CE News "Risky Business" No. 19

Not long ago, more than 50 companies offered professional liability insurance (PLI) to civil engineers. It was a buyer's market. Insurers offered below-cost premiums to just about anyone who wanted coverage in order to generate cash flow to support high-profit ventures, like investing in the stock market. Then, when the market cratered and the economy went with it, PLI providers had to deal with a double-whammy: Losses from their investments, and soaring claim frequency and severity created by high-risk insureds that should never have been offered coverage to begin with. Today, just a handful of PLI companies are left, and most are looking to make a profit from their underwriting. As a consequence, rates are high and poorly managed firms are being told to look elsewhere for coverage.

As savvy design professionals know, even the lowest of the low are capable of obtaining PLI for a fairly reasonable sum, as long as their purpose is marketing (i.e., obtaining a certificate of coverage) rather than protection. Which should hardly be a comfort to those with "real" protection, because even the best PLI provides precious little security. Consider the following facts.

PLI is sold on a claims-made basis; i.e., the policy in place at the time a claim is made is the one that responds to the claim. Generally speaking, two or more years elapse between the time you perform a service and a claimant alleges that that service failed to meet the standard of care and, as a consequence, caused damage. What kind of PLI coverage, if any, will you have two years from now? You can't be sure.

PLI coverage usually includes a prior acts limitation; i.e., if the policy you purchased for 2004 has a five-year prior acts limitation, you would be uninsured for any claim alleging you performed negligently before 1999. Were you able to renew the policy for 2005, the 1999 date would in some cases stay in place; in other cases, it would change to 2000. In either case, it could be worse. Some of today's PLI policies offer little prior acts protection at all.

PLI companies have also been decreasing their risk by increasing their insureds' deductibles, meaning you'd have to foot more of the bill were a claim filed against you. But in the grand scheme of things, that really does not make that much difference. Higher deductibles do not affect the time spent defending a claim, to locate and organize files, interview people, educate attorneys and experts, participate in discovery, and so on, creating a loss of $50,000 or more, not including opportunity costs. Nor do higher deductibles affect the $5 million or more you lose when the plaintiff is (or was) a potential client for life.

Also bear in mind that PLI policies have aggregate limits. If you have a $500,000 policy, and experience a $500,000 claim, the cost of resolving subsequent claims filed during the same policy year could possibly have to be come from the firm's and/or its principals' pockets.

And be mindful of insurers' attitudes, which have not changed in the least over the years: They all hate to pay claims (which is understandable) and some will look for almost any reason not to. In some cases, as when one company provides your PLI and another provides your commercial general liability (CGL), you might have to sue both to get either to "do the right thing." (An insurer is in business to make money for the company's owners. As such, insureds are in the best position to encounter a positive attitude when they own the company.)

And this last note about PLI: It fails to cover the many exposures arising from contractual liabilities, such as those you could create by promising to perform according to "the highest professional standards," by agreeing to indemnify and/or defend a client or (in most states) certifying that construction met code.

Bottom line: Even under the best of circumstances, PLI is a safety net, but not one that is fail-safe. Even the best PLI cannot eliminate the frustration, anguish, and productivity loss that almost invariably accompany a claim. If your attitude is "What the heck, I'm insured," it's time for an attitude adjustment. The best protection against claims and losses is learning about the steps you can take to manage your risk…then taking them.