

convention 2007

TH05 Don't Let Green Design Cause Red Ink **05/03/2007, 1:30 PM - 3:00 PM**

1.5 LUs - Entry to intermediate level

Some architects respond to emerging challenges to their profession by avoiding risk or simply ignoring legal developments that create exposures. Others, however, learn to identify what services create risk and how that risk can be managed. With the increasing public emphasis on green design, architects face significant exposures that challenge their professionalism and profitability. This session focuses on a realistic appraisal of emerging risks and discusses skills to manage them.

Learning objectives:

- Recognize the exposures that unrealistic expectations about the benefits of green design generate
- Identify the contractual and professional risks created by contracts and state the benefits of green design
- Evaluate how the increased level of service and risk intrinsic in meeting LEED or other certification requirements should affect compensation

Providers: Victor O. Schinnerer and Company Inc., CNA Insurance, The AIA Trust, and AIA Risk Management Committee

Speaker

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**Don't Let Green Design
Cause Red Ink**

TH05
Thursday, May 3, 2007, 1:30-3:00 p.m.

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Acknowledgements/Credits

This program is sponsored by The AIA Trust and provided by Victor O. Schinnerer & Company, Inc., CNA Insurance, The AIA Trust, and the AIA Risk Management Committee.

The information presented and opinions expressed are those of Victor O. Schinnerer & Company, Inc., the program administrator and underwriting manager of the CNA professional liability insurance program for design firms, the only Commended Program of The American Institute of Architects since 1957.



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Learning Objectives

As published on www.aiaconvention.com Web site

1. Recognize the exposures that unrealistic expectations about the benefits of green design generate.
2. Identify the contractual and professional risks created by contracts and statements of the benefits of green design.
3. Evaluate how the increased level of service and risk intrinsic in meeting LEED® or other certification requirements should affect compensation.



Avoiding Red Ink

The types of exposures on sustainable projects are not different from those on other projects but the prudence is necessary to avoid losses:

- Interest in green design often generates unreasonable expectations or onerous contractual obligations such as guarantees.
- Any green design project should be approached with greater communication, comprehensive documentation and a clear and mutual understanding of scope, goals and limitations.
- Increased services and value should result in increased compensation.

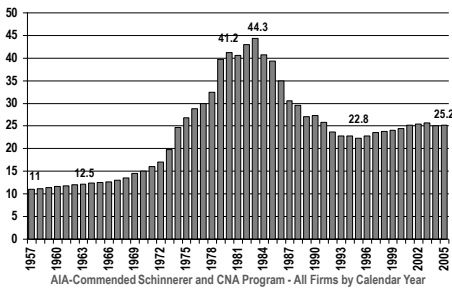


Claim Trends

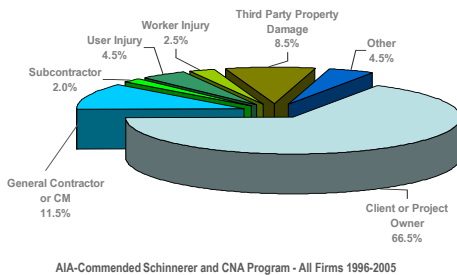
Benchmarking information from the AIA-commended Schinnerer professional liability insurance program with CNA.



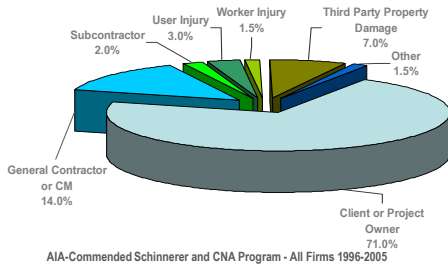
Frequency of Claims Reported Claims Per 100 Firms



Frequency of Claims by Claimant Type



Severity of Claims by Claimant Type



The Legal Status of Architecture Firms

An introduction to causes of action that lead to legal liability.



Design Firms and Law

The two things about the law:

1. The law protects the reasonable expectations of the parties.
2. You are responsible for the foreseeable costs of your wrongful conduct.



The two things about design practice:

1. It's all about trade-offs.
2. The trade-offs are all about money, time, and quality.

Tort and Contract Law

- Basic protection of negligence standard
 - Legal framework of protection
 - Based on standard of care
- Freedom to assume contractual obligations
 - Changing or creating rights
 - Exceeding normal legal liability

Negligence and Liability

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

Defining Level of Performance

- Standard of Care Issues
 - Is standard changed in a rational way?
 - Is professional obligation being replaced by a guarantee of service or result?
- Unfulfillable Expectations
 - Does client understand your need to use professional judgment?
 - Does client expect perfection?

Defining Level of Performance

The AIA will: *Promote sustainable design including resource conservation to achieve a minimum 50 percent reduction from the current level of consumption of fossil fuels used to construct and operate new and renovated buildings by the year 2010, and promote further reductions of remaining fossil fuel consumption by 10 percent or more in each of the following five years.*

- Is this a guarantee that buildings reaching Substantial Completion in 2015 will only require 29.5 percent of 2005 levels of fossil fuels to construct and operate? Does it change the standard of care for architects who are members of the AIA?

Breach of Contract

- Did a valid contract exist?
 - Could the parties enter into a contract?
 - Was there an agreement?
 - Was there consideration?
- If a contract existed, was it breached?
 - Was there a failure to substantially perform as promised?
 - If not performed in substantial compliance with the contract, what is an adequate remedy?

Breach of Warranty

- Was a promise made?
 - About time, cost, result?
 - Related to the services?
- Was there a right to rely on it?
- Did the party actually rely on it?
- Did the promise prove to be false?
- What harm did reliance cause?
- What remedy is adequate?

Extent of Exposure

- Who can recover?
 - Negligence: anyone harmed
 - Contract: anyone in privity
 - Warranty: anyone with reliance
- How much can they recover?
 - Direct and consequential damages
 - Insurance, business and personal assets
- How long before exposure ends?
 - Limited by statutes of repose and limitations
 - By contract risk can be unlimited

Other Causes of Action

- Consumer protection laws
- Fraud
 - Fraud in the inducement
 - Constructive fraud
- Misrepresentation
 - Negligent misrepresentation
 - Material misrepresentation
- Concealment of material fact
- Product liability

Claim Examples

Narratives of claims against design professionals in the AIA-commended program identified as based on green design.



LEED® Certification as Guarantee

Architect agrees to design to acquire enough points for Gold certification. Developer advertises planned office building using superlatives about "reduced operating costs and healthier and more productive occupants" from USGBC information to attract tenants at higher rents. Budget and time constraints prevent certification as Gold. Developer sues for negligence, breach of contract and breach of warranty based on architect's "guarantee" of Gold certification.



Green Roof Structural Problem

Architect, landscape architect and client agree on extensive green roof installation. Water infiltration causes significant direct and consequential damages. After analysis it is determined that cause is inadequate structural stability. Structural engineer claims that proper information on roof use and installation was not provided. Architect had limited structural engineer's liability to \$50,000.



Operable Sash Endangering Health

University agreed to architect's design of operable sash for library despite concerns over effect of untreated air on building's operations. Architect stress importance of outside air for health and alertness of students. Solar shading for energy conservation provides shelter for pigeons. Students report respiratory illnesses when using library. Newspapers report "epidemic." Parents express concern. Architect sued for negligence because of introduction of diseases contained in pigeon droppings.



Green Products and Mold

Insurance company wants green products in redesign of interior space. Design firm specifies cork flooring in kitchen areas. Damage to cork flooring in high-traffic areas by sinks, ice machines and coffee makers results in water retention and growth of mold. Employees not satisfied with attempts to clean and seal floors with environmentally safe solutions. Cork tiles are replaced with vinyl flooring.



Improper Use of Patented System

Design team develops efficient process for moving solar shading for building. After project is completed, owner gains publicity because of innovation. Owner also attracts attention of company that has valid patent on similar system. Patent holder demands significant licensing fee or the removal and destruction of the solar shading system. Owner sues architect as prime professional based on negligence in not researching patent and to enforce contractual provision that requires architect to defend and indemnify client for any intellectual property infringement.



Security Compromised by Daylighting Design

Client is government contractor providing military systems designs and terrorism identification services. Client invests in green design that includes extensive daylighting systems. Federal government determines that government contractor is putting confidential information at risk because of windows and skylights and threatens to revoke government contractor's security rating, cancel existing contracts and prevent future consideration. Client sues architect citing that standard of care was breached because architect was aware of client and government security concerns.



Delay Because of Product Unavailability

Architect made decision to use green product from new manufacturer whose promotional information was impressive. Architect shared promotional information with owner who, based on architect's opinion, agreed to its use. Product was not readily available. Project completion was delays and construction schedule distorted. Contractor demanded increased payments for overhead, lost profits and out-of-sequence construction. Owner brought claim against architect since architect never informed owner that product was subject to delayed delivery.



Substitution of High Embodied Energy Material

Project owner agrees to design that uses domestic stone. Contractor approaches owner with option of using stone quarried in India, finished in Italy and installed in Vermont for cost savings. Architect "discovers" substitution, argues with owner about violation of green design because of high embodied energy in imported stone. Architect releases information to press about substitution. Architect sued by owner for violation of confidentiality agreement and by contractor for defamation.



Guarantee of Indoor Air Quality

Lured by the promise of "healthier and more productive occupants" basic to LEED® publicity, tenant rents space in Silver certified building. At end of first year, tenant's records indicated greater use of sick leave, increased complaints by employees about eye strain and drafts, and reduced output by clerical staff. Tenant demands rent rebate from project owner based on promise of a healthful workplace and tenant sues architect.



An Unrecognized Change in Standards

Architect designs facility to meet existing codes and standards including local laws concerning sustainability. Public pressure produces political action that changes requirements as project is in construction. Owner is forced to delay project for redesign to meet new requirements and changed interpretations. Architects wants to be paid for redesign. Owner sues architect stating that a reasonable architect would have been aware of impending changes and therefore is responsible for redesign, reconstruction and delay damages.



Design-Build “Skip-Over” of Liability

Construction company signs design-build contract for green design. Design-builder “educates” owner that many problems with sustainable design can occur based on incompetence of design professionals. Owner agrees with design-builder that it will pursue remedies directly against design team if problem occurs. Design-builder assigns rights to sue subcontracted design team members and agrees to assist owner in any litigation. Design-builder signs design subcontracts with design team. Problems occur (delays, extras, constructability issues, mold) and owner sues design team firms directly.



Responsibility for Material Recycling

County government requires recycling of construction materials existing on site and excess to construction. Architect designs green project that requires recycling. Architect agrees to construction observation services. During construction, contractor determines that prices for recycled steel and other materials have declined, project is delayed by recycling obligations, and lower tipping fees in another state would save time and money. County finds out about dumping and takes legal action against project owner. Owner sues architect based on architect’s duty to observe construction services and failure to identify and prevent dumping.



Subcontractor Substitution

Green design includes use of sealants that are “environmentally friendly” to achieve sustainability designation for client that is a national environmental association. Subcontractor uses wrong sealant claiming that sealant was improperly specified and even if properly specified would not have worked. Sealant has to be removed; subcontractor declares bankruptcy. Both indoor air quality and association reputation degraded by use of wrong sealant. Claim against architect includes improper specification and negligent construction observation.



Confidentiality Violated by Award Competition

Architect designs building recognized for innovative sustainability attributes. Project owner agrees to allow photography of exterior and interior to be used by architect in articles and promotional material. Architect enters award competition and provides details of floor plans, mechanical systems and building structure without further approval by owner. Owner seeks injunction against public display and damages because of violation of confidentiality and security interests.



Vicarious Liability for Owner-Selected Consultant

Project owner recommends LEED® Accredited Professional to architect. Architect agrees to hire person as consultant to assist on sustainable design. Consultant recommends specific materials and systems. After construction owner is dissatisfied because of increased up-front cost, questionable quality, construction delays, and energy costs that are higher than anticipated. Owner sues architect; architect blames advice of consultant. Consultant has no professional liability insurance coverage or attachable assets.



Application of Consumer Protection Laws

Homeowner is interested in architect designing a low-cost addition that would provide a healthful interior and save on energy costs. Architect agrees to design a "state-of-the-art" green residence for homeowner. Discusses expertise and how design and service will "assure" client of satisfaction with an on-time and within-budget project. Owner is unhappy with cost, time and result. Sues architect under consumer protection laws, alleges fraud in the inducement to the contract for services, and demands rescission of contract and return of fee even though design and construction are complete.



BIM Use Creates Unpaid Services

Firm uses Building Information Modeling system for energy analysis and constructability. Client appreciates ability of firm to respond quickly to requested changes during the design process. Based on client's continually increasing awareness of the latest in sustainable design, client constantly requires changes in design and analyses. Firm accommodates client demands even though its contract does not specifically allow it to modify its compensation to meet the increase in services. Firm attempts to collect additional fee; client sues for negligence stating that changes were the result of the firm's failure to understand sustainable design requirement.



Energy Use Above Promise

Design team agrees to three-school project that would serve as examples of sustainable design and energy conservation. Using appropriate design standards and including commissioning efforts, schools are completed and put into service. Architects and consulting engineers signed contract that stated that projects would "reduce operating costs by 50 percent" over schools of similar size. Energy usage is comparable to other schools recently designed and constructed. School system is publicly embarrassed, disappointed and blamed as being "hoodwinked" by architect and engineers. School system brings claim.



Cycle of Redesign to Meet Budget

Architect agrees to design to owner's specific construction budget. Construction costs escalate and specialty contractors knowledgeable in sustainable construction cost more than projected. Bids come in over budget. Redesign reduces scope and quality. Rebids come in over budget because of further cost escalation. Additional redesign significantly delays schedule and still is over budget. Owner did not agree to limit architect's liability to redesign. Architect sued for increased financing costs, lost opportunity costs and other expenses.



Greenwashing Causes Damage to Reputation

Law firm noted for its lobbying expertise hires architect to design new offices at a level of green design that would attract positive attention. Architect obtains promotional information from manufacturers of products and systems and based on promotional information provides plans and specifications to attention-getting green design. Local press looks into materials and systems used and claims that sustainability is not as promoted. Firm is held up to ridicule beyond that attributed to its lobbying. Firm denies attempt to "greenwash" project and publicly blames architect through demand for remediation and apology.



Client Demand for Esthetic Changes

Architect designs building that seems to meet point totals for sustainability rating. During construction project owner finally becomes aware of the design's "look" and is dissatisfied. Orders an esthetic change that jeopardizes rating, may increase life-cycle costs but also saves construction cost. Decision is made that building no longer meets certification standards. Owner wanted rating to "increase resale and lease rates and attract tenants in a saturated market" but argued that esthetic change was needed for same purpose. Claims architect should have designed project to allow change and still garner points.



Practice Management Precautions

- Using sound practice techniques to keep green projects from creating unmanageable exposures or exposing your firm to uninsurable risks.

Challenges in Green Design

- Competition between client demands
- Market-driven projects
 - Reduced initial costs
 - Compressed delivery times
- Sustainability projects
 - Measurement of “green design”
 - Reduced encapsulated energy and energy cost
 - Reduced life-cycle costs
 - Marketing advantage

Challenges in Green Design

- What is the carefully defined scope?
 - How are goals and expectations defined?
 - Is there compensation for a continual review of integration and changes?
 - Is a warranty being implied or expressed?
- How are design decisions documented?
- Who is responsible for the investigation of products and systems?

Challenges in Green Design

- Who provides construction oversight?
- What expectations for users are being created?
- How is owner/operator being trained to run systems and maintain performance?
- How will performance be documented and compared to standard?
- Can extended services be provided?

Meeting the Challenges in Green Design

- Specify standard of care
 - Manage client expectations
 - Recognize risks in holding oneself out as expert or as LEED® Accredited Professional
- Control project scope
 - Client should acknowledge increased level of service and risk with compensation
 - Client should limit unpaid services

Meeting the Challenges in Green Design

- Set reasonable contract requirements
 - Use an AIA or other contract that recognizes professional judgment and defines scope and fee.
- Avoid express warranties or guarantees
- Limit liability for consequential damages
- Use AIA B303, *Duties and Responsibilities of the Architect for LEED™ Certification*

Meeting the Challenges in Green Design

- Manage product selection process
 - Caution owner on availability of products
 - Beware of danger of substitutions
- Document a rational selection process
 - Request technical data not promotional material
 - Research manufacturer's reputation and production capacity
 - Keep client informed of risks discovered

Green Design Can Lead to Red Ink

- **Unfulfilled Expectations:** Dissatisfaction because of unrealistic benefits.
- **Cost Recovery Attempts:** Offsets to unproduced cost savings or unrealized financial benefits.
- **Express Warranties:** Reliance on false promises of success or benefits.
- **Fraud or Misrepresentation:** Accusations of deceptive practices.

Evaluation

Speaker

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Contact Information

More information about the CNA professional liability insurance program can be obtained through The AIA Trust at www.TheAIATrust.com or directly from Victor O. Schinnerer & Company, Inc. through www.Schinnerer.com. Additional risk management information is available through these websites and www.PlanetRiskManagement.com.

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