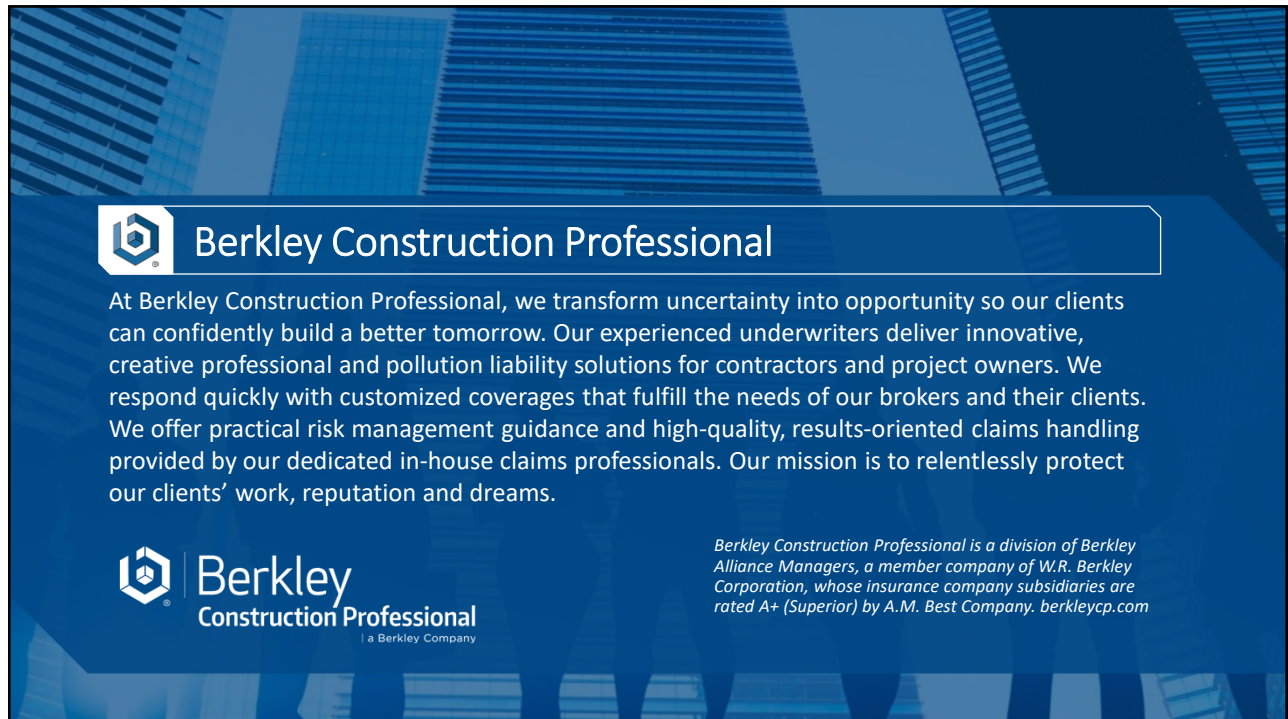




Could This Happen to You? Professional Liability Claims and Lessons Learned


 Berkley
Construction Professional
a Berkley Company

1



Berkley Construction Professional

At Berkley Construction Professional, we transform uncertainty into opportunity so our clients can confidently build a better tomorrow. Our experienced underwriters deliver innovative, creative professional and pollution liability solutions for contractors and project owners. We respond quickly with customized coverages that fulfill the needs of our brokers and their clients. We offer practical risk management guidance and high-quality, results-oriented claims handling provided by our dedicated in-house claims professionals. Our mission is to relentlessly protect our clients' work, reputation and dreams.

 Berkley
Construction Professional
a Berkley Company

Berkley Construction Professional is a division of Berkley Alliance Managers, a member company of W.R. Berkley Corporation, whose insurance company subsidiaries are rated A+ (Superior) by A.M. Best Company. berkleycp.com

2

Legal Notice

Information provided by Berkley Construction Professional is for general interest and risk management purposes only and should not be construed as legal advice nor 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, firm 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.

© 2024 Berkley Construction Professional 3

3

Facilitated by



Diane P. Mika
Senior Vice President,
Risk Management Officer


- 25+ years in loss prevention education for A/E professional liability insurance
- BS in Organizational Behavior from University of San Francisco
- Certified Instructional Designer
- Has led in-depth claims studies to understand A/E risks and has translated that into meaningful education programs



© 2024 Berkley Construction Professional 4

4

Today's Program



- Facts
- Problems
- Resolution
- Lessons Learned

Q&A

© 2024 Berkley Construction Professional 5

5



 Claim 1: Polluted by Subcontractor Failure

6

Presented by



Walter J. Adams, Jr.
Vice President, Professional
Liability Claims Manager

- 22 years of experience handling claims and is licensed to practice law in New York.
- Practiced law at a New York law firm handling professional liability, general liability and environmental coverage matters, as well as construction coverage litigation
- Earned a Juris Doctorate degree from Fordham University School of Law in New York



7

7

The Project

Construction of two nursing home facilities

Coverage Type: Pollution

Project Type: Nursing Home

Role: General Contractor

Delivery Method: Traditional – Design-Bid-Build

Construction Value: \$50 Million



8

8

The Major Players

- Insured: General Contractor
 - Fireproofing Trade Contractor (FTC)
- Owner
- Fireproofing Manufacturer



9

9

The Claim

- Mold was discovered on a fireproofing product sprayed on the buildings' surface throughout the basements
- General Contractor (our insured) notified us and initiated mold testing
- Initially believed the mold was caused by a manufacturing defect and/or improper installation
- Estimated cost to remediate was \$300K to \$400K



10

10

The Action Plan

- Fireproofing trade contractor (FTC) and manufacturer denied responsibility and refused to contribute financially
- Berkley CP authorized the insured to hire contractors and consultants to engage in the remediation
- Our plan of action was to complete and pay for the remediation and subrogate against both FTC and the manufacturer
- The insured hired contractors and consultants to engage in the remediation



11

11

Subrogation Problems: Defenses and Counterclaims

- Manufacturer and FTC continued to deny responsibility
- Mold appeared on surfaces that *had* and *had not* been treated with the fungicide (photographic evidence and witness testimony)
- FTC asserted they notified the insured's project superintendent that ventilation was required to dry and cure the product (and advised multiple times that ventilation was inadequate)
- Additionally, FTC questioned why the insured installed windows that further blocked air flow
- Manufacturer's testing showed fungicide present, and its warranty did not cover consequential damages

12

12

Factors in Settlement Negotiation and Mediation

- Contract between insured and FTC:
 - Provided the right to recover from FTC “all losses, damages, penalties and fines, whether actual or liquidated, direct or consequential, and all reasonable attorney’s fees suffered or incurred by Contractor by reason of or as a result of Subcontractor’s Default.”
 - Required FTC to carry pollution insurance
- Insured never verified coverage and, in fact, FTC did not have an insurance policy to respond
- Further, FTC was a small company with limited assets
- First mediation attempt was unsuccessful
- Settlement reached to avoid litigation

13

13

The Resolution

- Berkley CP paid \$1.2 Million for the demolition, removal, repair, and replacement of the affected walls, fireproofing, and remediation of the mold
- Legal expenses were roughly \$44K
- Manufacturer contributed \$100K
- Fireproofing trade consultant contributed \$20K
- Insured paid its SIR of \$100K



14

14

The Lessons Learned

Insurance

- General contractors should require their subcontractors to have pollution insurance
- Verification of insurance is critical
- Cannot rely on the usual certificate of insurance that is often provided as the certificate does not indicate that the insurance was bound
- Need a copy of the policy's declarations page or a letter from the subcontractor's insurance company or broker confirming coverage is in place

15

15

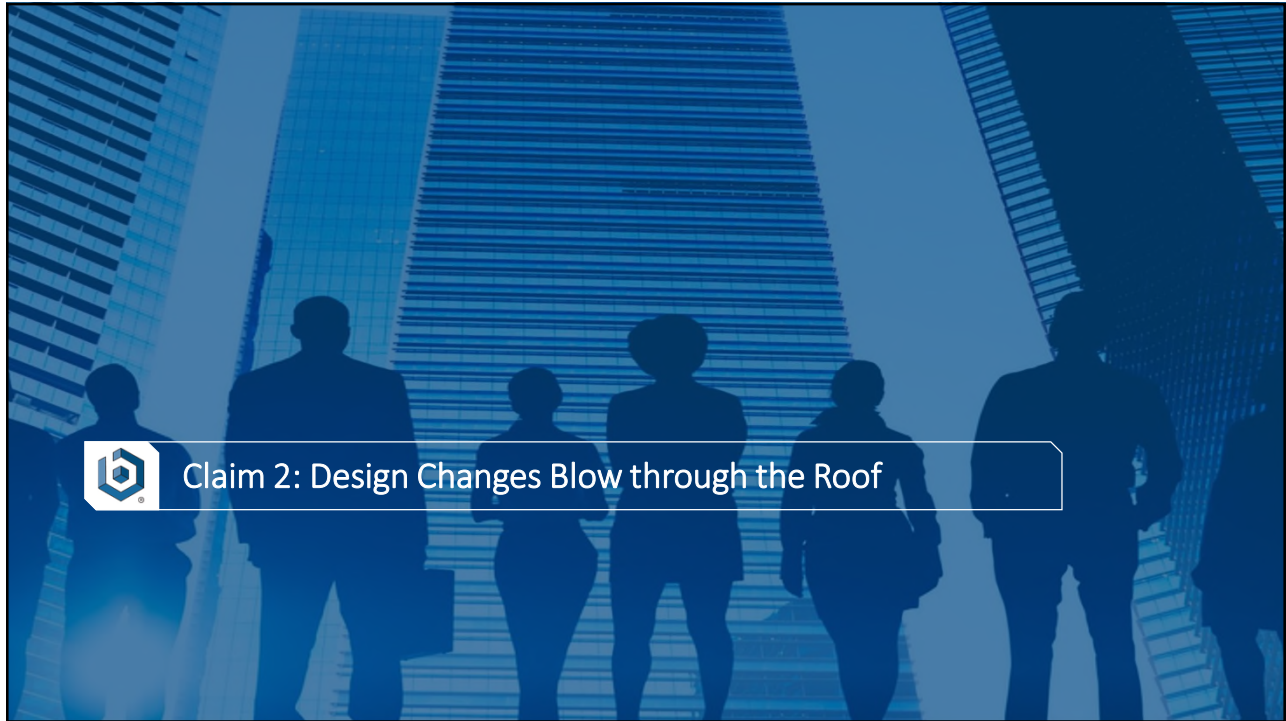
The Lessons Learned

Project Management

- Establish and adhere to QA/QC procedures
- Understand and follow manufacturer's installation guidelines
- Maintain adequate documentation

16

16



17

Presented by



Janice Greenberg
Assistant Vice President,
Senior Claims Examiner

- Attorney with more than 20 years of experience counseling and litigating on behalf of insurance companies in various jurisdictions
- Previously handled professional liability claims for design and construction professionals as well as pollution liability claims for a leading carrier
- Earned Juris Doctorate from Hofstra University School of Law, Hempstead, New York



18

18

The Project

Design of a new building to treat materials for a manufacturing process

Damage Type: Economic Loss/Cost Overruns / Delays

Project Type: Manufacturing

Role: Design-Builder

Delivery Method: Design-Build

Construction Value: \$1.5 M



19

19

The Major Players

- Insured: Design-Builder
- Roofing Subcontractor
- Owner



20

20

The Situation

- Fans/ventilation system broke in early Spring (18 months after project completion)
- Ventilation system was shut down for several days
- After repair of ventilation system, the roof ballooned causing damage to much of the roof
- Owner contacted roof warranty company to inspect the issue
- Estimated cost to repair and owner's shutdown costs was \$384K



21

21

Inspections

- Roof warranty company refused to warranty the roof due to failure to install vapor barrier
- Design-Builder (our insured) retained its own engineer to inspect the damage
- Engineer confirmed that replacement of the entire roof system was needed for proper functioning, including application of the required vapor barrier

22

22

The Action Plan

- Berkley CP authorized the insured to hire the roofing subcontractor to remediate as soon as possible to avoid:
 - Unpredictable winter weather in a few months
 - Shutdown costs for the owner while repairs are made



23

23

Key Issues with Project

- Insured had not designed this type of building before
- Owner wanted to reduce costs
- Initial purchase order included a vapor barrier (which is needed in this style of building with high temperatures/humidity)
- Selected an option without a vapor barrier



24

24

The Resolution

- Resolved through informal negotiations
- Roof repairs and shutdown costs \$285K
 - Berkley CP paid \$170K
 - CGL carrier contributed \$65K
 - Insured paid their SIR of \$50K
- Legal expenses totaled almost \$2K



25

25

The Lessons Learned

- It is crucial to have experience in the project type
- Due diligence on similar type buildings would have revealed that a vapor barrier was needed
- Have QA/QC measures in place when making any designs changes to save on costs, particularly if your company has limited experience in the project type
- Like contracts, purchase orders should be reviewed for consistency with deliverables

26

26



27

Professional Liability Claims Generally Arise out of Economic Loss

- Professional services provided pre-construction
- Cost overruns as a result of scheduling/delays
- Owner's consequential damages
 - Loss of Use, Revenue
 - Loss of Financing
 - Loss of Reputation

In addition, GL policies typically exclude pollution and mold losses



© 2024 Berkley Construction Professional 28

28

Visit our Website:

BCP is solely dedicated to serving the professional and pollution liability insurance needs of the construction industry



<https://berkleycp.com/risk-management>

BCP is at the forefront of educating and identifying potential professional liability hazards of the construction industry and providing innovative solutions to the industry

Claim Scenarios



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

At A Glance Claim Scenarios

© 2024 Berkley Construction Professional 29

29

Questions?

Diane P. Mika
Senior Vice President,
Risk Management Officer
dmika@berkleyalliance.com
831.293.6243

Walter J. Adams Jr.
Vice President,
Professional Liability Claims Manager
wadams@berkleyalliance.com
212-822-3373

Janice Greenberg
Assistant Vice President
Senior Claims Examiner
jgreenberg@berkleyalliance.com
212.822.3376

30