



5 Ways to Protect Your Company from Green Litigation

By Jonathan Sweet

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Major litigation over green remodeling hasn't come to the residential market yet, but it's probably only a matter of time. There has already been legal action on the commercial side, with more likely to come, says attorney Chris Cheatham, LEED AP.

The most prominent case has been Southern Builders v. Shaw Development, which was settled out of court last year. There were many disputed issues in that case, but a prominent one was the developer's suing the general contractor for more than \$635,000 in lost tax credits when the building failed to achieve a silver LEED rating.

"Residential is lagging behind commercial in terms of green remodeling," says Cheatham, an attorney with Watt, Tieder, Hoffar & Fitzgerald in Washington, D.C., and author of the Green Building Law Update blog. "You're going to start seeing some of the same legal issues that just aren't there yet in terms of case law on the residential side."

Cheatham suggests five general areas remodelers should think about to protect themselves from potential green lawsuits. Laws and regulations may vary depending on your state and municipality, so be sure to consult with a local attorney if you have concerns about your company.

1. Don't make promises

One thing a remodeler should never do is guarantee a project will accomplish something specific, e.g. "These windows will cut your energy bills \$100 a month." Promises regarding energy efficiency and indoor air quality have led to lawsuits in commercial construction, and that could easily happen in remodeling as well, Cheatham says. "You don't know how these homes are going to be used after you finish it," he says. "You can tell them what you expect, you can predict what you think energy savings will be, but don't make guarantees."

That rule applies to every step of the project, from the advertising the potential client sees before signing the deal to promises made by a salesperson to get the contract and statements during the design planning stage. Any of those areas could potentially open your company up to litigation.

2. Educate the homeowner

Once you've finished the home, the homeowner needs to run it. Most homeowners don't know how to optimally operate and maintain an energy-efficient home, especially when you throw in complicated systems such as solar or geothermal. The right education could save a lot of headaches.

"The most important part of these green building projects if you want to improve your energy usage is the operation and maintenance, so the residents need to understand how to actually work the system, and that requires education," Cheatham says.

3. Make careful product choices

According to a recent study by TerraChoice Environmental Marketing, the number of self-proclaimed green products across all product areas has increased by as much as 176 percent. In the same study, the company concluded 98 percent of products were guilty of some form of "greenwashing."

Many green products are new and unproven, and if a product fails, homeowners are going to be looking to you as the remodeler to make it right.

"Chinese drywall isn't a green material, but it really shows how using any material that hasn't been fully tested can get you in trouble," Cheatham says. "There's a potential for a lot of these new green materials to result in defects."

Even if the product is a good one, it could be the wrong product for that application. For example, there have been lawsuits around bamboo and cork floors that warped because of excessive condensation, Cheatham says. Although the product wasn't faulty, it was used somewhere it shouldn't have been.

4. Get your trades on board

Just as with a faulty product, sub-par work by a trade contractor will fall in your lap. Make sure your trades understand the demands of the green project and pass on those requirements to their employees. They need to understand their responsibilities as part of the building team. Requirements should be formalized in an explicit, written contract, Cheatham says. (See No. 5.)

5. Craft contracts carefully

Clearly spell out who is responsible for what. This is especially important if the remodeler is not designing the home and instead executing an architect's plans. If the home fails to meet expectations, is it the architect's fault for a bad design or the remodeler's fault for an improper build?

This becomes an even bigger issue if you're attempting to meet standards for certification, especially in new construction, such as LEED for Homes.

"When projects don't actually achieve the certification, there are extra costs," Cheatham says. "It's going to mean protracted legislation if the parties end up in court trying to determine who's responsible. The more particular you can be with your contract in regard to the green building strategies, the better off you will be."