GREEN PROPERTY INSURANCE: IT'S GETTING EASIER TO GO GREEN

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Introduction. Though green buildings have been around for decades, green property policies have only been on the market since 2006 for commercial properties and 2009 for residential properties. It is not that insurers were ignoring green buildings for all those years, but instead, insurers were using that time to evaluate the risks associated with green buildings and green construction. Now, the verdict appears to be in – green buildings are a good risk in an expanding market. So insurers like Fireman's Fund, Zurich, AIG, and ACE have newer products that speak to these risks.

What is green? Green construction, and sustainable construction, refers to development in an environmentally responsible and resource-efficient manner. The purpose is to meet the needs of current users, while not compromising the ability of future generations to use those same resources. Green building affects the entire construction process from siting and demolition to design, construction, operation and maintenance, to renovation and expansion. Green buildings employ technologies and practices to promote not only resource efficiency, but also seek to reduce environmental impact and increase occupant health through the efficient use of energy, water and other resources, heightened indoor environmental standards, and reductions in waste, pollution and adverse environmental effects. In the U.S., two major systems certify green construction – Leadership in Energy & Environmental Design (LEED) by the U.S. Green Building Counsel and Green Globes by the Green Building Initiative. LEED is a point based system where building projects earn points for meeting specific green building criteria. Projects are then rated certified, silver, gold, or platinum depending on how many points it has achieved.

Why are things going green? Many building owners, including colleges and universities and the federal government, have vowed as a matter of policy to only build in an effort to eliminate or reduce their impact on the natural environment and significantly reduce their carbon footprint. For example, the U.S. General Service Administration has pledged to use its vast building stock as a proving ground to test and evaluate innovative and underutilized sustainable building technologies and practices. But it is not just institutional owners who see the advantage of building green. Private and commercial owners see the economic value in higher occupant productivity from healthier indoor air quality and a healthier staff, and higher returns on investment from lower operating, maintenance, and utility costs. In addition, private and commercial owners are looking to the positive market perception of green construction to increase sales and the leasing potential of their properties. In addition, new building codes often compel the use of green technologies. Moreover, lenders may offer incentives based upon buildings meeting and maintaining green standards.

Green buildings also advantage insurers, who have seen fewer claims related to harmful health conditions as a result of green materials used, including low VOC emitting paint and carpets. According to four years of data collected by Fireman's Fund, green buildings under its policies have seen 20% less claims than standard construction. And more specifically, general liability and environmental policies on green buildings suffered 10% fewer losses. [1]

For Green Property Owners.

Risks under traditional policies. Given the growth in green construction in the past few decades, new green technologies and products are coming out daily. But cutting edge, and sometimes untested and expensive, green products, designs and methods can have significant effects impacting recovery after an insured loss. Prudent owners need to be mindful of these effects in placing coverage and in prosecuting claims. Green insurance products address the coverage gaps discussed below that may arise under traditional insurance policies.

- *Increased Property Valuation/Increased Time and Cost to Reconstruct Green.* Green building property valuations tend to be higher than traditional building stock. Similarly, the cost to reconstruct green tends to be greater than to rebuild a traditional building. The U.S. Green Building Counsel estimates that an eco-friendly home made of materials that are not mass produced can cost 3-5% more to build. Under traditional property policies, owners should be mindful that coverage limits may not recognize increased property value and greater costs to reconstruct green after a loss. In addition, green reconstruction may take longer than a traditional reconstruction due to green construction methods or the limited availability of specialty products; therefore, business interruption values may not reflect a realistic timeframe for renewed operations after green reconstruction.

- *Lack of Coverage for Green Reconstruction Requirements.* After a loss, green recertification may require that specific methods or practices be employed in the course of reconstruction, some of which are not covered under traditional policies. For example, LEED recertification requires that all or a significant portion of debris from a damaged site be sorted and recycled. Cost to do so may far exceed the cost to simply demolish and dispose of debris at a landfill. But, a traditional property or fire policy will only cover the cost to demolish and dispose of debris at a landfill, leaving an owner who chooses to reconstruct green exposed to any added cost to sort and recycle the debris and meet green recertification requirements.

- *Increased Cost to Meet Heightened Certification Requirements.* Green rating systems evolve, becoming more stringent as technologies advance. Therefore, a LEED Gold building from ten years ago may not meet the current standard for LEED Gold or even the lowest level on the rating system. So, even if coverage limits allow a green building to rebuild to its previous state that may not be enough for the building to be recertified under newer versions of the rating systems.

- *Excluded Green Elements.* Traditional property policies specifically exclude coverage for some green elements, such as vegetated roofs. Vegetated roofs are installed because the soil and chosen vegetation serve as insulation, minimizing heat loss in winter and reducing cooling losses in summer. Policies may specifically exclude vegetated roofs, or related occurrences, such as failure of roof vegetation, may fall under traditional exclusions, such as a landscaping and vegetation exclusion. More catastrophic failures, such as a collapse, may be excluded due to structural or design defect or due to proximate causation of weight of rain, snow, or ice.

- *Lack of Coverage for Cost to Recertify.* Given the paperwork, tracking, and submission requirements, recertification can be a labor intensive and costly process not covered by traditional policies.

- *Loss of Financial Incentives.* Failure to recertify or decertification may have legal and financial consequences for an owner, including loss of tax or financing incentives or even denial of an occupancy permit. Though an insured may claim that failure to recertify after a loss or decertification results in a loss in property value, and therefore property damage, insurers may not consider such an event an occurrence caused by the negligence of the insured, excluding such consequential damages from coverage.

Green Certification Insurance. Though these products are newer, green property coverage has been around since Fireman's Fund introduced the first commercial property endorsement in 2006. Now, such coverage is considered mainstream by some insurance underwriters. The Fireman's Fund's Property-Gard Green Coverage Endorsement, and similar commercial green property products by other insurers, including Zurich, offer additional coverage for green property owners focused on certification by green rating authorities:

- *Green Upgrade Coverage.* This coverage is available to buildings that are not currently certified as green. The Fireman's Fund's Property-Gard Endorsement covers the cost for an owner, after a loss, to rebuild the building to the lowest green certification level of LEED, Green Globes, or the federal Energy Star program. If, for some reason, it is not possible to rebuild to certification requirements, costs

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are covered to rebuild with green products and methods that promote sustainability and energy efficiency.

- *Green Certification Coverage.* Under this section, a certified green building or green operation can rebuild to green certification requirements, but owners should be careful that the policy specifically states the level of certification sought and that the policy recognizes that certification requirements change over time.

- *Green Certification Upgrade.* Endorsements cover the cost to rebuild property to attain the next highest green certification level from the rating authority.

- *Vegetated Roof & Heat Island Effect Coverage.* The weight of soil, snow and water loads, and vegetation create special risks for vegetated roofs, especially risk of collapse. Endorsements are available to cover existing vegetated roofs, including coverage for the waterproofing layer, soil, plants, and water source. Endorsements are also available for trees, shrubs, plants and lawns related to a vegetated roof or planted to dissipate heat island effect, but such endorsements specifically exclude coverage for loss due to disease, insects, or weather conditions.

- *Broader Protection beyond the Building.* Green property endorsements recognize that elements outside the building are necessary for green certification status and as such, offer broader protection within an extended radius from the building. Endorsements can cover paved surfaces, underground systems, and personal property located within 1,000 feet of the building. This offers the property owner coverage for porous pavement systems, special irrigation and gray water collection systems, bike racks, and other furnishings.

- *Coverage for Green Reconstruction Requirements.* Green endorsements cover costs reasonably necessary to sort, remove, and deliver debris to recycling facilities rather than landfills, with any remuneration reducing the total loss. In addition, such endorsements can cover costs to flush out a building or contaminated area with 100% outside air after construction to ensure that indoor air quality meets certification requirements.

- *Green Consultant Services.* After a loss, the services of green design and commissioning consultants may be necessary to ensure green recertification. Available endorsements cover the retention of an architect and/or engineer accredited by the green rating authority to participate in the redesign and reconstruction of the damaged property. In addition, if a loss exceeds $10,000, coverage is available to a hire a professional engineer to provide commissioning services. Commissioning services would include supervision of the repair or installation of replacement HVAC equipment and testing to ensure that building systems are operating at optimum efficiency and peak performance and in alignment with one another, even if no damage to HVAC systems in the loss.

- *Cost to Recertify.* Coverage includes reasonable and necessary registration and certification fees charged by the green rating authority.

- *Financial Incentives.* Coverage is available for an owner that loses a green financial incentive due solely to a covered loss. Subject to a sublimit, endorsements will compensate the owner for as long as two years for lost tax or loan discounts or favorable rates, utility discounts, and monetary grants or specialized funding.

Green property endorsements do have specific terms and exclusions that bear careful study. For example, such endorsements will usually not pay for loss or expense due to enforcement of law or ordinance. This exclusion includes denial of an occupancy permit for any reason or testing or demolition due to contamination or pollution of the site. In addition, such endorsements reimburse an owner only after the damaged property is repaired or replaced. Therefore, an insurer may make a standard payout under the policy soon after the loss, but under the endorsement, the insurer will only reimburse additional costs incurred for green reconstruction or recertification after construction is complete, which is usually required within two years of the loss. It is also important to remember that Fireman Fund's offering, and many other products, are endorsements rather than stand-alone property policies. Therefore, all terms and exclusions of the property policy apply unless specifically modified by the endorsement. In addition, all of these coverages are subject to the limits, or sublimits, of insurance stated in the declarations.

Sustainable Reconstruction. Some other insurers veer away from green certification and instead focus on sustainable construction. For example, ACE offers a Green Building Restoration Policy, which is a stand-alone policy, that allows an insured to rebuild after a loss in an environmentally friendly manner, including coverage for furnishings, floor coverings, and energy efficient glass, roofing, insulation and HVAC equipment.

On-Site Energy Generation. As many as 250,000 households in the U.S. have on-site energy generation, be it solar, wind or geothermal. Though insureds should ensure that any power generation equipment is specifically listed as covered property on their standard property policy, specific endorsements and policies are available for such equipment. Lexington offers the LexElite Eco-Homeowner policy covering failure of household on-site energy generation. Through a 2% added premium, the policy covers the cost to purchase power, get permits and inspections to bring systems back online, and other related expenses.

Extended Business Interruption. Because it may take longer to rebuild green and for revenues to return to pre-loss levels, extended business interruption coverage is generally available for up to 12 months, though coverage is available for 18-24 months for an additional premium. This additional time can allow for recertification, delivery of specialized equipment, or installation of complex or custom systems. If appropriate, owners of on-site energy generation equipment should ensure that coverage is secured and sufficient to compensate for energy that cannot be sold onto the grid due to a loss. In addition, owners of on-site generation or water collection systems should also maintain coverage for the purchase of energy, water, or other resources, while equipment is repaired or replaced.

Green Reputation Coverage. Such coverage provides reimbursement for reasonable fees, expenses, and costs to respond to and/or defend a civil lawsuit for failure to meet or comply with green building standards. Such an endorsement may also cover the cost of a reputation crisis consultant to manage adverse press to mitigate reputational damages.

Conclusion. Though the writing of these policies and endorsements may have gone mainstream since their introduction just six years ago, in the world of insurance, these policies are newborns, untested and untried by the courts. Their terms are subject to ongoing revision, often expanding coverage. There is no industry standard form and thus careful “shopping” among competing insurance companies is warranted. Care must be taken to assure that insurance professionals placing coverage are aware of the latest trends and most comprehensive coverage available in this evolving area. Though it is expected that these policies will evolve over time as courts interpret their language, green buildings are here to stay and so are the policies that speak to the risks that arise from them.

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1. Brodsky, Matthew. “Making Claims on Green Buildings.”.Risk & Insurance. May 1, 2010. LPR Publications, 2010. Web. Retrieved January 5, 2012.

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Tracy Steedman was a speaker at the Forum’s 2011 Regional Program on Construction Contracts and will be serving as a co-site coordinator for the 2012 Regional Program held in Philadelphia. Tracy also authored the “Green Construction” Chapter of the recently released Maryland Construction Law Desk Book.

Edward Gentilcore was recently appointed as the Co-Chair of the ABA Construction Litigation Committee. Ed also authored an article to be published in Under Construction titled “Henry Gifford, et al. v. U.S. Green Building Council: Has Mr. Gifford Been Left with a Leg on Which to Stand to Pursue Discovery, Should He Have Been, and May Others Follow?”

Matthew DeVries will be co-presenting Workshop A “IS IT AN OFFER YOU CAN’T REFUSE? – Practical Tips in Navigating Project Labor Agreements” at the Midwinter Meeting in Houston, TX.

Joel Gerber and **Keith Bergeron** will both be presenting at the Forum Annual Meeting in Las Vegas, NV.