

California Class Action Classics

By Elizabeth J. Cabraser

The American class action is not a mere aggregation of multiple small claims. At its best, and as designed, the class action is litigation with a social purpose. Class actions, as representative suits, mirror our democratic form of government, in which a few are elected or selected to protect and promote the rights and interests of the many. Class actions were the engines of the civil rights movement, and civil rights litigation – most notably the class action known as *Brown v. Board of Education*¹ preceded civil rights legislation.

Class actions provide direct access to the courts for those without the wherewithal to fund, on their own, what has become ever more costly and complex civil litigation. It is not so far from the most idealistic of civil rights suits, to the complaints of consumers weary of being nicked and dined to death. The rights to fair and equal treatment in all the transactions of daily life, from schooling, to voting, to housing, to credit, and to pay, are almost exclusively vindicated and advanced in class actions. In the broad arena of consumer transactions, California has led the nation in recognizing the value and necessity of class suits, and in enabling their fair, efficient, and practical judicial management, through a series of landmark decisions that have become jurisprudential exemplars.

California's treasury of class action jurisprudence is far richer than that of any other state. Our California courts were establishing enduring class action principles decades before the modern Federal Rules were devised.² California Code of Civil Procedure Section 382, enacted 135 years ago, encapsulated in a single grand sentence the equitable and inclusive philosophy that has informed California jurisprudence ever since.³ Some

courts tolerate class actions; California courts have celebrated them. As the California Supreme Court observed in its landmark *Vasquez v. Superior Court* decision: "In California, we do not lack authority on the amenability of consumer claims to class action litigation."⁴ In nearly every decade, our state's commitment to consumer protection and commercial fair play has renewed and refined itself in notable California Supreme Court and Court of Appeal decisions. No single article could include them all.⁵ It is the fate of "Best of —" lists, whether of the Most Important Books of 2008, or the Greatest Rock Guitarists of All Time, to generate controversy. Favorites are inevitably omitted, and the listmakers accused of favoritism, elitism, or worse. There is no question that this brief piece is far from inclusive – itself a violation of class action precepts. But all must agree that the decisions highlighted in this article belong in the pantheon of judicial decisions that endure and influence class action practice today, and that will continue to guide us in the future. If not the "greatest hits," or the definitive Top Ten, all of these cases are class action classics.

Many California cases deal in depth with the procedural details of class action litigation, from discovery, to substitution of class representatives, to the approval of class action settlements and awards of fees to class counsel. These decisions fascinate the specialists and provide fodder for endless discussions among the class action obsessed. There is always more to learn, or re-learn, and class actions occupy a fascinating, if sometimes obscure and quirky, area of litigation. Decisions explored in this article do sometimes dwell in the details, but they likewise transcend them to announce principles that have



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secured and revitalized the protections and benefits of class actions for all Californians; and, because these cases have been cited and followed across the country, for all Americans. In the most profound sense, if you know these cases, you know class action law.

1. *Daar v. Yellow Cab Company* (1967) 67 Cal.2d 695

Daar, the fountainhead of California consumer jurisprudence, was a case involving the most mundane subject – the daily overcharges to which Los Angeles taxicab riders had been subjected by Yellow Cab over the course of four years. The class members could not be identified, and the level of overcharges was known only to the defendant. The individual losses were small, making it "economically infeasible" to pursue them other than as class action, and there would have been a "failure of justice" but for "the maintenance of a class suit." To avoid such a failure, the Supreme Court established this enabling distinction between the "ascertainability" requirement for class certification, and the inescapable fact that in many consumer scenarios individuals cannot be identified at the pleading or class certification stages:

If the existence of an ascertainable class has been shown [e.g., there were numerous Yellow Cab passengers during the suit's four year period] there is no need to identify its individual members in order to bind all members by the judgment. The fact that the class members are unidentifiable at this point will not preclude a complete determination of the issues affecting the Class. Presumably an accounting in the suit at bench will determine the total amount of the alleged overcharges; any judgment will be binding on all the users of taxicabs within the prior four years. However, no one may recover his separate damages until he comes forward, identifies himself and proves the amount thereof.⁶

The lesson of *Daar* is that a binding judgment depends upon a community of interest among the members of the defined class, not their identification or appearance as individuals. *Daar* established that this community of interest requires neither a common fund, nor a common recovery.⁷ Where liability can be determined by the adjudication of common questions of law or fact, the requirement of individualized adjudication of remaining issues, such as damages, is not disabling. The design of a trial that prioritizes the common questions is both specific to the circumstances of each case, and informed by the public policy that provides for class suits to ensure access to the courts.⁸

The *Daar* court also sowed the seeds of the *cypres* remedy as the equitable mechanism to recover and dedicate, to appropriate class or public use, funds that are disgorged by a wrongdoing defendant but cannot be completely or cost-effectively distributed to individual class members.⁹

2. *Vasquez v. Superior Court* (1971) 4 Cal.3d 800

Justice Mosk's *Vasquez* decision is jurisprudence for the ages. *Vasquez* synthesizes and builds upon *Daar* and other prominent class certification decisions of the 1960s to proclaim an enduring juridical commitment to consumer protection through the class action mechanism. *Vasquez* is replete with quotable passages, and *Vasquez* has been cited, and its key insights adopted by federal and state courts

nationwide. More significantly, after some years in exile, *Vasquez* was revived and reembraced by the California Supreme Court in a recent series of decisions (including *Discover Bank* and *Sav-on Drug*, discussed more fully below) reconfirming the necessity and importance of class actions to implement California's substantive consumer laws.

Vasquez involved an early telemarketing scheme that sold meat and freezer installment contracts to generally unsophisticated consumers in San Joaquin and Stanislaus Counties. The "meat" company colluded with several finance companies. The demurrer to the class claims in the complaint was sustained by the trial court; plaintiffs sought a writ of mandate to enable them to proceed to try the fraud claim as a class action, while defendants contended each consumer must prove the fraud individually. The Supreme Court resoundingly rejected this contention.

Vasquez recognizes the modern necessity of group redress when consumers have been defrauded as a group: "If each is left to assert his rights alone if and when he can, there will at best be a random and fragmentary enforcement, if there is any at all."¹⁰ As Justice Mosk observes, this failure of justice is not only an individual calamity: it offends the public interest and disserves society. "This result is not only unfortunate in the particular case, but it will operate seriously to impair the deterrent effect of the sanctions which underlie much contemporary law. The problem of fashioning an effective and inclusive group remedy is thus a major one."¹¹

In short, consumer protection is the business of the courts, on behalf of society: "protection of unwary consumers by unscrupulous sellers is an exigency of the utmost priority in contemporary society." Since *Vasquez* set the tone, consumer protection and class actions have risen and fallen together in California jurisprudence. *Vasquez* both acknowledged the need for consumer protection class actions, and identified and defined the technique of common proof of fraud, by which such class actions succeed:

Frequently numerous consumers are exposed to the same dubious practice by the same seller so that proof of the prevalence of the practice as to one consumer would provide proof for all.

Individual actions by each of the defrauded consumers is often impracticable because the amount of individual recovery would be insufficient to justify bringing a separate action; thus an unscrupulous seller retains the benefits of its wrongful conduct. A class action by consumers produces several salutary by products, including a therapeutic effect upon those sellers who indulge in fraudulent practices, aid to legitimate business enterprises by curtailing illegitimate competition, and avoidance to the judicial process of the burden of multiple litigation involving identical claims. The benefit to the parties and the courts could, in many circumstances, be substantial.¹²

How is one to prove that purchases made via several thousand separate phone calls, involving oral representations, were in fact part of a common scheme susceptible to common proof of fraud? In *Vasquez*, defendants made the same arguments defendants have made against class treatment of fraud ever since, focusing on the separate amounts of the sales, the separate circumstances of the consumers, *ad infinitum*. *Vasquez* rejected these – noting the suit was more fundamentally characterized by common defendants, "a common sales recitation," and the use of pricing formulas by defendants.¹³ *Vasquez* adopted the well-established evidentiary principle of the rebuttable presumption of reliance that arises from the application of the objective reasonable person standard, a principle long utilized in California and elsewhere to prove fraud.

In short, reliance flows from the materiality of the allegedly fraudulent representation or omission: "We conclude that if the trial court [or the jury] finds that [these] were material, it could find an inference or rebuttable presumption of reliance by each class member without his direct testimony."¹⁴

The *Vasquez* precedent that, upon a finding that a reasonable person would have relied upon the allegedly deceitful statements or concealments, "an inference of justifiable reliance by each class member would arise,"¹⁵ has animated a broad array of consumer and investment class actions in California ever since. This proof principle resonates with the reality of modern consumer transactions, and illustrates the lesson that the law endures

when it is based upon the reality of the public life which it regulates.

3. *La Sala v. American Savings & Loan Ass'n* (1971) 5 Cal.3d 864

In *La Sala*, Justice Tobriner eviscerated the utility of the time-honored defense tactic of settling with or paying off the named plaintiffs in order to eliminate the class action. Variations of this tactic continue today, but *La Sala* states the principle, drawing upon desegregation and civil rights analogies (and reminding us, by these choices, of the high priority our highest court has repeatedly accorded consumer claims) that unilateral action by defendants does not “mechanically render those plaintiffs unfit *per se* to continue to represent the class. Whether the named plaintiffs will fairly and adequately protect the class frames an issue that rests in the discretion of the trial court If, however, the court concludes that the named plaintiffs can no longer suitably represent the class, it should at least afford plaintiffs the opportunity to amend their complaint, to redefine the class, or both, in order to establish a suitable representative.”¹⁶ If the circumstances require, notification of the class as to the need of a substitute representative should be given before the class is prejudiced by dismissal of the action.¹⁷

4. *Collins v. Rocha* (1972) 7 Cal.3d 232

The *Collins* plaintiffs were 44 “economically deprived” farm workers defrauded by a labor contractor who promised them, orally, many hours of work harvesting chili peppers for \$1.65/hour. They were transported to Monterey, where they were summarily discharged and stranded. This State’s highest court, per Justice Mosk, became their champion, and applied *Vasquez*’s “controlling” common proof principles to their claims.¹⁸

Collins confirms that *Vasquez* meant what it said, applies to a wide array of fact patterns, applies to fraudulent conduct, as well as to misrepresentations, and to oral as well as written fraud: “An inference of reliance arises if a material false representation was made to the plaintiffs whose acts thereafter were consistent with reliance upon the representations.”¹⁹ Action

proves reliance. Buying the product (in *Vasquez*) or showing up for work (in *Collins*) is often the most compelling proof that plaintiffs were taken in by defendants’ deceit. *Collins* also dispensed with arguments that plaintiffs’ damages required individual proof, and that the damages claimed could be characterized as relatively large, militated against class treatment.²⁰

In *Collins*, Justice Mosk coined a comparative, public policy-derived formula to determine when any case, involving any claims, merits class certification:

The ultimate question in every case of this type is whether, given an ascertainable class, the issue which may be jointly tried, when compared with those requiring separate adjudication, are so numerous or substantial that the maintenance of a class action would be advantageous to the judicial process and to the litigants.²¹

The California courts have returned to this standard, in every decade since, to reaffirm that every case raising common questions, whether sounding in consumer fraud, or warranty breach, or medical monitoring for latent disease, is entitled to consideration, under this comparative standard for class certification, and that no type of claim is categorically disqualified for class treatment.²²

5. *Occidental Land, Inc. v. Superior Court* (1976) 18 Cal.3d 355

Justice Mosk, writing for the Court, affirmed a trial court’s refusal to decertify a home purchaser class on fraud claims against an Orange County subdivision developer. The *Occidental* decision acknowledged the procedural flexibility

inherent in class actions – classes initially certified may be decertified, and claims initially rejected for class treatment may subsequently prove themselves worthy of class certification.²³

Vasquez was again involved as controlling, this time not as to a telemarketed installment sales pitch, or an oral representation to farmworkers, but to the complex (albeit unfair) documentation attending real property sales: “As we held in *Vasquez*, an inference of reliance arises if a material false representation was made to persons whose acts thereafter were consistent with reliance upon the representation. That principle controls the present case.”²⁴ *Occidental* affirmed that “justifiable reliance may be established on a common basis.”²⁵

Occidental soundly rejected two anti-certification arguments: that the unique attributes of each parcel of real property foreclosed class treatment,²⁶ and that “the materiality of [the] alleged misrepresentations depends on highly particularized proof of each individual’s financial station.”²⁷ *Occidental* dispensed with the latter thesis definitively: “We have found no authority for this novel proposition. Requiring proof of this nature would necessarily preclude the certification of virtually all class actions based on allegations of fraud. Our decision in *Vasquez* repudiates such a concept.”²⁸ We should not mistake this flat statement as a result-oriented class action enabler, notwithstanding the Supreme Court’s implicit acknowledgement, on a number of occasions, that in California class actions are not mere procedural options – they are woven into our substantive statutory common law, and embedded in its remedies.²⁹

Vasquez, *Collins*, and *Occidental* are, nonetheless, not creating a proof dispensation for class actions. To the contrary, they are applying long-established common law proof principles (such as the reasonable person standard for proof of fraud through circumstantial evidence) to assure that class actions are not disabled by the imposition of higher proof standards, or unrealistic evidentiary restrictions, that frustrate common proof.

6. *Richmond v. Dart Industries, Inc.* (1981) 29 Cal.3d 462

This time it was a recreational property owner class that was challenged, by a Lake Tahoe developer. At issue was the defendants' failure to provide for, *inter alia*, adequate water and sewer facilities. The claims sounded in fraud, negligence, unjust enrichment, and breach of trust, and the requested remedies included declaratory relief and rescission. The defendants' anti-class tactics included conducting a "survey" – utilizing a promotional flyer mailed to the 2,600 lot owners by a homeowner, but sponsored and paid for by the defendants, that urged homeowners to "support your Project!," and denigrated the class suit. The goal was to sow dissension and demonstrate intra-class conflict. The "survey" results (which included 266 responses favorable to the developer) were submitted in opposition to class certification, and were considered by the trial court in denying the class.³⁰

Richmond reached the Supreme Court, then headed by Chief Justice Rose Bird, at the 1980's height of federal and state judicial enthusiasm for class actions – a fervor which subsided markedly during the 1990's and the first years of this century, and which has only recently begun to revive (a judicial response, perhaps, to the newly evident dystopia produced by an unregulated "free market" system). Although *Richmond* was a creature of its times – as its effusive, pro-class citations and quotations attest³¹ – its essential holdings on what the adequacy of representation requirement means have withstood the trials of time and continue to be followed today. When a defendant attempts to sabotage a class by creating and exploiting intra-class conflict, *Richmond* contains the definitive catalogue of remedies: create subclasses, redefine the class,

add a substitute class representative, and/or allow dissenters to opt-out (or inter-vene), as the circumstances of the particular case suggest. In short, class members who oppose the suit "should not be able to defeat the right of the remaining class members to maintain a representative action."³² The various class management mechanisms and techniques described in *Richmond* deserve attention, as collectively they address virtually every imaginable intra-class problem, without resort to decertification. After all, as *Richmond* concludes, "Since the judicial system substantially benefits by the efficient use of its resources, class certification should not be denied so long as the absent class members' rights are adequately protected. Additionally, there is great value in including the differing viewpoints, rather than precluding the class suit."³³

The language and rationale of *Richmond* remind us that the judicial system itself is a public resource, which must be conserved, and that its highest and best use is to adjudicate the common claims of groups of that public, whether as consumers, workers, or property owners, whose rights and interests have come under common attack. *Richmond* stands for the prohibition of defense tactics which undermine the community of interest of these groups, which isolate their members for economically infeasible adjudication unwarranted by the reality of the conduct at issue, or which deploy attrition tactics to cause plaintiffs and the system to waste time and money as the price of access.

7. *Linder v. Thrifty Oil Co.* (2000) 23 Cal.4th 429

Linder was a quintessential small-damages consumer case, brought under the Song-Beverly Credit Card Act of 1971³⁴ and the UCL to redress a \$0.04 per gallon overcharge on gas customers who paid by credit card. To the lower courts, small damages meant insubstantial benefits,³⁵ and a negative view of the merits of the case jaundiced the class certification analysis. Justice Baxter, writing for a unanimous Court, reversed the lower court's rejections of class treatment.

Linder is the go-to case for a contemporary restatement of the classic articulation of the role of class actions in the

California justice system. *Linder* cites and endorses *Daar*, *Vasquez*, and *Richmond*, among numerous other California and federal authorities, to re-acknowledge, for the 21st Century, "the importance of class actions as a means to prevent a failure of justice in our judicial system."³⁶ *Linder* reminds us of the dual functions of the class suit in our system. "By establishing a technique whereby the claims of many individuals can be resolved at the same time, the class suit both eliminates the possibility of repetitious litigation and provides small claimants with a method of obtaining redress."³⁷

The *Linder* court, following federal precedent and invoking California's own jurisprudence, forbade infusing the class certification decision with an evaluation of the merits: the law bars "merit-based" inquiries in the class certification process."³⁸

Linder's message is that small damages do not defeat class actions; small merits may, but a mash-up of class and merits issues in an undifferentiated class certification decision defeats both due process and public policy. In *Blue Chip Stamps v. Superior Court* (1976) 18 Cal.3d 381, Justice Tobriner had written separately to caution against turning the class action against itself by arguing the small amount of individual recovery as a factor against class treatment. Over the years, *Blue Chip Stamps* had indeed been (mis)cited to equate small damages with insubstantial benefit, a trap into which the lower courts fell in *Linder*. The *Linder* Supreme Court decision eliminates jurisprudential support for this notion, reminding us of Judge Tobriner's injunction to trial courts to consider "the role of the class action in deterring and redressing wrongdoing," and that wrongdoing included the retention of ill-gotten gains, even those extracted from consumers a few cents at a time.³⁹ A company that extracts a dollar from each of millions of customers will reap a handsome profit; the class action is often the only way to halt and redress such exploitation."⁴⁰

Linder acknowledges that management of class actions is often not easy, but always worth doing.⁴¹

As *Linder* reminds us, the outcome in *Blue Chip Stamps* was an anomaly, and it is the principle articulated by Justice Tobriner therein, in *Daar* and *Vasquez*

before him, and in other Supreme Court decisions still, that yet prevails: “We have affirmed the principle that defendants should not profit from wrongdoing simply because their conduct harmed large numbers of people in small amount instead of small numbers of people in large amounts.”⁷⁴²

8. *Massachusetts Mutual Life Insurance Co. v. Superior Court* (2002) 97 Cal.App.4th 1282

Many California Court of Appeal decisions arguably belong in any “greatest hits” list of California class action jurisprudence; *Mass Mutual* is my pick because it illustrates the symbiotic power of the substantive and procedural province of our consumer statutes, which cannot be imagined or implemented without the class mechanism.

Mass Mutual involved both UCL and CLRA claims, brought on behalf of a class of 33,000 life insurance policyholders, and involving a 15-year class period. The insurance policy at issue was called a “vanishing premium” policy—the inducement to purchase was that the dividend yield of the policies would be used to pay the premiums. Mass Mutual controlled the timing and amount of dividends, and the class claim was that it exploited this power to eliminate the “vanishing premium” feature post-purchase. As a consumer fraud statute, the CLRA provides for actual damages, punitive damages, and attorney fees “as a result” of violative methods, actions or practices. This causation element, often articulated as “reliance,” does not preclude class certification. *Mass Mutual* clarifies this point: “the causation required by Civil Code section 1780 does not make plaintiffs’ claim

unsuitable for class treatment. Causation as to each class member is commonly proved more likely than not by materiality. The fact that a defendant may be able to defeat the sharing of causation as to a few individual class members does not transform the class question into a multitude of individual ones; plaintiffs satisfy their burden of sharing causation as to each by sharing materiality as to all.”⁷⁴³

Mass Mutual applies the *Vasquez* and *Occidental* evidentiary principle that reliance, and hence causation, may be inferred by the fact finder from materiality. *Mass Mutual* emphasizes that the material fact may be a fact undisclosed as well as one misrepresented. “Plaintiffs contend Mass Mutual failed to disclose its own concerns about the premiums it was paying and that those concerns would have been material to any reasonable person contemplating the purchase” of that product.⁴⁴ “If the undisclosed assessment was material, an inference of reliance as to the entire class would arise, subject to any rebuttal evidence Mass Mutual might offer.” The trial court order certifying the CLRA class was affirmed.

An additional insight of *Mass Mutual* is that even complex and sophisticated insurance (or credit) contracts are marketed and sold, and may be fairly characterized and addressed, as consumer products. If, as in these cases, the contracts at issue are packaged and promoted using the mass advertising techniques developed in flogging mass-produced consumer goods, then it is both disconcerting and unfair for defendants to revert to contentions, after the fact, that characterize the transactions as traditional, face-to-face, and individualized negotiations. The federal courts have all too often been blind to this prejudicial paradox; the

California courts, as in *Mass Mutual*, have frequently seen through it.⁴⁵

9. and 10. *Sav-on Drug Stores, Inc. v. Superior Court* (2004) 34 Cal.4th 319; *Discover Bank v. Superior Court* (2005) 36 Cal.4th 148

The California Supreme Court has engaged in a recent revival and reaffirmation of the policies and principles articulated in *Vasquez* and other class action classics. Two of the most significant California Supreme Court decisions of the early 21st Century, *Sav-On Drugs v. Superior Court* and *Discover Bank v. Superior Court* feature citations to, and quotations of the key passages of *Vasquez*. In each of these cases, the California Supreme Court reversed lower court decisions that denied class certification status in cases for workers (*Sav-On Drug*) and consumers (*Discover Bank*), whose relatively small damages claims could not have survived the costs and delays of modern individualized litigation. The Supreme Court, in both cases, accordingly acted to preserve access to the courts, for the benefit of California consumers and employees, by ensuring that the class action principles, articulated nearly forty years ago in *Vasquez*, and reaffirmed throughout the decades, remain vital safeguards for the current century.

Each of these two decisions will stand as a modern classic of California class action jurisprudence, each is lengthy and nuanced, and each deserves far more careful study and analysis than this article can provide. These cases will serve as fountainheads for a future generation of California class action jurisprudence not simply because they continue the heritage of *Vasquez* and its progeny, but because each

addresses, and suggests solutions for, recurring problems in consumer and wage earner litigation. *Sav-on Drug* affirms the propriety of utilizing statistical and other objective evidentiary techniques to prove liability and damages, where to do so is both fairer and more realistic than reverting to (often obsolete or nonexistent) individualized proof, which defendants persist in arguing is the only way to prove liability or damages.

In *Discover Bank*, the California Supreme Court determined that the Federal Arbitration Act⁴⁶ does not preempt a determination, under California law, that class arbitration waivers are unconscionable. As the court explained, where the class action waiver is found in a consumer contract in a setting in which disputes by consumers predictably involve small amounts of damages, and where it is alleged that the party with the superior bargaining power has carried out a scheme to deliberately cheat large numbers of consumers out of individually small amounts of money, the class action waiver becomes in practice and reality an exculpatory clause, and thus violates Cal. Civ. Code section 1668. Such waivers are thus unconscionable under California law, and should not be enforced. In reaching the conclusion that, as a matter of California substantive law (and where California law applies to the dispute) consumers may not be prevented from using the class action mechanism to secure the meaningful adjudication of their claims, the *Discover Bank* decision refers to *Vasquez*, to *Linder*, to Justice Tobriner's separate opinion in *Blue Chip Stamps*, and to other notable California Supreme Court decisions to demonstrate the touchstone principle of California consumer policy, as enforced by California consumer law.

These "Top 10" cases should be part of your "go to" arsenal in battling defendants who want to defeat class certification so that they can continue their unrestrained assault on Californians' rights. ■

"It is said in *Smith v. Swormstedt*, 16 How. 286: "The rule is well established that where the parties interested are numerous, and the suit is for an object common to them all, some of the body may maintain a bill on behalf of themselves and of the others...."

³ Section 382 of the Code of Civil Procedure provides, "... 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."

⁴ *Vasquez v. Superior Court* (1971) 4 Cal.3d 800, 808.

⁵ For a more exhaustive bibliography of over 200 important California state court class certification decisions since 1850, and a list of "Top Ten California Class Action Cases of the New Millennium," see §§ 22.01, 22.02 of Cabraser, et al., *California Class Action Practice and Procedure* (LexisNexis).

⁶ 67 Cal.2d at 706; bracketed material supplied.

⁷ *Id.* at 707.

⁸ *Id.* at 714.

⁹ *Id.* at 716.

¹⁰ 4 Cal.3d at 807. This language and other passages from *Vasquez* were recently quoted by the Supreme Court as the basis of California consumer class action policy in *Sav-on Drug Stores, infra*.

¹¹ *Id.*, citing Kalven & Rosenfield, "Function of Class Suit" (1941) 8 U. Chi. L. Rev. 684, 686.

¹² *Id.* at 808.

¹³ See the *Vasquez* court's detailed dissection of purportedly "individual issues" at 4 Cal. 3d 800, 812-813.

¹⁴ *Id.* at 815.

¹⁵ *Id.* at 815, n.9.

¹⁶ 5 Cal. 3d 864, 871-872.

¹⁷ *Id.* at 872-873.

¹⁸ 5 Cal.3d at 235-237.

¹⁹ *Id.* at 237.

²⁰ *Id.* at 238.

²¹ *Id.* at 238.

²² See, e.g., *Lockheed Martin Corp. v. Superior Court* (2003) 29 Cal.4th 1096. In *Lockheed*, the Supreme Court reversed certification of a medical monitoring class on the facts before it, but reaffirmed the principle that such cases were not precluded categorically from class treatment, so long as the *Collins* "ultimate question" formula was met. 29 Cal.4th at 1104.

²³ 10 Cal.3d at 360.

²⁴ *Id.* at 363.

²⁵ *Id.*

²⁶ *Occidental* thus distinguished the oft-cited decision in *City of San Jose v. Superior Court* (1974) 12 Cal.3d 447, in which class status was denied in a diminution-in-value case by those whose property fell under the flight pattern of the local airport.

²⁷ *Id.*

²⁸ *Id.*

²⁹ See, e.g., the Consumer Legal Remedies Act, Cal. Civil Code §§ 1770, et seq., which incorporates a statutory class action procedure (derived from Rule 23 of the Federal Rules of Civil Procedure) providing for class certification "if the unlawful method, act, or practice has caused damage to other consumers similarly situated," Cal. Civil Code section 1781(a), as the mechanism to enforce the CLRA: "underlying purposes, which are to protect consumers against unfair and deceptive business practices and to provide efficient and economical procedures to secure such protection." (Cal. Civil Code § 1760.)

³⁰ 29 Cal.3d at 487.

³¹ See, e.g., the passages at 29 Cal.3d 402, 469-470.

³² *Id.* at 471.

³³ *Id.* at 474.

³⁴ Cal. Civil Code § 1747, et seq.

³⁵ Among other things, the Court of Appeal had a Goldilocks problem with class damages, opining that Song-Beverly statutory procedures were either too small to warrant, or too onerous (\$100 per class member) in the aggregate, to sustain class treatment. The Supreme Court noted an "entire range of penalties" between these poles, which would reconcile class treatment with fairness to the defendant.

³⁶ 23 Cal.4th at 434.

³⁷ *Id.* at 435.

³⁸ *Id.* at 439, citing cases.

³⁹ *Blue Chip Stamps*, 18 Cal.3d at 387 (citing *Daar* and *Vasquez*).

⁴⁰ *Id.*

⁴¹ 23 Cal.4th at 446, quoting Tobriner, J., in *Blue Chip Stamps*.

⁴² *Id.* at 446, quoting *State of California v. Levi-Strauss* (1988) 41 Cal.3d 400, 412.

⁴³ *Id.* at 1292, citing *Blackie v. Barrack* (9th Cir. 1975) 524 F.2d 891, 907, fn. 22.

⁴⁴ *Id.* at 1293, 1294.

⁴⁵ Commentators have also recently raised the alarm on credit "products" that are "defective": consumers are confronted with and unprotected from toxic credit and financial products which, had they been traditional consumer goods, would have been subjected to at least theoretically protective pre-marketing regulatory review. (See, e.g., Elizabeth Warren, "Making Credit Safer," 157 Un. Pa. L. Rev. (Nov. 2008).)

⁴⁶ 9 U.S.C.S. § 1 et seq.

¹ (1984) 347 U.S. 483.

² In *Wheelock v. First Presbyterian Church of Los Angeles* (1897) 119 Cal. 477, for example, the California Supreme Court adopted the newly-minted equity language of its federal counterpart to hear and decide a representative suit to settle the financial affairs of a church riven by intramural strife: