



CORPORATE COUNSEL FACES OFF AGAINST A LEASE CURRENT TRENDS (AND PITFALLS) IN LEASING TRANSACTIONS

Prepared By:

Saul A. Mishaan, Partner at Armstrong Teasdale LLP

Andrew P. Brucker, Partner at Armstrong Teasdale LLP

Erin Lavelle, Managing Director and General Counsel at Real Property Capital, Inc.

Follow us on social media!



@accgp



@delvacca

www.acc.com

April 24, 2019 In-House Counsel Conference

Presenters:



Saul A. Mishaan, Partner



Armstrong
Teasdale



Andrew P. Brucker, Partner



Armstrong
Teasdale



Erin Lavelle, Managing Director and General Counsel



CORPORATE COUNSEL FACES OFF AGAINST A LEASE

CURRENT TRENDS (AND PITFALLS) IN LEASING TRANSACTIONS

- Types of Leases
 - “Mom and Pop”
 - Rated Retail
 - Industrial
 - Cell Towers
 - Big-Box Leases
 - Non-Profit Leases
 - Medical Leases
 - Triple Net Leases
 - Other Leases Customized to Achieve Bond, Tax, Legal and Restructuring Solutions (e.g., Sale /Leasebacks)

CORPORATE COUNSEL FACES OFF AGAINST A LEASE CURRENT TRENDS (AND PITFALLS) IN LEASING TRANSACTIONS

In-house counsel is often presented with a potential lease transaction—whether it be acting as a landlord or as a tenant—and is faced with the question:

Do I keep this in house?

CORPORATE COUNSEL FACES OFF AGAINST A LEASE

CURRENT TRENDS (AND PITFALLS) IN LEASING TRANSACTIONS

- Factors to Consider:
 1. Costs
 2. Complexity of Lease
 3. Familiarity with Lease Issues
 4. Objectivity (Can't See the Forest for the Trees)
 5. *CYA*
 6. It's Only a Renewal

CORPORATE COUNSEL FACES OFF AGAINST A LEASE

CURRENT TRENDS (AND PITFALLS) IN LEASING TRANSACTIONS

- **Costs**

- Leasing has evolved, and tenants and landlords, owning different CRE, have become more educated, sophisticated (e.g., funds, sponsors...)
- Standard lease forms no longer in vogue.
- You get what you pay for.
- Variety of payment structures to accommodate situation and deal size.
- Important to realize leases have financial value, and certain types of springing leases would allow a prospective purchaser to borrow from a bank before even owning a CRE asset.

CORPORATE COUNSEL FACES OFF AGAINST A LEASE

CURRENT TRENDS (AND PITFALLS) IN LEASING TRANSACTIONS

- Complexity of Lease
 - No situation is the same.
 - Forms may be recycled, but are deceiving and in the absence of an astute CRE leasing attorney, a general counsel can sometimes do more harm.
 - Sometime more is not better.
 - Sometimes less is not better.

CORPORATE COUNSEL FACES OFF AGAINST A LEASE

CURRENT TRENDS (AND PITFALLS) IN LEASING TRANSACTIONS

- Familiarity with Leasing Issues
 - Keep in mind business objective
 - Do not overly complicate and blow up a deal
 - Common sense
 - Knowledge of the local market –
 - Extremely important as this could turn off the other side
 - Tricks (e.g. Landlord would “gross up” square footage to overcharge tenant on CAM)
 - Local tax abatements (e.g., property taxes, ICAP (NY specific))
 - Case studies
 - Brooklyn, New York – Ground Up Construction – “Big-Box Tenants”
 - New York, New York – Retail Position – Times Square Lease
 - New Jersey – Warehouse Lease – National Distribution Company
 - Miami, Florida – Medical Center Lease – Mount Sinai Hospital

CORPORATE COUNSEL FACES OFF AGAINST A LEASE

CURRENT TRENDS (AND PITFALLS) IN LEASING TRANSACTIONS

- Can't See the Forest for the Trees
 - You have to know when to push and when to pull.
 - What are the most important terms you would need in any CRE?
 - Ego is expensive (leave it at the door).
 - General counsel is often times **not** an independent counsel (business, company pressure can affect ability to negotiate effectively).
 - If you do not have expertise on something, do not do it; engage an outside counsel (e.g., New Jersey Environmental Laws).
 - A poorly negotiated lease can destroy overall project.

CORPORATE COUNSEL FACES OFF AGAINST A LEASE

CURRENT TRENDS (AND PITFALLS) IN LEASING TRANSACTIONS

- ***CYA***
 - Important for in-house counsel to have an insurance policy (e.g., third-party counsel).
 - Never engage a solo practitioner (a second set of eyes is prudent).
 - We are all human.
 - Sleep well at night.
 - Know your boundaries.

CORPORATE COUNSEL FACES OFF AGAINST A LEASE

CURRENT TRENDS (AND PITFALLS) IN LEASING TRANSACTIONS

- It's Only a Renewal (as Tenant)
 - “If we’ve been living with this lease for the last decade, what needs to be reviewed?”
 - Pay careful attention to escalations, as times and circumstances may have changed.
 - Time to make improvements.
 - Landlord also has reason to want a renewal:
 - Rent continuation
 - Brokerage fee
 - No down time
 - No rent concessions or work letter

CORPORATE COUNSEL FACES OFF AGAINST A LEASE

CURRENT TRENDS (AND PITFALLS) IN LEASING TRANSACTIONS

- Practical Tips for a General Counsel
 - Effective communication with client
 - Understand LOI/terms sheet
 - Understand overall business objective
 - Penny wise, dollar foolish
 - Bad lease can affect marketability (e.g., financing, event of sale)
 - Abstract
 - Carve out lease issues (to be continued...)

CORPORATE COUNSEL FACES OFF AGAINST A LEASE

CURRENT TRENDS (AND PITFALLS) IN LEASING TRANSACTIONS

- Carve out lease issues – ***Q: Are you the Landlord or the Tenant?***
 - Commencement Date v. Rent Commencement Date
 - Work Letters
 - Ground Up Construction
 - Build Outs
 - Delivery Dates
 - Twilight Zone
 - Certificate of Occupancy
 - ADA Issues
 - Signage
 - Insurance
 - Simultaneous Work

[Continued]

CORPORATE COUNSEL FACES OFF AGAINST A LEASE

CURRENT TRENDS (AND PITFALLS) IN LEASING TRANSACTIONS

- Additional Rent/ Escalations/ Other Charges
 - Property Taxes
 - Base Year
 - Percentage
 - CAM
 - Should not include all expenses
 - Typically delete capital improvements, brokerage fees, etc.
 - Common Charges
- Special Considerations
 - Environmental
 - Brownfield Sites
- Financials

[Continued]

CORPORATE COUNSEL FACES OFF AGAINST A LEASE

CURRENT TRENDS (AND PITFALLS) IN LEASING TRANSACTIONS

- Exit Strategies
 - Kick-Outs
- Guaranties
 - Good Guy (long term preferable)
- Assignment/ Sublease

CORPORATE COUNSEL FACES OFF AGAINST A LEASE

CURRENT TRENDS (AND PITFALLS) IN LEASING TRANSACTIONS

But Traditional Leasing May Be Dying, and There Are New Trends in CRE:

- Traditional Retail Space is being rented for:
 - Surgi-Centers
 - Urgent Care
 - Amazon Go Stores
 - Nordstrom Mini Stores (NO INVENTORY)
 - Bonobos (Owned by Walmart) – try on clothing
 - Sears Mini Stores (appliances and bedding)
 - “Head Shops”
 - Short-Term Rental (like pop-up) – test a new concept or brand
 - Student Housing
- One result: The traditional big box rental which includes a percentage rent must die
 - Such retail space is used for returns and to try on product, NOT for sale

SPEAKER BIOGRAPHIES – SAUL MISHAAN



Saul Mishaan has more than 35 years of experience in the commercial and real estate industries. Saul's experience is particularly noteworthy in representing landlords in major leasing transactions in New York and nationwide for big box retail locations with major rated tenants. His experience also extends to mall, shopping center and urban street leases.

He has handled matters encompassing real property leasing, foreclosures, commercial paper litigation, corporate, and land partnership dissolutions. Saul also has extensive experience with the licensing and transfer of intellectual property on behalf of numerous licensees and licensors for both major and minor marks. He has handled matters in state and federal court, including commercial foreclosure proceedings, partnership/shareholder/member and contract disputes, business torts, title and lien matters, trademark, copyright, and other intellectual property related disputes, creditors' rights and general business and commercial controversies.

Saul also advises small businesses on a regular basis on various commercial law issues.

Further, he assists the less fortunate in the community in connection with home foreclosures, and he sits on the boards of various charitable communal organizations.

SPEAKER BIOGRAPHIES – ANDREW BRUCKER



Andrew Brucker has been practicing real estate law for more than 35 years. He concentrates his practice on cooperative and condominium matters, as well as handles a variety of refinancing and leasing transactions. Andrew has represented landlords and tenants in the rental of commercial and professional space for businesses, ranging from large medical practices to banks and “pop-up” retailers.

Andrew has been an active member in the legal community. He is the former chairman of the New York City Bar Association Committee on Cooperative and Condominium Law. Under his leadership, the Committee also created a new Condominium Contract of Sale, which was approved by the New York State Bar and published by Blumberg Forms. Previously, he and the Committee revised and drafted the current version of the Alteration Agreement for Cooperatives. He is currently a member of the Committee, which is revising the Cooperative Contract of Sale, expected to be published by Blumberg Forms. Andrew is currently the chairman of the New York City Bar Association Committee on Cooperative and Condominium CLE, which entails conducting all related CLE programs hosted by the Bar.

Andrew has conducted over two dozen CLE courses for the New York State Bar, the New York City Bar Association and Council of New York Cooperatives and Condominiums on real estate, co-op and condo topics. He also co-authored the Code of Ethics adopted by the New York Association of Realty Managers and taught a course on ethics at New York University's Real Estate Institute for more than 10 years. In addition, Andrew is a frequent speaker and lecturer at various industry seminars on real estate matters.

SPEAKER BIOGRAPHIES – ERIN LAVELLE



Erin Lavelle is a Managing Director and General Counsel with Real Property Capital, located in Philadelphia serving clients nationwide. Real Property Capital provides debt and equity advisory services from the most structured transactions to the most commoditized, across all asset classes including hospitality, office, retail, multi-family and specialized industrial. Erin and her team actively source debt and equity on behalf of private and institutional clients and oversees legal matters for the firm including the engagement, negotiation and closing processes.

Erin is a seasoned real estate attorney in both private firm and corporate settings counseling Sponsors on their acquisition, development and finance of multi-family, office, hospitality and industrial projects. She has participated in transactions totaling over 2 Billion including the 400MM acquisition and finance of 1MM square feet Corporate Plaza in Edison, NJ; a 280MM development and finance of a Luxury Condominium Complex in Philadelphia, and the 160MM refinance of Mixed Use Office Building in Midtown Manhattan.

Erin holds BA degrees in English and Political Science from the University of Scranton and a Juris Doctorate from Widener University Commonwealth Law School.

Erin lives in Philadelphia where she serves on several non-profit boards supporting education and children's causes. She is an avid SoulCycle and PureBarre attendee as well as a novice golfer, improving with each season.

A reminder about the benefits of ACC membership...

- Free CLE, like the one you're attending right now
- Roundtables
- Networking meetings
- Special events
 - Spring Fling, Fall Gala, Diversity Summer Program, Golf Outing, Pro Bono clinics, Charity Softball Game & Family Fun Day, and more!
- Access to ACC resources, including:
 - ACC Newsstand (customizable updates on more than 40 practice area)
 - ACC Docket Magazine
 - InfoPAKs
 - QuickCounsel Guides
- **For more information or to refer a new member, see your hosts today or contact Chapter Administrator, Chris Stewart, at ChrisStewart@ACCglobal.com.**

