



Real Estate Agents & Property Managers E&O Claim Scenarios



Berkley Service Professionals is your partner in risk management!

If an alleged error or omission occurs, a business 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 real estate professionals manage the issues and concerns so that they can focus on their business.

With Real Estate Services E&O insurance from Berkley Service Professionals 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.

Real Estate Agents Claim Scenarios

Playing Both Sides Can Be Costly

A real estate agent was accused of breach of fiduciary duty and damages in connection with the sale and purchase of a home. In this case, the agent represented both the buyer and the seller, which elevated their fiduciary duty.

In addition to being a dual agent on this transaction, the real estate agent had also handled a previous sale of the property. The buyer alleged that the agent had

prior knowledge of a foundation issue and had failed to obtain proper professionals to further investigate an initial inspection report.

The agent and seller both contended that the sales price was below market value, reflecting the items flagged in the home investigation, but this was not documented. While the claim settled for \$175,000, the majority was paid by the sellers. Berkley Service Professionals negotiated a settlement for our policyholder for \$50,000. Defense costs came to nearly \$10,000 and the policyholder contributed \$15,000 to the settlement and legal expenses through their deductible. In addition, the buyer agreed to withdraw their complaint filed with the department of real estate.

Lessons Learned: Inspections and related repairs are a frequent source of claims. In this matter, the real estate agent should have documented their discussions with the buyer regarding the home inspection results and obtained a signed agreement that the buyer understood the defects and that the price of the home had been reduced accordingly. In general, agents should keep detailed notes of key discussions, recommendations provided, decisions made, and follow-up required. This advice is particularly important when an agent is representing both buyer and seller. Having good documentation is key in claim defense.



Failure to Disclose

A buyer purchased residential property and alleged that their real estate agent failed to adequately advise them regarding recommended inspections and/or protect him with modifications to the purchase agreement when defects were discovered prior to closing.

Inspections before closing revealed drainage and HVAC issues and the seller was requested to address them. The transaction proceeded to closing and the buyer discovered afterward that the seller had not addressed or had not adequately addressed the issues that needed to be fixed. The buyer alleged that their real estate agent failed to modify the purchase contract to reflect the seller's obligations prior to closing to ensure that the required repairs had been undertaken.

The buyer's real estate agent, however, maintains that the buyer was told to have the property re-inspected before closing to ensure the repairs were done. The agent

assumed the buyer would do so and because of this did not modify the purchase agreement. Unfortunately, this was not documented in writing and the buyer denies they ever received this instruction.

As a result, the buyer paid more than \$75,000 to undertake the repairs and then sought reimbursement from their real estate agent, as well as the seller and the seller's real estate agent. Since the defense had to rely on a jury believing the real estate agent over the buyer because communications weren't documented in writing, Berkley Service Professionals negotiated a settlement for our policyholder for \$45,000. Defense costs of \$50,000 were incurred before settlement was achieved.

Lessons learned: Detailed documentation is necessary for disclosures and interactions among all parties to have a verifiable record of these communications.



Real Estate Agents Claim Scenarios



Seen and Unseen

A home buyer alleged that a real estate agent failed to disclose issues with the garage drainage, lack of foundation and unpermitted construction on a residential property they purchased. Most of the alleged deficiencies were identified in a pre-closing inspection report and the purchase price was negotiated accordingly. However, other alleged deficiencies were concealed and unforeseen.

The real estate agent only had an obligation to disclose known facts and those evident by visual inspection. The buyer allegations included potential fraud because of the failure to disclose and breach of fiduciary duty. In the sale, the real estate agent represented both buyer and seller, which enhanced their fiduciary duty.

The buyer sought more than \$200,000 in damages. In order to avoid the cost of further litigation, the matter settled in mediation without admission of fault by the real estate agency. The home purchaser received a total settlement of \$57,000. Berkley Service Professionals paid \$25,000, the policyholder/real estate agency paid \$15,000 of the settlement through their deductible and an individual agent contributed \$17,000. In addition, Berkley Service Professionals paid \$20,000 in defense costs.

Lessons learned: There is an enhanced duty with dual representation by agents. Make sure the dual nature is disclosed and acknowledged by all parties. Keep detailed notes of all conversations and disclosures.

Lost in Transaction

A real estate agent represented the seller in the sale of their house to a contractor for more than \$2 million. The contractor/purchaser financed the property with a first mortgage loan from a private lender and two notes from the seller in the combined amount of \$770,000, which were all secured by the house and property.

The contractor/purchaser defaulted on payments on the loans and notes. Due to a possible overvaluation of the property at the time of the sale, there was insufficient equity in the property to repay the lien holders if the property was sold. The sellers alleged that the real estate agent provided improper advice on the risks of the structure of the financing of the sale and failed to encourage them to retain an attorney in the transaction, which was not required by law.

Berkley Services Professionals paid \$385,000 on behalf of the policyholder and defense costs of \$24,000. The policyholder paid an additional \$15,000 in defense costs via their deductible.

Lessons learned: Real estate agents have potential exposure to liability for breach of fiduciary duty and good faith. This can happen, as it did in this case, when complicated financing structures are involved and there is a failure to properly investigate the condition of the borrower in the transaction or to obtain current financial information from the borrower. It is also commonly acknowledged that a seller carryback loan has inherent risks that a real estate agent should disclose in writing to the seller before close of escrow. In addition, the real estate agent should have advised the homeowner client to obtain independent legal advice before engaging in two seller-financed mortgages.



Property Managers Claim Scenarios

Resident Retaliation

An apartment resident filed a housing discrimination complaint against the property manager (our policyholder) with the county's Human Rights and Relations Department (HRRD), alleging that the property manager failed to repair defective conditions in the apartments (water damage, mold and mildew) leading to health issues, increased utility bills and retaliation when complaints were made.

The property manager moved the resident to a different unit, but it had the same problems. To complicate matters, the property manager found additional resident-caused damages to the vacated apartment (but could not supply documentation). They alleged that the property manager said they wouldn't charge the resident for those additional damages if they dropped their housing discrimination complaint. HRRD was prepared to issue a "Determination of Reasonable Cause" based on the failure for reasonable accommodation and the coercion attempt and asked the property manager if they were interested in making a conciliation offer to right the situation. They were.

Berkley Service Professional was successful in negotiating the terms of a conciliation agreement—without the admission of liability or wrongdoing by the property manager—that secured a full release from the resident for a settlement amount of \$3,500, which was about half of what was originally demanded. The agreement also required fair housing training for all property managers, maintenance supervisors and office staff to be monitored by HRRD. Defense costs for this claim mounted to \$10,000. Both the settlement and the defense costs were within the policyholder property manager's deductible.

Lessons learned: Housing discrimination claims need to be taken seriously, addressed and clearly documented, including a timeline of events and actions taken.



Protected by Proper Procedures

An apartment resident filed a housing discrimination complaint against a property manager with the city's Human Relations Commission (HRC) alleging wrongful eviction in violation of Title VIII of the Civil Rights Act of 1968. The resident was repeatedly late in making rent payments in violation of the lease terms. The property manager provided multiple proper notices to the resident indicating a violation of the lease's payment terms.

When the property manager commenced lease termination and eviction proceedings in accordance with the lease, the resident was still permitted to remain in the apartment and catch up on rent payments. Notice of non-renewal of the lease was properly issued but the resident refused to vacate the premises. The property manager received a favorable judgment in regard to the eviction proceeding, but the claimant nonetheless filed a complaint with the HRC.

While the HRC action was pending, the property manager paused the eviction process and offered to forgo eviction proceedings if the resident paid overdue rent and dropped the HRC complaint, but the resident did not respond. Ultimately, the HRC complaint was dismissed due to a finding of no reasonable cause.

While there was no liability, Berkley Service Professionals aided this policyholder by providing counsel from an attorney. The property manager paid the \$6,000 legal cost which was within their deductible.

Lessons learned: Having an insurance carrier that will partner with their policyholder to steer them through a claim minefield is invaluable. Following proper procedures and having documentation to corroborate actions is the best defense to claims—especially baseless ones.



About Berkley Service Professionals

At Berkley Service Professionals, we transform uncertainty into opportunity so our clients can confidently build a better tomorrow. We do this by providing customized professional liability insurance solutions for miscellaneous non-medical professionals and expert in-house claims management. It's our mission to work relentlessly to protect our clients work, reputation and dreams. We offer value through our ability to respond quickly, our experience and with innovative insurance solutions that fulfill the needs of our brokers and their clients.

Berkley Service Professionals conducts business as Berkley Managers Insurance Services, LLC in California as a surplus lines broker. CA License #0H05115.

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Contact us!

Email submissions to: mp submissions@berkleysp.com

Tom Rea
Executive Vice President
trea@berkleysp.com
860.781.6340

Paul Dillion
Senior Vice President
pdillion@berkleysp.com
619.302.2631
CA License #0G08110

Christopher Downs
Senior Vice President
Director of Business
Development
cdowns@berkleysp.com
650.779.9205

Laura Gookin
Senior Vice President
lgookin@berkleysp.com
619.913.3737

Amanda Castro
Vice President
acastro@berkleysp.com
860.781.6336

Jude Sedliak
Vice President
jsedliak@berkleysp.com
770.910.1019

Monica Young
Vice President
Affinity Underwriting
myoung@berkleysp.com
831.293.8945

Berkley Service Professionals

180 Glastonbury Blvd | 4th Floor
Glastonbury, CT 06033
berkleysp.com

In California:
a division of Berkley Managers Insurance Services, LLC
CA License #0H05115

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