NSPE Position Statement: No. 1751—Statutes of Repose, Certificate of Merit, Sole Source Workers’ Compensation, and Good Samaritan Laws

Statute of Repose

It is the position of the National Society of Professional Engineers (NSPE) to support the enactment of statutes of repose for claims against professional engineers. Professional engineers face a substantial degree of liability exposure for property damage, economic damages, bodily injury, and wrongful death resulting from their alleged negligence in the design of improvements to real property that has long since been completed, and for which the engineer should not reasonably be held responsible due to reasons outside his or her realm of control. Most state legislatures have responded to this situation by adopting laws known as statutes of repose. Statutes of repose bar actions against design professionals after a certain period of time following the completion of services or the substantial completion of construction. Such statutes are based on the general legal principle that a potential defendant in a lawsuit should not be required to defend him/herself against “stale” claims that could easily be based upon faded memories, lost evidence, or witnesses who have since disappeared. For example, stale claims are a particular possibility in the construction industry, where the real property or facilities for which or to which services have been provided may last many decades, and during which time the engineer has had no control over operation and maintenance of the property or facility.

NSPE urges its state societies to seek the enactment of statutes of repose which bar actions against engineers after a certain period of time following the completion of services or the substantial completion of construction. Furthermore, NSPE urges the states to use the following model as a resource in supporting statutes of repose at the state level.

Model Statute of Repose

1. Except as otherwise provided in Section 2, no action to recover damages for injury to a person or for wrongful death or for damage to property, nor any act for contribution or indemnity for damages sustained on account of such injury or wrongful death or damage to property arising from any defect in the structure or improvement resulting from the design, planning, supervision of construction, or construction of an improvement to real property shall be brought against a professional engineer more than seven years after the completion of such improvement.

2. If by reason of such defect, an injury to the person, or an injury causing wrongful death or an injury to property occurs during the seventh year after completion, an action to recover damages for such injury or wrongful death or damage to property may be brought within one year after the date on which such injury occurred, but in no event may such action be brought more than eight years after the completion of the improvement.

3. The limitations prescribed by this section shall not be asserted by way of defense by any owner, tenant, or other person in actual possession or control of such an improvement where the improvement constitutes the proximate cause of the injury or death.

4. For purposes of this section an improvement shall be deemed to be “completed” when the construction is sufficiently complete so that an improvement may be utilized by its owners or lawful possessor for the purposes intended. In the case of a phased project with more than one substantial completion date, the seven-year period of limitations for actions involving systems designed to serve the entire project shall begin at the substantial completion of each phase.
Certificate of Merit
It is the position of the National Society of Professional Engineers (NSPE) to support the enactment of certificate of merit laws to reduce baseless claims against professional engineers. Injured parties often seek relief from any party that may be even remotely involved in alleged wrongful death, personal injury, property damage, or breach of contract. Professional engineers are often targets of these suits. Many of these malpractice and negligence claims brought against professional engineers may have no material basis or justification in fact or in law. It is further the position of NSPE to urge its state societies to seek the enactment of certificate of merit laws using the following model as a resource in supporting such legislation at the state level.

Model Certificate of Merit Statute
1. In any action for damages alleging professional malpractice by a professional engineer, the plaintiff shall be required to file with the complaint an affidavit of a third-party professional engineer competent to testify, which affidavit shall set forth specifically at least one negligent act, error, or omission claimed to exist and the factual basis for each such claim. The third-party professional engineer shall be licensed in this state and actively engaged in the practice of engineering.
2. The contemporaneous filing requirement of Section 1 shall not apply to any case in which the period of limitation will expire within 10 days of the date of filing and, because of such time constraints, the plaintiff has alleged that an affidavit of a third-party professional engineer could not be prepared. In such cases, the plaintiff shall have 45 days after the filing of the complaint to supplement the pleadings with the affidavit. The trial court may, on motion, after hearing and for good cause extend such time as it shall determine justice requires.
3. If an affidavit is filed after the filing of a complaint, as allowed under Section 2, the defendant shall not be required to file an answer to the complaint and affidavit until 30 days after the filing of such affidavit.
4. This Act shall not be construed to extend any applicable period of limitation.

Workers’ Compensation Statute
It is the position of the National Society of Professional Engineers (NSPE) to support the enactment of provisions in state workers’ compensation laws that provide professional engineers on the construction site immunity from third-party claims by injured workers, unless those professionals have specifically assumed the responsibility for safety practices or have been willfully or grossly negligent in the preparation of design plans or specifications.

Workers’ compensation laws require employers to assume the cost of an employee’s occupational disabilities without the need of the employee to prove fault or negligence on the part of the employer. In exchange, the laws prohibit employees from suing their employer for damages. Many workers’ compensation laws, however, do not prohibit an injured employee from suing a third party who may have been responsible for or contributed to the employee’s injury for compensation beyond that provided in the workers’ compensation law. On construction sites, professional engineers are a likely third-party target for such additional compensation.

Some state legislatures have recognized the need to extend the immunity provided to employers under the workers’ compensation law to professional engineers when they are one of numerous parties on a construction site. These states have amended their statutes to provide immunity to professional engineers on construction projects when they are not responsible under contract for the means, methods, techniques, sequences, and procedures of construction or for employee safety.
NSPE urges its state societies to seek the enactment of this liability immunity provision in state workers’ compensation laws. Furthermore, NSPE urges the states to use the following model as a resource in supporting such legislation at the state level.

**Model Sole Source Workers’ Compensation Statute**

Except as provided in the workers’ compensation act, no professional engineer who is retained to perform professional services on a construction project, nor any employee of a professional engineer who is assisting or representing the professional engineer in the performance of professional services on the site of the construction project, shall be liable for any injury on the construction project for which compensation is recoverable under the workers’ compensation act, unless responsibility for safety practices is specifically assumed by contract. The immunity provided by this section shall not apply to willful misconduct or gross negligence in the preparation of design plans or specifications.

**Good Samaritan Act**

It is the position of the National Society of Professional Engineers (NSPE) that professional engineers (obligated under the Code of Ethics to dedicate their service to the public health, safety, and welfare) who voluntarily assist their communities, states, and the nation in times of crisis when requested by the appropriate public official, be protected from liability exposure when performing such voluntary duties. In times of natural disasters or other catastrophic events, engineering expertise and skills are needed to provide structural, mechanical, electrical, or other engineering services and may be needed to determine the integrity of structures, buildings, piping, or other engineered systems. It is the further position of NSPE that its state societies be urged to advocate the enactment of state laws which provide immunity from liability for any personal injury, wrongful death, property damage, or other loss caused by a professional engineer’s acts, errors, or omissions in the performance of voluntary engineering services in times of crisis. Furthermore, NSPE urges the states to use the following model as a resource in supporting such legislation at the state level.

**Model Good Samaritan Act**

1. As used in this Section:
   a. “Professional Engineer” shall mean a person duly licensed under the state engineering licensure law as a professional engineer;
   b. “Public Official” means any federal, state, or locally elected official with overall executive responsibility in the jurisdiction in which the emergency or event has occurred;
   c. “Public Safety Official” means any appointed or elected federal, state, or local official with overall executive responsibility to coordinate public safety in the jurisdiction in which the emergency or event has occurred;
   d. “Law Enforcement Official” means any appointed or elected federal, state, or local official with overall executive responsibility to coordinate law enforcement in the jurisdiction in which the emergency or event has occurred;
   e. “Building Inspection Official” means any appointed or elected federal, state, or local official with overall executive responsibility to coordinate building inspection in the jurisdiction in which the emergency or event has occurred.

2. A professional engineer who voluntarily, without compensation, provides structural, electrical, mechanical, or other engineering services related to a declared national, state, or local emergency caused by a major earthquake, hurricane, tornado, fire, explosion, collapse, or other similar disaster or catastrophic event at the request of or with the approval of a national, state, or local public official, law enforcement official, public safety official, or building inspection official acting in an official capacity shall not be liable for any personal injury, wrongful death, property damage, or other loss related to the
professional engineer’s acts, errors, or omissions in the performance of any engineering services for any structure, building, piping, or other engineered system, either publicly or privately owned.

a. The immunity provided in this Section shall apply only to a voluntary engineering service(s) that occurs during the emergency or within 90 days following the end of the period for an emergency, disaster, or catastrophic event, unless extended by an executive order issued by the Governor under the Governor’s emergency executive powers.

b. Nothing in this Section shall provide immunity for wanton, willful, or intentional misconduct.

Reference: PP No. 170—Legislation to Address Professional Liability and Risk Management for Engineers