The State of New Hampshire

MERRIMACK, SS **SUPERIOR COURT**

Curtis S. Ridlon

v.

State of New Hampshire, Bureau of Securities Regulation

No. 2017-CV-00405

ORDER

The Plaintiff, Curtis S. Ridlon, has brought an action for declaratory judgment and injunctive relief against the State of New Hampshire, Bureau of Securities Regulation ("BSR" or "the Bureau"). He alleges that the BSR is violating his constitutional right to a jury trial and his constitutional right to due process by pursuing an administrative enforcement action against him for penalties, restitution and disgorgement totaling approximately $6 million. He seeks preliminary injunctive relief, and an order barring the BSR from pursuing an administrative enforcement action against him for penalties and damages in excess of $1,500 and for damages for restitution and disgorgement. He also seeks to bar the BSR from conducting administrative hearings before employees of the Bureau. The BSR objects to his request for injunctive relief and has moved to dismiss. For the reasons stated in this Order, the Motion to Dismiss is DENIED. Because the administrative proceedings brought against Ridlon constitute a clear violation of his constitutional rights, he will suffer irreparable harm if the administrative proceedings against him continue, and he has no adequate remedy at law, and the public interest favors injunctive relief, the BSR is enjoined from proceeding with the current Staff Petition to the

extent it seeks penalties, restitution and disgorgement.[1]

I

On a Motion to Dismiss, the Court must treat allegations in a Complaint as true, and construe all reasonable inferences therefrom in favor of the plaintiff. When considering a Motion to Dismiss, the court must determine whether the facts as pled are sufficient under the law to set forth a cause of action. Brzica v. Trustees of Dartmouth College, 147 N.H. 443, 450 (2002). The court must accept the truth of all well pleaded facts, with all reasonable inferences therefrom. Mt. Springs Water Co. v. Mt. Lakes Vill. Dist., 126 N.H. 199, 200 (1985). A court may also consider documents filed by the parties in connection with the Motion. A reviewing court need not accept as true statements in the complaint that are merely conclusions of law. Chase v. Vill. Dist. of Eastman, 128 N.H. 807, 814 (1986). In this case, the facts relevant to the issues do not appear to be in dispute, because the Plaintiff argues only that the procedural mechanism by which the BSR seeks to resolve its allegations against him are unconstitutional.

Ridlon's Complaint asserts that he was employed by Waddell & Reed, a securities broker-dealer and registered investment adviser, from August 1985 until October 14, 2016. (Amended Compl. ¶¶ 8, 9.) He alleges that on April 25, 2017, the BSR brought a Staff Petition against him alleging that he, as an investment adviser, engaged in a scheme to defraud his clients by charging them improper fees over an eight year period. (Amended Compl., Ex A. at ¶ I, 4 [hereinafter "Staff Pet."].) The Staff Petition alleged that Ridlon fraudulently obtained close to $2.8 million in fees from his clients. (Staff Pet., ¶ I, 2.) It

[1] It does not appear that Ridlon challenges the BSR's right to bar him from licensure under RSA 421-B; the Amended Complaint alleges he retired in October 2016. (Amended Compl. ¶ 8.)

further alleged that these fees were obtained by Ridlon in his capacity as an investment adviser to his clients, and that he should therefore be ordered to pay fines, restitution, costs and fees. (Id. ¶ III.)

The Staff Petition asserts that the claims against Ridlon extend back to 2007, involved over 200 of Ridlon's clients and the execution of 1,294 Financial Planning Services Agreements ("FSPA"). (Id. ¶ I, 5.) The breath and complexity of the proceedings are set forth in the Staff Petition itself which establishes that litigation of these issues will involve taking evidence from numerous witnesses:

> 4. Based on its investigation, the Bureau determined that Ridlon engaged in a scheme to defraud *two hundred and eight (208) clients* of millions of dollars *over a period of at least eight (8) years* by deceiving those clients into believing that they were required to pay an annual fee for management of their accounts when in reality Ridlon was having them sign up for unnecessary optional financial planning.
>
> > a. *Nearly every client* that the Bureau interviewed was lead [sic] to believe that the financial planning contract they signed each year, known as the Financial Planning Services Agreement (hereinafter "FPSA"): 1) was required; 2) was primarily for Ridlon to continue managing their accounts; and 3) that the fee charged was based on a percentage of the value of their accounts as calculated by Ridlon. As for the financial planning booklets they received each year, these clients believed that the financial planning products, although unwanted, were an ancillary benefit of the annual fee and not something they could opt out of. . . .
> >
> > b. *Many of Ridlon's clients* assert that they would not have paid for these financial services as a separate fee is given the option. . . .
> >
> > c. *Many of Ridlon's clients* assert that they were never shown the first three pages of the five-page FPSA and that they were never provided with Waddell's Form ADV for Financial Planning, as required.

(Id. ¶ I, 4 (emphasis added).)

The BSR's Staff Petition also alleges that:

> 5. Pursuant to N.H. RSA 421-B:6-604(d) (formerly RSA 421-B:26, III), in a

> final order, the Secretary of State may, in addition to any bar, suspension, revocation or denial of any registration or license, may [sic] impose a civil penalty not to exceed $2,500 for a single violation. Ridlon is subject to this provision and should be permanently barred from licensure. Additionally, Ridlon should be subject to a fine of $2,500 for every fraudulently obtained financial planning fee as determined by the hearing officer. The Bureau will establish that Ridlon's clients were deceived by Ridlon into executing up to 1,294 FPSA's, which equates to a fine of up to $3,235,000.

(Id. ¶ II, 5.)

The Staff Petition recites that during the course of its investigation, the BSR entered into a Consent Order with Ridlon's employer, Waddell & Reed, pursuant to which Waddell & Reed, without admitting wrongdoing, refunded over $2 million in financial planning fees to Ridlon's clients, paid a $300,000 fine, paid $300,000 in costs to the Bureau, and contributed $300,000 to the BSR's investor education fund. (Id. ¶ I, 6.) Despite this recovery, the BSR seeks an administrative fine against Ridlon in an amount up to $3,235,000, restitution in the amount of $1,343,427.20 and disgorgement of up to $1,513,711.09. (Amended Compl. ¶ 13.) It asserts that it is proceeding pursuant to RSA 421-B:6-604, captioned "Administrative Enforcement." (Staff Pet., *passim*.) Until 2009, the predecessor statute permitted a de novo trial by jury after a determination by the BSR.[2]

Ridlon moved to dismiss the administrative proceeding against him claiming violations of his constitutional rights to a jury trial and to due process of law. (Amended Compl. ¶ 15.) Prior to the BSR deciding Ridlon's Motion to Dismiss, the parties agreed to allow Ridlon to bring these issues before the Court. (Id. ¶ 16.) Ridlon now seeks to enjoin

[2] This procedure would satisfy Part I, Article 20 of the New Hampshire Constitution. See Jenkins v. Canaan Mun. Court, 116 N.H. 616 (1976).

the administrative proceedings against him.

II

RSA 421-B was enacted in 2015, and took effect on January 1, 2016. See Laws 2015, 273:1. The statute is entitled the Uniform Securities Act ("USA"), and it is a uniform act which has been enacted in 19 jurisdictions. In broad terms, the statute requires registration of securities and registration of broker-dealers, and exempts securities subject to registration under federal law and federal law. See generally RSA 421-B:3-301, et seq.;RSA 421-B:4-401, et seq. Article 421-B:5-508 contains criminal penalties. Article 6 of the statute provides for civil enforcement of the rules and regulations established under the USA.

RSA 421-B:6-603 is captioned "Civil Enforcement." The statute provides in substance that "[i]f it appears to the attorney general or secretary of state that a person has engaged, is engaging, or is about to engage in an act, practice, or course of business constituting a violation of this chapter or an order issued under this chapter, . . . the attorney general or the secretary of state may maintain an action in the superior court to enjoin the act, practice, or course of business . . . ." RSA 421-B:6-603(a). In addition to many equitable remedies such as an injunction, asset freeze and attachment, the statute provides that in an action under this section, and after a proper showing, a court may enter an order for:

> (C) the imposition of a civil penalty up to a maximum of $5,000 for a single violation; an order of rescission, restitution, or disgorgement directed to a person that has engaged in an act, practice, or course of business constituting a violation of this chapter or the predecessor act or an order issued under this chapter or the predecessor act[.]

RSA 421-B:6-603(b)(2)(C). The Comments to the statute state that "this section is similar

to § 603 of the Uniform Securities Law."

RSA 421-B:6-604 is captioned "Administrative Enforcement." It contains language similar to RSA 421-B:6-603 and provides in substance that "[i]f the secretary of state determines that a person has engaged, is engaging, or is about to engage in an act, practice, or course of business constituting a violation of [the] chapter or an order issued under [the chapter], or that a person has, is, or is about to materially aid an act, practice, or course of business constituting a violation of [the] chapter, or order issued under [the chapter], the secretary of state may . . . issue an order directing the person to cease and desist from engaging in the act, practice, or course of business . . . or . . . issue an order under RSA 421-B:2-204."[3] It also provides for enforcement outside of the superior court:

> (b) Summary process. An order under subsection (a) is effective on the date of issuance. Upon issuance of the order, the secretary of state shall promptly serve each person subject to the order with a copy of the order and a notice that the order has been entered . . . . If a person subject to the order does not request a hearing and none is ordered by the secretary of state within 30 days after the date of service of the order, the order becomes final as to that person. If a hearing is requested or ordered, the secretary of state, after notice of and opportunity for hearing to each person subject to the order, may modify or vacate the order or extend it until final determination. If the person to whom a cease and desist order is issued fails to appear at the hearing after being duly notified, such person shall be deemed in default, and the proceeding may be determined against him or her upon consideration of the cease and desist order, the allegations of which may be deemed to be true.
>
> (c) Procedure for final order. If a hearing is requested or ordered pursuant to subsection (b), a hearing shall be held pursuant to RSA 421-B 6-612. In accordance with RSA 421-B:6-612, the secretary of state shall issue a written decision stating the action to be taken by the department and may set forth findings of fact, conclusions of law, and disposition. The final order may make final, vacate, or modify the order issued under subsection (a).

[3] RSA 421-B:2-204 is captioned "Denial, Suspension, Revocation, Conditions, or Limitation of exemptions."

> (d) Civil penalty. In a final order, the secretary of state may impose a civil penalty up to a maximum of $2,500 for a single violation. In addition, every such person who is subject to such civil penalty, upon hearing, and in addition to any other penalty provided for by law, be subject to such suspension, revocation, or denial of any registration or license, or be barred from registration or licensure, including the forfeiture of any application fee.
>
> (e) After notice and hearing, the secretary of state may enter an order of rescission, restitution, or disgorgement directed to a person who has violated this chapter, or a rule or order under this chapter. Rescission, restitution, or disgorgement shall be in addition to any other penalty provided for under this chapter.

RSA 421-B:6-604. The Comments to the section state that "This section is similar to § 604 of the Uniform Securities Act." The Uniform Securities Act is silent as to the amount of a civil penalty to be imposed, apparently leaving it up to the enacting states. USA § 604 (2002). The cognate section of the USA provides:

> (d) Civil Penalty. In a final order under subsection (c), the administrator may impose a civil penalty up to $[ ] for a single violation or up to $[ ] for more than one violation.

USA § 604(d).

As enacted in New Hampshire, the statue allows the BSR to obtain penalties of up to $5,000 per violation through a civil action under RSA 421-B:6-603, and $2,500 per violation through administrative actions under RSA 421-B:6-604. The statute does not address the right to a jury trial in the context of civil action, and by definition excludes the right to a jury trial in a summary proceeding under RSA 421-B:6-604.

III

Ridlon argues that allowing a hearing to proceed at the BSR violates his constitutional rights to a jury trial under Part I, Article 20 of the New Hampshire Constitution. Second, he argues that the procedure utilized by the BSR violates his right to due process under both the State and Federal Constitutions because the employees of the

BSR are both the prosecutor and hearing officers. While recognizing that administrative agencies also often hold hearings, Ridlon argues that the Bureau has only 12 employees, fewer than half of whom are attorneys. (Amended Compl. ¶¶ 54–55.)

Ridlon argues that he is entitled to a jury trial for two reasons. First, he argues that he is entitled to a jury trial because the Bureau seeks penalties against him in excess of $1,500, and under the New Hampshire Constitution, a fine of more than $1,500 is the threshold amount for which jury trials are required by Part I, Article 20 of the New Hampshire Constitution. Second, he argues that the proceedings against him are, in essence, an action for fraud, and in such an action he would have been entitled to a jury trial in 1784 and is therefore entitled to a jury trial today.

The BSR objects to his request for injunctive relief and moves to dismiss this declaratory judgment action, arguing that Ridlon is not entitled to a jury trial because New Hampshire's Uniform Securities Act, RSA 421-B, creates special statutory rights that did not exist at common law and in such cases no right to a jury trial exists.

The right to a trial by jury in civil cases is guaranteed by Part I, Article 20 of the New Hampshire Constitution. The New Hampshire Supreme Court has stated that the right to a trial by jury is a fundamental one. State v. Morrill, 123 N.H. 707, 711 (1983). The right to jury trial exists in New Hampshire to the extent that the jury trial right existed when the Constitution was adopted in 1784. See, e.g., Hair Excitement, Inc. v. L'Oreal U.S.A., Inc., 158 N.H. 363, 368 (2009). Thus, the New Hampshire Supreme Court has stated that the right to a jury trial cannot be invoked in special, statutory or summary proceedings unknown to the common law. McElroy v. Gaffney, 129 N.H. 382, 386 (1987). But the Court has stated that "the decisions of this State indicate a strong tendency to

uphold the right of trial by jury whenever possible." Id. Older cases recognize that at common law the right to a jury trial was "with few exceptions . . . absolute." See, e.g., Douglas v. U.S. Fidelity & Guar. Co., 81 N.H. 371, 374 (1924); Dale v. Kennett, 75 N.H. 536, 537 (1910).

A

The right to a jury trial in civil cases has particular resonance in New Hampshire jurisprudence. One important cause of the Revolution in New Hampshire was dissatisfaction with the corrupt practices of Governor Wentworth, who brought suit to obtain property, and adjudicated those suits, with his Council, some of whom were his relatives. See, e.g., Perkins v. Scott, 57 N.H. 55, 61 (1876). As Justice Ladd noted, writing more than 140 years ago, "[o]ne of the 'injuries and usurpations, having in direct object the establishment of an absolute tyranny over these States,' which was charged upon George the Third by the Declaration of Independence, was,-- 'He has combined with others to subject us to a jurisdiction foreign to our Constitution, and unacknowledged by our laws; giving his assent to their acts of pretended legislation . . . For depriving us, in many cases, of the benefits of trial by jury.'"[4] Id. at 80 (Ladd, J.).

[4] A century later Chief Justice Rehnquist similarly noted, tracing the background of the Seventh Amendment right to trial by jury in civil cases, that the right to a jury trial in civil cases was critically important to the framers of State and Federal Constitutions:

> It is perhaps easy to forget, now more than 200 years removed from the events, that the right of trial by jury was held in such esteem by the colonists that its deprivation at the hands of the English was one of the most important grievances leading to the break with England. The extensive use of vice-admiralty courts by colonial administrators to eliminate the colonists' right of jury trial was listed among the specific offensive English acts denounced in the Declaration of Independence. And after war had broken out, all of the 13 newly formed states restored the institution of civil jury trial to its prior prominence; 10 expressly guaranteed the right in their state constitutions and the 3 others recognized it by statute or by common practice. Indeed, "the right to trial by jury was probably the only one universally secured by the First American state constitutions . . . ."

Dissatisfaction with corrupt British legal procedure led to the so called "common sense" era of New Hampshire jurisprudence, in which cases were adjudicated without regard to legal principles. In re Proposed Rules of Civil Procedure, 139 N.H. 512, 515 (1995). Immediately following the Revolution, most judges possessed no legal education, and the jurors were warned against "paying too much attention to the niceties of the law to the prejudice of justice." Reid, From Common Sense to Common Law to Charles Doe: The Evolution of Pleading in New Hampshire, 1 N.H.B.J. 27, 28 (1959). Shortly after the Revolution, juries were instructed "[i]t is our business to do justice between the parties. Not by any quirk of the law out of Coke or Blackstone, books I never read and never will, but by common-sense and common honesty, as between man and man." William Plummer, Jr. Life of William Plummer, quoted in J. Reid, Chief Justice: The Judicial World of Charles Doe, 94 (1967). The primacy of the jury in the 1780s is illustrated by the fact that the New Hampshire judicial system had neither rules nor reported decisions until 1802 when Jeremiah Smith became Chief Justice. "The State's functional lack of an effective and independent judiciary in 1784 cannot be gainsaid." Gilman v. Lake Sunapee Props., 159 N.H. 26, 37 (2009) (Hicks, J., concurring). It is within this context, that the Court must consider whether or not the BSR's claim for penalties, restitution and disgorgement are common law causes of action, cognizable by trial by jury.

B

Part I, Article 20 of the New Hampshire Constitution provides a right to jury trial which it states shall be "sacred," "except in cases in which it has been heretofore otherwise

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Parklane Hosiery Co. v. Shore, 439 U.S. 322, 340–41 (1979) (Rehnquist, J., dissenting) (citations omitted).

used and practiced." It was always recognized that chancery actions did not require a jury as they were not tried to a jury at common law. See generally Perkins, 57 N.H. 55. Similarly, equity actions to enjoin public nuisances or enforce ordinances were always held not to require a trial by jury. Manchester v. Anton, 106 N.H. 478, 480–81 (1965); State v. Saunders, 66 N.H. 39, 89 (1889).

The Court has held there is no right to jury trial in cases in which a plaintiff's cause of action did not exist at common law. Thus, in Hallahan v. Riley, the Court held that there was no right to a jury trial on a plaintiff's appeal from a decision of an unemployment tribunal since the plaintiff was simply attempting to recover pursuant to a right that did not exist at common law. 94 N.H. 338, 339–40 (1947). Similarly, in Hair Excitement, Inc. v. L'Oreal, U.S.A., Inc., where a plaintiff who sought a jury trial, and sought to recover under New Hampshire's Consumer Protection Act, a statute which did not exist at common law, the Court held no jury right existed. 158 N.H. at 368–69. In Franklin Lodge of Elks v. Marcoux, the Court declined to reverse a trial court ruling that a claim for money damages for discrimination was excepted from the constitutional right to jury trial, noting that the "customary practice of pursuing such claims rested with the Human Rights Commission," and that the party asserting the right to jury trial had not addressed whether the right to be free from discrimination was recognized at common law in 1784. 149 N.H. 581, 591–92 (2003). The Court stated that it "considers the comprehensive nature of the statutory framework to determine whether the jury trial right extends to the action." Id. at 591.

But the Court has taken a different approach where the State seeks to obtain a penalty. In State v. Morrill, the Court held that the Legislature could not eliminate the

right to a jury trial if the fine for a violation, a noncriminal offense, exceeded the amount, then $500, constitutionally entitling civil litigants to a jury trial. 123 N.H. at 712–13. Similarly, in Town of Henniker v. Homo, the Court held that a fine imposed under a municipal ordinance in the amount greater than that constitutionally entitling civil litigants to a jury trial under Part I, Article 20 of the New Hampshire Constitution could not be imposed. 136 N.H. 88, 89 (1992).

While not cited by either party, both cases are consistent with East Kingston v. Towle, in which the Court held that a statute which permitted the selectmen of a town to charge an owner with the amount of damage done by his dog was unconstitutional because it did not provide the right to notice and hearing and did not provide a right to a trial by jury. 48 N.H. 57 (1868). The statute specifically provided that "every person suffering loss or damage by reason of the maiming, worrying, or killing of his . . . domestic animals by dogs, may . . . present to the selectmen of the town . . . proof of the nature and extent of [his damages]," whereupon the officers were to "draw an order in favor of the person suffering such loss or damage, upon the treasurer of [the] town for the amount [assessed]." Id. at 58. The statute then provided that the town could recover in an action of assumpsit against the keeper or owner of the dog for the amount assessed. Id. In holding the statute violative of the right to a jury trial guaranteed by Part I, Article 20, the Court recognized that:

> The owner of the animals is the real party injured; the owner of the dog is the party liable for the injury. The amount to be recovered in the suit by the town is the actual damage as determined by the selectmen, and that amount is the compensation to the owner of the animals for his damages.

Id. at 63.

The analogy to the instant case, where the BSR seeks disgorgement of lost profits in

the amount of over $1.5 million and restitution in the amount of up to $1.343 million is apparent. While the remedy the BSR requests is cast in equitable terms, restitution and disgorgement of lost profits, its claim is in fact one of fraud. (See Staff Petition, ¶ 5.) And of course, the BSR seeks penalties in the amount of $2,500 per violation, an amount over the constitutional limit of $1,500. See N.H. CONST. pt. I, art. 20.

C

The BSR makes two arguments in support of the proposition that Ridlon has no right to a jury trial. First, it argues that RSA 421-B creates special statutory rights that did not exist at common law and, therefore, Ridlon has no right to a jury trial. (Def.'s Mem. in Support of Mot. to Dismiss, at 4.) In support of this argument, the BSR cites to 5 G. MacDonald, New Hampshire Practice: Civil Practice and Procedure § 42.01 n.10:

> The court's view of the right to jury trial of issues of fact in administrative proceedings has shifted over the years. In the early days, when there were few administrative agencies to contend with, the court took the view that, whenever an agency was given the power to assess damages, the parties had a right to have the issues of fact on which damages would be based tried by a jury. See Copp v. Henniker, 55 N.H. 179 (1875) (highway); East Kingston v. Towle, 48 N.H. 57 (1868) (dogbite). As the number of agencies increased, and the court came to view determination of fact issues by those agencies as a permissible, if not essential, function of government, it backed away from this position and held that agencies could fix damages without a jury, relying on the notion either that the claimant had elected the agency's determination over an action at law (see Carbonneau v. Hoosier Eng'g Co., 96 N.H. 240 (1950)) or that the issue on which the right to damages, as opposed to the liability for damages itself, would turn was unknown prior to 1784. See Pomponio v. State, 106 N.H. 273 (1965); Hallahan v. Riley, 94 N.H. 338 (1947). *At present, the rule is that any issue committed by statute to an administrative agency to determine, even when liability for damages may be established in the proceeding, is not subject to a constitutional right of jury trial.*

(Emphasis added). The Court believes that the last sentence of the text reads the reported cases too broadly.

In 2009, the Court noted that Part I, Article 20 had been amended three times since 1784 in order to increase the amount in controversy. Gilman, 159 N.H. at 30. But the Court noted:

> [T]he original meaning of the article, and our analysis pursuant to it, has not changed. . . . To resolve whether a party has a right to trial by jury in a particular action, we generally look to both the nature of the case and the relief sought, and ascertain whether the customary practice included a trial by jury before 1784. Part I, Article 20 was a recognition of an existing right, guaranteeing it as it then stood and was practiced, guarding it against repeal, infringement, or undue trammel by legislative action, but not extending it so as to include what had not before been within its benefits. Our analysis, therefore, requires a historical discussion.

Id. at 30–31 (quotations & citations omitted).

The New Hampshire Supreme Court has not wavered from the principle that a penalty greater than $1,500 may not be imposed other than after jury trial. In State v. Morrill, the Court held that a fine in excess of that allowed by Part I, Article 20 may not be imposed for a noncriminal violation. 123 N.H. at 713. In Town of Henniker v. Homo, a bare 3-2 majority of the Court held that a fine of more than $6,060 under a zoning ordinance did not violate a civil litigant's right to a jury trial under Part I, Article 20 of the New Hampshire Constitution, even though the total fine imposed was $6,060, or $100 for each of the 606 days they violated the ordinance. 136 N.H. at 89–90. The majority believed that the defendant's right to jury trial was not violated because each day of violation was a separate offense and the fine imposed for each offense was only $100. Id. at 90. While Judges Batchelder and Horton dissented, finding the aggregation of 606 violations "offensive to notions of fairness and the constitutionally guaranteed entitlement to a jury as factfinder," there can be no dispute that the entire Court believed that Part I, Article 20 barred imposition of a penalty under the zoning ordinance, which it referred to

as "civil fines." Id. at 88–90. If RSA 421-B was interpreted to allow fines of $2,500 to be imposed without a jury finding, it would be inconsistent with the Court's decisions in State v. Morrill and Town of Henniker v. Homo.

The BSR attempts to distinguish Morrill and Homo by characterizing them as "violation level criminal offenses." (Def.'s Mem. in Support of Mot. to Dismiss, at 7.) But this argument is an oxymoron; a violation is not a criminal offense. State v. Brady, 122 N.H. 110, 110 (1982). Both decisions are premised upon the right to jury trial in civil cases guaranteed by Part I, Article 20 of the State Constitution, not upon the right to jury trial guaranteed in criminal cases set forth in Part I, Article 15.

This analysis is buttressed by decisions of the United States Supreme Court interpreting the cognate Seventh Amendment to the United States Constitution. Although the United States Supreme Court has in some circumstances expanded or contracted its view of what is required by the Seventh Amendment,[5] traditionally the Court utilized an analysis similar to that used by the New Hampshire Supreme Court to determine whether the Seventh Amendment guarantees a right to jury trial "to preserve the right to jury trial as it existed in 1791." Baltimore & Carolina Line, Inc. v. Redman, 295 U.S. 654, 657 (1935);

[5] For example, the United States Supreme Court has held that the Seventh Amendment right to jury trial is broader than that afforded by the historical test in cases involving new procedures such as declaratory judgment actions which in substance seek legal relief. Beacon Theaters, Inc. v. Westover, 359 U.S. 500 (1959); see also Dairy Queen v. Wood, 369 U.S. 469 (1962). Moreover, the Supreme Court suggested in Ross v. Bernhard, 396 U.S. 531, 538 n.10 (1970), that there is no right to a jury trial in cases which are too complex for jurors to understand. This issue has not yet been resolved by the United States Supreme Court, although some lower federal courts have specifically held that there is no jury trial required in a very complex civil case on due process grounds. See, e.g., In re Japanese Elec. Prods. Antitrust Litig., 631 F.2d 1069 (1980), *rev'd on other grounds* 475 U.S. 574 (1986). Ironically, the idea of a complexity exception to Part I, Article 20 was addressed by the New Hampshire Supreme Court in the context of the necessity of referring equitable matters to a jury, see Davis v. Dyer, 62 N.H. 231, 239 (1882), but the Court seems to have taken the view that mere complexity is not a basis upon which the right to trial by jury can be denied, see Daley v. Kennett, 75 N.H. 536 (1910).

see also Parklane Hosiery, Inc., 420 U.S. at 333; Curtis v. Loether, 415 U.S. 189, 193 (1974); see generally Wright & Miller, Federal Practice & Procedure, § 2302 (2017).

In Tull v. United States, the Supreme Court held that the Seventh Amendment jury right applies to an action by the government seeking imposition of a monetary penalty in a civil enforcement action. 481 U.S. 412, 427 (1987). Like the New Hampshire Supreme Court, the United States Supreme Court held that the Seventh Amendment jury trial right applies only to actions that are analogous to suits at common law, and not those that are analogous to cases tried in courts of equity or admiralty. Id. at 417. The Court reasoned that prior to the enactment of the Seventh Amendment English courts had held that a civil penalty suit was a particular species of an action that was within the jurisdiction of courts of law. Id. at 419 (citing Atcheson v. Everitt, 1 Cowper 382, 98 Eng. Rep. 1142 (K.B. 1776) and Calcraft v. Gibbs, 5 T.R. 19, 101 Eng. Rep. 11 (K.B. 1792)). Close reading of the English cases cited by the United States Supreme Court compel the conclusion that at common law actions for penalties brought pursuant to statutes which, like RSA 421-B:5-508, provided for criminal penalties, were nonetheless considered civil actions in which the procedures applicable to civil cases were applied. Atcheson, 98 Eng. Rep. at 1147 (action for penalty based on bribery statute); Calcraft, 101 Eng. Rep. at 19 (action for penalty based upon violation of the game laws). As Lord Mansfield noted in Atcheson, "penal actions were never yet put under the head of criminal law, or crimes." Atcheson, 98 Eng. Rep. at 1147.

Since Tull's holding that enforcement actions for monetary penalties are actions for debt which fit squarely within the class of cases to which the jury trial right attached at common law, the jury trial right has been universally recognized by federal courts in enforcement actions brought by the United States Securities and Exchange Commission

seeking civil money penalties. SEC v. Lipson, 278 F.3d 656, 662 (7th Cir. 2002); SEC v. Spencer Pharm., Inc., 58 F. Supp. 3d 165, 166 (D. Mass. 2014); SEC v. Mattera, No. 11 Civ. 8323, 2013 U.S. Dist. LEXIS 174163, at 44 (S.D.N.Y. Dec. 9, 2013); SEC v. Badian, 822 F. Supp. 2d 352, 365 (S.D.N.Y. 2011); see generally M. Martens and T. Parades, The Scope of the Jury Trial Right in SEC Enforcement Actions, 71 NYU Annual Survey of American Law 147 (2015).

Tull and its progeny interpreting the Seventh Amendment to the United States Constitution are compelling authority, since the right guaranteed by the Seventh Amendment is correlative to the right guaranteed by Part I, Article 20 of the New Hampshire Constitution. See generally Curtis v. Loether, 415 U.S. 189; Parklane Hosiery Co., Inc., 420 U.S. at 333. It follows that the BSR cannot seek a fine of $2,500 for a violation of RSA 421-B without a jury determination of liability.

D

The BSR argues that even if Ridlon is entitled to a jury trial on the penalty portion of its claim, no right of jury trial exists to the extent the BSR seeks disgorgement or restitution, as they are equitable remedies. (Def.'s Mem. in Support of Mot. to Dismiss, at 9–10.) However, RSA 421-B:6-601 makes clear that these remedies are, in fact, penalties. RSA 421-B:6-601(b) provides, in relevant part:

> Notwithstanding any other provision of law, the secretary of state shall have exclusive authority and jurisdiction . . .
>
> > (5) To investigate and impose *penalties* for violations of the securities laws, including:
> >
> > > (A) Revoking, suspending or denying licenses and registrations.
> > >
> > > (B) Fines.

(C) Rescission, restitution, or disgorgement.

(Emphasis added); see also RSA 421-B:6-604(e) (providing that "restitution, or disgorgement shall be in addition to any other *penalty* provided for in this chapter." (emphasis added)).

Further, the Staff Petition itself specifically alleges that Ridlon committed fraud:

> 4. Based on its investigation, the Bureau determined that Ridlon engaged in a scheme to defraud up to two hundred and eight (208) clients of millions of dollars over a period of at least eight (8) years by deceiving those clients into believing that they were required to pay an annual fee for management of their accounts when in reality Ridlon was having them sign up for unnecessary optional financial planning.

It is true that claims of fraud raise difficult questions regarding the right to a jury trial. New Hampshire cases have long recognized that where a plaintiff has been deprived of money or property by a contract fraudulently procured, he may rescind the contract and recover in an action at law his money or chattels. See, e.g., Dion v. Cheshire Mills, 92 N.H. 414, 415 (1943). As a general rule, where the remedy for fraud sought is damages, the action is considered to be legal in nature and there is a right to jury trial; where the claimant can be made whole by some equitable remedy, for instance, by the reconveyance of real estate or some other specific relief available only in chancery, a claim was treated as equitable and there is no right to jury. See, e.g., Plechner v. Widener College, Inc., 569 F.2d 1250, 1258 (3d Cir 1977); Gordon v. Tafe, 121 N.H. 250, 251 (1981); Wright & Miller, 9 Federal Practice & Procedure § 2311 (2017).

If the action by the BSR is considered a fraud action, a separate right to a trial by jury exists. The BSR recognizes that the Staff Petition alleges that Ridlon committed fraud, but argues that even if there is a jury trial right in fraud cases, no right exists in the instant

case, because:

> [U]nlike fraud or deceit, a person can violate the USA without a purposeful mental state. Compare RSA 421-B:5-501 (2) (making it unlawful "to make an untrue statement of material fact" in connection with the sale of securities, without inquiry into the purpose behind it), with Tessier v. Rockefeller, 162 N.H. 324, 332 (2011) ("Fraud . . . must be proved by showing that the representation was made . . . with the intention of causing another person to rely on the representation.").

(Def.'s Mem. in Support of Mot.to Dismiss, at 8.) However, this is a distinction without a difference. For example, in interpreting the analogous Seventh Amendment, the United States Supreme Court has held that the heightened pleading requirements of the Private Securities Litigation Reform Act ("PSLRA") did not affect the common-law right to jury trial in cases seeking penalties for violation of the security laws. Tellabs, Inc. v. Makor Issues & Rights, Ltd., 551 U.S. 308, 321 (2007).

Legislatures and courts are free to change the manner in which claims are enforced procedurally as long as those changes do not deprive a litigant of a fundamental right. The constitutional right to a jury trial does require that a case be tried as it would have been in the 18th century, with such long forgotten procedures as the common-law incompetency of parties and women married to a party as a result of coverture. Nor does it matter that securities and for that matter, corporations as we understand them, did not exist in the 18th century. The purpose of what Part I, Article 20 refers to as the "sacred" right to jury trial is to protect citizens from State or State assisted attempts to seize their property without the consent of a jury, not to enshrine certain forms of procedures.

Decisions of the federal courts are instructive. In SEC enforcement actions, courts and lawyers have assumed without much discussion that the jury should only return a general verdict finding of securities law violations at which point the judge can determine the appropriate penalty and make factual findings to increase the penalty. SEC v. Tourre, 4

F. Supp. 3d 579, 593–94 (S.D.N.Y. 2014); SEC v. Solow, 554 F. Supp. 2d 1356, 1366–67 (S.D. Fla. 2008); SEC v. Ingoldsby, No. 88-1001-MA, 1990 WL 120731, at *6 (D. Mass. May 15, 1990) (granting disgorgement after jury verdict). Such a result is consistent with Tull itself, in which the United States Supreme Court held that a liability finding must be made by a jury, but an equitable penalty can be imposed by a judge without violating the Seventh Amendment. 421 U.S. at 427.

IV

The BSR argues that Ridlon should be required to exhaust administrative remedies under the primary jurisdiction doctrine and that the Court should not consider his claim. (Def.'s Mem. in Support of Mot. to Dismiss, at 14.) But as the BSR recognizes, the doctrine of primary jurisdiction is discretionary. Frost v. Comm'r, N.H. Banking Dep't, 163 N.H. 365, 372–73 (2012). The doctrine of primary jurisdiction "provides that a court will refrain from exercising its concurrent jurisdiction to decide a question until it has first been decided by the specialized administrative agency that also has jurisdiction to decide it." Wisniewski v. Gemmill, 123 N.H. 701, 706 (1983); Frost, 163 N.H. at 371. The doctrine is inapplicable here because the BSR lacks jurisdiction to adjudicate the monetary claims it is asserting against Ridlon; they must be decided by a jury.

In order for a plaintiff to obtain a preliminary injunction, he or she must establish that he or she has a likelihood of success on the merits, he or she will suffer irreparable harm if relief is not granted, that he or she has no adequate alternative remedy at law, and that an injunction is in the public interest. N.H. Dep't of Envtl. Servs. v. Mottolo, 155 N.H. 57, 63 (2007). Ridlon has established a likelihood of success on the merits on his claim that he is entitled to a jury trial before the BSR can obtain penalties, restitution and

disgorgement as a matter of New Hampshire constitutional law. There is authority for the proposition that a person who is deprived of his constitutional rights suffers irreparable harm. See Thompson v. N.H. Bd. of Medicine, 143 N.H. 107, 110 (1998). If the proceedings against him at the BSR are not enjoined, Ridlon will be deprived of those rights and be forced to litigate in a forum in derogation of his constitutional rights.

The BSR will suffer no harm if an injunction is granted because it may still proceed against him in Superior Court for monetary relief, and it can obtain preliminary relief in order to secure any judgment it obtains on behalf of the citizens in whose name it seeks restitution and disgorgement. Finally, the public interest favors enforcement of constitutional rights.

It follows that the administrative proceedings seeking penalties, restitution and disgorgement must be and are ENJOINED. Whether Ridlon is liable for penalties as a result of violating RSA 421-B must be determined by a jury if Ridlon requests one. In light of this conclusion, the Court need not reach the other claims asserted by Ridlon.

SO ORDERED

12/19/17
DATE

s/Richard B. McNamara
Richard B. McNamara,
Presiding Justice

RBM/