



Exploring Uncharted Waters

PLANNING FOR GREEN BUILDING LIABILITY

THE MOVEMENT FOR GREEN BUILDING IS CHARGING

ahead so fast the law surrounding this type of construction has not been able to keep up and remains largely uncharted territory. It is difficult to predict which standard will rule and how the court will interpret that standard.

Simply put, green building is environmentally friendly design and construction, also known as sustainable building. Different standards currently regulate green building, including the popular U.S. Green Building Council's Leadership in Energy and Environmental Design program, the Life Cycle Assessment, the National Green Building Standard, and Green Globes, to name a few. The common goal among all of these standards is to promote construction that protects the environment, encourages healthier places to both work and live, and maximizes the efficiency of natural resources and energy.

The law surrounding green building is largely unsettled. Multiple government entities at all different levels around the country are encouraging or requiring sustainable building and design, but the court cases construing these issues simply have not been tried. Therefore, the law slowly but surely will have to catch up.

Uncertainty = increased risk

New and evolving standards not previously tested in courts translate to unpredictable and uncertain risks. Not only is the law unsettled, the green building community has yet to collectively agree on which standard to follow. As a result, there are areas of potential liability related to green building, including the following:

- › Which standards will the project conform to?
- › How will these standards be interpreted by the code and the courts?

- › Who is responsible for obtaining required certifications?
- › Who is responsible if there are delays in certification?
- › What if there is a lack of sufficient numbers of trained/qualified certification inspectors?
- › Who is responsible for selection of materials or equipment to meet certification and performance criteria?
- › Who is responsible for delays on green building materials if demand outstrips supply?
- › Who is ultimately responsible for design or construction relating to specific certification points, and what damages will there be if there is a failure to meet that level of certification?
- › What, if any, statutory, contractual or implied guarantees or warranties are created when being involved in the green certification and construction processes?

AIA takes a position

The newly updated American Institute of Architects (AIA) owner and architect form contracts discuss sustainable design but provide little definition. The final decision remains the responsibility of the owner. Yet, the 2007 AIA form B101 contract specifically requires that architects "shall consider environmentally responsible design alternatives,

such as material choices and building orientation." "Consider" is a very elastic term that may have unintended consequences.

Protecting yourself

Clarity may help. To protect yourself and your company, your contracts should be reviewed and updated regularly to adjust to risks associated with green building. Given the current level of uncertainty and the changing landscape, you should view this as an ongoing iterative process. The contracts should expressly address and assign all responsibilities associated with green building and certification. Another protection tool is investing the necessary time, money and energy into becoming familiar with green building and receiving sustainable building training. Finally, designers should resist the temptation to sign certification form documents if possible. These certifications may be viewed as guarantees or warranties that may invalidate your errors and omissions insurance coverage.

Surviving uncharted waters

Green building is here to stay. The legal and liability consequences are unknown and present serious risks. You should educate yourself and update your contracts and practices to reduce those risks. ■

This article is not intended to provide specific legal advice but, instead, as general commentary regarding legal matters. You should consult with an attorney regarding your legal issues, as the advice you may receive will depend upon your facts and the laws of your jurisdiction.

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