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## Foreword

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## FOREWORD

### Stanley Mosk\*

While I was serving as Attorney General of California the mail brought a letter one day from an irate housewife in Ventura enclosing broken pieces of a plastic cosmetics jar. She believed she had purchased a jar full of a popular rejuvenating cream, but when the opaque jar accidentally fell and broke she observed a hidden inner lining with air spaces between the lining and the walls of the jar itself. This resulted in reducing the apparent quantity of cream by nearly one-third. What, she demanded, was the State of California going to do about this?

We began an investigation and to our surprise learned that almost every cosmetics jar on the shelves of California shops contained a similar false bottom and false side walls. While only a few manufacturers actually misrepresented the net weight on their labels, it was my belief that the inner lining constituted a visual falsification, since consumers had a right to rely on the exterior size of the container as an indication of the quantity of its contents regardless of weight.

Fortunately our research revealed a previously unused section of the Business and Professions Code<sup>1</sup> which specifically prohibits containers made with "a false bottom, false side walls, false lid or covering, or . . . otherwise so constructed or filled, wholly or partially, as to facilitate the perpetration of deception or fraud." Armed with that statutory authority I called a meeting of major cosmetics manufacturers and their counsel and warned them that I was about to enforce the law. However, if they would restructure their packaging at once, I would defer proceedings to seize those offending jars presently on the shelves.<sup>2</sup>

The cosmetics representatives attempted to rationalize the deceptive containers—false sides and bottoms were said to be desirable for heat insulation—and then protested they could not make containers exclusively for California since their products were marketed nationally. The law is the law, I insisted, and if

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\* Stanley Mosk, since 1964 a Justice of the California Supreme Court, served as Attorney General of California from 1959-1964.

1. CAL. BUS. & PROF. CODE § 12605 (West 1964), as amended, CAL. BUS. & PROF. CODE § 12606 (West Supp. 1974).

2. *Id.* This code section permits seizure of deceptive jars.

they elected to forego the California market—ten percent of the nation—that would be their choice. The ultimate result: they revised their containers; the statute and the dignity of California were upheld and consumers searching for the fountain of youth were not denied their full measure of the indescribable variety of beauty preparations. As a postscript: we discovered that many products other than cosmetics similarly violated deceptive packaging proscriptions and we took comparable corrective steps in those instances.

During my years as Attorney General I established an active consumer fraud section and a business fraud section, as well as an antitrust division, all designed to use the power of government to protect consumers from overreaching business enterprises. Those who succeeded me in that office have maintained and expanded the same services.

But even an aggressive and vigilant government cannot assume the entire burden. Unfortunately there is no sure way in which the gullible can be protected from the avaricious in modern society. If one chooses to buy the Golden Gate bridge—before inflation boosts the price—it is unlikely that even the most alert governmental agencies will be able to deter him. But to throw up our hands in despair because all the simpletons in our midst cannot be saved would doom the majority of good people who may have ascended a rung or two higher on the credibility ladder to a sad economic fate. Fortunately, for the sake of our pride and our purse, government—legislatively and judicially—has manifested a growing concern for our well-being as consumers. That is the theme of this thoughtful and useful issue of the *Santa Clara Lawyer*. It will be cited often.

One effort of the judiciary, with which I am now concerned, has been helping to shape the consumer class action. Its development in recent years has been significant and rapid. In some circumstances caveat emptor has been superseded by caveat vendor.

Even though consumer class actions are deemed a contemporary phenomenon, from the inception of its judicial system California has recognized representative suits protecting the economic interests of affected groups. In the very first volume of *California Reports*, the Supreme Court permitted an action on behalf of shareholders of a joint stock company to dissolve the company and distribute assets, even though some of the shareholders—ordinarily necessary parties—were out of state.<sup>3</sup> The court described the rule in terms that could be adapted to current consumer class actions:

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3. Von Schmidt v. Huntington, 1 Cal. 55, 68 (1850).

Where the question is one of a common or general interest, or where the parties form a voluntary association for public or private purposes, the persons interested are commonly numerous, and any attempt to unite them all in the suit would be, even if practicable, exceedingly inconvenient, and would subject the proceedings to the danger of perpetual abatements and other impediments . . . .<sup>4</sup>

In 1872, section 382 of the Code of Civil Procedure<sup>5</sup> was amended to provide for representative actions: “[w]hen the question is of a common or general interest, of many persons, or when the parties are numerous, and it is impractical to bring them all before the court, one or more may sue or defend for the benefit of all.”<sup>6</sup>

For the next nine decades, however, California courts adopted a restrictive view of class actions, until the horizons were expanded by such contemporary decisions as *Chance v. Superior Court*,<sup>7</sup> *Daar v. Yellow Cab Co.*,<sup>8</sup> and *Vasquez v. Superior Court*.<sup>9</sup> The latter two cases resulted in relaxation of several of the previously significant barriers to consumer class actions: (1) the necessary parties requirement; (2) the common fund requirement; (3) the identifiability of the ascertainable class at the outset of the action; and, (4) the necessity of total identity of facts for each class member.

By mentioning California cases I do not mean to imply this state is alone in consumer protection progress. Significant decisions can be found in many jurisdictions, such as Florida,<sup>10</sup> New York,<sup>11</sup> Ohio,<sup>12</sup> Illinois<sup>13</sup> and New Jersey.<sup>14</sup> In *Kugler v. Romain*,<sup>15</sup> the Supreme Court of New Jersey specifically grounded its approval of a class action suit against sellers of “educational” material on our decision in *Vasquez*.

There have been pragmatic reasons for judicial improvisation in the field of consumer protection. Unfortunately, in the eyes of many critical observers, some administrative agencies, particularly at the federal level, have not been as vigilant in protection of consumer rights as they could be. Professor Louisell has written, “administrative agencies such as the FTC, FCC, and

4. *Id.* at 66-67.

5. CAL. CIV. PRO. CODE § 382 (West 1973).

6. *Id.*

7. 58 Cal. 2d 275, 23 Cal. Rptr. 761, 373 P.2d 849 (1962).

8. 67 Cal. 2d 695, 63 Cal. Rptr. 724, 433 P.2d 732 (1967).

9. 4 Cal. 3d 800, 94 Cal. Rptr. 796, 484 P.2d 964 (1971).

10. *City of Miami v. Keton*, 115 So. 2d 547, 552 (Fla. 1959).

11. *Hall v. Coburn Corp.*, 26 N.Y.2d 396, 259 N.E.2d 720 (1970).

12. *Robnet v. Miller*, 152 N.E.2d 763 (Ohio App. 1957).

13. *Kimbrough v. Parker*, 101 N.E.2d 617, 618 (Ill. App. 1951).

14. *Kugler v. Romain*, 58 N.J. 522, 279 A.2d 640 (1971).

15. *Id.*

ICC have failed to live up to the high promises of their golden years."<sup>16</sup> Former Commissioner Nicholas Johnson of the FCC has attributed the lack of administrative vigilance to ineffective counsel, inadequate investigative facilities, public ignorance of agency policies and failure of agencies to encourage effective citizen participation.<sup>17</sup>

The omissions of the administrative process and the somewhat tardy response by legislative bodies created a vacuum which the judiciary necessarily filled. To support that theme, instead of my undertaking an immodest description of our court's rationale which resulted in the widely discussed *Vasquez* opinion, I yield again to Professor Louisell:

In *Vasquez*, the court freely acknowledges social, legislative, and judicial considerations, beyond the facts of the instant case, which support a class action in a consumer fraud situation. The court begins discussion of the availability of a class action by considering the position of a consumer in modern society. "Protection of unwary consumers from being duped by unscrupulous sellers is an exigency of the utmost priority . . . ." Throughout the opinion, the court is sensitive to the social realities which are entwined with the facts being asserted. The opinion notes the lack of bargaining power of the low income consumer, the widespread use of high pressure sales techniques, and the possibility that, in the absence of a class action, the individual consumer may lack a remedy for fraud. Equally important, the court specifically enumerates some of the anticipated results of allowing a class action, noting the importance of such an action as an effective sanction against the wrongdoer, and as a deterrent against other illegitimate practices. Given these societal considerations, the class action is a significant step in equalizing the bargaining power of the consumer with that of the seller. This step helps achieve optimal working of the judicial system for, as so often stated, the adversary process functions best when the opposing parties are equally powerful.<sup>18</sup>

I do not imply, by the foregoing generous quotation, that *Vasquez* and similar decisions were free from criticism. Quite the contrary, representatives of some business and financial institutions read ominous implications into the judicial trend. A counsel for a national lending corporation wrote: financial companies "may cease to do business with any dealer who lacks suffi-

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16. Louisell, Miller & West, *Comments on Vasquez v. Superior Court*, 18 U.C.L.A. L. REV. 1056, 1063 (1971) [hereinafter cited as Louisell].

17. Johnson, *A New Fidelity to the Regulatory Ideal*, 59 GEO. L.J. 869 (1971).

18. Louisell, *supra* note 17 at 1062 (footnote omitted).

cient financial backing to substantially satisfy any legal liability that the financial institution may incur by reason of the breach of his warranties."<sup>19</sup> I for one do not see that as quite the evil the writer implied it to be. Another business writer decries the class action as "essentially a device to impose the loss on the innocent lender after the dealer has made his money and moved or become judgment-proof. The better method of protection is prevention through consumer education and state policing."<sup>20</sup>

The class action remains controversial. Its value is inevitably in the eye of the beholder. There are its critics who are concerned about the impact on business enterprises primarily and financial institutions secondarily. There are those who believe the class action imposes an unmanageable administrative burden on the judicial process and creates grave problems of due process. Still others doubt that the minimal benefits to generally apathetic named and unnamed plaintiffs justify the usually generous rewards harvested by victorious counsel.

On the other side of the debate are those who are convinced the consumer class action is a healthy tonic for the free enterprise system. It restores faith in our judicial system to those whose resources are limited and who could not, unless joined together with many others, obtain redress for a grievance that may be minor in the broad economic scheme but major to a necessitous individual. It aids the judicial process by combining into one lawsuit many small actions that would otherwise be tried separately. It can serve to prevent a fraudulent business operation from retaining its ill-gotten gains and finally, by penalizing competition that defrauds, it aids the vast majority of legitimate business firms that operate with high standards of integrity.

Whether consumer class actions are a placebo or a panacea, or something in between, remains to be determined. The jury is still out. While we await the ultimate verdict, I am hopeful that consumer class actions will be given every reasonable experimental opportunity under the tender guidance of wise and imaginative trial judges.

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19. Baronoff, *Comments on Vasquez v. Superior Court*, 18 U.C.L.A. L. REV. 1091, 1096.

20. Smit, *Are Class Actions for Consumer Fraud a Fraud on the Consumer*, 26 BUS. LAW. 1053, 1078 (1971).