

ProNetwork News

Risk Management Tools for the Design Professional

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The Latest on *Gifford v. U.S.G.B.C* Will This Case Lead Us to Greener Pastures?

Adapted from articles by Brian Stewart and Niall Fordyce of Collins Collins Muir + Stewart LLP

The case of *Gifford v. United States Green Building Council* is the first lawsuit to call into question the validity of the United States Green Building Council's ("USGBC") LEED certification program, to our knowledge. The suit was filed in Federal District Court in New York in October 2010. The thrust of the lawsuit concerned a study commissioned by the USGBC in March 2008, and performed by the New Buildings Institute ("NBI") concerning performance of LEED buildings versus non-LEED certified projects. The case was initially filed as a class action, and included causes of action for fraud, unfair competition, deceptive trade practices, false advertising, wire fraud and unjust enrichment. The lawsuit alleged that the USGBC's 2008 study concerning more efficient energy use in LEED certified buildings is fraudulent.

Where Has *Gifford* Led Us?

Since the initial filing last year, the lawsuit has been amended and it is no longer a class action. It continues to focus on the single March 2008 study commissioned by the USGBC concerning performance of LEED buildings versus non-LEED certified projects. It asserts federal claims of false advertising under the Lanham Act, and New York state law claims of deceptive trade practices and false advertising. It also asserts unfair business practices, unfair competition, and false advertising claims under the common law.

Like the first complaint, the amended complaint alleges that the USGBC is making false claims concerning LEED buildings and energy savings. However, the amended complaint focuses more on claims that LEED advertising, such as LEED brochures, and "The LEED Guide" is misleading in claiming energy savings through obtaining LEED certification. The amended complaint alleges that the USGBC does not conduct site investigations of the buildings it certifies; that LEED buildings are not actually required to perform as predicted as a condition of certification; that the LEED ratings systems are not based on any objective scientific criteria; that USGBC falsely claims that LEED provides "third party" verification that "a building or community was designed and built using strategies aimed at improving performance across all the metrics that matter most: energy savings..."; and that the USGBC falsely advertises that LEED-certified and other "green" buildings increase employee productivity.

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LEED Has No Class?

Of particular interest is that the amended lawsuit is no longer a class action. Gifford, the original plaintiff, has brought on two engineers (a mechanical engineer and an engineer specializing in moisture and mold issues) and an architect as additional plaintiffs.

A class action is quite a complex animal, and the law has very particular requirements as to how a case can achieve class action status. A big problem for the plaintiff achieving class action status in this case was whether the USGBC's allegedly false statements caused the same or similar harm to the same type of potential plaintiff class members. The plaintiff in this case was casting a wide net, and it appears that he was unable to meet his requirement. Also, Gifford himself is not a LEED accredited professional.

At this point, it is not completely clear whether the plaintiff in *Gifford* was unable to achieve class action status, or whether the plaintiff made the strategic decision not to move forward as a class action. The attorneys for the parties refused to speak to us concerning this case, and our calls have not been returned. However, the impact and scope of a class action suit, coupled with the plaintiff's original decision to seek class action status strongly suggests that the plaintiff either tried and failed to get the class certified, or made the decision that they would not be granted class status. Either way, it takes some bite out of the case. It is no longer a case with potentially hundreds or even thousands of plaintiffs and a far-reaching scope. Still, this is a direct attack on the USGBC and the LEED process. As such, it could still significantly impact the USGBC and LEED.

As it stands, the amended complaint still seeks permanent injunctive relief to stop USGBC from claims of higher energy efficiency with LEED certified buildings. The plaintiffs also seek to recover profit derived from the USGBC's alleged unlawful conduct; damages sustained by the plaintiffs from the USGBC's alleged unlawful conduct; and attorney's fees and other costs. Clearly, class action or not, these are potentially very significant damages. Also, assuming that the amended complaint survives a motion to dismiss, the discovery process that will follow will likely reveal the inner workings of the USGBC, as well as opening up their processes to public scrutiny.

Notwithstanding the *Gifford* case, LEED issues may have already affected your projects and contracts, or may affect them in the future. As always, should you have any questions concerning LEED issues you have encountered or may encounter, please contact your attorney.

Nothing contained within this article should be considered the rendering of legal advice. Anyone who reads this article should always consult with an attorney before acting on anything contained in this or any other article on legal matters, as facts and circumstances will vary from case to case.

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Broker's Note