

Architects & Engineers Claim Scenarios



Berkley Design Professional is your partner in risk management!

If an alleged error or omission occurs, a firm could become entangled in a dispute or litigation that can be costly in terms of time, money and loss of reputation.

Our dedicated and experienced claim professionals will help the design firm manage the issues and concerns so that they can focus on their business.

With Architects & Engineers Professional Liability insurance from Berkley Design Professional your clients can rest assured that they'll be supported when they need it most!

These claim scenarios provide insight into instances where a claim may occur and the lessons learned.

Architects Claim Scenarios

The Failing Foundation

An architect designed a new church building and was also responsible for providing engineering services. There were numerous issues regarding the quality of the construction work—the foundation, in particular. The architect used its standard contract which stated that they would “ensure” contractor performance in accordance with plans and specifications. Additionally, the architect did not have a written contract with its structural engineer nor the geotech firm (which it agreed to retain as a subconsultant), only proposals. As a result, the architect was unable to engage its consultants in dispute resolution. To settle the claim, Berkley Design Professional paid \$606,000 on behalf of the policyholder and \$70,000 in legal expenses.

Lessons learned: A design professional should never “ensure” the quality of construction work. That could create an uninsurable warranty of performance of another party—the contractor. It is a best practice that prime consultants have contracts in place with subconsultants including responsibility to indemnify the prime consultant for the negligent performance of subconsultant services. The dispute resolution process and venues for subconsultant agreements should align with the prime agreement.



Defective Administration

A small architectural firm provided design and construction contract administration (CCA) services for a two-story addition to a library that was several hours from their office. The contractor was terminated by the owner after numerous construction defects were identified during construction. The owner demanded that the contractor's bonding company complete the project, but the bonding company refused. The owner then instituted arbitration against the architectural firm, contractor and bonding company for numerous construction defects. The owner alleged that the policyholder did not perform adequate CCA services including proper field observation and reporting. In addition, the policyholder improperly certified contractor payment requests for work not completed or performed incorrectly. The entire addition had to be demolished. Berkley Design Professional paid \$275,000 on behalf of the policyholder plus almost \$80,000 in legal expenses.

Lessons learned: Construction contract administration services must be performed diligently and in accordance with the professional standard of care. In this case, there may have been lack of diligence in identifying defects in construction during its field observation and negligence in over-certifying amounts due to the contractor in the monthly payment certification review process.

Auto Dealership Drama

An architect designed an auto dealership and its scope of services included civil engineering and construction contract administration (CCA). Several years later, when the owner entered into negotiations to sell the dealership, the purchaser's inspector discovered multiple construction defects – some of which caused water intrusion that were alleged to be due to design and construction errors. The policyholder's CCA services were limited, but not clearly defined in its contract with the owner. While most issues were ultimately determined to be construction defects, the lack of sufficient definition of limited CCA phase services created additional exposure to the policyholder. Berkley Design Professional paid \$175,000 on behalf of the policyholder plus \$176,000 in legal expenses.

Lessons learned: Construction contract administration services must be performed diligently in accordance with the professional standard of care. Contract language clearly defining the design professionals' duties and responsibilities is critically important. If the scope of services is modified (reduced) by mutual agreement of the architect and owner, those limitations (including excluded services) should be defined in contract with a hold harmless clause from the owner for services not performed. After the contract is signed, such changes should be documented in a design services change form authorized and agreed to in writing.



Architects Claim Scenarios

Don't Dig Yourself a Hole

An architect was hired to renovate a garage and kitchen for a private residence with workspace under the garage. The architect did not confirm site conditions and did not realize the lot sloped considerably in the area of the renovations. As a result, the contractor excavated to the depth defined in the plans. The foundation and 12-inch thick concrete walls had to be torn out so that re-excavation could occur to achieve appropriate depth for the workspace. Berkley Design Professional paid nearly \$23,000 on behalf of the policyholder to replace the walls and defense costs were \$19,000.

Lessons learned: It's essential to check the existing site conditions prior to design. If a topographic survey is necessary to understand grades, require the owner to provide a survey. Don't rely on eyeball assumptions.

Accessibility Complications

A local architect of record (AOR) worked together with an out-of-state design architect on a new university dormitory project. With construction about 50% complete, it was discovered that several bathroom types were not in full compliance with FHA accessibility regulations. The design architect had retained an accessibility consultant, and the project was compliant with ADA, but that consultant did not have sufficient expertise in the breadth of code regulations for the project and in the jurisdiction, including FHA requirements. Changes to correct the accessibility deficiencies would have delayed the opening of the project until after the beginning of the next semester. The AOR took a proactive approach. A new accessibility consultant was retained and the attorney retained on behalf of the policyholder was able to negotiate a variance acceptable to the university, municipality and state regulators which enabled the dormitory to open on time. This matter was handled as a claim-prevention matter with no out of pocket cost to the policyholder. Berkley Design professional paid \$10,900 in legal fees on behalf of the policyholder.

Lessons learned: Accessibility compliance is a complex issue particularly on multi-unit housing projects where various codes and regulations apply. Architects are advised to retain accessibility consultants with a wide range of expertise in applicable requirements. In addition,

when issues arise during construction, be proactive in developing solutions. In this scenario, the AOR did so and created several options for the university to consider that would also be acceptable to the governing authorities minimizing what could have been a very expensive claim.

Changing Code Requirements

An architect completed the design for a multi-use project which included retail, office and residential components. The project was put on hold prior to construction. Eighteen months later, the developer approached the architect and wanted to put the project out to bid. Unfortunately, in the interim, several local building codes had changed and the design documents needed to be revised at a fairly substantial cost. When the architect advised the developer of this fact, the developer pointed out that the contract stated that architect "shall comply with all applicable codes" and that the architect needed to absorb the additional costs due to this contract clause. The architect reported the matter to Berkley Design Professional where it was designated a claim as it was a demand for services for no additional fee. This action invoked the policyholder's deductible. Berkley Design Professional retained local counsel. The counsel was able to negotiate with the developer and their attorney to get partial payment for the revisions to the plans; however, the developer was not happy with the situation and future potential projects are now at risk. Berkley Design Professional paid \$150,000 for the code corrections on behalf of the policyholder and \$30,000 in defense costs.

Lessons learned: Codes and regulations can change particularly when projects are on hold for a long period of time. Design professional contract language regarding code compliance should be qualified to "codes and regulations applicable and in force at the time of performance of design services" or similar language defining a date of preparation of design and construction documents. Additional services should be justified in contract when a project is suspended and restarted requiring design or construction document modification for updated codes and regulations.





The Stake That's Out of Date

A surveyor was retained by a contractor to stake the corners of a new single-family house. The surveyor referred to a site plan and utility data that was out of date. An updated site plan, including revised building location and existing utility information, was issued by the architect and civil engineer and transmitted to the surveyor prior to construction. However, the surveyor failed to check his email for the updated documents and used an outdated prior plan for staking. The foundations were partially placed in the incorrect location requiring removal and replacement. Berkley Design Professional paid \$45,000 on behalf of the policyholder and \$20,000 in defense costs. The policyholder paid a \$10,000 deductible.

Lessons learned: Make sure that the most current design/construction document plans are used particularly prior to staking for construction sites and when there are pending design changes. Email and other correspondence should be checked for updates to plans prior to performing services.

Curb Your Deliverables

Elevation data for curb height was improperly represented in the CAD files and plotted to the hard copy construction documents for a 2,500 linear-foot-portion of a concrete curb surrounding a large bus storage parking area. The policyholder, a civil/surveyor firm, neglected to perform a check of the 2D construction document deliverables in its QA/QC process. Approximately 1,500 linear feet of curb was

placed prior to the error being discovered requiring tear out and replacement. Berkley Design Professional paid \$175,000 on behalf of the policyholder and \$30,000 in defense costs. The policyholder paid a \$25,000 deductible.

Lessons learned: Be sure to review printed 2D deliverables in the QA/QC process prior to issuing construction documents for bidding and construction. There can be errors in the process of plotting hard copy 2D deliverables from CAD and BIM files.

When Plans Go Down the Drain

Grading for a new road entering private land for a new office building abutting a state highway was determined utilizing a drone survey. The civil-surveyor neglected to field check benchmark elevations from the aerial survey with actual elevations at the interface of the property to the state highway. The new road was constructed according to civil plans which did not properly reflect actual grades of the state road. Significant rework was necessary to correct drainage problems on both the new and existing roadways. Berkley Design Professional paid \$250,000 on behalf of the policyholder and \$35,000 in defense costs. The policyholder paid a \$25,000 deductible.

Lessons learned: Confirm the accuracy of existing utilities, site setbacks and current or pending improvements to adjacent properties. When using drones or other aerial survey techniques, perform on the ground confirmation of critical spot elevations.



Engineers Claim Scenarios

Careless Contracting

A small civil/survey firm had a master agreement with a municipality to provide on-call engineering services and periodic site inspections. The firm's individual projects were handled with a purchase order, not a contract. On a road improvement project a motorcyclist was severely injured when the driver lost control and crashed within a construction area. The civil/survey firm did not document its inspections of the area under construction nor did they provide reports to the municipality. Ultimately, Berkley Design Professional paid \$200,000 on behalf of the policyholder as part of a \$3 million settlement. Additionally, \$48,000 was paid in legal expenses. The decision to settle was made to curtail litigation costs and avoid a potentially devastating jury verdict.

Lessons learned: When performing services on individual projects based on a master service agreement, the design professional should carefully define the scope of services and responsibilities it is undertaking on the specific project and exclude services not provided. Site visits and inspections performed during the construction contract administration phase should be clearly documented and placed in the project record.

You're Blocking My View

A surveyor was retained by a general contractor to perform construction staking for a new multi-family residential development adjacent to a waterway. Negotiations had occurred with adjacent property owners to adjust the rear-yard setback of the new project to preserve open space views from the adjacent properties. The project's site plans were updated by the civil engineer reflecting the agreed-upon modified setbacks. However, the policyholder utilized an earlier site plan with outdated setbacks and building location. Deep foundations were placed and the first-floor structure erected in incorrect locations. The views of adjacent property owners were compromised, requiring demolition and reconstruction of portions of the construction work. Berkley Design Professional paid \$1 million on behalf of the policyholder and more than \$100,000 in defense costs. The policyholder paid a \$50,000 deductible.

Lessons learned: When design issues of a project are fluid, make sure the most current plans are being used. Confirm in writing the version of the construction documents used for construction.

Project Payment Reviews: Quite the Site to See

A large multi-discipline engineering firm working on a design-build project was retained by a general contractor to review payment applications for certification of the project to the owner and lender. Correspondence between the contractor and policyholder indicated that those reviews were to be "desktop reviews" only without a requirement for the engineer to visit the project site. The contractor was having financial difficulties and did not pay its subcontractors in full, abandoned the project and ultimately declared bankruptcy. There were insufficient funds remaining for the owner to complete the project. The owner filed a lawsuit alleging the engineer should have visited the site prior to certifying the contractor's payment applications. Berkley Design Professional paid more than \$277,000 on behalf of the policyholder plus \$182,000 in legal expenses. The policy holder contributed/paid a \$200,000 deductible.

Lessons learned: Construction contract administration services must be performed diligently and in accordance with the professional standard of care. If the scope of services is modified by mutual agreement of the engineer and owner, a design services change form should be authorized and agreed to in writing. In this case, there was no substantial documentation nor written agreement of the "desktop review" of construction progress being acceptable. Absent a written agreed-upon design change authorization, the engineer was deemed to be negligent in not providing in-person site observation and in over-certifying amounts due the contractor in the monthly payment certification review process.



About Berkley Design Professional

Our motto is: Better By Design.® By this we mean that our policyholders are better businesses because we've designed comprehensive coverage and risk management solutions that make their practice less susceptible to loss. Berkley Design Professional is a member company of Berkley whose rated insurance company members are assigned an A+ rating by A.M. Best Company. W. R. Berkley Corporation is an insurance holding company that is among the largest commercial lines writers in the United States and operates worldwide in two segments of the property casualty insurance business: Insurance and Reinsurance & Monoline Excess.

The claim scenarios described here are offered solely to illustrate the types of situations that may result in claims. These scenarios should not be compared to an actual claim. The precise coverage afforded by any insurer is subject to the terms and conditions of the policies as issued. Products and services are provided by one or more insurance company subsidiaries of W. R. Berkley Corporation.

Information provided is for general interest and risk management purposes only and should not be construed as legal advice nor confirmation of insurance coverage. The user of the information should consult with an attorney experienced in the laws and regulations of the appropriate jurisdiction, and practice management recommendations should be carefully reviewed and adapted for the particular project requirements, firm standards and protocols established by the design professional.

Berkley Design Professional

99 Pacific Street | Suite 555E

Monterey, CA 93940

www.deltek.com/en/partners/berkleydp

©2021 Berkley Design Professional. All Rights Reserved.
BDP:21-012:PDF:8/21



berkleydp.com

© 2021 Berkley Design Professional. All Rights Reserved.

Contact Information berkleydp.com

Lawrence Moonan

Executive Vice President,
Chief Operating Officer
lmoonan@berkleydp.com
831.250.7082

Andrew Mendelson, FAIA

Senior Vice President,
Chief Risk Management Officer
amendelson@berkleydp.com
312.340.3475

Diane Mika

Vice President, Director of
Risk Management Education
dmika@berkleydp.com
831.293.6243

Cathy Santiago

Vice President,
Director of Underwriting
Operations
csantiago@berkleydp.com
831.293.6245

Monica Young

Vice President, Program
Director, BDP Express®
myoung@berkleydp.com
831.293.8945

Barbara Block

Assistant Vice President,
Senior Underwriter
bblock@berkleydp.com
813.293.8815

Janet Hafner

Assistant Vice President,
Senior Underwriter
jhafner@berkleydp.com
831.293.8814

Deborah Ferris

Assistant Vice President,
Senior Underwriter
dferris@berkleydp.com
770.910.1014

Colleen Kennedy

Assistant Vice President,
Senior Underwriter
ckennedy@berkleydp.com
215.268.9390

Wayne Brockington

Senior Underwriter
wbrockington@berkleydp.com
202.239.4629

Christopher Regan

Underwriter
cregan@berkleydp.com
212.822.3390

Jeannette Vaccarezza

Senior Risk Management
Education Specialist
jvaccarezza@berkleydp.com
831.293.6248