

By Shannon D. Sentman and Stephen Del Percio

## Risk and Liability

LESSONS FROM MORE THAN A DECADE OF GREEN BUILDING.

LEED HAS BEEN AT THE FOREFRONT OF A SEA CHANGE IN THE REAL ESTATE INDUSTRY AND THE STALWARTS OF THIS CHANGE FACE NEW RISKS FOR WHICH THERE REMAINS LITTLE GUIDANCE.

More than a decade into the LEED-led era of green building, the real estate industry still has little formal guidance on the new risks and liabilities for the designers and contractors who are building green. One thing we know for certain is that the shift to green building has not resulted in an influx of reported lawsuits against the design and construction profession — which is an encouraging start. Beyond this, there have been

some lessons learned, reported insurance claims and stark warnings, but there has been little in the way of actual judicial guidance.

When faced with a lack of guidance due to novelty, the conservative ranks of the risk management professions (surety, insurance and the legal community) apply a simple formula: *Novelty = Risk*. Until the tarnish of time and experience exposes the faults of such novel concepts, risk management professionals are left to draw conclusions by analogy and devise risk management tools and strategies from assumptions based on past experience. That is, they look to existing jurisprudence to derive likely outcomes for the new set of facts, and from this, they craft tools to avoid risk exposure — e.g., new insurance products, specific contract provisions and riders, and other risk management tools.

anticipated level of performance.

Although many of these are interrelated, each concern can be addressed through appropriate risk management tools and strategies, including clear contracts, working with risk management specialists, and appropriate product due diligence.

With more than a decade of experience under our belts, we know that LEED has been at the forefront of a sea change in the real estate industry and that the stalwarts of this change — designers and contractors — face new risks for which there remains little guidance. Even though these risks have not materialized into vast new litigation or insurance claims involving designers and contractors, it is appropriate to take proper precautions to avoid liabilities for those building green. This includes working with risk management professionals who understand green building and can manage the risks through appropriate insurance coverage, contractual provisions, and other tools and strategies. **ed+c**

### Key Concerns

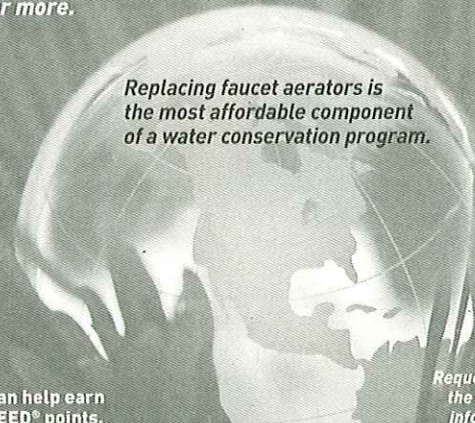
Among those providing commentary on the risks to designers and contractors that build green, there is a general consensus on a few primary areas of concern. These risks include liability arising from:

- Failures to achieve requisite green building certification or performance standards;
- Untested building designs, systems and materials;
- Insurance coverage gaps caused by enhanced standards of care and warranties and guarantees;
- Lack of specialized risk management tools — specific contracts/contract provisions and insurance and surety products; and
- Marketing materials that may overstate either a professional's capabilities or a building's an-


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