

# ORANGE COUNTY BUSINESS JOURNAL

## Snell & Wilmer L.L.P. LAW OFFICES

### LEED Legal Alerts

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**T**he year 2012 has seen a brisk upturn in the number of government and commercial buildings in Orange County that have achieved LEED (Leadership in Energy and Environmental Design) Platinum Certification, the highest level in sustainability excellence awarded by the United States Green Building Council (USGBC).

Recent noteworthy examples include UC Irvine's Medical Education Building (Platinum Certification for New Construction) and Jacobs Irvine Office at 3161 Michelson in Irvine (Platinum Certification for Commercial Interiors).

In addition, a number of high-profile projects slated to open in 2013, including PIMCO's new headquarters in Fashion Island and the new City of Newport Beach Civic Center on Avocado, also will likely qualify for LEED Certification.

At the same time, 2012 has seen a brisk upturn in the number of laws and regulations – as well as litigation – affecting sustainable building design and environmental marketing. Chief among these is the Federal Trade Commission's newly-revised *Guides for the Use of Environmental Marketing Claims*, issued on October 11, 2012. (16 Code of Federal Regulations Part 260). These laws present new challenges for a building owner and the owner's design team seeking to navigate the changing legal landscape.

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the precise issue presented in an appeal filed to the USGBC challenging the LEED Gold Certification awarded to the Northland Pines High School. In that case, the certification was challenged by several concerned citizens as being based on improper energy and indoor air prerequisites. Although the certification ultimately was upheld by the USGBC, the case raised significant questions regarding both the USGBC's review process and the independence of the USGBC.

The Northland Pines High School case led to industry concerns that the USGBC nevertheless could decertify a building that had obtained LEED certification, which, in turn, could lead to lawsuits.

In California, that concern is particularly acute because of the state's Unfair Competition Law (Business & Professions Code Section 17200), as well as the False Advertising Law (Business & Professions Code Section 17500), the Environmental Marketing Claims Act (Business & Professions Code Section 17580.5), common law fraud and other theories of relief.

In *Hill v. Roll International Corp.*, 195 Cal. App. 4th 1295 (2011), a consumer brought claims under these laws alleging that Fiji Water had violated the FTC regulation and state law by making false and misleading claims suggesting that Fiji Water

had been endorsed as environmentally superior by a third party organization. The Court of Appeal upheld the dismissal of the plaintiff's claim in that case but, in so doing, it reaffirmed the applicability of the Unfair Competition Law to environmental marketing claims based on violations of the FTC regulation. Clearly, claims that LEED certification was improperly obtained or granted could form the basis of a similar claim.

#### Basics of LEED

LEED's mission is to provide a framework for implementing practical and measurable green building design, construction and maintenance. LEED consists of rating systems, such as LEED Platinum, LEED Gold or LEED Silver. Currently, LEED offers certification for New Construction, Existing Buildings, Commercial Interiors, Core & Shell, Schools and Homes.

#### Advantages of LEED Certification

LEED-certified buildings are designed to:

- ◆ Be healthier and safer for occupants
- ◆ Conserve energy and water
- ◆ Reduce greenhouse gas emissions
- ◆ Use building materials with reduced environmental impacts; and
- ◆ Reduce waste sent to landfills

Occupants of LEED-certified buildings may enjoy any number of benefits from working in a sustainable building, such having the freedom to open the windows to let in fresh air and greater control of office temperatures. LEED-certified buildings are also often intended to enhance indoor air quality by using fewer building materials containing toxic chemicals.

Employers may see locating in LEED-certified buildings as socially responsible and good business, especially when their customers include environmentally aware companies. Employers also may believe that providing a healthy workspace may result in increased employee retention.

Owners of LEED-certified buildings may find they have an asset that is able to operate more efficiently, and thus less expensively, and one that may have increased tenant or customer satisfaction. Owners also may be eligible for financial incentives, including tax-exempt bonds and tax credits. LEED-certified buildings also may fetch higher rents.

#### New Federal Trade Commission Regulation

Partly in response to concerns about unfounded marketing claims involving LEED certification, the FTC recently promulgated its new *Guides for the Use of Environmental Marketing Claims*, issued on October 11, 2012. This regulation includes a new section on "Certifications and Seals of Approval," and cautions that the regulation prohibits not only misleading statements made to the public but also misleading statements made in the course of obtaining the certification.

#### LEED Litigation

A claim that LEED-certification was improperly granted to a school in Wisconsin was

#### Minimizing LEED Liability

There are a number of mechanisms an owner can employ to minimize liability for claims related to seeking or obtaining certification under LEED, including the following:

- ◆ Address sustainability certification and continued building performance in contracts with the design and construction professionals
- ◆ Engage a team with experience and expertise in LEED compliance and certification
- ◆ Carefully analyze the claims to be made by the owner's representatives or brokers in marketing the building
- ◆ Consider including appropriate language in leases; and
- ◆ Consider obtaining insurance that will cover claims for negligent misrepresentation

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