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PRONETWORK NEWS

Risk Management Tools for the Design Professional

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Built to Code, Sued Anyway: The Legal Gray Zone for Design Professionals

By Catherine Ewing and Katherine Jones

For design professionals, a historic guidepost to legal risk management has been compliance with the building codes, international codes, or model codes that govern their designs.[1] But what happens when you've followed the code to the letter—and still find yourself facing a lawsuit? Many design professionals are surprised to learn that code compliance, while essential, does not guarantee immunity from liability.

As an initial matter, most design professionals understand that failure to comply with applicable codes can expose them to significant legal liability. Because building codes establish the minimum legal standards for health, safety, and structural integrity, deviating from them—even unintentionally—can be construed as a breach of the professional duty of care. In litigation, plaintiffs often rely on code violations to establish both causation and the foreseeability of harm. Nevertheless, the legal consequences of failing to comply with relevant code provisions can vary depending on the jurisdiction. In some jurisdictions failing to comply with code is simply evidence of negligence that can be considered with other evidence in the case.[2] While in other states – such as Alabama, California, Nevada, Virginia, and New York - not meeting a code's requirements may be grounds for the courts to presume that your design was negligent without the introduction of additional evidence. [3] [4]

What many design professionals find more surprising, however, is that the inverse proposition is not also true - i.e. that code compliance insulates design professionals from a finding of negligence. Nonetheless, code compliance does not per se result in a finding of no negligence in any jurisdiction in the United States. While code compliance can be evidence that a architect or engineer complied with the proper standard of care in their designs, it is not conclusive proof.

Courts have found that compliance with code is relevant to evaluating the legal professional standard of care in that it creates a baseline of professional conduct. [5]

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[1] Thompson v. Gordon, 398 Ill. App. 3d 538, 548 (2009);

[2] Lindsey v. Bill Arflin Bonding Agency, 645 So. 2d 565, 567 (Fla. Dist. Ct. App. 1994); Ramirez v. Acevedo, 2021 IL App (1st) 200799-U, ¶ 35

[3] Code Violations as Negligence Per Se: Some states treat certain code violations as "negligence per se," meaning the violation itself establishes a presumption or conclusion of negligence, shifting the burden to the defendant to prove they were not negligent. Within this category, some courts distinguish between codes adopted for the general public's safety versus those for a particular class of people.

[4] Parker Bldg. Servs. Co. v. Lightsey, 925 So. 2d 927, 931 (Ala. 2005); Comments to Cal. Evid. Code § 669; Vega v. E. Courtyard Assocs., 117 Nev. 436, 441 (2001);Bay Point Condo. Ass'n v. RML Corp., 52 Va. Cir. 432, 437 (Cir. Ct. 2000); Bay Point Condo. Ass'n v. RML Corp., 52 Va. Cir. 432, 437 (Cir. Ct. 2000)

[5] Mary Imogene Bassett Hosp. v. Cannon Design, Inc., 84 A.D.3d 1524, 1526-27 (App. Div. 2011); Buktaw v. Trader Joe's Co., 2018 Cal. Super. LEXIS 14146

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However, courts typically assess other factors, including reasonableness, awareness of danger, causation, expert testimony on professional standards, and any contractual obligations that might impose a higher standard of care than the minimum requirements of the code.

One of the largest of these external influences on standard of care considerations is climate change. Climate change is increasingly making extreme weather events, such as severe heat waves and harsh precipitation, more common and, crucially, more foreseeable. For design professionals, including engineers and architects, this can have significant implications for the standard of care to which they are held.

Significantly, building codes rely heavily on historical weather data to establish minimum design standards that ensure structures can withstand local environmental conditions. This data—collected over decades or even centuries—includes records of wind speeds, snow loads, rainfall, seismic activity, temperature extremes, and flood patterns.[6] However, climate scientists now forecast with high confidence that extreme temperatures and precipitation events will become more frequent, more severe, and more prolonged.[7] This scientific understanding fundamentally shifts the scope of what is considered foreseeable in design. Mere adherence to minimum code compliance or contractual requirements based on past climate data may no longer be sufficient if current projections indicate a greater risk.[8]

For example, in an Arizona case, a civil engineering firm was found negligent for a bridge design that led to flooding to adjacent property because it was foreseeable (despite a contract requirement to design for a 25-year flood event and properly designing for a 25-year flood event) that a 50-year flood or a 100-year flood could occur.[9] Similarly, in an Illinois case, engineers who designed a building to relevant building codes were found negligent because wind loads in excess of the building code were foreseeable.[10]

These cases demonstrates that negligence can arise when design professionals fail to incorporate foreseeable climate change impacts – or other foreseeable events - into their plans, signifying a failure to apply their discretion, special skills, and knowledge. Therefore, the question of an architect's or engineer's negligence in the preparation of plans is one of fact, and mere code compliance becomes less of a safety net when the foreseeability of climate change or other impacts is clearly established through scientific consensus and real-world occurrences.

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[6] https://www.fema.gov/emergency-managers/risk-management/building-science/bcat

[7] Conservation Law Found., Inc. v. Exxon Mobil Corp., 3 F.4th 61 (1st Cir. 2021)

[8] Cole v. Collier, No. 4:14-CV-1698, 2017 U.S. Dist. LEXIS 112095 (S.D. Tex. July 19, 2017)

[9] L.H. Bell &Assocs. V. Granger, 543 P.2d 428 (Ariz. 1975)

[10] Laukkanen v. Jewel Tea Co., 222 N.E.2d 584 (Ill. 1966)

Failing to comply with codes carries significant legal risks, potentially leading to a finding of negligence, either as strong evidence or, in many jurisdictions, as negligence per se, depending on the nature of the code and the harm caused. While adhering to building codes is a critical defense against claims of negligence, providing strong evidence of meeting the standard of care, mere compliance may not always be sufficient as professional standards can often exceed minimum code requirements. Therefore, a proactive and thorough approach to understanding and implementing both code provisions and other foreseeable events is essential for mitigating professional liability.