

BUILDING THE DIFFERENCE-IN-VALUE DEFENSE IN TEXAS: HAVE YOU CONSIDERED AN APPRAISAL EXPERT?

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Owners almost always claim repair costs in construction defect cases. Whether the plaintiff is entitled to repair costs or difference-in-value is a complex issue, with different jurisdictions taking various approaches. In Texas, courts have held that the “general rule” is that the plaintiff is entitled to the lesser of repair costs or the difference-in-value. *Hall v. Hubco, Inc.*, 292 S.W.3d 22, 36 (Tex. App.—Houston [14th Dist.] 2006, pet. denied). Defendants would be wise to build a “difference-in-value” defense, bolstered by an appraisal expert, to counter the plaintiff’s election of remedy—generally repair costs, which are often much higher than difference-in-value damages.

When a plaintiff can recover repair costs

Under Texas law, a litigant is not required to plead its measure of damages. *Bowen v. Robinson*, 227 S.W.3d 86, 94 (Tex. App.—Houston [1st Dist.] 2006, pet. denied). The owner is entitled to elect its remedy.

The most often relied upon case to allow a plaintiff to recover costs of repair (also known as “remedial damages”) is *Turner, Collie & Braden, Inc. v. Brookhollow, Inc.*, 642 S.W.2d 160 (Tex. 1982). There, the Texas Supreme Court held that when a contractor has substantially performed, the owner can recover the cost of completion less the unpaid balance on the contract price.

Difference-in-value vs. Repair Costs

The owner is generally entitled to the lesser of repair costs or difference-in-value. However, the defendant may bear the burden of proving the lesser remedy. *Greene v. Bearden Enterprises, Inc.*, 598 S.W.2d 649, 651 (Tex. App.—Ft. Worth 1980, writ ref’d n.r.e.). In *Greene*, the appellate court held that a plaintiff is entitled to recover for breach of a construction contract the lesser of the reasonable cost to remedy the defects or the difference in value of the structure contracted for and the value of the structure in its defective condition. Whether the remedial cost or difference in value is the proper measure of damages depends on the facts and circumstances of the particular case. However, in most circumstances, the main factors to be considered are the physical and economic feasibility of correcting defects or bringing the structure into compliance with the contract.



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The *Greene* court held that if the defendant was dissatisfied with the remedial cost measure of damages, it had the duty to show there was no difference in value of the building as contracted for and as received, or that the difference was less than the remedial cost. Which party has the burden in proving difference in value has not, however, been decided by the Texas Supreme Court.

A flow chart for determining the proper measure of damages

The state of Texas law on repair costs vs. difference-in-value can generally be summarized in the following flow chart:

