

Lawsuit Challenging Legitimacy of LEED Program Could Have Major Implications

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A significant new lawsuit was recently filed in the United States District Court for the Southern District of New York, that could have major implications for the entire segment of the design and construction industry that has evolved around the Leadership in Energy and Environmental Design rating system ("LEED"). This litigation, challenging the very legitimacy of the LEED designation, is of a different type than the construction disputes described in our earlier Alert, [LEED Could Lead to Litigation](#) (July, 2009).

On October 8, 2010, Plaintiffs Henry Gifford and Gifford Fuel Saving, Inc. filed this class action suit against U.S. Green Building Council ("USGBC"), David Gottfried, Richard Fedrizzi, Rob Watson, et al. USGBC is a nonprofit organization founded by David Gottfried and Richard Fedrizzi that trademarked the Leadership in Energy and Environmental Design rating system ("LEED") designed by Rob Watson. The putative class members include consumers who paid for LEED certification, taxpayers whose city and state tax dollars have been spent on the costs of LEED certification in publicly-commissioned buildings, and building design and construction professionals who design energy-efficient buildings.

The Complaint alleges that the LEED rating system is not based on objective scientific criteria or actual measurements; rather it is based on an supportable point system that awards points in a fundamentally indefensible manner. For example, under the system the addition of a bike rack earns one point, but a ten percent reduction in heating and cooling earns only two points. The Complaint further alleges that USGBC commissioned a study by the New Buildings Institute (NBI) which: used skewed samples in its data collection; used biased survey takers; compared a set of new LEED buildings to a set of both old and new non-LEED buildings (for example, NBI compared non-LEED buildings built as early as 1920 to LEED buildings built after 2000); and compared LEED median averages to the non-LEED mean averages. The Complaint alleges that these skewed samples and data are fraudulently misrepresentative and are being used by USGBC to market its system and products through press releases and its website.

Based on those allegations, the Complaint alleges six causes of action. Count I alleges that defendants violated the Sherman Anti-Trust Act by fraudulently monopolizing the market through false claims contained in its website and press releases. Those false claims omitted material facts about the actual performance of LEED buildings and promoted the fraudulent and biased NBI study results. Count II alleges that defendants violated the Lanham Act by using unfair competition methods through deceptive marketing. This count alleges that consumers in every segment of the market are influenced by USGBC's press releases and website promoting its product based on NBI's biased studies; making statements leading consumers to believe USGBC actually verifies compliance with LEED standards, which it does not; and vastly overstating the energy efficiency of LEED buildings.

Count III alleges deceptive trade practices under New York state law based on statements in press releases that conceal from consumers how the data USGBC uses is deceptively presented, that conceal material facts discovered in the studies, and misrepresent the performance of LEED buildings. Count IV alleges false

advertising under New York state law based on fraudulent claims misrepresenting LEED building performance. Count V alleges wire fraud under the Racketeer Influenced Corrupt Organizations Act (RICO). This count alleges that all defendants were part of an "enterprise" that devised a scheme of deception with the goal of using fraudulent misrepresentations at the expense of the class members. The Complaint alleges that the enterprise violated RICO by fraudulently misrepresenting its system and products and then taking online payments based on those statements. Count VI alleges that the defendants were unjustly enriched at the expense of the class by profiting from fraudulently-induced sales. The Complaint seeks both equitable remedies and money damages for each cause of action alleged.

To date, no answer or motions have been filed by defendants.