

## A Loss Cause Too: Betterment

by Grant A. Simpson, FAIA, and James B. Atkins, FAIA

We addressed the concept of betterment, or added value, in our first risk management article [[www.aia.org/risk\\_losscause](http://www.aia.org/risk_losscause)] more than two years ago. Since then we have encountered no reduction in the confusion and general lack of understanding of the concept



of betterment. Central to the confusion is if and by how much owners are damaged when an architect, engineer, or contractor makes a mistake on their project. Secondly, there is a general lack of understanding that some errors and omissions are to be expected, and thus some amount of damage caused by them is also to be expected. At the risk of jumping in the shark tank once again, we will address the issues surrounding betterment in more detail in this article.

As with most of our work, this article contains references to court pleadings, allegations by plaintiffs, and citations from AIA documents and publications as well as *Black's Law Dictionary* and *Roget's Thesaurus*. We

have been criticized for citing these sources instead of strictly following court rulings. However, this material has repeatedly proved to be helpful in settlement of arguments, and since 97 percent of lawsuits settle out of court, according to Legal Reform Now, case law, although meaningful and relevant, is not always the most useful tool in the architect's dispute resolution ef-

forts, essentially because most architects are not lawyers, and most lawyers are not architects.

We encourage you to consult your lawyer, but also to study all material sources that will assist you in understanding your legal

rights and your options in explaining complex subjects to your clients as you attempt to resolve disputes. This article is written with the intention that it can be presented to your clients, other business associates, and even your lawyer for the purpose of explaining betterment from the viewpoint of an architect. Hopefully, it will assist you in avoiding disputes regarding betterment in the future.

### Unjust enrichment

The matter of unjust enrichment lies at the foundation of most issues surrounding betterment in the context of building construction. *Black's Law Dictionary* addresses unjust enrichment as the:

*"General principle that one person should not be permitted unjustly to enrich himself at expense of another, but should be required to make restitution of or for property or benefits received ..."*

In civil disagreements, laws provide an organizational structure designed to help the parties in dispute reach a just and equitable resolution. If an architect providing professional services is negligent and damages another party, and an agreement as to restitution of the damage cannot be reached through an alternative method of dispute resolution, then the laws of the land will help the parties reach a resolution. It is not the intent of the law that any party be unjustly enriched by the outcome of a lawsuit. The fundamental intent of the law is that a party bringing a lawsuit be restored to the same position they would have been in if no damage had occurred.

Betterment can be a complex issue in a damage claim when considering both the measure of damage and the measure of improvement upon the property. The measure of improvement must be viewed as betterment, and the damages caused by the expense of correcting the mistake, or impact expenses, are the measure of restitu-



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tion. Nonetheless, when owners are confronted with repair and betterment costs, they frequently do not differentiate between them and often feel the design professional is responsible for both. This attitude grows more likely if much time passes before the mistake is discovered.

There can be circumstances, imposed by contract, where an architect may be liable for all costs over a certain amount, including betterment. This can occur when an architect agrees to guarantee the total cost of construction. Although it is rare in architecture today, architects should be very careful when signing contracts with wording that constitutes a guarantee of construction cost or budgets, and they should never consider such clauses without the advice of an attorney.

### Betterment

Black's Law Dictionary describes betterment as:

*"An improvement of a ... building that goes beyond repair or restoration."*

Examples of betterment include:

Five light fixtures have been designed over a dining room table. The owner decides, after construction commences, to add a sixth fixture to accommodate a longer table recently purchased. All expenses related to adding the fixture are betterment.

In another example, no light fixture has been shown in an entry closet. During construction, the owner decides to add a light fixture in the entry closet. All expenses related to adding the fixture are betterment.

And, in another example, as a project nears completion, the owner decides

to add a storage room in the attic of a new home, above the two-car garage. All expense related to adding the storage room is betterment.

All of these examples involve changes that the owner decided to make after the design was completed and construction had commenced. Nonetheless, owners sometimes make claims against architects for the cost of changes that they decide to make because of something that the architect, ostensibly, should have known. Such changes, made at the sole discretion of the owner after the construction contract is signed, will always be betterment.



### The standard of care: mistakes

Architects are human like everyone else and make mistakes. Accordingly, the standard of care for the practice of architecture is not perfection or perfect performance. Logically, if perfection is not the standard, a certain measure of imperfection becomes the standard. Although architectural services must be sufficient in providing designs, documents, and services, those services and products of service cannot reasonably be expected to be perfect.

When a mistake does occur, conformance to the standard of care will be determined by whether or not another architect may have made the same or similar mistake under the same circumstances. It follows that the standard of care will not be that there was no chance for a mistake at all.

By any measure of expectation for

the performance of an architect, there must be some level of expectation of mistakes. This is true for any professional, in any discipline, be it engineering, construction, or law. Given the fact that most mistakes cost money to correct, contingencies should be provided within the budget to cover the cost of mistakes that are reasonably expected to occur.

### Is betterment involved in errors and omissions?

Betterment is involved in the majority of errors and omissions claims when an architect has made a mistake in the construction documents or has omitted or left something out of the documents that is required to build the building.

In our original article, "A Loss Cause," published in 2004, we cited an example of betterment that effectively describes the fundamental balance between value added to the project and the impact damages caused by remediation:

*"An owner ... hires an architect to design a house. The owner instructs the architect to specify gold-plated faucets in all lavatories. When the project is completed, the owner discovers that pewter faucets of the same design as the gold faucets have been installed*

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*instead, and he demands that the architect pay for replacement of the faucets. The gold faucets are priced at \$1,000 each at the plumbing showroom. The pewter faucet costs \$200 each and they cannot be returned to the vendor. The plumber informs the owner and architect that the replacement cost is \$75 for each faucet. What is the actual amount that the owner has been damaged for each faucet?*

*In this case, the total damages to the owner for each faucet is \$275 (\$200 for the original unusable faucet plus the \$75 labor charge to remove the pewter faucet and install the gold faucet). The owner must rightfully pay to purchase the \$1,000 gold faucet because the original construction costs did not include the value of the gold faucet."*

This example succinctly clarifies the reality that the full measure of appropriate restitution includes only the cost of the original defective design, plus the remediation costs, and not the total cost of the remediation. An unfortunate misunderstanding in many claims made against architects is that owners believe the damages in this example should be either \$1,075, or \$1,275, both of which represent unjust enrichment to the owner.

### Damages when betterment is involved

If all or a portion of the cost for a particular claim issue involves work or scope that would have been necessary to construct the project regardless of whether the alleged error or omission had occurred, this work, or betterment, enriches the owner and is the owner's obligation. Further, when remedial work is required, whether it be reconstructive or simply added

scope, the solution to the problem arising from an error or omission must be reasonable in the context of the original project design conditions. For example, if the project was designed and constructed under a very restrictive budget and extensive "value engineering," the resolution of a damage claim must include restitution consistent with the cost restrictions originally guiding the actions of the project team. A "gold plated" or "Cadillac" resolution would be inappropriate and would likely represent unjust enrichment.



Expert consultants often confuse their own preferences with the standard of care. What an expert employed by the plaintiff would have preferred to do is not the standard of care. There is frequently, if not always, more than one way to arrange information on a drawing, represent a design, or detail a complex assembly. Different professionals do things differently and yet arrive at similarly sufficient and satisfactory results. The standard of care is not defined through determining that an architect could have done something differently, but through determin-

ing if the way the design professional did something was not objectively sufficient.

Unfortunately, when a lawsuit is filed, many experts hired by the plaintiff are not motivated to find a reasonably priced solution for a client who believes they have been damaged. These plaintiffs are upset about the damage, and they want to be made whole in every respect. The plaintiff's expert is more likely to lean toward a solution that is guaranteed not only to fix the problem, but also to make sure the plaintiff is happy with the "fix." The experts select better systems and better quality materials for the remediation than the owner paid for or had the ability to pay for originally. It is common in such circumstances to find that these "fixes" often include betterment, and they are implemented on the belief that the architect is going to make the owner whole in every respect and is going to pay for the full cost of the fix. In such circumstances, plaintiff's experts may try to camouflage betterment within the argument that the full cost was required for "remediation" of the damage.

The spectrum of damages impacting the architect can range from no damage costs, as in the case where the entire resolution of the claim is betterment, to all costs incurred, as in the case where the resolution results in no improvement to the property or added-value to the owner. We will look at examples of each of these conditions later in the article.

### Damages when betterment is not involved

There can be cases where the architect has made a mistake and no betterment is involved in resolving the mistake. If the resolution of the mistake involves only remediation of the condition and does not result in

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increased value, the entire cost may be compensable repair damages. Consider the following example:

An owner has constructed a high rise office building. In the men's restrooms, the urinals have been designed with alcoves that are separated by drywall partitions that have been clad with ceramic tile. After the owner occupied the building, the local code official denies tenant construction permits because the urinal alcoves are too deep for their width and thus do not comply with the ADA Standards for Accessible Design, which had been made a part of the local code. The solution to the problem is to demolish the alcoves and make them shallower so that the width of the alcove complies with ADAAG. In this example, there was no improvement beyond restoration, and thus the entire cost of the solution represents impact damages attributable to the architect.

### Why the owner is responsible for betterment

Many owners struggle with the fact that they must pay for all or a portion of someone else's mistake. The reason is very simple. The architect's contract is not based on perfect or complete performance. As with all professional services, the measure of the standard of care is whether the services provided were sufficient. There are conditions in the general contractor's contract that require them to provide "complete" or fully functional systems and assemblies, but the architect is not ordinarily bound to such conditions. The architect is not responsible for the work or a "complete" scope. Completeness in professional services is almost always subjective and not objective. While the architect tries to provide complete drawings and specifications, the human factor will always prevent this from occurring in an absolute sense.



The architect's drawings and specifications are not a product, and the obligation for completeness does not exist such as when you purchase an automobile. You have the right to expect the vehicle to be complete in every way, and if it is not, you exercise the automaker's "warranty" to be made whole. Any part that is missing or defective must be provided or replaced. Under general legal principles, the architect provides no warranty regarding the drawings and specifications. These are only the architect's instruments of service, the adequacy of which is judged by the standard of care previously discussed, and they will always require some measure of interpretation and clarification when they are used for construction.

That is why the owner must pay for added scope and the architect and the contractor do not. Consider the following example that might occur in everyday life:

A landscape company sells flowering plants installed by the flat. A homeowner orders seasonal flowers for his flower beds at his house. The landscape company estimates 10 flats to

do the job. When installation begins, it is discovered that 10 flats are not enough, and 2 more flats are required to fill out the beds. The landscape company sold 10 flats and they are only responsible for installing 10 flats. The homeowner will have to pay for installation of 2 more flats if they want the flower beds filled.

It is puzzling that so many owners struggle with this same condition, a condition where additional scope or product is required, when dealing with design and construction and the cost of their buildings.

### What plaintiffs often claim

Unfortunately, when claims are made against architects, the claims seldom recognize any value for betterment. Commonly in plaintiff's pleadings, a simple listing of proposed change orders, change order requests, or change orders is presented as the measure of damage that the plaintiff wants to be reimbursed for. In other words, "I spent the money, so you pay me back." In almost all cases, even a cursory review reflects that most or all of the claim issues involve tangible additions to the building, or better-

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ment. Consider the following example:

The owner has built an office building with a meeting area and a lobby constructed in a portion of the basement. The original intent was to pour the basement wall in architectural concrete and leave the concrete exposed in the lobby. The architect failed to specify architectural concrete, and the plaintiff was not happy with the structural-grade concrete finish. The architect proposed a remedial solution of coating the basement wall with plaster with a "Venetian" finish, at a cost of \$25/sf. The owner asked for designs for cladding the walls with burlled maple paneling. The owner selected the paneling at a cost of \$60/sf and demanded that the architect pay the entire cost.



In this example, the owner rejected the reasonable resolution, a resolution that would have put him in as nearly the same position as he should have originally been, and instead selected a resolution that could never have been anticipated based on the original design environment. The more expensive wood paneling is betterment to the

extent that the actual damage to the owner was represented by the \$25/sf cost of the proposed Venetian finished plaster, a similar grade of finish. The owner would be unjustly enriched if the architect were required to pay the full \$60/sf cost of the wood paneling.

### Too much betterment

Plaintiff's also often claim that the additional costs related to errors and omissions got out of control and deprived them of the opportunity to manage their budgets. In such cases, the plaintiff's experts are likely to opine that there was "too much betterment," so the architect should pay for some or all of it. Plaintiffs may attempt to justify their gains due to betterment within the argument they would not have proceeded with the project if they had known in advance what the final cost would be.

This "too much betterment" allegation disregards the reality that the owner is the sole beneficiary to the added value to the project. Requiring the architect to pay for the full scope of betterment represents unjust enrichment and is not a fair measure of damage. In reality, people who invest their money in the scope of buildings, as these owners request the architect to do, retain some degree of ownership.

Claims such as this can be especially problematic on fast track and negotiated GMP projects where there is no fixed construction cost and construction has proceeded before the construction documents are completed. (For a more complete discussion, refer to "Managing Risk on Fast Track Projects," by Simpson and Atkins, in *The Architect's Handbook of Professional Practice Update 2006*.)

### The timing of discovery

Although beyond the scope of this article, the stage of project progression

can dramatically impact the measure of compensable repair damages involved in a mistake. For example, if a mistake is discovered during the bidding and negotiation phase, the mistake will involve a solution that is entirely on paper, and probably will have minimal, if any, impact expenses. On the other hand, if the construction is complete and the project is about to be occupied, the amount of impact expenses may greatly outweigh the amount of betterment.



### Observing the standard of care

This article is not intended to convey the idea that all parties involved in an architectural project should carry a calculator and constantly keep score on each other in the mistake game. Nonetheless, "score" in today's construction industry always relates to money. It is reasonable, although perhaps not in concert with the strict measure of the law related to liability and damage, that the architect should not have to pay the owner for every part, piece, and parcel of repair expenses related to errors and omissions. Mistakes, or errors and

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omissions, are always going to occur, and owners should wisely establish budgets that include contingencies to cover the cost of a reasonable measure of human mistakes.

As a caution, architects should also pay heed that excessive expenses as a consequence of errors and omissions they make may well exceed a reasonable standard of care and thus give rise to a reasonable expectation by an owner that the architect should reimburse those excessive expenses.

### Conclusion

The issue of betterment ranges from obvious black and white to chaotic conditions of great complexity. When time, inconvenience, and unforeseen expenses enter the argument, the emotion and intensity usually increases. Nonetheless, the overriding issue is that the legal system was not intended to allow a party in a dispute to become unjustly enriched.

Solutions to errors and omissions may contain no betterment and consist entirely of impact expenses, they may totally consist of betterment, or, more commonly, they may be made up of both. In any case, when such disputes arise, the better the parties are informed, the more likely an equitable settlement can be reached. While most courts do not hold designers accountable for the cost of betterment, since almost all cases settle out of court, a clear understanding among the parties can help facilitate a quicker resolution.

So, as you are getting ready for that meeting with the owner of a new office building that you designed to explain why he or she will have to pay for the granite countertops that were not scheduled in the restrooms, grab that copy of A Loss Cause Too: Betterment, from the printer to give to the owner, and don't forget to be careful out there.

### Reference:

This series will continue next month in *AIArchitect* when the subject will be "Love Me Tender, Maintaining the Client Relationship."

If you would like to ask Jim and Grant a risk or project management question or request them to address a particular topic, contact [legalcoordinator@aia.org](mailto:legalcoordinator@aia.org).

James B. Atkins, FAIA, is a principal with HKS Architects. He serves on the AIA Documents Committee and is the 2006 chair of the AIA Risk Management Committee.

Grant A. Simpson, FAIA, manages project delivery for RTKL Associates. He is the 2006 chair of the AIA Practice Management Advisory Group.

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