NO. S171845

IN THE
SUPREME COURT OF CALIFORNIA

Kwikset Corporation, *et al.*,
Petitioners,
vs.
The Superior Court Of Orange County,
Respondent,

James Benson, *et al.*,
Real Parties in Interest

After a Decision by the California Court of Appeal,
Fourth Appellate District, Division Three
Case No. G040675

Honorable David C. Velasquez
Judge of the Superior Court for the County of Orange
O.C.S.C. Case No. 00CC01275

Unfair Competition case. Service on the Attorney General
For the State of California and the District Attorney
For the County of Orange required by California Business
And Professions Code section 17209.

ANSWER BRIEF ON THE MERITS

JONES, BELL, ABBOTT, FLEMING & FITZGERALD L.L.P.
Michael J. Abbott (State Bar No. 053042) MJAbbott@JonesBell.com
Fredrick A. Rafeedie (State Bar No. 138422) FARafeedie@JonesBell.com
William M. Turner (State Bar No. 199526) WMTurner@JonesBell.com
601 South Figueroa Street
Twenty-Seventh Floor
Los Angeles, California 90017-5759
Telephone: 213 / 485-1555
Facsimile: 213 / 689-1004

Attorneys for Petitioners and Answering Parties
Kwikset Corporation and The Black & Decker Corporation

NO. S171845

IN THE
SUPREME COURT OF CALIFORNIA

Kwikset Corporation, *et al.*,
***Petitioners*,**
vs.
The Superior Court Of Orange County,
***Respondent*,**

James Benson, *et al.*,
Real Parties in Interest

After a Decision by the California Court of Appeal,
Fourth Appellate District, Division Three
Case No. G040675

Honorable David C. Velasquez
Judge of the Superior Court for the County of Orange
O.C.S.C. Case No. 00CC01275

Unfair Competition case. Service on the Attorney General
For the State of California and the District Attorney
For the County of Orange required by California Business
And Professions Code section 17209.

ANSWER BRIEF ON THE MERITS

JONES, BELL, ABBOTT, FLEMING & FITZGERALD L.L.P.
Michael J. Abbott (State Bar No. 053042) MJAbbott@JonesBell.com
Fredrick A. Rafeedie (State Bar No. 138422) FARafeedie@JonesBell.com
William M. Turner (State Bar No. 199526) WMTurner@JonesBell.com
601 South Figueroa Street
Twenty-Seventh Floor
Los Angeles, California 90017-5759
Telephone: 213 / 485-1555
Facsimile: 213 / 689-1004

Attorneys for Petitioners and Answering Parties
Kwikset Corporation and The Black & Decker Corporation

TABLE OF CONTENTS

TABLE OF CONTENTS (continued)

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES (continued)

TABLE OF AUTHORITIES (continued)

Page

TABLE OF AUTHORITIES (continued)

TABLE OF AUTHORITIES (continued)

Page

Out-of-State Statutes

Page

Other Authorities

INTRODUCTION AND SUMMARY OF ARGUMENT

To have standing to prosecute an Unfair Competition Law (Bus. & Prof. Code § 17200 et seq. (UCL)) or False Advertising Law (Bus. & Prof. Code § 17500 et seq. (FAL)) claim, the plaintiff must establish that he or she has "lost money or property as a result of" the unfair competition or false advertising. (Bus. & Prof. Code §§ 17204, 17535.) Plaintiffs here lack standing because they did not "lose" money or property as a result of the "Made in USA" labels they claim induced them to purchase Defendants' locksets. Instead, Plaintiffs received that for which they paid.

> "A person is not cheated when that which he gets is worth all that he pays for it, which is also common sense. He may anticipate more, and be falsely led to expect it, on the strength of which he may be entitled to be relieved from the bargain. But if he holds onto it, he cannot claim damages for the deceit, if he has suffered no loss which is the case, where, although not getting all that he had the right to expect, he gets after all the worth of his money."

(*Jacobs v. Levin* (1943) 58 Cal. App. 2d Supp. 913, 916, quoting *Pittsburgh L. & T. Co. v. Northern Cent. Life Ins. Co.* (W.D. Pa. 1905) 140 F. 888, 898.)

This fundamental and common sense principle of law applies squarely to this case. Plaintiffs alleged in their Second Amended Complaint (SAC) that they were induced by misleading "Made in USA" labels to buy Defendants' locksets and that they "lost" the money they "paid" for the locksets. Those locksets were substantially made in America

in one of several plants maintained in the United States by Defendants.[1] Although they were substantially made in America, Plaintiffs' locksets contained a few foreign-made screws and/or a foreign-assembled latch component.[2] Plaintiffs, however, have made no complaint about the locksets other than they did not qualify for a "Made in USA" label. Plaintiffs have not alleged that the locksets they purchased would have been physically, functionally, or operationally different if all of the parts had been made in the United States. Plaintiffs have not alleged that the inclusion of a few foreign parts rendered the locksets inferior in quality or performance as compared to locksets made entirely in the United States. In short, Plaintiffs have not alleged that the locksets they bought differed in any physical, functional, operational, or qualitative respect from locksets that would have qualified for a "Made in USA" label under California law.

Moreover, Plaintiffs have made no factual allegations establishing that their alleged reliance on the "Made in USA" labels resulted in any actual monetary loss to them. For example, Plaintiffs have not alleged that their reliance on the labels resulted in them paying more than the actual value of the locksets. Nor have Plaintiffs alleged that their reliance on the labels resulted in them suffering any consequential or indirect monetary losses. Nor have Plaintiffs alleged that if they had known the truth (i.e., that the locksets were not 100% made in America),

---

[1] Presiding Justice Sills stated in his original dissent that Kwikset was a "bonafide American" manufacturer, and that its locksets were "substantially" made in America. (*Benson v. Kwikset Corporation* (2005) 126 Cal. App. 4th 887, 932 (dis. opn. of Sills, P.J.), review granted April 27, 2005.) It is undisputed that Defendants maintained "several plants located throughout the United States, plus one in Mexico." (*Benson v. Kwikset Corporation* (2007) 152 Cal. App. 4th 1254, 1264.)

[2] As Plaintiffs' SAC correctly alleges, the locksets contain "many parts" and their production involves "numerous operations." (3 Pet. Ex. 21 at 451.)

they would have purchased other equivalent locksets for less money. Rather, Plaintiffs have simply alleged that they paid money for the locksets. That alleged payment does not establish a monetary loss. The locksets Plaintiffs purchased had value. Even the Superior Court "concede[d] that the locksets have intrinsic value as locking devices . . . ." (3 Pet. Ex. 31 at 607.) Plaintiffs do not contend otherwise. Thus, Plaintiffs received locksets with value in exchange for the money they paid. In the absence of allegations establishing an actual financial loss sustained as a result of the "Made in USA" labels, the only conclusion that can be drawn from Plaintiffs' allegations is that they "received what they paid for" and did not lose their purchase price. (See *Kwikset Corporation v. Superior Court* (February 25, 2009, G040675) typed opinion p. 11 (hereinafter, Typed Opn.).)

The Court of Appeal correctly and unanimously held that Plaintiffs failed to allege facts in their SAC sufficient to establish that they "lost money . . . as a result of" the "Made in USA" labeling. (Typed Opn. pp. 9-13.) Contrary to Plaintiffs' argument, the mere fact that a person has been induced by a misrepresentation to buy a product does not necessarily mean that the person "lost money," let alone his or her entire purchase price, as a result of the purchase. If the product was worth what the person paid for it, then the person did not suffer a monetary loss even if the person would not have bought the product had he or she known the truth. (See e.g., *Gagne v. Bertran* (1954) 43 Cal. 2d 481, 491.) (*Post*, pp. 18 – 44.)

The Court of Appeal also correctly and unanimously denied Plaintiffs' request for yet another opportunity to amend their complaint to attempt to state facts establishing that they "lost money" as a result of the "Made in USA" labels. (Typed Opn. pp. 14-15.) The Court of Appeal found that (1) many published cases were available to inform Plaintiffs of the factual allegations necessary to support their standing, (2) Plaintiffs

failed to substantiate their assertion that evidentiary support existed for their proposed amendments, (3) the trial record failed to support Plaintiffs' proposed amendments, and (4) Plaintiffs' theory that they could allege a monetary loss that is eligible for restitution is untenable because the Superior Court has already denied restitution to past purchasers such as Plaintiffs. (*Ibid.*) The Court of Appeal did not abuse its discretion in denying Plaintiffs leave to amend their SAC. (*Post*, pp. 44 – 48.)

STATEMENT OF THE CASE

I. Procedural History

A. The Trial

On January 21, 2000, plaintiff James Benson filed this action as an uninjured private attorney general alleging that Defendants had engaged in unlawful, unfair, and fraudulent business practices and false advertising in violation of sections 17200 and 17500 of the Business and Professions Code by representing their locksets as "Made in USA" and/or "All American Made." (1 Pet. Ex. 2 at 91–103 (original complaint).) Plaintiff Benson's section 17200 cause of action was predicated on Defendants' alleged violations of (1) section 17533.7 of the Business and Professions Code (Section 17533.7) which prohibits the use of a "Made in USA" label when any "article, unit, or part" of the merchandise has been "entirely or substantially made, manufactured, or produced outside of the United States," and (2) section 1770(a)(4) of the Civil Code (Section 1770(a)(4)) which prohibits "[u]sing deceptive representations or designations of geographic origin in connection with goods." Plaintiff Benson made no allegation in his original complaint that he had ever bought any of Defendants' locksets for himself nor did he allege that he had suffered any monetary loss as a result of the "Made in USA" labeling on

any of Defendants' locksets.[3]

After plaintiff Benson's original complaint was filed, and out of an abundance of caution, Defendants took immediate action to remove the "Made in USA" labeling from all of their locksets. The Superior Court found that "[t]he evidence establishes that in April 2000, Defendants' [*sic*] ceased all use of the USA designation on all of their locksets." (3 Pet. Ex. 26 at 529.) Later in 2000, Defendants entered into a consent order with the Federal Trade Commission which precludes Defendants from representing its locksets as "Made in USA" unless "'all, or virtually all, of the component parts of such product are made in the United States and all, or virtually all, of the manufacturing of such product is performed in the United States.'" (*Benson v. Kwikset Corporation, supra,* 152 Cal. App. 4th at p. 1265.) As the Superior Court found, "[t]he Consent Order also permitted Defendants to sell off their existing ['Made in USA' labeled] inventory in the ordinary course of business provided that no inventory violating the Order could be shipped after November 1, 2000." (3 Pet. Ex. 26 at 530.)

Despite the fact that Defendants ceased labeling their locksets as "Made in USA" and had entered into the federal consent order in 2000, plaintiff Benson and his counsel nevertheless continued to prosecute this action. A court trial was held in December of 2001, and it resulted in a judgment entered on May 23, 2002. (2 Pet. Ex. 10 at 277-78; 3 Pet. Ex. 26 at 511-32.) The Superior Court held that Section 17533.7 is "an extremely strict statute" and is therefore violated even if only a single foreign part is

---

[3] In his original deposition and trial testimony given in 2001, plaintiff Benson denied under oath that he had ever purchased Defendants' locksets for himself. He also confirmed that he had been reimbursed for those few locksets he had bought on behalf of others. (1 Pet. Ex. 2 at 59-60; 1 Pet. Ex. 3 at 108-111, 123-24, 131-32, 139-41.)

incorporated into a "Made in USA" labeled product sold in California. (3 Pet. Ex. 26 at 523.) With respect to Section 1770(a)(4), the Superior Court held that it is not as strict as Section 17533.7, and that therefore the law was only violated if the "merchandise as a whole is deceptively labeled." (3 Pet. Ex. 26 at 526.) Based on these interpretations of law, the Superior Court found that those locksets that Defendants labeled with a qualified claim, such as "Made in USA/Assembled in Mexico," "Made in USA of Primarily Domestic Components," "Made in USA of Domestic and Foreign Components," and "Made in the USA of Foreign and Domestic Parts" violated neither Section 17533.7 nor Section 1770(a)(4). (3 Pet. Ex. 26 at 523). The Superior Court further found that "Made in USA" labeled locksets that incorporated a few screws or pins made outside the United States violated Section 17533.7 but did not violate Section 1770(a)(4). (3 Pet. Ex. 26 at 523-24, 526.) The Superior Court also found that "Made in USA" labeled locksets that incorporated a latch assembly that was sub-assembled in Mexico violated both laws. (*Ibid.*) Finally, the Superior Court found that "Made in USA" labeled locksets that included levers that were sanded in Mexico did not violate either law. (*Ibid.*)

Based on its findings and conclusions, the Superior Court issued the following remedy as set forth in the final judgment:

1. Defendants are "prohibited and enjoined from labeling any lockset intended for sale in the State of California 'All American Made,' or 'Made in USA,' or similar unqualified language, if such lockset contains any article, unit, or part that is made, manufactured, or produced outside of the United States." (2 Pet. Ex. 10 at 278.)

2. Defendants are required to send a court approved notice to their California customers advising them that any lockset in the customer's inventory that contains a "Made in USA," "All American Made," or similar unqualified designation may be returned to Kwikset for

replacement with an equivalent item in compliant packaging or, at Kwikset's option, a refund of the original purchase price. (*Ibid.*)

In rejecting plaintiff Benson's request that restitution be ordered to consumers, the Superior Court stated as follows:

> Although the court has found a violation of law, the misrepresentations, *even to those for whom the "Made in USA" designation is an extremely important consideration,* were not so deceptive or false as to warrant a return and/or refund program or other restitutionary relief to those who have been using their locksets *without other complaint.*

(3 Pet. Ex. 26 at 531, italics added.)

The Superior Court thereafter awarded plaintiff Benson attorney fees of $2.9 million. (2 Pet. Ex. 10 at 278.)

B. The Appeal

Defendants and plaintiff Benson appealed from the Superior Court's judgment. On June 30, 2004, the Court of Appeal issued a two-to-one opinion in which the majority affirmed the judgment. (*Benson v. Kwikset Corporation* (2004) 120 Cal. App. 4th 301, rehg. granted July 29, 2004.) On July 29, 2004, however, the Court of Appeal, on its own motion, granted a rehearing to consider the issue of "whether Code of Civil Procedure section 1021.5 may be construed to authorize recovery of expenses other than the prevailing party's attorney fees." (*Benson v. Kwikset Corporation* (2005) 126 Cal. App. 4th 887, 897, review granted April 27, 2005.)

On November 2, 2004, Proposition 64 was passed. On November 16, 2004, while the rehearing was still pending, Defendants filed a motion to vacate the judgment on the ground that plaintiff Benson's standing was revoked by the passage of Proposition 64. On December 28, 2004, plaintiff Benson filed his response to Defendants' motion.

On February 10, 2005, the Court of Appeal issued a unanimous opinion vacating the judgment on the ground that plaintiff Benson's standing had been revoked by the passage of Proposition 64. (*Benson v. Kwikset Corporation, supra,* 126 Cal. App. 4th at p. 926.) The Court of Appeal remanded the matter to the Superior Court with directions to permit plaintiff Benson to move for leave to file an amended complaint alleging facts establishing his standing and the representative action requirements under Proposition 64. (*Ibid.*) The Court of Appeal directed the Superior Court either to reenter the original judgment if plaintiff Benson pled and proved his standing and the representative action requirements under Proposition 64 or to dismiss the action if plaintiff Benson failed to do so. (*Ibid.*)

With respect to the merits of plaintiff Benson's claims, the Court of Appeal split two-to-one in favor of affirming the Superior Court's decision on the merits. In his dissent, Presiding Justice Sills stated as follows:

> The interpretation [of Section 17533.7] proffered by the plaintiffs and adopted by the court actually puts bonafide American manufacturers like Kwikset at a disadvantage against competitors who assemble everything abroad and export their products back to the United States. Both Kwikset and a Taiwanese exporter of locks are reduced to the same status: Neither can claim to make its product in America even though Kwikset's products substantially *are* made in America.
>
> III. Today's Result Sanctions Predatory Litigation in the Style of the Infamous Trevor Law Group
>
> I must also take issue with the ridiculously high attorney fee award. Three million dollars is too much for a few pins and

> screws. To award $3 million in attorney fees for a few screws, pins and a latch assembly is to confirm everything that the law's [UCL] critics have been saying about it, namely that the law really is a way for underemployed lawyers to create business for themselves by harassing California businesses on the basis of some de minimis putative nonconformance with some regulation or law.
>
> . . . [E]ven if today's result were correct as a matter of statutory interpretation, the award of attorneys' fees was clearly grossly disproportionate to what has been accomplished by the litigation.
>
> There has been no injury. No breach of contract. No one got hurt. The only money to change hands is the multimillion dollar windfall to the attorneys who brought this action if today's decision is allowed to stand.
>
> And what has been accomplished by this litigation other than the enrichment of the plaintiffs' attorneys? *The only real results are negative, and especially negative to American workers.* If today's decision stands, no firm may dare to advertise "made in USA" on its products, even if entirely assembled or "transformed" in the United States by American workers . . . .

(*Benson v. Kwikset Corporation, supra,* 126 Cal. App. 4th at pp. 932-33 (dis. opn. of Sills, P.J.), review granted April 27, 2005.) Presiding Justice Sills concluded that:

> . . . Cases like this one are, in my opinion, precisely the sort of abuse that Proposition 64 was crafted to halt (except in this case the plaintiff is represented by a respectable law firm rather than the infamous Trevor Law Group). My position is that the unfair competition laws

> are good laws, but that the judiciary must apply those laws with a certain amount of common sense. Well, be that as it may, the passage of Proposition 64 by a large margin only confirms that the electorate was indeed fed up with the abuses of the unfair business practices laws, *of which plaintiff's case is a prime example*.

(*Id.* at p. 927, italics added.)

The majority also expressed apprehension about its decision on the merits:

> We also share our dissenting colleague's angst about both the effect of this law [Section 17533.7], particularly in an age of global trade, and the potential for abuse that may arise under the unfair competition law. If we had the power to do so, we would rewrite the statute to address those concerns.

(*Id.* at p. 916.) The majority also stated that "[w]e agree with out dissenting colleague's assertion that the [attorney fees] award appears to be unnecessarily high." (*Id.* at p. 919.)

Plaintiff Benson and Defendants both petitioned for review to this Court with respect to different issues. On April 27, 2005, this Court granted plaintiff Benson's petition which questioned the correctness of the Court of Appeal's conclusion that Proposition 64 applied to this case. This Court ordered further action in the matter deferred pending its disposition of *Californians For Disability Rights v. Mervyn's, LLC.* (*Benson v. Kwikset Corporation* (2005) 2005 Cal. LEXIS 4587.)

On April 11, 2007, this Court transferred this matter to the Court of Appeal "with directions to vacate its decision and to reconsider the cause in light of *Branick v. Downey Savings & Loan Assn.* (2006) 39 Cal. 4th 235 [46 Cal. Rptr. 3d 66, 138 P.3d 214]." (*Benson v. Kwikset Corporation* (2007) 2007 Cal. LEXIS 6537.)

On June 29, 2007, the Court of Appeal issued an opinion vacating the original judgment, and remanding the matter to the Superior Court with the following directions:

> As to defendants Kwikset Corporation and Black & Decker Corporation, the judgment and postjudgment order are vacated and the matter is remanded to the superior court with directions to afford plaintiff an opportunity to move for leave to file an amended complaint that alleges facts establishing the standing and representative action requirements for unfair competition law and false advertising law claims as implemented by Proposition 64. Plaintiff must file his motion for leave to amend within 30 days of the filing of the remittitur. The court shall then determine whether plaintiff has satisfactorily alleged facts supporting his standing and the right to maintain this lawsuit as a representative action. In the event plaintiff successfully alleges and proves his right to relief under the unfair competition law and the false advertising law, as amended by Proposition 64, the court shall reenter its original judgment. If plaintiff fails to plead or prove his right to maintain this lawsuit, the court shall enter a judgment dismissing the action.

(*Benson v. Kwikset Corporation* (2007) 152 Cal. App. 4th 1254, 1284.) With respect to the merits, the Court of Appeal again issued a two-to-one decision affirming the Superior Court's decision on the merits. In his dissent, Presiding Justice Sills stated that "I must reluctantly dissent because the majority leaves the door open for the possibility of further litigation on the merits." (*Ibid.*) The justices in the majority again expressed that they shared the dissent's "angst" about the effect of Section 17533.7 and the potential for abuse of the unfair competition law. (*Id.* at p. 1274.)

C. Proceedings On Remand

Remittitur issued from the Court of Appeal on September 4, 2007. On October 4, 2007, plaintiff Benson filed in the Superior Court a motion for leave to file a first amended complaint.[4] (1 Pet. Ex. 1 at 1–47.) The proposed amended complaint not only added allegations related to "injury in fact" and "lost money," but also added three new plaintiffs. On November 29, 2007, over Defendants' opposition (1 Pet. Exs. 2, 3, 4, 5), the Superior Court granted plaintiff Benson's motion, and ordered the Plaintiffs' First Amended Complaint (FAC) deemed filed on that date. (1 Pet. Ex. 8 at 209–31; 1 Pet. Ex. 9 at 232–34.) On December 14, 2007, Defendants filed a petition for a writ of mandate in the Court of Appeal seeking an order requiring the Superior Court to reverse its order granting leave to amend on the ground that the amended complaint (1) improperly added new plaintiffs to this action, (2) included sham allegations designed to avoid a dismissal of this action, and (3) improperly omitted allegations that were made in plaintiff Benson's original complaint. The petition was denied on December 26, 2007.

On December 28, 2007, Defendants filed a demurrer to Plaintiffs' FAC on the grounds that Plaintiffs could not satisfy the class action requirements imposed by Proposition 64 and had not alleged facts establishing their injury in fact and loss of money. (2 Pet. Exs. 10, 11, 12.) The demurrer was fully briefed by the parties. (2 Pet. Exs. 13, 14.) On January 31, 2008, the Superior Court overruled Defendants' demurrer. (2 Pet. Ex. 15 at 360–81; 2 Pet. Ex.16.)

On March 3, 2008, Defendants filed a petition for a writ of

---

[4] This case was assigned to a different trial judge on remand because in December of 2002 the original trial judge, Raymond J. Ikola, was appointed as an Associate Justice of the Fourth District Court of Appeal, Division Three.

mandate requesting that the Court of Appeal order the Superior Court to vacate its ruling on the demurrer to the FAC on the ground that Plaintiffs could not satisfy the class action requirements imposed by Proposition 64. On March 10, 2008, the Court of Appeal issued an Order denying the petition. Presiding Justice Sills concurred, but wrote separately and stated as follows:

> I write separately to underscore that I vote to deny this petition only because it is not based on the issue of whether plaintiff suffered "injury in fact." Indeed, I find it hard to comprehend how this plaintiff sustained any "injury in fact," as this court has recently had occasion to construe the term. (*See Hall v. Time Inc.* (2008) 158 Cal. App. 4th 847 [consideration paid for book because of misleading and deceitful tactics to fool customers into thinking that they were under obligation to pay for book held not to be injury in fact].) However, the injury in fact issue was not raised in the petition and remains open for adjudication.

(3 Pet. Ex. 26 at 533 – 34.)

On March 18, 2008, Defendants filed a motion for judgment on the pleadings arguing that Plaintiffs' FAC failed to allege facts establishing that they suffered an injury in fact and a loss of money as a result of the "Made in USA" representations on the locksets they purchased. (3 Pet. Ex. 18.) Defendants and Plaintiffs fully briefed the motion. (3 Pet. Exs. 19, 20, 22.)

On April 11, 2008, before Defendants' motion for judgment on the pleadings could be heard by the Superior Court, Plaintiffs filed a motion for leave to file the SAC. (3 Pet. Ex. 21.) In their motion, Plaintiffs stated that several cases had been decided by the courts of appeal "further elucidating the Proposition 64 requirements," and that they were seeking leave to amend in order to "more fully set forth their allegations that they

suffered 'injury in fact' and 'lost money or property as a result of the unfair competition' . . . ." (3 Pet. Ex. 21 at 429 ll. 3-4, 12-14.) On May 1, 2008, Defendants filed a notice of no opposition to Plaintiffs' motion for leave to amend.[5] (3 Pet. Ex. 24.) On May 15, 2008, the Superior Court granted Plaintiffs' motion and deemed Plaintiffs' SAC filed on that date. (3 Pet. Ex. 25.)

Plaintiffs alleged the following in their SAC: (1) between 1996 and 2000, they purchased for their own use Defendants' locksets which were misrepresented as "Made in USA," (2) they "saw and read Defendants' misrepresentations that the locksets were 'Made in U.S.A.' at the time [they] purchased the locksets and relied on such misrepresentations in deciding to purchase and in purchasing them," (3) they were "induced to purchase and did purchase Defendants' locksets due to the false representation that they were 'Made in U.S.A.' and would not have purchased them if they had not been so misrepresented," (4) in purchasing the locksets, Plaintiffs were "provided with products falsely advertised as 'Made in U.S.A.,' deceiving [them] and causing [them] to buy products [they] did not want," (5) "Defendants' 'Made in U.S.A.' misrepresentations caused [them] to spend and lose the money [they] paid for the locksets," and (6) they "suffered injury and loss of money as a result of Defendants' conduct adjudicated to be unlawful."[6] (3 Pet. Ex. 21 at 447 – 49.)

On June 13, 2008, Defendants filed a demurrer to the SAC.

---

[5] As a result of the filing of Plaintiffs' motion for leave to file the SAC, Defendants withdrew their motion for judgment on the pleadings. (3 Pet. Ex. 23 at 487 – 88.)

[6] Plaintiff Benson made these allegations despite the fact that he testified both in deposition and at trial that he never purchased Defendants' locksets for himself and that he had been fully reimbursed for those few locksets he had bought on behalf of others. (1 Pet. Ex. 2 at 59-60; 1 Pet. Ex. 3 at 108-111, 123-24, 131-32, 139-41.)

(Pet. Ex. 26.) Defendants argued that Plaintiffs had failed to allege facts establishing that they suffered injury in fact and a loss of money as a result of the "Made in USA" labels on the locksets they purchased. (3 Pet. Ex. 26 at 506 – 10.) The parties fully briefed the demurrer. (3 Pet. Exs. 27, 28, 29.) On July 10, 2008, the Superior Court overruled Defendants' demurrer. (3 Pet. Ex. 31.)

D. The Writ Proceedings

On July 17, 2008, Defendants filed a petition for writ of mandate requesting that the Court of Appeal order the Superior Court to vacate its ruling on Defendants' demurrer, and instead sustain the demurrer without leave to amend. On August 29, 2008, the Court of Appeal issued an order to show cause "why a petition for writ of mandate should not issue commanding the superior court to . . . enter a new and different order sustaining the demurrer without leave to amend." On September 29, 2008, Plaintiffs filed their Return to Defendants' petition. On November 20, 2008, the Court of Appeal heard oral argument, and the matter was submitted on that date.

On February 25, 2009, the Court of Appeal issued a writ of mandate "ordering respondent [Superior Court] to vacate the July 10, 2008 order overruling petitioners' demurrer and to enter a new order sustaining the demurrer without leave to amend and to thereafter enter a judgment dismissing the underlying action." (Typed Opn. p. 15.) The Court of Appeal held that Plaintiffs had failed "to adequately allege [that they] suffered economic injury resulting from petitioners' use of false country of origin labels on their products" and that Plaintiffs had "not carried their burden of showing a reasonable possibility of amending the complaint to allege the requisite economic injury." (*Id.* at p. 2.)

With respect to the "lost money" requirement of Proposition 64, the Court of Appeal held that Plaintiffs were required to allege facts

showing that they suffered an actual "economic" injury as a result of the "Made in USA" labels. (Typed Opn. p. 9.) The Court of Appeal concluded that, standing alone, the allegation that Plaintiffs were induced by the "Made in USA" labels to buy locksets that they would not have bought had they known the "Made in USA" labels were inaccurate was not sufficient to show they suffered an actual economic injury. (*Ibid.*) The Court of Appeal explained that Plaintiffs received locksets in exchange for the money they paid, and that Plaintiffs had no other complaint about the locksets such as they were defective, or that they were not worth what Plaintiffs paid for them, or that they cost more than similar products without a false country of origin label, or that they were of inferior quality, or that they failed to perform as expected. (*Ibid.*)

With respect to Plaintiffs' request for yet another opportunity to amend their complaint, the Court of Appeal denied the request for several reasons. First, the Court of Appeal found that many published cases were available "to inform [Plaintiffs] what factual allegations were necessary" to support their standing, and that Plaintiffs "were on notice that merely alleging they purchased [Defendants'] locksets in reliance on the products' false labels would not suffice to establish standing."[7] (Typed Opn. p. 14.) Second, the Court of Appeal found that although Plaintiffs asserted in their Return that there existed evidentiary support for their proposed amendments (Return at 43), Plaintiffs "fail[ed] to provide any citation to the record or present any documentation to support" that assertion. (Typed Opn. p. 14.) Third, the Court of Appeal found that the trial record failed to support Plaintiffs' proposed amendments. (*Ibid.*) As

---

[7] In their motion for leave to file their SAC, Plaintiffs conceded that several cases had been decided by the courts of appeal "further elucidating the Proposition 64 requirements" for standing. (3 Pet. Ex. 21 at 429 ll. 3–4, 12–14.)

an example, the Court of Appeal noted that although plaintiff Benson alleged in the SAC that he bought Defendants' locksets for himself and was not reimbursed, both his sworn pre-trial and trial testimony proved that he had been reimbursed by his clients for those lockset purchases. (*Ibid.*) Fourth, the Court of Appeal found that Plaintiffs' theory that they could allege a monetary loss eligible for restitution was unsustainable in that the Superior Court had already denied restitutionary relief because Plaintiffs and consumers had used Defendants' locksets "without other complaint." (*Id.* at pp. 14-15.) In light of these factors, the Court of Appeal concluded that Plaintiffs had "failed to show a reasonable possibility they could *truthfully* amend the complaint to allege facts establishing their standing to maintain this action." (*Id.* at p. 15, italics added.)

On March 13, 2009, Plaintiffs filed a petition for rehearing seeking to convince the Court of Appeal to give them leave to amend their complaint yet again. Filed concurrently with the petition for rehearing was a motion for judicial notice in which Plaintiffs requested the Court of Appeal take judicial notice of purported evidence and documents that Plaintiffs claimed supported their proposed amendments to the SAC. On March 18, 2009, the Court of Appeal denied Plaintiffs' petition for rehearing stating that the petition "is supported by evidence not submitted to the trial court and not contained in the appendix to the petition," and that the "court cannot consider evidence called to its attention for the first time after determination of the appeal."

On April 6, 2009, Plaintiffs filed their Petition For Review with this Court.

ARGUMENT

I. The Court Of Appeal Correctly Held That Plaintiffs Failed To Allege Facts Establishing That They "Lost Money" As A Result Of The "Made In USA" Labels

A. In Order To Satisfy The "Lost Money" Requirement Imposed By Proposition 64, A Plaintiff In A False Advertising Case Must Allege Facts Establishing An Actual Monetary Loss Resulting From Reliance On The False Advertising

In order to have standing to prosecute this action, Plaintiffs were required to plead and prove that they "lost money or property as a result of" the "Made in USA" labels on the locksets they purchased. (Bus. & Prof. Code §§ 17204, 17535.) Plaintiffs alleged in their SAC that they (1) were induced by the "Made in USA" labels to purchase the locksets, (2) would not have purchased those locksets if they had known that the "Made in USA" labels were inaccurate, and (3) lost the money they "paid" for the locksets as a result thereof. (3 Pet. Ex. 21 at 447-49.) Plaintiffs made no complaint about the locksets other than they did not qualify for a "Made in USA" label. Plaintiffs did not complain about the prices they paid for the locksets, or about the quality, functionality, usefulness, or appearance of the locksets. As explained below, Plaintiffs' allegations simply do not establish that they "lost money" as a result of the "Made in USA" labels.

Proposition 64 added language to sections 17204 and 17535 of the Business and Professions Code that restricts standing in private UCL and FAL actions to those persons who have "suffered injury in fact and ha[ve] lost money or property as a result of" the unfair competition or false advertising. The plain meaning of this statutory language, the official

election materials submitted to the voters, and the case law interpreting the statutory language all confirm that the "lost money or property as a result of" requirement requires the plaintiff to plead and prove that he or she suffered an actual monetary or property loss as a result of the conduct constituting the violation. (Bus. & Prof. Code §§ 17204, 17535 [an action shall be prosecuted "by any person who has suffered injury in fact and has lost money or property as a result of" the unfair competition or false advertising]; Voter Information Guide, Gen. Elec. (Nov. 2, 1964) official title and summary, p. 38 ["Limits individual's right to sue by allowing private enforcement of unfair business competition laws only if the individual was actually injured by, and suffered financial/property loss because of, an unfair business practice."]); *id.*, analysis by the Legislative Analyst, p. 38 ["This measure prohibits any [private] person . . . from bringing a lawsuit for unfair competition unless the person has suffered injury and lost money or property."]; *id.*, argument in favor of Prop. 64, p. 40 [Proposition 64 makes sense because it "[p]rotects your right to file a lawsuit if you've been damaged."]; *id.*, rebuttal to argument against Prop. 64, p. 41 [Proposition 64 "[p]rotects your right to file a lawsuit if you've been harmed."]; *Peterson v. Cellco Partnership* (2008) 164 Cal. App. 4th 1583, 1590 (*Peterson*) ["in the aftermath of Proposition 64, only plaintiffs who have suffered actual damage may pursue a private UCL action"]; *Animal Legal Defense Fund v. Mendes* (2008) 160 Cal. App. 4th 136, 147 [the injury in fact and lost money or property requirement "discloses a clear requirement that injury must be economic, at least in part, for a plaintiff to have standing under" the UCL].)

It is apparent from the statutory language itself, as well as from the ballot materials, that the electorate does not want UCL/FAL litigation to be pursued where the plaintiff has not suffered an actual monetary or property loss as a result of the alleged unfair competition or

false advertising.

In this case, the "lost money" requirement is at issue. If the "lost money" requirement requires the plaintiff to establish an actual monetary loss, then the first question that must be addressed is what are the types of monetary losses that a person might suffer as a result of being induced by a misrepresentation to buy a product. First, a person might pay more for the product than it was actually worth as a result of the misrepresentation. (Civ. Code § 3343(a).) The difference between the amount paid for the product and the actual value of the product would be the person's "out-of-pocket" monetary loss. (*Alliance Mortgage Co. v. Rothwell* (1995) 10 Cal. 4th 1226, 1240.) Second, a person might spend money over and above the purchase price in reliance on the misrepresentation (i.e., indirect or consequential damages). (*Stout v. Turney* (1978) 22 Cal. 3d 718, 726, 729-30; Civ. Code § 3343(a)(1) & (a)(2).) Third, if the product was bought for profit-making purposes, the person might lose profits that would have been earned had the product possessed the characteristics fraudulently attributed to it. (Civ. Code § 3343(a)(4).) Fourth, a person might suffer a monetary loss because the actual value of the product at the time of purchase was less than the value the person was fraudulently led to believe he would receive. (*Alliance Mortgage Co. v. Rothwell, supra,* 10 Cal. 4th at p. 1240.) Fifth, a person might contend that in the absence of the misrepresentation, he or she would have purchased an equivalent product for less money, and therefore he or she lost the difference in price between the product actually purchased and the product he or she contends would have been purchased.

In California, a person fraudulently induced to purchase property is entitled in a fraud action to recover his or her "out-of-pocket" loss, consequential damages, and, under certain circumstances, lost profits

resulting from the fraud.[8] (Civ. Code § 3343.) In a UCL or FAL action, however, the defrauded person would be limited to recovering restitution. (*Korea Supply Co. v. Lockheed Martin Corp.* (2003) 29 Cal. 4th 1134, 1148 (*Korea Supply*) ["the Legislature did not intend to authorize courts to order monetary remedies other than restitution" in a UCL action].) The amount eligible for restitution would be the person's "out-of-pocket loss" (i.e., the "excess of what the plaintiff gave the defendant over the value of what the plaintiff received."). (*Cortez v. Purolator Air Filtration Products Co.* (2000) 23 Cal. 4th 163, 174 (*Cortez.*) Although Plaintiffs argue that awarding the excess constitutes an award of "fraud damages" and not restitution, this Court has made clear that restitution is an element of fraud damages: "[W]hile the award of [fraud] damages may be greater than the sum fraudulently acquired from the Plaintiff, the award includes an element of restitution – the return of the excess of what the plaintiff gave the defendant over the value of what the plaintiff received." (*Ibid.*) The return of the excess is "literally" restitution. (*Ibid.*)

Both the California and Ninth Circuit courts of appeal have held that the "lost money or property" requirement of section 17204 of the Business and Professions Code limits standing "to individuals who suffer losses of money or property that are eligible for restitution" under section 17203 of the Business and Professions Code. (*Buckland v. Threshold Enterprises, Ltd.* (2007) 155 Cal. App. 4th 798, 817 (*Buckland*); *Citizens of Humanity, LLC v. Costco Wholesale Corp.* (2009) 171 Cal. App. 4th 1, 22;

---

[8] California law does not permit the defrauded person to recover the difference in value between what the person actually received and what he or she was fraudulently led to believe he or she would receive. (*Stout v. Turney*, *supra,* 22 Cal. 3d at p. 725.) Nor is there any California authority permitting the defrauded person to recover the difference in price between what he or she paid for the product and the price of an allegedly equivalent product that he or she contends would have been purchased in the absence of the misrepresentation.

Yabsley v. Cingular Wireless, LLC (2009) 176 Cal. App. 4th 1156, 1166; and *Walker v. Geico General Ins. Co.* (E.D. Cal. 2007) 474 F. Supp. 2d 1168, 1172, affd. (9th Cir. 2009) 558 F. 3d 1025, 1027 (*Walker*).) The *Buckland* court reasoned that since the monetary remedy for a UCL violation is limited to restitution, the money or property allegedly "lost" by the plaintiff must be eligible for restitution. (*Buckland*, at p. 817.) The *Walker* court concluded that interpreting the "lost money or property" requirement to mean a monetary loss eligible for restitution "avoid[s] the anomalous situation where a plaintiff could suffer 'loss of money or property' for *section 17204* purposes [i.e., standing purposes] but simultaneously not have 'lost money or property' for *section 17203* purposes [i.e., restitution purposes]." (*Walker,* at p. 1172.)

In the Court of Appeal, Plaintiffs relied on *Buckland* and argued that "[t]he import of the 'lost money or property' prerequisite in section 17204 'is to limit standing to individuals who suffer losses of money or property that are eligible for restitution.'" (Return at 32, quoting *Buckland.*) The Court of Appeal agreed. (Typed Opn. p. 10.)

In this case, whether "lost money" means monetary losses of the type that are eligible for restitution or monetary losses of the type that are recoverable as damages, the Court of Appeal correctly held that Plaintiffs did not plead facts in their SAC establishing that they "lost money . . . as a result of" the "Made in USA" labels. Plaintiffs alleged they "paid" money and received locksets in exchange.[9] (3 Pet. Ex. 21 at 447 – 49.) There is no dispute that Plaintiffs "clearly intended to buy locksets."[10]

---

[9] To "pay" in this context means "to give over (a certain amount of money) in exchange for something." (Random House Webster's Unabridged Dict. (2d ed. 1998) p. 1424.)

[10] In fact, Plaintiffs asserted in their Return and Petition For Rehearing filed in the Court of Appeal that, if given an opportunity, they could amend

(Typed Opn. p. 11.) Plaintiffs did not allege that as a result of their reliance on the "Made in USA" labels they paid more than the actual value of the locksets, or that they suffered consequential damages, or that they lost profits. Nor, as pointed out by the Court of Appeal, did the Plaintiffs allege that the locksets were defective, or of inferior quality, or failed to perform as expected.[11] (Typed Opn. pp. 9, 11.) As acknowledged by the Superior Court, the locksets Plaintiffs purchased had "intrinsic value as locking devices . . . ." (3 Pet. Ex. 31 at 607.)

The exchange of money for locksets did not result in a monetary loss to Plaintiffs. "[I]f the [locksets] were worth what plaintiffs paid for them, plaintiffs were not damaged by their purchase, for even though they would not have bought the [locksets] had they known the truth, they nevertheless received property as valuable as that with which they parted." (See *Gagne v. Bertran*, *supra,* 43 Cal. 2d at p. 491.) Stated another way:

> "A person is not cheated when that which he gets is worth all that he pays for it, which is also common sense. He may anticipate more, and be falsely led to expect it, on the strength of which he may be entitled to be relieved from the bargain. But if he holds onto it, he cannot claim damages for the deceit, if he has suffered no loss which is the case, where, although not getting all that he had the right to expect, he gets after all the worth of his money."

(*Jacobs v. Levin*, *supra,* 58 Cal. App. 2d Supp. at p. 916, quoting

---

their complaint to allege that there were alternative lower priced locksets available for them to buy at the time they purchased Defendants' locksets. (Return at 42-3; Pet. For Rehearing at 6.)

[11] It appears that the Court of Appeal was suggesting that these types of allegations might reflect that Plaintiffs paid more than actual value for the locksets.

Pittsburgh L. & T. Co., supra, 140 F. at p. 898.)

As these authorities establish, being induced by a misrepresentation to purchase something does not necessarily mean that the purchaser has suffered a monetary loss. For example, in a case analogous to this one, *Chavez v. Blue Sky Natural Beverage Co.* (N.D. Cal. 2007) 503 F. Supp. 2d 1370, the plaintiff brought a proposed UCL and FAL class action based on the allegation that he and the class were induced to buy defendant's Blue Sky beverages as the result of the defendant's misrepresentations that the beverages were made in New Mexico. The named plaintiff alleged that he had a desire to support a New Mexico company, and "'would not have purchased Blue Sky Beverages had he known where they were really manufactured and/or where the company that owned or controlled the canning of Blue Sky Beverages was located.'" (*Id.* at p. 1372, quoting the complaint.) The plaintiff asserted that he and the class members suffered a monetary loss "equal [to] the amount paid for the Blue Sky beverages because they would not have purchased the drinks had they known the drinks and company were no longer related to" New Mexico. (*Id.* at p. 1373.) The district court dismissed the action at the pleading stage because plaintiffs had not alleged an actual economic loss:

> Plaintiffs' alleged injury and damages are nonexistent because Defendants' alleged promise had no value. In other words, Plaintiffs have not alleged damages resulting from Defendants' supposed misrepresentation of the location of its bottling operations and/or corporate headquarters.
>
> [¶] . . . [¶]
>
> . . . Plaintiff did not pay a premium for Defendants' beverages because the drinks purportedly originated in Santa Fe, New Mexico. Accepting the facts as stated by

> Plaintiffs and drawing all inferences in their favor, Defendants' promise concerning geographic origin *had no value* and Plaintiffs have suffered no damages by purchasing beverages they thought were produced in New Mexico by a New Mexico-based company, but actually originated in California. As a result of Plaintiffs' failure to allege any damages under all four causes of action, Plaintiffs have no standing to pursue their claims against Defendants.

(*Id.* at p. 1374, italics added.) Thus, the district court held that although the plaintiff had paid money for a product he purchased in reliance on misrepresentations concerning the geographic origin of the product, the plaintiff did not suffer a monetary loss because the misrepresentations did not result in him being charged a "premium" for the product.

Similarly, in *Hall v. Time, Inc.* (2008) 158 Cal. App. 4th 847, the plaintiff's UCL action was based on the allegation that he was induced by misrepresentations concerning a "free preview" period to buy a book from the defendants for $29.95. In affirming the trial court's dismissal of the action at the pleading stage, the court of appeal held that the plaintiff's payment of the purchase price did not satisfy the new standing requirements imposed by Proposition 64:

> In this case, [plaintiff] did not allege he suffered an injury in fact . . . . He expended money by paying Time $29.95 – but he received a book in exchange. He did not allege that he did not want the book, the book was unsatisfactory, or the book was worth less than what he paid for it.

(*Id.* at p. 855.) Thus, although the plaintiff in *Hall* was allegedly induced by a misrepresentation to buy the book, the court held that plaintiff's payment for the book did not constitute an injury in fact or loss of money.

In *Gagne v. Bertran, supra,* 43 Cal. 2d 481, a fraud case, plaintiffs were induced to purchase certain parcels of real property by misrepresentations made by the defendant concerning the condition of the properties' soil. Plaintiffs presented evidence that "they would not have bought them [the properties] had they known that defendant's statements were erroneous." (*Id.* at pp. 484-85.) This Court held that "if the lots were worth what plaintiffs paid for them, plaintiffs were not damaged by their purchase, for even though they would not have bought the lots had they known the truth, they nevertheless received property as valuable as that with which they parted." (*Id.* at p. 491.) Thus, although plaintiffs were induced by misrepresentations to pay money for the properties, that payment did not constitute a monetary loss as a result of the fraud.

Non-fraud cases have also recognized that a UCL plaintiff does not "lose" money for standing purposes when he or she receives a product of equivalent value in exchange for the payment of the purchase price. For example, in *Peterson, supra,* 164 Cal. App. 4th 1583, a case arising under the "unlawful" prong of the UCL, the plaintiffs' action was based on the allegation that they bought insurance policies from the defendant who was not licensed to sell such insurance. California law makes it unlawful to sell an insurance contract without a license to do so. The plaintiffs argued that they had suffered injury in fact and had lost money because the insurance should not have been sold to them in the first place by the unlicensed defendant and because a portion of the premiums they paid were unlawfully retained by the defendant. (*Id.* at p. 1586-87.) In affirming the trial court's dismissal of the action at the pleading stage on the ground that the plaintiffs had not shown that they suffered a monetary loss, the court of appeal rejected the plaintiffs' argument:

> Plaintiffs here do not allege they paid more for the insurance due to the defendant's

> collecting a commission. They do not allege they could have bought the same insurance for a lower price either directly from the insurer or from a licensed agent. Absent such an allegation, plaintiffs have not shown they suffered actual economic injury.

(*Id.* at p. 1591.) Thus, the *Peterson* court held that although plaintiffs may have been subjected to acts of unfair competition, no monetary loss was suffered by the plaintiffs as a result of simply paying for the insurance.

Similarly, in *Medina v. Safe-Guard Products, International, Inc.* (2008) 164 Cal. App 4th 105 (*Medina*), the plaintiff bought a "tire and wheel service" insurance contract from the defendant who was not licensed to sell such insurance contracts. The plaintiff asserted a UCL class action claim predicated on the defendant's unlawful practice of selling insurance contracts without a license to do so. The trial court sustained the defendant's demurrer finding that the plaintiff had not suffered an injury in fact and a loss of money as a result of the unfair competition. (*Id.* at p. 114.) The plaintiff appealed "asserting that the fact of his payment for the contract, *by itself*, is sufficient to show 'injury in fact.'" (*Ibid.*) The *Medina* court rejected the plaintiff's argument holding that the plaintiff received what he paid for: "[plaintiff] has not alleged that he didn't want wheel and tire coverage in the first place, or that he was given unsatisfactory service or has had a claim denied, or that he paid more for the coverage than what it was worth because of the unlicensed status of [defendant]." (*Ibid.*) Thus, although the plaintiff paid money for a product that was sold to him in violation of the UCL, the plaintiff's payment of the purchase price did not establish his standing to sue under Proposition 64.

One non-California case is also instructive. In *Walls v. The American Tobacco Company* (Okla. 2000) 11 P.3d 626, the Oklahoma Supreme Court was presented with the following question: "Assuming

arguendo that a product was sold in violation of the Oklahoma Consumer Protection Act ('OCPA'), may a party bring an action as an 'aggrieved consumer' . . . solely as a result of his or her payment of the purchase price for that product?"[12] (*Id.* at p. 627.) The OCPA makes it unlawful, among other things, to make a misrepresentation about a product in a consumer transaction. (Okla. Stat. tit.15, § 753 (2009).) Under the OCPA, only an "aggrieved consumer" may bring a private action for damages. (Okla. Stat. tit.15, § 761.1(A)(2009).[13]) After determining that the term "aggrieved consumer" means a consumer who has suffered "some detriment or loss as a result of a violation of the OCPA," the Oklahoma Supreme Court concluded that a person may not bring an action as an aggrieved consumer "solely as a result of his or her payment of the purchase price for that product." (*Walls v. The American Tobacco Company, supra,* 11 P.3d at p. 630.) In other words, the Oklahoma Supreme Court determined that a consumer does not suffer detriment or loss simply because he or she paid for a product sold in violation of the OCPA.

In sum, a person does not necessarily lose money, let alone his or her entire purchase price, as a result of being induced by a misrepresentation to buy a product. In this case, Plaintiffs paid money but received locksets with value in return. Plaintiffs did not allege that those locksets differed in any physical, functional, or operational respect from lockets that would have qualified for a "Made in USA" label under California law. Moreover, Plaintiffs did not allege that they paid more than market value for the locksets as a result of the "Made in USA" labels or that the locksets failed to perform or function properly. In the absence of

---

[12] A copy of *Walls v. The American Tobacco Company* is attached hereto as Exhibit A.

[13] Copies of sections 753 and 761.1 of title 15 of the Oklahoma Statutes are attached hereto as Exhibits B and C, respectively.

such an allegation, Plaintiffs received what they paid for and did not "lose" the amounts they paid for the locksets.

B. Under The Facts Alleged By Plaintiffs, The Amounts Plaintiffs Paid For Their Locksets Would Not Be Eligible For Restitution

As explained above (*ante*, at pp. 21 – 22), case law has established that the phrase "lost money or property" as used in section 17204 of the Business and Professions Code means "losses of money or property that are eligible for restitution" under section 17203 of the Business and Professions Code. (See e.g., *Buckland*, *supra,* 155 Cal. App. 4th at p. 817, and *Walker*, *supra,* 474 F. Supp. 2d at p.1172, affd. 558 F. 3d at p. 1027.). In the Court of Appeal, Plaintiffs agreed with this case law, and argued that the monies they paid for the locksets were "eligible for restitution." (Return at 32-33.) The Court of Appeal, however, found that Plaintiffs had not alleged monetary losses eligible for restitution. (Typed Opn. p. 11.) The Court of Appeal's finding was correct for the following reasons.

First, the Superior Court after a trial on the merits denied restitution to purchasers of the mislabeled locksets. (3 Pet. Ex. 26 at 531.) Although plaintiff Benson appealed arguing that the "trial court erred by denying his request for restitution to consumers who purchased Kwikset's unlawfully labeled products," he abandoned that issue shortly before the oral argument in the Court of Appeal. (*Benson v. Kwikset Corporation*, *supra,* 152 Cal. App. 4th at p. 1277.) The Superior Court's denial of restitution is final, and therefore the amounts Plaintiffs paid for their locksets are not "eligible" for restitution.

Second, even if the Superior Court had not yet decided the restitution issue, under the facts alleged in the SAC, the amounts Plaintiffs paid for their locksets would not be eligible for restitution. A monetary loss

is eligible for restitution if it "encompass[es] quantifiable sums one person owes to another . . . ." (*Cortez, supra,* 23 Cal. 4th at p. 178.) Moreover, the monetary loss must be "objectively measurable." (*Day v. AT&T Corp.* (1998) 63 Cal. App. 4th 325, 338-39.)

Where a plaintiff claims to have been induced by a false representation to buy something, the "objectively measurable monetary loss" eligible for restitution is the "excess of what the plaintiff gave the defendant over the value of what the plaintiff received." (See *Cortez, supra*, 23 Cal. 4th at p. 174.) The return of such excess is "literally" restitution. (*Ibid.*)

In this case, Plaintiffs did not allege that they paid more than the actual value of the locksets as a result of the misleading "Made in USA" labels. Rather, they simply alleged that they paid for the locksets. As recognized by the Superior Court, those locksets had value. (3 Pet. Ex. 31 at 607.) Thus, Plaintiffs paid money but they received locksets with value in return. In the absence of an allegation that Plaintiffs paid more than the actual value of the locksets as a result of the "Made in USA" labels, Plaintiffs "received the benefit of their bargain and are not entitled to any restitution." (Typed Opn. p. 11.)

A contrary holding would not comport with the object of UCL/FAL restitution. First, the object of such restitution is to restore the status quo ante by placing the plaintiff in "the position in which [he or she] would have been were it not for the [defendant's] illegal conduct . . . ." (*See Cortez, supra,* 23 Cal. 4th at p. 171; see also *Colgan v. Leatherman Tool Group* (2006) 135 Cal. App. 4th 663, 700 [holding that "[t]he record . . . contains *no* evidence concerning the amount of restitution necessary to restore purchasers to the status quo ante"].) Here, if the entire amounts paid by the Plaintiffs for their locksets were eligible for restitution, Plaintiffs would be eligible to receive their purchase price back *and* keep the valuable

locksets they purchased. Such a result would not restore the status quo ante.

Second, if this Court were to hold that circumstances such as those alleged in this case make the entire purchase price eligible for restitution, then UCL and FAL actions would become "an all-purpose substitute" for tort actions, "*something the Legislature never intended.*" (*Korea Supply*, *supra,* 29 Cal. 4th at p. 1151, italics added.) "Given the UCL's . . . relaxed liability standards, were [this Court] to allow" plaintiffs under circumstances similar to those alleged in this case to keep the products they purchased *and* recover their purchase price too, "plaintiffs would have an incentive to recast claims under traditional tort theories as UCL violations." (*Ibid.*) For example, a plaintiff allegedly induced by a false representation to buy something would have a greater incentive to assert a UCL/FAL claim (because of the relaxed liability standards and the opportunity both to keep the product and recover his or her entire purchase price) than to assert a fraud or negligent misrepresentation claim with their more rigorous pleading requirements and their stricter liability and damages standards. As this Court has previously held, the Legislature did not intend UCL and FAL actions to become substitutes for traditional tort actions. (*Ibid.*)

In sum, the amounts that Plaintiffs paid for their locksets are not "eligible" for restitution under the facts alleged in the SAC. Accordingly, under the case law cited above, those amounts cannot constitute "lost money" under Proposition 64.

C. Plaintiffs' Construction Of The "Lost Money" Requirement Is Inconsistent With The Plain Language And Intent Of Proposition 64 And Would Lead To Anomalous Results

Plaintiffs argue that the "lost money" requirement imposed by

Proposition 64 is satisfied by a plaintiff simply alleging that he or she was induced by the misrepresentation to pay money for the product. (Pls.' Op. Br. at 15-16.) Such an interpretation is inconsistent with the plain language and intent of Proposition 64, fails to acknowledge the context in which the statutory language is used, and would lead to anomalous results.

In context, the phrase "lost money" does not mean "no longer in possession of" money. If it did have such a broad meaning, it would impermissibly "encompass[] every purchase or transaction where a person pays with money." (*Peterson*, *supra,* 164 Cal. App. 4th at p. 1592.) Instead, the phrase "lost money" means monetary losses of the type that are eligible for recovery by a person who has suffered such losses as the result of the unlawful act or omission of another. The ballot materials provided to the electorate directly support this interpretation. The argument in favor of the proposition stated that Proposition 64 "[p]rotects your right to file a lawsuit if you've been *damaged*." (Voter Information Guide, Gen. Elec., *supra*, argument in favor of Prop. 64, p. 40, italics added.) The word "damage" means "injury or harm that reduces value or usefulness" (Random House Webster's Unabridged Dict. (2d ed. 1998) p. 504), and "[l]oss or injury to person or property." (Black's Law Dictionary (8th ed. 2004) p. 416.) The rebuttal to the argument against the proposition stated that Proposition 64 "[p]rotects your right to file a lawsuit if you've been *harmed*." (Voter Information Guide, Gen. Elec., *supra*, rebuttal to argument against Prop. 64, p. 41, italics added.) The word "harm" means "to do or cause harm to; injure; damage; hurt" (Random House Webster's Unabridged Dict., *supra*, p. 873), and "[i]njury, loss, damage; material or tangible detriment." (Black's Law Dictionary, *supra*, p. 734.) The official summary of the proposition prepared by the Attorney General stated that Proposition 64 "[l]imits individual's right to sue by allowing private enforcement of unfair business competition laws only if the individual was

actually injured by, and *suffered financial/property loss* because of, an unfair business practice." (Voter Information Guide, Gen. Elec., *supra*, official title and summary, p. 38, italics added.) Thus, the "lost money" requirement of Proposition 64 requires a plaintiff to establish that he or she actually "lost money," not just "parted with" or "paid" money, as a result of the unfair competition or false advertising. As explained above (*ante*, at pp. 18 – 28), "paying" money as a result of false advertising is not necessarily the same as "losing" money as a result of false advertising.

Plaintiffs' argument that "to lose money is to be deprived of it" (Pls. Op. Br. at 16) fails to acknowledge the context in which the phrase "lost money" is used. Plaintiffs assert that they were "deprived of the money they paid for" Defendants' locksets. (*Ibid.*) But "paying money" and being "deprived of" money are not the same. To "pay" money means "to give over (a certain amount of money) in exchange for something." (Random House Webster's Unabridged Dict., *supra*, p. 1424.) A consumer does not "lose" money when he or she pays money for a gallon of milk at the grocery store. Instead, the consumer has exchanged money for milk of equivalent value. In this case, Plaintiffs exchanged their money for locksets of equivalent value. That exchange did not constitute a loss of money.

In any event, interpreting the "lost money" requirement to mean that the plaintiff must only have "paid" or "parted with" money in reliance on the misrepresentation would lead to anomalous results and encourage the very types of shakedown lawsuits that Proposition 64 was designed to stop. Underemployed attorneys will use such a relaxed standard to create business for themselves by searching for trivial or hypertechnical misstatements on which to predicate UCL and/or FAL class

actions.[14]

Consider the following example: A sporting goods retailer buys basketballs from two manufacturers, ABC Co. and XYZ Co. The retailer packages the basketballs in packaging it creates, and sells the basketballs to its consumer customers. The basketballs of both manufacturers are made to the specifications of the official game ball used by the National Basketball Association. The retailer sells both manufacturers' basketballs for $30. On one occasion during the packaging process, the retailer inadvertently places five hundred basketballs made by manufacturer ABC Co. into packaging on which there is the following representation: "Made to the Specifications of the Official Game Ball of the NBA by XYZ Co." (hereinafter, the Ball).

Customer Smith visits the sporting goods retailer intending to buy a basketball, and ultimately purchases the Ball for $30. The retailer sells all 500 mislabeled Balls to its customers without ever noticing the mislabeling.

After using the Ball hundreds of times without complaint for two years, Customer Smith "discovers" (with the help of his attorney) that the Ball he purchased was really manufactured by ABC Co., and not

---

[14] Once such statements are found, it would not be difficult to find plaintiffs who are willing to allege that they subjectively relied on the trivial misstatement, and that they would not have parted with their money if they had known the truth. This case presents a classic example of how easy it is to make such allegations. Here, plaintiff Benson testified both at his original deposition and at trial that he had never purchased a Kwikset lockset for himself and that he had been reimbursed for those few Kwikset locksets he purchased on behalf of others in his capacity as a handyman. (1 Pet. Ex. 2 at 59-60; 1 Pet. Ex. 3 at 108-111, 123-24, 131-32.) Despite his sworn testimony, in the SAC plaintiff Benson alleged for the first time (eight years after he commenced this action) that in reliance on the "Made in USA" labels he twice bought Kwikset locksets for himself, and that he was not reimbursed for those locksets. (3 Pet. Ex. 21 at 447-48.)

XYZ Co. In response to that discovery, Customer Smith brings a UCL and FAL action alleging that he relied on the "Made . . . by XYZ Co." misrepresentation and would not have purchased the Ball had he known the truth at the time of his purchase (i.e., that the Ball was really made by manufacturer ABC Co.). Customer Smith further alleges that he "lost" the $30 he paid for the Ball. Customer Smith makes no allegation that the Ball was not worth the $30 he paid for it. He makes no allegation that he paid a premium attributable to the "Made . . . by XYZ Co." representation. He makes no allegation that the Ball was not made to the specifications of the NBA's official game ball. He makes no allegation that the Ball he purchased was different in any respect from the basketballs manufactured by XYZ Co. He makes no allegation that the Ball failed to perform or function as expected. Nevertheless, Customer Smith seeks to certify a class of all purchasers of the Ball who may have been exposed to the "Made . . . by XYZ Co." representation, and prays for restitution and injunctive relief on behalf of himself and the proposed class, and attorney fees for his lawyers.

Although Defendants submit that most people would characterize such a lawsuit as frivolous and a waste of the court's limited time and resources, under Plaintiffs' construction of the "lost money" requirement, Customer Smith would have standing to prosecute such a frivolous class action. Customer Smith's alleged reliance on the "Made . . . by XYZ Co." representation, coupled with the allegation that he "paid" and "lost" the $30 he spent on the Ball, would alone be sufficient to satisfy Proposition 64's "lost money . . . as a result of" requirement. Under Plaintiffs' construction of the "lost money" requirement, it would not matter that Customer Smith received a basketball worth $30, or that the basketball was in fact made to the specifications of the official game ball of the NBA, or that Customer Smith used the Ball without any other

complaint for two years. Having satisfied Plaintiffs' "paid" money threshold, Customer Smith could then seek to represent a class of purchasers who may have been exposed to the "Made . . . by XYZ Co." representation but who did not rely on it in making their purchases. (*In re Tobacco II Cases* (2009) 46 Cal. 4th 298, 314-24.) Thus, under Plaintiffs' construction of the "lost money" requirement, a minor and unintentional misrepresentation, which causes no actual economic loss to the plaintiff, could lead to a full blown UCL/FAL class action simply because the plaintiff "paid" money in the transaction. Such a class action, as frivolous as it would be, would have "economic nuisance value," *Lockyer v. Brar* (2002) 115 Cal. App. 4th 1315, 1317, and could (and likely would) be used by unscrupulous and/or underemployed lawyers to extort settlement monies and attorney fees from defendants. Proposition 64 was enacted to stop such frivolous lawsuits.

Consider another example: A small California jewelry store chain displays for sale a total of 1,000 rings. The rings are advertised by the jeweler as "cubic zirconia" rings, and their advertised price is $50. Customer Jones enters one of the stores intending to buy a ring and ultimately purchases the advertised ring for $50. The chain sells all 1,000 rings within two months.

As it turns out, the rings advertised as "cubic zirconia" were actually "diamond" rings which had a market value of $500 each. Obviously, the jeweler's advertising was a mistake. Customer Jones (or more likely his attorney) learns of the inadvertent misrepresentation three years after his purchase. The result is that Customer Jones brings a UCL and FAL action alleging that (1) he would not have purchased the ring if he had known that the "cubic zirconia" advertisement was incorrect, and (2) he "lost" the money he "paid" for the ring. Customer Jones makes no allegation that the ring was not worth the $50 he paid for it. He makes no

allegation that the "diamond" ring is not as aesthically pleasing as a "cubic zirconia" ring. He makes no allegation that the "diamond" is of poor quality or of lesser quality than "cubic zirconia." He makes no allegation that the "diamond" caused him any actual monetary loss, damage or injury that he would not have suffered if the stone had been "cubic zirconia." Nevertheless, Customer Jones seeks to certify a class of all purchasers of the misrepresented ring, and prays for restitution, injunctive relief, and attorney fees. Again, under Plaintiffs' construction of the "lost money" requirement, Customer Jones would have standing to prosecute such a frivolous and wasteful class action because he "paid" money in alleged reliance on the "cubic zirconia" advertisement. But, did Customer Jones actually "lose" money? Of course not. Customer Jones paid $50 to the jeweler and received a "diamond" ring worth $500 in exchange. No monetary loss was sustained even though Customer Jones was induced by a false advertisement to buy the ring. If Proposition 64 is not construed to deny Customer Jones standing under such circumstances, then the proposition is meaningless.

If the last two examples are not sufficient to convince this Court that Plaintiffs' construction of the "lost money" requirement is incorrect, consider the following example based on two recent California cases. In *Medina, supra,* 164 Cal. App 4th 105 and *Peterson, supra,*164 Cal. App. 4th 1583, the plaintiffs bought insurance products from the defendants who were not licensed to sell such insurance. The plaintiffs asserted UCL actions predicated on the defendants' unlawful practice of selling insurance without a license to do so. The plaintiffs in each case "paid" for the insurance products. The court of appeal in those cases correctly affirmed the trial courts' dismissal of the actions on the ground that the plaintiffs had received valuable and enforceable insurance coverage for the money they "paid" and had not shown that they suffered a monetary

loss resulting from the defendants' unlicensed status.

But, should the results in *Medina* and *Peterson* be different if the plaintiffs had simply cast their claims as UCL/FAL misrepresentation claims by alleging that: (1) the defendant failed to disclose the material fact that it was not licensed to sell insurance, and (2) had plaintiffs known the truth they would not have purchased the insurance from the defendant?[15] Under Plaintiffs' construction of the "lost money" requirement, the answer would be "yes" because the *Medina* and *Peterson* plaintiffs would have "paid" money for a product in reliance on the allegedly deceptive material omission. Moreover, the *Medina* and *Peterson* plaintiffs would have the right to represent all others who purchased such insurance whether or not the defendants' license status would have impacted their decisions to buy the insurance. (*In re Tobacco II Cases*, *supra*, 46 Cal. 4th at pp. 314-24.) Such a result would be absurd, however, because the *Medina* and *Peterson* plaintiffs clearly did not "lose" the money they paid for the insurance.

In sum, Plaintiffs' construction of the "lost money" requirement is inconsistent with the plain language and intent of Proposition 64, and would lead to anomalous results.

---

[15] A failure to disclose a material fact will support a UCL and FAL action. (*Massachusetts Mutual Life Ins. Co. v. Superior Court* (2002) 97 Cal. App. 4th 1282, 1291 [holding that the trier of fact could find that the defendant's failure to disclose a particular fact about its insurance product "would have been important to prospective" purchasers and that the failure to disclose the fact "was misleading" in violation of the UCL], and *People v. Toomey* (1984) 157 Cal. App. 3d 1, 17 [holding that the defendant's failure to disclose certain facts "misrepresented the nature and value of the product and therefore in itself constituted 'unfair competition' and 'false or misleading statements' under *sections 17200* and *17500*"].)

D. The Court Of Appeal's Construction Of The "Lost Money" Requirement Does Not Undermine The UCL's And FAL's Purpose Of Protecting Consumers

The Court of Appeal in this case simply held that the "lost money" requirement imposed by Proposition 64 requires a plaintiff to plead an actual economic injury. (Typed Opn. pp. 9-13.) Plaintiffs assert that the Court of Appeal's construction of the "lost money" requirement "would eviscerate California's vital consumer protections in the UCL and FAL" and "largely write private enforcement out of these laws, especially with respect to false advertising actions . . . ." (Pls.' Op. Br. at 28.) That assertion lacks merit.

Requiring a UCL/FAL plaintiff to prove an actual monetary or property loss resulting from the false advertising will not undermine consumer protections in the UCL and FAL. Consumers who have actually suffered such a loss as a result of the false advertising will not only be permitted to prosecute UCL and FAL actions, they will also have an opportunity to seek restitutionary and injunctive relief on behalf of a class of consumers who *may not* have even been actually influenced by the false advertising. (*In re Tobacco II Cases*, *supra*, 46 Cal 4th 298.)

Consumers who cannot establish a traditional monetary or property loss resulting from the false advertising will still have access to the Consumer Legal Remedies Act (CLRA) (Civ. Code § 1750 et seq.). The CLRA makes unlawful certain unfair methods of competition and unfair and deceptive acts or practices employed in consumer transactions. (Civ. Code § 1770.) In order to have standing to prosecute an action under the CLRA, a consumer need only establish that he or she suffered "any damage" as a result of the use or employment of an act declared unlawful by the CLRA. (Civ. Code § 1780(a).) Under the CLRA, "any damage" "may encompass harms other than pecuniary damages, such as certain types

of transaction costs and opportunity costs." (*Meyer v. Sprint Spectrum L.P.* (2009) 45 Cal. 4th 634, 640, fn. omitted.)

Finally, in those instances where no loss or damage results from the alleged false advertising, public prosecutors have the right to bring UCL and FAL actions "without the need to allege and prove the standing requirements for private plaintiffs." (Typed Opn. p. 13.)

E. Proposition 64 Was Intended To Stop Proposed Class Actions, Like This One, Where The Only Potential Beneficiaries Are The Plaintiffs' Attorneys

One of the purposes of Proposition 64 is to stop attorney-driven UCL/FAL lawsuits where the plaintiff has not suffered a monetary or property loss as a result of the alleged prohibited conduct, and the only likely beneficiary of the litigation is the plaintiff's attorney. The instant action is just such a lawsuit.

In January of 2000, plaintiff Benson filed this action as an uninjured private Attorney General on behalf of the general public. Plaintiff Benson made no allegations in his original complaint that he had ever bought any of Defendants' locksets for himself or that he had suffered any monetary loss as a result of the "Made in USA" labeling on any of Defendants' locksets. Plaintiff Benson confirmed that he was personally unaffected and uninjured by the "Made in USA" labels in his original deposition and trial testimony given in 2001. (1 Pet. Ex. 2 at 59-60; 1 Pet. Ex. 3 at 108-111, 123-24, 131-32, 139-41.)

After plaintiff Benson's original complaint was filed, and out of an abundance of caution, Defendants took immediate action to remove the "Made in USA" labeling from all of their locksets. The Superior Court found that Defendants "ceased all use of the USA designation on all of their locksets" by April of 2000, less than four months after the complaint was filed. (3 Pet. Ex. 26 at 529.) That same year, Defendants entered into a

consent order with the Federal Trade Commission which precludes Defendants from representing its locksets as "Made in USA" unless "'all, or virtually all, of the component parts of such product are made in the United States and all, or virtually all, of the manufacturing of such product is performed in the United States.'" (*Benson v. Kwikset Corporation, supra,* 152 Cal. App. 4th at p. 1265.) Because the mislabeling issue was minor, "[t]he Consent Order also permitted Defendants to sell off their existing ['Made in USA' labeled] inventory in the ordinary course of business provided that no inventory violating the Order could be shipped after November 1, 2000." (3 Pet. Ex. 26 at 530.)

Despite Defendants' immediate corrective actions, plaintiff Benson and his counsel continued to prosecute the case. That continued prosecution resulted in no monetary relief to purchasers of the mislabeled locksets, and injunctive relief that would provide no benefit to Plaintiffs or the class of past purchasers they seek to represent. As explained by Presiding Justice Sills in his original dissent, the only persons who would receive any benefit from this litigation if Plaintiffs established their standing are Plaintiffs' attorneys:

> . . . [E]ven if today's result were correct as a matter of statutory interpretation, the award of attorneys' fees was clearly grossly disproportionate to what has been accomplished by the litigation.
>
> There has been no injury. No breach of contract. No one got hurt. The only money to change hands is the multimillion dollar windfall to the attorneys who brought this action if today's decision is allowed to stand.
>
> And what has been accomplished by this litigation other than the enrichment of the plaintiffs' attorneys? *The only real results are negative, and especially negative to American*

> *workers.* If today's decision stands, no firm may dare to advertise "made in USA" on its products, even if entirely assembled or "transformed" in the United States by American workers . . . .

(*Benson v. Kwikset Corporation*, *supra,* 126 Cal. App. 4th at pp. 932-33 (dis. opn. of Sills, P.J.), review granted April 27, 2005.)

Presiding Justice Sills' identification of the Plaintiffs' attorneys as the only potential beneficiaries of this litigation reflects reality. Restitution for past purchasers of Defendants' locksets (i.e., Plaintiffs and the proposed class members) was expressly denied by the Superior Court. (Pet. Ex. 10 at 275.) Moreover, because Plaintiffs and the proposed class of past purchasers purchased their locksets between 1996 and 2000, the original judgment's prohibitory and mandatory injunctions would provide them with no relief.[16] In sum, the best result that Plaintiffs could achieve is a judgment that would (1) provide them and the proposed class of past purchasers with no relief or benefit, and (2) award Plaintiffs' attorneys $2.9 million in fees. While Plaintiffs and the proposed class members have *no beneficial interest* in a lawsuit seeking such a result, Plaintiffs' attorneys obviously do have such an interest.

Where, as here, "the individual's interests are no longer served by group action, the principal – if not the sole – beneficiary then becomes the class action attorney." (*Blue Chip Stamps v. Superior Court*

---

[16] The original judgment's injunctive relief would also provide no relief to non-class members. The prohibitory injunction would provide no relief because Defendants stopped selling "Made in USA" labeled products in 2000. The mandatory injunction would provide no relief because Defendants' retailers and distributors no longer possess "Made in USA" labeled products in their inventory. The mandatory injunction was issued in 2002 only because there remained "a few" "Made in USA" labeled locksets on retailers' shelves at that time. (3 Pet. Ex. 26 at 530.) Over seven years have passed since that injunction was issued.

(1976) 18 Cal. 3d 381, 386.) To allow class counsel to become the principal beneficiary of the class action "is 'to sacrifice the goal for the going,' burdening if not abusing our crowded courts with actions lacking proper purpose." (*Ibid.*) It is a misuse of the class action device to permit a proposed class action to proceed where the benefits to the class members will be "nominal and symbolic" and the "chief beneficiaries" of the action will be class counsel. (See *Howard Gunty Profit Sharing Plan v. Superior Court* (2001) 88 Cal. App. 4th 572, 579, citing *Deposit Guaranty Nat. Bank v. Roper* (1980) 445 U.S. 326, 339; see also 2 Newberg On Class Actions (4th ed. 2002) §4:36, p. 310 ["Many courts and commentators have concluded that a class action is not . . . superior when class members will receive no real benefit from a favorable judgment"].)

Proposition 64 was designed to stop UCL/FAL cases like this one where the plaintiffs are not financially harmed by the defendant's conduct, the plaintiffs and the class members stand to receive nominal or no relief from the defendant, and the plaintiffs' lawyers stand to become the "chief" beneficiaries of the litigation. Presiding Justice Sills expressed this view in his original dissent:

> . . . Cases like this one are, in my opinion, precisely the sort of abuse that Proposition 64 was crafted to halt (except in this case the plaintiff is represented by a respectable law firm rather than the infamous Trevor Law Group). My position is that the unfair competition laws are good laws, but that the judiciary must apply those laws with a certain amount of common sense. Well, be that as it may, the passage of Proposition 64 by a large margin only confirms that the electorate was indeed fed up with the abuses of the unfair business practices laws, of which plaintiff's case is a prime example.

(*Benson v. Kwikset Corporation., supra,* 126 Cal. App. 4th at p. 927 (dis.

opn. of Sills, P.J.), review granted April 27, 2005.)

In sum, contrary to Plaintiffs' assertions, this is not a case of mass consumer fraud. Defendants did not intend to mislead consumers. Consumers were not financially or physically harmed by purchasing the mislabeled locksets. The Superior Court refused to award restitution to past purchasers of Defendants' locksets because the "Made in USA" labels, "even to those for whom the 'Made in USA' designation is an extremely important consideration, were not so deceptive or false" as to warrant such relief, especially since the locksets were used "without other complaint." (3 Pet. Ex. 26 at 531.) There was no finding (or even an allegation) that the "Made in USA" labeled locksets differed in any physical, functional, operational, aesthetic, or price respect from a lockset that would have qualified for a "Made in USA" label. This case is about the $2.9 million attorney fees award. If Proposition 64 is not construed to stop a proposed class action lawsuit where the named plaintiffs suffered no monetary or property loss as a result of the misleading advertising, and the only relief that can be granted is a multimillion dollar award to the plaintiffs' attorneys, then Proposition 64 is hollow.

II. The Court Of Appeal Did Not Abuse Its Discretion By Denying Plaintiffs Yet Another Opportunity To Attempt To Amend Their Complaint

The Court of Appeal did not abuse its discretion in denying Plaintiffs another opportunity to amend their complaint.

On June 29, 2007, in light of this Court's holding in *Californians For Disability Rights v. Mervyn's, LLC* (2006) 39 Cal. 4th 223, the Court of Appeal vacated the original judgment in favor of plaintiff Benson on the ground that Proposition 64 revoked his standing. However, in accordance with this Court's directions and its decision in *Branick v. Downey Savings & Loan Assn.* (2006) 39 Cal. 4th 235, the Court of Appeal

remanded this case to the Superior Court "with directions to afford plaintiff an opportunity to move for leave to file an amended complaint that alleges facts establishing the standing and representative action requirements for unfair competition law and false advertising law claims as implemented by Proposition 64." (*Benson v. Kwikset Corporation, supra,* 152 Cal. App. 4th at p. 1284.) The Court of Appeal also directed the Superior Court to either (1) reimpose the original judgment if plaintiff pled and proved his standing under Proposition 64, or (2) dismiss this action "[i]f plaintiff fails to plead or prove his right to maintain this lawsuit" under Proposition 64. (*Ibid.*) Thus, Plaintiffs were aware that a failure to allege facts supporting their standing would result in a dismissal of the action.

On remand, Plaintiffs were permitted to file first and second amended complaints in an effort to adequately allege their standing under Proposition 64. (1 Pet. Ex. 9, 3 Pet. Ex. 25.) After determining that Plaintiffs had failed to satisfy the "lost money" requirement of Proposition 64, the Court of Appeal denied Plaintiffs' request for leave to amend their complaint yet again for several reasons.

First, the Court of Appeal found that many published cases were available "to inform [Plaintiffs] what factual allegations were necessary" to support their standing, and that Plaintiffs "were on notice that merely alleging they purchased [Defendants'] locksets in reliance on the products' false labels would not suffice to establish standing."[17] (Typed Opn. p. 14.)

Second, the Court of Appeal found that although Plaintiffs asserted in their Return that there existed evidentiary support for their

---

[17] In their motion for leave to file their SAC, Plaintiffs conceded that several cases had been decided by the courts of appeal "further elucidating the Proposition 64 requirements" for standing. (3 Pet. Ex. 21 at 429 ll. 3–4, 12–14.)

proposed amendments (Return at 43), Plaintiffs "fail[ed] to provide any citation to the record or present any documentation to support" that assertion.[18] (Typed Opn. p. 14.)

Third, the Court of Appeal found that the trial record failed to support Plaintiffs' proposed amendments. (*Ibid.*) As an example, the Court of Appeal noted that although plaintiff Benson alleged in the SAC that he bought Defendants' locksets for himself and was not reimbursed, his sworn pre-trial and trial testimony reflected that he had been reimbursed by his clients for those lockset purchases. (*Ibid.*)

Fourth, the Court of Appeal found that Plaintiffs' theory that they could allege a monetary loss eligible for restitution was unsustainable in that the Superior Court had already denied restitutionary relief because Plaintiffs and consumers had used Defendants' locksets "'without other complaint.'" (*Id.* at pp. 14-15, quoting Statement of Decision.)

In light of these factors, the Court of Appeal concluded that

---

[18] On March 13, 2009, Plaintiffs filed a petition for rehearing seeking to convince the Court of Appeal to give them leave to amend their complaint yet again. Filed concurrently with the petition for rehearing was a motion for judicial notice wherein Plaintiffs requested the Court of Appeal take judicial notice of purported evidence and documents that Plaintiffs claimed supported their proposed amendments to the complaint. On March 18, 2009, the Court of Appeal denied Plaintiffs' petition for rehearing stating that the petition "is supported by evidence not submitted to the trial court and *not contained in the appendix to the petition*," and that the "court cannot consider evidence called to its attention for the first time after determination of the appeal." (Italics added.) The appropriate time for Plaintiffs to have made their request for judicial notice was at the time they filed their Return. The Return is the document in which Plaintiffs requested leave to amend and in which Plaintiffs made their arguments as to why they should be afforded leave to amend. The Court of Appeal did not err by not considering the purported additional facts set forth in Plaintiffs' request for judicial notice. (See *Reynolds v. Bement* (2005) 36 Cal. 4th 1075, 1092 [rejecting as untimely plaintiff's effort to obtain leave to amend his complaint by presenting for the first time in a petition for rehearing additional facts that could have been alleged in the complaint].)

Plaintiffs had "failed to show a reasonable possibility they could *truthfully* amend the complaint to allege facts establishing their standing to maintain this action." (*Id.* at p. 15, italics added.)

Plaintiffs had the burden of showing that they could actually amend their SAC to state facts that support their standing. "'[T]he burden is on the plaintiff to show in what manner he or she can amend the complaint, and how that amendment will change the legal effect of the pleading.'" (*Medina, supra,* 164 Cal. App 4th at p. 112 fn. 8, quoting Weil & Brown, Cal. Practice Guide: Civil Procedure Before Trial (The Rutter Group 1983) ¶ 7:130, p. 7-50 (rev.#1, 2007).) Plaintiffs suggested to the Court of Appeal that they "could" allege whatever facts were necessary to cure whatever pleading deficiency the Court of Appeal might find with respect to Plaintiffs' SAC. For example, Plaintiffs asserted that they "could amend the complaint" to allege *either*: (1) "there were other alternative lockset products available to plaintiffs, many of which were lower priced than the misrepresented Kwikset locksets they purchased," *or* (2) "the value of Kwikset's locksets was less than what plaintiffs paid for them," *or* (3) "the value of Kwikset's locksets was less than . . . the value of the locksets as represented." (Return at 42–43.) Plaintiffs were treating pleading like a game of darts; they were throwing proposed allegations at the Court of Appeal and hoping one of them hit the Court of Appeal's bulls-eye. But, pleading is not a game. California has a rule of truthful pleading. "It is a rule against false statements of fact, or concealment of the truth . . . ." (4 Witkin, Cal. Procedure (5th ed. 2008) Pleading, §397, pp. 535-36.) Plaintiffs failed to show "'in what manner [they] *can* amend the complaint, and *how* that amendment will change the legal effect of the pleading.'" (*Medina, supra,* 164 Cal. App 4th at p. 112 fn. 8.) *"'It is not up to [the Court of Appeal] to figure out [for Plaintiffs] how [Plaintiffs'] complaint can be amended to state a cause of action.'"* (*Ibid.*)

In sum, Plaintiffs failed to show that they could, in fact, amend their SAC to state truthful facts establishing that they lost money as a result of the "Made in USA" labels on the locksets they purchased. Accordingly, the Court of Appeal did not abuse its discretion by denying Plaintiffs' request for yet another opportunity to attempt to amend their complaint.

CONCLUSION

For all of the foregoing reasons, the judgment of the Court of Appeal should be affirmed.

Dated: October 7, 2009

JONES, BELL, ABBOTT, FLEMING & FITZGERALD L.L.P.
Michael J. Abbott
Fredrick A. Rafeedie
William M. Turner

By: Fredrick A. Rafeedie
FREDRICK A. RAFEEDIE
Attorneys for Petitioners and Answering Parties Kwikset Corporation and The Black & Decker Corporation

CERTIFICATE OF COMPLIANCE

Pursuant to California Rule of Court 8.504(d), and in reliance upon the word count feature of the software used, I certify that the attached **ANSWER BRIEF ON THE MERITS** contains 13,826 words, exclusive of those materials not required to be counted under Rule 8.504(d).

Dated: October 7, 2009

JONES, BELL, ABBOTT, FLEMING & FITZGERALD L.L.P.
Michael J. Abbott
Fredrick A. Rafeedie
William M. Turner

By: Fredrick A. Rafeedie
FREDRICK A. RAFEEDIE
Attorneys for Petitioners and Answering Parties Kwikset Corporation and The Black & Decker Corporation

LEXSEE 11 P 3D 630

BRIAN WALLS, et al., Plaintiffs v. THE AMERICAN TOBACCO COMPANY, et al., Defendants

No. 92,324

SUPREME COURT OF OKLAHOMA

2000 OK 66; 11 P.3d 626; 2000 Okla. LEXIS 67

September 19, 2000, Filed

PRIOR HISTORY: [***1] CERTIFIED QUESTIONS OF LAW FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA, SVEN ERIK HOLMES, UNITED STATES DISTRICT JUDGE.

DISPOSITION: CERTIFIED QUESTIONS ANSWERED.

SYLLABUS

[*0] The United States District Court for the Northern District of Oklahoma certified four questions to this Court pursuant to *20 O.S.1991, § 1602*. The questions certified are (1) whether a party may bring an action under the Oklahoma Consumer Protection Act as an aggrieved consumer solely as the result of payment of the purchase price for the product; (2) whether an individual consumer may seek to recover a civil penalty of not more than $ 10,000 per violation of the Oklahoma Consumer Protection Act; (3) whether an individual consumer action under the Oklahoma Consumer Protection Act is limited to conduct that occurred since 1988; and (4) whether a consumer class action for violations of the Oklahoma Consumer Protection Act would preclude class members from later bringing separate tort or contract actions.

COUNSEL: Derek S. Casey, HUTTON & HUTTON, Wichita, Kansas for plaintiffs.

Richard C. Ford, Leanne Burnett, Victor E. Morgan, CROWE & DUNLEVY, Oklahoma City, Oklahoma for defendants.

JUDGES: WINCHESTER, [***2] J. SUMMERS, C.J.; HARGRAVE, V.C.J.; HODGES, LAVENDER, KAUGER, WATT, BOUDREAU, WINCHESTER, JJ. - concur.

OPINION BY: WINCHESTER

OPINION

[627] WINCHESTER, J.**

[*1] The United States District Court for the Northern District of Oklahoma has before it the question of whether it should certify a class of cigarette smokers in a case against six current or former manufacturers of cigarettes and the Council for Tobacco Research. The Federal Court has determined that there are certain unresolved questions of Oklahoma law that may be determinative. The Court has certified the following questions of law to this Court pursuant to *20 O.S. 1991, § 1601 et seq.*:

> "1. Assuming *arguendo* that a product was sold in violation of other provisions of the Oklahoma Consumer Protection Act ("OCPA"), may a party bring an action as an "aggrieved consumer" under 15 O.S. § 761.1A solely as a result of his or her payment of the purchase price for that product?
>
> "2. May an individual person bring a claim for liability under 15 O.S. § 761.1C against an entity based on a violation of the OCPA?
>
> "3. If an action is brought under either or both 15 O.S. § 761.1A or 15 O.S. §

761.1C, is that [***3] action limited to conduct that occurred since 1988?

"4. If the answer to question 1 is yes, if a class is certified under the OCPA consisting of all persons who have purchased such an OCPA violating product in Oklahoma solely on the basis of the purchase price, will the members of such class be precluded from bringing any separate actions sounding either in tort or contract by virtue of any Oklahoma law prohibiting split causes of action?"

[*2] For the reasons discussed below, our answer to questions 1 and 2 is no, and our answer to question 3 is yes. Because the answer to question 1 is no, we do not reach question 4.

I. THE PERTINENT AMENDMENTS TO THE OCPA.

[*3] The OCPA was first enacted in 1972. The title of the OCPA expressly vested authority in the Attorney General for enforcement of the OCPA. The Attorney General was authorized to bring actions to restrain the unlawful practices enumerated in the OCPA. 1972 Okla.Sess.Laws, ch. 227, § 5, codified in title 15, § 755. The OCPA also [**628] provided for civil penalties. Pursuant to the original civil penalty provision, 1972 Okla.Sess.Laws, ch. 227, § 11, codified at § 761 of title 15, the legislature authorized [***4] the Attorney General to recover a civil penalty of not more than $ 5,000.00 per violation from any person who violated the terms of a permanent injunction.

[*4] The first relevant amendment to the OCPA occurred in 1980. See 1980 Okla.Sess.Laws, ch. 192 § 4, codified at title 15, *§ 761.1*. The 1980 amendment provided in pertinent part:

"A. The commission of any act or practice declared to be a violation of the Consumer Protection Act shall render the violator liable to the aggrieved consumer for the payment of actual damages sustained by the customer and costs of litigation including reasonable attorney's fees.

"B. The commission of any act or practice declared to be a violation of the Consumer Protection Act, if such act or practice is also found to be unconscionable, shall render the violator liable to the aggrieved customer for the payment of a civil penalty, recoverable in an individual action only, in a sum set by the court of not more than Two Thousand Dollars ($ 2,000) for each violation. . . .

[**629] "C. Any person who wilfully violates the terms of any injunction or court order issued pursuant to the Consumer Protection Act shall forfeit and pay a civil penalty of [***5] not more than Ten Thousand Dollars ($ 10,000.00) per violation, in addition to other penalties that may be imposed by the court, as the court shall deem necessary and proper. For the purposes of this section, the district court issuing an injunction shall retain jurisdiction, and in such cases, the Attorney General, acting in the name of the state, or a district attorney may petition for recovery of civil penalties.

"D. In administering and pursuing actions under this act, the Attorney General and a district attorney are authorized to sue for and collect reasonable expenses and investigation fees as determined by the court. Civil penalties or contempt penalties sued for and recovered by the Attorney General or a district attorney shall be used in furtherance of their duties and activities under the Consumer Protection Act."

[*5] The above quoted section is the one which was examined by this Court in *Holbert v. Echeverria, 1987 OK 99, 744 P.2d 960*. In *Holbert*, this Court held that a private individual was not authorized to prosecute a consumer protection claim, and that the power to seek redress for violations of the OCPA was expressly conferred upon the [***6] Attorney General or a district attorney. *Holbert, 1987 OK 99, P15, 744 P.2d at 965*.

[*6] After the *Holbert* decision, the legislature amended *§ 761.1(A)* to expressly provide a private right of action to an aggrieved consumer. *Section 761.1(C)* was left undisturbed. 1988 Okla.Sess.Laws, ch.161, § 2. The 1988 amendment to *§ 761.1(A)*, with the additions underlined, provided:

"A. The commission of any act or practice declared to be a violation of the Consumer Protection Act shall render the violator liable to the aggrieved consumer for the payment of actual damages sustained by the customer and costs of litigation including reasonable attorney's fees,

> and the aggrieved consumer shall have a private right of action for damages, including but not limited to, costs and attorney's fees. In any private action for damages for a violation of the Consumer Protection Act the court shall, subsequent to adjudication on the merits and upon motion of the prevailing party, determine whether a claim or defense asserted in the action by a nonprevailing party was asserted in bad faith, was not well grounded in fact, or was unwarranted by existing law or a good faith [***7] argument for the extension, modification, or reversal of existing law. Upon so finding, the court shall enter a judgment ordering such nonprevailing party to reimburse the prevailing party an amount not to exceed Ten Thousand Dollars ($ 10,000) for reasonable costs, including attorney's fees, incurred with respect to such claim or defense."

[*7] The next pertinent amendment to *§ 761.1* occurred in 1994. 1994 Okla.Sess.Laws, ch.235, § 4. The 1994 amendment added a phrase, which is underlined, to *§ 761.1(C)*:

> "C. Any person who is found to be in violation of the Oklahoma Consumer Protection Act in a civil action or who willfully violates the terms of any injunction or court order issued pursuant to the Consumer Protection Act shall forfeit and pay a civil penalty of not more than Ten Thousand Dollars ($ 10,000.00) per violation, in addition to other penalties that may be imposed by the court, as the court shall deem necessary and proper. For the purposes of this section, the district court issuing an injunction shall retain jurisdiction, and in such cases, the Attorney General, acting in the name of the state, or a district attorney may petition for recovery of [***8] civil penalties."

[*8] *Section 761.1* has not changed, in the parts pertinent to the present inquiry, since the 1994 amendment (minor amendments to other subsections of *§ 761.1* occurred in 1997, 1998 and 1999). Thus *§ 761.1(A)* is currently identical to the subsection as amended in 1988, and *§ 761.1(C)* is identical to the subsection as amended in 1994.

II. ASSUMING ARGUENDO THAT A PRODUCT WAS SOLD IN VIOLATION OF OTHER PROVISIONS OF THE OCPA, A PARTY MAY NOT BRING AN ACTION AS AN "AGGRIEVED CONSUMER" UNDER *§ 761.1(A)* SOLELY AS A RESULT OF HIS OR HER PAYMENT OF THE PURCHASE PRICE FOR THAT PRODUCT.

[*9] The first certified question asks if a party may sue as an aggrieved consumer pursuant to *§ 761.1(A)* solely as a result of paying the purchase price for a product. The plaintiffs argue that the consumer need not prove actual damages. Subsection A specifically states that an act or practice declared to be a violation of the OCPA renders the violator liable to the aggrieved consumer for the payment of actual damages. The 1988 amendment in response to *Holbert* added that the aggrieved consumer shall have a private right of action for damages. *Title 23 O.S.1991,* [***9] *§ 61* provides: "For the breach of an obligation not arising from contract, the measure of damages, except where otherwise expressly provided by this chapter, is the amount which will compensate for all detriment proximately caused thereby, whether it could have been anticipated or not."

[*10] The plaintiffs' argue that being an aggrieved consumer merely requires proof that a plaintiff was the consumer in an unlawful transaction. But 761.1(A) plainly states otherwise. That subsection confers upon an "aggrieved consumer" a private right of action for damages. Actual damages are a necessary element of a claim under this subsection. In *Whitlock v. Bob Moore Cadillac, Inc., 1997 OK 56, 938 P.2d 737*, the plaintiff sued for damages based on fraud and violation of the OCPA. The trial court granted summary judgment to the defendant. In affirming, we observed that the record revealed that the plaintiffs had incurred no monetary damages and had received precisely what they had bargained for. *Whitlock, 1997 OK 56, P3, 938 P.2d at 738.*

[*11] Even the term "aggrieved consumer" implies that the consumer must have suffered some detriment caused by a violation [***10] of the OCPA. The consumer must have suffered some detriment to successfully pursue a private right of action under *§ 761.1(A)*. We have defined "aggrieved party," for the purpose of appellate standing, as one whose pecuniary interest in the subject matter is directly and injuriously affected, or one whose right in property is either established or divested by the decision from which the appeal is prosecuted. *Cleary Petroleum Corp. v. Harrison, 1980 OK 188 P4, 621 P.2d 528, 530.* We have also held that an aggrieved party must have a personal stake in the litigation because of an actual or threatened distinct in-

jury which has a causal connection between the alleged wrong and the actions challenged. *Turley v. Flag-Redfern Oil Co., 1989 OK 144 P12, 782 P.2d 130, 135..*

[*12] Although the parties have cited many cases from other states, these cases are not particularly helpful in interpreting *§ 761.1* because other states' consumer protection acts contain very different language. [1] However, **[**630]** the Kansas Consumer Protection Act, like *§ 761.1(A)*, permits a consumer who is aggrieved by a violation of the Act to recover actual damages. *K.S.A. 50-636 (b).* **[***11]** In *Finstad v. Washburn University of Topeka, 252 Kan. 465, 845 P.2d 685 (1993)*, the Kansas Supreme Court determined that the use of the term "aggrieved consumer" in the Kansas Act meant that a consumer must show loss or injury resulting from a violation of the Act.

1 A list(including citations and summaries) of other states' consumer protection statutes can be found in Appendix A to *Unfair and Deceptive Acts and Practices*, 4th ed., published by the National Consumer Law Center.

[*13] Therefore, to have a private right of action under *§ 761.1(A)*, a consumer must suffer some detriment or loss as a result of a violation of the OCPA. Accordingly, a person may not bring an action as an aggrieved consumer under *§ 761.1(A)* solely as a result of his or her payment of the purchase price for that product. An essential element of a claim under *§ 761.1(A)* is actual injury or damage caused by a violation of the OCPA.

III. AN INDIVIDUAL MAY NOT SEEK A PENALTY UNDER § 761.1C AGAINST AN ENTITY [*12] BASED ON A VIOLATION OF THE OCPA.**

[*14] *Section 761.1(C)* expressly permits the Attorney General, acting in the name of the state, or a district attorney, to petition the district court for the recovery of civil penalties of not more than $ 10,000 per violation of the OCPA. The plaintiffs in the present case contend that *§ 761.1(C)* also permits an aggrieved consumer to recover this penalty because the authority to recover a civil penalty arises out of the defendants' wrongful acts, and not the status of the prosecuting party. To support this argument, the plaintiffs cite cases from other states. However, the consumer protection acts of many other states expressly permit a consumer to sue to recover a civil penalty. *Section 761.1(C)* contains no such express permission.

[*15] Additionally, such a private right of action to recover a civil penalty under *§ 761.1(C)* cannot be implied. As discussed in Section I of this opinion, in *Holbert, 1987 OK 99, P15, 744 P.2d at 965*, we held that a consumer does not have a private right of action under the OCPA, and that as a result, the legislature amended *§ 761.1(A)* after the *Holbert* opinion to confer such a **[***13]** private right of action. Significantly, the legislature did not amend *§ 761.1(C)* at that time.

[*16] When we examined *§ 761.1(C)* in *Holbert*, the civil penalty could only be sought by the Attorney General or a district attorney after an OCPA defendant violated an injunction or a court order that had been issued previously. [2] That is the reason *section 761.1(C)* provides that the district court issuing an injunction shall retain jurisdiction. Since *Holbert*, *§ 761.1(C)* was amended (in 1994) to permit the civil penalty to be assessed against a person who is found to be in violation of the OCPA in a civil action. The plain meaning of this amendment is that the civil penalty may now be assessed in an action brought by the Attorney General or a district attorney upon the showing of a violation of the OCPA, even though the person has not violated a previously issued court order. There is still nothing in *§ 761.1(C)* which would imply that an aggrieved consumer can seek the imposition of the civil penalty provided for in this subsection.

2 *Title 15 O.S. § 756.1(2)* permits the Attorney General or a district attorney to bring an action to obtain an injunction.

[*14]** **[*17]** Additionally, any construction of *§ 761.1(C)* which would find that a consumer could bring an action under this subsection to impose a civil penalty would be contrary to its express language. The last sentence of *§ 761.1(C)* provides "for the purposes of this section, the district court issuing an injunction shall retain jurisdiction, and in such cases, the Attorney General, acting in the name of the state, or a district attorney may petition for the recovery of civil penalties."

[*18] Further, legislative intent must be ascertained from the whole section. *Comer v. Preferred Risk Mut. Ins. Co., 1999 OK 86, P18, 991 P.2d 1006, 1013-1014. Section 761.1(B)* permits a consumer to recover a civil penalty of $ 2000, in addition to damages, if the actions of the defendant are found to be unconscionable. Therefore, the **[**631]** legislature has provided for civil penalties in a consumer case in this subsection. Also, *section 761.1(D)* provides that civil penalties recovered by state officials shall be used in furtherance of their duties and activities under the OCPA. Thus, the legislature expressly stated that civil penalties should be collected by the state to be used **[***15]** in further enforcement activities.

[*19] Language similar to the last sentence of *§ 761.1(C)* in the Washington consumer protection statute (*RCW 19.86.140*) has been construed by Washington

courts to mean that the state can be the only recipient of a civil penalty. See *Stigall v. Courtesy Chevrolet-Pontiac, Inc., 15 Wn. App. 739, 551 P.2d 763* and *Aungst v. Roberts Construction Co., Inc., 95 Wn.2d 439, 625 P.2d 167 (1981).*

[*20] Accordingly, an individual person may not seek a civil penalty under *§ 761.1(C).*

IV. A PRIVATE RIGHT OF ACTION UNDER *§ 761.1(A)* OF THE OCPA IS LIMITED TO CONDUCT THAT OCCURRED SINCE THE EFFECTIVE DATE OF THE 1988 AMENDMENT.

[*21] Since there is no private right of action under *§ 761.1(C)*, the issue raised by the third question presented is whether the 1988 amendment to *§ 761.1(A)* operated prospectively or retrospectively. Statutes are generally presumed to be prospective in application. This presumption is rebutted when there is legislative intent that is expressly declared or necessarily implied from the language used. Doubt must be resolved against retrospective application. *Fraternal Order of Police v. Choctaw, 1996 OK 78 P40, 933 P.2d 261, 271.* **[***16]**

[*22] The plaintiffs argue that because the legislature amended *§ 761.1(A)* in the next legislative session following the *Holbert* case, that fact is sufficient to show that the legislature always intended that consumers should have a private right of action. Thus, plaintiffs contend, the legislature intended the amendment to operate retrospectively. However, the timing of the amendment, with no other indication of legislative intent, is not sufficient to remove doubt. In the case of *In re Bomgardner, 1985 OK 59, 711 P.2d 92*, we examined a series of legislative responses to our opinions on the scope of grandparental visitation and found that legislative intent to make the changes retrospective could be implied from the purpose of the statute.

[*23] The 1988 amendment to *§ 761.1(A)* does not expressly declare that the amendment shall operate retrospectively. Further, there is nothing in the language used in the amendment which would necessarily imply a legislative intent that the amendment was to operate retrospectively. We carefully examined the history of the OCPA in *Holbert*, and found that the legislature did not intend that there be a private **[***17]** right of action. Thus, the argument that a private right of action was always intended is contrary to our decision in *Holbert*.

[*24] Additionally, statutes that effect changes in substantive rights are presumed to operate prospectively. *Fraternal Order of Police, 1996 OK 78 P40, 933 P.2d at 271, Majors v. Good, 1992 OK 76 P12, 832 P.2d 420, 422.* On the other hand, statutes affecting procedure only may be applied retroactively. A procedural change is one that affects the remedy only, and not the right. *Trinity Broadcasting Corp. v. Leeco Oil Co. 1984 OK 80 P9, 692 P.2d 1364, 1366-67.* The 1988 amendment to *§ 761.1(A)*, which changed the OCPA to permit a private right of action where there was none before, is a substantive change.

[*25] In *Thomas v. Cumberland Operating Company, 1977 OK 164 P10, 569 P.2d 974, 977*, we found that a statutory amendment which permitted newly recoverable damages upon the wrongful death of a child, which were non-existent before the amendment, created and enlarged substantive rights and operated prospectively. Similarly, in *Hammons v. Muskogee Medical Center Authority, 1985 OK 22 PP6-7, 697 P.2d 539, 542,* **[***18]** we held that an amendment to the Political Subdivision Tort Claims Act that included public trusts within its protection and thereby removed the right to sue them unless the Act was followed, was not a mere procedural provision and could not be applied retrospectively.

[632]** **[*26]** Consequently, we hold that a private right of action under *§ 761.1(A)* is limited to conduct which occurred after the effective date of the 1988 amendment.

V. CONCLUSION

[*27] We answer the questions posed by the United States District Court for the Northern District of Oklahoma as follows:

1. Assuming *arguendo* that a product was sold in violation of other provisions of the OCPA, a party may not bring an action as an "aggrieved consumer" under *§ 761.1(A)* solely as a result of his or her payment of the purchase price for that product.

2. An individual person may not bring a claim for liability under *§ 761.1(C)* against an entity based on a violation of the OCPA.

3. If an action is brought by a consumer under *§ 761.1(A)*, that action is limited to conduct that occurred since 1988.

4. Because the answer to question 1 is no, we do not answer question 4.

CERTIFIED QUESTIONS ANSWERED.

[*19] SUMMERS, C.J.; HARGRAVE, V.C.J.; HODGES, LAVENDER, KAUGER, WATT, BOUDREAU, WINCHESTER, JJ. - concur**

B

LexisNexis

LEXSTAT 15 OKLA. STAT. 753

OKLAHOMA STATUTES, ANNOTATED BY LEXISNEXIS (R)

*** This document is current with Emergency Legislation through Chapter 2 ***
*** of the First Regular Session of the 52nd Legislature ***
*** June 24, 2008 Annotation Service ***

TITLE 15. CONTRACTS
CHAPTER 20. CONSUMER PROTECTION
CONSUMER PROTECTION ACT

Go to the Oklahoma Code Archive Directory

15 Okl. St. § 753 (2009)

§ 753. Unlawful practices

A person engages in a practice which is declared to be unlawful under the Oklahoma Consumer Protection Act, Section 751 et seq. of this title, when, in the course of the person's business, the person:

1. Represents, knowingly or with reason to know, that the subject of a consumer transaction is of a particular make or brand, when it is of another;

2. Makes a false or misleading representation, knowingly or with reason to know, as to the source, sponsorship, approval, or certification of the subject of a consumer transaction;

3. Makes a false or misleading representation, knowingly or with reason to know, as to affiliation, connection, association with, or certification by another;

4. Makes a false or misleading representation or designation, knowingly or with reason to know, of the geographic origin of the subject of a consumer transaction;

5. Makes a false representation, knowingly or with reason to know, as to the characteristics, ingredients, uses, benefits, alterations, or quantities of the subject of a consumer transaction or a false representation as to the sponsorship, approval, status, affiliation or connection of a person therewith;

6. Represents, knowingly or with reason to know, that the subject of a consumer transaction is original or new if the person knows that it is reconditioned, reclaimed, used, or secondhand;

7. Represents, knowingly or with reason to know, that the subject of a consumer transaction is of a particular standard, style or model, if it is of another;

8. Advertises, knowingly or with reason to know, the subject of a consumer transaction with intent not to sell it as advertised;

9. Advertises, knowingly or with reason to know, the subject of a consumer transaction with intent not to supply reasonably expected public demand, unless the advertisement discloses a limitation of quantity;

10. Advertises under the guise of obtaining sales personnel when in fact the purpose is to sell the subject of a consumer transaction to the sales personnel applicants;

11. Makes false or misleading statements of fact, knowingly or with reason to know, concerning the price of the subject of a consumer transaction or the reason for, existence of, or amounts of price reduction;

12. Employs "bait and switch" advertising, which consists of an offer to sell the subject of a consumer transaction which the seller does not intend to sell, which advertising is accompanied by one or more of the following practices:

a. refusal to show the subject of a consumer transaction advertised,

b. disparagement of the advertised subject of a consumer transaction or the terms of sale,

c. requiring undisclosed tie-in sales or other undisclosed conditions to be met prior to selling the advertised subject of a consumer transaction,

d. refusal to take orders for the subject of a consumer transaction advertised for delivery within a reasonable time,

e. showing or demonstrating defective subject of a consumer transaction which the seller knows is unusable or impracticable for the purpose set forth in the advertisement,

f. accepting a deposit for the subject of a consumer transaction and subsequently charging the buyer for a higher priced item, or

g. willful failure to make deliveries of the subject of a consumer transaction within a reasonable time or to make a refund therefor upon the request of the purchaser;

13. Conducts a closing out sale without having first obtained a license as required in this act, Section 751 et seq. of this title;

14. Resumes the business for which the closing out sale was conducted within one (1) year from the expiration date of the closing out sale license;

15. Falsely states, knowingly or with reason to know, that services, replacements or repairs are needed;

16. Violates any provision of the Oklahoma Health Spa Act, *Section 2000 et seq. of Title 59 of the Oklahoma Statutes*;

17. Violates any provision of the Home Repair Fraud Act, Section 765.1 et seq. of this title;

18. Violates any provision of the Consumer Disclosure of Prizes and Gifts Act, *Section 996.1 et seq. of Title 21 of the Oklahoma Statutes*;

19. Violates any provision of Section 755.1 of this title or *Section 1847a of Title 21 of the Oklahoma Statutes*;

20. Commits an unfair or deceptive trade practice as defined in Section 752 of this title;

21. Violates any provision of *Section 169.1 of Title 8 of the Oklahoma Statutes* in fraudulently or intentionally failing or refusing to honor the contract to provide certain cemetery services specified in the contract entered into pursuant to the Perpetual Care Fund Act;

22. Misrepresents a mail solicitation as an invoice or as a billing statement;

23. Offers to purchase a mineral or royalty interest through an offer that resembles an oil and gas lease and that the consumer believed was an oil and gas lease;

24. Refuses to honor gift certificates, warranties, or any other merchandise offered by a person in a consumer transaction executed prior to the closing of the business of the person without providing a purchaser a means of redeeming such merchandise or ensuring the warranties offered will be honored by another person;

25. Knowingly causes a charge to be made by any billing method to a consumer for services which the person knows was not authorized in advance by the consumer;

26. Knowingly causes a charge to be made by any billing method to a consumer for a product or products which the person knows was not authorized in advance by the consumer;

27. Violates Section 752A of this title;

28. Makes deceptive use of another's name in notification or solicitation, as defined in Section 752 of this title;

29. Falsely states or implies that any person, product or service is recommended or endorsed by a named third person; or

30. Falsely states that information about the consumer, including but not limited to, the name, address or phone number of the consumer has been provided by a third person, whether that person is named or unnamed.

C

LexisNexis

LEXSTAT 15 OKLA. STAT. 761.1

OKLAHOMA STATUTES, ANNOTATED BY LEXISNEXIS (R)

*** This document is current with Emergency Legislation through Chapter 2 ***
*** of the First Regular Session of the 52nd Legislature ***
*** June 24, 2008 Annotation Service ***

TITLE 15. CONTRACTS
CHAPTER 20. CONSUMER PROTECTION
CONSUMER PROTECTION ACT

Go to the Oklahoma Code Archive Directory

15 Okl. St. § 761.1 (2009)

§ 761.1. Liability under Consumer Protection Act

A. The commission of any act or practice declared to be a violation of the Consumer Protection Act shall render the violator liable to the aggrieved consumer for the payment of actual damages sustained by the customer and costs of litigation including reasonable attorney's fees, and the aggrieved consumer shall have a private right of action for damages, including but not limited to, costs and attorney's fees. In any private action for damages for a violation of the Consumer Protection Act the court shall, subsequent to adjudication on the merits and upon motion of the prevailing party, determine whether a claim or defense asserted in the action by a nonprevailing party was asserted in bad faith, was not well grounded in fact, or was unwarranted by existing law or a good faith argument for the extension, modification, or reversal of existing law. Upon so finding, the court shall enter a judgment ordering such nonprevailing party to reimburse the prevailing party an amount not to exceed Ten Thousand Dollars ($ 10,000.00) for reasonable costs, including attorney's fees, incurred with respect to such claim or defense.

B. The commission of any act or practice declared to be a violation of the Consumer Protection Act, if such act or practice is also found to be unconscionable, shall render the violator liable to the aggrieved customer for the payment of a civil penalty, recoverable in an individual action only, in a sum set by the court of not more than Two Thousand Dollars ($ 2,000.00) for each violation. In determining whether an act or practice is unconscionable the following circumstances shall be taken into consideration by the court: (1) whether the violator knowingly or with reason to know, took advantage of a consumer reasonably unable to protect his or her interests because of his or her age, physical infirmity, ignorance, illiteracy, inability to understand the language of an agreement or similar factor; (2) whether, at the time the consumer transaction was entered into, the violator knew or had reason to know that price grossly exceeded the price at which similar property or services were readily obtainable in similar transactions by like consumers; (3) whether, at the time the consumer transaction was entered into, the violator knew or had reason to know that there was no reasonable probability of payment of the obligation in full by the consumer; (4) whether the violator knew or had reason to know that the transaction he or she induced the consumer to enter into was excessively one-sided in favor of the violator.

C. Any person who is found to be in violation of the Oklahoma Consumer Protection Act in a civil action or who willfully violates the terms of any injunction or court order issued pursuant to the Consumer Protection Act shall forfeit and pay a civil penalty of not more than Ten Thousand Dollars ($ 10,000.00) per violation, in addition to other penalties that may be imposed by the court, as the court shall deem necessary and proper. For the purposes of this section, the district court issuing an injunction shall retain jurisdiction, and in such cases, the Attorney General, acting in the name of the state, or a district attorney may petition for recovery of civil penalties.

D. In administering and pursuing actions under this act, the Attorney General and a district attorney are authorized to sue for and collect reasonable expenses, attorney's fees, and investigation fees as determined by the court. Civil penalties or contempt penalties sued for and recovered by the Attorney General or a district attorney shall be used for the furtherance of their duties and activities under the Consumer Protection Act.

E. In addition to other penalties imposed by the Oklahoma Consumer Protection Act, any person convicted in a criminal proceeding of violating the Oklahoma Consumer Protection Act shall be guilty of a misdemeanor for the first offense and upon conviction thereof shall be subject to a fine not to exceed One Thousand Dollars ($ 1,000.00), or imprisonment in the county jail for not more than one (1) year, or both such fine and imprisonment. If the value of the money, property or valuable thing referred to in this section is Five Hundred Dollars ($ 500.00) or more or if the conviction is for a second or subsequent violation of the provisions of the Oklahoma Consumer Protection Act, any person convicted pursuant to this subsection shall be deemed guilty of a felony and shall be subject to imprisonment in the State Penitentiary, for not more than ten (10) years, or a fine not to exceed Five Thousand Dollars ($ 5,000.00), or both such fine and imprisonment.

PROOF OF SERVICE

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action. My business address is 601 South Figueroa Street, Twenty-Seventh Floor, Los Angeles, California 90017-5759.

On October 8, 2009, I served the foregoing document(s) described as: **ANSWER BRIEF ON THE MERITS**

☒ **BY MAIL:** I am readily familiar with this firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. postal service on that same day in the ordinary course of business. I am aware that on motion of party served, service is presumed invalid if postal cancellation date or postage meter date is more than 1 day after date of deposit for mailing in affidavit.

☐ by placing a true copy thereof in sealed envelope(s) addressed as stated on the attached "SERVICE MAILING LIST."

☒ by placing a true copy thereof in sealed envelope(s) addressed as follows:

Honorable David C. Velasquez (1 Copy)
Department CX-101
Superior Court of the State of California
County of Orange
Civic Complex Center
751 West Santa Ana Boulevard
Santa Ana, California 92701

Orange County District Attorney (1 Copy)
Tony Rackauckas
401 Civil Center Drive, Room 200
Santa Ana, California 92702

Court of Appeal Clerk (1 Copy)
California Court of Appeals
Fourth Appellate District, Division Three
P.O. Box 22055
Santa Ana, California 92702

Attorney General (1 Copy)
Edmund G. Brown Jr.
Consumer Law Section
300 South Spring Street
Los Angeles, California 90013

Jonathan W. Cuneo (1 Copy)
Michael G. Lenett
Cuneo Gilbert & LaDuca, LLP
507 C. Street, N.E.
Washington, D.C. 20002
Attorneys for Real Parties In Interest

Timothy G. Blood (1 Copy)
Pamela M. Parker
Kevin K. Green
Coughlin Stoia Geller Rudman & Robbins LLP
655 West Broadway, Suite 1900
San Diego, California 92101
Attorneys for Real Parties In Interest

Venus Soltan (1 Copy)
Soltan & Associates
450 Newport Center Drive, Suite 350
Newport Beach, California 92660
Attorneys for Real Parties In Interest

Joel D. Joseph (1 Copy)
Joel D. Joseph & Associates
Attorneys at Law
7272 Wisconsin Avenue, Suite 300
Bethesda, Maryland 20814

☐ **BY FAX:** By transmitting a true and correct copy of the above-referenced document(s) at ____ AM/PM to the persons listed on the attached "SERVICE MAILING LIST" at the facsimile numbers reflected on the "SERVICE MAILING LIST." The phone number for the sending facsimile machine is (213) 689-1004. The transmission was reported as complete and without error. The transmission report was properly issued by the transmitting facsimile machine. A true copy of the transmission report is attached.

☐ **BY PERSONAL SERVICE:** I personally delivered a true and correct copy of the above-referenced document to:

☐ **BY OVERNIGHT MAIL:** I caused to be delivered to an express service carrier courier or driver authorized by said express service carrier, a true copy of the foregoing document(s) in sealed envelopes or packages designated by the express service carrier for delivery on the next business day with fees for overnight delivery paid or provided to:

☐ the person(s) listed on the attached "SERVICE MAILING LIST."

☐ the following person(s):

I declare under penalty of perjury that the foregoing is true and correct.

Executed on October 8, 2009, at Los Angeles, California.

Charlotte E. Van Buren

CHARLOTTE E. VAN BUREN