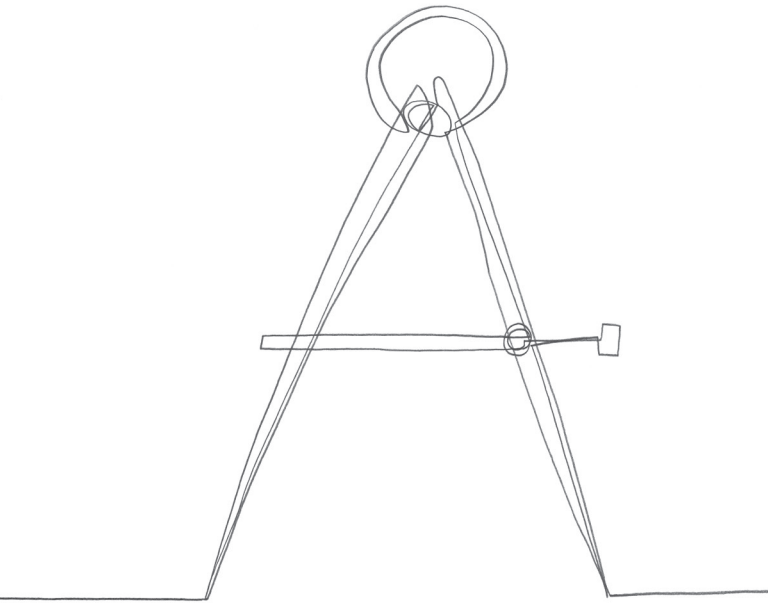


# Beazley Insight

## The Rising Tide of Sustainable Design

By Colleen Palmer



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Once viewed as “going the extra mile,” sustainable design is fast becoming part and parcel of the job for design professionals. According to McGraw-Hill Construction, the number of project manuals referencing Leadership in Energy and Environmental Design (LEED) certification (the internationally recognized green building certification system promulgated by the U.S. Green Building Council) rose to 25.9 percent in 2009 from 10.5 percent in 2006. LEED is referenced in 71 percent of the specifications for projects valued at \$50 million or more.<sup>1</sup> And in some jurisdictions, building green is no longer a choice, but a codified mandate.

California, often at the forefront of environmental issues, is leading this charge, with its recent enactment of the California Green Building Standards Code (CALGreen), a mandatory minimum sustainable design building code for all new buildings in the state. Effective January 1, 2011, CALGreen legislates initiatives aimed at everything from reducing indoor water use, to improving construction waste management, to reducing the quantity of air contaminants. It also includes two tiers of voluntary sustainability standards for those wishing to aim higher than the minimum CALGreen requirements. Many believe these voluntary standards may eventually become mandatory.

## Examining the Exposure

Whether it is required by the state or just desired by an owner, building green presents special risk challenges for design professionals. Design professionals taking on new building projects in California now have no choice but to recognize and address these risks as they navigate through the mandatory CALGreen requirements.

Significant exposure can arise from an alleged failure to adhere to sustainable building requirements. A failure to meet CALGreen’s minimums could mean a building code violation. Clients could potentially claim numerous damages such as costs to implement, construction delays, lost tax incentives, and lost or lessened leases if a project fails to achieve anticipated objectives.

## Mitigating Exposures

Whenever you’re working in the realm of sustainable design – whether building to CALGreen standards or to enable an owner to achieve a third-party sustainability certification such as LEED – some basic truths of risk management become more vital than ever.

<sup>1</sup> Tudor Van Hampton, ENR.com, Green Building Thrives in a Shaky Economy, 11/24/10

- **Stick to the standard of care.** Your project's contract should speak only to the profession's standard of care. While you may agree to exercise the generally accepted standard of care to provide a design that complies with applicable laws, codes and regulations in effect as of the date of execution of your professional services agreement, you should not guarantee compliance with all laws, codes and regulations. With so many regulations out there – changing rapidly – there could be inherent conflicts in the regulations applicable to a particular project, which could leave you technically in breach of contract.
- **Make no promises.** Under no circumstances should your contract include a guarantee or warranty, express or implied, of your professional services or that the project will achieve any particular energy savings or performance result. This is a golden rule of risk management for design professionals and it is particularly important in the realm of sustainable building, since green-era products may be new and untested. Moreover, many factors regarding the use and operation of the completed project can impact a building's energy efficiency (from compliance with building maintenance manuals, to what type of light bulbs are used, to who controls the thermostat) that are out of a design professional's control.
- **Manage expectations.** A major part of any successful project is setting client expectations and managing those expectations as the project proceeds. (After all, so many professional liability claims fundamentally stem from someone's expectations not being met.) Sustainable design may cost more at the outset of a project before any energy costs savings may be ultimately realized, and many green building materials haven't been available long enough to have a proven track record. Be proactive in clearly articulating the facts and managing client expectations at every stage of a project, even (and especially) if it makes you the bearer of bad news. And of course, rigorously document all such communications.
- **"Maximize" your insurance.** Many of our insureds take full advantage of the expertise Beazley offers to mitigate their exposure. We have the expertise to support the architects and engineers' market and help insureds outpace emerging exposures, including those arising from sustainable design. Design firms need appropriate coverage and important complementary services designed expressly to control risk – from contract reviews by experienced attorneys to pre-claim consulting to help mitigate an incident that could potentially generate a lawsuit.

CALGreen's arrival underscores that sustainable design – with all its potential benefits and challenges – is here to stay. Will it and future regulations like it, spur more litigation around sustainable design? Will the codification of sustainable design inch up the standard of care in the design world? Both seem likely. Prudent risk management backstopped by effective insurance will continue to serve as the design firm's best defense.

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