

# Green and Sustainable Design: Professional Liability Risk and Insurability Issues for Design Professionals

## PLI Seminar

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## Introduction

- Many Positive Aspects of Green/Sustainable (“G/S”) Design
- Presentation Focus
  - Professional Liability Risk
  - Professional Liability Insurance Concerns
- Presentation Objectives
  - Increase Design Professional Awareness of Risk and Insurability Issues Associated with G/S Design
  - Present a Framework for the Development of Contractual and Risk Management Practices to Minimize Risk and Maximize Insurance Coverage in the G/S Design Context
- Presentation Assumes Basic Understanding of G/S Design, LEED, and Other Background Definitions and Standards

## Client Expectations in G/S Design Context

- G/S Projects – Those considered environmentally sensitive in their siting, planning, programming, design, construction, operation and maintenance
- This characterization demonstrates that achievement of G//S standards and performance objectives cuts across
  - Entire Multi-Decade Life Cycle of a Project
  - Embraces and Depends upon the Adequate Performance of All Major Project Participants
    - Project Owner
    - Prime Design Professional and Subconsultants
    - Constructor and Trade Subcontractors
    - Specialized G/S Consultants
    - Product Manufacturers
    - Operations and Maintenance Firms

## Client Expectations in G/S Design Context

- Achievement of G/S Compliance represents Project Owner Potential for Much to Gain and Much to Lose
- Significant Potential for Disappointed Project Owner Expectations
- G/S Design – Choices and Issues
  - Choices and Legal Requirements
  - Tension and Competition: Cost, Schedule, Quality and Long-Term Project Performance
  - Front-End Impacts on Cost and Schedule
  - Longer-Term Impacts on Project Life-Cycle O&M Cost

## Client Expectations in G/S Design Context

- Design Professional Role in Informing Client Decision-Making on G/S Design Choices and Issues.
  - Design Professional Qualifications and Experience
  - Documenting Communications with Client
  - Documenting Role of Other Project Participants in G/S Design Choices and Issues
  - Documenting Client Decision-Making on G/S Design Choices and Issues.
  - Impressing upon Client Limitations on Role/Abilities of Design Professional in Achievement of G/S Design Objectives or Standards.

## Professional Liability Risk: Contextual Background and General Considerations

Principal Factors that, in general, Impact Professional Liability Risk for Design Professionals:

- Lack of qualifications or experience of the design professional to undertake the client's commission
- Misrepresentation of the design professional as to its qualifications or experience to undertake the commission
- Unrealistic or unreasonable client expectations as to project result or performance capabilities, or the design professional's ability to achieve those expectations
- Lack of documentation as to important communications between the client and the design professional as to the definition, qualifications and limitations regarding the achievement of the client's expectations

## Professional Liability Risk: Contextual Background and General Considerations

- Contractual terms that heighten the generally applicable negligence-based professional standard of care or impose specific warranty or performance standards or obligations upon the design professional, the achievement of which are beyond the professional standard of care or the control or ability of the design professional
- Circumstances in which the design professional provides certifications or collateral warranties that address subjects beyond the design professional's service scope or ability to control, or representations that exceed the professional standard of care
- Project design involving new, experimental, untested or innovative practices, products, processes, systems or technologies
- Practice in an area in which the application of the professional standard of care is especially ill-defined and experience undeveloped
- Projects in which the consequential damage exposure for performance deficiencies or failures is significant and may occur over an extended period

## Professional Liability Risk: Contextual Background and General Considerations

- Projects in which design is developed in an "integrated" process involving multiple project participants, but in which the professional standard of care and risk allocation provisions are defined in a traditional manner in the design professional's agreement that do not adequately account for the integrated design development process
- Projects in which design responsibility is not clearly defined or understood and diffused among multiple project participants
- Projects in which design of permanent project work is delegated to a constructor, or in which performance specifications assign design responsibility to a constructor, but in which the extent of the design delegation or assignment is not clearly defined
- Projects in which services are undertaken in an ill-defined and evolving regulatory environment in which federal, state and local law or codes may conflict or have not been previously or consistently interpreted or applied

## Professional Liability Risk: Contextual Background and General Considerations

- Projects in which the interests and objectives of the initial client "developer" may not be consistent with those of the intended or ultimate project occupant or user
- Projects in which the performance and functionality of the design relative to the completed project inextricably depends upon the competent and consistent implementation of certain minimal operations and maintenance standards, assumptions and expectations
- Practice in an area in which legal principles relating to risk and liability of design professionals is uncertain due to paucity of directly applicable legal precedent

G/S Design Involves All of the Preceding Factors

## Professional Standard of Care ("PS/C")

- Perfection not Required
- Responsible to Perform According to Standard Expected of Similar Professionals Performing Under Similar Circumstances
- Assumes Ability to Control Factors within Scope and Contractual Assumption and Performance
- Application in the Context of Novel or Innovative Service Activities or Design Contexts does not Alter but does Lead to Greater Uncertainty in PS/C Application
- Contractual Performance/Warranty Provisions
  - Relationship to PS/C
  - Performance Capability
  - Extended Periods of Risk Exposure
  - Professional Liability Insurance Issues

## Professional Standard of Care (“PS/C”)

- Heightened PS/C Due to LEED AP Designation
- Factors Extraneous to Pure Technical Skill and Capability in PS/C Application in G/S Design
  - The strong political and design professional practice "environment" encouraging and promoting G/S development and design
  - Economic incentives to developers to implement G/S design
  - Project owner (or design professional) aspirational goals may predominate over pragmatic or realistic technical and professional abilities to achieve those goals
  - The increasing growth of design professionals and others promoting the development of G/S design
  - The "backend" or longer-term economic benefits of owning a G/S-designed project, in terms of potentially reduced operating and maintenance costs and increased revenues

## Professional Standard of Care (“PS/C”)

- Professional ethical standards that create obligations to promote or implement G/S design objectives
- The degree of the project owner's informed understanding of risks involved in G/S design and the achievement of G/S standards and performance objectives
- To what extent do ethical standards relating to G/S design affect professional liability exposure of design professionals?

## Professional Standard of Care (“PS/C”)

- Emerging and Diversified Class of Potential G/S Experts
- Do more Precise and Exacting Contractual G/S Standards Reduce or Increase Professional Liability Risk Exposure?
- Application of the PS/C in the G/S Design Context should take into account:
  - Contractual terms, including scope of services and performance obligations and objectives
  - Roles and responsibilities of the various project participants relative to G/S design development
  - Degrees of uncertainty associated with interpretation or application of relevant codes, statutes, regulations - and the law relating to G/S design
  - The innovative nature of the design or the products, technology and processes presented in the G/S design at issue
  - The experience and qualification of the design professional, including representations made by the latter in that regard

## Professional Standard of Care (“PS/C”)

- Other circumstances relevant to the professional standard of care application, including the nature of service delivery (e.g., collaborative or integrated design approach to G/S design development issues, or fast-track); specification of new or experimental products, systems, technologies or processes; influence of construction means and methods in the achievement of any performance objectives; and the influence of other factors outside the control of the design professional, such as the project owner’s post-completion operations and maintenance of the project on the ability to achieve or sustain any performance standards or objectives
- LEED standards are relatively new, evolving and varying (no or minimal uniformity), and the application of those standards in any specific design context allows for significant discretion and flexibility as to how to achieve any given level of LEED certification or other sustainability standard.

## G/S Design Process

- Integrated and Collaborative Process among many Project Participants
  - Opportunity for both Risk Reduction and Risk Increase
  - The G/S design development process often is undertaken in an integrated and collaborative mode. As has been stated:
 

“... Achieving...green objectives may require additional integration of the designers, contractors, subcontractors, installers and other project team members. Under the LEED Rating Systems, several project team members are sometimes responsible for achieving any one point toward certification. For owners who desire LEED certification for their projects, this factor presumably gives an integrated project team an advantage over the more segregated approach of conventional project teams. *(cont.)*”

## G/S Design Process

“These green objectives, and the additional integration required to achieve them, create new risks for owners, architects, contractors and for each of the other project team members. The structure of green building standards, such as LEED, further magnifies the potential impact of these risks on each of the project team members. For example, LEED awards certification based on an aggregate of points achieved and therefore, a failure to achieve any one point can result in the failure of an entire project to achieve the desired (or required) certification level. Thus, because several project team members may be involved in achieving any one point toward LEED certification, a failure by a single member of the project team can result in the same project-wide failure to achieve certification.”

B. Phillips & S. Sentman, “Structuring and Drafting Project Agreements to achieve Green Building Objectives, Green Building and Sustainable Development: The Practical Legal Guide” (J. Furr et al. eds, American Bar Association, 2009).

## G/S Design Process

- Implications Regarding Spearin Implied Warranty Obligation
- Performance Specifications
  - Clarity
  - Crossing the Line
  - Implications Regarding Design and Professional Responsibility
- Design Delegation

## Product Risk

- Specifying New or Experimental Products
- Discontinuance of Product Manufacture
- Product Availability
- Manufacturer “Puffing”

## Legal Bases of Professional Liability

- Lack of Legal Precedent at Appellate Court Level
- Anticipated Claim Theories
  - Breach of contract
  - Breach of warranty (i.e. failure to achieve specific standards or performance requirements explicitly or implicitly required or referenced in the design professional's agreement)
  - Breach of the professional standard of care, or negligence
  - Negligent misrepresentation (arising principally in the context of a claimant alleging that the design professional made negligent statements as to G/S compliance or performance)
  - Misrepresentation as to the design professional's qualifications or experience in G/S design
  - Strict liability under certain codes, statutes or other legal requirements

## Legal Bases of Professional Liability

- False Claims Act liability (arising out of circumstances in which a design professional is contractually obligated to achieve specific and objectively-defined and ascertainable G/S standards or performance objectives and in which the design professional invoices and is paid with public funds based upon its statements of compliance)
- “New wine in old bottles” or “special place in the sun”

## Third-Party Liability

- Subsequent Project Owners
- Tenants or Other End-Users of the Completed Facility
- Investors
- Construction lenders

## Consequential Damages

- Reduced energy, water and other operational costs
- Increased market value and revenue (e.g., rental or sales)
- Increased investor participation and revenue (investor return) expectations and opportunity
- Decreased insurance premiums
- Increased worker productivity
- Tax incentives and credits, as well as rebates
- Development credits and incentives
- Enhanced project and project owner reputation
- Potential increase in sales or increased revenue potential if the completed facility is a more pleasant or "green-friendly" place to transact business

## Professional Liability Insurance

- What is the professional liability market doing about G/S risk?
- Professional Liability Insurance Issues
  - Professional Services
  - Warranty Exclusion

## Risk Management and Contractual Considerations

- Realistically informing, managing (qualifying or limiting) and documenting client expectations
- Avoiding warranties or guaranties in contracts, certifications or otherwise - especially as to subjects beyond the ability of the design professional to control or otherwise reasonably be responsible for achieving
- Developing a specific standard of care provision that explicitly references the various factors and circumstances that (along with general considerations) should be taken into account in the G/S design context
- Including limitation of remedies provisions in the contract of engagement
- Developing specific and encompassing consequential damage disclaimer and waiver provisions
- Limiting compliance with laws, statutes, codes, regulations and standards to the extent required or expected by the professional standard of care

## Risk Management and Contractual Considerations

- Clearly defining roles and responsibilities of project participants in the G/S design development and implementation process and documenting same in relevant contract provisions, and project management plans, and submittal review stamp language
- Do not certify or warrant as to matters beyond the scope, control or responsibility of the design professional
- Reviewing marketing and related materials for representations made regarding the design professional's qualifications and experience in G/S design and the ability to achieve G/S objectives and standards
- Recognizing that, generally, professional liability insurance does not cover pure warranty liability or related liability beyond breach of professional duty, care or negligence
- Limiting liability for claims arising out of integrated design service activities
- Tempering and moderating zeal and enthusiasm for G/S aspirations and objectives

## Conclusion

- Be Aware of Professional Liability Risk and Insurance Concerns
- Develop Responsive Contractual and Risk Management Practices

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