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Ten Things I Hate about My Last Deal – What to Do Better Next Time: Practical Advice for Real Estate Lawyers

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Ten Things I Hate about My Last Deal – What to Do Better Next Time: Practical Advice for Real Estate Lawyers[1]

Commercial real estate transactions have gone through intense scrutiny in this latest downturn. With the benefit of hindsight, how can our documents and the advice we give create value and establish more certainty for our clients going forward? The purpose of this paper is to explore ten practical things to consider doing differently and, hopefully, better, for the next time our transactions are looked at through a magnifying glass.

1. If You Hear "I'll Sue You," Stop Talking and Regroup

Once parties are involved in a dispute, it is prudent for an attorney to consider whether continuing communications and conduct might be used against the client in future litigation. Often the frustration of contentious transactions creates an atmosphere where unnecessary and frequently negative comments are made. It is wise to stop and acknowledge this impasse and put in place additional procedures to help eliminate and protect these communications. The goal in most cases is to avoid litigation and to reach an agreement between the parties. One way to minimize the risk that future conduct and communications will be admissible in evidence in any future litigation is to include a header in communications with the opposing party that indicates the letter, e-mail or other form of communication is an "inadmissible offer to compromise." Even if not dispositive on the issue of admissibility, it is a good practice to use an attorney client privilege/work-product header on all communications between counsel and client.

Further, if the parties agree to engage in negotiations, it is prudent to enter into a pre-workout or pre-negotiation letter.[2] A paragraph similar to the following is helpful to confirm this:

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[1] The author gratefully appreciates the assistance and support of Bryan Patrick, Amy Mitchell, Travis Siebeneicher and Jennifer Sherrill without whom this paper could not have been prepared timely or well.

[2] One recent case where disputing parties entered into a pre-negotiation letter may be instructive on best practices. CMR Mortg. Fund, LLC v. Canpartners Realty Holding Co. (*In re* CMR Mortg. Fund, LLC), 2009 WL 2870114 (Bankr. N.D. Cal. 2009. In the *CMR* case, the senior lender and junior lender agreed in a pre-negotiation agreement that the senior lender would delay its foreclosure to give the junior lender time to decide if it wanted to exercise its right to take title to the secured property or to buy the senior note. Both loans were secured by a single deed of trust on one property, and the junior loan was subordinated to the senior loan and did not have the right to foreclose. The junior lender paid the senior lender an extension fee and waived past and future claims against the senior lender except for claims that the senior lender failed to apply the extension fee in accordance with the loan documents and their Co-Lender Agreement. The pre-negotiation agreement had an integration provision that stated there were no oral agreements between the parties. The parties negotiated for months but did not reach agreement and the senior lender foreclosed, wiping out the junior lender's interest in the property. Despite the waivers, the bankruptcy court allowed a breach of contract claim against the senior lender with respect to the extension fee. The loan documents and Co-Lender Agreement did not state expressly what would happen to the extension fee if the senior loan term was not extended, and the bankruptcy court found that the agreements "were reasonably susceptible to the interpretation that, absent extension of the loan, the fee must be returned to the junior lender." Based on this interpretation, the bankruptcy court allowed the junior lender to maintain

> The parties agree that all conduct and communications of any nature whatsoever (whether verbal or nonverbal, express or implied, whether made both before the date of this letter or afterwards) of any signatory below in connection with the discussions and negotiations contemplated by this letter or in any meetings or correspondence relating to [insert subject matter] shall constitute settlement communications and are inadmissible for any purpose whatsoever in any judicial or similar proceeding pursuant to Rule 408 of the Federal Rules of Civil Procedure and its state and foreign counterparts. To the extent any such conduct or communications are held not to constitute settlement communications, the parties agree that such conduct and communications are still not admissible for any purpose whatsoever in any judicial or similar proceeding.[3]

No matter what written agreements are in place, there is no substitute for having a higher level of scrutiny and coordination internally and with counsel to protect against inadvertent agreements. Use of words such as "this looks good" or "this looks like a done deal, I'll circle back with you" may be the basis for claims of an agreement or at a minimum a reliance claim by the other party. It is essential to promptly clarify the intentions of the parties.[4]

2. Deadlines Without Time Extensions Can Take Away the Breathing Room Needed to Make Deals

When deals are difficult and good options are limited, often it is actually harder to reach an agreement that is fair and desirable to both parties if there are hard fixed deadlines and no right to extend. Parties can use a drop dead date to take an uncompromising position and refuse to make reasonable and customary business deals.[5] Recognizing this fact and making provision for extensions in agreements at the front end of a transaction can save time and money at the back end when the term expires. Borrowers facing maturity dates and tenants facing lease expiration dates can have their backs against a wall if there are

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a claim for relief that the senior lender had fraudulently induced the junior lender to enter into the pre-negotiation agreement.

[3] Evidence of conduct and statements made in compromise negotiation is inadmissible. T. R. Evid. 408. *See generally* 7 William V. Dorsaneo, III & E. Lee Parsley, *Texas Litigation Guide* § 102.01 (2010).

[4] In the *BACM* case, a telephone conversation by a loan servicer was construed by the borrower as an agreement. BACM 2001-1 San Felipe Road Ltd. P'ship v. Trafalgar, 218 S.W.3d 137, 144 (Tex. App. – Houston [14th Dist.] 2007, pet. denied. When the borrower sent a follow-up letter accepting the alleged verbal agreement, the lender promptly did not dispute the agreement, deposited the enclosed check and only returned the amount after a long delay. The trial court found for the borrower on the basis of an alleged new agreement. The Court of Appeals viewed the agreement as a modification of the loan documents and the letter and negotiation of the check as sufficient to satisfy the statute of frauds. It was fortunate for the lender that the borrower's breach of the new agreement or modified agreement prevented the borrower from enforcing the terms of the agreement.

[5] For example, a tenant can be faced with a forcible entry and detainer action before the tenant is able to move into new space. If the lease is silent, a landlord can notify the tenant three days prior to filing an action, and after the hearing before the justice court, a tenant can be faced with a writ of possession within 24 hours after the officer posts the required warning. Tex. Prop. Code Ann. § 24.0061 (Vernon 2010). Even in the circumstance where the tenant has a basis to fight such an action, the entire time period between filing and loss of possession can be as little as 60 to 90 days.

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Also available as part of the eCourse
10 Things to Do Differently in Your Next Deal; plus Update and Practice Tips on Deed Restrictions in Texas

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