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IN PERSON

Laying Down The Law

BY PAUL MCMORROW | BANKER & TRADESMAN STAFF WRITER

Dan Dain is a litigator and chairman of Brennan, Dain, Le Ray, Wiest, Torpy & Garner, a ten lawyer firm specializing in real estate law. It's a firm staffed by veterans of Boston's big law firms. "We saw an opportunity in the marketplace to offer the highest-quality, most sophisticated legal services, with that big firm training and expertise, but with more flexibility in terms of rates," Dain said. "We saw a niche in the marketplace for offering real value to the real estate industry." The approach is working – at a time when downsizing dominates the headlines, Dain's boutique is growing.

Dan Dain

Company; Brennan, Dain, Le Ray, Wiest, Torpy & Garner, Boston
Title: Chairman
Age: 38
Experience: 14 Years

Q: How has your firm been able to grow in this environment?

A: Two factors are in play. One is, we are busy. The mix of work has changed somewhat, but clients have reacted positively to our value proposition and the expertise we bring. The other side is, right now there are some really, really talented real estate lawyers on the market. There's an opportunity to think long-term about the direction of our firm, and bring within our firm some very, very talented attorneys. We didn't want to lose that opportunity.

Q: How has the firm's workload changed with the economy?

A: There's no question the number of permitting projects is down overall. We're seeing a lot of subleasing. We're seeing continued volume of litigation, but the mix of litigation has changed. I'm doing less permitting litigation, and more litigation that's tied to the economy. Landlord-tenant disputes where tenants have defaulted. Construction disputes where the owner is unable to pay, or the construction company is in the middle of a project and is facing financial difficulties.

Q: What sorts of things are you seeing on the condo association side?

A: We're seeing a fair amount of litigation by condominium associations against developers and builders for construction defects. We're seeing some litigation by associations against unit owners who are unable to pay the condominium fees. There have always been associations that have brought suit against builders, but in this economy, perhaps there's been an uptick because there's a concern that builders and developers may not be around forever, and you'd better act quickly if you want to get them back in to make changes or pay a lump sum.

Q: You've been doing a lot of work around lease defaults. Were landlords prepared for a wave of defaults?

A: If you're a landlord and a tenant defaults and you're facing litigation, your goal is to litigate over a sum that's liquidated, where liability can be established quickly and easily. It keeps your legal fees down and gets you in and out of court quickly. That's your goal. Tenants who have defaulted are looking to minimize their exposure, hopefully through the requirement that a landlord uses reasonable diligence to find a replacement tenant. A lot of these leases we see being litigated today were negotiated at a time when neither the landlord nor the tenant was contemplating a tenant default. Neither one wanted to turn these default provisions into terms that were heavily negotiated, that could have resulted in a deal falling through.

For example, we're seeing acceleration clauses, which are clauses landlords like, they allow landlords to accelerate the future rental stream into a lump sum they can recover quickly in court. Some of those acceleration clauses are combined with duties to mitigate. We're seeing courts hesitating to accelerate where the duty to mitigate is one that only plays out over time. And hence, the mitigation clauses are not immediately enforceable, often requiring landlords to wait month by month to try to collect rent, which leads to protracted and much more expensive litigation.

Q: So when times were good, these seemed like minor provisions in the overall negotiations, and getting a deal done and getting a tenant in place were most important, but now that things have turned…

A: Default provisions were often considered boilerplate. There were default provisions that were used for a long time and no one really looked at them or negotiated over them or put a lot of thinking into how the default provision would actually be enforced in court, whether it would lend itself to a summary judgment motion, whether it would lend itself to a verdict for sum certain, whether landlords and tenants would have to hire expert witnesses, which are very expensive and time-consuming. No one was really thinking too much of how they would play out in court. We all have a lot more experience with how default provisions actually play out in court. I think that experience can really inform the leasing attorney, and how to draft the default provision on the front-end, so as to avoid costs and time at the back end.

5 TOP FIVE MOUNTAINS DAIN HAS CLIMBED:

1. Mera Peak, Nepal, 21,000 feet.
2. Mount Kilimanjaro, Tanzania, 19,000 feet.
3. Iliniza Norte, Ecuador, 17,000 feet.
4. Cotopaxi, Ecauador, 19,000 feet.
5. Mount Washington, N.H., 6,288 feet.