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GREEN BUILDING LIABILITY: CONSIDERING THE APPLICABLE STANDARD OF CARE AND STRATEGIES FOR ESTABLISHING A DIFFERENT LEVEL BY AGREEMENT

*Darren A. Prum**

I. INTRODUCTION

Recently, many in the construction industry appear to be adopting the standards and practices of green buildings on new and existing projects. With this shift to more sustainable approaches by the various participants and with the corresponding need for parties that specialize in these practices to fulfill an owner's goals, the applicable standard of care for a given relationship when a problem occurs also may become an undetermined and overlooked risk for those involved in these types of projects. As such, the applicable standard of care for liability situations concerning green building construction will inevitably become an issue the courts will need to address upon the filing of a dispute from one of these projects.

A short time ago, the courts came close to deciding this issue in *Shaw Development v. Southern Builders*,¹ but the parties reached a settlement prior to the trial, which precluded the court from providing some type of guidance in its opinion. Moreover, much of the research concerning an applicable standard of care for construction focuses on traditional methods. With this in mind, the meaningful and unique differences for an applicable standard of care for those involved in a green building project require an understanding of the most likely court treatment based on existing common law and approved strategies for creating a different level through the contractual relationship.

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1. *Shaw Dev., LLC. v. S. Builders*, No. 19-C-07-011405 (4th Cir. filed Feb. 16, 2007).

Therefore, anyone involved in a green building development needs to take an active role to make sure their written agreement will call for the correct and appropriate standard of care so that the risks associated with the currently undefined common law outcome do not become an emergent risk from a project gone wrong.

As the process of building green becomes more of a mainstream practice, time will only tell how long before parties to a claim actually litigate the standard of care applied to those involved in these types of projects. In the *Shaw Development v. Southern Builders* lawsuit,² the parties filed claims that asserted theories where the standard of care would become an issue and an opinion would provide guidance from the courts on how to better protect others in similar circumstances; however, they reached a settlement prior to trial.³

As such, many parties are now involved in green building agreements where the standard of care issues will either become part of a final contract or left to the courts to determine when a dispute arises. Up to this point, numerous commentators evaluated, explained, and proposed the proper applications for a standard of care within the traditional design and construction context in addition to specialty situations;⁴ but with the recent transition into more sustainable practices across the industry, the meaningful distinctions between these different methods merit an evaluation of their own.

Absent a provision by the parties otherwise, the courts will need to decide the applicable standard of care with regards to green building developments. The likelihood of a dispute occurring where a judge must decide the level of a standard of care in a green building case constantly increases due to the continued adoption of sustainable construction practices; so any party wishing to avoid this untested corner of common

2. Complaint S. Builders, Inc. v. Shaw Dev., LLC, No. 19-C-07-011405 (4th Cir. Feb. 16, 2007).

3. Darren A. Prum & Stephen Del Percio, *Green Building Claims: What Theories Will a Plaintiff Pursue, Who Has Exposure, and a Proposal for Risk Mitigation*, 37 REAL ESTATE L.J. 243, 246 (2009) [hereinafter Prum & Del Percio 1].

4. See e.g., JUSTIN SWEET & MARC M. SCHNEIER, LEGAL ASPECTS OF ARCHITECTURE, ENGINEERING AND THE CONSTRUCTION PROCESS (8th ed. 2009); KEVIN R. SIDO, ARCHITECT AND ENGINEER LIABILITY: CLAIMS AGAINST DESIGN PROFESSIONALS (3rd ed. 2009); W. E. Guilian, *Liability of Architects and Engineers*, 35 TENN. L. REV. 9, 9 (1967); Jeff Sobel, *Architect Tort Liability in Preparation of Plans and Specifications*, 55 CAL. L. REV. 1361, 1361 (1967); Gibson B. Witherspoon, *Architects' and Engineers' Tort Liability*, 16 DEF. L.J. 408 (1967); *Liability of Design Professionals – The Necessity of Fault*, 58 IOWA L.REV. 1221 (1973) [hereinafter IOWA NOTE]; Richard M. Shapiro, *Design Professionals: Recognizing the Duty to Inform*, 30 HASTINGS L.J. 729 (1979); Matthew S. Steffey, *Negligence, Contract, and Architects' Liability for Economic Loss*, 82 KY. L.J. 659 (1994); Roger W. Stone, *Architects' and Engineers' Liability under Iowa Construction Law*, 50 DRAKE L. REV. 33 (2001); Constance Frisby Fain, *Architect and Engineer Liability*, 35 WASHBURN L.J. 32 (1995); Carl J. Circo, *When Specialty Designs Cause Building Disasters: Responsibility for Shared Architectural and Engineering Services*, 84 NEB. L. REV. 162 (2005).

law by taking a proactive approach with language of their choosing that stipulates the level they want applied in their agreement needs to consider the requirements already imposed by the courts.

Based on this paradigm shift within the real property development community, this article considers the applicable standard of care as applied to green building projects, and provides guidance for creating a different level through a contractual relationship. Part II starts by tracing the relevant standard of care from its roots in common law negligence to the modern legal approaches used in specialty construction with special consideration toward the unique issues posed by a green building project. Part III evaluates how those involved in a green building project may utilize or avoid the different proven strategies employed to set a different standard of care as well as the approaches taken by several of the common design and construction document forms available to the parties. Finally, Part IV wraps up by offering recommendations to each type of party getting involved in this type of a construction project and strategies for creating amenable provisions within a green building agreement for everyone involved.

II. COMMON LAW'S DUTY OF CARE VIA NEGLIGENCE

When a dispute arises out of a green building project, the plaintiff may pursue a tort or contract theory or both.⁵ Since a green building project's underlying foundation occurs in the area of specialty construction, the transition from contract law to tort as a claim creates a unique situation between negligence, strict liability and the implied warranty duty of reasonable care.⁶ As a result, one author characterized the legal situation in specialty construction as:

A corollary to the principle that a design professional must perform contractual design services in accordance with the professional standard of care is that the design professional's duty of care is normally coextensive with the scope of the contractual duty.⁷

In such situations, one of the most likely claims asserted may be founded in negligence or strict liability or a combination of the two.⁸

With this premise in mind and for negligence to occur, the defendant must have a duty towards the plaintiff whereby a breach occurs that proximately causes damages.⁹ Generally, a minimal level of conduct

5. See Prum & Del Percio 1, *supra* note 3, at 247.

6. See Circo, *supra* note 4, at 165.

7. *Id.* at 178.

8. See Prum & Del Percio 1, *supra* note 3, at 247.

9. W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS 165 (5th ed. 1984).

applies; however, since many green projects qualify as high performance buildings¹⁰ or require professionals with special knowledge or skills in order to gain certification, a different standard may apply to architects, engineers, and contractors due to the project specific requirements deemed necessary when executing their obligations.

In the context of strict liability, the plaintiff will seek to impose liability on a defendant for reasons other than fault.¹¹ While early court decisions in this area terminated culpability upon the completion of the project and limited the responsibility to a contractor's own work, the provider now becomes automatically liable to all foreseeable plaintiffs when failing to disclose dangerous conditions or performing negligent work, which includes the design and construction phase and any supervision by the architects and engineers.¹²

Absent any agreement otherwise and should a plaintiff choose to pursue either theory, common law doctrine still imposes a duty of care upon the defendant and often becomes an important issue in a claim.

A. GENERAL STANDARD OF CARE

Under a negligence claim, the underlying assumption begins with the belief that there is a uniform standard of conduct to compare against a person's behavior; however, the vast number of permutations makes this approach impossible when applied to real life situations.¹³ From this dilemma, courts created the "reasonable person" standard as an objective

When considering negligence as a theory to pursue with in the context of architects, engineers, and contractors, one treatise points out that dividing the claim into the three different categories that involve personal injury, harm to property, and those causing economic loss but unrelated to personal or property damages provides some insight on how the courts will receive a claim. See SWEET & SCHNEIER, *supra* note 4, at § 14.02B. They describe that by and large the courts tend to provide relief for claims manifesting out of personal injury over the other two categories, and losses to personal property before those asserting economic loss. *Id.* From this tendency, the commentators explain that this insight provides some predictability for future claims in this area; but as the courts decide new cases that erode these traditional notions, the limitations of a negligence claim to personal harm appears to dissolve over time. *Id.* In addition, third party claims that assert economic losses show mixed results. *Id.* at § 14.08C. Some states allow these lawsuits on the basis that no differences exist between personal and property losses as compared with economic injuries. *Id.* In fact, one California court accepted this rationale because the architect maintains an ability to keep or get a contractor removed from a project. *U.S. v. Rogers & Rogers*, 161 F. Supp. 132, 136 (S.D. Cal. 1958). Yet, in other states, this approach frequently gets rejected on the grounds that a party lacked a duty of care to the third party plaintiff; or the courts still require the parties show the traditional privity of contract to proceed on a claim for economic losses. See SWEET & SCHNEIER, *supra* note 4, at § 14.08C.

10. See generally Darren A. Prum, *Green Buildings, High Performance Buildings, and Sustainable Construction: Does It Really Matter What We Call Them?*, 21 VILL. ENVTL. L.J. 1 (2010).

11. See KEETON, ET AL., *supra* note 9, § 95.

12. See *id.* at § 104A.

13. See *id.* at § 32.

approach for the deciders of fact when measuring someone's conduct.¹⁴

In creating the "reasonable person," courts have explained that this fictional individual follows a prudent course of action in all situations but sometimes strays due to human shortcomings as determined by the community.¹⁵ The "reasonable person" also retains the identical physical characteristics as the defendant, but acts with only the average mental capacity.¹⁶ Yet when a defendant's knowledge becomes the issue, courts bifurcate the analysis with regard to the specifics of the case.¹⁷ Depending on the situation, the general standard of care or an elevated level for those individuals with superior knowledge or skill applies.¹⁸

Beginning with the basic minimum standard, one group of authors explained that knowledge occurs when the truth and the belief in the veracity of a fact come together.¹⁹ From this definition, the general collective knowledge of the community creates a floor for common wisdom amongst its members.²⁰ Therefore, as society progresses, the level of common knowledge within a community also increases correspondingly.²¹

However, in cases involving a person with superior knowledge, skill or training, the courts impose an elevated standard to act reasonably based on their superior learning and experience.²² This generates two additional requirements in that any person who takes on any effort specifying the need for a particular expertise must use reasonable care and must possess the minimal level of requisite knowledge and ability.²³ However, this also creates situations where a specialist might be held liable and not a general practitioner because the superior judgment, skill and knowledge must correlate with what the professional actually possesses and not that of the expert.²⁴ Consequently, a person who is a professional or has special skills is required to possess and exercise the knowledge and skill of a member of the profession in good standing in similar communities.²⁵

14. See KEETON, ET AL., *supra* note § 32. This standard also goes by several other names: reasonable man of ordinary prudence, person of ordinary prudence, or person of reasonable prudence. *Id.*

15. *Id.*

16. *Id.*

17. *Id.*

18. *Id.*

19. *Id.*

20. *Id.*

21. *Id.*

22. *Id.*

23. *Id.* This is also commonly referred to as professional malpractice. *Id.*

24. *Id.*

25. *Id.*

Thus, the defendant's actions will get evaluated against those of the hypothetical reasonable person "under the same or similar circumstances" unless the elevated standard for professionals applies.²⁶

B. AN OUTCOME STANDARD

Borrowing an implied warranty or outcome based approach, a minority of courts analyzed the unique circumstances pertaining to the construction industry as well as the claims litigated, and began changing the comparison standard in their jurisdictions to now require the professional to accomplish the client's expressed or understood outcome on a given project.²⁷

In taking this approach, these courts have abandoned the previously discussed requirement to compare the actions taken by the defendant to those of a similarly situated professional in like circumstances.²⁸ Instead, their inquiry now focuses on whether the defendant met the plaintiff's ultimate goal; and if not, whether the professional knew or should have known of the objective.²⁹ Therefore, these courts now apply more of a strict liability doctrine when determining a standard of care for construction claims.³⁰

By changing course with respect to an elevated reasonable person standard, the courts that follow this logic can usually be grouped into one of three factions.³¹ Several of these courts³² explained that unlike the other main professions of law and medicine with numerous precedents and who also receive the elevated common law rule treatment, the construction industry conducts business in an area where the science is exact, which makes a strict standard of compliance more appropriate.³³ Consider the fact that a doctor and lawyer generally do not contract themselves for a specific result, those who do so in relation to construction, generally expect to achieve a particular outcome.³⁴ This means that those involved in the

26. See KEETON, ET AL., *supra* note § 32.

27. See SWEET AND SCHNEIER, *supra* note 4, §14.07.

28. *Id.*

29. *Id.*

30. *Id.* at 263.

31. *Id.* at 264. These authors explain that a fourth scenario occurs where the courts will also use this approach; but it applies mainly in a contracts context, which falls outside the scope of this article. *Id.* In this situation, the theory pursued is a breach of contract type that arises out of a design-build context or one where the professional agrees to provide services for both designing the structure and overseeing the construction process to completion. See *id.* at 264.

32. *Tamarac Dev. Co. v. Delamater, Freund & Assocs.*, 234 Kan. 618, 622 (1984); *Broyles v. Brown Eng'g Co.*, 275 Ala. 35, 38-39 (1963).

33. See *Tamarac*, 234 Kan. at 622.

34. See *Tamarac*, 234 Kan. at 622. More specifically, the court applied this rationale to cases

construction industry, on the other hand, have less of a margin of error with respect to their ability to deliver an expected outcome.

In other courts, the decision to alter the applicable standard reflects a concern to provide an outcome of fairness based on the law.³⁵ These jurisdictions begin by recognizing that many in the construction industry hold themselves out as experts, whereas the client comes from a position that lacks a specific knowledge or skill.³⁶ This makes the client completely reliant on the expert for successfully carrying out and completing the project as outlined.³⁷

Lastly, a few courts bring into play the more lenient standards for recovery and enlarged penalties found in the statutes applying to consumer protection and deceptive trade practices. The Supreme Court of Kansas,³⁸ the Appellate Division of New York's Supreme Court,³⁹ and the Texas Court of Appeals⁴⁰ have already validated this approach.

Hence, due to the nature of green buildings and the different methods for certifying compliance with such a goal, a court hearing a case of first impression involving this type of construction could easily adopt or extend existing precedent to include an outcome standard as an unexpected solution not contemplated by the parties.⁴¹

C. APPLYING A LEVEL OF CARE TO THOSE INVOLVED IN GREEN BUILDINGS

In considering the applicable benchmark for those individuals involved in green buildings, the understanding of the likely standard becomes very important since work in this industry regularly occurs on the basis of an oral agreement that does not contemplate or grasp the possibility of a later lawsuit. Other times, the written agreement fails to

involving architects and engineers. *Id.*

35. See SWEET AND SCHNEIER, *supra* note 4, § 14.07.

36. *Id.*

37. *Id.*

38. Moore v. Bird Eng'g Co., 273 Kan. 2, 41 (2002).

39. Ragucci v. Prof'l Constr. Serv., 25 A.D.3d 43, 44 (N.Y. App. Div. 2005).

40. White Budd Van Ness P'ship v. Majo-Gladys Drive Joint Venture, 798 S.W.2d 805, 805 (Tex. App. 1990). While this opinion shows the willingness of this court to take a new direction, it only offers limited precedent and illustrates the direction some courts are moving. After the original opinion, the Texas Court of Appeals isolated the court's previous position that the Texas Deceptive Trade Practices Act applied to "purely professional services." Chapman v. Wilson, 826 S.W.2d 214, 217 (Tex. Ct. App. 1992). In addition, the Texas Legislature amended section 17.49(c) of the Texas Business and Commerce Code to prohibit damages that emanate from professional services. Tex. Bus. & Com. Code §17.49(c).

41. See SWEET AND SCHNEIER, *supra* note 4, § 14.07. An interesting aspect of this standard change occurred in South Carolina where, after adoption, the South Carolina Supreme Court expanded the ability to make claims to third parties such as subsequent owners and contractors. *Id.*

address this issue entirely. Accordingly, this lack of forethought into a standard of care by the parties prior to a dispute will require the courts to provide the appropriate guidance at a later date.

1. *Current Legal Approaches to a Standard of Care*

Prior to the mid 1890s, courts used the “reasonable person” standard for establishing the minimum level of care owed by the defendant.⁴² However, two courts evaluated the responsibility of an architect in comparison to other professions such as doctors and lawyers that already used the elevated standard.⁴³ These courts reasoned that the elevated standard applied since the responsibility between the various professions did not materially differ,⁴⁴ which consequently persuaded other jurisdictions to follow the same approach.⁴⁵ Moreover, with the exception of one court in a distinguishable case, the majority of jurisdictions hold the two professions of architecture and engineering to the same level of treatment when applying the elevated standard of care.⁴⁶ Hence, the

42. *But see* *Coombs v. Beede*, 36 A. 104, 104–05 (Me. 1896); *Chapel v. Clark*, 117 Mich. 638–39 (1898).

43. *See Coombs*, 36 A. at 104–05; *Chapel*, 117 Mich. at 639.

44. *See Coombs*, 36 A. at 104–05; *Chapel*, 117 Mich. at 640. The Supreme Court of Maine explained that:

The architect’s responsibility is the same as that of a lawyer or doctor. The undertaking implies that the architect possesses skill and ability, including taste sufficient to enable him to perform the required services at least ordinarily well, and that he will exercise his skill and ability reasonably and without neglect.

Coombs, 36 A. at 104-05.

45. *See, e.g.*, *City of Eveleth v. Ruble*, 225 N.W.2d 521 (Minn. 1974). In footnote 2, the court pronounced the elevated standard of care for engineers and specifically mentioned influential decisions when it pointed out: Of particular assistance are cases involving architects. *See, e.g.*, *Kostohyrz v. McGuire*, 212 N.W.2d 850 (Minn. 1973); *Aetna Ins. Co. v. Hellmuth, Obata & Kassabaum, Inc.*, 392 F.2d 472 (8 Cir. 1968); *Miller v. DeWitt*, 208 N.E.2d 249 (Ill. 1965); *Pittman Constr. Co. v. City of New Orleans*, 178 So.2d 312 (La. App. 1965); *Covil v. Roberts & Co. Associates*, 144 S.E.2d 450 (Ga. App. 1965); *Peerless Insurance Co. v. Cerny & Associates, Inc.* 199 F. Supp. 951 (D. Minn. 1961); *Bodin v. Gill*, 117 S.E.2d 325 (Ga. App. 1960); *Scott v. Potomac Ins. Co. of Dist. of Columbia*, 341 P.2d 1083 (Or. 1959); *Wills v. Black and West, Architects*, 344 P.2d 581 (Okla. 1959); *Smith v. Goff*, 325 P.2d 1061 (Okla. 1958); *Ressler v. Nielsen*, 76 N.W.2d 157 (N.D. 1956); *State v. Malvaney*, 72 So.2d 424, 43 (Miss. 1954); *Paxton v. County of Alameda*, 259 P.2d 934 (Cal. 1953); *Surf Realty Corp. v. Standing*, 78 S.E.2d 901 (Va. 1953); *Bayshore Dev. Co. v. Bonfoey*, 78 So. 507 (Fla. 1918); *Dysart-Cook Mule Co. v. Reed & Heckenlively*, 89 S.W. 591 (Mo. 1905); *Chapel v. Clark*, 76 N.W. 62 (Mont. 1898); *Coombs v. Beede*, 36 A. 104 (Me. 1896). *See, also*, *Annotation*, 25 A.L.R. 2d 1085; 5 Am. Jur. 2d, *Architects*, § 8. *Id.* at 525 n.2.

46. *See Witherspoon, supra* note 4, at 410. This commentator cited the one exception at the time to occur in Louisiana. *Id.* In that case, the dispute emanated out of the form contract used by architects yet performance occurred by an engineer. *Rabinowitz v. Hurtwitz-Mintz Furniture Co.*, 133 So. 498, 499 (La. Ct. App. 1931). This court held that, even though the plaintiff did not qualify under the applicable architect licensing statutes, he only held himself out as a civil engineer and performed as such, which allowed for differentiating between the professions. *Id.*

application of a higher standard for architects and engineers appears settled by the courts for claims arising out of a general construction situation.

Furthermore, some courts actually expanded the common law elevated standard of care to exceed the floor of prevalent practices as set forth by the profession in some instances.⁴⁷ In these cases, judicial or statutory standards exceed those of the profession and the courts then call for compliance above the norm.⁴⁸

Recently, one researcher looked toward the standard used in specialty design projects where the responsibility for shared architectural and engineering services occurs.⁴⁹ The main alternative to the traditional method of Design-Bid-Build is Design-Build where a single contract binds responsibility for the entire project upon the primary contractor for all development activities.⁵⁰ After reviewing many applicable cases that arose out of this nontraditional method, the author determined that the courts will most likely apply an elevated standard to each design professional participating in the project regardless of contractual clauses attempting to limit liability.⁵¹

Thus, courts appear to apply the elevated standard of care for professionals in both traditional and nontraditional approaches to designing buildings, including both architects and engineers, but an even higher level may be relevant when judicial or statutory criteria surpass that of the profession.

2. Possible Applications for a Common Law Standard of Care

When looking closely at green building projects in order to attach the elevated level of the common law standard of care, many differences to the traditional and nontraditional approaches occur and can influence the applicability. First, the nature of the project needs investigating. Often, a project gets described as a green building when its overall approach better fits within the definition of a high performance one or vice versa.⁵² While the differences are meaningful, the knowledge or skills necessary to complete such a complex and intricate project require more than a common level.

Secondly, the knowledge needed to successfully complete such structures goes beyond that of the licensed professional. These structures

47. See IOWA NOTE, *supra* note 4, at 1248.

48. *Id.* at 1228.

49. See Circo, *supra* note 4, at 166–67.

50. *Id.* at 170.

51. *Id.* at 205.

52. See Prum, *supra* note 10, at 28.

often involve an architect or engineer but many times include other specialists in environmentally friendly practices that provide technical know-how for integration through the design process. Just like the issues forcing the Federal Trade Commission to grapple with deceptive and unfair marketing claims on construction products claiming certain green properties,⁵³ governmental regulation concerning green building consultants does not exist; as a result, the expectations of others and the level of expertise of a given specialist can provide a difference.

A third difference may occur due to the fact that many third party certification programs for buildings also provide credentials to individuals who demonstrate a level of competence within their system and preferred practices. For example, one of the most popular private third party rating systems connected with these types of buildings comes from the United States Green Building Council's ("USGBC") Leadership in Energy and Environmental Design ("LEED").⁵⁴ One aspect of their program includes a certification designation for individuals charged with "an advanced depth of knowledge in green building practices."⁵⁵ Consequently, the LEED AP designation requires an individual pass a standardized exam given by the USGBC or its designee.⁵⁶ In its latest version, the USGBC requires each person to agree to its Disciplinary and Exam Appeals Policy, which sets

53. See Prum, *supra* note 10, at 15.

54. *Id.* at 24. Another common third party program for verifying the attainment of green building standards emanates from England and Canada. *Id.* at 25. This system, called Green Globes, has its own certification program for individuals that receive the Professional or Assessor designation. *Personnel Certification Program Frequently Asked Questions*, GREEN BUILDING INITIATIVE <http://www.thegbi.org/green-globes/personnel-certifications/faqs.asp> (last visited Apr. 21, 2010). Similar to LEED, this program also certifies individuals as competent over a certain body of knowledge. *Id.* Many of the tax and other incentives provided by state and local governments require LEED or Green Globes certification as an independent third party verification in order to make sure compliance with a program's stated goals occurs and to unlock the financial rewards. See generally Darren A. Prum, *Creating State Incentives for Commercial Green Buildings: Did the Nevada Experience Set an Example or Alter the Approach of Other Jurisdictions?* 34 WM & MARY ENVTL. L & POL'Y REV. 171, 172 (2009).

55. See *Glossary*, GREEN BUILDING CERTIFICATION INSTITUTE, <http://www.gbci.org/DisplayPage.aspx?CMSPageID=84> (search "LEED AP") (last visited Apr. 19, 2010).

56. Interestingly, the eligibility requirements in order to sit for the entry level exam only requires "experience in the form of involvement on a LEED-registered project, employment (or previous employment) in a sustainable field of work, or engagement in (or completion of) an education program that addresses green building principles." Green Building Certification Institute, *LEED Green Associate Handbook*, 4 (April 2010), available at <http://www.gbci.org/main-nav/professional-credentials/exam-guide/preparation/leed-green-associate.aspx>. Similarly, the higher level exam's eligibility requirements include "previous experience (see the Definition of 'personal involvement with a LEED project' definition below), within three years of your application submittal date, on a project registered for LEED certification." Green Building Certification Institute, *LEED AP Building Design & Construction Candidate Handbook*, 6 (April 2010), available at <http://www.gbci.org/main-nav/professional-credentials/exam-guide/preparation/leed-ap-bdc.aspx>. Curiously, neither of these levels set an educational baseline as is frequently associated with many types of professionals.

forth minimal levels of ethical conduct.⁵⁷ By virtue of conferring a designation predicated on demonstrating a particular body of knowledge, the USGBC may have also created a professional standard for those it certifies.

Finally, a lack of a unified national standard may create a variety of standards depending on the third party certification programs. With so many different certification programs available, the involvement of a particular consultant for one specific third party credential may not correspond with the one pursued. This ability to crossover between programs will create different standards depending on the credentials' needs for certifying a particular program.

With these unique characteristics to a green building project in mind, the ability for a court to provide a single solution may become elusive especially without a national standard; yet should the courts apply the common law professional approach, the flexibility of examining the knowledge or skill of a member of the profession in good standing in a similar locale may offer the best answer.

While the classification as to whether a project qualifies as a green building or high performance one may play an important role, the underlying rationale explained by the Supreme Courts of Maine and Michigan, in which they found no difference in responsibilities between architects and other professionals,⁵⁸ also holds in this instance. The skills and knowledge dictated by the scope of these projects most certainly requires consultants with specialized expertise regardless of whether a building is deemed green or high performance.

Moreover, the third party verification programs most likely were prompted to develop the certification credentials because these types of projects demand specialized skills and knowledge. Interestingly, the USGBC does not require a LEED AP to certify a submission in order to gain recognition on a project, but at the same time offers credentials to individuals to demonstrate their knowledge on the subject.⁵⁹ This unusual decision cuts two ways. In one way, the approach creates an open system where anyone with the appropriate knowledge and skills can successfully submit a project; however, in another respect, the USGBC sets forth a minimal level of professional standards to those it certifies and allows for additional credit on project submission for using those individuals.

57. See Green Building Certification Institute, *Disciplinary and Exam Appeals Policy*, (February 2010), available at <http://www.gbci.org/ShowFile.aspx?DocumentID=3582>.

58. See *Coombs v. Beede*, 36 A. 104, 104-05 (Me. 1896); *Chapel v. Clark*, 117 Mich. 638, 639 (1898).

59. See U.S. GREEN BLDG. COUNCIL, *LEED NEW CONSTRUCTION VERSION 2.2 REFERENCE GUIDE* 4 (2005).

Thus, the responsibilities conferred upon green building professionals merit enough specialization that the elevated standard of care will apply in conformance with the previously mentioned court decisions; and to this end, courts will need to assess the facts pertinent to a given case in order to determine the appropriate criteria for the knowledge and skill comparison within the evaluation.

Accordingly, a court faced with determining a green building standard of care under common law may choose to either evaluate the conduct based on a professional exercising the same care, skill, and diligence in like circumstances or follow the minority of jurisdictions that utilize an outcome based approach and require completion of the project as expected by the client.

III. ESTABLISHING A DIFFERENT STANDARD BY CONTRACT

When the common law standard of care is not desired, the parties involved in a green building project may attempt to set a different standard within their agreement.⁶⁰ In this type of strategy, several different situations arise where the parties wish to change the standard in a variety of different ways. Consequently, the written agreement that creates the parties' relationship becomes the logical first place to determine the applicable standard of care when avoiding the default rule.

A. RAISING THE STANDARD

Many times, the parties may inadvertently agree to a standard of conduct above the applicable one based on common law, without comprehending the consequences of their actions. Some of these situations occur when the parties agree to satisfying the client, include a suitability or fitness requirement, a verifiable performance standard, or supply a project "free of defects."⁶¹

In taking such an approach, the parties commissioning the document may alter or tweak the existing default rules in order to obtain a more favorable position should litigation occur later.⁶² For instance, the custom contract standard for a professional may look like the elevated common law rule discussed earlier, but in actuality the language is altered slightly to compare the professional within the community instead of a comparable

60. See SWEET AND SCHNEIER, *supra* note 4, § 14.04(A).

61. See SIDO, *supra* note 3, § 5.01(B).

62. See SWEET AND SCHNEIER, *supra* note 4, § 14.04(A).

locale.⁶³ This significant change may occur to protect the professional so that their competition becomes the sole standard for judgment⁶⁴ or to express the fact that only those in the immediate community can fully appreciate the limitations based on the project's location.

Another scenario occurs when the contract also includes language that relieves a party from any standard arising out of an express or implied warranty.⁶⁵ In such situations, the drafter recognizes the reluctance of some courts to allow claims for economic losses in torts; so by waiving the possibility of these standards as well, a plaintiff will no longer have negligence and warranty claims available as theories to pursue. Moreover, by waiving the warranty theories as standards in a custom contract, the drafter also removes a more rigorous evaluation method in lieu of the professional's paradigm for comparing the defendant's actions should a lawsuit proceed under a torts theory.⁶⁶

While many unsophisticated parties unwittingly accept these types of terms, others do not and challenge the language. Frequently, those parties with leverage in their bargaining position or experience with construction contracts will resist these type of changes, but the response will commonly try to justify the need for the language by explaining their professional liability insurance policy will fail to provide coverage should they deviate from the professional standard.⁶⁷ Of course, the previous examples of changes to the standard of care only make it more difficult to succeed on a claim where a duty of care is applied rather than forcing them to cause a professional liability insurance policy to fail to give protection.

1. *Satisfying the Client*

Another strategy employed to raise the standard of care includes the use of satisfaction as a determining factor. In these circumstances, a one-sided agreement occurs where a conditional situation obligates the performing party to meet the client's requirements in order to obtain discharge.⁶⁸ This creates a scenario where a client's obligation to pay for services only occurs after satisfaction or waiver.⁶⁹

63. See SWEET AND SCHNEIER, *supra* note 4, § 14.04(A).

64. *Id.*

65. *Id.*

66. *Id.*

67. *Id.*

68. See *id.* at § 14.04(B).

69. *Id.* Of course, an aggrieved party may still pursue an equitable claim using a theory of unjust enrichment. *Id.* Moreover, should a client make a rightful claim coupled with a proper refusal to pay, then a forfeiture situation, in which one party performed and did not receive compensation, possibly could occur. *Id.* To defend against such a forfeiture claim, the client may defend by asserting that a

Depending on the circumstances, courts apply one of two standards to the satisfaction requirement.⁷⁰ This application stems from either an objective approach where the reasonable person becomes the standard or a subjective measurement where the personal satisfaction of the owner sets the benchmark.⁷¹

Under the objective standard, courts take the position that at the time of contract only the time of payment becomes uncertain and that the client could not reasonably believe their opinion would provide the sole basis for satisfaction.⁷² This logic provided the basis for courts to adopt the “reasonable person” standard for construction situations.⁷³

In these types of scenarios, courts look to see how well mechanical measurements capture a party’s performance.⁷⁴ One commentator explained this in the construction context as a scenario where a manufacturer would provide compensation only if satisfied with the performance of a machine designed by the engineer.⁷⁵ Under an application of the “reasonable person” standard, an obligation to pay the engineer would occur when attaining the threshold required by a reasonable manufacturer and not the company under contract.⁷⁶

In contrast, a number of jurisdictions broke from the “reasonable person” approach and began using the subjective standard to situations involving personal performance.⁷⁷ The Pennsylvania Supreme Court clarified the difference as:

The contract in the Gerling case being one in which performance was conditioned on the satisfaction of the owner, the test of adequate performance was not whether the owner ought to have been satisfied but whether she was satisfied. (citations omitted). There are, however, two limitations inherent in this principle: (1) that the dissatisfaction must be genuine and not prompted by caprice or bad faith, and (2) that if the work is not sufficiently completed for a reasonable determination whether it was or would be satisfactory, then the rejection is

waiver happened when the aggrieved party accepted less than full performance or an estoppel took place because they were deceived into believing something less than carrying out the entire agreement would be satisfactory. *Id.* However, in cases where the contract language plainly demonstrates the parties knew about the risk of forfeiture, the courts will enforce the provision even no matter the outcome. *Id.*

70. See *First Nat’l Realty v. Warren-Ehret Co.*, 233 A.2d 811, 814 (Md. 1967); *Morin Bldg. Prod. Co. v. Baystone Constr. Inc.*, 717 F.2d 413, 414 (7th Cir. 1983).

71. See *Morin Bldg. Prod. Co.*, 717 F.2d at 416.

72. *Duplex Safety Boiler Co. v. Garden*, 101 N.Y. 387, 389 (1886).

73. See *First Nat’l Realty*, 233 A.2d at 815.

74. See SWEET AND SCHNEIER, *supra* note 4, § 14.04(B).

75. *Id.*

76. *Id.*

77. See *First Nat’l Realty*, 233 A.2d at 811.

premature.⁷⁸

Accordingly, another court explained the distinction between the two scenarios by noting: “The reasonable person standard is employed when the contract involves commercial quality, operative fitness, or mechanical utility which other knowledgeable persons can judge. . . . The standard of good faith is employed when the contract involves personal aesthetics or fancy.”⁷⁹

Placing these approaches into the traditional construction scenario, a commentator illustrated the logical consistencies when applied in practice.⁸⁰ He noted that the design phase of construction tends to invoke the subjective standard since a large part of the acceptance emanates from aesthetics;⁸¹ whereas the remaining phases of traditional construction more closely relate to the situations aligned with the objective standard.⁸²

Considering a green building perspective on top of the normal construction issues, a satisfaction type scenario becomes a very real possibility. A green building consultant may easily agree to a situation that rests on the final outcome achieving certain performance characteristics as part of the third party certification system requirements. In that case, the objective standard would apply since the determining factor can hinge on meeting the reasonable level as compared with other green building participants.

All too often, this type of situation becomes a reality in the green building arena since many developers try to leverage their sustainable initiatives to their advantage and in turn the strategy permeates through all aspects of the construction project. For instance, many of these types of marketing approaches allow the developers to defend premium pricing or to complete a sale to the consumer because of the added benefits identified with green construction. Moreover, the consumer may interpret the added costs into higher quality construction, a longer product lifecycle, or reduced ownership and maintenance costs. Yet, when these types of objectives get incorporated into a green building project, an unassuming party to the development goals may have agreed to a satisfaction standard.

As part of the counterclaim in *Shaw Development v. Southern Builders, Inc.*⁸³ the case illustrated how a party easily agreed to a green building standard that implied the higher level of satisfaction without the

78. Hood v. Meininger, 105 A.2d 126, 128 (Pa. 1954).

79. Indiana Tri-City Plaza Bowl, Inc. v. Glueck's Estate, 422 N.E.2d 670, 675 (Ind. Ct. App. 1981); see also Action Eng'g v. Martin Marietta Aluminum, 670 F.2d 456, 460-61 (3d Cir. 1982).

80. See SWEET AND SCHNEIER, *supra* note 4, § 14.04(B).

81. *Id.*

82. *Id.*

83. Complaint, *supra* note 2.

comprehension of their actions.⁸⁴ In this case, the parties executed a form contract that delineated the project's LEED requirements in an incorporated specification section, but the owner could not receive tax credits due to the contractor's inability to timely supply a certificate of occupancy as required under the controlling legislation.⁸⁵

From this set of facts, and but for the apparent settlement, the parties could have litigated the green building requirements as a satisfaction type of situation where the contractor agreed to perform at the higher level due to the nature of the project agreed upon in the specification document. The critical aspect of this part of the case would turn on whether a reasonable owner would attain the equivalent level of satisfaction based on the contractor's lack of performance to deliver the certification of occupancy in time to qualify for the tax credits.

In other situations, a green building consultant may need to develop innovative design features to garner the third-party certification. Often, these features are heavily aesthetic and may not ultimately suit the client's taste. In these circumstances, the subjective standard will most likely apply due to the personal preferences involved.

While those involved in green buildings should generally try to avoid satisfaction situations because courts will generally enforce them, many parties to these contracts may unwittingly find these types of provisions throughout an agreement due to the heavy reliance by their clients to deliver the many real and perceived benefits promised.

2. *Warranty of Fitness*

Besides satisfaction, the parties may also agree upon a higher level standard of care by requiring the finished project be suitable or fit for the client's particular purposes. In this type of situation, courts will look to any conduct by those involved prior to and during the contract that put the performing party on notice.⁸⁶ Any type of negotiations, discussions, or understandings may provide enough of a basis to create an obligation.⁸⁷ However, a further inquiry into whether a promise or opinion occurred will yield different outcomes.

In upholding these types of standards, courts follow a three-part

84. See Prum & Del Percio 1, *supra* note 3, at 246.

85. Prum & Del Percio 1, *supra* note 3, at 246.

86. See SWEET AND SCHNEIER, *supra* note 4, § 14.04(C).

87. *Id.* Another commentator pointed out that design professionals will take precautions to avert any type of conduct indicative of a warranty to realize specific outcomes. See SIDO, *supra* note 4, § 5.01(B) n.9. He specifically states that terms like, "accomplish," "achieve," "ensure," "warrant," and "free from defects," frequently get interpreted as a warranty by the courts. *Id.*

inquiry to ascertain the reliance on the statement by the aggrieved party and whether to hold someone accountable.⁸⁸ First, courts will investigate the definiteness surrounding the statement.⁸⁹ In making this inquiry, courts will balance such hypothetical green building statements like, “in my opinion, your employees will be more productive due to the green features of the building” as compared to “I am certain you will find your transaction costs lowered because of the green features.” The second statement asserts a definite cause-and-effect type situation, while the first remark suggests an outcome based on a personal belief.

Next, courts will evaluate the amount in which the performing party can affect the desired outcome.⁹⁰ An example of this type of situation within the green building context would include a declaration that “a third party certification organization will have no problem awarding the building its approval” whereas “the visitors to your development will really appreciate your sustainable features.” Based on these declarations, the person making the assertion can probably affect the outcome in the first scenario but will not have any influence over the visitors in the second proclamation.

Finally, courts will determine whether the reliance by the client falls within a reasonable and appropriate level.⁹¹ For instance, a green building assertion that “the use of dual flush toilets will garner greater third party certification points than single ones” versus “this project will be completely sustainable”⁹² provides meaningful differences. In applying these declarations to a reliance level, the client would definitely depend on a green building consultant’s superior knowledge to put forward alternatives that better satisfy an applied standard. However, hardly any of the construction projects around the world can ever accomplish the goal of being completely sustainable and would fall outside a reasonable level with those participants experienced in the industry.

As illustrated with these green building examples, the more concrete the statement, the greater the likelihood that the performing party can influence the outcome or maintains the special expertise; and the further reliant the aggrieved party becomes on the statement, the greater the chances of a court determining a fitness standard existed.⁹³

88. See SWEET AND SCHNEIER, *supra* note 4, § 14.04(C).

89. *Id.*

90. *Id.*

91. *Id.*

92. In using the word “sustainable” as an illustration within the construction context, the meaning should receive a strict interpretation like the one put forward by Charles J. Kibert, Ph.D., in his writings on the subject and that concentrates on the application of “ecologically sound principles.” See Prum, *supra* note 10, at 1.

93. SWEET AND SCHNEIER, *supra* note 4, § 14.04(C). While not uniformly applied by courts, the

Thus, the green building process is fraught with pitfalls at all levels in which the parties may create particular objectives for achievement that courts will enforce; so all types of assurances need limitations to avoid agreeing to precise performance levels outside those commonly practiced.

3. *Performance Standards*

Amongst the most likely scenarios to create a higher level of care in the context of green buildings, a performance standard may occur within an agreement as well. In this situation, the parties look to objectively measure the accomplishments of those performing by conditioning payment to specific outcomes.⁹⁴ While placing a large risk on the performing party, a design professional may choose to take on this type of arrangement because it can provide an effective marketing tool.⁹⁵

As applied to the evolving trend of green building, this type of standard appears very well suited to attract new clients; one consultant already announced this type of performance standard and gained much publicity by making such an offer.⁹⁶ Billed as a first of its kind guarantee, Energy Ace, Inc. announced in August 2009 that it would provide its clients a LEED certification assurance or return their earned fees.⁹⁷ This announcement created much debate amongst green building consultants as to its feasibility from a professional point of view,⁹⁸ while others viewed the approach as really a limitation of liability clause on the part of Energy Ace to reduce claims by owners.⁹⁹

In looking at the details of the performance guarantee from a standard of care perspective, the company's approach to accepting this higher level via their contract appears to materialize on an incremental basis rather than at once in the original agreement. Energy Ace's customary contract for LEED services provides that the firm must first supervise the LEED administration, building commissioning, and energy modeling while

treatise dismisses the assertion of the parole evidence rule for discussions prior to contract formation. *Id.* The authors explain that most courts will permit the testimony in determining an outcome. *Id.*

94. SWEET AND SCHNEIER, *supra* note 4, § 14.04(D).

95. *Id.*

96. See Andrew C. Burr, *LEED Certification, or Your Money Back*, COSTAR GROUP (2009), <http://www.costar.com/News/Article.aspx?id=3382057DA7A6BD8657098DA222674BBC>.

97. *Id.* In fact, the President of Energy Ace was quoted as saying, "We can offer clients a certainty that their project is going to be certified and remove that anxiety." *Id.* The assurance provides that projects failing to earn certification or the level pursued would be entitled to a return for the company's LEED Administration fee. *Id.*

98. *Id.*

99. Darren A. Prum & Stephen Del Percio, *Green Building Contracts: Considering the Roles of Consequential Damages & Limitation of Liability Provisions*, 23 LOY. CONSUMER L. REV. 113, 139 (2010) [hereinafter Prum & Del Percio 2].

completing a sustainability charette.¹⁰⁰ If satisfied with the project and the cooperation levels by the other parties on the project, Energy Ace would then amend its contract to guarantee certification.¹⁰¹

While Energy Ace's incremental approach culminates in a performance standard that most likely appears attainable, several legal issues may arise out of cases where accomplishing the designated goal meets impossibility and the courts tend to reject the agreed upon benchmark. In these situations and from a general construction perspective, the performing party will not recover for their efforts because they assumed the risk.¹⁰² This includes unjust enrichment type claims; but sometimes in cases similar to the satisfaction standard discussed earlier, the aggrieved party can obtain some compensation when showing they conferred some type of benefit.¹⁰³

Other times, the decision by a court to require compensation despite missing the performance standard will hinge on whether the obligation to pay emanates from a condition or promise.¹⁰⁴ This type of situation appears analogous to the situation concerning payment clauses in construction contracts and when the obligation to deliver compensation occurs. In these cases, the prevailing rationale by the courts for requiring payment stems from an underlying belief that the performing parties generally expect to receive compensation for their work, and a result calling for a forfeiture must establish a complete and unambiguous contractual provision demonstrating an undertaking of the risk of nonpayment.¹⁰⁵

As such, a decision to follow a strategy like that of Energy Ace in the green building context must utilize an agreement that delineates an attainable performance standard for the charged party as well as clear language within the contract that demonstrates the desire to accept the risk of nonpayment in the event the green building goal approaches the realm of impossibility or risk facing a hostile court to the arrangement.

100. See Burr, *supra* note 96. A charette is the name of the process for diagramming the sustainability measures during the project phase.

101. *Id.*

102. See SWEET AND SCHNEIER, *supra* note 4, § 14.04(D).

103. *Id.*

104. *Id.*

105. See Margie Alsbrook, Comment, *Contracting Away an Honest Day's Pay: An Examination of Conditional Payment Clauses in Construction Contracts*, 58 ARK. L. REV. 353, 384 (2005); David R. Hendrick, et al., *Battling for the Bucks: The Great Contingency Payment Clause Debate*, 16 CONSTR. LAW. 12, 16–20 (1996).

4. “Free of Defects”

In a “free of defects” situation, a party may unwittingly agree to a change in the standard of care and alter the legal applications of a future claim from their original beliefs. This may happen directly in the language of the contract or through inconsistencies found in the documents that form the basis of the agreement. One example of this type of scenario is *Chesapeake Paper Products Co. v. Stone & Webster Engineering Corp.*, where a Purchase Order and Engineering Contract contained vastly different language controlling the standard of care.¹⁰⁶

In this case, the paper products company retained the engineering firm to supply services in connection with \$105 million expansion of its mill.¹⁰⁷ After numerous correspondence between the parties, they signed an agreement that stipulated “the Engineer shall provide detail engineering services . . . conforming to good engineering practice.”¹⁰⁸ However, the Purchase Order issued by the company stated on the backside that “all materials and articles covered by this order” will be “free from defects in material and/or workmanship, and merchantable.”¹⁰⁹ Because of this discrepancy, two different standards of care could possibly apply to the engineers; and it became an issue when, due to the “fast track” process employed during the project, the drawings contained errors and omissions that caused delays along with increased costs and expenses.¹¹⁰ Upon hearing the case, the Fourth Circuit Court of Appeals upheld the original trial jury’s decision that the Purchase Order’s language should apply.¹¹¹

While the language in the *Chesapeake Paper Products Co.* case appears borrowed from the requirements for disclaimers under the Uniform Commercial Code,¹¹² this case is a good illustration of how a services contract can easily incorporate a clause from a goods setting. This means that an even higher level standard of care above that of a professional may apply to engineers such that any defects in the drawings will cause a breach irrespective of any fault.¹¹³

In situations where a green building professional accepts a purchase order from a client, the language stated on the document also needs to be reviewed to determine whether a similar clause could become part of an

106. *Chesapeake Paper Prod. Co. v. Stone & Webster Eng’g Corp.*, 51 F.3d 1229, 1230 (4th Cir. 1995).

107. *Id.*

108. *Id.* at 1230–31.

109. *Id.* at 1231.

110. *Id.* at 1230–31.

111. *Id.*

112. U.C.C. § 2-316 (2001).

113. See SIDO, *supra* note 4, § 5.01[B].

agreement. An unsuspecting green building professional could easily find that any failures to receive recognition by a third party certifier for sustainable choices in a project may create a source of liability since the result did not occur “free from defects.” These failures to gain recognition may not fatally harm a project’s attempt to gain the desired third party certification but may require more expensive and costlier choices to earn additional credits elsewhere.

Hence, a green building consultant may inadvertently agree to language issued by an organization that typically deals in goods and gets caught in a scenario that creates a higher standard of care than otherwise required under the circumstances.

Therefore, courts generally do not take issue when parties agree to a standard of conduct above the applicable one based on common law; but in the case where they show reluctance, additional language to demonstrate acknowledgment of the added risk will provide a remedy.

B. LOWERING THE STANDARD

While unusual, a situation may arise where the parties prefer to agree to language that creates a lower standard of care than allowed under common law. As explained earlier, courts already decided that in situations where judicial or statutory standards exceed those of the profession, the heightened level will apply.¹¹⁴ However, in circumstances where others do not receive exposure to unreasonable risks of harm, courts will allow the parties to establish their own standard.¹¹⁵ This new standard may actually provide for satisfaction of the duty of care at a level below that of the professional as long as it remains a private agreement and does not concern public safety.¹¹⁶

Furthermore, this situation raises another question as to whether informed consent needs to occur in order to uphold such provisions. Since the parties choose to make an agreement using a lowered standard of care, the underlying contractual requirements of good faith and fair dealing also become necessary.

In looking toward this possible requirement, one commentator analogized the Doctor-Patient relationship as similar to that of an Architect-Client with respect to disclosures.¹¹⁷ This commentator endorsed the need for requiring architects to explain to their clients the benefits and

114. See IOWA NOTE, *supra* note 4, at 1228.

115. See SWEET AND SCHNEIER, *supra* note 4, § 14.05(D).

116. *Id.*

117. See Shapiro, *supra* note 4, at 729.

detriments of each design alternative similar to those required by doctors to their patients.¹¹⁸ Yet, courts appear reticent to extend this doctrine from those facts dealing with health and well-being of another to situations concerned with economic risk in the limited number of cases that address this issue.¹¹⁹

In one of the few cases examining this issue, the court differentiated the circumstances under which an engineer must provide disclosure.¹²⁰ This court turned to the contractual relationship as the basis for making a decision on a disclosure requirement.¹²¹ The court explained that when an engineer contracts to design a structure that meets the building code, he has no responsibility to tell the client of the different alternatives.¹²² However, when an engineer's contract calls for an opinion as to whether a particular structure could satisfy the building code, he must disclose the various methods available and their likelihood of successful compliance.¹²³

In another case involving a design professional and the use of consultants to ascertain the need for a specialized permit relating to construction in wetlands, the court's decision turned on whether the parties' relationship invoked a fiduciary duty.¹²⁴ The court examined the parties' form contract and found that the design professional was under no obligation to obtain the permits but needed to assist the owner in efforts that pursued governmental authorization.¹²⁵ Even though the owner pointed out that applying for the needed permit after commencing construction could cause criminal and civil penalties, the court held that no fiduciary relationship occurred in spite of the fact that the designer maintained special knowledge and expertise with a duty to look out for the other contracted party's interests.¹²⁶

As applied to a green building scenario and more specifically the consulting aspect in gaining a third party certification, the safety determinations are generally separate from those decisions involving the selection of sustainable building practices and products. For instance, in evaluating alternatives for a green building project with the goal of satisfying a third party verification standard, the professional selects a typical product used by others in similar circumstances based on

118. See Shapiro, *supra* note 4, at 729.

119. See SIDO, *supra* note 4, § 11.10.

120. Westmount Int'l Hotels, Inc. v. Sear-Brown Assoc., 65 N.Y.2d 618, 619 (1985).

121. *Id.*

122. *Id.*

123. *Id.*

124. See Winsted Land Dev. v. Design Collaborative Architects, P.C., CV 960071571, LEXIS 2180, at *34 (Conn. Super. Ct. Aug. 12, 1999).

125. *Id.* at *42.

126. *Id.* at *48.

sustainable characteristics like carbon footprint, performance, manufacture materials, cost, durability, and conformance within a particular program's rules. Nevertheless, the client instructs that the professional use a different product despite understanding the tradeoffs just because the suggested one costs more to install. Upon completion of the project, the client fails to qualify for a government green building incentive because the substituted product failed to perform up to the standards required by the third party verification program. In this example, the client should not be able to recover against the green building consultant since the two parties agreed upon a standard below that used by the profession and did not create an unsafe situation.

Hence, it appears that the green building situation will afford parties the opportunity to agree upon a lowered standard of care than allowed under common law as long as the professional's judgment does not concern public safety. But the requirement to provide full disclosure on the alternatives for a given choice will turn on whether a fiduciary relationship exists.

C. CONTRACT EXAMPLES

Quite often, the parties to an agreement choose to memorialize their agreement by using form documents; while other times, an attorney drafts a custom contract for a given client's repeated use. Each method includes its own costs and benefits to the parties of the contract and requires an understanding on how it will affect the green building liability of the stakeholders. With these approaches in mind, each stakeholder needs to understand the perspective of the drafter in setting a different standard of care for a set of forms or custom contracts as well as any ramifications it may cause upon the parties should a claim arise at a later date.

In reviewing the different approaches taken by the various publishers of form contracts, the sponsoring organizations appear to take different approaches. Some include specific language on setting a standard of care while others ignore the subject completely.¹²⁷ For instance, both the American Institute of Architects ("AIA") and Engineers Joint Contracts Documents Committee ("EJCDC") form documents affirmatively include language to directly and indirectly articulate a specific standard of care; whereas the ConsensusDOCS approach applies common law by keeping

127. Compare AM. INST. OF ARCHITECTS, FORM B101, STANDARD FORM AGREEMENT BETWEEN OWNER AND ARCHITECT § 2.2 (2007) and ENG'R JOINT CONTRACTS DOC. COMM., FORM E-500, STANDARD FORM AGREEMENT BETWEEN OWNER AND ENGINEER FOR PROFESSIONAL SERVICES § 6.01A (2002) with CONSENSUS, FORM 200, STANDARD AGREEMENT AND GENERAL CONDITIONS BETWEEN OWNER AND CONTRACTOR (2007).

silent on the mater.¹²⁸ Concerning the area of green buildings, ConsensusDOCS and the Design Build Institute of America each put forward separate additional forms for inclusion with their main agreements, but neither of these documents addresses the standard of care issue.¹²⁹

As such, the following review will cover the forms utilizing language to set forth a standard of care in order to avoid a common law application in the event a dispute arises.

1. Engineering Joint Contracts Documents Committee

As the first major set of form documents to tackle this issue, the EJCDC included a specific provision stating that the professional standard applied.¹³⁰ The language used by the drafter starts by reiterating the professional standard of care as applied by common law.¹³¹ It continues with additional language to exclude any outcome-type approaches either allowed expressly or impliedly that would serve as a new comparison standard.¹³² By inserting this paragraph, the EJCDC attempted to create a balanced, reasonable and predictable outcome should a dispute arise at a later time.

When theory meets reality and with the addition of green building to the construction mix, this provision used by the EJCDC may trigger some unintended results. First, the language casts a wide net across all of the engineering services or potential other activities, to face comparisons with either an engineer or some other professional depending on the nature of the work. This poses a problematic issue with regard to services outside

128. AM. INST. OF ARCHITECTS, FORM B101, STANDARD FORM AGREEMENT BETWEEN OWNER AND ARCHITECT § 2.2 (2007); ENG'R JOINT CONTRACTS DOC. COMM., FORM E-500, STANDARD FORM AGREEMENT BETWEEN OWNER AND ENGINEER FOR PROFESSIONAL SERVICES § 6.01A (2002); CONSENSUS, FORM 200, STANDARD AGREEMENT AND GENERAL CONDITIONS BETWEEN OWNER AND CONTRACTOR (2007).

129. *But see* CONSENSUS, FORM 310, GREEN BUILDING ADDENDUM (2009); DESIGN BUILD. INST. OF AM. CONSENT FORM, SUSTAINABLE PROJECT GOALS EXHIBIT (2009).

130. ENG'R JOINT CONTRACTS DOC. COMM., FORM E-500, STANDARD FORM AGREEMENT BETWEEN OWNER AND ENGINEER FOR PROFESSIONAL SERVICES § 6.01A (2002). The form states:

The standard of care for all professional engineering and related services performed or furnished by Engineer under this Agreement will be the care and skill ordinarily used by members of the subject profession practicing under similar circumstances at the same time and in the same locality. Engineer makes no warranties, express or implied, under this Agreement or otherwise, in connection with Engineer's services.

Id.

131. *Compare* ENG'R JOINT CONTRACTS DOC. COMM., FORM E-500, STANDARD FORM AGREEMENT BETWEEN OWNER AND ENGINEER FOR PROFESSIONAL SERVICES § 6.01A (2002) *with City of Eveleth*, 225 N.W.2d at 524.

132. ENG'R JOINT CONTRACTS DOC. COMM., FORM E-500, STANDARD FORM AGREEMENT BETWEEN OWNER AND ENGINEER FOR PROFESSIONAL SERVICES § 6.01A (2002)

that of traditional engineering activities like land use controls and green building assistance. For instance, the provision might require a court to apply the standard of a licensed attorney for those activities concerning land use controls. However, in the case of green building, many engineers also provide advice on sustainable practices as part of their normal services; in which case, the applicable standard becomes another issue for the court to determine based on a specific set of facts.

Second, as discussed previously with respect to a national standard for green building professionals, the criteria to evaluate the proper conduct of those providing such services remains one for the court to still determine. If the drafters intended for this provision to provide some level of predictability as to a court outcome, then the added and untested dimension of a party providing green building services under this form fails in this respect.

Hence, anyone deciding to use this form needs to realize that the agreement offers no better protection than a common law application with respect to establishing a standard of care and can create some unexpected comparisons when providing green building services to those outside the engineering profession. However, it supplies a shield against an outcome based result should a party attempt this approach for relief.

2. *American Institute of Architects Forms*

Following the EJCDC, the AIA form document series contained a new provision stipulating a specific standard of care starting with its 2007 release.¹³³ In the AIA version, the drafters also reiterated the common law standard of care for professionals.¹³⁴ Their provision bound all activities to that of a similarly situated architect with comparable circumstances.¹³⁵

By taking this approach, the AIA's language provides more predictability than that of the EJCDC. The AIA limits all comparisons for the services rendered to that of another architect. It does not fall into the same trap as the EJCDC by taking an extra step in calling for those

133. AM. INST. OF ARCHITECTS, FORM B101, STANDARD FORM AGREEMENT BETWEEN OWNER AND ARCHITECT § 2.2 (2007) (illustrating the change in AIA form documents from before the 2007 release when they remained silent on a specific standard of care, which would invoke the general approach under the law). See also SWEET AND SCHNEIER, *supra* note 4, § 14.04(A) (including in its new paragraph § 2.2 from AIA Form B101: "[T]he architect shall perform its services consistent with the professional skill and care ordinarily provided by architects practicing in the same or similar circumstances. The Architect shall perform its services as expeditiously as is consistent with such professional skill and care and the orderly progress of the Project.").

134. AM. INST. OF ARCHITECTS, FORM B101, STANDARD FORM AGREEMENT BETWEEN OWNER AND ARCHITECT § 2.2 (2007).

135. *Id.*

activities outside the normal architectural duties to receive a comparison with professionals in other disciplines.

Interestingly, this approach may yield out of the ordinary results under two different types of scenarios related to the delivery of green building consulting. First, if a performing party provides bundled services where both green building and architectural activities occur and become inextricably intertwined, the contractual standard will call for comparisons with similarly situated architects but not necessarily ones with equivalent knowledge in sustainability matters. The second type of scenario occurs in the exact opposite situation where the performing party separates their green building and architectural services with different agreements. Under this scenario, the green building activities would be compared to an architect instead of another professional who provides sustainability services. Either application of the AIA language could create unexpected results and consequences to a case pertaining to green building issues.

Furthermore, the AIA did not address an outcome-based standard of care like the EJCDC. The AIA drafters simply stated a standard of care for application in the event that a dispute arises on a later date, but they chose to stay silent on this aspect throughout the document.¹³⁶

Of note, the *Shaw Development v. Southern Builders* case emanated out of the parties' execution of the 1997 version of the AIA Owner-Contractor Agreement where no standard of care existed.¹³⁷ If litigated, the court would most likely have given us the needed guidance that either the elevated standard of care will apply and the proper professional will be utilized for comparison purposes, or that the outcome based approach provides a better solution in these cases where a party agrees to deliver a green building in order to obtain a state's tax credits.

Thus, the AIA document series provides more particular language in providing a predictable standard of care for architects when reiterating the common law but fails to put forward a comprehensive solution for different levels of service and does not contemplate a court applying an outcome based approach to a lawsuit which falls into the realm of possibility when a party specifies that they want a green building upon completion.

Therefore, these examples and especially the *Shaw* case show us that parties will use form contracts and adapt them to include green buildings as part of the agreement without thoughtfully considering many of the important details inherent to sustainable construction, which will most likely become an issue in the event of a dispute later in time.

136. *But see* AM. INST. OF ARCHITECTS, FORM B101, STANDARD FORM AGREEMENT BETWEEN OWNER AND ARCHITECT § 2.2 (2007).

137. Complaint S. Builders, Inc. v. Shaw Dev., LLC, No. 19-C-07-011405 (4th Cir. Feb. 16, 2007).

IV. STRATEGIES FOR REPRESENTED PARTIES

For all parties entering an agreement concerning a green building, the risk associated with blindly applying a form contract without making modifications to address specific issues underlying a sustainable construction project remains a primary concern for a variety of reasons.¹³⁸ As illustrated throughout this article, the lack of guidance from courts provides a great deal of uncertainty in predicting outcomes when determining a standard of care, but a carefully drafted or revised document can try to prevent some of the major pitfalls previously noted that are inherent in building green.

While the issues involved in green building are numerous, a good place to start with respect to the scope of this article begins with a determination as to whether the applicable standard of care should come from a comparison with other professionals or that of a particular outcome. Often, an owner will express desire to obtain a specific third party certification goal, which can unwittingly set a particular outcome; but due to the unpredictability in achieving a specific result, other participants will be reluctant in agreeing to this type of situation.

After selecting a direction, the parties need to decide if they would prefer to contract a specific level of care or allow common law to dictate. A common law solution tends to occur when those involved prefer a non-confrontational approach, either directly or indirectly. However, by inserting language that sets forth an applicable benchmark, the parties can anticipate a more predictable outcome.

Should the parties choose to set a level of care in their agreement, the degree may provide for a higher standard than used in common law or a lower one so long as safety will not become an issue. In addition, if the parties are exchanging documents to form the contract, they need to take precautions so as to avoid getting caught with inappropriate language, like that of the Uniform Commercial Code or otherwise due to a party's normal procurement process.

Finally, market issues may create unequal bargaining positions, so a party may be forced to accept less than ideal terms. At times when just a few projects find funding to commence work, the owner will leverage the superior position to impose conditions on those performing the work; while at other times when a surplus of development occurs, the parties providing the services will dictate their terms for acceptance.

With the foregoing in mind, each stakeholder in these types of projects

138. See Prum & Del Percio 1, *supra* note 3, at 265.

will have different issues that will sometimes cause conflicts. Consequently, the different strategies and concerns based on this article's analysis are divided by the each type of stakeholder.

A. OWNERS

As the central figure in moving a project forward, owners set the tone from the very beginning. Their chief concern begins with the delivery of the project as envisioned and within a set of parameters, which then permeates into all other aspects of the development. One recommended suggestion to accomplish an expected result begins with drafting a document that explains its green building goals for the project and identifies a party accountable for attaining a specific designation.¹³⁹

In following this advice, the language used by the owner to complete this exercise can easily trigger the application of the outcome approach or a higher level standard of care like warranty of fitness. This document will provide the outward manifestation to all involved that the owner expects all performing parties to deliver as promised. Yet, the owner needs to make sure that a party accepting these terms does not exceed their insurance coverage either due to requirements outside the professional standard or otherwise. In which case, the owner may end up with nothing due to a charged party declaring bankruptcy and an insurance policy without any obligations to provide compensation.

Nonetheless, owners must also proceed with caution when asked to agree upon using a profession's form document. This starts with a perception of bias toward the profession they represent by the drafter; but as illustrated earlier, it can cause some unintended results that place an owner in a more difficult position to predict an outcome should a dispute arise later even though the standard looks like the common law.

Furthermore, should a performing party try to slightly modify the common law standard for professionals to a more advantageous one, the owner should reject such provisions as well. The change need be only slight to completely skew an outcome from a national standard to a local one and create different criteria for comparison purposes.

Thus, an owner maintains leverage to some extent in dictating the project's end goal but needs to take precautions against situations where a performing party exceeds insurance protections as well as when they try to modify the standard of care to their advantage.

139. See Prum & Del Percio 1, *supra* note 3 at 265.

B. DESIGN PROFESSIONALS

After the owner, the design professional's situation sits squarely at the intersection of all stakeholders in a green building project. Depending on the design professional's knowledge and skills as well as the owner's strategy, the designer may provide bundled or unbundled services to the project. In these types of situations, the designer's activities will include either both traditional design and green building services together or in an a la carte manner.

If the services are bundled, a court will have a difficult time separating the activities between those that are traditionally part of the profession and those involving a green building. In which case, the professional standard for a designer could apply when a green building lapse occurs. This may provide a better solution for a designer when using language in the contract like the AIA's professional standard. However, in a common law scenario, the designer's actions will compare to a similarly situated professional, which by definition will need both a knowledge of design and the green building standards. While still strong, the common law scenario will not provide as good and predictable an outcome as the AIA's language.

If services are not bundled, the design professional receives an opportunity to bifurcate the two types of services. By taking this action, the designer can now tailor an appropriate standard of care to the potential risks inherent in the work. For example, the design services may require aesthetics, which usually calls for a higher level of care like satisfaction; whereas the sustainable practices aspect does not affect safety and can utilize a lower standard than common law. While bundling and unbundling services may not be practical in all scenarios, especially given the different personalities of the clients, it does provide the design professional an opportunity to gain better protections where available and a more predictable outcome as well.

No matter the scope of service, the designer should also try to include language that excludes any type of outcome approach whether done expressly or impliedly. A common situation like this will occur where contract discharge gets predicated on the client's satisfaction. Because designers frequently deal with aesthetics and innovation, they can easily find themselves in a contract with a stipulated higher level standard of care due to the requirement for a client's satisfaction.

Hence, depending on whether a design professional chooses to bundle or unbundle the contractual services will create different standard of care issues that will affect all parties and needs to receive serious consideration prior to executing an agreement covering green building elements.

C. GREEN BUILDING PROFESSIONALS

Similar to an unbundled designer, the green building consultant stands alone with his or her own contract emanating from any of the other parties involved in the development. Because of the emerging nature of the green building professional, courts have yet to provide guidance on the appropriate comparison for environmentally friendly practices. As mentioned, the lack of a national standard creates the opportunity for the courts to create a patchwork benchmark, but the adoption by many in the industry of only a couple third party certification systems allows for some level of uniformity. By a green building professional affiliating with one of the third party certification systems, some type of standard may impliedly receive an application through common law. Nonetheless, by inserting language calling for a specific profession or third party credentialing standard, the green building consultant can rest assured that his or her work will get an appropriate comparison.

Also as a separate consultant, the green building professional must watch out to not get caught up in the hiring firm's normal procurement process. Because many firms already have established departments to handle procurements and frequently view consultants in a comparable manner, often it becomes more convenient to issue a purchase order to the consultant. However, if this language fails to receive the appropriate review for the scope of the project and activities performed, then a green building consultant can find language originally drafted for other types of law like the Uniform Commercial Code with an unanticipated standard of care and its accompanying duties as a new performance level.

Moreover, since the green building consultant can provide services independent of other activities, the contracting standards may allow for more flexibility. This flexibility will allow all parties to tailor the contract to specifically set the appropriate standard of care based on the services rendered. For example, a green building professional may pursue a lower standard of care than applied at common law. Since the majority of decisions made by a green building consultant involve sustainable practice tradeoffs, the likelihood that any of these decisions affect safety will approach zero. In which case, the green building professional fits into a unique circumstance where the law allows for a lower standard of care than at common law.

In the same manner, a client and green building consultant may agree to the use of innovative design points when seeking third party certification for the project. In reaching their agreement, the green building professional may have to seek approval from the client in order to receive compensation. In which case, the consultant may unintentionally trigger a

higher standard of care, like satisfaction for those innovative design points and needs to recognize the consequences of these aspects to a project.

Finally, if market forces dictate performance guarantees like the one brought forward by Energy Ace, then a green building consultant needs to weigh their risk options to determine an appropriate response. Taking on the higher level standard of care brings risks, yet with a proper strategy to mitigate the consequences like Energy Ace's incremental approach, a green building consultant may choose to accept a contract with these types of provisions.

Consequently, the green building professionals possess unique characteristics in their activities that provide opportunities to draft a custom contract for their protection when standard of care becomes an issue but must also watch out for situations where they may get bound to another threshold.

D. CONTRACTORS

As the main party transforming the owner and design professional's vision into reality, contractors bring forth their own unique set of issues. Like that of the designer and green building consultant, the contractor may also get bound to the procurement process of an owner where nontraditional language finds its way into the final agreement. Again, the contractor must proceed cautiously when accepting work in such a manner and needs to have all of the documents in the procurement process reviewed in order to avoid these types of unexpected results.

Similar to an owner, a contractor needs to cautiously evaluate any form contracts put forward by a professional organization. As mentioned earlier, ConsensusDOCS took the approach in drafting their forms to rely on common law while the EJCDC and AIA defined a standard of care. With these different methods in mind, a contractor needs to evaluate their own particular risks to ascertain whether a contractually defined standard of care or common law provides a better protection.

In other areas, a green building with the likelihood of requiring a third party certification places new duties and burdens on a contractor like coordinating and obtaining certain documents within specific timeframes. As illustrated with the *Shaw* case, a contractor can reduce or eliminate an owner's ability to obtain special green building tax incentives and can trigger claims that require an aggrieved party to show breach of their duty of care. Since courts still do not provide guidance on the appropriate standard of care for a green building, an agreement defining a benchmark will assist the parties in determining the merits of a case and the proper strategy concerning a settlement for valid claims.

Lastly, the contractor needs to proceed carefully when recommending, installing, and commissioning new technology into a structure as a sustainable alternative. Since many of the sustainable tradeoff decisions involve new and emerging technology, the contractor may find him or herself with a higher level standard of care through the warranty of fitness avenue. Many times a contractor recommends substitute products for a project and should a problem occur later with respect to the green aspects of a development, this proposal may become the basis for a court action.

Accordingly, a contractor needs to recognize that a green building creates new exposures and risks that can lead to a claim at a later date by an aggrieved party and that, absent a provision in its contract stipulating an applicable standard of care, the decision by a court hearing a case of first impression becomes unpredictable.

Therefore, all parties to a green building contract need to work together at the onset to draft language that establishes a fair and balanced standard of care that allows all those involved to understand their obligations while providing a predictable outcome, should a dispute arise at a later point in time.

V. CONCLUSION

Absent firm guidance from the courts, the applicable standard of care for those involved in green buildings remains an educated guess at best. However, the inclusion of language that contemplates how to evaluate a party's duty of care in a contract will go a long way in avoiding the uncertain default rules associated with green buildings.

While form contracts provide a good starting point, they do not take into account the unique performance characteristics associated with green building and need adjustment accordingly or an unexpected result will most likely occur. In drafting custom language, the parties need to recognize that both higher and lower standards of care will pertain and should receive the corresponding attention, but in some cases, multiple documents may include language previously written to address other sources of law and get applied collectively.

As such, an agreement concerning a green building project needs all of the parties involved to take an active role in defining the relevant standard of care or risk of the yet to be determined application of common law to this type of development.