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Appellate Reports

By Jeffrey I. Ehrlich

Unfair Competition Law (UCL) and False Advertising Law (FAL)

Bus. & Prof. Code, §§ 17200, 17500; no right to jury trial: *Nationwide Biweekly Admin., Inc. v. Superior Court* (2020) __ Cal.5th __ (Cal. Supreme)

While it has been settled law that claims for equitable relief under the UCL and FAL are not subject to a jury trial, the law has been less clear on whether there is a right to a jury trial on claims for civil penalties under those statutes. In this case the Supreme Court held that there is neither a statutory nor a constitutional right to a jury trial under either statute.

PAGA

Arbitration; individual versus representative claims: *Brooks v. AmeriHome Mortgage Company, LLC* (2020) 47 Cal.App.5th 624 [260 Cal.Rptr.3d 428], *pet. for review filed (May 11, 2020)* (Second Dist, Div. 6.)

Brooks was an employee of AmeriHome. His employment contract included an arbitration clause. Brooks filed a written notice of wage-violation claims with the the Labor and Workforce Development Agency (LWDA) pursuant to the Private Attorneys General Act of 2004 (PAGA). (Lab. Code, § 2698 et seq.) Brooks alleged that he and other AmeriHome employees were "entitled to penalties and wages as allowed under § 2698 et seq." and "will seek them on his own behalf and on behalf of other similarly situated" employees. AmeriHome filed a petition to compel arbitration. Brooks then filed a first-amended complaint in the Superior Court, alleging a single violation under PAGA based on AmeriHome's failure to pay minimum and overtime wages, provide meal periods and rest breaks, etc. Unlike the LWDA notice, Brooks's first amended complaint did not seek individual recovery for unpaid wages. The "prayer for relief" seeks only "civil penalties," "costs and attorney['s] fees," and "other and further relief the court may deem just and proper."

Brooks filed a motion for a preliminary injunction to enjoin arbitration. AmeriHome filed a motion to stay proceedings pending arbitration. The trial *628 court issued the preliminary injunction and denied the stay request. The court found that "allowing the arbitration to proceed would split a pure PAGA claim between the trial court and an arbitration forum. A PAGA claim is made on behalf of the State and, ... the State cannot be compelled to go to arbitration." The court further stated that whether Brooks is the "proper plaintiff to bring this matter on behalf of the State is a question for this [c]ourt, not an arbitrator." The Court of Appeal affirmed.

Where an employee alleges a single representative cause of action under PAGA, the claim cannot be split into an arbitrable individual claim and a nonarbitrable representative claim. Here, Brooks's complaint is, as the trial court described it, a "pure PAGA claim." Brooks alleged a single cause of action under PAGA and did not allege an individual claim for wage recovery in his complaint. His complaint prayed only for "civil penalties," "costs and attorney['s] fees," and "other and further relief the court may deem just and proper." Because he brought a representative claim, he cannot be compelled to separately arbitrate whether he was an aggrieved employee.

Civil rights

28 U.S.C. § 1981; "but for" versus "motivating factor" causation – claim under § 1981 requires plaintiff to prove but-for causation: *Comcast Corporation v. National Association of African American-Owned Media* (2020) __ U.S. __, 140 S.Ct. 1009 (U.S. Supreme)

Entertainment Studios Network (ESN), an African-American-owned television-network operator, sought to have cable television conglomerate Comcast Corporation carry its channels. Comcast refused, citing lack of programming demand, bandwidth constraints, and a preference for programming not offered by ESN. ESN and the National Association of African American-Owned Media (collectively, ESN) sued, alleging that Comcast's behavior violated 42 U.S.C. § 1981, which guarantees "[a]ll persons ... the same right ... to make and enforce contracts ... as is enjoyed by white citizens." The District Court dismissed the complaint for failing plausibly to show that, but for racial animus, Comcast would have contracted with ESN. The Ninth Circuit reversed, holding that ESN needed only to plead facts plausibly showing that race played "some role" in the defendant's decision-making process and that, under this standard, ESN had pleaded a viable claim. Reversed.

To prevail, a tort plaintiff typically must prove but-for causation. Normally, too, the essential elements of a claim remain constant throughout the lawsuit. ESN suggests that section 1981 creates an exception to one or both of these general principles, either because a section 1981 plaintiff only bears the burden of showing that race was a "motivating factor" in the defendant's challenged decision or because, even when but-for causation applies at trial, a plausible "motivating factor" showing is all that is necessary to overcome a motion to dismiss at the pleading stage. The Court rejected these arguments and held that a section 1981 plaintiff bears the burden of showing that the plaintiff's race was a but-for cause of its injury, and that burden remains constant over the life of the lawsuit.


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