

# The LePatner Report

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## Drafting Contracts for Today's Complex Projects

For the full text of this article as it appeared in the *New York Law Journal*, please visit our web site at [www.bblesq.com](http://www.bblesq.com).

By **Barry B. LePatner, Esq.** and **Victoria R. Drogin, Esq.**

**C**ounsel for corporate, governmental and institutional owners have long been faced with limited choices when deciding on how to structure the architectural, engineering and construction agreements to be used for their clients' new construction projects. These projects include headquarters facilities, hotels, offices, warehouse/distribution centers, shopping malls as well as residences for executive clients.

Today's mixed use projects which incorporate diverse functions such as a hotel, condominium apartments, a multiplex cinema, retail stores and parking, involve complex business objectives that must be woven into the fabric of the agreements for each design and construction team member. Is there a critical need for the retail and parking facilities to be completed for the holiday shopping season to ensure cash flow for funding the balance of the project? Will a fast track process be needed to commence work on the hotel and apartment tower to secure a management contract with a major hotel company, although the balance of the project can proceed through a general phased design process? In a renovation project, do the owner's business goals include a need to maintain ongoing operations while construction proceeds on a phased basis? These are only a few of the critical issues that counsel must identify and incorporate into the contract process. Standardized forms and pre-packaged contract formats, which are promulgated by the associations for the architects, engineers, or the construction industry, make it next to impossible to address these issues in a workable legal context.

Whether you are the general counsel for a corporation or institution, or a law firm that advises clients who do not regularly require construction-related

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## Web News Small Firms Turning to the Web:

*LePatner & Associates is featured in the New York Law Journal*

By **Victoria R. Drogin, Esq.**



*Spiral stairway: "Seeing the Light"*

**H**ow are the challenges of today's evolving technology affecting the way law firms must compete in the future? In a world of e-corporations, consumer control and immediacy of information, can law firms - and professional service firms in general - rise to the challenges posed by a BLUR economy marked by increased competition and exciting new vehicles for servicing clients?

A recent article in the *New York Law Journal* entitled, *Small Firms Are Turning to the Web*, touches upon some of these issues in a survey examining how small or boutique/niche firms are beginning to use the Internet and overcoming their resistance to developing Web sites.

LePatner & Associates was featured in this article for having developed and utilized its Web site as part of the firm's overall marketing and business development program as far back as 1996 when the Internet was in its infancy. This strategy was designed to synchronize with LePatner & Associates' client base and to complement and service its corporate, institutional and design clients who use the Internet to compete in their respective industries. Through the thousands of monthly visitors to the firm's website, LePatner & Associates has utilized this new technology to discuss the firm's service philosophy and its dedication to generating creative business solutions for its clients. The firm's website enables it to showcase its adaptability to the new environments in which the firm and its clients compete and communicate.

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## Your Real Property From Mechanics' Liens?

By: David J. Pfeffer, Esq.

**Y**our project is substantially complete. You have paid the contractor for most of the work and material provided on your project and you are finally ready to accept possession of your premises. No sooner than you are ready to move into your new facility, however, do several subcontractor - with whom you do not have a contractual relationship - encumber your real property by filing mechanics' liens.

Your lenders are calling, the board of directors has scheduled a meeting and you need answers fast.

This is not an unlikely scenario in today's complex construction process, where several tiers of subcontractors and materialmen rely on a general contractor to be the conduit of payment for services and material provided on the project. While the filing of a mechanic's lien does not ensure immediate payment to a sub who performed work on the project, it often exerts pressure on an owner to step up and make payment or take other actions to resolve the issue.

Lien Laws were enacted to protect those individuals or entities who are not paid for labor performed or material furnished in connection with the improvement of real property. The Lien Law enables an individual or entity owed money for labor or materials furnished to file a mechanic's lien. Although the filing of a lien does not create any entitlement to payment - that is determined by basic contract law - the Lien Law affords security to those providing labor or materials by encumbering the land on a private improvement.

Although an owner can post a surety bond or deposit money or security with the court to discharge a mechanic's lien and seek redress from the contractor who was paid for the work, this process can be expensive and often takes several weeks before the lien is discharged. Moreover, as principal of the lien can be dis-

charge bond, the owner can ultimately be responsible for paying the underlying sum to the surety if the subcontractor prevails in its suit to foreclose on the bond. As such, an owner will not want to bond off the lien itself. This is especially true if the owner has already paid the contractor for the labor and material the unpaid subcontractor has furnished.

**The construction agreement between the owner and contractor should contain a provision requiring the contractor to discharge any liens filed on the project.**

There are several ways an owner can safeguard itself from having its property encumbered by mechanics' liens. Since all of the following mechanisms are embodied in the construction agreement between the owner and contractor, careful planning and foresight must be adopted when structuring the construction agreement.

First, the construction agreement should contain a provision requiring the contractor to discharge any liens filed on the project. So long as the owner pays for all work performed, it should not undertake the risk of discharging mechanics' liens filed on its real property. As such, any failure to discharge a lien should constitute a material breach of the agreement for which the owner should be entitled to all costs, including attorneys' fees, related to discharging the lien.

Second, although "no lien" contract provisions are void and unenforceable as against public policy, the Lien Law permits a contract condition whereby a contractor receiving payment is required to waive all rights to file a lien with regard to payments received. This is known as a waiver of lien. The owner should require the contractor to execute the waiver of lien simultaneously with delivery of payment for labor and material already furnished. For additional protection, each waiver of lien should contain a representation that the contractor will defend, indemnify and hold the owner harmless from and against all dis-

putes, claims, losses, damages and expenses caused by any lien filed by or on behalf of the contractor and its subcontractors and materialmen.

Third, the owner should withhold a specified percentage of funds during the course of the project until the contract work is complete and accepted. This is known as "retainage." A sufficient amount of retainage will ensure that there are sums available at the end of a project to resolve claims by unpaid lienors. The retained sums can be used as leverage to compel the contractor to pay the lienor or discharge the lien. The percentage to be retained and the time when retainage is to be paid to the contractor should be spelled out in the construction agreement.

Finally, on certain construction projects, it may be prudent to secure a payment bond prior to the commencement of construction. A payment bond is an undertaking by a surety to compensate unpaid subcontractors, laborers, materialmen and others for the work and materials they provide on the project. Although the existence of a payment bond does not limit one's right to file a lien, it joins another responsible party into the fold and gives the owner additional leverage when it comes time to negotiate the discharge of the lien.

Although these measures will not ensure that mechanics' liens will not be filed on your project, they safeguard the owner by providing an effective mechanism for the discharge of liens. More importantly, they operate to give the owner maximum leverage against the contractor, the surety and lienor. When properly incorporated into a construction agreement, these measures operate in concert to provide a lethal front against liens filed on an owner's real property. ■

advice, adapting standardized industry forms to a project's special needs has traditionally been the accepted norm. However, this forces counsel for the owner to either create its own contract structure or adapt the industry forms with riders that often fail to address the inherent weaknesses in such contracts. In turn, these drafting problems have led to a search by attorneys for better alternatives due chiefly to a general lack of sophistication or experience with the nuances of this specialized area of the law.

It is widely recognized that even today's seemingly simple construction projects are far more complex than those constructed even ten years ago. Owners are facing increasing choices in the means and methods of design and construction. The decisions of whether or not to utilize a construction manager or whether to use a designbuild mechanism or the many new variations thereof, for example, can give the most sophisticated executives or university vice presidents pause. Furthermore, today's new project agreements must account for a host of new building technologies for structural, electrical, plumbing, heating and air conditioning systems. Add to this the increasingly important need for incorporating advanced security and telecommunications consulting services, to name but a few of the options available, and it is easy to see that the legal agreements needed to protect an owner and separately identify the obligations and liabilities for each project participant should not be left to the unwarly.

Hence, most owners and in-house counsel are faced with a major dilemma early in the conceptual stage of their important projects:

*Does our existing team of advisors and counselors possess the experience and sophistication to assist in the business and legal decisions attendant to launching the project?*

*Do we have the requisite skills to draft the preliminary documents needed to prepare the requests for proposals that will define the scope and business goals for the project?*

*Does in-house counsel have the experience needed to assist in the preparation and negotiation of the requisite contract documents to ensure adequate protection of our multi-million dollar investment in the project?*



All too often, the answer is: No.

### The Dilemma for Most Corporate Counsel

For many, if not most projects, the role of an owner's counsel is critical and enormously important. If the project involves leased property, in-house or outside counsel has worked closely with the client to prepare the requisite lease and associated documentation that preceded design and construction of its new premises.

Where a project involves the purchase of property, counsel will have assisted in legal tasks that may encompass such issues as zoning, land use, environmental and conveyancing. In addition, counsel will likely have worked closely with the client in its efforts to secure financing for the project, the documentation for which is extremely important, especially where the construction financing is being replaced by a permanent loan upon completion of the work.

As this important legal work nears completion, the owner is contemplating how the project will be designed and constructed. If counsel is well-versed in the design and construction phases of development, its continuing efforts on behalf of the owner will be a seamless segue throughout the remainder of the project. If, however, outside counsel's prior experience in these areas is limited in nature, or its experience extends to "marking up" standard form agreements used on a prior, perhaps unrelated project, the law firm's undertaking of this assignment may well exceed its experience.

Increasingly, corporate and in-house counsel have begun to recognize the need and the value of securing specialized expertise in this area of the law. Turning to standardized agreements in today's construction environment has become increasingly risky for owners and their attorneys. This is because each project is unique and the variables of each project – the special features needed to match the scope with the project delivery system, the combination of consultants to be integrated and coordinated to the phased completion dates for separate stages of many projects – all must be properly defined so that responsibilities and liabilities are properly ascribed to each of the project team members.

At the outset of each project, construction counsel must meet with executives or senior officials of the client and survey their critical needs for project success. This investigation involves a series of goal-oriented questions directed at the specific business and legal objectives critical to the project's the successful completion. By identifying these issues counsel insures that the owner will be provided a series of agreements that: (i) contain the requisite provisions which will effect their business goals; and (ii) require each participant to buy into the owner's goals as a component of the work, labor and/or services to be performed. As a result of this effort, each of the contracts for the individual team members should include acknowledgments of the team members' commitments to the owner's project goals.

### Conclusion

As the business and legal complexities of the design and construction world become interwoven with the building needs of the corporate, governmental and institutional world, it has become more critical than ever to secure agreements for projects that reflect the realities of the owner's bottom line business issues. In-house corporate counsel, as well as outside counsel for these clients, must become highly sensitized to the need to develop specialized agreements that will both protect the parties and provide the guidance necessary for the successful completion of a client's project. ■

By Brad Cronk *Design Consultant*

In the wake of the well-publicized structural failures that occurred in New York City during the past year, one wonders whether such problems could have been better forecast, given the age and condition of many of the buildings in the city. Hundreds of square feet of brick rain down from a high-rise office building onto Madison Avenue, disrupting traffic and business for weeks. Older buildings in Harlem and also along the rejuvenated 42nd Street, suffer partial collapse after their foundations are disturbed by new construction on adjacent property. And tragically, in two well-known stories, a school girl in Brooklyn and a young woman in the East Village are killed when chunks of masonry unexpectedly fall from the facades. Although these extreme examples captured the attention of the media and the public, there are countless other less serious failures every day which nevertheless result in significant damage to an owner's building and property.



structural members which, in turn, may fail, and so on. Such was the case in the building collapses referenced above. Taken to the extreme, the World Trade Center bombers theorized that a single, well-placed bomb could significantly cripple or collapse the entire building.

Non-structural failures typically refer to building "envelope" failures. The building envelope (or skin) is the set of materials and systems which define the exterior of the building. For most multi-story buildings today, these envelopes consist of (1) masonry and steel lintel systems or (2) curtain wall systems that can integrate a variety of materials such as glass, metal, granite, stone, and even masonry. Masonry collapse, air and water infiltration through the facade,

glass lite "popping" from windows or curtain walls, and water penetration at roofs and skylights are the most common forms of building envelope failure. Most are surprised to learn that the collapse of the brick facades in the examples mentioned above are non-structural failures. While falling bricks are potentially deadly, they typically do not belie a problem with the building's structural system - just perhaps the system used to anchor the bricks to the building structure. Another type of non-structural failure concerns a building's mechanical systems. Failure within one of today's increasingly sophisticated and multi-integrated mechanical, electrical, and conveyance systems may result in serious building-wide consequences such as insufficient fresh air exchange, erratic heating and cooling, or power loss. Further, with most building renovations now including a fully wired information technology infrastructure, mechanical system failures will not only effect occupant comfort, but may also endanger business operations and communications itself. ■

*In the next LePatner Report, Part II on common causes of building failures and how to identify potential flaws during design and construction which could lead to failure. Also, see Barry B. LePatner's book on this subject, Structural Failures: A Case Study for Architects Engineers, and Lawyers, co-authored with Sydney P. Johnson. Or, see [www.bblesq.com](http://www.bblesq.com) for selected cases reproduced from his book.*

Building failures are typically classified into two broad categories: structural or non-structural. Yet there is much more information that can be extracted from these general categories. Although building failures can occur during construction, most would probably associate building failures with those buildings that have been in operation and that have been occupied for some time.

As its name implies, structural failures refer to those failures which compromise the integrity and safety of the building's structural components; its columns, foundations, bearing walls, floor and roof slabs, etc. Failure of one or more of these elements may simply cause local damage at, or around, the element in question. For example, an underdesigned beam may sag from the imposition of an unexpected load, causing cracking of the adjacent wall, ceiling and floor finishes. In some cases, the telltale signs may be quite subtle, such as hairline cracks in a concrete column. In these cases, only a licensed professional engineer should be trusted to make a diagnosis. The real danger of the structural failure is the possibility of an impending chain reaction of such failures. That is, as a structural member fails, its load is redistributed to adjacent

## Join Us at Harvard

Come hear **Barry LePatner** present marketing insights and strategies for the new economy. Presented as part of a three day summer seminar at Harvard's Graduate School of Design headed by A. Eugene Kohn of Kohn Pederson Fox (KPF). This course offers a wealth of information for architects, interior designers, engineers and contractors on how to position your firm for business in the next millennium. Panelists Roz Brandt will address presentation skills; Kevin Kelley will discuss the use of graphics and computer technology; and Diane Barnes, will present the buyer's side of real estate. All who are interested should contact the Professional Development office at Harvard University by calling (617) 495-1680 or view the course curriculum and registration requirements at the GSD web site:

[www.gsd.harvard.edu/profdev/](http://www.gsd.harvard.edu/profdev/)

"Out of Bounds," the new **Scarsdale Teen Center**, held its grand opening on the afternoon of June 13. **LePatner & Associates** provided pro-bono project management services for the non-profit organization which provides a safe and accessible venue for activities and events for local teens. **LePatner & Associates** is grateful to the team of **York Hunter**, construction managers, **AHSC**, architects, and **AKF Engineers** for their dedication and commitment to this important project.

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375 Park Avenue  
New York, New York 10152  
(212) 935-4400  
E-mail: [bblesq@ix.netcom.com](mailto:bblesq@ix.netcom.com)  
Website: <http://www.bblesq.com>  
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## 20 years in 2000

In celebration of the upcoming twentieth anniversary of **LePatner & Associates**, the firm will soon premier a new format for the LePatner Report. In keeping with the firm's philosophy of providing a creative forum for issues critical to the design and construction industry, the new format will tie in and reference more client-specific issues and in the not-so-distant future, the LePatner Report will be delivered to our readers via the Internet. Stay tuned.

The NYC School Construction Authority has awarded a major contract seeking analysis and assessment of SCA's current contractor review processes and the development of a software package and training program. In conjunction with Decision Strategies Fairfax International ("DSFX") and Fluor Daniel, **LePatner & Associates** will provide legal and consulting services for contract compliance as part of this project.

## IN LUMINAE The Quiz

- 1 Name the two categories in which building failures are typically classified.
- 2 Why were lien laws enacted and who does it protect?
- 3 **True or False:** There is only one way an owner can safeguard itself from having its property encumbered by mechanics' liens.

Answers below.

1. Structural and non-structural.
2. The New York State Lien Law was enacted to protect those individuals or entities who are not paid for labor performed or material furnished in connection with the improvement of real property.
3. **FALSE** - Owners have several ways they can safeguard themselves from having its property encumbered by mechanics' liens - Lien provisions in the Owner-Contractor agreement, lien waivers, retaining and obtaining a surety bond are just a few ways owners can retain some protection.

Answers to In Luminæ Questions :

## Quote of the Quarter

*"The difference between products and services blurs to the point that the distinction is a trap. Winners provide an offer that is both product and service simultaneously."*

--Stan Davis and Christopher Meyer