One Call and Bilt-Rite: Can they be Reconciled?

By Eric Kimbel

On November 7, 2007, the Pennsylvania Superior Court issued a decision limiting the scope of Bilt-Rite claims in the context of the One Call Act. In Excavation Technologies, Inc. v. Columbia Gas Co. of PA, the Superior Court, en banc with one dissent, held that the economic loss doctrine, the One Call Act and the purposes of the Act prevented recovery on a Bilt-Rite claim for negligent misrepresentation against Columbia Gas as a facility owner for failing to adequately mark its lines pursuant to One Call. The Court held that plaintiff, Excavation Technologies, Inc. ("ETI"), could not recover damages for cost overruns and downtime under a Bilt-Rite theory based upon Columbia Gas' failure to mark its lines.

Less than one year earlier, however, the Commonwealth Court issued a decision finding that the Latrobe Municipal Authority ("Authority") could be liable as a facility owner to a project owner, LeNature's, under a theory of negligence when the Authority failed to mark its sewer lines in accordance with One Call. (LeNature's Inc. v. Latrobe Municipal Auth. and City of Latrobe.) However, the Court also held that because LeNature's had not alleged that the Authority's sewer lines were a "dangerous instrumentality," LeNature's could not recover against the Authority as it is immune from such liability under the Political Subdivision Tort Claims Act.

There is a real conflict in these two interpretations of the One Call Act, and the impact of Bilt-Rite on such claims. Columbia Gas stands for the proposition that a facility owner cannot be held liable in negligence under a Bilt-Rite theory for failure to adequately mark its lines and that there is no private cause of action for negligence under One Call. LeNature's stands for the proposition that a facility owner can be held liable in negligence and that there is a private cause of action for negligence under One Call, but there was no recovery because of governmental immunity. The inconsistencies underscore the need for caution, knowledge and counsel when asserting or defending a claim in these areas.

ETI was engaged to perform excavation for a waterline extension project in North Bethlehem Township. ETI notified One Call who in turn notified Columbia Gas of the excavation activity. Columbia Gas marked the project area, but, according to ETI, failed to accurately mark some of its lines and did not mark other of its lines. ETI allegedly struck Columbia Gas' lines 11 separate times due to the inadequate or non-existent markings and incurred cost overruns and downtime. ETI filed suit in the Court of Common Pleas of Washington County asserting a claim for damages based upon a Bilt-Rite theory of negligent misrepresentation and a claim for breach of contract. The trial court dismissed both counts, and ETI appealed only the dismissal of the Bilt-Rite claim.

The Superior Court affirmed the dismissal of ETI's action, reasoning that unlike the architect in Bilt-Rite, Columbia Gas was not supplying information for pecuniary gain and had no contractual relationship with the parties to the project. The Court explained, "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." ETI's claim did not fit into the Bilt-Rite exception to the economic loss rule, which barred recovery by ETI.

The economic loss rule states that "no cause of action exists for negligence that results solely in economic damages unaccompanied by physical injury or property damage." The majority in Columbia Gas explained the application of the rule as follows: "without physical harm to either the person or the property of the plaintiff, i.e. some physical impact, the plaintiff does not recover for a defendant's negligence." Bilt-Rite provides an exception to long-standing economic loss rule.

The Court also cited two public policy reasons embodied in One Call for dismissal of ETI's claim. First, the Act does not provide a private cause of action for negligence. The Court explained that the legislature had determined that a private negligence action under the Act was not in the public interest, stating, "unlike the Illinois and Florida statutes, the Pennsylvania One Call Act does not provide for a private cause of action for negligence." Second, the Court then explained that the damages suffered by ETI were not the type the Act seeks to prevent. Instead, the Act seeks to "protect against the potential types of harm immediately occasioned by a breach of underground lines, i.e., disruption of service to the public and physical harm ... as well as property damage ...."

The Columbia Gas court did not include in its decision any mention of Le-Nature's and did not try to reconcile the conflict which exists between the two. It must be noted, however, that the Commonwealth Court and the Superior Court are not bound by each other's decisions. In LeNature's, the Commonwealth Court held that a facility owner could be liable to a project owner for negligence in failing to mark its lines. LeNature's engaged TEDCO as general contractor to install

improvements at its facility in Latrobe. TEDCO notified One Call on July 16, 2003 of the forthcoming drilling and excavation. Despite notification through One Call, the Authority and the City of Latrobe never responded. The drilling subcontractor, Shelly Drilling Company, struck and damaged the Authority's sewer lines when drilling on October 3, 2003. LeNature's paid for the repairs to the sewer lines and other damages. LeNature's then filed suit against the Authority and the City asserting that the failure to mark the lines was negligent and a breach of implied contract.

The trial court dismissed the complaint finding that LeNature's, as a project owner, was not one of the entities which is protected by One Call and further held that the Authority and City could not be held liable because of the immunity provided by the Tort Claims Act.

On appeal, the Commonwealth Court examined the One Call Act to determine that facility owners have a duty to respond to all One Call notices received from a contractor or subcontractor within two working days of the notice. The Court further held that facility owners do owe a duty to owners under Act, stating, "by expressly providing for 'any other person' covered by the Act besides a contractor, the Act obviously was not intended to be limited to protecting only contractors and designers but also was intended to cover the other party necessarily involved in the excavation or demolition work associated with the project, the owner." The Court further explained, "LeNature's was an intended beneficiary of the One Call statute as the owner, i.e. the person who engaged the contractor. Thus, a review of the One Call statute reveals that the 'owner' is a person covered under this Act."

The Columbia Gas decision may or may not be the last word on ETI's claim. ETI filed a Petition for Allowance of Appeal with the Pennsylvania Supreme Court on December 5, 2007. The Supreme Court had not ruled as to whether or not it will hear the appeal at the time of this publication. The Court did, however, decline to hear LeNature's appeal on December 6, 2007.

The actions of the courts have left uncertain the application of the Bilt-Rite case to the ability to pursue private causes of action for negligence under the One Call Act. Based upon the current state of the law, Columbia Gas certainly limits the ability to pursue a Bilt-Rite claim based upon flawed One Call information that is provided without pecuniary gain; LeNature's, however, seemed to allow a claim under the same circumstances, except for the governmental immunity. Whatever the reasons for the split in authority, it is safe to say that the current state of the law is unclear at best and the Pennsylvania Supreme Court could clarify this area by accepting the appeal of Columbia Gas. BG

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