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4 Things Real Estate Lawyers Need To Know About Bitcoin

By **Andrew McIntyre**

Law360 (February 14, 2018, 12:02 PM EST) -- The recent wild swings in the price of bitcoin coupled with reports of property purchases using the cryptocurrency is generating a buzz in the real estate community, and lawyers say it's crucial to be up to speed on a few key aspects of bitcoin when discussing potential deals with clients.

Attorneys say they have seen an uptick in interest from clients over the past several months, and most conversations at some point circle back to the question of how to get deals done given bitcoin's volatility.

Volatility, though, is only one of various concerns. Lawyers are also trying to figure out how best to structure deals, given that bitcoin to this point has shown traits of both a currency and a commodity.

"We're just starting to see talk on it," said Brian Pick of McDonald Carano LLP. "I just got my first couple calls on it this past couple weeks."

Here, Law360 looks at four things real estate lawyers need to know about bitcoin.

Volatility Remains a Concern

The value of one bitcoin over the past year has moved between just over \$1,000 to more than \$19,000 in mid-December, and then over the past two months lost half its value from that peak. Such volatility creates myriad problems when attempting to buy real estate with bitcoins, lawyers say.

"You're going to have transactional agreements that try to hedge against fluctuations through fluctuation limits," said Steven Weber of Weber Law PA. "Negotiations of when those fluctuation limits are in effect. Is it during the period of transfer? Do they continue even after the period of transfer?"

One of the problems is that down payments are typically made a month or several months before a deal closes, and if bitcoin, say, loses half its value over that period, how does that affect the purchase and sale agreement?

"The seller may say, 'That money that you put down, that's only half of what I need now for the down payment,'" said Garth Bostic of Nixon Peabody LLP.

Indeed, transactional language will need to be adjusted to take into account which party is liable if fluctuation triggers problems in the contract. And expect courts at some point in the near future to start weighing in on the topic, lawyers say.

"I expect that those transactional agreements are going to set forth who bears the risk for the fluctuation. How much fluctuation is acceptable?" Weber said. "There will be instances where you don't have sophisticated parties. If there's no fluctuation provision or other method ... it's only a matter of time before this is tested in the courts."

Small All-Cash Deals Are Likely Early Targets

Commercial real estate is largely sitting on the sidelines at this point when it comes to bitcoin, as the sector grapples with a number of issues the cryptocurrency poses, but the more immediate use of bitcoin, according to Nixon Peabody's Justin Thompson, will be for smaller, single-family purchases.

For those deals, buyers can use a service that sells bitcoins, effectively converting them into U.S. dollars in order to do the deal, which eliminates some of the problems of actually paying with bitcoins and subjecting the deal to bitcoin to fluctuation.

Those are also easier deals to do than commercial deals, particularly if lenders aren't involved. And such deals are already happening across the U.S. and globally.

Kuper Sotheby's International Realty in September last year announced it had arranged the first-ever bitcoin purchase of a single-family home, in Texas, and lawyers say as bitcoin becomes more popular, it will first be the smaller deals that see the most action.

"That's happened in Manhattan Beach ... Lake Tahoe, Dubai, across the world," Thompson said, of smaller deals.

And while commercial companies are still waiting to see how bitcoin plays out, these smaller deals could be the start of a broader acceptance of bitcoin in the real estate world, lawyers say.

"This is technology on a direct collision course with real estate. It's hard to think of a more antiquated ... process than the real estate transaction," Thompson said.

Landlords Are Exercising Caution

Purchase and sale deals are one consideration as far as bitcoin goes, but the cryptocurrency is also increasingly being considered as payment for leases, and landlords are being cautious.

One of the issues for landlords' accepting bitcoin as payment is that tax liability is assessed on the value of the bitcoins at the time of the transaction, and since bitcoin fluctuates so much, that could cause tax problems.

Said Kordestani of Farella Braun & Martel LLP said he's had many client calls on the matter over the past several months.

"Ten thousand dollars on Monday might be worth \$5,000 on Wednesday. The IRS would tax you on the \$10,000," Kordestani said. "None of my clients are renting [to clients who pay in bitcoin] unless they don't have a better offer."

There is also the question of how landlords are dealing with the very companies that have sprung up as bitcoin has gained popularity, and landlords may be reluctant to offer a long-term lease to so-called crypto clients

Offering a lease for three, five or seven years to a company that's heavily invested in cryptocurrency could be a risk for landlords, given the novelty of the movement and the

unknown of how long it will stick around, Kordestani said.

"Who knows how long this will last?" Kordestani said.

It's Unclear Whether Bitcoin Will Behave Like a Commodity or a Currency

Another issue for real estate deals done in bitcoin is the fact that bitcoin is showing some traits of a commodity given its wild price swings but is also showing traits of a currency, yet it hasn't gained traction in the banking world as a currency, and that makes commercial deals tricky, according to attorneys.

"With bitcoin, you do see similarities with other currencies and other commodities," said Louis Archambault of Saul Ewing Arnstein & Lehr LLP. "If bitcoin is adopted by the banks, you could have an integration of the system."

While adopting bitcoin as a currency in the banking sector is one challenge, other aspects of real estate deals are also complicated by bitcoin's nebulous status. Title insurance is one such area.

"How do we get a title insurance policy when we don't know what the consideration is?" Pick said. "You're going to have to come up for some other way to do it."

And until bitcoin becomes more established as a currency, expect it to still be a challenge to do commercial real estate deals with it, lawyers say.

"The real question is going to be whether cryptocurrencies begin to act like real currencies instead of commodities," said Bob Braun of Jeffer Mangels Butler & Mitchell LLP.

"I can see it being [valuable], ... particularly for trans-national, cross-border transactions," Braun added.

--Editing by Rebecca Flanagan and Emily Kokoll.

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