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# NOT YOUR PARENTS' TRESPASS DAMAGES

*by DAN JACOBSON*

Walter Wencke was a colorful character, to say the least. In 1968, the San Diego attorney lost a bid for a seat in the House of Representatives. Undaunted, Wencke went on to control a vast array of business interests, which he "systematically loot[ed]." *Superior Motels, Inc. v. Rinn Motor Hotels, Inc.*, 195 Cal. App. 3d 1032, 1043 (1987). After he was convicted of fraud in *United States v. Wencke*, 604 F.2d 607 (9th Cir. 1979), he fled the coop. Bill Ritter, *San Diego's Strange Characters Make It Fraud's Court Jester*, L.A. Times, June 6, 1985, http://articles.latimes.com/1985-06-06/news/mn-6793_1_san-diego-fraud. It is unknown what happened to him after that.

One of the businesses from which Wencke stole on a regular basis operated a motel in Sunnyvale. This and other Wencke shenanigans ultimately resulted in *Superior Motels*. The plaintiffs proved that Wencke's cohorts wrongfully occupied the motel. The trial court awarded the plaintiffs the "net operating profits" from the motel and its amenities. *Id.* at 1047. The court of appeal rejected this award, holding that damages for the wrongful occupation of property was governed by California Civil Code section 3334, which only allowed for "the reasonable rental value of the property." *Id.* at 1069. Today, the plaintiffs would have received at least the net operating profit.

The trial court in *Superior Motels* was a few years ahead of the legislature, which amended California Civil Code section 3334 in 1992. It is still true that "a continuing trespass is an intrusion under circumstances that indicate the trespass may be discontinued or abated," and that "Civil Code [s]ection 3334 [governs] damages allowed for continuing trespass." *Starrh & Starrh Cotton Growers v. Aera Energy LLC*, 153 Cal. App. 4th 583, 592 (2007). Also, section 3334 still dictates that damages for wrongful occupation of land include "the value of the use" of the wrongfully occupied property, as it did when *Superior Motels* was decided. But because of the 1992 legislation, section 3334 now defines the "value of the use" of the wrongfully occupied property as "the greater of the reasonable rental value of that property or the benefits obtained by the person wrongfully occupying the property by reason of that wrongful occupation." *Bailey v. Outdoor Media Grp.*, 155 Cal. App. 4th 778, 785-86 (2007).

*Bailey* is the primary case discussing the 1992 amendment to section 3334. In *Bailey*, the wrongful land occupation was on a strip of roadside land in the City of Grand Terrace. Originally, Outdoor Media Group (OMG) leased the property from Gary Bailey. OMG built billboards on the property, and sold advertising space. Eventually, the Bailey/OMG lease came to an end, and the two parties couldn't agree on a new lease. OMG did not leave, and thus trespassed by continuing to occupy the land. OMG continued to sell advertising space on the billboards, and collected the resulting advertising revenue. Later, OMG sold the billboards to Lamar. OMG fraudulently told Lamar that OMG had a valid lease with Bailey, which it "assigned" to Lamar. There was no such lease. *Id.* at 781. By this time, the city had banned the construction of new billboards. *Id.*

Bailey sued both OMG and Lamar for continuing trespass. Before we go on, keep in mind that the 1992 amendment to section 3334 says that the value of the use "of the property is the *greater* of the reasonable *rental value* of that property or the *benefits obtained* by the person wrongfully occupying the property by reason of that wrongful occupation." Cal. Civ. Code § 3334 (emphasis added). So, one should be thinking: which is greater, the "benefits obtained" by OMG and Lamar by selling advertising space on the billboards, or the "rental value" of land along the side of a City of Grand Terrace Road that presumably would not include bill-

boards, since OMG built and would probably take their billboards with them and the city had banned new billboards. Ultimately, the *Bailey* court awarded Bailey the profits that OMG obtained as a result of its trespass onto Bailey's land. The court held that the plain language of the 1992 amendment made it applicable to any sort of wrongful occupation of land "to eliminate financial incentives for trespass by eradicating the benefit associated with [any] wrongful use of another's land." *Bailey*, 155 Cal. App. 4th at 786.

The legislative history of the 1992 amendment is instructive in understanding the "financial incentive [that was then available to] trespass[ers]." *Id.* The amendment resulted from a resolution of the State Bar's Conference of Delegates. *Id.* at 785. Persons had been "dump[ing] their waste on unoccupied land of little value (*e.g.*, desert land) in order to avoid expensive toxic waste disposal fees. If the owner of the property sought redress, the polluter faced relatively low potential damage awards because the [rental value of the] land was essentially worthless." *Starrh*, 153 Cal. App. 4th at 603.

Since the "benefits obtained" by OMG—the advertising revenue—were greater than the rental value of the roadside strip of land, Bailey was awarded the benefits obtained as a result of OMG's trespass onto the land. The only question remaining was whether those benefits included the gross amount paid to OMG or only OMG's net profit. Bailey argued that he was entitled to all of the gross revenue generated by OMG's advertising sales since all such revenue were benefits obtained by OMG as a result of the wrongful occupation. While the court did not close the door to a gross revenue analysis in the right case, it gave very little hint as to what facts would constitute such a case, and certainly the facts in *Bailey* did not. However, the court found that it is the wrongful occupier's burden to produce evidence of expenditures that will lower the gross revenue to the net profit. Without such evidence, gross revenue is the appropriate award. *Id.* at 787-88.

With respect to Defendant Lamar, the company to which OMG fraudulently sold the billboards and the "right" to continue to lease from Bailey, subdivision (b)(2) of section 3334 exempts from its general rule wrongful occupation that "is the result of a mistake of fact," and says that damages for such mistaken occupation is only the "reasonable rental value" of the land. But, the court in *Bailey* held that a section 3334 "mistake of fact" is "unintentional or inadvertent," (*id.* at 787) and "significantly . . . the [purpose of the] 1992 amendment[,] . . . to eliminate the financial incentive for dumping toxic material on property owned by another [would be frustrated if a section 3334 mistake of fact could be] "a mistaken belief regarding ownership of the real property [or a mistake that] "the trespasser[] [had] permission to use that property." Thus, such is not the law. *Id.* at 794. Therefore, Lamar's misunderstanding regarding the ownership of the property or whether it really had permission to use the property was irrelevant.

If *Superior Motels* were to be heard today, the trial court's award of Mr. Wencke's associates' profits would have been sustained. In fact, if the defendants couldn't produce and prove their expenditures, not only would the plaintiffs have been awarded the profits, they would have been awarded all of the monies received by the defendants, because such would be the "benefits obtained . . . by reason of [the defendants'] wrongful occupation."

***Dan Jacobson*** *is a professor at Pacific West College of Law, and a practicing attorney in Orange County. He can be reached at dlj@jacobsonlawyers.com.*