

ACREL PRESENTATION ON REPRESENTATIONS AND WARRANTIES
April 6, 2016

1. Overview
 - a. Scope of presentation—R/W in commercial real estate transactions
 - b. Definitions:
 - i. Representation
 - ii. Warranty
 - c. Scope of Seller R/W in PSA (cf. scope of *Buyer* R/W in PSA)
 - i. Duration of study period—shorter time period may warrant more robust R/W; longer time period may warrant fewer R/W; consider if there is no study period
 - ii. Negotiating strength of parties
 - iii. Market conditions
 - iv. Type of asset involved
 - v. Status of seller
 - d. Continuum of R/W
 - i. No controversy
 1. Power and authority (subject to lender approval?)
 2. No conflicts
 3. OFAC
 4. Bankruptcy
 5. Not a foreign person
 6. No brokers other than those specified
 - ii. Within the range of reasonableness
 1. Violation notices
 - a. Limit to outstanding notices?
 - b. Limit to those received within certain time period?
 - c. Include hazmat?
 2. No condemnation (threatened or pending)
 3. No litigation
 - a. Threatened—knowledge based
 - b. Pending—not knowledge based
 4. No employees
 - a. Collective bargaining agreements (certain markets)
 - b. Withdrawal and other employee liability
 5. No service contracts other than those disclosed
 - a. Long term energy contracts – may not be terminable and may require energy provider’s advance consent (and 90 days’ notice)
 - b. Elevator and similar contracts
 6. Leases
 - a. No amendments (including lease and rent commencement date certificates)
 - b. Full force and effect
 - c. All TI and LC amounts have been paid

- d. No tenant broker agreements
 - e. No default by LL or T
 - f. Amount of security deposits
 - g. Rent roll--UGHHHHHHHHHHHH
 - 7. Environmental reports and test results
 - a. Most recent
 - b. All
 - 8. Loan assumption information
 - a. Amount of indebtedness and reserve accounts
 - b. Enumeration of loan documents
 - c. No defaults
 - d. Satisfaction of assumption conditions
 - 9. No ROFRs, ROFOs, or purchase options granted by Seller
 - 10. Property information is true and correct in all material respects
 - 11. Tax appeals—no tax certiorari proceedings
 - 12. Quality of title to personal property
 - 13. ERISA
 - 14. Others required by local law, such as radon and lead paint
 - 15. Access (ADA)
 - iii. Aggressive
 - 1. Condition/quality of title to real property
 - 2. No material adverse change (MAC clause)
 - 3. Financial statements
 - 4. Zoning and other publicly available information
 - 5. Special assessments
2. Representations and warranties are heavily negotiated in commercial purchase and sale agreements, but what's market?
 - a. When is the other party overreaching or getting greedy?
 - b. Does "as is" really work?
3. Mid-stream changes in accuracy of seller's R/W
 - a. Seller default or failure of condition?
 - b. When should seller be allowed to modify its R/W?
 - i. Seller has no control over changed R/W, e.g., condemnation, tenant defaults
 - ii. Seller has control over changed R/W, e.g., suit initiated by Seller
 - c. When does risk of tenant failure pass – at "go-hard" date or closing?
 - d. What's a material change?
 - i. Dollar amount?
 - ii. Percentage of purchase price?
 - iii. Deductible concept
4. Differences between property-level R/W and entity-level R/W
 - a. Is differing treatment warranted?
 - i. Statute of limitations (state and Federal)

- ii. Difficulty in independently verifying accuracy of entity-level R/W
 - iii. Different liability exposure/caps (should there be a cap for a violation of an entity-level R/W?)
 - b. What differing treatment is appropriate?
 - c. Entity-level R/W
 - i. No post-closing liabilities
 - ii. Ownership of interests (legal and beneficial) free and clear of all liens and rights
 - iii. No consent required for transfer of interests
 - iv. Interests not registered under federal securities laws
 - v. Interests are not certificated
 - vi. True and complete copies of all entity documents
 - vii. No employees
 - viii. No subsidiaries
 - ix. No other business activities besides indirect ownership of the property
5. Knowledge qualifications
- a. Mirage or substance?
 - b. What is “best knowledge” anyway?
 - i. Reference Ed Levin’s recent article in *Probate & Property*
 - ii. Requirement that knowledge party make “due inquiry”
 - c. Identify knowledge person
 - i. Avoid making qualitative R/W that knowledge person has “most knowledge” about R/W or property
 - ii. Specify duration of affiliation of knowledge person to property
 - iii. Knowledge party should have no personal liability
 - d. Property manager’s knowledge
 - i. Do not impute to seller
 - ii. Allow property manager to provide separate certificate to buyer; not a closing condition, and no liability imputed to seller
6. R/W for specialized PSAs
- a. Hotels
 - i. Union contracts
 - ii. Multiemployer plans
 - iii. No violation of labor and employment laws
 - iv. Financial statements
 - v. Bed bugs
 - vi. Status of franchise agreement
 - vii. Licenses (including liquor license) and permits
 - viii. ADA, including accessible guest rooms and other facilities
 - b. Biotech
 - i. Environmental/Haz Mats
 - ii. Decommissioning of lab space
 - iii. Licenses
 - c. GSA tenanted asset

- d. Multi family
 - i. Bed bugs
 - ii. Radon
 - iii. Lead paint
 - iv. Fair Housing Act (including access)
 - e. Retail
 - i. Financial performance
 - ii. Exclusives
 - f. Land
 - i. Entitlements
 - ii. Land area
 - iii. Zoning and land use development
 - g. Portfolio sales
 - i. Potentially different knowledge parties for each asset in portfolio
 - ii. Potential combination of land and entity interest sales
 - h. Health care facilities
 - i. Compliance with healthcare laws (including regulations)
 - 1. Filing of cost reports mandated by law
 - 2. No convictions re certain categories of offenses, e.g., financial misconduct
 - ii. Licenses
 - iii. Healthcare regulatory reports/notices (Medicare/Medicaid)
 - iv. Residence agreements
 - v. Facility agreements
7. Be careful with “boilerplate” R/W
- a. What’s lurking in the wording?