



# 18<sup>th</sup> Annual Real Property and Estate Planning Symposia

Commercial Real Estate Transactions Group:  
Portfolio Transfers – Defusing Hidden Time Bombs  
in Portfolio Deals

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**April 26, 2007**

Commercial Real Estate Transactions Group: Portfolio Transfers – Defusing Hidden Time Bombs in Portfolio Deals

Commercial Real Estate Transactions Group: Portfolio Transfers - Defusing Hidden Time Bombs in Portfolio Deals will introduce the following topics which arise in many of today's portfolio transactions:

## Commercial Real Estate Transactions Group: Portfolio Transfers – Defusing Hidden Time Bombs in Portfolio Deals

- I. Due Diligence in Portfolio Transfers - We will discuss approaches to ordering, organizing, managing, reviewing and resolving diligence issues arising in title, survey, environmental and zoning diligence; typical benchmarks of analysis, lender sensitivity, resolving problems with insurance, indemnities, cash settlements and other devices. We will comment on the emergence of E-room and data base technologies supplanting conventional document "war" rooms.

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- II. Entity Deals v. Asset Deals - Are we buying the buildings, or are we buying the partnership or llc that owns them? The agreements will look different, but the substance of either type will touch many of the same issues. We will explore possible advantages of and additional liabilities presented in entity transactions, the tax consequences of one structure versus the other, the utility of 1031 tax deferred exchange structures, and possible transfer tax consequences of varying deal structures.

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III. Insurance Considerations - We will explore relevant considerations in placing insurance coverage for portfolio properties, including occurrence made versus claims made policies, and we will present an update on terrorism insurance and other catastrophic coverage issues.

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IV. Timing Considerations - We will explore a variety of issues which will affect the timing of a portfolio transaction, including SEC filings, if required, "bulk sale" and other tax clearance considerations, governmental certifications, permits and clearances, lender diligence and consent and related issues.

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V. Contract Provisions Including Representations and Warranties - We will offer observations about what portfolio buyers ask for, what sellers will give, and where the parties will settle; the difference between public and private deals, pre - and post - closing recourse and remedies, indemnities, baskets and caps, anti-sandbagging protections, and related issues.

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- CLE Objections Report
- CLE Flood Zone Report
- CLE Ground and Parking Lot Lease Report
- CLE REAs, Declarations and CCRs Report
- CLE Survey Checklist
- CLE Survey Comments Report
- CLE Title Review Checklist
- CLE Use Restriction Report
- CLE Sample Portfolio Agreements of Sale



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### I. Due Diligence in Portfolio Transfers

- Title, Survey, Environmental and Zoning
- Entity Level Diligence
- Defining Seller's Deliverables
- Use of E-room Technologies\*
  - Use of E-room Post-Closing

\*to be presented by Merrill Corp.

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### Due Diligence in Portfolio Transfers (cont.)

- Anti-Sandbagging
- Lender Review Issues
- Relevance, Utility and Application of Due Diligence Rights in Public v. Private Deals

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## II. Entity Deals v. Asset Deals

- Tax and Accounting Issues
  - Tax Planning
  - Allocation of Purchase Price
  - Transfer Tax Consequences
  - 1031
- Representations and Warranties

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### III. Insurance Considerations\*

- Property, Casualty, Liability
- Terrorism and Catastrophic Loss
- Environmental

\*to be presented by Gallagher

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### Insurance Considerations (cont.)

- Historic Claims – Need for Rep and Schedule
- Blending Coverages, Brokers and Renewal Periods
- TRIA Update

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### Insurance Considerations (cont.)

- Diligence Review; By Whom?
- Traps for the Unwary: Earthquake, Wind, Terrorism

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#### IV. Timing Considerations

- Governmental Certifications, Clearances and Permits
- Issues During Executory Period
  - Pre and Post Diligence
  - SEC Review/Clearance
  - Governmental Approvals
  - Bulk Sale Clearance Certificates

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### Timing Considerations (cont.)

- Relations with Tenants
- New Leases, Contracts and Changes to the Property
  - “Deemed” Approval
- Lender Approvals



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V. Contract Provisions

■ PROPERTIES

- “All or None”
- Right to Withdraw and Kick Out
- Right of Substitution
- Linked Properties
- Personality
- JV Bidders

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### Contract Provisions (cont.)

- Purchase Price
  - Minimum
  - Allocated Values

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### Contract Provisions (cont.)

- Casualty/Taking
  - Defining “Material” and “Material Adverse Effect” - Property v. Portfolio Considerations
  - Defining Standards and Walk Away Rights

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### Contract Provisions (cont.)

- Termination Rights
- Responsibility for Repair
  
- Representations and Warranties
  - Entity

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### Contract Provisions (cont.)

- Property Level
  - Reasonably Discoverable v. Known v. Should have Known
  - Public Record
  - Leasing Commissions
    - Market Rate
    - Who's Responsible?

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### Contract Provisions (cont.)

- Knowledge Qualifier; Defining Knowledge
- Survival
- Baskets and Caps
- Relevance, Utility and Application of Representations and Warranties in Public v. Private Deals

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### Contract Provisions (cont.)

- Condition of Closing
  - Casualty/Taking
    - Material or MAE
  - Change in Occupancy Levels
  - Delivery of Estoppels and SNDAs

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### Contract Provisions (cont.)

- Confidentiality
  - Audit/Accounting Issues
  - Public v. Private Deals
  - Required Disclosures and Filings
  - Mutual Consent and “Deemed” Approval
  - Press Releases



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### Contract Provisions (cont.)

- As-Is
  - Release
  - Indemnity
  - Implications in Lease-back

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### Contract Provisions (cont.)

- OFAC Patriot Act
- Closing Adjustments