

Class Actions

The Scope Of Class Restitution In The Wake Of In Re Tobacco II Cases

by
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Commentary

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Are class members who are potentially uninjured entitled to restitution under the UCL in light of the California Supreme Court's decision in *In re Tobacco II Cases*, 46 Cal. 4th 298 (2009)? In its decision, the California Supreme Court refused to extend Proposition 64 standing and causation requirements to putative class members, reasoning that doing so would frustrate Business & Professions Code Section 17203's entitlement to restitution — an entitlement that is “patently less stringent” than the standing requirement for the class representative codified under Section 17204. See *In re Tobacco II Cases*, 46 Cal. 4th at 320. In practical terms, only the named class representative in a UCL action is required to establish that he or she actually suffered “injury in fact and has lost money or property as a result of the unfair competition”, whereas putative class members would be entitled to restitution of money or property “which *may* have been acquired’ [] by means of the unfair practice.” See *id.* (italics in original). This distinction has been the subject of significant debate, leading some to claim that the Court's analysis would improperly permit a certified UCL restitution class to include putative class members who may not have actually been injured.

As an initial point, the core premise of this criticism ignores *Tobacco II's* reaffirmation of fundamental UCL tenants that effectively return the gravamen of

a UCL claim to the *status quo*, pre-Proposition 64. Historically, whether class members were actually damaged has played absolutely no part in the UCL calculus. Rather, “the UCL's focus [is] on the defendant's conduct, rather than the plaintiff's damages, in service of the statute's larger purpose of protecting the general public against unscrupulous business practices.” *Id.*, at 312. In furtherance of this policy, relief is available “without individualized proof of deception, reliance and injury” [*id.* at 320], upon the minimal showing that “members of the public are likely to be deceived....” See *Id.*, at 312. These standards define a completely different remedial paradigm that is more expansive than traditional tort law causes of action. This feature of the UCL was underscored by the *Tobacco II* Court, who reasoned that “to hold that the absent class members on whose behalf a private UCL action is prosecuted must show ... that they have ‘lost money or property as a result of the unfair competition’ (§ 17204) would conflict with the language in section 17203 authorizing broader relief.” See *id.*, at 320.

However, the fact that the UCL's more expansive remedial paradigm may include class members who did not act in reliance on the challenged practice does not mean that the class includes members who were not injured. Such a conclusion disregards the fact that the global impact of a deceptive business practice, from the defendant's perspective, will always be distributed in some form to the entire consumer base. For example, even when only a handful of consumers purchase a product based on a deceptive advertising campaign, the cost of the deceptive advertising campaign itself is passed on

to all purchasers as a component of the purchase price of that product. Similarly, where a business promotes a deceptive feature of a product to justify a purchase price that is above the price of the competing brand, all purchasers are damaged by having to pay the enhanced price whether they relied on the deceptive representation or not. In both example cases, crafting a restitution formula to return such funds to the entire class of purchasers seeks to further the UCL's objective that "wrongdoers not retain the benefits of their misconduct...." See *In re Tobacco II Cases*, 46 Cal. 4th at 320.

Yet, if a UCL class can include persons who did not act in reliance on the challenged practice, what, if any, boundaries are there on the limits of class-wide restitution? Under applicable law, there are only three limitations on the trial court's discretion: (1) the restitution must constitute "money or property ... which may have been acquired by means of ... unfair competition" (Cal. Bus & Prof Code § 17203), (2) the money or property returned must be money or property which the class member has an ownership interest, and (3) the money or property returned

must be limited to that necessary to restore the *status quo*. See *Colgan v. Leatherman Tool Group, Inc.*, 135 Cal. App. 4th 663, 698 (2006) (citing *Korea Supply Co. v. Lockheed Martin Corp.*, 29 Cal. 4th 1134, 1148 (2003); *State of California v. Altus Finance*, 36 Cal. 4th 1284, 1304-05 (2005); *Kraus v. Trinity Management Services, Inc.*, 23 Cal. 4th 116, 126-27 (2000)). All three limitations seek to ensure that any restitutionary relief awarded by the court is tailored to the challenged practice. Thus, while the scope of potential restitutionary relief to class members is broad, it is not limitless.

In short, criticism that *Tobacco II* improperly permits restitution to uninjured class members conflates the clear distinction drawn by the *Tobacco II* Court between standing requirements imposed on the named plaintiff versus the broad relief afforded to consumers under the UCL. In many cases, complete realization of the UCL's remedial paradigm will require certification of a broad restitutionary class that includes both persons who did, and did not act in reliance on the challenged practice. ■

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