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DETECTION, REMEDIES, AND LEGAL CONSEQUENCES



Learn to Confront Risk – It's the Professional Thing to Do

By John P. Bachner



After my previous column appeared ("Practice Management: Don't Learn the Hard Way," September/October 2014), geoprofessionals from several firms expressed concern that professional-liability insurance (PLI) seemed to be the only risk-management tool their firms used. "We don't seem to be doing anything to prevent claims," they said. "Where does that leave us?" Good question.

To my mind, risk management is far different from risk confrontation, the latter being what the Geoprofessional Business Association (GBA) preaches. PLI is a risk-management/risk-transfer tool: If a claim comes in, call the insurance agent. That's not confronting risk; i.e., identifying any given project's risks and taking appropriate steps to dominate them.

I've written before about the inherent weaknesses of PLI, including the fact that probably half or more of the claims that come in are below the deductible. When they do, the policy's owner could be on the hook for the whole tab; i.e., all the out-of-pocket expenses plus the other expenses PLI doesn't cover in the best of

circumstances; e.g., the value of lost productivity, lost projects, diminished reputation, and - commonly - a lost client (and potential client for life), because it's usually the client that sues. Making matters worse, geoprofessionals are personally liable for what they do, no matter what happens to their firms. Does that mean if a claim is big enough - something that exceeds the PLI policy's limits and the firm's ability to raise sufficient cash - geoprofessionals could wind up losing their homes, their investments, and a portion of their salaries for ten years or more? Not to be too scary, but the answer to that question is, "Yes. That's exactly what it means." Does that kind of outcome occur often? No. Has it ever occurred? Yes, and it could again. Which means that, unless you exit denial and stop believing PLI is all you need, you (and your staff, of course) likely will be in for a particularly rude awakening.

You need knowledge to confront risk. You need to know how to assess project risks and what your firm needs to do to dominate them. You can gain this knowledge through reading, listening, discussion, and observation. Experience is a good teacher, too, but preferably, it's the experience of others, rendered through instruments like GBA's highly praised case histories.

Are you one of those who believes you have little to worry about because you only accept small, relatively simple projects? Bad news: As GBA case histories show unequivocally, the smaller and simpler the project, the greater the risk. Make that a residential-ownership project and the risk increases exponentially: Homeowners expect perfection from the home (detached or otherwise) in which they have invested their future, making them quick to sue when they receive something less than perfection. They also make for sympathetic plaintiffs in the eyes of judges and jurors, most of whom are homeowners themselves. "But I get around all of that," some geoprofessionals have told me confidently, citing two principal reasons. Reason one: "We don't work for homeowners.

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We only work for well-heeled developers we've worked for before." Unfortunately, misinformation like that only serves to make the risk more powerful.

No matter whom they contract with, professionals - licensed or not - owe a duty of care to every party that could foreseeably be injured or damaged by their negligent acts, a requirement that all too often leads to a search for anything that could be used to support an allegation of professional negligence. And that search can become a scramble when project professionals are the only parties available to sue, after other project participants (e.g., constructors and developers) have evaded liability through corporate (usually LLC) dissolution or sovereign immunity. Remember: Project professionals remain personally liable no matter what happens to their firms.

Reason two: "When I work with homeowners, I require them to sign a contract through which they waive my liability." Again, risk-empowering misinformation.

Professionals *cannot* have their liability waived; it's against public policy. As such, if another party has agreed to waive your liability, your liability has actually become *unlimited*. And as for a limitation-of-liability (LOL) provision, courts are loath to enforce them against homeowners, arguing that professionals use disparate bargaining power to coerce homeowners into giving up their rights.

Another concern about small projects - residential or otherwise - is competence. When the budget is borderline, the owner commonly focuses on keeping first costs as low as possible. This almost always results in skimpy scopes of service and reliance on second-tier professionals to develop them. High quality? Fuhgeddaboudit! The likelihood of that kind of project having problems? High, because the various quality-related issues go ignored; e.g., project kick-off meeting, start-tofinish geoprofessional involvement on the design team, and comprehensive construction observation. When claims erupt, they quickly expand to entrap all members of the project team. Which brings me to yet another teaching point: Project-team balance.

If your firm is large and other project-team firms are small – a somewhat frequent situation – your firm has the deep pockets and most significant risk. Consider GBA *Case History 100*, which



chronicles what happened when a somewhat large firm took on a \$100, pile-driving criteria-development project for a sole-practitioner civil engineer engaged in the design of a riverfront hotel. Problems emerged. The pile-driving contractor - a small firm with limited resources - settled quickly. The civil engineer didn't have to; he had no PLI, nor did the architect. Which party had the most money? The geoprofessional firm, by far, creating a severe project-team imbalance that cost the firm more than \$1 million. How would you confront the imbalance risk on that project? You'd run, not walk, to the nearest exist.

Bottom line: To confront risk, realize that PLI is a last resort, a device that transfers problems to a third party. The first resort? Risk confrontation: You and your ability to identify project risks and

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know what to do about them. If you lack that ability right now, if it is not as well developed as you'd like, do the professional thing: Learn! Your future and the future of your firm may depend on it.

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