

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA**

NEUCHATEL INSURANCE and)	CIVIL ACTION
GREAT NORTHERN INSURANCE CO.,)	
)	NO. 96-5396
Plaintiffs)	
)	
vs.)	
)	
ADT SECURITY SYSTEMS, INC.,)	
WELLS FARGO ALARM SYSTEMS,)	
COAST SECURITY CORPORATION and)	
INTERNATIONAL VAULT, INC.,)	
)	
Defendants)	

TROUTMAN, S.J.

M E M O R A N D U M

In early September, 1995, over the Labor Day Weekend, a Rolex Watch facility located in Lancaster, PA, was burglarized. As a consequence thereof, Rolex allegedly sustained losses in an amount in excess of 1.8 million dollars, based upon the value of property stolen in the burglary and costs associated with the interruption of its business.

After covering Rolex's losses, plaintiffs as insurers and subrogees of Rolex, commenced this action against defendants ADT and Wells Fargo, suppliers and monitors of Rolex's security alarm system, and against Coast Security, which supplied the vault breached in the burglary. Plaintiffs initially asserted claims based upon negligence, breach of contract and misrepresentation against defendants ADT and Wells Fargo, and

claims based upon breach of warranties, negligence and strict liability against Coast.

Coast then filed a third-party complaint against International Vault, manufacturer of the vault supplied to Rolex by Coast. Subsequently, plaintiffs sought and received leave of court to file an amended complaint, in which they asserted claims directly against International Vault for negligence, breach of warranties and strict liability. Plaintiffs also added claims for misrepresentation against Coast.

Jurisdiction of the district court over this action is based upon diversity of citizenship. Plaintiffs are citizens of Switzerland and Minnesota, respectively. Based upon the allegations of the amended complaint, which have not been challenged in relevant detail by any of the defendants, all defendants are citizens of states other than Minnesota, and the amount in controversy exceeds \$50,000. We conclude, therefore, that subject matter jurisdiction of this action is proper under 28 U.S.C. §1332.

Presently before the Court are motions by Coast and International Vault to dismiss all claims and crossclaims against them pursuant to Fed. R. Civ. P. 12(b)(6). As noted, the claims against Coast and International Vault are based upon alleged defects in the vault manufactured by International Vault and sold to Rolex by Coast Security. With respect to Coast Security, Inc., plaintiffs allege that the vault supplied to Rolex did not meet class "M" specifications, contrary to representations made

by Coast at the time Rolex purchased the vault. (First Amended Complaint, Doc. #23, ¶18). Plaintiffs further allege that Coast is in the business of supplying such products, and that, as a result of Coast's failure to deliver a vault manufactured and distributed in accordance with Coast's representations, the vault was defective, unsafe for its intended use and, therefore, was unreasonably dangerous. (Id., Count VII). In addition, plaintiffs allege that despite Coast's knowledge of the purpose for which Rolex purchased the vault and its intended use thereof, Coast knowingly supplied a vault unfit for its ordinary purpose, thereby breaching implied warranties of merchantability and fitness for a particular purpose. (Id., Counts VIII, IX). Plaintiffs also allege that the losses Rolex sustained in the burglary were caused by Coast's negligence in (1) failing to supply the vault it ordered, i.e., a vault which met class "M" specifications; (2) failing to warn Rolex of the defects and dangers in the vault supplied by Coast; and (3) failing to adequately test and inspect the vault. (Id., Count X). Finally, plaintiffs allege that in deciding to purchase the vault from Coast, Rolex relied upon Coast's representations that it would supply a vault constructed entirely of steel and masonry which met class "M" specifications, and that plaintiffs, as subrogees of Rolex, were injured when Coast knowingly provided a vault of lesser quality, not in accordance with the representations upon which Rolex purchased the vault and upon which Coast intended to induce Rolex's purchase of the vault. (Id., Count XI, XII).

In Coast's third-party complaint against International Vault, filed prior to the amendment of plaintiffs' complaint, Coast alleges that International Vault is responsible for any damages based upon plaintiffs' claims for breach of warranties, strict liability or negligence for which Coast may be found liable.

Plaintiffs' direct claims against International Vault, asserted in their amended complaint, are based upon allegations that International Vault (1) manufactured a defective and unreasonably dangerous product (Id., Count XIII); (2) breached implied warranties of merchantability and fitness for a particular purpose (Id., Counts XIV, XV); (3) negligently fabricated an unsuitable product which International Vault failed to test and about which it failed to warn Rolex. (Id., Count XVI).

The motions filed by defendants Coast and International Vault to dismiss the amended complaint and to dismiss the third party complaint are quite similar in that the moving parties, in large part, rely upon the same underlying facts and substantive bases. Indeed, in many respects the motions are virtually identical, since even International Vault's motion to dismiss the third-party complaint is based entirely upon its contentions that plaintiffs' negligence, product liability and warranty claims against Coast Security are legally insupportable. Accordingly, we will first dispose of the issues common to both Coast's and International Vault's pending motions before discussing the

additional issues applicable only to Coast Security's motion to dismiss the amended complaint.

As previously noted, the moving defendants supplied only a vault, one component of the security system designed to protect Rolex from the types of losses allegedly sustained in the September, 1995, burglary. We will, therefore, express no opinion concerning the substantive merit and ultimate viability of plaintiffs' claims against the remaining defendants, ADT and Wells Fargo, suppliers of other products and services which were likewise part of the Rolex security system.

I. Legal Standards Applicable to Motions Under Fed. R. Civ. P. 12(b)(6)

In general, when considering motions to dismiss for failure to state a claim upon which relief can be granted, the Court must accept as true all the factual averments in plaintiffs' well-pleaded complaint; the Court must construe the complaint in the light most favorable to plaintiffs; and the Court must determine whether, "under any reasonable reading of the pleadings, the plaintiff[s] may be entitled to relief." Colburn v. Upper Darby Township, 838 F.2d 663, 665-666 (3d Cir. 1988) (citing, Estate of Bailey by Oare v. County of York, 768 F.2d 503, 506 (3d Cir. 1985)). The Court is not, however, required to accept the truthfulness of opinions, legal conclusions or deductions derived from the actual allegations of fact. Government Guarantee Fund v. Hyatt Corporation, 955 F. Supp. 441 (D. Virgin Islands 1997).

In disposing of a Rule 12(b)(6) motion to dismiss, the Court is ordinarily limited to considering the sufficiency of the claims based upon the pleadings alone, and, "if matters outside the pleadings are presented to and not excluded by the Court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56 and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56." Fed. R. Civ. P. 12(b)(6). Such rule, however, is not absolute. Rather, in deciding a Rule 12(b)(6) motion the Court may likewise consider "matters of public record, exhibits attached to the complaint and items appearing in the record of the case." Oshiver v. Levin, Fishbein, Sedran & Berman, 38 F.3d 1380, 1384, n. 3 (3rd Cir. 1994).

In some instances, "items appearing in the record of the case" may include documents attached as exhibits to a defendant's Rule 12(b)(6) motion to dismiss. Pension Benefit Guaranty Corp. v. White Consolidated Industries, Inc., 998 F.2d 1192 (3rd Cir. 1994). The authenticity of such documents, however, must be undisputed and plaintiff's claims must be based thereon. Id.; Foust v. FMC Corp., 962 F. Supp. 650 (E.D. Pa. 1997).

Although at least two of the substantive issues asserted in support of the Rule 12(b)(6) motions of Coast and International Vault are specifically based upon the contract between Rolex and Coast for the purchase of the vault, none of

the parties involved have addressed the propriety of the Court's consideration of and reliance upon the contract, which is an exhibit to Coast Security Corporation's Motion to Dismiss, but was not made part of the complaint or amended complaint. We conclude, however, that in light of the allegations of the amended complaint and in light of certain issues brought before the Court in the pending motions to dismiss and in plaintiffs' responses thereto, the contract is essential for determining whether plaintiffs' warranty and other claims based upon the contract should be dismissed or allowed to proceed.

Consequently, we will first consider whether it is appropriate to rely upon the contract between Coast and Rolex for the sale of the vault in ruling on the instant motions to dismiss, although such contract is part of the record only as an exhibit to a motion to dismiss the amended complaint.

In accordance with the standards announced by the Court of Appeals in Pension Benefit Guaranty Corp. v. White Consolidated Industries, if we expect to rely upon the contract in ruling on the instant motions we must determine whether there is any dispute concerning the authenticity of the contract and whether plaintiffs' claims are based upon it.

The contract, attached as Exhibit B to defendant Coast's motion to dismiss, (Doc. #29), clearly refers to the sale of a "Class-M" vault by Coast to Rolex, and bears the signatures of officers of both Coast and Rolex. Moreover, plaintiffs do not dispute that the copy of the contract attached to Coast's motion

is authentic. We conclude, therefore, that Exhibit B to Coast's motion to dismiss is an authentic copy of the contract between Rolex and Coast for the sale of the vault at issue in this action.

It is likewise clear that plaintiffs' claims against Coast and International Vault are based upon the contract, since it is the document which sets forth the specifications of the vault, establishes that the sale occurred, the date thereof, and that defendant Coast was the vendor. In addition, plaintiffs do not suggest that their claims are not based upon the contract between Rolex and Coast, or that it is in any way inappropriate for the Court to rely upon the contract for the sale of the vault in ruling on the motions to dismiss.

We ultimately conclude, therefore, that the contract is part of the record of the case which we may properly consider in deciding the pending motions.

Having set forth the procedural framework for our consideration of the pending motions, we turn to our discussion of the substantive legal issues involved therein.

II. Warranty Claims--Statute of Limitations

Both Coast Security and International Vault argue that since Rolex purchased the vault breached in the burglary in 1987, plaintiffs' claims for breach of implied warranty of merchantability and for breach of implied warranty of fitness for a particular purpose are barred by the four year statute of

limitations found in the Uniform Commercial Code, (UCC), which is incorporated into statutes governing the sale of goods that are potentially applicable to this action.¹

Plaintiffs respond, in the first instance, that it is inappropriate to raise the statute of limitations in a motion to dismiss rather than as an affirmative defense in an answer to the complaint. Plaintiffs further contend that they commenced suit within the four year statute of limitations period applicable to their claims against Coast and International Vault in that, in accordance with a UCC provision, the implied warranties on the vault were explicitly extended to future performance of the vault. Thus, plaintiffs argue that the statute of limitations on their claims began to run in 1995, when the breaches of the implied warranties were discovered. Finally, plaintiffs contend that the moving defendants failed to attach any evidence of the delivery date of the vault. Consequently, plaintiffs assert that there is nothing in the record of the case from which the Court might determine that their warranty claims accrued more than four years before suit was filed.

1. The parties to the pending motions have analyzed the warranty claims under both Pennsylvania and Connecticut statutory law relating to the sale of goods. Although the vault was apparently purchased in Pennsylvania and was installed in the Rolex facility in Pennsylvania, the purchase order which serves as the contract for the sale of the vault provides that it shall be construed under the laws of Connecticut. Since both Pennsylvania and Connecticut have adopted the warranty provisions of the UCC, however, there appears to be no conflict between Pennsylvania and Connecticut law in this regard.

All parties to the pending motions agree that whether plaintiffs' warranty claims are decided under Pennsylvania or Connecticut law, such claims are subject to the UCC four year statute of limitations for contract claims arising out of the sale of goods, and that the statute ordinarily begins to run on the date of delivery of the goods. See, 13 Pa. Cons. Stat. Ann. §2725 (Purdon's 1984); Patton v. Mack Trucks, 519 A.2d 959 (Pa. Super. 1986); Conn. Gen. Stat. §42-a-725; Beckenstein v. Potter & Carrier, Inc., 464 A.2d 18 (Conn. 1983). The questions before the Court with respect to the statute of limitations issue, therefore, are (1) whether such issue may be considered and determined in the context of a Rule 12(b)(6) motion to dismiss; (2) if so, whether there is sufficient evidence in the record to determine when delivery of the vault was tendered by Coast to Rolex; (3) whether plaintiffs' warranty claims accrued upon delivery of the vault or whether such claims accrued upon discovery that the vault did not conform to specifications, in that warranties covering the vault were explicitly extended to cover its future performance.

With respect to plaintiffs' contention that the statute of limitations defense is not properly asserted in a Rule 12(b)(6) motion, defendant International Vault notes that the Court of Appeals has permitted consideration of whether a claim is barred by the statute of limitations in the context of a motion to dismiss where the viability of such defense may be discerned from the complaint itself, i.e., where the facts as

pled demonstrate that the claim is untimely. Oshiver v. Levin, Fishbein, Sedran & Berman, 38 F.3d at 1384, n.1. Here, however, since plaintiffs have not alleged the date of purchase of the vault in either the complaint or in the first amended complaint, and did not attach a copy of the contract itself to either document, and since neither defendant Coast nor defendant International Vault has filed an answer to the amended complaint, the accrual date of the claim cannot be conclusively determined from the pleadings alone.

Nevertheless, having already determined that the contract for the sale of the vault is properly part of the record upon which the instant motions may be decided, we likewise conclude that the statute of limitations defense was appropriately asserted and may be decided by the Court on the basis of the entire record before the Court. In Pension Benefit Guaranty Corporation v. White, the Court of Appeals reasoned that if a concededly authentic document upon which a plaintiff's claims are based may not be considered in deciding a motion to dismiss the complaint for failure to state a claim upon which relief can be granted, a plaintiff could avoid dismissal of a legally deficient claim by artful pleading alone. Similarly, in this case, if we are limited to the face of the pleadings in determining whether plaintiff's warranty claims are barred by the statute of limitations, and may not refer to the contract which is properly part of the record, we would be forced to postpone consideration of such defense due solely to the plaintiffs'

Careful omission of the delivery date of the vault from their complaint and amended complaint. Thus, based upon the reasoning of Pension Benefit Guaranty Corporation v. White and Oshiver v. Levin, we conclude that the statute of limitations defense may be considered in the context of the pending motions to dismiss the amended complaint and to dismiss the third-party complaint since the defense is clearly evident from the entire record that is properly before the Court, albeit not from the complaint or amended complaint alone.

Review of the record before the Court on the pending motions, including the contract between Coast and Rolex, (Exh. B to Doc. #29), discloses that contrary to plaintiffs' contention, there is evidence in the record which establishes that the vault was purchased, delivered and installed at the Rolex facility in Lancaster more than four years prior to commencement of the instant action. In the first instance, the contract between Rolex and Coast is dated September 16, 1987. (Id.). In addition, plaintiffs allege that Rolex contracted with ADT for provision of an alarm security system in 1987 and that the vault was purchased "as a component part of its security system," (Amended Complaint, Doc. #23, ¶¶11, 76). Clearly, therefore, the only reasonable inference to be drawn from the record is that the "integrated security system" that plaintiffs describe, including, inter alia., the vault and the alarm system, was delivered and installed at the Rolex facility in late 1987, approximately eight years prior to the burglary which gave rise to this action.

Consequently, unless plaintiffs are correct in their contention that warranties on the vault were explicitly extended to future performance of the vault, plaintiffs' warranty claims are barred by the statute of limitations.

Plaintiffs' argument with respect to explicit extension of the warranties, however, cannot succeed by reference to the contract for the sale of the vault alone, since there is nothing in the contract which suggests that the parties contemplated any extended warranties. Indeed, the contract specifically disclaims any warranties other than those expressly stated in the contract, limits such warranties to one year following shipment of the vault, and provides that all warranty claims must be presented in writing to the seller within that period. (See, Exh. B to Doc. #29, ¶10).

Thus, plaintiffs' argument that their warranty claims relating specifically to the vault accrued in September, 1995, when the burglary at the Rolex facility occurred, can be based only upon plaintiffs' contention that the vault was part of the "integrated security system" that Rolex purchased in 1987. (See, Response of Plaintiffs to Motion of Defendant, International Vault, Inc. to Dismiss Plaintiffs' Amended Complaint, Doc. #39 at 5; Amended Complaint, Doc. #23, ¶11). Indeed, absent such contention, there is no basis for plaintiffs' reliance upon Cucchi v. Rollins Protective Services, 574 A.2d 565 (Pa. 1990), which refers specifically to an arrangement whereby plaintiff paid for service to be provided by the defendant for the duration

of an ongoing lease. Here, however, although plaintiffs allege that defendant ADT "agreed to provide Rolex with an alarm security system...and in conjunction therewith to install, service and monitor the alarm system," and that ADT advised Rolex to contract with defendant Wells Fargo to obtain additional security, (Doc. #23, ¶¶11, 15), plaintiffs do not allege any connection between the moving defendants and either ADT or Wells Fargo. With respect to Coast and International Vault, plaintiffs allege that Rolex purchased a vault represented to meet class "M" specifications from Coast Security, that the vault did not meet such specifications and that plaintiffs believe that International Vault was the supplier of the vault. (Id. at ¶18). According to the allegations of the amended complaint, therefore, although the vault may have been part of an integrated system as conceived by Rolex, the purchase of the vault was completely independent of the purchase of the remaining components of the security system. Moreover, plaintiffs have not suggested in their response to the pending motions that they can or intend to produce evidence that defendants Coast and International Vault were aware of any connection between the purchase of the vault and the purchase of other components of a security system. Thus, regardless of the viability of plaintiffs' argument concerning the extension of warranties with respect to any of the other defendants, which is not presently before the Court, neither the amended complaint, the contract, nor anything else in the record provides a basis for plaintiffs' argument that the parties to the

sale of the vault expressly intended to extend the limited warranty found in the contract. Indeed, based upon the record before the Court there is not even a plausible inference that Coast and International Vault were aware that Rolex intended to incorporate the vault into an integrated security system which was to be monitored by ADT. There is, therefore, absolutely nothing other than plaintiffs' conclusionary arguments which suggests that Coast and Rolex expressly intended to extend the warranties applicable to the vault to future performance thereof. Thus, we conclude that the statute of limitations on plaintiffs' warranty claims began to run on the date of delivery of the vault, as ordinarily provided in the UCC, and, therefore, that such claims are barred by the four year statute of limitations that plaintiffs concede is applicable to their warranty claims.

III. Strict Liability and Negligence Claims

Although both International Vault and Coast Security argue that as a matter of substantive law, plaintiffs may not recover in tort for the types of losses alleged in this action, the moving defendants take different approaches to the legal issues involved. International Vault contends that if confronted with negligence and strict liability claims similar to those asserted by plaintiffs in this case, the Supreme Court of Pennsylvania would preclude such claims by logical extension and application of the "Economic Loss Doctrine" first identified by the U.S. Supreme Court in East River S.S. Corp. v. Transamerica

Delaval, Inc., 476 U.S. 858, 106 S.Ct. 2295, 90 L.Ed. 2d 865 (1986). Coast argues, inter alia., that plaintiffs' product liability claims should be dismissed pursuant to the rationale adopted by the Pennsylvania Superior Court in Lobianco v. Property Protection, Inc., 437 A.2d 417 (Pa. Super. 1981), in which the court concluded that as a matter of social policy, the risk of loss from a defective product which caused only economic loss should not be allocated to the manufacturer and seller thereof. Coast also contends that all of plaintiffs' tort claims should be dismissed based upon limitation of liability clauses in the contract between Coast and Rolex. We will here consider the two defendants' purely legal bases for dismissal of the negligence and strict liability claims, reserving, for the moment, our discussion of Coast's contract arguments.

A. Economic Loss Doctrine

In East River, an admiralty case, the Supreme Court concluded that a plaintiff should not be permitted to recover on a products liability theory where the loss resulting from the alleged defect in the product was limited to damage to the product itself. The Court reasoned that contract remedies for such purely economic losses were a more appropriate means of recovery than tort remedies. The Pennsylvania Superior Court later adopted the East River rationale, stating in REM Coal Co., Inc. v. Clark Equipment Co., 563 A.2d 128, 133 (Pa. Super. 1989), that it was "in complete accord" with the notion that a claim for breach of warranty "supplies a suitable framework for regulating

and enforcing the expectations of the parties as to product performance."

In addition, the Court of Appeals for the Third Circuit had previously predicted that the East River analysis would be adopted by the Pennsylvania Supreme Court. Aloe Coal Co. v. Clark Equipment Co., 816 F.2d 110 (3rd Cir. 1986). Still, the Pennsylvania Supreme Court has not yet had occasion to determine whether to follow the U.S. Supreme Court's analysis in economic loss cases.

More important for the present case, both REM Coal and Aloe Coal involved the same type of claim as East River, i.e., damage to the allegedly defective property itself. Neither the Pennsylvania Superior Court nor the Third Circuit has yet considered the scope of the economic loss doctrine under Pennsylvania law if property other than the product itself is lost or damaged as the result of an alleged defect.

There have, however, been several persuasive district court decisions to the effect that the tort recovery limitation imposed by the economic loss doctrine likewise extends to property reasonably expected to be damaged by an alleged product defect. See, e.g., Hartford Fire Insurance Co. v. Huls America, Inc., 893 F. Supp. 465 (E.D. Pa. 1995); 2-J Corp. v. Tice, 926 F. Supp. 55 (E.D. Pa. 1996); Wellsboro Hotel Co. v. Prins, 894 F. Supp. 170 (M.D. Pa. 1995). The court in Hartford analyzed the issue in terms of the diverse purposes of tort and contract law,

noting that property damage claims do not fit well within the traditional concern of tort law, i.e., providing a remedy for injuries to the person which would otherwise have no means of redress. Economic injuries, on the other hand, are generally compensable through various contract remedies, including breach of warranty claims. In Wellsboro, the court adopted the Hartford analysis, concluding broadly that claims based upon "failed economic expectations" are not appropriately asserted under tort theories of liability. 894 F. Supp. at 175. Even more broadly, the court in 2-J Corp. held that the gravamen of tort claims arising out of damage to the contents of a prefabricated building that collapsed were that the building did not perform as expected. The court, therefore, granted defendant's motion for summary judgment on the tort claims since plaintiff asserted, in essence, that it had failed to receive the "benefit of its bargain," a claim sounding in contract rather than in tort. 926 F. Supp. at 57.

Finally, we note that the Pennsylvania Superior Court has recently endorsed a new approach to determining whether a claim is more properly characterized as a tort or a contract claim. In Phico Insurance Co. v. Presbyterian Medical Services, 663 A.2d 753, 757 (Pa. Super. 1995), the court abandoned as inadequate and unworkable an inquiry into whether a claim based upon a contract alleged misfeasance or nonfeasance as a means for determining the "character" of a claim for the purpose of deciding whether a plaintiff may pursue a tort remedy. The

court concluded that the inquiry should focus on the "gist" of the claim. Id. The Phico Insurance case involved the question whether a breach of contract exclusion in a liability policy was applicable to claims that the extremely poor management of a health care facility amounted to gross negligence on the part of the employees in charge, not whether property damage was compensable via a tort action. Nevertheless, the reasoning employed by the Superior Court panel echoes the rationale underlying the economic loss doctrine as applied in the above-cited district court cases. Relying upon the evident trend in Pennsylvania law toward examining the essence of the claim in considering whether to permit a tort remedy for disappointed expectations in a commercial relationship, we are persuaded that the full scope of the economic loss doctrine as set forth in the recent district court cases will be adopted by the Pennsylvania Supreme Court when it has the opportunity to address this issue.

Application of the economic loss doctrine to the negligence and product liability claims alleged against International Vault and Coast Security in the amended complaint leads inexorably to the conclusion that such claims arise entirely from the contract in which Coast agreed to supply Rolex with a class "M" vault. Plaintiffs allege that the manufacturer (International Vault) and the seller (Coast Security) negligently supplied a vault which did not meet the specifications of the contract and that the vault was defective by reason of its failure to meet the contract specifications. Such allegations

fall squarely within the conceptual framework of the economic loss doctrine, i.e., plaintiffs' negligence and product liability allegations reflect frustrated commercial expectations. We conclude, therefore, that the negligence and product liability claims asserted against International Vault and Coast Security are subject to dismissal in accordance with the economic loss doctrine, since such claims are more appropriately addressed under a contractual warranty theory of liability rather than under negligence or strict liability theories.

B. Social Policy Considerations

With respect to the product liability claims asserted against it, Coast Security notes that in Lobianco v. Property Protection, Inc., the Pennsylvania Superior Court, en banc, concluded that the purposes of strict liability claims under the RESTATEMENT (SECOND) OF TORTS, §402A would not be well served by permitting the plaintiff to proceed under a products liability theory in an action arising out of the failure of a burglar alarm system to function properly. The court concluded that the risk of loss of the jewelry stolen in a burglary that was not detected by the alarm system was more appropriately placed upon the owner of the jewelry than upon the supplier of the alarm system. The court ultimately concluded, therefore, that permitting recovery for such loss by means of a strict liability claim was not justified.

In reaching this determination, the Superior Court looked to the traditional considerations underlying the social

policy decision inherent in permitting recovery for strict liability claims, i.e., that it is more equitable to allocate to the suppliers of a defective product the risk of loss caused thereby because the suppliers are better able to insure against such losses. Conceptually, the considerations described by the court in Lobianco amount to an expression of the same concerns that form the philosophical underpinnings of the economic loss doctrine. Compare, Lobianco, 437 A. 2d at 424--425, with East River, 90 L.Ed. 2d at 877.²

Having already concluded that the Pennsylvania Supreme Court would adopt the economic loss doctrine, we likewise conclude that the variant--and predecessor--thereof represented by the Lobianco decision would be accepted.

IV. Contractual Limitations on Warranty and Tort Claims

Defendant Coast Security contends that various contract provisions likewise support dismissal of plaintiffs' warranty and tort claims. The contract limits express warranties on the vault to failure to conform to specifications and to defects in workmanship discovered and reported in writing within one year of shipment of the vault, and further provides that all implied

2. It is interesting to note that in Lobianco, which preceded the East River decision by several years, the Pennsylvania Superior Court cited a series of California cases upon which the United States Supreme Court later relied in East River.

warranties are expressly disclaimed. (Exh. B to Doc. #29, ¶10).³

In addition, Coast argues that there are valid and enforceable limitation of liability clauses in the contract relating to all damages arising from sale or installation of the vault, relating specifically to burglary and theft of the contents of the vault, and relating to remedies available for breach of the express warranties in the contract. (Id., ¶¶9, 11).⁴ Coast contends that the contractual limitations on

3. The warranty provision of the contract provides as follows:

10. WARRANTIES:

Seller warrants to the original Buyer that the Equipment will be manufactured and, if installed under Seller's direction pursuant to Section 8 shall be installed in conformity with the specifications and drawings expressly approved by the Seller, subject to variations consistent with practical testing and inspection standards. Seller warrants that the vault module will, upon shipment, be free from defects, provided that it is properly stored, installed, maintained, operated and serviced. Seller's warranties shall terminate one year from date of shipment of the Equipment and all warranty claims must be presented in writing to Seller within such period or be barred. Upon receipt of such claims, Seller may, at its option, examine the Equipment where located or have the part claimed to be defective returned to Seller for inspection. EXCEPT AS EXPRESSLY SET FORTH HEREIN, NO EXPRESS OR IMPLIED WARRANTY, INCLUDING ANY WARRANTY OF MERCHANTABILITY OR FITNESS, SHALL EXIST IN CONNECTION WITH ANY EQUIPMENT SOLD OR FURNISHED BY SELLER, AND SUCH WARRANTIES ARE EXPRESSLY EXCLUDED.

4. The contract includes the following provisions, in addition to ¶10, relating to limitations of liability and remedies:

9. DISCLAIMER OF LIABILITY

Seller shall not be liable for loss of profits,
(continued...)

liability, warranties and damages foreclose plaintiffs' claims against Coast for failure to provide a vault which conformed to the specifications in the contract, as well as all claims for losses sustained in the burglary, regardless of Coast's conduct or any role the vault may have had in facilitating the occurrence which resulted in the alleged losses.

Plaintiffs concede that contractual limitation of warranty clause and other limitation of liability clauses are

4. (...continued)

incidental, consequential, liquidated or other damages arising from the sale or installation of its Product. Seller shall not be liable for successful entry by a burglar on the modules. Seller shall not be liable for any loss or theft of or any damages to contents of the Vault, in use by Buyer or Buyer's customers which must be moved or otherwise handled by Seller's installers in the performance of their work, whether or not negligently caused. Buyer shall provide guards or bank personnel (sic) to be present at all times while such moving or handling is done. Buyer shall provide its own insurance against the risk of loss or theft while such articles are being moved or handled.

11. REMEDIES LIMITED

Seller will, at its option, either repair or furnish a replacement part for Equipment manufactured by Seller which upon inspection is determined to be defective under Seller's warranty and will correct any installation made under its direction pursuant to Section 8 which is defective under Seller's installation warranty. The foregoing sets forth Buyer's sole remedy for any breach of Seller's warranties or any defects in equipment or in work for which the Seller is responsible. Without limiting the generality of the of the foregoing, SELLER SHALL IN NO EVENT BE LIABLE FOR LOSS OF MONEY, OTHER VALUABLES, PROFITS OR INCIDENTAL, CONSEQUENTIAL OR ANY OTHER DAMAGES RESULTING FROM THE LOSS OF USE OR MALFUNCTION OF ANY EQUIPMENT SOLD BY SELLER WHETHER OR NOT FORESEEABLE BY SELLER AND WHETHER OR NOT DUE TO SELLER'S NEGLIGENCE.

enforceable under both Pennsylvania and Connecticut law in appropriate circumstances. Not surprisingly, however, plaintiffs contend that the limitation of liability, warranties and remedies clauses at issue in the contract between Coast and Rolex fail to meet the standards required for enforcement of such clauses.⁵ Plaintiffs argue that the contractual limitation of liability and remedy clauses upon which Coast relies are to be evaluated in accordance with the standards applied to the broadest exculpatory clauses under Pennsylvania law, notwithstanding plaintiffs' apparent agreement that the choice of law provision in the contract specifies that Connecticut law governs interpretation of the contract. (Id., ¶14). Although Coast likewise relies heavily

5. Also not surprisingly, plaintiffs make no distinction among the three clauses at issue in this case with respect to whether such clauses purport to merely limit Coast's liability or to completely insulate it from liability.

In Valhal Corp. v. Sullivan Associates, Inc., 44 F.3d 195, 202 (3rd Cir. 1995), the court noted that "there are differences between a contract which insulates a party from liability and one which merely places a limit upon that liability." The court further noted that the validity and enforceability standards applied to limitation of liability clauses are less stringent than the standards applied to exculpatory clauses. "Limitation of liability clauses are routinely enforced under the Uniform Commercial Code when contained in sales contracts negotiated between sophisticated parties and when no personal injury or property damage is involved." Id. at 203. Included among the less stringently enforced limitation of liability clauses are provisions excluding reimbursement for special, indirect or consequential damages.

In light of our disposition of the contractual limitation of liability and disclaimer issues under Connecticut law, however, we have no occasion to analyze the contract clauses involved in the pending motions in the manner suggested in Valhal.

upon the legal standards developed by Pennsylvania courts regarding the validity and enforceability of contract clauses limiting or disclaiming warranties and other types of liability, Coast asserts that Connecticut law with respect to such issues is virtually identical to Pennsylvania law.

It appears, however, that the Connecticut courts have not formulated standards concerning enforcement of contractual limitation and disclaimer of liability clauses as broadly or in as much detail as Pennsylvania courts. Nevertheless, there is sufficient authority from the Connecticut courts to conclude in this case that the limitation and disclaimer of liability provisions in the contract for the purchase of the vault are valid and enforceable under Connecticut law, at least with respect to plaintiffs' negligence and warranty claims.

In general, despite the obligatory recitation that contract clauses which purport to relieve a party of liability for its own negligence are disfavored, the Connecticut courts, as well as the Second Circuit Court of Appeals, predicting the course of Connecticut law, have recognized that limitation of liability clauses are generally upheld where such limitation appears in a signed contract between parties of equal status, and particularly in the context of security alarm systems. See, V.P. Enterprises, Inc. v. A.J.T. Burglar Alarm Systems, Inc., No. CV 91-03311773-S, 1993 WL 393840 (Conn. Super. Sept. 20, 1993); Leon's Bakery, Inc. v. Grinnell Corp., 990 F.2d 44 (2nd Cir. 1993).

In determining whether exculpatory clauses are enforceable, Connecticut courts appear to be most concerned with whether such provisions are unconscionable, i.e., whether a party to the contract would be subjected to unfair surprise or oppression as a result of enforcing a contractual warranty limitation or a limitation on liability or damages. Emlee Equipment Leasing Corp. v. Waterbury Transmission, Inc., 626 A.2d 307 (Conn. App. Ct. 1993); Hanover Insurance Co. v. American District Telegraph Co., No. CV 88-0232346, 1991 WL 269106 (Conn. Super. Dec. 4, 1991). The Connecticut Appellate Court, evaluating a warranty disclaimer in Emlee, concluded that printing the limitation of warranty in capital letters in the body of the contract made it sufficiently conspicuous to avoid unfair surprise. Although the court appeared to agree that oppression might be found if plaintiff were left without a remedy for the product's failure of performance, the court concluded in Emlee that the lessee/plaintiff had sufficient recourse via the contractual assignment by the lessor/defendant of all manufacturer's warranties to plaintiff. Thus, the lessor's disclaimer of all warranties was enforced by the court despite the fact that there actually were no manufacturer's warranties available for the product in question.

More broadly, the Second Circuit Court of Appeals in Leon's Bakery noted that the rationale underlying enforcement of exculpatory clauses in commercial transactions for alarm systems relates to the disproportionate value of the system and the

property to be protected by it. The court concluded that a clause limiting liability for damages resulting from a malfunction of a fire alarm system was not unconscionable in that the cost of the alarm system was obviously related to the value of the equipment and service provided, and was not high enough to reasonably suggest that such cost included a premium to insure against loss of the property on the premises. Thus, the court seemed to suggest that the availability of property insurance is a sufficient remedy for failure of a protective system, and, therefore, that an exculpatory clause in a contract for such system should not be considered oppressive for the reason that plaintiff is denied recourse for an injury resulting from failure of the system, even if such failure is due to the negligence of the supplier thereof.

At the least, the court appears to have concluded that given the cost of the protective product and/or service provided, the uncertain value of the property at risk, and the cost of insurance coverage, it is unreasonable to expect the provider of an alarm system to guarantee the product or service against losses of the type the system is designed to minimize.⁶ Hence, limitation of liability clauses are enforceable in cases involving protective alarm systems. Such reasoning is equally

6. This basis for enforcing limitation of liability clauses under Connecticut law recalls the reasoning of the Pennsylvania Superior Court in concluding that, as a matter of social policy, recovery under a strict liability theory for claims arising out of a malfunctioning burglar alarm system would not be justified. See, Lobianco v. Property Protection, Inc., 437 A.2d at 425.

applicable to a security product such as the vault here at issue, which is an independent component of an integrated protective system.

Although the parties to Coast's motion to dismiss plaintiffs' complaint have not attempted to discern and apply principles of Connecticut law to the claims against Coast, the Court is nevertheless obliged to undertake that task pursuant to the choice of law provision of the contract between Coast and Rolex. In addition to the reasoning of the Second Circuit Court of Appeals in Leon's Bakery, which we conclude may be applied to the exculpatory clauses in this action, we likewise conclude that the decision in V.P. Enterprises presents factual circumstances analogous to those underlying this action and represents a fair application of the principles which appear to guide enforcement of such clauses under Connecticut law.

In V.P. Enterprises, plaintiff alleged that it contracted with the defendant to design an alarm system capable of protecting its jewelry store from burglars. Accordingly, the defendant supplied an alarm system combining door sensor devices and infrared motion detectors. The contract, however, contained no term relating to a particular type of installation, specifically disclaimed any warranties of merchantability and fitness for a particular purpose to the effect that the system could not be compromised or would absolutely provide the protection intended, and excluded liability for personal injury

or property damage due to defendant's negligence or failure to perform any obligation undertaken pursuant to the contract.

Several years later, plaintiff's jewelry store was burglarized by thieves who entered by drilling a hole through the common wall between the store and an adjoining building undergoing renovations. The burglars did not activate the alarm system, and thereby escaped detection, because they did not disturb the door sensors and because they breached only the display cases in an approximately ten foot area of the store not covered by the infrared detectors.

In a lawsuit alleging, inter alia., breach of contract and breach of implied warranties, the Connecticut Superior Court concluded that the injury was inflicted at the time the system was installed and that plaintiff was capable of ascertaining the defect in the alarm system by testing and inspection at the time the system was installed, since it was not altered in the time between installation and the burglary. Consequently, plaintiff's warranty and contract claims were barred by the statute of limitations, as well as by the contractual limitation of liability clause, which the court concluded was enforceable in the absence of proof of gross negligence by the defendant.

This action is similar to V.P. Enterprises in all relevant respects. The contract between Coast and Rolex clearly, specifically and conspicuously disclaims implied warranties, as well as any suggestion that the vault is not subject to entry by burglars, and any responsibility for damages incidental or

consequential to the failure of the vault to perform as expected. Although there is an allegation of gross negligence included within the negligence count asserted against Coast in the Amended Complaint, the gravamen of the claim is that Coast carelessly failed to deliver a vault which met the specifications of the contract. Nothing therein suggests that Coast's conduct exceeded simple negligence.

Moreover, there are no allegations in the amended which suggest that Rolex could not have inspected the vault and discovered its alleged failure to conform to contractual specifications at the time it was delivered. This factor, which appears to have been an important consideration in the statute of limitations analysis in V.P. Enterprises, lends further support to our prior conclusion that there is no basis for extending the statute of limitations on plaintiffs' warranty claims.

Based upon Connecticut law as applied by the Connecticut Superior Court in V.P. Enterprises and by the Second Circuit Court of Appeals in Leon's Bakery, we conclude that the disclaimer of warranty and limitation of liability clauses at issue in this action are enforceable to the same extent that substantially similar clauses were enforced by the courts in those cases.

Finally, considering a factor that appears in other Connecticut decisions to be essential for finding exculpatory clauses enforceable, but which was not explicitly considered in V.P. Enterprises, we conclude that the disclaimer of warranties

and other exculpatory clauses did not eliminate all remedies for failure of Coast to provide a vault which met the specifications of the contract. Rather, the contract contained an express warranty that the vault conformed to the description found in the contract, and provided for repair or replacement of any nonconforming or defective parts. Under the express warranty, however, Rolex was required to inspect the vault and bring any nonconformity with contract specifications to Coast's attention within one year of delivery of the vault. (See, Exh. B to Doc. #29 at ¶10). Such warranty would, by its terms, have extended to making the vault conform to class "M" specifications as described in the contract. Apparently, however, Rolex did not timely inspect the vault and, therefore, failed to exercise its rights under the express warranty. Under such circumstances, we conclude that pursuant to Connecticut law, we are amply justified in enforcing the disclaimers of implied warranties, liability and damages set forth in the contract between Coast and Rolex.

Although we have already determined that plaintiffs' negligence and product liability claims are barred by the Pennsylvania economic loss doctrine, and that plaintiffs' warranty claims are barred by the statute of limitations, our conclusions with respect to the disclaimer of warranty and limitation of liability issues provide additional bases for dismissing plaintiffs' claims for negligence and breach of warranty, and, concomitantly, for dismissing Coast's third-party claims against International Vault.

V. Misrepresentation Claims

Defendant Coast asserts that plaintiffs' claims for negligent misrepresentation, Count XI of the amended complaint, and for fraudulent misrepresentation, Count XII, may be dismissed based upon the limitation of liability clause found in ¶9 of the contract, and that plaintiffs have attempted to assert that their misrepresentation claims are subject to a relaxed standard of causation which applies only to cases involving claims of professional negligence resulting in death or bodily harm to the plaintiff.

Plaintiffs argue in response that they are aware of and able to bear the full burden of establishing the causation element of their misrepresentation claims. Plaintiffs further argue that claims involving intentional conduct, such as their fraudulent misrepresentation claim, are not subject to contractual limitations of liability or to dismissal for any other reason asserted by Coast.

We begin our analysis of the misrepresentation claims by setting forth the elements thereof under Pennsylvania law, which we presume is applicable to such claims in the absence of allegations that the alleged misrepresentations were made to Rolex anywhere other than in Pennsylvania.

To assert a claim for negligent misrepresentation under Pennsylvania law, plaintiffs must allege a misrepresentation arising from lack of reasonable care in communicating erroneous information upon which the recipient thereof justifiably relies,

resulting in injury to person or property. Kurtz v. American Motorists Insurance Co., No. 95-1112, 1995 WL 695111 (E.D. Pa. Nov. 21, 1995); Woodward v. Dietrich, 548 A.2d 301, 308, n. 5 (Pa. Super. 1988). In addition to these elements of false information, justifiable reliance and damages, a claim for fraudulent misrepresentation requires that the misrepresentation be communicated intentionally or recklessly, and that it be intended to induce action on the part of the recipient. Id.

Although plaintiffs have accurately recited the elements of negligent and fraudulent misrepresentation claims against Coast in the amended complaint, it is apparent that such allegations, in reality, state nothing more than the same claim which underlies the entire reason that Coast is a party to this action, i.e., its failure to supply a vault that conforms to the description found in the contract between Coast and Rolex. Plaintiffs do not allege any misrepresentations by Coast subsequent to the purchase and delivery of the vault which induced Rolex to forego inspection of the vault in the interim between delivery/installation of the vault and the burglary. Moreover, even if we infer from the allegation that the burglars gained access to Rolex's property stored in the vault through splintered and rotting wood, that Rolex did not receive a vault composed of steel and masonry as suggested by the Class "M" designation in the contract, plaintiffs do not allege that the composition of the vault was a hidden condition thereof. Hence,

our conclusion that the misrepresentation claims do not substantively differ from the breach of warranty and negligence claims which we have already concluded may be dismissed for a variety of reasons.

Thus, we ultimately agree with defendant Coast's contention that plaintiffs' negligent and fraudulent misrepresentation claims are likewise subject to the limitation of liability provisions of the contract between Coast and Rolex, since we conclude such claims are the same tort and warranty claims previously dismissed which plaintiffs merely labeled differently in Counts XI and XII of the amended complaint.

Finally, we note that under Pennsylvania law there is a two year statute of limitations for fraud claims, as well as for negligence claims. See, 42 Pa. Cons. Stat. Ann. §5524 (Purdon's Supp., 1996). Consequently, such claims are likewise barred by the statute of limitations since, as noted, there are no allegations in the amended complaint to the effect that Rolex could not have learned of the vault's nonconformance with representations made by Coast by inspection thereof long prior to the burglary, indeed, within the express warranty period provided in the contract.

VI. Summary

Having considered all of the issues asserted in defendant International Vault's motion to dismiss the third-party complaint, and in the motions of defendants Coast and

International Vault to dismiss the amended complaint, as well as plaintiffs' responses thereto, we conclude for the reasons discussed that plaintiffs can prove no facts which would entitle them to relief on any of the claims asserted against the moving defendants. We will, therefore, dismiss with prejudice plaintiffs' claims against Coast Security and against International Vault. We will likewise dismiss Coast Security's third-party complaint against International Vault, since there is no basis for the third-party complaint in the absence of any claims against Coast. An appropriate order will be entered, granting the pending motions in their entirety

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA

NEUCHATEL INSURANCE and)	CIVIL ACTION
GREAT NORTHERN INSURANCE CO.,)	
)	NO. 96-5396
Plaintiffs)	
)	
vs.)	
)	
ADT SECURITY SYSTEMS, INC.,)	
WELLS FARGO ALARM SYSTEMS,)	
COAST SECURITY CORPORATION and)	
INTERNATIONAL VAULT, INC.,)	
)	
Defendants)	

TROUTMAN, S.J.

O R D E R

And now, this _____ day of August, 1997, upon consideration of the motions of International Vault, Inc., to dismiss the third-party complaint, (Doc. #19), and to dismiss plaintiffs' amended complaint, (Doc. #26), the motion of defendant, Coast Security, to dismiss the amended complaint, (Doc. #29), and plaintiffs' responses thereto, **IT IS HEREBY ORDERED** that the motions are **GRANTED**.

IT IS FURTHER ORDERED that all claims, crossclaims and third-party claims against defendants Coast Security, Inc., and International Vault, Inc., are **DISMISSED with prejudice**.

S.J.