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Legal Minds

For law firms serving the retail real estate industry, the recession has been a time of change, discovery, and — for some — a time of growth.

Randall Shearin

As with many areas of retail, the legal aspects of the industry have changed during the course of the recession. Attorneys are being asked to handle more complex issues for clients and seek new solutions for problems. Shopping Center Business recently interviewed a number of attorneys to gauge what challenges they see on the legal horizon, and how their practices have evolved as a result of the recession.

The nature of technology alone has changed the legal practice. Leasing and deal-closing, in particular, have been the areas affected the most.

"The use of the Internet has made us revisit many of our core negotiation styles," says Abe Schear, partner with Arnall Golden Gregory in Atlanta. "We try to make sure that we talk often to both our clients and those on the other side. Negotiation by email, while useful at times, generally makes the entire process less pleasant and can slow down the final rush to the finish."

While the Internet can slow down the leasing process by having too many hands in the lease at once, the speed of delivery caused by technology has quickened the expectations of clients. Coupled with the fact that clients are anxious to get deals done to get stores open, save on rents, or make up for lost time, many attorneys said they saw the time assignments took shrinking.

"The pace quickens every year that goes by," says Kevin Margolis, partner with Benesch in Cleveland. "We are in a service business, and you have to perform in a timely and efficient manner. You have to hustle and deliver the goods on every client assignment and outperform expectations."

"While quick response time has always been a requirement, 'very fast' is the new normal," adds Jane Snoddy Smith, a partner in the Austin, Texas, office of Fulbright & Jaworski.

"There must be 100 different ways to say 'I need this immediately,' yet no one, of course, wants a discount on quality," says Schear.

Since the onset of the recession, deals have also become more complex. Acquiring a retail asset in bankruptcy, renegotiating a lease for rent relief, and working new financing structures on assets have all become more common in legal practices, according to our sources. But now that retail has turned the corner, many attorneys see their practices changing again.

"The real estate practice during the last 3 years focused on lease renegotiations, financing workouts and exercising financing remedies, rather than on the more positive role of working new deals," says Andrew Ingram, the real estate and banking practice leader at Thompson & Knight. "In the last 12 months, there have been more distressed property dispositions, which is somewhat of a positive development. Most recently, there has been a decline of the negative transactions and an increase in positive transactions to a point that you can see the lines will cross once again and turn our work into more of a positive practice."

"Our practice is growing with a number of clients buying more retail projects, particularly projects that are performing and have development opportunities," says Schear. "Some of our tenant clients continue to expand their store openings."

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At Benesch, the practice saw a lot of workouts during the recession. "The pace of that work has begun to taper off with transactional and financing work replacing it," reports Margolis.

Miriam Waleska Sanchez-Arroyo, a retail real estate attorney in Puerto Rico, saw the opportunity to strike out on her own during the recession. Being on the ground in Puerto Rico in a time when many U.S. retailers have a multiple-store presence on the island has benefited Sanchez-Arroyo's practice.

"After 15 years of experience working for major law firms on the island, the current retail environment has allowed me to go on my own and start my own practice," says Sanchez-Arroyo, who has represented tenants and REITs in local courts and in negotiations. "My familiarity with the island's retail landscape can save them time and money when it comes to deciding on the best location for their stores or representing them in court."

For many firms, the recession has been a time of growth as clients switched from larger firms — who may have viewed the real estate sector as one to avoid — to smaller firms who specialized in the complex transactions required for the retail environment.

"Our law practice has grown substantially," says Larry Friedman, of Dallas-based Friedman & Feiger LLP. "Banks, real estate developers, investors and entrepreneurs have made a dramatic shift from the large law firms to the mid-size firms in order to get more personalized services, better value and goal-oriented business solutions."

"Our practice has adapted in these challenging economic times to focus on value-added services to our clients," says Harlan Robins, partner in the Columbus, Ohio, office of Baker & Hostetler. "Additionally, we are focused on creating value/opportunities for our clients as well."

Boston-based Goulston & Storrs, whose bread-and-butter is representing retailers and retail development firms, handles everything from real estate to intellectual property, employment law, bankruptcy, tax and litigation matters for clients. The firm used the recession to reorganize its various practice areas consistent with how its clients approach their businesses, says Nancy Davids, director and co-chair of Goulston & Storrs Retail Industry Group.

"As the retail market continues to rebound, more and more opportunities will develop for retailers, developers and investors," says William Dillion, a director at Goulston & Storrs. "We anticipate that the next generation of retail will look substantially different than the model we grew accustomed to in the last decade."

At medium-sized Friedman & Feiger, like at larger Goulston & Storrs, it wasn't so much what the firm was asked to work on, but how they were asked to work.

"Our clients have reached out and asked us to become more than service providers," says Friedman. "They have asked us to become hands-on, involve ourselves in their businesses, and learn more about their industries and their particular goals. They have asked us to focus on problem solving and business solutions rather than simply providing answers to legal questions."

"Now, clients are asking us to integrate into their system of operations, and in many cases provide what would have been an internal function," adds Jerry Converse with the Austin, Texas, office of Fulbright & Jaworski. "There is an informal outsourcing going on, and outside lawyers are providing support for audit and internal compliance."

"Our law firm has had to reach beyond the traditional role of counselor and scribe in real estate transactions and become 'matchmaker' — putting buyer and capital source together in order to keep our real estate practice in play," concludes Friedman.

For many firms, the recession didn't stop the deals from flowing...it just slowed them down. In recent months, Goulston & Storrs has been involved in two major lifestyle developments in Massachusetts and a redevelopment project in the Fenway area of Boston. It also helped CBL & Associates in the formation of a \$1.1 billion joint venture with TIAA-CREF to invest in its shopping centers. Goulston has been active on the tenant side with clients like Tory Burch, 7 for All Mankind, Swarovski and Bose. One of its major clients, Costco, also continued its expansion throughout the recession.

Toronto firm Minden Gross has done a lot of work with U.S. retailers who, because of the strengthened Canadian dollar, are opening stores in Canada. The firm spends a lot of time on learning curve issues with its clients, dealing with leasing intricacies. As well, there has been intensified activity of Canadian shopping

centers developers investing internationally in markets like Brazil and China.

"It is becoming a seamless real estate economy, no matter what side of the border you are on," says Stephen Messinger, a partner with Minden Gross.

Minden Gross has advised retailers like Loblaw, Starbucks, Target and Walmart on issues like leasing and due diligence. The influx of U.S. retailers to the market has caused some changes in lease negotiations, says Messinger. In Canada, much of the retail space is controlled by the top 10 owners.

"U.S. retailers have greater bargaining power in the United States because there are more developers who are not as dominant in some areas," says Messinger. "[Canadian] Developers and [U.S.] retailers are coming from a different cultural background as to what is and is not the norm in negotiating. There's a give and take and learning that's going on by both sides."

Among the sticking points: term length (longer in U.S. leases) and audit rights (common in Canadian leases).

Arnall Golden Gregory also represents both tenants and landlords in its retail real estate practice. The firm's clients include three major mall developers, two big box tenants and a number of inline tenants, regional landlords and international investors.

There are also challenges ahead for tenants and landlords with the law itself. Issues that law firms are watching include the Community Recovery and Investment Act; debt regulations; green leasing; carried interest legislation and ADA accessibility. In California, the new mandatory green building code, known as "CalGreen" is a concern for developers. For more on this, see the article by Cox, Castle & Nicholson attorneys on page 46 of this issue.

All of the attorneys that SCB interviewed had a positive feel for the way the industry is going. Many, like Thompson & Knight, cited the fact that their business is changing more from workouts and rent reduction requests to new leasing activity and acquisition contracts.

"For the first time since the beginning of the recession, it feels like the recovery is here," says Friedman. "Investment sales on retail properties are rising and lenders are loosening up a bit. As a result, deal activity could begin to return to its pre-recession levels this year."

"New thinking about how to position retail centers, the new financing environment and continuing growth of e-commerce will be a tremendous influence on the market in the years ahead," says Davids of Goulston & Storrs. "It's a time for creativity — and opportunity — for retailers."

"For those people who see that the retail product is a great way to learn and meet people, there will be no shortage of opportunities," says Schear. "Relationships will thrive in the near term."

"While some of our developer clients have a more localized focus on the New York, D.C., and New England markets, others have a truly national footprint. Generally speaking, the last several years saw little ground up development, but we experienced some significant exceptions to that, especially our government entitlement practice in the D.C. market and our retail practice in New York City and the surrounding area."

Nancy Davids, director and co-chair of Goulston & Storrs Retail Industry Group, Boston.



Davids

"You have to stay current. I do a lot of teaching on both sides of the border. I am always reading. The challenge is to stay abreast of the current trends and stay a part of the industry, not just a lawyer who is serving the industry."

Stephen Messinger, Partner, Minden Gross, Toronto

"The retail market was able to hold its ground in spite of the 5-year recession that impacted [Puerto Rico's] economy in 2006. Things are starting to look brighter

now. The island's new government administration has started to fuel the economy, and consumer confidence is on the rise."

Miriam Waleska Sanchez-Arroyo, Sanchez-Arroyo Law Offices, Puerto Rico.



Sanchez-Arroyo

"Our firm has, for well over 20 years, considered retail to be a core product. We have long represented landlords and tenants, both international and otherwise, with retail projects throughout the United States. We have managed to keep this focus by hiring professionals who are industry focused and happy to be working on retail projects."

Abe Schear, Partner, Arnall Golden Gregory, Atlanta.



Schear

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