

THE BUSINESS OF BUILDING REDEFINED

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**ARE YOU
COVERED?**

**COMPREHENSIVE GREEN BUILDING LIABILITY
INSURANCE NOT QUITE READY FOR PRIME TIME**

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Are you covered?

Comprehensive green building liability insurance not quite ready for prime time

MIKE NESTEROFF

The U.S. Green Building Council's (USGBC) minimum program requirements for buildings certified under its Leadership in Energy and Environmental Design (LEED) program is now in effect for certifications issued under the LEED 2009 process. The requirements include mandatory reporting of energy and water usage for a five-year period after occupancy and provide for potential revocation of LEED certification for noncompliance. While it is unclear what level of noncompliance would result in LEED decertification, the mere threat increases the litigation risk for builders, engineers and design professionals, and should send them scrambling to check their insurance coverages and perhaps shopping for specific green building coverage. What they will find, however, may not be very comforting.

As the number of green buildings has skyrocketed over the past several years, the primary goal has been to achieve certification through programs such as LEED, the U.S. Environmental Protection Agency's Energy Star or the Green Building Initiative's Green Globes. But certification is only a way station in the sustainability process. The real goal is performance, and, as several studies have discovered, green buildings don't always perform as anticipated. At the request of the USGBC, the New Buildings Institute conducted a study of 121 LEED-certified new buildings built as of 2006 and found that 53 percent did not qualify for EPA's Energy Star label, meaning they failed to perform better than three-fourths of the existing building stock. Consequently, the USGBC adopted the minimum performance standards, which include the energy and water usage reporting requirements and the potential for decertification.

Thoughtful contracting at the beginning of a project needs to include a frank conversation between the owner, design

professionals and contractors about how to allocate the risk of not meeting standards or not achieving promised energy/water/operational savings targets. Designers, engineers and builders with competent legal counsel drafting contracts with owners should avoid any warranties by the designer, engineer or builder of a particular certification or that the building will achieve the energy savings designed, and also should provide explicitly that the designer, engineer or builder does not guarantee certification or performance. This is particularly important for insurance coverage, since most liability policies will not cover a breach of warranty claim.

Despite good contract drafting, a lawsuit cannot be avoided in every instance. Unfortunately, insurance coverage for claims may still be problematic even if there is no warranty made. Most policies for design professionals, for example, cover negligent performance of professional services, which is judged by the standard of an ordinarily prudent competent professional. But as USGBC updates its accreditation standards, it's not clear whether the legal standard has changed or could change. Still to be determined are whether the recent revisions to the requirements for LEED accredited professional designations also raise the standard of care and, if so, whether the liability policies cover a breach of the LEED-AP standard of care.

At the same time, insurers have not rushed to develop new coverage or expand existing coverage for design and engineering professionals and builders in the green context quite as much as they have for building owners. For example, several insurance companies now offer endorsements and standalone policies to property owners for repairing or rebuilding covered property to an "environmentally friendly" standard,

while others provide coverage for vegetative or "green" roofs, runoff capture systems, debris removal, and even loss of tax credits.

One of the first comprehensive general policy endorsements offered last year that might help design professionals and builders reimburses for costs arising out of an adverse green claim, which the endorsement defines as a civil lawsuit alleging failure to meet or comply with industry-recognized green building standards. The endorsement, however, defines a "green building" as one that complies with green building standards. Thus, there might not be coverage if a building ultimately fails to receive green certification. In addition, the endorsement puts a cap on costs at \$50,000, while actual litigation costs might substantially exceed that amount.

As the green building movement evolves rapidly, due in part to government mandates at the federal, state and local levels, the emerging risks and liabilities pose challenges for insurers, those insured, and counsel. Until more comprehensive insurance coverage arrives to meet these challenges, the best defense remains solid contract drafting and clear communication at each step of the design, engineering and construction process. 



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