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THE KOREA SUPPLY DECISION: MONETARY RELIEF REMEDIES UNDER THE UCL

*by Carlton Varner**

In *Korea Supply Co. v. Lockheed Martin Corp.*[1], the California Supreme Court held that nonrestitutionary disgorgement was not an available form of monetary relief in private individual actions under the Unfair Competition Law ("UCL"), *Bus. & Prof.* Code § 17200. Although this was not a surprise in view of the court's earlier decisions in *Kraus v. Trinity Management Services, Inc.*[2], and *Cortez v. Purolator Air Filter*[3], both decisions contained ambiguous language which could lead one to conclude that, in some circumstances, disgorgement was a remedy under the UCL apart from restitution. While *Korea Supply* dispelled this ambiguity, it left open two key issues to be resolved by future courts - or perhaps the Legislature. The first is whether its "no disgorgement" ruling applies to class actions, and the second issue is what types of monetary relief are not "nonrestitutionary disgorgement." This article will explore the background of monetary relief remedies in UCL actions, the impact of *Korea Supply* on those remedies, and discuss the two questions left open by the *Korea Supply* decision.

The UCL's scope is broad and it has lax standing requirements.[4] The UCL reached is high water mark in 1998 with the Supreme Court decision in *Stop Youth Addiction v. Lucky Stores*,[5] where the court permitted a nonclass representative action to proceed even though the plaintiff suffered no injury and the predicate statute had no private right of action. Since *Stop Youth*, the Supreme Court has issued four decisions — *Cel-Tech Communications v. L.A. Cellular*,[6] *Kraus*, *Cortez*, and now *Korea Supply*, which cut back on the scope and remedies under the UCL. Likewise, several Court of Appeal decisions[7] in the last two years have likewise shown a greater hostility to UCL claims and a willingness to dismiss them at the pleading stage. *Korea Supply* may simply be the latest manifestation of this trend.

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1 29 Cal. 4th 1134 (2003).

2 23 Cal. 4th 116 (2000).

3 23 Cal. 4th 163 (2000).

4 *See generally* Kelso, *California Unfair Competition Law: Regulatory Balance or Unlevel Playing Field?*, COMPETITION, Vol II (Winter 2002-03); Polidora & Heidemen, *California Unfair Competition Law After Kraus and Cortez*, COMPETITION, Vol. 9 (Summer/Fall 2000), p. 1.

5 17 Cal. 4th 553 (1998).

6 20 Cal. 4th 163, 182-86 (1999) (creating "safe harbor" exception for unfair prong and limiting it to "incipient" antitrust violations).

7 *See*, e.g., *Chavez v. Whirlpool Corp.*, 93 Cal. App. 4th 363 (2001) (conduct that does not violate Cartwright Act is neither unlawful nor unfair under UCL); *Rosenbluth Int'l v. Superior Court*, 101 Cal. App. 4th 1073 (2002) (UCL does not reach private harm caused by breach of contract); *Lavie v. Proctor & Gamble*, 105 Cal. App. 4th 496 (2003) (advertising campaign not deceptive).

In any event, the availability of disgorgement, combined with the broad liability and lax standing requirements, made the UCL a unique and sometimes awesome weapon in the arsenal of antitrust and unfair competition plaintiffs. Unlike restitution — which requires only restoration of money or property to identified victims from which it was taken — disgorgement requires the defendant to give up all profits earned as a result of the unfair competition regardless of whether they were taken from persons who were victims. In addition to the fact that the disgorgement amount is usually higher than the restitution amount, it also is often easier to establish as a matter of proof. Disgorgement is also sometimes determined based in part on the culpability of the defendant. Thus, eliminating disgorgement as a remedy in UCL actions removes a significant weapon from plaintiffs' arsenal..

It should also be emphasized at the outset that, although the *Korea Supply* plaintiff lost the disgorgement battle, it won the war. The Supreme Court affirmed the judgment of the Court of Appeal that plaintiff had stated a cause of action for the tort of interference with prospective advantage. It held that plaintiff was not required to plead that defendants acted with specific intent to interfere with the relationship, only that defendants knew that interference was certain or substantially certain to occur as a result of their action[8], and the means used for the interference must be independently wrongful.[9] While this article will focus on the disgorgement issue, this section of the *Korea Supply* opinion is significant in itself with ramifications for future tort actions involving intentional interference claims.

I. Background

A. The Statute

The UCL defines unfair competition as any "unlawful, unfair, or fraudulent" business act or practice.[10] Under the unlawful prong, the plaintiff just "borrows" violations of other laws and treats them as unlawful practices independently actionable under the UCL,[11] The "unfair" prong reaches conduct that may not violate the predicate statute but may nonetheless be considered unfair.[12] The "fraudulent" prong likewise has a broad reach, and doesn't require the intent and scienter requirements necessary in common law fraud actions.[13]

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8 29 Cal. 4th at 1154-65. The court distinguished between actions for interference with prospective advantage and those for interference with contract, describing the latter as a species of the former. It noted that the former has a more rigorous pleading burden since the plaintiff must plead and prove conduct that is independently wrongful.

9 The "independently wrongful" conduct was that defendants had engaged in bribery and offered sexual favors to key officials in a foreign government in order to obtain a contract from that government.

10 *Bus & Prof.* Code § 17200.

11 *Saunders v. Superior Court*, 27 Cal.App. 832 (1994). Any law, civil or criminal, state or federal, can serve as the predicate statute even if it itself has no private cause of action.

12 See generally *Cel-Tech Communications v. L.A. Cellular*, 20 Cal. 4th 163 (1999) (below cost pricing that did not violate UPA may be unfair under UCL where it is contrary to the spirit of the antitrust laws or an incipient violation thereof.

13 *Searle v. Wyndham Int'l*, 102 Cal.App. 4th 1327 (2002); *Klein v. Earth Elements*, 59 Cal.App. 4th 965 (1997).

Actions for unfair competition can be brought not only by public prosecutors, but by private parties on behalf of themselves or the "general public."[14] This "private attorney general" feature of the UCL in effect allows a private party to bring a "nonclass representative" action which has the same monetary exposure to a defendant as a class action but without the due process safeguards normally attendant to a class action.[15] It is these "nonclass class actions" coupled with the no injury requirement that has led to the abuse of the UCL by lawyers seeking to extort quick settlements from small businesses.[16]

The remedies available to private parties[17] are set forth in Section 17203 of the Business & Professions Code. It provides in relevant part as follows:

> Any person who engages . . . in unfair competition may be enjoined in any court of competent jurisdiction. The court may make such orders and judgments . . . as may be necessary to prevent the use or employment by any person of any practice which constitutes unfair competition . . . and as may be necessary to restore to any person in interest any money or property . . . which may have been acquired by means of such unfair competition.

Courts have uniformly held that this language does not authorize the recovery of damages, compensatory or punitive,[18] All agree, however, that it permits restitution. Prior to *Kraus* and *Cortez*, at least one court held that it permitted disgorgement, and several others suggested so in *dicta*.[19] At least one court,[20] however, found that the use of the word "restore" in Section 17203 meant that the UCL "operates only to return to a person those measurable amounts which are wrongfully taken by means of an unfair business practice."[21]

B. Kraus & Cortez

The primary issue in *Kraus*, supra, was whether "fluid recovery" was available in nonclass, representative UCL actions. Fluid recovery, which is permitted in class

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14 *Bus & Prof.* Code § 17204.

15 *See generally Bronco Wine Co. v. Frank A. Logoluso Farms*, 214 Cal.App. 3d. 69, 720- 21 (1984); In both *Kraus* and *Cortez*, the California Supreme Court attempted to deal with these due process concerns by creating the "competent plaintiff" requirement, authorizing various equitable defenses, etc. *See* generally Polidisa & Heideman, *supra* at no. 5.

16 See "Unfair Competition", Supplement to the San Francisco Recorder, February 2003.

17 Public prosecutors may also recover civil penalties. Bus & Prof. Code § 17206.

18 *Cel-Tech, supra*, 20 Cal. 4th at 179.

19 *People v. Thomas Shelton Powers*, 2 Cal.App. 4th 330 (1992). Dicta in various Supreme Court decisions also arguably suggested that disgorgement was a remedy under the UCL. *Bank of the West v. Superior Court*, 2 Cal. 4th 1254, 1256 (1992); *Fletcher v. Security Nat'l Bank*, 23 Cal. 3d. 442, 450-51 (1979).

20 *Day v. AT&T*, 63 Cal.App. 4th 325 (1998).

21 Id. at 338-39.

actions pursuant to statute,[22] simply means that any "residue" remaining from defendant's payment of damages after class members have collected their individual shares is paid to the "next best use" rather than returned to defendant. In *Kraus*, the business practice in question was the retention of security deposits in violation of the Civil Code. The lower court found the practice violated the unlawful prong of the UCL, ordered disgorgement of the deposits with any unclaimed residue to go to a tenants rights organization, and was then affirmed by the Court of Appeals.

In *Kraus*, the Supreme Court reversed the Court of Appeal and held that "To the extent that the trial court ordered defendants to make any refunds other than to refund money to tenants and former tenants, the award was not authorized by the UCL."[23] While this holding seems clear, some earlier language in its opinion led some to conclude that a UCL order may compel a defendant to return money obtained through an unfair business practice even though not all is to be restored to victims.[24] Likewise, the focus on the availability of fluid recovery in UCL action led some to conclude that disgorgement was permitted so long as it is not tied to fluid recovery.[25] Nonetheless, there was much in the *Kraus* opinion which suggested, rather overtly, that disgorgement was not a remedy under the UCL at all. The court described a restitution order as one compelling defendant to return money to persons who had an "ownership interest" in the property, and then stated that restitution was the "only" monetary remedy under the UCL.[26] It noted that, when the legislature added restitution to the UCL, there was no authority for an order permitting disgorgement.[27] These statements, combined with the actual holding, portended a ruling that disgorgement is not permitted at all under the UCL.

Cortez was likewise a nonclass representative action. The business practice in question was the failure to pay overtime wages in violation of the Labor Code. The remedy sought was the return of profits defendants earned by withholding overtime wages, as well as the restoration of the wages. Citing *Kraus*, the court quickly concluded that the return of profits was disgorgement not permitted by the UCL, but defendant may be compelled to restore unpaid wages to the employees stating that "Once earned, those unpaid wages became property to which the employees were entitled."[28] The main issue in *Cortez*, however, were whether the unpaid wages were damages not recoverable under the UCL.

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22 Code of Civil Procedure, § 384.

23 23 Cal. 4th at 138.

24 23 Cal. 4th at 127.

25 As the court itself noted, however, fluid recovery is necessary only when defendant has been ordered to disgorge money that is not to be returned to the persons from whom they were obtained. 23 Cal. 4th at 127. Thus, if the only remedy is restitution there is no residue for fluid recovery purposes.

26 23 Cal. 4th at 127-28.

27 23 Cal. 4th at 132.

28 23 Cal. 4th at 168, 173-74.

The court rejected this argument, holding that earned but unpaid wages could be recovered as restitution. It emphasized that some damage claims may contain a restitutionary element — the return of the excess of what plaintiff gave over the value of what plaintiff received — and to that extent may be recovered as restitution under the UCL.[29] Other types of damages, such as a damages award in a negligence action in tort may include monetary compensation for lost wages, pain and suffering, physical injury and property damage. Such awards, said the court, would not have an element of restitution recoverable under the UCL.[30]

Thus, following *Kraus* and *Cortez* it was clear that, at least in a nonclass representative action, disgorgement was not a remedy at least to the extent that the unclaimed residue was to be put into a fluid recovery fund. It was also clear that, while the restitutionary element of a damages claim could be recovered in a UCL action, the nonrestitutionary aspects of damage claims could not. That set the stage for *Korea Supply*.

II. The Korea Supply Case

In *Korea Supply*, the predecessor of defendant Lockheed, Loral Corp., was one of two bidders trying to sell miliary equipment to the Republic of Korea. Plaintiff was a company representing the other bidder, MacDonald Dettwiler ("McDonald"), and stood to receive a $30 million commission if McDonald's bid was accepted.[31] It was not, and Loral was the winning bidder. Plaintiff filed suit alleging that Loral won the bid because it offered bribes and sexual favors to Korean government officials. Such conduct allegedly violated the Foreign Corrupt Practices Act, which served as the predicate statute for the unlawful prong of the UCL. On the UCL claim, plaintiff sought disgorgement to it of the profits realized by Lockheed Martin on the sale of the military equipment to Korea.[32]

The trial court sustained a demurrer to the Complaint without leave to amend. The Court of Appeals reversed the trial court's judgment. Citing a portion of the *Kraus* opinion stating that "[a]n order that a defendant disgorge money obtained through an unfair business practice may include a restitutionary element, but is not so limited,"[33] it concluded that the plaintiff sufficiently stated a claim under the UCL. It then held that, even where the money sought to be disgorged was not taken from plaintiff and plaintiff did not have an ownership interest in the money, a UCL plaintiff can recover disgorgement of profits.

The Supreme Court reversed the judgment of the Court of Appeals on the UCL claim holding that nonrestitutionary disgorgement was not an authorized remedy

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29 23 Cal. 4th at 174.

30 23 Cal. 4th at 174.

31 29 Cal. 4th at 1140.

32 29 Cal. 4th at 1142-43.

33 23 Cal. 4th at 1142-43.

under the UCL. The court began by stating that the Court of Appeal had "misread" the cited language from *Kraus*.[34] The cited language, said the court, merely defined the term disgorgement in order to demonstrate it was broader than restitution. The court then reaffirmed that its holding in *Kraus* that the only monetary relief in UCL representative actions is restitution, and extended that holding to individual actions under the UCL.[35] It then identified several bases upon which it concluded that nonrestitutionary disgorgement is not a remedy under the UCL.

First, the Supreme Court noted that the language of Section 17203 itself authorized only restitution. As to the argument that the equitable language of Section 17203 is sufficient to allow disgorgement, it noted that the predecessor to Section 17203, Civil Code Section 3369, had no specific monetary remedies at all.[36] When the Supreme Court held that the inherent equitable power included restitution,[37] this was subsequently codified in the statute itself. Thus, while the legislature confirmed the power of courts to order restitution in UCL actions, it did not increase those powers, by adding disgorgement or otherwise. Citing its prior decision in *Kraus*, the court stated that the legislature thus did not intend Section 17203 to provide courts with unlimited equitable powers, and nothing in the legislative history suggested it intended to authorize disgorgement of profits to a plaintiff who does not have an ownership interest in those profits.[38]

Second, the court, noting that attorney fees and damages, including punitive damages, are not available under the UCL, concluded that deterrence by means of monetary penalties is not the act's sole objective. Rather, the language in Section 17203 that the equitable powers of the court are to be used to "prevent" practices and "restore" money shows an intent by the Legislature to limit the available monetary remedies. It emphasized, and explicitly stated, that "This court has never approved of nonrestitutionary disgorgement of profits as a remedy under the UCL."[39]

Third, the fact that plaintiff characterized its monetary remedy as "restitution" was inaccurate since, under *Kraus* and *Cortez*, restitution is limited to the return of money to persons who had an "ownership interest" in the money or property.[40] Since the monetary relief sought by plaintiff would not replace any money or property that defendants took directly from plaintiff, or in which it had a vested interest as in *Cortez*, it was not restitutionary.

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34 29 Cal. 4th at 1145.

35 Unlike *Kraus* and *Cortez* which are nonclass representation actions, *Korea Supply* was a single plaintiff individual action.

36 29 Cal. 4th at 1147.

37 *People v. Superior Court (Jayhill Corp.)*, 9 Cal. 3d. 283, 286 (1973).

38 29 Cal. 4th at 1147-48.

39 29 Cal. 4th at 1148.

40 29 Cal. 4th at 1149.

Fourth, the court noted that plaintiff's remedy "resembles a claim for damages,"[41] and permitting such nonrestitutionary disgorgement would enable a plaintiff to obtain tort damages while bypassing the burden of proving the elements of liability under traditional tort claims. Given the lax standing and broad liability scope of the UCL, plaintiffs would have an incentive to recast claims under traditional tort theories as UCL violations. The result would be, said the court, that the UCL would be used as an "all-purpose substitute" for a tort or contract action, something the legislature never intended.[42]

Finally, the court stated that, while restitution is limited to restoring money to direct victims, a potentially unlimited number of individual plaintiffs could recover disgorgement. This would expose defendants to multiple suits and risk of duplicative liability without the traditional limits on standing. This raises due process concerns, and creates a risk of unfairness not only to defendants but also to direct victims of the practice.[43]

Korea Supply thus leaves no doubt that disgorgement, along with damages, is not a remedy under the UCL in either individual or representative actions. We now turn to two major questions left unanswered — or at least partially unanswered — by *Korea Supply*. The first is whether the "no disgorgement" rule applies to class actions, and the second is what types of monetary relief claims constitute restitution and how do they differ from damages or disgorgement.

A. Is Disgorgement Still Available As A UCL Remedy In Class Actions?

In the footnote 6 of its opinion, the *Korea Supply* court stated as follows:[44]

> "Our discussion of this case is limited to individual private actions brought under the UCL. In public actions, civil penalties may be collected from defendants. (§ 17206). Further, in *Kraus* we noted that the legislature 'has authorized disgorgement into a fluid recovery fund in class actions' (citing *Kraus*). *These issues are not before us, and therefore we need not address them further.*" (emphasis added)

This is a rather tantalizing footnote. It will no doubt be cited by plaintiffs as indicating that disgorgement remains a remedy if a class is certified in UCL action, and by defendants as indicating that the court will eliminate disgorgement as a remedy in UCL class actions if and when it has the opportunity to do so.

It should be noted that, as discussed *supra*, the disgorgement issue arose in *Kraus* in the context of whether fluid recovery was permitted in nonclass representative

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41 29 Cal. 4th at 1150.

42 29 Cal. 4th at 1151.

43 29 Cal. 4th at 1152.

44 29 Cal. 4th at 1152.

actions. Once the *Kraus* court concluded that fluid recovery was not allowed in representative actions, it was a short step to conclude that disgorgement also not permitted.[45] Conversely, since fluid recovery is permitted in class actions, under the UCL or otherwise, so is disgorgement. Thus, in the post-*Kraus* but pre-*Korea Supply* era, one court concluded that disgorgement was permitted in class actions under the UCL.[46]

In re Vitamin Cases,[47] a decision by a Court of Appeals one month after *Korea Supply*, held that a fluid recovery/cy pres distribution was permitted in a price fixing case asserting claims under the Cartwright Act and the UCL.[48] The *Vitamins* court, however, did not discuss disgorgement or cite *Korea Supply*. The issue there was simply whether CCP 384 prohibited settlement where none of the proceeds were to be distributed to class members, and all distributed via fluid recovery.[49] The court concluded it did not, and a solely cy pres settlement accompanied by the necessary due process safeguards, including notice to the class, was authorized under California law.[50] The *Vitamins* court cited *Kraus* near the end of its opinion, but only to note that the disgorgement ruling in *Kraus* had no relevance to the issue before it.[51]

In *Cruz v. Pacific Health Systems*,[52] the Supreme Court itself suggested in dicta that disgorgement "may" be permitted in class actions under the UCL,[53] citing *Kraus* and footnote 6 of the *Korea Supply* decision. *Cruz* itself, held only that injunctive relief claims under the UCL are not arbitrable.

There is, however, much language in the *Kraus* opinion, as well as its holding, which independently suggests that disgorgement is not a remedy under the UCL in any circumstances.[54] Previewing its *Korea Supply* opinion, the Supreme Court reviewed the legislative history of the UCL and concluded that the legislature did not intend any monetary remedy beyond restitution.

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45 In fact, the *Kraus* court stated at the beginning of its opinion that fluid recovery is "necessary only" when disgorgement is also available. 23 Cal. 4th at 127.

46 *Corbett v. Superior Court*, 101 Cal. App. 4th 649 (2002). The defendant in *Corbett*, however, argued that, since *Kraus*, as a matter of law, a plaintiff could not pursue a class action for violations of the UCL. The court rejected this argument. The *Corbett* decision also has a lengthy dissent arguing, *inter alia*, that *Kraus* determined disgorgement was not a remedy under the UCL.

47 107 Cal. App. 4th 820 (2003)

48 Fluid recovery for the "unpaid residue" in Cartwright Act price fixing cases has long been authorized by California law. *State of California v. Levi Strauss & Co.*, 41 Cal. 3d 460 (1986).

49 107 Cal. App. 4th at 825-27. Appellants, who were class members, asserted that CCP 384 required distribution to class members first, with only the "unpaid residue" being distributed on a *cy press* basis.

50 107 Cal. App. 4th 828-30.

51 It is also significant that the same justice who authorized the *Vitamins* opinion (Justice Haerle) also authorized the dissent in *Corbett* (note 46 supra) which argued that *Kraus* precluded disgorgement in UCL class actions as well.

52 30 Cal. 4th303 (2003)

53 Id. at 318.

54 23 Cal. 4th at 133-35.

Likewise, most, if not all, of the five bases of the *Korea Supply* opinion itself apply with equal force to class actions.[55] The legislative history and statutory interpretation of the UCL would still lead to a "no disgorgement" rule, as would the fact that deterrence through monetary penalties is not the main goal of the statute. Likewise, the "ownership interest" requirement would apply equally to plaintiffs in class as well as nonclass actions. The concern about the UCL becoming an "all-purpose substitute" for tort and contract claims would increase, not decrease, if disgorgement were permitted in UCL class actions. Thus, from an analytical standpoint, the *Korea Supply* holding should apply to class actions.

In earlier decisions[56] the Supreme Court has also held that "class actions are only a means to enforce substantive law"[57] and a court should not "alter a rule of substantive law to make class actions more available."[58] To prohibit disgorgement in individual and representative UCL actions, but permit it in class actions, would violate this principle.

Regardless of how the courts ultimately view this issue, however, the California Legislature may amend the UCL to permit disgorgement in UCL actions. As of the publication deadline of this article, there are several bills pending before the legislature to amend the UCL. While most of the amendments relate to correcting abuses of the UCL unrelated to the disgorgement issue, some bills do contain language authorizing disgorgement apart from restitution as a additional monetary relief remedy.[59]

B. What Is Restitution After Korea Supply?

A second issue arising from *Korea Supply* is what type of monetary relief claims constitute restitution, and how one distinguishes them from the prohibited disgorgement and damages type of monetary relief claims. It was clear from *Kraus* and *Cortez* that the hallmark of restitution is that plaintiff must have an "ownership interest" in the money or property to be restored. In *Korea Supply*, where the monetary relief sought by plaintiff was a percentage of the profits obtained by defendant on the contract it allegedly won by improper means, it was fairly simply to conclude that plaintiff had no ownership interest in those profits.

It may be more difficult to apply the "ownership interest" requirement to other types of monetary relief claims, particularly those where the restitution (permitted)

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55 The only basis cited by the *Korea Supply* court for its "no disgorgement" ruling that may not apply to class actions is the due process concern. The notice, opt out, and similar procedural vehicles in class actions should alleviate that concern.

56 *City of San Jose v. Superior Court*, 12 Cal. 3d. 447 (1974).

57 Id. at p. 462.

58 Id.

59 See, e.g., S.B. 122, 2003 Reg. Sess. (Cal. 2003).

and damages (not permitted) concepts[60] appear to overlap. *Cortez* provides some guidance here, with its holding that earned but unpaid wages are "vested property rights" and thus may be properly characterized as restitution rather than damages. In distinguishing between damages and restitution, the *Cortez* opinion stated that some damage awards — such as those in a fraud action where the monetary relief may include money fraudulently taken from plaintiffs — have a restitutionary element.[61] By contrast, said the court, a damages award in a negligence action in tort for lost wages or property damage would not include a restitutionary element.[62]

Korea Supply picks up where *Cortez* left off. It goes one step further and describes the requisite ownership interest as a "vested interest" in which money or property is taken "directly" from plaintiff. In *Korea Supply* plaintiff at most had only an "contingent expectancy" of a commission if its client won the contract, and this was not sufficient to meet the vested interest requirement.[63] The *Korea Supply* court likened the "vested interest" requirement to the res created by a constructive trust,[64] money or property which 'can clearly be traced to particular funds or property in the defendant's possession.'[65] Finally, *Korea Supply* states that restitution is limited to money "directly owed" to plaintiff by defendant, and there the restitution was sought from a third party from whom plaintiff never expected payment in the first place.[66] Thus, *Korea Supply* may further narrow the definition of restitution under the UCL beyond the "ownership interest" requirement of *Kraus* by requiring a vested interest in a "res" analogous to that necessary for a constructive trust and excluding recoveries when plaintiffs did not give money or property directly to defendants.

III. Conclusion

Korea Supply is a decision with profound implications for unfair competition law in California. While it is just the latest of several Supreme Court decisions restricting the scope and remedies of the UCL, its ban on nonrestitutionary disgorgement combined with its narrow definition of restitution may do much to reduce the use of the UCL in private party actions. Indeed, the court's admonition that the UCL is not to be an "all-purpose substitute" for common law and statutory private actions is explicit confirmation that the Supreme Court intends to reduce the

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60 Prior to the *Kraus*, *Cortez* and *Korea Supply* trilogy, courts had already concluded that certain types of monetary relief claims were for compensatory damages, and thus not permitted under the UCL. *MAI Systems Corp. v. UIPS*, 856 F.Supp. 538, 542 (N.D. Cal. 1994) (damages for lost business opportunity); *Baugh v. CBS*, 828 F. Supp. 745, 757-58 (N.D. Cal. 1994) (damages for embarrassment and emotional distress).

61 *Cortez* indicates that, where the monetary relief has a restitutionary element, that part may be recovered in a UCC action. 23 Cal. 4th at 174.

62 In addition to the "ownership" or "vested" interest requirement, *Cortez* also suggests that to qualify as restitution, there must be "quantifiable sums one person owes another." 23 Cal. 4th at 179.

63 29 Cal. 4th at 1150.

64 Id.

65 29 Cal. 4th at 1150, quoting from *Great-West Life & Annuity Ins. v. Knudson*, 534 U.S. 204, 213 (2002).

66 29 Cal. 4th at 1150.

incentives to assert UCL claims in private litigation. It remains to be seen, however, whether the "no disgorgement" rule will be applied to class actions and this may be the next battleground in the continuing saga of the UCL.