

CONSTRUCTION DEFECT CLAIMS AND DEFENSES IN UTAH

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INTRODUCTION

“No house is built without defects[.]” *Davencourt at Pilgrims Landing Homeowners Ass’n v. Davencourt at Pilgrims Landing, LC*, 2009 UT 65, ¶ 59, 221 P.3d 234 (quoting *Bethlahmy v. Bechtel*, 91 Idaho 55, 415 P.2d 698, 711 (1966)). Unfortunately, many owners mistakenly assume every defect gives rise to a claim. More unfortunate is the thinking of many lawyers that claims for defective construction must sound in tort. Although a claim for defective construction might sound in tort, most sound in contract, and some sound in both. The challenge is recognizing what defects give rise to claims and determining what theory or theories of law will apply. To avoid embarrassment and unnecessary fees and costs in construction defect litigation, precision in alleging the relevant facts and pursuing the appropriate claims is required. The purpose of this article is to show how claims and affirmative defenses apply to allegations of defective construction. Among the various potential parties to a defective construction dispute, the claims are often different depending on the role of the party. Therefore, the various claims are addressed in relation to the party against which they potentially apply, namely builder, architect or engineer, manufacturer or merchant/seller, and owner. Many affirmative defenses apply in construction defect cases, but this article discusses only a limited number that are lesser known or understood.

CONSTRUCTION DEFECT CLAIMS

The first question a lawyer should ask when presented with an allegation of defective construction is, “was there personal injury or injury to property other than the construction itself?” If the answer to this question is “no”, the economic loss rule, which is discussed with other affirmative defenses below, bars most non-intentional tort claims. All is not lost, however, and the lawyer should look for breaches of express and implied provisions in the contract that would support claims in contract.

Contract Claims against Builders:

Most construction contracts contain an express promise or covenant to build in conformance with the plans and specifications. The most basic claim for defective construction

against the builder is one for breach of this promise or covenant. Failure to build in accordance with the plans and specifications can give rise to a claim in contract for defective construction.

The builder's duties, however, vary depending on the nature of the specifications. Broadly speaking, specifications can be divided into two types, design specifications and performance specifications. Design specifications dictate precisely what products or materials will be used. A proprietary specification is a typical example of a design specification. Likewise, specifications of products with specific criteria are design specifications. *See e.g., Rex T. Fuhrman, Inc. v. Jarrell*, 21 Utah 2d 298, 445 P.2d 136, 138-39 (Utah 1968)(specifying asphalt emulsion for foundation waterproofing). Specifications referring to a government, industry or professional standard are also typically design specifications. For example, "The fire sprinkler system shall be installed in accordance with NFPA-13" is a design specification. Specifications as to how a product must be installed are also design specifications. *See, e.g., Meadow Valleys Contractors, Inc. v. Utah Dept. of Transp.*, 2011 UT 35, ¶ 8, 266 P.3d 671 (Utah 2011)(specifying paving method). If the contract has a design specification, and the builder fails to strictly comply, the builder may be held liable for the breach. When the builder has built in strict conformance to a design specification, however, the owner bears the risk of any defect resulting from the specification.

On the other hand, performance specifications dictate results. *See e.g., Jacobsen Constr. v. Structo-Lite Engineering*, 619 P.2d 306 (Utah 1980)(tank construction specifying a tensile strength of 100,000 psi and a flexal strength of 150,000 psi with a very smooth, hard surface and good finishing properties). When a builder agrees to a performance specification, he warrants that the result will in fact be achieved.

A warranty is an assurance by one party to a contract of the existence of a fact upon which the other party may rely. It is intended to relieve the promisee of any duty to ascertain the fact for himself, and it amounts to a promise to answer in damages for any injury proximately caused if the fact warranted proves untrue.

SME Industries, Inc. v. Thompson, Ventulett, Stainback and Associates, Inc., 2001 UT 54, ¶ 18, 28 P.3d 669 (quoting *Groen v. Tri-O-Inc.*, 667 P.2d 598, 604 (Utah 1983)). In the construction context, this means the plaintiff must demonstrate that the warrantor made promises guaranteeing or assuring a specific result. *Hone v. Advanced Shoring & Underpinning, Inc.*, 2012 UT App 327, ¶ 12, 291 P.3d 832.

Recognize that an express warranty might exist outside the contract documents. For example, advertisements might contain warranties. Warranties may also be inferred from statements relating to quality, quantity and condition. In the *Hone* case, the Hones contracted with Advanced Shoring to install fourteen helical piers and forty-five grouted columns beneath their house to prevent the house from sinking. Afterwards, Advanced Shoring determined more work would be needed to prevent the sinking. The project manager informed the Hones of the need for additional underpinning and allegedly said, "I won't guarantee it unless I get \$10,000 more." When the house continued to sink, the Hones successfully sued Advanced Shoring for breach of express warranty.

In addition to express warranties, Utah recognizes a narrow implied warranty of workmanlike manner or habitability for residential construction only.

Under Utah law, in every contract for the sale of a new residence, a vendor in the business of building or selling such residences makes an implied warranty to the vendee that the residence is constructed in a workmanlike manner and fit for habitation. . . . [T]o establish a breach of the implied warranty of workmanlike manner or habitability . . . a plaintiff must show (1) the purchase of a new residence from a defendant builder-vendor/developer-vendor; (2) the residence contained a latent defect; (3) the defect manifested itself after purchase; (4) the defect was caused by improper design, material, or workmanship; and (5) the defect created a question of safety or made the house unfit for human habitation.

Davencourt, 2009 UT 65 at ¶¶ 34-44.

When discussing implied warranties, one might assume that every construction contract must contain an implied warranty that the builder will comply with applicable building codes. To the contrary, however, Utah does not recognize this as an implied duty. *Davencourt*, 2009 UT 65 at ¶¶ 41-44.

Note that a claim for breach of warranty requires a showing of reasonable reliance. *Management Comm. of Graystone Pines Homeowners Ass'n v. Graystone Pines, Inc.*, 652 P.2d 896, 900 (Utah 1982). Therefore, when the promisee knows the assurance is false, he will not prevail on a breach of warranty claim.

The covenant of good faith and fair dealing is another implied provision in all contracts that should not be overlooked in the defective construction context. The covenant implies “a duty to perform in the good faith manner that the parties surely would have agreed to if they had foreseen and addressed the circumstance giving rise to their dispute.” *Young Living Essential Oils, LC v. Marin*, 2011 UT 64, ¶ 8, 266 P.3d 814. The covenant also includes “an implied duty that contracting parties refrain from actions that will intentionally destroy or injure the other party’s right to receive the fruits of the contract.” *Id.* ¶¶ 9, 16 (citations and internal quotation marks omitted). The covenant does not imply new or inconsistent obligations to the contract. *See Oakwood Vill. LLC v. Albertsons, Inc.*, 2004 UT 101, ¶ 45, 104 P.3d 1226. However, in an industry where there is great temptation and opportunity to cut corners, install inferior materials or to cover up shoddy workmanship, this covenant comes into play. Note that a breach of the implied covenant of good faith and fair dealing potentially gives rise to a claim for broad consequential damages including mental anguish. *See Billings v. Union Bankers Ins. Co.*, 918 P.2d 461, 466 (Utah 1996)(applying the implied covenant of good faith and fair dealing to an insurance contract).

Contract Claims against Architects and Engineers:

Most architects and engineers do not expressly warrant the accuracy and suitability of their plans and specifications. *See e.g., Ross v. Epic Engineering, PC*, 2013 UT App 136, ¶ 2, n.1. Furthermore, Utah does not imply this warranty in contracts for architect and engineering services. *SME*, 2001 UT 54 at ¶ 26. In *SME*, the Supreme Court of Utah adopted the following policy for this position:

Architects, doctors, engineers, attorneys, and others deal in somewhat inexact sciences and are continually called upon to exercise their skilled judgment in order to anticipate and provide for random factors which are incapable of precise

measurement. The indeterminate nature of these factors makes it impossible for professional service people to gauge them with complete accuracy in every instance.... Because of the inescapable possibility of error which inheres in these services, the law has traditionally required, not perfect results, but rather the exercise of that skill and judgment which can be reasonably expected from similarly situated professionals.

SME, 2001 UT 54 at ¶ 27 (citation omitted). Accordingly, architects and engineers “do not impliedly warrant or guarantee a perfect plan or satisfactory result.” *Id.* at ¶ 28; *see also, Ross*, 2013 UT App 136 at ¶ 26. Implied in contracts for architecture and engineering services, however, is a duty “to use reasonable and customary care in the provision of professional services arising from contract”, which duty “is owed only to the person or entity for whom the professional services are to be rendered.” *Id.* at ¶ 30. Although this duty is expressed in terms of a professional standard of care, this claim is a contract claim and should not be confused with a professional negligence claim, which is discussed below. Furthermore, while this is a contract claim, expert testimony is required to show a breach of this duty. *See e.g., Ross*, 2013 UT App 136.

Contract Claims against Manufacturers and Merchants:

Goods are the components of all construction projects. Consequently, when the goods as opposed to the installation are defective, the Uniform Commercial Code (“UCC”) might come into play. The UCC might apply if there has been a sale of goods. As between the builder and the owner, most transactions will be hybrid transactions for the sale of goods and services. Utah applies a predominant purpose test to determine whether the sale is for goods or services. Accordingly, “if service predominates, and the transfer of title to personal property is only an incidental feature of the transaction, the contract does not fall within the ambit of [the UCC].” *Utah Local Govt. Trust, v. Wheeler Machinery Co.*, 2008 UT 84 ¶ 30, 199 P.3d 949 (quoting *Beehive Brick Co. v. Robinson Brick Co.*, 780 P.2d 827, 832 (Utah Ct. App. 1989)). Although service is likely to predominate in many construction contracts, installation is often incidental to the sale of the goods. Furthermore, whether service predominates is a question of fact. *Wheeler Machinery*, 2008 UT 84 at ¶ 31. Accordingly, builders are often also merchants under the UCC, and UCC claims should never be ignored.

The primary claims under the UCC are claims for breach of express warranties and claims for breach of the implied warranties of merchantability and fitness for a particular use. Pursuant to Utah Code § 70A-2-313:

(1) Express warranties by the seller are created as follows:

(a) Any affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain creates an express warranty that the goods shall conform to the affirmation or promise.

(b) Any description of the goods which is made part of the basis of the bargain creates an express warranty that the goods shall conform to the description.

(c) Any sample or model which is made part of the basis of the bargain creates an express warranty that the whole of the goods shall conform to the sample or model.

(2) It is not necessary to the creation of an express warranty that the seller use formal words such as “warrant” or “guarantee” or that he have a specific intention to make a warranty, but an affirmation merely of the value of the goods or a statement purporting to be merely the seller’s opinion or commendation of the goods does not create a warranty.

Unless disclaimed with conspicuous language, a warranty of merchantability is implied in a contract for the sale of goods. Pursuant to Utah Code § 70A-2-314:

Goods to be merchantable must be at least such as

(a) pass without objection in the trade under the contract description; and

(b) in the case of fungible goods, are of fair average quality within the description; and

(c) are fit for the ordinary purposes for which such goods are used; and

(d) run, within the variations permitted by the agreement, of even kind, quality and quantity within each unit and among all units involved; and

(e) are adequately contained, packaged, and labeled as the agreement may require; and

(f) conform to the promises or affirmations of fact made on the container or label if any.

Utah Code § 70A-2-315 defines the implied warranty of fitness for a particular purpose as follows:

Where the seller at the time of contracting has reason to know any particular purpose for which the goods are required and that the buyer is relying on the seller’s skill or judgment to select or furnish suitable goods, there is unless excluded or modified under the next section an implied warranty that the goods shall be fit for such purpose.

Claims under the UCC sound in contract. Accordingly, the injured party must show privity of contract. In the construction context, privity will often be shown by the contract

between the builder and the owner or by assignment from the builder, who purchased the goods, to the owner.

Contract Claims against Owners:

Ordinarily, owners are the victims of defective construction. When the plans and specifications are defective, however, and the builder is required to do more work or furnish additional or other materials than originally contemplated, the builder often will have a claim against the owner. This is so because when the owner is obligated under the contract to furnish the plans and specifications, the owner impliedly warrants that the plans and specifications are accurate and suitable for the anticipated construction and that they correctly describe the physical conditions at the site.¹ This is known as the Spearin Doctrine after the landmark case of *U.S. v. Spearin*, 248 U.S. 132 (1918). Utah recognizes the Spearin Doctrine. *See e.g., R. C. Tolman Const. Co., Inc. v. Myton Water Ass'n*, 563 P.2d 780, 782 (Utah 1977) (“We recognize the validity of the proposition advocated by the plaintiff; that if plans and specifications are so deficient or defective that a contractor encounters conditions different from those as represented or reasonably to be anticipated, he should be entitled to recover for extra costs incurred in dealing with those different conditions.”); *see also, Jack B. Parson Constr. Co. v. State*, 725 P.2d 614, 616 (Utah 1986); *Thorn Constr. Co., Inc. v. Utah Dept. of Transp.*, 598 P.2d 365, 368 (Utah 1979); *L. A. Young & Sons Constr. Co. v. County of Tooele*, 575 P.2d 1034, 1037 (Utah 1978). As of yet, the Spearin Doctrine has only been successfully used in claims against governmental entities on public works contracts. In *Frontier Foundations, Inc. v. Layton Const. Co., Inc.*, 818 P.2d 1040 (Utah App. 1991), the Utah Court of Appeals was asked to apply the Spearin Doctrine to a private contract, but the Court of Appeals was unable to do so because the contract effectively disclaimed the warranty.

Also, the builder will not prevail on a claim for breach of this implied warranty if he knew or reasonably should have known of the defect in the plans and specifications. *See, R. C. Tolman*, 563 P.2d at 782. Furthermore, unless the builder reasonably relies on erroneous representations in the plans and specifications, the builder bears the risk of adverse site conditions that are unknown to both the owner and the builder.

Accordingly, wise owners disclaim the implied warranty of accuracy and suitability of plans and specifications, and wise builders contract to shift the risk of adverse site conditions back to the owner. Therefore, prior to pleading, the parties should carefully examine the contract for such disclaimers and risk shifting provisions.

¹ As discussed above, architects and engineers generally do not warrant the accuracy and suitability of their plans and specifications to owners. Accordingly, the owner is exposed to liability for defective plans and specifications without a third party to indemnify or hold the owner harmless. A possible way for owners to avoid this liability is to contract for design/build construction. Under a design/build contract, a warranty of accuracy and suitability of plans and specifications should be implied. *See e.g., Leishman v. Kamas Valley Lumber Co.*, 427 P.2d 747 (Utah 1967); *see also, C.O. Falter Construction Corp. v. City of Binghamton*, 684 N.Y.S.2d 86 (App. Div. 1999); *Fru-con Construction Corp. v. United States*, 42 Fed. Cl. 94 (1998); *see also* 3 Bruner & O’Conner on Construction Law § 9:87; Edward Hannan, *Whose Design Is It? Sorting Out Liability In Construction Cases*, Defense Counsel Journal 576 (Oct. 1993). Caution must be observed, however, because design/build contracts often disclaim such warranties.

Tort Claims against Builders:

Negligence:

When a defect in construction causes personal injury or injury to property other than the construction itself, claims sounding in negligence arise. Builders have a duty to avoid unreasonable risks of the final product injuring persons or property. *Williams v. Melby*, 699 P.2d 723, 729 (Utah 1985); *Reighard v. Yates*, 2012 UT 45, ¶¶ 27-33, 285 P.3d 1168. Accordingly, a builder will be liable if he breaches that duty and his breach is the proximate cause of the injury. See e.g., *Romrell v. W. W. Clyde and Co.*, 531 P.2d 867 (Utah 1975).

Fraudulent Non-Disclosure and Negligent Misrepresentation:

Builders also have an independent duty to disclose to their immediate transferees defects in home construction about which they know or should know. *Smith v. Frandsen*, 2004 UT 55, ¶ 28, 94 P.3d 919; see also *Yazd v. Woodside Homes Corp.*, 2006 UT 47, ¶¶ 28, 35, 143 P.3d 283; *Moore v. Smith*, 2007 UT App 101, ¶¶ 36-40, 158 P.3d 562. Failure to do so can give rise to a claim for negligent misrepresentation and fraudulent non-disclosure. Note, however, this duty has only been recognized in the context of residential home construction.

Breach of Fiduciary Duties:

Generally, builders do not owe a fiduciary duty to owners with whom builders contract. The Supreme Court of Utah, however, has recognized that a developer in control of a homeowners association owes a limited fiduciary duty to the homeowners, which duty is independent of contractual duties. *Davencourt*, 2009 UT 65 at ¶¶ 34-44. In recognizing this duty, the Supreme Court of Utah adopted the Restatement (Third) of Property: Servitudes § 6.20 (2000), which provides in relevant part:

Until the developer relinquishes control of the association to the members, the developer owes the following duties to the association and its members:

(1) to use reasonable care and prudence in managing and maintaining the common property;

* * *

(5) to comply with and enforce the terms of the governing documents, including design controls, land-use restrictions, and the payment of assessments;

(6) to disclose all material facts and circumstances affecting the condition of the property that the association is responsible for maintaining;

Accordingly, developers that are in control of the homeowners association may be held liable for defective construction stemming from failures to comply with these duties.

Tort Claims against Architects and Engineers:

In bringing professional negligence claims against an architect or engineer, the plaintiff must show that the injury was caused by the architect's or engineer's failure to meet the standard of his profession in preparing plans or supervising the work. *Nauman v. Harold K. Beecher and Associates*, 24 Utah 2d 172, 467 P.2d 610, 615 (Utah 1970); *see also Hunt v. ESI Engineering, Inc.*, 808 P.2d 1137, 1139 (Utah App. 1991)(engineers and other designers have a duty under negligence principles to perform their services so as to eliminate any unreasonable risk of foreseeable injury.) Remember that professional negligence will apply only if the injury is a personal injury or damage to property other than the construction itself. *See e.g., Ross*, 2013 UT App 136, ¶ 8 (negligence claim against engineer barred by economic loss rule). Also, remember that showing a breach of this duty requires expert witness testimony because layperson testimony is insufficient to show that the care given fell below a professional standard. *Nauman*, 808 P.2d at 615.

Claims against Manufacturers and Sellers:

Actions in Utah sounding in tort for defective products are governed by the Product Liability Act, Utah Code § 78B-6-701 *et seq.* Utah Code § 78B-6-703(1) provides that:

In any action for damages for personal injury, death, or property damage allegedly caused by a defect in a product, a product may not be considered to have a defect or to be in a defective condition, unless at the time the product was sold by the manufacturer or other initial seller, there was a defect or defective condition in the product which made the product unreasonably dangerous to the user or consumer.

The Product Liability Act does not define what a product liability action is, but it does include claims of negligence manufacturing and strict product liability. *Wheeler Machinery*, 2008 UT 84, at ¶ 10.

Strict Liability:

Utah applies the Restatement (Second) of Torts § 402A, at 347-48 (1965) to claims for strict product liability. Section 402A provides in relevant part:

- (1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if:
 - (a) the seller is engaged in the business of selling such a product, and
 - (b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.

Strict liability is generally directed against manufacturers of products and sellers of

products. In the construction context, however, product sales will often be hybrid transactions for the sale of both products and construction services. In many cases, builders are in fact in the business of selling products, but like with the predominant purpose test under the UCC, builders will avoid strict liability for defective products if they are not in the business of selling products, but simply utilized these component parts in the construction. *See e.g., Maack v. Resource Design & Const., Inc.*, 875 P.2d 570, 581-82 (Utah App. 1994).

Negligent Manufacturing:

Negligent manufacturing is legally distinct from strict product liability. “While strict liability focuses on the condition of the product, ‘[n]egligence looks at the acts of the manufacturer and determines if it exercised ordinary care in design and production.’” *Am. Tobacco Co., Inc. v. Grinnell*, 951 S.W.2d 420, 437 (Tex. 1997)(quoting *Caterpillar, Inc. v. Shears*, 911 S.W.2d 379, 384 (Tex. 1995)). Consequently, while manufacturers of defective products are subject to negligent manufacturing claims, sellers of defective products are generally exempt.

DEFENSES

Any discussion about claims for defective construction would be insufficient without a discussion concerning the economic loss rule and a few other lesser-known defenses that come into play in defective construction cases. The following is intended to introduce these defenses, but is by no means an exhaustive description of applicable defenses.

The Economic Loss Rule:

As mentioned at the beginning of this article, the first question a lawyer should ask when presented with an allegation of defective construction is, “was there personal injury or injury to property other than the construction itself?” The reason for this is that the economic loss rule will bar most non-intentional tort claims against builders, architects and engineers for purely economic damages. Simply stated, the economic loss rule is that “economic damages are not recoverable for non-intentional torts absent physical property damage or bodily injury. *American Towers Owners Ass’n, Inc. v. CCI Mech., Inc.*, 930 P.2d 1182, 1189 (Utah 1996); *see also, Reighard*, 2012 UT 45 at ¶¶ 19-26; *SME*, 2001 UT 54 at ¶ 32, n.8. Economic losses are defined as:

‘[d]amages for inadequate value, costs of repair and replacement of the defective product, or consequential loss of profits--without any claim of personal injury or damage to other property . . . as well as ‘the diminution in the value of the product because it is inferior in quality and does not work for the general purposes for which it was manufactured and sold.’

American Towers, 930 P.2d at 1189 (quoting *Maack*, 875 P.2d at 579-80 (citation omitted))

Subsequent to the ruling in *American Towers*, the economic loss rule was codified for application in defective construction cases at Utah Code § 78B-4-513, which provides as follows:

(1) Except as provided in Subsection (2), an action for defective design or construction is limited to breach of the contract, whether written or otherwise, including both express and implied warranties.

(2) An action for defective design or construction may include damage to other property or physical personal injury if the damage or injury is caused by the defective design or construction.

(3) For purposes of Subsection (2), property damage does not include:

(a) the failure of construction to function as designed; or

(b) diminution of the value of the constructed property because of the defective design or construction.

(4) Except as provided in Subsections (2) and (6), an action for defective design or construction may be brought only by a person in privity of contract with the original contractor, architect, engineer, or the real estate developer.

(5) If a person in privity of contract sues for defective design or construction under this section, nothing in this section precludes the person from bringing, in the same suit, another cause of action to which the person is entitled based on an intentional or willful breach of a duty existing in law.

(6) Nothing in this section precludes a person from assigning a right under a contract to another person, including to a subsequent owner or a homeowners association.

This section and *American Towers* have made the economic loss rule increasingly important in construction disputes in Utah. Conforming to the products liability origins of the economic loss rule, *American Towers* treated the entire construction project as one integrated product. Accordingly, failure of one component of the project that in turn caused damages to other components of the project was not “damage to other property”. Consequently, damage to the project caused by the failure of one component of the project is purely economic loss that cannot be recovered under a non-intentional tort theory of recovery.

In 2002, the Utah Supreme Court clarified the economic loss rule as follows:

The proper focus in an analysis under the economic loss rule is on the source of the duties alleged to have been breached. Thus, our formulation of the economic loss rule is that a party suffering only economic loss from the breach of an express or implied contractual duty may not assert a tort claim for such a breach *absent an independent duty of care under tort law*.

Hermansen v. Tasulis, 2002 UT 52, ¶ 16, 48 P.3d 235 (emphasis added). The Court further stated:

[T]he initial inquiry in cases where the line between contract and tort blurs is whether a duty exists independent of any contractual obligations between the parties. When an independent duty exists, the economic loss rule does not bar a tort claim ‘because the claim is based on a recognized independent duty of care and thus does not fall within the scope of the rule.’

Hermansen, 2002 UT at ¶ 17 (citing *Town of Alma v. Azco Constr., Inc.*, 10 P.3d 1256, 1263 (Colo. 2000)).

The analysis courts undertake to determine whether an independent duty exists in tort is complicated and outside the scope of this article. See, *Yazd*, 2006 UT 47 at ¶ 16. Independent duties that have been recognized by courts in Utah in the construction context, however, were discussed above in the claims section of this article.

If the complaint does not allege facts giving rise to a recognized independent duty, but nevertheless asserts a claim for negligence or other non-intentional torts without alleging personal injury or injury to property other than the construction itself, the economic loss rule should be asserted as an affirmative defense.

The Betterment Doctrine:

With a claim for defective construction, the plaintiff may recover:

- (i) the reasonable cost of construction and completion in accordance with the contract, if this is possible and does not involve unreasonable economic waste; or
- (ii) the difference between the value that the product contracted for would have had and the value of the performance that has been received by the plaintiff, if construction and completion in accordance with the contract would involve unreasonable economic waste.

Rex T. Fuhriman, 445 P.2d at 138-39 (citing Restatement, Contracts, Section 346(1)). These calculations should never put the plaintiff in a better position than he would have occupied in the absence of the defect. Often times, the parties contracted for construction that in one way or another is insufficient, and the plaintiff prays for relief including the cost of something or some work that is more expensive than he contracted to purchase. Under these circumstances, the defendant should assert the betterment doctrine to prevent the plaintiff from recovering a windfall. If successful on this defense, the defendant should not be held liable for the additional cost the plaintiff would have incurred if the errors had not been made in the first place. See e.g., *St. Joseph Hospital v. Corbetta Construction Co., Inc.*, 316 N.E.2d 51 (Ill. App. 1974); *Lochrane Engineering, Inc. v. Willingham Realgrowth Investment Fund, Ltd*, 552 S.2d 228 (Fla. App. 1998).

Warranty of Accuracy and Suitability of Plans and Specifications:

As discussed above, when the owner furnishes the plans and specifications for the construction, the owner impliedly warrants that the plans and specifications are accurate and

suitable for the anticipated construction. In addition to giving the builder a claim for additional costs incurred due to defective construction, this warranty serves as a defense against a claim for defective construction when the plans and specifications are the cause of the defect. This is effectively a standard defense based on intervening causation, the scope of which is described as follows:

A contractor has a duty to ‘perform the work required by its contract ... with that degree of care ordinarily possessed and exercised by other contractors doing the same or similar work in [the same] locality.’ *Andrus v. State*, 541 P.2d 1117, 1121 (Utah 1975). However, a ‘contractor is not liable if [it] has merely carried out the plans, specifications and directions given [it], since in that case the responsibility is assumed by the employer, *at least when the plans are not so obviously dangerous that no reasonable [person] would follow them.*’ *Leininger v. Stearns-Roger Mfg. Co.*, 17 Utah 2d 37, 41, 404 P.2d 33, 36 (1965) (emphasis added).

Trujillo v. Utah Dept. of Transp., 1999 UT 227, ¶ 39, 986 P.2d 752.

The Statute of Repose:

In construction defect cases, a number of different statutes of limitations might apply depending on the claims asserted. Contract, UCC, fiduciary duties, negligence, strict liability and fraud all have different statutes of limitations. While all these statutes of limitations apply, construction defect claims are further constrained by the following statute of repose:

(3)(a) An action by or against a provider based in contract or warranty shall be commenced within six years of the date of completion of the improvement or abandonment of construction. Where an express contract or warranty establishes a different period of limitations, the action shall be initiated within that limitations period.

(b) All other actions by or against a provider shall be commenced within two years from the earlier of the date of discovery of a cause of action or the date upon which a cause of action should have been discovered through reasonable diligence. If the cause of action is discovered or discoverable before completion of the improvement or abandonment of construction, the two-year period begins to run upon completion or abandonment.

(4) Notwithstanding Subsection (3)(b), an action may not be commenced against a provider more than nine years after completion of the improvement or abandonment of construction. In the event the cause of action is discovered or discoverable in the eighth or ninth year of the nine-year period, the injured person shall have two additional years from that date to commence an action.

(5) Subsection (4) does not apply to an action against a provider:

(a) who has fraudulently concealed his act, error, omission, or breach of duty, or the injury, damage, or other loss caused by his act, error, omission, or breach of duty; or

(b) for a willful or intentional act, error, omission, or breach of duty.

Utah Code § 78B-2-225. Although subsection (3) refers to a period of limitations, this is not a statute of limitations. “Statutes of limitations are essentially procedural in nature and establish a prescribed time within which an action must be filed after it accrues.... [S]tatutes of repose abolish a cause of action after a certain period, even if the action first accrues after the period has expired.” *Lee v. Gaufin*, 867 P.2d 572, 575-76 (Utah 1993). Section 78B-2-225 is a statute of repose because the period begins to run upon completion or abandonment, not the accrual of an action.

CONCLUSION

Unfortunately, “no house is built without defects.” When the claims and defenses applicable to defective construction are seemingly as diverse and complicated as the defects themselves, one might say with regard to these claims and defenses, “no prosecution or defense is without flaw.” Hopefully, the foregoing outline will assist the reader in more effectively prosecuting and defending these most complicated claims.