

Legal Alert

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QUESTION: ARE ENVIRONMENTALLY AND SOCIALLY RESPONSIBLE BUILDINGS RISKY?

ANSWER: THE “GREEN” BUILDING INDUSTRY IS STILL GREEN AND NEW IDEAS CREATE UNFORESEEN RISKS!

Kermit the Frog was right. Being green is not easy!

Why are environmentally friendly and sustainable buildings called “green,” anyway? After all, dirt and rocks are usually environmentally friendly and natural products. Yet, dirt and rocks are generally brown, black or grey.

Are they called green buildings because the designs, methods and materials are green and untested? Are they green because other owners, developers, designers and contractors will be envious of the LEED certifications? Are the owners and developers green with nausea over the delays, cost overruns, and failures to deliver the promised performance of new and innovative systems? Or are they green because of all of the green that will be required to pay for over-budget projects, remediation efforts, and the costs of future litigation?

The Chesapeake Bay Foundation learned the perils of being green the hard way. The mission of the Chesapeake Bay Foundation is to save Chesapeake Bay. The Chesapeake Bay Foundation wanted a green building for its headquarters on the Bay in Annapolis, Maryland. The building was to use recycled and environmentally friendly materials.

So what was the problem?

The building used a lot of glue-laminated wood columns and beams. Some of these wood columns and beams were exposed to the elements. The U.S. District Court Judge wrote: “Any ordinary person knows that, all else equal, wet wood rots.” He continued: “To reiterate, just about anyone who has ever stained a deck knows that cracked, waterlogged wood stands to rot.” *Chesapeake Bay Foundation, Inc. v. Weyerhaeuser Co.*, 848 F.Supp.2d 570 (2012).

The general contractor, Clark Construction Group, LLC thought that the wood it bought from Weyerhaeuser had been treated so that it would not rot when it was wet, however. Weyerhaeuser had agreed to provide Clark Construction with Parallam PSL columns and beams to be used on parts of the project exposed to the elements. Parallams are manufactured with strips of wood glued together to look rough-hewn. As the Court of Appeals noted:

The wood strips' lack of uniformity creates channels, or "avenues," that run longitudinally through the Parallams. Thus, water is expected to infiltrate Parallams used outdoors. To protect against rotting, Parallams are pressure-treated with a wood preservative intended to fully penetrate the avenues.

Clark Construction believed the Parallams sold by Weyerhaeuser had been treated with a preservative to prevent rotting. The Parallams were untreated, however. *Chesapeake Bay Foundation v. Weyerhaeuser, Co.*, 2014 WL 3747 128 (4th Cir., 7/31/14).

After completion of the building in December 2000, "water began leaking through Parallams into the building." Investigations were conducted and in 2004 the leaking was stopped. In 2009, Chesapeake Bay found out that the Parallam beams and columns were rotting. **(A rotting building is not very sustainable!)** Chesapeake Bay, the architect and general contractor then learned that the Parallams had not been treated with the proper preservative and the preservative was not "well-suited to the job of preserving the Parallams." Weyerhaeuser was alleged to have knowingly given false assurances to the contrary. The lawsuit was filed on December 3, 2010.

The district court dismissed the case in 2012 saying that Chesapeake Bay should have known back in 2001 and 2002 that the wood was getting wet and would probably rot. Therefore, the statute of limitations had run. On July 31, 2014, the Court of Appeals said that if the beams and columns had been properly sealed, they were not supposed to rot. Thus, just because the water was leaking through the beams in 2001 and 2002 did not mean that the beams were rotting. The Court of Appeals thought there was a genuine issue as to whether Weyerhaeuser had misled Chesapeake Bay and the architect and the contractor. The case will now go to trial.

So what can be done?

New materials and new construction methods bring risks. The owner needs to be sure it can enforce remedies for future performance failures. If the building was leaking in 2001, will they "throw the case out" in 2012 because the statute of limitations has expired? Apparently, the length of

the warranty on the wood beams and columns was too short.

Some recycled and environmentally friendly materials will be inherently more likely to deteriorate. (If the environmentally friendly material is glue-laminated and pressure treated with something called PolyClear 2000 to keep it from rotting, is it really “environmentally friendly?”)

Kermit may really have been correct! Please let me know if you need assistance reviewing, revising and negotiating construction contracts and other documents related to green building contracts.

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