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S174229

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

OPENING BRIEF ON THE MERITS

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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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OPENING BRIEF ON THE MERITS

STATEMENT OF THE ISSUE SET FORTH IN THE GRANTING OF THE PETITION FOR REVIEW

Is Civil Code section 3345, which permits an enhanced award of up to three times the amount of a fine, civil penalty, or "any other remedy the purpose or effect of which is to punish or deter" in actions brought by or on behalf of senior citizens or disabled persons seeking to "redress unfair or deceptive acts or practices or unfair methods of competition," applicable in an action brought by senior citizens seeking restitution under the Unfair Competition Law (Bus. & Prof. Code, section 17200 et seq.)?

INTRODUCTION

The only monetary remedy permitted by the UCL in a private action by senior citizens is restitution. No damages of any kind are allowed. Given this well established law, it would seem obvious that the treble penalty provision of Civil Code section 3345 cannot apply to a private UCL restitution action. Nevertheless, the Court of Appeal concluded just the opposite. That conclusion is wrong for multiple reasons.

The Court of Appeal recognized the "well-established rule that private plaintiffs" in UCL actions "'may not receive damages, much less ***treble*** damages,'"[1] but failed to recognize that the reason for this rule – the "***streamlined***" process – is destroyed if a treble damage award is permitted in a UCL action. The Court of Appeal's conclusion, were it correct, would destroy the "***streamlined***" process of the UCL by turning private actions by senior citizens into a "compensatory"/"punitive" damages trial roughly akin to a common law fraud trial.[2] If the Legislature had intended such a result, surely it would have said so, but it did not.

However, the Court of Appeal side-stepped the absence of any legislative history suggesting a desire to overturn the "***streamlined***" process by concluding that section 3345 "by its own terms" applied to private UCL actions brought by seniors. *Slip Opinion,* p. 18 n.13. Indeed, the Court of

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[1] *Slip Opinion,* p. 2 (citing this Court's decision in *Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co.*, 20 Cal. 4th 163, 179 (1999) (emphasis by this Court)).

[2] Indeed, the appellate court acknowledged that an award under section 3345 "is similar in many respects to an award of punitive damages." *Slip Opinion,* p. 2.

Appeal started its opinion by declaring that the "unambiguous language of section 3345 encompasses" UCL actions. *Slip Opinion,* p. 2. Accordingly, the Court of Appeal found that the "plain language" rule of statutory construction required the application of section 3345 to UCL actions. *Slip Opinion,* p. 23. But close inspection of section 3345 reveals that the language underlying the Court of Appeal's "by its own terms" refers to the Consumer Legal Remedies Act ("CLRA"),[3] not the UCL. Section 3345 applies to "unfair or deceptive acts" and "unfair methods of competition." That exact language is found in the CLRA, but not in the UCL.

The significance of the fact that section 3345 refers to the CLRA and not the UCL is that the "plain meaning" rule, contrary to the Court of Appeal's conclusion, does not resolve the issue presented. Once the inquiry turns to other principles of statutory construction, including consideration of the legislative history, it is clear that section 3345 was not intended to apply to the UCL. Had the Legislature intended to abrogate the no damages of any kind rule of the UCL, it would have surely said so, yet nothing in the language of section 3345 or the legislative history of section 3345 gives even a hint that this was the Legislature's intention. Given that silence, the conclusion must be that section 3345 was not intended to apply to the UCL.

The Court of Appeal's error in deciding that the "plain meaning" rule was applicable caused it to misapply another rule of statutory construction. It is an established rule that a specific statute (such as the

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[3] *Civil Code,* §§ 1750 *et seq.*

UCL remedy provision) controls over a general statute (such as section 3345). The Court of Appeal acknowledged this rule and conceded that it would apply but for the fact that "section 3345 by its very terms applies" to UCL actions. *Slip Opinion,* p. 18 n 13. But section 3345 does not "by its very terms" apply to UCL and thus the Court of Appeal's failure to apply the specific/general rule constituted a further error.

Finally, the Court of Appeal wrongly concluded that the phrase "or any other remedy" in section 3345 referred to a restitution award. Section 3345 permits trebling, assuming other requirements are met, 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 . . . ." Established rules of statutory construction provide that specific terms control apparently more general ones. The specific terms of section 3345 – fines and penalties – are each punitive, non-compensatory remedies. These specific terms control the more general "or any other remedy" final term, requiring the conclusion that section 3345 does not encompass the non-punitive restitution remedy of the UCL.

In summary, for all these reasons, the Opinion of the Court of Appeal must be reversed and the decision of the trial court reinstated. Such a result will underscore the overarching principle that damages, of any kind, are not permitted directly or indirectly in a UCL action brought by private plaintiffs.

STATEMENT OF THE CASE

This case is a class action filed on behalf of individuals 65 and older who purchased one of four annuities sold by Defendant and Real Party in Interest National Western Life Insurance Company ("National Western"). The operative Third Amended Complaint (filed December 22, 2005) alleges causes of action against National Western for violations of the UCL, fraud, declaratory relief, breach of contract, and breach of the implied covenant of good faith and fair dealing – but the only cause of action certified against National Western by the trial court's ruling of February 28, 2007 was a UCL cause of action.[4] The gist of the UCL claim is that National Western's annuities violated certain notice provisions found in sections 10127.10(c) and 10127.13 of the Insurance Code. The relief sought under the UCL claim was restitution, along with treble damages under Civil Code section 3345.[5]

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."[6] The trial court granted that motion at the time of oral argument on October 3, 2008, which ruling was then set forth in a written

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[4] *See* Petitioners' Exhibits in Support of Petition for Writ of Mandate, as submitted to the Court of Appeal ("Petitioners' Exhibits"), Exhibits "A" & "B."

[5] Petitioners' Exhibits, Ex. "A," ¶¶ 30-31.

[6] 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. *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."

ruling issued November 14, 2008.[7] 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 preventative. Therefore trebled recovery is not available under section 3345."[8]

Plaintiffs filed a writ petition with respect to this 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 rendered its Opinion on May 21, 2009, in which it issued a peremptory writ of mandate directing the trial court to vacate its ruling and to enter a new order denying the motion for judgment on the pleadings as to the claim for trebling under the UCL. The substance of the appellate court's Opinion, as it is relevant for this present proceeding, is discussed below.

Believing that the Court of Appeal's Opinion was incorrect, not supported by the law, and raised an important issue of first impression,

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

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

National Western sought review from this Court on June 29, 2009. Following the filing of an Answer by Petitioners and a Reply by National Western,[9] this Court granted review on September 9, 2009.

THE PASSAGE OF SENATE BILL 1157

Civil Code section 3345 was enacted in 1988 through the passage of Senate Bill No. 1157. SB 1157 actually resulted in the enactment or amendment of three statutes: (1) the enactment of Business & Professions Code section 17206.1, which amended section 17206 to permit certain government officials – not private parties – to assess additional penalties for UCL violations perpetrated against seniors and the disabled; (2) the amendment of the Consumer Legal Remedies Act to provide additional remedies up to $5,000 to senior citizens and disabled persons who suffer damage by a violation of the act (Civil Code sections 1761 and 1780); and (3) the enactment of Civil Code section 3345, which allows the trier of fact to treble statutory penalties when the disabled or elderly are victimized.[10]

There is nothing in the legislative history of SB 1157 that demonstrates, let alone even implies, that the Legislature ever intended section 3345's trebling of remedies to be applied to ***private*** UCL actions. The purpose of enacting Business & Professions Code section 17206.1 was to encourage ***law enforcement agencies*** to prosecute unfair practices

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[9] Four letters of amicus curiae in favor of the position of National Western and supporting the granting of review were filed with the Court.

[10] National Western submitted portions of the legislative history of SB 1157 with its reply papers to the trial court, which history then became part of the writ proceeding before the Court of Appeal. Petitioners' Exhibits, Ex. "P."

directed towards the elderly and disabled.[11] Had the Legislature intended to provide the trebling of remedies to UCL actions brought by private citizens, it could have easily done so by amending Business & Professions Code section 17203 while it was enacting section 17206.1. In fact, the legislative history explicitly states that while private litigants may enforce the UCL, they "cannot recover civil penalties or damages."[12]

In short, nothing in the legislative history of SB 1157, including section 3345, supports any notion that such statute permits triple restitution in a claim brought by a private plaintiff under the UCL. Indeed, the concurrent enactment of Business & Professions Code section 17206.1 as part of SB 1157, which allows only governmental entities the ability to seek penalties under the UCL, only supports the position that private UCL claimants may not seek the remedies afforded under section 3345.[13]

LEGAL DISCUSSION

1. APPLICATION OF SECTION 3345 TO THE UCL IS INCONSISTENT WITH THE "*STREAMLINED*" PURPOSE OF THE UCL

Damages of any kind are not allowed in a UCL action. This restitution limitation on monetary recovery in a UCL action dates back to the 1970's. *Chern v. Bank of America,* 15 Cal. 3d 866, 875 (1976).[14] From

[11] Petitioners' Exhibits, Ex. "P," p. 482.

[12] Petitioners' Exhibits, Ex. "P," p. 482.

[13] As noted below, the Court of Appeal admitted that the "legislative history of section 3345 is unhelpful" in determining if treble restitution can be applied to private UCL actions.

[14] *Chern* specifically considered Business & Professions Code sections 17500 and 17535 (the False Advertising Law ("FAL"), but the language in

Chern to the present, this Court has never wavered from this limitation. To the contrary, this Court later advised that private plaintiffs may not "receive damages, much less ***treble*** damages," in a UCL action. *Cel-Tech, supra,* 20 Cal. 4th at 179 (emphasis by the Court). In the same vein, this Court has stated 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).

The reason for precluding damage awards in UCL actions is the frequently articulated desire for an uncomplicated UCL procedure. The "exclusion of claims for compensatory damages" is entirely "consistent with the overarching legislative concern to provide a ***streamlined*** procedure for the prevention of ongoing or threatened acts of unfair competition." *Dean Witter Reynolds, Inc. v. Superior Court,* 211 Cal. App. 3d 758, 774 (1989) (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 v. Purolator Air Filtration Products Co.*, 23 Cal. 4th 163, 173 (2000), this Court made the same point in explaining that the UCL "is

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those sections is similar to sections 17200 and 17203, and *Chern* has been interpreted as applying to the UCL as well as the FAL. *Bank of the West v. Superior Court,* 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 this Court observed in *In Re Tobacco II Cases*, 46 Cal. 4th 298, 312, n.8 (2009), a "violation of the UCL's fraud prong is also a violation of the false advertising law."

not an all-purpose substitute for a tort or contract action." *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").

This Court returned to the topic of "speed and administrative simplicity" in *Korea Supply* when it "reaffirm[ed] that an action under the UCL 'is not an all-purpose substitute for a tort or contract action.'" *Korea Supply, supra* at 1150. This Court went on to explain that "the 'overarching legislative concern [was] to provide a streamlined procedure for the prevention of ongoing or threatened acts of unfair competition.' Because of this objective the remedies provided are limited." *Korea Supply, supra* at 1150 (quoting *Cortez*).[15]

The Court of Appeal acknowledged the holdings in *Cel-Tech* and *Korea Supply* but failed to give these holdings proper significance for three reasons. First, nowhere does the Court of Appeal mention the purpose for not allowing damage recoveries – the desired for a "***streamlined***" process

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[15] 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 v. Threshold Enterprises, Inc.*, 155 Cal. App. 4th 798, 812 (2007); *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."

for resolving UCL claims. Second, the Court of Appeal mistakenly concluded that the "plain language" rule of construction required the conclusion that section 3345 applied to the UCL, a mistake we discuss in the next subsection. Third, the Court of Appeal compounded its errors by concluding that neither *Cel-Tech* nor *Korea Supply* "suggests enhanced remedies may not be available . . . under a different, express legislative mandate authorizing them." *Slip Opinion,* p. 16. The assumption seems to be that it does no violence to the UCL if damages are injected into its procedure by a statute that is not part of the UCL. In fact, whether damages are permitted in a UCL action by a revisionist reading of section 17203 or by incorporation of the section 3345 trebling procedure, the result is the same: the "***streamlined***" process praised in *Cel-Tech* and *Korea Supply* disappears.

The destruction of the "***streamlined***" process is perhaps most vividly demonstrated when one considers UCL class actions such as this case. Recently, this Court has explained that relief may be granted to UCL class members without "individualized proof" of "injury," or what the dissent called "no-injury class actions." *In re Tobacco II Cases, supra,* 46 Cal. 4th at 320, 335. The contrast to the proof requirements for trebling under section 3345 could not be more striking. Section 3345(b)(3) requires a trial judge to consider, among other things, whether one or more senior citizens "***actually suffered*** substantial physical, emotional or economic ***damages*** resulting from the defendant's conduct." (Emphasis added.) While this is miles from the overarching desire for "speed and administrative simplicity" in an individual case, in a class action case the otherwise simple process is destroyed exponentially.

2. THE "PLAIN LANGUAGE" OF SECTION 3345 DOES NOT ENCOMPASS UCL ACTIONS BY SENIORS

Central to the Court of Appeal's Opinion is the mistaken conclusion that the enhanced remedy of section 3345 by "express legislative mandate" applies to UCL restitution awards of private litigants. *Slip Opinion,* p. 16. The appellate court repeatedly stated this conclusion. For example, the court asserted that the "unambiguous language of section 3345 encompasses" UCL actions, that "the language of section 3345 itself . . . on its face applies" to UCL actions, and "as we must repeatedly note, section 3345 by its very terms applies, without limitation," to UCL actions. *Slip Opinion,* pp. 2, 3, 18 n.13. Despite the repetition, in fact section 3345 ***does not*** expressly or unambiguously refer to the UCL. Rather, it expressly refers to the CLRA.

The "very terms" used in section 3345 state that it applies to "unfair methods of competition" and "unfair or deceptive acts." While various sections of the UCL use the term "unfair competition," 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).[16] Further, section 1780(b)(1) of the CLRA provides that a fine of

[16] 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." Moreover, 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 in 1988, expressly cross-referenced section 3345 and the CLRA, there is no similar cross referencing of section 3345 and the UCL.

In emphasizing that section 3345 expressly references the CLRA but not the UCL, we do not mean to suggest that this ends any inquiry into whether section 3345 was intended to apply to UCL restitution actions by seniors. Rather, the point is that section 3345 does not unambiguously by its "very terms" apply to the UCL.[17] As this Court said in *Hodges v. Superior Court,* 21 Cal. 4th 109, 113 (1999), the "language is not pellucid." Did the drafters of section 3345 mean for the phrases "unfair methods of competition" and "unfair or deceptive acts" to include the UCL as well as

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

[17] Of course, the "plain meaning" rule has never been applied as a straightjacket, as this Court has frequently looked beyond statutory language to determine "whether the literal meaning of a statute comports with its purpose. . . ." *County of San Bernardino v. City of San Bernardino,* 15 Cal. 4th 909, 943 (1997); *Lungren v. Deukmejian,* 45 Cal. 3d 727, 735 (1998).

the CLRA or not? One cannot tell from simply looking at the statutory language and thus the inquiry must move beyond the statutory language to "extrinsic sources" including "the legislative history." *People v. Coronado,* 12 Cal. 4th 145, 151 (1995).

3. THE LEGISLATIVE HISTORY OF SECTION 3345 DEMONSTRATES THAT IT WAS NOT INTENDED TO ENCOMPASS THE UCL

In considering the legislative history of SB 1157, one "well-settled rule of statutory construction" is paramount: statutes are not construed to "'overthrow long-established principles of law unless such [an] intention is made clearly to appear either by express declaration or by necessary implication.'" *E.g., People v. Cardenas,* 31 Cal. 3d 897, 913-14 (1982); *Rincon Del Diablo Mun. Water Dist. v. San Diego County Water Authority,* 121 Cal. App. 4th 813, 819-20 (2004). Here the long-established principle is that neither punitive, treble nor any form of damages are permitted in a UCL action. Thus, if the Legislature intended to permit what is essentially a form of damages by the trebling penalty, one would expect to find an "express declaration" of that intent, but there is none.

The Court of Appeal began its opinion by acknowledging 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 acknowledgment is critical because the Legislature knows how to make plain its intent and would have had to do so for a change as significant as applying the trebling feature of section 3345 to the UCL.

In *De Anza Santa Cruz Mobile Estates Homeowners Ass'n. v. De Anza Santa Cruz Mobile Estates,* 94 Cal. App. 4th 890, 911-12 (2001), the issue was whether a section of the Mobilehome Residency Law[18] was an exclusive remedy precluding the recovery of punitive damages. The court held that since section 798.86 provided for a discretionary $500 penalty in addition to a plaintiff's actual damages for a violation of the statute, the Legislature had intended to preclude recovery of general punitive damages. Noting that in another section of this same law[19] the Legislature had stated that the remedy was "nonexclusive," the court explained that the Legislature "knows how to express such a concept, and its silence on the subject therefore indicates a contrary intent." *De Anza, supra* at 911. Proving the court's point, two years later the Legislature did amend section 798.86 to expressly permit the recovery of punitive damages.

In *Brodie v. Workers' Compensation Appeals Board,* 40 Cal. 4th 1313 (2007), 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," *Brodie, supra* at 1323, not unlike the prohibition on damages, of any kind, under the UCL. In deciding whether the 2004 amendment changed that law, this Court explained that no such

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[18] *Civil Code*, § 798.86.

[19] *Civil Code*, § 798.889(g).

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, this 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 Opinion devotes several pages to the legislative history of SB 1157, but nowhere in the Court of Appeal's discussion or 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.[20] The Legislature passed SB 1157 in 1988, or 12 years after *Chern v. Bank of*

[20] 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. *Slip Opinion,* p. 23. "[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.

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. Such a dramatic overhaul of the essence of a UCL action can be accomplished only by an express legislative mandate, which is completely absent here.

4. THE RULE THAT A MORE SPECIFIC STATUTE CONTROLS OVER A MORE GENERAL STATUTE DEMONSTRATES THAT SECTION 3345 DOES NOT ENCOMPASS THE UCL

It is a well-established principle of statutory construction that a "more specific statute controls over a more general one." *E.g., Collection Bureau of San Jose v. Rumsey,* 24 Cal. 4th 301, 310 (2000); *Cumero v. Public Employment Relations Bd.*, 49 Cal. 3d 575, 587 (1989); *People v. Gilbert,* 1 Cal. 3d 475, 479 (1969); *Code of Civil Procedure,* § 1859. In *Collection Bureau,* the provisions in apparent conflict were section 13554 of the Probate Code and section 914 of the Family Code. Assuming the

two sections to be in conflict, the court concluded that "the Probate Code provisions still must be found to control as they are clearly the more specific." *Collection Bureau, supra* at 310.

In this case, Business & Professions Code section 17203 is clearly a more specific remedy for violations of the UCL than Civil Code section 3345. Indeed, the Court of Appeal acknowledged this, 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 apply this principle, however, because of its mistaken conclusion that section 3345 by "its very terms" applied to UCL actions. Since section 3345 does not by "its very terms" apply to UCL actions, the general vs. specific rule of construction is applicable and demonstrates that section 3345 was not intended to apply to UCL private actions.

5. SECTION 3345 BY ITS OWN TERMS IS NOT APPLICABLE TO A RESTITUTION AWARD UNDER THE UCL

Section 3345 was never intended to permit the trebling of UCL restitution awards despite the Court of Appeal's position to the contrary. *Slip Opinion,* p. 13. The conclusion that private UCL actions cannot be trebled by section 3345 results from both the express language of section 3345 along with well-established principles of statutory construction.

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). The words "***the*** purpose" are not interchangeable with the words "***a*** purpose," though the Court of Appeal mistakenly concluded that they were.[21]

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 of the remedy 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. To conclude that the final term in the series – "other remedy" – has a different meaning broad enough to encompass a compensatory award, one must conclude that the term "other remedy" is not impacted by the preceding terms. Such a conclusion is at odds with established rules of statutory construction as we explain below.

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[21] The heading for subsection 3(a) of the Court of Appeal's Opinion states: "Deterrence of anti-competitive or deceptive business practices is ***a*** purpose or effect of the unfair competition law's restitution remedy." *Slip Opinion*, p. 14 (emphasis added). The first sentence of that subsection then states that "California courts have long recognized that restitution awarded under the unfair competition law has ***a*** deterrent purpose or effect." *Slip Opinion*, p. 14 (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).

One of the well-established rules of statutory construction is 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.*, 23 Cal. 4th 116, 141 (2000) (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."[22]

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.

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[22] *Accord Martin v. Holiday Inns, Inc.,* 199 Cal. App. 3d 1434, 1437 (1998) (citing *Scally*); *Lawrence v. Walzer & Gabrielson,* 207 Cal. App. 3d 1501, 1506 (1989) (principle used in non-statutory context in interpreting an arbitration provision.): *Pour Le Bebe, Inc. v. Guess? Inc.*, 112 Cal. App. 4th 810, 826-27 (2003) (whether to vacate arbitration award under Code of Civil Procedure section 1286.2 (a)(1) if the court determines the "award was procured by corruption, fraud ***or other undue means***") (emphasis added).

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 Ninth Circuit 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 court 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 the complaint 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 that precede it I the

text of the statute, of which punitive damages under section 3294 is a prime example, whose sole purpose is to punish or deter.

In short, once correctly read, it is clear that the language of section 3345 does not encompass a restitution award. Rather it was intended to apply to non-compensatory awards of fines, penalties or punitive damages. Accordingly, the trebling penalty of section 3345 is not applicable to restitution sought in a private action by senior citizens under California's unfair competition law.

6. CONCLUSION

Based on the foregoing, this Court should confirm that the enhanced trebling penalty set forth in Civil Code section 3345 is inapplicable to a claim for restitution sought in a private action by senior citizens under the UCL and reverse the erroneous decision of the Court of Appeal.

Dated: October 5, 2009

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

Larry M. Golub, counsel of record for Petitioner and Real Party In Interest National Western Life Insurance Company, certifies that the foregoing ***Opening Brief on the Merits*** contains approximately 6165 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 14,000 words permitted under California Rule of Court 8.520(c)(1). The type used to prepare this brief is 13 point Times New Roman, and the lines are double-spaced.

Dated: October 6, 2009 By: _____
Larry M. Golub

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 **October 6, 2009** I served the foregoing document(s) described as **OPENING BRIEF ON THE MERITS** 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.

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[ ] 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 **October 6, 2009.**

NAME: ANITA VARELA

Anita Varela
(Signature)

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Court of Appeal Case No. B212512
Supreme Court Case No: S174229

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