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California Supreme Court Further Clarifies Pleading Requirements for Standing Under the UCL in the Wake of Proposition 64

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In *Kwikset Corp. v. Superior Court of Orange County (Benson)*, ___ Cal. Rptr. 3d ___, No. S171845, 2011 WL 240278 (Jan. 27, 2011), the Supreme Court of California held that consumers who allege that a product's allegedly deceptive labeling caused them to purchase the product, and that they would not have purchased the product but for the labeling, have properly alleged "lost money or property" within the meaning of Proposition 64, and thus have standing to sue under the California Unfair Competition Law (UCL). Nonetheless, the court emphasized the need for consumers to demonstrate both (i) that there is a connection between the labeling and a consumer's individual purchase decision, and (ii) that the consumer actually lost money or property as a result. All in all, although it announces a liberal pleading standard, the decision may provide defendants with good arguments against class certification.

Background

In November 2004, California voters approved Proposition 64, which altered standing rules for plaintiffs seeking to bring claims under the UCL (Cal. Bus. & Prof. Code § 17,200 et seq.). Before the enactment of Proposition 64, any private individual could file a UCL lawsuit on behalf of the general public, even if the person had not suffered any injury. Proposition 64 amended the UCL to require that a private plaintiff must have personally incurred "injury in fact," and that he or she must have "lost money or property" as a result of unfair competition or business practices in order to bring suit for violations of the UCL. *See generally*, *Californians for Disability Rights v. Mervyn's, LLC*, 39 Cal. 4th 223, 227–228 (2006).

In May 2009, the Supreme Court of California held that under the UCL—as amended by Proposition 64—only the named class representative of a putative class action alleging fraudulent misrepresentation was required to establish actual reliance, causation, and injury; absent class members were not required to affirmatively demonstrate these factors in order to properly plead a claim under Proposition 64. *In re Tobacco II Cases*, 46 Cal. 4th 298, 312–329 (2009). Thus, under *Tobacco II,* only the putative class representative is required to meet Proposition 64's threshold standing requirements of having suffered "injury in fact" and having "lost money or property as a result" of the defendant's allegedly unfair competition. Left unanswered by *Tobacco II* was the question of what "injury in fact" must be pled and proved in a post–Proposition 64 UCL case.

***Kwikset*: A Plaintiff Pleads Standing If He Lost Money as a Result of a False Label**

In *Kwikset*, the plaintiffs' amended complaint contained four counts—three asserting violations of the UCL and a fourth count under the false advertising law (Cal. Bus. & Prof. Code § 17,500 et seq.). Plaintiffs alleged the following: (1) Kwikset labeled certain locksets as "Made in the U.S.A.," or with a similar description; (2) Kwikset made these representations despite knowing they were false, in that certain parts of the lockset were foreign-made or certain aspects of the products were foreign-manufactured; (3) plaintiffs saw and relied upon the representations for their truth in purchasing the Kwikset locksets in California; (4) plaintiffs would not have purchased Kwikset's products had the products not contained the "Made in the U.S.A." label; and (5) the plaintiffs spent and lost the amount of money that each plaintiff paid for the defendant's locksets.

The court granted review of the case to clarify the standing requirements under the UCL in light of Proposition 64, and pronounced a "simple test" for standing, stating that a party must (1) establish an economic injury sufficient to qualify as injury in fact, and (2) show that the economic injury was caused by the unfair business practice or false advertising at issue.

With respect to the economic injury, the court found that a consumer who alleges that he or she relied on the truth and accuracy of a label and was deceived by a misrepresentation into making a purchase he or she otherwise would not have made has suffered an economic harm, in that the consumer paid more for a product than the consumer otherwise would have paid had the product been accurately labeled. This economic injury exists, according to the court, despite the fact that the allegedly mislabeled product may be viewed objectively as functionally equivalent to the actual product the consumer intended to purchase. The court rejected the analysis of the Court of Appeal that limited standing to only those circumstances where a plaintiff alleges that the product received was either defective, overpriced, or of inferior quality, stating that injuries of this sort were "wholly unrelated" to the false labeling. The Supreme Court of California found this analysis to be simultaneously "underinclusive," in that it ignored the "real economic harm" a consumer may suffer as a result of purchasing a mislabeled product in reliance on the truth of the label, as well as "overinclusive" with respect to the forms of injuries that might be causally related to the false labeling.

The court concluded that a consumer making a false advertising claim who alleges that he or she relied on a product label to make a purchase decision satisfies the causation prong of the standing requirement by merely alleging that he or she would not have purchased the product but for the misrepresentation. The court thus reversed the Court of Appeal, and remanded for further proceedings consistent with its opinion.

Implications

While this decision almost certainly will embolden the plaintiffs' bar to file false advertising claims even where the product actually delivered is functionally equivalent to the product advertised, the court's reasoning may also be helpful to defendants in opposing class certification or seeking summary judgment in such cases. In explaining why economic harm occurred when the product actually delivered was the functional equivalent of the advertised product, the court used the following examples:

> A counterfeit Rolex might be proven to tell the time as accurately as a genuine Rolex and in other ways be functionally equivalent, but we do not doubt the consumer (as well as the company that was deprived of a sale) has been economically harmed by the

> substitution in a manner sufficient to create standing to sue. Two wines might to almost any palate taste indistinguishable—but to serious oenophiles, the difference between one year and the next, between grapes from one valley and another nearby, might be sufficient to carry with it real economic differences in how much they would pay. Nonkosher meat might taste and in every respect be nutritionally identical to kosher meat, but to an observant Jew who keeps kosher, the former would be worthless.

The court thus made clear that a plaintiff must come forward with proof of how the product was less valuable to him or her, and that certain plaintiffs may have unique purchasing preferences that will confer standing. Unclear from the court's analysis is how a unique class representative's standing affects plaintiffs' burden of demonstrating fact of injury or presenting a classwide damages theory on a common basis. Under the *Kwikset* analysis, a court could not determine if absent class members suffered economic harm without a class-member by class-member analysis. For example, was a wine purchaser and member of a putative false advertising class a oenophile who actually cared which valley the grapes came from or what year the grapes were grown, or a person who was satisfied with the taste of the wine (irrespective of any false advertising) and therefore suffered no harm? In addition, the degree or amount of any such harm may well turn on individualized facts. Moreover, even if *Kwikset* can be read as applying only to the named plaintiff's burden of proof and leaves unaltered *Tobacco II*'s standing analysis, a defendant who can remove a California UCL case can argue that Article III's case-or-controversy requirement mandates that each class member must demonstrate injury in fact, a significant barrier to class certification. The court's reasoning thus potentially opens the door to an argument that these individualized issues preclude certification of a class, even if the named plaintiff has established a claim for his or her own economic harm. This decision further underscores the need for a defendant in a false advertising claim to develop a factual record—through depositions of the named plaintiffs, expert testimony, and otherwise—that demonstrates the individualized issues that preclude certification.

If you have any questions or would like more information on any of the issues discussed in this LawFlash, please contact any of the following members of Morgan Lewis's Class Action Practice:

Chicago
Scott T. Schutte 312.324.1773 sschutte@morganlewis.com

Los Angeles
Joseph Duffy 213.612.7378 jduffy@morganlewis.com

Philadelphia
J. Gordon Cooney, Jr. 215.963.4806 jgcooney@morganlewis.com
Kristofor T. Henning 215.963.5882 khenning@morganlewis.com

San Francisco
Molly Moriarty Lane 415.442.1333 mlane@morganlewis.com

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