CE News "Risky Business" No. 18

While ignorance may not be bliss, the adage notwithstanding, it sure can help prevent some of the anxiety that knowledge can breed. In fact, that point is reinforced every time I lead one of ASFE's *Introduction to Professional Practice* seminars: "If I had known all that before I chose civil engineering as a career, I probably would have chosen something a lot less risky," I often hear. Nor is that sentiment much of an exaggeration, given the number of physicians who have opted to find another career in the face of growing litigiousness and even faster-growing malpractice (a.k.a., professional liability) insurance premiums. Fortunately, government understands how important engineers are to society, which is why all states have established ***statutes of repose***.

Although they vary from jurisdiction to jurisdiction, statutes of repose typically establish that a design professional's liability to all parties ends within a certain number of years (commonly, ten) after completion or substantial completion of the construction project involved. Compare statutes of repose to ***statutes of limitations*** that establish that a design professional's liability to all parties ends within a certain number of years *after a defect is discovered.* In other words, were a design defect discovered 30 years from today, the party allegedly injured or damaged by it would have until 40 years from today to file a claim, assuming a ten-year statute of limitations was in effect. Given that type of exposure, insurance rates would be far higher than they already are, litigiousness would be encouraged rather than discouraged, and even more civil engineers would enroll in night school to become lawyers!

Do not assume that the protection afforded by a statute of repose is automatic or unassailable. You need to understand intimately those that exist in each state where your contracts would be enforced. You'll probably need the assistance of an attorney.

Do statutes of repose apply to environmental remediation projects? Maybe. Maybe not. Some statutes of repose are consider only "improvements to real property." Is an environmental clean-up an "improvement"? In common sense, yes. In law, not always.

What about the nature of the action? Some statutes of repose apply only in the case of "civil actions for malpractice or professional negligence...." Others apply to "actions based upon tort, contract or otherwise...." An attorney may tell you that such language makes a huge difference and has serious implications for how you word your contract. For example, if your contract includes a "standard of care" provision that begins with "Services performed by CONSULTANT under this AGREEMENT will be conducted in a manner consistent with that level of care and skill ordinarily exercised...", you and your firm are agreeing by contract that you will not commit the tort of negligence. As such, if you do commit a negligent act, you would have committed a tort (a civil wrong for which the court will grant a remedy) and you would have breached your contract. A breach of contract action is not a "civil action for malpractice or professional negligence." Negligence could also trigger a claim for breach of warranty or guarantee, on the ground that the "will be" of "will be conducted" means far more than "in the future."

There's something else you need to know about statutes of repose: You can establish your own by contract. Although such provisions have no impact on the rights of third parties, they can do a great deal to reduce your exposure to actions brought by clients, owner clients in particular. Consider the following excerpt from a sample contract provision included in *ASFE Contract Reference Guide, Edition 3.1*:

> **TIME BAR TO LEGAL ACTION**
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> **Notwithstanding any statute that may provide additional protection, CLIENT and CONSULTANT agree that claims by either party against the other for breach of this AGREEMENT or for failure to perform in accordance with the applicable standard of care shall not be initiated more than [two (2)] years from the time the party knew or should have known of the condition giving rise to its claim, and shall under no circumstances be initiated more than [four (4)] years from the date on which CONSULTANT completes services....**

Bottom line: The knowledge that breeds anxiety should also breed the desire to gain more knowledge, so that risk can be managed. The victims of risk, first and foremost, tend to be victims of their own ignorance.