S171845

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

KWIKSET CORPORATION, et al.,

Petitioners,

vs.

THE SUPERIOR COURT OF ORANGE COUNTY,

Respondent.

JAMES BENSON, et al.,

Real Parties in Interest.

Fourth Appellate District, Division Three, No. G040675
Orange County Superior Court, Case No. 00cc01275
The Hon. David C. Velasquez, Judge Presiding

AMICUS BRIEF OF CONSUMER ATTORNEYS OF CALIFORNIA IN SUPPORT OF REAL PARTIES IN INTEREST

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CERTIFICATE OF INTERESTED PARTIES

Pursuant to California Rule of Court 8.208, *amicus* and its counsel certify that apart from the attorneys representing the *amicus* in this proceeding, as disclosed on the cover of this Brief, *amicus* and its counsel know of no other person or entity that has a financial or other interest in the outcome of the proceeding that the petitioner or their counsel reasonably believe the Justices of this Court should consider in determining whether to disqualify themselves under canon 3E of the Code of Judicial Ethics.

Dated: December 21, 2009

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SHARON J. ARKIN

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INTRODUCTION

Proposition 64 established a new standing requirement for actions brought under Business & Professions Code section 17200 ("the UCL"). After Proposition 64, the person filing a complaint under the UCL must be one who suffered an "injury in fact and lost money or property as a result of the unfair competition" alleged. (Business & Professions Code section 17204.)

In *In re Tobacco II Cases* (2009) 46 Cal.4th 298, this Court examined the meaning and application of the "as a result of" language in Proposition 64. This case presents a different issue: What constitutes a "loss of money or property" for purposes of standing to bring a UCL action? Unfortunately, numerous appellate courts, including the appellate court in this case, conflate the concept of "loss of money or property" with damages.

In doing so, those appellate courts ask the wrong question. Those courts fundamentally ask: "Did the plaintiff get something with an economic worth equivalent to what he paid?" The correct question, for purposes of the UCL, however, is different. The question for UCL purposes is: "Did the plaintiff get what the defendant represented it was selling?"

The first question goes to an issue of damages, i.e., was there a compensable injury? The second question goes to the issue of whether the defendant acted unlawfully or deceptively, i.e., did it violate the UCL?

The facts in this case present a paradigm for distinguishing between these two questions, and the importance of asking the right one. The issue is not whether the plaintiff obtained a lock set that was worth the price he was charged. Rather, the issue is whether the plaintiff got what the manufacturer represented it was selling: A lockset ***manufactured in America***. And the evidence in the trial in this case proved that he did not. Because he did not get a lockset that was made in America, the plaintiff lost the money he spent for the lockset. The fact that the plaintiff may have received something of ***economic*** "value" equal to what he paid is irrelevant because he did ***not*** receive ***what was advertised***.

This formulation of the question - did the plaintiff get what the defendant represented that it was selling? - highlights the very nature of consumer misrepresentations that the UCL is intended to address. Obviously, Kwikset utilized the "Made in America" packaging for a reason: Whether out of pure patriotism or an intent to support American manufacturers or American jobs, some purchasers will choose a product that is "Made in America" over one that is foreign-made. (See, Integer

Pulse, Tracking the Trends, *Neo-Patriotism*, Issue 19, July 2009, available at http://email. integermidwest.com/pulse/july-09/ (accessed 12/17/09); R. Klara, Brandweek, August 31, 2009, available at http://www.brandweek.com/bw/content_display/esearch/e3if39271c89709c28ecdfc32f21f86912f?imw=Y (accessed 12/17/09).)

Applying the "lost money or property" language as the appellate court did here will encourage manufacturers to steal market share by making misrepresentations on the basis of those buyers' intentions or interests – and will be able to do so with impunity. But those buyers have lost money because they have paid for something other than what the manufacturer represented – a foreign-made product that does not support American companies or American jobs.

One other point needs to be made here. Kwikset argues that such a rule will result in anyone, anytime being able to get a refund on a purchase or obtain other compensation beyond the economic value of the product. Kwikset's argument ignores the fundamental premise: Manufacturers will be required to provide restitution (of whatever amount a trial court determines is warranted) ***only when it makes misrepresentations about its product, violates the law, or acts unfairly***. Kwikset, and other manufacturers, can avoid the parade of horribles Kwikset posits simply by

operating their businesses fairly.

In interpreting Proposition 64, this Court is required to construe the statute in such a way as to promote, and not defeat, the purposes of the statute. But the formulation used by the appellate courts in this and other cases undermines the purposes of the UCL – that is, to protect competitors and consumers from unfair competition. Again, this case provides the paradigm: Under the appellate courts' holdings, a manufacturer can literally steal market share by making meaningful, but blatantly untrue, misrepresentations. But so long as the manufacturer gives value for the price, neither competitors nor consumers can stop that conduct. Such a construct undermines the purposes of the UCL.

In contrast, of course, by focusing on the defendant's wrongful conduct rather than the harm to the plaintiff – which is the standard to be applied in UCL actions – and asking whether the consumer lost money by buying something that was misrepresented, the underlying purposes of the UCL ***are*** fulfilled. That is, manufacturers can be stopped from engaging in such conduct, manufacturers can be deterred from engaging in such conduct by being forced to provide restitution for their misconduct, and consumers and competitors can be protected.

INTEREST OF THE *AMICUS*

The Consumer Attorneys of California ("Consumer Attorneys") is a voluntary membership organization representing approximately 6,000 associated attorneys practicing throughout California. The organization was founded in 1962. Its membership consists primarily of attorneys who represent individuals subjected in a variety of ways to personal injury, employment discrimination, and other harmful business and governmental practices. Consumer Attorneys has taken a leading role in advancing and protecting the rights of injured Californians in both the courts and the Legislature.

As an organization representative of the plaintiff's trial bar throughout California, including many attorneys who represent consumers in class actions under the Unfair Competition Law, Consumer Attorneys has an abiding interest in the issues in this case.

LEGAL ARGUMENT

The starting point for examination of the issues in this case is this Court's decision in *In re Tobacco II Cases* (2009) 46 Cal.4th 298. As

decided in that case, there are general principles which apply equally to the analysis here: (1) Proposition 64 imposes only ***standing*** requirements and the substantive elements for proving a UCL violation have not changed (*id.*, at 314-315); (2) Only the class representative must meet the standing requirements, and the class members do not. (*Id.*, at 321.)

Tobacco II also confirmed the basic principles underlying the UCL: "The substantive right extended to the public by the UCL is the right to protection from fraud, deceit and unlawful conduct, and ***the focus of the statute is on the defendant's conduct***." (*Id.*, at 324, internal quotations and citations removed, emphasis added.)

One more fundamental legal principle is important in consideration of the issue here: "The cardinal rule of statutory construction is to ascertain ***and give effect to*** the intent of the Legislature." (*Building Industry Assn. v. City of Camarillo* (1986) 41 Cal.3d 810, 819; emphasis added.) As this Court has repeatedly confirmed, the UCL "has as a major purpose 'the preservation of fair business competition.'" (*Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Company* (1999) 20 Cal.4th 163, 180.)

Applying these principles to the construction and application of the "loss of money or property" standing requirement compels the conclusion

that any time a consumer buys a product which has been misrepresented, or which is sold in violation of the law, that consumer has literally lost the actual money expended for the product, irrespective of whether the consumer obtained a product with the same economic value as the amount spent. Indeed, what the consumer obtained is irrelevant because the focus of the statute is on the defendant's conduct, not on the plaintiff's "damage."

THE UCL HAS NEVER REQUIRED THAT THE PLAINTIFF SUFFER A LOSS OF "VALUE" OR "WORTH" AND INTERPRETING PROPOSITION 64 AS IMPOSING SUCH A REQUIREMENT FOR STANDING WOULD UNDERMINE THE PUBLIC POLICY PURPOSES UNDERLYING THE UCL

The appellate court in this case interpreted the phrase "loss of money or property" contained in the new standing requirements as meaning that the plaintiff must have suffered a loss in ***value***, i.e., that the plaintiff paid ***more*** for the product than it was ***worth***. But nothing in the UCL or in this Court's interpretation of it prior to Proposition 64 supports that construct. And Proposition 64's ballot materials expressly disclaimed any intent to change the substantive requirements for bringing an individual action. Because the substantive requirements for obtaining restitution never included a value or

worth calculation, it would undermine the public policy purposes of the statute to impose such a damages requirement for standing purposes.

As this Court pointed out in *Tobacco II*, the ballot materials for Proposition 64 expressly stated that the intent of the proposition included "protecting the right of individuals to retain an attorney and ***file an action for relief pursuant to this chapter***." (*Id.*, at 317, citing Prop. 64, section 1, subd. (d); emphasis added.)

The "relief pursuant to this chapter" traditionally includes restitution of "money or property . . . which may have been acquired" by the defendant from the consumer victim through the unfair business practices. (Business & Professions Code section 17203; *Tobacco II*, at 320.) As this Court put it in *Korea Supply Company v. Lockheed Martin Corporation* (2003) 29 Cal.4th 1134, 1148, "[u]nder the UCL, an individual may recover profits unfairly obtained to the extent that these profits represent ***monies given to the defendant*** . . . ." (Emphasis added.) Thus, the focus has always been on ***what the defendant obtained*** from the plaintiff, and not what "damages" the plaintiff might – or might not – have suffered. Indeed, as this Court has repeatedly pointed out, "damages" are not recoverable in a UCL action. (*Id.*)

When the plaintiff in this case purchased the defendant's misrepresented and illegally-marketed lockset, the defendant unequivocally and undisputedly obtained money from the plaintiff. As *Korea Supply* established, that money is recoverable as restitution in a UCL action because that is the relief available pursuant to the UCL.

Conversely, when the defendant obtained that money from the plaintiff, the plaintiff inevitably "lost" that money, because the plaintiff no longer had it. The fact that the plaintiff obtained something of value in exchange has always been irrelevant under the UCL.

The reason for this has been repeatedly stated by this Court and others: The focus is on the defendant's conduct, not the plaintiff's "damage," because damages are not recoverable. (*Tobacco II*, at 312; *Korea Supply Co. v. Lockheed Martin Corp.* (2003) 29 Cal.4th 1134, 1144; *Fletcher v. Security Pacific National Bank* (1979) 23 Cal.3d 442, 453.) As such, the statute is a strict liability one, i.e., fault and damages are irrelevant. (*Fletcher*, at 454 ["One requirement of such enforcement is a basic policy that those who have engaged in proscribed conduct surrender all profits flowing therefrom. . . . Thus a class action may proceed, in the absence of individualized proof of lack of knowledge of the fraud, as an effective means to accomplish this disgorgement."] .) The restitutionary

remedy is intended to deter conduct prohibited by the statute. (*Id*.) One powerful way to assure deterrence is to require the defendant to restore to the consumers who purchased its misrepresented or illegal products the monies it unfairly obtained. (*Id*, at 454 ["***To permit the [retention of even] a portion of the illicit profits, would impair the full impact of the deterrent force that is essential if adequate enforcement [of the law] is to be achieved***." (Bracketed material in original, internal quote marks and citations omitted.].)

A note about Kwikset's reliance on a passing statement in *Cortez v. Purolator Air Filtration Products Co.* (2000) 23 Cal.4th 163 is necessary here. In *Cortez* – an action that did not even deal with a product sale - this Court discussed the general interplay between damages and restitution. In doing so, it commented that ***in a common law fraud context***, the plaintiff's recovery may be in excess of his or her actual damages. The Court labeled this recovery as restitutionary, i.e. "the return ***of the excess*** of what the plaintiff gave the defendant over the value of what the plaintiff received." (*Cortez*, at 174.)

There are at least two problems with Kwikset's reliance on this single comment, above and beyond the fact that it is dicta: (1) While the Court was discussing one possible form of restitution, that does not

preclude other restitutionary constructs, especially given that restitution is an equitable concept and is to be ordered under the UCL when necessary to deter misconduct; and (2) The restitutionary concept expressed in *Cortez* actually supports the plaintiff's arguments here: That statement is saying that restitution is comprised of ***more than*** the difference between the economic value and what was paid, because the difference between the economic value and what was paid are the damages. That is precisely what should happen here: The defendant should be required to return to the consumers who purchased their illegally misrepresented locksets something apart from the difference between what was paid and what it was worth. *Cortez*, therefore defeats, rather than supports, Kwikset's argument.

Finally, given that the UCL has historically focused on imposing equitable restitution intended to deter a defendant from engaging in unfair business practices without proof of damage, it would be anomalous in the extreme to impose on this substantive construct a threshold standing requirement for relief (i.e., economic damages) that is more stringent than the relief obtainable under the statute itself. Nor is it necessary to do so in order to effectuate the purposes of Proposition 64.

A. **Imposing a damages requirement for standing is contrary to the expressed intent of Proposition 64**.

Prior to the passage of Proposition 64, an action could be brought under the UCL even by an "unaffected" plaintiff, i.e., a plaintiff who had never engaged in a transaction with the defendant. (*Tobacco II*, at 314.) Proposition 64's text expressly called out this problem as part of the UCL that needed a statutory "fix": "These unfair competition laws are being misused by private attorneys who: . . . file lawsuits for clients who have not used the defendant's product or service, viewed the defendant's advertising, or had any other business dealing with the defendant." (Prop. 64, section 1, subdivision (b)(3).)

One intent of Prop. 64 was, therefore, to require that the plaintiff had actually engaged in a transaction with the defendant in order to bring the action the way to avoid the prior abuses of the statute. The "lost money or property" requirement for standing addresses this concern because the plaintiff cannot logically have paid money or lost property to the defendant unless the plaintiff was actually engaged in a transaction with the defendant.

B. **Statutory construction principles preclude the conclusion that "loss of money or property" requires a showing of damages**.

When interpreting a statute, a court's "fundamental task ... is to determine the Legislature's intent so as to effectuate the law's purpose." (*People v. Lewis* (2008) 43 Cal.4th 415, 491; internal quote marks omitted; *see also, People v. King* (2006) 38 Cal.4th 617, 622; see also, e.g., *People v. Ramirez* (2009) 45 Cal.4th 980, 987.) The court begins "'by examining the statute's words, giving them a plain and commonsense meaning.' [Citation.]" (*People v. Lewis, supra,* at p. 491.) If the statutory language is unambiguous, the plain meaning controls. (*People v. King, supra,* at p. 622.) If the statutory language is reasonably susceptible to more than one interpretation, the court may consider various extrinsic aids, including "the purpose of the statute, the evils to be remedied, the legislative history, public policy, and the statutory scheme encompassing the statute." (*Ibid.,* internal quote marks and citations omitted*; see, also People v. Ramirez, supra,* at p. 987; *In re Derrick B.* (2006) 39 Cal.4th 535, 539.)

Thus, there is a two-step process: (1) If the statutory language is not ambiguous, its plain meaning must be effectuated; (2) If the statutory language is ambiguous, extrinsic aids to interpretation may be examined. But either way, "[t]he cardinal rule of statutory construction is to ascertain

and give effect to the intent of the Legislature." (*Building Industry Assn. v. City of Camarillo* (1986) 41 Cal.3d 810, 819.)

Under either prong of the analysis, the appellate court's conclusion is erroneous. First, under a plain and common sense analysis of the phrase "lost money or property," a consumer who purchases a product has "lost money," i.e., they no longer have the actual cash expended for the product. The consumer may have received something of value in exchange for that money, but the authors of Proposition 64 did not elect to import that concept into their construct. Had the intention been to require that the transaction cause the plaintiff to suffer a diminution in their net worth by a reduction in value, the authors could have and should have used the traditional tort concept of "damages." The initiative then would have read: "by any person *who has suffered an injury in fact and incurred damages as a result of such unfair competition*." But that's not what it says.

Accordingly, under the first prong of the statutory analysis, the plainest meaning of the phrase is that a consumer who purchases a product has literally "lost" the money they paid for the product.

The second prong of the statutory construction analysis turns on the question of whether the statute is ambiguous. Ambiguity exists whenever there are two or more reasonable interpretations of the language. (*Tobacco*

II, at 315.) At the very least "loss of money for property" is ambiguous: Defendant asserts that it means the plaintiff must show damages; plaintiff asserts that plaintiff need only show payment. That being the case, the construction that promotes the public policy purposes of the statute must be applied. (*Id.*)

The public policy purposes of the UCL have been repeatedly expressed by this Court and others. The UCL "has as a major purpose the preservation of fair business competition." (*Cel-Tech*, at 180; *Puentes v. Wells Fargo Home Mortgage, Inc.* (2008) 160 Cal.App.4th 638, 644.) Indeed, "[t]he ***primary*** purpose of the unfair competition law (UCL) is the preservation of fair business competition," including "the right of the public to protection from fraud and deceit." (*People ex rel. Bill Lockyer v. Fremont Life Ins. Co.* (2002) 104 Cal.App.4th 508, 514, internal quote marks omitted; *Barquis v. Merchants Collection Assn.* (1972) 7 Cal.3d 94, 110.) The restitutionary remedy is intended "to deter future violations of the unfair trade practices statute and to foreclose retention by the violator of its ill-gotten gains." (*Bank of the West v. Superior Court* (1992) 2 Cal.4th 1254, 1267; *Juarez v. Arcadia Financial, Ltd.* (2007) 152 Cal.App.4th 889, 135.)

Kwikset's argument that restitution is intended only to return the

parties to their original positions is incorrect. That is ***not*** the goal of ***statutory*** restitution. "In contrast to contract restitution, statutory restitution is not solely 'intended to benefit the [victims] by the return of the money, but instead is designed to penalize a defendant for past unlawful conduct and thereby deter future violations.'" (*People v. Beaumont Inv., Ltd*. (2003) 111 Cal.App.4th 102, 135.)

The public policy purposes underlying the UCL cannot be fulfilled if the threshold standing requirement to even bring an action demands that the plaintiff not only engage in a transaction with the defendant but ***also*** suffers economic damages (i.e., a diminution in their net worth) in doing so. And this case provides the perfect example of why this is so.

Kwikset represented that its locksets were "Made in America." In fact, as determined at trial, that representation was unlawful under the UCL, because Kwikset's locksets did not meet the requirements of Business & Professions Code section 17533.7. Similarly, the representation violated the fraud prong of the UCL. The appellate court assumed that the lockset was, in fact, worth the price paid, concluded that, as such, the plaintiff did not "lose" any money on the deal and thus could not bring a UCL action.

So this is the scenario under the appellate court's analysis: Kwikset can obtain a greater market share by violating the law and making

misrepresentations as compared to another lock manufacturer who obeys the law and does not falsely advertise its products as made in America. Thus, not only are consumers induced to purchase something they are not receiving, i.e., a lockset made in America, but competition is injured and the marketplace is no longer trustworthy. And because the lockset has a value equivalent to what was paid, ***nothing can be done to stop Kwikset's misconduct or deter it or others from doing the same***.[1]

That result is anathema to the purposes underlying the UCL. It undermines, rather than promotes, the goals of the UCL and thereby violates the fundamental principles of statutory construction.

In contrast, by concluding that the "loss of money or property" threshold for standing only requires that the plaintiff gave money to the defendant for a product which was manufactured illegally or which was misrepresented, the purposes of the statute are promoted: A manufacturer violating the law or making misrepresentations can be enjoined and, in order to deter future violations, the manufacturer can be ordered to pay restitution. This analysis also puts the focus back where the statute requires

[1] And the argument that public prosecutors could still pursue UCL claims against these defendants is unsupported in the record by any evidence demonstrating the number of potential such cases throughout the State or that the public prosecutors have the resources to effectively pursue every case.

it to be – on the defendant's conduct.

C. Other appellate decisions with holdings similar to the decision in this case should be overruled.

Since the passage of Proposition 64, several appellate courts have engaged in the same erroneous analysis as the appellate court in this case, i.e., by equating "loss of money or property" with damages or a diminution in value. For example, in *Medina v. Safe-Guard Products* (2008) 164 Cal.App.4th 105, the appellate court held that a consumer could not sue the issuer of a service contract from an unlicensed seller under the UCL because the contract could be enforced against the unlicensed seller and there were, therefore, no damages. That means that legitimate companies that go through the expense and trouble of becoming licensed in California to sell insurance are put at a competitive disadvantage because other companies can flaunt the law and sell the same products without becoming licensed. And given the financial hardships suffered by governmental agencies in this economy, it is impractical to believe that regulatory actions could even begin to address this problem. The natural result will be that none of the businesses in the market will be licensed, either because the licensed companies will be driven out of the market or will conclude that

they need not bother with licensing either.

Hall v. Time, Inc. (2008) 158 Cal.App.4th 847 provides another example of the problem. In that case, the plaintiff ordered a book based on the promise of the seller that he would be provided with a "free preview period." During the "no obligation-free trial period," however, the seller engaged in a "scheme to obtain immediate payment from the consumer through . . . misleading and deceitful tactics." (*Id.*, at 850.) The appellate court held that the plaintiff's payment under threat of a collection action did not constitute a "loss of money or property" under the UCL for standing purposes because the book was worth what he was forced to pay for it.

Again, therefore, a seller that engages in misrepresentations and "misleading and deceitful tactics" to obtain payment is immune and can continue to engage in such misconduct with impunity. Other sellers have a choice: Either engage in similar tactics or suffer a loss of customers, profits or market share.

Other decisions make the same erroneous analysis, including *Animal Legal Defense Fund v. Mendes* (2008) 160 Cal.App.4th 136, *Chavez v. Blue Sky Natural Beverage Co.* (N.D CA 2007) 503 F.Supp.2d 1370, and *Peterson v. Cellco Partnership* (2008) 164 Cal.App.4th 1583. All of the cases holding that the purchase of a product its not itself the loss of money

or property should be overruled.

CONCLUSION

The only way that businesses which act unlawfully, unfairly or fraudulently can be effectively deterred under the UCL is if the "loss of money or property" standing provision is construed as actual payment rather than damages, or loss of value. The appellate court's construction of the statute undermines the UCL's public policy purposes and should be rejected.

Dated: December 21, 2009

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CERTIFICATE OF LENGTH OF BRIEF

I, Sharon J. Arkin, declare under penalty of perjury under the laws of the State of California that the word count for this Brief, excluding Tables of Contents, Tables of Authority, Proof of Service and this Certification is 4,292 words as calculated utilizing the word count feature of the Word:Mac 2008 software used to create this document.

Dated: December 21, 2009

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SHARON J. ARKIN