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Consumer

California Top Court Says ‘Labels Matter’; Fleshes Out Prop 64 Standing Requirements

“Labels matter” the California Supreme Court decreed, resolving the uncertainty over the standing requirements under Proposition 64’s amendment to the unfair competition law: Plaintiffs who allege that they bought a product because they were deceived by a product’s label have standing to sue (*Kwikset Corp. v. Super. Ct. of Orange County, Cal.*, No. S171845, 1/27/11).

In a 5-2 opinion penned by Justice Kathryn Mickle Werdegar, the supreme court explained that the “lost money or property” requirement under Proposition 64 means that a plaintiff must demonstrate some form of “economic injury” to establish standing.

And misleading labels can cause economic injuries, the court held. “For each consumer who relies on the truth and accuracy of a label and is deceived by misrepresentations into making a purchase, the economic harm is the same: the consumer has purchased a product that he or she paid more for than he or she otherwise might have been willing to pay if the product had been labeled accurately.”

Under the supreme court’s decision, a consumer can satisfy the standing requirement of California’s unfair competition law (UCL), Bus. & Prof. Code § 17204, by alleging that he or she would not have bought the product but for the misrepresentation on the label of that product.

In 2004, the California electorate approved Proposition 64, which narrowed the standing requirement for bringing a claim under Section 17204. The UCL previously allowed any person to bring an action on behalf of the public, but Proposition 64 limited standing to “any person who has suffered injury in fact and has lost money or property as a result of unfair competition.”

The question before the supreme court was what the requirement that a party must “have lost money or property” actually means.

In dissent, Justice Ming W. Chin said that the majority’s approach fails to narrow the standing requirement and prevent “shakedown lawsuits” as the voters intended in passing Proposition 64. The majority’s rule makes it easier to bring a UCL lawsuit because it relieves plaintiffs of the burden of alleging a loss of money or property, the dissent said. Now, they only

have to allege that they would not have purchased the mislabeled product, Chin wrote.

No ‘Pot of Gold’ for Plaintiffs. Attorneys agreed that this was an important decision, but practitioners from both sides of the bar told BNA that it wasn’t a “game changer.”

“This decision is correct on the law and it will ensure that the UCL isn’t completely gutted as a consumer protection tool”—a result consistent with the voters’ intention in adopting Proposition 64, Kimberly A. Kralowec, a plaintiffs’ attorney at The Kralowec Law Group and author of the blog, *The UCL Practitioner*, told BNA.

If the court had come out the other way, it would have effectively shut down a private person’s ability to bring misrepresentation cases under UCL’s fraud prong, she said. But Kralowec said this doesn’t open the floodgates for claims because many practitioners already interpreted the law this way.

“This decision doesn’t create a pot of gold for plaintiffs,” agreed William F. Tarantino, of counsel at Morrison Foerster in San Francisco who has significant experience defending consumer class actions.

It’s a really important point that plaintiffs may not be able to get restitution on the basis of allegations that would be adequate for standing under this decision, Tarantino told BNA.

This case also doesn’t affect class certification standards or what plaintiffs will have to prove on a class-wide basis, he continued.

“The plaintiffs can win a motion to dismiss, but the other requirements are really the same,” Tarantino said. “California has always had a low barrier to entry for class cases and this is no surprise,” he said.

Cynthia H. Cwik, a partner at Jones Day who defends class actions told BNA that “UCL and FAL plaintiffs must still allege, and eventually prove, that the misrepresentation ‘was an immediate cause of the injury-producing conduct.’ In certain unfair competition and false advertising cases, this standard may still present a significant hurdle for plaintiffs, particularly where the alleged misrepresentation is minor or non-material.”

However, the decision opens the door for claims for purely injunctive relief, Matt C. Bailey, a partner at Pollard Bailey, a Los Angeles law firm that specializes in representing plaintiffs in class action litigation, told BNA. Bailey is also the author of the blog *Bailey Class Action Daily*.

After Proposition 64 passed, it was difficult to bring injunctive claims because defendants were arguing that

the loss of money or property must have a restitutionary component for standing, Bailey said.

“It’s good for the plaintiffs’ bar,” Bailey said. The requirements for establishing standing for a UCL fraud claim are thin after this decision. This case brings the UCL as close as possible to the way it was before Proposition 64, he said.

Tarantino said that this decision may lead to battles over removal.

“A lot of cases will be removed to federal court so that defendants can take advantage of more stringent federal standing requirements,” Tarantino said. “Federal law isn’t nearly as favorable.”

Tarantino said it will be interesting to see what standard of proof courts require for notices of removal.

Made in the USA. This class action arose in 2000 after the plaintiff purchased a lockset manufactured by defendant Kwikset Corp. labeled as “Made in USA.” The plaintiff alleges that some of the lockset’s parts were made or assembled in Taiwan and Mexico. Plaintiff James Benson brought claims under California’s unfair competition law, Bus. & Prof. Code § 17200 et seq., and the false advertising law, Bus. & Prof. Code § 17500 et seq.

The trial court entered judgment for Benson in a bench trial. After Proposition 64 passed in 2004, the Court of Appeal eventually ordered the trial court to dismiss the case for lack of standing because the plaintiff had not alleged a loss of money or property. The plaintiff spent money on a lockset, and he received a lockset that was not overpriced or defective. The frustrated desire to buy fully American-made products was insufficient to satisfy standing, the court of appeal reasoned. Benson appealed.

Labels Matter. “Simply stated: Labels matter,” the supreme court said. The court pointed out that the marketing industry is premised on the idea that labels matter, and that consumers will buy products based in part on their label. The court said that whether food is labeled kosher or halal may be of enormous consequence to a Jew or Muslim person, or whether wine is from a certain region may matter to a wine lover.

And to some consumers, the “Made in USA” label matters, the court said. The materiality of this representation is recognized by the California Legislature, which has outlawed deceptive and fraudulent “Made in USA” labels, § 17533.7.

“A consumer who relies on a product label and challenges a misrepresentation contained therein can satisfy the standing requirement of section 17204 by alleging that he or she would not have bought the product but for the misrepresentation,” the court held.

This formulation is enough to establish the required economic injury, the court said, because “from the complaint’s allegations we know the consumer valued the money he or she parted with more than the product as it actually is.”

“That increment, the extra money paid, is economic injury and affords the consumer standing to sue.”

Two-Part Test. Under Proposition 64, standing is limited to any person who has “suffered an injury in fact and has lost money or property as a result of unfair competition.”

The supreme court said that the language of these clauses suggested a simple two-part test. To satisfy the

narrower standing requirements imposed by Proposition 64, a party must now:

- establish a loss or deprivation of money or property sufficient to qualify as injury in fact, i.e., economic injury, and
- show that the economic injury was the result of, i.e., caused by, the unfair business practice or false advertising that is the gravamen of the claim.

For prong one of the test, the court said that there were not special barriers to establishing economic injury under Proposition 64:

While the economic injury requirement is qualitatively more restrictive than federal injury in fact, embracing as it does fewer kinds of injuries, nothing in the text of Proposition 64 or its supporting arguments suggests the requirement was intended to be quantitatively more difficult to satisfy. Rather, we may infer from the text of Proposition 64 that the quantum of lost money or property necessary to show standing is only so much as would suffice to establish injury in fact; if more were needed, the drafters could and would have so specified.

For the causation prong, the court said that its discussion in *In re Tobacco II Cases*, 46 Cal. 4th 298 (Cal. 2009) (10 CLASS 469, 5/22/09), was controlling here. Under *Tobacco II*, a plaintiff must show that “the misrepresentation was an immediate cause of the injury-producing conduct,” but the plaintiff does not need to allege that the misrepresentation was the sole or even the decisive cause of the injury-producing conduct.

Restitution Not Required for Standing. The supreme court also overturned a line of cases that have held that the “lost money or property” requirement restricts standing under Section 17204 to individuals whose losses are eligible for restitution.

The standards for establishing standing under Section 17204 and eligibility for restitution under section 17203 are “wholly distinct,” the court said citing to *Clayworth v. Pfizer Inc.*, 49 Cal. 4th 758 (2010).

“That a party may ultimately be unable to prove a right to damages (or, here, restitution) does not demonstrate that it lacks standing to argue for its entitlement to them.”

Dissent: Collapsing Two Elements. In dissent, Ming said that the majority collapsed the two requirements of Proposition 64—that a plaintiff suffer injury in fact *and* have lost money or property—into one. The majority defines “lost money or property” as an economic injury, which is a type of injury in fact. The majority’s conclusion “effectively renders one of the two statutory requirements redundant and a nullity.”

Justices Joyce L. Kennard, Marvin R. Baxter, Carlos R. Moreno, Ronald M. George concurred in the judgment. Justice Carol A. Corrigan joined in the dissent.

Jonathan W. Cuneo of Cuneo Gilbert & LaDuca in Washington, D.C., argued for Benson. Benson was also represented by Venus Soltan of Soltan & Associates; Timothy G. Blood, Pamela M. Parker and Kevin K. Green of Robbins Geller Rudman & Dowd in San Diego; Michael F. Lenett, also of Cuneo Gilbert & LaDuca.

Frederick A. Rafeedie of Jones Bell Abbott Fleming & Fitzgerald in Los Angeles argued for Kwikset. Kwikset was also represented by Michael J. Abbott and William M. Turner, also of Jones Bell Abbott Fleming & Fitzgerald.

Several amici curiae briefs were also filed for both sides.

BY JESSIE KOKRDA KAMENS

The full text of the opinion is available at: <http://op.bna.com/class.nsf/r?Open=jkas-8dpmng>.