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S174229

IN THE
SUPREME COURT OF CALIFORNIA


SUPREME COURT
FILED

JAMES A. CLARK, *et al.*,

Petitioners,

JUL 29 2009

v.

Frederick K. Orlich Clerk


THE SUPERIOR COURT OF LOS ANGELES COUNTY, Deputy

Respondent.

NATIONAL WESTERN LIFE INSURANCE COMPANY,

Real Party in Interest.

After a Decision by the Court of Appeal
Second Appellant District, Division Seven
Case No. B212512

REPLY TO ANSWER TO PETITION FOR REVIEW

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and Petitioner
National Western Life Insurance Company

Service on Attorney General and Los Angeles County District Attorney
Pursuant to California Business & Professions Code Section 17209

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INTRODUCTION

The cursory Answer submitted by Plaintiffs fails to make a dent in National Western’s arguments that the Opinion issued by the Court of Appeal drastically and erroneously changed the scope of remedies that now will be available to private litigants under the UCL. In addition, the Answer ignores the question as to whether this Court should accept review of a decision that, for the first time, permits trebling of “restitution” awards for private UCL actions brought by senior citizens. As acknowledged by Plaintiffs in their writ petition to the Court of Appeal, the legal issue in this case is one of “first impression in the appellate courts” and “an issue of

widespread interest and importance to consumer litigation affecting a burgeoning senior population.”¹

National Western’s Petition advanced a number of compelling and well-supported arguments as to why the Court of Appeal decision is in error and has altered the UCL landscape. In response, the Answer focuses on discrete portions of certain of those arguments, but never is able to demonstrate that the Court of Appeal’s decision allowing trebling of restitution under the UCL is correct, either based on the statutory language of Civil Code section 3345 or its legislative history. For example, the Answer observes that the Court of Appeal concluded that the “unambiguous language” of section 3345 “compels its application to restitution under the UCL.” Answer, pp. 1-2. If the language used by the Legislature was so “unambiguous,” then why did the Court of Appeal spend pages addressing the legislative history of Senate Bill 1157, only to find it “unhelpful” in deciding whether section 3345 was intended to “contradict the well-established rule” precluding damages, including treble damages, in private UCL actions? *Slip Opinion*, p. 2. By the same token, if the language of section 3345 was so “unambiguous,” why has it taken 20 years for any court to authorize treble damages for a private party claim under the UCL? No other court decision has ever allowed monetary recovery other than actual restitution under the UCL – except the decision below.

¹ Indeed, counsel for Plaintiffs has three other certified class actions seeking section 3345 trebling of UCL restitution. Petition, p. 3 (citing Petition for Writ, p. 14, ¶ 25(c)).

The Answer's arguments aside, if any Court is going to alter the well-established rule that restitution is the only monetary remedy allowed under the UCL, it should be this Court. Review is essential.

1. THE PLAIN MEANING OF SECTION 3345 DOES NOT MAKE IT APPLICABLE TO RESTITUTION UNDER THE UCL

In its Petition, National Western first challenged the Court of Appeal's contentions that section 3345 by "express legislative mandate," by its "unambiguous language," and "by its very terms" applies to actions by senior private plaintiffs seeking restitution. Petition, pp. 9-10 (citing *Slip Opinion*, pp. 16, 2, 18 n.13). National Western demonstrated that, rather than section 3345 referring to the UCL, section 3345's precise language is derived from – and explicitly cross-referenced in – the separate statutory scheme of the CLRA. *Civil Code*, §§ 1750 *et seq.*

In response to this unassailable fact, the Answer posits that National Western has failed to assess the "plain meaning" of section 3345 in that its analysis is some form of "wordplay" and that National Western contends the language of section 3345 "must coincide *word-for-word* with the language" of the UCL. Answer, p. 3 (italics in original). In support of this assertion, the Answer relies on this Court's well-established statutory construction principles reiterated in *Day v. City of Fontana*, 25 Cal. 4th 268, 272 (2001).

National Western's focus on the cross-referencing of section 3345 and the CLRA, however, is an examination of the "plain meaning" of

section 3345. It also comports with this Court’s guidance in *Day*: “Our fundamental task in construing a statute is to ascertain the intent of the lawmakers so as to effectuate the purpose of the statute.” *Day, supra* at 272. National Western merely examined the language used by the Legislature in enacting section 3345 and the Legislature’s undisputed copying of portions of the language from the CLRA so as to distinguish the situation with the CLRA from that involving the UCL, where there was no such lifting of that latter statute’s text. Again, National Western’s comparison of this statutory language was undertaken only in response to the Court of Appeal’s incorrect assertion that the “very terms” of section 3345 apply to private UCL actions.

The Answer also urges that due to the “sweeping” scope of the UCL, it is “inconceivable that the Legislature would not have understood in adopting section 3345 that section 17200 was among the statutes designed ‘to redress unfair or deceptive practices or unfair methods of competition.’” Answer, pp. 3-4. Ironically, in support of its “sweeping” scope assertion, the Answer cites to this Court’s decision in *Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co.*, 20 Cal. 4th 163, 180 (1999). As addressed at length in the Petition, and as acknowledged in the Court of Appeal decision, *Cel-Tech* is the leading case in which this Court confirmed that private plaintiffs may *not* “receive damages, much less treble damages,” in a UCL action. *Cel-Tech, supra* at 179.

In a similar way, the Answer then cites to this Court’s decision in *Farmers Ins. Exchange v. Superior Court*, 2 Cal. 4th 377, 383 (1992), wherein the Court referenced that the UCL “borrows” violations of other

laws and treats them as unlawful practices under the UCL. Answer, p. 4. From this non-controversial concept, the Answer then makes the leap that National Western's argument that section 3345 applies to the CLRA, together with the UCL's "borrowing" of violations, is a tacit admission that section 3345 applies to the UCL. Had Plaintiffs read the context of this Court's discussion of the UCL in *Farmers*, they would have seen the last portion of the Court's discussion at page 383, wherein the Court expressly advised that such "borrowed" violations are "subject to the distinct remedies provided" under the UCL. Unlike the CLRA, which provides all manner of monetary remedies (both compensatory and punitive), *see Civil Code*, § 1780(a), the UCL provides only for restitution as a monetary remedy in private actions. It is beyond dispute that the UCL borrows violations from other statutes, but not remedies. *Cel-Tech*, *supra* at 180; *Buckland v. Threshold Enterprises, Ltd.*, 155 Cal. App. 4th 798, 812 (2007).

Finally, the Answer cites three federal district court cases and argues that they add something relevant to this case.² They do not. *None* of these cases sought to apply section 3345 remedies to a UCL claim, and even the Answer admits that *Hood* and *Ross* involved application of section 3345 trebling to a claim for punitive damages under Civil Code section 3294,³ and *Gusse* involved an attempt to treble a claim under the civil penalty

² Answer, pp. 4-5 (citing *Hood v. Hartford Life & Accident Ins. Co.*, 567 F. Supp. 2d 1221, 1223 (C.D. Cal. 2008); *Ross v. Pioneer Life Ins. Co.*, 545 F. Supp. 2d 1061, 1065 (C.D. Cal. 2008); *Gusse v. Damon Corp.*, 470 F. Supp. 2d 1110, 1118 (C.D. Cal. 2007)).

³ Indeed, the district court's analysis of section 3345 in *Ross* supports the position of National Western, as addressed at page 25 of the Petition.

provisions of the Song-Beverly Act. *See* Civil Code, §§ 1794(c), 1794(e)(1).⁴

In sum, there is no link between section 3345 and any private party claim under the UCL. The Court of Appeal was wrong when it asserted that the language of section 3345 unambiguously encompassed such claims under the UCL, and the Answer does nothing to redeem that erroneous assertion.

2. THE “OTHER REMEDY” PRONG OF SECTION 3345 CANNOT APPLY TO RESTITUTION UNDER THE UCL

In the Petition, National Western carefully demonstrated that the pivotal language of section 3345(b) allows for trebling only if “a trier of fact is authorized by a statute to impose either a fine, or a civil penalty or other penalty, or any other remedy *the* purpose or effect of which is to punish or deter. . . .” Petition, pp. 21-25 (emphasis added). As part of that discussion, we demonstrated that the emphasized word “the” was significant, and that the Court of Appeal effectively substituted the word “a” in order to support its belief that section 3345 trebling could be obtained even if punishment or deterrence was merely an incidental purpose or effect of the statute in question. The Petition also addressed the doctrine of *ejusdem generis*, an established rule of statutory construction, in which concluding words in a series of terms (such as the words “other” or

⁴ While there is dicta in *Hood* as to section 3345 applying to the UCL and CLRA, no actual UCL claim was involved in *Hood* and thus there was no detailed analysis of the applicability of section 3345 to a UCL claim. Moreover, the defendant itself contended that section 3345 applied to a UCL claim and apparently no one contested that contention. *Hood, supra* at 1227.

“any other”) should be read to include only terms of like kind or character. *See Civil Code*, § 3534. In other words, since the term “any other remedy” follows the terms “fine,” “civil penalty” and “other penalty,” that term “any other remedy” must be tantamount to a fine or penalty – and *the* purpose or effect of the UCL is not penal, but to restore money wrongfully taken.

The Answer ignores the entire discussion of the doctrine of *ejusdem generis*, presumably since it cannot dispute this basic rule of statutory construction, and instead postulates that the word “the” in section 3345 refers only to the immediately following word “purpose,” and not to the word “effect,” which follows after the disjunctive “or.” Answer, p. 6. In essence, the Answer would insert the article “an” before the word “effect.” And this is right after the Answer accuses National Western of wordplay!

Plaintiffs’ parsing of the language of section 3345(b) is unsupportable. The article “the” applies *both* to the words “purpose” and “effect.” Not only is this the plain meaning of the statutory language but it also comports with the doctrine of *ejusdem generis*. As other courts have concluded, punitive damages under Civil Code section 3294, civil penalties under the Song-Beverly Act and punitive provisions under the CLRA are all statutes that impose a fine or penalty or other remedy that have *the* purpose or *the* effect of punishing or deterring. The only monetary remedy under the UCL – restitution – does not have *the* purpose or *the* effect of punishment or deterrence, and any incidental deterrent purpose or effect that may occur by the imposition of a restitution award is insufficient to comply with the plain meaning of section 3345(b).

3. THE AVAILABILITY OF PENALTIES FOR PUBLIC UCL CLAIMS DOES NOTHING TO SUPPORT ANY TREBLING REMEDY FOR PRIVATE UCL CLAIMS

The Answer's final section seeks to juxtapose the availability of civil penalties for public UCL claims (*i.e.*, those brought by the Attorney General and other specified government officials) with the UCL provisions relating to private party claims, so as to argue that National Western's Petition incorrectly implies the Legislature created no connection between the UCL and section 3345. Answer, pp. 6-9. As with Plaintiffs' prior assertions, this argument goes nowhere and is easily dismissed.

First, in briefing before the Court of Appeal, National Western addressed the issue of Business & Professions Code sections 17206 and 17206.1 and the civil penalties provided for under those statutes in cases brought by the Attorney General or other government officials, contrasting those remedies with the limited remedies available for private party UCL claimants.⁵ Moreover, National Western fully explained that, at the same time in 1988 that SB 1157 enacted Civil Code section 3345, the Legislature also enacted section 17206.1, which permitted certain government officials to assess additional penalties for UCL violations perpetrated against seniors and the disabled. *See* Written Return, p. 22.

⁵ *See, e.g.*, National Western's Written Return to Petition for Writ of Mandate, p. 3. There, National Western cited *State of California v. Altus Finance, S.A.*, 36 Cal. 4th 1284, 1307 (2005), wherein this Court reviewed the civil penalties language of section 17206 and contrasted it to the language of section 17204. This distinction between the rights of public and private plaintiffs under the UCL is also addressed in *Bradstreet v. Wong*, 161 Cal. App. 4th 1440, 1459 (2008) (“[s]uch penalties, [civil penalties] however, are an available remedy only in a public action”).

Therefore, the “connection” between section 3345 and sections 17206 and 17206.1 has not been denied by National Western; it has only been argued to be irrelevant for purposes of *private* UCL actions. That is, National Western’s sole point is that there is nothing in the legislative history that suggests that the Legislature ever intended to provide section 3345’s trebling of remedies under *private* UCL actions.⁶ Furthermore, if the Legislature had desired that private plaintiffs should be able to seek a section 3345 trebling of remedies under the UCL, it could have easily amended Business & Professions Code section 17203 at the same time it enacted sections 3345 and 17206.1. It also could have so amended section 17203 in the twenty years since section 3345 was enacted. It did neither.

In short, the Answer’s resort to citing the connection between public UCL remedies in section 17206.1 and the penal trebling remedies of section 3345 is unavailing. It also affords no basis why this Court should not accept review of the Court of Appeal’s decision, which for the first time has permitted treble damages to be awarded in a private UCL claim.

⁶ In fact, National Western observed that the legislative history of SB 1157 explicitly states that while private litigants may enforce the UCL, they “cannot recover civil penalties or damages.” *See* Written Return, p. 22 (citing Petitioners’ Exhibits, Ex. P, at p. 482).

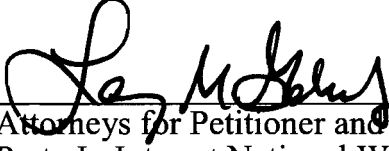
4. CONCLUSION

Based on the foregoing, National Western respectfully requests that review be granted as to the Court of Appeal's May 21, 2009 Opinion.

Dated: July 29, 2009

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**CERTIFICATION OF WORD COUNT PURSUANT TO
CALIFORNIA RULES OF COURT 8.504.(d)(1)**

Larry M. Golub, counsel of record for Petitioner and Real Party In Interest National Western Life Insurance Company, certifies that the foregoing *Reply to Answer to Petition for Review* contains approximately 2409 words (including footnotes), based on the “Word Count” of the computer program that was used to prepare this brief. Thus, this brief contains fewer than the 4,200 words permitted under California Rule of Court 8.504(d)(1). The type used to prepare this brief is 13 point Times New Roman, and the lines are double-spaced.

Dated: July 29, 2009

By: _____


Larry M. Golub

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

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: Barger & Wolen LLP, 633 W. Fifth Street, 47th Floor, Los Angeles, California 90071.

On **July 29, 2009** I served the foregoing document(s) described as **REPLY TO ANSWER TO PETITION FOR REVIEW** on the interested parties in this action by placing the original a true copy thereof enclosed in sealed envelope addressed as stated in the attached mailing list.

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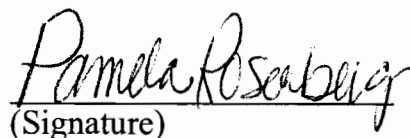
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NAME: PAMELA ROSENBERG


(Signature)

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Clark v. National Western Life Insurance Co., et al.

LASC Case No: BC 321681

Court of Appeal Case No. B212512

Supreme Court Case No: S174229

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