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Welcome to Insights

a quarterly newsletter from Patton & Sullivan designed to keep you up-to-date on legal issues that may impact your business.

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The Facebook Playbook

By Caitlin Connell

The social media revolution has allowed us to share more of our lives with friends and family. But the voluntary sacrifice of privacy inherent in social media use has become a valuable tool in a host of litigation situations.

In divorce proceedings or custody disputes, for example, it may prove an unfaithful act or a parent's fitness; in personal injury cases, it may contradict a party's claim for physical or emotional injury; and in almost any litigation, it may uncover key communications, admissions, or impeaching facts.

Gaining access to the information in a person's Facebook profile can pose legal challenges. So potential litigants can influence their situation by taking preemptive action to capture material that could be the target of discovery by lawyers. If a litigant deletes information that can be a major issue for their case, resulting in sanctions.

Our firm moves quickly to save (via printing or a screen shot) all publicly available Facebook information maintained on the subject Facebook profile. Many users do not restrict their profile to privacy settings, but can quickly delete or make private their profile once litigation commences. Our job is to ensure such actions are evidenced, so that our client gets the benefit of potential evidentiary sanctions.

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Playing field tilts in business tort cases

By John Patton

A California Court of Appeal ruling is changing how the parties in a business dispute calculate whether to go to court by holding out hope of collecting treble damages plus attorney fees.

Normally, parties to a civil lawsuit are confined to recovery of the actual damages that they suffered due to another's wrongful conduct, and must bear their own legal fees in the litigation process. The most common exception is a contract entitling the prevailing party to recover attorney's fees.

These rules typically turn the decision on whether to file a lawsuit into an economic one, in which the risks and costs of pursuing litigation are balanced against the potential rewards of successfully pursuing such relief. Few practical business owners or individuals want to spend more money pursuing justice than they are likely to recover at the end of

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Friends of the litigants can provide the virtual key to the case.Most information that is secured by a privacy setting may be viewed and saved or printed by a "Facebook friend." This often proves to be the best means for proving the existence of evidence, and also the destruction of evidence.

Also, a discovery request can win identification of all Facebook profiles the user has ever had. A request for each URL – the website that appears when you are visiting the user's profile page – will allow lawyers to research that profile and where relevant, propound discovery requests for a copy of the profile "download." It also allows lawyers to conduct third-party discovery to Facebook if necessary. Facebook does not produce user content, but will provide basic user information in response to a subpoena. This is one of many reasons why conducting Facebook Discovery is very tricky, and requires a thought out process.

Discovery of social media is an emerging field and much of the law on accessing information from social media accounts has been written in federal courts and by states other than California. But the potential value of discovery of social media accounts is not in doubt.

Consider the case of Clement v. Johnson's Warehouse Showroom, Inc. (Ark. Ct. App. 2012) 2012 Ark. App. 17, 9 in which the court found no abuse of discretion in the allowance of social media photographs. Those photos contradicted the plaintiff's claim that he was in excruciating pain and had a bearing on his credibility. The pictures show him drinking and partying.

Social media can be used to help or hurt a case. The one truism is that in a world full of phone cameras and tag technology, the truth will come out more often with a focused and proven discovery plan.

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the litigation process, and this is a major factor to be considered when a dispute arises.

But a fairly recent decision of the California Court of Appeal, interpreting a criminal statute, alters the playing field in civil cases where the claimant can prove the deprivation of money or property by false pretenses. Such situations could have broad application to tort cases of fraud, cases not uncommon to business and other disputes. The typical business tort case often involves claims that one party misrepresented something that caused the other to enter into the transaction and suffer loss.

In Bell v. Feibush (2013) 212 Cal.App.4th 1041, a civil case in which a lender sued a borrower for obtaining a loan under false pretenses, the court examined Section 496 of the California Penal Code, concerning the crime of receiving stolen property. Bell reconfirmed prior criminal cases holding that a party who is a principal in a theft of property may also be guilty of receiving stolen property. It also held that money, or anything else that can be the subject of a theft, constitutes "property" for purposes of the statute. It also found that a prior criminal conviction was not required to support a finding of civil liability under Section 496. Based on these holdings, the court found that the defendant had obtained property from the plaintiff by false pretenses, and thus was guilty of receiving stolen property under Section 496. It then examined subpart (c) of Section 496, which authorizes any victim of such a crime to bring an action to recover "three times the amount of actual damages . . . sustained . . ., costs of suit, and reasonable attorney's fees."

Bell holds that this provision applies to a civil suit for fraud based upon the defendant's
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Stopping the legal clock

By Randy Sullivan

The statute of limitations is a commonly used defense to any claim. But a California court recently took a step toward enforcing contractual modifications to the statute of limitations.

With the economy improving, and more deals being reached between sophisticated parties, it is as important as ever to ensure that the contract governing the party's rights is properly vetted.

In the case of Brisbane Lodging, L.P. v. Webcor Builders, Inc., the court upheld a contract provision that provided that no claim could be brought four years after the substantial completion of the project's construction. The underlying contract was for the construction of a Radisson Hotel.

Ordinarily, any claim based on a breach of contract must be filed four years from the date the contract claim accrued – the point at which a reasonable party knew or should have known that the other party to the agreement had breached the contract. This is an issue that is often a focal point of discovery in litigation between the parties.

It is an even greater issue for construction defect matters. If a defect is considered latent -- it is not obvious -- then the party may have up to 10 years to file a lawsuit under C.C.P. § 337.15.

The contract at issue in Brisbane for the design and construction of the Radisson Hotel limited that right. Specifically, the contract provided that the accrual date would be the date that the project was substantially completed. The question presented then for the first time, was whether such a provision could be enforceable in California.

In short, the court concluded that the parties to the construction contract for the Radisson Hotel decided to establish a set date from which any contract claim could accrue. The court made its ruling, even though the contractor had been called out and then did work to repair a sewer line more than six years after the parties entered the agreement. The problems apparently returned two years later.

Nevertheless, the court concluded that there were two critical reasons for upholding the limitation on when a lawsuit could be filed.
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obtaining money from the plaintiff by use of false pretenses. It also holds that a prior criminal conviction is not required to support a finding of civil liability under Section 496, or for imposition of these civil remedies. Therefore, even without a contract that provided for recovery of legal fees by the prevailing party, the plaintiff in Bell was entitled to recover her legal fees, and three times the amount of the loan procured by the fraud, among other recoveries.

This holding means that a defendant in a civil action for fraud can be exposed to treble damages and liability for the plaintiff's legal fees if the plaintiff can prove that the defendant obtained property under false pretenses, and that this caused harm to the plaintiff. In other words, a plaintiff utilizing a claim under Section 496 may be able to recover additional damages, plus his or her attorney's fees, where such relief was not previously recoverable. The holding of Bell means that victims of fraud may be able to economically justify a civil action for recovery of their losses due to the fraud, where such an action previously might not have made business sense.

Bell also means that the court system will likely see the increased use of Penal Code Section 496 in the civil context, and that the Legislature will likely be asked by insurance companies or the business community to reexamine how far its provisions should go toward penalizing such conduct, or rewarding parties with extra damages in such cases.

But absent action by the Legislature or the California Supreme Court, Bell is the rule of law for now in California, and a powerful aid to victims of fraud that tips the existing playing field in their favor.
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First, the parties were sophisticated, commercial parties developing property. That is to say, the contract did not involve a residential homeowner or buyer. Secondly, the contract did not seek to limit the time under which a lawsuit could be filed, such as a modification from four years to one year.

This decision, although limited, is important. Before a contract is signed, all of its terms and conditions should be carefully considered. After the contract is signed, and if a dispute arises, an attorney should be consulted to ensure that the statute of limitations does not expire.

A safe solution in most any construction matter is to have the parties enter into a tolling agreement stating that while the contractor is repairing an item the statute of limitations is not running. This serves to stop the clock, put the matter on ice, and give the parties time to reach a resolution instead of rushing to file suit.

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SEC eases rules for private placement securities

By Ralph Kokka

The Securities and Exchange Commission ("SEC") has recently approved final rules that have eased the restrictions against general solicitation and advertising in private placements of securities. Under previous SEC rules, if a company wanted to raise capital by selling stock, it could either register the offering with the SEC, a lengthy and expensive process, or rely on one of the exemptions from registration.

The most widely used exemption was Rule 506 under Regulation D, which allowed the sale of an unlimited amount of securities to an unlimited number accredited investors (individuals with net worth of $1 million or more (not including residence) or $200,000 annual income for past two years), and up to 35 non-accredited investors.

As a "safe harbor" exemption, Rule 506 was a fairly company-friendly exemption as there were very few formal disclosure obligations if securities were being sold to accredited investors only. One of the main prohibitions in qualifying for the Rule 506 exemption, however, was that the sale of the securities could not be accomplished through a general solicitation or general advertising. This essentially limited companies to relying on finding investors through institutional investors, such as venture or private equity funds, or networks of interested, high-net worth individuals, such as angel groups.

Under the recently approved final SEC rules, companies can now sell securities through a general solicitation or (Cont. page 5)

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advertising and qualify for the Rule 506 exemption provided that the existing terms of Rule 506 are satisfied, the sale is to accredited investors only, and the company has taken reasonable steps to verify that the purchasers are accredited investors. Reasonable steps include consideration of the nature of the purchaser and the type of accredited investor the purchaser claims to be, how much information the company has concerning the purchaser, the nature of the offering, how the purchaser was solicited and the amount of investment. A company can satisfy its obligations by reviewing tax forms of the purchaser for the past two years, bank and brokerage statements, credit reports, or obtaining written confirmation from an attorney, CPA or registered broker-dealer that the person has taken reasonable step to verify the purchaser is an accredited investor.

Finally, the new SEC rules disqualify an offering from Rule 506 exemption if certain "bad actors" are involved. Disqualifying involvement can range from being an officer, director or 20% or more shareholder of the company, to being compensated in some way in connection with the offering. A bad actor is someone guilty of a felony or misdemeanor or subject to an SEC order involving the sale of securities, acting as an underwriter, broker-dealer or adviser, or fraudulent or deceptive conduct. The "bad actor" disqualification will not apply if the company can establish that it did not know, in the exercise of reasonable care, that there was a "bad actor" involved in the offering.

While the new rules allow companies to go out and advertise as broadly as they want to sell stock, it remains to be seen whether and to what degree companies will take advantage of these new rules.

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