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IN THE
SUPREME COURT OF CALIFORNIA

SUPREME COURT
FILED

JUL 20 2009

JAMES A. CLARK, et al.
Petitioners,
v.

Frederick K. Orrick Clerk
F. Robinson
Deputy

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 Appellate District, Division Seven

ANSWER TO PETITION FOR REVIEW

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Case No. B212512

ANSWER TO PETITION FOR REVIEW

National Western focuses on a policy argument (preserving the “streamlined” UCL procedure) as its reason for granting review here (Ptn., pp. 1-4). National Western is wrong on the policy question, but there is no need for this Court to reach that issue. Rather, the Petition should be denied out of hand because National Western has offered no plausible basis for rejecting the Court of Appeal’s straightforward conclusion that the “unambiguous language” adopted by

the Legislature in Civil Code section 3345 compels its application to restitution under the UCL (Slip Opinion, p. 2).

National Western's effort to overcome the hurdle of the Legislature's clear command depends, not upon careful analysis of the statutory language, but upon (1) wilful disregard of the close connections the Legislature forged between section 3345 and the UCL, and (2) resort to word-play rather meaning as a mode of statutory interpretation. Once those stratagems are unmasked, it becomes clear that the Court of Appeal was correct in it holding that the plain language of section 3345 encompasses UCL restitution awards, and that there is no need for this Court to reexamine that holding. The Petition should be denied.

I. THE PLAIN MEANING OF SECTION 3345 MAKES IT APPLICABLE TO RESTITUTION UNDER THE UCL.

A. APPLICATION TO THE UCL.

National Western's claim that the plain language of section 3345 does not make it applicable to UCL actions rests on a method of interpretation which has no support in the law and would lead to absurdities if applied as National Western advocates here.

Rather than asking whether "the plain *meaning* of the language" *Day v. City of Fontana* (2001) 25 Cal.4th 268 at 272, makes section 3345 applicable to the

UCL, National Western asserts that the language of 3345 must coincide *word-for-word* with the language of the statute to which it is supposed to apply.

Section 3345 applies by its terms to actions brought “to redress unfair or deceptive practices or unfair methods of competition.” According to National Western, that language makes section 3345 applicable to the CLRA, because Civil Code section 1770(a) includes the phrases “unfair and deceptive” and “unfair methods of competition.” Because, however, the UCL is aimed at “any unlawful, unfair or fraudulent business act or practice” (Business & Professions Code section 17200), and does not use the phrases “unfair and deceptive” and “unfair methods of competition,” National Western claims that section 3345 does not apply “by its very terms” to the UCL (Ptn., p. 10).

National Western’s approach replaces the search for plain meaning with mere wordplay. A consideration of “plain meaning,” as this Court requires, *Day v. City of Fontana, supra*, 25 Cal.4th 268, 272, rather than a precise coincidence of wording, leaves no doubt that the UCL is as much aimed at redressing “unfair and deceptive” acts or practices and “unfair methods of competition” as the CLRA, and therefore that section 3345 is applicable to both.

As this Court has held, the coverage of section 17200, encompassing “any unlawful, unfair or fraudulent business act or practice” is “sweeping.” It embraces

“anything that can properly be called a business practice and that at the same time is forbidden by law,” as well as any practice which, though not otherwise unlawful, is unfair, or fraudulent. “In other words, a practice is prohibited as ‘unfair’ or deceptive even if not ‘unlawful’ and vice versa.” *Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co.* (1999) 20 Cal. 4th 163 at 180. It is inconceivable that the Legislature would not have understood in adopting section 3345 that section 17200 was among the statutes designed “to redress unfair or deceptive practices or unfair methods of competition.”

Further, it follows from this Court’s construction of the “unlawful” prong of the UCL as “borrowing” its meaning from other statutes, *Farmers Ins. Exch. v. Superior Court* (1992) 2 Cal. 4th 377, 383, that any business practice or method of competition forbidden by the CLRA also warrants a remedy under the UCL. In arguing that section 3345 applies to the CLRA, therefore, National Western is, contrary to its stance in the Petition, implicitly admitting that it applies to the UCL as well.

The federal decisions applying section 3345 also support rejection of National Western’s “word for word” approach. The district courts in both *Hood v. Hartford Life and Accident Insurance Co.* (E.D.Cal.2008) 567 F.Supp.2d 1221, and *Ross v. Pioneer Life Insurance Co.* (C.D.Cal.2008) 545 F.Supp.2d 1061, applied section 3345

to treble punitive damages awarded under Civil Code section 3294 for insurance bad faith claims. So too, the court in *Gusse v. Damon Corp.* (C.D.Cal.2007) 470 F.Supp.2d 1110, 1118, held section 3345 applicable to treble civil penalties under the Song-Beverly Act for breach of warranty.

The *Hood* court had the most extensive discussion of the issue. The *Hood* court took it as given that section 3345 is applicable to both CLRA and UCL claims, 567 F.Supp.2d 1221, 1227, but rejected defendant's contention that its application is limited to remedies under those two statutes. Section 3345, the court held, is applicable to any cause of action seeking redress for "unfair practices," and Hood's bad faith insurance claim was such a cause of action. 567 F.Supp.2d 1221.

National Western's claim that section 3345 does not apply by "its very terms" to the UCL (Ptn., p. 10) is untenable.

B. APPLICATION TO RESTITUTION

The same is true of National Western's assertion that section 3345 is not applicable to restitution claims because it is not "the sole purpose" of restitution to punish or deter.

National Western asserts that the language making section 3345 applicable to remedies "*the* purpose or effect of which is to punish or deter," as opposed to "*a*

purpose or effect of which is to punish or deter,” limits its application to those remedies that have punishment and deterrence as their *sole* purpose (Ptn., p. 22).

What National Western ignores this time is that section 3345's application is not limited to remedies which have “the purpose” of punishing or deterring. It applies to remedies which have *either* that “purpose” *or* that “effect.” The word “effect” would have been surplusage if the Legislature intended to include only remedies with the *sole* purpose of punishing or deterring. It goes without saying that any remedy with the sole purpose of punishing or deterring would also have the effect of punishing and deterring. Because, therefore, “[c]ourts should give meaning to every word of a statute if possible, and should avoid a construction making any word surplusage,” *Arnett v. Dal Cielo* (1996) 14 Cal. 4th 4 at 22 , section 3345 must be read to apply to remedies that have the *effect* of punishing or deterring, even if one of their *purposes* is, as with restitution, to restore to the victims of fraud what they had lost.

National Western’s claim that section 3345 does not apply to restitution by “its very terms” is also without merit.

II. NATIONAL WESTERN’S PETITION GIVES THE MISLEADING IMPRESSION THAT SECTION 3345 WAS WRITTEN WITHOUT REGARD TO THE UCL.

National Western seeks to buttress its argument that section 3345 does not

apply to the UCL by focusing on cross-references and correspondences in language between the CLRA and section 3345, and then pointing out that “[c]onversely, 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 (Ptn., p. 11).”

The implication is that the Legislature created no connections between section 3345 and the UCL, but that implication is grossly misleading. Senate Bill 1157 as adopted included, not only the enactment of section 3345 and changes to the CLRA, but a new section of the UCL: Business & Professions Code section 12406.1.

Section 17206.1 provides for civil penalties in public UCL actions in addition to those under section 17206, where “the acts of unfair competition” are perpetrated against seniors or the disabled. The factors included in section 17206.1 to determine whether and to what extent the enhanced penalty should apply, are the very ones enumerated in section 3345, stated in precisely the same language. The same factors are also incorporated into the CLRA’s similar statutory penalty provisions, Civil Code section 1780(b)(1).

Just as the connections between section 3345 and the CLRA reinforce the application of section 3345 to CLRA awards as a remedy for seniors cumulative to

that in 1780(b)(1), therefore, so the connections between section 3345 and the UCL reinforce the application of section 3345 as a remedy for seniors cumulative to that under section 17206.1 under the UCL.

In short, contrary to the impression given by the Petition, the language of section 3345, Business & Professions Code section 17206.1 and Civil Code section 1780(b)(1) make it clear that, in enacting Senate Bill 1157, the Legislature intended section 3345 to work in tandem with the UCL, as well as with the CLRA. Rather than detracting from the understanding created by the plain language that section 3345 applies to the UCL, this aspect of legislative history reinforces that understanding.

CONCLUSION

National Western has failed to make arguments worthy of this Court's consideration for overturning the Court of Appeal's holding that the "unambiguous language of section 3345 encompasses" UCL restitution (Slip Opinion, p. 2).

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For the reasons stated above, the Petition should be denied.

DATED: July 17, 2009

A handwritten signature in black ink, appearing to read 'R. S. Gerstein', written over a horizontal line.

Robert S. Gerstein, Attorney for
Petitioners JAMES A. CLARK, et al.

STATEMENT OF COMPLIANCE

Pursuant to Rule of Court 14(c)(1), I certify that the **ANSWER TO PETITION FOR REVIEW** is proportionately spaced, has a typeface of 14 points or more, and contains 1,557 words.

DATED: July 17, 2009

Respectfully submitted,

A handwritten signature in black ink, appearing to read "R. Gerstein", is written over a solid horizontal line.

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