

CORPORATE INSURANCE LAW

Expert Analysis

Green Buildings and Insurance

According to a report released at the end of April, the federal government could make available as much as \$72 billion in funding or loan guarantees under 30 existing federal programs from a variety of federal agencies to enhance the energy efficiency and sustainability of commercial buildings and multifamily residences.¹ The availability of federal funding for green building initiatives combined with the enactment of local laws like the green buildings laws passed by New York City at the end of 2010 ensure that the momentum for green building will continue to grow.

For insurers, the growing popularity of green buildings means both addressing claims arising out of the use of new technologies and developing new products addressing green building risks. Although these issues are relatively new, insurers have begun to see green building-related claims, and some new products have been developed. This article first summarizes the new New York City green buildings laws and then discusses claims and products related to green buildings.

Green Buildings Law

On Dec. 28, 2009, Mayor Michael R. Bloomberg signed four bills designated as the Greener, Greater Buildings Plan into law.² The laws were seen as a step toward meeting the goals of Mayor Bloomberg's PlaNYC, which seeks to make significant reductions in the city's carbon footprint by 2030. In fact, reductions in greenhouse gases from buildings are a critical part of this plan, because city studies have shown that buildings account for more than 79 percent of all city carbon emissions.³ The green buildings laws were specifically designed to reduce greenhouse gases from city buildings and were projected to reduce



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the city's carbon footprint by 5 percent.

The newly enacted laws address four different components of green building: (i) the Energy Conservation Code; (ii) Energy Audits and Retro-Commissioning; (iii) Benchmarking of Energy and Water Use; and (iv) Lighting Upgrades.⁴

The New York City Energy Conservation Code, which will be effective on July 11, 2010, will set forth the standards for building energy performance.⁵ Under the code, nearly all alterations

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and renovations, as well as new construction, will be required to comply with the standards for energy efficiency. In comparison, the New York State Code only applies to alterations that impact more than 50 percent of a building.

The Energy Audits and Retro-Commissioning law requires owners of large buildings to conduct an energy audit and submit an energy efficiency report at least once every 10 years, with the first such reports due beginning in 2013.⁶ Among other things, the energy efficiency reports will analyze building systems that impact energy consumption, such as HVAC, water, elevator and electrical and lighting systems, to identify reasonable repairs, maintenance and retrofitting that if implemented

would result in energy savings. The reports will also identify costs associated with such repairs, maintenance and retrofitting. With certain exceptions, building owners will be required to implement those measures.

The Benchmarking of Energy and Water Use law requires owners of large buildings to submit annual water and energy usage totals to an Internet database beginning May 1, 2011.⁷ This information will be available to the public on the Internet and will provide a tool for comparing the water and energy efficiencies of different buildings as well as comparing building efficiency from year to year.

Finally, the Lighting Retrofit law requires large buildings to upgrade their lighting systems to comply with the New York City Energy Conservation Code by Jan. 1, 2025.⁸ Lighting systems governed by this law include lighting controls, tandem wiring, exit signs, interior lighting and exterior lighting.

Claims Under Existing Policies

Apart from legal requirements and federal incentives, many owners and developers have recognized the benefits of green building, and more and more projects are being developed in accordance with Leadership in Energy and Environmental Design (LEED) standards and/or using equipment that meets Energy Star standards in order to construct buildings that are more energy efficient.

In some cases, green building projects are utilizing new technologies or materials such as alternative energy systems featuring solar power or wind turbines, carpets made of natural fiber, vegetative roofs or flooring made of recycled materials. Insurers face a challenge in developing products and modifying existing products to address risks posed by these new technologies and materials because there is little claims history to draw upon.

Claims data for green building-related claims has not been compiled and published publicly, and although insurers are beginning to see

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claims related to green building in some areas, at this point it remains difficult to separate real claims history from hypothetical or anecdotal discussions about green building claims. Most published material has focused on construction defect claims. For example, media reports have often included discussion of the risk of leaking from vegetative roofing products. With respect to existing insurance products, insurers generally expect green building to impact claims experience under property insurance policies, professional liability policies and builder's risk policies.

Claims are filed under a property insurance policy when a building suffers damage requiring repairs or restoration. Typically, the policy will provide coverage for the repair work or replacement costs. Although many are convinced that green building practices result in reduced operating costs, such practices may also increase construction and installation costs. In the case of a damaged building, restoration to green standards might have long-term benefits, but the restoration work itself may be more expensive. Absent controlling policy language, it is an open question whether an insured can claim a right to restore the building to green standards where the building was not originally constructed to meet a green standard.

There has been a fair amount of speculation concerning the impact of green building on professional liability claims against design professionals. In the event that a building's performance falls short of green certification goals, claims could be made against the architects, engineers or contractors. Typically, errors and omissions policies cover the insured design professionals for the negligent failure to meet their professional standard of care. However, most policies do not cover claims for breach of warranty. Therefore, the issue that may arise is whether the claim is an ordinary professional negligence claim or whether the design professional warranted that the building would meet green certification goals.

Claims under builder's risk policies associated with green building may include claims for loss due to delayed opening as a result of LEED certification issues or other delays due to the use of new technology and equipment. These issues and others may be addressed by new green building insurance products that have begun to enter the market.

Insurance Products

Several insurance carriers have entered the market or are in the process of developing products related to green building insurance. In the last few years, ACE, Fireman's Fund, Chartis, XL, Lloyd's

of London and Zurich have all announced the launching of new policies or endorsements related to green building risks. In addition, some insurers offer premium discounts to insureds who have already met green certification standards. The new products generally address risks typically associated with property coverage, builder's risk insurance or professional liability insurance.

For example, policies are available that provide coverage for loss incurred to replace damaged building materials and systems with a green alternative such as non-toxic paints and carpeting, Energy Star rated electrical equipment, Energy Star qualified roof and insulation materials, LEED certified lighting systems, water efficient interior plumbing and efficient HVAC systems. It may also be possible to purchase coverage to rebuild an entire building to green certified standards after a covered loss.

Policies are also available to cover the risk of restoring a green-certified building to its original condition following covered damages. Such coverage may include replacement of existing green systems such as green roofs, alternative water systems and green power generating equipment. Similar policies may also provide some coverage for upgrading damaged

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equipment, property or vehicles to a higher level of LEED certification. In addition, some policies may cover the costs of retaining LEED accredited professionals to supervise repair work.

A number of insurers are also offering builder's risk coverages that include green risks on either a stand-alone basis or by endorsement to existing business risk policies. These policies or endorsements may provide coverage for additional green expenses incurred after a covered loss, such as debris recycling, expenses of environmental professionals, expenses associated with achieving LEED certification or re-certification, costs of construction using green technologies, financial losses due to environmental laws, loss of tax credits or loss due to delayed openings.

Looking Forward

Both nationally and locally, there is a strong movement toward green building and a growing

understanding that green building techniques save operating costs in the long run and create more energy efficient buildings and communities. We can expect there to be growing pains as developers, building owners and design and construction professionals mobilize to tackle the new challenges associated with green buildings. These issues also create new challenges for insurance companies and risk managers.

Although traditional insurance products may in some cases respond to green building-related losses, it is likely that insurers will continue to address these risks through new products or endorsements to traditional policy forms. Like other insurance products, the new products are likely to evolve over time in response to claims experience.

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1. Van Ness Feldman, P.C. Using Executive Authority to Achieve Greener Buildings: A Guide for Policymakers to Enhance Sustainability and Efficiency in Multi-Family Housing and Commercial Buildings. (April 29, 2010) <http://www.vnf.com/assets/attachments/USGBC%20report%204-29-10.pdf>

2. The New York City green buildings laws were discussed in more depth in the following two New York Law Journal columns: Block, Kenneth M. and Semel, Hilary, "New York City's Greener Greater Buildings Plan Becomes a Law," 243 NYLJ No. 5 (Jan. 8, 2010) and Warren, Charles S., Mintzer, Karen L., Hindriks, Inge and Swidler, Pamela, "New York City Goes 'Greener' and 'Greater,'" 243 NYLJ No. 48 (March 15, 2010).

3. Id.

4. NYC Admin Code, §§28-308.1-311.5; NYC Admin Code, §§28-1001.

5. NYC Admin Code, §§28-1001.

6. NYC Admin Code, §§28-308.

7. NYC Admin Code, §§28-309.

8. NYC Admin Code, §§28-310.v

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