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### David Raves Promoted to Principal

David Raves was promoted to Principal at Maiello Brungo & Maiello, LLP. Mr. Raves leads the firm's Construction Law Group and represents public and private clients and sureties in construction-related matters. He is a council member of the Construction Law Section of the Allegheny County Bar Association. A former architect, Mr. Raves joined the firm in 1999.

### MB&M Attorney Appointed to Board of Directors

Jennifer L. Cerce, an associate with Maiello Brungo & Maiello since 2001, was appointed to the Board of Directors of ACBA Services, Inc., a for-profit subsidiary of the Allegheny County Bar Association. Her appointment is through June 2006.

### Maiello Brungo & Maiello Online

Find more legal information for the construction industry and businesses in general at our Web site: [www.mbm-law.net](http://www.mbm-law.net).

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Contractors Can Recover Economic Losses  
Sales and Use - A Taxing Question  
Mechanics' Lien Waiver Filing Loosened  
Uniform Construction Code Update  
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## DESIGN PROFESSIONALS SHOULD KNOW: CONTRACTORS CAN RECOVER ECONOMIC LOSSES

*A duty of care upon design professionals to those individuals who rely upon the professional information eliminates any need for a direct contract.*

In a case of first impression decided January 15, 2005, the Pennsylvania Supreme Court in *Bilt-Rite Contractors, Inc. v. The Architectural Studio* held that a contractor may maintain an action for negligent misrepresentation to recover economic damages against an architect, even though there is no direct contract between the two parties.

In *Bilt-Rite*, a school district entered into a contract with the defendant Architect to provide design services, including plans and specifications that were to be submitted to contractors in the bid process. Plaintiff Contractor relied on Architect's plans, drawings and specifications, submitted a bid and was awarded the general construction contract by the district. Upon commencement of the work, Contractor found that certain work required special construction methods and not the normal methods proffered by Architect. This resulted in increased construction costs.

Contractor filed an action against Architect under a theory of negligent misrepresentation, asserting that Architect's information was false and/or misleading and seeking damages for the increased costs incurred. Architect filed preliminary objections arguing that (1) the action was barred by the "economic loss doctrine" in that Contractor's tort action cannot recover for purely economic losses and (2) because there was no contract between Contractor and Architect, Architect owed no duty to the Contractor.

Contractor then argued that the Supreme Court recognizes the theory of negligent misrepresentation, citing Section 552 of the Restatement (Second) of Torts, which provides that in certain situations a defendant can be held liable for negligent misrepresentation for information negligently supplied for the guidance of others. Contractor further argues that the Court has not included privity of contract in its elements of negligent misrepresentation; rather, the Court has focused on foreseeability of reliance. Architect, on the other hand, relies on the concept of privity and maintains that design professionals cannot be held liable for Contractor's economic losses if there is no contractual relationship.

The Court, after an exhaustive review of the case law of this Commonwealth and of other states, found that Section 552 should apply to architects and other design professionals. The Court set forth that Section 552 provided sufficient limitations as follows:

- The defendant is liable only to those, whether in contractual privity or not, for whose benefit and guidance the information is supplied. The information may be either direct or indirect. In that regard, the foreseeability of use is critical to liability.
- Because the information is negligently rather than intentionally supplied, courts have been careful to limit liability to only those whose use of the information is reasonably foreseeable.
- By limiting the liability for negligence to cases in which a defendant manifests intent to supply the information for the sort of use in which the plaintiff's loss occurs, the law pro-

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Hot Construction Topics



*Design Professionals, continued...*

notes the important social policy of encouraging the flow of commercial information upon which the operation of the economy rests.

The Court agreed with Contractor's argument that privity is unnecessary, noting that Section 552 imposed a duty of care upon design professionals to those individuals who rely upon the professional information, and this duty eliminated any need for a direct contract between the parties. Furthermore, the Court held that Contractor is not barred from recovering purely economic losses simply because the lawsuit was a tort action and not a contract action.

Design professionals who, to date, have enjoyed protection from liability because of a lack of a contract with contractors and/or a lack of a "duty" to contractors are now subject to possible lawsuits and payment of damages. Conversely, contractors and others who do rely upon the work of design professionals are permitted to seek recovery for monies lost in reliance upon negligent information provided by the design professional.

Regardless of whether you are the owner, design professional or the contractor, the impact of the Court's decision in *Bilt-Rite* will be substantial.

<sup>1</sup> The Economic Loss Doctrine provides that no cause of action exists for negligence that results solely in economic damages unaccompanied by physical injury or property damage.

## Sales and Use - A Taxing Question

*The Code now grants exemption directly to a construction contractor, but only for...building machinery and equipment.*

Confusion has continued since the Pennsylvania Sales and Use Statute was substantially revised in 1998. Most of the confusion arises when the owner is a public or charitable entity. The old method of receiving the owner's tax-exempt number has, for the most part, gone by the wayside.

This article outlines the general rule. But as you will see, the code's complexities and exceptions make every situation unique, and you should consult a qualified professional to determine the full tax liability.

Generally, the first step for tax analysis is to consider any transaction of goods or services a taxable event. This conclusion is reinforced by the tax code's use of the words "any," "all," "every" and "each."

Taxable transactions are of two types:

- Sale at Retail to - any transfer of tangible personal property for consideration
- Use of - the exercise of any right or power incidental to ownership, custody or possession of

tangible personal property, including transportation, storage or consumption.

The next step is to determine whether the transaction is exempt or excluded. Exclusions are items that are not intended to be taxed. Exemptions are items within the general scope of the statute imposing the tax but, for certain reasons, are exempt.

### No more use of owner's certificate

Whether a transaction is taxed usually (though not always) is based on the type of entity receiving the property or how the property will be used. Exempt entities include governments, charities, volunteer fireman's organizations, nonprofit educational institutions or religious organizations for religious purposes, provided that the materials are not used in any unrelated business. Under the old Code, a contractor could enjoy the benefits of the tax-exempt entity's certificate. This method is no longer appropriate.

### Example: asphalt

A paving contractor bought bituminous asphalt for use in paving streets for a township. Can this contractor claim sales and use tax exemption?

The statute provides tax exemption for sales of property or services to the federal government and the Commonwealth of Pennsylvania, its instrumentalities or political subdivisions, which include counties, cities, boroughs, incorporated towns, townships and school districts. A township may claim an exemption from sales tax. However, sales to a township are exempt only when invoiced directly to the township. The paving contractor is liable for Pennsylvania and local sales tax on the purchase of bituminous asphalt.

### Direct exemption is restricted

The 1998 Code now grants exemption directly to a construction contractor, but only for the sale at retail to or use of **building machinery and equipment** and services thereto when transferred to a **tax-exempt entity**.

Building machinery and equipment is that which is used for generation, storage, conditioning, distribution and termination. However, the statute and code provide a long list of examples of what is included - and what isn't. For example, while electrical is listed as exempt from sales and use tax, it does not include wire, conduit, receptacles and junction boxes.

How does a contractor appropriately claim the exemption when purchasing building machinery or equipment? Because a vendor of tangible personal property is required to collect sales tax unless the customer provides a valid

exemption certificate, the contractor must provide the supplier with an exemption certificate to obtain the exemption for those items that meet the definition of building machinery and equipment. The construction contractor should complete a Pennsylvania Exemption Certificate (Form REV-1220) by including on Line 7 this statement:

**Property or services qualify as building machinery and equipment and will be transferred pursuant to a construction contract to [name of exempt entity].**

The Department of Revenue interprets Regulation §31.13 to include situations in which the contractor enters into a contract with a developer that will dedicate the sanitary sewer installation, upon completion of the subdivision, to a public utility, municipality or municipal authority.

### Example: water and sewer lines

The contractor is performing site development work, including installing water and sanitary sewer lines. Upon completion of the work, the sewer lines will be dedicated to a municipal township authority, and the water lines will become the property of a regulated water company. Is the transaction tax exempt?

The contractor may purchase certain property exempt from sales tax, if the purchases are made pursuant to a contract with a public utility. Exemption is limited to equipment, machinery and parts that the contractor, in conjunction with the contract, will transfer to the public utility or a municipal authority engaged in a sanitary sewer operation. The property purchased pursuant to the exemption must be directly used in a sanitary sewer installation, not a storm sewer. The exemption does not apply to any items used beyond the curb of what will be commercial or privately owned property of a residential subdivision. Water mains, sewer treatment equipment, pipes, fittings, manholes and covers, stone bedding and covering, cement and pumping equipment are examples of exempt property.

Appropriate application of the Sales and Use tax is complicated and, in some instances, convoluted. To save money at the time of purchase, completing the appropriate forms is necessary. However, if the tax is inadvertently paid, a contractor may be entitled to submit a refund in the form of a credit on future tax liability. For the latest bulletins, see [www.revenue.state.pa.us](http://www.revenue.state.pa.us).

## Mechanics' Lien Waiver Filing Requirements Loosened

Act 96, effective December 2004, loosens the filing requirements of Mechanics' Lien Waivers, also known as No-Lien Agreements. These agreements, if properly completed, waive a contractor's statutory right to file a lien against real property in the event of nonpayment for the improvements made.

In order for a no-lien agreement to be binding on a lower tier subcontractor or material supplier, actual proof that the notice was presented to that entity prior to labor and material being furnished is necessary. One method of proving presentation is to file the no-lien

agreement with the prothonotary of the county where the property is located.

Prior to Act 96, to be effective, the filing needed to be indexed in the name of the contractor as defendant and the owner as plaintiff AND ALSO in the name of the contractor as plaintiff and the owner as defendant. The responsibility of ensuring that the no-lien was properly indexed rested on the filing party.

This "double work" greatly increases the potential for misfiling and invalidating the no-lien protections.

Act 96 relies on computers to eliminate the dual indexing in one situation: If the prothonotary office's system electronically indexes agreements in a way that they can be retrieved regardless of whether the party is plaintiff or defendant.

Of course, to ensure that a no-lien agreement is properly filed, one still needs to verify whether the prothonotary can in fact allow for an electronic search for an entity regardless of its party status on the document indexed. Failing to do so could run the risk of the filing not operating as valid notice of the project's no-lien status.

## Uniform Construction Code Update

Since our newsletter last summer, the Legislature has amended the Pennsylvania Uniform Construction Code (UCC) or statewide building code. In addition to Act 92, the Department of Labor and Industry, which is responsible for enforcement, continues to issue updates and clarifications.

The most significant change was the exclusion of UCC coverage to residential alterations when there are no structural or egress changes. Even with this code modification, municipalities still may enact an ordinance requiring permits; and if the municipality had a permit requirement for this type of work in effect as of July 1, 1999, it would remain in effect.

Act 92 also revised the definitions of agricultural building (§103), which now includes certain structures owned and used by recognized religious sects, and utility and miscellaneous use structure, which now allows these buildings to be excluded from the UCC if they are less than 1,000 square feet. For all those readers in the Christmas tree business, the Act excluded certain restrictions on the use of natural cut trees in various occupancy groups.

In addition to July's Act 72 changes, the enactment of December's Act 203 allowed municipalities to continue to utilize municipal standards for sewer and water laterals that were otherwise repealed upon the adoption of the UCC, so long as the standards were in effect by January 1, 2005.

In addition to the above legislative refinements, the Department of L&I continues to update its interpretation and enforcement. These can be found on the department's web site [www.dli.state.pa.us](http://www.dli.state.pa.us). From the home page, perform a key word search for "ucc." The site also provides a comprehensive listing of those municipalities that follow the UCC.