


MARSH



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**The Green Built Environment
in the United States**
*2008 Year-end Update of The State
of the Insurance Market*

Contents

- 1 Introduction 1
- 2 Design Firm Professional Liability Coverage 2
- 3 Environmental Coverage 5
- 4 Builders Risk Coverage 7
- 5 Property Coverage 9
- 6 Casualty Coverages 13
- 7 Surety 16
- 8 New Product Offerings 18
- 9 Conclusion 19
- 10 Markets Surveyed 20
- 11 2008 Year-end Markets Surveyed 21

Marsh published the first industry wide green market report in June 2008. Because of the rapidly changing landscape of risks and opportunities in the green built environment and the markets' response to them, we are pleased to present a year-end update.

The update reflects an increased interest among insurance companies in green building. For example, in the commercial property insurance sector more carriers are entering the marketplace with increased capacity and varying products. Meanwhile, the casualty markets generally remain concerned about potential risks associated with green buildings, but also demonstrate a desire to learn more about them as well as the benefits of green building. Despite current challenges in financing new projects, there still is considerable support for building green. Even with the current economic climate, McGraw-Hill anticipates that green construction will grow to \$56 billion - \$70 billion in the next five years.

Reprinted below is the complete text of Marsh's first green market report. Current updates are highlighted in green. The information reflected in the updated green text was compiled from market surveys conducted by Marsh during September through December 2008.

2

Design Firm Professional Liability Coverage

Introduction

Much of any risk associated with green buildings emanates from design and related services. The American Institute of Architects (“AIA”) contracts and codes of ethics promote sustainable design. As part of its work in this area, the AIA supports the U.S. Green Building Council’s LEED Certification. (LEED is an acronym for Leadership in Energy and Environmental Design.) As of May 2008, the design firm professional liability markets acknowledge that it is premature to determine the exact impact of green design or to know whether the risks are materially different from those emanating from traditional design. Although none of the markets surveyed has developed new policies or coverage enhancements, many are providing their clients with risk management advice. Most are keeping a watchful eye.

Key Risks – The Market’s Perception

The AIA is playing a role in advocating for sustainable design. For example, architects (via the AIA code of ethics and the **AIA B101™-2007** agreements) are being required to address sustainability. Here is sample language from the **AIA B101™-2007** contract:

§3.2.3 The Architect shall present its preliminary evaluation to the Owner and shall discuss with the Owner alternative approaches to design and construction of the Project, including the feasibility of incorporating environmentally responsible design approaches.

§3.2.5.1 The Architect shall consider environmentally responsible design alternatives, such as material choices and building orientation, together with other considerations based on program and aesthetics, in developing a design that is consistent with the Owner’s program, schedule and budget for the Cost of the Work.

In addition, **B214™-2007 (formerly B214™-2004), Standard Form of Architect’s Services: LEED Certification** is a scope of services document

that establishes duties and responsibilities when the owner seeks certification from the U.S. Green Building Council's Leadership in Energy and Environmental Design (LEED).

The addition of ethical and/or contractual requirements (AIA B101™-2007) related to sustainable design may have an impact on the legal standard of care, raising it above the traditional negligent standard that is covered by professional liability insurance.

Other potential design related risks include:

- Liability for the increased cost of certain types of damages, such as lost profits, lost business opportunities, increased tax burdens, and energy costs.
- Liability for warranting an outcome without having complete control over things such as construction means and methods and operation and maintenance.
- Liability for structural problems and leaks associated with green roofs.
- Lack of proper green experience and qualifications on the part of the design team.
- Lack of control over material specifications and substitutions on the part of the contractors.

Regardless of the above, many agree that green design requirements can also mitigate risk. For example, one pre-requisite for LEED certification is building commissioning which can help identify and correct design errors before the building is operational. In addition, the LEED certification process fosters a more collaborative, communicative working environment, which may reduce miscommunication and conflict.

Market Response

As of May 2008, all markets surveyed acknowledged that it is premature to draw any conclusions or to offer new coverage. Much will likely depend on the claim activity or lack thereof.

Insurers already have experienced claim activity. Below are several examples*:

- Claim by developer against architect because building did not achieve LEED Gold Certification.
- Claim against architect and structural engineer due to water infiltration from green roof.
- Claim against design team because the cork flooring they specified resulted in water retention and mold.
- Claim against architect because lack of green product availability caused project delays.

- Claim against architect because health problems of tenants' employees increased despite warranties that the indoor air quality would improve.

Most markets believe that traditional design professional liability policies provide a significant amount of coverage for the **negligent** performance of professional design services. However, the general consensus is that a key difference between traditional design and green design involves enhanced performance expectations (i.e., energy savings, employee productivity, etc.) and an evolving standard of care which may not be covered by traditional architects and engineers professional liability insurance policies.

As of the date of creating this report, no insurance companies surveyed have made changes to their underwriting criteria, pricing and/or coverage with respect to the design of green buildings. Several insurers do provide risk and contract management advice for their design firm clients. Focus is placed on the avoidance of performance guarantees, the appropriate standard of care, and a well-defined scope of services.

Outlook

As underwriters gain a better understanding of the risks and benefits of green design, the insurance marketplace is likely to evolve. One insurer is contemplating an energy savings guarantee insurance policy for HVAC firms and, perhaps, a project-specific professional liability policy designed to cover all firms working on a LEED project.

2008 Year-end Update

- **Market conditions remain the same.**
- **Emphasis is on contractual risk allocation.**
- **No adverse claim history to date.**
- **New and evolving professional liability exposures emanating from LEED Accredited Professionals and Commissioning Agents' services. Most markets are generally willing to cover if they meet certain underwriting criteria. Emphasis will be on experience, education and training.**

3

Environmental Coverage (Pollution Legal Liability and Contractor Pollution Liability)

Introduction

The pollution legal liability and contractors pollution liability markets surveyed have not yet taken a firm stance on green construction or developed green environmental products, one exception being AIG Environmental (see below). At this point, they generally view green construction as more of a property issue. And, quite similar to the insurance markets writing other lines of coverage, the environmental insurance markets appear to be in a “wait and see” mode. Yet the initial perception is that, for the most part, green construction ultimately may reduce environmental risks.

Key Risks – The Market’s Perception

The environmental underwriters surveyed view green construction as potentially less risky than traditional construction. Here are several examples:

- A. Recyclable materials (e.g. less waste going to non-owned disposal sites, leading to fewer claims at non-owned disposal sites, which, in turn, typically makes them better candidates for this coverage at a generally reduced cost in comparison to other types of construction sites.)
- B. More attention to health and safety (e.g. fewer third-party exposures, which leads to fewer claims by third parties for exposures to asbestos, lead, or demolition dust). This may make green projects better candidates for this coverage at a reduced cost in comparison to other types of construction.
- C. Decreased impact to the environment (e.g. less sediment impact, less site runoff) meaning a potential decrease in the likelihood that regulators will assess fines and penalties against them relating to site run-off issues.

Market Response

At present, only one market, AIG Environmental, has created what might be considered a green environmental insurance product. However, the “product” is in effect a discount for green buildings as opposed to a completely new environmental product specifically developed for green construction. The Sustain-a-Build Initiative currently enables AIG Environmental clients to receive discounts of up to 10 percent on premiums for new Pollution Legal Liability (PLL) policies for properties

certified under the U.S. Green Building Council's LEED green building rating system.

Responses of other environmental insurers run the gamut. For example, one market's stance is that there is currently no "regulatory body" for green buildings and no "standards" for enforcement and penalties. Because of this the market will not offer green environmental policies.

Another insurance market stated: "We're not doing anything at this point because the link between green buildings and green construction sites and risk mitigation is not clear."

In the current environment, most insurers agree that green building risks must be viewed on a case-by-case basis and that a strong argument may be made for reduced risks and possible premium credits. One key exception is the increased potential for mold. Energy efficient and airtight buildings tend to keep moisture out, but may also increase the potential for mold.

Outlook

It is quite likely that the environmental insurance markets will offer new coverage enhancements and policy credits as they gain a better appreciation for the potential benefits of green construction.

2008 Year-end Update

- ***No significant market changes in terms of coverage or pricing.***
- ***Most markets continue to monitor closely.***

4

Builders Risk Coverage

Introduction

Although property insurance markets have taken a proactive stance on green products and solutions, the builder's risk market has yet to follow suit.

Key Risks – The Market's Perception

Perceived risks involve delay in opening exposures, especially those associated with LEED recertification. Specifically, the concerns raised by the insurance markets emanate from the time it may take to procure special equipment, the time and the cost associated with flushing out a reconstructed space with fresh air and adding new filtration media to conform to LEED standards.

Market Response

To date, only one market of those surveyed has developed a green builder's risk product. The "Delay of Occupancy or Use – Green Amendment" endorsement, a new enhancement to Fireman's Fund Builder's Risk/Owner's Risk product, is designed to cover green soft costs for additional expenses incurred after a covered loss, such as diverting debris to recycling, flushing out the reconstructed space with fresh air, commissioning the repaired building systems and re-registering with the U.S. Green Building Council. It can also provide coverage for loss of net earnings from alternative power or water systems if those systems were completed and operational prior to the loss.

Outlook

As the property insurance markets become more familiar with green risks, they are likely to create new products and loss prevention services for builders risk coverage, as well.

2008 Year-end Update

- **Several additional builders' risk insurance carriers now offer specific "green" endorsements. They include Zurich, Travelers and ACE. However, the coverage varies by market, so conducting a policy form comparison is very important.**

ZURICH:

Zurich recently introduced Better Green™, a builders' risk green property

endorsement that is the first in a series of green building-related coverage products in development.

According to Zurich, Better Green™ coverage applies to insured projects that incorporate techniques from one or both of the following standards:

- LEED® Green Building Rating System™ of the US Building Green Council or
- Green Globe Assessment and Rating System

Highlights of this endorsement include the following coverages:

1. Air quality management expense
 2. LEED Accredited Professional expense
 3. Recertification Fees
 4. Building Commissioning expense
 5. Debris Recycling
- This enhanced coverage is subject to a term aggregate sublimit of liability. The sublimit options range from \$1 million to up to \$10 million. The Builders' Risk policy per occurrence deductible will apply to all coverages, including the green coverage extension with the exception of a \$250,000 deductible which is applicable to green roof systems.

TRAVELERS:

Green Build Additional Coverage

According to Travelers, this new product was developed to allow customers with new or renovation projects the opportunity to add green building coverage enhancements to their Builders' Risk or Installation policies. Green Build Additional Coverage may cover many costs related to rebuilding and recertifying a covered property to its budgeted level of green certification. A covered loss may result in additional expenses to comply with certification standards of a green authority. Coverage also may apply to technology used in green construction, such as alternative power generating equipment and alternative water systems.

ACE:

The retail inland marine division of ACE USA has added green building endorsements to its builders' risk product offering.

According to ACE, the endorsements are designed to address customers' potential financial loss stemming from changes in environmental standards, repairs using green materials, additional debris-removal expenses, and loss of tax credits.

Despite the new developments, insurance markets generally continue to be concerned about the impact of the LEED certification process on delay in opening exposures.

5

Property Coverage

Introduction

The property insurance marketplace was the first to offer special coverages for green and LEED certified buildings.

Green buildings have special qualities which often require coverage enhancements to standard insurance policies. To date, each insurance market takes a slightly different approach to address the risks.

Key Risks – The Market's Perception

For insurance buyers, determining proper values to avoid being underinsured at the time of a loss or to avoid being charged too much premium is a critical aspect in the process of obtaining green coverage. Examples include valuing the cost of vegetative roofs and alternative water and energy systems. These systems are difficult to value because they often involve new materials and technologies.

Business interruption and extra expense values are equally challenging to estimate. An example of this involves estimating how much time it will take to return a property to full operation following a loss. Such an effort could call for the availability of special equipment, as well as making complex installations, the cost of building commissioning – a LEED prerequisite – and diverting debris to recycling centers rather than the nearest landfill. Other concerns revolve around structural damage, water damage and fire risks from leaking or dried-out vegetative roofs. All of this is compounded by the challenge of tying these values to a specific level of LEED certification – certified, silver, gold, or platinum.

Property underwriters also have concerns about green roofs, especially with respect to the potential for water damage and structural problems.

Despite the increased risks, several insurers are beginning to recognize the potential benefits of green buildings. For example, according to a major property insurer, the top causes of property loss in commercial buildings are electrical fires, malfunctioning HVAC systems, and plumbing problems. The certification process for a green building helps to verify that the electrical, HVAC, and plumbing systems are working at high levels of efficiency, thus reducing the possibility of a loss.

Market Response

To date, five insurers of those surveyed have issued green enhancements to their standard property forms, or specific green insurance policies. They include: Fireman's Fund, AIG (thru its Lexington Subsidiary) ACE, Travelers, and Liberty Mutual. Fireman's Fund, an Allianz subsidiary, was the first U.S. insurer to customize its property forms for green buildings. Its Green-Gard suite of coverages is geared to new construction, green renovations to existing buildings, and rebuilding after a loss.

Firemen's Fund Green Upgrade Coverage can allow insureds to replace standard systems and materials with green ones if they have a loss. The Fireman's Fund program may cover the cost to rebuild and replace with specified green alternatives, such as nontoxic paints and carpeting, Energy-Star rated electrical equipment, roof and insulation materials, energy-efficient lighting systems and water efficient interior plumbing. In the event of a covered total loss, the insurance policy may cover the cost to rebuild as a green certified building.

The **Fireman's Fund Green Certified Building Coverage** is designed for buildings that are already green-certified. If these buildings suffer a covered loss, the policy can provide coverage for a vegetated roof, alternative water system, green power generating equipment, and more. The policy also may cover the cost to hire a Leadership in Energy and Environmental Design (LEED) accredited professional to oversee repairs and it can reimburse the insured for loss of income incurred through the use of alternative power generating equipment. This coverage includes credit for certain green features. To qualify, the building must be certified by the U.S. Green Building Council.

The **Fireman's Fund Building Commissioning Coverage** can cover the cost to hire a commissioning engineer to confirm that the insured building systems (HVAC, electrical and plumbing) operate at high performance and in alignment with one another. In addition, the program may pay for the engineer to run a test and balance on the insured's HVAC system, including heat, ventilation, and air conditioning – whether or not it was directly involved in the loss.

The **Fireman's Fund's Loss Control Green Consulting** helps customers control rising energy costs and decrease carbon emissions, among other benefits.

The **Fireman's Fund's iCustomer Series® Green Resource Center** is an online collection of articles, tools, and links that helps customers understand the green building movements and its many benefits.

Lexington's Update to Green Endorsement is designed to provide coverage for commercial and residential policy holders to rebuild an insured building and replace select personal property with products that embrace sustainability principles and reduce the overall impact of the building on the environment. This coverage is tied to the LEED standards. It is

particularly targeted to clients in real estate, financial services, hospitals, education, and public entity sectors. A growing number of entities in these sectors have embraced green building and are expected to continue to do so for the foreseeable future.

ACE has a similar stand-alone insurance policy. In addition, **Travelers** offers green building coverage enhancements. This coverage is designed for mid-sized businesses (notably, the enhancements include coverage for recycling, commissioning, and LEED certification fees).

Liberty Mutual Property, part of Liberty Mutual Group, recently introduced a portfolio of green commercial property coverages. Among them is **Green Select™**, a property policy endorsement that gives customers the coverage flexibility to choose from a variety of green coverages. The endorsement also can cover costs to recertify a building one level higher than its previous certification in the LEED Certification Program or Green Globe Certification Program. **Green Select's** flexibility can extend to non-green properties by giving owners access to the extra funds needed to upgrade certain aspects of their property to green.

Each insurer's coverage varies slightly in its approach, but they all can address the increased cost of green construction as well as the additional time required to order, deliver, and install special materials/equipment. Some also can cover commissioning and LEED certificated fees, among other enhancements. Coverage comparisons are necessary to assess how effectively each of the insurance products meets the specific objectives and requirements of the insurance buyer.

Outlook

As the green built environment continues to evolve, so too will the property insurance marketplace. New insurance markets most likely will seek to participate in this evolving sector. Policy language and pricing will likely be refined as underwriters become more knowledgeable of the unique and specialized risks associated with green business.

2008 Year-end Update

- **More markets have begun offering green property coverage enhancements, including Affiliated FM and FM Global. Several insurers offer higher limits, although some coverage is still sublimited.**
- **Affiliated FM recently endorsed a new "green" coverage to its ProVision® all-risk property policy. Affiliated offers a "flexible" single limit that applies to all green upgrade coverage. After a partial loss, only a non-certified building's damaged components will be upgraded to comply with the applicable standards. Only in the event of a total loss is the coverage designed to satisfy the pre-requisites and earn the minimum number of points to meet a certain level of LEED certification.**

- *FM Global offers up to \$5 million or 25% of property damage loss per occurrence limits at the Insured location. The coverage is largely driven by definitions of “Green” and Green Authority. Like most other coverages, the form covers vegetative roofs, flushing of air handling, equipment, recycling a LEED AP’s services and upgrades to Green – All subject to policy terms, conditions, and exclusions.*
- *Coverages vary, so it’s important to conduct a thorough policy form comparison.*
- *Vegetative roofs have gained more attention. [One carrier excludes damage to the vegetative roof covering of properties located in high hazard wind zones.] This underscores the need to review the policy form carefully.*

Evolving risk issues to consider include:

1. *How a “green” authority evaluates a loss. For example, once a building is certified under the LEED New Construction and Major Renovation Track, is it always certified even if it sustains a partial loss?*
2. *In the event of a total loss, does the authority require the building to be recertified under the standards that existed at the initial certification or under the current standards?*

Insureds should consider seeking coverage for the costs to meet the same level of certification if the green authority changes its standards.

6

Casualty Coverages (General Liability, Workers' Compensation, Umbrella Liability)

Introduction

When it comes to green construction, many of the casualty insurance markets we surveyed appear to be in the early stages of the learning curve. As a result, there is a significant fear of the unknown. Most of the markets we surveyed have taken a “time will tell” outlook on both the risks and the risk mitigators emanating from the green built environment.

None of the markets surveyed articulated any specific impact on potential workers' compensation risks. The commentary below applies to general liability and products liability coverages.

Key Risks – The Market's Perception

The insurance markets surveyed, for the most part, view the green built environment as potentially more risky than traditional construction.

Specifically, many of them voiced the following concerns:

- The lack of appropriate qualifications and experience of contractors and subcontractors performing this work, which could result in faulty workmanship and construction defect claims.
- New and untested products, materials, and processes that may not have the durability and longevity of their traditional counterparts. This could lead to an increase in products liability and completed operations claims [not dissimilar to their concerns over Exterior Insulation and Finish Systems (“EIFS”) several years ago].
- New roof systems and the potential for structural and water damage claims.
- New HVAC handling systems and related performance and air quality issues.
- The impact of inadequate maintenance on the construction contractors' potential liability leading to increased claim activity.

Interestingly, none of the insurance markets surveyed mentioned possible ways in which green (especially LEED Certified) buildings may reduce risk. For example, none cited the potential benefits achieved through the commissioning process, the emphasis on lifecycle collaboration, improved indoor air quality, and the use of building information modeling (BIM).

Market Response

None of the markets that we surveyed indicated they are currently planning to issue new policies, coverage enhancements, coverage restrictions, or premium credits or debits, with one exception: one insurer indicated it will not cover green construction on an excess or umbrella basis.

All of the insurance markets surveyed indicated they will ask more questions about a green project than normal, primarily about the contractors' and subcontractors' qualifications, experience and quality control programs during both the construction and maintenance phases. In addition, the insurers generally will continue to track and compile loss data.

Outlook

The casualty markets we surveyed may benefit from a better understanding of the risks and the risk mitigators emanating from the green built environment.

Nonetheless, the current environment presents a significant opportunity for members of the insurance industry and the design and construction industries to collaborate on a way to better identify, treat and mitigate the risks of green construction, and to develop approaches that foster, rather than discourage, this form of project delivery.

2008 Year-end Update

- *No new products, coverages, or exclusions, but there is an increased interest in learning about green issues.*
- *Noticeable lowering of the level of insurer resistance; desire to address in a "risk aware" mode.*
- *See most risk as "property" or "professional." Biggest concern is in the area of construction defects (completed operations) – which may take five to six years to "mature."*

New/Evolving Concerns

- *Green roofs and windstorms. Roofs in general have always been a big cause of construction defect claims.*
- *Porous materials and mold.*
- *Bamboo, cork and higher flammability ratings. Same with new fuels, such as ethanol.*

- *New energy systems such as mini co-generation units, wind power units and solar panels add weight and stress to the roof and structure.*
- *Functionality of low VOC materials.*
- *Importance of operations and maintenance (O & M) phase; contractor must carefully document the O & M information for the owner/operator.*

Introduction

The surety markets surveyed have yet to take any specific position with respect to green construction nor have they changed their underwriting standards to address this sector.

Key Risks – The Market's Perception

However, when surveyed, the sureties generally characterized their specific concerns as revolving around onerous contract provisions and the risk of inadvertently guaranteeing a specific performance or efficacy for energy usage, water consumption, and/or LEED certification.

Market's Response

At this point, the surety markets we surveyed have not developed new products or services for green building, and they have made no specific adjustments to their underwriting criteria to deal with this sector.

However, they are scrutinizing green contracts more closely.

Outlook

Much of what happens in this market going forward is likely to depend on the sureties' actual experience, the experience and qualifications of the firms working on green projects, and the contractual allocation of risk.

On the other hand, these evolving performance standards could present opportunities for new surety solutions. For example, one surety is considering an energy savings guarantee policy for HVAC firms.

2008 Year-end Update

- **Markets continue to focus on the contractor's level of green building experience.**
- **Markets are also concerned about contractually assumed damages and efficacy guarantees if those provisions are not drafted with reasonable contract forms. The markets see this as potentially similar to design/build issues of the early '90s.**

- *From the owner/developer's perspective, some jurisdictions have implemented regulations that require bonds to guarantee LEED certification and specific performance standards. In the case of the District of Columbia, for example, the prospective bonds are not scripted as conventional performance and payment bonds but rather impose demand provisions. Such regulations generate scrutiny from surety companies both individually and on the part of their industry association. However, green building ordinances that contain surety requirements have not yet been pushed down to the contractors' level.*
- *No known issues of "green" related contractor defaults.*

8

New Product Offerings

AIG

AIG Risk Management (AIGRM), a unit of AIG Commercial Insurance, recently announced its AIGRMGreen(SM) product line, a component of AIG Real Estate Solutions.

The primary casualty coverage for property owners and managers of green buildings consists of two coverages: AIGRMGreen Reputation Coverage(SM) and AIGRMGreen Indoor Environment Coverage(SM).

AIGRMGreen Reputation Coverage provides up to \$50,000 in coverage, per occurrence, fee crisis management consultant costs resulting from management of a reputational crisis when a green building experiences adverse publicity.

AIGRMGreen Indoor Environment Coverage is designed to provide protection against claims of bodily injury caused by any substance or odor produced by or originated from a green building's specialized equipment used to improve air quality or water quality control. While such equipment is critical to green certification, loss resulting from this type of equipment is typically not covered in standard policies, exposing the building owner to potential coverage gaps.

ACE

ACE USA (through ESIS®) recently launched a LEED Consulting Practice to help building owners achieve LEED certification. ESIS staff members work with clients on many U.S. Green Building Council rating elements, with a focus on indoor air quality. Other services include those relating to daylighting and views, energy performance evaluations, and water efficiency planning, among other services.

Conclusion

The U.S. Green Built Marketplace continues to grow at a rapid pace. There is increasing interest by the insurance marketplace in understanding the risks and benefits of building green. We expect this trend to continue.

Marsh will monitor these developments closely. We will continue to work closely with insurance buyers and with commercial insurers to promote awareness of green building developments, to educate and inform about related exposures and opportunities, and to assist in the creation of new insurance products and solutions geared specifically to the green built environment, and we intend to report, on a regular basis, our findings.



10

Markets Surveyed

Design Firm Professional Liability

AIG (Lexington)
CNA/Schinnerer
XL Insurance

Catlin
Lloyd's
Zurich

Property

Affiliated FM
FM Global
XL Insurance

AIG (Lexington)
Travelers
Zurich

Environmental

ACE
Arch
Great American
XL Environmental

AIG Environmental
Chubb
Liberty Mutual
Zurich

Casualty

AIG
St. Paul's Travelers

Old Republic
Seabright

Builder's Risk

AIG (Lexington)
Travelers
Zurich

FM Global
XL Insurance

Surety

Chubb
Travelers

CNA
Zurich

2008 Year-end Markets Surveyed

Design Firm Professional Liability

AIG (Lexington)
CNA/Schinnerer
Beazley USA

Catlin
Zurich-American

Property

ACE
Affiliated FM
AIG (Lexington)
Fireman's Fund
Zurich

FM Global
Liberty Mutual
Travelers
XL Insurance

Environmental

ACE USA
Arch
Great American
XL Insurance

AIG Environmental
Chubb
Liberty International
Zurich North America

Casualty

AIG
St. Paul's Travelers

Old Republic
Seabright

Builder's Risk

AIG (Lexington)
Travelers
Zurich

FM Global
XL Insurance

Surety

Chubb
Travelers

CNA
Zurich

*Note: The markets surveyed do not represent a comprehensive list of markets. They are a representative list of insurance markets that routinely provide coverage for construction and related exposures in the United States.



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