

WRAP Policies – Navigating Ethical Issues on Your Construction Files

Wednesday, May 23, 2018

Presented By the IADC Construction Law and Litigation Committee and Insurance and Reinsurance Committee

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Presenters



Renee Gomez

*Marlow, Adler, Abrams, Newman & Lewis
Coral Gables, FL*

Rgomez@marlowadler.com



Adam P. O'Brien

*Wells, Anderson & Race, LLC
Denver, CO*

aobrien@warllc.com



Maritza Peña

*Marlow, Adler, Abrams, Newman & Lewis
Coral Gables, FL*

mpena@marlowadler.com

WRAP Insurance

Controlled Insurance Programs:

- OCIP
- CCIP

4-1 CLIENT – LAWYER RELATIONSHIP

Rule 4-1.7. Conflict of Interest; Current Clients

(e) Representation of Insureds. Upon undertaking the representation of an insured client at the expense of the insurer, a lawyer has a duty to ascertain whether the lawyer will be representing both the insurer and the insured as clients, or only the insured, and to inform both the insured and the insurer regarding the scope of the representation. All other Rules Regulating The Florida Bar related to conflicts of interest apply to the representation as they would in any other situation.

Colorado Formal Opinion 91

Ethical Duties of Attorney Selected by Insurer to Represent Its Insured

- Tripartite Relationship
 - Lawyer retained by a liability insurance carrier to defend a claim against the carrier's insured must represent the insured with "undivided fidelity."

Colorado Formal Opinion 135

Ethical Considerations in the Joint Representation of Clients in the Same Matter or Proceeding

- Conflicts?
- Waivers?

Fla. Stat. §558.001. Legislative Findings and declaration.

- The Legislature finds that it is beneficial to have an alternative method to resolve construction disputes that would reduce the need for litigation as well as protect the rights of property owners. An effective alternative dispute resolution mechanism in certain construction defect matters should involve the claimant filing a notice of claim with the contractor, subcontractor, supplier, or design professional that the claimant asserts is responsible for the defect, and should provide the contractor, subcontractor, supplier, or design professional, **and the insurer of the contractor, subcontractor, supplier, or design professional**, with an opportunity to resolve the claim through confidential settlement negotiations without resort to further legal process.

Fla. Stat. §558.003. Action; compliance.

- A claimant may not file an action subject to this chapter without first complying with the requirements of this chapter. If a claimant files an action alleging a construction defect without first complying with the requirements of this chapter, on timely motion by a party to the action the court shall stay the action, without prejudice, and the action may not proceed until the claimant has complied with such requirements. The notice requirement is not intended to interfere with an owner's ability to complete a project that has not been substantially completed. The notice is not required for a project that has not reached the stage of completion of the building or improvement.

ALTMAN CASE

- *Altman Contractors, Inc. v. Crum & Forster Specialty Ins. Co.*, 880 F.3d 1300 (11th Cir. Jan. 2018).

Is the notice and repair process set forth in [Chapter 558 of the Florida Statutes](#) a "suit" within the meaning of the CGL policies issued by C&F to ACI?

The Florida Supreme Court answered this question in the affirmative, explaining that "[a]lthough the chapter 558 process does not constitute a 'civil proceeding,' it is included in the policy's definition of 'suit' as an 'alternative dispute resolution proceeding' to which the insurer's consent is required to invoke the insurer's duty to defend the insured."



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General Conditions of the Contract for Construction

§ 11.3 Waivers of Subrogation

§ 11.3.1 The Owner and Contractor waive all rights against (1) each other and any of their subcontractors, sub-Subcontractors, agents, and employees, each of the other; (2) the Architect and Architect's consultants; and (3) Separate Contractors, if any, and any of their subcontractors, sub-subcontractors, agents, and employees, for damages caused by fire, or other causes of loss, to the extent those losses are covered by property insurance required by the Agreement or other property insurance applicable to the Project, except such rights as they have to proceeds of such insurance. The Owner or Contractor, as appropriate, shall require similar written waivers in favor of the individuals and entities identified above from the Architect, Architect's consultants, Separate Contractors, subcontractors, and sub-subcontractors. The policies of insurance purchased and maintained by each person or entity agreeing to waive claims pursuant to this section 11.3.1 shall not prohibit this waiver of subrogation. This waiver of subrogation shall be effective as to a person or entity (1) even though that person or entity would otherwise have a duty of indemnification, contractual or otherwise, (2) even though that person or entity did not pay the insurance premium directly or indirectly, or (3) whether or not the person or entity had an insurable interest in the damaged property.

§ 11.3.2 If during the Project construction period the Owner insures properties, real or personal or both, at or adjacent to the site by property insurance under policies separate from those insuring the Project, or if after final payment property insurance is to be provided on the completed Project through a policy or policies other than those insuring the Project during the construction period, to the extent permissible by such policies, the Owner waives all rights in accordance with the terms of Section 11.3.1 for damages caused by fire or other causes of loss covered by this separate property insurance.

4-1 CLIENT – LAWYER RELATIONSHIP

Rule 4-1.1. Competence

A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the presentation.

What is LEED?

Leadership in Energy and Environmental Design (LEED) is one of the most popular green building certification programs used worldwide. This program creates a set of rating systems for the design, construction, operation, and maintenance of green buildings, homes, and neighborhoods that aims to help building owners and operators be environmentally responsible and use resources efficiently.

LEED works for all buildings anywhere, regardless of where they are in their life cycle. From hospitals to schools, from historical buildings to those still in the design phase, there's a LEED for every type of building project.

Five categories that correspond to the specialties available under the LEED professional program:

a. Green Building Design & Construction

- LEED for New Construction
- LEED for Core & Shell
- LEED for Schools
- LEED for Retail: New Construction and Major Renovations

b. Green Interior Design & Construction

- LEED for Commercial Interiors
- LEED for Retail: Commercial Interiors

c. Green Building Operations & Maintenance

- LEED for Existing Buildings: Operations & Maintenance

d. Green Neighborhood Development

- LEED for Neighborhood Development

e. Green Home Design and Construction

- LEED for Homes

Achieve better buildings with LEED

- Projects pursuing LEED certification earn points across several categories, including energy use and air quality. Based on the number of points achieved, a project then earns one of four LEED rating levels: Certified, Silver, Gold or Platinum.

Why LEED?

- LEED certification means a healthier and more productive construction space, reduced stress on the environment by encouraging energy and resource-efficient buildings, and savings from increased building value and decreased utility costs.

LEED CERTIFICATION REQUIREMENTS

In order to achieve LEED certification, projects must earn points in these categories:



Innovation



Introduction of novel features and procedures

Indoor Environmental Quality



Use of natural light and efficient air conditioning

Materials and Resources



Responsible construction waste management and sustainable sourcing of materials

Location and Transportation



Land protection and access to public transportation and green vehicles

Sustainable Sites



Sufficient green open space and light pollution reduction

Energy and Atmosphere



Optimizing sustainable energy production and metering

Water Efficiency



Indoor and outdoor water reduction

Source: www.usgbc.org

Green Building Litigation

- *Southern Builders, Inc. v. Shaw Development, LLC*, Case No. 119-C-07-01145 (Circuit Court of Somerset County, Md. 2006):

In *Southern Builders*, the contractor filed a mechanics' lien against the project. A counterclaim was filed by Shaw which alleged damages resulting from significant delays in the construction of the condominium complex. The claims made by the developer included the loss of tax credits following failure to obtain LEED certification. While a requirement to build to LEED Silver standards was included in the project manual and the scope of work accompanying the construction contract, the builder did not construct the building to comply with LEED requirements. Additionally, following significant delays in construction, the builder did not attempt to seek final LEED certification. The suit sought to recover \$635,000 for the loss of the LEED-related tax credits. The parties ultimately settled the suit.

This case highlights the importance of evaluating the many risk allocation issues present in green building projects that may not be receiving the necessary attention from the parties and their lawyers. A competent lawyer must keep up to date with these ever evolving green litigation issues that were not present in the brick and mortar cases of the past.

Denver Green Roof Initiative

- Requires buildings in excess of 25,000 sf constructed after January 1, 2018 to include a green roof or combination of green roof and solar energy collection.
- “Green roof” allows vegetation to grow in a medium designed and constructed in accordance with the Denver Green Roof Construction Standard.
- Applies to roof replacements.

Questions for Presenters?



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*Marlow, Adler, Abrams, Newman & Lewis
Coral Gables, FL*

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aobrien@warllc.com



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