

An illustration showing the profile of a person's head and shoulder in shades of red and orange. The person's right hand is raised, with fingers spread, against a green background that resembles a landscape with hills. The sky is blue with white clouds. The text "Opposing Viewpoints: Greenwashing" is overlaid in white on the person's face.

Opposing Viewpoints: Greenwashing

In this issue, business and real estate lawyer Jay Freedman provides an opinion editorial in his article that explores the risks of building Green. From time to time, FMI publishes opinion pieces by non-FMI persons with the primary purpose of providing a forum for strong opinions; the publication of this piece does not necessarily represent the view held by FMI or its employees. If you have an opposing point of view, we welcome your submittal.

Coming Clean: Green Building Brings Risk of Greenwashing

By Jay B. Freedman

Like it or not, contractors and those involved in construction across the country must acknowledge the trend towards building green. Celebrities advocate it. Government agencies encourage or mandate it. The media publicizes it. Contractors must anticipate and manage the new risks associated with the design and construction practice. Greenwashing is at the forefront of the new risks that must be faced and incorporated into risk management plans by participants at every level of the construction industry.

Greenwashing is not a new phenomenon. While it may now include a few new tricks, the practice is at least 40 years old and began when corporations tried to improve their public images after the start of the modern environmental movement. For instance, in 1969 public utilities spent more than \$300 million on advertising, more than eight times what they spent on the anti-pollution research they were touting in their ads. Whether the utilities were trying to mislead the public is uncertain, but it is certain that they were trying to create a green image.

GREENWASH: the act of misleading consumers regarding the environmental practices of a company or the environmental benefits of a product or service. The term **Green sheen** has similarly been used to describe organizations which attempt to appear that they are adopting practices beneficial to the environment. (<http://en.wikipedia.org/wiki/Greenwash>)

LEADING FACTORS

Though the times have changed, the need for good public relations and marketing remains. Given the media buzz and government mandates concerning green building, contractors, designers and others involved in the construction process have a strong interest in putting an environmentally friendly face on their services, products and experiences. Even a cursory review of *Engineering News-Record* and other industry trade publications will find many ads for green products, from concrete countertops to low-VOC sealants to tankless water heaters.

Unfortunately, the green claims may be mistakes, exaggerations or outright lies. To further compound the risk, consumers are generally skeptical towards green advertising, distrusting the corporations behind the ads. A recent survey of 6,000 consumers found that more than 20% of those surveyed said they never believe claims made in green advertisements, according to a story about the perils of greenwashing aired on NBC's "Today" show. Two-thirds of the survey's respondents said they only believe the claims sometimes. With an already litigious society, allegations of greenwashing may become a litigation lightning rod. Coincidentally, jury research indicates that two-thirds of jurors agree that it is appropriate to award damages against corporate defendants even though the corporation is not at fault.

HOW IT OCCURS

Intentional or accidental, greenwashing encompasses a wide variety of conduct and arises for a variety of reasons. At its heart, however, greenwashing involves some form of flawed communication, ranging from actual advertising materials to statements contained in building permit applications. The most subtle forms of greenwashing involve so called hidden trade-offs such as advertising a product as being energy-efficient without disclosing that it contains environmentally unfriendly materials. Another example is advertising the use of recycled materials during construction without disclosing that the materials are trucked in across four other states. In both instances, the advertised green feature is offset or negated by an undisclosed environmentally unfriendly practice.

Of course, the advertiser may not be aware of the undisclosed trade-off. The hypothetical contractor that contracts to buy recycled materials may not know the source of the materials. In one real-world example, an owner seeking LEED certification sought credits based on the use of regional materials. The owner contracted with a supplier to provide the materials, but did not inform the supplier of the reasons underlying the materials choice. The supplier then substituted another regional material that was first sent out-

of-state for processing. In both the hypothetical and real-world examples, the greenwashing could have been avoided if all parties understood the green building purposes.

Similarly, greenwashing can result from ignorance or misunderstanding. Building “green” can mean different things to different people. Some people assume that a green building is energy-efficient, while others believe that it will provide a healthier indoor environment, while still others focus on site selection. To many in the building industry, green means sustainable, which is yet another term subject to multiple meanings. The lack of a generally accepted definition creates a landscape that can foster unintentional greenwashing.

Greenwashing can also be more overt, even intentionally false. It can involve unsupported claims,

such as representations of “organic” components without providing any way to check the certification. Some manufacturers certify themselves rather than employ third parties. Greenwashing can involve vague claims, such as advertising that a product is 100% natural, even though natural products can still be hazardous. In fact, these kinds of claims have drawn the attention of

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marketing materials to really understand a product before touting its green benefits. Builders, contractors and design professionals will likely not be able to rely on product advertisements to successfully defend themselves from greenwashing allegations. To the contrary, it is likely that those involved in green building will be held to a higher standard of care.

For example, green contractors have received complaints about acoustics in buildings that use natural ventilation instead of HVAC systems. It seems people are used to hearing the familiar buzz of the mechanical ventilation. The market responded with sound-masking systems (i.e., white-noise machines). One such system was advertised as being “green” because it allegedly conserved energy, improved light quality, improved thermal comfort and increased thermal efficiency and controllability. However, all of these claims are subject to allegations of greenwashing.

The sound-masking system itself does not conserve energy; it is installed to create background noise when the building’s HVAC system is not working. The energy savings are created by the reduced use of the HVAC system. The sound masking system does not improve light quality. It may be installed in buildings that employ day-lighting in connection with natural ventilation, with the natural light improving the light quality. Similarly, thermal comfort, thermal efficiency and thermal controllability are improved by the green aspects of the HVAC system, not the sound-masking system. Nonetheless, the marketing materials promote the sound-masking system as a green product.

the Federal Trade Commission. The FTC is currently reviewing its restrictions on environmental marketing claims in response to allegations of false advertising, and new guidelines are expected by the end of 2008.

IN CONSTRUCTION

The most problematic instances of greenwashing may occur in the construction since in this context, it relates to false or misleading claims about the green benefits of component parts. Contractors and designers need to research the alleged benefits and track record of green products prior to using them. They need to read beyond the



In another real-world example, a law firm recognized for its environmental lobbying hired a design team for the firm's new office. The law firm wanted to use the highest green standards, and the design team made several product recommendations based on the team's review of marketing materials. The local press investigated the design and discovered that the proposed systems and products were not as green as claimed. The firm was then accused of greenwashing.

In addition to positive press, market conditions have created financial incentives for building green. As the financial incentives increase, so do the incentives to greenwash at all stages of the construction process. Many local agencies have enacted green building programs that reward green projects. Contractors can receive

expedited permits, shortened plan review or reduced permit fees if they build green projects. As a result, they may be inclined to exaggerate the green aspects of their project. At the same time, green projects may be subject to heightened scrutiny because of the financial incentives involved. At least for the next few years, all parties should expect to face additional questions. Contractors should properly document all aspects of their green projects so they can provide the requested answers. If a contract requires low-VOC paint, the contractor, designer and subcontractor should all be able to prove



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that low-VOC paint was, in fact, used. If a project promises to reduce water usage by 35%, the parties will need not only to document the reduction going forward but also should consider demonstrating that the technology involved has an established track record.

Greenwashing is currently a buzzword in a skeptical society. Those in the construction industry should expect that promises of

greener projects and products will be closely evaluated by the buying public and that allegations of greenwashing will be publicized. However, attention to detail, proper communication and adequate research, combined with awareness of the more subtle aspects of greenwashing, can reduce or eliminate much of the risk. ■

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AVOIDING THE HIDDEN RISKS OF BUILDING “GREEN”

By Jay B. Freedman

Building a green project, whether to seek a LEED certification or just to be environmentally conscious, may create risks that are not present in conventional projects. Identifying potential pre-construction risks will ensure contractors can effectively resolve these issues before disputes arise.

On the risk-management end, contractors seeking a LEED or Green Globes certification need to work with their insurance brokers and carriers to make sure they are covered for such items as re-commissioning if the building is damaged or a contract claim if the building isn't as energy-efficient as advertised. Coverage for these items is not contained in a typical CGL policy, and it is too late to correct an oversight after a lawsuit is filed.

Prior to construction, contractors should understand that there is not yet a universally accepted standard for “building green;” therefore, they need to communicate with their design team to develop common goals at the beginning of the project. A contractor seeking basic LEED certification may be focused on reused and recycled materials for marketing reasons while its designers choose to pursue credits that are easier to document. While certification is achieved, the owner's expectations are not met and litigation may result.

When pursuing a certification, contractors also need to pay extra attention to the details of the contracts with their design team. A LEED-accredited professional may have been hired to shepherd the contractor through the process, but the contractor still needs to make sure that everyone knows who is ultimately responsible for LEED decisions and that the contract with that person details his or her duties and responsibilities. A certification goal can be missed by a few credits because everyone thought someone else was handling the credits that were not obtained.

Most residential builders recognize that homebuyers are more sophisticated than they were even five years ago. They pay closer attention to marketing materials and often remember everything they were told during the sales process. Many take notes that are later produced during their defect suits. Builders need to carefully monitor the content of their sales brochures and print advertisements, and representations by their sales personnel, to ensure they are not overpromising the benefits of new technologies. If “instant hot water” is advertised, the homeowners will hold builders to that promise, and research shows that the jurors will heavily rely on the written sales brochure.

Homebuyers are also influenced by what they read in the media or find through their own Internet research. “The benefits of building green” have generated significant attention both in the news and on various home-oriented cable channels. With homebuyers more likely to expect energy savings, healthier houses, the use of recycled products or some of the other perceived benefits of a “green” house, builders must take steps to reduce unfounded and unspoken expectations prior to the sale.

The adage that perception equals reality can create new risks for the green contractor. The buyer's perception of the project can easily differ from the reality of what is being built, and the contractor will be held accountable (right or wrong) when the completed project does not measure up to expectations. Contractors can avoid problems at the end of the project by taking extra care to foster communication among all team members and to address the unspoken assumptions at the beginning of the project. When the expectations and responsibilities are clearly defined from the start, the contractor can achieve a better result while reducing risks.

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