

Gist of the Action Doctrine May Not Bar Tort Claims Arising from Negligent Performance of Contractual Duties

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On December 15, 2014, the Pennsylvania Supreme Court broke its long silence on the gist of the action doctrine when it issued its decision in *Bruno v. Erie Insurance Co* (available at <http://www.pacourts.us/assets/opinions/Supreme/out/J-23-2014mo - 1020440752914779.pdf>). The gist of the action doctrine precludes a plaintiff from asserting tort claims when the conduct complained of is based in contract. Finding that the gist of the action doctrine has been ingrained in Pennsylvania jurisprudence for nearly two centuries, the court reaffirmed the doctrine's fundamental purpose — to preserve the distinction between contract and tort claims — and provided guidance on how the doctrine should be applied. The court held that, where a defendant challenges a tort claim pled by a plaintiff based on the gist of the action doctrine, the key inquiry is “the nature of the duty alleged to have been breached.” The “mere labeling” of a claim by a plaintiff is not controlling. If the alleged duty breached “is one created by the parties by the terms of their contract — i.e., a specific promise to do something that a party would not ordinarily have been obligated to do but for the existence of the contract — then the claim is to be viewed as one for breach of contract.” Where the duty derives from a “broader social duty,” the claim is properly cast as a tort.

These guiding principles are largely consistent with prior case law on the gist of the action doctrine; thus, *Bruno* does not upset the standard that has long been applied. However, the *Bruno* decision takes a fairly narrow view of the scope of contractual duties and thereby creates the potential for a narrowed application of the doctrine — an outcome cautioned against by the concurring opinion in the case.

Bruno analyzed the gist of the action doctrine in the context of an insurance dispute. According to the allegations in their complaint, the Brunos purchased a homeowner's insurance policy from Erie Insurance Company that obligated Erie to pay up to \$5,000 for a direct loss to the property caused by mold. While renovating their home, the Brunos discovered mold in the basement and promptly informed Erie. An Erie adjuster and an engineer employed by Erie investigated the mold problem to determine its severity and whether it required remediation. The adjuster and the engineer told the Brunos that the mold was harmless, that the Brunos should continue with their renovations and that health problems associated with mold were a media frenzy and overblown. Two months later, after members of the Bruno family began experiencing health problems, the Brunos had the mold tested, at their own expense, and discovered that the mold was toxic and hazardous to human health. The Brunos filed a lawsuit that included claims against Erie for breach of contract and negligence. Erie filed preliminary objections seeking dismissal of the negligence claim based on the gist of the action doctrine. Agreeing that Brunos' claims against Erie derived from the insurance contract, the trial court granted Erie's preliminary objections and dismissed the negligence claim. The Superior Court affirmed that decision, and the Brunos appealed.

The Pennsylvania Supreme Court held “that the [Brunos'] negligence claim was not barred by the gist of the action doctrine, as the claim was based on an alleged breach of a social duty imposed by the law of torts, and not a breach of a duty created by the underlying contract of insurance.” The court reasoned that, although Erie had an obligation to investigate

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whether mold was present and to pay for property damage caused by the mold, the substance of the Brunos' allegations was not that Erie failed to meet these obligations, but rather that, during the course of fulfilling these obligations, Erie's adjuster and engineer acted negligently by making false assurances to the Brunos that the mold was harmless and that the Brunos should continue their renovations efforts. The Brunos' reasonable reliance on these assurances allegedly caused them to suffer physical harm. The court concluded that these factual allegations implicated duties beyond those imposed by the contract and, thus, supported a tort claim. The court explained that "a party to a contract may be found liable in tort for negligently performing contractual obligations" and further stated:

[A] negligence claim based on the actions of a contracting party in performing contractual obligations is not viewed as an action on the underlying contract itself, since it is not founded on the breach of any of the specific executory promises which compromise the contract. Instead, the contract is regarded merely as the vehicle, or mechanism, which established the relationship between the parties, during which the tort of negligence was committed.

Concerned that this language may cause courts interpreting *Bruno* to define contractual duties too narrowly, Justice Eakin wrote a separate concurrence (available at <http://www.pacourts.us/assets/opinions/Supreme/out/J-23-2014co-1020440752914793.pdf>) to caution against such a result:

I . . . agree the "gist of the action" doctrine does not bar the present action because statements concerning toxicity are outside the scope of the insurance policy, but I write separately to caution against what I deem troublesome language. To the extent the majority is perceived to "paint with a broad brush," suggesting any negligence claim based on a contracting party's manner of performance does not arise from the underlying contract, . . . I must disagree.

Future cases will test the breadth of the *Bruno* ruling. Plaintiffs will be more aggressive in asserting tort claims along with breach of contract claims. Defendants still have the gist of the action doctrine in their quiver, now affirmed by the Pennsylvania Supreme Court as a fundamental tenet of Pennsylvania law. And the obligation of trial courts deciding whether to dismiss a tort claim under the gist of the action doctrine remains the same: assess the factual allegations in the complaint to determine whether a claim "is truly one in tort, or for breach of contract."

The questions that remain to be answered are how trial courts will delineate between contract and tort and whether they will feel constrained by the "troublesome language" in *Bruno* to permit plaintiffs to pursue tort claims that encroach on contractual duties.

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