

Weil Gotshal Partner Discusses the End of Decade-Long Case That Presaged the Great Recession

BY B. COLBY HAMILTON

The decision in *Stender v. Archstone-Smith Operating Trust*, 07-cv-02503, by U.S. District Judge William Martinez of the District of Colorado granting summary judgment to dismiss the class action is, on its face, a relatively straightforward contract case.

The plaintiffs—property owners in a real estate investment trust—alleged the controlling investors of the REIT violated the terms of the declaration of trust when they executed a reverse merger that forced the property owners to make a choice. Either they take a new class of equity in the new trust, one with less tax protections than they previously enjoyed. Or they accept the same per-share cash offer as any other shareholder when the deal was complete.

Martinez agreed with the defendants that they were plainly within their right to conduct the merger, given their majority stake in the REIT, without either allowing the plaintiffs to weigh in or providing them with an equal equity status as before.

It's only once the full context of the \$1 billion action is known that the scope of the litigation becomes appreciable. When it was completed in 2007, just weeks before the housing market

bubble burst to trigger the Great Recession, the \$22 billion transaction represented one of the largest real estate investment transactions in history. The fact that now-defunct Lehman Brothers was the banking partner to Tishman Speyer in the deal speaks to the depth from which the suit has emerged.

Weil, Gotshal & Manges partner Jonathan Polkes, co-chair of the firm's global litigation department, appreciates the context. Having shepherded the defense in the case for primary defendants, along with attorneys for KPMG and Tishman Speyer, Polkes lived a decadelong odyssey in a case that finally, and completely, came to a halt.

Q. Can you provide some context on this win—what has it taken to get to this point?

A. The deal is widely considered to be one of the bellwethers of the high point of the real estate market bubble, and, therefore, also widely considered to be a turning point at the beginning of the bursting of the bubble, as evidenced by the fact that, within a year the deal had gone sour, and Lehman Brothers had filed for bankruptcy shortly thereafter, the deal had to be restructured several times, with additional debt



Jonathan Polkes

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had to be put into it, all because real estate valuations began to tumble.

You had multiple groups of plaintiffs bringing every conceivable kind of attack that you can have against a deal like this. You had three arbitrations, each one essentially a mini-trial, resulting in a written decision, each one confirmed by a court. You had four different state court proceedings. You had two federal court of appeals decisions. You had one New York state Appellate Division decision, which, in and of itself was an exceptional decision. In that case the Appellate Division dismissed remaining counts of one of the

complaints by themselves—instead of just remanding, they threw it out.

You had two TROs that took place over two consecutive days; one was in New York, one was in Colorado. You had four different district courts dealing with this at various times. You had in the main case, over 80 depositions, taking place in 12 different states. The documentary record was over a million pages. The summary judgment papers ran to 4,700 pages. And it all took 10 years.

This really required a massive amount of concentration, focus and management. Everything was on as big a stage as you can possibly imagine. You could make this a case study of what it is to do a massive, complex M&A litigation, all arising out of an historic real estate transaction. If you think of it that way, this case has everything.

Q: How did you and your team manage to keep things on course?

A: To answer that, I need to first give a shoutout to my colleague Caroline Zalka. These cases went on for so long that Caroline started on them as an associate, became a partner, and then became the day-to-day manager of these cases.

To the extent you can keep a consistent, core team, it's a huge help, especially associates. We had a core team of five people or so who were on every case throughout this entire 10-year period. We brought in specialists, and people to help with writing from time to time, but we always kept the same core group of people.

We all met, as a team, regularly, frequently during this entire period.

I think what that did was foster a sense of commitment and ownership. Everyone felt like they were responsible for this case, like it was their case. Everybody knew all aspects of all the cases, even the ones they weren't specifically working on. We would have large meetings where everybody would talk about what they were doing, everybody was familiar with every piece of the case. I think that was a huge help.

Q: Are there any core takeaways for litigators that you have after handling a case like this?

A: I think you've got to understand the elevator pitch. You've got to have a 60-second version of what your case is about, and why you're right. That's got to run through every single piece of this case. That's whether your dealing with an arbitration that you're litigating in Pennsylvania, a state court in California or an appellate division court in New York, or before the Tenth Circuit court of appeals. There's got to be some consistency among all these positions with something that's tying it all together. In our case, it was an enormous faith in the integrity of the deal.

I also think you've got to stay flexible, because you just never know what curveball is going to be thrown at you. Two TROs in two days was not something that we could anticipate.

Lastly, you've got to have a lot of confidence in the strength of your

team and the strength of your case, and be willing to work through the low points as well as the high ones. Any case that goes on this long, there's going to be frustrations, there's going to be disappointments, and there's going to be points when morale is flagging. Just like in any other challenge like this, you've got to keep your spirits up, and have faith things are going to work out OK.

Q: What's it like having things finally come to a close after such a journey?

A: Given the fact this happened in the dog days of summer, when a lot of people and clients are out of the office, a lot of the high-fiving had to be done over the internet. If we'd all been in the office, I think there would have been a lot of running up and down the halls, whooping it up, and a lot of client conference calls and people screaming and shouting.

It was a little more muted than it normally would have been. We're all looking forward to all being together when everyone's back in the office.

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