

January 29, 2020 **FEATURE**

Civil Theft Claims Not Barred by Economic Loss Rule

Separation of powers prevents judge-made rule from barring statutory claims

By Catherine M. Chiccine

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The economic loss rule does not bar a statutory claim for civil theft, even where the theft also breaches the parties' contract, the [Colorado Supreme Court](#) ruled. Separation of powers principles prevent this judicially created rule from limiting statutory causes of action, the court reasoned. This ruling follows the recent trend toward contraction of the economic loss rule.



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Civil Theft Also Breaches Parties' Contract

In *Bermel v. BlueRadios, Inc.*, the plaintiff had contracted to provide services for the defendant, a wireless data and communications company. The plaintiff's contract prohibited him from removing any

proprietary information from the defendant's premises. In August 2014, the plaintiff sued the defendant for unpaid wages and expenses he had incurred on behalf of the business. In anticipation of his lawsuit, the plaintiff knowingly forwarded thousands of emails from his business email account to his personal email account. Those emails contained the defendant's proprietary information.

The defendant filed counterclaims against the plaintiff, including breach of contract and civil theft. After the close of evidence at trial, the plaintiff moved for a directed verdict on the defendant's civil theft counterclaim. He argued it was barred by the economic loss rule, which provides that "a party suffering only economic loss" from a breach of contract cannot "assert a tort claim for such a breach absent an independent duty of care under tort law."

The trial court denied the motion, concluding that the economic loss rule does not bar a statutory cause of action. The Colorado Court of Appeals affirmed the trial court's decision, reasoning that the economic loss rule is a "judge-made" rule, whereas civil theft is a "legislatively created cause of action," and separation of powers prevented the court from barring a statutory claim.

Economic Loss Rule Cannot Limit Statutory Claims

The Colorado Supreme Court agreed with the appellate court, holding that "even if civil theft is a claim sounding in tort, separation of powers principles dictate that the judge-made economic loss rule cannot bar a statutory cause of action." In so ruling, the court looked to the language of Colorado's civil theft statute and noted that the Colorado legislature expressly provided a cause of action and remedy to victims of theft.

In contrast to this statute, the economic loss rule is “merely a judicial construct” adopted to maintain the boundary between contract and tort, protect parties’ expectations in contracting, and simplify litigation. “To limit or abrogate a clear legislative pronouncement by reason of such judicial policy concerns would offend the separation of powers.” The court also observed that the legislature’s intent to provide a statutory remedy to victims of theft was plain from the face of the statute, no contrary statutory provision was before the court, and there was no allegation that the statute was unconstitutional. Thus, the court could not limit the remedy provided by the statute.

In addition, the court noted that Colorado’s statutory remedy for stolen property predated its adoption of the economic loss rule by nearly 140 years. The court described itself as “especially wary” of limiting the availability of a statutory remedy that had been in existence for many decades longer than the economic loss rule had been.

The court noted a split of authority in the Colorado Court of Appeals regarding the issue. A prior Colorado appellate case, *Rhino Fund, LLLP v. Hutchins*, held that the economic loss rule cannot limit a “legislatively created scheme designed to extend a civil remedy to those harmed by alleged criminal activity.” Another Colorado appellate case, *Makoto USA, Inc. v. Russell*, held the opposite, determining that the economic loss rule *could* preclude a statutory claim. In affirming the appellate court’s ruling, the supreme court upheld *Rhino Fund* and overruled *Makoto*.

Trend Toward Limiting the Economic Loss Rule

While the majority of states, Colorado included, still limit the availability of tort remedies for economic losses when a contract exists, many states have been constricting the applicability of the economic loss rule. “There is an increasing trend towards using statutes to recover economic loss, usually on a mass or class action basis,” says James M. Beck, Philadelphia, PA, cochair of the Trends and Developments Subcommittee of the ABA Section of Litigation’s Mass Torts Litigation Committee. “The economic loss rule at one point was very broad but now is becoming more narrow, and the *Bermel* court’s ruling demonstrates the trend toward limiting application of the rule,” notes Mark A. Romance, Miami, FL, vice-chair of the Section of Litigation’s Commercial & Business Litigation Committee.

Courts are increasingly recognizing a legislature’s ability to decide when a party can recover tort damages, even in the context of a breached contract. “The Colorado court’s ruling reinforces the legislature’s power to create causes of action that trump common law claims,” Romance states. “As for statutory causes of action for economic loss, I think the position that ‘the legislature allowed it, so the economic loss rule can’t prohibit it’ is the majority rule,” says Beck.

Colorado isn’t the only state applying this logic. For example, courts in Texas, Florida, and Connecticut have prohibited the application of the economic loss doctrine as a defense to various statutory claims. In *McCaig v. Wells Fargo Bank (Texas), N.A.*, the U.S. Court of Appeals for the Fifth Circuit explained that “a statutory offender will not be shielded from liability simply by showing its violation also violated a contract.” Florida has gone even farther and limited application of the economic loss rule to products liability claims only. In *Tiara Condominium Association, Inc. v. Marsh & McLennan Companies, Inc.*, the Florida Supreme Court reasoned that the economic loss rule began in the products liability context, and “expansion of the rule beyond its origins was unwise and unworkable in practice.”

However, not all states are on board with this trend, and some still apply the economic loss rule to limit statutory causes of action. “Pennsylvania, for example, extends its economic loss rule to statutory causes of action, such as its consumer fraud statute,” notes Beck. And some practitioners urge caution before abandoning common law principles in determining appropriate relief for tort claims. “The line between torts and contracts has always been blurred. Tort claims are grounded in common law, and that common law shouldn’t be completely ignored simply because the parties have a contract,” explains Romance.

Rule in Flux? Attorneys Take Note

Both plaintiff and defense attorneys should proceed with caution. “When you are pursuing claims on behalf of clients, you want to look not only to traditional common law claims involving contracts, but also to statutory remedies that may not be popular or often used, but may provide a remedy,” suggests Romance. On the other hand, “defense counsel needs to know what claims the economic loss rule can serve as a defense to, such as strict liability claims,” explains Beck.

Regardless of whether one is a plaintiff or a defense attorney, no state applies the economic loss rule exactly the same way, so attorneys should research the doctrine before determining whether to use it. “The economic loss rule itself is in flux, and attorneys need to figure out what their own state says about the rule before they assert it,” recommends Beck.

Catherine M. Chiccine is an associate editor for Litigation News.

Resources

- Justin Sallis, “The Economic Loss Doctrine: Getting Rid of the Surplusage in Franchise Case Complaints,” 38 *Franchise L.J.*, No. 4 (Spring 2019).
- Alexander I. Passo, “Indiana Court of Appeals Recognizes Exception to Economic-Loss Doctrine in Accounting Malpractice Actions,” *Prof. Liab. Litig.* (Apr. 20, 2017).
- Oran F. Whiting, “Florida’s Economic Loss Rule Limited to Products Liability Cases,” *Litigation News* (July 1, 2013).
- *Ulbrich v. Groth*, No. 18815, 78 A.3d 76, 310 Conn. 375 (Nov. 12, 2013).
- *Town of Alma v. AZCO Constr., Inc.*, No. 99SC424, 10 P.3d 1256 (Colo. 2000).
- *Comptech Int’l, Inc. v. Milam Commerce Park, Ltd.*, 753 So. 2d 1219 (Fla. 1999).
- *Burke v. Napieracz*, No. 95-1260, 674 So. 2d 756 (Fla. Dist. Ct. App. 1996).

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