



## CALIFORNIA HIGH COURT IMPERILS JURY-TRIAL RIGHT IN CIVIL LITIGATION WITH UNFAIR COMPETITION ACT RULING

by Jeffrey Margulies

On April 30, 2020, the California Supreme Court issued its eagerly awaited opinion on the right to jury trials in actions brought under California’s Unfair Competition Law (UCL)<sup>1</sup> and False Advertising Law<sup>2</sup> (FAL). The result was perhaps unsurprising—the court reversed an intermediate appellate decision finding that defendants did have a right to jury trial on liability issues but not civil penalties. The court’s rationale and explanation of how California courts approach the right to jury trial in cases involving overlapping equitable and non-equitable claims, however, is dangerously broad. Under the court’s reasoning, litigants arguably have no right to jury trial in a California court in *any case* where UCL claims are based on the same facts and legal determinations as non-equitable claims. If this result comes to pass, parties’ right to jury trial in a wide range of civil litigation in California will depend on whether they are in state or federal court.

### Background

The case, *Nationwide Biweekly Administration, Inc., et al. v. Superior Court*,<sup>3</sup> involves a rather ordinary UCL/FAL claim. Four California district attorneys sued a debt-payment service under the UCL and FAL for making allegedly deceptive statements. The complaint sought injunctive relief, civil penalties, and restitution of money wrongfully acquired from California consumers.

The trial court struck the defendants’ demand for jury trial, relying on “well settled” California law that held UCL and FAL claims were equitable and thus subject to a court trial. Things got interesting when the defendants sought a writ of mandate in the Court of Appeal. After the Court of Appeal issued a summary “postcard” denial of the writ, the defendants petitioned for review in the California Supreme Court, which the Supreme Court granted. Instead of hearing the appeal, the Supreme Court transferred the matter back to the Court of Appeal with directions to issue an order requiring the district attorneys to show cause why the defendants did not have a right to jury trial for a UCL and FAL claim for civil penalties authorized under those statutes.

Perhaps reading the tea leaves in the Supreme Court’s order, the Court of Appeal determined that the defendants in fact had a right to jury trial on liability in a civil penalties case,<sup>4</sup> relying extensively on *Tull v. United States*.<sup>5</sup> In *Tull*, the U.S. Supreme Court determined that an action seeking civil penalties under the Clean Water Act was analogous to an action for debt at common law, and thus the Seventh Amendment guaranteed a defendant to a jury trial. Along the way, the Court of Appeal panel cast doubt on its prior

<sup>1</sup> Cal. Business & Professions Code § 17200 *et seq.*

<sup>2</sup> Cal. Business & Professions Code § 17500 *et seq.*

<sup>3</sup> 2020 WL 2107914, \_\_\_ Cal. 3d \_\_\_ (Apr. 30, 2020).

<sup>4</sup> *Nationwide Biweekly Administration, Inc., et al. v. Superior Court*, 24 Cal. App. 5th 438 (2018) (*Nationwide Biweekly I*).

<sup>5</sup> 481 U.S. 412 (1987).

determination that defendants had no right to jury trial in Proposition 65 enforcement actions.<sup>6</sup> The district attorneys then petitioned for review, which the California Supreme Court granted.

### **Court Finds that the UCL and FAL are Equitable Claims Requiring a Court Trial**

The 74-page majority opinion, authored by Chief Justice Cantil-Sakauye, examines in great detail whether the California Legislature intended a right to jury trial in UCL and FAL cases, and whether the California Constitution requires jury trials in such cases.

#### ***Legislative Intent***

The court concluded that UCL and FAL litigants have no statutory right to jury trial because the Legislature intended such claims to be tried by the court “exercising the traditional flexible discretion and judicial expertise of a court of equity, and not by a jury, including when civil penalties as well as injunctive relief and restitution are sought.”<sup>7</sup> The court relied on the Legislature’s initial adoption of the acts with the sole remedy of injunctive relief, an equitable remedy not tried to a jury. The court also relied on the statutes’ language relating to the civil penalties available: “The objective that the Legislature sought to accomplish through its adoption of the broad standard embodied in the UCL fits perfectly with the role historically exercised by a court of equity.”<sup>8</sup> The court determined that the tests for liability under the UCL, such as whether a defendant’s conduct “‘threatens an incipient violation of an antitrust law’ or ‘violates the policy or spirit of one of those laws’ . . . is too indeterminate to be adequately conveyed by jury instructions or applied by a jury.”<sup>9</sup> The court acknowledged that FAL liability is not too indeterminate for juries to understand, but it nevertheless found that such liability was not appropriate for juries:

[T]he FAL does not typically involve the type of ordinary factfinding assigned to a jury, but rather calls for an equitable judgment to determine whether an often undisputed advertising or promotional practice presents a sufficient tendency to deceive or confuse the public so as to support invocation of the FAL’s remedies. As the breadth of the cases arising under the FAL attests, this determination calls for consideration of a wide variety of factors that prior cases and past administrative experience have shown may render an affirmative statement (or a failure to disclose) in a product label, packaging, or in other advertising or promotional practices misleading in a particular context.<sup>10</sup>

#### ***Constitutional Right to Jury Trial***

The court next turned to whether the California Constitution provided litigants a right to jury trial in UCL and FAL actions. Applying settled law, the court asked: Is the “gist” of the action one of the types of actions for which the common law provided a right to jury trial in 1850, which did not include suits in equity.<sup>11</sup>

The court first assessed whether, as the Court of Appeal had determined, the penalties and injunctive relief were severable, because if they are *not* severable, then California law expresses a preference for determining the equitable issues first. The court held, “[b]ecause the determination whether a statutory violation has been established itself triggers the availability of both injunctive relief and civil penalties, the equitable and legal aspects of the action are not severable.”<sup>12</sup>

<sup>6</sup> *Nationwide Biweekly I*, 24 Cal. App. 5th at 461-63, citing *DiPirro v. Bondo Corp.*, 153 Cal. App. 4th 150 (2007).

<sup>7</sup> Slip op., Maj. Op. at 10.

<sup>8</sup> *Id.* at 15.

<sup>9</sup> *Id.* at 19, quoting *Cel-Tech Comms., Inc. v. Los Angeles Cellular Telephone Co.*, 20 Cal. 4th 163, 187 (1999).

<sup>10</sup> *Id.* at 31.

<sup>11</sup> *Id.* at 41.

<sup>12</sup> *Id.* at 50.

The court next held that UCL and FAL causes of action were not akin to common-law actions as of 1850. Accordingly, it once again examined the statutory schemes discussed in the opinion's section on legislative intent to hold that the gist of UCL and FAL claims is equitable and not triable by jury. It relied on: (i) the fact that "the bulk of the remedies provided for in the statutes . . . are clearly equitable in nature"<sup>13</sup>; and (ii) "the expansive and broadly worded substantive standards that are to be applied in determining whether a challenged business practice or advertising is properly considered violative of the UCL or FAL call for the exercise of the flexibility and judicial expertise and experience that was traditionally applied by a court of equity."<sup>14</sup>

The court then went on to distinguish *Tull*, holding that the Seventh Amendment right to jury trial was not consistent with the California Constitution and that the federal law in question did not contemplate the same type of equitable considerations in determining liability. The California Supreme Court even expressed its belief that the U.S. Supreme Court ignored equitable considerations in the civil penalties available under the Clean Water Act in concluding that such liability claims were legal.<sup>15</sup>

### The Concurring Opinion

Justice Krueger, joined by two other justices, authored a concurring opinion. The opinion rejected the majority's characterization of FAL claims as inherently equitable but concurred in the judgment that the claims in this case were equitable and did not give rise to a right to jury trial. First, Justice Krueger noted that the concept of liability being decided by a jury and the amount of penalties being decided by the court "strains the idea that the gist of the action is predominantly legal."<sup>16</sup> Second, when "the same allegedly deceptive conduct is pleaded as a violation of both statutes, the same liability questions that a jury would decide for purposes of the FAL would be decided by the court for purposes of the UCL."<sup>17</sup> "Trying liability under the FAL to the jury, while the rest of the action was decided by the court, would create procedural complications without significant benefit to the defendant demanding jury trial."<sup>18</sup> In the end, Justice Krueger was persuaded that California law would allow a court to nullify a jury's finding on FAL liability, by either determining no UCL liability first, or awarding no penalties where the jury found FAL liability, thus rendering the gist of the action equitable.<sup>19</sup>

### What's Next?

The Supreme Court declined to determine whether its analysis applied to other statutes under which the government brought an action seeking injunctive relief and civil penalties, thus leaving for another day the question whether, for example, *DiPirro* remains good law in the context of Proposition 65 liability. Under Proposition 65, for example, while the remedies are described as equitable, the liability questions in most cases are anything but nuanced, one of the primary drivers of the *Nationwide Biweekly* court's decision on the nature of the UCL.

However, *Nationwide Biweekly* could effectively negate the right to jury trial in every civil case—and many of them are brought—where the UCL claims are coextensive with traditional legal claims. Consider, for example, a consumer class action where a business is alleged to have violated the Consumer Legal Remedies Act (CLRA),<sup>20</sup> the UCL, and the FAL, as well as breached an express warranty, by allegedly

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<sup>13</sup> *Id.* at 59.

<sup>14</sup> *Id.* at 60.

<sup>15</sup> *Id.* at 63-72.

<sup>16</sup> Slip op., Conc. Op. at 13.

<sup>17</sup> *Id.*

<sup>18</sup> *Id.* at 13-14.

<sup>19</sup> *Id.* at 14-15.

<sup>20</sup> Cal. Civ. Code §§ 1750 *et seq.*

making misrepresentations or engaging in deceptive conduct when labeling a product. Under the analysis in *Nationwide Biweekly*, a court could easily conclude that the existence of a UCL claim defeats the parties' right to a jury trial on the CLRA and warranty claims. Because the underlying factual issues and liability analysis under the UCL and FAL claims would not be severable from the legal claims, why would the court not simply try the equitable claims first and then impose its findings on the legal claims? And any attempt to bifurcate and try the legal claims first would run headlong into the "preference" in California courts to try equitable claims first.

This result is directly contrary to how federal courts treat non-severable legal and equitable claims. Under the Seventh Amendment, "no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law." Ninth Circuit authority, holds that "in a case where legal claims are tried by a jury and equitable claims are tried by a judge, and the claims are based on the same facts, in deciding the equitable claims the Seventh Amendment requires the trial judge to follow the jury's implicit or explicit factual determinations."<sup>21</sup> Thus, if the hypothetical consumer class action involving UCL, FAL, CLRA, and warranty claims is tried to a defense verdict in federal court, the court would adopt the jury's explicit and implicit factual findings in deciding the UCL and FAL claims and could not nullify the jury's verdict, as is suggested by the *Nationwide Biweekly* decision.<sup>22</sup>

Unless the U.S. Supreme Court steps in to hold that the Seventh Amendment right to jury trial applies in state court proceedings—which no court has yet held—the prospects for jury trials in any case involving a UCL claim in state court in California are bleak. Given the ubiquity of UCL claims, this outcome could affect a wide variety of litigation, including competition, intellectual property, employment, and virtually all consumer and public interest litigation. While the defendants in *Nationwide Biweekly* requested the California Supreme Court to rule on the Seventh Amendment right, it declined to do so, on the ground that it had not been properly raised.<sup>23</sup> The defendants may ultimately be eyeing a petition for certiorari to the U.S. Supreme Court, but that court's precedent also suggests a significant uphill battle.<sup>24</sup>

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<sup>21</sup> *Los Angeles Police Protective League v. Gates*, 995 F.2d 1469, 1473 (9th Cir. 1993) (internal quotation marks and citation omitted).

<sup>22</sup> See, e.g., *Allen v. Hyland's, Inc., et al.*, 2016 WL 4402794, Case No. 2:12-cv-01150-DMG-MAN, (filed Aug. 16, 2016), (district court determined UCL and FAL claims by reference to jury's implicit findings on CLRA and warranty verdict in favor of defendant), *aff'd in part and rev'd in part*, 773 Fed. Appx. 870 (9th Cir. 2019).

<sup>23</sup> *Slip Op.*, Maj. Op. at 73, n. 25.

<sup>24</sup> See *Minneapolis & St. L.R. Co. v. Bombolis*, 241 U.S. 211, 217 (1916) ("the 7th Amendment applies only to proceedings in courts of the United States, and does not in any manner whatever govern or regulate trials by jury in state courts, or the standards which must be applied concerning the same.").