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CALIFORNIA SUPREME COURT HOLDS NO RIGHT TO JURY TRIAL FOR UNFAIR-COMPETITION OR FALSE-ADVERTISING-LAW CLAIMS

To Our Clients and Friends:

On April 30, 2020, the California Supreme Court issued a long-awaited opinion in *Nationwide Biweekly Administration Inc. v. Superior Court*, No. S250057, ___ Cal.5th ___ regarding whether civil actions brought by governmental entities on behalf of the People, seeking statutory penalties under the Unfair Competition Law, Business and Professions Code §§ 17200 et seq. ("UCL"), and False Advertising Law ("FAL"), Business and Professions Code §§ 17500 et seq., must be tried to a jury. A unanimous Court held that there is no right to a jury trial for causes of action brought under the UCL, regardless of the relief sought. A majority of the Court held the same as to the FAL.

The discussion below provides a brief overview of the UCL and FAL, analyzes the California Supreme Court's decision in *Nationwide Biweekly*, and identifies some of the unresolved questions left open by *Nationwide Biweekly.*

I. Overview of the UCL and FAL

The UCL permits both private parties and public prosecutors to bring suits to combat "unfair competition," which is defined broadly to include "any unlawful, unfair or fraudulent business act or practice." (Bus. & Prof. Code, § 17200.) While the potential application of the statute is exceedingly broad, it provides few—yet powerful—remedies. Private plaintiffs may obtain an injunction and restitution of money or property acquired by means of unfair competition. (*Id.*, § 17203.) Public prosecutors may obtain these remedies as well as civil penalties up to $2,500 per violation, plus up to an additional $2,500 for each violation against an elderly or disabled person. (*Id.*, §§ 17203, 17206.1.)

The FAL protects consumers from "false or deceptive advertising." (*People v. Super. Ct.* (*Olson*) (1979) 96 Cal.App.3d 181, 190; Bus. & Prof. Code, § 17500.) Like the UCL, the FAL can be used by either private plaintiffs or public prosecutors, and authorizes injunctive relief, restitution, and (for public prosecutors) civil penalties. (Bus. & Prof. Code, §§ 17535, 17536.)

As these remedies are equitable in nature, they are awarded by the court. (See *id.*, § 17203 [court may order injunctive relief or restitution]; *id.*, § 17206, subd. (b) ["The court shall impose a civil penalty for each violation of this chapter."]; *id.*, § 17536.) Accordingly, courts have regularly stricken jury demands in UCL cases and required parties to try their case to the court. (See Real Party in Interest's Opening Brief on the Merits (Dec. 18, 2018) *Nationwide Biweekly Administration, Inc. v. Super. Ct.*, No. S250047, 2018 WL 7108369, at pp. 45-46 [compiling cases denying jury trial right in UCL actions].)

Some courts and commentators have observed that this practice stands in tension with the broad scope of the UCL, which can be used to target business practices that violate *any* law—civil or criminal—including laws that would provide for a right to trial by jury if the claim were brought directly. For example, if a public prosecutor chose to pursue a predicate violation in a criminal proceeding, the defendant would be entitled to trial by jury, a higher standard of proof, and a host of other protections that are absent when prosecutors elect to try the case as a civil UCL action instead. Furthermore, claims asserting "fraudulent" and "unfair" business practices often involve fact-intensive inquiries of the kind that, in other contexts, are left to a jury.

Finally, even when civil penalties are imposed for enforcement purposes, they may still have a compensatory or punitive aspect, and appear akin to money damages. (See *Kizer v. County of San Mateo* (1991) 53 Cal.3d 139, 147-148 [explaining that although civil penalties "may have a punitive or deterrent aspect, their primary purpose is to secure obedience to statues and regulations"].) Civil penalty awards can also be substantial, raising due process questions about the constitutional limits on awards. (See, e.g., *City and County of San Francisco v. Sainez* (2000) 77 Cal.App.4th 1302, 1321 [holding 28% net-worth penalty not constitutionally impermissible against due process challenge]; Cal. Const., art. I, § 17.) Because the penalties can be so large as to reach the outer bounds of what is constitutionally permissible, due process arguably suggests they should be determined by a jury. (See *Kennedy v. Mendoza-Martinez* (1964) 372 U.S. 144, 164-165 [statutory remedies which "are essentially penal in character" should not be imposed without due process "safeguard[]" of trial by jury]; *State v. Altus Finance* (2005) 36 Cal.4th 1284, 1308 [explaining "[c]ivil penalties . . . are designed to penalize a defendant"].)

Nationwide Biweekly presented two of these concerns—predicate violations of laws that require fact-intensive inquiries regarding deceptive advertising, and public prosecutors seeking considerable sums in civil penalties—while denying the defendant a trial by jury. The Supreme Court's decision addresses each of these concerns, ruling their application in the UCL and FAL contexts weigh against a state constitutional right to a jury trial.

II. Procedural Background of *Nationwide Biweekly*

The California Department of Business Oversight and several district attorney's offices acting on behalf of the People sued Nationwide Biweekly Administration Inc., its subsidiary Loan Payment Administration LLC, and its owner Daniel Lipsky (collectively, "Nationwide") under the UCL, FAL, and other state laws, for false and misleading advertising and for operating without a license. The government sought to enjoin the allegedly unlawful practices, restitution of all money wrongfully acquired from California consumers, and civil penalties of up to $2,500 for each violation of the UCL. The defendants demanded a jury trial, and the trial court struck the demand on the government's motion.

Nationwide ultimately petitioned the Supreme Court for review, and the Supreme Court directed the Court of Appeal to issue an order to "show cause why defendant does not have a right to a jury trial where the government seeks to enforce the civil penalties authorized" under the UCL. The Court of Appeal then granted Nationwide's peremptory writ of mandate, and, in a published opinion, crafted a

narrow right to trial by jury: only to decide the question of liability, and only when the government seeks civil penalties. The Court of Appeal determined it would still decide the *amount* of civil penalties and other remedies to be awarded.

The public-prosecutor plaintiffs filed a petition for review of the Court of Appeal's decision, which the Supreme Court granted on September 19, 2018.

The question presented was: "Is there a right to a jury trial in a civil action brought by the People, acting through representative governmental agencies, pursuant to the Unfair Competition Law (Bus. & Prof. Code, § 17200, et seq.) or the False Advertising Law (Bus. & Prof. Code, § 17500, et seq.), because the People seek statutory penalties, among other forms of relief?"

The California Attorney General and the California District Attorneys Association, both of which have "longstanding" practices of trying UCL cases "before the bench," submitted amicus curiae briefs in support of the governmental entities and against a right to trial by jury.

III. The Supreme Court's Decision

Chief Justice Cantil-Sakauye authored the opinion of the Court in which Justices Chin, Corrigan, and Groban joined. Justice Kruger filed a separate opinion concurring in the judgment; Justices Liu and Cuéllar joined in Justice Kruger's separate concurrence. All seven Justices agreed that all UCL cases must be tried to the court, not a jury, and that in this case, the FAL claim should also be tried to the court. Collectively, the two opinions spanned 92 pages.

A. Chief Justice Cantil-Sakauye's Majority Opinion Speaks In Broad Terms.

In a majority opinion authored by Chief Justice Cantil-Sakauye (joined by Justices Chin, Corrigan, and Groban), the California Supreme Court reversed the Court of Appeal and held that there is no right to a jury trial for causes of action under the UCL or FAL, whether brought by a private party or a public prosecutor, and regardless of the relief sought. (*Nationwide Biweekly Administration, Inc. v. Super. Ct.* (Apr. 30, 2020, S250057) ___ Cal.5th ___ [p. 61].) The Court "express[ed] no opinion" on whether the "jury trial right applies to other statutory causes of action that authorize both injunctive relief and civil penalties." (*Id.*, at [p. 4].)

First, the Court held that the UCL provides no statutory right to a jury trial because the purpose and legislative history of the UCL "convincingly establish that the Legislature intended" UCL claims to be tried to the court, "exercising the traditional flexible discretion and judicial expertise of a court of equity, . . . including when civil penalties as well as injunctive relief and restitution are sought." (*Id.*, at [p. 10].) In arriving at that determination, the Court highlighted many of the significant UCL cases that have been decided during the "more than 80-year history" of the statute. (*Id.*, at [pp. 17-24].) Likewise, after examining seminal FAL decisions, the Court concluded that there was no statutory right to a jury trial because, "as with the UCL, the Legislature intended that the civil cause of action embodied in the FAL would be tried by a court of equity rather than by a jury." (*Id.*, at [p. 39].)

Second, the Court decided that there is no constitutional right to trial by jury in UCL and FAL cases because the "gist" of an action under the UCL or FAL is equitable, not legal, in nature. (*Id.*, at [p. 52] [applying "gist of the action" standard outlined in *C&K Engineering Contractors v. Amber Steel Co.* (1978) 23 Cal.3d 1].) The Court first considered the nature of the remedies provided by the UCL, finding "the bulk of the remedies"—specifically, restitution and injunctive relief—are "clearly equitable in nature." (*Id.*, at [p. 59].) As for the civil penalty remedy available to public prosecutors, the majority found that even that remedy, under the circumstances, is equitable in nature because the UCL's penalties, "unlike the classic legal remedy of damages, are noncompensatory in nature" and are used to fund further enforcement. (*Id.*, at [p. 60].) The Court also reasoned that the exercise of calculating the *amount* of a civil penalty under the UCL and FAL invoked equitable principles, as the "court is afforded broad discretion to consider a nonexclusive list of factors"—an assessment "typically undertaken by a court and not a jury." (*Id.*, at [pp. 59-60].) After finding the remedies afforded were more equitable in nature than legal, the Court examined the nature of the UCL and FAL claims themselves. The "expansive and broadly worded" standards to be applied in determining whether contested business practices were unlawful "call for the exercise of the flexibility and judicial expertise and experience that was traditionally applied by a court of equity." (*Id.*, at [p. 60].) The Court then concluded that UCL and FAL actions "are equitable either when brought by a private party seeking only an injunction, restitution, or other equitable relief or when brought by the Attorney General, a district attorney, or other governmental official seeking not only injunctive relief and restitution but also civil penalties." (*Id.*, at [pp. 52-53, 61].) There is no right to a jury trial for *any* actions brought under the UCL or FAL. (*Id.*, at [pp. 53, 61].)

B. Justice Kruger Arrives at the Same Conclusion by a "Somewhat Different—and Narrower—Path."

In her separate concurrence, Justice Kruger (joined by Justices Liu and Cuéllar) expressed a preference for deciding the issue on the facts of the case before her and by weighing the relative importance of the remedies sought. Finding that the case was at too early a procedural stage to do so, Justice Kruger took a "broader look" at the UCL, and agreed with the majority that, because "liability under the UCL inherently rests on equitable considerations . . . of a sort that only the trial court can effectively weigh and determine," the "gist" of a UCL action is equitable and there is no right to trial by jury. (*Nationwide Biweekly Administration, Inc.*, *supra*, ___ Cal.5th ___ [conc. opn. of Kruger, J.], at [p. 4].)

However, Justice Kruger disagreed with the majority's analysis of the FAL. She contended that unlike the UCL, "nothing about the nature of liability determination under the FAL" implicates the "inherently equitable judgment uniquely suited to a court." (*Id.*, at [pp. 6-7, 12].) Unlike the UCL, determining liability under the FAL does not require weighing the equities such as the competing harms and benefits or the parties' and public's interests, and instead requires only findings of fact as to whether the public is likely to be deceived—a task more suited to a jury. Nonetheless, she concurred in the judgment, reasoning that on the facts of this case, the FAL claim was "inherently intertwined" with the UCL claim because the same questions that would decide FAL liability would be decided by the court for UCL liability. (*Id.*, at [p. 13].) As a result, the FAL causes of action in this case are "predominantly equitable in character," and do not therefore trigger the right to trial by jury. (*Id.*, at [pp. 12-13].)

As Justice Kruger recognized, where UCL and FAL claims are pleaded together, there is no procedural benefit to separating out FAL issues for a jury trial. (*Id.*, at [pp. 13-14].) Regardless of how a jury decided a FAL claim, the court would retain the power to nullify that verdict in two ways: first, by ruling in the opposite manner for the same conduct on the UCL claim; second, by retaining the ultimate authority and discretion to craft remedies for any FAL and UCL violations that may be found. (*Ibid.*) In such cases, the court will effectively determine the ultimate outcome.

IV. Practical Implications and Unanswered Questions

A. Forum Selection and Severability of Issues That May Be Tried to a Jury.

As the tide of UCL claims brought by private plaintiffs and public prosecutors continues to rise, the existence and extent of a right to try some or all claims to a jury now depends on whether a defendant litigates in state or federal court. UCL defendants should assess at the outset of litigation whether a jury or bench trial on eligible claims would be preferable, as that determination may affect strategic considerations, including forum selection, removal or remand, and bifurcation: the outcome may be different depending on the venue.

In federal court, "the court may order a separate trial of one or more separate issues [or] claims" for "convenience, to avoid prejudice, or to expedite and economize," so long as it does not impinge on the right to trial by jury. (Fed. R. Civ. P. 42, subd. (b).) Accordingly, where a case presents both legal and equitable claims that do not overlap, the court may bifurcate and "regulate the order of the trial." (*Danjaq LLC v. Sony Corp.* (9th Cir. 2001) 263 F.3d 942, 962.) But if the legal and equitable issues or evidence overlap, the legal claims must be resolved before the court addresses the equitable issues. (*Id.*; *Nationwide Biweekly Administration, Inc.*, *supra*, ___ Cal.5th ___ , at [p. 68] [citing *Tull v. United States* (1987) 481 U.S. 412, 425].)

In California, however, where there are both legal and equitable issues, the court may decide to try the equitable issues first. (See *Nationwide Biweekly Administration, Inc.*, *supra*, ___ Cal.5th ___ , at [p. 44]; *Raedeke v. Gibraltar Savings & Loan Assn.* (1974) 10 Cal.3d 665, 696; see *Orange County Water Dist. v. Alcoa Global Fasteners, Inc.* (2017) 12 Cal.App.5th 252, 354 [in cases with both equitable and legal claims, the equitable claims "could, and in many cases should" be tried first].) If the California court's determination of those issues also resolves all the legal questions, there could be no need for a jury. But where the equitable issues do not determine the outcome of the legal issues, there may still be a right to trial by jury on those legal questions. (*Nationwide Biweekly Administration, Inc.*, *supra*, ___ Cal.5th ___ , at [p. 43].)

Accordingly, *Nationwide*'s holding adds an additional layer to consider with respect to forum selection, because the opportunity for and scope of a jury trial may vary depending on whether the case is tried in state or federal court.

B. Application to Other Statutory Schemes That Provide for Civil Penalties and Injunctive Relief.

While the Court held there was no right to a jury trial under the UCL, both the majority and concurring opinions made clear they were not passing upon other statutory schemes that provide for civil penalties and injunctive relief. The Court's analysis nonetheless provides a useful guide for understanding which statutory schemes are more likely to come with a jury-trial right.

In *Nationwide Biweekly*, the Court held the civil penalties under the UCL and FAL were equitable in nature because the amount awarded as well as liability itself were determined based on equitable considerations. In assessing the amount of the civil penalty to be imposed under either the UCL or the FAL, the court has "broad discretion to consider a nonexclusive list of factors," such as "the relative seriousness of the defendant's conduct and the potential deterrent effect of such penalties." (*Id.*, at [pp. 59-60].) This type of "qualitative evaluation and weighing of factors is typically undertaken by a court and not a jury." (*Ibid.*) This made the remedy more equitable in nature, despite its resemblance to the classic legal remedy of money damages.

But this may not hold true as to all civil penalties authorized by other statutory schemes. Indeed, other statutory schemes, such as those providing for statutorily prescribed penalties not implicating the exercise of a judge's discretion, or those that evince a clear legislative purpose to be punitive rather than restitutionary, may be considered "legal" in nature. Additionally, if the liability inquiry does not require as complex a balancing of factors as the UCL often does, the "gist of the action" could conceivably be deemed "legal" rather than equitable, potentially triggering the right to trial by jury.

C. The Right to Trial by Jury Under the Sixth and Seventh Amendments to the United States Constitution.

The Court also declined to address whether the United States Constitution's Sixth and Seventh Amendments provide an independent constitutional right to trial by jury. The Court deemed the issue waived, ruling that Nationwide had not advanced this argument in the Court of Appeal. (*Id.*, at [p. 73, fn. 25].)

The Court did, however, conclude that the Court of Appeal erred in relying on the U.S. Supreme Court's decision in *Tull v. United States* (1987) 481 U.S. 412. First, the majority held that *Tull* "rested exclusively" on construing the right to trial by jury under the Seventh Amendment, which applies only to trials in federal—not state—court. (*Id.*, at [p. 66].) The majority also noted the "significant differences in the manner in which the federal and California constitutional civil jury trial provisions have been interpreted and applied," as well as the difference in statutory standards, given the "type of equitable discretion" that must be exercised under the UCL and FAL. (*Id.* at [pp. 72-73].)

D. Importance of a Statement of Decision To Aid Appellate Review.

Writing for the majority, Chief Justice Cantil-Sakauye noted that an "additional significant benefit" of trying UCL claims to a court, rather than a jury, is that a court must issue "a statement of decision explaining the factual and legal basis for its decision" if requested to do so. (*Id.*, at [p. 23].) Such a

statement of decision differs, of course, from the kind of verdict forms filled out by juries. Appellate review of detailed statements of decision, "in turn, promotes the creation of a cumulative body of precedent that improves the consistency of future determinations under the UCL and provides needed guidance to companies" regarding acceptable business practices. (*Id.*, at [pp. 23-24].) As the UCL and FAL have no clear boundaries, and in fact are "expanding" to cover "new facts and relations," the majority found any potential for overreach better tempered by the transparency a court judgment would provide. (*Id.*, at [pp. 16, 23-24].) Justice Kruger, on the other hand, found this reasoning "unpersuasive" as a basis to narrow the civil jury trial right enshrined in the California Constitution. (*Nationwide Biweekly Administration, Inc.*, *supra*, ___ Cal.5th ___ [conc. opn. of Kruger, J.], at [p. 11].)

The Court's decision underscores the importance of proactively crafting a statement of decision that will be advantageous for purposes of appellate review.

V. Conclusion

Nationwide Biweekly forcefully confirms the decades of Court of Appeal precedent holding that UCL (and some FAL) claims are to be decided by judges, rather than juries, and raises a number of strategic considerations to consider in litigating against such claims.

For more information, please feel free to contact the Gibson Dunn lawyer with whom you usually work or any of the following attorneys listed below.

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