

REEXAMINING AND LIBERALIZING THE CLASS SUIT DEVICE

Joseph Joemer C. Perez

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REEXAMINING AND LIBERALIZING THE CLASS SUIT DEVICE*

Joseph Joemer C. Perez**

Reform is a never-ending process, particularly in the dynamic field of procedural law.¹ Yet, there is a procedural device, known as the class suit, which has remained basically unreformed and unaltered for the past hundred years of Philippine procedural law. Moreover, this device has been little utilized in this jurisdiction. In the reported cases, many attempts to employ the class suit device were rejected by the Supreme Court. Indeed, the class suit may be considered an animal in hibernation, which wakes up infrequently and roars quite timidly. Its inability to adapt to the needs and demands of modern society also makes it a species in danger of wasting away to oblivion and perhaps extinction.

This paper shall argue that the class suit device enjoys little utility and success due to the restrictive wording of the class suit provision in the Rules of Court and the restrictive interpretation given to it by the Supreme Court. It shall point out further that this restriction is very unfortunate because it prevents the applicability of the class suit device in many situations where a mass remedy would have been the most appropriate and perhaps the only viable remedy. The narrowness of the present scope of class suit in this jurisdiction prevents us from harnessing the power and usefulness of this procedural device. The paper thus advocates a liberalization of the rule on class suit, and at the same time, offer some suggestions on how to undertake such reform.

The paper shall first examine the nature, purpose, and fundamental principles of class suit (Parts I & II). Then, it shall examine the reason why this procedural device is infrequently used and rarely succeeds, focusing on

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** Member, Student Editorial Board, PHILIPPINE LAW JOURNAL (2003). LL.B., *Cum Laude*, *Valedictorian* (2004); B.A. Political Science, *Magna Cum Laude* (2000), University of the Philippines.

¹ ANTONIO BAUTISTA, *Towards Further Reform in Philippine Civil Procedure*, 75 PHIL. L.J. 172 (2000).

the "common interest" requirement which is the single biggest obstacle to the application of class suit (Part III). A discussion of the limitations of the present class suit provision then follows, in which it shall argue that the present law on class suit is very restrictive and obsolete, and prevents the harnessing of this potentially useful and effective collective remedy's full power (Part IV). It thus advocates a liberalization of the class suit device (Part V). The paper shall then confront some major concerns or problems that may arise from the liberalization of class suit, drawing lessons from the American experience in addressing those issues and concerns (Part VI). It will conclude with some practical suggestions on how to liberalize our law on class suit device, including a draft proposal (Part VII).

I. NATURE, ORIGIN, AND PURPOSE

Class suit, also known as "class action" or "virtual representation," is an action "where one or more may sue for the benefit of all implying that if the parties are numerous and it is impracticable to bring them all to court, one or more may sue for their benefit."² The method of the class suit is "to permit any member of the group individually, unchosen and unasked and without any organization of the class or prior consent from others, to step forward and sue on behalf of all."³

The class suit was an ancient invention of equity, dating back to the medieval age. It was originally used in suits by villagers against a landlord, members of a ship's crew against the owner, and shareholders in an enterprise against the managers.⁴ There were even reported cases when imaginative English judges permitted class treatment in litigation by a vicar against parishioners for tithes or by parishioners against the vicar for an exemption from the tithes.⁵

Originally called "bill of peace," it was a device created by the English chancery courts to mitigate certain rigors of the rules on compulsory

² *Dimayuga v. Court of Industrial Relations*, No. 10213, 101 Phil. 590, 597, May 27, 1957.

³ HARRY KALVEN, JR. & MAURICE ROSENFELD, *The Contemporary Function of the Class Suit*, 8 U.CHI.L.REV. 684, 691 (1941).

⁴ FLEMING JAMES, GEOFFREY HAZARD & JOHN LEUBSDORF, *CIVIL PROCEDURE* 645 (5th ed.), *citing* STEPHEN YEAZELL, *FROM MEDIEVAL GROUP LITIGATION TO THE MODERN CLASS ACTION*, 132-96 (1999).

⁵ ADOLF HOMBURGER, *State Class Actions and the Federal Rule*, 71 COLUM.L.REV. 609, 611 (1971).

joinder.⁶ In cases where the interested parties who must be impleaded are too numerous, the class suit device is employed to allow the action to go forward without the joinder of all the indispensable or necessary parties.⁷ This same rationale for class suits is acknowledged in early Philippine decisions:

The general rule requires the joinder of all necessary parties whenever possible, and the joinder of all indispensable parties under any and all conditions. But the class suit is an exception to this requirement by allowing a number of persons to sue or defend even if not all the necessary or indispensable parties are joined in the action.⁸

The class suit device has another exceptional feature – the judgment in a class suit is binding on all the members of the class, even those absent members who were not impleaded or did not participate in the litigation.⁹ At the start, it was very uncertain if a class suit decree had binding effects on the absentees.¹⁰ It was only in the early twentieth century that the United States Supreme Court finally settled the uncertainty and ruled that a judgment in a class suit is binding on absentees,¹¹ provided of course, that they were adequately represented in compliance with due process requirements.¹²

The traditional justification for class suit is judicial economy and convenience.¹³ By completely settling a controversy common to numerous persons who cannot be practicably joined, class suits promote efficiency by reducing multiple litigation.¹⁴ Also, one of the traditional functions of class suit is to allow a group of people to sue or defend when the law does not

⁶ KALVEN & ROSENFELD, *supra* note 3, at 708. *Hansberry v Lee*, 311 U.S. 32, 61 (1940).

⁷ JAMES ET AL., *supra* note 4.

⁸ *Borlasa v. Polistico*, No. 22909, 47 Phil. 345, 348, Jan. 28, 1925.

⁹ *Cadalin v. Phil. Overseas Emp. Admin. Administrator*, G.R. No. 104776, 238 SCRA 722, Dec. 5, 1994; *Supreme Tribe of Ben Hur v. Cauble*, 255 U.S. 356, 41 S.Ct. 338, 65 L.Ed. 673 (1921). See also I REGALADO, *supra* note 9, at 88; BAUTISTA, BASIC CIVIL PROCEDURE 19 (2003).

¹⁰ JAMES ET AL., *supra* note 4, at 648, citing JOSEPH STORY, COMMENTARIES ON EQUITY PLEADING 82-98 (3d ed. 1844). See also GEOFFREY HAZARD ET AL., *An Historical Analysis of the Binding Effect of Class Suits*, 146 U. PA. L. REV. 1849 (1998).

¹¹ *Supreme Tribe of Ben Hur v. Cauble*, 255 U.S. 356 (1921).

¹² *Hansberry v Lee*, 311 U.S. 32 (1940).

¹³ BAUTISTA, *supra* note 9, at 19.

¹⁴ *Id.* at 646.

consider them as a legal entity,¹⁵ such as a group of workers not yet registered as a union.¹⁶

Modern class actions can also provide access to the courts for a group of persons who cannot afford to sue separately.¹⁷ This device is used in vindicating claims which, taken individually, are too small to justify legal action, but which are of significant size if taken as a group.¹⁸ It thereby defuses the advantage of powerful defendants by not allowing them to contest liability with each of many small claimants in a single, separate and lopsided suit.¹⁹

Class suit first appeared in the Philippine scene in 1901 as section 118 of the Code of Civil Procedure, or Act No. 190. Fisher, in his annotation on the Code of Civil Procedure, cited "general chancery practice" as the source of this provision,²⁰ unlike most of the other provisions which were derived from the California Code of Civil Procedure. It has remained basically unchanged for the past one hundred years, withstanding the 1940, 1964, and 1997 revisions of the Rules of Court.

Curiously, the Philippine version differs from the American version from which it is derived. From the beginning, the Philippine version required, *inter alia*, "common or general interest in the subject matter of the controversy," while both federal and state American versions require merely that "the question is one of a common or general interest." Thus, the California Code of Civil Procedure, also the source of the Philippine Code of Civil Procedure, simply provides that "when 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."²¹

¹⁵ JAMES ET AL., *supra* note 4, at 644 (5th ed.).

¹⁶ *Umali v. Lovina*, 2771, 86 Phil. 313, Apr. 29, 1950.

¹⁷ *Id.*

¹⁸ 59 AM JUR 2d § 50.

¹⁹ *Id.*

²⁰ F.C. FISHER, THE NEW ANNOTATED CODE OF CIVIL PROCEDURE OF THE PHILIPPINE ISLANDS 76 (3d ed. 1925).

²¹ JACK FRIEDENTHAL ET AL., CIVIL PROCEDURE 753 (3d ed.). This provision is essentially that of the Field Code, adopted first in New York in 1849. The Federal Equity Rule 38 (1912) has similar wording: "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

This Philippine requirement of community of interest in the "subject matter of the controversy" determined the course of Philippine case law on class suits, leading to a generally strict or restrictive approach on the matter.

II. THE PHILIPPINE APPROACH ON CLASS SUIT

We first examine the Philippine approach on class suit, relying exclusively on the Rules of Court provisions and Philippine jurisprudence. Class suit is allowed by section 12 of Rule 3 ("Parties to Civil Actions"), which provides:

Sec. 12. *Class Suit.* – When the subject matter of the controversy is one of common or general interest to many persons so numerous that it is impracticable to join all as parties, a number of them which the court finds to be sufficiently numerous and representative as to fully protect the interests of all concerned may sue or defend for the benefit of all. Any party in interest shall have the right to intervene to protect his individual interest.

This provision remains basically the same for the past one hundred years of Philippine procedural law. Its origins can be traced to Section 118 of the Code of Civil Procedure, which provision is ultimately derived from "general chancery practice."²²

The only significant difference is that before the 1997 amendment, "one or more" may sue or defend for the benefit of all, while as presently worded, "a number of them" or more than one may sue or defend for the benefit of all. Also, before 1997, the interested persons must be so numerous that it is impracticable to "bring them all before the court," while under the present wording, it must be impracticable to "join all as parties." This is to clarify the unintended implication of the previous wording, which might be construed as referring to physical improbability.²³

The only other provision on class suit is that found in the last sentence of section 2 of Rule 17, which provides that "a class suit shall not be dismissed or compromised without the approval of the court."

whole." Miller, *Of Frankenstein Monsters and Shining Knights: Myth, Reality, and the "Class Action Problem."* 92 HARV.L.REV. 664, 669 n. 24 (1979).

²² FISHER, *supra* note 20, at 76.

²³ JOSE FERIA, CIVIL PROCEDURE ANNOTATED 240 (2000).

It should be noted that the class suit device may be used either to sue or defend for the benefit of the members of the class. But in this study, the plaintiff class action will be the model used, since it is far more common, although many of the principles and observations are likewise applicable to defendant class actions.

1. Elements

The elements of a class suit are the following: (1) that the subject matter of the controversy be of common or general interest to many persons; in other words, there must be a "class" or a group of persons sharing a common interest in the subject matter of the controversy,²⁴ and (2) that such persons be so numerous as to make it impracticable to bring them all to the court,²⁵ or join them all as parties.²⁶ It is also required (3) that the parties actually before the court are "sufficiently numerous and representative so that all the interests are fully protected."²⁷

The element of "numerosity" or "numerousness" is relatively uncontroversial, although there is no fixed rule and the determination of this requirement is necessarily made on a case-to-case basis.²⁸ The number of the members of the class may amount to hundreds²⁹ or thousands.³⁰ In one case³¹ for the recovery of wages of twenty-three laborers, it was held that the eighteen laborers who were not named in the complaint were not so numerous as to make it impracticable to include them individually in the complaint.

The element of representativeness is also relatively uncontroversial, at least in the reported Philippine cases. A principle basic to the concept of "class suit" is that plaintiffs brought on the record must fairly represent and protect the interests of the others.³² In one case for recovery of wages,³³ it

²⁴ *Mathay v. Consolidated Bank and Trust Company*, No. 23136, 58 SCRA 559, 570-71, Aug. 26, 1974.

²⁵ *Id.* at 570; *Sulo ng Bayan, Inc. v. Araneta, Inc.*, 31061, 72 SCRA 347, 357, Aug 17, 1976.

²⁶ RULES OF COURT, Rule 3, § 12.

²⁷ § 12. *See also* *Dimayuga v. Court of Industrial Relations*, No. 10213, 101 Phil. 590, 597, May 27, 1957.

²⁸ *Annotation: Class Suit and Aspects of Its Application*, 48 SCRA 282, 286 (1972).

²⁹ *Borlasa v. Polistico*, No. 22909, 47 Phil. 345, Jan. 28, 1925.

³⁰ *Acar v. Rosal*, No. 21707, 19 SCRA 625, Mar. 18, 1967.

³¹ *Diaz v. De la Rama*, No. 47778, 73 Phil. 104, Aug. 14, 1941.

³² *Dimayuga*, 101 Phil. at 597.

was held that this condition is not met where it appears that each claimant is only interested in collecting his own claims and has no concern in protecting the interests of the other claimants, as shown by the fact that hundreds of them have abandoned their co-claimants and have entered into separate compromise settlements of their respective claims.

It is the requirement of community of interest in the subject matter of the controversy, which ignites much problem and confusion. This requirement also frequently tolls the death knell for most of the cases claiming to be class suits. Accordingly, considerable time must be devoted to the analysis of this element. First, however, one looks into the other aspects of class suit under Philippine procedural law.

2. Pleading

For a case to be properly considered as a class suit, there must be an allegation in the complaint or other initiatory pleading that the plaintiffs are suing "on behalf" or "for the benefit" of all the members of the class.³⁴ The complaint should "show on its face that the action is intended to be litigated as a class suit."³⁵

However, an action does not become a class suit merely because it is designated as such in the pleadings.³⁶ The complaint or other initiatory pleading should allege the existence of the necessary facts, namely, the existence of a subject matter of common interest, and the existence of a class and the number of persons in the alleged class, so that the court can determine whether the members of the class are so numerous as to make their joinder impracticable, to contrast the number appearing on the record with the number in the class and to determine whether the claimants on record adequately represent the class and the subject matter of general or common interest.³⁷

³³ *Cadalin v. Phil. Overseas Emp. Admin. Administrator*, G.R. No. 104776, 238 SCRA 722, Dec. 5, 1994.

³⁴ *Borlasa*, 47 Phil. at 349; *Claudio v. Zanducta*, G.R. No. 45664, 64 Phil. 812, 819, Sep. 28, 1937.

³⁵ *Borlasa*, 47 Phil. at 349.

³⁶ *Mathay*, 58 SCRA at 570-71.

³⁷ *Id.* See also *Board of Optometry v. Colet*, G.R. No. 122241, 260 SCRA 88, 102, Jul. 30, 1996.

Thus, in one case,³⁸ the Court held that the complaint, though explicitly captioned as a class suit, was defective as such because of the failure to allege the *number* of the members of the alleged class. Without such allegation, the trial court would not be able to ascertain if it was really impracticable to bring all the members of the class before the court or if the plaintiffs on record are sufficiently numerous and representative.³⁹

3. Binding effect and safeguards

The judgment in a proper class suit, whether favorable or not, is binding on all members of the class, even those who are not actually impleaded or named as parties.⁴⁰ This is an important exception to the general rule that only the parties to a case are bound by the judgment therein.

Because of this *res judicata* effect even on non-parties, there is a significant risk of deprivation of due process to those absent members who are bound without actually having their day in court. To address this risk, the Rules of Court provide certain safeguards, such as the following:

First, it is required that the named parties "be sufficiently numerous and representative as to fully protect the interests of all concerned."⁴¹ Indeed, "the risk of inadequate or insufficient representation is that the judgment may bind the represented parties who are actually absent."⁴² The Supreme Court thus gave this caveat:

Courts must exercise utmost caution before allowing a class suit, which is the exception to the requirements of joinder of all indispensable parties. For while no difficulty may arise if the decision secured is favorable to the plaintiffs, a quandary would result if the decision were otherwise as those who were deemed impleaded by their self-appointed representatives would certainly claim denial of due process.⁴³

³⁸ Mathay Consolidated Bank and Trust Co., No. 23136, 58 SCRA 559, Aug 26, 1974.

³⁹ *Id.* at 571.

⁴⁰ I REGALADO, *supra* note 9, at 88; BAUTISTA, *supra* note 9, at 19.

⁴¹ RULES OF COURT, Rule 3, § 12.

⁴² BAUTISTA, *supra* note 9, at 19.

⁴³ Cadalin v. Phil. Overseas Emp. Admin. Administrator, G.R. No. 104776, 238 SCRA 722, Dec. 5, 1994.

Second, the Rules of Court also give "any party in interest... the right to intervene to protect his individual interest."⁴⁴ This important right of intervention, however, seems to have been diluted by the ruling in the case of *Philippine Manufacturing Co. v. Board of Public Utility Commissioners*,⁴⁵ where the Supreme Court denied the motion to intervene filed by some of the parties in interest "in view of the fact that the interest of these parties was already represented in the proceeding, and inasmuch as the admission of numerous intervenors might serve unduly to encumber the proceedings and delay a decision."⁴⁶ The Court justified such denial by stating:

It is true that section 118 of the Code of Civil Procedure recognizes the right of any party to intervene in a class suit for the protection of his individual interest. But where, as here, the proposed intervenor has no individual interest adverse to all other litigants, but only an interest in common with others, it is apparent that intervention is not necessary to his protection; and in such case it must be considered discretionary with the court whether the intervention shall be permitted.⁴⁷

Third, the parties that brought the class suit have control over the case with the right to compromise or even discontinue the same.⁴⁸ However, as a safeguard, the Rules provide that "a class suit shall not be dismissed or compromised without the approval of the court."⁴⁹ Implied in this rule is the duty of judges to carefully scrutinize proposed settlements and ensure that they are fair to the absentees.

4. Distinguished from permissive joinder of parties

In both class suit under Rule 3, section 12, and permissive joinder of parties under Rule 3, section 6, similar essential factors exist, namely the same transaction or series of transaction is involved; and common questions

⁴⁴ RULES OF COURT, Rule 3, § 12.

⁴⁵ No. 15744, 40 Phil. 285, Oct. 20, 1919.

⁴⁶ *Phil. Manufacturing Co. v. Board of Public Utility Comm'rs*, No. 15744, 40 Phil. 285, 294, Oct. 20, 1919.

⁴⁷ *Id.*

⁴⁸ I REGALADO, *supra* note 9, at 88.

⁴⁹ RULES OF COURT, Rule 17, § 2. This requirement for court approval is included in section 2, "Dismissal upon motion of plaintiff." However, it is suggested that this requirement also applies even in "Dismissal upon notice of plaintiff" (section 1) because otherwise, such particular requirement for class suit would be superfluous, considering that section 2 already requires court approval for dismissals in general.

of fact or law are at issue.⁵⁰ What distinguishes a class suit is the requirement of "common or general interest in the subject matter of the controversy." That is, there is only one right or cause of action belonging in common to many persons, not separately or severally to distinct individuals.⁵¹ There is no such requirement in permissive joinder, which merely requires common question of law or fact and right of relief arising from the same transaction or series of transaction.⁵²

The other factor that serves to distinguish the rule on class suits is of course the "numerousness" of parties involved. The rule is that for a class suit to be allowed, it is necessary that the parties be so numerous that it would be impracticable to bring them all before the court.⁵³

III. COMMON INTEREST IN THE SUBJECT MATTER

A class suit is proper "when the subject matter of the controversy is one of common or general interest" to many persons so numerous that it is impracticable to join all as parties.⁵⁴ There must be some privity or jural relationship among the members of the class with respect to the subject matter of the action. This requirement – common interest in the subject matter – is the single most important factor, which restricts the applicability of the class suit device.

The community of interest must be in the subject matter of the controversy, which means "the physical facts, the things real or personal, the money, lands, chattels, and the like, in relation to which the suit is prosecuted, and not the delict or wrong committed by the defendant."⁵⁵ Common interest in the questions of fact or law is not sufficient.⁵⁶ If the common interest is merely in the questions of fact or law, the case is not a

⁵⁰ In *Re Request of the Heirs of the Passengers of the Doña Paz*, A.M. No. 88-1-646-0, 159 SCRA 623, 627, Mar. 3, 1988.

⁵¹ *Id.*

⁵² *Id.* at 625-26.

⁵³ *Id.* at 629-30.

⁵⁴ *Id.*, Rule 3, § 12.

⁵⁵ *Mathay*, 58 SCRA at 571.

⁵⁶ *Sulo*, 72 SCRA at 357, citing *Scott v. Donald*, 165 U.S. 107. See also *BAUTISTA*, *supra* note 9, at 19, citing *MVRS Publications, Inc. v. Islamic Da'arah Council of the Philippines*, G.R. No. 135306, 396 SCRA 210, Jan. 28, 2003; *Newsweek, Inc. v. Intermediate Appellate Court*, G.R. No. 63559, 142 SCRA 171, May 30, 1986.

"true" class suit, but a "spurious" one covered by the provision on permissive joinder of parties.⁵⁷

The interest of the members of the class must be common or joint, that is, the controversy involves "an indivisible right affecting many individuals whose particular interest is of indeterminate extent and is incapable of separation."⁵⁸

There is no class suit if the interest is not joint but merely several or independent, i.e., that is, the right or liability of each is separate and distinct.⁵⁹ In such a case, class suit is not allowed but a permissive joinder of parties may be allowed if there are common questions of law or fact and the right to relief arises out of the same transaction or series of transaction.⁶⁰

A. CLASS SUIT ALLOWED

Community of interest in the subject matter is exemplified by the old case of *Borlasa v. Polistico*,⁶¹ which is invariably cited by commentators as an illustration of the class suit. In that case, an association, *Turnuban Polistico & Co.*, was organized for the purpose of holding a lottery every Sunday. Each of the members had to pay fifty centavos every week. In the Sunday lottery, the lucky member would get the collected money, minus PHP200 which was set aside and received by the defendant (president-treasurer) as part of the association's funds. This arrangement continued for several years until the funds in the custody of the president-treasurer amounted to PHP74,000, prompting certain members to file an action for the dissolution of the association, accounting and distribution of the assets accumulated over the years. The trial court ordered the plaintiffs to amend their complaint by including *all* the members of the association either as plaintiffs or as defendants. The problem is that Turnuhan Polistico had several hundred members.

The Supreme Court reversed the order of the trial court and held that "the situation involved is precisely the one contemplated in section 118

⁵⁷ Mathay, 58 SCRA at 574. The classifications of class suits into *true*, *hybrid* and *spurious* was followed in the U.S. Federal Rules of Civil Procedure before the 1966 amendment of Rule 23 (Class Suits).

⁵⁸ *Borlasa*, 47 Phil. at 349.

⁵⁹ Mathay, 58 SCRA at 573-74.

⁵⁹ No. 22909, 47 Phil. 345, Jan. 28, 1925.

⁶⁰ RULES OF COURT, Rule 3, § 6. Mathay, 58 SCRA at 573-74.

⁶¹ No. 23136, 47 Phil. 345, Aug. 26, 1974.

of the Code of Civil Procedure, where one or more may sue for the benefit of all."⁶² It was held therein that the requirements of a class suit are met. *First*, the members are so numerous that "it would be impossible to make all of the persons in interest parties to the case and to require all of the members of the association to be joined as parties would be tantamount to a denial of justice."⁶³ *Second*, there is common interest in the subject matter of the controversy which "involves an indivisible right affecting many individuals whose particular interest is of indeterminate extent and is incapable of separation."⁶⁴

B. CLASS SUIT NOT ALLOWED.

In many other cases that reached the Supreme Court, however, class suit was considered improper for lack of community of interest in the subject matter of the controversy. This lack of common interest may involve three permutations:

1. Representatives have no interest

The named class representatives themselves must have an interest in the subject matter common with the persons they claim to represent. In other words, class representatives must be members of the class themselves. They must sue not only in behalf of others, but also in their own behalf. If they sue purely in behalf of others, it is not a class suit under section 12 of Rule 3 but a mere representative suit under section 3.⁶⁵ The distinction is important because in a representative suit under section 3, the representative must show that he is authorized to sue in behalf of others.⁶⁶ Absent such showing of authority, the representative would lack standing to sue.⁶⁷

⁶² *Id.* at 348.

⁶³ *Id.*

⁶⁴ *Id.*, at 349

⁶⁵ RULES OF COURT, Rule 3, § 3. *Representatives as parties.* — Where the action is allowed to be prosecuted or defended by a representative or someone acting in a fiduciary capacity, the beneficiary shall be included in the title of the case and shall be deemed the real party in interest. A representative may be a trustee of an express trust, a guardian, and executor or administrator, or a party authorized by law or these Rules...

⁶⁶ *Dimayuga*, 101 Phil. at 597; *Ferrer v. Reyes*, No. 24552, 54 SCRA 265, 277, Dec. 19, 1973; *Workers of Antique Electric Cooperative, Inc. v. Nat'l Lab. Rel. Comm'n*, G.R. No. 120062, 333 SCRA 182, Jun. 8, 2000.

⁶⁷ In a *class suit* (Rule 3, Sec. 12) such authorization is not required. In fact, one main feature of class suits is that the plaintiff takes the initiative in filing and prosecuting the case without the knowledge or consent of the absentees. The authority is presumed

The situation is illustrated by the case of *Sulo ng Bayan, Inc. v. Araneta, Inc.* A corporation filed a "class suit" on behalf of its individual members for the recovery of certain parcels of land allegedly owned by said members; the plaintiff corporation itself did not claim to own the land. The Supreme Court held that a class action is not proper. In a class suit, "the person who sues must have an interest in the controversy, common with those for whom he sues... Here, the plaintiff corporation does not even have an interest in the subject matter of the controversy, and cannot, therefore, represent its members or stockholders who claim to own in their individual capacities ownership of the said property."⁶⁸

2. Distinct or several interests.

There is no class suit if the interests of the members of the class in the subject matter of the controversy are *distinct, several, or separate*. This involves different situations, such as the following:

a. Recovery of real property.

It is well settled that a class suit is not proper in actions to recover real property,⁶⁹ where *separate portions* of the same parcel of land are claimed *individually* by different persons to the exclusion of each other.⁷⁰ Each of the parties has an interest only in the particular portion of the land he is actually occupying, which portion is completely different from the other portions individually occupied by the other parties.⁷¹

An additional justification is that in actions involving the ownership of real property, each of the several owners could allege and prove his right to his respective portion in a different way, such as succession, acquisitive

from the community in interest shared by the parties on record and the members of the class. Hence, a class suit is also known as "virtual representation."

⁶⁸ *Sulo ng Bayan, Inc. v. Araneta, Inc.*, 31061, 72 SCRA 347, 357, Aug. 17, 1976.

⁶⁹ *Rallonza v. Evangelista*, No. 4612, 15 Phil. 531, Mar. 21, 1910; *Berses v. Villanueva*, No. 7309, 25 Phil. 473, Oct. 10, 1913; *Sulo ng Bayan, Inc. v. Araneta, Inc.*, 31061, 72 SCRA 347, 357, Aug. 17, 1976; *Ortigas & Co., Ltd. v. Ruiz*, 33952, 148 SCRA 326, 339, Mar. 9, 1987. However, in the anomalous case of *Tuason v. Register of Deeds*, 70484, Jan. 29, 1988, 157 SCRA 613, for the recovery of land taken away from the petitioners by a presidential decree, certain persons with the similar plight were allowed to intervene for having "substantially fulfilled the requirements laid down for a class suit." *Id.* at 623. Such a hasty ruling seems to be inaccurate, considering the consistent ruling in the previous cases that class suit is not proper for the recovery of land. It should perhaps be treated as a simple case of *intervention* under Rule 19.

⁷⁰ *Rallonza v. Evangelista*, No. 4612, 15 Phil. 531, Mar. 21, 1910.

⁷¹ *Berses v. Villanueva*, No. 7309, 25 Phil. 473, Oct. 10, 1913; *Ortigas & Co., Ltd. v. Ruiz*, No. 33952, 148 SCRA 326, 339, Mar. 9, 1987.

prescription, sale, donation, so that they cannot all be held to have identical title.⁷²

Thus, in the case of *Berses v. Villanueva*,⁷³ the land in dispute was possessed or occupied by 319 persons. The plaintiff, claiming to be the owner thereof, sued fourteen of the occupants to recover the land, and obtained a judgment in his favor. The writ of execution was sought to be enforced against all of the 319 occupants, the plaintiff claiming that even those occupants who were not impleaded were bound by the judgment since the ejectment case was a class suit. The Supreme Court rejected such contention, ruling that the provision on class suit relates to a common and general interest in a single specific thing and not to distinct ones. In this case, each defendant had an interest only in the particular portion he was occupying, which portion was completely different from the other portions individually occupied by other defendants.⁷⁴ The Court explained as follows:

While all of them are in possession of their respective portions of the land with the intention of appropriating it and are all in the same situation in connection with the action for recovery instituted by the sole owner of the land, still, when the suit is commenced, one of them might allege a private right or reason that would not assist the others, or that the others might lack. Some might allege prescription, while others would have no right other than that produced by mere possession without title, for they are not coheirs or co-owners of the common thing, nor do they possess all the disputed property jointly and *pro indiviso*. Each one could allege and prove his respective right in a different way for each portion of the land, so they cannot all be held to have identical interests or the same grounds to justify their actual possession.⁷⁵

The same rationale, separateness of the interest in the subject matter, was applied in cases for *recovery on a promissory note*. Thus, in the case of *Lichauco v. Limjuco*,⁷⁶ a promissory note was held in common by the eight heirs of the original holder. One of them sued the maker to recover on the said note in his own behalf and in behalf of his co-heirs. The Supreme Court did not allow him to sue alone and required that all co-heirs be impleaded. Aside from the fact that the interested parties were not numerous, the Court also noted that each of the co-heirs has separate and distinct interest in the

⁷² Sulo, 72 SCRA at 357.

⁷³ No. 7309, 25 Phil. 473, Oct. 10, 1913.

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ G.R. No. 6189, 19 Phil 12, Mar. 11, 1911.

note, applying by analogy the rationale in not allowing class suit in cases for the recovery of land.

b. *Recovery of surcharges*

In the case of *Valencia v. City of Dumaguete*,⁷⁷ the plaintiffs filed a class suit to recover the surcharges allegedly collected illegally by the city government from some 30,000 customers of four movie houses. It was held that a class suit did not lie, as no one plaintiff had any right to, or any share in the amounts individually claimed by the others, as each of them was entitled only to the return of what he had personally paid.⁷⁸

c. *Libel*

In the case of *Newsweek Inc. v. Intermediate Appellate Court*,⁷⁹ certain sugar planters in Negros Occidental filed a class suit for libel in their own behalf and in behalf of 8,500 other sugarcane planters against Newsweek for an article allegedly portraying the province as dominated by big landowners or sugarcane planters who exploit, brutalize and kill their workers. It was held therein that class suit is not proper because each of the plaintiffs has a *separate and distinct reputation* in the community. Thus, they do not have a common or general interest in the subject matter of the controversy.⁸⁰

d. *Stockholder's right to subscribe*

In the case of *Mathay v. Consolidated Bank and Trust Company*,⁸¹ the Board of Directors of Consolidated Mines, Inc. (CMI) set up and organized a new bank. Certain CMI stockholders filed a class suit in behalf of the other stockholders to enforce their right to subscribe *pro rata* to the capital stock of the said new bank. The Supreme Court held that a class suit is not proper because the interest of each stockholder "was *several*, not common or general... Each one of the CMI stockholders had determinable interest; each one had a right, if any, only to his respective portion of the stocks. No one of them had any right to, or any interest in, the stock to which another was entitled."⁸²

⁷⁷ No. 17799, 5 SCRA 1096, Aug. 31, 1962.

⁷⁸ *Valencia v. City of Dumaguete*, 1799, 5 SCRA 1096, 1101, Aug. 31, 1962.

⁷⁹ 63559, 142 SCRA 171, May 30, 1986.

⁸⁰ *Newsweek, Inc. v. Intermediate Appellate Court*, 63559, 142 SCRA 171, 176-77, May 30, 1986.

⁸¹ G.R. No. 23136, 58 SCRA 559, Aug 26, 1974.

⁸² *Mathay*, 58 SCRA at 572.

The Court further held that even assuming *arguendo* that the CMI stockholders suffered wrongs that had been committed by similar means and even pursuant to a single plan of the CMI Board which organized the bank, "the wrong suffered by each of them would constitute a wrong separate from those suffered by the other stockholders, and those wrongs alone would not create that common or general interest in the subject matter of the controversy as would entitle any one of them to bring a class suit on behalf of the others... Separate wrongs to separate persons, although committed by similar means and even pursuant to a single plan, do not alone create a 'common' or 'general' interest in those who are wronged so as to entitle them to maintain a representative action."⁸³

e. Mass accident

In *In Re Request of the Heirs of the Passengers of the Doña Paz*, twenty-six (26) plaintiffs filed a class suit in behalf of approximately 4,000 relatives and heirs of the passenger-victims of the M/V Doña Paz maritime tragedy. The Supreme Court held that the case is not a class suit, but merely involves a permissive joinder of parties because the plaintiffs and the members of the purported class have *distinct, separate* rights.⁸⁴ The right of action is "not unal but plural," and "there are as many rights of action as there are plaintiffs."⁸⁵ A mass accident such as the sinking of the M/V Doña Paz resulted in "separate wrongs to separate persons," which, "though committed by similar means,... do not alone create a common or general interest in those who are wronged."⁸⁶

3. Antagonistic interests

If the interests of the members of the putative class are conflicting, class suit is obviously not proper. There is no true class to speak of if it is beset by internal antagonisms, and such a situation would give rise to problems of the adequacy of representation.

Thus, in the case of *Ibañes v. Roman Catholic Church*,⁸⁷ thirteen persons commenced a class suit in behalf of the residents of the municipality of Ternate, Cavite, against the Roman Catholic Church for the recovery of an image of the Holy Child. It was found, however, that the plaintiffs' real

⁸³ *Id.* at 572-573.

⁸⁴ *In Re Request of the Heirs of the Passengers of the Doña Paz*, A.M. No. 88-1-646-0, 159 SCRA 623, 625-6, Mar. 3, 1988.

⁸⁵ *Id.* at 627.

⁸⁶ *Id.* at 628 n.7.

⁸⁷ No. 4695, 12 Phil. 227, Dec. 12, 1908.

motive in filing the case is to remove the holy image from the Catholic Church and transfer it to the Philippine Independent Church. Since many of the Ternate residents are Catholics, "it is very apparent that many of the inhabitants are opposed to the transfer of the image from the Roman Catholic Church. Under the circumstances, the thirteen plaintiffs do not fairly represent all of the inhabitants of the town. Their interest and the interests of some of the others are diametrically opposed. For this reason this action can not be maintained."⁸⁸

In the *first* category, where the representative has no interest in the subject matter of the controversy, it is understandable why class suit is improper. The person claiming to act as class representative must share the interests of the other members of the class; he must have a substantial stake in the controversy, which will ensure his vigilance in protecting the rights of the class.

Likewise, in the *third* category, where there is conflict or antagonism within the class, it is also understandable why class suit is improper. The class representative cannot be said to represent adequately the interest of the other class members with an interest in conflict with his.

As for the *second* category, however, where the class members have separate or distinct interests, class suit treatment should not be denied automatically and superficially. There are some cases where even if the members of the class have separate or distinct interests, they all share an interest in a *common question of law or fact*, such as a fraudulent scheme or negligent conduct, which merits class-wide resolution. Of course, class suit is not always proper from the mere fact of common questions, but in cases where the common question *predominates* over individual questions or concerns, a class suit is more proper and should not be denied. We shall further explain this argument below.

IV. LIMITATIONS OF THE PHILIPPINE APPROACH

A. TOO RESTRICTIVE TO BE USEFUL

Because of the requirement that there be *common interest* in the *subject matter* of the controversy, the applicability of the class suit device is severely restricted. The narrow scope of the present class suit provision has

⁸⁸ Ibañes v. Roman Catholic Church, No. 4695, 12 Phil. 227, Dec. 12, 1908.

effectively foreclosed its application in many cases of group injury where a class suit would have been the best way to handle the problem.

Consider, for instance, a group of consumers who have bought merchandise from an unscrupulous seller who induced them to buy through fraudulent misrepresentation.⁸⁹ Or consider a group of defrauded securities purchasers who are claiming for damages and rescission on the ground of manipulations of stock prices through false statements addressed to the general investing public.⁹⁰ Under our present class suit provision, class suit for the rescission of such contracts is not allowed because the consumers/purchasers have no common interest in the *subject matter* of the controversy (separate contracts), each having a separate right to rescind and entitled separately to damages.

Or consider a situation where thousands of taxicab riders seek to recover the illegal overcharges collected by the cab company.⁹¹ Under the present provision, class suit would be improper because of lack of community of interest in the *subject matter*. In fact, there is already a Philippine case where class suit treatment was denied in a similar situation.⁹² Mass accident situations are also precluded from the applicability of class action.⁹³ Under Philippine case law, "separate wrongs to separate persons, although committed by similar means and even pursuant to a single plan, do not alone create a 'common' or 'general' interest in those who are wronged so as to entitle them to maintain a representative action."⁹⁴

And yet class suit is the more viable remedy in this type of cases, since "individual actions by each of the defrauded consumers is often impracticable because the amount of individual recovery would be

⁸⁹ Vasquez v. Superior Court of San Joaquin County, 484 P.2d 964 (1971).

⁹⁰ Dolgow v. Anderson, 43 F.R.D. 472, 438 F.2d 825 (1971).

⁹¹ Daar v. Yellow Cab Co., 67 Cal.2d 695, 433 P.2d 732 (1967).

⁹² Valencia v. City of Dumaguete, 1799, 5 SCRA 1096, 1101, Aug. 31, 1962.

⁹³ In Re Request of the Heirs of the Passengers of the Doña Paz, A.M. No. 88-1-646-0, 159 SCRA 623, Mar. 3, 1988.

⁹⁴ Mathay, 58 SCRA at 573, citing Society Milion Athena, Inc. v. Nat'l Bank of Greece, 281 N.Y. 282, 22 N.E.2d 374 (1939), a case which has "haunted the New York courts, severely restricting resort to class relief in a variety of situations, and particularly in tort and contract claims for money damages." HOMBURGER, *State Class Actions*, *supra* note 5, at 618.

insufficient to justify bringing a separate action; thus an unscrupulous seller retains the benefits of its wrongful conduct."⁹⁵

In this kind of cases, our courts focus on the *community of interest in the subject matter* of the controversy (as dictated by the wording of Rule 3, Sec. 12), rather than on the *common questions* involved.⁹⁶ This requirement almost always results in the denial of class suit treatment, since the standard of *community of interest in the subject matter* is a very high one.

The requirement of *community of interest* is already a very high standard, requiring that there be some sort of privity among the members of the class. But our own Rules of Court provision on class suit even went a step further by requiring community of interest in the *subject matter* of the controversy. Since *subject matter* is defined as "the physical facts, the things real or personal, the money, lands, chattels, and the like, in relation to which the suit is prosecuted, and not the delict or wrong committed by the defendant,"⁹⁷ the provision in effect requires that there be some common fund or common (co-owned) property involved to merit class suit treatment.

Upon close analysis, this requirement actually limits class suit to cases of *compulsory* joinder of numerous *indispensable* parties.⁹⁸ If, as the class suit provision requires, numerous persons have common interest in the *subject matter* (e.g., co-owners), any judgment concerning the said subject matter would necessarily affect the rights the other parties, and this is basically the definition of an indispensable party.⁹⁹ That is the reason why their joinder is compulsory, because no final determination can be had of an action without their participation in the suit.¹⁰⁰ Thus, in an action involving a

⁹⁵ Vasquez v. Superior Court of San Joaquin County, 484 P.2d 964, at 968 (1971).

⁹⁶ "The requirement that the [class members] have an interest in the 'subject' of the action suggests that there be some one title or thing which is the subject of the action and in which all the plaintiffs must have an interest, while the requirement that they have common or general interest in the 'question' before the court suggests that joinder is allowed where, if separate suits were brought, the same question of law or fact would be involved." WILLIAM BLUME, *The "Common Questions" Principle in Representative Suits*, 30 MICH.L.REV. 878, 880 (1932).

⁹⁷ Mathay, 58 SCRA at 571.

⁹⁸ HOMBURGER, *State Class Actions*, *supra* note 5, at 618.

⁹⁹ I MANUEL MORAN, COMMENTARIES ON THE RULES OF COURT 191 (1979 ed.); REGALADO, *supra* note 9, at 83; I FERIA, *supra* note 23, at 236; BAUTISTA, *supra* note 9, at 19.

¹⁰⁰ RULES OF COURT, Rule 3, Section 7.

co-owned land, all the co-owners are indispensable parties,¹⁰¹ because they all have common interest in the same subject matter of the controversy.

Therefore, the problem with limiting class suit to cases where there is common interest in the *subject matter* of the controversy is that it restricts class suit to cases, which require *compulsory* joinder of *indispensable* parties. Limiting class suit to cases of compulsory joinder drastically reduces its scope or applicability.

If the modern development of the class suit is to be hitched to compulsory joinder, the class suit is virtually doomed. Compulsory joinder requirements have everywhere been relaxed, and the number of compulsory joinder cases is rapidly diminishing. On the compulsory joinder test, then, the number of occasions for the class suit must be similarly diminishing.¹⁰²

In requiring community of interest in the subject matter, and in limiting class suit to cases where compulsory joinder would have been required, the court in effect requires *substantive privity* or connection among the members of the class. According to Professor Homburger, *privity* is a "vague concept of feudal origin that defies definition and analysis. It denotes a sort of legal cross-relationship between the members of the class."¹⁰³ It is a standard applicable to compulsory joinder, but should not always be required in class suits. The problem with this requirement of privity is explained by him thus:

Since privity implies that there is a jural relation of one sort or another between the parties, it essentially belongs in the area of substantive law. Its relevance to a functional solution of procedural problems in multi-party litigation is highly questionable...¹⁰⁴

Whether a selected few of a numerous class should be permitted to represent the [absentees] involves basic policy decisions and practical considerations that frequently are independent of the jural relations of the class members. While consensual relationships, such as common property rights or voluntary associations, at times may give assurance that those before the court will act in the best interest of

¹⁰¹ I FERIA, *supra* note 23, at 233-34, citing *Ruguian v. Ruguian*, 9 Phil. 527 (1908); *Cruzcosa v. Concepcion*, 101 Phil. 146 (1957); *Arcelona v. Court of Appeals*, 280 SCRA 20 (1997).

¹⁰² KALVEN & ROSENFELD, *supra* note 3, at 708.

¹⁰³ ADOLF HOMBURGER, *The 1975 New York Judicial Conference Package: Class Actions and Comparative Negligence*, 25 BUFF.L.REV 415, 422 (1976).

¹⁰⁴ HOMBURGER, *State Class Actions*, *supra* note 5, at 615.

all, it is by no means clear that a non-consensual bond of unity, created fortuitously by transactions and occurrences which affect the entire group in a similar fashion, could not forge a tie of equal or even greater strength.¹⁰⁵

Stated otherwise, courts should not be so obsessed in requiring *substantive privity* among the members of the class in determining the propriety of a class suit treatment. It should instead be guided by "basic policy decisions and practical considerations," which are more relevant in finding a "functional solution" to "procedural problems." Courts should be more pragmatic and look at factors such as: (a) impracticability or inefficiency of prosecuting separate actions in view of the comparatively modest amount of the individual claims and the prohibitive expense of litigating complex questions of law and fact; (2) impracticability of joining all claimants because of their large number; (3) the obvious predominance of the common issues of law and fact over any other subsidiary separate issues; (4) the absence of any unusual management problems; (5) the unavailability of other tools for the effective disposition of the controversy.¹⁰⁶

The concern that there is a danger of inadequate representation in the absence of privity is not always and not necessarily sound. There may be instances when the members of the class have no privity (separate wrongs, separate transactions, and separate damages) but they have a "tie of equal or even greater strength." A group of persons in the same predicament and having a small stake in a large controversy have more incentive to unite because it would not be worthwhile to prosecute their small claims individually.

At this juncture, it is important to note that in at least one Philippine case, we can get a glimpse of a departure from this overly restrictive approach. This liberal deviation happened in the case of *Asociacion de Agricultores*,¹⁰⁷ decided almost twenty-five years ago. This interesting case is discussed below.

B. A GLIMPSE OF A LIBERAL DEVICE: ASOCIACION DE AGRICULTORES

In almost all of the Philippine cases on class suit, the Supreme Court is quite strict in insisting that there be "*common or general interest*" in the "*subject*"

¹⁰⁵ *Id.* at 617.

¹⁰⁶ *Id.* at 618.

¹⁰⁷ *Asociacion de Agricultores de Talisay-Silay, Inc. v. Talisay-Silay Milling Co., Inc.*, 19937, 88 SCRA 294, 456, Feb 19, 1979.

matter of the controversy." It is clear from the said rulings that a mere commonality of interest among the parties in the *question of fact or law* is not sufficient for an action to qualify as a class suit.¹⁰⁸ According to the Supreme Court, if a case does not involve a common interest in the *subject matter* but merely *common question* of law or fact and *common relief*, then such an action is not a "true" class suit, but a "spurious" one, which is a case of mere permissive joinder of parties.¹⁰⁹

However, in the 1979 case of *Asociacion de Agricultores de Talisay-Silay, Inc. v. Talisay-Silay Milling Co., Inc.*,¹¹⁰ for one brief shining moment, there was a significant liberalization of this strict standard. In that case, six sugarcane planters and the *Asociacion de Agricultores* filed a class suit, on behalf of thousands of other sugarcane planters and laborers, against the Talisay-Silay Milling Co., seeking to get the benefits of the increased sharing participation under the Sugar Act of 1952. The Sugar Act prescribes a certain sharing scheme of the increase in sugar production among the millers, the planters, and the laborers. The said scheme applies "in the absence of written milling agreements between the majority of planters and the millers of sugarcane in any milling district in the Philippines." In this case, the issues involved were, *inter alia*, the constitutionality of the law as well as its applicability to the Talisay-Silay milling district.

The defendant contended that the case was not a proper class suit, because the members of the purported class of planters and laborers do not have common interest in the subject matter of the controversy, the increase in the share of the production being claimed by plaintiffs. The Supreme Court considered the case as a proper class suit and ruled that "the propriety of considering the present litigation as a class suit cannot be open to question." The Court, speaking through Mr. Justice Barredo, ratiocinated:

[V]ery little elucidation is needed to demonstrate the palpable *community of interest* of all the planters in the district in the settlement of the two vital *issues of fact and the various issues of law* submitted for Our determination in this case...

¹⁰⁸ Sulo, 72 SCRA at 357, *citing* Scott v. Donald, 165 U.S. 107, Aug. 17, 1976.

¹⁰⁹ Mathay, 58 SCRA at 574. The Supreme Court was referring to the classification of class suits into *true*, *hybrid* and *spurious* which was used in the U.S. Federal Rules of Civil Procedure before the 1966 amendment of Rule 23 (Class Suits). See 3 MOORE'S FEDERAL PRACTICE 3401 *et seq.* (2nd ed. 1948).

¹¹⁰ G.R. No. 19937, 88 SCRA 294, Feb. 19, 1979.

Thus, by settling the controversy as to whether or not Section 1 of Republic Act 809 applies to the Talisay-Silay district, the factual issues to be determined have to do only with the number of planters there were in the district during the periods in dispute and how many of them had written milling agreements with the CENTRAL. Of course, it was of particular interest respectively to each of those who worked on the plantations within the district as to who of them should be deemed as planters or not, and being planters who among them were contract and non-contract planters within the contemplation of Section 7 of Republic Act 809. But at the same time, it cannot be denied that *the same issues were of common interest to all the PLANTERS and, in fact, to their respective laborers*, since it is on the correct resolution thereof that the expected improvement or augmentation of their share in the production of the CENTRAL would depend. In other words, *all the PLANTERS in the district as well as their respective laborers were similarly situated, whether they were named parties or not*. More than that, *the resolution of said issues could not in any event be different as to any of them, which is virtually saying that the subject matter of the controversy cannot be but of common and general interest to all of them*. On the other hand, the number of planters involved, not to mention the number of laborers to be affected, is so numerous as to make it impracticable to bring them all to court. Under these circumstances, the propriety of considering the present litigation as a class suit cannot be open to question.¹¹¹ (Emphasis supplied)

Thus, the Supreme Court considered this case as a class suit even if the planters and laborers represented did not actually have common interest in the subject matter of the controversy, strictly speaking. The subject matter, defined in the *Mathay* case as "the physical facts, the things real or personal, the money, lands, chattels, and the like, in relation to which the suit is prosecuted, and not the delict or wrong committed by the defendant,"¹¹² is the increased share in the sugar production claimed by the planters and laborers, and technically, each one of the planters and laborers has a distinct and determinate interest or portion in the said share.

It is thus clear that the members of the putative class, the planters and laborers, do not actually have common interest in the subject matter of the controversy. What they have is a "community of interest... in the settlement of the two vital issues of fact and the various issues of law." The Court explained that the planters' and laborers' common interest in the resolution of the questions of law and fact amounts to a common interest in

¹¹¹ *Asociacion*, 88 SCRA at 455-56.

¹¹² *Mathay*, 58 SCRA at 571.

the subject matter of the controversy, since the "the resolution of said issues could not in any event be different as to any of them."

This is a clear deviation from the standard class suit requirement of common interest in the subject matter of the controversy and not merely common interest in the question of fact or law involved. It is a liberalization of the strict standards of the Rules of Court on class suit. The *ponente*, Mr. Justice Barredo, cited the comments of Mr. Chief Justice Moran:

Moreover, according to Chief Justice Moran,¹¹³ the theory in the United States that a *class suit* is permissible whenever there is community of interest in the question involved and in the relief sought, even in the absence of community of interest in the subject matter of the litigation, "may be adopted in the Philippines under the present rules which authorize joinder of parties who have common interest in the same question of fact or law where the relief sought arises out of the same transaction or series of transactions." This view strengthens the position of appellees in this case.¹¹⁴ (Emphasis supplied)

The liberal seeds planted by the case of *Asociacion de Agricultores*, however, did not take root. Subsequent cases reverted to the strict standard of community of interest in the subject matter of the controversy.

V. LIBERALIZING THE PHILIPPINE CLASS SUIT DEVICE

The task at hand is to carry on the liberalization of class suit begun by *Asociacion de Agricultores*, in order to harness the potential usefulness of this procedural device. The restrictiveness and unavailability of the class suit device is unfortunate, considering the increasing number of situations where large groups or masses of people are faced with the common problem, injury, or wrong. "Social and economic change has vastly expanded the number and kind of situations in which 'numerous persons' might be exposed to the same legal occurrence."¹¹⁵

Modern society seems increasingly to expose men to... group injuries for which individually they are in a poor position to seek legal redress, either because they do not know enough or because such redress is disproportionately expensive. If each is left to assert his rights alone if and when he can, there will at best be a random and fragmentary enforcement, if there is any at all. This result is not only

¹¹³ II MORAN, *supra* note 99, at 203.

¹¹⁴ *Asociacion*, 88 SCRA at 456.

¹¹⁵ JAMES ET AL., *supra* note 4, at 649.

unfortunate in the particular case, but it will operate seriously to impair the deterrent effect of the sanctions, which underlie much contemporary law. The problem of fashioning an effective and inclusive group remedy is thus a major one.¹¹⁶

Class suit is a viable collective remedy for cases where large number of persons are exposed to the same legal occurrence or placed in the same predicament. It is conducive to judicial economy and convenience by preventing multiplicity of suits. More importantly, a class action can "provide access to the courts for a group of persons, none of whom can afford to sue separately."¹¹⁷ It operates "as a legal aid device for the benefit of similarly situated claimants who could succeed only by marshalling their strength."¹¹⁸ In a country such as ours where access to the courts is still a nagging problem,¹¹⁹ class suit may provide part of the solution by allowing the representation of persons who are unable to present directly their grievances to the courts. By ensuring access, class actions also, in a sense, help enforce the law by requiring a violator to bear the costs it inflicts on a class of victims, costs it otherwise could avoid because each victim's injury is too small to warrant suit.¹²⁰ The class opponent is thus forced to confront the full social costs of its activities.¹²¹ One author explained thus:

[Class suits are ideal] where numerous claimants, similarly situated, are caught between the impracticability of joining with others and the impracticability of proceeding alone. If the maintenance of individual actions exposes litigants to disproportionate expenditures of money, time and effort, the denial of class relief is tantamount to a denial of substantive justice. By the simple device of committing numerous small wrongs, lawbreakers may escape the arm of justice...¹²²

In many cases, denial of class action relief is tantamount to the denial of any relief,¹²³ because a claimant with a small individual stake would be deterred by the disproportionately high cost of litigation. For instance, in the case of *Valencia v. City of Dumaguete*,¹²⁴ the plaintiffs filed a class suit to

¹¹⁶ KALVEN & ROSENFELD, *supra* note 3, at 686.

¹¹⁷ JAMES ET AL., *supra* note 4, at 642.

¹¹⁸ HOMBURGER, *State Class Actions*, *supra* note 5, at 641.

¹¹⁹ In spite of the constitutional provision that "Free access to the courts... shall not be denied to any person by reason of poverty." Article III, Section 11.

¹²⁰ JAMES ET AL., *supra* note 4, at 643.

¹²¹ Comment, *Developments in the Law - Class Action*, 89 HARV. L. REV. 1321, 1355-1356 (1976).

¹²² HOMBURGER, *State Class Actions*, *supra* note 5, at 641.

¹²³ *Id.* at 624.

¹²⁴ 17799, 5 SCRA 1096, Aug. 31, 1962.

recover the illegal surcharges collected by the city government from some 30,000 customers of movie houses. The Supreme Court denied class suit treatment because each of the moviegoers was separately entitled only to the return of what he had personally paid. The Court did not even consider the fact that it is very impracticable, almost foolish, for an individual moviegoer to file a costly suit just to recover the surcharges collected from him. Whereas if the class suit had been allowed, it would be more practicable and more cost-efficient, because the cost of litigation would eventually be shared by all the members of the class.

Thus, it is high time to *liberalize* the class suit device and adapt it to the present needs of modern society. By liberalization, we mean the expansion of the applicability of the class suit device, extending its scope to cover more situations than presently accommodated. To do this, it is necessary to "un-hitch" class suit from compulsory joinder. This can be done by removing the requirement that the members of the class have common interest in the *subject matter* of the controversy, and shifting emphasis to simple commonality in the *questions of fact or law* involved. In this way, the privity requirement is removed and the courts are left free to consider more relevant and more practical factors in the determination of the propriety of class suit.

Of course, not every case of numerous persons having common interest in the *questions* involved merits class action treatment. Actual joinder is always preferable when practicable.¹²⁵ There is a higher bar that must be hurdled before an action may be maintained as a class suit. Under one formulation,¹²⁶ class action is proper only when the following additional requisites are met: (a) the questions of law or fact common to the members of the class *predominate* over any questions affecting only individual members; and (b) a class action is *superior* to other available methods for the fair and efficient adjudication of the controversy.

In determining the requisite of "predominance," the court ascertains whether the efficiency and economy of common adjudication outweigh the interest each class member may have in individual adjudication.¹²⁷ Meanwhile, under the "superiority" requisite, the court must compare other adjudicative possibilities such as individual actions and administrative

¹²⁵ HOMBURGER, *State Class Actions*, *supra* note 5, at 614.

¹²⁶ FEDERAL RULES OF CIVIL PROCEDURE, Rule 23(b)(3). NEW YORK CIVIL PRACTICE LAW AND RULES, art. 9, § 901 (a)(2), (a)(5).

¹²⁷ HOMBURGER, *State Class Actions*, *supra* note 5, at 614.

proceedings.¹²⁸ These requirements of *predominance* and *superiority* ensure that the class suit device will only be permitted in cases where it would be the most proper and efficient instrument to use.

For example, in some cases of consumer fraud, the common questions involved, the fraudulent scheme and liability of the defendant seller, are pervasive or more significant than the individual issues, or the individual consumer's share in the damages awarded.¹²⁹ The fact that there may be separate transactions, or the fact that each member of the class must prove his separate claim, should not automatically preclude the availability of the class suit device. As held in a leading California case:

The requirement of a community of interest does not depend upon an identical recovery, and the fact that each member of the class must prove his separate claim to a portion of any recovery by the class is only one factor to be considered in determining whether a class action is proper. The mere fact that separate transactions are involved does not of itself preclude a finding of the requisite community of interest... *The determination of whether a class action is appropriate will depend upon whether the common questions are sufficiently pervasive to permit adjudication in a class action rather than in a multiplicity of suits,*¹³⁰ *[or] whether there are issues common to the class as a whole sufficient in importance so that their adjudication on a class basis will benefit both the litigants and the court.*¹³¹

The maintenance of the suit as a class action is not precluded so long as the issues, which may be jointly tried, when compared to those requiring separate adjudication, justify the maintenance of the suit as a class action.¹³²

This shift in emphasis *from* common interest in the subject matter *to* common questions would effectively extend the scope or increase the applicability of the class suit device to accommodate more cases involving numerous persons, such as products liability cases; cases where numerous persons suffer from pollution caused by a particular polluter;¹³³ anti-trust

¹²⁸ *Id.* at 632.

¹²⁹ *Vasquez v. Superior Court of San Joaquin County*, 484 P.2d 964 (1971).

¹³⁰ *Id.* at 969.

¹³¹ *Id.* at 970.

¹³² *Id.* at 974.

¹³³ In *Oposa v. Factoran*, G.R. No. 1033, 224 SCRA 792, July 30, 1993, a taxpayers' class suit was filed asking the court to compel the Secretary of Environment and Natural resources to cancel all existing timber license agreements in the country. The Supreme Court made an all-sweeping pronouncement that "the said civil case is indeed a class suit. The subject matter of the complaint is of common and general interest... to

cases; or where numerous persons are defrauded in a common scheme, such as securities fraud or consumer fraud. In certain situations, class suit may also be proper for mass accidents.

In general, class suit should be made available in cases involving numerous persons where each person holds "a small stake in a large controversy."¹³⁴ This type of group injury or mass controversy is also the most likely to involve immensely complex factual and legal issues, and redress for it is likely to involve expense totally disproportionate to any of the individual claims.¹³⁵ Without a liberal class suit device, the injured member of the class in such a case would not bring suit because of the disproportion between his stake and the amount of resources required by such a large and complex litigation. But with a liberal class suit device, the representative plaintiff will have more incentive to pursue the case, because he can then advance the costs of litigation with the hope of eventually recovering them from the avails of the suit (under the 'common fund' doctrine).¹³⁶

It might be argued that there is no necessity in extending the scope or applicability of the class suit device, since other alternatives are available.¹³⁷ However, the alternatives of multiple party litigation (permissive joinder of parties, intervention, and consolidation) do not sufficiently meet the need for a viable collective remedy. The efficacy of such alternatives presupposes "a group of economically powerful parties who are obviously able and willing to take care of their own interest individually through individual suits or individual decisions about joinder or intervention,"¹³⁸ which is rarely the case. One authority explained the limitations of joinder and the virtues of class suit thus:

all the citizens of the Philippines." The Supreme Court, in effect, held that the class composed of all citizens of the Philippines was represented by the plaintiffs. The propriety of such pronouncement is highly doubtful. For a class suit to be proper, there must be an ascertainable group who shares a common interest. In this case, the class of all Filipino citizens is too broad and too vague. Besides, it is impossible that all Filipino citizens would want the cancellation of timber license agreements, including the defendants and the licensees.

¹³⁴ KALVEN & ROSENFELD, *supra* note 3, at 684.

¹³⁵ *Id.*

¹³⁶ JAMES ET AL., CIVIL PROCEDURE 642 (5th ed.).

¹³⁷ See, e.g., *Bulig-Bulig Kita Kamaganak Association v. Sulpicio Lines, Inc.*, G.R. No. 84750, 173 SCRA 514, 517, May 19, 1989.

¹³⁸ *Vasquez v. Superior Court of San Joaquin County*, 484 P.2d 964, 968 (1971), *citing Dolgow v. Anderson*, 43 F.R.D. 472, 484.

The cardinal difficulty with joinder, however, is that it presupposes the prospective plaintiffs' advancing en masse on the courts. In most situations such spontaneity cannot arise because the various parties who have the common interest are isolated, scattered, and utter strangers to each other. Thus, while the necessity for group action through joinder clearly exists, the conditions for it do not. It may not be enough for society simply to set up courts and wait for litigants to bring their complaints — they may never come.

What is needed, then, is something over and above the possibility of joinder. There must be some affirmative technique for bringing everyone into the case and for making recovery available to all. It is not so much a matter of permitting joinder as of ensuring it.... This is the technique of the class suit.¹³⁹

VI. PROBLEMS AND CONCERNS ON LIBERALIZATION AND LESSONS FROM THE AMERICAN EXPERIENCE

In any reform, there are certain issues that would surface and must be addressed. Liberalizing class suit would increase its use and applicability but would also increase or accentuate certain problems and concerns peculiar to a class suit. In this section we shall highlight some of the major problems and suggest ways of dealing with them. *First*, we discuss the problem of adequate representation. How do we expand the scope of class suit and at the same time ensure that the interest of the absentees is well protected? *Second*, we discuss the risk of over-extension of the class suit device. How can we ensure that class suit treatment is allowed only in cases, which really merit such a mass remedy? *Third*, we explore the problem of manageability. How can we ensure that class suits, complex and usually protracted litigations, involving high stakes and intricate questions of fact and law, are manageable and that our judicial system is equipped and prepared to handle them?

In addressing these issues, we shall draw some lessons and guidance from the extensive experience of the American legal system on class suits.

But first, a short historical background on the American experience with class suits. The class suit, which originated in equity began to be codified in the 19th century, such as the Field Code of 1848 first adopted in New York. Typically, the codes provided simply that "where the question is one of a common or general interest of many persons, or where the persons who might be made parties are very numerous and it may be impracticable

¹³⁹ KALVEN & ROSENFELD, *supra* note 3, at 687-88.

to bring them all before the court, one or more may sue or defend for the benefit of all."¹⁴⁰

In 1938, the Federal Rules were adopted and departed from the typical code provision.¹⁴¹ Federal Rule 23 at that time provided for a tripartite classification of class suits into "true," "hybrid" and "spurious," based on the differences in the "jural relationships" among the members of the class. Different *res judicata* consequences were thought to follow, depending on the type.¹⁴² This scheme was highly conceptualized or theoretical and proved difficult to apply, which led to a complete revision of Rule 23 in 1966, substituting functional tests for the conceptual categories, and also providing some procedural guidance for the courts in handling class actions.¹⁴³ Many states in the U.S. have adopted the amended Rule 23 in their class action rules.¹⁴⁴ Even some states (such as California) which retained their old class suit provisions began to "interpolate" judicially Federal Rule 23 into their class suit procedure.¹⁴⁵

A. ADEQUATE REPRESENTATION

The chief concern in liberalizing the class suit device is the problem of adequate representation. How can we liberalize or extend the applicability of class suit and at the same time protect the rights and interests of the absentees who will be bound by the judgment despite not having an actual day in court?

The adequacy of representation of the absent members of the class is a valid and serious concern,¹⁴⁶ and may be the single most important reason why the Supreme Court has been generally reluctant to extend the scope and applicability of the class suit device. Adequate representation in class suits is tremendously important for two reasons.¹⁴⁷ *First*, it ensures that the due process rights of the absent members are respected,¹⁴⁸ so as to justify the binding effect of the judgment on absentees who have not *literally*

¹⁴⁰ *Id.* at 647, citing CLARK, CODE PLEADING § 63.

¹⁴¹ KALVEN & ROSENFELD, *supra* note 3, at 649.

¹⁴² *Id.* at 650.

¹⁴³ COUND ET AL., CIVIL PROCEDURE: CASES AND MATERIALS 623 (4th ed.).

¹⁴⁴ FRIEDENTHAL ET AL., *supra* note 21, at 753.

¹⁴⁵ *Daar v. Yellow Cab Co.*, 67 Cal.2d 695, 433 P.2d 732 (1967).

¹⁴⁶ BAUTISTA, *supra* note 9, at 19.

¹⁴⁷ COUND ET AL., *supra* note 143, at 629.

¹⁴⁸ *Hansberry v. Lee*, 311 U.S. 32, 61 S.Ct. 115, 85 L.Ed. 22 (1940).

had their "day in court."¹⁴⁹ *Second*, on a pragmatic level, inadequate representation might render the judgment vulnerable to a collateral attack, which would render the class suit judgment almost worthless and the litigation a gross waste of time and effort.¹⁵⁰ The Supreme Court enunciated a similar concern, thus:

Courts must exercise utmost caution before allowing a class suit, which is the exception to the requirements of joinder of all indispensable parties. For while no difficulty may arise if the decision secured is favorable to the plaintiffs, a quandary would result if the decision were otherwise as those who were deemed impleaded by their self-appointed representatives would certainly claim denial of due process.¹⁵¹

But this fear of inadequate representation should not prevent the reform and liberalization of the rule on class suit. What needs to be done is to strike a balance between the two interests.

In the first place, there are already certain safeguards in place to ensure that the interests of the absentees are well protected and adequately represented. Earlier we mentioned three such safeguards: (1) It is required that the class representatives "be sufficiently numerous and representative as to fully protect the interests of all concerned."¹⁵² (2) The Rules of Court also give "any party in interest... the right to intervene to protect his individual interest."¹⁵³ (3) Finally, the Rules provide that "a class suit shall not be dismissed or compromised without the approval of the court."¹⁵⁴

Ultimately, however, it is the judge who can best ensure adequacy of representation. He is given the control of the class suit proceedings at every stage and may make various orders and findings to ensure that the interest of the absentees is well protected. The experience of the American judiciary in this matter is illuminating. Adequacy of representation is of crucial

¹⁴⁹ COUND ET AL., *supra* note 143, at 629.

¹⁵⁰ *Id.* Gonzales v. Cassidy, 474 F.2d 67 (5th Cir. 1973).

¹⁵¹ Cadalin v. Phil. Overseas Emp. Admin. Administrator, G.R. No. 104776, 238 SCRA 722, Dec. 5, 1994.

¹⁵² RULES OF COURT, Rule 3, Sec. 12.

¹⁵³ *Id.*

¹⁵⁴ *Id.*, Rule 17, Sec. 2. This requirement for court approval is included in section 2, "Dismissal upon motion of plaintiff." However, it is suggested that this requirement also applies even in "Dismissal upon notice of plaintiff" (section 1) for otherwise, such particular requirement for class suit would be superfluous, considering that section 2 already requires court approval for dismissals in general/

importance in the American approach on class suits because of its due process implications. Thus, in the seminal case of *Hansberry v. Lee*,¹⁵⁵ the United States Supreme Court held that a decree in a class action could be binding on the absentees, provided there is adequate representation which would satisfy the requirements of due process. The court held that there is "failure of due process only in those cases where it cannot be said that the procedure adopted fairly assures the protection of the interests of absent parties who are bound by it."¹⁵⁶ It is therefore helpful to look at the American experience in dealing with the problem of adequate representation.

Under Federal Civil Procedure Rule 23,¹⁵⁷ determining the propriety of giving federal class action treatment to a case is a two-stage process.¹⁵⁸ First, it must be determined whether the four procedural requisites under Rule 23 (a) – numerosity, common question, typicality and adequate representation – have been satisfied. Second, it must be ascertained whether the particular action falls within the definition of one of the permissible types or categories of class suits set out in Rule 23 (b).

The four pre-requisites under Rule 23 (a) are the following:

- (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.

Of the four procedural prerequisites, the fourth (adequacy of representation) is the single most important and the one most heavily litigated.¹⁵⁹ In determining if the representation is adequate, the courts look at the adequacy of the representatives and the adequacy of their counsel. The representatives must be members of the class and have substantial stake

¹⁵⁵ 311 U.S. 32 (1940).

¹⁵⁶ *Id.* at 42.

¹⁵⁷ See Appendix.

¹⁵⁸ *COUND ET AL.*, *supra* note 143, at 740.

¹⁵⁹ *Id.*, at 629.

in the litigation, and not motivated by factors such as greed, vindictiveness, or pursuit of competitive advantage.¹⁶⁰ As for the class' lawyer, the courts examine not only the good faith of the lawyer but also his technical competence. All of the lawyer's resources must be evaluated – professional experience, motivation, support staff, and other professional commitments – considering that class suits are highly complex, protracted and technical.¹⁶¹ Finally, the court must also make sure that the class is not beset by internal antagonism.¹⁶²

Moreover, in a certain type or category of class suit, Federal Rule 23 requires that the members give actual mailed notice to all absent members of the class whose addresses are known.¹⁶³ This applies to the so-called "damage" class action, Federal Rule 23(b)(3), where the only tie among the members of the class is that they claim to have been injured in the same way by the defendant. In addition, members of the class in this category of class suits, the "damages" class suit, may opt out by signifying that they do not wish to have their claims included in the action. As for the other categories, actual individualized notice is not required, leaving such matter to the judge's discretion.

Proposed settlements are also subjected to intensive judicial scrutiny in the American class suit practice. This is crucial because most class suits are settled before actual trial.¹⁶⁴ Once a case is "certified" as a proper class suit, it is bound to become a "big" case involving a complex and protracted litigation and the possibility of enormous damage awards. Thus, many defendants deem it best to just settle at this stage. When settlement is in view, however, "the tensions within the class suit emerge in sharper perspective."¹⁶⁵ The members of the class sometimes cannot agree on the sufficiency of the amount and the form of the offer, whether in cash, coupon, lower rates, or other non-monetary forms. Thus, the court must carefully scrutinize the terms of the proposed settlement to ensure its fairness to the absentees.

¹⁶⁰ *Id.*

¹⁶¹ *Id.*, at 630.

¹⁶² *Id.*

¹⁶³ Federal Rules of Civil Procedure, Rule 23(c)(2). *Eisen v. Carlisle*, 417 U.S. 156, 94 S.Ct. 2140, 40 L.Ed.2d 732 (1974).

¹⁶⁴ JAMES ET AL., CIVIL PROCEDURE 663 (5th ed.).

¹⁶⁵ *Id.*

All these requirements, standards and guidelines, taken together, appear "fully to meet the requirements of *Hansberry v. Lee* on adequate protection of the absentees' interest."¹⁶⁶

B. OVER-EXTENSION

To address the concern that class suit would be over-extended or would be allowed even in cases not meriting class treatment, Federal Rule 23, aside from the four abovementioned pre-requisites of numerosity, common questions, typicality, and adequate representation, also requires the additional criteria that (a) the questions of law or fact common to the members of the class *predominate* over any questions affecting only individual members (the "predominance" criterion); and (b) a class action is *superior* to other available methods for the fair and efficient adjudication of the controversy, the "superiority" criterion.¹⁶⁷ As we have already discussed, these predominance and superiority requirements ensure that the class suit device will only be permitted in cases where it would be the most proper and efficient instrument to use.

In addition, the judge is given the discretionary power to allow or disallow class suit and provides some guidelines in the exercise of such authority. Thus, Federal Rule 23 enumerates some factors that a judge must consider in determining the criteria of "predominance" and "superiority":

- 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;

¹⁶⁶ *Id.*

¹⁶⁷ U.S. Federal Rules of Civil Procedure, Rule 23(b)(3). Technically, the so-called "predominance" and "superiority" requirements apply only to a specific type of class action — those covered by the Rule 23(b)(3) category. It has been observed, however, that these two added criteria have universal applicability to *all* class actions. HOMBURGER, *State Class Actions*, *supra* note 5, at 636.

d.) the difficulties likely to be encountered in the management of a class action.¹⁶⁸

In other words, class suit treatment is not automatically given to all cases involving numerous persons and common questions. The court has to consider several factors (particularly the "predominance" of the common questions), in determining whether the case really deserves to be considered and litigated as a class suit.

C. MANAGEABILITY

As for managing a class suit litigation (often very complex and technical), Federal Rule 23 gives some procedural guidelines and provides for court control of the representative's conduct, including allowing absentees to intervene,¹⁶⁹ subdividing the class into subclasses along the lines of their interest,¹⁷⁰ limiting the issues as to which shall be binding on the absentees,¹⁷¹ and requiring court approval of any settlement.¹⁷²

But of course, Federal Rule 23 cannot anticipate all the problems and give detailed solutions to them. It is merely a "procedural skeleton requiring fleshing out by judges and lawyers experimenting with it in an ever-increasing range of circumstances and in a variety of innovative ways... Its basic operation ultimately depends on the ingenuity of district judges working cooperatively with counsel to engineer the management of complicated lawsuits."¹⁷³

Admittedly, the class suit under Federal Rule 23 might be too complex and difficult for courts to administer. Class suits typically involve complex questions of fact (thus, extensive discovery) and often complex and novel issues of substantive law.¹⁷⁴ But it is no more complicated than other "big" cases, such as antitrust and patent litigation.¹⁷⁵ Besides, the "big case" phenomenon transcends the class action. The "big case" is an "inevitable

¹⁶⁸ U.S. Federal Rules of Civil Procedure, Rule 23(b)(3). See note 168, *supra*.

¹⁶⁹ *Id.*, Rule 23(c)(2).

¹⁷⁰ *Id.*, Rule 23(c)(4)(B).

¹⁷¹ *Id.*, Rule 23(c)(4)(A).

¹⁷² *Id.*, Rule 23(e).

¹⁷³ Miller, *supra* note 21, at 677.

¹⁷⁴ JAMES ET AL., CIVIL PROCEDURE 658 (5th ed.).

¹⁷⁵ *Id.*

byproduct of the mass character of contemporary society and the complexity of today's substantive regulations."¹⁷⁶

Besides, the fear that the class action might be too "big" or complex a device to be employed in a certain case — is addressed by the express requirement by Federal Rule 23 that a "class action is superior to other available methods for the fair and *efficient* adjudication of the controversy."¹⁷⁷ Moreover, the same Rule 23 enjoins the court to consider the "difficulties likely to be encountered in the management of a class action."¹⁷⁸ To reiterate, class suit treatment is not automatically given to all cases just because they involve numerous persons and common questions. The judge still has to determine if the class suit approach would be an *efficient* way of handling the case.

The judge's ability to handle and manage such a "big case" is crucial. Judges handling class suits would have to convert their "role from one of passive adjudicator of a dispute staged by opposing counsels to that of active systems manager."¹⁷⁹ But there is no reason why this cannot be done. At first, there would be some groping in the dark, some mistakes and missteps. But with time and experience, courts will be better adept in handling class actions with more precision and care.¹⁸⁰

Courts can find ingenious ways to solve seemingly intractable problems in class suits. Consider, for example, the problem of administering class relief in suits where the class is seeking monetary relief. After the court finds that the defendant is *liable*, there is a need to "individualize" the proceedings, particularly in determining damages. The court has to *calculate* the amount of damages to the plaintiff class and then *distribute* the proper share of the award to individual class members. One approach in doing this is the *bifurcated trial*. The first trial considers only the issue of liability. The

¹⁷⁶ Miller, *supra* note 21, at 668.

¹⁷⁷ United States Federal Rules of Civil Procedure, Rule 23(b)(3).

¹⁷⁸ *Id.*, Rule 23 (b)(3)(D).

¹⁷⁹ Miller, *supra* note 21, at 667.

¹⁸⁰ "Instead of wielding a meat axe, courts increasingly are operating with a scalpel. As a result, district judges frequently redefine classes to improve manageability; grant partial certification when appropriate to take advantage of the economics of group adjudication on at least some issues; bifurcate the adjudication of liability from the remedy phase in certain case to improve efficiency; insist on a high level of legal skill to improve the quality of representation, which serves to reduce the risk of collateral attack; establish subclasses when antagonisms or conflicts exist within the group..." *Id.* at 680-81.

second trial (if defendant is found liable) addresses the amount of damages. The latter proceeding may be either highly individualized (mini-trials) or it may be a general proceeding to calculate the damages to the class as a whole.¹⁸¹ Courts sometimes utilize another approach called the "fluid class recovery" wherein the class award is used to provide a general benefit to class members rather than to compensate them individually. In an antitrust class suit, for example, when it is often impossible to identify precisely all of the victims of the violation, courts sometimes will order the defendant company to lower its prices for a specified amount of time.¹⁸²

The role of the bar in the success of class suit reform is also crucial. However, there is some concern that an expansion of the class suit device might lead to widespread abuse by unscrupulous lawyers, including "unprofessional practices relating to attorneys' fees, 'sweetheart' settlement deals, dilatory motion practice, harassing discovery, and misrepresentation to judges."¹⁸³ This abuse must be guarded against, but the possibility of abuse should not be used to keep class suit restrictive and useless.

VII. RECOMMENDATIONS

We recommend a *liberalization* of the class suit provision in the Rules of Court towards the liberal direction of a Federal Rule 23 approach. This would make the class suit device available in many situations calling for a viable collective remedy. Our goal is to make our rule on class suit more liberal and flexible, while at the same time avoiding the complexity, intricacy and detail of the entire Federal Rule 23.

The first step towards liberalization is to remove the restrictive requirement of common interest in the subject matter of the controversy.¹⁸⁴ This would effectively shift the emphasis from the restrictive requirement of substantive privity to a more liberal standard of *commonality of questions*. We can do this by adopting the procedural pre-requisites laid down in Federal

¹⁸¹ COUND ET AL., *supra* note 143, at 636.

¹⁸² *Id.*

¹⁸³ *Id.* at 665-666.

¹⁸⁴ The distinction between class suit and permissive joinder of parties would be attenuated, but not totally erased. Both devices would be founded on common interest in the *question* involved in the controversy, but class suit would require an additional prerequisite – that the parties be so numerous that it would be impracticable to bring them all before the court.

Rule 23(a), *viz.*, (1) numerosity; (2) common questions; (3) typicality; (4) adequate representation.

As additional safeguard against possible misuse or over-extension of the class suit device, it would be wise to include also the additional criteria that (a) the questions of law or fact common to the members of the class *predominate* over any questions affecting only individual members;¹⁸⁵ and (b) a class action is *superior* to other available methods for the fair and efficient adjudication of the controversy.¹⁸⁶ This ensures that not all cases involving numerous persons and common questions will be given class suit treatment, but only those cases which really merit such treatment or where class suit is the most efficient and effective device in handling the controversy. This is similar to the approach of New York.¹⁸⁷

Of course, the other safeguards for adequate representation must be maintained, such as the right to *intervene*, and the requirement of court approval for *dismissals and compromises*. For clarity, it should also be made explicit that the courts are authorized to *subdivide* a class and to allow class actions with respect only to *particular issues*.¹⁸⁸

There must also be some provision on the *notice* requirement, which must be more flexible than the Federal Rule 23 provisions on notice. Individualized notice is not always necessary in class actions for purposes of due process; the method of giving notice depends on a balancing between the costs involved and the size of individual's stake. There are other ways of publicizing the class suit that are more cost-efficient but no less effective.¹⁸⁹ Accordingly, the matter of notice should be left largely to the discretion of the court.

It is best *not* to adopt many of the other provisions of the Federal Rule 23, particularly the typology or categorization under Rule 23(b) which serves "little function and therefore could be abandoned."¹⁹⁰ It is also better not to include the other detailed procedural guidelines in Federal Rule 23.

¹⁸⁵ This *predominance* requirement can be combined with the *common questions* requirement.

¹⁸⁶ UNITED STATES FEDERAL RULES OF CIVIL PROCEDURE, Rule 23(b)(3).

¹⁸⁷ FRIEDENTHAL ET AL., *supra* note 21, at 754-55.

¹⁸⁸ This is similar to UNITED STATES FEDERAL RULES OF CIVIL PROCEDURE, Rule 23 (c)(4); NEW YORK CIVIL PRACTICE LAW AND RULES, art. 9, § 906.

¹⁸⁹ JAMES ET AL., CIVIL PROCEDURE 660-662 (5th ed.); HOMBURGER, *State Class Actions*, *supra* note 5, at 637-38; *Class Action*, *supra* note 121, at 1627-28.

¹⁹⁰ *Class Action*, *supra* note 121, at 1626.

This is to afford some flexibility to the judges handling class actions as well as to maintain the simplicity of our Rules of Court provision on class suit, avoiding clutter and verbiage. It should be noted, however, that even in the absence of those Federal Rule 23 provisions, our courts may still find them useful and adopt or incorporate them in managing class suits. This was precisely what the California Supreme Court has done with great success – maintaining its old and simple class suit provision¹⁹¹ but “interpolating” Federal Rule 23 into the California class suit procedure – in the landmark cases of *Daar v. Yellow Cab Co.* and *Vasquez v. Superior Court*.

Below is a draft proposal incorporating these suggestions:¹⁹²

Class Suit. – (a) *Prerequisites to a class action.* One or more members of a class may sue or be sued for the benefit of all 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 which predominate over any questions affecting only individual members; (3) the claims or defenses of the representative parties are typical to the claims or defenses of the class; (4) the representative parties will fairly and adequately protect the interests of the class; and (5) a class action is superior to other available methods for the fair and efficient adjudication of the controversy.

(b) *Intervention.* Any party in interest shall have the right to intervene to protect his individual interest.

(c) *Notice.* Reasonable notice of the commencement of a class suit shall be given to the class in such manner as the court directs. In determining the method by which notice is to be given, the court shall consider (i) the cost; (ii) the resources of the parties; and (iii) the stake of each represented member of the class.

¹⁹¹ The California Code of Civil Procedure simply provides that “when 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.” FRIEDENTHAL ET AL., *supra* note 21, at 753.

¹⁹² The draft proposal draws from the proposal given by Professor Adolf Homburger, chairman of the Advisory Committee of the New York Judicial Conference on Civil Practice Law and Rules. HOMBURGER, *State Class Actions*, *supra* note 5, at 655. A large part of Prof. Homburger’s draft proposal was subsequently adopted or codified by New York and became article 9 of New York’s Civil Practice Law and Rules. HOMBURGER, *1975 New York Judicial Conference*, *supra* note 103.

(d) *Actions conducted partially as class actions.* When appropriate, (1) an action may be brought or maintained as a class action with respect to particular issues, or (2) a class may be divided into subclasses and each subclass treated as a class.

(e) *Dismissal, discontinuance, or compromise.* A class suit shall not be dismissed, discontinued or compromised without the approval of the court.

It is hoped that such liberalization would make the class suit device more attuned and more responsive to the need of contemporary society for a viable and meaningful collective remedy.

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APPENDIX A: Federal Rules of Civil Procedure (as amended in 1966)

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

(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) of this rule, 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 the member from the class if the member 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 the member desires, enter an appearance through counsel.

(3) The judgment in an action maintained as a class action under subdivision (b)(1) or (b)(2) of this rule, 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) of this rule, whether or not favorable to the class, shall include and specify or describe those to whom the notice

provided in subdivision (c)(2) of this rule 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.