Is a Wave of Civil Theft Claims On Its Way for Business Litigators?

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In May of this year, just as Colorado business litigators were dreaming of their summer plans, the Colorado Supreme Court issued a long-awaited decision on the applicability of the economic loss rule to civil theft claims asserted in breach of contract cases. The high court's decision is likely to have a ripple effect for years to come.

In Bermel v. BlueRadios, Inc., the Supreme Court considered whether the economic loss rule bars a statutory civil theft claim, or counterclaim, in a breach of contract case. Plaintiff in the case, a contractor for a telecommunications company, had filed suit for unpaid wages and expenses. Before filing suit, and in anticipation of the litigation, plaintiff forwarded to himself "thousands of [company] emails and attachments" to his personal Gmail account. Once suit was filed, the defendant countersued under Colorado's civil theft statute, C.R.S. § 18-4-405, for theft of its proprietary information.

Plaintiff defended against the civil theft counterclaim on the basis of the economic loss rule, a judge-made rule first adopted in Colorado in 2000. The general purpose of the economic loss rule is to maintain a boundary between tort and contract claims for the same economic injury, by limiting a plaintiff to breach of contract claims where the misconduct alleged in support of a *tort* claim also constitutes a breach of a *contract* with a defendant.

The Supreme Court rejected plaintiff's argument that the economic loss rule bars statutory civil theft claims, reasoning that to so rule would violate separation of powers principles. "[A] clear legislative pronouncement" and remedy created by the Colorado General Assembly must take precedence over a judge-made rule, said the court.

In so ruling, the Supreme Court rejected a contrary ruling of the Colorado Court of Appeals in Makoto USA, Inc. v. Russell, with a blunt criticism of that opinion. The Makoto court clearly "overstepped" in ruling that the Colorado General Assembly did not evidence any intent to "expand" contractual remedies by way of the civil theft statute, said the Supreme Court. The civil theft statute creates a clear and plain remedy for violations, and thus it was not the Court of Appeals' prerogative to question the legislature's intent.

The Bermel opinion is likely to have a far-reaching effect beyond the facts of that case.

First, as Justice Gabriel noted in his dissenting opinion, many, if not most, breach of contract cases may now be pled to include a civil theft claim or counterclaim. A non-breaching party can allege, for example, that his counter-party's receipt and retention of payment after failing to perform amounts to "theft" under the statute. This scenario, said Justice Gabriel, is likely to lead to an "end run" around contract law and the terms of the parties' contract.

Second, the Bermel opinion makes clear that *other* statutory claims potentially available to a party in a breach of contract case *also* will take precedence over the economic loss rule. Simply put, according to the Supreme Court, the economic loss rule "cannot bar a statutory cause of action." Creative plaintiff and defense lawyers may now look for ways to build Colorado Consumer Protection Act or other statutory claims or counterclaims into breach of contract cases.

Finally, the Bermel opinion leaves open the question of whether a statutory civil theft claim is nevertheless barred by other statutory provisions, such as the preemption terms of Colorado's

Uniform Trade Secrets Act. Although the Bermel plaintiff made that argument to the Supreme Court, the court ruled that plaintiff failed to properly raise that issue in the lower courts.

Time will tell if the Supreme Court has opened a floodgate to civil theft, and possibly other statutory claims, in ordinary breach of contract cases. Next year, as business litigators once again begin dreaming of their summer plans, we may have a clearer picture of whether Justice Gabriel's prediction has come true. Stay tuned!