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The Truth about PLI

By John P. Bachner

I'm amazed by how much geoprofessionals do *not* know about the professional-liability insurance (PLI) they pay so dearly for. I've prepared this article to help fill in some blanks.

1. You Need PLI

The nature of what you do makes you particularly liable to negligence-liability claims. Unlike other members of the design team, you deal with natural conditions that are hidden by earth, rock, water, and time. It's your job to assess these conditions based on relatively few samples that may or may not be representative of what lies below, and then develop "confirmation-dependent" recommendations. "Confirmation-dependent" is the term to use, I believe, because it highlights a key aspect of the "observational method" developed by Terzaghi and Peck; i.e., you cannot assess your recommendations' appropriateness until you are on-site to confirm that the subsurface conditions revealed by earthwork are the same conditions you inferred to exist from your samples, experience, and judgment. If actual conditions differ from those on which you based your confirmation-dependent recommendations – i.e., if actual conditions failed to confirm the presence of the conditions you inferred – you'd modify the confirmation-dependent recommendations to develop your final recommendations.

All too often, in an unwise effort to save a few dollars, clients retain a replacement geoprofessional to perform on-site observation, significantly aggravating the risk of something going wrong. When it does, the geoprofessionals are vulnerable to claims. Given that failing to respond to claims is an admission of fault, geoprofessionals need to defend every claim against them, and that can be costly. Without insurance, geoprofessionals would have to pay the costs on their own, usually via the geoprofessional firms for which they act as agents. In some cases, however, geoprofessionals might have to pay personally, because geoprofessionals – as most other professionals – are personally

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liable for what they do. Unless you're willing to gamble with your life savings, PLI is a necessity. It's necessary, too, for marketing purposes, given most clients' insistence on adequate coverage. Do note, however, that having PLI does not eliminate the possibility of having to pay personally, when the amount of the award exceeds a PLI policy's limit.

2. You Owe a Duty of Care to Any Party That Could Foreseeably Be Damaged or Injured by Your Negligence

As a geoprofessional, you owe a duty of care to every party that could foreseeably be injured or damaged by your negligence. If you perform services for single-family housing or condominium developers, foreseeability applies to everyone who buys a home and, in some cases, to the second and third owners, too. Many homeowners expect perfection and are quick to sue, frequently as part of a development-based class action. Often their lawsuits are successful because courts commonly side with homeowners and look for almost any theory of law to do so. Recognizing this, many geoprofessionals seek a quick settlement, because the cost of settling is less than the cost of proving they shouldn't have been sued to begin with. All of which explains why geoprofessionals who serve single-family housing or condominium developers tend to pay more for their PLI than others do.

3.PLI Has Holes

PLI has holes because it's a safety net and not a trampoline. It covers only those exposures that result from negligence or allegations of it; i.e., allegations that you failed to meet the standard of care and, as a consequence, you injured or damaged someone.

- PLI does not cover claims that fall within a policy's deductible or amounts that exceed its limit. (I know of one firm whose principals are personally on the hook for another five years because of a jury award that was about $2 million more than their policy's limits.)
- PLI does not cover claims arising from services you provided before a stipulated date.
- PLI does not cover the contractual liabilities you create should you:
  - inadvertently certify (i.e., guarantee) that a certain condition existed at a given time,
  - assume others' liabilities via an indemnity,
  - agree to "defend" a client, or
  - take on a project-safety liability

because you told a construction worker to watch out for a hazard without immediately thereafter clarifying in writing that your humanitarian concern should not be construed as a contractual modification. (Contracts typically make the constructor-in-charge responsible for "the means, methods, sequences, and operations of construction, and safety programs attendant thereto.")

4. PLI Is Not a Commodity

People who say "All PLI is the same" don't know what they're talking about. Some PLI providers care far more about their insureds than others. Some give far better service than others. Some charge more than others and, most assuredly, some charge less. And those that take the latter course are seldom altruistic. Because there usually is a three-year or longer gap between an insured's date of payment and that time when the insurer will have to pay out on that insured's behalf, the insurer has time to use the premium money. In fact, some insurers regard offering insurance as a means to gather "other people's money" or "OPM" for their own investments, some of which turn out to be huge, costly duds. Although some 50 or more PLI providers are in the market today, you can probably count the long-term providers on the fingers of one hand. Remember: The agent or broker you deal with is not the insurer.

5. Understand What "Claims-Made" Means and What You Need To Consider

All PLI is issued on a "claims-made" basis. This means that the PLI policy in force when the claim is made is the policy that covers that claim, providing that the claim is based on an alleged negligent act that occurred

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within the policy's coverage period; e.g., 2005 through now. Assuming you'll be sticking with the same PLI provider, as most geoprofessionals do, you'd be wise to consider the insurer's economic strength going forward. In fact, how strong is the insurer likely to be three or more years from now, when something you allegedly do wrong today matures into a claim? Many individuals – including public- and private-sector risk managers – are deeply concerned about that issue, and therefore require that the insurer meet certain criteria established by A.M. Best Company, the internationally recognized and relied-upon insurance-company-rating organization. Best has developed three important criteria by which to evaluate an insurance company. Two of these criteria are used on a routine basis. One of the two is the "financial-strength rating," or "FSR," which Best calls "a convenient indicator of the size of a company in terms of its most recent cross-checked submission of year-end, first-, second- or third-quarter regulatory surplus and related accounts."

Best considers "secure" those PLI providers it rates as A++ or A+ (superior), A or A- (excellent), or B++ or B+ (good). Best considers "vulnerable" any company rated B or less.

The second criterion is "financial-size category" or "FSC," which Best bases on "reported policyholders' surplus plus conditional or technical reserve funds, such as the asset valuation reserve, other investment and operating contingency funds and miscellaneous voluntary reserves reported as liabilities." Best indicates financial-size category by Roman numerals ranging from Class I (smallest) to Class XV (largest). As such, it's common to consider a company rated A++/XV "rock solid," ***but doing so is a mistake:*** The size of an insurer's balance sheet is more or less meaningless. Consider, for example, the failures of Reliance Insurance Company and the DPIC Companies, both of which had surpluses of $2 billion at various points in their histories, as part of larger insurers. As the Reliance and DPIC failures demonstrated, "The bigger they are, the harder they fall."

The most important safety factor you want to consider is not a company's size or strength today, when you buy your PLI, but rather the company's forecasted strength when a future payout is required. Forecasted financial strength is called creditworthiness; i.e., an insurer's likely ability to meet its financial obligations – including claims – three, four, or more years from now, when today's mistake (real or otherwise) matures into a claim the PLI provider has to defend. The only Best rating that reveals an insurer's creditworthiness is "Best's Capital Adequacy Ratio," or "BCAR," which Best develops based on more than 100 tests. It's not shown as a range-indicating Roman numeral or letter. Instead, just as your own personal creditworthiness, BCAR is shown as a number. The average 2013-14 BCAR score for the insurance industry as a whole was 255. How does your PLI carrier rate? GS

JOHN P. BACHNER is the executive vice president of the Geoprofessional Business Association (GBA), a not-for-profit association of firms that provide geotechnical, geologic, environmental, construction-materials engineering and testing (CoMET), and related professional services (*en.wikipedia.org/wiki/Geoprofessions*). GBA develops programs, services, and materials to help its members and their clients confront risk and optimize performance. Contact John at *john@geoprofessional.org*.