



Q&A With Kelley Drye's Joe Hoffman

Law360, New York (November 22, 2011, 12:22 PM ET) -- Joe Hoffman is a partner in the Washington, D.C., office of Kelley Drye & Warren LLP, where he co-chairs the office's business group. His real estate practice cuts across a wide range of clients and transactions, including purchases, sales, like-kind transactions, financings, distressed debt, receiverships, foreclosures, workouts and bankruptcy related proceedings. He represents national and local real estate owners and investors (both institutional organizations and individual developers), lenders, borrowers, landlords and tenants in all sectors.

Q: What is the most challenging case or deal you have worked on and what made it challenging?

A: A recent real estate development transaction presented a blitz of complex real estate, bankruptcy, litigation and Maryland state law issues. Our clients, a group of individual real estate owners and developers, owned the retail development rights associated with a large, high-profile mixed-use development; those rights were acquired with \$18 million of financing that was recourse to the individuals.

The development was ready to come out of the ground right as the recession hit in 2009, causing the joint venture (comprised of national homebuilders) that owned the development's fee interest to put the entire development into bankruptcy due to an over-leveraged position.

To make matters worse, the homebuilders sought to eliminate the retail development rights as part of the bankruptcy proceeding, arguing that such rights constituted an executory contract that could be rejected. The clients interviewed two of their long-standing law firms to represent them in connection with this matter, with one of the principals announcing during the interview that "relationships would be made or broken" based on the outcome of the case.

Stakes were thus high given the clients' significant personal financial exposure (not to mention the case's complexity as it involved issues of first impression). Happily, we prevailed and resolved the matter with our clients recouping their entire investment.

Q: What aspects of your practice area are in need of reform and why?

A: The financial crisis has uncovered glaring systemic weaknesses with securitized commercial loans that go bad. In particular, many real estate practitioners have been required to deal with lenders for securitized commercial real estate loans in the context of negotiating loan workouts, deeds in lieu of foreclosure and purchases of properties out of receivership.

Unfortunately, in each case, getting these deals done is extremely difficult for a variety of reasons — the lenders are under extreme pressure given the large number of loans they are trying to restructure or otherwise resolve; because of the large number of distressed loans with which they are dealing, some lenders are being forced to offer only a "standard" set of workout terms that does not necessarily address each situation adequately; lenders in some cases are allegedly acting in their own self-interests in order to acquire distressed real estate on bargain terms; and in many situations, given the large volume of cases, some lender representatives are not sufficiently creative to address all the different scenarios with which they are presented.

Given the growing number of securitized mortgage loans that will need to be modified or otherwise addressed over the next few years, lenders will need to overcome these barriers in order to provide liquidity to the commercial real estate market, and to avoid assuming ownership of commercial real estate through an even greater number of foreclosures than what is already occurring.

Q: What is an important issue relevant to your practice area and why?

A: Commercial real estate owners have operated under a cloud of uncertainty for several years with regard to the federal tax treatment of "carried interests." As many real estate transactions structured as joint ventures contain a "promote" or "carried interest" element, the tax treatment of this interest can go to the heart of the economic arrangement between co-owners of commercial real estate.

Uncertainty over this key metric has caused some clients to try to accelerate sale transactions, fearing that legislation will be adopted on an untimely basis reducing their returns. Other clients have attempted to negotiate provisions that spring into effect if the carried interest rules are changed. And still other clients, seeking to maximize their returns at the expense of their joint venture partners, negotiate on the basis that new tax rules have already been adopted. Just when you thought you'd seen everything, there's always something ...

Q: Outside your own firm, name an attorney in your field who has impressed you and explain why.

A: Ron Braunstein, from Riemer and Braunstein in Boston, is an attorney with whom I've had the pleasure of working on a handful of deals as our clients are in a number of joint ventures together. Ron gets it — he's smart and a strong advocate for his client, but at the same time he sees the big picture and is practical-minded. While it's no surprise that we don't always see eye-to-eye (particularly when he is negotiating hard against my developer client's interests!), Ron is creative at solving problems and focused on what's important and what's not.

Q: What is a mistake you made early in your career and what did you learn from it?

A: Up until the time I was a senior associate, I shied away from doing real estate financing for borrowers, preferring to stand on the sidelines while one of my colleagues shouldered most of the responsibility in those transactions. Around that time, I started to gradually immerse myself in borrower representations and ultimately mastered the ability to represent real estate owners in connection with their financing transactions.

As a result, I'm better prepared today to counsel real estate owners on all facets of their business including purchases and sales, financings and leasing. Moreover, I can safely say that such financing work for borrower clients helps me in representing lender clients, and my lender work facilitates my representation of borrowers. Moral of the story? Don't be shy and resist being pigeon-holed — get off the bench and learn new skills!