

GROWING DEMAND FOR GREEN CONSTRUCTION REQUIRES LEGAL EVOLUTION

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was not bold enough by far. Green building has become a commonplace theme in the design professions, construction, and legislative activity at all governmental levels with the attendant regulatory frameworks—if not yet a reality by the count of actual buildings.

The implications of this exponential growth are troubling, as reflected in the inherent tension that is arising in the evolution of sustainable building. On one hand, the facially desirable goals underlying sustainable building have pushed general and easily articulated principles of “sustainable building” to the forefront of consideration on a significant portion of construction and development projects. In many instances, this focus on sustainable building threatens to displace many other traditionally important considerations. On the other hand, a growing minority of professionals are examining the core issues involved in sustainable building with intense scrutiny to salvage real, practical and positive outcomes in performance from the application of green or sustainable features to the built environment. In the eyes of the latter professionals, because it appears the growth of sustainable building is unlikely to peak or plateau in the near future, vigilance in scrutinizing the actual promises of the green building movement will become even more important.

This article suggests that the growing divergence between the fundamental principles that motivate the green building movement and the actual, demonstrable benefits of green building techniques and requirements counsel professionals in this area to exercise restraint in the manner in which they push green building. Our concern is not that the goals of green building are undesirable—to the contrary, they are important and deserve our attention. Instead, we believe that the inertia of the green building movement has resulted in its development beyond the technical considerations and expertise that should be retraining its

Having introduced some of the first articles and earlier presentations in the United States on the legal issues associated with “green” or “sustainable” building¹ affords a unique perspective on the current pervasiveness of the discourse about green building.² One of these early pieces suggested that green building would be a niche practice with an increase in the ambit of concern to the design professional, contractor, and legal professional. In retrospect, the article

growth. In a word, we are troubled that the green building movement has begun to believe its own press releases.

Once we discuss in very broad terms our concerns, we address three specific areas in which green building has important implications for construction law and, as a consequence, for construction lawyers.

Seeing Green Everywhere

Development and planning decisions at the highest levels, rapidly changing technical requirements, and tangled threads of legislative, regulatory, and code compliance for energy and sustainable attributes are all expanding the universe of green professional and business stakeholders. Like the coming of environmentalism and its exemplar, Earth Day, in the 1970s, green building is now de rigeur for all interested parties in the built environment. Many, if not all, of those involved in construction law recognize that the movement to valorize green options for the development, design, construction, and maintenance of building assets has become a rousing chorus in the last few years. A simple examination of the number of design, construction, public and private ownership entities, and even law firms touting their green credentials is proof enough. Whether these practices have been created to engage the arena critically or as new marketing initiatives riding the green wave or is often unclear. One thing is clear: This ocean of interest may be wide, but it is not deep.³ Particularly in terms of human behavior, economics, and scientific fact, the field lacks significant engagement with first principles and is often characterized by wishful—albeit well-intentioned—thinking.

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Why does this matter concern attorneys, and why should attorneys not simply follow the lead of other professionals in pushing green building? Aren't the technical challenges and promises best left to technical professionals? We do not believe so. In their traditional roles as policy advisors, contract drafters, risk and business counselors, and litigators, construction attorneys can face unusual challenges in this new green setting. Helping an owner make informed decisions about pursuing green developments or buildings becomes difficult when the level of knowledge needed to make a recommendation is hard to obtain or based primarily on green puffery. Buildings and their construction have become a new location for environmental attention based on the energy expended both in putting them up (or in some instances taking them down as well as putting them up) and in running and maintaining them.

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Add to this the attempts at social engineering that pervade the field as well as many parts of the U.S. Green Building Council's® ("USGBC®") Leadership in Energy and Environmental Design® ("LEED®") program, the nascent regulatory schemes for carbon footprints and accounting, and claims about sustainable development, and the complications begin to multiply for practicing attorneys.

It may be natural in this challenging economy for attorneys, design professionals, and real estate developers to bang the green drum in order to acquire new business, but this does not come without a significant price, or without risk. It can be said with some confidence that we are entering a new post-honeymoon phase, one that is not characterized by self-serving ideological validation or unquestioning acceptance of the USGBC, though of course, such views continue to hold a substantial audience. Instead, professionals, consultants, owners, and contractors are looking more closely at how to make the best of the opportunities that green development and construction present. But as stated earlier, this is the minority view, and in all likelihood, it will remain so for the foreseeable future, absent active support for questioning the currently received (albeit uncritically, in our perspective) view.

As Timur Kuran's book title puts it,⁴ there are many "private truths and public lies" in this arena. Many building owners and developers know that green is often nothing but marketing cover; technical professionals know that creating zero-energy skyscrapers is questionable at best and voodoo at worst; standards organizations know that creating more and more green standards written by self-interested and self-selected committee members is simply a way to sell product; and government officials know that votes and money can be garnered from green initiatives. If the market accepts all of these at face value, why not jump in?

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The due diligence often required of attorneys before providing counsel necessitates recognition of the limits of green claims, or at the very least, a warning to clients that caveat emptor is the order of the day. Certainly many construction attorneys are now aware, for example, that a project involving a green building rating product such as USGBC's LEED or the Green Globes® rating system product put out by the Green Building Initiative™ or the EPA's Energy Star® poses basic problems in defining substantial completion, and requires a mindset modification as to what constitutes a project's finish line. Final acquisition of these certifications may and often will occur long after the common definition of substantial completion in form contracts.⁵

General Concerns for Attorneys

The current climate for green buildings is characterized by three important elements, all of which generate issues for the attorneys involved in assessing the proper risk attributes of a transaction, claim, or litigation. First, the information stream regarding green building and development is, to some degree, polluted with ideological effluent and poor methodological and statistical information. Wading through this area is more like navigating debates about nuclear power, multiple

chemical sensitivities or the dangers of electric fields. Blithely taking any of the proffered "facts" without further questioning could lead to serious consequences in counseling a client or arguing a case. Moral crusaders rarely provide good information in the arena of green building, and attorneys would do well in studying literature related to green building to be mindful of Oliver Wendell Holmes's sage observation that "[c]ertitude is not the test of certainty."⁶

Second, it is important to keep in mind that buildings are technically and physically complex systems. This makes achievement of specific performance outcomes difficult without a great deal of control and accountability in design, construction and maintenance, a set of conditions that currently does not exist in most construction or retrofit projects. The often-exaggerated claims for obtaining green performance outcomes result from marketing or advocacy, not from an honest assessment of the economic, technical, engineering, and scientific realities. For example, many green building advocacy groups, the USGBC being the leader among these, continue to claim that green buildings increase worker productivity, decrease absenteeism, and generally improve occupant health, in addition to providing substantial energy consumption reductions.⁷ In a green school setting, these same groups claim decreased asthma and improved learning outcomes for the children.⁸ These often-questionable claims regarding green building benefits have proven successful both with untrained audiences such as legislators and school boards and with development-savvy professionals such as bankers, business owners and real estate developers. Success with the former is often based on their technical inability to look too closely at a proposition clothed in sentimental finery when using someone else's money; with the latter from a need to create marketing buzz at comparatively little cost.

Third, green building is now interconnected with many other environmental and policy concerns far outside the realm of any single legal area. TIF districts; leasing requirements; lending practices; environmental and planning concerns at the state, regional and local levels; performance contracting; SEC disclosures, pension fund preferential treatment of green buildings; and of course, green jobs are only one small set of nodes in a highly dense and interconnected network. Keeping up with the constant stream of green building news and activity having an impact on this area of the law is impossible for any one person. Instead of the limited specialty area envisioned in the early article of 2004, green building, ill-defined as it is, continues to grow by leaps and bounds.

Construction attorneys are placed in a difficult position as a result. The admittedly desirable goals of green building often dissuade attorneys from approaching these areas too critically, lest their concerns or criticisms be misread as suggesting they are environmentally unfriendly. This passivity is understandable, but it leads to two potential problems in managing risk. First, it gives a false sense of coherency to the task at hand because without a critical examination the issues are oversimplified. Second, this passivity allows the general public or even interested parties to imagine that a lack of negative response from legal and design professionals in the area constitutes tacit approval and validation with concomitant minimization—or ignorance—of risk. Since owners and developers often look first to these professionals for counsel regarding risk, a significant mismatch can take place. A false sense of security in the face of these issues can be detrimental to all the parties.

One of the primary reasons for confusion in the legal profession when dealing with green building results from a lack of critical engagement with the field and a passive role in the face of the rapid changes. Most of what is written or discussed tends to be limited to narrow legal

issues combined with a rather banal acceptance of whatever is proffered by recognized media or business entities. This often explains the lack of any deeper examination by attorneys of the claims being made for green building by the USGBC, AIA, or the many local, state and federal governmental entities. Combine this with the fact that many attorneys lack technical or scientific training and it is easy to see how the profession can find itself without a clear capacity to provide meaningful counsel except after the field has been adequately “legalized” via appellate cases.

At the same time, we should not be deaf to the sociological need in the legal profession itself to control the discourse around green as a way to maintain current positions of authority or create new loci of authority, all in the service of revenue acquisition. This too is easily understood; witness the barrage of new practice groups dealing with green building, carbon regulation, and corporate social responsibility. The legal profession is traditionally structured to take advantage of regulatory change as an active rent-seeker irrespective of the rational basis of regulatory enactments. Further, though the number of reported cases remains small⁹ and thus of less interest to active litigators, the fact that extensive legislative and regulatory changes are occurring means that these changes will eventually become part of the litigators’ realm as well.

To this point, we have made general observations that highlight our concern about the current direction of green building and the need for much more critical analysis of developments, not only at the technical, but also the legal, levels. We now turn to specific examples of new and unusual concerns that are not normally part of the current practice for the traditional transactional or litigating construction attorney. We examine here three areas within this new landscape: increases in the standard of care for design professionals; contractor issues and the problem of consequential damages; and finally, a detailed look at the legal implications of the new v.3 LEED requirements.

Increases in the Standard of Care for Design Professionals

No one could have envisioned that the coming of green to the design professional field would have brought changes so pervasive as to alter the standard of care of the whole profession. It was predictable that a significant minority of design professionals would actively pursue green building and that legal counsel for these design professionals would be compelled to understand and provide appropriate guidance related to green issues. But the current state of affairs seems to suggest that to provide the proper guidance, *all* lawyers counseling design professionals need to familiarize themselves with green issues at a much more detailed level.

Architects in current practice in almost any locality must now provide professional services that account for and deliver the green attributes of a building project and counsel the owner regarding the options.¹⁰ The landscape has changed so radically in the last five years that any licensed architect or engineer not capable of providing these services risks being seen as providing sub-standard services.¹¹ This is a trenchant example of a change in the standard of care resulting from an involuntary process that is not based on technological transformations.

The insurance implication for this involuntary increase in the standard of care has yet to be determined, but there is no question that it raises questions concerning the extent to which a design professional is providing professional services in connection with advising clients about green building. For example, one carrier’s policy articulates:

“Professional services” means those professional services specifically described in the Application that the “insured” is legally qualified to perform for others on behalf of the “named insured,” including but not limited to: [architect or engineer; landscape architect, land surveyor or planner, etc.] and in conjunction with the “insured’s” delivery of “professional services,” such “professional services” shall include “technical services” and services as a LEED Accredited Professional.”

This is an interesting start whose intent is clear, although “LEED Accredited Professional” is not defined or clarified. There are many different types of LEED AP[®]s especially since the USGBC has sought to put in a new regime of accreditation within the past year. In addition, if the standard of care for design professionals already includes activity for pursuing green, then the activity as a LEED AP should already be covered. Is the additional language then surplusage, or will a court try to make sense of this in some manner to prevent it from being mere surplusage? In essence, does being a LEED AP have a special status in this policy for the delivery of professional services? Although these questions are beyond the scope of this article, clearly they are on the minds of at least some carriers.

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On the other hand, the reticence of many other professional liability carriers to actively engage the coming of green design except as a marketing opportunity and the AIA’s desire to turn licensed professionals into green advocates may prove to be a real problem.¹² In essence, green design activity, including obtaining a certification via a green building rating product such as LEED or Green Globes will now fall within the purview of the “professional services” definition of the policy. Thus, failures to obtain a green building rating system outcome are arguably within the coverage afforded by all current professional liability policies. In addition, it may be argued that a design professional is negligent for *not* pursuing green design outcomes that may include minimizing energy consumption, maximizing indoor air quality to protect occupant health, or minimizing the carbon footprint of a project within the parameters provided by the owner’s program. Whether an owner specifically wants to be green or not, it is now the design professional’s duty to be as green as possible under the circumstances, though it is often hard to imagine how a design professional would know the scope of its duty in delivering green design absent direction from the owner.

Serious consideration must be given to adding affirmative provisions to contracts between owners and design professionals that exclude or precisely delineate the extent of any duties to design green as part of the professional services offered on a project. Green services should be on an explicit “opt-in” basis rather than a default “opt-out” basis.

Often enough, green options may be in direct economic conflict with the owner's interests.

At the same time that the increase in the breadth of an architect's practice within the general standard of care for the design professional has taken place, there continue to be licensed architects touting themselves and their firms as having special knowledge about green design and construction. Some of these self-professed claims are based on design professionals passing exams created and administered by a number of nongovernmental organizations with no oversight from the state or recognized standard-setting bodies. In fact, a recent conversation with a licensed architect and head of the sustainability practice for a well-known national environmental engineering company who identifies himself as an "expert" in green design acutely demonstrates this difficulty. When asked if he had looked closely at any of the studies he often cites to convince owners, legislators, and others to use the LEED rating system product, he replied, "No, I'm an architect, not a statistician. I don't need to know if the information is correct or not—if it is published, I can use it."¹³

Another well-known design firm responsible for the retrofit of a two-million-square-foot commercial building states on its website:

[The Architecture Firm] has been commissioned by the owners of [the Project] to design a retrofit/greening project that will use sustainable technologies and strategies to modernize [the Project] and make it more energy efficient. The project will reduce the base building electricity use by 80 percent (including energy savings and cogeneration), equivalent to 68 million kilowatt hours or 150,000 barrels of oil per year.¹⁴

It appears from this quote that achieving an 80-percent reduction can be assured and that detailed calculations have confirmed the outcome. No indication is given that the claims here are based on malleable computer models and technology too new to have any track record.

Many green design options are on shaky foundations or find themselves based upon unclear scientific or technical grounds.

For the transactional construction attorney, these representations voluntarily raise the standard of care and pose a new risk to manage or exploit. The attraction of green as a marketing strategy as well as the need to respond to competitor marketing is so strong that virtually all design firms now stress this on their websites and in their marketing materials. Especially when representing licensed architects, it is crucial for legal counsel to control this advocacy or marketing license to militate against mismatched expectations involving the owner or other parties. Though architects tend to be the most susceptible, other design professionals in this arena are also using green representations as a market differentiator. Even under the defensible position that the new standard of care includes the green activity of design professionals, counsel must be careful that voluntary representations for building performance or qualifications do not create a claim to a higher standard of care, which would be outside present insurance coverage.¹⁵

For the litigating attorney, this increased standard of care creates interesting new avenues of concern or exploitation. Prime among them will be the need to prove up this new standard of care either as a shield or a sword. This will result in a battle of the experts, but the more germane problem is how to tell who is an expert in this area. Given the state of the field and the common advocacy-based claims of expertise, litigators will have trouble sorting the advocates from the true experts. Many green design options are on shaky foundations or find themselves based upon unclear scientific or technical grounds.¹⁶

Increased Complexity for Contractors: *Southern Builders* and Consequential Damages

Although much of the focus on potential liability related to green construction has been on design professionals, it is also important for general contractors to understand the nuances of the green construction process and the differences between traditional construction and green construction. A historical view of the general contractor's attitude has often been something like, "We don't care if the thing is green, red, blue, etc. If you tell us what to build, we will build it." As one might expect, things are not always so simple.

Green construction can be more complex than traditional commercial construction because different techniques may be required by the contractor to install green products, or at the very least, the general contractor will have to be sufficiently well-versed to retain the most well-qualified subcontractor to install new green products. Plus, green obligations create another layer of variables on an already complex equation. Obviously, if the subcontractor fails, the general contractor will be exposed to liability. Building green may take longer and follow different paths from traditional construction, in part due to differing materials and techniques and the certification process, so the contractor has to be aware of potential delays and insulate itself from liability for such delays in his contracts. Also, as discussed below, delays in green construction may result in damages that are quite different from traditional "delay damages."

The contractor should be familiar with other administrative and documentation requirements, as well as potential regulatory and code requirements and incentives that could cause delays. Unexpected change orders, as well as on-site modifications, will require more circumspection by the project team because such changes conceivably could be inconsistent with certification goals or regulatory incentives, or with the integrated performance of as-built green building components and systems. The bottom line is that the contractor and its counsel should be fully educated about the risks of building green; otherwise, they may not be able to appropriately transfer responsibility or liability to the owner, architect, or engineer.

A case on point is *Southern Builders, Inc. v. Shaw Development*.¹⁷ Although this case has often been discussed, it is necessary to lay the factual and legal posture for us to discuss the unaddressed problem of consequential damages in the context of a green project.

Shaw Development purchased a piece of land in Somerset County, Maryland, and hired Southern Builders as its general contractor to construct a condominium project on the land. Southern Builders ultimately filed a \$54,000 lien claim against the project, a 23-unit condominium development with total construction costs approaching \$7,500,000. The developer's counterclaim alleged one count for a breach of contract and another count for negligence. Significantly, for present purposes, both counts aver damages from Southern Builders in the amount of \$635,000 for the contractor's failure to "construct an environmentally

sound 'Green Building,' in conformance with a 'Silver Certification Level according to the U.S. Green Building Council's Leadership in Energy and Environmental Design (LEED) Rating System,'" which resulted in forfeiting tax credits under a Maryland green building program (never actually identified in the pleading).¹⁸

There are a number of confusions present in this language regarding the LEED certification process, including that building a project in conformance to the LEED certification system assures an "environmentally sound" building. But much more importantly for this analysis, a certification and final affirmation of a rating level only comes after the physical completion of the building and is usually many months after the completion of the project. Thus, a breach of the contract cannot accrue prior to completion if the contract term at issue is to build a LEED Silver-certified project. At the outset, no one knows if the project will get LEED certified or not. The owner presented no facts suggesting that some deficiency in the construction resulted in the failure to obtain the certification.

In fact, it is very unlikely that any contractual obligation existed for Southern Builders to "construct an environmentally sound building" or obtain a LEED Silver certification. The contractual basis for Southern Builders' obligation does not appear to be in the AIA A101-1997 Standard Form of Agreement between Owner and Contractor sections appended to the countercomplaint.¹⁹ Instead the countercomplaint incorporates language from the Project Manual, which appears to include the specifications that form the nexus for breach of the contract.²⁰ That Project Manual provided, in pertinent part, as follows:

Project is designed to comply with a Silver Certification Level according to the U.S. Green Building Council's Leadership in Energy and Environmental Design (LEED) Rating System, as specified in Division I Section "LEED Requirements."²¹

Oddly enough, there is no documentation of the Division I Section "LEED Requirements," only this reference to such requirements. Most importantly, this provision, even if interpreted as a specification of some kind, does not say that Southern Builders must take responsibility for *constructing* or obtaining the LEED certification. All it says is that the "Project is *designed* to comply" with the desired rating level (emphasis added). Thus, one could argue that a project for which the contractor follows the drawings and specifications of the design prepared by the architect and provided to the contractor, with an assumed warranty of adequacy by the owner (via the *Spearin* doctrine) should result in the appropriate certification level. All the contractor has to do is what he always does—fulfill the terms of the contract as established in the drawings and specifications. If there is a failure of certification, it would be a result of the design, not of the construction. The negligence claims are similarly structured, except the averment is that a failure to construct the building to LEED Silver Level is an indication that Southern Builders fell below the standard of care ordinarily required of contractors.

This analysis provides us with three lessons. First, even basic pleadings and the subsequent substantive pursuit of claims can become highly confused or erroneous without a deeper understanding of the green building rating systems at issue, green building regulatory requirements, and the appropriate strategies of attack and defense resulting from this knowledge. As more and more regulations establish a mandate for green rating systems, the risks for both transactional and litigation activity become higher. This doesn't even account for a growing body of legislation or regulatory activity that lacks careful drafting or a proper policy foundation.²²

Second, the underlying contractual documents never addressed the risk issues associated with the tax credits dependent on the green building rating product involved. This omission is important not only in trying to assess liability for the purported failure of the structure as completed to achieve some green standard, but also in establishing the requisite foreseeability of loss of the tax credits as a compensable loss.

Third, the confusion surrounding the green building rating system seems to have distracted the owner from another more common attack based on the construction delays that caused the failure to obtain the tax credits in the first place.²³ This line of attack would have to deal with the issues of direct versus consequential damages. In this scenario, the AIA A101-1997 standard contract had a specific inclusion by reference of the AIA A201 General Conditions of Contract, which in turn had a mutual waiver of the consequential damages clause.²⁴ Some of the implications of the waiver of consequential damages are addressed below.

The confusion surrounding the green building rating system seems to have distracted the owner from another more common attack based on the construction delays.

Finally, it bears noting that a general contractor or a subcontractor will have a major role to play in the actual acquisition of a LEED certification unless specifically adumbrated in the contractual documents. Contractors must provide detailed documentation as well as obtain documentation from subcontractors; ensure proper green material supply; address fundamental site control issues; and often engage in collaborative activity to deliver the certification. This begs the question as to what level of specifications should be contractually required of the design professional on projects involving green rating systems. Left aside for the moment is the differentiation between a design specification, prescriptive specification, and a performance specification that can easily become confused when delivering a green project.

Although the *Southern Builders* case settled, the classification of damages could have become a major contention in this case. Many construction contracts contain a waiver or mutual waiver of consequential damages. The A201-1997 General Conditions of the Contract of Construction at issue contained such a provision:

The Contractor and Owner waive Claims against each other for consequential damages arising out of or relating to this Contract. This mutual waiver includes:

1. damages incurred by the Owner for rental expenses, for losses of use, income, profit, financing, business and reputation, and for loss of management and employee productivity or of the services of such persons; and
2. damages incurred by the Contractor for principal office expenses including the compensation of personnel stationed there, for losses of financing, business and reputation, and for loss of profit except anticipated profit arising directly from the Work.

This mutual waiver is applicable, without limitation, to all consequential damages due to either party's termination

in accordance with Article 14 [Termination or Suspension of The Contract]. Nothing contained in this Subparagraph 4.3.1.0 shall be deemed to preclude an award of liquidated damages, when applicable, in accordance with the requirements of the Contract Documents.²⁵

The inquiry into which damages qualify under this definition of consequential damages can be difficult and may seem imprecise because such damages are the outcome of events further down the causation chain than direct damages. According to black letter law, direct damages are those that are the natural and proximate result of the breach, whereas consequential damages are those that, in the ordinary sense of events, would naturally result from a breach and can reasonably be said to have been foreseen or contemplated by the parties at the time when they made the contract as a probable result of the breach.²⁶

For example, is the failure to obtain tax incentives offered by a state program a direct or consequential damage? In applying the direct versus consequential damages analysis to loss of tax incentives from failing to achieve LEED certification in the face of a waiver of consequential damages provision, a developer may argue that tax incentives were contemplated by the contract and known by the contractor at contract formation. Therefore, the failure to receive said incentives would be argued to be a *direct* result of the contractor's failure to meet the contracted LEED certification level and thus, a recoverable direct damage.

In opposition, a contractor may argue that the loss of such tax incentives constitutes consequential damages, thereby precluding recovery pursuant to contract language waiving recovery of same. Although this type of analysis is not unique to green construction, the types of damages that may arise as a result of green construction disputes may be unique, including tax credits, green grants, future development rights, or new categories of lost profits. As developers and contractors commence green building projects, unmet expectations may lead to new litigation that varies from traditional construction disputes. Those in the construction industry must plan ahead and protect themselves at contract formation by explicitly delineating each party's obligations, responsibilities, and liabilities in the green construction process. Additionally, construction players must perform due diligence in advance in order to understand the specific criteria of the green building incentive programs and directives that apply in their states, counties, and/or municipalities.

As developers and contractors commence green building projects, unmet expectations may lead to new litigation that varies from traditional construction disputes.

The *Southern Builders* case and the developing area of case law raise several types of risks that a contractor may unknowingly assume when entering into a contract to build a green building. First, the contractor should become fully educated about the unique risks on the project. Second, the contract documents must have sufficient risk-transfer mechanisms so that there is a clear understanding of liability on behalf of all parties. Great danger exists where standard form contracts are used without specific language or liability-shifting provisions that address

green building. To avoid unanticipated liability, the contractor should be hesitant to guarantee the delivery of a building that matches a certain level of certification.

A contractor should try to avoid guaranteeing the delivery of a certified building without fully understanding the implications of the contract into which it is entering with respect to green building liability. It is suggested that a contractor only agree to perform in accordance with the plans and specifications of the approved design of the building while using only the approved materials outlined therein. That way, if the contractor performs in accordance with owner-approved plans and specifications, the contractor should be shielded from liability if the plans and specifications fail to deliver a green building that meets the owner's anticipated certification or sustainability.²⁷

Moreover, a contractor should make sure that any liability incurred flows down to subcontractors. Lastly, a contractor should be aware of the potential damages being agreed to when entering into a green construction contract. Consequential damages may include, among other things, loss of funding, loss of revenues, loss of grant eligibility, rescission of tax credits, liquidated damages, breach of the lease by tenant, increased maintenance costs, and adverse marketing perception.²⁸

A contractor could also become a defendant in a construction defects suit coupled with a claim for negligence. Because a contractor has a duty to homeowners, the owner of a home or condominium with a construction defect related to green elements of the home or condominium may have a valid cause of action against all parties in the construction process, including contractors.²⁹ Such negligence lawsuits against contractors may stem from the use of improper materials or poor workmanship.³⁰ However, unlike typical construction defect claims that establish a certain standard of care to which a contractor is held, the standard of care with respect to green construction defects is vague due to the fact that green construction is in its initial stages.³¹ The standard of care with which a contractor must operate is currently undefined, and that ambiguity will remain until more performance data have been developed and more green construction cases have been litigated.³²

A contractor also must be wary of negligence *per se* claims if a particular method of construction or construction defect violated a federal, state, or local statute or ordinance.³³ A negligence *per se* claim is valid if (1) there is an apparent violation of a statute or ordinance; (2) the persons harmed by the negligence are the class of individuals that the statute is designed to protect; and (3) the injury suffered was the type that the statute aims to prevent.³⁴ Negligence *per se* claims may provide a *prima facie* claim for breach of contract as well. In the event that a contractor is liable for defective construction, the party seeking damages is generally entitled to the cost of repair or diminution in value of the building, whichever is less.³⁵

Obviously, project team members should only agree to assume risks that they can control. There are many aspects of green certification and entitlement processes that may be beyond the control of project team members. Because of this, the parties should contractually spell out the respective responsibilities to insulate themselves from potential liability. For example, from a general contractor's standpoint, it would be worthwhile to develop a policy that requires that party's contracts to clearly explain who is responsible for the green certification process and the defined role of the general contractor in that process as well as the specific duties and requirements of the general contractor.

The general contractor should have procedures in place to ensure that its performance during the project does not jeopardize the LEED cer-

tification process. Since compliance with the LEED certification process is documentation-intensive, it is especially critical that the design professional and the general contractor agree upon the pertinent documents required from the general contractor and when those documents should be provided.

These prophylactic considerations for the general contractor are reminiscent of the “mold protocols” that were developed by and for general contractors and home builders several years ago when the next wave of construction defect litigation was thought to be mold litigation. Many builders and contractors developed written procedures that would reduce or eliminate the risk of mold appearing during the construction process, or thereafter.

Other issues exist that could result in delays caused by the LEED certification process should be of concern to contractors. For example, flushing air from a new building, as well as additional commissioning, may be required for LEED certification points and can present problems where there is a specific completion date attached to liquidated damages for late completion. Further, as mentioned above, the parties should determine the entity that bears the risks of delays related to the acquisition of “green” products. General contractors have to contractually ensure, perhaps through broadly worded force majeure provisions, that they are not responsible for delays beyond their control.

Changing the mindset is a challenge, as it is tough to break old habits. Perhaps with the evolution of green construction, as well as design/build projects, clear communication and contractual definition of team members’ responsibilities and allocation of risks may become the norm rather than the exception.

Digging Down to the Next Level and Hitting LEED v3

For the better part of 10 years, the green building movement has been largely brought to the forefront by the efforts of the USGBC and its LEED rating system. Indeed, encountering the term “LEED” in this area is almost of equal ubiquity as encountering the phrase “green building” itself. Although those efforts of the USGBC are now bearing significant and growing fruits of widespread recognition, supported by an all-out, multifaceted, multidisciplinary, multiprofessional, marketing barrage, the law has found itself once again faced with having to deal with a new overlay of responsibilities and risks on which clients and consumers are looking to the legal profession for answers.

Reactions from industry professionals to these new risks and responsibilities have varied. Some have responded with inquisition and concern, evaluating the technical challenges presented by green building and then assessing whether current contracts and other documents adequately recognize, evaluate, and deal with green building issues. Others have reacted dismissively, believing that the identification of risks and liability associated with green building is either without foundation or somehow an incredible effort geared toward attacking the green building process itself. The tremendous marketing push behind the green building movement has been viewed by many others as a significant opportunity for their own professional development and, as such, have simply found it time to jump on the green bandwagon. However, what remains unclear is in what direction the wagon is pointed.

Fortunately, many professionals—including attorneys—are directing their efforts toward identifying the risks associated with green building, developing solutions to those risks and/or recognizing that the parties need to be fully aware of the process in order to be able to adequately allocate the responsibilities of performance and develop contractual mechanisms reasonably and responsibly supporting them.

Some of these efforts have already yielded results. For example, evaluation of contractual models in existence led to separate efforts by the AIA³⁷ and The Associated General Contractors of America,³⁸ among other industry organizations, to develop and support agreements that address their views of the issues: AIA Contract Documents and ConsensusDOCS, respectively. In the design-build arena, the Design Build Institute of America (“DBIA”) responded with the “Sustainable Project Goals Exhibit.”³⁹

The ConsensusDOCS effort has resulted in the 310 Green Building Addendum (“Green Building Addendum”), released in November 2009.⁴⁰ The Green Building Addendum is the construction industry’s first standard contract document designed specifically to address the risks and responsibilities associated with green building. The Green Building Addendum is not intended to be the end-all and be-all of green building risk and responsibility allocation, but rather a recognition that this process must include an open, effective, and collaborative dialogue among all members of the design and construction team in order for there to be a greater likelihood of a successful green/green-rated result. The Addendum provides a solid foundation for the contractual process that must accompany these allocation and collaborative concepts.

The Green Building Addendum focuses on the creation in name—if not in actuality—of a Green Building Facilitator. The Green Building Facilitator is the person charged with the responsibility of discussing with an owner the potential issues arising from the owner’s decision—whether informed or uninformed—to “go green.” Thereafter, the Green Building Facilitator’s role shifts to that of an administrator, coordinating the performance of services by the design, construction, and development team to make certain that all parties are aware of the other parties’ performance and the impact of that performance on the desired green result.

Although the Green Building Facilitator is given a great deal of responsibility by the ConsensusDOCS model, the Addendum addresses directly the risk associated with the desired green achievement and ultimate goal being sought by the owner of the green building project. If green ratings require the pursuit of green building optimization measures and if meeting a given green rating threshold is a condition to achieving certain performance incentives, such as tax credits, loans, grants, building variances, fee reductions, expedited permitting, building variances, etc., then the parties need to be aware that a failure to achieve the required rating will yield consequences.⁴¹ It is those consequences that must be addressed in detail in the green project’s contract documentation. Moreover, the Green Building Addendum suggests and recommends by reference that insurance and surety concepts be evaluated and addressed as well.

Other issues that exist that could result in delays caused by the LEED certification process should be of concern to contractors.

The AIA’s effort has been in a much different direction. Though AIA B214-2007⁴² does contemplate the services of a LEED Accredited Professional to assist in design and administration of the project, there is very little identified in the document in terms of consequences if there is failed performance. Still, it does represent a good starting point for a

dialogue between the parties to address what services can and should be requested if a LEED rating is being sought.

A more troubling encounter is presented by other documents in the AIA family of design and construction agreements requiring the design professional to advance a green and sustainable design model to the owner for consideration and to adopt green building elements into the design being performed.⁴³ To some, this may represent proper and responsible design practice. To others, it constitutes a modification of the designer's role—not as one to facilitate the owner's desires and to present methods to achieve that objective, but rather as the arbiter of what the owner should want as opposed to what the owner does want. Some have suggested that the reason for such a shift is the view by many architects that green building is a new form of architectural design, much the same as the Renaissance, Victorian, and Revival schools or forms of architecture. The problem with this view is that it separates design from the actual performance of the building. Confusing the design with the performance attributes of a building will often place owners in positions (and possibly future commitments) they never thought they would be making or encountering when the initial decision to "go green" was made.

Another set of concerns stems from the fact that many municipal ordinances have elected to utilize the LEED rating system as the trigger point for awarding a development incentive.⁴⁴ Examples are numerous,⁴⁵ where tax credits,⁴⁶ additional floor area allowances,⁴⁷ expedited permitting,⁴⁸ or other like incentives⁴⁹ are conditioned upon achievement of a LEED Silver, LEED Gold, or other specified LEED rating designation. Moreover, there has been a growing trend of mandating various levels of LEED certification for new construction and major renovation of public and private buildings.⁵⁰ In addition to municipal and state-level mandates/incentives, such practices have also been instituted on the federal level.⁵¹ What is troubling about these increasingly common practices is that the success or failure to achieve the government-offered incentive and/or mandate is now being placed into the hands of a nongovernmental agency with which most taxpayers have little familiarity and over which taxpayers have absolutely no control.

The tremendous marketing push behind the green building movement has been viewed by many others as a significant opportunity for their own professional development and, as such, have simply found it time to jump on the green bandwagon. However, what remains unclear is in what direction the wagon is pointed.

Putting aside whether such a delegation of responsibility is legally appropriate (clearly a topic wanting for its own detailed treatment), one is still left to wonder whether and why such a practice has become almost commonplace without much comment or concern. Perhaps it is because there is a perceived public benefit to be derived from achieving the green rating. One would certainly question whether universal acceptance would accompany the enforcement of DUI or speeding law checkpoints by a private organization (especially if the private organiza-

tion were responsible for establishing the standards in the first place). A further factor complicating this already perplexing dilemma is the evolution of the LEED rating process to its latest iteration, LEED 2009, also referred to as LEED v3.

Fresh on the heels of an article developed by and on behalf of USGBC, indicating that the legal risks associated with green buildings was little more than old wine in new bottles,⁵² the USGBC, in a dual capacity, launched the Green Building Certification Institute™ ("GBCI™") and LEED v3. It appeared this double-barreled approach was used to downplay any significant concern (some of which has already been voiced) over the release of revisions to the existing LEED rating system destined to have a much more significant impact on the green building industry than outwardly promoted. Indeed, the initiation of LEED v3 has been advocated by many, including the USGBC, as a step in a much-needed and beneficial direction, namely, to provide actual supportive performance data to back the heretofore claimed benefits of green building. The problem with this approach is that it comes loaded with much more disconcerting language about decertification in the event the criteria originally endorsed by the USGBC as a part of the rating system are somehow found later to be inaccurate or inadequate. Depending upon the provision reviewed, these ongoing decertification risks exist for a period of at least five years and possibly as many as 20 years, based on reporting criteria identified.⁵³

Further, there are elements of LEED v3, as interpreted by the GBCI LEED Certification Policy Manual, April 2009, that require owners to impose continuing monitoring and performance obligations not only on tenants, a hugely intractable proposition, but also on subsequent purchasers.⁵⁴ Consider now the following scenario: an owner/developer has created a green-rated facility that has obtained certification by the USGBC. The sale of the property by the original owner/developer is predicated in part on the value of that structure as well as the structure's ability to enjoy a healthy tax credit conditioned upon the achievement of a LEED Silver rating. Through circumstance or other reasons, the building's performance comes into question and the building faces decertification. Should the original developer be liable to the purchaser due to the fact that the building no longer enjoys the rating and accompanying tax credits?

Likewise, in the event that the rating loss is determined to be due to a design or construction error, and that error occurs beyond typical statutes of limitation and/or repose, is it now possible that the design and construction team may still be liable for performance of this building many years after more traditional liability and remedies would have expired? If that were not enough, consider also the whistleblowing features of the LEED v3 model. A review of the GBCI LEED Certification Policy Manual, April 2009 again provides even the casual reader with sobering warnings of extreme caution. The USGBC may act on any information reported to it in order to take action and decertify a given structure.⁵⁵ The GBCI LEED Certification Policy Manual, April 2009, again provides for no immediate opportunity for a building owner to be aware that the complaint has been made, at least not before the USGBC has already chosen to take action to consider decertification.

The USGBC then makes clear in this GBCI LEED Certification Policy Manual, April 2009, that the rules of evidence will not be enforced in any proceeding arising out of or relating to such a challenge.⁵⁶ Although this may prove a very tempting course of action to be taken by disgruntled former employees of the owner or a competitor, there is also a concern whether false allegations that performance standards are not being met will enjoy the same protections akin to a litigation privilege afforded to a defamatory statement made in a judicial proceeding. That is not much

consolation to an owner who has lost a LEED rating due to false information alleged over its building or that building's operation.

In the face of increasing concern about this new iteration of the LEED rating system, and the criticism that its new data collection feature could present numerous complications and conflicts, the USGBC put its marketing machinery back into motion. Reaching out through a media outlet, the senior vice president for the USGBC sought to quash any thought that this new version of LEED and the accompanying release of the GBCI LEED Certification Policy Manual, April 2009, by the GBCI presented anything of a "new" nature.⁵⁷ In the process, however, the USGBC perhaps inadvertently acknowledged that even pre-LEED v3 projects could be the target of decertification, or equally important, that the loss of credit points could result in a downgrading of the facility from one level of LEED to another (with the possibly consequent loss of tax credits or other rating-based incentives).⁵⁸

This organizational press release continued by referencing a "LEED 2009 MPR Supplemental Guidance" document released in November 2009, months after release of LEED v3 itself.⁵⁹ Without addressing the relative merits and shortcomings of this Guidance document in detail, certain items are immediately notable. First, while the USGBC has purportedly delegated rating enforcement responsibility to the GBCI, and the GBCI has issued the GBCI LEED Certification Policy Manual, April 2009, the USGBC is still exercising interpretive control by virtue of the Guidance document. Second, while the Guidance document does say that collection of this building energy and water usage data is "NOT" intended to penalize projects for nonperformance and "NOT" to "create insurmountable technical or legal barriers to registering a LEED project," the document does not prevent this information from being used to attack a building's rating status. Indeed, some 20 pages earlier, the document notes: "If it becomes known that a LEED project is or was in violation of an MPR, certification may be revoked, or the certification process may be halted. These situations will be handled on a case by case basis according to the GBCI's challenge policy."⁶⁰ Of course, we have now come full circle, being inserted procedurally back into the GBCI LEED Certification Policy Manual, April 2009, where "Formal rules of evidence shall not apply. Relevant evidence may be admitted." The GBCI LEED Certification Policy Manual, April 2009, also proffers:

It is the intent of GBCI to review ongoing project performance to assess project compliance with LEED Green Building Rating System requirements. Project owners authorize GBCI to access and review their project's Energy and Water Usage Data from the utility service provider and/or the whole-project metering facility where such meters are in place. This authorization shall be maintained for a period of twenty (20) years following the date the project achieves LEED certification.⁶¹

As such, despite the outward marketing package, scrutiny of the GBCI LEED Certification Policy Manual, April 2009; the Guidance document; and LEED v3 still yields many concerns regarding the stability of maintaining this rating, once and if it is ever achieved.

Suffice it to say that the challenges presented by LEED v3 and the decertification concepts will be complicated. Add to the mix that decertification can be initiated based on the whistleblower features of the GBCI LEED Certification Policy Manual, April 2009, makes the scenario even more intriguing in terms of its high potential for conflict.

That is not to say that the whistleblower features are going to be

the only and exclusive means by which challenges will be raised regarding these green buildings. Indeed, decertification challenges may loom on the horizon regardless of these procedures surrounding LEED v3. Recent pronouncements from the USGBC suggest some level of decertification as always been a possible specter for any LEED-rated project. Regardless of the procedure or events that result in a decrease in a green rating or complete decertification, are the statutes and other regulatory provisions equipped to address the consequences of a building thought to satisfy the required level of performance, but is found to no longer comply at some later date? Should the remedy be a complete return of funds to the public trust due to the now-deemed-inadequate nature of the building? Should there be no consequence from a subsequent decertification or derating? Should there be a pro-rata reduction of benefit? All of these

Should the original developer be liable to the purchaser due to the fact that the building no longer enjoys the rating and accompanying tax credits?

issues will ultimately be faced by the parties as well as by the courts.

Realizing the Opportunities of Green

Dismissive assertions that these innovations will not create uncertainty, conflict, and dispute are almost as troublesome as the very real risks presented by these latest developments. If there is to be a true effort to support design and construction of buildings that are ecosymbiotic and provide actual energy or water efficiency validated by proven performance and verifiable measurements, then action must be taken now that implements those steps and requirements for truly independent and objective verification before it becomes too late. The further uncertainty and potential conflict that exists with regard to green building performance measures responsive only to aspirational or social engineering goals may drive otherwise interested designers, contractors, and developers away from the green market without any reasonably predictable prospect or timetable for them to return.

Such an outcome would be truly unfortunate in light of the welcome advance that the owner and developer communities are now willing to use their substantial resources to promote the environmental and economic benefits of green building. If green building becomes just another layer of transaction costs that must be borne—in some instances inequitably—by the various parties for unverifiable or questionable gain, all that goodwill may be irretrievably squandered. The merits of green performance will undoubtedly be debated and assessed in the years to come, as they should be, given the complex and intertwined technical, legal, and even sociological elements presented. To aid that debate, objective and scientific effort must be put forth to assemble actual tractable information and data to assess. At the same time, the law must inform itself and acknowledge that there are unique risks associated with delivering these buildings and those risks must be addressed as must equilibration of the responsibilities for achievement of the desired green results. Increasing the clarity and certainty of the contractual matrix as well as asking these difficult questions will enhance the prospects for the continued growth of green buildings that truly perform, and will permit the debate to focus on the technical and societal elements of enhancing building performance.

Endnotes

1. Ujival K. Vyas, *Observing a Greener Landscape: Sustainable Design's Increasing Impact on the Construction Industry*, IADC Newsletter, December 2004; the only article that seems to be of similar vintage is Stephen Del Percio, *The Skyscraper, Green Design, & the LEED Green Building Rating System: The Creation of Uniform Sustainable Standards for the 21st Century or the Perpetuation of an Architectural Fiction?* 28 ENVIRONS ENVTL. L. & POL'Y J. 117, Fall 2004.

2. Although we will often use the term "green building" in what follows, it should be noted that this is for convenience only and that a fuller description and definition of the term is to be found in Ujival K. Vyas, *Green, Sustainable, or High Performance? Knowing the Difference and Managing the Risks*, CONSTRUCTION BRIEFINGS, No. 2008-09 (Thompson Reuters/West 2008). This article also provides a more detailed understanding of the differences in substance and form between the terms "green," "sustainable," and "high-performance" as noun epithets for "building."

3. *Id.* To some degree, much of this superficiality comes from the simple fact that a widely agreed-upon definition of green or sustainability does not exist. The lack of a definition of green buildings is no surprise since wrestling with or providing any type of definition can be to the detriment of players who reap benefits from just this lack of definition. In some important ways, the green industry is similar to the vitamin and supplement industry where actual pharmacological efficacy is not important. This similarity has disturbing implications for the current spate of legislation and governmental sympathy for promulgating green building.

4. TIMUR KURAN, PRIVATE TRUTHS AND PUBLIC LIES: THE SOCIAL CONSEQUENCES OF PREFERENCE FALSIFICATION (Harvard 1995).

5. The current delays in reviewing paperwork associated with the LEED process often exceed one year subsequent to substantial completion of the building. For a more general but very useful discussion of the limitations of third-party green building rating products, see the NATIONAL INSTITUTE OF BUILDING SCIENCES, REPORT ON BUILDING RATING AND CERTIFICATION IN THE U.S. BUILDING COMMUNITY, September 2009. Energy Star® requires at least one year of performance data for a commercial building once it is 95% occupied before it can be awarded an Energy Star® building label; see, http://www.energystar.gov/index.cfm?c=new_bldg_design.new_bldg_design_benefits. Also note that EPA has provided model language to be used in contracts between the owner/architect and the owner/contractor that has as part of the recommended specifications that "the Contractor shall adhere to products, methods, and quality levels specified in the construction documents. Any proposed substitutions must be submitted according to the procedures defined herein. *Substitutions that may alter the energy performance goals of the project will not be approved. No substitutions are permitted without approval of the design team [emphasis added].*" See Energy Star, "The Building Energy Performance Specification for Designing and Operating Buildings that Meet Energy Star® Criteria," at http://www.energystar.gov/index.cfm?c=new_bldg_design.new_bldg_design_benefits. Finally, it should be noted in passing that if a document or other rating system requirement is listed as part of a punch list, the relationship between substantial completion and final completion could become a hornet's nest with final payments and retainage hanging in the balance.

6. Oliver Wendell Holmes, *Natural Law*, in 2 THE COLLECTED WORKS OF OLIVER WENDELL HOLMES 446 (Sheldon M. Novick, ed., U. Chi. Press 1995).

7. GREG KATS, THE COSTS AND FINANCIAL BENEFITS OF GREEN

BUILDINGS: A REPORT TO CALIFORNIA'S SUSTAINABLE BUILDING TASK FORCE (Oct. 2003); CATHY TURNER & MARK FRANKEL, "ENERGY EFFICIENCY OF LEED FOR NEW CONSTRUCTION BUILDINGS (March 2008); John. H. Scofield, *A Re-Examination of the NBI LEED Building Energy Consumption Study*, PROCEEDINGS OF THE INTERNATIONAL ENERGY PROGRAM EVALUATION CONFERENCE 764 (2009), available at www.oberlinedu/physics/Scofield/pdf_files/Scofield%20IEPEC%20paper.pdf.

8. GREG KATS, CAPITAL E, GREENING AMERICA'S SCHOOLS: COSTS AND BENEFITS, 17 (October 2006), available at www.usgbc.org/Show-File.aspx?DocumentID=2908. But see also the devastating critique by a recognized authority on the construction of green buildings—Charles Kibert, *Uncertified Green Building Claims* (Apr. 22, 2007), <http://kibert.blogspot.com/> (last visited May 15, 2010)—for a detailed analysis of the claims made in the Kats report on schools.

9. See *So. Builders, Inc. v. Shaw Development LLC*, No. 19-C-07-11405, (Somerset Co. (Md.) Cir. Ct. filed, Feb. 7, 2007); *AHRI v. City of Albuquerque*, No. CIV-08-63, U.S. Dist. LEXIS 106706 (D.N.M. 2008); *Destiny USA Holdings, LLC v. Citigroup Global Markets Realty Corp.*, 889 N.Y.S.2d 793 (N.Y. App. Div., 4th Dep't 2009). See <http://www.greenrealestatelaw.com/category/green-building-litigation/> for more information on these cases.

10. See Frederick F. Butters, *Greening the Standard of Care: Evolving Legal Standards of Practice for the Architect in a Sustainable World*, 33:2 REAL ESTATE ISSUES 23 (Nov. 2008). It would be easy to say that the standard of care for any architect using the AIA B-101 2007, and any engineer using the AIA flow-through document for a contract between the architect and engineer has affirmatively been increased because of §§ 3.2.3 and 3.2.5.1 at least require them to consider and present to the owner green options. Given the number of projects on which this set of documents are used and combined with the AIA's own complete absorption of the green mantra (including requiring CLEs for all licensed architects related to "sustainability"), the simple fact is that all architects must now possess the requisite skill and knowledge to design and provide the owner guidance for producing a "green" or "sustainable" project. In fact, the AIA's Code of Ethics makes it plain that all licensed architects who are AIA members must advocate for "sustainability." The AGC and DBIA standard documents do not suffer from this infirmity since they account for the types of attributes via a separate "green" addendum.

11. At a recent presentation delivered in Florida to the Association of Licensed Architects, there were at least two local licensed practitioners who had never heard of LEED, even though they practice in a state that has legislation—HB 697—that requires all land developments to account for greenhouse gas emissions, and where many local municipalities have LEED or other green requirements for public buildings.

12. Professional liability providers need to address an even more basic question: Is it possible to provide insurance for "advocacy"? The AIA appears to think that advocacy for green design is something that all architects should do with owners (see Butters, *surpa* note 10). Recent additions to the AIA Standard Form documents seem to provide a contractual requirement for the architect to present "environmentally responsible design alternatives" and "shall consider" such alternatives in producing a design (AIA B-101 2007, §§ 3.2.3 and 3.2.5.1). The language in these provisions is confusing at best and incoherent at worst. Given this, deletion of the provisions is advisable.

13. The most ironic thing about this conversation is that this particular licensed architect often advocated to owner-clients green options that

did not make good economic or environmental sense. He felt strongly that his role was to advocate for green building, not provide professional services. Even so, the very well-known environmental engineering firm employed him to create a new source of revenue by providing LEED-related services.

14. The quote has been sanitized to protect the firm.

15. Argo Insurance Brokers in Pleasant Hill, California, recently created an endorsement that purports to cover the increased standard of care as well as failure to achieve LEED certification. See Susanne Sclafane, *Argo Brokerage Tackles Architect, Design Risks with Green Building Endorsement*, P&C NAT'L UNDERWRITER (Jan. 11, 2010), www.property-casualty.com/Issues/2010/January-11-2009/Pages/Argo-Brokerage-Tackles-Architect-Design-Risks-With-Green-Building-Endorsement.aspx?k=green. The oddity here is that the company has created an endorsement to service this tricky area and their commercial insurance specialist is under the fundamental confusion that a LEED AP "actually comes out and does the designation of the building." Nothing could be further from the truth. Argo here seems to be trading on an attempt to curry favor with the USGBC for business acquisition purposes without actually having an understanding of what they are covering. In a very difficult market and with the significant decrease in numbers of practicing licensed architects, it is understandable but fraught with difficulties.

16. JAMES E. WOODS, RICHARD SWEETSER, & DAVOR NOVOSEL, U.S. DEPT OF ENERGY, COOPERATIVE AGREEMENT DE-FC26-03G013072, NATIONAL CENTER FOR ENERGY MANAGEMENT AND BUILDING TECHNOLOGIES TASK 06-02: SCIENTIFIC OUTREACH PILOT PROJECT (July 2009); Dan J. Lemieux & Paul E. Totten, *The Importance of Building Envelope Commissioning for Sustainable Structures*, ASHRAE Buildings IX Conference 1 (2004); *Special Focus Issue: Understanding the Business of Green*, 33:3 Real Estate Issues (Ujjval K. Vyas & Susanne Cannon, eds., 2008); John Pezzey & Michael Toman, *Making Sense of "Sustainability," Resources for the Future*, Issue Brief 02-25, (Aug. 2002).

17. See Countercomplaint, *So. Builders, Inc. v. Shaw Development LLC*, No. 19-C-07-11405, (Somerset Co. (Md.) Cir. Ct. filed, Feb. 7, 2007).

18. *Id.* at ¶ 10, and with slight variations at ¶¶ 24, 25(b), 31(b).

19. A largely unmodified AIA 101-1997 form contract was used on that project. The fact that this approach was taken for a project that was valued at almost \$7 million dollars may indicate that little attention was paid to front-end risk management.

20. Countercomplaint, *supra* note 17, at Exhibit A, ¶ 8.1.4 of the AIA A101-1997.

21. *Id.* at Exhibit B, § 1.2(D)(2).

22. See Bryan M. Seifert, *Sustainable Buildings and the Surety*, 33:3 REAL ESTATE ISSUES 47 (2008).

23. For a more detailed exposition please see Stephen Del Percio, *Shaw Development v. Southern Builders: The Anatomy of America's First Green Building Litigation*, 68NYC (aug. 20, 2008) www.greenbuildingsnyc.com/2008/08/20/the-anatomy-of-americas-first-green-building-litigation/ (last visited Nov. 6, 2008).

24. Countercomplaint, *supra* note 17, at Exhibit A, ¶ 8.1.2 of AIA A101-1997.

25. See AIA Document A201-1997, General Conditions of the Contract for Construction, ¶ 4.3.10 (an identical version of this language is present in the AIA Document A201-2007 at ¶ 10.1.6).

26. *Hadley v. Baxendale*, 9 Exch. 341, 156 Eng. Rep. 145 (1854). It should be noted that the ConsensusDOCS 310 Green Building Addendum explicitly states that damages resulting from the pursuit of green

attributes are deemed consequential damages. See ConsensusDOCS 310 Green Building Addendum at § 8.2.

27. Here, we are assuming that the achievement of some green building standard is addressed through specific design or prescriptive specifications as opposed to performance or mixed specifications. When a contractor executes a contract that arguably contains performance specifications to achieve green building, the contractor's liability presents itself with the potential to be vastly greater.

28. Skellenger Bender, *Identifying Risks in Green Building Design*, PAC. NW. DESIGN PROF'L LEGAL UPDATE (Special Green Edition, Sept. 2008). Consequential damages are mutually waived in the form General Conditions contracts.

29. Jefferey D. Masters & John R. Musitano, Jr., *Managing Liability Risks in Green Construction*, 30 L.A. LAW. 17, 18 (Dec. 2007).

30. *Id.*

31. *Id.*

32. *Id.*

33. *Id.*

34. *Id.*

35. *Id.*

36. In fact, this is the approach being developed by task forces working on the ConsensusDOCS and trade and advocacy groups such as the Associated General Contractors of America.

37. AIA is the leading professional membership association for licensed architects, emerging professionals, and allied partners. Prepared by the AIA with the consensus of owners, contractors, attorneys, architects, engineers, and others, more than 100 forms and contracts comprise the AIA Contract Documents. These standard forms and contracts define the relationships and terms involved in design and construction projects. See www.aia.org.

38. ConsensusDOCS was created by the collective action of 22 construction associations, and provides for standard form contractual documents negotiated among and agreed to by consensus of the participating associations. Upon ConsensusDOCS' release in 2007, the Associated General Contractors of America (AGC) and Construction Owners Association of America (COAA) essentially folded their contract documents program into the consensus process. See www.consensusdocs.org.

39. As might be expected, this form document is intended to be used with other DBIA form contracts and for design-build delivery applications. This makes it difficult to use in alternative applications. In addition, it is singularly LEED-centric and in § 3.3 makes clear that the owner bears all responsibility for identifying the "Legal Requirements for the Project that relate to sustainable design." Both of these are odd choices because it is obvious that there are many options for fulfilling sustainable design apart from LEED certification and the owner is oftentimes not in the best position to know what the local jurisdictional requirements are for both sustainable design and/or construction.

40. The Green Building Addendum, which one of the authors, Mr. Gentilcore, participated in creating as the co-chair of the drafting team, was released by ConsensusDOCS on November 10, 2009. See AGC Environmental Observer, *AVAILABLE NOVEMBER 10, 2009—ConsensusDOCS 310 Green Building Addendum*, AGC ENVTL. OBSERVER (Oct. 28, 2009), <http://newsletters.agc.org/environment/2009/10/28/available-november-10-2009-consensusdocs-310-green-building-addendum/>.

41. As noted above, the Green Building Addendum specifically and broadly deems the damages stemming from a "failure to attain the Elected Green Status or intended benefits to the environment . . . as

consequential damages subject to any applicable waiver of consequential damages in a Governing Contract unless specifically excluded from such a waiver in the Governing Contract." See Green Building Addendum at § 8.2. This approach presents the parties with a clear line of demarcation that they can then address with greater specificity in their underlying contract documents.

42. AIA B214 (2007): Standard Form of Architect's Services: LEED® Certification (contains the scope of services to be provided by the Architect for the achievement of a given LEED certification rating).

43. In the Standard Form of Agreement Between Owner and Architect, labeled as the B101 (2007), the architect is required to discuss with the owner whether it is feasible to incorporate environmentally responsible/sustainable design and construction elements into the project.

44. Other green building rating systems commonly founded in regulations include the Green Building Initiative's Green Globes and the Environmental Protection Agency's Energy Star program. See Green Globes, www.greenglobes.com; Energy Star, www.energystar.gov.

45. "According to the USGBC, the LEED rating system has been incorporated into 'legislation, executive orders, resolutions, ordinances, policies, and initiatives. . . in 45 states, including 195 localities (131 cities, 36 counties, and 28 towns), 34 state governments (including the Commonwealth of Puerto Rico), 13 federal agencies or departments, 17 public school jurisdictions, and 39 institutions of higher education across the United States.'" See, *As The Green Building Industry Grows, So Will Green Building Claims*, CONSTR. BRIEFING (Oct. 2009)(citing U.S. Green Building Council, Government Resources, available at <http://www.usgbc.org/DisplayPage.aspx?CMSPageID=1779>).

46. For example, the County Council for Baltimore County, Maryland, adopted Bill #28-08 providing tax credits for new residential constructions that earn a minimum of LEED Silver certification. Projects attaining LEED Silver earn a 40% property tax credit, with 60% for LEED Gold, and 100% for LEED Platinum. See Bill No. 28-08 (Apr. 21, 2008), <http://resources.baltimorecountymd.gov/Documents/CountyCouncil/bills/b02808.pdf>. The Baltimore County Council also passed Bill #78-07, where LEED for New Construction earns a 50% property tax credit for Silver, 60% for Gold, and 80% for Platinum. LEED Core and Shell Silver receive 40%, Gold 50%, and Platinum 70%. LEED for Existing Buildings Silver earns a tax credit of 10%, with 25% for Gold, and 50% for Platinum. See Bill No.78-07 (Oct. 15, 2007), <http://resources.baltimorecountymd.gov/Documents/CountyCouncil/bills/b07807.pdf>.

47. The Pittsburgh City Council approved an amendment to the Pittsburgh Code entitled "Sustainable Development Bonuses," granting a density bonus of an additional 20% floor area ratio and an additional variance of 20% of the permitted height for all projects that earn LEED for New Construction or LEED for Core and Shell certification. See City of Pittsburgh Legislative File No. 2006-0540 (ver. 3), <http://legistar.city.pittsburgh.pa.us/detailreport/Reports/Temp/48200916593.pdf>.

48. The Chicago Department of Construction and Permits Green Permit Program offers expedited permitting for projects that incorporate innovative green building strategies, including LEED certification. Commercial projects are eligible to receive an expedited permit in less than 30 days if the project achieves LEED certification. See City of Chicago, Green Permit Program, http://egov.cityofchicago.org/webportal/COC-WebPortal/COC_EDITORIAL/GreenPermitBrochure.pdf.

49. The City of Tampa Sustainability Ordinance No. 2008-112 offers developers of commercial and multifamily residential buildings a 20-80% rebate on building permit fees depending on the level of LEED certifica-

tion that the building earns. See Ordinance No. 2008-11 (July 2, 2008), <http://docserver.tampagov.net/cache/00001/880/Ordinance%20No.%202008-111%20to%202008-118.pdf>. The Cincinnati City Council adopted Ordinance 446-2007, providing an automatic 100% real property tax exemption of the assessed property value for newly constructed or rehabilitated commercial or residential properties that earn a minimum rating of LEED Certified. Buildings that earn LEED Certified, Silver or Gold can receive a real property tax abatement up to \$500,000, with no limit for LEED Platinum buildings. See Ordinance No. 446-2007 (Dec. 12, 2008), http://city-egov.cincinnati-oh.gov/Webtop/ws/council/public/child/Blob/21605.pdf?rpp=-10&m=2&w=doc_no%3D%27200701240%27.

50. The Washington, D.C., Green Building Act of 2006 requires that all District public buildings meet certain LEED certification standards. The District currently supports private sector innovation by expediting LEED Gold-level projects through the permitting process. However, by 2012, all new private development projects will be required to meet certain levels of LEED certification. With this Act, the District became the first major U.S. city to require LEED certification for private projects. See Green Building Act of 2006, http://green.dc.gov/green/lib/green/pdfs/Green-Building_act06.pdf. More recently, the Illinois Green Buildings Act was put into effect in July 2009, requiring all new state-funded construction or major renovations to seek the highest level of LEED, Green Globes, or equivalent certification possible given budget limitation. See Public Act 096-0073 (July 24, 2009), <http://www.ilga.gov/legislation/publicacts/fulltext.asp?Name=096-0073>. In addition to the Act, the State Capital Development Board has instituted the "Green Building Guidelines for State Construction," which specifically mandates LEED New Construction certification or a more applicable standard from the LEED family, with no allowance for other standards. See Capital Development Board, Green Building Guidelines for State Construction (July 30, 2007), <http://www.cdb.state.il.us/forms/download/CDB%20Green%20Building%20Guidelines.pdf>.

51. For example, the U.S. General Services Administration (GSA) requires that a building be certified as LEED Silver at a minimum in order to be considered for GSA leasing/occupancy. See U.S. Gen. Servs. Admin., Sustainable Design Program, www.gsa.gov/sustainable/design. This may have to change somewhat as the Green Globes rating product for Commercial applications became the only official American National Standards Institute (ANSI) voluntary, consensus-based standard (the official name is *ANSI/GBI 01-2010: Green Building Assessment Protocol for Commercial Buildings*) in April 2010. As such, the GSA may have to allow Green Globes equal footing with the USGBC products as required by OMB circular A-119 as revised in 1998, see especially § 6(f), which says: "Your agency should also recognize that use of standards, if improperly conducted, can suppress free and fair competition; impede innovation and technical progress; exclude safer or less expensive products; or otherwise adversely affect trade, commerce, health, or safety." See Office of Mgmt. & Budget, Circular No. A-119 Revised (Feb. 10, 2008), www.whitehouse.gov/omb/rewrite/circulars/a119/a119.html (last visited May 15, 2010).

52. See U.S. Green Building Council, *Building Green: The Legal Risk in "Building Green": New Wine in Old Bottles?* www.urbangreencouncil.org/assets/documents/white-paper_legal-risk-in-building-green.pdf (last visited May 14, 2010).

53. See GBCI LEED CERTIFICATION POLICY MANUAL, (Apr. 2009), at "Distribution of Project Information" and "Whole Building Project Monitoring Guide." www.gbci.org/main-nav/building-certification/resources.aspx.

(last visited May 14, 2010). While the authors acknowledge the laborious long form references to this document, the reference is necessitated by possibly conflicting material on the GBCI website. There is a second GBCI LEED Certification Policy Manual on the GBCI website that appears to be specific for the LEED Neighborhood Development (LEED-ND) product, and which also appears to have conflicting information. This Policy Manual likewise is dated April 2009. In the latter manual, there is a general section before the program-specific information that only requires data to be provided for five years (see § 2 and § 17.2). See GBCI LEED CERTIFICATION POLICY MANUAL (Apr. 2009), www.gbci.org/files/ND_LEED_Certification_Policy_Manual.pdf [hereinafter 2009 LEED POLICY MANUAL]. There are further inconsistencies in confidentiality and aggregation of data protocols that are beyond the scope of this article. It still bears notation that the GBCI LEED Certification Policy Manual (Apr. 2009) discussed herein in greater detail is accessed via the GBCI website link that is followed by this language: "This document contains GBCI policies for LEED certification. This document does not apply to LEED for Neighborhood Development or LEED Italia; for LEED ND, please see the LEED ND Policy Manual." Following the link to the other manual, this statement appears: "This document contains GBCI policies for LEED ND certification." See GBCI, Resources, <http://www.gbci.org/main-nav/building-certification/resources.aspx>. However, this latter referenced manual does not so clearly state its applicability than the comments accompanying the links themselves. Given GBCI's published right to change these provisions without notice and at

the organization's own discretion, the uncertainties associated with decertification and appeals related to failure of certification or rating level will remain acute. Only one decertification has gone through the system to our knowledge. Interestingly, this involved a pre-LEED v3 project. See Stephen Del Perico, *Breaking: USGBC Upholds LEED Gold Certification of Northern Pines High School*, GREEN Real Estate L.J., Apr. 29, 2010, www.greenrealestatelaw.com/2010/04/usgbc-upholds-leed-gold-certification-of-northland-pines-high-school/.

54. 2009 LEED POLICY MANUAL, *supra* note 53.

55. *Id.* at "Certification Challenge Policy" (last visited May 14, 2010).

56. *Id.*

57. See *USGBC Says No Such Thing as "LEED Decertification," MULTI-FAMILY EXECUTIVE*, Feb. 18, 2010.

58. *Id.*

59. See U.S. GREEN BUILDING COUNCIL, LEED 2009 MPR SUPPLEMENTAL GUIDANCE, VERSION 1.0 (Nov. 2009)

60. *Id.*

61. The technical and legal niceties necessary to make this obligation functional do not seem to have been considered. What happens if the number or type of occupants must be changed for economic feasibility? Just the simple problem of making sure all subsequent purchasers and tenants are required to fulfill this additional encumbrance on the property gives serious pause. Owners, and their counsel, should also note that the two "versions" of policy manuals issued by the GBCI appear to contain