Assessing Liability for Green Building Failures, Part II: How Claims of Green Building Failures Fare Under Common Law Doctrines

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I. Introduction

Part I of this paper1 traced the history of green building regulation and noted that aspirational and voluntary green building codes have been evolving into regulatory imperatives. This Part II investigates the extent to which traditional legal doctrines employed in assessing construction failures may be helpful in adjudicating liabilities associated with green building failures.2

This paper does not provide a taxonomy of causes of action that might be invoked in the face of a green building failure,3 nor does it enter the ongoing debate over the value of specific green building certification programs, such as the U.S. Green Building Council’s Leadership in Energy and Environmental Design.

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2Part I defined “green building failures” to encompass the failure of a building to satisfy green building standards. The following discussion uses the term more broadly to encompass any failure of a building to perform as expected by the owner. When such a failure may be actionable on the basis of traditional contract or tort theories is beyond the scope of this article.

3In Prum and Percio, Green Building Claims: What Theories Will A Plaintiff Pursue, Who Has Exposure, And A Proposal For Risk Mitigation, 37 Real Est. L.J. 243 (Spring 2009), the authors provide an overview of the types of claims for relief that might be stated for a green building failure and the parties who might have a stake in such litigation. They also discuss the types of considerations that might enter into the various each parties' drafting approaches with respect to a contract for sustainable building.
(LEED) program, or even the general viability of the industry’s approach to green buildings. Rather, we intend to review a number of common law doctrines that are invoked in allocating responsibility for traditional construction claims, and see how claims relating to green building failures fare under these doctrines.

II. The Application of Traditional Construction Law Doctrines to Construction Governed by Green Building Codes

A. Are Green Codes Like Traditional Building Codes?

The law regarding traditional building codes is quite developed in some respects, and it would be very convenient if the same principles would carry over when adjudicating disputes involving green building codes. Unfortunately, green building codes are sufficiently different that reliance on traditional building code ju-

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4 LEED is one of the first, most comprehensive, and best-known third-party certification programs. At the same time, it has its critics as noted in Part I. For a student note outlining a variety of criticisms of the USGBC program (some of which would be applicable to competing third-party certification programs), see Keller, LEEDing in the Wrong Direction: Addressing Concerns With Today’s Green Building Policy, 85 S. Cal. L. Rev. 1377 (July 2012).

5 Some authors have suggested that the green building movement would benefit from more critical introspection:

[T]he growing divergence between the fundamental principles that motivate the green building movement and the actual, demonstrable benefits of green building techniques and requirements counsel professionals in this area to exercise restraint in the manner in which they push green building. Our concern is not that the goals of green building are undesirable—to the contrary, they are important and deserve our attention. Instead, we believe that the inertia of the green building movement has resulted in its development beyond the technical considerations and expertise that should be restraining its growth. In a word, we are troubled that the green building movement has begun to believe its own press releases.

Vyas and Gentilcore, Growing Demand for Green Construction Requires Legal Evolution, 30 The Constr. Law. 10 (Summer 2010). Similar warnings were given several years earlier, in an article whose title expresses the key concern of its author. Percio, The Skyscraper, Green Design, & The LEED Green Building Rating System: The Creation of Uniform Sustainable Standards for the 21st Century or the Perpetuation of an Architectural Fiction?, 28 Environ’s Env’t. L. & Pol. J. 117 (Fall 2004). Ultimately, Del Percio’s concern is less that the green building movement may ultimately be founded on an “architectural fiction” and more that green building directives would do well to tailor their mandates to building strategies that have demonstrable “green” results (and that the industry invest in studying and documenting such results).

risprudence seems unpromising. There are several distinguishing features of green building codes that should be addressed when fashioning contracts and legal arguments regarding their interpretation.

The most salient difference is that green building codes are not motivated by health and safety concerns. When most lay people think of building codes, they envision safety-related regulations like those in the National Electrical Code®.7 Such traditional codes are intended to ensure that a building is suitable for use and occupancy without exposing its occupants to unreasonable risks of bodily injury or adverse health consequences. Green building codes, on the other hand, are not concerned primarily with health and safety. Of course, they are partly intended to improve the quality of the working environment, and perhaps in that sense they have a health and safety component, but health and safety are not the primary goals of such codes. This fact makes a difference (as addressed below) when it comes to applying some doctrines of the common law, such as treating code violations as negligence per se.

Second, the primary intended beneficiaries of traditional building codes are the people who immediately inhabit, occupy, and visit the subject structures. To be sure, their health and safety ultimately advance broader societal interests, but those interests are not the chief focus of building codes.8 On the other hand, compulsory green building codes focus less on protecting building occupants than on serving broader societal goals (and reducing the long range life cycle costs borne by building owners). The International Green Construction Code (IgCC), published by the International Code Council, broadcasts that its function is global: “to produce environmental benefits on a massive scale: a scale impossible to attain with purely voluntary green building programs and rating systems.”9 Just as a mandatory green building code is not intended to benefit immediate users, the private adoption of a green building code—by contracting to achieve green

certification, for example—is not directed at benefiting those who will use the building at issue.¹⁰

Are there intended beneficiaries of green building codes apart from “society” in general? In the case of mandatory green building codes, it is difficult to articulate specific individual beneficiaries. On the other hand, one might ask whom an owner intends to benefit by choosing to “adopt” a private green building standard. The answer may well include “society in general” or future workers, who may have a better workplace environment. Still, many owners will also identify themselves as one of the more direct beneficiaries. Green building decisions may bring immediate benefits such as tax credits, and they are likely to bring long-term energy savings or improved worker efficiency. There may also enhance an owner’s image as a good community citizen¹¹ or the owner’s subsequent ability to attract environmentally conscious customers. When it comes to assessing impacts of green building violations, one starting point may be to inquire as to the identity and interests of the intended beneficiaries of the green building standards.

Third, many green building codes are not simply pass/fail standards: it is possible to earn certification in varying shades of “green.” Achieving LEED “silver” standards may constitute a “failure” for an owner intent on advertising its building as meeting LEED “gold” standards, even if the owner earned the same tax credits or other economic benefits by achieving the silver level. A different owner might declare success by earning a silver rating when it was shooting for something more modest. In short, the standard for assessing whether a building “passed” a green building code is subjective and to some extent a question of degree. By contrast, the standards under most traditional building codes are a simple pass/fail: government inspectors do not issue certificates of occupancy that rate a building as “acceptably safe,” “super safe,” or “Tony Stark/Iron Man safe.”¹²

Fourth, satisfaction of some green building codes may depend

¹⁰Again, all these discussion are conditioned on the one notable exception that green codes usually include components to promote occupants’ health. The extent to which green buildings achieve this goal is subject to debate, but there is no question that increasing the quality of the interior environment is the focal point of many green code requirements.


¹²There are, of course, other areas in which the government does provide variable safety ratings for the benefit of consumers, such as the Five-Star rating system used to assess vehicle safety. See generally http://www.safecar.gov.
on site selection and design considerations that are outside the scope of many contractors’ responsibilities and expertise. That fact comes into play in imposing responsibility for satisfaction of “code” requirements, as discussed further below.

Finally, and a fact that rankles many commentators, green building codes are often promulgated and enforced by private, third-party agencies rather than by government agencies. The complaints about such non-governmental adjudications arise from concerns about their impartiality and consistency of enforcement. It will be interesting to see how “private” third-party codes change as governments take notice of these concerns and there is more competition in the green building code marketplace. As noted in Part I, there is already a strong movement to favor codes that are promulgated and adopted more like traditional building codes.

The governmental adoption of a green building code bears the force of a legal mandate, which carries certain legal consequences. Even the private adoption of a green building code through


14 An interesting discussion of the potential ramifications of governmental adoption of private green building codes may be found in Maguire, The Imposing Specter of Municipal Liability for Exclusive Promotion of Green Building Certification Systems, 1 U. Baltimore J. Land & Dev. 157 (Spring 2012). The author states at the outset of his article that he has worked for a company that has an interest in the question posed. Still, the article’s suggestion that there may be legal problems with a municipality’s exclusive promotion of a specific certification system is intriguing, and where the market does not dissuade a municipality from employing a single certification standard, litigation may ensue.

15 Wolf, A Yellow Light For “Green Zoning”: Some Words of Caution About Incorporating Green Building Standards Into Local Land Use Law, 43 Urb. Law. 949 (Fall 2011).

16 Some critics seem to assume that third-party codes are inherently suspicious. It is easy to throw out terms like “private agencies” in apposition to the “public agencies” that adopt and enforce traditional building codes, but how much of a substantive difference is there? There are very few manuscript building codes, and most building codes are drafted by “third-party” agencies. Some people trust these third-party agencies more than they trust private green building code drafters, but the question of what distinguishes an agency such as USGBC from the ICC in terms of the trustworthiness of its code products requires more attention than is available in this space. One commentator who offers articulate concerns about green codes is Schindler in Following Industry’s LEED®: Municipal Adoption of Private Green Building Standards, 62 Fla. L. Rev. 285 (April 2010), whose many arguments include the suggestion that green codes are a good start but do not go far enough in achieving their ostensible environmental goals.
contract alters the nature of the parties’ respective obligations and rights. At the same time, the word “code” can only import a limited amount of pre-existing law, and parties should take care to delineate the precise attributes of a green code when trying to assess the extent to which existing legal doctrines (especially those founded on traditional building codes) will be applied.

Finally, it should be noted that there are other building mandates that rise to the level of “codes” in some sense of the word that might serve as better analogies when formulating the law of green building. The Americans with Disabilities Act, for example, has important and widespread impacts on public buildings, as do historic preservation codes. These codes are similar to green codes at least to the extent that their goals are socio-economic rather than health and safety, and adjudication of claims arising from such codes might provide important lessons for green building.17

B. Should Violation of a Green Building Code Be Negligence Per Se?

Some authors have suggested that violations of green building codes may be actionable as negligent per se.18 There is a certain intuitive appeal to the inference of negligence from the mere violation of a building code, as one may presume that building codes set minimum standards of safety or health. There are, however, reasons to question the application of such a rigid rule.

Although there are minor variations in the law of negligence per se among different jurisdictions, the core elements of an action for negligence per se can be stated as follows:

An actor is negligent if, without excuse, the actor violates a statute that is designed to protect against the type of accident the actor’s conduct causes, and if the accident victim

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17 There are elements of ADA requirements that are related to health and safety, obviously, but ADA mandates with respect to buildings are driven by open access and convenience issues as much as by pure health and safety issues. That does not preclude liability for deficiencies in design under the ADA, of course. Bruner & O’Connor on Construction Law § 17:37 (2002).

18 Sulkowski, From the Environment, 39 Real Estate L.J. 192 (Fall 2010); Lenssen & Roodman, Worldwatch Paper 124: A Building Revolution: How Ecology and Health Concerns are Transforming Construction, at 18 (WORLDWATCH INSTITUTE 1995). Dale E. Ahearn & Geoffrey M. White, Understanding and Mitigating the Risks of Green Building, Aspatore, 2009 WL 133925 (“We are not aware of any specific negligence per se claim in connection with green building, but the basic theory of such liability does fit within the structure of green building codes.”).
is within the class of persons the statute is designed to protect.\textsuperscript{19}

In short, an action for negligence \textit{per se} may be brought by an individual who was the intended beneficiary of a statute and suffered an injury that the statute was intended to prevent.\textsuperscript{20} Violations of building codes may be found—but are not always found—to constitute negligence \textit{per se}. As the Virginia Supreme Court explained in applying negligence \textit{per se} when a boy drowned after gaining access to a homeowner’s pool though a defective fence:

In the case at bar, the evidence was clearly sufficient, and the trial court ruled as a matter of law, that [defendant] violated the Building Code because the pool gate latch was not self-latching and the latch itself was substantially lower (32 inches from the ground instead of 48 inches) than required. [The victim] was clearly within the class of individuals meant to be protected because Section 616.9 of the National Building Code specifically required the fence to make the pool entirely “inaccessible to small children.” The harm suffered here, [the child’s] drowning, was the type against which the statute was designed to protect . . . \textsuperscript{21}

Why are claims for negligence \textit{per se} attractive to tort claimants? One reason is the resulting simplification in a claimant’s burden of proof. A party can demonstrate negligence (that is, breach of the duty of care) merely by proving violation of a statute and an ensuing injury against which the statute was designed to protect. The claimant need not establish that the defendant bore a duty to the individual claimant or that the defendant acted below some “reasonable person” or related standard of care. Proof of the violation is proof of liability, assuming of course that the claimant can establish a causal connection between the violation and the injury at issue.\textsuperscript{22}

However, a tort claim for negligence \textit{per se} based on an architect’s or contractor’s violation of a green building code is

\textsuperscript{19} Restatement Third, Torts: Liability For Physical And Emotional Harm § 14 (2010).

\textsuperscript{20} Some writers find the application of the doctrine of negligence \textit{per se} problematic: “The mainstream jurisprudential approach of finding or rejecting automatic proof of ‘negligence on the part of the violator [of a nonprescriptive statute], subject to a limited range of excuses or to none at all’ is unsystematic, vague, muddled, and wrongheaded.” Bloomquist, The Trouble With Negligence Per Se, 61 S. Car. L. Rev. 221 (Winter 2009).


\textsuperscript{22} For a pair of articles discussing negligence \textit{per se} generally and criticizing the manner in which its limiting conditions are applied, see Twerski, Negligence Per Se And Res Ipsi Loquitur: Kissing Cousins, 44 Wake Forest L. Rev. 997
problematic on several fronts. First, green building codes are not primarily safety codes intended to prevent injuries, being aimed more at economic benefits and long term preservation of the environment. Second, it is almost always a building owner who seeks recourse for violation of the green building codes, and not the employees who might be seen as within the “class of persons the statute is designed to protect.” To invoke negligence per se as a basis for recovery, an owner faces the challenge of demonstrating that green building codes are designed to protect them.23

In addition, the economic loss that an owner suffers from a green building failure is most likely a private economic benefit, such as the loss of tax credits or a building that is less efficient (and thus more costly) than the owner anticipated. Although reduced operational expenses may be a collateral goal of green building codes (assuming that they are effective in saving energy and natural resources), the literature surrounding the creation of such codes ordinarily treats such savings as side-benefits and not the principal goals of the codes. Indeed, green building often costs more than standard building. In addition, as discussed below, the economic loss rule may bar any claim for negligence per se.24

That is not to say that evidence of a violation of a green building code is inadmissible. Indeed, as discussed further below, it may well be admissible as evidence of negligence even if it does not establish negligence per se. The view that violation of a building code has bearing on liability in tort is accurate, even if it does provide a procedural shortcut like the doctrine of negligence per se.

C. Application of the Spearin Doctrine to Green Build-
ing and the Contractual Obligation to Satisfy Codes

An area of contract drafting that needs work in any sustain-

23 Even violations of traditional building codes will not always support a claim for negligence per se. See, e.g., Zimmerman v. St. Peter’s Catholic Church, 87 Ohio App. 3d 752, 754, 622 N.E.2d 1184 (2d Dist. Montgomery County 1993) (alternate holding; declining on several bases to find that alleged violation of Ohio Building Code would constitute negligence per se under circumstances addressed in case, including requirement that a violation of a building code, to constitute negligence per se, required proof that resulting condition of building was unreasonably dangerous).

24 Davencourt at Pilgrims Landing Homeowners Ass’n v. Davencourt at Pilgrims Landing, LC, 2009 UT 65, 221 P.3d 234 (Utah 2009) (court held that negligence per se claim based on violation of building code was barred by economic loss rule).
able project—indeed in any project—is the allocation of responsibility to build according to “code.” In standard contracts, contractors often bear the burden of ensuring that construction is consistent with “codes,” leaving the contractors to determine which codes apply:

§ 3.7.2 The Contractor shall comply with and give notices required by applicable laws, statutes, ordinances, codes, rules and regulations, and lawful orders of public authorities applicable to performance of the Work.\(^\text{25}\)

On the other hand, the language of a contract may, on its face, limit the contractor’s obligation to notifying the design professional of code violations of which it becomes aware, while shielding the contractor from the consequences of following plans that diverge from code requirements:

§ 3.2.3 The Contractor is not required to ascertain that the Contract Documents are in accordance with applicable laws, statutes, ordinances, codes, rules and regulations, or lawful orders of public authorities, but the Contractor shall promptly report to the Architect any nonconformity discovered by or made known to the Contractor as a request for information in such form as the Architect may require.

§ 3.2.4 . . . If the Contractor performs those obligations, the Contractor shall not be liable to the Owner or Architect for damages resulting from . . . nonconformities of the Contract Documents to applicable laws, statutes, ordinances, codes, rules and regulations, and lawful orders of public authorities.\(^\text{26}\)

It would be nice to say that the three provisions quoted above, applied with relevant common law doctrines, constitute a clear delineation of each party’s responsibility to ensure compliance with building codes on a traditional construction contract. For better or worse, liability for a traditional code violation might be borne by the contractor, by the design professional, or by both depending on the circumstances and the jurisdiction in which the violation occurs.\(^\text{27}\)

When one starts asking who bears the burden of green build-

\(^{25}\)American Institute of Architects, Form A201-2007, “General Conditions of the Contract for Construction” § 3.7.2 (2007). This particular contract does not say “building codes,” a fact some authors have noted but whose consequences are not entirely clear. See Bruner & O’Connor on Construction Law § 5:61 (2002).

\(^{26}\)American Institute of Architects, Form A201-2007, “General Conditions of the Contract for Construction” §§ 3.2.3 & 3.2.4 (2007).

ing violations writ large, the answer will probably not be found by recourse to common law, as that law is simply not clear. Nonetheless, it makes sense to compare traditional building codes to green building codes in trying to get some footing in answering the question. To the extent that a contract or the common law burdens a contractor with the responsibility for complying with codes, there is a perfectly rational basis for this obligation: code compliance is the natural business of contractors (and their subcontractors). Substantial portions of green building codes are written as specific construction imperatives, and there may be a natural and compelling analogy—for whatever the analogy may be worth—between those attributes of a particular green code and a traditional building code.

On the other hand, imposition of a green building code on a contractor makes little sense where the contractor has little control over key project elements that will affect compliance, such as site selection or the specific manner in which an owner targets green certification. Is construction of a bicycle rack to encourage conservation of natural resources a “requirement” of a green building code? The answer (in a code that rewards bicycle racks) may well be “not unless the owner chooses to exploit that construction to earn points toward certification.”

A common law doctrine that may provide some direction in this regard is the well-known Spearin doctrine, under which a contractor who builds in accordance with plans and design specifications (as opposed to performance specifications) is shielded from liability for a building’s consequent defects. The Spearin doctrine may not apply in traditional settings to protect a contractor from code violations that deal with safety matters where the contractor is obligated to build according to code. In one case, for example, the Kentucky Court of Appeals reversed a jury verdict for a contractor and ordered entry of judgment NOV over a Spearin defense:


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39 S.Ct. 59, 61, 63 L.Ed. 166 (1918), in which the United States Supreme Court held that “if the contractor is bound to build according to plans and specifications prepared by the owner, the contractor will not be responsible for the consequences of defects in the plans and specifications.” There is a major distinction between defects in plans and specifications versus a clear violation of a building code provision.\textsuperscript{32}

On the other hand, where the building’s “performance” is not related to traditional building codes or the safety of occupants, the \textit{Spearin} doctrine provides a more compelling defense.\textsuperscript{33} Of course, a substantial consideration in a green building project is the extent to which particular specifications that bear on the ultimate certification of a green building (or the satisfaction of a green building code) are design specifications or performance specifications. A specification that requires a contractor to purchase all materials within 600 miles from the location of the project—a design specification—probably imposes liability on the design professional where the green code at issue grants points for the acquisition of materials within 300 miles.\textsuperscript{34} A specification that requires that the contractor acquire building materials from such sources as will satisfy a green code’s proximity points squarely imposes liability on the contractor.

As a consequence, vague statements in the contract documents about an owner’s aspirations to build green cannot serve to allocate responsibility in the same manner as tying specific certification objectives to specific specifications. The \textit{Spearin} doctrine has its own issues, of course, but this is one area in which the substantial body of law related to the doctrine will have some immediate bearing on the principled resolution of green building disputes.\textsuperscript{35}


\textsuperscript{33}Brewster, It’s Not Easy Being Green—A Green Building, That Is: How To Avoid Disputes and Allocate Risks In The Modern Green Building Movement, 30 Miss. C. L. Rev. 65 (2011) notes that while the \textit{Spearin} doctrine may provide some defense, the contractor is still liable for its own “means and methods,” a concern that is similar to the policies that insulate performance specifications from application of the \textit{Spearin} doctrine.

\textsuperscript{34}Here, the discussion assumes a green code that is point-based and the election of points for proximity in acquiring building materials is optional, rather than mandatory.

\textsuperscript{35}Of course, the \textit{Spearin} doctrine itself will not resolve issues where there is concurrent causation of a green building failure where some causes can be attributed to the design professional and some to the contractor, discussed below.
D. The Identification and Proof of Damages for Green Building Failures

Some economic benefits of obtaining green building certification are readily predictable, measurable, and lost when certification is not obtained. The most obvious of these economic benefits are tax benefits for which a green building owner intends to qualify. Tax benefits are easy to assess as damages precisely because they are predictable, measurable, and they are won or lost based on a certification process that articulates precise standards for achieving such credits.

On the other hand, some green building owners strive for certification for social policy, moral commitments, public relations, or other reasons. The achievement of certification to these owners may bring benefits that are not primarily economic, and the loss of certification, conversely, results in a deprivation to the owner that is difficult to assess in economic terms. The absence of a clear economic element of such a loss does not necessarily mean that losses should not be recoverable. For more than two centuries courts have found a way to compensate tort victims for pain and suffering through monetary damages, even though pain and suffering are not readily understood as “economic” losses. Rather, the law awards victims monetary compensation as a rough mechanism for trying to restore them to the same level of mental happiness or satisfaction as they would have enjoyed but for the injury that caused them to suffer.

How will the law compensate a bicycle manufacturer that trades on the environmental benefits of cycling, when its new office or manufacturing facility fails to qualify for green certification? If it could be shown that the market prices for certified buildings are higher than functionally equivalent non-certified buildings, there is at least an economic loss that can be compensated. But what about corporate embarrassment or the public relations hit that this “environmentally friendly” cycling company takes? Do companies undergo pain and suffering or some sort of compensable corporate angst in circumstances like this? It is possible that a consulting witness can devise some way of measuring corporate karma for purposes of evaluating such intangible losses? Until now no such method seems to have emerged.

The fact that noneconomic losses are so ethereal does not mean that claimants are necessarily on better footing when they can articulate purely economic losses. Two of the economic motives for building green are energy savings and improved work environments. Both of those attributes have clear economic
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ramifications, and at least in principle are readily converted to money. When a green building does not produce expected energy savings, the owner arguably suffers an economic loss that can be measured by the difference between actual energy cost and the owner’s (reasonable) expectations as to the energy costs. The loss of a green working environment could arguably be valued in a manner similar to the way in which experts value inefficiency of labor working under difficult contract conditions.

Merely formulating a measure of damages does not avoid the obvious problems in seeking such damages from a jury. On what did the owner base its expectations that a green building would perform better? Was there an express representation or warranty by the architect/contractor? Was the owner’s expectation based more generally on “literature” that suggests that green buildings may be more efficient? Is there any rational or scientific basis for the owner’s expectations, and can the owner’s expectations be quantified? The same questions haunt expectations that a company’s work force will operate more efficiently in a green environment. It is not difficult to establish the parameters of a damage claim in principle, but actually proving such a claim may be well-nigh impossible given the shortage of reliable studies that are detailed enough to support an expert opinion as to damages arising from the lost labor productivity. One might be tempted to respond “Perhaps such quantification is difficult now, but eventually science and damage experts will catch up, just as they have done when quantifying claims for loss of labor productivity.” That hope is at best optimistic, especially if it is anchored by the “reliability” of studies on the loss of labor productivity on adversely impacted construction sites.

There is another problem with such claimed damages that is even more pernicious than the difficulty of measuring them: it may not even be clear that the existence of damages is certain. It is blackletter law that damages need not be proven with certainty, and that reasonable approximation is permissible. That liberality in measuring damages, however, only applies after the existence of damages can be proven with certainty. Absent compelling proof of the existence of damages, they cannot be awarded at all.

Why is that of special concern in green building disputes? For such damages as the loss of tax credits, certainty is not a problem.

When alleging loss of energy efficiency or worker productivity, on the other hand, it may be quite difficult to find reliable scientific testimony to the effect that but for some breach by the architect/contractor, the owner would have enjoyed energy savings or a more productive work environment. Certainly, there are studies suggesting that energy savings and increased workplace efficiency are probable consequences of green building, which economic benefits are likely to outweigh the additional cost of green construction.37

On the other hand, there are skeptics. Indeed, in one case that has received substantial attention from green building stakeholders (in part because it is one of the few published decisions dealing with green issues), the U.S. Green Building Council argued in a Motion to Dismiss that

Importantly, in the various applications for which LEED certification is made available, points are awarded for design, materials, location, technologies, strategies aimed at improving the environmental performance of the building in question. With the exception of the existing buildings program, the LEED certification process does not assess the actual environmental performance of any of the structures for which certification is sought or granted.38


38 U.S. Green Building Council’s Memorandum of Law in Support of Motion to Dismiss the First Amended Complaint, Gifford v. U.S. Green Building Council, Docket No. 1:10-CV-07747-LBS (S.D.N.Y April 6, 2011) (available on www.pacer.gov at https://ecf.nysd.uscourts.gov/doc1/12718043601). Henry Gifford brought the suit in an effort to recover damages on the basis of a number of legal theories, all of which asserted that USGBC was overselling the benefits of green building as part of its efforts to push LEED certification. First Amended Complaint, Gifford et al. v. U.S. Green Building Council, Docket No. 1:10-CV-07747-LBS (S.D.N.Y. February 8, 2011) (available through PACER at https://ecf.nysd.uscourts.gov/doc1/12718791911). The case was eventually dismissed for want of standing, and the dismissal was not appealed. Mr. Gifford is not alone in questioning the factual basis for assertions that green building achieves meaningful results (at least as certified by many third-party certification agencies) that are implied by such agencies. See, e.g., Vyas and Gentilcore, Growing Demand for Green Construction Requires Legal Evolution, 30 Constr. Law. 10 (Summer 2010).
Some critics are disappointed in this implied “admission” that benefits of green certification standards may not be subject to assessment.

Is this really that troubling? Many traditional building codes are also based on including elements of design that are predicted to improve safety, even though the actual enhancement of safety is not subject to objective test. A four-hour fire wall passes muster because its materials are reasonably predicted to serve as a sufficient fire break, and not because the fire inspectors actually burn the structure and measure the wall’s capacity to retard the spread of flames. Fire codes (and similar building codes), however, have the benefit of substantially more theoretical and empirical support than green building codes with respect to such things as energy efficiency and worker productivity.

To be sure, green building proponents have little trouble relying on studies—albeit limited in scope and number—that encourage them to trust the efficacy of green building standards. Detractors have little trouble in offering what they perceive to be effective criticisms of the assumptions underlying green construction, at least as far as economic and environmental promises are proffered by the proponents. In the current statute of affairs, there is no consensus as to what economic and environmental benefits can reasonably be inferred in measurable quantities as flowing from green construction. 39

E. Foreseeability of Damages In Green Building Contexts

Ever since Pickford & Co. and its chief proprietors Baxendale and Ors were absolved of liability for lost profits arising from Pickford’s late delivery of a steam engine crankshaft to City Steam-Mills and its owner (Mr. Hadley), the common law has limited damages for breach of contract to those “that may reasonably be supposed to have been in the contemplation of the parties, at the time they made their contract, as the probable result

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39 See generally Bruner & O’Connor on Construction Law §§ 17:38.51 to 17:38.54 (Supp. 2012). Although the present discussion focuses on the liability of design professionals and contractors based on actual green building failures, Bruner and O’Connor note that an important part of green building is managing client expectations in the face of uncertainty: “The key lies in educating owners on the benefits and potential risks of particular green design alternatives.” Of course, providing solid advice in this realm is inherently difficult where many assumptions about green building are not confirmed with extensive empirical studies—at least at this point.
of the breach of it.”\textsuperscript{40} That rule “jumped the pond” in the nineteenth century,\textsuperscript{41} and it presently may be summarized as follows:

\textbf{§ 351. Unforeseeability And Related Limitations On Damages}

(1) Damages are not recoverable for loss that the party in breach did not have reason to foresee as a probable result of the breach when the contract was made.

(2) Loss may be foreseeable as a probable result of a breach because it follows from the breach

(a) in the ordinary course of events, or

(b) as a result of special circumstances, beyond the ordinary course of events, that the party in breach had reason to know.\textsuperscript{42}

The rule of \textit{Hadley v. Baxendale} has been cited in over 2,000 published state and federal opinions, and although the rule has been the subject of extended commentary, analysis, criticism, and discussion, the essential statement of the law by Baron Sir Edward Hall Anderson has survived for more than a century and a half.\textsuperscript{43}

As set out in Section 351(2)(a) & (b) of the Restatement, there are two different paths by which one might prove that a particular loss was sufficiently foreseeable to sustain recovery. First, damages might be foreseeable as a probable result of a breach because the loss “follows from the breach in the ordinary course of events.” This type of objective foreseeability allows recovery

\textsuperscript{40} Hadley v. Baxendale, 9 Exch. 341, 156 Eng. Rep. 145 (1854).


\textsuperscript{42} Restatement Second Contracts § 351 (1981).

\textsuperscript{43} On the occasion of the sesquicentennial of the decision, Texas Wesleyan Law School held a two-day symposium concerning \textit{Hadley v. Baxendale} and devoted an issue of its law review to papers discussing the case. A thoughtful examination of \textit{Hadley v. Baxendale}’s history and reach can be found at Tettenborn, \textit{Hadley v. Baxendale: Contract Doctrine or Compensation Rule?}, 11 Tex. Wesleyan L. Rev. 505 (Spring 2005), and several other papers examining different aspects of the history and progeny of the decision can be found in the same issue. In the article cited, Professor Tettenborn argues that limitation of \textit{Hadley} to contract cases is unwarranted, notwithstanding the fact that few (English) courts have extended the rule to tort cases. To the extent that a different rule is used in tort to limit damages to those proximately caused by a defendant’s misconduct, of course, a plaintiff is encouraged to find both tort and contract remedies for any claim.
absent subjective or conscious foreseeability simply from the natural, predictable results of a breach. Thus, the loss of income from the late opening of a hotel probably qualifies as the “probable result” of a contractor’s breach that causes the delay.

How does one go about assessing the foreseeability of particular damages “in the ordinary course of events?” The trivial answer is “ask the fact finder.” A more robust answer is that foreseeability is a complex analysis that must consider many different factors that bear on the probable consequences in the “ordinary course of events.” Bruner and O’Connor have summarized some of those factors as follows:

(1) the sophistication of the parties; (2) the detail with which construction contracts are prepared; (3) the flexibility built into construction contracts to make changes or to give definition to contract requirements during construction; (4) the frequent practice of giving contractual definition to the type and amount of damages awarded for certain breaches; (5) the recognized “hurly-burly” of the construction process; and (6) the common industry appreciation for the likely consequences of most breaches.45

As intimated by the sixth factor, what constitute the “foreseeable” consequences of a breach can change over time as industry participants become more knowledgeable about their projects. Indeed, the law of foreseeability has developed to the point that some commentators believe that Hadley v. Baxendale would actually have been decided differently today, either due to legal or technological developments.

As applied to green building codes, widespread dispersal of information concerning the green building movement and its socioeconomic benefits widens the scope of predictable consequences of green building failures in the “ordinary course of events.” A contractor in the early days of green building may have been surprised to learn, for example, that the government was offering lucrative tax credits for qualifying buildings. To the extent that such tax credits were not known throughout the construction industry and a green building failure could not be said to occasion the loss of such credits “in the ordinary course of events,” the owner might have been barred from recovering such a loss as being unforeseeable. Today, the result may well be different.

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45Bruner & O’Connor on Construction Law § 19:18 (2012) (internal footnotes for each of the factors omitted).
Most parties would rather not leave the determination of foreseeable damages to a jury when there is an alternate course ready at hand. Section 351(2)(b) of the Restatement suggests such an alternate, where it allows recovery of otherwise unforeseeable damages in “special circumstances.” These circumstances arise when “the party in breach had reason to know” of them when the contract was made.

One way to guarantee a contractor's knowledge of such “special circumstances” is to specify them in the contract. Even in the early days of green building, when the loss of tax credits might not have been viewed as a probable result of a breach by the contractor, an owner could ensure that the contractor had “reason to know” by including a reliance on tax credits in the parties’ negotiations or in the contract itself.\(^6\)

Clear disclosures of potential “special” losses can ensure that they are recoverable from the perspective of foreseeability. Of course, such disclosures might also result in a contractor's (or design professional's) insistence on express exclusion of liability for the damages at issue. In either case, the parties would know from the outset what their liabilities and limitations on recovery would be, allowing each of them to manage its risks accordingly.

On a final note, knowledge of consequences might not equate to knowledge of damages attending those consequences. A contractor may be keenly aware that its failure to acquire building materials within a stated proximity from the project could cost the owner a specific level of “green” certification, and that loss of tax credits is an immediate consequence of that loss of certification. On the other hand, owners are unlikely to itemize, and contractors are unlikely to infer, all the ramifications of losing green certification for which the owner might later seek compensation.

**F. Waiver of “Consequential” Damages in the Context of Green Building**

As noted above, parties may choose to limit their exposure to payment of certain types of losses that their breaches may occasion. They can accomplish this protection by carving out specific damages for which they will not be held liable, even (or especially) when such damages are foreseeable. Alternatively, they may negotiate caps on certain types of damage.

LIABILITY FOR GREEN BUILDING FAILURES, PART II

In addition to the barrier of foreseeability as an outside limit to damage recovery, there is another distinction that comes into play in limiting damages, and that is the difference between “direct” and “consequential” damages. The foreseeable/unforeseeable dichotomy and the direct/consequential dichotomy have caused some commentators problems as they conflate the analytically distinct concepts. It is helpful to bear in mind that consequential damages may be entirely foreseeable but nonrecoverable because they are “consequential” and not “direct.” Similarly, consequential damages may be unforeseeable. In the absence of an agreement to waive consequential damages or some common law limitation on the recovery of such damages, consequential damages may be recovered in the same manner as direct damages.

Scores of authors and courts have articulated the difference between consequential and direct damages, and most observers qualify their definitions by observing that the distinction is anything but precise:

Actual damages are either “direct” or “consequential.” There is no bright-line test for distinguishing consequential from direct damages. Attempts by courts from different jurisdictions to distinguish the two have sometimes yielded inconsistent results and failed to provide needed clarity.

Direct damages are those that flow naturally and necessarily from the breach and compensate for loss that is presumed to have been foreseen or contemplated by the parties as a consequence of breach. Whether a given damage item is direct or consequential

47 Under the Uniform Commercial Code, for example:

§ 2-713. Buyer’s Damages for Non-Delivery or Repudiation.

(1) Subject to the provisions of this Article with respect to proof of market price (Section 2-723), the measure of damages for non-delivery or repudiation by the seller is the difference between the market price at the time when the buyer learned of the breach and the contract price together with any incidental and consequential damages provided in this Article (Section 2-715), but less expenses saved in consequence of the seller’s breach.

48 Tettenborn, Consequential Damages In Contract—The Poor Relation?, 42 Loy. L.A. L. Rev. 177 (Fall 2008), analyzes the nature of consequential damages and what distinguishes them from direct damage, and concludes that: damages for consequential loss in contract are, and ought to be, regarded as different from damages for direct losses. They are in fact subject to different rules and rightly so. This is a fact that ought to be recognized in contracts scholarship. One can only hope that in future years as much will be written about them as a category as about other categories such as expectation, reliance, and other losses.

49 See, e.g., Poulin, Recovering Consequential Damages, 23 Constr. L. 29 (Fall 2003).

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turns primarily on pertinent contract language, but also may be influenced by such factors as the parties’ sophistication. Common examples of direct damages include unpaid contract amounts, cost to repair defective work, and reduced project value due to nonconforming work.

Consequential damages, in contrast, are losses to the nonbreaching party that “result naturally, but not necessarily, from the breach.” They “must be foreseeable and . . . directly traceable to the wrongful act and result from it.” A classic example of consequential damages is lost profit on collateral business arrangements.50

The American Institute of Architects’ A201-1997 introduced bilateral waivers of consequential damages as a “standard” contract term,51 and such waivers are uniformly held to be enforceable. Nonetheless, the waiver of consequential damages may leave an important question unanswered: which damages are consequential, and which are direct? In other words, the parties may agree that they will not recover consequential damages from each other, but the contractor and the owner may have very different ideas as to which damages are “direct” and which are “consequential.” Is achievement of a gold-level certification an inherent quality of the building itself, the loss of which is compensable? Or, as the contractor might argue, is achievement of a third-party certification something that might result “naturally, but not necessarily, from the breach?” Just as parties may specify what damages are foreseeable and not, the parties may also specify what damages are “direct” and what damages are “consequential” for purposes of limiting their liability. In the absence of clear negotiated definitions, there may remain considerable room for argument.52

In short, mutual waivers of consequential damages provide protection, but the protection can be illusory if the parties do not

50 Dannecker, Hill, Kofron, and Rycraft, Recovering and Avoiding Consequential Damages in the Current Economic Climate, 30 Constr. L. 28, 28–29 (Fall 2010) (internal footnotes omitted).
51 For two views of the mutual waiver at the time it was introduced see Axelroth, Mutual Waiver Of Consequential Damages—The Owner’s Perspective, 18 Constr. L. 11 (Jan. 1998) and Ernstrom and Dehlmer, Mutual Waiver Of Consequential Damages: The Contractor’s Perspective, 18 Constr. L. 4 (Jan. 1998).
52 In Prum and Percio, Green Building Contracts: Considering the Roles of Consequential Damages & Limitation of Liability Provisions, 23 Loy. Consumer L. Rev. 113 (2010), the authors provide a general overview of the application of the mutual waivers of consequential damages and related issues in standard and specialized forms published by AIA, EJCDC, ConsensusDocs, and DBIA. The forms, as one might expect, fare differently in the eyes of these commentators. For example:
distinguish between foreseeable/unforeseeable damages and
direct/consequential damages and draft accordingly.\textsuperscript{53}

\textbf{G. Doctrine of economic waste}

The principle that the law will not reward economic waste has
been around for centuries (albeit it under different names), and
in its present posture\textsuperscript{54} holds that:

(2) If a breach results in defective or unfinished construc-
tion and the loss in value to the injured party is not proved
with sufficient certainty, he may recover damages based on:

(a) the diminution in the market price of the property
caused by the breach, or

(b) the reasonable cost of completing performance or of
remedying the defects if that cost is not clearly dispropor-
tionate to the probable loss in value to him.\textsuperscript{55}

\textsuperscript{53}A splendid example of the difficulty in distinguishing consequential from
direct damages and keeping the distinction separate from the foreseeable/
unforeseeable distinction may be found in Sidnell, Consequential Damages: Are
Constr. Law. 109 (2010). Ms. Sidnell analyzes a handful of cases that addressed
the recovery of damages and argues that several classes of damages that might
appear to be consequential should be treated as direct. She concludes:

As can be seen from the cases canvassed, even after more than 150 years of jurispru-
dence, there is little certainty over the type and extent of foreseeable damages that
are recoverable. Even where the parties have addressed the consequences of a breach
of contract with a bald consequential damages clause, there are two schools of thought
as to whether such an exclusion is only narrow enough to exclude indirect damages
that fall into the second branch of the \textit{Hadley v. Baxendale} rule or whether an ac-
cepted commercial meaning applies such that claims for loss of profits or increased
energy costs are precluded. Lastly, for those drafting exclusion clauses, be wary of
opening words that colour the meaning of specified losses that follow.

\textsuperscript{54}Not everyone accepts the current rationale or formulation of the rules for
economic waste. See, e.g., Daniel and Marshall, Avoiding Economic Waste in
875, 888--889 (2007) (“The economic waste doctrine appears to have been doomed
from inception, especially since it appears to have never been properly defined,
and therefore, was incapable of being properly understood.”). These authors’
ultimate assessment that the economic waste doctrine as currently employed is
a bad idea is not entirely persuasive, but the article provides an interesting
perspective on the theory and application of the economic waste doctrine.

\textsuperscript{55}\textsuperscript{Restatement Second Contracts \S 348 (1981).}
In some states, where a repair leaves a building in a less desirable state than it would have occupied but for the defect and subsequent repair, the owner may be able to recover both the cost of the repair and the diminution in market value after the repair. For purposes of discussion, assume that flaws in the design or construction process have resulted in the completion of a building that fails to obtain the desired level of green certification or in some other sense fails to satisfy the “green” constraints that have been imposed by code or the private agreement of the parties. What does one make of waste in the context of green building failures?

First, in assessing whether there is “economic waste,” the fundamental question is whether the cost of the repair is “clearly disproportionate to the probable value of the loss” to the owner. As discussed above, the “probable value of the loss” to the owner in the context of a green building failure may be extremely difficult to determine. In fact, it may be difficult to determine whether the owner suffers any compensable loss from a green building failure unless there are clear economic consequences (such as a loss of tax credits).

In this regard, the owner has a distinct procedural advantage: most courts hold that once a breach and cost of repair are proven, it is the offending contractor’s (or design professional’s) burden to prove that the proposed repair would constitute economic waste. That in essence imposes a presumption that that cost of repair is preferable, leaving it in the hands of the offending party—design professional or contractor—to persuade a court that insistence on repair would result in economic inefficiency in the sense that the cost dramatically exceeds the value of the owner’s loss.

Second, the remedy when a repair might constitute economic waste is to award “the diminution in the market price of the property caused by the breach.” This rule makes eminent sense by promoting economic efficiency when an owner’s base interest in a property is primarily economic. However, it is difficult to say that most owners are motivated primarily by economic considerations in choosing to build green (where the owner actually has a choice, of course). Owners who elect to build green often do so for reasons that are notably divorced from mere economic considerations, and their interests may well include such noneconomic values as moral obligation, public relations, etc. Because green building often costs more than standard building, an owner may

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56 See generally Perloff, Comment: The Economic-Waste Doctrine In Government Contract Litigation, 43 DePaul L. Rev. (Fall 1993).
actually pay a premium to get a green-certified building. When an owner’s compensation is limited to its loss in market value caused by a green building failure, the owner may therefore be under-recovering. If the rule were reformulated to allow recovery of repair cost unless it exceeds the owner’s total loss in value (and was not limited to the loss in fair market value), the rule might be easier to justify. That would still present the issue of how one assigns an economic value to such losses beyond diminution in fair market value, but at least in principle the revised rule would accommodate the general “benefit of the bargain” measure on which breach of contract damages are anchored. Moreover, it would be difficult to justify damages in excess of diminished market value if the claimant owner sells its building and will thereafter suffer no ongoing damage beyond a lower-than-expected selling price.

Third, this discussion assumes that participants can talk meaningfully about the diminution in market value that a building suffers in the face of a green building failure. Market value is the price at which a property would change hands between a willing buyer and a willing seller in an arms-length transaction when both parties are knowledgeable about the relevant facts and neither is under a compulsion to act. There are typically three mechanisms for measuring market value: the cost method, the income method, and the comparable sales method. The latter is usually identified as the preferable method. As its name implies, the comparable sales method requires that the appraiser identify “comparable” arms-length sales of similar properties and then adjust the sales prices to reflect the fact that the compared sales are not identical. These “comparable” sales are assumed to approximate in some rough sense the market value of the subject property. Diminution in market value requires two appraisals: the value of the subject property if it were not impaired, and the value of the property as impaired. The difficulty of making such assessments is clear: the reliability of appraisals tends to erode when there are few buildings that exist that are physically comparable and are certified under similar certification standards (or there is no stock of comparable defective buildings). When comparable properties are not available, the cost of repair itself is often used as a proxy for diminution in market value.

These concerns suggest that the doctrine of economic waste will be difficult to apply with respect to green buildings, at least until green buildings are commonplace enough that reliable measures of market value can be utilized to calculate damage awards.
H. Liquidated Damages

Several authors have suggested that parties may look to liquidated damages clauses,\textsuperscript{57} performance bonds,\textsuperscript{58} or incentive clauses to provide compensation in the face of potential green building failures. Are liquidated damages viable in such circumstances?

The answer depends on the type of damage being considered, as the elements of an enforceable liquidated damages clause may not apply to all damages arising from green building failures. By way of analogy, time-based liquidated damage clauses in construction contracts usually restrict the loss that is being liquidated to those damages arising from an unexcused \textit{delay}. Damages that arise independently from delay are usually compensable under ordinary damage principles when they do not fall within the scope of some performance-based liquidated damages clause. The U.S. Supreme Court has noted that “[t]here is no reason why parties competent to contract may not agree that certain elements of damage difficult to estimate shall be covered by a provision for liquidated damages and that other elements shall be ascertained in the usual manner.”\textsuperscript{59} As a consequence, a liquidated damage clause must be tailored to ensure that only qualifying types of damages are governed by the clause. Similarly, any liquidation of damages that might arise from a green building failure—likely not the consequence of mere delay—must identify with some precision the damages that are liquidated.

In addition, the common law has always recognized limitations on liquidated damage clauses to ensure that they are not disguised penalties. Although there may be a dispute as to the ef-

\begin{itemize}
\item \textsuperscript{58}Prum and Medders, The Bonds That Tie: Will a Performance Bond Require That a Surety Deliver a Certified Green Building?, 9 Hastings Bus. L.J. 1 (Fall 2012).
\item \textsuperscript{59}J.E. Hathaway & Co. v. U.S., 249 U.S. 460, 39 S. Ct. 346, 63 L. Ed. 707 (1919), \textit{quoted in} Heckman and Edwards, Time Is Money: Recovery of Liquidated Damages by the Owner, 24 Constr. Law. 28 (Fall 2004). Heckman and Edwards survey the law related to liquidated damages and suggest that owners would do well to replace the standard AIA and AGC language (as of 2004) with alternative language utilized in DBIA and AOD contracts. The authors also suggest that liquidated damage provisions can be written so as to limit their application to particular losses occasioned by delay, with an understanding that non.enumerated losses could be calculated by the ordinary method.
\end{itemize}
Liability for Green Building Failures, Part II

ficiency of the limitations that are employed for that purpose, the general rule may be stated that:

§ 356. Liquidated Damages And Penalties

(1) Damages for breach by either party may be liquidated in the agreement but only at an amount that is reasonable in the light of the anticipated or actual loss caused by the breach and the difficulties of proof of loss. A term fixing unreasonably large liquidated damages is unenforceable on grounds of public policy as a penalty.

(2) A term in a bond providing for an amount of money as a penalty for non-occurrence of the condition of the bond is unenforceable on grounds of public policy to the extent that the amount exceeds the loss caused by such non-occurrence.60

These rules face exactly the same difficulties that burden the economic loss doctrine and the general quantification of damages in the face of green building failures. The enforceability vel non of a liquidated damage clause presumes that the claimant can articulate to some degree the value of “the anticipated or actual loss caused by the breach.” For all the reasons addressed above, there will always be “difficulties of proof of loss” in green building failures (with some modest exceptions, like the loss of tax benefits). Even where economic losses are certain to be occasioned by a green building failure, they may be very tough to prove. Use of a possibly unenforceable liquidated damages clause is certainly preferable—at least in the eyes of an injured party—to being forced to prove damages where such proof is difficult to come by. Nonetheless, the nature of possible damages arising from green building failures suggests that clauses liquidating damages for such failures may be less readily enforceable than traditional liquidated delay damage clauses.

I. The Economic Loss Rule

The economic loss rule is not applied uniformly throughout the United States,61 but those jurisdictions that have applied the rule generally agree that a party may not sue in tort for the breach of

60 Restatement Second Contracts § 356(2) (1981).
61 In commenting on a recent Vermont Supreme Court case applying the economic loss rule to bar a condo association from suing a general contractor in negligence, the authors of The Construction Lawyer's Hard Hat Case Notes observed:
Increasingly, the economic loss rule is being asserted by contractors and design professionals as a defense to negligence claims asserted by various project

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a contractual duty that causes only economic losses unless the tort duty being sued upon arises independently from the parties’ contractual relationship. In sum, courts will read contracts as governing the parties’ rights and remedies against each other to the exclusion of common law tort claims. The rule has no special application to green construction contracts, but it is an expanding and important doctrine in any context where parties fix their remedies contractually. It is commonplace to suggest that parties do well to allocate their respective duties in their contracts; it is less so to cite the economic loss rule as a reason for special attention to contractual allocations of responsibility and standards of care.

A tort claim arising from a party’s substandard work may have very different procedural and substantive attributes (and defenses) than a suit for breach of contract seeking redress for the same substandard work. To list just half a dozen:

1. Different standards of care may apply to contract and tort claims;
2. Punitive damages are not available for breach of contract but can be awarded for most torts with proof of willful (or sufficiently culpable) misbehavior;
3. Limitations on damages based on “foreseeability” may be different under tort and contract notions of “foreseeability”;
4. Different statutes of limitations may apply to tort and contract actions;
5. Insurance may not cover breach of contract losses in circum-

participants, from owners to subcontractors. Many state supreme courts have ruled on the applicability of the economic loss rule to the construction industry with very varied results, depending on whether there is privity between the parties, the nature of the services provided, the availability of other potential means of recovery, or whether the plaintiff will be left without any remedy for its losses, and the existence of special exceptions such as the “professional services” exception, among other bases. Even so, there is no national consensus on the application of the rule, with each state effectively adhering to its own unique public policy and common law principles, as is evidenced by the Vermont Supreme Court’s rejection of the “threat of imminent harm” exception permitted in Maryland. Although the economic loss rule provides a formidable defense to design and construction negligence claims, the success of the defense will largely depend on the fortuity of the venue in which the claims arose.

Zicherman and Oshiro, Hard Hat Case Notes, 33 Constr. Law. 46 (Winter 2013) (discussing Long Trail House Condo. Ass’n v. Engelberth Const., Inc., 2012 VT 80, 59 A.3d 752 (Vt. 2012)). Of course, the parties’ contract can include a choice of law provision to add predictability to the version of the economic loss rule that might be applied.

A very capable summary of the nature and application of the economic loss rule may be found in Johnson, The Boundary-Line Function of The Economic Loss Rule, 66 Wash. & Lee L. Rev. 523 (Spring 2009).
stances in which the loss would be covered if it arose from negligence; and

6. Tort law may permit apportionment of damages in a manner not permitted under contract law.

The economic loss rule has intrigued scholars for some time, and drawn a number of comments that try to place the role of the economic loss rule in construction contracts, a difficult undertaking.\(^{63}\)

In any event, a very substantial portion of claims that disgruntled owners might bring for green building failures can be precluded (or limited) from the outset by close attention to the economic loss rule and its enforcement in the jurisdiction in which the project is located. The key to invoking this rule in most jurisdictions is that the parties have intentionally drafted their contracts to provide a private scheme of (a) standards of conduct, and (b) remedies that the court will enforce to supplant common law tort claims.

The economic loss rule reaches far beyond precluding tort standards of care or tort remedies, however: it can serve to bar entire causes of action (such as claims for fraud or negligent misrepresentation) that might otherwise arise during a party’s performance of its agreement. In the context of green building, authors have suggested that an owner whose building does not perform as anticipated may seek relief for negligent misrepresentation, deceit, or a similar claim. In states that have articulated a sturdy version of the economic loss rule, however, the combination of the rule and a comprehensive merger clause\(^ {64}\) in the parties’ contract can undercut any such claims.

Moreover, the protection (or disability) of the economic loss


\(^{64}\) A merger clause in this context would state in the parties’ agreement that all understandings, promises, representations, negotiations, etc., are merged into the final contract so as to preclude either party from relying on any unstated obligations.
rule may extend well beyond the parties in immediate privity with respect to the contractual obligations at issue. For example, one court has held that a subcontractor was barred by the economic loss rule from suing an engineer who had allegedly furnished defective specifications that forced the subcontractor to perform unanticipated work in preparing steel beams for painting. The court observed that the subcontractor had a claim against the general contractor, who had a claim against the owner (under the Spearin doctrine), who in turn had a contract with the engineer. Because the parties' various rights and responsibilities could be traced through a chain of contracts from the sub-subcontractor to the engineer, the economic loss rule barred the sub-subcontractor's negligence claim even though the sub-subcontractor and engineer were not in privity. This liability shield is obviously extensive in any state that applies the economic loss rule similarly, and it counsels parties throughout the contractual chain to protect themselves through their contracts and not to rely on potential tort claims for recourse.

J. Standard of Care and Negligence

A vital question in assessing green building violations is the standard of care that applies to design professionals and contractors in the green building industry. A complete examination of these standards is outside the scope of our inquiry—this article is really only concerned with what the codification of green building standards may contribute to standards of care, but the topic has been addressed in the literature and will undoubtedly draw further comment in the coming years.

As explained above, violation of a green building code will likely not constitute negligence per se. That does not mean that the building standards imposed by green codes are irrelevant. In the case of OSHA violations, for example, the overwhelming rule (albeit not unanimous) is that a code violation will not support liability as negligence per se, but OSHA regulations are admissible

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as evidence of standards of care. In jurisdictions where an owner’s negligence claim is not barred by the economic loss doctrine, then the code itself may effectively provide a standard of care even if it requires enforcement by the finder of fact.

The fact that a code can be used as evidence of a standard of care is helpful, but it is not conclusive in predicting liability. Some juries may not be persuaded that violation of a building code (even a safety code) constitutes negligence, as demonstrated in the Kentucky case noted above, and educated jurors may find it difficult to understand exactly how point-based green cases work. Nonetheless, a government-imposed green code is probably more persuasive as to establishing a standard of care than expert testimony about community design standards where green building is optional.

K. Concurrent Causation of a Green Building Failure

Green building presents some interesting questions of causation and allocation of responsibility arising from the fact that there is often more than one path to certification. As a simple example, most points-based certification schemes include mandatory standards together with categories in which an owner must earn a specified number of points. There is flexibility, however, in the manner in which points can be earned, and one strategy might involve a contractor-borne responsibility (such as securing materials from within a specified geographical to the project site) while another strategy to earn the same points might arise from an architect-borne or owner-borne responsibility. What happens if each of the parties defaults on some attribute of the project for which it bears responsibility? The result might be violation of a building code, or perhaps a demotion in certification level.

For example, under the Sante Fe Residential Green Building Code, a new residence must earn 16 points under “Chapter 5: Lot Design, Preparation, and Development.” There are several

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67 See, e.g., Hernandez v. Martin Chevrolet, Inc., 72 Ohio St. 3d 302, 1995-Ohio-200, 649 N.E.2d 1215, 17 O.S.H. Cas. (BNA) 1296 (1995) (OSHA violation cannot serve as violation of negligence per se), but see Eister v. Hahn, 420 N.W.2d 443, 445 (Iowa 1988) (OSHA violation can constitute negligence per se but not gross negligence). The policy reasons that courts invoke to bar negligence per se claims arising out of OSHA violations are not present in green building cases, but underscore the difficulty of using negligence per se in general.

ways to earn points that may impose obligations on different parties to the construction process. Four points can be earned for each of the following: "Basic training in tree or other natural resource protection is provided for the on-site supervisor," which is likely a contractor responsibility, four points are available if "[v]egetation and trees are selected that are native or regionally appropriate for local growing conditions" perhaps a design professional’s responsibility, and the owner can earn four points by sharing a driveway.71

Now suppose the owner in Santa Fe insists that the architect and contractor plan to earn at least 26 points. As the project progresses, it turns out that an uncooperative neighbor won’t tolerate a shared driveway, the well-meaning but ill-trained landscape architect chooses plants that are better suited to Maine than to northern New Mexico, and the contractor’s project manager neglects to participate in training related to tree and natural resource protection. Rather than scoring 26 points, the project makes only 14 points under Chapter 5. Whose fault is it? It can fairly be said of each of the three (contractor, owner, and architect) is responsible, because each of their failures keeps the project from earning the target number of points.

For better or worse, other aspects of contract law have provided analogies by which a scenario such as this might be adjudicated. One mechanism is to treat the planned excess in points as a contingency fund available only to the owner. In a stipulated-sum contract, for example, the contractor often includes a “contingency” that is used to cushion unanticipated costs. If the contractor is required to incur unanticipated expenses within the scope of its work, the contractor has a paper “fund” built into its budget that can absorb the additional cost without cutting into the contractor’s budgeted profit. Of course, if there are no

69Draft Amendments to Sante Fe Residential Green Building Code (Adopted January 1, 2012), http://www.santafenm.gov/DocumentCenter/Home/View/9873, p. 12, ¶ 503.1(4). With respect to each of the three examples provided, it is conceivable that responsibility could be allocated to someone other than the party identified above for illustrative purposes. Of course, it is easy to construct many similar examples in which different parties with different responsibilities could share in the blame for failing a building code or certification level, thereby giving rise to the allocation question identified below.


unanticipated costs, the contractor keeps the balance of the unused contingency and neither the owner nor the architect has a claim to the unused funds. The cushion in terms of points might be treated similarly, except that the owner has an exclusive right to claim the benefit of these extra points, and neither the architect nor the contractor can argue that the owner owed an “obligation” to make those points available for the benefit of the project at large. In the scenario above, neither the contractor nor the architect can claim that the owner's failure to secure a shared driveway agreement “caused” the default in Chapter 5 points.

On the other hand, a court might view the scenario as more akin to allocating schedule float under federal government contracts (or under private contracts that have float allocation clauses making the float a shared resource). Federal cases hold that schedule float is a “shared resource”—that it belongs to the project, and not to any individual party. This extra time built into the schedule can be claimed by the first party that needs it to absorb some delay in performance of that party’s obligations. If the owner experiences a one-month delay in acquiring owner-furnished equipment that postpones installation of turbines by a month, after which the contractor suffers a one-month delay in retaining a transporting skilled workers to install and commission the turbines, the owner is entitled to claim the benefit of the one-month of float that was built into the turbine schedule.

Finally, a court might adopt some system of apportionment, under which the court strives to allocate responsibility in some equitable manner. Allocation of partial responsibility is common in tort schemes under which comparative fault is apportioned by juries, and claimants may be barred from recovering to the extent their own fault contributed to damages (or in some jurisdictions, completely barred from recovering if their own fault was greater than that of other parties). In construction disputes, apportionment or allocation of responsibility for delays is one way of ameliorating the doctrine of “concurrent delay,” under which a claimant cannot recover for any period of delay by the opposing party.

where the claimant itself is responsible for an overlapping delay for which it bears responsibility.\footnote{The ramifications of concurrent delay depend, of course, on the nature of the “concurrent” delay. Moreover, although the general rules stating the ramifications of concurrent delays can be articulated relatively briefly, actually analyzing alleged concurrent delay can be a difficult task. A nice overview that highlights evidentiary problems can be found in Kutil and Ness, Concurrent Delay: The Challenge to Unravel Competing Causes of Delay, 17 Constr. L. 18 (Oct. 1997).}

Is one of these a “better” or more “natural” rule to adopt in allocating responsibility where several defaults arguably contributed to a green building failure? There are not strong policy arguments as dictating that any one of the three approaches is best for all circumstances, and it is not difficult to tinker with the facts and thereby make one of the three approaches seem most equitable under different circumstances that might be hypothesized.

In the absence of a clear and predictable judicial answer to allocation of responsibility—indeed, in the face of competing analogies from other areas of construction law—the parties are best served to adopt their own scheme for allocation.

\section*{III. Conclusion}

Construction law eventually adapts to continuing technical and business innovations, and green building construction stands alongside several other developments that will require the creativity of attorneys and judges in the years to come. In the absence of mature case law or exhaustive regulatory or statutory governance, the first challenge in ordering green building liabilities is to confront the most obvious areas of potential dispute in the contracts among the parties. Although courts will eventually impose rules in the absence of contractual provisions that order the parties’ rights and responsibilities, appellate decisions tend to lag many years behind construction innovations, and waiting for common law developments is a poor substitute for drafting contracts that allocate risks clearly in advance.

Of course, contracting for the sake of clarity does little to advance the cause of green building law. A clear allocation of risks does, however, assist all parties in managing their respective shares of such risks. Parties should therefore attempt to envision the problems that are likely to arise in litigating green building disputes under existing common law doctrines. As outlined above, determining the application of common law doctrines to green building failures is by no means a simple or predictable endeavor.