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# High Court Merges 'Gist of the Action' and 'Economic Loss' in 'Dittman'

Pennsylvania courts have long struggled with the question of whether and when a party to a contractual relationship assert a tort cause of action against another contracting party for conduct arising out of the contractual relationship.

By **Andrew J. DeFalco** | January 11, 2019 at 02:58 PM

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Andrew J. DeFalco, Spectator  
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The Pennsylvania Supreme Court's recent holding in *Dittman v. University of Pittsburgh Medical Center*, No. 43 WAP 2017, 2018 WL 6072199 (Nov. 21, 2018) made headlines in legal circles for its landmark ruling that an "employer owes employees a duty to exercise reasonable care to protect them against an unreasonable risk of harm in collecting and storing employees' data on its computer systems," confirming the existence of a duty of care in so-called "data breach" cases. What received less publicity was the second half of the *Dittman* opinion, where the court effectively merged Pennsylvania's "economic loss doctrine" with Pennsylvania's "gist of the action"

doctrine.

Pennsylvania courts have long struggled with the question of whether and when a party to a contractual relationship can assert a tort cause of action against another contracting party for conduct arising out of the contractual relationship. Two separate doctrines emerged in Pennsylvania common law to attempt to answer this question.

The first, the so-called economic loss doctrine, focused generally on the type of damages sought. Historically, in products liability actions, Pennsylvania courts ruled that "recovery in tort is barred ... where the only damage alleged is to the product itself," see *REM Coal v. Clark Equipment*, 563 A.2d 128 (Pa.Super. 1989). Extrapolating from that rationale, with certain exceptions, Pennsylvania courts applied the economic loss doctrine to preclude recovery where allegedly tortious conduct "results solely in economic damages unaccompanied by physical injury or property damages," as in *Adams v. Copper Beach Townhome Communities*, 816 A.2d 301, 305 (Pa.Super. 2003).

The second doctrine, the so-called gist of the action doctrine, focused on the nature of the conduct alleged. Pennsylvania courts explained "when a plaintiff alleges that the defendant committed a tort in the course of carrying out a contractual agreement, courts examine the claim and determine whether the 'gist' or gravamen of it sounds in contract or tort; a tort claim is maintainable only if the contract is collateral to conduct that is primarily tortious," see *Sunquest Informaiton Systems v. Dean Witter Reynolds*, 40 F. Supp. 2d 644, 651 (W.D.Pa. 1999). Pennsylvania courts made various inquiries to make this determination, including whether the tort claims arose solely from a contract between the parties; whether the duties allegedly breached were created and grounded in the contract itself; whether the liability

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stems from a contract; or whether the tort claim "essentially duplicates a breach of contract claim or the success of which is wholly dependent on the terms of a contract," see *eToll v. Elias/Savion Advertising*, 811 A.2d 10, 19 (2002).

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However, although these doctrines were well known, the application of these doctrines by courts (and lawyers) was inconsistent and marked by confusion. As to both, many courts seemed unsure of when the doctrines applied and when it did not.

Then, in *Bruno v. Erie Insurance*, 106 A.3d 48, 68–69 (Pa. 2014), the Supreme Court addressed the gist of the action doctrine, and simplified and clarified its application. In *Bruno*, the plaintiffs had an insurance policy covering mold. When the plaintiffs discovered mold, Erie sent an adjuster to their home, who negligently told the plaintiffs that it was harmless. Addressing the gist of the action doctrine, the court explained “the nature of the duty alleged to have been breached is ... to be the critical determinative factor in determining whether the claim is truly one in tort, or for breach of contract.” It continued “if the facts of a particular claim establish that the duty breached is one created by the parties by the terms of their contract—i.e., a specific promise to do something that a party would not ordinarily have been obligated to do but for the existence of the contract—then the claim is to be viewed as one for breach of contract ... If ... the facts establish that the claim involves the defendant’s violation of a broader social duty owed to all individuals, which is imposed by the law of torts and, hence, exists regardless of the contract, then it must be regarded as a tort.” Applying this test, the court found that while Erie complied with its contractual duties to test for mold and pay the claim, the duty alleged to have been violated by the adjuster—to avoid rendering unfounded advice—was a duty outside the contract. Thus, the doctrine did not apply.

Following suit, in *Dittman*, the Supreme Court addressed the economic loss doctrine, and shifted its focus away from the nature of the damages claimed, to focus on the nature of the duty breached—just like the application of the “gist of the action”

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doctrine in *Bruno*. In *Dittman*, employees of UPMC sued it after their personal information was accessed and stolen from UPMC's computer systems. In addressing whether the economic loss doctrine precluded the employees' claims, the court found that the application of the economic loss doctrine "turns on the determination of the source of the duty plaintiff claims the defendant owed ... [and] if the duty arises under a contract between the parties, a tort action will not lie from a breach of that duty. However, if the duty arises independently of any contractual duties between the parties, then a breach of that duty may support a tort action."

Thus, through *Bruno* and *Dittman*, the Supreme Court took two separate doctrines addressing when a contracting party can assert a tort claim against another party to the contract, one focused on damages, the other on conduct, and merged them into one single doctrine that focuses solely on the duty owed and whether it is created by the contract. In ruling that virtually the same test is to be applied for both doctrines, the Supreme Court clarified, simplified and called for uniform application of the test for when a tort action can be brought by and against contracting parties.

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