Victor O. Schinnerer & Company, Inc.

Management Advisory

Avoiding Third Party Claims

Sound contracting practices and provisions are effective risk management tools since contracts define and determine rights, responsibilities, and procedures. Accordingly, they are often used to determine the liability of project participants.

While anyone who suffers property damage or personal injury due to the negligence of an environmental practitioner has the right to demand compensation for losses sustained, the same is not true in every state when the injured party suffers "economic loss." Most states do not require a valid contract as a prerequisite to a claim for damages that are considered economic losses. In many states, however, courts have decided that unless the contract envisions a benefit for a non-contractual party—a third party—the contract cannot be enforced by or provide economic benefit to an outside party.

Through the use of a third-party exclusion, the environmental practitioner and the client are establishing a rule that should be followed by the courts. In litigation, a court should hold that third parties have no right to sue based on some other set of contractual obligations because that contract contains a third-party exclusion provision that clearly states that all rights and benefits are owed solely by one party to the other. A third-party exclusion does not compromise a client's position. It is one that could significantly limit the risks of the environmental practitioner.

Removing the Possibility of "Beneficiary" Status

Obviously, a disappointed client can sue an environmental practitioner with whom it has a contract. However, many cases have been brought by contractors or other third parties that do not have any contractual privity with the environmental practitioner. Such a third party contractor, employee, or neighbor may contend a "third-party beneficiary" right in the contract.

These third parties will claim to have relied upon the environmental practitioner's services or work product (e.g., opinions, reports, surveys, plans, and specifications). For example:

- ✔ A contractor may claim additional costs or delays due to alleged errors and omissions in the plans, specifications, or reports prepared by the environmental practitioner.
- ✔ Another consultant providing services on the project may claim damages because it relied upon statements or opinions regarding the soils or subsurface conditions made in the environmental practitioner's reports.
- ✔ The purchaser of the property may claim damages resulting from reliance upon information contained in the environmental practitioner's reports.
- ✔ Employees of a contractor, subcontractor, or even the government may claim that they have been injured as a result of the environmental practitioner's services. Workers compensation laws limit recovery by employees from their employer. Thus, individual employees often seek damages against the environmental practitioner based on the theory that the practitioner negligently breached its duty to locate or identify contaminants or to provide job site safety. A citizen may bring a claim upon the same theory.

It is advisable to include a provision stating that deliverables are for the sole use of the client and not for any other individuals. A second recommended provision should state that the work product may be used for a limited duration and is not to be used by any other person without the express written authorization of the environmental practitioner. Such disclaimers may preclude a finding that third party reliance upon the report or analysis of the

environmental practitioner was "justifiable." Also, a precise definition of the scope of services may act as a defense to a third-party claim on the theory that the environmental practitioner was not retained to perform services for the third party. The Engineers Joint Contract Documents Committee, in EJCDC Document E-500, 2003 edition, handles this issue with the following language:

C. Unless expressly provided otherwise in this Agreement:

1. Nothing in this Agreement shall be construed to create, impose, or give rise to any duty owed by Owner or Engineer to any Contractor, Contractor's subcontractor, supplier, other individual or entity, or to any surety for or employee of any of them.

2. All duties and responsibilities undertaken pursuant to this Agreement will be for the sole and exclusive benefit of Owner and Engineer and not for the benefit of any other party.

3. Owner agrees that the substance of the provisions of this paragraph 6.07.C shall appear in the Contract Documents.

Not All Claims Are Excluded

Limiting the environmental practitioner's risk from third parties is not *entirely* accomplished by avoiding third party beneficiary claims. Another area of potential liability is a claim of negligent misrepresentation. This would be a viable claim for a plaintiff if an environmental practitioner provided erroneous information or misrepresented the nature or extent of contamination or cleanup costs, which in turn resulted in the claimant relying on the information to its detriment. Individuals and entities that receive and rely on the environmental practitioner's reports can bring this sort of claim. It is of particular concern because it often provides recovery for economic loss in those states where the economic loss rule is still the law. Even in those states that require privity of contract to justify a suit for economic losses, a claim of misrepresentation may be allowed. While there is no absolute way to limit the environmental practitioner's exposure to claims from third parties, prohibiting "third party beneficiaries" in service agreements can be effective in lessening the probability of a loss.

For more information on practice management, please visit our website at www.Schinnerer.com or www.PlanetRiskManagement.com. You can reach our Risk Management Department at 301/951-9753, fax at 301/951-5496, or email at vos.RMeducation@Schinnerer.com.

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