

**DANGERS OF ENTERING HOTEL GUEST’S ROOM EVEN
IF ROOM OBTAINED BY CREDIT CARD FRAUD**

In the new case of *U.S. v. Bautista*, criminal defendant Kevin Bautista “using only a personal computer, ordinary software, and a color ink jet printer, manufactured approximately \$7,000 in counterfeit currency while staying in room No. 332 of the Good Nite Inn in San Diego.” It was not this activity which drew the attention of police, but the fact that the hotel reported his credit card as stolen. Bautista had reserved the room through www.lodging.com with a Visa card. www.lodging.com noticed that the card was stolen, and advised the Good Nite Manager, who called the police. The manager did not evict the suspect from the room, but rather wanted the police to come and find out what was going on with Mr. Bautista and the card. If the suspect had been unable to explain the credit card problem to the satisfaction of the manager she would have asked the police to evict him unless he could have come up with an alternative form of payment.

The police showed up and Bautista’s car was gone, but a housekeeper advised that a woman was still in the room. The manager gave the officers a “100 key” but this was only a pass key to the outside rooms, not to guest quarters. When the police knocked on the door, the woman spoke but would not open the door, and eventually the officers tried the pass key and simultaneously, the pass key for some reason worked and the woman opened the door to the room. Ms. Bautista seemed frozen and would not answer questions; she did not close the door on them, but rather, backed up, allowing the police to keep the door from closing. She then told them to come in, while backing away from the door. The police then saw the counterfeiting equipment and ultimately arrested Mr. Bautista, who confessed to the crime.

At trial, Bautista moved to exclude all evidence gained by or after entering the hotel room, which he said was illegal, including the confession. In criminal law, all evidence obtained through any illegal means is considered “fruit of the poisonous tree” and is excluded from evidence no matter how much it proves the guilt of

the defendant. The court denied the motions, defendant appealed, and the appellate court ruled that: 1) the evidence seen and seized by entering the room was obtained illegally and would be barred from trial; 2) the confession was a separate matter and could come into evidence. Thus, Bautista will likely be convicted but the legal matters raised by the case are important for the guest industry, in general.

The fine point that the case turned on was that the manager did not call the police to help her to eject the patron (a lawfully ejected guest does not have full privacy rights) but instead just called the police to further investigate the credit card situation. It is well settled that the Constitution’s privacy protections extend to all areas where a person has a “reasonable expectation of privacy” and, under this test, “if a hotel guest’s rental period has expired or has been lawfully terminated, the guest does not have a reasonable expectation of privacy in the hotel room” per *U.S. v. Haddad* 558 F.2d 968, 975 (9th Cir. 1977). Thus, where a manager lawfully ejects the guest, he does not have a reasonable expectation of privacy if the ejection is no more intrusive than it needs to be. The *Haddad* court said, “A justified ejection is no different than a termination of the rental period, when the guest has completely lost the

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right to use the room and any privacy associated with it.” Here, though, the police and the hotel were not ejecting Bautista, just investigating his ability to pay. His right to continued use of the room, and hence his right to privacy in it, were never challenged before the room was entered and the evidence was taken. The manager took no affirmative steps to repossess the room once she learned that the card was stolen and instead planned to evict the patron only if it turned out that the police confirmed the stolen status of the card and if Bautista was unable to otherwise pay. In other words, the guest was assumed to be in at least temporary lawful possession of the room and not under process of ejection. The court rejected the idea that once credit card theft was confirmed, ejection would have been “inevitable.” The court found that until a lawful ejection occurred, the guest had a privacy right in the room. While the room was not yet properly paid for, the manager and police had no way to know the guest could not make alternative arrangements to pay and thus, it was the hotel’s decision not to eject the guest. It was irrelevant that the room was not yet paid for.

The court distinguished a prior case, *People v. Satz*, where the guest used a stolen credit card to register. When the manager confronted the guest, the guest admitted he had no other way to pay and the manager at that point called the police, for the purpose of helping her evict the guest, not just to investigate. This was considered taking “affirmative steps” to evict the guest, “and as a result, the defendant no longer had a reasonable expectation of privacy there.”

It was also emphasized in *Bautista* that “neither the motel’s manager nor the police” knew whether Bautista had obtained the room by fraud. No investigation had yet been conducted, and no cause for ejection had been developed. *Bautista* still had two days remaining on his reservation and the motel had taken no affirmative steps to repossess the room.

What This Case Means for Hotel Managers

The case seems to put hotels in a “no-win” situation, but some rules can be gleaned from the case. First, it is often the instinct of the guest industry to give the patron the benefit of the doubt, and call the police only for the purpose of further investigation, like the manager in *Bautista*. In that case, if the police are not called for the purpose of evicting the guest, it might not be a good idea to give them a pass key to the guest’s room or help them into the room unless and until a decision has been made by

the manager to evict and that decision communicated to the police. Second, it is probably not a good idea for managers to read *Bautista* as an invitation to be trigger-happy about eviction, as if eviction is somehow erring on the safe side, even though this case makes it sound that way. *Bautista* was a criminal case, focusing more on the behavior of the police than on the hotel, and if there is a civil suit against the hotel, new issues will arise about the hotel’s right to evict. The only issue in *Bautista* was whether the police had been properly given the right to go into the room from the police perspective, *i.e.*, if the hotel had told them “evict.” It is not enough, when judging the behavior of the police, to say “the hotel told us the credit card was bad and gave us a pass key and told us to investigate, so that’s why we went in without consent.” If the hotel had said “evict,” the police would likely have the right to go in the room, but the hotel might still be liable civilly if it did not in fact have the right to tell the police that.

The best course of action when a guest has used a stolen or fraudulent means of payment seems to be to ask for an alternative means of payment and then make sure that it is in fact a stolen or fraudulent card, before asking the police to evict the patron. However, it is most prudent not to give the police the means to enter the room before the decision to evict has been made or before the request to help evict has been communicated to the police.

- Paul J. Lipman

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NEW TWO-YEAR STATUTE OF LIMITATIONS FOR PERSONAL INJURY ACTIONS DOES NOT APPLY RETROACTIVELY TO REVIVE CLAIMS THAT WERE A YEAR OLD BEFORE 1/1/03

Should the new two-year statute of limitations at *Code of Civil Procedure* section 335.1 apply retroactively to revive personal injury actions that expired under the old one-year rule before the effective date of 1/1/03, but were thereafter filed within two years of the loss? In the case of *Krupnick v. Duke Energy Morro Bay LLC*, the Court responded to this inquiry in the negative.

In that matter, plaintiff filed an action for personal injury on January 8, 2003. The complaint alleged that plaintiff had slipped and fallen on the defendant's premises on January 26, 2001. Although the old one-year statute had expired, plaintiff argued that the new two-year statute revived the claim. Defendant demurred to the complaint on the basis that it was already barred by the old one-year rule, *Code of Civil Procedure* section 340, subdivision (3), before the new two-year statute took effect on 1/1/03.

The court rejected plaintiff's argument that the new statute revived a claim that was already dead under the one-year rule before the effective date of the new two-year statute, 1/1/03. Primarily, the court based its decision on two established rules of statutory construction. First, an enlargement of limitations operates *prospectively* unless the statute expressly provides otherwise. Under relevant case law, "prospectively" in the statutes of limitations context is often held to mean that a new statute does extend claims that haven't expired yet, to give existing claims an enlarged period going forward. What a new statute of limitations definitely will not do is reach back and revive claims already expired before the new statute took effect. Second, the new two-year statute specifies that it is retroactive for 9/11 claims but is silent about retro-activity for all other claims. Where exceptions to a general rule are specified by statute, other exceptions are not to be implied or presumed.

Consistent with the foregoing rationale, the Court reasoned that section 335.1 does not expressly provide that it applies to claims which are clearly time-barred under section 340, subdivision (3). The same act that added section 335.1 did add section 340.10 which specifically provides that a two-year statute of limitations is intended to apply retroactively to "any action brought for injury to, or for the death of" any victim of the "terrorist-related aircraft crashes of September 11, 2001. . . ." Thus, the legislature knew how to make the Act retroactive where it wanted to, and it wanted it to be

retroactive for 9/11 claims exclusively. Therefore it concluded that the new statute will revive dead 9/11 claims, but will not revive expired personal injury claims.

In an uncodified portion of the act, the Legislature explained that the September 11th terrorist victims were deserving of special treatment due to the inequity caused by the one-year statute of limitations. Primarily, under the existing laws, residents of California who were victims of the September 11th attacks would be forced to prematurely choose between litigation and federal remedies while residents of other states would have twice as long to pursue litigation. The Legislature believed that extending the statute of limitations would reduce the amount of overall litigation because victims would have the opportunity to evaluate other avenues of recourse. Therefore, the Legislature determined that September 11th terrorist victims were to be the *exclusive* recipients of a retroactive application of section 335.1.

A federal case, *Abreu v. Ramirez*, also holds that the two-year statute is not retroactive. It is unclear whether the loss in *Abreu* occurred more than one year before 1/1/03, that is, whether the claim was already dead before the new statute took effect. *Abreu* has language in it favorable to the position that no loss which occurred before 1/1/03 gets a two year statute of limitations. This language allows an argument that even if the claim still had time on the one-year clock as of 1/1/03, the plaintiff has to file within one year of the accident, if the accident occurred before the effective date of the new two-year rule, 1/1/03. However, (1) *Abreu*, as a federal trial court decision, is persuasive authority only, and not binding on a California court; and (2) there is a line of cases in California holding that "unless otherwise excepted," a new statute of limitations does enlarge all existing claims which have not yet expired under the old law by the time the new law takes effect. The defense bar has been arguing that because of the 9/11 exception, the new statute does, impliedly, "otherwise except" regular pre-1/1/03 personal injury claims from any kind of enlargement. However, a majority of trial courts seem to be applying the following rule: If the claim was already expired by 1/1/03 it remains expired; but if the claim had not expired under the one-year rule by 1/1/03, the new statute adds extra time and plaintiff is given two years from the date of loss to file.

- Jill D. Brachman & Paul J. Lipman

MEET LISA RENAUD

“Local girl” Lisa Renaud grew up in a very close-knit family in Placentia, California and has an older sister and younger brother. If you ask Lisa who she admires most over all others, she will tell you she admires her entire family, which has supported her and provided her with a solid foundation. Not surprisingly, she names her parents as her inspiration and number one role models.

Lisa joined Wesierski & Zurek LLP’s Irvine office a little over two years ago, having spent almost 10 years at 20th/21st Century Insurance. In fact, it was while at 20th/21st Century that Lisa realized she enjoyed litigating files so much that she wanted to take it one step further. She enrolled in Whittier Law School, attending law school at night while working as a Senior BI Examiner during the day. This may have contributed to Lisa’s penchant for going to the gym at all hours (even as late as midnight!) to relieve stress.

Lisa graduated Magna Cum Laude from law school and received CALI awards for excellence in Insurance Law and Legal Writing. Lisa loves the challenging aspect of the law and the fact that no two cases are alike. In fact, Lisa recently had to locate a “butt implant” expert, but thankfully, that is all behind her.

Balancing a career in law with a full personal life is also a challenge, but Lisa manages to do just that. Some of her favorite activities are reading, skiing, volleyball, relaxing with family and friends by the pool or at the beach, and attending baseball games (Go Angels!).

If that’s not enough, Lisa also manages to participate in charities and volunteer work. Last year Lisa ran in several 5K charity runs, including the Susan Komen Race for the Cure in support of Breast Cancer.

Lisa plans to continue to learn and conquer more areas of law. We have no doubt that she will conquer whatever she sets her mind to.



NEW AT WESIERSKI & ZUREK LLP

We are pleased to announce the following attorneys have joined Wesierski & Zurek:

Christine Seyler: Ms. Seyler attended the University of Hawaii where she graduated with double majors in English and political science, then continued her studies at California Western School of Law where she graduated at the top of her class, receiving her Juris Doctorate in 1993.

Matt Van Fleet: Mr. Van Fleet graduated from U.C. Santa Barbara with a degree in business/economics, then received his Juris Doctorate from Santa Clara University School of Law. He was admitted to the California State Bar in 2003.

Editor

Paul J. Lipman