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Green-Building and Renewable-Energy Insurance Claims: Where Are We Now?

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INTRODUCTION

Coverage involving Green Buildings and clean-energy initiatives is a hot topic. It seems everyone is going green.¹ Inevitably, this area of environmental coverage will give rise to disputed claims. This article presents an overview of what can be expected as the coverage marketplace advances and claims are litigated.

“Green Buildings”

“Green Buildings” are energy efficient and may qualify for certification as such or for financial incentives and tax breaks. Clean energy initiatives can involve a lot of things from reducing carbon emissions² and greenhouse gases³ to recycling e-waste.⁴

¹ Increased energy efficiencies and a market demand for a limited supply of Green Buildings can provide attractive returns on investment when measured against the upfront development and construction costs. Increasingly, Green Buildings are believed to increase net operating income and enhance real estate market value. A recent survey by the Northeast-Midwest Institute indicates a green trend with respect to large-scale, community-transforming brownfields redevelopment. In this challenging economic climate, buyers, credit tenants and long-term investors are increasingly interested in green asset values, operational efficiencies and real estate development conditions as a condition of occupancy or investment.

² Specialized coverage products have been rolled out recently that are designed to insure against risks associated with Carbon Capture and Sequestration (CCS) projects. These new coverage products are intended to address risks arising from design through implementation closure and post-closure of geologic storage sites. The offerer of these products asserts in marketing materials that effective deployment of CCS systems will be a critical element of meeting long-term global carbon emission reduction. These products purportedly can be applied not only to cleaner coal operations, but also to a wide variety of industrial processes, on shore and offshore. The coverage products purportedly have a duration of several decades and provide \$50 million in annual coverage for property damage, as well as protection against government suspensions of sequestration activities. The policies, however, do not purport to cover a site’s potential liability for offset credits that are cancelled due to a subsequent release of stored emissions.

³ The United States Environmental Protection Agency (EPA) recently proposed the first comprehensive national system for reporting emissions of carbon dioxide and other greenhouse gases produced by major sources in the United States. The proposed rule calls for suppliers of fossil fuels or industrial greenhouse gases, manufacturers of vehicles and engines, and facilities that emit 25,000 metric tons or more of CO₂ or CO₂-equivalent-greenhouse-gas emissions per year to submit annual reports to the EPA. The comment period for the proposed rules closes June 9, 2009.

⁴ Reduction and management of E-Waste continues to be an important issue as the lifespan of computers has shrunk from as much as six years to as little as two. Cellular phones generally have less than a two year lifespan. A growing number of states have enacted or are considering legislation to address the issues of responsibility for recycling and banning cathode ray tubes and other E-Wastes from being deposited in

Insurance coverage is a factor in several ways when it comes to Green-Building development and maintenance, in addition to traditional liability and property risks. First, coverage products can be used to address the risk that green technology will not perform as expected in terms of cost savings or basic function. This issue may give rise to coverage issues involving both general and professional liability. As with all types of construction projects, the time to consider a Green-Building or clean-energy coverage program is before the first spade of dirt is turned. Second and similarly, insurance can serve a useful function in terms of facilitating transactions by addressing stakeholder concerns. In other words, risks associated with financing or purchase and indemnity commitments can be managed using insurance in order to reassure potential participants in a development deal. Third, traditional coverage must be molded to fit unique Green-Building risks and scenarios. For example, suppose a state-of-the-art ventilation system allegedly harms someone resulting in legal action. The potential for disputes over subsequent coverage can be diminished through careful planning and tailoring of coverage provisions. Some practical tips are provided below.

Fourth, policyholders of all stripes purchase liability insurance in case they get sued. Going green raises myriad liability issues. For example, municipalities face potential legal challenges to new municipal codes and ordinances that require heightened levels of energy-efficiency. A federal judge has already granted a preliminary injunction barring enforcement of such laws pending the outcome of a lawsuit brought by HVAC contractors and distributors against the city of Albuquerque, New Mexico. In *The Air Conditioning, Heating and Refrigeration Institute v. City of Albuquerque*, the plaintiffs charge that Albuquerque's 2008 energy Conservation Code, which requires more insulation in single-family houses, outlaws electric water heaters, and imposes high efficiency standards for heating and cooling equipment, is preempted by existing federal law. The Energy Policy and Conservation Act sets efficiency standards for HVAC equipment and may preclude states, municipalities or other entities from taking independent action. Where there is litigation, liability insurance should be available to off-set defense costs. Fifth, insurance can be used to address the risk that government incentives or environmental mandates or regulatory standards may change. The *Albuquerque* case highlights the shifting sands potential policyholders face. Changing regulatory conditions and government incentives have always been a significant hurdle to establishing viable, long-term renewable energy and recycling programs.

There will always be coverage disputes given the time value of money. It is impossible to predict exactly what coverage disputes will be litigated and how. Nonetheless, a review of background information, prior to "environmental" claim disputes arising out of the coverage and issues described in this article should prove valuable to insurance practitioners of all kinds.

The LEED® Program

There are many ways to measure how "green" a building is. LEED® is fast becoming the most recognizable standard in this country by which a building's degree of "greenness" can be measured.⁵ LEED®, which stands for Leadership in Energy and Environmental Design, is a system developed and administered by the United States Green Building Council, a non-profit organization. LEED® information is a means of certifying a building's overall sustainability, using a wide range of criteria in five categories: sustainable sites, water efficiency, energy & atmosphere, materials & resources, and indoor environmental quality.

LEED® is a voluntary system that measures a building's sustainability on a 100-point scale. Ten additional bonus points may be awarded to recognize innovations in design and operations and take into account regional priorities focusing on geographically-specific environmental issues (e.g., reduced water

landfills. Federal legislation has been proposed that would provide financial incentives for recycling E-Waste and potentially pre-empt state laws.

⁵ The following LEED® description was developed, in part, by Anderson Kill & Olick, P.C.'s Thomas R. Petty. Mr. Petty is a shareholder in Anderson Kill's Washington, D.C. office and is a LEED® Accredited Professional.

use in arid parts of the country). Buildings that satisfy certain prerequisites and earn a sufficient number of optional points are awarded LEED® certification on a scale ranging from “certified” (40 – 49 points), to “silver” (50 – 59 points), “gold” (60 – 79 points), and, ultimately, “platinum” (80 points or more).⁶

There are other standards for measuring how “green” a building is, such as “Green Globes” which is similar to LEED® and is administered by The Green Building Initiative, a separate non-profit organization. Green Globes, a web-based system that is thought to be less costly than LEED®, measures a building’s sustainability on a 1,000-point scale. In addition, the United States Environmental Protection Agency administers the Energy Star® program, which measures a building’s energy efficiency. Buildings that achieve a score of 75 or greater, on a scale of 1 to 100, qualify to use the Energy Star label. These and other standards are not necessarily inconsistent with LEED®. For example, 80% to 85% of the substance of LEED® is essentially the same as the “Green Globes” system. LEED® also relies on Energy Star as its measure of a building’s energy efficiency for one of LEED®’s optional points.

Various LEED®-based initiatives have been adopted by 12 federal agencies, including the federal government property manager, the General Services Administration, and in at least 44 states and 186 localities across the country. Many jurisdictions require or reward buildings for earning LEED® certification. Tax breaks and other developmental incentives may be associated with LEED® and recent federal stimulus dollars may also be available for LEED®-related energy initiatives.

COVERAGE ISSUES

Green-Buildings

What happens when green technology does not perform as expected in terms of cost savings, basic function or qualification for incentives built into initial implementation assumptions? “Going Green” raises a multitude of risk transfer and insurance issues, including:

- Policyholder rights against contractors and/or architects when construction projects fail to obtain LEED® certification or yield the benefits envisioned. Failure of new technologies to yield cost saving or perform as promised can significantly undermine the initial success and future viability of green construction projects.
- The scope of property coverage if and when additional costs associated with obtaining LEED® certification or with increased or supplemental energy-related construction costs are incurred.
- How and whether coverage exists for costs to replace sustainable materials in a fire or as a result of some other natural or man-made calamity.

These are just some of the insurance and potential claim issues that need to be considered in going green. While many insurance companies are now developing new products to specifically address compliance with evolving clean-energy standards and LEED® standards, considering how these risks already are covered is an important place to start. For example, just because new-technology or code-compliance replacement costs are not specifically addressed in insurance-policy language, does not mean that coverage for such costs is not available. On the contrary, just because coverage was not specifically contemplated should not mean that it does not exist.

Because “environmental” liabilities are difficult to assess and estimate going forward and may require millions of dollars to address or remediate, litigation can be a prerequisite to obtaining adequate coverage. No one, including the insurance industry, fully anticipated the scope, implications and

⁶ Some developers shy away from platinum certification simply because of the difficulty in achieving and maintaining this demanding level of energy efficiency.

potentially-huge liabilities associated with the federal environmental laws enacted in the 1970s and 1980s. Therefore, when considering insurance coverage for "environmental" liabilities under any type of insurance policy, an important fact to keep in mind is that litigation between policyholders and insurance companies concerning coverage for environmental liabilities has continued unabated from the time such liabilities were first imposed.⁷

⁷ More recently, the history of the so-called absolute pollution exclusion provides insight into the state by state battles over environmental coverage. Coverage involving energy efficiency is likely to lead to more of the same given the stakes. See, e.g.: *Federal Parks Real Estate Purchasing Group v. St. Paul Fire and Marine Ins. Co.*, 472 F.3d 33, 46 (2d Cir. 2006) (holding that under New York Law, "the term 'contamination' is ambiguous under the [relevant liability insurance] policy because the common definition of the term that the District Court employed ... would allow the contamination exclusion in the policy to be applied in a limitless variety of situations"); *Manus v. Ranger Ins. Co.*, 142 Fed. Appx. 280 (9th Cir. 2005) (holding that dumping of waste materials at illegal dump site, which included "dirt, brush, weeds, grapevines, leaves, tree stumps, tree branches, ice plants, sod, concrete, and tires," was not unambiguously excluded by pollution exclusion); *Cooper v. Travelers Indem. Co. of Ill.*, 113 Fed. Appx. 198 (9th Cir. 2004) (holding that pollution exclusion did not bar coverage for losses sustained after health officials closed policyholder's restaurant because its well water tested positive for E. Coli contamination); *Herald Square Loft Corp. v. Merrimack Mut. Fire Ins. Co.*, 344 F. Supp. 2d 915 (S.D.N.Y. 2004) (holding under New York law that pollution exclusion did not preclude coverage for lead paint dust contamination caused by repair work of contractor); *Amerada Hess Corp. v. Zurich Ins. Co.*, 29 Fed. Appx. 800, 2002 U.S. App. LEXIS 3517 (3d Cir. (Virgin Islands) Mar. 6, 2002) (different compelling interpretations of the "absolute" pollution exclusion and the policyholder's reasonable expectations render exclusion ambiguous and coverage available); *Reliance Ins. Co. v. Moessner*, 121 F.3d 895 (3d Cir. 1997) (standard "absolute" pollution exclusion does not bar coverage for injuries caused by carbon monoxide emissions from machinery sold and serviced by policyholder), on remand sub nom. *Reliance Ins. Co. v. VE Corp.*, Civ. Action No. 95-538, 2000 U.S. Dist. LEXIS 1819 (E.D. Pa. Feb. 10, 2000) (insurer's unilateral change of policy terms on renewal of policy that was contrary to insured's reasonable expectation of continued coverage would not be given effect under Pennsylvania law); *Governmental Interinsurance Exch. v. City of Angola, Ind.*, 8 F. Supp. 2d 1120 (N.D. Ind. 1998); *Sphere Drake Ins. Co. v. Y.L. Realty Co.*, 990 F. Supp. 240 (S.D.N.Y. 1997); *Lefrak Org., Inc. v. Chubb Custom Ins. Co.*, 942 F. Supp. 949 (S.D.N.Y. 1996).
Alabama: *Porterfield v. Audubon Indem. Co.*, 856 So.2d 789 (Ala. 2003) (liability for lead poisoning from flaking and peeling lead paint in a residential apartment held not barred by pollution exclusion despite being considered a pollutant, because the operative terms "discharge," "dispersal," "release," or "escape" in the exclusion are ambiguous).
California: *Charles E. Thomas Co. v. Transamerica Ins. Group*, 72 Cal. Rptr. 2d 577 (Cal. App. 1998) (exclusion for cleanup costs only applies to government-mandated cleanups); *C.O.D. Gas & Oil Co., Inc. v. Ace Am. Ins. Co.*, No. D042245, 2004 Cal. App. Unpub. LEXIS 5419 (Cal. Ct. App. June 8, 2004) (holding that loss of sales relating to leak in underground storage tanks was not excluded under absolute pollution exclusion; "purpose of the absolute pollution exclusion is to protect insurers against environmental losses and not to exclude coverage for insured's ordinary negligence"); *SEMEX Corp. v. Federal Ins. Co.*, 398 F. Supp. 2d 1103 (S.D. Cal. 2005) (holding that insurance company had duty to defend third-party claims arising from one-time release of ammonia into the atmosphere and "not a long term, or repeated, release of an item into the environment").
Connecticut: *Danbury Ins. Co. v. Novella*, 727 A.2d 279 (Conn. 1998) (lead paint); *Nat'l Grange Mut. Ins. Co. v. Caraker*, 2006 WL 853153 (Conn. Super. Ct. 2006) (coverage exists because "the exclusion clause is ... ambiguous with respect to whether asbestos released as described in the complaint can be properly classified as a pollutant ... [and because ambiguity exists where] one could conclude that the terms 'discharge, dispersal, seepage, migration, release or escape' apply to outdoor environmental pollution only").
Illinois: *American States Ins. Co. v. Koloms*, 227 Ill. Dec. 149, 687 N.E.2d 72 (Ill. 1997).
Indiana: *American States Ins. Co. v. Kiger*, 662 N.E.2d 945 (Ind. 1996) (groundwater contamination from gasoline leaks; giving effect to exclusion would eviscerate coverage sold to gasoline station operator); *Friedline v. Shelby Ins. Co.*, 774 N.E.2d 37 (Ind. 2002) (finding the pollution exclusion ambiguous and construing it against the insurance company so as not to exclude coverage for injuries resulting from release of carpet glue fumes).
Kansas: *Associated Wholesale Grocers, Inc. v. Americold Corp.*, 934 P.2d 65 (Kan. 1997) (did not apply to damages to food products as result of hostile fire).
Louisiana: *Doerr v. Mobil Oil Corp.*, 774 So. 2d 119, 135 (La. 2000) ("the total pollution exclusion was neither designed nor intended to be read strictly to exclude coverage for all interactions with irritants or contaminants of any kind"); *State Farm Fire and Cas. Co. v. M.L.T. Constr. Co., Inc.*, 849 So.2d 762, 770-71

When faced with claims, particularly large claims, it often may be in an insurance company's best financial interest to deny coverage and litigate to address the existing claim and discourage future similar claims.⁸ Indeed, in the 1990s, insurance companies reportedly spend at least \$1 billion annually to fund litigation against their policyholders.⁹

(La. Ct. App. 2003) (illustrating insurance company attempts to improperly extend the scope of pollution exclusions and holding that coverage exists because "rainwater is not a substance that is usually viewed as a pollutant ... [and] the clear purposes of the pollution exclusion clauses are to prevent businesses from escaping responsibility for polluting behavior by procuring insurance to cover such losses and further to encourage businesses to curb polluting activities.").

Maryland: *Sullins v. Allstate Ins. Co.*, 667 A.2d 617 (Md. 1995); *Clendenin Bros., Inc. v. United States Fire Ins. Co.*, 390 Md. 449, 889 A.2d 387 (Md. 2006) (holding that, under policies containing total pollution exclusion, insurance company had duty to defend claims for alleged injuries arising from manganese welding fumes because claims were for localized, workplace injuries, and not for environmental pollution).

Massachusetts: *Andrew Robinson Int'l, Inc. v. Hartford Fire Ins. Co.*, 2006 WL 1537382 (Mass. Super. 2006) (holding that "when presented with the aforementioned ambiguities in the [policy], a policyholder could reasonably believe that (and justifiably rely on) property damage caused by a cloud of fine particulate matter, i.e. dust or smoke, containing lead qualifies as a 'Specified Cause[] of Loss,' for which coverage is allowed under the pollution exclusion clause."); *Western Alliance Ins. Co. v. Gill*, 686 N.E.2d 997 (Mass. 1997); *Atlantic Mut. Ins. Co. v. McFadden*, 595 N.E.2d 762 (Mass. 1992).

New Hampshire: *Weaver v. Royal Ins. Co. of Am.*, 674 A.2d 975 (N.H. 1996).

New Jersey: *Byrd v. Blumenreich*, 722 A.2d 598 (N.J. Super. App. Div. 1999) (exclusion held ambiguous with respect to lead paint injuries in a residential setting).

New York: *Roofers' Joint Trading, Apprentice & Educ. Comm. v. General Acc. Ins. Co.*, 275 A.D.2d 90, 713 N.Y.S.2d 615 (4th Dept. 2000) (finding that total pollution exclusion did not bar coverage for injuries caused when fumes were released when a roofing membrane was applied with hot air during a classroom demonstration); *Eastern Mut. Ins. Co. v. Kleinke*, 739 N.Y.S.2d 657 (App. Div. 2002) (refusing to extend policy wording to encompass activity beyond the scope of "absolute" pollution exclusion's historical purpose in holding that the definitions of waste in the policy implies a limitation "intended to exclude only environmental contamination as a result of industrial waste" and not arising out of the presence of bacteria); *GA Ins. Co. v. Naimberg Realty Assocs.*, 650 N.Y.S.2d 246 (App. Div. 1996); *General Accident Ins. Co. of Am. v. Idbar Realty Corp.*, 622 N.Y.S.2d 417, (Sup. Ct. 1994), aff'd in part & modified in part, (App. Div. 1996); *Generali-U.S. Branch v. Caribe Realty Corp.*, 612 N.Y.S.2d 296 (Sup. Ct. 1994).

Texas: *Kelley-Coppedge, Inc. v. Highlands Ins. Co.*, 980 S.W.2d 462 (Tex. 1998) (property damage caused by rupture of oil pipeline along easement).

Washington: *Kent Farms, Inc. v. Zurich Ins. Co.*, 998 P.2d 292 (Wash. 2000), aff'g 969 P.2d 109 (Wash. App. 1998) (exclusion does not bar coverage for injuries caused by ingestion of diesel fuel caused by overfilling of tank).

Wisconsin: *Donaldson v. Urban Land Interests, Inc.*, 564 N.W.2d 728 (Wisc. 1997); *Langone v. Am. Family Mut. Ins. Co.*, 300 Wis.2d 742 (Wis. Ct. App. 2007) (coverage granted because "the policy and dictionary definitions of the term 'pollutant' do not suffice to unambiguously categorize carbon monoxide as pollution under the facts of this case."). For the viewpoint of a policyholder, see John A. MacDonald, *Decades of Deceit: The Insurance Industry Incursion into the Regulatory and Judicial Systems, Coverage* (Nov./Dec. 1997). For the viewpoint of an academic that agrees with the policyholder viewpoint on the "absolute" pollution exclusion, see Jeffrey W. Stempel, *Reason and Pollution: Correctly Construing the "Absolute" Exclusion in Context and in Accord With Its Purpose and Party Expectations*, Tort & Ins. Law J. (Fall 1998).

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See, e.g.:

Federal: *Coal Heat, Inc. v. U.S. Fid. and Guar. Co.*, 2000 WL 1689713 (E.D.Pa. 2000) (pollution exclusions are to be interpreted broadly under Pennsylvania law; recovery for the release of home heating oil onto property was unambiguously barred "in accord with [the relevant exclusion's] natural, plain and ordinary meaning."); *Hartford Underwriter's Ins. Co. v. Estate of Turks*, 206 F. Supp. 2d 968 (E.D. MO 2002) (under Missouri law, lead paint considered a "pollutant" within meaning of policy's pollution exclusion, thus barring coverage for alleged bodily injury); *Housing Auth. Risk Retention Group, Inc. v. Chicago Housing Auth.*, 378 F.3d 596 (7th Cir. 2004) (holding that pollution exclusion precluded coverage for defense of city housing authority against class action alleging exposure to environmental contaminants, including nontraditional claims such as environmental discrimination); *Admiral Ins. Co. v. Feit Mgt. Co.*, 321 F.3d 1326 (11th Cir. 2003) (holding death and injury caused to apartment residents by carbon monoxide fumes from building's hot water heater were excluded by absolute pollution exclusion); *Auto Owners Ins. Co. v. City of Tampa Housing Auth.*, 231 F.3d 1298 (11th Cir. 2000) (finding that absolute pollution exclusion barred coverage for injuries to child caused by ingestion of lead paint); *St. Leger v. Am. Fire & Cas. Co.*, 61 F.3d 896 (3d Cir.

1995); *U.S. Liab. Ins. Co. v. Bourbeau*, 49 F.3d 786 (1st Cir. 1995); *Nova Cas. Co. v. Waserstein*, 424 F. Supp. 2d 1325 (S.D. Fla. Mar. 24, 2006) (while "living organisms,' 'microbial populations,' 'microbial contaminants,' and 'indoor allergens,' fit the ordinary definition of 'contaminant,' ... to interpret the pollution exclusion clause [differently] would re-write the definition of 'pollutant.'" Summary judgment on coverage was denied as factual questions existed over coverage representations). *West Am. Ins. Co. v. Band & Desenberg*, 925 F. Supp. 758 (M.D. Fla. 1996), aff'd, 138 F.3d 1428 (11th Cir. 1998); *Yale Univ. v. Cigna Ins. Co.*, 224 F. Supp. 2d 402 (D. Conn. 2002) (Connecticut law bars coverage for property loss or damage in form of asbestos contamination in this case because policyholder "has not pointed to any language within the Contaminant Exclusion, or the policies generally, that renders the exclusion ambiguous.").

Alabama: *Federated Mut. Ins. Co. v. Abston Petroleum, Inc.*, 967 So.2d 705 (Ala. 2007) (gasoline considered a "pollutant" within the meaning of absolute pollution exclusion).

California: *Insurance Comm'r v. Golden Eagle Ins. Co.*, No. A087172 (Cal. 1st. Dist. Ct. App. May 8, 2000) (finding that total pollution exclusion barred coverage for bodily injury to employees caused by carbon monoxide from gas engine not properly vented and used inside by contractor); *Lewis v. Hartford Cas. Ins. Co.*, 2006 U.S. Dist. LEXIS 3754 (N.D. Cal. Jan. 31, 2006) (holding that absolute pollution exclusion precluded coverage for discharge of perchloroethylene from dry-cleaning operation into soil and groundwater because such discharges constituted "pollution `commonly thought of as environmental pollution' ").

Colorado: *TerraMatrix, Inc. v. U.S. Fire Ins. Co.*, 939 P.2d 483 (Colo. Ct. App. 1997); *Blackhawk-Central City Sanitation Dist. v. Am. Guar. & Liab. Ins. Co.*, 214 F.3d 1183 (10th Cir. 2000) (finding that coverage for sewage and effluent, including suspended solids, fecal coliform bacteria, ammonia, residual chlorine and other chemicals discharged by sanitation district was barred by absolute pollution exclusion).

Florida: *State Farm Fire & Cas. Ins. Co. v. Deni Assocs of Fla., Inc.*, 678 So. 2d 397 (Fla. 4th Dist. Ct. App. 1996), aff'd, 711 So. 2d 1135 (Fla. 1998).

Illinois: *Connecticut Specialty Ins. Co. v. Loop Paper Recycling, Inc.*, 356 Ill. App. 3d 67, 291 Ill. Dec. 875, 824 N.E.2d 1125 (2005) (holding that absolute pollution exclusion barred coverage for injuries sustained by neighbors of paper recycling company from fire set to cardboard by vandals).

Louisiana: *Grefer v. Travelers Ins. Co.*, 919 So.2d 758, (La. Ct. App. 2005) (chemicals released during pipe cleaning deemed pollutants because "the most important consideration in the insured's status as a polluter are the first two factors, the nature of the insured's business and whether it presents a risk of pollution.").

Minnesota: *Larson v. Composting Concepts, Inc.*, 2008 WL 2020489, 1-2 (Minn. Ct. App. 2008) (barring coverage "[b]ecause the terms of the pollution exclusion are ambiguous and the plain [non-technical] meaning of 'pollutants' includes the dispersal of living organisms from the composting site.").

Missouri: *Cas. Indem. Exch. v. City of Sparta*, 997 S.W.2d 545 (Mo. Ct. App. 1999); *Heringer v. Am. Family Mut. Ins. Co.*, 140 S.W.3d 100 (Mo.App. W.D. 2004) (the definition of pollutant in the policy includes lead paint; "[t]he language in the ... policy applies the pollution exclusion to the 'ingestion, inhalation or absorption of pollutants from any source.' It does not limit the pollution exclusion to environmental pollution.").

Nebraska: *Cincinnati Ins. Co. v. Becker Warehouse, Inc.*, 262 Neb. 746, 635 N.W.2d 112, (Neb. 2001) (rejecting urged limitation of excluded claims to traditional environmental damage and the term pollutants to those that cause traditional environmental damage).

New York: *A-One Oil, Inc. v. Mass. Bay Ins. Co.*, 672 N.Y.S.2d 423 (App. Div. 1998) (exclusion barred coverage for residential exposure to asbestos); abrogated by *Belt Painting Corp. v. TIG Ins. Co.*, 742 N.Y.S.2d 332 (App. Div. 2002) (holding that "the better view was that this type of exclusion 'applies only to environmental pollution, and not to all contact with substances that can be classified as pollutants.'"), aff'd, 295 N.E.2d 15 (NY 2003).

Pennsylvania: *Madison Constr. Co. v. Harleysville Mut. Ins. Co.*, 678 A.2d 802, 806 (Pa. Super. 1996), aff'd, 735 A.2d 100 (Pa. 1999) (fumes released from concrete curing agent); *Matcon Diamond, Inc. v. Penn Nat. Ins. Co.*, 815 A.2d 1109 (Pa. Super. 2003) (carbon monoxide is unambiguously a "contaminant" under the language of the policy using the dictionary definition of pollutant and because "the federal Clean Air Act designates carbon monoxide as a pollutant.").

Texas: *United Nat'l Ins. Co. v. Hydro Tank, Inc.*, 525 F.3d 400, 401-402 (5th Cir. 2008) (where claim states that injury was caused by a pollutant "and/or" a non-pollutant, coverage is [barred based upon a complicated contract interpretation analysis, including] because "where general terms like 'chemicals' and 'vapors' follow specific terms like 'hydrogen sulfide' there is a presumption that the general terms are to be construed to belong to the same class or category as the more specific term.").

Washington: *Quadrant Corp. v. Am. States Ins. Co.*, 154 Wash.2d 165 (Wash. 2005) (injuries caused by fumes from waterproofing material were excluded from coverage because "where the exclusion specifically includes releases or discharges occurring on the owner's property or as the result of materials brought onto the property at the behest of the insured, and a reasonable person would recognize the offending substance as a pollutant, the policy is subject to only one reasonable interpretation and the exclusion must not be

Practical Tips on LEED® Certification and Risk

The following practical tips should be of assistance when undertaking LEED® or other renewable-energy projects.¹⁰ Professionals handling projects for which LEED® certification will be sought should remember that just because the *design* satisfies the requirements of the Green Building Council does not mean that the finished *project* will be certified. To the extent some sort of development agreement exists, what, exactly, does it require you to accomplish regarding LEED® and other intangible factors? Remember that the ability of the project to secure a certificate of occupancy can, in some jurisdictions, depend on securing LEED® certification. Tax credits can depend on certification, too.

Ensure that the entire development and risk management team—including the disciplines that are not directly impacted by LEED®—is aware of the LEED® objectives. Identify the disciplines that are impacted by LEED® and see that relevant policy language reflects the LEED® requirements. Becoming an additional insured on other people's insurance policies is an economical way to manage risk! The package of contracts that is entered into for the project represents an opportunity to share the risk of LEED®-certification failure with all participants—such as the Architect, LEED® Consultant, and Constructors—whose acts and omissions can make the difference between success and failure. Contractors and other project participants also need to remember that policyholders may not be able to rely on commercial general liability insurance to respond to claims that acts and omissions, or those of subcontractors, caused the project to fail to receive certification, or to reach the target certification level or incentive-qualifying goal.

Renewable Energy

As energy demand continues to rise, the search for environmentally-friendly, cost-efficient and renewable energy has caused the insurance industry to respond. Green Buildings and LEED® certification are one specific example, but what might a green coverage program actually consist of and how might claims arise? One major insurance company has developed and marketed an insurance product expressly targeted to ethanol producers, biodiesel producers, hydroelectric facilities, wind-energy facilities, biomass facilities, solar facilities, geothermal facilities and manufacturers of related technology, including specifically solar panels, wind turbines and wind-turbine components. This package product is marketed to offer renewable energy industries "All-Risk" property protection.¹¹

Moreover, under the new program, specific coverage is available for renewable electric-power-generation, including turbines, boilers, transformers, powerhouses, solar panels and renewable-fuel equipment, conveyors, distillation towers, storage and production tanks, tank farms, load outs, fuel-related storage, finished-product storage, shops and offices. Newly-acquired equipment would

limited.").

Wisconsin: *Peace ex rel. Lerner v. Nw. Nat. Ins. Co.*, 596 N.W.2d 429 (Wis.1999) (lead present in paint considered a "pollutant" within the meaning of a pollution exclusion clause in landlord's commercial general liability insurance policy using the ordinary meaning of the words found in a non-legal dictionary). For the viewpoint of lawyers who regularly represent the insurance industry, see Zampino *et al.*, *The Sophist Maze: The Polluter's Revision of the History of the "Total" Pollution Exclusion*, Mealey's Litig. Rep.-Ins., Sept. 27, 1994, at 14.

⁹ See *Miller v. Fluharty*, 201 W. Va. 685, 693, 500 S.E.2d 310 (W. Va. 1997) (citing Anderson & Gold, *Recoverability of Corporate Counsel Fees in Insurance Coverage Disputes*, 20 Am. J. Trial Advoc. 1 (1996)). See Scism, *Tight-Fisted Insurers Fight Their Customers to Limit Big Awards*, Wall St. J., Oct. 15, 1996, at 1.

¹⁰ These tips were developed, in part, by Anderson Kill shareholder, Kevin J. Connolly. Mr. Connolly routinely advises clients as part of Anderson Kill's Real Estate and Construction practice group.

¹¹ This kind of broad coverage can be very valuable in the face of "environmental" claims. See, e.g., a recent decision in *Janart 55 West 8th L.L.C. v. Greenwich Ins. Co.*, Case No. 1:06-cv-14293 (S.D.N.Y.) (holding that "All-Risk" coverage may respond to residential, rather than industrial, "environmental" contamination).

automatically be included in the proposed coverage. There is no need for a separate boiler and machinery policy. However, machinery breakdown, electrical and steam related perils might require separate underwriting.

Business income, contingent business income and extra expense insurance are available separately as part of the program as well. Historic production levels and current marketplace value, among other factors, would be used in determining business income and the amount of insurance as well as premiums. Green or renewable energy activities would also require separate liability insurance protection for bodily injury, property damage, personal injury and advertising injury. Accordingly, general liability insurance for existing renewable energy operations, as well as newly-acquired or expanded organizations or development is addressed as part of the proposed package.

Broad "all-risk" renewable energy-specific insurance sounds like it has everything covered. As mentioned above, however, the renewable energy industry has proved extremely volatile. To the extent energy savings are not accomplished and projected returns on investment do not materialize, it may be difficult or impossible to demonstrate business income loss to a claims adjuster's satisfaction. Catastrophic storm or fire damage to equipment should be covered, but what if fuel or feed stock is tainted or the equipment is not destroyed, but merely does not operate as expected initially or over time? As with any new coverage program, undefined terms and provisions may require vetting and sufficiently-experienced brokers may be scarce. On the plus side, opportunity for creative premium ratings based on renewable-energy production in terms of, for example, Kilowatt hours or gallons of, or other units of energy, produced may prove to be a boon for certain operations.

CONCLUSION

Whether you are developing a Green Building, occupying one or involved in renewable energy initiatives, ignoring insurance coverage matters may make them go away - until it's too late. Construction and design professionals, developers, real estate professionals, government officials and lenders need to understand how insurance interweaves with Green Building and renewable-energy-initiative issues to be effective in achieving their goals and managing insurance assets when potential risks become reality. New coverage products may be part of the solution. One thing is certain, however, large claims will lead to litigation as these issues are sorted out state by state.

About the Author:

John G. Nevius is a shareholder in the New York office of Anderson Kill and has successfully resolved and litigated a variety of legal and technical matters, most of which involve insurance coverage. He provides advice and scientific expertise on a wide range of engineering issues and has represented numerous Fortune 500 companies. Mr. Nevius has extensive experience trying or arbitrating complex environmental, telecommunications, construction, real estate and work-place safety disputes on behalf of policyholder clients. He has a broad range of legal experience, but is considered an expert on environmental insurance, including general liability, pollution legal liability (PLL), clean-up costs cap (CCP), finite risk, financial assurance and so-called pollution exclusions. Mr. Nevius is co-author with Eugene R. Anderson of a treatise on Brownfields Law and Practice involving clean up and redevelopment of contaminated real estate and the use of environmental insurance. He is also a Senior Consultant at Anderson Kill Insurance Services (AKIS), a non-legal subsidiary of the firm as well as an Adjunct Faculty member at Pace University Law School where he will be teaching a course on Climate and Insurance in the Fall.

The information appearing in this article does not constitute legal advice or opinion. Such advice and opinion are provided by the firm only upon engagement with respect to specific factual situations.

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