

**Managing Green Risk:
Liability Through A Sustainable Lens**

OBERMAYER
REYNOLDS & SMITH, P.C. LLP
Attorneys at Law

Green Building Risk

- Contractual liability
- Standard of care
- New green laws
- Climate change risk
- Product liability
- False advertising

Contractual Liability

- *Shaw Development v. Southern Builders*
- The Contract

10. Specifically, the Project Manual and Scope of Work required Southern Builders to construct an environmentally sound "Green Building," in conformance with a "Silver Certification Level according to U.S. Green Building Council's Leadership in Energy & Environmental Design (LEED) Rating System."

Contractual Liability

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PROJECT MANUAL
The Captain's Galley
Crown Point, Maryland
March 27, 2008

2. Project is designed to comply with a Silver Certification Level according to the U.S. Green Building Council's Leadership in Energy & Environmental Design (LEED) Rating System, as specified in Division 1 Section "LEED Requirements."

Contractual Liability

WHEREFORE, Shaw Development demands judgment in its favor and against Southern Builders for:

(b) Six Hundred Thirty-Five Thousand Dollars (\$635,000.00) in tax credits for failing to construct the Project in conformance with a "Silver Certification Level" according to U.S. Green Building Council's Leadership in Energy & Environment Design (LEED) Rating System;

Professional Negligence

- "Standard of care" is the criterion for determining when malpractice has been committed by a professional
- A design or building professional's conduct is judged by what a reasonable professional would do in a similar situation

Professional Negligence

- Lured by the promise of "healthier and more productive occupants" based on LEED® publicity, tenant rents space in Silver-certified building.
- At end of year, tenant's records indicated greater use of sick leave, increased complaints by employees about eye strain and drafts, and reduced output by clerical staff.
- Tenant demands rent rebate from project owner based on false promise of a healthful workplace and increased productivity.
- Owner sues architect for not designing healthful workplace.
- Tenant sues architect for bodily injury based on poor indoor air quality.

Source: Schinnerer/CNA Professional Liability program for design firms

Product Liability

- New products have new risks
- Delay may be caused by lack of availability, rejection or questioning by building officials, etc.
- Failure to perform as promised

Real life example

- Architect made decision to use green product from new manufacturer with impressive promotional information.
- Architect did no research on product availability and did not warn owner of any possible problems.
- Owner, based on architect's opinion, agreed to its use.
- Product was not readily available.
- Project completion was delayed and construction schedule distorted.
- Contractor demanded increased payments for overhead, lost profits and out-of-sequence construction.
- Owner brought claim against architect since architect never informed owner that product was subject to delayed delivery.

Source: Schinnerer/CNA Professional Liability program for design firms

Legal Issues: Regulation

- Green practices are being incorporated into state and local zoning and building codes and ordinances
 - 14 percent of U.S. cities with populations of more than 50,000 have green building programs
 - The number of counties with green building programs has grown by nearly 400 percent since 2003
- Federal statutes require federal agencies to procure recycled material, reduce energy consumption and prevent pollution.

Types of Green Building Regulations

- Command and Control Type Regulations
 - July 17, 2008—California adopts green building code for all new construction statewide
 - 2007—Boston, Washington, San Francisco, Los Angeles mandate green building requirements for new construction above a specified square footage
- Financial Incentives
 - 2008—Portland enacts "feebate" structure
- Non-Financial Incentives
 - Expedited permitting; increased FAR, building height or density for green buildings

AHRI v. City of Albuquerque

- Adopted in 2007, set to take effect in June of 2008, the Albuquerque Energy Conservation Code was part of the City's attempt to significantly reduce carbon dioxide and green house gas emissions.
- July 3, 2008—Air Conditioning, Heating and Refrigeration Institute and other HVAC trade organizations, contractors and distributors sued the City of Albuquerque to stop components of the city's high performance building code from taking effect.
 - Argue that the Energy Policy and Conservation Act of 1975 ("EPCA"), 42 U.S.C. 6201, et seq., preempt the building code's provisions related to energy efficiency of HVAC products.

AHRI v. City of Albuquerque

- October 3, 2008, Chief District Court Judge Martha Vazquez granted the preliminary injunction, and laid out her opinion that the Albuquerque Code was indeed preempted.
 - "There is no doubt that Congress intended to preempt state regulation of the energy efficiency of certain building appliances in order to have uniform, express, national energy efficiency standards."
 - "At the time the Code was drafted the Green Building Manager, by his own admission, was unaware of federal statutes governing the energy efficiency of HVAC products and water heaters and the City attorneys who reviewed the Code did not raise the preemption issue."

Climate Change Risk Disclosure

- 2005 SEC guidance concluded that resolutions [about climate change risk] could be omitted under SEC Rule 14a-8 (i)(7) as ordinary business matters, not suitable for shareholder consideration
- New 2010 SEC revisions to Staff Legal Bulletin No. 14E (CF) state that in deciding when a company can omit a resolution, rather than focusing on whether a resolution relates to an evaluation of risk, the staff will instead focus on the underlying subject matter to which the risk pertains.



False Advertising—"Greenwashing"

- Federal Trade Commission Liability
 - FTC Green Guides
 - "Every express and material implied claim that the general assertion conveys to reasonable consumers about an objective quality, feature or attribute of a product or service must be substantiated. Unless this substantiation duty can be met, broad environmental claims should either be avoided or qualified, as necessary, to prevent deception about the specific nature of the environmental benefit being asserted."
 - General authority over fraudulent, false and deceptive practices
- SEC Liability

Real Life Examples

- In a securities filing, Applied Solar Inc., a solar energy corporation based in California, said it would install solar systems at a LEED-certified development near San Diego, but that project is not expected to deliver until late this year
- FTC charged Kmart Corp., Tender Corp., and Dyna-E International with making false and unsubstantiated claims that their paper products were "biodegradable." Kmart Corp. called its American Fare brand disposable plates biodegradable, Tender Corp. called its Fresh Bath-brand moist wipes biodegradable, and Dyna-E International called its Lightload brand compressed dry towels biodegradable.

For More Information

- Green Building Law Blog--
www.greenbuildinglawblog.com
- SEC--www.sec.gov
- FTC--www.ftc.gov
- DSIRE Website--www.dsireusa.org
- USGBC--www.usgbc.org
- Delaware Valley Green Building Council--
www.dvgbc.org
