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IN THE

SUPREME COURT OF CALIFORNIA

JAMES A. CLARK, *et al.*,

Petitioners,

v.

THE SUPERIOR COURT OF LOS ANGELES COUNTY,

Respondent.

NATIONAL WESTERN LIFE INSURANCE COMPANY,

Real Party in Interest.

After a Decision by the Court of Appeal
Second Appellant District, Division Seven
Case No. B212512

PETITION FOR REVIEW

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Service on Attorney General and Los Angeles County District Attorney Pursuant to California Business & Professions Code Section 17209

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ISSUE PRESENTED

Is the trebling penalty set forth in section 3345 of the Civil Code applicable to restitution sought in a private action by senior citizens under California's unfair competition law?[1]

INTRODUCTION – WHY REVIEW SHOULD BE GRANTED

Despite an unbroken line of decisions dating back to the 1970's holding that damages, whether compensatory, punitive or treble, are not available under the UCL, the Court of Appeal concluded that Civil Code section 3345, including its treble penalty feature, is applicable to restitution sought in a private UCL class action by senior citizens. This conclusion stands on its head the "overarching legislative concern to provide a ***streamlined*** [UCL] procedure"[2] by the exclusion of damage claims of any kind. While acknowledging these "well-established principles of law," the appellate court nevertheless found that section 3345 applies to restitution sought in private UCL actions brought by senior citizens. *Slip Opinion,* pp. 21, 23.[3]

The issue presented by this case is one of first impression in an area of California law of enormous importance. UCL "claims appear as part of

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[1] Business & Professions Code, sections 17200 through 17210. The law is hereafter referred to as the "UCL."

[2] *Cortez v. Purolator Air Filtration Products Co.,* 23 Cal. 4th 163, 173 (2000), quoting *Dean Witter Reynolds, Inc. v. Superior Court,* 211 Cal App. 3d 758, 774 (1989) (emphasis by the Court).

[3] A copy of the Court of Appeal's May 21, 2009 Opinion (and its May 21, 2009 Order Modifying Opinion (No Change in Judgment)) is attached to this Petition for Review, pursuant to California Rule of Court 8.504(b)(4).

virtually all consumer class actions in California." W. Stern, *Bus. & Prof. C. §17200 Practice*, § 1.2 at 1-1 (Rutter Group 2009). While we are unaware of any specific count of UCL cases, whether bought individually or as a class action, now pending in California, that number is certainly quite large. Reflective of the rapid growth and prevalence of UCL claims is the fact that in the last decade this Court has repeatedly considered various aspects of the UCL,[4] most recently in its decision issued last month in *In Re Tobacco II Cases*, 46 Cal.4th 298 (2009).[5]

Prior to the issuance of the Court of Appeal's published decision, one thing practitioners could bank on was that neither punitive damages nor treble damages could be awarded in a UCL action because the ***only*** monetary remedy permitted under the UCL is restitution.[6] However, the

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[4] *See, e.g., Branick v. Downey Savings & Loan Assn.*, 39 Cal. 4th 234 (2006); *Californians for Disability Rights v. Mervyn's, LLC*, 39 Cal. 4th 223 (2006); *Korea Supply Co. v. Lockheed Martin Corp.*, 29 Cal 4th 1134 (2003); *Kraus v. Trinity Management Services, Inc.*, 23 Cal. 4th 116 (2000); *Cortez, supra*, 23 Cal. 4th 163; *Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co.*, 20 Cal. 4th 163 (1999).

[5] There are additional UCL cases currently under review by the Court. *See, e.g., Kwikset Corp. v. Superior Court*, No. S171845 (review granted 6/11/09); *Clayworth v. Pfizer, Inc.*, No. S166435 (review granted 11/19/08) (among the issues announced by this Court in accepting review is the scope of restitution under the UCL – an issue also present in this case); *Arias v. Superior Court*, No. S155965 (review granted 10/10/07); *Amalgamated Transit Union v. Superior Court* , No. S151615 (review granted 06/20/07).

[6] *See, e.g., Cortez, supra*, 23 Cal.4th at 173-74 (this Court explaining the difference between damages and restitution and that only restitution is available under the UCL); *Kraus, supra,* 23 Cal.4th at 126 ("Through the UCL a plaintiff may obtain restitution . . . in order to . . . restore to the parties in interest money or property taken by means of unfair competition"); *Buckland v. Threshold Enterprises, Ltd.*, 155 Cal. App. 4th 798, 817 (2007) (citing *Cortez*, Division Four of the Second Appellate District explains that "remedies for individuals under the UCL are restricted to injunctive relief and restitution" and that "restitution under the UCL is not the recovery of compensatory damages, but a form of equitable relief."

Court of Appeal concluded that since 1988 (the date of enactment of Civil Code section 3345) there was a hidden exception to the plain statements in *Cel-Tech* and *Korea Supply* that treble damages and punitive damages are not recoverable in a UCL action, specifically the trebling procedure of section 3345. In reaching this conclusion, the appellate court never considered how section 3345 would actually operate if it were grafted onto a private UCL action. In that circumstance, section 3345 would turn the UCL trial into a two-stage trial effectively similar to a tort action with a prayer for punitive damages. This is miles from the "***streamlined*** procedure" envisioned by the Legislature for UCL actions.

The Court of Appeal here has effectively ignored decades of controlling precedent from this Court, which has consistently found that the Legislature intended to limit private UCL monetary remedies to restitution. In this case of first impression, review is warranted in order for this Court to determine whether the Legislature intended such a drastic change in UCL remedies when it enacted section 3345.

In fact, the underlying writ petition also acknowledged that the legal issue in this case presented one of "first impression in the appellate courts" and "an issue of widespread interest and importance to consumer litigation affecting a burgeoning senior population." That petition further alleged that counsel for plaintiffs has three other certified class actions seeking section 3345 enhancement of UCL restitution. Petition for Writ, p. 14, ¶ 25(c).

In summary, this case presents an important issue of law, an issue of first impression and one of extraordinary importance to the bench and bar. Review by this Court is essential.

SUMMARY OF THE ARGUMENT

The Court of Appeal based its Opinion on the fundamental premise that section 3345 "by its own terms applies" to private UCL actions brought by seniors. *Slip Opinion*, p. 18 n.13. Thus, the Court of Appeal concluded that section 3345(a)'s use of the words "unfair methods of competition" constitutes an "express legislative mandate" that section 3345 applies to UCL actions. *Slip Opinion,* pp. 16, 22.[7] This conclusion, however, is incorrect.

Section 3345 was enacted in 1988 as part of Senate Bill 1157 ("SB 1157"). In enacting section 3345, the Legislature made explicit reference not to the UCL, but rather to the Consumer Legal Remedies Act ("CLRA"). *Civil Code*, §§ 1750 *et seq*. Specifically, section 3345(a) commences with a declaration that it applies only to actions by or on behalf of senior or disabled citizens "as those terms are defined in subdivisions (f) and (g) of Section 1761," part, of course, of the CLRA. Further, the damages section of the CLRA specifically applicable to seniors requires the "trier of fact" to make an affirmative finding regarding one or more "of the factors set forth in subdivision (b) of Section 3345." *Civil Code,* § 1780(b)(1)(B). Thus,

[7] Section 3345(a) provides as follows: "This section shall apply only in actions brought by, on behalf of, or for the benefit of senior citizens or disabled persons, as those terms are defined in subdivisions (f) and (g) of Section 1761, ***to redress unfair or deceptive acts or practices or unfair methods of competition***." (Emphasis added.)

both the CLRA and section 3345 cross-reference the other statute, but no similar express reference to the UCL is found in section 3345.

With respect to the UCL, the phrase "unfair competition" appears in several portions of the UCL, but not the precise phrase "unfair methods of competition" used by section 3345. *See Business & Professions Code,* §§ 17200, 17202, 17203, 17204, 17206. 17206.1. By contrast, that precise language of section 3345 does appear in the CLRA. *Civil Code,* § 1770(a).[8] In short, the appellate court's opinion hinges on the conclusion that section 3345 by its plain language declares itself applicable to UCL private restitution actions, but that conclusion is in error.

In addition to the incorrect premise that section 3345 expressly referred to the UCL, the Opinion is based on a second erroneous underpinning. Specifically, the Court of Appeal concludes that while treble or punitive damages are not permitted by section 17203 of the UCL, allowing these damages under the UCL by reason of section 3345 does no harm to the overall UCL process. In fact, such a result would destroy the Legislature's overriding desire for a "***streamlined***" process for resolving UCL cases.

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[8] Section 1770(a) provides: "(a) The following ***unfair methods of competition*** and unfair or deceptive acts or practices undertaken by any person in a transaction intended to result or which results in the sale or lease of goods or services to any consumer are unlawful:" (Emphasis added.) Similarly, section 3345's phrase "unfair or deceptive acts or practices" is also found in the section 1770(a) of the CLRA.

It is, of course, a familiar principle of statutory construction that the Legislature is presumed not to intend to disturb settled principles of law – here, that no damages of any kind are permitted under the UCL – absent a clear expression of intention to do so. While the Legislature could have decided to permit trebling of restitution under the UCL, concluding that such trebling of restitution – the only monetary remedy allowed by the UCL – was more important than the "***streamlined***" process of the UCL, if that were the case one would expect to find in the legislative history some hint of that intention. None exists.

Finally, the Court of Appeal has simply misread section 3345(b). That subsection permits trebling, assuming the other requirements are satisfied, when a statute imposes "either a fine, or a civil penalty or other penalty, ***or any other remedy the purpose or effect of which is to punish or deter*** . . . ." (Emphasis added.) Fines and penalties are remedies having nothing to do with compensating an injured party – they are punitive remedies.[9] The Court of Appeal's opinion concludes, however, that "other remedies" (the last and emphasized item in the quoted phrase) is not limited to non-compensatory remedies but includes a restitution remedy pursuant to section 17203. This conclusion is incorrect.

Long established principles of statutory construction provide that specific terms control apparently more general ones, and terms separated by commas are presumed to be similarly limited in scope. Applying these

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[9] It is no coincidence that the Legislature placed this trebling statute in that portion of the Measure of Damages section of the Civil Code entitled ***Penal Damages***. *Civil Code*, Article 3 of Chapter 2, Title 2, Part 1 of Division 4.

well-established principles of statutory construction to subsection (b) of 3345 is particularly appropriate because it is consistent with the use of the phrase "***the*** purpose or effect" as opposed to "***a*** purpose or effect." So limited, the term "other remedy" is restricted to non-compensatory remedies such as punitive damages pursuant to section 3294 of the Civil Code and other statutes permitting punitive or treble damages, but not restitutionary awards pursuant to section 17203 of the UCL.

STATEMENT OF THE CASE

Factual Background

This case is a class action on behalf of individuals 65 and older who purchased one of four annuities sold by National Western Life Insurance Company ("National Western"). While the Third Amended Complaint alleged causes of action for fraud, breach of contract, and breach of the implied covenant of good faith and fair dealing, among others, the only cause of action certified against National Western in the trial court's ruling of February 28, 2007 was a UCL cause of action.[10] The gist of plaintiffs' UCL claim is that National Western violated certain notice provisions found in sections 10127.10(c) and 10127.13 of the Insurance Code.

Procedural Background

As discussed above, this case was filed as a class action against National Western, with plaintiffs alleging five separate causes of action: breach of contract, bad faith, fraud, declaratory relief, and violation of the

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[10] *See* Petitioners' Exhibits in Support of Petition for Writ of Mandate ("Petitioners' Exhibits"), Exhibits "A" & "B." In the Court of Appeal, plaintiffs were the Petitioners. Now, National Western is the Petitioner.

UCL. The Third Amended Complaint is the operative complaint, filed December 22, 2005. Petitioners' Exhibits, Ex. "A." The trial court denied certification as to all causes of action with the exception of certifying a single claim under the UCL. Petitioners' Exhibits, Ex. "B."[11]

National Western filed a motion for judgment on the pleadings on July 15, 2008, seeking to dismiss the claim for "treble damages under Civil Code section 3345."[12] Following oral argument on October 3, 2008, the trial court granted that motion at the time of the hearing, which ruling was then set forth in a written ruling issued November 14, 2008.[13] Relying on this Court's decisions in *Cel-Tech* and *Korea Supply*, the trial court concluded as follows:

> "Plaintiffs have no statutory cause of action except under the UCL. Damages are not available under the UCL and restitution, the only available remedy, is not punitive or

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[11] There is a subclass, consisting of individuals that purchased their National Western annuities from the same agent who sold the annuity to Nancy Clark, the deceased mother of plaintiff James Clark, but that class consists of approximately 36 individuals and 50 annuity contracts. Petition for Writ of Mandate, p. 5, ¶ 8. The subclass is not implicated in the present proceedings.

[12] Petitioners' Exhibits, Exs. "C" and "D" through "G." As observed by the Court of Appeal, National Western simultaneously filed a motion for summary adjudication that similarly sought to dismiss the treble damages claim, along with another claim alleged with respect to the subclass. *Slip Opinion*, p. 4. Plaintiffs opposed the motion for judgment on the pleadings and National Western submitted reply papers. Petitioners' Exhibits, Exs. "H" through "M," and "O through "S."

[13] Petitioners' Exhibits, Exs. "T," "U," and "V."

> preventative. Therefore trebled recovery is not available under section 3345."[14]

Plaintiffs filed a petition for writ with respect to the trial court's written ruling on December 5, 2008. After the Court of Appeal requested and National Western supplied preliminary opposition to the writ petition, the Court of Appeal issued an Order to Show Cause on December 30, 2008. National Western then submitted its written return, and plaintiffs filed their reply. Oral argument occurred on May 7, 2009. The Court of Appeal issued its Opinion on May 21, 2009.[15]

Pursuant to the Opinion, the Court of Appeal granted the writ petition, and directed the trial court to vacate its November 14, 2008 written ruling as to National Western's motion for judgment on the pleadings and to enter a new order denying the motion. The substance of the appellate court's Opinion, as it is relevant for this present Petition for Review, is discussed below.

LEGAL DISCUSSION

1. CONTRARY TO THE CONCLUSION OF THE COURT OF APPEAL, SECTION 3345 DOES NOT EXPRESSLY REFERENCE THE UCL

The underlying premise of the Court of Appeal's Opinion is that the enhanced remedy of section 3345 by "express legislative mandate" applies

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[14] Petitioners' Exhibits, Ex. "V," p. 8:21-23.

[15] Later that same day, Division Seven issued its Order Modifying Opinion (No Change in Judgment).

to restitution awards of private litigants under the UCL. *Slip Opinion,* p. 16. Indeed, the appellate court declared that the "unambiguous language of section 3345 encompasses" UCL actions brought by seniors seeking restitution. *Slip Opinion,* p. 2. Based on this premise, the Court of Appeal swept aside over 30 years of California case law declaring that neither punitive nor treble damages can be awarded under the UCL. But the premise is wrong. Section 3345 does not expressly or unambiguously refer to the UCL. Rather, it expressly refers to the CLRA, as found at Civil Code sections 1750 *et seq.*

Consistent with its underlying premise, the Court of Appeal concluded that "section 3345 by its very terms" applied to actions by senior private plaintiffs seeking restitution. *Slip Opinion,* p. 18 n.13.[16] However, "its very terms" do not reference the UCL. To be sure, various sections of the UCL use the term "unfair competition," but the phrase "unfair methods of competition" does not appear anywhere in the UCL. *Bus. & Prof. Code,* §§ 17200, 17203, 17204, 17206, 17206.1. Similarly, the phrase "unfair or deceptive acts" is not found in the UCL.

In contrast to the UCL, ***both*** "unfair or deceptive acts" and "unfair methods of competition" are contained in the CLRA. *Civil Code,* § 1770(a).[17] Further, section 1780(b)(1) of the CLRA provides that a fine of

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[16] The final sentence of that footnote states: "But as we must repeatedly note, section 3345 by its very terms applies, without limitation, to actions brought by or on behalf of those categories of individuals 'to redress unfair or deceptive acts or practices or unfair methods of competition.'"

[17] Again, section 1770(a) provides: "The following ***unfair methods of competition*** and ***unfair or deceptive acts*** or practices undertaken by any person in a transaction intended to result or which results in the sale or

up to $5,000 may be awarded, if, among other requirements, the "trier of fact" makes "an affirmative finding in regard to one or more of the factors set forth in subdivision (b) of Section 3345." Of course, section 3345 itself references the CLRA definition of senior citizens and disabled persons in subsection (a), a point acknowledged twice by the Court of Appeal. *Slip Opinion*, pp. 10, 22 n.16.

Conversely, nowhere in section 3345 does it cross reference any section of the UCL – and nowhere in the UCL does it cross reference any portion of section 3345. Thus, while the Legislature in enacting SB 1157 expressly cross-referenced section 3345 and the CLRA, there is no similar cross referencing of section 3345 and the UCL, and there is no legislative history – contrary to the appellate court's underlying premise – suggesting that section 3345 was intended to apply to private restitution claims by seniors under the UCL.

Having demonstrated that the plain language of section 3345 does not apply to a UCL action brought by seniors, the next step is to determine if the legislative history addresses the issue. The Court of Appeal acknowledges that the "legislative history of section 3345 is unhelpful" in determining whether the section was intended to apply to the UCL. *Slip Opinion*, p. 2. This acknowledgement is critical since it is clear that the Legislature knows how to make plain its intent. A perfect example is section 798.86 of the Civil Code, the penal remedy provision of the Mobilehome Residency Law. In *De Anza Santa Cruz Mobile Estates*

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lease of goods or services to any consumer are unlawful:" (Emphasis added.)

Homeowners Ass'n., v. De Anza Santa Cruz Mobile Estates, 94 Cal. App. 4th 890, 911-12 (2001), the court held that this section provided the exclusive penalty for violations of the statute and thus punitive damages were not permitted. The court explained that the Legislature "knows how to express" its intent and therefore silence on the subject "indicates a contrary intent." *Id.* Two years later, the Legislature amended section 798.86 to specifically permit the recovery of punitive damages.

In this case, had the Legislature intended to change established law and permit a restitution award in a private UCL action to be trebled, it could have easily said that, but no such language exists. Silence on this point is particularly telling given, as we discuss below, the overarching legislative desire for a "***streamlined***" UCL process in which no damages of any kind are permitted. If the Legislature wanted to change this process, it could have said so but did not.

Moreover, another well-established principle of statutory construction is that a "more specific statute controls over a more general one." *E.g., Cumero v. Public Employment Relations Bd.,* 49 Cal. 3d 575, 587 (1989); *Arbuckle-College City Fire Protection Dist. v. County of Colusa,* 105 Cal. App. 4th 1155, 1166 (2003). The Court of Appeal acknowledged this principle, stating "[w]ere section 3345 merely a general authorization of treble damages in civil actions brought by senior citizens . . . , we would agree the general authorization would not trump the specific, limited restitution remedy provided in . . . section 17203." *Slip Opinion,* p. 18 n.13. The appellate court declined to so agree, however, explaining that "section 3345 by its very terms applies, without limitation, to actions

brought by or on behalf of those categories of individuals 'to redress unfair or deceptive acts or practices or unfair methods of competition.'" *Id.* As we have demonstrated, section 3345 does not "by its very terms" apply to the UCL (in contrast to the CLRA), and thus the more limited restitution remedy of section 17203 applies to the exclusion of section 3345.

In summary, whether by the application of the statutory construction principle that the Legislature knows how to modify existing law (and did not do so here) or the principle that a specific statute trumps a more general one, section 3345 does not apply to private actions by seniors seeking restitution under section 17203.

2. APPLICATION OF SECTION 3345 TO THE UCL IS INCONSISTENT WITH THE BASIC PURPOSE OF THE UCL

Since ***1976*** the rule in California has been that ***damages*** may not be recovered by ***private individuals*** in a UCL action. *Chern v. Bank of America,* 15 Cal. 3d 866, 875 (1976).[18] Consistent with this long-standing principle, this Court has explained that private plaintiffs may not "receive damages, much less ***treble*** damages," in a UCL action. *Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co.,* 20 Cal. 4th

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[18] While it is true that *Chern* specifically considered sections 17500 and 17535, the language in those sections is similar to sections 17200 and 17203, and *Chern* has been interpreted as applying to the UCL as well as the False Advertising Law. *Bank of the West,* 2 Cal. 4th 1254, 1266 (1992); *Colgan v. Leatherman Tool Group, Inc.,* 135 Cal. App. 4th 663, 675 n.7 (2006); *Meta-Film Associates v. MCA, Inc.,* 586 F. Supp. 1346, 1363 (C.D. Cal. 1984). As the Court just noted in *In Re Tobacco II Cases*, a "violation of the UCL's fraud prong is also a violation of the false advertising law." *In re Tobacco II Cases, supra,* 42 Cal. 4th at ___, n.8, 93 Cal.Rptr.3d 559, 569.

163, 179 (1999) (emphasis by the Court).[19] In the same vein, *Korea Supply* explained that "attorneys fees and damages, including punitive damages, are not available under the UCL . . . ." *Korea Supply Co. v. Lockheed Martin Corp.,* 29 Cal. 4th 1134, 1148 (2003).

One of the most familiar rules of statutory construction is that the Legislature is deemed to be aware of "existing laws and judicial decisions in effect at the time legislation is enacted" and does not intend to overthrow long-established principles of law unless such an intention is clearly expressed or necessarily implied. *People v. Licas,* 41 Cal. 4th 362, 367 (2007); *Brodie v. Workers' Compensation Appeals Board,* 40 Cal. 4th 1313, 1325 (2007). Here, this principle is controlling for two reasons. First, applying the enhanced remedy of section 3345 to actions by seniors seeking restitution under the UCL is inconsistent with the overarching principle of a "***streamlined***" procedure in which no damages or any monetary relief other than restitution is permitted. Second, as the Court of Appeal acknowledges, nothing in the legislative history of section 3345 expresses an intention to overrule the principle of a "***streamlined***" procedure.

A. The Prohibition on the Recovery of Damages, of Any Kind, by Section 17203 is a Fundamental Principle of the UCL

While *Cel-Tech* and *Korea Supply* plainly hold that neither treble nor punitive damages are permitted in a UCL action, it is the reason for the rule that is critical. Simply put, the reason is that permitting an award of

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[19] As explained in footnote 6 above, the only monetary remedy available under the UCL is restitution.

treble or punitive damages is fundamentally inconsistent with the often-articulated desire that there should be an efficient UCL procedure. In *Dean Witter*, the court discussed this precise issue, explaining that the "exclusion of claims for compensatory damages is also consistent with the overarching legislative concern to provide a ***streamlined*** procedure for the prevention of ongoing or threatened acts of unfair competition." *Dean Witter, supra,* 211 Cal. App. 3d at 774 (emphasis by the court). The court went on to explain that permitting "individual claims for compensatory damages" would "tend to thwart this objective by requiring the court to deal with a variety of damage issues of a higher order of complexity." *Dean Witter, supra* at 774.

In *Cortez,* this Court made the same point in explaining that the UCL "is not an all-purpose substitute for a tort or contract action." *Cortez, supra* at 173; *accord Inline, Inc. v. A.V.L. Holding Co.,* 125 Cal. App. 4th 895, 904 (2005). Quoting *Dean Witter,* this Court explained that the reason that "damages are not available under section 17203" was the "'overarching legislative concern" for a "'***streamlined***'" UCL procedure. *Cortez, supra* at 173; *see also Bank of the West, supra,* 2 Cal. 4th at 1266-67 ("[i]n drafting the act, the Legislature deliberately traded the attributes of tort law for speed and administrative simplicity").

Korea Supply is, of course, the opinion in which this Court explicitly declared that punitive damages are not recoverable in a UCL action. Critically, in this same opinion, the Court took the occasion to "reaffirm that an action under the UCL 'is not an all-purpose substitute for a tort or contract action,'" for the same reasons noted in *Dean Witter* and *Cortez* – legislative objective of a streamlined UCL procedure – explaining:

"Because of this objective, the remedies provided are limited." *Korea Supply, supra* at 1150.

The concept of the UCL having limited remedies, but a broad liability scope is repeated in many other decisions of this Court and the intermediate appellate courts. *Cel-Tech, supra* at 180; *Buckland, supra,* 155 Cal. App. 4th at 812; *Shersher v. Superior Court,* 154 Cal. App. 4th 1491, 1497 (2007). In *Farmers Ins. Exchange v. Superior Court,* 2 Cal. 4th 377, 387 (1992), this Court advised that UCL actions were "subject to the distinct remedies provided thereunder."

The Court of Appeal, while acknowledging that *Cel-Tech* and *Korea Supply* preclude the recovery of treble or punitive damages under a UCL action, held that neither "case suggests enhanced remedies may not be available to private litigants under a different, express legislative mandate authorizing them." *Slip Opinion,* p. 16. Above we have demonstrated that section 3345 is ***not*** an "express legislative mandate authorizing" treble or punitive damages in a UCL action, and our point here is that the appellate court never considered the fact that permitting such damages is fundamentally inconsistent with the legislative scheme of the UCL.

No cause of action exists pursuant to section 3345. Rather, it is a damages or remedies section to be applied to a cause of action. Thus, whether the right to recover treble or punitive damages is claimed to exist in section 17203 or section 3345, the result is the same: in a UCL action, such damages would now be able to be recovered. With the triggering of section 3345, however, comes the baggage of the requirements of

subsection (b) for the award of enhanced remedies. In addition to the straightforward and "***streamlined***" factors required to make a restitution award under the UCL,[20] pursuant to the theory advanced by the Court of Appeal, the trial court will now also have to consider whether the factors of section 3345(b)[21] permit the trebling of the restitutionary award. Such a result is in inextricable conflict with the basic principle of a streamlined procedure, as the procedural setting of this present case demonstrates.

Under the decision of the Court of Appeal, this UCL class would be permitted to recover treble/punitive damages ***in a UCL cause of action.*** Again, section 3345 is a remedies section, and there is no freestanding cause of action for enhanced remedies. Under the decision of the Court of Appeal, therefore, the trial judge will now have to consider and make some affirmative findings on the multiple factors contained in section 3345(b) to decide whether UCL class members are entitled to treble/punitive

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[20] In determining the amount of a restitution award for a private litigant pursuant to section 17203, the trial court determines "***those measurable amounts which are wrongfully taken*** by means of an unfair business practice." *Day v. AT&T Corp.,* 63 Cal. App. 4th 325, 338-39 (1998) (emphasis by the court); *Colgan, supra,* 135 Cal. App. 4th at 698. This process does not involve consideration of any of the factors listed in section 3345(b).

[21] Under section 3345(b), the trial court must consider, among other things, whether "the defendant's conduct ***caused*** one or more senior citizens . . . to suffer: loss or encumbrance of a primary residence, principal employment or source of income . . . ." (Emphasis added.) Under section 3345(b)(3), a trial judge would have to find "whether one or more senior citizens . . . are ***substantially more vulnerable*** than others members of the public to the defendant's conduct because of age, poor health or infirmity . . . and ***actually suffered*** substantial physical, emotional or economic ***damages*** resulting from the defendant's conduct." (Emphasis added). These considerations are simply inconsistent with the streamlined process of section 17203.

damages.[22] No matter how described, no matter the rationale, this is plainly inconsistent with the "***streamlined***" procedure concept of the UCL.[23]

B. Nothing in the Legislative History of Section 3345 Even Hints at an Intention to Supersede This Court's Decisions in *Cel-Tech* and *Korea Supply*

The Court of Appeal concedes at the outset that the legislative history "is unhelpful" in deciding whether section 3345 was intended to "contradict the well-established rule" precluding damages in UCL actions. Nevertheless, at other points, the Court of Appeal backtracks and declares that the history does not indicate "a clear intent to modify this accepted principle" nor suggest a limit on the language of section 3345. *Slip Opinion,* pp. 2-3. The latter sentiment misses the point. Without a "clear intent," none can be inferred.

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[22] The Court of Appeal found that damages under section 3345 are not punitive damages. *Slip Opinion,* pp. 17-18. This conclusion is in direct conflict with two federal cases holding that section 3345 is a punitive damages statute, and which decisions were ignored by the Court of Appeal. *Ross v. Pioneer Life Ins. Co.,* 545 F. Supp. 1061, 1066-67 (C.D. Cal. 2008); *In re Felton,* 197 B.R. 881, 891-92 (N.D. Cal. 1996). Assuming the trebling permitted by section 3345 does qualify as punitive damages, then the process gets even more complex as the factors required for an award of punitive damages will also have to be considered, as the court in *Felton* so declared.

[23] It is also worth considering the class action aspect of applying section 3345 to UCL actions. The findings required under section 3345(b) seem to invoke the "fact of damage," a liability issue, as well as the amount of damage. *See Martino v. McDonald's System, Inc.*, 86 F.R.D. 145, 147 (N.D. Ill. 1980); *see also B.W.I. Custom Kitchen v. Owens-Illinois, Inc.*, 191 Cal. App. 3d 1341, 1350 n.7 (1987) ("Courts and commentators have taken great pains to point out that injury or 'fact of damage,' which must be proven on a class-wide basis, is separate and distinct from the issue of actual damages"). Thus, applying section 3345 to a UCL class action further complicates what is supposed to be a "streamlined" process.

In *Brodie, supra,* 40 Cal. 4th 1313, the issue was whether a 2004 amendment to the workers' compensation laws was intended to supersede *Fuentes v. Workers' Comp. Appeals Bd.,* 16 Cal. 3d 1 (1976). *Fuentes* adopted a rule – called "formula A" – for determining the percentage of disability attributable to a new injury when a worker had prior industrial or non-industrial injuries. *Brodie, supra* at 1321-22. Following *Fuentes,* this Court explained that "the law stood, settled for 28 years," not unlike the prohibition on damages, of any kind, in the UCL. *Brodie, supra* at 1323. In deciding whether the 2004 amendment changed that law, this Court explained that no such Legislative intention would be presumed "'unless such intention is clearly expressed or necessarily implied.'" *Brodie, supra* at 1325; *accord, Van Horn v. Watson*, 45 Cal.4th 322, 333 (2008) (defendant "does not identify anything that would overcome the presumption that the Legislature did not intend to work such a radical departure").

Having determined that the language of the 2004 amendment did not resolve the issue, the Court considered the legislative history stating: "If the Legislature had intended a departure from formula A, one would expect to find some trace of this intent in the legislative history," noting that such "a change, if intended, would likely have been remarked upon." *Brodie, supra* at 1328. But, as this Court explained: "Instead, one hears only silence." *Brodie, supra* at 1329.

The Court of Appeal devotes several pages to the legislative history of SB 1157,[24] but nowhere in the Court of Appeal's discussion nor in the legislative history itself is there any reference to an intent to abrogate the fundamental principle that damages are not permitted in a UCL action. The Legislature passed SB 1157 in 1988, or 12 years after *Chern v. Bank of America, supra,* 15 Cal. 3d 866, 875, had first announced this principle. Like the situation in *Brodie,* if such a cardinal principle of the UCL was to be changed, "one would expect to find some trace of this intent in the legislative history," but there is none. We know that section 17206.1 of the UCL (involving "public" action penalties) was also enacted as part of SB 1157, and if the Legislature had intended the trebling remedy of section 3345 to apply to private party awards under section 17203 of the UCL, it would have been quite easy to so state – but no such statement exists. Accordingly, there is no basis for concluding that section 3345 was intended to abrogate "the overarching legislative concern to provide a ***streamlined*** procedure for the prevention of ongoing or threatened acts of unfair competition." *Dean Witter, supra,* 211 Cal. App. 3d at 774.[25]

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[24] *Slip Opinion,* pp. 7-13.

[25] At the end of the Opinion, the Court of Appeal diverges from its earlier statement that the legislative history of SB 1157 was "unhelpful" and provided no "clear intent" as to modifying UCL law. *Slip Opinion*, p. 2. Specifically, the appellate court closes its Opinion by explaining that the legislative history "supports our conclusion" and is "fully consistent" with applying section 3345 to UCL actions brought by seniors. "[F]ully consistent" is not the needed finding. To supersede the basic principle that no damages are permitted in a UCL action, the legislative history would have to demonstrate a clear intention for such a result, and unquestionably no such clear intention exists. In short, the Court of Appeal's attempt to bolster its conclusion serves only to establish that neither the language of the statute nor the legislative history evince a clear legislative intent to permit trebling of UCL restitution.

3. SECTION 3345 BY ITS OWN TERMS IS INAPPLICABLE TO A RESTITUTION AWARD UNDER THE UCL

Correctly read, in the context of a private action not involving fines or penalties, the express language of section 3345 permits the trebling of punitive damages, not restitution awards. So read, the Court of Appeal's Opinion commits clear error when it concludes that: "*Section 3345 May Be Used To Enhance a Restitution Award.*" *Slip Opinion,* p 13.

Assuming the other prerequisites of section 3345 are present, trebling is a possible option only if "a trier of fact is authorized by a statute to impose either a fine, or a civil penalty or other penalty, or any other remedy ***the*** purpose or effect of which is to punish or deter. . . ." *Civil Code,* § 3345(b) (emphasis added). While the Court of Appeal did use the word "***the***" at one point in the opinion,[26] repeatedly it used the "***a*** purpose or effect" construction. *Slip Opinion*, p. 14 (emphasis added).[27]

Having moved from "***the***" to "***a***," the appellate court noted that prior decisions of this and other appellate courts have concluded that a secondary

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[26] *Slip Opinion,* p. 14.

[27] The heading for subsection 3(a) of the Opinion states: "Deterrence of anti-competitive or deceptive business practices is ***a*** purpose or effect of the unfair competition law's restitution remedy." The first sentence of that subsection then states: ". . . California courts have long recognized that restitution awarded under the unfair competition law has ***a*** deterrent purpose of effect." (Emphasis added.) This switch in terms can also be detected in the introductory paragraphs of the Opinion, where the Court of Appeal observes that "deterrence of illegal acts is ***an*** important aim and ***a*** recognized effect of a restitution remedy under the unfair competition law." *Slip Opinion*, p. 2 (emphasis added).

purpose of a restitution award is deterrence. *Slip Opinion,* pp. 14-15. Therefore, reasoned the Court of Appeal, since deterrence is ***a*** purpose of UCL restitution awards, such awards can be trebled. Respectfully, the appellate court missed the point.

Section 3345 permits trebling if, assuming the other prerequisites are present, "a fine, or a civil penalty or other penalty, or any other remedy the purpose or effect of which is to punish or deter" is involved. Fines, civil penalties, or other penalties are all situations in which ***the sole purpose*** is to punish or deter. Stated differently, there is no compensatory element (be it damages or restitution) involved in a fine, civil penalty or other penalty. Unlike this class of non-compensatory awards, the Opinion of the Court of Appeal presumes that the final term in the series – "other remedy" – has a different meaning broad enough to encompass a compensatory award, such as a restitution award under the UCL.

This conclusion is at odds with established rules of statutory construction, including the maxim of jurisprudence that "Particular expressions qualify those which are general." *Civil Code,* § 3534. "This principle is an expression of the doctrine of *ejusdem generis* . . . which seeks to ascertain common characteristics among things of the same kind, class, or nature when they are cataloged in legislative enactments." *Harris v. Capital Growth Investors XIV,* 52 Cal. 3d 1142, 1159 (1991). The doctrine of *ejusdem generis* is "illustrative of the more general maxim *nocitur a sociis*—'it is known from its associates.'" *Harris, supra* at 1160.

Numerous decisions have followed the principle of *ejusdem generis* in interpreting statutes. *See, e.g.*, *People v. Giordano*, 42 Cal.4th 644, 660 (2007) (citing *Harris*, this Court explained "the general term or category is 'restricted to those things that are similar to those which are enumerated specifically'"); *Kraus v. Trinity Management Services, Inc.*, *supra*, 23 Cal.4th 141 (same); *Pasadena University v. Los Angeles County*, 190 Cal. 786, 790 (1923) ("where general words follow the enumeration of particular classes of persons or things, the general words will be construed as applicable only to persons or things of the same general nature or class as those enumerated"). Moreover, this principle is especially applicable when the last term in the series of terms uses the word "other" or "otherwise." *See Armenta v. Churchill*, 42 Cal.2d 448. 454 (1954) ("Under the doctrine of ejusdem generis, the concluding words 'other construction material' would take color from the preceding listing and be limited to substances ordinarily associated in that same class"); *People v. McKean*, 76 Cal. App. 114, 118-19 (1925) (the words "or otherwise" as used in the statute "should be construed as signifying other like means, i.e., means which are of the same general nature or class as advertisements, or which are of the same general nature or class as those notices which are akin to advertisements"). As the court explained in *Scally v. Pacific Gas & Electric Co.*, 23 Cal. App. 3d 806, 819 (1972):

> "The rule is based on the obvious reason that if the Legislature had intended the general words to be used in their unrestricted sense, it would not have mentioned the particular things or classes of things which would in that event become mere surplusage. The words

> "other" or "any other" following an enumeration of particular classes should be read therefore as other such like and to include only others of like kind or character." [28]

In considering the language of section 3345(b), the *ejusdem generis* maxim is particularly helpful for two reasons. First, the prior listed terms ("fine" and "penalty") are exclusively non-compensatory and punitive. Second, applying the maxim gives appropriate meaning to the use of "***the***" as opposed to "***a.***" Like a fine or penalty, the "other remedy" must have "***the***" purpose or effect of punishment or deterrence, not just some incidental deterrent effect. So read, section 3345 permits the trebling of punitive, treble or any other non-compensatory monetary award, but the section is inapplicable to compensatory damages or restitutionary awards.

This conclusion is consistent with certain federal decisions that have attempted to define the purpose of section 3345. For example, in *Sanchez v. Monumental Life Ins. Co.,* 102 F.3d 398 (9th Cir 1996), the defendant sought to satisfy the amount in controversy requirement and avoid a remand, arguing it could treble the alleged contract damages pursuant to section 3345. The court rejected this argument, explaining at page 405 that "Monumental's argument is premised on a fundamental misunderstanding of section 3345. That provision provides for trebling ***punitive*** damages . . . ." (Emphasis by the court.) Continuing its explanation, the Ninth Circuit

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[28] *Accord Martin v. Holiday Inns, Inc.*, 199 Cal. App. 3d 1434, 1437 (1988) (citing *Scally*); *Lawrence v. Walzer & Gabrielson*, 207 Cal. App. 3d 1501, 1506 (1989) (principle used in non-statutory context in interpreting an arbitration provision).

advised that section 3345 "allows for the trebling" of "***fines or penalties***" but not "***contract*** damages." *Sanchez, supra* at 405 (emphasis by the court).

In *Ross v. Pioneer Life Ins. Co.,* 545 F. Supp. 2d 1061, 1065 (C.D. Cal. 2008), the plaintiff sought permission to amend to include a request for treble damages pursuant to section 3345 in an insurance bad faith case in which punitive damages were sought. In granting the motion, the district court explained that section 3345 "permits the trebling of punitive damage claims in appropriate cases." *Ross, supra* at 1065. Further, the court stated: "A review of the Legislative history of Civil Code § 3345 indicates that when it was enacted it was expressly foreseen that the provision would be applied to a trebling of punitive damages under Civil Code § 3294." *Ross, supra* at 1065. As *Ross* found, the legislative history of SB 1157 is consistent with the conclusion that "other remedy" is limited in meaning to those remedies, of which punitive damages under section 3294 is a prime example, whose sole purpose is to punish or deter.

The Court of Appeal in the present case, however, got it wrong. As such, it has sent the scope of remedies recoverable under the UCL woefully off-course. Review is essential to confirm that monetary relief under the UCL is limited to restitution, a remedy that cannot be trebled by a misinterpretation of Civil Code section 3345.

4. CONCLUSION

Based on the foregoing, National Western respectfully requests that review be granted as to the Court of Appeal's May 21, 2009 Opinion.

Dated: June 29, 2009

BARGER & WOLEN LLP
KENT R. KELLER
LARRY M. GOLUB

By: _____
Attorneys for Petitioner and Defendant National Western Life Insurance Company

CERTIFICATION OF WORD COUNT PURSUANT TO CALIFORNIA RULES OF COURT 8.504.(d)(1)

Larry M. Golub, counsel of record for Petitioner and Defendant National Western Life Insurance Company, certifies that the foregoing ***Petition for Review*** contains approximately 7210 words (including footnotes), based on the "Word Count" of the computer program that was used to prepare this brief. Thus, this brief contains fewer than the 8,400 words permitted under California Rule of Court 8.504(d)(1). The type used to prepare this brief is 13 point Times New Roman, and the lines are double-spaced.

Dated: June 29, 2009

By: _____
Larry M. Golub

Opinion

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

JAMES A. CLARK et al.,

Petitioners,

v.

THE SUPERIOR COURT OF LOS ANGELES COUNTY,

Respondent,

NATIONAL WESTERN LIFE INSURANCE COMPANY,

Real Party in Interest.

No. B212512

(Super. Ct. No. BC321681)

ORIGINAL PROCEEDING; application for writ of mandate. Victoria Chaney, Judge. Petition granted.

Gianelli & Morris, Robert S. Gianelli; Ernst & Mattison and Raymond E. Mattison for Petitioners James A. Clark, Orville R. Camien, Mary F. Simms-Schmidt, and Carmen R. Armstrong, on behalf of themselves and the Certified Class.

No appearance by Respondent Los Angeles County Superior Court.

Barger & Wolen, Kent R. Keller and Larry M. Golub for Real Party in Interest National Western Life Insurance Company.

Reed Smith, Margaret M. Grignon, Robert D. Phillips, Jr., James C. Martin and Wendy S. Albers for Association of California Life and Health Insurance Companies, North American Company for Life and Health Insurance and Midland National Life Insurance Company as Amici Curiae on behalf of Real Party in Interest.

Civil Code section 3345 (section 3345) authorizes the award of an enhanced remedy—up to three times greater than the amount of a fine, civil penalty "or any other remedy the purpose or effect of which is to punish or deter" that would otherwise be awarded—in actions by or on behalf of senior citizens or disabled persons seeking to "redress unfair or deceptive acts or practices or unfair methods of competition." Is this enhanced remedy available in a private action by senior citizens seeking restitution under California's unfair competition law (Bus. & Prof. Code, § 17200 et seq.)?

The unambiguous language of section 3345 encompasses actions under the unfair competition law brought by or on behalf of senior citizens, even those initiated by private plaintiffs seeking only restitution. Although section 3345 is limited to actions involving remedies intended to "punish or deter," deterrence of illegal acts is both an important aim and a recognized effect of a restitution remedy under the unfair competition law. (See, e.g., *Korea Supply Co. v. Lockheed Martin Corp.* (2003) 29 Cal.4th 1134, 1148 (*Korea Supply*); *Bank of the West v. Superior Court* (1992) 2 Cal.4th 1254, 1267.)

Nonetheless, as both real party in interest and the amici curiae forcefully argue, because the enhanced remedy authorized by section 3345 is similar in many respects to an award of punitive damages, permitting a treble restitution recovery appears to contradict the well-established rule that private plaintiffs in actions under the unfair competition law "may not receive damages, much less *treble* damages . . . ." (*Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone* (1999) 20 Cal.4th 163, 179 (*Cel-Tech*).) The legislative history of section 3345 is unhelpful on this point, neither indicating a clear intent to modify this accepted principle of unfair competition jurisprudence nor reflecting an understanding that the sweeping language in section 4 of

Senate Bill No. 1157 (1987-1988 Reg. Sess.), which enacted section 3345, was to be given a restrictive interpretation. Accordingly, we are left with the language of section 3345 itself, which on its face applies to senior citizens or disabled persons seeking restitution under the unfair competition law.

Because the trial court concluded section 3345 is inapplicable to private actions seeking restitution under the unfair competition law, we grant the petition for writ of mandate filed by James A. Clark, Orville R. Camien, Mary F. Simms-Schmidt and Carmen R. Armstrong on behalf of themselves and as representatives of a certified class of certain senior citizens and direct respondent Los Angeles Superior Court to vacate its order of November 14, 2008 granting National Western Life Insurance Company's (National Western) motion for judgment on the pleadings and enter a new and different order denying that motion.

FACTUAL AND PROCEDURAL BACKGROUND

1. *The Certified Class Action*

This action, originally filed in September 2004 by Clark, a senior citizen, alleges National Western utilized deceptive business practices to induce the purchase of high-commission annuity contracts with large surrender penalties in violation of, among other things, the unfair competition law. In December 2005 a third amended complaint was filed naming the petitioners as plaintiffs and including class action allegations. The third amended complaint alleged violations of the unfair competition law, breach of contract, breach of the covenant of good faith and fair dealing and fraud and sought, in part, restitution of the improper surrender penalties and enhanced remedies for each cause of action under section 3345.

In February 2007 the trial court granted, in part, petitioner's motion for class certification, certifying a class consisting of "[a]ll California residents who purchased National Western Life Insurance Company deferred annuities when they were age 65 or older" under specified certificate forms. However, the court permitted the class to

proceed only on the unfair competition claim.[1] The court also certified a subclass of approximately 36 class individuals who purchased annuities sold by Ezra Chapman and ruled the subclass could proceed against Chapman and National Western on both the fraud claim and the unfair competition claim.[2]

2. *National Western's Motions for Judgment on the Pleadings and Summary Adjudication*

On July 15, 2008 National Western filed a motion for judgment on the pleadings, asserting section 3345's enhanced, "treble damages" remedy was inapplicable to a private action under the unfair competition law. On the same date, National Western filed a motion for summary adjudication presenting the identical argument. In addition, the summary adjudication motion argued punitive damages were not available for the subclass's fraud claim because plaintiffs could not establish that National Western had ratified Chapman's conduct or had engaged in any behavior warranting the imposition of punitive damages.

On November 14, 2008 the court granted National Western's motion for judgment on the pleadings without leave to amend, concluding section 3345 is inapplicable to a private action seeking restitution under the unfair competition law because "restitution, the only available remedy, does not have the purpose or effect of punishment or deterrence." The court denied National Western's motion for summary adjudication,

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1 The certified class was defined as, "All California residents who purchased National Western Life Insurance Company deferred annuities when they were age 65 or older under the following certificate forms: Confidence Flex 85 (01-1114CA-98); Confidence Flex 45 (01-11114CB-98); Confidence Index 2000 (01-1117C-99); Liberty Champion (01-1128C-02-CA)."

2 The trial court certified a subclass of "[a]ll California residents who purchased National Western Life Insurance Company deferred annuities when they were age 65 or older under the following certificate forms sold by Ezra Chapman: Confidence Flex 85 (01-1114CA-98); Confidence Flex 45 (01-11114CB-98); Confidence Index 2000 (01-1117C-99); Liberty Champion (01-1128C-02-CA)."

finding triable issues of material fact existed as to whether the subclass's common law fraud claim warranted punitive damages.

3. *The Instant Petition*

On December 5, 2008 plaintiffs petitioned this court for a writ of mandate compelling the trial court to vacate its order granting the motion for judgment on the pleadings and to enter a new order denying the motion. After requesting and receiving an informal opposition to the petition, on December 30, 2008 this court issued an order to show cause as to why the relief requested in the petition should not be granted. On January 23, 2009 National Western filed its return, and on February 13, 2009 plaintiffs filed their reply.

DISCUSSION

1. *Standard of Review*

We review de novo the trial court's order granting a motion for judgment on the pleadings (*Gerawan Farming v. Lyons* (2000) 24 Cal.4th 468, 515), assuming the truth of, and liberally construing, all properly pleaded factual allegations in the complaint. (*Id.* at pp. 515-516; see *Kapsimallis v. Allstate Ins. Co.* (2002) 104 Cal.App.4th 667, 672 ["[a]ll properly pleaded, material facts are deemed true, but not contentions, deductions, or conclusions of fact or law"].) On appeal we properly consider evidence outside the pleadings presented to the trial court without objection (*Stone Street Capital, LLC v. California State Lottery Com.* (2008) 165 Cal.App.4th 109, 115; *O'Neil v. General Security Corp.* (1992) 4 Cal.App.4th 587, 594, fn. 1), as well as matters subject to judicial notice. (*Stone Street Capital*, at p. 115; *Kapsimallis*, at p. 672 ["judicially noticeable matters may be considered"].)

2. *Overview of the 1988 Consumer Protection Legislation Providing Additional Penalties and Enhanced Remedies for Unfair or Deceptive Practices Perpetrated Against Senior Citizens or Disabled Persons*

Since 1977 the unfair competition law has prohibited unlawful, unfair or fraudulent business practices or unfair, deceptive, untrue or misleading advertising (Bus. & Prof. Code, § 17200) and subjected violators in actions prosecuted by public

prosecutors to civil penalties not exceeding $2,500 for each violation (Bus. & Prof. Code, § 17206), as well as to injunctions and restitution orders (Bus. & Prof. Code, § 17203). Private plaintiffs may also prosecute actions under the unfair competition law, but their remedies are limited to orders for injunctions and restitution. (Bus. & Prof. Code, § 17203.) Damages and penalties, whether compensatory or punitive, are prohibited. (*Korea Supply, supra,* 29 Cal.4th at p. 1148 [only monetary relief available to private plaintiffs under unfair competition law is restitution; compensatory and punitive damages are not authorized]; *Kasky v. Nike, Inc.* (2002) 27 Cal.4th 939, 950 ["[i]n a suit under [unfair competition law], a public prosecutor may collect civil penalties, but a private plaintiff's remedies are 'generally limited to injunctive relief and restitution'"]; *Cel-Tech, supra,* 20 Cal.4th at p. 179 [under unfair competition law "[p]laintiffs may not receive damages, much less *treble* damages, or attorney fees"].)

In 1987, citing statistics from the California Department of Justice and the International Association of Chiefs of Police indicating senior citizens were "the most frequent victims" of consumer fraud and deceptive business practices, often with tragic consequences, the state Department of Consumer Affairs urged the Legislature to strengthen the consumer protection laws to protect senior citizens from consumer fraud.[3] Senate Bill No. 1157 (1987-1988 Reg. Sess.), passed by the Legislature in September 1988 and signed by the Governor and enacted into law later that month (see Stats. 1988, ch. 823, §§ 1-4, pp. 2665-2669), was the culmination of that effort.

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3 In urging new legislation, the Department of Consumer Affairs noted several reasons seniors are susceptible to unfair business practices: Senior citizens "usually have substantially reduced incomes and often are retired. A reduced income can limit a person's mobility and with it the ability to go elsewhere when prices are high or sales practices are abusive. Reduced mobility caused by fear of crime and poor health also reduces access to information sources and increases reliance on door-to-door, telephone and mail order sales. [¶] . . . [¶] When seniors are defrauded, few are able to replace the loss because of their reduced or lost earning capacity. In some cases, when life savings or homes are lost through fraudulent schemes, seniors must turn to the state and public agencies for ongoing assistance." (See Sen. Rules Com., Off. of Sen. Floor Analyses of Sen. Bill No. 1157 (1987-1988 Reg. Sess.) as amended June 13, 1988, p. 3.)

a. *The evolution of Senate Bill No. 1157*

As originally sponsored by the Department of Consumer Affairs and introduced by Senator Ed Davis on March 5, 1987, Senate Bill No. 1157 simply added a new section 17206.1 to the Business and Professions Code, providing civil penalties for violation of Business and Professions Code section 17200 would be not less than $2,500 or more than $5,000 for each violation if the victim of the violation is 65 years old or older.[4] The enhanced civil penalty was to be collected in an enforcement action initiated by the Attorney General or a designated local prosecutor pursuant to Business and Professions Code section 17206.

The Attorney General opposed the legislation. In an April 9, 1987 letter to Senator Davis, Attorney General Van de Kamp explained existing law, which under Business and Professions Code section 17206 provided for a civil penalty up to $2,500 per violation of the unfair competition law, gave the courts broad discretion to tailor civil penalties to the specific features of each case and cautioned the mandatory penalty scheme envisioned by Senate Bill No. 1157 "would create administrative nightmares at best, and may well be unconstitutional." (Atty. Gen., letter to Senator Ed Davis re Sen. Bill No. 1157 (1987-1988 Reg. Sess.) Apr. 9, 1987.)

Amendments to Senate Bill No. 1157 in May 1987 eliminated the mandatory minimum civil penalty of $2,500 for each violation of Business and Professions Code section 17200, specifying instead a civil penalty of not more than $5,000 for each violation. The Attorney General's office acknowledged the amendments eliminated the major problems it had identified in the original bill but still opposed it because "the bill accomplishes no demonstrable purpose and creates ambiguities, constitutional questions, difficult law enforcement problems and uncertainties where none now exist." (Senior Assist. Atty. Gen. Herschel T. Elkins, mem. to Assist. Atty. Gen. Jeff Fuller, re: Sen. Bill

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4 At the request of the parties the trial court took judicial notice of portions of the legislative history of Senate Bill No. 1157 (1987-1988 Reg. Sess.). We do, as well, but our review has included material apparently not presented to the trial court. (See Evid. Code, § 459, subd. (a)(1).)

No. 1157 (1987-1988 Reg. Sess.) May 12, 1987, p. 3.) In a May 12, 1987 analysis of the legislation provided to the Department of Consumer Affairs, Senior Assistant Attorney General Herschel T. Elkins observed, "Of course, the author is seeking greater protection for senior citizens. Perhaps greater personal remedies in the actions brought by those consumers might be helpful. Of greatest help, of course, would be additional personnel to allow agencies to bring actions in areas in which victims are more likely to be senior citizens." (*Ibid.*)

The staff of the Department of Consumer Affairs attempted to resolve some of the Attorney General's concerns about the enforcement of proposed new Business and Professions Code section 17206.1 with additional amendments. It also sought to implement the suggestion of creating greater personal remedies for senior citizens by proposing in the same bill new language in the Consumers Legal Remedies Act (Civ. Code, § 1750 et seq.) (CLRA)[5] authorizing the recovery of three times actual damages, as well as reasonable attorney fees, when the victim of a violation of the CRLA is a senior citizen. The Attorney General's office responded to this series of proposals by preparing draft language for a new section 3284 of the Civil Code, which would have authorized the court, when it was otherwise "authorized by statute to impose a fine, penalty or any other remedy for the purpose of punishment or deterrence," to consider in setting the amount to impose various factors relating to the impact of the defendant's conduct on senior citizens. (See Dept. Consumer Affairs, letter to Senior Assist. Atty. Gen. Herschel T. Elkins, June 19, 1987.)

Following further refinements to these draft proposals by the Department of Consumer Affairs and Senator Davis's staff, Senate Bill No. 1157 was amended on July 9, 1987 to provide for (1) addition of section 17206.1 to the Business and Professions Code, authorizing imposition of a civil penalty not to exceed $2,500 in

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5 The CLRA prohibits specified unfair and deceptive acts and practices in a "transaction intended to result or which results in the sale or lease of goods or services to any consumer." (Civ. Code, § 1770, subd. (a).)

addition to the civil penalty that may be assessed and recovered in a civil action under Business and Professions Code section 17206; (2) amendment of Civil Code section 1780 to permit recovery by senior citizens of three times actual damages in private actions under the CLRA; and (e) addition of section 3345[6] authorizing the trier of fact, whenever it finds one or more of the factors listed in subdivision (b) of the new section relating to the effect of the defendant's conduct on senior citizens, to impose a fine, penalty or other remedy that is greater than it would impose in the absence of that factor.

The scheduled hearing on Senate Bill No. 1157 (1987-1988 Reg. Sess.) as amended July 9, 1987, was cancelled at the request of Senator Davis. No further action was taken on the bill until April 12, 1988 when it was re-referred to committee following additional amendments by Senator Davis. These April 1988 amendments extended the bill's coverage to "disabled persons," as well as to "senior citizens," and narrowed the focus from senior citizens and disabled persons generally to those who are more vulnerable to harm than the average consumer, have been specifically targeted as the victims of consumer fraud or have suffered significant harm that relates to their status as senior citizens or disabled persons. The proposed CLRA amendments eliminated the trebling of actual damages in senior citizen cases and provided instead, in addition to other remedies that may otherwise be available, an award of up to $5,000 when the trier of fact finds the senior citizen or disabled person suffered substantial physical, emotional or economic damage from the defendant's conduct and makes an affirmative finding in regard to one or more of the enumerated factors involving senior citizens or disabled

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6 The available legislative history does explain why the new provision was renumbered section 3345 rather than section 3284.

persons as victims of consumer fraud now set forth in the bill's proposed section 3345. (See Sen. Bill No. 1157 (1987-1988 Reg. Sess.) as amended Apr. 12, 1988, §§ 1-3.)[7]

The reach of proposed section 3345 was expressly limited by the April 1988 amendments, so that it no longer applied in any action brought by or on behalf of senior citizens or disabled persons, but only in actions "to redress unfair or deceptive acts or practices or unfair methods of competition." (See Sen. Bill No. 1157 (1987-1988 Reg. Sess.) as amended Apr. 12, 1988, § 4.) In addition to simply considering the factors relating to the impact of the defendant's conduct on senior citizens and disabled persons in fixing the amount of an otherwise authorized fine, penalty or other remedy for the purpose of punishment or deterrence, however, as amended proposed section 3345 permitted the trier of fact to impose additional amounts up to three times the remedy otherwise available. Moreover, just as the enhanced CLRA remedy cross-referenced the factors identified in the enhanced remedy specified in proposed section 3345, the amended section 3345 adopted the definitions of "senior citizen" and "disabled person" that would be included in the CLRA. (*Ibid.*)

After some final, technical amendments to conform the legislation to another bill passed in the same session, Senate Bill No. 1157 (1987-1988 Reg. Sess.) as amended June 13, 1988, was passed by the Legislature in August 1988 and signed by the Governor on September 12, 1988. (See Stats. 1988, ch. 823, §§ 1-4, pp. 2665-2669.)

b. *The final version of the 1988 senior citizen and disabled person legislation*

As the review of the development and final adoption of Senate Bill No. 1157 makes plain, the legislation was the product of the Department of Consumer Affairs' effort to strengthen the role of the Attorney General and other public prosecutors in protecting senior citizens and disabled persons from unfair business practices and the fully complementary, but nonetheless distinct, preference of the Attorney General's

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7 In addition, the CLRA attorney fee provision was expanded to apply in any action under the act, not only those pursued on behalf of senior citizens and disabled persons. (See Sen. Bill No. 1157 (1987-1988 Reg. Sess.) as amended Apr. 12, 1988, § 3.)

office to create greater private remedies for senior citizens who have been targeted as victims of consumer fraud. As finally enacted the legislation effected three major changes to California's consumer protection laws relating to senior citizens and disabled persons. First, it amended the unfair competition law by adding Business and Professions Code section 17206.1,[8] which authorizes the Attorney General and prosecutors in civil enforcement proceedings to recover an added civil penalty up to $2,500 (in addition to the $2,500 civil penalty available under Business and Professions Code section 17206) when the unfair practice is perpetrated against a senior citizen or disabled person. (See Bus. & Prof. Code, § 17206.1; Stats. 1988, ch. 823, § 1, pp. 2665-2666.)[9]

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8 Business and Professions Code section 17206.1 provides, "(a)(1) In addition to any liability for a civil penalty pursuant to Section 17206, any person who violates this chapter, and the act or acts of unfair competition are perpetrated against one or more senior citizens or disabled persons, may be liable for a civil penalty not to exceed two thousand five hundred dollars ($2,500) for each violation, which may be assessed and recovered in a civil action as prescribed in Section 17206. [¶] . . . [¶] (c) in determining whether to impose a civil penalty pursuant to subdivision (a) and the amount thereof, the court shall consider, in addition to any other appropriate factors, the extent to which one or more of the following factors are present: [¶] (1) Whether the defendant knew or should have known that his or her conduct was directed to one or more senior citizens or disabled persons. [¶] (2) Whether the defendant's conduct caused one or more senior citizens or disabled persons to suffer: loss or encumbrance of a primary residence, principal employment, or source of income; substantial loss of property set aside for retirement, or for personal family care and maintenance, or substantial loss of payments received under a pension or retirement plan or a government benefits program, or assets essential to the health or welfare or the senior citizen or disabled person. [¶] (3) Whether one or more senior citizens or disabled persons are substantially more vulnerable than other members of the public to the defendant's conduct because of age, poor health or infirmity, impaired understanding, restricted mobility, or disability, and actually suffered substantial physical, emotional, or economic damage resulting from the defendant's conduct. . . ."

9 To ensure that senior citizens benefit from such public prosecutions, Business and Professions Code section 17206.1 also requires that "[r]estitution ordered pursuant to this subdivision" be given "priority over recovery of any civil penalty" under section 17206.1, "but shall not be given priority over any civil penalty imposed pursuant to subdivision (a) of section 17206." (Bus. & Prof. Code, § 17206.1, subd. (d).)

Second, it amended the CLRA to authorize private litigants to recover, in addition to other remedies available under the act, including compensatory and punitive damages, an additional monetary award—up to $5,000—when the unfair practice prohibited by the act is perpetrated against a senior citizen or disabled person. (Civ. Code, § 1780, subd. (b)(1)(A)-(C); Stats. 1988, ch. 823, § 3, pp. 2667-2668.)

Third, it added section 3345 to the Civil Code, authorizing an enhanced remedy in actions brought by or on behalf of senior citizens seeking redress for "unfair or deceptive acts or practices or unfair methods of competition." (§ 3345, subd. (a).) Section 3345, subdivision (a), limits the new provision to actions "brought by, or on behalf of, or for the benefit of senior citizens or disabled persons, as those terms are defined in subdivisions (f) and (g) of [Civil Code] Section 1761[10] to redress unfair or deceptive acts or practices or unfair methods of competition." Section 3345, subdivision (b), provides the enhanced remedy: "Whenever a trier of fact is authorized by a statute to impose either a fine, or a civil penalty or other penalty, or any other remedy the purpose or effect of which is to punish or deter, and the amount of the fine, penalty, or other remedy is subject to the trier of fact's discretion, the trier of fact shall consider all of the following factors,[11] in

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10 Civil Code section 1761, subdivision (f), part of the CLRA, defines "senior citizen" as "a person who is 65 years of age or older." Subdivision (g) defines "disabled person" as "any person who has a physical or mental impairment that substantially limits one or more major life activities."

11 The factors to be considered by the trial court in determining whether to impose the enhanced remedy are: "(1) Whether the defendant knew or should have known that his or her conduct was directed to one or more senior citizens or disabled persons. [¶] (2) Whether the defendant's conduct caused one or more senior citizens or disabled persons to suffer: loss or encumbrance of a primary residence, principal employment, or source of income; substantial loss of property set aside for retirement, or for personal or family care and maintenance; or substantial loss of payments received under a pension or retirement plan or a government benefits program, or assets essential to the health or welfare of the senior citizen or disabled person. [¶] (3) Whether one or more senior citizens or disabled persons are substantially more vulnerable than other members of the public to the defendant's conduct because of age, poor health or infirmity, impaired understanding, restricted mobility, or disability, and actually suffered substantial physical, emotional, or economic damage resulting from the defendant's conduct."

addition to other appropriate factors, in determining the amount of fine, civil penalty or other penalty, or other remedy to impose. Whenever the trier of fact makes an affirmative finding in regard to one or more of the following factors, it may impose a fine, civil penalty or other penalty, or other remedy in an amount up to three times greater than authorized by the statute, or, where the statute does not authorize a specific amount, up to three times greater than the amount the trier of fact would impose in the absence of that affirmative finding."

3. *Section 3345 May Be Used To Enhance a Restitution Award*

The trial court granted National Western's motion for judgment on the pleadings because, in its view, restitution, the only monetary relief available to private litigants under the unfair competition law, does not have the purpose or effect of punishment or deterrence, a prerequisite to application of section 3345's enhanced, treble recovery. Echoing that conclusion, National Western asserts restitution under the unfair competition law is intended to restore money or property acquired by the defendant, not to deter unlawful conduct. That interpretation of the nature of a restitution remedy, potentially applicable not only in private actions under the unfair competition law but also in lawsuits alleging common law fraud or violation of a variety of other consumer protection statutes, is unduly cramped.

In determining whether section 3345 applies when an action has been brought by senior citizens seeking restitution for fraud or deceptive business practices, we are, of course, guided by well-established principles of statutory construction. Our fundamental task is to ascertain the Legislature's intent and thereby effectuate the purpose of the statute. (*Olson v. Automobile Club of Southern California* (2008) 42 Cal.4th 1142, 1147; *Smith v. Superior Court* (2006) 39 Cal.4th 77, 83.) "We begin with the statutory language because it is generally the most reliable indication of legislative intent." (*Miklosy v. Regents of University of California* (2008) 44 Cal.4th 876, 888.) "If there is

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(§ 3345, subd. (b).) The identical factors are included in Business and Professions Code section 17206.1, subdivision (c).

no ambiguity, then we presume the lawmakers meant what they said, and the plain meaning of the language governs." (*Day v. City of Fontana* (2001) 25 Cal.4th 268, 272; see also *Smith*, at p. 83.) "If, however, the statutory terms are ambiguous, then we may resort to extrinsic sources, including the ostensible objects to be achieved and the legislative history. [Citation.] In such circumstances, we '"select the construction that comports most closely with the apparent intent of the Legislature, with a view to promoting rather than defeating the general purpose of the statute, and avoid an interpretation that would lead to absurd consequences."'" (*Day,* at p. 272.) "We do not construe statutes in isolation, but rather read every statute 'with reference to the entire scheme of law of which it is part so that the whole may be harmonized and retain effectiveness.'" (*People v. Pieters* (1991) 52 Cal.3d 894, 899; see also *Stone Street Capital, LLC v. California State Lottery Com., supra*, 165 Cal.App.4th at p. 118 ["[w]e presume that the Legislature, when enacting a statute, was aware of existing related laws and intended to maintain a consistent body of rules"].)

Under the plain language of section 3345 two prerequisites must be satisfied before its enhanced remedy may apply: (1) The action must be brought by or on behalf of senior citizens or disabled persons seeking redress for "unfair or deceptive acts or practices or unfair methods of competition"—plainly satisfied here; and (2) the action must be one in which the trier of fact is authorized by a statute to impose a fine, civil penalty or any other penalty the purpose or effect of which is to punish or deter.

a. *Deterrence of anti-competitive or deceptive business practices is a purpose or effect of the unfair competition law's restitution remedy*

Contrary to the trial court's conclusion, California courts have long recognized that restitution awarded under the unfair competition law has a deterrent purpose and effect. (See *Bank of the West v. Superior Court, supra,* 2 Cal.4th at p. 1267 [purpose of restitution order under Bus. & Prof. Code, § 17203 is "'to deter future violations of the unfair trade practice statute and to foreclose retention by the violator of its ill-gotten gains'"]; *Korea Supply, supra,* 29 Cal.4th at p. 1148 ["deterrence of unfair practices" is "important goal" of unfair competition law, though not sole objective]; *Fletcher v.*

Security Pacific National Bank (1979) 23 Cal.3d 442, 450 [unfair competition law vests trial court with "broad authority" to fashion remedies that effectively "'prevent'" unfair trade practices and "deter the defendant, and similar entities, from engaging in such practices in the future"]; *Colgan v. Leatherman Tool Group, Inc.* (2006) 135 Cal.App.4th 663, 695 ["[u]nder the False Advertising and Unfair Competition Laws, the remedy of restitution serves two purposes—returning to the plaintiff monies in which he or she has an interest and deterring the offender from future violations"]; cf. *People ex rel. Kennedy v. Beaumont Investment, Ltd.* (2003) 111 Cal.App.4th 102, 135 ["statutory restitution [under unfair competition law] is not solely 'intended to benefit the [victims] by the return of money, but instead is designed to penalize a defendant for past unlawful conduct and thereby deter future violations'"].) The deterrent effect of a restitution remedy under the unfair competition law was most recently articulated in *In re Tobacco II Cases* (May 18, 2009, S147345) ___ Cal.4th ___ [2009 Cal. Lexis 4365], in which the Supreme Court noted in the context of interpreting Proposition 64's impact on class actions that its holdings in prior nonrestitutionary disgorgement cases "did not overrule any part of *Fletcher v. Security Pacific National Bank, supra,* 23 Cal.3d 442, under which restitution may be ordered 'without individualized proof of deception, reliance, and injury if necessary to prevent the use or employment of an unfair practice.'" (*In re Tobacco II Cases,* at p. ___, fn. 14.)[12]

Although acknowledging that deterrence may be an effect of a restitution remedy, National Western emphasizes "[t]he object of restitution is to restore the status quo by

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12 The deterrent effect of a restitution award has also been recognized in cases not involving the unfair competition law. (See, e.g., *McConnell v. Merrill Lynch, Pierce, Fenner & Smith* (1983) 33 Cal.3d 816, 821 [deterrence is object of restitution award under unfair practices law (Bus. & Prof. Code, § 17500 et seq.)]; *Beverly v. Anderson* (1999) 76 Cal.App.4th 480, 487 [restitution in case involving welfare fraud serves to deter potential wrongdoers]; *People v. Moser* (1996) 50 Cal.App.4th 130, 135-136 [restitution in criminal context has objectives beyond simply indemnifying the victim; "[i]t also seeks to rehabilitate the defendant and deter defendant and others" from future criminality].)

returning to the plaintiff funds in which he or she has an ownership interest" (*Korea Supply, supra,* 29 Cal.4th at p. 1149) and argues applying section 3345 in a private action seeking restitution under the unfair competition law would transform the remedy and, in effect, allow an award of damages under the guise of restitution, something the Supreme Court has specifically held is prohibited. (See, e.g., *Korea Supply,* at p. 1148 [disgorgement of profits in which plaintiff has no ownership interest is not permitted under the unfair competition law even though it would have a deterrent effect; a "court cannot, under the equitable powers of [Bus. & Prof. Code, §] 17203, award whatever form of monetary relief it believes might deter unfair practices"]; see also *Day v. AT&T Corp.* (1998) 63 Cal.App.4th 325, 339 [The intent of Bus. & Prof. Code, § 17203's restitution remedy "is to make whole, equitably, the victim of an unfair practice. While it may be that an order of restitution will also serve to deter future improper conduct, in the absence of a measurable loss the section does not allow the imposition of a monetary sanction merely to achieve this deterrent effect. Nor is the section intended as a punitive provision, though it may fortuitously have that sting when properly applied to restore a victim to wholeness."].)

National Western's argument misapprehends *Korea Supply, supra,* 29 Cal.4th 1134, as well as *Cel-Tech, supra,* 20 Cal.4th 163. Both cases hold the court's equitable powers to fashion a remedy under the unfair competition law, while broad, are not unlimited and cannot serve as justification for awarding plaintiff damages, even when such an award is consistent with the unfair competition law's purpose of deterrence. Neither case suggests enhanced remedies may not be available to private litigants under a different, express legislative mandate authorizing them.

Unlike *Korea Supply* and *Cel-Tech,* in this case the plaintiffs do not seek to justify monetary relief other than restitution under the unfair competition law: The enhanced remedy is sought under section 3345, a separate statute, which specifically authorizes such an enhanced remedy in unfair competition actions brought by senior citizens. We simply must presume the Legislature meant what it said when it provided section 3345

applied in unfair competition actions involving a fine, civil penalty or "*any other remedy*" the purpose of which is to punish or deter. (See *People v. Toney* (2004) 32 Cal.4th 228, 232 ["[i]f the statutory language is unambiguous, 'we presume the Legislature meant what it said, and the plain meaning of the statute governs'"]; accord, *Genlyte Group, LLC v. Workers' Comp. Appeals Bd.* (2008) 158 Cal.App.4th 705, 714; see also *Hood v. Hartford Life & Accident Insurance Co.* (E.D. Cal. 2008) 567 F.Supp.2d 1221, 1227 ["[t]he text of the statute clearly indicates that section 3345 applies to the UCA [unfair competition law] and the CLRA, as both Acts prohibit 'unfair practices'"].)

National Western insists section 3345's separate authorization for an enhanced remedy in unfair competition cases is immaterial. Other statutes, it notes, also authorize the recovery of treble or punitive damages (see, e.g., Code Civ. Proc., § 425.13 [authorizing punitive damages in action for professional negligence against health care provider under certain circumstances]; Civ. Code, § 987, subd. (e)(3) [authorizing punitive damages in actions involving destruction or alteration of "fine art"]); but those provisions have never been used to justify a treble damage award under the unfair competition law. In fact, it argues, the Supreme Court has repeatedly held punitive damages, authorized under Civil Code section 3294 for acts involving oppression, fraud or malice, are not permitted under the unfair competition law. (See *Korea Supply, supra,* 29 Cal.4th at pp. 1148-1149; cf. *Cel-Tech, supra,* 20 Cal.4th at p. 179 [treble damages not permitted under unfair competition law].)

National Western's statutory analogies miss the mark. Code of Civil Procedure section 425.13 is applicable to professional negligence actions, not unfair competition actions. Civil Code section 987, authorizing a separate action for the destruction of fine art, provides a separate cause of action (and includes within that action possible remedies of compensatory damages, punitive damages and attorney fees), not an enhanced remedy in an unfair competition action.

Moreover, although National Western likens Civil Code section 3294's general authorization of punitive damages to section 3345's "trebling" authorization, the two

statutes are quite different. Civil Code section 3294 is a general punitive damages statute. Section 3345, in contrast, is a specific mandate of an enhanced remedy in actions by senior citizens or disabled persons asserting unfair competition. To suggest it does not apply in an action by senior citizens seeking redress for unfair competition under the unfair competition law when the only statutory prerequisites have been satisfied is to ignore the statute's express language. (See *Reno v. Baird* (1998) 18 Cal.4th 640, 658 ["'[c]ourts should give meaning to every word of a statute if possible, and should avoid a construction making any word surplusage'"]; accord, *Donovan v. Poway Unified School Dist.* (2008) 167 Cal.App.4th 567, 593.)[13]

b. *Section 3345 does not require the remedy be "discretionary"*

Relying on language from section 3345, subdivision (b), concerning the proper application of the statute "when the amount of the fine, penalty or other remedy is subject to the trier of fact's discretion," National Western also contends the section's enhancement only applies if the amount of the fine, penalty or other remedy is discretionary. Insisting restitution awarded under the unfair competition law is not discretionary (see *Cortez v. Purolator Air Filtration Products Co.* (2000) 23 Cal.4th 163, 178 ["a restitutionary order under [Bus. & Prof. Code, §] 17203" encompasses "quantifiable sums one person owes to another"]), National Western argues restitution cannot be subject to a section 3345 enhancement.

National Western's argument is based on a fundamentally flawed reading of the statutory language. The first sentence of section 3345, subdivision (b), provides, when

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13 Were section 3345 merely a general authorization of treble damages in civil actions brought by senior citizens or disabled persons, we would agree the general authorization would not trump the specific, limited restitution remedy provided in Business and Professions Code section 17203. (See, e.g., *Lake v. Reed* (1997) 16 Cal.4th 448, 464 ["more specific statute controls over a more general one"]; *Cumero v. Public Employment Relations Bd.* (1989) 49 Cal.3d 575, 587 [same].) But as we must repeatedly note, section 3345 by its very terms applies, without limitation, to actions brought by or on behalf of those categories of individuals "to redress unfair or deceptive acts or practices or unfair methods of competition."

the amount of the fine, penalty or other remedy is subject to the trier of fact's discretion, the trier of fact shall consider various enumerated factors, including "whether the defendant knew or should have known that his or her conduct was directed to one or more senior citizens or disabled persons," in "determining the amount of fine, civil penalty or other penalty, or other remedy to impose." The second sentence of subdivision (b) instructs the trier of fact, once the amount of the penalty or other remedy is fixed—either because it is set by statute or determined by the trier of fact—to consider those same factors in deciding whether to treble the award.[14]

A careful reading of the statute permits no other conclusion. Section 3345 specifically authorizes trebling either "the amount authorized by statute, or, where the statute does not authorize a specific amount," the amount the trier of fact imposed in its discretion. (§ 3345, subd. (b).) If, as National Western asserts, section 3345 applied only to actions in which the fine, penalty or other remedy was subject to the trier of fact's discretion, it would not apply to any action in which the fine or civil penalty was fixed by statute. Such a conclusion is directly contrary to the statutory language as well as its purpose. (See *Reno v. Baird, supra,* 18 Cal.4th at p. 658 [statute must be read to avoid interpretation that would render any of its provisions a nullity].)

Equally flawed is National Western's assertion the trial court has no discretion under the unfair competition law in determining the amount of restitution to be awarded. Restitution is an equitable remedy. (*Cortez v. Purolator Air Filtration Products Co., supra,* 23 Cal.4th at p. 180.) "A court cannot properly exercise an equitable power without consideration of the equities on both sides of the dispute." (*Ibid.;* see also *Olson*

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14 As discussed above, in its initial iteration section 3345 simply directed consideration of factors relating to the impact of the defendant's conduct on senior citizens and disabled persons in fixing the amount of an otherwise authorized fine, penalty or other remedy. (Sen. Bill No. 1157 (1987-1988 Reg. Sess.) as amended July 9, 1987.) The second sentence in subdivision (b) permitting the trier of fact to impose up to three times the amount of the fine, penalty or other remedy once the base amount was determined was included with the April 1988 amendments to the legislation. (See Sen. Bill No. 1157 (1987-1988 Reg. Sess.) as amended Apr. 12, 1988.)

v. Cohen (2003) 106 Cal.App.4th 1209.) If equity demands a lesser amount than that needed to fully restore the plaintiff to the status quo, the trial court may award a lesser amount. (See, e.g., *Olson*, at p. 1214 [unfair competition action is equitable in nature and court may consider equitable factors in deciding amount of restitution to award].)

4. *Section 3345 Applies to Actions To Enforce the Unfair Competition Law*

Far more troubling than National Western's arguments parsing (incorrectly) the meaning of particular words and phrases in section 3345 is the position of amici curiae, the Association of California Life and Health Insurance Companies, North American Company for Life and Health Insurance and Midland National Life Insurance Company, that the three enhanced remedy provisions included in Senate Bill No. 1157—the addition of Business and Professions Code section 17206.1 to the unfair competition law; the amendment of the CLRA to provide a civil penalty in actions under the act by senior citizens and disabled persons; and the adoption of section 3345—are properly viewed as independent enactments, each with its own, self-contained provisions dealing with enhanced protection for senior citizens and disabled persons.[15]

The amici properly observe it is generally presumed legislation is enacted with an awareness of existing law (see, e.g., *Shirk v. Vista Unified School Dist.* (2007) 42 Cal.4th 201, 212 ["[t]he Legislature is deemed to be aware of existing statutes, and we assume that it amends a statute in light of those preexisting statutes"]; *People v. Licas* (2007) 41 Cal.4th 362, 367 ["'the Legislature is deemed to be aware of existing laws and judicial decisions in effect at the time legislation is enacted and to have enacted and amended statutes "'in light of such decisions as to have a direct bearing upon them'"'"]), and an intention to overturn long-established principles of law is not inferred in the absence of a clear expression in either the statutory language or legislative history. (*Van Horn v.*

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15 National Western expressly declines to adopt amici's argument, stating, although section 3345 does not apply to private actions under the unfair competition law seeking only restitution as a remedy, it takes no position on the question whether the civil penalties specified in Business and Professions Code sections 17206 and 17206.1 may be trebled in an appropriate case under section 3345.

Watson (2008) 45 Cal.4th 322, 333 [""[w]e do not presume that the Legislature intends, when it enacts a statute, to overthrow long-established principles of law unless such intention is clearly expressed or necessarily implied""]; *Torres v. Automobile Club of So. California* (1997) 15 Cal.4th 771, 779 ["courts should not presume the Legislature in the enactment of statutes intends to overthrow long-established principles of law unless that intention is made clearly to appear either by express declaration or by necessary implication"].)

The well-established principles of law at issue here are, as discussed above, that restitution is the only monetary relief available to a private litigant under the unfair competition law and that only the Attorney General and designated public prosecutors are empowered to recover civil penalties in actions under the unfair competition laws. (See *Korea Supply, supra*, 29 Cal.4th at p. 1148, fn. 6 ["[i]n public actions, civil penalties may be collected from a defendant"].) Surely, the amici contend, if the Legislature had intended section 3345 to apply to private restitution awards or civil penalties recoverable under the unfair competition law, it would have said so. Far from doing that, the Legislature made the amendment to the unfair competition law independent and self-contained, defining the terms "senior citizen" and "disabled person" and specifying the factors for the court to consider in deciding whether to impose the enhanced civil penalty under Business and Professions Code section 17206.1 rather than cross-referencing the CLRA or section 3345. Indeed, the amici argue, if the Legislature had intended section 3345 to extend to the unfair competition law, the enactment of Business and Professions Code section 17206.1 would have been superfluous.

The amici's explanation of how the various portions of Senate Bill No. 1157 should relate to each other is certainly reasonable from a policy perspective. But their position is inconsistent with the plain language of the statute itself. In the same bill that added Business and Professions Code section 17206.1 to the state's basic unfair competition law, the Legislature provided that new section 3345 would be applicable to actions brought to redress unfair or deceptive acts or practices or unfair methods of

competition. Yet nowhere in Senate Bill No. 1157 or in the committee reports or analyses accompanying its passage is there any suggestion that "action brought to redress . . . unfair methods of competition" did not include the unfair competition law (or the CLRA). The natural reading of the language actually used by the Legislature, which is by no means absurd, compels the contrary conclusion. (See *Miklosy v. Regents of University of California, supra,* 44 Cal.4th at p. 898, fn. 6 ["because we find no compelling evidence of legislative error, and because the statutory scheme is neither absurd nor inherently unfair, we must construe the law as written by the Legislature"]; see also *id.* at p. 907 (conc. opn. of Werdegar, J.) [agreeing that court properly construes statute in accord with its unambiguous language even if contrary to the overall purposes and structure of the legislative scheme, but urging Legislature to revisit the statute if the words used do not properly convey its intent].)[16]

There is no merit to the amici's contention that construing section 3345 to apply to actions under the unfair competition law makes enactment of Business and Professions Code section 17206.1 superfluous. Without section 17206.1 the maximum civil penalty available per violation in an enforcement action on behalf of senior citizens or disabled persons would be $2,500 (pursuant to Business and Professions Code section 17206) trebled under section 3345. With the enhanced penalty provision of section 17206.1 the potential available civil penalty is increased to $5,000 per violation, which can then be trebled. Nor is the specification of factors relating to senior citizens in section 17206.1 in any way inconsistent with the repetition of those same factors in section 3345. As stated in section 17206.1 the factors assist the court, as trier of fact, in assessing whether to

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16 The interrelation, rather than the independence, of the various provisions of Senate Bill No. 1157 is underscored by cross-references that exist between the new CLRA provisions and section 3345. As discussed, the definitions of "senior citizen" and "disabled person" added to the CLRA are adopted by section 3345 and the specific factors for imposing an enhanced remedy delineated in section 3345 are incorporated by reference in the CLRA civil penalty provision. Yet the amici argue, as they must to be consistent, the new CLRA civil penalty provisions, like those added to the unfair competition law, are not subject to trebling under section 3345.

impose a civil penalty greater than the penalty specified in section 17206 (that is, whether to impose as much as an additional $2,500 per violation). In section 3345 the factors are used to decide whether to increase the base civil fine up to as much as treble the original sum. Although the analysis for these two steps may be essentially the same, the results are quite different.

Finally, although our interpretation of the scope of section 3345 and its application to actions brought under the unfair competition law is based on the plain language of the statute itself, the legislative history of Senate Bill No. 1157—to the extent it sheds any light on the issue at all—supports our conclusion. (See *California School Employees Assn. v. Governing Board* (1994) 8 Cal.4th 333, 340 ["Ordinarily, if the statutory language is clear and unambiguous, there is no need for judicial construction. [Citation.] Nonetheless, a court may determine whether the literal meaning of a statute comports with its purpose."]; accord, *In re Tobacco II Cases, supra,* at p. __ ["even though recourse to extrinsic material is unnecessary given plain language of statute, we may consult it for material that buttresses our construction of the statutory language"]; see also *Aguiar v. Superior Court* (2009) 170 Cal.App.4th 313, 326.) The twin purposes of the 1988 legislation were to encourage the investigation and prosecution of deceptive business practices perpetrated against senior citizens and to create new forms of civil redress available to senior citizens to "compensate for the lack of [existing] remedies." (See Sen. Rules Com., Off. of Sen. Floor Analyses, Sen. Bill No. 1157 (1997-1998 Reg. Sess.) as amended June 13, 1988, p. 2, [¶] 2.) It is fully consistent with those goals to construe section 3345 to apply to unfair competition actions brought on behalf of senior citizens under the unfair competition law. (See generally *Viles v. State of California* (1967) 66 Cal.2d 24, 32-33 [remedial legislation must be liberally construed to protect persons within its purview].)

DISPOSITION

The petition is granted. Let a peremptory writ of mandate issue directing the trial court to vacate its order of November 14, 2008 granting National Western's motion for judgment on the pleadings and to enter a new order denying that motion and to conduct any further proceedings not inconsistent with this opinion. Petitioners are to recover their costs in this writ proceeding.

PERLUSS, P. J.

We concur:

WOODS, J.

JACKSON, J.

Order Modifying Opinion

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

JAMES A. CLARK et al.,

Petitioners,

v.

THE SUPERIOR COURT OF LOS ANGELES COUNTY,

Respondent,

NATIONAL WESTERN LIFE INSURANCE COMPANY,

Real Party in Interest.

No. B212512

(Super. Ct. No. BC321681)

ORDER MODIFYING OPINION (NO CHANGE IN JUDGMENT)

THE COURT:

It is ordered that the opinion filed herein on May 21, 2009 be modified as follows:

1. On page 13, in the last sentence of the first full paragraph under heading number 3, "common law fraud or" is deleted and footnote 12 is added to the end of the sentence, which will require the renumbering of all subsequent footnotes.

[12] We need not address whether a common law fraud claim seeking rescission and restitution (see Civ. Code, §§ 1692, 3343) would fall within the ambit of section 3345.

There is no change in the judgment.

PERLUSS, P. J. WOODS, J. JACKSON, J.

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

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: Barger & Wolen LLP, 633 W. Fifth Street, 47th Floor, Los Angeles, California 90071.

On **June 29, 2009** I served the foregoing document(s) described as **PETITION FOR REVIEW** on the interested parties in this action by placing [ ] the original [X] a true copy thereof enclosed in sealed envelope addressed as stated in the attached mailing list.

[X] **BY MAIL (as indicated on Service List)**

[ ] I deposited such envelope in the mail at Los Angeles, California. The envelope was mailed with postage thereon fully prepaid.

[X] I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with U.S. Postal Service on that same day with postage thereon fully prepaid at Los Angeles, California in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postage cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

[ ] **BY EMAIL [as indicated on Service List)]**

[ ] I served the above-entitled document(s) by email and .pdf attachment through the office email service for Barger & Wolen LLP.

[ ] **BY FACSIMILE**

[ ] By transmitting an accurate copy via facsimile to the person and telephone number as follows:

[X] **(STATE)** I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed at Los Angeles, California on **June 29, 2009.**

NAME: PAMELA ROSENBERG

Pamela Rosenberg
(Signature)

SERVICE LIST
Clark v. National Western Life Insurance Co., et al.
LASC Case No: BC 321681
Court of Appeal Case No. B212512
Supreme Court Case No: S_____

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Honorable Victoria Chaney
Superior Court of California, County of Los Angeles
Central Civil West Courthouse, Dept. 324
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Los Angeles, CA 90005

VIA U.S. MAIL

Case No: BC 321681

California Court of Appeal
Second Appellate District, Division One
300 S. Spring Street, 2nd Floor, North Tower
Los Angeles, CA 90013

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Case No: B212512