these teachers are, for most part, far along in their careers and have fashioned their lives and finances around an expectation of continued employment. The possibility of professional and personal stigmatization upon termination is more pronounced. Thus, the discretion of school administrators is properly circumscribed.

The California procedure for dismissing probationary employees exceeds the provisions of many other states and the minimum constitutional requirements specified by the Supreme Court during its last term. This statutory hearing procedure, supplemented by judicial review, however, may be hampered by two defects. First, it may not adequately protect the petitioning teacher from the bias of a hostile board. Second, it may provide only marginal additional protection over alternatives less burdensome to the state. A balancing of interests, as performed by Judge Coffin in *Drown*, suggests that the same level of protection could be afforded with less administrative cost and delay by providing the probationary teacher with a detailed statement of reasons for his nonretention and full access to the courts to pursue any tort or constitutional claim he might have against the board or administration.

John E. Thorson

II

CIVIL PROCEDURE

A. Compelling Depositions in Class Actions

Southern California Edison Co. v. Superior Court.[1] The supreme court considered the need to protect unnamed class action plaintiffs in discovery proceedings brought by defendants. The named plaintiffs had brought suit on behalf of themselves and approximately 1500 unnamed plaintiffs who owned boats moored at King Harbor in Redondo Beach. They sought damages for injuries to their boats from a "shower" of particulate matter and pollutants discharged by defendant's electric generating plant.[2] The named plaintiffs supplied Edison with a list of approximately 500 unnamed plaintiffs who were members of the King Harbor Boat Owners Association. From the list, Edison randomly selected 20 unnamed plaintiffs for depositions and noticed the attorney for the named plaintiffs that the despositions would be taken. Edison took the position that since all class action plaintiffs,

1. 7 Cal. 3d 832, 500 P.2d 621, 103 Cal. Rptr. 709 (1972) (Sullivan, J.) (unanimous decision).

2. Plaintiffs sought compensatory damages of $5,000,000, exemplary damages of $5,000,000, and a permanent injunction. *Id.*

whether named or not, are parties "for whose immediate benefit an action or proceeding is prosecuted . . . ,"[3] the notice alone was sufficient to compel attendance, and subpoenas were not necessary. Despite "extensive" attempts by the attorney for the named plaintiffs, he was able to produce only two of the prospective deponents; the rest were unable to attend, refused to appear, or could not be reached. Edison then noticed the taking of depositions of another 20 randomly selected unnamed plaintiffs, and informed plaintiffs' attorney that it intended to move under Code of Civil Procedure section 2034(d)[4] for the exclusion from the class of all those who failed to appear.

In response, plaintiffs moved for a protective order under Code of Civil Procedure section 2019(b)(1),[5] which provides for protection against discovery proceedings that constitute "annoyance, embarrassment, or oppression." Plaintiffs sought a ruling that the named plaintiffs were the only persons "for whose immediate benefit an action . . . is prosecuted . . . ," as described in Code of Civil Procedure section 2019(a)(4), and that defendants could only compel named plaintiffs to attend depositions through notice to their attorney.

The trial court issued a protective order on the ground that it was "unfair" to prospective class members, and "an unwarranted and improper burden" on counsel for named plaintiffs to require him to produce anyone other than the named plaintiffs.[6] But the court did not

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3. In the case of depositions of a person for whose immediate benefit an action or proceeding is prosecuted or defended . . . the service of a subpoena upon any such deponent is not required if proper notice of the taking of such deposition is given to the attorney of the party prosecuting or defending the action or proceeding for the immediate benefit of the deponent or to such party, if he has no attorney.

CAL. CODE CIV. PRO. § 2019(a)(4) (West Supp. 1972). If attendance is required beyond 150 miles from the residence of the deponent, an order based on good cause is required. CAL. CODE CIV. PRO. § 2019(b)(2) (West Supp. 1972). Notice standards are set out in subsection (a)(1).

4. If a party or person for whose immediate benefit the action or proceeding is prosecuted or defended . . . willfully fails to appear before the officer who is to take his deposition, after said party or his attorney has been served with a proper notice in accordance with the provisions of subdivision (a)(4) of Section 2019 of this code . . . the court on motion and notice may strike out all or any part of any pleading of that party, or dismiss the action or proceeding or any part thereof, or enter a judgment by default against that party, or impose such other penalties of a lesser nature as the court may deem just . . . .

CAL. CODE CIV. PRO. § 2034(d) (West Supp. 1972).

5. Upon motion . . . the court in which the action is pending may make an order that the deposition shall not be taken, or that it may be taken only at some designated time or place . . . [or] except by allowing written interrogatories by oue or more parties, or that certain matters shall not be inquired into, or that the scope of the examination shall be limited to certain matters . . . or the court may make any other order which justice requires to protect the party or witness from annoyance, embarrassment, or oppression.

CAL. CODE CIV. PRO. § 2019(b)(1) (West Supp. 1972).

6. 7 Cal. 3d at 837 n.4, 500 P.2d at 623 n.4, 103 Cal. Rptr. at 711 n.4.

bar the taking of depositions from unnamed plaintiffs. Instead, it quashed the outstanding notices of deposition and ruled that Edison must issue subpoenas in order to notice depositions of unnamed class members. Defendants then obtained a writ of mandate, and the supreme court granted a hearing.

The supreme court discharged the writ, sustaining the trial court's refusal to define unnamed plaintiffs as anything other than parties whose "immediate benefit" is at stake in a class action. The court thus avoided an unnecessary distinction that could have created difficulties in future class actions.[7] It also upheld the trial court's ruling that Edison could take the depositions of unnamed plaintiffs by subpoena. Presumably the defendant would employ the same procedure used to depose nonparty witnesses. The court's decision left the named plaintiffs with the burden of showing good cause for a protective order conditioning or restricting defense discovery.[8] Plaintiffs' suggestion, that in a class action the defendant should be compelled to show good cause for taking the deposition of unnamed plaintiffs, was rejected.[9]

In essence, defendant Edison sought unsuccessfully to take advantage of the conflict between discovery procedures, which were designed to provide maximum access to information held by other parties, and class actions, based on the principle of virtual representation[10] and developed to permit the interests of many persons to be enforced by the action of a few.

I. EXISTENCE OF A CLASS ACTION

The availability of class actions has been justified on many grounds.[11] Judicial economy aside, one of the primary justifications is still economic: a class action permits the enforcement of the rights of class members, without imposing the burdens of expense that would result if each plaintiff had to bring an individual action.[12] The other major justification is that in the absence of a class action mechanism

7. One such problem might be that of res judicata for the unnamed class plaintiffs. *See, e.g.*, Daar v. Yellow Cab Co., 67 Cal. 2d 695, 704, 433 P.2d 732, 739, 63 Cal. Rptr. 724, 731 (1967).

8. It follows directly from the holding of La Sala v. American Sav. & Loan Ass'n, 5 Cal. 3d 864, 489 P.2d 1113, 97 Cal. Rptr. 849 (1971) that named plaintiffs bear the responsibility for protecting the rest of the class.

9. *See* text accompanying notes 52-56 *infra* for a discussion of the allocation of burdens in discovery motions.

10. Fallon v. Superior Court, 33 Cal. App. 2d 48, 50, 90 P.2d 858, 859 (1st Dist. 1939).

11. *See, e.g.*, the court's discussion in Daar v. Yellow Cab, 67 Cal. 2d 695, 714-15, 433 P.2d 732, 746, 63 Cal. Rptr. 724, 738 (1967).

12. *See, e.g*, Hohman v. Packard Instrument Co., 399 F.2d 711 (7th Cir. 1968); Himmelblau v. Haist, 195 F. Supp. 356 (S.D.N.Y. 1961).

many claims might not be litigated at all.[13]

Section 382 of the Code of Civil Procedure, which permits class action suits, provides in part: "[W]hen the question is one of a common or general interest, of many persons, or when the parties are numerous, and it is impracticable to bring them all before the court, one or more may sue or defend for the benefit of all."[14] Section 382 is "based upon the common law theory of convenience to the parties when one or more fairly represents the rights of others similarly situated who could be designated in the controversy."[15]

Once an ascertainable class is established,[16] the standards required to maintain a class action are the existence of a community of interest, the representativeness of the named plaintiffs, and the presence of fair and adequate representation for the class.[17] When these requirements are met,[18] and sufficient notice[19] is given to members of

13. *See* Daar v. Yellow Cab, 67 Cal. 2d 695, 714-15, 433 P.2d 732, 746, 63 Cal. Rptr. 724, 738 (1967). Comment, *Attorney's Fees in Individual and Class Action Antitrust Litigation,* 60 CALIF. L. REV. 1656, 1671 (1972).

14. CAL. CODE CIV. PRO. § 382 (West Supp. 1972).

15. Fallon v. Superior Court, 33 Cal. App. 2d 48, 50, 90 P.2d 858, 859 (1st Dist. 1939).

16. *See* Daar v. Yellow Cab, 67 Cal. 2d 695, 704, 433 P.2d 732, 739, 63 Cal. Rptr. 724, 731 (1967). For a discussion of *Daar* and the meaning, if any, of ascertainability, *see* Note, *Class Suits,* 56 CALIF. L. REV. 1639, 1642 (1968).

17. *See, e.g.,* the discussion of representation in La Sala v. American Sav. & Loan Ass'n, 5 Cal. 3d 864, 871-72, 489 P.2d 1113, 1119-20, 97 Cal. Rptr. 849, 855-56 (1971).

18. In the absence of explicit statutory guidance, the California Supreme Court in *Daar* referred to Federal Rule 23 as an appropriate standard for the courts. 67 Cal. 2d at 708, 433 P.2d at 742, 63 Cal. Rptr. at 734.

In Vasquez v. Superior Court, 4 Cal. 3d 815, 817-18, 484 P.2d 964, 975, 94 Cal. Rptr. 796, 807 (1971), the court also adopted the applicable language of the Consumers Legal Remedies Act [CAL. CIV. CODE § 1750 *et seq.* (West 1973)] as a procedural guide. Civil Code section 1781(c) specifies that, upon notice,

> [t]he court shall hold a hearing, upon motion of any party to the action which is supported by affidavit of any person or persons having knowledge of the facts, to determine if any of the following apply to the action:
>
> (1) A class action pursuant to subdivision (b) is proper.
>
> (2) Published notice pursuant to subdivision (d) is necessary to adjudicate the claims of the class.
>
> (3) The action is without merit or there is no defense to the action.

CAL. CIV. CODE § 1781(c) (West 1973).

Civil Code section 1781(b) specifies that, upon notice,

> The court shall permit the suit to be maintained on behalf of all members of the represented class if all of the following conditions exist:
>
> (1) It is impracticable to bring all members of the class before the court.
>
> (2) The questions of law or fact common to the class are substantially similar and predominate over the questions affecting the individual members.
>
> (3) The claims or defenses of the representative plaintiffs are typical of the claims or defenses of the class.
>
> (4) The representative plaintiffs will fairly and adequately protect the interests of the class.

CAL. CIV. CODE § 1781(b) (West 1973).

19. *See* text accompanying notes 46-50 *infra.*

the class, all members who do not withdraw from the suit will be bound by its outcome.

At the pleading stage of a class action suit, the defendant must show that one of these requirements is not met if it wishes to prevent the suit from proceeding. However, a class action defendant would appear to lack standing to contest the issues of fairness and adequacy of representation provided by the named plaintiffs. Of course, concern for finality and judicial economy might lead the trial court, upon objection by defendant, to order additional named plaintiffs and counsel. This would prevent later challenges by members of the class if the defendant were found not liable.[20] Aside from contesting the minimum class size—that is, the impracticality of bringing all the members before the court—a defendant could only challenge the maintenance of the class suit by demonstrating that there was no "community of interest" among the members of the class,[21] or that the named plaintiffs were not representative of the class.[22]

The courts have interpreted the "community of interest" element of the class action suit to mean that "each class member will not be required to litigate numerous and substantial issues to establish his individual right to recover."[23] However, individual litigation over certain issues, such as proof of damages by each class member, will not preclude bringing the action as a class suit.[24] Parties can maintain class actions even if there is some variation in the evidence of liability,[25] providing that common issues predominate.[26] A class action will be dismissed only when the claims are found to be distinctive rather than common.[27]

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20. *See* note 7 *supra.*

21. This was Edison's claimed intention. 7 Cal. 3d 832, 839, 500 P.2d 621, 624, 103 Cal. Rptr. 709, 712 (1972).

22. The representativeness of the named plaintiffs, a requirement only recently split off from that of fair and adequate representation, appears to be no more than a clarification of the analytical intersection of the requirement of community of interest and the principle of res judicata. Named plaintiffs must be members of the class they seek to represent. La Sala v. American Sav. & Loan Ass'n, 5 Cal. 3d 864, 870-73, 489 P.2d 1113, 1116-17, 97 Cal. Rptr. 849, 852-53 (1971). If they are not, they lack standing and cannot bring the action. Consequently, the unnamed members would neither be bound by the action nor entitled to damages.

23. Vasquez v. Superior Court, 4 Cal. 3d 800, 811, 484 P.2d 964, 970, 94 Cal. Rptr. 796, 802 (1971).

24. Daar v. Yellow Cab, 67 Cal. 2d 695, 709, 433 P.2d 733, 742-43, 63 Cal. Rptr. 724, 734-35 (1967).

25. *See* Vasquez v. Superior Court, 4 Cal. 3d 800, 811, 484 P.2d 964, 970, 94 Cal. Rptr. 796, 802 (1971).

26. Consumers Legal Remedies Act, CAL. CIV. CODE § 1781(b) (West 1973), applied in *Vasquez* 4 Cal. 3d at 818, 484 P.2d at 975, 94 Cal. Rptr. at 807.

27. *See* cases collected in Daar v. Yellow Cab, 67 Cal. 2d at 710-11, 433 P.2d at 743-44, 63 Cal. Rptr. at 735-36. However, those cases would probably be permitted as class actions today.

Since the unnamed plaintiffs are permitted to present their individual damage claims after the common issues of law and fact have been decided, defense discovery of the damage claims of unnamed plaintiffs is difficult to justify. In fact, the amount of damages will often be a matter peculiarly, or at least equally, within the defendant's knowledge.[28] If not, discovery directed at the named plaintiffs should, in most circumstances, enable the defendant—and the court—to ascertain the potential damages.

Defendants could also seek discovery from all class members in order to show a lack of community of interest. Given competent counsel for both sides, however, discovery from the named plaintiffs should bring out the existence or absence of common questions. It is difficult to conceive of a situation in which variations in questions of liability that would compel dismissal of the class part of the complaint could not be discovered from named plaintiffs. Therefore the courts should consider discovery from unnamed plaintiffs only if named plaintiffs cannot provide enough information on the existence of a community of interest. Even then, narrowing the class defined in the complaint, or adding additional named plaintiffs, would appear to be more direct solutions.[29]

In sum, there are no strong arguments to support discovery from unnamed plaintiffs.

II. DISCOVERY: SANCTIONS AND PROTECTIONS

a. Sanctions

California's discovery rules were liberalized in 1957 and discussed by the court in *Greyhound v. Superior Court*[30] and its com-

28. *See, e.g.*, the fact situation in Daar v. Yellow Cab, 67 Cal. 2d 695, 433 P.2d 732, 63 Cal. Rptr. 724 (1967), where defendant Yellow Cab's records would reveal the extent of meter overcharges.

29. Some defense claims might require narrowing of the class. For example, Edison might claim that some owners' boats were damaged by road grit when being transported. The plaintiffs had anticipated this by describing a class of owners whose boats were moored at the harbor or not transported to and from the lake. Similarly, in *Vasquez*, the defense might have claimed that there were independent transactions involved. However, the class was already narrowed to those claiming a common sales pitch; moreover, not all claims need be common, so long as common questions predominate.

30. For a complete listing of the purposes of discovery, and a series of cases interpreting the discovery statutes, see Greyhound Corp. v. Superior Court, 56 Cal. 2d 355, 364 P.2d 266, 15 Cal. Rptr. 90 (1961) and cases immediately following: Steele v. Superior Court, 56 Cal. 2d 402, 364 P.2d 292, 15 Cal. Rptr. 116 (1961); West Pico Furniture Co. v. Superior Court, 56 Cal. 2d 407, 364 P.2d 295, 15 Cal. Rptr. 119 (1961); Cembrook v. Superior Court, 56 Cal. 2d 423, 364 P.2d 303, 15 Cal. Rptr. 127 (1961); Carlson v. Superior Court, 56 Cal. 2d 431, 364 P.2d 308, 15 Cal. Rptr. 132 (1961); Filipoff v. Superior Court, 56 Cal. 2d 443, 364 P.2d 315, 15 Cal. Rptr. 139 (1961).

panion cases. The court made it clear that the function of modern discovery is to permit economical investigation of opposing parties, so that there may be a just disposition on the merits. To accomplish this the courts have held that: (1) statutes are to be construed liberally in favor of discovery; (2) judicial discretion to restrict discovery must only be exercised to prevent abuse or oppression by a party; (3) sanctions should not be imposed as punishments, but only as necessary to achieve the goals of the discovery statutes.[31]

When applying these guidelines the courts have only reluctantly used their ultimate sanction—the entry of a default judgment against a party resisting discovery—and then generally only after the party refused to obey a court order directing compliance.[32] The analysis in *Greyhound* suggested that courts should tailor sanctions to rectify a party's specific resistance to a particular part of the discovery process; sanctions should not cut a party off from the courts. This rule is well illustrated by *Caryl Richards, Inc. v. Superior Court*.[33] In the face of a court order, the defendant continually refused to divulge the exact percentages of ingredients in its hair spray, which had allegedly caused eye damage to plaintiff. The court of appeal vacated the default judgment entered by the trial court against the defendant. The court reasoned that the only valid purpose of plaintiff's discovery would have been to help establish the harmful nature of the spray. A proper order, the court suggested, might be that for trial purposes, the spray was able to cause eye injury. The court added:

> [i]t seems to us further evident that the order that the court made which deprived petitioner of any right to defend the action upon its merits was designed not to accomplish the purposes of discovery but designed to punish petitioner for its failure to disclose in detail its secret process.
>
> While under the statute the court undoubtedly has the power to impose a sanction which will accomplish the purpose of discovery, when its order goes beyond that and denies a party any right to defend the action or to present evidence upon issues of fact which are entirely unaffected by the discovery procedure before it, it not only abuses its discretion but deprives the recalcitrant party of due process of law.[34]

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31. *See, e.g.*, Caryl Richards, Inc. v. Superior Court, 188 Cal. App. 2d 300, 303-04, 10 Cal. Rptr. 377, 379-80 (2d Dist. 1961). *See* text accompanying note 34 *infra*.

32. MacDonald v. Joslyn, 275 Cal. App. 2d 282, 79 Cal. Rptr. 707 (2d Dist. 1969); Thompson v. Vallembois, 216 Cal. App. 2d 21, 30 Cal. Rptr. 796 (5th Dist. 1963).

33. 188 Cal. App. 2d 300, 10 Cal. Rptr. 377 (2d Dist. 1961).

34. *Id.* at 305, 10 Cal. Rptr. at 381. Note that the entry of default judgment was reversed despite the existence of court orders seeking to compel discovery.

Given the nature of a class suit, exclusion from the class would have almost the same effect as an entry of a default judgment. Under this analysis, it is highly doubtful that the exclusion of unnamed class action plaintiffs sought by Edison would have been sustained on appeal even if it had been granted by the trial court. Edison planned to proceed from noticing of depositions directly to exclusion of those who did not appear for depositions. Without first showing a refusal under a court order to comply, it was unlikely that a trial court would have granted such exclusion absent a showing of bad faith and complete disregard for the judicial process by the unnamed plaintiffs.[35] The trial court would have been required to inquire about Edison's purpose for seeking discovery, so that it could tailor its sanctions and orders to compensate for the information which Edison had been denied. The only valid line of inquiry would have concerned the existence of a class, and this properly should have been addressed to the named plaintiffs first. Only if there had remained some doubt would it be necessary to seek discovery of unnamed plaintiffs. Even then, persons chosen randomly by Edison would not have been so important to this initial determination of the existence of the class, as to justify their expulsion from the prospective class.

b. Protections

The counterpart of the sanction for failure to cooperate in discovery is the protective order to prevent annoyance, embarrassment, or oppression of a party or witness.[36] As with the imposition of sanctions, protective orders lie within the discretion of the trial court.[37] When either party seeks to obtain information which imposes a great burden on the other party, protective orders tailored to the particular situation have been granted.[38] After *Greyhound*, the courts have approved to a limited extent a plaintiff's use of discovery for a "fishing expedition."[39] When plaintiffs have sought to obtain a very large amount of information as measured by the effort required of the defendant, however, the trial courts have generally granted protective orders.[40] This concept of

35. For an example of such a case holding that the entering of a default judgment did not deny due process, *see* Hammond Packing Co. v. Arkansas, 212 U.S. 332 (1909).

36. CAL. CODE CIV. PRO. § 2019(b)(1) (West Supp. 1972), quoted note 5 *supra*.

37. CAL. CODE CIV. PRO. § 2019(b)(1); *cf.* CAL. CODE CIV. PRO. § 2034(d) (West Supp. 1972), quoted note 4 *supra*.

38. *See, e.g.*, Rosemont v. Superior Court, 60 Cal. 2d 709, 388 P.2d 671, 36 Cal. Rptr. 439 (1964). For similar results under Federal Rule 23, *see* De Long Corp. v. Lucas, 138 F. Supp. 805 (S.D.N.Y. 1956) and Ful-Vue Sales Co. v. American Optical Co., 11 F.R.D. 185 (S.D.N.Y. 1951).

39. Greyhound Corp. v. Superior Court, 56 Cal. 2d 355, 385, 364 P.2d 266, 281, 15 Cal. Rptr. 90, 105 (1961).

40. *See* cases cited note 38 *supra*.

protection from burdens and oppression is equally applicable to the protection of plaintiffs from overreaching by defendants.

In *Alpine Mutual Water Co. v. Superior Court*,[41] the named class action plaintiffs were granted partial protection from defendant's interrogatories. Defendants sought both information that was contained in public records and information that would have required the named plaintiffs to contact each of the unnamed class members about their finances and property values. After noting that the named plaintiffs were required to answer with respect to their own claims, the court held that named plaintiffs could also be compelled to supply information about the class that was in their possession or readily available to them and was not equally available to their adversary. But representative plaintiffs could not be compelled to supply information concerning members which was not in named plaintiffs' possession or control unless the interrogatory was directly related to: (1) the named plaintiffs' standing to maintain the action; (2) the existence of an ascertainable class; or (3) the existence of that community of interest which is necessary to sustain the class action.[42]

The *Alpine* decision, noted ouly in passing in *Edison*, thus defines the only legitimate reasons for a defendant's discovery against the unnamed plaintiffs in a class action. Further, the *Alpine* court appears to have anticipated the holding of *La Sala v. American Savings and Loan Ass'n*,[43] which ruled that the named plaintiffs assume a fiduciary duty to the members of the class by bringing a class action. Part of that obligation is the duty to go forward with the suit, whether by prosecuting the action instead of settling[44] or by defending the propriety of the suit as a class action in the first instance. The named plaintiffs' obligation set out in *Alpine* is the counterpart of the rule which confines defendant's discovery, at least initially, to those plaintiffs named in the suit.

III. NOTICE REQUIREMENTS AND BURDENS OF SEEKING DISCOVERY

a. Problems of notice

In attempting to treat the unnamed plaintiffs like plaintiffs in a conventional suit, Edison was proceeding under section 2019(a)(4) of the Code of Civil Procedure, which required written notice to be served on the attorney for the named plaintiffs. It is useful to compare this to two other notice concepts.

41. 259 Cal. App. 2d 45, 66 Cal. Rptr. 250 (2d Dist. 1968).

42. Alpine Mutual Water Co. v. Superior Court, 259 Cal. App. 2d 45, 54, 66 Cal. Rptr. 250, 256 (2d Dist. 1968).

43. La Sala v. American Sav. & Loan Ass'n, 5 Cal. 3d 864, 489 P.2d 1113, 97 Cal. Rptr. 849 (1971).

44. *Id.* at 871, 489 P.2d at 1116, 97 Cal. Rptr. at 852.

Once a person has become a party to an action and an attorney has filed an appearance on his or her behalf, notice to that party is directed to the attorney representing that person. On the other hand, a party must subpoena a nonparty witness to compel his or her attendance at any proceedings including discovery, since he or she has not been brought before the court.[45] This, of course, is the distinction that was at issue in *Edison*, though concealed by the "person for whose immediate benefit" terminology. The court could have taken the view that unnamed plaintiffs were not personally before the trial court. Therefore defendants could not have reached unnamed plaintiffs by mere notice to the representative plaintiffs' attorney.[46]

Another notice concept that is applicable to class actions is the need to provide sufficient notice to bind those who are not present when their interests are adjudicated.[47] Due process has been satisfied in this regard by mailing individual notices,[48] by advertising,[49] and by publication and posting of notice[50] reasonably designed to reach class plaintiffs without spending more on notice than is anticipated from the entire verdict.[51] Thus, far less than personal, in-hand service suffices to bind the unnamed plaintiffs.

On the other hand, the unnamed plaintiffs cannot be bound by the outcome without at least some form of notice reasonably designed to reach them. Certainly no less an attempt at notice should be required when unnamed plaintiffs are called upon to take an active part in the suit by an appearance for a deposition.

b. Allocating burdens in seeking discovery

In the *Edison* opinion,[52] the supreme court reiterated its statement in *Greyhound*[53] that the courts should be careful to place the

45. CAL. CODE CIV. PRO. §§ 1985 (West Supp. 1972), 1985.5 (West 1955), 2016 (West Supp. 1972).

46. *See, e.g.*, Waters v. Superior Court, 58 Cal. 2d 885, 377 P.2d 265, 27 Cal. Rptr. 153 (1962).

47. *E.g.*, zoning ordinance hearings, where notice requirements are specified in statutes rather than being within the discretion of the adjudicatory body. *See, e.g.*, CAL. GOV'T CODE § 65905 (West 1966).

48. CAL. GOV'T CODE § 65905.

49. *See, e.g.*, Eisen v. Carlisle & Jacquelin, 52 F.R.D. 253, 267-68 (S.D.N.Y. 1971) (providing for notice by publication as one-quarter page advertisements in the *Wall Street Journal, New York Times, Los Angeles Times, San Francisco Chronicle* and *San Francisco Examiner*). In particular, see the discussion in *Eisen* at 259-60 and 263 of the costs of advertising, mailing, and administering the various notices required in the course of a large class suit.

50. *See* note 47 *supra.*

51. *See* note 49 *supra.*

52. 7 Cal. 3d at 842-43, 500 P.2d at 627, 103 Cal. Rptr. at 715.

53. Greyhound Corp. v. Superior Court, 56 Cal. 2d 355, 379, 364 P.2d 266, 277, 15 Cal. Rptr. 90, 101 (1961).

burden of avoiding or seeking discovery on the correct party. Some discovery statutes—generally those that result in a relatively heavy imposition on a party—require the proponent to show good cause and obtain a court order.[54] Others, such as section 2019, allow a party to commence discovery procedures such as interrogatories without recourse to the court. Then the party resisting discovery has the burden of proving annoyance, embarrassment, or oppression.[55]

In *Edison*, named plaintiffs sought to shift that burden to the defendant in the class action situation, by seeking a ruling which would have required defendants to show good cause in every case before they could depose unnamed class plaintiffs. The court refused to fashion such a rule. It stressed that the legislature could not have intended the court to reverse such a clearly imposed requirement. Therefore the burden remains on named plaintiffs to seek, as each case arises, the protective orders they need to safeguard their unnamed brethren.[56]

IV. THE CLASS ACTION BURDENED BY DISCOVERY

Edison devoted considerable analysis to the question of defining the unnamed plaintiffs as "parties for whose immediate benefit an action is . . . prosecuted." Then it noted that, despite the parties' contention, this was not the sole issue presented by the case. Another issue was whether the trial court's order requiring the use of subpocnas for discovery of unnamed plaintiffs, rather than mere notice to the named plaintiffs' attorney, was an abuse of discretion. A discussion followed on the proper allocations of the burdens of opposing, or seeking, discovery. The court devoted only a paragraph to the potential for abuse inherent in the notice procedure sought by Edison, and noted in passing the "chilling" effect on class actions that could result. Virtually no consideration was given to whether the trial court's order had gone far enough.

The notice procedure which Edison sought could have stifled class actions. It would have imposed heavy burdens on the named plaintiffs, by requiring them to exhaust time and money in an effort to produce persons whom they did not know. Also, such a notice procedure could have dismantled a class simply by excluding those who did not

54. *See, e.g.*, CAL. CODE CIV. PRO. § 2032 (West Supp. 1972) (requiring submission to a medical examination). *See also* CAL. CODE CIV. PRO. § 2031 (West Supp. 1972) (ordering production of documents and other evidence for inspection). As the *Greyhound* opinion noted, "Discretion is obviously involved here." 56 Cal. 2d 355, 379, 364 P.2d 266, 277, 15 Cal. Rptr. 90, 101 (1961).

55. CAL. CODE CIV. PRO. § 2019(b)(1) (West Supp. 1972).

56. 7 Cal. 3d at 843, 500 P.2d at 628, 103 Cal. Rptr. at 715.

appear. While the suboena requirement removes the burden of producing persons from the named plaintiffs' attorney, however, he or she still must attend those depositions. Of greater importance, the potential for exclusion of class members remains, heightened by the fact that refusal to attend would now constitute disobedience to the court.[57] Class action defendants, deprived by *Edison* of a virtually free device for harassment and dismissal, must make do with a nominally priced subpoena. Defendants can still alter the representative nature of the class action by requiring a personal appearance in the common-question parts of the suit. Especially where the amount claimed for each plaintiff is relatively small, the time and expense that an appearance will cost the individual plaintiff may outweigh the potential recovery. Some of the burdens of expense and geography that were removed by the availability of class actions will have been reimposed.[58]

CONCLUSION

Edison's effect on class action suits is negative. Unnamed plaintiffs have lost some of their isolation from the conduct of the class action, but have gained very little. The requirement of a subpoena, rather than mere notice to the attorney of record, does not greatly reduce the potential for defense harassment, nor lessen the "chill" that may result to the concept of the class action. Since the defense has no valid purpose for turning to unnamed plaintiffs first, a truly protective order would require the defendant to confine his initial discovery to the named plaintiffs. The order would also require another hearing, at which the defendant would have to show good cause for additional discovery from unnamed plaintiffs.[59] By predicating such an order on an initial showing of good cause by named plaintiffs, the court would have satisfied the allocation of burdens set out in section 2019 (b)(1). That section speaks not only to burdens; its objective is "to protect the party or witness from annoyance, embarrassment, or oppersion." The protective order approved in *Edison* does not meet that goal.

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57. *See* discussion accompanying notes 30-35 *supra* on the court's use of discovery sanctions.

58. *See* text and cases accompanying note 12 *supra.*

59. For the view of the Seventh Circuit that (1) the requested information must be actually needed in preparation for trial, and (2) discovery devices must not be used to take unfair advantage of "absent" (i.e. unnamed) class members, *see* Brennau v. Midwestern United Life Ins. Co., 450 F.2d 999 (7th Cir. 1971), *cert. denied,* 405 U.S. 921 (1972) (upholding dismissal with prejudice of those known but unnamed plaintiffs who did not answer mailed interrogatories, following mailed notice of the court's discovery order and the impending sanction).

B. *Purposely Filing Actions in Improper Venue*

Barquis v. Merchants Collection Ass'n of Oakland, Inc.[1] The supreme court held that a cause of action for injunctive relief was stated by allegations that a collection agency filed small claims actions in the wrong county and used form complaints that failed to state facts sufficient for the trial judge to determine whether venue was proper. The court further held that default judgments rendered despite improper venue and defective complaints were not subject to collateral attack and that plaintiffs, therefore, stated no cause of action for the vacating of these judgments.

Barquis was a class action brought in the name of all persons against whom Merchants Collection Association (Merchants) obtained default judgments on the basis of improperly filed complaints. Merchants is a large Oakland collection agency which provides collection services primarily for retail stores located throughout California.

Plaintiffs asked that Merchants be enjoined from engaging in allegedly illegal collection practices which produced a large number of small claims court default judgments. Additionally, plaintiffs asked that all default judgments based on these illegal practices for two years preceding commencement of suit be voided. The trial court sustained a demurrer, without leave to amend, and dismissed the complaint. The court of appeal held that plaintiffs had failed to state a cause of action that would support any of the requested relief.[2]

Plaintiffs first alleged that Merchants obtained a large number of default judgments by repeatedly filing small claims actions in improper counties[3] with the intent of impairing the debtors' ability to defend themselves. Section 395 of the California Code of Civil Procedure provides that proper venue in a contract action involving a claim of less than $500 is the county where the obligation is to be performed, the county where the contract was entered into, or the county where the defendant was a resident at the commencement of the action.[4] At all times relevant to this action the plaintiffs in *Barquis* and the class of persons they represented resided outside Alameda County, and the ob-

1. 7 Cal. 3d 94, 496 P.2d 817, 101 Cal. Rptr. 745 (1972) (Tobriner, J.) (unanimous decision).

2. Barquis v. Merchants Collection Ass'n of Oakland, Inc., 16 Cal. App. 3d 793, 94 Cal. Rptr. 500 (1st Dist. 1971), *vacated*, 7 Cal. 3d 94, 496 P.2d 817, 101 Cal. Rptr. 745 (1972).

3. *See* CAL. CODE CIV. PRO. § 395 (West Supp. 1973), which sets out venue rules for small claims actions.

4. Additionally, Code of Civil Procedure section 396(a) provides that if from the complaint or affidavit it appears that the action was filed in the wrong court, the trial judge is to transfer it to the proper court "unless the defendant consents in writing, or in open court . . . , to the keeping of the action or proceeding in the court where commenced." CAL. CODE CIV. PRO. § 396(a) (West Supp. 1973).

ligations on which they were sued by Merchants were entered into and intended to be performed outside Alameda County. Nevertheless, Merchants filed its actions against these plaintiffs in the Oakland-Piedmont municipal court in Alameda County.[5]

Second, plaintiffs alleged that Merchants' small claims actions were filed on form complaints which failed to state facts sufficient for the trial judge to determine whether the actions were filed in the proper court. Section 396(a) of the California Code of Civil Procedure requires plaintiffs in small claims actions to include in their complaints, or in separately filed affidavits, facts sufficient for the trial judge to determine whether the action was brought in the proper court.[6] Plaintiffs claimed that the form complaints filed against them made only conclusory statements concerning venue,[7] and that these statements were not sufficient for the judge to determine whether venue was proper.[8] Consequently these statements failed to satisfy the requirements of section 396(a).[9]

I. INJUNCTIVE RELIEF

Plaintiffs' plea for injunctive relief was based on California Civil Code section 3369, which permits injunctive relief from unlawful, unfair or fraudulent business practices.[10] The supreme court endorsed plaintiffs' basis for recovery and advanced an additional theory of its own to support the conclusion that plaintiffs stated a cause of action for injunctive relief—that Merchants' alleged action constituted a tortious "abuse of process."

In support of the abuse of process theory the court held that plaintiffs' allegations satisfied the two requirements of the tort of abuse of process:[11] an ulterior purpose and " 'a wilful act in the use of the

5. Plaintiffs also alleged a violation of California Civil Code section 1812.10, which provides that the proper venue in actions on contracts or installment accounts is in the county where the contract was signed or the county where the defendant resided either when the contract was entered into or when the action was commenced. The court concluded that because California Civil Code section 1812.10 applied only to actions on installment contracts at the time this action was brought, it cannot be controlling in this action which concerns installment accounts. 7 Cal. 3d at 99, 122-24, 496 P.2d at 820, 838-39, 101 Cal. Rptr. at 748, 766-67.

6. CAL. CODE CIV. PRO. § 396(a) (West Supp. 1973).

7. These complaints stated only that Merchants was " 'informed and believe[d]' that the account was 'payable in the City of Oakland, County of Alameda.' " 7 Cal. 3d at 101, 496 P.2d at 822, 101 Cal. Rptr. at 750.

8. *See* note 4 *supra.*

9. *See* 7 Cal. 3d at 114-15 n.15, 496 P.2d at 832 n.15, 101 Cal. Rptr. at 760 n.15.

10. *See* note 22 *infra.*

11. Although plaintiffs did not argue abuse of process as a basis for relief, the court concluded that it may make an independent analysis of plaintiffs' allegations and is not restricted to legal theories advanced by plaintiffs in testing the sufficiency of the complaint. 7 Cal. 3d at 103, 496 P.2d at 823, 101 Cal. Rptr. at 751.

process not proper in the regular conduct of the proceeding.' "[12] Complaints that fail to satisfy a statutory requirement—in this instance, California Code of Civil Procedure sections 395 or 396(a)—clearly are "not proper in the regular conduct of the proceeding." The requirement of an ulterior purpose is satisfied by plaintiffs' charge that Merchants intended to obtain an increased number of default judgments by making it difficult for defendants to represent their interests in the actions.

Second, the court found that Merchants' alleged practices constituted an unlawful business practice and, as such, were enjoinable under California Civil Code section 3369.[13] Merchants argued that the alleged practices were not governed by section 3369, contending that the statute applies only to unfair business practices against competitors and is not intended to protect consumers.[14] Additionally, Merchants argued that the scope of conduct encompassed by the term unfair business practices includes only deceptive representations of a business's services or product and that this concept should not now be expanded to include "misuse of judicial procedures."[15]

In disposing of Merchants' first contention, the court reasoned that the public has the greatest need of protection from unfair business practices,[16] citing numerous cases holding that section 3369 is not limited to anti-competitive acts,[17] and found in the language of the statute an implication of the legislature's intent to protect consumers from unfair business practices.[18]

As to Merchants' second contention, the court reasoned that although an injunction against misuse of judicial procedures may be a novel application of the injunction statute, such an application would not expand the scope of business conduct the legislature intended the statute to cover. Observing that most actions brought under section 3369 have been directed at a business's deceptive representations either of itself or its product, the court contended that the statute "was intentionally framed in its broad, sweeping language precisely to enable judicial tribunals to deal with the innumerable ' "new schemes which the fertility

12. *Id.* at 103-04, 496 P.2d at 824, 101 Cal. Rptr. at 752, *quoting* Templeton Feed & Grain v. Ralston Purina Co., 69 Cal. 2d 461, 466, 446 P.2d 152, 155, 72 Cal. Rptr. 344, 347. *See also* PROSSER, LAW OF TORTS 856-58 (4th ed. 1971).

13. 7 Cal. 3d at 108-09, 496 P.2d at 827, 101 Cal. Rptr. at 755.

14. *Id.* at 109, 496 P.2d at 828, 101 Cal. Rptr. at 756.

15. *Id.*

16. *Id.* at 111, 496 P.2d at 829, 101 Cal. Rptr. at 757.

17. *Id.*

18. *Id.* at 110, 496 P.2d at 828, 101 Cal. Rptr. at 756. Section 3369(5) provides: "Actions for injunction under this section may be prosecuted . . . by any person acting for the interests of itself . . . or the general public." CAL. CIV. CODE § 3369(5) (West Supp. 1973). A statute that regulates business activities in the interest of the general public can fairly be described as protecting the consumer.

of man's invention would contrive." ' "[19] The court held that section 3369 permits the courts to reach a just solution whenever a business practice violates fundamental notions of fair and honest dealing.[20] Since the court had already concluded that Merchants' conduct would be unlawful if plaintiffs' allegations were proved,[21] it held further that the same activities would therefore constitute an unlawful business practice under section 3369.[22]

II. VOIDING THE JUDGMENTS

In addition to injunctive relief, plaintiffs asked the court to declare void all judgments that Merchants improperly obtained during the two years preceding the action. Plaintiffs based this request for relief on California Code of Civil Procedure section 396(a), which provides that unless a complaint in a small claims action contains facts sufficient for the judge to determine whether venue is proper, "no further proceedings shall be had in the action or proceeding, except to dismiss the same without prejudice." Plaintiffs argued that the default judgments entered in these actions were void because the complaints were defective under section 396(a), and that, therefore, the actions should have been dismissed by the trial court.

Merchants responded that the alleged venue defects could not justify a collateral attack on the default judgments.[23] They claimed that venue objections are waived if not timely made, and that section 396(a) does not make venue a jurisdictional element necessary for the trial court to render an effective final judgment.

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19. 7 Cal. 3d at 112, 496 P.2d at 830, 101 Cal. Rptr. at 758, *quoting* American Philatelic Soc'y v. Claibourne, 3 Cal. 2d 689, 698, 46 P.2d 135, 140 (1935).

20. 7 Cal. 3d at 112, 496 P.2d at 830, 101 Cal. Rptr. at 758, *citing* American Philatelic Soc'y v. Claibourne, 3 Cal. 2d 689, 698, 46 P.2d 135, 140 (1935).

21. 7 Cal. 3d at 103, 496 P.2d at 823, 101 Cal. Rptr. at 751.

22. *Id.* at 113, 496 P.2d at 831, 101 Cal. Rptr. at 759. Section 3369 provides in part:

> 2. Any person performing or proposing to perform an act of unfair competition within this State may be enjoined in any court of competent jurisdiction.
>
> 3. As used in this section, unfair competition shall mean and include unlawful, unfair or fraudulent business practice and unfair, deceptive, untrue or misleading advertising. . . .

CAL. CIV. CODE § 3369 (West Supp. 1973). Additionally, Merchants argued that injunctive relief was unnecessary because California Code of Civil Procedure section 396(a) already provides a remedy: namely, if venue is improper defendants can move to transfer the action to the proper court, or the court can do so on its own motion. Brief for Respondents (Merchants) in the supreme court, at 9. But plaintiffs in *Barquis* alleged Merchants' business practices prevented them from effectively representing their interests in the small claims actions and thus impaired their ability to invoke these remedies. Remedies are not "available" if they cannot be exercised. Merchants' claim that these remedies exist is illusory if Merchants' business practices interfered with their exercise. Alternative remedies available to plaintiffs are discussed *infra* at notes 27-34 and accompanying text.

23. 7 Cal. 3d at 114, 496 P.2d at 831-32, 101 Cal. Rptr. at 759-60.

The supreme court held that since section 396(a) contains an exception to the rule that objections to venue are waived if not timely made,[24] the trial judges in the original actions were obligated to determine sua sponte whether venue requirements were being met. Inquiry would have revealed that venue was improperly laid. Instead of entering default judgments, the trial courts should have dismissed all of the actions.[25]

Despite the trial courts' failures to dismiss, the supreme court upheld the default judgments on two bases. First, plaintiffs in the present action had alternative means of attacking the default judgments. Second, failure to comply with the requirements of section 396(a) is not a fundamental jurisdictional defect that would deprive the trial court of subject matter jurisdiction and the power to enter an effective final judgment. A final judgment so entered is thus not subject to collateral attack.[26]

a. Alternative remedies for improper venue

The supreme court cited four alternative means for defendants in small claims actions to attack judgments on the basis of improper venue.[27] First, they could file formal motions for change of venue. Second, they could advise the trial judge of inadequacies in the complaints by informal letter or "any other appropriate means."[28] Third, since the right to object to venue is not waived in small claims cases,[29] defendants could raise such a defect in appeals of their judgments. Finally, they could raise venue objections in motions to set aside default judgments under section 473 of the Code of Civil Procedure.[30]

The court's reliance on alternative methods for attacking the judgments is unrealistic. All of the suggested options assume that defendants in small claims actions have knowledge both of venue requirements and of the remedies for their violation. But the very nature of small claims actions undermines the validity of these assumptions. A

24. *Id.* at 115, 118-19, 496 P.2d at 832, 834-35, 101 Cal. Rptr. at 760, 762-63.
25. *Id.* at 118, 496 P.2d at 834-35, 101 Cal. Rptr. at 762-63.
26. *Id.* at 119, 496 P.2d at 835, 101 Cal. Rptr. at 763.
27. *Id.* at 118-19, 496 P.2d at 835, 101 Cal. Rptr. at 763.
28. *Id.* at 118, 496 P.2d at 835, 101 Cal. Rptr. at 763.
29. *Id.* at 116-19, 496 P.2d at 833-35, 101 Cal. Rptr. at 761-63.
30. *Id.* at 118-19, 496 P.2d at 835, 101 Cal. Rptr. at 763. California Code of Civil Procedure section 473 provides:

> The court may, upon such terms as may be just, relieve a party or his legal representative from a judgment, order, or other proceeding taken against him through his mistake, inadvertence, surprise or excusable neglect. Application for such relief must . . . be made within a reasonable time, in no case exceeding six months, after such judgment. . . .

CAL. CODE CIV. PRO. § 473 (West 1967). The court stated that "this remedial provision is highly favored and is to be liberally construed in favor of permitting a determination of actions on their merits." 7 Cal. 3d at 119 n.22, 496 P.2d at 835 n.22, 101 Cal. Rptr. at 763 n.22.

major purpose for establishing small claims courts was to eliminate the need for legal counsel. Section 117(g) of the Code of Civil Procedure specifically prohibits attorneys from participating in the filing, prosecution or defense of litigation in small claims courts.[31] Since venue rules are technical statutory requirements, defendants without attorneys are unlikely to know the applicable venue requirements in their particular actions. Even if legal counsel were permitted, most defendants would not know enough about venue to have any reason to consult attorneys who could advise them. Indeed, because it is recognized that defendants without attorneys are not likely to object to venue, the legislature assigned to the trial judges in small claims actions the responsibility for examining venue on their own motion.[32]

The defendants in the small claims actions contested in *Barquis* cannot realistically have been expected to know without the advice of attorneys that the actions violated venue requirements, that the complaints were defective, that the judgments were subject to attack on appeal because the judges failed to comply with section 396(a), or that venue objections could be made through motions to set aside the default judgments. Technically, these alternatives were available. But it is unrealistic to expect the defendants in the small claims actions to have used them.[33] The court's proposed alternate remedies assume de-

31. CAL. CODE CIV. PRO. § 117(g) (West Supp. 1973). This provision is consistent with the purpose and intended practice of small claims courts. These courts are intended to provide speedy and inexpensive settlements of disputes. A recent comment cited "delay, cost, and procedural technicalities of the regular courts" as leading to reform efforts which have produced small claims courts. Comment, *Small Claims Court: Reform Revisited,* 5 COLUM. J. OF L. & SOC. PROBS. 47 (1969). The court is essentially a court of equity which functions as an informal fact finding body without using technical rules of evidence and other formalities. Eovaldi & Gestrin, *Justice for Consumers: The Mechanisms of Redress,* 66 NW. U.L. REV. 281, 296 & n.79 (1971); Commeut, *Small Claims Court: Reform Revisited,* 5 COLUM. J. OF L. & SOC. PROBS. 47, 55-56 (1969); Comment, *Small Claims Courts and the Poor,* 42 S. Cal. L. Rev. 493, 496 (1969); Commeut, *The California Small Claims Court,* 52 CALIF. L. REV. 876, 881 (1964); Note, *Small Claims Courts as Collection Agencies,* STAN. L. REV. 237, 240-41 (1952). Litigating without lawyers permits greater informality in the proceedings, provides an opportunity for the parties to avoid the expeuse of hiring an attorney, and allows a resolution of their disputes without expert knowledge of the technicalities of the law. Note, *Small Claims Courts as Collection Agencies,* 4 STAN. L. REV. 237, 240-41 (1952).

32. Code of Civil Procedure section 396(a) provides:

> In all [small claims] actions . . . plaintiff shall state facts in the complaint . . . showing that the action has been commenced in the proper court for the trial of such action. . . . Except as herein provided, if such complaint . . . be not so filed, no further proceedings shall be had in the action . . . except to dismiss the same without prejudice.

CAL. CODE CIV. PRO. § 396(a) (West Supp. 1973). Uuder normal rules of civil procedure responsibility to make venue objections rests with defense counsel. *See* CAL. CODE CIV. PRO. § 396(b) (West Supp. 1973).

33. Professor Wigmore said of small claims actions in which attorneys may not participate:

fendants were aware that their small claims judgments were defective because venue was improperly laid. It has already been shown that the legislature assumed small claims defendants would *not* be aware of venue defects and accordingly assigned to the trial judge the role of remedying such defects. Furthermore, the court recognized that a small claims action against a person residing in another county impairs the defendant's ability to protect his interests and is more likely to result in a default judgment.[34]

b. Collateral attack

The court's second reason for refusing to vacate the judgments was that improper venue is not a fundamental jurisdictional defect that would deprive a court of the power to render an effective final judgment.[35] According to the court, there are at least two kinds of jurisdiction: jurisdiction in the strict or "fundamental sense," which confers on the court power to render an effective final judgment; and jurisdiction in its "ordinary sense," which regulates a court's authority to act in a certain manner once "fundamental jurisdiction" is established.[36] A judgment is void only when it is rendered by a court without jurisdiction in the fundamental sense. The supreme court reasoned that in the small claims actions which underlay *Barquis*, the Oakland-Piedmont municipal court had fundamental jurisdiction to hear the actions, but lacked jurisdiction (in the ordinary sense) to do anything but dismiss the actions. The supreme court concluded that since the trial court acted in excess of its ordinary jurisdiction but within its fundamental jurisdiction, the judgments are not void.

The court reasoned that venue could be jurisdictional in the fundamental sense only if expressly designated as such by the constitution

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> [I]t would be a defiance of common sense and a nullification of the main purpose, to enforce the jury-trial rules of Evidence; for *the parties are expected to appear personally without professional counsel, and they cannot be expected to observe rules which they do not know.*

1 J. WIGMORE, EVIDENCE § 4(d), at 106 (3d ed. 1940) (emphasis supplied). The observation has equal force when applied to technical questions of venue or jurisdiction rather than evidence. Courts should not assume that persons without counsel will be aware of technical legal defects or will exploit subtle legal remedies that might be available. The legislature recognized this when it delegated to the trial judge the lawyer's role of objecting to venue. Courts should do no less.

34. 7 Cal. 3d at 107, 496 P.2d at 826-27, 101 Cal. Rptr. at 754-55. *See also* Comment, *The California Small Claims Court*, 52 CALIF. L. REV. 876, 887-88 (1964).

35. 7 Cal. 3d at 119, 496 P.2d at 835, 101 Cal. Rptr. at 763. Witkin explains that:

> In its strict sense, venue is *not jurisdictional.* Jurisdiction relates to the *power* of the court to act, and a court with such power may render a valid judgment though it is not the court of the proper county for trial [citations omitted].

2 B. WITKIN, CALIFORNIA PROCEDURE § 416, at 1248 (2d ed. 1970) (emphasis in original).

36. 7 Cal. 3d at 120 n.24, 496 P.2d at 836 n.24, 101 Cal. Rptr. at 764 n.24 and authorities cited.

or by statute.[37] Neither source seems to have elevated the venue requirement to the level of being jurisdictional in the fundamental sense, and California Code of Civil Procedure section 396(a) suggests the legislature's intent was to leave that status unchanged. Furthermore, section 396(a) permits parties to cure venue defects by consent.[38] Since fundamental jurisdiction can never be conferred by consent, the venue requirement of section 396(a) is therefore not jurisdictional in the fundamental sense.

On the premise that venue requirements are intended to serve the convenience of the parties, it has been suggested that these requirements should be considered jurisdictional when they express a governmental interest or policy superior to those of the litigants.[39] Arguably there is a strong governmental interest in providing litigants (and especially defendants) a fair opportunity to present their cases. This is reflected in the established California policy that favors deciding cases on their merits.[40] The court in *Barquis* argued convincingly that abuses of small claims courts by certain classes of litigants have undermined public confidence in the court system.[41] The governmental interest in maintaining public acceptance of the judicial process and the governmental policy that disfavors default judgments (combined with the knowledge that small claims actions filed in the wrong county result in a greater number of default judgments), argue strongly that venue requirements in small claims actions should be jurisdictional in a fundamental sense.

c. Extrinsic fraud

Even if the court's two grounds for not vacating the default judgments are sound, there is a third rationale that should have established a cause of action for collateral attack of the judgments: the complaint in *Barquis* alleged facts that, if proved, would support a finding that the judgments were obtained through extrinsic fraud. The absence of any discussion by Justice Tobriner suggests that this issue was not raised by plaintiffs in the proceedings below.[42] As the court observed,

37. *Id.* at 121, 496 P.2d at 836-37, 101 Cal. Rptr. at 764-65, *quoting* Newman v. County of Sonoma, 56 Cal. 2d 625, 627, 364 P.2d 850, 851, 15 Cal. Rptr. 914, 915 (1961).

38. *See* note 4 *supra.*

39. 2 B. WITKIN, CALIFORNIA PROCEDURE § 417, at 1249 (2d ed. 1970).

40. *See* 5 B. WITKIN, CALIFORNIA PROCEDURE § 126, at 3702 (2d ed. 1971) and authorities cited.

41. 7 Cal. 3d at 108, 496 P.2d at 827, 101 Cal. Rptr. at 755.

42. Extrinsic fraud was not discussed in any of the six briefs filed by plaintiffs and their *amici curiae* or in the five briefs filed by defendants during the court of appeal and supreme court proceedings. On file, California Supreme Court, San Francisco, California. No argument based on extrinsic fraud was made during oral

however, it is not limited to plaintiffs' legal theories when considering whether the complaint states a cause of action on which relief can be granted.[43]

Courts of general jurisdiction have inherent equity power to vacate default judgments resulting from extrinsic fraud or mistake.[44] Such an action may be initiated by motion or by a new action in equity whether or not the time for appeal has run.[45] The trial court in the present action, therefore, could have permitted collateral attack of the small claims judgments.

Extrinsic fraud is found when an affirmative act of the prevailing party prevented a hearing of the case on its merits.[46] "And fraud practiced on the court by concealing facts affecting its jurisdiction is ground for relief."[47] In *Miller v. Higgins*[48] the court of appeal affirmed the trial court's decision to set aside an order for child adoption. The court held that the prevailing party in the previous adoption action had committed a fraud on the court by concealing facts upon which its jurisdiction depended.[49] A collateral action to set aside the adoption

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argument before the supreme court. Telephone conversation with Peter Hagberg, attorney for plaintiffs, October 18, 1972. Nor was the extrinsic fraud theory treated in the court of appeals decision. Barquis v. Merchants Collection Ass'n of Oakland, Inc., 16 Cal. App. 3d 793, 94 Cal. Rptr. 500 (1st Dist. 1971), *vacated*, 7 Cal. 3d 94, 496 P.2d 817, 101 Cal. Rptr. 745 (1972).

43. *See* note 11 *supra*.

44. Bloniarz v. Roloson, 70 Cal. 2d 143, 146, 449 P.2d 221, 223, 74 Cal. Rptr. 285, 287 (1969) (Traynor, C.J.); CALIFORNIA CONTINUING EDUCATION OF THE BAR, CALIFORNIA CIVIL APPELLATE PRACTICE § 4.30, at 138 (1966).

45. Bloniarz v. Roloson, 70 Cal. 2d 143, 146, 449 P.2d 221, 223, 74 Cal. Rptr. 285, 287 (1969); Heathman v. Vant, 172 Cal. App. 2d 639, 648, 343 P.2d 104, 109 (2d Dist. 1959); CALIFORNIA CONTINUING EDUCATION OF THE BAR, CALIFORNIA CIVIL APPELLATE PRACTICE § 4.30, at 138-39 (1966).

46. United States v. Throckmorton, 98 U.S. 61, 65-66 (1878). *See also* Olivera v. Grace, 19 Cal. 2d 570, 122 P.2d 564, 140 A.L.R. 1328 (1942). Speaking for the majority in that case, Chief Justice Gibson wrote:

> One who has been prevented by extrinsic factors from presenting his case to the court may bring an independent action in equity to secure relief from the judgment entered against him.

Id. at 575, 122 P.2d at 567. *See generally* 29 CAL. JUR. 2d *Judgments* § 160 (1956).

47. 29 CAL. JUR. 2D *Judgments* § 160, at 113 (1956). Extrinsic fraud should lie whether the jurisdiction in question is fundamental or ordinary. *See* note 36 *supra* and accompanying text. *See also* Miller v. Higgins, 14 Cal. App. 156, 111 P. 403 (2d Dist. 1910), discussed in notes 48-50 *infra* and accompanying text, in which the court clearly had jurisdiction in the ordinary sense to award a decree of adoption, but was precluded from exercising its power under that jurisdiction because another court had already issued such a decree. The court held that concealment of the previous decree of adoption caused the court to exercise jurisdiction it would not otherwise have exercised and therefore was a fraud on the court and grounds for collateral attack on the second decree of adoption. 14 Cal. App. at 163, 111 P. at 406. *See* note 50 *infra*.

48. 14 Cal. App. 156, 111 P. 403 (2nd Dist. 1910).

49. *Id.* at 163, 111 P. at 406.

order was proper because the order would never have been made had the concealed facts been disclosed to the court.[50]

In the present case, Merchants allegedly practiced a fraud both on the plaintiffs and on the court. The supreme court found that, if plaintiffs' allegations are true, Merchants' use of improper venue in actions against plaintiffs prevented plaintiffs from presenting their cases to the courts. This practice apparently had its intended effect of increasing the number of default judgments obtained by Merchants.[51] Merchants clearly had a duty to use complaints that stated facts sufficient for the trial judge to determine whether the actions were in the proper court, and their intentional failure to do so would clearly be a fraud on the court. The supreme court also concluded that the trial court had no jurisdiction (in the ordinary sense) to enter the default judgments in question and would not have done so had Merchants disclosed material facts to the court.[52]

CONCLUSION

The supreme court's holding in *Barquis* takes the inconsistent position that even if Merchants' business practices are tortious and otherwise unlawful, Merchants may nevertheless profit from this wrongdoing because the default judgments based on the practices may not be collaterally attacked. Assuming that injunctive relief is granted on remand, this result should have a salutary effect on Merchants' debt collection practices since it would face contempt charges should it continue violating Code of Civil Procedure section 396(a).[53] But this de-

50. *Id.* *See also* Batchelor v. Finn, 169 Cal. App. 2d 410, 337 P.2d 545, 341 P.2d 803 (2nd Dist. 1959) (collateral attack on the judgment upheld because trial court would not have entered judgment if it had had all the facts); Gordon v. Gordon, 145 Cal. App. 2d 231, 302 P.2d 355 (2nd Dist. 1956):

> When a trial judge in a proper proceeding vacates a judgment he has rendered in ignorance of material facts which he believes a party had a duty to disclose to him, and which, if known to him, would have caused him to refrain from ordering the judgment, we will not question his action.

Id. at 235, 302 P.2d at 358.

51. Small claims actions against out-of-county defendants normally produce a greater number of default judgments than do such actions filed in the county where the defendants reside. Comment, *The California Small Claims Court,* 52 CALIF. L. REV. 876, 887-88 (1964). The named plaintiffs in *Barquis,* and the class of persons they represented, were all persons against whom Merchants had secured default judgments.

52. 7 Cal. 3d at 118, 496 P.2d at 834-35, 101 Cal. Rptr. at 762-63.

53. California Civil Code section 1812.10 now requires that all actions on contracts and installment accounts be brought only in the county where the contract was signed, where the buyer resided when the contract was signed or when the action was commenced, or where the goods purchased are affixed to and part of real property. CAL. CIV. CODE § 1812.10 (West Supp. 1973). To secure these protections for the consumer, the legislature provided that the "venue" and "jurisdiction" provisions

cision undermines California's legislative policy against unlawful business practices because it does not deter other collection agencies from engaging in precisely the same practices condemned in *Barquis*.

Under the holding in *Barquis*, a collection agency engaged in these unlawful practices can only be told to cease such activities in the future. But because the nature of these unlawful practices prevents those who are harmed from challenging them, suits for injunctive relief should be rare, and many persons are likely to suffer harm before such a suit, in the form of a class action, is finally brought.

The supreme court in *Barquis* addressed itself to the social costs of permitting collection agencies to abuse the judicial process:

> [T]he widespread misuse of the courts [by collection agencies] contributes to an undermining of confidence in the judiciary by reinforcing the unfortunate image of the courts as "distant" entities, available only to wealthy or large interests—an image evidently subscribed to by a significant proportion of our citizenry. . . . Under these conditions, courts have a strong interest in ensuring that abuses of the legal process by collection agencies are not perpetuated.[54]

It is submitted that any interest in preventing abuse of the courts or in restoring public confidence in the judiciary is defeated by a decision which permits collection agencies engaged in a profitable unlawful activity to keep their profit when they are caught.

A better result would grant the injunctive relief requested and also vacate all the default judgments that Merchants would not be barred by the statute of limitations from relitigating. This would not satisfy all of the plaintiffs in *Barquis*, but it would return most of the parties to the positions they would have occupied had the trial judges properly dismissed the actions pursuant to the requirements of Code of Civil Procedure section 396(a). This result would provide the greatest equity to plaintiffs consistent with the terms of section 396(a) that requires defectively filed cases to be dismissed without prejudice.

Richard Kalish

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of § 1812.10 may not be waived [CAL. CIV. CODE § 1801.1 (West 1970)] unless the buyer is represented by counsel when the waiver is made. CAL. CODE CIV. PRO. § 396 (a) (West Supp. 1973). This legislation prevents retailers from circumventing venue requirements by having their customers sign consents to suit in distant counties. The legislation further requires that the plaintiff in any action on a contract or installment account must state in the pleading [§ 396(a)] or an accompanying affidavit [§§ 396 (a) and 1812.10] facts showing that the action was commenced in a proper county. The result in *Barquis* demonstrates that a plaintiff can ignore these statutory "safeguards" entirely and still obtain valid and enforceable default judgments against out-of-county debtors.

54. 7 Cal. 3d at 108, 496 P.2d at 827, 101 Cal. Rptr. at 755.