2019 | VOLUME 4

COHEN SEGLIAS
PALLAS GREENHALL & FURMAN PC

CONSTRUCTION IN BRIEF

BUILDING SUCCESS

What's New?

Ashling A. Ehrhardt
Co-Editor-in-Chief

Christopher W. Sexton
Co-Editor-in-Chief

Sydney Pierce
Associate Editor

Happy holidays from the editorial team at Cohen Seglias! In our final issue of 2019, you will learn the pros and cons of arbitration provisions in construction contracts, the legal implications of text messages, and how to challenge OSHA citations with the Unpreventable Employee Misconduct Defense. In the Q&A on the back cover, Lane Kelman discusses our Green Building Group and how he assists clients on sustainable projects.

Please reach out to us with any questions. We hope you have a wonderful holiday season!

CONTRIBUTORS:

Jonathan A. Cass
Lane F. Kelman
Jonathan Landesman
Michael Metz-Topodas
Kathleen M. Morley
George E. Pallas
Christopher W. Sexton
Stasha M. Sosnowicz

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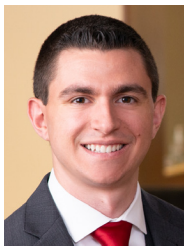
Sydney Pierce

New Faces



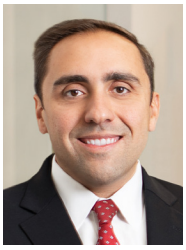
Ryan Boonstra returns to Cohen Seglias as an associate in our Government Contracting Group. He serves the firm's clients in a wide variety of matters, including bid protests, small business matters, defense contracting, weapon development and research contracting, government construction, and matters relating to the Federal Acquisition Regulation. While in law school, Ryan was a summer associate in the firm's Government Contracting Group.

Sally J. Daughtery joined our Wilmington, DE office as senior counsel. She is a focused and creative litigator with a keen business judgment honed over three decades of representing small and medium-sized businesses throughout the Mid-Atlantic region. Clients turn to Sally for guidance in areas including employment and labor matters, contract negotiation and interpretation, competitive business disputes, and business best practices. She prides herself on providing sound, executive-level advice to business clients, helping them to avoid litigation whenever possible and positioning them for the best possible outcome when litigation cannot be avoided.

Brionna L. Denby recently joined our Wilmington, DE office as an associate in the firm's Government & Regulatory Law, Internal Investigations, and Title IX Groups. She counsels corporations, educational institutions, non-profit groups, and other entities faced with allegations of wrongdoing. Brionna draws on her experience both in the government and in the private sector to help her clients successfully navigate complex investigations and disputes resulting in legally defensible decisions. Before joining Cohen Seglias, Brionna served as a Deputy Attorney General for the Delaware Department of Justice in the Civil Division, Defensive Litigation Unit, and in the Office of Civil Rights and Public Trust.

Michael I. Schwartz joined our Construction Group as an associate in our Philadelphia office. His practice focuses on construction litigation. Michael represents contractors, subcontractors, design professionals, owners, and other parties on both private and public construction projects. Prior to joining Cohen Seglias, Michael was an attorney at a Philadelphia law firm where he defended owners, contractors, and subcontractors against catastrophic injury and construction defect claims. He also completed a judicial clerkship with New Jersey Superior Court and a judicial internship with the United States Bankruptcy Court.

Robert S. Turchick joined our Philadelphia office as a construction associate. He focuses his practice on all aspects of construction litigation. Bob represents design professionals, contractors, subcontractors, owners, and other parties involved in public and private projects. Before joining Cohen Seglias, Bob was an associate at a Philadelphia law firm where he represented architects, engineers, contractors, and subcontractors against a wide variety of claims. His experience includes defending clients in catastrophic injury cases involving the use of heavy equipment at job sites, as well as design and construction defect claims.



Jeffrey P. Valacer recently joined Cohen Seglias' Newark office as an associate in the Construction Group. He represents a diverse group of general contractors, subcontractors, construction managers, and design professionals in construction law and related litigation. Jeff has an extensive litigation background in both state and federal court, including the United States Bankruptcy Court. He handles all facets of complex litigation, including claim preparation, discovery, motion practice, and trial preparation. Jeff also has significant experience handling settlement negotiations, mediations, and arbitrations for a wide array of clients.

Cohen Seglias Founder Roy Cohen Named a 2019 Pennsylvania Trailblazer by *The Legal Intelligencer*

Roy Cohen was named a 2019 Pennsylvania Trailblazer by *The Legal Intelligencer* in its inaugural list. The Pennsylvania Trailblazer list spotlights individuals who are agents of change and have made significant marks on the practice, policy, and technological advancement of their practice.

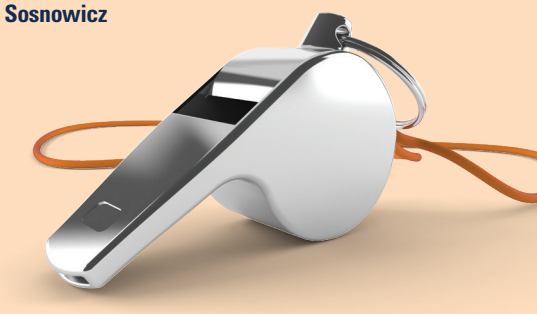
Cohen Seglias' Philadelphia Office Building Success with Habitat for Humanity of Philadelphia

On October 16, Cohen Seglias' volunteer team returned to Habitat for Humanity Philadelphia's Sharswood Site for their final build day of 2019. The team worked on the interiors of the homes as they installed floor protection, door frames, and cabinetry, building on the work completed at our volunteer day earlier this summer in support of the Neighborhood Revitalization project.

For more information about Cohen Seglias news and events, contact the firm's Marketing Director, Kerstin Isaacs, at 267.238.4730 or kisaacs@cohenseglias.com.

Arbitration Provisions: Who Needs Them?

By Jonathan A. Cass and Stasha M. Sosnowicz



On July 30, 2019, Pennsylvania's adoption of the Revised Uniform Arbitration Act (RUAA) officially went into effect. This new law should prompt all owners, contractors, subcontractors, or anyone else involved in the construction industry to revisit the impact of arbitration provisions in construction contracts generally and whether or not they will be beneficial.

First, it is important to know that standard construction contracting forms from the American Institute of Architects have a standard arbitration provision that can be altered or stricken altogether by contracting parties. However, at the very least, a party to a construction contract should consider its own goals for the project and should consult an attorney to make sure that the provision advances its goals and protects its rights.

A party to a construction contract should also consider whether an arbitration provision in the construction contract is desirable at all. As in most legal issues, there are pros and cons to be weighed. For instance, arbitration is generally lauded as being cheaper and more efficient than traditional litigation. However, as sophisticated arbitrators have become the norm in construction arbitration, hidden costs arise. Merely filing an arbitration demand through the American Arbitration Association, the standard arbitration service organization specified in most arbitration provisions, can cost thousands of dollars depending on the amount of the claim—much more than the filing fee in a court system. Another hidden cost is the arbitrator's hourly fees. Arbitrators, especially ones well-versed in the nuances and technical issues of construction law, can cost up to $500–$800 per hour. For clients who are also paying the hourly fees for their attorney, these costs can add up quicker than court-based litigation fees.

Additionally, while arbitration is relatively faster than going to court, the arbitration award is enforced through the court system. The prevailing party must file a lawsuit in court to obtain a judgment to impose the award. This can be a challenging and time-consuming process if the arbitration award is poorly written or goes outside of the scope of the initial issues.

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Can a Text Message Form a Binding Contract? OMG. The Answer May Surprise You.

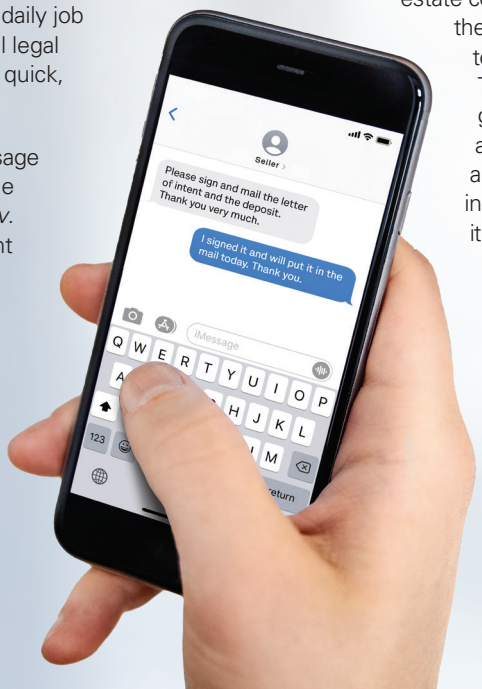
By George E. Pallas and Kathleen M. Morley

In today's world of texting and emails, individuals regularly communicate via these written forms of communication using their mobile devices for both business and personal matters. On construction projects, it is no secret that emails largely have replaced other forms of written correspondence such as letters and faxes. More recently, text messaging (texting) has become one of the primary methods of communication on a jobsite.

Part of the appeal of texting is its speed and efficiency. Nearly everyone has a cell phone, and it is estimated that short message services, like texting, have a 98% read rate compared to the estimated 22% read rate for emails. Texting is a direct and quick way to communicate, allowing for speedy answers to urgent questions and an easy way to disseminate information quickly. On a jobsite, texting can be a useful tool for efficiently coordinating work, deliveries, and schedules, notifying workers of changes or safety issues, and facilitating prompt resolution of encountered issues that could otherwise delay work. Many construction companies are taking advantage of these benefits by permitting and even encouraging employees to communicate via text in carrying out daily work on a project.

As more business is conducted via texting, new questions regarding the legal implications of such exchanges continue to arise. While the law has been developing for some time concerning email communications, courts are just beginning to address particular disputes and questions surrounding texting. With the increasing prevalence of this form of communication in facilitating daily job operations, companies need to understand the potential legal impact and considerations that come into play with this quick, and often casual, form of communication.

Recently, a court in Massachusetts held that a text message can constitute a writing sufficient to create an enforceable contract for the sale of land. In *St. John's Holdings, LLC v. Two Electronics, LLC*, a buyer's agent and a seller's agent exchanged a number of drafts of a letter of intent, along with emails and text messages, concerning the sale of a piece of property. When they agreed upon a final letter of intent, the seller's agent texted the buyer's agent, asking that the buyer sign the final letter of intent and provide a deposit. That same day, the buyer's agent arranged to meet with the seller's agent and delivered the signed, final letter of intent and deposit check to be passed along to the seller. The seller then refused to execute the letter of intent and tried to enter into a sale agreement with a different buyer. The original buyer filed a lawsuit seeking to enforce its rights to buy the property.



The case came down to whether the parties had merely engaged in negotiations regarding the purchase of the property or whether their dealings, carried out through electronic communications over text messages and emails, gave rise to a binding contract for the purchase and sale of that property. The formation of a legally-enforceable contract requires a clear offer, a clear acceptance of that offer, and agreement by both parties as to the terms of that offer. For contracts regarding the sale of land to be enforceable, the Statute of Frauds requires that they are supported by a writing that includes the essential terms and is signed by the party against whom enforcement is sought.

The court concluded that the text message from the seller's agent, asking the buyer to sign the letter of intent and provide a deposit, was a writing that, when read in the context of the other exchanges between the parties, contained sufficient terms to create a binding and enforceable contract between the seller and original buyer. In reaching this conclusion, the court recognized that electronic writings of relative informality and brevity can satisfy writing requirements, that essential terms of a contract can be spelled out over multiple writings that can be read together, and that signature requirements can be met in the absence of a formal signature.

Although this case was decided under Massachusetts law and involved the signature and writing requirements applicable to real estate contracts under the Statute of Frauds, there are important lessons and warnings to take away from this court's decision. This decision reflects that courts, as a general matter, are beginning to evolve and adapt the law to current technology and communication methods utilized by individuals and businesses. Significantly, it is reasonable to assume that courts will find that the elements evidencing a legally-enforceable contract can be based on a series of brief and informal electronic communications between agents of the parties in the context of construction contracts, which are subject to customary contract law principles and not the heightened standards imposed by the Statute of Frauds.

There are additional cases from various jurisdictions in recent years, including New York, Iowa, and Pennsylvania, which reflect this trend of considering text messages as evidence of parties' agreements. In light of this, companies should be aware that, despite the apparent or perceived informality, text messages can and will have legal ramifications. It is clear that a text message, or a series of them, can create an enforceable contract and may constitute a writing, which could give rise to certain rights or claims. On the one hand, text messages could help support or bolster your position concerning a particular dispute or issue in the absence of other contemporaneous project records. On the other hand, text messages sent by you or your employees could come back to haunt you and could evidence work authorization or directives. By way of example, a criminal complaint was recently filed in New Jersey federal court against the owner of a construction company. This complaint alleged that the owner had denied directing workers to perform repair work on a roof during a sworn deposition taken by OSHA in investigating two jobsite injuries. However, OSHA subsequently discovered text messages sent by the owner to the workers on both occasions did direct the performance of repairs on the roof.

The bottom line is that companies and employees need to know and understand that text messages should not be carelessly sent, as they could be interpreted to be binding upon the company. Companies should be aware of team members discussing change orders, extra work, or potential claims via texting and whether team members are providing notice of claims, conditions, or other issues via texting. This information is critical to protecting the company's rights and liability, as well as ensuring the preservation of all relevant documentation.

As more and more communications are exchanged via texting, discovery in litigation and arbitration matters increasingly involves text messages. Companies need to realize that preservation obligations extend to electronically stored information, including text messages. Steps must be taken to preserve project-related text messages to avoid potential evidentiary problems and possible discovery sanctions in the event of litigation. Companies should have policies in place to address the use of cell phones and the types of project communications that are being discussed and exchanged via texting. In addition, companies should establish a retention policy for the preservation of project-related text messages on both private as well as company-owned cell phones—B4 it is 2 late!

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Arbitration Provisions: Who Needs Them?

By Jonathan A. Cass and Stasha M. Sosnowicz

Continued from page 2

Further, if a party believes that an arbitrator wrongfully decided the case, it will have an extraordinarily difficult time changing the award. Arbitration awards are notoriously difficult to appeal successfully or vacate. Usually, one needs to demonstrate fraud or bad faith by either party, partiality by the arbitrator, or patent abuse of discretion. Even arguing that an award is not supported by the evidence presented or arguing that the arbitrator erroneously applied the law is not enough to change an arbitration decision.

On the other hand, depending on the claim, there can be numerous reasons to go to arbitration instead of a court. Indeed, depending on the claim, the procedural posture, and the situation of the individual parties, these negative aspects of arbitration may actually be reasons to provide for an arbitration provision in a contract. Nonetheless, the ability to control the venue, the substantive law involved, as well as the limited scope of discovery, are also reasons to negotiate for a favorable arbitration provision. The fact that arbitration decisions are not published may also be an advantage as this guarantees more privacy to a well-known entity seeking to limit repeat claims from multiple parties. The flexibility and speed of arbitration are also usually seen as persuasive reasons to include arbitration in a contract.

All of these considerations require anyone entering into a contract, especially when the standard form includes an arbitration provision, to engage an attorney to ensure that their needs are met, both in the contract and in the inevitable dispute resolution process. An attorney can negotiate to add potential improvements to standard arbitration provisions, such as limiting discovery depending on the size of the claim, capping the fees of selected arbitrators, and specifying the applicable law to be used during an arbitration. Another potential addition is the requirement of a mandatory mediation before demanding arbitration so that the actual issues can be streamlined beforehand.

With the application of the RUAA revamping arbitration provisions in Pennsylvania and many other states, retaining an attorney is more important than ever so that you can be apprised of new developments in the evolving case law, shifts in standard arbitration practice, and whether an existing contract is affected by the new law. The lawyers at Cohen Seglias are ready and able to provide guidance for all your arbitration provisions and general construction law needs.

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But We Did Everything Right!
Challenging OSHA Citations with the Unpreventable Employee Misconduct Defense



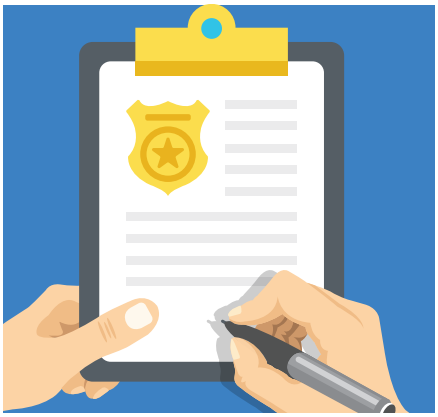
By Michael Metz-Topodas, Jonathan Landesman, and Christopher W. Sexton

Despite the construction industry's few areas of certainty, contractors can invariably count on facing an OSHA compliance inspection at some point. These visits are meant to ensure everyone on-site is complying with OSHA's many and detailed construction-related standards and regulations. When these inspections reveal noncompliance, contractors often end up receiving citations for violations, sometimes with costly fines.

Construction companies fend off the risk of citations and fines by having robust safety programs covering all areas of job performance. But what happens when, despite an employer taking all reasonable measures to run a safe job site, OSHA still finds violations and issues citations? What happens when a careless or reckless employee ignores company safety policies and training? Should the employer be liable? Would an OSHA citation be warranted? Courts interpreting OSHA regulations say: "Not always." The Unpreventable Employee Misconduct Defense (UEM Defense) is an effective tool for safety-conscious contractors whose employees' errant conduct results in citations and fines.

The OSHA Citation Process

The OSHA citation process begins with an OSHA compliance officer arriving on-site to perform an inspection, usually triggered by a complaint or an incident involving an injury or fatality. The officer is required to limit the job site review to locations relevant to the inspection's purpose. For example, an inspection responding to a complaint of inadequate fall protection could look at elevated areas, but not, say, silica levels at demolition locations. Contractors may, and often do, have their counsel present during such inspections, or at least consult their attorney as soon as they learn of the inspection.



When a compliance officer finds violations and issues citations with fines, the cited contractor can seek to negotiate a resolution with OSHA, but has only fifteen days to do so. Failing a satisfactory settlement, a contractor may submit a notice of contest to the citation, which moves the process into a formal proceeding, much like a litigation. During this process, a contractor can formally raise the UEM Defense. Contractors usually negotiate settlements, contest citations, and raise the UEM Defense through their counsel.

The UEM Defense

When raising the UEM Defense, a contractor argues that it took all reasonably possible measures to prevent the conduct cited and does not deserve the citation and fine. This defense arises out of the legal premise that a contractor should not have strict liability for OSHA Act violations.

Like many other legal principles, the UEM Defense has several elements which the cited contractor bears the burden of proving. Specifically, a contractor must show it:

1. Established a work rule to prevent the cited violation and/or unsafe behavior or conditions from occurring (policy)
2. Adequately communicated the rule to employees (communication)
3. Took steps to discover noncompliance (monitoring)
4. Effectively enforced the rule whenever employees transgressed it (enforcement)

Evidence Required and Advance Measures

To satisfy these elements, contractors need the right kind of evidence, which requires taking appropriate action well before receiving an OSHA citation—after is too late. Remember the old saying: "By failing to prepare, you are preparing to fail." The following specific types of evidence support each element.

1. Policy – A contractor meets this element by showing written safety policies and practices—both company-wide and job-specific—that match or exceed what the OSHA standard referenced in the citation requires. For example, for a roofer to meet this element, it should:

- Have a written safety manual and safety policies that align with or even mimic OSHA's fall protection standards
- Have a written safety plan for each job, including a fall protection plan if necessary
- Hire someone with fall protection expertise to serve as a safety manager or as the designated person responsible for company-wide safety
- Supply and provide all necessary safety equipment, such as harnesses and lifelines

2. Communication – Written policies, however, provide no defense unless the company communicates them to its workers by explaining not only rules and policies, but also how they apply to common job-site situations. So, for example, a roofing subcontractor should:

- Make safety certification an employment requirement, including OSHA-10 for laborers and OSHA-30 for foreman and supervisors
- Require comprehensive training in company safety policies, including fall protection training that meets OSHA standards, for on-boarding new hires
- Conduct job-specific safety training for each project with attention to the site's unique fall hazards
- Have morning toolbox talks on relevant safety topics, including demonstrations of relevant job site fall protection equipment
- Hold safety discussions at daily job meetings that identify particular fall hazards for the day's work
- Make sure safety training includes assessment, that is a way to measure participants' understanding, such as by requiring trainees to demonstrate using fall protection equipment properly

3. Monitoring – A company must also perform daily or near-daily job site supervision and inspection to identify safety hazards and ensure workers comply with company safety policies. For the roofing subcontractor, advance measures include:

- Direct supervisors and foremen to observe project activity regularly with attention to safety compliance, including following fall protection standards
- Send a safety or project manager to the job site to conduct unannounced safety inspections
- Hire a third-party safety consultant specializing in fall protection compliance to perform a safety audit or mock OSHA inspection

4. Enforcement – Meeting the final element means having an actual, progressive, and consistent enforcement program for safety policies. In an "actual" program, the employer enforces safety rules and disciplines violators, unlike policies that exist only on paper or have no teeth. A safety policy should also include progressive disciplinary measures with harsher consequences for repeated offenses or more serious violations. Finally, a program must have consistent enforcement. The same consequences must apply for similar violations for any employee disciplined—whether a newly hired laborer or the company's top project manager. Here are ways to execute these guidelines:

- Record all safety policy infractions and the consequences to the employee
- Position the project so that it can succeed even if the company has to subject its best worker on the job to discipline

In carrying out these measures, contractors should also keep in mind one essential guideline—document everything! As the popular adage goes, "In OSHA's mind, if it's not documented, it didn't happen!" To help preserve the record for a successful UEM Defense, contractors should create and update consistently throughout every project the following documents: job safety plan, sign-in sheets for safety trainings and job site safety meetings, daily logs with notations regarding safety issues (including any informal safety-related communications), and correspondence regarding any disciplinary action for safety rules violations. As much as possible, such documentation should cover all of the above types of evidence.

Drawing on the above examples, a contractor can present sufficient evidence to support all four elements. Once it does, OSHA bears the burden to refute that evidence. If OSHA cannot successfully do so, the contractor should prevail.

Conclusion

Contractors should implement the above policies, programs, and practices to ensure they can deploy the UEM Defense when confronting an OSHA citation and fine resulting from an employee's rogue conduct. These measures also promote overall job site safety for all workers.

Even with these measures, the UEM Defense's protection is not guaranteed. No two OSHA citation cases involve identical circumstances, and asserting the defense requires knowing both the underlying facts and how they fit with the defense's legal requirements. Contractors facing actual OSHA citations and fines should consult with legal counsel well-versed in the UEM Defense and OSHA citation cases.

This article was originally printed in the September 2019 issue of *The Contractor's Compass,* the official educational journal of the American Subcontractors Association.

Jon is co-chair of the Labor & Employment Group and can be reached at 267.238.4726 or jlandesman@cohenseglias.com. Michael and Chris are associates in the Construction Group and can be reached at 267.238.4755 or mmt@cohenseglias.com and 267.238.4710 or csexton@cohenseglias.com, respectively.

Q&A with Lane F. Kelman

Our newsletter team recently sat down with the Chair of the firm's Green Building Group, Lane Kelman.

Q: Tell us a little about your practice and the Green Building Group.

A: My group understands the unique issues that arise with green building design and construction and provides legal counsel to owners, design-builders, and the trades that perform work on sustainable projects. During the contract preparation phase, we work with clients to develop customized contracts that minimize risk and pass liability onto the appropriate parties. Most standard forms do not adequately do that because they do not consider the complexity involved in achieving sustainable goals, and they do not appropriately allocate responsibility. Once work commences, my team counsels clients on addressing potential problems, whether delay, defect, or certification related.

Q: What changes have you seen in the industry over the past decade?

A: Sustainable projects have become much more prevalent. "Sustainability" is part of the everyday vernacular now. Years ago, a sustainable project was an outlier, and pricing often reflected the lack of familiarity. Now, all of the players are much more familiar with sustainable projects, their accompanying requirements, and the technical specifications. The American Institute of Architects actually created its own sustainable contract forms a few years back in recognition of the increased number of sustainable projects.

Q: What types of problems do your clients typically face?

A: I group the problems into two categories. The first category relates to contract provisions. Too many times, a contract is not adequately tailored to the project requirements and related risks. So if a situation arises, the contract does not sufficiently account for that specific scenario, whether it be certification, proprietary materials, or warranty-related issues. The second category relates to disputes. Project close-out, delay, and construction defects are often the types of disputes that arise. The legal concepts are the same as any other construction dispute, but causation is sometimes more novel. For example, a new sustainable product that was specified may, in fact, be more "green" but may perform poorly for its intended purpose, e.g., a "green" cladding. We assist in resolving issues over liability for the poor performing product and any damages caused by its installation.

Lane is Chair of the Green Building Group. He can be reached at 267.238.4728 or lkelman@cohenseglias.com.

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