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CONSTRUCTION NEWS

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FACILITY OWNER NOT RESPONSIBLE  
FOR IMPROPERLY MARKED  
UNDERGROUND UTILITIES

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## FACILITY OWNER NOT RESPONSIBLE FOR IMPROPERLY MARKED UNDERGROUND UTILITIES

*Portions of the following scenario are fictitious and the factually accurate portions are so bizarre that they appear to be fictitious.*

You receive a notice to proceed on the new construction project and you dutifully call the PA One-Call system for identification of underground facilities. Once excavation commences, it is discovered that a utility company improperly marked and in some instances did not mark its facilities causing your company damages in the form of downtime of personnel and equipment. Understanding that the Owner is not really at fault for your downtime, you contact your attorney for advice on whether or not the utility company bears some responsibility. Your attorney suggests that other states have found utility owners liable under similar statutory schemes and that Pennsylvania law, although developing in the area may allow an action directly against the utility company.

Based on the discussions, you file a complaint against the utility company alleging that they negligently misrepresented information to you by improperly marking the utilities and seek the recovery of economic damages in the form of downtime of personnel and equipment. Initially, the Court of Common Pleas of Washington County grants the utility company's request to dismiss the suit on the basis that you do not have a direct contract with them and Pennsylvania law prohibits the recovery of economic damages under the "economic loss doctrine." This doctrine, widely recognized under Pennsylvania law, prohibits an action for negligence that results solely in economic damages unaccompanied by physical injury or property damage.

Feeling that the dismissal was in error, you appeal to the Superior Court. A three panel of judges reverses based on the Pennsylvania Supreme Court holding in *Bilt-Rite Contractor, Inc. v. Architectural Studio* which states that an entity in the business of supplying information may be held liable for economic damages when it negligently supplies information and it is foreseeable that the information supplied will be used and relied upon by third persons, even if the third parties have no direct contractual relationship with the supplier of the information. The Superior Court found that the utility company, by virtue of its obligations to locate its facilities under the Pennsylvania One-Call, was in the business of supplying information for the purposes of imposing liability and that it was reasonable to assume that the marking of facilities under the One-Call system would be relied upon by third parties. Judge Melvin filed a dissenting opinion.

The utility company requests reargument before the full Court which is granted. The Court withdraws its previous decision and issues a new decision written by the previously dissenting judge that upholds the lower court's dismissal of your action. The new decision holds that a utility company supplying information pursuant to its obligations under the One-Call system is not in the business of supplying information for pecuniary gain, as was the architect in the *Bilt-Rite* case. The Court also held that the One-Call statutory scheme did not create a private cause of action against the facility owner and, in fact, entitled the contractor to compensation from the project owner as a result of additional work necessary to identify the precise location of utilities. In short, the Court found that public policy does not support the imposition of tort liability on a facility owner under its obligations under the PA One-Call system.

Although almost a win for contractors, the Court changed its mind and absolved facility owners from costs associated with their non-compliance under PA One-Call. Under the statute, contractors still have the opportunity to collect additional costs incurred against the project owner even though the Owner may not be at fault. Contractors must provide notice to the Owner and are limited to costs under a force account basis as set forth in PennDOT's 408 specifications.

The Construction Law Group of Maiello, Brungo and Maiello can further educate you on this important issue and advise you as to how and if they affect your business. Please contact David Raves at 412.242.4400 or [dr@mbm-law.net](mailto:dr@mbm-law.net), or any member of the Construction Law Team.

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