

Many Masters

Loss Prevention Committee

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Since 1993, the efforts of hazardous waste site cleanup professionals (known in Massachusetts as “licensed site professionals” or “LSPs”) to oversee remedial actions and return contaminated land (brownfield sites) to productive use have conferred long-term benefits not only to landowners, but also to abutting property owners, municipalities and the environment. Further, these efforts have reduced potential impediments (*e.g.*, financing) to the conveyance of such land, thereby promoting smart growth and economic vitality.

At its core, the role of the LSP is “to render waste site cleanup activity opinions that can be relied on as sufficient to protect public health, safety, welfare and the environment.” *See* G.L. c. 21A, § 19. The LSP is licensed by the Board of Registration of Hazardous Waste Site Cleanup Professionals (the “LSP Board”). *See* 309 CMR 3.00. The LSP acts, however, at the behest of a specific client with contextual needs and concerns in a regulatory environment subject to interpretation and differences in judgment. As such, a tension arises between the LSP’s obligations to its client, and potential risks and liabilities that arise from its duties to the LSP Board, the state Department of Environmental Protection (“MasasDEP”), and possibly to foreseeable third parties. This article explores these tensions.

Duty to the Client

Waste site cleanup activity opinions (“LSP Opinions”) are not developed on behalf of MassDEP or the LSP Board. Instead, they are developed on a contractual basis for a client, that may be an individual, a business, or a governmental entity. The LSP (or the environmental consulting firm that employs the LSP) typically enters into a contract with the client to render opinions that comply with the provisions of G.L. c. 21E and its implementing regulations (310 CMR 40.0000, known as the Massachusetts Contingency Plan (the “MCP”). The contract defines the relationship between the LSP and the client, including the scope of work and limitations on liability. In addition, the contract typically will require the LSP to meet a certain duty of care in undertaking work.

Duty to the Public - The LSP Board & The MassDEP

LSP Opinions represent to the MassDEP that response actions have been conducted in accordance with the applicable standards of care and state regulations (*e.g.*, the MCP). *See* 310 CMR 40.0015(4). The LSP is licensed by the state, indicating that he or she is qualified to render LSP Opinions. To be eligible for a license, an individual must meet certain education and experience requirements, demonstrate that he or she possesses “good moral character,” and pass a written examination. The license is valid for three years and continuing education is required. Further, like most professionals, the LSP must abide by “Rules of Professional Conduct,” 309 CMR 4.00 (the “LSP Rules”), that were promulgated by the LSP Board. The LSP is subject to disciplinary action such as loss of license for failure to conform to the LSP Rules.

In the course of rendering an LSP Opinion, an LSP must meet several public duties imposed by the LSP Board's regulations. For example, an LSP may not opine that a site remediation has been completed unless that LSP concludes that the investigation and cleanup were conducted consistent with the MCP. *See* 309 CMR 4.03(3)(b); *see also* 310 CMR 40.0015(4). In addition, the LSP must include any facts, data or other information that are pertinent to the LSP Opinion, and explain any such information that may tend to support or lead to a contrary opinion. *See* 309 CMR 4.03(3)(b) & (d); *see also* 310 CMR 40.0015(2).

Further, if the LSP "identifies a release or threat of release that in the LSP's professional judgment poses or could pose an Imminent Hazard as described in 310 CMR 40.0321 at a particular site at which he or she is providing Professional Services, he or she shall: (a) immediately advise his or her client of the need to notify the [MassDEP] of the Imminent Hazard; and (b) notify the [MassDEP] of the [I]mminent [H]azard no later than 24 hours after identifying such, unless the client has provided such notice." 309 CMR 4.03(4).

Arguably, the obligation of an LSP to the general public extends even further, as the LSP Rules require LSPs to "hold paramount public health, safety, welfare, and the environment in the performance of professional services." 309 CMR 4.03(1). While the LSP Board has indicated that it believes this language is aspirational and should not affect an LSP's liability to third parties, this language may create an expectation on the part of third parties that the client's interests must be balanced against the interests of the public.

Duty to the Public - Third Parties

There may be circumstances in which the law of torts imposes a duty of care on the LSP to certain foreseeable third parties. The concept of such third party liability is not new to professional service providers in this state. The Supreme Judicial Court ("SJC") has determined that some professionals, including civil engineers and accountants, may be exposed to liability to foreseeable third parties, as discussed below. In a 1967 case, the plaintiff, a general contractor, had appealed from a directed verdict in favor of the defendant, a civil engineer and surveyor, on the plaintiff's claim that the defendant had negligently staked the locations for construction of two catch-basins and a roadway, with the result that plaintiff had to rebuild them. While the plaintiff and defendant each had a contract with the same real estate developer, they did not have a contract with each other. The SJC noted that (a) the defendant knew the identity of the general contractor who would be constructing the catch-basins and roadway, (b) the defendant knew that the purpose of the work was to enable the general contractor to undertake the construction, and (c) the type and extent of damages were foreseeable and not remote. In these circumstances, the SJC held that the defendant civil engineer could be liable to the general contractor for negligent misrepresentation, and ordered a new trial. *See Craig v. Everett M. Brooks Co.*, 351 Mass. 497, 501 (1967), *limited by Page v. Frazier*, 388 Mass. 55, 65 (1983) (stating that principles of *Craig* are "limited to instances where the defendant knew that the plaintiff would rely on his services").

The SJC extended the concept of a duty of care owed by professionals to third parties to accountants in *Nycal Corp. v. KPMG Peat Marwick LLP*, 426 Mass. 491 (1998). In *Nycal*, the SJC held that accountants may be held liable to non-contracted third parties only where the third party could demonstrate "actual knowledge on the part of accountants of the limited -- though

unnamed -- group of potential [third parties] that will rely upon the [report], as well as actual knowledge of the particular financial transaction that such information is designed to influence.” *See id.* at 498.

The Massachusetts Appeals Court extended this concept further when it stated that architects also may be liable to non-contracted third parties. “[W]e see no reason why a design professional such as an architect should be exempt from liability for negligent misrepresentation to one where there is no privity of contract.” Nota Construction Corp. v. Keyes Associates, 45 Mass.App.Ct. 15, 21 (1998).

While we have identified no Massachusetts appellate case holding that an LSP may be liable to foreseeable third parties, that is not inconsistent with the case law and should be considered a possibility by LSPs. This potential duty of care to third parties would likely extend to those that reasonably and foreseeably rely on the LSP Opinion. This many include parties that would rely on the LSP Opinion in providing financing, for example.

Analysis & Conclusions

A tension may arise between the expectations of the client and the responsibilities of the LSP. For example, the client may expect that the LSP will follow directions as to confidentiality, timing, and scope of work. However, the LSP is obligated by its LSP license to ensure that work supporting his or her LSP Opinion complies with the requirements of the MCP. It is possible that the client’s expectations will at times conflict with the mandates of the MCP. To reduce the risk of a deteriorating client relationship, it is important to discuss with the client -- before beginning work and possibly in the contract itself -- the LSP’s obligations that arise from its state license and the requirements of the MCP. The client should be informed that confidentiality, timing and scope of work - as well as other factors - may not be within the LSP’s control.

The LSP is exposed to risk of disciplinary action by the LSP Board. In addition, the LSP is exposed to risk of a “notice of noncompliance” or similar administrative enforcement action from MassDEP. While there is some question as to the MassDEP’s authority to seek enforcement against an LSP, as opposed to the responsible party, MassDEP pursues such enforcement on occasion. In both cases, we believe that the risk is best addressed by the LSP through maintaining a thorough understanding of the MCP and the LSP Rules, staying abreast of MassDEP policy, communicating fully with clients, and following good practices. In some cases, an independent review of the LSP Opinion by another LSP may be appropriate.

Finally, the LSP is exposed to the risk of litigation by a foreseeable third party. These risks are likewise reduced by the steps discussed above. In addition, an LSP should consider if its contractual terms with its client are appropriately protective (e.g., indemnification and limits of liability), ensure that its professional liability insurance extends to such third parties, and be proactive in consulting with colleagues and counsel as appropriate when a project sours.

One final note. While an LSP may face risks of disciplinary action, enforcement or litigation from its many masters, we believe that the LSP best defends against each of these risks by

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having a thorough understanding of the MCP and the LSP Rules, staying abreast of MassDEP policy, and following good practices.

This communication is intended to provide general information about an area of concern to LSPs. It is not legal advice. You should consult with legal counsel for advice specific to your circumstances.

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