Betterment or Added Value? The Defense with an Identity Crisis

by Jerome V. Bales, Esquire

While the definition of betterment, or added value, appears to be clear, case law and legal precedents regarding this matter are not. Whether or not a design professional can use betterment as a defense without a burden of proof depends on the jurisdiction.

The doctrine of betterment is a fundamental principle in the determination of an owner’s recoverable damages in a construction dispute. Design professionals (designers), particularly architects and engineers, routinely apply the principles of betterment or added value in claim negotiations. However, the legal precedent on this topic is not as well developed as one might think. The courts do not uniformly label the defense as “betterment” or “added value.” In fact, these terms are rarely found in case decisions. Instead, the courts usually cite the general proposition that an injured party should not end up in a better position than it was before the tort or breach of contract, making it difficult to find betterment case law by typical computer word searches. Some authors have referred to this doctrine as the defense or theory of “added first benefit” or “added benefit,” but to date they do not appear in any reported decision.

Adding to the problem is the fact that the case decisions are often result-oriented and sometimes reach inconsistent results without analysis of legal precedent.

Finally, the courts do not all agree as to whether betterment is an affirmative defense or inherent in the claimant’s burden of proof. The same is true with respect to the burden of proof to demonstrate some of the exceptions to the doctrine.

With this background, this paper will examine the basic principles of betterment and exceptions thereto in the context of claims against designers, contractors, and suppliers. The cases discussed are organized by two common fact patterns:

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The omission of a component from the design or construction.

The repair or replacement of a component that was actually constructed.

In addition, this paper discusses which party has the burden of proof and suggested contract language to address betterment issues.

**Basic Rule of Betterment**

The doctrine of betterment is a rule of damages that is 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 actions for breach of contract, the courts generally hold that the damages awarded should place plaintiffs in the same position they would have been had the contract been performed. However, plaintiffs should not be awarded more than the benefit that they would have received had the promisor properly performed the contract.

As discussed herein, the courts have applied the concept of betterment to a variety of construction disputes. Assuming the liability of the design professional has been established, general rules have been developed within the industry and through case law (subject to some exceptions). The following represents the author’s attempt to summarize those general rules:

If the designer fails to include an item in the design, the owner should pay what the component would have cost if it had been included in the original design. However, the designer should pay any “premium” associated with a change order.

If the owner repairs or replaces a defective component, the owner should not recover the cost of any enhancement exceeding the quality evidenced in the contract documents. Further, the owner’s damages should be reduced to the extent that the identifiable useful life of a component will be extended. However, the designer should pay the cost of any retrofitting expense, waste, and intervening increase in the cost of the labor or materials necessary to correct the error.

**Element Omitted from the Project**

**Design Omission**

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

To illustrate, in *Lochrane Engineering, Inc. v. Willingham Investment Fund, Ltd.*, a land buyer sued the developer/seller and others over an inadequate tank-drain septic system, and the developer/seller cross-claimed against the civil engineer and septic contractor. The engineer negligently advised the contractor and developer to locate the two septic systems for each duplex in the rear yards, rather than placing one in the front and one in the rear. This caused the two systems in the rear to have inadequate drain fields. The trial court awarded $45,000 against the seller, contractor, and engineer, consisting of the cost to study the feasibility of connecting to the sewer system, the expense of pumping out the system, and the cost to add an aerobic system.

In reversing the judgment against the engineer, the court advanced a thoughtful hypothetical, cited in subsequent decisions, which differentiated the damages owed by a contractor and 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 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. 

Essentially, the 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 they been in the original design. Since the buyer only produced evidence of the cost of repair, the *Lochrane* court reversed the judgment against the engineer.

*Lochrane* references a Florida appellate decision, *Soriano v. Hunton*, which used the same betterment concepts in a defective design case involving the erection of steel framework for a bank. The bank hired an architecture firm to design a bank building. The architects, in turn, hired a structural engineer to
assist in the design of the bank by providing structural designs. When the 
builder began construction and came to the point where the structural design 
was to be used, the builder told the architects that the design was defective. The 
original structural engineer had disappeared by then. The architect, however, 
obtained two other structural engineer opinions that confirmed that the design 
was defective.

The architects proceeded with a new structural design that required tearing 
out some of the partially constructed building, resulting in greater expense to 
the builder and owner. Since responsibility for the design fell to the architects, 
and they had hired the structural engineer to assist with the design, they sued 
the engineer for breach of contract and indemnification.

The architects alleged that they incurred a total cost of $56,291 to complete 
the modifications. The trial court disallowed $10,780 for part of the 
modifications it deemed unnecessary and deducted $5,340 for the engineer’s 
recovery under a counterclaim, leaving a total damage award of $40,171 to the 
architects. 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.11 (Another Florida appellate court12 and the Supreme 
Court of Maine13 have issued similar rulings.)

Owners often ask designers to reimburse the cost of a change order issued by 
the contractor to install a component that was 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, the owner might argue that 
the contractor may have included a “premium” in the change order. That is, the 
contractor charged more than it would have if that work had been a part of the 
original design and thus incorporated into the bid or negotiated price for the 
project. The extent of any premium would not constitute betterment or added 
value since the owner would not have paid that much if the missing component 
had been included in the original design. The problem is that the contractor may 
not be forthcoming with the necessary cost information to determine if there 
was a premium associated with a change order. Therefore, the question of which 
party has the burden of proof (discussed below) becomes crucial because it may 
be pure speculation whether the change order includes a hidden premium.

Sometimes, the designer can verify the price of the omitted component 
through independent sources such as a catalogue, expert testimony, etc. If the 
contractor passed through the cost of the item and only added its standard 
overhead and profit, there would be no premium. If the designer can 
demonstrate this fact on one change order, the designer can then argue that the 
contractor probably did not include any premium on other change orders for the 
project. Unfortunately, it is not so easy to verify some change orders, particularly 
as to the amount of labor to retrofit the component. In some cases, the owner 
and designer may agree to settle the change order claims based upon an arbitrary 
percentage representing the theoretical premium charged by the contractor.

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 has imposed such an implied warranty of fitness\(^\text{14}\) (to be distinguished from an implied warranty of reasonable skill and diligence or workmanlike performance, which may constitute mere negligence\(^\text{15}\)). If the claim involves a design error and the jurisdiction in question imposes an implied warranty of fitness of the design documents, the designer may find it more difficult to successfully argue betterment or added value. This result would be consistent with the cases discussed below, which have refused to recognize betterment because the designer agreed to or represented that the design would be complete.\(^\text{16}\)

**Possible Exception: Representation or Warranty by the Designer**

What if the design professional, by oral statements or through contract language, represents to the owner that the design will be complete or function properly? In that scenario, some cases have held that betterment will not be available as a defense and that the owner should be entitled to enforce the representation or recover what is essentially the benefit of the bargain. For instance, in *Carter v. Wolf Creek Highway Water Dist.*,\(^\text{17}\) a design engineer brought an action against a water district to recover unpaid fees. 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 since the owner would have paid for it regardless of the plaintiff’s actions. However, the court found evidence that the parties intended the project to operate properly upon completion. Therefore, the owner was damaged when it had to incur the cost of the new distribution line.\(^\text{18}\)

The same result was reached in *Skidmore, Owings & Merrill v. Intrawest I L.P.*\(^\text{19}\). There the architect represented that it could design a functional building that would meet the owner’s tight budget and exacting schedule, and the architect made numerous representations that the drawings were complete. The owner relied upon the drawings to establish the amount of the guaranteed maximum price for the construction of a high-rise complex. As the construction progressed, the owner had to make extensive structural, electrical, plumbing, and mechanical changes, and the architect admitted that it had violated the standard of care. The jury awarded $820,372 for contract changes and extra work in addition to other damages. On appeal, the architect argued that the owner was receiving a windfall because even if the designs had been complete from the beginning, the owner would have paid for the additions to the project. The court distinguished this case from *Henry J. Robb*,\(^\text{20}\) *St. Joseph Hospital*,\(^\text{21}\) and *Lochrane*,\(^\text{22}\) finding “special circumstances” that required the court to affirm the verdict in favor of the owner. Although there was no express guarantee of the accuracy of the cost estimates, the court found that the architect knew the owner would rely on its drawings and estimates to establish the cost of construction.

**Possible Exception: Design-Build**

In some instances, the warranty provided by the design-builder 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 Design-Build Institute of America’s (DBIA) owner/design-builder agreement\(^\text{23}\) requires the design professional to exercise the 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, the document 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.”\(^\text{24}\) The term “Work” is defined as “the design, construction and services required by the Design-Build Documents....”\(^\text{25}\) A court could rely upon these design warranties and decline to require the owner to pay for what would otherwise constitute betterment arising out of an omission in the design.

**Possible Exception: Owner Would Not Have Built the Project or Accepted the Design**

As stated above, the application of the betterment defense is premised on the fact that the owner should not be placed in a better position than if the contract had been fully performed. In some cases, however, the owner may claim that the project or the particular design feature in question would never have been undertaken or 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 results reached by some courts.

The court did not recognize betterment or added value in *L.L. Lewis Const., L.L.C. v. Adrian*,\(^\text{26}\) 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 that 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.\(^\text{27}\) That is, the owners may have chosen to forego 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.\(^\text{28}\)

The court reached the same result in *State ex rel. Stephan v. Wolfenbarger and McCulley, P.A.*,\(^\text{29}\) where the State of Kansas sued an architect for negligent design of a ventilation system of a clinical science and pathology building. The system had a snow ingestion problem. During each snowfall, a large quantity of snow
was ingested into the building through the louvers, forming drifts that then caused damage when the snow melted. The state corrected the problem by extending the plenum air supply systems on the roof into eight snow chambers resembling huge doghouses. The owner also installed filters behind the air intakes. Snow then collected and ran off the roof harmlessly. The jury awarded the full cost of repair to the state. On appeal, the architect argued that this was a windfall to the owner because if the snow chambers had been included in the original plans, the state would have paid the same amount of money. The state responded that it would not have accepted the snow chambers in the original design and that they only installed them because other methods of repair were impossible considering the as-built conditions. Since the evidence was controverted on this issue, the Kansas Supreme Court upheld the jury verdict.

The fact that the owner would not have started a project if it had known of the design errors and the resulting costs was an important factor to the court in *Skidmore, Owings & Merrill v. Intrawest I L.P.* (discussed in the previous section).

A contrary result was reached in *Gagne v. Bertran*, where the plaintiffs testified that they would not have purchased property if they had known the truth about the presence of fill dirt. The court found that the plaintiffs had sustained no damage because of the erroneous soils tests by the defendant.

**Construction Omission**

With the traditional design-bid-build method of project delivery, it is more difficult to argue that the owner should absorb any of the damages when the contractor or supplier fails to provide a required component of the project. If the contract documents required the component that the contractor failed to install, 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, so the owner should not have to pay more to have the contract enforced. To this extent, the contractor is in a different position than the designer. Of course, 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 charge the owner? May the contractor argue unjust enrichment or betterment? As stated above, it is axiomatic that 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.

On the other hand, the contractor may have missed the requirement because of an alleged ambiguity in the plans and specifications. Although not rising to the level of a legal defense, for settlement purposes, the contractor may be able to make an "equitable" argument that the owner should not receive the item for free and that the owner, designer, and contractor should all should share the expense.

**Repair or Replacement of Defective Component**

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 necessary corrective measures taken
to 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.\(^\text{34}\)

The courts do not hesitate to limit the plaintiff's recovery against the
designer, contractor, or supplier to prevent a windfall of this type. The seminal
case is *St. Joseph Hospital v. Corbetta Const. Co., Inc.*,\(^\text{35}\) which involved claims
filed by a hospital against the architect, contractor, and the manufacturer of
plastic laminate wall paneling installed on the walls of the new hospital. The
paneling had a flame spread rating of approximately 17 times the maximum
permitted under the building code, and the owner had to replace it at a cost of
approximately $300,000. The jury awarded the entire cost of the repairs to the
plaintiff. 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.\(^\text{36}\) Following
the decision in *Henry J. Robb, Inc. v. Urdahl*,\(^\text{37}\) the court reduced the damage
award by $116,000, representing the cost differential of the paneling, associated
labor (the paneling was more difficult to install), and the additional hardware,
which had not been specified in the original design documents.\(^\text{38}\)

In *Fleming v. Scott*,\(^\text{39}\) two floor furnaces installed by a remodeling contractor
did not work properly. The plaintiff replaced the furnaces with a new forced-air
system with heat runners to all of the rooms. This work required excavation of
a basement where none had previously existed. The jury based its award on the
total replacement cost, including the excavation, but the Colorado Supreme
Court reversed and remanded the case for a new trial. The court ruled that the
owner could not charge the contractor for more and different kinds of materials
than embraced in the contract.\(^\text{40}\)

In *Oakwood Villa Apartments, Inc. v. Gulu*,\(^\text{41}\) an owner contracted with a
heating contractor to design and install a heating system in an apartment
complex. Several problems arose with the heating system immediately upon
installation. The owner sued for breach of contract. The court of appeals, in
rejecting the trial court's general award of $9,000, stated, "it is necessary to
determine what the parties bargained for and in which respects the performance
fell short of expectations."\(^\text{42}\)

The contract required the heating contractor to design a system that would
meet the latest Institute of Boiler and Radiator Manufacturers 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. Thus, the court pointed out:

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. 43

The court thus concluded that the plaintiff was only entitled to damages for the system that was bargained for and nothing more. The court did find, however, that the heating contractor was liable for work improperly performed during installation of the system. The evidence indicated that certain pipes were improperly soldered, which caused leaks in the lines and valves. The court said that damages should be awarded if the facts indicated that the leaks were attributable to the heating contractor and if the repairs were reasonable and necessary. Other courts have similarly denied recovery for enhancements or quality upgrades. 44

A swimming pool contractor was found liable for the cost of a retaining wall that was not included in the original plans for a pool. In Wright v. Stevens, 45 the homeowners claimed damages to complete the work, and the contractor objected to the cost of the retaining wall. The court found that the essence of the bargain was that the plaintiffs would receive a serviceable, lasting swimming pool, and held that it was a question of fact as to whether the retaining wall was necessary to fulfill that bargain. Therefore, the court affirmed the jury verdict awarding that cost to the plaintiffs. 46

Finally, the supplier of a roof claimed that the jury’s award of replacement damages unjustly enriched the owner in Board of Educ. of Charles County v. Plymouth Rubber Co. 47 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. 48 The court noted that contrary to the warranty, the plaintiff never really had a roof that was watertight (the decision begins with the statement, “This 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. Although the supplier offered evidence as to significant differences between the two roofing systems, it did not offer testimony to refute the conclusion that the new system was necessary to provide a watertight roof as guaranteed by the warranty. 49

Reduction for Extended Useful Life

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

In Allied Chemical Corp. v. Van Buren School District No. 42, 50 the district installed a 20-year roof on a school building. The roof leaked continuously after
installation. Nine years after the original project, the school district replaced a portion of the roof, and two years later, 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 only two years of use.\(^5^1\) The Arkansas Supreme Court disagreed, finding that the cost of replacing the first roof section should be prorated on an 11/20 basis to recognize nine years of use, and on a 9/20 basis for the second replacement to recognize 11 years of use.\(^5^2\) 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 school district’s continued use of the original roof.\(^5^3\)

In another roof case, *Bloomsburg Mills, Inc. v. Sordoni Construction Co.*,\(^5^4\) the Pennsylvania Supreme Court reached the same conclusion and reduced the plaintiff’s damages based on the years of actual use. The building owner brought an action against the architect for improper design of the roof, which had been guaranteed by the manufacturer for 20 years. The cost of the original roof was $14,979. The owner spent $32,420 to replace the roof after 8.5 years of use. In affirming the jury verdict of $18,645, the supreme court found that it was appropriate for the jury to reduce the damages by 42.5 percent (8.5 years divided by 20) and award 57.5 percent of the replacement cost.\(^5^5\) The Supreme Court of New Jersey reached the same result in *525 Main Street v. Eagle Roofing Co.*\(^5^6\)

The courts have also prorated the damages for other building components. For example, in *Rhode Island Turnpike and Bridge Authority v. Bethlehem Steel Corp.*,\(^5^7\) the bridge authority brought an action against Bethlehem Steel (Bethlehem) 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.”\(^5^8\) The trial court found that the original paint afforded some degree of protection to the bridge for three years, but the plaintiff had contracted for a paint job that should have lasted 12 years. The court concluded that the defendant deserved a credit of $1,378,039, representing 25 percent of the cost of the repairs ($5,512,158), entering a judgment for $4,134,188. On appeal, the defendant argued that remedial work was performed over several years and that the court should calculate the credit accordingly. The Supreme Court of Rhode Island rejected that argument, ruling that to permit Bethlehem credit for the extra time it took to cure its breach and paint the 2.5 mile long bridge would “wrongfully allow the company to benefit from the fortuitous fact” that it took several years to repaint the bridge.\(^5^9\) The court held:

> 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.\(^6^0\)
The court remanded the case for a determination of damages based upon its ruling.\footnote{61}

In \textit{Fleming v. Scott},\footnote{62} the Supreme Court of Colorado held that the defendant-contractor was entitled to a credit with respect to the owner’s damages for replacement of two floor furnaces. The court held that the homeowner “is not entitled to be placed in a position more advantageous than she contracted for.”\footnote{63} 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.\footnote{64} The court also held that the trial court should have instructed the jury to take into consideration the 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).\footnote{65} The court reversed the jury verdict for full replacement cost and remanded the case for a new trial.\footnote{66} Other courts have also reduced recoveries to account for the use enjoyed by the plaintiff.\footnote{67}

Some courts have declined to reduce the owner’s damages based upon depreciation or useful life. For example, in \textit{Price v. B. Const. Co.},\footnote{68} purchasers of a house 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 50 years. The issue on appeal was whether the jury should have been instructed to prorate the damages over the 50-year life expectancy of the new system, \textit{i.e.}, whether the damages should have been limited to $1/50$ of the replacement costs since the original guarantee was only for one year. The defendant argued that it would be unfair to require payment of a sum that would give 50 years of freedom from water infiltration. Applying the test established in \textit{525 Main Street},\footnote{69} the court found that the parties bargained for work of a greater life expectancy than the one-year guarantee.\footnote{70} Finding that the damages were appropriate and should not be reduced by depreciation, the court reasoned:

\[\text{[U]nlike a roof which has limited life due to its exposure to the elements,}\]
\[\text{the cellar of a new house that remains free from water for one year after its}\]
\[\text{construction might reasonably be expected to remain free from water}\]
\[\text{indefinably thereafter.}\]

When a telephone transmission tower collapsed after the owner had used it for more than half of its 50 to 75-year life expectancy, the Fifth Circuit Court of Appeals applied Louisiana law and refused to reduce the damages for depreciation. In \textit{Boston Old Colony Ins. Co. v. Tiner Associates, Inc.},\footnote{72} the lower court granted the plaintiff’s motion \textit{in limine} to exclude any evidence of depreciation. On appeal, the defendant (the contractor that failed to temporarily brace the tower during repairs) claimed that the court should have considered depreciation because half of the tower’s useful life had been expended at the time of the collapse, citing \textit{Bellsouth}.\footnote{73} In rejecting that contention, the court distinguished the holding in \textit{Bellsouth} based upon the long life expectancy of the tower. Unlike the plaintiff in \textit{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.\footnote{74} The appellate court affirmed the district court’s ruling on the motion \textit{in limine}.\footnote{75}
Courts have also 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.*, the owner used a roof for seven years before replacing the rest. The defendant essentially made a betterment argument, which the trial court rejected. 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.77

At least one Louisiana Court of Appeals has followed *Five M. Palmer Trust*. A Delaware court declined to reduce the damages for depreciation under the facts before citing the potential for jury confusion. In *Council of Unit Owners of Sea Colony East v. Carl M. Freeman Associates, Inc.*, the condominium association claimed a multitude of construction defects. The plaintiff filed a motion *in limine* in an attempt to block the defendants from presenting any evidence to reduce the damages based upon the "useful life theory."

The owner replaced the roof after 13 years of use, and the association claimed other problems in the condominiums such as defective walls, concrete balconies, and walkways. The court noted that unlike the roof these various building components may not have clearly identifiable life expectancies, distinguishing *Bloomsburg* and *Allied*. The court 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 have unduly benefited the defendants. The court also 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.

**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*, 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.\textsuperscript{85} (citation omitted)

Other cases have arrived at similar results. In \textit{Carter v. Quick},\textsuperscript{86} the owners entered into an oral contract for the construction of a dwelling for a price of $25,000. After moving into the home, the owners initiated an action for breach of contract, alleging that the builder represented that 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. The owners also alleged negligent performance of the contract. After a bench trial, judgment for $4,060 was granted to the owners and the builder was allowed $205 on a counterclaim. The bulk of the owners’ damages represented the cost of replacing a brick veneer on the front of the home. On appeal, the primary dispute involved the appropriate measure of damages for replacement of the brickwork.

After meandering through a general discussion of the law of damages in Arkansas and elsewhere, the court settled on a rule allowing for the cost of curing the defects except where curing the defects would cause unreasonable economic waste. The court further recognized that it was undisputed that the current market value of the home (with the poor brickwork) exceeded the contract price, which suggested that perhaps no damages were due. However, the court felt that the owners should not be deprived of the benefit of their bargain.

The builder contended that the cost of the brick replacement was so excessive as to render replacement costs unavailable as a matter of law. The court was not persuaded, stating:

\begin{quote}
It 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 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.\textsuperscript{87}
\end{quote}

The dispute in \textit{Dierickx v. Vulcan Industries}\textsuperscript{88} 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 attempts to stop seepage in the basement, the contractor gave up. During this 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, seeking damages, including the amounts paid to the original contractor and the second contractor and for damages for personal injury and property stored in the basement. At trial, the court found that the contractor breached its contract and gave judgment to the owner for $230, the amount the owner had paid to the contractor under the waterproofing contracts.

On appeal, the court opined that the owner’s claimed damages for a subsequent contract that resulted in a greater benefit than was promised by the original contractor (no seepage for in excess of five years) was not well founded.
On the other hand, the trial court had improperly limited the owner’s damages to the original contract price. The court held that the proper measure of damages was the lowest cost of furnishing the owner a dry basement for the warranty period of five years. The owner was entitled to this measure of damages even if the damage amount exceeded the original contract price. In addition, the owner could recover incidental damage caused by the breach.

In a recent case decided by the Kansas Supreme Court, the court allowed the owner 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 reached the same result.

**Other Applications of Betterment or 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 reluctantly prepare and provide such estimates. While cost estimating is an everyday, mundane task in the construction industry, the issue of cost is anything but mundane and is many times a source of heated conflict among owners, contractors, and designers.

In many jurisdictions, if a design professional significantly underestimates the cost of the 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 case review provides a general discussion of the risks to a design professional when cost underestimation becomes an issue and how the concept of betterment may apply.

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

On appeal, the owner contended that the trial court erred in dismissing his claim for increased costs. The appellate court agreed, and observed that the owner’s claim arose out of 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 costs would exceed $375,000, knew that a fair return on the owner’s investment could not be achieved if the cost exceeded $375,000, and failed to inform the owner of the increased cost 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 court agreed that the dismissal of the owner’s claim was an error, in *obiter dictum* the court rejected the owner’s contention that damages should be measured by the increase in construction costs. The court reasoned:

> 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].

Instead, the court stated the measure of damages as:

> 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.

Finally, the court ruled that an architect should not recover fees if the actual cost of construction is not reasonably near the estimate.

Thus, under the circumstances of *Capitol*, recovery of lost profits is permissible, subject to appropriate proof, including the owner’s instruction to the architect to prepare the estimate with the understanding that constructing the hotel at issue would produce a fair return on investment under the circumstances.

In the more recent case of *Kellogg v. Pizza Oven, Inc.* a pizza parlor wished to construct a building on land owned by another. The pizza parlor and 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.

The 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.

The court allowed recovery of the difference between the actual cost of the building and the estimated cost, less change orders and the customary ten percent permissible variation. The court distinguished cases disallowing such damages, reasoning that such cases involved owners whereas the pizza parlor was not an owner, but a lessor. More importantly, the court reasoned that other cases involved buildings with increased value or the potential for increased rental
income, but no such evidence was submitted demonstrating any potential for increased efficiency, increased customer revenue, or an increase in 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.”

**Real Estate Purchase: Diminished Property Value**

The question of betterment may arise in the context of the purchase of real estate. The buyer intending to build a project may rely upon a professional that renders advice on the suitability of the land for the building, e.g., soils 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 in point turn on whether there was in fact some diminution in value because of the faulty advice.

In *Gagne v. Bertran*, the Supreme Court of California held that the plaintiffs failed to prove that they had been damaged by incorrect soils 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.

In *Cory v. Villa Properties*, the court considered a suit by the buyers of real estate 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. The 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 since the value of the property was greater than or equal to the purchase price. However, the court 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).

**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...
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). For example, the Texas Court of Appeals considered the question in Hollingsworth Roofing Co. v. Morrison. A homeowner sued a roofer that allowed a swimming pool to remain uncovered during roofing repairs, which allowed tar to fall into the pool. The court entered judgment 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. The court held, “The party urging such a contention has the burden to show that the repair, as made, resulted in an enhancement of value.” Since the defendant produced no evidence establishing any enhanced value, the judgment in favor of the plaintiff was affirmed on that issue. Another Texas Court of Appeals held that the defendant was not required to specifically plead betterment, but that the defendant had the burden of proof that there was enhancement.

However, some courts have held that the owner has the burden to prove that there was no betterment or added value. On occasion, some courts have directed a verdict against the owner for failing to properly itemize the damages. In City of Westminster v. Centric-Jones Constructors, the city sued the prime contractor and designer, claiming problems with its wastewater treatment plant. The city claimed the total cost to replace 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 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.

In Neal v. Saizan, a homeowner sued the contractor that designed and constructed a roof over an addition to a home. The trial court found that the defendant was negligent in the design and construction of the roof that 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 award any damages above that amount because it found that the roof as rebuilt was an improvement and that there was no evidence adduced as to the cost of repair versus the cost of the improvement. 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. Therefore, the appellate 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.
The highest court in Maryland reached the same result in two decisions. In Corelli Roofing Co. v. National Instrument Co., the owner of a building sued a roofer for breach of a guarantee that the roof as installed would not leak. The plaintiff sued for the cost of a replacement roof. The trial court ruled in favor of the plaintiff, awarding the replacement cost of the roof, but the appellate court reversed as to the damage award. The higher court found that the proper measure of damages for an express warranty is the amount of money that will render that which is guaranteed to be as warranted. However, since there was no evidence of the type of new roof installed, the extent of the new warranty, or how it compared to the original roof, the court ordered a new trial on damages. The court found that there was insufficient evidence on which to base an award since the owner had not adequately proven its damages. Corelli was followed by the Maryland Court of Appeals decision in Hooton v. Kenneth B. Mumaw Plumbing & Heating Co., Inc. This issue has practical implications. 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 contract. For example, all or part of the following provision might be included in an owner-architect/engineer agreement (the second paragraph could also 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 repair or replace a component of the Project 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 designer’s agreement to pay such a “premium” may violate 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 this defense. 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.
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3 The term “added value” might imply that the defendant must prove that an omitted item would add to the market value of the improvement, which is generally not a requirement.

4 The term “betterment” appears in some administrative decisions. See, Nordair Engineering Corp., 98-2 BCA P 29967 (Eng. B.C.A. 1998) 1998 WL 601243, where 16” access holes drilled in the floating floor slab were not considered betterment since they were needed for the retrofit, and any benefits were incidental and perhaps even detrimental. Credit was given for the extended useful life of polyurethane pads; Steelship Corporation, 78-2 BCA P 13478 (Eng. B.C.A. 1978) 1978 WL 2240, where the cost of replacement boat procured after termination of contractor-supplier included betterment due to enhancements.


8 Id. at 232-233.

9 Id. at 233.


11 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.”

12 See, also, Grossman v. Sea Air Towers, Ltd., 513 So.2d 686 (Fla. App. 1987), rev. denied, Grossman v. Sea Air Towers, Ltd., 520 So.2d 584 (Fla. 1988). The 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.
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.”


Betterment or Added Value? The Defense with an Identity Crisis

38 Id. at 940-941.
40 Id. at 702.
42 Id.
43 Id.
44 Community Television Services, Inc. v. Dresser Industries, Inc., 435 F. Supp. 214 (D. S.D. 1977), aff’d, Community Television Services, Inc. v. Dresser Industries, Inc., 586 F.2d 637 (8th Cir. 1978), cert. denied, Dresser Industries, Inc. v. Community Television Services, 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 & Associates, 524 So.2d 488 (Fla. App. 1988), rev. denied, Hunton, Shivers, Brady & Associates 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, Grossman v. Sea Air Towers, Ltd., 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 Center v. Thyne Const. 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 Engineering, Inc. v. Willingham Realgrowth Inv. Fund Ltd., 552 So.2d 228 (Fla App. 1989), rev. denied, Lochrane Engineering, Inc. v. Willingham Realgrowth Inv. Fund Ltd., 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 Property and Building Commission of Dept. of Finance v. H.W. Miller Const. 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 was not entitled to have her addition constructed with 30’ wood pilings instead of 12’-15’ concrete pilings. Recovery was limited to what the contract provided. Bachman v. Parkin, 471 N.E.2d 759 (Mass. App. 1984), rev. denied, Bachman v. Parkin, 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 that 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). The owner was not entitled to the 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, Harley Paws, Inc. v. Mohns, Inc., 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 (Wy. 1981). Home purchasers suing a builder may not include in the repair and completion costs the value of cedar shake shingles when the original bargain was for asphalt shingles. See, Philip L. Bruner and Patrick J. O’Connor, Jr., Bruner and O’Connor on Construction Law §§19.26 to 19.28 (2002); See, also, John P. Ludington, LLB, Annotation, “Modern Status of Rule as to Whether Cost of Correction or Difference in Value of Structures is Proper Measure of
45 Wright v. Stevens, 445 So.2d 791 (Miss. 1984).
46 Id. at 796.
48 Id. at 1297.
49 Id.
51 Id. at 449.
52 Id.
53 Id. at 450.
55 Id. at 204.
56 525 Main Street Corp. v. Eagle Roofing Co., 168 A.2d 33 (N.J. 1961). The owner’s recovery for a defective roof must be prorated for expected life of the replacement roof beyond the remaining guaranteed useful life of the original, defective roof.
58 Id. at 1297.
59 Id.
60 Id.
61 Id. at 1298.
63 Id. at 702.
64 Id.
65 Id.
66 Id.
70 Id. at 27.
71 Id.
74 Id. at 231.
75 Id. at 234.
77 Id. at 366.


Id. at 363.

Id. at 364.

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

Id. at 906-07.


Id. at 465.


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

Capitol Hotel Co., Inc. v. Rittenberry, 41 S.W.2d 697 (Texas App. 1931).

Id. at 704.

Id.


Id. at 634.


Id. at 22-23.


Id. at 633.

Id. at 634.

Fed. R. Civ. P. 8(c).


Id. at 876.

Id.

Id.

Id.


228 (Fla. App. 1989), rev. denied, Lochrane Engineering, Inc. v. Willingham
Realgrowth Inv. Fund Ltd., 563 So.2d 631 (Fla. 1990); Zindo v. Pelican Builders,
1986); Corelli Roofing Co. v. National Instrument Co., 214 A.2d 919 (Md. 1965);
(Md. 1974).
110 City of Westminster v. Centric-Jones Constructors, 100 P.3d 472 (Colo. App.
2003), cert. granted, City of Westminster v. Centric-Jones Constructors, 2004 WL
2504512 (Colo. 2004).
111 Id. at 478.
113 Id. at 833.
114 Id. at 833-34.
115 Id.
117 Id. at 921.
118 Id. at 922.
119 Hooton v. Kenneth B. Mumaw Plumbing & Heating Co., Inc., 318 A.2d 514,
519 (Md. 1974).