



GUEST ESSAYS

For Better Or For Worse: Betterment Limits Your Responsibility For Damages

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You goofed. It happens. But now the owner wants to upgrade the project at your expense, insisting that you pay for the sun, the moon and the stars. Your insurer and your lawyer are insisting that the owner is being unreasonable, but this is your biggest client. Knowing your responsibility for damages, educating your client and being practical can save your client relationships and money.

The Betterment Concept

If you make an error in design, you are responsible for damages directly caused by your error, sufficient to place your client in the same position had there been no error. Usually, this is measured by the cost to repair the work. Where repair would be unduly wasteful (tearing down the building, for example), damages are measured by the difference between the project cost as designed and the costs as designed properly. These damage measures are designed to give the owner the benefit of its bargain, but not to place the owner in a better position. Unless you guarantee the owner's construction cost, costs that would have been borne by the owner had there been no error remain the responsibility of the owner.

The St. Joseph Hospital Example

A 1974 case from the Illinois Appellate Court is frequently cited as the best example of the betterment concept. There, a hospital was designed to include thousands of elements on dozens of pages of drawings and hundreds of pages of specifications. The specifications called for Textolite wall panels. After construction, the City of Chicago refused to issue a certificate of occupancy because the Textolite panels' flame spread rating was 17 times the maximum allowed by the building code. The Textolite panels needed to be torn out and replaced with Micarta paneling. Micarta paneling was both more expensive and more difficult to install. The hospital sued the architect, claiming as damages (1) the cost of tearing out the specified Textolite paneling; (2) the cost of purchasing the more expensive Micarta paneling; and (3) the cost of the more difficult installation of the new Micarta paneling.

The court found that the hospital was entitled to the cost of tearing out the Textolite paneling, but that the remaining costs would have been borne by the hospital if the proper panels had been specified. Allowing the hospital to pass those costs to the architect would result in a windfall. The hospital's only real complaint was that the project cost more than anticipated. Had the Micarta panels been specified from the outset, the bids would have been higher and the hospital would have had to pay for the higher cost.

Similar doctrines apply when a component's useful life is extended by repair or replacement. An underspecified roof replaced during year 2 of a 10 year life does not entitle an owner to ten more years, or



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a 12 year roof. Even if the roof leaked during the first two years, the design professional is entitled to credit for the "added value" of two years' use of the roof.

Both the St. Joseph Hospital and the added value examples apply to contractors as well. A construction defect may be repaired with an expensive upgrade, and will not be recoverable from the contractor.

How To Break The News

Each of these situations have some issues in common: (1) it can be difficult to separate the betterment from the "tear out" cost, and (2) your client is angry anyway. Consider the situation where speakers have been left out of the plans. All of the wiring and mounting hardware were included, but the CAD layer containing the speakers was just left off. The speakers can be purchased and mounted for the same cost as if they had been originally included. The owner's complaint is that the project is now more expensive than he had planned, but the betterment doctrine yields no damages recoverable from the architect.

Compare that situation to one where the wiring and hardware were omitted as well. Now, the walls and ceilings must be torn apart to install the wiring, the project opening is delayed and the contractor charges a ridiculous premium to do the work. How much is your problem? This situation frequently requires the aid of construction accounting experts and a three-way negotiation with the owner, architect and contractor.

Either way, your client is furious. He is also likely to review the entire project, blaming you for every change order and cost increase, and arguing that he had a fixed budget. If you had properly designed the project, he would have value-engineered somewhere else so that the budget would have been met. What can you do?

First, before the project even starts, educate your client about project costs and change orders. Discussing project goals and budgets are a good opportunity to explain that change orders and unforeseen conditions are inevitable. There are no perfect plans, no matter who designs the project. The owner needs to include some funds for unforeseen conditions or contingencies and not all change orders mean a design error.

Later, if errors are discovered, do not agree to pay for more than your fair share. Tell your client that an error has been discovered and that you will report the matter to your insurer. Notify your insurer and your lawyer before committing to anything. Do not assume that you can negotiate within your deductible as if this were car insurance. Invariably, the repair costs will exceed the preliminary estimates and you may negate any opportunity for your lawyer or insurer to negotiate an appropriate settlement. More important, you may jeopardize your insurance coverage. It is every lawyer's nightmare to find that his client has admitted fault and agreed to pay for the sun, the moon and the stars, despite the limitations imposed by the betterment doctrine.

If you have a betterment situation with your largest client, or you cannot fully assert a betterment defense without damaging your reputation, talk to your insurance carrier and your attorney. Insurers are practical people and are interested in providing you with good claims service. Even where a betterment analysis provides for no recoverable damages, it may be worthwhile to save the client relationship or obtain a release without incurring litigation costs. Insurers will not just give away money, but they will be sympathetic to practical concerns.



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For better or for worse, design errors and betterment issues will make for uncomfortable situations. You will be better off if you understand betterment, educate your clients and are practical in your approach.

About the Author: Eric L. Singer is with Wildman, Harrold, Allen & Dixon, Lisle, Illinois. His practice concentrates in construction law and in the representation of design professionals in all aspects of construction claims and dispute resolution.

NOTE: This article is intended for general discussion of the subject, and should not be mistaken for legal advice. Readers are cautioned to consult appropriate advisors for advice applicable to their individual circumstances.