



## PUBLICATION

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### Sustainable Construction: Too Good to Be True?

Over the past decade, sustainable—or green—construction has moved from the periphery into the spotlight in many parts of the country. With states such as California and New York writing sustainable building requirements into their building codes, green construction has now become the norm for most newly constructed projects. With the rapid growth of the green construction industry, one of the key concerns raised by many has been the concern over the new risks that may exist to those entities involved with the green construction movement. With new project delivery methods, stricter performance criteria for building systems, and the utilization of new and mostly untested building materials and equipment, the chance for new liability exposure for designers and contractors alike seemed almost inevitable. However, after over a decade of green construction, the Armageddon that many thought was inevitable (yours truly included) has not manifested itself. In fact, litigation related to green construction has been almost non-existent throughout the country. So the question that is begging to be answered is, why? Construction litigation continues to be as prevalent as ever, so why does green construction appear to be immune? This article explores some of the potential reasons for this anomaly and whether we can expect the good times to continue for the foreseeable future.

#### No Coverage for You!

The most compelling reason for why there has not been an influx of construction litigation related to green construction is the lack of insurance coverage for most green specific claims. Most insurance carriers offer commercial general liability (CGL) policies that cover property damage caused by defects in construction. While this may cover damages caused by defective green products (i.e. leaking green roofs), it will not cover economic damages suffered by systems not operating as efficiently as they were designed to. A majority of the benchmarks for green construction are related to the efficiency of the building systems themselves. When those systems do not operate at the stated efficiency levels, the result is not property damage, but rather added economic costs to the building owner who may be paying more in water and energy costs than they expected. While traditional CGL policies do not provide coverage for these purely economic claims, most professional liability policies will cover economic damages that result from errors and omissions in the design of the building. However, considering the scrutiny that goes into

certifying design documents for green buildings, most owners would find it difficult to prove that a design error alone was the cause for the reduced efficiency experienced in their building after commissioning. As well, many carriers are explicitly excluding coverage for these kinds of damages even in professional policies as many carriers have realized the potential exposure on green construction projects. So far, the insurance industry's reluctance to offer products that would insure against these types of economic claims has inured to their benefit as it has dissuaded most Plaintiffs from making those sorts of claims. Until claims for economic loss resulting from non-performing systems start to appear, and insureds start pressuring their insurers to offer products to protect them, expect the insurance industry to continue to take a low profile on these issues.

### Green Construction? What is That?

Another contributing reason for why we have not seen many lawsuits involving green construction is that many Plaintiff's firms have yet to understand the nuances of green construction and the unique issues that such projects may create for owners. The truth is, traditional construction defect actions are still as prevalent as ever, with the construction industry having rebounded from the economic collapse in 2008. For most attorneys who specialize in construction, there is plenty of work to go around asserting traditional, and more familiar, defect claims. Windows still leak, roofs still pond water, and stucco still cracks. For most attorneys, these are familiar claims that they have handled many times before and they generally result in strong enough claims to command a lucrative resolution. In other words, why fix what is not broken? Green construction presents many new, and sometimes complicated issues. For example, proving that a building is not achieving a 20% reduction in electrical usage could be a tedious and costly endeavor. There are very few litigation experts in the field of green construction, mainly because there has not been any litigation, so finding someone qualified to justify these claims may be difficult. As well, as discussed above, the lack of insurance coverage for purely economic claims has caused most Plaintiff's attorneys to shy away from pursuing these types of claims. Simply put, the cost/benefit is not quite there for most Plaintiff's attorneys to venture into this uncharted territory. It will not be long, however, until a savvy Plaintiff's firm takes the time to understand the intricacies of green construction, and is able to craft claims that can only arise from buildings that utilize green construction practices. In the meantime, so long as traditional claims keep food on the table, we should not expect a significant uptick in green construction claims.

### Do I Even Have a Claim?

Another contributing factor to the void of green construction litigation has been the lack of information available to building owners regarding efficiency performance for both their buildings and similar buildings. In the green construction arena, this is commonly referred to as benchmarking. Because most states don't require owners to report their energy and water usage, most owners don't have the information available to them to determine how their building is performing compared to similar buildings. While benchmarking alone does not tell the entire story, it is a valuable tool for owners to evaluate how their own building systems are functioning and whether changes need to be made. This is particularly important in new construction where the owner cannot compare energy usage from prior years to those after green upgrades were made to increase energy efficiency. Without benchmarking information, most owners do not have the means to evaluate whether their building is operating as designed. California recently signed into law AB 802 which will allow commercial and multi-family residential owners to more easily track their annual energy usage and will make that information available to the public. The goal in implementing this legislation is to allow owners to make more informed decisions about energy use in their buildings. On the flip side, once this information becomes public knowledge, owners will have the tools available to them to develop claims for failure to provide efficient systems, should they choose. The reality is most buildings that have implemented energy efficient systems have only been in operation for a handful of years, and therefore information about how they have operated in comparison to non-efficient buildings is sparse. Once more time has passed, and more information starts to become available, it is likely there may be some unhappy owners who are just realizing for the first time that they are not getting what they paid for.

While the risk still remains, it is likely that for the foreseeable future, litigation involving green construction is likely to remain minimal. This does not mean, however, that owners, designers, and contractors should not spend the necessary time analyzing these potential risks and taking necessary steps to manage those risks through their

contracts and available insurance. Once green construction starts to make up the majority of new construction projects, which is expected to happen by 2022, it will only be a matter of time before these claims start to arise, and those parties who have already taken measures to manage their risk will be happy they did.

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