (1971), are strong support for the view that the legislature had no intention of locking class action courts into the framework of required notice in class action cases in which such notice requirement would effectively kill the class action as a remedy.


\textsuperscript{198} CAL. CIV. CODE §1781(g).

\textsuperscript{199} If notice is not required in any form prior to judgment, a conflict arises within Section 1781 itself. CAL. CIV. CODE §1781(g) requires that "The best possible notice of judgment shall be given in such manner as the court directs to each member who was personally served with notice pursuant to subdivision (d) and did not request exclusion" (emphasis added). What if no class members were served with personal notice, or notice were dispensed with prior to judgment? To whom is the notice of judgment to be given in such case; and should such notice be ordered if it will, in effect, consume a disproportionate amount of the final recovery? The fluid recovery device could be used to reimburse unidentified repeating consumer class members even without notice to such members of the judgment, after claims of identifiable members who come forward and prove the amount of their damages are satisfied. The possibility that the costs of identifying and notifying all class members of the judgment will unreasonably diminish the amount of the recovery would also be avoided.

\textsuperscript{199} 67 Cal. 2d at 706, 433 P.2d at 740, 63 Cal. Rptr. at 732.
\end{footnotesize}
recovery to unidentifiable but repeating users, a fluid recovery scheme was used. The parties reached an out-of-court settlement of $1.4 million, of which $950,000 was to be returned to the class by a reduction of taxicab fares below the then existing maximum authorized fares. The defendants agreed to reduce fares in a minimum of $95,000 annually until the total fare reduction was completed. The plaintiff recommended this form of recovery because it was feared that the cost of administering and supervising claims would consume a disproportionate amount of the money recovered in judgment.

The fluid recovery device has also been used on the federal level. Although the Second Circuit has decided that the fluid recovery device is "illegal, inadmissible as a solution of the manageability problems of class actions and wholly improper," the Supreme Court has not yet determined this issue.

The fluid recovery device provides a method of recovery for class members who are repeating consumers of the defendant, thereby fulfilling one of the beneficial purposes of the class action suit even without notice. With such devices available to the trial court, as well as the requirement that the representation of absent class members' interests by the named class members be adequate, protection of the interests of consumer class members with small individual damages is assured for all practical purposes. To secure the additional benefits of a class action suit, including the reduction of multiplicity of litigation as a danger to the courts and a threat to the defendant, the best protection the class action court can grant is "to give itself reasonable assurance that under all of the circumstances that may prevail in the future . . . renewed harassment is nothing but a remote theoretical possibility."
CONCLUSION

Resolution of the tension between the due process requirements sufficient to ensure the res judicata effect of a class action judgment and the maintenance of the consumer class action to redress minor individual injuries caused to large groups of people by the wrongful acts of the defendant obviously does not lend itself to the procedural strait-jacket of legislation. That "danger lies in the rigidity of a detailed rule" has been shown by the inflexible notice requirement for Rule 23(b)(3) actions contained in Rule 23(c)(2), and interpreted by the United States Supreme Court in Eisen. The inflexibility of such a procedure, although it does indeed ensure that the judgment will be res judicata to those class members receiving individual notice who do not request exclusion, has the effect of thwarting the primary purpose of the class action device as an equitable means to further the legitimate interests of the court and the parties in reducing the multiplicity of litigation by allowing a forum for the determination of small claims which do not lend themselves to individual litigation.

On the other hand, the present statutory authority for class actions in California, while reflecting the flexibility urged by the California Supreme Court, lacks definitive guidelines for the court to adopt in determining the procedural requirements of a class action suit. Thus, in dealing with consumer class actions, the courts must continually maintain a delicate balance between the public interest in reducing multiplicity of litigation, the defendant's interest in binding the entire class so as to avoid the harassment of further suits, and the plaintiffs' interest in recovery of their damages and punishment of the defendant by retrieving from the wrongdoer all his ill-gotten gains.

Perhaps the basic question which must be asked in all such cases is: "For whose benefit is the notice to be given?" Although the immediate answer is "For the benefit of all parties and the court, by ensuring that the judgment will be binding on the entire class," the problem reaches deeper than that. Surely notice is not intended to be what it has become in the federal courts: a weapon the defendant can use against the class action to effectively destroy it at the moment it is classified as a Rule 23(b)(3) type action. There is, furthermore, something inconsistent in allowing the defendant to assert the rights of absent class members to receive individual notice. Individual notice to all class members can only strengthen the representative plaintiff's

206. Moore, supra note 23, at 571.
207. 417 U.S. at 175; see text accompanying notes 44-50 supra.
208. See text accompanying note 145 supra.
case against the defendant, not only by ensuring that the judgment binds all class members, but also by ensuring that adequate representation of all facets of the issues to be litigated is present. Thus, the absentees may come forward with further claims against the defendant which, as long as such questions of law or fact are common to the class, may be presented by the representative plaintiff. There is also the possibility of unfavorable publicity for the defendant if individual notice is ordered, as shown by the recent Second District Court of Appeal case of Colwell Company v. Superior Court,209 in which the defendant stipulated to a trial of the issue of liability prior to notice to the class, for fear that notice of the impending action would encourage the class members to withhold payments to the defendant.210

The only legal benefit accruing to the defendant by requiring individual notice to all class members is the assurance that the judgment will be binding on the entire class, assuming that such action can proceed at all in the face of the expense of such notice. However, as the court stated in Cartt, nothing prevents the defendant from giving notice at his own expense, and if the defendant is "sincerely troubled about the res judicata effect of this litigation, it should be permitted to buy as much protection against future claimants as it thinks it needs."211

The interests of the state in providing a forum for its citizens, and the interest of the plaintiffs in obtaining redress for individually minor injuries involving complex legal issues, must also be considered in determining the notice requirements. The Mullane Court's balancing of the "interests of the State in bringing any issues as to its fiduciaries to a final settlement" against the individual interest to be protected by due process212 could be considered here. The protection of the interests of absentee class members is vital to the continuing usefulness of the class action device. The most obvious method of protecting absentee class members' interests is by requiring individual notice to the class members as a prerequisite to that suit.213 As the United States Supreme Court has noted,214 "[t]he fundamental requisite of due process of law is the opportunity to be heard."215 Further, "[t]his right to be heard has little reality or worth unless one is informed that the matter is pending and can choose for himself whether to appear or

209. 50 Cal. App. 3d 32, 123 Cal. Rptr. 228 (1975).
210. Id. at 34, 123 Cal. Rptr. at 228-29.
211. 50 Cal. App. 3d at 974, 124 Cal. Rptr. at 386.
212. 339 U.S. at 313-14.
215. Id. at 394.
default, acquiesce or contest.”

However, if the class member is deprived of any hearing at all because the class action device is economically infeasible due to the requirement of individual notice, and the claims of the individual member, though possibility meritorious, are not suited to an expensive individual litigation, surely this is also an effective deprivation of “the opportunity to be heard.”

To avoid depriving the consumer class of any hearing at all by imposing a financially impossible burden of individual notice upon the representative plaintiff, the trial court should consider the possibility that adequate representation, rather than individual notice, is sufficient to guarantee protection of the interests of absentee class members. There are statutory safeguards to this theory: Civil Code Section 1781(c) gives the court the authority, upon motion of any party to the action, to hold a hearing to determine if the prerequisites of maintaining a class action are present. If the court determines that the claim presented by the named plaintiffs is possibly prejudicial to the interests of the class as a whole, or if it feels individual class members may have additional claims which are still common to the class, the court has

217. 234 U.S at 394.
218. If the class action device is not used, the problems in the area of mass consumer claimants against a single defendant will not disappear. For example, if an individual consumer plaintiff sues a defendant for recovery of his individual damages, he may also recover punitive damages by showing a course of conduct sufficient to support the allegations of fraud. By showing a similar course of conduct by the defendant’s actions towards other consumers, the plaintiff is in effect outlining the class by showing an ascertainable class and a community of interest—the present requirements for defining a class sufficient to support a class action. If the plaintiff succeeds in his recovery of punitive damages, as well as his individual damages, he may be considered to have recovered from the defendant all the ill-gotten gains of the illegal activity perpetrated upon the class by the defendant. Therefore, when the next plaintiff in the class seeks recovery from the defendant of his own individual damages and, again, punitive damages, the problem of the punitive damages recovered by the first plaintiff arises. If those punitive damages were intended as a means of recovery by the plaintiff of all the fraudulent proceeds of the defendant’s illegal conduct, should the second plaintiff also be allowed to recover punitive damages against the defendant when, in effect, the defendant has already been forced to give up his proceeds? If not, the second plaintiff’s individual damages, as is more than possible in a consumer fraud action, may be insufficient to support an individual litigation, and thus none of the remaining plaintiffs will be able to recover even their individual damages from the defendant. On the other hand, if the second plaintiff can recover punitive damages from the defendant by again showing a similar course of conduct towards the other “class” members, this would in effect punish the defendant twice for the same series of transactions, which is beyond the scope and purpose of punitive damages.

219. CAL. CODE CIV. PROC. §382 requires that there be an ascertainable class and a well-defined community of interest among class members; see text accompanying notes 104-105 supra. See text accompanying notes 135-136 for the requirements of a class action under CAL. CODE §1781(b).
220. See CAL. CT. RULES, Manual for Conduct of Pretrial Proceedings in Class Actions, §427.6(a), at 20 (1974). In the hearing to determine whether notice is to be ordered, the Manual allows consideration of the merits of the action only if relevant to the issue of whether or not notice is to be given except for consumer class actions brought under the Consumers Legal Remedies Act, CAL. CODE §1750 et seq. In a consumer class action, the Manual requires that the hearing procedures of CAL. CIV.
the power to order notice as a means of ensuring that the representation is adequate. If the court determines that notice should be required to ensure adequate representation, as in Mullane, Section 1781(d) gives the court the discretion to order personal notification or notice by publication. In a consumer class action suit in which the class is huge, the possibility that notice by publication will reach class members representative of all views within the class is increased, allowing interested members to present their views concerning the prosecution of the suit, while keeping the expense of the action manageable.

If the court allows the suit to proceed to trial on the merits without notice to the class, and binds the entire class by the resulting judgment, in the unlikely event that a class member with *de minimis* damages wishes to sue separately for his claim, he may raise the issue of lack of notice or adequate representation in a later proceeding to attack the binding effect of the judgment. Two of the major purposes of the class action device would still have been accomplished, insofar as the action would have served as a method of deterring and punishing the defendant by recovering from him the gains of his illegal activity, and as a method of obtaining redress for injuries to numerous small claimants. Also, the possibility that a class member will bring a later suit if not personally notified in the prior suit is so remote that for all practical purposes the third major benefit, reduction of numerous suits arising from the same act, can be said to have been achieved.

The possibility of foreclosing the class member's right to conduct his own suit by extending the judgment to such a member without notice

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Code §1781(c)(3) be followed. This section allows the court to consider whether or not the action is without merit or whether there is any defense to the action, without limiting such considerations to the issue of notice.

221. Scott v. City of Indian Wells, 6 Cal. 3d 541, 550, 492 P.2d 1137, 1142, 99 Cal. Rptr. 745, 750 (1972). "Should the court conclude that the named plaintiffs may not adequately represent the class, it should afford them an opportunity to amend their complaint to redefine the class or to add new individual plaintiffs."

222. The court in Cartt v. Superior Court suggests that if notice by publication is ordered, it should be "meaningful" notice which would have a "reasonable chance of reaching a substantial percentage of the class members who do not while away their spare time by browsing among fictitious name statements and notices of trustees sales." 50 Cal. App. 3d at 974, 124 Cal. Rptr. at 386.


224. Notice by publication has been found to be sufficient in a consumer class action in which the class is huge and damages are *de minimis*. Cooper v. American Sav. & Loan Ass'n, 55 Cal. App. 3d 274, 285, 127 Cal. Rptr. 579, 585 (1976).

225. Hansberry v. Lee, 311 U.S. 32, 42 (1940). In a class suit, "the considerations which may induce a court . . . to proceed, despite a technical defect of parties, may differ from those which must be taken into account in determining whether the absent parties are bound by the decree . . . ."

may be theoretically unacceptable to some, even though this right is, as a practical matter, almost useless to the consumer who cannot afford an expensive individual litigation to recover *de minimis* damages. Therefore, if it is determined that some form of notice, as well as adequate representation, is constitutionally required before the judgment may be extended to bind the entire class, the trial court should consider whether the requirement that the judgment be binding on the entire class should be a prerequisite to the bringing of the class action suit. The possibility that class members with minimal individual damages will desire to sue separately must be balanced against the possibility that, absent a class action, the defendant will retain the benefits of his illegal activity and there will be no redress for the class as a whole.

The continuing viability of the class action device as a means of consumer protection for those financially unable to obtain any other method of redress, as well as a punitive and preventive device against past and future injuries to consumers, requires the court to view the class action not as a rigidly structured procedure, bound by requirements which only the economically powerful can fulfill. Rather, it should be viewed as a practical, equitable means of controlling deceptive, fraudulent, and illegal business practices inflicted upon a group which includes all society—consumers—and which has no other weapon as effective or as feasible at hand. A rigid requirement that the judgment resulting from the class action be binding on all class members, when such a requirement may not only put the class action out of the financial reach of the injured class but may also be totally unnecessary from a practical viewpoint, would make the most effective legal remedy the small claimant has almost useless. The greater requirement is, instead, for "a system of law that dispenses justice to the lowly as well as to those liberally endowed with power and wealth."\(^2\)

*Charlotte E. Hemker-Smith*