# LETTERS


## Liquidated Damages

To the Editor:

In the March '96 *Legal Column*, Quenda Behler Story contrasts "time is of the essence" with liquidated damages to the point of emphasizing that you can't have it both ways. This characterization is incorrect. Two parties may stipulate in a contract that a certain amount shall be paid in case of default on a contract. This is known as liquidated damages, and in construction work it is usually related to time of completion. In order for liquidated damages to be enforceable, certain conditions must exist. The amount of liquidated damages must be reasonable, and it must be difficult to ascertain actual damages. The latter is usually the case when timely completion delays occupancy. Additionally, it has been held that in order for liquidated damages to apply to default on time of completion, it must be established that "time is of the essence." This usually requires that those or similar words be written into the contract (Carter v. Sherburne Corp., 1974). In other words, if you have a liquidated damages clause, you *must* have a "time is of the essence" clause.

Glenn Davis
Wilmington, N.C.

*Quenda Behler Story responds:*

*Until Mr. Davis describes a "time is of the essence" clause as a necessary prerequisite to an enforceable liquidated damages clause, I agree with his comments, but there we part company. As support for his argument, he cites Carter v. Sherburne, which involved a construction contract where, during the course of the work, the owner had caused delay in a variety of ways.*

*When the contractor did not finish the contract on time, the owner sought to avoid his contract payment by claiming the liquidated damages clauses in the contract amounted to a time is of the essence clause. The court said the liquidated damages clause was not the same thing as a time is of the essence clause: "… the inclusion of penalty or forfeiture (liquidated damages) clauses is strong evidence that time is not of the essence…." Then the court said, with regard to the liquidated damages clause itself, that the plaintiff owner could not enforce that clause because "Delay … will be excused where it is caused by the … opposite party."*

*In other words, the court determined that the liquidated damages clause precluded a time is of the essence finding, and then the court refused to enforce the liquidated damages clause — not because there was no time is of the essence clause in the contract, but because the owner was the cause of the delay. Therefore the owner could not penalize the contractor for the delay, liquidated damages or not.*

## Win-Win

To the Editor:

Quenda Behler Story's article "Time Is of the Essence" (*The Legal Column*, 3/96) briefly addresses liquidated damages. She states, "This arrangement is fair to both the contractor and the client." My opinion is that if time is truly an important issue to the client, the liquidated damages clause would rebate the same dollar amount as the penalty back to the contractor for each day he completes the project *ahead* of schedule. This, to me, is a real win-win situation; the contractor has a financial incentive to do the work as efficiently as possible and the client has a completed project on time or earlier.

One more comment on liquidated damages: Make clear in your contract all causes for delay that are beyond your control, such as weather, timeliness of decisions by the clients, and additional work orders. Every time a delay described in your contract occurs, write a change order to address it. And of course, if additional work is desired by the client, add in the appropriate time necessary to get the work done.

Nina Winans
Winans Construction
Oakland, Calif.

## In Defense of Hardboard

To the Editor:

The article "Lawyers Press More Suits on Siding Makers" (*Eight-Penny News*, 3/96) needs to be put in perspective.

It is true that because of the Louisiana-Pacific situation, the attorneys of the "class action industry" have focused attention on hardboard. It is true that a class-action suit has been filed against one or more hardboard siding manufacturers in the State of Alabama. It is true that law firms are shopping for potential clients. Masonite Corporation expects to have its suit dismissed.

The rest of the article is conjecture that seems to be intended to recruit clients for Mr. Dorman's legal firm. We hope that the anonymous "expert" is indeed called to testify so that his misconceptions about wood fiber and the benefits of proper installation and maintenance can be debunked.

Consider the following: Hardboard siding has been in the market for over 30 years with total shipments of over 25 billion feet. That's enough to side over 15 million average-sized single-family houses. That's proven dependability.

C. Curtis Peterson
Executive Vice President
American Hardboard Association
Palatine, Ill.

## Watch Out for Wiring

To the Editor:

Chris DeBlois's article on attaching

deck ledger boards was excellent (*Practical Engineering*, 3/96). Here's an interesting anecdote from my experience: Ten years after a deck ledger was attached through the band joist with lag screws (the interior finished ceiling prevented the use of through-bolts), the house burned down because the lag screws had nicked a BX cable. The 14-gauge wire (improperly protected by a 20-amp fuse), was under compression for all that time. Apparently, the wire insulation carbonized and ultimately ignited. I always specify through-bolts, which require the installer to inspect the other side and locate any plumbing or wiring that might be in harm's way.

Robert Randall
Mohegan Lake, N.Y.

## Steel Pretzel

To the Editor:

One item in Phil Hubbard's article "Survival Tips for Downtown Remodelers" (3/96) made the hair stand up on the back of my neck. It reads more like a prescription for suicide rather than a "survival tip." His suggestion to bribe elevator operators into allowing long materials to stick up through the emergency hatch out the top of the cab is irresponsible.

On one of our projects, a contractor came up with the same "clever" idea: He was able to induce the night elevator operator to open the top hatch and allow him to slide the top of a 10-foot structural steel channel up into the space above the car. In his mind, this was clearly an improvement over hand-carrying the steel up 22 flights of stairs. What he failed to grasp, however, was that as the car began its trip up, the 4,000-pound elevator counterweight started on its own trip down! All went well until the car approached the tenth floor and reached its maximum speed (as did the counterweight). The steel channel was leaning toward the back of the cab just enough so that its top was in the direct path of the onrushing counterweight. If you can imagine standing a foot from a two-ton pile driver, you would have some idea of the surprise they experienced.

Fortunately, neither the contractor nor the elevator operator was killed, but the steel channel ended up looking like a pretzel, and the floor of the elevator cab was fairly well demolished. Both the contractor and the elevator operator were immediately fired and were responsible for the substantial cost of repairing the elevator.

All of which is to say that cutting corners on safety may come back to bite you in unexpected ways.

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