



ADVISORY BULLETIN

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WHAT IS BETTERMENT?

Betterment is a legal doctrine that can reduce the monetary value of a professional liability claim asserted against a design professional. Outside of hypothetical settings, many design professionals have not heard the term “betterment” used; even fewer know its actual meaning. Most design professionals go an entire career without a claim, so the doctrine may never have come up. This Advisory Bulletin reviews and discusses “betterment” using real world scenarios.

Generally, betterment is a defense raised in a design context to a monetary claim made by an owner for an allegedly deficient design. The defense of betterment can be used both by design professionals and contractors; however, design professionals will be the focus of this article. Importantly, betterment is not a defense to liability. Even though there may be a problem with a design (professional liability), the betterment doctrine may limit the design professional’s monetary responsibility to the owner/claimant. For example, an owner may be precluded from recovering some of the cost for a repair, even if the repair was required because of professional liability.

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Why? Because the repairs may result in an improvement the owner would had to have paid for anyway. This is also called “first dollar cost.” Betterment also occurs when the repair results in an improvement over what was originally intended.

HOW DOES THE LAW APPLY BETTERMENT?

The betterment defense holds that any added value from a repair must be considered when quantifying the design professional’s liability for causing the need for that repair. The law does not allow an owner to be put in a better position than he or she would have been in had the professional liability not occurred. However, when unanticipated work is required to bring a constructed design back into compliance with code, the contract documents, or otherwise, the owner may recover increased costs that would have been avoided had the design been correct at the outset. These expenses become a component of the total cost of repair, and are known as “premium costs.”

Timing plays a crucial role in the availability of the betterment defense, and to what extent it can apply to reduce monetary liability. The key timing components are whether the project has been bid and a contract signed with the contractor, and if so, has this design element been constructed? If not, the owner may not have suffered compensable costs, at least not yet. With no compensable costs in play, a design change may fix the problem; however, the design professional will generally not be compensated for his or her re-work. On the other end of the spectrum, if the owner or contractor has spent money to construct all or a part of a deficient design, and must spend more to remediate the constructed design, the owner will attempt to recover these costs from the design professional who may have both a betterment defense and an associated defense of limitation of expense to the owner’s “first costs.”

REAL WORLD HYPOTHETICALS: DOES THE BETTERMENT DEFENSE APPLY?

Example 1

The design fails to include an ADA compliant entry ramp. A betterment defense does apply. If the missing ramp is identified prior to the project being bid/contracted, or prior to the owner spending money implementing the design, then the design may simply be changed to include the ramp. If the project has been bid, but construction has not started, the contractor’s price must be updated to include the ramp. If the project has been built, the ramp must be added. In the latter two scenarios, the owner would have been required by code to build and pay for a project with an ADA compliant

ramp. Although not in the initial design, the owner does not get the ADA ramp for free. That would be an impermissible betterment to the property. However the owner gets to collect any “premium costs” that are required to put the ramp in later, or for the contractor to adjust its bid, if those costs are higher than had the ramp been properly included in the original design.

Example 2

A 1,000 square foot septic drain field is designed and constructed, but the correct size should have been 1,500 square feet. Yes the betterment defense applies. By code, and functionality requirements, the owner would have had to pay for, and install, a 1,500 square foot drain field. In this scenario, the owner must pay for the additional 500 square feet. The design professional would be responsible for the premium costs, i.e. the difference in the cost had the additional square footage been installed as part of the original construction.

Example 3

Structural steel is missing from part of the design, but was not discovered until construction was complete. Betterment applies, but only to some of the costs to address the problem. Betterment/first dollar costs applies to the missing structural steel itself because the owner would have had to pay for the steel if it was in the original design. However the owner is entitled to recover its premium costs associated with the remedial work because this is added work rather than original competitive procurement. The owner is also entitled to the “rip and tear costs” to access where the structural steel is missing. In this example, if it was a slab, these costs could be rather high given the nature of what must be accessed in order to add the steel.

Example 4

A designed and constructed 20 year roof fails after 10 years. The owner replaces it with a new 20 year roof. Disregarding installation issues, the betterment defense applies. The owner used the roof for 10 years. The owner does not get the cost of the new 20 year roof. The owner may be compensated for the value of the lost 10 year life remaining in the old roof. Otherwise, the new 20 year roof would be “better” than the remaining 10 years left on the old roof, and the owner would have paid for a 20 year roof, but in effect received a 30 year roof.

Example 5

A nine year old building develops a leak in a stack pipe due to issues with the original design. Hypothetically, the leak repair is relatively simple and inexpensive. However, access to make the repair requires removing a substantial amount of walls and structural components that are nine years old. As part of the repair, they are replaced with new, but equal materials. Does betterment apply? Unlike the scenario above with the new 20 year roof replacing the old 20 year roof that had been used for 10 years. Here, betterment does not apply to the costs of replacing the non-defective components and materials removed and replaced to address the problem. Even if those materials were nine years old and replaced with new; there is no credit given for the nine years of use like with the roof. This is because those components would not have to be replaced in the ordinary course as part of anticipated maintenance. The replaced walls and structural components are known by three terms, all of which functionally mean the same thing: “Rip and Tear Costs,” “Access Costs,” or “Get to Costs.”

HOW CAN I USE BETTERMENT?

The concept of betterment and the associated limitation to “first cost” may be asserted by your claims professional, in consultation with your attorney, as part of pre-suit evaluation or in negotiation as a defense to a professional liability claim. It can be used for back of the napkin analysis purposes or pre-claim negotiation during informal discussions with an owner or contractor while a job is ongoing and of course where applicable, betterment is available to counsel as a defense to a lawsuit. It is not necessary for a design professional to remember the precise legal phrases. Just remember that the law does not allow a claimant to get a Cadillac for the price of a Pinto.

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