

Welcome to the latest edition of Wayman, Irvin & McAuley's quarterly newsletter - "Your Best Defense."

For the Summer 2008 edition, we have focused on recent court decisions and legal issues relevant to the construction industry. Wayman, Irvin & McAuley has a long-standing tradition of representing construction industry clients. We have established ourselves as a premier law firm in the representation of design professionals working directly with design firms and through their insurance carriers. In addition, our attorneys have represented contractors, subcontractors, owners and developers. We have provided legal guidance to construction industry clients in litigation, as well as risk management, corporate and general legal counseling. In providing excellent legal representation, we recognize the importance of keeping our clients well-informed of legal events and trends which may impact their businesses. Accordingly, we have dedicated this issue of our newsletter to articles that outline recent court decisions and legal developments effecting the construction industry.

The first article analyzes the recent Pennsylvania court decision of *Excavation Technologies*, which addressed a contractor's claim for damages suffered in encountering utility lines. This decision qualified the landmark Pennsylvania Supreme Court decision of *Bilt-Rite*, wherein the Supreme Court ruled that a contractor could maintain a direct claim against a design professional. *Bilt-Rite* was a critical decision in the construction arena; however, many questions remained unanswered by the Supreme Court's opinion.



In *Excavation Technologies*, the Superior Court of Pennsylvania further developed the *Bilt-Rite* line of case law, as more fully explained in the article by Paul Mannix.

In the second article, Max McTiernan addresses the Green Design/Building Movement and the liability exposure it presents to the design profession. It is quite clear that green buildings are now a fixture in the construction industry. However, green buildings and their design present unique challenges to the construction industry. Max points out some of the pitfalls inherent in green design and provides some ideas for managing these risks.

Another important development in the construction industry over the past year is the updating of the AIA industry standard contract forms. In his article, Jim Creenan outlines some of the most important features of the new AIA documents. Another recent Pennsylvania court decision, *Imperial Excavating*, is discussed on page 5. Finally, Mark Gesk provides information on the re-establishment of the Allegheny County Bar Association's Construction Arbitration System.

We hope that the articles in this edition prove both informative and useful.

As always, if you have any questions or are in need of any further service, please contact the authors or any of our attorneys. Please visit our Web site, www.waymanlaw.com, for a complete look at the firm's capabilities and professional staff.



EXCAVATION TECHNOLOGIES V. COLUMBIA GAS CO.: EXPANSION OR LIMITATION OF BILT-RITE?

By Paul M. Mannix, Esq.

In *Excavation Technologies, Inc. v. Columbia Gas Company of Pennsylvania*, 2007 PA Super 327 (2007), where an excavator filed suit against a gas company for

alleged faulty utility line markings, the Superior Court of Pennsylvania addressed the scope of *Bilt-Rite Contractors, Inc. v. Architectural Studio*, 866 A.2d 270 (Pa. 2005). *Bilt-Rite* was the landmark Pennsylvania case, in which the Supreme Court of Pennsylvania held that a contractor could directly sue a design professional for negligent misrepresentation based on inaccurate information within the contract documents. The *Bilt-Rite* decision overruled previous Pennsylvania court decisions wherein design professionals were protected from direct contractor claims under the "economic loss doctrine." This doctrine essentially provides that a plaintiff cannot sue a party with whom it has no contract for purely economic damages. In holding that the contractor could recover economic losses, the *Bilt-Rite* court adopted Section 552 of the Restatement (Second) of Torts. This section provides that one who has a "pecuniary interest" in a transaction is liable for "pecuniary loss" that results when "he fails to exercise reasonable care or competence in obtaining or communicating the information."

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In *Excavation Technologies*, the Superior Court of Pennsylvania considered the applicability of 552 of the Restatement to a claim by an excavator against Columbia Gas. During a waterline extension project, Excavation Technologies, Inc. ("ETI") requested that Columbia Gas mark its gas lines pursuant to Pennsylvania's One Call Act, 73 P.S. 176-86. Although Columbia Gas attempted to mark its lines, ETI encountered unmarked gas lines during excavation at various locations. No personal injuries or property damage resulted, but ETI claimed that it experienced significant downtime due to the utility interferences.

ETI filed negligent misrepresentation and breach of contract claims against Columbia Gas, alleging damages for its downtime losses of approximately \$75,000. The trial court sustained preliminary objections to both claims. It dismissed the tort claim as precluded by the economic loss doctrine and dismissed the breach of contract claim on the grounds that no privity of contract existed between the parties. ETI appealed the trial court's decision to the Superior Court of Pennsylvania.

On appeal, ETI argued that its tort claim fell within the exception to the economic loss doctrine recognized in *Bilt-Rite*. However, the Superior Court distinguished *Bilt-Rite*, finding that the duty to identify gas lines in response to the One Call Act was not analogous to the duty of architects to provide accurate architectural plans. The Court explained that unlike an architect, Columbia Gas was not paid for its services and had no contractual relationship with the parties to the project. The Court stated, "consequently we find that Columbia Gas does not provide information for pecuniary gain or engage in a commercial transaction when it responds under the One Call Act." It emphasized that utility companies do not mark underground lines as part of their business but rather as an unpaid service mandated by the state.

While recognizing that courts in Illinois and Florida have permitted economic damages against utility companies for negligent marking of underground lines, the Superior Court found these cases unpersuasive. The Court noted that the applicable statutes in Illinois and Florida provide a private right of action for negligence, while the Pennsylvania One Call Act does not. The Court further expounded that the One Call Act states that its provisions "shall not affect any civil remedies for personal injury or property damage," 73 P.S. 182.2(e), suggesting that damages for other types of harms are not available.

ETI argued that its claim was supported by subsection (3) of Restatement 552 which provides for an exception to the economic loss doctrine in negligent misrepresentation cases where a defendant "is under a public duty to give the information." The Superior Court however rejected this argument, noting that subsection (3) was not implicated in

the *Bilt-Rite* decision and it was reluctant to "disturb the well-established principles of the economic loss rule in the absence of express direction from the Legislature." The Court further expressed concern that allowing recovery for economic loss under the present circumstances would "expand the potential pool of plaintiffs beyond reason," by allowing anyone impacted by downtime to sue a utility company for damages. The Superior Court ultimately viewed the Supreme Court's adoption of Section 552 of the Restatement in *Bilt-Rite* as simply a recognition that design professionals have duties to foreseeable third parties to contracts.

In a dissenting opinion, Judge Klein observed that the purpose of the economic loss doctrine is to keep contract claims and tort claims in separate spheres, and that exceptions to the doctrine are appropriate where a public duty exists even if a contractual duty does not. He argued that because the One Call Act assesses fines based on the degree of "inconvenience caused by the party's noncompliance," the act assumes that utilities should be held accountable for economic losses. According to Judge Klein, relieving utilities from liability would "promote careless or indifferent compliance with the act, contrary to the legislative purpose."

After the *Bilt-Rite* decision, many questions were left unanswered as to the reach of the ruling. Construction industry participants, as well as their counsel, have been awaiting additional appellate decisions to further define the *Bilt-Rite* decision. Design professionals have been seeking court rulings which would limit the scope of *Bilt-Rite* and, while *Excavation Technologies* interprets *Bilt-Rite* narrowly, it provides little, if no, benefit to the design profession. As a practical matter, rather than limiting the liability exposure for design professionals, the *Excavation Technologies* decision may have quite the opposite effect. Contractors who are prohibited under the *Excavation Technologies* ruling to sue utility companies for the mis-marked lines may now be forced to focus their attention on the project design professional or owners when utility line interferences arise.

It is important to note that the attorneys representing *Excavation Technologies* are seeking to have this case reviewed by the Pennsylvania Supreme Court. Thus, the ruling may be subject to further scrutiny by the Supreme Court. However, as the law presently stands, the economic loss doctrine may act as a shield to utility companies, at least in the One Call Act setting, while its use by the design professional appears extremely limited.

Attorney Mannix will be happy to discuss these or related issues further if you would like. Please contact him at pmannix@waymanlaw.com.



GREEN BUILDINGS - THEIR PROMISES, YOUR LIABILITY

By Francis "Max" McTiernan, Esq.

The U.S. Green Building Council ("USGBC") outlines wonderful benefits for the building owner that follows the Leadership in Energy and Environmental Design ("LEED") program:

- Lower operating costs and increased asset value;
- Reduce waste sent to landfills;
- Conserve energy and water;
- Healthier and safer for occupants;
- Reduce harmful greenhouse gas emissions;
- Qualify for tax rebates, zoning allowances and other incentives in hundreds of cities;
- Demonstrate an owners' commitment to environmental stewardship and social responsibility;
- Improve employer productivity and satisfaction.

It is easy to see that an owner would be anxious to be a part of this program that offers such tangible benefits. All citizens should be encouraged to be environmentally responsible. However, the LEED system presents some unique issues for the design professional.

While USGBC promises your client cost savings and increased productivity from following its performance criteria, the first question the design professional needs to ask is, who is responsible for making the promised performance of a green building become a reality? The USGBC is clear that the responsibility for meeting your client's green building expectations is not theirs. As the USGBC sets forth in its literature:

"Also, please note that none of the parties involved in the funding or creation of the LEED for New Construction Green Building Rating System, including the U.S. Green Building Council or its members, make any warranty/express or implied or assume any liability or responsibility, to you or any third parties for the accuracy, completeness, or use of, or reliance on, any information contained in the LEED for New Construction Green Building Rating System, or for any injuries, losses or damages (including, without limitation, equitable relief) arising out of such use or reliance."

Your client's expectations have been raised by someone who is not on the project and who has no contractual responsibility to the owner to deliver what has been promised. Once the client expresses the intention that the building be LEED certified, the design professional needs to

advise the client what is involved in becoming LEED certified. The owner needs to be aware that LEED certification may result in savings over the lifetime of the building but that it will result in extra design and construction costs.

There needs to be an understanding of exactly what is the owner's expectation. Is the owner looking for LEED platinum certification for marketing? Are lower utility costs the primary motivation? Once the goals are understood, discussions can take place as to whether a LEED consultant needs to be retained or if the goals can be reached by the current design group. A written record should be made of the meetings so that there is a clear understanding of what the owner expects and how the design team intends to meet the expectations.

A written record of the owner's expectations with regard to LEED must include a reference as to how the LEED elements will effect costs. Not only increased design costs but increased construction costs should be discussed. Even if the amount cannot be qualified at that time, it must be noted that everyone is aware that these costs will increase in order to meet LEED requirements. Any effects on the project schedule should also be reviewed and documented. Again, even if the exact extent of the impact on the project scheduled is unknown, if it is expected to adversely impact the schedule, this needs to be memorialized.

If the client has LEED requirements that need to be handled by a consultant, consideration should be given to whether they will be in direct contract to the owner or your subconsultant. If they are a subconsultant, there is the risk that you could be held to be liable if the project does not meet LEED standards or produce promised performance. This can become particularly difficult if the consultant has insufficient insurance coverage.

If the LEED consultant is in direct contract with the owner, this removes the problem of compensation from the design professional. Also, if the consultant promises certain results such as energy savings and these are not reached due to errors by the consultant, the design professional is removed from the line of liability. Having the consultant be in direct contact with the owner also reinforces that meeting LEED requirements are the primary responsibility of the consultant.

It is important to keep in mind that the design professional should not make guarantees of future savings based on LEED requirements. A promise that productivity will improve or that the value of the building will increase by 50% can be influenced by countless variables. If a design professional advises an owner that these benefits can be expected and they aren't realized, a claim will invariably be made. Additionally, a claim based on a promise that certain certification levels would be realized may not be covered under a professional liability policy.

The key to managing risks with regard to LEED

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certification is similar to other risk management. The design professional has to communicate with the building owner and understand the owner's expectations. Based on these expectations, the design professional must make it clear that costs and effort will be required to meet those expectations. This then has to be placed in writing if problems arise, so that it is documented that the owner was advised that LEED certification would result in increased time and costs to the project and that specific results were not guaranteed by the design professional.

Green buildings will likely become the norm in construction and renovation. It is important that the design professional understand the owner's expectations and only assume responsibility for those areas in which he has expertise and control. While the USGBC has noble and lofty goals and promises, the design professional needs to be careful that these do not result in a heightened standard of care. Up front communications and documentation are the keys to avoiding LEED liability.

Attorney McTiernan will be happy to discuss these or related issues further if you would like. Please contact him at fmctiernan@waymanlaw.com.



THE NEW AIA FORMS: 10 CHANGES THAT WILL AFFECT YOUR A&E PRACTICE

By: James W. Creenan, Esq.

The American Institute of Architects periodically issues updated versions of its industry-standard contract forms, usually around every 10 years or so. Yet, AIA's issuance of the new 2007 version set of documents last year signals a turning point for the use of industry-standard documents in the construction field for two reasons. First, AIA now has a legitimate competitor with the issuance of ConsensusDOCS from a consortium of organizations representing all construction project players. Second, AIA's standard terms will likely begin to show less favoritism to the design team.

Although much has been written about the new AIA-2007 documents, here are ten changes that will impact your architectural practice now or during a claim:

1. More owners will begin using ConsensusDOCS. Owners will begin questioning why you are recommending the AIA form, indicating further erosion of the architect-owner relationship. How prepared are you to answer this question?
2. More Use of the One-Part AIA B101-2007. Think your administrative staff had difficulty keeping paperwork together? Try convincing a judge that "the contract" consists of two contracts.

3. Early Consideration of Sustainable Design. The Architect is now contractually obligated to discuss sustainable design in planning stage. Be sure to document the occurrence of this discussion.

4. Budget and Prepare For Digital Data. The 2007 documents recognize that paper-based projects have fallen by the wayside. Two new AIA documents control the transmission and license of digital data: E201-2007, the Digital Data Protocol Exhibit, and C106-2007, Digital Data Licensing Agreement. While this paradigm shift from paper to data will require technology planning and upgrades for some, two main questions governing the paper project will survive: who owns the data and who is responsible for its accuracy.

5. The Architect Gives Way to Third-Party as "Initial Decision Maker." The AIA form calls for parties in dispute to retain a third-party neutral as the IDM. While this will shield the architect from the age-old criticism of bias, the new IDM model removes the architect's ability to foster a cooperative and fair spirit to dispute resolution.

6. More Arbitrations Will Be Consolidated. Under AIA-2007, a party must affirmatively reject consolidation of arbitrations, or, for example, the architect runs the risk of having a payment dispute with the owner wrapped into a contractor's claim for delay.

7. A Maximum 10 Year Cap on All Claims. There has been a fair amount of litigation over the AIA's so-called "private statute of limitations." In Pennsylvania, the courts apply a four-year statute to breach of contract claims and a twelve-year statute of repose as absolute bar on most construction claims.

8. B101-2007 Requires Architect to Maintain Insurance. This should not represent a change for most firms, but smaller practices have been forced to go "bare" in recent years due to volatility and price escalation in the professional liability insurance market. If your firm still falls in that category, beware of the contractual obligations to maintain insurance in adequate amounts for an appropriate period.

9. Contractor to Add A&E Team As "Additional Insureds." Pay attention to the certificate provided, as the law affords certificate holders very few rights. "Additional insured" status may require a specified endorsement noted on certificate. If so, make sure you have a copy of the endorsement and that it meets the requirement of the contract.

10. Owner Has Greater Ability to use Instruments of Service in Event of Termination. Under prior versions, the owner had to prove default before rightfully using design drawings after terminating an architect from the project. Stated simply, now, as long as payment has been made, an owner may continue to use construction drawings after termination.

Attorney Creenan will be happy to discuss these or related issues further if you would like. Please contact him at jcreenan@waymanlaw.com.

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PENNSYLVANIA SUPERIOR COURT REVISITS THE PROMPT PAYMENT ACT

By Paul M. Mannix, Esq.

In *Imperial Excavating and Paving, LLC v. Rizzetto Construction Management, Inc.*, the Superior Court of Pennsylvania provided further analysis of the Pennsylvania Prompt Payment Act (PPPA), determining that an award in favor of a subcontractor for attorneys fees and interest was appropriate.

In *Imperial Excavating*, Rizzetto Construction Management Inc. (“RCM”) was retained by the Southern Lehigh School District to perform work on school athletic fields. RCM entered into a subcontract with Imperial Excavating and Paving (“Imperial”) for removal of the existing topsoil, grading and compacting. RCM had a separate “Lawn and Grasses” contract with Wolk’s Landscaping under which Wolk was to correct any irregularities in the soil and “apply 6 inches of top soil to the seeded athletic fields.” Under its contract, Imperial had no responsibility to place any topsoil on the fields; however, during the course of its work, Imperial did perform some placement of topsoil.

After the work was completed by both Imperial and Wolk, the School District eventually began using the fields. However, various problems were encountered with the fields. The School District retained an expert geotechnical engineer to determine the nature and cause of the problem. The expert concluded that the topsoil did not measure a uniform six inches and had not been properly tilled. The school rejected the fields and withheld \$120,000 from RCM. In turn, RCM withheld over \$250,000 from Imperial, claiming that Imperial was responsible for the improper topsoil placement and tilling.

Thereafter, Imperial filed a claim against RCM and its surety company, alleging breach of contract. In its complaint, Imperial sought the additional monies owed under its contract and, in addition, sought attorney fees, interest and penalties under the PPPA. The PPPA provides in relevant part:

WITHHOLDING ACCEPTANCE OR FAILURE TO PAY RETAINAGE. If an owner, contractor or subcontractor unreasonably withholds acceptance of work or fails to pay retainage as required by this section, the owner, contractor or subcontractor shall be subject to the payment of interest at the rate established in section 5(d) on the balance due and owing on the date acceptance was unreasonably withheld or the date the retainage was due and owing, whichever is applicable. The owner, contractor or subcontractor shall also be subject to the provisions of section 12.

PENALTY FOR FAILURE TO COMPLY WITH ACT. If arbitration or litigation is commenced to recover payment due under this act and it is determined that an owner, contractor or subcontractor has failed to comply with the payment terms of this act, the arbitrator or court shall award, in addition to all other damages due, a penalty equal to 1% per month of the amount that was wrongfully withheld. An amount shall not be deemed to have been wrongfully withheld to the extent it bears a reasonable relation to the value of any claim held in good faith by the owner, contractor or subcontractor against whom the contractor or subcontractor is seeking to recover payment.

AWARD OF ATTORNEY FEE AND EXPENSES. Notwithstanding any agreement to the contrary, the substantially prevailing party in any proceeding to recover any payment under this act shall be awarded a reasonable attorney fee in an amount to be determined by the court or arbitrator, together with expenses.

See 73 P.S. §509 & 512. In accordance with this language, the trial court found in favor of Imperial and ordered RCM to pay interest, penalties and attorney’s fees, as well as the contract balance.

On appeal, the Superior Court determined that, based on the contract requirements and the evidence at trial, Imperial had fully performed under the contract and was therefore entitled to the withheld portion of the contract balance. The Court further ruled that the evidence at trial sufficiently supported the verdict, including the award of attorney’s fees, penalties and interest. The Court explained that the PPPA requires an award of these additional damages to a “substantially prevailing party.” While noting that the determination of whether a party “substantially prevailed” is left to the trial court’s discretion, the Superior Court found that the trial court did not abuse its discretion in finding Imperial to be a such a prevailing party. In support of its finding, the Court emphasized that the amount withheld by RCM did not bear a reasonable relation to the value of the underlying claim as its withholdings were almost twice as much as the amount the owner withheld from RCM.

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ACBA CONSTRUCTION ARBITRATION SERVICES

By Mark J. Gesk, Esq.

Any and all controversies, claims, or disputes arising out of or relating to this contract or breach thereof, shall be referred to final and binding arbitration pursuant to the Procedures and Rules then in effect of the Construction Arbitration Services of Western Pennsylvania ("CAS") of ACBA Services, Inc., 400 Koppers Building, 436 Seventh Avenue, Pittsburgh, PA 15219.

Wayman, Irvin & McAuley, is pleased to announce our participation in the Allegheny County Bar Association Construction Arbitration Services division. This is a fast-track system designed to reduce costs and allow for timely resolution of matters.

Under the new rules for the section, the case is initially managed by a local attorney for purposes of organization until an arbitrator is selected with ACBA assistance. To choose an arbitration panel, construction industry professionals may be selected to serve on the panel, ensuring that the panel is intimately familiar with the construction process. To serve on the panels, attorneys must have fifteen years in practice, including ten years of specializing in construction law. Non-attorney members are chosen by invitation only.

In order to take advantage of this service, you need to be certain that the contract for services includes the following language:

I would like to add that I have personally been trying cases involving design professionals, construction managers, and other parties involved in the construction process for over thirty-one years, and I am very excited about this new opportunity to have construction cases heard by ACBA Construction Arbitration Services. Not only does it come from a learned group of attorneys that can expeditiously and frugally hear and decide the case, but also the involvement of professionals involved in the construction process means that its is a means to have experts in construction determine the value of claims without the necessary posturing and expense of litigation in the court system.

We here at Wayman, Irvin, & McAuley would be happy to assist you in reviewing your contract document forms to make certain that the ACBA Construction Arbitration Service is a viable option for easy dispute resolution.

Wayman Watch...

- *The Pittsburgh Tribune Review has recently named Wayman, Irvin & McAuley, LLC as one of the Best Places to Work in Pittsburgh with under 100 employees.*
- *Congratulations to Mark Gesk and Kate Fagan, who were recently named Pennsylvania Super Lawyers by Law & Politics and publishers of the Philadelphia Magazine!*
- *Paul Mannix was an invited speaker at "Design Law for Pennsylvania Architects and Engineers," a day-long seminar held in Pittsburgh.*
- *Krista Orashan directed and presented the firm's risk management seminar to Remax real estate personnel.*
- *Dale Forsythe and Jim Creenan presented a General Liability Seminar for CNA Insurance at their regional claims offices in Reading in April.*

