Criminal Code Used in Civil Action to Recover Triple Damages and Attorney Fees

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When is a breach of contract also fraud? When the party never intended to perform.

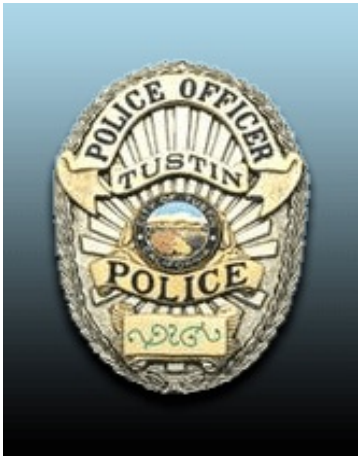
Breach of contract is easy to spot, but business owners are often confused about what constitutes fraud. Someone fails to pay all the money owed on an invoice, and the client wants us to add a cause of action for fraud. That's probably not fraud.

The elements of fraud are (1) a misrepresentation of a material fact; (2) made with the intention that the party rely on that representation to his detriment; (3) reasonable reliance on the misrepresentation; and (4) damages. As you can see from the above elements, in the case of a contract, for there to be fraud the fraudulent intent must exist at the time of the contract. If a person enters into a contract intending to perform, if he later fails to perform, that breach will not transmute into fraud no matter now egregious and flagrant his breach. To prove fraud, you must show that at the time the defendant entered into the agreement, he had no intention of performing.

So how do you get into the mind of the defendant to determine if he intended to perform when he signed the agreement? Thankfully, California courts have held that the behavior *after* the contract was signed can be used to show that the defendant never intended to perform. In our case, the defendant borrowed a significant amount of money from our client, and pursuant to the agreement that money was to be invested in a business venture. It was still a loan, but part of the "security" for the loan was that it would be used in the business venture. The money was never repaid, and our client hired us to recovery the money.

We went her one better. We sued for fraud, because we could see no indication that the money ever went into the business venture. We felt that would be sufficient to show that at the time of the contract, the defendant did not intend to put the money into the business but rather intended to use it for personal expenses. He was free to argue that he intended to invest the money at the time of the contract and therefore it was not fraud, but how would he explain why the money immediately went for his own personal use? As we suspected, defendant fought us on discovery, and when we compelled him to respond, he could not provide any proof that the money had ever gone into the business.

But here is where we got really creative. There is a criminal code section that makes it illegal to receive stolen property, and allows a victim to bring a **civil action** against the criminal to recover three times the value of the stolen property, and to recover all attorney



fees. We sued under that section, alleging that the entire loan process had just been a artifice to relief our client of her money. In other words, he stole the money from our client through a bogus business venture, and kept that money for himself.

This was the most difficult part to get the judge to understand. Indeed, on this creative cause of action he indicated that he would likely rule against us, but our briefing apparently saved the day. We used the analogy of a crook who comes to the door and sells a little old lady aluminum siding for the house, knowing that he is not in that business and never intends to provide the siding. The fact that he presents the victim with a contract and then fails to perform the contract does not make it any less of a fraud or theft. If that were the case, then every thief could assure himself that he would never be liable for more than the money he stole, just so long as he made certain to insert a contract into the process.

A fact pattern that will support this breach of contract/fraud/theft approach does not arise very often, but we have tried it twice before. In both of the prior actions, we won on the breach of contract and fraud causes of action, but could not get the judge to consider the theft cause of action. The theft cause of action provides a real conceptual hurdle for most judges. Many judges are former District Attorneys or Public Defenders, and their criminal law backgrounds taught them that a criminal cannot be convicted of both stealing property and receiving that property. Yet, here I am arguing to them that I want damages under a statute dealing with receiving stolen goods even though this is the same person that stole the goods (here, the money).

In reality, the law says that someone cannot be convicted of *both* offenses, but can be charged with *either*. Indeed, the law says that if the statute of limitations has passed for the theft of the goods, the thief can still be charged with receiving the property, because the statute actually states that it is an offense to receive or exercise control over the stolen property. Thus, the same person that steals the property is guilty of exercising control over it if it still has not been returned.

The second conceptual hurdle involves the erroneous concept that the defendant must have been convicted of the offense before the civil suit can take place. After all, the judges reason, the legal standard for the burden of proof on a criminal conviction is beyond a reasonable doubt, whereas in civil court it is just more probable than not. How can a defendant be made to pay under a criminal statute when he has never been convicted of the offense? Complicating the matter, no reported decision has ever discussed the civil remedies under the criminal statute upon which we were relying.

In reality, these concerns are easily disposed of, but the judge must be made to wrap his mind around the concept. In the latter case, no criminal conviction is necessary because it still must be shown in the civil action that the defendant committed the offense. Other cases involving civil enforcement of criminal statutes have made clear that the primary reason the statutes provide for a civil remedy is that law enforcement does not always have the will or resources to go after a criminal. A victim of a crime should not be dependant on the vagaries of the criminal system in order to seek redress. For example, there is a statute that permits cable companies to seek civil damages for the theft of a cable signal. What are the odds that police departments around the state are going to devote resources to going after cable thieves? Therefore, the Court of Appeal held that cable companies can prosecute under these criminal statutes whether or not the defendant has ever been criminally charged. It's a win-win. The cable company can become its own police force in order to discourage cable thieves, and the government need not devote resources to that purpose.

So it is here. There would be little disincentive to using false pretenses to "borrow" money if the worst that could happen to the defendant is that he would someday be ordered to return the money. Morris & Stone uses this criminal statute to impose a quasi-criminal remedy on the defendant, providing a much greater disincentive regarding this type of fraud, since the defendant must pay back three times the amount he took.

This judge finally got it, and tripled the damages, awarding our client three times what she had loaned to the defendant. As a huge bonus, the statute provides that the defendant must pay all attorney fees incurred by the plaintiff. Absent a contract provision, you are not entitled to recover attorney fees under a breach of contract case, and rarely under a fraud claim. Since we used this criminal statute, the court also awarded our client all her attorney fees.

We might just start wearing police badges.