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GEOSTRATA

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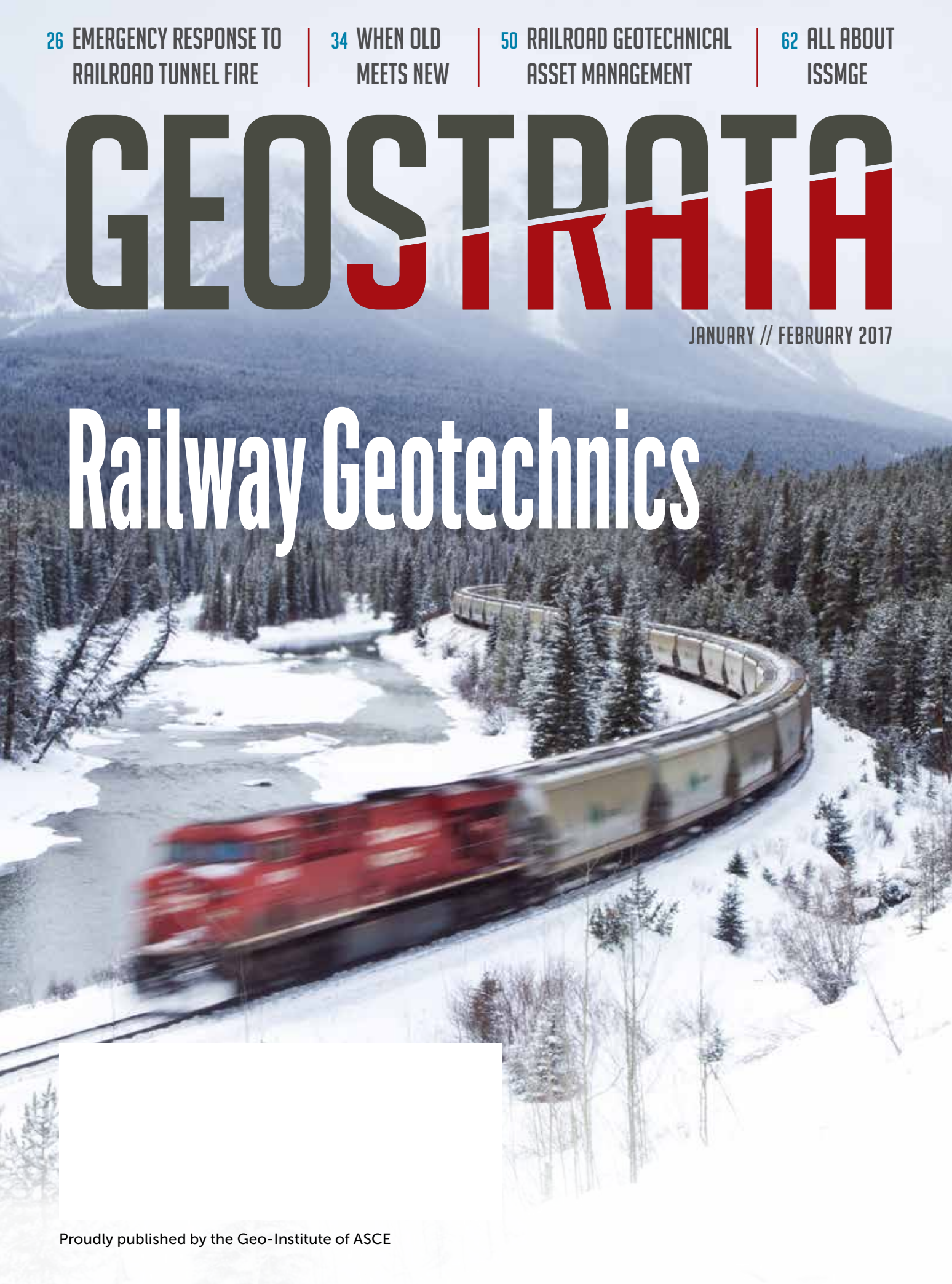

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Collections 101

By John P. Bachner

The Geoprofessional Business Association (GBA) has for years advised its members to be extremely circumspect about suing clients to obtain payment. All too often, instead of paying what they owe, slow-paying clients use the money involved to retain a lawyer and a hired-gun expert to countersue, claiming negligence. In those cases, the typical outcome is months or years of costly litigation, frustration, aggravation, lost opportunities, lost productivity, and damaged reputation. Consider the case of a GBA-Member Firm we'll call Sadder, Wiser Associates (SWA), an engineering consultancy that had taken slow-pay clients to small-claims court on 60 separate occasions, winning almost every time.

If you must accept small projects for a new client, and possibly some ongoing ones, too, do not submit your signed, final report until you are paid in full. Demand estimated full payment in advance, and/or accept credit cards, and/or send your report COD.

The project in question began when a developer retained SWA to perform a Phase I Environmental Site Assessment (ESA) of an improved property the client was planning to purchase for the construction of an office building. The property was previously used as a gasoline/service station that had installed underground tanks to store diesel fuel, gasoline, and waste oil. Reportedly, all tanks had been removed, but no documentation was available.

The developer accepted SWA's proposal and its provisions relating to limitation of liability, standard of care, dispute resolution, and billing and payment, all as recommended by GBA. Because SWA had not previously dealt with the developer, it required a retainer amounting to 50 percent of the estimated fee; the developer obliged.

SWA conducted the assessment and found that the site's historic use as a gas station and the undocumented removal of underground storage tanks presented a substantial risk. The firm recommended subsurface exploration, including sampling and analysis of soil and groundwater. Per the developer's request, SWA submitted a second proposal including general conditions that were identical to those of its initial proposal. The developer again accepted without equivocation, and the firm began phase two, discovering oil globules in the purge water of one of its observation wells. Analysis revealed the presence of hydrocarbons at levels slightly exceeding the "reportable concentration" under state law. SWA recommended that the developer notify the property owner of its regulatory-reporting requirement, and that additional characterization be performed to assess the extent of the contamination and the need for remediation.

Concerned by the firm's findings, the property owner asked the developer to conduct more sampling. The developer declined, suggesting, instead, that the owner retain SWA. SWA was concerned about such an arrangement, and agreed to accept it only after the developer and owner both acknowledged and accepted the conflict-of-interest risk in writing. SWA thereupon presented to the owner a sample-and-analysis proposal with general conditions that matched those that the developer had twice accepted. Although the owner also was a first-time client, SWA waived its 50 percent-retainer requirement because of timing issues and because of the commission's small scope and fee (about $1,200). SWA completed its services quickly: Its findings affirmed the presence of contamination, and, because of the above-threshold level previously encountered, the owner was required to report the situation to the regulatory agency.

Once it completed the project, SWA submitted its $1,200 invoice, but payment was not forthcoming. SWA issued a second invoice 30 days later, and a third in 30 days more, all ignored. Then SWA's CEO got involved, placing calls to the owner's CEO: These, too, were ignored. Finally, after almost six months passed, the owner's CEO wrote to SWA's CEO, promising to pay the bill if SWA would furnish a copy of the report SWA had prepared for the developer. The developer gave SWA permission to share the report, and it

did. But the owner still refused to pay. Instead, it retained another consultancy, with no licensed professionals on staff, to review what SWA had done and resample the observation well. After completing its resampling, the new consultant "averaged" the various test results and concluded the condition did not have to be reported, despite unambiguous, written regulatory-agency guidance to the contrary.

SWA sent a letter to the owner, documenting regulatory-reporting requirements, and the firm continued to submit monthly payment reminders. The client ignored the reminders and the additional telephone calls as well. A visit to the owner's office also proved fruitless, as did SWA's calls for mediation, a procedure SWA's general conditions required before court action could occur.

Finally, after more than a year had passed, SWA decided to take the matter to small-claims court. Three days before the court date, the owner countersued for $20,000, alleging that SWA had contaminated its property when diesel fuel leaked from its drilling rig. The two cases were consolidated in district court, and SWA retained counsel. The attorney estimated that legal fees and expenses would not exceed $5,000; he was confident that SWA would prevail.

Discovery for both sides began when lawyers started reviewing files and interviewing participants, initiating the financial "blood-letting." SWA also had to cover the time staff members spent collecting and copying files and discussing the case with the firm's lawyers.

The property owner's CEO's deposition responses were startling. He readily acknowledged that the claim about the drilling rig's leaking fuel tank was a fabrication. And the owner's expert acknowledged that he had no evidence to show that SWA had at any time acted negligently. Given these revelations, SWA's attorney moved for summary judgment. But the judge denied the motion, saying he "needed to know more about the case." As a consequence, the lawsuits plodded forward, with preparation of documentation, interrogatories, production of expert witnesses, depositions, motions, negotiations, and conferences. At that point, the owner retained a new attorney and made additional "fact allegations" that were not in the original complaint. SWA had no choice but to authorize its lawyer to perform the additional research needed to support an "abuse-of-process" claim.

Wearying of the process, the owner at this point offered to settle if SWA paid it $4,000. SWA rejected the offer, and both sides appeared before a pretrial-conference judge. The judge indicated that he probably would bar the owner's expert and might even accept the abuse-of-process claim.

Immediately thereafter, the owner offered to settle if SWA paid it $2,000. Buoyed by its attorney's belief that it would "do really well" with the abuse-of-process claim, SWA offered to settle for the original fee of $1,200, plus attorney and expert fees totaling $51,000. The owner countered, offering $2,000 to SWA. SWA rejected that offer, too, and — believing it could recover its legal fees — decided to go to trial. That's when SWA's attorney noted that doing "really well with the abuse-of-process claim" meant the owner could be required to pay no more than one-third of SWA's legal costs. Learning that, SWA offered to settle for $25,000. The owner responded with a check for $16,000; SWA took it.

All told, SWA invested close to $100,000 in out-of-pocket expenses and the value of staff time. The client's settlement of $16,000 took the net cost down to $84,000, an amount that exceeded all the money SWA collected on all the prior nonpayment claims, not including the damage done to staff morale, the value of billable time lost, and opportunity cost.

The moral of this story: If you must accept small projects for a new client, and possibly some ongoing ones, too, do not submit your signed, final report until you are paid in full. Demand estimated full payment in advance, and/or accept credit cards, and/or send your report COD. But above all, don't sue!

JOHN P. BACHNER has been an independent consultant since 1971, when he founded his firm, Bachner Communications, Inc. Through the firm's association/foundation-management division, John served as the Geoprofessional Business Association's (GBA's) executive vice president from 1973 through 2015. GBA is a not-for-profit association that develops programs, services, and materials to help GBA-Member Firms and their clients confront risk and optimize performance. GBA-Member Firms provide geotechnical, geologic, environmental, construction-materials engineering and testing (CoMET), and related professional services (*en.wikipedia.org/wiki/Geoprofessions*). GBA invites geoprofessional constructors, educators, and government officials to become involved. Contact GBA at *info@geoprofessional.org*.