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REAL ESTATE DISPUTES

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EXPERT FORUM

REAL ESTATE DISPUTES



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Robert J. Ward focuses his practice on commercial and securities litigation. He has represented major corporations, commercial banks, investment banks, private equity firms, hedge funds and other business entities in complex commercial and securities litigation, in federal and state courts, in New York and elsewhere. He has defended and prosecuted claims of breach of contract, fraud, accountant's liability, securities fraud, breach of fiduciary duty and negligence by corporate officers and directors, breach of covenants not to compete, professional malpractice and intellectual property infringement.

CD: How would you describe the extent of disputes currently surfacing in the real estate sector? Could you outline the scale and value of the disputes being seen?

Ward: Lately, there has been a relative lull in commercial real estate litigation. As a general rule, distressed markets generate more conflict and with stronger markets recently, there have been fewer disputes. This is not to say that real estate litigation has halted completely, however, as we are still seeing ground lease rent resets and operating escalation disputes, which are regularly recurring types of litigation. Further, well-known difficulties in the retail sector have resulted in an increased number of disputes in that space.


CD: What are some of the most common causes of dispute? What global and regional trends have been impacting this space?

Ward: Disputes most commonly arise in distressed markets. The tough retail environment has caused an uptick in defaulted mortgages, workouts and foreclosures relating to retail properties. We are also seeing retailers fight with landlords over rent hikes and issues like the allocation of shared expenses. In New York, another trend we are seeing is increased litigation stemming from the glut of new

developments for sale. An oversaturated market means developers are not meeting their projected returns and investors are looking for someone to blame, be it project managers and contractors for failing to keep costs in check or architects for making errors that require costly corrections. The softer market has also strained the relationship between developers and brokerage firms. In the second half of the year, several brokerage firms have sued developers alleging unfair practices and unpaid fees. Even after units are sold, developers are not out of the woods – we are seeing a growing number of construction defect cases resulting from construction issues in high-end condominiums.

CD: To what extent are tough economic conditions and increasing project complexity fuelling real estate disputes?

Ward: Overall, economic conditions have been improving in the US, contributing to the relative stability of the commercial real estate market. We have not seen economic conditions fuel real estate disputes the way we have in previous down cycles. Nor have we really seen increasing project complexity spur additional disputes, as New York real estate projects have been highly complex for many years.



CD: Have any recent, high-profile real estate disputes caught your eye? What made them notable?

Ward: Earlier this year, the Second Department of the New York Appellate Division held that a commercial tenant's waiver of its right to bring a Yellowstone injunction was enforceable and not contrary to public policy. In New York, Yellowstone injunctions have long been used by commercial tenants to challenge or extend the time to cure lease defaults without risking lease forfeiture. Going forward, landlords will likely demand that tenants waive the right to seek Yellowstone injunctions, thereby gaining a substantial edge in disputes regarding alleged lease defaults. In another interesting decision, a federal judge in the Eastern District of New York awarded a group of graffiti artists a judgment of \$6.75m against a real estate developer who destroyed the artists' work, which had been featured on the exterior walls of the developer's building known as '5Points', located in Queens, New York. The decision is instructive for property owners and artists who look to collaborate on future projects.

CD: What strategies can disputing parties deploy to help manage the cost of dispute resolution?

Ward: Of course, resolving disputes through mediation and arbitration is normally far more efficient and cost-effective than lengthy trial litigation. Another strategy for managing the cost of dispute resolution is to include a fee-shifting provision in operative contracts. This has proven effective in preventing would-be litigants from filing weak lawsuits.

CD: Do you expect to see an increase in real estate disputes over the coming months and years? What trends do you predict will define this space?

Ward: There is always a boom and bust aspect to real estate litigation. We may see an increase in the near future. Interest rates are going up, which could

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*Robert J. Ward,
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have a constraining effect on the commercial real estate market. Additionally, tax changes from the recent tax laws may result in more litigation, caused by additional pressure resulting from lost deductions.

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