

Kwikset Corp. v. Superior Court Clarifies UCL Standing Requirements

BY THE CLASS ACTION AND COMPLEX LITIGATION PRACTICE

In the past two years, the California Supreme Court has issued important decisions interpreting California's Unfair Competition Law (California Business and Professions Code sections 17200, *et seq.* the ("UCL")), a law almost universally invoked in California consumer class actions. Two years ago, the Court decided *In re Tobacco II Cases*, and held that the representative plaintiffs(s) in a UCL class action needed to plead and prove standing by a showing of "actual reliance" for claims brought under the UCL's fraud and false advertising prongs.¹ Last week, the Court addressed *Kwikset Corp. v. Superior Court (Benson)*, a case again interpreting the UCL's standing requirement in false advertising cases.² In *Kwikset*, the Court held that "plaintiffs who can truthfully allege that they were deceived by a product's ['Made in the U.S.A.'] label into spending money to purchase [a] product, and would not have purchased it otherwise" have standing to sue under the UCL regardless of the fact that the product worked as promised and regardless of the fact that the plaintiff would be ineligible for restitution.³ This alert summarizes *Kwikset* and analyzes the practical implications in consumer UCL litigation that may arise as this important body of law develops in the future.

Background: *Kwikset Corporation v. Superior Court (Benson)*

The backdrop to *Kwikset* is Proposition 64. Before the California voters passed this important Proposition, California's UCL had no standing requirement. Plaintiffs who had no dealings with a defendant could invoke the UCL and sue on behalf of the general public. Proposition 64 changed that. Now, a private plaintiff wishing to bring a UCL claim must plead and prove that he has "suffered injury in fact and has lost money or property as a result of such unfair competition." The new standing requirement, while simple in text, has led to confusion. How must the plaintiff have lost money? In an advertising case, must the product be functionally defective or is it enough that it is mislabeled and plaintiff can allege that the mislabeling caused him to purchase the product? Must the named plaintiff be eligible for restitution in order to have standing? The Supreme Court in *Kwikset* sought to resolve some of these questions.

The plaintiff in *Kwikset* initially filed a representative action in 2000 alleging Kwikset falsely marketed and sold locksets labeled "Made in the U.S.A." A trial confirmed that the locks actually included parts made in Taiwan and were partially assembled in Mexico. The original plaintiff sought injunctive relief and restitution for violations of all three of the UCL's prongs, alleging that Kwikset's conduct was unfair, unlawful and fraudulent within the meaning of the UCL.

The trial court granted plaintiff injunctive relief but denied restitution. Both parties appealed. During the appeal, the voters approved Proposition 64. In light of the new standing requirements, the Court of Appeal affirmed the decision on the underlying merits but remanded to the trial court for a determination of plaintiff's standing. On remand, the trial court held the plaintiff's amended complaint sufficiently pled injury and loss of money. Kwikset again appealed and the Court of Appeals reversed, reasoning that

although the product's label was inaccurate, the plaintiff failed to allege an overcharge or a functional defect in the lockset.

The Supreme Court granted review and reversed. As noted above, the Court held that "plaintiffs who can truthfully allege they were deceived by a product's label into spending money to purchase the product, and would not have purchased it otherwise, have 'lost money or property' within the meaning of Prop. 64, and have standing to sue."⁴ The Court acknowledged that Proposition 64 had "materially curtailed" the universe of people who may bring a UCL suit.⁵ Nonetheless, interpreting the revised statute's plain language, the Court adopted a two-part test for interpreting the "lost money or property" standing requirement. According to the Court, a party "must [] (1) establish a loss or deprivation of money or property sufficient to qualify as injury in fact, i.e., *economic injury*, and (2) show that the economic injury was the result of, i.e., *caused by*, the unfair business practice or false advertising that is the gravamen of the claim."⁶

Applying the test, the Court held the plaintiff sufficiently pled standing. The Court reasoned that the plaintiff had alleged economic injury because he parted with money to buy the lock he believed was manufactured exclusively in the United States.⁷ The Court also held that plaintiff had alleged causation because he alleged he would not have purchased the lockset but for the misrepresentation.⁸ Further, the Court rejected the Court of Appeal's "functional defect" analysis, holding that, as alleged, the "Made in the U.S.A." representation was part of the "basis of the bargain," and the falsehood was sufficient to give rise to standing.⁹ Thus, while the lock may work perfectly and be just as valuable as a lock made abroad, the Court held that "ineligibility for restitution is not a basis for denying standing[.]"¹⁰ Instead, citing to its recent decision in *Clayworth v. Pfizer, Inc.*¹¹ – a case that dealt with UCL standing in suits between competitors – the Court held that "the standards for establishing standing . . . and eligibility for restitution . . . are wholly distinct."¹² Thus, because the plaintiff had paid money for a product (the economic injury) based on the belief that defendant's representation was true when the representation was in fact false (causation), he had standing.

Does *Kwikset* Alter The State of Consumer Class Action Litigation in California?

The plaintiff's bar will likely invoke *Kwikset* and argue that it broadens UCL standing, pointing to the Supreme Court's rejection of Court of Appeal decisions equating standing with the availability of restitution in consumer cases.¹³ A careful reading indicates, however, that the decision does not affect a major sea change in favor of plaintiffs. To the contrary, while a defeat for the defendant in the particular case, the Court's analysis in *Kwikset* reinforces authority that defendants can use in defending UCL consumer cases. Three key arguments stand out.

First, in citing back to *Tobacco II*'s "actual reliance" requirement, the Supreme Court confirmed its commitment to a "but for" test in false advertising cases. In *Tobacco II*, the Court held that a plaintiff "proceeding on a claim of misrepresentation as the basis of his or her UCL action must demonstrate actual reliance on the allegedly deceptive or misleading statements, in accordance with well-settled principles regarding the element of reliance in ordinary fraud actions[.]"¹⁴ The *Kwikset* Court reaffirmed this *Tobacco II* holding, but did not stop there. Instead, the Court added an explanatory footnote confirming its understanding of reliance: "'Reliance' as used in the ordinary fraud context has always been understood to mean reliance on a statement for its truth or accuracy."¹⁵ "It follows[.]" the Court explained, "that a UCL fraud plaintiff must allege he or she was motivated to act or refrain from action based on the truth or falsity of a defendant's statement, not merely on the fact that it was made."¹⁶ For defendants, the Court's commitment to a heightened reliance requirement confirms that complaints based on mere exposure to an advertisement will not survive a pleading challenge. A plaintiff alleging only that they saw an advertisement has not alleged UCL standing. Instead, under *Kwikset*, a plaintiff must allege he saw an advertisement before purchase, must allege he saw a specific representation in that advertisement, must allege he believed that representation to be true when it was in fact false, and must allege he changed his

position based on the belief the representation was true. If any of these allegations are missing, the plaintiff has failed to allege his UCL standing.

Nor does the reliance requirement stop with the pleadings. *Kwikset* also confirms that “[o]nce this threshold pleading requirement has been satisfied, it will remain the plaintiff’s burden thereafter to prove the elements of standing[.]”¹⁷ As a practical matter, this means that defendants have multiple opportunities to topple a would-be plaintiff’s UCL claim based on standing. At the pleading stage, a plaintiff must specifically allege not just reliance on the fact of defendant’s representation, but also on the fact that defendant’s representation was true. In analyzing these allegations, defense counsel should give special attention to the wording of plaintiff’s allegations because a plaintiff may make factual allegations to satisfy his pleading burden that he or she will not be able to support during discovery.¹⁸

Second, *Kwikset* also resolves a dispute in some lower court decisions regarding whether *Tobacco II*’s “actual reliance” standard applies to false advertising claims brought under the UCL’s “unfair” or “unlawful” prong, as opposed to the “fraud” prong. In discussing the “actual reliance” test, the Court in *Tobacco II* noted that its “discussion of causation in this case is limited to such cases where, as here, a UCL action is based on a fraud theory involving false advertising and misrepresentations to consumers.”¹⁹ Some courts took this holding to mean that reliance only needed to be shown in false advertising cases if the plaintiff invoked the UCL’s “fraud” prong. Other courts disagreed, looking to the theory alleged, not the prong invoked.²⁰ In *Kwikset*, the Supreme Court endorsed the latter view. Acknowledging that the plaintiff had made some “unlawful” prong allegations, the Court held that “[t]he theory of the case is that *Kwikset* engaged in misrepresentations and deceived customers. Thus, our remarks in *In re Tobacco II Cases*[,] concerning the cause requirement in deception cases, are apposite.”²¹ Given the Court’s holding, would-be false advertising plaintiffs can no longer seek to evade *Tobacco II*’s “actual reliance” standard by invoking the “unfair” or “unlawful” prongs. If plaintiff’s theory is misrepresentation or deception, he must, under *Kwikset*, plead and prove “actual reliance.”

Third, *Kwikset* raises an interesting opportunity for defendants to make new arguments against class certification. In confirming that the plaintiff must prove reliance on the truth of the representation at issue, the Court explained its willingness to consider plaintiff’s subjective views. Specifically, the Court explained that “considerations” of the plaintiff’s “subjective motivations” “are a routine part of common law deceit actions: we will allow one party who subjectively relied on a particular deception in entering a transaction to sue, while simultaneously precluding another who subjectively did not so rely from suing. To consider them in the context of a statutory deceit action thus is wholly unremarkable.”²² The Court, in other words, recognized that individuals who saw the same advertisement may be differently situated. While the Court’s discussion in *Kwikset* was limited to standing, and the Court in *Tobacco II* already held that the UCL’s “standing requirements are applicable only to the class representatives, and not all absent class members[.]”²³ the Court’s acknowledgment that different individuals may be differently situated with respect to the claim’s core theory suggests that courts in future cases should recognize that common issues often do not predominate in putative false advertising class actions.

Conclusion

Popular discussion of *Kwikset* will undoubtedly describe it is a victory for the plaintiff’s bar. That characterization is incomplete. While *Kwikset* takes away the argument that a plaintiff must be eligible for restitution to have UCL standing, it nevertheless confirms that the UCL’s standing requirement has real meaning. A would-be false advertising plaintiff invoking the UCL must plead and prove that he relied on the truth of the representation at issue, not just that he saw it. A plaintiff must satisfy this important requirement not only at the pleading stage but throughout the case, regardless of the particular UCL prong he invokes. These are important holdings that will undoubtedly shape future UCL litigation and raise interesting issues in the coming years.



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¹ In re Tobacco II Cases, 46 Cal. 4th 298 (2009).

² Kwikset Corp. v. Super. Ct. (Benson), No. S171845, 2011 WL 240278 (Cal. Jan. 27, 2011).

³ Kwikset Corp., 2011 WL 240278 at *1.

⁴ Kwikset Corp., 2011 WL 240278 at *1.

⁵ Kwikset Corp., 2011 WL 240278 at *4.

⁶ Kwikset Corp., 2011 WL 240278 at *5.

⁷ Kwikset Corp., 2011 WL 240278 at *10.

⁸ Kwikset Corp., 2011 WL 240278 at *10.

⁹ Kwikset Corp., 2011 WL 240278 at *14.

¹⁰ Kwikset Corp., 2011 WL 240278 at *15.

¹¹ Clayworth v. Pfizer, Inc., 49 Cal. 4th 758, 789 (2010) (holding competitor can bring UCL claims without being entitled to restitution so long as standing met).

¹² Kwikset Corp., 2011 WL 240278 at *14.

¹³ Kwikset Corp., 2011 WL 240278 at *20.

¹⁴ In re Tobacco II Cases, 46 Cal. 4th at 306. The *Tobacco II* Court acknowledged that in certain limited cases where a plaintiff alleges exposure to a long-term advertising campaign an "unrealistic degree of specificity" in pleading is not required. *Id.* at 328.

¹⁵ Kwikset Corp., 2011 WL 240278 at *8 n.10.

¹⁶ Kwikset Corp., 2011 WL 240278 at *8 n. 10.

¹⁷ Kwikset Corp., 2011 WL 240278 at *10 n. 15.

¹⁸ See, e.g., Princess Cruise Lines, Ltd. v. Superior Ct. (Wang), 179 Cal. App. 4th 36, 44 (2009) (confirming lack of standing based on deposition testimony).

¹⁹ In re *Tobacco II*, 46 Cal. 4th at 326 n.17.

²⁰ Compare In re Steroid Hormone Product Cases, 181 Cal. App. 4th 145, 159 (2010) ("where the UCL claim is based upon the unlawful prong" it "presents no issue regarding reliance") with Durell v. Sharp Healthcare, 183 Cal. App. 4th 1350, 1363 (2010) ("[T]he reasoning of Tobacco II applies equally to the 'unlawful' prong of the UCL when, as here, the predicate unlawfulness is misrepresentation and deception.").

²¹ Kwikset Corp., 2011 WL 240278 at *8 n.9.

²² Kwikset Corp., 2011 WL 240278 at *10 n.14.

²³ In re Tobacco II, 46 Cal. 4th at 306.