



Kaplin Stewart

Attorneys at Law

June 2010

Learn More:

“Contractors May Now Bring Direct Action for Economic Losses Against Design Professional”

“Design Professionals may be Subjected to a Contractor’s Claim for Economic Damages”

About the Author

William D. Auxer



610.941.2519
wauxer@kaplaw.com

About the Practice

Construction Law Group

Subscribe

gvandenberg@kaplaw.com

This newsletter is published as a service to clients and friends. It is intended to give general information only and not to provide advice on specific legal issues. © 2010 Kaplin Stewart Meloff Reiter & Stein, P.C.

910 Harvest Drive, Suite 200
Blue Bell, PA 19422
T: 610.260.6000
www.kaplaw.com

CONTRACTORS LOSE BATTLE TO RECOVER ECONOMIC DAMAGES AGAINST PUBLIC UTILITY COMPANIES

Contractors historically have encountered unmarked or mismarked public utility lines on projects, causing them to incur unanticipated costs and other monetary damages. The question of whether contractors can recover these damages against public utility companies has been a hot issue for the past several years, both in the courts and in Harrisburg. In the recent Pennsylvania Supreme Court case of *Excavation Technologies v. Columbia Gas Co.*, the Pennsylvania Supreme Court put the issue to rest, at least in the courts, by holding that a contractor cannot recover economic damages against a public utility company for negligence in marking utility lines.

In *Excavation Technologies*, the contractor used a negligence theory in an attempt to recover economic damages against a public utility company for improperly marking or failing to mark utility lines. In its defense, the public utility company argued that the contractor's claim was barred by the Economic Loss Doctrine, a legal principle which precludes the recovery of purely monetary damages (as opposed to damages for injury to person or property) in claims of negligence. The contractor, however, relied on an exception to the Economic Loss Doctrine adopted by the Pennsylvania Supreme Court in the case of *Bilt-Rite Contractors, Inc. v. Architectural Studio*. This exception, as noted by the Supreme Court, applies to negligence claims against a person who, in the course of his/her business, profession or employment in which he/she has a “pecuniary interest,” fails to exercise reasonable care and supplies false information to others who rely on it to their detriment. In *Bilt-Rite*, the Pennsylvania Supreme Court, acknowledging the exception, held that the Economic Loss Doctrine did not bar a contractor's negligence claim against a design professional who supplied inaccurate information in drawings relied upon by the contractor.

In *Excavation Technologies*, the Pennsylvania Supreme Court held that the exception did not apply because, unlike a design professional, a public utility company is not in the business of supplying information for pecuniary gain. Under the Underground Utility Line Protection Act (also known as “PA One Call Act”), a public utility company is obligated to mark utility lines in the area that a contractor plans to perform digging, excavation or any other type of underground work within two working days of contractor notifying the One Call System. The Supreme Court determined that the PA One Call Act did not provide a private cause of action for the recovery of economic damages against a public utility company, and concluded that allowing such a cause of action to proceed would be contrary to the legislative intent underlying the Act.

Somewhat controversially, the Court also stated that imposing liability against a public utility company would be against public policy because to do so would “shift the burden from excavators, who are in the best position to employ prudent techniques on job sites to prevent facility breaches.” Contractor trade associations would likely disagree with such a statement. Those associations have been lobbying the Pennsylvania legislature to amend the PA One Call Act to expressly permit contractors to recover economic damages from public utilities that fail to mark or improperly mark utility lines. Such lobbying, however, has been met with great opposition by the public utility companies, and has not yet resulted in legislation. While the *Excavation Technologies* decision may have brought the battle to an end in the courts, the battle in Harrisburg continues.

For more information on recovery of economic damages in construction litigation, or for any other questions you may have regarding construction law, please contact William D. Auxer at 610.941.2519 or wauxer@kaplaw.com. You can also contact any member of our Construction Law group.