

# Potholes in the Green Road

## Legal and Insurance Issues Arising From Sustainability

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# Learning Objectives

- Managing Risk
- Recognizing Risk Opportunities
- Better contract language
- LEED-related lawsuits

# Risk “Opportunities”

- What service is promised
- What service is delivered
- What product is installed
- How it performs over time

# USGBC Green Goals

- Optimize Site
- Minimize non-renewable energy use
- Select “green” products
- Conserve water
- Improve indoor environment
- Optimize operation and maintenance

# Managing Risk

- Manage Client Expectations
- Define Scope of Services
- Avoid Warranty of Result
- Controlling Consequential Damages

# Client Expectations

- LEED Certification
- Energy Savings
- Green Materials
- Adaptability
- \$\$\$\$\$\$\$\$\$\$

# Managing Expectations

- Educate Client About Uncertainty of Products & Processes, New Technologies
  - Products Lack History of Use
  - System Components Lack History of Compatibility
  - Encourage/Require Commissioning Phase
  - Emphasize Operator Education

# Scope of Services

- Description of Services Which Describes Services, Not a Result
- A/E Shall Design a LEED-certified building – NO
- A/E's Design Shall Meet All “Applicable Energy Efficiency Standards – NO
- A/E Will Certify Upon Completion That Project ...



# Standard of Care

- **Standard of Care – The A/E shall exercise that degree of skill and care ordinarily exercised by reasonably prudent and careful A/Es practicing in the locale of the Project under the same or similar circumstances. - YES**
- **Certify, Ensure, Insure, Warrant - NO**

# Consequential Damages

- What are they? – lost rents, tax credits, sales, profits, “missed the market”
- Contract clause: To the fullest extent permitted by law, neither the [A/E nor the Owner] [Subcontractor nor the General Contractor] shall be liable to the other for indirect or consequential damages, including but not limited to, lost use, lost profits, lost reputation, lost tax benefits, or lost business opportunities, in any way arising out of or relating to the Project or the performance of this Agreement.

# Document the Design Process

## Document Design Choices by Owner

- Provide Owner With Options – Confirm Choices
- Identify Third-Party Representations
  - Memo to File
  - Confirm in Letter

# Document the Design Process

– Identify Projects in Operation

- Suggest/Conduct Visits
- Encourage Owner Contact With Operators

# LEED Lawsuits

- *Shaw Development v. Southern Builders (2007)*
  - Mechanic's Lien by Contractor
  - Developer Countersued for Loss of Tax Credit For Lack of Construction in Accord With LEED Requirements
  - Settled Out of Court

# LEED Lawsuits

- *Air Conditioning, Heating and Refrigeration Inst. V. City of Albuquerque*
  - City Adopted Minimum Efficiency Stds.
  - Local HVAC Companies Sued for Injunction, Based on Energy Policy and Conservation Act

- Court Ruled in Favor of HVAC Contractors
- Because Conflicting Standards HVAC Contractors Would Have to Increase Stocks,
- Unable to Set Consistent Standards for Customers
- Distinguish Between Law Setting Standards and Law Requiring Compliance With Existing Standards

# USGBC's Building Performance Initiative

- Gather Performance Data As Part of Retention of Certification
- Focus on Building Use
- Provide Basis for Suits?