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THE EXPANDING LIABILITY OF ENVIRONMENTAL  
CONSULTANTS TO THIRD PARTIES

JOEL SCHNEIDER†

## I. INTRODUCTION

Over the past few years, the liability landscape upon which environmental consultants practice has changed drastically. This is due to the fact that consultants are increasingly being sued by third parties with whom they did not contract.<sup>1</sup> Reported cases show a definite trend toward naming consultants in significant and complex lawsuits seeking economic losses and cleanup costs. The cases frequently arise under state common law principles whereby the plaintiffs argue that a consultant with whom they did not contract owed them a duty of care. There is also a growing line of cases addressing a consultant's liability for Superfund cleanup costs in situations where a consultant had no expectation that he would be involved in paying for the cleanup of hazardous wastes.

The cases in this area present a particularly vexing problem for consultants since third parties to their contracts bring suit and since the damages sought often dwarf the value of the underlying contract and any profit actually earned.<sup>2</sup> Further, plaintiffs seek damages that were not contemplated when the work was undertaken and the claims relate to work that the consultant did not agree to perform.<sup>3</sup> Moreover, even if the consultant ultimately succeeds in its defense, the victory comes at a high price. These complex cases typically involve staggering defense costs as well as numerous parties and experts.

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1. See JAY FEINMAN, PROFESSIONAL LIABILITY TO THIRD PARTIES, § 1.1 (2000) (noting that aside from primary duty of care to their clients many professionals are now excepted from owing duty of care to third parties).

2. See *id.* at § 1.2 (stating economic losses to third parties can be substantial as losses can extend along chains of causation to persons far removed in time and contract from the consultant).

3. See *id.* at § 1.3. Problems occur when liability is imposed beyond the contract because "it upsets the parties' own allocation of rights and duties, diminishes their ability to regulate their own affairs, introduces inefficiencies into the process and raises the threat of indeterminate liability." *Id.*

The increasing potential for consultant liability to third parties arises in many different contexts.<sup>4</sup> Most early cases filed against consultants involved accidents resulting in personal injuries. While personal injury cases continue to be filed, third party suits against consultants for environmental cleanup costs, economic losses, damages caused by unsuccessful business deals, and Superfund contribution costs have become more prevalent. Representative cases include:

- A consultant was sued by an assignee of its contract for failing to identify hazardous waste contamination in an assessment report.<sup>5</sup>
- After its business collapsed, a neighbor to GE's contaminated property sued GE's consultant for negligently performing a site investigation.<sup>6</sup>
- A company whose site came to be included on the National Priorities List sued the government's contractor whose alleged negligence led to the listing.<sup>7</sup>
- A consultant hired to assist a client with regulatory compliance issues was sued by an unknown purchaser of the property who discovered substantial mercury contamination of property designated for residential housing.<sup>8</sup>

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4. *See id.* at § 1.1 (noting many professionals including lawyers, accountants, architects, engineers, and appraisers are subject to third party liability).

5. *See* *Bronstein v. GZA Geoenvironmental, Inc.*, 665 A.2d 369 (N.H. 1995) (finding no tort liability because consultant owed no duty of care to ultimate purchasers of property). For a further discussion of *Bronstein*, *see infra* notes 97-106 and accompanying text.

6. *See* *Midwest Aluminum Mfg. Co. v. General Elec. Co.*, No. 4:90-CV-143, 1993 WL 725569, at \*6 (W.D. Mich. 1993) (granting consultant's motion for summary judgment and holding consultant lacked "requisite relationship" with neighbor sufficient to create any legal obligation).

7. *See* *United States Ecology, Inc. v. Carlson*, 638 F. Supp. 513, 515-16 (C.D. Ill. 1986) (seeking to prevent company from being named on update to National Priorities List by naming those waste disposal sites which present greatest danger to public health or welfare). The defendant, United States Ecology, complained that Ecology and Environment, Inc., an engineering firm hired by Illinois to evaluate a site, owed it a duty to exercise due care in that evaluation. United States Ecology argued that Ecology and Environment's failure to fulfill that duty led to a loss of their business reputation. *See id.* at 520. United States Ecology alleged that the defendant breached its duty of care by relying on obsolete and inaccurate data and by failing to visit the site. *See id.* The district court held that Ecology and Environment owed no duty to United States Ecology given that the loss of business reputation in the complaint was not reasonably foreseeable and would lead to undue multiple defendant liability. *See id.* at 521.

8. *See* *Grand Street Artists v. General Elec. Co.*, 19 F. Supp. 2d 242, 244 (D.N.J. 1998). For a further discussion of *Grand Street Artists*, *see infra* notes 74-96 and accompanying text.

- A consultant hired to observe and document underground tank excavation activities, to perform soil and groundwater tests, to remediate soil and groundwater contamination, and to prepare reports and work plans to be filed with the state was sued by a purchaser of the property for failing to discover all underground tanks on the property.<sup>9</sup>
- A consultant hired by the government to identify environmental contamination in a building, including “readily accessible” asbestos, was sued by the building’s purchaser to whom the consultant gave a letter summarizing the results of its inspection, provided at a cost of only \$200.<sup>10</sup>
- A group of individuals “residing near” the Rocky Mountain Arsenal sued the government and Shell Oil Company for “personal injury and property damage as a result of airborne pollutants released during the joint cleanup effort at the Arsenal by Shell and the Government.”<sup>11</sup>
- A purchaser of contaminated property (Lincoln) sued the seller (Orsetti). Prior to the purchase, Lincoln’s consultant, Beta, stated that the property was “clear of

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9. See *Deangelo v. Exxon Corp.*, No. A-791-98T3, slip op. at 26 (N.J. Super. Ct. App. Div. Oct. 15, 1999) (holding consultant not liable given that contract for sale was replete with disclaimers). Specifically, the court noted that the contract stated, “[a]ny reliance . . . on the report, or any information therein shall be at your own risk. You should conduct your own investigation to determine the accuracy of the report and the condition of the property.” *Id.* For a further discussion of *Deangelo*, see *infra* notes 34-48 and accompanying text.

10. See *Delaware County Redevelopment Auth. v. McLaren/Hart Env’tl. Eng’g*, No. CIV. A. 97-3315, 1998 WL 181817, at \*1, \*5-\*7 (E.D. Pa. 1998) (asserting both tort and contract law claims). The court held that negligence claims would not be allowed to go forward while the plaintiff could pursue breach of contract claims, which the consultant did not contest. See *id.* at \*7, \*12.

11. See *Daigle v. Shell Oil Co.*, 972 F.2d 1527, 1530 (10th Cir. 1992). The plaintiffs sought “response costs” from Shell and the government for medical monitoring under § 107(a) of the Comprehensive Environmental Response, Compensation and Liability Act [hereinafter CERCLA] as well as damages from Shell under an “ultrahazardous activity” strict liability claim. See *id.* The Court of Appeals for the Tenth Circuit granted the government’s motion to dismiss all of the tort claims against it for lack of subject matter jurisdiction insofar as the cleanup activities fell under the discretionary function exception to their waiver of sovereign immunity. See *id.* at 1531. As to Shell’s motions to dismiss, the court dismissed the CERCLA § 107(a) “response cost” claims, while denying dismissal of the “ultrahazardous activity” strict liability claim. See *id.*

contamination.” Orsetti filed a negligence and fraud/misrepresentation suit against Beta.<sup>12</sup>

- A consultant hired to excavate and grade a portion of land for a proposed housing development was sued for Superfund contribution because it unknowingly spread some of the contaminated soil over parts of the property.<sup>13</sup>
- A person who conducted a pre-purchase soil investigation at a site was sued because, it was argued, the soil testing was a “disposal” of hazardous substances sufficient to trigger Superfund liability.<sup>14</sup>
- An engineering firm hired to prepare engineering plans and drawings, to assist in obtaining permits, and to provide engineering and consulting services was sued as an “operator” of a landfill.<sup>15</sup>

This Article discusses the developing case law addressing the liability of environmental consultants to third parties outside the consulting contract. Although the laws of each state and among federal circuits frequently differ and should be examined for the controlling principles in a given case, some general trends are emerging. Section II discusses one such trend, for example, the potential for consultant liability under traditional common law principles. Section III addresses the potential liability of consultants under the federal Superfund statute. Finally, Section IV of this Article suggests steps consultants can take to reduce their liability and risk of loss.

## II. COMMON LAW LIABILITY OF CONSULTANTS

### A. The Critical Duty Analysis

The most important legal element that a plaintiff must establish in a suit against a consultant is the existence of a legal duty that

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12. See *Lincoln Alameda Creek v. Cooper Indus., Inc.*, 829 F. Supp. 325, 329-30 (N.D. Cal. 1992) (holding consultant owed no legal duty to Orsetti and plaintiff did not qualify as third party beneficiary under contract law claim). The court also dismissed the fraud/misrepresentation claim because Orsetti did not fall within the class of persons entitled to rely on the representations. See *id.* at 330.

13. See *Kaiser Aluminum and Chem. Corp. v. Catellus Dev. Corp.*, 976 F.2d 1338, 1339-40 (9th Cir. 1992). For a further discussion of *Kaiser Aluminum*, see *infra* notes 158-169 and accompanying text.

14. See *United States v. CMDG Realty Co.*, 96 F.3d 706, 711 (3d Cir. 1996). For a further discussion of *CDMG*, see *infra* notes 173-80 and accompanying text.

15. *City of N. Miami v. Berger*, 828 F. Supp. 401, 412-13 (E.D. Va. 1993) (finding engineering firm did not qualify as “operator” given that they had no authority to make final operational decisions).

the consultant owed to the third party.<sup>16</sup> The notion that a consultant only owes a duty to someone with whom it directly contracts is inaccurate insofar as the concept of privity, which traditionally limited a consultant's liability, no longer applies.<sup>17</sup> No bright-line standard exists for determining precisely when a consultant owes a duty to a non-party to the contract. Judges decide, as a matter of law, the issue as to whether or not a duty exists.<sup>18</sup> The key factor in such a determination is the concept of foreseeability of injury.<sup>19</sup>

Foreseeability does not require a specific forecasting of particularly identifiable victims or an accurate prediction of the exact harm that may result from the conduct.<sup>20</sup> Instead, a party may be liable to persons who normally and generally fall within a zone of risk that the particular tortious conduct created.<sup>21</sup> Because almost every occurrence is theoretically foreseeable, the existence of a duty usually depends upon balancing fairness and public policy considerations.<sup>22</sup> One commentator noted:

Asking whether the defendant owes the plaintiff a "duty" is simply another way of asking if the defendant ought to be liable to the plaintiff for its negligence, and "foreseeability" is merely a proxy for a policy determination about the scope of liability in a particular case. Determining foresee-

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16. See *Monig v. Alfano*, 254 N.W.2d 759, 764 (Mich. 1977). The general elements of a cause of action for negligence are the existence of a duty to the plaintiff, a breach of that duty by the defendant, legally cognizable harm to the plaintiff, and causation between the defendant's negligent act and the harm. See RESTATEMENT (SECOND) OF TORTS § 281 (1965).

17. See generally FEINMAN, *supra* note 1, at § 3.1. The California Supreme Court asserted that the "overwhelming weight of authority" supported the doctrine that lack of privity bars an action for economic loss in a third-party case. See *Buckley v. Gray*, 110 Cal. 339 (1895).

18. See *Durflinger v. Artiles*, 673 P.2d 86, 91 (Kan. 1983) (distinguishing questions of law from questions of fact in negligence actions).

19. See *Donnelly Constr. Co. v. Oberg/Hunt/Gilleland*, 677 P.2d 1292, 1295 (Ariz. 1984) (holding "[d]uty and liability are only imposed where both the plaintiff and the risk are foreseeable to a reasonable person."); see also *Mid-Western Elec., Inc. v. DeWild Grant Reckert & Assoc. Co.*, 500 N.W.2d 250, 254 (S.D. 1993) (finding engineering firm liable).

20. See *Di Cosala v. Kay*, 450 A.2d 508, 517 (N.J. 1982) (defining "zone of risk").

21. See *id.* (stating "a party will be liable to persons foreseeably exposed to danger when the injury suffered was generally to be anticipated [even if] it was not the exact injury that could have been predicted.").

22. See generally, *Biakanja v. Irving*, 320 P.2d 16 (Cal. 1958) (discussing duty of care to third party); *Bily v. Arthur Young & Co.*, 834 P.2d 745 (Cal. 1992) (holding defendant auditor owed no general duty of care regarding conduct of audit to persons other than client); *Brooks v. Bank of Wisconsin Dells*, 467 N.W.2d 187 (Wis. Ct. App. 1991) (finding in some situations, parties injured by negligent provision of professional services may sue professional regardless of privity).

ability is always a judgment in hindsight about the degree of concern that the defendant should have had for the plaintiff's interests.<sup>23</sup>

In *First Federal S&L Ass'n of Rochester v. Charter Appraisal Co., Inc.*,<sup>24</sup> the Connecticut Supreme Court stated:

Many harms are quite literally "foreseeable," yet for pragmatic reasons, no recovery is allowed . . . . A further inquiry must be made, for we recognize that "duty" is not sacrosanct in itself, but is only an expression of the sum total of those considerations of policy which lead the law to say that the plaintiff is entitled to protection . . . . While it may seem that there should be a remedy for every wrong, this is an ideal limited perforce by the realities of this world. Every injury has ramifying consequences, like the ripples of the waters, without end. The problem for the law is to limit the legal consequences of wrongs to a controllable degree . . . . The final step in the duty inquiry, then, is to make a determination of the fundamental policy of the law, as to whether the defendant's responsibility should extend to such results.<sup>25</sup>

Then, in *Giantonio v. Taccard*,<sup>26</sup> the New Jersey Superior Court attempted to sum up this cloudy area, stating:

[R]esolution of the question of whether a duty is owed and to whom often involves no more than a value judgment upon a factual complex rather than an evident application of a precise rule of law. The ultimate determination inevitably reflects the seasoning and experience of the one who judges.<sup>27</sup>

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23. FEINMAN, *supra* note 1, at § 5.4.1. The fairness and policy analysis "involves identifying, weighing, and balancing several factors – the relationship of the parties, the nature of the attendant risk, the opportunity and ability to exercise care, and the public interest in the proposed solution." *Carvalho v. Toll Bros. & Developers*, 675 A.2d 209, 212 (N.J. 1996) (citing *Hopkins v. Fox & Lazo Realtors*, 625 A.2d 1110, 1116 (N.J. 1993)). Courts recognize that foreseeability of harm and consideration of fairness and policy are connected. Since foreseeability involves an analysis of the magnitude and likelihood of potential harm, it is objectively determinable. Conversely, the resolution of fairness and policy considerations is a much less certain determination. See FEINMAN, *supra* note 1, at § 5.4.1.

24. 724 A.2d 497 (Conn. 1999).

25. *Id.* at 502 n.9 (quoting *RK Constructors, Inc. v. Fusco Corp.*, 650 A.2d 153 (Conn. 1994)).

26. 676 A.2d 1110 (N.J. Super. Ct. 1996).

27. *Id.* at 1114 (noting court's reservation in finding duty of care).

## B. Traditional Case Law

Case law addressing consultant liability traditionally focused more on the nature and scope of a consultant's undertaking rather than fairness and policy considerations. The decision in *Midwest Aluminum Manufacturing Co. v. General Electric Co.*<sup>28</sup> presents a good example of the traditional, conservative approach some courts have taken when considering a consultant's liability. In *Midwest Aluminum*, Midwest, a neighbor of General Electric (GE), alleged that contamination at GE's property caused Midwest's business failure.<sup>29</sup> Midwest sued GE's consultant, Sirrinc, alleging that Sirrinc negligently performed its investigation and fraudulently misrepresented that Sirrinc would fully and accurately study the contamination.<sup>30</sup> The court dismissed Midwest's claim, holding that "[t]here is no legal requirement known to this Court – and none was brought to the Court's attention – that an agent of one neighbor has a duty owed to another neighbor without some sort of an affirmative action taken by the agent."<sup>31</sup>

*Deangelo v. Exxon Corp.*<sup>32</sup> presents another example of traditional analysis of consultant liability.<sup>33</sup> In *Deangelo*, Exxon hired Handex, an environmental remediation company, to observe the excavation of tanks and document ongoing tank removal activities at a former gasoline station.<sup>34</sup> Handex issued several reports to Exxon, representing that all underground storage tanks had been removed from the site.<sup>35</sup> After the plaintiff, Deangelo, became interested in the property, he asked Exxon for its environmental

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28. *Midwest Aluminum Mfg. Co. v. General Elec. Co.*, No. 4:90:CV-143, 1993 WL 725569, at \*1 (W.D. Mich. 1993).

29. For a discussion of *Midwest Aluminum*, see *supra* note 6 and accompanying text.

30. See *id.*

31. *Id.* at \*6.

32. *Deangelo v. Exxon Corp.*, No. A-791-98T3, slip op. at 26 (N.J. Super. Ct. App. Div. Oct. 15, 1999).

33. For a discussion of *Deangelo*, see *supra* note 9 and accompanying text; see also *Lutz Eng'g Co., Inc. v. Industrial Louvers, Inc.*, 585 A.2d 631 (R.I. 1991) (holding that contractor's liability to third party does not extend beyond scope of its contractual undertaking to its client).

34. See *Deangelo*, No. A-791-98T3, slip op. at 3 (discussing property owner's discovery that underground tanks may have been leaking petroleum hydrocarbon products and decision to hire subcontractor to remove tanks).

35. See *id.* at 6 (discussing relevant language in Remedial Action Workplan that Handex prepared). Handex's Remedial Action Workplan specified that "[a]ll underground storage tanks, associated product piping, and product dispensers have been removed from this site. There are no on-going sources of contamination." *Id.*



reports regarding the property cleanup.<sup>36</sup> Exxon turned over its data on the site, including the reports Handex prepared.<sup>37</sup> After the plaintiff purchased the property, Handex found additional tanks.<sup>38</sup> The discovery delayed the plaintiff's use of the property and prompted a lawsuit against Exxon and Handex.<sup>39</sup> After the jury returned a verdict against Exxon and Handex, the court granted the defendants' motion for judgment notwithstanding the verdict.<sup>40</sup> The New Jersey Appellate Division affirmed the decision.<sup>41</sup>

In an action against Handex, Deangelo argued that Handex negligently failed to discover all underground storage tanks at the property.<sup>42</sup> The court, however, rejected Deangelo's arguments.<sup>43</sup> The court reviewed the evidence and determined that Handex was not contractually bound to Exxon to identify all tanks.<sup>44</sup> Thus, the

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36. *See id.* at 4 (tracing sale process of two Exxon properties to Deangelo). Deangelo purchased the Ridgewood property and deeded it to a corporation he established for the purpose of operating an automobile repair facility on the site. *See id.* at 8.

37. *See id.* at 4 (stating Deangelo requested any environmental reports regarding cleanup of properties to determine whether sites were worth pursuing).

38. *See id.* at 8 (stating Handex employees discovered additional tanks while conducting post-remediation soil borings).

39. *See Deangelo*, No. A-791-98T3, slip op. at 3 (claiming estimated damages of \$32,890.58, including interest on mortgage, taxes on property, insurance premiums, and bill from remediation expert). Deangelo asserted that the discovery of the additional tanks brought his development project to a standstill. *See id.* He requested the Handex reports analyzing the soil samples taken during the first day of excavation to determine whether the development of the property could proceed, but did not receive them until almost six months after the samples were taken. *See id.* He asserted that, without the reports, he could not determine whether further remediation of the property was necessary. *See id.*

40. *See id.* at 3 (discussing unanimous jury verdict finding defendant Exxon 80% liable for negligent misrepresentation, defendant Handex 15% liable for negligence, and plaintiffs 5% comparatively negligent).

41. *See id.* at 26.

42. *See id.* at 22 (arguing that Handex's report that all tanks had been removed sufficiently demonstrated Handex's negligence). Plaintiffs emphasized that Handex failed to take any measures to actually locate tanks, such as a magnometer or digging test pits. Plaintiffs also asserted that Handex failed to look for other tanks upon the discovery of the first unknown tank. *Id.* at 23.

43. *See id.* at 24 (stating specifically that Handex did not even owe duty to investigate to Exxon).

44. *See Deangelo*, No. A-791-98T3, slip op. at 3. The court held that Exxon proved that it retained Handex for the "limited purpose of observing and documenting underground tank excavation activities, performing soil and groundwater testing, remediating soil or groundwater contamination, and preparing reports and workplans to be filed with the New Jersey Department of Environmental Protection." *Id.* The court specified that none of Exxon's work orders to Handex required it to detect or excavate underground tanks. *See id.*

court reasoned, Handex owed no such duty to the plaintiff. According to the *Deangelo* court:

To place [the] requirement [to identify all tanks] on Handex as a matter of law would have the practical effect of forcing a party to a contract to enlarge the scope of its work without compensation in order to protect itself against the possibility of a negligence suit by some third party. Aside from the fact that it would be unfair to impose such a duty on Handex, the relationship between the parties evidences no practical need to do so as a matter of [sic] policy.<sup>45</sup>

Moreover, Handex's statement that there were no other tanks at the property was justifiably based upon the information Exxon provided to Handex.<sup>46</sup> In addition, it was important to the court that Deangelo had hired his own expert who had the "means to avoid the risk of reliance on Handex's work" but failed to do so.<sup>47</sup> The court stressed that Exxon's contract explicitly warned plaintiffs against reliance upon Handex's report in view of the limited purpose for which Handex was engaged to serve on the property.<sup>48</sup>

*Sykes v. Propane Power Corp.*<sup>49</sup> is another illustrative case employing a traditional analysis of consultant liability. In *Sykes*, a chemical recovery plant hired Sullivan Engineering to assist in obtaining an operating permit.<sup>50</sup> In the course of its work, Sullivan prepared drawings detailing the layout and location of the facilities involved in the chemical recovery process, but it did not perform a safety engineering evaluation of the process.<sup>51</sup> After an employee was

45. *Id.* at 25.

46. *See id.* at 24 (finding no maps provided by Exxon reflected tanks and citing undisputed testimony that presence of additional tanks "could not have been discovered by careful, visual inspection of the site.").

47. *Id.* at 25-26 (emphasizing plaintiffs' expert's knowledge that tank was found that had not previously appeared on any map provided by Exxon). The court stated that there was nothing preventing plaintiffs or their expert from inquiring of Exxon what steps were being taken to determine the existence of other tanks. *See id.* at 25. Further, the court suggested that if plaintiffs' expert was not satisfied with Exxon's efforts, plaintiffs' contract permitted plaintiffs to inspect the property for additional tanks. *See id.*

48. *See id.* (re-emphasizing the fact that Exxon did not hire Handex to undertake an "exhaustive examination of the site to locate remaining underground tanks.").

49. 541 A.2d 271 (N.J. Super. 1988).

50. *Id.* at 272.

51. *See id.*

killed in an explosion, it was determined that the cause of the accident was a defect in the recovery process.<sup>52</sup>

In affirming the grant of summary judgment to Sullivan, the court focused on the “four corners” of Sullivan’s contractual undertaking.<sup>53</sup> Sullivan was retained simply to prepare generalized drawings of the processing system components in order to show how the chemicals were carried, stored, and discharged.<sup>54</sup> The court noted that, “[g]iven the specific purpose for which Sullivan was hired, and the limited scope of the order which he was required to follow in preparing the documents . . . the trial court properly granted summary judgment . . . .”<sup>55</sup> The court reasoned that “the need to foresee and prevent a particular risk of harm from materializing should be commensurate with the degree of responsibility which the engineer has agreed to undertake.”<sup>56</sup>

### C. More Liberal Cases

The frequently cited court decision, *Caldwell v. Bechtel, Inc.*,<sup>57</sup> illustrates the reasoning applied in more liberal cases, holding consultants liable for third party injuries.<sup>58</sup> In *Caldwell*, Bechtel contracted to provide “safety engineering services” to a transit authority and was sued by an equipment operator who allegedly contracted silicosis because of the negligent performance of Bechtel’s duties.<sup>59</sup> Reversing the lower court decision, the United States Circuit Court of Appeals for the District of Columbia held that Bechtel’s liability was not limited to the four corners of its contract.<sup>60</sup> The court stated, “[w]hile in contract law, only one to whom the contract

52. *See id.* at 273.

53. *See id.* at 275 (holding that, “given the specific purpose for which Sullivan was hired, and the limited scope of the order which he was required to follow . . . the trial court properly granted summary judgment . . . .”).

54. *See Sykes*, 541 A.2d at 275 (observing that Sullivan performed his obligations under contract and was not obligated to do anything more).

55. *Id.* (affirming trial court’s grant of summary judgment).

56. *Id.* (linking need to foresee and prevent risk of harm with degree of consultant’s responsibility).

57. 631 F.2d 989, 989 (D.C. Cir. 1980).

58. *See id.* (illustrating reasoning for holding consultants liable for third party injuries).

59. *See id.* at 992-93 (noting reason for suit by an equipment operator). The equipment operator alleged negligence by: 1) the Occupational Safety and Health Administration [hereinafter OSHA]; 2) the National Loss Control Service Corporation [hereinafter NLCS]; 3) Bechtel, Inc.; 4) International Union of Operating Engineers, Local No. 77; and 5) the Shea – S&M-Ball joint venture. *See id.* at 993 n.1. Appellant was awarded compensation for job incurred silicosis under the Longshoremen’s and Harbor Worker’s Compensation Act, 33 U.S.C. § 901. *See id.*

60. *See id.* at 1002-03 (noting extent of possible liability).

specifies that a duty be rendered will have a cause of action for its breach, in tort law, society, not the contract, specifies to whom the duty is owed, and this has traditionally been the foreseeable plaintiff.<sup>61</sup> In conclusion, the court stated:

[C]ourts have primarily premised an extension of liability to the site architect [consultant/contractor] upon its contractual undertaking on behalf of the project owner, and upon the resultant foreseeability of injury to workers in the event that the undertaking is negligently performed. We endorse this interpretation of the interrelationship of contractual duties owed to one party upon possible duty and tort owed to another party . . . .<sup>62</sup>

The North Carolina decision, *Howell v. Fisher*,<sup>63</sup> is another example of the liberal line of cases in this area. In *Howell*, the plaintiffs were individuals who invested in a corporation, relying upon a soil testing report a consultant prepared for the company.<sup>64</sup> After the corporation became insolvent, the individuals sued the consultant even though they were not in privity of contract.<sup>65</sup> The court of appeals reversed the lower court's decision and held that the case could proceed against the consultant.<sup>66</sup> The court of appeals believed that a jury could find it reasonably foreseeable that investors would be damaged if the reports were incorrect.<sup>67</sup> To support its

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61. *Id.* at 998 (explaining difference between duty in contract law and duty in tort law).

62. *Id.* at 999 (endorsing interpretation of contractual duties to one party and tort duties to another); see also *Southeast Consultants, Inc. v. O'Pry*, 404 S.E.2d 299 (Ga. 1991). Here, the court held that a homeowner whose septic tank was improperly installed had a cause of action against his builder's subcontractor who performed percolation tests. See *id.*

63. 272 S.E.2d 19 (N.C. Ct. App. 1980).

64. See *id.* at 21. Plaintiffs bought capital stock in Howell at a price of \$184,000.00 and loaned Howell \$204,000.00. See *id.* After plaintiffs had invested, Howell began mining the Harriet tract and soon discovered that the quality, quantity, and value of the minerals did not meet the standards represented in defendant's feasibility study. See *id.* at 22.

65. See *id.* Plaintiffs alleged that defendants were negligent in conducting the soil tests and in providing incomplete and misleading information about the feasibility and potential value of the Harriet mining operation. See *id.* at 22.

66. See *id.* The court recognized an exception to the general rule that a stockholder cannot maintain an action in his own right against a third party for an injury directly affecting him. See *id.* The exception applies when the injury to the stockholder appears to have occurred because of a "violation of some special duty owed the stockholder by the wrongdoer and having its origin in circumstances independent of the plaintiff's status as a stockholder." *Id.*

67. See *id.* at 24. Plaintiffs did not have an action in contract because the court reasoned that they did not stand to gain a benefit from the contract entered into for soil testing services, which were solely for the corporation's benefit. See *id.*

holding, the court relied on the plaintiff's allegations that the consultant knew that the report had a specific purpose and target audience and that the report was intended to induce plaintiffs to act by investing in the corporation.<sup>68</sup>

The question as to whether a court finds a duty to a third-party from a consultant's contract may depend on whether the plaintiff asserts a negligence action or a negligent misrepresentation action. In *Raritan River Steel Co. v. Cherry, Bekaert & Holland*,<sup>69</sup> the North Carolina Supreme Court discussed the foreseeability standard used in negligence actions and the standard followed in the RESTATEMENT (SECOND) OF TORTS section 552.<sup>70</sup> The court noted that:

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at 23. The court, however, held that plaintiff's complaint did allege a cause of action based on defendant's negligence. *See id.*

68. *See Howell*, 272 S.E.2d at 25 (alleging sole purpose of report was to induce plaintiffs to invest in corporation). In another noteworthy case, *Carvahlo v. Toll Bros. & Developers*, the court performed a "multi-dimensional" analysis to determine whether the consultant owed a duty to a third party. *See Carvahlo v. Toll Bros. & Developers*, 675 A.2d 209, 213 (N.J. 1996). In *Carvahlo*, the plaintiff's decedent was killed when the walls of a trench in which he was working collapsed. *See id.* at 210-11. The plaintiff claimed that the project engineer hired the inspector, who was present when the accident occurred, to observe the work performed and to monitor the progress of the work. *See id.* The plaintiff argued the inspector had a duty to supervise safety procedures of the construction. *See id.* at 212. The court framed the legal issue as whether the engineer had a legal duty to exercise reasonable care for the safety of workers when the engineer had a contractual responsibility for the progress of the work, but not for the safety conditions, yet was aware of working conditions at the site that created a risk of serious injury to workers. *See id.* at 211. In holding that summary judgment should not have been granted to the consultant, the court was plainly swayed by "considerations of fairness and policy" and "its value judgment, based on an analysis of public policy." *Id.* at 214-15. Even though the consultant was not hired to assess safety concerns, the court noted that the consultant was at the site everyday and there was "an overlap of work-progress considerations and work-safety concerns." *Id.* at 211, 213. In doing a "fairness" analysis the court also focused on the fact that the consultant had the authority to take or require corrective measures if safety concerns affected the progress of the work, and the consultant was aware of the risk of harm. *See id.* at 211. "The existence of actual knowledge of an unsafe condition can be extremely important in considering the fairness in imposing a duty of care." *Id.* at 214. The court stated that "the engineer had the opportunity and was in a position to foresee and discover the risk of harm and to exercise reasonable care to avert any harm." *Id.* at 215. In addition, the New Jersey Supreme Court reasoned that the "financial arrangements and understanding [between the consultant and its client] do not overcome the public policy that imposes a duty of care and ascribes liability to the engineer in these circumstances." *Id.*; *see also Vogan v. Hayes Appraisal Assoc., Inc.*, 588 N.W.2d 420 (Iowa 1999) (holding appraiser hired by bank/mortgagee to monitor progress of new home construction is liable to home owner for its negligence after builder defaulted).

69. 367 S.E.2d 609.

70. *See id.* at 609-10 (N.C. 1988) (discussing foreseeability standard used in negligence actions).

[Section 552] prevents extension of liability in situations where the . . . [consultant] ‘merely knows of the ever-present possibility of action in reliance upon [the audit report], on the part of anyone to whom it may be repeated.’ As such, it balances, more so than the other standards, the need to hold . . . [consultants] to a standard that accounts for their contemporary role in the financial world with the need to protect them from liability that unreasonably exceeds the bounds of their real undertaking.<sup>71</sup>

In addition, commentators have discussed the differences between the two actions, stating:

First, the misrepresentation action specifically requires that the third party rely on the defendant’s misrepresentation, while the negligence action does not contain that specific requirement. Second, the misrepresentation action as stated in RESTATEMENT (SECOND) section 552(2) contains specific limitations on the third parties to whom a duty is owed and the type of transaction for which harm suffered is legally cognizable.<sup>72</sup>

Nevertheless, as a practical matter, the differences between the two causes of action are not terribly significant because the elements of negligence and negligent misrepresentation claims generally are applied in the same manner.<sup>73</sup>

A more troubling decision for environmental consultants is the New Jersey federal court holding in *Grand Street Artists v. General Electric Company*<sup>74</sup> The *Grand Street Artists* decision illustrates a clear example of the principle that “tort liability can be adapted to address areas in which recognition of a cause of action and the imposition of a duty of care are both novel and controversial.”<sup>75</sup> In *Grand Street Artists, Quality Tool & Die Company (Quality)* triggered

71. *Id.* at 617 (defining limits of liability). Nevertheless, other courts have noted the similarity between negligence and negligent misrepresentation claims. See *Greycas, Inc. v. Proud*, 826 F.2d 1560, 1563 (7th Cir. 1987) (noting similarities). “[W]e have great difficulty both in holding them apart in our minds and in understanding why the parties are quarreling over the exact characterization.” *Id.*; see also *H. Rosenblum, Inc. v. Adler*, 461 A.2d 138 (N.J. 1983).

72. FINEMAN, *supra* note 1, at § 5.2.

73. *Id.* at 48-49 (holding “[a]s a practical matter, the reliance requirement often is subsumed within the negligence action’s requirement of a causal link between the breach of duty and the harm; only by relying on the information can the third party suffer harm as a result of the defendant’s communication.”).

74. 19 F. Supp. 2d 242 (D.N.J. 1998).

75. *Dunphy v. Gregor*, 642 A.2d 372, 376 (N.J. 1994) (recognizing principle in numerous settings).

New Jersey's property transfer cleanup statute, the Environmental Clean Up Responsibility Act (ECRA), by ceasing its operations.<sup>76</sup> A year later, Quality hired Jenny Engineering (Jenny) to assist with ECRA compliance issues.<sup>77</sup> Jenny's undertaking was specifically defined in writing and was based on the accuracy of statements from the owner concerning the site conditions and history of operations.<sup>78</sup> Jenny made no mention of mercury contamination in the report it filed with the State.<sup>79</sup> Thereafter, Grand Street Artists (GSA) investigated whether to buy the property and hired its own consultant to do a "Due Diligence Pre-Purchase."<sup>80</sup> This consultant, REM, reviewed Quality's ECRA case file and concluded that the level of contamination met current "Cleanup Standards."<sup>81</sup> Quality then sold the property to GSA, which intended to develop "customized urban homes."<sup>82</sup> Several years later mercury contamination was discovered on the property.<sup>83</sup>

GSA sued numerous parties, including Jenny, arguing that Jenny's ECRA submissions were "materially false and misleading" because the submissions failed to identify any mercury contamination.<sup>84</sup> Jenny asserted that it owed no duty to prospective purchasers.<sup>85</sup> The court framed the legal issue as "whether a defendant/environmental consultant who provides ECRA assistance to an owner who wishes to cease operations owes a duty to a plaintiff who

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76. See *Grand Street Artists*, 19 F. Supp. 2d at 244.

77. See *id.* at 245 (stating that Quality hired Jenny for "technical assistance" in ECRA process).

78. See *id.* Jenny expressed concern over possible legal liability given that Quality's decision to comply with ECRA came more than one year after shutdown. See *id.* Thus, Jenny notified Quality that the statements would be based on the accuracy of their statements and known history of operations. See *id.*

79. See *id.* at 246 (examining argument that Jenny's failure to discover mercury breached duty of care to plaintiffs).

80. See *id.* "This 'Due Diligence Pre-Purchase' involved an examination of the premises to determine whether they could be safely converted to residential use." *Id.*

81. See *Grand Street Artists*, 19 F. Supp. 2d at 246. Accordingly, "REM advised GSA that the property was suitable for development as a residential project." *Id.*

82. *Id.*

83. See *id.* After mercury was discovered in 1996, the DEP rescinded its approval, which prompted GSA to bring suit. See *id.*

84. See *id.* Plaintiffs contended that "Jenny breached a 'duty of due care' which it owed to plaintiffs by failing to conduct its environmental audit . . . in an independent manner and in accordance with generally accepted standards . . ." *Id.*

85. See *id.* at 246-47. Jenny asserted that they merely provided assistance to Quality in facilitating its "cessation of operations" under ECRA, and thus, owed no duty to prospective purchasers. *Id.* "Additionally, it argues that because it did not have a duty, it cannot be held liable for contribution or indemnification." *Id.*

has relied upon a review of the owner's ECRA submissions in making the decision to purchase the premises and convert them for residential use."<sup>86</sup>

In actuality, the court addressed the scope of a consultant's liability when it files reports available for public inspection.<sup>87</sup> The court held that Jenny could have foreseen that real estate purchasers would rely on its reports.<sup>88</sup> The court stated that "ECRA submissions are public filings which were easily accessible to prospective purchasers. Thus, it was foreseeable that a potential purchaser would look to the prior ECRA submissions in considering whether to enter into the transaction."<sup>89</sup> According to the court, the fact that the property was not for sale when Jenny did its work and that GSA did not know plaintiff intended to buy the property was not determinative.<sup>90</sup>

Further, the court rejected Jenny's fairness and policy arguments.<sup>91</sup> The court reasoned that Jenny's liability was not limitless because the plaintiffs in the case purchased the premises and were not "remote."<sup>92</sup> The court also did not credit Jenny's argument that it was being exposed to significant liability.<sup>93</sup> The court stated that the fact that "the magnitude of the liability may be great does not by itself provide enough of a reason for not finding a duty. Environmental harm is often substantial."<sup>94</sup> Indeed, the court reasoned that two factors favored imposing a duty. First, "the public has an interest in the proper compliance with ECRA to protect it against hazardous waste."<sup>95</sup> Second, there was some indication in

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86. *Grand Street Artists*, 19 F. Supp. 2d at 247.

87. *See id.* at 250.

88. *See id.* (stating that "[f]rom the structure of ECRA, Jenny should have known its work would have been used by others interested in purchasing the premises.").

89. *Id.*

90. *Id.*

91. *See Grand Street Artists*, 19 F. Supp. 2d at 251 (noting that Jenny raised a number of fairness and policy arguments). Jenny "argues that by finding a duty to 'remote and future purchasers,' the court will 'affect an equally inefficient allocation of professional responsibilities.'" *Id.* This would expose environmental consultants to "unlimited class of plaintiffs and limitless liability." *Id.*

92. *See id.* (responding to Jenny's fairness and policy argument).

93. *See id.* (noting that even though liability may be great environmental harm is also substantial in this situation).

94. *Id.* at 251-52.

95. *Id.* at 252.



the record that Jenny knew that the premises would be sold once the ECRA process was complete.<sup>96</sup>

Although the *Grand Street Artists* decision will undoubtedly increase the exposure of consultants to liability, its bounds are limited. For example, courts often literally interpret non-reliance clauses in a contract.<sup>97</sup> In *Bronstein v. GZA Geoenvironmental, Inc.*, the plaintiff contracted to purchase property and hired GZA to conduct an environmental survey.<sup>98</sup> After GZA completed work on the survey, Bronstein assigned his rights to plaintiffs, Samuel Bronstein, James Fokas and Herbert Miller (BFM plaintiffs), who purchased the property.<sup>99</sup> After the sale, hazardous waste contamination was discovered on the property and the owners sued GZA.<sup>100</sup> The court affirmed the dismissal of GZA and held that GZA owed no duty to the BFM plaintiffs.<sup>101</sup> The court based its decision on the language in the contract between GZA and Bronstein and the affirmative steps GZA took to limit reliance by others upon its work.<sup>102</sup> GZA wisely stated in writing that its report was prepared “for the exclusive use of [Bronstein].”<sup>103</sup> Further, the dissemination of the report was prohibited “without the prior written consent of GZA.”<sup>104</sup> Based on the limiting language in GZA’s report, the court found that it was not reasonably foreseeable that Bronstein would furnish the information to the BFM plaintiffs, or that the BFM plaintiffs

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96. See *Grand Street Artists*, 19 F. Supp. 2d at 252 (noting that former Jenny geologist stated “that it was his ‘understanding’ that after the ECRA process was completed, [Quality] would sell the premises.”).

97. See *Bronstein v. GZA Geoenvironmental, Inc.*, 665 A.2d 369, 372 (N.H. 1995) (holding it was not foreseeable that Bronstein would furnish report to other parties without consent of GZA). For further discussion of *Bronstein*, see *supra* note 5 and accompanying text.

98. See *Bronstein*, 665 A.2d at 370 (noting that GZA completed project before Bronstein assigned his rights to plaintiffs).

99. See *id.* (noting that plaintiffs then entered into option agreement with James C. Cooney Jr. for sale of property).

100. See *id.* at 371 (stating environmental firm that Cooney hired found hazardous waste contamination on property and Cooney declined to go forward with sale).

101. See *id.* at 372 (stating holding of court that GZA owed no duty of care to BFM).

102. See *id.* (discussing non-reliance provisions in contract between GZA and Bronstein).

103. *Bronstein*, 665 A.2d at 372.

104. *Id.* (stating that dissemination beyond reporting to lender and title insurer was not allowed without GZA’s consent).

would rely on the report.<sup>105</sup> Therefore, according to the court, GZA owed no duty of care to the BFM plaintiffs.<sup>106</sup>

Despite these court decisions, consultants should not be lulled into believing that courts systematically enforce contractual limitation of liability clauses. For example, in *State Farm v. HHS Associates, Inc.*,<sup>107</sup> State Farm purchased property from HHS that was later discovered to be contaminated.<sup>108</sup> State Farm sued HHS's consultant, SMC, alleging that SMC negligently failed to discover that petrochemicals were present.<sup>109</sup> SMC moved to dismiss the claim and argued that its contract with HHS specifically repudiated any third party reliance on its contract.<sup>110</sup> Further, SMC argued that State Farm had no greater rights under the contract than HHS; HHS

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105. *See id.* The court determined that since the report itself contained the express limitation on dissemination, the lender was aware of the limitation. *See id.* "Additionally, it would not be reasonably foreseeable that information supplied to a lender by a potential purchaser would be transmitted by that lender to other purchasers." *Id.*

106. *Id.*; *see also generally* R-1 Associates, Inc. v. Goldberg-Zoino & Associates, Inc., 1995 WL 517554 (Sup. Ct. Mass. 1995) (holding that GZA should be granted partial summary judgment for limitation of liability provision); Goldstein v. Wausau Ins. Co., et al., No. SOM-L-2262-96, slip op. at 3 (N.J. Super. Ct. Law Div., Nov. 5, 1999) (refusing to extend *Grand Street Artists* decision to inappropriate lengths). In *Goldstein*, the court granted summary judgment to defendant consultant, McLaren/Hart Environmental Engineering Corporation on plaintiff Goldstein's claims of fraudulent concealment, gross negligence/reckless indifference and negligence. *See id.* at 2. The original property owner hired McLaren/Hart to investigate contamination at a site and prepared several reports that were submitted to the DEP. *See id.* Before buying the property, Goldstein hired his own expert who deemed McLaren/Hart's work incomplete and inadequate. *See id.* Thereafter, Goldstein bought the property anyway and worked with his expert to obtain ECRA clearance. *See id.* After several years of work at the site, significant TCE contamination was found and Goldstein sued McLaren/Hart. *See id.* The court granted McLaren/Hart's motion for summary judgment, reasoning that although a duty could exist under *Grand Street Artists* because it is foreseeable that prospective purchasers would rely upon prior environmental reports in considering whether to purchase the property, none was owed to Goldstein under these facts. *See id.* The court held:

Thus, Plaintiff would have this Court accept the assertion that a reasonably foreseeable plaintiff is one who relies upon a sampling plan that he or she finds to be both incomplete and inadequate in choosing to purchase property. Such an assertion is not the holding in *Grand Street Artists*, nor is it one this Court is willing to accept.

*Id.* at 3.

107. 1995 WL 739703, at \*1 (E.D. Pa. 1995).

108. *Id.* at \*1 (noting that HHS hired consultant, SMC, who found petrochemicals present in soil).

109. *See id.* (establishing presence of petrochemicals in soil that SMC failed to fully discover).

110. *See id.* The contract included a provision specifically disclaiming any third party rights, expressly stating, "[N]othing contained in this agreement shall create a contractual relationship with or cause of action in favor of any third party against either [HHS] or [SMC]." *Id.*

agreed to indemnify SMC.<sup>111</sup> Despite this language, the court permitted the case to go forward and held that “the obligations of an intended third-party beneficiary [State Farm] are [not] . . . identical to those [of] the contracting parties.”<sup>112</sup> Thus, despite the limiting language in SMC’s contract, if the jury decided that the contracting parties intended to benefit State Farm, SMC could be liable to State Farm.<sup>113</sup>

In *Woodward-Gizienski & Associates v. Geotechnical Exploration, Inc.*,<sup>114</sup> the developers of a condominium project brought a negligence and equitable indemnity action against soil engineers hired by homeowners in the project.<sup>115</sup> The homeowners hired the engineers to investigate the site and make recommendations to cure defects and damage arising from settlement of balconies, buildings and pools.<sup>116</sup> The homeowners relied on the engineers’ recommendation in making their repairs.<sup>117</sup> After the developers settled with the homeowners, the developers sued the forensic soil engineers alleging that they negligently caused the homeowners to make excessive repairs to their property.<sup>118</sup> The lower court dismissed the case and the decision was affirmed on appeal.<sup>119</sup> The court held that the developers had no legal basis to assert the existence of damage and could not state a cause of action against the homeowner’s consultant.<sup>120</sup>

### III. SUPERFUND LIABILITIES OF CONSULTANTS

Consultants face substantial third-party liability under Superfund if they do not properly perform their work. In *New Castle County v. Halliburton NUS Corp.*,<sup>121</sup> EPA hired Halliburton NUS Corporation (NUS) to perform a Remedial Investigation/Feasibility Study (RI/FS) at the Tybout’s Corner Landfill Site.<sup>122</sup> The

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111. *See id.* at \*2 (holding SMC’s argument to be without merit).

112. *State Farm v. HHS Associates, Inc.*, 1995 WL 739703, at \*2.

113. *Id.* at \*4 (describing standard to be applied).

114. 208 Cal. App. 3d 64 (1989) (noting reliance of third party).

115. *Id.* at 66 (tracing procedural background).

116. *See id.* (outlining duties of engineering firm).

117. *See id.* (noting justified reliance by third party on professional opinion).

118. *See id.* at 66-67 (claiming breach of duty of professional care).

119. *See Woodward-Gizienski*, 208 Cal. App. 3d at 64.

120. *See id.* at 67-68 (holding developers had no claim against engineers under doctrine of equitable indemnification).

121. 903 F. Supp. 771 (Del. 1995), *aff’d in part*, 111 F.3d 1116 (3d Cir. 1997) (illustrating consultant liability in Superfund context).

122. *Id.* at 773. The purpose of the study was to determine the presence of the Merchantville Formation in relation to the Columbia Sand and the Potomac Sand. *See id.* The Merchantville Formation is a layer of clay that separates the

county sued NUS, alleging that NUS negligently installed a well that contributed to the contamination at the site.<sup>123</sup> 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).<sup>124</sup> Section 9619(a) provides that

A person who is a response action contractor with respect to any release or threatened release of a hazardous substance . . . 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.<sup>125</sup>

The court held that a response action contractor is liable to “any other person” who is harmed by the contractor’s negligence.<sup>126</sup> The court reasoned that the phrase “any other person” is broad and includes third-party potentially responsible parties (PRPs), such as the plaintiff, New Castle County.<sup>127</sup>

The saving grace afforded to response action contractors pursuant to section 9619(a) is that they are held to a negligence, rather than a strict liability, standard of liability.<sup>128</sup> However, if a consultant does not perform services for the government, the consultant cannot rely upon section 9619 as a shield.<sup>129</sup> Therefore, consultants who undertake work at a contaminated site may expose them-

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polluted Columbia Sand and the underlying formation known as the Potomac Sand that serves as the major drinking water source for residents of New Castle County, Delaware. *See id.*

123. *See id.* (claiming improperly drilled well resulted in opening in Merchantville formation that allowed pollution to flow into Potomac Sand).

124. *See id.* at 775 (refusing to apply public duty doctrine).

125. *See* 42 U.S.C. § 9619(e)(2) (2002) (clarifying liability of response action contractor as opposed to liability of responsible parties). Section 9619(e)(2) further provides that this section “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.” *Id.*

126. *See New Castle County*, 903 F. Supp. at 775 (stating response action contractor is liable under § 9619 given finding of contractor’s negligence, gross negligence or intentional misconduct).

127. *See id.* (refusing to limit phrase “any other person” and provide protection to defendant).

128. *See id.* (explaining that prior to enactment of § 9619 response action contractors were held to strict liability standard).

129. *See id.* at 775 (recognizing limitations of § 9619 protection).

selves to significant Superfund liability, which is strict, joint and several.<sup>130</sup>

For example, in *K.C. 1986 Limited Partnership v. Reade Manufacturing*,<sup>131</sup> a consultant, Terracon, installed wells at a contaminated site to induce a prospective purchaser to buy the property.<sup>132</sup> Subsequently, significant contamination was found on the site and the owner sued Terracon, and argued that Terracon's installation of monitoring wells contributed to the contamination on the site.<sup>133</sup> The court held that Terracon could be liable under CERCLA section 9607(a)(2) as a person who "disposed" of hazardous wastes at the site because disposal is not limited to the original introduction of a hazardous material to a site.<sup>134</sup> The court refused to immunize a consultant who performed pre-acquisition soil testing from CERCLA liability.<sup>135</sup>

When Congress wished to relax the strict liability standard of CERCLA, it expressly did so. CERCLA has a specific section for persons providing care and advice during cleanup and no reference is made to environmental testing. 42 U.S.C. §9607(d). Nor were environmental investigators given any protection in 42 U.S.C. §9619 which limits the liability of response action contractors who are working for the government or are working for a private responsible party under the supervision of the government. Nor did Congress create a special defense for environmental testers.<sup>136</sup>

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130. See *id.* at 776 (outlining CERCLA liability).

131. 33 F. Supp. 2d 1143 (W.D. Mo. 1998).

132. *Id.* at 1146 (revealing site had been used for manufacturing, blending and storing of herbicides).

133. See *id.* (claiming wells drilled as part of pre-acquisition environmental investigation caused arsenic and other contaminants to flow "from the more highly contaminated clay into the less contaminated underlying sand aquifer."). The consultant argued that the wells had been constructed "in accordance with the standard of care" that existed in the Greater Kansas City area in 1989. See *id.* at 1147.

134. See 42 U.S.C. § 9607(a)(2) (2002). Section 9607(a)(2) identifies as parties that could be liable for contamination "any person who at the time of disposal of any hazardous substance owned or operated any facility which such hazardous substances were disposed of . . . ." *Id.*

135. See *K.C. Partnership*, 33 F. Supp. 2d at 1151 (asserting that there is express language in CERCLA to support court's holding).

136. *Id.* (providing specific examples of statutes containing express language supporting theory that consultants who undertake work at contamination site could expose themselves to liability).

The Court of Appeals for the Fifth Circuit, in *Geraghty & Miller, Inc. v. Conoco, Inc.*,<sup>137</sup> also addressed the liability of a consultant as an arranger for disposal of hazardous substances. In *Geraghty & Miller, Inc. v. Conoco, Inc.* (Conoco) hired Geraghty & Miller (G&M) “to assess possible contamination beneath several suspected [pollution] source areas” on Conoco’s property.<sup>138</sup> G&M agreed to prepare design specifications for the installation of groundwater monitoring wells, to install the wells, and to sample the wells.<sup>139</sup> Once the work was completed, Conoco suspected that the wells were installed improperly and the deficiencies aggravated existing contamination.<sup>140</sup> Despite Conoco’s claims that G&M was liable under CERCLA, the court granted G&M’s motion for summary judgment.<sup>141</sup>

Ultimately, however, the Fifth Circuit reversed the decision.<sup>142</sup> According to the Fifth Circuit, no bright-line test exists for determining when a consultant is an arranger within the meaning of CERCLA.<sup>143</sup> The court rejected a narrow interpretation of the term “disposal,” thereby “leaving open the possibility that one who moves hazardous waste intra-site can be held liable as an arranger.”<sup>144</sup> Even though G&M had not brought hazardous substances to the site, if the consultant “caused waste to be dispersed across the site it would be subject to arranger liability.”<sup>145</sup> Nonetheless, to impose liability, there must “be a nexus that allows someone

137. 234 F.3d 917, 920 (10th Cir. 2000), *reh’g denied*, 247 F.3d 243, *cert. denied*, 121 S. Ct. 2592 (2001) (stating that both soil and groundwater had been contaminated by ethylene dichloride).

138. *See id.* (satisfying requirements of Louisiana Department of Environmental Quality pursuant to Resource Conservation and Recovery Act, 42 U.S.C. §§ 6901-6922(k) (1994) [hereinafter RCRA]).

139. *See id.* at 921 (explaining Geraghty & Miller [hereinafter G&M] installed fifty monitoring wells and monitored them for one year).

140. *See id.* (explaining Plaintiffs uncovered physical evidence that showed at least four wells had not been installed according to contract specification).

141. *See Geraghty & Miller*, 234 F.3d at 922. Conoco filed a counterclaim seeking relief under CERCLA §§ 107 and 113. *See id.*

142. *See id.* at 927-29. The district court granted G&M’s motion for summary judgment on several grounds, including the claim that G&M did not meet CERCLA’s definition of covered persons because G&M did not operate, arrange or transport hazardous materials and because the claim was time barred. *See id.* at 921.

143. *See id.* at 929 (explaining that because CERCLA does not define “arranged for,” court looked to “definition and interpretation of ‘disposal’ for assistance in deciding if one is an arranger.”).

144. *Id.* (citing *Tanglewood E. Homeowners v. Charles-Thomas, Inc.*, 849 F.2d 1568, 1573 (5th Cir. 1988) (upholding circuit’s previous rejection)).

145. *Id.* (citing *Burlington N. R.R. Co. v. Wood Indus., Inc.*, 815 F. Supp. 1384, 1392 (E.D. Wash. 1993)).

to be labeled as an arranger.”<sup>146</sup> The nexus is “the *obligation* to exercise control over hazardous waste disposal, and not the mere ability or opportunity to control the disposal.”<sup>147</sup> The court also ruled that the “totality of the circumstances” must be taken into account to determine if arranger liability should be imposed.<sup>148</sup>

The court, in *Geraghty & Miller*, also discussed the liability of a consultant who installs monitoring wells as an operator.<sup>149</sup> Addressing this issue, the court held that a consultant could be liable as an “operator” of a site at which it worked so long as there is “some nexus between that person’s or entity’s control and the hazardous waste contained in the facility.”<sup>150</sup> The nexus necessary to establish “operator” liability turns on a determination as to whether the consultant had authority to control the cause of the contamination at the time the hazardous substances were released into the environment.<sup>151</sup> Under this analysis, the “totality of the circumstances concerning . . . [the consultant’s] involvement at the site” must be analyzed to determine if operator liability attaches.<sup>152</sup> Factors relevant to operator liability include the consultant’s control over the placement, design and installation of the wells, including the selection and supervision of the subcontractor who performed the actual installation, and whether the consultant merely gave advice and expertise to the project ultimately controlled by the owner.<sup>153</sup> Other factors to examine include the owner’s technical expertise, its supervision of the work, and the relative authority of the parties at the worksite.<sup>154</sup>

The court, in *K.C. Partnership*, also held that a consultant could be liable as an “operator” under CERCLA section 9607(a)(2).<sup>155</sup> To determine the issue as to whether Terracon was liable as an op-

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146. *Geraghty & Miller*, 234 F.3d at 929 (recognizing nexus must exist for arranger, as it must exist for operator, before liability will attach).

147. *Id.* (quoting *General Elec. Co. v. AAMCO Transmissions, Inc.*, 962 F.2d 281, 286 (2d Cir. 1992) (emphasis in original) (stating that control over substance makes one liable as arranger)).

148. *See id.* at 928 (stating that control is one aspect of test).

149. *Id.* (referencing to case law because CERCLA provides little guidance).

150. *Id.*

151. *See Geraghty & Miller*, 234 F.3d at 928 (finding entity cannot be deemed to be operator without control).

152. *Id.*

153. *See id.* at 929 (stating totality of circumstances should take into consideration each of these factors).

154. *See id.* (stating that Conoco and G&M disagree on expertise level).

155. *See United States v. Gurley*, 43 F.3d 1188, 1193 (8th Cir. 1994). A person is an “operator” under section 9607(a)(2) of CERCLA if he or she: (1) had authority to determine whether hazardous waste would be disposed of and the method of disposal and (2) actually exercised that authority, either by personally performing

erator, the court examined whether a disposal occurred during the consultant's activity at the site and whether Terracon "had authority to determine whether and how hazardous waste would be disposed of and exercised that authority during its involvement with the site."<sup>156</sup> Because Terracon was specifically retained to determine the environmental status of the site, prepared a plan to investigate the site, had access to the site and decided how and where to install the monitoring wells at issue, the court found that a question of fact existed as to whether Terracon was an operator.<sup>157</sup>

In another noteworthy Superfund case, *Kaiser Aluminum & Chemical Corp. v. Catellus Development Corp.*,<sup>158</sup> Catellus Development sought contribution from Ferry, the consultant, for the cost of cleaning up a contaminated site.<sup>159</sup> Catellus Development's predecessor hired Ferry to excavate and grade a portion of the land for a proposed housing development.<sup>160</sup> While excavating the development site, Ferry spread some of the displaced soil over other parts of the property.<sup>161</sup> Catellus claimed that Ferry exacerbated the extent of the contamination by spreading contaminated soil over clean areas of the property.<sup>162</sup> The Ninth Circuit Court of Appeals decided that Catellus could be liable under CERCLA.<sup>163</sup> The court added that 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."<sup>164</sup> The court found that Ferry "disposed of" hazardous substances because the term includes "the dispersal of contaminated soil during the excavation and grading of a development site."<sup>165</sup>

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the task necessary to dispose of the hazardous waste or by directing others to perform those tasks. *See id.*

156. *K.C. 1986 Ltd. P'ship v. Reade Mfg.*, 33 F. Supp. 2d 1143, 1153 (1998) (revealing nature of Terracon's involvement but not extent of its involvement at issue).

157. *See id.* at 1154 (finding summary judgment inappropriate).

158. 976 F.2d 1338 (9th Cir. 1992).

159. *See id.* at 1340 (seeking contribution under CERCLA).

160. *See id.*

161. *See id.*

162. *See id.*

163. *See Kaiser Aluminum*, 976 F.2d at 1341 (stating Catellus' allegation is sufficient to state claim under §§ 9607(a)(2) and 9607(a)(4)).

164. *Id.* (finding control of day to day operation of plant during release of hazardous substance is essential to operator liability).

165. *Id.* at 1342 (holding removal of tainted soil and spreading it over untainted soil constitutes "dispersal").



The Ninth Circuit further held that Ferry could be liable as a “transporter” under CERCLA section 9607(a)(4).<sup>166</sup> Since CERCLA defines “transportation” as “the movement of a hazardous substance by any mode . . .,” Ferry could be a transporter because it necessarily moved the contaminated soil when it excavated and graded the property.<sup>167</sup> The court ruled that the movement of contaminated soils on-site could subject a consultant to CERCLA liability.<sup>168</sup> The court reasoned that “[t]here is no logical basis for a defendant’s liability as a ‘transporter’ under section 9607(a)(4) to hinge solely on whether he moves hazardous substances across a recognized property boundary.”<sup>169</sup>

The *Kaiser Aluminum* decision is consistent with the Fifth Circuit’s reasoning in *Tanglewood East Homeowners v. Charles-Thomas, Inc.*<sup>170</sup> The Fifth Circuit, in *Tanglewood*, held that a 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.<sup>171</sup> The court reasoned that, “since disposal may be merely the ‘placing of

166. See *id.* at 1343 (discussing liability under § 9607(a)(4)). Section 9607(a)(4) imposes liability on any person who “accepted any hazardous substances for transport to disposal or treatment facilities, incineration vessels or sites selected by such person, from which there is a release, or a threatened release, which causes the occurrence of response costs, of a hazardous substance . . .” *Id.* (citing 42 U.S.C. § 9607(a)(4) (1995)).

167. *Kaiser Aluminum*, 976 F.2d at 1343 (citing 42 U.S.C. § 9601(26)(2001) (noting that Ferry was potential transporter pursuant to language in CERCLA).

168. See *Kaiser Aluminum*, 976 F.2d at 1343 (noting that hazardous material does not have to be conveyed to separate parcel of land to incur liability under CERCLA § 9607(a)(4)).

169. *Id.* The Ninth Circuit continued:

We conclude that liability may be imposed under section 9607(a)(4) for transporting hazardous material to an uncontaminated area of property, regardless of whether the material was conveyed to a separate parcel of land. Catellus’s allegations that Ferry excavated the contaminated soil from one area of the property and moved it to another are sufficient to allege potential liability predicated upon 42 U.S.C. §9607(a)(4).

*Id.*

In contrast, the Tenth Circuit, in *Geraghty & Miller*, refused to impose transporter liability on a consultant. See *Geraghty & Miller*, 234 F.3d at 929 (discussing liability as transporter of hazardous waste). The Tenth Circuit reasoned that even if the consultant’s conduct resulted in the unintended migration of a hazardous substance, there still must be evidence that the contractor moved the hazardous substance to “another facility or site.” *Id.* (noting that evidence of intent to transport hazardous waste is needed to incur liability).

170. Compare *Kaiser Aluminum*, 976 F.2d 1338 (9th Cir. 1992), with *Tanglewood E. Homeowners v. Charles-Thomas, Inc., et al.*, 849 F.2d 1568 (5th Cir. 1988) (addressing “arranger” liability in context of construction cases).

171. See *Tanglewood*, 849 F.2d at 1573-74 (discussing previous court decision not to dismiss complaint for failure to state claim upon which relief under CERCLA may be granted).

any . . . hazardous waste into or on any land . . . ,’ those who move the waste about the site may fall within the terms of the provision.”<sup>172</sup>

The foregoing decisions, however, conflict with *United States v. CDMG Realty Co.*<sup>173</sup> In *CDMG*, the purchaser of contaminated property sought contribution from Dowel Associates (Dowel), arguing that a soil investigation conducted by Dowel spread contamination at the site.<sup>174</sup> The Third Circuit agreed that a soil investigation could constitute a disposal under CERCLA.<sup>175</sup> Nevertheless, unlike the Fifth and Ninth Circuits, the Third Circuit, in *CDMG*, refused to hold the consultant strictly liable.<sup>176</sup> The court held that the consultant could only be liable if the plaintiff proved that the soil investigation was negligent.<sup>177</sup> The court stated that “it is not enough for plaintiff to show that a soil investigation has caused the spread of contaminants. Rather, we conclude that in order to establish that ‘disposal’ has occurred based on a soil investigation, a plaintiff must also show that the investigation was conducted negligently.”<sup>178</sup>

The Third Circuit reasoned that if a person was strictly liable for the spreading of contaminants during a soil investigation, such liability would discourage pre-purchase due diligence.<sup>179</sup> Therefore, the Third Circuit differs from other circuits because it imposed a negligence standard which, in its view, “harmonize[d] CERCLA’s clear intention to allow soil investigations and its goal of remedying hazardous waste sites.”<sup>180</sup>

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172. *Id.* at 1573 (discussing potential liability under CERCLA for those who merely move waste about site).

173. 96 F.3d 706 (3d Cir. 1996).

174. *See id.* at 710.

175. *See id.* at 719 (noting that dispersal of contaminants could constitute disposal). It was not significant to the court that the disturbance at issue was *de minimis*. *See id.* “The dispersal of contaminants need not reach a particular threshold level in order to constitute ‘disposal’ . . . . There is no exception for *de minimis* disturbances.” *Id.* Further, the court noted that “the fact that a defendant’s dispersal of contaminants is trivial may provide a ground to allocate less liability to that defendant, but it is not a defense to liability.” *Id.* (emphasis omitted).

176. *See id.* at 720-21 (noting that strict liability does not apply here because this is not ordinary case).

177. *See id.* at 722 (discussing plaintiff’s burden in order to demonstrate “disposal” has occurred).

178. *CDMG*, 96 F.3d at 721 (discussing what plaintiff must prove to demonstrate liability).

179. *See id.* (asserting that pre-purchase due diligence entails appropriate inquiry and appropriate soil investigation).

180. *Id.* at 722 (discussing reasoning for applying negligence standard).

## IV. SUGGESTED PROTECTIVE MEASURES FOR CONSULTANTS

Recent case law, including the decisions highlighted in this Article, require individuals and companies involved in the environmental consulting business to take proactive steps to protect themselves. Consultants must evaluate their liability exposure and make informed judgments as to whether it is worthwhile, or profitable, to undertake a project in the face of the potential risks.

In order to protect themselves, consultants should take the critical step to re-examine standard language in contracts to assure that the terms and provisions accurately reflect the scope of services the consultant agrees to undertake. Key contract terms should be specifically defined. In addition, consultants should ensure that their contracts plainly and clearly delineate the scope of their undertaking. There should be standard procedures for modifications to the scope of work. Furthermore, all changes to the scope of work should be put in writing.

The body of the consultant's report should document that the work or report is done only for the benefit of the contracting party. The report should also include a written understanding of the purpose of the work and for whom it is designed to benefit. Contracts should include no reliance clauses and explicit statements that the report is only prepared for the benefit of the contracting parties and that reliance by anyone else is not authorized. In addition, the consultant should contractually limit the client's right to distribute its report and specifically tailor indemnity provisions to the work at issue instead of using boilerplate language.

Further, it is important to include confidentiality provisions in contracts so that the dissemination of information in reports is limited.<sup>181</sup> If a consultant obtains information and data from a client or third party, such disclosure should be specifically mentioned. The consultant should not vouch for the accuracy of information provided by another person.<sup>182</sup> In addition, the contract should specifically identify the applicable law governing the transaction.<sup>183</sup>

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181. See Leigh Ann K. Epperson, *Environmental Traps for Contractors*, 7 S.C. ENVTL. L.J. 135 (stating contracting parties are "free to shift liability by means of assumption or indemnity agreements.")

182. See FINEMAN, *supra* note 1, at 239 (discussing third party beneficiary doctrine as focusing on intent of parties and setting standards in third party relationship).

183. See *id.* (asserting that court's role in construction process is to interpret and enforce contract in accordance with parties' expectations).

Most importantly, consultants should not undertake services beyond those specifically delineated in the contract.<sup>184</sup> The contract should specifically set forth the consultant's intent and understanding that the consultant's work will not benefit a third party.<sup>185</sup> Indeed, the contractor should obtain assurances and written affirmations from the client that the work is not intended to benefit a particular class of persons, for example, prospective purchasers of real estate or banks.<sup>186</sup>

Consultants should document the governing standards and requirements that frame the scope of their undertaking and disclaim responsibility for toxic, hazardous, or other dangerous substances that may be discovered. Furthermore, it is helpful for consultants to encourage their clients to make written representations and warranties concerning their knowledge of the undertaking in question. Finally, a consultant should always obtain appropriate insurance coverage for their work.

## V. CONCLUSION

Lawyers for environmental consultants must be aware that their clients are increasingly named in lawsuits filed by plaintiffs with whom the consultant did not contract. Consultant liability may arise under common law principles and under the federal Superfund statute. Recent case law indicates a trend toward expanding the scope of a consultant's liabilities. Under the common law, the *Grand Street Artists* decision has the potential to drastically increase the exposure of consultants because, at some point, practically everyone involved in the environmental consulting business must file a report available for public inspection.<sup>187</sup> In the Superfund context, the decisions in *Kaiser Aluminum* and *Tanglewood* are likely to result in new claims against consultants.<sup>188</sup>

Nevertheless, other recent cases indicate that a consultant's duties are not limitless.<sup>189</sup> Even if a consultant makes a mistake, it

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184. See *id.* (noting that parties have opportunity in contracting process to delineate their performance obligations and risks and benefits of construction).

185. See *id.* at 235 (discussing application of "intent to benefit" text to terms of contract creating third party beneficiary relationship).

186. See *id.* (examining parties' intent at time of contracting for third party beneficiary).

187. For a discussion of *Grand Street Artists* and its implications, see *supra* notes, 74-96 and accompanying text.

188. For a discussion of *Kaiser Aluminum* and *Tanglewood* and their implications, see *supra* notes 158-172 and accompanying text.

189. For a complete discussion of the traditional, conservative approach to consultant liability to third parties, see *supra* notes 28-56 and accompanying text.

does not result in liability if no duty was owed to the plaintiff or if there was no justifiable reliance on the mistake.<sup>190</sup> Further, in the Superfund context, some courts refuse to hold consultants strictly liable and require a plaintiff to prove negligence.<sup>191</sup> Additionally, some courts strictly enforce contractual limitation of liability clauses.<sup>192</sup> Perhaps the most important lesson to be learned by this discussion is that there must be a heightened sensitivity to the potential for new claims. Although all risks cannot be completely eliminated, consultants and their lawyers can, and should, take concrete practical steps to avoid or reduce their liability to third parties.<sup>193</sup>

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190. See *Midwest Aluminum Mfg. Co. v. General Elec. Co.*, No. 4:90-CV-143, 1993 WL 725569, at \*6 (W.D. Mich. 1993) (emphasizing that "duty does not arise everywhere with everyone," and that there must be requisite relationship to give rise to legal obligation for benefit of third party).

191. See, e.g., *United States v. CMDG Realty Co.*, 96 F.3d 706, 706 (3d Cir. 1996) (requiring plaintiff to prove negligence).

192. For a complete discussion of the methods of reducing liability to third parties, see *supra* notes 181-86 and accompanying text.

193. For a thorough discussion of consultant liability, see generally Epperson, *supra* note 181.