Green Building Claims: What Theories Will A Plaintiff Pursue, Who Has Exposure, And A Proposal For Risk Mitigation

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GREEN BUILDING CLAIMS: WHAT THEORIES WILL A PLAINTIFF PURSUE, WHO HAS EXPOSURE, AND A PROPOSAL FOR RISK MITIGATION

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I. Introduction

In the United States, construction projects appear to be catching a ride on a green wave with the federal, state and local governments, non-profit organizations like the U.S. Green Building Council (USGBC), and professionals such as architects, interior designers and contractors leading the way. To encourage these types of projects, many states now offer green building incentives in conjunction with inducements created by local governments to spur sustainable construction in their jurisdiction. A recent example includes The American Institute of Architects’ (AIA) 2007 national convention which, in celebrating its 150th anniversary, demonstrated the profession’s commitment to this direction by choosing the theme: “Growing Beyond Green: How you can green your projects, educate your clients, and reduce the impact buildings have on the environment.”

Seeing this movement on the horizon, the USGBC responded by creating the Leadership in Energy and Environmental Design (LEED) Green Building Program in 1998 to provide an independent and recognizable standard for sustainable design. The USGBC reports that there are currently at least 14,390 registered LEED proj-

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projects with 1,753 that have proceeded to certification under the program. It also points out that the LEED program encompasses over 3.6 billion square feet of commercial building space and that one recent study expects the value of green construction to approach $60 billion by 2010.

In addition, many consumers and tenants now demand cutting edge, energy-efficient products and buildings in order to reduce operating costs. Owners looking to obtain higher rents capitalize on these desires by developing projects that require the latest technology. As a result of these client requests, many architects and engineers, hungry for credentials in completing these types of projects, will specify the numerous innovative products coming to market to achieve green goals. However, with a lack of experience and research on these new technologies and the additional construction requirements imposed on the project team by a green mission, a claim against all parties involved in the project becomes highly probable when the outcome falls short of expectations.

In recognition of these eventualities, this paper reviews one of the first of its kind lawsuits arising out of the construction of a green building. Then, it examines the possible legal bases under which green building claims may be asserted. Next, the paper evaluates the various stakeholders who may incur risk during a green project and looks at suggested methods for mitigation. Finally, it sets forth a proposal on how attorneys and stakeholders can kick off a green building project correctly and the types of concerns the legal community needs to consider when involved in such developments in order to mitigate these emerging risks.

II. America's First Reported Green Building Litigation: Shaw Development v. Southern Builders

The Shaw Development versus Southern Builders case demonstrates the heightened risks that industry stakeholders are facing due to the increase in regulatory activity at the state and local level. The most important lesson for stakeholders to take out of the case is that they cannot rely on form construction agreements or provisions in connection with green building projects. It is also critical to note from the outset that the allegations in the lawsuit were not that the owner’s contractor failed to obtain LEED certification as required by the contract documents; rather, it was the failure of both parties to translate the procedure for obtaining green building tax credits
under a Maryland state-level incentive program into the contract documents that exposed both sides to unanticipated liability.\textsuperscript{11} The litigation also suggests the critical importance for parties to review how their contracts address the potential for consequential damages arising out of a green project that purports to secure any type of financial incentive offered under a state- or local-level green building program.\textsuperscript{12}

a. Background to the Lawsuit
The project out of which the lawsuit originated was a $7.5 million, 23-unit condominium development in Crisfield, Maryland called the Captain’s Galley. The development was completed in 2006 and the owner intended to apply for a LEED Silver rating from USGBC. The project experienced construction delays and, accordingly, Southern Builders—the project’s general contractor—filed a mechanic’s lien in connection with its work for $54,000.00. The owner counterclaimed for $1.3 million, $635,000.00 of which were damages for the lost tax credits.

b. The Tax Credits at Issue
It is important to review Maryland’s green building tax credit program in order to understand exactly how the owner drafted its counterclaim against the contractor. Maryland offers state tax credits of up to 8 percent of a development’s total cost for projects greater than 20,000 square feet.\textsuperscript{13} Projects must be in pursuit of a LEED rating in order to apply for the credits.\textsuperscript{14} Project teams are required to first submit what the program calls an Initial Credit Certificate Application to the Maryland Energy Administration, which will review the application and then provide an Initial Credit Certificate indicating the maximum credit amount available to the project and set an expiration date for the credits.\textsuperscript{15} Once the project receives a Certificate of Occupancy, it can apply for a Final Credit Certificate, which it must obtain prior to the expiration date as set forth in the Initial Credit Certificate.\textsuperscript{16} In addition, a LEED AP must affirm to the MEA that the project meets the requirements of LEED Silver (which may implicate liability issues which are discussed infra in Section IV.B.) in order for the Final Credit Certificate to issue.\textsuperscript{17} What ultimately made the Captain’s Galley project dangerous for the contractor is that, if the Initial Credit Certificate expires prior to the project receiving the Final Credit Certificate, the credits are returned to the program and the project must reapply to MEA.\textsuperscript{18}

c. Project Contract Documents and the Owner’s Countersuit
The parties executed the AIA’s 1997 version of the A101 Owner/Contractor agreement, and outlined the project’s LEED requirements in an annexed specification section. However, there did not appear to be language in the contract documents obligating the contractor to obtain any formal level of certification from USGBC under LEED. Significantly, although the tax incentives (and the procedure for securing them) were not identified specifically in the contract documents, the A101 obligated the contractor to deliver a Certificate of Occupancy to the owner within 366 calendar days from the date that the agreement was executed.

The owner’s countersuit against the contractor in the action alleged claims in negligence and breach of contract for the contractor’s failure to “construct an environmentally sound ‘green building’ in conformance with the LEED rating system.” The owner’s court papers, though, did not include any details with respect to how the lost credits were the responsibility of the contractor, other than language suggesting that the Certificate of Occupancy was delivered well after the date set forth in the Initial Credit Certificate. According to the owner’s papers, “the project remained incomplete ‘[n]early nine (9) months after the required completion date (i.e., the 336 calendars specified in the A101).’”

d. The Result & Why the Lawsuit Settled Out of Court

It appears that the Shaw case settled out of court after the Circuit Court judge set a trial date for sometime in August of 2007. Again, it is important to note that the source of risk against which the parties’ contract did not protect came from the applicable regulatory scheme. However, that regulatory scheme could easily have been one where formal LEED certification (or any other third-party certification) was required, and the owner’s claim against the contractor would have been quite different. In Shaw, the contractor—or its attorneys—was clearly not aware of the requirements of the Maryland legislation when reviewing the proposed contract documents and, consequently, could not make an informed decision with respect to whether it was positioned to accept that level of risk in connection with the project. Similarly, the owner and its counsel failed to translate a procedure for procuring the tax credits into the contract documents, which would have, at the least, assured the owner that it could assert a breach of contract claim against the contractor in the event that it failed to comply with those specific contractual provisions.
Perhaps most significantly, the case likely settled because of the mutual waiver of consequential damages provision that is included in the A201 General Conditions of Construction document. Although it was unclear from the contract documents whether the parties amended that provision (the A201 was not included as an exhibit to Shaw’s countersuit papers), should that provision have remained unchanged, the owner would have had an extremely difficult time arguing that the lost tax credits were not consequential in nature.  

### III. Possible Claims

As a result of the Shaw case and other insurance claims that have been reported to date, green building projects provide ample opportunity for liability risks and potential litigation. These claims will typically emanate from either a torts or contracts theory and mainly occur when a disappointed end user developed an elevated set of expectations for the project. In addition, the lack of a comprehensive national standard for green building plays a role in determining acceptable performance in the mind of each different end user. Accordingly, when green requirements are written into contract documents, there is a heightened risk that “green” will mean something different to each stakeholder: a LEED rating, improved indoor air quality, or more efficient energy performance, for example. It is therefore critical that expectations are matched from the outset of the project through concise contract language that accurately reflects the parties’ discussions with respect to defining the project’s green agenda.

#### a. Misrepresentation

As real estate markets become more competitive, many developers look towards the use of green initiatives as an advantage. This may help developers justify premium pricing or close a sale because of the perceived added benefits. From a consumer perspective, the higher price may translate into better quality construction, longer-lived products, and lower energy and maintenance costs. However, when these two opposing viewpoints collide, the buyer’s dissatisfaction may turn to anger followed by a claim. For those individuals pursuing liability based on misrepresentation, they need to consider the three choices of deceit (or fraud), negligence, and strict liability.

#### i. Deceit
In order to assert a claim for deceit, a plaintiff must prove that the defendant knowingly intended to mislead.\textsuperscript{33} The defendant’s actions also needed to induce the plaintiff to rely on the false facts that caused the injury.\textsuperscript{34} In a real estate context, many states now recognize that the seller must disclose a known defect that materially affects the value or desirability of the property.\textsuperscript{35} Furthermore, courts will hold sellers liable for inaccurate performance and quality statements regarding a building and its construction.\textsuperscript{36}

With these requirements in mind for deceit, the lack of a national green building standard makes it difficult to establish whether a building qualifies as green and, if so, by how much. This leads to the issue that some developers may choose to advertise their project as green while following some requirements and ignoring others.\textsuperscript{37} Many owners—or their attorneys—remain ignorant of the procedures for obtaining LEED certification or the distinctions between rating systems and mistakenly advertise their projects as certified under LEED before construction has even commenced. One attorney, who is a critic of the LEED program, pointed out that “[t]here are a lot of exaggerated claims, and as an attorney reading through these things, I think, ‘Oh my goodness; somebody’s going to get sued.’”\textsuperscript{38} Specifically, he notes the lack of research to support health and productivity claims made by owners provides an opportunity for a lawsuit.\textsuperscript{39} However, in terms of quantifying the dollar amount of injury, numerous recent studies have touted the increased sales price or rent rates for certified green buildings versus non-green buildings, which may assist aggrieved purchasers or lessees in arguing that an owner or developer’s misrepresentation with respect to a property’s green features or ultimate level of certification materially affected the sales or rental price of the property.\textsuperscript{40}

Another breakdown may occur when a “green” material fails to conform due to either a buyer’s or seller’s confusion of the standard.\textsuperscript{41} As a result, the Federal Trade Commission held hearings on July 15, 2008, in order to better evaluate and propose changes its guidelines regarding buildings and textiles as they relate to environmental claims.\textsuperscript{42}

In contrast, those involved in the project may make specific claims to attaining a certain level of sustainability but later fail to achieve the advertised status.\textsuperscript{43} For example, an attorney for a professional liability insurance company recently noted several cases where these types of situations have already occurred.\textsuperscript{44} One instance included a case where an owner of a project filed a claim
against an architect because a tenant asked for a rollback on the rent due to the promise and lack of delivery that the building would have healthier air quality. The tenant contended that the building triggered an increase in the number of sick days used by its employees, reduced productivity of its workers, and caused more worker disturbances due to eye strain and drafts.

Nevertheless, a plaintiff must overcome a very high standard in order to prevail on these types of claims in connection with green projects. However, with many people looking for green building features in a project, the opportunity to intentionally or unknowingly satisfy the requirements for a deceit claim remains fairly easy.

ii. Negligence

Another avenue for an aggrieved party to pursue a claim includes negligence, which may encompass design, workmanship, and material defects. In a negligence action, the defendant must have a duty towards the plaintiff whereby a breach occurs that causes damages. Under this duty, a developer or owner, design professional, and all contractors may receive inclusion in a direct claim when a structure fails to meet green building obligations.

In using negligence as a basis for an action, a plaintiff most likely will pursue claims that the defendant(s) failed to adhere to green building standards via their duty owed the aggrieved party or through the breach of specific laws in this area called a per se violation.

When attempting to establish the duty of a defendant to provide a green building, a plaintiff will need to establish the higher standard that is applied towards professionals and skilled tradesman. To determine this level, expert testimony will provide the basis for determining the prevailing industry standard of care. While many courts understand that experts will disagree, the standard of care inquiry will become even more pronounced on issues concerning green construction. The lack of a uniform national standard may create a moving target whereby design professionals and contractors may be held to different standards in different locations and on different types of projects, depending on their knowledge base and level of experience with green construction. Accordingly, it may take time to establish an applicable green building legal standard and may require further analysis of the performance of the designs, techniques, and materials.

From a per se perspective, a plaintiff may assert that the delivered building does not conform with the applicable green building laws.
To make the *per se* claim, the plaintiff needs to be a member of the class of people the measure was designed to protect, the law must be written to specifically protect against this type of injury, and the defendant must have violated the statute, ordinance, or regulation.  

Depending on the jurisdiction, the Washington Supreme Court explained that American courts take different viewpoints on negligence *per se*.  

The majority of jurisdictions hold that a failure of a statutory duty is a breach of the standard of care. Meanwhile, courts in seven states take the approach that failing to follow a statutory duty provides evidence of negligence; and five other states hold the opinion that a violation of the statute provides *prima facie* evidence whereby the defendant may rebut the presumption by competent support.

Nonetheless, proving a violation of the law becomes difficult because of the lack of national green building standard, statutes, or building codes. In fact, a project may create a negligence *per se* situation when trying to adhere to a program’s specific green requirements, but these efforts may directly conflict with a local directive.

For example, materials manufactured close to the project receive preferential treatment under the LEED program in an effort to lower transportation pollution. However, some local agencies may have conditionally approved a project based on the use of specific materials from a manufacturer a little further away. This quandary places the green building goal or requirement at direct odds with opening the door to a negligence *per se* claim.

Therefore, a defendant can expect a plaintiff to include a negligence cause of action as part of a larger claim because a comprehensive green building standard for the country is still evolving.

### iii. Strict Liability

Under this cause of action, a plaintiff will seek to impose liability on a defendant for reasons other than fault. In early court holdings, the liability placed upon a contractor for his negligence relating to an injury to a third party while constructing a building ended upon completion and was limited to his own work, but this rationale no longer applies. The courts now hold that a contractor becomes automatically liable to all foreseeable plaintiffs when it fails to disclose known dangerous conditions or performs negligent work. This includes negligent design or construction and may apply to architects and engineers who supervise the project as well.
In spite of this approach, a limitation exists for contractors when they carefully execute the plans, specifications, and directions provided. In these situations, the employer assumes responsibility so long as a reasonable person would not have followed the instructions due to an obvious defect or danger.

Depending on the type of construction, strict liability may also apply in situations where the land being developed ultimately becomes titled in someone else’s name other than the owner. The courts distinguish projects where a developer constructs buildings for lease and sale to others based on the belief that the structure’s original purpose was akin to a sale of a product and should follow the rules on strict liability.

Based on these circumstances, each green project must receive an independent evaluation to determine the applicability. One situation where a lawsuit grounded in strict liability may occur surrounds homebuilders involved in large scale home production. The USGBC extended its LEED certification program to production homes in August 2005, while the National Association of Home Builders (NAHB) continues to develop its National Green Building Standard. As homebuilders begin to mass produce and market their finished homes as green, a host of issues will emerge, possibly turn into litigation for all stakeholders, and pit all parties against each other if the homes fail to perform as anticipated. This scenario could also lead to a class action situation when the defect applies to a large-scale subdivision with numerous homes.

Nonetheless, a court still must decide whether a home that fails to meet green standards will actually qualify as negligent design or construction.

1. Warranty Theory

Sometimes when a plaintiff’s best opportunity for a claim against a defendant includes an “economic loss,” the only avenue available for recovery becomes either a warranty theory or breach of contract assertion. However, the warranty provisions of Article 2 in the Uniform Commercial Code (UCC) only apply to “transactions in goods” and have no application to pure services contracts. In situations where the transaction involves both goods and services, the judge and parties involved will need to decide on the applicability of the UCC. One authority notes that construction contracts and real estate repairs involving installations tends to provide an area where constant disputes exist. Thus, the distinc-
tions provided previously in the application of Strict Liability may offer some guidance as to whether an aggrieved party may successfully pursue this type of claim but the determination still remains fact specific.\footnote{78}

Analogous to the requirements for negligence, a plaintiff must begin by proving that the defendant made a warranty.\footnote{79} This warranty may occur expressly or impliedly.\footnote{80} Then, the plaintiff must show that the goods lacked compliance with the warranty or were otherwise defective at the time of the sale.\footnote{81} After that, the plaintiff must establish that an injury happened and that the source of the damages occurred due to the defective nature of the goods. In a warranty claim, both proximate and cause in fact theories are required for success.\footnote{82} However, once these elements are already established, the defendant may still quash the claim by asserting defenses that include the use of disclaimers, the lack of notice, the absence of privity, a claim outside of the statute of limitations, and the assumption of risk by the plaintiff.\footnote{83}

a. Express Warranty

An express warranty is made where a seller or lessor makes representations concerning the quality, condition, description, or performance potential of a good.\footnote{84} This may occur in three different manners if the seller or lessor indicates that:

1. as part of the basis for the bargain, that the goods will conform to any “affirmation” or “promise of fact”;
2. the good conform to the description of the product; or
3. the goods conform to any “sample” or “model” provided by the buyer or lessee.\footnote{85}

As a result, the words “warrant” or “guarantee” are unnecessary to create the specific intention of an express warranty.\footnote{86}

Sometimes, the statement made by the seller or lessor requires an evaluation as to whether an opinion or express warranty occurred. These require the trier of fact to determine whether the situation follows the precedent set forth for a “descriptive” case, a “basis-of-the-bargain” case, or a “puffing” case.\footnote{87} While the first two instances will likely lead to an express warranty as statements of fact, a “puff” merely describes an opinion which does not qualify for protection.\footnote{88}

In the green construction context, this doctrine of law may apply to situations where a seller or lessor, at any level in the process,
expressly warrants in a broad manner that a building is green, sustainable, or energy efficient. Should a contract not include specific language regarding the parties’ green building obligations, a plaintiff could utilize the seller-supplied marketing materials against a defendant to establish a structure’s failure to adhere to the agreement. The previously mentioned attorney with the professional liability insurance company noted an example of this type of allegation during a different claim against an architect who allegedly guaranteed LEED Gold Certification for a project but came up short because of fiscal and time limitations. In this instance, the developer sought recourse from the architect because it used the purported LEED Gold Certification as a marketing tool to appeal to tenants and justify the building’s higher rents.

Hence, each person or entity involved in a green building project needs to evaluate every performance representation and make sure every party involved understands what the realistic final product will deliver. Otherwise all defendants should expect to see an express warranty claim involved as part of a larger action.

b. Implied Warranty

Closely related to strict liability, the theory of implied warranty emanates from the nature of the transaction or circumstances of the parties. This application requires a merchant to assure that the goods for sale or lease are merchantable, and appropriate for a “particular purpose.” These warranties must arise from a course of dealing or usage of trade.

In each sale or lease, an implied warranty of merchantability automatically attaches on each transaction conducted by a merchant normally involved in the trade of such goods. To satisfy this requirement, the goods must be “fit for the ordinary purposes for which goods of that description are used.” It makes no difference whether the merchant knew or could find out that the product lacked merchantability.

In a construction context, 42 states attach an implied warranty of workmanlike performance and/or fitness on new home sales. For example, California takes the approach that plaintiffs maintain expectations and rely on the builders’ work. As a result, a showing of physical property damages becomes unnecessary, but a builder must receive a notice of any defect from the plaintiff. In addition, these courts limit the application of implied warranties only to cases involving new construction.
As applied to green buildings, one commentator raised the question of whether a LEED submittal by a design professional or tradesman that verifies compliance with a specific requirement will create a performance guarantee. The illustration of this claim questions whether a warranty will attach when: ‘‘an engineer signs a LEED submittal confirming that the heating and cooling system selected for a project meets criteria for ozone control. Later testing reveals the system produces too much ozone, so the owner demands it be replaced.’’ The answer to whether the LEED submittal will create a warranty for the certifier still remains a subject for the courts to clarify. In the interim, a number of major insurance carriers are taking this possibility seriously, and considering the creation of an endorsement to standard policies of professional liability that would protect design professionals in the event that a claim arises out of the contested certification. It is therefore even more critical for design professionals and their attorneys to review language in their contracts and ensure that a court would not construe such language to be the functional equivalent of a warranty or guarantee with respect to any particular outcome.

Likewise, the courts have not decided whether these implied warranty standards will extend to an otherwise appropriately performing green home as well. Hence, until the courts determine otherwise, a warranty claim still provides an aggrieved party a viable alternative to pursue for a building that fails to live up to expectations.

c. Breach of Contract

Another theory an aggrieved party may decide to pursue includes breach of contract. A breach of contract occurs when one party fails to perform as promised. A material breach happens prior to the completion of the contract whereas a claim for substantial performance occurs after some type of performance. In these types of cases, the prevailing party usually receives damages based on the cost to bring the building into compliance with the original terms of the agreement that was breached.

To succeed in a claim for material breach of contract, a plaintiff must show that but for the failure, he was ready, willing, and able to perform. Depending on the level of the infringement, the aggrieved party may choose to cancel the contract. In situations where the breach is partial or immaterial, the aggrieved party may then choose to continue with the contract and sue to recover dam-
The facts of the case usually dictate what is material for a given contract. Similarly, a substantial performance claim will also depend on the facts of a given case. To qualify under this theory, the performance must not vary greatly from the initial agreement and provide basically the same result as those originally promised. From a construction perspective, the courts will look at the intended purpose of the building and the costs required to remediate the structure into perfect compliance with the contract.

When adding the new requirements of a green building into the mix, a breach of contract claim becomes a good option for a plaintiff looking for relief. An easy assertion against the defendant could be the defendant’s failure to supply the agreed upon green performance standards. These benchmarks could include, but not limited to, specific energy standards, overall green certification, or even government tax benefits. This appears to be one of the main claims by Shaw Development in its counterclaim with Southern Builders.

Accordingly, a disgruntled party may easily assert a breach of contract allegation when pursuing a claim for a building that did not live up to its green expectations.

**IV. Possible Defendants To A Claim**

With the projected explosion of construction litigation regarding green buildings quickly approaching, various stakeholders need to consider different approaches to green projects in order to minimize the previously explained legal threats as well as the possible or most likely inclusion in the litigation surrounding it. When a plaintiff’s attorney decides to file a lawsuit, the prevailing approach includes naming all parties involved in the project as defendants. This rationale stems from the plaintiff’s desire to receive a finished building or rental space that conforms to a promised green standard and that the defendants’ need to determine culpability amongst themselves for the lack of performance.

In order to successfully execute a green development, there are different risks that project owners, design professionals, contractors, and lenders will need to address. Hence, each stakeholder in a
green building project needs to assess its risk and take measures to mitigate its damages.

a. Owner

Usually, the owner of a project is at the center of the development process. The owner provides the site, the design, the strategies and methodologies in which the project will proceed, and the funding. Depending on the owner’s experience, attorneys, risk managers and accountants might also become necessary to provide for a smooth project from conception to the end of its useful life.

In a traditional construction scenario, an owner may choose to develop an individualized contract or use standardized forms that are promulgated by organizations like the American Institute of Architects (AIA). Unfortunately, the standardized forms approach may lead to complex legal problems and require interpretations because the language used is not appropriate for the specific project. Similarly, problems may occur due to the lack of comprehension by a contractor who decides to blatantly disregard a specific provision just because he cannot understand it.

Moreover, from a green building perspective, owners must also anticipate new and different legal concerns in conjunction with those just mentioned. In order to minimize these future legal issues, a good beginning point for an owner includes composing its own document that explains its green building goals for a particular project. This document should resemble something similar to a corporation’s mission statement and provide guidance for all future decisions and contracts. Then, the owner needs to evaluate its goals for the given project and investigate all alternatives available within its stated objectives.

When obtaining assistance from an attorney, the legal advisor needs to assist owners pursuing such projects with tailored documents and strategies for managing the unique risks associated with green buildings. This begins with proper research into a project’s individualized characteristics, which translates into prudently drafted Requests for Proposals (RFP), Requests for Qualifications (RFQ), and ultimately contracts.

As these documents are drafted, they will also need to reflect the sustainable development goals as well, particularly because every project includes its own unique planning, design, and site characteristics. Construction documents also need to explicitly convey the expectation level and program for the green building certification
and evaluate each proposal during the bidding process on its merits to attain the previously defined goals.139

Furthermore, they should identify a party responsible for achieving the overall green building designation on the project.140 More specifically, in the event a failure occurs with the delivery of one of the components required to achieve the green building goal, the owner’s contract with the other parties should attempt to allocate responsibility as well.141 One option available to an owner includes utilizing a liquidated damages provision to protect itself against lost tax incentives due to the building’s inability to satisfy the government’s requirements or other losses associated with green design features that are difficult to quantify in advance of construction.142 Another alternative may incorporate the use of financial incentives in the payment provisions contained in the contract documents that reward a party for attaining the specified green building goal.143

Also, the owner may need to entertain the idea of utilizing a design-build or turnkey approach to focus the attention of those involved on the finished building instead of their traditional roles in a design-award-build approach.144 However, if implementing the traditional methods of construction contracting, the owner needs to clearly outline performance requirements for the design professionals.145 These contracts, as well as those with contractors, need to compel performance that strictly adheres to the specifications required for a given level and/or a specific green program.146

Thus, by taking a thoughtful and analytical approach while keeping all options open, an owner may prevent or provide solutions for later legal issues distinctly created in green building projects that concludes in a less than expected result.

b. Design Professional

In a unique and delicate position, the design professional first and foremost works for the owner in a capacity where ideas become formalized, but often times the nature of the project requires architects and engineers to also make independent construction decisions to support their original design mandates.147 It is not uncommon for an owner to utilize the services of these professionals to administer the construction contract.148 However, because of these distinctively different roles, the design professional also becomes one of the most susceptible parties within a given construction project to be the target of a lawsuit filed by owners, contractors, or third-party beneficiaries.149
When adding the complexities and ever changing nature of the green building standards to the traditional sources of construction liability, these same design professionals now face even greater risks for any failure to perform their contractual obligations. This situation mainly occurs due to the continuous evolution and fluid nature of the green building standards as well as the role a designer plays in the project. Sometimes the owner will engage the design professional to administer the contract of construction, while other times it only requires the creation of the project’s design program.

On the other hand, by blurring these lines, the designer now creates an opening for a liability claim based on a warranty theory when the building’s performance fails to deliver as promised. Most professional liability insurance policies exclude coverage for situations where the design professional falls short of furnishing a guaranteed result or if they pledge energy savings or a specific green certification. For example, standard policy language states, “this policy does not apply to warranties and guarantees and any claim(s) based upon or arising out of express warranties and guarantees.”

According to an attorney for a professional liability insurance company, savvy owners avoid requiring guarantees in these situations and instead impress unambiguous performance objectives upon their design professionals while staying out of the way to let them complete the task at hand. Many times the best intentions turn into a costly claim.

Furthermore, the documents used by the USGBC for LEED certification contain provisions that may lead to similar exposures if not addressed by contract. In fact, the normal agreement used between an owner and design professional usually contains insignificant to no language concerning LEED. The commonly used AIA B101 form, which was updated in 2007, only provides that the design professional “consider environmentally responsible design alternatives.” Indeed, the 2007 version of the AIA B101 is replete with very general references to the architect’s obligation to communicate such alternatives to the owner. As drafted, should the architect fail to sufficiently discuss green design options with the owner, it may find itself at risk for a breach of contract claim if the owner is not satisfied with the architect’s work product. This possibility is made more particularly acute given the broad and vague language that the B101 provisions contain.

To handle contracts under which a LEED rating will be sought, the AIA released the B214 2004 Standard Form of Architect’s Ser-
vices: LEED Certification to help clarify a design professional’s scope of services with respect to green building projects. This form seeks to determine the duties and responsibilities of a design professional when the owner chooses to obtain LEED certification from the USGBC. Unfortunately, this approach bifurcates the process by requiring the design professional, in conjunction with the owner, to develop a LEED goal on one form while using the other form to explain the process driven aspects of a project.

With these additional design professional risks a real threat, the process for containing liability begins with managing an owner’s expectations. The parties need to utilize specific legal language to determine the design professional’s obligations in relation to achieving green building goals, as well as any responsibility for securing applicable governmental incentives. Due diligence by design professionals and their legal counsel will become an important early step to mitigate future liability issues, followed by educating the owner that green buildings are generally more expensive than traditional construction. This strategy will hopefully impress upon and alert the owner at a very early stage that a green project will probably require additional funds and resources than traditional methods.

Moreover, the design professional should involve the owner in green building decisions at this same early stage. Because many of the green building certification programs like LEED require trade-offs within the different credit categories, the owner needs to understand their impact to the overall project’s cost without compromising the integrity of the original design goals.

As a result, the role of the design professional in a green building project creates numerous possibilities for a party to make a claim when the project does not turn out as expected. However, with a well-conceived and implemented strategy, the contract documents may assist the parties in minimizing the risks associated with pursuing green design opportunities.

c. Contractor

After the creation and selection of a design, the traditional owner turns to a contractor for the execution of the plan. Sometimes, the contractor performs some of the work itself by utilizing its own work force to complete the job, but typically it will subcontract work out to specialized trades. The contractor generally serves to coordinate and schedule the tradesmen used in a given project, make
sure each trade adheres to quality standards, and provide a system to ensure proper and timely payments occur for services rendered. Based on this complicated role, the contractor, its subcontractors, or their suppliers can easily be named as defendants in claims for delay, breach of contract, nonpayment, warranty, negligence, and fraud by owners, designers, other subcontractors, or other third parties.

When a green building becomes part of the equation, the contractor’s role becomes even more crucial to the project’s success. The contractor is responsible for translating the vision of the owner and designer into reality. During this process, the contractor offers its expertise towards achieving this vision by recommending different alternatives to various materials and building system choices. This may include materials and other types of systems used throughout the structure. Moreover, as the engine driving the physical construction of the building, the contractor must coordinate tradesmen and suppliers to achieve the green building standards while providing proper documentation and deliverables on schedule.

To minimize green building risk, contractors should begin by completely understanding which program and what level the project expects to achieve. Sometimes, creating separate entities that handle this type of work and that assume the liability may become necessary. Other times, shifting the risk to subcontractors may provide a better strategy. A contractor should consider only those subcontractors with experience in green building as well as those with the financial capacities to handle any problems that may arise due to the green building cost premium.

In addition, the contractor should make sure those involved have received education and experience in green building programs. This encompasses senior managers that oversee the project’s execution, as well as personnel who review all internal processes and procedures to make sure that they adhere to any green building requirements. This may also lead to the consideration of hiring an in-house green building consultant to shore up any areas of deficiency.

Therefore, a contractor, regardless of the tier, needs to take a proactive approach if choosing to pursue or accept work that involves a green building because the likelihood of being included in any claim for missing the standard remains extremely high.

d. Lenders
Often, owners lack sufficient equity to fund a project completely on their own, so a lender frequently plays a critical role in the real estate development process by providing debt financing in the form of a loan secured by a mortgage on the property. The owner may use these funds to pay for services such as design professionals, contractors, or materials. In the context of a private construction project, debt financing usually take the form of a construction loan which covers the fiscal requirements over the time needed to finish the project in exchange for a security interest. Depending on the amount of financing obtained by the owner, a project may not proceed even though a design was created or the fiscal constraints may hamper the ability to handle typical construction situations like change orders, price escalation, or claims. Financing issues may also cause lengthy delays or even force a termination of the project.

Likewise, lenders face liability that may arise from many areas in a construction project. Among the possibilities, a lender may face a suit for misrepresentation or fraud in a contract to loan funds, abrupt termination of the lending arrangement, or the exercise of undue influence in managing the affairs of a delinquent borrower. To protect its interests, a lender will need to meet with the owners to discuss the green building implications as it relates to the project and construction loan draws. Among the discussion items, the lender will need to comprehend the differences between a green and traditional construction process, the different types of materials and systems used, and the responsibility assignments for documenting and delivering certifications as it relates to the releasing of funds at the appropriate times.

Consequently, a lender may find itself in a green building claim very easily because it did not complete its due diligence prior to its complete involvement in a green construction project.

V. A Proposal for Limiting the Risk of a Green Building Claim

Given the various possibilities for claims against different types of stakeholders, there are some specific and general approaches that may assist in limiting green building liability. Each party considering involvement in a green building project should carefully consider the following proposals when putting their plans into action.
a. Advice to Owners

The most significant source of risk for an owner contemplating a green construction project is overstating the benefits of the building in advance of completing the project. This risk is two-pronged. First, the owner may misunderstand the intricacies of the LEED system and advertise its building as “certified” to a certain level of certification before a formal third-party designation has been conferred. If the owner is relying on the certification to sell apartment units or lure tenants into its building, it may face claims for rescission or rent abatement, among others, if that certification is not ultimately achieved. It is therefore imperative for owners to understand the procedures by which their projects will pursue any third-party certification and take those procedures into account in their marketing materials accordingly.

Second, many of the soft benefits of green building—air quality, tenant productivity, for example—rest upon extremely dubious studies. Owners should therefore be careful about emphasizing the benefits of their green buildings and not overstate the anticipated level of performance when advertising or promoting their projects to potential tenants.

Finally, from the owner’s perspective, a waiver of consequential damages provision could be extremely problematic (as it likely was in Shaw) in the event that a lawsuit arises out of a green project. Unlike direct damages, which will be awarded to compensate the non-breaching party for the costs of remedying the defective work that caused the other party’s breach, consequential damages are those damages which flow from that breach and can be substantially more significant in dollar value. In order to be awarded, consequential damages must be contemplated by the parties at the time they entered into the contract as a probable result of either party’s breach and cannot be speculative or too remote from the original breach such that a court would deem them to have been unforeseeable. In Shaw, had the contract documents specifically referred to the tax credits and their corresponding dollar amount, the owner would have had a far easier time arguing that the contractor’s failure to deliver the project as scheduled was the direct cause of its loss of the credits. On the contrary, the contractor would have argued that the loss of the credits simply flowed from the construction delays, were thus consequential, and the owner was barred from recovering them from the contractor because of the mutual waiver provision in Section 4.3.10 of the A201 General Conditions of the Contract for
Construction. It is likely that this mutual waiver played a significant role in driving the case towards settlement.

The consequential damages inquiry has broad ramifications across all facets of green construction contracts and will likely become increasingly commented upon both by courts and attorneys as green building litigation increases. For example, an owner who brings a lawsuit against its contractor in the event that a project fails to achieve a certain level of LEED certification would likely be barred from claiming the lost rental premium from the contractor should a mutual waiver of consequential damages provision be present in the parties’ agreement. An owner may be unwilling—or unable, particularly given the tighter lending requirements in the current state of the economy—to accept this level of risk, so it must either negotiate to cap consequential damages at a certain level (perhaps at the limits of the contractor’s CGL policy or the design professional’s professional liability policy) or include a liquidated damages provision in the event that the damages due to a particular breach are difficult to ascertain at the time it negotiates the agreement.

Again, the consideration of consequential damages in the context of green construction contracts will remain critical because courts have yet to rule on whether a lost financial incentive or alleged rental premium on a green project should be deemed direct or consequential. In the interim, it will remain increasingly important for project stakeholders to consider all of the ramifications of a consequential damages provision.

b. Advice to Design Professionals

From a legal counselor’s perspective to mitigate risk for design professionals, an attorney needs to keep current on the changing landscape within the green building movement. This includes attending seminars, utilizing local AIA resources, reading a variety of resources with current updates, and following changes in the standard of conduct for design professionals in the jurisdiction where the project is located.

In addition, the attorney must work closely with the design professional to understand the parameters of available insurance coverage. This knowledge will help design professionals craft specific language to guard against and limit any types of warranties in their executed contracts. If the design professional still chooses to accept standard forms, then the attorney will be able to advise
with respect to the risks and ramifications of proceeding without additional protective language. Alternatively, the attorney may suggest a liquidated damages clause, because it may provide a previously agreed upon resolution when circumstances create an adverse situation.

One of the most important issues with respect to design professionals is what many perceive to be a shifting standard of care within the industry with respect to green design. Professional liability policies will only insure a design professional for errors and omissions that are committed because the design professional did not satisfy the prevailing standard of care, which is defined as the level of care of a similarly situated professional. A typical standard professional liability policy exclusion is for claims that arise where a design professional holds itself out as having a higher level of expertise than contemplated by the prevailing standard of care.

In this context, a professional liability insurer will likely disclaim coverage for any claims that are asserted against the architect. It is not difficult to imagine that a design professional, who qualifies as a LEED Accredited Professional and touts itself as a green design expert in marketing or other promotional materials would be held to a higher standard of care. This possibility makes it extremely important that a design professional’s contract specifically sets forth the green design services that the design professional will provide. It also demands that the design professional’s counsel assist the design professional in crafting marketing materials that accurately reflect the design professional’s competency in a manner that is not overstated.

c. Advice to Contractors

As a legal advisor to businesses that contract for green construction work, the language used in the contract and subcontract must clearly outline all green building expectations and deliverables. This may help avoid using a standard language that places the subcontractors under provisions incorporated in the main agreement with the owner. Similarly, contractors should insist upon a waiver of consequential damages provision from owners because many green construction damages will not be direct in nature. In the Shaw case, if the parties’ form AIA contract included the standard mutual waiver of consequential damages provision, it is likely that this was one of the major reasons why the case settled before trial.

Finally, the contractor’s insurance policy must be reviewed to ensure that sufficient coverage exists in this rapidly changing area.
Sometimes a contractor will choose to engage in a design-build contract with the owner and accept new and different levels of risks. Similar to the design professional’s dilemma discussed earlier, many contractor policies will develop similar gaps in coverage and require the purchase of additional endorsements in order to contain specific green building risks. For example, commercial general liability policies generally only cover claims for property damage, so it is likely that in Shaw the contractor’s CGL policy would not have covered the owner’s claims for the lost tax credits. Until the insurance industry crafts an endorsement or product that accounts for these types of claims, it is incumbent upon contractors and their counsel to review policies of insurance with heightened vigilance on green projects to ensure that the most comprehensive coverage as possible remains available.

d. Use of Form Contracts
The use of form contract documents is currently the largest source of risk for industry stakeholders that participate on green construction projects. Green building regulations are being enacted quickly-sometimes obligating projects to comply with new codes after construction drawings have been produced and specifications drafted. It is a critical threshold issue that the applicable regulatory environment be surveyed in advance of construction and that requirements be translated into the contract documents. Moreover, stakeholders should acknowledge the possibility that regulatory requirements may change during the course of the project, and contract provisions should explicitly refer to the green building codes and regulations with which the project will be required to comply.

Failing to precisely define the term “green” in the contract documents—whether it be a LEED rating, a certain level of building performance, or other definition as contemplated by the parties—may also prove to be a source of liability. It is simply not possible to draft form “green” language and insert it into an agreement for green construction or design services; by nature, green requirements and programs will differ for every project. It is therefore critical that the owner and its attorneys work through a project’s green requirements in advance of construction to ensure that the proper scope be incorporated into the contract documents.

e. Attorney’s Concerns
There is no question that the current frenetic pace of regulatory activity is what is, fundamentally, driving the potential for increased
green building risk. In *Shaw*, a relatively new piece of legislation that was not translated by the parties into their contract documents exposed both sides to unanticipated liability. It is therefore critical that the first inquiry on any green construction project be a review of the applicable codes and regulations that may apply to the project in question. Attorneys must carefully dissect these requirements and ensure that the specific procedures for compliance are accurately reflected by contract.

Attorneys for design professionals— and more specifically architects— must pay careful attention to the new language of the 2007 version of the AIA documents. The architect now has an obligation to communicate sustainable design alternatives to the owner, but the form AIA documents provide a very low level of detail with respect to what those specific obligations might be. If the architect fails to satisfy this very vague language, the owner would have the right to assert a breach of contract claim against the architect. It is therefore critical that attorneys for architects set forth the specific green design services that the architect will provide within the contract documents.

VI. Conclusion

As the green wave continues to engulf the construction industry with new dilemmas and questions, those wishing to avoid future litigation must pursue customized contract and risk management solutions in order to protect themselves and other participants that are involved in green building projects. As illustrated earlier, such projects may be subjected to litigation under a variety of contract or tort theories. However, the risk management starting point for any green project should begin with the owner, who must articulate its goals for the project and set the tone for subsequent participants, as well as recognize any applicable regulatory scheme applied by state or local government. Once this overview is established, the other parties will enter the project with a solid understanding of expectations across the board.

Likewise, a custom tailored contract will assist in memorializing the expectations of the parties. While a form contract aims to provide good protections versus the risk of a claim on general construction projects, the new requirements set forth by the green building standards demand customized approaches to lessen the possibilities of a lawsuit. The danger of relying on form contracts
becomes all the more acute when a project either voluntarily seeks to take advantage of green building incentives or is required to satisfy a particular mandate in order to receive a certificate of occupancy. The Shaw Development case makes it clear that parties who do not investigate the applicable regulatory structure and translate any associated procedures into their contract documents will do so at their own peril.

However, provided that the additional legal considerations as described in this article are adequately addressed through thoughtful drafting and planning, green design does offer industry stakeholders the ability to reduce their exposure to construction risk. A truly green design offers an integrated, interdisciplinary approach to maximizing a building’s efficiency and performance, which should ultimately translate into a reduced risk for construction- or design-related claims. It follows that a project which, from the outset, integrates all design components by bringing each party to the table to maximize efficiency will reduce the risk of design errors, delay claims, or other traditional construction-related legal issues that typically crop up during the course of a project.

1The American Institute of Architects, Local Leaders in Sustainability: Green Incentives, June 17, 2008.
3Charles J. Kibert, Policy Instruments for a Sustainable Built Environment, 17 J. LAND USE & ENVTL. LAW 379 (Spring 2002).
7Dick Dahl, It’s not easy being green: Will ‘green certification’ issues lead to litigation, LAWYERS WEEKLY, September 8, 2008.
8Dick Dahl, It’s not easy being green: Will ‘green certification’ issues lead to litigation, LAWYERS WEEKLY, September 8, 2008.
9See Quatman and Manies, supra note 2.
10See Quatman and Manies, supra note 2. According to a statistic presented by a representative of XL Specialty Insurance during the Green Building Initiative’s The Liability of Building Green webinar series, only 27 percent of design professionals consider themselves “very experienced” with respect to

11 After receiving some press in a number of local newspapers during the course of 2007, the Shaw Development case was first profiled extensively at the greenbuildingsNYC blog in August of 2008. See The Anatomy of America’s First Green Building Litigation, available at http://www.greenbuildingsnyc.com/2008/08/20/the-anatomy-of-americas-first-green-building-litigation/ (last visited December 5, 2008) [hereinafter America’s First Green Building Litigation]. The major points of that analysis are set forth herein.

12 See infra Section V.a.

13 Md. Regs. Code tit. 14 § 26.02 (2008). The current iteration of the program has doled out all of the available tax credits and is not currently accepting additional applications.


19 See America’s First Green Building Litigation, supra note 11.

20 See America’s First Green Building Litigation, supra note 11.

21 See America’s First Green Building Litigation, supra note 11.


23 See America’s First Green Building Litigation, supra note 11.

24 See infra Section V for a detailed discussion of the implications of consequential damages provisions on green building projects.


35Florrie Young Roberts, *Disclosure Duties in Real Estate Sales and Attempts to Reallocate the Risk*, 34 *Conn. L. Rev.* 1 (Fall 2001).


37See Masters and Musitano, *supra* note 25 at 17.


48See Keeton, Dobbs, Keeton, and Owen, *supra* note 32 at § 30.


50See Masters and Musitano, *supra* note 25 at 18.

51See Keeton, Dobbs, Keeton, and Owen, *supra* note 32 at § 32.

52See Keeton, Dobbs, Keeton, and Owen, *supra* note 32 at § 32.

53See Keeton, Dobbs, Keeton, and Owen, *supra* note 32 at § 32.

54See Masters and Musitano, *supra* note 25 at 18.


57See Keeton, Dobbs, Keeton, and Owen, *supra* note 32 at § 36.


See Masters and Musitano, supra note 25 at 18.

See Masters and Musitano, supra note 25 at 18.

See Dahl, supra note 7.

See Keeton, Dobbs, Keeton, and Owen, supra note 32 at § 95.

See Keeton, Dobbs, Keeton, and Owen, supra note 32 at § 104A.

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70 See White and Summers, supra note 74 at § 9-1. The authors note that a warranty liability claim parallels a negligence assertion but is not necessary for success.

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85 U.C.C. § 2-313(1), § 2A-210(1).

86 U.C.C. § 2-313(2), § 2A-210(2).

87 See White and Summers, supra note 74 at § 9-3.

88 See White and Summers, supra note 74 at § 9-4.

89 See Masters and Musitano, supra note 25 at 18.

90 See Masters and Musitano, supra note 25 at 18.

91 See Dahl, supra note 7.

92 See Dahl, supra note 7. A detailed discussion of the potential lack of insurance coverage for the design professional that lands itself in this type of situation is set forth infra in Section IV.B.

93 See White and Summers, supra note 74 at § 9-7.


96 U.C.C. § 2-314(1), § 2A-212(1).

97 U.C.C. § 2-314(1), § 2A-212(1).

98 See White and Summers, supra note 74 at § 9-8.

99 Riverfront Lofts Condominium Owners Ass’n v. Milwaukee/Riverfront Properties Ltd. Partnership, 236 F. Supp. 2d 918 (E.D. Wis. 2002). In addition to the 42 states mentioned, footnote 3 of the opinion further explains that Hawaii and Utah adopted this doctrine in the dicta of their opinions.


The issues surrounding warranties and guarantees are significant because standard policies of professional liability exclude claims arising out of a design professional’s warranty or guarantee, or functional equivalent thereof. According to a recent report that reviewed the current state of the insurance marketplace with respect to green building that was produced by Marsh, a number of insurers are considering professional liability policy endorsements that would be designed to protect design professionals against this situation. See Marsh Report, available at http://www.greenbuildingsnyc.com/2008/09/11/marsh-report-at-least-one-professional-liability-insurer-is-considering-a-leed-project-coverage-endorsement/ (last visited December 3, 2008).

See Masters and Musitano, supra note 25 at 18.

See Masters and Musitano, supra note 25 at 18.


John D. Calamari, Joseph M. Perillo, THE LAW OF CONTRACTS § 11.18(b).

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See Masters and Musitano, supra note 25 at 18.

See Masters and Musitano, supra note 25 at 18.


Shaw Development, LLC v. Southern Builders, Inc., No. 19-C-07-011405 (Somerset Cty. Cir. Ct. Md.2007). However, it is important to note that the contract documents did not include specific language with respect to the tax credits, which likely hurt the owner’s argument that the contractor breached the agreement and likely drove the matter towards settlement rather than trial.


See Dahl, supra note 7.

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Justin Sweet, Marc M. Schneier, LEGAL ASPECTS OF ARCHITECTURE, ENGINEERING AND THE CONSTRUCTION PROCESS (Thomson 2004).

Justin Sweet, Marc M. Schneier, LEGAL ASPECTS OF ARCHITECTURE, ENGINEERING AND THE CONSTRUCTION PROCESS at § 8.02 (Thomson 2004).

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See Conner, supra note 123 at 11.

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The importance of drafting an accurate RFP should not be overlooked, particularly where the RFP will eventually be included as part of the project’s contract documents.

Owners must, as always, be careful to ensure that any liquidated damages provision is proportional to the actual loss that may be incurred in order to prevent a court from deeming it to be an unenforceable penalty provision which was crafted to ensure the other party’s performance.

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154 See Hudgins, supra note 103.


156 See Hudgins, supra note 103.

157 See Hudgins, supra note 103. Examples mentioned in the article include the use of a cork floor covering that became a mold hazard, a fresh air window system that caused respiratory problems because pigeon droppings accumulated under a rooftop solar shade, and a leaky vegetated roof that caused water damage.

158 See Conner, supra note 123 at 13; See Zehren, supra note 153.

159 See Zehren, supra note 153.

160 Am. Inst. of Architects Form B101 § A.1.6 (2007).

161 For example, Section 3.2.5.1 of the B101 states that “[t]he Architect shall consider environmentally responsible design alternatives, such as material choices and building orientation, together with other considerations based on program and aesthetics, in developing a design that is consistent with the Owner’s program, schedule and budget for the Cost of the Work.”


164 See Zehren, supra note 153.

165 See Conner, supra note 123 at 13; Zehren, supra note 153.

166 See Conner, supra note 123 at 13.

167 See Conner, supra note 123 at 13.

168 See Zehren, supra note 153.

169 See Zehren, supra note 153.

170 See Sweet and Schneier, supra note 127 at § 17.03. Sometimes they are referred to as a General or Prime Contractor.

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173 See Conner, supra note 123 at 12.

174 See Conner, supra note 123 at 12.
See Conner, supra note 123 at 12.

See Conner, supra note 123 at 12.

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See Conner, supra note 123 at 12.

See Sweet and Schneier, supra note 127 at § 8.03.

See Conner, supra note 123 at 12.

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See Conner, supra note 123 at 12.

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See Conner, supra note 123 at 12.

See Conner, supra note 123 at 12.

See Conner, supra note 123 at 12.

See Kolton, supra note 123.

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

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This provision, Claims for Consequential Damages, states that “[t]he Contractor and Owner waive Claims against each other for consequential damages arising out of this Contract.’’

See Conner, supra note 123 at 14.

See Conner, supra note 123 at 14.

See Conner, supra note 123 at 14.

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See Conner, supra note 123 at 14.

See Conner, supra note 123 at 14.

As set forth above at footnote 158, the 2007 version of the B101 Owner—Architect agreement includes very vague allusions to the architect’s obligations with respect to communicating green design alternatives to an owner. As drafted, this language is extremely problematic for the architect and should be amended to clearly delineate the scope of the architect’s green design services to avoid any potential breach of contract claim by the owner later on during the course of the project.

See Conner, supra note 123 at 13.

See Conner, supra note 123 at 13.

See Conner, supra note 123 at 13.

See Conner, supra note 123 at 12.

See supra note 196 and accompanying text.