

## When Stealing Is Not Considered Theft

By: Arthur G. Boylan

Money is improperly transferred by an employee, the employee doctors the books, and the business suffers a loss as a direct result. Typically, this scenario means that an act of theft has occurred. But what if the employee never actually takes the money for himself?

This unusual fact pattern was presented in a recent decision in the



Minnesota Court of Appeals: *TCI Bus. Capital, Inc. vs. Five Star Am. Die Casting, LLC, et al.*, No. A16-0741, 2017 WL 279571, at \*2 (Minn. Ct. App. Jan. 23, 2017). Apparently motivated by a desire to make himself

look good in his job, the defendant in TCI Business created a somewhat elaborate series of false transactions involving customers, false invoices, purchasing orders, packing lists, bills of lading, and accounting adjustments. The defendant transferred money around (including outside the company) so it appeared a customer/debtor he was responsible for pursuing had already paid \$250,000. In reality, the customer had not. Here's the twist: the defendant had good instincts about his lack of job security. Thus, before the defendant was able to complete the scheme by selling some of the debtor's equipment and re-adjusting plaintiff's internal accounting records, the defendant was terminated for reasons unrelated to the accounting shenanigans.

After the plaintiff discovered the scheme, one of the intriguing questions was whether the defendant was liable under the Minnesota

Civil Theft statute. Ordinarily, the statute is a powerful tool for the business litigator because a "person who steals personal property from another is civilly liable to the owner of the property for its value when stolen plus punitive damages of either \$50 or up to 100 percent of its value when stolen, whichever is greater." Minn. Stat. § 604.14, subd. 1 (2016). In other words, the statute authorizes liability for the value of the property stolen and punitive damages in the same amount. *Id.* § 604.14, subd. 1. The statute further provides, "The recovery of stolen property by a person does not affect liability under this section, other than liability for the value of the property." *Id.* § 604.14, subd. 5.

In most circumstances, when you take something you are not entitled to...well, that's stealing. Not so here. The defendant won summary judgment in the district court because the court concluded that defendant did not "steal" anything. Rather, according to the Court, the defendant merely transferred funds around and initiated internal accounting entries. On appeal, plaintiff argued the defendant took possession of the money by giving it to the customer in the form of accounting adjustments. The Minnesota Court of Appeals affirmed.

The lynchpin was an analysis of the word "steals." The statute does not define the word. But, relying on a series of dictionary definitions, the Court of Appeals affirmed summary judgment for the defendant because the word "steals" generally means that a person wrongfully and surreptitiously takes another person's property for the purpose of keeping it or using it. The Court of Appeals concluded that the plaintiff did not have suf-

ficient evidence that the defendant took property with the intent to use it or keep it. According to the Court, the defendant merely caused money to be transferred from company to company by wire, caused certain accounting entries with the intent to make the customer's debt to plaintiff appear temporarily less than it actually was. There was no evidence that defendant intended to keep or use the money at issue or that he actually kept it or used it. As a result, the Court of Appeals concluded that he did not "steal" the money for purposes of the Minnesota Civil Theft statute.

In the future, the TCI Business decision is likely to be a case limited to its specific facts. After all, when someone takes something they are not entitled to, common sense tells us they have "stolen" something—whether or not there is independent proof that they intend to use it or keep it. The bad intent should be presumed—no? And, if additional proof is really required, how would a plaintiff expect to develop that proof? If the defendant has not already used the money, the savvy defendant will either invoke the Fifth Amendment (due to the obvious criminal implications) or testify that he or she never intended to use or keep the property at issue. Ultimately, let's hope the TCI Business case is recognized for what it is—a peculiar result driven by highly unusual facts.

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