



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!

Learn from the claim scenarios presented here and gain valuable insights about situations that can lead to claims and the lessons learned.

Architects Claim Scenarios

The Failing Foundation

An architect designed a new community center for a nonprofit organization 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 in excess of \$600,000 on behalf of the policyholder and nearly \$100,000 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.

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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.

Window Subcontractor Shines a Light on Code Requirement Error

An architect designed a multi-story apartment building. During construction, it was discovered that 200 windows didn't meet code egress requirements. At the beginning of the construction phase, the issue was brought to the architect's attention by the contractor and window subcontractor. The architect replied that using the windows as an emergency escape was not a requirement. The architect's response was incorrect, however, because the building type was changed during the design of the project and the architect failed to revise its design to comply with the relevant code for emergency escape and rescue windows. The architect made a design error with no valid defense to the claim. This matter was settled in mediation for \$900,000. Berkley Design Professional paid \$650,000 on behalf of the policyholder and the policyholder paid \$250,000 through its deductible.



Lessons learned: Be sure to confirm code specified egress requirements during the design and construction documents phases as part of your firm's quality procedures. When a supplier or contractor raises a code compliance concern, take that input seriously, thoroughly review the code and technical implications and properly respond. Often times, suppliers know their product better than the design professional. This loss could have been avoided with proper response by the policyholder.

Seeing the Light on Undersized Window Error

An architectural firm designed multiple apartment buildings in a multi-family housing development. The architect included windows in one of the bedrooms that were insufficient to meet code requirement for light and ventilation, preventing the property owner from renting the spaces as 2-bedroom units. Windows had to be removed and replaced in two buildings that had already been constructed. Berkley Design Professional negotiated the cost to correct and paid the settlement of \$340,000 on behalf of the policyholder and \$35,000 in defense costs above the policyholder's \$10,000 deductible.

Lessons learned: Confirm code light and ventilation requirements and compliant window design for residential occupancy during the design and construction documents phases as part of your firm's quality procedures. This is basic criteria to be resolved early in the design phase. It is particularly important in apartment buildings where any error can be replicated several times over. Don't just rely on design software or junior design or technical staff to make these important decisions.



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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 allegedly 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 the 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.

Faulty Window Substitution Creates Claim

The owner of an apartment complex issued a demand letter to the policyholder (architect) and a window manufacturer for the correction of windows leaking throughout the project. The owner had directed a change in the window manufacturer from that specified by the architect. The architect's position was that the windows were properly detailed including flashing and that the window manufacturer should respond under warranty as the windows were installed by a manufacturer-approved subcontractor. The window manufacturer's technical representative determined that the installation was incorrect and needed to be remediated. At the window

manufacturer's and owner's request, the architect provided an updated flashing detail to support the corrective work. The owner did not proceed with the remediation as there were conflicting opinions on the cause of the leakage. The owner filed a complaint for \$700,000 against the architect and the window manufacturer, but in negotiation, the demand was reduced to \$500,000. The matter progressed to mediation where the owner's demand escalated to \$1.3 million in part due to the diminished value of the building. Although Berkley Design Professional's claims experts and legal counsel felt that the policyholder met the standard of care and their liability was low, the cost of litigation could have been in excess of \$250,000. The claim ultimately settled at mediation for only \$30,000. Berkley Design Professional paid \$25,000 on behalf of the policyholder plus defense and expert costs that exceeded \$100,000.

Lessons learned: Treat product and system substitutions with caution. Require the contractor or owner to be responsible for substituted products including alternative detailing and installation criteria, manufacturer quality certification and enforceable product warranties.

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.



Architects Claim Scenarios

Consultants Should Know the ABCs of ADA Accessibility

The owner of a new apartment complex filed a claim against the architect for several issues on the project: frozen and burst sprinkler pipes, Civil Rights Commission investigation and adverse ruling due to accessibility code violations regarding balcony door thresholds, other ADA violations (thermostat height, shower dimensions) and noise-generating balcony materials. While the balcony threshold was found to be code-compliant, the architect negotiated a resolution with the property owner to prepare corrective plans and pay for balcony sound and other ADA corrections. The matter settled for \$70,000—within the policyholder's deductible. Berkley Design Professional paid \$7,000 in legal fees on behalf of the policyholder.

Lessons learned: Retain an accessibility consultant with knowledge of the breadth of codes and regulations that impact the design of multi-family residential occupancies. Thoroughly review ADA/accessibility compliance issues during the design and construction documents phases and confirm compliant dimensions in the construction administration phase.

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.

Proactively Playing it Safe

An architect designed a three-story apartment building but neglected to specify safety glass for the bathroom windows as required by code (ICC). This error was caught during a final code review by the building department enabling corrective action to be taken in a timely manner limiting damages to approximately \$3,600. The architect settled directly with the owner within its deductible through an invoice write-off on another project.

Lessons learned: Understand detailed aspects of applicable code and specify products accordingly. Be proactive and engage in solutions as early as possible to minimize potential damages.





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 the contract when a project is suspended and restarted requiring design or construction document modification for updated codes and regulations.

Window Substitution Leads to a Mold and Moisture Headache

An architect was retained by an owner (developer) to design the building envelope for a new apartment building. The majority of the building was design-build, for which the policyholder was not involved. Moisture penetration issues were identified by the owner including water on window sills and mold was present in one of the apartment units. The owner ran tests on the HVAC system to determine the cause of elevated moisture and humidity levels in the apartments. The HVAC system was design-build by a local contractor without the architect’s involvement or responsibility.

During investigation of the moisture issues, the architect learned that the contractor did not install the windows the architect had specified. The owner chose a much less expensive window instead. The architect advised against the substitute window type and had documented this advice to the owner. The architect also discovered that the moisture barrier was not installed per specification. Instead, the contractor installed an air barrier that was not as effective as the barrier that the architect specified.

The claim was eventually closed due to a lack of activity over several years. Although the owner is no longer pursuing action against the policyholder, the architect had to endure almost a year with the threat of a claim and litigation.

Lessons learned: Cheap construction creates problems—avoid these projects. Be cautious in client selection to understand the quality of the project the owner/developer and contractor wish to build. Thoroughly document the project design and owner decision-making process and be clear in objecting to low-quality materials and systems. In the design services agreement, clearly identify the scope of services of the architect—what is included in the architect’s scope and what is excluded and provided by others. In this case, the architect had a well-documented project record which enabled this claim to be defended without out-of-pocket cost to the architect or Berkley Design Professional.



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.



Engineers Claim Scenarios

Proper Documentation Cuts Through the Noise

An acoustical consultant, our policyholder, received notice of complaint of highway noise at an apartment project adjacent to a freeway allegedly due to faulty window installation. In the design phase, the acoustical consultant performed a noise study as the basis of its recommendation for a window system with a high sound isolation rating, which the architect included in the design. The windows evidently did not perform per the manufacturer's specifications. The acoustical consultant provided additional acoustical measurements and analyses for diagnostics (outdoor noise intrusion into dwelling units) on an hourly basis. The owner/developer pursued a remedy from the window manufacturer. No claim was made against the acoustical consultant, nor was there any suggestion that it was at fault. The matter is closed with no costs incurred.

Lessons learned: Provide research and studies consistent with the standard of care of a specialty consultant and thoroughly document both the process and the recommendations. If problems arise, work with the project team to determine a resolution and seek additional services where appropriate. The policyholder followed these best practices, was paid for its additional services and the matter was resolved at no cost to the consultant or Berkley Design Professional.



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.



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