



## Contractor Hit with Massive Design Liability



*A consultant's major code violation leaves the contractor to face huge liability for design insufficiencies*



### What Happened?

A contractor contracted with a new client to construct a high-rise office building in Southern California. The contractor hired all of the design firms for this design-build project and was therefore at-risk for the designers' performance. The client had one stipulation: he insisted on having the contractor hire the structural engineer (SE) who had previously worked on three of the client's successful Florida projects. The contractor had no objection. After all, a good history between a client and a designer could only be a good thing, right?

The project started smoothly and design and construction proceeded on schedule. In fact, the project neared substantial completion with ample time to reach the client's specified occupancy date. The SE had a few setbacks, not having worked in California before, but came up with unique solutions to problems encountered.



### An Unpleasant Surprise

When the plans were reviewed and the project was inspected for the certificate of occupancy, the contractor received this shocking news: the high-rise did not meet earthquake code in California due to insufficient structural design. Extensive and expensive retrofitting of structural elements would be required. Meeting the occupancy date the contractor had agreed to was now out of the question.

Ultimately, the client filed a significant claim against the SE and the contractor, attempting to recover the added costs of the retrofitting and the economic loss from the delay in occupancy.



### How Insurance Responded

Because the losses were caused by a design error, the contractor's general liability policy did not respond. The SE did have professional liability (PL) insurance, but the available limits were grossly insufficient to cover the alleged losses. Fortunately, the contractor had purchased PL insurance to cover its vicarious liability, and the policy did respond to cover the remainder of the losses arising from the negligent performance of the SE. This protective PL coverage acted much like an umbrella policy in that it sat in excess of the SE's underlying professional liability limits and paid out only when the designer's PL policy was exhausted.



### Lessons Learned

Knowledge of local building codes is key to a successful project. Even though the client and the SE had a successful history, that history was from projects in another state on the other side of the country. The SE had never worked in California before and was unprepared to meet prevailing earthquake code.

When dealing with stringent codes, it's always best to get plans preliminarily reviewed before substantial completion of construction. If the SE's design had been examined at the design stage, correction of the inadequate design would have been much easier, much faster and much cheaper.

Finally, the contractor was well served by recognizing its vicarious liability for the actions of the design firms it directly contracted with through this design-build project. Purchasing Professional Liability coverage as part of its comprehensive construction insurance provided essential financial protection.



# Berkley Construction Professional



## Protection You Need

Berkley Construction Professional is a leading provider of specialized construction professional insurance and pollution coverage for construction-related industry exposures. We were

founded by a team of insurance professionals with a passion for the construction industry and deep roots in construction professional liability underwriting, risk management and claims.



## Coverage Highlights

We're a leading provider of specialized construction professional insurance and pollution coverage for all construction-related industry exposures, offering:

- Limits up to \$25 million
- First party protective indemnity coverage
- Third party professional liability coverage
- Pollution liability coverage
- Cutting edge risk management education programs that help you avoid project upsets and claims
- Experienced claims personnel dedicated to construction professional and pollution liability cases
- Insurer rated A+ (Superior) by A.M. Best Company

## About Berkley Construction Professional

Berkley Construction Professional is dedicated to serving the professional and pollution liability insurance needs of the construction industry and has the authority to quickly provide solutions that best serve clients' needs. Berkley Construction Professional is a division of Berkley Alliance Managers which is a member company of Berkley whose rated insurance company members are assigned an A+ (Superior) 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.

Information provided by Berkley Construction Professional is for general interest and risk management purposes only and should not be construed as legal advice nor a confirmation of insurance coverage. As laws regarding the use and enforceability of the information contained herein will vary depending upon jurisdiction, the user of the information should consult with an attorney experienced in the laws and regulations of the appropriate jurisdiction for the full legal implications of the information.

Practice management recommendations should be carefully reviewed and adapted for the particular project requirements, company standards and protocols established by the construction professional

Products and services described above are provided through various surplus lines insurance company subsidiaries of W. R. Berkley Corporation and offered through licensed surplus lines brokers. Not all products and services may be available in all jurisdictions, and the coverage provided by any insurer is subject to the actual terms and conditions of the policies issued. Surplus lines insurance carriers do not generally participate in state guaranty funds and insureds are therefore not protected by such funds.



## Contact Information

berkleycp.com

### Ray Bustamante

Managing Director  
rbustamante@berkleycp.com  
973.600.0926

### Ed Sheiffle

Executive Vice President  
esheiffle@berkleycp.com  
973.775.7492

### Peter Brooks

Senior Vice President  
pbrooks@berkleycp.com  
720.360.7500

### Chris McQueen

Senior Vice President  
cmcqueen@berkleycp.com  
770.910.1015

### David Pacifici

Senior Vice President  
dpacifici@berkleycp.com  
818.291.6231

### Eric Smentowski

Senior Vice President  
esmentowski@berkleycp.com  
312.705.1122

### John Witkiewicz

Senior Underwriter  
jwitkiewicz@berkleycp.com  
770.910.1016

### Sean Brown

Underwriter  
sebrown@berkleycp.com  
973.775.3368

### Annie Buelow

Underwriter  
abuelow@berkleycp.com  
312.705.1128

### Courtney Fowler

Underwriter  
cfowler@berkleycp.com  
770.910.1020

### Ashley Harrell

Underwriter  
aharrell@berkleycp.com  
312.368.3458

### Joe Rosario

Underwriter  
jrosario@berkleycp.com  
312.368.1141

### Lauren Taylor

Underwriter  
lataylor@berkleycp.com  
212.822.3396

### Rahsaan Nurullah

Executive Underwriter  
W/R/B Underwriting  
rnurullah@wrbunderwriting.com  
+44.203.943.9120

### Peter Clarke

Underwriter  
W/R/B Underwriting  
peclarke@wrbunderwriting.com  
+44.203.943.9062

## Berkley Construction Professional

412 Mt. Kemble Avenue | Suite G50  
Morristown, NJ 07960  
973.775.7492 | berkleycp.com

In California:

a division of Berkley Managers Insurance Services, LLC  
CA License #OH05115