



## BRIDGEPORT CONTINUING EDUCATION

# UCL Remedies: The Scope of Injunctive Relief and Restitution

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by

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# I. Background

- Remedies language is set forth in Bus. & Prof. Code §17203.
- Equitable remedies only avenue for private plaintiffs:
  - **Injunctive relief:** “The court may make such orders or judgments ... as may be necessary to prevent the use or employment by any person of any practice which constitutes unfair competition ...” (§17203)
  - **Restitution:** “The court may make such orders or judgments ... as may be necessary to restore to any person in interest any money or property, real or personal, which may have been acquired by means of such unfair competition.” (§17203)

# Background *(continued)*

- Language represents a legislative trade-off:
  - *Bank of the West v. Superior Court*, 2 Cal.4th 1254 (1992);  
*Dean Witter Reynolds, Inc. v. Superior Court*, 211 Cal.App.3d 758 (1989).
  - “In drafting the act, the Legislature deliberately traded the attributes of tort law [including a damages remedy] for speed and administrative simplicity.” *Bank of the West*, 2 Cal.4th. at 1266-67.
- UCL remedies are cumulative to remedies afforded by other laws. Bus. & Prof. Code §17205.
- The judge decides the propriety of these remedies. Because they are equitable, there is no right to a jury trial in a UCL case.

## II. Injunctive Relief

- Scope of available relief
  - Injunction remedy is intentionally broad, designed to enable courts to rectify activity that violates the UCL “in whatever context such activity might occur.” *Barquis v. Merchants Collection Assn.*, 7 Cal.3d 94, 111 (1972).
  - “[T]he [UCL] was intentionally framed in its broad, sweeping language, precisely to enable judicial tribunals to deal with the innumerable ‘new schemes which the fertility of man’s invention would contrive.’” *Id.* at 112.

# Injunctive Relief *(continued)*

- Backward-looking vs. forward-reaching injunctions:
  - Injunctions to halt future wrongful acts. *See, e.g., California Service Station etc. Assn. v. Union Oil Co.*, 232 Cal.App.3d 44, 57 (1991).
  - Injunctions to remedy the past effects of unfair business practices. *Hewlett v. Squaw Valley Ski Corp.*, 54 Cal.App.4th 499 (1997); *Consumers Union of U.S., Inc. v. Alta-Dena Certified Dairy*, 4 Cal.App.4th 963, 966 (1992).

# Injunctive Relief *(continued)*

- Injunctions requiring affirmative acts?
  - *Colgan v. Leatherman Tool Group, Inc.*, 135 Cal.App.4th 663 (2006).
  - *People v. Toomey*, 157 Cal.App.3d 1 (1984).

# Injunctive Relief *(continued)*

## Questions

- Under Prop. 64, what is scope of injunction entered at request of private plaintiff?
- Can defendant be enjoined from engaging in practice as it relates to all defendants even if action is not representative?
- Is formal class certification required?

### III. Restitution/Disgorgement

- Court “may only order restitution to any person from whom money or property has been unfairly or unlawfully obtained.” *Cortez v. Purolator Air Filtration Prods. Co.*, 23 Cal.4th 163, 172 (2000).
- Even if the defendant’s conduct is wrongful, the plaintiff has no right to restitution under the UCL if it never had a vested interest in the money or property at issue. *Korea Supply Co. v. Lockheed Martin Corp.*, 29 Cal.4th 1134 (2003).



# Restitution/Disgorgement *(continued)*

- Can non-restitutionary disgorgement of profits ever be recovered?
  - Not in a non-class, representative action. *Kraus v. Trinity Mgmt. Serv., Inc.*, 23 Cal.4th 116 (2000).
  - Not in an individual action. *Korea Supply Co. v. Lockheed Martin Corp.*, 29 Cal.4th 1134 (2001).
- In a certified UCL class action?
  - **Yes** – *Corbett v. Superior Court (Bank of America, N.A.)*, 101 Cal.App.4th 649 (2002).
  - **No** – *Feitelberg v. Credit Suisse First Boston LLC*, 134 Cal.App.4th 997 (2005); *Madrid v. Perot Systems Corp.*, 130 Cal.App.4th 440 (2005).
- How would disgorgement of profits be measured?

# Restitution/Disgorgement *(continued)*

## Retail intermediary?

- Based on the word “directly” in *Korea Supply*, 29 Cal.4th at 1149, defendants (primarily product manufacturers) argue that the involvement of a retail intermediary precludes a restitutionary award because such an award would not “replace any money or property that defendants took *directly* from plaintiff” (emphasis added).
- Compare *Phillips v. DaimlerChrysler Corp.*, Sacramento County Superior Court case no. 03AS05615 (order dated April 22, 2004) with *Conroy v. Fresh Del Monte Produce* case no. RG04-146298 (order dated March 7, 2005), Alameda County Superior Court case no. RG04-146298 and *In re Tobacco Cases II*, JCCP no. 4042 (order dated May 23, 2003).

# Restitution/Disgorgement *(continued)*

How to measure restitution and prove it at trial?

- Restitution is “measured by the difference between the actual value of that with which the defrauded person parted and the actual value of that which he received.” Stern, *Bus. & Prof. C. §17200 Practice*, §8:89.1 (Rutter Group 2006) (citing *Colgan v. Leatherman Tool Group, Inc.*, 135 Cal.App.4th 663 (2006)).
- The *Colgan* formulation:
  - “the sums received by [the defendant] attributable to the ‘Made in U.S.A.’ representations” (134 Cal.App.4th at 674-75);
  - “the amount ... necessary to restore purchasers to the status quo ante” (*id.* at 700);
  - “the dollar value of the advantage to [the defendant]” (*id.*).

# Restitution/Disgorgement *(continued)*

How to measure restitution and prove it at trial? *(continued)*

- The *Colgan* evidentiary roadmap:
  - “exchange value” on the open market;
  - retail price;
  - expert testimony on “the dollar value of the consumer impact or the advantage realized by” the defendant as a result of its UCL violations.

# Restitution/Disgorgement *(continued)*

- Damages by another name are still damages ...
  - *Vikco Ins. Servs., Inc. v. Ohio Indem. Co.*, 70 Cal.App.4th 55 (1999);
  - *Seibels Group, Inc. v. R.J. Reynolds Tobacco Co.*, 1999 WL 760527 (N.D. Cal.).

## IV. Other Equitable Relief

- Declaratory relief is an available UCL remedy. *AICCO, Inc. v. Insurance Co. of North America*, 90 Cal.App.4th 579 (2001).
- Accounting/Constructive Trust are also available remedies. *People v. Orange County Charitable Servs.*, 73 Cal.App.4th 1054 (1999).

# V. Attorneys' Fees?

- No express right under UCL
- Contractual recovery per Civ. Code §1717(a) -
  - Contractual right to attorneys' fees is reciprocal even if contract appears to be unilateral. *Wilson's Heating & Air Conditioning v. Wells Fargo Bank*, 202 Cal.App.3d 1326 (1988).
- Private Attorney General doctrine - CCP § 1021.5
  - *Beasley v. Wells Fargo Bank*, 235 Cal.App.3d 1407 (1991) ("Beasley II").
  - *Baxter v. Salutory Sportsclubs, Inc.*, 122 Cal.App.4th 941 (2004).
- Catalyst theory
  - *Graham v. DaimlerChrysler Corp.*, 34 Cal.4th 553 (2004).

## VI. Public Prosecutor Actions

- Same injunctive relief and restitution remedies as above.
  - **Plus** – monetary penalties up to \$2,500 per violation. (§17206)
  - **And** – additional \$2,500 per violation when senior citizens involved. (§17206.1)
- Only AG/DA/County Counsel can get penalties. (§17206)



## VII. Did Prop. 64 Revive A “Damages” Remedy For Private Plaintiffs?

- After Prop. 64, plaintiffs have to prove loss of money or property, i.e., damages. However, under pre-Prop. 64 caselaw, they cannot recover damages.
- Reason: legislative trade-off between tort remedies and streamlined procedures. *Bank of the West v. Superior Court*, 2 Cal.4th 1254 (1992).
- But now the streamlined procedures are gone, too. Class certification is required; no more “streamlined” representative actions.

# Did Prop. 64 Revive A “Damages” Remedy For Private Plaintiffs? *(continued)*

- It may be time for the courts to reexamine whether the rationale for limiting UCL monetary remedies to “restitution” alone still exists.
- For more, see Fazio, “Did Prop. 64 resuscitate ‘damages’ as a UCL remedy?” *The UCL Practitioner* (September 12, 2005) (<[www.uclpractitioner.com/2005/09/did\\_prop\\_64\\_res.html](http://www.uclpractitioner.com/2005/09/did_prop_64_res.html)>)

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Questions