Judicial Protection for the Consumer: Vasquez v. Superior Court

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JUDICIAL PROTECTION FOR THE CONSUMER:
VASQUEZ v. SUPERIOR COURT

In Vasquez v. Superior Court1 California's requirements for a
class action were substantially eased, making the state's position among
the most liberal in the nation.2 The supreme court, under the provi-
sions of the Code of Civil Procedure section 382,3 allowed for the first
time a class action in a consumer fraud case, thus placing California
in substantial agreement with federal decisions under the Federal Rules
of Civil Procedure.4

The court considered the effect of the recently enacted Consumers Legal Remedies Act,5 intended to allow individual and class actions
for consumer fraud, on the Vasquez decision.6 Although the court's
resolution of this crucial issue is unclear, it is reasonable to conclude

1. 4 Cal. 3d 800, 484 P.2d 964, 94 Cal. Rptr. 796 (1971).
2. Of the other states, only a twenty year old Illinois decision seems to have
allowed a consumer class action for fraud. See Kimbrough v. Parker, 344 Ill. App.
483, 101 N.E.2d 617 (1951). Many states, on the other hand, have rejected such a
class action. See, e.g., Spear v. H.V. Greene Co., 246 Mass. 259, 140 N.E. 795 (1923);
Freeman v. State-Wide Carpet Distr., Inc., 365 Mich. 313, 112 N.W.2d 439 (1961);
Hall v. Coburn Corp. of America, 26 N.Y.2d 396, 259 N.E.2d 720, 311 N.Y.S.2d 281
(1970); Davies v. Columbia Gas & Elec. Corp., 151 Ohio St. 417, 86 N.E.2d 603
(1949).
244, § 12, at 406 (West Cal. Legis. Serv.). The text of the section dealing with the
class action was not altered by the amendment. The relevant portion of the section
may be found in the text accompanying note 36 infra.
4. FED. R. CIV. P. 23. See note 76 infra for a discussion of the federal cases
concerning class actions based on fraud. In Snyder v. Harris, 394 U.S. 332 (1969), the
Supreme Court interpreted rule 23 to prohibit the aggregation of claims to reach the
$10,000 minimum amount, effectively prohibiting consumer fraud class actions even if
the other jurisdictional requirements are met. Although federal class actions may no
longer be brought under this ruling in the average consumer fraud case, past decisions
under rule 23 are helpful as regards current guidelines in the state courts. Snyder did
not prohibit all federal class actions, however, and such actions may still be brought in
such instances as the redress of racial discrimination, securities fraud cases, or other
federal question cases where no amount is required. See 2 C. WRIGHT, LAW OF FED-
ERAL COURTS § 72, at 315-17 (2d ed. 1970).
5. CAL. CIV. CODE §§ 1750-56, 1760-61, 1770, 1780-84 (West Supp. 1971)
(originally enacted as Cal. Stat. 1970, ch. 1550, § 1, at 3157). During the same
session of the California legislature the Consumer Credit Reporting Act, comprising
References in this note to the California Civil Code are exclusively to the Consumers
Legal Remedies Act.
that the court has restricted the application of the act in consumer class actions in such a way as to protect the liberalized guidelines set forth in *Vasquez* from the limitations of the act.\textsuperscript{7}

Also significant in *Vasquez* is that for the first time in California a court held that a contract could be rescinded against a finance company assignee who had only constructive notice of the seller's fraud. The decision extends the application in California of the "close connection" rule which holds the financier accountable for the actions of the seller if they have had sufficient and continuing contact.\textsuperscript{8} Although constructive notice has previously been applied to prevent the collection of finance charges under an installment contract, rescission of the entire contract had not previously been allowed.\textsuperscript{9}

This note will explore certain aspects of the *Vasquez* decision and their relation to consumer fraud class actions generally. First, the liberalized class action rules set forth by the court will be discussed.\textsuperscript{10} This will be followed by an analysis of the effect of the new Consumers Legal Remedies Act on the *Vasquez* opinion.\textsuperscript{11} The third aspect of the opinion to be examined will be the approval of the remedy of rescission of contracts against assignee finance companies in consumer fraud cases where a constructive "close connection" is proved between the finance company and the original seller.\textsuperscript{12}

**Vasquez and the Class Action**

The plaintiffs, who eventually numbered thirty-seven, were residents of San Joaquin and Stanislaus Counties. They sought rescission in the superior court of San Joaquin County of food and freezer purchase agreements entered into with a food processor. Separate contract documents were executed for the freezers and the long-term food packages when the purchase agreements were entered into with the food processor. These contracts were then assigned by the processor to three finance companies; the food processor and the three finance companies were named as defendants in the class action brought on the contracts.\textsuperscript{13}

The first cause of action alleged a class action for fraud, contend-

\textsuperscript{7} See notes 98-101 and accompanying text *infra*.
\textsuperscript{8} See notes 109-49 and accompanying text *infra*.
\textsuperscript{9} See notes 115-23 and accompanying text *infra*.
\textsuperscript{10} See notes 13-77 and accompanying text *infra*.
\textsuperscript{11} See notes 78-108 and accompanying text *infra*.
\textsuperscript{12} See notes 109-49 and accompanying text *infra*.
\textsuperscript{13} This note will, for reasons of clarity, follow the pattern of Justice Mosk's opinion, and refer to "defendants" who are real parties in interest in the trial court—the finance companies—as defendants. "Plaintiffs" will designate both named plaintiffs and anonymous class members, both of whom seem to total about 200.
ing that the costs of the food and freezer were grossly inflated. The trial court upheld the defendant's demurrer to the class action aspect of the fraud count on the basis that class actions for fraud could not be maintained by consumers. A second cause of action alleged a class action for rescission of the contracts on the grounds that the food processor required separate documents in each transaction, thereby violating the Unruh Act; the trial court overruled the demurrers of the defendants as to this cause of action. The case came before the court when the plaintiffs sought a writ of mandate to compel the trial court to allow them to proceed to try the cause of action for fraud as a class action.

The defendants contended that mandate was inappropriate because the plaintiffs had adequate remedies available to them through appeal. The court met this contention by pointing out that "piece-meal" disposition of a case was contrary to previous California decisions. Moreover, when all the causes of action in the complaint have a single object, as they did in Vasquez, no appeal may be taken from a dismissal of one count only because the holding was not a final judgment. Since an appeal may be taken only from a final judgment, the court considered the plaintiff's petition for a writ of mandate appropriate.

The class action allows a representative suit by one or more individuals afflicted by a similar complaint, but too many in number to feasibly be united in a single action. Typically, the class injured has suffered small individual losses, and separate actions would be unfeasible because of the costs of bringing the suit. Class actions are also valuable because they may eliminate injustices eventuated by the inability of governmental authorities to control the numerous instances

14. 4 Cal. 3d at 805-06, 484 P.2d at 967, 94 Cal. Rptr. at 799.
16. 4 Cal. 3d at 806, 484 P.2d at 967, 94 Cal. Rptr. at 799.
17. Id.
18. See, e.g., Bank of America v. Superior Court, 20 Cal. 2d 697, 701, 128 P.2d 357, 360 (1942); Mather v. Mather, 5 Cal. 2d 617, 55 P.2d 1174 (1936). A writ of mandate may be issued by an appellate court directing action to be taken, or disposition to be made of a case, by an inferior court. CAL. CODE CIV. PROC. § 1085 (West 1955).
21. 4 Cal. 3d at 807, 484 P.2d at 968, 94 Cal. Rptr. at 800.
22. In California, the class action is statutorily authorized by CAL. CODE CIV. PROC. § 382 (West 1954). See text accompanying note 36 infra for the text of the section.
of consumer fraud, and judicial efficiency is promoted due to the fact that the judgment is res judicata as to all members of the class, thereby avoiding a multiplicity of lawsuits.

The binding effect of the class action, however, is a two-edged sword. Absent class members represented in the lawsuit may be unintentionally harmed either by inept representation or, as has happened, by collusive agreements between the opponent and the in-court representative on the class. Such possibilities of abuse or inequity have led the court in past decisions to establish certain requirements before a class action may be brought under Code of Civil Procedure section 382. First, "there must be an ascertainable class," and second, "there must be a well-defined community of interest in the questions of law and fact affecting the parties to be represented.

The standard to be met in determining the ascertainable class requirement has been liberally construed in Daar v. Yellow Cab Co., where the court allowed a class action by taxicab patrons who had been systematically overcharged—a class without independent significance. In Daar some of the passengers had script books which recorded their travels, but the court did not limit the class to this group. Instead, the class was also extended to those patrons who rode Yellow Cabs on limited occasions, provided only that they could establish their presence to the satisfaction of the trial court. Daar thus weakened the necessity for a clearly ascertainable class.

24. See 4 Cal. 3d at 817 n.14, 484 P.2d at 974 n.14, 94 Cal. Rptr. at 806 n.14.
26. An example of such agreement may be found in Hansberry v. Lee, 311 U.S. 32 (1940). In Hansberry, however, the collusion was so extreme that the Supreme Court reversed the Illinois court and found no res judicata effect, since to allow it would have violated the due process clause.
29. E.g., Chance v. Superior Court, 58 Cal. 2d 275, 290, 373 P.2d 849, 858, 23 Cal. Rptr. 761, 770 (1962); Weaver v. Pasadena Tournament of Roses Ass'n, 32 Cal. 2d 833, 842-43, 198 P.2d 514, 520 (1948).
32. Id. at 706, 433 P.2d at 740, 63 Cal. Rptr. at 732.
33. "[W]hether there is an ascertainable class depends in turn upon the community of interest among the class members in the questions of law and fact involved." Id.; accord, Gerhard v. Stephens, 68 Cal. 2d 864, 912, 442 P.2d 692, 728, 69 Cal. Rptr. 612, 648 (1968). For an argument that the ascertainable class requirement has fully
The court did not even discuss the "ascertainable class" issue in Vasquez, except to state that there was no problem in this regard, since the members on the class would be readily identifiable through the defendant's business records coupled with the fact that they would be residents of Stanislaus and San Joaquin counties. Although the Vasquez decision continued to make the distinction between the "ascertainable class" and "community of interest" requirements, it now seems clear that they have become closely entwined in California.

The key question in a class action under section 382, then, is whether there is the requisite community of interest among the members of the class. Section 382, which formed the basis for the class action in Vasquez, provides:

 André 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.

Prior to Weaver v. Pasadena Tournament of Roses Association, the "community of interest" requirement was satisfied only where the potential class in question was so similar in interest as to be wholly comprised of "necessary parties"—identified parties who could have brought suit on their own behalf. In Weaver a class action was brought on behalf of individuals who waited in line after being promised tickets to the Rose Bowl but were unable to purchase them because the tickets had been distributed elsewhere. Weaver liberalized the class action requirements by throwing out the "necessary party" limitation, holding that to limit class actions to necessary parties would emasculate section 382. The decision held, however, that since the causes of action of the several plaintiffs were separate and distinct, a decision favorable or adverse to any of the named plaintiffs could not merged with the community of interest requirement see The Supreme Court of California, 1967-1968, 56 Calif. L. Rev. 1612, 1641 (1968), which states: "Daar thus pushes this emasculation of the supposedly independent ascertainable class requirement to its conclusion by explicitly rejecting the notion that the members of the class must be known or identifiable at the time the suit is brought."

34. 4 Cal. 3d at 811, 484 P.2d at 970, 94 Cal. Rptr. at 802.
35. Though the requirement of an "ascertainable class" has been weakened by Daar, see note 33 supra, the existence of the class must always be established. This would, however, generally be accomplished as a result of the "community of interest" allegations. Daar v. Yellow Cab Co., 67 Cal. 2d 695, 706, 433 P.2d 732, 740, 63 Cal. Rptr. 724, 732 (1967).
37. 32 Cal. 2d 833, 198 P.2d 514 (1948).
determine the rights of the absent members of the class, and the class action was denied.\footnote{39}

The impact of the \textit{Weaver} decision was unclear. The court cited so many items of proof as being "individual" in nature\footnote{40} that at least one writer has contended that the elimination of the necessary party requirement was counteracted by the obscure reasoning presented by the court.\footnote{41} In effect, the requirements for a class action remained muddled.

\textit{Daar v. Yellow Cab Co.}\footnote{42} markedly clarified the confusion, and posited two other criteria for deciding whether a class action was appropriate. First, the court had to decide whether or not each person's right to recover was separate and distinct from that of his fellow class members.\footnote{43} If the issues were not separate and distinct, then the court would also have to balance the importance of hearing the issues in a large number of individual suits with the appropriateness of adjudication in a single class action.\footnote{44} \textit{Daar} did not require that \textit{all} issues be resolvable in the class action. It is sufficient, under the \textit{Daar} holding, that there are sufficiently important "common questions" to justify a class action,\footnote{45} and the class action will only be \textit{res judicata} as to the common questions decided.\footnote{46}

Although \textit{Daar} did not involve fraudulent misrepresentations, \textit{Vasquez} held that \textit{Daar}'s principles were controlling in determining whether the class action was "an appropriate vehicle to resolve a claim based upon such misrepresentations."\footnote{47} \textit{Vasquez} also employed \textit{Daar}'s discussion of previous California decisions—notably \textit{Weaver}—to distinguish the "markedly dissimilar" facts of those cases.\footnote{48}

The court specifically discussed the case of \textit{Slakey Brothers Sacramento, Inc. v. Parker}\footnote{49} in which creditors of an insolvent subdivider had brought a class action alleging that the defendant had concealed the subdivider's financial difficulties. In that case, the class action was

\begin{itemize}
\item \textit{Slakey Brothers Sacramento, Inc. v. Parker}\footnote{49}
\item \textit{Daar v. Yellow Cab Co.}\footnote{42}
\item \textit{Vasquez}\footnote{47}
\item \textit{Weaver}\footnote{40}
\item \textit{Daar}\footnote{43}
\item \textit{Id.}\footnote{44}
\item \textit{Id.}\footnote{45}
\item \textit{Id.}\footnote{46}
\item \textit{Id.}\footnote{47}
\item \textit{Id.}\footnote{48}
\end{itemize}
denied on the basis that there could be no community of interest due to the fact that the representations to creditors had been made in so many different ways, and on these grounds, Slakey Brothers was distinguished in Vasquez.

Actions for consumer fraud are of course brought against the background of the ordinary commercial sales transaction. In this sort of business dealing, it is inevitable that each sale is an individual transaction, conducted with different customers on different days, often with merchandise differing in many aspects from sale to sale. Each customer also makes a purchase as a result of an individual motivation, and may have relied on separate portions of the sales representation. As such, these transactions have in the past been labeled "separate and distinct," resulting in a lack of the requisite community of interest among the defrauded consumers.

Plaintiffs in Vasquez seized on the matter of the representations which had been made to the consumer as the entering wedge and alleged that common misrepresentations had been made to consumers by the food processor in that the freezers and food packages were sold by salesmen who were reciting by rote from a memorized sales manual. The representations made to each customer were thus essentially the same. Since the plaintiffs alleged fraud, the court discussed the matter of community of interest in that frame of reference, noting the requisite elements in establishing fraud: a false representation made with knowledge of its falsity and with the requisite intent that it be relied upon and reasonable reliance in fact upon the representation with resulting damages.

Defendants argued that each case was so distinct that no class action could legitimately resolve the issue. For example, the food packages were purported to last seven months. Therefore, argued the de-

50. In Slakey Bros. the class members were relatively well-to-do businessmen with, presumably, adequate resources to finance litigation. The claims in that case ranged up to $81,840. Furthermore, misrepresentations were made to the alleged class as a group, some to public officers, and still others to only portions of the group. The Vasquez decision notes that "the alleged misrepresentations were in form and mode of communication so varied as to 'exhaust the legal possibilities.'" 4 Cal. 3d at 819, 484 P.2d at 976, 94 Cal. Rptr. at 808.

51. 4 Cal. 3d at 819, 484 P.2d at 976, 94 Cal. Rptr. at 808.

52. For a general discussion of these reasons, and a statement that class suits for rescission of contracts are unlikely, see Annot., 114 A.L.R. 1015, 1016 (1938). Vasquez specifically repudiated the "33-year-old categorical pronouncement" of the A.L.R. by allowing the class action. 4 Cal. 3d at 820 n.17, 484 P.2d at 977 n.17, 94 Cal. Rptr. at 809 n.17.

53. 4 Cal. 3d at 811-12, 484 P.2d at 971, 94 Cal. Rptr. at 803.

54. Id. at 811-15, 484 P.2d at 970-74, 94 Cal. Rptr. at 802-06.

fendants, until each plaintiff testified as to their individual rate of food consumption, resolution of this issue was impossible. Since individual testimony would clearly be required in this matter, acceptance of this argument by the court would have effectively precluded the class action.

The court found this argument unpersuasive at the pleading stage because the denial of a class action in such a situation would presuppose that plaintiffs could not establish their allegations without the testimony of the individual class members. Rather, the court noted that on demurrer the allegation that the representations were the same must be accepted as true, even though it was clear that separate individual transactions took place. In an extremely significant step, the court thus held that common representation claims must, at the pleading level, be afforded the opportunity to show a common basis.

If plaintiffs can prove their allegations at the trial, an inference that the representations were made to each class member would arise, in which case it would be unnecessary to elicit the testimony of each plaintiff as to whether the representations were in fact made to him. This, in effect, makes a crucial practical alteration in the burden of proof at trial heretofore not present in the decisions. The absent class member now need only demonstrate that he is a member of the particular class, and there is no need for specific testimony as to whether the elements which initially led to class liability apply to him. Once the class representative has proven the elements of fraud as to himself, together with a common representation, these elements in turn determine that the fraud applies to the class as a whole.

56. 4 Cal. 3d at 812-13, 484 P.2d at 971-72, 94 Cal. Rptr. at 803-04.
57. Id.
58. Id. at 812, 484 P.2d at 971, 94 Cal. Rptr. at 803.
59. In spite of the fact that individual consumers might have different specifications of their food desires, the court found that the existence of ready-made food “packs” lent further credence to the plaintiffs’ allegation of common representations. Id. at 813, 484 P.2d at 972, 94 Cal. Rptr. at 804.
60. Id. at 812, 484 P.2d at 971, 94 Cal. Rptr. at 803.
61. Assuming that the common representations have been established, however, it seems likely that abolishing the requirement of specific testimony will result in no alteration in the eventual outcome of the case. This is so because the nature of the representations in this sort of case is so extreme as to create virtual certainty that fraud, in fact, did exist. Taking the freezer representations as an example, similar cases in other jurisdictions have almost universally found that fraud was present. See Toker v. Perl, 103 N.J. Super. 500, 247 A.2d 701 (L. Div. 1968), aff’d 108 N.J. Super. 129, 260 A.2d 244 (App. Div. 1970); Jones v. Star Credit Corp., 59 Misc. 2d 189, 298 N.Y.S.2d 264 (Sup. Ct. 1969). These cases were decided under the mandate of Uniform Commercial Code § 2-302, which has not been adopted in California. However, State Finance v. Smith, 44 Cal. App. 2d 688, 112 P.2d 901 (1941), seems to have arrived at the same result without regard to the unconscionability element.
The "common representation," then, was the keystone upon which the community of interest requirement was satisfied in *Vasquez*. Not only must the plaintiffs be afforded the opportunity to show a common representation, but once its existence has been shown, the inference is that the absent class members also relied upon the same representation.62

As in *Daar*,63 the court pointed out that community of interest does not depend on an identical recovery on behalf of all class members.64 This is a sound move, and further erodes the restrictive doctrine previously espoused in *Weaver*.

In discussing the reliance issue, the court cited a series of California cases which held that it was not necessary to show reliance on false representations by direct evidence.65 California decisions have held that an inference of reliance on false representations may be established in certain cases.66 The court also considered the positions of Williston67 and the Restatement of Contracts,68 which maintain that a presumption of reliance should be established in like circumstances. In the end, however, the court established an inference, and declined the opportunity to establish a presumption in favor of the consumer, since it was not deemed necessary to uphold the ultimate decision in the case.69 In a situation similar to *Vasquez*, however, an inference at the trial court is almost certain to be sufficient in each case. This is so be-

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62. For a discussion of the court's ruling on the inference issue see text accompanying notes 65-69 *infra*.
64. The court held that "[t]he requirement of a community of interest does not depend on an identical recovery, and the fact that each member of the class must prove his separate claim to a portion of any recovery by the class is only one factor to be considered in determining whether a class action is proper. The mere fact that separate transactions are involved does not of itself preclude a finding of the requisite community of interest . . . ." 4 Cal. 3d at 809, 484 P.2d at 969, 94 Cal. Rptr. at 801.
65. The court quoted Hunter v. McKenzie, 197 Cal. 176, 185, 239 P. 1090, 1094 (1925) as follows: "The fact of reliance upon alleged false representations may be inferred from the circumstances attending the transaction which oftentimes afford much stronger and more satisfactory evidence of the inducement which prompted the party defrauded to enter into the contract than his direct testimony to the same effect." 4 Cal. 3d at 814, 484 P.2d at 972, 94 Cal. Rptr. at 804.
68. RESTATEMENT OF CONTRACTS § 479, illustration 1, at 914 (1932).
69. "Whether an inference . . . or a presumption . . . of reliance arises upon proof of a material false representation we need not determine in this case. It is sufficient for our present purposes to hold that if the trial court finds material misrepresentations were made to class members, at least an inference of reliance would arise as to the entire class." 4 Cal. 3d at 814, 484 P.2d at 973, 94 Cal. Rptr. at 805.
cause the nature of the fraud alleged is so extreme that the inference thus established may well be conclusive against the defendant. Barring unusual circumstances, it is hard to imagine a member of the class who did not rely on the representation.

One of the customary aspects of the consumer class action has been that the individual claims involved are small. In Vasquez, however, the claims were in the $1,300—$1,700 range, and defendants argued that the amounts involved were large enough to justify individual actions. The court responded to this argument by drawing an analogy to Jones v. H.F. Ahmanson & Co., a class action brought on behalf of minority stockholders protesting the transfer of certain stock to a holding company for the benefit of the majority stockholders. Although the Jones case concerned sections of the Financial & Corporations Codes, it also alleged a right to sue on behalf of the class of minority stockholders under the provisions of section 382 of the Code of Civil Procedure. Since a class action was involved, and since the sums in question were "substantially" greater than those involved in Vasquez, the court completed the analogy and concluded that stockholders as a class were not more entitled to protection than were consumers.

In summary, Vasquez has placed California in substantial accord with the federal decisions insofar as class actions are concerned, and

70. Id. at 816, 484 P.2d at 974, 94 Cal. Rptr. at 806.
71. 1 Cal. 3d 93, 460 P.2d 464, 81 Cal. Rptr. 592 (1969).
73. 1 Cal. 3d at 120-21, 460 P.2d at 480, 81 Cal. Rptr. at 608.
74. In Jones, the amount was considerably greater. Plaintiffs asked for damages of $972.50 per share for return of capital, plus interest, exemplary damages, and fair market value for each share of the holding company's stock. 1 Cal. 3d at 118, 460 P.2d at 478, 81 Cal. Rptr. at 612. According to the District Court of Appeal, the fair market value of the holding company's stock was in the vicinity of $9,000. Jones v. H.F. Ahmanson Co., 76 Cal. Rptr. 293, 297 (Ct. App. 1969), vacated, 1 Cal. 3d 93, 460 P.2d 464, 81 Cal. Rptr. 592 (1969).
75. 4 Cal. 3d at 816, 484 P.2d at 974, 94 Cal. Rptr. at 806.
76. Federal class actions are predicated upon Rule 23 of the Federal Rules of Civil Procedure, which specifies the customary class size and common question requirements and notes two additional balancing tests through which the court may reach a decision: (1) whether common issues predominate over issues affecting only individual members of the class, and (2) whether a class action is "superior to other available methods for the fair and efficient adjudication" of the matter. These general principles are apparently applied in both Daar and Vasquez, suggesting that Rule 23 federal decisions will be worthwhile guidelines in California class actions under section 382 of the California Code of Civil Procedure. Compare Vasquez v. Superior Court, 4 Cal. 3d 800, 484 P.2d 964, 94 Cal. Rptr. 796 (1971) with Dolgow v. Anderson, 43 F.R.D. 472 (E.D.N.Y. 1968) and Contract Buyers League v. F & F Inv., 48
has applied the class action to one of the central problems of consumer fraud—that of fraudulent misrepresentation. The case has subtly but significantly altered the burden of proof at trial, and has, standing alone, placed the state in the forefront of class action litigation.

Vasquez and the Consumers Legal Remedies Act

The Consumers Legal Remedies Act became effective on January 1, 1971. By implication, the legislature specified that the act was not to be retroactive. Thus, Vasquez was decided against the background of the act, even though the suit, which was filed before the effective date of the act, was not brought within the confines of the act.

One of the act's primary characteristics is that it is a class action statute, intended to provide specifically for consumer fraud class actions. The guidelines for its implementation are similar to those employed by the court in Vasquez. Section 1781(b) provides:

The court shall permit the suit to be maintained on behalf of all members of the represented class if all of 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.

Furthermore, a fact situation such as that found in Vasquez seems to fall under the provisions of section 1770 of the act, which provides:

The following unfair methods of competition and unfair or deceptive acts or practices undertaken by any person in a transaction in...
tended to result or which results in the sale or lease of goods or services to any consumer are unlawful:

(g) Representing that goods or services are of a particular standard, quality, or grade, or that goods are of a particular style or model, if they are of another. 82

The Consumers Legal Remedies Act, however, contains certain limitations which are not applicable to actions brought under Code of Civil Procedure section 382. Under the act, for example, thirty days prior to bringing an action the consumer must issue a demand for rectification of the alleged violations, 83 and no action may be maintained if the seller has made an attempt to identify members of the similarly situated class, 84 has notified the identified members of the class that action will be taken on their request for rectification, 85 and has, in fact, given that remedy or will do so in a "reasonable time." 86 Moreover, "good faith" is a defense to any action which may be brought under the act, provided that the seller has employed "reasonable procedures" to avoid such errors. 87

These provisions stand in possible contrast to section 382 as interpreted in Vasquez. The act is designed to protect the consumer without harm to the fraudulent seller beyond that which he will incur from simply repaying amounts already illegally gained from the consumer. 88

According to an author who participated in the drafting of the act, 89 the act will safeguard the rights of the consumer. Section 1782 (c)(4) provides that no action may be maintained if the seller can show that:

82. A "particular standard" could be interpreted as a reasonable asking price for the freezers, rather than the inflated values at which they were sold. Section 1770(e) also seems to apply. The wording of that section states that it is unlawful to represent "that goods or services have sponsorship, approval, characteristics, ingredients, uses, benefits, or qualities which they do not have or that a person has a sponsorship, approval, status, affiliation, or connection which he does not have." (emphasis added). Allegedly, the food packages were to last seven months, and representations were made that the consumer would save substantially on monthly food budgets.

83. Id. § 1782(a). The demand requirement applies where no request for injunctive relief is sought.

84. Id. § 1782(c)(1).
85. Id. § 1782(c)(2).
86. Id. § 1782(c)(3).
87. Id. § 1784.

88. In the words of Reed, "it was recognized that even the most corrupt merchant can exonerate himself under these provisions." Reed, supra note 80, at 17. The legislature accepted this disadvantage, however, in order to allow passage of the act.

89. James S. Reed, Chief Counsel, Assembly Judiciary Committee, California Legislature, 1967-71.
Such person has ceased from engaging, or if immediate cessation is impossible or unreasonably expensive under the circumstances, such person will, within a reasonable time, cease to engage, in such methods, act or practices. 90

These provisions, of course, are as yet untested. Although Reed argues that settlement with the named plaintiffs will not prohibit them from continuing with the action, 91 the act is not clear in that regard, and “no action may be maintained” if the seller has made a “good faith” attempt to rectify the harm done to the consumer. 92

The traditional reluctance of consumers to continue with a class action after settlement has been offered in their individual case was illustrated in *Vasquez*, where two of the individual plaintiffs were unwilling to settle and, on behalf of the other consumers, continued the suit. If the trial court were to determine, as the defendants claimed and as could be inferred from the high percentage of potential settlement, that a good faith attempt to settle had been made on behalf of the seller, the *Vasquez* case could not have been maintained under the provisions of the act.

Moreover, since there is no guarantee that a “good faith” attempt to notify all defrauded members of a particular class will actually result in their notification, 93 the seller would be left with gains accumulated from those defrauded consumers who have not been apprised of their rights. In an action under section 382, on the other hand, a judgment is leveled against the seller for the full amount of his fraudulent sales, thus preventing him from benefiting from his practices.

The provisions of the act are reasonable insofar as they protect the consumer who complains vociferously to the seller, and threatens a lawsuit. Those same provisions, however, protect the fraudulent seller from suit and may, in some circumstances, allow him to retain some of the profits from his illegal activity.

The ultimate differences between the Consumers Legal Remedies Act and actions brought under section 382 of the Code of Civil Procedure remain for later decisions to resolve. It seems clear, however, that there are at least several distinctions which would cause the consumer to bring an action under section 382, rather than under the act.

The defendants in *Vasquez*, well aware of these distinctions, ar-

90. CAL. CIV. CODE § 1782(c)(4) (West Supp. 1971).
91. Reed, supra note 80, at 19.
93. Under the provisions of section 1781(d), the court may direct either party to notify the members of the class concerning the action. This provision would doubtless allow for maximum exposure. Nevertheless, not all actions for consumer fraud entail large consumer items for which detailed records are kept, and the seller could easily retain a substantial profit in such a case even after meeting “good faith” notice requirements.
gued that since the act contained many protective provisions for defendants, no plaintiff would choose to bring suit under the more restrictive provisions of the act if the court allowed a class action for consumer fraud under section 382. Defendants claimed, therefore, that allowing a class action under the *Vasquez* facts would render the act nugatory.

The court found that there was "no merit" in defendant's contention. Their reasoning on this issue, however, is unclear, and it seems that the court has not taken a clear stand regarding the extent to which the act is applicable to the general field of consumer fraud.

The court first cited section 1752, where the act stipulates that its provisions are not exclusive, in support of their conclusion that there is "a legislative intent not to affect class actions which may be maintained under other provisions of law." Since the act does not specifically provide that its remedies are to be exclusive for the general type of deceptive representations described in section 1770, the dicta seems to clearly imply that the act has been tightly interpreted by the court and would not apply to future cases similar to *Vasquez*. Such cases could be maintained under "other provisions of law" which would include section 382 of the Code of Civil Procedure, as interpreted in *Vasquez*.

The court, however, continued with another statement which creates considerable uncertainty as to their actual intention. The court carefully discussed the fact that section 1770 was largely confined to deceptive representations, and pointed out that a case like *Daar*, where a taxicab company overcharged because of inflated meter readings, would not apply to future cases similar to *Vasquez*. Such cases could be maintained under "other provisions of law" which would include section 382 of the Code of Civil Procedure, as interpreted in *Vasquez*.

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94. 4 Cal. 3d at 818, 484 P.2d at 975, 94 Cal. Rptr. at 807. Business interests succeeded in purging the "unconscionability" language from the act, which also contributed to the fact that it is inherently weaker than actions brought under the Code of Civil Procedure. As is true with most legislative enactments, the Consumers Legal Remedies Act is a product of compromise. This is ideal for a democracy, but not very ideal for the consumer, whose lobbies are often less organized than those of business interests. See Reed, *supra* note 80, at 11.

95. 4 Cal. 3d at 818, 484 P.2d at 975, 94 Cal. Rptr. at 807.

96. *Id.* at 818, 484 P.2d at 976, 94 Cal. Rptr. at 808.

97. The act does state, in section 1752, that "[c]lass actions by consumers brought under the specific provisions of Chapter 3 (commencing with section 1770) of this title shall be governed exclusively by the provisions of Chapter 4 (commencing with section 1780)." Prior to this statement, however, the section is quite explicit in holding that its remedies are not exclusive. The first portion of the section reads: "The provisions of this title are not exclusive. The remedies provided for herein shall be *in addition to* any other procedures or remedies provided for in any other law.

Nothing in this title shall limit any other statutory or any common law rights of the Attorney General or any other person to bring class actions." CAL. CIV. CODE § 1752 (West Supp. 1971) (emphasis added). The implication seems clear that Chapter 4 is to govern only if the plaintiff voluntarily brings an action under Chapter 3. For further discussion of this issue see text accompanying notes 100-01 *infra.*
would not come within the confines of the act. Conspicuous by its absence, however, was commentary on whether Vasquez would be permitted today under section 382, or whether the same fact situation would now have to be brought under the more restrictive provisions of the act. The court does not, in clear terms, meet this issue and, indeed, conclude their holding on the matter with the statement that "if a class action is filed after January 1, 1971, the effective date of the act, and it alleges conduct described in section 1770, the procedures specified in the act must be utilized." This phrase of the opinion is extremely important, since the court merely states that a suit must be brought under the act "if it alleges conduct" which is proscribed in the act. Of course, this statement sheds little light on whether Vasquez would be deemed to come within the proscriptions specified in the act. Does the court infer that all actions for consumer fraud must henceforth be brought under the provisions of the act? If so, the effect of the earlier portions of the Vasquez decision are largely negated. On the other hand, does the court's statement comprise a warning to plaintiff's counsel to carefully avoid alleging specific practices specifically mentioned in the wording of section 1770? If so, such an interpretation would unquestionably restrict the application of the act and permit full use of section 382 as interpreted in Vasquez while still allowing recourse to the act should plaintiffs desire to invoke its provisions. This crucial issue will have to await final adjudication in a subsequent case when plaintiffs allege causes of action which are predicated on deceptive representations, but carefully avoid any mention of the specific wording of section 1770.

Lending support to the proposition that the act has been expanded by the court to cover all aspects of consumer fraud which may be reasonably inferred as falling under section 1770 is the court's failure to specifically cite Vasquez as falling outside the aegis of the act, and further, the court's refutation of the defendant's claim that no plaintiff would bring an action under section 1770 if such an action could also be brought under section 382 of the Code of Civil Procedure. If the court has in fact restricted the application of the act, the defendant's argument applies with some force, and the court's response that the defendant's argument had no merit was really no response at all. Indeed, there would appear to be significant "merit" to the defendant's contention. It is entirely possible, however, that the court has indicated through dictum that the facts of Vasquez would fall within the

98. 4 Cal. 3d at 818, 484 P.2d at 976, 94 Cal. Rptr. at 808. Of course, the legislature was very much aware of the Daar holding, which does much to explain why such a fact situation was not included—it already was allowed by laws less restrictive than the Consumers Legal Remedies Act. See Reed, supra note 80, at 14.

99. 4 Cal. 3d at 818, 484 P.2d at 976, 94 Cal. Rptr. at 808.
act, and as a result, the suit could not be brought under section 382 if it were repeated today. If this is the court's interpretation, the limitation is unfortunate. The clear mandate of the legislature is that the act be interpreted by the courts in the manner most favorable to the consumer. 100 In fact, the act itself provides, in section 1752, that "[t]he provisions of this title are not exclusive. The remedies provided for herein shall be in addition to any other procedures or remedies provided for in any other law." 101

To briefly summarize, the court has not specifically stated that the act would apply to all consumer fraud class actions, since it merely stated that the act would apply only if the plaintiffs "allege conduct" within section 1770. Indeed, since the act was not retroactive, the court was under no compulsion to even mention it. The sounder view may be that the court was simply stating that all actions brought which alleged the specific practices mentioned in the act must be governed exclusively by the protective procedures of the act. 102 To the extent that there may be a choice here between a limitation of the scope of the Consumers Legal Remedies Act and a limitation on the Vasquez interpretation of section 382, the legislature itself provided the ground rules: decide in favor of the consumer. 103 Furthermore, the court, by restricting the application of the act, would not prevent an individual consumer from seeking redress under its provisions. This would apply in relation to some practices proscribed under the act, primarily misleading advertising, which are outside the realm of the Vasquez decision. 104

The legislature displayed no desire to substitute the act for the current law on consumer class actions. 105 When the 1970 legislature met, the Vasquez case was still making its way to the supreme court. It is extremely questionable that there would have been a Consumers Legal

100. Reed, in discussing section 1760 of the Civil Code, providing for liberal construction of the act, makes the point very strongly when he writes in reference to the legislature's policy statement, that "[t]he message is clear—when in doubt, decide in the consumers' favor." Reed, supra note 80, at 8.


102. Support for this interpretation may be found in the court's statement that "class actions brought for redress against the specified deceptive practices and filed hereafter must be governed exclusively by the provisions of the act." 4 Cal. 3d at 819, 484 P.2d at 976, 94 Cal. Rptr. at 808 (emphasis added).

103. CAL. CIV. CODE § 1760 (West Supp. 1971); see note 100 supra.

104. The list of practices proscribed under section 1770, sixteen in all, includes the advertising of goods when there is no intention to sell them as advertised, and the advertising of goods when a reasonable supply is not available, unless a specific quantity is mentioned in the advertisement. Id. §§ 1770(i), (j).

105. See text at note 97 supra. Nowhere does the act state that it will supersede prior case law.
Remedies Act had *Vasquez* been part of the prevailing California law. It would be ironic indeed if the attempt of the legislature to grant consumers greater latitude of redress in consumer fraud class actions became anachronistic so soon after its passage. Even though *Vasquez* does not make clear whether it expands or restricts the act, the latter seems not only to be the most reasonable interpretation of the decision, but also that which would be most in accord with the legislative intent and the rights of the consumer.

Regardless of the view taken as to the court's interpretation of the act in relation to the general application of the act to consumer fraud class actions brought under section 382, the generally liberal tenor of the court's holding in *Vasquez* gives obvious notice that the act's provisions will be liberally interpreted within the framework of the legislation. This may be important in the still unresolved problem which will arise in a case in which some of the practices complained of are discussed specifically in section 1770, and some are wholly outside the terms of the act. A liberal interpretation of the act, as required by section 1760, would seem to indicate that all cases of this dual nature could be brought under section 382. This, apparently, was the express intent behind the act as promulgated by the legislature. Since the whole purpose of the consumers Legal Remedies Act is to benefit the consumer, the court should not strain to include cases within the act which might otherwise be solved under the more liberal doctrine of *Vasquez*.

The legislature may have unwittingly established a regrettable barrier in prohibiting the defrauded consumer access to decisional law if the specific practice is alleged to be within the purview of section 1770 of the Consumers Legal Remedies Act. The court, on the other hand, may have intended to rectify this situation by giving the act a restrictive interpretation if plaintiffs plead consumer fraud without mentioning any of the specific practices mentioned in section 1770. Though this interpretation may well be what the court intended, and is certainly the view most beneficial to the consumer, the specific determination of this issue was not finalized in *Vasquez* in clear terms.

**Vasquez and the Close Connection Rule**

*Vasquez* involved much more than technical rules regarding which parties may or may not bring a class action. One of the most pervasive problems in the consumer fraud field is that the original seller—after

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107. See Reed, *supra* note 80, at 9.
108. The legislature, of course, was operating without any foreknowledge that remedies for consumer fraud under the rule of *Vasquez* would soon be available to the consumer.
assigning the installment contracts in question to a finance company—may have gone bankrupt, left the area, or otherwise escaped financial responsibility to the consumer. This, obviously, would give the victorious consumer a Pyrrhic victory if the finance company can effectively claim holder in due course status and thus escape liability. It is this problem, central to the field, to which the court next turned. The Vasquez decision expands on what formerly was dicta in Morgan v. Reasor Corporation which held that when a close connection existed between the original seller and the financier, that connection in turn warranted the establishment of a fictional agency relationship between the financier and the seller.

The "close connection" rule was first espoused in the landmark case of Commercial Credit Corp. v. Childs, an Arkansas decision. There, the court held that "[because] appellant was so closely connected with the entire transaction . . . it cannot be heard to say that it . . . was an innocent purchaser for value before maturity . . . ."

The close connection rule, in effect, establishes an agency relationship between the seller and the financier in order to cause the financier to be an original party to the transaction. Although other courts have adopted the rule, this interpretation is still the minority position.

California, prior to Morgan, had not applied the agency relationship unless there was actual notice of the fraud. In Commercial Credit Corporation v. Orange County Machine Works, the leading California case, the finance company supplied the vendor with contract forms, twice consulted with the vendor about the impending deal, knew all the details of the transaction in advance, had financed prior sales to

110. Id. at 895, 447 P.2d at 647-48, 73 Cal. Rptr. at 407-08.
111. 199 Ark. 1073, 137 S.W.2d 260 (1940).
112. Id. at 1077, 137 S.W.2d at 262.
113. The rationale for this rule is delineated in Jones v. Approved Bancredit Corp., 256 A.2d 739, 742 (Del. Sup. Ct. 1969): "[T]he more the holder knows about the underlying transaction . . . the more he controls or participates in it, the less he fits the role of the good faith purchaser for value; and the less justification there is for according to him the protected status of holder in due course. . . ."
116. 34 Cal. 2d 766, 214 P.2d 819 (1950).
the same firm, and served as the essential moving force behind the sale. The court held that the finance company was deemed an original party to the transaction in a very real sense. For the next eighteen years the requirement in California for the loss of holder in due course status was actual notice.

The close connection rule espoused in Orange County, however, underwent substantial revision in Morgan v. Reasor Corporation. There the court applied Civil Code section 1812.7 to bar a finance company with "constructive" knowledge of violations of the Unruh Act from recovering finance charges. No longer was there a requirement of active participation or actual knowledge. In Morgan the financier was held liable because there were sufficient warnings of non-

117. Only actual notice would be sufficient, under this rule, to establish the "original party" or "close connection" relationship required in Commercial Credit. The Morgan decision states that "[i]t is the rule in Commercial Credit the buyer must show that the seller contemplated that the credit would in fact be advanced by, and the note in fact held by, the particular financing institution involved, since such proof would amount to demonstration of ratification of an undisclosed agency." 69 Cal. 2d at 895, 447 P.2d at 647-48, 73 Cal. Rptr. at 407-08. The lack of any additional guidelines to illustrate the financier's intent in this somewhat restrictive view led the court, in a later dicta portion of the Morgan opinion, to develop the other factors discussed in note 123 infra.

118. 69 Cal. 2d 881, 447 P.2d 638, 73 Cal. Rptr. 398 (1968). Morgan was an action in declaratory relief brought to establish whether the Unruh Act applied to a lien contract and a promisory note providing for the construction of a house. The seller assigned the contract within three months to a finance company. The court held that the act applied to this sort of contract, and prevented the finance company from collecting the finance charges. The 1969 legislature amended the Unruh Act to prevent its application to construction contracts, providing that "this act is intended to abrogate any contrary rule in Morgan v. Reasor Corp." Cal. Stat. 1969, ch. 554, § 2, at 1180; see CAL. CIV. CODE § 1801.4 (West Supp. 1971).

119. "In case of failure by any person to comply with the provisions of this chapter, such person or any person who acquires a contract or installment account with knowledge of such noncompliance is barred from recovery of any finance charge ... imposed in connection with such contract ... and the buyer shall have the right to recover from such person an amount equal to any of such charges paid by the buyer." CAL. CIV. CODE § 1812.7 (West Supp. 1971).

120. This requirement will likely be fulfilled in most of the ordinary transactions which occur. One writer has maintained that "the 'knowledge' requirement for the application of section 1812.7 will be satisfied in the vast majority of consumer sales." McCall, Commercial Transactions and Consumer Protection, 1970 CAL. LAW 443, 469. For a discussion of the factors which may lead the court to conclude that the seller possesses the intent to transfer the contract to the financier and, also, that the financier has constructive knowledge sufficient to warrant his identification as the seller's principal see note 123 infra.

121. 69 Cal. 2d at 889, 447 P.2d at 643-44, 73 Cal. Rptr. at 403-04. At the time of the Morgan decision, the term used was "time-price differential." The phrase was struck by the 1969 legislature from Civil Code section 1802.10 and the phrase "finance charge" was substituted.
compliance with the Unruh Act to put a reasonable man on notice as to such violations.\textsuperscript{122}

In a later portion of the opinion, clearly dictum, the court added another, crucially important, criteria. The fact that the seller “contemplated” that the amount involved would be transferred to the financier was established as a primary test of the financier’s liability. Though this section of the opinion was dictum, the impact it caused on the \textit{Commercial Credit} case was substantial.\textsuperscript{123} However, the holding of the court was limited to the finance charges involved and did not involve the liability of the financier under the original contract.

In \textit{Vasquez} the plaintiffs alleged that the seller had assigned its installment contracts to the finance companies over a long period of time, and further, that the majority of the contracts had been assigned to one of the finance companies which also provided forms to be used by the food processor.\textsuperscript{124} Clearly, these allegations were designed to bring \textit{Vasquez} under the \textit{Commercial Credit} rule as interpreted in \textit{Morgan}.

These distinctions with regard to actual and constructive notice are built upon the codification of the notice requirement in California Commercial Code section 3302(1)(c) which provides:

A holder in due course is a holder who takes the instrument . . . without notice that it is overdue or has been dishonored or of any defense against it or claim to it on the part of any person.

Since negotiable instruments are not excluded by this section, even such an instrument would be inadequate to allow holder in due course status to be extended to the finance companies under the allegations in \textit{Vasquez}.\textsuperscript{125}

The contract in \textit{Vasquez}, moreover, was \textit{not} an ordinary promissory note.\textsuperscript{126} It was merely an installment contract assigned to a finance

\textsuperscript{122} Id. at 889, 447 P.2d at 643, 73 Cal. Rptr. at 403.
\textsuperscript{123} Since facts to illustrate the assignor’s intent and the assignee’s “knowledge” were not available, the court formulated the following guidelines by which such intent and knowledge might be deduced in future cases of the same variety: If the financier has inquired into the buyer’s credit rating; if the financier’s name appeared on the note at the time it was executed by the buyer; if the commercial paper was assigned to the financier on the same day that the transaction took place; or if there have been a “substantial number” of previous dealings between the seller and the finance company involved. Id. at 896, 447 P.2d at 648, 73 Cal. Rptr. at 408. One or more of these circumstances may cause application of the agency principle through the close connection rule.
\textsuperscript{124} 4 Cal. 3d at 832 n.21, 484 P.2d at 979 n.21, 94 Cal. Rptr. at 811 n.21.
\textsuperscript{125} Id. at 822, 484 P.2d at 978, 94 Cal. Rptr. at 810.
\textsuperscript{126} Id. The primary practical difference between promissory notes, which are negotiable instruments, and installment contracts, which are not under these circumstances, concerns the defenses which may be employed by the buyer in each case. For itemization of “real defenses” available against a holder in due course see \textit{Uniform...
company with whom the seller customarily did business, together with an invalid clause waiving plaintiff's defenses against assignees.\textsuperscript{127} In most transactions of this sort, there is no intent to pass the contract on after it has been assigned, \textit{i.e.}, it has reached its ultimate destination.\textsuperscript{128} Even if the documents had not been separately negotiated in \textit{Vasquez}, waiver of liability clauses such as those which have been included in the seller’s contract would only be effective if the assignee takes in good faith and without notice of possible defenses.\textsuperscript{129} Thus, if “notice” is defined liberally in a constructive rather than actual sense, financiers are effectively precluded from establishing holder in due course status unless they can clearly indicate \textit{no} constructive knowledge. Section 9206 of the Commercial Code, however, does provide a caveat in relation to the “notice” requirement, and states that a “different rule” may be established for consumer goods purchasers.\textsuperscript{130}

The primary question in \textit{Vasquez} was whether Civil Code section 1804.2—a portion of the Unruh Act—established a “different rule” regarding the notice requirement. Under this section:

Except as provided in section 1812.7, an assignee of the seller’s rights is subject to all claims and defenses of the buyer against the seller arising out of the sale notwithstanding an agreement to the contrary, but the assignee’s liability may not exceed the amount of the debt owing to the assignee at the time that the defense is asserted against the assignee. \textit{The rights of the buyer under this section can only be asserted as a matter of defense to a claim by the assignee.}\textsuperscript{131}


\textsuperscript{127} A waiver-of-defense clause is prohibited by the Unruh Act, \textit{CAL. CIV. CODE} § 1804.1(a) (West Supp. 1971). The act also prohibits an execution of any note by a buyer which will cut off any right of action the buyer has against the seller if the note is separately negotiated. \textit{Id.} § 1810.7. California, with these restrictions on holder in due course status, is one of a growing minority with similar statutory provisions. For a comprehensive survey of the 16 states with such statutes, see Murphy, \textit{Another “Assault Upon the Citadel”: Limiting the Use of Negotiable Notes and Waiver-of-Defense Clauses in Consumer Sales}, 29 OHIO ST. L.J. 667, 674 n.24 (1968).

\textsuperscript{128} \textit{See Comment, Resort to the Legal Process in Collecting Debts from High Risk Credit Buyers in Los Angeles—Alternative Methods for Allocating Present Costs}, 14 U.C.L.A. L. REV. 879, 900 n.83 (1967), \textit{quoted in Morgan}, where the author states that “[s]ince neither the seller nor the financing agency normally intends any further negotiation of the instrument, the general policy behind granting holder in due course status to a purchaser—to further the free transferability of commercial paper—is not applicable to the typical retail installment sale.”

\textsuperscript{129} \textit{CAL. COMM. CODE} § 9206 (West 1964).

\textsuperscript{130} \textit{Id.} § 9206(1).

\textsuperscript{131} \textit{CAL. CIV. CODE} § 1804.2 (West Supp. 1971) (emphasis added). Defendants argued that a reasonable interpretation of section 1804.2 “would be that it is inspired by the realization of the legislature that whenever a seller commits fraud there are in effect two victims, the buyer and the finance company. It is a fair attempt to allocate losses,
The import of the section is apparently to prevent the buyer from bringing an action for rescission against the finance company. The wording is unfortunate because no reference is made as to whether actual or constructive notice is required in this regard.

The court in Vasquez interpreted the code section to mean that the limitations on the buyer's rights asserted in section 1804.2 apply only to the assignee without notice of any sort. The court stated:

We are constrained to conclude that the limitations on a buyer's rights set forth in section 1804.2 are not applicable if an assignee has taken the contract with notice of defenses of the buyer against the assignor or if the assignee's relationship with the assignor comes within the rule set forth in Commercial Credit.\(^{132}\)

This is an extremely important departure from past decisions. The entire contract becomes suspect under Vasquez, not merely the portion under the control of the assignee. The assignee, under the Vasquez rule, is deemed to be privy to the original fraud even though the contract for the sale of the goods is quite separate and distinct from the financing.

Several policy reasons were advanced by the court for its decision to make the finance companies defendants in Vasquez,\(^{133}\) and the court pointed out that section 1804.2, which was taken from the Uniform Consumer Credit Code,\(^{134}\) was not intended to prevent affirmative suits against the finance company for rescission, but rather to protect the finance companies against large suits for damages in products liabilities cases.\(^{135}\)

\(^{132}\) 4 Cal. 3d at 824, 484 P.2d at 980, 94 Cal. Rptr. 796 (1971). One of the participants in the drafting of the Uniform Consumer Credit Code, however, argued that "under the interpretation urged by real parties in interest, if the buyer had paid in all or a substantial amount of the consideration, the assignee would be able to take advantage of his seller's fraudulent conduct by keeping the money paid in and refusing to bring suit, thereby leaving the buyer with a claim for fraud that he could not raise." Brief for William F. McCabe as Amicus Curiae at 7-9, Vasquez v. Superior Court, 4 Cal. 3d 800, 484 P.2d 964, 94 Cal. Rptr. 796 (1971).

\(^{133}\) The court argued that an act intended to benefit consumers should not be interpreted in such a manner that they would be treated less beneficially than others in the commercial arena. In addition, the Unruh Act was to be liberally interpreted to benefit the consumer. Id. at 824-25, 484 P.2d at 979, 94 Cal. Rptr. at 811.

\(^{134}\) Uniform Consumer Credit Code § 2.404, Alternative A. The court noted that the model code has not been adopted in California.

\(^{135}\) William Warren, a co-reporter-draftsman of the Uniform Consumer Credit Code, commented extensively on section 1804.2 in an amicus curiae brief. He wrote that the section "gives a just result only if the word 'claim' is interpreted to mean a valid, enforceable claim on the part of the assignee." Brief for William F. McCabe as Amicus Curiae at 10, Vasquez v. Superior Court, 4 Cal. 3d 800, 484 P.2d 964, 94 Cal. Rptr. 796 (1971). For his general discussion of the section see id. at 7-10.
Apparently the legislature was unable to imagine a situation in which stopping the finance company from enforcing its claim would not be a sufficient safeguard,\textsuperscript{136} and thus did not provide for it. \textit{Vasquez}, however, provided just such a situation within months of the act's passage. Accordingly, the court was forced to stretch the language of section 1804.2—which by its language appeared to preclude affirmative action for rescission against the financier—to achieve a sound result.\textsuperscript{137}

The real basis of the decision against the finance companies was probably not the contention that the financiers actually have reason to know of the seller's actions.\textsuperscript{138} Rather, the court appeared to be motivated by the fact that if the lender did not take the loss, the buyer would absorb the entire loss instead. Lending credence to this interpretation of the court's motivations is their statement that,

\begin{quote}
[i]n the instant case, as in many situations in which consumers have been defrauded by a seller, a judgement against the seller alone would represent a Pyrrhic victory because the defrauding seller is insolvent and the victorious consumers remain liable to the finance companies, which as the assignees of the installment contracts claim that they are entitled to payment even if the seller-acted fraudulently. Obviously, if plaintiffs are to be made whole for the wrongs allegedly done to them, the finance company defendants must be held liable as assignees if [the seller] is culpable.\textsuperscript{139}
\end{quote}

The holding of the court in this matter, whatever the motivation, makes it incumbent upon the finance company to protect itself.\textsuperscript{140} The only apparent alternative is more effective investigation, at least initially, of the sellers with whom the finance company might expect less

\textsuperscript{136}. In \textit{Morgan}, for example, the finance company stood to lose $7,544.12, and they were thus fairly certain to bring suit. 69 Cal. 2d 881, 885, 447 P.2d 638, 641, 73 Cal. Rptr. 398, 401 (1968).

\textsuperscript{137}. The language, at least, is a stretch from the apparent plain language of the section. If one attributes "fault" to misinterpretation of the provision, it apparently lies with the drafters of the legislation. For opposing views on the intent of the section see note 131 \textit{supra}.

\textsuperscript{138}. Many of the customary contacts between the finance company and the seller are arguably remote from selling functions, and are much closer to credit functions. See Note, \textit{Consumer Financing}, 55 Cornell L. Rev. 611, 620-22 (1970), for a viewpoint critical of fusing the two.

\textsuperscript{139}. 4 Cal. 3d at 821-22, 484 P.2d at 978, 94 Cal. Rptr. at 810 (emphasis added).

\textsuperscript{140}. The great majority of consumer installment sales contracts will likely fall within the rule of \textit{Vasquez}. Cf. McCall, \textit{Commercial Transactions and Consumer Protection}, 1970 Cal Law 443, 469, where the author states that "[t]he sweep of the close connection rule as announced by the Court [in \textit{Morgan}] will obviously include a vast percentage of all transactions in which a seller transfers notes and accounts generated by retail installment sales to his financier. . . . Thus, the 'knowledge' requirement for the application of section 1812.7, will be satisfied in the vast majority of consumer sales." While the author was discussing \textit{Morgan} and section 1812.7, the argument would be just as valid under the facts in \textit{Vasquez}.\textit{}}
than honorable dealings. However, as the finance companies take a more active role in the investigation of the seller, they will inevitably establish a relationship with the seller which will bring them within the original party agency rule of *Commercial Credit*.

Thus, caught between the rules of *Commercial Credit* and *Vasquez*, the only real alternative available to the finance company is the effective policing of the fraudulent seller. This will result, no doubt, in initial difficulties for the financiers and quite possibly in the bankruptcy of several sellers because no one will be willing to buy their installment contracts. For the most part, the costs of financing will increase in proportion to the amount of loss previously suffered by consumers due to their lack of effective redress. If the consumer can win a suit brought under the *Vasquez* holding, the finance company will lose profits only to the extent that the consumer previously suffered a loss.

To the extent that general costs will rise because the financiers must now investigate all sellers, it is preferable to add such small costs to the contract than to ask the particular defrauded consumer to suffer the entire loss. Clearly, finance companies would be less willing to purchase the contracts of sellers likely to cause them loss. This would imply that the first casualties under the more discriminating financing policies would be the seller likely to be fraudulent. Hopefully, the result of forcing the financing companies to be thus discriminating would be the eventual elimination of fraudulent sellers. In the meantime, it seems far more advisable to place the risk of loss on the finance company rather than on the innocent buyer.

Thus, contrary to the court's statement, the question of whether lenders who purchase installment contracts should be deemed holders in due course is considered by the court and is resolved against the lenders, simply by holding that all lenders in the typical installment con-

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141. This, in fact, was the very contention of the finance companies in *Vasquez*. 4 Cal. 3d at 824, 484 P.2d at 980, 94 Cal. Rptr. at 812.

142. The finance company is probably in the best position to accomplish this policing. See Comment, *supra* note 128 at 900 n.83 (1967) where the relationship is explained as follows: “Although the purchases of consumer paper may be isolated transactions, they are normally carried on under an agreement between the finance company and the seller providing for many such sales. . . . To the extent that the finance company has a close connection with the seller, it is in a better position to discover and police the legality of the seller’s contract with the buyer.”

143. Alternately, the prices charged by the sellers involved will rise so drastically because of the increased financing costs that no one will patronize them.


145. See 4 Cal. 3d at 825, 484 P.2d at 980, 94 Cal. Rptr. at 812.

146. *Id.* at 825, 484 P.2d at 980, 94 Cal. Rptr. at 812.

147. *Id.* at 825 n.24, 484 P.2d at 980 n.24, 94 Cal. Rptr. at 812 n.24.
tract purchase have constructive notice of the fraud and are therefore not holders in due course. Since the companies cannot disassociate themselves without radical alterations in their business patterns, finance companies are in effect denied the opportunity to claim holder in due course status.

**Conclusion**

The *Vasquez* decision deals with many aspects of the consumer fraud problem, and takes what may be generally considered a liberal position.

The court, in construing section 382 of the Code of Civil Procedure to allow consumer class actions for fraud, has taken significant steps to broaden the class action rule in California. For the first time, it allowed an action for consumer fraud to proceed as a class action, significantly expanding on the rule in *Daar v. Yellow Cab Co.*—previously the leading case. Furthermore, they have made an important alteration in the burden of proof at trial, by establishing an inference that common representations will be deemed to have been made to all members of the class. No longer will individual plaintiffs be required to testify on the specific representations of the seller, if the court is satisfied that the representations were in fact common to all. As a development in the California law of class actions, *Vasquez* is a large step forward. California is now in line with federal decisions under rule 23 of the Federal Rules of Civil Procedure and is the leading state in the nation in the area of consumer litigation through the class action.

Bowing to consumer pressure, and without a court decision on consumer class actions, the legislature enacted the Consumers Legal Remedies Act in 1970. By itself, the act may well have been a valuable guideline towards the intent of the legislature in the area of consumer protection. The court, however, was unclear in its holding as to whether the facts of *Vasquez* are included within the provisions of the act. Presumably, they could be, but the court may have served notice that unless specific allegations at the pleading level include references to the act, the court will allow the action to be brought under the *Vasquez* rule. Given the liberal scope of the opinion, it seems reasonable to believe that the court may in the future exclude many fact situations from the act’s operation, particularly if the safeguards built into it do not have their intended effect, and instead impede effective consumer relief.

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149. This is so because financiers will find it extremely difficult to attain assignee status under the *Vasquez* decision, and this will effectively foreclose the possibility of holder in due course status.
Echoing this interpretation, the court expanded the definition of the close connection rule to include actions for rescission of the original contract. As such, this expansion, coupled with the rule in *Morgan v. Reasor Corp.* means that a fictional agency relationship may be established in nearly all arrangements between the seller and purchaser of consumer installment contracts. Although the court has been reluctant to discuss the question of holder in due course status for purchasers of installment contracts, expanded definition by the court has the same practical effect as denying such status to the financiers. This is a sound judgment, though it will obviously result in some hardship to finance companies.

Eventually, the courts must make a decision on the allocation of loss caused by a fraudulent seller. California has joined the ranks of those minority states, in what hopefully will be an emerging view, who hold that the finance company is more fiscally able to bear the loss than is the consumer. Moreover, the benefits may expand beyond such a negative justification if the finance companies are forced to protect themselves by more efficient investigation, with the resultant decrease in the number of fraudulent sellers.

In summary, the *Vasquez* decision is a significant step forward in the California view of the class action and the limitation of the holder in due course doctrine for the benefit of the consumer. Hopefully, this decision will clear the way for effective consumer litigation on behalf of the defrauded purchaser too poor to afford individual recoveries. In that respect, by liberalizing further the rules governing class actions in consumer fraud cases, the decision will have indirectly contributed to a marked decrease in the number of fraudulent sellers operating in California and will perhaps stimulate similar action by other jurisdictions.

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