

In the Supreme Court of the State of California

**NATIONWIDE BIWEEKLY
ADMINISTRATION, INC.; LOAN
PAYMENT ADMINISTRATION, LLC;
AND DANIEL LIPSKY,**

Petitioners,

v.

**THE SUPERIOR COURT OF THE
STATE OF CALIFORNIA, FOR THE
COUNTY OF ALAMEDA,**

Respondent,

**THE PEOPLE OF THE STATE OF
CALIFORNIA,**

Real Party in Interest.

Case No. S250047

SUPREME COURT
FILED

OCT 26 2018

Jorge Navarrete Clerk

Deputy

First Appellate District, Division 1, Case No. A150264
Superior Court, County of Alameda, Civil Case No. RG15770490
The Honorable Ioana Petrou

REQUEST FOR MODIFICATION OF QUESTION PRESENTED

The attorneys on the following page represent Real Party in Interest, the
People of the State of California, in this matter:

DEAN D. FLIPPO
District Attorney of Monterey County
JOHN F. HUBANKS (SBN 163765)
Deputy District Attorney
CHRISTOPHER JUDGE (SBN
274418)
1200 Aguajito Road, Room 301
Monterey, CA 93940
Telephone: (831) 647-7770
Facsimile: (831) 647-7762

EDWARD BERBERIAN
District Attorney of Marin County
ANDRES H. PEREZ (SBN 186219)
Deputy District Attorney
3501 Civic Center Drive, Room 130
San Rafael, CA 94903
Telephone: (415) 473-6450
Facsimile: (415) 473-3719

LISA GREEN
District Attorney of Kern County
JOHN MITCHELL (SBN 99967)
Deputy District Attorney
1215 Truxton Avenue
Bakersfield, CA 93301
Telephone: (661) 868-1657
Facsimile: (661) 322-3765

NANCY E. O'MALLEY
District Attorney of Alameda County
MATTHEW L. BELTRAMO (SBN
184796)
Assistant District Attorney
7677 Oakport Street, Suite 650
Oakland, CA 94621
Telephone: (510) 383-8600
Facsimile: (510) 383-8615

On September 19, 2018, this Court granted the petition for review filed by Real Party in Interest, the People of the State of California (“People”). The People had requested review of the following question:

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.), the False Advertising Law (Bus. & Prof. Code, § 17500, et seq.) or *the Check Sellers, Bill Payers, and Proraters Law* (Fin. Code, § 12200, et seq.), because the People seek statutory penalties, among other forms of relief?

(Emphasis added.) The People’s opening brief on the merits is currently due to be filed on November 19, 2018.

On October 25, 2018, after this Court granted review, the Department of Business Oversight (“DBO”), on behalf of the People, filed in the Alameda County Superior Court a dismissal of the first and second causes of action alleged in the complaint. These causes of action had been brought solely under the Check Sellers, Bill Payers, and Proraters Law (Fin. Code, § 12200, et seq.), referred to hereinafter as the “Proraters Law.” (See Declaration of Matthew Beltramo (“Beltramo Dec.”) ¶ 2.) The dismissal was part of a larger settlement between the DBO and Defendant Nationwide Biweekly Administration, Inc. (“Nationwide”). That settlement included the anticipated dismissal of a federal action that Nationwide had brought against the DBO. (Beltramo Dec. ¶ 7.)

The dismissal of the two causes of action alleged under the Proraters Law was entered on the date it was filed, October 25, 2018. Thus, the People are no longer asserting the Proraters Law as a direct cause of action in this case, nor are they seeking statutory penalties under that Law. (Beltramo Dec. ¶ 8.)

The remainder of the complaint remains intact, including the third, fourth, fifth and sixth causes of action, which are all alleged under the Unfair Competition Law (“UCL”) or the False Advertising Law (“FAL”). (Beltramo Dec. ¶ 3.) Those causes of action are actively being pursued on behalf of the People by the District Attorneys of Alameda, Kern, Marin, and Monterey Counties. The People are still seeking statutory penalties, among other forms of relief, under the UCL and FAL. (Beltramo Dec. ¶ 10.) The Proraters Law is alleged as a basis for liability in the sixth cause of action, but only insofar as it may serve as a *predicate* offense under the UCL. (Beltramo Dec. ¶ 8.)

The People are willing and able to address the original question presented, in its entirety, including whether the availability of statutory penalties under Proraters Law gives rise to a jury trial right. However, given the dismissal of the two causes of action that were directly asserted under the Proraters Law, the People respectfully request that the question presented be modified as follows:

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.) ~~or the Check Sellers, Bill Payers, and Proraters Law (Fin. Code, § 12200, et seq.)~~, because the People seek statutory penalties, among other forms of relief?

The People believe that, as modified, the question presented accurately reflects the current posture of the underlying case. (See Cal. Rules of Court, rule 8.504(b)(1); Beltramo Dec. ¶ 10.) Importantly, the Proraters Law is far less frequently litigated than the UCL or FAL. The question presented, as modified, remains of critical importance to the People and prosecutors around the State, for all the reasons stated in the People's Petition for Review, including the need to secure uniformity of decision throughout the State. (See Cal. Rules of Court, rule 8.500(b); Beltramo Dec. ¶ 11.)

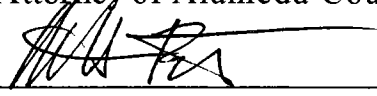
The People have communicated with appellate counsel for Defendants regarding this request. Counsel does not oppose this request in principle, provided that this agreement not be deemed a waiver of any argument that the right to jury trial (if any such right is found by the Court) applies to the Proraters Law to the extent it is asserted as a predicate offense under the UCL. (Beltramo Decl. ¶ 12.)

Accordingly, the People respectfully request that the Court modify the question presented as set forth above.

Dated: October 26, 2018

Respectfully submitted,

NANCY E. O'MALLEY,
District Attorney of Alameda County,

By:  _____

MATTHEW BELTRAMO
Assistant District Attorney
*Attorneys for Real Party in Interest,
the People of the State of California*

DECLARATION OF MATTHEW BELTRAMO

I, Matthew Beltramo, declare as follows:

1. I am admitted to practice law in the State of California. I am an Assistant District Attorney, employed by the Alameda County District Attorney's Office, which serves as one of the offices representing Real Party in Interest, the People of the State of California (the "People") in this matter.

2. The complaint in this matter includes six causes of action. The first two causes of action are alleged under the Check Sellers, Bill Payers, and Proraters Law (Fin. Code, § 12200, et seq.) (the "Proraters Law"). The Proraters Law authorizes imposition of statutory penalties, among other forms of relief.

3. The remainder of the People's complaint is brought under either the Unfair Competition Law¹ (third, fourth and sixth causes of action) or the False Advertising Law² (fifth cause of action).

4. This Court granted the People's petition for review on September 19, 2018. The People's opening brief on the merits is currently due to be filed on November 19, 2018.

5. In their petition, the People requested review of the following question:

Is there a right to a jury trial in a civil action brought by the

¹ Bus. & Prof. Code, § 17200, et seq. (hereinafter "UCL").

² Bus. & Prof. Code, § 17500, et seq. (hereinafter "FAL").

People, acting through representative governmental agencies, pursuant to the Unfair Competition Law (Bus. & Prof. Code, § 17200, et seq.), the False Advertising Law (Bus. & Prof. Code, § 17500, et seq.) or *the Check Sellers, Bill Payers, and Proraters Law* (Fin. Code, § 12200, et seq.), because the People seek statutory penalties, among other forms of relief?

(Emphasis added.)

6. On October 25, 2018, after this Court granted the petition, the Department of Business Oversight (“DBO”), on behalf of the People, filed a dismissal in the Alameda County Superior Court of the first and second causes of action. Those causes of action had been brought solely under the Proraters Law. According to the Superior Court records, the dismissal was entered on the date it was filed, October 25, 2018. The remainder of the complaint, including the UCL and FAL causes of action, remains intact.

7. I understand that the dismissal of these causes of action was part of a larger settlement between the DBO and Defendant Nationwide Biweekly Administration, Inc. (“Nationwide”). I also understand that the settlement includes the anticipated dismissal of a federal lawsuit that Nationwide had brought against the DBO. (See *Nationwide Biweekly Admin., Inc. v. Owen* (N.D. Cal.) Docket 5:14-cv-05166-LHK (filed Nov. 21, 2014).)

8. Accordingly, the People are no longer asserting causes of action directly under the Proraters Law, or seeking statutory penalties

directly under that Law. As currently alleged, the Proraters Law forms a basis of liability only to the extent it may operate as a *predicate* offense for the UCL.

9. Given the dismissal of the two causes of action that were directly asserted under the Proraters Law, the People believe that removing the reference to the Proraters Law from the question presented more accurately reflects the current posture of this case.

10. The People continue to be represented in this action by the District Attorneys of Alameda, Kern, Marin and Monterey Counties, and continue to seek statutory penalties, among other forms of relief, based on the violations of the UCL and FAL alleged in the third, fourth, fifth and sixth causes of action.

11. In my experience, the Proraters Law is far less frequently litigated than either the UCL or FAL. By contrast, whether there is a right to jury trial under the UCL or FAL remains a question of critical importance to the People and the agencies that represent them, both in this action and others pending around the State, as set forth in greater detail in the People's Petition for Review.

12. On October 24-26, 2018, I communicated with Alan Yockelson, appellate counsel for Defendants in this matter, regarding this request for modification of the question presented. Counsel did not oppose this request in principle, provided that this agreement not be

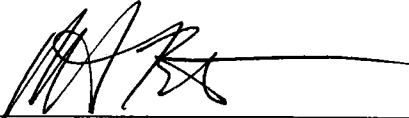
deemed a waiver of the argument that the right to jury trial, if such a right is found by this Court, applies to the Proraters Law to the extent it is asserted as a predicate offense under the UCL.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, and that this declaration was executed in Oakland, California, on October 26, 2018.

Respectfully submitted,

NANCY E. O'MALLEY,
District Attorney of Alameda County,

By: _____


MATTHEW BELTRAMO
Assistant District Attorney

PROOF OF SERVICE

I am employed in the County of Alameda, State of California. I am over the age of eighteen years and not a party to this action. My business address is 7677 Oakport Street, Suite 650, Oakland, CA 94621.

On October 26, 2018, the attached **REQUEST FOR MODIFICATION OF QUESTION PRESENTED** was served on the interested parties in this action as follows:

Alan S. Yockelson, Esq.
Law Office of Alan S. Yockelson
501 W. Broadway, #A-385
San Diego, California 92101
(949) 290-6515
al.yockelson@gmail.com
yockelson@appellatelaw.net
Appellate Counsel for Defendants

Steven L. Simas, Esq.
Daniel Tatick, Esq.
Simas & Associates, Ltd.
3835 North Freeway
Boulevard, Suite 228
Sacramento, CA 95834
ssimas@simasgovlaw.com
dtatick@simasgovlaw.com
Counsel for Defendants

Clerk of Court
Alameda County Superior Court
1225 Fallon Street
Oakland, CA 94612
Attn: Civil Case # RG15770490

Clerk of Court
First District Court of Appeal
350 McAllister Street
San Francisco, CA 94102
*Attn: Court of Appeal Case
#A150264*

BY U.S. MAIL: I enclosed the documents in a sealed envelope addressed as set forth above and placed the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with this business's practice for collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid.

BY EMAIL: I also emailed the documents to counsel via the following email addresses: al.yockelson@gmail.com, yockelson@appellatelaw.net, ssimas@simasgovlaw.com, dtatick@simasgovlaw.com.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on October 26, 2018, at Oakland, California.


Stacy McCormick