Client Alert.

February 2, 2011

Kwikset Reset: Why The California Supreme Court's Latest Horror May Be Less Scary Than It Looks

By William Stern, Sylvia Rivera, and William Tarantino

Plaintiffs' lawyers have already started to blow their vuvuzelas, heralding last week's decision by the California Supreme Court in *Kwikset Corp. v. Superior Court.* They are calling it the final nail in the coffin of Proposition 64, the tort reform initiative that voters passed in 2004 to end the madness that had been rife in California's unfair competition law (UCL). Even the business-minded Wall Street Journal called *Kwikset* a win for plaintiffs and a blow to tort reform. But before companies doing business in California press the panic button, should we hit Reset?

FACTS.

Kwikset Corp. v. Superior Court, No. S171845 (Jan. 27, 2011), was a "gotcha"-style false advertising class action over yet another "Made in USA" label designation—a form of serial litigation that appears to be an "only-in-California" phenomenon. Plaintiffs alleged that the defendant falsely marketed and sold locksets labeled as "Made in USA." To paraphrase Captain Renault, plaintiffs were "shocked, shocked to find" that a tiny fraction of the overall product was either made in Taiwan (the set screws) or assembled in Mexico (the latch assemblies). Plaintiffs sued, alleging that (i) they purchased locksets, (ii) the representations were false, (iii) plaintiffs relied on the misrepresentations, and (iv) they would not have bought otherwise. In just about every other jurisdiction, this claim would have gotten the boot. Not California.

HOLDING.

The issue in *Kwikset* was what the voters meant in Proposition 64 when they required a UCL plaintiff, in order to have standing, to plead and prove "injury in fact" and "lost money or property." The intermediate appellate court had held that plaintiffs did not show standing because they failed to allege that the locksets were overpriced or of inferior quality, or that plaintiffs did not receive the benefit of their bargain. The Supreme Court reversed, in a 5-2 decision:

> [P]laintiffs who can truthfully allege they were deceived by a product's label into spending money to purchase the product, and would not have purchased it otherwise, have "lost money or property" within the meaning of Proposition 64 and have standing to sue.
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> If a party has alleged or proven a personal, individualized loss of money or property in any nontrivial amount, he or she has also alleged or proven injury in fact.

The majority reaffirmed that an economic injury sufficient to confer standing does not necessarily translate into a valid restitution claim, as plaintiffs must prove that the offending conduct caused both a loss to consumers and a corresponding

gain to defendant. In other words, even if plaintiffs can proceed with a claim under the *Kwikset* standard, injunctive relief may be the only available remedy absent proof of diminution in value.

The dissent argued that the majority opinion is "[i]n direct contravention of the electorate's intent" in passing Proposition 64, and "makes it easier for a plaintiff to achieve standing under the UCL" by simply alleging a subjective motivation that "he or she would not have bought the product but for the misrepresentation."

WHAT DOES *KWIKSET* MEAN?

Kwikset was a no-injury case. No-injury cases are the fashion rage among plaintiffs' counsel because of what economists call the "low barrier to entry." In no-injury cases, consumers got what they paid for, the product wasn't defective, no one was injured, and only by resorting to hair-splitting worthy of a Jesuit priest or Talmudic scholar did anyone lose money. Consequently, under the "economic loss" rule followed in many (and maybe most) state and federal jurisdictions, the loss of money merely from buying a product that is not otherwise defective is insufficient to confer standing. Even in those jurisdictions that have allowed such claims, they tend to require that the consumer plead and prove that he overpaid. Under *Kwikset*, by contrast, a consumer is not required to allege or prove the diminished value of the product—at least in injunction cases (which this was).

In that sense, *Kwikset* marks California as an outlier. But is that news? The California Supreme Court staked that claim already with its decision *In re Tobacco II Cases*, 41 Cal. 4th 1257 (2007). There, the Supreme Court held that these UCL standing requirements apply only to the named plaintiff, not to all absent class members. In California—but nowhere else—you could conceivably plead a class (at least in state court) in which no one except the named plaintiff has standing. California thus became one of two jurisdictions in the country that thought accommodating a cigarette false advertising class action was a good idea. So, if there is an "Open for Business" sign over the doors to the California state courts displaying their unique willingness to host consumer class actions, it was placed there by *Tobacco II*, not *Kwikset*.

Kwikset probably means that fewer false advertising cases will be amenable to dismissal on standing grounds, at least at the pleading stage. That means more defendants may have to endure often costly discovery and law-and-motion practice in defeating the class at the certification stage or winning summary judgment. Litigation costs may increase, and that could apply upward pressure on settlement. The converse, however, is that *Kwikset* puts a premium on removal to federal court in no-injury cases, given the federal courts' reluctance to apply California's UCL standing requirements if they conflict with Article III "injury in fact" or with federal requirements for class certification.

Some troublesome aspects remain. The majority didn't impose any common-sense restraints on how idiosyncratic a plaintiff's claim of loss can be, yet still satisfy the UCL standing requirement. The dissent calls this a subjective standing rule, in which standing for the entire class is dictated, in effect, by the most susceptible consumer.

CONCLUSION.

Companies doing business in California shouldn't concede the dire prognostications. *Kwikset* and *Tobacco II* were standing cases—they say nothing about class certification and nothing about summary judgment or proving damages. They may make it easier for plaintiffs in some no-injury cases to claim standing—to wedge their toe into the door of the state courts—but defendants should not despair. No-injury cases are fundamentally unsympathetic, and they are extraordinarily difficult cases for plaintiffs to prove classwide damages or restitution, let alone to get a class certified. This is where the door slams, and defendants get to press the Reset button.

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