

ACI's 2nd Forum on Construction Claims & Litigation

February 24-25, 2015

The Trend and Proliferation of Green Construction

David N. Crump, Jr.
Director of Legal Research
National Association of
Home Builders

Roger Bradley
Member
Melvin & Melvin PLLC

Joe Duncan
Partner
Huie, Fernambucq & Stewart LLP

Tweeting about this conference?

#ACIConstruction



The Green Building Wave in Residential Construction

- The market share for green homes continues to rise -
from 2% in 2005 to 17% in 2011
- Emerging field
- Mistakes will be made
- Unexpected problems will arise



GREEN CONSTRUCTION

Green Certification and Contract Issues

- Contractors continue to use standard forms
- Fail to adequately address specialized green building requirements



GREEN CONSTRUCTION

Potentially more risky than traditional construction

- Potential for faulty workmanship and defect claims because of lack of appropriate qualifications and experience of contractors and subcontractors
- Potential for increase in product liability claims resulting from new and untested products that may not have the durability and longevity of their traditional counterparts
- The impact of inadequate maintenance on the contractors' potential liability leading to increased claim activity



GREEN CONSTRUCTION

- Increasingly, Federal, State and local legislation mandates green building certification
- 12/2/14 - National Defense Authorization Act for Fiscal Year 2015
- For residential building projects authorized by this act – the Secretary of Defense may use the ICC 700 National Green Building Standard, the LEED Green Building Standard System, the Green Globes Green Building Certification System, or an equivalent protocol



LEED® for Homes

- Developed by The U. S. Green Building Council (USGBC)
- Scorecard: conservation of energy and water, indoor air quality, building materials, land use design and consumer education
- Four levels: Certified – Silver - Gold - Platinum
- Higher-scoring homes earn higher LEED rating certification levels



The National Green Building Standard

- ANSI Approved Standard – ICC- 700
Consensus development by 41 Industry professionals
- Flexibility in selection alternatives - Few mandatory provisions
- Points are earned for energy, water, resource efficiency, lot & site development, indoor environment quality, maintenance & home owner education
- Bronze, Silver, Gold and Emerald Performance Levels



Green Globes

- Green Building Initiative (GBI)
- Online rating tool
- Primarily commercial – but also for multifamily construction
- Based on consensus developed ANSI green building assessment protocol for commercial buildings



GREEN CERTIFICATION

- Selection of certification program
know your program in advance
- Be familiar with the program
requirements, the verification
process, certification inspection
- Make sure your employees and subs
have adequate training
- Educate your building officials



Green Building Contracts

- Specify program and certification level to be achieved in the contract
- Provide certification alternatives and price differentials (if applicable)
- Provide for failure to receive certification, or certification at a lower level
- Liquidated damages as a possible remedy



Green Building Contracts

- Provide for excusable delay, for reasonable substitution of materials and components, and the possibility of added costs
- Specify all rebates, tax credits, and grants to be sought
- Assign responsibility for application, receipt of proceeds, and any effect on the contract price



Green Building Contracts

Maintenance

- Necessary for continued performance
- Who is responsible for conducting maintenance?
- Who is liable for lack of maintenance?
- Maintenance training and manuals
- Third party maintenance



Certification Disclaimer

- Your new home has been awarded a Green Building Certification issued by _____.
This certification indicates that your residential structure is in conformity with _____ level standards at the time of certification.
- The Homeowners acknowledge and agree that the issuance of the Green Building Certificate shall not be construed as providing any additional Builder warranties beyond those expressly provided under the contract of sale, and shall not be construed as providing any Builder guarantees of future energy savings, positive health attributes, environmental advantages, enhanced appraisal value, or other beneficial qualities associated with green construction.



Green Building Warranty

- **Express warranty provided is the exclusive warranty – ads and promotional materials shall not be construed as any representation of warranty**
- **For workmanship and materials only**
- **Avoid unintended warranties of functionality and energy savings**



Green Building Warranty Disclaimer

- **Green building functionality depends on lifestyle choices, and proper home maintenance. Benefits from green building may vary or not be achieved. There are no guarantees of future energy savings, positive health attributes, environmental advantages, higher resale value or other beneficial qualities associated with green construction.**
- **No warranty is provided for green building performance.**



Litigation Disputes Over Failed Promises of Green Certification

Tweeting about this conference?

#ACIConstruction



Causes of Action

- Failure to pursue certification
- Building defects or failure to build to certification specifications
- Misrepresenting efficiency gains or LEED certification
- Failure of green materials
- Discriminatory RFPs or bid requests



Types of Cases

- Efficiency Claims and Misrepresentation
- Building Codes
- Bidding Process
- Materials
- Contract Disputes



Types of Cases:

Misrepresentation

- Completed building is not as energy efficient as advertised
- Improper claim that building is LEED certified
- Loss of re-certification if tenants fail to comply with requirements



Types of Cases: Building Codes

- **Conflicts between state and federal law**
 - Is state or local code pre-empted by federal standards for energy efficiency?
- **Confusion between versions**
 - Does local law incorporate a particular version of LEED or the “current” version?
 - Which level is required for the project?
- **Are only government buildings required to be certified or must private buildings be green?**



IgCC: Int'l Green Constr. Code

- Overlay to existing international codes
- Incorporates ASHRAE Standard 189.1 as alternate path to compliance
- Mandatory for all new construction and renovation of existing buildings in Baltimore City, MD April 1, 2015
 - Buildings certified LEED Silver, or ASHRAE 189.1 compliant exempt



Types of Cases: Bidding Process

- Does bidding process in public buildings discriminate against developers with less experience building green buildings?
- Is government entity using requirement of LEED certification to avoid using competitive bidding processes?



Types of Cases: Materials

- Will an untested green building material wear the same as a more traditional material?
- Suits between manufacturers of green materials



Types of Cases: Contract Disputes

- Who is responsible for obtaining LEED certification?
- Who is responsible if building is not built to LEED specification?
- Who owns the LEED documentation on the project?



Risks

- Failure to obtain certification
 - Loss of or failure to qualify for grants
 - Loss of conditional bank loans or bonds
 - Lawsuits where certification required
- Failure of materials
 - Suits from owners



Risks

- **Misrepresentation**

- Suits from owners, purchasers, or tenants

- **Insurance issues**

- Does green building raise the standard of care?
- No insurance coverage for breach of contract suits for failure to obtain certification



Cases

• Shaw Development v. Southern Builders

- Project accepted into green building program giving an 8% tax credit but requiring certification by a certain date
- Building was not complete by required certification date, so tax credit was lost
- Contractor sued developer and placed a lien on building; Developer countersued for failure to obtain certification
- Outcome: Settled



Cases

- Gidumal v. Site 16/17 Development LLC

- Building had green-construction defects, including an “energy-efficient” HVAC system that was insufficient to heat the space
- Owners sued developer for fraud and breach of contract
- Outcome: Settled



Cases

- Chesapeake Bay Foundation, Inc. v. Weyerhaeuser Co.
 - Parallel strand lumber that was to be treated with untested sealant and was exposed to weather before installation rotted within 10 years of completion
 - Owner, designer, and contractor sued subcontractor that supplied and treated the lumber
 - Outcome: Trial court dismissed as time-barred; Appeals court vacated; Trial pending



Cases

- Flintco Pacific, Inc. v. City of Palo Alto
 - City fired general contractor during construction and claims it failed to turn over LEED documentation necessary to complete the project
 - Contractor sued the city
 - Outcome: Pending



Cases

- Air Conditioning, Heating and Refrigeration Institute v. City of Albuquerque
 - City building code required small retail and office buildings to comply with minimum standards for HVAC that were more stringent than federal requirements
 - Manufacturers, distributors, and installers sued the city
 - Outcome: Federal law pre-empts the mandatory portions of the code



Cases

- Building Industry Association of Washington v. Washington State Building Code Council
 - State energy code required new buildings to incrementally move toward a 70% reduction in energy usage; The legislation suggested the cheapest way to do so was to use appliances more efficient than federal law required
 - Builders sued, claiming the law was pre-empted
 - Outcome: The law did not require use of more efficient appliances, so federal law did not pre-empt the state code



Minimizing Risk of Legal Liability

- Contract documents
- Management techniques
- LEED action plan
- Insurance issues
- Other strategies



Insurance Coverage Concerns in Green Construction

#ACIConstruction



Underdeveloped Coverage Opinions

- There are 25 opinions and unreported opinions on Westlaw which reference LEED standards
- None of them reference coverage



What types of damages must insurance address?

- **Traditional Construction Defect Damages**
 - Damage to the “work” or component part
 - Negligent construction
 - Damage to portions of the project other than “your work”
- **Consequential Damages**
 - Loss of incentives
 - Loan discounts
 - Loss of tax benefits
 - Utility discounts
 - Monetary grants
 - Decreased efficiency/higher cost of operating building
- **Other Damages**
 - Damaged reputation



Coverage concerns for Green/LEED Certification

- **Professional Liability**

- Does the failure to meet an LEED level arise from a failure to properly design, select materials, plan construction processes?
- Is the failure to meet a set energy efficiency under a professional's control?
- Negligent misrepresentation claims

- **General Liability**

- Does the failure relate to negligent construction or defective products?

- **Owner Coverage**

- Builder's Risk/Property Coverage



Professional Liability Concerns

- LEED Certification standards are a guarantee/warranty
- Most Professional Liability coverages for Architects & Engineers exclude coverage for guarantees
- Coverage for claims post-completion
 - LEED buildings can be decertified
 - Is there an obligation to have completed coverage



Insurance products for Professional Liability

- Since 2009, Lloyd's of London has underwritten green professional liability for Argo Insurance Group of San Francisco
 - Expands definition of professional services to include all of the usual and customary services that are associated with Green Building.
 - Specifically includes coverage for guarantees and warranties of green certification
 - Includes premium discounts for USGBC members
- Zurich Z Pro coverage:
 - Includes expanded definition of professional services to include LEED accredited professionals
- Policies may have separate limits or sublimits



CGL Contractor Coverage Concerns

- What are the a contractor/subcontractor's risks for LEED/Green claims?
 - Actions of a contractor can affect a building's LEED status
 - Materials may need to be required to come from local sources (e.g. timber) or recycled
 - Reduction of waste may be an integral part of the LEED plan to meet a specific level
 - Defective/negligent construction by the contractor
 - Leaking roofs
 - Defectively installed component parts
 - Negligently constructed structural members

#ACIConstruction



ISO General Liability Coverage

Generally, claims for failure to meet a LEED standard are a contractual claims under CGL policies

Unless...

There has been damage.



Has there been a CGL “occurrence”

- Is there an “occurrence”?

Has there been an accident, including continuous exposure to substantially the same general harmful conditions that resulted unexpectedly or without intention or design?

Did the accident damage something other than “your work”?

-is the damage to portions of the structure that were not within the scope of the contractor’s work or control



Differing definitions of occurrence

Gratuitous disclaimer

States differ widely on what is an occurrence, what is unexpected and what is “your work”



Contractor insurance products

[#ACIConstruction](#)



Owner insurance issues/Property coverage

- Fireman's Fund was the first carrier to offer LEED/Green property coverage in 2006

- Fireman's Fund has reported that green buildings have 20% less claims than non-green buildings

- ISO has had standard form in place since 2009 for Green property owners

- Today 40+ carriers offer coverage

- Fireman's Fund, Zurich, AIG, Lexington, ACE, Liberty Mutual, etc

#ACIConstruction



Green Property Coverage Features

- Three components of ISO standard form
 - Green upgrade coverage provides increased existing replacement-cost coverages to reflect the higher costs of damages property. USGBC estimates that green materials cost 3-5% more
 - Additional limits are provided for green upgrades which may include waste reduction, recycling costs, reuse of salvage materials, or professional and testing fees
 - The cost and burden for tracking/documenting construction practices, salvage, recycling can increase overhead
 - Cost to flush outside air from building
 - Cost to recertify building
 - Extended business interruption coverage for reconstruction with green construction standards



Green Property Coverage Features

- LEED Standards may also increase or become more stringent
- A building constructed in 2008 with Gold Standard may not meet the 2016 standard
- CGL policies may actually exclude elements of Green Coverage
 - Vegetated roof



Green Property Products

- Policy may cover:
- Green upgrade coverage: to upgrade a non-green building to green
- Green certification: to meet minimum certification
- Green certification upgrade: to meet a higher standard



Builder's Risk Coverage

- The American Association of Insurance Services (AAIS) introduced two standardized green builder's risk endorsements
- Green Building Coverage: additional coverages during construction
 - Indoor Air Quality
 - Recycling Debris
 - Recertification
 - Electricity and Water Replacement

[#ACIConstruction](#)



• Delay in Completion Coverage