

PROFILES

THE K/BIS ISSUE

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law & order



GREEN CONTRACT PROVISIONS

Prevent green building from becoming red ink. By Peter G. Merrill, CKD

Green building and remodeling is so hot that it's burning its way into every aspect of both residential and commercial building and remodeling. Building green has been around for a number of years as a voluntary method of building, but today, almost every state and municipality is not only actively encouraging voluntary green building practices, but many local governments are now mandating green building codes that must be followed by both builders and remodelers.

Although green building has been around for years, most of the newer green building materials and products are so new that they haven't been tested for longevity or performance over a long period of time. Most builders and remodelers are relying on the manufacturer's stated performance of their products. Green products and green design are proving to be an entirely new specialization that's totally different from the typical construction that we've all become accustomed to over the years.

ALTERNATIVE DISPUTE RESOLUTION

After retiring from the kitchen and bath industry about five years ago, I chose to use my construction knowledge to become a construction mediator and arbitrator, providing alternative dispute resolution (ADR) to the construction industry as an alternative to going to court and being involved in lengthy and costly litigation. My company has become one of the largest construction ADR providers in the United States with construction ADR specialists located in all 50 states. ►►



Over these five years, I've seen so many designers and contractors lose vast sums of money because they didn't have the proper language in their construction contracts or sales agreements. Instead of benefitting from a construction-knowledgeable ADR specialist who could handle their disputes, they were forced to go to court. The interesting aspect of this problem is that it's completely under your control as a designer or contractor to protect yourself from lengthy and costly litigations in front of a judge and/or jury who simply don't understand construction, particularly the intricacies of sustainable design and building materials.

Most judges will admit that if a construction-related case comes before them in court and they have little or no knowledge of the construction issues involved, whichever side makes the best and most convincing presentation will win the case.

All U.S. citizens have the constitutional right to a trial by jury and to use the court system. Unfortunately, there are several problems with the court system when it comes to construction-related disputes. The first problem is that judges and juries usually have limited or no knowledge of construction. In most court trials, both parties will spend thousands of dollars providing experts who will attempt to convince the judge and jury that they're correct in their position related to the dispute.

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side makes the best and most convincing presentation will win the case. Frankly, that's why there are so many appeals of verdicts. Of course, this entire court process is very expensive, and the court process takes a long time to be completed, especially when there are multiple appeals. There's no provision for the parties to select a judge—whoever is the judge of record for the jurisdiction of the case will be the presiding judge.

Another problem with the litigation process that makes it very costly is the series of very specific rules and procedures that must be followed, including the Federal Rules of Evidence, which essentially necessitates that the parties hire attorneys to represent them in court.

Yet another problem with litigation is the time it takes just to get the case to court and then go through the entire litigation process. I've seen many designers, architects, contractors, and other industry professionals who have gone out of business waiting for their case to be scheduled due to the long backlog of cases facing most courts. Keep in mind that if you win, the case isn't actually over until the losing party decides to accept the verdict. Should the other party opt to appeal the verdict, you'll have to wait even longer.

GREEN CONSTRUCTION DISPUTES

Avoiding the litigation process in particularly important in settling green-related construction disputes. Conventional construction disputes are known as prescriptive-based disputes in which you can physically see why the construction defect has happened, such as a window not flashed properly, countertops not being installed level, or an exhaust fan not drawing air properly. All of these prescriptive disputes can be measured or traced to improper installation.

Green-related disputes are known as performance-based disputes that can't be immediately tied to any specific construction, installation, or prescriptive process. Green-related disputes



will most likely concern performance issues, such as indoor air quality, energy efficiency, sustainability, and resource allocation. These performance-based issues could be a result of several prescriptive issues, homeowner maintenance, and green product performance, or a combination of issues.

Although all U.S. citizens have the constitutional right to their day in court, it's a right that can be waived by the parties in dispute. Binding arbitration is the most popular form of ADR used by the construction industry to avoid the litigation process. The most important aspect of arbitration is that both parties are involved in the selection of the arbitrator. Both parties have the option to review the biography and background of potential arbitrators and the parties might even decide to interview the arbitrators that they're considering.

Why is this so important? If you were ill or injured, you'd go to a doctor because she should have the experience and education to understand human anatomy and know how to cure whatever ails you. If she doesn't have the depth of knowledge to properly cure your illness or injury, she most likely will send you on to a specialist who's more knowledgeable on how to remedy or cure your specific illness or injury. Likewise, if you have a construction dispute, you should have a construction-knowledgeable, yet neutral, person handling your dispute. Our National Panel of Construction ADR Specialists is comprised of individuals who each ►►

► Protect Yourself Contractually

Another aspect of green disputes to consider is that you might be inadvertently promising or specifying green performance for your design or your construction.

The following two paragraphs are examples of suggested contract language to use in your construction contract or design agreement to protect yourself from overpromising green performance and assuring yourself that you will be using the more expeditious, inexpensive and knowledge-based arbitration process to settle your disputes.

PLEASE DO NOT PLACE ANY CLAUSES IN YOUR CONTRACTS OR AGREEMENTS WITHOUT YOUR ATTORNEY'S APPROVAL.

Designers and Architects

The drawings, plans, and other technical documents supplied by _____ (your name) were designed or drawn using the green-related information provided by the _____ (Energy Star, USGBC, NAHB, RESNET, etc). _____ (your name) does not guaranty that the green building will meet the expected level of green construction that is indicated according to the green rating as planned for this building. In addition, _____ (your name) assumes no responsibility for the accuracy of the rating, as the rating system allows for some flexibility and the rating for your building will be calculated based only on the information provided related to the construction of the building. If any dispute related to our services should occur, the dispute shall be settled through binding arbitration as provided by and according to the Arbitration Rules and Procedures of Construction Dispute Resolution Services, LLC, a National/International construction dispute firm that has developed a special "National Green Panel" to specifically handle green-related disputes. The cost for the arbitration shall be shared equally by the parties, although personal attorneys, experts, or other personal expenses shall be paid directly by the party using those special services. The parties acknowledge that they are giving up their right to use the court system to settle any disputes. The arbitration award shall be binding upon the parties and may be enforced in any court of competent jurisdiction.

Builder, Contractor, or Subcontractor

_____ (your name) will attempt to build the building as specified by the plans, drawings, and other documents provided for the construction of the building by a designer, architect, or other individual or entity. As to the green aspects of the building, _____ (your name) will utilize the materials specified and will endeavor to have the building perform as expected as a result of the green construction specified for this building. _____ (your name) can not guarantee that the building will perform as expected, as the green performance of a building, depends on several other issues other than the construction of the building including but not limited to the use and maintenance of the building by the owner. If any dispute related to our services should occur, the dispute shall be settled through binding arbitration as provided by and according to the Arbitration Rules and Procedures of Construction Dispute Resolution Services, LLC, a National/International construction dispute firm that has developed a special "National Green Panel" to specifically handle green-related disputes. The cost for the arbitration shall be shared equally by the parties, although personal attorneys, experts or other personal expenses shall be paid directly by the party using those special services. The parties acknowledge that they are giving up their right to use the court system to settle any disputes. The arbitration award shall be binding upon the parties and may be enforced in any court of competent jurisdiction.

has a specialized area of expertise. If we had a kitchen and bath-related dispute, we would look to our kitchen and bath specialists. We have CKDs and CMKBDs on our panel. Another major advantage to arbitration is that arbitration awards generally are not subject to appeal. Arbitration awards are final and binding; the only exception is if there was a breach of a very specific procedural processes.

There is very little chance that a judge or jury will possess the technical expertise to handle a construction dispute, especially a green-related dispute. If you specify in your construction contract that "all disputes shall be settled through binding arbitration," you're virtually assuring both parties that they won't be involved in lengthy and costly litigation to settle disputes. If you specify a provider as the arbitrator, you'll have covered both of the major issues to assure that you'll avoid litigation and you will have a construction or green-knowledgeable arbitrator handling your dispute.

Just as a consumer should take the time to select the right kitchen designer or contractor, you should spend the time necessary to research and specify the arbitration provider that you would like to use if and when there are any disputes that need outside intervention to settle a dispute. Don't wait until a dispute develops to select your method of settling the disagreement or the provider of the services that you'll need. You must go to court unless both parties agree to use ADR. **P**



Peter G. Merrill, CKD, is the President and CEO of Construction Dispute Resolution Services, LLC. A former kitchen and bath designer, Peter received the NKBA's first honorary life membership in 2004. He has served on the NKBA's Builder/Remodeler Advisory Council and is a past president of the NKBA New York Tri-State Chapter. For more information, visit www.cdrsllc.com or contact Peter at 888-930-001 or petermerrill@cdrsllc.com.

LEGISLATIVE UPDATE



NKBA Legislative Victories

NKBA members across the country have been busy with legislative efforts. Commitment to the defeat of interior design legislation was apparent when members in a number of states spent countless hours meeting with legislators, attending state house lobby days, and sending hundreds of e-mail messages and letters to committee members hearing the bills. The NKBA is pleased to report that through the focused efforts of our members, every one of the legislative initiatives heard in the early part of the year was defeated.

One of the most restrictive practice acts in the country was introduced in the Minnesota Senate in January. If passed, practicing full design services would have hinged on the passing of the NCIDQ exam. After more than two hours of testimony, the Committee rejected efforts to license the profession and voted against the bill.

In Colorado, overwhelming opposition to an Interior Designers' Certification Act was voiced, causing the sponsor to withdraw the proposed legislation indefinitely with no further action anticipated on the bill. This was accomplished through more than 1,500 e-mail messages and letters to Committee members and legislators, as well as personal testimony given at the hearing attesting to the harmful impact the bill would have on the industry.

Washington state members were vocal in expressing their opposition to a design practice act introduced to the Senate Labor, Commerce, and Consumer Protection Committee. Members worked together with the Washington Professionals Protecting Interior Design Freedom coalition and the bill was stalled in Committee. Unfortunately due to Washington legislative policies, the bill will automatically reappear before the Committee next year.

A Maryland Interior Designer Licensing Act introduced before the House Economic Matters Committee was withdrawn by its sponsor when overwhelming opposition was raised by diligent members, who participated in a call-in and e-mail campaign, and attended the hearing.

Nebraska members banded together to oppose an interior design title act that would have regulated the design profession. After letters and personal contacts, the bill did not receive a favorable report from the committee and did not pass to the full legislature.

The NKBA is actively monitoring or opposing legislation in Alabama, Tennessee, South Carolina, Florida, and California and will continue to provide progress updates.

NKBA members, allied professionals, and designers who have taken an active part in protecting the rights of the design community to continue practicing their profession without unwarranted and additional restrictive governmental regulation should be congratulated. The NKBA, with the assistance of local membership, will continue to work toward awareness and current updates, as well as to provide resources to members in confidently opposing proposed legislation.

Please contact the NKBA for more information or assistance in your state.

– EDWARD S. NAGORSKY, ESQ.
NKBA GENERAL COUNSEL AND DIRECTOR OF LEGISLATIVE AFFAIRS