TORT LAW

What Happened to the Unfair Competition Law?

by Jeremy Robinson, Column Editor

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Once upon a time in the not-too-distant past, Business and Professions Code ("B & P Code") §17200 (also referred to as the Unfair Competition Law or "UCL") was a very potent weapon in the fight against consumer fraud and other similar undesirable activity in California. I still remember my first encounter with the UCL as a newly-minted California lawyer in the mid-1990's. I was astonished at the breadth of the statute and the remedies available, and the relatively light burden of proof needed to succeed on a claim. My home state, Kentucky, had nothing comparable.

A lot has changed since then, and not necessarily for the better. Mostly notable, perhaps, is the passage of Proposition 64. That measure amended B & P Code §17204, which articulates who may sue to enforce the UCL, by deleting the language that had formerly authorized suits by any person "acting for the interests of itself, its members or the general public," and by replacing it with the phrase, "who has suffered injury in fact and has lost money or property as a result of unfair competition." *See, Californians For Disability Rights v. Mervyn's, LLC* (2006) 39 Cal.4th 223, 228. The measure also amended B & P Code §17203, which authorizes courts to enjoin unfair competition, by adding the following words: "Any person may pursue representative claims or relief on behalf of others only if the claimant meets the standing requirements of Section 17204 and complies with Section 382 of the Code of Civil Procedure, but these limitations do not apply to claims brought under this chapter by the Attorney General, or any district attorney, county counsel, city attorney, or city prosecutor in this state." *Californians For Disability Rights v. Mervyn's, LLC, supra*, 39 Cal.4th at 228.

Most of the appellate cases addressing Proposition 64 concern whether it applies to suits that were filed before the measure passed. In *Californians For Disability Rights*, the California Supreme Court laid the issue to rest and determined that it did apply to such actions. *Id*. at 233.

In addition to Proposition 64, however, another slightly less publicly visible trend has been afoot with regard to limiting the power of the UCL. That trend concerns the availability of remedies under the UCL, particularly what is termed "non-restitutionary disgorgement." In order to understand exactly what that limitation means, a bit of discussion about the UCL remedies in required.

B & P Code §17203, the statute that defines the remedies available under the UCL, authorizes a court to "make such orders ... as may be necessary to prevent the use or employment by any person

of any practice which constitutes unfair competition, ... or as may be necessary to restore to any person in interest any money or property, real or personal, which may have been acquired by means of such unfair competition." Thus the statute itself provides only for injunctive relief and restitution as proper remedies. *Ibid*.

Nevertheless, several cases interpreting the UCL have made reference to the ability of the courts to order "disgorgement" of wrongfully-obtained monies as being within the equitable remedies under the UCL. *See, e.g., Fletcher v. Security Pacific National Bank* (1979) 23 Cal.3d 442, 452; this, in turn, led to some confusion among UCL practitioners as to the availability of "disgorgement" as a separate remedy under the UCL, and as to the circumstances in which "disgorgement" was available. Arguably, a defendant who violated the UCL could be forced to disgorge all profits resulting from the violation even if, for whatever reason, strict restitution was not a viable remedy.

In a much anticipated decision among UCL practitioners, the Supreme Court in *Kraus v. Trinity Management Services, Inc*. (2000) 23 Cal.4th 116 drove the first nail into the coffin of "non-restitutionary disgorgement" as a viable remedy under the UCL. The court in *Kraus* ruled that disgorgement of unfairly obtained profits into a fluid recovery fund was not an available remedy under the UCL in a "representative action," *i.e.*, one brought on behalf of the general public but not certified as a class action. *Id.* at 137. A big part of the court's reasoning centered on due process concerns about payment of monies to persons who were not parties to the case and would not necessarily be bound by the court's decision. *Id.* Nevertheless, language in the *Kraus* decision suggested that such a remedy might be available under the UCL in a case where a class was actually certified as that would alleviate the due process issues.

Three years later, the court took another big bite out of the UCL in *Korea Supply Co. v. Lockheed Martin Corp.* (2003) 29 Cal.4th 1134. The plaintiff in *Korea Supply* was a business that represented a defense contractor in a deal with the government of the Republic of Korea that would have netted the plaintiff a commission of $30 million had its bid been accepted. The plaintiff alleged that it lost the contract to another bidder, Lockheed Martin, even though plaintiff's bid was lower and its product superior, because Lockheed Martin's agent had done business the old fashioned way, *i.e.*, "offered bribes and sexual favors to key Korean officials." *Korea Supply*, *supra*, 29 Cal.4th at 1140.

The plaintiff sued Lockheed Martin under various theories, including unfair competition under the UCL. Even though the plaintiff had never paid the defendant any money, it sought "restitution" and disgorgement of the profits the defendant had received as the result of its wrongful conduct. The Supreme Court framed the issue as "whether disgorgement of profits that is not restitutionary in nature is an available remedy for an individual private plaintiff under the UCL." *Id*. at p. 1144. The Court declared it was not.

The court held that the only remedy expressly authorized by B & P Code §17203 was restitution to individuals who had an ownership interest in money paid to the defendants. *Id*. at 1147. There was nothing, either in the express language of the statute or in its legislative history, to indicate that the legislature intended to authorize a court to "order a defendant to disgorge all profits to a plaintiff who does not have an ownership interest in those profits." *Id*. Therefore, because the recovery sought by the plaintiff was something other than the return of money or property that was once in its

possession or money in which the plaintiff had a vested interest, the UCL did not provide a viable remedy. *Id.* at 1149.

Arguably, the final stake through the heart of "non restitutionary disgorgement" under the UCL was driven home in *Madrid v. Perot Systems* (2005) 130 Cal.App.4th 440. The court in *Madrid* addressed the question left open in *Kraus*: whether "disgorgement" that was not strictly restitutionary in nature was available in a properly certified UCL class action. The *Madrid* court held it was not. *Id.* at 461-462. Although California's class action statutes specifically allow for disgorgement into a fluid recovery fund (see C.C.P. §384), the court reasoned that C.C.P. §384 was merely a procedural device for payment of damages in appropriate cases and does not expand the substantive remedies available under the UCL. *Madrid, supra*, at 461.

These cases, and others like them, have severely restricted the scope of the once-powerful UCL. Nevertheless, consumers are still occasionally able to eke out small victories under the UCL in the appellate courts. For example, in the recent case of *Shersher v. Superior Court*, 2007 WL 2584733, the court held that a plaintiff or class of plaintiffs did not necessarily have to pay funds directly to the defendant in order to be entitled to restitution under the UCL. The plaintiff could have purchased the products from third-party vendors, for example. As the court explained:

> **Nothing in *Korea Supply* conditions the recovery of restitution on the plaintiff having made direct payments to a defendant who is alleged to have engaged in false advertising or unlawful practices under the UCL. The only requirements the UCL and the false advertising law impose on such recovery are that the plaintiff must be a "person in interest" (that is, the plaintiff must have had an ownership interest in the money or property sought to be recovered), and the defendant must have acquired the plaintiff's money or property "by means of ... unfair competition" or some other act prohibited by the UCL or the false advertising law. Plaintiff in this case has alleged that he paid money to a retailer to purchase Microsoft's product based on false or misleading statements on the product package. This assertion, if true, supports a claim for restitution.**

Shersher v. Superior Court, supra, 2007 WL 2584733, *1.

So while today's UCL is certainly only a shadow of its once-powerful self, it is still possible to mount a successful UCL class action provided that one can make a case for restitution and identify the group to whom the restitution would be paid.