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# A Quick Analysis of Kwikset: Labels Might Matter, But No Reset to Proposition 64

***Product Liability Advisory***

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**A Quick Analysis of *Kwikset*: Labels Might Matter, But No Reset to Proposition 64**

On January 27, 2011, the California Supreme Court held in *Kwikset Corp. v. Superior Court*, Case No. S171845, that plaintiffs have standing under California's Unfair Competition Law (UCL) and False Advertising Law (FAL) if they "can truthfully allege that they were deceived by a product's label into spending money to purchase the product, and would not have purchased the product otherwise." From the business defense perspective, the concern with this new opinion is whether it signals a retreat from the beachhead gained by Proposition 64: will the opinion allow businesses to once again be subjected to lawsuits brought by cardboard plaintiffs serving as fronts for lawyer-driven lawsuits? The opinion itself is not anti-business. But, for the business defense community, there is concern that parts of the opinion can be twisted as purported support for a UCL action based on an individual's "subjective" valuation even though the plaintiff (and all others similarly situated) received the "benefit of the bargain," with a monetary award that is again based on a "subjective" valuation. Such an action, however, is not even remotely supported by the opinion. This note briefly addresses each of the red flags raised by the opinion.

**Background**

In 2004, the Civil Justice Association of California (CJAC) put Proposition 64 on the ballot as an appeal to the people to take back the civil justice system. Proposition 64 targeted a specific form of action that had become extraordinarily burdensome to businesses operating in California: the statutory "Unfair Competition Law" or "UCL" action. Specifically, Proposition 64 took aim at the cottage industry of "general public" UCL actions flourishing as a result of an unusual standing provision that permitted "any person" to bring an action "in the interests of . . . the general public."

*See* former Business and Professions Code § 17204. Capitalizing on this provision, attorneys were using mothers, spouses, shell corporations, and random strangers to act as disinterested "private attorneys general" to pursue UCL actions challenging acts that were allegedly "unfair" and occurring in "business." On some occasions, attorneys would dispense altogether with the troublesome necessity of a client, electing to act as the lawyer *and* the plaintiff.

The goal of Proposition 64 was to return the courts to their intended purpose: resolving actual disputes arising between actual persons about actual harm. Moreover, in keeping with the specific purpose of the UCL to redress impacts of unfair competition, Proposition 64 sought to ensure that the actual harm involved in a UCL action was the type of harm the UCL is intended to redress. Thus, Proposition 64 repealed the prior standing provision and replaced it with the requirement that a UCL plaintiff must have suffered "injury in fact" *and* "lost money or property as a result of" the alleged act of unfair competition. Proposition 64 also added a provision to Business and Professions Code § 17203 requiring that a private plaintiff wishing to represent the interests of others must have standing under the new § 17204 and meet the requirements for asserting a class action. In November, 2004, the voters adopted Proposition 64.

**The Facts of the Case**

The facts of this case are quite unique, and critical to the analysis and result. The defendant manufactured locksets that were affirmatively marketed as "Made in the USA," "All American Made," etc., although they allegedly were foreign made or included foreign-made parts. California law specifically prohibits falsely designating foreign-made goods as made in America. Business and Professions Code § 17533.7. Prior to adoption of Proposition 64, the case was tried to verdict. The trial court found that defendant had engaged in false labeling and issued an award consisting solely of injunctive relief, but rejected a request that restitution be ordered to consumers. Proposition 64 was adopted while the matter was on appeal. In the wake of the California Supreme Court's decisions in *Californians for Disability Rights v. Mervyn's, LLC*, 39 Cal. 4th 223 (2006), and *Branick v. Downey Savings & Loan Ass'n*, 39 Cal. 4th 235 (2006), the case was remanded to determine whether plaintiff Benson had standing under the new requirements imposed by Proposition 64.

Back in the trial court, the plaintiff filed an amended complaint that added other plaintiffs, and included specific allegations that each plaintiff saw and read the "Made In The USA" labeling, understood that labeling to mean that the locksets were made in America, relied upon that representation in electing to purchase the locksets, would not have purchased the locksets but for the understanding that they were made in America, and "lost money" by reason of the purchase of locksets they would not have purchased but for the false representation. Significantly, the complaint sought "only injunctive relief, not restitution." Slip op. p. 5.

**The California Supreme Court's Holding**

The California Supreme Court reversed the appellate court's holding that the plaintiffs lacked standing. The court of Appeal held that the plaintiffs had not shown that they "lost money" as a result of the act of unfair competition because they had not alleged that foreign-made locksets were not functionally equivalent to locksets made in America, or worth any less than locksets made in America.

The California Supreme Court held that "functional equivalence" is not the test. The plaintiffs wanted to purchase locksets made in America, but in fact received locksets that were not made in America. They made this purchase based on the express and false labeling by defendants misidentifying the locksets as made in America. Thus, they did not get what they paid for, and could be said to have "lost money" within the meaning of Proposition 64. Consequently, plaintiffs had standing to bring their action seeking injunctive relief. The court expressly disapproved the cases that held that eligibility for restitution is a predicate for standing under the UCL and FAL.

**The 'Subjective' Standard**

A principal concern with the *Kwikset* opinion is its reliance, in part, on the subjective views of the plaintiff. The court reasoned that the plaintiffs had "lost money" because they wanted to purchase American-made locksets, but were induced by the false labeling to purchase locksets that were not. Thus, *to these plaintiffs* the locksets they purchased were of a lesser value than American-made locksets despite the apparent functional equivalence of the foreign locksets to American-made

locksets. *See, e.g.,* slip op. pp. 21-22. While a subjective standard is understandably of concern, in this case it is surrounded by objective standards that should deflect abuses.

At the threshold, the standard for assessing whether an allegedly deceptive statement or act is deceptive is inherently objective. The standard is whether a "reasonable person," or "person of ordinary intelligence," would be deceived. *Lavie v. Procter & Gamble Co.*, 105 Cal. App. 4th 496, 504-512 (2003).

Secondly, the allegedly deceptive act or practice must be material in the context of the transaction to support the notion that the act or practice caused the loss of money or property. *See* slip op. p. 25. "Materiality" is an objective standard. *See id.*

In *Kwikset*, these questions were removed as questions of fact, because there was a statute establishing as legislative facts that labeling foreign-made products as American made is deceptive and material. In all cases, however, the objective standards for what is "deceptive" and for "materiality" restrain a plaintiff's ability to fashion an implausible case based on his or her claimed subjective valuations.

These objective standards operate to prevent a plaintiff from simply asserting that some practice made a subjective difference to that individual that devalued the transaction. For example, in *Peterson v. Cellco Partnership*, 164 Cal. App. 4th 1583 (2008) – cited with approval in *Kwikset* – the plaintiff's claim was based upon the failure of the defendant to obtain the correct licensing to sell the cell phone insurance included with cell phone contracts. The *Kwikset* opinion would not allow the plaintiff in that situation to create the requisite "lost money" by asserting that it mattered subjectively to him that defendant was not properly licensed. Where the plaintiff received the services and insurance he paid for, it could not reasonably be claimed that whether or not defendant was properly licensed was material.

The *Kwikset* opinion does not in all respects get it right. The opinion disapproves lower court opinions that required the "lost money" to be restitutionary in nature. The opinion ignores the fact that Proposition 64 was drafted on the heels of *Korea Supply Company v. Lockheed Martin Corp.*,

29 Cal. 4th 1134 (2003) – which confirmed that the only monetary remedy available in a private UCL action is restitution – and that the Proposition 64 language echoes the language in *Korea Supply* describing what is restitution. The court misses the mark in that regard.

The court does, however, deliberately point up the "sharp contrast" between the economic harm now required for standing to assert a private UCL action and the prior standard. Slip op. p. 11. In future cases, it will be critical to focus on that aspect of the opinion, and the listing of economic harms the court signaled would be appropriate to qualify as "lost money."

**'Benefit of the Bargain'**

The *Kwikset* opinion notes that the "benefit of the bargain" concept as it has developed as a measure of damages is misplaced in the context of articulating the rules of standing under the UCL, which does not allow a damage remedy. Slip op. p. 28. The terminology notwithstanding, the court does also acknowledge that a plaintiff *has not* "lost money" when the plaintiff *got what he or she paid for*. While Kwikset sought to bolster its arguments with measure of damage cases, in general the business defense community has, in this context, used the term "benefit of the bargain" colloquially to mean that the plaintiff *got what he or she paid for*. There was no intent to import the statutes or case law developing the damages measure.

Significantly, the *Kwikset* opinion does not discard important case law in this regard: *Hall v. Time, Inc.*, 158 Cal. App. 4th 847, 855 (2008); *Medina v. Safe-Guard Products,* 164 Cal. App. 4th 105, 114 (2008); and *Peterson v. Cellco Partnership*, 164 Cal. App. 4th 1583, 1592 (2008). Indeed, those cases are cited with approval over the course of the court's opinion. *See* Slip op. pp. 11, 15, 17, 24. In each of these cases, the plaintiff claimed "lost money" because he had paid money to the defendant. In each case, the court held that money paid in a transaction does not count as "lost money" when the plaintiff *got what he paid for*. In *Kwikset*, the court held that the plaintiffs did not get what they paid for because they paid for American-made locks and they got foreign-made locks. Slip op. p. 24. In making this factual distinction, however, the court did not disapprove the rule.

As a practical matter, this rule is important in avoiding baseless litigation of the precise nature Proposition 64 was intended to prevent. In every transaction, the buyer parts with money. But that is not a "loss" of money when the buyer receives in return that for which he or she paid. To allow the

consideration in a bilateral transaction to count as "lost money" would go far to erase Proposition 64. Again, it must be emphasized that the court in *Kwikset* did not disapprove the rule. It found, rather, that plaintiffs did not receive that for which they paid.

**'Subjective' Standard and Monetary Relief**

Another concern raised by *Kwikset* is whether the opinion suggests that the plaintiffs could recover monetary relief based on a subjective valuation. This concern is raised by the statement that the value of a mislabeled product may be less than what it purports to be based on the buyer's subjective views, which translates to an economic harm. Slip op. pp. 21-22. The opinion, however, does not support using this standard for purposes of remedy.

Key to the opinion is the analytical separation of the standard developed for "economic harm," and monetary remedy. The only monetary remedy available to a private plaintiff in a UCL action is restitution. *Korea Supply*, *supra*. The opinion implicitly acknowledges that there is no basis for restitution where the plaintiff received equal value for the money he or she paid (the "functional equivalent" of what was mislabeled). Indeed, that is the reason the court did *not* require a restitutionary interest in order to establish standing. The opinion does not equate "economic harm" giving rise to standing with the money in which a plaintiff has a restitutionary interest necessary for monetary relief. Just the opposite: the court held that "the standards for establishing standing under section 17204 and eligibility for restitution under section 17203 are wholly distinct." Slip op. p. 30. This must likewise be true when the question is "eligibility for restitution": the "standard[] for establishing standing" cannot be substituted, and subjective valuation cannot be imported into the determination of monetary relief.

Further, the opinion emphasizes that "[i]njunctions are 'the primary form of relief available under the UCL to protect consumers from unfair business practices,' while restitution is a type of 'ancillary relief.'" Slip op. p. 31 *quoting In Re Tobacco II Cases*, 46 Cal. 4th 298, 319 (2009). The court strongly signals that in this type of action, where the plaintiff can only allege and prove economic harm based on subjective valuation rather than lack of functional equivalence, the only UCL remedy would be injunctive relief.

Finally, if the action is presented as a putative class action, asserting a monetary remedy based on a subjective valuation would in all probability defeat certification. While *Tobacco II* holds that only the named plaintiff need establish standing, each member of the putative class would have to show a right to recover restitution. If that alleged right were based on the subjective value of a product or service (as represented versus actual, where there is functional equivalence), the *existence* and *amount* of any difference would inherently constitute individualized issues. In a class of any size it is likely these individualized issues would predominate over common issues, defeating certification.

***Conclusion***

The significance of *Kwikset* must be appreciated in its procedural context: the opinion addresses the pleadings standard in the context of a claim solely for injunctive relief. While the court rejected those cases that equated standing with eligibility for restitution, whether a plaintiff has pled economic harm and whether a statement is objectively deceptive will remain a critical issue for determining standing. Moreover, it is critical to recognize what the court *did not* hold, or even support: *Kwikset* offers no basis for a contention that a monetary remedy can be recovered based on a subjective valuation.

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