ARNOLD & PORTER LLP

ADVISORY

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IN *KWIKSET*, THE CALIFORNIA SUPREME COURT LOWERS THE BAR TO GAIN STANDING FOR UNFAIR COMPETITION CLAIMS, BUT MAY HAVE RAISED THE BAR ON MONETARY RECOVERY

Plaintiffs may now have an easier time bringing unfair competition claims for alleged false or misleading advertising in California, but they may have a harder time recovering money from defendants on these claims.

So said the California Supreme Court in a highly-anticipated ruling, in late January, that relaxed the standing requirements of California's Unfair Competition Law (UCL) and False Advertising Law (FAL), but that also reaffirmed the narrow categories of relief available under that law. *Kwikset Corp.* v. *Super. Ct.*, No. S171845 (Cal. Jan. 27, 2011).

California's high court held that plaintiffs can show that they "lost money or property" to gain standing under the UCL merely by alleging that they saw and relied on false statements on a product label, and would not have bought the product otherwise. That, according to the Court, is sufficient to allege the "economic injury" required by the statute.

But *Kwikset* was not all bad news for defendants. Apparently accepting arguments of business groups that submitted an amicus brief (available here), the Court reaffirmed that injunctions are the primary form of relief under the UCL, and that a plaintiff must meet a heavy burden to obtain "ancillary relief" in the form of restitution. Not only must plaintiffs show they lost money or property, they must also show that it was *acquired* by the defendant through an unfair business practice. *Kwikset's* discussion of restitution will help defendants rebut the argument that monetary relief is available under the UCL or FAL even if a plaintiff cannot prove that a defendant acquired money as a result of an act of unfair competition.

ACT I

The Scene. Kwikset Corporation sold locksets labeled "Made in the U.S.A." James Benson bought one. He then learned that the lockset contained pins made in Taiwan, or was partly assembled in Mexico. So in 2000—with his "patriotic desire...frustrated"—Benson brought a representative action under the UCL against Kwikset. He asked for an injunction and restitution.

The trial court granted the injunction, but denied restitution: "the misrepresentations...were not so deceptive or false as to warrant...restitutionary relief to those who have been using their locksets without other complaint." Both sides appealed.

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Enter the People: Proposition 64. While the appeals were pending, in 2004 the people of California enacted Proposition 64. Their purpose was to put an end to "shake-down" lawsuits by limiting standing under the UCL to those who "suffered injury in fact" and also "lost money or property" as a result of unfair business practices. In light of the new standing requirements, the Court of Appeal sent Benson back to the trial court with leave to try to meet the new pleading requirements.

A New Complaint, A New Appeal. Benson amended his complaint to allege he "lost" the money he paid for the locksets because he would not have purchased them if he had known about the Taiwanese pins or Mexican labor that went into them.

The trial court found that Benson had adequately alleged standing. Kwikset appealed again. It argued that Benson had not lost money or property because he did not allege the locksets were overpriced or defective and thus he got the benefit of his bargain. The Court of Appeal agreed with Kwikset, and the Supreme Court granted review.

ACT II

Meanwhile… While *Kwikset* was on its 10-year road to the California Supreme Court, the high court was busy posting several markers along the way.

Kraus. In 2000, the Court held in *Kraus* v. *Trinity Management Services, Inc.* that nonrestitutionary disgorgement was not a permitted remedy under the UCL. 23 Cal. 4th 116, 137 (2000). In that case, a group of tenants sought to force a landlord to disgorge profits obtained as a result of unfair business practices. The trial court ordered the disgorgement, and directed the landlord to place the money in a "fluid recovery fund." Any money left in the fund after valid claims had been paid was to go to a program to advance the legal rights of San Francisco residential tenants. The Supreme Court held that a disgorgement remedy is not authorized by the UCL, which only allows injunctive and restitutionary relief.

Korea Supply. In 2003, in *Korea Supply Co.* v. *Lockheed Martin Corp.*, the Court reaffirmed and clarified its holding in *Kraus*. 29 Cal. 4th 1134, 1145 (2003). Citing *Kraus*, the Court explained that restitution requires that a defendant return unfairly obtained money "to those persons in interest from whom the property was taken." *Kraus*, 29 Cal. 4th at 126-27. The *Korea Supply* Court reaffirmed that restitution is the only monetary relief available under the UCL.

Tobacco II. Then in 2009—in a move that pleased the plaintiffs bar—the Court eased the UCL's standing requirements in *In re Tobacco II Cases*, 46 Cal. 4th 298 (2009). The Court held that only named plaintiffs in a UCL class action need satisfy the standing requirements. Justice Baxter, joined by two dissenting colleagues, described the ruling as creating "no-injury class actions" because a showing of injury to absent class members was not required for standing. Moreover, in dicta that was inconsistent with the definition of restitution in *Kraus* and *Korea Supply*, the Court suggested that restitution might be available to class members without a showing that a defendant acquired money from a plaintiff by means of an unfair business practice. For our advisory on *In re Tobacco II Cases*, click here.

Clayworth. Finally, in 2010, in *Clayworth* v. *Pfizer*, the Court signaled its discontent with lower court UCL decisions that had conflated "the issue of standing with the issue of... remedies" by holding that a plaintiff can only satisfy the UCL's standing requirement by showing an entitlement to restitution ("That a party may ultimately be unable to prove a right to damages (or here, restitution) does not demonstrate that it lacks standing to argue for its entitlement to them"). This did not bode well for the Kwikset defendant, which made this precise argument in its effort to show the absence of standing. 49 Cal. 4th 759, 788-89 (2010). For our advisory on *Clayworth*, click here.

ACT III

With those guideposts in view, the *Kwikset* Court proceeded to untangle the issues of standing and relief.

Kwikset's Expansion of Standing. The Court rejected Kwikset's argument that Mr. Benson lacked standing because the lockset he received was of equal value to the

amount he paid for it, and thus he didn't lose any money or property.

The Court held that when a consumer buys a product in reliance on a misrepresentation about the product, the consumer automatically satisfies the "lost money or property" requirement—regardless of whether the consumer received a product worth what was paid. The Court held that the "lost money or property" requirement is satisfied by a showing of "economic injury," and that economic injury may be shown—at least in a product label misrepresentation case—by the mere expenditure of money to buy the product. The Court also disapproved the line of Court of Appeal cases that had read the "lost money or property" requirement as limiting standing to those entitled to restitution.

The Court's ruling will make it more difficult for manufacturers and retailers to dispose of UCL or FAL cases on standing grounds.

Kwikset's Limitation of Remedies. Although most defense-oriented commentators have bemoaned *Kwikset* as unmitigated bad news for corporations seeking to limit the proliferation of frivolous lawsuits, the opinion does contain some glimmers of hope. While challenges to a plaintiff's *standing* may no longer be a fruitful way to defend product misrepresentation cases, *Kwikset* should prove helpful in limiting or eliminating the *monetary relief* plaintiffs may seek.

Mindful of the distinction between standing and remedies, the Court made clear that restitution is not available merely because a plaintiff has "lost money or property" sufficient to gain standing to sue. It stated that "a restitution order against a defendant...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." The Court cited a specific sentence in *Kraus*, where the Court had stated that "when we refer to orders for restitution, we mean orders compelling a defendant to return money obtained through an unfair business practice to those persons in interest from whom the property was taken." This re-affirmation that restitution requires proof that a defendant has *actually* obtained money from plaintiff by means of an unfair business practice will help refute the argument, made by many in the plaintiffs' bar, that restitution is available simply if a defendant *may* have acquired money through an act of unfair competition.

We hope you have found this advisory useful. If you have questions, please contact your Arnold & Porter attorney, or:

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