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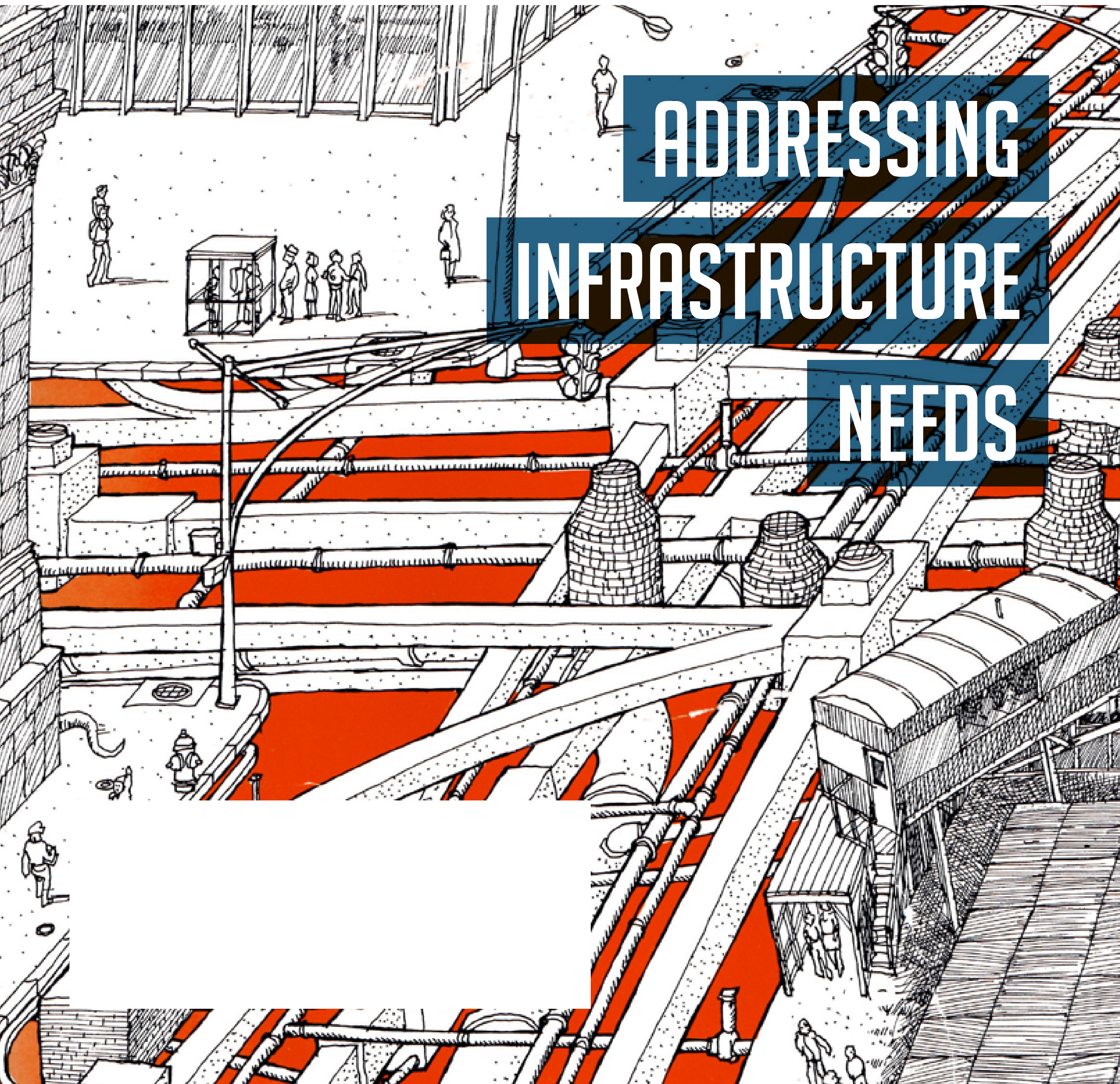


ADDRESSING INFRASTRUCTURE NEEDS

The GeoCurmudgeon

PLI, Part 2

By John P. Bachner

Three years ago (March/April 2015 *GEOSTRATA*, pp. 62-65), I wrote a "GeoCurmudgeon" column about professional-liability insurance, also known as errors and omissions insurance (even though an omission is an error), PL insurance, and PLI. I made five important points.

One: You need PLI for marketing purposes, if nothing else. Few clients will work with an uninsured firm. But also consider this: Each professional in your firm is personally liable, meaning that, if the firm does not have enough PL insurance capacity and/or capital reserves to settle a claim or fund a judgment, opposition counsel can go after individuals and whatever assets they may own. It doesn't happen often, but it *does* happen. Would you want to work for that firm?

Two: You owe a duty of care to any party that could foreseeably be damaged or injured by your negligence. Just about anyone can come after your firm by alleging that your negligence caused them a foreseeable injury, on a highway you helped design, near a retaining wall you were involved with, and on *ad infinitum*. In other words, it's not just clients, constructors, and fellow design-team members you have to worry about. And unlike businesses that can dissolve and governments that can declare sovereign immunity, geoprofessional firms cannot evade liability, if only because geoprofessionals are personally liable.

Three: PLI has holes. Your firm faces many risks that PLI does not cover, like contractual liabilities and other exclusions listed in the PLI policy. Certifying one thing or another is one of these, because certifications can be considered guarantees that can significantly expand your uninsured-liability exposure. Also usually excluded: Assumption of on-site safety responsibilities, something that can happen when a field representative says or does the wrong thing, and assumption of fiduciary responsibility, something you could unwittingly do just by calling yourself your client's representative.

Four: PLI is not a commodity. The contracts insurers use vary from company to company. How PL companies respond to claims varies, too, as do the no-cost benefits some companies provide. If you select your PLI provider based on price alone, you could be making a big mistake. Find out what your money *really* buys.

Five: Understand what "claims-made" means and what you need to consider. PLI policies are issued on a "claims-made" basis; i.e., the PLI policy in force at the time a claim is made — *not* when the claim-inducing incident occurred — is the policy that covers. Given that claims typically arise three or more years after an alleged negligent act was committed, the policy you buy today will respond almost exclusively to negligent acts you allegedly committed in the past. Will the insurer be in a position to pay; i.e., is it creditworthy? To answer that, you need to know about Best's Capital Adequacy Ratio," or "BCAR," a creditworthiness metric that A. M. Best — the world's leading insurance-rating organization — develops based on more than 100 tests.

As you no doubt are aware, PL insurance is not cheap. So, this time around, I focus on a few issues that relate to the cost of coverage and other issues you should consider before making a choice.

Get Bids: Especially if you have a good claims-against record, making your firm a desirable PLI buyer, have your agent shop around. Once you get the lowest responsible bid, let your current insurer know. Many will lower the renewal premium to keep you "in the fold." (This can aggravate some PLI buyers, who believe the company to which they have been loyal should offer its best price the first time around… but so it goes.) *Do not buy based on premium costs alone!* Before dealing with a new company, speak with other insureds to learn what their experience has been, with the agent or broker as well as the insurer. Dealing with an established company is wise. You do not want to deal with a here-one-day-and-gone-the-next outfit whose first response to a claim is trying to not cover it. You also want to know about "extras" the PL insurer is willing to give you in addition to coverage.

Consider Agentless Insurance: Typically, about 10 to 15 percent of your PLI premium goes to the agent as a commission. While some agents provide valuable services that make the commission worthwhile, just about all those services — other than wining, dining, and golf — can be had from a direct seller of PLI. In some cases, the rates are less, but the services may not be as robust. In other cases, the rates may be higher, but the companies offer high-quality services and other benefits that show up on the bottom line.

Money for Loss Prevention: You'd think that every PLI company would have an extensive array of loss-prevention resources for its insureds. Not so. When it comes to loss prevention, PL insurers' most common educational service is helping insureds understand and review contracts. Even though only a few people in the typical firm deal with contracts, PL insurers emphasize the issue because a good contract — say one with a limitation-of-liability provision — reduces the insurer's exposure. But what about issues like client relations, establishing project-intervention teams, and the like? What's the PLI industry's usual offering? Nothing at all. What about reimbursement for webinars, seminars, and programs like Fundamentals of Professional Practice? Usually nothing at all. *Ask about these matters.* Do not proceed under the false assumption that "My PL coverage is all I need." It's not; not by a long shot. At least one insurer "out there" gives even some of its smallest insureds $5,000 or more each year to invest in firm-betterment programs selected by the firm, as well as programs such as peer review, usually a once-every-five-years under-the-hood look at a firm that can easily cost $40,000 or more.

Free Legal Guidance: Wouldn't it be nice to have a direct line to your PL provider's top attorney; someone who can provide easily understood guidance about contract dos and don'ts, negotiating better deals, responding to a possible claim situation, and so on? Yes, it would be nice, but it's not often found. For the most part, you will be advised to speak with your agent. Some agents have in-depth knowledge of contract issues; many more do not. But say you could have 12 or more hours a year of access to a reliable, top-flight lawyer, not just an agent. How much would that be worth? Close to $5,000 or more.

Legal Assistance When a Claim Is Filed: The best PL insurers assign seasoned construction-claims attorneys to handle their insureds' defense, making life a lot easier for you at a time when you really need some comfort. What's the practice of the PL provider you're considering? Some seem to care more about attorneys' hourly rates than their capabilities. Ask those in a position to know; e.g., other insureds who have been through a claim or plaintiff's construction-claims attorneys who have faced a given PL insurer's selection for defense. *Important:* Some geoprofessionals have experienced major problems because they assumed, erroneously, that the great lawyer they rely on for general business or personal issues can handle construction claims well. That is seldom the case… and any attorney who indicates otherwise without the requisite construction-claims litigation experience is *not* a great lawyer.

Lower Rates for Expert-Witness Service: How much of your firm's income comes from expert-witness engagements? If it's a relatively small percentage — what many PL insurers

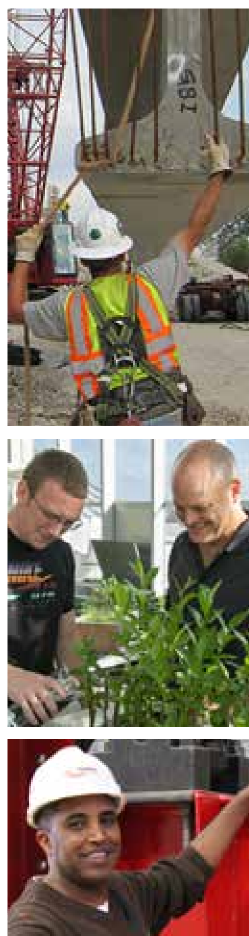
Firms that are risk-aware and experience few claims should enjoy lower rates than others. What would you have to do to become more risk-aware?

consider “normal” — it would not have any real impact on rates. That can change when the percentage is high, because those who serve as experts are just about bulletproof from a professional-liability viewpoint; I’ve never heard of an expert being successfully sued for rendering a professional opinion. Given that expert-witness service imposes just about no risk on a PL insurer, those who derive a significant portion of their income from forensic/expert services should pay a percent-of-gross rate that is markedly less than the rate paid by those firms that derive almost all their income from engagements that create far more risk.

Lower Rates for Excellent Performance: Firms that are risk-aware and experience few claims should enjoy lower rates than others. What would you have to do to become more risk-aware? By how much would your cost of coverage decline if you could do it? Your insurer should be able to provide that information or at least fund or help fund activities — like peer review — that can help you identify your risk-related strengths and weaknesses.

Lower Rates for Better Clients and Projects: Some client types are generally regarded as high risk; e.g., developers of single-family homes, be they detached, attached, or condominium. If you can derive a level of income and profitability that makes the (typically) higher PLI rates and more-frequent claims worthwhile, so be it. But how much could you save by attracting less risk-prone clients and projects?

Establish Your Own Little PL Insurance Company: In most cases I’m aware of, your PLI-policy deductible has a significant influence on your premium; the lower your deductible, the higher your bill. But what if you could increase your deductible almost without risk? Suppose, for example, that your deductible is $50,000. Were that the case, you’d possibly want to consider obtaining a



universal life-insurance policy, which is principally an investment instrument that builds cash value much faster than conventional whole life. How much coverage should you obtain? Well, assuming you'd want to double your deductible to $100,000, you'd obtain enough coverage to build a $50,000 cash value fairly quickly; say in three to five years, if not even faster. While universal coverage is pricier than whole-life, you might be able to offset some of the premium cost with the money you'd save on your PL-insurance bill. Should a claim arise, you would pay for your additional $50,000 of self-insurance not by cashing in the universal policy, but rather by borrowing against its cash value. You can pay the loan back over time at a modest interest rate — often around 2 percent — paid to and set by the insurer. In some cases, however, you can have the insurer charge a higher interest rate; e.g., 10 percent instead of 2 percent. Why? Because, it's your or your firm's money to begin with. As such, if you're able to charge, say, 10 percent, you might be able to deduct 100 percent of the interest as an expense, but 80 percent of that interest would go into your universal-life account, where it would grow on a tax-deferred basis. And if you have no claims you need to borrow to cover, you could derive an excellent bonus when you're set to retire.

Bottom line: There's a lot more to PLI than meets the eye. If you haven't previously been informed about some of the concepts I've touched on here, why not? More important: What can you do about it? GS

JOHN PHILIP BACHNER has been an independent consultant since 1971. Through his firm's (Bachner Communications') association-/foundation-management division, he 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 its 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*.