

# The End of the Economic Loss Doctrine?

by James W. Kutz, Esquire, McNees, Wallace & Nurick LLC



A recent landmark decision issued by the Pennsylvania Supreme Court, *Dittman v. UPMC*, creates significant additional liability exposure for all employers and could signal the end of the Economic Loss Doctrine in Pennsylvania.

The case arose when several employees of UPMC filed a class action Complaint alleging that a data breach had occurred that resulted in substantial personal and financial information being disclosed for approximately 62,000 UPMC employees and former employees. The plaintiffs further alleged that the stolen data, much of which included information employees were required to provide as a condition of their employment, was used to file fraudulent tax returns on behalf of certain employees, which resulted in actual damages. Accordingly, the plaintiffs filed suit in the Court of Common Pleas of Allegheny County.

One of the employees' primary theories of liability was that UPMC was negligent in safeguarding their personal and financial information, and that UPMC had a duty to prevent the information from being lost, stolen, or otherwise disclosed to unauthorized persons. Essentially, the employees argued that UPMC had a common law "duty of care," which permitted the employees to bring a claim

for simple negligence against UPMC. UPMC filed Preliminary Objections to the employees' Complaint, arguing primarily that the employees had no viable cause of action in Pennsylvania for negligence because the employees sought only "economic" damages, and did not argue that they suffered physical injury or property damage, and thus the Economic Loss Doctrine barred the Complaint. The "Economic Loss Doctrine" is a common law legal principle that has been applied by Courts for many decades that largely prevents parties from bringing suit under a negligence theory for solely economic damages. As will be discussed in detail below, the Supreme Court's decision in *Dittman* effectively eviscerates this Doctrine in Pennsylvania.

Before the Supreme Court heard the case, the two lower courts had ruled in favor of UPMC. Initially, the Trial Court granted UPMC's Preliminary Objections and ruled that:

1. An employer does not have a duty to safeguard employees' personal information
2. The Economic Loss Doctrine barred the claims of the employees because they had only alleged pecuniary losses, as opposed to property damage or personal injury

The Superior Court affirmed that decision, and the employees appealed to the PA Supreme Court. The Supreme Court ultimately overturned the lower court's ruling, and found that the Economic Loss Doctrine did not bar the employees' negligence claim against UPMC. Rather, the Court found that UPMC owed a duty of due care to its employees to use reasonable care to safeguard their personal sensitive data, and to the extent that negligence and damages could ultimately be proved at a trial on remand, that UPMC would be potentially liable for same.

The overall impact of the *Dittman* decision is far reaching, not only for those involved in the highway construction industry, but for all employers. First, the Court effectively created a common law duty of all employers to protect personal information. If employers do not take reasonable safeguards to protect confidential information, they could be subject to a negligence claim by their employees. While employers can never fully protect themselves from being sued, prudent employers should fully evaluate the impacts of this decision, and consider what reasonable steps it can take to protect the private information of their employees. While this area of the law will continue to evolve, to defend against negligence claims, employers may be required to show that they took steps such as hiring external firms to analyze data security, adequately training their employees, making sure firewalls are in place, etc., to argue that they were not "negligent" in the event of a data breach. Employers should also consider discussing this case with their liability insurance carriers to determine whether they have coverage in the event they are sued on a negligence claim due to a security breach that compromises data. In an environment like the highway construction industry, where personal information such as certified payrolls is routinely sent to others, an employer's duty to reasonably safeguard that type of information is unclear, but once again appropriate safeguards should be considered.

The second significant issue to consider following the *Dittman* decision is whether the Economic Loss Doctrine has any continued viability in Pennsylvania. It is axiomatic that one party can always file suit against another party with which it has a contractual relationship to seek economic losses. However, when a party has no direct contract with another party, its ability to bring a direct suit against that entity for purely economic damages has previously been extremely limited.

The most-common “noncontractual” cause of action that one party can bring against another is a claim for simple negligence. First-year law professors often tell their law students that the tort of “negligence” can be summed up in four words: “duty, breach, causation, damages.” In *Dittman*, the Supreme Court focused heavily on the “duty” part of this analysis, as, without such a duty, one cannot prevail on a claim for negligence.

Most negligence claims are brought because everyone has certain common law duties to others to not be negligent. The Court in *Dittman* emphasized the longstanding premise that when an actor’s “affirmative conduct” is involved, “he is generally under a duty to others to exercise the care of a reasonable man to protect them against an unreasonable risk of harm to them arising out of the act.” In other words, even if one does not have a contractual relationship with another, he or she still has certain “duties” to others.

When personal injuries or property damage are involved, it is not unusual for a plaintiff to allege that a number of defendants were negligent in causing their injuries. However, before the *Dittman* decision was issued, it was very difficult for a plaintiff to allege a negligence theory to seek purely “economic” damages against the party that it believed caused it harm but with which it does not have a contract, because the Economic Loss Doctrine barred such claims. Notably, the one primary exception to the Economic Loss Rule prior to the *Dittman* decision was set forth by the Pennsylvania Supreme Court in *Bilt-Rite Contractors, Inc. v. The Architectural Studio* (2005) in which the Court allowed a direct cause of action against a design professional for solely economic damages because it ruled that the design professional had made “negligent misrepresentations” on which the plaintiff contractor was permitted to rely. The *Bilt-Rite* decision created a narrow exception to the Economic Loss Doctrine by allowing, in certain circumstances, design professionals to be sued directly by those with whom they had no direct privity of contract because designers are in the business of providing professional information for pecuniary gain.

Following the Supreme Court’s decision in *Bilt-Rite* in 2006, the Court subsequently refused to extend the *Bilt-Rite* decision to situations involving mistakes by utility firms.

In *Excavation Technologies v. Columbia Gas* (2009), the Court denied a claim by a contractor for purely economic losses (such as idle time, delay costs, etc.) due to the utility firm’s failure to properly mark its facilities. In that case, the Court found that because utility firms were not in the business of providing information to contractors for pecuniary gain, the contractor’s claim for “negligent misrepresentation” should be dismissed.

While it is somewhat unclear from the face of the Supreme Court’s decision in *Dittman*, the *Dittman* decision seemingly eliminates the Economic Loss Doctrine in Pennsylvania. Indeed, the Court appeared to indicate in its Opinion that had the plaintiffs in *Excavation Technologies* brought a simple “negligence” claim rather than a “negligent misrepresentation” claim, that the contractor may have prevailed on their direct claim against the utility. Essentially, one can now bring a negligence claim against any entity that owes he or she a duty to protect them against an unreasonable risk of harm, irrespective of the Economic Loss Doctrine. The Court in *Dittman* noted that the key inquiry will be to determine if a “duty” is owed to another, irrespective of whether there is a contractual relationship.

The practical effect of the *Dittman* decision is that it has opened the floodgates for significantly more lawsuits, not only with respect to data breaches but with respect to many other contractual settings involving third parties. In the highway construction industry, there are now many scenarios in which the Pennsylvania Supreme Court has at least created a significant question as to whether direct liability exists for simple negligence in a situation where there is no privity of contract. Several questions that arise in the highway construction industry following the *Dittman* decision include:

- Can a contractor now file a direct lawsuit against a utility firm for negligence, either for mismarking their facilities, and/or for simply failing to show up when they had previously promised to do so in a certain time period, if the losses are solely economic?
- Can a contractor now bring a direct claim against a consultant inspection firm working for PennDOT (either working at a manufacturer’s plant or in the field), for negligent inspection that allowed a defective

product to be shipped to the jobsite and/or installed on a project?

- What steps should a prime contractor take to protect personal information, not only for its own employees, but for the payroll information it receives from subcontractors?
- Does the *Dittman* decision create any additional liability for public owners given the existence of governmental immunity statutes, and if not will the General Assembly act to expand a public owner’s liability for tort claims?
- Does the *Dittman* decision create additional liability for design professionals beyond what *Bilt-Rite* already provides?

In summary, the *Dittman* decision is one of the most-significant decisions recently issued by the Pennsylvania Supreme Court, as it not only creates significant potential additional risks for employers, but also creates additional legal theories that can be brought to recover damages from those arguably responsible for the harm.

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