Site Assessment Liability of Environmental Engineering Design Professionals

Howard W. Ashcraft, Jr.
Hanson, Bridgett, Marcus, Vlahos & Rudy, LLP

Introduction

Site assessments are now a required element of most real property transactions. "Due diligence" now requires evaluation of structures for seismic risks, review of projects for disability access, and preliminary environmental assessments as a prerequisite to any purchase. This increase in site assessments has created lucrative opportunities for consultants. But the opportunities also entail risk. This paper compares site assessments and traditional consulting, examines potential liabilities associated with site assessments and provides strategies for coping with the increased risks.

Site Assessments: A Different Type of Risk

Site assessments differ from conventional consulting assignments in three fundamental ways. First, many key risk factors are not within the consultant's control. Second, liability exposures do not inherently relate to potential rewards. Finally, site assessment liability endures for extended periods; i.e. the liability is very long-tailed.

CONTROL OVER RISK FACTORS

In a conventional design project, the consultant has control over many of the risk factors. The consultant has an opportunity to evaluate whether a project is technically or economically feasible, has substantial input or control over key design decisions, and has an opportunity to review work progress and rectify potential problems.

In contrast, a site assessment assignment affords few controls over principal risk factors. For instance, the resultant damage from a failure to discover contamination will depend upon the type of contaminant, the particular population which may be exposed, the site's hydro-geologic

conditions, and other factors not in the consultant's control. These uncertainties make it difficult to adequately address the risks associated with a site audit project.

RISKS ARE NOT INHERENTLY RELATED TO COMPENSATION

"Reward follows risk" exemplifies traditional consulting assignments. For example, a consultant has a rough idea of the potential liability associated with a structure's design – usually a percentage of the construction cost. The consultant's fee also bears an indirect relation to construction cost, resulting in a rough correlation between the size of risk assumed and the consultant's compensation. Contrast this situation with that existing in site assessments.

Relation to Thoroughness

The consultant's risk in a site assessment generally relates to the thoroughness of investigation. As thoroughness, and therefore fee, increases, the uncertainties and risk reduce. This leads to the anomalous result that in site assessments the fee inversely correlates to risk. Since the client will often dictate the level of effort, the consultant loses a degree of control over the risk assumed.

Magnitude of Damages

The nature and magnitude of the damages in site assessments also differ from conventional consulting. Failure to detect contamination may expose a substantial population to significant harm. Although the assessment may have a low cost, it may come with extensive liability potential. Even if the damage is only economic, it can entail a severe liability potential that bears no relation to the fee earned.

Third Parties

Site assessments are often a factor in making financial decisions, such as purchases, investments or loans. In these instances, the risk comes from a third party's economic assessment of the profitability of the transaction – a calculation unknown to the consultant. In fact, the consultant may not even know of the existence of the persons relying upon the consultant's opinion or the magnitude of the economic transaction. Where a party has relied upon a report to its detriment, it could seek the value of its investment, including loss of expected profits.[1] In performing assessments, many consultants never even consider these risks.

DURATION OF EXPOSURE

Site assessment risks are "long-tailed." The liability claim may surface many years after the assessment was completed.[2] In addition, evolution of technical standards, understanding of exposure impacts and a changing legal framework may alter the liability climate *long after* project completion. The asbestos industry provides a striking example of the dangers of "long-tailed risks." Even as the dangers of asbestos became known, virtually no one in the industry would have predicted the extent of future liability and its effect on industry. Superfund liability demonstrates another dramatic shift in liability exposures. A disposal or treatment plan that was acceptable at one time may constitute a basis for liability in a later era.

UNCERTAIN STANDARD OF CARE

The duration of environmental risks can also erode the standard of care defense by making the standard of care less certain. Several factors lead to this result.

Changing Techniques, Standards, & Guidelines

First, site assessment techniques are developing and changing rapidly. An acceptable approach today may fall out of favor at a later time. Second, since the levels of acceptable contamination rely on regulatory pronouncements, standards are subject to instantaneous evolution, or even a sudden change in the law itself. California's Proposition 65 (which prohibits any contamination that will "probably" affect drinking water) is a good example of a major change in levels of

[1] The recoverability of lost profits will depend upon the particular jurisdiction in which suit is brought, as well as the particular factual situation.

[2] The type of risk may affect the statute of limitations which will be applied. For example, most states have a statute of repose, covering latent deficiencies in construction. But such statutes typically do not apply to personal injury claims, and a few statutes expressly exclude environmental claims. Thus, toxic exposure claims may surface long after a report is issued.

that will "probably" affect drinking water) is a good example of a major change in levels of acceptable contamination. Third, it is difficult to assess how thorough to make an evaluation. In design engineering, trade standards and building codes often define a level of acceptability. But in site assessments, the engineer does not have established guidelines to determine when an assessment is sufficiently complete.[3] The consultant's experience and the client's pocketbook often determine the level of thoroughness. Finally, the use of indirect evidence – such as photographs, use histories and intermittent sampling – often controls site assessments. The evaluation must, therefore, rest on judgment and extrapolation.

Experts May Hold Consultant to Highest Standard

At first blush, these uncertainties might lead one to the conclusion that it is difficult to breach a standard of care so loosely defined. Two flaws undermine such reasoning. First, expert testimony generally determines the standard of care.[4] Where the standard of care is uncertain, experts tend to testify based upon personal, rather than objective, standards. Second, once any evidence of a breach of the standard of care exists, a judge *must* allow the jury to determine whether the engineer breached the standard. This effectively limits the opportunities for summary judgment or other expedited resolution.

Lay Juries May Apply Strictest Standards

The uncertain state of professional standards also affects the outcome of site audit liability. Faced with conflicting expert testimony concerning liability, but undisputed evidence of damage, juries often conclude that a breach of the standard of care occurred. A jury's tendency to apply the standard in a retrospective, rather than *prospective*, fashion can exacerbate this tendency.[5] Thus, the freedom of juries to resolve conflicting testimony subtly favors the plaintiff in environmental actions.[6]

The differences between traditional consulting and site assessments create new realities – realities that dictate understanding the risks a particular project entails, contractually allocating those risks and pricing services on a risk, as well as a cost, basis. The following section examines some of the key liability issues to better understand the risks assumed.

Liability To The Client

Although a client might assert any of a wide range of potential liability theories against an engineer, the key theories are negligence, breach of contract, and warranty.

---

[3] The American Society for Testing and Materials (ASTM) and other organizations have developed standards for site assessments. The engineering community is concerned that the standards being set exceed the level of effort requested by most clients. Consultants performing non-ASTM compliant assessments should explicitly note, in the proposal, contract and report, that the service requested and provided does not follow the ASTM guidelines.

[4] *Miller v. Los Angeles Co. Flood Control District*, 8 Cal.3d 689, 701-703 (1973); *Huber, Hunt & Nichols, Inc. v. Moore*, 67 Cal.App.3d 278, 313 (1977).

[5] A professional's conduct is supposed to be measured from the viewpoint of the professional at the time it performed its services. But a jury already knows that problems arose and will often erroneously judge the professional's conduct based upon the knowledge of what actually occurred.

[6] Soils engineers involved in residential development are aware of this phenomenon. For example, during the 1970s and 1980s, standards for site investigation and development recommendations in California underwent substantial change. The drought of 1976-1977 and the floods of 1982-1983 changed many standard recommendations. Nonetheless, engineers sometimes found themselves sued for recommendations made during the transition period, but on the basis of opinions grounded in later-developed standards.

NEGLIGENCE

A consultant can be liable to his or her client for negligent performance of the site assessment or environmental audit and may have to reimburse the client for the actual loss sustained.[7] Most consultants understand and generally are willing to accept this risk.

BREACH OF CONTRACT

Liability for breach of contract is similar to liability arising from negligence. However, a breach of contract action is concerned with the consultant's compliance with its contractual promises, including the promise to perform in accordance with prevailing standards. In some jurisdictions, the measure of damages and the limitation periods applicable to breach of contract differ from the standards used in negligence actions. For instance, economic damages are generally permitted in breach of contract actions but, depending upon jurisdiction, might not be awarded under a negligence theory.

WARRANTY

Warranties and certifications create additional problems. In many instances, a public agency, the client or the client's bank requires that the consultant issue a certification regarding the condition of the site either before or after some corrective effort. Often, these certifications are absolute and unqualified.[8] If the conditions are not as certified, liability may attach regardless of negligence. Not only is this liability exposure substantial, it may not be insured. Many errors and omissions policies do not cover liability assumed by contract, and the consultant's insurer may, thus, decline to cover liability arising from errant certifications.

Definition for "Certification"

One solution for engineers is to define "certification" as a professional opinion, and expressly not a warranty. In California, professional organizations responded to this problem by asking the legislature to define "certification" by statute, eliminating the need for qualifying language in every certification. The result is Business & Professions Code section 6735.5, which states:

> The use of the word "certify" or "certification" by a registered professional engineer in the practice of professional engineering or land surveying constitutes an expression of professional opinion regarding those facts or findings which are the subject of the certification, and does not constitute a warranty or guarantee, either expressed or implied.

This statute provides a middle ground for an engineer forced to provide a written opinion concerning property. While it is preferable not to provide any certification, if one must "certify" or provide a "certification," this definition helps. Engineers outside California should consider adding such language, and if the project is in California, they should refer to this statute for definition of the terms.

BROAD LIABILITY EXPOSURE TO CLIENT

An errant opinion directly affects the client's business interests and can result in significant liability. For example, a negligently performed site assessment or environmental audit can result in liability for the following: overpayment on a property purchase, excess loan costs, loss of financing or costs of remediation. It can result in a client having to disclose liabilities on its

---

[7] *Gagne v. Bertran*, 43 Cal.2d 481, 486 (1954). Consider the example of a person who relies upon an engineer's representation to purchase a property for $500,000, which the buyer believes is worth $650,000. If, due to environmental impairment the property is only worth $400,000, the measure of damages would be $100,000. If, however, a client loses a definite sale due to the consultant's negligence, the total lost profit may be recoverable.

[8] Inevitably, the demand for a certification comes shortly before a planned transaction closing. If the consultant refuses to sign a certification, the transaction may not occur and the client may sue the consultant. The client may also have planned to pay the consultant from the closed transaction. This "carrot and stick" approach puts great pressure on the consultant.

balance sheet which may affect investment and financing.[9] The potential losses vary with the nature of the client's interests.

Liability to Third Parties

Although an engineer owes its primary duties to its clients, under some circumstances the engineer can be liable to other persons as well. Site assessments and environmental audits can lead to unexpected liability to third parties in two ways. First, parties other than the client can rely upon the engineer's recommendations. Second, the engineer may become aware of information which should be disclosed to protect third parties from environmental hazards.

ECONOMIC RELIANCE ON CONSULTANT'S REPORT

Relatively few decisions exist concerning a consultant's liability to third parties who have relied upon the consultant's reports. But the treatment of other professionals suggests how the courts might treat engineers. During the last decade, third parties have made repeated attempts to hold accountants liable for misrepresentations or omissions in audited financial reports. Accountant liability is similar to the liability of a consultant performing site assessments. The accounting decisions are a bellwether of the potential liability of consultants issuing site assessment reports.

Depending upon jurisdiction, four approaches apply to an accountant's liability to third parties: *actual privity, privity of relationship, foreseeable reliance* and *intended beneficiary*.[10]

PRIVITY OF CONTRACT

Actual Privity

The common law did not permit third parties to sue for negligent injury to their economic interests. Only those who had contracted with the defendant, who were in *privity of contract*, could bring suit. Under the actual privity rule, a person cannot rely upon the consultant's report unless the relying party has a contractual relationship with the consultant. This rule is intertwined with the unavailability, in certain jurisdictions, of economic damages in negligence actions.

The actual privity approach sharply limits the potential class of plaintiffs. Third parties, such as lenders, may attempt to circumvent the rule by obtaining its explicit waiver by the consultant.

Privity of Relationship

As the law developed, courts realized that some circumstances warrant allowing third parties to recover. But if parties not in contract could sue, how could a consultant maintain any limit on the potential extent of liability?

The New York courts, in *Ultramares Corp. v. Touche,*[11] concluded that an auditor should not have liability to third party claimants unless the claimant had a *privity of relationship* with the auditor. Under this approach, an accountant has liability if he or she knew that the financial reports had a particular purpose, and also knew of the existence of a party or parties who would rely upon the reports. In addition, some conduct on the part of the accountant must link him or her to that party or parties, and that conduct must evince the accountant's understanding of that party's reliance.[12] This relationship substitutes for the prior requirement of contractual privity.

---

[9] A bank that forecloses on property that contains hazardous wastes, for example, may become liable for the cost of remediation. *United States v. Maryland Bank & Trust Co.*, 632 F.Supp 573 (D.Md. 1986).

[10] The table at the end of this paper categorizes jurisdictions by the theories they permit for third party reliance.

[11] 174 N.E. 441 (N.Y. 1931).

[12] *Credit Alliance v. Arthur Andersen & Co.*, 483 N.E.2d 110 (N.Y. 1985).

The privity of relationship approach has allowed courts to limit the expansion of third party liability, but it has done so in an arbitrary manner. It is difficult to determine what conduct sufficiently links auditor and third party. Hence, the auditor or the third party have a difficult task when trying to determine the extent of liability and the risks assumed.

Foreseeable Reliance

Other courts have adopted a pure foreseeability approach.[13] Under this approach, liability attaches if the third party's reliance upon the report was foreseeable. Although satisfyingly simple, this approach leads to extensive liability. As stated by the California Supreme Court, "...[T]here are clear judicial days on which a court can foresee forever."[14] In the context of site assessments, it is generally "foreseeable" that the client will provide a report to purchasers, lenders or investors, regardless of the report's primary purpose.

The practicalities of litigation exacerbate the broad sweep of a foreseeability rule. The legal system generally reserves issues of fact, such as foreseeability, for a jury, which greatly reduces the chance that a defendant can achieve a summary disposition of the action. Faced with the expensive and uncertain prospect of a jury trial, many professionals opt to settle claims of dubious validity.

INTENDED BENEFICIARY

Until recently, most legal commentators generally assumed that California followed the foreseeability rule. However, in *Bily v. Arthur Young & Co.*,[15] the California Supreme Court adopted the intended beneficiary approach of section 552, Restatement of Torts, Second.[16]

> For the reasons stated above, we hold that an auditor's liability for general negligence in the conduct of an audit of its client's financial statements is confined to the client; i.e., the person who contracts for or engages the audit services. Other persons may not recover on a pure negligence theory.
>
> There is, however, a further narrow class of persons who, although not clients, may reasonably come to receive and rely on an audit report and whose existence constitutes a risk of audit reporting that may fairly be imposed on the auditor. *Such persons are*

---

[13] *Rosenblum v. Adler*, 461 A.2d 138 (N.J. 1983); *Citizens State Bank v. Timm, Schmidt & Co.*, 335 N.W.2d 361 (Wis. 1983).

[14] *Thing v. LaChusa*, 48 Cal.3d 644, 668 (1989).

[15] 3 Cal.4th 370 (1992).

[16] § 552. Information Negligently Supplied for the Guidance of Others:

(1) One who, in the course of his business, profession or employment, or in any other transaction in which he has a pecuniary interest, supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information;

(2) Except as stated in Subsection (3), the liability stated in Subsection (1) is limited to loss suffered:

   (a) by the person or one of a limited group of persons for whose benefit and guidance he intends to supply the information or knows that the recipient intents to supply it; and

   (b) through reliance upon it in a transaction that he intends the information to influence or knows that the recipient so intends in a substantially similar transaction;

(3) The liability of one who is under a public duty to give the information extends to loss suffered by any of the class of persons for whose benefit the duty is created, in any of the transactions in which it is intended to protect them.

> *specifically intended beneficiaries of the audit report who are known to the auditor and for whose benefit it renders the audit report*. While such persons may not recover on a general negligence theory, we hold that, for the reasons stated in part IV(B), *post*, they may recover on a theory of negligent misrepresentation.[17] (emphasis added.)

And the *Bily* court sent a clear message that it would apply the intended beneficiary rule to professionals other than accountants.

> The Restatement of Torts Second approach is also the only one that achieves consistence in the law of negligent misrepresentation. Accountants are not unique in their position as suppliers of information and evaluations for the use and benefit of others. Other professionals, including attorneys, architects, engineers, title insurers and abstractors, and others also perform that function. And, like auditors, these professionals may also face suits by third persons claiming reliance on information and opinions generated in a professional capacity.[18]

Foreseeability Standard Applied to Environmental Consultants

Approximately a month after its issuance, a federal court applied the *Bily* decision to a third party claim against an environmental engineer. In *Lincoln Alameda Creek v. Cooper Industries*,[19] a prospective purchaser had retained an engineer to evaluate soil and ground-water contamination. Unbeknownst to the engineer, the purchaser provided a copy of the report to the seller. The purchaser instituted suit against the seller after finding additional contamination. The seller cross-complained against the engineer alleging errors in the preliminary site assessment.

The federal court noted that *Bily* acknowledged that engineers and other professionals supply information and evaluations for others to use and held that: "Therefore, for all groups of information-supplying professionals, liability is limited to those persons the information is intended to benefit."[20] The court further held that both parties to a real estate transaction are not automatically intended beneficiaries.

> The facts underlying this case are not unique. The preparation of a professional's report – such as a contamination report or an engineer's report – is frequently a condition of sale. Therefore, if both parties to the transaction are ordinarily beneficiaries of such reports, it is quite remarkable that there are no cases on this issue.[21]

Broader Liability for Appraisers

The court in *Soderberg v. McKinney*[22] took a more expansive view of the "intended beneficiary." In a case involving a real estate appraiser, the *Soderberg* court stated:

> Further, we do not believe that a real estate appraiser hired by a mortgage broker must know the potential investors by name or specific indemnity. As *Bily* indicated, liability may be appropriate where the defendant "knows with substantial certainty that plaintiff, or the particular class of persons to which plaintiff belongs, will rely on the representation in the course of the transaction." (citations omitted.)[23]

---

[17] 3 Cal.4th at 406.

[18] *Id*. at 410.

[19] 829 F.Supp. 325 (N.D. Cal., 1992).

[20] *Id*. at 328-329.

[21] *Id*. at 329.

[22] 44 Cal.App.4th 1760 (1996).

[23] *Id*. at 1768.

Thus, the court in *Soderberg* held the appraiser liable to the *class of lenders* who relied upon his appraisal when making investment decisions, even though he was unaware of the specific plaintiff. This echoes Comment h to the Restatement Section 552, which states in part:

> …[I]t is not required that the person who is to become the plaintiff be identified or known to the defendant as an individual when the information is supplied. It is enough that the maker of the representation intends it to reach and influence … a group or class of persons, distinct from the much larger class who might reasonably be expected sooner or later to have access to the information and foreseeably to take some action in reliance upon it.[24]

Bily, Lincoln Alameda Creek and *Soderberg* constrict, but do not eliminate, the risk of suit by third parties. The third party will need to establish that the consultant intended that the third party be benefited by its opinions. Under *Soderberg*, the consultant's responsibility extends only to that class of persons substantially certain to receive and rely upon the consultant's opinions and reports.

HOW THIRD PARTIES SEEK TO GAIN RELIANCE RIGHTS

To avoid the limitations of the Restatement rule, sophisticated third parties take steps to assure that they are intended beneficiaries. For example, lending institutions may require that the engineer send an opinion or certificate to them directly. Where the engineer has already issued a report, the third party may write to advise the consultant that it will be relying upon the report. This permits the third party to argue that the consultant "re-issued" the report if it permitted republication and reliance by the financial institution. The consultant should, therefore, monitor – and where appropriate, object – to any republication or reuse of the report.

Duty to Protect Third Parties

When a consultant discovers a condition that threatens injury to third parties, must he or she take steps to warn the potential victims? The legal principles applicable to such situations leave the result in doubt, and it is thus difficult to provide a concise answer. Under some conditions, however, a duty to warn may exist.

Development of Duty to Warn

In *Tarasoff v. Regents of the University of California*,[25] a mentally ill man told his psychiatrist that he intended to kill a woman. The staff at the University-run clinic did not confine the patient, nor did they advise the police or the woman of the threat. Two months later, the man killed her. Her parents then sued the University for failing to warn concerning the known threat.

Among other things, the University argued that the information confided was privileged and that the psychiatrist could not, and need not, advise the police or warn the potential victim. The state's Supreme Court disagreed, stating:

> Although, as we have stated above, under the common law, as a general rule, one person owed no duty to control the conduct of another, nor to warn those endangered by such conduct, the courts have carved out an exception to this rule in cases in which the defendant stands in some special relationship to either the person whose conduct needs to be controlled or in a relationship to the foreseeable victim of that conduct.[26]

[24] Restatement of Torts, 2nd § 552, Comment h.

[25] 17 Cal.3d 425 (1976).

[26] *Id*. at 435. (citations omitted).

BALANCING FACTORS

In later decisions, California's Supreme Court has used this balancing of factors to determine whether to impose a duty. As stated in *Thompson v. County of Alameda*:[27]

> It is a fundamental proposition of tort law that one is liable for injuries caused by a failure to exercise reasonable care. We have said, however, that in considering the existence of "duty" in a given case, several factors require consideration including "the foreseeability of harm to the plaintiff, the degree of certainty that the plaintiff suffered injury, the closeness of the connection between the defendant's conduct and the injury suffered, the moral blame attached to the defendant's conduct, the policy of preventing future harm, the extent of the burden to the defendant and consequences to the community of imposing a duty to exercise care with resulting liability for breach, and the availability, cost, and prevalence of insurance for the risk involved.[28]

Foreseeability from Special Relationship

Foreseeability, however, remains the most important factor.[29] In *Tarasoff*, the court held that a "special relationship" existed between the psychiatrist and his patient and thus the psychiatrist had a duty to warn of the threatened murder. The "special relationship" cases since *Tarasoff* have slowly expanded the type of situations in which a duty to warn exists. In general, the cases have required that the injured parties be dependent upon the defendant or that the injured parties relied upon the defendant's conduct.[30] This detrimental reliance is a key factor establishing a "special relationship."[31]

CONSULTANT'S DUTY TO WARN

While no published California decisions have considered whether a consultant has a "special relationship" with third parties that would obligate him or her to disclose potential dangers to persons foreseeably injured, the State's Attorney General issued an opinion indicating that such a "special relationship" does exist.[32]

Identifiable Victims; Imminent Risk

The Attorney General reviewed the standards enunciated in *Tarasoff* and concluded that a duty to warn would exist if an engineer knew a building was in danger of collapse and, after informing the owner, knew that the owner intended to take no action and would not disclose the danger to tenants. If a "special relationship" exists between a structural engineer performing an investigation of an apartment complex and tenants, then a "special relationship" would likely exist in a situation where the unsuspecting public was in contact with hazardous materials. It is thus likely that a consultant would have a duty to disclose critical information where the consultant knows that the client will not make the disclosure.

Conflicting Duties

The existence of a duty to disclose places the consultant in a delicate position. If the consultant does not disclose, then he or she may incur liability to injured persons. If the consultant discloses against the client's wishes and the consultant's opinion is not correct, the engineer may face a claim for negligently interfering with the client's business interests. Needless to say, the consultant cannot expect further referrals from the client!

---

[27] 27 Cal.3d 741 (1980).

[28] *Id*. at 750.

[29] 17 Cal.3d at 434.

[30] *Olson v. Children's Home Society*, 204 Cal.App.3d 1362, 1366 (1988).

[31] *Id*. at 1366.

[32] 68 Ops. Cal. Atty. Gen. 250, 257 (1985). While Attorney General Opinions are not binding on any court, they are often considered by the courts as persuasive secondary authority.

A duty to disclose may also conflict with contractual requirements or with existing privileges. Site assessment contracts often have provisions requiring that the consultant keep its findings confidential. In addition, the consultant's observations and conclusions may form part of a lawyer's investigation on behalf of a client – and thus qualify as privileged under the work-product doctrine. The twin duties of confidentiality and disclosure place the consultant in a very difficult position.

Strategies to Manage Risk

Engineers cannot eliminate all liability inherent in site assessment work. But it is possible to substantially diminish potential risks. The following section discusses several risk management strategies. Bear in mind that not all risk reduction strategies are appropriate for all projects, and it is unlikely that a contract would include all of them. More realistically, one will pick and choose the appropriate solutions for a given project and thereby tailor the contract to the potential liability risk.

EVALUATE THE "CLIENT"

One of the most important risk factors is the identity of the client and the manner in which the client will use site assessment. A site assessment for a governmental body is less risky than a pre-purchase assessment for a real estate development syndicate. If the client will distribute the information to many third parties, risk obviously increases. The first step in managing risk, therefore, requires a critical examination of the projects and clients to determine whether to accept the assignment, and on what terms.

DEFINE THE LIMITED NATURE OF THE ASSIGNMENT

Besides technical excellence, often the best method for reducing the risk of being held to have breached the standard of care is to carefully delineate your scope of work, including work that you will not perform. You should set forth in writing a clear statement of the analysis to be performed, the standards being used, and the limits on the investigation. This will support the argument that you correctly performed within the standards and limits imposed.

Litigation typically relies on three documents to prove the scope of work: proposal, contract and report. Consistency among these documents is vital, and all three should echo important limitations on the scope of work. Many firms have QA/QC review of reports – the proposal and contract should have QA/QC review as well.

LIMIT RELIANCE BY THIRD-PARTIES

The contract should explicitly limit reliance by third parties. This is accomplished by stating that:

- The services, data and opinions are solely for the client's use, are for a particular project, and no one other than the client may rely upon that work;
- The client may not distribute the data, opinions, and reports to third parties without consultant's prior written agreement;
- The services, data, and options are "perishable", i.e., they should not be relied upon indefinitely; and
- The agreement is not assignable.

In conjunction with these limitations, the consultant can request that the client indemnify it from liability to third parties arising out of unauthorized distribution or use of the report. If the client must distribute the report to a third party, the third party should execute a written agreement which states that:

- The third party is bound by all of the conditions and limitations of the contract and report;
- The third party agrees to any limitations of liability or indemnity provisions;

- The liability limitation applies in the aggregate; and
- No duty exists to apportion the limitation amount between client and third party.

LIMIT LIABILITY

With some exceptions, it is possible to contractually limit one's liability to one's client. The exact form of the limitation will depend upon the jurisdiction and the specific purpose for the limitation provision. For more information on drafting limitation of liability provisions, see the paper on that topic in this set.

OBTAIN INDEMNIFICATION

Engineers should attempt to obtain indemnification from their clients for protection from third party actions. Remember, however, that the protection afforded by an indemnification provision has statutory and common law limitations that vary by jurisdiction. And also remember that no clause is any better than the financial strength of the indemnitor.

AVOID OR QUALIFY CERTIFICATIONS

Unless covered by a specific statute that defines "certification" as a professional opinion (as California does for licensed engineers), consultants should resist pressure to sign broad certifications. The consultant can avoid this problem if its contract provides that it has no obligation to execute a certification unless:

- The client provides the form before the engineer executes agreement; and
- The scope of work is sufficient to enable the consultant to form a professional opinion concerning the subject of the certification.

The agreement, and any certificate, should state that: the certification is an expression of professional opinion, and it is not a warranty, express or implied.

RESPONSIBILITY FOR DISCLOSURES

The agreement should specifically state that the client has the sole responsibility to provide any notices or disclosures to public agencies or to the public.

LIMIT PROMISE OF CONFIDENTIALITY

In making agreements, engineers should limit any confidentiality clauses to provide that the consultant may disclose information under the following circumstances:

- As requested by legal process, and that the engineer has no obligation to object to, or contest the validity of, such legal processes;
- Where consultant has an arguable duty to disclose; and
- As necessary for the consultant's defense in a civil, criminal or administrative proceeding.

Jurisdictional Analysis Table

State	Actual Privity	Privity of Relationship	Restatement of Torts, 2d	Foreseeability	No Decision
Alabama			X		
Alaska			X		
Arizona			X[a]		
Arkansas			X		
California			X		
Colorado			X		
Connecticut			X		
Delaware			X		
Florida			X		
Georgia			X		
Hawaii					X
Idaho		X			
Illinois		X			
Indiana		X			
Iowa			X		
Kansas			X		
Kentucky			X		
Louisiana[b]					
Maine					X
Maryland					X
Massachusetts					X
Michigan			X		
Minnesota			X		
Mississippi				X	
Missouri			X		
Montana		X[c]			
Nebraska			X		
Nevada	X				
New Hampshire			X		
New Jersey				X	
New Mexico					X
New York		X			
North Carolina			X		
North Dakota			X		
Ohio			X		

State	Actual Privity	Privity of Relationship	Restatement of Torts, 2d	Foreseeability	No Decision
Oklahoma					X
Oregon[d]					
Pennsylvania	X		X		
Rhode Island			X		
South Carolina					X
South Dakota					X
Tennessee			X		
Texas			X		
Utah			X		
Vermont					X
Virginia					X
Washington					X
West Virginia			X		
Wisconsin				X	
Wyoming					X

a. Not explicitly adopted, but cited as "instructive." *Hoffman v. Greenberg*, 767 P.2d. 725 (Az. App. 1988).

b Louisiana has followed an approach that is theoretically different from the four theories listed in the chart, but which appears to result in a cross between Restatement and Foreseeability approaches.

c. In *Jim's Excavating Service v. HKM Associates*, 878 P.2d 248 (Mont. 1994) the court held that Restatement §552 should apply to a contractor's suit against the project engineer or architect. In a third party action against an accountant (more similar to site liability case), the privity of relationship test should apply. (*Thayer v. Hicks*, 793 P.2d 784 (Mont. 1990)).

d. Oregon has indicated that Restatement section 552 is "close to the mark," but has opted to develop the scope of duty on a case-by-case basis. (*Onita Pacific Corp. v. Trustees of Bronson*, 843 P.2d 890 (Or. 1992)).