

“BETTERMENT” AND THE LAW OF DAMAGES

When design professionals make a mistake that they then correct, often at their own expense, the concept of *betterment* enters into the relationship between design professional and owner. The concept of *betterment* simply means that when a design professional recognizes an error or omission in the design work and corrects it, either voluntarily or because the owner insists upon it, the cost of the required additional or corrected work must be borne by the design professional. However, in computing that cost, the owner is expected to pay for any added value to the structure. The theory upon which betterment rests is that rules of equity in the law compel the owner to pay for improvements which the owner would have had to pay for absent the error or omission by the design professional.

For example, where a design professional fails to design a building or building system to required governmental code, applicable damage law both in contract and in tort (for negligence) will subject the design professional to damages measured basically by the cost of redesigning (and if necessary reconstructing) the project to conform with code. However, if the code requirement not met by the design professional in the original design requires the installation of different or additional components which have added value to the owner, the owner has received a betterment and should pay for it.

Owners, on the other hand, will look to either contract wording or decisional law which requires the design professional to design to the minimum requirements of governmental codes. The owner will argue that in order to receive what the owner contracted for, the professional designer must deliver a design which when constructed will conform to the minimum of governmental code. While the law of damages in contract law differs somewhat from the damage law in negligence, the concept of *betterment* should not differ. Whether the owner is

pursuing contract damages or tort damages against the design professional, the legal concepts of unjust enrichment or causation should apply to the determination of damages. Under unjust enrichment, the owner should not be awarded damages which gives the owner a windfall.

Therefore, the damages should be calculated so that the owner pays for the betterment while recovering the damages associated with the erroneous or deficient design. Similarly, if the claim brought by the owner against the design professional is for negligence, the design professional should be heard when arguing that the cause of the owner's damages relates only to the expenses incurred in connection with the deficient or erroneous design and not with the cost of the correct or improved design.

Although the concept of betterment is alive and well, there is a surprising lack of decisions applying the concept to the determination of damages arising out of defective work by design professionals. We can expect that when design professionals and their insurers litigate issues involving betterment, helpful decisions will become available.