



CONSTRUCTION CONFLICT MANAGEMENT

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As is typical on any construction project, immediately prior to and after the signing of a subcontract, the general contractor and the subcontractor are excited about the prospect of constructing the residential or commercial project that is the subject of their agreement. After the start of construction, however, the general contractor and the subcontractor often cease all communication, and the steps leading up to the blame game begin.

For instance, a conflict may develop between the design plans and the owner's instruction or desires. Both the general contractor and the subcontractor must modify their planned contracted work at greater expense than anticipated. Subsequently, the general contractor and the subcontractor cannot agree on who bears the burden of paying for the change and/or the risks associated with the change. Thus, the general contractor stops paying the subcontractor, and the subcontractor soon confronts the general contractor about not being paid. The general contractor continues to refuse to pay, the subcontractor makes the decision to cut its losses and leaves the job. Inevitably, a lawsuit is filed.

Recently, the **Missouri Supreme Court** came to a decision that affects this type of altercation. In **Vance Bros. Inc. v. Obermiller Construction Services Inc.**, the court held as follows:

- A petition on account is sufficiently an action on a contract to invoke a Missouri statute (431.180) that entitles the successful construction claimant to interest and attorney's fees, meaning that you are not required to allege exclusively a breach of contract to get the benefit of 431.180.
- The trial court is not faced with an all-or-nothing decision to award interest and attorney's fees. It is the trial court's discretion to award both, neither, one or the other.

The dispute that prompted the filing of *Vance Bros. Inc. v. Obermiller Construction Services Inc.* is far more interesting and instructive as an example of the quintessential general contractor-subcontractor quagmire than the holding itself.

Under these circumstances the allegations mount, and subcontractors and suppliers often find themselves defending claims that far exceed their original anticipated costs. One reason is that many times — in claims arising out of changed orders or design or construction defects — the damages alleged include all costs incurred by the general contractor or the owner above and beyond those stated in the original contract price, irrespective of the basis or reasons for those additional costs.

At first glance, such damages might seem appropriate, assuming the claim has merit. But where the extra costs include a betterment, or added benefit, to the work already provided, the general contractor or owner may not, in fact, be entitled to all of the damages sought, even if he or she is successful.

This concept or doctrine is appropriately called the betterment, or first added benefit,



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2.1-2.2 Contractors and subcontractors often get into disputes because additional costs arise unexpectedly. Who is responsible for the bill? Decide beforehand through the initial contract.

defense. In cases of torts (where a wrongful act occurs other than a breach of contract) the betterment doctrine applies as follows:

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.

In other words, the defendant is entitled to a credit of the value of the benefit that the plaintiff received from the defendant's tortious conduct.

With respect to breach of contract claims, generally under the doctrine of betterment a plaintiff is only entitled to be put in the same position he or she would have been in had the contract been performed, but the plaintiff is typically not entitled to more than the benefit he or she would have received had the defendant properly performed the contract.

The classic example of the application of this doctrine is illustrated by the holding in *Dierickx v. Vulcan Industries* (Mich. 1968). In that case, the homeowner engaged the contractor to apply a sealant to his basement walls, and the contractor warranted against leaks for five years. The basement leaked and the owner was required to excavate the basement wall at great expense. The owner sued the contractor for the cost of excavation and resealing, but the court denied the owner a portion of his claimed damages because the owner was only entitled to the reasonable cost of providing a dry basement for five years. The excavation provided an added benefit to the owner in that it protected the basement from leaks and moisture for more than five years. In other words, the plaintiff purchased a five-year protection plan for his basement and that was all he was entitled to receive.

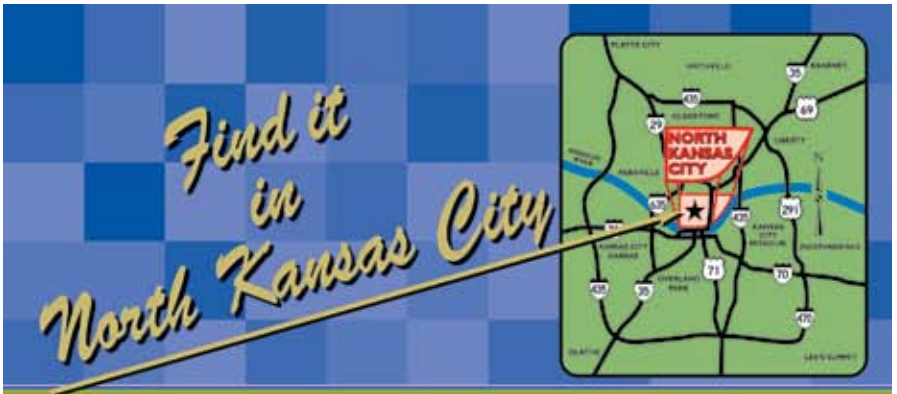
This sounds like a simple rule — and it is — but it is more difficult to apply in practice than one might think because it is often a challenge to determine the value of the added benefit or betterment. For example, in the case of *Dierickx v. Vulcan Industries*, while it may be clear that the excavation of a basement confers to the owner an added benefit, the question becomes what is the value of that extra or added benefit? Obviously,

SUBCONTRACTORS MIGHT CONSIDER INCLUDING A PROVISION IN THEIR CONTRACTS ADDRESSING THE SUBCONTRACTOR'S LIABILITY FOR ENHANCEMENTS OR UPGRADES BEYOND WHAT WAS ORIGINALLY INCLUDED IN THE CONTRACT ... INSISTING THAT ALL CHANGES TO THEIR AGREEMENTS BE PUT IN WRITING.

a plaintiff should not be deprived of the benefit of his bargain, but placing a value on the betterment or added benefit to the plaintiff can be difficult and, in some cases, speculative. As a result, defendants must be diligent in establishing the value of the added benefit that was conferred upon the plaintiff in raising the betterment defense.

The betterment or added benefit defense is a constantly developing area of construction law, largely because of the speculative nature the doctrine. Heading off such claims before they arise can prove to be a better alternative to sorting out a sticky legal issue. Subcontractors might consider including a provision in their contracts addressing the subcontractor's liability for enhancements or upgrades beyond what was originally included in the contract. Subcontractors may also want to consider insisting that all changes and modifications to their agreements be put in writing with a value identified therein to prevent future disputes. □

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