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McCarter & English LLP on

Covering the Green Roof - With Insurance

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Introduction. In the short story, *The Oranging of America*, Max Apple chronicles in a small way the presence of the Howard Johnson restaurants' trademark orange roofs.¹ Hard, impervious, anything-but-natural, these constructions have little in common beyond their fundamental purpose with the new color of roofs: green. "Green roofs" in turn are not classified by their color. Instead it is their attributes - energy efficient, run-off reducing, pollutant absorbing, habitat creating, among others² - that earn the green appellation.

Green roofs are becoming increasingly popular in light of the groundswell of interest in "green building" and sustainability. Many building owners, developers and investors are increasingly focused on participating in this trend (whether for principled or monetary reasons). Standards are developing such as those prepared by the American Society for Testing and Materials³ and the U.S. Green Building Council ("USGBC"). One of the most significant is the USGBC's LEED Green Building Rating System.⁴ Green roofs and other energy-efficient and low-resource-impact features can be part of the LEED system.

This commentary looks at green roofs from an insurance perspective. First, the commentary describes the nature of a green roof and catalogs potential problems that may occur with roofs generally and green roofs in particular. Next, the commentary considers the role of insurance in the context of traditional roof problems and extrapolates from those ideas to a discussion of how a claim concerning a green roof problem (including the effect of LEED standards) might be addressed.

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1. Max Apple, *The Oranging of America, The Oranging of America and Other Stories* (New York: Grossman Publishers, 1976).
 2. See Larry Foxman, National League of Cities, *Greenroofs, A Municipal Action Guide* 3 (Dec. 2006).
 3. E.g., American Society for Testing and Materials, ASTM E2397.05 – Standard Practice for Determination of Dead Loads and Live Loads Associated with Green Roof Systems (2005).
 4. The Leadership in Energy and Environmental Design ("LEED") Green Building Rating System "accelerates global adoption of sustainable green building and development practices through the creation and implementation of universally understood and accepted tools and performance criteria." U.S. Green Building Council, What is LEED?, available at <http://www.usgbc.org/displaypage.aspx?CMSPageID=222>.

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What is a Green Roof? Green roofs, also known as vegetative roofs, have evolved considerably from the sod and bluestem grass constructions common on the American prairie in the 19th century.⁵ They have been popularized recently in North America as part of the trend toward green building and sustainability. Indeed, Toronto just enacted the first municipal law mandating the construction of green roofs.⁶

- A green roof is more than a collection of planters located on a roof. Simply stated, a green roof is a construction of growing medium and plants added on top of a traditional, modified roofing system.⁷ It includes: plants (limited in variety in some cases, in other cases diverse);
- a growing medium (not necessarily including soil);
- a fabric layer (to contain roots and the growing medium but permitting drainage of water);
- a drainage layer;
- a roofing membrane;
- insulation; and
- the roof structure (reinforced as necessary).⁸

There are generally two types of green roofs: extensive and intensive. An extensive green roof is characterized by low weight and capital cost, minimal plant diversity, and reduced maintenance requirements and access.⁹ The growing medium is generally less

5. Laura Ingalls Wilder, *On the Banks of Plum Creek* 45, 51 (HarperCollins Publishers, New York, 1953).

6. See Press Release, Green Roofs for Healthy Cities, *Toronto City Council Adopts Mandatory Green Roof Requirements* (May 27, 2009).

7. *E.g.*, City of Toronto, Municipal Code Ch. ___, Requiring and Governing the Construction of Green Roofs (“Toronto Green Roof Ordinance”), art. I (May 27, 2009) (“GREEN ROOF: means an extension of an above Grade roof, built on top of a humanmade structure, that allows vegetation to grow in a growing medium and which is designed, constructed and maintained in accordance with the Toronto Green Roof Construction Standard.”).

8. Steven Peck and Monica Kuhn, Ontario Association of Architects, Design Guidelines for Green Roofs at 4-5, available at <http://www.cmhc.ca/en/inpr/bude/himu/coedar/loader.cfm?url=/commonspot/security/getfile.cfm&PageID=70146>.

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than six inches in depth. The roof micro-climate can be very dry and hot and the plant life, accordingly, must be low and hardy, such as species typically found in alpine, arid or semi-arid ecosystems. Maintenance visits are few for tasks such as inspections, application of fertilizer and limited weeding.¹⁰

Intensive green roofs are the opposite. The depth of the growing medium is greater (up to two feet) and the roof costs substantially more. Because of the deeper soil depth, plant diversity can be greater, including trees and shrubs.¹¹ Maintenance is increased because the plants chosen require more tending (including watering and watering systems), but also because increased access (including visitors) puts more stress on the garden and the roof.¹²

As may be obvious, a significant structural effect of green roofs derives from the soil depth and its accompanying weight when saturated with water. Extensive green roofs may have saturated media weight between 16 and 35 pounds per square foot; intensive roofs may be six times that.¹³ Moreover, the additional loads from a green roof are located at the top of a building and may increase the design stresses that a building must support under earthquake and wind loads. These added stresses may require additional structural strength necessitating the use of steel or concrete or other strength components throughout the entire structure.

Roof Claims. That roofs can be problematic is not to be doubted. A case that catalogs many of the things that can go wrong arose in Delaware out of repairs to the roof of an anchor tenant at a shopping mall and subsequent leakage. In *Jardel Co., Inc. v. Lakewood Builders, Inc.*,¹⁴ the Delaware Superior Court provided substantial detail on roof construction and the contracting, retention, supervision and technique that went into a repair, and the repair of the repair.

9. *Id.* at 4.

10. *Id.*

11. *Id.* at 4-5.

12. *Id.* at 5.

13. *Id.* at 4-5.

14. [1987 Del. Super. LEXIS 1154](#) (Del. Super. Ct. 1987).

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It should not be surprising that, as comprehensive and detailed as it is, the *Jardel* case does not catalog all the sources of problems that can arise with a roof and its repair. But it is a very good start. To distill it:

1. defective specifications;
2. unqualified contractors;
3. inadequate information regarding the design and condition of the roof;
4. negligent performance by the roofing contractor;
5. unavailability of materials;
6. resulting third-party damage;
7. defective conditions of the roof; and
8. weather delays.¹⁵

All are in addition to the problems inherent in the passage of time with a properly constructed roof: leakage at joints, flashing, substrate, membrane, expansion joints, and penetrations.

When an extensive or intensive green roof is built there are several new systems that need to be combined on the roof, including structural support for the additional weight of plants, growing medium and water, watering systems, drainage systems, additional access and, of course, a living ecosystem of growing plants. Any of these can, for one reason or another, go wrong. But the potential problems go beyond that. Additional access provides more risks that something will be jarred loose, punctured, or deformed so that the watertight integrity of the roof is compromised. More significantly, the tons of dirt or other growing medium may obscure the condition of the roof potentially making punctured membranes, loose flashing or failed seals difficult to locate. This has the effect of allowing leakage to proceed longer before identification of the source and also increases the cost of repair.¹⁶

15. *Id.* at *2-*12.

16. At the same time, according to the Marsh report, many agree that green design requirements can also mitigate risk. For example, one prerequisite for LEED certification is building commissioning, which can help identify and correct design errors before

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Coverage for Roofs. Regardless of the catalogue of potential new problems associated with green roofs, green roof coverage claims are likely to be analogous to traditional roof claims. In other words, we are likely to see an incremental shift in some regards, but not whole-scale change. Only time will tell whether this prediction is correct, as there have not yet been many claims associated with green buildings. Indeed, according to the insurance companies surveyed by Marsh in its 2008 report, there has only been one claim to date arising from a vegetative roof. The controversy involved a claim against a building's architect and structural engineer due to water infiltration into the building from the green roof.¹⁷ That this is the first claim to have emerged is not surprising. Leaking is a common problem for all kinds of roofs, not to mention vegetative roofs, which incorporate water into the design.

The roof claim in the Marsh report likely involves claims of negligent design and construction under a commercial general liability (“CGL”) policy or a professional liability/errors and omissions policy. Losses involving green roof problems may fall within the coverage provided by property policies as well.¹⁸

Cause and Concurrent Causation. Disputes between policyholders and insurers over green roof problems will likely follow the current roof insurance claim patterns and policy analysis. For example, if an owner is seeking coverage for a leaking roof under a property policy, there are two main threshold questions: is there property damage, and, if so, was the property damage caused by a risk covered by the policy?

A typical property policy covers “direct physical loss of or damage to Covered Property caused by or resulting from any ‘covered cause of loss.’”¹⁹ The covered risks are either enumerated (“named peril” policies) or described as “all risk,” by which the carrier covers all risks except those that are specifically excluded.²⁰

the building is operational. The systems included within scope of services for commissioning a LEED project are based on the owner's project requirements. In addition, the LEED certification process fosters a more collaborative, communicative working environment, which may reduce miscommunication and conflict. MARSH, THE GREEN BUILT ENVIRONMENT IN THE UNITED STATES, 2008 YEAR-END UPDATE OF THE STATE OF THE INSURANCE MARKET 3 (2009).

17. *Id.*

18. There are new insurance products specifically designed for green buildings.

19. *E.g., Victory Peach Group, Inc. v. Greater New York Mut. Ins. Co.*, [707 A.2d 1383](#) (N.J. Super. Ct. App. Div. 1998).

20. *Id.*

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In a leaking roof case, it is pretty clear that there is “property damage” as the term is commonly understood and as it is defined in a typical policy. Thus, the inquiry tends to focus on whether there was a covered “cause” of loss. Oftentimes there may be more than one asserted cause leading to analysis of concurrent causation under the applicable policy.

The coverage grant in an insurance policy is always followed by various excluded causes of loss (often referred to as “excluded perils”) and other specific exclusions. There are a number of standard exclusions which insurance companies are likely to raise which may be particularly pertinent to green roofs. In property policies, for example, there are typically exclusions for “wear and tear” and “deterioration,”²¹ as well as “defective design” or “defective construction.”²² Thus, an insurance company will argue that even though there is property damage, namely, the leaky roof and the damp, discolored or moldy building interior, there is no coverage because the leaky roof was caused by defective design, or faulty workmanship, or deterioration, which is excluded under the policy. Courts in such instances engage in a causation analysis.

To illustrate, despite an exclusion for “faulty workmanship” the court in *Driscoll v. Providence Mutual Fire Insurance Co.*,²³ found that the insureds' policy provided coverage where the damage to the roof in question was caused by a combination of both faulty workmanship, which was excluded, and by weight of ice and snow, which was not excluded. In that case, the policyholders discovered damage at one of their rental properties during an inspection in preparation for a new tenant, including outward-leaning outside walls, ceiling cracks, a two-inch drop in the roof, and other problems. The owners submitted a claim to their insurance company under their “all risk” policy. The insurance company denied the claim on the basis of its expert's opinion that the damage was caused by faulty roof design, a cause that was excluded from coverage under the terms of the insurance policy. The property owners hired their own engineer, who inspected the house and determined that faulty design had combined with the weight of snow from the prior winter to cause the property damage.²⁴

21. See, e.g., *Ariston Airline & Catering Supply Co. Inc. v. Forbes*, [511 A.2d 1278](#) (N.J. Super. Ct. Law Div. 1986).

22. See, e.g., *242-44 East 77th St., LLC v. Greater N.Y. Mut. Ins. Co.*, [815 N.Y.S.2d 507, 509](#) (App. Div. 2006).

23. [867 N.E.2d 806](#) (Mass. App. Ct. 2007).

24. *Id.* at 807-08.

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The owners had purchased an all risk policy, which broadly covered all risk of direct physical loss unless the loss was excluded. The weight of ice and snow was a covered cause of loss which was not excluded under the policy.²⁵ However, the policy also contained an exclusion for faulty work. Finally, the policy contained the following provision: “[w]e will not pay for loss or damage caused by or resulting from any of [the excluded causes of loss]. But if loss or damage by a ‘covered cause of loss’ results, we will pay for that resulting loss or damage.”²⁶

The court found that both faulty design and the weight of snow and ice concurrently caused the damage. Because the damage was caused by both a covered and an excluded “cause of loss,” the court found that the covered cause of loss trumped, and the faulty design exclusion did not bar coverage.²⁷

One can imagine similar concurrent causation issues arising around a green roof. For example, if the roof drains are inadequately sized and overwhelmed by torrential rains with resultant flooding of the green roof and structural damage to the roof because of the extra weight, can the property owner find coverage under his property policy, or must he seek recourse from his architect or builder under their malpractice policies? The answer undoubtedly will depend on the specific terms of the owner's policy and the specifics of the particular claim. What is not as idiosyncratic, however, is the need for the property owner to anticipate such problems and thoughtfully to address them so that the first time he is considering his insurance situation is not while the water is pouring in through the ceiling. Because many of the risks associated with green buildings and green roofs emanate from design-related services, we are likely to see concurrent causation as a repeated theme in the green build context.

“Green” Features May Go Beyond Aesthetics. Although in some instances green roof claims will follow the current roof insurance claim patterns and policy analysis, in light of the unique nature of the green roof, especially within the context of a LEED certified building, we may see some new twists on prior results. One old coverage battleground which may yield some new results is the question of what constitutes “property damage.” Something a court considered as merely “aesthetic” - and not property dam-

25. *Id.* at 810.

26. *Id.*

27. [Id. at 810-11](#). This analysis is referred to as concurrent causation analysis.

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age - under the traditional rubric, may be transformed into something entirely different in the green building context.

For example, under the traditional rubric, if a builder installs the wrong colored shingles on a building, the carrier may assert there is no “property damage” - the roof just does not look as it should. The result in *Down Under Masonry, Inc. v. Peerless Insurance Co.*,²⁸ illustrates this principle. In that case, a contractor building a new garage for a homeowner hired a subcontractor to install shingles on the roof of the garage. The subcontractor purchased and installed eastern grade B white cedar shingles instead of the western blue label red shingles that the contract required. The white shingles were different in color than the red shingles on the owners' nearby house, and were of inferior quality.²⁹ The owners sued the contractor, who in turn tendered the claim to its liability insurer. The contractor's insurance company denied coverage, refusing to defend or indemnify the contractor on the basis that there was no property damage. The court agreed with the insurance company, affirming the lower court's no-coverage ruling on the basis that no “physical injury” or “loss of use” occurred.

The policy in that case obligated the insurance company to pay those sums that the policyholder became legally obligated to pay as damages because of “property damage.” The policy defined “property damage” as *physical injury to tangible property or the loss of use of tangible property that is not physically injured*.³⁰

The subcontractor installed shingles that were of inferior quality and different in color from those specified in the original contract with the owners. “Nothing in the record, however, suggest[ed] that any physical defect existed in the shingle material used or in the manner in which the shingles were installed, or that the owners were unable to use their new garage as a result.”³¹ Accordingly, “[t]o find that the aesthetic impact on property value caused by the installation of inferior shingles equates to property damage would extend coverage beyond the contemplation of the parties.”³² The court thus de-

28. [950 A.2d 1213](#) (Vt. 2008).

29. *Id.* at 1214.

30. *Id.* at 1215-16.

31. *Id.* at 1216.

32. *Id.*

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clined to find coverage under the contractor's CGL policy for what the court viewed as aesthetic damage.

In the context of green buildings however, the color of a roofing material may be much more significant than mere aesthetics, and a court in the green-build context would likely reach a different result than the court in *Down Under Masonry*. According to LEED certification requirements, the color and grade of shingles has an impact on certification and the efficacy of the roof itself. For example, alternatives available under LEED to address the “heat island effect” permit a roof to be either a green roof, or covered with a material of Solar Reflective Index (“SRI”) value of 29 or above for a steep-sloped roof, or 78 or above for a low-sloped roof.³³ The intent is to reduce the heat island effect by increasing the solar reflectivity of building materials. In general, lighter materials typically have a higher SRI than dark materials. Light materials reflect light, dark materials absorb light. Thus, the “wrong color shingles” would not be merely aesthetic, but would likely constitute property damage as the owner has lost the use of its roof to reflect sunlight. Two potential adverse consequences in this situation may be higher operational expenses due to higher heating loads on the building cooling system, as well as an impact on the building owner's ability to become LEED certified at a targeted level, due to the loss of LEED accreditation points from the use of nonconforming materials.

Improvements Required by Code. Attendant with the increasing public awareness of issues such as climate change, there has been a surge in demand for green buildings. The green building discourse has reached such a level that an increasing number of municipalities have enacted green building ordinances. As noted above, Toronto became the first city in North America to adopt an ordinance requiring green roofs on new construction buildings. But it is not alone in addressing the place of green buildings in the municipal skyline. A publication by the U.S. Green Building Council identifies 198 localities that have enacted LEED initiatives.³⁴ An interesting question arises where a covered peril damages a building without a green roof and missing other LEED features, but the local code requires rebuilding to include a green roof or otherwise incorporate green building attributes, including LEED certification. Would there be coverage for those improvements?

33. LEED 2009 For New Construction and Major Renovations, Sustainable Sites Credit 7.2, Heat Island Effect-Roof (U.S. Green Building Council, Inc., 2009), available at <http://www.usgbc.org/DisplayPage.aspx?CMSPageID=1970>.

34. U.S. Green Building Council, LEED Initiatives in Governments and Schools (June 1, 2009), available at <http://www.usgbc.org/DisplayPage.aspx?CMSPageID=1852>.

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One of the often unanticipated consequences of any disaster is the cost of replacement of non-conforming structures with those that conform to code. Many policies contain exclusions for those costs. For example:

We will not pay for loss or damage caused directly or indirectly by any of the following: Such loss or damage is excluded regardless of any other cause or event that contributes concurrently or in any sequence to the loss. a. Ordinance or Law The enforcement of any ordinance [or law: \(1\)](#) Regulating the construction, use or repair of any property; ...³⁵

But by the same token, coverage extensions are available that put this coverage back in.

In the event of damage by a Covered Cause of Loss to a building that is Covered Property, we will pay the increased costs incurred to comply with enforcement of an ordinance or law in the course of repair, rebuilding or replacement of damage of that property, subject to the limitations stated³⁶

However, even in circumstances where an “ordinance or law” exclusion is not neutralized with an extension, policyholders may still prevail on coverage for increased code-required costs.

To predict how a court might deal with this replacement issue for a green roof, we can extrapolate from an analogous case, *Royal Cloud Nine, L.L.C. v. Lafayette Insurance Co.*, set in the Vieux Carré, the historic district of New Orleans.³⁷ During Hurricane Katrina, the historic Latrobe building was damaged by the storm. The building was on the National Register of Historic Places, and carried the Vieux Carré Commission's highest historical and architectural rating: “purple”. The Vieux Carré Commission requires that the roofs of purple-rated structures be replaced with natural slate as opposed to materials of lesser quality.³⁸ The inspector hired by the insurance company prepared a roofing estimate for inferior slate valued at only a fraction of the price of the

35. *E.g., Danzeisen v. Selective Ins. Co. of Am.*, [689 A.2d 798, 799-800](#) (N.J. Super. Ct. App. Div. 1997).

36. *See e.g., SR Int'l Business Ins. Co., Ltd. v. World Trade Center Properties LLC*, No. 01 Civ. 9291(HB), [2006 U.S. Dist. LEXIS 79326 at *13](#) (S.D.N.Y. Oct. 31, 2006).

37. [987 So. 2d 355](#) (La. Ct. App. 2008).

38. *Id.* at 359.

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requisite natural slate. The policyholder filed suit against the insurance company seeking, among other things, the replacement cost of the roof using the natural slate.

Although it secured coverage at the trial level, on appeal the policyholder contended that the trial court erroneously failed to find the insurance company liable for the increased cost of replacing the roof with natural slate as required by the Vieux Carré Commission. The insurance company argued against the increased replacement cost on the basis that the ordinance or law exclusion in its policy precluded replacement cost coverage of the roof.³⁹

The insurance policy provided for the replacement costs in “the amount you actually spend that is necessary to repair or replace the lost or damaged property.”⁴⁰ The court found that Hurricane Katrina caused the damage to the policyholder's roof, not the enforcement of the Vieux Carré Commission requirements and that replacement at the “purple” level was “necessary.” Accordingly, the court awarded the policyholder an additional \$62,400 to replace the roof with natural slate.⁴¹

Green building ordinances often require that any new construction or renovation over a certain square footage must attain LEED certification or otherwise meet certain efficiency or sustainable attribute requirements. Toronto's new green roof ordinance, for example, requires that “[e]very building or building addition constructed after January 30, 2010 with a Gross Floor Area of 2,000 square metres or greater shall include a Green Roof.”⁴² If a Toronto building is destroyed by fire and the owner intends to rebuild, the owner is actually required by law to rebuild the structure to a more costly standard, much like the Latrobe building in *Royal Cloud Nine* was required to conform to specific, more expensive standards applicable to historic buildings. An insurance company is likely to assert arguments against code-required increased costs, similar to those asserted in *Royal Cloud Nine*. Even with a law and ordinance exclusion, however, the carrier may not prevail.

Weather, Seasons and the Period of Restoration. To this point, we have addressed only coverage issues with respect to “property.” A significant feature of most property policies, however, is the provision of coverage for the interruption of the insured's busi-

39. *Id.*

40. *Id.*

41. *Id.*

42. Toronto Green Roof Ordinance, art. II, § __.A.

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ness. While a green roof may be used by a business directly with its clients (e.g., a therapeutic garden at a hospital or the setting of a restaurant), a more substantial role is the place of the green roof in the overall characterization of the building as “green” or “sustainable” or “LEED certified.” If the green roof is, for example, integral to the marketing of a building or the amount of rent that can be obtained or the approval of a certificate of occupancy, then the time for the restoration of the roof may be critical.

Analysis of the “period of restoration” was central to one of the decisions rendered in the World Trade Center insurance dispute over coverage for the September 11 terrorist attacks. In *SR International Business Insurance Co., Ltd. v. World Trade Center Properties LLC*,⁴³ the insured sought to recover lost rents for the *actual* period of time it took to rebuild the replacement structure for the World Trade Center, rather than a *theoretical* amount of time to rebuild. The insured's policy provided that its insurers would “pay for the actual loss of ... Rental Value sustained by the Insured due to the necessary ‘suspension’ of the Insured's ‘operations’ during the ‘period of restoration.’”⁴⁴ In turn, however, the “period of restoration” was defined as beginning on “the date and time of direct physical loss or damage” and ending on “[t]he date when the property *should* be repaired, rebuilt or replaced with reasonable speed and similar quality.”⁴⁵

The court concluded that the insured's “actual period to rebuild” argument would require the court to read “should be repaired” as “would be repaired.” Unfortunately for the insured the court did not agree with the insured's parsing of the language:

That certain terms could apply to both an actual and a hypothetical period does not mean that they do when other text, and context, and authority, and logic, prove that they do not.⁴⁶

Accordingly, the court found that the period of restoration was the theoretical period, rather than the actual time it would take to restore the facility.

43. No. 01 Civ.9291 (MBM), 2005 WL 827074 (S.D.N.Y. Feb. 15, 2005).

44. *Id.* at *3 (internal quotations omitted).

45. *Id.* (internal quotations omitted).

46. *Id.* (emphasis added).

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The central feature of a green roof is its vitality: by definition, it has a “living” biological component integral to its design. Accordingly, the time to restore a green roof may not be as simple as counting up the number of days required to lay down a membrane, install a drainage system, spread some soil and plant some cuttings or lay some sod. The weather and seasons may be entirely determinative of what can be done. And if the green roof's viability matters to the conducting of the insured's business, then ensuring coverage for the full required period of restoration is essential.

Conclusion. There are no doubt numerous other aspects of insurance coverage that will apply to green roofs; results will often turn on nuances in the applicable policy and will always depend on the particular facts in issue. Policyholders and their brokers and insurers need to approach the insurance of a green roof by recognizing that while many of the coverage questions and their answers will be similar to what has transpired with traditional roofs, only a thoughtful examination of coverage focused on the green roof will deliver the policy that provides the coverage required.

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