



“AM I COVERED?”

INSURANCE CONSIDERATIONS FOR
THE DESIGN PROFESSIONAL “GOING GREEN”

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The emergence of green building and sustainable design has introduced the world of building construction to new territory in the realm of energy savings and design implementation requiring new innovations in project delivery. On the flip-side, green building has also introduced new avenues of liability and exposure to design professionals beyond the traditional risks inherent in performing professional design services. Most business savvy design professionals make the wise decision to invest in professional liability insurance to cover the risks of an unfortunate error or omission. However, in the environment of green building and sustainable design, traditional liability insurance may not be adequate to cover the risks and potential exposure of a failed green project. For the design professional considering “going green” the question which must be asked is: “Am I covered?”

The standard professional liability insurance policy covers architects, engineers and other design professionals for wrongful acts arising from the performance of their professional services. Such policies will typically define the term “professional services” to mean services that the insured is legally qualified to perform for others in the insured’s practice as an architect, engineer, land surveyor, landscape architect, construction manager, scientist, or technical consultant – or similar language to that effect. These same policies will exclude coverage for any express warranties or guaranties other than guarantees that the insured’s professional services will conform to the generally accepted standard of care. Some policies may even exclude consequential damages arising from contractual obligations in certain circumstances.

The concern then becomes whether a design professional is covered by his or her existing professional liability policy for services involving green building. This concern is predicated on three principal aspects of green building. The first is the fact that green building, while certainly becoming more mainstream as time goes on, often involves services beyond traditional architectural/engineering and construction administration raising the question of whether such services are “professional services” within the policy coverage. Second, green building projects, and especially those adhering to a specific green building rating system, often include project objectives which may be beyond those considered to be within generally accepted standards of care implicating concerns of guarantees and warranties which would otherwise be excluded from coverage. Finally, in the event that a green project is not delivered per the owner expectations, the damages which flow from such failure may be in the form of lost financing, tax incentives, energy savings and marketability which could be considered consequential in nature arising from the contracts for design and construction.

For example, assume that an owner wishes to develop a green building project which, when completed should achieve a LEED Silver rating per the USGBC LEED-NC guidelines.¹ Part of the owner’s motivation for a development achieving this certification is the allowance of additional square footage than otherwise permitted by local zoning laws, state and local grant money and low interest financing made available for such projects, tax credits and incentives, reduction of energy costs and acquisition of energy credits, and the overall marketability of the property. In order for the

¹ LEED is an acronym for Leadership in Energy and Environmental Design. The LEED Green Building Rating System was established by the United States Green Building Council (USGBC) for the purposes of defining and measuring green buildings. While several rating guidelines and pilot programs have been created since its inception, LEED-NC (LEED Green Building Rating System for New Construction & Major Renovations) provides a set of performance standards for the design and construction of commercial, institutional and high rise residential developments.

owner to realize these goals, a LEED Silver rating must be achieved and the owner makes this a requirement in all contracts for design and construction.

In order to achieve the LEED Silver rating, the project must adhere to specific design and construction guidelines for certification not otherwise required by state construction and energy codes. In addition, there are procedures which must be followed for project registration, design and construction submissions, and ultimate certification not otherwise required in the typical construction project. Further, in order to achieve the desired certification, the LEED guidelines require commissioning and in some cases enhanced commission by a Commissioning Authority (CxA). These requirements may raise an issue of whether the insured architect or engineer is performing professional services within the scope of his or her practice.

Moreover, it is certainly within the owner's benefit to require that the project delivered will achieve the desired LEED rating, otherwise the efforts and expense of achieving the same would be meaningless. This raises a concern of whether agreeing to deliver a specifically rated project, which arguably requires performance beyond the general standard of care, will constitute a guarantee or warrantee triggering an exclusion in coverage.

Finally, while the owner may certainly end up with a functioning development, should the project fail to achieve the desired LEED Silver rating the sought after "green" incentives may be in jeopardy or unobtainable. In such instance, will these consequential damages be covered by the traditional professional liability policy?

Certainly, there are arguments which can be made on both sides of the coverage issue. Arguably, green building, green consulting or green commissioning services may fall within the broad definition of professional services. As to the concerns of whether agreeing to furnish a specific green result will constitute a guarantee or warrantee, a carefully worded contract can certainly help

to alleviate this risk. Finally, as to the damages resulting from a green project, one can certainly argue that such are not consequential, i.e., arising from contract, but rather a proximate result of a deviation from the standard of care, i.e., negligence and thus covered. Again, a carefully worded contract would assist in this regard.

Even so, it is untold how the insurance industry will respond to green building claims against design professionals. Coverage may certainly be excluded, limited, or subject to a reservation of rights for the reasons discussed above. Also, a variety of insurance coverage is presently being made available to owners, contractors, and most recently design professional as an endorsement to their existing policies for green building projects. The fact that such green coverage is available may suggest that not having it means that one is not covered for claims arising from green projects. Again, this is an uncharted territory and the design professional must proceed with caution.

While time will certainly tell how green building will effect professional liability coverage, for now, the prudent design professional should inquire and ensure that coverage is available for those green services which he or she proposes. It is too late at the end of the project to question whether a claim, which given the nature of green building project may be substantial, will be covered by insurance... or the unfortunate design professional alone.

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