The "Betterment" or Added Benefit Defense

Jerome V. Bales, Shamus O'Meara, and Mark R. Azman

Jerome V. Bales

Shamus O'Meara

Mark R. Azman

When disputes arise concerning expenditures to fix defective designs, construction work, or materials, design professionals, contractors, and suppliers can face claims that far exceed their original fees and costs. The defendants in such disputes frequently contend that the owner spent too much on repairs or replacement, which raises the following question: Can an owner recover for an improvement to, or added value over, the products or services for which he or she originally bargained, because another party breached the construction contract or is otherwise at fault for causing damages? The answer to this question is complex, and can present a significant impediment to resolving disputes.

In these circumstances, design professionals and contractors can employ a defense that the repair, replacement, or amount of money demanded constitutes a "betterment" or "added benefit"[1] to the product or service originally provided. These concepts provide more than simply a "defense." They relate to the measure of damages available to owners as well as the inherent burden of proving entitlement to the item or amount demanded. To date, no significant statutory authority exists to guide practitioners in this area. Moreover, as shown in this article, the legal decisions involving these concepts are extremely fact laden and do not necessarily lead to uniform results.

Jerome V. Bales, a member of the law firm of Lathrop & Gage, L.C., in Kansas City, Missouri, has been practicing for 32 years and is a member of the Steering Committee of Division Three of the ABA Forum on the Construction Industry. Shamus O'Meara is a partner with Johnson & Condon in Minneapolis handling construction, public entity and self-insurance matters. Mark R. Azman is a senior associate with Johnson & Condon practicing in construction and complex litigation.

The Basic Rule of Betterment

The doctrine of betterment is a rule of damages not unique to construction law. For example, the *Restatement (Second) of Torts* provides:

> **§ 920 Benefit to Plaintiff Resulting from Defendant's Tort**
> When the defendant's tortious conduct has caused harm to the plaintiff or to his property and in so doing conferred a special benefit to the interest of the plaintiff that was harmed, the value of the benefit conferred is considered in mitigation of damages, to the extent that is equitable.

Similarly, in breach of contract actions, courts generally hold that the damages awarded should place plaintiff in the same position he would have been had the contract been performed, but plaintiffs should not be awarded more than the benefit they would have received had the promisor properly performed the contract.[2]

As discussed herein, courts have applied the concept of betterment in a variety of construction disputes.[3]

Omission from the Project

Element Missing from the Design

Design professionals frequently invoke the betterment or added value defense in the context of claims involving omissions in design documents. Generally, courts require owners to pay what the omitted item would have cost had it been included in the original design. Accordingly, if the error is not discovered in the design stage, the owner should not have to pay for any intervening increase in the cost of labor or materials necessary to correct the error, or the cost of necessary retrofitting demolition that would not have been part of the original design.

For example, in *Lochrane Engineering, Inc. v. Willingham Realgrowth Investment Fund, Ltd.*,[4] a land buyer sued a developer-seller and others over an inadequate tank-drain septic system, and the developer-seller cross-claimed against its civil engineer and the septic contractor. During development, an engineer had negligently advised the contractor and developer-seller to install two septic systems in a backyard, instead of installing one in the front and one in the rear, causing inadequate drain fields. The trial court found against the developer-seller, contractor, and engineer in the amount of $45,000, consisting of costs to study the feasibility of connecting to the sewer system, pumping out the system, and adding an aerobic system.

Reversing the judgment against the engineer, the Florida appellate court advanced a thoughtful hypothetical, cited in subsequent decisions, differentiating the damages owed by a contractor and a design professional:

> If a fixed-price contractor agrees to install an adequate drain field and installs a 1,000 square foot drain field which is later determined to be insufficient and to need 200 square feet more area, the contractor, being liable for the cost of repairs, is liable to the owner in damages for the cost of installing the

Published in *Construction Lawyer*, Volume 26, Number 2, Spring 2006 © 2007 by the American Bar Association. Reproduced with permission.
All rights reserved.This information or any portion thereof may not be copied or disseminated in any form or by any means or stored in an electronic database or retrieval system without the express written consent of the American Bar Association.

> additional feet of drain field. However, if a knowledgeable owner retains a civil engineer . . . and . . . the engineer states his opinion (by word or design specification) that a 1,000 square foot drain field would be adequate and the owner has that system installed, and later it is determined that a 1,200 square foot drain field was necessary for an adequate system . . . [t]he owner, not the engineer, should pay for the additional 200 feet of drain field . . . because the necessity for the additional 200 feet of drain field was caused by the owner's need to dispose of the sewage produced by the structure served and was not caused by the engineer's failure to have originally correctly estimated the quantity of drain field necessary to meet that need. . . . Also, if the cost of later installing the additional 200 feet of drain field costs more than it would have cost if installed as part of the original undertaking, the engineer would be liable for the difference as well as any other consequential damages.[5]

Essentially, the Florida appellate court was of the opinion that a design professional cannot, as a matter of law, be responsible for items that the owner would have paid for itself had the items been in the original design. Because the buyer only produced evidence of the cost of repair, the court reversed the judgment against the engineer.[6]

Lochrane references another Florida appellate court case, *Soriano v. Hunton*,[7] in which the same betterment concepts were applied to a defective design case involving the erection of steel framework for a bank. In *Soriano*, a bank hired an architecture firm to design a bank building and the architecture firm, in turn, hired a structural engineer to provide designs. After beginning construction, the builder informed the architecture firm that the designs were defective. Unable to find the original structural engineer, the architecture firm obtained two new structural engineer opinions, both of which confirmed that the design was defective. Accordingly, the architects proceeded with a new structural design that required tearing out some of the partially constructed building and resulted in greater expense to the builder and the owner. Because responsibility for the design fell to the architects, and they had hired the original structural engineer to assist with the design, they sued the original structural engineer for breach of contract and indemnification.[8]

The architects alleged $56,291 in damages, the cost of completing the modifications. The Florida trial court disallowed $10,780 for modifications it deemed unnecessary and deducted $5,340, representing the engineer's recovery under a counterclaim resulting in a total damage award of $40,171. On appeal, the structural engineer argued that he was not responsible for those costs that would have necessarily been incurred and paid for by the owner had the modifications been a part of the original design. The Florida Court of Appeals agreed. Another Florida appellate court[9] and the Supreme Court of Maine[10] have issued similar rulings.

Possible Exception—Contractor Premiums

Owners often seek reimbursement from designers where a change order issued to the contractor pertains to components that were omitted from the design. Even if a designer can demonstrate that the change order involves pure betterment or added value, with no retrofitting or extra expense, an owner might argue that the contractor probably included a "premium" in the change order. That is, the contractor charged more than it would have if that work had been incorporated into the bid or negotiated price for the project. Because the owner would not have paid such a premium if the missing component had been included in the original design, the premium does not constitute betterment or added value.

The problem is that a contractor may not be forthcoming with the information necessary to determine if there was a premium associated with a change order. Because the existence of a hidden premium may be based on pure speculation, the question of which party has the burden of proof (discussed below) becomes crucial.

Sometimes a designer can verify the price of an omitted component through independent sources, such as a catalog or expert testimony. When a contractor passes through the cost of an item, adding only its standard overhead and profit, there is no premium. Moreover, once the designer can demonstrate the lack of a premium on one change order, it can argue that the contractor likely did not include a premium on other change orders. Unfortunately, some change orders are difficult to verify, particularly as to the amount of labor used to retrofit the component. In some cases, the owner and the designer may agree to settle the change order claims based upon an arbitrary percentage representing a theoretical premium charged by the contractor.

Possible Exception—Professional Standards and Implied Warranties

Another factor is whether the jurisdiction in question holds the designer to a professional standard of care or whether it imposes an implied warranty of fitness of the drawings and specifications for their intended purpose. A minority of jurisdictions have imposed such an implied warranty of fitness.[11] Where the claim involves a design error and the relevant jurisdiction imposes an implied warranty of fitness of the design documents, the designer may find it more difficult to succeed on betterment or added value arguments. Such a result is consistent with the cases discussed below where courts have refused to recognize betterment because the designer agreed or represented that the design would be complete.[12]

Possible Exception—Representation or Warranty by the Designer

What if the design professional, through either oral statements or contract language, represents to the owner that the design will be complete or function properly? Some cases have held that the betterment defense is unavailable under such facts, and that the owner should be entitled to enforce the representation or recover what is essentially the benefit of the bargain. In *Carter v. Wolf Creek Highway Water Dist.*,[13] for instance, a design engineer brought an action against a water district to recover unpaid fees, and the water district counterclaimed for damages incurred to make a water storage tank function properly. The owner claimed that the tank did not operate as promised because water could not flow to and from the tank, necessitating the construction of an additional distribution line. The engineer argued that the owner should pay for the line because it would have been paid by the owner regardless of plaintiff's actions. The court, however, found that there was evidence that the parties intended the project to operate properly upon completion and, therefore, the owner was damaged when it had to incur the cost of the new distribution line.[14] A Washington appellate court reached the same result.[15]

Possible Exception—Warranty by Design-Builder

In some instances, the warranty provided by the design-builder

 © 2007 by the American Bar Association. Reproduced with permission. All rights reserved.This information or any portion thereof may not be copied or disseminated in any form or by any means or stored in an electronic database or retrieval system without the express written consent of the American Bar Association.

extends to design errors. Thus, if there is an omission from the design, a court might not apply the betterment defense for the same rationale discussed above.

For example, the DBIA design-build agreement[16] requires the design professional to exercise that standard of care that is consistent with the level of skill and care ordinarily used by similar professionals practicing under similar conditions at the same time and location. However, it also provides that the parties may attach specific performance standards, the terms of which could constitute an express warranty. To the extent that the parties agree to achieve a specific result, the betterment defense might not apply.

Similarly, the AIA family of design-build documents includes warranties that "the Work will be free from defects not inherent in the quality required or permitted by law or otherwise, and that the Work will conform to the requirements of the Design-Build Documents."[17] The term "Work" is defined as "the design, construction and services required by the Design-Build Documents. . . ."[18] A court could rely upon these design warranties and decline to require the owner to pay for what would otherwise constitute betterment arising from an omission in the design.

Possible Exception—The Owner Would Not Have Built the Project or Accepted the Design

As stated above, the premise of the application of the betterment defense is that the owner should not be placed in a better position than if the contract had been fully performed. However, in some cases the owner may claim that the project or the particular design feature in question would never have been undertaken/accepted if the owner had known the truth. This fact (or the absence of any evidence as to the owner's intentions) has been crucial to the result reached by some courts.

The court did not recognize betterment or added value in *L.L. Lewis Constr., L.L.C. v. Adrian*,[19] where homeowners prevailed against a remodeling contractor on a claim for defective workmanship and lack of adequate engineering. The contractor argued that the trial court erred in awarding the cost of additional steel beams and other extra work necessary to support the weight of a two-story addition, reasoning that the owners would have been required to pay for that additional support if it had been installed at the beginning of the project (particularly with a cost-plus contract). However, the Missouri Court of Appeals held that this was pure speculation, and that there was no evidence the owners would have undertaken the addition if the structural concerns had been communicated to them by the contractor at the beginning of the project.[20] That is, the owners may have chosen to forgo the room addition or could have decided to build a new home instead. Therefore, the court held that the trial court did not err in awarding the costs of the additional beams and support structures.[21] The Kansas Supreme Court reached the same conclusion, where evidence at trial concerned what the owner would have done had the design defect not existed.[22]

A contrary result was reached in *Gagne v. Bertran*,[23] a case involving erroneous soil tests, where the plaintiffs testified that they would not have purchased the property if they had known the truth about the presence of fill dirt. Because the plaintiffs did not prove that the lots were worth less than the purchase price or that the value of the building was less than the cost of construction, the California Supreme Court determined that the plaintiffs had sustained no damage.[24]

Omission by Contractor or Supplier

Contractors and suppliers are in a different position than designers. Where the contract documents require a component that the contractor or supplier fails to provide, betterment should not apply. The reason is obvious: If the contractor had fully performed the contract, it would have supplied the component at no additional cost to the owner. Accordingly, the owner should not have to pay more to have the contract enforced. In contrast, the owner should not be able to charge the contractor based upon a new design that exceeds the requirements of the contract documents.

What if the contractor honestly missed the item in the contract documents and did not include that item in its pricing? May the contractor argue unjust enrichment or betterment? As stated above, if the contract documents required the component, the contractor should abide by the terms of the contract and supply the item without any additional charge to the owner.

What if the contractor missed the requirement because of an alleged ambiguity in the plans and specifications? Aside from any contract interpretation arguments that apply, the contractor may refer to betterment as part of an "equitable" argument that the owner should not receive the item for free and that the owner, designer, and contractor should all share the expense. Although such an argument does not rise to the level of a legal defense, it may nonetheless be effective as part of settlement discussions.

Repair or Replacement of Defective Component Included in the Project

Assuming that the component was included in the design and installed by the contractor, the question of betterment may arise when the owner corrects the defective design or construction.

Enhancement to the Project

It is clear that when the owner corrects the defective component, it cannot recover for an enhancement to the project. The following is a simplistic explanation of this rule:

> The purchaser of a Ford who encounters some instance of faulty design in his vehicle is not entitled to its replacement by a Cadillac. Therefore, if corrective measures necessary taken enhance the value of the property above that which it would have had if built according to the original concept, this should not be the obligation of the architect who is found liable.[25]

The courts do not hesitate to limit the plaintiff's recovery against the designer, contractor, or supplier in order to prevent a windfall of this type. The seminal case is *St. Joseph Hospital v. Corbetta Constr. Co., Inc.*[26] *St. Joseph Hospital* involved claims filed by a hospital against its architect, its contractor, and the manufacturer of plastic laminate wall paneling that had been installed on the walls of the new hospital. The paneling had a flame-spread rating of approximately seventeen times the maximum permitted under the building code, and it cost the hospital approximately $300,000 to replace it. The jury awarded the entire cost of repairs to the hospital. On appeal, the defendants contended that, if the hospital recovered the costs of the more expensive paneling, it would be unjustly enriched and placed in a better position than if the architect had fully performed the original contract. The Illinois Court of Appeals agreed with that proposition.[27] Following the decision in *Henry J. Robb, Inc. v. Urdahl*,[28] the court reduced the damage award by $116,000, representing the cost differ-

All rights reserved.This information or any portion thereof may not be copied or disseminated in any form or by any means or stored in an electronic database or retrieval system without the express written consent of the American Bar Association.

ential of the paneling, associated labor (the new paneling was more difficult to install), and the additional hardware, which had not been specified in the original design documents.[29]

In *Fleming v. Scott*,[30] two floor furnaces installed by a remodeling contractor did not work properly, and the plaintiff replaced them with a new forced-air system with heat runners to all of the rooms. This required excavation of a basement where none had previously existed. The jury awarded damages to the plaintiff representing the total replacement cost including the excavation. The Colorado Supreme Court reversed the award and remanded the cause for a new trial, ruling that the owner could not charge the contractor for more and different kinds of materials than embraced in the contract.[31]

In *Oakwood Villa Apartments, Inc. v. Gulu*,[32] an owner contracted with a heating contractor to design and install a heating system in an apartment complex. Immediately upon installation, several problems arose with the heating system. The owner sued for breach. In rejecting the trial court's general award of $9,000, the Michigan Court of Appeals pointed out that "it is necessary to determine what the parties bargained for and in which respects the performance fell short of expectations."[33] The contract required the heating contractor to design a system that would meet the latest Institute of Boiler and Radiator Manufacturer methods, FHA requirements, and the inspection requirements of the city. The court found no evidence that the system failed to meet any of those requirements. Accordingly, "the manifest injustice of going to a contractor to design an inexpensive system and then comparing it to one which an experienced professional engineer would have designed should be apparent on its face. All that the plaintiff was entitled to was a heating system as specified in section 2 of the contract."[34] The plaintiff was entitled to damages for the system that he bargained for and nothing more. The heating contractor, however, was liable for any work improperly performed during installation of the system. For example, the costs of repairing leaks caused by improperly soldered pipes were attributable to the heating contractor to the extent such repairs were reasonable and necessary.

Other courts have similarly denied recovery for enhancements or quality upgrades.[35]

Reduction for Use or Depreciation

When the owner replaces or repairs the component after having used the project for a number of years, damages may be reduced to reflect the extended life expectancy of that component. The outcome of decisions on this point varies based upon whether the component has a discernible useful life and whether the owner experienced significant problems with the component prior to its repair/replacement.

In *Allied Chemical Corp. v. Van Buren School District No. 42*,[36] a school district installed a twenty-year roof on a school building. The roof leaked continuously after installation. Nine years after the original installation, the school district replaced a portion of the roof. Two years later, it replaced the rest of the roof. The school district sued the manufacturer of the roof and the surety (other parties were sued but not involved in the decision). Before entering a default judgment, the court heard evidence on damages and prorated the replacement costs on an 18/20 basis, giving the defendant credit for two years of use.[37] The Arkansas Supreme Court disagreed, finding that the cost of replacing the first roof section should be prorated on an 11/20 basis, recognizing nine years of use, and on a 9/20 basis for the second replacement, recognizing eleven years of use.[38] In reversing the trial court and remanding for further proceedings, the court reasoned that crediting only two years ignored the defendants' attempted repairs after that time and the district's continued use of the original roof.[39]

In another roof case, *Bloomsburg Mills, Inc. v. Sordoni Construction Co.*,[40] the Pennsylvania Supreme Court reached the same conclusion and reduced the plaintiff's damages based upon the years of actual use. In *Bloomsburg*, a building owner brought an action against an architect for improper design of a roof that had been guaranteed by the manufacturer for twenty years. The cost of the original roof was $14,979. The owner spent $32,420 to replace the roof after 8 1/2 years of use. Affirming a jury verdict of $18,645, the Pennsylvania Supreme Court found that it was appropriate for the jury to reduce the damages by 42.5 percent (8 1/2 years divided by 20) and award approximately 57.5 percent of the replacement cost.[41] The Supreme Court of New Jersey reached the same result in *525 Main Street Corp. v. Eagle Roofing Co*.[42]

The courts also have prorated the damages for other building components. For example, in *Rhode Island Turnpike and Bridge Authority v. Bethlehem Steel Corp.*,[43] the Bridge Authority brought an action against Bethlehem Steel for defective painting of bridge steel work. The problem was due to the defendant's failure to clean the steel surface before applying the paint; one of the witnesses described the original paint as "coming off in the breeze."[44] The trial court found that the original paint afforded some degree of protection to the bridge for three years but that plaintiff had contracted for a paint job that should have lasted twelve years. Accordingly, the defendant deserved a credit for $1,378,039, which represented 25 percent of the cost of the repairs ($5,512,158). Judgment was entered for $4,134,188. Though the defendant argued, on appeal, that it should be given credit for the years it performed remedial work, the Supreme Court of Rhode Island disagreed. Rejecting the defendant's argument, it ruled that to permit Bethlehem credit for the extra time it took to cure its breach and paint the 2 1/2-mile-long bridge would "wrongfully allow the company to benefit from the fortuitous fact" that it took several years to repaint the bridge.[45] Further:

> In computing the credit, the essential time element is not the number of years that portions of the original coat of paint remained on the bridge, but rather the amount of time that Bethlehem's paint job as a whole served some useful function. This approach best serves the meaning of the term "credit." Bethlehem can only claim credit for that benefit which it has bestowed upon the Authority, that is, the useful life of the original paint.[46]

The Supreme Court of Rhode Island remanded the case for a determination of damages based upon its ruling.[47]

In *Fleming v. Scott*,[48] the Supreme Court of Colorado held that a defendant-contractor was entitled to a credit with respect to an owner's damages for replacement of two floor furnaces. At most, the plaintiff was entitled to the cost of replacing the defective floor furnaces with the same type of system or a refund of the contract price, but was "not entitled to be placed in a position more advantageous than she contracted for."[49] Moreover, the trial court should have instructed the jury to take into consideration depreciation of the equipment due to four years of use (although the court did not specify the life expectancy of the equipment in its decision).[50] The Supreme Court of Colorado reversed the jury verdict of full replacement cost and remanded the case for a new trial.[51] Other courts have similarly reduced recoveries to

All rights reserved.This information or any portion thereof may not be copied or disseminated in any form or by any means or stored in an electronic database or retrieval system without the express written consent of the American Bar Association.

account for the use enjoyed by a plaintiff.[52]

Some courts have declined to reduce the owner's damages based upon depreciation or useful life. For example, in *Price v. B. Constr. Co.*,[53] the purchasers of a home sued the seller-builder for breach of an express warranty that the cellar would be free from water intrusion for one year. Water entered the home within the first year. To repair the problem, the plaintiffs installed a new drainage system with a life expectancy equal to the building itself, or at least fifty years. The issue on appeal was whether the jury should have been instructed to prorate the damages over the fifty-year life expectancy of the new system, i.e., whether the damages should have been limited to one-fiftieth of the replacement costs since the original guarantee was only for one year. The defendant argued that it would be unfair to require it to pay a sum that would give fifty years' freedom from water infiltration. Applying the test established in *525 Main Street*,[54] the New Jersey appellate court found that the parties bargained for work of a greater life expectancy than the one-year guarantee.[55] Finding that the damages were appropriate and should not be reduced by depreciation, the court reasoned, "[U]nlike a roof which has limited life due to its exposure to the elements, the cellar of a new house that remains free from water for one year after its construction might reasonably be expected to remain free from water indefinitely thereafter."[56]

In *Boston Old Colony Ins. Co. v. Tiner Associates, Inc.*,[57] a telephone transmission tower collapsed after the owner had used it for more than half of its fifty- to seventy-five-year life expectancy. The lower court granted plaintiff's motion in limine to exclude any evidence of depreciation. On appeal, the defendant (the contractor who failed to brace temporarily the tower during repairs) claimed that the court should consider depreciation because half of the tower's useful life had been expended at the time of the collapse, citing *Bellsouth*.[58] In rejecting that contention, the Fifth Circuit Court of Appeals, applying Louisiana law, distinguished the holding in *Bellsouth* based upon the long life expectancy of the tower; unlike the plaintiff in *Bellsouth*, the owner of the tower did not expect to have to replace the tower in the next two years, so there was no benefit to the plaintiff from the collapse.[59] Accordingly, the Fifth Circuit Court of Appeals affirmed the district court's ruling on the motion in limine.[60]

Courts also have declined to recognize depreciation based upon the severity of the problems experienced by the owner during the useful life of the component—that is, when the useful life was not so useful. For example, in *Five M. Palmer Trust v. Clover Contractors, Inc.*,[61] the owner used a roof for seven years before replacing it. Rejecting the defendant's argument, the Louisiana Court of Appeals ruled:

> We are not persuaded by defendant's argument that this somehow rewards plaintiff with a new roof after using the old roof for over seven years. The fact is that plaintiff never got the roof it paid for in the first place, and it has suffered with a roof that leaked continuously since it was installed despite repeated attempts by defendant to repair the roof which were not only unsuccessful but which aggravated the problem.[62]

At least one Louisiana court of appeals[63] has followed *Five M. Palmer Trust*.

A Delaware superior court declined to reduce the damages for depreciation under the facts before it, citing the potential for jury confusion. In *Council of Unit Owners of Sea Colony East v. Carl M. Freeman Associates, Inc.*,[64] a plaintiff condominium association claimed a multitude of construction defects and filed a motion in limine to block the defendants from presenting any evidence to reduce damages based upon the "useful life theory." Among the problems, the plaintiff had to replace the roof after thirteen years of use, and there were defective walls, concrete balconies, and walkways. Distinguishing *Bloomsburg*[65] and *Allied*,[66] the Delaware superior court noted that, unlike a roof, these various building components may not have clearly identifiable life expectancies. Accordingly, it granted the plaintiff's motion in limine, reasoning that the "useful life theory" had the potential to create significant proof problems and substantial jury confusion, which might unduly benefit the defendants.[67] Moreover, it stated that if it allowed a reduction for useful life, the plaintiff would be entitled to an offset for the diminished use of the defective component during its "not-so-useful life," which would create overwhelming proof problems.[68]

Cost of Repair Exceeding Original Contract Sum

Should the doctrine of betterment apply to limit the damages claimed by the owner when the cost to repair the defective component exceeds the contractor's original price? Assuming there is no economic waste and the reasonable repair provides the owner with a benefit equal to that contemplated under the contract, the owner may recover the entire cost of repair from the contractor.

An excellent example is the case of *Scheppegrell v. Barth*,[69] in which the contractor agreed to paint the inside of the owner's home for $1,100. The paint later peeled and flaked. The owner then hired another contractor to repaint at a cost of $2,411 and sought to recover this amount from the original painter. The court allowed the recovery, stating:

> In this case the work performed is worthless and must be completely redone. Plaintiff is entitled to be made whole and to claim the expense of repainting the interior of his residence. According to the evidence, the lowest bid for this work amounted to $2,411, and the defendant is liable to plaintiff in that amount. (Citation omitted).[70]

In *Carter v. Quick*,[71] some owners entered into an oral contract for construction of a dwelling at a price of $25,000. After moving into the home, the owners initiated an action for breach of contract and negligent performance of the contract, alleging that the builder represented the home would be constructed in a good and workmanlike manner and that the quality of the construction would be consistent with the builder's own residence. After a bench trial, the owners were awarded $4,060, the bulk of which represented the cost of replacing a brick veneer on the front of the home, and the builder was awarded $205 on a counterclaim. The primary issue on appeal involved the appropriate measure of damage for replacement of the brickwork.

After meandering through a general discussion of the law of damages in Arkansas and elsewhere, the Supreme Court of Arkansas settled on a rule that would allow for the cost of curing defects, except where curing the defects would cause unreasonable economic waste. It also rejected the builder's argument that the cost of the brick replacement was so excessive as to render replacement costs unavailable as a matter of law, stating that "[i]t cannot be seriously contended that replacement would result in material injury to the structure. The mere fact that replacement would cost $4,000 or more and the

All rights reserved.This information or any portion thereof may not be copied or disseminated in any form or by any means or stored in an electronic database or retrieval system without the express written consent of the American Bar Association.

contract price was only $25,000 does not mean that the [owner] had met his burden to the extent that the court should say, as a matter of law, that there was an unreasonable economic waste or that the expense is too great to resort to this measure of damages."[72] Finally, although the Arkansas court felt that the owners should not be deprived the benefit of their bargain, it did note that the current, undisputed market value of the home, with the poor brickwork, exceeded the contract price, perhaps suggesting that there were no damages.

The dispute in *Dierickx v. Vulcan Industries*[73] involved application of a waterproofing sealant to the basement walls of the owner's home. The contractor provided a warranty with the work stating that the basement would be seepage free for five years. After years of trying to stop seepage in the basement, the contractor gave up. During this time period, the owner paid the contractor $230 for the work. Subsequently, the owner hired another contractor to break up a portion of the owner's driveway and excavate at the basement wall. The owner sued the original contractor, seeking amounts paid to the original contractor and the second contractor, for personal injury damages, and for damages to property stored in the basement. At trial, the court found that the contractor had breached its contract and rendered judgment in favor of the owner for $230, the amount the owner had paid to the original contractor under the waterproofing contracts.

On appeal, the Michigan appellate court opined that any claims to recover the second contract price were not well founded, as the second contract resulted in a greater benefit than that promised by the original contractor (no seepage for in excess of five years). On the other hand, the trial court had improperly limited the owner's damages to the original contract price. The proper measure of damages, the court held, is the lowest cost of furnishing the owner a dry basement for the warranty period of five years. The owner is entitled to this measure of damages even if the amount exceeds the original contract price. In addition, the owner may recover incidental damages caused by the breach.

In *State ex rel. Stovall v. Reliance Ins. Co.*,[74] a recent Kansas Supreme Court case, an owner was allowed to seek recovery of direct damages, not to exceed the cost to replace the original system on the date of discovery of the defect, and consequential damages, even if these damages far exceeded the original contract price. The Supreme Court of Mississippi has reached the same result.[75]

Other Applications of Betterment/Added Value

Underestimating Construction Costs

Contractors and design professionals are routinely called upon to provide cost estimates to owners. Mindful that they are navigating through a minefield of potential troubles, design professionals and contractors are reluctant to prepare and provide such estimates. While cost estimating is an everyday, mundane task in the construction industry, the issue of costs is anything but mundane and is frequently a source of heated conflict among owners, contractors, and design professionals.

In many jurisdictions, if a design professional significantly underestimates the cost of a project, the design professional may not only risk losing a fee, but may also be liable for damages to the owner. Depending upon the jurisdiction, damages may be calculated as the difference between actual cost and the estimated cost, as the difference between the market value of the property and the estimated cost, or as lost profits suffered by a commercial owner. The following cases reveal the risks to a design professional when underestimation becomes an issue and how the concept of betterment may apply.

The early case of *Capitol Hotel Co., Inc. v. Rittenberry*[76] involved an architect retained to design and provide a cost estimate for the construction of a hotel. The architect represented in his cost estimate that the cost of construction would be no more than $375,000, when, in fact, the actual cost was $500,000. The architect sued to recover his fee when the owner subsequently refused to pay. The owner countersued, seeking damages associated with the increased cost of construction and other damages. Prior to trial, a Texas trial court dismissed the owner's claim for increased construction costs. At trial, a jury found in favor of the architect on his claim for fees and denied recovery to the owner on his remaining claims.

On appeal, the owner contended the trial court erred in dismissing his claim for increased costs. The Texas appellate court agreed, observing that the owner's claim arose from the parties' contract, but sounded in tort (negligence and fraud) due to the architect's violation of the duty to act with reasonable skill. The claim included allegations that the architect knew that the owner would not have undertaken construction if it knew costs could exceed $375,000, knew that a fair return on the owner's investment could not be achieved if costs exceeded $375,000, and failed to inform the owner of increased costs until it was too late for the owner to attempt any cost-saving measures, forcing the owner to complete the project for $500,000.

Although the Texas appellate court agreed that the dismissal of the owner's claim was error, it rejected the owner's contention that damages should be measured by the increase in construction costs. In dictum, the Texas appellate court said:

> It would be inequitable to permit defendants to retain this building with this added value and at the same time recover the amount of such additional expenditure from [the architect].[77]

Instead, it identified the following as the correct standard:

> The measure of damages generally for a breach of contract is such a sum as will fully and fairly compensate the injured party for the losses sustained, taking into consideration what was in contemplation of the parties when it was made—in this case a reasonable return on the investment.[78]

Thus, while recovery of lost profits was permissible in *Capitol*, it was subject to proof that the owner instructed the architect to prepare the estimate with the understanding that constructing the hotel would produce a fair return on investment. Even if lost profits could not be proven with sufficient certainty, the owner could still recover, upon prevailing on liability, some nominal amount as damages. Finally, the court in *Capitol* ruled that an architect may not recover fees if the actual cost of construction is not reasonably near the estimate.

In the more recent case of *Kellogg v. Pizza Oven, Inc.*,[79] a pizza parlor wished to construct a building on land owned by another. The pizza parlor and the owner agreed that the owner would pay for the building up to $60,000 and that the pizza parlor would pay for any excess amounts. The architect was aware of this agreement. The architect submitted a cost estimate of $62,000, but the actual cost of the building was about $92,000. The architect failed to monitor bids submitted by contractors and failed to inform the pizza parlor of the increased costs until the building was almost finished.

All rights reserved.This information or any portion thereof may not be copied or disseminated in any form or by any means or stored in an electronic database or retrieval system without the express written consent of the American Bar Association.

The Colorado Supreme Court presented the general rule:

> An architect who substantially underestimates, through lack of skill and care, the cost of a proposed structure, which representation is relied upon by the employer in entering in the contract and proceeding with construction, may not only forfeit his right to compensation, but may become liable to his employer for damages.[80]

Accordingly, the pizza parlor recovered the difference between the actual cost of the building and the estimated cost, less change orders and the customary 10 percent permissible variation. The court in *Kellogg* distinguished cases disallowing such damages, reasoning that such cases involved owners. In contrast, the pizza parlor was not an owner but a lessor and, therefore, did not stand to retain any benefit from the additional costs. More importantly, the other cases involved buildings with increased value or the potential for increased rental income, but the defendant in *Kellogg* did not submit any evidence demonstrating potential for increased efficiency, increased customer revenue, or increased functionality.

Under Minnesota law, an architect may be held liable for certain damages resulting from underestimating the costs of construction. In such cases, the owner's recovery may include forfeiture of the architect's compensation, but "not the excess costs of the structure." Rather, the owner's recovery "is the difference between the total cost of the property to date and that amount of money that a prudent person would pay for the property in its present condition."[81]

Real Estate Purchase—Diminished Property Value

The question of betterment may arise in the context of the purchase of real estate. A buyer intending to build a project may rely upon a professional who renders advice on the suitability of the land for the building, e.g., soil tests. If the advice is erroneous, the professional might argue that the buyer should not be able to recover any damages because it received the value of the property. That is, the buyer should not be placed in a better position than if the advice had been correct. The cases on point turn on whether there was in fact some diminution in value because of the faulty advice.

In *Gagne v. Bertran*,[82] the Supreme Court of California held that the plaintiffs failed to prove that they had been damaged by incorrect soil tests performed by the defendant. The plaintiffs testified that when they purchased the property, they relied on the tests showing the absence of fill dirt. Despite the fact that the plaintiffs had to pay more than anticipated for the construction of the foundation, the court held that they did not prove that the lots were worth less than the purchase price or that the value of the building was less than the cost of construction.[83]

In *Cory v. Villa Properties*,[84] a California appellate court considered a suit by the buyers of realty against the sellers, claiming that they thought they had purchased 2.84 acres of land rather than 1.88 acres. The plaintiffs testified that they would not have purchased the property if they had known the facts. The lower court held that the plaintiffs had not shown any damage, but that ruling was reversed and the case was remanded for a new trial. After discussing *Gagne*, the California Court of Appeals found that the plaintiffs did not sustain any out-of-pocket loss because the value of the property was greater than or equal to the purchase price.[85] However, it ruled that there was a triable issue as to whether the plaintiffs sustained any "additional damages," i.e., lost profits reasonably anticipated from subdividing and selling off the acreage (based upon California damage statutes).[86]

Burden of Proof

Is betterment or added value an affirmative defense that must be pled and proven by the architect, contractor, or supplier? Or is it the owner's burden to show that the damages claimed are necessary to put the owner in the same position as if the contract had been properly and fully performed? The decisions are mixed, and the issue can have a dramatic impact on the outcome of a case.

Many states have rules or statutes similar to Federal Rule of Civil Procedure 8(c), which provides that "[i]n pleading to a preceding pleading, a party shall set forth affirmatively . . . any other matter constituting an avoidance or affirmative defense."[87] Rule 8 does not indicate whether betterment constitutes a matter of "avoidance" or whether the claimant should bear the burden of proof.

Most courts have placed the burden of proof on the design professional, contractor, or supplier ("defendant" here for the sake of convenience).[88] However, some courts have held that the owner has the burden to prove that there was no betterment or added value.[89]

The Texas Court of Appeals considered the question in *Hollingsworth Roofing Co. v. Morrison*.[90] In *Hollingsworth*, a homeowner sued a roofer who allowed a swimming pool to remain uncovered during roofing repairs, which allowed tar to fall into the pool. Judgment was entered for the cost to replaster the pool, but the defendant complained that the pool was in need of replastering anyway and that its value would be enhanced by replastering.[91] The court held that "[t]he party urging such a contention has the burden to show that the repair, as made, resulted in an enhancement of value."[92] Because the defendant produced no evidence establishing any enhanced value, the judgment in favor of the plaintiff was affirmed on that issue.[93] In *Chemical Express Carriers, Inc. v. French*,[94] another Texas appellate court held that the defendant is not required to specifically plead betterment but that the defendant has the burden of proof that there has been an enhancement.

Other courts have placed the burden of proof upon the owner and, on occasion, have directed a verdict against it for failing to properly itemize damages. In *City of Westminster v. Centric-Jones Constructors*,[95] the city sued the prime contractor and the designer claiming problems with its wastewater treatment plant. The city claimed the total cost of replacing two of the three structures involved in the project. The design of the new structures included features that were not a part of the original specifications, such as the correction of a code violation by changing apertures in the walls and including additional structural support. The city sought the total cost of removing, redesigning, and rebuilding the defective construction. The case went to trial against the contractor and its surety, and the court directed a verdict against the plaintiff for failing to properly itemize its damages. The court of appeals affirmed that result, comparing the plaintiff's case to the disfavored "total cost" approach used by contractors to support other types of claims.[96]

In *Neal v. Saizan*,[97] a homeowner sued the contractor who designed and constructed a roof over an addition to a home. The Louisiana trial court found that the defendant was negligent in the design and construction of the roof, which subsequently leaked. The total cost of replacement was $5,200, but the court only awarded $2,700, which was the original contract price for the roof. The trial court would not

All rights reserved.This information or any portion thereof may not be copied or disseminated in any form or by any means or stored in an electronic database or retrieval system without the express written consent of the American Bar Association.

award any damages above that amount because it found that the roof as rebuilt was an improvement and there was no evidence adduced as to the cost of repair versus the cost of the improvement.[98] The Louisiana Court of Appeals affirmed the judgment of the trial court, finding that the plaintiff had not just repaired the roof but had made an improvement to it, and there was no breakdown of the damages by the plaintiff.[99] Therefore, the court found that the trial court did not err in refusing to award additional damages to the plaintiff where no evidence was adduced as to the exact cost of the same.[100]

The Supreme Court of Maryland has reached the same result in at least two decisions.[101]

This issue has practical significance. Betterment is difficult to quantify; therefore, it is critical to understand which party has the burden of proof. In the absence of clear appellate authority in a particular jurisdiction, counsel might consider seeking an advanced ruling from the court so that the damages are determined on the merits, rather than risking an adverse outcome based upon the failure to produce evidence on the issue of betterment or added value.

Contract Language

Due to the unpredictability of the case decisions cited in this article, the parties to a project should consider whether to address the issue of betterment in their contracts. For example, all or part of the following provision might be included in the owner-architect/engineer agreement (the second paragraph also could be used in the owner-contractor agreement):

> If a component of the Project is omitted from the Contract Documents due to the breach of contract or negligence of the Architect/Engineer, it will not be liable to the Owner to the extent of any betterment or added value to the Project. Specifically, the Owner will be responsible for the amount it would have paid to the Contractor for the component if it had been included in the Contract Documents, and the Architect/Engineer will be responsible for any retrofit expense, waste, any intervening increase in the cost of the component and a presumed "premium" of ___% of the cost of the component furnished through a Change Order from the Contractor.
>
> If it is necessary to replace a component of the Proj-ect due to the breach of contract or negligence of the Architect/Engineer, it will not be liable to the Owner for any enhancement or upgrade of the component beyond what was originally included in the Contract Documents. In addition, if the component has an identifiable useful life that is less than the building itself, the damages of the Owner shall be reduced to the extent that the useful life of the component will be extended by the replacement thereof.

The use of this clause would favor the designer by solidifying the defense of betterment and defining the "premium" associated with change orders. However, the parties should consider whether the designer's agreement to pay such a "premium" violates the terms of its professional liability policy as an assumption of liability by contract.

Conclusion

The betterment or added value doctrine is widely recognized and commonly applied in construction claims, but this aspect of the law of damages is far from being fully developed. The approach of the courts varies and many of the decisions appear to be result-oriented. There are many exceptions to the defense, and the courts do not even agree on whether the doctrine is an integral part of the owner's burden of proof or an affirmative defense of the designer, contractor, or supplier. Consideration should be given to including a betterment provision in design and construction contracts to eliminate this uncertainty.

Endnotes

1. Some authors have used the term "added first benefit" to describe the doctrine or defense, but no reported decision to date has utilized that term. In fact, very few decisions use any label whatsoever. In this article, the doctrine or defense will be termed "betterment" or "added value."

2. *See* Glendale Fed. Sav. & Loan Ass'n v. Marina View Heights Dev. Co., 135 Cal. Rptr. 802 (Cal. App. 1977).

3. *See* PHILIP L. BRUNER & PATRICK J. O'CONNOR JR., BRUNER AND O'CONNOR ON CONSTRUCTION LAW §§ 19.7, 19.8, 19.26 to 19.29 (2002); *see also* Ben Patrick, *The Added First Benefit Rule*, 24 CONSTR. LAW. 26 (Summer 2004); Stewart W. Karge, *Architect-Engineer's Damages: The Added First Benefit Theory*, 9 CONSTR. LAW. 1 (Nov. 1989).

4. 552 So. 2d 228 (Fla. App. 1989), *rev. denied*, 563 So. 2d 631 (Fla. 1990).

5. *Id.* at 232–33.

6. *Id.* at 233.

7. Soriano v. Hunton, Shivers, Brady & Assocs., 524 So. 2d 488 (Fla. App. 1988), *rev. denied*, Hunton, Shivers, Brady & Assocs. v. Soriano, 534 So. 2d 399 (Fla. 1988).

8. This result in *Soriano* is at least in part the result of the relationship between the parties. The court based its decision on the fact that the architects, as the responsible party for the design of the building, voluntarily chose to perform the adjustments to the design without the owner's authority to do so. The court found that such an action, which amounted to the architects voluntarily conferring a benefit upon the owner, violated the general rule that a person who without a mistake, coercion, or request has unconditionally conferred a benefit upon another is not entitled to restitution. The court continued: "to permit the architects to recover from the structural engineer in this instance may encourage acts of volunteerism under a guise of mitigating an owner's damages without the owner's consent."

9. *See also* Grossman v. Sea Air Towers, Ltd., 513 So. 2d 686 (Fla. App. 1987), *rev. denied*, 520 So. 2d 584 (Fla. 1988) (Structural engineer was found to have "under-designed" a building deck. The court held that the proper measure of damages was the amount necessary to restore the deck to its original condition, plus related losses occasioned by failure of the deck—including adverse impact on the owner's operations. However, the construction costs associated with increasing the load capacity of the deck were the owner's responsibility, as these costs would have been incurred even if there had been no negligence on the part of the defendants.).

10. Wendward Corp. v. Group Design, Inc., Maine Test Borings, Inc., 428 A.2d 57 (Me. 1981) (A geotechnical engineer mistakenly took soil borings at the wrong location. The damage award had to be reduced to exclude costs associated with what was necessary to continue construction, such as deep excavation and removal of all dump and compact fill to necessary levels. Such items "cannot be included in any award of damages.").

11. Broyles v. Brown Eng'g Co., 151 So. 2d 767 (Ala. 1963); Fed. Mogul Corp. v. Universal Constr. Co., 376 So. 2d 716 (Ala. Civ. App. 1979); Bloomsburg Mills, Inc. v. Sordoni Constr. Co., 164 A.2d 201 (Pa. 1960); Hill v. Polar Pantries, 64 S.E.2d 885 (S.C. 1951); Beachwalk Villas Condo. Ass'n, Inc. v. Martin, 406 S.E.2d 372 (S.C. 1991); Tommy L. Griffin Plumbing & Heating Co. v. Jordan, Jones & Goulding, Inc., 463 S.E.2d 85 (S.C. 1995); E. Steel Constructors, Inc. v. City of Salem, 549 S.E.2d 266 (W. Va. 2001); *see also* Bd. of Educ. of Cmty. Consol. Sch. Dist. No. 54 v. Del Bianco & Assocs., Inc., 372 N.E.2d 953 (Ill. App. 1978) (holding that the defendant had the implied obligation to specify the use of reasonably good materials, to perform its work in a reasonably workmanlike manner, and in such a way as reasonably to satisfy such requirements as it had noticed the work was required to meet). This is to be distinguished from an implied warranty of reasonable skill and diligence or workmanlike performance, breaches of which may constitute mere negligence (*see*

All rights reserved.This information or any portion thereof may not be copied or disseminated in any form or by any means or stored in an electronic database or retrieval system without the express written consent of the American Bar Association.

First Nat'l Bank of Akron v. Cann, 503 F. Supp. 419, 440 (N.D. Ohio 1980)).

12. Carter v. Wolf Creek Highway Water Dist., 635 P.2d 1036 (Or. App. 1981), and Skidmore, Owings & Merrill v. Intrawest I L.P., 1997 WL 563159 (Wash. App.) (unpublished opinion).

13. 635 P.2d 1036 (Or. App. 1981).

14. *Id*. at 1038.

15. Skidmore, Owings & Merrill v. Intrawest I L.P., 1997 WL 563159 (Wash. App.) (unpublished opinion).

16. DBIA Document No. 535 (Standard Form of General Conditions between Owner and Design-Builder), ¶ 2.3.1.

17. AIA Document A141-2004, Exhibit A, § A.3.5.1.

18. AIA Document A141-2004, § A.1.1.6.

19. 142 S.W.3d 255 (Mo. App. 2004).

20. *Id.* at 264.

21. *Id*.

22. State *ex rel.* Stephan v. Wolfenbarger and McCulley, P.A., 690 P.2d 380 (Kan. 1984).

23. 275 P.2d 15 (Cal. 1954).

24. *Id.* at 22–23.

25. Goodin, *Architectural Malpractice Litigation* § 140, 19 Am. Jur. 2d *Trials* 231 (2006).

26. 316 N.E.2d 51 (Ill. App. 1st Dist. 1974).

27. *Id.* at 59.

28. 78 A.2d 387 (D.C. App. 1951).

29. *Id*. at 940–41.

30. 348 P.2d 701 (Colo. 1960).

31. *Id*. at 702.

32. 157 N.W.2d 816 (Mich. App. 1968).

33. *Id.*

34. *Id.*

35. Cmty. Television Servs., Inc. v. Dresser Indus., Inc., 435 F. Supp. 214 (D.S.D. 1977), *aff'd,* 586 F.2d 637 (8th Cir. 1978), *cert. denied,* Dresser Indus., Inc. v. Cmty. Television Servs., Inc., 441 U.S. 932, 99 S. Ct. 2052, 60 L. Ed. 2d 660 (1979) (damages for replacement of television tower were reduced by betterment of $20,000 due to differences in the construction); Soriano v. Hunton, Shivers, Brady & Assocs., 524 So. 2d 488 (Fla. App. 1988), *rev. denied,* Hunton, Shivers, Brady & Assocs. v. Soriano, 534 So. 2d 399 (Fla. 1988) (deduction made for the cost of structural modifications that the owner would have incurred had they been part of the original design, but recovery was allowed for out-of-sequence costs and additional engineering since the owner did not derive an added benefit from them); Grossman v. Sea Air Towers, Ltd., 513 So. 2d 686 (Fla. App. 1987), *rev. denied,* 520 So. 2d 584 (Fla. 1988) (when a concrete deck collapsed and was rebuilt, the cost incurred in increasing the load capacity of the deck would have been the owner's responsibility even if there had been no negligence on the part of the defendants); Temple Beth Sholom and Jewish Ctr. v. Thyne Constr. Corp., 399 So. 2d 525 (Fla. App. 1981) (if the owner elects a more expensive design as a part of the repairs, recovery is limited to the reasonable costs of repair according to the original design plus professional fees to implement the repairs); Lochrane Eng'g, Inc. v. Willingham Realgrowth Inv. Fund Ltd., 552 So. 2d 228 (Fla App. 1989), *rev. denied,* 563 So. 2d 631 (Fla. 1990) (the defendants were not liable for the cost of engineering study to determine the feasibility of connecting a septic tank to the municipal sewer system, which was not contemplated by the original design); State Prop. and Bldg. Comm'n of Dep't of Fin. v. H.W. Miller Constr. Co., 385 S.W.2d 211 (Ky. 1964) (damages should not include enhancements unless the comparative cost of repair is the same as the original design); Zindo v. Pelican Builders, Inc., 367 So. 2d 1294 (La. App. 1979) (homeowner not entitled to have her addition constructed with 30-foot wood pilings instead of 12–15-foot concrete pilings, but is limited to what her contract provided); Bachman v. Parkin, 471 N.E.2d 759 (Mass. App. 1984), *rev. denied,* 474 N.E.2d 182 (Mass. 1985) (the owner cannot recover for expenditures made for extraneous purposes that created a better house than had been agreed upon); Martin v. Phillips, 440 A.2d 1124 (N.H. 1982) (homeowners terminated the contractor and completed the project were not entitled to recover amounts in excess of the stated allowances for such items as carpeting, cabinets, and the heating system since that would place them in a better position than they would have been under the contract); Sid Grinker Co., Inc. v. Craighead, 146 N.W. 478 (Wis. 1966) (owner not entitled to cost of redoing doors in a manner superior to that contemplated in the contract); Harley Paws, Inc. v. Mohns, Inc., 639 N.W.2d 223, 2001 WL 1403557 (Wis. App. 2001) (unpublished opinion, text in Westlaw), *rev. denied,* 643 N.W.2d 94 (Wis. 2002) (damages should be credited for an upgrade to more expensive countertops); Hollon v. McComb, 636 P.2d 513 (Wyo. 1981) (home purchasers suing builder may not include in its repair/completion costs claim the value of cedar shake shingles when the original bargain was for asphalt shingles); *see* Bruner & O'Connor, *supra* note 3, §§ 19.26 to 19.28; *see also* John P. Ludington, Annotation, *Modern Status of Rule as to Whether Cost of Correction or Difference in Value of Structures Is Proper Measure of Damages for Breach of Construction Contract,* 41 A.L.R.4th 131, § 22 (1985). *But see* Bd. of Educ. of Charles County v. Plymouth Rubber Co., 569 A.2d 1288 (Md. App. 1990), *cert. denied,* Eurell Co. v. Bd. of Educ. of Charles County, 578 A.2d 778 (Md. 1990) (defective roofing case). Although the court found that the owner was only entitled to a system that would fulfill the warranty made by the supplier, and not one designed to exceed that standard, it held that the trial court did not err in admitting evidence of the replacement cost of the roof as a measure of damages. The court noted that contrary to the warranty, the plaintiff never really had a roof that was watertight (the decision begins with the statement "[t]his is a case about a roof that just wouldn't stop leaking"). Further, the plaintiff offered testimony that it was necessary to replace the roof with a more expensive system to ensure that it remained watertight.

36. 575 S.W.2d 445 (Ark. 1979).

37. *Id*. at 449.

38. *Id.*

39. *Id*. at 450.

40. 164 A.2d 201 (Pa. 1960).

41. *Id*. at 204.

42. 168 A.2d 33 (N.J. 1961) (owner's recovery for defective roof must be prorated for expected life of the replacement roof beyond the remaining guaranteed useful life of the original, defective roof).

43. 415 A.2d 1295 (R.I. 1980).

44. *Id*. at 1297.

45. *Id*.

46. *Id*.

47. *Id*. at 1298.

48. 348 P.2d 701 (Colo. 1960).

49. *Id*. at 702.

50. *Id*.

51. *Id*.

52. Bellsouth Telecomm., Inc. v. Citizens Utilities Co., 962 F. Supp. 79 (E.D. La. 1996); Oakwood Villa Apartments, Inc. v. Gulu, 157 N.W.2d 816 (Mich. App. 1968); *see* Bruner & O'Connor, *supra* note 3, § 19.29.

53. 187 A.2d 25 (N.J. App. 1962).

54. 525 Main Street Corp. v. Eagle Roofing Co., 168 A.2d 33 (N.J. 1961).

55. *Price*, 187 A.2d at 27.

56. *Id*.

57. 288 F.3d 222 (5th Cir. 2002).

58. Bellsouth Telecomm., Inc. v. Citizens Utilities Co., 962 F. Supp. 79 (E.D. La. 1996).

59. *Boston Old Colony*, 288 F.3d at 231.

60. *Id*. at 234.

61. 513 So. 2d 364 (La. App. 1987).

62. *Id*. at 366.

63. Nat'l Tea Co. v. Plymouth Rubber Co., Inc., 663 So. 2d 801, 808 (La. App. 1995).

64. 564 A.2d 357 (Del. Super. 1989).

65. Bloomsburg Mills, Inc. v. Sordoni Constr. Co., 164 A.2d 201 (Penn. 1960).

66. Allied Chem. Corp. v. Van Buren Sch. Dist., 575 S.W.2d 445 (Ark. 1979).

67. *Sea Colony*, 564 A.2d at 363.

68. *Id.* at 364.

69.117 So. 2d 903 (La. 1960).

70. *Id*. at 906–07.

71. 563 S.W.2d 461 (Ark. 1978).

72. *Id*. at 465.

73. 158 N.W.2d 778 (Mich. 1968).

74. 107 P.3d 1219 (Kan. 2005).

75. Wright v. Stevens, 445 So. 2d 791 (Miss. 1984).

76. 41 S.W.2d 697 (Tex. App. 1931).

All rights reserved.This information or any portion thereof may not be copied or disseminated in any form or by any means or stored in an electronic database or retrieval system without the express written consent of the American Bar Association.

77. *Id*. at 704.
78. *Id*.
79. 402 P.2d 633 (Colo. 1965).
80. *Id*. at 634.
81. Kostohryz v. McGuire, 212 N.W.2d 850, 853–54 (Minn. 1973) (citing Durand Assoc. v. Guardian Inv. Co., 183 N.W.2d 246, 250 (Neb. 1971)).
82. 275 P.2d 15 (Cal. 1954).
83. *Id.* at 22–23.
84. 225 Cal. Rptr. 628 (Cal. App. 1986).
85. *Id.* at 633.
86. *Id*. at 634.
87. FED. R. CIV. P. 8(c).
88. Boston Old Colony Ins. Co. v. Tiner Assocs., Inc., 288 F.3d 222 (5th Cir. [La.] 2002); Kellogg v. Pizza Oven, Inc., 402 P.2d 633 (Colo. 1965); State Prop. and Bldg. Comm'n of Dep't of Fin. v. H.W. Miller Constr. Co., 385 S.W.2d 211 (Ky. 1964); Nat'l Tea Co. v. Plymouth Rubber Co., Inc., 663 So. 2d 801 (La. App. 1995); Bd. of Educ. of Charles County v. Plymouth Rubber Co., 569 A.2d 1288 (Md. App. 1990), *cert. denied*, Eurell Co. v. Bd. of Educ. of Charles County, 578 A.2d 778 (Md. 1990); Zontelli & Sons, Inc. v. City of Nashwauk, 373 N.W.2d 744 (Minn. 1985); L.L. Lewis Constr., L.L.C. v. Adrian, 142 S.W.3d 255 (Mo. App. 2004); Bloomsburg Mills, Inc. v. Sordoni Constr. Co., 164 A.2d 201 (Penn. 1960); Hollingsworth Roofing Co. v. Morrison, 668 S.W.2d 872 (Tex. App. 1974); Chem. Express Carriers, Inc. v. French, 759 S.W.2d 683 (Tex. App. 1988); Skidmore, Owings & Merrill v. Intrawest I L.P., 1997 WL 563159 (Wash. App.) (unpublished opinion).
89. Gagne v. Bertran, 275 P.2d 15 (Cal. 1954); City of Westminster v. Centric-Jones Constructors, 100 P.3d 472 (Colo. App. 2003), *cert. granted*, 2004 WL 2504512 (Colo. 2004); Zindo v. Pelican Builders, Inc., 367 So. 2d 1294 (La. App. 1979); Neal v. Saizan, 486 So. 2d 832 (La. App. 1986); Corelli Roofing Co. v. Nat'l Instrument Co., 214 A.2d 919 (Md. 1965); Hooton v. Kenneth B. Mumaw Plumbing & Heating Co., Inc., 318 A.2d 514 (Md. 1974).
90. 668 S.W.2d at 872.
91. *Id*. at 876.
92. *Id.*
93. *Id*.
94. 759 S.W.2d 683, 689 (Tex. App. 1988).
95. 100 P.3d 472 (Colo. App. 2003), *cert. granted*, 2004 WL 2504512 (Colo. 2004).
96. *Id*. at 478.
97. 486 So. 2d 832 (La. App. 1986).
98. *Id*. at 833.
99. *Id*. at 833–34.
100. *Id*.
101. Corelli Roofing Co. v. Nat'l Instrument Co., 214 A.2d 919 (Md. 1965); Hooton v. Kenneth B. Mumaw Plumbing & Heating Co., Inc., 318 A.2d 514, 519 (Md. 1974).

 © 2007 by the American Bar Association. Reproduced with permission. All rights reserved.This information or any portion thereof may not be copied or disseminated in any form or by any means or stored in an electronic database or retrieval system without the express written consent of the American Bar Association.