

March 5, 2024

Hon. Justice William Dato (Acting Presiding Justice)  
Hon. Justice Truc T. Do  
Hon. Justice Julia C. Keley  
California Court of Appeal  
Fourth Appellate District, Division One  
750 B Street, Suite 300  
San Diego, CA 92101

**RE: *The People of the State of California v. Ashford University, LLC, et. al.*  
(Case No. D080671)**

Dear Justices Dato, Do, and Keley:

The Center for Consumer Law and Economic Justice at the University of California, Berkeley, School of Law writes to respectfully request that this Court order its opinion in *People v. Ashford University, LLC* certified for publication. (Cal. Rules of Court, rule 8.1120.)

The Court's opinion in *Ashford* provides a thoughtful consideration of a critical but under-analyzed issue: civil penalties in public prosecutions. The opinion provides useful guidance for trial courts determining the appropriate amount of civil penalties under the unfair competition law (UCL) and the false advertising law (FAL). And the opinion underscores a matter of enormous public interest: a for-profit university whose deception and misrepresentation ultimately cost students and taxpayers millions of dollars.

The opinion is well-reasoned, valuable, and meets at least three of the standards for publication set out in the Rules of Court. (Cal. Rules of Court, rule 8.1105(c)(2), (3), (6).) We believe it belongs in the Official Reports.

### **Interest of Amici Curiae**

**The Center for Consumer Law and Economic Justice** is a research, advocacy and teaching center housed at the law school of the University of California, Berkeley. The Center works to enhance the study and practice of consumer law, and toward the creation of a safer and fairer marketplace for all. The Center frequently participates as *amicus curiae* in appellate cases in California and around the nation.

**I. The Opinion Should Be Published Because It Meets At Least Three Standards Set Forth in California Rule of Court 8.1105(c).**

Rule 8.1105(c) of the California Rules of Court specifies that if an opinion meets any one of the nine standards listed in the rule, that opinion “should” be certified for publication. The opinion in *Ashford* meets at least three of those standards.

**A. The opinion “explains ... an existing rule of law.” (Cal. Rules of Court, rule 8.1105(c)(3)).**

The Court’s opinion “explains [a] rule of law” by delineating the relief afforded by California’s Unfair Competition Law (UCL) and False Advertising Law (FAL).

The opinion helpfully explains how to count and calculate UCL and FAL violations for the purpose of civil penalties, and how to analyze whether a penalty is excessive. The opinion clarifies that a trial court may rely on statistical evidence developed by experts to determine the number of UCL and FAL violations—doing so does not amount to a “trial by formula.” (Opn. at pp. 29-33.) Moreover, the opinion confirms that a trial court has the equitable authority to determine the number of violations for which a defendant may properly be held responsible. (Opn. at p. 35.) Thus, it is within the trial court’s discretion to count each deceptive phone call as a separate violation. (Opn. at p. 37.) In addition, the opinion clarifies that penalty awards may account for deceptive statements made to non-residents of California. (Opn. at p. 47.)

Finally, the opinion clarifies the proper test for determining the constitutionality of a civil penalty: it is not, as defendants contended, the *Gore* guideposts. (Opn. at p. 56.) As the Court noted, since the guideposts address punitive damages, not civil penalties, *Gore* is a “poor fit” for assessing disproportionality of civil penalties in UCL and FAL cases. (Opn. at p. 55.) Instead, the *Bajakajian* test from *Reynolds* is, the Opinion aptly concludes, the proper test to analyze the constitutionality of a civil penalty. (Opn. at p. 53.)

**B. The opinion “applies an existing rule of law to a set of facts significantly different from those stated in published opinions.” (Cal. Rules of Court, rule 8.1105(c)(2)).**

To our knowledge, the California courts of appeal have not published an opinion considering civil penalties for UCL and FAL violations in the context of student loans or online universities. In fact, few opinions deciding public prosecutions are ever published, since not many such cases are filed and only rarely

are those brought to trial. That is a particularly powerful reason why this opinion, which applies the law to this increasingly important issue, would be a valuable addition to the Official Reports.

Further, this opinion is an especially useful and clear example of the proper way to apply the UCL and FAL to a misrepresentation scheme. Since a court determines what amounts to a UCL or FAL violation on a “case-by-case basis,” the specific facts in *Ashford* are crucial. (See opn. at p. 25.) The unique facts in *Ashford* make it notably different from published opinions. Indeed, the Court’s distinguishing of those cases provides an object lesson in the extension of existing law to a new and instructive factual situation:

“Defendants neither argue nor establish that errors like those that occurred in *Duran* were committed by the trial court here.” (Opn. at p. 31.)

“[O]ur holding in *Johnson & Johnson* was expressly limited...” (Opn. at p. 33.)

“[C]ourts have limited *Jayhill* to its facts” and “[I]t is unlikely that *Jayhill* intended to establish a test for determining the number of violations applicable to all situations.” (Opn. at p. 35.)

“And while defendants cite *Olson* [...] as an example of a case in which the Attorney General argued for a per-victim approach, the prior argument of a party in another case has no bearing on our decision in this case.” (Opn. at p. 38.)

“As for defendants’ reliance on *Philip Morris*, that case’s prohibition against using punitive damages to punish a defendant for injuries it inflicts on nonparties does not apply in this context.” (Opn. at p. 42.)

If published, the Court’s thorough, fact-intensive opinion would provide helpful guidance to trial courts confronted with UCL and FAL claims in new contexts.

**C. The opinion “[i]nvolves a legal issue of continuing public interest.” (Cal. Rules of Court, rule 8.1105(c)(6)).**

“The nature of defendants’ misrepresentations, the overwhelming number of violations, and the length of time over which they were committed, all indicate a serious level of culpability.” (Opn. at p. 73.)

Student loan debt is a nationwide crisis of great public concern. U.S. borrowers hold \$1.6 trillion in federal student loan debt—and 3.8 million

Californians owe over \$142 billion of that debt.<sup>1</sup> Ashford University generated revenues of hundreds of millions of dollars annually, the vast majority from federally-backed loan and grant programs. (Opn. at pp. 3-4.) To meet its bottom line, Ashford made millions of misleading phone calls to prospective students all over the country. (Opn. at p. 13.) Ashford’s misrepresentation resulted in thousands of students left with useless degrees and insurmountable debt. (See opn. at pp. 57-59.) Even worse, Ashford targeted an already-vulnerable population: students from low-income backgrounds with “complex” and “difficult” lives. (Opn. at p. 4.)

This Court’s opinion, if published, would provide a note of warning to for-profit online colleges set up to attract federal student loan dollars and provide little but debt and disappointment in return. It also would send a beacon of hope to the myriad students who have been swindled by these schools, sending the message that redress is possible.

## II. Conclusion

We respectfully request that this Court order that its opinion in this case be certified for publication.

Sincerely,



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<sup>1</sup> Jacob Jackson & Darriya Starr, *Student Loan Debt in California*, Public Policy Institute of California (June 2023), <https://www.ppic.org/publication/student-loan-debt-in-california/>.