

Shades of Green:

**The Claims Outlook and
Some Preventative Steps to Take**

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beazley

Go for the Gold!

Project involved the design and construction of an office condominium development.

The Developer marketed the building as “green” and made representations about energy savings and tax credits.

By contract, the architect agreed as follows:

Go for the Gold!

- “Architect warrants that it is highly experienced in projects of this size, type and complexity, and will perform its services at a level consistent with a first-class architect. Architect further acknowledges that USGBC LEED accreditation is of utmost importance to Owner and agrees that it shall design a facility that achieves Gold level LEED accreditation.”

Go for the Gold!

- Upon completion, the Project failed to achieve Gold accreditation for numerous reasons.
- In the meantime, the commercial real estate market experienced a glut of available space.
- A number of buyers backed out because of the “failure” to attain LEED certification.

Go for the Gold!

The Developer sued the Architect on breach of warranty, breach of contract and negligence counts for its failure to fulfill its “guarantee” of Gold.

Claimed damages included combinations of:

- Diminution in value of the property
- Lost profits on “undone” sales
- Increased carrying costs
- Increased energy costs over the life of the building

Lesson learned: Do not guarantee a particular outcome

What is that stuff on the floor?

- Project involved the renovation of a trendy restaurant and nightclub.
- In fitting with the club's theme, the Owner wanted an environmentally friendly facility.
- The Architect had some experience in green design but very little in the hospitality and food service sector.

What is that stuff on the floor?

To meet the Owner's "green" initiative, the Architect utilized a flooring product with the following properties:

- The product is harvested with no waste materials produced. This results in no damage to the tree or the environment in which it is harvested.
- The product does not attract dust and consequently does not cause allergies.
- The product is a natural fire retardant, and does not spread flames or release toxic gases during combustion.
- The density of the product is such that it has wonderful insulating properties, thermal as well as acoustical.

What is that stuff on the floor?

CORK

Outcome: Flooring replaced with vinyl at design firm's expense.

Lesson learned: Don't lose sight of the basics: the nature of the project and ultimate use of the facility.

Lets Put another Skylight there!

- Project involves the design and construction of a research facility.
- Client is a government contractor that requires top secret security clearance for government nuclear work.
- Among the Contract Documents were the government criteria that must be met for this type of facility.
- Client requested an ergonomic friendly building incorporating green design features.
- Ultimately the building incorporated extensive day-lighting systems.

Lets Put another Skylight there!

- During the government's recertification process, the building was not given the necessary security clearance to continue the work.
- Client sues the designer for design that did not meet security requirements.

Lesson learned: Green design elements must be consistent with Owner criteria and program.

I don't like that new building, lets call in sick.

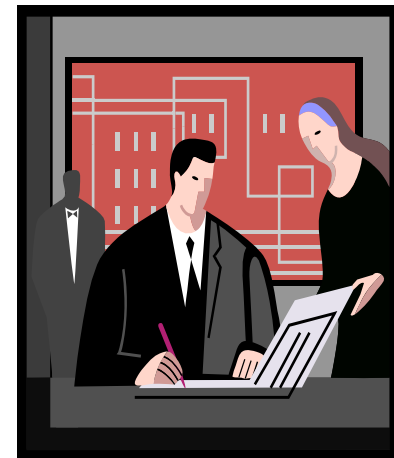
- During the RFP process for an office development, the Architect provided USGBC information and data promising “healthier and more productive” employees in a Gold certified building.
- The Owner used this material to market to tenants.
- Ultimately, numerous employees reported illnesses related to the HVAC system.
- Tenants demanded rent rebates, and the Owner sues the Architect for negligent design, and cited the literature provided with the Proposal.

Lesson learned: Avoid subjective statements and stick to measurable facts.

“Green” Risk Management Solutions

Contracts

- Tool to Manage Clients Expectations
 - ✓ Does the Client understand “green” design?
 - ✓ What is the Client really looking to attain?
 - ✓ Are the expectations reasonable and attainable?
 - ✓ Define as the Owner’s Program
- Standard of Care
 - ✓ Negligence based
 - ✓ Not a static standard
- Avoid Express Warranties or Guarantees
 - ✓ The Project will obtain LEED Gold rating
 - ✓ The Project will achieve 25% energy savings



“Green” Risk Management Solutions

Contracts (cont’d)

- Scope of Services
 - ✓ Clearly define it
 - ✓ Objective criteria
 - ✓ What you will do vs. desired outcome

- Waiver of consequential damages
 - ✓ Failure to recognize energy savings
 - ✓ Diminution of property value
 - ✓ Failure to obtain tax credits

- Owner/End-User responsibilities for proper operations and maintenance

Sustainable Design:

Recommended language:

- ✓ “The LEED Green Building Rating System or similar environmental guidelines (“LEED”) utilizes certain design, construction and usage criteria in order to promote environmentally friendly building. The Owner acknowledges and understands that LEED is subject to interpretation, and achieving levels of compliance involves factors beyond the control of the Design Professional, including, but not limited to, the Owner’s use, operation and maintenance of the completed project. In addressing LEED, the Design Professional shall perform its services in a manner consistent with that degree of skill and care ordinarily exercised by design professionals performing similar services in the same locality, and under the same or similar circumstances and conditions. The Design Professional will use reasonable care consistent with the foregoing standard in interpreting LEED and designing in accordance with LEED. However, the Design Professional does not warrant or represent that the Project will actually achieve LEED certification or realize any particular energy savings. The Design Professional shall not be responsible for any environmental or energy issues arising out of the Owner’s use and operation of the completed project.”

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- ✓ Certification involves more than design.

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- ✓ Reaffirmation of the standard of care.

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- ✓ Disclaimer of warranties.

Sustainable Design:

Recommended language:

- ✓ “Neither the Client nor the Design Professional shall be liable to the other or shall make any claim for any incidental, indirect or consequential damages arising out of, or connected in any way to the Project or this Agreement. This mutual waiver includes, but is not limited to, damages related to loss of use, loss of profits, loss of income, loss of reputation, unrealized savings or diminution of property value and shall apply to any cause of action including negligence, strict liability, breach of contract and breach of warranty.”
 - ✓ Waiver of consequential damages.