Recent Development

WHAT IS GREEN? THE LACK OF A NATIONAL UNIFORM STANDARD

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I. INTRODUCTION

A “green building” is a structure that is designed, built, operated, maintained, renovated, and reused in an “environmentally responsible and resource-efficient” manner.\(^1\) Also known as a sustainable or high performance building, green buildings are designed to use energy, water, and other resources more efficiently. These buildings also protect occupants’ health, and have a reduced environmental impact due to their energy efficiency and reduced use of natural resources.\(^2\) In addition, green buildings’ environmentally efficient design are expected to reduce a building’s operating costs, heighten aesthetic qualities, and even improve the overall quality of life of its occupants.\(^3\)

While some may disagree on the effects green buildings can have on an occupant’s mental and physical health, many would agree that green buildings have the potential to reduce the environmental impact of the built environment based upon the large percentage of resources currently used by buildings.\(^4\) In the United States, “buildings account for: 39% of total energy use, 12% of total water consumption, 68% of total electricity consumption, 38% of carbon dioxide emissions,” and there is room for improvement in these numbers\(^5\)

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2. Id.
3. Id.
The potential benefits of green buildings on the environment have led to a growing market for green building. In 2005, the green market comprised 2% of non-residential construction.\(^6\) In 2008, the number rose to 10-12%, and by 2013, 20-25% of non-residential construction is expected to be green.\(^7\) The overall green construction market is likely to double between 2009 and 2013.\(^8\)

As the green market continues to grow, there is concern that the lack of a nationally uniform green standard might give rise to legal challenges.\(^9\) Just as there are building standards for what constitutes safely installed electrical wiring,\(^10\) building standards for what constitutes a “green” structure are needed. Without a nationwide green rating system, owners, developers, and purchasers may not fully comprehend the relative environmental impact of the raw materials or structures they are producing or purchasing, making way for breach of contract and misrepresentation claims. This paper discusses the various rating systems that make a building green, and how variation between rating systems may trigger litigation, as well as discuss the possibility of a nationally uniform green building standard.

II. GREEN RATING SYSTEMS

The most widely used green rating system in the United States is the United States Green Building Council’s (“USGBC”) Leadership in Energy and Environmental Design (“LEED”).\(^11\) LEED is a voluntary green-certification program that focuses on six major areas: sustainable sites, water efficiency, energy and atmosphere, materials and resource, indoor environmental quality, and innovation in design.\(^12\) Points are awarded in each of

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7. Id.
8. Id.
these categories with additional points available for addressing region-specific priorities. LEED rating systems can be used in nine different areas of construction including new construction, homes, schools, and healthcare facilities. The USBGC continually updates LEED and released the most recent revision on April 27, 2009. Because of LEED's third-party certification process, it has become an attractive means by which state and local governments can measure the environmental performance of new buildings.

In Canada, another green rating system, “Green Globes,” is provided by the Green Building Initiative (“GBI”). Green Globes provides an online assessment tool that evaluates seven main categories on a 1000-point scale: energy, indoor environment, site, water, resources, emissions, and project/environmental management. New and existing commercial buildings may become certified with a rating of one to four globes after first achieving at least thirty-five percent of the total 1000 points. Although not as well known as LEED, Green Globes is considered to be less cumbersome and less expensive because of the ease of use of the rating systems.

In 2009 the American Society of Heating, Refrigerating and Air-Conditioning Engineers, in collaboration with the Illuminating Engineering Society of North America and the USGBC, released their own green building standard, entitled “standard 189.1.” This standard provides minimum criteria, for new high-performance and green commercial buildings and major renovation projects similar to LEED. Unlike LEED, however, proposed Standard 189 sets minimum standards for building greenhouse gas emissions. The standard is expected to be added easily into the building codes of environmentally-

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13. Id.
14. USGBC, LEED Rating, supra note 11.
17. Green Bldg. Initiative, Green Globes, http://www.thegbi.org/green-globes/ (last visited October 27, 2010); see also Bennett, supra note 16.
18. Green Globes, supra note 17.
21. Bennett, supra note 16.
22. Id.
conscious jurisdictions as the standard is already written in similar code language.\footnote{Id.}


Along with the green rating systems listed above, some local and state governments have adopted their own green building standards. For example, in 2004 the City of Chicago adopted The Chicago Standard, which is based on LEED points that are reasonable and appropriate for Chicago. The city hopes that private developers will use this guideline in their green buildings.\footnote{City of Chicago, Dep’t. of the Env’t., The Chicago Standard, http://egov.cityofchicago.org/city/webportal/portalContentItemAction.do?contentOID=536910321&contentTypeName=COC_EDITORIAL&topChannelName=Dept&channelId=0&programId=0&entityName=Environment&deptMainCategoryOID=536887205 (last visited Oct. 27, 2010).} California went one step further when it announced mandatory green building standards known as CALGREEN.\footnote{Press Release, Office of the Governor, Governor Schwarzenegger Announces First-in-the-Nation Statewide Green Building Standards Code (Jan. 12, 2010), available at http://gov.ca.gov/index.php?print-version/press-release/14186/.} These standards become effective in 2011 at which point all new buildings will be required to comply.\footnote{Id.} Existing buildings are also eligible to become CALGREEN-certified.\footnote{Id.} At the city level of regulation, Dallas, TX passed green building standards for residential and commercial buildings.\footnote{City of Dallas, Green Dallas, Green Buildings, http://www.greendallas.net/green_buildings.html (last visited Oct. 27, 2010).} In addition to meeting these standards, residential buildings may also become green certified through other city-approved certification programs including LEED, Green Built North Texas, Green Point, and Green Communities.\footnote{Id.}
III. POTENTIAL LIABILITY FROM GREEN CONFUSION

With the myriad of different green building rating systems available, there will be confusion over what is considered to be green if the certification goals are not clearly communicated. A land owner or buyer of an existing building may think green means LEED certification, while the developer or seller may think green is NGBS certification. This lack of clarity might result in damages including, but not limited to, loss of sale, loss of government incentives and tax credits, increased design and construction costs, and diminished asset value.32

A. Misrepresentation

One legal claim that may be brought by individuals looking to assign liability for a substandard or non-certifiable structure is intentional misrepresentation. Because of the many different green rating systems, a developer may advertise that his project is green while hand-picking which requirements he will follow.33 Many owners and attorneys are unaware of the certification requirements and procedures that officially classify a project as green, and some use the term green liberally.34 In addition to liability for making claims that the project is green, liability may be incurred if claims are made that the project is healthier or has a smaller carbon footprint.35 The purchase of materials that are thought to be green might also result in legal claims if the materials do not conform to the specific green standard with which the project is trying to certify.36 The injury caused by misrepresentation may potentially be shown by the decrease in sales price or rent rates that result when the project is no longer classified as green.37

In order to prove negligent misrepresentation, a plaintiff must be shown that the defendant had a duty towards the plaintiff and that a breach of that duty caused damages.38 To

34. Id.
35. Masters et. al, supra note 9.
36. Prum, supra note 33.
37. Id.
38. Id. at 249; Restatement (Second) of Torts § 552 (2009). This section of the Restatement provides for and defines a cause of action for “Information Negligently Supplied for the Guidance of Others.”
establish defendant’s duty, a plaintiff must establish the standard to which the defendant will be held responsible.\textsuperscript{39} Establishing the duty of the standard of care may prove elusive because there is not a nationally uniform green building standard, statute, or building code.\textsuperscript{40} For example, a project may adhere to specific green requirements that differ from the local green building standard. One green standard is met, while the other is not. To avoid this confusion, expectations must be clearly communicated as to what the green standard will be prior to design and construction.

\textbf{B. Breach of Contract}

If the desired green standard is communicated in a contract, but the green standards are not met and the green certification is not obtained, a plaintiff may claim breach of contract. A contract must not only state the correct green standard, the correct version of that green standard, and the timeline by which that green standard must be achieved, but the contract also must state each stakeholder’s role in achieving the green standard.\textsuperscript{41} Contracts should clarify who is responsible for tracking, collecting, assembling, and submitting the documentation needed to achieve green certification.\textsuperscript{42} Contracting parties might also want to define who is responsible if the project fails to certify.\textsuperscript{43}

In the first known LEED-related lawsuit, \textit{Southern Builders v. Shaw Development},\textsuperscript{44} a cause of action was breach of contract claim. The contractor in this case agreed to obtain LEED Silver certification for a multi-residential project.\textsuperscript{45} The owner applied and qualified for a state income tax credit based on this certification, but later had to forfeit the credit when the contractor did not complete the project within the time required by the state’s green building tax program.\textsuperscript{46} The project lost $600,000 in tax credits.\textsuperscript{47} Green standards, timelines, and responsible parties must be clearly defined to avoid lawsuits and

\begin{itemize}
\item[\textsuperscript{39}] Prum, supra note 33, at 249.
\item[\textsuperscript{40}] Prum, supra note 33, at 249.
\item[\textsuperscript{41}] Bennett, supra note 16, at 21.
\item[\textsuperscript{42}] Id.
\item[\textsuperscript{43}] Id.
\item[\textsuperscript{44}] Prum, supra note 33, at 244, n.22, citing Shaw Development, LLC v. Southern Builders, Inc., No. 19-C-07-011405 (Somerset Cty. Cir. Ct. Md. 2007).
\item[\textsuperscript{45}] Prum, supra note 33, at 245.
\item[\textsuperscript{46}] Id.
\item[\textsuperscript{47}] Id.; See also Anderson et. al, supra note 32.
\end{itemize}
loss of tax credits and sales.

IV. A NATIONALLY UNIFORM GREEN STANDARD

The American Clean Energy and Security Act of 2009 was approved by the House of Representatives in June 2009 and is currently awaiting approval by the Senate.48 Section 201 of this bill, sometimes referred to as the Waxman-Markey Act, addresses the need for energy efficient buildings and requires “national energy building codes for residential and commercial buildings, sufficient to meet each of the national building code energy efficiency targets.”49 The Act would require state and local governments to comply with or exceed the national building codes set therein.50

A national building code would create green building uniformity and eliminate confusion caused by a multiple set of private, state, and local green standards.51 Design and construction costs might be reduced as well when one green standard emerges as the sole expectation for green projects.52 Misrepresentation and breach of contract claims would also decrease as clarity over green standards increased.

Despite these benefits, some would argue that lobbying interest groups would weaken the standard, making it less effective than standards implemented by individual states.53 Organizations not supporting a nationally uniform standard, however, are organizations that promote their own green certification programs.54 These programs would cease to exist if a national standard was established.

Some scholars reference the success of cooperative federalism in the Clean Air Act as an example of the positive impact of uniform standards.55 They argue that a similar system would make a national green building standard effective and implementable.56 Once national green building metrics are established, state and local governments would be required to

49. Id. § 201.
50. Id.
52. Id.
53. Id. at 275–76.
54. Id.
55. Shapiro, supra note 51, at 277–78.
56. Id.
implement these into local codes. If states failed to adopt a satisfactory implementation plan they would either be punished for non-compliance or be provided with an alternative code by the federal government.

V. CONCLUSION

Creating a nationally uniform green standard would minimize confusion related to green construction by clarifying which standard would be expected by the owner, builder, and purchaser. The number of green buildings would even increase as regulating green construction became less cumbersome.

Several different green rating systems are being used in the United States to certify that a building is green. As the green market grows, questions over which standard a project conforms to may create confusion that results in litigation. Misrepresentation and breach of contract claims could be asserted if the correct green certification is not achieved in a timely manner. If the government establishes a nationally uniform green standard, green confusion will be minimized, which would ideally result in fewer claims and create a uniform enforcement standard for courts faced with these issues.

57. Id. at 278.
58. Id.