ASSOCIATION OF BUSINESS TRIAL LAWYERS

abtl REPORT

ORANGE COUNTY

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Q&A with the Honorable Glenda A. Sanders
By William C. O'Neill

[*Editorial Note: Judge Sanders started her legal career in South Africa as an Assistant Professor of Law at the University of Cape Town, and then later practiced as a Barrister in Durban, South Africa. In 1986 she joined Latham & Watkins in Orange County where she practiced for 15 years as an associate and partner. Judge Sanders was sworn in as a Superior Court Judge in January 2003. In August 2012, Judge Sanders was elected to the position of Assistant Presiding Judge by the Judges of the Orange County Superior Court.*]

Q: Having been the Assistant Presiding Judge for about nine months now, how would you describe the role and responsibilities of the Presiding and Assistant Presiding Judges?

A: They are quite different from those of a trial judge. The Presiding Judge (and by extension the Assistant Presiding Judge) is ultimately responsible for the administration of every aspect of the Court. He is the face of the court when interacting with the other branches of government, the public, the media

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The "Right to Repair Act" Ten Years Later
By Bonnie J. Bennett

Ten years after its enactment, the Right to Repair Act or "SB800" (*Civil Code* §895, et seq.), is making its presence known. SB800 applies to new residential construction. The act does not apply to commercial construction or condominium conversions. (*Civil Code* §896). The stated intent of SB800 was to reform construction defect law by saving money, reducing lawsuits and achieving what most homeowners want, their homes repaired. The reality is that SB800 was a response to the Economic Loss Doctrine as set forth in *Aas v. Superior Court* (2000) 24 Ca1.4th 627. This article will set forth a summary of SB800, its practical problems and this author's opinion as to its success.

Summary of Statute

SB800 applies to residential dwellings units (including condominiums) where the contract was signed by the seller on or after January 1, 2003. SB800 also applies to subsequent purchasers and homeowner associations. (*Civil Code* §945.) The statute sets forth building standards for the home. (*Civil Code* §896.) Generally, these standards state that doors and windows shall not leak, concrete slabs should not have significant cracks, the soils under the residence shall not cause damage to the structure, stucco shall not have significant cracks or separations, plumbing systems shall operate properly, etc.

There are a variety of requirements that a builder has to comply with in order to maintain its right to repair any home that reports a problem. Specifically, the builder must do the following:

- Maintain the name and address of an agent for service

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The President's Message

By Mark D. Erickson

As we turn the corner on the half-way mark of the year, ABTL has been very busy and I hope that you have had a chance to participate in our Spring Activities. At our April dinner program, we revisited the FDIC/IndyMac trial with the trial team from Nossaman that achieved a $169 million verdict for its client. In May, Judge Gail Andler was kind enough to open her courtroom for a brown bag lunch presentation on strategies for keeping depositions civil. The event was a sell-out and it is encouraging to know that our program emphasis on civility this year is striking a chord with our membership.

June was ABTL's "giving back" month. On June 12th, ABTL hosted its Wine Tasting Fundraiser for the Public Law Center with the net proceeds from the dinner and wine sales donated to Orange County's pro bono legal service center. While the donations are still being counted, it is already clear that ABTL raised a record amount for PLC thanks to your generosity and that of the ABTL Board member firms. I think we all agree that our money could not go to a more worthy cause. In the spirit of support for PLC, I encourage each of you to find time to take on a pro bono case. I can tell you from personal experience that you will be hard-pressed to find a more appreciative client and a more rewarding experience than helping those forgotten find justice.

ABTL also donated sweat equity (literally) on June 28th by staffing a Habitat for Humanity Build Day in Santa Ana. Volunteers from Gibson Dunn & Crutcher, Crowell & Moring, Latham & Watkins, Orrick, Law Offices of Jeff Shields, and Haynes and Boone worked all day on a home that will go to a needy family.

When we return from our summer vacations, I encourage the partners and supervisors in our membership to evaluate the quality of mentoring we are providing to our younger lawyers. As we promote civility in our membership and our county generally, it is important to realize that our younger charges will imitate the behavior and tactics that we model. Are we doing

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For Whom the *Bell (v. Feibush*) Tolls
By Kathryn J. Besch

How does California law allow for treble damages in a breach of contract action and attorneys' fees where the contract does not provide for attorneys' fees? Until recently, litigants were out of luck on those issues. However, a recent published decision in *Bell v. Feibush* (2013) 212 Cal.App.4th 1041 opened the door to alternate remedies in disputes that constitute theft. In the business litigation realm, treble damages and attorneys' fees may be available in breach of contract cases where the contract was induced by false pretense.

The Bell Background

On January 15, 2013, the Fourth District Court of Appeal, Division Three addressed whether Penal Code section 496 permitted civil remedies in the absence of a criminal conviction. Specifically, section 496(a) makes receiving or buying property "that has been obtained in any manner constituting theft" a criminal offense punishable by imprisonment. Section 496(c) provides that any person "who has been injured by a violation of" section 496(a) may obtain treble damages, costs of suit, and attorney's fees. Critical to civil practitioners, the *Bell* court further addressed whether the phrase "constituting theft" also included taking of property by false pretenses, *i.e.,* fraud.

The *Bell* case arose from a loan based on false pretense. Defendant Igal J. Feibush ("Feibush") induced Plaintiff Sharon Bell ("Bell") to make a loan to Feibush for $202,500 based on Feibush's representation that he owned the trademark "Toughlove" and needed funds to settle litigation regarding his interests in the toughlove industry. Feibush told Bell that he intended to "launch a national 'revamped' version of Toughlove that would earn millions of dollars" after settling lawsuits in the toughlove industry (purportedly an industry focused on rehabilitation through strict counseling and other forms of "toughlove" treatment). (*Bell v. Feibush*, *supra,* at 1044.) Bell loaned Feibush $202,500, but Feibush

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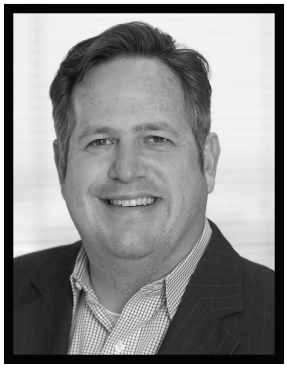
The Overlooked Characteristics of the Most Effective Business Litigators
By Kent Schmidt

When lawyers and laypersons alike think about the qualities of outstanding litigators, certain words and images invariably spring to mind: passionate and zealous oral advocacy; a meticulous and thoughtful strategist; or perhaps a thespian of the courtroom who knows how to persuade and charm a jury. For some, the image of a "junkyard dog" litigator whose tenacity outlasts an opponent represents the quintessential image of the type of attorney they want in their corner. As I contemplate the lawyers who have had the greatest impact on my development as a business litigator, and have achieved the most remarkable results for clients, a different characteristic comes to mind which may be the most important of all: creativity.



This may seem counterintuitive because lawyers are not usually known for being imaginative or creative. Apart from notable outliers in our profession, most of us act and look much the same; from our hairstyles and dark suits right down to our tasseled loafers. But the concept of creativity comes into greater focus when we contemplate the fact that every lawsuit or similar legal conflict at its core presents a problem that needs a solution. The conflicts that our clients face range from a minor lawsuit that is mostly just a nuisance to an intractable conflict between partners that threatens their future prospects to enjoy a return on years of investment and collaboration. Like many problems, litigation dilemmas often spawn ancillary problems ranging from a law firm invoice causing a CFO severe heartburn to intrusive discovery that uncovers additional legal concerns.

Difficult problems require extraordinary solutions and the best and brightest in the profession are first and foremost problem solvers who achieve superior results by applying outside-the-box thinking that others would have overlooked. This is what marks the masterful from the mundane. My longtime mentor and partner, Roger Magnuson, uses a phrase for this type of unimaginative lawyer: they are "paint by the numbers" lawyers who never reach a level of mastery simply because they do not go outside the lines and think broadly about what they are doing. Let

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ABTL YOUNG LAWYERS UPDATE

ABTL Board of Governors' member Hon. Gail Andler welcomed ABTL members into her courtroom on May 21 for an event hosted by ABTL Young Lawyers Division entitled "Maintaining Civility: Lessons From Deposition Disasters." Michael Penn moderated a panel of distinguished attorneys, including Darren Aitken (Aitken*Aitken*Cohn), Mark Erickson (Haynes & Boone), and Gerald Klein (Klein & Wilson). Over 65 attendees were treated to a series of selected deposition disaster video clips that featured irritating witnesses, obstructing opposing counsel, and annoying/frustrating tactics.

Analysis and commentary by the panelists provided tools and strategies to combat bad behavior by opposing counsel and witnesses in a deposition setting. Discussion also focused on tips for conducting depositions in light of the seven-hour rule imposed by C.C.P. Section 2025.290 and the ABTL's Civility Guidelines. A special thanks to Judge Gail Andler and her court staff at the Civil Complex Center for hosting us in her courtroom.

Shortly after the deposition workshop, fellow Board of Governors' member Hon. Nancy Wieben Stock welcomed a dozen ABTL Young Lawyers and summer associates into her courtroom on June 24 for a Brown Bag Lunch with the Orange County Superior Court Civil Complex Judicial Panel. The panel of Judges included Hon. Gail Andler, Hon. Ronald Bauer, Hon. Kim Dunning, and Hon. Nancy Wieben Stock.

The Judges provided observations about the cases the Complex Panel typically adjudicates, including class actions, construction defect, mass tort, and insurance dispute matters. The panel addressed their various methods of managing the claims of thousands of individual plaintiffs, such as utilizing bell-weathering processes or creative case solution strategies. The panel also noted that some cases are particularly well suited for a settlement judge (not assigned to the matter) to work with parties towards resolution.

Like the Judicial Interview in this Issue, the discussion also touched on the upcoming budget cuts. The uncertainty presented by the impending budget crisis is a serious source of stress and concern for all court employees. It is a good time to remember how critical it

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and the bar. He is responsible for ensuring that, within the constraints of the budget, the Court is run in a manner that maximizes access to justice. This goal requires involvement in a myriad of subject areas such as judicial assignments, case management systems, the efficient flow of cases through the Court, the maintenance of the buildings, complaint procedures, the creation of committees to assist in the running of the Court, appointing Supervising Judges for the various Panels and Branch Courts, interaction with our many justice partners such as the District Attorney, the Public Defender, the Sheriff, Police Agencies, the Healthcare Agency, the County, Probation, and the private bar.

The most important task at this time, however, is the continuing need to press for adequate funding for the Courts, the third branch of government, to ensure that the doors of our Court remain open to serve the public.

Q: I gather that an increased amount of the Presiding Judge's time has been devoted to budget issues in the past few years?

A: Yes. Before the State budget crisis, the Presiding Judge was able to spend more time addressing internal court administration and participating in State-wide efforts generally to improve the Courts of the State of California. Now a great deal of time and effort is spent simply trying to minimize the negative impacts of massive cuts to the State Courts' budget.

Q: Can you explain in broad terms the extent of these budget cuts?

In the past the judicial branch received approximately two percent of the State's General Fund. That is more or less the national average for state funded judiciaries. The California Judiciary, the largest judiciary in the nation, now receives about .8% of the State's General Fund. In FY 08/09, 59% of the Orange County Superior Court's revenues came from the General Fund. Today about 15% of its revenues come from that Fund. This means that the trial courts have been forced to find other sources of revenue by, for example, increasing civil fees resulting in the courts becoming more "user fee" funded. This is a troubling trend because it makes the courts less accessible to those who cannot afford the fees, and they are usually the most vulnerable in our community.

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Q: Over the past few years, Orange County attorneys have noticed the ways that the Los Angeles Superior Courts have handled their budget issues. How has Orange County been able to avoid the court closures and layoffs that afflicted Los Angeles?

A: With the exception of the Laguna Hills Courthouse, our Court has so far avoided court closures and layoffs by the use of improved technology which has enabled us to do more work with fewer people, encouraging court users to be "on-line" instead of "in-line"—obtain information, pay fines, complete "smart" forms on line—and by not replacing people who resign or retire thereby reducing our work force —without terminating employees—by about 16% since FY08/09. These operational changes, and many others, have enabled the Court to build reserves which have been used to offset the deficits we have experienced over the last several years.

Q: How will the budget signed by the Governor on June 27 affect Orange County?

A: State wide the Trial Courts were allocated an additional $60 million for FY13/14, of which Orange County will receive approximately $3.6 million. This amount, while appreciated, does very little to make up for the $1 billion in prior cuts the courts have sustained since 2008.

More importantly, the courts will no longer be permitted to retain reserves in excess of 1% of their revenues which covers about 3 days of payroll in Orange County. As a result in FY14/15, our Court will not be able to backfill its deficit with reserves as we have done in the past in order to avoid drastic cuts. On July 1, 2014 our Court projects it will be facing a deficit of about $44 million.

Q: Does the Court intend to have furlough days after July 1, 2014 to reduce the deficit?

A: The Court will need to consider all the options other courts have already implemented. Furloughs alone will not resolve the problem. One furlough day per month for an entire year would save the court approximately $4.1 million. So even if the court furloughed its employees 12 days of the year, the Court would still have a budget shortfall of approximately $40 million.

Q: Heading into this fiscal storm, do you have any suggestions as to how the legal profession can assist the courts?

A: The legal profession can continue to press for more funding for the courts which are so fundamental to our democracy. Attorneys can help by increasing their efforts to resolve their discovery disputes and other law and motion matters so that time can be devoted to matters where judicial intervention is clearly necessary. We may start relying even more heavily on Temporary Judges to assist us in settling, not only trials, but also some of these pretrial disputes. Attorneys can encourage their clients to take more advantage of the Expedited Trial Program (CCP Section 630.1). Attorneys can stipulate to changing the statutory procedures so that they do not have to give up rights they might consider too important to waive in any particular case, for example the right to appeal. Finally, lawyers can help by being patient when papers aren't processed as fast or tasks take longer than they did in the past because staff will have to do the same amount of work with fewer resources.

The ABTL thanks Judge Sanders for her time.

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of any Notice of Claim. This information must be included with the original sales documentation (*Civil Code* §912(e));

- Record a notice stating that the property is subject to SB800 (*Civil Code* §912(f));
- Provide a copy of SB800 with the original sales documentation (*Civil Code* §912(g)); and
- Instruct the purchasers that they must notify subsequent purchasers of the applicability of SB800 to their home (*Civil Code* §912(h)).

If the builder fails to complete any of these items, all which must be done prior to sale of the home or unit, the homeowner is released from the requirements of SB800 and can proceed with litigation. (*Civil Code* §912(i).)

Once a homeowner discovers a problem, the home-

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owner must provide notice of an alleged defect to the builder. (*Civil Code* §910.) The statute requires that the Notice of Claim must describe the claim in enough detail to be able to determine nature and location of the alleged building standard violation. (*Civil Code* §910 (a).) This written notice must be sent via certified mail to the builder's agent. (*Civil Code* §910(a).) It is important to clearly label this as a Notice of Claim pursuant to SB800 so it is not confused with ordinary customer service requests. While homeowners are not precluded from utilizing normal customer service procedures to correct a problem, that procedure does not satisfy the notice requirements for an SB800 claim. (*Civil Code* §910(b).)

After the builder receives proper notice of the claim, they have fourteen days to acknowledge receipt of the claim. (*Civil Code* §913.) If the builder wants to inspect the alleged violation, that inspection must be made within fourteen days after acknowledgement of the receipt of the notice of claim. (*Civil Code* §916.) If the inspection falls outside of the fourteenth day, it is important to obtain an agreement to extend the SB800 deadlines with the homeowner or their representative. (*Civil Code* §930(a).)

Once the initial inspection of the property is completed, the builder may request a second inspection. This must be requested within **three** days of the initial inspection. (*Civil Code* §916(c).) Often a second inspection is needed to either investigate conditions further, or to verify that an alleged condition was not observed. Within thirty days of the initial or second inspection, the builder must submit a repair offer. (*Civil Code* §917.) The repair offer has numerous requirements that must be met, or the builder is deemed to have waived their rights and the homeowner may proceed with a lawsuit. Those requirements are:

- Offer to repair an alleged violation and provide a detailed, specific, step-by-step statement identifying which violation is being repaired and explain the nature and location of the repair;
- Offer to compensate the homeowner for applicable damages (*see, Civil Code* §944);
- Provide the names, and relevant contact information of the contractors performing the repairs;
- Advise the homeowner of their right to request up to three alternate contractors;
- Offer to mediate the dispute if the homeowner requests. (*Civil Code* §§917, 919.)

After receipt of the offer to repair the homeowner has thirty days to respond. They may request additional contractors, accept the repair or go to mediation. (*Civil Code* §§918, 919.) If the repair offer is accepted, the repairs must commence within fourteen days of acceptance. (*Civil Code* §921.) If mediation is selected, the mediation must occur within fifteen days after the request. (*Civil Code* §919.) If repairs are to be made subsequent to mediation, they must commence within seven days after mediation. (*Civil Code* §921.) A builder cannot obtain a release for any repairs that are made pursuant to the SB800. However, in lieu of making repairs, the builder can offer cash, in which case the builder may obtain a release from the homeowner. (*Civil Code* §929.)

As can be seen from this section, SB800 has imposed numerous requirements and the majority of the deadlines and responsibilities fall upon the builder. There are numerous other requirements not mentioned above that can result in the homeowner being released from the requirements of SB800 and being permitted to file a lawsuit or lift a stay of litigation. However, the purpose and goal is for the builder and homeowner to have an opportunity to resolve defect claims, quickly and efficiently, without additional litigation.

Practical Problems and Challenges Presented by SB800

As with any legislation, while the drafters attempt to cover a range of scenarios, inevitably some things are missed. SB800 is no exception to this general rule. Some of the more common issues that have arisen are discussed below.

The time for compliance with the SB800 process is short. It does not contemplate complicated issues. A good example is a home that is experiencing distress due to soils movement. It takes time for experts to evaluate the claim and develop a repair plan that accommodates the conditions present at a particular home. While SB800 promotes quick resolution, some claims simply take many months to properly evaluate and repair.

Another concern is the receipt of a multi-claim laundry list of alleged defects. Often the alleged defects are

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difficult to locate, or are insufficiently described. This becomes problematic when the builder prepares its repair offer. *Civil Code* §924 requires that a builder respond to each and every alleged unmet standard in its repair offer. If there is an alleged violation that is not being repaired, the builder must state in detail why it's not being repaired. The penalty is severe, if only one issue is not addressed, it can mean the forfeiture of the right to repair, mediate, etc. (*Civil Code* §§920, 930.)

There is developing case law with respect to SB800; a few of the cases are summarized below. One, was with respect to a Civil Code §912(a) document demand served prior to the initiation of a lawsuit. Counsel for a large number of homeowners sent a document request to the builder prior to serving the builder with a Notice of Claim. When builder's counsel stated that the request was premature because a Notice of Claim had not been served, plaintiffs' counsel filed suit. The court in *Darling* reasoned that the document demand process was in the pre-litigation procedure section and followed the Notice of Claim provisions. Therefore, a homeowner or their counsel could not serve a document demand without first serving a Notice of Claim. (*Darling v. Superior Court* (2012) 211 Cal.App.4th 69, 84.) This result makes sense; not only is it the logical conclusion given the statutory scheme, it also prevents abuse and avoids waste.

Similarly, if a homeowner is subject to SB800 and sues a builder without first providing a Notice of Claim and opportunity to repair, the homeowner carries the burden of proving that the builder did not comply with the requirements of SB800. (*Standard Pacific v. Superior Court* (2009) 176 Cal.App.4th 828, 834.) The court reached this decision because the homeowners failed to allege that they had provided notice and opportunity to repair in their complaint, thus the stay of proceedings pursuant to Civil Code §930 was granted.

Two other cases have been decided with respect to SB800. In *Anders v. Superior Court* (2011) 192 Cal.App.4th 579, 592-593, the court held that when a developer seeks to enforce its own alternative dispute resolution procedures (*Civil Code* §914) and they are proven to be unenforceable, the homeowners are not required to then follow the SB800 pre-litigation procedures. In the same year, another court held that the Right to Repair Act disclosure provisions do not apply to a builder who opts out of the statutory pre-litigation procedures. (*Baeza v. Superior Court* (2011) 201 Cal.App.4th 1214, 1226.)

An interesting, unsettled area of law is the intersection of SB800 and subrogation claims. "Subrogation is the insurer's right to be put in the position of the insured, in order to recover from third parties who are legally responsible to the insured for a loss paid by the insurer." (*Progressive West Ins. Co. v. Superior Court (Preciado)* (2005) 135 Cal.App.4th 263, 272.) The right of subrogation is purely derivative; i.e. a subrogated insurer "has *no greater rights* than the insured and is *subject to the same defenses* assertable against the insured." (*Travelers Cas. & Sur. Co. v. American Equity Ins. Co.* (2001) 93 Cal.App.4th 1142, 1151.) The insurer "cannot acquire anything by subrogation to which the insured has no right and can claim no right the insured does not have." (*National Union Fire Ins. Co. of Pittsburgh Pa. v. Cambridge International Services Group, Inc.* (2009) 171 Cal.App.4th 35, 53.) Thus, an insurer "stands in the shoes" of the homeowner.

Subrogation arises most often when a claim is made to homeowner's insurance company for a flood, fire, or other loss. The insurer will generally make repairs and compensate the homeowner for relocation costs (if required) pursuant to the terms of the policy. Prior to the enactment of SB800 the insurers would (after repairing the home) seek reimbursement for the claims from builders. Now, subrogation claims face a huge obstacle: SB800. Since the insurer "stands in the shoes" of the homeowner, they must also comply with SB800. First, the alleged defect in question is usually repaired, so there is nothing to inspect or repair. Second, there is no true mechanism to dismiss the case if the insurer can not comply with the pre-litigation procedure. Finally, insurers will try to get around the strict notice requirements by stating that homeowner warranty requests satisfy the notice provisions (so far this has not had much success). This will require either judicial determination or perhaps legislative intervention.

Construction Defect Law – Changed?

SB800 was in effect a response to *Aas v. Superior Court* (2000) 24 Ca1.4th 627. *Aas* set forth the Economic Loss Doctrine in California. The Economic Loss Doctrine states that a plaintiff can't recover for the costs of repairing or replacing alleged defective components of a structure that have not caused damage to other property.

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Aas greatly restricted plaintiff's rights to recover for alleged construction defects in tort. SB800 has diminished the impact of *Aas* by creating statutory right to recover for construction defects even if there has not been damage to other property.

When SB800 was enacted the legislature stated that "[t]he purpose of the Act – or at least the purpose of what is now Chapter 4 – is to give the builder the opportunity to resolve a homeowner's construction defect claim in an expeditious and nonadversarial manner." (*Darling v. Superior Court* (2012) 211 Cal.App.4th 69, 82.) From a litigation perspective, SB800 is neither quick nor efficient; it has merely added another step to the process. Now, most cases start with a motion to stay pending compliance with SB800 (*see, Civil Code* §930), then go through the repair process. It might resolve the case, it might not. From a builder's and homeowner's perspective SB800, can be successful. Homebuilders with a well trained and efficient customer service department are able to handle SB800 claims quickly and often resolve homeowner complaints prior to litigation. For homeowners whose warranties have expired it can resolve a problem without the expense of litigation. As shown the results are mixed as to accomplishing the stated goal and as this article points out there are clearly areas in which SB800 should be revised.

♦*Bonnie J. Bennett is an associate in the Irvine office of Koeller, Nebeker, Carlson & Haluck, LLP.*

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everything we can do to shape the growth of our younger attorneys? Are we instilling the notion that we are part of a proud profession with ethical responsibilities first, and a for-profit enterprise a far distant second? Take a moment to reflect on the people who shaped your concept of what it means to be an attorney. I know I count myself very fortunate to have had Greg Lindstrom as a mentor as a young associate and later Chris Dubia when I was a junior partner.

When it comes to mentoring, today's technology is a blessing and a curse. Associates no longer have to track down partners to review work product. With "track changes", associates can accept emailed drafts and make changes on their own time. So the associates get the "what"—but do they get the "why"? Are you taking the time to explain why you are making changes? Are you seeking to uncover the thought process of your associate or just telling them the answer? Ask yourself, did you learn more in school from getting a true/false test back or from office hours? Beyond being available like a professor in office hours, we need to actively reach out to the younger lawyer (partner to associate, senior associate to junior associate) because the younger attorney has all of the same pressures to bill and perform that you do, just less control over their schedule. Not to get all preachy but the senior attorney needs to initiate—look for an opportunity. For its part, ABTL is putting together a "how to mentor" program over lunch in Judge Andler's courtroom with some talented senior attorneys from our membership. Keep an eye out for the announcement and let's address how to pass on the important lessons of our profession.

I also look forward to seeing you all at a very special ABTL dinner program on September 11th.

♦*Mark D. Erickson is a litigation partner at Haynes and Boone LLP in Irvine.*

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failed to repay Bell upon her request for repayment. Bell later learned that the "toughlove" business was a scam and that Feibush had made false representations to induce her to make the loan.

Bell brought an action in the Superior Court of Orange County against Feibush for breach of contract, fraud and violation of Section 496(a). During default proceedings, the trial court requested additional briefing and oral argument addressing the section 496 issues. In supplemental briefing and oral argument, Bell argued that Feibush violated Section 496(a) because he stole property under a false artifice and maintained the property to her exclusion. The trial court awarded Bell damages of $202,500, prejudgment interest on the breach of contract and fraud causes of action, and treble damages of $607,500 on the Section 496(a) cause of action. The trial court was apparently troubled by this outcome and stated, "I really don't

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like it, to be honest with you, but that is what [Penal Code section 496] says." Furthermore, although Bell was awarded treble damages, the trial court made clear that no double recovery would be available. Thus, Bell's recoverable damages were limited to $607,500 – the amount of treble damage liability under Section 496(a).

The Statutory Language

Section 496(a) provides in pertinent part:

> Every person who buys or receives any property that has been stolen or that has been obtained in any manner constituting theft or extortion, knowing the property to be so stolen or obtained, or who conceals, sells, withholds, or aids in concealing, selling, or withholding any property from the owner, knowing the property to be so stolen or obtained, shall be punished by imprisonment in a county jail for not more than one year, or imprisonment pursuant to subdivision (h) of Section 1170.

Section 496(c) creates civil liability for the violation of Section 496(a):

> Any person who has been injured by a violation of subdivision (a) or (b) may bring an action for three times the amount of actual damages, if any, sustained by the plaintiff, costs of suit, and reasonable attorney's fees.

The *Bell* court noted that Section 496 "does not state a criminal conviction under section 496(a) is required for a private plaintiff to recover treble damages under section 496(c)." (*Bell v. Feibush, supra,* 212 Cal.App.4th at 1045.) Rather, Section 496 "permits 'any person' who 'has been injured by a violation of subdivision (a) or (b)' to 'bring an action' to recover treble damages." (*Id.* at 1045.)

In its analysis regarding the possible prerequisite of a criminal conviction, the *Bell* court addressed *Heritage Cablevision of Cal., Inc. v. Pusateri* (1995) 38 Cal.App.4th 517 (*Heritage*). The *Heritage* court specifically addressed the same question with respect to Penal Code section 593d, which provided, in pertinent part, that "[a]ny person who violates this section shall be liable to the franchised or otherwise duly licensed cable television system…" The *Heritage* court determined the phase "person who violates" was not ambiguous and that its plain meaning interpretation was consistent with the statutory objective. The *Heritage* court found that a person need not be criminally convicted to be characterized as a "person who violates" under Penal Code section 593d.

Similarly, the *Bell* court determined that a criminal conviction is "not a prerequisite to recovery of treble damages by any person injured by a violation of Section 496 (a)." (*Bell v. Feibush, supra,* 212 Cal.App.4th at 1046.) The *Bell* court articulated that its construction is consistent with the statutory purpose to allow "*anyone* injured by the sale of knowingly stolen property to bring a civil action against the seller, in order to reduce thefts by eliminating the market for stolen goods." (*Citizens of Humanity, LLC v. Costco Wholesale Corp.* (2009) 171 Cal.App.4th 1, 17-18, disapproved on another ground by *Kwikset Corp. v. Superior Court* (2011) 51 Cal.4th 310.) (Emphasis in original.)

The *Bell* court further noted that "the Legislature believed the deterrent effect of criminal sanctions was not enough to reduce thefts" but that the Legislature concluded the means to reduce thefts "was to dry up the market for stolen goods by permitting treble damage recovery by 'any person' injured by the knowing purchase, receipt, concealment, or withholding of property stolen or obtained by theft." (*Bell v. Feibush, supra,* 212 Cal.App.4th at 1047.) The *Bell* court explained that making the recovery of treble damages contingent upon a criminal conviction would not advance the goal the Legislature intended.

What is "theft" in the context of commercial litigation?

To determine what constitutes "theft" under Section 496 (a), the *Bell* court looked to Penal Code section 484 ("Section 484"). Section 484 provides in relevant part:

> Every person who shall feloniously steal, take, carry, lead, or drive away the personal property of another, or who shall fraudulently appropriate property which has been entrusted to him or her, or who shall knowingly and designedly, by any false or fraudulent representation or pretense, defraud any other person of money, labor or real or personal property, or who causes or procures others to report falsely of his or her wealth or

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> mercantile character and by this imposing upon any person, obtains credit and thereby fraudulently gets or obtains possession of money, or property or obtains the labor or service of another, is guilty of theft….

Consistent with *People v. Gomez* (2008) 43 Cal.4th 249, 255, fn. 4), the *Bell* court determined that Section 484 includes theft by false pretense. The *Bell* court acknowledged Feibush's policy concerns that permitting treble damages under Section 496(c) could allow litigants to circumvent limitations on remedies, but concluded that "when the Legislature enacted section 496(c), it presumably understood that the phrase 'a violation of subdivision (a)' would include theft by false pretense" and that "it is the task of the Legislature to address those concerns." (*Bell v. Feibush, supra,* 212 Cal.App.4th at 1048-49.)

Bell's impact

What does the *Bell* decision mean to business litigation practitioners? Essentially, the *Bell* decision opens the door to alternate remedies of treble damages and attorneys' fees in a case that may otherwise be limited to damages for breach of contract and fraud. The *Bell* decision also has potential application to a subset of conversion claims.

As demonstrated by the facts in the *Bell* case, a cause of action for violation of Section 496(a) may provide a lender more damages in cases where the plaintiff was induced to make a loan under false pretenses. Similarly, other types of breach of contract cases (for example claims involving partnership disputes and real estate transactions) where the plaintiff's claims arise from fraud may support a cause of action based on violation of Section 496(a). The definition of theft in Section 484 is in no way limited to fraud, but also includes feloniously stealing, taking, carrying, leading, or driving away the personal property of another. Thus, claims based on a violation of Section 496(a) may also arise in commercial litigation cases involving conversion.

Why is the ability to recover under Section 496(c) without a criminal conviction under Section 496(a) so significant? The reasoning, like the recovery, is threefold.

First, Section 496(c) provides for "three times the amount of actual damages, if any, sustained by the plaintiff." Unlike punitive damages, treble damages are recoverable without a burden on the plaintiff to offer proof of income. Accordingly, a plaintiff seeking damages under Section 496(c) may recover more damages than if he or she brought a fraud cause of action. Moreover, a plaintiff may recover damages with less time and effort under Section 496(c) than a fraud based claim as punitive damages place the burden of proof on the plaintiff.

Second, recovery under Section 496(c) entitles a plaintiff to attorneys' fees that may not otherwise be recoverable. Unless provided by statute, attorneys' fees are only recoverable if agreed to by the parties. (Code Civ. Proc., § 1021.) It is well settled that "[a]ttorney fees incurred by a plaintiff in bringing a fraud action are not recoverable." (*Bezaire v. Fidelity & Deposit Co.* (1970) 12 Cal.Appl.3d 888, 892.) Thus, attorneys' fees are not generally available in fraud actions or breach of contract actions where the contract does not provide attorneys' fees. In such instances, inclusion of a cause of action for violation of Section 496(a) offers another avenue for the plaintiff to recover attorneys' fees.

Third, the ability to recover damages under Section 496(c) in the absence of a criminal conviction under Section 496(a) opens the door to similar claims based upon other sections of the Penal Code. The *Bell* court made clear that if the Legislature intended to make a criminal conviction a prerequisite to treble damage liability under section 496(c), it easily could have said so." (*Bell v. Feibush, supra,* 212 Cal.App.4th at 1046.) Indeed, the Appellate Court pointed out that the *Heritage* decision, which found that a criminal conviction was not a prerequisite to civil liability, was based on a similar Penal Code section that did not expressly address a criminal conviction. Any industrious litigator can scour the Penal Code to locate sections providing for applicable treble damages and argue that civil liability should be imposed if the section does not expressly provide that criminal conviction is a prerequisite to recovery.

Although the *Bell* decision opens the door to treble damages and attorneys' fees in cases where such damages would not otherwise be recoverable, the full impact of the *Bell* court's decision may take time to ascertain. As the trial court awarded damages upon a default judgment, the *Bell* decision offers no guidance as to the burden of proof applicable to recovery of treble damages or attorneys' fees under Section 496(c), nor does it address

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any questions that may arise as to the adequacy of pleading a violation of Section 496(a). Until these questions are reviewed by another court, or the Legislature revises Section 496(c), we can expect a rise in business litigation actions asserting violations of the Penal Code, and specifically Section 496(a).

♦ *Kathryn J. Besch is a business litigator.*

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us consider a few ways business litigators can venture outside the lines and bring creative problem solving to elevate this craft to the extraordinary.

Client Expectations

Creativity often begins at the point of the engagement for legal services. Clients are with increasing frequency seeking alternative fee arrangements to advance a variety of interests not the least of which is to obtain legal services through a more economical structure. The way in which lawyers are paid has evolved from the "services rendered" statement to the detailed hourly invoice used for the last several decades to a new era in which clients expect us to creatively place a value on the unique perspective we bring to the table. We are all aware of the typical alternative fee arrangements including contingency fees, flat fee billing and fees tied to milestones in litigation. But there are a thousand variations on these and other fee arrangements. Here are a few:

- Discount an hourly fee with a proviso that, if a particular result is obtained, that discount is earned on the back end.

- Bill the matter hourly at full rates, but if the firm prevails at the end of the case and obtains an attorney fee award, any fees that the client is awarded will be retained by the firm.

- Success fees can be put into an agreement early in the case depending on the results achieved in settlement. Suppose your client is sued for $1 million. You could agree that if you obtain a settlement of $250,000 in the first 120 days, the firm will receive a $25,000 bonus for that result. This counters the economic incentive that is inherent in a straight billing arrangement and motivates early settlement.

- There are also variations on the flat fee. A client with cash flow concerns can agree that a payment will be made each month for a set amount irrespective of what the fees are and will ultimately pay the full amount even if that means the firm carries a receivable for a period of time.

New engagements present an opportunity to reconsider the client's expectations and the lawyer's reasonable desire to be fairly compensated for services rendered. The best approach may be a new blend of fee arrangements that is only discovered by moving outside the fee arrangement paradigms.

Case Management Creativity

The next opportunity for creative collaboration involves your opposing counsel. It is easy to allow a piece of litigation to proceed down the familiar path of reaction and response. The drill is all too familiar. A plaintiff files and serves a complaint; the defendant seeks an extension then files a demurrer or motion to dismiss. Someone commences discovery, boilerplate objections are served, depositions are scheduled, and "nasty grams" are exchanged over timing, sequence, and priority for depositions. Meet and confer letters are exchanged with lots of cut and paste language about the usual objections. Mediation is scheduled after about 9-10 months of this back and forth and the case comes to a close. But "Groundhog Day" litigation is not the only way to litigate. There may be a road less travelled that, depending on opposing counsel's level of cooperation, will lead to a better result for both sides.

Clients and our courts may be well-served by our initiating a dialogue with opposing counsel over case management, particularly when it comes to discovery. Last year, I represented out-of-state clients in a case in which we were contemplating about seven depositions, some in California

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and some out of state. My office was about halfway between opposing counsel's office in San Diego and his client's office in Los Angeles. We agreed to a deposition schedule in which all depositions would be taken at my office, including my out-of-state clients' depositions, that the depositions would proceed two days--week over seven weeks, alternating between plaintiff and defendants until completed and I would cater lunch for each day and validate parking for our adversaries. It was a relatively small thing, but the arrangement worked out well and saved the headache of formal deposition notices and priority and location fights. The deposition schedule proceeded without a hitch and, although we had plenty of other things to fight about, we were all able to focus on the merits of the case rather than silly fights that have consumed lawyers all too often.

This type of collaboration requires trust and a certain amount of "horse trading"—agreeing to waive rights and come to a consensus. Each side must set aside their distrust for their adversary and give up something to get something. Here are some other case management ideas:

- Rather than fighting over definitions of terms in a document request and crafting duplicative and overlapping demands and objections, agree with counsel as to the "first cut" of documents that would need to be exchanged in the case and a basic protocol for obtaining e-discovery.

- Consider meeting and conferring before filing a demurrer (as required in the United States District Court, Central District of California before filing a motion to dismiss) and exploring whether issues in the pleading can be resolved without judicial intervention.

- Craft a real and meaningful joint case management statement (beyond the Judicial Council form) that includes practical suggestions for how the case can be managed with as little judicial intervention as possible.

Consensus Creativity

Sometimes jettisoning a paint-by-numbers approach requires judicial buy-in. Judges, like the rest of us, may be challenged to think more creatively unless they recognize that the solution will result in conserving judicial resources.

I recently represented a client in what could have been an expensive and protracted consumer class action lawsuit involving the application of a California statute to my client's business practice. Shortly before our first case management conference, I was served with a stack of discovery from plaintiff's counsel. That discovery prompted a conversation that eventually led to our mutual recognition that the entire case boiled down to the interpretation of a few phrases in the statute. It was apparent that the parties would be well-served to obtain the Court's interpretation of the statute sooner rather than later. We recognized that we could achieve that end by submitting stipulated facts and briefing on the question presented. With the approval and support of the Court we then held what the Court termed a "bifurcated trial" on statutory interpretation. The Court ultimately agreed with my interpretation of the statute and dismissed the case.

Beyond the result achieved, the client obtained an efficient resolution. The entire consumer class action lawsuit consisted of the filing of a complaint, attending a case management conference, briefing and oral argument and entry of a final order. Not one deposition was taken and no demurrer or other motion was ever filed. Even though my client prevailed, the plaintiff's counsel was also a winner in a sense. He presumably represented his client on a contingency fee basis and was far better served learning that the court did not share his interpretation of the statute earlier rather than months or years down the road after thousands of dollars in costs and fees were spent. Just as important, the case required far few-

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er judicial resources than if we had taken the long road oft travelled.

Closer Creativity

Perhaps the greatest opportunity for attorneys to stretch their creativity abilities is in bringing the case to a conclusion. Every case has a takeoff followed by a flight pattern of varying durations and an eventual landing—whether of the smooth or crash variety. Since most cases come to a close through a settlement, it is critical that litigators consider creative ways to resolve what would appear to be intractable conflicts. Here are a few creative settlement concepts to consider.

Several years ago during the worst of the recession, my client was pursuing a defendant on a contract claim. There were defenses to the claim and the defendant was thus paying its counsel significant fees in the litigation. Counsel represented to me that his client was on the verge of bankruptcy in large part because of this debt and any judgment we obtained would be meaningless. My client was of course paying me to pursue an objective but would not be well-served if I obtained an unenforceable judgment ten or twelve invoices down the road. We came up with a resolution. The defendant stipulated to a judgment on the contract in an amount modestly discounted. My client agreed that the judgment could not be executed for the next 18 months. This breathing space allowed the client to wait and see if their adversary (a former customer) would weather the economic storm. If they did, we could execute on the judgment and be in the same position we would have found ourselves with a win at trial, but without having to spend the fees to get there. If the business did not survive, we would save a significant amount in fees. This turned out to be a resolution that was in the best interest of both clients.

Creativity is sometimes the missing ingredient when the sun is setting as the parties sit in the mediator's office at the end of a long day, still miles apart in their offers and counter-offers. Rather than packing the bags and heading to the parking structure, pause and consider a few alternatives.

One approach is to convert the failed mediation into arbitration with specific parameters. Assuming that the mediator who knows the case and has invested several hours into learning the relevant facts and law is respected by both sides at the end of the mediation, empower him or her to be an arbitrator. Schedule a further session in which the former mediator now arbitrator will be given an abbreviated presentation of evidence, a closing argument and then make a "baseball arbitration" ruling within an agreed range—the parties' last and best settlement offers. Each side submits a number to the arbitrator who then chooses which number is the more reasonable and equitable. Both parties are incentivized to propose a number that is as reasonable as possible so that it will have the greatest likelihood of being chosen.

Some of the best creative settlement proposals involve gifts to charitable organizations. It is often the case that the thought of a plaintiff receiving a settlement check is more abhorrent to the defendant than the pain of parting with those funds. The parties can agree on an amount that goes not to the plaintiff, but to a third-party charity (such as the Public Law Center—shameless plug) that the two adversaries support. The gift can either be anonymous or accompanied by a message stating that the gift is being donated as a way of resolving differences and supporting the community. Again, everyone wins. The plaintiff might enjoy a nice tax deduction. The defendant receives some gratitude and respect for selflessly allowing the charity to receive the fruits of his or her litigation. The charity, and by extension, our community is supported.

One of the things I enjoy most about being a litigator is applying these types of new ideas to settlement strategy. It is refreshing to put down the case law and the mountains of papers that we generate and remember that behind almost every case are the faces of real people with strong emotions and significant business concerns. If you look closely at the faces of these litigation participants, you will see something further—hurts, egos, offenses, bitterness, greed and disappointment. Grasping what is really going on in the

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lives of these individuals is sometimes the key to settling a case. Most seasoned litigators can recall the effectiveness of an apology or sincere statement of regret in bringing about resolution. But too often we pass over this opportunity because we are inextricably tied to the legal concepts and facts set forth in our mediation briefs with excruciating detail and precision. My friend, Michel Zelnick of the The Zelnick Group is a lawyer, CPA and psychotherapist who works with the most difficult of these conflicts to bring about resolutions to fractured relationships. Calling on a psychotherapist to resolve a case is certainly painting outside the lines but may be just the missing ingredient to resolving a challenging case.

Conclusion

There are many things about the practice of law that make this a great profession. Chief among those is the ability to solve problems by applying not just rote knowledge and technical acumen, but artful and creative solutions that others might overlook. Our courts are overcrowded and underfunded and there is no better time for members of bench and bar to step outside of our comfort zones and tired old ways of doing things to consider new approaches to achieving results for our clients and their adversaries. In addition to all of these benefits, it certainly is much more interesting and fulfilling to creatively paint outside the lines than to paint by the numbers.

♦*Kent Schmidt is a partner at Dorsey & Whitney LLP in Irvine.*

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is to maintain courtesy and civility in dealing with court staff. Attorneys are encouraged to work proactively and engage the court efficiently and expeditiously.

The ABTL thanks and appreciates the Civil Complex Panel for their willingness to host and reach out to the younger lawyers in our group. Your accessibility, thoughtfulness, and commitment to education as demonstrated at this lunchtime gathering helps improve and advance the practice of law in Orange County.

To become more involved in the Young Lawyer Division of the ABTL, contact our Executive Director, Linda A. Sampson, at 714.516.8106 or by email to abtloc@abtl.org.

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