

Q&A With Baker Donelson's Tim Lupinacci

Law360, New York (March 26, 2013, 12:59 PM ET) -- Timothy M. Lupinacci is a shareholder in Baker Donelson Bearman Caldwell & Berkowitz PC's Birmingham, Ala., office and chairman of the firm's financial institutions group. He concentrates his practice in the areas of bankruptcy and restructuring, financial services and transactions, and health law.

Lupinacci primarily represents special servicers, banks, financial institutions and asset-based lenders in loan workouts and insolvency, with an emphasis on creative restructuring of problem loans, including long-term care and senior housing defaults. He has experience with workouts and bankruptcies involving defaulted CMBS loans. Lupinacci is a frequent lecturer on creditors' rights, workouts and insolvency, and has been recognized by Best Lawyers in America, Chambers USA and Alabama Super Lawyers.

Q: What is the most challenging case you have worked on and what made it challenging?

A: One of the more challenging cases I was involved in surrounded the bankruptcy of several hundred nursing homes under the consolidated parent in a bankruptcy case pending in Delaware. I represented a lender who had security interest in six of the 250 nursing homes involved in the bankruptcy. There was a dispute about the value of the property, where the debtor attempted to cramdown by 50 percent. We argued that the transaction constituted a true lease, rather than financing.

If we prevailed on the argument, the debtor would have either had to assume the lease in full, including full payment obligations, or reject the lease, at which point we would get the property back. After a trial in Delaware Bankruptcy Court, the court ruled that the financing structure was a true lease, removing the debtors' ability to cramdown the debt. The debtor filed a motion to reconsider the ruling and the parties agreed to go to mediation, where the case was settled through a restructure of the loan obligations.

Some of the challenges involved the significant litigation leading up to the trial, the creativity needed to address restructuring health care facilities and the fact that once a settlement was reached, the settlement was predicated upon the closing of the restructure occurring by the end of the third quarter of the particular year. The lender had not received any payments in 18 months and needed to get the

loan back to performing status by the end of the third quarter.

As the parties engaged in significant negotiations and differences of opinion as to the restructure, the tragedy of Sept. 11, 2001 occurred. Debtors' counsel were in New York and were affected in various ways. As a result, there was a two-week delay in proceedings toward the closing. Ultimately, on the last business day of the third quarter of 2001, signatures were circulated by fax and the settlement was implemented. Ultimately, the lender was paid in full.

Q: What aspects of your practice area are in need of reform and why?

A: Since the current Bankruptcy Code is now 35 years old, I think that several of the provisions are in need of tweaking and revision. I am watching with interest the American Bankruptcy Institute's Commission to Study the Reform of Chapter 11. I think that the changing financing structure of business has resulted in less efficient and more contentious reorganizations under the Bankruptcy Code. The overarching need for this reform is a unified Bankruptcy Code that recognizes the realities of today's marketplace. Hopefully, the commission will build consensus around reform that increases efficiencies, decreases costs and better enables struggling companies to reorganize while protecting the rights and remedies of secured creditors.

Q: What is an important issue or case relevant to your practice area and why?

A: In discussions with financial institution clients over the past year, the issue that keeps them up late at night is the increased regulatory oversight and implementation of Dodd-Frank. As the various regulatory agencies adopt hundreds of new regulations to implement the provisions of the law, financial institutions and others outside the banking world, including broker-dealers, investment advisers, municipal finance professionals, and SEC public companies, have to plan for and react to implementation. For financial institutions, some of the most important changes are yet to come, including regulations governing capital standards, consumer financial protection, mortgage finance reform, debit cards and swaps.

Another issue that I am monitoring is the CRE Finance Council's recommendations for disclosure templates for CMBS Special Servicers. The CREFC Transparency Working Group finalized recommendations in December 2012 for a revised modification report and new liquidation reports that includes information on fees, affiliates and actions taken on loan modifications, as well as final resolution of legacy loans. As the CMBS continues its strong rebound since the fourth quarter of 2011, CREFC's work in the areas of reporting and transparency will assist the long-term industry growth.

Q: Outside your own firm, name an attorney in your field who has impressed you and explain why.

A: Bob Rubin of Burr & Forman served as a mentor early in my career. He impressed me with his ability to build relationships with clients and expand business relationships through effective client development. He is tenacious in zealously representing his clients, yet was effective in negotiating compromises that were in the client's best interest. He afforded me, as a young lawyer, opportunities to handle increasingly substantial matters on my own, allowing me to succeed, and fail. Bob takes control of a courtroom by walking through his "story of the case" and vigorously arguing his position. He is generous with his time, training and impacting the next generation of lawyers.

Q: What is a mistake you made early in your career and what did you learn from it?

A: One of the important lessons I learned early in my career was the need to take full responsibility for everything relating to a case, regardless of whether there are other lawyers working on the matter. In this particular instance, I was assigned to a large project that was being led by a senior associate for the partner we both worked for. The project entailed determining the ultimate amount of claims in a mega-bankruptcy case for which the firm was representing the debtor. This involved comparing filed proof of claims, the debtor's business records and the bankruptcy schedules.

As a first year associate, I did a lot of the work on the project, however I provided the information to the senior associate who put together the final analysis and gave it to the partner. The results of the analysis were then circulated to counsel for the senior lenders, unsecured creditors committee and proposed liquidators trustee. During a conference call later that day, it came to light that there was a duplication in the counting of the dollar amount of proof of claims and the bankruptcy schedules. As a result, we were tasked with spending the entire night getting the numbers correct.

I learned that, even though there were other lawyers with more seniority on the case, the responsibility to make sure that the work was done accurately and correctly was on me as a professional. This was a lesson that allowed me to take ownership of every matter I worked on, and not rely on others to catch mistakes or fix things before they went out.

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