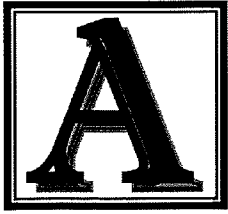


THE ARKIN



LAW FIRM

April 28, 2009

Chief Justice and Associate Justices
California Supreme Court
350 McAllister Street
San Francisco, CA 94102

Re: *Kwikset Corporation v. Superior Court (Benson)*
Case No. S171845

Dear Justices:

Consumer Attorneys of California strongly urges you to accept review of the published decision in this case. The *Kwikset* case provides the perfect example of how the lower courts are misapplying the “lost money or property” provision in Prop. 64, thereby rendering the Unfair Competition Law virtually useless in consumer fraud cases. Review and resolution of this issue is of the utmost importance.

STATEMENT OF INTEREST

The Consumer Attorneys of California (“Consumer Attorneys”) is a voluntary membership organization representing approximately 6,000 associated attorneys practicing throughout California. The organization was founded in 1962. Its membership consists primarily of attorneys who represent individuals subjected in a variety of ways to personal injury, employment discrimination, and other harmful business and governmental practices. Consumer Attorneys has taken a leading role in advancing and protecting the rights of injured Californians in both the courts and the Legislature.

As an organization representative of the plaintiff’s trial bar throughout California, including many attorneys who represent consumers in class actions under the Unfair Competition Law, Consumer Attorneys has an abiding interest in the issue addressed in the *Kwikset* opinion.

WHY REVIEW SHOULD BE GRANTED

Proposition 64 amended sections 17203 and 17204 of the Unfair Competition Law (“the UCL”). In amending section 17203, Prop. 64 established a new standing requirement for bringing UCL actions. In order to bring an action after Prop. 64, the person filing the complaint had to be one who suffered an “injury in fact and lost money or property as a result of the unfair competition.

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In the *Tobacco II Cases*, Case No. S147345, this Court is considering the meaning of the “as a result of” language in that statutory amendment. But a series of recent cases, including this case, have struggled with a different part of the Prop. 64 amendments – the “lost money or property” concept in Prop. 64. Unfortunately in this case, and others (see, e.g., *Hall v. Time, Inc.* (2008) 158 Cal.App.4th 847; *Medina v. Safe-Guard Products International, Inc.* (2008) 164 Cal.App.4th 105 and *Peterson v. Cellco Partnership* (2008) 164 Cal.App.4th 1583) some appellate courts have held that the plaintiff purportedly got what they paid for. As such, these courts concluded, the plaintiff did not “lose” money or property and did not, therefore, have standing to bring a consumer action under the UCL. The appellate court in this case reached the same conclusion.

In this case, the statement by the defendant that was false and deceptive was that its products were “Made in America” when, in fact, a substantial portion of each product was either not manufactured or not assembled in this country and was in violation of a controlling statute. Despite the flagrant misrepresentation proven in this case, the appellate court concluded that the plaintiff did not have standing to bring a UCL action because he did not suffer a “loss” of money or property. Rather, the court held, he paid for a lock set and received a lock set of comparable quality to other similarly-priced lock sets.

The problem is that the appellate court in this case – as in others – conflated the concept of damages with the requirement for loss of money or property. But, as this Court has repeatedly confirmed, damages are not recoverable in a UCL action. (*Bank of the West v. Superior Court (Industrial Indemnity Co.)* (1992) 2 Cal.4th 1254.) It is anomalous to interpret the standing requirements for the statute to require a showing of damages when, in fact, damages are not recoverable in the action.

In this case, the plaintiff “lost money or property” because he *intended to buy* a lock set that was “Made in America,” but *received* a lock set that was *not* “Made in America.” He lost money, as that term should be applied under the UCL, because he paid for something other than what he *intended* to buy.

And this case highlights the very nature of consumer misrepresentations that the UCL is intended to address. Obviously, Kwikset utilized the “Made in America” packaging for a reason – whether because of pure patriotism or an intent to support American manufacturers or American jobs, some purchasers will choose a product that is “Made in America”

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over one that is foreign-made. Applying the “lost money or property” language as the appellate court did here will encourage a manufacturer to attempt to steal market share on the basis of those buyers’ intentions – and will be able to do so without repercussion. But those buyers have lost money because they have paid for something they did not intend to buy – a foreign-made product that does not support American companies or American jobs.

An interpretation of the standing requirement for loss of money or property that only requires that the plaintiff purchase a product as to which a misrepresentation has been made is consistent with the purpose of Prop. 64. Prop. 64 was passed in order to assure that the plaintiff bringing the action had an actual transactional nexus with the defendant and was not an “unaffected” plaintiff. (See Proposition 64, section 1 (Findings and Declarations), ¶ (b)(3).) Because the plaintiff purchased the defendant’s product, he was an “affected” plaintiff and properly has standing under the UCL.

The UCL has long been perceived to be one of the most meaningful and useful of California’s consumer protection statutes. (See, for example, *Fletcher v. Security Pacific National Bank* (1979) 23 Cal.3d 442.) As such, it is imperative that this Court accept review of this case in order to establish the meaning of the “lost money or property” clause in section 17203. To continue to allow damages concepts to infect the standing analysis for the UCL will not only undermine the effectiveness and utility of the statute, but will allow manufacturers and sellers to make blatantly false statements to the consuming public with no repercussion. This is not only unfair to consumers, but to competitors who do not make similar false statements.

Because these issues are of such great importance, it is respectfully requested that this Court grant the petition for review.

THE ARKIN LAW FIRM

SHARON J. ARKIN

:sja

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 333 S. Grand Ave., 25th Floor, Los Angeles, CA 90071

On April 28, 2009, I served the foregoing document described as:

CAOC AMICUS LETTER IN SUPPORT OF GRANT OF REVIEW

on the interested parties in this action by placing true copies thereof enclosed in sealed envelopes addressed as stated on the attached mailing list.

- Courier: I caused each envelope to be sent by Federal Express or Overnight Express.
- By Mail: By depositing with the U.S. Postal Service on this day with postage thereon fully prepaid at Brookings, OR.
- By Personal Service: I caused to be delivered such envelope by hand to counsel at:
- By FAX I caused each document to be sent by FAX to the numbers as listed on the attached mailing list.

Executed on April 28, 2009 at Brookings, OR.

- State I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

SHARON J. ARKIN

| Party | Attorney |
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| Petitioners: Kwikset Corporation The Black and Decker Corp. | Fred A. Rafeedie Michael J. Abbot Jones Bell Abbott et al LLP 601 S Figueroa St 27FL Los Angeles, CA 90017 |
| Respondent | The Superior Court of California, County of Orange Attn: Hon. David Velasquez Dept. # CX-101 700 Civic Center Dr. West Santa Ana, CA 92701 |
| Real Parties in Interest James Benson Al Snook Christina Grecco Chris Wilson | Venus Soltan Soltan and Associates 450 Newport Center Drive Suite 350 Newport Beach, CA 92660 Pamela M. Parker Coughlin, Stoia, Geller, Rudman & Robbins 655 W. Broadway, Suite 1900 San Diego, CA 92101 |
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