



LEGAL UPDATES

## Colorado Supreme Court Clarifies – a Bit – the Economic Loss Rule

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In a case that could have far reaching implications for business and construction litigation, the Colorado Supreme Court issued an opinion on April 21, 2025, providing some greater clarity on the economic loss rule under Colorado law in *Mid-Century Insurance Company v. HIVE Construction, Inc.*, 2025 CO 17 (2025). While the overall case law in Colorado remains murky in places, the court did step in to resolve ambiguity about whether or not willful and wanton conduct was, or was not, an exception to the economic loss rule.

### The Economic Loss Rule In Colorado

Colorado adopted the economic loss rule in 2000 in *Town of Alma v. AZCO Constr., Inc.*, 10 P.3d 1256, 1264 (Colo. 2000), holding 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.”

As a policy matter, the economic loss rule protects and promotes the ability of parties to allocate risks through contractual agreement, while preserving the boundary between tort claims and contract claims.

Having adopted the economic loss rule, Colorado courts have reached different holdings about the application of the rule in different contractual settings, often arising out of a determination of whether or not an “independent duty” exists outside the applicable contract. Depending on the context and setting, the practical application of the economic loss rule in Colorado is full of nooks and crannies.

### Colorado Courts Split on Applying the Economic Loss Rule to Intentional Torts

The clarity recently provided by the Colorado Supreme Court touched on the split in authority over intentional torts and a potentially weighty footnote in a prior opinion. Previously, a trilogy of cases found that the economic loss rule barred common law intentional tort claims. See *Hamon Contractors, Inc. v. Carter & Burgess, Inc.*, 229 P.3d 282, 289 (Colo. App. 2009), as modified on denial of reh’g

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(June 11, 2009) (concluding that the “economic loss rule can apply to fraud or other intentional tort claims based on post-contractual conduct”); *Former TCHR, LLC v. First Hand Mgmt. LLC*, 317 P.3d 1226 (Colo. App. 2012)(holding that the economic loss rule barred fraud and concealment claims because they did not arise out of an independent duty); *Top Rail Ranch Estates, LLC v. Walker*, 327 P.3d 321 (Colo. App. 2014)(economic loss rule barred fraudulent concealment, intentional misrepresentation and negligent misrepresentation claims).

Into this state of the law, the Colorado Supreme Court in 2019 considered whether the economic loss rule could bar a tort claim created by statute, rather than the common law. Finding a statutory duty arose independent of contract, the Colorado Supreme Court found that the economic loss rule did not apply. *Bermel v. BlueRadios, Inc.*, 440 P.3d 1150 (Colo. 2019). Going further, however, the court in *Bermel* included a weighty footnote – stating that, “the economic loss rule generally should not be available to shield intentional tortfeasors from liability for misconduct that happens to also breach a contractual obligation.” *Bermel*, 440 P.3d at 1154 n.6. This footnote, while dicta and separate from the holding, lent credence to arguments that the economic loss rule was inapplicable to any intentional tortious conduct, casting doubt on prior rulings of the Colorado Court of Appeals.

In 2021, a division of the Colorado Court of Appeals diverged from other divisions following its interpretation of the footnote in *Bermel*. In *McWhinney Centerra Lifestyle Center LLC v. Poag & McEwen Lifestyle Centers-Centerra LLC*, 486 P.3d 439, 453 (Colo. App. 2021), a division of the Colorado Court of Appeals found that intentional torts were an exception to the economic loss rule, following the footnote in *Bermel* as a substantive statement of Colorado law.

## **The Colorado Supreme Court Clarifies That the Economic Loss Rule Can Bar Willful and Wanton Conduct**

In the context of this split of authority, the Colorado Supreme Court in *Mid-Century* addressed a commercial construction job with an applicable contract. The plaintiff alleged that the defendant contractor was willfully and wantonly negligent, arguing that willful and wanton conduct was excepted from the economic loss rule. The court noted that the district court, relying on *McWhinney*, had permitted the willful and wanton negligence claim, while the appellate court had reversed, following the prior line of cases and noting that the footnote in *Bermel* was mere dicta.

In *Mid-Century*, the Colorado Supreme Court clearly stated and ruled that the economic loss rule does apply to willful and wanton tort claims. Thus, Colorado law now holds that a plaintiff may not avoid the economic loss rule by alleging that negligent or other tortious conduct was “willful & wanton.” Reaching this result, however, the Colorado Supreme Court distinguished willful and wanton conduct from intentional conduct under Colorado law, using this distinction as a way to state that the footnote in *Bermel* does not apply to willful and wanton conduct.

## **The Colorado Supreme Court Does Not Provide Clarity On Intentional Torts**

This result, however, only provides partial clarity. While *Mid-Century* settles the law such that willful and wanton conduct is subject to the economic loss rule, *Mid-Century* does not provide further guidance on the existing split between Court of Appeals decisions holding that intentional torts are subject to the economic loss rule while the footnote in *Bermel* certainly implies that they are not. This split in authority on “intentional” torts may persist until the issue arrives again back before the Colorado Supreme Court in a later case.

## **What This Means for Your Business In Colorado**

While the overall impact will vary from case to case and industry to industry, the ruling in *Mid-Century* reinforces the ability of businesses to allocate and specify business risks in their contracts. Particularly in construction contracts, clear contractual provisions that specify applicable standards and bargained-for remedies should provide greater protection to parties. Enterprising plaintiff’s counsel will have more difficulty sidestepping contractual provisions to impose more general negligence standards without the ability to avoid the economic loss rule by simply alleging that conduct was “willful & wanton.”



While open questions remain about the application of the economic loss rule to intentional torts, Colorado law should provide greater protections to contracting parties that are more careful to provide contractual standards for performance and allocations of risks within their contracts.

If you have questions about how this ruling may impact your business, please contact [Billy Jones](#), or your regular Lathrop GPM attorney.