

**THE GIST OF THE ACTION DOCTRINE:
LESSONS FROM PENNSYLVANIA’S SEARCH FOR CAUSE OF
ACTION ESSENCES**

*Alex A. Tsiatsos, Esq.**

I. INTRODUCTION

Consider the following scenario. A homeowner hires a pest-control contractor to spray a gallon of pesticide around the outside of the homeowner’s house. The homeowner signs a contract provided by the contractor which requires the contractor to apply the pesticide in a manner consistent with the pesticide’s labelling. However, instead of spraying one gallon of pesticide around the outside the house, the contractor inexplicably (and contrary to the labelling) sprays 500 gallons of highly toxic pesticide inside the house, causing a fire that destroys the house. The homeowner sues the contractor for the negligence of his work only to lose at summary judgment because the court held that “the gist of the action” was really a breach of the contract that the homeowner signed, not a negligence claim (despite the homeowner’s protests to the contrary). Perhaps the homeowner can recover some measure of the money he paid for the contracting services due to the contractor’s breach of his promise to apply pesticide in a proper manner, but he can recover nothing for his destroyed house.

While this may seem farfetched and unfair, recent appellate court decisions based on similar fact patterns have upheld this result.¹ Under the recently prominent “gist of the action doctrine” and related doctrines, courts more and more frequently prevent plaintiffs from trying negligence claims when the subject matter of the claim also involves a contractual relationship.

This Article examines the gist of the action doctrine, from its modern prominence in Pennsylvania through its reformulation in the 2014 case of *Bruno v. Erie Insurance Co.*,² and to its spread to other jurisdictions. This Article argues that the doctrine is ill-suited to modern principles of jurisprudence. By searching for the “essence” of a contract claim or tort claim, the gist of the action doctrine and related doctrines wrongfully deny aggrieved parties their right to bring legitimate claims. This article concludes by suggesting that the proper solution is for courts to focus on the specific contract language to determine whether a particular tort claim can be brought.

* The author is a practicing attorney in Martinsburg, WV with the firm of McCune & Tsiatsos, PLLC. The author has represented both plaintiffs and defendants in tort and contract actions. The author would like to thank Eleanor Hurney, Elizabeth Lake, Katheryn Marcum, Joshua Wiseman, Allisyn Monteleone, Clayton Reid, and the other members of the editorial staff of the *West Virginia Law Review* for their edits, comments, and valuable assistance with respect to this Article.

¹ See *Severn Peanut Co. v. Indus. Fumigant Co.*, 807 F.3d 88, 89 (4th Cir. 2015).

² 106 A.3d 48 (Pa. 2014).

II. BACKGROUND

The gist of the action doctrine is a judicially created doctrine³ which originated in Pennsylvania case law, and has been explained as follows:

[T]he [gist of the action] doctrine bars 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.⁴

Thus formulated, the doctrine bars a tort claim, not based on specific contract language, but merely as long as the tort liability “arises from,” is “grounded in,” “stems from,” “essentially duplicates,” or “is dependent on” the contract claim.⁵ Because the issue is the “gist” or “gravamen” of the claim, “[t]he test is not limited to discrete instances of conduct”⁶ Under this doctrine, the court need not look to the specific contract language to determine whether a tort claim is barred; rather, “a court looks to the claim as a whole, not to any isolated details to determine whether the ‘essential ground’ of the action sounds in contract or tort.”⁷ Indeed, the words “gist” and “gravamen,” which are often used to express the doctrine, are effectively synonymous with “essence.”⁸

The exact phrase “the gist of the action doctrine” does not appear in Pennsylvania or other case law until 1999.⁹ Despite its relative youth, however,

³ Clark v. EMC Mortg. Corp., No. 08-CV-1409, 2009 WL 229761, at *3 (E.D. Pa. Jan. 29, 2009) (“Pennsylvania’s gist of the action doctrine”).

⁴ eToll, Inc. v. Elias/Savion Advert., Inc., 811 A.2d 10, 19 (Pa. Super. Ct. 2002) (citations and punctuation omitted).

⁵ *Id.*

⁶ Erie Ins. Exch. v. Abbott Furnace Co., 972 A.2d 1232, 1238 (Pa. Super. Ct. 2009) (citing Pa. Mfrs.’ Ass’n Ins. Co. v. L.B. Smith, Inc., 831 A.2d 1178, 1182 (Pa. Super. Ct. 2003)).

⁷ Michael M. Baylson et al., *The Intersection of Contract Law and Tort Principles—The Pennsylvania Gist of the Action Doctrine and Related Principles*, in 7 BUSINESS AND COMMERCIAL LITIGATION IN FEDERAL COURTS § 78, at 8 (3d ed. 2011); see also Sullivan v. Chartwell Inv. Partners, LP, 873 A.2d 710, 718 (Pa. Super. Ct. 2005) (“Generally, the gist-of-the-action doctrine precludes a party from raising tort claims where the essence of the claim actually lies in a contract that governs the parties’ relationship.”).

⁸ Bruno v. Erie Ins. Co., 106 A.3d 48, 53 nn.4–5 (Pa. 2014) (“The term gist has traditionally been understood to mean ‘the ground or essence of a legal action.’ Gravamen is defined as ‘the substantial point or essence of a claim, grievance or complaint.’” (citations omitted) (quoting BLACK’S LAW DICTIONARY 711, 721 (8th ed. 2009))).

⁹ Sunquest Info. Sys., Inc. v. Dean Witter Reynolds, Inc., 40 F. Supp. 2d 644, 651 (W.D. Pa. 1999) (punctuation omitted).

the modern expression of the gist of the action doctrine has a more involved history.

The Pennsylvania federal courts that brought the doctrine to recent prominence relied upon the decision of a Pennsylvania state court in 1992, *Bash v. Bell Telephone Co. of Pennsylvania*,¹⁰ as the source of the doctrine.¹¹ *Bash*, in turn, relied upon *Closed Circuit Corp. of America v. Jerrold Electronics Corp.*,¹² which held that

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 A claim *ex contractu* cannot be converted to one in tort simply by alleging that the conduct in question was wantonly done.¹³

The *Bash* court also cited *Iron Mountain Security Storage Corp. v. American Specialty Foods, Inc.*,¹⁴ which in turn cited a 1964 Supreme Court of Pennsylvania case, *Glazer v. Chandler*,¹⁵ which held that:

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 wellsettled forms of actions. Most courts have been cautious about permitting tort recovery for contractual breaches and we are in full accord with this policy The methods of proof and the damages recoverable in actions for breach of contract are well established and need not be embellished by new procedures or new concepts which might tend to confuse both the bar and litigants.¹⁶

What then were these “wellsettled forms of action” in 1964? Pennsylvania courts at the time still “retain[ed] the concept of fact pleading as

¹⁰ 601 A.2d 825 (Pa. Super. Ct. 1992).

¹¹ See *eToll, Inc. v. Elias/Savion Advert., Inc.*, 811 A.2d 10, 14 (Pa. Super. Ct. 2002) (citing *Bash*, 601 A.2d at 829).

¹² 426 F. Supp. 361 (E.D. Pa. 1977).

¹³ *Id.* at 364 (citations and punctuation omitted).

¹⁴ 457 F. Supp. 1158 (E.D. Pa. 1978).

¹⁵ 200 A.2d 416 (Pa. 1964).

¹⁶ *Id.* at 418.

distinguished from code pleading”¹⁷ which was “distinguished from the notice-giving system adopted by the Federal Rules of Civil Procedure.”¹⁸

Indeed, as late as 1969, the court in *Baccini v. Montgomery*,¹⁹ held that “[c]auses ex delicto and ex contractu cannot be joined in the same action.”²⁰ Therefore, it is not surprising that the court in *Glazer*, the fount of Pennsylvania’s modern gist of the action doctrine, refused to allow both tort and contract claims.²¹ Pennsylvania pleading law at the time simply would not allow it based on the idea that causes of action belong to separate, unjoinable categories.

This history had lead Pennsylvania lower and federal courts to the four-element version of the gist of the action doctrine requiring courts to distill tort or contract “essence” from specific causes of action.²² However, that history had not included a definitive statement of the doctrine by Pennsylvania’s highest court until the 2014 decision of *Bruno v. Erie Insurance Co.*²³ Mold had been found in the Brunos’ house, but the Brunos’ insurance company adjuster and its retained engineer suggested that the mold was nothing to worry about; in fact, the mold proved toxic.²⁴ According to the Brunos, the mold caused a host of ailments, including cancer, and forced the Brunos to abandon their house.²⁵

The Brunos sued their insurer for negligence based on the misleading statements made by the adjuster and engineer that the mold was nothing to worry about.²⁶ The insurer initially filed a demurrer arguing that because the action was based on the contractual relationship between the insurer and the insured, the gist of the action doctrine barred the negligence claim.²⁷ The trial court agreed, and dismissed the claims because it found that “[b]ut for the insurance policy, [the insurer] would owe the Brunos no obligation as defined by larger social policies embodied by tort laws.”²⁸ The Superior Court affirmed,

¹⁷ *Stafford v. Old Heritage Mut. Ins. Co.*, 70 Pa. D. & C.2d 544, 549 (Pa. C.P. Fulton Cty. 1975) (punctuation omitted).

¹⁸ *Id.* (citing 2A RONALD ANDERSON, PENNSYLVANIA CIVIL PRACTICE § 1019.1).

¹⁹ 46 Pa. D. & C.2d 219 (Pa. C.P. Del. Cty. 1969).

²⁰ *Id.* at 219–20.

²¹ *See Glazer*, 200 A.2d at 418.

²² *See supra* note 4 and accompanying text.

²³ 106 A.3d 48 (Pa. 2014).

²⁴ *Id.* at 52.

²⁵ *Id.* at 51–52.

²⁶ *Id.*

²⁷ *Id.* at 53.

²⁸ *Id.* (punctuation omitted) (quoting the trial court’s opinion).

also finding that “the gravamen of the Brunos’ action against [the insurer] sounds in contract—not in tort.”²⁹

On appeal, the Supreme Court of Pennsylvania noted that other Pennsylvania courts had indeed relied on the four-part statement of the doctrine, including attempts by courts to determine whether a contract claim and a tort claim were “inextricably entwined.”³⁰ However, the court traced a different, older history of the ideas underlying the doctrine, and found precedent in cases from the 1800s which “endorsed the principle that merely because a cause of action between two parties to a contract is based on the actions of the defendant undertaken while performing his contractual duties, this fact, alone, does not automatically characterize the action as one for breach of contract.”³¹

Bruno concluded by refocusing the inquiry from a search for “essences” to an analysis of duties:

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, however, 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.³²

Bruno’s duty-based inquiry implicitly swept aside the earlier “essence-based” inquiry that lower and federal Pennsylvania courts used when considering the gist of the action doctrine.³³ While the doctrine may survive in name, following *Bruno* it is no longer the quest for “essences” that it once was—at least not in Pennsylvania. Instead, the analysis as to whether a tort claim is barred should turn on the question of whether “any of the specific executory promises which comprise the contract” were breached.³⁴

But before *Bruno* was decided, the doctrine had already escaped across state lines: The phrase “the gist of the action doctrine” first appeared in West

²⁹ *Id.* at 54.

³⁰ *Id.* at 67 n.14 (referencing *eToll, Inc. v. Elias/Savion Advert., Inc.*, 811 A.2d 10 (Pa. Super. Ct. 2002)).

³¹ *Id.* at 63.

³² *Id.* at 68 (citations omitted).

³³ *Id.*

³⁴ *Id.* at 70.

Virginia in a federal district court decision in 2011,³⁵ and was discussed by the Supreme Court of Appeals of West Virginia in *Gaddy Engineering Co. v. Bowles Rice McDavid Graff & Love, LLP*³⁶ in 2013, which cited Pennsylvania's pre-*Bruno* four-element statement of the doctrine.³⁷

Interestingly, just a few months before *Gaddy*, West Virginia federal courts were not inclined to apply what they believed to be Pennsylvania's doctrine to West Virginia cases. In *Melton v. Precision Laser & Instrument, Inc.*,³⁸ the court stated that "Pennsylvania's 'gist of the action' doctrine, however, is inapplicable because West Virginia law governs Melton's tort claims."³⁹

In fact, West Virginia's recent adoption of the gist of the action doctrine stands in stark contrast to its previous jurisprudence. In the 1952 case of *Homes v. Monongahela Power Co.*,⁴⁰ the court held:

The correct rule is . . . [w]here the transaction complained of had its origin in a contract which places the parties in such a relation that in attempting to perform the promised service the tort was committed, the breach of contract is not the gravamen of the action. The contract in such case is mere inducement, creating the state of things which furnishes the occasion of the tort, and in all such cases the remedy is an action ex delicto, and not an action ex contractu.⁴¹

Therefore, prior to adopting the gist of the action doctrine, which bars tort claims where there is a contract covering the same general subject matter, West Virginia cases actually barred contract claims when there was a tort claim that arose from the contract claim!⁴² This change did not completely escape notice. Justice Richard F. Neely cited *Homes v. Monongahela Power Co.* in his dissent in *Cochran v. Appalachian Power Co.*⁴³—the case that is the source for West Virginia's gist of the action doctrine—stating that "[m]any tort actions have their origins in contracts."⁴⁴

³⁵ *Backwater Props., LLC v. Range Res.-Appalachia, LLC*, No. 1:10CV103, 2011 WL 1706521, at *6–8 (N.D.W. Va. May 5, 2011).

³⁶ 746 S.E.2d 568 (W. Va. 2013).

³⁷ *Id.* at 577.

³⁸ No. 2:12-cv-1697, 2013 WL 210900 (S.D.W. Va. Jan. 18, 2013).

³⁹ *Id.* at *9.

⁴⁰ 69 S.E.2d 131 (W. Va. 1952).

⁴¹ *Id.* at 136 (quotations omitted).

⁴² Older statements of the same rule exist. *See, e.g., Kuhn v. Brownfield*, 12 S.E. 519, 521 (W. Va. 1890).

⁴³ 246 S.E.2d 624 (W. Va. 1978).

⁴⁴ *Id.* at 630 (Neely, J., dissenting). Decisions after *Cochran* do attempt to keep the possibility of tort liability for an independent tortious act, while moving closer to the gist of the

While West Virginia's home-grown jurisprudence seems to have been forgotten, since *Gaddy*, West Virginia courts have continued to apply the pre-*Bruno* Pennsylvania "essence" version of the gist of the action doctrine.⁴⁵ Pennsylvania remains the primary source for gist of the action doctrine jurisprudence, with approximately 160 state court decisions and 561 Pennsylvania federal court decisions containing that term.⁴⁶ West Virginia courts record 16 gist of the action doctrine decisions.⁴⁷ Additionally, the federal and territorial decisions from the Virgin Islands have 50 gist of the action doctrine records.⁴⁸ The doctrine was first applied in the Virgin Islands in *Charleswell v. Chase Manhattan Bank, N.A.*⁴⁹ in 2004, finding precedent in a 1999 Virgin Islands decision based on Pennsylvania law.⁵⁰

Before other courts follow suit, they may wish to consider the problems that the Bruno court implicitly recognized with the doctrine, as well as the additional problems with it and other related doctrines that *Bruno* did not resolve.

III. ANALYSIS: CONCEPTUAL AND PRACTICAL DIFFICULTIES WITH THE GIST OF THE ACTION DOCTRINE

The gist of the action doctrine has received surprisingly little critical attention.⁵¹ *The Restatement (Third) of Torts* expressed some disapproval, but without considering the problems caused by the doctrine and why those problems exist.⁵² Another author found the doctrine "confusing" and

action doctrine. *See, e.g., Chamberlaine & Flowers, Inc. v. Smith Contracting, Inc.*, 341 S.E.2d 414, 417 (W. Va. 1986) ("The distinction between tort and contract liability, as between parties to a contract, can be difficult to define.").

⁴⁵ *See, e.g., Covol Fuels No. 4, LLC v. Pinnacle Mining Co., LLC*, 785 F.3d 104, 115 (4th Cir. 2015) (citing the four-element test); *Travelers Prop. Cas. Co. of Am. v. Mountaineer Gas Co.*, No. 2:15-cv-07959, 2015 WL 7196515, at *2 (S.D.W. Va. Nov. 16, 2015) (same).

⁴⁶ This data was obtained from a January 13, 2016, Westlaw search for "gist of the action doctrine" in "All Federal" and "All States" sub-databases.

⁴⁷ This data was obtained from a January 14, 2016, Westlaw search for "gist of the action doctrine" in "West Virginia" and "Related Federal" sub-databases.

⁴⁸ This data was obtained from a January 14, 2016, Westlaw search for "gist of the action doctrine" in "Virgin Islands" and "Related Federal" sub-databases.

⁴⁹ 308 F. Supp. 2d 545 (D.V.I. 2004).

⁵⁰ *Id.* at 566–67.

⁵¹ Naturally, the Brunos argued that the gist of the action doctrine, as previously articulated, was a "murky" and "confounding concept." *Bruno v. Erie Ins. Co.*, 106 A.3d 48, 57 (Pa. 2014). An amicus brief filed by the Pennsylvania Association for Justice argued that the doctrine did "not provide a clear and understandable tool to separate genuine contract claims from tort ones." *Id.* at 60 n.9.

⁵² The commentary in the RESTATEMENT (THIRD) OF TORTS: LIAB. FOR ECON. HARM § 9 (AM. LAW INST., Tentative Draft No. 2, 2014), prefers the economic loss rule, stating that "[t]his Restatement does not subscribe to the approach taken in *eToll* . . . [t]he distinction between fraud

“unclear”⁵³ and suggested that the doctrine might be abandoned in favor of the economic loss rule.⁵⁴

First, it is worth noting again that *Bruno* did change the actual application of the doctrine. Because the *Bruno* opinion was so collegially written, its repudiation of the earlier gist of the action doctrine analysis may have largely escaped notice. Nevertheless, the text of the opinion itself no longer recites the pre-*Bruno*, four-part, “essence-based” statement of the doctrine; and as discussed, the analysis now must turn on the question of duty as the terms of the contract define it. While this language-duty analysis is a marked departure from the previous “essence” analysis, the fact that post-*Bruno* federal courts in Pennsylvania have continued to cite or rely upon the pre-*Bruno*, four-part statement of the doctrine suggests that *Bruno*’s new jurisprudence may need further emphasis.⁵⁵

In West Virginia and the Virgin Islands, recognition of *Bruno*’s impact won’t work a mandatory change in jurisprudence. Rather, the problems created by the old gist of the action doctrine still pose potential problems.⁵⁶ Those dangers, which were not clearly explained in *Bruno* or elsewhere, are worth understanding. First, Section II.A will consider the need to look to the specific language of the contract in order to allow courts to apply the rule to specific sets of facts in a fair and even manner, rather than applying the generalized gist of the action doctrine. Next, Section II.B discusses similar issues that arise under the related economic loss rule, and argues for a more limited use of this doctrine.

A. *The Need to Look to Specific Contract Language*

The purpose behind the gist of the action doctrine is a sensible one: A party who has entered into a contract should be bound by his agreement. Therefore, where a party tries to bring a claim in a manner that would violate

that is ‘tangential’ to a contract and fraud that is ‘intertwined’ with it is too hard to draw in a satisfactory way.”

⁵³ Laura A. Wagner, Note, *The Economic Loss Doctrine: A Recommendation for the Supreme Court of Pennsylvania*, 72 U. PITT. L. REV. 825, 829–30 (2011).

⁵⁴ *Id.* at 839.

⁵⁵ *Turturro v. United States*, 629 F. App’x 313, 323 n.2 (3d Cir. 2015) (citing pre-*Bruno* cases involving a four-part statement of the doctrine). However, some Pennsylvania courts have recognized that *Bruno* changed the state’s jurisprudence. *See, e.g., Dommel Props. LLC v. Jonestown Bank & Tr. Co.*, 626 F. App’x 361, 365–66 (3d Cir. 2015).

⁵⁶ The key West Virginia decision, *Gaddy Engineering Co. v. Bowles Rice McDavid Graff & Love, LLP*, 746 S.E.2d 568 (W. Va. 2013), in addition to appearing to adopt Pennsylvania’s pre-*Bruno*, four-part, essence-based test, also hinted at a duty-based analysis similar to *Bruno*. *Id.* at 577. However, the court did not address how the two different statements of the doctrine can co-exist. If the issue can be determined by looking to the terms of the contract (as advocated below), why does a court still need to perform the four-part “essences” inquiry, or even a duty-based analysis pursuant to *Bruno*?

his contractual agreement, the claim should be barred by virtue of that agreement.

However, because it must be applied to specific facts, the doctrine cannot be left in such a generalized form. To return to the pesticide example in the introduction, the contract might have specifically stated that the contractor could not be held liable for damaging the flowers growing around the house. Such language would have been a clear and specific waiver and, indeed, a reasonable one. Flowers growing close to the house might inevitably come into contact with the pesticide that was supposed to be sprayed around the perimeter of the house. Therefore, when the flowers die after the pesticide is sprayed, the homeowner's suit for tort damages would be properly barred by the actual, specific terms of the contract.

The mechanism that actually bars the tort claim should be the express contract language that waives the claim.⁵⁷ Unfortunately, the gist of the action doctrine as expressed pre-*Bruno* does not instruct the courts to focus on specific contract language. Instead, the doctrine invites unnecessary speculation by instructing courts to focus on the "essence" of the claim. It is not clear why the mere fact that the homeowner entered into a contract for pest control spraying should, as a general matter, bar a tort claim on the same subject. Of course, the concept of waiver or other more familiar contractual defenses can involve great complexity or controversy. However, any such complexity or controversy will revolve around transparent facts of contract language and publicly observable contract behavior.

Focusing on specific contract terms also produces a fairer result: barring claims that parties have agreed to waive does nothing more than enforce what the parties already agreed to (even if they are reluctant to admit it). A waiver-based approach avoids an inquiry into the opaque world of cause of action "essences" and satisfies the purpose behind the gist of the action doctrine—namely, preventing a party from bringing a tort claim that is barred by a contract provision.

Without being anchored to specific, identifiable contract terms, the gist of the action doctrine also invites uneven application. Judges may be expected to disagree as to what constitutes a contract's "essence," and, as such, whether or not the pre-*Bruno* version of the doctrine applies to a claim will be decided

⁵⁷ *Prime Medica Assocs. v. Valley Forge Ins. Co.*, 970 A.2d 1149, 1156 (Pa. Super. Ct. 2009) ("Waiver is the voluntary and intentional abandonment or relinquishment of a known right. 'Waiver may be established by a party's express declaration or by a party's undisputed acts or language so inconsistent with a purpose to stand on the contract provisions as to leave no opportunity for a reasonable inference to the contrary.'" (citations omitted) (quoting *Samuel J. Marranca Gen. Contracting Co. v. Amerimar Cherry Hill Assocs. Ltd. P'ship*, 610 A.2d 499, 501 (Pa. Super. Ct. 1992))).

without any guiding standard.⁵⁸ Such uncertain application undercuts important features of judicial resolution such as uniformity, predictability and transparency.

The effect of an unclear jurisprudential rule is not merely academic. By preventing what would otherwise be a legitimate tort claim, the doctrine also denies the right of an aggrieved party to his day in court. Whether this right is based on the guarantee of a jury trial,⁵⁹ or more litigation-specific rights under the notice pleading rules,⁶⁰ uncritical application of the gist of the action doctrine threatens those rights.

Bruno's remedy is to focus on the duty created: if "the duty breached is one created by the parties by the terms of their contract[.]" the claim is contractual; if "the claim involves the defendant's violation of a broader social duty owed to all individuals," the claim is a tort claim.⁶¹ This is undoubtedly an improvement over the pre-*Bruno* "essence-based" inquiry, however, the concept of duty is still a step removed from the true elements of the parties' agreement—the contract terms themselves. The contract terms create the duties, and by focusing on duties rather than specific words, the risk remains that judges will have to resort to something less transparent and publicly accessible than the words themselves. As many commentators have noted, the line between tort and contract theory has never been completely obvious,⁶² and relying on the additional concept of a "duty" may not make it any more certain.⁶³

⁵⁸ *Bruno v. Erie Ins. Co.*, 106 A.3d 48, 68 (Pa. 2014) ("Subsequent decisions of the Superior Court assessing whether a particular tort claim between contracting parties is barred by the gist of the action doctrine have taken varied approaches.").

⁵⁹ U.S. CONST. amend. VII; FED. R. CIV. P. 38(a) ("The right of trial by jury as declared by the Seventh Amendment to the Constitution—or as provided by a federal statute—is preserved to the parties inviolate.").

⁶⁰ *See e.g.*, FED. R. CIV. P. 8(a)(2) ("A pleading that states a claim for relief must contain: . . . a short and plain statement of the claim showing that the pleader is entitled to relief[.]").

⁶¹ *Bruno*, 106 A.3d at 68.

⁶² William Seth Howard, *The Commercial Loss Doctrine: Ladies and Gentleman [sic] of the Jury . . . Look at This Tangle of Thorns*, 8 DEPAUL BUS. & COM. L.J. 339, 340 (2010) ("The line between tort and contract law has never been definitively drawn[.]"); Charles Miller, *Contortions Over Contorts: A Distinct Damages Requirement?*, 28 TEX. TECH L. REV. 1257, 1257 (1997) ("[T]he borderland of tort and contract, and the nature and limitations of the tort action arising out of a breach of contract are poorly defined." (quoting WILLIAM LLOYD PROSSER, *The Borderland of Tort and Contract*, in SELECTED TOPICS ON THE LAW OF TORTS 380, 452 (1953))).

⁶³ *Kevin Gros Offshore, L.L.C. v. Max Welders, Inc.*, No. 07-7340, 2009 WL 152134, at *3 (E.D. La. Jan. 22, 2009) ("Whether a property damage claim arising out of improper repairs to a vessel sounds in contract or tort seems at first to be a rather metaphysical matter."); *Montgomery Cty., Md. v. Jaffe, Raitt, Heuer & Weiss, P.C.*, 897 F. Supp. 233, 237 (D. Md. 1995) (noting the "ultimately metaphysical question of whether a legal malpractice claim is more contract than tort or vice-versa"); *Benton v. City of Oakland City*, 721 N.E.2d 224, 230 (Ind. 1999) (noting the "highly abstract, almost metaphysical debates over whether the duty alleged to have been breached was a 'private' one or a 'public' one[.]"); Jay M. Feinman, *Implied Warranty, Products*

For example, duties to the public at large (assumed by *Bruno* to be the hallmark of a tort claim) often intrude into the world of contracts: contracts are voided, not because of anything having to do with the private contractual relationship between the parties, but because the contract is found to violate some principle of public policy.⁶⁴ Other claims involve both tort and contract duties at the same time: for instance, in the legal malpractice context, “any effort to sort out the fundamental nature of the action is futile and resolves none of the issues at hand. Untidy as it may seem, a legal malpractice claim is always at once both contract and tort.”⁶⁵ Therefore, a strictly duty-based analysis is not always workable because it is not possible to neatly separate private contract duties from public tort duties.

The ultimate remedy is as easy to fashion as it is to implement: the gist of the action doctrine should only apply in cases where specific language in the parties’ contract waives or otherwise bars a tort claim. By focusing on the specific language, the court will ensure that the parties’ contractual bargain is

Liability, and the Boundary Between Contract and Tort, 75 WASH. U. L.Q. 469, 488 (1997) (“The acts of a party may breach duties in tort or contract alone or simultaneously in both. The nature of the injury most often determines which duty or duties are breached.” (quoting *Sw. Bell Tel. Co. v. DeLaney*, 809 S.W.2d 493, 494–95 (Tex. 1991) (quoting *Jim Walter Homes, Inc. v. Reed*, 711 S.W.2d 617, 618 (Tex. 1986))); Thomas C. Galligan, Jr., *Contortions Along the Boundary Between Contracts and Torts*, 69 TUL. L. REV. 457, 498 (1994) (noting that in the landlord-tenant relationship, “the contract may also create tort duties”).

⁶⁴ *Evans v. Jeff D.*, 475 U.S. 717, 759 (1986) (Brennan, J., dissenting) (citations omitted) (noting “the well-established principle that an agreement which is contrary to public policy is void and unenforceable”); *Morgan’s Home Equip. Corp. v. Martucci*, 136 A.2d 838, 845 (Pa. 1957) (“[C]ontracts in restraint of trade made independently of a sale of a business or contract of employment are void as against public policy regardless of the valuableness of the consideration exchanged therein.” (citation omitted)); *Wellington Power Corp. v. CNA Sur. Corp.*, 614 S.E.2d 680, 686 (W. Va. 2005) (“[N]o action can be predicated upon a contract of any kind or in any form which is expressly forbidden by law or otherwise void.” (punctuation omitted) (quoting *State ex rel. Boone Nat’l Bank of Madison*, 29 S.E.2d 621, 623 (W. Va. 1944), *overruled on different grounds by State v. Chase Sec., Inc.*, 424 S.E.2d 591, 600 (W. Va. 1992))); RESTATEMENT (SECOND) OF CONTRACTS § 178 (AM. LAW INST. 1981) (“A promise or other term of an agreement is unenforceable on grounds of public policy if legislation provides that it is unenforceable or the interest in its enforcement is clearly outweighed in the circumstances by a public policy against the enforcement of such terms.”).

⁶⁵ *Montgomery Cty.*, 897 F. Supp. at 237. The same confusion exists with respect to other types of claims. See *Pope v. Winter Park Healthcare Grp., Ltd.*, 939 So. 2d 185, 187 (Fla. Dist. Ct. App. 2006) (“The independent contractor/nondelegable duty analysis . . . is confusing and somewhat misleading because duties that arise under the law of tort and duties that may arise under contract are often intertwined.”); Geri Lynn Mankoff, Note, *Florida’s Economic Loss Rule: Will It Devour Fraud in the Inducement Claims When Only Economic Damages Are at Stake?*, 21 NOVA L. REV. 467, 478 (1996) (“In certain cases, duties may merge, making it difficult to determine whether failure to perform the duty amounts to a breach of contract or an independent tort.”).

preserved without denying any party a remedy based on extra-contractual negligence.⁶⁶

It is true that by denying the ability of plaintiffs to bring tort claims the gist of the action doctrine has the effect of increasing judicial economy and effecting some degree of tort reform. Therefore, the immediate consequence of refocusing the doctrine by tying claims to specific contract language will be that more tort claims will reach a jury. In the short run, this will result in more costs to litigants and more transactional costs to society as a whole, as attorneys will have to draft even more detailed contracts to anticipate the waiver of tort claims. Whether such careful drafting eventually bears the fruit of fewer lawsuits and lower overall costs is unknown, but the purpose behind the gist of the action doctrine and this article's criticism of it is not merely an economic one. Indeed, there is no express indication that the courts that have adopted the gist of the action doctrine have done so for judicial economy.

Moreover, including such contract language would not be difficult. In the case that provided the apparently egregious example at the beginning of this article, *Severn Peanut Co. v. Industrial Fumigant Co.*, the defendant agreed to provide fumigation services in exchange for \$8,604.⁶⁷ The contract also stated that the amount "was not 'sufficient to warrant [the defendant] assuming any risk of incidental or consequential damages' to [the plaintiff's] 'property, product, equipment, downtime, or loss of business.'"⁶⁸ The defendant applied far too much pesticide to the plaintiff's peanut storage facility (in violation of the label on the pesticide), which resulted in a fire that caused over 19 million dollars in damages.⁶⁹

The Fourth Circuit, applying North Carolina law, did not have the gist of the action doctrine at its disposal. Nevertheless, it found that the simple contract language disclaiming consequential damages prevented the multi-million dollar tort claim.⁷⁰ Courts routinely allow such specific contract language to prevent tort liability,⁷¹ and such attention to detail in the drafting

⁶⁶ Parties will still argue over the meaning and effect of contract terms. But, unlike the search for essences required by the gist of the action doctrine, contract construction is guided by well-established and transparent canons with which courts have long-standing familiarity. *See, e.g.*, RESTATEMENT (FIRST) OF CONTRACTS §§ 235–36 (AM. LAW INST. 1932).

⁶⁷ 807 F.3d 88, 89–90 (4th Cir. 2015).

⁶⁸ *Id.* at 90 (quoting Joint Appendix at 47, *Severn*, 807 F.3d 88 (No. 15-1063)).

⁶⁹ *Id.*

⁷⁰ As discussed more below, the court also applied the related economic loss rule. However, the effect of focusing on the actual contract language stands in contrast to the general application of both the gist of the action doctrine and the economic loss rule.

⁷¹ *Chepkevich v. Hidden Valley Resort, L.P.*, 2 A.3d 1174, 1193 (Pa. 2010) ("[E]xculpatory clauses may bar suits based on negligence even where the language of the clause does not specifically mention negligence at all."); *Murphy v. N. Am. River Runners, Inc.*, 412 S.E.2d 504, 508–09 (W. Va. 1991) ("Generally, in the absence of an applicable safety statute, a plaintiff who expressly and, under the circumstances, clearly agrees to accept a risk of harm arising from the

stage would allow courts to avoid having to determine the “essence” of a party’s claim.

B. Similar Problems with the Economic Loss Rule

The preceding analysis of the gist of the action doctrine calls into question a similar doctrine known as the economic loss rule, pursuant to which “a party generally may not recover in tort when a defective product harms only the product itself [instead of a person or other property].”⁷² Specifically, the rule bars recovery of economic losses or “disappointed economic expectations[]” [which, i]n the context of products liability . . . may include damages for inadequate value of a product, costs of repair and replacement of the defective product, or consequential lost profits as a result of a defective product.⁷³ A much cited source of the rule is the 1965 Supreme Court of California decision *Seely v. White Motor Co.*⁷⁴ In *Seely*, the plaintiff bought a truck manufactured by the defendant for use in the plaintiff’s “heavy-duty hauling” business.⁷⁵ The truck never worked properly, and eventually overturned, causing damage to the truck and causing the plaintiff to lose profits as a result of not being able to operate the truck.⁷⁶ The plaintiff sued the manufacturer for these economic losses.⁷⁷ Noting a distinction in the law “between tort recovery for physical injuries and warranty recovery for economic loss,” the court held that “[e]ven in actions for negligence, a manufacturer’s liability is limited to damages for physical injuries and there is no recovery for economic loss alone.”⁷⁸

defendant’s negligent or reckless conduct may not recover for such harm, unless the agreement is invalid as contrary to public policy.”); Natasha V. Konon, Note, *Sommer v. Federal Signal Corp.: Clarifying the Confusion over the Tort/Contract Borderland and the Rules of Contribution*, 14 PACE L. REV. 543, 549 (1994) (“Absent a statute or public policy to the contrary, a contracting party may use an exculpatory clause to exempt itself from the consequences of its own ordinary negligence if the contractual language limiting liability is clear and unambiguous.”).

⁷² *Isla Nena Air Servs., Inc. v. Cessna Aircraft Co.*, 449 F.3d 85, 87 (1st Cir. 2006) (citing *E. River S.S. Corp. v. Transamerica Delaval, Inc.*, 476 U.S. 858, 867–68 (1986)).

⁷³ Danielle Sawaya, Note, *Not Just for Products Liability: Applying the Economic Loss Rule Beyond Its Origins*, 83 FORDHAM L. REV. 1073, 1079 (2014) (quoting *Casa Clara Condominium Ass’n v. Charley Toppino & Sons, Inc.*, 620 So. 2d 1244, 1246 (Fla. 1993) (quoting *Sensenbrenner v. Rust, Orling & Neale, Architects, Inc.*, 374 S.E.2d 55, 58 (Va. 1988))).

⁷⁴ 403 P.2d 145 (Cal. 1965); see also R. Joseph Barton, *Drowning in a Sea of Contract: Application of the Economic Loss Rule to Fraud and Negligent Misrepresentation Claims*, 41 WM. & MARY L. REV. 1789, 1794 (2000) (“The economic loss rule is a judicially created doctrine, first articulated by the California Supreme Court in *Seely v. White Motor Co.*”).

⁷⁵ 403 P.2d at 147.

⁷⁶ *Id.* at 147–48.

⁷⁷ *Id.*

⁷⁸ *Id.* at 151.

The economic loss rule's relationship to the gist of the action doctrine is unclear. Some courts describe the rules as "mirror images" of each other.⁷⁹ Both doctrines are said by some to be "closely related" and perhaps merely "one of pedigree"—the economic loss rule having developed in the product liability context, and the gist of the action having developed outside of that context.⁸⁰ Pennsylvania,⁸¹ West Virginia,⁸² and the Virgin Islands⁸³—in addition to being the only jurisdictions to expressly adopt the gist of the action doctrine—have also adopted the economic loss rule.

But the economic loss rule, even if initially tied to products liability cases, has become unmoored. Courts have stated that both it and the gist of the action doctrine "are designed to maintain the conceptual distinction between breach of contract claims and tort claims" without reference to product liability.⁸⁴ This distinction has been hard to maintain. Indeed, "[o]ne of the reasons why the application of the [economic loss rule] is so confusing is because duties exist in both tort law and contract law."⁸⁵

Perhaps inevitably, the focus on difficult conceptual distinctions has led to the search for "essences." Courts, indeed, have sought the same contract and tort "essences" when applying the economic loss rule that courts sought when applying the gist of the action doctrine.⁸⁶

⁷⁹ Heindel v. Pfizer Inc., 381 F. Supp. 2d 364, 384–85 (D.N.J. 2004).

⁸⁰ Bohler-Uddeholm Am., Inc. v. Ellwood Group, Inc., 247 F.3d 79, 104 n.11 (3d Cir. 2001) ("The 'gist-of-the-action' test is a better fit for this non-products liability case."); Graham Packaging Co. v. Transplace Tex., L.P., No. 1:15-CV-01186, 2015 WL 8012970, at *2–4 (M.D. Pa. Dec. 7, 2015); Md. Cas. Co. v. Preferred Fire Prot., Inc., No. 2:14-CV-245, 2014 WL 4218715, at *4 (W.D. Pa. Aug. 25, 2014) (explaining that "the economic loss doctrine is reserved for those cases involving products liability").

⁸¹ Gongloff Contracting, L.L.C. v. L. Robert Kimball & Assocs., Architects & Eng'rs, Inc., 119 A.3d 1070, 1076 (Pa. 2015) ("Pennsylvania law generally bars claims brought in negligence that result solely in economic loss.").

⁸² Syl. Pt. 9, Aikens v. Debow, 541 S.E.2d 576, 579 (W. Va. 2000).

⁸³ Ringo v. Southland Gaming of the U.S.V.I., No. ST-10-CV-116, 2010 WL 7746074, at *6 (V.I. Sept. 22, 2010).

⁸⁴ *Graham Packaging Co.*, 2015 WL 8012970, at *2.

⁸⁵ Geri Lynn Mankoff, *Florida's Economic Loss Rule: Will It Devour Fraud in the Inducement Claims When Only Economic Damages Are at Stake?*, 21 Nova L. Rev. 467, 477 (1996).

⁸⁶ See, e.g., Wojtunik v. Kealy, 394 F. Supp. 2d 1149, 1171 (D. Ariz. 2005) ("The negligent misrepresentation claim is barred as a matter of law by Arizona's economic loss rule because it is in essence based on alleged non-performance under the Merger Agreement and is thus in reality a breach of contract claim masked as a tort claim."); *Adams ex rel. Adams v. City of Westminster*, 140 P.3d 8, 11 (Colo. App. 2005) ("The essence of plaintiff's claim is that he has suffered economic losses arising from the employment contract. Under the economic loss rule, it is highly doubtful that plaintiff could assert a tort claim against the City."); *Clayton v. State Farm Mut. Auto. Ins. Co.*, 729 So. 2d 1012, 1014 (Fla. Dist. Ct. App. 1999) ("Where the alleged fraudulent misrepresentation is inseparable from the essence of the parties' agreement, the economic loss rule still applies.").

Unlike the gist of the action doctrine, however, the economic loss rule has drawn significant scholarly attention—much of it critical.⁸⁷ Indeed, courts have recognized that the rule has become too expansive and have linked it again to its earlier products liability context.⁸⁸ But, as other jurists have noted, there is often “no explanation of why the economic loss rule is appropriately applied in the products liability context but is unworkable or unwise in that broader context.”⁸⁹

The economic loss rule, as it has developed, bears all the hallmarks of the same murky inquiry into “essences” and gravamen that mark the gist of the action doctrine. For the reasons set forth above, courts should strive to limit the economic loss rule’s application to those instances where the actual terms of a contract prevent a tort claim.⁹⁰

IV. CONCLUSION

For the most part, it is easy enough to distinguish a tort claim from a contract claim. Parties will cite a contractual provision in support of a claim for contract damages, and in the absence of a contract, parties will rely upon general principles of negligence in support of a claim for tort damages. As a practical matter, confusion will arise only in cases in which a contract exists between the parties, and in which the plaintiff has also raised tort claims.

In such cases, there is no need for courts to engage in metaphysical speculation. Rather, courts should look to the black and white terms of the contract. If the actual contract language bars the tort claim, it is barred; if not, the claim should proceed. Any other guidepost—whether a search for “essences” or an attempt to distinguish different types of duties—risks leading courts back into an older, less transparent jurisprudence.

⁸⁷ Vincent R. Johnson, *The Boundary-Line Function of the Economic Loss Rule*, 66 WASH. & LEE L. REV. 523, 524–26 nn.2–5 (2009); Danielle Sawaya, *Not Just for Products Liability: Applying the Economic Loss Rule Beyond Its Origins*, 83 FORDHAM L. REV. 1073, 1073 (2014) (“Although the economic loss rule may seem like an easy way to maintain the boundary between tort law and contract law, confusion abounds when courts attempt to determine the proper contexts in which to apply the doctrine.”).

⁸⁸ *Tiara Condo. Ass’n, Inc. v. Marsh & McLennan Cos.*, 110 So. 3d 399, 407 (Fla. 2013) (“[W]e . . . hold that the economic loss rule applies only in the products liability context. We thus recede from our prior rulings to the extent that they have applied the economic loss rule to cases other than products liability.”).

⁸⁹ *Id.* at 414 (Canady, J., dissenting).

⁹⁰ Indeed, some courts have restricted the economic loss rule to the terms of the parties’ agreement or, at least, to their ability to have negotiated such an agreement. See, for example, cases cited in Sawaya, *supra* note 73, at 1089 nn.146–53.