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In cases involving both legal and equitable claims, it is possible and may make sense for plaintiffs to seek a bench trial in lieu of a jury trial. Under California law, legal claims entail a right to a jury, but equitable claims do not. In a case involving both legal and equitable claims, California law generally requires that the court try the equitable claims first, before holding a jury trial for any remaining legal claims. This article discusses pleading and motion strategies that plaintiffs can employ to try to avoid a jury trial in such “mixed” cases, where suitable remedies are available in equity.

Plaintiffs may wish to avoid a jury trial for a variety of reasons, including because a judge is better suited to decide a particular case. For example, a case may involve complex business transactions that are difficult for jurors to digest. Such complexity often presents a greater challenge for plaintiffs because they usually have the burden of proof and must convince three-quarters of the jurors to prevail. Further, some jurors may sympathize with certain defendants and allow those sympathies to influence their deliberations. This is often a concern where the plaintiff is a large business or wealthy individual with greater resources than the defendant, or when the plaintiff is more educated, sophisticated, or proficient in English than the defendant. Judges, by way of their training and experience, are often more adept at giving the appropriate weight to such factors.

Plaintiffs may also prefer bench trials because they are generally more efficient and cost less. Even before the COVID-19 Pandemic (“Pandemic”), jury trials were more expensive because they took longer to get to trial, and even longer to try. The Pandemic has placed unprecedented pressures on court dockets and substantially delayed civil jury trials in most jurisdictions. Reports of civil jury trials actually proceeding during the Pandemic are scarce, with many trial-ready cases still waiting for a trial date. Without the pressure of an impending trial, many cases that under normal circumstances might have settled on the eve of trial, have yet to resolve. In contrast, bench trials have been proceeding during the Pandemic, in part because they can be conducted more effectively over Zoom or in a socially-distanced setting.

To illustrate the strategies discussed herein, we will use examples from fiduciary disputes, which typically involve both legal and equitable claims and where suitable remedies are often available in both law and equity. However, these strategies may be applicable to other types of litigation where suitable remedies are available in equity.

## I. Pleading Strategies To Secure A Bench Trial

It is usually premature to structure the initial complaint specifically to avoid a jury trial. Plaintiffs, however, do not need to plead an exclusively equitable case in the initial complaint to avoid a jury trial. As we will discuss, it is possible to plead both legal and equitable claims at the outset, but still preserve the ability to secure a bench trial. Plaintiffs should plead all available claims at the outset, even if equitable claims provide a sufficient remedy, because the legal claims may have other advantages that are not readily apparent at the outset. For example, in a typical fiduciary dispute involving self-dealing by the fiduciary defendant who runs the business, the shareholder plaintiffs will likely have an equitable breach of fiduciary duty claim. But plaintiffs should also plead fraud (if the facts support it) and any contract claims under the parties’ written agreements. Even though fraud and contract claims may not offer any additional remedies over a fiduciary duty claim and may entail a jury right, they may be necessary if, for some reason, the court finds that the equitable claims are not viable. For instance, if the defendant fiduciary successfully challenges plaintiffs’ individual or derivative standing to bring a fiduciary duty claim, the fraud and contract claims might be the only viable claims. These issues are not always obvious at the initial pleading stage, so plaintiffs should try to preserve all available claims and remedies for as long as possible, even if plaintiffs know they want a bench trial from the outset of litigation.

Preserving the ability to secure a bench trial at a later stage of litigation continues with the initial case management conference. Plaintiffs will have to specify their request for a jury or bench trial in the initial case management statement. The best practice is generally to pay the jury fees and designate the case for a jury trial because, as we will discuss, it is possible to abandon a jury trial and seek a bench trial later. Plaintiffs who do not timely pay jury fees and designate the case for a jury trial, on the other hand, risk waiving their right to a jury and will be stuck with a bench trial if defendants elect that option.

Plaintiffs should also, however, preview in the initial case management that some or all of the pleaded claims and defenses are equitable, and that they will file a motion to bifurcate the legal and equitable claims at the appropriate time. Otherwise, the court may issue a scheduling order setting a jury trial because at least one party requested it in their case management statement.

Ultimately, securing a bench trial in a mixed case involving legal and factual claims requires dismissing the legal claims altogether or convincing the court to try the equitable claims first. We will discuss the mechanics of how to do this in the next section, but first, it is important for plaintiffs to carefully evaluate the strength of their equitable claims relative to their legal claims and whether the equitable claims provide suitable remedies. Plaintiffs must then

decide whether their legal claims are necessary or whether they can proceed to trial solely on their equitable claims without compromising the strength of their case.

In the example discussed above, if plaintiffs can overcome the standing issues the equitable fiduciary duty claim is stronger and would provide the same remedies as the legal claims, making it unnecessary to try the fraud and contract claims to the jury. The fiduciary duty claim in that example alleges a self-dealing transaction, which is a breach of the duty of loyalty, so the fiduciary defendant usually has the burden of proving that the transaction is inherently fair to the company and its shareholders. This is a high burden for the defendant to satisfy. In contrast, plaintiffs would have the burden of proof on the legal contract and fraud claims.

As another example, while it is common at the outset of a fiduciary dispute to plead both a direct and a derivative claim for breach of fiduciary duty, it is often unnecessary to try both. Under some circumstances, a direct claim for breach of fiduciary duty may entail a right to a jury, whereas a derivative claim usually does not. In those situations, if there are no impediments to the derivative claim, *e.g.*, defendant does not intend to contest plaintiff's standing to assert a derivative claim and all of the remedies plaintiff seeks are available through a derivative claim, the plaintiff should consider dismissing the direct claim and proceeding with a bench trial on the derivative claim.

## II. Motion Strategies To Secure A Bench Trial

Securing a bench trial, either by asking the court to try the equitable claims first or by dismissing the legal claims, is likely to require motion practice as to which triable claims entail a right to a jury. That issue is often contested because (1) the answer is not always obvious, *i.e.*, based on bright-line rules, and (2) defendants want a jury trial for many of the same reasons that plaintiffs want to avoid a jury trial.

The law on which claims entail a right to a jury is dependent on the underlying facts of the case, not how a claim is styled. California courts apply the "gist of the action" test to decide whether a claim is legal or equitable. This test analyzes whether the action was one that was triable by a jury under English common law in 1850, when the California constitution was first adopted. Under this test, the court is not bound by the form of the cause of action or the prayers for relief, but rather by the nature of the rights involved and the facts of the case. If the gist of the action was only cognizable in equity in 1850 and the prayer for relief requires the application of equitable doctrines, there is usually no right to a jury trial. For example, the gist of a typical fiduciary claim by a shareholder against directors and/or officers for breach of the duty of loyalty is equitable because the duty of loyalty arises out of trust principles and requires the application of equitable doctrines such as "inherent fairness." Allegations of fraud as a basis for the breach of fiduciary duty, however, could make the claim legal.

Further complicating the issue is the applicable choice of law to the claim. If, for example, Delaware law governs, as is sometimes the case in fiduciary disputes involving Delaware business entities, then California will apply Delaware law to decide if the claims entail a right to a jury.

As you might infer from this discussion, there is a substantial body of case law on the classification of claims as legal or equitable, which is beyond the scope of this article. The main takeaway here is that the classification of claims is not straightforward, so it is often contested and requires motion practice.

The preferred approach to securing a bench trial is a "Motion to Try Equitable Claims First" because it does not require plaintiffs to dismiss viable legal claims before trial. Under the well-established "equity first" rule in California, trial courts are encouraged to try equitable claims first, without a jury, because it promotes judicial economy by potentially obviating the need for a jury trial. If the trial court's determination of equitable issues is also dispositive of the legal issues, or if plaintiffs voluntarily dismiss the remaining legal claims after prevailing on the equitable claims, nothing further remains for a jury.

The strength of such a motion depends on to what extent the equitable claims predominate and would obviate the need for a jury trial on the remaining issues. The court may not be inclined to grant such a motion and potentially complicate the presentation of evidence at trial merely to accommodate an equitable claim that comprises of only a small portion of the overall case. Plaintiffs, thus, should persuade the court (1) that the putative equitable claims entail no right to a jury and (2) that a bench trial on those claims will make a jury trial unnecessary because, for example, the court's determination of the equitable issues is likely to be dispositive of the legal issues, the equitable remedies are cumulative of or would moot the legal remedies and/or that plaintiffs will dismiss their legal claims if they prevail on the equitable claims.

If the court is not willing to try the equitable claims first, plaintiffs will need to dismiss their legal claims in order to secure a bench trial. This only makes sense if plaintiffs can completely eliminate the risk of a jury trial. There may be no such risk in some cases where defendant has no argument that the remaining claims entail a right to a jury. However, as discussed above the parties often do not agree on which claims entail a right to jury.

One way for plaintiffs to present this issue to the court is to file a "Motion to Vacate Jury Trial" before dismissing

any claims and inform the court in that motion that plaintiffs will dismiss their legal claims if the court decides that the remaining triable claims are equitable. The motion should set forth why, under the applicable law, the remaining triable claims are equitable with no right to a jury. If the court decides in plaintiffs' favor, plaintiffs can dismiss their legal claims with confidence that doing so will avoid a jury trial.

For either motion, practically speaking plaintiffs have the burden of demonstrating that the triable claims do not entail a right to a jury. Trial courts are usually reluctant to deny a defendant a jury trial because it involves a fundamental right under the California constitution and if the Court of Appeal finds that the trial court's decision was erroneous, it would likely require a new trial. As such, a trial court is unlikely to grant the motion unless it is confident that none of the triable claims entail a right to a jury. If the trial court has any doubt as to the matter, it has the option of holding a jury trial on all issues and deciding after trial whether some or all of the jury's findings were advisory such that the trial court can independently decide them. This is often the safer option for the trial court because if its findings agree with the advisory jury's findings, then even if the trial court wrongly decides whether the claim entails a jury right, there may not be an appealable error because the trial court and the jury's findings are consistent. The plaintiff, however, has failed to avoid a jury trial.

While motions to vacate a jury trial or try equitable claims first are often brought on the eve of trial as *in limine* motions, the better practice is to bring them as noticed motions as early as plaintiffs are ready to narrow their case for trial. As discussed above, such motions often raise complex and esoteric issues and plaintiffs have the practical burden on such motions. Therefore, plaintiffs should give themselves sufficient time to convince the court of their position, which might require multiple rounds of briefing and/or argument. Accordingly, bringing such motions early offers the best chance that a court will decide them in plaintiffs' favor.

### III. Conclusion

There are a variety of reasons to prefer a bench trial over a jury trial, including the costs of a jury trial, the jury's ability to understand a complex case, and how a plaintiff or defendant might present to a jury. The ongoing Pandemic and its impacts on the courts' trial calendars is another reason for plaintiffs to consider whether they might prefer a bench trial. A bench trial may not be an option in legal cases unless all parties waive the right to a jury. However, in cases involving both legal and equitable claims, where suitable remedies are available in equity and the burden of proof and other considerations weigh in favor of the equitable claims, plaintiffs can utilize the strategies discussed herein to secure a bench trial.