The Gist of the Action Doctrine for Products Liability Cases

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Pennsylvania recognizes the gist of the action doctrine in the realm of contract law. This claims-limiting rule ensures that a breach of contract case is focused on the terms of an agreement and the parties' performance of their contractual obligations. Claims based in tort, such as misrepresentation or fraud, are routinely dismissed and the cause of action limited to one for breach of contract.

In products liability cases, however, the claims asserted all too often go beyond a defendant's design, manufacture and distribution of an allegedly defective product. Moreover, parties uninvolved in the design, manufacture and distribution of a product find themselves sued in products liability cases. As part of the ongoing modernization of Pennsylvania products liability law called for by our Supreme Court in *Tincher v. Omega Flex*, Pennsylvania courts should import the gist of the action doctrine into our products liability jurisprudence to ensure that the claims asserted in a products liability case are limited to those bearing on the design, manufacture, and distribution of the product at issue and that the only parties sued on these claims are the manufacturer and distributor of that product.

Pennsylvania's Gist of the Action Doctrine

The "gist of the action" doctrine bars "re-casting ordinary breach of contract claims into tort claims," as in *Pediatrix Screening v. Telechem International*, 602 F.3d 541, 548 (3d Cir. 2010). Where a claim for misrepresentation, fraud, or other tort claim "arises solely from the contract between the parties or essentially duplicates a breach of contract claim," the tort claims cannot be maintained, as held in *eToll v. Elias/Savion Advertising*, 811 A.2d 10, 19 (Pa. Super. Ct. 2002). Application of this doctrine ensures that where the crux, or "gist," of the dispute is based on the terms of a contract and the parties' performance of that contract, the only allowable claim is one for breach of contract. Pennsylvania courts have yet to apply this doctrine in other areas of law.

'Tincher' and the Call to Modernize

In 2014, the Pennsylvania Supreme Court decided *Tincher v. Omega Flex,* 104 A.3d 328 (Pa. 2014), and put in place a new framework governing products liability cases. *Tincher* represented

a step towards the "necessary modernization" of Pennsylvania products liability law called for by the commonwealth's most senior jurists, as in *Bugosh v. I.U. North America*, 971 A.2d 1228 (Pa. 2009) (Saylor, J., dissenting). At the same time, the Pennsylvania Supreme Court called on practitioners and the Courts of Common Pleas to grapple with the many issues left unanswered by its *Tincher* decision. As jurists and practitioners alike tackle our Supreme Court's challenge to fill in the contours of Pennsylvania products liability law, well-developed legal principles in other areas of law can guide these efforts.

Application of the Gist of the Action Doctrine

Importing the gist of the action doctrine would represent a significant step toward modernizing Pennsylvania's products liability law. The doctrine should apply in those cases where the gist of the allegations are based on a defect in a product's design, manufacture, or warnings; the conduct of a product's designer or manufacturer in bringing that product to the market; and breaches of express and implied warranties. It would restrict the allowable claims in such cases to the three categories of products liability claims confirmed in *Phillips v. Cricket Lighters*, 841 A.2d 1000, 1007 (Pa. 2003): strict liability for defective design, manufacture, and warnings; negligence in a product's design, manufacture, and preparation of its warnings; and breach of express and implied warranty. A plaintiff claiming damages from an allegedly defective product would be permitted to pursue any products liability theory recognized under Pennsylvania law, but tangential claims such as fraud, misrepresentation, or conspiracy—claims which are not in any sense products liability claims—would be prohibited.

Application of the gist of the action doctrine in products liability cases is consistent with limitations imposed by Pennsylvania courts in prior cases. For example, where a plaintiff alleges a failure to warn claim along with allegations of fraud and misrepresentation, the latter are often dismissed as duplicative of the failure to warn claim. That was the result in *Kline v. Pfizer*, 2009 U.S. Dist. LEXIS 623 (E.D. Pa. 2009), where the plaintiff alleged that a manufacturer fraudulently and negligently "misrepresented" a product by not disclosing that the product was not safe and effective. The court, however, rejected the fraud and misrepresentation claims as an impermissible recasting of the plaintiff's failure to warn theory. The court explained that the "very basis of these claims is that the manufacturer knew of the dangers associated with its product, but fraudulently concealed this knowledge and fraudulently misrepresented that the drug was safe and effective by failing to warn of its dangers. Thus, the very crux of these claims

rests on a failure to warn theory of liability." The court saw that the fraud and misrepresentation claims were redundant of the failure to warn claim and dismissed them accordingly.

An expanded gist of the action doctrine would modernize Pennsylvania products liability law and bring our law in line with those of other states. For instance, New Jersey's Product Liability Act has been applied to preclude separate claims for fraud when a plaintiff brings a claim for a defective product, see *Sinclair v. Merck & Co*., 195 N.J. 51 (2008). Other states, such as Louisiana and Tennessee, disallow conspiracy claims in product liability lawsuits. Prohibiting claims such as fraud and conspiracy, which are not traditional product liability theories, would be a significant step towards modernizing Pennsylvania's products liability law.

Expansion of the gist of the action doctrine into Pennsylvania's product liability law also acknowledges the reality that "there are parties who conceivably have some relation with the manufacture and sale of the product, but their relation is peripheral and not directly related to the distributive process," as in *Harms v. Caterpillar Tractor*, 399 N.E.2d 722, (Ill. App. 1980). Moreover, it has long been the law in Pennsylvania that, absent allegations that a particular entity manufactured, designed, or distributed an allegedly defective product, there can be no "duty, breach of duty, or legal causation, and hence there can be no liability" on any product liability theory, as in *Cummins v. Firestone Tire and Rubber*, 495 A.2d 963 (Pa. Super. Ct. 1985).

Applying the gist of the action doctrine to preclude claims in products liability lawsuits against parties who are not product sellers is consistent with this rule. Once again, existing precedent from Pennsylvania's state and federal courts provides support for an expanded gist of the action doctrine. Pennsylvania courts have dismissed individual defendants, such as corporate executives and sales representatives, as defendants in product liability cases, as in *Arndt v. Johnson & Johnson*, 2014 U.S. Dist. LEXIS 28629, *23 (E.D. Pa. Mar. 6, 2014) and in *In re Diet Drugs Products Liability Litigation*, 220 F. Supp.2d 414, 425 (E.D. Pa. 2002). In *Arndt*, Judge Gene Pratter of the U.S. District Court for the Eastern District of Pennsylvania held that alleged misstatements attributed to the defendant's executives could not have caused the injury complained of and therefore "are not actionable." The conduct plaintiff attributed to those executives had nothing to do with the manufacture or design of the product at issue and was not "causally connected" to the injury claimed.

In other cases where the crux of the case is clearly a product liability claim, Pennsylvania courts have dismissed defendants who are not traditionally classified as product sellers. In *Reid v. Albizem*, Judge Nitza Quinones Alejandro of the Eastern District rejected the plaintiff's - contention that "a physician is considered a seller of a product" against whom a breach of warranty claim may be maintained as part of a product liability lawsuit. 2014 U.S. Dist. LEXIS 87462 (E.D. Pa. Jun. 25, 2014). Pennsylvania's definition of a product "seller" includes "neither a physician who implanted a medical device, nor the hospital at which the implant procedure occurred ... where the primary activity involved is the provision of medical services ... ." Pennsylvania's federal courts have also held that inventors and researchers of allegedly defective products are not proper defendants in a product liability suit, as in *Kallman v. Aronchick*, 981 F. Supp. 2d 372 (E.D. Pa. 2013). Each of these cases shows that Pennsylvania courts already scrutinize products liability allegations against defendants who are not traditionally viewed as product sellers within the meaning of Pennsylvania law. Formalizing this rule under an expanded gist of the action doctrine recognizes this reality.

Conclusion

Where the gist of an action is that a product was defective, negligently designed or manufactured, or did not perform as warranted, the only permissible causes of action should be those that fall within Pennsylvania's three-part framework of products liability law: strict liability, negligence, and breach of warranty against a product manufacturer or product seller. A gist of the action doctrine for products liability cases would modernize Pennsylvania products liability law by requiring that claims falling outside this framework be dismissed where the gist of the allegations sound in products liability.