

The Marin Lawyer

An Official Publication of the Marin County Bar Association



PRESIDENT’S MESSAGE LAWYER REFERRAL OFFERS A WIN-WIN SITUATION

By Marlene P. Getchell

Many people in our community who are dealing with the impact of the current economic crisis often wonder where they can turn for help. For many of them, the answer is the Lawyer Referral Service (“LRS”) operated by the Marin County Bar Association.

Most of us are familiar with the traditional role that LRS plays with lawyers applying to serve on a panel, assisting people with questions regarding one aspect of the law. These panels, developed for people who are able to pay but do not know how to find an attorney or what services they need, also serve as a way for our members to reach out to prospective clients.

LRS normally isn’t a money maker for the Marin County Bar Association. There have been many years that it has run in the red. However, LRS does give us the opportunity to reach out into the community and provide not only affordable legal services to the public, but also a positive image of attorneys in Marin. In fact, LRS includes a panel that provides services to senior citizens 60 years and older who meet certain financial criteria at half the hourly rate normally charged for work being done.

(Continued on page 10.)

Calendar of Events

No General Membership Meeting in July

July 15th
Probate & Estate Planning Section Meeting
12 – 1:30 pm

July 16th
Real Property Section Meeting
12 – 1:30 pm

July 20th
Probate & Trusts Mentor Group
12 – 1:30 pm

Look for details each month in *The Marin Lawyer*

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David Brown was Guest Editor of this issue of *The Marin Lawyer*. Philip R. Diamond is Series Editor for 2009.

DIVORCE – CORPORATE STYLE

By Fred B. Weil*
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When marital partners reach the point of irreconcilable differences, either party can end the marriage through “no fault” dissolution. But for corporate shareholders, getting out of a California corporation when deep differences arise can be difficult.

In my experience, the most typical situation is one where the corporation was organized by one family or by a group of 2 or more friends, but the shares have passed to their descendants, whose interests widely diverge from each other. Frequently, one faction has effective control of the corporation and the other faction either wants more money dis-



(Continued on page 11.)

FAMILY VIOLENCE COURT IN MARIN



Hon. Verna Adams

by Hon. Verna Adams, Marin County Superior Court Presiding Judge, and Kim Turner, Court Executive Officer



Kim Turner

A year ago, Marin's criminal justice leaders took a bold step for public safety. With no new State of County funding, I, in collaboration with the District Attorney, Public Defender, and probation, launched Marin's Family Violence Court, designed to focus the court's attention and resources on Marin's highest-risk domestic violence defendants. High-risk domestic violence defendants are those who have a history of family violence and high recidivism rates. In Marin County, family violence is the most often charged

violent crime, according to court filing data. This well known fact gave local leaders the impetus to implement the Family Violence Court. Our District Attorney, Edward Berberian, has cited family violence as the number one violent crime in Marin.

The concept of the Family Violence Court is to work with defendants referred into the program after they have pled guilty to or been convicted of domestic violence charges. In weekly court proceedings, Family Violence Court team members intensively monitor defendants' court-ordered attendance at batterers' treatment programs, as well as other therapeutic services to assist them in permanently altering behavior that leads to family violence. At the one year mark, Family Violence Court team members report that the program has achieved remarkable results; none of the participating defendants has had any new convictions for domestic violence.

I have presided over Family Violence Court since its inception. The outcomes so far are evidence of the Family Violence Court's stunning success. The fact that not one of these high-risk defendants has re-offended in the last year is truly a remarkable achievement. I expected the outcomes of intensive monitoring to be promising; I did not expect them to be so undeniably compelling. Right now the Family Violence Court is filled to capacity, but there are many defendants who would benefit from this targeted, therapeutic approach. My hope is that we can serve a greater number of defendants and their families in the future.

Family Violence Court's core team members include Deputy Probation Officer Melissa Davis, Deputy Public Defender George Shea, and Deputy District Attorney Chuck Cacciatore, as well as an on-site batterers' treatment pro-

gram facilitated by John Hamel, a licensed clinical social worker, who meets with defendants for their mandatory batterers' treatment program directly following the adjournment of court each week. The Department of Health and Human Services also provides information and referrals to family therapeutic services and alcohol and drug treatment providers. For those defendants who demonstrate commitment and progress toward complying with the court's orders, they may elect to participate in "post graduation" services to help them reunify with their families and develop better strategies for coping with family stress.

Much of the credit for the successful defendant outcomes goes to the Probation Department, which is handling the case management of defendants to ensure their compliance with all court orders. Acting Chief Probation Officer Michael Daly said, "The probation Department feels strongly about domestic violence in Marin. DPO Melissa Davis has done an outstanding job during the first year of Family Violence Court and has played a large part in its success. She holds offenders accountable and addresses the victim issues with equal importance."

Sustaining the Family Violence Court, given today's fiscal realities, will be challenging. All criminal justice departments and the court are faced with significant budget reductions in the coming year which will stretch resources thin. In spite of this unavoidable obstacle, I believe that Family Violence Court is not only a proven strategy to improve public and victim safety, but it also has an added benefit that is too often overlooked. By reducing recidivism in high-risk defendants, a myriad of other criminal justice costs on new arrests are successfully avoided, such as incarceration, prosecution, and victim-related costs. The Family Violence Court does not just make sense as a public safety program, but also gives taxpayers a great return-on-investment of their tax dollars to address a pervasive criminal justice issue.

Family Violence Court meets every Wednesday at 2:30 p.m. in Courtroom J. The first graduation, in which three of the Family Violence Court participants were recognized for successfully completing the program, was held on May 20, 2009. Members of the Bar as well as the public are always welcome to observe these proceedings.

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JUDGE ANDREW SWEET ADDRESSES MARIN COUNTY BAR ASSOCIATION

By Lara Wallman, Marin County Deputy Public Defender

Hon. Andrew Sweet

I first read in the Marin Independent Journal that Andrew Sweet, a former prosecutor from Alameda County, was becoming a Marin county Judge. As a Deputy Public Defender, I was quite nervous when I was assigned to his trial department on April 27, 2009 for a misdemeanor DUI case. I entered his courtroom in Department E of Marin County Superior Court with an equally nervous client. Judge Sweet had an excited expression, introduced himself as "Andy," and asked us for our motions in limine. On day two of the trial, he advised both counsel that we would promptly finish at 4:30 p.m. that afternoon because he was going to a Giant's game. I found his demeanor to be professional yet friendly, and his rulings to be fair and well reasoned. When my Chief Deputy Public Defender, David Brown, invited me to join him at the Marin County Bar Association luncheon to hear from Judge Sweet, I felt both privileged and excited.

Judge Sweet, a local Marin kid, graduated from Redwood High School, received his undergraduate degree from U.C. Berkeley, and his Law degree from the University of San Francisco. He began his speech with a joke about judges. He then explained why he wanted to become a judge, what he wants to see in his courtroom, and what he wanted to achieve in his judgeship.

Judge Sweet addressed the Marin County Bar Association at our monthly General Membership meeting on June 24. He told us that he wanted to become a judge to bring

impartiality to the courtroom. However, he did not know he wanted to become a judge until later on in his career. Like many new practicing attorneys, Judge Sweet wanted a career in the courtroom. He applied to both district attorney and public defender offices statewide. Alameda County hired him as a Deputy District Attorney, and he remained there for the next thirteen years. He then briefly practiced civil litigation in San Francisco before applying for a judgeship here in Marin. Judge Sweet feels that his combination of civil and criminal experience makes him well qualified to sit on the bench.

As a Marin County Superior Court Judge, Judge Sweet is determined to be his own person, and that his rulings should not be influenced by politics. From the attorneys who come into his courtroom, he expects preparedness, honesty, and civility. He does not want sandbagging or speaking objections. He expects (and I have experienced in his courtroom so far) that attorneys must have good legal authority before making arguments.

Judge Sweet stated that his goal as judge is to be fair, thoughtful, and to bring integrity into his courtroom. Although my case was only the second jury trial over which he has presided, I believe that Judge Sweet is holding true to his goals and will continue to be a valuable asset to the Marin County Courts.



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AWARD OF LIQUIDATED DAMAGES UPHELD IN A RETAIL LEASE WHERE THE TENANT IMPROPERLY DISCONTINUED OPERATIONS

By Scott D. Rogers*
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In today's troubled economic climate, it is increasingly common for retail tenants to cease or suspend operations and "go dark". Even if the tenant continues to pay contract rent and common area maintenance charges, discontinuance of operations by itself will often be an actionable default if the lease contains a continuous operations clause. In just these circumstances, the California appellate court in *El Centro Mall, LLC v. Payless ShoeSource, Inc.*, 174 Cal. App. 4th 58 (May 21, 2009), upheld an award of damages to a shopping center landlord based upon a liquidated damages clause contained in the retail lease.

Background Facts

Payless entered into a commercial lease for 3,300 square feet in the landlord's shopping center. The lease contained a fairly typical continuous operations clause obligating the tenant to operate during specified hours seven days a week throughout the term of the lease. The continuous operation clause also contained a liquidated damages provision setting forth an additional daily charge equal to the greater of \$100 or 10 cents per square foot of floor area for each and every day that the tenant failed to operate in the premises (applicable after a five day grace period for the first breach). The poorly drafted liquidated damages clause expressly noted that "such additional charge is a liquidated sum representing the minimum damages which Landlord is deemed to have suffered, including damages as a result of Landlord's failure to receive Percentage Rental, if any, under this Lease..."

Due to poor sales over a prolonged period, Payless had not paid percentage rent for nearly 6 years. 284 days prior to expiration of the lease term, Payless ceased operations in the premises. Notwithstanding that Payless continued to pay rent and all other amounts due under the lease, Payless' closure constituted a breach of the lease's continuous operations clause. The landlord sought to collect the addi-

tional charge under the liquidated damages clause. Payless refused to pay, claiming that the liquidated damages clause was an unenforceable penalty under California Civil Code section 1671.

As stipulated by the parties, trial was based on briefs and written evidence but without live testimony. Payless contended that the liquidated damages clause was arbitrarily applied by the landlord among the shopping center's tenants and thus could not be a reasonable estimate of the potential damages at the time the lease was executed. The landlord asserted that the liquidated damages clause was properly intended to reimburse the landlord for its loss in business at the shopping center arising from Payless' discontinuance of operations. The trial court held that Payless had not overcome the presumption of validity of the liquidated damages clause and awarded \$98,000 in liquidated damages to the landlord.

Analysis of Decision

In reviewing the trial court's ruling, the appellate court noted the changes made by the legislature in 1977 amending California Civil Code section 1671 to delete the prior presumption of invalidity of liquidated damages clauses and replacing it in most cases with a presumption of validity.

(Continued on page 12.)

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RESOLUTION

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RESTORATIVE POLICING: AN ALTERNATIVE LAW ENFORCEMENT RESPONSE

by Officer and Doctor Joel Fay, San Rafael Police Department*

In 1999, in response to the growing concern among the downtown merchants and citizens about the mentally ill

homeless population, the San Rafael Police Department decided to try an innovative approach. The first step was to acknowledge that for many mentally ill people, an arrest without a plan was nothing more than a temporary incarceration and an ineffective use of resources.

In November 1999, I conducted a needs assessment of the San Rafael community and decided on an approach, which sought to reintegrate mentally ill and homeless persons into the community. I developed an inter-agency collaborative specializing in mentally ill persons who frequently contact law enforcement. The effort involved shifting law enforcement's focus from arresting mentally ill offenders to challenging the treatment status quo. The process began by revising the police perspective of the homeless mentally ill. I suggested that the mentally ill citizen was a victim of an inadequate service system. Shifting schematic blame from a person to the system began a process of engagement with a severely marginalized population. This perspective recognized the role of mental illness in maintaining homelessness and criminal behavior.

Focusing on a Solution

In Marin, the implementation of this law enforcement-driven collaborative provides the required links to engage and treat the community's most-difficult clients. However, before Officers could engage clients, they needed to engage the social service system. I proposed a partnership between law enforcement and treatment providers that would allow community service providers to gain the type of outreach and community presence required to intervene with homeless mentally ill persons, while assisting police departments with their most difficult citizens.

Moving toward this solution requires law enforcement and mental health providers to shift their focus away from organizational and fiscal issues and toward treatment goals while helping law enforcement consider a longer view. It should not surprise police or mental health groups that in the end they need one another to accomplish their goals.

I named the concepts and methods for working with mentally ill persons "Restorative Policing." A Restorative

Policing Project (RPP) has three basic goals:

- To maintain public safety;
- To reduce harm to individuals and the communities; and
- To restore marginalized individuals to a supportive natural community.

To accomplish its goals, a Restorative Policing project increases community awareness using community outreach and public speaking, encourages clients to use treatment and supportive services, instead of criminal justice services, and uses individual advocacy as a primary intervention.

Marin County's RPP collaborative allows law enforcement and other elements of the criminal justice system to bring cases directly to the mental health system requesting intervention in the life of a client. A synergy of police philosophy, social work and psychiatry has allowed community mental health to successfully treat people who were previously considered untreatable. This collaboration with mental health has allowed law enforcement to reduce fruitless calls for service, to gain compassion for the mentally ill, and to successfully intervene in the lives of persons they once thought of as bums or vagrants. Clients now see police as concerned public assistants instead of bullies and brutal enforcers. Police build relationships and become compassionately involved in the lives of persons they once felt to

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MEET YOUR DIRECTORS SPOTLIGHT ON MATT WHITE

The Marin Lawyer decided that it would be a good idea to let the MCBA membership get to know a little more about the MCBA Directors whom they elected,

and who give so much to make the MCBA a great, vibrant, organization. To that end, *The Marin Lawyer* will run a series of articles, each focusing on a different MCBA Director or Officer. This month, our spotlight is on MCBA Past President and current Program Chair Matt White.

The Marin Lawyer: What is your practice area?

Matt White: For most of the past 30 years, plaintiff's personal injury work. Recently, I've begun doing more general civil litigation. I also do ADR through Resolution Remedies here in San Rafael.

TML: Why did you decide to become a lawyer?

MW: Two reasons. First, when I learned I could argue all day long *and* get paid for it, I knew this was the job for me. Second, I had high hopes of making a difference in the world, and saw law as a means toward that end.

TML: Why do you live in Marin?

MW: Why not? I've traveled quite a bit and never found a more beautiful place. Aside from that, I've lived here for nearly 50 years – and inertia is a powerful force in my life.

TML: What do you love to do when you're not busy practicing law?

MW: I've had some success racing my Ferrari on the Formula One European tour. (Just joking.) Really, I have a small but productive vegetable garden, which consumes great portions of my weekend. I've been playing softball for many years; for some reason, the older and slower I get, the more fun it is.

TML: Tell us about your family.

MW: One wife (married 32 years), two sons (22 and 17), one beautiful Bedlington Terrier, two stupid cats, four

hungry koi, and two dozen goldfish.

TML: If you could pursue any other career besides law, what would it be and why?

MW: This is the terrifying part: I have no other skills or vocational interests. Now, if I could choose another occupation *and* have the talent to support it, I'd pitch for a major league baseball team (National League only; I'd want to bat). Or, if I knew any good jokes, I'd be a standup comedian; I like hearing people laugh.

TML: Why did you join MCBA?

MW: It's been a wonderful way to get to know so many lawyers in our community. I spent 20 years in San Francisco and it was just too big to get to know everybody. Here, it's possible, and I love it.

TML: Why did you become a Program Chair?

MW: My rule is: When Marlene Getchell asks for something, the answer is always "yes."

TML: What are some of the challenges facing the Bar right now?

MW: First, in the private sector, fewer and fewer of our clients can afford our services. We need to find a way to provide access to justice for *all* members of the community, not just the wealthy ones. Second, the independence of our judiciary remains under attack. As lawyers, we either speak up to defend judges' independence, or cede the justice system to those who want to use it for their own political purposes.

TML: What has been the highlight of your career so far?

MW: In 2004, during my MCBA presidency, I ran for judge here in Marin. I did not win – obviously – but I met a lot of good people, had fun, and learned quite a bit about public perception of judges and the legal system.

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PRESS RELEASE
(June 15, 2009)

**CHANGE OF PUBLIC BUSINESS HOURS
RECORDS MANAGEMENT DIVISION
ROOM 112, CIVIC CENTER HALL OF JUSTICE**

Effective June 29, 2009, the Court will shorten its Records Management Division's public business hours. The new public hours will be 8:30 AM - 12:30 PM daily.

This step is being taken to best balance the need for public access to court records with the reduction in our workforce following the decline in state financial support for the trial courts. This change will be in effect indefinitely. We look forward to that time when we will be in a position to restore and expand services in the Court's Records Management Division.

For additional information regarding this press release, contact, Kim Turner, Court Executive Officer at (415) 473-6244.

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NEXT MEETING: Thursday, July 9th, 6 pm,
Café Arrivederci
11 G Street, San Rafael

SPEAKER/TOPIC: Kim Turner, Marin County
Court Executive Officer
status of the court during
the current budget crisis

RSVP/INFO: Kristi L. Edwards, CCLS,
491-5000,
kledwards@justice.com

TIP OF THE MONTH: Six continuing education
workshop opportunities await MCLPA members at
our August '09 conference in Palm Springs.



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INSURANCE BAD FAITH LITIGATION SEMINAR

On September 10, 2009 at the Corte Madera Inn from 4:00 – 6:00 pm, the Marin County Bar Association will offer a seminar offering 2 hours MCLE credit, on “INSURANCE BAD FAITH LITIGATION” presented by Guy O. Kornblum. Mr. Kornblum is well known in the insurance bad faith field, having been one of the first lawyers in California to try a first party bad faith case after the key cases of *Gruenberg* and *Silberg* were decided in the early 70’s. He also co-authored the first Rutter Group Practice Guide; Bad Faith, and has conducted hundreds of hours of seminars on insurance litigation. He is co-author of the recently released 2 volume “Negotiating and Settling Tort Cases,” published by the American Association for Justice and the Thomson West Publishing Company.

Mr. Kornblum is Certified in Civil Trial Advocacy by the National Board of Trial Advocacy; is a Lifetime Member, Multi-Million Dollar Advocates Forum Member; and is a Platinum Member of The Verdict Club, which recognizes “significant accomplishments by verdicts or settlements” of trial lawyers. He also is a Charter Fellow, Litigation Counsel of America Trial Lawyer Honorary. Mr. Kornblum has been listed in many significant lists of premier law firms. He is a Northern California Super Lawyer for 2006-2009.

HIGHLIGHTS of SEMINAR

- Some basic concepts of insurance law and insurance bad faith that you need to know, you may think you know them but maybe don’t.
- The construction of an insurance policy; what you need to evaluate whether the company has made a wrong decision. You may think you have it all, but probably do not. How do you get it and insure that it is complete?
- Bad faith cases – where are they today? Concepts and Realities. The three tiers, and rules as to each; cost considerations in pursuing such; issues pertaining to punitive damages in bad faith cases. Limitations on recovery and economic realities of litigating a bad faith case.
- What makes a “good” “bad faith” case? How do evaluate, and how do you settle these cases. Are they subject to good results at mediation, and if so how do you posture them for a good result then.
- The “genuine dispute” doctrine. Is it really a defense to “bad faith”
- How important is the insured’s conduct?
- How do you convert the contract claim to a tort claim? What gets you over the contract limitation on damages to the tort arena, and exposure to punitives?
- Does punitive exposure factor into the evaluation and settlement of a bad faith case?
- Some thoughts on the claim file and how it can be used in settlement and trial.
- The trial call: 10 basic “must do’s” at the trial of a bad faith case.

Date: **September 10, 2009**

Time: **4-6PM**

Location: **Best Western Corte Madera Inn, 1815 Redwood Hwy, Corte Madera**

Cost: **\$60 for MCBA members/ \$85 non MCBA members**

Seating is limited. Please make reservations in advance using form below.

Marin County Bar Association is a State Bar of California MCLE Approved Provider. MCBA certifies that this activity conforms to the standards for approved education activities prescribed by the rules and regulations of the State Bar of California governing minimum continuing legal education and qualifies for two (2) hours of MCLE credit. State Bar Provider #411.



To register, please fill out the form below and mail it, with your check payable to the Marin County Bar Association, 30 N. San Pedro Road, Ste. 140, San Rafael, California, 94903. Insur Law 9/10/09

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July, 2009

Dear Member of the Marin County Bar Association,

Re: Application to become an Officer or Director of the Marin County Bar Association

Pursuant to the Bylaws of the Marin County Bar Association, a Nominating Committee will be chosen.

The committee will meet prior to the September Board of Directors Meeting and make their recommendations for Officers and Directors for 2010. The committee will then report their recommendations at the September General Membership Meeting.

The election will be held at the November General Membership meeting.

If you wish to be considered for a director or officer position, please complete the application below and mail to President-elect Beth Jordan Marin County Bar Association 30 N. San Pedro Rd., Ste. 140 San Rafael, CA 94903. All applications must be received, in hand, by the close of the business day, **September 1, 2009**. If you wish to attach additional information, please do so.

Very truly yours,
Marlene Getchell, President
Marin County Bar Association

APPLICATION

Dear Nominating Committee,

I wish to become a director, the president, secretary, treasurer (please circle applicable positions(s)) of the Marin County Bar Association.

Please state your qualifications:

Please state your reason for seeking this position:

Applicants Signature: _____

Name: _____

Address: _____

City/State/Zip: _____

**ALL GOLFERS
(AND FRIENDS OF GOLFERS)
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WHAT: THIRD ANNUAL MCBA GOLF TOURNAMENT
(AND BENEFIT FOR GUIDE DOGS FOR THE BLIND)

WHEN: FRIDAY, OCTOBER 2, 2009

FORMAT: SCRAMBLE (SO THAT GOLFERS OF ALL LEVELS MAY PARTICIPATE AND HAVE A GREAT TIME!)

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(President's Message, continued from page 1.)

Applicants for LRS must have a full-time office for the practice of law in Marin County. If the applicant has a secondary office, the applicant must spend at least 75% of his or her time working in Marin. Each lawyer on the panel must meet or exceed standards of experience and qualifications. Standards of experience include requirements of practice in the area of expertise, such as being counsel of record in a few cases pertaining to the practice area or having drafted documents pertaining to the area of expertise. Applicants who are certified by the California State Bar as specialists in the area of expertise will automatically meet the experience requirements. Qualifications generally include the completion of 3 hours of continuing legal education courses within the last 36 months in the area of practice. The cost to join the LRS panel is only \$175 and allows the attorney to participate on the general panel and 3 subject matters. The attorney donates the first half-hour consultation. Any fees after that are negotiable between the client and the attorney. The attorney needs to pay LRS only 12.5% of the total attorneys fees received, as a referral fee.

Applications for the LRS panel are reviewed by members of our LRS Committee which is made up of attorneys who practice law in Marin. Once an application is approved, referrals are made to panelists on rotation in a fair and impartial manner. Jan Salas serves as the LRS Coordinator. She talks to the clients looking for attorneys and works with the panelists in making LRS assignments.

LRS has over 70 lawyers on its panel with expertise in virtually all areas of the law. The cost of the one-half hour consultation is a nominal \$50 administrative fee which is paid to LRS. The fee is waived for personal injury and workers' compensation matters. Frequently, legal problems can be solved during the initial half hour consultation. LRS is now able to accept inquiries from clients for LRS panelists on line at the MCBA website.

LRS can always use more referrals of clients in need of a skilled attorney. I frequently refer people to LRS who need an attorney or have a legal question that is not in my area of expertise.

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(Divorce, continued from page 1.)

tributed or wants to convert their ownership to cash or some other investment. When shareholders are equal partners, dissolution is an available, though sometimes complicated, remedy. When an unhappy shareholder cannot muster 50% of the shareholder votes, dissolution may be possible in some circumstances.

An unhappy shareholder holding at least 50% of a corporation's voting stock may file with the Secretary of State a voluntary election to wind up and dissolve under Corporations Code Section 1900,¹ thereby beginning the process. The shareholder needs no reason for commencing dissolution – it is essentially a “no fault” dissolution. Where that process may lead is discussed below.

If unhappy shareholders together own at least 1/3 of the outstanding shares, they can file a complaint for dissolution with the Superior Court under Section 1800, but there are very limited grounds. The most frequent grounds are:

(a) the corporation has abandoned its business for more than one year;

(b) the corporation has an even number of directors and the board is deadlocked, creating a situation where the business can't be managed profitably or the property and business are in danger of being impaired or lost, and the shareholder factions are unable to elect an uneven number of directors to break the deadlock;

(c) those in control have been guilty of, or knowingly countenanced, persistent and pervasive fraud, mismanagement or abuse of authority or persistent unfairness toward any shareholders, or the corporation's property is being wasted;

(d) if the corporation has 35 or fewer shareholders, liquidation is reasonably necessary for the protection of the rights or interests of the complaining shareholders.

Unhappy shareholders who own less than 1/3 of the shares may still have the right to force dissolution. Under Section 1800, the complaining shareholders, in counting up to 1/3, are allowed to exclude from the denominator shares owned by persons who personally participated in any of the transactions described in item (d). As a result, a small minority being abused by a large majority may have enough shares to force dissolution. In all other circumstances, unhappy shareholders owning less than 1/3 of the shares must look to other remedies or accept their powerless minority status.

A successful effort to commence dissolution under Section 1800 or 1900 may, however, be only the first step. The party that moves to commence dissolution must then wait to see if the corporation or the non-moving parties (the other shareholders) exercise the right under Section 2000 to avoid dissolution by purchasing for cash the shares of the moving party at “fair value.” Fair value is determined on the basis of liquidation value, but taking into

account the possibility of a sale of the entire business as a going concern in a liquidation. Courts have interpreted “fair value” to be something less than fair market value because of the assumption that a sale would occur over a short period of time in a liquidation context. However, the courts have held that no minority discount is to be applied, that a covenant not to compete from the departing shareholder is to be presumed in valuing the business, and that taxes that might be incurred in liquidation are to be ignored because there will be no liquidation if the moving party's shares are purchased. If the parties fail to agree on fair value, the nonmoving parties, upon posting a bond for certain expenses, may petition the Superior Court to stay the dissolution proceedings and determine the fair value of the shares, which is accomplished through three appraisers appointed by the Court. The rules under Section 2000 are complex, have been the subject of extensive litigation, and should be carefully considered by all parties.

The foregoing is a very brief summary of the rules governing corporate dissolutions in situations of conflicts among the shareholders. The unique facts of each situation will affect the appropriateness of pursuing remedies under Sections 1800, 1900 and 2000, or other remedies.

**Fred B. Weil is a partner at Hanson Bridgett LLP. He combines his experience in corporate and tax matters in handling disputes involving closely-held corporations. He can be reached at fweil@hansonbridgett.com or (415) 995-5087.*



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¹ Section references are to the California Corporations Code.

(Award, continued from page 4.)

Section 1671(b) currently provides as follows:

“[A] provision in a contract liquidating the damages for the breach of the contract is valid unless the party seeking to invalidate the provision establishes that the provision was unreasonable under the circumstances existing at the time the contract was made.”

The court recognized that the objective of a liquidated damages clause is to stipulate an estimate of damages so that the parties may know with reasonable certainty the extent of liability in the event of breach. (*ABI, Inc. v. City of Los Angeles* (1984) 153 Cal.App.3rd 669, 685) and that courts apply a “reasonable endeavor test” which requires that the parties have attempted to “estimate a fair average compensation for any loss” (*Ridgely v. Topa Thrift & Loan Assn.* (1998) 17 Cal.4th 970, 977).

The subject liquidated damages clause was intended to represent “the minimum damages which the Landlord is deemed to have suffered, including as a result of Landlord’s failure to receive Percentage Rental.” The court separated its review of the clause’s application to lost percentage rental from the landlord’s other losses. As to percentage rental, the court rejected the liquidated damages clause as an invalid penalty as the lease contained a readily ascertainable separate formula for determining damages for loss of percentage rental. As to the landlord’s other losses from breach of the continuous operations clause, however, the court acknowledged the role of liquidated damages as “it is difficult to estimate the amount of damages from the loss of synergy, goodwill, and patronage accompanying the breach of the continuous operations covenant by a national tenant such as Payless...”

In support of its position that the liquidated damages clause was not a reasonable attempt to estimate future damages for breach of the continuous operations clause, Payless presented evidence regarding the absence, of or inconsistent liquidated damages provisions in, other leases in the shopping center. Although it observed that Payless’ evidence could give rise to an inference that the liquidated damages clause was arbitrary, the court upheld the trial court’s decision that Payless had failed to meet its burden of proof to demonstrate that the clause was not intended by the parties to be a reasonable estimate of damages and thus a penalty. The decision was thus affirmed.

Observations

Because there has been scant, if any, authority on the application of liquidated damages clauses to breaches of the

continuous operations provisions in retail leases, landlords and tenants have grappled for years with the enforceability and even the desirability of such clauses in their retail leases. This case suggests that in the right circumstances even a poorly drafted liquidated damages clause can survive judicial scrutiny. As a consequence, the stakes have been raised so that landlords and tenants need to focus more carefully on the decision to include such clauses and the substance of those clauses. From the landlord’s perspective, liquidated damages may now be viewed as a viable remedy for the tenant’s closure in violation of a continuous operations provision. From the tenant’s perspective, liquidated damages may now provide some certainty as to the tenant’s potential exposure and aid the tenant in deciding whether or not to “go dark” in violation of its lease.

**Scott Rogers is a senior partner in the Real Estate, Development, Land Use and Finance Group of Holme Roberts & Owen LLP. Resident in the firm’s San Francisco office, his practice focuses on the representation of institutional and private real estate investors in all aspects of real estate equity and finance transactions. Mr. Rogers obtained his BA in Economics from U.C. Irvine and his J.D. and M.B.A. from UCLA. He is the chair of the Executive Committee of the Real Property Section of the State Bar of California.*

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be subhuman. Police become essential advocates, filling the gaps in a service system that has been divided into silos by maintaining accountability among the mentally ill and the agencies chartered to serve them.

Marin County's Restorative Policing Project

Marin's RPP has two major components. The first is the Forensic Multi-Disciplinary Team (FMDT). Each month, twenty-plus agencies meet to discuss law enforcement-initiated case management requests under the umbrella of the FMDT. Participants in the FMDT include criminal justice, mental health, and community service agencies. At monthly meetings, FMDT members review law enforcement requests for innovative client services and develop individualized case management plans. Law enforcement officers become substantially involved in the case management of difficult clients bridging a gap between clinic and community once thought to be insurmountable.

The FMDT, which began as cautious collaboration, has developed into a true partnership. Adopting a "never-give-up" policy, the FMDT never rejects a referral and keeps open clients on the roster until their cases are resolved. A successful resolution involves transferring the client from criminal justice to effective treatment. A client is removed from the FMDT roster once he engages in treatment. The guiding philosophy has developed into a collaborative action oriented, client focused workgroup instead of a long-term inter-agency strategy committee.

Allowing law enforcement to refer cases directly to mental health and community-based organizations may not seem revolutionary. The unique aspect of Marin's FMDT is the continued involvement of mental health liaison officers in the care planning and case management of the community's most difficult and compromised people. The FMDT effectiveness depends on law enforcement officers not only intervening more skillfully in the moment of the crisis but also following up after the incident to advocate for arrestees or detainees and ensuring the delivery of treatment services that are adequate to prevent further law enforcement contacts. The FMDT is not a treatment team, but a "get people into treatment" team.

The second component of the RPP is the Mental Health Liaison (MHL) Officer program. To assist the FMDT, each local law enforcement agency assigned an officer who participates in case planning and other project meetings. Using a specialized community-policing model, officers become familiar with the team's clients and their treatment plans. In this role police assist FMDT members in locating clients and checking in on their placements, thus becoming a visible extension of the treatment plan. Clients and mental health professionals have come to rely on the MHL officers

and frequently call on the services of the MHL officers to assist them. Families with a mentally ill member are also aware of MHL officers in their community and frequently ask to speak with these officers when efforts to engage a mentally ill relative have failed.

In the FMDT's ten years of operation many clients have been shifted from the criminal justice system to mental health. The success of the FMDT helped Marin County obtain its first mentally ill homeless grant and then two additional grants working with mentally ill offenders. Unfortunately, these programs have been cut drastically and may be cut further during the current financial crisis. The FMDT continues to meet and help clients at a time of dwindling resources and treatment slots. At a time when there is so little money to help those that need it the most, it makes sense to have the key organizations, who regularly encounter these individuals, meet to discuss the best ways to utilize available resources.

**Officer Joel Fay, Psy. D., is a Police Officer and Psychologist with the San Rafael Police Department. Dr. Fay works with the mentally ill and through a Restorative Policing program seeks to engage the mentally ill in treatment. Dr. Fay also works extensively with emergency responders after traumatic events. Dr. Fay teaches on various psychological issues to emergency responders and speaks at numerous conferences.*



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July 15th

Probate & Estate Planning Section Meeting
Frank Dubreuil, Bernstein Global Wealth Management
“Keeping it in the Family ~ The Three G’s ~ Gifting, GRATs and Grantor Trusts”
Tamalpais Room, San Rafael Corporate Center, 750 Lindero, San Rafael
12 – 1:30 pm

July 16th

Real Property Section Meeting
12 – 1:30 pm
David L. Roth, Practical Tips on Litigating Boundary Disputes
Seafood Peddler
For more information and to sign up, please contact section co-chair Derek Weller at derek@derekwellerlaw.com or (415) 453-1375.

July 20th

Probate & Trusts Mentor Group
An informal forum to further discuss issues addressed at the monthly estate planning section meetings or any other issues. Bring your lunch and interesting estate planning/trust administration/probate issues to discuss, and snacks will be provided.
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The Marin County Bar Association
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