THE STATE OF NEW HAMPSHIRE

SUPREME COURT

No. 2018-0035

Curtis S. Ridlon

v.

New Hampshire Bureau of Securities Regulation

APPEAL PURSUANT TO A FINAL JUDGMENT OF THE MERRIMACK COUNTY SUPERIOR COURT

BRIEF FOR THE APPELLANT NEW HAMPSHIRE BUREAU OF SECURITIES REGULATION

NEW HAMPSHIRE BUREAU OF SECURITIES REGULATION

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QUESTION PRESENTED

1. Does Part I Article 20 of the New Hampshire Constitution require all administrative enforcement actions in which fines exceed $1,500 to be tried before a jury, regardless of whether the State is seeking to enforce statutory rights that did not exist in 1784 or purely equitable relief? BSR Appdx. at 91-106, 217-27.[1]

STATEMENT OF THE CASE AND FACTS

In 2017, Appellant New Hampshire Bureau of Securities Regulation ("BSR") instituted an administrative proceeding under the New Hampshire Uniform Securities Act ("USA") against Appellee Curtis Ridlon, alleging that Ridlon defrauded hundreds of people, cheating them of millions of dollars. BSR Appdx. at 111-12. At the time of these alleged acts, Ridlon was a securities broker-dealer agent and a registered investment adviser, licensed by BSR. *Id.* at 111. The petition asserted that, despite owing his clients a fiduciary duty, Ridlon disguised unnecessary optional financial-planning services as mandatory annual fees for account management. *Id.* at 112. Ridlon's clients, many of whom were elderly, had no need for extensive financial planning and would not have paid these fees had they known that they were optional additional services. *Id.* at 111-12.

Prior to the adjudication on the merits of the pending administrative action, Ridlon filed a declaratory-judgment action in Merrimack County Superior Court, seeking to enjoin the administrative action. *Id.* at 2-17. In addition to other grievances, Ridlon claimed that the

[1] As used in this brief: (1) "BSR br." refers to this brief submitted by Appellant New Hampshire Bureau of Securities Regulation; (2) "BSR Appdx." refers to the separately bound appendix submitted by the appellant; and (3) "Tr." refers to the transcript of the hearing on the pending motions held on December 4, 2017.

administrative proceeding against him violated his right to a trial by jury under Part I, Article 20 of the New Hampshire Constitution. *See id.* Ridlon also filed a motion for a preliminary injunction, seeking to halt the administrative enforcement action. *Id.* at 69-88.

Following a non-substantive amendment to Ridlon's complaint, BSR moved to dismiss. *See id.* at 18-20, 89-106. BSR argued that the USA creates statutory rights that did not exist when the New Hampshire Constitution was passed in 1784 and, therefore, Ridlon did not have any right to a jury trial. *Id.* at 94-97. Alternatively, BSR argued that its action was equitable to which Ridlon was also not entitled to a jury trial. *Id.* at 98-101. Ridlon objected, arguing that a jury trial was required whenever the State seeks penalties in excess of $1,500, and that BSR's action was essentially one for common-law fraud. *See id.* at 197-206.

The trial court agreed with Ridlon and enjoined BSR's administrative enforcement action. BSR br. at 62. Noting the case law holding that statutory rights of recent vintage do not require a jury trial, it nonetheless found that this Court "has taken a different approach when the State seeks to obtain a penalty." *Id.* at 52. Relying on cases interpreting the criminal right to a jury trial found in Part I, Article 15, the trial court determined that, whenever the State seeks a penalty in excess of $1,500, the right to jury trial attaches. *Id.* at 52-54. The trial court also found that "[w]hile the remedy BSR requests is cast in equitable terms," BSR's action "is in fact one for fraud" also requiring a jury trial. *Id.* at 54. Given its conclusion, the trial court declined to reach Ridlon's remaining arguments. *Id.* at 62. This appeal followed.

SUMMARY OF ARGUMENT

L'Oreal v. Hair Excitement, 158 N.H. 363 (2008) and related cases establish the proper framework in which to analyze an action like the one brought by BSR in this case. Under the standard described in *Hair Excitement*, Ridlon is not entitled to a jury trial in BSR's

administrative action. BSR enforces a statute encompassing causes of action unknown to the common law. First enacted in 1981, the act addresses securities, something even the trial court admitted did not exist at the time of the adoption of the New Hampshire Constitution. In a comprehensive and exhaustive statute, the Legislature embraced entirely new concepts developed as a "cure to a current mischief," with remedies, burdens of proof, and culpability standards all unique to the statutory scheme. The act imposes mainly, if not exclusively, equitable remedies designed to protect New Hampshire citizens. Whereas the application of *Hair Excitement* dictates a denial of the right to a jury trial, the trial court simply never undertook the proper analysis.

Instead, the trial court mistakenly relied on several cases providing for a right to a jury trial for violation-level offenses. These decisions rested on the requirement in Part I, Article 15 of the New Hampshire Constitution and do not apply to civil litigants under Part I, Article 20, nor should they be applied here for the first time to civil litigants. To justify its position, the trial court also created an enhanced right to a jury trial in cases in which the State participates as a civil litigant—a position completely without support.

In addition, the trial court held that BSR brought an action for common-law fraud notwithstanding the stark difference between the two types of actions and despite the statute's specific assertion that the type of fraud the Legislature envisioned goes far beyond that found in the common law. The trial court also ignored the fact that certain types of common-law fraud, including those coming closest to the present action, were historically actions in equity to which no jury trial right applies.

Further, the trial court transformed equitable relief into remedies at law by relying on the term "penalties." According to the trial court, this phrase transforms everything near it—

restitution, rescission, disgorgement, and the provisions of the statute in general—into nothing more than legal remedies. However, the use of this term does not result in such a transformation. To the contrary, remedies specifically described as "penalties" are often considered "equitable."

Compounding the error, the trial court mistakenly relied extensively on federal Seventh Amendment jurisprudence as "compelling," despite the fact that the Seventh Amendment does not apply to the states and, contrary to the assertion of the trial court, the Seventh Amendment test differs from the test used in New Hampshire. Nevertheless, even if one looked to cases interpreting the Seventh Amendment, numerous opinions, including those cited but overlooked by the trial court, establish that the right to a jury trial does not attach to this type of administrative proceeding. In fact, no body of precedent supports the imposition of a right to a jury trial in the type of administrative proceeding brought by BSR. Even the cases relied on by the trial court acknowledge that "the right to a jury trial may have no application to administrative proceedings." This remains true in federal case law and is consistently the position adopted by other states. For all of these reasons, the trial court erred in ruling that Ridlon is entitled to a jury trial in BSR's administrative action.

STANDARD OF REVIEW

The only question presented on appeal is the constitutionality of the administrative scheme created by the USA. "The constitutionality of a statute is a question of law, which [this Court] review[s] *de novo*. *State v. Wilson*, 169 N.H. 755, 768 (2017).

ARGUMENT

I. NO RIGHT TO A JURY TRIAL EXISTS, BECAUSE THE USA CREATES SPECIAL STATUTORY PROCEEDINGS THAT DID NOT EXIST AT COMMON LAW.

Part I, Article 20 of the New Hampshire Constitution states, in relevant part:

> In all controversies concerning property, and in all suits between 2 or more persons except those in which another practice is and has been customary and except those in which the value in controversy does not exceed $1,500 and no title to real estate is involved, the parties have a right to a trial by jury.

N.H. CONST. pt. I, art. 20. "It is beyond dispute that the right to a jury trial is a fundamental one under our State Constitution in both the civil and criminal contexts." *State v. Morrill*, 123 N.H. 707, 711 (1983). "It is equally clear, however, that the right is not without limitation . . . ." *Id.* at 712. Part I, Article 20 does not create or establish any new right to a jury trial. *Hair Excitement, Inc. v. L'Oreal U.S.A., Inc.*, 158 N.H. 363, 368 (2008). Rather, "[i]t 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." *Id.* (quoting *Davis v. Dyer*, 62 N.H. 231, 235 (1882)). For instance, "[i]t is well recognized that the right has no application in special, statutory, or summary proceedings unknown to the common law, or to purely equitable proceedings." *McElroy v. Gaffney*, 129 N.H. 382, 386 (1987).

This Court has stated "[t]o resolve whether a party has a right to trial by jury in a particular action, [it] generally look[s] to both the nature of the case and the relief sought, and ascertains whether the customary practice included a trial by jury before 1784," the year the State Constitution was adopted. *Hair Excitement*, 158 N.H. at 368 (quotation omitted). As noted above, when the Legislature creates statutory rights that did not exist at common law, no right to

a jury trial attaches to that proceeding. *See McElroy*, 129 N.H. at 386.

In *Hair Excitement*, this Court rejected the plaintiff's demand for a jury trial in a case involving violations of the Consumer Protection Act ("CPA"). *Hair Excitement*, 158 N.H. at 367-68. The Court examined whether the cause of action existed in 1784 or instead involved "proceedings unknown to the common law." *Id.* at 368 (quotation omitted). Because the plaintiff alleged a "breach of codified rights," in addition to inquiring whether a jury trial was customary in 1784, the Court further looked to the "nature of the statutory framework to determine whether the jury trial right extends to the action." *Id.* (quotations omitted). The Court determined that the CPA created new actions within a broad framework of new rights. The Court held that the CPA was "a comprehensive statute designed to regulate business practices . . . by making it unlawful for persons engaged in trade or commerce to use . . . unfair competition and deceptive business practices." *Id.* (quotation omitted). Based upon the statute's "comprehensive" nature, this Court then held that the CPA "creates new statutory rights which did not exist in New Hampshire common law." *Id.* It found that, with respect to the CPA, "our constitution does not confer a right to a jury trial." *See id.*

As with the CPA, the Legislature created the USA to be a comprehensive statute designed to protect investors in New Hampshire. Similar to the CPA, the USA prohibits deceptive business practices when selling securities and giving investment advice. *See* RSA 421-B:5-501 & :5-502. Both have provisions for criminal and civil liability. *Compare* RSA 358-A:6, *with* RSA 421-B:5-508 & :5-509. Both the CPA and the USA create private rights of actions for the injured party. *Compare* RSA 358-A:10, *with* RSA 421-B:5-509. In fact, if the CPA did not expressly exempt securities regulation, *see* RSA 358-A:3, the two statutes would significantly overlap. *See* RSA 358-A:2 (broadly making unlawful "any unfair or deceptive act

or practice in the conduct of any trade or commerce"). Finally, and perhaps most importantly for purposes of this case, both the CPA and USA include sections permitting the imposition of civil penalties. *Compare* RSA 358-A:4, III(b), *with* RSA 421:B:6-604(d).

Further, in many ways the USA is more comprehensive than the CPA, as it contains entire sections devoted to the regulation and registration of securities, the licensing of brokers and investment advisors, and creates a complete process for administration and judicial review. *See* RSA ch. 421-B, art. 3, 4, & 6.[2] The USA's definition section includes numerous technical descriptions, including a two-page definition of "security"; references to various federal laws of modern vintage; allusions to modern organizational structures like limited liability partnerships; and definitions for terms like "investment adviser" and "issuer." *See generally* RSA 421-B:1-102. The USA features numerous complex sections such as:

- Investment Adviser Registration Requirements and Exemptions, RSA 421-B:4-403,
- Succession and Change in Registration of Broker-Dealer or Investment Adviser, RSA 421-B:4-407,
- Prohibited Conduct in Providing Investment Advice, RSA 421-B:5-502, and
- Custody of Client Funds or Securities by Investment Advisers, RSA 421-B:5-502-A.

Thus, the USA's comprehensiveness eclipses even that of the CPA. *See Hair Excitement*, 158 N.H. at 368.

Additionally, this Court in *Hair Excitement* found that the CPA was not enacted until 1970, long after the time of statehood. *Id.* at 368. Similarly, the USA was first enacted in 1981. *See* Laws 1981, 214:1. In fact, no state had securities regulation until the early 1900s "with the first general securities law being said to have been enacted by the State of Kansas in 1911, and

with 48 jurisdictions having enacted such statutes by 1933."[3] *Brenner v. Oppenheimer & Co.*, 44 P.3d 364, 533 (Kan. 2002) (quoting 69 Am. Jur. 2d, *Securities Regulation-State* § 1, p. 772 (1993)). New Hampshire had no form of securities regulation, also known as "blue-sky law," until 1917. *See* Laws 1917, 202:1-14. As such, no comprehensive scheme for regulating securities existed at common law.

Hair Excitement is not an anomaly. This Court has consistently denied requests for a jury trial with respect to statutes, like the USA, which regulate matters that did not exist at common law. For example, in *Hallahan v. Riley*, this Court held that a party had no right to a jury trial in an unemployment-compensation dispute. 94 N.H. 338, 339-40 (1947); *see also Pomponio v. State*, 106 N.H. 273, 274-75 (1965). This Court also held that no jury trial right attached to involuntary-admission proceedings, noting that "because it is a special statutory proceeding, there is no constitutional requirement for a trial by jury in the commitment of insane or mentally ill persons." *In re Sandra H.*, 150 N.H. 634, 636-37 (2004). The same is true for eminent-domain proceedings. *See V.S.H. Realty v. Manchester*, 123 N.H. 505, 505-06 (1983); *Whelton v. State,* 106 N.H. 362, 363 (1965).

In this case, the trial court acknowledged this well-settled test, and even cited to *Hair Excitement*. *See* BSR br. at 52. However, after doing so, it held that the State must be treated differently when it seeks penalties. *Id.* Yet, nothing in the case law addressing statutory proceedings foreign to 1784 common law carve out an exception for statutory causes of action where the State is seeking civil penalties. In fact, as noted above, the CPA provides for civil

[2] In total, the USA occupies roughly 150 pages in RSA Title XXXVIII, including 55 sections spanning 7 articles. *See* RSA ch. 421-B (2015 & Supp. 2017). The definition section alone is 17 pages long. *See* RSA 421-B:1-102(1)-(62).

penalties, and nothing in *Hair Excitement* is limited to private rights of action, or holds that, when the State or penalties are involved, the analysis changes.

Further, in its order, the trial court ignored other superior court decisions from across the State that have uniformly used the analysis set forth in cases like *Hair Excitement* to deny requests for a jury trial in civil statutory-enforcement actions that did not exist at common law—including those involving the imposition of penalties. *See* BSR Appdx. at 171-81; *N.H. Dep't of Envtl. Servs. v. Marino*, Coos Super. Ct., no. 04-E-145, at 3 (*Vaughn*, J.) (Order, Feb. 3, 2005) ("Here, the State's action is based upon statutory remedies and is not one recognized at common law."); *N.H. Dep't of Envtl. Servs. v. Boemark Const. Corp., et al.*, Rockingham Super. Ct., no. 218-2014-CV-01379 (*Anderson*, J.) (Order, Jan. 27, 2017); *N.H. Dep't of Envtl. Servs. v. Brown*, Belknap Super. Ct., no. 211-2009-EQ-00215, at 4 (*O'Neil*, J.) (Order, Sept. 10, 2012) ("[The defendant] does not have the right to jury trial with respect to the permanent injunction or the civil penalties sought by NHDES."). In September 2017, even the Merrimack Superior Court held the same. *See* BSR Appdx. at 182-88; *N.H. Dep't of Envtl. Servs. v. F&N Convenience*, Merrimack Super. Ct., no. 217-2016-cv-731, at 6 (*Tucker*, J.) (Order, Sept. 1, 2017) ("The objection to the defendants' jury trial demand is sustained. A judge will decide all trial issues.").[4] The State is aware of no New Hampshire decision, other than the one currently on appeal, to the contrary.

Finally, other jurisdictions have found that the inclusion of civil penalties does not unilaterally transform a modern, comprehensive statute addressing matters unknown to the

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[3] As the trial court noted, "securities and for that matter, corporations as we understand them, did not exist in the 18th century." BSR br. at 60.

[4] Notably, all four of these superior court decisions involved cases in which the State sought civil penalties pursuant to a statute.

common law into one implicating the right to a jury trial. In *State v. Sailor*, a New Jersey appellate court examined whether an inclusion of a provision for civil penalties in the New Jersey Insurance Fraud Prevention Act necessitated a jury trial. 810 A.2d 564 (N.J. Super. Ct. App. Div. 2001). The court found no such right. Examining similar acts, it found:

> Even more akin to the Act, which provides for civil penalties, are the Spill Compensation Control Act, and the New Jersey Consumer Fraud Act, which also create civil penalty enforcement actions. [We have] held that there was no right to a jury trial under the Spill Act since it was a newly created statutory right and "the Legislature by its enactment did not codify nor could it have codified a common law right that did not pre-exist." Similarly, [we have] held that in a suit by the Attorney General for violations of the Consumer Fraud Act, there was no right to a jury trial since the cause of action was "foreign to the common law, being [a] modern day creation[] of the Legislature for the relief and cure of a current mischief."

Id. at 567-68 (internal citations omitted); *see also State ex rel. Douglas v. Schroeder*, 384 N.W.2d 626, 629-30 (Neb. 1986) (finding no jury trial for a statute including penalties due to its "modern" character). This Court should, therefore, reverse and deny the request for a jury trial, because the USA creates a comprehensive statutory scheme unknown to the common law.

II. THE TRIAL COURT ERRED WHEN IT RULED THAT *STATE V. MORRILL* AND *TOWN OF HENNIKER V. HOMO* APPLY TO STATE CIVIL ACTIONS.

A. *Morrill* and *Henniker* Apply Only in Criminal Proceedings and Only to Offenses That Are Violations as Defined in the State's Penal Code.

The trial court initially recognized the litany of opinions denying the right to a jury trial in cases much like this one. BSR br. at 52. However, it quickly overlooked this precedent and instead relied extensively on the cases of *State v. Morrill* and *Town of Henniker v. Homo*, asserting that this Court has never "wavered" from granting a jury trial where the State seeks a penalty. *Id.* at 53, 56; *see also State v. Morrill*, 123 N.H. 707 (1983); *Town of Henniker v. Homo*, 136 N.H. 88 (1992). However, both of those cases involved violation-level offenses as

defined by the New Hampshire Criminal Code; neither involved a civil administrative proceeding.

In *Morrill*, a defendant was charged with driving while intoxicated ("DWI"), a violation-level offense. *Morrill*, 123 N.H. at 709. This Court analyzed when and why the Court would apply a monetary limit to a penalty for a violation. It first stated that:

> [E]very offense defined in the Criminal Code or by other statutes is classified as either a felony, a misdemeanor, or a violation. The statute provides that a "violation does not constitute a crime and conviction of a violation shall not give rise to any disability or legal disadvantage based on conviction of a criminal offense."

Id. The legislation at issue in *Morrill* changed a first-time DWI from a misdemeanor to a violation, and the defendant claimed that he was being deprived of his right to a jury trial under the New Hampshire Constitution. *Id.* at 711 (alleging that a DWI I has been "'decriminalized' . . . only in name"). The Court examined the defendant's claim that the Legislature subversively attempted to avoid valid criminal constitutional protections by reclassifying the former misdemeanor as a violation. *Id.*

Importantly, this Court's entire analysis took place within the context of a *criminal* process. *Id.* at 711-12. It began by stating: "[W]e do not require as a matter of constitutional right that a jury trial be available even for petty *criminal* offenses." *Id.* at 712 (emphasis added). The Court then determined that it must decide whether a "violation," as re-designated by the Legislature, fit within the category of offenses that were historically considered "petty offenses," or whether the penalties associated with the violation instead rose to a level that would once again require typical criminal-level protections. *Id.* In other words, the Court had to decide at what point a monetary penalty for a violation-level offense caused that offense to revert to a crime of the type requiring a trial by jury.

The Court essentially determined that an offense should no longer be considered "petty" once the fine exceeded a certain amount. *See id.* However, Part I, Article 15, the provision of the New Hampshire Constitution granting a jury trial right to criminal defendants, does not contain a threshold amount. *See* N.H. CONST. pt. I, art. 15. The Court then observed that, historically, the Court had looked to the limits applied in the civil context for guidance. *Morrill*, 123 N.H. at 712-13. Specifically, the Court relied upon *State v. Jackson*, 69 N.H. 511, 522 (1898), which held that it would make little sense to limit a justice of the peace to a specified amount in civil actions only to allow the same justice of the peace to exceed that amount in a criminal action without the benefit of a jury. *Id.* at 713. When *Jackson* was decided, a justice of the peace was statutorily limited to imposing a civil penalty of no more than $13.33.[5] *Jackson*, 69 N.H. at 522. The Court in *Jackson*, thereafter, imported that amount into the criminal context as a reasonable threshold. *Id.* The Court in *Morrill* reasoned that it should embark on a similar path. *Morrill*, 123 N.H. at 713. In order to set a limit at which a violation-level offense could no longer be considered "petty," the Court decided to appropriate the amount applicable to civil jury trials in Part I, Article 20—at the time, $500. *Id.*

It bears repeating that both of these decisions, *Jackson* and *Morrill*, dealt with violation-level offenses in what were clearly described as criminal proceedings. For instance, when justifying its adoption of the amount applicable to a justice of the peace in civil actions, the Court in *Jackson* stated: "[The Constitution's] authors certainly deemed it as necessary to secure a person from being deprived of his property without the judgment of his peers in a *criminal action* as it was in a civil action." *Morrill*, 123 N.H. at 713 (quoting *Jackson*, 69 N.H. at 522)

[5] The court in *Jackson* did not even find it necessary to choose a constitutional amount, instead choosing the limit of authority bestowed upon justices of the peace by statute. *Jackson*, 69 N.H. at 520.

(emphasis added). Similarly, when summarizing its decision, the Court in *Morrill* stated:

> Our review of the landmark cases outlining the right to a jury trial in this State convinces us that the framers of our constitution did not intend that individual *criminal defendants* be denied a jury trial in cases where fines may be levied which are greater than the amount constitutionally entitling civil litigants to a jury determination.

Id. at 712 (emphasis added). Thereafter, and upon this reasoning, it adopted the numerical threshold applicable to certain civil litigants found in Part I, Article 20. In doing so, the Court again specifically limited its decision to offenses under the penal code: "We do not believe that a fine exceeding this amount can be levied against individuals charged with *offenses under our penal code*, without granting them a jury trial on appeal." *Id.* at 713 (emphasis added).

Likewise, *Town of Henniker v. Homo* concerned a violation-level offense related to operating a junk yard without a license violative of the local zoning ordinance. *Henniker*, 136 N.H. at 90. The only issue in *Henniker* concerned whether a per-violation fine could be aggregated to meet the $500 threshold set forth in *Morrill*. *Id.* at 89-90. Although cited as authority by the trial court, during oral argument, the trial court correctly noted that *Henniker* really only dealt with how to do math; specifically, whether to consider the penalty at issue as a single $6,060 penalty or an aggregation of 606 ten-dollar penalties. Tr. 14-16, 22.

Henniker did not advance the state of the law with respect to jury trials in any other respect. In fact, although noting that the principal asserted in *State v. Morrill* applied to "violations of local ordinances," the Court in *Henniker* intentionally did not rule on the applicability of a jury trial even in the case before it, accepting it only *arguendo* and stating: "For the purposes of this appeal, we will assume that the defendants *would have been entitled to a jury trial* had the civil fines arisen from the *same* violation." *Henniker*, 136 N.H. at 89 (first emphasis added). In any event, as with *Morrill*, the "violation" in *Henniker* constituted an

"offense." *Id.* at 90. The Court merely cited to *Morrill* and determined—again only by assuming *Morrill's* applicability—that the penalties were singular rather than aggregated.[6] *Id.*

In its pleadings before the trial court, BSR distinguished *Morrill* and *Henniker* by underscoring the criminal nature of the proceedings in those cases, specifically highlighting that they all involved "violation-level criminal offenses." BSR Appdx. at 97. However, the trial court summarily dispatched of this explanation, referring to the State's "argument [a]s an oxymoron" and stating that a statutory "violation" is not considered a "criminal offense." BSR br. at 56.

The trial court's use of "oxymoron" is in some sense *apropos*, because a violation-level offense exists as a kind of contradiction in terms. RSA 625:9 of the New Hampshire Criminal Code entitled "Classification of Crimes" includes violations. RSA 625:9. The section describes "violation" as an offense for which only a "civil fine" may be assessed. RSA 625:9, V. The legislature in that same section, but a different paragraph, specifies, as the trial court notes, that a violation is actually not a "crime." RSA 625:9, II(b).

However, "[w]hile for the purposes of the Criminal Code a 'violation' is an 'offense' but not a 'crime', no such distinction exists outside the Code." *State v. Miller*, 115 N.H. 662, 664 (1975). "It thus appears that the classifications [in the Criminal Code] were for determination of punishments and were not intended to affect the 'criminal process of enforcement.'" *Id.* At least with respect to jury trials, opinions recognizing this legislative designation of a violation still referred to defendants in such cases as "criminal defendants" involved in a "criminal process."

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[6] The trial court noted a split decision in *Henniker*, and the State agrees that the dissent is illuminating. BSR br. at 55-56. The concise dissenting opinion referred to the penalty at issue as "civil fines, so called," indicating that, in reality, the dissent believed these to be something other than civil fines as that term is more commonly used. *Henniker*, 136 N.H. at 90.

Morrill, 123 N.H. at 712 (the framers "did not intend that individual *criminal defendants* be denied a jury trial") (emphasis added); *see also Jackson*, 69 N.H. at 522.

Recently, superior courts facing the question now before this Court have called a prosecution for a violation-level offense a "criminal" proceeding in the same shorthand way the State did in its prior pleadings, and for good reason. *See, e.g.*, BSR Appdx. at 180; *N.H. Dep't of Envtl. Servs. v. Brown*, Belknap Super. Ct., no. 211-2009-EQ-00215, at 4 (*O'Neil*, J.) (Order, Sept. 10, 2012) (discussing *Henniker* and *Morrill* as involving a "criminal statute"). In most respects, a violation exhibits all the procedural hallmarks of a crime including the possibility of arrest, *see Miller*, 115 N.H. at 664, and a prosecutorial stage that may begin with arraignment and a "charge," *see State v. Gagnon*, 135 N.H. 217, 218-19 (1991). Sometimes, a misdemeanor can be reduced to a violation. *See* RSA 625:9, VI. As with any offense, a violation must be proved beyond a reasonable doubt. RSA 625:10. Finally, rather than being held "liable," a defendant is found "guilty" with respect to a violation. *See, e.g., Henniker*, 136 N.H. at 90.

Contrast this with a civil case which commences with a complaint, *Super. Ct. Civ. R.* 4(b), and the issuance of a Summons, *Super. Ct. Civ. R.* 4(c), without the possibility of arrest. The civil case begins with a structuring process rather than an arraignment and with no ability to change a criminal action into a civil one. *See Super. Ct. Civ. R.* 5. Whatever label one wishes to use, prosecution of a violation differs markedly from civil litigation for any non-"offense." *See Portsmouth v. Karosis*, 126 N.H. 717, 718 (1985) (asserting that a city may not resort to civil proceedings to collect fines for the commission of a violation).

Most importantly, regardless of whether one labels a violation as criminal or at least criminal-like, RSA 625:9, and the criminal code in general, clearly identify a "violation" as an "offense." *See, e.g.*, RSA 625:9, II. The State Constitution groups offenses together with

criminal prosecutions for purposes of procedural rights, including those related to a jury trial.[7] *See* N.H. CONST. pt. I, art. 15 ("No person shall be held to answer for any crime or *offense* . . . ." (emphasis added)). Except for *East Kingston v. Towle*, 48 N.H. 57 (1868), all of the cases on which the trial court relied concern violation-level offenses. *See* BSR br. 52-53. None involve ordinary civil litigation.

Nevertheless, the trial court in this case acted as if both *Henniker* and *Morrill* had found that any civil penalty over the constitutional limit in Part I, Article 20, in any type of case—civil, administrative, or otherwise—triggered the right to a jury trial. As demonstrated above, none of the defendants in the cases cited qualified as "civil litigants" and none were embroiled in "civil litigation." The opinions limited their own rulings to instances involving "criminal defendants" charged with "offenses under our penal code." *Morrill*, 123 N.H. at 713; *Henniker*, 136 N.H. at 89. The rulings in *Henniker* and *Morrill* simply do not apply in a civil, much less the administrative, context.

B. The Trial Court Incorrectly Ruled that *State v. Morrill* and *Henniker v. Homo* Addressed the Right to a Jury Trial Under Part I, Article 20.

The trial court further mistakenly ruled that this Court, in both *Henniker* and *Morrill*, determined that the right to a jury trial in those cases was provided by Part I, Article 20. Specifically, the trial court stated: "Both decisions are premised upon the right to a jury trial in civil cases guaranteed by Part I, Article 20 of the State Constitution, not upon the right to a jury

[7] Different analyses may take place with respect to *criminal processes* as opposed to *criminal outcomes*, at least when determining issues like whether jeopardy attaches. *See State v. Fitzgerald*, 137 N.H. 23, 27 (1993) ("We have acknowledged, however, that the applicability of characteristically criminal procedures does not prevent a proceeding from being civil in substance."). The full gamut of law regarding criminal protections is vast and well-developed. The State does not claim to assay all of its aspects here. The full scope of the right to a jury trial, however, is fully briefed.

trial guaranteed in criminal cases set forth in Part I, Article 15." BSR br. at 56. Not so. As stated previously, the Court in those cases needed to specify an amount over which an otherwise "petty offense" reverted to its fully-criminal counterpart. It did so by appropriation, because resolution of those cases required some monetary threshold under Part I, Article 15, which contains no specific dollar amount, not because the defendant actually was a civil litigant. The Court in those opinions cited to Part I, Article 20 simply to identify the specific provision in which they found the requisite analogy. Nevertheless, the constitutional right to a jury trial enforced in those cases resides in Part I, Article 15. Other cases make this clear.

This Court summarized the genesis of the rulings in *Morrill* and *Jackson* in 1992. *See Opinion of the Justices (DWI Jury Trials)*, 135 N.H. 538, 541-43 (1992). There, the Court specifically and repeatedly affirmed that the requirements described therein originated in Part I, Article 15. The Court prefaced its opinion by quoting at length from Part I, Article 15. *Id.* at 539. The Court later summarized the holding in *Morrill* as one carving out an exception to the requirement in Part I, Article 15, ruling that:

> Our cases from the time of the adoption of the constitution have consistently held that part I, article 15 of the New Hampshire Constitution guarantees criminal defendants the right to trial by jury either in the first instance or on appeal to the superior court. *Morrill* excepts violations in which the potential fine is less than the amount entitling civil litigants to trial by jury.

Id. at 541-42; *see also id.* at 540 (citing *State v. Ray*, 63 N.H. 406 (1885) and "pt. I, art. 15").

Morrill itself cited to *State v. Ring* when defining the task before it, stating that *Ring* "requires us to determine whether the sanctions presently attached to DWI I take it outside the realm of 'petty offense[s] not requiring trial by jury.' *State v. Ring*, 106 N.H. at 511." *Morrill*, 123 N.H. at 712. *Ring*, in turn, specifically asserts that the proper analysis relates to Part I, Article 15. *State v. Ring*, 106 N.H. 509, 510 ("The right to trial by jury guaranteed by N. H.

Const., Part I, *Art.* 15th . . . .").[8] Therefore, *Morrill*, and by extension *Henniker*, undeniably interpret Part I, Article 15.

Ignoring the limited application of these cases, the trial court broadly proclaimed that any civil penalty in any civil litigation that could exceed $1,500 triggered the right to a jury trial. According to the trial court, this Court enunciated this rule in *Morrill* in 1983 (which itself drew from *Jackson* in 1899) and reaffirmed it in *Henniker* in 1992. Yet, apparently, this watershed event went unnoticed. In the 118 years since *Jackson*, the 35 years since *Morrill*, and the 25 years since *Henniker*, no New Hampshire Supreme Court decision has given a civil litigant a right to a jury trial simply because the possible amount of a penalty was more than $1,500. By contrast, at least four superior courts have ruled that a defendant is not entitled to a jury trial under Part I, Article 20, simply because a penalty exceeds $1,500. *See* BSR Appdx. at 171-88. As already noted, the most recent of these occurred in the same court only three months prior.[9] *See id.* at 183-88. Clearly, such a right has never existed and there is no reason for this Court to create one now.

C. The Trial Court Erred When It Created a Standard Uniquely Applicable to the State When it Participates as a Civil Litigant.

The trial court's desire to foist what have always been criminal provisions onto civil actions culminated in its enunciation of a novel proposition unsupported by case law and resulting from a policy of the court's own creation. Notwithstanding that Part I, Article 20

[8] Not surprisingly, *Ring* also involved a violation-level offense and referred to proceedings related to the offense as "criminal." *See id.* at 510-11 (citing to a judicial report involving the "exclusive jurisdiction of criminal offenses" and disposing of the issue by referencing the "statutory scheme regulating the criminal jurisdiction of municipal and district courts").

[9] Although the trial court referred to Judge Tucker's decision in *State of N.H. Dept. of Env. Servs. v. F&N Convenience, LLC et al.*, 217-2016-CV-00731 as "well-reasoned" during oral argument, he did not mention its existence or analysis in his final order. Tr. at 14.

applies to all civil litigation with equal force, even litigation where the State is not a party, the trial court announced that a heightened jury-trial right exists when the State acts as a plaintiff in a civil action. BSR br. at 60. After reviewing a history of "corrupt practices," the trial court articulated its new position, ruling: "The purpose of what Part I, Article 20 refers to as the 'sacred' right to a jury trial is to protect citizens from State or State assisted attempts to seize their property without consent of a jury, not to enshrine certain forms of procedures." *Id.* at 50 and 60.

None of the cases cited by the trial court support the proposition that its drafters created Part I, Article 20 with the intent that it apply differently to the State, and the State has found no cases supporting this position. In fact, this Court found in at least one statutory example that the State itself possesses an equal right to invoke it. *Whelton v. State*, 106 N.H. 362, 363 (1965) ("judicial and public policy dictate that where the right of trial by jury does exist the right is bilateral"). Conversely, no cases suggest that the right can be more easily erased in cases involving solely private litigants simply because there is no government encroachment to guard against.

Numerous New Hampshire opinions contradict the trial court's assertion, including those cited by the trial court itself, and affirm that the purpose of Part I, Article 20 was, in fact, to "enshrine certain" procedures; namely, those existing at the time of the adoption of the constitution. *Hair Excitement*, 158 N.H. at 368. In derogation of this Court's well-established precedent, the trial court's notion of protection wistfully harkens to the criminal, not the civil, guarantee as it is Part I, Article 15 that guards against "State . . . attempts to seize [a defendant's] property." BSR br. at 60; *see State v. Bilc*, 158 N.H. 651, 654 (2009) ("A right to jury trial is granted to *criminal* defendants in order to prevent oppression by the Government.") (quotation

omitted; emphasis added). As such, the trial court's ruling ignored the applicable law, instead, superimposing criminal rights onto civil litigation.

In establishing this new concept, the trial court also unfairly characterizes the governmental role. Many State actions in the civil context—including this one—work to the benefit of specific citizens rather than the bulwarking of government authority or forcing conformity with society as a whole. Here, BSR seeks as its primary purpose to return funds to individuals, many elderly, swindled by the unlawful actions of the respondent.[10] BSR's petition specifically requests an order requiring Ridlon to pay "restitution to his clients." BSR Appdx. 117-18. In cases like this, the government acts not in spite of New Hampshire citizens, but specifically on their behalf, in order to achieve a fair result and help those that would otherwise lack protection. No case suggests it should be hamstrung in this effort. The Legislature created a new, comprehensive statutory scheme to effectuate this public purpose.

D. Imposing the Standards from these Criminal Cases onto Civil Litigation Would Unnaturally Expand the Right to a Jury Trial, Cause Confusion, and Overrule Longstanding Precedent.

Although referencing the civil guarantee in a criminal process may be necessary when determining the monetary boundaries of a "petty offense," it makes no sense to do the reverse. No logical reason exists for grafting the limits for a "petty offense" onto civil cases, especially those stemming from a statute with no corollary at common law, encompassing mainly if not exclusively equitable relief, and certainly not in the administrative context. To do so would illogically expand the right to a jury trial.

Part I, Article 15, as explained through *Morrill* and related cases, encompasses a

[10] With each passing day, the chance to help victims decreases. At the time of the petition, many victims were elderly and one was 98 years old. BSR Appdx. at 112.

monetary limit that, once surpassed, triggers the right to a jury trial with respect to offenses of any stripe. In other words, once a penalty exceeds a certain amount in the criminal realm, the right to a jury trial is automatic and universal. This comports with the sweeping nature of the right to a jury trial in criminal cases generally. *See Bilc*, 158 N.H. at 652 (citing *State v. Gerry*, 68 N.H. 495, 496 (1896)) ("It has never been denied or doubted that by this article trial by jury according to the course of the common law is secured to the defendant in all criminal cases without exception.").

Conversely, a jury trial has never been required under Part I, Article 20 for cases in equity or "statutory or summary proceedings unknown at common law" irrespective of the amount in controversy. *See Hair Excitement*, 158 N.H. at 368-70. Therefore, cases wherein a party may have to pay many millions of dollars or comply with costly injunctions do not implicate the right to a jury trial. The cases cited by the trial court say as much.

For instance, the trial court cites to *Perkins v. Scott* to illustrate government gone awry and the consequent need for jury trials. 57 N.H. 55 (1876); BSR br. at 50, 52. But the Court in *Perkins* actually denied the request for a jury trial, ironically in a case involving complicated financial matters.[11] The Court found:

> [T]he investigation and adjustment of accounts had come to be matter of well understood and admitted equity jurisdiction; and, . . . until the case of *Marston* v. *Brackett*, 9 N.H. 336, decided in 1838, it had not been intimated in this state, or anywhere else, that there was a right of trial by jury in equity proceedings.

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[11] *Perkins* merely refuted the claim that the right to a jury trial was essentially eliminated entirely. The Court stated, it "is enough to show, as I think, that the court cannot decide this question against the defendant upon the ground that the constitution does not really and absolutely secure the right of jury trial in any case." *Perkins*, 55 N.H. at 81.

Perkins, 57 N.H. at 81. It went on to find that a jury trial not only does not apply in some cases, but probably in many cases, stating:

> The framers of the constitution, in asserting in Art. XX of the Bill of Rights the right of trial by jury, 'except in cases in which it has been heretofore otherwise used and practised,' clearly recognized that there were one or more classes of cases in which trial by jury could not be demanded as matter of right. There is no doubt that at common law there were *many cases* in which a trial by jury could not be had.

Id. at 84, (*Smith*, J.) (emphasis added). Part I, Article 20 holds the *preservation* of the right, not its universal application, "sacred." *See Hair Excitement*, 158 N.H. at 368-69 ("It 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." (quotation omitted)). Importing the criminal guarantee would broaden its use in ways previously unknown and overturn well-established State law.[12] To BSR's knowledge, no court has made criminal constitutional protections generally applicable to civil cases, and this Court should not do so now.

III. NO RIGHT TO A JURY TRIAL EXISTS BECAUSE THE USA FOCUSES ON EQUITABLE RELIEF.

A. The USA Focuses on the Equitable Resolution of Claims to Which No Right to a Jury Trial Attaches.

As stated above, "[i]t is well recognized that the right [to a jury trial] has no application in special, statutory, or summary proceedings unknown to the common law, *or* to purely equitable proceedings." *McElroy v. Gaffney*, 129 N.H. 382, 386 (1987) (emphasis added). Therefore, although this Court should find that no such right exists for the reasons discussed

[12] This Court previously rejected a plea for a similarly expansive interpretation of Part I, Article 20. *See Employers Liability Assurance Corp. v. Tibbetts*, 96 N.H. 296, 298 (1950) (ruling that an interpretation that a jury trial exists unless the action existed at common law *and* a jury trial was *not* available in 1784 "cannot be accepted").

above, the equitable nature of the USA overall and the specific relief sought provide an independent basis for denying such a right. *See, e.g.*, *Schroeder*, 384 N.W.2d at 629-30 (holding that the "principle thrust" of the Consumer Protection Act is equitable and finding that the defendant had no right to a jury trial).

The USA repeatedly provides for equitable remedies and does so in numerous contexts. For instance, the USA gives the Secretary of State authority to "revoke, suspend, condition, or limit the registration of any registrant" under certain conditions. RSA 421-B:4-412(b). In civil actions, the USA provides for "a temporary or permanent injunction, restraining order, writ of mandamus, or a declaratory judgment," further providing for "appropriate or ancillary relief" including "an asset freeze, accounting, writ of attachment, writ of general or specific execution, and an appointment of a receiver or conservator." RSA 421-B:6-603(b)(1) & :6-603(b)(2)(A)(i). The USA contemplates issuance of an order allowing "the secretary of state to take charge and control of a defendant's property." RSA 421-B:6-603(b)(2)(B). In typically equitable language, the USA further gives the court the power to "grant[] other relief that the court considers appropriate." RSA 421-B:6-603(c). The trial court itself acknowledged that the USA includes "many equitable remedies such as an injunction, asset freeze and attachment." BSR br. at 46.

The current case specifically focuses on "rescission, restitution, [and] disgorgement" as well as various forms of injunctive relief. BSR Appdx. 117-18; *see also* RSA 421-B:6-603(b)(2)(C).[13] "[T]he remedies of rescission and reformation of contracts entered into in consequence of the mutual mistakes of the parties fall primarily and naturally within the peculiar jurisdiction of equity." *McIsaac v. McMurray*, 77 N.H. 466, 470 (1915).

[13] The trial court also stated that BSR's request for remedies "is cast in equitable terms." BSR br. at 54.

Equity also encompasses restitution. Together with other forms of equitable relief, restitution helps return a party "to their pre-injury status." *E. Derry Fire Precinct v. Nadeau*, 155 N.H. 429, 432 (2007) (discussing the purpose of "equity" in the context of "[e]quitable rescission and restitution").[14] "Rescission and restitution is an equitable remedy" that "may be ordered where material misrepresentations reasonably relied upon induce the injured party to enter into a transaction." *Patch v. Arsenault*, 139 N.H. 313, 317-18 (1995).

Disgorgement works in concert with restitution in cases where one party would be unjustly enriched. *See, e.g., In re Haller*, 150 N.H. 427, 430 (2003) ("Restitution is an equitable remedy typically applied to contracts implied in law to disgorge the benefit of unjust enrichment."). Generally, "[r]estitution and disgorgement are part of courts' traditional equitable authority." *United States v. Universal Mgmt. Servs.*, 191 F.3d 750, 760 (6th Cir. 1999).

BSR's complaint seeks these traditionally equitable remedies, an injunction requiring Ridlon to "immediately cease and desist from further violations," and an order making Ridlon "permanently barred from licensure." BSR Appdx. 117-18; *see also Exeter v. Britton*, 115 N.H. 209, 211 (1975) (an "[i]njunction is an equitable remedy"). Therefore, both the statute as a whole and the relief sought sound in equity. No right to a jury trial exists in such matters.

B. The USA's Penalty Provision Does Not Create a Right to a Jury Trial.

1. The possible imposition of a penalty does not create a right to a jury trial for a statute whose purpose is equitable.

As noted above, in *Hair Excitement*, the fact that the New Hampshire CPA contains

[14] The same superior court justice in this matter also found restitution to be an equitable remedy that does not entitle one to a jury trial. In *Eames v. Bedor*, the trial court ruled that neither party could request a jury trial because the "Petitioners assert a classic restitution claim based on unjust enrichment." 2012 N.H. Super. LEXIS 3, 5-6 (N.H. Super. Ct. Mar. 28, 2012) (*McNamara*, J.) ("The claim sounds in equity."); *see also Eames v. Bedor*, 2012 N.H. Super. LEXIS 15, *5-6 (N.H. Super. Ct. July 13, 2012) (*McNamara*, J.) (also ruling that claim for attorneys' fees cannot give rise to an independent right to a jury trial).

provisions for penalties did not factor into this Court's analysis when it determined that no right to a jury trial existed under that statute. Similarly, many states have explicitly found that the existence of a civil penalty provision does not transform a case pursuant to a equitable statute into an action at law thereby implicating the right to a jury trial. For instance, the Minnesota Court of Appeals denied a defendant the right to a jury trial in the consumer-protection context where the trial court "imposed civil penalties of $ 70,000." *State by Humphrey v. Alpine Air Products, Inc.*, 490 N.W.2d 888, 891 (Minn. Ct. App. 1992). The court found that the government's lawsuit—one that included a request for an injunction, civil penalties, and restitution—"was entirely equitable in nature." *Id.* at 895. Similarly, just this past year, a Washington appeals court also denied a request for a jury trial in a case where "[t]he trial court entered an order imposing a civil penalty . . . in the amount of $793,540.00," as well as $362,625 in restitution and $337,593.20 in attorneys' fees. *State v. Mandatory Poster Agency, Inc.*, 398 P.3d 1271, 1276 (Wash. Ct. App. 2017). Despite a request for civil penalties, the court ruled that a consumer "case brought by the State is an equitable action, and there is no jury trial." *Id.*

The Nebraska Supreme Court summarized the relevant positions in the context of the state's consumer protection act, stating:

> "The present cause of action and right to seek redress are foreign to the common law, being modern day creations of the Legislature for the relief and cure of a current mischief."
>
> While the act permits the recovery of an attorney fee, restoration of the purchase price, and the imposition of civil penalties, its principal thrust is to prevent unfair or deceptive acts or practices in trade or commerce. Consequently, the act is equitable in nature, in the sense that it seeks to prevent prejudicial conduct rather than merely compensate such damage as may flow therefrom. The monetary consequences imposed to discourage future like acts and practices are ancillary to the act's principal equitable thrust.

Schroeder, 384 N.W.2d at 629 (quoting *Kugler v. Market Dev. Corp.*, 306 A.2d 489, 492 (N.J.

Super. Ct. Ch. Div. 1973)). The court then concluded "that the trial court was correct in denying [the defendant] a jury trial." *Id.* at 630.

Finally, a Colorado court similarly responded to a claim under its consumer protection act, in which a defendant argued that the statutory action "was legal because the Attorney General sought to recover money damages and impose civil penalties, both of which are economic." *People v. Shifrin*, 342 P.3d 506, 512 (Colo. App. 2014). The court agreed that "the Attorney General sought monetary relief in the form of civil penalties and under the equitable principles of restitution and disgorgement." *Id.* However, the court found that:

> [t]he majority of courts in other jurisdictions have concluded that similar consumer protection actions are primarily equitable. Because we consider these cases well-reasoned, and several of them involve statutes similar to the CCPA, we follow them here.

Id. The court then held: "Accordingly, we conclude that defendant was not entitled to a jury trial." *Id.* at 513. Such is the case here. BSR's action in this case sounds in equity. No right to a jury trial exists for this type of action.

2. The term "penalty" is consistent with equitable remedies such as "restitution, rescission, and disgorgement."

The trial court ignored the comprehensive nature of the USA, its regulation of a modern practice, and its equitable nature. It instead focused solely on the word "penalty," going so far as to rule that the use of the term transformed traditionally equitable remedies like "rescission, restitution, [and] disgorgement" into legal remedies. The trial court, thereby, erred by failing to use the test enunciated in *Hair Excitement* and by failing to recognize the equitable nature of the statute generally. Further, the trial court mistakenly believed that a "penalty" could only be associated with actions at law.

In truth, the word "penalty" has no fundamental aversion to equity. Although remedies at "law" and "equity" sometimes sharply diverge, the concept of equitable relief does not exclude

imposition of a "penalty." In fact, this Court has specifically determined that some remedies may qualify as penalties although distinctly equitable in nature. In *In re Guardianship of Dorson*, this Court stated:

> A surcharge is the *equitable penalty* imposed when a trustee fails to exercise the requisite standard of care and the trust suffers thereby. It is the *penalty* for failure to exercise common prudence . . . .
>
> . . .
>
> Equity is primarily responsible for the protection of rights arising under trusts . . . . In addition to direct damages, courts may order consequential damages and punitive damages where malice or *fraud* is involved. The court may adapt its decree to fit the nature and gravity of the breach and the consequences to the beneficiaries and trustee.

156 N.H. 382, 386-87 (2007) (emphasis added; quotations, citations, and brackets omitted). Other courts similarly have found no mutual exclusivity between an "equitable" remedy and a penalty. *See In re Fox*, 725 F.2d 661, 663 (11th Cir. 1984) ("In addition, the courts have also used fee shifting as an equitable penalty for abusive or bad faith litigation practices"); *In re Scheidmantel*, 868 A.2d 464, 492-93 (Pa. Super. Ct. 2005) ("A surcharge is the equitable penalty imposed when a trustee fails to exercise the requisite standard of care and the trust suffers thereby"); *Matter of Wigfall*, 2008 N.Y. Misc. LEXIS 3515, at *7 (N.Y. Sup. Ct. June 17, 2008) (asserting that New York law "imposes the equitable penalty of disinheritance upon a parent who" acts negligently). In *State v. Irving Oil Corp.*, the Vermont Supreme Court found the civil penalties in an environmental statute to be equitable in nature and consequently denied the defendant the right to a jury trial. 955 A.2d 1098, 1107-08 (Vt. 2008). It ruled that "[o]ur holding that the civil-penalties remedy under [the statute] is essentially equitable finds additional support in decisions from other states reaching the same conclusion in similar environmental-

enforcement contexts." *Id.* at 1107.[15] This conclusion factored into Judge Tucker's decision in Merrimack County Superior Court to find no right to a jury trial. *See* BSR Appdx. at 185-86.

Therefore, use of the word "penalty" does nothing to alter what has always been considered equitable relief or transform the USA generally from a statute focused on equitable relief to one concerned with collection of a debt. The trial court's disproportionate reliance on the word "penalty" cannot be justified.

3. *East Kingston v. Towle* does not create a right to a jury trial in civil penalty actions.

The trial court cited *East Kingston v. Towle*, 48 N.H. 57 (1868), to support its position on civil penalties. BSR br. at 53. According to the trial court, the Court in *Towle* found an action for penalties analogous to an action on assumpsit; however, the trial court misinterprets the ruling and applicability of *Towle*.

In *Towle*, a statute allowed a plaintiff whose domestic animals were harmed by a dog to seek recovery from the town. *Towle*, 48 N.H. at 58. Under the statute, the town unilaterally determined the amount of damages and paid the plaintiff. *Id.* at 63. The town could then recover that same amount from the dog's owner as a "penalty," with no chance for the owner to dispute the calculation of damages. *Id.* at 58, 63. *Towle* essentially states that the statute at issue took what was otherwise indisputably a simple common law action for damage to property and bifurcated it in a manner that deprived the plaintiff of the right to be heard. *Id.* at 63. (affirming that "[t]he owner of the animals is the real party injured" and repeatedly referring to the so-called "penalty" as "damages"). Although "called a forfeiture or penalty" to the town, the action in *Towle* was clearly one to recover damages, and the defendant, therefore, maintained the same

[15] The trial court itself uses the phrase "equitable penalty" when describing certain forms of relief under federal law. *See* BSR br. at 61.

right to defend against it. *Id.* at 62-63 ("His interest in the question of damages is the same whether he pays the amount to the owner of the animals or to the town . . . ."). In *Towle*, the legislature did nothing more than codify a common law claim for damages, call it a "penalty," and clumsily separate the damage calculation from the fault determination. *See id.* at 58-59.

Most importantly, *Towle does not say* that actions to recover penalties should be considered actions in assumpsit; it states that the infirm statute at issue (enacted in 1863) took what was a common-law claim for damages, wrested it from the plaintiff, and changed it into a claim that the town could bring in assumpsit. *Id.* at 58. The statute, not the common law, created the type of action. *Id.* ("*By the statute*, after such order has been drawn the town may recover in an action in assumpsit . . . .") (emphasis added). Further, the Court determined that the damage assessment must be presented to a jury, not because it involved a penalty, because it was over $1,500, or because it was an action in assumpsit but because it involved "property,"—i.e., domestic animals. *Id.* at 63 (stating that the constitutional "provision . . . guarantees the right of trial in all controversies relating to property, unless a different usage prevailed before the constitution was adopted"). *Towle*, therefore, is entirely inapposite. [16]

[16] Interestingly, the court in *Towle* premised its entire decision on the jury being able to decide the "amount" of damages, not just whether the defendant was responsible for the injury. If applied to the type of action here, this would mean that the jury would determine not just whether the defendant should be penalized, but the amount of the penalty itself—something the trial court specifically said would not occur. *See Towle*, 48 N.H. at 64-65; *see also* BSR br. at 60-61.

IV. BSR'S ALLEGATIONS OF FRAUD DO NOT CREATE A RIGHT TO A JURY TRIAL.

A. Including an Allegation of Fraud Does Not Transform an Action Under a Contemporary, Comprehensive Statute into a Common-Law Action for Fraud.

BSR's petition seeks multiple forms of relief against Ridlon, all as set forth in the USA. In it, BSR recites instances of fraud when describing Ridlon's corrupt behavior. The trial court took this to mean that "[w]hile the remedy the BSR requests is cast in equitable terms . . . its claim is in fact one of fraud." BSR br. at 54. The trial court further claimed that the type of fraud would be heard by a court of law rather than a court of equity. *Id.* at 59-61. The argument above demonstrates that BSR's action is statutorily created, not a codification of existing common law, and, as such, the Court need not inquire further. In addition, as discussed above, both the statute and the relief sought are equitable in nature. The trial court's attempt to find a comparison to fraud cannot change this.

Significantly, this Court already rejected substantially the same argument with respect to the CPA. *Hair Excitement*, 158 N.H. at 369-70. In *Hair Excitement*, the plaintiff claimed that the action resembled a common law action for fraud. *Id.* at 369. The Court determined that a CPA violation involved different elements, a different burden of proof, and "broader damages than a common law fraud action." *Id.* Therefore, it "decline[d] to hold that RSA chapter 358-A is analogous to common-law fraud or deceit." *Id.* at 370.

Every reason this Court rejected the akin-to-fraud argument in *Hair Excitement* apply in this case, but with even greater force. Unlike common-law 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)

(requiring proof of intent for common-law fraud). The statute contains numerous violations with unique elements that in no way resemble common-law fraud, including but in no way limited to, prohibitions against:

- charging exorbitant fees;
- disclosing client information without consent;
- "induc[ing] excessive trading in a customer's account, or induc[ing] trading beyond [a] customer's known financial resources";
- "maintain[ing] discretionary accounts without written authorization"; and,
- failing to "make a record of [a] transaction" that includes the name of the customer, "the name, amount and price of the security," and "the date and time when [the] transaction took place."

See RSA 421-B:5-501(b)(2)(B), (C), (3)(A); *see also* RSA 421-B:5-502(b)(2)(A)-(V).

As with the CPA, the USA adjudicatory procedure requires proof by a preponderance of the evidence, as opposed to common-law fraud, which requires proof by clear and convincing evidence. *Compare* RSA 421-B:6-613(v) ("All decisions shall be reached upon the basis of preponderance of the evidence."), *with Hair Excitement*, 158 N.H. at 369 (noting that common law "[f]raud must be proved by clear and convincing evidence"). A person can violate the USA without regard to whether an investor actually relied upon any representation or before it caused any actual loss to the investor. *See, e.g.*, RSA 421-B:5-501(a)(3) (stating that it is unlawful for a person to "engage in an act . . . that operates *or would operate* as a fraud or deceit upon another person." (emphasis added)). Some distinctions between the USA and the common law could not be more clear. Specifically, the USA expressly provides: "'Fraud,' 'deceit,' and 'defraud' are not limited to common law deceit." RSA 421-B:102(17). Thus, by its plain language, the USA necessarily encompasses a broader scope of conduct than common-law fraud.

In this case, BSR relied on and sought relief for provisions that have no relation to common-law fraud. Specifically, the petition alleged that Ridlon violated his "fiduciary" duty to

his clients, asserting that he "had a duty to act primarily for their benefit," and that "the high frequency with which Ridlon sold . . . unnecessary services to his clients was wholly improper." BSR Appdx. 112-13. The petition relies in part on the fact that Ridlon acted "in his capacity as an investment adviser," noting that it is "unlawful for any person that advises others for compensation" to engage in the alleged behavior. *Id.* at 115-16. It demands forms of damages unavailable at common law; namely, not only restitution to his clients but "the costs of the investigation, and any related proceedings, including reasonable attorney's fees . . . ." *Id.* at 117. Generally, the petition asks that Ridlon "cease and desist from further violations," "pay restitution," "disgorge" certain funds, be "permanently barred from licensure," and bear the costs of "investigation and enforcement." *Id.* at 117-18. Therefore, just as in *Hair Excitement*, the current action bears no resemblance to common-law fraud and this Court should find no right to a jury trial.

B. Even if the Court Deemed This Case Analogous to Fraud, Such Claims Were Often Heard in Equity.

In addition, not all fraud claims were actions at law. "[C]onfusion has arisen because of the fact that both law and equity take jurisdiction over issues of fraud." *Dion v. Cheshire Mills*, 92 N.H. 414, 415 (1943). For instance, if a plaintiff admits execution of a contract but seeks cancellation (a type of rescission), the plaintiff must proceed in equity. *See id.* at 415-16. In *Stone v. Anderson*, the Court announced that courts in equity would always take jurisdiction over actions in fraud whenever a complete remedy could not be had at law. 26 N.H. 506, 518 (1853). It stated:

> [T]here can be no doubt of the jurisdiction of this court, as a court of equity, to entertain the cause; for this court has jurisdiction in equity, independent of any alleged necessity for discovery, in all cases of fraud, where complete and adequate relief cannot be had at law.

> It has jurisdiction in all cases of fraud, if the remedy at law is not perfect and complete . . . .

Id. at 518, 521. Although some actions might have been originally cognizable at law, equity jurisdiction "interfered upon the special ground of accident, mistake, *or fraud.*" *Davis*, 62 N.H. at 235 (emphasis added). Complex accounting cases, like ones involving shared access to accounts, were considered equitable and not tried to a jury. *See id.* ("Cases involving the investigation of accounts, particularly where the accounts are mutual or complicated, are within the equity jurisdiction of the court.").

Here, BSR's petition alleges that Ridlon managed the investment accounts of the victims. BSR Appdx. at 112-13. BSR alleges that Ridlon disguised optional financial-planning fees as mandatory annual fees. *Id.* at 113. For evidence of the complexity of these financial matters, the Court need only look to the attachment to the staff petition, which contains over fifty pages of accounting spreadsheets. *See generally id.* at 119-170. Finally, Ridlon owed and allegedly violated a fiduciary duty to his clients to whom he gave investment advice. *See* RSA 421-B:5-502(b)(2) ("A person who is an investment advisor . . . is a fiduciary and has a duty to act primarily for the benefit of [his] clients."). Equity often asserted jurisdiction over fiduciaries. *See Wentworth v. Waldron*, 86 N.H. 559, 561 (1934) ("Matters affecting the conduct of fiduciaries which have not been definitely placed by statute within the exclusive jurisdiction of probate courts are still cognizable in equity"). Therefore, to the extent the petition touches upon fraud, it does so with respect to complex financial matters and fiduciary relationships for which courts of law could not provide an adequate remedy. Such cases would traditionally be heard in equity without a jury.

V. THE TRIAL COURT ERRED IN FINDING SEVENTH AMENDMENT CASES

"COMPELLING."

A. The Seventh Amendment Does Not Apply to the States.

Having misapplied *Morrill* and *Henniker*, and having failed to undertake an analysis similar to that in *Hair Excitement*, the trial court then left behind a robust and binding body of New Hampshire precedent and instead embraced its conception of a federal test, thereby embarking on what has been described as "an 'abstruse historical' search for the nearest 18th century analog." *Tull v. United States*, 481 U.S. 412, 421 (1987) (describing federal Seventh Amendment jurisprudence). However, the Seventh Amendment simply does not apply to the states. *See Hi-Tech Pharms., Inc. v. Cohen*, 208 F. Supp. 3d 350, 354 n.2 (D. Mass. 2016) ("[T]he Seventh Amendment has not been held applicable to the states through the due process clause of the Fourteenth Amendment."); *Opinion of the Justices*, 121 N.H. 480, 482-83 (1981). In addition, although faced with the question many times, this Court has not previously cited to the Seventh Amendment as guidance when determining when a jury trial is required in New Hampshire.[17] There is no reason to rely on it here.

B. The Seventh Amendment Cannot Be Used as Guidance in This Context Because the Federal and State Tests Substantially Differ.

The trial court held that "the right guaranteed by the Seventh Amendment is correlative to the right guaranteed by Part I, Article 20 of the New Hampshire Constitution." BSR br. at 58. In reality, the federal and state tests differ substantially. In New Hampshire, courts look to whether a right to a jury trial existed for a particular cause of action at the time that the State Constitution was enacted. *See Hair Excitement*, 158 N.H. at 368. In contrast, as noted in *Tull*, federal courts

[17] The State has found only nine N.H. Supreme Court cases directly citing to the Seventh Amendment in any context, usually by way of a passing reference, and never to determine whether the right to a jury trial exists. Although there may be other cases indirectly referencing federal law, it appears that this Court has previously found the Seventh Amendment far from "compelling."

focus on the relief sought. *Tull*, 481 U.S. at 421 ("[C]haracterizing the relief sought is 'more important' than finding a precisely analogous common-law cause of action in determining whether the Seventh Amendment guarantees a jury trial."). The Pennsylvania Supreme Court illuminated this distinction, stating:

> [I]mportantly, as noted above, this court has viewed the proper analysis under the Pennsylvania Constitution to consist of, *inter alia*, an inquiry into whether the jury trial existed for the cause of action at common law at the time of the adoption of our Constitution. Conversely, federal case law examines whether the statutory cause of action is analogous to a common law claim for which there was a right to trial by jury, with focus . . . on the relief provided.

Wertz v. Chapman Twp., 741 A.2d 1272, 1278 (Pa. 1999). Similarly, the Wisconsin Supreme Court held: "As [the United States Supreme Court] cautioned, the fact that the subject matter of a modern statutory action and an 18th-century English action are close equivalents 'is irrelevant for Seventh Amendment purposes,' because 'that Amendment requires trial by jury in actions unheard of at common law.'" *State v. Schweda*, 736 N.W.2d 49, 60 n.9 (Wis. 2007) ("[T]he approach of the federal courts in interpreting the federal Constitution places emphasis on the character of the relief sought.").

In contrast, New Hampshire courts determine if the case is one "for which the jury trial right existed when the constitution was adopted in 1784." *Hair Excitement*, 158 N.H. at 368. When the legislature "creates new statutory rights that did not exist at common law," the analysis ends. *Id.* A court may include the "nature of the relief sought" in its analysis but only in conjunction with the "nature of the case" generally and only to "ascertain whether the customary practice included a trial by jury before 1784." *Id.* In the case of "codified rights," the Court will "further consider the comprehensive nature of the statutory framework." *Id.*

In *Hair Excitement*, once the Court examined the purpose of the statute and its comprehensive nature, it ruled that the right to a jury trial did not attach, without examining the nature of the relief sought. *Id.* (ruling that, because of the purpose of the statute and its comprehensive nature, "our constitution does not confer the right to a jury trial for a claim under RSA chapter 358-A"). The Court went on to provide additional analysis of the statute but a definitive conclusion had already been reached. *Id.* at 369. In any event, never is the search for an equivalent action that existed in 1784 entirely "irrelevant" as it is with the Seventh Amendment. *See Schweda*, 736 N.W.2d at 60 n.9. Therefore, in addition to being wholly inapplicable, the federal test diverges sharply from the one used in New Hampshire.

C. By Broadly Sweeping All of BSR's Claims Under Common-Law Fraud, the Trial Court Ignored the Ubiquitous Recognition that Administrative Actions Are Fundamentally Different Proceedings.

Even if this Court relied on Seventh Amendment jurisprudence, the right to a jury trial would have no application to BSR's administrative action. Although the trial court found "*Tull* and its progeny . . . [to be] compelling authority" it completely ignored *Tull's* treatment of administrative proceedings. BSR br. at 58. Contrary to the trial court's ruling, *Tull* found that the right to a jury trial "is not applicable to administrative proceedings." *Tull*, 481 U.S. at 418, n.4.

Nevertheless, the trial court inexplicably held that 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." BSR br. at 57-58. However, all of the cases cited by the trial court were already in federal court; none dealt with the right in the context of an administrative proceeding. *SEC v. Lipson*, 278 F.3d 656, 659 (7th Cir. 2002); *SEC v. Spencer Pharm., Inc.*, 58 F. Supp. 3d 165 (D. Mass. 2014); *SEC v. Mattera*,

2013 U.S. Dist. LEXIS 174163 (S.D.N.Y. Dec. 9, 2013); *SEC v. Badian*, 822 F. Supp. 2d 352 (S.D.N.Y. 2011). In truth, the right to a jury trial does not attach to an administrative action brought by the U.S. Securities Exchange Commission ("SEC").

In the past year, the United States Court of Appeals for the Eleventh Circuit has reaffirmed that "it is well-established that the Seventh Amendment does not require a jury trial in administrative proceedings designed to adjudicate statutory public rights." *Imperato v. United State SEC*, No. 15-11574, 2017 U.S. App. LEXIS 14915, at *11 (11th Cir. Aug. 11, 2017). In addition, several SEC decisions have found the same. *See John Thomas Capital Mgmt. Grp.*, Initial Decision Release No. 693, 2014 SEC LEXIS 4162, 2014 *6 (ALJ Oct. 17, 2014; *In the Matter of Harding Advisory, LLC, et al.* 2014 SEC LEXIS 938, 2014 *35 n.46 (ALJ Mar. 14, 2014); *see also Jarkesy v. S.E.C.*, 803 F.3d 9, 28 (D.C. Cir. 2015) (noting the administrative determination that the right to a jury trial did not apply).

The fact that administrative adjudication does not violate the Seventh Amendment was addressed over forty years ago. In, the seminal case of *Atlas Roofing Co. v. OSHRC*, 420 U.S. 442 (1977), employers subject to the Occupational Safety and Health Act of 1970 (commonly referred to as "OSHA") claimed that the Seventh Amendment guaranteed them a right to a jury trial, asserting that an action "for civil penalties for violation of a statute is a suit for a money judgment which is classically a suit at common law." *Atlas,* 430 U.S. at 449. They argued that "assign[ing] the function of adjudicating the Government's rights to civil penalties for violation of the statute to . . . an administrative agency" violated that right. *Id.* at 450. The United States Supreme Court disagreed, stating:

> At least in cases in which "public rights" are being litigated - e.g., cases in which the Government sues in its sovereign capacity to enforce public rights created by statutes within the power of Congress to enact - the Seventh Amendment does not prohibit

> Congress from assigning the factfinding function and initial adjudication to an administrative forum with which the jury would be incompatible.

Id. at 449-50 (internal citations omitted). *Tull* itself cites *Atlas* for the very proposition that "*the Seventh Amendment is not applicable to administrative proceedings*" due to "the practical limitations of a jury trial," questioning "its functional compatibility with proceedings outside of traditional courts of law." *Tull*, 481 N.H. at 418 n.4 (emphasis added).

The pronouncement in *Tull* on administrative law has become binding precedent in other states and courts have refused to credit *Tull* without also accepting the admonition relative to administrative hearings. For instance, an Alabama appeals court analyzed a request for a jury trial in an administrative proceeding within the context of *Tull* and ruled that:

> The [defendant's] reliance on *Tull* is misplaced. Footnote 4 of the Supreme Court's opinion in *Tull* states that "the court has also considered the practical limitations of a jury trial and its functional compatibility with proceedings outside of traditional courts of law in holding that the Seventh Amendment is not applicable to administrative proceedings." Thus, since the hearings conducted by the Department and the Commission were administrative proceedings, we find that [the defendant] was not entitled to a trial by jury.

Alabama Dep't of Envtl. Management v. Wright Bros. Constr. Co., 604 So. 2d 429, 433-34 (Ala. Civ. App. 1992) (citations omitted); *see also Tracey Mining Co. v. Commonwealth*, 544 A.2d 1075, 1077 (Pa. Commw. Ct. 1988) (denying a request for a jury trial and noting that *Tull* anticipated that the practical limitations of a jury trial "may render it inapplicable to administrative proceedings"). Opinions limiting the availability of a jury trial in administrative proceedings appear in many jurisdictions for multiple reasons. *See Tracey Mining Co.*, 544 A.2d at 1078 (finding no right to a jury trial in the administrative context and holding that "[i]t would not be practical for a jury to confront complex factual and highly technical administrative determinations"); *Maryland Aggregates Ass'n v. State*, 655 A.2d 886, 897 (Md. 1995) ("[T]he right under the Maryland Constitution to a civil jury trial concerns the allocation between judge

and jury of the responsibility for decision making in judicial proceedings" and therefore the question in an administrative proceeding "[s]imply does not arise") (quotations and citation omitted).

Overall, an overwhelming number of states do not provide for a jury trial for administrative actions like the one in this case. As stated by the Supreme Court of California:

> A number of our sister states have addressed state constitutional jury trial challenges to similar administrative schemes. These decisions, which involve money awards by "antidiscrimination" commissions, and by a "landlord-tenant" board, unanimously hold that no jury trial right exists as to adjudication of a matter otherwise properly within the regulatory power of an administrative agency.

McHugh v. Santa Monica Rent Control Bd., 777 P.2d 91, 112 (Cal. 1989) (also noting a federal exception to the requirement for a jury trial for governmentally-enforced "public" rights) (citations omitted).

Nor does New Hampshire law imply any resistance to permitting administrative proceedings without a jury. In fact, this Court has expressly recognized that "[d]ecisions upon questions of fact by various administrative bodies have long been an integral and accepted procedure in our government system." *Pomponio v. State*, 106 N.H. 273, 275 (1965) (*citing Boody v. Watson*, 64 N.H. 162 (1882)).[18]

Although fully briefed, the trial court failed to provide any analysis specific to administrative proceedings. The trial court's decision finds no support in federal law, in the law of other states, or in New Hampshire case law with respect to administrative actions like the one brought by BSR in this case.

---

[18] The New Hampshire Practice Series notes that "[a]t present, the rule [in New Hampshire] 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." 5 MacDonald, *Wiebusch on New Hampshire Civil Practice and Procedure* § 42.01 n.10 (3d ed. 2010).

CONCLUSION

For the foregoing reasons, the State requests that this Court reverse the decision of the trial court and rule that Ridlon is not entitled to a jury trial in BSR's administrative action.

ORAL ARGUMENT

BSR respectfully requests that the Court schedule this matter for full-court oral argument, as the Court's calendar permits. If the Court grants this request, Senior Assistant Attorney General K. Allen Brooks will appear for oral argument on behalf of BSR.

The appealed decision is in writing and is appended to the brief.

Respectfully submitted,
New Hampshire Bureau of Securities Regulation
By its attorney,

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Attorney General

May 21, 2018

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CERTIFICATE OF SERVICE

I hereby certify that two copies of the foregoing were sent this 21st day of May 2018, postage prepaid, to Brian M. Quirk, Esq.; Nathan R. Fennessy, Esq.; Preti Flaherty Beliveau & Pachios PLLP; 57 North Main Street; P.O. Box 1318; Concord, NH 03302-1318; *Counsel for Mr. Ridlon*

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NOTICE OF DECISION

File Copy

Case Name: **Curtis S. Ridlon v The State of New Hampshire, Department of State, Bureau of Securities Regulation**
Case Number: **217-2017-CV-00405**

Enclosed please find a copy of the court's order of December 19, 2017 relative to:

ORDER

December 19, 2017

Tracy A. Uhrin
Clerk of Court

(485)

C: Brian M. Quirk, ESQ; Scott E. Sakowski, ESQ; K. Allen Brooks, ESQ

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.).

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[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);

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[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

Richard B. McNamara,
Presiding Justice

RBM/