

**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

<b>ASBURY AUTOMOTIVE GROUP LLC,</b>	:	<b>CIVIL ACTION</b>
	:	
<b>Plaintiff,</b>	:	
	:	
<b>v.</b>	:	
	:	
<b>CHRYSLER INSURANCE COMPANY,</b>	:	
	:	
<b>Defendant.</b>	:	<b>NO. 01-3319</b>

**Reed, S.J.**

**January 7, 2002**

**MEMORANDUM**

This action arises out of an insurance policy issued by defendant Chrysler Insurance Company (“Chrysler”) to plaintiff Asbury Automotive Group LLC (“Asbury”) covering the period from February 1, 1999 to February 1, 2000. Plaintiff has brought suit for declaratory judgment, reformation of the policy, bad faith pursuant to 42 Pa.C.S.A. § 8371, negligent misrepresentation and fraud. Chrysler has moved to dismiss Count II of the complaint, requesting reformation of the policy, for failure to plead with specificity as required by Civil Rule of Procedure 9(b). Chrysler has further moved to dismiss Counts IV and V of the complaint, setting forth the negligent misrepresentation and fraud claims, on the grounds that the claims are barred by the gist of the action doctrine and the economic loss rule. For reasons articulated below, the motion to dismiss will be denied.

**Factual Background<sup>1</sup>**

Plaintiff Asbury is the owner of car dealerships located throughout the country. With the assistance of an insurance broker, plaintiff requested proposals from certain insurance

---

<sup>1</sup> All facts are taken as true from the complaint, as required by law.

companies, including defendant Chrysler. Representatives of the parties met on February 10 and 11, 1999 in Jacksonville, Florida, to negotiate the terms of the insurance policy that plaintiff was interested in purchasing. The parties agreed that the primary insurance policy would include coverage for employment practices liability (“EPL”). A representative from Chrysler then stated that all of the types of coverage included in the primary policy would also be included in the excess umbrella policy. After reaching agreement on all of the material terms, Asbury purchased both the primary and excess umbrella policies from defendant, covering the period from February 1, 1999 to February 1, 2000. Asbury did not receive a copy of the policies until July 2000.

In 1999 and 2000, a number of current and former employees of a corporate entity that Asbury had purchased in 1998 filed EPL complaints with the EEOC and the Oregon Bureau of Labor and Industry. Chrysler, in compliance with its duty under the primary insurance policy, provided a defense to the EPL complaints. In August 2000, Chrysler authorized the payment of \$1.5 million for settlement purposes, but warned plaintiff that the \$2 million policy limit under the primary policy was almost exhausted. Plaintiff claims this was the first time that Chrysler informed it that the excess umbrella policy did not cover EPL claims. In September 2000, Chrysler paid Asbury \$1.8 million to defend or settle the EPL claims, thereby exhausting coverage under the primary policy. Asbury now seeks to hold Chrysler liable for the defense and indemnification against the remaining EPL claims under the excess umbrella policy.

## Legal Standard<sup>2</sup>

Rule 12 (b) of the Federal Rules of Civil Procedure provides that “the following defenses may at the option of the pleader be made by motion: ... (6) failure to state a claim upon which relief can be granted.” In deciding a motion to dismiss under Rule 12 (b) (6), a court must take all well pleaded facts in the complaint as true and view them in the light most favorable to the plaintiff. See Jenkins v. McKeithen, 395 U.S. 411, 421, 89 S. Ct. 1843 (1969). Because the Federal Rules of Civil Procedure require only notice pleading, the complaint need only contain “a short and plain statement of the claim showing that the pleader is entitled to relief.” Fed. R. Civ. P. 8 (a). A motion to dismiss should be granted only if “it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations.” Hishon v. King & Spalding, 467 U.S. 69, 73, 104 S. Ct. 2229 (1984).

## Subject Matter Jurisdiction

I observe as a preliminary matter that the grounds for this Court’s subject matter jurisdiction over this action have not been clearly alleged. Federal courts have a sua sponte obligation to plumb their jurisdiction. See Employers Ins. of Wausau v. Crown Cork & Seal Co., 905 F.2d 42, 45 (3d Cir. 1990); see also Meritcare Inc. v. St. Paul Mercury Ins. Co., 166 F.3d

---

<sup>2</sup> Based upon the allegations of the complaint, there are at least three states whose laws may govern the substantive issues here: (1) Pennsylvania, identified on the relevant insurance policies as plaintiff’s residence (Complaint, Exh. A); (2) Florida, the location of the negotiations between the parties concerning the scope of the insurance policies (Complaint at ¶ 9); and (3) Michigan, the residence and principal place of business of defendant (Id. at ¶ 2). Although no determination has been made with regard to which state’s law will govern, Chrysler contends, and Asbury does not dispute, that the laws of Florida and Michigan are substantially similar to Pennsylvania law in all relevant aspects. “Where the different laws do not produce different results, courts presume that the law of the forum state shall apply.” Financial Software Systems, Inc. v. First Union Nat’l Bank, Civ. No. 99-623, 1999 WL 1241088, at \*3 (E.D. Pa. 1999) (citing McFadden v. Burton, 645 F. Supp. 457, 461 (E.D. Pa. 1986)); Denenberg v. American Family Corp., 566 F. Supp. 1242, 1251 (E.D. Pa. 1983), superseded on other grounds as explained in Miniscalco v. Gordon, 916 F. Supp. 478, 481 (E.D. Pa. 1996). Accordingly, I will analyze the claims pursuant to Pennsylvania law.

214, 217 (3d Cir. 1999) (holding that a district court may “address the question of jurisdiction, even if the parties do not raise the issue”) (quoting Liberty Mut. Ins. Co. v. Ward Trucking Corp., 48 F.3d 742, 750 (3d Cir. 1995)). Plaintiff has invoked subject matter jurisdiction pursuant to 28 U.S.C. § 1332, alleging that the parties are diverse and the amount in controversy exceeds \$75,000. (Complaint at ¶ 3.) Nevertheless, Asbury fails to specify the exact figure of the amount in controversy. Although Asbury requests a declaratory judgment that Chrysler owes it a continuing duty to defend and indemnify Asbury against employment discrimination claims until the excess umbrella policy is exhausted, Asbury fails to allege whether claims continue to be brought against the excess umbrella policy or the amount of any claims brought. I will presume for purposes of the motion to dismiss that the full limit of \$25 million of the umbrella policy constitutes the amount in controversy. (Complaint at ¶ 10; Exhibit A thereto; Declaration Page, Umbrella Policy No. 3800.) However, I reserve judgment on whether this limit is truly “in controversy” for purposes of subject matter jurisdiction.

### **Equitable Reformation**

Chrysler has moved to dismiss plaintiff’s request for equitable reformation of the excess umbrella policy for failure to plead either fraud or mutual mistake with particularity as required under Federal Rule of Civil Procedure 9(b). Reformation of a contract, while a rare exercise of a court’s equitable powers, is possible when a party can show clear and convincing evidence of fraud or mutual mistake. See Patterson v. Reliance Ins. Cos., 332 Pa. Super. 592, 597, 481 A.2d 947 (1984). Under Rule 9(b), a plaintiff must “inject precision and some measure of substantiation into [the] allegations [of fraud] . . . who, what, when, where, and how: the first paragraph of a newspaper story would satisfy the particularity requirements.” Sun Co. v. Badger

Design & Constructors, 939 F. Supp. 365, 369 (E.D. Pa. 1996) (brackets in original) (quoting In re Chambers Dev. Sec. Litig., 848 F. Supp. 602, 616 (W.D. Pa. 1994)). The complaint alleges that during a meeting between the parties from February 10 to February 11, 1999, in Jacksonville, Florida, Bill Koehane, a representative of defendant, informed plaintiff that the excess umbrella policy would cover all of the areas of liability that were covered by the primary policy, which included EPL. (Complaint at ¶ 9.) The complaint further alleges that there was a yet to be explained delay of seventeen months by the defendant in providing copies of the policies to plaintiff. Upon receipt of the excess umbrella policy after the expiration of the policy period, Asbury found that the excess umbrella policy did not cover EPL as it had been led to believe. (Id. at ¶ 10.) Contrary to defendant’s contention, these allegations are sufficiently particular to inject precision and some measure of substantiation to its allegations. I therefore conclude that plaintiff has set forth specific allegations of fraud or mutual mistake sufficient to request reformation of the insurance policy.

### **Fraud and Negligent Misrepresentation Claims**

Chrysler contends that plaintiff’s fraud and negligent misrepresentation claims are, essentially, a breach of contract claim in disguise, and should be dismissed under the “gist of the action” test and the “economic loss” doctrine.<sup>3</sup> “When a plaintiff alleges that the defendant

---

<sup>3</sup> Although the Pennsylvania Supreme Court has neither accepted nor rejected either doctrine, this Court continues to predict on the basis of the holdings of the Superior Court of Pennsylvania in Phico Ins. Co. v. Presbyterian Medical Servs. Corp., 444 Pa. Super. 221, 227-30, 663 A.2d 753 (1995) and Redevelopment Auth. v. International Ins. Co., 454 Pa. Super. 374, 391-95, 685 A.2d 581 (1996), that the Supreme Court of Pennsylvania will adopt the gist of the action test. See Caudill Seed & Warehouse Co. v. Prophet 21, Inc., 123 F. Supp. 2d 826, 833 (E.D. Pa. 2000). Additionally, the Third Circuit Court of Appeals has predicted that the Pennsylvania Supreme Court would adopt the version of the economic loss doctrine that the United States Supreme Court developed in East River S.S. Corp. v. Transamerica Delaval, 476 U.S. 858, 90 L. Ed. 2d 865, 106 S. Ct. 2295 (1986). See Bohler-Uddeholm Am., Inc. v. Ellwood Group, Inc., 247 F.3d 79, 103-04 n. 10 (3d Cir. 2001).

committed a tort in the course of carrying out a contractual agreement, Pennsylvania courts examine the claim and determine whether the ‘gist’ or gravamen of it sounds in contract or tort; a tort claim is maintainable only if the contract is ‘collateral’ to conduct that is primarily tortious.” Sunquest Info. Sys., Inc. v. Dean Witter Reynolds, Inc., 40 F. Supp. 2d 644, 651 (W.D. Pa. 1999) (citing cases). The gist of the action test requires the court to determine from the complaint the essential nature of the claim alleged by distinguishing between contract and tort claims on the basis of source of the duties allegedly breached; if the claim essentially alleges a breach of duties that flow from an agreement between the parties, the claim is contractual in nature, whereas if the duties allegedly breached were of a type imposed on members of society as a matter of social policy, the claim is essentially tort-based. See Phico Ins. Co. v. Presbyterian Medical Servs. Corp., 444 Pa. Super. 221, 229, 663 A.2d 753 (1995).

Similarly, the economic loss rule generally “prohibits plaintiffs from recovering in tort economic losses to which their entitlement flows only from a contract . . . .” Duquesne Light Co. v. Westinghouse Elec. Corp., 66 F.3d 604, 618 (3d Cir. 1995). The economic loss doctrine was developed in the context of precluding product liability tort claims when one party contracted for a flawed product from the other party and the only injury resulting from the flaw occurred to the product itself. See Bohler-Uddeholm America, Inc. v. Ellwood Group, Inc., 247 F.3d 79, 104 n.11 (3d Cir. 2001). As both doctrines flow from the same principle that tort actions do not lie where the liability stems from a contract, and as the instant action does not involve a products liability claim, the “gist of the action” test is the more appropriate approach for this case. See id.

Turning to the case at hand, it is a difficult task at this stage of the case for the Court to determine whether the gist of the action test bars recovery for the tort claims as pleaded in the

complaint. The gist of the action test generally bars fraud claims in cases where a defendant's alleged failure to perform its duty under the contract is inexplicably transformed into a claim that this failure amounts to fraud. See, e.g., Caudill Seed & Warehouse Co. v. Prophet 21, Inc., 123 F. Supp. 2d 826, 833 (E.D. Pa. 2000); Sun Co., 939 F. Supp. at 369. In contrast, Asbury has alleged that Chrysler misrepresented what Chrysler's duties under the contract would be. A person defrauded into entering a contract may either rescind the contract or affirm it and maintain an action for fraud. See Mellon Bank Corp. v. First Union Real Estate Equity & Mortg. Invs., 951 F.2d 1399, 1408 (3d Cir. 1991). Nevertheless, by its request for reformation of the insurance policy, plaintiff seeks to give effect to the reasonable expectations of the parties as allegedly manifested in the negotiations. See Alexander & Alexander, Inc. v. Rose, 671 F.2d 771, 778 (3d Cir. 1982). Once the contract is reformed, plaintiff would have the right to recover from Chrysler the amount to which it would be entitled under the reformed policy; this would be the true basis for holding Chrysler liable. See id. Thus, plaintiff's attempts to recover under contract reformation and for defendant's tortious conduct appear to be inconsistent.

However, it is the plaintiff's prerogative to plead inconsistent or alternative causes of action. See Indep. Enters. Inc. v. Pittsburgh Water & Sewer Auth., 103 F.3d 1165, 1175-76 (3d Cir. 1997). Federal Rule of Civil Procedure 8 (e) (2) states, in pertinent part, "[a] party may [ ] state as many claims or defenses as the party has regardless of consistency . . . ." Plaintiff has alleged sufficient factual bases for the claims asserted. Plaintiff alleges the existence of a substantial insurance policy with a \$1.8 million premium (a tempting motivation indeed), covering liabilities of an operation extended over multiple locations in at least eight states. The added improbability that a sophisticated business organization would negotiate and accept an

umbrella insurance policy that failed to cover the same areas of liability as the primary insurance policy, lends credence to plaintiff's allegations of wrongdoing. Similarly, the allegation of the lengthy delay in the defendant's delivery of the relevant insurance policies to plaintiff gives rise to a further permissible inference of fraud. Although plaintiff may later be required to elect among the inconsistent remedies requested in this case, it would be premature to dismiss the tort claims at this stage.

### **Conclusion**

Defendant has moved to dismiss Counts II, IV and V of the complaint, comprising plaintiff's request for reformation of the insurance policy and the claims of fraud and negligent misrepresentation. For the foregoing reasons, the defendant's motion to dismiss Counts II, IV and V of the complaint will be denied.

An appropriate Order follows.

**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

<b>ASBURY AUTOMOTIVE GROUP LLC,</b>	:	<b>CIVIL ACTION</b>
	:	
<b>Plaintiff,</b>	:	
	:	
<b>v.</b>	:	
	:	
<b>CHRYSLER INSURANCE COMPANY,</b>	:	
	:	
<b>Defendant.</b>	:	<b>NO. 01-3319</b>

**ORDER**

**AND NOW**, this 7th day of January, 2002, upon consideration of the motion of defendant Chrysler Insurance Company, to dismiss pursuant to Rule 12 (b) (6) of the Federal Rules of Civil Procedure (Doc. No. 9), the response of plaintiff Asbury Automotive Group LLC (Doc. No. 11), and the reply thereto (Document No. 13), and for the reasons set forth in the foregoing memorandum, **IT IS HEREBY ORDERED** that the motion of defendant is **DENIED**.

**IT IS FURTHER ORDERED** that Chrysler Insurance Company shall answer the remaining allegations of the complaint no later than January 28, 2002.

\_\_\_\_\_  
LOWELL A. REED, JR., S.J.