

Colo. High Court Defies Contract Damages Precedent

By **Perry Glantz** (July 10, 2019, 3:28 PM EDT)

Traditionally, legal remedies for breach of contract do not allow the court to force a party to perform or punish the breaching party for its failure to perform, but instead are limited to compensation of the nonbreaching party for its loss resulting from the breach.[1] In short, punitive damages are not available in the context of a breach of contract. The question is, has that now changed in Colorado?



Perry Glantz

In May 2019, in *Bermel v. BlueRadios Inc.*, the Colorado Supreme Court published an opinion that could open the door to recovery of a form of punitive damages for breach of contract.[2] Specifically, the court held that the economic loss rule cannot bar a claim for civil theft in the context of a breach of contract action.[3] The economic loss rule provides that "a party suffering only economic loss from the breach of an express or implied contractual duty may not assert a tort claim for such a breach absent an independent duty of care under tort law." [4]

Accordingly, pursuant to *Bermel*, a party that has suffered only economic loss from a breach of contract can assert a claim for civil theft and potentially recover treble damages and attorney fees for what is, in reality, a breach of contract.

The majority of the Colorado Supreme Court based its decision on the principles of separation of powers.[5] Because the economic loss rule is a judge-made rule, the court decided that this doctrine could not bar statutorily-imposed liability for intentionally wrongful conduct. The decision, however, does not take into account the Colorado law of exemplary damages that is a matter of statute and has been interpreted to bar punitive damages for breach of contract.

The prohibition of the award of punitive damages for breach of contract is based upon the Colorado Supreme Court's interpretation of the Colorado statute governing exemplary damages.[6] In *Mortgage Finance Inc. v. Podleski*, the court determined that exemplary damages under the Colorado statutes were available only for claims sounding in tort.[7] The traditional goal of compensation of the nonbreaching party to a contract was determined to be "at odds" with the statutory purpose of the exemplary damages statute.[8]

A claim for civil theft is made possible through a different statute in the Colorado Criminal Code entitled "Rights in Stolen Property." [9] This criminal law allows an owner of property taken by theft, robbery or burglary to sue the person who took it and recover three times the amount of actual damages plus their attorney fees. This private right of action is intended to punish a party that has committed a crime. It was added to the Colorado criminal law in 1973 at the request of trucking companies to recoup losses caused by employee theft in cases where the government failed to bring criminal charges.[10]

By allowing a claim for civil theft to be asserted for a breach of contract, the Colorado Supreme Court has created a procedure whereby damages that are designed to punish the breaching party are now allowed for a breach of contract. This would appear to put the decision in *Bermel* in conflict with the decision in *Podleski* and its numerous progeny. The Colorado exemplary damages statute does not allow damages for a breach of contract. However, under *Bermel*, a breach of contract can now be punished through a claim for civil

theft. The separation of powers analysis in *Bermel* does not address this conflict.

The dissenting judges in *Bermel* recognized the potential risk of this decision and its practical impact on the litigation of breach of contract claims in the future. The dissent points out that the opinion:

dramatically expands ... contractual remedies and establishes a precedent that ... [might] inappropriately allow many future contract claims to be asserted as civil theft claims, in pursuit of otherwise unavailable treble damages and attorney fees awards.[11] [T]o allow the civil theft claim to proceed here would create a precedent under which many contract claims could be pleaded as civil theft claims, allowing an end run around contract law and the terms of the parties' contract. For example, a great many contract claims arise from a scenario in which one contracting party pays the other for goods or services and the other does not perform. Under the majority's analysis, the payor in this scenario could virtually always assert a civil theft claim (the payee allegedly stole the payor's money), allowing it to seek treble damages and attorney fees not otherwise available under the parties' contract.[12]

The decision in *Bermel* is also contrary to the theory of efficient breach of contract. This theory posits that not all breaches of contract should be discouraged. This is particularly true if the breaching party's gains are greater than the injured party's losses. A breach in this situation allows the injured party to be fully compensated and the breaching party to realize a net gain. A win-win situation, if you will.

Under *Bermel*, as described in the dissenting opinion, this type of efficient breach could lead to punitive treble damages and the recovery of attorney fees. The availability of recovering attorney fees further serves to promote litigation in a situation in which all of the actual economic factors should encourage the breach.

In Florida, on the other hand, "damages for civil theft can only be trebled where there is no contractual relationship between the parties" unless the claim is separate and distinct from any breach of contract.[13] Similar results are to be found in Connecticut[14] and Utah.[15]

The *Bermel* decision and a recent Colorado Court of Appeals decision, *Tisch v. Tisch*,[16] combine to create a potentially vast expansion of the use of civil theft in business and contract litigation.

In *Tisch*, the Colorado Court of Appeals affirmed a judgment in the minority shareholders' favor for civil theft against the majority shareholder, finding the minority shareholders had proven the corporation should have been profitable for up to 20 years, these profits should have been declared distributions and the majority shareholder had stolen these phantom "distributions."

The allowance of these particular claims may embolden the pursuit of commercial litigation with the hope of treble damages and attorney fees at the end of the day. The Utah decision cited above applying the economic loss rule to a civil theft claim was based on Colorado law prior to *Bermel*. This could certainly be at risk now. In any event, these developments will impact settlement negotiations in the short term while these issues are sorted out.

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- [1] [Mortg. Fin., Inc. v. Podleski](#), 742 P.2d 900 (Colo. 1987).
- [2] [Bermel v. BlueRadios, Inc.](#), 440 P.3d 1150, (Colo. 2019).
- [3] Id. at 1151.
- [4] [Town of Alma v. AZCO Const., Inc.](#), 10 P.3d 1256, 1264 (Colo. 2000).
- [5] Bermel, 440 P.3d at 1153–54.
- [6] C.R.S. § 13-21-102.
- [7] Mortg. Fin., Inc. v. Podleski, 742 P.2d 900, 902 (Colo. 1987).
- [8] Id.
- [9] C.R.S. § 18-4-405.
- [10] [Itin v. Ungar](#), 17 P.3d 129, 134 (Colo. 2000).
- [11] 440 P.3d at 1160.
- [12] Id. at 1163.
- [13] [Leisure Founders, Inc. v. CUC Intern., Inc.](#), 833 F. Supp. 1562, 1573 (S.D. Fla. 1993).
- [14] [BKM Enterprises, Inc. v. Budget Modular Workstations, Inc.](#), 2007 WL 806275 (February 21, 2007).
- [15] [Preventive Energy Solution, LLC v. NCAP Ventures 5 LLC](#), 2017 WL 87028 (January 10, 2017).
- [16] [Tisch v. Tisch](#), 439 P.3d 89 (Colo. Ct. App. 2019).