

*Preventing a **Green** Project From Making You **Black & Blue:***

*Understanding Contractual and
Legal Risks of Green Building*

William E. Kelley, Jr., LEED AP

Joseph M. Leone, LEED AP

Russell M. Webb III, LEED AP



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Indiana Building Green Symposium
March 10, 2010

2

Growth of Green Building



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Growth of Green Building

3

Value of Green Building Construction¹

- \$36 - \$49 billion in 2009
- \$96 - \$140 billion projected by 2013
- 10-12% of non-residential construction in 2008
- 20-25% projected in 2013

¹ Green Building Facts, U.S. Green Building Council © 2008

Understanding Contractual and Legal Risks of Green Building

1. The Legal Risks of Green Building
2. Is There Insurance Coverage for Green Building?
3. Contractual Allocation of Risk and Responsibility
4. Government Initiatives



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Green Building Lawsuits



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Green Building Lawsuits

6

□ ***Shaw Development v. Southern Builders (Maryland)***

- Shaw Development was the project owner for a \$7.5 Million, 23-unit condominium project in Maryland
- Southern Builders, the general contractor, filed a \$54,000.00 mechanic's lien against the project, and Shaw Development countersued for \$1.3 Million, including a claim for lost tax credits under the state tax program
- Contract Form: AIA A101-1997 Standard Form of Agreement Between Owner and Contractor, which did not specifically include any language about LEED or other green building requirements.
- Project Manual: the project is “designed to comply with a Silver Certification Level” according to the LEED rating system.
- THE UNANSWERED QUESTION: Can a contractor be held liable for the failure of a project to achieve the desired level of LEED certification?



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What are the Legal Risks of Green Building?



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What are the Legal Risks of Green Building?

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□ **Fraud and Misrepresentation**

□ **Unfulfilled Expectations**

- “Overall construction costs will be less than 2% more for a LEED project than a conventional project...”
- “Increased costs of LEED will be recouped in energy savings over the life of the building...”
- “LEED buildings will have a higher market value and garner higher rental rates...”
- “Workers in a LEED building will be healthier and have increased productivity...”



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□ **Fraud and Misrepresentation**

□ **Greenwashing**

- Federal Trade Commission Guides for the Use of Environmental Marketing Claims (the “Green Guides”)



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- **Contract Liability**
 - Design Changes
 - Delays
 - The *Spearin* Dilemma: Design Specifications vs. Performance Specifications
 - Guarantees and Warranties
 - Payment Tied to Submission of LEED Certification Documents
 - Subcontracts and Flow-Down Clauses
 - Substantial Completion



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□ **Standard of Care**

- Can a LEED AP or a green building professional be held to a higher standard of care?
- Will an increased standard of care be covered under standard insurance policies?
- Will Owners attempt to increase the standard of care in standard form contracts?



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□ Damages

- What are the damages for a project that fails to meet its desired level of LEED certification?
- How do you measure the damages for the failure to meet the desired level of LEED certification?
- Are damages covered under standard insurance policies?



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□ **Tort Liability**

- Is the failure to achieve LEED certification a construction defect?
- Negligence Per Se and Green Building Legislation
- “Sick building” claims
- Economic loss doctrine



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What Issues are on the Horizon?

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- Green Legislation
- Green Building Codes
- Green Insurance for Contractors and Designers
- Decertification of LEED Projects



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Is There Insurance Coverage for Green Building?



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□ **Green Insurance Policies:**

□ Fireman's Fund

- Green-Gard

□ Zurich

□ Travelers

- Master Pac Green Endorsement

□ Chubb

- Customarq Classic

□ ACE

- ACE Green CPL

□ AIG

- Green Reputation Coverage
- Green Indoor Environment Coverage

□ Argo Insurance

- Argo Green Pro (Sustainable Architect & Engineer Professional Liability)



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Is There Insurance Coverage for Green Building?

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- Possible Exclusions:
 - Professional Liability Exclusion
 - Guarantees and Warranties
 - Contractual Liability
 - Liquidated Damages



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Contractual Allocation of Risk and Responsibility



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Contractual Allocation of Risk and Responsibility

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- Written agreement defines the rights, obligations, and remedies of the parties



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- Language of contract is superior to industry standards, course of conduct, and fairness



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Contractual Allocation of Risk and Responsibility

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- What are the legal risks?
 - Project fails to achieve certification
 - Project fails to realize projected cost savings
 - Owner loses financial incentives
 - Green building design or construction process results in traditional claims
 - Delays, Spearin claims, cost overruns, labor inefficiency claims, etc.



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Contractual Allocation of Risk and Responsibility

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- What should you do?
 - Specify the design development process related to certification
 - Specifically identify the owner's obligations
 - Dissuade owner initiated changes
 - Limit or liquidate consequential damages
 - Waiver of damages caused by the default of others
 - Be careful of indemnification obligations for green claims



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Green Building Standard Form Agreements:

- ▣ AIA B214 2007—The LEED Addendum
- ▣ ConsensusDOCS 310 Green Building Addendum
- ▣ DBIA Sustainable Project Goals Exhibit



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- AIA B214 2007—The LEED Addendum
 - Addendum to Owner-Architect Agreement
 - Applies only to LEED Certification



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- AIA B214 2007—The LEED Addendum
 - Pre-Design Workshop
 - LEED Certification Plan
 - LEED Certification Specs
 - Construction
 - Final LEED Certification Report



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- ConsensusDOCS 310—Green Building Addendum
- Multi-party Agreement
- Applies to any certification procedure



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27

- ConsensusDOCS 310—Green Building Addendum
 - Owner Appoints Green Building Facilitator (GBF)
 - GBF advises owner of Green Status alternatives
 - Owner elects Green Status
 - GBF prepares Green Measures Report
 - Owner elects Green Measures
 - GBF issues Green Measures Report to project participants
 - A/E incorporates Elected Green Measures into plans and specs
 - GBF confirms plans and specs include Elected Green Measures
 - Construction



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2'

AIA B214

Only applies to LEED

Addendum to Owner-Architect Agreement

Based on traditional design process

ConsensusDocs 310

Applies to any certification

Addendum to any project agreement

More formalized process

Detailed objection procedure

GBF liable for failure to achieve certification



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Contractual Allocation of Risk and Responsibility

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- DBIA Sustainable Project Goals Exhibit
 - Credits are identified in the “Basis of Design Documents”
 - Owner identifies the requirements
 - D/B agrees to use “best efforts” to achieve certification
 - Alternative Remedies



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What Government Initiatives Influence Green Building?



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What Government Initiatives Influence Green Building?

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□ Federal Initiatives:

- Since 2003, the U.S. government's largest construction owner, the General Services Administration (GSA), has required LEED certification for all new construction and substantial renovations under its "Sustainable Design Program".
- Since 2001, the Army Corps of Engineers (COE) has required that all new projects for design and construction of military facilities strive to achieve a Bronze rating under its Sustainable Project Rating Tool (SPiRiT), which incorporates the LEED system.



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- Federal Initiatives (cont'd):
 - Energy Policy Act of 2005 (EPAAct 2005)
 - Executive Order 13423 (Signed January 2007)
 - Energy Independence and Security Act of 2007 (EISA 2007)
 - Executive Order 13514 (Signed October 2009)



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- Federal Initiatives aimed at Private Owners:
 - Renewable Electricity Production Tax Credit (PTC)
 - Business Energy Investment Tax Credit (ITC)
 - Residential Energy Efficiency Tax Credit
 - Residential Renewable Energy Tax Credit



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□ Indiana Initiatives:

□ June 2008, Executive Order 08-14

- All new state buildings shall be designed, constructed, operated and maintained to achieve “maximum energy efficiency”, to extent can be accomplished on a cost effective basis, with consideration of construction and operating costs over life cycle of the building
- Department of Administration (DOA) shall develop design standards for all new state buildings with the goal of achieving “energy efficiency”
- “Energy efficiency” may be demonstrated through (1) LEED Silver; (2) two globe rating under Green Globes; (3) EPA’s ENERGY STAR; or (4) equivalent rating system accredited by ANSI



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□ Indiana Initiatives:

- The 2010 General Assembly is currently considering House Bill 1063.
- House Bill 1063 effectively mirrors Executive Order 08-14 and reiterates the goal of “achieving maximum energy efficiency” in government buildings.



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- State Initiatives aimed at Private Owners:
 - Net Metering
 - Income Tax Deduction for Solar-Powered Roof Vents or Fans
 - Renewable Energy Property Tax Deduction
 - Residential Energy-Efficient Appliance Rebates



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37

Thank You

Drewry Simmons Vornehm, LLP
8888 Keystone Crossing, Suite 1200
Indianapolis, IN 46240
317-580-4848
www.drewrysimmons.com