**"Exploring Environmental Liability Risks of Engineers and Geologists in New York State"©**

***Frederick Eisenbud, Esq.***[1]

**Presentation to the Long Island Association of Professional Geologists**

**March 9, 2016**

## INTRODUCTION

The focus of this article is on ways that geologists and engineers ("consultants") can incur liability for their work as environmental consultants or contractors in New York. The law and cases in other states are not necessarily the same as that in New York, and the reader should be sure to make a new assessment of potential liability in any other State he or she performs work in.[2] It is the author's goal to impress upon the reader that it is a natural tendency for a person who is asked to pay for environmental contamination to sue anyone that had anything to do with the property and the contamination, and you and your firm can wind up being named in the resulting lawsuit. Because it is very difficult to get out of such lawsuits on motions to dismiss for failure to state a cause of action,[3] and the defense costs associated with getting to a point where you can

---

[1] The author is Of Counsel to Campolo, Middleton & McCormick, LLP (4175 Veterans Memorial Highway, Ronkonkoma, New York 11779 [631738-9100/ feisenbud@cmmllp.com]) and is Chair of its Environmental Practice Group. He was a 1975 graduate of Hofstra Law School, where he was Editor-in-Chief of the Hofstra Law Review. He founded the first Environmental Crime Unit in the State of New York at the District Attorney level in 1984 while at the Suffolk County District Attorney's Office. He then served as Deputy Chief of the Federal and State Litigation Bureau of the Suffolk County Department of Law, where he was counsel to the Suffolk County Board of Health. His practice focuses on all aspects of environmental law and litigation. The author has served as co-chair of the Environmental Law Committee of the Suffolk County Bar Association on numerous occasions, was the Co-Chair of the Environmental Committee of HIA-LI for ten years, and is a director of that Long Island business organization. He has taught Environmental Law at Touro Law School as an Adjunct Professor, and lectures frequently to County and State Bar Associations.



[2] Articles in the literature can be found to assist the reader to compare New York's law to that in other states. *See, e.g.*, Schneider, "The Expanding Liability of Environmental Consultants to Third Parties," 13 Vill. Envtl. L.J. 235 (2002); Gerrard, "Consulting Liability in Environmental Due Diligence", 7/22/2005 N.Y.L.J. 3 (Col. 1). The Gerrard article was a particularly helpful jump-off for reviewing New York's standards, and also examines decisions in other states.

[3] *See, e.g., Tyree Organization, Ltd. v. Cashin Associates, P.C.*, 14 Misc.3d 1220(A) (Sup. Ct. Nassau Co. 2007) (unreported): "When deciding a motion made pursuant to CPLR 3211(a)(7), the court must

hope to move for summary judgment and avoid the added cost of trial can be significant (and the ability to avoid trial by that procedure is uncertain),[4] the reader should make certain that adequate insurance exists to protect against such lawsuits. An examination of the types of insurance vehicles available to the reader is beyond the scope of this article.

Finally, since this is an article on keeping out of trouble, please note that this article cannot be relied on as legal advice from an attorney, which can only be accomplished after a thorough review of the facts of your individual case, and the law that is applicable to those facts.

**Breach of Contract, Negligence and Malpractice Claims Associated With Phase I's and Phase II's**

Problems arise when a Buyer takes title, only to discover an environmental condition that the Buyer now must investigate and remediate. If the Buyer had a Phase I or II performed before the closing, and the environmental consultant missed the presence of the contamination or the abandoned USTs, the Buyer will look to the consultant for its damages. The Buyer will assert that it would not have purchased the property had its true environmental condition been known, or that Buyer would have negotiated a reduced purchase price to reflect the anticipated cost of cleanup.

The environmental consultant that contracts directly with the Buyer can be sued for breach of contract when the consultant fails to discover contamination that should have been found given the scope of the contract.[5]

When the environmental consultant arguably performed every task contemplated by the contract

---

determine whether the pleader has a cause of action, not whether it has been properly plead. *Guggenheimer v. Ginzburg*, 43 N.Y.2d 268, 401 N.Y.S.2d 182, 372 N.E.2d 17 (1977); and *Rovello v. Orofino Realty Co.*, 40 N.Y.2d 633, 389 N.Y.S.2d 314, 357 N.E.2d 970 (1976). If from the facts alleged in the complaint and the inferences which can be drawn from the facts the court determines that the pleader has a cognizable cause of action, the motion must be denied. *Sokoloff v. Harriman Estates Development Corp.*, 96 N.Y.2d 409, 729 N.Y.S.2d 425, 754 N.E.2d 184 (2001); and *Stucklen v. Kabro Assocs.*, 18 A.D.3d 461, 795 N.Y.S.2d 256 (2nd Dept.2005)."

[4] As summarized by the court in *Tyree Organization, Ltd. v. Cashin Associates, P.C.*, 2007 WL 171906 (Sup. Ct. Nassau Co. 2007) (unreported): "Summary judgment is a drastic remedy which will be granted only when the movant established that there are no triable issues of fact. … The party seeking summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law. … Once the movant has established a *prima facie* entitlement to judgment as a matter of law, the party opposing the motion must come forward with proof in evidentiary form establishing the existence of triable issues of fact or must demonstrate an acceptable excuse for triable issues of fact exist. … A motion for summary judgment should be denied if the court has any doubt as to the existence of a triable issue of fact. … When deciding a motion for summary judgment, the court must view the evidence in a light most favorable to the non-moving party and must give the non-moving party the benefit of all reasonable inferences which can be drawn from the evidence. … However, mere conclusions of law or fact are insufficient to defeat a motion for summary judgment." (citations deleted).

[5] E.G., *Mercy Center, Inc. v. JLC Environmental Consultants, Inc.*, 2005 WL 4441855 (Sup. Ct. N.Y. Co. 2005) (not reported) (JLC could be sued by Buyer for breach of contract when it agreed to undertake an examination of the property for USTs, and the sub-contractor hired by JVC, Advanced Cleanup Technologies, failed to find three USTs.

but did not find contamination, the lawsuit often will include causes of action for negligence (sometimes cast as gross negligence) and professional malpractice. The statute of limitations in such cases, where the underlying theory is professional malpractice, is three years.[6]

The court in Tyree *Organization, Ltd. v. Cashin Associates, P.C.*, 2007 WL 171906 (Sup. Ct. Nassau Co. 2007) explained professional malpractice and its relationship to negligence and breach of contract as follows:

> Generally speaking, malpractice is the negligence of a professional toward a person for whom a service is rendered. *Santiago v. 1370 Broadway Assoc.*, 264 A.D.2d 624, 695 N.Y.S.2d 326 (1st Dept.1999). A professional will be liable for malpractice if he/she departs from the standard of care expected of members of the profession and the departure was a proximate cause of plaintiff's injury. *Giambona v. Stein*, 265 A.D.2d 775, 697 N.Y.S.2d 399 (3rd Dept.1999). However, the professional may also be liable in negligence if the gravamen of the complaint is not negligence in furnishing the professional service, but the professional's failure in fulfilling a different duty. *Weiner v. Lenox Hill Hospital*, 88 N.Y.2d 784, 788, 650 N.Y.S.2d 629, 673 N.E.2d 914 (1996). Nevertheless, the distinction between malpractice and negligence is a "subtle one" because "no rigid analytical line separates the two" theories. *Id.* at 787, 650 N.Y.S.2d 629, 673 N.E.2d 914.A lawyer, for example, may be liable, not only for malpractice and negligence, but also for breach of contract, if the lawyer makes an express promise to the client to obtain a specific result or an implied promise to exercise due care in performing services required by the contract. *Santulli v. Englert, Reilly & McHugh*, 78 N.Y.2d 700, 706, 579 N.Y.S.2d 324, 586 N.E.2d 1014 (1992).However, "a breach of contract claim premised on the lawyer's failure to exercise due care or to abide by general professional standards is nothing but a redundant pleading of the malpractice claim." *Levine v. Lacher & Lovell-Taylor*, 256 A.D.2d 147, 151, 681 N.Y.S.2d 503 (1st Dept.1998)

A "profession" has been defined as "an occupation usually associated with long-term educational requirements leading to an advanced degree, license evidencing qualifications met prior to engaging in the occupation and control of the occupation through standards of ethical conduct and malpractice liability rendered."[7] Even before enactment of the Professional Geologist Licensing law in 2014,[8] it is the author's opinion that, in most instances, the environmental consultant is

---

[6] CPLR §214(6) provides that "the limitations period in non-medical malpractice actions would be three years, irrespective of whether the complaint is cast in contract or tort." *Tyree Organization, Ltd. v. Cashin Associates, P.C.*, 2007 WL 171906 (Sup. Ct. Nassau Co. 2007).

[7] Tyree *Organization, Ltd. v. Cashin Associates, P.C.*, 2007 WL 171906 (Sup. Ct. Nassau Co. 2007), *citing Santiago v. 1370 Broadway Assoc.,264 A.D.2d 624 (1st Dept. 1999).*

[8] NYS Education Law §7206-b, enacted L 2014, ch 475, §3, effective November 21, 2016.

going to be considered a "professional" for purposes of a professional malpractice claim.[9]

***Can the Consultant Be Liable to Parties It Did Not Contract With?***

If the environmental consultant contracts directly with the Seller or Buyer, or is a sub-contractor of the consultant who contracted with the Seller or the Buyer, and was responsible for the work the contractor agreed to perform, the question arises, when can the allegedly negligent environmental contractor be sued by a third party with whom the environmental consultant had no contractual relationship. The rule is as follows:[10]

> "The long-standing rule is that recovery may be had for pecuniary loss arising from negligent representations where there is actual privity of contract between the parties *or a relationship so close as to approach that of privity."*[11]

The following factors are considered in determining whether the requisite relationship, short of actual privity, exists to sustain a cause of action for negligent misrepresentation:

> (1) awareness that the reports were to be used for a particular purpose or purposes; (2) reliance by a known party or parties in furtherance of that purpose; and (3) some conduct by the defendants linking them to the party or parties and evincing defendant's understanding of their reliance."[12]

Where a potential Buyer contracts with an environmental consultant who sub-contracts out the agreed upon work, the court is likely to find that these criteria are satisfied. For example, in *Mercy Center, Inc. v. JLC Environmental Consultants, Inc. and Advanced Cleanup Technologies, Inc.*[13]

---

[9] In Tyree *Organization, Ltd. v. Cashin Associates, P.C.*, 2007 WL 171906 (Sup. Ct. Nassau Co. 2007), the court indicated it is "unclear whether an 'environmental consultant' is a professional who may be sued for malpractice for breach of professional obligations which the consultant has undertaken by contract." Because Cashin is a firm of architects and engineers, the court concluded it was acting as a professional when it undertook work as an environmental consultant. It also cited *Neumann v. Carlson Environmental, Inc.*, 429 F.Supp.2d 946 (N.D.Ill.2006), where the District Court held that an environmental consultant could be liable for professional malpractice under Illinois law based upon the particularized knowledge and expertise of the consultant**. In the author's opinion, New York courts will reach the same conclusion.**

[10] *Mercy Center, Inc. v. JLC Environmental Consultants, Inc. and Advanced Cleanup Technologies, Inc.*, 2005 WL 441855 (Sup. Ct. N.Y. Co. 2005) (not reported). The court found that the criteria were met so that the buyer of a vacant lot who was told by its environmental consultant that there were no USTs present could sue both its environmental consultant (JLC Environmental) and the subcontractor that agreed to undertake the radar survey (Advanced Cleanup Technologies) on a theory of negligent misrepresentation or professional misconduct.

[11] *Ossining Union Free School Dist. v. Anderson LaRocca Anderson*, 73 N.Y.2d 417, 424 (1989) (negligent preparation of a report).

[12] *Id*. at 425.

[13] 2005 WL 441855 (Sup. Ct. N.Y. Co. 2005) (not reported).

the court denied Advanced Cleanup Technologies' motion for summary judgment. Plaintiff contracted with JLC Environmental to do a Phase I and Phase II, which included doing a radar survey to determine if chemical storage tanks were at the site. The court denied Advanced Cleanup Technologies' motion for summary judgment on the causes of action by the plaintiff property owner against it directly:

> It cannot be denied as a matter of law that Advanced possessed a clear understanding that such a survey (as, presumably, many others like it performed nationwide by members of a growing environmental consulting industry) was being performed preparatory to reliance by some party having an ownership or prospective ownership interest, or responsibility, vis-a-vis the surveyed property. To deny that would be to deny the very reason for the enterprises which both Advanced and JLC are engaged in. The complaint, reasonably and liberally read, alleges just that; i.e., that Advanced was aware that its report was to be used by a party with an interest in the property that was the subject of its report ( *see, Ossining Union Free School Dist., supra* ). The law does not require that Advanced knows the precise name of the individual just that it knows there exists such an individual, whose use of the report is, as the Court of Appeals pragmatically put it, "the end and aim of the transaction" ( *id.,* at 425).

Sometimes, the issue is couched in terms of whether the party who relied on the report that negligently misrepresented the environmental condition of property was an intended third-party beneficiary of the contract, and not merely an "incidental beneficiary." As explained by the court in *Blumenfeld Development Group, Ltd. v. Roux Asociates, Inc.*, 2004 WL 2609384 (Sup. Ct. Nassau Co. 2004) (not officially reported):

> In order to claim third-party benefits, the putative third-party beneficiary will be deemed an intended beneficiary if "recognition of a right to performance in the beneficiary is appropriate to effectuate the intention of the parties and either (a) the performance of the promise will satisfy an obligation of the promisee to pay money to the beneficiary [not relevant here]; or (b) the circumstances indicate that the promisee intends to give the beneficiary the benefit of the promised performance.... An incidental beneficiary ... is not an intended beneficiary." *LaSalle Nat. Bank v Ernst & Young LLP.*, 285 AD2d 101, 108 [1st Dept. 2001] quoting Restatement (second) of Contracts §302.

In *Blumenfeld*, it is not clear what Blumenfeld Development's relationship to the property was. The decision merely says that Blumenfeld's law firm retained Roux Associates to undertake a phase I and limited phase II environmental assessment of certain property. That property was sold at a foreclosure sale to non-party Tiago Holdings Corp. which assigned the title to plaintiff Tiago Holdings, LLC. Blumenfeld and Tiago Holdings, LLC sued Roux for negligently failing to find UST's that were present, causing Tiago Holdings, LLC to incur $180,000 in cleanup costs. Blumenfeld was reimbursed for all of its expenses by Tiago Holdings, LLC. The court found that

Blumenfeld could not sue for breach of contract because it could allege no damages. As for Tiago Holdings, LLC, which was not in existence at the time of Roux's contract with Blumenfeld, the court agreed with Roux that Tiago Holdings, LLC was not an intended beneficiary of the contract, and granted summary judgment to Roux.

Of significance to the reader is the fact that the court in *Blumenfeld* found it important that "the Environment Assessment Report prepared by defendant Roux specifically states that it was prepared for the exclusive use of plaintiff BDG - and any third-party use of the report was the sole responsibility of BDG." Because plaintiff BDG was not the purchaser of the property at issue, and plaintiff BDG could not show that it was damaged in any way since it was reimbursed all of its expenses by Tiago Holding, LLC, its claims against defendant Roux for breach of contract, detrimental reliance and indemnification were dismissed.

Sometimes, the negligent misrepresentation alleged can be an exaggeration of the scope of the problem, which caused the plaintiff to take actions it otherwise would not have taken. In *Tyree Organization, Ltd. v. Cashin Associates, P.C.*[14] the Valley Stream UFSD brought a lawsuit against Exxon Mobil, the owner of the ExxonMobil station that had a release, and Tyree. Tyree and ExxonMobil settled, and Tyree obtained subrogation rights from the School District. Standing in the shoes of the District, Tyree sued Cashin Associates for $225,000 in fees paid to Cashin by the District for air testing and the costs associated with relocating the kindergarten classes and administrative offices that followed receipt of Cashin's indoor air report. The report allegedly overstated the level of gasoline contaminants in the air at the elementary school because gasoline-powered equipment was stored at the school, thus causing the District unnecessarily to incur relocation costs. The court denied Cashin's motion to dismiss for failure to state a cause of action.

***The Relevance of Customary Practices to Establishing the Standard of Care***

Whether or not a defendant environmental consultant complied with relevant industry standards and applicable regulations provides "some evidence" as to whether the consultant's conduct was negligent or constituted professional malpractice, but is not necessarily outcome determinative. Once again, the court in *Tyree v. Cashin* ably sets out the law:

> Cashin argues that the testing methods it used were approved by the Environmental Laboratory Approval program, 10 NYCRR § 55-2.1 *et seq.* Thus, as a matter of law, Cashin claims that it complied with customary practice and its contractual obligation.
>
> Compliance with relevant industry standards, be they derived from customary business practice or government regulation, is some evidence that the defendant exercised due care and was not negligent. *Trimarco v. Klein*, 56 N.Y.2d 98, 105-6, 451 N.Y.S.2d 52, 436 N.E.2d 502 (1982).On the other hand, proof of a customary practice coupled with a showing that it was ignored and the departure was a proximate cause of plaintiff's loss, may

[14] 2007 WL 171906 (Sup. Ct. Nassau County 2007) (not officially reported).

establish negligence. *Id.* at 106, 451 N.Y.S.2d 52, 436 N.E.2d 502. "Proof of a common practice aids in formulating the general expectation of society as to how individuals will act in the course of their undertakings"

The failure to comply with industry standards or regulations, however, does not in and of itself establish that defendant was negligent. Nor does compliance with regulations or other standards establish that the defendant was not negligent. See, *Mercogliano v. Sears, Roebuck and Co.*, 303 A.D.2d 566, 756 N.Y.S.2d 472 (2nd Dept.2003); and *Duncan v. Corbetta*, 178 A.D.2d 459, 577 N.Y.S.2d 129 (2nd Dept.1991).

In the case of occupations other than professionals, the standard of care remains one of reasonableness. In the case of professionals, the standard remains one of good and accepted practice expected of members of the profession. Thus, while compliance with administrative regulations is some evidence that the professional engaged in good and accepted practice, it does not establish as a matter of law that the professional did not commit malpractice. *Id.* See also, *Contini v. Hyundai Motor Co.*, 876 F.Supp. 540 (S.D.N.Y.1995).

Compliance with Public Health regulations does not necessarily establish that Cashin exercised due care in testing the indoor air samples taken from the Clearstream School. Nor does compliance with Public Health regulations establish that Cashin fully performed its contract with the School District. In particular, evaluating air quality by an approved method without allowing for vapor emanating from gas-powered equipment may not be good and accepted practice for an engineer functioning as an environmental consultant. On the other hand, it may have been totally appropriate for an environmental consultant to consider the contamination from the vehicles as a given and focus on the marginal effect of the gasoline spill, particularly since young children were effected.

The issue cannot be resolved without the assistance of expert testimony as to the standard of care required of an engineer functioning in the capacity of an environmental consultant. In any event, compliance with Public Health regulations is but one factor bearing on whether Cashin complied with professional obligations and fully performed its contract.

Just as new lawyers are told they should not rely on forms because the facts of their case may make the forms irrelevant or worse, it is the author's opinion that consultants cannot blindly follow industry practices without consideration of the facts. It is at least possible that everyone in an industry routinely follows a practice that makes no sense under the facts presented to the

consultant.

***Reliance by the Environmental Consultant on Course of Conduct to Establish That The Contract Was Not Violated***

Environmental Consultants may do work for the same clients in many locations over a lengthy period of time. The court in *Tyree v. Cashin* was also asked to determine whether the course of prior conduct between Cashin and the School District established a course of conduct as to the testing protocols for indoor air testing so that it could not be said Cashin breached its contract with the District.

The court first noted that, "In interpreting a contract, the court's role is to ascertain the intention of the parties at the time that they entered into the contract. … If that intent is discernible from the plain meaning of the language of the contract, there is no need to look further. … On the other hand, if the language of the contract is ambiguous, the court must look to extrinsic evidence for guidance as to which interpretation should prevail. *Evans v. Famous Music Corp., supra.* One form of extrinsic evidence is the parties' course of dealing; that is, the practical construction which the parties themselves have placed on the contract. See, Prince, *Richardson on Evidence* § 11-403 (11th Ed. Farrell)." (citations deleted).

Cashin argued that the protocols it employed at the elementary school for indoor air testing were identical to those used at another school in the District. Because terms like "monitoring services", and "technical assistance" were not defined, the court agreed that "resort to extrinsic evidence is necessary." The court rejected, however, the argument that the parties' course of dealing in this case was an aid for determining their intent with regard to how the testing in the elementary school should be done:

> In a contract for professional services, the party for whom the services are performed ordinarily lacks knowledge of the appropriateness of the professional's services. Thus, the party is required "to repose confidence in the professional's ability ... and realistically cannot be expected to question and assess the techniques employed or the manner in which the services are rendered." *Shumsky v. Eisenstein*, 96 N.Y.2d 164, 167, 726 N.Y.S.2d 365, 750 N.E.2d 67 (2001). Because the School District lacked knowledge as to the appropriateness of the environmental consulting services performed by Cashin, the course of dealing with regard to the Forrest Road School is not relevant to determine the meaning of the Clearstream School contract. Rather, the meaning of the contract will be determined with reference to the standard of good and accepted practice of engineers acting as environmental consultants.

It is likely then that the consultant's ability to rely on its course of conduct with a particular client will turn on the knowledge and sophistication of the client. For example, if work is done for a major gasoline company, it is likely that the person acting on behalf of the company will be as knowledgeable as the environmental consultant.

Part of the problem the consultant may face is the tendency of those who are responsible for the remediation of contaminated properties to look to as many other people as they can who can help pay for the work, and that may include the consultant. Thus we will examine defenses that may be applicable to the consultant's case, depending on the facts presented.

## STATUTE OF LIMITATIONS

Generally speaking, a lawsuit based on breach of contract requires that suit be brought within six years, and a lawsuit based on a tort, such as negligence or professional malpractice, within three years.[15] While that may seem straight forward, there are a number of rules that can alter the outcome of a motion for dismissal based on statute of limitations.

For example, the consultant who is deemed a professional is subject to a continuing representation exception that can extend the statute of limitations for malpractice. As long as the lawsuit is commenced within three years of the consultant filing its last report, it is timely.[16] The continuous representation doctrine is based on two notions: (1) that a client cannot be expected to assess the quality of professional services, or be burdened with the obligation to identify errors in those services, while they are still in play; and (2) that the client, if she becomes aware of the errors, should be able to give the professional an opportunity to undertake corrective efforts without the interruption of a lawsuit.[17]

The tolling of the statute of limitations based on the continuous representation doctrine only applies when the claim is one of professional misconduct.

If a client has a professional malpractice claim, the lawsuit must commence within three years, "regardless of whether the underlying theory is based in contract or tort."[18]

### *CPLR §214-c: Extension of Statute for Certain Claims of Damages to Property Arising From the Latent Effects From Exposure to a Substace*

CPLR §214-c(2) declares that "Notwithstanding the provisions of section 214, the three year period within which an action to recover damages for personal injury or injury to property caused by the latent effects of exposure to any substance or combination of substances, in any form, upon or within the body or upon or within property must be commenced shall be computed from the date of discovery of the injury by the plaintiff or from the date when through the exercise of reasonable diligence such injury should have been discovered by the plaintiff, whichever is earlier."

---

[15] *See* CPLR §214. Actions to be commenced within three years: for … injury to property; for personal injury; for malpractice other than medical, dental or podiatric malpractice,…" *and* CPLR§203. "Actions to be commenced within six years: where not otherwise provided for; on contract;…"

[16] *Southern Wine & Spirits of America, Inc. v. Impact Environmental Engineering, PLLC,* 104 A.D.3d 613, 614-15 (1st Dept. 2013).

[17] *In re Lawrence,* 24 N.Y.3d 320, 342-343 (2014).

[18] CPLR §214(6).

This provision can come into play when, for example, underground storage tanks, leaking petroleum or hazardous substances, are discovered long after a property owner takes title to property. If the property owner hired a consultant to do a Phase I and Phase II prior to taking title, and the consultant did not discover the USTs, the consultant, as discussed further on, will be brought into litigation by the owner against the Seller.

New York's "time of discovery rule" contains a number of caveats which limit how long the statute of limitations can be extended. Thus CPLR §214-c(4) states:

> where the discovery of the cause of the injury is alleged to have occurred less than five years after discovery of the injury or when with reasonable diligence such injury should have been discovered, whichever is earlier, an action may be commenced or a claim filed within one year of such discovery of the cause of the injury; provided, however, if any such action is commenced or claim filed after the period in which it would otherwise have been authorized pursuant to subdivision two or three of this section the plaintiff or claimant shall be required to allege and prove that technical, scientific or medical knowledge and information sufficient to ascertain the cause of his injury had not been discovered, identified or determined prior to the expiration of the period within which the action or claim would have been authorized and that he has otherwise satisfied the requirements of subdivisions two and three of this section.

Thus, if the owner of property discovers property damage (from, e.g., vapors intruding into structures), but does not know the source of the substance causing the damage, the statute of limitations may be extended for up to six years from when the damage is discovered or should have been discovered (five years to discover the source plus one year to commence a lawsuit). But, if the lawsuit is not commenced within three years of discovery (because the source was not then known), the lawsuit cannot proceed unless the person claiming damages can allege and prove that "technical, scientific or medical knowledge and information sufficient to ascertain the cause of his injury had not been discovered, identified or determined", a seemingly impossible burden. Often, the means of discovering the source are well known, but the cost is prohibitive. That, it would appear, is not sufficient under New York law.

For purposes of understanding that claims against the consultant may arise many years after work was completed, it is important to be aware of a Federal law that may override the limitations on New York's time of discovery rule. In 1986, the Federal Superfund law, CERCLA, was amended to require a uniform federally required commencement date for state statutes of limitations involving hazardous substances. 42 USC §9658(a)(1) states:

> (1) Exception to State statutes
>
> In the case of any action brought under State law for personal injury, or property damages, which are caused or contributed to by exposure to any hazardous substance, or pollutant or contaminant,

> released into the environment from a facility, if the applicable limitations period for such action (as specified in the State statute of limitations or under common law) provides a commencement date which is earlier than the federally required commencement date, such period shall commence at the federally required commencement date in lieu of the date specified in such State statute.

The "federally required commencement date" is defined to mean "the date the plaintiff knew (or reasonably should have known) that the personal injury or property damages referred to in subsection (a)(1) of this section were caused or contributed to by the hazardous substance or pollutant or contaminant concerned." On its face, that sounds very much like New York's rule. But what about the limitations pertaining to discovery of the cause of the injury?

In *Freier v. Westinghouse Electric Corporation*,[19] a 2002 decision by the United States Circuit Court for the Second Circuit, the Court reviewed a challenge to the federally required commencement date statute as it applied to New York's hazardous and toxic substance statute of limitations found in CPLR §214-c. The Court concluded that the language of the federal statute "makes it indisputably clear that Congress intended, in the cases to which § 9658 applies, that the FRCD [federally required commencement date] preempt state law accrual rules if, under those rules, accrual would occur earlier than the date on which the cause of the personal injury was, or reasonably should have been, known to be the hazardous substance."[20] Thus "a plaintiff may bring suit within one year after discovery of the cause of an injury, even if more than five years have elapsed since discovery of the injury."

With regard to the additional requirement of New York's rule that it be shown that the requisite scientific knowledge be shown not to be reasonably available, the Court found that, to the extent that the required showing would cause an accrual date earlier than the one allowed by the federal statute, it too was preempted by the federal law. Significantly for purposes of interpreting what is meant by "knew or should have known", the Court stated that "we certainly cannot conclude that Congress meant the FRCD standard of what a plaintiff 'reasonably should have known' to extend to information that was obtainable only through the private commissioning of expensive studies."[21] Thus if the "federally required commencement date" is applied to CPLR §214-c, the statute of limitations for property damage claims may be far longer than three years.

***Further Ways Claims Can Be Made Against the Consultant Years After the Normal Statute of Limitations Has Run: Claims for Contribution and Indemnification***

When a party who did not cause or contribute to damage to property caused by the release of petroleum or hazardous substances by another party pays money to correct the damage from the

---

[19] 303 F.3d 176 (2nd Cir. 2002), *cert. Denied, Westinghouse Elec. Corp. v. Freier*, 2003 U.S. LEXIS 3248 (April 28, 2003).

[20] *Id*. at 196 - 197.

[21] *Id*. at 207.

release (e.g., when the State of New York remediates petroleum or hazardous substance contamination), fairness and equity entitles such person to be indemnified for all costs incurred by the person who caused or contributed to the contamination. Indemnification requires that the party who caused or contributed to the contamination reimburse the party who does the remediation for all costs incurred. The statute of limitations for such claims is six years from each expenditure. That, obviously, can be decades after the substance was released. If multiple parties contributed to the contamination, each typically is deemed jointly and severally liable to the party seeking indemnification, which means any person responsible can be compelled to pay the plaintiff for all of the damages proven.

In such lawsuits, it is commonplace for the defendants accused of causing or contributing to the adverse condition of the property to sue each other for contribution. Further, the defendants may sue others not named by the Plaintiff in the original lawsuit for contribution by filing a third party claim. Contribution claims are based on the possibility that one defendant may wind up indemnifying the plaintiff for all of plaintiff's damages, even though other defendants caused or contributed to the problem. The result will be that each defendant's share will be equitably determined. While the Plaintiff can collect 100% from any of the defendants, each defendant can be compelled to pay its fair share to any defendant who pays more than its fair share to the Plaintiff. Like claims for indemnification, the statute of limitations for contribution claims is six years from when the person suing for contribution has paid more than the defendant's fair share. That could occur after the lawsuit for indemnification results in a judgment and one or more defendants pay more than their fair share.

***CLR § 214-d. Limitations on certain actions against licensed engineers and architects***

A provision of the CPLR, intended to benefit certain professionals who are sued ten or more years after their alleged negligent conduct, also demonstrates the legislature's awareness that contribution and indemnification claims against consultants may arise long after the alleged misconduct. CPLR § 214-d reads:

> 1. Any person asserting a claim for personal injury, wrongful death or property damage, or a cross or third-party claim for contribution or indemnification arising out of an action for personal injury, wrongful death or property damage, against a licensed architect, engineer, land surveyor or landscape architect or against a partnership, professional corporation or limited liability company lawfully practicing architecture, engineering, land surveying or landscape architecture which is based upon the professional performance, conduct or omission by such licensed architect, engineer, land surveyor or landscape architect or such firm occurring more than ten years prior to the date of such claim, shall give written notice of such claim to each such architect, engineer, land surveyor or landscape architect or such firm at least ninety days before the commencement of any action or proceeding against such licensed architect, engineer, land surveyor or landscape architect or such firm including any cross or third-party action or claim. The notice of claim shall identify the performance, conduct or omissions complained of, on information and belief, and

shall include a request for general and special damages. Service of such written notice of claim may be made by any of the methods permitted for personal service of a summons upon a natural person, partnership or professional corporation. A notice of claim served in accordance with this section shall be filed, together with proof of service thereof, in any court of this state in which an action, proceeding or cross or third-party claim arising out of such conduct may be commenced or interposed, within thirty days of the service of the notice of claim. Upon the filing of any such notice of claim, a county clerk shall collect an index number fee in accordance with section eight thousand eighteen of this chapter and an index number shall be assigned.

2. In such pleadings as are subsequently filed in any court, each party shall represent that it has fully complied with the provisions of this section.

3. Service of a notice as provided in this section shall toll the applicable statute of limitations to and including a period of one hundred twenty days following such service.

4. From and after the date of service of the notice provided for in subdivision one of this section, the claimant shall have the right to serve a demand for discovery and production of documents and things for inspection, testing, copying or photographing in accordance with rule three thousand one hundred twenty of this chapter. Such demand shall be governed by the procedures of article thirty-one of this chapter. In addition, the claimant shall have the right to the examination before trial of such licensed architect, engineer, land surveyor or landscape architect or such firm or to serve written interrogatories upon such licensed architect, engineer, land surveyor or landscape architect or such firm after service of and compliance with a demand for production and inspection in accordance with this section. The court may, at any time at its own initiative or on motion of such licensed architect, engineer, land surveyor or landscape architect or such firm deny, limit, condition or restrict such examination before trial or written interrogatories upon a showing that such claimant has failed to establish reasonable necessity for the information sought or failed to establish that the information sought by such examination or interrogatories cannot reasonably be determined from the documents or things provided in response to a demand for production and inspection served in accordance with this section. Such examination before trial or interrogatories shall otherwise be governed by article thirty-one of this chapter.

5. After the expiration of ninety days from service of the notice provided in subdivision one of this section, the claimant may commence or interpose an action, proceeding or cross or third-party claim against such licensed architect, engineer, land surveyor or landscape architect or such firm. The action shall proceed in every respect as if the action were one brought on account of conduct occurring less than ten years prior to the claim described in said action,

unless the defendant architect, engineer, land surveyor or landscape architect or such firm shall have made a motion under rule three thousand two hundred eleven or three thousand two hundred twelve of this chapter, in which event the action shall be stayed pending determination of the motion. Such motion shall be granted upon a showing that such claimant has failed to comply with the notice of claim requirements of this section or for the reasons set forth in subdivision (h) of rule three thousand two hundred eleven or subdivision (i) of rule three thousand two hundred twelve of this chapter; provided, however, such motion shall not be granted if the moving party is in default of any disclosure obligation as set forth in subdivision four of this section.

6. No claim for personal injury, or wrongful death or property damage, or a cross or third-party claim for contribution or indemnification arising out of an action for personal injury, wrongful death or property damage may be asserted against a licensed architect, engineer, land surveyor or landscape architect or such firm arising out of conduct by such licensed architect, engineer, land surveyor or landscape architect or such firm occurring more than ten years prior to the accrual of such claim shall be commenced or interposed against any such licensed architect, engineer, land surveyor or landscape architect or such firm unless it shall appear by and as an allegation in the complaint or necessary moving papers that the claimant has complied with the requirements of this section. Upon the commencement of such a proceeding or action or interposition of such cross or third-party claim, a county clerk shall not be entitled to collect an index number fee and such action, proceeding or cross or third-party claim shall retain the previously assigned index number. Such action, proceeding or cross or third-party claim shall otherwise be governed by the provisions of this chapter.

7. The provisions of this section shall apply only to a licensed architect, engineer, land surveyor or landscape architect or such firm practicing architecture, engineering, land surveying or landscape architecture in the state of New York at the time the conduct complained of occurred and shall not apply to any person or entity, including but not limited to corporations, which was not licensed as an architect, engineer, land surveyor or landscape architect or such firm in this state or to a firm not lawfully practicing architecture, engineering, land surveying or landscape architecture at the time the conduct complained of occurred.

8. The provisions of this section shall not be construed to in any way alter or extend any applicable statutes of limitations except as expressly provided herein.

Failure to follow the procedures set out in 214-d will result in dismissal of the lawsuit. If a claim is made ten or more years after the alleged misconduct, the Plaintiff must specify the factual basis for the claim of misconduct. However, recognizing that this may be difficult so long after the fact, the plaintiff is granted discovery tools that can be used prior to drafting the complaint.

It is important to note that only the specified classes of consultants are entitled to claim the benefits of 214-d. While engineers acting as environmental consultants are covered, professional geologists are not. The LIAPG may wish to encourage the State organization to lobby to add professional geologists to the list of professionals covered by CPLR 214-d.

How does all of this impact consultants? First, of course, there can be circumstances where a consultant is retained to address a problem on behalf of a seller of contaminated property, and the consultant negligently causes the release of petroleum or hazardous substances (e.g., when a UST is accidentally perforated by drilling). Second, a consultant can be retained by a buyer to conduct a Phase I or Phase II so that the buyer will understand what expenses it may have to incur if it takes title, and the consultant fails to discover USTs that were abandoned without being pumped out, and they release their contents.

Appropriate insurance coverage which consultants should obtain is beyond the scope of this presentation. However, it should be obvious that your insurance representative must be consulted to make certain that claims are covered even if based on an occurrence that happened decades before.

***Can Consultants Avoid or Limit Liability or Damages By Contract?***

"Absent a statute or public policy to the contrary, a contractual provision absolving a party from its own negligence will be enforced",[22] as will provisions limiting the consequences of such negligence.[23] Thus the consultant can attempt to insert such provisions in its contracts, although it runs the risk that the client will decline to retain the consultant.

However, it is the public policy of New York that "a party may not insulate itself from damages caused by grossly negligent conduct,"[24]and "[t]his applies equally to contract clauses purporting to exonerate a party from liability and clauses limiting damages to a nominal sum."[25] As summarized by the Court of Appeals, New York's highest court:

> Gross negligence, when invoked to pierce an agreed-upon limitation of liability in a commercial contract, must "smack[ ] of intentional wrongdoing" (Kalisch–Jarcho, Inc. v. City of New York, 58 N.Y.2d, at 385, 461 N.Y.S.2d 746, 448 N.E.2d 413, supra). It is conduct that evinces a reckless indifference to the rights of others (id.; see also, Restatement [Second] of Contracts § 195[1] [intentional or reckless conduct vitiates contractual term limiting liability] ).[26]

If the claim against the consultant is for a breach of contract based on the negligence (or gross negligence) of the consultant, may the client file claims for property or personal injury based

---

[22] *Sommer v. Federal Signal Corporation*, 79 N.Y.2d 540, 553 (1992).
[23] *Id.* at 553-554, citing a case where an alarm company contract provision limiting liability to $50 was upheld.
[24] *Id.* at 554.

[25] *Id.*
[26] *Id.*

both on breach of contract (because terms of the contract were violated) and tort (based on the manner in which the work was performed)? This question is proper to ask because of New York's recognition of the "economic loss rule." If a claim is purely contractual and asserts only economic loss, the plaintiff's assertion of a breach of contract claim precludes additional claims for contribution, common-law indemnification and professional negligence/malpractice.[27] In that circumstance, the limiting provisions in the contract could be very significant.

New York's Court of Appeals set out a number of examples where both a breach of contract claim and a claim for damages from a tort could be brought[28]:

> [The Court of Appeals has] recognized a number of circumstances in which legal duties independent of contractual obligations could exist. For instance, cases involving "[p]rofessionals, common carriers and bailees" constitute circumstances in which "policy, not the parties' contract ... gives rise to a duty of due care." Id. at 551–52, 583 N.Y.S.2d at 961. Separate tort liability can also arise 'from a breach of a duty distinct from, or in addition to, the breach of contract.' " Id. at 551, 583 N.Y.S.2d at 961 (citing North Shore Bottling Co. v. C. Schmidt & Sons, 22 N.Y.2d 171, 179, 292 N.Y.S.2d 86, 239 N.E.2d 189 (1968)). Finally, the Court of Appeals held that an independent action in tort might lie in cases of "abrupt, cataclysmic occurrence.

Are geologists and engineers "professionals" who have a duty of care that can give rise to an action independent of a breach of contract claim? The answer clearly was "yes" even before the State finally approved the Professional Geologist Licensing bill on 2014. In *Green Hills (USA) LLC v. Aaron Streit Inc. and Certified Environments, Inc.*[29] Streits sold land to Green Hills in Brooklyn, and represented that the land was free of any toxic or hazardous substances or underground fuel-oil tanks. Green Hills retained Certified Environments, Inc. ("CEI"), and CEI reported prior to the closing that it found no evidence of underground storage tanks or past use of fuel oil. Relying on seller's representations and CEI's findings, Green Hills took title. Subsequently, it learned that the warehouse had been heated with oil for a period of years, and two underground tanks with oil were then discovered. It was ascertained that oil had leaked into the soil and groundwater, and Green Hills undertook to establish a work plan under the supervision of NYS DEC. Green Hills brought an action against seller (Streits) for injunctive relief under RCRA, and for damages under State law theories. Green Hills also sought damages from CEI based on breach of contract, and contribution, common-law indemnification and professional negligence/malpractice." CEI sought to dismiss the tort claims based on the economic loss rule. The District Court denied the motion to dismiss:[30]

---

[27] *Green Hills (USA) LLC v. Aaron Streit Inc. and Certified Environments, Inc.*, 361 F.Supp.2d 81, 89 (E.D. NY 2005).

[28] *Id.* at 90, discussing *Sommer v. Federal Signal Corporation*, 79 N.Y.2d 540 (1992).

[29] *Id.*

[30] *Green Hills (USA) LLC v. Aaron Streit Inc. and Certified Environments, Inc.*, 361 F.Supp.2d 81, 90-91 (E.D. NY 2005).

> Plaintiff alleges that it has suffered injuries beyond those explicitly contemplated under contract, including injuries to its property as well as the surrounding groundwater (state property), not to mention expenses involved in the investigation and remediation process it has undertaken pursuant to various statutory and regulatory obligations. These claims involve more than a generalized "duty of due care" or mere "enforcement of the bargain." Sommer, 79 N.Y.2d at 552, 583 N.Y.S.2d at 961. The alleged professional negligence on the part of CEI has caused plaintiff to incur the additional expense in cleaning up waste that clearly affects parties not privy to the contract. The nature of the work performed by CEI has a significant public interest, and the breach of those duties could have dramatic consequences.
>
> Consequently, this case, similar to Sommer and Hydro Investors, concerns "[p]rofessionals ... [who] may be subject to tort liability for failure to exercise reasonable care, irrespective of their contractual duties." Sommer, 79 N.Y.2d at 551, 583 N.Y.S.2d 957, 593 N.E.2d 1365. See also Robinson Redevelopment Co. v. Anderson, 155 A.D.2d 755, 757, 547 N.Y.S.2d 458 (3d Dep't 1989) ("We conclude that the contractual and professional relationship of plaintiff and defendants gave rise to two distinct wrongs, one contractual and the other grounded in professional malpractice, recoverable at law."); Commerce & Industry Ins. Co. v. Vulcraft, Inc., No. 97 Civ. 2578, 1998 WL 823055, at *12 (S.D.N.Y. Nov. 20, 1998) (rejecting application of economic loss rule when claim "is in substance one for professional malpractice, and that obligation is distinct from any contract into which the parties may have entered"). Accordingly, Green Hills can proceed with claims sounding in both contract and tort.

Another interesting case is *Southern Wine & Spirits of America, Inc. v. Impact Environmental Engineering, PLLC*.[31] There, Impact Environmental was retained to prepare an environmental site assessment, apparently by the buyer of property. Impact Environmental failed to disclose to its client the presence of 38 drywells, containing potential contaminants, on client's property, despite availability of this information in public records. The Appellate Division, First Department, found that this raised a fact issue as to whether the consultant's conduct with respect to its environmental site assessment (ESA) was "grossly negligent," precluding summary judgment enforcing consultant's contractual limitation on liability.
The Appellate Division also found that the lower court properly found that:

> Impact had a professional duty independent of the parties' agreements. Although Impact, an environmental consultant, was not *** subject to licensing requirements, public policy requires that it should be held to a "professional" standard of care, given the nature of its services (see Green Hills (USA), L.L.C. v. Aaron

[31] 104 A.D.3d 613 (1st Dept. 2013).

Streit, Inc., 361 F.Supp.2d 81, 89–91 [E.D.N.Y.2005] ). Indeed, "[p]rofessionals ... may be subject to tort liability for failure to exercise reasonable care, irrespective of their contractual duties" (Sommer v. Federal Signal Corp., 79 N.Y.2d 540, 551, 583 N.Y.S.2d 957, 593 N.E.2d 1365 [1992] ).[32]

## LIABILITY ARISING OUT OF THE PERFORMANCE OF PHASE I AND PHASE II ENVIRONMENTAL ASSESSMENTS

It is now the norm that Phase I site assessments will be performed on behalf of a buyer or seller or bank in a commercial real estate transaction, and any suspicious condition frequently will lead to a request to perform a limited Phase II environmental assessment which may include soil and groundwater testing, and a search for Underground Storage Tanks (UST's").

Typically, the contract of sale will allow the buyer a period of time to undertake environmental due diligence, and to cancel the contract if any unsatisfactory environmental conditions are found. The Buyer may be given a Phase I report that was done for the Seller, or the Buyer may retain an environmental consultant to perform the Phase I directly for the Buyer.[33]

The environmental consultant should make certain that the contract of sale does not purport to prevent the consultant from reporting certain conditions that are found to the New York State Department of Environmental Conservation ("DEC"), or other Federal or local regulatory agencies if the consultant is required by law to report what is found. The consultant does not want to be put in the position of choosing between a breach of contract claim for revealing what is found to third parties, and being fined, for example, $25,000.00 per day for not reporting evidence of a petroleum discharge to the appropriate agency within two hours of discovery.

The key case with regard to reporting of petroleum spills is the DEC Commissioner's decision in *In re Middleton, Kostekosta Associates Ltd.*[34] There, the ALJ dismissed the DEC complaint which alleged a violation of 6 NYCRR §613.8, which reads: "Any person with knowledge of a spill, leak or discharge of petroleum must **report** the incident to the department within two hours of discovery. …" The ALJ concluded that the obligation fell only upon the owner and operator of the facility. There, the person who was alleged not to have reported the discharge was acting as a favor to a friend when he went to the site to observe the performance of a contractor hired to conduct soil borings at the site. He was acting on behalf of a bank that held a mortgage on the property. Based on the color and smell of soil borings taken by another contractor, the respondent concluded the soil could have been contaminated. The Commissioner held that the purpose of

---

[32] *Id.* at

[33] The author's recommendation to real estate attorneys is also made to consultants requested to assess environmental conditions pursuant to a potential purchase of commercial property: file Freedom of Information Requests with all pertinent agencies as soon as you know a client will seek to purchase property. Often, the time allowed in a contract for due diligence is not sufficient to obtain administrative records. If the FOIL requests are made as soon as the purchaser expresses interest in property, by the time the contract is negotiated, the documents may already be in hand.

[34] 1998 WL 939495 (N.Y.Dept.Env.Conserv.) (DEC File No. R1-6039, decided December 31, 1998).

613.8 was to assure a prompt response to a release, and that "The **reporting** duty is on everyone with knowledge of the spill." The Commissioner observed that the respondent was neither an engineer nor an attorney, and thus could not claim any privilege that might preclude reporting what was observed. The Commissioner remanded the case to the ALJ for further proceedings (the respondent had not filed an answer to the complaint, but moved to dismiss). Of interest for the purpose of arguing the amount of any penalty if liability were found is the following statement of the Commissioner:

> Granting the relief staff seeks in whole or even in part would arguably tend to chill relationships between environmental consultants and their clients. On the other hand, the importance of the Department obtaining prompt **reports** on spills, leaks and discharges of petroleum cannot be disparaged. These competing factors need to be taken into account in this proceeding. It appears from the complaint that Respondent did in fact reveal the presence of contamination to the Department, but did so two months instead of two hours after obtaining knowledge of the spill. Whether the delay resulted in actual harm and the priority assigned to the spill by staff would seem to be relevant, at least as to the determination of any penalty. Facts as to whether and why the owner, operator and/or other environmental consultant did or did not **report** the contamination may be germane.

To avoid being put into an impossible conflict between the client and the law, most contracts which limit who the consultant may give the information found to frequently contain an exception for any information which the law requires be reported, or where a Court directs the consultant to provide the information to a party seeking to know what was found. If the consultant is faced with a demand for information from a third party, it will be helpful if the contract places the burden on the party that retained the consultant to obtain a protective order.

## POTENTIAL SUPERFUND LIABILITY OF CONSULTANTS

The author presumes that environmental consultants have a basic understanding of Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"), and will here merely set out without citation the law's draconian terms. Four categories of Potentially Responsible Parties are set out: the current owner of property at which hazardous substances have been released or may be released; the past owner at the time of the release or potential release; any person who arranges for disposal at the facility, and the transporter of hazardous substances to the facility if the transporter selects the disposal site. Liability, generally,[35] is strict, joint and several, and applies retroactively to actions that occurred before the law went into effect in late 1980.

Environmental consultants working at hazardous waste sites face substantial third-party liability under CERCLA in two ways: their actions can make them current operators, or arrangers of disposal. For example, in *New Castle County v. Halliburton NUS Corp*.,[36] EPA hired Halliburton NUS Corporation (NUS) to perform a Remedial Investigation/Feasibility Study (RI/FS) at a county landfill site.[37] The county sued NUS, alleging that NUS negligently installed a well that contributed to the contamination at the site. The court ruled that NUS could be liable to the county under section 9619(a) of the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA.

42 U.S.C. Section 9619(a) provides that:

> (1) A person who is a response action contractor with respect to any release or threatened release of a hazardous substance or pollutant or contaminant from a vessel or facility shall not be liable under this subchapter or under any other Federal law to any person for injuries, costs, damages, expenses, or other liability (including but not limited to claims for indemnification or contribution and claims by third parties for death, personal injury, illness or loss of or damage to property or economic loss) which results from such release or threatened release.
>
> (2) Negligence, etc.
>
> Paragraph (1) shall not apply in the case of a release that is caused by conduct of the response action contractor which is negligent, grossly negligent, or which constitutes intentional misconduct.

The court held that a response action contractor is liable to "any other person" who is harmed by

[35] *But see Burlington Northern and Santa Fe Railway Company v. United States*, 556 U.S. 599 (2009) where the United States Supreme Court affirmed the ruling of the District Court that the cost of remediation should be apportioned between the responsible parties.

[36] 903 F. Supp. 771 (Del. Dist. 1995), *aff'd in part*, 111 F.3d 1116 (3d Cir. 1997).

[37] The description of the case that follows is taken from Schneider, "The Expanding Liability of Environmental Consultants to Third Parties," 13 Vill. Envtl. L.J. 235 (2002).

the contractor's negligence. One benefit to response action contractors, however, is that they are held to a negligence, rather than a strict liability, standard of liability.

It is important to keep in mind that the response action contractor provision only applies if services are provided for the government.[38] Federal courts have held environmental contractors liable as current operators where they allegedly installed wells in a manner that spread the contamination,[39] or spread contaminated soil around the property where it was found,[40] and/or as arrangers of disposal[41]or transporters[42] of hazardous substances based on their moving contaminated soil across property, thus spreading the contamination.

## CONCLUSION

It should now be apparent that no one should be in the business of environmental contracting or consulting without having adequate insurance protection. Writing your contracts clearly so there is no confusion as to the scope of your work can help, as will high level and appropriate training of all your employees. In the end, however, it is difficult to prevent someone who is being held liable for a potentially multi-million dollar cleanup from seeking contribution in some form from whoever the person can identify. Even if you are wrongfully accused (which may well have

---

[38] Similar but more restrictive limitations on response action responder liability are found in Article 27 of the NYS Environmental Conservation Law and NYS Navigation Law. *See* ECL § 27-1321. "Protection against liability" which contains the following: "Nothing in subdivision one of this section shall be deemed or construed to relieve from liability for damages or injuries any person who: (a) is alleged to have caused said damages or injuries as the result of gross negligence, or reckless, wanton or intentional misconduct, or (b) is under a legal duty to respond to the incident, or (c) receives compensation other than reimbursement for out-of-pocket expenses for services in rendering assistance or advice." Thus it appears that work for a fee takes the environmental consultant out of the protection intended. NYS Navigation Law § 178-a ("Responder Immunity") only applies to the first 120 days after the discharge, and provides. "The provisions of subdivision two of this section shall not apply to any response efforts undertaken by a person later than one hundred twenty days after a discharge has been stopped. Thereafter, such person shall not be strictly liable without regard to fault, but the liability of such person for personal injury or property damage shall be limited to acts or omissions of the person during the course of such response efforts which are shown to be the result of negligence, gross negligence, or reckless, wanton or intentional misconduct."

[39] *New Castle County v. Halliburton NUS Corp*, 903 F. Supp. 771 (Del. Dist. 1995), *aff'd in part*, 111 F.3d 1116 (3d Cir. 1997); *Geraghty & Miller, Inc. v. Conoco, Inc.*, 234 F.3d 917, 920 (10th Cir. 2000), *reh'g denied*, 247 F.3d 243, *cert. denied*, 121 S. Cto. 2592.

[40] *Kaiser Aluminum & Chemical Corp. v. Catellus Development Corp.*, 976 F.2d 1338 (9th Cir. 1992) (Ferry could be liable as an operator if it "had authority to control the cause of the contamination at the time the hazardous substances were released into the environment.").

[41] *Tanglewood East Homeowners v. Charles-Thomas, Inc.*, 849 F.2d 1568 (5th Cir. 1988) (consultant who dispersed contaminated soil during the construction of a housing subdivision could be strictly liable under CERCLA as a person who arranged for disposal or treatment of hazardous substances "since disposal may be merely the 'placing of any … any hazardous waste into or on any land….'). *But see United States v. CDMG Realty Co.*, 96 F.3d 706 (3d Cir. 1996) (consultant only liable for spreading soil around if plaintiff proved the soil investigation was negligently performed).

[42] *Kaiser Aluminum & Chemical Corp. v. Catellus Development Corp.*, 976 F.2d 1338 (9th Cir. 1992) (Ferry could be liable as a transporter under CERCLA 9707(a)(4) because "transportation" is defined as "the movement of a hazardous substance by any mode").

been the case in some of the cases discussed above, which after all only involved motions to dismiss or for summary judgment by defendants who believed they were not liable), the cost of defending yourself can be extremely expensive.

.