

Green Litigation: A Failure to LEED Can Be Worse Than You Think

Green building has been getting a bad rap. One of the major green certification systems, Leadership in Energy and Environmental Design (LEED), was recently involved in a class-action lawsuit (*Gifford et al v. U.S. Green Building Council*, Docket No. 10 CIV. 7747), in which plaintiffs alleged that the LEED building rating system made false promises as to the performance of LEED-certified buildings and manipulated data showing that LEED-constructed buildings were more efficient than standard-constructed buildings. Elsewhere, a federal court stopped one city from enforcing its green building code under the legal doctrine of federal preemption, because the federal government has already taken over the area of energy regulation (*AHRI v. City of Albuquerque*, decided October 3, 2008). Even green advertising is affected: The Federal Trade Commission (FTC) has issued new guidelines restricting the use of the word “green” and other marketing that claims a product’s or service’s environmental benefits (FTC, *Guides for the Use of Environmental Marketing Claims*).

With the 2008 financial crisis and the decline of building in general, green plumbing’s prominence is growing. As explained by LEED faculty member Kathleen Smith in a U.S. Green Building Council (USGBC) publication, “there is a lot of low-hanging fruit that new and existing buildings can implement, for example, installing new plumbing fixtures in existing buildings.” In a recent renovation project, Smith found that retrofitting the plumbing had the greatest impact. “The owner decided to retrofit the plumbing fixtures in the whole building when they

realized how much water they consumed (the water closets were 3.5 gpf [gallons per flush], urinals were 1.6 gpf, etc.).”

Several third-party organizations have created green building certification programs with emphases on efficient and environmentally friendly water use. The most widely used certification program is the USGBC’s LEED certifications. LEED requires improvements in water efficiency as one of the five categories used to determine a project’s rating of Certified, Silver, Gold, or Platinum. In the water-efficiency categories, projects can earn Water Efficient Landscaping credits, an Innovative Wastewater Technology credit, and a Water Use Reduction credit (for 20 percent and 30 percent reductions in water use).

Forty-five states and hundreds of local governments have incorporated LEED’s certification requirements into legislation requiring or incentivizing the use of LEED standards. According to the USGBC, LEED-related spending will generate an additional \$12.5 billion dollars in GDP and will support 230,000 jobs that will in turn provide \$10.7 billion in labor earnings from 2009 to 2013. LEED-certified buildings also will produce \$4.8 billion in energy savings during the same period.

As more governmental bodies add incentives for green building, such as tax breaks, expedited permitting, grants, and marketing assistance, the stakes for green engineers grow higher. Installing a plumbing system that does not meet LEED’s certification requirements will result in costs to retrofit the noncompliant system, losses in tax incentives and grants, and economic losses

related to delays in achieving the desired certification. Design professionals now are faced with lawsuits claiming enormous damages as a result of the refusal of the sought-after LEED certification.

Luckily, you can take several steps to protect yourself and your business from major litigation based on green building claims.

INSURANCE

You now can insure against green building claims with a new insurance policy. For example, Argo Insurance Brokers Inc., a regional insurance broker, offers the first green professional liability policy for engineers and other design professionals doing work on green building projects. The policy covers design services “provided as an accredited/certified professional in the areas of sustainable site development, water savings, energy efficiency, materials and resource selection, indoor environmental quality, and computer-aided drafting and design services.”

Argo also offers Green Reputation Coverage, which could reimburse you for costs spent defending against “adverse green claims,” which are lawsuits alleging that you failed to comply with green building standards, and “adverse green publicity events,” which are negative reports in the media regarding the green project. However, the policy does not appear to offer coverage specifically for a project that fails to achieve the required LEED certification.

Other insurance carriers also are covering green building liability with broader property and environmental endorsements that can be added to your liability insur-

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ance policy. For example, you could obtain an endorsement that includes liability for underground pipes and cisterns used to capture water runoff, which ordinarily is excluded from liability policies. These kinds of policies could protect you against the building damage that green building techniques may cause, but would not protect you against damages stemming from a failure to achieve the correct certification for a project.

Some insurance carriers are covering green building liability with broader property and environmental endorsements that can be added to your liability insurance policy.

If you purchase a green insurance policy or endorsement, it could cover warranties and guarantees you make in design agreements. However, it is not yet clear how courts will interpret these new types of policies and endorsements. Consider the costs carefully when picking a green policy or endorsement.

DON'T MAKE ANY PROMISES

While an insurance policy can protect you after a green building client files suit against you, you can take many steps to prevent litigation from the beginning of a project.

The best rule to follow during design agreement negotiations is to limit, as much as possible, the promises you make. This starts with managing expectations from the beginning of negotiations, meaning that you

may have to budget in some extra time so that you can address all of the green building aspects of a project. As you begin conversations with owners, contractors, and consultants, keep in mind that you need to develop reasonable expectations about what you can achieve. Remember the many factors that

are out of your control, particularly if you are retrofitting an older building.

The next step is to control the words of your design agreement to make sure that you aren't signing onto more responsibility than you can afford. This means avoiding language stating that you, the design professional, "certifies" or "warrants" a certain result (such as green building certification) or language stating that "the design will achieve" a certain result. Avoid specific guidelines as to water savings, and avoid promising a specific number of LEED points.

Of course, the owner or contractor you're negotiating with may ask you to sign LEED documentation forms that require you to "declare," "affirm," or "certify" certain responsibilities to the USGBC. Thus, you may want to insert a section into your design agreement that makes it clear that you are not making any promises beyond those to the USGBC in the LEED documentation forms you signed. State explicitly that you were giving your professional opinion to the best of your knowledge, not promising or guaranteeing anything.

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Make sure that you aren't promising to assume more liability than is appropriate. In lawsuits over green building projects, often the largest amounts of money demanded are consequential damages. If an owner or contractor doesn't achieve the necessary LEED certification, damages will go beyond merely making repairs or replacing systems—you may be held liable for consequential damages, which include lost tax benefits, lost income from the building, and other economic losses. Often, design professionals overlook contractual liability avoidance techniques that can minimize exposure to risk. For example, you may be able to avoid paying such damages if the owner or contractor signs a consequential damages waiver, which could significantly limit the amount of money an owner or contractor could claim from you. Additional waivers are useful if you plan to use new, untested products or designs.

Beyond limiting the promises that you make, important points of green contract negotiation include determining who will be handling the paperwork. Which party will be

submitting the documentation necessary to achieve the desired green certification and the documentation necessary to get the tax breaks and other privileges for green builders? Which party is responsible for keeping track of the information required and assembling it for such documentation? Who will pay for that work?

Finally, before signing a design agreement, make sure that you review all of the parts relating to your liability carefully, preferably with a lawyer. Review the warranty, damages, and "act of God" sections. Pay attention to the insurance section, and double check that you have fulfilled the contract's insurance requirements.

During the above contract negotiations, have an attorney draft the special language necessary for green building contracts to protect yourself against adverse green lawsuits. With careful contract negotiation and contract drafting, you may limit or avoid costly litigation.

Green building and sustainable design will likely grow in importance and popularity in the coming years. President Obama's

2011 State of the Union address announced several new green initiatives, including tax incentives aimed at decreasing the energy use of commercial buildings by 20 percent and increased Small Business Administration (SBA) financing to provide small businesses with the capital for energy-efficient retrofit projects. To fully take advantage of the economic opportunities available in the green building and green engineering industries, protect yourself—whether in the form of an insurance policy or in the form of careful contract drafting with the help of an experienced attorney. **PSD**

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