

## ABA Forum on the Construction Industry

Report from Meeting of April 7-9 in New Orleans, the “Owner’s Perspective”

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Four key things:

- (1) International Building Code is here to stay, goodbye existing codes
- (2) The economic loss doctrine is on the wane, driven by home owners
- (3) There are reported opinions on “betterment” you just won’t find them with a Lexis search
- (4) New AGC Owner/Architect form contracts

### (1) International Building Code:

- Only competitor is the NFPA, otherwise “I” codes
- SBC, UBC, BOCA are all dead
- New is the “Performance Code”, toss out prescriptive codes, use third party review (i.e., Code officials may not have the expertise), will require design professional to tell owner how to use building, bring owner into discussion of design objectives, e.g., consequence of smoke damage. Risk to design professional: “shall be protected”, “ shall allow safe isolation”
- Broad coverage, any “stakeholder”, i.e., owner, developer, design professional
- AIA drove call for uniformity starting in the 70’s
- Also new, “Wild Land Interface”
- Includes “Existing Building Code”, “Property Maintenance Code”, “International Energy Conservation Code” and “Residential Code”
- Promulgating authority is the ICC, International Code Council

### (2) Economic Loss

- Basic theory, you can not recover economic damages in tort
- Tort limited to property damage and personal injury
- What is diminution in value?
- Get around theories: (a) “substantial control”, (b) negligent misrepresentation, § 522 of Restatement of Torts, (c) breach of warranty, and (d) third party beneficiary.
- Courts divided, but slight but growing majority allow recovery against design professionals and construction managers, as we see in Corporex, subs recover v. owners
- § 522 only goes to design, not contract administration
- Why this is a bad idea: (a) violates contractual relationships and allocation of risks, (b) puts design professional in a conflict between duty to owners and third parties, (c) increases design fees, insurance costs, (e) will not get owner’s out of litigation, will be impleaded regardless

## (3) Betterment

- Also called “Added First Benefit” or “Added Value”
- Cases, see index of cases, will recite owner should not be put in a better position by virtue of design professional omission-windfall
- NO UNIFORM RULE
- Defense or damages, generally reduction of damages vs. cost of “fix” equals damages
- Some courts will allow reduction for use or depreciation, e.g., 10 year use of 20 year roof, discernable life expectancy, what if “not so useful” use or problems during use.
- Underestimating construction costs vs. governmental units on fixed budget
- Owner arguments: (1) warranty, negligent representations, (2) would not have built project or accepted designs
- Premium for change orders
- Question of burden of proof, on defendant

## (4) AGC Document No. 240, Standard Form of Agreement Between Owner and Architect/Engineer, and No. 245, Short Form of this Agreement

- AGC has very specific provision re Architect’s and its consultants professional liability insurance, B141 is silent
- The new document has detailed requirement for providing a Project Schedule showing the timing and sequencing of the design and construction, and updating of the schedule
- AGC maintains the copyright, but owner gains “property rights” in event of termination, and payment of all outstanding fees through termination. This allows the owner to use the physical drawings to complete the job, and the owner is no longer “held hostage” by the architect. There is a built in premium to discourage walking away from the contract. Under AGC owner may use for additions and renovations, and indemnity provision to protect architect.
- Mediation/arbitration-eliminate B141 provision against joinder, allowing joinder of “all parties necessary to resolve a claim”
- Cost of the work, the AGC form distinguishes situation where Contractor is retained to provide preconstruction service as part of the Work, and relieves Architect from responsibility for redesign if contractor does cost estimating; however where architect responsible he must redesign, and does not get benefit of waiver or limitation of liability
- Review of shop submittals, AGC provides must respond within 10 days of receipt
- Site visits, B141 “at intervals appropriate to stage of Contractor’s operations”, AGC 240: “at appropriate intervals, but not less than \_\_\_\_\_ times”
- AGC take architect out of the middle in claim disputes between the owner and the contractor

- Owner should pay extra for as-builts; emphasis on fairness/balance.
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(5) False Claims Act

- Federal statute result of blatant fraud by contractors in Civil War
- Some states have adopted and used aggressively in responding to contractor claims
- This is the whistle blower statute, “qui tam” actions
- Direct action, take over by AG
- Retaliation suits

**INDEX**

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