White Paper

Land Surveyor Liability

Part 1 of 9

Author: David E. Woolley, PLS
Executive Board Member, LSACTS
March 9, 2010

LSACTS White Paper 2010-002

Version 1.3

Table of Contents

Mission Statement

To promote the public's perception of land surveying and to support all efforts by Professional Land Surveyors to elevate the stature of the profession. As an advisory organization, our purpose is to research, summarize, debate, and publish our findings on various topics relating to the principles and applications of the Professional Land Surveyors Act and the California Subdivision Map Act.

Adopted: June 12, 2009

Introduction

Liability [lahy-uh-**bil**-i-tee]
Any legal responsibility, duty or obligation owed. This liability may arise from contracts in consequence of torts[1] committed.

Land surveyors have been held legally liable in the courts for wrongful boundary locations, incorrect construction stakes, and incorrect platting. The land surveyor's liability is present regardless of whether the inaccurate[2] survey is one of intent or mistake. The land surveyor owes a duty. The breach of the duty not under contract is a tort. The scope of damages being sought is limited only by the imagination of the plaintiff's attorney and potentially the state licensing board. As a matter of professional responsibility, a surveyor should not attempt to avoid the liability that is incumbent upon the surveyor. The professional surveyor must recognize the liability, manage it and charge just compensation for assuming this liability. Economic factors, a client's unwillingness to pay for services, and poor direction from clients are not acceptable reasons for negating the law and jeopardizing one's license.

This White Paper is the first of nine papers addressing land surveyor liability. Sources of liability will be discussed in broad terms within this paper. Follow up papers will detail each individual tort action and the professional responsibilities of the land surveyor. These papers are intended to be issued at approximately two month intervals until complete.

[1] Torts are civil wrongs recognized by law as grounds for a lawsuit. These wrongs result in an injury or harm constituting the basis for a claim by the injured party. While some torts are also crimes punishable with imprisonment, the primary aim of tort law is to provide relief for the damages incurred by a plaintiff and to deter others from committing the same torts. The injured person may sue for an injunction to prevent the continuation of the tortuous conduct or for monetary damages. There are four elements to a tort, all of which must be present before the court can order a remedy: duty, breach of duty, causation and injury.
[2] "Inaccurate" in this context refers to the process required to properly determine a boundary and not to a quantity or quality of measurement.

The Professional

Two hallmark principles defining a professional individual are providing service to the public and assuming associated burden of corresponding liability. In order to provide services, the professional must: be licensed[3] by the state, exercise independent judgment, possess superior education in their field of knowledge, and demonstrate the understanding of the duty owed to the public.

The surveyor may offer opinions regarding matters of material fact. A representation of opinion by an individual within the general public is ordinarily not actionable[4]. Conversely, misrepresentations of opinion are actionable where the professional holds himself out to be specially qualified in a particular area of expertise[5]. The surveyor's work is often viewed as an expression of professional opinion and may be considered as representations of fact. Therefore, the surveyor's work may bear liability because clients rely on the surveyor's professional opinion to be factual and correct.

Contracts

As stated in *Hydrotech Systems, Ltd. v. Oasis Waterpark* (1991) 52 Cal.3d 988, 995, the licensed professional is required to have a rudimentary understanding of contract administration. In an effort to protect the public, the California Legislature has legislated contract requirements for the land surveyor[6]. In California, the basic statutes governing the formation, interpretation, and enforceability of private contracts are expressed primarily in the California Civil Code and the California Commercial Code. Additionally, the Statute of Frauds as referenced in California Civil Code § 1619-1623, recognizes a few of the basics: namely, expressed or implied contracts.

The surveyor can incur or avoid some liabilities (by way of informed consent[7]) based on contract language. The required standard of care is usually directly linked to the scope of work. It is equally important for the surveyor to contractually agree to what services will be provided as well as what services will not be provided. The surveyor must understand it is never acceptable to contract to violate the law or to contract to perform a negligent service that could harm an individual or the public. A land surveyor acting in the capacity of a business owner who does

[3] "The purpose of the licensing law is to protect the public from incompetence and dishonesty in those who provide building and construction services. [Citation.] The licensing requirements provide minimal assurance that all persons offering such services in California have the requisite skill and character, understand applicable local laws and codes, and know the rudiments of administering a contracting business. [Citations.] The obvious statutory intent is to discourage persons who have failed to comply with the licensing law from offering or providing their unlicensed services for pay." (*Hydrotech Systems, Ltd. v. Oasis Waterpark* (1991) 52 Cal.3d 988, 995.)

[4] Witkin, 5 *Summary of California Law, Torts*, supra at § 678, pg. 779

[5] *Id*. at § 680, pg. 781-782

[6] Business and Professions Code at § 8759.

[7] Informed consent is a person's agreement to allow something to happen after the person has been informed of all the risks involved and the alternatives.

not verify whether or not a city is a charter city or a general law city on public works projects is one potential example of violating the law in the execution of the contract. A charter city likely allows the surveyor relief from a prevailing wage[8] contract obligation. If the city is classified as a general law city rather than a charter city, the surveyor may be subject to paying prevailing wage[9]. This distinction can be overlooked due to the subcontracting relationship of a surveyor to an engineer or architect (prime contractor is not subject to prevailing wage). The surveyor is responsible to know the parameters of prevailing wage regulations and to pay their employees accordingly, regardless of the contract language with the prime contractor. A failure to recognize the prevailing wage requirement can lead to a Department of Industrial Relations investigation resulting in fines, back payment to employees (even after completion of the project) and result in the surveyor being banned from future work with the governmental agency. Practitioners tip, topographic surveying and mapping[10] are all covered practices under prevailing wage law.

Negligence Per Se, Negligence, Standard of Care

The surveyor can be subject to any number of claims (also known as causes of action). The basis for most causes of action is negligent performance of responsibilities resulting in a breach of the standard of care[11] (reasonable man doctrine). The plaintiff must prove every element of the case, which will include proving that the surveyor did not meet the standard of care. A surveyor will defend against this claim by proving that they did, in fact, meet the standard of care for their profession. Typically, the arguments for and against liability will focus on the duty, skill, and knowledge ordinarily possessed by reputable surveyors currently practicing in a similar locality and under similar circumstances as compared to the surveyor in question. A failure of the surveyor to fulfill these duties to the same extent as would be done by a reputable surveyor in a similar locality and under similar circumstances is deemed to be negligence.

In most instances, a breach of the standard of care by a surveyor is proven by the testimony of competent experts in the field of land surveying[12]. The surveyor, by virtue of a license, is not necessarily an expert. By assuming the designation or the role of an expert, the surveyor can also incur considerable liability. The litigation privilege of California Civil Code § 47, which protects attorneys, judges, jurors, witnesses, and other court personnel from liability arising from publications made during a judicial proceeding, did not apply to an expert witness

[8] California Labor Code, Sections §1720-1723

[9] Department of Industrial Relations regulations, Title 8 California Code of Regulations, section 16001(a)(1), provides that any interested party may file a request with the Director of DIR to determine coverage under the prevailing wage laws. The request can be either for a specific project or type of work to be performed that the interested party believes may be subject to or excluded from coverage as public works under the Labor Code. The full text of DIR's regulations can be found at: http://ccr.oal.ca.gov, (Title 8, Division 1, Chapter 8, Subchapter 3, Article 2). The prevailing wage hotline (415) 703-4774.

[10] Winzler & Kelly v Department of Industrial Relations, (1981), 121 Cal. App. 3d 120, See Appendix B.

[11] A requirement that a person act toward others and the public with watchfulness, attention, caution and prudence that a reasonable person in the circumstances would. If a person's actions do not meet this standard of care, then the acts are considered negligent, and any damages resulting may be claimed in a lawsuit for negligence.

[12] Miller v Los Angeles Co. Flood Control District 8 Cal. (1973) 3d 689, 701-703; Huber, Hunt, & Nichols, Inc. v Moore (1977) 67 Cal. App. 3d 278, 313.

from suit by his/her former client ("friendly expert witness") because § 47 does not protect a negligent expert witness from liability to the party who hired him.

It is commonly acknowledged in some jurisdictions that there are varying levels of compliance with state laws. This is not a reflection of the actual standard of care. Simply stated, a peer group that chooses to violate the law does not establish a standard of care.

Statutory rules of practice provide a minimum standard of care. Local practices may elevate that standard but may not diminish it. Violation of the law which results in injury or damages is known as negligence per se[13], particularly to a class of persons the law was intended to protect. Failure of the surveyor to follow statutes or regulations may presumptively establish negligence, thereby forfeiting the surveyor's best defense to a cause of action (the argument of having met the standard of care).

Fraud, Constructive Fraud and Mortgage Fraud

Fraud is not reserved for those on Wall Street or scams reported in local newspapers, television, and the internet. Surveyors have exposure to being charged for fraud, constructive fraud[14] and mortgage fraud. The primary reasons surveyors are not routinely charged with these crimes is that plaintiffs do not raise issue because of the lack of available settlement funds in this scenario. If a plaintiff asserts a criminal argument; typically a defendant's insurance (general liability, errors and omissions) company can deny coverage for plaintiff's claims. Without insurance coverage, a defendant may not be able to pay a settlement award – this fact makes attorneys reluctant to assert these arguments for fear of obtaining an uncollectable judgment. It must be noted, however, that a successful criminal action against a defendant may result in incarceration and personal liability, which means the defendant's personal assets may be subject to forfeiture and restitution orders by the court even attaching his or her future earnings.

During the California 2009 legislative session, Senate Bill 239[15] was passed into law. This bill was a repeal and restatement of the current penal code increasing penalties for misdemeanors and felonies. This legislation was not directed at surveyors but includes most of the licensed or registered brethren in related areas of practice. A California District Attorney Association representative (co-sponsor of the legislation) stated that, although surveyors are not named directly, they are subject to the provisions outlined in this Senate Bill. As an example, the surveyor may be exposed to mortgage fraud liability in the performance and completion of an

[13] Negligence per se is defined as "if the evidence establishes that the plaintiff's or defendant's violation of the statute or ordinance proximately caused the injury and no excuse or justification for the violation is shown by the evidence, responsibility may be fixed upon the violator without other proof of failure to exercise due care." Witkin, 6 Summary of California Law, Torts (9th ed. 1987) § 818, pg. 170. The doctrine of negligence per se (as a presumption affecting the burden of proof) is codified by California Evidence Code §669.

[14] Constructive fraud is defined as any act, omission, or concealment involving a breach of a legal or equitable duty, trust, or confidence that results in damage to another even if the conduct is not otherwise fraudulent. CEB, California Real Property Remedies and Damages 1 (2nd ed. 2005) § 3.27, pp. 128-131. See also California Civil Code § 1571 and 1573.

[15] Penal Code, Section 532f

American Land Title Association (ALTA) survey[16]. In analyzing potential liability, the first question is whether a substandard field survey was intentionally performed? The contrary would be an instance in which a substandard field survey was completed unintentionally, which would liability due to incompetence. Evidence of a substandard survey could include missing available evidence within the ALTA survey or the failure by the surveyor to file a Record of Survey when required by Section 8762 of California Business & Professions Code. Failure of the licensed surveyor to perform his duties accurately and professionally may result in a fraud claim against the surveyor.

A surveyor may be sued for unfair competition because he has engaged in a fraudulent business practice by not providing accurate surveys and/or failing to file Records of Survey as required by California statute. California defines unfair competition as any unfair or fraudulent business practice or act[17]. See also *Kasky v Nike, Inc.* (2002) 27 Cal. 4th 939. Economically, surveyors that practice honestly cannot compete with surveyors that do not follow the laws intended to protect the public – following correct procedures is simply more expensive and time consuming than cutting corners and failing to file a requisite Record of Survey when necessary.

Negligent Misrepresentation[18] and Professional Opinion

The defendant (surveyor) may be found liable by California courts because he made a false statement. As an example, the surveyor could have made a false statement (not usually orally, but typically on a map or other work product) and, even though he reasonably believes it to be true and has exercised prudent care, he may be found to have made a negligent misrepresentation. Misrepresentation may be due to dishonesty or ignorance, the consequence is the same – civil liability for the surveyor if he is sued.

As stated above, negligent misrepresentation is defined as a false statement of fact. In determining facts, the surveyor must gather sufficient evidence and present his written work product as a statement of fact. The facts are based on the evidence. There are many different types of evidence and considerations in boundary determination such as:

1. Research of the public records and private records available

[16] Penal Code, Section 532f, (1) Deliberately makes any misstatement, misrepresentation, or omission during the mortgage lending process with the intention that it be relied on by a mortgage lender, borrower, or any other party to the mortgage lending process.

[17] Business and Professions Code §17200

[18] The elements of a cause of action for negligent misrepresentation include:

1.) defendant must have made a representation as to a past or existing material fact;
2.) the representation must have been untrue;
3.) regardless of his actual belief, the defendant must have made the representation without any reasonable ground for believing it to be true;
4.) the representation must have been made with the intent to induce plaintiff to rely upon it;
5.) the plaintiff must have been unaware of the falsity of the representation (he must have acted in reliance upon the truth of the representation and he must have been justified in relying upon the representation);
6.) as a result of his reliance upon the truth of the representation, the plaintiff must have sustained damage.

Walters v. Marler (1978) 83 Cal. App. 3d 1, 13.

2. Proper search for (and measurement of) all pertinent monuments necessary to reestablish a boundary (or number of boundary lines)

3. Redundant quantifiable measurements

4. Identification of latent and patent ambiguities in deeds

5. Junior and senior rights assigned to the adjoining properties (reviewing all adjoining deeds)

6. The adverse or confirming affects of improvements and

7. When applicable, parol evidence (oaths)

If the surveyor ignores any of these minimum requirements, then his opinion, as offered by way of a map or plat may be invalidated. This is only one basis for a negligent misrepresentation case. It is definitively irresponsible for a surveyor to ignore or not document evidence in boundary establishment. This includes locating and measuring all monuments and evidence recovered during the course of the survey and depicting all of the evidence on the prepared map (especially the monuments or improvements not consistent with the boundary resolution).

The sale and purchase of real property is typically the largest capital expenditure for most Americans during their lifetimes. We (surveyors) would no sooner purposefully crash into a high end sports car than to short cut a boundary survey; the affect is the same. Because boundary litigation costs can exceed the cost of most high end sports cars, why would any responsible surveyor not fulfill his legal responsibilities and complete the technical and legal processes of a boundary survey? Every surveyor needs to ask themselves the basic question of: "Is it ever appropriate to show a "record" boundary[19]?" If so, who benefits? How is the boundary going to be used? Suppose a lender is loaning $4M on a commercial property and requests an ALTA survey be done as part of the due diligence – then the following questions logically follow: Does the lender know the quality of the survey? Should he be required to know the quality of the survey? Or should the lender be able to rely on the licensed surveyor to produce a high quality and accurate survey by virtue of the fact that the surveyor is a licensed professional? Is the lender expected to understand the surveyor's disclaimer note(s)? Do the nonsensical disclaimer notes constitute informed consent? Do the disclaimer notes confirm surveying negligence? Suppose the surveyor did not file the necessary maps required by law? Is the surveyor performing a "record" boundary to save a client a few thousand dollars on a $20M building? While these seem easy to answer, these same questions can be much more difficult to answer during a surveyor's deposition to prove a negligent misrepresentation claim.

[19] A record boundary is the rotation of a record document i.e. deed, parcel map, final map etc., to two found monuments measured in the field and without the consideration of other evidence.

Surveyor liability appears to be inversely proportional to the fees charged. The lower fee may garner a lower quality product and subject the surveyor to significant liability.

Third Party Liability, Foreseeable Reliance, Third Party Reliance[20] and Intended Beneficiary

It is accurate to presume the surveyor's primary responsibilities are to his or her client, but the surveyor must also be aware of and completely understand his obligation to third parties and the general public. To best understand third party liability for land surveyors, where there is limited case law, we must review professions that perform similar functions. An auditor is a professional certified public accountant that has similar third party liabilities to those of the land surveyor. The auditor is an independent reviewer that prepares a report for various parties; one example is a report on the financial health of a publicly traded company. Most of us remember Arthur Anderson's role in the Enron case[21]. In light of Arthur Anderson and their considerable resources and level of sophistication, the surveyor has to wonder how well he may fair against a valid claim by a third party. There are several hallmark cases involving a duty owed to a third party, two selected cases are; *Ultamares Corp. v Touche*, (N.Y. 1931) 174 N.E. 441 and *Bily v. Arthur Young & Co.*, (1992) 3 Cal. 4th 370. In *Bily v. Arthur Young & Co*., the California Supreme Court adopted the intended beneficiary approach of § 552, RESTATEMENT OF TORTS, 2ND [22]. The surveyor may find that the attorneys will argue both sides and the application of the *Bily v. Arthur Young & Co.*

In today's economy, with the land values in California continuing to rise in the future, we would be remiss to disregard the number of residential and commercial properties surveyed and not consider the potential claims filed by lenders looking for a form of contract rescission. Years ago, many reputable surveyors gave up on conducting ALTA surveys on commercial property. Many surveyors were not willing to violate the law or short cut the evidence collection, such as searching for all of the pertinent monuments required for a proper boundary resolution or the mandatory filing requirements. Said violations of the law and shortcuts are fraudulent and done

[20] "One who through the tort of another has been required to act in the protection of his interest by bringing or defending an action against a third person may be entitled to recover reasonable compensation for loss of time, attorney fees and other expenditures thereby suffered or incurred in the earlier action" (Supreme Court's opinion in Pullman Standard, Inc. v. ABEX Corp., 693 S.W.2d 336 (Tenn. 1985).

[21] Arthur Anderson was one of the "big five" accounting firms in the nation. In 2002, the eighty nine year old firm with 28, 000 employees voluntarily surrendered their license to practice as Certified Public Accountants. The Supreme Court subsequently reversed the ruling in favor of Arthur Anderson, but, the company was in ruins. Today there are still hundreds of lawsuits pending against the firm.

[22] §552: Information Negligently Supplied for the Guidance of Others.

(1) One who, in the course of his business, profession or employment, or in any other transaction in which he has a pecuniary interest, supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information.

(2) Except as stated in Subsection (3), the liability stated in Subsection (1) is limited to loss suffered:

(a) by the person or one of a limited group of persons for whose benefit and guidance he intends to supply the information or knows that the recipient intents to supply it; and

(b) through reliance upon it in a transaction that he intends the information to influence or knows that the recipient so intends in a substantially similar transaction.

to be more competitive, but end up damaging the public and the public's perception of the land surveying profession.

The Court also sent a clear message to all professionals that the liability of other professionals would also be governed by the intended beneficiary rule[23].

> [This] approach is also the only one that achieves consistence in the law of negligent misrepresentation. Accountants are not unique in their position as suppliers of information and evaluations for the use and benefit of others. Other professionals, including attorneys, architects, professionals, title insurers and abstractors, and others also perform that function. Like auditors, these professionals may also face lawsuits by third persons claiming reliance on information and opinions generated in a professional capacity[24].

Foreseeable reliance attaches liability to the surveyor's work for a third party's reliance on the surveyor's work product. Surveyors have an inherent exposure to this type of liability, as surveyors are typically vital component of a larger project. The list of third parties who may be reliant on the surveyors' work includes architects, engineers, construction managers, lenders, title companies, buyers, sellers, real estate agents, brokers and investors. The surveyor has a unique legal responsibility to accurately determine and portray boundaries - no other person in the state of California has this same privilege or authority (with the exception of the pre-1982 registered civil engineer). With this unique privilege comes the land surveyor's responsibility to protect property rights and safeguard the public welfare[25]. It is within this context that it becomes apparent the surveyor willing to cut corners and prepare a substandard survey offers little benefit in creating a "record" boundary which does not fulfill his duty (see negligence above). Furthermore, additional liability arises for this substandard surveyor toward the general public based on the theories of third party liability, foreseeable reliance, third party reliance and intended beneficiaries.

Defamation (Slander and Libel) and Confidentiality Agreements

Most surveyors are generally familiar with the practice of other professionals in the surveying field. The work of other professionals will sometimes fall under our scrutiny. One of the most reported reasons professionals are reluctant to report the substandard practices of other licensees to our Board for disciplinary actions is fear of retribution[26]. Therefore, a basic understanding of defamation will be beneficial to the ethical surveyor. As an expert witness and a practitioner who will report scofflaws to our Board, this author has been threatened with a defamation lawsuit. The best defense, according to competent counsel, is the truth in statements.

[23] A person who is not a party to a contract or trust, but is intended by the parties to benefit from the contract or trust. Such a person has the ability to legally enforce the contract or trust once their right to the benefit vests.
[24] Bily v. Arthur Young & Co., (1992) 3 Cal. 4th 370 at 410.
[25] Business and Professions Code § 8708.
[26] "Ethics for the Professional Surveyor, A Collection of Thoughts", Dennis J. Mouland (1996)

Generally speaking, defamation is the issuance of a false statement about another person, which causes that person to suffer harm. Slander involves the making of defamatory statements by a transitory (non-fixed) representation, usually an oral representation. Libel involves the making of defamatory statements in a printed or fixed medium, such as a magazine or newspaper. To be found liable for a defamation claim the following elements of a cause of action must include:

1.) A **false** and defamatory statement concerning another;
2.) The unprivileged publication of the statement to a third party (that is, somebody other than the person defamed by the statement);
3.) If the defamatory matter is of public concern, fault amounting at least to negligence on the part of the publisher;
4.) Damage to the plaintiff.

In the context of defamation law, a statement is "published" when it is made to a third party. That term does not mean that the statement has to be in print.

Many surveyors do not realize that if sued as a business, the surveyor's general liability policy may cover the cost of the defense; if they are sued as an individual, the homeowner's policy may cover the cost of the defense. When a plaintiff files a defamation lawsuit, expect to receive the complaint as a corporation and as an individual. Defamation cases tend to be difficult to win, and damage awards tend to be small. As a result, it is unusual for attorneys to be willing to take defamation cases on a contingent fee basis. Typically, fees expended in litigating even a successful defamation action can exceed the total recovery[27].

A surveyor, acting as an expert witness at trial, is not relieved of the responsibility to file a complaint with the Board by signing a confidentiality agreement as part of a settlement agreement[28]. The surveyor, as an expert witness, should ask an attorney to explain the terms and consequences of the applicable confidentiality agreement. The surveyor is seldom privy to the actual details of a settlement, but a surveyor bound by the confidentiality agreement benefits from the inclusion of language to protect from him or her from a defamation claim. As an example, if the plaintiff's expert was able to negotiate that a defendant could only file an injunction (as opposed to a damage claim) if plaintiff's expert violated the confidentiality agreement, there could be no monetary liability for the surveyor expert.

Statute of Limitations for Fraud

The Legislative Counsel of California issued an opinion specifically dealing with land surveyor liability on April 29th, 2008 as No. #0806551[29]. A copy of this opinion is attached hereto as Appendix A. Nevertheless, it is important to understand that these statutes may not

[27] www.expertlaw.com
[28] Business and Professions Code § 8776.4
[29] Appendix A

apply to fraud cases (see California Penal Code sections 800 et seq., particularly sections 801.5 and 803). The statute of limitations for certain types of fraud is four (4) years from the date of the discovery of the fraud. For example, if the surveyor is involved in constructive fraud in the preparation of an ALTA survey completed years earlier, the clock on the statute of limitations does not start ticking until actual discovery of the fraud.

Conclusion

For a breach of duty either under contract or a tort action the surveyor may be liable to a client or an unknown third party. In *Rozny v Marnul*, (1969), 250 N.E. 2d the Court cautioned that every surveyor should ask himself the following questions:

1.) Is this survey free from negligence?
2.) Have I performed the survey as any other prudent surveyor would under the same circumstances?
3.) Whom do I expect to rely on my survey?

Questions added by this author:

4.) Does an inaccurate survey exist?
5.) If so, for what purpose will the survey be used?
6.) Does a typical client understand the legal obligations, which may be in addition to contractual obligations of the surveyor?

A surveyor is free to charge any fee for his or her professional services, but that is not to say the work product generated has any direct correlation to the fee that was charged. The fee charged by a professional is not solely related to the time and material cost of the service rendered. The extent and nature of the liability incurred should be considered, too.

As stated in the introduction, it is the author's intent to write a white paper on each of the eight bolded subjects in this paper.

Although not quoted directly, credit is given to Mr. Howard W. Ashcraft of Hanson, Bridgett, Marcus, Vlahos & Rudy, LLP for some of the legal theories expressed in the article "Standard of Care in Professional Liabiality Actions" (February, 2002).

Disclaimers

The information contained in this document is the proprietary and exclusive property of the Land Surveyors Advisory Council on Technical Standards (except as otherwise indicated).

The information contained in this document is subject to change without notice.

This information in this document is provided for informational purposes only. The Land Surveyors Advisory Council on Technical Standards specifically disclaims all warranties, express or limited, including, but not limited, to the implied warranties of merchantability and fitness for particular purpose, except as provided for in a separate license agreement.

The author of this document, David E. Woolley, is a licensed surveyor with over 20 years of experience in the field. That being said, Mr. Woolley is not an attorney. As such, nothing in this article may be construed as offering any legal advice. The article is for basic informational purposes only and does not contain legal advice or legal opinions by the author. Any substantive legal questions should always be addressed to competent licensed legal counsel. As such, Mr. Woolley is not and cannot be liable for offering any legal advice or opinions by offering this informational article for the reader's review and consideration.

LSACTS Executive Board Members

Contact Us

Web: www.lsacts.com

LEGISLATIVE COUNSEL
Diane F. Boyer-Vine

CHIEF DEPUTIES
Jeffrey A. DeLand
Daniel A. Weitzman

PRINCIPAL DEPUTIES
Edward Ned Cohen
Alvin D. Gress
Kirk S. Louie
William K. Stark

Joe Ayala
Cindy M. Cardullo
Debra Zidich Gibbons
Patricia Hart Jorgensen
Michael R. Kelly
Thomas J. Kerbs
Diana G. Lim
Romulo I. Lopez
Francisco A. Martin
Robert A. Pratt
Patricia Gates Rhodes
Jeff Thom
Richard B. Weisberg

DEPUTIES
Stephanie L. Abel
Michael P. Beaver
Vanessa S. Bedford
Ann M. Burastero
Gwynnae L. Byrd
Sergio E. Carpio
William Chan
Elaine Chu
Byron D. Damiani, Jr.
J. Christopher Dawson
Stephen G. Dehrer
Linda B. Dozier
Eric D. Dye
Sharon L. Everett
Krista M. Ferns
Sharon R. Fisher
Lisa C. Goldkuhl
Lauren S. Goshen
Jennifer M. Green
Mari C. Guzman
Maria Hilakos Hanke
Charlotte L. Hasse
Amy J. Haydt
Baldev S. Heir
Russell H. Holder
Valerie R. Jones
Lori Ann Joseph
Michael J. Kerins
Jacqueline R. Kinney
Jennifer R. Klein
Eve B. Krotinger
L. Erik Lange
Felicia A. Lee
Mira A. Macias
Mariana Marin
Anthony P. Márquez
Christine N. Maruccia
Fred A. Messerer
William E. Moddelmog
Sheila R. Mohan
Abel Muñoz
Kendra A. Nielsam
Gerardo Partida
Sue-Ann Peterson
Michael Pinkerton
Lisa M. Plummer
Deborah J. Rotenberg
Michelle L. Samore
Amy E. Schweitzer
Aaron D. Silva
Jessica L. Steele
Mark Franklin Terry
Janice L. Thurston
Bradley N. Webb
Rachelle M. Weed
Armin G. Yazdi
Jenny C. Yun
Jack Zorman

OFFICE OF LEGISLATIVE COUNSEL
State Capitol, Suite 3021
Sacramento, California 95814

TELEPHONE (916) 341-8000
FACSIMILE (916) 341-8020
INTERNET www.legislativecounsel.ca.gov
EMAIL administration@legislativecounsel.ca.gov

Legislative Counsel of California

April 29, 2008

Honorable Noreen Evans
Room 3152, State Capitol

STATUTE OF LIMITATIONS: LAND SURVEYORS - #0806551

Dear Ms. Evans:

You have asked the following questions:

1. What are the applicable statutes of limitation that would apply to a cause of action for land surveyor services that are inaccurate or not performed to the ordinary standard of care in the land surveying profession, if the subject property is not otherwise physically improved or constructed upon?

2. Is there a maximum period of time, or statute of repose, after which a land surveyor may not be held liable for land surveyor services that are inaccurate or not performed to the ordinary standard of care in the land surveying profession, if the subject property is not otherwise physically improved or constructed upon?

By way of background, land surveyors are licensed pursuant to Chapter 15 (commencing with Section 8700) of Division 3 of the Business and Professions Code, to perform various services that locate and measure the size and dimensions of real property (see Sec. 8726, B.P.C). A licensed land surveyor is required to use a written contract when contracting to provide professional services to a client, subject to specified exemptions (Sec. 8759, B.P.C). These services may or may not result in any physical improvement to, or construction upon, the real property for which the land surveyor performs services, for example, lot-line adjustments or corner-records, but may result in a written document being produced by the surveyor and given to the client.

There is no special statute of limitations for damages to unimproved property. Rather, Chapter 3 (commencing with Section 335) of Title 2 of Part 2 of the Code of Civil

Procedure[1] sets forth different statutes of limitation that may apply depending on the theory of recovery.

In this regard, Sections 335, 337, 338, and 339 provide, in pertinent part, as follows:

"335. The periods prescribed for the commencement of actions other than for the recovery of real property, are as follows:"

"337. Within four years: 1. An action upon any contract, obligation or liability founded upon an instrument in writing... .

* * *"

"338. Within three years:

* * *

"(b) An action for trespass upon or injury to real property.

* * *"

"339. Within two years: 1. An action upon a contract, obligation or liability not founded upon an instrument of writing ... .

* * *"

Thus, a cause of action based upon a written contract, such as a breach of contract, must be brought within four years (para. (1), Sec. 337). The claim accrues when the plaintiff discovers, or could have discovered through reasonable diligence, the injury and its cause (*Angeles Chem. Co. v. Spencer & Jones* (1996) 44 Cal.App.4th 112, 119). A cause of action based upon an oral contract must be brought within two years of the discovery of the loss or damage (Sec. 339). A cause of action to recover damages for injury to real property, for example, by negligence, must be brought within three years (subd. (b), Sec. 338). The claim commences to run when the plaintiff knows, or should have known, of the wrongful conduct at issue (*Angeles Chem. Co. v. Spencer & Jones*, supra, at p. 119).

In addition, statutes of repose set outside limits to liability for services performed in connection with the construction of an improvement to real property.

In this regard, Sections 337.1 and 337.15 provide, in pertinent part, as follows:

"337.1. (a) Except as otherwise provided in this section, no action shall be brought to recover damages from any person performing or furnishing the design, specifications, surveying, planning, supervision or observation of construction or construction of an improvement to real property more than four years after the substantial completion of such improvement for any of the following:

---

[1] All further section references are to the Code of Civil Procedure, unless otherwise specified.

"(1) Any patent deficiency in the design, specifications, surveying, planning, supervision or observation of construction or construction of an improvement to, or survey of, real property;

"(2) Injury to property, real or personal, arising out of any such patent deficiency; or

"(3) Injury to the person or for wrongful death arising out of any such patent deficiency.

"(b) If, by reason of such patent deficiency, an injury to property or the person or an injury causing wrongful death occurs during the fourth year after such substantial completion, an action in tort to recover damages for such an injury or wrongful death may be brought within one year after the date on which such injury occurred, irrespective of the date of death, but in no event may such an action be brought more than five years after the substantial completion of construction of such improvement.

"(c) Nothing in this section shall be construed as extending the period prescribed by the laws of this state for the bringing of any action.

"(d) The limitation prescribed by this section shall not be asserted by way of defense by any person in actual possession or the control, as owner, tenant or otherwise, of such an improvement at the time any deficiency in such an improvement constitutes the proximate cause of the injury or death for which it is proposed to bring an action.

"(e) As used in this section, 'patent deficiency' means a deficiency which is apparent by reasonable inspection.

"(f) Subdivisions (a) and (b) shall not apply to any owner-occupied single-unit residence." (Emphasis added.)

"337.15. (a) No action may be brought to recover damages from any person, or the surety of a person, who develops real property or performs or furnishes the design, specifications, surveying, planning, supervision, testing, or observation of construction or construction of an improvement to real property more than 10 years after the substantial completion of the development or improvement for any of the following:

"(1) Any latent deficiency in the design, specification, surveying, planning, supervision, or observation of construction or construction of an improvement to, or survey of, real property.

"(2) Injury to property, real or personal, arising out of any such latent deficiency.

"(b) As used in this section, 'latent deficiency' means a deficiency which is not apparent by reasonable inspection.

"(c) As used in this section, 'action' includes an action for indemnity brought against a person arising out of that person's performance or furnishing of services or materials referred to in this section, except that a cross-complaint for

indemnity may be filed pursuant to subdivision (b) of Section 428.10 in an action which has been brought within the time period set forth in subdivision (a) of this section.

"(d) Nothing in this section shall be construed as extending the period prescribed by the laws of this state for bringing any action.

"(e) The limitation prescribed by this section shall not be asserted by way of defense by any person in actual possession or the control, as owner, tenant or otherwise, of such an improvement, at the time any deficiency in the improvement constitutes the proximate cause for which it is proposed to bring an action.

"(f) This section shall not apply to actions based on willful misconduct or fraudulent concealment.

"(g) The 10-year period specified in subdivision (a) shall commence upon substantial completion of the improvement, but not later than the date of one of the following, whichever first occurs:

"(1) The date of final inspection by the applicable public agency.

"(2) The date of recordation of a valid notice of completion.

"(3) The date of use or occupation of the improvement.

"(4) One year after termination or cessation of work on the improvement.

"The date of substantial completion shall relate specifically to the performance or furnishing design, specifications, surveying, planning, supervision, testing, observation of construction or construction services by each profession or trade rendering services to the improvement." (Emphasis added.)

Thus, a cause of action to recover for damages to real property caused by a patent defect in the construction of an improvement to the property must be brought within four years after the substantial completion of the improvement (subd. (a), Sec. 337.1).[2] Similarly, a cause of action to recover for damages to real property caused by a latent defect in the construction of an improvement to the property must be brought within 10 years after the substantial completion of the improvement (subd. (a), Sec. 337.15).[3]

---

[2] This limitation, however, may not be asserted as a defense by any person in actual possession or control, as owner, tenant, or otherwise, of the improvement at the time a deficiency in the improvement causes injury or death, and does not apply to any owner-occupied single-unit residence (subds. (d) and (f), Sec. 337.1). The limitation may be extended to five years when the injury or wrongful death occurs during the fourth year after substantial completion (subd. (b), Sec. 337.1).

[3] This limitation, however, may not be asserted as a defense by any person in actual possession or control, as owner, tenant, or otherwise, of the improvement at the time a deficiency in the improvement causes injury or death, and does not apply to actions based on willful misconduct or fraudulent concealment (subds. (e) and (f), Sec. 337.15). A cross-complaint for indemnity may (continued...)

The statutes of limitation and the statutes of repose are not mutually exclusive, and must both be considered in determining the viability of a claim. With regard to a claim based on a latent defect, the California Supreme Court has stated as follows:

> "[A] suit to recover for a construction defect generally is subject to limitations periods of three or four years, depending on whether the theory is breach of warranty (§ 337, subd. 1 [four years: 'action upon any contract, obligation or liability founded upon an instrument in writing']) or tortious injury to property (§ 338, subds. (b), (c) ... [three years: trespass or injury to real or personal property]). However, these periods begin to run only when the defect would be discoverable by reasonable inspection. (*Regents, supra,* at p. 630.) On the other hand, 'section 337.15 ... imposed an absolute requirement that a suit ... to recover damages for a [latent] construction defect be brought within 10 years of the date of substantial completion of construction, regardless of the date of discovery of the defect.' (*Regents, supra,* at p. 631, fn. omitted.) 'The interplay between these statutes sets up a two-step process: (1) actions for a latent defect must be filed within three years ... or four years ... of discovery, but (2) in any event must be filed within ten years ... of substantial completion.' (*North Coast Business Park v. Nielsen Construction Co.* (1993) 17 Cal.App.4th 22, 27.)" (*Lantzy v. Centex Homes* (2003) 31 Cal.4th 363, 369-370, citing *Regents of University of Cal. v. Hartford Acci. & Indem. Co.* (1978) 21 Cal.3d 624, 630-631; hereafter *Regents*).

Thus, it is a two-step analysis in first determining whether any applicable statutes of limitation have run, and then whether the claim has been extinguished by the running of the period of repose.[4]

The question that arises is whether the provision of land surveyor services, without any physical improvement to, or construction upon, the real property is an "improvement" for purposes of Sections 337.1 and 337.15. These statutes do not define "improvement." If something is physically constructed to completion on the property, it is likely safe to conclude that it is an improvement. However, at what point does the rendering of construction services, including land surveyor services, become an improvement for purposes of these statutes?

The term "improvement," as used in Section 337.15, has been given a very broad interpretation (*Gaggero v. County of San Diego* (2004) 124 Cal.App.4th 609, 615-618 (hereafter

---

(...continued)
be filed in an action that has been brought within the 10-year time period (subd. (c), Sec. 337.15). Also, common interest developments and residential units first sold after January 1, 2003, are subject to separate statutes affecting the applicable limitations periods for suit upon latent defects in those projects (see Sec. 895 and following, and Secs. 941 and 1375, Civ. C.).

[4] The First District Court of Appeal has held that *Regents'* two-step analysis also applies to Section 337.1 relative to patent defects (*Roger E. Smith, Inc. v. SHN Consulting Engineers & Geologists, Inc.* (2001) 89 Cal.App.4th 638).

Gaggero), in which the court held that a landfill constituted an improvement within the meaning of Section 337.15):

> "As used in *section 337.15* 'an improvement' is in the singular and refers separately to each of the individual changes or additions to real property that qualifies as an 'improvement' irrespective of whether the change or addition is grading and filling, putting in curbs and streets, laying storm drains or of other nature." (*Gaggero*, supra, at p. 616, citing *Liptak v. Diane Apartments, Inc.* (1980) 109 Cal.App.3d 762, 771.)

Thus, the term "improvement" has been construed to refer separately to each of the individual changes or additions to real property. However, some language in *Gaggero*, which involved structural damage due to subsidence at a former county landfill, makes ambiguous the extension of its holding to property that is not physically improved or constructed upon:

> "While the county's primary goal may not have been to obtain a profit from eventual sale of the landfill, in filling it, covering it and selling it, the county was engaged in making the real property suitable for further use by others. Section 337.15 and the cases which have interpreted it make it clear, in enacting the statute, the Legislature's unambiguous intention was to put a temporal limit on liability for individuals and entities engaged in these sorts of purposeful alterations to and transfers of real property." (*Gaggero*, supra, at p. 618).

Thus, the court in *Gaggero* identified physical changes to the land, "in making the real property suitable for further use by others," as part of the "purposeful alterations" that led the court to conclude that the landfill constituted an improvement within the meaning of Section 337.15.

Nonetheless, the case law makes it abundantly clear that the legislative intent in enacting Sections 337.1 and 337.15 was to limit liability exposure to a finite period of time for certain activities in association with making improvements to real property:

> "[I]t appears the Legislature enacted section *337.1* in 1967 in response to the construction industry's fear that it could face virtually unending liability due to the advent of discovery-based accrual rules for statutes of limitation. ... Thus, the purpose of section *337.1* was not to promote harmony among contractors during construction, but rather 'to prevent "uncertain liability extending indefinitely into the future."...'" (*Roger E. Smith, Inc. v. SHN Consulting Engineers & Geologists, Inc.*, supra, at pp. 646-647, citing *Regents*, supra, at p. 633, fn. 2).
>
> "Numerous opinions have noted that the purpose of section *337.15* is to shield members of the construction industry from liability of indefinite duration for property damage caused by their work." (*Industrial Risk Insurers v. Rust Engineering Co.* (1991) 232 Cal.App.3d 1038, 1043).
>
> "Section 337.15 clearly and unambiguously expresses a legislative intent to put a 10-year limit on latent deficiency liability exposure for 'any person' performing certain activities in making improvements to real property. Among

> the activities covered by the statute are performing or furnishing the design or specifications of the improvement." (*Gaggero*, supra, at p. 617, citing *Magnuson-Hoyt v. County of Contra Costa* (1991) 228 Cal.App.3d 139, 143-144.)

Because surveyor services are expressly included among the construction services subject to Sections 337.1 and 337.15 (subd. (a), Sec. 337.1 and subd. (a), Sec. 337.15), it follows that those services are among those for which the Legislature intended to limit liability exposure to a finite period of time in enacting those statutes.

Moreover, while the statutes of limitation commence to run based on the discovery of the loss or injury, as described above, the statutes of repose commence to run upon "the substantial completion of the improvement" (Ibid.). Substantial completion has been construed, for purposes of Section 337.15, to commence as to each profession on the date its services to the improvement are substantially complete:

> "[T]he last sentence of Code of Civil Procedure section 337.15, subdivision (g) 'relates' the concept of substantial completion to services rendered to an improvement, and it relates this concept 'specifically' to the services rendered by 'each' profession. ... [T]he reasonably plain meaning of this sentence is that the limitations period commences as to each profession on the date its services to the improvement are substantially complete.
>
> * * *
>
> "A defendant's services with respect to an improvement may be completed well before the improvement itself is finished. If the limitations period does not commence until substantial completion of the improvement, construction industry members may be subject to liability for an indefinite time over 10 years after the substantial completion of their work. We do not believe that this was what the Legislature intended when it added subdivision (g) to the statute in 1981." (*Industrial Risk Insurers v. Rust Engineering Co.*, supra, at pp. 1042-1044)

Thus, for purposes of Section 337.15, and consistent with the legislative intent to limit liability to a finite period as described above, substantial completion commences as to each profession on the date its services to the improvement are substantially complete.

It is critical to note that no court has addressed the particular fact pattern at issue in this opinion, in which land surveyor services are performed on real property that is not otherwise physically improved or constructed upon. Significantly, as set forth above, the courts have repeatedly returned to legislative intent with each expansion of the statutes. In light of the foregoing case law, we think it would be inconsistent with the Legislature's clear intent to limit liability for construction services to a finite period, either four years or 10 years, if Sections 337.1 and 337.15 did not apply to land surveyor services as an improvement, even if there is no other physical improvement to, or construction upon, the real property. However, we must emphasize that the statutes on their face are not entirely clear, and that neither the statutes nor the case law are dispositive.

If faced with the fact pattern at issue in this opinion, we think the better construction would be to find that land surveyor services in themselves, without additional physical improvements or construction services being rendered, would constitute an "improvement" for purposes of Sections 337.1 and 337.15.

Accordingly, we conclude that a cause of action for land surveyor services that are inaccurate or not performed to the ordinary standard of care in the land surveying profession, if the subject property is not otherwise physically improved or constructed upon, is subject to the two, three, and four year statutes of limitation described above, depending on the theory of recovery, but in any event, must be filed within four or 10 years of substantial completion of the services under the statutes of repose. Also, the maximum period of time for which a land surveyor may be held liable for land surveyor services that are inaccurate or not performed to the ordinary standard of care in the land surveying profession, if the subject property is not otherwise physically improved or constructed upon, is 4 or 10 years from the substantial completion of the services.

Very truly yours,

Diane F. Boyer-Vine
Legislative Counsel

Sheila R. Mohan

By
Sheila R. Mohan
Deputy Legislative Counsel

SRM:ckt

STATE OF CALIFORNIA
GRAY DAVIS, *GOVERNOR*

DEPARTMENT OF INDUSTRIAL RELATIONS
OFFICE OF THE DIRECTOR
455 Golden Gate Avenue, Tenth Floor
San Francisco, CA 94102
(415) 703-5050

July 19, 2002

Stephen C. Tedesco, Esq.
Littler Mendelson
650 California Street, 20th Floor
San Francisco, CA 94108

Re: Public Works Case No. 2002-002
Survey Work
Construction of Veritas Elementary School
Manteca Unified School District

Dear Mr. Tedesco:

This constitutes the determination of the Director of Industrial Relations regarding coverage of the above-referenced work under California's prevailing wage laws and is made pursuant to Title 8, California Code of Regulations ("CCR"), section 16001(a). Based on my review of the facts of this case and an analysis of the applicable law, it is my determination that the survey work for the Manteca Unified School District ("District") in preparation for the construction of a school is a public work subject to the payment of prevailing wages.

In October 2000, the District entered into a Real Property Purchase and Development Agreement ("Agreement") with Atherton Woodward Partners, LLC ("Developer") under which the District agreed to purchase a portion of a parcel of property owned by Developer. The Agreement provides that, as a precondition of the sale, the District would obtain approval from the California Department of Education ("CDE") for the acquisition of the property on which to construct Veritas Elementary School, a public school. The District would also obtain an environmental site assessment of the property to obtain Department of Toxic Substances Control ("DTSC") approval. As of January 1, 2000, both the CDE and DTSC approvals are necessary to obtain state funding for school construction. Both CDE and DTSC require the land be surveyed as part of the environmental site assessment. If there are no environmental impediments on the surveyed property, CDE can approve the project more quickly. The Agreement further provides that, should the District discover an environmental condition on the property that would prevent its use as a school, Developer agrees to remove the condition or terminate the agreement at Developer's option.

The District contracted[1] with MCR Engineering ("MCR") to conduct two surveys of the proposed school site. One was a boundary survey, which outlined the particular borders of the property and produced a boundary map. The boundary survey was for the District to determine whether to purchase the property and to determine whether the parcel is what it has been represented to be by Developer. The other survey performed by MCR was a topographical survey, which determines what the property physically looks like. The topographical survey results in a report or topographical map that reveals any particular impediments on the land. Licensed surveyors perform both surveys. After the surveys, the District and Atherton changed the description of the property the District would buy to move one border 170 feet to the west. The boundary survey map, dated December 7, 2001, became the basis for the description of the property the District would buy. The District took title to the property in February 2002, using state money.

What is now Labor Code[2] section 1720(a)(1) (as amended by statutes of 2001, chapter 938, section 2) defines "Public Work" as:

> Construction, alteration, demolition, installation, or repair work done under contract and paid for in whole or in part out of public funds ... . For purposes of this paragraph, "construction" includes work performed during the design and pre-construction phases of construction including, but not limited to, inspection and land surveying work.

Title 8, CCR, section 16001(c) provides "Field survey work traditionally covered by collective bargaining agreements is subject to prevailing wage rates when it is integral to the specific public works project in the design, pre-construction or construction phase." In this case, the survey work performed by MCR is traditionally covered by a master collective bargaining agreement between Operating Engineers Local Union No. 3 and Bay

---

[1] MCR Engineering asserts that the purchase orders used to contract for the surveys are not "construction contracts" and presumably therefore not a public work under what is now Labor Code section 1720(a)(1). However, that section requires, among other elements, only a "contract" for the existence of a public work, and purchase orders are contracts. As is discussed, infra, it is the work that must fall within an enumerated definition.

[2] Unless otherwise indicated, all subsequent statutory references are to the Labor Code.

Counties Civil Engineers and Land Surveyors Association, Inc. See also, *Winzler v. Kelly* (1981) 121 Cal.App.3d 120.

While acknowledging that section 1720(a)(1) defines construction to include land surveying work performed during the design and pre-construction phases of construction, MCR argues that the boundary and topographical surveying work it performed for District is not construction because the end product is simply the creation of a property map, at which point MRC's work is done. MCR further reasons that its surveying work was not performed during the design and pre-construction phases of construction because no specific construction plans were made at the time the map was completed. Finally, MCR argues that the surveying work was not integral to a specific public works project because it was uncertain whether the District might build the school on the property.

I am not persuaded by MCR's arguments. The District contracted with MCR to perform the surveying work as part of District's carrying out of its responsibilities under the Agreement to obtain approval by CDE for the construction of the Veritas Elementary School. As a result of the surveying, the parcel's description was changed and the District purchased the property upon which the school will be built. As such, MCR's surveying took place during the pre-construction stage of the school construction and constitutes "construction" under section 1720(a)(1), for which prevailing wages must be paid.

I hope this determination satisfactorily answers your inquiry.

Sincerely,

Stephen J. Smith
Director