

# LePatner Report

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## The Best of Times.... or Are They?

By Barry B. LePatner, Esq.

“It was the best of times, it was the worst of times....” So wrote Charles Dickens to describe the period of great transition that preceded the upheaval of the French Revolution in the late 1780s. The times that Dickens portrayed included stories of great wealth, great uncertainty and novel ideas that swept across the face of Europe. Whether the traditional world of the 18th century establishment would retain any vestige of its previous self in the face of such change was, of course, the central premise of “A Tale of Two Cities.”

So it is that we view the great changes and challenges that are rushing across our global landscape today, affecting every aspect of our lives. The ubiquity of the computer has brought into question whether employees need to be in the office to do their work. This affects the traditional concept of the geographical location of our places of business which, in turn, will impact tomorrow's brick and mortar decisions of developers, landlords and urban planners.

The array of information on design issues and construction costs that is now immediately available to owners, architects, engineers and contractors is affecting the speed at which decisions can be made both during the design phase as well as in the field. As a result, the two bywords of the builder, budget and schedule, are being looked at in new ways that will change the face of how projects are built in the decade ahead.

Where once anyone who needed to rent an apartment or an office, or purchase a house or condo, had to retain a broker to advise as

to the available inventory in a given locale, now anyone anywhere can view the range of facilities and take a “physical” walk through by virtue of the Internet. The concept that everything is available to everyone is reshaping the broker world in ways that will only serve to benefit both the buyer and the seller, a result that can only be welcomed by those who often questioned the alleged exclusivity that the broker world worked hard to convey to its clientele.

Who will be the beneficiaries of all this change? Will real estate owners, whether corporate, commercial, individual or governmental, find themselves with more valuable property at the end of this cycle? Will architects, engineers and contractors learn how to adapt to the technological tools now coming available and bring buildings to life in a smarter, faster and more affordable fashion while profiting from the savvy professionalism they bring to each project? Or will we find that the design and construction world lacks the vision to make the transition to this new order?

Will a new and younger cadre of architects and engineers join their business peers in a partnership by bringing a more sophisticated approach to design that couples smart ideas with an emphasis on helping the at-risk client to meet its business objectives?

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## LePatner & Associates Reflects & Celebrates its 20<sup>th</sup> Anniversary

LePatner & Associates begins a year-long celebration of the firm's twentieth anniversary. The firm opened its offices on Monday, November 4, 1980. The next day, Tuesday, November 5, 1980, the office was closed in observance of the national Presidential Election Day on which Ronald Reagan defeated then President Jimmy Carter.



The firm started with a simple goal of solving client's problems. A majority of the firm's clients were architects, engineers, interior designers and design professionals from lighting consultants to structural engineers. The firm has evolved over the years to widen its client base to include many prominent corporate, commercial

and real estate owners. The firm has expanded its services to include construction litigation services, project management services, construction counsel and business advisory services on matters pertaining to everything from getting a project off the ground to providing representation before, during, and after a project breaks ground. Joins us in celebrating our twentieth anniversary by looking out for upcoming notices of events in the summer and fall. ■

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By: Lina G. Telese, Esq.

Many reasons exist for one party to require another party to add it as an additional insured on the other party's liability policy. Generally, the additional insured is provided with the right to an immediate defense by the named insured's insurer rather than being indemnified for defense costs at a later date. Typically, an owner should require that it be named as an additional insured on its lessee's, contractor's, or subcontractor's Commercial General Liability ("CGL") policy. The lessee, contractor or subcontractor will then purchase an additional insured endorsement to its CGL policy covering the owner as an "additional insured."

Generally, any insured party other than the named insured is referred to as an "additional insured." One should be aware that there are more specific descriptions which do breed confusions. The additional named insured is known as that party who is added to the policy by way of an endorsement; whereas, the "automatic insured" are those additional insureds that are afforded coverage via a policy's omnibus clause. They are best described as automatic insureds because they are afforded

coverage without any action on the named insured's part. The named insured need not add them to the policy by way of an endorsement; they are automatically covered. "Automatic insureds" are automatically included as insureds under a policy by virtue of their close relationship with the named insured. "Additional insureds" on the other hand, do not necessarily enjoy the same close relationships with the named insured.

All parties involved in a construction project should make certain that they not only have adequate coverage under their own CGL policies but are named as additional insureds on the policies of the other parties involved in the project. The additional insureds do not directly pay premiums for the coverage they receive as additional insureds. The additional insured receives this benefit in exchange for its performance under its contract with the named insured.

All additional insureds must realize that although they now have additional coverage, they are not in control of their defense. An additional insured surrenders control of its defense to the insurer affording coverage. Many sophisticated litigants often prefer to control their own defense having their own reputable and successful counsel as part of their team. A contract provision would protect an additional insured with the proper language so as to enable such additional insured to control its own defense.

An insurer's duty to defend is not triggered until it receives actual notice of the suit from the insured. Accordingly, it is critical that a party, immediately upon being made aware of a claim or a potential claim, notify the other party, who is obligated to name the first party as well as its insurer (if known) of the claim. This is known as a "tender of defense."

It is important to realize that the named insured is distinct from an additional insured. A named insured typically enjoys greater rights under a common policy than does an additional named insured. For example, a named insured is entitled to notice of cancellation of the policy.

The additional insured should not only make certain that the insured furnishes it with a certificate reflecting its status as an additional insured under its CGL policy, it should also obtain a copy of the CGL policy in order to make certain that there are no exclusions in the policy which might affect the rights of the additional insured. The additional insured needs a copy of the insured's policy so that it can determine if it has coverage, or if it needs to act to protect its interests.

More often than not, an additional insured has other insurance coverage usually under its own CGL policy. The "other insurance" coverage refers to coverage which not only insures the same risk but is for the benefit of the additional insured during the same period of time, thereby providing the additional insured with concurrent coverage. Probably, the most significant problem encountered by additional insureds relates to the integration of their own insurance with the insurance provided by virtue of their additional insured status. The intention of additional insureds is virtually always that the other party's insurance provide them with primary protection, with their own insurance providing them with excess insurance protection. Unfortunately, contractual provisions requiring additional insured status often fail to clearly state this intent, and until recently, the insurance policies themselves almost never established payment priority.

Many insurers do not feel that the additional insured should receive the benefit of primary coverage under their policy especially when they are not found to be at fault. In New York State, the courts will allow concurrent insurers to recover from one another under a contribution theory wherein the additional insured's own insurance will pay a pro rata portion along with the insured's. The insurance industry has developed a standard endorsement for establishing the payment priority between policies when one party is an additional insured wherein the policy states that the additional insured's own primary coverage is excess over any other primary insurance available to the additional insured. However, this does not necessarily mean that a party is afforded the requisite protections. All policies must be carefully reviewed and analyzed by the insured/additional insured to ascertain whether or not its interests are in fact protected under the policy.

In the event an owner of a construction project breaches its promise to obtain insurance for the additional insured, the owner could be liable for all resulting damages, including defense costs and losses that would have been covered had the owner obtained the correct policy. In the State of New York, if the insured does not purchase the insurance it promised, the additional insured cannot look to the insurer for protection. The additional insured's only recourse is, if any, limited to a breach of contract action against the owner.

In summary, additional insured status is a reinforcement of the underlying contract's indemnification and hold harmless provisions, it does not replace them. Moreover, the additional insured must certify that it is an additional insured by obtaining not only a copy of the endorsement certifying its status but also a copy of the policy to ascertain the extent of its protections. In addition, under any policy of insurance, the insured, whether additional or not, must immediately notify the party obligated to name the other party as an additional insured as well as the insurer of a possible claim. Finally, to solely impose a contractual risk transfer without adequate

insurance backup as an insured can invite trouble if the contract turns out to be null and void. It is in your best interest to protect yourself contractually as well as through all available insurance. ■

Additional insureds must realize that...they are not in control of their defense. An additional insured surrenders control of its defense to the insurer affording coverage.

Many sophisticated litigants often prefer to control their own defense having their own reputable and successful counsel as part of their team.



*High-speed connectivity continues to redefine our work and living spaces which have become radically different from any other period in our modern history.*

**A**n important new trend in the real estate, design and construction industries is the emergence of "plug-n-play" buildings. With more and more networked environments being built, the structured network has become second only to air conditioning as a preferred building amenity, giving rise to a fourth new utility: the high-speed network <sup>1</sup>. The traditional triumvirate of utilities-- Electricity, Plumbing and Heating Ventilating and Air Conditioning ("HVAC")--have been part of the modern building experience since the late 1930s, but a recent BOMA / ULI <sup>2</sup> office tenant survey, revealed that the most important items tenants coveted were: (i) energy efficient HVAC system; (ii) wiring for Internet access; (iii) high-speed networks (LAN and WAN connectivity); (iv) fiber-optics capability; and (v) conduits for electrical/data/voice cabling <sup>3</sup>. Clients who are involved in the construction of both commercial and residential projects, local area networks (L.A.N.s) have become a more frequent requirement in their programs.

A structured network is a collection of copper or fiber optic lines that are a part of the physical construction of a space and connected to a server or computer in a central location. A Smart Building has a completely integrated wiring architecture. This cable architecture can consist of copper, fiber and wireless connectivity that can provide high bandwidth capability ("throughput"). Nearly every strategy for capturing throughput requires a physical line of some kind (fiber or copper). Recently, however, advances in fixed wireless can provide an inexpensive alternative for bandwidth-hungry businesses. Wireless speeds can now match hard-wired networks at nearly 100 mbps (more than 1,500 times the speed of a 56k modem) <sup>4</sup>.

If an owner is planning new construction, the benefits of retaining an information technology ("IT") consultant early in the design process are numerous. First, costs of IT systems can be reduced as the systems often impact numerous levels of interior design. Second, competitive pricing and bids can be obtained for a low-voltage layout. Third, the proposed layout can be coordinated with other design-construction disciplines such as mechanical, electrical, plumbing and structural, which could minimize changes during the construction phase. Fourth, the IT design/construction team can begin mobilizing for construction with other trades during the creation of the construction documents (CD) phase which helps to mitigate potential conflicts during construction administration phase. Finally, retaining an IT specialist early often means avoiding delays

looking for a similar entity when the owner is exposed to higher costs during a late stage of the construction project.

Aesthetic issues aside, these systems are not inexpensive. Nor do they stand alone as separate program areas on a floor plan. Almost all IT systems being planned require some degree of mechanical and electrical support such as an uninterrupted power supply (UPS) to prevent loss of power and a supplemental mechanical system geared to cool computer equipment.

Faster connectivity comes at a price. Costs vary depending on region, scope of work, complexity of installation, size of the space to be networked and accessibility for existing spaces. Tenants not in pre-wired buildings but who want to install a high-speed network are faced with increasing labor costs as more and more projects that come online require technical trades who are backlogged due to the large demand <sup>5</sup>. Higher labor costs coupled with the current torrent of large office buildings desiring to offer tenants high-speed access to the Internet have raised the costs of installation to an all-time high.

As building owners and property managers seek ways to bring added service to their space, retain their current tenants and attract new tenants, the new breed of tele-communications companies ("telecoms") are clamoring for the opportunity to wire buildings that currently lack high-speed access. This climate is good for property owners/managers since most of the telecoms are willing to pay for the installations and upgrade work because the tenant revenues far exceed the installation and maintenance costs. Additionally, some landlords are finding they can share in the revenues, which can be as high as 10% of the telecoms receipts from customers <sup>6</sup>.

The future of the high-speed world is guaranteed to change. As Internet connections become faster, Web sites plan for more video and interactivity. Whatever form it takes, broadband is poised to revolutionize the way we use high speed networks <sup>7</sup>. The speed of communication will have an obvious effect on the real estate industry in the sense that faster access to information will speed up the decision-making process <sup>8</sup>.

The need for speed is driven by increased information and demand. Since the early 1990's, information technology has transformed the degree to which owners incorporate newer levels of connectivity to their databases, networks, and the Internet. Owners are also increasingly asking their representatives to include and make recommendations for placing IT consultants on their project team short-lists.

We are at a point where building owners have to think of creative technological solutions to support their business endeavors. It is not enough that you can perform the best analysis, write the best brief, or negotiate the best transaction. It has become a matter of who has the best communication tools and the best information delivery model to put the information at users fingertips when they need it. ■

#### References:

1. "The Fourth Utility," by Paul Doherty, AIA, *the digit group*, January, 2000
2. BOMA/ULI = Building Owners' and Managers' Association / Urban Land Institute
3. "eRealEstate: a Virtual Certainty," Report by Rosen Consulting Group & Arthur Andersen, January 2000.
4. "Construction Labor Costs going through ceiling in New York," *Crains New York*, April, 2000.
5. "Telcos battle for virtual reality," *Crains New York*, April, 2000.
6. "The IT Guy" by Eric C. Peterson, *Real Estate New York*, March 2000.
7. "Networks in the Sky" by Michael J. Martinez, *ABCNews.com*, January, 2000
8. "A Broadband Universe," by Judy Muller, *ABCNews.com*, September, 1999.

Collage image above taken from LePatner & Associates' new L.A.N. Room designed and built January-April, 2000.

# F I R M N e w s

## The Best of Times...or Are They?

Continued from Page 1

Will contractors and designers learn to work cooperatively and in association with one another to bring new energy and ideas to the concept of design/build, enhancing everyone's future sphere of influence in the owner/designer/builder sphere?

There is no guarantee that there will be any winners in this game unless a new, improved order prevails. Despite the unrelenting construction boom of the past seven years, a boom that has seen everyone in the business busy and unemployment for the design and construction world at zero percent, the news has not all been rosy. Architects and engineers, though grateful to be fully occupied have not, the truth be told, been making the profits that will hold them through any downturn in the economy. In truth, they have not been retaining enough earnings to spend on the capital budgets they must have to ensure the technology for the next generation of computers that match those that their clients require for new projects. One managing principal of a major international architectural firm recently admitted to me over lunch that his firm has been unable to raise fees despite the boom in construction. "There are still so many firms out there who are willing to

undercut everyone else's fees and do a project below cost – it's unbelievable!" he muttered.

Similarly, contractors are faced with rising subcontractor prices but are relying on higher volume to see more fall to the bottom line. This is not the way to smartly prepare for the anticipated downturn in the economy that will lead, within the next two years to a drop off of business. Preparing for that day should be the primary objective of every principal in the real estate, design and construction world. That the lessons of history are too often lost on those who lead in this world is an all-too-often cited maxim by this writer.

For those who may have forgotten, never knew or chose not to heed those prescient words of Charles Dickens, it will be most instructive to share with you the full opening paragraph of "A Tale of Two Cities" and the words that should be taken to heart by all of us in this first year of the new millennium (or last of the old millennium for those who choose to be purists):

*"It was the best of times, it was the worst of times, it was the age of wisdom, it was the age of foolishness, it was the epoch of belief, it was the epoch of incredulity, it was the season of Light, it was the season of Darkness, it was the spring of hope, it was the winter of despair, we had everything before us, we had nothing before us, we were all going direct to Heaven, we were all going direct the other way-in short, the period was so far like the present period."* ■



RRP

Rendering of BBL&A's new reception area

## Save the Date....

BBL&A is happy to announce that during this summer, it is looking forward to displaying for its friends and clients an exhibit of architectural art and design drawings from some of the world's most renowned designers. This showing will take place at the firm's new office at 101 East 52nd Street. A gala 20th anniversary celebration will take place in early November. Announcements and invitations of these joyous and entertaining events will be sent shortly.

## IN LUMINAE

The Quiz

- 1 True or False: An insurer's duty to defend is not triggered until it receives actual notice of the suit from the insured.
- 2 What was the central premise of "A Tale of Two Cities" ?
- 3 Explain what the term "fourth utility" means.

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### Barry B. LePatner & Associates LLP

101 East 52nd Street - 21st Floor  
New York, New York 10022  
(212) 935-4400  
E-mail: [mail@lepatner.com](mailto:mail@lepatner.com)  
[lepatner.com](http://lepatner.com)

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## Join Us at Harvard

Come hear **Barry LePatner** present marketing insights and strategies for the new economy. Presented as part of a three day seminar at Harvard's Graduate School of Design headed by A. Eune Kohn of Kohn Pedersen Fox (KPF). 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 website:

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

BBL&A is pleased to welcome **Danielle M. Regan** and **Jeffrey K. Goldsmith** to the firm. Prior to joining the firm, Ms. Regan was a litigation associate specializing in appellate work, construction and insurance law. Mr. Goldsmith was counsel for the NYC Department of Parks & Recreation, Design & Construction Division.

BBL&A has recently been retained by a hotel conglomerate in connection with property damage unfortunately sustained to one of its hotel buildings on the west side of Manhattan. Our firm will coordinate all efforts in seeking the recovery from the hotel's insurer as well as from the adjacent property owner who is undertaking a development project.

BBL&A is proud to announce that it has been retained by a major architectural firm to structure its acquisition of another A/E firm. BBL&A will provide advisory services relating to the acquisition.

Answers to In Luminæ Questions:  
1. True - An insurer's duty to defend is not triggered until it receives actual notice of the suit from the insured.  
2. The central premise of "A Tale of Two Cities" was whether the traditional world of the establishment would retain any vestige of its previous self in the face of change during the period of great transition that preceded the upheaval of the French Revolution in the late 1780s.  
3. The fourth utility refers to the emergence of the high-speed network as a desirable amenity that owners and tenants alike seek in today's smart buildings.

## Quote of the Quarter

*The secret of greatness is simple. Do better work than any other man in your field and keep on doing it.*

-- Wilfred A. Peterson