

Case No. S262081

**IN THE SUPREME COURT
STATE OF CALIFORNIA**

SIRY INVESTMENT, LP,	)	SECOND APPELLATE DISTRICT
	)	DIVISION 2
Plaintiff / Appellant,	)	APPEAL CASE NO. B277750
	)	
vs.	)	LOS ANGELES SUPERIOR COURT
	)	CASE NO.: BC372362
SAEED FARKHONDEHPOUR, et al.,	)	Hon. Edward B. Moreton, Jr.
	)	Department: 44
Defendants / Respondents.	)	
_____	)	

**APPLICATION FOR LEAVE TO FILE AMICUS BRIEF
AND BRIEF OF AMICUS CURIAE STEVEN P. SCANDURA
IN SUPPORT OF APPELLANT, SIRY INVESTMENT, LP**

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**APPLICATION FOR LEAVE TO FILE BRIEF OF AMICUS
CURIAE IN SUPPORT OF APPELLANT SIRY INVESTMENT, LP**

TO THE HONORABLE TANI CANTIL-SAKAUYE, CHIEF JUSTICE
OF THE STATE OF CALIFORNIA:

Pursuant to California Rule of Court 8.520, Steven P. Scandura, Esq., respectfully requests leave to file the accompanying amicus curiae brief in support of appellant Siry Investment, LP, in order to present interests of anti-fraud attorneys practicing in the State of California.

Statement of Interest of Amicus Curiae

Amicus Steven P. Scandura is an attorney practicing, *inter alia*, anti-fraud law in the State of California, often representing the victims of frauds similar to that inflicted on appellant Siry Investment, LP.

This request concerns ONLY the issue of the applicability of Penal Code §496(c) to civil cases.

Amicus has multiple cases involving Penal Code §496(c) against various malefactors who have committed fraud. Amicus is one of the few such attorneys willing to take these cases on a contingency fee, which is often the only option for most victims.

Amicus' interest is that the Court not "throw the baby out with the bath water," and consider especially the lasting and far-reaching impact that affirming the lower court's decision will have on efforts to combat fraud in the State of California.

Amicus has no interest in this pending action, nor does he represent the interest of any party to this case. No party or attorney to this case has authored any part of this brief, assisted Amicus in any way, or paid any money or other thing of value to Amicus. No other person has made any monetary contribution intended to fund the preparation of this brief.

This Brief Will Assist the Court in Deciding this Matter

Amicus believes that sharing the unique perspective of the plaintiffs anti-fraud bar will help explain why the Legislature wisely refrained from restricting the applicability of Penal Code §496(c) to merely the trafficking in stolen goods. Further, there are many cases endangered by the Second District's decision in *Siry* which fall in between *Siry* and the strictly anti-fencing-of-physical-goods cases. Amicus aims to present these issues.

Introduction

This brief addresses public policy issues only. Amicus here contends that *Bell v. Feibush* (2013) 212 Cal.App.4th 1041, is an important protection that helps maintain the rule of law and helps keep fraud in check. Without it, anti-fraud cases become far more difficult to take and prosecute. Penal Code §496(c) gives the victims a fighting chance.

In many instances, the malefactors have stolen most all of their victim's money, leaving them with insufficient resources to fund the prosecution of their case. They must often resort to a contingency fee.

In many instances, the malefactors have a war-chest of stolen money to fund the defense of the case against them.

This creates an unfair imbalance: without treble damages or attorney fees, the victim's attorney is limited to 40% of the amount stolen, whereas the malefactor can spend 100% of the amount stolen. Penal Code §496(c) remedies this imbalance.

Anti-fraud cases are extremely difficult, *Siry* being a good example as it is still pending after 14 years! Concurrent fraudulent conveyances make recoveries in fraud cases even more tenuous. Not only must victims fund their case, but they have to chase the money too. Limiting recovery to actual damages and denying attorney fees guarantees that fewer anti-fraud cases will get taken and that more scammers will get away scot free.

Further, there does not appear to be any widespread abuse of Penal Code §496(c) under *Bell v. Feibush*. If anything, there are not enough anti-fraud cases as many frauds still go unrectified.

Amicus asks the Court to consider these additional points:

1. There is a paucity of public law enforcement dedicated to eradicating fraud. The FBI has less than 14000 agents in the entire Country, with only a fraction working on fraud cases.
2. Fraud is at epidemic levels, yet few are fighting it other than a small cadre of civil lawyers (*there are not even enough anti-fraud lawyers to constitute a section of the State Bar*).
3. There are many cases which fall in between *Siry* and the standard anti-fencing cases. These cases fall within the spirit of Penal Code §496(c) even if they are not strictly the fencing of stolen merchandise.

Fraud is parasitic, having a strong tendency to metastasize and damage whole areas of an economy. Left unchecked, fraud begets fraud. It skews competition in favor of those who will promise anything. Fraud acts as a tax on the entire economy. Left unremedied, it subsidizes bad actors and makes it difficult for the honest to compete.

Ultimately, unchecked fraud leads to kleptocratic institutions which stifle legitimate business and crush an economy. Rampant fraud goes a long way to explain how Russia, with a population of 145 million people and vast natural resources, has a smaller GDP than New York and barely half that of California. How does one invest in a place when there is no way to trust that honesty will be enforced? The answer is invariably: less often and at higher cost.

Penal Code Section 496(c) Is Sorely Needed

Siry's interpretation of Penal Code §496(c) hurts the public. There already is a paucity of law enforcement dedicated to eradicating fraud.

Fraud is at epidemic levels, yet few people are fighting it other than a small cadre of civil lawyers. In many cases, frauds leave victims broke and unable to fund litigation to chase the perpetrators. They must rely on contingency lawyers.

Siry, if it stands, will unquestionably make it easier to get away with fraud. It will make it less likely that an attorney can afford to take such a case on a contingency. It makes it much harder for people who have lost everything to pursue legal remedies.

Siry harkens back to the days of judicial lenience towards fraud. It was not until 1977 that this Court clearly rejected the requirement that fraud be proven by clear and convincing evidence. See, *Liodas v. Sahadi* (1977) 19 Cal.3d 278, 286-293. The ability to sue for fraud successfully is a backbone of the rule of law and an essential piece to a modern economy. The proliferation of fraud threatens our economy and the rule of law. *Siry* hurts by dramatically shifting the balance in favor of the malefactors.

Further, it is not enough to say that the availability of punitive damages mitigates the impact of *Siry*. Punitive damages must be proven with clear and convincing evidence; something that is particularly difficult in fraud cases because the malefactors typically have exclusive control over the evidence. Victims often are left in the dark about what happened, knowing little else but that they have been cheated.

Fraud imposes social costs that can far exceed the actual money stolen. The epidemic of EB-5 frauds (*targeting foreigners who invest \$500,000 here for a green card*) has all but shut down the EB-5 investment visa program, costing the State millions of dollars in lost legitimate investments. The imposition of treble damages is a logical and efficient way to force scammers to bear at least some of these social costs. However, denying treble damages allows scammers to externalize the social costs (*in economics: a subsidy*). Treble damages help correct the subsidization of

fraud. *Siry* changes that dynamic to make frauds more profitable (*or less costly to undertake*).

By their nature, scammers hide their tracks and then hide the money. Many perfectly legitimate fraud cases will go unsatisfied because of the persistent tendency of courts not just to go lenient on fraud and but to then go hard on those trying to establish the resulting fraudulent conveyances. The *Siry* interpretation of §496(c) makes fraud a more profitable business decision. Making it harder to prosecute fraud makes more frauds viable.

Siry illustrates this point perfectly. *Siry* would have the plaintiffs only recover \$534,118 in actual damages (*plus prejudgment interest*), after fourteen years of litigation. Obviously 40% of \$534,118 is not enough to fund such a case. No reasonable lawyer or litigant should ever take such a money losing case, and therefore such frauds will tend to go unredressed.

Siry makes fraud safer to perpetrate. Scammers can steal as much as they can since there is virtually no law enforcement on the beat. If someone sues, the MOST they will get is the amount provably stolen, and they can always settle for a fraction of that since the plaintiff cannot recover attorney fees. As *Siry* amply demonstrates, scammers can litigate endlessly (*often using the very money they stole to fund the defense*) to make it untenable to prosecute these cases.

Only the prospect of treble damages and attorney fees makes it viable for attorneys to take many of these perfectly legitimate cases. In *Siry*, despite having proven fraud by clear and convincing evidence, the Court of Appeal deprived the plaintiff of attorney fees after more than 14 years of litigation. The Court must know that this will discourage attorneys from taking fraud cases even where the fraud is obvious (*as in this case*). Why is that a good thing? Forcing plaintiff's lawyers to rely on punitive damages to fund their attorney fees is simply throwing the courts back to the day when fraud needed to be proven by clear and convincing

evidence—something that is seldom possible when the malefactors control the evidence. The Court would be giving the clearest benefit to those malefactors who can most effectively hide evidence. Only rare cases where clear and convincing evidence is *already* in the victims' hands will be viable for attorneys to take.

***Bell v. Feibush* Better Addresses the Modern Economy**

Many fraud cases fall within the exact purpose of Penal Code §496(c) yet would be excluded under *Siry*. For example, take the case of an importer of Covid-19 face masks who prepaid \$580,000 for 528,000 face masks for resale to healthcare providers. When the masks arrived at the port, the exporter's conspirator faked a bill of lading, secretly claimed the goods, and then turned them over to another company to liquidate them. [This case was recently filed: Los Angeles Superior court case no. 21LBCV00320, *Stop-C19 v. Tooling Express, et al.*] Clearly, the goods were stolen, and fenced. But they were stolen with forged documents which makes §496(c) inapplicable under the *Siry* interpretation. It is hard to see that as a viable case without treble damages and attorney fees.

Similarly, many instances of fraud involve outright theft. Take the example of someone who steals a computer password, fraudulently uses it to empty the victim's bank accounts, and launders the money by sending his friend to a casino. This is almost exactly the same as breaking into a warehouse, stealing stereos and giving them to a fence. But under the *Siry* interpretation, §496(c) would not apply. What about the situation where a house title is taken during a fraudulent mortgage short-sale scheme, and the property is then sold to a shell LLC and then to a *bona fide* purchaser?

Is this Court going to rule that digital transactions involving purely electronic goods do not qualify under Penal Code §496(c) even where all of the elements are met? One can see many such thefts occurring, but all are

technically fraud, not theft. For example, a burglar could break into a publicist's office, steal a box of celebrity photographs and sell them through a friend at a swap meet and even the *Siry* court would have to concede that it would be covered by §496(c). However, if the celebrity's phone is hacked, digital photographs are stolen, and then they are sold through an intermediary on the web, then *Siry* would not apply §496(c). How is it any less applicable just because the goods are purely electronic? Why is it not theft when the "good" are money? What if it is bitcoin that is stolen? None of these involve the fencing of goods envisioned by *Siry*. Even Evidence Code §250 recognizes the parity of the electronic and the physical.

The line between theft and fraud gets very blurry. For example, is it theft when one steals a keycard to gain entry into a warehouse to steal the goods, but not so when one fraudulently poses as a courier, allowing the victim to load the goods onto the wrong truck from whence they are then sold at a swap meet?

Conclusion

Amicus argues that the best result is to leave *Bell v. Feibush* in place. Fraud is theft. *See*, Penal Code §484(a). Splitting hairs to redefine theft to exclude almost everything except the very narrowest of definition has no place in the law anymore and should not be followed.

Respectfully submitted,

DATED: June 14, 2021 **The Law Offices of Steven P. Scandura**

By: 
Steven P. Scandura, Esq.
Amicus Curiae

CERTIFICATE OF COMPLIANCE:

This brief contains 2133 words, as determined by the word processing program's count function.

Respectfully submitted,

DATED: June 14, 2021

The Law Offices of Steven P. Scandura

By: 
Steven P. Scandura, Esq.
Amicus Curiae

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AND BRIEF OF AMICUS CURIAE STEVEN P. SCANDURA
IN SUPPORT OF APPELLANT, SIRY INVESTMENT, LP**

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STATE OF CALIFORNIA
 Supreme Court of California

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