

## Ropes & Gray Real Estate Group was a Lead Sponsor at the Inaugural IMN Real Estate General Counsel's Forum

Earlier this month several partners from Ropes & Gray's real estate practice group chaired and spoke on panels at the inaugural IMN Real Estate General Counsel's forum in New York City. The panels focused on a variety of topics relevant to today's changing real estate market, including real estate joint ventures, acquiring and selling loans secured by real estate, challenges in developing and financing new construction, and prevalent issues in property acquisitions and due diligence. We thought it would be helpful to share some key insights, market trends and competitive information discussed on these panels.

### Joint Ventures: The Latest Legal & Transactional Structures



**Marc D. Lazar** of Ropes & Gray and representatives from Hines REIT, Marathon Asset Management and Arthur J. Gallagher

Operating partners are increasingly demanding that their capital partners share in the liabilities associated with non-recourse carve-out guaranties (commonly called bad boy guaranties) and environmental indemnities to the extent such liabilities are not caused by the operating partner's or sponsor's bad acts. Such a back-stop from a capital partner would typically be negotiated in the joint venture agreement or a separate contribution agreement.

Capital partners are proposing structures in which the managing member is a wholly owned subsidiary of the capital partner, with the operating partner's management rights being governed by a management agreement. The theory behind this approach is that it is easier to terminate a management agreement than to remove a manager under a joint venture agreement.

### Acquiring/Selling Notes: What You Need to Know



**David C. Djaha** of Ropes & Gray and representatives from Alex Brown Realty, Capital One, Capstone Equities, Carval Investors and the Davis Companies

It is essential to know your preferred exit strategy at the beginning of negotiations as your strategy ("loan to own" vs. "income play") is critical in determining what to focus on during acquisition negotiations and diligence.

Buyers are increasingly seeking exclusivity periods (to the extent one can be negotiated) in connection with buying loans as a way to limit downside risk on diligence costs.

In transactions where the buyer is afforded a due diligence exclusivity period, the scope of seller representations and warranties are likely to be minimal.

## New Construction, Development & Financing



**Walter R. McCabe III** of Ropes & Gray and representatives from Forest City Ratner Companies and First American Title Insurance Company

Waivers of consequential damages are becoming a standard policy among many general contractors. However, there is still negotiating room to push back on this “contract requirement.”

General contractor and construction manager approaches are blurring, but there are still differences at the extremes.

A “covenant lite” approach towards lien waivers and remedies is receding and more aggressive monitoring and direct payment arrangements are the current trend.

National title insurance companies will not provide mechanics’ liens coverage on a construction project except on a pending disbursement basis.

## Property Acquisitions & Acquisition Due Diligence



**Peter A. Alpert** of Ropes & Gray and representatives from TIAA-CREF, Cole Real Estate Investments and First American Title Insurance Company

There are severe limits to the CERCLA “all appropriate inquiry” safe harbor, including that (i) it is ineffective at conferring protection under many state superfund statutes, and (ii) the safe harbor could be lost as a result of any post-closing development or rehabilitation activities. It is important that buyers consider state law and adjust the scope of their environmental diligence accordingly.

Under many circumstances, a tenant on a property with pre-existing environmental contamination can incur “operator” liability for those conditions. Also, those conditions could affect the safety of the premises. Therefore, prospective tenants should not conveniently assume that they need not perform any environmental diligence.

In some jurisdictions, certain types of tenancies are deemed “ownership” for superfund purposes, underscoring the need for tenants to perform diligence, and to have adequate protection against liability for pre-existing conditions built into the lease.