

**IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY  
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA  
CIVIL TRIAL DIVISION**

DREXEL UNIVERSITY,	:	October Term, 2004
	:	
Plaintiff,	:	No. 02442
	:	
v.	:	COMMERCE PROGRAM
	:	
NATIONAL UNION FIRE INS. CO. OF	:	Control No. 012814
PITTSBURGH, PA,	:	
	:	
Defendant.	:	

**ORDER**

**AND NOW**, this 29<sup>TH</sup> day of April, 2005, upon consideration of defendant's Motion for Judgment on the Pleadings, the response thereto, the briefs in support and opposition, the oral arguments of counsel heard on April 25, 2005, and all other matters of record, and in accord with the Memorandum Opinion issued contemporaneously herewith, it is hereby

**ORDERED** that said Motion is **GRANTED** and plaintiff has no duty to defend or indemnify plaintiff or its agents in the action pending in the United States District Court for the District of New Mexico, docket number CIV-02-0689, nor in the action pending in the United States District Court for the Eastern District of Pennsylvania, docket number 02-CV-0266, and it is further **ORDERED** that this action is **DISMISSED**.

**BY THE COURT:**

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**HOWLAND W. ABRAMSON, J.**

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Defendant.	:	

**MEMORANDUM OPINION**

Plaintiff, Drexel University (“Drexel”), brought this declaratory judgment against its insurer, National Union Fire Insurance Company of Pittsburgh, PA (“NUFIC”) in an attempt to have NUFIC defend and indemnify Drexel under two School Leaders Errors and Omissions Policies issued to Drexel by NUFIC (the “Policy”). Drexel was sued by a third party, Santa Fe Science and Technology, Inc. (“SFSC”), in the United States District Court for the District of New Mexico (the “New Mexico Action”)<sup>1</sup> and in the United States District Court for the Eastern District of Pennsylvania (the “Pennsylvania Action”).<sup>2</sup>

As the basis for both actions, SFSC claims that it gave some of its proprietary conductive polymer fiber to Drexel’s agent, Professor Ko, who agreed orally and in writing to keep it

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<sup>1</sup> In the New Mexico Action, SFSC asserted claims against Drexel and its agent, Professor Ko, for breach of contract, breach of the duty of good faith and fair dealing, statutory misappropriation of trade secrets, conversion, intentional and negligent misrepresentation, negligent disclosure, negligent retention and supervision, tortious interference with contractual relations, prima facie tort, and injunctive relief. Drexel was subsequently dismissed from that action for lack of personal jurisdiction

<sup>2</sup> Drexel brought the Pennsylvania Action as a declaratory judgment action seeking a ruling that it had no liability to SFST. SFST counterclaimed against Drexel for breach of contract, breach of the duty of good faith and fair dealing, common law theft of trade secrets, statutory misappropriation of trade secrets, idea misappropriation, conversion, intentional and negligent misrepresentation, negligent disclosure, negligent retention and supervision, tortious interference with existing and prospective contractual relations, prima facie tort, civil conspiracy and unjust enrichment.

confidential. Professor Ko wove the fiber into a piece of fabric, conducted tests on that fabric, and then sent the fabric and the results of the tests to China Textile Institute in what SFST alleges was a violation of his agreement not to disclose information regarding SFST's proprietary fiber.

Drexel sought coverage from NUFIC for defense costs and ultimately for indemnification should a judgment be entered in the New Mexico or Pennsylvania Actions. NUFIC denied that it had a duty to defend or indemnify Drexel under the Policy, which denial of coverage Drexel contests in this action.

“A court's first step in a declaratory judgment action concerning insurance coverage is to determine the scope of the policy's coverage.” General Accident Insurance Co of America v. Allen, 547 Pa. 693, 706, 692 A.2d 1089, 1095 (1997). In this case, the Policy provides that there is no coverage for any claim:

arising out of a breach of contract . . . ; this exclusion shall not apply to . . . any liability that the insured would have in the absence of a contract.

(the “Contract Exclusion”). Motion for Judgment on the Pleadings (“MJP”), Ex. A, Endorsement 8; *id.*, Ex. B., Endorsement 8. In addition, there is no coverage for any claim “arising out of any misappropriation of a trade secret . . .” (the “Trade Secret Exclusion”). MJP, Ex. A, Endorsement 19; *id.*, Ex. B., Endorsement 19. NUFIC argues that both of these exclusions apply to the claims raised in the New Mexico and the Pennsylvania Actions, so that NUFIC need not defend nor indemnify Drexel in either action.<sup>3</sup>

“After determining the scope of coverage, the court must examine the complaint in the underlying action to ascertain if it triggers coverage. If the complaint against the insured avers facts that would support a recovery covered by the policy, then coverage is triggered and the

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<sup>3</sup> Pursuant to certain language in the Policy that required NUFIC to pay up to \$100,000 in defense costs despite the exclusions in the Policy, NUFIC tendered \$100,000 to Drexel. That amount is not in dispute. Instead, in this action, Drexel seeks payment of defense costs over \$100,000.

insurer has a duty to defend until such time that the claim is confined to a recovery that the policy does not cover.” General Accident, 547 Pa. at 706, 692 A.2d at 1095.

The trial court in the Pennsylvania Action dismissed all of SFST’s tort claims and the unjust enrichment claim under the gist of the action doctrine, so the only remaining claims in that action are for breach of contract, breach of the duty of good faith and fair dealing, and violation of the New Mexico Trade Secrets Act. Drexel admits that the latter claim is necessarily barred by the Trade Secrets Exclusion. *See* Drexel’s Brief in Response to MJP, p. 17. However, Drexel argues that the Breach of Contract exclusion does not act to preclude coverage for the contract claims in the Pennsylvania Action because they involve “liability that the Insured would have in the absence of a contract” as evidenced by the tort claims that were dismissed.<sup>4</sup> This court disagrees.

The tort claims were dismissed under the gist of the action doctrine. That doctrine:

precludes plaintiffs from re-casting ordinary breach of contract claims into tort claims. . . Tort actions lie for breaches of duties imposed by law as a matter of social policy, while contract actions lie only for breaches of duties imposed by mutual consensus agreements between particular individuals. [A tort claim is barred] where the duties allegedly breached were created and grounded in the contract itself . . . [or] the tort claim essentially duplicates a breach of contract claim or the success of [the tort claim] is wholly dependent on the terms of the contract.

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<sup>4</sup> Drexel also argues that coverage for the tort and contract claims is not precluded by the Trade Secrets Exclusion because those claims do not involve just trade secrets. Instead, they are based on misappropriation of “ideas” or wrongful use of “proprietary information,” which Drexel argues encompasses something more than does “trade secrets.”

Admittedly the Policy does provide coverage for “misappropriation of ideas under implied contract.” MJP, Ex. A, Endorsement 14; *id.*, Ex. B, Endorsement 14. However, this clause does not apply here because, as set forth below, this whole case arises out of an alleged breach of an express contract. The Pennsylvania District Court recognized this distinction when it dismissed the misappropriation of ideas claim under the gist of the action doctrine. Furthermore, a claim for misappropriation of ideas under an applied contract usually involves advertising or entertainment ideas, or something less developed or concrete than the chemical formulae, manufacturing processes, and other applied methodologies at issue here. *See Silver v. Television City, Inc.*, 207 Pa. Super. 150, 215 A.2d 335 (1965) (idea for television show); Thomas v. R.J. Reynolds Tobacco Co., 350 Pa. 262, 38 A.2d 61(1944) (advertising idea). *See also* Nimmer on Copyright § 16.01.

Etoll, Inc. v. Elias/Savion Advertising, Inc., 811 A.2d 10, 14-19 (Pa. Super. 2002). By dismissing the tort claims under this doctrine, the district court necessarily found that the duties that Drexel allegedly breached were contractual rather than tort duties. In other words, the court found that the liability SFST is attempting to impose upon Drexel would not exist in the absence of the contract between them. Therefore, under the Breach of Contract Exclusion in the Policy, NUFIC need not provide Drexel with a defense nor indemnify Drexel with respect to the Pennsylvania Action.

Similarly, NUFIC need not provide a defense or indemnification in the New Mexico action, even though the tort claims in that action remain viable. It is clear from the facts alleged by SFST that all of its tort claims arise out of the contractual relationship between Drexel and SFST.<sup>5</sup> Since SFST freely gave the fiber to Drexel, Drexel could not be found guilty of theft, conversion, negligence, fraud, or tortious interference with respect to the fiber in the absence of an agreement limiting Drexel's use of the fiber. It is only because SFST gave the fiber to Drexel pursuant to an agreement that Drexel must keep it a secret that it was wrongful for Drexel to forward it to the China Textile Institute. Therefore, all of the tort and other claims in the New Mexico action "arise out of a breach of contract," and they are excluded from coverage under the Policy.

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<sup>5</sup> "The particular cause of action that a complainant pleads is not determinative of whether coverage has been triggered. . . . [T]o allow the manner in which the complainant frames the request for redress to control in a case such as this one would encourage litigation through the artful use of pleadings designed to avoid exclusions in liability insurance policies." Mutual Benefit Ins. Co. v. Haver, 555 Pa. 534, 538-9, 725 A.2d 743, 745 (1999).

## **CONCLUSION**

For all the foregoing reasons, defendant's Motion for Judgment On the Pleadings is granted, and the court will issue a declaratory judgment in defendant's favor.

**BY THE COURT:**

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**HOWLAND W. ABRAMSON, J.**