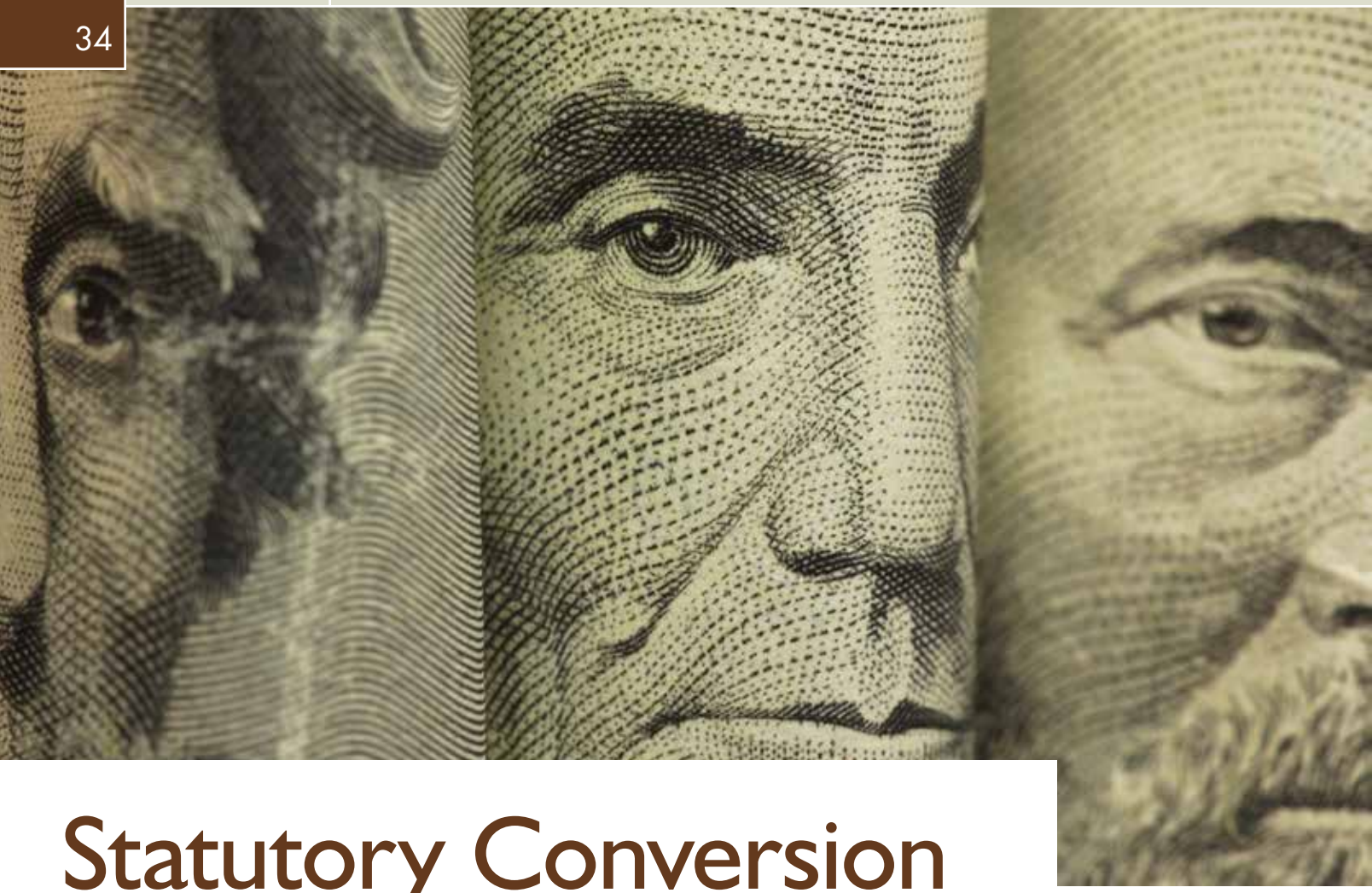

Statutory Conversion and Treble Damages

Puzzles of Statutory Interpretation

By Adam D. Pavlik

All lawyers encounter the common law tort of conversion when they take their first-year Torts class in law school. In addition to the common law, Michigan has enacted a conversion statute that provides for treble damages. But when does the statute apply, and when are treble damages available? These questions pose surprisingly difficult issues of statutory interpretation with, at times, conflicting answers from our appellate courts.

Are common law and statutory conversion different causes of action?

As a common law tort, conversion consists of "any distinct act of dominion wrongfully exerted over another's personal property in denial of or inconsistent with his rights therein."[1] Although the tortfeasor's act of dominion "must be willful,…one can commit the tort unwittingly if he is unaware of plaintiff's outstanding property interest."[2] This means even acquiring a chattel in good faith is not a defense if it rightfully belongs to another.[3] Although conversion was recently described as "a strict liability tort,"[4] the better interpretation is that it is a *general intent* tort. The tortfeasor must only intend to do the *act* which deprives the injured party of his or her property right and need not have knowledge of the injured party's interest in the chattel.

Conversion is embedded as a background principle of our legal system. It was imported into Michigan as part of the common law.[5] Reported references to Michigan courts invoking the concept of tortious conversion go back to the mid-nineteenth century.[6] Thus, there would have been a cause of action for conversion at common law even without any legislative action.

However, there has been a conversion statute in Michigan (MCL 600.2919a) since 1976.[7] It originally provided that an injured party "may recover 3 times the amount of actual damages sustained, plus costs and reasonable attorney's fees" when "damaged as a result of another person's buying, receiving, or aiding in the concealment of any stolen, embezzled, or converted property when the person…knew that the property was stolen, embezzled, or converted."[8] In 2002,[9] this language was interpreted as applying only to a "fence"[10] acting with scienter,[11] which added an element to the common law tort: only someone who *received* "stolen, embezzled, or converted property" *knowing* it had been "stolen, embezzled, or converted" was liable under the statute, for treble damages. The thief from whom the fence received the stolen, embezzled, or converted property, on the other hand, was only liable at common law, for ordinary damages.

The legislature felt this interpretation of the statute created a loophole.[12] It amended MCL 600.2919a in 2005.[13] It now provides:

> (1) A person damaged as a result of either or both of the following may recover 3 times the amount of actual damages sustained, plus costs and reasonable attorney fees:
>
> (a) Another person's stealing or embezzling property or converting property to the other person's own use.
>
> (b) Another person's buying, receiving, possessing, concealing, or aiding in the concealment of stolen, embezzled, or converted property when the person buying, receiving, possessing, concealing, or aiding in the concealment of stolen, embezzled, or converted property knew that the property was stolen, embezzled, or converted.

Section 2919a(1)(b) contains the pre-2005 language, while subparagraph (a) contains the language added by the legislature to patch the loophole.

This history presents a puzzle of legislative interpretation. Subparagraph (b) clearly refers to the subset of all conversions the pre-2005 language dealt with: those involving a fence who acts with scienter. To understand subparagraph (a), the key concern is the meaning of the phrase "own use." Defendants who have been sued under subparagraph (a) seek to avoid exposure to treble damages liability by arguing they have not *used* the chattel that was converted. The Michigan Court of Appeals recently validated this analysis by considering the dictionary definition of the word "use" and concluding, "[t]he term 'use' requires only that a person 'employ for some purpose'" the chattel at issue.[14] While setting out a broad definition of "use," this analysis maintains a distinction between statutory conversion, which requires that the chattel be converted to the tortfeasor's own use, and common law conversion, which does not contain such a requirement.

This interpretation, however, disregards that the phrase "own use" is a term of art. As has been observed in the past, the conversion statute does not define the word "convert," so the common law definition of "conversion" is incorporated into the statute by reference.[15] The phrase "own use" is part of the name of the tort at common law, "conversion to another's own use"; it is a vestigial remnant of the legal fiction that was the foundation for the tort of conversion.[16] Because the legislature is presumed to be aware of the common law and legislate in light of it, and innovations on the common law are narrowly construed,[17] treating the phrase "own use" as having independent meaning appears to overlook the provenance of the phrase. While it is true that "common law conversion does not necessarily require a determination regarding conversion to one's own use,"[18] this is because "own use" is not an element of the tort but part of the name of the tort itself; it is simply a rote legal formula with no independent meaning[19] that satisfies antiquated requirements of the common law.

Such a reading apparently renders superfluous the pre-2005 language now found in subparagraph (b). If "own use" has no independent meaning, subparagraph (a) appears

Fast Facts

The Michigan Court of Appeals recently interpreted Michigan's conversion statute, MCL 600.2919a, but some arguments appear not to have been brought to the Court's attention and are potentially available for future litigants to make.

A 2005 amendment to the conversion statute forces interpreters of the statute to choose between competing canons of statutory interpretation.

There are inconsistent interpretations of the statute's use of the phrase "may recover," with some opinions treating it as entitling the injured party to treble damages and the most recent interpretation concluding it is at the trial court's discretion.

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to apply to *all* conversions, meaning all conversions are subject to treble damages, and there is no reason to specifically restate in subparagraph (b) that an especially serious subset of conversions is also subject to treble damages. This is in tension with the rule of statutory interpretation that "in construing a statute, effect must be given to every part of it. One part must not be so construed as to render another part nugatory, or of no effect."[20]

In short, two canons of statutory conversion are in conflict when interpreting MCL 600.2919a. On the one hand, the legislature saw fit to include both subparagraph (a) and (b), which suggests that subparagraph (a) should be interpreted narrowly to create space for subparagraph (b) to have nonredundant meaning. Such an interpretation, however, requires a conclusion that the legislature was unaware that the phrase "own use" is part of the common law verbal formula that is part of the tort of conversion, and therefore the legislature used the phrase in a fashion inconsistent with the common law. We are forced to pick between canonical presumptions of statutory interpretation.

This author believes that the better interpretation regarding subparagraph (b) construes it as surplusage. While violating the presumption against statutory surplusage, it honors the competing presumption that the legislature is aware of the common law, legislates in light of it, and only attempts to change it deliberately. The legislature may have indulged a belt-and-suspenders approach to the statutory language due to a concern that the language added in 2005, if shorn of the pre-2005 language, would have uncertain and potentially narrowing interpretive consequences. Such an interpretation of the statute would mean there is no further difference between common law and statutory conversion because statutory conversion would be left with no unique elements. This interpretation construes the 2005 amendment as having changed the nature of MCL 600.2919a from a law that established a new statutory tort providing for an enhanced remedy against fences of stolen property, to a law that statutorily enhances the remedy available to any claim under the preexisting common law tort. While courts continue to recognize common law and statutory conversion as separate causes of action,[21] this distinction is predicated on investing the phrase "own use" with meaning which its common law heritage indicates it does not have—an argument the appellate courts have yet to confront.

Treble damages: of right, or discretionary?

Setting the previous discussion aside, assume that a plaintiff has properly pled a claim of statutory conversion. After trial, the plaintiff obtains a judgment. Under the statute, the plaintiff "may recover 3 times the amount of actual damages sustained, plus costs and reasonable attorney fees." Is the plaintiff *entitled* to treble damages, costs, and attorney fees, or is this at the discretion of the fact-finder?

There is a split in judicial interpretation of this language between *entitlement* cases and *discretionary* cases. The Court of Appeals recently held that it is at the fact-finder's *discretion* whether to award treble damages, ratifying the reasoning of two unpublished decisions reaching the same conclusion.[22] Against this, the Court of Appeals earlier observed that an injured party is *entitled* to treble damages under the statute.[23] It is not entirely clear why the earlier entitlement decisions (which were published) did not govern the outcome of the later discretionary cases under the "first out rule."[24] While one can imagine arguments related to whether the remarks about a *right* to treble damages or being *entitled* to treble damages were the holdings of the earlier cases or mere dicta, the more recent discretionary opinions have not made this analysis nor otherwise distinguished the earlier entitlement cases.

What does it mean that a plaintiff "may recover" treble damages? For the panels holding that treble damages are at the discretion of the fact-finder, the reasoning has rested on the familiar rule that "[t]he term 'may' is permissive and indicates discretionary activity."[25] The entitlement cases have not generally delved into the may/shall analysis, and have instead simply stated that the statute creates an entitlement to treble damages.

The better reading of MCL 600.2919a is that an injured party is entitled to treble damages. One problem with the discretionary reading of the statute is that it ignores to whom the permission runs. If the statute said the *court may award* treble damages, the discretionary reasoning would be much stronger. But the statute actually says the plaintiff "may recover" treble damages. In the absence of the statute, "only one recovery for a single injury is allowed under Michigan law."[26] The statute, then, gives permission *to the plaintiff* to be compensated in excess of ordinary damages which, if not authorized by statute, would be rejected out of hand as a matter of law. While it is true that the statute says the injured party "may recover" treble damages rather than "shall recover" them, this is most sensibly interpreted as the legislature *permitting* (rather than *requiring*) the plaintiff to pursue the case.[27] Had the statute read "shall recover," that would implicitly be an absurd requirement that no one whose property was converted could let the injury pass. Such a rule would be analogous to the common law crime of "misprision of felony," which made it a misdemeanor for someone with knowledge of another person's commission of a felony not to disclose that knowledge to some proper authority.[28] Courts routinely interpret "shall" to mean "may" when it would produce an absurd result otherwise,[29] and would certainly have done so here if the legislature had said "shall recover,"[30] but the legislature's care in wording the statute should not go to waste.

The entitlement interpretation also relies on fewer inferences than the discretionary interpretation. The discretionary interpretation depends on two inferences not stated expressly in the text: (1) permitting the plaintiff to *recover* treble damages implicitly permits the finder of fact to decide whether to *award* them; and (2) reading into the statute some standard on which the court would make such a decision (e.g., the defendant's bad faith). The better reading of the text is the one that does not require accumulating inferences. The entitlement reading of the statute is also consistent with Michigan caselaw interpreting similar wording in other statutes: the Supreme Court has previously interpreted a trespassing statute that used the "may recover" language as creating an entitlement to treble damages.[31]

In addition to this textual analysis, the structure of MCL 600.2919a suggests that the legislature did not intend for treble damages to be discretionary. The statute says the injured party "may recover 3 times the amount of actual damages sustained," but it does not say the injured party may recover *up to* treble damages. It seems highly unlikely that the

legislature would expect the fact-finder to, on the one hand, exercise discretion about whether to award extraordinary damages while, on the other hand, constrain that fact-finder to a choice of either ordinary damages or treble damages, but nothing in between. In one of the discretionary cases, the Court of Appeals held precisely to the contrary: because the legislature did not include the words "up to," the fact-finder had a choice of treble damages or ordinary damages, but nothing in between.[32] While this is a reasonable interpretation of the statute's omission of the words "up to," the bizarre result (treble damages or single damages with nothing in between) casts doubt on the entire discretionary interpretation of the statute.

The entitlement interpretation also avoids the strange conclusion that the legislature intended to vest the fact-finder with discretion but did not articulate how or in what circumstances that discretion should be exercised. Tellingly, none of the discretionary cases has filled this gap by articulating a judge-made standard. One said that "the trial court must determine if treble damages are appropriate" with no further explanation of how to make that appropriateness determination.[33] Another said that "whether to award treble damages is a question of fact for the trier of fact" without explaining which fact must be found to award them.[34] It seems unlikely that the legislature would put the fact-finder in the strange position of needing to invent its own standard for applying its discretion, which would almost necessarily exist on a spectrum (e.g., the outrageousness of the defendant's bad faith), but require the fact-finder to make only a binary choice of single or treble damages as opposed to crafting an appropriate remedy along the spectrum between those options.

Conclusion

While there was once a clear distinction between statutory and common law conversion, it has since been blurred by legislative action. The current interpretation of MCL 600.2919a may have overlooked the common law origins of the phrase "own use." The statute can be interpreted as an enhancement of the remedy available for the common law tort of conversion and is thus incorporated in any complaint for conversion simply as a measure of relief without needing to plead it separately. With respect to treble damages, the best reading of MCL 600.2919a is that it entitles the plaintiff to treble damages. Interpreting the statute to create an entitlement to treble damages is consistent with a close analysis of the text, two published cases in the Court of Appeals, prior precedent interpreting the language used in the statute, and the structure of the statute. ■

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ENDNOTES

1. *Nelson & Witt, Inc v Texas Co*, 256 Mich 65, 70; 239 NW 289 (1931).
2. *Warren Tool Co v Stephenson*, 11 Mich App 274, 299; 161 NW2d 133 (1968).
3. *Gibbons v Farwell*, 63 Mich 344, 349; 24 NW 855 (1886) ("The intention with which the wrongful act is done by which a party is deprived of his property… is of little consequence, provided the act is done. It is the effect of the act which constitutes the conversion.").
4. *J Franklin Interests, LLC v Meng*, unpublished opinion per curiam of the Court of Appeals, issued September 29, 2011 (Docket No. 296525).
5. Const 1835, sched 2; *Stout v Keyes*, 2 Doug 184, 188–189 (Mich, 1845).
6. See, e.g., *Galloway v Holmes*, 1 Doug 330, 338 (Mich, 1844).
7. 1976 PA 200.
8. *Id.*
9. *Marshall Lasser, PC v George*, 252 Mich App 104, 112–113; 651 NW2d 158 (2002) (per curiam).
10. *Harris v JB Robinson Jewelers*, unpublished opinion of the United States District Court for the Eastern District of Michigan, issued March 10, 2011 (Docket No. 05-10294-BC) (specifically characterizing a defendant under the statute as a "fence").
11. *Echelon Homes, LLC v Carter Lumber Co*, 472 Mich 192, 201–202; 694 NW2d 544 (2005).
12. Senate Legislative Analysis, HB 4356, May 31, 2005.
13. 2005 PA 44.
14. *Aroma Wines & Equip, Inc v Columbia Distribution Servs, Inc*, ___ Mich App ___, ___; ___ NW2d ___ (2013) (per curiam).
15. *Victory Estates, LLC v NPB Mortgage, LLC*, unpublished opinion per curiam of the Court of Appeals, issued November 20, 2012 (Docket No. 307457).
16. See *Maryland Staffing Servs, Inc v Manpower, Inc*, 936 F Supp 1494, 1507 (ED Wis, 1996).
17. *Wales v Lyon*, 2 Mich 276, 282 (1851).
18. *Aroma Wines*, n 14 *supra* at ___.
19. Cf. *M'Culloch v Maryland*, 17 US (4 Wheat) 316, 413–423; 4 L Ed 579 (1819) ("necessary and proper" in the U.S. Constitution is interpreted as a phrase, with neither word having independent meaning that limits the meaning of the other).
20. *People v Burns*, 5 Mich 114, 117 (1858).
21. See, e.g., *Smith v Doades*, unpublished opinion per curiam of the Court of Appeals, issued October 12, 2010 (Docket No. 291026).
22. *Aroma Wines*, n 14 *supra*, citing with approval *Poly Bond, Inc v Jen-Tech Corp*, unpublished opinion per curiam of the Court of Appeals, issued July 27, 2010 (Docket No. 290429), and *LMT Corp v Colonel, LLC*, unpublished opinion per curiam of the Court of Appeals, issued April 19, 2011 (Docket No. 294063).
23. *Alken-Ziegler, Inc v Hague*, 283 Mich App 99, 104 n 6; 767 NW2d 668 (2009) (per curiam) (speaking of "plaintiff's *right* to recover 3 times the amount of actual damages" [emphasis added]); *New Properties, Inc v George D Newpower, Jr, Inc*, 282 Mich App 120, 137; 762 NW2d 178 (2009) (per curiam).
24. See MCR 7.215(J)(1).
25. *Aroma Wines*, n 14 *supra* at ___.
26. *Great Northern Packaging, Inc v Gen Tire & Rubber Co*, 154 Mich App 777, 781; 399 NW2d 408 (1986).
27. For an example of this usage of the phrase "shall recover," see MCL 30.411a(5). While the context is undoubtedly different, the fact that context must be considered indicates that mere reliance on the may/shall distinction is insufficient.
28. Perkins & Boyce, Criminal Law (3d ed), p 572.
29. Garner, *Shall we abandon shall?*, 98 ABA J 26, 26–27 (August 2012).
30. Cf. *People v Lefkovitz*, 294 Mich 263, 270; 293 NW 642 (1940) (misprision of felony is "wholly unsuited to American criminal law and procedure as used in this State"). The Court obviously would interpret "shall recover" as "may recover," to avoid an interpretation that would compel individuals to pursue a civil remedy for a private wrong.
31. *Lane v Ruhl*, 103 Mich 38, 39–45; 61 NW 347 (1894).
32. *Poly Bond*, n 22 *supra*.
33. *LMT Corp*, n 22 *supra*.
34. *Aroma Wines*, n 14 *supra* at ___.