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Article
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**U.S. GREEN BUILDING COUNCIL SUED FOR \$5 MILLION +
IN NEW YORK CLASS ACTION CASE**

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On October 8, 2010, a class action lawsuit was filed in the United States District Court for the Southern District of New York against the U.S. Green Building Council, David Gottfried and Richard Fedrizzi, USGBC's founders, Rob Watson who allegedly developed the L.E.E.D.[®] rating system for USGBC and others.

The lawsuit charges USGBC with antitrust violations, false advertising, fraudulent misrepresentations, violations of the federal RICO statute and other offenses.

According to the complaint, USGBC was established in 1993. In 2000, USGBC trademarked the Leadership in Energy and Environmental Design rating system (L.E.E.D.[®]). USGBC uses the L.E.E.D.[®] to certify that buildings are energy efficient. USGBC charges building owners for certifying their buildings as being L.E.E.D.[®] certified. There are various levels of certification. The minimum charge to certify a building is \$2,900. The fee increases with the size of the building. Certification for a newly constructed building of over 500,000 square feet is \$20,900.

According to the complaint, USGBC's revenues for 2008 exceeded \$64 million.

The essence of the complaint is that USGBC claims that L.E.E.D.[®] buildings are 25% - 30% more energy efficient than non-L.E.E.D.[®] buildings and that USGBC has data

that verifies these energy efficiency claims. The complaint says that USGBC does not independently verify any information that it receives from building owners. The applicants for certification self-certify the information submitted to USGBC. Furthermore, the certification system does not require the submission of actual data regarding energy usage. The complaint contends that the certification system is based on computer modeling. The building owner or architect estimates what energy usage savings will result from the system that will be installed and then uses computer modeling to determine energy savings. USGBC does not require hard data of actual usage or actual savings.

The complaint states that the USGBC comparison claims for energy savings are based on data from two separate studies. The first is a study commissioned by USGBC and performed by the New Building Institute (NBI). The complaint alleges that the 2008 NBI study was presented by USGBC as a study of all L.E.E.D.[®] certified buildings that had been certified prior to the time that the study sample data was obtained. In fact although 552 buildings had been certified, only 252 buildings submitted data in response to the data request prepared by NBI. Of the 252 respondents, NBI elected to use only 121 submissions based on the fact that the remainder of the submissions did not have data sufficient to be included in the study. NBI then analyzed the data using the median energy use on the group of 121 new buildings included in the NBI database. When making a comparison, NBI turned to a database of 5,215 buildings reported by the United States Energy Information Administration's Commercial Buildings Energy Consumption Survey Catalog (CBECS). The CBECS buildings date from as early as 1920. Further, the NBI study compared the median energy use of the L.E.E.D.[®] certified buildings to the "mean" energy use of the CBECS buildings.

According to the complaint, the comparison is meaningless. In fact, the complaint alleges that the buildings in the CBECS database were probably more energy efficient than the L.E.E.D.[®] certified buildings.

Based on these facts, the complaint alleged that USGBC engaged in monopolization through fraud in violation of the Sherman Antitrust Act. In reviewing the antitrust allegations in the complaint, it is difficult for this author to understand how the alleged practices constitute monopolization in violation of the Sherman Act.

The other specific causes of action alleged in the complaint relate to unfair advertising, misrepresentation, fraud, etc. in violation of both federal and state statutes.

The complaint was brought on behalf of several different classes of plaintiffs. In order to proceed as a class action, plaintiffs will have to prove that they have valid standing to proceed as a class. USGBC will challenge plaintiffs' right to proceed in this regard.

This is a major litigation that is an example of what associations who engage in standards and certification can expect to face in today's litigious society. We are sure that USGBC will deny the allegations of the complaint and present a vigorous defense.

We will report later after an answer is filed. For further information contact sfellman@gkglaw.com.

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