

UTILITIES AND TELECOMMUNICATIONS ALERT

EXCAVATOR BARRED FROM SUING UTILITY FOR NEGLIGENCE IN MARKING UNDERGROUND LINES

On December 29, 2009, the Pennsylvania Supreme Court held that utilities are not liable for economic losses caused by the utility's failure to properly mark the location of underground facilities.

The Pennsylvania's One Call System was created by statute in 1974. 73 P.S. §§ 173-186. It was established to prevent damage to underground facilities and promote safety. Under this System, utilities have a duty to provide accurate information as to the location of its underground lines by locating, marking or staking their position in response to a notice from anyone intending to use equipment for excavation, tunneling, grading, boring, blasting, demolition or any similar work. See 73 P.S. § 177(5).

In this case, an excavation company used Pennsylvania's One Call System to request the locations of utilities facilities in the vicinity of water line project be marked before the excavation work started. However, the gas company allegedly marked several gas lines improperly and failed to mark other gas lines. During the excavation work, the excavation company struck gas lines. The excavation company suffered economic losses resulting from the downtime for its manpower and equipment. But, there were no personal injuries or property damage.

The excavation company sued the gas company under a negligent misrepresentation theory. By using this theory, the excavation company could recover purely economic damages if it was justified in relying on the information negligently supplied by gas company (even without any accompanying physical injury or property damage). See, e.g., RESTATEMENT (SECOND) OF TORTS, § 522(1); *Bilt-Rite Contractors, Inc. The Architectural Studio*, 581 Pa. 454, 866 A.2d 270 (2005) (architects and other design professionals can be liable for negligently supplied information). Excavation contractors in Illinois and Florida have used this theory to recover their economic damages from utilities in situations where the utility supplied inaccurate or no information in response to a request to mark underground facilities.

However, the Pennsylvania Supreme Court refused to adopt this theory for excavators in Pennsylvania for the following reasons. See *Excavation Technologies, Inc. v. Columbia Gas Company*, 2009 Pa. LEXIS 2794 (Order entered December 29, 2009). First, the Court could not justify comparisons to architects in *Bilt-Rite*. Here, unlike the architects, the gas company was not in the business of providing information for pecuniary gain. The gas company was compelled by statute to respond to all requests under the One Call System and these responses were made without remuneration.

Next, the Court found that the Pennsylvania legislature did not create a statutory remedy for economic losses suffered by excavation contractors. The Court noted that a statutory directive would be needed to depart from the "economic loss doctrine," which prohibits a causes of a action in negligence that results in purely economic losses. In Pennsylvania, this common law doctrine requires personal injury or property damage for a viable negligence claim.

The Court determined that the legislature did not create a statutory remedy or a private cause of action for such situations. In fact, the Court found that the One Call System was not designed to protect excavation

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companies against economic losses. The Pennsylvania One Call System places the ultimate responsibility to prevent breaches of underground facilities on the party doing the digging. *See* 73 P.S. §§ 177(5)(i) (requiring excavators to "employ prudent techniques" to ascertain the precise position of such facilities), 178(7) (excavators maintain duty to protect against harm to life, health, or property). This is consistent with the view that excavation companies are in the best position, and fully capable, of preventing breaches of underground lines because they are at the work site. Thus, there is no statutory or policy basis to shift liability for the excavator's economic losses to the gas company.

Simply put, without legislative action, the excavation company is required to establish personal injuries or property damage to sustain a claim of negligent misrepresentation against a utility for mismarked (or unmarked) underground facilities. This could not be done in this case, and this suit was dismissed.

Nevertheless, it is important to remember that this case only sought recovery for economic damages. It should not effect any remedies for personal injuries or property damage. 73 P.S. § 182.2(e); *see, e.g., Cipriani v. Sun Pipe Line Co.*, 393 Pa. Super. 471 (Pa. Super. 1990) (evidence was sufficient to establish that defendant pipe company was negligent in marking the pipeline and failing to properly survey the pipeline); *Le-Nature's, Inc. v. Latrobe Municipal Authority*, 913 A.2d 988 (Pa. Cmwlth. 2006) (municipal entities were entitled to sovereign immunity for negligent marking of sewer line); *National Fuel Gas Distribution Corp. v. Greenland Construction, Inc.*, 2007 Pa. Dist. & Cnty. Dec. LEXIS 386 (Jefferson County, April 10, 2007) (One Call statute did not preclude the owner's common law cause of action for negligence).

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