

WELCOME TO
LEGALLY GREEN:
 The Legal Environment for
 Design Professionals in a Greening World

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A Greening World

- The commitment and desire to build green or sustainable projects continues to grow
- National Society of Professional Engineers® in its Code of Ethics for Engineer supports sustainable growth








NSPE Code of Ethics for Engineers

“Engineers are encouraged to adhere to the principles of sustainable development¹ in order to protect the environment for future generations.”

III Professional Obligations (2)(d)



Sustainable Development defined

The NSPE defines “sustainable development” in footnote 1 in its Code of Ethics for Engineers as

“...the challenge of meeting human needs for natural resources, industrial products, energy, food, transportation, shelter, and effective waste management while conserving and protecting environmental quality and the natural resource base essential for future development.”

ASHRAE GOES GREEN

The American Society of Heating, Refrigerating and Air-Conditioning Engineers (ASHRAE) in its Mission Statement declares its commitment to green or sustainable growth.

“To advance the arts and sciences of heating, ventilating, air conditioning and refrigerating to serve humanity and promote a sustainable world.”

American Institute of Architects

AIA Board in 2005 published its new Directory of Public Policies and Position Statement

“The creation and operation of the built environment require an investment of the earth’s resources. Architects must be *environmentally responsible* and advocate for the sustainable use of those resources.”

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AIA Board's New Position Statement No. 42

"Architects must strive for energy efficiency and waste reduction in the built environment, encourage energy-conscious design technology, and support a national program for more efficient use of nonrenewable resources and the development of renewable energy sources."
[emphasis added]

Green Trend Continues

As of February 2008, the U.S. Green Building Council reported that 43,000 people from design professionals to contractors had been accredited

Green/sustainable development is here to stay



Legal Impact of Green/Sustainable Development on Design Professionals

- Standard of Care
- Contractual Issues



Tort Law and Contract Law

Tort Law
Basic Protection of Negligence Standard
Legal Framework of Protection
Based on Standard of Care

Contract Law
Freedom to Assume Contractual Obligations
Changing or Creating Rights
Exceeding Normal Legal Liability

Elements of Tort Liability

Based on Negligence

- Duty
- Breach
- Causation
- Damage



How Duties are Established

Legal Requirements

- Codes and Standards
- Registration Laws
- Other Laws, Rules, Regulations

Contractual Obligations

Actions Creating Intended or Unintended Duties



Determination of Negligence and Liability

Negligence

- What duty existed?
- Was the standard of care met?
- Was there a breach of a duty?

Liability

- If there was a breach of duty, did it cause damage?
- Can the damage be traced to the breach?
- Could such damage have been expected?

Standard of Care

Negligence is the failure to use reasonable care. Reasonable care is that degree of care which a reasonably careful person would use under like circumstances. Negligence may consist either in doing something that a reasonably careful person would not do under like circumstances or in failing to do something that a reasonably careful person would do under like circumstances.

Reasonable care on the part of a design professional is that degree of care which a reasonably careful design professional would use under like circumstances. Negligence may consist either in doing something that a reasonably careful design professional would not do under like circumstances or in failing to do something that a reasonably careful design professional would do under like circumstances.

Standard of Care

Established by Expert Witness Testimony

Since the issue in negligence cases is what other design professional would have done under the same circumstances, expert testimony is normally required to allow the judge or jury to determine whether negligence occurred

Expert Witness Testimony

Must be objective to show standard – not to show negligence

Testimony as to reasonableness of service provided by design professional


- at the time the service occurred
- in the same locality
- by the same discipline
- based on the facts then known

Not what “expert” would have done now

Does Greening Change the Standard of Care?

Law is not settled but so far the answer appears to be NO

Negligence per se & Building Codes, Florida Building Code, city or county building codes



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Negligence Per Se

Differs from traditional negligence in that a violation of a statute or code is deemed as a matter of law negligence

Four elements to establish a negligence per se claim:

1. a violation of a statute which established as duty to take precautions to protect a particular class of persons from a particular injury or type of harm
2. plaintiff must establish he was in the class that statute designed to protect
3. plaintiff must establish that he suffered an injury the statute was designed to protect against
4. plaintiff must establish that his injury was legally caused by the violation of the statute

Negligence per se Claims for failure of design to meet green statute or ordinance

In Florida, a violation of the Florida Building Code is not considered negligence per se but just evidence of negligence

In Minnesota, Montana and other states failure to meet state or local green laws is negligence per se

In Florida, given the green trend and coming new green laws and standards there may be attempts to pursue negligence per se claims on failed green design

At present negligence per se not available in Florida for building code violations

Affect of LEED® Accreditation on Standard of Care for a Design Professional

No case law yet in Florida

NOTE: a design professional that advertises LEED® credentials could be subjected to a standard of care that requires this design professional to exercise that degree of care that a reasonable LEED® credentialed design professional would use under like circumstances

Expert testimony on the standard of care for an LEED® credentialed design professional

Value of Negligence for Design Professionals

Standard provided by Florida Law

Design professional not a guarantor

Design professional providing intellectual service not a physical product

Limits expose to damages

Ways to Lose The Negligence Standard

Voluntarily waive it

Contractual language

Language like “guarantee” “warranty” “ensure”

Effect of contractual guarantees on professional liability insurance; exclusion against express warranties or guarantees

Contractual Concerns in a Green Project

Contractual guarantees on LEED certification (certified, silver, gold and platinum)

Don't guarantee a building or HVAC system will obtain a certain LEED® rating

Be careful with marketing material representations

“Reasonable care to achieve” LEED® certification levels

Warranty/Guarantee Language

Group 1
Design professional will obtain LEED® certification

Design professional shall obtain LEED® certification

Group 2
Design professional will endeavor to obtain LEED® certification

Design professional will use reasonable care to achieve LEED® certification

**Green Projects, New Products,
Informed Consent**

Rapid growth in green building causing an explosive growth of new products

Lack of product history and limited research


Who bears the risk of specifying experimental products, client or design professional?

- Don't Let It Be You!

**Green Projects, New Products,
Informed Consent**

Avoid potential problems:

1. analyze and share manufacturer's data with Client
2. conduct mock tests where appropriate
3. provide full disclosure to client
4. obtain informed consent




**Informed Consent with Experimental
Materials or Systems or New Un-tested
Products**

- inform the Client of alternative methods and materials
- inform the Client of the risks and benefits of such sustainable material, if applicable
- inform the Client that the use of such material or system is untested with you and therefore experimental

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Informed Consent

Obtain the written signed consent of the client on such decision to show that the client participated in the risk in trying to reap the rewards of this new material or system



Waiver of Consequential Damages in Green Designing

Risk of loss of LEED®

Possible financial penalties

Loss of public financing

Marketing embarrassment for client based on announced LEED® rating that was not attained

Such issues make it crucial to have a waiver of consequential damages in the contract or subcontract

Making Green in a Green World

Green Design

- Risks are similar in green design to traditional risks but just appear in a different guise
- Key is to be aware of the risks in green design to manage the risks

Making Green in a Green World

Manage the risks by:

- Focusing on performance
- Focusing on customer service
- Paying attention to contract language
- Using written change orders
- Using properly-worded advertisement

Questions & Answers

**THANK YOU FOR YOUR
TIME AND ATTENTION**

AE RESOURCES WEBINAR

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