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[When is a “fee” not a tax? When the Mullarkey Court says so...](#)

In a little-noticed ruling issued November 3rd, 2008 (yes, great time to avoid attention, don't you think?) the Mullarkey Majority on the Colorado Supreme Court quietly handed down an extremely far-reaching decision designed to permanently end-run [TABOR](#) and undermine the [Colorado Constitution](#). Like most people, I missed the significance of this case ([Barber vs. Ritter](#)) both at the time (my attention, like most Americans, was focused elsewhere) and even after launching *Clear The Bench Colorado*.

However, [recent expressions of citizens outrage](#) in response to massive increases in vehicle registration fees and exorbitantly punitive late fees - all part of the so-called [FASTER bill \(SB 108\)](#) passed by the Colorado Legislature and signed into law by [Governor Bill Ritter](#), who continues to defend the increased fees - have turned the spotlight on the issue of *fees* vs. *taxes*.

Fees vs. Taxes - what's the difference?

A *fee* is a charge for use of a service or amenity - the amount of which is related to the cost of providing that service or amenity. Thus, licensing fees for hunting and fishing help fund game wardens, forestry service personnel, equipment, and property, etc. while fees for visiting state parks similarly help provide for personnel, property, upkeep, and the like. The key feature of *fees* is that the user of a given good or service pays, and the funds collected are related to the purpose of providing the good or service.

A *tax*, on the other hand, while it may be applied to a particular good or service or more generally to the population at large, *is collected to raise general purpose revenues*. Taxes collected may be unrelated, or completely disproportionate, to expenditures. Thus, taxes on sales of goods (alcohol, clothing, etc.) or services (restaurants, dry cleaning, etc.) are not necessarily related to the cost of providing, regulating (e.g. health & safety inspections) or protecting (police, fire, courts, etc.) the goods or services taxed. Government can spend tax revenues on anything it wants. That's why taxes go into the “General Fund” and expenditures are allocated by the legislative budgetary process.

Back in the days when the Colorado Supreme Court apparently still believed in upholding the law instead of engaging in creative exercises of convoluted argumentation to circumvent it (Mullarkey apparently had yet to hit her stride), decisions reflected these definitions and principles. The 1989 [Bloom v. City of Fort Collins](#) decision (mangled almost beyond recognition in the [Barber v. Ritter](#) ruling) was clear:

A fee is distinct from a tax in that, “[u]nlike a tax, a special fee is not designed to raise revenues to defray the general expenses of government, but rather is a charge imposed upon persons or property for the purpose of defraying the cost of a particular governmental service.”

Morphing Taxes into Fees - the Mullarkey/Ritter shell game

Governor Ritter, the Colorado Legislature, and the Mullarkey Majority find the requirement to first *ask* before raising *taxes* (as required by [TABOR](#)) to be rather tiring - and restricting their power to accomplish *their* goals with *your* money. What to do, what to do? Simple - creatively define their way out of the restrictions; *impose fees, instead of raising taxes* - no need to ask the voters first; then just transfer the collected revenue (the ol' shell game) into the general fund, so as to avoid those pesky restrictions on spending the money only on the “particular governmental service” for which the fee was collected.

But these semantic shenanigans can't be legal, right? That's what the plaintiffs in the [Barber v. Ritter](#) case thought - and they had good legal precedent ([Bloom v. City of Fort Collins](#)) on their side, too. However, they failed to reckon with the logic-bending and creative writing skills of the

Mullarkey Court.

Starting with [Bloom](#)'s premise that a fee “might be subject to invalidation as a tax” when the “principal purpose” is to raise general revenues, the Mullarkey Majority went on to declare that to find “principal purpose” and legislative intent, “we look to the language of the enabling statute for its expression.”

If the language discloses that the primary purpose for the charge is to finance a particular service utilized by those who must pay the charge, then the charge is a “fee.” On the other hand, if the language states that a primary purpose for the charge is to raise revenues for general governmental spending, then it is a tax. Moreover, the fact that a fee incidentally or indirectly raises revenue does not alter its essential character as a fee, transforming it into a tax. ([Barber](#), p. 26)

Ergo, as long as legislators remember to *say* that a “fee” is for a particular purpose when drafting legislation, it makes no difference if in practice the “fee” is collected and spent for purposes entirely unrelated to the enabling statute. Legislators can now avoid the dreaded “ask first” [TABOR](#) restrictions on taxes by simply calling it a fee and remembering to specify a particular purpose - say, “restore crumbling bridges” - one can always shift the collected revenues to one's pet project later.

So what's the bottom line? Well, the good news is that thanks to the Mullarkey Majority on the Colorado Supreme Court, you probably won't see the Colorado Legislature increase taxes much next year - as long as they haven't completely killed [TABOR](#), they would have to ask your permission first (well, in theory, anyway). The bad news is that thanks to the Mullarkey Court, *they won't have to raise taxes* - they'll just increase or add new “**fees**” instead. Now doesn't that make you feel better?

Of course, if you'd rather not suffer an increase in either *fees* **or** *taxes* - at least not without being asked specifically first, *as is your right* under the Colorado Constitution - you have one last chance to **DO** something about it. *Ditch the Mullarkey Majority* - vote “**NO**” on unjust justices before they can tax you again in 2010! Let's **Clear The Bench, Colorado!**

Tags: [Alex Martinez](#), [Barber vs. Ritter](#), [Bill Ritter](#), [car tax](#), [Colorado Car Tax](#), [Colorado Constitution](#), [Colorado Judges](#), [Colorado Mill Levy](#), [Colorado Supreme Court](#), [FASTER](#), [judicial accountability](#), [Judicial Activism](#), [judicial retention](#), [Know Your Judge](#), [late fee](#), [Mary Mullarkey](#), [Michael Bender](#), [Mill Levy Tax Colorado](#), [Mill Levy Tax Freeze](#), [Mullarkey Court](#), [Mullarkey Majority](#), [Nancy Rice](#), [November Surprise](#), [Ritter Auto Tax](#), [TABOR](#), [unjust justices](#)

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10 Responses to “When is a “fee” not a tax? When the Mullarkey Court says so...”

1. [James Bowen](#) on 19 Jul 2009 at 9:00 AM <#>



These things are necessary when you live in a state where the citizens do everything in their power to avoid paying the taxes that provide the services they demand.

2. [CTBC Director](#) on 26 Jul 2009 at 3:20 PM <#>



The ends justify the means, eh James?

Your statement seems to endorse lying to the people to “give them what they want.”

Perhaps, rather than politicians pandering to the public promising all things to all people - and at no cost - we might be better served by statesmen (and women) who make clear the cost of government services, then allow the people to make rational choices - like adults, not wards of the state.

Like many others, I have no objection to paying for the services I demand (and use). However, I object vehemently to being forced to pay for services I neither demand, use, or even desire. I object even more vehemently to being lied to and treated as incapable of making my own decisions about how to allocate MY resources and live MY life.

CTBC Director

3. [Joshua](#) on 31 Jul 2009 at 9:51 AM <#>



James, your necessity argument is the rational that Mullarkey, Bender, Marroney, Ritter, and the Democratic majority have employed. But, none of them has had to fill out the 26 page application for food assistance, listened to their children cry from hunger, or laid awake wondering how they'd keep their upscale homes. None of them has lacked for medical or dental care and their PERA accounts are full. The same is true of the bureaucrats and public employee unions who support them.

Clear The Bench Colorado is, in attempting to rid us of Mullarkey and her buds, performing a true public service. Purging the court of those who are contemptuous of the law, contemptuous of the ordinary citizens who voted for TABOR, and disdain the basic tenant that government exists to serve the people, is imperative.

4. [Jamie](#) on 17 Oct 2009 at 8:28 AM <#>



CTBC:

I want to thank you for highlighting this issue. I recently was stung by Ritter's new scam...I mean fees. This being the second episode for me I decided to e-mail my Govenor and issue a complaint. The e-mail was returned as undeliverable however, the Govenor did grace me with a link to his news letter. It seems that the oppinions of his constituants no longer matter so long as he can skate around the laws we the people vote for.

5. [David Henderson](#) on 30 Jan 2010 at 9:03 PM <#>



Is this why Lakewood has both a sales tax and a “public improvement fee” (PIF), complete with requirements that all cash registers have to have a sign that says, “The PIF is NOT [underlined] a sales tax, but is part of the price of goods and services sold”? Was the PIF implemented after this ruling? Or has it been around since before TABOR?

davidh

6. [Dan](#) on 30 Jun 2010 at 6:59 AM <#>



I too have felt the knife of fee collectors. I'm not educated in law and politics but find myself paying four times the amount of my registration fee's for my trailers. My point is the trailers are not on the road, bridges and highways 365 days of the year. How does one pay late fees on something that wasn't used? I work hard...I pay my fair share...politicians and members of state governments are out of control with spend, spend, spend. “Who cares where the money comes from!?”...Lets stop this madness...I budget my finances...Let MAKE them too.

Dan in Fremont

7. [What a mess! Colorado politics... « Conservative Libertarian Outpost](#) on 09 Sep 2010 at 8:40 AM <#>



[...] re-defining Taxes as Fees (Colorado Car Tax, Ritter Gun [...])

8. [Kent](#) on 27 Sep 2010 at 4:26 PM <#>



Apparently it is not your “government” that assesses the PIF, but your local businesses. See what the City of Aurora says:

Public Improvement Fee (PIF) General Information

A Public Improvement Fee is a private fee that is collected by businesses on sales transactions. The money is used to pay for the public improvements related for a development of their site, such as curbs and sidewalks, storm management systems, sanitary sewer systems, public street lighting, and road and bridge development.

The PIF is specifically a fee and NOT a tax; therefore it becomes a part of the overall cost of the sale/service and is subject to sales tax.

The PIF is not collected by the City, but by a third party administrator hired by the owner of the development site. Questions about the PIF should be directed to the organization handling the PIF for that specific development area.

Guess you should complain about having to pay for curbs and gutters at you local shopping centers that assess a PIF

9. *Warren Pugh* on 06 Oct 2010 at 10:12 PM <#>



PIF. Americans have not been rebellious for too many years. They have been fairly law abiding, but since we are no longer considered anything but drones by the public bureaucrats the growth of people carrying firearms in public is going to gain some added significance.

Without PIFs folks are already taxed for those so-called services that doll up our streets and curbs. Time to rebel

10. *Jim Wyatt* on 20 Oct 2010 at 12:19 PM <#>



Does the term “unjust enrichment” ring a bell for anybody? In the case of clear and convincing evidence, these “justices” (non-capitalization and disrespect intended) seem to think that, in their position, they are “above the law” and may do as they please. It is time to put true conservatives (NOT REPUBLICAN OR DEMOCRAT) but TRUE CONSERVATIVES in these positions! Let them know, and their successors know that WE WILL THROW YOU OUT if you “rule” against OUR WILL!

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