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Abstract

The green building market continues to grow, but so do the corresponding legal risks which are only now being explored by scholars and practitioners. Lurking in the shadows behind any green building risk management strategy is how consequential damages - damages which may flow from a party's breach of a design, construction, or consulting contract - should be allocated among project stakeholders. This allocation is particularly critical on green building projects, whose unique and novel nature can create an increased potential for consequential damages. For example, green building tax credits, premium rents, and even energy savings might fall within the definition of consequential damages, creating disproportionately large liability for parties that fail to protect themselves by contract.

However, guidance from the courts on exactly what might constitute green building-related consequential damages is likely years away. Only one lawsuit to date provides any relevant insight, but its applicability is broad, particularly given the pace of green building regulatory activity that continues to take place at the state and local levels. After tracing the history of consequential damages and reviewing their potential sources on green building projects, this Article reviews how major industry organizations have treated the topic in form green building contract exhibits, and suggests general risk management strategies for different green building project stakeholders who allocate the risk of consequential damages in their contracts.
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I. Introduction

In the real property development arena, one of the major changes in project focus is sustainability. To this end, many owners now tend to opt for greener building designs and corresponding construction processes.\(^1\) In fact, a recent study for the United States Green Building Council (USGBC) attributed $173 billion of GDP and 2.4 million jobs to green-related construction during the years 2000 to 2008.\(^2\) This study also projected that from 2009 to 2013, green construction will dramatically increase to $554 billion in GDP and bear responsibility for 7.9 million jobs.\(^3\) With this recent philosophical change in approach to the development of real property, new issues and risks are emerging for all those involved that require the attention of legal counsel for those represented parties.

Regardless of project type, some of the most critical construction contract provisions emanate out of the parties choices in allocating the risk of consequential damages. Frequently, these damages are not the direct byproduct of one party’s breach, but rather those that “flow” from the breach. Claims for consequential damages have the potential to dwarf the total amount of the contract. For example, consider the lost rental premium profits that the developer of a large commercial office building might claim in

\(^1\) Booz Allen Hamilton, *Green Jobs Study*, UNITED STATES GREEN BUILDING COUNCIL, 2009.
\(^2\) Id. at 5.
\(^3\) Id. at 5.
the event that the project failed to reach the anticipated level of third-party environmental certification on which both the developer and its lender were relying upon.

As indicated by the USGBC study, numerous green building projects were constructed during the past decade, and many more will occur in the future. However, during this time period, only one lawsuit pertaining to a project’s green building qualities has been reported.

In Shaw Development v. Southern Builders, the use of a form document with a mutual waiver of consequential damages barred the owner from pursuing its lost tax credits under a breach of contract theory. Despite the circumstances relating to the claim in Shaw providing a unique set of facts, the case’s applicability appears broad given the pace of green building activity that continues to take place across the nation.

Accordingly, firm guidance from the courts with respect to the types and scope of green building related damages that might be deemed consequential is likely forthcoming at some point in the future. However, those stakeholders involved in green building projects now must carefully consider the types of limitation of liability provisions included in their contracts at the present time rather than waiting for a judicial opinion at a later date.

4 No. 19-C-07-011405 (Somerset Cty. Cir. Ct. Md. 2007)
With the foregoing in mind, this Article examines the role of consequential damage and limitation of liability provisions as applied to green building contracts. Part II begins with a historical background to consequential damages from both a common law and Uniform Commercial Code approach and then considers its applicability to various stakeholders like owners, design professionals, and contractors. Part III examines several of the common design and construction document forms currently employed by most project teams as well as a green building guarantee that functionally operates as a limitation of liability provision. Finally, Part IV concludes by providing recommendations to each kind of construction project stakeholder in navigating these types of provisions in connection with green building projects.

II. Consequential Damages

When contemplating a construction contract for a green building where parties wish to minimize the risk of future litigation, the parties should first consider that construction claims will generally be asserted under either a tort or contract theory. Green building related causes of action may accrue due to a raised expectation level for a particular project, but may also arise due to the lack of a national standard with regard to performance or certification, failure to achieve a specific goal, or some other difference in the

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\(^6\) Id.
understanding between the parties with respect to the unique aspects associated with green buildings.\(^7\)

Depending on the theory pursued at that later date, consequential damages may become applicable under common law or the Uniform Commercial Code (UCC).\(^8\) Customarily, a breach of contract assertion after construction is completed will include a substantial performance claim that allows the prevailing party to collect damages predicated on the cost required to make the building conform to the original terms of the breached agreement.\(^9\) In spite of this approach, when considering the added complexities of a green building, consequential damages under common law could be available because the project may fail to qualify for a financial incentive or lose an alleged rental premium or underlying asset value based on the structure’s added value to tenants.\(^10\) Because of the green building arena’s novelty, courts have yet to set a direction for these types of claims as to whether the damages should be considered direct or consequential.\(^11\)

Similarly, the UCC may become applicable when a party decides to pursue a strict or products liability claim.\(^12\) Traditionally, courts have held

\(^7\) Id.

\(^8\) Id.

\(^9\) Id.

\(^10\) See Prum and Del Percio, supra note 5.

\(^11\) Id.

\(^12\) Id.
short of imposing liability on a contractor after work and project completion. However, liability now attaches when a contractor performs negligent work or does not disclose a known dangerous condition. Moreover, the courts now treat projects where the land being developed eventually changes title to someone else other than the owner as a good. In these situations, a court’s analysis will be fact-specific, and it may allow plaintiffs to pursue warranty theories as allowed under the UCC. From a green building perspective, this approach could manifest into a claim using the UCC through mass-produced and marketed homes, commercially franchised stores, or unproven technology rushed to market. In addition, if products used in the construction of the building fail, a plaintiff may turn to the installer or manufacturer itself under a UCC theory to obtain damages.

Because green building construction contracts sit squarely at the intersection of the common law and the Uniform Commercial Code, this Article considers damages from both perspectives.

a. Common Law Background


\[14\] Id. The negligent work and nondisclosure also apply to the design or construction and those professionals like architects and engineers who provide supervisory services. Id. This does not apply to those situations where contractors carefully execute plans to the specifications based on the provided directions. Id.

\[15\] Id.

\[16\] Id.

\[17\] See Prum and Del Percio, supra note 5.
Before 1854, the decision to award damages became a question for the jury to answer, which meant very few precedents and broad discretion for triers of fact.\footnote{See Calamari and Perillo, supra note 9 at § 14.5.} However, once England’s commercial economy began to boom, the decision in the case of Hadley v. Baxendale changed this previously inconsistent approach; and it subsequently received widespread approval by common law jurisdictions.\footnote{Id.}

In Hadley, the court articulated two main rules.\footnote{Hadley v. Baxendale, 9 Exch. 341 (1854).} First, an injured party may recoup those damages “as may fairly and reasonably be considered either arising naturally, i.e., according to the usual course of things, from such breach of contract itself.”\footnote{Id. These are also more commonly known as general damages.} Second, an injured party may recapture damages “such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it.”\footnote{Id.}

Accordingly, these rules reduced business risk by restricting the amount juries could award for breach of contract and created systems for victims of contract breaches to recapture damages that were distinct to their special situation.\footnote{James J. White, Robert S. Summers, Uniform Commercial Code § 10-4(c) (5th Ed. 2000).} However, the courts in both England and the United...
States have since wrestled with these rules to determine appropriate boundaries between consequential and direct damages.\(^{24}\)

In trying to resolve these issues, two approaches emerged as solutions. In 1903, the United States Supreme Court set forth the “tacit-agreement” test.\(^{25}\) Using this more limiting assessment, plaintiffs are limited to consequential damages that evolve from unique instances where “the defendant fairly may be supposed to have assumed consciously, or to have warranted the plaintiff reasonably to suppose that is assumed, [such liability] when the contract was made.”\(^{26}\) Thus, as several commentators have explained, this approach requires a plaintiff to prove that the parties explicitly considered the foreseeability of consequential damages and that the defendant agreed to take on the risk.\(^{27}\)

In contrast, several modern legal scholars point out that the courts began moving away from this narrow approach.\(^{28}\) In fact, as Professor Corbin has explained:

> “[a]ll that is necessary, in order to charge the defendant with a particular loss, is that it is one that ordinarily follows the breach of such a contract in the usual course of events, or that reasonable men in the position of the parties would have foreseen as a probable result of breach.”\(^{29}\)

\(^{24}\) Id.


\(^{26}\) Id. at 544.

\(^{27}\) See Calamari and Perillo, supra note 9; White and Summers, supra note 23.


\(^{29}\) 5 A. Corbin, Contracts § 1010 at 79 (1964).
More succinctly, in order to be recoverable, consequential damages cannot be too speculative or too tenuously related to the original contract breach; otherwise a court will consider them as an unforeseeable possibility and deny their recovery.  

Thus, a party to a green building contract trying to avoid a common law consequential damages claim must keep in mind that any specific causes of action must overcome the modern standard requiring that a reasonable person would have foreseen such an injury. However, given the explosion in studies and reports touting the benefits – financial and otherwise – of green buildings – it would be difficult to argue that consequential damages were not foreseeable by the parties at the time they executed the contract.

b. Applicability to the UCC

If a plaintiff pursues a claim under the UCC, the owner has recourse to the full spectrum of remedies available under the Code, including the right to sue for incidental and consequential damages. A good starting point

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30 See Farnsworth on Contracts § 880 (2d Ed. 1990).

31 U.C.C. § 2-711 (1990). For plaintiffs pursuing this theory in green building litigation, the remedies include the right to cover and sue for damages, to recover damages for non-delivery, and specific performance when applicable.

32 U.C.C. § 2-713 (1990). Section 2-715 defines incidental and consequential damages vesting with the buyer:

Buyer's Incidental and Consequential Damages.

(1) Incidental damages resulting from the seller's breach include expenses reasonably incurred in inspection, receipt, transportation and care and
begins with Section 2-714 where general or direct damages ensue “in the ordinary course” from the seller’s breach and those applicable “incidental and consequential damages under the next section.”

Under the next Section 2-715, the drafters of the UCC expressly rejected the Supreme Court’s “tacit agreement” test in favor of an assessment of the “reasonable foreseeability of probable consequences” where the damages are not too speculative and could not be prevented. In short, this approach now makes the seller responsible if he had the ability to comprehend a buyer’s broad or specific goals when consummating the agreement. In fact, a seller may now incur liability for consequential custody of goods rightfully rejected, any commercially reasonable charges, expenses or commissions in connection with effecting cover and any other reasonable expense incident to the delay or other breach.

(2) Consequential damages resulting from the seller’s breach include:

- any loss resulting from general or particular requirements and needs of which the seller at the time of contracting had reason to know and which could not reasonably be prevented by cover or otherwise; and
- injury to person or property proximately resulting from any breach of warranty.


35 Gerwin v. Southeastern Cal. Ass’n of Seventh Day Adventists, 92 Cal.Rptr. 111 (4th Dist. 1971). This liberal approach appears universal as one commentator pointed out that: “Even Pennsylvania, which had long adhered to the restrictive test despite adoption of the Code, changed its judicial mind and buried the tacit agreement test.”

See White and Summers, supra note 18 at §10-4(c).
37 U.C.C. § 2-715, Comment 3 (1990). In fact, one treatise explains that: “The Code therefore rejects the oft-suggested rationale that the rule of Hadley v. Baxendale protects the seller against insuring risks for which, had the seller
damages regardless of whether the seller affirmatively understood the risk of loss. Furthermore, the buyer must also show a degree of certainty in the consequential damages and that they are not too speculative in nature.\(^{38}\)

As a result, depending on the situation, the courts will determine whether the loss should qualify as consequential or direct damages. Among the most common types of cases where courts approve consequential damages include situations where an aggrieved party pursues lost profits, where a liability to third parties occurs due to the use or resale of a seller’s product, or where an appropriate causal connection exists.\(^{39}\) However, courts

been aware of them, the seller would have demanded a greater compensation.\(^{38}\) U.C.C. § 2-715, Comment 4 (1990). Comment 4 states:

The burden of proving the extent of loss incurred by way of consequential damage is on the buyer, but the section on liberal administration of remedies rejects any doctrine of certainty which requires almost mathematical precision in the proof of loss. Loss may be determined in any manner which is reasonable under the circumstances.


\(^{39}\) See WHITE AND SUMMERS, supra note 23 at §10-4(d). In determining a case on lost profits clearing up the interpretation of the Arkansas Code, the United States Court of Appeals for the Eighth Circuit explained:

"Where a seller provides goods to a manufacturing enterprise with knowledge that they are to be used in the manufacturing process, it is reasonable to assume that he should know the defective goods will cause a disruption of production, and loss of profits is a natural consequence of such disruption. Hence, loss of profits should be recoverable under those circumstances."

Lewis v. Mobil Oil Corp., 438 F.2d 500 (8th Cir. 1971).

As for damages arising out of liability to third parties due to the use or resale of a seller’s product, one commentator points out that sometimes this theory is limited to the payments made to a third party under a legal obligation; while other times, a court will accept custom or trade usage in a given
do not deem certain categories of damages to a buyer as consequential; each unique set of facts provides a distinct basis for the trier of fact to determine the scope and nature of the damages.\textsuperscript{40}

Likewise, courts will evaluate the loss for certainty and speculation, especially where lost profits are at issue.\textsuperscript{41} In these situations, the “new business rule” will bar recovery when a buyer cannot provide evidence of prior financial gains of the operation or that of similarly situated businesses in the area.\textsuperscript{42} Some courts strictly follow the “new business rule,” and other jurisdictions have carved out exceptions to the general rule.\textsuperscript{43}

Finally, the UCC only allows recovery for losses “which could not reasonably be prevented by cover or otherwise.”\textsuperscript{44} In considering this language, one commentator suggests taking into account Section 350 of the industry because nonconformance will effective cause their operation to close. See White and summers, supra note 23 at §10-4(d).

Finally, in a causal connection case, the courts allowed recovery for a different piece of glass that did not correspond with the new panels in their reflectivity and color tint as well as the cost to replace the initially defective exterior glass. \textit{R.W. Murray Co. v. Shatterproof Glass Corp.}, 758 F.2d 266 (8th Cir. 1985).

\textsuperscript{40} Id. The commentators note that as “Judge Cardozo once observed, the distinction between direct and consequential damages is not absolute but relative to circumstances, including the scope of the promise itself.” (Id.)

\textsuperscript{41} See White and Summers, supra note 23 at §10-4(e).

\textsuperscript{42} Id.

\textsuperscript{43} Compare Gerwin v. Southeastern Cal. Ass’n of Seventh Day Adventists, 92 Cal.Rptr. 111 (4th Dist. 1971) (The buyer could not recover future profits on a brand new business because future profits could not be calculated with reasonable certainty,) with \textit{In re Merritt Logan, Inc.}, 901 F.2d 349 (3d Cir. 1990) (A grocery that did not turn a profit for its first year and a half of existence could pursue a claim for lost profits despite being a relatively new business.).

\textsuperscript{44} U.C.C. § 2-715(2)(a) (1990).
Restatement (Second) of Contracts’ formulation where the aggrieved party must make a reasonable, yet unsuccessful, effort to avoid the loss that could not have been avoided without “undue risk, burden, or humiliation.”⁴⁵ In this context, and with a representative case from the construction industry, the Court of Appeals for the District of Columbia allowed recovery of consequential damages in a situation where initial tests regarding the strength of recently poured concrete showed nonconformance but could not conclusively be determined until after the concrete had cured in 28 days.⁴⁶ The court explained that, despite the buyer’s use of the product, it had not neglected its duties to prevent a loss to the seller.⁴⁷

Consequently, when contemplating a green building contract, the parties to the agreement must additionally consider the UCC’s unique requirements where a damage, like those arising from a delay, may be

⁴⁵ See White and Summers, supra note 23 at §10-4(f). The pertinent parts of section 350 state:

Avoidability: Avoidability as a Limitation on Damages

(1) Except as stated in Subsection (2), damages are not recoverable for loss that the injured party could have avoided without undue risk, burden or humiliation.

(2) The injured party is not precluded from recovery by the rule stated in Subsection (1) to the extent that he has made reasonable but unsuccessful efforts to avoid loss.


The commentators further propose that those wishing to “breathe more life” into this section of the UCC should delve into the supporting comments, examples and cases with this section. (See White and Summers, supra note 23 at §10-4(f.).)

⁴⁷ Id. at 1203.
determined based on the language surrounding it, the certainty of the loss, and any necessary or possible actions to mitigate the other party’s loss.

c. Green Building Applications

When considering these rules in the context of green buildings, all parties involved must fully comprehend their rights and remedies with respect to consequential damages. Each stakeholder will come with different desires and needs in order to limit their current and future liabilities beyond those normally associated with a construction project.

i. Owner’s Perspective

From an owner’s perspective, consenting to a waiver of consequential damages may be extremely problematic. The owner generally stands to lose the most by agreeing to waive its ability to pursue consequential damages from members of its design or construction team.

Generally, an owner’s main concern revolves around completion of the project within budgeted limitations and in a timely fashion. Nonetheless, many owners choose to pursue a green building for a variety of reasons including the fact that they wish to capitalize on higher rents and asset value

48 JUSTIN SWEET, MARC M. SCHNEIER, LEGAL ASPECTS OF ARCHITECTURE, ENGINEERING AND THE CONSTRUCTION PROCESS §27.06(A) (8th Ed. Thomson 2009).
49 Id. at §27.06(B).
that are perceived to derive from third-party green building certification, as well as financial incentives dangled in front of them by state and local governments. If the party responsible for attaining third-party certification fails to accomplish the goal as required by contract, the damages that flow from that breach may be deemed consequential. Accordingly, the owner, or even its construction lender, may refuse to give up their rights to pursue those damages by contract. However, given the current construction climate, and in contrast to the recent real estate boom, owners are enjoying a desperate market of construction service providers who may be more inclined to accept the owners’ terms rather than risk losing out on increasingly scarce work.

Thus, the consequential damages provision may become a battleground for negotiations between the parties and their attorneys. Nevertheless, during the course of negotiations, owners must consider how likely it is that the risks contemplated by a consequential damages provision will occur in order to hedge against the possibility that their design or construction service provider will simply walk away from the project given the potential for catastrophic consequential damages to be assessed against it.

50 See Prum and Del Percio, supra note 5. In the United States, the main third party green building certification systems are the United States Green Building Council’s Leadership in Energy and Environmental Design (LEED) and the Green Building Initiative’s Green Globes.
52 See Prum and Del Percio, supra note 5.
ii. Design Professional’s Perspective

Frequently, design professionals will agree to allow the owner to pursue consequential damages in the event of a breach of their agreement for professional design services, but only to the extent of their fee or to the extent that those damages would be covered by the available limits of the designer’s professional liability insurance policy. This means it is critical for owners to review the terms of their design agreements with their insurers to confirm that coverage will continue in place in the event of claims arising out of a given green building project.

In other cases where the designer renders third-party green building certification and consulting services independent from professional design services, it still remains unclear as to whether insurance coverage exists for claims where a project failed to achieve the required level of third-party certification, or even for any pendent claims.\(^{53}\)

Hence, negotiations over the specific parameters of a consequential damages provision will ultimately be a business decision for both sides to consider.

iii. Contractor’s Perspective

\(^{53}\) See infra Section III.e.
Usually, a contractor will assert a consequential damages claim against an owner on the basis that it lost a business opportunity or its goodwill has diminished in value.\(^\text{54}\) When lost profits become the issue, the contractor generally maintains that the owner’s conduct reduced or altered its bonding capacity.\(^\text{55}\) However, the courts do not provide straightforward guidance in these instances.\(^\text{56}\) A majority of cases hold the claims as too speculative in nature except for situations where the contractor plainly shows a track record of earning consistent profits.\(^\text{57}\)

On the other hand, and as noted above, contractors may be forced to run the risk that delivering a late project will result in some sort of consequential damage claim asserted by the owner. One area which has yet to be fully explored by stakeholders is tying, for example, failure to earn LEED certification to some sort of liquidated damages provision in order to address the unique risks associated with green construction projects. As discussed in more detail below, the Design-Build Institute of America has created a form contract document that attempts to establish the parameters of a liquidated damages regime. However, contractors and their attorneys should insist that the owner receive only one bite at the apple; in other words, the contractor should not be responsible for both liquidated and consequential damages. The liquidated sum, however established, should fully compensate the owner for

\(^{54}\) See Sweet and Schneier, *supra* note 48 at §27.06(C).

\(^{55}\) Id.

\(^{56}\) Id.

the project’s green building failures, and the contractor should not be exposed
to any damages beyond those as identified in the liquidated damages
provision.

Thus, in considering how to negotiate a consequential damages clause
into the context of the green building industry, the various parties will easily
take opposite positions to inclusion and waiver; but some middle ground
solutions exist that allow each stakeholder to remain protected as long as all
participants remain reasonable.

III. Construction Contracts

Usually before the various stakeholders get involved in a green building
project, some type of agreement occurs between each party. While
sometimes these agreements do not get formalized, the majority of the time
the parties complete or draft a written contract followed by an action to
execute it; so their relationship becomes memorialized. Quite often the
starting point begins with a national form contract; while other times, the
parties draft a custom document for a particular project. With these
approaches in mind, each party to a green building contract needs to
understand the starting perspective for the drafter in tackling a consequential

58 See Prum and Del Percio, supra note 5.
59 Id. at 266.
60 Id.
damages clause, as well as how the general strategy towards this issue protects the interests of a given stakeholder.\(^{61}\)

- **American Institute of Architects’ Forms**

As would be expected from a set of contracts that emanate from design professionals, the American Institute of Architects’ (AIA) form construction documents are drafted with provisions that are generally favorable to the architect or design professional. However, it is also important to note that, notwithstanding the AIA’s increasing emphasis on sustainability,\(^{62}\) the new 2007 version of the AIA documents contain little guidance or protective language for either the design professional or owner; the few references to sustainability that are included are contained in Sections 3.2.5.1 and 3.2.5.2 of the B101 Owner – Architect Agreement and relate to the architect’s obligation to promote sustainable design alternatives to the owner during the schematic design phase.\(^{63}\) While these provisions may be problematic for

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\(^{61}\) Id.


\(^{63}\) These provisions state that “[t]he 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” and “[t]he Architect shall consider environmentally responsible design alternatives, such as material choices and building orientation.”

In addition, the “Traditional Development” process includes five phases: SD – Schematic Design, DD – Design Development, CD – Construction
other reasons related to scope of work, standards of care, and implied warranty, it suffices for purposes of this Article to note that the AIA documents do little to address the transfer of green building risk between the parties.

Accordingly, because green building may implicate various types of previously unconsidered risks, which may include the failure to achieve a specified green building certification, the loss of public financing, the inability to qualify for government tax credits or abatements, possible monetary penalties, and lawsuits from tenants who request rent reductions because they leased office space under certain auspices that failed to materialize, design professionals should strongly consider insisting upon a waiver of consequential damages clause to mitigate these unknown liabilities in their contracts.64 While the savvy owner may seek to remove such a clause from its design agreements, the design professional must consider the potential for green building projects to spawn large consequential damages claims from the owner, and determine its ability to bear the risk of such damages by contract.

As is its practice every ten years, the AIA updated its Owner-Architect Agreement form in 2007.65 Similar to its predecessor document, the B151 (1997),66 the B101 (2007) includes a mutual waiver of consequential damages

Documents, BD – Bidding or Negotiation, and CM – Construction Management. (See SWEET AND SCHNEIER, supra note 43 at §12.02) 64 G. William Quatman, Ryan M Manies, White Paper: Managing the Risks and Embracing the Benefits of Going Green, THE AIA TRUST, February 2008. 65 Am. Inst. of Architects Form B101 (2007). 66 According to one set of commentators, the decision in 1997 to begin including a provision to waive consequential damages can be traced in part to
that states "[t]he Architect and Owner waive consequential damages for claims, disputes or other matters in question arising out of or relating to this Agreement." This "mutual" waiver, of course, is of much more import to the architect, as it is far more likely that the architect’s acts or omissions will impact the owner’s budget and schedule than the other way around.

Curiously, the B101 contains no definition for the term "consequential damages," so the general explanation of terms contained in Paragraph 10.2 applies and references the AIA form A201 General Conditions of the Contract for Construction document. Contained within Paragraph 15.1.6 of form A201, the definition of consequential damages gets defined as:

1. damages incurred by the Owner for rental expenses, for losses of use, income, profit, financing, business and reputation, and for loss of management or 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.

Perini Corp. v. Greate Bay Hotel & Casino, Inc (129 N.J. 479, 610 A.2d 364 (1992)), where the New Jersey Supreme Court upheld an arbitration decision in which a construction manager received consequential damages for $14.5 million on a $600,000 contract. (See SWEET AND SCHNEIER, supra note 48 at §27.07(D)).
This provision does far more than merely compel a waiver of such claims on two levels.\(^{70}\) First, it now renders the Eichleay formula\(^ {71}\), irrelevant, since it disallows the recovery of home office overhead.\(^ {72}\) Second, it attempts to allow liquidated damages only for “direct” situations and not for those considered “indirect” or consequential.\(^ {73}\) However, in all practicality, the task of differentiating between direct, indirect, and consequential damages that qualify for the liquidated treatment may pose a question greater than the courts can resolve.\(^ {74}\) As a result, a knowledgeable owner trying to preserve the right to claim consequential damages will strike out the language.\(^ {75}\)

In applying this provision to a green building contract, some commentators believe that many of the damages arising from a failure to obtain a specific green building certification would also get included and placed aside due to the language used in making this broad waiver.\(^ {76}\) As a result, they strongly recommend caution for attorneys who provide advice to

\(^{70}\) See SWEET AND SCHNEIER, supra note 48 at §27.07(D).

\(^{71}\) The Eichley formula, as adopted by the Federal Circuit Court of Appeals, applies to claims to assist in calculating home office overhead expenses due to delays caused by the owner on federal contracts. Satellite Elec. Co. v. Dalton, 105 F.3d 1418 (Fed. Cir. 1997). Depending on the jurisdiction, some courts will employ this formula to determine injuries while others require strict proof of damages. (See SWEET AND SCHNEIER, supra note 48 at §27.02(F)).

\(^{72}\) Id.

\(^{73}\) Id. When the AIA rolled out this strategy towards waiving consequential damages in 1997, the Associated General Contractors (AGC) expressed concern with the language and approach. (Id.) The AGC took the position that strong owners would respond by including severe liquidated damages clauses in exchange for granting the waiver. (Id.)

\(^{74}\) Id.

\(^{75}\) Id.

\(^{76}\) See Quatman and Manies, supra note 64.
design professional clients who consider deleting this waiver on any project including green building requirements.\textsuperscript{77}

Hence, parties using the AIA form construction documents in a green building situation need to recognize this approach embedded in the standard language which strongly favors design professionals at the peril of owners and should look to alternative solutions for protection in circumstances where this provision provides an unacceptable approach.

b. Engineers Joint Contracts Document Committee Forms

Taking a less controversial approach, the Engineers Joint Contracts Document Committee (EJCDC) employs its own unique strategy with regards to consequential damages in its E-500 Standard Form of Agreement Between Owner and Engineer for Professional Services.\textsuperscript{78} The E-500 does not directly cover damages in the body of the contract.\textsuperscript{79} Instead, the form incorporates a separate exhibit to explain the allocation of risk, which makes the waiver completely optional.\textsuperscript{80}

When invoking Exhibit I Allocation of Risk, the existing paragraph 6.11 is amended and supplemented with additional language for inclusion if considered appropriate and desirable by the parties.\textsuperscript{81}

\textsuperscript{77} Id.

\textsuperscript{78} Eng’r Joint Contracts Doc. Comm. Form E-500 (2002).

\textsuperscript{79} Id.

\textsuperscript{80} Eng’r Joint Contracts Doc. Comm. Form E-500 Exhibit I (2002).

\textsuperscript{81} Id.
16.11.B.2, the form provides language for a complete waiver of liability by the Owner for special, incidental, indirect, or consequential damages. However, in the notes for the users, the drafters explain the language options allow for flexibility in situations where the parties wish to address special concerns inherent in the project or for specific situations. In addition, the drafters also provide alternative language that allows the users to convert the complete waiver of consequential into one with a limitation.

Similar to the AIA approach, the EJCDC also contains a Waiver of Rights in Form C-700 Standard General Conditions of the Construction Contract. In paragraph 5.07(B), the owner gives a complete waiver for any losses to the Contractor, Subcontractor, and Engineer. However, there is no

6.11.B.2 Exclusion of Special, Incidental, Indirect, and Consequential Damages

“...To the fullest extent permitted by law, and notwithstanding any other provision I the Agreement, consistent with the terms of paragraph 6.11.E the Engineer and Engineer’s officers, directors, partners, employees, agents, and Engineer’s Consultants, or any of them, shall not be liable to Owner or anyone claiming by, through, or under Owner for any special, incidental, indirect, or consequential damages whatsoever arising out of, resulting from, or in any way related to the Project or the Agreement from any cause or causes, including but not limited to any such damages caused by the negligence, professional errors or omissions, strict liability, breach of contract, or warranties, express or implied, of Engineer or Engineer’s officers, directors, partners, employees, agents, or Engineer’s Consultants, or any of them including but not limited to:”

Deleted: 1

82. Id.

83. Id.

84. Id.


86. Id.
similar contractor waiver of consequential damage claims against the owner; while a liquidated damages situation receives no mention in the form at all.\textsuperscript{87}

As a result, the EJCDC takes no actions to consider the unique situations that emanate from a green building. Parties who choose to use the EJCDC forms will be left to their own devices in considering how to allocate the unique risks presented by green building projects. Most owners and especially those experienced developers of green buildings will likely balk at giving a blanket waiver of consequential damages to their contractors and design professionals. However, in the context of the EJCDC documents, it is important to note that the forms are primarily designed for use on heavy civil projects.

\textbf{5.07.B and C Waiver of Rights}

"B. Owner waives all rights against Contractor, Subcontractor, and Engineer, and the officers, directors, members, partners, employees, agents, consultants, and subcontractors of each and any of them for:

1. loss due to business interruption, loss of use, or other consequential loss extending beyond direct physical loss or damage to Owner’s property or the Work caused by, arising out of, or resulting from fire or other perils whether or not insured by Owner; and

2. loss or damage to the completed Project or part thereof caused by, arising out of, or resulting from fire or other insured peril or caused by loss covered by any property insurance maintained on the completed Project or part thereof by Owner during partial utilization pursuant to Paragraph 14.05, after Substantial Completion pursuant to Paragraph 14.04, or after final payment pursuant to Paragraph 14.07.

C. Any insurance policy maintained by Owner covering any loss, damage or consequential loss referred to in Paragraph 5.07.B shall contain provisions to the effect that in the event of payment of any such loss damage, or consequential loss, the insurers will have no rights of recovery against Contractor, Subcontractors, or Engineer, and the officers, directors, members, partners, employees, agents, consultants and subcontractors of each and any of them."

(\textit{Id.})

\textsuperscript{87} Id.
construction projects (such as bridges, tunnels, highways, or other similar types of infrastructure) where the primary design responsibility rests with an engineer rather than an architect and third-party green building rating systems are largely inapplicable.

Despite the fact that the EJCDC uses a separate exhibit to make its waiver completely optional, it offers nothing materially different than the provision contained in the AIA forms. Thus, those parties looking for a different approach may want to consider using one of the form exhibits promulgated by ConsensusDOCS or the Design Build Institute of America.

c. ConsensusDOCS Forms

In the fall of 2007, a three-year effort by a combination of different stakeholders in the construction industry unveiled a new family of documents named ConsensusDOCS.\(^8^8\) Held out as an alternative to the long published AIA and EJCDC series of documents, these forms received endorsements from 22 different organizations in an effort to provide a cohesive and unified

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\(^8^8\) Larry D. Harris, Brian M. Perlberg, “Advantages of the ConsensusDOCS Construction Contracts,” 29 Construction Lawyer 1 (Winter 2009). This effort include the Association of General Contractors (AGC) and the Construction Owners Association of American (COAA) merging their previous form contracts and document programs into a single system designed to take into account varying points of view and achieve a consensus amongst the numerous stakeholders in a given project. (Id.)
approach with a goal to eliminate any perceived biases for a particular
stakeholder in a project.  

While some commentators point out various shortcomings within the
documents, the motivation behind this system began with placing the best
interests of a particular project at the forefront instead of a specific
stakeholder and laying out best practices with a reasonable distribution of
risk amongst the parties. To help accomplish this goal, ConsensusDOCS put
forward a different series of forms depending on the delivery method and
parties’ relationship in the project.

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89 Id. These 22 organizations include: National Association of State Facilities
Administrators (NASFA), The Construction Users Roundtable (CURT),
Construction Owners Association of America (COAA), Associated General
Contractors of America (AGC), Associated Specialty Contractors, Inc. (ASC),
Construction Industry Round Table (CIRT), American Subcontractors
Association, Inc. (ASA), Associated Builders and Contractors, Inc. (ABC), Lean
Construction Institute (LCI), Finishing Contractors Association (FCA),
Mechanical Contractors Association of America (MCAA), National Electrical
Contractors Association (NECA), National Insulation Association (NIA),
National Roofing Contractors Association (NRCA), Painting and Decorating
Contractors of America (PDCA), Plumbing Heating Cooling Contractors
Association (PHCC), National Subcontractors Alliance (NSA), Sheet Metal and
Air Conditioning Contractors' National Association (SMACNA), Association of
the Wall and Ceiling Industry (AWCI), National Association of Electrical
Distributors (NAED), National Association of Surety Bond Producers (NASBP),
The Surety & Fidelity Association of America (SFAA). (See
http://www.consensusdocs.org/about_member-organizations.html)

90 See Susan L. McGreevy, Michael E. Callahan, “ConsensusDOCS: Consensus

91 See Harris and Perlberg supra note 88.

92 http://www.consensusdocs.org/information_finding-appropriate.html The
documents are placed into the following series: General Contracting (200
Series), Collaborative Documents (300 Series), Design-Build (400 Series),
Construction Management at Risk (500 Series), Subcontracting (700 Series),
Program Management (800 Series).
(http://www.consensusdocs.org/catalog.html)
With respect to consequential damages, the ConsensusDOCS authors had the arduous task of trying to balance numerous competing concerns of the member organizations. The drafters settled on the approach that so long as a contract contains a liquidated damages clause, no mutual waiver occurs between the parties. The drafters memorialized this strategy in Article 6.6 “Limited Waiver of Consequential Damages.”


94 Liquidated Damages Clauses attempt to specify a certain dollar amount to be paid in the event of a future default or breach of contract.

6.5 LIQUIDATED DAMAGES

6.5.1.1 SUBSTANTIAL COMPLETION

The Contractor understands that if the Date of Substantial Completion is not attained, the Owner will suffer damages which are difficult to determine and accurately specify. The Contractor agrees that if the Date of Substantial Completion is not attained the Contractor shall pay the Owner Dollars ($______) as liquidated damages and not as a penalty for each Days that Substantial Completion extends beyond the date of Substantial Completion. The liquidated damages provided herein shall be in lieu of all liability for any and all extra costs, losses, expenses, claims, penalties and any other damages of whatsoever nature incurred by the Owner which are occasioned by any delay in achieving the Date of Substantial Completion.

6.5.1.2 FINAL COMPLETION

ConsensusDOCS Form 200 §6.5 (2007).

95 ConsensusDOCS Guidebook. One commentator points out that this becomes a true statement based on the fact that an owner may recoup damages when a contractor causes delay but not in a converse situation. (See McGreevy and Callahan, supra note 90.) Another commentator explains that a gross inequity exists when owners waive their consequential losses because they surrender more rights than contractors; so in allowing them to recover liquidated damages, an owner receives an opportunity to minimize risk. (See Harris and Perlberg, supra note 88; Price and Johnson, supra note 93.)

96 ConsensusDOCS Form 200 §6.6 (2007). One commentator explained that this title does not necessarily describe the clause it attempts to portray. See McGreevy and Callahan, supra note 90.
consequential damages clause creates an absolute surrender of such claims by default unless the parties take the affirmative step of adding or altering the language to an open space area in the form, which creates a limited waiver.  

Because ConsensusDOCS took this adaptable approach to such a thorny issue, a contract involving green buildings could either include a complete waiver of consequential damages or a partial allowance coupled with or without a liquidated damages clause. As a result, outcomes may vary depending on how the parties ultimately execute the forms.

Nevertheless, with respect to liquidated damages, to date no court has interpreted a green building related liquidated damages provision. For example, a provision that imposes liquidated damages on a party for failing to earn the owner’s desired level of LEED certification might, in some

### 6.6 LIMITED MUTUAL WAIVER OF CONSEQUENTIAL DAMAGES

“Except for damages mutually agreed upon by the Parties as liquidated damages in Paragraph 6.5 and excluding losses covered by insurance required by the Contract Documents, the Owner and the Contractor agree to waive all claims against each other for any consequential damages that may arise out of or relate to the Agreement, except for those specific items of damages excluded from this waiver as mutually agreed upon by the Parties and identified below. The Owner agrees to waive damages including but not limited to the Owner’s loss of use of the Project, any rental expenses incurred, loss of income, profit or financing related to the Project, as well as the loss of business, loss of financing, principal office overhead and expenses, loss of profits not related to this Project, loss of reputation, or insolvency. The Contractor agrees to waive damages including but not limited to loss of business, loss of financing, principal office overhead and expenses, loss of profits not related to this Project, loss of bonding capacity, loss of reputation, or insolvency…”

ConsensusDOCS Form 200 §6.6 (2007).

See McGreevy and Callahan, supra note 90.
jurisdictions, be deemed an unenforceable penalty provision rather than one that attempts to calculate the non-breaching party’s damages with some level of precision in advance of contract performance.\(^{98}\)

Under the first scenario where the parties do not add to Article 6.6 nor execute the liquidated damages provision, the language used by ConsensusDOCS and the AIA appear very similar in that they both create a complete waiver of consequential damages.\(^ {99}\) This would lead one to follow the same logic as explained previously in the AIA form discussion that many of the damages arising from a failure to achieve a specific green building certification and lost financial incentives will not provide for financial relief\(^ {100}\) because the language used by ConsensusDOCS waives all rights except those expressly added by the parties in the fill-in the blank section of the article.\(^ {101}\) This default approach would most likely provide an advantage to all parties involved in the green project except the owner, who would have little recourse against the others when the green aspects of the project fail for some reason.

However, should the parties add any of the unique types of claims possible to a green building project into the consequential damages part of the form, then the section will live up to its title and only provide a limited waiver for those situations not listed in the executed contract. The

\(^{98}\) See, e.g., City of Elmira v. Larry Walter, Inc., 150 A.D.2d 129 (3d Dep’t 1989).

\(^{99}\) See McGreevy and Callahan, supra note 90.

\(^{100}\) See Prum and Del Percio, supra note 5 at 263.

\(^{101}\) ConsensusDOCS Form 200 §6.6 (2007).
ConsensusDOCS approach already affords this type of flexibility when using the form contract and provides the opportunity for a middle ground where all parties to a green building project discuss certain risks while ultimately agreeing who should bear the financial burden in the event of a failure down the road.

Likewise, subject to the caveat that such clauses have yet to be tested in the courts in the green building context, liquidated damages clauses give the parties another option to allocate the risk when a building fails to achieve a particular green aspect. Depending on the owner’s situation, he may be unwilling or unable to endure or waive the entire risk and could offer capping any consequential damages at a specific amount via the language for liquidated damages in Article 6.5. By using this alternative in tandem the parties may also negotiate a middle ground in which neither party bears the complete risk of a green project.

While the ConsensusDOCS approach does not offer anything new, it does provide built-in flexibility for the parties to a green project with the least amount of alteration to the base form even as they tailor it to their specific circumstances and risk tolerances which may reduce upfront legal costs.

d. ConsensusDOCS 310 – Green Building Addendum

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102 See Prum and Del Percio, supra note 5 at 263.

103 See McGreevy and Callahan, supra note 90.
On November 10, 2009, ConsensusDOCS released its Green Building Addendum, which is designed to serve as an appendix to underlying design or construction agreements, not as a stand-alone document. The Addendum identifies roles and responsibilities for project participants in pursuit of the owner’s green goals. These goals are rating system neutral and can also be defined in Section 3.1 Addendum as simply “benefits to the environment or natural resources, either as part of the construction process or during the life cycle, use or maintenance of the Project.”

Among other definitions, the Addendum distinguishes between procedural and physical “green measures” that the project team intends to implement in pursuit of the owner’s green building goals as defined in Section 3.1. The Addendum also provides for a “Green Building Facilitator” to coordinate and facilitate the process of obtaining the Owner’s desired green building status or certification, identifying green building measures both procedural and physical, potential design and construction alternatives, and other services as required by the terms of the Addendum. The Green Building Facilitator is identified explicitly in Section 4 of the Addendum and can be the architect, engineer, contractor, or other corporate entity (or

105 ConsensusDOCS Form 310 Green Building Addendum §3 (2009).
106 Id. at §3.1 (2009). Because the goals are rating system neutral, the Addendum can be used in pursuit of certification under LEED, Green Globes, or even Energy Star.
107 Id. §6.
108 Id. §4.
Moreover, the Addendum includes an entire section devoted to risk allocation. Section 8.2 provides that the parties, including the Green Building Facilitator, will be subject to any limitations on liability that may be set forth in their underlying contracts. However, the section explicitly acknowledges that the owner’s “loss of income or profit or inability to realize potential reductions in operating, maintenance, or other related costs, tax, or other similar benefits or credits, marketing opportunities and other similar opportunities or benefits, resulting from a failure to attain the [project’s green building goals as defined in the Addendum] shall be deemed consequential damages subject to any applicable waiver of consequential damages” in any underlying design or construction contract.

In addition, the form uses specific language to make it clear that no project participant other than the Green Building Facilitator will be “liable or responsible for the failure of [any procedural or physical green measures] to achieve the [project’s green building goals as defined in the Addendum],” including the project’s failure to earn any third-party certification as designated in the Addendum. However, in taking this approach, the drafters also refused to absolve the project team’s liability “from any

\[109\] Id.
\[110\] Id. §8.
\[111\] Id. §8.2
\[112\] Id.
\[113\] Id.
obligation to perform or provide [procedural or physical green measures]” as required by their underlying contracts.\textsuperscript{114}

In short, the Addendum punts to the terms of the underlying agreement with respect to the distribution of consequential damages and remains silent in providing a definition for the term despite tackling the thorny area of risk allocation amongst the parties.\textsuperscript{115}

Therefore, the combination of documents released by ConsensusDocs appears to offer more of the previously mentioned strategy to waive consequential damages but in a repackaged formulation; however it does provide a bit more flexibility with an important additional addendum that specifically addresses the unique aspects of a green building project.

e. Design Build Institute of America – Sustainable Project Goals

While the Design Build Institute of America (DBIA) provides support for successful delivery of design-build projects, it also offers contract form documents that may provide alternative solutions even if the parties do not use this delivery mechanism on a green building development. Similar to ConsensusDocs, the DBIA offers a green building contract exhibit as well.\textsuperscript{116}

\textsuperscript{114} Id.

\textsuperscript{115} This lack of a definition in the Addendum for consequential damages appears to be a unique approach taken only by ConsensusDocs.

\textsuperscript{116} Design Build Inst. of Am. Sustainable Project Goals Exhibit (2009).
Although intended as an exhibit to the Owner – Design-BUILDER agreement, the “Sustainable Project Goals Exhibit” also includes an entire section devoted to remedies.

In Section 4.1 of the Sustainable Project Goals Exhibit, the parties agree that, if the project fails to satisfy third-party requirements including the anticipated level of LEED certification, they will file a “timely appeal” with USGBC or other appropriate entity. The costs of such an appeal will then rest with the Owner; however, if, after the appeal is filed and decided, the project still fails to satisfy the requirements of the third-party system or, the Legal Requirements as defined in Article 3 of the Exhibit, the parties can choose one of three options.

First, the owner can waive any claims against the design/builder for its “failure to satisfy or achieve LEED certification at any level or other

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117 Id. 118 Id. at §4. Interestingly, this section appears as one of the first provisions in any form contract document or exhibit devoted exclusively to green building projects that addresses an allocation of risk between the contracting parties. 119 Id. at §4.2. The pertinent part of Article 4 states: “[i]n the event that, after a timely appeal to the USGBC or other certifying organization, the Project fails to obtain such level of LEED certification or other sustainable standards as are identified in, or as required by the Legal Requirements, the parties agree as follows: Waiver . . . Liquidated Damages . . . [or] Limited Obligation to Cure.” Id.

120 Id. Section 3.3 allows the parties to specifically identify ordinances, statutes, or executive orders that as defined Legal Requirements; if none are listed, “it is presumed that there are no applicable requirements.” Id. at §3.3. However, it is critical to note that pursuant to §3.1 “the Owner shall be responsible to identify any such requirements applicable to the Project and the Design-BUILDER is entitled to rely on the Owner’s representations without any independent verification.” Id. at §3.1
sustainable standards.”

This provision also explicitly states that “in no event shall the failure of the Project to satisfy or obtain such level of LEED certification or other sustainable standards be deemed a breach of contract.”

Under such circumstances and absent a breach, the inquiry related to consequential damages becomes moot.

Second, the parties can agree on a fixed dollar amount as liquidated damages for the project’s failure to earn the anticipated level of LEED certification or its failure “to achieve other sustainable standards as are identified, or as required by the Legal Requirements, provided the Owner has fully satisfied its obligations in relation thereto.”

Critically, this provision states that the design/builder “shall not be liable for any other related damages including, but not limited to, consequential damages.”

Finally, the parties can choose to impose a limited obligation to cure the project’s failure to on the design/builder. This obligation is “to cure the situation through the addition, replacement or correction of materials, configurations, systems or equipments in order to obtain the level of LEED certification indicated above and/or to satisfy or achieve other sustainable standards as are identified, or as required by the Legal Requirements.”

However, the extent of the costs which the design/builder will be responsible for curing is limited to: (i) any remaining funds in the construction

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121 Id. at §4.2.
122 Id.
123 Id.
124 Id.
125 Id.
contingency; (ii) the design/builder’s share in the savings if the cost of the work comes in less than the design/builder’s guaranteed maximum price of the work; or (iii) a fixed sum agreed to by the parties.

Although promulgated by a design-build organization, this Exhibit comes the furthest to date in addressing risk allocation in a green building contract form and provides a useful starting point for modifying an existing agreement or when custom drafting one with regard to consequential damages and its intricacies.

f. Custom Drafted Contracts

On many construction projects, the foregoing forms will provide a good starting point for the parties to negotiate the terms of their agreement. Provisions relating to standards of care, limitations on liability, consequential damages, indemnification, dispute resolution, and the parties’ termination rights will, among others, be the subject of negotiation between the parties and their attorneys. The little case law that exists in the green building arena directs our attention to recognize that blind reliance on form construction agreements is dangerous for all parties involved in the negotiation given the

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126 Typically, an owner will withhold a percentage of the overall cost of the work that exists to cover unanticipated construction expenses, such as subcontractor buy-out overruns or other pre-negotiated expenses, which the constructor can access with the owner’s prior written approval.

127 Id.
rapidly changing regulatory structure that may apply to construction projects of various sizes and scopes.\textsuperscript{128}

Moreover, the parameters of a given limitation on liability or consequential damages provision will depend on each party’s respective appetite for risk. As seen with the AIA, EJCDC, and ConsensusDocs, the design professional will first try to eliminate any exposure; but frequently, they will fall back to a position that insists on capping liability on a given project to the available limits of its professional liability insurance policy, while others will insist on a cap that rests on the extent of the design professional’s fee.\textsuperscript{129}

For example, consider an insurance claim that was reported at the 2007 AIA National Convention by CNA’s Frank Musica.\textsuperscript{130} In this scenario, the jurisdiction in which the project was located had applicable green building legislation, and the architect designed the structure to comply with the existing codes and regulations at the time the development broke ground.\textsuperscript{131} During the course of the project, the codes and regulations changed, and in order to comply with them, the project required a redesign.\textsuperscript{132} However, the owner demanded that the architect perform the redesign for no

\textsuperscript{128} See generally Prum and Del Percio, supra note 5.

\textsuperscript{129} While this may not occur in every case, the authors’ collective experience with negotiations in this area tends to follow similar patterns.


\textsuperscript{131} Id.

\textsuperscript{132} Id.
additional fee, arguing that it was required by the terms of its agreement for architectural services to perform the additional services. Respectfully, the architect disagreed; and the owner commenced a lawsuit.

Based on this type of scenario where the risks arise from a new regulatory environment in a patchwork fashion that constantly changes, stakeholders face a rising risk profile for green building projects and now must revisit the form contract language, which they might previously have agreed to without hesitation.

Therefore, each stakeholder in a green building project must remember its unique and emerging nature; and in particular, the differences that may exist in regulatory structures from jurisdiction to jurisdiction. These differences suggest the importance of paying careful attention to damages provisions under all circumstances.

g. Other Green Building Contract Issues

In August of 2009, Atlanta-based green building and LEED consultant Energy Ace, Inc. announced what it called the industry’s first LEED certification guarantee, claiming that the company could “offer clients a certainty that their project is going to be certified and remove that anxiety.”

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133 Id.
134 Id.
The announcement was highly publicized throughout the green building media, with commentators either suggesting that the move was a stroke of genius, or “all hat, no cattle.”

However, a closer look at the “guarantee” reveals that, in substance if not form, it actually reads more like a limitation on Energy Ace’s liability in the event that one of its projects fails to earn the “guaranteed” level of LEED certification. The Energy Ace program works as follows: the firm performs a LEED charette pursuant to its standard LEED certification contract, which contemplates energy modeling, LEED administration, and building commissioning. If, after the charette takes place, Energy Ace is satisfied that the project is on track for the desired level of LEED certification, it will amend its contract to provide a refund to the owner of the LEED administration component of its fee, which is typically between 30 and 45 percent of its total fees for a given project. In other words, Energy Ace is limiting its liability to the owner for its failure to earn LEED certification.

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137 See Burr, supra note 135.

138 Id.

139 Id.

140 A discussion of why guaranteeing the results of a third-party (i.e., USGBC/GBCI) review and audit of a LEED application is beyond the scope of this Article, but important to note in this context as well.
While the notion of a LEED guarantee is problematic for a firm rendering design services from a professional liability perspective, there is generally no statutory requirement for a firm to carry such insurance whether it renders professional design services or otherwise. Accordingly, for a firm such as Energy Ace, the guarantee is less problematic. Nevertheless, calling this type of limitation on liability a “guarantee” may be shrewd marketing, but there are risk implications for firms that choose to implement a similar program.

First, many design firms also perform LEED consulting and administration in connection with rendering engineering or architectural services. There is the possibility that a professional liability carrier would disclaim coverage for any claim arising out of a green building project where the firm issued the guarantee, even if (1) the guarantee was just a dressed up limitation of liability provision; and (2) the claim arose out of aspects of the project not specifically tied to the purported guarantee. Second, by promoting the guarantee, firms may create a heightened level of expectation in the eyes of their clients, which, if not satisfied, may expose them to any number of...

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141 Although a full discussion of this critical issue is beyond the scope of this Article, it is worth noting that most professional liability insurance policies will exclude coverage for claims that an insured breached a warranty or guarantee, whether that warranty or guarantee is express or implied.

142 Owners, of course, will require by contract that the design professional procure such insurance, as well as liability insurance, and name the owner and any other entities as additional insureds under those latter policies.

143 A basic Google search will reveal dozens of design firms which have added these types of services to their menu of offerings.
claims which may not be covered by any controlling policies of insurance, such as misrepresentation or fraud.

It also remains a question as to whether a court would enforce a limitation of liability provision in this context, particularly if the damages that flow from a party’s failure to earn LEED certification are disproportionate to the limits of the provision. This inquiry is not limited to contract provisions similar to the Energy Ace guarantee.

For example, many LEED consultants will insist on limiting their liability by contract to the amount of their fee for their LEED consulting services.\(^{144}\) The courts have not been uniform in their analyses;\(^{145}\) and accordingly, the enforcement of limitation of liability provisions has typically been fact-specific.\(^{146}\) The courts will consider whether the clause identifies all essential terms of the limitation and if the parties understood and agreed to all of its permutations.\(^{147}\) Other courts will apply a strict approach when

\(^{144}\) This has been the authors’ experience in working with various LEED consultants.


\(^{147}\) See, e.g., Valhal Corp. v. Sullivan Associates, Inc., 44 F.3d 195, 202-04 (3d Cir. 1995) (stating that “[l]imitation of liability clauses are a way of allocating ‘unknown or undeterminable risks’ and are a fact of everyday business and commercial life. . . . [s]o long as the limitation which is established is reasonable and not so drastic as to remove the incentive to perform with due care”).
confronted with limitation of liability provisions and construe their interpretations against the party seeking enforcement.\(^{148}\)

Moreover, the New Jersey Superior Court’s analysis in *Marbro, Inc. v. Borough of Tinton Falls* is particularly insightful in these situations.\(^{149}\) In this case, an engineer contracted with the borough for work in a local park.\(^{150}\) The contract limited the engineer’s liability for professional acts, errors, or omissions of negligence to the total amount of its fee ($32,500.00), but also required the borough to indemnify the engineer against any action brought against it in connection with its services under the contract.\(^{151}\) During the project, a third party sued the borough, and it in turn brought a third-party negligence action against the engineer.\(^{152}\) The engineer moved for summary judgment seeking to enforce the limitation of liability provision, while the borough opposed the motion claiming that the provision was inconsistent with the indemnity clause.\(^{153}\)

The court ruled in favor of the engineer and held that the two provisions were not inconsistent, noting that the limitation of liability clause did not shield the engineer from all potential liability for professional negligence.\(^{154}\) Rather, if the engineer was determined to be negligent, it was


\(^{150}\) *Id.*

\(^{151}\) *Id.*

\(^{152}\) *Id.*

\(^{153}\) *Id.*

\(^{154}\) *Id.*
liable up to its $32,500.00 fee.\textsuperscript{155} On the other hand, the indemnification clause required the borough to defend and indemnify the engineer against any legal action related to the rendering of its services under the agreement, unless the engineer acted outside of the scope of its duties and/or contrary to law.\textsuperscript{156} The court held that “These provisions are consistent with each other.”\textsuperscript{157}

Important for purposes of this article, the court also explained that, “the appropriate inquiry is whether the cap is so minimal compared with the expected compensation that the concern for the consequences of a breach is drastically minimized. . . . This is not a liability cap so minimal compared with the expected compensation as to minimize [the engineer’s] concern for the consequences of a breach of its contractual obligations. The agreed-upon cap provided adequate incentive to perform.”\textsuperscript{158}

This brings on the more difficult question to answer when the party seeking to limit its liability stands to earn a disproportionately larger profit as compared to the contractual provision. Consequently, the fact-specific inquiry approach that most courts take will consider the totality of the circumstances, including the extent of the damages alleged by the party seeking to bar the enforcement of the limitation of liability clause.

While the courts provide little guidance to date, it is likely that the types of consequential damages could flow from the breach of an agreement

\textsuperscript{155} Id.
\textsuperscript{156} Id.
\textsuperscript{157} Id. at 163
\textsuperscript{158} Id. at 162-63.
for LEED administration and certification where the formal LEED rating is tied to financial incentives might be significant. Case in point, consider the $635,000.00 in lost tax credits from the Shaw Development litigation discussed earlier. Neither the Third Circuit in Valhal nor Marbro articulated a bright line rule for making a determination in this instance.

Thus, there is “no readily apparent answer to these questions and that is the problem. If the parties need to know one thing, it is how critical risk allocation provisions in their contractual arrangements are going to be interpreted and enforced.

Hence, it appears that without firm guidance from the courts with respect to the treatment of consequential damages or provisions that limit risk in the context of green buildings, the main form documents appear uniform in their strategy to seek a complete waiver as if this was a traditional construction project unless the parties take an affirmative action otherwise; yet the DBIA recognizes some of the meaningful differences and attempts to address these concerns accordingly.

IV. Suggestions for Represented Parties


See Prum, supra note 51.

BRUNER & O’CONNER, CONSTRUCTION LAW, § 19:52.67.
Given the foregoing evaluations and general suggestions, we make the following proposals with respect to consequential damages and limitation of liability clauses to the various groups of represented parties negotiating a green building contract.

a. From an Owner’s Perspective

As a threshold matter, in order to make an informed decision about the type and extent of risk transfer mechanisms it wishes to employ in its design and construction agreements, an owner must understand the green building regulatory structure that may apply to its construction project. For example, in *Shaw Development v. Southern Builders*, the tax credits which the owner sought to obtain were contingent on the contractor’s ability to deliver a certificate of occupancy by a fixed date under the controlling legislation. The owner’s failure to modify the form mutual waiver of consequential damages provision in the 1997 version of the AIA’s A201 General Conditions document prevented it from pursuing the lost tax credits as consequential damages from the contractor, and likely drove the lawsuit into settlement rather than full-blown litigation. Given the current state of the construction market, owners are enjoying a great deal of leverage and discretion in awarding contracts. Determining what types of green building-related damages are direct, as opposed to consequential, still provides a

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162 See Prum and Del Percio, *supra* note 5.
163 Id.
question mark due to the infancy of the industry and lack of reported case law.

Moreover, owners want to ensure that insurance coverage purchased by a design professional will stand behind policyholder in the event a claim becomes necessary in order to compel redesign. For instance, most policies for professional liability in many jurisdictions contain “burning limits” provisions. This means that if the owner sues and defense costs are incurred, there may be nothing remaining for the owner to recover if he pursues a consequential damages claim. In contrast, under a Commercial General Liability (CGL) policy, a claim against a contractor does not erode the limits of the coverage.

Thus, savvy owners will refuse to waive their right to pursue consequential damages on green building projects while the courts sort out the issues raised in this article.

b. From a Design Professional’s Perspective

When assisting design professionals on these matters, the form documents provide a good place to start. While savvy owners and construction management experts will most likely reject the mutual waiver of consequential damages approach, the designer can effectively assert that the architects, engineers, and construction trade industries approve this language by virtue of their form documents we discussed earlier. Even the most vocal
opponent of the AIA’s mutual waiver of consequential damages, the Associated General Contractors (AGC) allowed very similar language in the ConsensusDocs package, which shows some type of acceptance by their actions. Often times, the owner will accept the form language as authoritative and the design professional will receive the maximum amount of protection.

In other situations, very experienced owners and their representatives will most likely reject a mutual waiver of consequential damages under most project scenarios. When this impasse occurs, the design professional may have a fall back position. At a minimum, the designer needs to ensure that the total amount of their exposure is limited to the available limits of their professional liability insurance. Moreover, the designer will want to make sure that other parties to the project waive their right to assert claims for consequential damages to avoid being named in a suit that could expose them to damages beyond the limits of their available insurance policy. Frequently, this becomes the middle ground under which the owner obtains some type of redress while the design professional limits future claims.

Hence, design professionals have the various form documents to support their notion that owners should completely release all claims for consequential damages, but when this option does not work, a limited waiver presents a workable solution for all parties.

c. From a Green Building Consultant’s Perspective
Similar to the advice of the design professional, a green building consultant should seek a complete waiver of consequential damages as well. However, because of the same issues noted previously, the consultant may try to limit the total amount of their exposure for a given green building project to their fees or less.

Because of the role they play on green building projects, many LEED or other third-party green building rating system consultants do not maintain professional liability insurance in connection with their projects, which could allow a middle ground. Of those that do, usually they obtain a high deductible policy and will pay for any defense or other costs up to that dollar threshold. In which case, the limitations on liability part of the agreement will play a very important part in completing a contract.

Therefore, the green building consultant should also attempt to obtain a complete waiver for all consequential damages, but when this is not possible, the better solution includes limiting all future claims to the fees received from the project.

d. From the Contractor’s Perspective

Generally, the contractor is the party from whom the owner is most likely to seek recovery of consequential damages. Given the likelihood that a contractor will not supervise or control the design professional or green
building consultant responsible for design phase credits or otherwise assembling the project’s third-party application materials, the contractor should insist on language similar to the DBIA Exhibit. This exhibit makes the project’s failure to earn the anticipated level of certification expressly not a breach of contract, which will make the inquiry related to consequential damages a moot point.

Nonetheless, this is a best-case scenario; and given the explosion in green building incentives and mandates, the owner may not be able to provide such a concession. In those instances, the contractor should carefully review provisions related to damages like liquidated, incidental, and consequential and understand the risks it is being asked to carry in order to make an informed decision during the course of negotiations.

As with any contractual relationship, the parties to a green building project seeking third party certification need to seek experienced counsel in this new development process for their particular circumstances so that their needs, risks, and rewards receive the proper attention in the final agreement.

V. Conclusion

While green building continues to engulf and set a new bar for construction, the corresponding legal analysis needs to keep pace as well. The courts have yet to provide any real guidance with respect to how clauses allocating the risk of consequential damages should be interpreted, nor have
they reviewed the novel types of risk allocation provisions that some parties are proposing in connection with their projects. Because the courts do not generally give advisory opinions and only one case implicating the unique characteristics of green building has occurred, these strategies remain untested and difficult to predict an outcome.

In contrast, legislative activity continues to take place quickly and at all levels of government in jurisdictions across the country. This frenetic pace continues to have significant impact on the risk profiles of green building projects and will undoubtedly catch some parties unexpectedly.

Accordingly, all stakeholders engaging in this type of work must review their green building contracts with counsel to limit their potential exposure to consequential or other types of damages that may be unanticipated.