

In addition to our [LePatner.com](http://LePatner.com) and [BrokenBuildings.com](http://BrokenBuildings.com) Web sites, we recently launched [BarryLePatner.com](http://BarryLePatner.com). Visit to read about his latest articles, media interviews and appearances discussing the construction industry and the state of our nation's infrastructure.



# LEPATNER

## CORPORATE CONSTRUCTION COUNSEL

# REPORT

SUMMER 2008 VOL. 28, NO. 1, 2

A QUARTERLY FOR THE DESIGN, CONSTRUCTION AND REAL ESTATE INDUSTRY FOR OVER 27 YEARS

## Failing to Protect

### Three Actions Our Leaders Must Take in Order to Save America's Crumbling Infrastructure

By Barry B. LePatner, Esq.

Our nation's infrastructure is in dire shape. If this summer's flood coverage following the Midwest's 30-plus deadly levee breaks doesn't convince you, think back a year ago. Last August 1, the collapse of the I-35W Bridge left many of us pondering the safety of our highways and byways. And who can forget the shocking images of post-Katrina New Orleans? If you're wondering what America has done in response to these disasters, the answer is "not nearly enough"—and that does not bode well for the future.

Each of these infrastructure breakdowns could have been prevented. Take the Midwest floods, for instance. In 1993 the same areas experienced massive flooding that resulted in over \$10 billion in damage as well as loss of life. The current flooding has so far cost \$1.5 billion and that number is sure to grow.

What went wrong? Why weren't proper measures taken to keep this type of flooding from happening again? Who dropped the ball—and why were they allowed to drop it? We as a society need to ask these questions, not to point the finger of blame, but to make certain that what was avoidable can be prevented in the years to come.

If you want to pinpoint a common problem in each of these infrastructure failures, look no further than the systems used to identify needed repairs and to allocate funds for infrastructure remediation. Since the 2005 National Transportation Act, states are allowed to do what they choose with the money given to them ▶

.....

Building on the success of **Broken Buildings, Busted Budgets**, Barry LePatner is working on a follow-up book that takes a hard look at the perilous state of our nation's infrastructure. This article has been edited from the introductory chapter of the book.

### Client Alert:

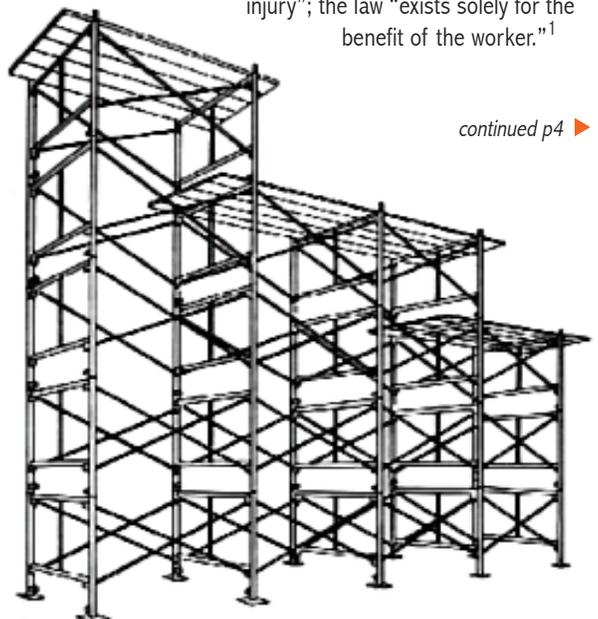
## Scaffold Law Applied to Work Done Without Owner's Consent

*Sanatass v. Consolidated Investing Company*  
(NY Court of Appeals, April 24, 2008)

By Henry H. Korn, Esq. and Amy J. Barrett, Esq.

New York's highest court issued a significant decision that has far reaching consequences to building owners. The *Sanatass* case involves scaffold law claims against the owner who did not consent to the work being performed by its tenant. The Court held that a building owner will be held liable for a worker's injuries under Labor Law §240(1) ("Scaffold Law") even when the work is performed for a tenant without the owner's knowledge and in violation of the tenant's lease. The Court concluded that Labor Law §240(1) "clearly places the burden on the owner should a violation of the statute proximately cause injury"; the law "exists solely for the benefit of the worker."<sup>1</sup>

continued p4 ▶



## FAILING TO PROTECT

- ▶ by the federal government. For the very first time, the federal government has stepped back from establishing national guidelines for the design and maintenance of our critical infrastructure facilities.

Unfortunately, the powers that be—politicians constantly vying for re-election—prefer to spend that money on things that get noticed by the public. Simply put, they get far more political mileage from, say, beautifying an old park than from making (less glamorous) repairs on a bridge or levee. Consequences can be disastrous.

Funding deferral makes infrastructure repair a losing battle. Allocating minimal amounts to keep a failing bridge or a levee in status quo condition is just plain wrong when facing the inordinate rebuilding costs and widespread economic damage that will result after it fails. Post-failure infrastructure costs are always astronomical—in terms of dollars and human lives—and far outweigh the costs of any preventive measures that could have been taken.

So, now that the Midwest floods have wreaked their havoc, what actions can our nation's leaders take to ensure that our infrastructure needs are met in a responsible way?

**We must start considering all of the ‘what ifs’ related to our failing infrastructure. Katrina should have served as an example that ‘hoping nothing happens’ is not an acceptable course of action.**

Here are three recommendations:

- 1 Stop using inaccurate statistics as justification for not spending the necessary monies on infrastructure.** In some locations in the Midwest, the recent flooding and that which occurred back in 1993, was designated as a “500-year flood zone.” Despite popular belief, this does not mean that such floods happen once every 500 years but that they have a 1/500 (or 0.2 percent) chance of happening in a year. According to a recent Kansas City Star story, if FEMA determines that a levee can withstand a 100-year flood—i.e., a flood that has a 1 percent chance of happening in a given year—then the area that levee protects is not considered to be in a flood plain. This designation means federal flood insurance

isn't required for residents who live in the area.

But these areas are flooding more and more frequently. Despite that fact, officials from organizations like the Army Corps of Engineers and FEMA like to say they couldn't have predicted the severity of the flooding. That may be true, but what they can control is how risk is assessed in these areas. Some of the methods being used for risk assessment, like floodplain maps, are outdated and inaccurate. Money needs to be allocated so that risk can be reassessed based on current circumstances so that levees can be built up and strengthened where they need to be.

The bottom line is that people need to know where they shouldn't build their homes or establish their businesses. Relying on inaccurate or misleading information to make these decisions puts families and businesses at risk and extends the potential for high costs in damages in the future.

## **2 Start calculating “real costs” when making decisions regarding the long-term impact of potential disasters.**

Needed infrastructure repairs are often ignored because the money it would take to make them in the short term a) isn't easily available, or b) would restrict the amounts of money politicians could spend in more visible areas favorable to them. But when you look long term, you suddenly realize the costs of infrastructure remediation pales in comparison to the future costs of ignoring it.

Using the levee breaks and flood wall breaches that resulted from Hurricane Katrina as an example, before Katrina struck, it would have taken an estimated \$10 billion to repair the levee system so that it could withstand such a storm and protect most of the New Orleans metro area. But now you must also take into account that New Orleans' population has been reduced by nearly 50 percent, and trade and commerce in the area may never fully recover.

The point is that we must start considering all of the ‘what ifs’ related to our failing infrastructure. Katrina should have served as an example that ‘hoping nothing happens’ is not an acceptable course of action. Anyone who truly took the long view would quickly see that it's almost always a terrible mistake to let infrastructure repair needs slide. Consider, for instance, that a recent report from the American Council of Engineering Companies shows that California alone estimates that it is losing \$15 billion or more a year in loss of production due to the lack of necessary spending to repair the state's infrastructure. State governments should take into account how much money they are losing by avoiding the repairs their infrastructure needs.

### 3 Force politicians and other government officials to act on expert recommendations given to them.

Our nation's infrastructure is frequently inspected, but repair recommendations often fall on deaf ears or get held up due to lack of funding. The I-35W Bridge is a prime example. According to a recent investigative report commissioned by the Minnesota Department of Transportation and compiled by the firm Gray Plant Mooty, MnDOT hired outside consultants to assess the fatigue life and fatigue cracking in the bridge and determine whether it was necessary to add "redundancy" to the bridge, i.e. providing extra support to the original structure as a safety precaution. Neither was accomplished. According to the report: "MnDOT initially recognized the need for redundancy but later focused on the fatigue analysis. Ultimately, the Bridge did not receive any materially different treatment than it had historically and redundancy was not added to the Bridge."

A bent gusset plate was photographed and filed in 2003 but none of the inspectors or MnDOT officials who saw the photo noticed. As it turns out, the bending of multiple plates caused the bridge collapse. If the repairs and inspections above had been carried out, perhaps the bent gusset plate would have been noticed and the bridge could have been repaired or closed to protect the public. According to the investigative report, as a result of the bridge collapse that happened because these repairs weren't made, 'lives were shattered...So too, was confidence in the [state's] bridges.' Fixing infrastructure problems that could lead to loss of human life is compulsory, not optional. We should create an independent system that requires that monies are used as designated and which then oversees the system to ensure that projects get completed as planned. It should not be earmarked money or pork barrel spending, but a non-discretionary spending item that must go towards its intended purpose.

There's a quote from the recent I-35W Bridge investigative report that says, "When a bridge collapses, so does public faith in government." Given what has recently happened in the Midwest, we can change the word 'bridge' to represent any form of infrastructure in the country and in doing so one realizes how critical the situation is.

For better or worse, Americans rely on the government to protect them from harm, and clearly government at all levels is falling down on the job. We hear about the billions of dollars spent on the War on Terror while here at home we are at risk every day because our infrastructure is crumbling. As a government and a society we must make safety at home a priority—and shoring up our infrastructure is the natural place to start.

## PROJECT CHECKLIST:

### Recognizing and Avoiding Common Pitfalls in the Construction Process

by Henry H. Korn, Esq. and C. Bradley Cronk, RA, LEED AP

- ▶ **CM/Contractor's lack of control over subcontractors.** Although an "at risk" CM/GC is responsible for the actions of its subcontractors, suppliers, and vendors, the reality is that most CM/GC's possess very little leverage if one of its subs mismanages its work or, worse, goes bankrupt. In most cases, the damage to the project will have already been done from delays and increased project costs ultimately borne by the Owner. Owners who step in to take control from its CM/GC in order to mitigate such a situation run the risk of establishing a de facto direct relationship with the subcontractors and inadvertently transferring risk from the CM/GC to itself. A strong contract provision holding the CM/GC explicitly responsible for the performance of their subs will at least give the Owner recourse to the CM/GC.
- ▶ **Use the Fast-Track process sparingly and strategically.** Do not use a fast-track process unless the Owner can really control its design consultants' ability to produce accurate, timely bid packages; that the design scope won't change; that the site conditions are known to all; and the approvals process can proceed uninterrupted from one phase to the next. However, it is the rare Owner who maintains full control of its consultants or contractors unless they are direct employees!
- ▶ **Incomplete & uncoordinated construction documents.** If one assumes the average architectural fee is 10% of the construction cost, then a dollar spent on an architectural fee to refine and finalize the drawings is worth \$10 of construction costs, i.e. it is much cheaper to design, than build. While financing pressures on developers are very real especially in the current economic environment, we strongly advocate allowing design professionals the incremental amount of time and fee needed to provide 100% complete and coordinated construction documents for final contractor bidding. This will minimize the discovery of costly additions, coordination errors and omissions once the project is under construction.
- ▶ **Excusable delays.** The Owner should clearly delineate what is and is not an excusable delay for the CM/GC that would entitle it to seek additional fees and/or extended general conditions. While force majeure, strikes (not resulting from the CM/GC's actions) and acts of war/terrorism are excusable delay examples, others like material cost increases, delivery delays, and certain concealed conditions should not necessarily be. At the least, they should be negotiated before the contract is signed.
- ▶ **Incentives to complete on budget and on time.** The Owner should retain financial control over the project so the construction team gets the job done within budget and on time. A combination of financial penalties, retainage, hold-backs and ▶

## PROJECT CHECKLIST *continued from p3*

incentives should be considered to achieve these goals. However, beware of completion bonuses, which can sometimes incentivize contractors to make claims to explain why they were prevented by others from achieving early completion.

▶ **Scheduling.** The Owner should ensure that the CM/GC's schedule contains critical milestone dates during construction as well as substantial completion and final completion. The CM/GC must provide the Owner with advance notice in the event of any delay during the Project. For delays caused by the CM/GC, it should be required to accelerate the work through overtime or other means to get the project back on schedule at no added cost to the Owner. The Owner should insist on a contract provision that states that the CM/GC use project management software such as Primavera or Prolog that can track a critical path schedule and other crucial project documents. The Owner is advised to purchase a software license also in order for its project manager to verify the CM/GC's electronic schedule file for manipulation or inconsistencies.

▶ **Consequential and Liquidated Damages.** Consequential damages are often negotiated because most CM/GC's do not have the financial strength to pay for the damages caused by an owner's business losses due to a delayed project. The ability to collect liquidated damages (a prescribed sum) for the CM/GC's delay on a per diem basis is usually recommended instead. Never agree to a cap on liquidated damages. Instead negotiate a larger retainage, hold it for a longer period of time and use a graduated scale to retain the CM/GC's profit should it delay the project.

▶ **Contract Price.** Depending on the design scope and project schedule, the Contractor must provide either a fixed-price cost based on complete documents describing a specific scope of work, or a guaranteed maximum price ("GMP") based on incomplete documents where the complete scope is inferred. Either one should include a detailed cost breakdown by trade of all the subs' work; general conditions costs, which are often performed by the CM/GC and should be itemized instead of a straight percentage of the subs' costs; provable insurance costs; a fair profit; and, depending on the scale and type of project, bond costs. Since a GMP is based on incomplete drawings, owners are advised to consider the cost-benefits of tasking the design team to provide 100% complete documents - see above.

▶ **Change Orders.** Change Order approval should rest exclusively with the Owner. The CM/GC who proceeds with change order work before obtaining written Owner authorization does so at its own financial risk. The CM/GC must provide the Owner with appropriate backup documentation demonstrating the cost of contractor work for the change orders. In the event of a legitimate disagreement over the cost of a change order, the Owner and CM/GC should agree to continue negotiating in good faith while the work proceeds so as to not delay the project. In no event should the CM/GC be allowed to halt the work and hold the project hostage over a change order negotiation. No time extension should be granted to the CM/GC because of a change order unless expressly proven by schedule analysis that it extends the critical path of the project. There should be an agreed upon fixed price for the change order, including overhead and profit.

## Scaffold Law...*con't. from p1*

Based upon this decision, we believe all property owners should be aware that lease requirements that a tenant inform and obtain landlord consent for work to be performed will have no effect on subsequent landlord liability based on the Scaffold Law. We note, however, that although the Court did not rule on defendant Owner's 3rd party indemnification claim, it appeared to conclude that the lease language may impact its right to indemnification. Defendant Owner's 3rd party claims against the tenant seeking contribution and indemnification based upon a clause in the lease providing for same in favor of the Owner and a requirement that the tenant obtain comprehensive liability insurance coverage are still pending. The Court noted that although the tenant's breach did not relieve defendant Owner of liability under the Scaffold Law, it may have bearing on its indemnification claim. Therefore, it is advisable to continue to include such prohibitive language in lease agreements.

Although this strict interpretation of Labor Law §240(1) will impose liability on landlords for injuries suffered by workers performing work at their premises, whether known, consented to, or unknown to the landlord, owners can continue to protect themselves through insurance, indemnification and, where there is another tortfeasor, by way of an action for contribution from that party.

<sup>1</sup> By amicus curiae brief, the New York State Trial Lawyers Association urged the Court to hold defendant Owner liable under Scaffold Law to prevent landlords from attempting to avoid liability under the statute through lease provisions.

### QUOTE OF THE QUARTER

"They gave me an unlimited budget — and I exceeded it."  
- George Allen

### LEPATNER REPORT

IS A PUBLICATION  
OF THE LAW OFFICES OF  
LEPATNER & ASSOCIATES LLP  
600 LEXINGTON AVENUE - 21ST FLOOR  
NEW YORK, NEW YORK 10022  
(212) 935-4400  
MAIL@LEPATNER.COM  
WWW.LEPATNER.COM  
© 2008, BARRY B. LEPATNER, ESQ.  
ALL RIGHTS RESERVED.