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Green Buildings & LEED Standards- Emerging Issues in the Race to be Green

Summary/Description:

Leadership in **E**nergy and **E**nvironmental **D**esign (LEED) Standards have been rapidly adopted by states and municipalities across the country. These "Green Building" standards under LEED present an entirely new set of risks and liability concerns for architects, engineers, and contractors. LEED standards can change rapidly and may result in an evolving standard of care over the life of a project. Damage models also present new concerns and concepts for insureds and their carriers that may not traditionally be considered damages per policy definitions. For example, the failure to properly complete construction of a Green Building may result in damages like the loss of significant property tax credits. Finally, due to the on-going certification requirements under LEED, Green Building's claims have a long tail and present a long-term risk for insureds and their carriers. This session presents a brief history of LEED certifications to provide context to participants. The discussion explores risk factors under LEED and considers liability issues confronting architects, engineers, suppliers and developers who go Green. The session considers risk-management tools, defenses to claims, risk-transfer ideas and claim resolution strategies. Finally, the session will evaluate some case studies and discuss practice tips.

I. Background and Scope of Leadership in Energy and Environmental Design ("LEED")?

Leadership in Energy and Environmental Design ("LEED") is the most widely used green building rating system in the world. Forty-five states and hundreds of local governments have incorporated LEED's certification requirements into legislation requiring or incentivizing the use of LEED standards.[1] LEED provides a framework to create healthy, highly efficient and cost-saving green buildings.[2] As of 2016,[3] 1,819 commercial and institutional projects achieved LEED certification in the 10 states within the Top 10 LEED list in 2016, representing 309.12 million gross square feet of real estate. And across the U.S., 3,366 projects were LEED-certified in 2016, representing 470.39 million square feet.[4]

In 2016, LEED for Building Operations and Maintenance was once again the most popular rating system within the Top 10 States, representing 53 percent of the total square footage certified; LEED for Building Design and Construction was the second most popular rating system, representing 42 percent of the square footage certified; and LEED for Interior Design and Construction was the third most popular rating system, representing 5 percent of total square footage certified.[5]

The LEED green building certification system is the foremost program for the design, construction, maintenance and operations of green buildings. More than 59,000 commercial, neighborhood and residential projects are currently LEED-certified, comprising more than six billion square feet of construction space in all 50 states in the U.S. and in more than 164 countries and territories globally.[6]

Green construction is also a large economic driver. According to USGBC's 2015 Green Building Economic Impact Study, green construction will account for more than 3.3

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[1]/ http://goo.gl/67gEf4

[2]/ https://goo.gl/7JepL2

[3]/ http://goo.gl/M3PcNY

[4]/ *Id.*

[5]/ *Id.*

[6]/ *Id.*

million U.S. jobs—more than one-third of the entire U.S. construction sector—and generate $190.3 billion in labor earnings by 2018. The industry's direct contribution to U.S. gross domestic product (GDP) is also expected to reach $303.5 billion from 2015–2018.[7]

LEED was originally created by United States Green Building Council ("USGBC") to accomplish the following:[8]

- Define "green building" by establishing a common standard of measurement;
- Promote integrated, whole-building design practices;
- Recognize environmental leadership in the building industry;
- Stimulate green competition;
- Raise consumer awareness of green building benefits; and
- Transform the building market.

LEED certification is recognized as a symbol of sustainability achievement. According[9] to the USGBC:

> LEED projects earn points by adhering to prerequisites and credits across nine measurements for building excellence from integrative process to indoor environmental quality. Prerequisites are required elements, or green-building strategies that must be included in any LEED certified project. Credits are optional elements, or strategies that projects pursue to gain points toward LEED certification. Credits are developed through several rounds of public comments and in collaboration with the USGBC board, broader membership and staff. As market readiness increases and new technologies become widely available, credits adapt to improve the value and environmental integrity of building projects. Based on the number of credits achieved, a project earns one of four LEED rating levels:

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[7]/ *Id.*

[8]/ https://goo.gl/GJCQ1a

[9]/ https://goo.gl/DJ4yLr

LEED Certified, LEED Silver, LEED Gold or LEED Platinum. The LEED rating systems work for all buildings at all phases of development and are meant to challenge project teams and inspire outside-the-box solutions.

The current version of LEED is known as LEED–V4 and is intended to promote[10]:

- Location and Transport;
- Sustainable Site;
- Water Efficiency;
- Energy and Atmosphere;
- Materials and Resources; and
- Indoor Air Quality.

II. History of Leadership in Energy and Environmental Design ("LEED"):

The USGBC was organized in 1993 as a membership-based non-profit to promote the betterment of buildings through sustainable practices in the building and construction industry.[11] The first version of LEED was adopted by the USGBC and launched in 1998.[12] LEED-V4 is the latest version of standards.

III. Risks and Source of Liability

LEED projects present challenging liability issues. Like other claims in this area, liability claims arise from negligence, malpractice, breach of contract, breach of warranty and building code violations. LEED projects required adherence to rigid design and construction specifications. In addition, because of certification requirements, the scope of liability includes several potentially responsible parties like architects & engineers,

[10]/ *LEED V4* – Impact Category and Point Allocation Development Process, p3.

[11]/ "*Green Building Basic Information*". US Environmental Protection Agency (EPA). 20 Feb. 2016. July 2016.

[12]/ Fowler, K.M and E.M Rauch. "*Sustainable Building Rating Systems Summary*." Pacific Northwest National Laboratory operated for the U.S Department of Energy by Battelle, 2006 July.

contractors, supplies and others. With many potentially responsible parties, coverage issues can quickly become challenging.

IV. Sample Cases and Analysis

1. *Barber v. West Chelsea Development Partners LLC*, Index No. 16104615/10 (Superior Court for New York County)[13] includes claims that a developer improperly failed to refund earnest money deposits ("EMD") from prospective purchases. The purchasers sued to get the down payments back and for the sales contracts to be rescinded. Among the purchasers' arguments is that the failure to close is excused by the developer's failure to obtain LEED certification as contemplated by the Offering Plan.

2. *JLB Realty, LLC v. Capital Development, LLC*, Case No. 1:09-cv-00632-BEL (USDC Maryland) involved claims for increased costs due to delays in construction. The purchaser backed out of sale of land transaction that was to be developed into a residential project. Seller retained the substantial earnest money deposit ("EMD") and the purchaser sued for return of the EMD. The seller contended that reasons for requiring a substantial EMD was the potential increased cost of meeting LEED or equivalent standards under local ordinance. The take away from this case is that damage models can include probable cost increases resulting from new mandates of compliance with LEED.

3. *The Chesapeake Bay Foundation, Inc., et. al. v. Weyerhaeuser Company* (USDC Maryland 11-cv-00047, Hon. Paul Grimm and 580 Fed. Appx. 203 (4th Cir. 2014)): This claim arose from the construction Chesapeake Bay Foundation's headquarters known as the "Merrill Center." The "green" design called for exposed structural wood members outside the envelope of the Merrill Center, including some that penetrated the

[13]/ https://goo.gl/4RXxTa See Complaint, ¶ 48.

building's façade. The building cost $7-million to build. The estimated cost of repair, according to a lawsuit filed by the organization, is $6-million.[14] Weyerhaeuser agreed to provide Parallam[15] PSL columns and beams for use in the construction. The Chesapeake Bay Foundation sued claiming the Parallams had not been properly treated and were defective. The case has a long procedural history and considers Maryland's three (3) year statute of limitation. Eventually, the primary case between Chesapeake Bay Foundation and Weyerhaeuser was settled in July 2015—15 + years after construction started.[16]

4. *Southern Builder's v. Shaw Development, No.*: 19-C-07-011405, Circuit Court, Somerset Co., Md. (2008). A contractor was hired to build a Silver LEED condominium project. Due to delays, the project was not finished on time and it cost the developer a loss of $600,000+ in tax credits to the developer. The lawsuit was later settled for an undisclosed amount.

V. Risk Management, Risk Transfer and Take Aways

Typical to most construction claims, parties seek to spread and allocate liability far and wide. A&E Defendants typically argue claims are based on construction / material problems and are not design flaws. A general contractor will seek to include subs and suppliers. The general contractor typically argues the claims are based on design

[14]/ http://goo.gl/efsG8F

[15]/ Parallam is a "sustainable" green material because it is constructed from strips of recycled wood and wood from fast-growing forests.

[16]/ http://goo.gl/etgEuu

problems. However, if there are any construction defects, the general contractor is entitled to indemnity from subcontractors.

One way to deal with the potential risk is to use Contracts specifically intended for LEED Projects. The American Institute of Architects has form documents to address many of these contractual issues specific to green building projects by creating[17] AIA B214. Contracts can include dispute resolution processes such as mediation and arbitration, and also require a certificate of merit by licensed professional must be included with any notice of claim.

Another way to deal with these risks is with proper insurance. There are several A&E carriers that provide products which include coverages for LEED certifications.

[17]/ Sample Contract AIA B214: https://goo.gl/ivwzyG