BY ROBERT BARTON AND JOHN SPURLING

Bell v. Feibush Portends Higher Stakes in Fraudulent Lending Cases

IN JANUARY 2013, the Fourth Appellate District of the California Court of Appeal published *Bell v. Feibush*, which may change the high-stakes litigation game involving disputes between borrowers, and their guarantors, and the lenders and investors who provide the all-important financing.[1] *Bell* applies Penal Code Section 496(c), which provides that any person who has been injured by a violation of Penal Code Section 496(a)—obtaining property in any manner that constitutes theft—may bring an action for three times the amount of actual damages plus the costs of suit, as well as reasonable attorney's fees. Penal Code Section 496 does not state anywhere that a criminal conviction is a prerequisite for a private plaintiff to recover treble damages.

Section 496(a) makes receiving property that has been obtained in any manner constituting theft a criminal offense punishable by imprisonment. Theft is broadly defined to include, among other things, false pretense, which is the consensual but fraudulent acquisition of property from its owner and causing or procuring others to report falsely as to his or her wealth or mercantile character in order to obtain credit and thereby fraudulently get possession of money or property.

A criminal conviction is not a prerequisite to recovery of treble damages in a civil action pursuant to Penal Code Section 496(c).

Significantly, the court in *Bell* held that a criminal conviction is not a prerequisite to recovery of treble damages in a civil action pursuant to Penal Code Section 496(c), noting that had the legislature intended to make a criminal conviction a prerequisite to assigning treble damage liability under the statute, it could easily have done so. Indeed, requiring a criminal conviction first would be contrary to public policy because many thefts are simply too small to get the attention of a prosecuting attorney, so the only deterrent is the prospect of a treble damages recovery by the injured victim thereby drying up the market for stolen goods.[2]

Bell played the role of a lender, investing $202,500 with Feibush, an entrepreneur, based on Feibush's representation that he owned the Toughlove trademark and needed the money to settle a lawsuit over his interests in the toughlove industry. With the lawsuit out of the way, Feibush told Bell that he would be free to launch a rejuvenated national version of Toughlove that would earn millions. Eventually tiring of Feibush's promises, Bell asked for her money back but received nothing more than an endless list of excuses.[3]

Bell filed suit, asserting causes of action against Feibush for breach of contract, fraud, and violation of Penal Code Section 496(a). After a default prove-up hearing, the trial court found that Feibush's representations were false and that the alleged toughlove business was nothing but a scam. The judgment awarded Bell $202,500 plus prejudgment interest on her breach of contract and fraud claims and treble damages of $607,500 on her Penal Code Section 496(c) claim.[4]

While some might argue that by awarding Bell treble damages, the court opened the door for creditors to claim that any breach of contract action constitutes fraud, and therefore is a theft under the California Penal Code, Section 484 describes acts constituting theft in rather specific terms, likely precluding any such abuse.

What makes *Bell* a hot case today is its potential application to several types of high stakes civil disputes including, among others, guarantors and borrowers who misrepresent their financial condition in order to secure loans and unscrupulous entrepreneurs who solicit investments in scam business enterprises.

For example, consider a single-purpose limited liability company formed to build a 300-acre shopping center. Standard commercial lending practice today requires the borrower to put forward one or more high net-worth individuals to personally guarantee the loan. Assume hypothetically that the proposed guarantors (all likely members of the LLC that was specially formed to develop the project) engage in some creative accounting, inflating their assets substantially and, in particular, their liquid assets. If at some point the project fails, the lender will look to the guarantors to make up any loss. When litigation ensues, if the lender can prove that the guarantors inflated their balance sheet, under *Bell* they may be personally liable for a treble damages award. At a minimum, the prospect of a treble damages award will provide powerful leverage to encourage an early settlement of certain high-stakes cases.

For another example, consider a real estate broker who wants to do more than just sell properties. He identifies an opportunity to develop a condominium complex on vacant land. After minimal preliminary planning, he determines that acquiring the land, permitting, architectural design, construction, and sales will cost $3 million, and he begins to solicit investments. Losing interest, he diverts the funds to other personal needs. When the investors demand that he either start the project or give them their money back, he fraudulently claims that their investments were all spent in the development stage and there is no money to go forward or return. Once again, under *Bell* the investors may be able to seek a treble damages recovery. ■

[1] *See* Bell v. Feibush, 212 Cal. App. 4th 1041 (2013).
[2] *Id.* at 1046.
[3] *Id.* at 1043.
[4] *Id.* at 1049.

Robert Barton is a sole practitioner in Torrance who spent nine years as a large-firm litigation associate. John Spurling is a partner at Shumener, Odson & Oh LLP in Los Angeles.