

2009 LESSONS LEARNED

FEBRUARY 2010

The Retail & Hospitality Group at Murtha Cullina is pleased to provide clients and friends with information about topics of interest to the Retail & Hospitality industry.

If you have questions about the issues addressed in this newsletter, or any other matters regarding Retail & Hospitality law, please feel free to contact the following attorneys:

Thomas M. Daniells
Paul L. Baccari
Meredith C. Burns
Frank M. Capezera
Kathleen E. Connolly
Michael P. Connolly
Michael J. Donnelly
Scott M. Gerard
Alena C. Gfeller
Kevin T. Hansted
Dwight A. Johnson
Robert E. Kaelin
Ryan M. MacDonald
Hugh F. Murray, III
Kari L. Olson
David Platt
Joseph R. Tarby, III
Thomas S. Vangel
Keith S. Varian

In Boston:
617.457.4000
In Hartford:
860.240.6000
In Madison:
203.245.9991
In New Haven:
203.772.7700
In Stamford:
203.653.5400
In Woburn:
781.933.5505

www.murthallaw.com

As we move through the first quarter of 2010, much of the uncertainty and uneven results which have characterized the retail and hospitality industries for well over a year remain with us. At Murtha Cullina LLP, we don't pretend to be economic prognosticators, nor do we have a crystal ball. However, our experiences in representing our clients over the past eighteen months or so have yielded some unmistakable trends which are likely to continue throughout 2010 and perhaps well beyond that. Hopefully, one or more of these musings will be useful to you in the future.

Landlord Concessions/Tenant Givebacks

Tenants, of course, are expecting more for less, usually with market justification. However, it isn't always just about the rent. In addition to rental reductions, expansion/contraction flexibility, caps on additional rent, elimination of a continuous operation clause, increased subletting/assignment flexibility, and facade, common area and premises upgrades are all concessions we have recently procured for our tenant clients. On the landlord side of the ledger, it is important to recognize that real benefits may be realized out of a renegotiation. Increased relocation flexibility, early termination options, extended term length, and commitments to increase rent based on future sales increases (coupled with financial disclosure obligations and audit rights) are all concessions we have obtained for landlord clients in return for some sort of financial concession. Ultimately, it is important to understand (and in some cases anticipate) both the immediate and the longer-term pressures and needs of the other side in order to obtain maximum economic advantage.

Lender Involvement

In our experience, the current economic climate is causing lenders to exercise a lot more caution. Expect

more careful review of pro-formas, requests for more significant personal guarantees of longer duration, and more conditional commitments. Lenders are also exercising more control by, for instance, prohibiting all lease amendments in an SNDA without lender consent. Conditional commitments may permit the lender to re-evaluate a project and reduce or even eliminate previously "committed" dollars. Be careful of the construction loan which conditions a permanent takeout on financial covenants which may not be achievable. The turmoil in the financial industry has often resulted in the loss of relationships and contacts, and can sometimes result in a temporary decision making void. Care in the drafting of financing contingencies, and the rights and remedies flowing from the failure of financing, are more important than ever. The key here is no surprises, which requires proper planning, careful drafting, and sufficient time built into the transaction to complete due diligence and satisfy financing prerequisites.

Employment Minefields

With the turmoil in our industries, layoffs are inevitable; our experience has shown that proper planning and appropriate due diligence performed before the fact can save a lot of headache (and litigation) later. In 2010, we expect wage and hour matters to continue to take center stage in the retail and hospitality industry, with continued litigation centering around allegations of unpaid overtime, misclassification and eligibility for tip credits. While the Employee Free Choice Act - which would have made union

organizing significantly easier - is unlikely to become law, recent union successes in the industry, including a first-ever labor contract at Foxwoods Casino, could mean that larger employers in the industry see an uptick in union activity. And of course, with a predominantly younger workforce, sexual harassment claims are likely to once again top the list of discrimination claims in the industry. While no employer can prevent all employment claims, solid HR practices and appropriate legal advice can position an employer to weather the storm that such claims can bring.

Bankruptcy/Creditor's Rights

The uptick in retail related bankruptcies has resulted in an increase of cases seeking to compel post-petition rents and the recovery of unpaid rents where a lease has been rejected. Our Group's attorneys have spent significant time counseling clients on bankruptcy avoidance as well as the pluses and minuses of voluntary and involuntary bankruptcy. There has been much more emphasis on work-outs, forbearances and trying to come up with solutions that are feasible for both sides. We have been working on structured settlements and stipulated judgments that factor in the reality of the current economic climate while protecting against a potential bankruptcy and providing for future rent flexibility once the economy strengthens. Similarly, we have been recommending that such agreements include a clear provision providing for the recovery of attorney's fees in the event of bankruptcy in light of the recent *Travelers Casualty* Supreme Court decision and the more recent Second Circuit Court of Appeals *Ogle v. Fidelity* decision.

Land Use

Further complicating development goals, local land use regulations are constantly evolving and are becoming even more stringent. Recent developments in land use law will affect the ability to expand, redesign and/or develop certain commercial properties. Of particular importance are the new "green" development laws and open space regulations. Fostering cooperative relationships with local land use planners, commissions and other key regulatory personnel is crucial, and careful analysis and planning could prevent unnecessary expense, delay and the need to overcome significant regulatory hurdles.

Environmental

Concerns about environmental exposure and liability have not abated during this downturn, as these issues are too important to ignore. Environmental due diligence remains a cornerstone to every development deal, as property conditions need to be investigated through the Phase I, Phase II and Phase III process, state regulatory programs (voluntary and mandatory) need to be well understood, and liability protections (including environmental insurance) need to be considered. More and more, developers are seeking out loan, grant and tax credit programs to help defray costs, especially on "Brownfield" sites. Environmental

liabilities continue to be heavily negotiated, whether retained by a seller or transferred to a buyer. As is the case with many issues, developers who anticipate environmental issues and address them clearly in the deal documents find themselves ahead of the game.

WELCOMING PAUL BACCARI TO THE TEAM



The Retail & Hospitality group is pleased to welcome Paul L. Baccari to our team. Paul joined Murtha Cullina in August 2009 and has been a welcome addition to both our Retail & Hospitality and Real Estate practice groups. Mr. Baccari has represented local and national lending institutions, national and regional franchise restaurants, investor groups and developers. He also has considerable experience in all aspects of real estate development.

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BOSTON

99 High Street
Boston, MA 02110
Tel: 617.457.4000
Fax: 617.482.3868

HARTFORD

CityPlace I
185 Asylum Street
Hartford, CT 06103
Tel: 860.240.6000
Fax: 860.240.6150

MADISON

71 Wall Street
Madison, CT 06443
Tel: 203.245.9991
Fax: 203.245.9997

NEW HAVEN

Whitney Grove Square
Two Whitney Avenue
New Haven, CT 06510
Tel: 203.772.7700
Fax: 203.772.7723

STAMFORD

177 Broad Street
Stamford, CT 06901
Tel: 203.653.5400
Fax: 203.653.5444

WOBURN

600 Unicorn Park Drive
Woburn, MA 01801
Tel: 781.933.5505
Fax: 781.933.1530