

## message from partner in charge

Our *Detroit Update* newsletter this month features a follow-up article regarding new requirements for LEED certification and a reprint from the ABA Section of Litigation that focuses on Michigan's outcome of a 50-state punitive damages claims survey.

Vicki Harding authored the LEED article that explains the new energy efficiency credits necessary for LEED certification as required by the U.S. Green Building Council Climate Initiatives, which was first proposed in November 2006.

Authored by Pepper partner Scott Gorland and associate Mary Deon, the Michigan survey reports that punitive damages designed to punish a defendant are generally not available in Michigan absent specific statutory authorization.

We hope you enjoy these articles, and we encourage you to find even more informative content on our Web site, [www.pepperlaw.com](http://www.pepperlaw.com), and our latest podcasts at [www.pepperpodcasts.com](http://www.pepperpodcasts.com).

Happy Holidays!

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## U.S. Green Building Council Climate Initiative: Energy Efficiency Credits Now Required for LEED Certification

Many Federal, state and local governments are offering incentives for green building practices, and some are imposing green building requirements on private as well as public developers. There is also a growing realization that green building practices make economic as well as environmental sense.

### LEED® (Leadership in Energy and Environmental Design) Certification

The leading benchmark for certifying green buildings is the LEED Green Building Rating Systems,™ which are developed by the U.S. Green Building Council (USGBC) through a consensus process that includes an opportunity for public comment and approval by a vote of USGBC members. (Pepper Hamilton is a member of USGBC, and lawyers from the firm are active in both regional USGBC chapters and the corresponding committees for pilot LEED Rating Systems.)

LEED Rating Systems include LEED-NC, which is applicable to new construction and major renovations; LEED-EB, which is a variation developed for certifying existing buildings; and LEED-CS (Core and Shell) and LEED-CI (Commercial Interiors), which were developed in recognition of the division of responsibility between the owner and tenants in a spec building, so that the owner and tenants can pursue certification independently for the base building and the tenant improvements.

Each of the LEED Rating Systems establishes both prerequisites (which are mandatory) and available credits in the areas of sustainable sites, water efficiency, energy and atmosphere, materials and resources, and indoor environmental

quality, by identifying the intent, requirements (including detailed metrics) and strategies for meeting the requirements for each item.

### Energy

Historically, a building that achieved all prerequisites could become LEED certified based on any combination of credits as long as the minimum number of credits were achieved (with increasing numbers of credits required for silver, gold and platinum certification).

As indicated by the fact that LEED stands for “Leadership in *Energy* and Environmental Design,” energy considerations constitute a major element of LEED certification. Notwithstanding this focus, it is possible for a building to be certified without obtaining any energy efficiency credits.

For example, under LEED-NC Version 2.2, two out of seven prerequisites deal with energy; and out of 69 possible points, up to 10 points are for energy optimization credits and up to 3 points are for renewable energy credits. However, since only 26 points are required for certification, this meant that a building could be LEED certified without obtaining any energy optimization credits.

### USGBC Climate Initiatives

According to the USGBC, buildings account for 38 percent of CO<sub>2</sub> emissions in the United States, with the majority of these emissions coming from combustion of fossil fuels to provide heating, cooling and lighting, and to power equipment. The building industry has a significant opportunity to play a role in reducing the potential threat to the climate.

In November 2006, USGBC announced that it would pursue a series of initiatives to focus attention and facilitate continuing industry changes designed to reduce the climate impact of buildings.

In order to increase the impact of LEED in reducing building-energy related greenhouse gas emission, one of the proposals was to require that all commercial projects achieve at least two points in the Energy Optimization Performance credit as a condition of LEED certification. The public was invited to comment on the proposal, which was then submitted to the USGBC membership for a vote.

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## Peppercast: Religious Discrimination in the Workplace

Few issues are as personal and potentially divisive as religion. In this podcast, **Robert Ludolph**, a partner in the Detroit office of Pepper Hamilton and chairman of the Detroit office’s Labor and Employment Practice Group, discusses religious discrimination in the workplace, including how employers can deal with claims from employees that an employer did not accommodate their religious practices or beliefs and claims asserting religious harassment.

If you are interested in the latest updates in the world of labor and employment, e-mail [podcasts@pepperlaw.com](mailto:podcasts@pepperlaw.com) to subscribe to *Pepper@Work*. This is an electronic news alert that provides employers with advice on how recent labor judgments and opinions will affect their organization.

Listen today by visiting the Labor and Employment section of [www.pepperpodcasts.com](http://www.pepperpodcasts.com).

# Update on Punitive Damages Claims - A 50-State Survey: Michigan

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In this monograph, state authors discuss the recent development of laws in their states and how they impact both general and pharmaceutical litigation. Pepper partner Scott Gorland and Pepper associate Mary Deon authored the Michigan chapter.

## I. Effect of FDA Regulation and Approval on Punitive Damages Claims in Michigan

As discussed in greater detail below, punitive damages, which are designed to punish the defendant, are generally not available in Michigan absent specific statutory authorization. *Gilbert v. DaimlerChrysler Corp.*, 470 Mich. 749, 765; 685 N.W.2d 391 (2004). However, exemplary damages, which are designed to compensate the plaintiff, are available in specific circumstances. *B&B Investment Group v. Gitler*, 229 Mich. App. 1, 9-10; 581 N.W.2d 17 (1998). There have been no reported cases in Michigan discussing what affect, if any, FDA regulation and approval would have on either punitive or exemplary damages claims.

## II. Insurability of Punitive Damages Claims in Michigan

Michigan law does allow coverage for punitive or exemplary damages although the parties may specifically exclude such damages from coverage in the insurance contract. *Meijer, Inc. v. General Star Indem. Co.*, 826 F. Supp. 241, 247 (W.D. Mich., 1993) *aff'd* at 1995 U.S. App. LEXIS 19951 (6th Cir., 1995). In *Meijer*, an insured filed a declaratory action against a commercial general liability insurer seeking determination that the policy covered the insured's liability for punitive damages awarded in a separate action against the insured by a third party. The court, applying Michigan law, granted the insured's summary judgment motion. Observing that the policy did not contain an express exclusion of coverage of liability for punitive damages, the court stated that coverage existed unless state public policy precluded coverage. The court found that Michigan law did not preclude coverage and that a contrary holding would create an exclusion not found in the parties' contract. As the

court explained, "to hold that punitive damages are not recoverable would create, in effect, an exclusion for which the parties did not negotiate and would allow insurer to collect premium coverage of a risk it assumed and then escape liability." *Id.* at 247.

## III. Recent Developments Concerning Punitive Damages Claims

Michigan is among a minority of jurisdictions which generally do not allow an award of punitive damages. *Eide v. Kesley-Hayes Co.*, 431 Mich. 26, 51; 427 N.W.2d 488, 498 (1988). Punitive damages are those which are designed to punish a party for misconduct and are only available in Michigan when they are expressly authorized by statute. *Gilbert v. DaimlerChrysler Corp.*, 470 Mich. 749, 765; 685 N.W.2d 391 (2004). Such damages may, however, be available when federal law governs a case. *Janda v. City of Detroit*, 175 Mich. App. 120, 129; 437 N.W.2d 326, 331 (1989) ("Damages for deprivation of a federal right are governed by federal standards. Thus, punitive damages may be awarded under 42 U.S.C. §1983 even where they would not normally be recoverable under the local law in the state where the violation occurred.") (internal quotations omitted).

*For the additional Recent Development Concerning Punitive Damages Claims, visit [http://www.pepperlaw.com/pepper/publications\\_article.cfm?rid=1293.0](http://www.pepperlaw.com/pepper/publications_article.cfm?rid=1293.0) to view the entire chapter.*

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### **Whole Building Energy Simulation v. Prescriptive Compliance Path**

A number of comments raised the objection that imposing a minimum of two energy efficiency points meant that a whole building energy simulation would be required under many of the Rating Systems. For example, LEED-NC provides three options for achieving points under the Optimize Energy Performance credit: Option 1 (1-10 points) requires a whole building energy simulation. Option 2 (4 points) provides a prescriptive compliance path, but is available only if the building is for office occupancy and under 20,000 square feet. Option 3 (1 point) provides a generally applicable prescriptive compliance path, but does not allow a building to achieve sufficient points to meet the mandatory minimum of 2 points.

In response, a prescriptive path has been developed for LEED for New Construction, LEED for Core and Shell, LEED for Schools and LEED for Retail projects that will allow them to achieve LEED certification without preparing a whole building energy simulation.

### **Mandatory Energy Efficiency Credit Points Now Effective**

The proposal as modified in response to comments became effective for projects registering after June 26, 2007. Projects under LEED for Homes and LEED for Neighborhood Development (both of which are in the pilot stage) are exempt. All other projects registering after the effective

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date are required to achieve at least two Optimize Energy Performance points in order to obtain certification.

Lawyers in Pepper's Real Estate Practice Group are conversant with the LEED Rating Systems and ongoing developments in the area. We can provide a legal perspective that will enhance the effectiveness of an integrated green building project team.

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