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GREEN BUILDING CONTRACTS: CONSIDERING THE ROLES OF CONSEQUENTIAL DAMAGES & LIMITATION OF LIABILITY PROVISIONS

Darren A. Prum & Stephen Del Percio

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. 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. 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. With this recent philosophical change in the approach to real property development, new issues and risks are emerging for all those involved—contractors, designers, owners, and lenders alike—that require the attention of legal counsel.

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 the event that the project fails to reach the anticipated level of third-party environmental certification, on which both the developer and its lender rely.

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 unique set of facts relating to the claim in *Shaw*, 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. Until then, stakeholders involved in green building projects must carefully consider the types of limitation of liability provisions included in their contracts.

With the foregoing in mind, this Article examines the role of consequential damages and limitation of liability provisions as applied to green building contracts. Part II begins with a historical background of consequential damages from both common law and Uniform Commercial Code ("UCC") perspectives, and then considers its applicability to various stakeholders, such as 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 provides recommendations to each kind of construction project stakeholder in navigating these types of provisions in connection

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4 No. 19-C-07-011405 (Somerset Cty. Cir. Ct. Md. 2007).
with green building projects.

II. Consequential Damages

Where parties to a green building construction contract wish to minimize the risk of future litigation, they should first consider that construction claims are generally 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 understanding between the parties with respect to the unique aspects associated with green building initiatives.

Depending on the theory pursued, consequential damages may become applicable under common law or the UCC. Customarily, a breach of contract allegation that is asserted 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. In spite of this approach, and especially when considering the added complexities of a green building, expansive 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. Because of the green building arena's novelty, courts have yet to set a precedent as to whether the damages should be considered direct or consequential.

Similarly, the UCC may become applicable when a party

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6 Id.
7 Id.
8 Id.
9 JOHN D. CALAMARI & JOSEPH M. PERILLO, THE LAW OF CONTRACTS § 11.18(a) (4th ed. 1998). In addition, in a breach of contract claim, a party is allowed to seek the damages necessary to place it where it would have been had the contract been fully performed which, absent language to the contrary in the contract, includes lost profits. Id. By contrast, under tort law, damages seek to place the party in the position it was in prior to the event giving rise to the tort. Id.
10 See Prum & Del Percio, supra note 5.
11 Id.
decides to pursue a strict or products liability claim.\textsuperscript{12} Traditionally, courts have declined to impose liability on a contractor arising after the project's completion.\textsuperscript{13} Liability now attaches, however, when a contractor performs negligent work or does not disclose a known dangerous condition.\textsuperscript{14} Moreover, the courts now treat projects where the land being developed eventually changes title to someone else other than the owner as a good.\textsuperscript{15} 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.\textsuperscript{16} From a green building perspective (and under the scope of the UCC), this approach could manifest into a claim through mass-produced and marketed homes, commercially franchised stores, or unproven technology rushed to market.\textsuperscript{17} In addition, if the products used in the construction of the building fail at any point, a plaintiff may turn to the installer or manufacturer itself to obtain damages under a UCC theory. Because green building construction contracts sit squarely at the intersection of the common law and the UCC, this Article considers damages from both perspectives.

A. Common Law Background

Before 1854, the decision to award damages to a harmed party was a question for the jury to answer; thus allowing for very few precedents and broad discretion for triers of fact.\textsuperscript{18} However, the decision in the case of\textit{Hadley v. Baxendale}, which followed a boom in England's commercial economy, changed this previously inconsistent approach, and subsequently received widespread approval by common law jurisdictions.\textsuperscript{19} In\textit{Hadley v. Baxendale}, the court articulated two main

\begin{footnotesize}
\begin{enumerate}
\item Id.
\item W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS \S 104A (5th ed. 1984).
\item 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.
\item Id.
\item Id.
\item See Prum & Del Percio, supra note 5.
\item See CALAMARI & PERILLO, supra note 9 at \S 14.5.
\item Id.
\end{enumerate}
\end{footnotesize}
rules. First, an injured party may recoup those damages "as may fairly and reasonably be considered...arising naturally, i.e., according to the usual course of things, from such breach of contract itself." 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."

Accordingly, these rules reduced business risk by restricting the amount juries could award for breach of contract and created a forum whereby victims of contract breach could recapture damages that were distinct to their special situation. 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.

In trying to resolve these issues, two approaches emerged. In 1903, the United States Supreme Court set forth the "tacit-agreement" test. 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 it assumed consciously, [such liability] when the contract was made." 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.

In contrast, several modern legal scholars point out that the courts began moving away from this narrow approach. 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.\textsuperscript{29}

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.\textsuperscript{30}

Thus, a party to a green building contract trying to avoid a common law consequential damages claim must keep in mind that any specific cause 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 the parties could not foresee certain consequential damages 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,\textsuperscript{31} including the right to sue for incidental and consequential damages.\textsuperscript{32} A good starting point is § 2-714, which provides that

\textsuperscript{29} ARTHUR CORBIN, CORBIN ON CONTRACTS (REVISED EDITION) § 56.5 (2005).
\textsuperscript{30} See E. ALLAN FARNSWORTH, FARNSWORTH ON CONTRACTS § 12.14 (2d ed. 1998).
\textsuperscript{31} U.C.C. § 2-711 (1990). For plaintiffs pursuing this theory in green building litigation, the available remedies include the right to cover and sue for damages, to recover damages for non-delivery, and to compel specific performance when applicable.
\textsuperscript{32} U.C.C. § 2-715 (1990). Section 2-715 defines incidental and consequential damages vesting with the buyer: "(1) Incidental damages resulting from the seller's breach include expenses reasonably incurred in inspection, receipt, transportation and care and 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 (a) 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 (b) injury to person or property proximately resulting from any breach of warranty." \textit{Id.}
general or direct damages may ensue “in the ordinary course of events from the seller’s breach,” and any applicable “incidental and consequential damages under Section 2-715” may also be recoverable.  

Under § 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 damages regardless of whether the seller affirmatively understood the risk of loss. Furthermore, the buyer must also show a degree of certainty about the consequential damages and that they are not too speculative in nature.

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 are cases that 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.

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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: “[E]ven 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 also WHITE & SUMMERS, supra note 23, at §10-4(c).
37 U.C.C. § 2-715 cmt. 3 (1990). In fact, one treatise explains that the Code “rejects the oft-suggested rationale that the rule of Hadley v. Baxendale protects the seller against insuring risks for which, had the seller been aware of them, the seller would have demanded a greater compensation. ARTHUR CORBIN, CORBIN ON CONTRACTS § 1008 at 74 (1964).
38 U.C.C. § 2-715 cmt. 4 (1990). Comment 4 states that “[t]he 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.” Id.
39 See WHITE & SUMMERS, supra note 23, at §10-4(d). In determining a case on lost profits clearing up the interpretation of the Arkansas Code, the
However, courts 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,” while 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 § 350 of the Restatement (Second) of Contracts’ formulation whereby the aggrieved party must make a

Eighth Circuit explained that “[w]here 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 industry because nonconformance will effective cause their operation to close. See White & 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. R.W. Murray Co. v. Shatterproof Glass Corp., 758 F.2d 266 (8th Cir. 1985).

\textsuperscript{40} See White & Summers, supra note 23, at § 10-4(d). 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 id. § 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 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).
reasonable, yet unsuccessful, effort to avoid the loss that could not have been avoided without "undue risk, burden, or humiliation." In this context, the Court of Appeals for the District of Columbia allowed a cement buyer to recover consequential damages for a shipment of cement that did not meet its strength requirements, even though it used the cement for twenty-eight days after initial strength tests were determined to be inconclusive. 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. Consequently, when contemplating a green building contract, the parties to the agreement must additionally consider the UCC's unique requirements that damages, like those arising from a delay, may be 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 to the table with different desires and needs in order to limit their current and future liabilities beyond those normally associated with a construction project.

1. 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 waiving its ability to

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45 See WHITE & SUMMERS, supra note 23, at §10-4(f). The pertinent parts of section 350 state: "(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." RESTATEMENT (SECOND) OF CONTRACTS § 350 (1981). 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 & SUMMERS, supra note 23, at § 10-4(f).


47 Id. at 1203.

48 JUSTIN SWEET & MARC M. SCHNEIER, LEGAL ASPECTS OF ARCHITECTURE, ENGINEERING AND THE CONSTRUCTION PROCESS § 27.06(A) (8th ed. Thomson 2009).
pursue consequential damages from designers or contractors.

Generally, an owner’s main concern revolves around completion of the project within its budgeted financial limitations and within certain time constraints. 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 that are perceived to derive from third-party green building certification, as well as potentially lucrative financial incentives offered 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 the right to pursue those damages by contract. However, given the current construction climate, and in direct contrast to the most recent real estate boom, owners are enjoying a desperate market; one that has seen construction service providers become 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 (or realistic) it may be 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.

2. 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

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49 Id. § 27.06(B).
50 See Prum & 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 & Del Percio, supra note 5.
extent of their fee or to the extent that those damages would be covered by the available limitations of the designer's professional liability insurance policy. It is therefore critical for owners to review the terms of their design agreements with the designer's insurers to confirm that coverage will continue to be in place in the event that any litigation may arise 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 for any pendent claims. Hence, negotiations over the specific parameters of a consequential damages provision will ultimately be a business decision for both sides to consider (and negotiate).

3. Contractor's Perspective

Under the threat of litigation, a contractor will assert a consequential damages claim against an owner on the basis that it lost a profitable business opportunity or its goodwill has diminished in value. When lost profits become the issue, the contractor generally maintains that the owner's conduct reduced or altered its bonding capacity. Unfortunately, the courts do not provide straightforward guidance in these instances. A majority of cases have held that these types of claims are too speculative except, for example, situations where the contractor plainly shows a track record of earning consistent profits.

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 damages claim asserted by the owner. For example, one area which has yet to be fully explored by stakeholders is tying failure to earn LEED certification to

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53 See infra Part III.E.
54 See SWEET & SCHNEIER, supra note 48, at §27.06(C).
55 Id.
56 Id.
58 One of the most popular third party certification programs connected with green construction in the United States comes from the USGBC's Leadership in Energy and Environmental Design program. See generally Darren A. Prum,
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 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 take opposite positions to inclusion and waiver. However, 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 interested party. Although sometimes these agreements do not get formalized, most often the parties complete or draft a written contract followed by an action to execute it; this memorializes their relationship. 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 contract drafter’s starting perspective when tackling a consequential damages clause, as well as how the general strategy towards this issue protects the interests of a given stakeholder.

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59 See Prum & Del Percio, supra note 5.

60 Id. at 266.

61 Id.

62 Id.
A. 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, \(^{63}\) the new 2007 version of the AIA documents contains little guidance or protective language for either the design professional or owner; the few references to sustainability that are included are contained in §§ 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. \(^{64}\) While these provisions may be problematic for other reasons related to scope of work, standards of care, and implied warranty, it suffices for purposes of this Article to observe 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 — such as a 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


\(^{64}\) Am. Inst. of Architects Form B101 (2007) §§ 3.2.5.1 - 3.2.5.2. 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." Id. In addition, the "Traditional Development" process includes five phases: SD – Schematic Design, DD – Design Development, CD – Construction Documents, BD – Bidding or Negotiation, and CM – Construction Management. See SWEET & SCHNEIER, supra note 48, at § 12.02.
unknown liabilities in their contracts. While the savvy owner may seek to remove such a clause from its design agreements, the design professional must consider the possibility that such green building projects will spawn large consequential damages claims from the owner, and then 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. Similar to its predecessor document, the B151 (1997), the B101 (2007) includes a mutual waiver of consequential damages 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 more important 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 vice versa.

Curiously, the B101 contains no definition for the term “consequential damages;” therefore, the general explanation of terms contained in Paragraph 10.2 applies, which references the AIA form A201 General Conditions of the Contract for Construction document. The definition of consequential damages in Paragraph 15.1.6 of form A201 is defined as:

- 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

- damages incurred by the Contractor for principal office expenses including the compensation of personnel

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67 See SWEET & SCHNEIER, supra note 48, at § 27.07(D). 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 Perini Corp. v. Greate Bay Hotel & Casino, Inc., 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. *Id.*
68 See Am. Inst. of Architects Form B101, supra note 66, at § 8.1.3.
69 *Id.* § 10.2 (stating that “[t]erms in this Agreement shall have the same meaning as those in AIA Document A201-2007, General Conditions of the Contract for Construction”).
stationed there, for losses of financing, business and reputation, and for loss of profit except anticipated profit arising directly from the Work.\textsuperscript{70}

This provision does far more than merely compel a waiver of such consequential claims on two levels.\textsuperscript{71} First, it now renders the Eichleay formula\textsuperscript{72} irrelevant because it disallows the recovery of home office overhead.\textsuperscript{73} Second, it attempts to allow liquidated damages only for "direct" situations and not for those considered "indirect" or consequential.\textsuperscript{74} 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. In light of this, a knowledgeable owner trying to preserve the right to claim consequential damages will strike out the language.

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 set aside due to the language used in making this broad waiver.\textsuperscript{75} As a result, they strongly recommend that attorneys use caution when providing advice to design professional clients who consider deleting this waiver on any project, including green building requirements.\textsuperscript{76} Hence, parties using the AIA form construction documents in a green building situation need to recognize that the standard language contains an embedded approach which strongly favors design professionals at the peril of owners, and they should look to

\textsuperscript{70} Am. Inst. of Architects Form A201 § 15.1.6 (2007).
\textsuperscript{71} See SWEET & SCHNEIER, supra note 48, at § 27.07(D).
\textsuperscript{72} See id. § 27.02(F). The Eichleay 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. See 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.
\textsuperscript{73} See Dalton, 105 F.3d at 1423.
\textsuperscript{74} See Am. Inst. of Architects Form A201, supra note 70. 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. The AGC took the position that strong owners would respond by including severe liquidated damages clauses in exchange for granting the waiver.
\textsuperscript{75} See Quatman & Manies, supra note 65.
\textsuperscript{76} Id.
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 Contract Documents 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{77} The E-500 does not directly cover damages in the body of the contract.\textsuperscript{78} Instead, the form incorporates a separate exhibit to explain the allocation of risk, which makes the waiver completely optional.\textsuperscript{79}

When invoking Exhibit I Allocation of Risk, the existing paragraph, 6.11, is amended and supplemented with additional language for inclusion if it is considered appropriate and desirable by the parties.\textsuperscript{80} Within paragraph 6.11.B.2, the form provides language for a complete waiver of liability by the owner for special, incidental, indirect, or consequential damages.\textsuperscript{81} However, in the notes for the users, the drafters explain that the language options allow for flexibility in situations where the parties wish to address special concerns inherent in the project or for specific situations.\textsuperscript{82} In addition, the drafters also provide alternative language that allows the users to convert the complete waiver of consequential damages into one with a limitation.\textsuperscript{83}

Similar to the AIA approach, the EJCDC also contains a

\textsuperscript{78} Id.
\textsuperscript{79} Id. at Exhibit I.
\textsuperscript{80} Id. at Exhibit I § 6.11.
\textsuperscript{81} Id. at Exhibit I § 6.11.B.2. The "Exclusion of Special, Incidental, Indirect, and Consequential Damages" states: "[T]o the fullest extent permitted by law, and notwithstanding any other provision in 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..." Id.
\textsuperscript{82} Id.
\textsuperscript{83} Id.
Waiver of Rights in Form C-700 Standard General Conditions of the Construction Contract.\textsuperscript{84} In paragraph 5.07(B), the owner gives a complete waiver for any losses to the contractor, subcontractor, and engineer.\textsuperscript{85} However, there is no similar contractor waiver of consequential damage claims against the owner, and liquidated damages receive no mention at all.\textsuperscript{86}

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 green building projects present. 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. In the context of the EJCDC documents, however, it is important to note that the forms are primarily designed for use on heavy civil 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).

Even though 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 an alternative approach may want to

\textsuperscript{84} Eng’r Joint Contracts Doc. Comm. Form C-700 (2007).

\textsuperscript{85} Id. § 5.07.B - C. The “Waiver of Rights” states: “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{86} Id.
consider using one of the form exhibits promulgated by ConsensusDOCS (see infra) or the Design-Build Institute of America.

C. ConsensusDOCS Forms

In the fall of 2007, after a three-year effort, a combination of different stakeholders in the construction industry unveiled a new family of documents named ConsensusDOCS. Held out as an alternative to the long-published AIA and EJCDC series of documents, these forms received endorsements from twenty-two different organizations in an effort to provide a cohesive and unified approach with a goal to eliminate any perceived biases for a particular stakeholder in a project.

While some commentators point out the shortcomings within the documents, the system aims to prioritize the best interests of a particular project instead of a specific stakeholder, and lays out best practices with a reasonable distribution of risk.

87 Larry D. Harris & Brian M. Perlberg, Advantages of the ConsensusDOCS Construction Contracts, 29 CONSTR. LAWYER 1 (Winter 2009), available at http://www.agc.org/galleries/contracts/Perlberg%20Reprint.pdf. This effort includes the 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. See id.

88 Id. These twenty-two organizations include: National Association of State Facilities Administrators; The Construction Users Roundtable; Construction Owners Association of America; Associated General Contractors of America; Associated Specialty Contractors, Inc.; Construction Industry Round Table; American Subcontractors Association, Inc.; Associated Builders and Contractors, Inc.; Lean Construction Institute; Finishing Contractors Association; Mechanical Contractors Association of America; National Electrical Contractors Association; National Insulation Association; National Roofing Contractors Association; Painting and Decorating Contractors of America; Plumbing Heating Cooling Contractors Association; National Subcontractors Alliance; Sheet Metal and Air Conditioning Contractors' National Association; Association of the Wall and Ceiling Industry; National Association of Electrical Distributors; National Association of Surety Bond Producers; The Surety & Fidelity Association of America. Id.

amongst the parties. To help accomplish this goal, ConsensusDOCS presents a different series of forms depending on the delivery method and parties' relationships in the project.

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 documented this strategy in Article 6.6: "Limited Mutual Waiver of Consequential Damages." Unlike its name suggests, this

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90 See Harris & Perlberg, supra note 87.
91 ConsensusDOCS Contract Catalog (2007), available at http://www.consensusdocs.org/catalog.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); and Program Management (800 Series). Id.
93 ConsensusDOCS Form 200 § 6.5 (2007). Liquidated Damages Clauses attempt to specify a certain dollar amount to be paid in the event of a future default or breach of contract. See id. § 6.5.1.1 ("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 [sic] 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.").
94 ConsensusDOCS Guidebook (2007), available at http://consensusdocs.org/wp-content/uploads/2010/09/410-ConsensusDOCS-Guidebook-July-2010.pdf. 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 & Callahan, supra note 89. Other commentators explain 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 & Perlberg, supra note 87; Price & Johnson, supra note 92.
95 ConsensusDOCS Form 200, supra note 93, § 6.6. ("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
particular 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, which creates a limited waiver. 96

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, no court to date has interpreted a green building-related liquidated damages provision. As a result, a provision that imposes liquidated damages on a party for failing to earn the owner’s desired level of LEED certification might, in some 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. 97

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 appears very similar in that they both create a complete waiver of consequential damages. 98 Similar to the logic explained previously in the AIA form discussion, 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 99 because the ConsensusDOCS language waives all rights except those expressly added by the parties in the fill-in-
the-blank section of the form. 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 supplement the consequential damages part of the form with green building-unique claims, 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 ConsensusDOCS approach already affords this type of flexibility when using the form contract by providing all parties to a green building project a middle-ground opportunity to discuss certain risks and agree upon 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 the parties to a green project built-in flexibility that requires 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

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

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100 ConsensusDOCS Form 200, supra note 93, § 6.6.
101 See id.
102 See McGreevy & Callahan, supra note 89.
green goals. These goals are rating system-neutral and are also defined in § 3.1 of the 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 § 3.1. The Addendum provides for a “Green Building Facilitator” to coordinate and facilitate the process of obtaining the owner’s desired green building status or certification. It also identifies green building measures, both procedural and physical, potential design and construction alternatives, and other services as the Addendum’s terms require. Section 4 of the Addendum explicitly identifies the Green Building Facilitators as the architect, engineer, contractor, or other corporate entity (or individual).

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 expressly 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

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104 ConsensusDOCS Form 310 Green Building Addendum § 3 (2009).
105 Id. § 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.
106 Id. § 6.
107 Id. § 4.
108 Id. § 4.1.
109 Id. § 8.
110 Id. § 8.2.
111 Id.
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.\textsuperscript{112} However, in taking this approach, the drafters also refused to absolve the project team’s liability “from any obligation to perform or provide [procedural or physical green measures]” as required by their underlying contracts.\textsuperscript{113}

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{114} Therefore, while 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, 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 Exhibit

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{115} Although intended as an exhibit to the Owner - Design-Builder agreement,\textsuperscript{116} the "Sustainable Project Goals

\textsuperscript{112} \textit{Id.} § 8.3.

\textsuperscript{113} \textit{Id.}

\textsuperscript{114} The Addendum’s lack of a definition for consequential damages appears to be a unique approach taken only by ConsensusDOCS.

\textsuperscript{115} Design-Build Inst. of Am., Sustainable Project Goals Exhibit (2009).

\textsuperscript{116} \textit{Id.}
Exhibit” also includes an entire section devoted to remedies.\textsuperscript{117}

In § 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 the USGBC or other appropriate entity.\textsuperscript{118} The costs of such an appeal will then rest with the owner. However, if, after the appeal is filed and a decision rendered, 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.\textsuperscript{119}

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 sustainable standards.”\textsuperscript{120} 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.”\textsuperscript{121} 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 to apportion 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.”\textsuperscript{122} This provision also states that the design-builder “shall not be liable for any

\textsuperscript{117} \textit{Id.} § 4. Interestingly, among all form contracts or exhibits devoted exclusively to green building projects, this section appears to be one of the first to address an allocation of risk between the contracting parties.

\textsuperscript{118} \textit{Id.} § 4.1. 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.” \textit{Id.}

\textsuperscript{119} \textit{Id.} Section 3.3 allows the owner to specify local ordinances, statutes, or executive orders as defined in the Legal Requirements; if none are listed, “it is presumed that there are no applicable requirements.” \textit{Id.} § 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.” \textit{Id.} § 3.1.

\textsuperscript{120} \textit{Id.} § 4.2.

\textsuperscript{121} \textit{Id.}

\textsuperscript{122} \textit{Id.}
other related damages including, but not limited to, consequential damages.\textsuperscript{123}

Finally, the parties can choose to impose a limited obligation to cure the project’s certification failure on the design-builder. This obligation is intended "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..."\textsuperscript{124}

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 contingency;\textsuperscript{125} (ii) the design-builder’s share of 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.\textsuperscript{126} Although promulgated by a design-build organization, to date this exhibit comes the furthest in addressing risk allocation in a green building contract form and provides a useful starting point for modifying or custom drafting an agreement with regard to consequential damages and its intricacies.

F. Custom Drafted Contracts

On many construction projects, the foregoing general forms will provide a good starting point for the parties to negotiate the particular terms of their agreement. Provisions relating to standards of care, limitation of 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 limited case law that exists in the green building arena indicates that, given the rapidly changing regulatory structure that may apply to construction projects of various sizes and scopes, blind reliance on form construction agreements is dangerous for all parties

\textsuperscript{123} \textit{Id.}
\textsuperscript{124} \textit{Id.}
\textsuperscript{125} Typically, an owner will withhold a percentage of the overall cost of the work to cover unanticipated construction expenses, such as subcontractor buy-out overruns or other pre-negotiated expenses, which the constructor can access only with the owner’s prior written approval.

\textsuperscript{126} Design-Build Inst. of Am., Sustainable Project Goals Exhibit § 4.2 (2009).
involved in the negotiation.\textsuperscript{127}

Moreover, the parameters of a given limitation of 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, the parties will fall back to a relatively leveraged 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{128}

For example, consider an insurance claim that was reported at the 2007 AIA National Convention by CNA's Frank Musica.\textsuperscript{129} 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{130} During the course of the project, however, the codes and regulations abruptly changed, and in order to comply with them, the project required a seismic redesign.\textsuperscript{131} The owner demanded that the architect perform the redesign for no additional fee, presumably arguing that it was required by the terms of its agreement for architectural services to perform the additional services.\textsuperscript{132} Respectfully, the architect disagreed, and the owner commenced a lawsuit.\textsuperscript{133}

Based on this type of scenario where the risks arise from a new regulatory environment in a constantly changing patchwork fashion, 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

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{127} See generally Prum & Del Percio, supra note 5.
\item \textsuperscript{128} While this may not occur in every case, the authors' collective experience with negotiations in this area tends to follow similar patterns.
\item \textsuperscript{130} Id.
\item \textsuperscript{131} Id.
\item \textsuperscript{132} Id.
\item \textsuperscript{133} Id.
\end{itemize}
\end{footnotesize}
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.” The announcement was highly publicized throughout the green building media, with commentators either suggesting that the move was a stroke of genius, or that it was “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: First, the firm performs a LEED charrette pursuant to its standard LEED certification contract, which contemplates energy modeling, LEED administration, and building commissioning. If, after the charrette 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 of its fee to the owner of the LEED administration component, which is typically between 30 and 45% of its total fees for a given project. In other words, Energy Ace is limiting and controlling its liability to the owner for its failure to earn LEED certification.

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136 See Burr, supra note 134.

137 Id.

138 Id.

139 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 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.

The courts have not been uniform in their analyses;

140 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 where the insured breached a warranty or guarantee, regardless of whether the warranty or guarantee is express or implied.

141 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.

142 A basic Google search will reveal dozens of design firms which have added these types of services to their menu of offerings.

143 This has been the authors’ experience in working with various LEED consultants.

accordingly, the enforcement of limitation of liability provisions has typically been fact-specific.\textsuperscript{145} 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.\textsuperscript{146} Other courts will apply a strict approach when confronted with limitation of liability provisions and construe their interpretations against the party seeking enforcement.\textsuperscript{147}

Moreover, the New Jersey Superior Court’s analysis in \textit{Marbro, Inc. v. Borough of Tinton Falls} is particularly insightful in these situations.\textsuperscript{148} In this case, an engineering firm contracted with the borough for work in a local park.\textsuperscript{149} The contract limited the firm’s liability for professional acts, errors, or omissions of negligence to the total amount of its fee ($32,500) and also required the borough to indemnify the firm against any action brought against it in connection with its services under the contract.\textsuperscript{150} During the project, a third party sued the borough, and it in turn brought a third-party negligence action against the engineering firm.\textsuperscript{151} The engineering firm 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.\textsuperscript{152}

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.\textsuperscript{153} Rather, if the engineer was

\begin{footnotesize}
\textsuperscript{142} Id. at 161.
\textsuperscript{143} Id. at 161, 163.
\textsuperscript{144} Id. at 161.
\textsuperscript{147} Id. at 161.
\textsuperscript{148} Id. at 161, 163.
\end{footnotesize}
determined to be negligent, it was liable up to its $32,500 fee.\textsuperscript{154} 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{155} The court held that the provisions were consistent with each other.\textsuperscript{156}

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{157}

This creates a challenge of finding a solution in instances where the party seeking to limit its liability stands to earn a disproportionately larger profit when 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 for LEED administration and certification where the formal LEED rating might be tied to significant financial incentives.\textsuperscript{158} For example, consider the $635,000 in lost tax credits from the Shaw Development litigation discussed earlier.\textsuperscript{159} Neither the Third Circuit in Valhal nor Marbro articulated a bright line rule for making a determination in this instance. Thus, "[t]here is no readily apparent answer to these questions and that is the problem. If the parties need to

\begin{thebibliography}{9}
\bibitem{154} Id. at 161.
\bibitem{155} Id. at 163.
\bibitem{156} Id.
\bibitem{157} Id. at 162-63.
\bibitem{158} See Prum, supra note 51, at 199 (comparing green building incentives in select states).
\bibitem{159} Prum & Del Percio, supra note 5.
\end{thebibliography}
know one thing, it is how critical risk allocation provisions in their contractual arrangements are going to be interpreted and enforced." 160

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. The DBIA, however, recognizes some of the meaningful differences and attempts to address these concerns accordingly.

**IV. Suggestions for Represented Parties**

Given the foregoing evaluations and general suggestions, this Article makes 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. 161 The owner’s apparent 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. 162 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

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160 BRUNER & O’CONNER, CONSTR. LAW § 19:52.67.
161 See Prum & Del Percio, supra note 5, at 245.
162 Id. at 247.
provides a 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 the 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 starting point. 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 discussed previously. 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. Oftentimes, 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 fallback 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 the designer to damages beyond the limits of its available insurance policy. Frequently, this becomes the middle ground under which the owner obtains some
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C. From a Green Building Consultant's Perspective

Similar to the advice for the design professional, green building consultants should also seek a complete waiver of consequential damages. However, due to the same issues noted previously, consultants 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 provide a middle ground. Those that do usually obtain a high deductible policy and pay for any defense or other costs up to the deductible. In such cases, the limitation of liability section 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 of all consequential damages. When this is not possible, however, the better option is to limit 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 specifies that the project's failure to earn the anticipated level of certification is 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 liquidated, incidental, and consequential damages 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 newly developing 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 it is 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 unanticipated damages.