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Colorado Supreme Court Revisits Economic Loss Rule

The Colorado Supreme Court has issued a number of opinions over the last several years clarifying the scope of the economic loss rule. On May 7, 2019, the court revisited the economic loss rule in *Bermel v. BlueRadios, Inc.*, imparting a blow to the strength of the doctrine by ruling that it does not bar civil theft claims under C.R.S. § 18-4-405, and further suggesting that it does not bar intentional tort claims, such as fraud.

The economic loss rule is a judge-made doctrine that enforces the boundary between contract law and tort law. The purpose of the rule is simple: to prevent parties from expanding the scope of their bargained-for remedies under a contract. At its most basic level, the rule applies when two parties have a contract not to do X, one of the parties does X, and the other party sues under tort theories based on that conduct. The rule is designed to honor the age-old notion that parties are encouraged to carefully allocate risks, rights and remedies when negotiating contracts.

The Colorado Supreme Court adopted the economic loss rule in two decisions issued on the same day in 2000—*Town of Alma v. Azco Const., Inc.* and *Grynberg v. Agri Tech, Inc.* The court in *Town of Alma* explained that the rule “is intended to maintain the boundary between contract law and tort law.” 10 P.3d 1256, 1259 (Colo. 2000). “[T]his principle that parties must be able to confidently allocate their risks and costs in a bargaining situation underlies the necessity for the economic loss rule.” *Id.* at 1261. The court later explained that the economic loss rule comes down to one fundamental question: can the plaintiff show a duty independent of the contract which supports its tort claim? See *BRW, Inc. v. Dufficy & Sons, Inc.*, 99 P.3d 66, 72 (Colo. 2004).

Bermel v. BlueRadios, Inc.

The Colorado Supreme Court granted certiorari in *Bermel* to resolve the narrow question of whether the economic loss rule bars civil theft claims asserted under C.R.S. § 18-4-405. 2019 CO 31, at ¶ 1 (2019). C.R.S. § 18-4-405 provides that the rightful owner of stolen property may recover that property from the taker, as well as reasonable attorneys’ fees and the larger amount between treble damages and \$200.00. Despite granting certiorari on the narrow issue regarding the interplay between claims asserted under both the civil theft statute and contract, the court’s opinion extends beyond the bounds of that issue.

The question as to whether the economic loss rule operates to bar civil theft claims was before the court because the Colorado Court of Appeals had arrived at different answers in separate opinions. In *Rhino Fund, LLLP v. Hutchins*, the Colorado Court of Appeals ruled that the economic loss rule did not bar an investor’s civil theft claim against a fund owner for diverting funds for his own benefit. 215 P.3d 1186, 1190 (Colo. App. 2008). One year later, in *Makoto USA, Inc. v. Russell*, a different division of the Court of Appeals held that the economic loss rule prevented

civil theft claims premised on returning funds paid out pursuant to a contract. 250 P.3d 625 (Colo. App. 2009).

The facts of *Bermel* were straightforward. Mr. Bermel contracted with BlueRadios, Inc. (“BlueRadios”) to provide engineering services. 2019 CO 31, at ¶ 4. Anticipating that he would soon be fired and potentially be involved in litigation, Bermel forwarded thousands of emails containing proprietary information to his personal email. *Id.* at ¶ 7. Bermel’s contract with BlueRadios, however, prohibited Bermel from “remov[ing] any Company materials [including Proprietary Information] from the business premises of [BlueRadios][.]” *Id.* at ¶ 6. After Bermel filed a wage claim against BlueRadios, the company asserted counterclaims against Bermel for breach of contract and civil theft. *Id.* at ¶¶ 8–9. The trial court found in favor of BlueRadios on both its breach of contract and civil theft counterclaims. *Id.* at ¶ 11. The Court of Appeals affirmed on the grounds that it considered Rhino Fund more persuasive than Makoto. *Id.* at ¶ 12.

A preliminary issue in *Bermel* involved whether civil theft—a statutory right of action—is a tort. But the court determined it was unnecessary to opine on this issue in resolving the case. *Id.* at ¶ 34. Instead, the court, in an opinion authored by Justice Márquez, reasoned that the economic loss rule does not bar civil theft claims because a judge-made doctrine cannot override a legislatively created right of action; thus, the decision was premised on broader separation of powers principles. *Id.* at ¶¶ 39–41. As a result, the court overruled Makoto. *Id.* at ¶ 43.

Justice Gabriel, joined by Justice Hart, dissented. The dissent took the position that a private cause of action under the civil theft statute is a tort, meaning that if the tort duty overlaps with the contractual duty, the economic loss rule bars the civil theft claim. *Id.* at ¶ 63. The dissent believed this was the case here because to establish that a civil theft occurred, BlueRadios first had to establish Bermel breached the contract by taking proprietary information. *Id.* at ¶ 65. Because the claims were “inextricably intertwined,” the dissent believed under the facts of this case, the claim was barred. *Id.* at ¶¶ 65–67.

An Intentional Tort Distinction?

Although the *Bermel* decision provided much needed clarity on the applicability of the economic loss rule in the context of civil theft claims, the court nevertheless opened the door to more uncertainty. In providing background on the economic loss rule, the court twice explained that its previous opinions had applied the rule to only bar common law tort claims for negligence or negligent misrepresentation. *Id.* at ¶¶ 15, 21.

Then, in a footnote, the court expounded that “the economic loss rule generally should not be available to shield intentional tortfeasors from liability for misconduct that happens also to breach a contractual obligation.” *Id.* at ¶ 20, n.6. This statement, arguably in dicta, suggests that the economic loss rule can only bar unintentional tort claims, such as negligence, as opposed to intentional tort claims, such as fraud, even though the Colorado Court of Appeals has applied the rule to both types of tort claims. At a minimum, the court’s footnote opens the door for future litigation on this issue.

Implications

The most obvious implication of the *Bermel* decision is that plaintiffs are incentivized to plead claims for civil theft in conjunction with their breach of contract claims, particularly since the civil theft statute allows a plaintiff to seek treble damages and attorneys’ fees that might not otherwise be available under the parties’ contract. Plaintiffs now understand that defendants can no longer use the economic loss rule to dismiss such claims.

Beyond *Bermel*’s limited holding, the court’s footnote suggests that the economic loss rule should not bar claims for

intentionally tortious conduct, creating uncertainty for both plaintiffs and defendants. While the key question under the economic loss rule used to be whether the plaintiff has alleged a duty independent from the contract sounding in tort, there now may be a preliminary question as to whether the plaintiff's claims are for negligence or intentional torts.

The fallout from the *Bermel* decision will most certainly be litigated in the coming years, and there may be additional unforeseen implications. But what is clear is that *Bermel* weakens the reach of the economic loss rule.

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