

# COMMERCE CASE MANAGEMENT PROGRAM DECISIONS:

## GIST OF THE ACTION DOCTRINE

by

LISA MEAD, GARRETT SPANGLER AND LEE APPLEBAUM<sup>1</sup>

### INTRODUCTION

#### **Gist of the Action: Commerce Court History and Policy Rationale**

Beginning in January of 2001, when applying the gist of the action doctrine, the Commerce Court has consistently cited the rule set forth by the Superior Court of Pennsylvania in Bash v. Bell Telephone Co.<sup>2</sup> and restated in Phico Ins. Co. v. Presbyterian Medical Services Corp.<sup>3</sup>

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<sup>1</sup>Lisa Mead, Class of 2009, Temple University's James E. Beasley School of Law, and Garrett Spangler, Class of 2008, Temple University's James E. Beasley School of Law, are the authors of the case summaries; with Ms. Mead also co-authoring the Introduction. Lee Applebaum, project creator and coordinator, is a Litigation Partner at Fineman, Krekstein & Harris, P.C. He edited and is co-author of the Introduction. This Chapter was completed in July 2007. This work is part of a joint project that originated between the Philadelphia Bar Association's Business Law Section and its Business Litigation Committee, and Temple's Beasley School of Law; which effort has now been expanded to include students from the Rutgers-Camden School of Law. Students work with a lawyer mentor/editor to summarize and describe opinions in the Commerce Case Management Program by subject area. Each lawyer works with one, two or three law students on a particular area of the law in which the Commerce Program Judges have issued opinions, with the students doing the research and writing and the lawyer guiding and editing the work. As completed, each "Chapter" is posted on the Business Litigation Committee's web page, which can be located on the Bar Association's website, <http://www.philadelphiabar.org/>. The goal is to cover the hundreds of opinions already written, and then to keep up with the well over 100 opinions added annually. Ideally, we hope to publish this compilation in a single book. If you are interested in participating in this project that has so many potential benefits, please contact Lee Applebaum at (215) 893-8702 or [lapplebaum@finemanlawfirm.com](mailto:lapplebaum@finemanlawfirm.com). Temple Law Professor William J. Woodward, Jr. was and is essential to the creation and development of this effort, and Professor Eve Klothen has brought Rutgers-Camden School of Law students into the effort.

<sup>2</sup>601 A.2d 825 (Pa. Super. 1992).

<sup>3</sup>663 A.2d 753 (Pa. Super 1995).

In Bash, the Superior Court first recognized the gist of the action doctrine. There, the Court held that a claim for negligence was barred under the gist of the action doctrine. Bash had entered into a contract with Bell Telephone Company to place a listing and a business advertisement in the local Yellow Pages. Bash alleged that Bell had (1) breached the contract and (2) acted negligently by failing to place his information in the Yellow Pages. The Court dismissed the negligence claim, reasoning that the obligations of the parties were defined by the terms of the contract, not by the law of torts.<sup>4</sup> In applying the gist of the action doctrine, the Court cited to case law from the U.S. District Court for the Eastern District of Pennsylvania:

Although mere non-performance of a contract does not constitute a fraud...it is possible that a breach of contract also gives rise to an actionable tort... "To be construed as in tort, however, the wrong ascribed to defendant must be the gist of the action, the contract being collateral." 1 C.J.S. Actions § 46<sup>5</sup>

The Bash Court cited another Eastern District case in addressing policy reasons behind the gist of the action doctrine:

[a]lthough they derive from a common origin, distinct differences between civil actions for tort and contract breach have developed at common law. Tort actions lie for breaches of duties imposed by law as a matter of social policy, while contract actions lie only for breaches of duties imposed by mutual consensus agreements between particular individuals...To permit a promisee to sue his promisor in tort for breaches of contract inter se would erode the usual rules of contractual recovery and inject confusion into our well-settled form of actions.<sup>6</sup>

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<sup>4</sup>Bash, 601 A.2d at 829-830.

<sup>5</sup>Closed Circuit Corporation of America v. Jerrold Electronics Corporation, 426 F.Supp. 361, 364 (E.D.Pa. 1977).

<sup>6</sup>Iron Mountain Security Storage Corporation v. American Specialty Foods, Inc., 457 F.Supp. 1158, 1165 (E.D.Pa. 1978).

Bash also asserted a fraud claim, alleging that Bell had falsely represented that it would place the listing, when in fact it had not. The Court held that the fraud claim failed on the merits because “the breach of a promise to do something in the future is not fraud... [and] an unperformed promise does not give rise to a presumption that the promisor intended not to perform when the promise was made.”<sup>7</sup> The Bash Court, however, did not link the success or failure of the fraud claim to the gist of the action doctrine.

In Phico, the Superior Court again addressed the gist of the action doctrine, and restated the rule set forth in Bash. A nursing home brought suit against its management company, alleging (1) breach of contract and (2) that the management company had acted with gross negligence and willful misconduct by egregiously managing the nursing home. Phico insured the management company. It brought a declaratory judgment action arguing, among other things, that because coverage was excluded for contractually based claims, it owed no duty to defend or indemnify the management company for what amounted to its breach of a consulting agreement.<sup>8</sup>

To determine whether the nursing home’s underlying claims sounded in contract or tort, the Court turned to the gist of the action doctrine. The Court noted that there were two lines of cases relating to determinations of whether a claim sounds in contract or tort. The first line – the misfeasance/nonfeasance test -- arose with Raab v. Keystone Insurance Co.,<sup>9</sup> the principles of which the Phico Court ultimately rejected:

The test used to determine if there exists a cause of action in tort growing out of a breach of contract is whether there

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<sup>7</sup>Bash, 601 A.2d at 832.

<sup>8</sup>Phico, 663 A.2d at 754-755.

<sup>9</sup>412 A.2d 638 (Pa. Super. 1979).

was an improper performance of a contractual obligation (misfeasance) rather than the mere failure to perform (nonfeasance).<sup>10</sup>

The Phico Court concluded that, although Raab set forth a bright, discernable, line for determining the claim's nature, its test was inadequate. The Court recognized that there are many agreement-based complaints which could be characterized as sounding in tort under Raab, when such claims should more properly be viewed as contract based. Consequently, the Superior Court did not follow its earlier rule set forth in Raab, and instead restated the rule found in Bash:

[T]o be construed as a tort action, the wrong ascribed to the defendant must be the gist of the action with the contract being collateral. In addition,...a contract action may not be converted into a tort action simply by alleging that the conduct in question was done wantonly. Finally,...the important difference between contract and tort actions is that the latter lie from the breach of duties imposed as a matter of social policy while the former lie for the breach of duties imposed by mutual consensus.<sup>11</sup>

The Court concluded that the claims for gross negligence and willful misconduct arose out of the performance of the contract, and the agreement was not collateral to any of the tort claims.<sup>12</sup>

Beginning in 2003, the Commerce Court began citing the Superior Court's gist of the action test as set forth in eToll, Inc. v. Elias/Savion Advertising, Inc.<sup>13</sup> In eToll, the

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<sup>10</sup>Id. at 639. Unlike the Superior Court, the Commonwealth Court continued to consider Raab's distinction between misfeasance and nonfeasance in determining whether an action sounded in contract or tort. Yocca v. Pittsburgh Steelers Sports, Inc., 806 A.2d 936, 944-945 (Pa. Cmwlth. 2002), rev'd on other grounds, 854 A.2d 425 (Pa. 2004). In the Commonwealth Court's Yocca, Opinion, that Court considered the facts under both the gist of the action doctrine and the misfeasance/nonfeasance test, finding that both yielded the same result, *i.e.*, dismissal of negligence and fraud claims grounded in non-performance of an alleged contract.

<sup>11</sup>Phico, 663 A.2d at 757.

<sup>12</sup>Id. at 758.

Superior Court observed that the doctrine had been recognized in Bash and Phico, but had not been expressly adopted by Pennsylvania's Supreme Court. The Superior Court examined the gist of the action doctrine to determine whether or not it applied to a fraud claim. eToll had developed an e-mail product called "e-mail 97," and had entered into a marketing agreement with Elias/Savion. Elias/Savion allegedly failed to follow through on many of its promises. In the fraud claim, eToll asserted that Elias/Savion had represented that it had the expertise to market the product, when in fact it did not. eToll also asserted that Elias/Savion fraudulently obtained money from eToll under the guise of performing the contract.<sup>14</sup>

The Court began with an analysis of several federal cases, and concluded that the Third Circuit's District Courts had applied the doctrine in a number of similar ways:

These courts have held that the doctrine bars tort claims:

- (1) "arising solely from a contract between the parties";<sup>15</sup>
- (2) where "the duties allegedly breached were created and grounded in the contract itself";<sup>16</sup>
- (3) where "the liability stems from a contract";<sup>17</sup> or
- (4) where the tort claim "essentially duplicates a breach of contract claim or the success of which is wholly dependent on the terms of a contract."<sup>18</sup>

The eToll Court observed that the Federal Courts had not carved out a categorical exception for fraud, and had not held the duty to avoid fraud as a separate duty from the

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<sup>13</sup>811 A. 2d 10 (Pa. Super. 2002).

<sup>14</sup>Id. at 12-14.

<sup>15</sup>Galdieri v. Monsanto Co., 245 F. Supp. 2d 636 (E.D. Pa. 2002).

<sup>16</sup>Werner Kammann Maschinenfabrik, GmbH, v. Max Levy Autograph, Inc., 2002 U.S. Dist. LEXIS 1460 (E.D. Pa. Jan. 31, 2002).

<sup>17</sup>Asbury Auto. Group LLC v. Chrysler Ins. Co., 2002 U.S. Dist. LEXIS 117 (E.D. Pa. Jan. 7, 2002).

<sup>18</sup>Polymer Dynamics Inc. v. Bayer Corp., 2000 U.S. Dist. LEXIS 11493 (E.D. Pa. Aug. 14, 2000).

contract itself. Instead, the cases turned on whether the fraud concerned the performance of contractual duties. If so, the alleged fraud would be merely collateral to the breach of contract claim. If not, the gist of the action would be in fraud, not contract. The Court adopted the persuasive authority of the Federal Courts in concluding that the gist of the action doctrine should apply to claims for fraud in the performance of a contract.<sup>19</sup>

Upon applying the test to the facts at hand, the Court concluded that: (1) all of the alleged facts as to fraud arose in the course of the parties' contractual relationship; (2) the duties were created and grounded in the contract; (3) the damages would be compensable in an ordinary contract action, so the fraud claim essentially duplicated the breach of contract claim; (4) the fraud at issue was not so tangential to the parties' relationship so as to make the fraud the gist of the action; and (5) the fraud claim was inextricably intertwined with the contract claim. Thus, fraud claim was dismissed under the gist of the action doctrine.<sup>20</sup>

Beginning in 2005, the Commerce Court began citing the gist of the action test as set forth by the Superior Court in Hart v. Arnold.<sup>21</sup> In Hart, the Court restated the gist of the action tests in eToll, Phico, and Bash after explaining:

In general, courts are cautious about permitting tort recovery based on contractual breaches. In keeping with this principle, this Court has recognized the “gist of the action” doctrine, which operates to preclude a plaintiff from re-casting ordinary breach of contract claims into tort claims.<sup>22</sup>

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<sup>19</sup>eToll, 811 A. 2d at 19-20.

<sup>20</sup>Id. at 20-21.

<sup>21</sup>884 A.2d 316 (Pa. Super. 2005), appeal denied, 587 Pa. 695, 897 A.2d 458 (2006).

<sup>22</sup>Id. at 339-340.

In Hart, the purchasers of real property asserted that the sellers had fraudulently induced them into entering an agreement, which they would not have entered but for the alleged fraudulent misrepresentations. The purchasers also asserted that the sellers engaged in “wanton” conduct after the contract’s formation. Essentially, they asserted that the sellers had committed fraud in both the inducement and the performance of the contract.<sup>23</sup> The Court held that the fraudulent inducement claim to be barred by the parol evidence rule, because the contract contained an integration clause.

With respect to fraud in the performance, the Court applied the gist of the action doctrine as stated in eToll, Phico, and Bash, and concluded: (1) the fraud claims were integrally related to the breach of contract claims; (2) the performance duties arose solely from the contract between the parties and were grounded in the contract itself; and (3) the fraud claims essentially duplicated the breach of contract claims. Therefore, the fraud in performance claims were barred under the gist of the action doctrine because they were collateral to the contract, which was the main cause of action.<sup>24</sup>

Pennsylvania’s Supreme Court has never decided whether the gist of the action doctrine should be applied in Pennsylvania.<sup>25</sup> The issue did not arise in its Yocca

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<sup>23</sup>Id. at 338-339.

<sup>24</sup>Id. at 341.

<sup>25</sup>Following decisions of Pennsylvania’s intermediate appellate courts, Pennsylvania’s Federal District Courts have predicted that the Pennsylvania Supreme Court would adopt the gist of the action doctrine. See, e.g., Retail Brand Alliance, Inc. v. Rockvale Outlet Center, L.P., No. 06-1857, 2007 U.S. Dist. LEXIS 7318 at n.8 (E.D. Pa. Jan. 31, 2007) (Stengel, J.) (reconsideration denied) (citations omitted) (“The Pennsylvania intermediate state courts have adopted this doctrine but it has not been accepted or rejected by the Pennsylvania Supreme Court. However, the Pennsylvania Superior Court and several federal courts have predicted that the Pennsylvania Supreme Court would adopt the doctrine were the issue presented before it. ... When a state’s highest court has not decided an issue, district courts may look to intermediate state appellate court decisions to assist in its prediction of how the state supreme court would rule.”).

Opinion, although addressed by the Commonwealth Court below.<sup>26</sup> More recently, the Supreme Court was to consider the application of the gist of the action doctrine to an insurance agreement,<sup>27</sup> but ultimately decided that case without reaching the gist of the action issue.<sup>28</sup> The Court did rule that a claim of faulty workmanship did not constitute an accident/occurrence under an insurance policy. In that case, damage resulted to a product where the defendant allegedly “did not meet the contract specifications and warranties, or the applicable industry standards for construction, and accordingly was in breach of the Contract and its warranties.”<sup>29</sup> Thus, there was no insurance coverage for what amounted to a claim of negligent contract performance.

An even more significant decision reflecting the Supreme Court’s potential thinking on the gist of the action doctrine is Bilt-Rite Contractors, Inc. v. The Architectural Studio.<sup>30</sup> In Bilt-Rite, there was no contractual relationship between the parties; the plaintiff contractor bringing a negligent misrepresentation claim against the principal’s architect.<sup>31</sup> The high Court addressed the application of the economic loss

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<sup>26</sup>See supra note 10.

<sup>27</sup>Kvaerner Metals Div. of Kvaerner U.S., Inc. v. Commer. Union Ins. Co., 577 Pa. 667, 845 A.2d 925 (2004) (granting petition for allowance of appeal stating that “the parties are directed to address the appropriate test or inquiry in ascertaining whether an underlying claim sounds in contract or tort for purposes of insurance coverage. Compare Redevelopment Auth. of Cambria Co., 454 Pa. Super. 374, 685 A.2d 581 (1996) (en banc) with Yocca v. Pittsburgh Steelers Sports, Inc., 806 A.2d 936 (Pa. Cmwlth. 2002), appeal granted, 573 Pa. 713, 827 A.2d 1203 (2003) and Tenos v. State Farm Ins. Co., 716 A.2d 626 (Pa. Super. 1998). This matter is consolidated for argument with Freestone v. New England Log Homes, Inc., 577 Pa. 735, 848 A.2d 929, 2004 Pa. LEXIS 742, 77 WAL 2003.” The Freestone case, where the Superior Court applied the gist of the action doctrine, was dismissed before a decision was rendered by the Supreme Court.

<sup>28</sup>Kvaerner Metals Div. of Kvaerner U.S., Inc. v. Commer. Union Ins. Co., 908 A.2d 888, 895 n.6 (Pa. 2006).

<sup>29</sup>Id. at 900.

<sup>30</sup>581 Pa. 454, 866 A.2d 270 (2005).

<sup>31</sup>Absent any contract, of course, the gist of the action doctrine cannot even be raised.

doctrine to negligent misrepresentation claims against a design professional, as defined by Restatement (Second) of Torts § 552.<sup>32</sup> In a lengthy opinion surveying a national body of case law, the Supreme Court found that the economic loss doctrine would not bar such a claim.<sup>33</sup>

Among the cases favorably cited and quoted is the South Carolina Supreme Court's decision in Tommy L. Griffin Plumbing & Heating Co. v. Jordon, Jones & Goulding.<sup>34</sup> The Bilt-Rite Court describes the South Carolina Supreme Court's "reasoned approach" in discussing "the realities of tort law versus contract law"<sup>35</sup> and then quotes from that Opinion:

[Our earlier] application of the "economic loss" rule maintains the dividing line between tort and contract while recognizing the realities of modern tort law. Purely "economic loss" may be recoverable under a variety of tort theories. The question, thus, is not whether the damages are physical or economic. Rather, the question of whether the plaintiff may maintain an action in tort for purely economic loss turns on the determination of the source of the duty plaintiff claims the defendant owed. *A breach of a duty which arises under the provisions of a contract between the parties must be redressed under contract, and a tort action will not lie. A breach of duty arising independently of any contract duties between the parties, however, may support a tort action.*<sup>36</sup>

Further, while not quoted in Bilt-Rite, the South Carolina Supreme Court stated the following in Tommy L. Griffin Plumbing: (1) "This Court addressed the 'economic

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<sup>32</sup>The Superior Court had barred the negligence claim under the economic loss doctrine, leaving the plaintiff without a remedy in the absence of a contract. 866 A.2d at 274, 288.

<sup>33</sup>Cf. Kvaerner US Inc., Kvaerner Holdings, Inc. v. Onebeacon Insurance Company, April Term 2003, No. 0940, 2003 Phila. Ct. Com. Pl. LEXIS 46 (C.C.P. Sept. 29, 2003) (Sheppard, J.), summarized below.

<sup>34</sup>320 S.C. 49, 463 S.E.2d 85 (1995).

<sup>35</sup>866 A.2d at 287-288.

<sup>36</sup>Id. at 288 (quoting Tommy L. Griffin Plumbing, 463 S.E. 2d at 88) (emphasis added herein).

loss’ rule in both Beachwalk and Kennedy. In Kennedy, we stated that ‘the “economic loss” rule will still apply where the duties are created solely by contract.’”<sup>37</sup>; and (2) “In most instances, a negligence action will not lie when the parties are in privity of contract. When, however, there is a special relationship between the alleged tortfeasor and the injured party not arising in contract, the breach of that duty of care will support a tort action.”<sup>38</sup>

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<sup>37</sup>463 S.E. 2d at 288 (citations omitted).

<sup>38</sup>Id.

**GIST OF THE ACTION CASE SUMMARIES**

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## I. FRAUD CASES

### A. CLAIMS DISMISSED

**Clemente v. Republic First Bank, December Term 2002, No. 00802, 2003 Phila. Ct. Com. Pl. LEXIS 23 (C.C.P. Phila May 9, 2003) (Jones, J.)** (the Court held claims of fraud, negligence, and gross negligence to be barred by the gist of the action doctrine). This Opinion is available at <http://courts.phila.gov/pdf/cpcvcomprg/clemente503.pdf>.

In Clemente, the Court sustained Republic First Bank's preliminary objections, which invoked the gist of the action doctrine to dismiss the Plaintiffs' tort claims. The Plaintiffs, Clemente and other individuals similarly situated, had borrowed money from Republic First Bank pursuant to written loan documents that provided for certain interest calculations. However, Republic First Bank had allegedly charged more than it was entitled to under the contract. Plaintiffs brought claims for fraud, breach of contract, breach of duty of good faith and fair dealing, negligence, gross negligence, and unjust enrichment. Republic First Bank filed preliminary objections to all but the breach of contract claim.

The Court cited eToll and Phico in dismissing the Plaintiffs' tort claims pursuant to the gist of the action doctrine. The only duty allegedly breached by Republic First Bank was its contractual duty to charge interest at a certain rate. The fact that it may have negligently, recklessly, or intentionally breached that contractual duty did not give rise to a tort claim, and only provided a basis for a breach of contract claim. Republic First Bank's preliminary objections were sustained, and the claims for fraud, negligence, and gross negligence were dismissed under the gist of the action doctrine.

The economic loss doctrine provided additional grounds for sustaining Republic First Bank's preliminary objection to the negligence and gross negligence claims: "The economic loss doctrine precludes recovery in negligence actions for injuries which are

solely economic.”<sup>39</sup> Here, the Plaintiffs’ excessive interest payments were the only damages they had suffered, and these were solely for economic loss; thus, the negligence and gross negligence claims were dismissed.

**New Hope Books, Inc. v. Datavision Prologix, Inc., July Term 2001, No. 1741, 2003 Phila. Ct. Com. Pl. LEXIS 62 (C.C.P. Phila. June 24, 2003) (Cohen, J.)** (the Court held claims of negligence, strict liability, and fraudulent misrepresentation to be barred by the gist of the action and economic loss doctrines). This opinion is available at <http://courts.phila.gov/pdf/cpcvcomprg/newhope603.pdf>.

In New Hope Books, the Court held that the gist of the action and economic loss doctrines barred claims of negligence, strict liability, and fraudulent misrepresentation. Plaintiffs were New Hope Publishing, Inc. and Frederick Schofield. Schofield was the author of three fictional novels. He self-published two of the novels through New Hope Publishing, which he had incorporated for the sole purpose of publishing his novels. Schofield was the sole shareholder, director, and officer of the company. In order for New Hope to be taken seriously in the book industry, Schofield gave New Hope the appearance of a fully staffed publishing house by creating a roster of fictional employees.

Schofield needed to affix UPC bar codes to his books so that certain retailers could scan the prices of the books at their registers. He placed several orders with Datavision, a company that produced self-sticking labels, during a six month period. Schofield used a fictitious name for his chief of marketing, Tom Butler, during all negotiations and when placing orders. Around January of 2001, Schofield allegedly received reports that the labels were not scanning properly at the points of sale. He argued that the scanning failures rendered sales records wholly inaccurate, and distributors were returning books and not placing re-orders. Schofield revealed his true

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<sup>39</sup>David Pflumm Paving & Excavating, Inc. v. Foundation Services, Co., 816 A.2d 1164, 1170 (Pa. Super. 2003).

identity to Datavision, advised it of the alleged problems, and sought compensation for his damages. Datavision believed there was no problem with the labels and refused Schofield's demand for compensation.

Schofield asserted four claims against Datavision for negligence, strict liability, breach of warranties, and fraudulent misrepresentation. Datavision filed a motion for summary judgment. The Court found in Datavision's favor on the negligence, strict liability, and fraudulent misrepresentation claims because they were barred by the gist of the action and economic loss doctrines. The Court cited the rule set forth in eToll:

The gist of the action doctrine bars tort claims that: (1) arise solely from a contract between the parties; (2) where the duties allegedly breached were created and grounded in the contract itself; (3) where the liability stems from a contract; and (4) where the tort essentially duplicates a breach of contract claim or the success of which is wholly dependent on the terms of the contract.<sup>40</sup>

When applying the gist of the action doctrine to the facts at hand, the Court explained that the heart of Schofield's negligence and strict liability claims was Datavision's alleged failure to design and produce labels that worked. All of the damages allegedly suffered were purely economic in nature, allegedly resulting from Datavision's workmanship. The Court concluded that these are the kinds of tort claims that the gist of the action and economic loss doctrines were designed to prevent.

Next, the Court held that Schofield's claim of fraudulent misrepresentation was barred by the gist of the action doctrine. The allegations focused on Datavision's representations about the testing it had performed and the assurances it had made after orders were placed. The Court stated that claims of fraud in the performance of a

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<sup>40</sup>eToll, 811 A.2d at 14.

contract are barred by the gist of the action doctrine,<sup>41</sup> and the fraudulent misrepresentation claim was dismissed. Summary judgment was granted in favor of Datavision on the claims of negligence, strict liability, and fraudulent misrepresentation, and the case was ordered to proceed to trial only on the breach of warranty claims.

**Nand Todi v. J&C Publishing, Inc., June Term 2002, No. 2969, 2003 Phila. Ct. Com. Pl. LEXIS 77 (C.C.P. July 17, 2003) (Cohen, J.)** (the Court held a fraud claim to be barred by the gist of the action doctrine). This Opinion is available at <http://courts.phila.gov/pdf/cpcvcomprg/todi703.pdf>.

In Todi, the Court relied on the gist of the action doctrine in dismissing a fraud claim. The matter originated with Mr. Stursberg's incorporation of reXnow.com, LLC ("Rex"), a website that provided a business-to-business real estate platform for an exchange of goods and services between property owners and commercial real estate providers. Mr. Stursberg operated J&C Publishing and marketed the Rex concept to potential customers. In March of 2000, J&C Publishing entered into an agreement with Intermedia Interactive Software to develop the computer software necessary to operate the Rex website.

Beginning in June of 2000, Nand Todi loaned Rex \$500,000 pursuant to a convertible note payable in one year. Todi also signed a licensing fee royalty agreement with J&C Publishing entitling him to receive ten percent of total revenues. The Rex website never became operational, Intermedia never released the software to Rex, and Rex went out of business. Following two litigations and bankruptcy proceedings on the part of Rex and J&C Publishing, a settlement conference was held and all of the parties agreed to a "Global Settlement."

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<sup>41</sup>eToll, 811 A.2d at 20.

The Global Agreement set forth the terms by which Rex and J&C Publishing would repay Todi. Todi filed this action as a declaratory judgment against J&C Publishing to compel Stursberg to execute the settlement agreement and to declare him in breach of the Global Settlement. Todi requested damages for breach of contract, fraud, breach of the covenant of good faith and fair dealing, and unjust enrichment. Todi's fraud claim was dismissed under the gist of the action doctrine. Here, the only duty J&C Publishing breached was its contractual duty under the Global Settlement, which provided a basis for the breach of contract claim. Accordingly, the fraud claim was dismissed.

**Axcan Scandipharm, Inc. v. American Home Products, October Term 2002, No. 02167, 2003 Phila. Ct. Com. Pl. LEXIS 12 (C.C.P. Phila. July 22, 2003) (Sheppard, J.)** (the Court held fraud claims to be barred by the gist of the action doctrine). This Opinion is available at <http://courts.phila.gov/pdf/cpcvcomprg/ax-op.pdf>.

In Axcan Scandipharm, the Court sustained the preliminary objections of American Home Products ("AHP") and Eurand International, and dismissed Axcan Scandipharm's fraud claim. Pursuant to several written agreements, Scandipharm was licensed to distribute certain pharmaceutical products manufactured by AHP. In an earlier litigation, Scandipharm was sued by third parties for patent infringement for distributing AHP's pharmaceutical products. Pursuant to the license agreement, AHP assumed responsibility for defense of the patent litigation, resolved it through a settlement agreement, and paid \$24 million in legal fees and settlement costs. AHP agreed in the settlement agreement not to seek reimbursement from Scandipharm.

In unrelated actions, other third parties brought products liability claims with respect to AHP's pharmaceutical products against Scandipharm and AHP. AHP then brought claims against Scandipharm for indemnification based on their licensing

agreement. AHP and Scandipharm arbitrated the indemnification claims before Judge Gafni, pursuant to a written arbitration agreement. AHP sought indemnification for the earlier settlement under a promissory estoppel theory, in addition to the other claim.

Scandipharm brought this action in the Court of Common Pleas, claiming that AHP was not entitled to recover the patent settlement amounts under the express terms of the settlement agreement. Scandipharm brought fraud and abuse of process claims, as well, claiming that it was fraudulently induced to enter the settlement agreement (because AHP promised not to seek indemnification) and fraudulently induced to enter the arbitration agreement (because AHP represented that it would only arbitrate the later indemnification claims and not the settled patent case). AHP filed preliminary objections claiming that Scandipharm's claims had to be arbitrated, and that the fraud claims should be dismissed. For reasons not pertinent herein, the Court found none of the settlement related claims arbitrable.

Citing eToll, the Court dismissed Scandipharm's fraudulent inducement claim because it was barred by the gist of the action doctrine. Scandipharm argued that the alleged fraud was in the inducement of the settlement and arbitration agreements, rather than in their performance: AHP had represented that it would not seek to recover the patent settlement amounts, which was an inducement for Scandipharm to enter into the settlement agreement. However, this alleged misrepresentation was expressly set forth in the settlement agreement, and the Court concluded that AHP's alleged failure to live up to its representation was a breach of contract, if anything. The gist of Scandipharm's action with respect to the settlement agreement was in contract, not in tort, and the fraud claim was dismissed.

As to the arbitration based claim, Scandipharm contended that its breach of contract claim was based on the settlement agreement only, and there was no bar to a fraud claim involving the arbitration agreement. The Court stated that AHP's alleged misrepresentation to Scandipharm about the scope of what they would be arbitrating was a term expressly set forth in the arbitration agreement itself. Therefore, Scandipharm's fraud claim was merely a claim for breach of the agreement. This "fraud" claim was also dismissed under the gist of action doctrine.

**Daniel Kerkel v. SPD Electrical Systems d/b/a SPD Technologies, May Term 2003, No. 01876, 2003 Phila. Ct. Com. Pl. LEXIS 42 (C.C.P. Phila. Dec. 9, 2003) (Cohen, J.)** (the Court held a fraud claim to be barred by the gist of the action doctrine). This Opinion is available at <http://courts.phila.gov/pdf/cpcvcomprg/kerkel-op.pdf>.

In Kerkel, the Court held that the gist of the action doctrine barred a fraud claim. Kerkel filed a complaint against SPD Electrical Systems that included a fraud claim for willfully breaching a contract to purchase certain stock at fair market value. Citing eToll, the Court sustained SPD's preliminary objection as to the fraud claim: Kerkel's fraud claim centered upon SPD's alleged failure to pay fair market value for the stock, a duty which arose pursuant to the written agreement between the parties. The fact that SPD may have willfully breached its contractual duty did not give rise to a tort claim, and only provided a basis for a contract claim.

**City of Philadelphia v. Human Services Consultants, II, Inc., March Term 2003, No. 0950, 2004 Phila. Ct. Com. Pl. LEXIS 26 (C.C.P. Phila. March 23, 2004) (Jones, J.)** (the Court held fraud and negligence claims to be barred by the gist of the action doctrine). This Opinion is available at <http://courts.phila.gov/pdf/cpcvcomprg/030300950.pdf>.

In City of Philadelphia, the Court dismissed claims of fraud and negligence under the gist of the action doctrine. The lawsuit arose out of three separate contracts for providing residential services to mentally ill and mentally retarded individuals. The City

of Philadelphia, Luzerne County, and Lehigh County sued Human Services Consultants II, Inc. (HSC, Inc.), Human Services Consultants Management (“HSCM”), Richard Adams, Linda Adams and Edgewater, Inc. The causes of action were for breach of contract, violation of the 4300 regulations, fraud, civil conspiracy, negligence, fraudulent transfers, and violation of 62 P.S. § 1407 (a)-(c).

On the contract claims, Plaintiffs successfully pleaded a cause of action against Richard Adams under a piercing the corporate veil theory, though not against Linda Adams. Plaintiffs’ success under that theory, however, then undermined Plaintiffs’ tort claims against Richard Adams. Thus, if they pierced the corporate veil making Richard Adams liable for misrepresentations in connection with performance of the contract, Plaintiffs could not pursue a fraud claim for those same misrepresentations; fraud claims based on performance of the contract being barred by the gist of the action doctrine. The negligence claim against Richard Adams was similarly barred. The Court cited eToll in holding that the fraud and negligence claims against Richard Adams were barred by the gist of the action doctrine. However, the fraud claims against HSCM were not barred because HSCM was not a party to the contracts at issue and there was no similar argument to pierce the veil or assertion of an alter theory; thus, the gist of the action doctrine did not apply.

**Philadelphia Regional Port Authority v. Carusone Construction Company, July Term 2003, No. 02701, 2004 Phila. Ct. Com. Pl. LEXIS 42 (C.C.P. Phila. April 14, 2004) (Sheppard, J.)** (the Court held a fraud claim to be barred by the gist of the action doctrine).

This Opinion is available at <http://courts.phila.gov/pdf/cpcvcomprg/030702701.pdf>.

In Philadelphia Port Authority, the Court held that a fraud claim was barred by the gist of the action doctrine. The Philadelphia Port Authority had hired Carusone

Construction Company to build a storage facility. Carusone had then sub-contracted with Summit Structures to provide the building structures. The building collapsed, and the Port Authority contracted directly with Summit to have Summit demolish it. In its counterclaim, Summit was attempting to recover the amounts that the Port Authority never paid in connection with the construction and demolition of the building. Summit's counterclaims were for breach of two separate contracts, fraud, negligence, and tortious interference with contract. The Port Authority filed preliminary objections to all of the counterclaims.

Summit's fraud claim against the Port Authority was barred by the gist of the action doctrine. Summit asserted that the Port Authority knew at the time it entered into the agreement that it would never pay Summit for the demolition work, and that the Port Authority's representation that it would make payment was expressly set out in the agreement. The Court held that the Port Authority's alleged failure to fulfill its representation was a breach of contract; and the gist of Summit's claim for payment from the Port Authority sounded in contract, not in tort, so the fraud claim was dismissed.

Summit also claimed that the Port Authority had been negligent in failing to require Carusone to secure bonds or insurance. Carusone had been required to do so under the Port Authority/Carusone contract, of which Summit claimed to be a third-party beneficiary. The Court stated that, under the gist of the action doctrine, Summit's negligence claim was really a claim for breach of the Port Authority/Carusone contract, and that Summit should bring a claim against Carusone. As for the tortious interference claim, the Court requested that Summit set forth in more detail the alleged criticism,

harassment, and negative publicity it had suffered, as well as details of the relationships that were affected.

**Plate Sales, Inc./Wilmington Steel v. Marathon Equipment Co., November Term 2003, No. 3714, 2004 Phila. Ct. Com. Pl. LEXIS 49 (C.C.P. Phila. April 16 2004) (Cohen, J.)** (the Court held a claim of misrepresentation to be barred by the gist of the action doctrine).

This Opinion is available at <http://courts.phila.gov/pdf/cpcvcomprg/031103714.pdf>.

In Plate Sales Inc./Wilmington Steel, the Court relied on the gist of the action doctrine in barring a claim of fraudulent misrepresentation. Plate Sales/Wilmington Steel alleged that Marathon Equipment Company had breached an oral stock agreement. Plate Sales brought a claim for fraudulent misrepresentation and a claim under Pennsylvania's Unfair Trade Practices and Consumer Protection Law ("UTPCPL"). Marathon asserted preliminary objections to Plate Sales' complaint.

The Court concluded that Plate Sales had failed to state a claim for fraudulent misrepresentation because it had not alleged facts that Marathon acted with intent to deceive it, and the misrepresentation was not of a past or present material fact. The Court added that the claim was also barred by the gist of the action doctrine because the crux of the fraud claim was Marathon's alleged breach of the oral stock agreement.

**Joseph M. Rafter v. William Shaw, January Term 2004, No. 03756, 2004 Phila. Ct. Com. Pl. LEXIS 56 (C.C.P. Phila. May 27, 2004) (Jones, J.)** (the Court held a fraud claim to be barred by the gist of the action doctrine).

This Opinion is available at <http://courts.phila.gov/pdf/cpcvcomprg/040103756.pdf>.

In Rafter, the Court relied on the gist of the action doctrine in dismissing a fraud claim. Joseph Rafter and John Williams brought an action against William Shaw and Shaw, Inc. regarding a conflict over commercial real estate and a liquor license. They disputed the existence of a contract requiring Shaw to sell the properties to Rafter and Williams. Rafter and Williams brought causes of action for specific performance, breach

of contract, and fraud. Shaw filed preliminary objections and the Court held that the gist of the action doctrine barred the fraud claim.

According to Rafter and Williams, Shaw had purposely misled them about his reasons for not completing the sale so that he could find another buyer. The Court determined that Shaw's alleged conduct, if wrongful, was nothing more than a breach of contract. The gist of any claim arising out of a delay in completing the transaction was grounded in contract and not tort, so the fraud claim was dismissed.

**Philadelphia Television Network, Inc. v. Reading Broadcasting, Inc., August Term 2001, 2005 Phila. Ct. Com. Pl. LEXIS 307 (C.C.P. Phila. July 14, 2005) (Sheppard, J.)** (the Court held a fraud and deceit claim to be barred by the gist of the action doctrine).

This Opinion is available at <http://courts.phila.gov/pdf/cpcvcomprg/010801663.pdf>.

In Philadelphia Television Network, the Court relied on the gist of the action doctrine in barring a claim for fraud and deceit. Philadelphia Television Network (PTN), a low-power television station, sued Reading Broadcasting, Inc. (RBI), a high-power television station. PTN brought claims for breach of the time brokerage agreement and option agreement, as well as fraud and deceit. As to the fraud and deceit claims, PTN asserted that RBI had made fraudulent misrepresentations that it was broadcasting at fifty percent effective radiated power (ERP), preventing PTN from exercising its option rights, and reaping profits which would have resulted from the difference between the cost of the shares under the option and the value of the shares once the station was sold.

The fraud and deceit claim was barred by the gist of the action doctrine. The Court's analysis stated that RBI's alleged fraud against PTN was fraud in the performance of the contract. For example, the fraud complained of was the station insisting to PTN that it was broadcasting at fifty percent ERP when it knew that it was

not. RBI's alleged fraudulent misrepresentations were grounded in its failure to perform the contracts. Therefore, PTN's fraud and deceit claim was a breach of contract claim recast as a tort, and was barred by the gist of the action doctrine.

**Banks v. Hanoverian, Inc., January Term 2005, No. 2807, 2006 Phila. Ct. Com. Pl. LEXIS 128 (C.C.P. Phila. March 10, 2006) (Abramson, J.)** (the Court held a fraud claim to be barred by both the gist of the action doctrine and the parol evidence rule). This Opinion is available at <http://courts.phila.gov/pdf/cpcvcomprg/050102807-031006.pdf>.

In Banks, the Court held that purchaser Banks' fraud claim against property-seller Hanoverian was barred by the gist of the action doctrine. Hanoverian sought summary judgment for all four claims brought by Banks: breach of contract, fraud, premises liability, and unjust enrichment.

Banks had agreed to purchase commercial real estate property from Hanoverian. He paid \$50,000 toward the purchase price, and then attempted to obtain financing through Wachovia Bank. Wachovia required that Banks conduct an environmental survey and make certain improvements. Banks and Hanoverian amended their agreement twice to provide extensions, but Banks was unable to secure financing with Wachovia. The settlement did not take place as contemplated, and Hanoverian denied an additional extension. Hanoverian informed Banks that he was in default of the agreement, and that the \$50,000 deposit had been forfeited.

The Court held that Hanoverian was entitled to summary judgment as to the breach of contract claim, because the alleged misrepresentations were barred by the parol evidence rule. The Court then concluded that Banks' fraud claim failed as a matter of law for two reasons. First, the claim was based on almost identical allegations as those set forth in the breach of contract claim, and those oral representations were barred by the

parol evidence rule. Second, Banks' fraud claim was barred by the gist of the action doctrine, which precludes plaintiffs from re-casting breach of contract claims into tort claims. Banks' fraud claim was based upon the breach of representations that were specified in the agreement and barred as parol evidence. Accordingly, the fraud claim was barred.<sup>42</sup>

**Carson/DePaul/Ramos v. Driscoll/Hunt, October Term 2005, No. 1090, 2006 Phila. Ct. Com. Pl. LEXIS 277 (C.C.P. Phila. July 20, 2006) (Sheppard, J.)** (the Court held a fraud claim to be barred by prior pending action and the gist of the action doctrine). This Opinion is available at <http://courts.phila.gov/pdf/cpcvcomprg/051001090.pdf>.<sup>43</sup>

In Carson/DePaul/Ramos, the Court upheld construction managers Driscoll/Hunt's preliminary objections, which were based on prior pending action and gist of the action arguments. At the time that subcontractor Ramos/Carson/Depaul (RCD) brought this action for fraud, it already had an action pending in this Court against Driscoll/Hunt (DH) for breach of contract, in which it had attempted an amendment to assert the same fraud claim, which amendment was rejected under the gist of the action doctrine.<sup>44</sup>

DH had contracted with the Philadelphia Phillies to act as construction manager for the new baseball stadium, Citizens Bank Park. RCD subcontracted with DH to install concrete foundations. Numerous delays and disruptions gave rise to an action that

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<sup>42</sup>The Court also dismissed Banks' premises liability for failing to establish the requisite elements of a negligence claim, but denied summary judgment as to the unjust enrichment claim because factual issues remained.

<sup>43</sup>This Opinion was written pursuant to Pa.R.A.P. 1925 after an appeal was taken. The Court also wrote an earlier opinion, which was issued on March 17, 2006, reaching these conclusions. The appeal was later dismissed.

<sup>44</sup>Carson/DePaul/Ramos v. Driscoll/Hunt, February Term 2004, No. 2166, 2006 Phila. Ct. Com. Pl LEXIS 277 at footnote 2 (Abramson, J.) (C.C.P. Phila. June 29, 2006). See <http://fjd.phila.gov/pdf/cpcvcomprg/040202166.pdf>.

commenced in February of 2004, in which RCD sought to recover \$15 million in impact/delay damages. The first action was for breach of contract and breach of the duty of good faith and fair dealing. The subcontract had required that RCD submit impact/delay claims as they occurred throughout the project. However, RCD asserted that DH had expressly agreed orally and in writing that RCD could submit those claims at the end of the project. In September of 2005, RCD moved to amend its complaint to assert the fraud claim based on DH's representations that RCD could submit impact/delay claims at the end of the project. The Court in the first action denied RCD's motion to amend because the fraud claim essentially duplicated the breach of contract claims, and the gist of the action sounded in contract, not in tort.

While that motion was pending, RCD brought this second action, asserting the same fraud claim. The bases of DH's objections to the fraud claim in this action were prior pending action and gist of the action. The Court held that since the fraud claim essentially duplicated the breach of contract claim in the first action, that claim was barred by a prior pending action. In addition, because the fraud claim arose out of the subcontract between the parties, the claim was barred by the gist of the action doctrine.

**John C. Cardullo & Sons v. Int'l Profit Assocs., August Term 2005, No. 3515, 2006 Phila. Ct. Com. Pl. LEXIS 321 (C.C.P. Phila. August 7, 2006) (Abramson, J.)** (fraud claims barred by gist of the action doctrine).

This Opinion is available at <http://fjd.phila.gov/pdf/cpcvcomprg/050803515.pdf>.

In John C. Cardullo & Sons, Cardullo filed an amended complaint asserting claims for fraud, breach of contract, and tortious interference with contract against International Profit Associates (IPA); and for rescission/breach of contract against International Tax Advisors (ITA). Defendants IPA and ITA filed preliminary objections to the amended complaint based on a forum selection clause set forth in the parties'

written agreements. The trial Court sustained in part the preliminary objections filed by the financial service providers upon finding that the forum selection clause in the written service agreement would not seriously impair Plaintiff's ability to pursue its claims.

The Court dismissed Cardullo's fraud claims. It reasoned that the fraud allegations were based upon the parties' contractual promises. Citing Hart v. Arnold,<sup>45</sup> the Court found the fraud claims duplicative because these claims were so closely intertwined with the contract claims, and are thus barred by the gist of the action doctrine.

**Hillier v. M.I.S.I. LP, January Term 2004, No. 0513, 2006 Phila. Ct. Com. Pl. LEXIS 71 (C.C.P. Phila. January 27, 2006) (Abramson, J.)** (fraudulent misrepresentation claim barred by gist of the action doctrine). This Opinion is available at <http://courts.phila.gov/pdf/cpcvcomprg/040100513.pdf>.

Louise Hillier brought a breach of contract claim against M.I.S.I., LP, P.I.S.I., Inc., and Northeast Executive Abstract Agency, Inc., over a real estate transaction. The contract contained a "time is of the essence" clause that required both buyer and seller to notify the other party of any concerns which may prevent the deal from going through. Buyer failed to notify seller within a reasonable time period that it may wish to terminate the agreement. Following notification of the buyer's desire to terminate the agreement only one day prior to settlement, and discovering that a \$50,000 deposit represented by buyer as deposited into an escrow account for the sake of this transaction was never deposited; seller brought this cause of action against buyer for breach of contract and fraudulent misrepresentation. Seller's claim for fraudulent misrepresentation was barred against MISI and PISI by way of the gist of the action doctrine since seller's claims were all based upon breach of contract.

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<sup>45</sup>884 A.2d 316, 339-340 (Pa. Super. 2005), appeal denied, 587 Pa. 695, 897 A.2d 458 (2006).

**Kevin D. Flynn Dev. Corp. v. Corporate Express Office Prods., July Term 2005, No. 3523, 2006 Phila. Ct. Com. Pl. LEXIS 50 (C.C.P. Phila. January 19, 2006) (Sheppard, J.)** (fraud claim barred by gist of the action doctrine). This Opinion is available at <http://courts.phila.gov/pdf/cpcvcomprg/050703523.pdf>.

Kevin D. Flynn Development Corporation brought an action against Corporate Express Office Products, Inc. (“Corporate”) for allegedly failing to pay the proper commissions pursuant to the terms of the parties’ March 2003 agreement. Plaintiff alleged breach of contract as well as fraud, constructive trust, and conversion claims against Corporate and several other named Defendants, including Corporate’s agent, the escrow agent, and the property’s registered seller/owner.

After reviewing the facts, the Court quickly pointed out that the case was simply a breach of contract claim between Plaintiff and Corporate. The Court rejected the fraud claim as a violation of the gist of the action doctrine because it “precludes plaintiffs from re-casting ordinary breach of contract claims into tort claims.”<sup>46</sup> Transforming a contract claim into a tort action is forbidden even if the questionable conduct is done wantonly.

**Itskowitz v. White & Williams, LLP, May Term 2003, No. 002926, 2005 Phila. Ct. Com. Pl. LEXIS 595 (C.C.P. Phila. November 10, 2005) (Abramson, J.)**. (fraud claim barred by gist of the action doctrine). This Opinion is available at <http://courts.phila.gov/pdf/cpcvcomprg/030502926-111005.pdf>.

A legal malpractice claim was brought by Dr. Harry Itskowitz against Defendant, law firm and certain of its lawyers. The doctor alleged breach of fiduciary duty, legal malpractice, intentional interference with contractual relations, fraudulent misrepresentation and nondisclosure, breach of contract, intentional infliction of emotional distress and negligent infliction of emotional distress. The Defendant attorneys alleged that the malpractice claims were invalid because they had only provided legal

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<sup>46</sup>eToll, 811 A.2d at 14.

representation to the partnership as an entity, and not to its individual partners. Defendants subsequently filed for summary judgment.

The fraud claim consisted of allegations that Defendants made misrepresentations that they would act in Plaintiff's best interest, with undivided loyalty; and would not engage in conflicts of interest or potential conflicts of interest. The Court struck down the fraud claim under the gist of the action doctrine, finding that the claim only repeated the negligence (malpractice) and contract counts.<sup>47</sup> The Court utilized the four part test set forth in Etoll, Inc. v. Elias/Savion Adver., Inc.,<sup>48</sup> which provides that the claim cannot be maintained when it (1) arose solely from a contract between the parties; (2) where the duties allegedly breached were created and grounded in the contract itself; (3) where the liability stems from a contract; (4) where the tort essentially duplicates a breach of contract claim or the success of which is wholly dependent on the terms of the contract. The Court rejected the notion that Defendants made distinct misrepresentations to Plaintiff -- through conduct, misrepresentations and omissions -- that they would act in Plaintiff's best interest while having no intent to do so. These claims were no different than the basic contract claims and malpractice claims. Efforts at stating a fraudulent inducement claim, which could theoretically survive a gist of the action argument, failed.

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<sup>47</sup>Appellate case law permits legal malpractice plaintiffs to bring claims for both negligence and breach of contract. See, e.g., Smith v. Gorski, 812 A.2d 683 (Pa. Super. 2002), appeal denied, 579 Pa. 692, 856 A.2d 834 (2004).

<sup>48</sup>Etoll, 811 A.2d at 19.

**2300 Realty Corp. v. Corp. Realty Ptnrs. & Co., January Term 2002, No. 01904, 2005 Phila. Ct. Com. Pl. LEXIS 450 (C.C.P. Phila. October 17, 2005) (Abramson, J.)** (misrepresentation claim barred by gist of the action doctrine). This Opinion is available at <http://courts.phila.gov/pdf/cpcvcomprg/020101904.pdf>.

Jonathan Martone and G. Kevin Smith allegedly discussed and formed an oral agreement to acquire and develop a building. Martone purchased the building alone and transferred it to a corporation, 2300 Realty Corp. Martone was the sole officer and shareholder of 2300 Realty, and made the transfer before obtaining a construction loan for purposes of renovating the building. 2300 Realty and Martone then brought this action against Smith for breach of agreement based on the alleged failure to pay half of the expenses associated with the renovation, and to participate equally in the construction loan.

In addition to the contract claim, Martone asserted a misrepresentation claim based on Smith's alleged promise to bear half of the costs associated with the building's renovation. The Court struck down this claim due to its duplicative nature and violation of the gist of the action doctrine.<sup>49</sup>

**Liss v. Liss, June Term 2002, No. 3502, 2005 Phila. Ct. Com. Pl. LEXIS 453 (C.C.P. Phila. June 29, 2005) (Jones, J.)** (fraud and intentional misrepresentation claims dismissed under gist of the action doctrine). This Opinion is available at <http://courts.phila.gov/pdf/cpcvcomprg/020603502.pdf>.

Two brothers, William and Sheldon Liss, created the closely held corporation, Liss Brothers, Inc., which faced financial collapse. At the time of the pending collapse, William sought no solution other than an asset liquidation. Sheldon liquidated the company, reacquiring many of its assets for a new company, Liss Global, Inc., in which Sheldon was sole shareholder. Thereafter, William filed a complaint and amended

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<sup>49</sup>eToll, 811 A.2d at 14-19.

complaint asserting claims for breach of fiduciary duty, breach of contract, breach of duty of good faith, promissory estoppel, conversion, fraud, intentional misrepresentation, appointment of a custodian/receiver, appointment of a constructive trust, and conspiracy. The Court granted summary judgment to Sheldon Liss on all claims. The fraud and intentional misrepresentation claims were dismissed by way of the gist of the action doctrine.<sup>50</sup>

**Global Payments Direct v. EVS Holding Co., August Term 2002, No. 1373, 2005 Phila. Ct. Com. Pl. LEXIS 399 (C.C.P. Phila. August 29, 2005) (Sheppard, J.)** (misrepresentation and fraud claims barred by gist of the action doctrine). This Opinion is available at <http://courts.phila.gov/pdf/cpcvcomprg/020801373.pdf>.

Global Payments Direct (“Global”) filed suit against EVS Holding Co. (“EVS”) for breach of contract and tortious interference with contract in response to an action EVS had filed for breach of contract, fraud, tortious interference with contractual relations, negligent and intentional misrepresentation, business disparagement, and unjust enrichment. EVS provided services to companies that desired to sell their products on the internet. It contracted with Global to provide credit card processing for their client merchants. The agreement set forth residual payments to EVS on charges collected by Global for processing merchant credit card sales that EVS had referred. The agreement further contained provisions requiring EVS to perform basic credit analyses through an application and approval process of merchant accounts based upon criteria that Global provided.

The EVS suit arose following Global’s retention of residual payments from accounts in good standing, to cover its costs of processing accounts which had been identified as fraudulent “stolen identity” accounts in default. The Global suit followed,

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<sup>50</sup>eToll, 811 A.2d at 19.

alleging that EVS failed to provide the proper level of screening set forth in the original agreement, and that Global was not required to bear the risk of loss on fraudulent accounts. The Court found for Global on the tortious interference action and EVS for breach of contract. Citing the gist of the action doctrine, the Court struck down EVS's misrepresentation and fraud claims because the claims were grounded in the parties' contract.<sup>51</sup>

**Premium Assignment Corp. v. City Cab Co., March Term 2005, No. 1135, 2005 Phila. Ct. Com. Pl. LEXIS 311 (C.C.P. Phila. July 15, 2005) (Abramson, J.)** (fraud claim for future intention not to perform on a contract barred by gist of action doctrine). This Opinion is available at (<http://courts.phila.gov/pdf/cpcvcomprg/050301135.pdf>).

City Cab Company ("City Cab") financed insurance policies on its business activities through Premium Assignment Corp. ("PAC"). City Cab cancelled its policies without payment, and PAC brought an action for breach of contract and fraud. PAC alleged that at the time City Cab entered its contract with PAC, City Cab knew that it was not going to pay the premiums. The Court sustained City Cab's preliminary objection to the fraud claim on two bases. First, under Pa.R.C.P. 1019(b), the Court cited a failure to plead with the requisite specificity. Second, in a footnote, the Court dismissed the fraud claim altogether under the gist of the action doctrine, which precludes re-casting ordinary breach of contract claims as torts. An alleged misrepresentation to fulfill a promise in the future is not the basis for a fraud claim. With only the breach of contract claim remaining, the Court also barred any recovery of punitive damages because such damages could not be awarded on a breach of contract claim. PAC was permitted to re-establish any special damages it suffered resultant to the breach of contract but all other claims were dismissed.

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<sup>51</sup>eToll, 811 A.2d at 19.

**Phila. TV Network, Inc. v. Reading Broad., Inc., August Term 2001, No. 1663, 2005 Phila. Ct. Com. Pl. LEXIS 307 (C.C.P. Phila. July 14, 2005) (Sheppard, J.)** (fraud and deceit claims barred by gist of the action doctrine). This Opinion is available at <http://courts.phila.gov/pdf/cpcvcomprg/010801663.pdf>.

Philadelphia Television Network, Inc. (“PTN”) entered into an agreement with Reading Broadcasting, Inc. (“RBI”) to broadcast programming, and potentially to acquire up to 40% of RBI common stock. The agreement consisted of a time brokerage agreement and an option agreement, an alleged breach of the latter constituting the basis for this suit. PTN asserted claims against RBI, including claims for fraud and deceit.

The Court denied the tort claims that PTN raised against RBI because they were barred by the gist of the action doctrine. The duties that PTN claimed RBI had failed to meet, or had misrepresented as being met, were grounded in the contract itself; therefore, they duplicated the PTN’s claims based on the terms of the agreement.<sup>52</sup>

**Pennsylvania Business Bank v. Franklin Career Servs. LLC, May Term 2002, No. 2507, 2005 Phila. Ct. Com. Pl. LEXIS 135 (C.C.P. Phila. March 14, 2005) (Jones, J.)** (fraud claim barred by gist of the action doctrine). This Opinion is available at <http://courts.phila.gov/pdf/cpcvcomprg/020502507.pdf>.

The Pennsylvania Business Bank (“PBB”) made a loan to MP III Holdings, Inc. (“MP III”), accepting MP III’s assets as collateral for the loan. Franklin Career Services (“FCS”) allegedly entered an agreement to acquire MP III’s assets. This purportedly breached the PBB/MP III loan agreement. PBB alleged that the FCS parties agreed to guaranty the loan if PBB would give a 60 day extension on the MP III loan. FCS denies there was any such agreement or any promises to acquire MP III. PBB claimed that MP III dissipated its assets during the time PBB believed that FCS had guaranteed the loan,

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<sup>52</sup>eToll, 811 A.2d at 14-15.

and before FCS made clear that it was not going to acquire MP III. PBB alleged that, had it known the truth, it would have asserted its rights against the collateral.

PBB brought suit, claiming that it had a binding guaranty agreement with FCS concerning the MP III loan. The bank's claims against FCS included counts for declaratory judgment, conversion, tortious interference with contract, breach of contract, and fraud. The Court dismissed the fraud claim under the gist of the action doctrine because the same allegations had already been properly pleaded as a breach of contract claim against FCS.<sup>53</sup>

#### **B. CLAIMS NOT DISMISSED**

**Teledyne Technologies Inc. v. Freedom Forge Corp. d/b/a Standard Steel, May Term 2000, No. 3398, 2002 Phila. Ct. Com. Pl. LEXIS 26 (C.C.P. Phila. April 19, 2002) (Sheppard, J.)** (the Court compared the gist of the action doctrine to the economic loss doctrine). This Opinion is available at <http://courts.phila.gov/pdf/cpcvcomprg/te-op.pdf>.

In Teledyne Technologies, the Court held that the Third Circuit's test for applying the economic loss doctrine was essentially the same test used in Pennsylvania for the gist of the action doctrine. Manufacturer Teledyne sued CSC and Louisville Forge & Gear Works for supplying defective steel used in manufacturing aircraft engine parts. The claims were negligence, strict liability, breach of implied warranties of merchantability and fitness for a particular purpose, and fraudulent and negligent misrepresentation.

CSC argued that the economic loss doctrine barred each of Teledyne's tort claims. The Court explained that the purpose of the economic loss doctrine in Pennsylvania is to "maintain the separate sphere of the law of contract and tort."<sup>54</sup> Pennsylvania's economic loss doctrine prohibits recovery for economic losses in a negligence action where the

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<sup>53</sup>eToll, 811 A.2d at 14.

<sup>54</sup>New York State Elec. & Gas Corp. v. Westinghouse Elec. Corp., 564 A.2d 919, 925 (Pa. Super. 1989).

plaintiff has suffered no physical injury or property damage.<sup>55</sup> However, the Court had recently held that the economic loss doctrine did not bar intentional misrepresentation claims “if the representation at issue is intentionally false.”<sup>56</sup> Therefore, the economic loss doctrine did not bar the plaintiff’s intentional misrepresentation claim.

CSC contended that in Werwinski v. Ford Motor Co.,<sup>57</sup> the Third Circuit found that there was no exception to the economic loss doctrine for intentional misrepresentation claims. However, the Court concluded that the economic loss doctrine test in Werwinski was remarkably similar to Pennsylvania’s gist of the action doctrine, under which a plaintiff pursuing a tort action must show that “the wrong ascribed to the defendant must be the gist of the action with the contract being collateral.”<sup>58</sup> The Court concluded that the test adopted in Werwinski did nothing more than apply a gist of the action test in an economic loss doctrine context. In essence, the Court concluded that Werwinski found an exception to the economic loss doctrine for intentional misrepresentation and fraud claims, and barred only those claims that were already prohibited by the gist of the action doctrine.

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<sup>55</sup>Spivack, 586 A.2d at 405.

<sup>56</sup>First Republic Bank v. Brand, 50 Pa. D. & C. 4th at 343.

<sup>57</sup>286 F. 3d 661 (3d Cir. 2002).

<sup>58</sup>Phico, 663 A.2d at 757 (1995).

**Academy Plaza L.L.C.1 v. Bryant Asset Mgmt., May Term 2002, No. 2774, 2006 Phila. Ct. Com. Pl. LEXIS 238 (C.C.P. Phila. June 9, 2006), (May 21, 2007) (Sheppard, J.)** (fraudulent inducement claim not barred by gist of the action doctrine).

This Opinion is available at <http://fjd.phila.gov/pdf/cpcvcomprg/020502774.pdf>.

The Court's Opinion issued in connection with the appeal of its June 2006 decision is **Academy Plaza L.L.C.1 v. Bryant Asset Mgmt., May Term 2002, No. 2774, 2007 Phila. Ct. Com. Pl. LEXIS 154 (C.C.P. Phila. May 21, 2007) (Sheppard, J.)**.

This Opinion is available at <http://courts.phila.gov/pdf/cpcvcomprg/020502774-052107.pdf>.

In Academy Plaza, the Plaintiffs, purchasers of three shopping centers, brought suit against Defendant sellers, alleging fraudulent inducement, negligent misrepresentation, unjust enrichment, breach of contract and civil conspiracy. The Plaintiffs' claimed that Defendants' provided misleading revenue figures, thereby obtaining a higher sale price. The case went to a bench trial before Judge Sheppard, who issued Findings of Fact and Conclusions of Law. In addressing the fraudulent inducement claim, the Court observed that a plaintiff must prove six elements: (1) a representation; (2) that was material to the transaction at hand; (3) made with the knowledge it was false or with recklessness as to whether it was true or false; (4) with the intention to mislead another party into relying upon it; (5) and the party actually based reliance upon such information; and (6) the resulting injury was proximately caused by such reliance.<sup>59</sup> The Court found the array of documentation and testimony presented by the plaintiffs to meet each of the points required.

The Plaintiffs had asserted, however, that the gist of the action doctrine prevented the Plaintiffs, claim of fraudulent inducement because it recast a breach of contract claim

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<sup>59</sup>Eigen v. Textron Lycoming Reciprocating Engine Division, 874 A.2d 1179, 1185 (Pa. Super 2005).

as a claim in tort, the object which the doctrine seeks to prohibit.<sup>60</sup> The Court cited to Redevelopment Auth. v. International Ins. Co.,<sup>61</sup> where the Superior Court stated that “[t]he important difference between contract and tort actions is that the latter lie from the breach of duties imposed as a matter of social policy while the former lie for the breach of duties imposed by mutual consensus.” Citing to the Superior Court’s Opinion in Sullivan v. Chartwell Investment Partners, L.P.,<sup>62</sup> Judge Sheppard focused on the difference between representations that induce a party to enter a contract in the first place, and issues concerning performance of the contract. Misrepresentations relating to inducing a contract are considered collateral to the contract’s performance, and as such are not barred by the gist of the action doctrine. In this case, the Defendants’ misrepresentations concerning the shopping center revenues violated societal interests in preventing fraud, and were collateral to the contract’s performance. Thus, they were not barred by the gist of the action doctrine.

In authoring a second Opinion in connection with an appeal of its original Findings of Fact and Conclusions of Law in this non-jury trial, the Court reiterated its original conclusion. While, the common application of the gist of the action doctrine prevents contract claims from being recast as tort actions and this Court held the converse to be true as well; tort claims may not be remolded into contract claims. The Court determined that the gist of the action doctrine therefore barred the breach of contract and unjust enrichment claims. Holding that Plaintiff’s claim for fraudulent inducement is the

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<sup>60</sup>Bash v. Bell Telephone Co. of Pennsylvania, 411 Pa. Super. 347, 601 A.2d 825, 829 (1992).

<sup>61</sup>685 A.2d 581, 590 (Pa. Super. 1996).

<sup>62</sup>873 A.2d 710 (Pa. Super. 2005).

gist of the action, the claims grounded in the alleged contractual agreement must be properly denied.

**Greencort Condo. Ass'n v. Greencort Partners, January Term 2004, No. 4045, 2004 Phila. Ct. Com. Pl. LEXIS 57 (C.C.P. Phila. December 23, 2004) (Cohen, J.)** (fraud and negligent misrepresentation claims not barred by gist of the action doctrine). This Opinion is available at <http://courts.phila.gov/pdf/cpcvcomprg/040104045-122204.pdf>.

Plaintiff Greencort Condominium Association (“GCA”) filed suit against a number of Defendants, including Fox & Roach and its agent Linda Schaal, alleging fraud and misrepresentation, among other claims. Defendants asserted preliminary objections, arguing, among other things, that the claims for fraud and misrepresentation should be barred by the gist of the action doctrine. The Court, however, refused to consider the doctrine because it had not been suggested in the amended complaint that a contract existed between these parties. The gist of the action doctrine is not applicable when no breach of contract claim is pleaded.

For other cases discussing fraud see Amico v. Radius Communications, January Term 2000, No. 1793, 2001 Phila. Ct. Com. Pl. LEXIS 88 (C.C.P. Phila. Jan. 9, 2001) (Herron, J.) (discussed below under tortious interference cases); The Flynn Company v. Peerless Door & Glass, Inc., November Term 2001, No. 0830, 2002 Phila. Ct. Com. Pl. LEXIS 61 (C.C.P. May 15, 2002) (Sheppard, J.) (discussed below under negligence cases); Atchison Casting Corp. v. Deloitte & Touche, LLP, July Term 2002, No. 003193, 2003 Phila. Ct. Com. Pl. LEXIS 11 (C.C.P. March 14, 2003) (Jones, J.) (discussed below under breach of fiduciary duty cases); Comsup Commodities, Inc. v. Osram Sylvania, Inc., February Term 2003, No. 01438, 2003 Phila. Ct. Com. Pl. LEXIS 25 (C.C.P. Phila. Dec. 3, 2003) (Cohen, J.) (discussed below under negligence cases); Advantage Systems, Inc. v. Bentley Systems, Inc., October Term 2005, No. 04908, 2006 Phila. Ct. Com. Pl. LEXIS 360 (C.C.P. Sept. 19, 2006) (Sheppard, J.) (discussed below under tortious interference case); Rambo v. Greene, August Term 2004, No. 03894, 2005 Phila. Ct. Com. Pl. LEXIS 517 (C.C.P. Phila. February 28, 2005) (Jones, J.), rev'd 906 A.2d 1232 (Pa. Super. 2006) (discussed below under negligence cases); CBG Occupational Therapy, Inc. v. Bala Nursing & Ret. Ctr., April Term 2003, No. 1758, 2005 Phila. Ct. Com. Pl. LEXIS 19 (C.C.P. Phila. January 27, 2005) (discussed below under conversion cases).

## II. NEGLIGENCE CASES

### A. CLAIMS DISMISSED

**Herman Goldner Company, Inc. v. Cimco Lewis Industries**, March Term 2001, No. 3501, 2001 Phila. Ct. Com. Pl. LEXIS 31 (C.C.P. Phila. Sept. 25 2001) (Herron, J.) (the Court held a negligence claim to be barred by the gist of the action doctrine). This Opinion is available at <http://courts.phila.gov/pdf/cpcvcomprg/goldner.pdf>.

In Goldner, the Court held that the gist of the action doctrine barred a negligence claim. The dispute involved the construction of the First Union Center. Goldner, a subcontractor on the project, had entered into a written purchase order agreement with Heat Transfer Technology, Inc. (HTT), whereby HTT agreed to secure the design and fabrication of refrigeration equipment for making artificial ice. HTT and Cimco then agreed to a written purchase order under which Cimco would design and fabricate the equipment in accordance with the terms of the subcontract. HTT also entered into a written purchase order with Klenzoid under which Klenzoid would design and manufacture a water treatment/filtration system for use at the project. The operation of the systems resulted in abnormal corrosion in heat exchange tubes and substantial system failures. Goldner and HTT attributed these failures to Cimco's use of steel heat exchange tubes, rather than the copper tubes specified in the subcontract, and to Klenzoid's improper construction of the system. Goldner and HTT asserted claims against Cimco and Klenzoid for breach of contract, breach of express warranty, and breach of implied warranties, and against Klenzoid for negligence.

Citing Phico, Klenzoid asserted that Pennsylvania's gist of the action doctrine barred Goldner's negligence claim because there was no socially imposed duty connected with Klenzoid's conduct. Rather, the duties Klenzoid allegedly breached arose solely

from the various contracts among the parties. For those reasons, the Court held that Goldner's negligence action was barred by the gist of the action doctrine.

**Honeywell International, Inc, f/k/a Honeywell, Inc. v. Archdiocese of Philadelphia, May Term 2001, No. 2321, 2001 Phila. Ct. Com. Pl. LEXIS 40 (C.C.P. Phila. Oct. 24, 2001) (Herron, J.)** (the Court held a negligence claim to be barred by the gist of the action doctrine).

This Opinion is available at <http://courts.phila.gov/pdf/cpcvcomprg/honeywell-1031.pdf>.

In Honeywell, the Court dismissed a negligence claim because the contract claim was the gist of the action. The action arose after Honeywell entered into a written agreement with the Archdiocese to provide water treatment service and temperature control maintenance to high schools and other buildings. Honeywell alleged that the Archdiocese failed to pay certain sums pursuant to the contract. The Archdiocese filed counterclaims of unjust enrichment and quantum meruit, alleging that Honeywell's lack of maintenance resulted in the necessity of hiring another contractor to address Honeywell's failure. The Archdiocese also filed a counterclaim in negligence.

The question before the Court was whether Honeywell's preliminary objections asserting the counterclaims' legal insufficiency should be sustained. The Court overruled Honeywell's preliminary objection asserting legal insufficiency of the unjust enrichment and quantum meruit claims. However, the Court dismissed the negligence claim because it was not the gist of the action.

After summarizing the two lines of cases relating to the gist of the action doctrine, Raab and Bash, the Court followed the approach set forth in Bash and restated in Phico. The Court concluded that the negligence claim was entirely dependent upon the express terms of the contract, and was merely a way of restating the breach of contract claim. The gravamen of the negligence claim was that Honeywell had improperly failed to

perform its contractual obligation through “dangerous repairs or lack thereof.” Similarly, the gravamen of the breach of contract claim was Honeywell’s “mismanagement and lack of maintenance.” The Court concluded that both alleged wrongs found their source in the contractual duties, which were maintenance and service. The claim for negligence was wholly dependent upon the express terms of the contract, and “not by the larger social policies embodied by the law of torts.”<sup>63</sup> Because the contract action was the gist of the action, the counterclaim for negligence was dismissed.

**The Flynn Company v. Peerless Door & Glass, Inc, November Term 2001, No. 0830, 2002 Phila. Ct. Com. Pl. LEXIS 61 (C.C.P. Phila. May 15, 2002) (Sheppard, J.)** (the Court held negligence, strict liability, and fraud claims to be barred by the gist of the action doctrine).

This Opinion is available at <http://courts.phila.gov/pdf/cpcvcomprg/flynn-05.pdf>.

In Flynn, the Court applied the gist of the action doctrine to dismiss negligence, strict liability, and fraud claims. Flynn managed an office building located at Philadelphia International Airport. Flynn executed a written contract with Peerless, under which Peerless was to replace forty existing windows with forty new acrylic windows. After the work was substantially completed, Flynn inspected the windows and found an alleged adhesion problem with the caulk. Flynn deemed the problem a “defect” as defined in the contract and retained \$7,987.00 from the total price of \$27,987.00. Flynn hired another contractor to carry out remedial measures.

The defective caulking continued from early 2001 through May of 2001, causing windows to crack and water to leak onto the premises. Flynn notified Peerless, but was ultimately required to hire others to make repairs. Flynn was told that the windows were of the wrong type, and should have been made of aluminum instead of acrylic. Flynn

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<sup>63</sup>Bash, 601 A.2d at 830.

eventually replaced all of the windows, and allegedly incurred costs to repair damage caused by water leakage. Flynn asserted claims of negligence, breach of implied warranties, breach of express warranty, strict liability, and fraud.

Peerless sought dismissal of the negligence, strict liability in tort, and fraud claims. Flynn alleged that the Defendants had a duty to use ordinary and reasonable care in providing and installing the windows and caulk. The Court stated, “merely using tort terms of art to describe defendants’ conduct does not make them actions in tort,” and cited Phico in applying the gist of the action doctrine:

[T]o be construed as a tort action, the wrong ascribed to the defendant must be the gist of the action with the contract being collateral. In addition,...a contract action may not be converted into a tort action simply by alleging that the conduct in question was done wantonly. Finally,...the important difference between contract and tort actions is that the latter lie from the breach of duties imposed as a matter of social policy while the former lie for the breach of duties imposed by mutual consensus.<sup>64</sup>

The Court held that the contract created the duties that were allegedly breached, so the gist of the action was a breach of contract. Furthermore, there was no social policy imposing a duty on Peerless to replace windows in a proper manner – the duty arose solely from the contract between the parties. The Court sustained Peerless’ objections and dismissed the negligence, strict liability, and fraud claims under the gist of the action doctrine.

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<sup>64</sup>Phico, 663 A.2d at 757.

**Eighth Floor, Inc. v. Terminal Industrial Corp., July Term 2003, No. 02855, 2003 Phila. Ct. Com. Pl. LEXIS 32 (C.C.P. Phila. Dec. 29, 2003) (Cohen, J.)** (the Court held a negligence claim to be barred by the gist of the action doctrine). This Opinion is available at <http://courts.phila.gov/pdf/cpcvcomprg/eighth-floor-op.pdf>.

In Eighth Floor, Inc., the Court relied on the gist of the action doctrine in dismissing a negligence claim. Eighth Floor, Inc. sued Terminal Industrial Corporation, Mount Corporation, and Kaplan Groll for breaching a lease. The three defendants filed preliminary objections, and the Court dismissed Eighth Floor's negligence claim against all Defendants. The claims against Mount and Groll were dismissed because neither was a party to the lease. The negligence claim against Terminal was dismissed because it was barred by the gist of the action doctrine: the only duty allegedly breached by Terminal was its contractual duty under the lease agreement. The fact that Terminal may have negligently, recklessly, or intentionally breached the contractual duty did not give rise to a tort claim, and only provided a basis for a breach of contract claim. The Court added that the economic loss doctrine provided additional grounds upon which to dismiss the negligence claims against the three defendants, since the damages claimed were solely for economic loss.

**Yorkwood, L.P. v. Kee Corporation, November Term 2002, No. 1703, 2004 Phila. Ct. Com. Pl. LEXIS 19 (C.C.P. Phila. April 13, 2004) (Cohen, J.)** (the Court held claims of negligent misrepresentation to be barred by the gist of the action doctrine). This Opinion is available at <http://courts.phila.gov/pdf/cpcvcomprg/021101703.pdf>.

In Yorkwood, the Court held that the gist of the action barred claims of negligent misrepresentation. Luis Basile had entered into a sales agreement with Kee Corporation to purchase a property in Philadelphia. Basile assigned his interest in the sale to Yorkwood. The contract was contingent upon Kee obtaining a permit from the City stating that it was legal to use the property as a restaurant. Kee obtained the permit by

representing to the City that the property had been used as a restaurant during the preceding three years. After the sale was closed, the City revoked the permit on the grounds that the property had not been used as a restaurant for three years. Yorkwood's appeal of the zoning decision was successful and it was issued a permit. As a result of the setbacks in obtaining the permit, Yorkwood alleged that it had suffered serious financial losses due to delays in renovations, and concessions made to secure the permit. Yorkwood brought three counts against Kee: breach of contract, unjust enrichment, and negligent misrepresentation.

Yorkwood's negligent misrepresentation claim was based upon an allegation that Kee had wrongly represented to it that the property could be used as a restaurant. The Court held that all claims of misrepresentation occurring after the agreement was executed were barred by the gist of the action doctrine.

**Rambo v. Greene, August Term 2004, No. 03894, 2005 Phila. Ct. Com. Pl. LEXIS 517 (C.C.P. Phila. February 28, 2005) (Jones, J.), rev'd, 906 A.2d 1232 (Pa. Super. 2006)** (claims alleging negligence, fraud and seeking punitive damages barred by gist of the action doctrine).

This Opinion is available at (<http://courts.phila.gov/pdf/cpcvcomprg/040803894.pdf>).

This case arose from a previous medical malpractice suit in which Defendant Ronald Greene, MD, refused to honor a subpoena from Plaintiff Kelly Rambo to provide expert testimony. Plaintiff's claims for breach of contract and breach of an implied contract were dismissed because the parties never reached an agreement that the doctor would testify; and there could be no such obligation against the expert's willing agreement.<sup>65</sup> Plaintiff's claims for negligence, fraud and professional malpractice were

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<sup>65</sup>“Because this Court has already determined that, under the circumstances at bar, an expert witness can not be compelled to give testimony against his will, any claims that

dismissed under the gist of the action doctrine, due to the reality that any possible obligation could only arise out of a contract.<sup>66</sup> Subsequently, the Superior Court reversed as to the implied contract claim and remanded with instructions that given the facts of this case an agreement could be inferred. The gist of the action holding was not raised on appeal.

**Danlin Mgmt. Group, Inc. v. Sch. Dist. of Phila., January Term 2005, No. 4527, 2005 Phila. Ct. Com. Pl. LEXIS 411 (C.C.P. Phila. August 29, 2005) (Jones, J.)** (negligent misrepresentation claim barred by gist of the action doctrine). This Opinion is available at (<http://courts.phila.gov/pdf/cpcvcomprg/050104527.pdf>).

Danlin Management Group (“Danlin”) entered into a contract with the School District of Philadelphia to provide advisory and support services. This suit arises from an alleged second agreement, purportedly entered pursuant to the original contract, on which Danlin performed but was not paid. Danlin brought claims grounded in contract and tort. The School District asserted both the gist of the action doctrine and the economic loss doctrine against the negligent misrepresentation claim. The negligent misrepresentation claim was based on communications with the School District suggesting that Danlin had secured both contracts, and that the School District later reneged on its promise. The Court reasoned that despite alternative factual scenarios surrounding the formation of any second agreement, the negligent misrepresentation claim was either barred by the gist of the action doctrine if the agreement was formed; or precluded by the economic loss doctrine if not formed.<sup>67</sup>

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Plaintiffs may have against Dr. Greene must be based upon the breach of a specific contractual agreement in order to survive.”

<sup>66</sup>eToll, 811 A.2d at 14-19.

<sup>67</sup>eToll, 811 A.2d at 19; David Pflumm Paving & Excavating, Inc., 816 A.2d at 1170.

**Samuel Grossi & Sons v. United States Fid. & Guar. Co., September Term 2004, No. 3590, 2005 Phila. Ct. Com. Pl. LEXIS 283 (C.C.P. Phila. June 27, 2005) (Sheppard, J.)**. (negligence claim barred by gist of the action doctrine). This Opinion is available at <http://courts.phila.gov/pdf/cpcvcomprg/040903590.pdf>.

During the construction of a baseball stadium, Plaintiff Samuel Grossi & Sons (“Grossi”) entered into two subcontracts, one for steel fabrication and one for steel erection. During construction, several delays were experienced and additional expenses were necessarily incurred by Grossi to complete its portion of the project. Parts of the expenses incurred were associated with the untimely review and response to questions regarding design drawings submitted by Grossi. Other expenses were associated with the increased costs that accompanied approved change orders.

Grossi allege that Defendant failed to adhere to its contractual obligations associated with the review and approval of design drawings, thus breaching its duty of care; which it claimed as negligence. A plaintiff is not permitted to bring an action on a contract and a tort action on the same claim, however, due to the gist of the action doctrine.<sup>68</sup> The Court therefore dismissed the negligence action and permitted proceedings only via the contract claim for alleged unpaid balances due on change orders.

**Cutting Edge Sports, Inc. v. Bene-Marc, Inc., March Term 2003, No. 01835, 2004 Phila. Ct. Com. Pl. LEXIS 30 (C.C.P. Phila. May 2, 2006) (Abramson, J.)** (negligence claim barred by gist of the action doctrine). This Opinion is available at <http://fjd.phila.gov/pdf/cpcvcomprg/030301835-050206.pdf>.

Cutting Edge Sports brought a breach of contract action alleging that Defendant insurance broker failed to procure liability insurance with participant coverage, and therefore the broker was unjustly enriched. The Court denied the broker’s motion to dismiss. Plaintiff subsequently filed a petition for leave to join two insurers as

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<sup>68</sup>eToll, 811 A.2d at 14-15.

Defendants, and to amend their class action complaint to add claims against Defendants for violating Pennsylvania's Unfair Trade Practices and Consumer Protection Law ("UTPCPL"), as well as for negligence.

The Court held joinder of additional Defendants was permitted, but the additional causes of action were not permitted. First, there was no actionable UTPCPL claim. Next, the negligence claim was not permitted because it violated the gist of the action doctrine. The Court stated that since the Plaintiffs had asserted claims for breach of the contractual duty to provide the promised insurance, an additional negligence claim based upon this breach was barred under the gist of the action doctrine.<sup>69</sup>

#### **B. CLAIMS NOT DISMISSED**

**Comsup Commodities, Inc. v. Osram Sylvania, Inc.**, February Term 2003, No. 01438, 2003 Phila. Ct. Com. Pl. LEXIS 25 (C.C.P. Phila. Dec. 3, 2003) (Cohen, J.) (the Court refused to dismiss misrepresentation claims at the preliminary objection stage where the existence of a contract was in dispute). This Opinion is available at <http://courts.phila.gov/pdf/cpcvcomprg/comsup-op.pdf>.

In Comsup, the Court refused to dismiss alternative tort claims because the existence of a contract was in question. Comsup Commodities, Inc. alleged that Osram Sylvania, Inc. negotiated to purchase quantities of tungsten from Comsup, but that Osram then refused to accept and pay for the tungsten. Comsup brought claims against Osram for breach of contract, promissory estoppel, and intentional and negligent misrepresentation. Osram raised preliminary objections that the gist of the action doctrine precluded Comsup from bringing claims for intentional and negligent misrepresentation. However, the Court refused to dismiss the alternative

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<sup>69</sup>Hart, 884 A.2d at 339-340.

misrepresentation claims at the preliminary stage in the proceedings because Osrarn denied the existence of the contract that Comsup claimed was breached.

For other cases discussing negligence see Atchison Casting Corp. v. Deloitte & Touche, LLP, July Term 2002, No. 003193, 2003 Phila. Ct. Com. Pl. LEXIS 11 (C.C.P. March 14, 2003) (Jones, J.) (discussed below under breach of fiduciary duty); Nicholas A. Clemente, Esq. and Nicholas A. Clemente, P.C., on behalf of themselves and all others similarly situated v. Republic First Bank, December Term 2002, No. 00802, 2003 Phila. Ct. Com. Pl. LEXIS 23 (C.C.P. Phila. May 9, 2003) (Jones, J.) (discussed above under fraud cases); New Hope Books, Inc. v. Datavision Prologix, Inc., July Term 2001, No. 1741, 2003 Phila. Ct. Com. Pl. LEXIS 62 (C.C.P. Phila. June 24, 2003) (Cohen, J.) (discussed above under fraud cases); City of Philadelphia v. Human Services Consultants, II, Inc., March Term 2003, No. 0950, 2004 Phila. Ct. Com. Pl. LEXIS 26 (C.C.P. Phila. March 23, 2004) (Jones, J.) (discussed above under fraud cases); Philadelphia Regional Port Authority v. Carusone Construction Company, Summit Structures LLC, July Term 2003, No. 02701, 2004 Phila. Ct. Com. Pl. LEXIS 42 (C.C.P. Phila. April 14, 2004) (Sheppard, J.) (discussed above under fraud cases); Cutting Edge Sports, Inc. v. Bene-Marc, Inc., March Term 2003, No. 01835, 2004 Phila. Ct. Com. Pl. LEXIS 30 (C.C.P. Phila. May 2, 2006) (Abramson, J.) (discussed in insurance cases below); Acme-Hardesty Co. v. Wenger, February Term 2001, No. 1799, 2001 Phila. Ct. Com. Pl. LEXIS 4 (C.C.P. Phila. Jan. 31, 2003) (Sheppard, J.) (discussed below under insurance cases); Greencort Condo. Ass'n v. Greencort Partners, January Term 2004, No. 4045, 2004 Phila. Ct. Com. Pl. LEXIS 57 (C.C.P. Phila. April 30, 2004) (Cohen, J.) (discussed above under fraud cases); Bricks, Boards & Gargoyles v. Plant Realty Co., March Term 2004, No. 02295, 2004 Phila. Ct. Com. Pl. LEXIS 64 (C.C.P. Phila. December 7, 2004) (Cohen, J.) (discussed below under conversion cases); Acme-Hardesty Co. v. Wenger, February Term 2001, No. 1799, 2001 Phila. Ct. Com. Pl. LEXIS 4 (C.C.P. Phila. Jan. 31, 2003) (Sheppard, J.) (discussed under insurance cases below); OneBeacon Ins. Group v. Liberty Mut. Ins., August Term 2004, No. 02670, 2005 Phila. Ct. Com. Pl. LEXIS 25 (C.C.P. Phila. January 21, 2005) (Abramson, J.) (discussed under insurance cases below).

### **III. BREACH OF FIDUCIARY DUTY CASES**

#### **A. CLAIMS DISMISSED**

**Atchison Casting Corp. v. Deloitte & Touche, LLP, July Term 2002, No. 003193, 2003 Phila. Ct. Com. Pl. LEXIS 11 (C.C.P. Phila. March 14, 2003) (Jones, J.)** (the Court held claims of fraud, negligent misrepresentation, and breach of fiduciary duty to be barred by the gist of the action doctrine). This Opinion is available at <http://courts.phila.gov/pdf/cpcvcomprg/atchison303.pdf>.

In Atchison, the Court granted preliminary objections in holding that the gist of the action doctrine barred claims of fraud, misrepresentation, and breach of fiduciary duty. Atchison Casting Corporation had hired the accounting firm Deloitte & Touche to audit its financial statements for the years 1996 through 2000. During that period of time, an officer of Atchison had misappropriated funds, submitted incorrect financial information to Atchison, and “cooked the books” of the subsidiary. Atchison sued Deloitte for failing to uncover the wrongdoings, which caused it to suffer significant economic and reputational harm. Deloitte counterclaimed that Atchison had caused its own harm and caused harm to Deloitte by immediately failing to inform it of the suspicious activities. Atchison filed preliminary objections against Deloitte’s counterclaims of fraud, negligent misrepresentation, breach of covenant of good faith and fair dealing, and aiding and abetting fraud, but did not object to Deloitte’s breach of contract claim.

Citing eToll and Phico, the Court dismissed the fraud and negligent misrepresentation claims because they were barred by the gist of the action doctrine. Atchison had contracted with Deloitte to deal honestly with Deloitte and fully disclose information. Therefore, Deloitte’s fraud and negligent misrepresentation claims were actually claims that Atchison had breached its contract with Deloitte. The Court stated that the manner in which Atchison committed the alleged breach was irrelevant; it was

simply a breach of contract, and the gist of Deloitte's action sounded in contract. Deloitte agreed to dismiss its claims for breach of covenant of good faith and fair dealing and aiding and abetting fraud.

Deloitte had also filed a third-party complaint against current and former Atchison employees, claiming that they had breached their fiduciary duties to Atchison, which resulted in a breach of duty to Deloitte. The Court relied on the gist of the action doctrine again in dismissing this claim. Any alleged fiduciary duties arose out of these individuals' employment contracts with Atchison. Therefore, Deloitte's breach of fiduciary duty claims, "if any," sounded in contract, not tort.

**Mercy Health System of Southeastern Pennsylvania v. Metropolitan Partners Realty LLC**, November Term 2001, No. 3046, 2003 Phila. Ct. Com. Pl. LEXIS 55 (C.C.P. Phila. July 10, 2003) (Jones, J.) (the Court held a breach of fiduciary duty claim to be barred by the gist of the action doctrine). This Opinion is available at <http://courts.phila.gov/pdf/cpcvcomprg/mercy703.pdf>.

In Mercy, the Court held that the gist of the action doctrine barred a breach of fiduciary duty claim. Mercy Health Systems of Southeastern Pennsylvania ("Mercy") had entered into two fifteen-year agreements with Metropolitan Partners Realty LLC, Philadelphia Wellness Partners, Anchor Health Properties, and Metropolitan Partners, Ltd. Although the agreements were each labeled "Lease," Mercy contended that the relationship went far beyond that of the traditional landlord/tenant. Mercy asserted that the agreements provided the basis of a joint undertaking with the Metropolitan Partners to create a one-stop shopping integrated healthcare and retail project. Mercy believed that Metropolitan Partners failed to perform its duties in accordance with the agreements' terms. It attempted to address the problems by requesting a re-negotiation of the

agreements, but the parties were unable to resolve the matter; and Mercy ultimately commenced this action.

Mercy's complaint asserted claims for rescission, declaratory judgment, breach of contract, breach of implied contract, breach of the implied covenant of good faith and fair dealing, breach of fiduciary duty, and unjust enrichment. Metropolitan Partners filed an answer with affirmative defenses to the complaint, and a motion for judgment on the pleadings. The Court held that four claims (rescission, declaratory judgment, breach of contract, and breach of implied contract) survived the motion to dismiss, but granted the motion in favor of Metropolitan on the last three claims (breach of the implied covenant of good faith and fair dealing, breach of fiduciary duty, and unjust enrichment).

The Court held that the breach of fiduciary duty claim was barred by the gist of the action doctrine. The basis of the alleged fiduciary duty was Mercy's assertion that the relationship with Metropolitan was not that of landlord/tenant, but one of a joint venture partnership. The Court did not address whether there was a fiduciary relationship between the parties, because even assuming there was such a relationship, the gist of the action doctrine barred the claim. The Court applied the test used in eToll, and concluded that the breach of fiduciary duty claim was based on Metropolitan's alleged breaches under the agreements. Therefore, the agreements were central to the breach of fiduciary duty claim, instead of collateral, and the claim was dismissed under the gist of the action doctrine.<sup>70</sup>

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<sup>70</sup>The Court dismissed the breach of the implied duty of good faith and fair dealing claim because a breach of the covenant of good faith is nothing more than a breach of contract claim, and an alleged breach of the implied duty does not provide an independent ground for liability. The Court dismissed the unjust enrichment claim because there were express written agreements that governed the rights and obligations between the parties.

## B. CLAIMS NOT DISMISSED

**Firstrust Bank v. DiDio, March Term 2005, No. 200, 2005 Phila. Ct. Com. Pl. LEXIS 376 (C.C.P. Phila. July 29, 2005) (Jones, J.)** (breach of fiduciary duty claim not barred by gist of the action doctrine). This Opinion is available at (<http://courts.phila.gov/pdf/cpcvcomprg/050300200.pdf>).

Firstrust Bank filed a complaint alleging violations of the Uniform Trade Secrets Act, breach of fiduciary duty, unjust enrichment, fraudulent misrepresentation and nondisclosure, negligent misrepresentation, conspiracy, and conversion against several of its officers and employees. The officers and employees had devised a plan to use the customer lists and other trade secrets to create a competing financial services firm, but filed preliminary objections to the bank's complaint.

Defendants asserted that the claim for breach of fiduciary duty was barred by the gist of the action doctrine because the fiduciary duty to which Defendants were bound was that set forth in the "ethics code," a signed statement of various contractual obligations. Defendants argued that this converts any fiduciary duty claim into one grounded in contract and is therefore barred by the gist of the action doctrine. Plaintiff bank contended that each employee maintained a position within the organization which gave rise to a fiduciary duty apart from or in addition to points laid out in the ethics code. The Court agreed that the fiduciary duty claim was not subsumed by the ethics code and therefore was not barred by the gist of the action doctrine.

For other cases discussing fiduciary duty see Temple Univ. Health Sys. v. Nat'l Union Fire Ins. Co., February Term 2004, No. 1547, 2005 Phila. Ct. Com. Pl. LEXIS 21 (C.C.P. Phila. January 7, 2005) (Jones, J.), aff'd in part, rev'd in part, 898 A.2d 1143 (Pa. Super. 2006) (without opinion) (discussed below under insurance cases); Worldwideweb Networx Corp. v. Entrade, Inc., December Term 2001, No. 3839, 2003 Phila. Ct. Com. Pl. LEXIS 84 (C.C.P. Phila. Feb. 19, 2003) (Cohen, J.) (discussed below under Other Cases); Temple Univ. Health Sys. v. Nat'l Union Fire Ins. Co., February Term 2004, No.

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1547, 2005 Phila. Ct. Com. Pl. LEXIS 21 (C.C.P. Phila. January 7, 2005) (Jones, J.), aff'd in part, rev'd in part, 898 A.2d 1143 (Pa. Super. 2006) (without opinion) (discussed below under insurance cases).

#### **IV. TORTIOUS INTERFERENCE CASES**

##### **A. CLAIMS DISMISSED**

**BDGP, Inc., t/a Claybar Development, L.P. v. Independent Mortgage Co., January Term 1999, No. 0812, 2004 Phila. Ct. Com. Pl. LEXIS 79 (C.C.P. Phila. March 31, 2004) (Cohen, J.)** (the Court held claims of tortious interference with contract relations to be barred by the gist of the action doctrine). This Opinion is available at <http://courts.phila.gov/pdf/cpcvcomprg/990100812.pdf>.

In BDGP, the Court held that claims for tortious interference with contract relations were barred by the gist of the action doctrine. The Defendants, a mortgage company, Independent Mortgage Co. (“IMC”), an individual, Michael Karp (“Karp”), and a partnership, Ithaca Partnership (“Ithaca”), filed a motion for partial summary judgment in an action brought by developers BDGP, Inc., t/a Claybar Development (“Claybar”), and JPA Development, Inc. The action was commenced in 1999, and concerned the purchase of real estate and related agreements. The complaint referenced six agreements and contained five claims (one breach of contract and four tort claims) against each Defendant, and on behalf of each developer individually.

Claybar’s claims of tortious interference against IMC and Ithaca were barred by the gist of the action doctrine. The Court noted that there may be recovery for tortious interference with contracted relations where a defendant has interfered with the prospective contracts or business relationships between third parties and the plaintiff.<sup>71</sup>

The Court held:

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<sup>71</sup>Neel v. Allegheny County Memorial Park, 137 A.2d 785, 787 (Pa. 1958) and Locker v. Hudson Coal Company, Locker v. Hudson Coal Company, 55 Lack. Jur. 85, 87 Pa. Dist. & Co. 264, 267, (1953).

[when] the allegations and evidence only disclose that defendant breached his contracts with plaintiff and that as an incidental consequence thereof plaintiff's business relationships with third parties have been affected, an action lies only in contract for defendant's breaches, and the consequential damages recoverable, if any, may be adjudicated only in that action.<sup>72</sup>

The Court reasoned that the entire basis of Claybar's tortious interference claims stemmed from IMC's failures to honor its commitments under the agreements. These failures allegedly caused Claybar to breach numerous obligations and contracts with third parties. In addition, there were no allegations in the complaint that distinguished the breach of contract claims from the tortious interference claims. If IMC and Ithaca had performed in accordance with their obligations under the agreements, there would have been no basis for the tort claims. Because Claybar's tortious interference claims were incidental to the contract claims, those claims fell squarely into the gist of the action doctrine.

**Allan J. Nowicki v. First Union National, April Term 2001, No. 0763, 2004 Phila. Ct. Com. Pl. LEXIS 110 (C.C.P. Phila. April 15, 2004) (Cohen, J.)** (the Court held a claim of tortious interference with contract to be barred by the gist of the action doctrine). This Opinion is available at <http://courts.phila.gov/pdf/cpcvcomprg/010400763.pdf>.

In Nowicki, the Court held that the gist of the action doctrine barred a claim of tortious interference with contract. Allan and Dianne Nowicki purchased nearly 2,000 acres of land in Wayne County in 1990, and First Union became the holder of the notes and mortgages. The Nowickis defaulted on the notes and First Union commenced foreclosure proceedings. After extensive litigation, First Union assigned its interest in the notes and mortgages to Stockport Forest Preservation.

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<sup>72</sup>Glazer v. Chandler, 200 A. 2d 416, 418 (Pa. 1964).

The Nowickis believed that First Union had committed numerous wrongful acts in its efforts to foreclose on the property. They commenced this action, which contained thirteen causes of action against First Union and Stockport: breach of contract, conversion, breach of the covenant of good faith and fair dealing, tortious interference with contract, defamation, slander of title, two claims of negligence, civil conspiracy, unjust enrichment, negligent misrepresentation, fraudulent misrepresentation, and breach of contract. The Nowickis alleged that First Union had breached a global settlement agreement that would have allowed for reduction in their debt and possible retention of the property.

The Court held that First Union was entitled to summary judgment on all counts. The claim of tortious interference with contract was barred by the gist of the action doctrine. The Nowickis had alleged that First Union tortiously interfered with their contractual relations by assigning its rights to Stockport. The time frame for this claim was after the global settlement was reached between the parties. The Court held that if the Nowickis were arguing that First Union had forfeited its right to make the assignment under the global settlement agreement, then the claim was barred by the gist of the action doctrine. Under that claim, the breach of the settlement agreement was the triggering act of the tortious interference claim, thus the claim was barred by the gist of the action doctrine.

**Advantage Systems, Inc. v. Bentley Systems, Inc., October Term 2005, No. 04908, 2006 Phila. Ct. Com. Pl. LEXIS 360 (C.C.P. Sept. 19, 2006) (Sheppard, J.)** (the Court held tortious interference with contract, fraud, and civil conspiracy claims to be barred by the gist of the action doctrine). This Opinion is available at <http://courts.phila.gov/pdf/cpcvcomprg/051004908.pdf>.

In Advantage Systems, the Court relied on the gist of the action doctrine in dismissing tort claims. In 1998, Advantage and Bentley had entered into a written contract: Advantage was to sell Bentley's products to Advantage's client base; and Bentley's authorized resellers would not in any way compete with Advantage by selling competing products or services, or interfering with Advantage's existing accounts and clientele. Pursuant to that agreement, Bentley agreed to compensate Advantage for the sale of every product that Advantage was authorized to sell, regardless or whether or not Advantage actually made the sale. The agreement also contained a binding arbitration provision.

The parties' business relationship deteriorated and was eventually terminated, allegedly by Bentley, in 2000. There was an arbitration proceeding in which the arbitrator found for Advantage on its breach of contract claim and dismissed the tort claims. Advantage then brought this action in which it re-asserted its claims against Bentley for tortious interference with contract, fraud, and civil conspiracy (the tort claims). Bentley filed preliminary objections that the tort claims were subject to arbitration, barred by the doctrines of res judicata and gist of the action, and were legally insufficient.

The Court held that, in addition to being arbitrable, Advantage's tort claims were subject to dismissal under the gist of the action doctrine because Advantage's tort claims arose from the agreement – the duties that Bentley had allegedly breached were created

and grounded in the contract. The tort claims were merely a re-casting of the breach of contract claim, upon which Advantage had already prevailed at arbitration. Therefore, the tort claims were dismissed under the gist of the action doctrine.

**B. CLAIMS NOT DISMISSED**

**Amico v. Radius Communications, January Term 2000, No. 1793, 2001 Phila. Ct. Com. Pl. LEXIS 88 (C.C.P. Phila. Jan. 9, 2001) (Herron, J.)** (the Court held preliminary objections based on the gist of the action doctrine to be without merit). This Opinion is available at <http://courts.phila.gov/pdf/cpcvcomprg/amico.pdf>.

In Paolo Amico, the Court held that the gist of the action doctrine did not bar certain tort claims. In the summer of 1999, WOW Enterprises and Paolo Amico (WOW's president) entered into a contract with Radius Communications. Radius was to broadcast a television show, "Cooking with Mamma, Old World Secrets," featuring Amico, for fifty-two weeks. Radius also promised to produce several promotional spots. Allegedly, Radius failed to broadcast as many spots as it had promised, and many of the spots aired in a technically defective manner. Numerous other shortcomings were alleged against Radius, including failure to correct technical difficulties, intentional withholding of transmissions, and improprieties in airing the spots. The errors allegedly interfered with merchandising plans and caused sponsors to lose interest and drop their sponsorship. WOW and Amico brought causes of action for breach of contract, interference with existing and prospective contractual relations, fraud, and punitive damages. Radius filed preliminary objections to all of the claims.

WOW and Amico asserted that the tort claims were barred by the gist of the action doctrine. The Court noted that the misfeasance/nonfeasance test set forth in

Raab,<sup>73</sup> which was cited by WOW and Amico, was no longer valid. Instead, the Court cited Phico:

[T]o be construed as a tort action, the wrong ascribed to the defendant must be the gist of the action with the contract being collateral. In addition,...a contract action may not be converted into a tort action simply by alleging that the conduct in question was done wantonly. Finally,...the important difference between contract and tort actions is that the latter lie from the breach of duties imposed as a matter of social policy while the former lie for the breach of duties imposed by mutual consensus.<sup>74</sup>

The Court held that the tort claims were not barred by the gist of the action doctrine because the alleged improper conduct was independent of the contract. By failing to properly broadcast the show, Radius had intentionally interfered with WOW and Amico's sponsorship agreements. The fact that Radius's alleged actions violated the contract was irrelevant: "when a party purposefully brings about the demise of the existing or prospective contract of a complainant, the fact that its actions may give rise to additional claims is of no import." The Court noted further that the contract did not appear to cover the quality of the show's broadcast or Radius's promise to produce the spots. Therefore, the alleged inferior quality of the broadcasts and the spots gave rise to a fraud action unrelated to the contract. The Court held the objections based on the gist of the action doctrine to be without merit.<sup>75</sup>

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<sup>73</sup>412 A.2d at 639 (1979) (whether there was an improper performance of a contractual obligation (misfeasance) rather than the mere failure to perform (nonfeasance)).

<sup>74</sup>Phico, 663 A.2d at 757.

<sup>75</sup>The Court also overruled objections based on the economic loss doctrine, which does not bar common law fraud claims where the misrepresentation is intentionally false.

**Advanced Surgical Services, Inc. v. Innovasive Devices, Inc.**, August Term 2001, No. 1637, 2001 Phila. Ct. Com. Pl. LEXIS 86 (C.C.P. Phila. Jan. 12, 2001) (Herron, J.) (the Court overruled objections based on the gist of the action doctrine). This opinion is available at <http://courts.phila.gov/pdf/cpcvcomprg/advanced.pdf>.

In Advanced Surgical Services, the Court overruled objections based on the gist of the action doctrine. Innovasive Devices, Inc. (“Innovasive”) had entered into an agreement with Advanced Surgical Services (“Advanced Surgical”) in which Advanced Surgical was to serve as an Innovasive sales representative. Innovasive was also to provide Advanced Surgical with a \$2,000 monthly allowance to hire a sales subagent. According to the agreement’s change-in-control provision, if another party were to buy out Innovasive, that party would have the option of either continuing the contract or paying Advanced Surgical a certain amount relative to the remainder of the contract.

Mitek Products (“Mitek”) acquired Innovasive and sent Advanced Surgical a letter confirming the termination of their relationship. However, Mitek allegedly failed to pay Advanced Surgical the required termination fee and withheld subagent payments. Also, Christine Wells, a Mitek agent, allegedly attempted to induce Advanced Surgical customers not to place orders until after April of 2000, when Mitek and Innovasive would have no commission obligations. Furthermore, Anthony Dale, another Mitek agent, allegedly spoke to one of Advanced Surgical’s customers and accused Robert Morris, an Advanced Surgical agent, of conversion. Advanced Surgical brought causes of action for breach of contract, interference with contractual relations, defamation, and civil conspiracy. The Defendants filed preliminary objections attacking the legal sufficiency of the tort counts.

The Defendants contended that the gist of the action doctrine precluded Advanced Surgical from bringing actions in tort. The Court cited Phico:

[T]o be construed as a tort action, the wrong ascribed to the defendant must be the gist of the action with the contract being collateral. In addition,...a contract action may not be converted into a tort action simply by alleging that the conduct in question was done wantonly. Finally,...the important difference between contract and tort actions is that the latter lie from the breach of duties imposed as a matter of social policy while the former lie for the breach of duties imposed by mutual consensus.<sup>76</sup>

The Court overruled the preliminary objection because Advanced Surgical had alleged improper conduct independent of the agreement: Wells' and Dale's actions, and the Defendants' conspiracy to interfere with Advanced Surgical's business relations, were all actions that had no connection to the contract. Therefore, the objections based on the gist of the action doctrine were overruled.

For other cases discussing tortious interference see Penn's Market v. Harleysville Insurance Company, February Term 2005, No. 0557, 2006 Phila. Ct. Com. Pl. 193 (C.C.P. Phila. May 3, 2006) (Abramson, J.) (discussed under insurance cases below); Gemini Bakery Equip. v. Baktek, February Term 2004, No. 3204, 2005 Phila. Ct. Com. Pl. LEXIS 121 (C.C.P. Phila. April 11, 2005) (Abramson, J.) (discussed under conversion cases below).

## **V. UNFAIR TRADE PRACTICES AND CONSUMER PROTECTION LAW**

**Pennsylvania Chiropractic Association v. Independence Blue Cross., July Term 2001, No. 2705, 2001 Phila. Ct. Com. Pl. LEXIS 112 (C.C.P. Phila. July 16, 2001) (Herron, J.) (reconsideration denied)** (the Court held the Raab misfeasance/nonfeasance dichotomy remained a valid test for claims brought under the Pennsylvania Unfair Trade Practices and Consumer Protection Law).

This Opinion is available at <http://courts.phila.gov/pdf/cpcvcomprg/pachiro.pdf>.

In Pennsylvania Chiropractic Association, the Court held that the Raab test<sup>77</sup> remained a valid test for claims brought under the Pennsylvania Unfair Trade Practices and Consumer Protection Law ("UTPCPL"). The Plaintiffs were two associations

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<sup>76</sup>Phico, 663 A.2d at 757.

<sup>77</sup>Raab, 412 A.2d at 639 (the test used to determine if there exists a cause of action in tort growing out of a breach of contract is whether there was an improper performance of an obligation, misfeasance, which sounds in contract; rather than the mere failure to perform, nonfeasance, which sounds in tort).

representing chiropractors in Pennsylvania and southern New Jersey (PCA and SNJS), four doctors of chiropractic medicine, and two patients. The Defendants were Independence Blue Cross (IBC) and its subsidiaries. The Plaintiffs brought a class action against IBC and its subsidiaries for breach of contract, breach of an implied duty of good faith and fair dealing, breach of fiduciary duty, and breach of the Pennsylvania Unfair Trade Practices and Consumer Protection Law. The providers alleged that they were denied payment for covered services under the insurer's health insurance plan; and the subscribers alleged that they were denied coverage for medically necessary chiropractic care.

As to the UTPCPL claim, the Defendants objected on the grounds that the claim was based on IBC's policy of improperly denying necessary chiropractic care, and that such a claim may only be allowed for misfeasance, not mere nonfeasance. The Plaintiffs responded that the misfeasance/nonfeasance dichotomy had been expressly rejected in Phico, and that even if the test had merit, they had alleged misfeasance on the part of the defendants. The Court stated that the purpose of the UTPCPL was to protect the public from fraud and unfair or deceptive business practices,<sup>78</sup> and cited the Pennsylvania Superior Court: "nonfeasance alone is not sufficient to raise a claim pursuant to the [UTPCPL]."<sup>79</sup>

The Court concluded that, notwithstanding Plaintiffs' reliance on Phico, the misfeasance/nonfeasance distinction appeared to remain a valid test for claims under the UTPCPL. In Phico, the Court expressly rejected Raab's misfeasance/nonfeasance distinction for determining when claims in tort may be brought alongside claims in

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<sup>78</sup>Keller v. Volkswagen of America, Inc., 733 A.2d 642, 646 (Pa. Super. 1999).

<sup>79</sup>Gordon v. Pennsylvania Blue Shield, 548 A.2d 600, 604 (Pa. Super. 1988).

contract. Instead, the Phico Court upheld the gist of the action test, which allows for tort claims where the contract is merely collateral.<sup>80</sup> Here, the Court held that the Phico decision was not dispositive for assessing a claim under the UTPCPL, which involves a statutory remedy and does not merely arise out of common law tort claims.<sup>81</sup>

Contrary to the defendants' argument, the subscriber plaintiffs had alleged more than a failure to reimburse them or to provide them with the benefits to which they believed they were entitled pursuant to the agreements. The Plaintiffs had alleged that the Defendants improperly limited chiropractic care by relying on undisclosed and improper medical guidelines, which limited subscribers' access to care; improperly denied care for certain "medically necessary" treatments; imposed arbitrary limits and designations on "chronic" versus "acute" conditions; allow non-qualified personnel to make treatment decisions; misrepresented the terms and conditions of the health care plans; and placed their financial needs over the health care needs of their subscribers. The Court held that these allegations, in their entirety, could rise to the level of misfeasance in order to state a claim under the UTPCPL. Therefore, the objection to the UTPCPL claim was overruled.<sup>82</sup>

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<sup>80</sup>Phico, 663 A.2d at 757.

<sup>81</sup>In Tenos v. State Farm Ins. Co., 716 A.2d 626, 631 (Pa. Super. 1998), a post-Phico case, the Court upheld the Gordon test requiring allegations of misfeasance rather than mere nonfeasance to state a cause of action under the UTPCPL.

<sup>82</sup>Judge Herron also addressed the misfeasance/nonfeasance UTPCPL standard in Solarz v. DaimlerChrysler Corp., April Term 2001, No. 2033, 2002 Phila. Ct. Com. Pl. LEXIS 34 (C.C.P. Phila. March 13, 2002), <http://fjd.phila.gov/pdf/cpcvcomprg/solarz3.pdf>.

## VI. EMOTIONAL DISTRESS CASES

**Legion Insurance Company v. Jan W. Doeff, MD**, May Term 2000, No. 3174, 2001 Phila. Ct. Com. Pl. LEXIS 97 (C.C.P. Phila. Dec. 18, 2001) (Sheppard, J.) (the Court held that emotional distress claims were not barred by the gist of the action doctrine). This Opinion is available at <http://courts.phila.gov/pdf/cpcvcomprg/legio-op.pdf>.

In Legion Insurance Company, the Court held that the gist of the action doctrine did not bar intentional and negligent infliction of emotional distress claims. Doeff was a licensed psychiatrist who was sued for malpractice by one of his patients, Elizabeth Liss, and her husband. Legion, Doeff's insurance carrier, originally agreed to defend Doeff against the Lisses' claims. However, Doeff refused to comply with Legion's request for a confirmation of answers regarding record keeping practices, which he had previously given in a policy renewal questionnaire. This prompted Legion to withdraw its defense of him less than seven weeks before trial. Legion asserted that the withdrawal was based on Doeff's alleged refusal to cooperate, as well as the alleged misrepresentations on his renewal questionnaire. Doeff was represented by personal counsel on the opening day of trial.

Legion brought this action against Doeff for expenses incurred in its defense of him in the Liss action. Doeff counterclaimed and asserted claims of breach of contract, breach of the covenant of good faith and fair dealing, breach of fiduciary duty, violations of Pennsylvania's Unfair Trade Practices and Consumer Protection Law, statutory bad faith, intentional infliction of emotional distress, and negligent infliction of emotional distress.

Legion asserted preliminary objections to the counterclaim, and argued that Doeff's emotional distress claims were barred by the economic loss and gist of the action doctrines. The purpose of the economic loss doctrine, as adopted in Pennsylvania, is

“maintaining the separate spheres of the law of contract and tort.”<sup>83</sup> Pennsylvania’s version of the doctrine precludes recovery for economic losses in a negligence action where the plaintiff has suffered no physical or property damage.<sup>84</sup> Here, the counterclaim alleged that Doeff suffered physical harm. As a result, the economic loss doctrine did not bar Liss’s claims.

Upon addressing the gist of the action, the Court cited Phico:

[T]o be construed as a tort action, the wrong ascribed to the defendant must be the gist of the action with the contract being collateral. In addition,...a contract action may not be converted into a tort action simply by alleging that the conduct in question was done wantonly. Finally,...the important difference between contract and tort actions is that the latter lie from the breach of duties imposed as a matter of social policy while the former lie for the breach of duties imposed by mutual consensus.<sup>85</sup>

Doeff asserted in the counterclaim that any contract Doeff had with Legion was collateral to Legion’s conduct. The Court concluded, however, that Legion’s purported attempt to harass Doeff into signing a sworn affidavit, and its alleged violation of the Rules of Professional Conduct, would be independent of and unrelated to Doeff’s insurance policy (the contract). Therefore, the Court held that the gist of the action doctrine did not bar Doeff’s emotional distress claims against Legion.

## **VII. STRICT LIABILITY CASES**

See New Hope Books, Inc. v. Datavision Prologix, Inc., July Term 2001, No. 1741, 2003 Phila. Ct. Com. Pl. LEXIS 62 (C.C.P. Phila. June 24, 2003) (Cohen, J.) (discussed above under fraud cases); The Flynn Company v. Peerless Door & Glass, Inc., Ed Pratt, Bunker Plastics, Inc., and Laird Plastics, Inc., November Term 2001, No. 0830, 2002 Phila. Ct. Com. Pl. LEXIS 61 (C.C.P. Phila. May 15, 2002) (Sheppard, J.) (discussed above under negligence cases).

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<sup>83</sup>New York State Elec. & Gas Corp. v. Westinghouse Elec. Corp., 564 A.2d 919, 925 (Pa. Super. 1989).

<sup>84</sup>Spivack v. Berks Ridge Corp., 586 A.2d 402, 405 (Pa. Super. 1991).

<sup>85</sup>Phico, 663 A.2d at 757.

## VIII. INSURANCE CASES

**Penn's Market I v. Harleysville Insurance Company, February Term 2005, No. 0557, 2006 Phila. Ct. Com. Pl. 193 (C.C.P. Phila. May 3, 2006) (Abramson, J.)** (the Court held that the gist of the action doctrine excused an insurance company from defending a claim for tortious interference with business relations). This Opinion is available at <http://courts.phila.gov/pdf/cpcvcomprg/050200557.pdf>.

In Penn's Market I, the Court held that the gist of the action doctrine excused insurance company Harleysville from any duty to defend a claim for tortious interference with business relations. Harleysville insured Penn's Market, owner and operator of a retail shopping complex. In the underlying litigation, Penn's Market was sued by Chanda, a corporation that had entered into a five-year lease with Penn's Market to operate an ice cream store. After Chanda changed the name of its store, Penn's Market refused to post the new name on advertising signs, removed Chanda's existing signs, blocked Chanda from using trash dumpsters, and excluded Chanda from the shopping center's promotional and marketing efforts. Chanda's complaint against Penn's Market contained three counts: breach of contract, breach of the covenant of good faith and fair dealing, and tortious interference with plaintiff's business relations.

Penn's Market tendered its defense of the Chanda litigation to Harleysville, and Harleysville refused to defend. Penn's Market brought this action seeking a defense. The Court held that Harleysville did not have to defend the underlying breach of contract claim because general liability insurance policies do not apply to claims based on breach of contract.<sup>86</sup> The Court further held that Harleysville did not have to defend for breach

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<sup>86</sup>See Redevelopment Authority of Cambria County v. International Insurance Company, 685 A.2d 581 (Pa. Super. 1996) (the purpose of general liability policies is to protect the insured from liability for essentially accidental injury to the person or property of another).

of the covenant of good faith and fair dealing because it was a “carbon copy” of the breach of contract claim.<sup>87</sup>

Based on the gist of the action doctrine, the Court held that Harleysville did not have to defend the claim for tortious interference with business relations because the tort-based claim was merely a replication of the breach of contract claim. The courts have barred tort claims:

- (1) arising solely from a contract between the parties;
- (2) where the duties allegedly breached were created and grounded in the contract itself;
- (3) where the liability stems from a contract; or
- (4) where the tort claim essentially duplicates a breach of contract claim or the success of which is wholly dependent on the terms of a contract.<sup>88</sup>

Applying this test to the facts underlying Chanda’s complaint, the court concluded that the tortious interference claim arose solely from the lease agreement; the duties allegedly breached were created by and grounded in the contract itself; liability would have stemmed from the lease agreement alone; and the tortious interference claim essentially duplicated the breach of contract claim. Therefore, Harleysville had no duty to defend the claim of tortious interference with business relations.<sup>89</sup>

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<sup>87</sup>See McHale v. NuEnergy Group, No. 01-4111, 2002 U.S. Dist. LEXIS 3307 (E.D. Pa. Feb. 27, 2002) (Pennsylvania law does not recognize a claim for breach of covenant of good faith and fair dealing as an independent cause of action separate from the breach of contract claim because actions forming the basis of the breach of contract claim are essentially the same as those forming the basis of the bad faith claim).

<sup>88</sup>Hart, 884 A.2d at 340.

<sup>89</sup>See also the discussion of Kvaerner Metals Div. of Kvaerner U.S., Inc. v. Commer. Union Ins. Co., in the Introduction.

**Drexel Univ. v. National Union Fire Ins. Co., October Term 2004, No. 02442, 2005 Phila. Ct. Com. Pl. LEXIS 197 (C.C.P. Phila. May 4, 2005) (Abramson, J.)** (tort claims barred by gist of the action doctrine). This Opinion is available at <http://courts.phila.gov/pdf/cpcvcomprg/041002442.pdf>.

A corporation sued a Drexel University professor for distributing a proprietary polymer fiber after agreeing in writing to keep it confidential. National Union Fire Insurance Company of Pittsburgh, PA (“NUFIC”) refused to defend and indemnify the Drexel professor in two Federal District Court cases; one in New Mexico and one in Pennsylvania. This refusal was based on policy exclusions for claims arising out of breaches of contract or misappropriation of trade secrets. In the present action, Drexel University sought a declaratory judgment in attempt to have the insurer defend and indemnify the professor under two “school leader errors and omissions” policies. NUFIC moved for judgment on the pleadings.

The underlying claims asserted by the corporation against Drexel included breach of contract, idea misappropriation, conversion, unjust enrichment and other torts. In the underlying case, the Pennsylvania Federal District Court ruled that the alleged breach was contractual and barred the tort claims, misappropriation of ideas claim and unjust enrichment claim under the gist of the action doctrine. The Commerce Court reiterated the Pennsylvania District Court’s dismissal in this declaratory judgment action, citing the standards set forth in Etol,<sup>90</sup> and held that because the Federal Court had already determined that the claims in that suit were contractual in nature, the policy excluded coverage. The insurance policy did not exclude misappropriation of ideas; however, the Federal Court’s finding that the gist of the action doctrine barred such claims because they were in essence breach of contract claims, meant that the underlying claims

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<sup>90</sup>eToll, 811 A.2d at 14.

remained uncovered because of the breach of contract exclusion. As to the New Mexico action, coverage was likewise excluded because all of the tort claims in that case arose out of an underlying contractual relationship.

**Temple Univ. Health Sys. v. Nat'l Union Fire Ins. Co., February Term 2004, No. 1547, 2005 Phila. Ct. Com. Pl. LEXIS 21 (C.C.P. Phila. January 7, 2005) (Jones, J.), aff'd in part, rev'd in part, 898 A.2d 1143 (Pa. Super. 2006)** (without opinion) (negligence claim barred by gist of the action doctrine, breach of fiduciary duty claim not barred).

This Opinion is available at <http://courts.phila.gov/pdf/cpcvcomprg/040201547.pdf>.<sup>91</sup>

Montgomery County Higher Education and Health Authority (“Authority”) publicly issued tax free revenue bonds and provided Greater Philadelphia Health Services (“GPHS”) with the proceeds as a loan to help purchase and renovate a nursing home. Temple University Health Systems (“TUHS”) was a signatory to the loan agreement and was to help with various aspects of the facility’s operation. Following the facility’s financial failure and default on the loan, the bond investors sought recourse to get back the money paid for the bonds. The bondholder suit included claims against corporate and individual parties, including insured parties, for breach of contract, negligence, and breach of fiduciary duty.

The insured parties brought this declaratory judgment action seeking defense and coverage from National Union Fire Insurance Company (“NUFIC”). NUFIC asserted that a contract exclusion provision in its policy denied coverage to all insureds. It refused to provide a defense to the corporate insureds and provided a defense only to the

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<sup>91</sup>The trial court’s opinion was adopted later as its opinion for purposes of appeal, Temple Univ. Health Sys. v. Nat'l Union Fire Ins. Co., February Term 2004, No. 1547, 2005 Phila. Ct. Com. Pl. LEXIS 1 (C.C.P. Phila. March 18, 2005) (Jones, J.), aff'd in part, rev'd in part, 898 A.2d 1143 (Pa. Super. 2006).

individual insureds. The Opinion was issued in response to NUFIC's motion for judgment on the pleadings.

First, the Court found that no coverage was available in connection with four counts in the underlying action which asserted breach of contract claims; i.e., these were excluded under the insurance contract's clear language. As the negligence count in the underlying action was for breaches of duty that amounted to no more than breaches of contract, the gist of the action was in contract; thus, this claim was excluded from coverage as well. As a result, there was no duty to defend or indemnify on these negligence claims since the overall nature of the underlying claim was in contract.<sup>92</sup>

Some of the corporate Defendants suggested that the doctrine should not apply since they were not all signatories to the loan; therefore, there was no underlying contract that could form the basis of a gist of the action argument. The Court, however, rejected this argument. Citing to City of Philadelphia v. Human Services Consultants II,<sup>93</sup> the Court found that the alleged conduct could potentially pierce the corporate veil. This permitted application of the gist of the action doctrine to bar the claims against the non-signatory Defendants as well.

However, the underlying breach of fiduciary duty claim against the individual insured was not excluded from coverage. At this stage of the pleadings, the Court found that the alleged fiduciary duty arose outside of any contract; thus, the gist of the action doctrine did not apply to bar coverage under the contract exclusion.

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<sup>92</sup>Freestone v. New Eng. Log Homes, Inc., 819 A.2d 550, 554 (Pa. Super. 2003), appeal dismissed, 2004 Pa. LEXIS 3393 (June, 29, 2004).

<sup>93</sup>March Term 2003, No. 950, 2004 Phila. Ct. Com. Pl. LEXIS 26 (March 23, 2004) (Jones, J.), <http://fjd.phila.gov/pdf/cpcvcomprg/030300950.pdf>.

**Acme-Hardesty Co. v. Wenger, February Term 2001, No. 1799, 2001 Phila. Ct. Com. Pl. LEXIS 4 (C.C.P. Phila. Jan. 31, 2003) (Sheppard, J.)** (the Court held a negligence claim to be barred by the gist of the action doctrine). This Opinion is available at <http://courts.phila.gov/pdf/cpcvcomprg/acm-op.pdf>.

In Acme-Hardesty Co., the Court dismissed a negligence claim against an insurance agent and insurer because it was duplicative of its breach of contract claim. The consolidated actions arose out of a warehouse fire. The warehouse was owned by Defendant Eastern America Transport and Warehousing (“Eastern”). The Plaintiffs were entities that lost property in the fire and/or the subrogating insurers on those losses. At the time of the fire, Honeywell, Inc. and Honeywell Protection Services Division (“Honeywell”) were responsible for monitoring the warehouse fire alarm systems from a remote location. Plaintiffs brought suit against both Eastern and Honeywell, alleging that both were liable for losses resulting from the fire.

Honeywell cross-claimed against Eastern for indemnification based on a written agreement in which Eastern agreed either to list Honeywell as an additional insured on all insurance policies in effect at the warehouse or to provide indemnification itself to Honeywell. The property was severely underinsured, and Eastern initiated a separate action against its insurer St. Paul, and the agent that recommended the insurance, ECBM. In that action, Eastern claimed that that the agent and insurer breached an agreement to evaluate the risks and recommend and provide proper insurance to Eastern; and in addition acted negligently, recklessly, fraudulently, in bad faith and in breach of their fiduciary duties.

Instead of joining or somehow intervening in that coverage action, Honeywell filed a joinder complaint against St. Paul and ECBM in the underlying action. In essence, Honeywell argued that it was a third part beneficiary to the Eastern-St. Paul-ECBM

agreement, and thus could assert the same kinds of claims against the insurer and agent that Eastern was asserting in the coverage action; though Honeywell limited its claims to breach of contract and negligence. In addition, Honeywell asserted that the insurer and agent were obligated to assess risks of the fire prevention and detection system, something that Eastern had not asserted as one of these parties obligations to Eastern. St. Paul and ECBM filed preliminary objections to that joinder complaint, including an argument that the gist of the action doctrine barred the negligence claim.

Applying the gist of the action doctrine, the Court cited Phico and eToll, and stated, “It is a fundamental rule of tort law that a negligence claim must fail if it is based on circumstances for which the law imposes no duty of care on the defendant.”<sup>94</sup> Therefore, in order to bring its negligence claim against ECBM/St. Paul, Honeywell had to assert that ECBM/St. Paul owed some duty to Honeywell which was imposed by law as a matter of social policy. Insurers do not have a general affirmative social duty to undertake risk assessments and provide insurance coverage to members of the public or their indemnities with whom they have no other relationship.<sup>95</sup> The Court dismissed Honeywell’s negligence claim against ECBM/St. Paul because it duplicated their breach of contract claim, and was barred by the gist of the action doctrine.

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<sup>94</sup>Fizz v. Kurtz, Dowd & Nuss, Inc., 519 A.2d 1037, 1040 (Pa. Super. 1987).

<sup>95</sup>The Court noted that this does not mean that insurers are immune from tort liability. Such entities can be liable for actions not pertinent in this case, such as negligent or fraudulent misrepresentation, tortious interference with contract, and myriad intentional torts.

**OneBeacon Ins. Group v. Liberty Mut. Ins.**, August Term 2004, No. 02670, 2005 Phila. Ct. Com. Pl. LEXIS 25 (C.C.P. Phila. January 21, 2005) (Abramson, J.) (negligence claim not barred by gist of the action doctrine). This Opinion is available at <http://courts.phila.gov/pdf/cpcvcomprg/040802670.pdf>

This action arose out of an alleged breach of an agreement between Liberty Mutual Insurance Company (“Liberty”) and OneBeacon Corporation and its subsidiaries (“OB”). OB brought suit against Liberty after Liberty allegedly mishandled numerous insurance claims that it had conducted in connection with its obligations under the agreement. OB asserted claims for breach of contract, breach of fiduciary duty, negligence, and unjust enrichment. The Court suggested the gist of the action doctrine may be applicable to at least the negligence claim in this case, but ultimately ordered the entire action to proceed to arbitration for resolution in accord with an arbitration clause in the agreement.

**Kvaerner US Inc. v. OneBeacon Insurance Company**, April Term 2003, No. 0940, 2003 Phila. Ct. Com. Pl. LEXIS 46 (C.C.P. Sept. 29, 2003) (Sheppard, J.) (the Court held a negligent misrepresentation claim to be barred by the economic loss doctrine, rather than the gist of the action doctrine). This Opinion is available at [http://courts.phila.gov/pdf/cpcvcomprg/kvaerner\\_po4-71534.pdf](http://courts.phila.gov/pdf/cpcvcomprg/kvaerner_po4-71534.pdf).

In Kvaerner, the Court held that Kvaerner had confused the economic loss doctrine with the gist of the action doctrine. Kvaerner filed for a declaratory judgment that insurance policies issued to it by Century Indemnity Company (“Century”) between 1964 and 1986 obligated Century to defend Kvaerner against asbestos-related bodily injury claims, and to indemnify Kvaerner for all sums it paid as damages. The amended complaint asserted three additional causes of action against Century: breach of contract, bad faith in failing to provide coverage, and negligent misrepresentation.

Century asserted preliminary objections, arguing that the negligent misrepresentation claim was barred by the economic loss doctrine. Kvaerner argued that

the claim was not barred by the economic loss doctrine because it was separate and apart from the contractual obligations imposed by the policies themselves. The Court concluded that Kvaerner's argument confused the economic loss doctrine with the gist of the action doctrine: the gist of the action doctrine requires an inquiry into the nature of the cause of action, while the economic loss doctrine focuses on the injury sustained by the plaintiff. The purpose of the economic loss doctrine in Pennsylvania is "maintaining the separate spheres of the law of contract and tort."<sup>96</sup> In its current form, the doctrine precludes recovery for economic losses in negligence and strict liability where the plaintiff has suffered no physical injury or property damage.<sup>97</sup> The Court concluded that the economic loss doctrine barred Kvaerner's negligent misrepresentation claim because there was no allegation of physical injury or property damage incurred by Kvaerner, and the damages it sought were purely economic.<sup>98</sup>

For other cases discussing insurance see Koken v. Commonwealth Prof'l Group, Inc., April Term 2004, No. 5968, 2006 Phila. Ct. Com. Pl. LEXIS 73 (C.C.P. Phila. February 9, 2006) (Sheppard, J.) (discussed under conversion cases below); Legion Insurance Company v. Jan W. Doeff, MD, May Term 2000, No. 3174, 2001 Phila. Ct. Com. Pl. LEXIS 97 (C.C.P. Phila. Dec. 18, 2001) (Sheppard, J.) (discussed under emotional distress cases above); Cutting Edge Sports, Inc. v. Bene-Marc, Inc., March Term 2003, No. 01835, 2004 Phila. Ct. Com. Pl. LEXIS 30 (C.C.P. Phila. May 2, 2006) (Abramson, J.) (discussed under negligence cases above).

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<sup>96</sup>New York State Elec. & Gas Corp., 564 A.2d at 925 (Pa. Super. 1989).

<sup>97</sup>Id. (citing Moscatiello v. Pittsburgh Contractors Equip. Co., 595 A.2d 1198, 1201 (Pa. Super. 1991)).

<sup>98</sup>See discussion of Bilt-Rite Contractors, Inc. v. The Architectural Studio in the Introduction.

## **IX. CONVERSION CASES**

**Rhoda Fischer v. William Dawley, June Term 2006, No. 508 (C.C.P. Phila. Feb. 6, 2007) (Sheppard, J.)** (the Court held conversion claims to be barred by the gist of the action doctrine).

This Opinion is available at <http://courts.phila.gov/pdf/cpcvcomprg/060600508.pdf>.

In Fischer, the Court held conversion claims to be barred by the gist of the action doctrine. Payphone, Inc. (“Payphone”) and Coin Call, Inc. (“Coin Call”) were incorporated in Pennsylvania as closely held corporations in 1985 and 1994, respectively. The common shareholders of both corporations included Plaintiff’s decedent Harvey Fischer, and Defendants William Dawley and Bernard Greenstein. Fischer alleged that Dawley and Greenstein had engaged in a series of wrongful acts with the intent to deny her money owed under Payphone’s and Coin Call’s shareholder agreements. She asserted two claims of conversion: one against each corporation, and both of which included Dawley and Greenstein. In addition, Judith Dawley and Frances Greenstein were named in the Coin Call conversion Count.

Citing Hart, the Court sustained the preliminary objections of those Defendants who were parties to the shareholder agreements, *i.e.*, the corporations, Dawley and Greenstein, and dismissed the claims for conversion under the gist of the action doctrine. Those Defendants had allegedly failed to pay money under a contract (the shareholders’ agreement). Fischer claimed that they had converted money that they were contractually obligated to pay, and since the gist of the action was contractual, the claims were dismissed. However, neither Judith Dawley nor Frances Greenstein were parties to the contract, so the conversion claim against them was not subject to the gist of the action doctrine.

**Koken v. Commonwealth Prof'l Group, Inc.**, April Term 2004, No. 5968, 2006 Phila. Ct. Com. Pl. LEXIS 73 (C.C.P. Phila. February 9, 2006) (Sheppard, J.) (conversion claim barred by gist of the action doctrine). This case is available at <http://fjd.phila.gov/pdf/cpevcomprg/040405968.pdf>.

Reliance Insurance Company (“RIC”) brought a suit against its former agent Commonwealth Professional Group (“CPG”) for breach of an agency agreement. Under the agreement, the agent had authorization to solicit applications for insurance and collect premiums for RIC. RIC asserted claims of breach of contract, breach of fiduciary duty, and conversion. RIC sought both punitive and actual damages. Due to RIC’s liquidation, the action was brought by M. Diane Koken in her capacity as Insurance Commissioner and liquidator of RIC.

The Court determined that the Plaintiff’s claim for conversion must be dismissed under the gist of the action doctrine. It cited Pittsburgh Contr. Co. v. Griffith<sup>99</sup> for its conclusion that where a claim asserts that a defendant failed to pay a plaintiff money owed under a contract, such as insurance proceeds, the conversion claim is barred by the gist of the action doctrine. In addition, RIC’s request for punitive damages was dismissed because the misconduct arose from a breach of contractual duties.

**Gemini Bakery Equip. Co. v. Baktek**, February Term 2004, No. 3204, 2005 Phila. Ct. Com. Pl. LEXIS 121 (C.C.P. Phila. April 11, 2005) (Abramson, J.) (conversion/misappropriation of trade secrets, unfair competition, and tortious interference with contractual relations claims not barred by gist of the action doctrine). This Opinion is available at <http://courts.phila.gov/pdf/cpcvcomprg/040203204.pdf>.

Gemini Bakery Equipment Co. (“Gemini”) brought action against Baktek and two men for breach of contract, conversion/misappropriation of trade secrets, unfair competition, and tortious interference with contractual relations. The two men were hired to help complete a piece of machinery and were provided access to intellectual property

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<sup>99</sup>834 A.2d 572, 584 (Pa. Super. 2003).

belonging to Gemini, subject to their agreement that following the project they could not continue to use the information to manufacture or produce a similar baking machine.

Gemini alleged the men had been manufacturing and selling similar baking machines following the end of their employment with Gemini, in direct violation of the alleged agreement. The Defendants argue that the Court should bar the claims for conversion/misappropriation of trade secrets, unfair competition and tortious interference with contractual relations under the gist of the action doctrine. The Court refused to dismiss the conversion/misappropriation and unfair competition claims because it was unclear if there actually existed an agreement between Plaintiff and Defendants, and any ruling would be premature. The intentional interference claim was dismissed on other grounds.

**CBG Occupational Therapy, Inc. v. Bala Nursing & Ret. Ctr., April Term 2003, No. 1758, 2005 Phila. Ct. Com. Pl. LEXIS 19 (C.C.P. Phila. January 27, 2005)** (fraud and conspiracy claims barred by gist of the action doctrine, but conversion claim is not barred where contract is collateral to tort action). This Opinion is available at <http://courts.phila.gov/pdf/cpcvcomprg/030401758.pdf>.

Plaintiffs CBG Occupational Therapy, Inc. (“CBG”) and Décor Unlimited entered into an agreement with Defendants, which include Bala Nursing & Retirement Center, Limited Partnership (“Bala”) and Center for Rehabilitative Therapies, Inc. (“CRT”). The agreement encompassed therapy equipment that Bala acquired from CBG; physical therapists recruited and hired by CBG to work under the direction of Bala and CRT; and included provisions regarding the agreement’s manner of termination. CBG alleged that Defendants breached the contract by not paying required recruitment fees for the therapists it hired, refusing to pay for damaged or missing therapy equipment, and improperly terminating the agreement.

Defendants filed a motion for reconsideration of the Court's denial of their motion for summary judgment based on application of the statute of limitations, and failure to provide evidence sufficient to sustain claims for fraud, conspiracy, tortious interference, and piercing the corporate veil. The Court dismissed the fraud and conspiracy claims because both were based on contractual breaches and were therefore barred by the gist of the action doctrine.<sup>100</sup> By contrast, the Court would not dismiss a conversion claim under the gist of the action doctrine. In that instance, equipment had been converted after the breach, and so it was the contract that was collateral to this tort action. This count was, however, dismissed on a statute of limitations argument.

**Bricks, Boards & Gargoyles v. Plant Realty Co., March Term 2004, No. 02295, 2004 Phila. Ct. Com. Pl. LEXIS 64 (C.C.P. Phila. December 7, 2004) (Cohen, J.)** (gist of the action doctrine barred claims of negligence, wrongful eviction, and conversion). This Opinion is available at <http://courts.phila.gov/pdf/cpcvcomprg/040302295.pdf>.

Bricks, Boards, & Gargoyles (“BB&G”) leased commercial space from Plant Realty Company (“Plant”) for its general use in the course of business. Plant was required to replace the roof on the premises but did not, allowing rain to damage BB&G’s property. BB&G placed their rent into an escrow account until the repairs had been completed, and Plant subsequently changed the locks to prevent BB&G from entering the premises.

BB&G brought claims for breach of contract, negligence, wrongful eviction, conversion, breach of the implied warranty of habitability, and breach of the covenant of quiet enjoyment. Plant contended that the gist of the action doctrine barred the claims of negligence, wrongful eviction and conversion because they are directly connected to the lease agreement. The Court upheld Defendant’s preliminary objections and reasoned that

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<sup>100</sup> eToll, 811 A.2d at 14.

the gist of the action doctrine must bar the three claims because they are duplicative of the breach of contract claim.<sup>101</sup>

**Cafe Parissa, Inc. v. 1601 Assocs., October Term 2001, No. 4272, 2004 Phila. Ct. Com. Pl. LEXIS 10 (C.C.P. Phila. June 30, 2004) (Jones, J.)** (trespass and conversion to chattel claims barred by gist of the action doctrine). This Opinion is available at <http://courts.phila.gov/pdf/cpcvcomprg/011004272.pdf>.

Café Parissa leased commercial space to be used as a restaurant. The building was subsequently sold to 1601 Associates, which assumed the Café Parissa lease. Provisions in the lease permitted the landlord to conduct repairs, alterations, and additions to the property with reasonable notice and consideration to the reasonable hours and use of the tenant's space.

Without notice, 1601 Associates began renovating and converting the space above tenant's premises into a residential apartment, thereby creating noise, debris, dust, and damage to the interior of tenant's space; rendering the premises unsuitable for use as a restaurant. Plaintiff's complaint included claims of trespass, breach of contract, and conversion to chattel in response to Defendant's conduct. The Court determined that the trespass and conversion to chattel claims were barred by the gist of the action doctrine because they arose from the parties' lease agreement.<sup>102</sup>

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<sup>101</sup>eToll, 811 A.2d at 14.

<sup>102</sup>eToll, 811 A.2d at 19.

## X. OTHER CASES

**Thermacon Enviro Systems, Inc. v. GMH Associates of America, Inc., March Term 2001, No. 4369, 2001 Phila. Ct. Com. Pl. LEXIS 74 (C.C.P. Phila. July 18, 2001) (Herron, J.)** (the Court noted that the gist of the action doctrine was not raised as an objection to a tort claim).

This Opinion is available at <http://courts.phila.gov/pdf/cpcvcomprg/therma.pdf>.

Thermacon Enviro Systems, Inc. had executed a purchase order agreement with GMH Associates of America, Inc. by providing aluminum tank covers for a waste water treatment plant. GMH was responsible for the installation of the covers as a subcontractor of Wickersham Construction and Engineering, Inc., and promised to pay Thermacon \$744,750 pursuant to the order. Thermacon contended that, although Wickersham made payments to GMH, GMH failed to pay Thermacon the full amount for the covers. Thermacon initiated this action, asserting claims for breach of contract, detrimental reliance, unjust enrichment, misrepresentation, and conversion.

Upon discussing the misrepresentation claim, the Court noted that GMH had not argued that Thermacon's tort claims were barred by the gist of the action doctrine. However, the Court sustained GMH's objections to the misrepresentation claim because there was no indication that GMH knew of its statements' falsity, that the statements were material to the transaction, or that GMH intended for Thermacon to rely on their statements.

**Worldwideweb Networx Corp. v. Entrade, Inc., December Term 2001, No. 3839, 2003 Phila. Ct. Com. Pl. LEXIS 84 (C.C.P. Phila. Feb. 19, 2003) (Cohen, J.)** (the Court held that a CEO did not owe a fiduciary duty to an individual stockholder, so there was no need to address gist of the action claim). This Opinion is available at <http://courts.phila.gov/pdf/cpcvcomprg/www303.pdf>.

Mark Santacrose, the CEO of a stock trading corporation, filed preliminary objections to the amended complaint of WorldWideWeb Networx Corporation, a

minority shareholder in Entrade, Inc. The amendment to the complaint pertained to Santacrose allegedly owing fiduciary duties to WorldWideWeb. Santacrose argued that both the gist of the action doctrine and the economic loss doctrine barred the breach of fiduciary duty claim. Santacrose also argued that he did not have a fiduciary duty to register WorldWideWeb's shares because he owed no such duty to Entrade's individual shareholders. WorldWideWeb argued that Santacrose did owe a fiduciary duty, that such duty existed outside of any contract between them, and that the violation of that duty was of a tortious nature. The Court held that Santacrose did not owe a fiduciary duty to an individual shareholder. Thus, it did not have to address the gist of the action doctrine, nor the economic loss doctrine.

**Arbor Associates, Inc. v. Aetna U.S. Healthcare, August Term 2002, No. 03976, 2003 Phila. Ct. Com. Pl. LEXIS 10 (C.C.P. Phila. Feb. 28, 2003) (Jones, J.)** (Court instructed plaintiffs to familiarize themselves with the gist of the action doctrine). This Opinion is available at <http://courts.phila.gov/pdf/cpcvcomprg/arbor203.pdf>.

In Arbor Associates, the Court sustained Aetna's preliminary objections that Arbor Associates had failed to set forth sufficient facts to support its contract and fraud claims with the necessary levels of specificity. The Court instructed Arbor to familiarize itself with the gist of the action and/or economic loss doctrines, and to plead only those causes of action for which recovery was permitted under Pennsylvania law.

**JK Roller Architects, LLC v. Tower Investments, Inc., September Term 2002, No. 2778, 2003 Phila. Ct. Com. Pl. LEXIS 40 (C.C.P. Phila. March 17, 2003) (Jones, J.)** (gist of the action inapplicable to promissory estoppel and unjust enrichment claims). This Opinion is available at <http://courts.phila.gov/pdf/cpcvcomprg/jkroller303.pdf>.

In JK Roller, the Court overruled the defendants' preliminary objections, which invoked the gist of the action doctrine. JK Roller Architects brought causes of action against several defendants (Tower Investments, Inc., Delaware 1851 Associates, LP,

Northern Liberties Development, LP, Reed Development Associates, Inc., and Bart Blatstein) for breach of contract and, alternatively, promissory estoppel and unjust enrichment. JK Roller alleged that the defendants failed to pay for services rendered pursuant to their agreements.

In their preliminary objections, the Defendants asserted that JK Roller's unjust enrichment and promissory estoppel claims were barred by the gist of the action doctrine. The Court overruled the preliminary objections because the gist of the action doctrine precludes claims for allegedly *tortious* conduct where the gist of the conduct sounds in contract rather than tort.<sup>103</sup> The Court held that the doctrine does not apply to alternative causes of action based on implied or constructive contracts, such as claims for unjust enrichment and promissory estoppel.

**North American Publishing Co. v. Sungard Availability Servs., April Term 2004, No. 8932, 2005 Phila. Ct. Com. Pl. LEXIS 449 (C.C.P. Phila. October 7, 2005) (Abramson, J.)** (claims for continuing trespass and punitive damages barred in breach of lease action).

This Opinion is available at <http://courts.phila.gov/pdf/cpcvcomprg/040408932.pdf>.

North American Publishing Company ("NAPCO") was a commercial tenant on the fifth floor of the North American Building. It brought suit against its Landlord and another commercial tenant, SunGard Availability Services, LP ("SunGard"), which occupied the floors immediately above NAPCO. SunGard installed temperature and humidity control systems on the fifth floor roof that resulted in repeated water damage to NAPCO. NAPCO ultimately was forced to move its operations to another facility and this suit ensued.

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<sup>103</sup>Redevelopment Auth. of Cambira v. Int'l Ins. Co., 685 A.2d 581, 590 (Pa. Super. 1996); Phico, 663 A.2d at 757 (1995) (emphasis added).

NAPCO brought claims for breach of a lease, trespass, breach of implied warranties, third party beneficiary claims and constructive eviction. Defendants asserted that the gist of the action doctrine barred any claims in tort where the alleged breach of duty was grounded in the contract itself, or essentially duplicated the breach of contract claim. The Court agreed and dismissed all tort claims, including continuing trespass and the request for punitive damages, ordering the suit to continue based solely upon the claims associated with breach of contract.<sup>104</sup>

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<sup>104</sup>eToll, 811 A.2d at 14.