JULY 19, 2018

Ninth Circuit – a UCL plaintiff must prove "value received" when purchased product has some value

by Jon Michaelson

In a recent unpublished opinion, a panel of the Ninth Circuit Court of Appeals reinforced the principle that obtaining restitution for violation of California's major consumer protection statutes can be a near impossible proposition. The Court in this case, *Chowning v. Kohl's Department Stores, Inc.*, 2018 WL 3016908 (9th Cir. June 18, 2018), dealt with a putative class action challenging Kohl's practice of listing both an "original price" (or "actual retail price") and a "sale price" on merchandise tags. The comparative price listing was alleged to constitute an actionable misrepresentation in violation of the California Unfair Competition Law ("UCL"), the California False Advertising Law, and the California Consumer Legal Remedies Act, because the items involved had never been sold at the higher "original price." In other words (according to Ms. Chowning), consumers purchasing these goods were led to believe they were getting a substantial bargain when in fact the deal was probably not as beneficial as they were being led to believe.

At the District Court level, a request for injunctive relief relative to Kohl's practice was addressed substantively in a separate case. Thus, the *Chowning* dispute focused on plaintiff's request for restitution – as the primary focus of the UCL and related statutes is equitable and damages cannot be recovered. *See, e.g., Korea Supply Co. v. Lockheed Martin Corp.*, 29 Cal. 4th 1134 (2003). Kohl's moved for summary judgment, based on the holding in *In re Tobacco II Cases*, 46 Cal.4th 298 (2009), that restitution is the difference between price paid and value received. According to Kohl's, because plaintiff admitted she had received some value from the goods purchased, she could not demonstrate any such difference and therefore could not prove she was entitled to restitution. Ms. Chowning attempted to avoid this conclusion by reference to calculations which applied the discount percentage reflected on the "misleading" price tags to prevailing retail prices, and by arguing that a full refund was a proper measure of restitution, and by contending that disgorgement of Kohl's profits was an appropriate remedy. All of these attempts were rejected. 2016 WL 1072129 at *6-10 (No 15-8673 C.D. Cal. Mar. 15, 2016). Per the District Court, because she had received some benefit, she was not entitled to restitution even if Kohl's had misled her by inflating the magnitude of the discounts it offered. *Id.* at *11-13.

Ms. Chowing fared no better in the Ninth Circuit. There, the panel similarly emphasized the equitable nature of proceedings under the UCL and related statutes, precluding recovery of compensatory damages. It acknowledged that restitution was ancillary relief rather than the main focus of protecting consumers from unfair practices (by way of injunction). And it followed the principle set forth in the

California case law – as it was bound to do – that restitution must be measured by the difference between amount paid and value received. As to plaintiff's position in opposing summary judgment, the panel focused in its opinion (as it had in oral argument) on whether she tendered any evidence of the value of what she had received. And the panel agreed that she had not. Indeed, her expert expressed no opinion on that point, and she had not attempted to show in any other way what the goods involved – or anything comparable – might have been worth at the time of purchase. As a result, "[w]ithout evidence of the 'value … received,' [the necessary] calculation is impossible," and summary judgment was appropriate. *Chowning,* 2018 WL 3016908, at *2.

Regarding the alternative approaches to restitution which plaintiff had advanced, the panel observed that refund and disgorgement were both unavailable in UCL (and companion statutory) proceedings, based on settled case law. As to plaintiff's discount percentage model, the panel characterized it as a measure of contract damages rather than a measure of equitable relief. It brushed aside plaintiff's reference to the use of the same approach in addressing the issue of standing in class action cases as inapposite when dealing with the separate question of restitution – citing in particular that aspect of the California Supreme Court's decision in *Kwikset Corp. v. Superior Court*, 51 Cal.4th 310 (2011) ("the standards for establishing standing … and eligibility for restitution … are wholly distinct")

Notwithstanding the clear guidance in California jurisprudence for more than a decade, plaintiffs continue to probe for ways to avoid limits on restitutionary recovery in pricing cases. *Chowning* illustrates how the courts continue to resist alternative arguments and new economic models. Whether this case is a final word on this issue remains to be seen.