

## **RISKY BUSINESS No. 5**

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Several of your owner clients probably ask you to accept contract provisions that diminish their protection. Why would your clients do something foolish? Because they have received bad legal advice. They've been told that the provisions in question will enhance their protection, when, in fact, the opposite is true. One of several provisions that fall into that category would require you to make your client an additional insured on your professional liability insurance (PLI) policy. Unless your PLI provider specifically agrees to the provision beforehand, however, *you cannot fulfill the client's requirement*. If you accept the client's provision, therefore, it could be argued that your unilateral acceptance of the provision created a false sense of security that discouraged the client from taking the additional risk management measures that were warranted, thus saddling you with potential exposures for breach of contract, negligent misrepresentation, or even fraud.

Understand that PLI exists principally to protect those who are injured or damaged by an insured professional's negligent errors or omissions, by giving the insured professional the means to provide appropriate compensation. To trigger coverage, the party that has allegedly been damaged or injured must file a claim. Accordingly, from a theoretical point of view, an owner client that seeks to be an additional insured on your PLI policy wants a source of recovery in case it files a claim against itself! But for what? A PLI policy responds only when professional negligence is involved. Most clients are public or corporate entities, not design professionals, meaning they do not even do what they want coverage for.

Some clients that ask to be additional insureds may employ their own design professionals. Should you unilaterally accept their additional-PLI-insured provision, an effort might be made to have your PLI insurer respond were the client's design

professionals accused of negligence. Your insurer would refuse to respond to such a claim, however, on the ground that you were not authorized to make your client an insured. Besides, it would be noted, special project wrap-up policies may be available to cover such exposures, when your client's personnel and your own are engaged on the same project.

You and your client also need to be aware that some PLI insurers might use acceptance of the client's additional-PLI-insured provision as an excuse to extricate itself from legitimate claims. The insurer might say to its insured, "Agreeing to make the client an additional insured violated our policy, so we're not going to cover the claim unless we're forced to by the courts." That kind of response would delay a payout, and/or could encourage the insured or the claimant to accept a lesser amount in return for the insurer's agreeing to not contest the claim's legitimacy.

So, how should you respond when you are asked to make your client an additional insured on your PLI policy? Start by explaining the facts, so your client understands the real risks. Perhaps you'll hear, "We deal with a lot of other firms, and they have no problem making us additional insureds." In that case, point out that making the client an additional insured amounts to a policy modification that only the insurer can make. You could then offer an alternative additional-PLI-insured provision that might look like the following sample (always develop your own contract language with the advice of an attorney familiar with your particular needs):

**CONSULTANT shall ask CONSULTANT's professional liability insurer to make CLIENT an additional insured on CONSULTANT's professional liability insurance policy. Assuming CLIENT can be made an additional insured, CLIENT shall pay the cost thereof (if any) after being notified of such cost by CONSULTANT.**

Clients that object to paying the additional costs involved want something for nothing, possibly indicating a win/lose attitude that could cause problems should something

unexpected occur during the course of the project. When dealing with that kind of client, it's usually best to take risk management measures sooner rather than later.

Clients that are concerned more about the availability of the protection than its cost may simply be risk-averse. If a somewhat large project is involved, such clients may prefer a project PLI policy; i.e., a PLI policy that covers all or most all the design professionals on a project for a defined period, typically up to seven years. (Conventional PLI policies afford claims-made coverage only; i.e., the policy in force at the time the claim is made is the one that would protect the client. Most claims arise two or more years after design is complete and, because most PLI policies renew annually, the policy in effect at the time the contract is signed will not likely be in place when a claim is filed. Note, too, that prior claims can exhaust a policy's capacity, and/or coverage may be precluded by virtue of a policy exclusion or a prior acts provision.)

Coverage outside the limits is another possibility for risk-averse clients. It comprises an additional layer of coverage accessible only by the named client, and only if the primary layer (provided by the practice PLI policy) is insufficient to afford full protection. This kind of coverage is particularly applicable to clients for which you provide a significant amount of service during a year, for a variety of projects.

Above all, in these and similar situations, keep your wits about you. If at all possible, do not butt heads with clients or their misinformed attorneys. Be professional. If that's not what a client wants you to be, be sure you really want that client.