

BY PETER MADRID

# Understanding LEEDigation

## The fast-growing trend of **GREEN** building spurs new issues for the commercial real estate industry

**W**ithin the legal industry, according to Marc Erpenbeck of Snell & Wilmer, a claim related to litigation about the USGBC LEED system is often referred to as “LEEDigation.”

Despite the fact that green building has been a fast-growing trend throughout the country and specifically in Arizona, he says, green building specific LEEDigation has lagged behind. “There are significant green building potential liabilities that I have no doubt will play out in arbitrations and the court system, yet there are simply few reported cases at this time.

“LEEDigation generally consists of five categories of potential claims: construction defects arising from new green building materials, certification issues, failure to meet specific requirements for green building mandates and incentives, misrepresentations of green building benefits, and regulatory/green building code issues,” says Erpenbeck, whose practice is concentrated in both transactional and

litigation matters in the areas of environmental, construction and real estate law.

“In Arizona, the efforts are frequently focused on energy efficiency (particularly with respect to air handling systems during our extreme heat) and water management — after all, we do live in a desert,” he adds.

With new materials, for instance, green building is driving new technologies to the marketplace because of their “green” or sustainable benefits, including potential points that a project may receive under the LEED system. With the design, specification, and installation of new products comes risk that the products will not perform as designed or marketed or maybe they simply will not hold up over time, Erpenbeck says. There are many product failure related claims in construction litigation when new products come to market, such as EIFS (synthetic stucco), Chinese drywall or polybutylene piping. Many times, he adds, it takes a number of years before the defect becomes apparent.

“With new and untested products, there is always some risk,” Erpenbeck says. “Some problems are more apparent like a claim made related to One Rockefeller Park in New York where a \$1.5M lawsuit was made by condominium owners because the building’s much-heralded ‘green’ heating system consistently fails to provide adequate heat, and that the actual performance is much different than was promised. In addition, delays in obtaining these more unique and new materials is also more common and can significantly impact the construction schedule as some of the products are not available at your local building supply stores.” Certification and failure to meet required certification is a relatively unique element of LEEDigation, and centers on the fact that a third party through USGBC Arizona to certify the points is required for LEED certification.

Sometimes buildings are “built to LEED standards,” and sometimes they are actually certified and certified to various levels, Erpenbeck says.

“We have experience on several LEED certified buildings in Arizona,” he explains. “When certification is sought and or required (by contract, code or as part of financing/incentive program) there is always risk that the third party will not



Audubon Center



Marc Erpenbeck



Carla Consoli

# USGBC Arizona Initiatives:

agree with the project owners and participants.

“When the level of certification desired or required is not achieved, the damages could be significant such as lost incentives or tax benefits, failure to obtain green financing, lost tenants, etc. The same can be true of a delay in the certification or additional expenses that are required to revise the design to pick up more points in another area when not as many points as anticipated were actually received.”

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— Marc Erpenbeck  
Snell & Wilmer

In addition, owners who are new to the process do not realize all of the various rating systems that are available for homes, commercial interiors, core and shell, new construction, schools, healthcare, retail, or existing building operation and maintenance.

“USGBC Arizona is a great source of education and has been responsive with respect to all of these issues,” Erpenbeck says. Misrepresentation of green building benefits, also known as “green washing,” is grounds for litigation. This is typically referred to as the misleading of consumers regarding the environmental practices of a company or the environmental benefits of a product or service.

“The Federal Trade Commission has taken the issue seriously and has issued stricter requirements on appliances and labeling and last year issued a Green Marketing Guide,” Erpenbeck says.

With regard to contracts and

transactions, Erpenbeck says Snell & Wilmer has done extensive work with many corporations in Arizona regarding the acquisition and construction of green spaces. The construction contracts include both typical and atypical modifications to address any specific risks with green building.

“We also have clients in Arizona that have modified their leases to make them more ‘green’ to conform to the company’s policies,” he says. As with most things in life, proof

is what counts the most. How well does “green building” work? Does it work in our own backyard? And what does a green building look like and “do” for us?

The answers can be found at the Nina

Mason Pulliam Rio Salado Audubon Center at the edge of the Salt River right in Downtown Phoenix, says Carla Consoli, Partner and Practice Group Leader for Lewis and Roca. The Center, LEED Platinum certified in June 2010, is home of the Arizona state office of the National Audubon Society.

“As a lawyer — an Environmental and Natural Resources lawyer at that — travelling from a downtown high-rise office building, I look forward to meetings at the Audubon Center,” Consoli says. “I walk through the front door leaving the hustle and bustle of urban life and entering a transformed former auto junkyard home to a pollinator garden, habitat for native birds and other wildlife which is truly transformative.

“Set against the Downtown Phoenix skyline, it proves that natural and urban landscapes can coexist,” Consoli says. “Isn’t this truly the mission of green building?” ■■■

★ Each branch will adopt a selected school and work with them to achieve a higher level of sustainability to teach/learn as they mature the program.

★ Start a multi-organizational intern program that will allow businesses to establish ongoing annual Internship programs with Arizona universities.

★ Develop a dashboard, almost complete, and have at least 6 cities and/or counties participate in this year with a focus on documenting where each currently is on sustainability issues and where they can focus ongoing annual improvement. We hope to make this a feature at our upcoming Heavy Medals Banquet. We will partner with ASU to help collect and evaluate data.

★ Acknowledge LEED Certified Building Owners and their support teams for the time period of April 2012 to April 2013. We will show a short video on each winner so they can teach banquet participants their “Lessons Learned” as well as their Best Practices.” ASU students will be assisting us in creating these videos. We will also feature three future LEED Certified Buildings so we can give a little bit of a taste to next year’s banquet.

★ Develop a multi-organizational approach to understanding what legislation is being developed that assists in the cause of sustainability. Currently IFMA, BOMA and USGBC have mutually purchased software to assist them in achieving this goal.

★ Redo our website to make more presentable and more up to date.

★ Develop a universal “Sustainability Map” that all organizations in Arizona can bless as an appropriate direction to take.



★ Hire an Executive Director.

— Curtis Slife,  
USGBC Arizona  
President