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The Risks and Rewards of Green Building

New legal implications arise from building environmentally friendly

By David Crump Jr., Patrick Perrone
and Loly Tor

Builders and consumers alike are embracing green building as an opportunity to engage in responsible projects that create new markets and provide environmental and economic benefits. However, green building is an emerging field with opportunities that have not previously been available or tested.

As a matter of good business practice, particularly for an undertaking that embraces new technologies and procedures, reasonable care must be taken to anticipate potential problems and liability risks. The decision to “build green” is fraught with legal landmines and companies running headlong into the field would be wise to consider the legal implications of their actions, such as fraud claims, contract disputes and

product liability-negligence claims.

Consumers will have high expectations for an energy-efficient, green-built home and, if they aren’t met, unhappy buyers may demand recourse, particularly after paying a premium price. Even if the home is code compliant, litigation may ensue over the builder’s marketing practices based on allegations of fraud and misrepresentation.

For example, if the builder touts energy savings -- savings that subsequently fail to materialize -- a reliant buyer might claim common-law fraud. While some states’ consumer protection acts exclude real estate transactions, many others specifically apply their acts to the sale and marketing of residential construction. Although regulated conduct under these acts can vary, as a general rule, representing that goods or services have characteristics, uses, qualities or benefits that they do not have is

deemed to be deceptive and unlawful.

Consumer protection acts may create unexpected problems for green building marketers who may not realize that their advertisements are inaccurate. For an example, a party making an affirmative misrepresentation in connection with the sale or advertisement of real estate is liable under the New Jersey Consumer Fraud Act even in the absence of knowledge of falsity. *See Strawn v. Canuso, 140 N.J. 43, 657 A.2d 420 (1995).*

Consumers who are upset over a perceived lack of green functionality have a powerful tool in the private cause of action provided by these acts. The award of exemplary, and often treble, damages, plus a recovery of attorneys’ fees, represents a potent recourse for unfulfilled green building purchasers. Builders should be aware that unmet green marketing claims can have consequences and should consult with their attorneys to make sure they are minimizing potential liability.

Under regulations promulgated by Section 5 of the Federal Trade Commission Act, any party making an express or implied claim that presents an objective assertion about the environmental attribute of a product or service must, at the time the claim is made, possess and rely upon a reasonable basis substantiating the claim. The Federal Trade Commission’s enforcement division has the power to seek

Perrone is a partner and Tor is an associate with the construction and engineering litigation practice of Kirkpatrick & Lockhart Preston Gates Ellis in Newark. Crump is the director of legal research for the National Association of Homebuilders.

injunctive relief and to impose civil fines for violations.

The FTC has published advisory Guides for the Use of Environmental Marketing Claims (Green Guides) that are designed to help businesses comply with these federal regulations. Though there are no guarantees, marketers who comply with the Green Guides can expect safe harbor for their representations concerning environmental benefits. Public hearings on a revision to the Green Guides are currently being held to address the new "green building" marketing language, such as the use of the term "sustainability." Expect the FTC to be more active in the future regulation of "green building" advertisements.

There is no standard meaning for much of the new "green building" terminology and defining terms upfront in the contract will lessen the likelihood of customer disputes. For instance, consumers may believe that the term "sustainability" means that green building components will last longer, when in reality some high performance materials and systems may actually have shorter life-spans and require frequent maintenance. The term "green building certification" may lead to controversy, since there are several different national and regional certification programs with differing criteria.

Contractually promising to obtain a green building certification is another area of concern. Certifications are granted by independent organizations with differing standards and guidelines and cannot be guaranteed. Contractually agreeing, and then failing, to obtain certification could then be actionable as a breach of contract, even if the home is code compliant, and even if a certificate of occupancy has been issued.

Green building is also expected, at least initially, to be more expensive than standard construction, with an additional possibility of unforeseen costs. For example, certain green components may be scarce and not easily obtainable without paying a premium. Special skilled

labor may be needed to install "exotic" components. Extra work may be required to correct installation mistakes that can occur when unfamiliar materials and new building techniques are used. Extra inspections may be needed to obtain certification or code compliance. With all of these additional expenses, defining who is responsible for additional costs is essential.

Additionally, there will be new classifications of delay arising from the novelty of green building. These may result from difficulties in obtaining special green materials, appropriate skilled labor, an unfamiliarity among inspection officials with green building projects, installation trial and error, extra work necessary to achieve certification and other certification approval problems. These new classifications should be included in the contractual definition of excusable delay.

Finally, a key to the continued functionality of a green building will be maintenance. The contract should clearly define maintenance responsibilities. Some builders are providing third-party maintenance programs in their contracts to avoid upkeep problems during the term of the express warranty. But, if the homeowner is expected to maintain green systems in an adequate fashion, maintenance training may be a necessity. Be sure that all maintenance manuals are supplied, and that their receipt is acknowledged.

Product manufacturers are also doing their part to offer green alternatives for home builders. From on-demand water heaters to VOC-free paint, new products are entering the market with greater frequency. Builders and manufacturers alike must be aware of the potential pitfalls associated with these new products.

If a green product fails and causes personal injury or damage to other property, manufacturers may face claims under the New Jersey Product Liability Act, N.J.S.A. 2A:58C-1 through 7, or under common-law negligence theories.

This should be a major concern for all parties when using products that have not been tested on the market. Builders should also be cognizant of potential liability for negligence associated with the improper installation of new products. The builder should work closely with the installer and the manufacturer to ensure that proper installation instructions are given and are followed.

In addition to the typical product liability and negligence claims, just as builders may face contractual liability for delay, manufacturers may face liability relating to construction delays if they misjudge the popularity and availability of their new green products. What happens if the 500 energy-efficient refrigerators the apartment builder ordered turn out not to meet the requirements necessary for green certification? Can the manufacturer be held liable for negligence or otherwise for resultant breach of contract claims the builder may face for failing to get a certification? In a similar vein, how do you determine a homeowner's damages resulting from the failure to achieve his or her expected energy savings? And how do you determine exactly which aspect of the green home failed to live up to expectations? If a homeowner cannot identify the manufacturer that is responsible, liability may fall to the builder or to the design professional that put the system together. To avoid these unexpected liabilities, builders should account for these uncertainties in their contracts.

Like all business enterprises, green building has rewards and risks. Builders should not be deterred from building green, but should remain aware of the risks and work closely throughout the life cycle of their projects with everyone involved. Those that embrace their suppliers, designers, trade contractors and attorneys in a continuing effort to minimize liability will set the standard for industry success and reap the rewards of the green building business. ■