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January 18, 2013 by [Aaron Morris](#), Partner

Appeal Victory -- Court of Appeal Agrees that Penal Code Section 496(c) Allows Recovery of Triple Damages and Attorney Fees for Failure to Repay a Loan if Money Gained Through False Pretense.

As we [reported](#) in October of 2011, we persuaded an Orange County Superior Court Judge to apply Penal Code section 496(c) – making it illegal to receive stolen goods – to a case where the defendant had failed to repay a loan. The loan agreement did not provide for attorney fees, so by bringing the civil action under Penal Code section 496(c), our client was entitled not only to recovery of all of her attorney fees, but treble damages as well.

The case involved a loan made by our client to the defendant, Igal Feibush. Feibush and his entities failed to repay the loan, and we were retained by the plaintiff to sue. I am always bothered by cases where the worst that can happen to the defendant is that he is made to repay the money that he borrowed in the first place (plus interest). Most attorneys would have pursued this as a garden variety breach of contract case. However, since the loan agreement did not provide for attorney fees, Feibush would face no downside in fighting such an action. Sure, he would incur his own attorney fees, but at the end of the day the case would likely have settled for less than what was owed, or gone to trial and resulted in a judgment for only the loan amount. Our client would have been left far from whole.

We figured out a better way. Penal Code section 496(c) makes it illegal to receive stolen property, and provides for a civil action to recovery any losses. We included a cause of action under that statute, arguing that Feibush had used a false pretense to obtain the money from our client. Basically, he told her he had a certain valuable trademark, and that the money from the licensing of that trademark would be used to repay the loan. It turned out he did not own that trademark, and he made no money from its licensing.

A quick aside for an important concept. Picture that an aluminum salesman comes to your door and sells you aluminum siding for your house for \$12,000. He presents you with and you sign an agreement for the installation of the aluminum siding, you pay the \$12,000, and then he never installs it. You sue for breach of contract, but during discovery you find out that he is not even a licensed contractor and has no access to aluminum siding. You can add a claim for fraud, and that gives you a shot at punitive damages, but basically your damages are the same under both the breach of contract and fraud actions -- the \$12,000 you paid for the aluminum siding that was never installed.

But here's the thing. If he had come to your door, put a gun in your face and stolen the \$12,000, everyone would understand that was a theft. The fact that he used a bogus contract instead of a gun to steal the money from you does not make it any less of a theft. That reality is so self-evident, but it escapes many judges. Kudos to Judge James Di Cesare who understood that a theft is a theft, whether by way of burglary, robbery or bogus contract.

And now back to our story. The Judge agreed that this was more than a simple breach of contract, and amounted to receipt of stolen property (the money). Although he expressed that he didn't like it because attorneys could start alleging breach of contract actions as thefts, he agreed that the criminal statute applied, and awarded three times the damages, and all of our attorney fees. Our client had loaned Feibush \$202,500, but the total judgment was just under \$700,000.

This application of Penal Code section 496(c) affords another huge benefit. The same result (albeit without the attorney fees) could be achieved with a fraud action and the award of punitive damages. However, punitive damages require a showing of the defendant's net worth and the ability to pay the damages. The treble damages under 496(c) are a fixed penalty, and require no such showing.

Igal Feibush appealed the treble damages aspect of the judgment, claiming that the criminal code did not apply because he had to first be criminally convicted, and that as the party that allegedly stole the money, he could not be convicted for receiving it.

The Court of Appeal rejected his arguments, and affirmed the judgment. The Court found that the criminal statute means exactly what it says. It agreed with us that theft by false pretense (the bogus contract) is still a theft, and that even the person who steals the money is still liable for receiving it. As icing on the cake, the Court of Appeal decided that our application of the statute, and the fact that the statute has generated no appellate decisions, made the opinion worthy of publication. In the future, when we advance this theory and encounter a judge who just can't wrap his or her mind around the concept, we can cite to our own case as authority.

Here is the [published opinion](#).