California Supreme Court Adopts *Per Se* Theory of Standing for False Advertising Claims Based on Consumer's Purchasing Motivation and Reaffirms Separate Requirements for Obtaining Restitution

In an important follow-up to its landmark decision in *In re Tobacco II Cases*, 46 Cal. 4th 298 (2009), interpreting Proposition 64's "standing requirements" to sue under California's Unfair Competition Law (Bus. & Prof. Code §§ 17200, *et seq.*) ("UCL"), the California Supreme Court, on January 27, 2010, held that a consumer has standing if he alleges that he would not have purchased the defendant's product but for the defendant's alleged misrepresentation, when objectively the product was not defective, worked as advertised and did not cost more than competitive products. In making this ruling, the Court reiterated that the requirements for standing "are wholly distinct" from the requirement for obtaining restitutionary disgorgement – the only monetary relief permitted under the UCL – which must be proven in a "measurable amount" to "restore" to the plaintiff what has been acquired by violation of the statute. The net result of the decision is to make it easier for consumers to allege standing to sue under the UCL, but to make it more difficult to meet the standards for class certification.

At issue in *Kwikset Corp. v. Super. Ct. of Orange County*, 2011 Cal. LEXIS 532 (Cal. Jan. 27, 2011), was the plaintiffs' allegation that when purchasing Kwikset's locksets, they saw, read and relied on, and were induced to purchase, the locksets, "due to the false representation that they were 'Made in U.S.A.' and would not have purchased them if they had not been so misrepresented." *Id.* at *9-10. Based on these allegations, plaintiffs brought a representative action under the UCL alleging that they had "suffered injury and loss of money as a result of Defendants' conduct," as required to allege standing under Proposition 64's amendment of the UCL. *Id.* at *10. On appeal, the Court of Appeal granted a writ ordering dismissal of the complaint. As the Supreme Court summarized the Court of Appeal's holding, "while plaintiffs had adequately alleged injury in fact, they had not alleged any loss of money or property. (See §§ 17204 [a private plaintiff must show "lost money or property"], 17535 [same].) Plaintiffs spent money to be sure but, the Court of Appeal reasoned, they received locksets in return, locksets they did not allege were overpriced or defective. Thus, while their 'patriotic desire to buy fully American-made products was frustrated,' that injury was insufficient to satisfy the standing requirements of sections 17204 and 17535." *Id.* at *11. The Supreme Court reversed.

Acknowledging that the UCL standing provisions required both "injury in fact" and "loss of money or property" (*id.* at *24), the Supreme Court held that the plaintiffs had adequately alleged both requirements. "Simply stated: labels matter . . . . In particular, to some consumers, the 'Made in U.S.A.' label matters. A range of motivations may fuel this preference, from the desire to support domestic jobs, to beliefs about quality, to concerns about overseas environmental or labor conditions, to simple patriotism." *Id.* at *31-34. The Court then reasoned that "[f]or each consumer who relies on the truth and accuracy of a label and is deceived by misrepresentations into making a purchase, the economic harm is the same: the consumer has purchased a product that he or she *paid more for* than he or she otherwise might have been willing to pay if the product had been labeled accurately. This economic harm – the loss of real dollars from a consumer's pocket – is the same whether or not a court might objectively view the products as functionally equivalent." *Id.* at *35-36 (emphasis by the Court). In short, the Court adopted a

per se rule – "A consumer who relies on a product label and challenges a misrepresentation contained therein can satisfy the standing requirement of section 17204 by alleging, as plaintiffs have here, that he or she would not have bought the product but for the misrepresentation." *Id.* at *36-37. That the product worked objectively as advertised, was not defective and a comparable product would not have been cheaper to purchase is, the Court ruled, irrelevant for purposes of standing.

In responding to the dissent's argument that a "plaintiff's subjective motivations in making a purchase" should play no role in deciding standing, the Court emphasized that the standard for establishing entitlement to restitution – the only monetary relief obtainable under the UCL – was far more stringent than the standard for establishing standing: "the standards for establishing standing under section 17204 and eligibility for restitution under section 17203 are wholly distinct." *Id.* at *37-38 n.14, 51-52. As the Court emphasized: "Restitution under section 17203 is confined to restoration of any interest in 'money or property, real or personal, which may have been *acquired* by means of such unfair competition.' A restitution order against a defendant thus requires both that money or property have been lost by a plaintiff, on the one hand, and that it have been acquired by a defendant, on the other." *Id.* at *53 (emphasis by the Court). The Court further stated that "[t]o make standing under section 17204 dependent on eligibility for restitution under section 17203 would turn the remedial scheme of the UCL on its head. Injunctions are 'the primary form of relief available under the UCL to protect consumers from unfair business practices,' while restitution is a type of 'ancillary relief.'" *Id.* at *54-55 (quoting *In re Tobacco II Cases*, 46 Cal. 4th at 319). As the Court further stated, the trial court has "considerable discretion" to determine what relief, "if any," to grant for a violation of the UCL. *Id.* at *38 n.15.

The Court's adoption of a *per se* theory of standing turning on the plaintiff's subjective motivation in purchasing a product will make it easier for consumers to avoid dismissal on the pleadings. A plaintiff will only need to allege that, absent the misrepresentation, he would not have purchased the product even if the product worked for him and even if the competitive product that he would have purchased instead was priced the same or even higher.

By the same token, the Court's ruling has the potential to make it more difficult for plaintiffs to obtain certification of UCL class actions. In May 2009, the California Supreme Court held in *In re Tobacco II* that Proposition 64's standing requirements were applicable only to the class representatives, and not to absent class members, and that the named plaintiff "must demonstrate actual reliance on the allegedly deceptive or misleading statements" to establish standing. *In re Tobacco II Cases*, 46 Cal. 4th at 306. Notwithstanding that the Court stated nothing in the decision "enlarges . . . the substantive rights [or] remedies of the class" (*id.* at 324), many in the plaintiffs' bar, conflating the requirements for standing with the requirements for obtaining restitution under the UCL, argued that, under *Tobacco II*, a class could be certified without any individual inquiry into whether the class members suffered a loss in a measurable amount for which they were entitled to restitution.

In *Kwikset*, however, the Court reiterated that the requirements for establishing entitlement to restitutionary disgorgement were "wholly distinct" from the requirements for standing. 2011 Cal. LEXIS 532, at *51-52. This will make it difficult to obtain certification of consumer classes because, under the UCL, "restitution is limited to restoring money or property to *direct victims* of an unfair practice" – a "restitutionary form of disgorgement" – and "nonrestitutionary disgorgement" is not a permissible UCL remedy. *Korea Supply Co. v. Lockheed Martin Corp.*, 29 Cal. 4th 1134, 1148, 1150-51 (2003) (emphasis added). Accordingly, "the amount of restitution" that may be awarded in a UCL action is that amount "necessary to make *injured* consumers whole" and it "must be of a *measurable amount* to restore to the plaintiff what has been acquired by violations of the statutes, and that measurable amount must be supported by evidence." *Colgan v. Leatherman Tool Group, Inc.*, 135 Cal. App. 4th 663, 697-98 (2006)

(emphasis added). Determining whether consumers were "direct victims" of an unfair practice and whether they were "injured" in a "measurable amount" are inherently individual issues requiring individual inquiries, which will be a major hurdle for plaintiffs to overcome in seeking class certification.

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