

'Bilt-Rite': The Expanding Scope of 'Providers of Information' and the Evolution of a Tort", by Greg Brown, Esq., published in The Legal Intelligencer, 3-10-2023

The Legal Intelligencer - 03-10-23 - Greg Brown, Esq. The Expanding Scope of Providers of Information and the Evolution of a Tort

There are circumstances where courts decline to apply Bilt-Rite despite the presence of a transfer of information accompanied by a pecuniary gain. Who, then, qualifies as a supplier of information to others for pecuniary gain subject to Section 552 liability? After nearly 20 years, a fresh look is justified.

In 2005 the Pennsylvania Supreme Court recognized Section 552 of the Restatement (Second) of Torts as the law of the commonwealth in *Bilt-Rite Contractors v. The Architectural Studio*, 866 A.2d 270 (Pa. 2005). Section 552 describes the duty owed when one party supplies information to others, for one's own pecuniary gain, where one intends or knows the information will be used by others. The tort allows a recipient of the information to sue the supplier for purely economic damages, even though there is not a contract between the supplier and recipient. Bilt-Rite represents an exception to the economic loss rule, which bars negligence actions for pure economic damages where there is no property damage or personal injury at issue.

Bilt-Rite involved a dispute between an architect and a contractor who relied on the architect's plans. The contractor alleged that the plans contained negligent misrepresentations about the construction techniques required to build the project, which caused the contractor to underestimate its costs and sustain a financial loss. As Bilt-Rite involved architecture and construction, a common misconception is that its holding is limited to design professionals. Indeed, as late as 12 years after Bilt-Rite was decided, litigants argued that Pennsylvania's recognition of Section 552 was confined to architects and engineers. See *Fulton Bank v. Sandquist*, No. 2306 EDA 2016, 2017 WL 4284923 (Pa. Super. Ct. 2017). However, Bilt-Rite is routinely applied to a wide range of "information supplying" businesses in the financial, insurance, real estate and legal sectors. Yet, there are circumstances where courts decline to apply Bilt-Rite despite the presence of a transfer of information accompanied by a pecuniary gain. Who, then, qualifies as a supplier of information to others for pecuniary gain subject to Section 552 liability? After nearly 20 years, a fresh look is justified.

Accountants

Accountants' work product is commonly relied on by their nonclients, and they have been considered "providers of information" within Bilt-Rite's reach. In 2017's *Fulton Bank* decision, the Pennsylvania Superior Court held that an accountant could be held liable to a bank with which the accountant did not have a contractual relationship. There, the accountant allegedly prepared inaccurate financial statements the bank later relied on to provide the accountant's client a bad loan. More recently, a federal court held that a claim against an accountant by a nonclient surety company could proceed where the surety company that relied on financial statements the accountant prepared for their mutual client. See *Platte River Insurance v. Joseph P. Melvin*, No. CV 20-3380, (E.D. Pa. Nov. 17, 2020). Similarly, an accountant who performed actuarial services was denied summary judgment where a nonclient hospital system claimed it relied on the accountant's actuarial reports years later. See *UPMC v. CBIZ*, 436 F. Supp. 3d 822 (W.D. Pa. 2020).

Banking and Financial Services

Elsewhere in the financial sector, the courts sent mixed signals. One federal court declined to dismiss an action against a bank by a nonclient where the bank provided him inaccurate information about the bank's client's account. See *Dicio v. Wells Fargo Bank*, No. CV 15-676, 2015, (W.D. Pa. Nov. 4, 2015). In contrast, the U.S. Court of Appeals for the Third Circuit held that Bilt-Rite did not apply to a credit card company for providing inaccurate information about his account because the company was not considered to be in the business of providing information for pecuniary gain. See *Azur v. Chase Bank, USA, N.A.*, 601 F.3d 212 (3d Cir. 2010).

The Insurance Industry

Insurance agents, brokers and adjusters are also considered providers of information for pecuniary gain subject to Bilt-Rite. In one federal case, an insurance agent selling a life insurance policy on behalf of a carrier was considered to be "in the business of providing information," and subject to Bilt-Rite. See *Durkey v. Pacific Life Insurance*, No. CV 17-317, (W.D. Pa. Aug. 4, 2017). Another federal court held that a third-party claim by one insurance agent against another for providing inaccurate advice during a consultation fell within Bilt-Rite's reach because the court deemed the consulting agent as in the business of supplying information for pecuniary gain. See *Rich v. Brandywine Insurance Advisors*, No. CV 16-3965, (E.D. Pa. Mar. 10, 2017). Even an insurance agent's inaccurate representations about its own business history were determined to be information supplied for pecuniary gain and subject to Bilt-Rite. See *First Sealord*

Surety v. Durkin & Devries Insurance Agency, 918 F. Supp. 2d 362 (E.D. Pa. 2013). Public insurance adjusters may be found liable to non-clients under Bilt-Rite for negligent misrepresentation, even where the third party that relies on the information is the adjuster's client's insurance carrier. See *Church Mutual Insurance v. Alliance Adjustment Group*, 102 F. Supp. 3d 719 (E.D. Pa. 2015), *aff'd*, 708 F. App'x 64 (3d Cir. 2017).

Real Estate

The real estate profession is another place where Bilt-Rite found a home. A federal court held that a real estate broker who negligently supplied information to a potential buyer was subject to Bilt-Rite because a broker's business entails "conveying information for the guidance of others in their business transactions" and that "brokers have a direct pecuniary interest in doing so because by supplying such information they hope to induce a sale of the subject property and thereby obtain a sales commission." See *Brownsville Properties v. Walnut Capital Real Estate Services*, Bankr. No. 10-21959, Adv. No. 12-2029, (Bankr. W.D. Pa. Aug. 1, 2013). Another federal court observed that "real estate brokers are professional information providers, whose clients rely upon the information and advice they provide—just like attorneys, architects, and accountants." See *Busch v. Domb*, No. CV 17-2012, (E.D. Pa. Mar. 12, 2018).

The Legal Industry

Attorneys may consider their economic responsibility for negligence as confined to the attorney-client relationship. Contrary to this view, the Superior Court reversed the dismissal of a negligent misrepresentation claim against a law firm by a nonclient based on Bilt-Rite where the law firm conducted a fraud investigation. See *Kirschner v. K&L Gates*, 46 A.3d 737 (Pa. Super. Ct. 2012). There, the law firm's client was a "special committee" tasked with investigating the existence of fraud in a business. The business later went bankrupt, allegedly due to massive fraud left undetected in the investigation. The court permitted the business' bankruptcy trustee, which was not the law firm's client, to sue the law firm for not identifying the fraud. Bilt-Rite was also applied to an attorney's provision of information where the attorney allegedly misrepresented a case's prospects for recovery to a nonclient in a referral fee dispute. See *Sheridan v. Roberts L. Firm*, No. 2:19-CV-00467-JDW, (E.D. Pa. Dec. 11, 2019).

Limitations on Section 552 Liability

Courts decline to apply Bilt-Rite to information provided by sellers of goods. Consequently, sellers of products as diverse as coffee, machinery, HVAC equipment, dog food, rare coins, ammunition, paint, roof coverings and steel escaped liability under Section 552. A used car dealer avoided Section 552 liability because his provision of information while selling a car was only "ancillary" to the sale, and the court did not consider the dealer as being in the business of supplying information. See *Pannetta v. Milford Chrysler Sales*, No. CIV.A. 14-05680, (E.D. Pa. Mar. 23, 2015). Courts also decline to apply Bilt-Rite where information is provided without pecuniary gain. For example, the Superior Court declined to hold a utility company liable for failing to properly mark its pipelines in anticipation of construction because the company did not provide the information for pecuniary gain. See *Excavation Technologies v. Columbia Gas Company of Pennsylvania*, 936 A.2d 111 (Pa. Super. Ct. 2007), *aff'd*, 604 Pa. 50 (Pa. 2009). Bilt-Rite also does not apply to an information-supplying professional if the information at issue is not of the type the professional customarily provides. For example, an engineer who provided information about a public contract to a vendor was not liable under Section 552 because the information at issue was not "architectural or engineering design information or specifications regarding the project." See *Fleming Steel v. Jacobs Engineering Group*, 373 F. Supp. 3d 567 (W.D. Pa. 2019).

In Conclusion, a Prediction

While some boundaries are clear from the caselaw interpreting Bilt-Rite, there is still room for clarification. For instance, why should a real estate broker be exposed to Bilt-Rite liability for providing information when selling a condo, while used car dealer is not exposed to the same liability when selling a car? Is there really a meaningful distinction between a credit card company providing information about its cardholder's account and a bank providing information about its customer's account? Fine distinctions aside, as Bilt-Rite approaches its third decade, it is foreseeable that its principles will eventually apply to other fields in our increasingly information-oriented economy.

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