Navigating a Fallen Sky

Civil Theft and Contracts after *Bermel v. BlueRadios, Inc.*

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Colorado's Rights in Stolen Property statute allows a litigant asserting a civil theft claim to seek treble damages and attorney fees and obtain a judgment that may be non-dischargeable in bankruptcy. This article discusses the viability of such claims where the parties involved had a contract.

Colorado's Rights in Stolen Property statute allows litigants to assert a civil theft claim and seek treble damages and attorney fees.[1] These are powerful and attractive remedies. But over the last few decades, Colorado courts have considered whether such claims can be asserted if the parties to the civil theft also have a contract concerning the same subject matter. In 2019, the Colorado Supreme Court held in *Bermel v. BlueRadios, Inc.* that the economic loss rule no longer bars claims (if it ever did) for civil theft where the parties have such a contract.[2] Does this mean that every contract case will now include a claim for treble damages? Has the sky fallen? The *BlueRadios, Inc.* dissent and some commentators seem to think so.[3]

However, the reality is more nuanced. The economic loss rule developed its role as a defense to statutory claims only recently, and even then it was unclear exactly how much protection it offered. *BlueRadios, Inc.* in many ways represents a return to the foundation of the economic loss rule as a barrier to negligence claims but perhaps not much more.

Yet it is undeniable that the economic loss rule no longer offers the hope of protection against claims for civil theft. So while the sky has not entirely fallen, adventurers into this area should check their maps carefully before exploring. This article provides some landmarks on that map. It describes the interplay between the civil theft statute and the economic loss rule and offers practical advice on handling civil theft claims in the context of contract disputes.

The Rights in Stolen Property Statute

In Colorado, crimes like embezzlement, stealing, and similar acts are largely subsumed under a single criminal statute that defines "theft."[4] Under CRS § 18-4-401, the theft statute, the act of theft has three general elements: (1) obtaining, retaining, or controlling someone else's property; (2) without authorization or by threats or deception; and (3) with a culpable state of mind, which can be proven directly or inferred through one of several factual circumstances listed in the statute.[5] State of mind can be shown by proving that the defendant does one of the following:

- intends to deprive the other person permanently of the use or benefit of the thing of value;
- knowingly uses, conceals, or abandons the thing of value in such manner as to deprive the other person permanently of its use or benefit;
- uses, conceals, or abandons the thing of value intending that such use, concealment, or abandonment will deprive the other person permanently of its use or benefit;
- demands consideration to which he or she is not legally entitled as a condition of restoring the thing of value to the other person; or
- knowingly retains the thing of value for more than 72 hours after the agreed-upon return time in any lease or hire agreement.[6]

This criminal statute can of course be prosecuted by the state. But theft victims can also bring a civil theft claim under the Rights in Stolen Property statute, CRS § 18-4-405. The remedies available to the victim under this statute are significant; a prevailing plaintiff is entitled to treble damages plus attorney fees. Unlike exemplary damages, these remedies are mandatory.[7] Further, a civil theft judgment also likely renders the resulting debt non-dischargeable in bankruptcy.[8]

History of the Economic Loss Rule in Colorado

The economic loss rule limits tort claims where the parties have a contract defining their rights and duties on the same subject matter. The belief that the economic loss rule could preclude a civil theft claim even where the statutory elements were satisfied is a product of the gradual evolution of the doctrine over the last few decades.

The Rule's Origins

Colorado has permitted individuals to bring private actions for civil theft since 1861.[9] The economic loss rule was recognized here over 100 years later, in the 1988 Court of Appeals opinion *Jardel Enterprises, Inc. v. Triconsultants, Inc.*[10] In this original formulation, the Court explained that "no cause of action lies in tort when purely economic damage is caused by a negligent breach of a contractual duty."[11] It reasoned that when parties form a contract, they are free to negotiate and restrict remedies in the event of a breach.[12] Thus, a claim for negligent breach would allow one party to escape these negotiated restrictions.[13]

Initially, the economic loss rule barred only negligence claims[14] and did not even extend to bar negligent misrepresentation in a business transaction.[15] But the doctrine's reach was already on the march, and the Court of Appeals soon expanded the rule to bar claims from third-party beneficiaries of contracts[16] and suggested that it might be relevant to quasi-contract claims as well.[17]

The Colorado Supreme Court adopted the economic loss rule in 2000 in *Town of Alma v. AZCO Construction, Inc.*,[18] taking a broader view of the rule than the Court of Appeals. Rather than focusing on barring negligent breach of contract claims, the Court viewed the doctrine as aimed more generally at "prevent[ing] tort law from 'swallowing' the law of contracts" in light of developments in products liability cases.[19] Thus, "whether the plaintiff may maintain an action in tort for purely economic loss turns on the determination of the source of the duty" and, in particular, whether this duty "arises under the provisions of a contract."[20] This suggested the appropriate inquiry was whether the tort duty allegedly violated arose independently of the duties imposed by the contract.[21]

But what did "independent" mean? Did it merely require litigants to point at a common law or a statutory source of duty on top of the contract, or did it require that the tort duty be totally separate from any contractual duty? In other words, what outcome did the economic loss rule imply when the parties adopted a contract duty that happened to overlap with a preexisting tort duty? Should the overlapping tort claims survive?

The Rule's Evolution

A few years later, in *BRW, Inc. v. Dufficy and Sons, Inc.*, the Colorado Supreme Court seemingly came down in favor of barring overlapping claims.[22] It explained that the economic loss rule required "courts to focus first on the contractual context among and between the parties to see whether there was a contractual relationship that established the duty of care alleged to have been breached."[23] If that duty was memorialized in the contract, it was irrelevant if it also arose in tort.[24] The Court hoped that parties to a contract would properly analyze all risks involved when forming a deal and "presumably will take into account the risk that these contingencies will occur while negotiating the contract."[25]

BRW, Inc. also addressed a line of older cases discussing misrepresentation that predated the economic loss rule. Before 2000, the Court had considered the interplay between contracts and misrepresentation claims under other theories. For example, in *Bill Dreiling Motor Co. v. Schultz* fraud or misrepresentation was not barred by the doctrine of parol evidence, which normally prevents a party from introducing evidence external to the contract to vary its terms.[26] Similarly, the Court held in *Keller v. A.O. Smith Harvestore Products, Inc.* that merger or integration clauses stating that the contract was the full and final articulation of the parties' agreement did not bar misrepresentation claims.[27] The Court explained these prior holdings by noting that "in some circumstances," at least where there was no overlapping contract duty, a claim for "negligent misrepresentation based on principles of tort law, independent of any principle of contract law, may be available[.]"[28] But the economic loss rule could bar claims such as those for negligent misrepresentation where the duty to avoid such misrepresentation is "memorialized in the contracts."[29] In *BRW, Inc.* the contract included a requirement for

BRW, Inc. to inspect the project and disclose nonconformance, so the Court determined that the contract imposed the duty to disclose.[30] The Court distinguished *Keller* by noting that the misrepresentation there had occurred before the contract was signed, while in *BRW, Inc.* the misrepresentation arose after the parties had already bargained for a specific allocation of duties.[31] It thus appeared that tort duties that overlapped with contractual duties, even for misrepresentation, could now be barred by the economic loss rule.

But in the year after *BRW, Inc.*, the Colorado Supreme Court seemed to endorse the contrary view that so long as the tort duty had an independent source, it survived regardless of whether it overlapped with a contract, at least where the tort duty predated the contract.[32] The Court held in *A.C. Excavating v. Yacht Club II Homeowners Ass'n* that a builder's duty to homeowners was recognized at common law,[33] the Colorado General Assembly had explicitly recognized this duty in enacting the Construction Defect Action Reform Act, and this duty survived the reasoning in *Town of Alma*.[34] It concluded that even where the same or similar tort duties were written into the contract, the economic loss rule would not bar the claim.[35]

Other cases seemed to agree with the survival of overlapping tort duties. The Supreme Court held that a fiduciary relationship can impose a duty of care that supports a tort action independent of any contractual action.[36] It also held that the economic loss rule does not bar a claim for improper attachment, even where it arises out of a contract dispute.[37]

The Economic Loss Rule's Relationship to Civil Theft

In the decade after adopting its broad formulation of the economic loss rule, the Colorado Supreme Court offered little guidance on how it would apply to intentional torts like fraud or theft. In older cases, the Court had noted that fraud claims were not dependent on the existence of an enforceable contract.[38] The Court had also referred to "fraud" in *Town of Alma*, but only to explain that the economic loss rule was not based on the type of damages sought but instead on the source of a duty.[39]

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So it was left to the Court of Appeals to sort out whether intentional torts survived the evolving economic loss rule and how to apply the Supreme Court's new tests. The Court of Appeals first addressed how the economic loss rule applied to civil theft in 2008 in *Rhino Fund, LLLP v. Hutchins*.[40] Citing to *A.C. Excavating*'s analysis that claims based on overlapping duties survived, the Court decided that the economic loss rule did not bar civil theft claims.[41]

But by 2009, other decisions suggested that civil theft claims overlapping a contract duty were barred.[42] In *Makoto USA, Inc. v. Russell*, the Court of Appeals relied on *BRW Inc.*'s analysis that overlapping claims did not survive without mentioning *A.C. Excavating*.[43] It acknowledged that remedies under the Rights in Stolen Property statute should survive if the Colorado legislature intended them to be additional remedies to those for breach of contract, but it believed the legislature did not so intend, so the overlapping claim was barred.[44] The Court distinguished *Rhino Fund* by stating that the duties there had not really overlapped at all because the contract did not cover the remedies available for civil theft.[45] By the end of the 2010s, the Colorado Court of Appeals seemed to have settled on the conclusion that the "economic loss rule can apply to fraud or other intentional tort claims based on post-contractual conduct" as determined by the independent duty analysis.[46]

The Colorado Supreme Court Reconciles the Views

In 2015, the Colorado Supreme Court sought to reconcile the different views on dealing with overlapping tort and contract duties by announcing a new definition of "independent duty" in *S K Peightal Engineers, Ltd. v. Mid Valley Real Estate Solutions V, LLC*.[47] It explained that "two types of independent duties of care . . . can render the economic loss rule inapplicable."[48] The first is contractual: "if the contract contains no duties or the allegedly breached tort duty is beyond the scope of the duties contained within the contract" the civil theft claim is not barred.[49] In other words, the economic loss rule does not come into play where there is no overlap in duties at all.

Second, the tort claim may survive "even though the parties have entered into a contractual relationship" where "certain special relationships" contain an "identical duty" to the tort duty allegedly breached.[50] These include, for example, the relationships between construction companies and home builders.[51] Accordingly, for a tort duty to survive where it overlaps with a contractual duty, the tort duty must arise out of a special relationship.

The next year, the Colorado Supreme Court tackled the issue of intentional torts. It noticed that the pendulum risked swinging too far against torts and described a danger that contract law would "swallow tort law."[52] In *Van Rees v.*

Unleaded Software, Inc., the Court addressed application of the economic loss rule to the intentional torts of fraud and theft.[53] The Court did not directly address whether the economic loss rule could block such claims because it was able to resolve the issue on narrower grounds.[54]

With regard to fraudulent inducement, the Supreme Court criticized the Court of Appeals' analysis in *Van Rees* for focusing on the fact that the tort claim was "related to the promises that eventually formed the basis of the contract[.]"[55] It reiterated that the question should instead be whether the tort duty was independent of the contract duty.[56] Because fraudulent inducement to enter into a contract necessarily predates the contract duties themselves, the tort duty not to commit fraud did not arise out of the contract.[57] This, however, did not resolve whether a fraud claim that was not independent of the contract might still be barred.[58]

On theft, too, the Supreme Court did not have to directly answer whether the economic loss rule applied because the plaintiff in *Van Rees* had not properly stated a claim for theft in the first place. The "thing of value" allegedly stolen was plaintiff's website and search engine rankings.[59] But there was no suggestion that defendant had defrauded plaintiff by intending to obtain or deprive plaintiff of these "things," so the Court did not have to reach the affirmative defense of the economic loss rule's application.[60]

Enter *BlueRadios, Inc.*

Three years later, the Supreme Court directly addressed the interplay between civil theft and the economic loss rule in *Bermel v. BlueRadios, Inc.*[61] Bermel provided engineering services for BlueRadios, Inc. under a contract that expressly prohibited him from removing BlueRadios, Inc.'s proprietary information. Thus, it was seemingly clear that the statutory duty not to steal these particular items of property had been memorialized in the parties' contract. Bermel was nonetheless found liable on claims including civil theft. He appealed, arguing that the economic loss rule barred the civil theft claim.

The Court of Appeals, after noting that this question had been left open by *Van Rees*,[62] affirmed the theft judgment against Bermel. It began by expressing its understanding that overlapping duty claims were barred, reasoning that *BRW, Inc.* held that "[n]ot only must the duty arise from a source independent of the contract, it must also be a duty that is not memorialized in the parties' contract."[63] It went on to explain, however, that because the economic loss rule was a judge-made rule, it could not bar a legislatively created cause of action.[64]

The Colorado Supreme Court agreed with the Court of Appeals. Like the Court of Appeals, it did not base its analysis on whether there was an independent duty. Indeed, it did not comment on whether an independent duty analysis was relevant at all. Instead, the Court adopted the Court of Appeals' reasoning that because the Rights in Stolen Property statute is a legislatively created statutory remedy, it would be improper for a judge-made rule such as the economic loss rule to bar its cause of action.[65]

In an apparent retreat from its prior broad formulations, the Court in *BlueRadios, Inc.* stated that it had previously applied the economic loss rule only "to bar common law tort claims of negligence or negligent misrepresentation."[66] In a footnote that echoed with the force of a headline, it explained 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."[67] Perhaps the Court has come full circle and returned to the more limited view originally expressed in *Jardel* that the economic loss rule bars only negligence. That seems to be the impression of the Court of Appeals in its opinions subsequent to *BlueRadios, Inc.*[68]

The *BlueRadios, Inc.* dissent, unlike the majority, recalled *Town of Alma* and worried that the theft alleged was not independent of the contract because it concerned theft of information made confidential by the contract.[69] The dissent worried that because "a great many contract claims arise from a scenario in which one contracting party pays another[,]" the payor could "virtually always assert a civil theft claim" unless barred by the economic loss rule.[70] Some practitioners share this concern, running the gamut from those who note that plaintiffs "are incentivized to plead claims for civil theft in conjunction with their breach of contract claims[,]"[71] to those who warn that this may open the floodgates of litigation.[72]

Where Does This Leave the Rights in Stolen Property Statute?

The obvious takeaway from *BlueRadios, Inc.* is that the economic loss rule is simply not available to bar theft claims. So, even if the contract contains a provision expressly prohibiting the taking of property, as was the case in *BlueRadios, Inc.*, or if the property is conveyed as consideration under a contract, this alone will not defeat a civil theft claim. This does not mean, however, that any time a contract is violated there will be a theft.

As the above history makes clear, the notion that the economic loss rule ever acted as the primary guardian against civil theft claims in contract disputes is debatable. While the *Makoto* decision temporarily suggested that the economic loss rule could bar such claims, the courts carved out important exceptions. As recognized in *Mid Valley*, special relationships overcame the rule. Colorado courts had little difficulty finding theft liability for contractors who violated the construction trust fund at the expense of their subcontractors, even though this was expressly a contractual relationship.[73] This has been true since at least *Town of Alma*.[74] It follows that a trustee who is appointed by contract to manage trust funds on behalf of beneficiaries and steals from the beneficiaries can be liable under the Rights in Stolen Property statute.[75] Similarly, to the extent that a fraud claim arises out of fraudulent inducement to convey property, it has been clear since *Van Rees* that fraud claims are not barred, so theft by deception may not have been either.

The effect of *BlueRadios, Inc.* was to remove the economic loss rule from consideration against theft in a narrow circumstance: where the contract contains duties concerning the property allegedly stolen. Thus, where the contract prohibits the use of confidential information, as was the case in *BlueRadios, Inc.*, or where the theft concerns the consideration exchanged by the parties in the contract, the economic loss rule is no longer a defense. This is not as large of an issue as the *BlueRadios, Inc.* dissent

and commentators suggest, however, because the most serious barrier to bringing civil theft claims has never really been the economic loss rule; rather, it has been the difficulty in meeting the statutory elements of a theft in the contract context. Voluntary contractual relationships do not lend themselves easily to the conclusion that criminal conduct has occurred.

As discussed above, theft requires proof that the victim owned specific property that the thief obtained without authorization or by threats or deception and with a culpable state of mind. A party asserting civil theft without a basis in fact for each of these elements is presumably discouraged by potentially having to pay an attorney fees award under CRS § 13-17-102 for a groundless proceeding, or fees under CRS § 13-17-201 if the complaint cannot survive a motion to dismiss for failure to state a claim.

Element One: Thing of Value

To properly assert a civil theft claim, a plaintiff must prove the theft statute's first element, that the claim concerns a specific thing of value.[76] For centuries, "property" has been defined as "the right to freely possess, *use*, and alienate" a thing.[77] This includes things that are obviously property, such as money,[78] negotiable instruments,[79] household goods,[80] automobiles,[81] business inventory,[82] and real estate, including equity in real estate.[83] In a business context property can also include corporate money stolen as a disguised distribution,[84] and intangible property such as proprietary emails[85] or trade secret information.[86] While certainly relevant for purposes of damages, property need not be valuable to be a "thing of value." Even insignificant things like "remnants of toilet paper rolls" or "stale pastries" could technically constitute property for purposes of civil theft.[87]

However, not every form of economic loss is property. A common contract dispute involves one party performing services and the other failing to pay or a similar dispute concerning an alleged loss of economic value. In this context, it would be difficult for the plaintiff creditor to identify particular property for purposes of a civil theft claim. While the exchange of promises is "property" in the sense that it gives the plaintiff creditor a chose in action against the defendant debtor,[88] this kind of property cannot satisfy the theft statute because, by definition, it "belong[s] to the party who suffered the injury[,]" not the debtor defendant who allegedly breached the contract.[89] In other words, if a plaintiff creditor's only damages are indirect economic losses from the contract and not specific, identifiable property that it lost, the right to recover those losses is likely not a "thing of value" under CRS § 18-4-401.

> "This is not as large of an issue as the *BlueRadios, Inc.* dissent and commentators suggest, however, because the most serious barrier to bringing civil theft claims has never really been the economic loss rule; rather, it has been the difficulty in meeting the statutory elements of a theft in the contract context."

Element Two: Without Authorization or by Deception

The theft statute's second element, that the property was obtained, retained, or controlled without authorization or by threats or deception, presents a serious limitation on applying civil theft where the parties entered into a voluntary agreement. If one contracting party was given access to or possession of another's property by a contract, it would seem that the obtaining, retaining, or controlling of the property was authorized, at least initially. Therefore, a successful civil theft claim must show that the defendant's treatment of the thing of value exceeded or violated the limits of the contractual authority or that the conveyance was itself the product of deception.[90]

Some courts have decided that where a contract sets forth specific limitations on the scope of the defendant's authority to retain and control the property, exceeding that authority amounts to unauthorized action.[91] In *Maryland Casualty Co. v. Messina*, the Colorado Supreme Court explained that the act of conversion can be established where the use of property was initially authorized, but the defendant exceeded its authority.[92] No subsequent appellate case has yet applied *Messina* to civil theft explicitly, and while the claims are similar, they are not identical.[93] But in discussing whether a third party's use of a vehicle is covered by the owner's insurance policy, Colorado courts have mentioned that the initial authority granted by the owner can end if the third party's conduct "rises to the level of theft or conversion[,]"[94] suggesting that there is some point at which the use of the property can exceed the authority granted. Cases cited by the Colorado Supreme Court from other states suggest that this can occur upon conduct "displaying utter disregard for the return or safekeeping of the vehicle."[95]

At least one trial court has explicitly expanded the *Messina* analysis to civil theft.[96] The Adams County District Court addressed theft claims arising out of personal charges made on a company credit card.[97] It reasoned that though the defendant was authorized to use the card, the particular charges were not authorized and could constitute the basis for a theft claim.[98] Contracting parties might

therefore be able to define the precise limits of authority in their contract and meet the second element of civil theft if the defendant exceeds that authority.

Where the property at issue consists of mere electronic information, though, there may be reason to question whether exceeding authority equates to a lack of authority. In the context of cybercrime laws, the Colorado legislature specifically criminalized not just "unauthorized" access but also access that is "in excess of authorization."[99] The latter term does not appear in the theft definition, which might imply that the theft statute has a more narrow reach.[100] When dealing with electronic information, courts across the country have differing views about whether the use to which information is put is distinct from whether access was authorized in the first place.[101]

Apart from lack of authority, a plaintiff could meet the second element of civil theft by showing deception. While the theft statute does not define "deception," Colorado courts have held that deception means a specific intent to defraud,[102] so deception under the theft statute is "synonymous with 'fraud.'"[103] This means that a plaintiff must prove that the defendant "made a representation, which is a false representation of a past or present fact, and that the victim parted with something of value in reliance upon the defendant's misrepresentation."[104] Therefore, intent to defraud under the theft statute may require proof of an affirmative fraudulent misrepresentation.

Based on the author's research, no cases have yet suggested that a mere omission is sufficient to show intent to defraud. Theft is not a crime of omission. Instead, the statute criminalizes an "affirmative, ongoing act."[105] The Colorado Supreme Court has indicated that an omission does not constitute deception where the other party was aware of the allegedly omitted fact,[106] and the Court of Appeals has also stated that a negligent omission "is insufficient to prove theft."[107] In discussing the interplay between securities fraud and theft, the Supreme Court referred only to the "statements that [the defendant] had made[,]" and not to omissions from those statements, in discussing how the theft claim was justified.[108]

As a result, civil theft is likely a viable claim only where an affirmative fraudulent statement induced someone to part with specific property. In this case, *BlueRadios, Inc.* might as a practical matter apply as earlier cases to support the proposition that the economic loss rule does not bar fraudulent inducement claims.[109]

Third Element: State of Mind

Lastly, a plaintiff must prove the theft statute's third element by showing the defendant's culpable state of mind. The specific intent to steal might be inferred if one party never had any intention of fulfilling its obligations under the contract,[110] because a "present intention not to fulfill [a] promise" can support a fraudulent misrepresentation claim.[111] But proving state of mind may be difficult because few parties to a contract document the fact that they are signing a deal with no intent to provide the promised consideration and to abscond with the other party's consideration.

Specific intent to steal is not the only way to meet the third element, however. While some Colorado cases mention that specific intent to steal is required where intent to steal was the only state of mind alleged by a plaintiff,[112] the Colorado Supreme Court stated in the 1980s that the "general reference to the requisite mental state" made by other cases "in no way mandates that every offense of theft as defined by the General Assembly requires proof of specific intent to deprive permanently[.]"[113] Accordingly, it is reversible error for a trial court to require proof of specific intent to steal where the state of mind can be proven using other subsections of the theft statute.[114] For example, intent may be demonstrated under CRS § 18-4-401(1)(e) where the defendant refuses to return property that was leased or rented under a lease or rental agreement.

The third element of theft may be met by showing that the stolen property was spent or dispersed. State of mind can be demonstrated by showing a knowing use of the property in such a manner as to permanently deprive.[115] "Knowingly" means that the defendant is aware that its conduct is practically certain to lead to a particular result.[116] This is a lower standard that "intentionally," which requires acting with specific intent to achieve the result.[117] Both states of mind are "equally heinous" under the theft statute.[118]

Courts have found "knowing" conduct where the defendant dispersed property by a volitional act that permanently deprived the owner. When the property at issue is money, the act of spending the money can be a knowing act of using the property in a way to permanently deprive the owner.[119] For example, if one party to a contract receives money as consideration with the express understanding that this consideration is to be spent performing the contract but instead spends that money on expenses other than contract performance, the state of mind element would likely be satisfied.[120]

State of mind can also be shown if a party demands consideration to which that party is not entitled as a condition of returning property.[121] Given that many contract disputes begin with dueling demand letters between counsel representing the parties, would such demands support the third element of theft? There are no cases on this issue to date, but the increased attention on civil theft remedies in the aftermath of *BlueRadios, Inc.* suggests that litigators may wish to consider whether combative correspondence alone might support the necessary state of mind.[122] However, this approach may be limited by existing case law because the Colorado Supreme Court has held that, generally, a debtor's failure to pay a creditor does not constitute theft.[123] And, at least where the contracting party had a belief that it was the true owner of the property based on prior undisputed documentation, such party's belief that it was "legally entitled" to the property does not constitute "intent to permanently deprive."[124]

Where the thing of value allegedly stolen is mere information, such as trade secrets, emails, or customer lists, the author questions whether any of the different prongs of the third element could be satisfied. Information, particularly in electronic form, is often copied rather than explicitly taken, and the original owner may retain the information. Cases discussing intent to deprive of electronic information arise in the realm of discovery sanctions for spoliation, and there it seems clear that intent to deprive means that the harmed party lost access to the information.[125] The other prongs of the third

element, similarly, all concern some sort of deprivation to the original owner of the property that may be lacking if the owner still retains the information.[126]

Advice for Practitioners

Practitioners seeking to bring civil theft claims in light of *BlueRadios, Inc.* should proceed carefully with the understanding that these claims are appropriate only where the elements of the theft statute are met. Such claims are certainly worth considering for disputes involving fraudulent inducement to convey specific property.

Practitioners expecting to defend against a potential flood of civil theft claims can take comfort in the fact that such claims are not properly brought in every contract case, and courts may sanction litigants and attorneys who pursue such claims without sufficient investigation or lack of substantial justification.[127]

Conclusion

BlueRadios, Inc. instructs practitioners considering civil theft claims to focus their inquiry on the theft statute's elements rather than being distracted by its historically brief flirtation with the economic loss rule. While *BlueRadios, Inc.* has led some to question whether every breach of contract case will now include a claim for treble damages, the sky has not entirely fallen because the limitations on civil theft claims remain the theft statute's elements. CL

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NOTES

1. CRS § 18-4-405.
2. *Bermel v. BlueRadios, Inc.*, 440 P.3d 1150 (Colo. 2019).
3. *Id.* at 1159–63 (Gabriel, J., dissenting); Brownstein, Colorado Supreme Court Revisits Economic Loss Rule (May 28, 2019); Kern, "Is a Wave of Civil Theft Claims On Its Way for Business Litigators?" CBA Business Law Section (Aug. 2019).
4. *See Hucal v. People*, 493 P.2d 23, 27 (Colo. 1971); *White v. People*, 472 P.2d 674, 677 (Colo. 1970).
5. While the statute does not specifically label these as factors that go to the defendant's state of mind, that appears to be the purpose of requiring one of them. *See People v. R.V.*, 635 P.2d 892, 896 (Colo. 1981); *People v. Schuett*, 819 P.2d 1062, 1067 (Colo.App. 1991) (noting that state of mind for theft is inferred from circumstances), *rev'd on other grounds* 833 P.2d 44; CRS § 18-4-401(1) (listing ways to prove state of mind).
6. CRS § 18-4-401(1)(a)–(e).
7. *See Steward Software Co., LLC v. Kopcho*, 275 P.3d 702, 712 (Colo.App. 2010).
8. *See* 11 USC § 523(a)(4), (6).
9. Terr. Laws of Colo. div. VI, § 58 (1861).
10. *Jardel Enters., Inc. v. Triconsultants, Inc.*, 770 P.2d 1301, 1304 (Colo.App. 1988).
11. *Id.* at 1303.
12. *Id.* at 1304.
13. *Id.* (citing Prosser and Keeton, *Torts* § 92 (5th ed. 1984)).
14. *See Jardel Enters., Inc.*, 770 P.2d 1301. *See also Grynberg v. Agri Tech, Inc.*, 985 P.2d 59, 63 (Colo.App. 1999); *Chellsen v. Pena*, 857 P.2d 472, 477 (Colo.App. 1992).
15. *Jardel Enters., Inc.*, 770 P.2d at 1304–05.
16. *Terrones v. Tapia*, 967 P.2d 216, 220 (Colo. App. 1998).
17. *Scott Co. of Ca. v. MK-Ferguson Co.*, 832 P.2d 1000, 1005 (Colo.App. 1991).
18. *Town of Alma v. AZCO Constr., Inc.*, 10 P.3d 1256 (Colo. 2000); *Grynberg*, 10 P.3d 1267.
19. *Town of Alma*, 10 P.3d at 1260.
20. *Id.* at 1262.
21. *Id.*
22. *BRW, Inc. v. Dufficy and Sons, Inc.*, 99 P.3d 66, 74 (Colo. 2004).
23. *Id.*
24. *See id.*
25. *Venderbeek v. Vernon Corp.*, 50 P.3d 866, 871 (Colo. 2002).
26. *Bill Dreiling Motor Co. v. Schultz*, 450 P.2d 70, 73 (1969).
27. *Keller v. A.O. Smith Harvestore Prods., Inc.*, 819 P.2d 69, 72–73 (Colo. 1991) (surveying cases).
28. *Id.* at 72.
29. *BRW, Inc.*, 99 P.3d at 74.
30. *Id.* at 75.
31. *Id.*
32. *See A.C. Excavating v. Yacht Club II Homeowners Ass'n*, 114 P.3d 862, 867 (Colo. 2005).
33. *Id.* at 867.
34. *Id.* at 868 (citing CRS §§ 13-20-801 et seq.).
35. *Id.* at 870.
36. *Accident and Injury Med. Specialists, P.C. v. Mintz*, 279 P.3d 658 (Colo. 2012).
37. *Venderbeek*, 50 P.3d at 871.
38. *Brody v. Bock*, 897 P.2d 769, 773 (Colo. 1995) (common law fraud can exist even if the fraud was to induce an oral agreement that was itself unenforceable under the statute of frauds).
39. *Town of Alma*, 10 P.3d at 1263.
40. *Rhino Fund, LLLP v. Hutchins*, 215 P.3d 1186, 1194 (Colo.App. 2008).
41. *Id.*
42. *See Makoto USA, Inc. v. Russell*, 250 P.3d 625, 629 (Colo.App. 2009).
43. *See generally id.*
44. *Id.* at 629.
45. *Hamon Contrs., Inc. v. Carter and Burgess, Inc.*, 229 P.3d 282, 291 (Colo.App. 2009).
46. *Id.* at 289.
47. *See S K Peightal Eng'rs, Ltd. v. Mid Valley Real Estate Solutions V, LLC*, 342 P.3d 868, 875 (Colo. 2015).
48. *Id.*
49. *Id.*
50. *Id.* (internal citation omitted).
51. *Id.* at 875–76.
52. *Van Rees v. Unleaded Software, Inc.*, 373 P.3d 603, 608 (Colo. 2016).
53. *Id.*
54. *See Bermel v. BlueRadios, Inc.*, 442 P.3d 923, 924 (Colo.App. 2017).
55. *Van Rees*, 373 P.3d at 607.
56. *Id.*
57. *Id. See also Rhino Linings USA, Inc. v. Rocky Mt. Rhino Lining, Inc.*, 62 P.3d 142, 148 (Colo. 2003).
58. *See, e.g.*, *Hamon Contrs., Inc.*, 229 P.3d 282.
59. *Van Rees*, 373 P.3d at 608.
60. *Id.* Though the questions did not arise in the opinion, it also seems strange to consider damages to good will in the form of search engine results as a specific item of property subject to being stolen.
61. *BlueRadios, Inc.*, 440 P.3d at 1154.
62. *BlueRadios, Inc.*, 442 P.3d at 924.
63. *Id.* at 926.
64. *Id.*
65. *BlueRadios, Inc.*, 440 P.3d. at 1158–59.
66. *Id.* at 1155.
67. *Id.* at n.6.
68. *E.g.*, *McWhinney Centerra Lifestyle Ctr. LLC v. Poag and McEwen Lifestyle Centers-Centerra, LLC*, 486 P.3d 439 (Colo.App. 2021).
69. *BlueRadios, Inc.*, 440 P.3d at 1162 (Gabriel, J., and Hart, J., dissenting).
70. *Id.* at 1163.
71. Brownstein, *supra* note 3.

72. Kern, *supra* note 3.

73. *See, e.g.*, CRS § 38-22-127; *In re Regan*, 151 P.3d 1281 (Colo. 2007); *Weize Co., LLC v. Colo. Reg'l Constr., Inc.*, 251 P.3d 489 (Colo.App. 2010).

74. *S K Peightal Eng'rs, Ltd.*, 342 P.3d at 875.

75. *See People v. Zarlengo*, 367 P.3d 1197, 1198 (Colo. O.P.D.J. 2016).

76. CRS § 18-4-401.

77. *City of Denver v. Bayer*, 2 P. 6, 6–7 (Colo. 1883) (emphasis in original), cited more recently in *Animas Valley Sand and Gravel, Inc. v. Bd. of Cty. Comm'rs*, 38 P.3d 59, 70 (Colo. 2001).

78. *Rhino Fund*, 215 P.3d at 1195.

79. *People v. Andersen*, 58 P.3d 537, 539–40 (Colo. 2000).

80. *Chryar v. Wolf*, 21 P.3d 428, 429 (Colo.App. 2000).

81. *People v. Bornman*, 953 P.2d 952 (Colo.App. 1997).

82. *People v. Moore*, 712 P.2d 1106, 1107 (Colo. App. 1985).

83. *Martinez v. Affordable Hous. Network, Inc.*, 109 P.3d 983, 986 (Colo.App. 2004).

84. *Tisch v. Tisch*, 439 P.3d 89 (Colo.App. 2019).

85. *BlueRadios, Inc.*, 440 P.3d at 1151.

86. *Id. But see contra Tolbert v. High Noon Prods, LLC*, 2021 LEXIS 91901, *10 (D.Colo. 2021) (holding that a mere "idea" cannot be "chattel" for purposes of conversion).

87. *See Starr v. Indus. Claim Appeals Office*, 224 P.3d 1056, 1059, 1061 (Colo.App. 2009) (discussing theft in context of determining fault for end of employment).

88. *Denver v. Jones*, 274 P. 924, 924–25 (Colo. 1929) (a chose in action is "[a] right to receive or recover a debt, or money, or damages for breach of contract, or for a tort connected with contract, but which cannot be enforced without action." (internal citation omitted)).

89. *Ford v. Summertree Lane LLC*, 56 P.3d 1206, 1209 (Colo.App. 2002).

90. A "threat" under the theft statute means "a statement of purpose or intent to cause injury or harm to the person, property, or rights of another by the commission of an unlawful act." *People v. Hickman*, 988 P.2d 628, 636 (Colo. 1999) (internal citation omitted). This article does not cover the possibility of a theft claim arising out of threats because in such case the contract would likely be voidable for duress. *See Vail/Arrowhead, Inc. v. Dist. Court*, 954 P.2d 608, 612 (Colo. 1998). Thus, the economic loss rule would likely never apply where improper threats are shown because there would be no contract. On the other hand, a fraud claim allows the plaintiff to seek damages instead of rescinding the contract, so fraud intersected with the economic loss rule before *BlueRadios, Inc. See Aaberg v. H.A. Harmon Co.*, 358 P.2d 601, 603 (Colo. 1960).

91. *Maryland Casualty Co. v. Messina*, 874 P.2d 1058, 1065 (Colo. 1994).

92. *Id.*

93. The major difference between conversion and civil theft is that conversion does not require the third state of mind element. *Itin v. Ungar*, 17 P.3d 129, n.10 (Colo. 2000).

94. *Wiglesworth v. Farmers Ins. Exch.*, 917 P.2d 288, 291 (Colo. 1996).

95. *Norton v. Lewis*, 623 So.2d 874, 875 (La. 1993), cited by *Wiglesworth*, 917 P.2d at 291.

96. *College Hills Filing #8 Condo. Assocs. v. Adkins*, Adams County District Court Case No. 2016 CV 196, 2018 Colo. Dist. LEXIS 768 (2018).

97. *Id.*

98. *Id.*

99. CRS § 18-5.5-102(1)(e). *See also See People v. Stotz*, 381 P.3d 357, 366-7 (Colo.App. 2016) (discussing same).

100. CRS § 18-4-401.

101. *Stotz*, 381 P.3d at 367 (surveying cases).

102. *See People v. Freda*, 817 P.2d 588 (Colo. App. 1991).

103. *People v. Collie*, 995 P.2d 765, 774 (Colo. App. 1999) (citing *Black's Law Dictionary* (6th ed. 1990)).

104. *People v. Vidauri*, 486 P.3d 239, 242 (Colo. 2021) (quoting *People v. Warner*, 801 P.2d 1187, 1189–90 (Colo. 1990) and *People v. Terranova*, 563 P.2d 363, 368 (Colo.App. 1976)).

105. *Gonzales v. Cty. Court of Arapahoe*, 477 P.3d 752, 760 (Colo.App. 2020).

106. *People v. Norman*, 703 P.2d 1261, 1268 (Colo. 1985).

107. *Starr v. Indus. Claim Appeals Office*, 224 P.3d 1056, 1066 (Colo.App. 2009).

108. *Thompson v. People*, 471 P.3d 1045, 1059 (Colo. 2020). The securities fraud statute, by contrast, expressly criminalizes fraudulent omissions as well as misrepresentations. CRS § 11-51-501(5)(b).

109. *See, e.g.*, *Van Rees*, 373 P.3d at 607.

110. *See People v. Stewart*, 739 P.2d 854, 856 (Colo. 1987).

111. *See H & H Distribs, Inc. v. BBC Int'l, Inc.*, 812 P.2d 659, 662 (Colo.App. 1990) (citing *Kinsey v. Preeson*, 746 P.2d 542 (Colo. 1987)).

112. *See Itin*, 17 P.3d 129; *Tisch v. Tisch*, 439 P.3d 89, 105 (Colo.App. 2019); *Huffman v. Westmoreland Coal Co.*, 205 P.3d 501, 505 (Colo.App. 2009).

113. *People v. Quick*, 713 P.2d 1282, 1289 (Colo. 1986).

114. *Franklin Drilling and Blasting, Inc. v. Lawrence Constr. Co.*, 463 P.3d 883 (Colo.App. 2018); *People v. Anderson*, 773 P.2d 542 (Colo. 1989).

115. CRS § 18-4-401(1).

116. CRS § 18-1-501(6); *People v. Eastepp*, 884 P.2d 305, 308 (Colo. 1994).

117. CRS § 18-1-501(5).

118. *See People v. Cowden*, 735 P.2d 199, 202 (Colo. 1987).

119. *Marvel Concrete v. Helmke*, 398 B.R. 38, 40–41 (Bankr.D.Colo. 2008).

120. *Weize Co., LLC v. Colo. Reg'l. Constr., Inc.*, 251 P.3d 489 (Colo.App. 2010).

121. CRS § 18-4-401(1)(d).

122. If this provides a practical reason for counsel to be cooperative and polite with each other instead of combative, that, in the author's opinion, would be a welcome effect.

123. *Stewart*, 739 P.2d at 855.

124. *Scott v. Scott*, 428 P.3d 626, 634 (Colo. App. 2018).

125. *See Applebaum v. Target Corp.*, 831 F.3d 740, 745 (6th Cir. 2016).

126. This might suggest that the civil theft claim in *BlueRadios, Inc.* was vulnerable on grounds other than the one appealed. In *BlueRadios, Inc.*, the allegedly stolen property consisted of "thousands of company emails containing proprietary information" that Bermel forwarded to his personal account. *BlueRadios, Inc.*, 440 P.2d at 1151. If the emails were merely copied by being forwarded, the owner was presumably not deprived of the information.

127. *See* CRS § 13-17-102; CRCP 11.