Tenants in Court: The Class Action

I. INTRODUCTION

A single tenant wields relatively little power in comparison to his landlord. Growing housing shortages assure landlords of low vacancy rates, and the loss of a tenant who departs because of an unhappy experience has little or no impact on a landlord who is confident of finding a new tenant within a few days or perhaps hours. Threats to move are generally treated with indifference, not only because of the ease of re-letting, but also because the tenant often has no alternative choice of accommodations which make it possible for him to execute his threat. In addition there is little or no competition in most areas to provide a better facility, except perhaps to the very rich, and landlords generally run little risk of a bad reputation resulting from poor relationships with tenants. In our mobile society there is not much chance that word-of-mouth advertising will cut rentals, as disgruntled and potential tenants rarely meet to share experiences and expectations.

Due to their weak bargaining position, the possibility of court relief becomes more than a passing thought to many tenants. Perhaps it is because courts today are viewed as more progressive, more protective of the otherwise insignificant "little guy," that they are seen as a means to improve living conditions. However, because the individual tenant is normally without the means to pursue litigation on his own, the possibility of court relief rarely becomes a reality. His claim may be of relatively little value, yet he can afford neither to expend the money for repair, nor the greater cost of pursuing to judgment his landlord's liability. And the low-income person who is

dependent on free legal services provided by the government is not only confined by his own monetary inadequacy, but by the realities of the legal situation as it exists. Clearly, the average legal aid office, understaffed and burgeoning with clients, cannot pursue each tenant claim, no matter how well founded or no matter that the sum involved is viewed by the individual tenant as rather large. A one hundred dollar claim—the price, perhaps, of repair for a leaky roof—lies within the range of being too large for the tenant to individually shoulder and too small, if one excludes the inadequate small claims action, to warrant serious consideration for litigation.

Into this dilemma is injected the possibility of a class action—combining grievances held by a large number of tenants against a single landlord. In this remedy appears the solution for tenants who find court action necessary and desirable. The number of clients and the combined monetary value of their claims makes the possibility of litigation more appealing to the attorney, more strategically valuable to clients who find strength in numbers, and more worthy of inclusion on clogged court dockets. Implicit in the class action, of course, is a common landlord who has injured a number of tenants. Most easily identified is the government, who, as a prime provider of housing for low-income families, is a readily accessable defendant. The large corporation who owns or controls numerous apartment complexes, perhaps in a college community, likewise is a possible class action target. Such relief becomes less a possibility as we approach the individual owner who rents or leases a small number of units, although an action by all the tenants in a given apartment block cannot be discounted. This discussion will explore the class action as a possible tenant remedy, note its current status and some of the major problems posed by present court practices, and examine possible future alternatives.

II. FEDERAL LAW

A. JUDICIAL INTERPRETATION

Tenants combining to pursue a common course of relief against a single landlord in federal court will be bound, as are all plaintiffs involved in class action litigation, by Rule 23 of the Federal Rules of Civil Procedure. Unlike the class action in California,[1] which

[1]A comprehensive discussion appears *infra* Part III.

remains a somewhat loose concept unfetterred by a great deal of court interpretation, the Federal Rules and the federal case law provide a well defined body of regulation and precedent governing this type of suit. In fact, that precedent is so deeply embedded in the handling of class actions that even a sweeping revision of Rule 23 adopted in 1966 has been unable, as was intended, to dispose of the limiting factors which have prevented the full value of the class action from being realized.[2]

The original Rule 23[3] was adopted in 1937, abolishing its predecessor, Equity Rule 38,[4] but incorporating the practice thereunder.[5] The brainchild of Professor Moore,[6] the rule divided class actions into

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[2]Kaplan, *A Prefatory Note,* 10 B.C. IND. & COM. L. REV. 497-500 (1969).

[3]Prior to amendment in 1966 Rule 23 provided:

(a) Representation. If persons constituting a class are so numerous as to make it impracticable to bring them all before the court, such of them, one or more, as will fairly insure the adequate representation of all may, on behalf of all, sue or be sued, when the character of the right sought to be enforced for or against the class is

(1) joint, or common, or secondary in the sense that the owner of a primary right refuses to enforce that right and a member of the class thereby becomes entitled to enforce it;

(2) several, and the object of the action is the adjudication of claims which do or may affect specific property involved in the action; or

(3) several, and there is a common question of law or fact affecting the several rights and a common relief is sought.

(b) Secondary Action by Shareholders. In an action brought to enforce a secondary right on the part of one or more shareholders in an association, incorporated or unincorporated, because the association refuses to enforce rights which may properly be asserted by it, the complaint shall be verified by oath and shall aver (1) that the plaintiff was a shareholder at the time of the transaction of which he complains or that his share thereafter devolved on him by operation of law and (2) that the action is not a collusive one to confer on a court of the United States jurisdiction of any action of which it would not otherwise have jurisdiction. The complaint shall also set forth with particularity the efforts of the plaintiff to secure from the managing directors or trustees and, if necessary, from the shareholders such action as he desires, and the reasons for his failure to obtain such action or the reasons for not making such effort.

(c) Dismissal or Compromise. A class action shall not be dismissed or compromised without the approval of the court. If the right sought to be enforced is one defined in paragraph (1) of subdivision (a) of this rule notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs. If the right is one defined in paragraphs (2) or (3) of subdivision (a) notice shall be given only if the court requires it.

[4]Equity Rule 38 read:

"When the question is one of common or general interest to many persons constituting a class so numerous as to make it impracticable to bring them all before the court, one or more may sue or defend for the whole."

The Equity Rules, adopted by the Supreme Court in 1912 and in effect until the adoption of the FEDERAL RULES OF CIVIL PROCEDURE in 1937, may be found at 226 U.S. 659.

[5]Ford, *The History and Development of Old Rule 23 and the Development of Amended Rule 23,* 32 ANTITRUST L. REV. 254, 255 (1966).

[6]Comment, *Proposed Rule 23: Class Actions Reclassified,* 51 VA. L. REV. 629, 630 (1965).

three categories. Moore named these categories "true," "hybrid," and "spurious," and although these designations do not appear in the text of Old Rule 23 they were adopted by the courts from the beginning and became effectively a part of the rule.[7]

The classification into this tripartite system resulted in what has been dubbed the "right-oriented" approach to class actions.[8] A "true" class action involved rights which were "joint, or common, or secondary." In contrast, a "spurious" action involved rights which were several and distinct, but which were bound together by a common question of law and fact as the basis for common relief. A "hybrid" action was somewhere in between; several rights were involved but they related to a specific property about which the litigation was concerned.[9]

The problems which the courts faced in handling these distinctions is well known and need not be duplicated here.[10] It is sufficient to note that spurious actions, which in reality were nothing more than permissive joinder devices, were the most difficult for the courts to conceptualize and administer.[11] The total revision of Rule 23[12] was

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[7] *Id.*

[8] Ford, *Federal Rule 23: A Device for Aiding the Small Claimant,* 10 B.C. IND. & COM. L. REV. 501, 502-503 (1969).

[9] Comment, *supra* note 6, at 630-631. Footnote nine of the article cited contains references to Moore's articles on the subject.

[10] See *Advisory Committee's Note on Rule 23,* 39 F.R.D. 94, 98-99 (1966).

[11] "The 'spurious' class action was a particularly puzzling creation." Wright, *Class Actions,* 47 F.R.D. 169, 175-176 (1969).

[12] **Rule 23.**
CLASS ACTIONS

(a) Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

(b) Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

(1) the prosecution of separate actions by or against individual members of the class would create a risk of

(A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or

(B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

critically acclaimed as a much needed and highly significant break-

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(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

(c) Determination by Order Whether Class Action to be Maintained; Notice; Judgment; Actions Conducted Partially as Class Actions.

(1) As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. An order under this subdivision may be conditional, and may be altered or amended before the decision on the merits.

(2) In any class action maintained under subdivision (b) (3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice shall advise each member that (A) the court will exclude him from the class if he so requests by a specified date; (B) the judgment, whether favorable or not, will include all members who do not request exclusion; and (C) any member who does not request exclusion may, if he desires, enter an appearance through his counsel.

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

(4) When appropriate (A) an action may be brought or maintained as a class action with respect to particular issues, or (B) a class may be divided into subclasses and each subclass treated as a class, and the provisions of this rule shall then be construed and applied accordingly.

(d) Orders in Conduct of Actions. In the conduct of actions to which this rule applies, the court may make appropriate orders: (1) determining the course of proceedings or prescribing measures to prevent undue repetition or complication in the presentation of evidence or argument; (2) requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of any step in the action, or of the proposed extent of the judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise to come into the action; (3) imposing conditions on the representative parties or on intervenors; (4) requiring that the pleadings be amended to eliminate therefrom allegations as to representation of absent persons, and that the action proceed accordingly; (5) dealing with similar procedural matters. The orders may be combined with an order under Rule 16, and may be altered or amended as may be desirable from time to time.

(e) Dismissal or Compromise. A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs.

through.[13] Perhaps the greatest relief was the realization that spurious class actions would be retired as a nemesis to bench and bar. Unfortunately, the exhilaration was premature and short-lived. The plan of those who revised the rule with the view toward enhancing the class action as a device to aid the small litigant has been effectively thwarted by the Supreme Court.

1. POTRERO HILL

Long entrenched within the concept of class actions was the rule against aggregation of claims in hybrid and spurious situations to reach the requisite jurisdictional amount.[14] In a true class action, since the rights involved were jointly held by all members of the class, the amount in controversy was that amount claimed by the class as a whole. By contrast, in hybrid and spurious actions, since rights involved were several and could be properly pursued individually by each class member, the amount in controversy was determined by the individual claims of the class members. To reach the jurisdictional minimum each class member had to show his claim, standing alone, was of itself sufficient to confer subject matter jurisdiction on the court. This rule was court imposed and resulted from an application of Rule 82 of the Federal Rules of Civil Procedure which states that no rule shall expand or contract existing federal court jurisdiction.[15] Since each individual claim, so the argument went, which was below the monetary minimum could not be heard in federal court, it would be expanding the jurisdiction of the court to take cognizance of those claims which would not otherwise be heard simply by lumping all of them together and treating the amount in controversy as the total sum.[16]

New Rule 23, it was hoped, would do away with the impermissability of aggregation in cases which under the Old Rule would have

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[13]*See e.g.*, Ford, *supra* note 5, at 262-263. The author is, however, careful to mention that new and troublesome problems may result. Other commentators have taken a "wait and see" attitude. *See e.g.*, Wright, *supra* note 11, at 171. For a discussion of the shortcomings of the rule as amended, see Note, *Revised Federal Rule 23, Class Actions: Surviving Difficulties and New Problems Require Further Amendment,* 52 MINN. L. REV. 509 (1967).

[14]Bangs, *Revised Rule 23: Aggregation of Claims for Achievement of Jurisdictional Amount,* 10 B.C. IND. & COM. L. REV. 601, 608 (1969).

[15]Rule 82 says in relevant part: "These rules shall not be construed, to extend or limit the jurisdiction of the United States district courts. . . ."

[16]This argument was likewise accepted in the first case to reach a court of appeals under New Rule 23. Alvarez v. Pan American Life Ins. Co., 375 F.2d 992 (5th Cir. 1967). It was subsequently adopted by the Supreme Court in Snyder v. Harris, 394 U.S. 332 (1969), discussed *infra.*

been classed as spurious.[17] One argument in favor of aggregation for those whose interests were bound only by similar questions of law and fact was that under the New Rule all members of the class, present or absent, are bound by the decision in the case unless they specifically opt out by a given date.[18] Under the Old Rule only those named in the pleadings were actually bound by the decision, and this fact gave credence to the argument that no aggregation of claims for a total class could be allowed since certain members whose claims were used to establish jurisdiction were not bound by an unfavorable decision.[19]

The New Rule likewise shot new life into the concepts of the class action as a remedy for the small litigant[20] and as a means of solving a given problem without a multiplicity of similar suits.[21]

Under the provisions of the New Rule members of the Potrero Hill Community Action Committee filed suit in the District Court for the Northern District of California seeking a declaratory judgment and a mandatory injunction against the Housing Authority of San Francisco. The Committee alleged that the Housing Authority, which received federal funds through a contract arrangement with the Department of Health, Education and Welfare, had breached its duty to provide a decent, safe, and sanitary housing unit for each of the tenants who lived in the Housing Authority's Potrero Hill Project.[22] Plaintiffs sought a delineation of their rights as tenants and an order requiring the repair of the premises. Twenty-seven persons were actually named as plaintiffs and they purported to represent themselves and all Project residents who comprised the class of individuals similarly situated and too numerous to bring before the court.

Exactly why plaintiffs chose a federal rather than a state forum is unclear. The defendant was a local housing authority whose federal

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[17]Kaplan, *supra* note 2.

[18]FED. R. CIV. PRO. RULE 23 (c) (2) (A). Wright, *supra* note 11, at 183.

[19]Decisions under the Old Rule were "without prejudice" to unnamed parties. This led to a curious situation: unnamed class members could benefit from a favorable decision but were not bound by an unfavorable one. There was a split in authority as to whether persons could intervene *after* a judgment on the merits favorable to them. *See Advisory Committee's Note on Rule 23, supra* note 10, at 105. No such loophole exists under the New Rule, since all class members who do not affirmatively withdraw before a verdict are bound thereby. Rule 23(c) (2).

[20]Ford, *supra* note 8.

[21]Kaplan, *supra* note 2, at 497. *See generally* Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure,* 81 HARV. L. REV. 356, 375-400 (1967).

[22]Potrero Hill Community Action Committee v. Housing Authority of San Francisco, 410 F.2d 974, 975 (9th Cir. 1969).

connections involved funding only. No diversity of citizenship was involved. The obvious explanation is that plaintiff wished to have a federal court recognize a federal remedy arising from the general statutory language of 42 U.S.C. § 1401 which outlines Congressional policy relative to a decent and safe low rent housing program.[23] Plaintiffs alleged that a federal question was involved, claiming that their rights as third party beneficiaries of the contract between the federal government and the Housing Authority, whereby the government agreed to expend funds in furtherance of the Potrero Hill low-rent facility, were breached because the Authority failed to properly maintain the project units in a decent, safe, and sanitary manner.[24] Underlying plaintiffs' strategy may have been the motion that a federal judiciary would be amenable to a grant of relief which might be unattainable in a local state forum.

To attain the jurisdictional minimum, plaintiffs claimed two things. First, they asserted that together all claims against defendant exceeded $10,000. Secondly, they asserted that each individual claim exceeded $10,000. The appellate court (Ninth Circuit), in affirming the lower court's dismissal of the case, recognized that the claims of all tenants together would certainly be more than $10,000,[25] but for reasons discussed *infra,* refused to allow aggregation. What is mysterious is that the court ignored without comment plaintiffs' allegation that each of them had a claim in excess of $10,000.[26] Of course a court may dismiss a case where the amount claimed is in bad faith and asserted merely to gain jurisdiction.[27] There is, however, no evidence that each plaintiff in *Potrero* acted in bad faith in asserting it would cost more than $10,000 to adequately repair his unit. Further, there appears no mention by the defense of bad faith in its brief. The whole discussion of jurisdictional amount, both by the defense

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[23]In relevant part 42 U.S.C. § 1401 states: "It is declared to be the policy of the United States . . . to assist the several states and their political subdivisions . . . to remedy the unsafe and insanitary housing conditions and the acute shortage of decent, safe, and sanitary dwellings for families of low income . . . ." 42 U.S.C. § 1402 defines "low rent housing" as "decent, safe, and sanitary dwellings within the financial reach of families of low income. . . ."

[24]42 U.S.C. § 1410 sets forth the provisions whereby the government may enter into contracts with local housing authorities to provide federal funds for low income housing. The reciprocal state statute under which the Housing Authority of San Francisco contracted with the federal governments is CAL. HEALTH & SAFETY CODE § 34327 (West 1967).

[25]410 F.2d at 976.

[26]In fact the court never mentioned this allegation although it was reiterated on page 22 of Appellants' (plaintiffs') brief.

[27]32 AM. JUR. 2d, *Federal Practice and Procedure* § 136 (1967).

and by the court, centers on the impropriety of aggregation of claims in the present action.

If plaintiffs sought a recognition of a federally protected right arising from the Low Rent Housing Act it won a grudging admission by the appellate court as to the existence of a federal question[28]—an admission neither the defense nor the trial court was willing to make. However, this was simply a matter of winning a battle and losing the war, since plaintiffs' case was dismissed by the court, which refused to allow the aggregation of claims for jurisdictional purposes.

The Ninth Circuit relied on a then recent Supreme Court decision, *Snyder v. Harris*,[29] which involved a delineation of aggregation practices under New Rule 23. To clarify a disparity which had arisen in the circuit courts over the permissability of aggregation under New Rule 23 where the type of suit would have previously been delineated hybrid or spurious, the Supreme Court granted certiorari to two cases, one from the Tenth Circuit allowing aggregation,[30] and one from the Eight Circuit denying it.[31]

The Court rejected the contention that aggregation of Old Rule hybrid of spurious claims was permissable under the New Rule, overturning the Tenth Circuit argument that an abolition of the types of class actions also worked an abolition of aggregation limitations. The Court noted that historically the rule against aggregation was devolved in cases involving joinder of claims, and since class actions involving separate claims were really a permissive joinder device they should be treated no differently therefrom.[32] The Court, although recognizing the familiar hazard of trying to differentiate between joint and separate claims and the other problems inherent under the Old Rule, nevertheless found that to allow aggregation would extend federal jurisdiction and be contrary to Congressional intent. Congress, it was felt, had declined, through its silence during the amendment of the Old Rule, to change the aggregation restrictions, and thus

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[28]410 F.2d at 978.

[29]394 U.S. 332 (1969).

[30]Coburn v. Gas Service Co., 389 F.2d 831 (10th Cir. 1968). The appellate court affirmed the trial court's allowance of aggregation where plaintiff sued on behalf of himself and 1800 others similarly situated for recovery of utility overcharges of $7.81 per customer.

[31]Snyder v. Harris, 390 F. 2d 204 (8th Cir. 1968). The appellate court affirmed the trial court's denial of aggregation where plaintiff sued for herself and others similarly situated in an action against the board of directors of a life insurance company who allegedly failed to distribute the proceeds of a stock sale to shareholders as required by law. Plaintiff's claim was for $8,740. 4,000 others were involved, with a total possible liability to defendant of $1,200,000.

[32]394 U.S. at 336-337.

"froze" present judicial interpretation. Further, Congressional policy was on the side of stemming the increasing tide of federal litigation, and allowing aggregation would militate against that policy.[33] The Court felt that aggregation problems arose most frequently in diversity cases which could be handled as adequately in state courts. Federal question cases, it was felt, could often be tried in the federal system without concern for jurisdictional minimums.[34]

In a vigorous dissent Justice Fortas chastized the Court for an unwillingness to reexamine its own policies in light of the spirit of the New Rule. He noted that the amended rule shifts the emphasis from traditional property notions to an analysis of the suitability of resolution of a particular claim by means of a class action.[35] It is as wrong, he concludes, for the Court to refuse jurisdiction granted to it as it is to exercise jurisdiction denied it.[36]

The *Potrero* court, applying *Snyder,* found aggregation improper, since it could find no single right peculiar to the class as a tenant group. Rather, applying traditional property concepts (which the court stated did not lend themselves well to the case),[37] it found that each tenant's rights as a lessee were separate from those of fellow tenants in the same housing project.[38]

2. THE PROPRIETY OF A TENANT CLASS UNDER RULE 23

The *Snyder-Potrero* line of cases is an unfortunate one for tenants, as well as others similarly situated. The small claimant is in no better position than he was prior to the amendment of Rule 23. The emphasis on the right-oriented approach as opposed to an analysis of the class action's suitability to resolution of a particular claim saps the New Rule of much of its vitality. That this is true may be demonstrated by a quick glance at the Rule and at the facts in the *Potrero* case.

Subdivision (a) of Rule 23 sets forth the prerequisites to a class action. There was little dispute in *Potrero* that the case was a proper

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[33]*Id.* at 339.

[34]*Id.* at 341.

[35]*Id* at 343-344 (dissenting opinion).

[36]"[T]he courts do not obey, but violate, the jurisdictional statutes if they continue to impose ancient and artificial judicial doctrines to fragment what is in every other respect a single claim, which the courts are commanded to stand ready to hear." *Id.* at 357.

[37]410 F.2d at 977.

[38]*Id.* at 978. Another recent decision has denied aggregation by a tenant class. Hahn v. Gottlieb, 430 F.2d 1243, 1245 n. 1 (1st Cir. 1970) (citing *Snyder* and *Potrero*).

class suit according to the criteria of this section and subdivision (b) (2).[39] The plaintiffs were too numerous to join, there were questions of law and fact common to all, the claims of the representative parties were typical of the class as a whole, and the named representatives were able to fairly and adequately protect the interests of the class.

Subdivision (b) delineates actions properly classified as class suits if the criterion of subdivision (a) have been met. A class action is proper, according to (b) (1), where separate actions by individual class members would create a risk of incompatible standards of conduct being established for the defendant because of inconsistent or varying adjudications, or where an adjudication for an individual would be dispositive of or impair the rights held by the class as a whole. It is clear that in *Potrero* varying adjudications in favor of or against individual tenants of the housing project would create the risk that the Housing Authority would find itself in varying legal postures *vis-a-vis* its different lessees. Further, a precedent set by an action of one lessee would be, for all practical purposes, dispositive of the rights of other tenants whose positions are nearly identical to that of the individual lessee. While it is probable that in a case concerning a federal right against a local housing authority the need to preserve a unanimity of adjudication with respect to plaintiffs and defendant is of greater concern than in an action against a private landlord, the use of the class action even in the latter case is a compelling one if we presume that the policy of the law is equal treatment of those similarly situated.

Subdivision (b) (2) authorizes a class action where the party opposing the class has acted or failed to act on grounds generally applicable to the class, thus making appropriate injunctive or declaratory relief applicable to the entire group. *Potrero* plaintiffs brought suit under this provision[40] for obvious reasons. Theirs was the type of case, as would be that of any tenant class, ideally suited to be prosecuted under this provision.

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[39]*Id.* at 976.

[40]Plaintiffs in *Potrero* properly demonstrated that they were a viable class under Rule 23 (b) (2). Other categories have been examined to demonstrate that their action may well have been proper under one of the other provisions. Generally, it would seem that any particular suit would have greater validity as a class action if it could fit into more than one category, although those which do not may be no less valid. Section (c) (1) provides that the court shall determine by order whether or not an action may be properly maintained as a class suit, and a court may be more strongly inclined to rule in favor of a class suit if the suit's characteristics apply to more than one category. It is interesting that (b) (2) was thought of by the Advisory Committee as applying to racial discrimination problems. 39 F.R.D. at 102. A good discussion of the applicability of the various categories will be found in Note, *Rule* 23: *Categories of Subsection (b),* 10 B.C. IND. & COM. L. REV. 539 (1969).

Subdivision (b) (3) authorizes the class suit where it appears to the court that the common element of the legal and factual issues predominate over individual concerns and where the class action is the superior method of fair and efficient adjudication of the dispute. Again, the *Potrero* circumstances strongly indicate that the class action was the best method for resolving the rights and liabilities of the parties. To treat the claim of the class as a whole as the amount in controversy would have done no violence to the purposes for which the class action was established. Rather it would have settled the federal issue and disposed of the claims of numerous persons, thus saving the time and energy of other courts, whether state or federal, which would be called upon to deal with the situation piecemeal.

The remainder of Rule 23 concerns itself with problems of notice,[41] the binding nature of the judgment,[42] class member options to withdraw from the action,[43] class divisions into subclasses,[44] court supervision to insure fair representation[45] and similar judicial housekeeping considerations. The whole tenor of the rule favors the proposition that a class action is proper when circumstances dictate its efficacy. No mention of aggregation is made (a fact the *Snyder* court regarded as Congressional approval of existing aggregation standards) and it seems harsh indeed to undercut the utility of the class action by an insistence on aggregation requirements promulgated under a defunct classification system.

Tenants in federal court must hope for a change in the law (or wait for increasing repair costs which will clearly make individual claims exceed $10,000 in cases of serious disrepair) and look for alternative remedies for their complaints.

B. RECENT PROPOSED LEGISLATION

It has been the practice in recent years for Congress to pass legislation which permits certain litigants to be heard in federal court without concern for the amount in controversy.[46] Perhaps the solution, barring an amendment to Rule 23 which would allow the claims

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[41] FED. R. CIV. PRO. Rule 23 (c) (2).

[42] FED. R. CIV. PRO. Rule 23 (c) (3).

[43] FED. R. CIV. PRO. Rule 23 (c) (2).

[44] FED. R. CIV. PRO. Rule 23 (c) (4).

[45] FED. R. CIV. PRO. Rule 23 (d).

[46] Examples include civil rights litigation, 28 U.S.C. § 1343, and suits involving restraints of trade, 28 U.S.C. § 1337. The *Snyder* court suggested that most class actions involving federal questions could be tried without regard to the amount in controversy. Snyder v. Harris, 394 U.S. 332, 341 (1969). (Justice Fortas, in dissent,

of the class as a whole to be treated as the amount in controversy,[47] would be legislation specifically allowing tenants to sue as a class in federal court without regard to jurisdictional minimums. To date no such proposal has been made in Congress, but it is worthy of note that recent consumer-oriented legislation has proposed such a scheme for consumers.

Two bills were introduced in the Ninety-first Congress which proposed means of redress for consumer fraud. The "Consumer Class Action Act"[48] sought to confer original jurisdiction upon the federal

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disagreed. *Id.* at 342 n. 2). The Court also suggested that in most instances diversity cases can be handled as well in state courts as in a federal forum. *Id* at 341. The latter comment seems to strike at the heart of the diversity concept itself.

[47]Such a solution has been suggested as "highly desirable" by Professor Wright. Wright, *supra* note 11, at 184.

[48]H.R. 14585, H.R. 14627, H.R. 14832, and H.R. 15066, 91st Cong., 1st Sess. (1969). H.R. 15543, H.R. 15655, H.R. 15656, and H.R. 15789, 91st Cong., 2d Sess. (1970). The companion bill was S. 3092, 91st Cong., 1st Sess. (1969). All bills are identical and read:

A BILL

To amend the Federal Trade Commission Act to extend protection against fraudulent or deceptive practices, condemned by that Act to consumers through civil actions, and to provide for class actions for acts in defraud of consumers.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Consumer Class Action Act".

SEC. 2. Section 5 of the Federal Trade Commission Act (15 U.S.C. 45) is amended by adding at the end thereof the following:

"(m) Consumers who have been damaged by unfair or deceptive acts or practices in commerce are hereby authorized to bring consumer class actions for redress of such damages. Such actions shall be brought as consumer class actions in accordance with section 4 of the Consumer Class Action Act."

SEC. 3. (1) Congress hereby declares that the protection afforded under the existing Federal Trade Commission Act is not sufficient to prevent unfair and deceptive acts perpetrated against consumers and that consumers should be allowed to sue directly for redress in the case of such practices. Congress therefore finds and declares that class actions are the most effective machinery for redress of consumer rights.

(2) Congress further finds and declares that many substantive rights to protect consumers are established in laws of the States, but there is no remedy by which many persons, each having a small claim, can obtain effective redress under State law. Therefore, it is in the public interest to embrace as Federal law certain State recognized rights and afford a uniform Federal process, by consumer class actions, as an effective remedy.

(3) Congress further finds that the lack of an effective process and remedy in these respects impairs the free flow of consumer goods in commerce and that there is an over-riding Federal interest in achieving candor and fair dealing in the marketplace, an interest which, if not protected, clogs the entire economy.

SEC. 4. (a) (1) An act in defraud of consumers which affects commerce is unlawful and the district courts of the United States shall have original jurisdiction without regard to the amount in controversy to entertain civil class actions for redress of such unlawful acts.

(2) For the purposes of this section an "act in defraud of consumers" is—

courts to hear civil actions brought to remedy unfair or deceptive trade practices, "without regard to the amount in controversy." The effect would have been to undo *Snyder v. Harris* for representative suits brought by consumers. Federal law, as outlined in the Federal Trade Commission Act, as well as any applicable state statutory or decisional law would be the basis for relief.[49]

Section 4 (3) of the act may have included tenants under the umbrella of protection, since a consumer was defined as "any natural person who is offered or supplied goods, services, *interests in land,*

(A) an unfair or deceptive act or practice which is unlawful within the meaning of section 5 (a) (1) of the Federal Trade Commission Act, or

(B) an act which gives rise to a civil action by a consumer or consumers under State statutory or decisional law for the benefit of consumers.

(3) A "consumer" is any natural person who is offered or supplied goods, services, interests in land, or intangibles primarily for personal, family, household, or agricultural purposes.

(b) In the case of any class action brought upon the basis that a deceptive act or practice which is unlawful within the meaning of section 5 (a) (1) of the Federal Trade Commission Act has violated consumer's rights, the court shall in construing the terms "unfair or deceptive", give great weight to the interpretation given such terms by the Federal Trade Commission and by the Federal courts in applying section 5 (a) (1) of the Federal Trade Commission Act; except that nothing in this Act or the amendments made by this Act, shall be construed to require the court to await administrative action by the Federal Trade Commission before applying Federal law to the facts of the case.

(c) In the case of any class action brought upon the basis of a violation of consumers' rights under any State law the court shall, in deciding such action, apply the following criteria:

(1) State law relating to consumers' rights under State statutory or decisional law is adopted as Federal law.

(2) Federal law applicable to each class shall be fashioned upon the law of the State and State statutory and decisional construction shall be applied as if jurisdiction of the Federal court were based on diversity of citizenship.

(3) In cases of conflict between State statutory and decisional construction and Federal law the latter shall prevail, and Federal law governing the case shall be fashioned from State law not in conflict, as near as may be, and from Federal law.

(4) If, prior to the date of enactment of this Act, a cause was not subject to removal under section 1441 of title 28, United States Code, the adoption of State law as Federal law by this Act shall not authorize the removal of such a cause on the jurisdictional basis of a Federal question.

(d) Whenever a class of consumers prevails in a class action under this Act, including the amendments made by this Act, the court shall award to the attorneys representing such class a reasonable fee based on the value of their services to the class. Attorneys' fees may be awarded from money damages or financial penalties which the defendant owes to members of the class who cannot be located with due diligence except that an attorney's fee may be awarded from damages or relief that the defendant owes to members of the class who cannot be located with due diligence. Such attorneys' fees awarded by the court shall not exceed 10 per centum of the total judgment unless failure to award a greater amount would be manifestly unjust and not commensurate with the efforts of counsel.

[49] *Id.* at § 4 (c)(1)(2)(3).

or intangibles primarily for personal, family, *household,* or agricultural purposes." (Emphasis added).

If we view the lessee in his traditional position as the holder of an interest in land, he arguably fits within the purview of the act. It has been effectively shown, however, that the modern tenant is in reality a consumer of housing, and as a consumer he fits more neatly within the parameters of the legislation.[50]

This liberal class action remedy for the defrauded small claimant was opposed by the Nixon Administration, which introduced the "Consumer Protection Act of 1969."[51] This proposal allowed for private consumer action only after the Attorney General or the Federal Trade Commission (FTC) had successfully obtained an injunction or entered an order against someone who had committed an unfair or deceptive act or practice[52] as defined by the legislation.[53] No mention of a class action appeared in the bill, although its advocates claimed such actions were the contemplated private remedy.[54] Moreover, no provision was made for aggregation of claims. The act included protection for consumers of real property, which arguably includes tenants.[55]

Proponents of the "Consumer Class Action Act" argued that injured persons should not have to wait for prior action by governmental bodies whose past record indicated that they had neither the manpower nor the desire to vigorously pursue dishonest business practices.[56] Rather, an effective remedy is possible only where private

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[50]Article, *The Tenant As A Consumer,* 3 U.C. DAVIS L. REV. 59 (1971).

[51]H.R. 14931, S.3201, 91st Cong., 1st Sess. (1969). The text of relevant portions of the bill, as amended by the Senate Commerce Committee, appear *infra*, note 62. The complete text of the original and amended versions of S. 3201 may be found in S. REP. NO. 91-1124, 91st Cong., 2d Sess., at 41 *et. seq.* and 21 *et. seq.*, respectively (1970).

[52]This provision allowing private action was contained in § 204 of the original bill. It is retained as § 206(a) in the amended version, *infra* note 62, but is no longer the sole possible remedy.

[53] § 201 of both the original and amended versions of S.3201 sets out those items which constitute "unfair consumer practice." The original contains eleven categories, the amendment sixteen. S. REP. NO. 91-1124, *supra* note 51, at 42 (original), 23 (amendment).

[54]Statement by R. McLaren, *Hearings on H.R. 14931 and Related Bills Before the Subcomm. on Commerce and Finance of the House Comm. on Interstate and Foreign Commerce,* 91st Cong., 2d Sess., ser. 91-43, at 202 (1970).

[55]Both the original bill and the Senate amendment, in § 201, define "consumer" as "any natural person who is offerred or supplied goods . . . for personal, family or household purposes." Real property is included within the definition of "goods." S. REP. NO. 91-1124, *supra* note 51, at 43 (original), 24 (amendment).

[56]*See* statement by B. Grant and statement by E. Berlen, *Hearings on S. 3092 and Related Bills Before the Consumer Subcomm. of the Senate Comm. on Commerce,* 91st Cong., 1st and 2d Sess., ser. 91-48, pt. 1, at 174 and 193, respectively (1970).

persons may themselves seek court aid. Neither government funds nor government personnel are necessary to affectuate the remedy, but small claimants gain an otherwise unobtainable day in court.[57]

Arguments for the administration proposal centered on several fears concerning enactment of the opposing measure. First, harrassment and coercion of businesses were likely to result if consumers were given the opportunity to pursue a private remedy by pooling their losses.[58] Small entrepeneurs would suffer most and could be driven out of business.[59] Second, attorneys, anticipating large fees, would sue indiscriminately, picking defendants not for their culpability but for their financial ability to pay large judgments rendered against them.[60] Third, courts would be flooded with class action litigation, and justice would grind to a halt.[61]

Extensive hearings were held in both houses of Congress on the opposing measures. The Senate reported out the administration bill with several amendments. The most crucial change amounted to a rejection of the limitation on private class actions.[62] While it retained the section which permitted the Attorney General or FTC to proceed

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[57]Statement by G. Gordin, *Id.* at 164, *et. seq.*

[58]Statement by E. Dunkelberger, *Id.* at 218.

[59]Statement by T. Rothwell, *Hearings on H.R. 14931, supra* note 54, at 288.

[60]Statement by H. Schiff, *Hearings on S. 3092, supra* note 56, at 200.

[61]Statement by R. McLaren, *Id.* at 25-26. Often the expansion of a legal doctrine or the passage of a new statute is opposed on the basis that the courts will become overcrowded with hopeful plaintiffs with unfounded claims. It is assumed there would be no opposition to one actually injured finding redress in court. Therefore, the argument must be that a change in the present judicial method or approach will breed frivolous suits. This belies the integrity of the legal profession and its ability to dissuade potential clients who have no chance of prevailing in court from wasting their money. In another context, a court responded to the argument that "literally thousands" of litigants would be forthcoming if the court made a certain decision by saying: "Our experience . . . confirms the view that the expense and vexation of legal proceedings is not lightly undertaken." Scenic Hudson Preservation Conf. v. F.P.C., 354 F. 2d 608, 617 (2d Cir. 1965).

§206(d) of the amended bill, *infra* note 62, allows the court to award the defendant the costs of defending the suit, including attorney's fees, if the court feels the action was brought frivolously, without probable cause, or for harassment.

[62]The relevant part of the amended bill reads:

SEC. 206. (a) When a supplier, (i) in any action brought by the Attorney General under section 205 of this title, has been enjoined from committing any unfair consumer practice, whether after final adjudication or by consent decree, or (ii) in any proceeding brought by the Federal Trade Commission under section 5 of the Federal Trade Commission Act with respect to acts or practices alleged to be unfair consumer practices within the meaning of section 201 of this title, has been ordered to cease and desist from that act or practice, and the order shall have become final within the meaning of section 5, either after adjudication or by consent decree, any consumer claiming to have been adversely affected by the act or practice giving rise to such injunction or order may bring a civil action against said supplier.

against violators of the act, it inserted a measure which gives private persons the right to institute a class suit ninety days after filing notice with the FTC of the alleged violation. During that ninety days the FTC or Justice Department may act against the alleged violator, in which case private action is postponed until a resolution of that action has been made. Clearly, while it will not give private persons complete dominion over consumer wrongs, it will open the door for action in many cases in which the government can or will do nothing.

The Senate Commerce Committee gave several reasons for rejecting the requirement of a prior government suit in all cases before allowing private litigation to commence. First, it cited the poor record of the FTC in the area of consumer protection. Consumers have

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(B) (1) Notwithstanding subsection (a), a consumer who has been injured by an unfair consumer practice may sue as a representative party on behalf of all for redress of such injury ninety days after the date on which the Federal Trade Commission has been notified of such practice if such action may be maintained as a class action under the Federal Rules of Civil Procedure, except that no consumer shall be a member of such class unless he shall have paid or become obligated to pay an amount greater than $10 in any transaction as a result of such practice.

(2) Any action under this subsection may be brought in the district courts of the United States and shall be governed by the Federal Rules of Civil Procedure.

(3) Actions pursuant to this subsection for redress of consumer injury shall be administered, so far as practicable, to avoid a multiplicity of actions seeking relief for or on behalf of the same consumers. Any action brought by the Attorney General pursuant to section 205 of this title or by the Federal Trade Commission pursuant to section 5(a) (6)(B) of the Federal Trade Commission Act, whichever first occurs, shall bar a complaint for redress of consumer injury by the other with respect to the same subject matter. If, within ninety days after the Federal Trade Commission has been notified under the provisions of paragraph (1) of this subsection, the Attorney General or the Federal Trade Commission publishes in the Federal Register notice of an intention to bring an action referred to in the previous sentence and does commence such an action within ninety days, and if any class action is brought under this section relating to the same subject matter and the same consumers for whom redress is sought in the action brought by the Attorney General or the Federal Trade Commission, then any such class action shall be stayed and consolidated with the action brought by the Attorney General or the Federal Trade Commission. The Attorney General and the Federal Commission shall notify any person known to him or to the Commission who has complained of the same unfair consumer practice of the intention to bring such an action.

(c) Actions pursuant to this section for redress of consumer injury shall be administered, so far as practicable, to facilitate voluntary settlements. The court shall have authority in a representative action, upon the tender of a reasonable settlement offer by the supplier to the entire class, to supervise the submission of such settlement offer to the class. The court may take reasonable steps to insure that the consumers in the class are afforded the opportunity to exercise an individual choice with respect to accepting or rejecting any settlement offer. The court shall insure that equal space for the presentation of views as to the merits of the offer shall be tendered to members of the class and suppliers in the notice of the offer to the members of the class. The cost of communicating the offer, or subsequent offers tendered under the provisions of this section, to the members of the class shall be borne by the defendants. Such settlement offer shall be completed as expeditiously as possible.

no assurance that the FTC will, despite recent improvements, remain strong through successive administrations. Second, the FTC and the Justice Department have only limited staffs and budgets. They cannot possibly handle all claims, and even many highly significant violations would go uncorrected. If administration proposals requiring prior government action in all cases were enacted into law, countless victims would be left with no possible remedy. By changing the act to include both public and private actions a much wider range of protection is available to the consumer. The Committee characterized the Nixon proposal as one in which the consumer was told "[y]ou cannot have your remedy until the bureaucracy is ready, willing and capable of prosecuting the [person] who has wronged you."[63]

One major problem with the amended legislation is that it fails to mention the permissability of aggregation for class actions. It seems clear from a reading of the bill that aggregation is entirely permissable for a representative suit is authorized where the individual loss of each class member is a minimum of ten dollars.[64] Since Congress is aware of both the $10,000 jurisdictional requirement of the federal courts and the Supreme Court's ruling limiting aggregation under Rule 23, it would be a hollow remedy indeed to permit class actions without allowing aggregation. Under present Rule 23 practice there

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(d) Whenever a consumer shall prevail in an action brought pursuant to this section, he shall be allowed to recover in addition to damages the costs of suit, including attorneys' fees. Such costs may be awarded from money damages which the defendant owes to members of the class who cannot be located with due diligence. Upon termination of a class action under this section, whether by judgment, settlement or compromise, the court shall inquire into the reasonableness of attorneys' fees charged and revise such fees where necessary to assure a reasonable relationship, taking into consideration the contingency of compensation, between such fees and the actual time spent by attorneys in preparation and prosecution of the action. If the court determines that any class action brought pursuant to this section has been brought frivolously, with knowledge that the claim lacks probable cause and with intent to harass or intimidate the defendant, the court may in its discretion award the defendant the cost of defending the suit, including a reasonable attorney's fee.

(e) An action to enforce any claim under this section shall be forever barred unless commenced within three years after the claim arose, except that this limitation shall be tolled during the period for which an action is barred under subsection (b).

[63]S. REP. NO. 91-1124, *supra* note 51, at 15-16.

[64]Both the amended bill and the Senate Committee comments fail to use the term "aggregation." This failure is mysterious. That aggregation is permissible seems to be so obvious to the drafters when they say "class action," that they don't specifically mention it. As mentioned, *infra*, this omission may be costly. Typical of the indications that aggregation is assumed is the following: "Class action proposals before Congress recognize that consumers have rights which the economics of court procedure now render illusory because the cost of prosecution exceed [sic] the potential recovery." *Id.* at 16.

may be nothing to prevent consumer class actions where each individual has a claim that exceeds $10,000; so the act, if it precludes aggregation, adds nothing to the present situation.

While both logic and the flavor of the bill suggest that aggregation is allowable, one is immediately reminded that *Snyder* clearly repudiated aggregation under New Rule 23 despite a very strong argument indicating that the intent of those who revised the Old Rule was to abolish aggregation limitations where the action was one which could be most efficiently and effectively handled by a representative suit. Failure to specifically spell out the fact that aggregation was no longer disallowed in what would have formerly been a "spurious" situation resulted in a retention of the old practice. It is not unlikely that federal courts, relying on the strict position of *Snyder,* would conclude that aggregation is impermissable under the "Consumer Protection Act," since consumer suits would have traditionly been dubbed "spurious," and in those situations aggregation is not allowed in the absence of specific language to the contrary.

Whether or not the "Consumer Protection Act" will be of value to tenants is at best conjectural. It must first find approval in Congress, then be liberally interpreted by courts to include tenants as consumers. Aggregation of claims must also be allowed, either by specific amendment to the legislation as reported to the Senate, or by permission of the courts if the act is enacted in its present form. Should administrative proposals requiring government action prior to private litigation be returned to the act, tenants could find little comfort in the enactment of the bill. Neither the Justice Department nor the FTC currently handles tenant problems. Since current manpower and budget limitations prevent both the FTC and the Justice Department from prosecuting all traditional consumer grievances, it is highly unlikely that they would have the resources to handle tenant problems, even if tenants convincingly argued that the act protected them.

The government, as the only means of securing relief, would have to be willing to take a tenant case, seek injunctive relief, and argue to the court that tenants were protected consumers. Given an overload of standard consumer fraud cases it is probable that tenants would have a long wait.

If, as seems likely, a consumer act is passed which allows for private action, tenants stand a good chance of benefiting therefrom. Without such a self-help law, however, consumer legislation will be of little value to those who live in rented housing.

III. CALIFORNIA LAW

A. JUDICIAL INTERPRETATION

Up to this point our discussion has focused on the class action as it is incorporated into the federal system. We have seen that lessees of the government may have an as yet undelineated federal remedy *vis-a-vis* local housing authorities. And, in a proper diversity situation, a tenant class may sue its private landlord in federal court. The problem does not appear to be one of the propriety of tenants as a class, but rather, as has been demonstrated, the impropriety of aggregation to reach the minimum requisite amount to confer jurisdiction on the court. There was no argument in *Potrero* that the plaintiffs were not a proper class and that the suit was not a proper one to be handled in a representative fashion. Rather, there was agreement that plaintiffs were a proper class according to Rule 23 (b) (2). Hence, the class action for tenants is a valid one provided each person has a claim in excess of $10,000. Unfortunately, most tenants are small claimants, thus making the available remedy meaningless.

However, as we examine the class action in California and the attending case law, there appears to be greater barriers to the proper maintenance of a class suit than the disallowance of aggregation. Perhaps these barriers are more apparent than real in light of recent trends, but existing judicial interpretation makes the present situation unclear at best.

1. *COMMUNITY OF INTEREST AND THE PROBLEM OF DISSIMILAR RELIEF.*

A. History

Unlike Rule 23, with its elaborate details for identifying and administering a class suit, California's class action provision, Code of Civil Procedure § 382, is short and uninformative. In relevant part it says:

> [W]hen the question is one of 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.

Despite the alternative language of § 382 which states that a class suit is proper when many persons have a common or general interest *or* when the parties are too numerous to join, the California Supreme Court has held that a common interest is required regardless of the

number of persons involved.[65] Just what constitutes this sufficiency of community interest has given the courts a good many problems from case to case.

The court has, however, eased one requirement in recent years which the earlier cases sought to impose on the class action. Those decisions held that the suit could be maintained only if the plaintiffs were in fact "necessary parties,"[66] as defined by statute,[67] but simply too numerous to be satisfactorily joined in one action. Rather, the high court has said that the community of interest among the plaintiffs need not meet the rigid "necessary party" standard.[68] This, it has been suggested, helps preserve the theoretical purpose of the class action, which is to avoid "a multiplicity of suits by enabling the greatest number of parties to have their rights determined without joining."[69]

There are two reasons why earlier cases applied the more rigid "necessary party" test. First, the class action provision of § 382 comes after the compulsory joinder language in the same statute which requires that "[o]f the parties to the action, those who are *united in interest must be joined* as plaintiffs or defendants."[70] (Emphasis added). Second, the history of class actions indicates that they were permitted to avoid a multiplicity of litigation when it was not feasible to follow equity's command that everyone whose interests would be affected by the judgment must be made a party to the litigation.[71] Hence, it was not surprising that courts saw the class action as

[65]Weaver v. Pasadena Tournament of Roses Ass'n, 32 Cal. 2d 833, 198 P.2d 514 (1948). This case evidently put to rest language in other cases which suggested that only one of the criteria of CAL. CODE OF CIV. PRO. § 382 (West 1954) need be met. Carey v. Brown, 58 Cal. 180 (1881), Jellen v. O'Brien, 89 Cal. App. 505, 264 P. 1115 (1928). *But see* Renken v. Compton City School Dist., 207 Cal. App. 2d 106, 24 Cal. Rptr. 347 (1962) (citing Jellen v. O'Brien, *supra*).

[66]A "necessary party" is one whose rights must be delineated in order that the rights of other parties to the litigation may be resolved with finality. This must be distinguished from an "indispensable party" who is one whose interests must inevitably be affected by any judgment. A necessary party's rights may be separable from those of the parties before the court, but those rights must be adjudicated before the entire matter is put to rest. 37 CAL. JUR. 2d, *Parties* §§ 4-5 (1957).

[67]CAL. CODE OF CIV. PRO. § 389 (West 1954). This section defines both indespensable and necessary parties.

[68]In holding that members of the class need not be necessary parties the court in *Weaver* disapproved language in cases such as Watson v. Santa Carmelita Water Co., 58 Cal. App. 2d 709, 137 P.2d 757 (1943) which imposed the requirement.

[69]Note, *Parties: Representative Suits: Unity of Interest Required Where Separate Relief is Demanded,* 37 CAL L. REV. 525, 527 (1949).

[70]The class action provision was considered merely an exception to the first part of the statute. The California statute was derived from a similar New York law, which in turn was influenced by Story's comments in EQUITY PLEADINGS. *Id.* at 527 n. 10.

[71]Comment, *Class Actions and Interpleader: California Procedure and the Federal Rules,* 6 STAN. L. REV. 120, 121 (1953).

a time saving device only when the parties, who would otherwise have been required to specifically participate in the suit, were simply too numerous to bring before the court. There was no desire, since the class action was the exception and not the norm, to extend the procedure to those cases in which a general interest in the subject matter of the litigation was held by a large number of persons, but where joinder would not have been mandatory in a case with a small number of litigants.[72]

To allow parties whose presence is not mandatory to a determination of the issues to join in the litigation is known as permissive joinder.[73] It is a newer legal development than compulsory joinder.[74] When the number of persons with a general interest makes permissive joinder impractical, then the class suit in their behalf is the alternative. Under Old Rule 23 of the Federal Rules the "spurious" action was considered merely a permissive joinder device.[75] The New Rule has liberalized this feature. The California Supreme Court has, to some extent, validated § 382 as a permissive joinder device. So, the class action, which originally developed to supplement compulsory joinder when the litigation involved too many parties, has now developed as a supplement to permissive joinder for the same reason.

B. Recent Trends

The extent to which the class action may now be used as a permissive joinder device in California is as yet unclear, although the Supreme Court has in its more recent decisions sought to expand and liberalize the concept. As previously mentioned the action was for a long time limited by the necessary party restriction. In addition the courts demanded a very strict community, or unity, of interest among the parties. This "united in interest" requirement was generally interpreted to mean that either a common fund or joint interests in property had to be the basis for the litigation.[76] In addition, the suit had

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[72]Equity, through a bill of peace, also allowed class suits where the only common interest was one of law and fact. *Id.* at 121-122. California seems to be moving away from its traditional rejection of this use of the representative suit. (See discussion, *infra*).

[73]37 CAL. JUR. 2d, *Parties* § 28 (1957).

[74]The California statute, CAL. CODE OF CIV. PRO. § 389 (West 1954), was adopted in 1927. For a discussion of the movement toward greater latitude in the joinder of parties generally, see Comment, *Joinder of Parties in California,* 23 CAL. L. REV. 320 (1935).

[75]Snyder v. Harris, 394 U.S. 332, 335 (1969); Wright, *supra* note 11, at 175. The federal permissive joinder provision is FED. R. CIV. PRO. Rule 20.

[76]Watson v. Santa Carmelita Water Co., 58 Cal. App. 2d 709, 137 P.2d 757 (1943); Price v. Communications Workers of America, 167 Cal. App. 2d 524, 334 P.2d 632 (1959). These two cases contain specific language asserting the common fund require-

to be of such a nature that, should the plaintiff class prevail, identical recovery would be accorded each individual class member.[77] Both the common fund and identity of relief requirements have been repudiated by the Supreme Court.[78] Unfortunately, the long series of cases in which appellate courts inconsistently applied these criteria are still around and continue to muddle an understanding of the class action both theoretically and procedurally.

A decision which sought to clarify the then existing class action case law is *Weaver v. Pasadena Tournament of Roses Ass'n,*[79] often referred to as the leading case, decided in 1948. While clearly laying to rest the necessary party requirement, the decision very unclearly decided that plaintiffs failed to represent an ascertainable class with a sufficiently united community of interest. The four named plaintiffs, along with several thousand others, had been denied admittance to the Rose Bowl in what they claimed was a fraudulent manner in violation of then existing state law. The four sought to represent all who had been denied admission. No, said the court. While it is true that some may have illegally been denied admittance as claimed, others may have been turned away because they were drunk and disorderly. What really exists are numerous individual claims the same defendant, which, although arising out of the same occurrence, do not share a sufficient community of interest to allow the class suit to proceed.[80]

The court, of course, feared that since a class action binds unnamed class members as well as named parties there may have been individual circumstances of which the court would be unaware in considering a verdict. Perhaps the defendant would be held liable to he who had not been wronged, but to whom admission had been legitimately denied.

What the court failed to realize, as has been suggested elsewhere,[81] was that recovery would have been denied to those who could not show themselves to be part of the class, while at the same time insuring a recovery to the undoubted majority who were not rowdy or drunk, but improperly excluded.

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ment. Many cases lent support to the conclusion that a sufficient "community of interest" was only manifest by a common fund or joint rights. Comment, *supra* note 71, at 125 n. 30.

[77]2 WITKIN CALIFORNIA PROCEDURE, *Representative or Class Suits* 105 (1954).

[78]Chance v. Super. Ct., 58 Cal. 2d 275, 23 Cal. Rptr. 761, 373 P.2d 849 (1962) (common fund), Daar v. Yellow Cab Co., 67 C.2d 695, 63 Cal. Rptr. 724, 433 P. 2d 732 (1967) (identity of relief).

[79]32 Cal. 2d 833, 198 P.2d 514 (1948).

[80]32 Cal. 2d at 839.

[81]Comment, *supra* note 71, at 132.

What *Weaver* accomplished, although it hid its accomplishment behind unclear phrases like "united in interest" and "ascertainable class," was to look at the class action in its functional sense rather than whether or not it was technically correct in a traditional sense. Later cases, discussed below, certainly view *Weaver* as a case in which the propriety of the class action was overshadowed by other considerations, although all factors were weighed.

A more recent decision, *Daar v. Yellow Cab,*[82] may now be the leading case, not only because it is more current, but because its clarity is far superior to the somewhat puzzling *Weaver. Daar* specifically refutes the need for identical relief as a class action prerequisite.[83] It finds no distinction between the court distributing damages and distributing a common fund.[84] And it reaffirms that no single property or fund need be the subject of the litigation.

Where *Daar* places its emphasis is where *Weaver* placed its (although not as explicitly)—on the appropriateness of the class action given the circumstances, rather than on whether or not the action fits into traditional rigid criteria. The court recognizes that the representative suit may be mandatory to vindicate the numerous small claimants and punish the defendant who might otherwise benefit from his wrongdoing by the fact that no one individually could afford to sue.[85] A recognition of the economic considerations, unmentioned in earlier cases, may in the future be one of the most important criteria in establishing the propriety of a class action.

The court emphasizes what may be termed the "legal position" of the respective parties. Where the claims of class members do not each depend on individual sets of facts and legal arguments, and where the defendant would advance the same defense to each claim if separate suits were filed, then a class action is appropriate.[86] This is true even where minor variations in proof are required in order for an individual class member to share in the judgment.[87] In other words, when the legal position of all class members is nearly identical *vis-a-vis* the defendant, a representative suit is appropriate. This is essentially how the *Weaver* court reacted. It felt that each claim was based on a set of facts peculiar to each person excluded from the football game, rather than on one set of facts applicable to all. Probably the better re-

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[82]67 Cal. 2d 695, 63 Cal. Rptr. 724, 433 P.2d 732 (1967).

[83]"As a practical matter, a requirement of common relief has no compelling importance and its absence presents no insuperable difficulties." 67 Cal. 2d at 709.

[84]*Id.*

[85]*Id.* at 715.

[86]*Id.* at 714.

[87]*Id.* at 713.

sult, suggested above, would have been to find a class action proper. What the *Daar* court calls "identical basic issues" would have been satisfactorily adjudicated by the representative plaintiffs, and when a determination was made on those issues (presuming the defendant's liability) others of the class who had been excluded from the Rose Bowl for the same reasons would have been allowed recovery. Numerous small claims would have been vindicated, but the defendant would not have been liable to those who were properly excluded due to improper conduct, as proof of such conduct would not be disallowed.

The *Daar* court quotes *Weaver* with approval and explains the decision on the basis that the legal position of the parties was not similar enough, but its own opinion suggests that it may have decided *Weaver* differently. In *Daar* the court approved a class suit against the Yellow Cab Company which had allegedly overcharged thousands of passengers. An ascertainable class was found despite the fact that the defendant claimed that some fares received were higher for a given number of miles than were other fares because some trips took longer, some passengers gave tips while others did not, and other incidental factors could have contributed to fare discrepancy. Amounts collected would, therefore, have depended on facts peculiar to each transaction.

The court brushed aside the fact that peculiar circumstances may exist in some instances, finding that the rights of small claimants and the interests of the court and the parties could best be served by a class action.

In a recent case, *Gerhard v. Stephens,*[88] the Supreme Court, relying on *Daar,* sets out two criteria for a class action which again emphasizes a more functional approach than that evidenced in earlier cases. One, substantial benefits to all parties must be shown to exist by the use of the representative suit. Two, there must not be numerous and substantial questions left to be litigated by individual plaintiffs after a "class judgment" on common questions has been rendered.[89]

The court leans heavily on the "substantial advantage" standard to test the suitability of a particular class action. Of course, this requires looking at the particular circumstances of the individual case, and looking at them to a greater extent than ascertaining only if plaintiffs are so united in interest as to insure identical relief. Looking only at the latter elements has effectively limited the class action in

[88]68 Cal. 2d 864, 69 Cal. Rptr. 612, 442 P.2d 692 (1968).

[89]68 Cal. 2d at 913.

the past. A new trend which will broaden the applicability of the class action beyond its traditional use is evident.

2. *THE PROPRIETY OF A TENANT CLASS*

Recent cases, then, indicate that tenant class actions have at least become a real possibility in California. First, the fact that numerous small claims would find no other remedy is a compelling consideration. Second, there may be many instances in which no substantial questions requiring individual proof would remain after a class judgment. This latter element presents a more difficult problem, depending on the amount of proof required. Proof of general disrepair of the entire premises may be sufficient if we view tenancy in something other than its traditional role. All tenants may have a common interest in the habitability of the entire premises. On the other hand, it is not inconceivable that a court, viewing tenants in their traditional role as individual leaseholders, would assert that the recovery of each is dependant upon a set of facts peculiar to his own apartment unit, disregarding similar circumstances in surrounding units. Defendant landlords may claim that a different defense is applicable to each tenant, nullifying the "substantial advantage" requirement of the class action.

There seems no overriding reason, however, why a class action would not be the best vehicle for handling tenant grievances. Normally a landlord allows an entire complex of apartments to fall into disrepair, rather than just one or two units. The common issue of the owner's liability to repair is more than likely applicable to all tenants alike, and could be adequately tried on a representative basis. There would be opportunity at trial for the defendant to present any defense he may have against a particular class member which may preclude him from recovery. A judgment against the landlord could be disbursed, in the case of money damages, on a showing by the individual tenant of occupancy and disrepair. The only issue would be the pro rata share of benefits, hardly an issue so complex as to require individual trials. Of course, a mandatory injunction would require repairs to create a habitable facility, and would require no additional proof by individual claimants except in the case of noncompliance.

A tenant class action may often serve as a useful tool for all parties concerned in resolving landlord-tenant differences. Small claim vindication is possible, multiplicity is avoided, and landlords can zero in on excluding those from recovery against whom there is a viable defense, rather than contesting cases where a duty to improve the rental units may be clear.

3. *AGGREGATION*

There is no case touching the validity of aggregation of claims in class actions in California. One reason is obvious from our discussion—the class action has usually been limited to such a degree that the issues have turned on the propriety of the action rather than on the aggregation of claims. When the courts have allowed a class action to proceed they have considered, for jurisdictional purposes, that the amount in controversy is the whole sum sought by the class. Often the whole sum has, of course, been synonomous with a common fund or property.

The law is only now beginning to move toward allowing the class action in cases where plaintiffs are bound together by nothing more than common questions of law and fact. Whether or not the courts will, in such instances, treat the amount in controversy as the total sought is debatable. On the one hand, they may merely follow precedent from the older cases and consider the total amount, without considering the differences in the subject matter of the case. On the other hand, courts may look to permissive joinder precedent which has denied aggregation for purposes of taking the case to a higher court.[90]

The problem is not one of great magnitude, however, for in California, unlike the federal system, aggregation does not become the central issue in whether or not the litigation can proceed. There is in the state always a forum available to hear the case.[91] There may be compelling reasons insofar as litigation strategy is concerned for having a higher court hear the case, but denial of aggregation does not preclude the case from being heard at all. Consequently, aggregation at the state level cannot be considered a crucial problem.

B. RECENT LEGISLATION

The California legislature, during the 1970 regular session, enacted

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[90]Emery v. Pac. Employers Ins. Co., 8 Cal. 2d 663, 67 P.2d 1046 (1937).

[91]In California each county is divided into judicial districts. Every county has at least one superior court which hears all claims in excess of $5,000. Those judicial districts with at least 40,000 persons living therein have a municipal court which, with certain exceptions, hears claims of up to $5,000. CAL. CODE OF CIV. PRO. § 89 (West 1954). Judicial districts with a population less than 40,000 have justice courts which, again with certain exceptions, hear claims of up to $1,000. CAL. CODE OF CIV. PRO. § 112 (West 1954). Claims between $1,000 and $5,000 which arise in a judicial district without a municipal court are heard in any municipal court in the county, or if none exists, then in superior court. *See generally* 13 CAL. JUR. 2d, *Courts* § § 172-182, 192-198 (1954).

the "Consumers Legal Remedies Act."[92] Like the proposed federal legislation, already discussed, the new California law offers consumers protection for a wide range of "unfair or deceptive acts or practices."[93] The act permits class actions for injured consumers, provided four 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.[94]

Condition (2) clearly allows an action when the class members are bound together only by similar questions of law or fact.[95] Such a provision allows a much greater latitude to consumers than has traditionally been given to those who attempt a representative suit. As was mentioned earlier, the courts have only recently turned toward permitting a class action where the plaintiffs are bound together solely by similar questions of law or fact. Since the new consumer remedy is authorization for class litigation independent of Code of Civil Procedure § 382, cases decided thereunder should have no direct bearing on suits commenced under the new law. It will be interesting, however, to see how courts will react to arguments analogizing to class action cases previously decided. Locked into the thinking of the courts are concepts which require more privity among plaintiffs than substantially similar questions of law or fact affecting each individual claim. The willingness of courts to permit class actions to proceed under the new statute may be influenced by those more rigid criteria inherited from prior class action decisions.

Likewise, it will be interesting to see whether or not the new consumer law has a liberalizing effect on class actions which must still be brought under § 382. Perhaps courts will hasten to allow representative suits where they might have previously denied them when they find that successful time saving litigation may be pursued when the class members have only factual or legal issues in common, rather

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[92]A.B. 292, Cal. Legislature, Reg. Sess. (1970). This adds Title 1.5 to Part 4 of Division 3 of the CAL. CIV. CODE, §§ 1750 *et. seq.* (West 1954).

[93]Sixteen categories are delineated. CAL. CIV. CODE § 1770 (West 1954) (new).

[94]CAL. CIV. CODE § 1781(b) (West 1954) (new).

[95]This is identical to the federal practice. *Cf.* FED. R. CIV. PRO. Rule 23 printed in full *supra* note 12.

than being "united in interest" in traditional terms.

A liberalization of § 382 procedure may be what a tenant class must ultimately rely on, since it is fairly clear that the new consumer act is not intended for its benefit. While the federal legislation offers protection for the consumer of real property, which arguably includes lessees, the California law limits its protection to the person buying *"tangible chattels* . . . for personal, family, or household purposes."[96] (Emphasis added). The act specifically exempts sales of entire residences or commercial buildings.[97] Together these provisions suggest that interests in real property, including leases, are excluded from protection.

A tenant could, however, make an argument that he fits the definition of a consumer—"an individual who seeks or acquires, by purchase or *lease,* any goods or services for personal, *family,* or *household* purposes."[98] (Emphasis added). To this may be added the legislative admonition that the act is to be "liberally construed . . . to protect . . . against unfair . . . business practices. . . ."[99] While the tenant has leased a housing unit for a family purpose, this unit does not fit the definition of "goods" in any traditional sense of that term or the definition of "tangible chattels" in the act. Traditional notions about lessees of real property are, however, being severely challenged,[100] and the trend is toward treating the tenant as a consumer of goods and services.[101]

It is obvious that the legislature did not attempt to offer protection to the tenant as such, so tenants will have to show that they are consumers in order to benefit from these statutes. The new law does, however, offer evidence that legislators are willing to allow a liberal class action remedy where the wrongs suffered may best be rectified by that device. Further, it indicated that a general revision of § 382, which could liberalize all representative litigation without the methodical court evolution currently taking place, may be possible in the future. Such a revision could greatly benefit tenants.

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[96]CAL. CIV. CODE § 1761(a) (West 1954) (new).

[97]CAL. CIV. CODE § 1754 (West 1954) (new).

[98]CAL. CIV. CODE § 1761(d) (West 1954) (new).

[99]CAL. CIV. CODE § 1760 (West 1954) (new).

[100]*See* Javins v. First Nat'l. Realty Corp., 428 F.2d 1071 (D.C. Cir. 1970), *cert. denied,* 400 U.S. 925 (1970).

[101]*Id.* at 1074. *See* Article, *supra* note 50.

IV. CONCLUSION

Some years ago the class action was advanced as a valuable tool for solving tenant grievances.[102] Unfortunately its impact has been minimal at best. Federal legislation is required to make it viable in the courts of the United States. Further development of the case law in California, with perhaps some unsuccessful attempts by tenants, will be required before the representative suit becomes viable on the state level. Of course, a state class action act would be most helpful in revising the present law to make it both more comprehensible and more workable, but no such prospect seems immediately likely, although the "Consumers Legal Remedies Act" has accomplished this in one area and may be an indication of general reform in the future.

In an era of rising litigation costs, landlords with large holdings, and crowded court dockets, the class action, while not a panacea, offers a valuable litigation tool for resolving problems left insoluable by other processes. Certainly it is a time and money saving device worthy of consideration by legislators who have the power to shape statutory language to better deal with class litigation methodology.

Hopefully, in the future, the class action can and will reach its full potential as a means of solving problems in the landlord-tenant field.

G. Richard Brown

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[102]Weinstein, *Revision of Procedure: Some Problems in Class Actions*, 9 BUFFALO L. REV. 433, 462 (1960).