

## Buying or Selling? Transaction Topics Were Hot at the 2018 ICSC Legal Conference

Oct 30 2018

Posted By: Chris A. Jenny

Practice Area: Real Estate & Retail Real Estate

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The ICSC Legal Conference was held in Orlando, Florida October 24-27 and the hot topics of discussion were consistent with the legal matters that attorneys in the retail real estate industry are addressing with frequency in 2018. While sessions focusing on leasing issues were still plentiful, it was clear that there was a shift in the number of sessions focused on transactional issues. The following is a list of some of the topics that were addressed with the greatest frequency at this year's conference.

**Transaction Due Diligence.** A number of sessions focused on the scope of proper due diligence by buyers in the purchases of real estate. Over the years, the due diligence period has been getting shorter and a typical timeline is now 30 days. Due to the volume of transactions that are happening, buyers should make sure that they have their vendors such as surveyors, appraisers, inspectors and other consultants scheduled before the purchase agreement is signed. Many buyers are surprised to find out that 30 days is not sufficient for their vendors to get their part of the due diligence completed.

**Tenant Due Diligence.** Buyers should work closely with their lenders to ensure that the proper amount of due diligence is conducted with regard to the property's tenants to ensure that the loan can be underwritten. Feedback should be sought on the form of the estoppel certificate that will be obtained from tenants. Of course, it is best to include the agreed upon form in the purchase agreement. Further, it is important to understand how many estoppel certificates are going to be required. Is it based on the square footage? Specific tenants? Tenant interviews are also an important item to address in the purchase agreement to ensure that the buyer and its lender will be able to prove the property's cash flow for underwriting purposes.

**Letters of Intent.** For a document that is almost always non-binding by its terms, there was a lot of lively debate regarding the length and content of letters of intent. One speaker opined that his rule of thumb is that an LOI should not be longer than 10% of the length of the definitive agreement. For example, if the agreement is 30 pages, then the LOI should not be any longer than 3 pages. Whether an LOI for a lease or purchase and sale, the LOI should clearly state that it is non-binding. Further, any terms that the parties may want to be binding such as a confidentiality clause, should be removed from the LOI and set forth in a separate, binding agreement. Finally, a significant amount of time was spent on litigation that involved LOI terms requiring "good faith" negotiations. Parties should avoid including "good faith" terms in a LOI.

**Title Insurance Issues.** There were a number of sessions devoted to title insurance. It is important to remember that parties to a transaction and their legal counsel should determine whether the title insurance price can be negotiated. Parties often fail to pursue possible price reductions that may be available, even in states that regulate rates. For example, it may be possible to stack properties. Because the first dollar of coverage is the most expensive, it is possible to stack multiple properties into one policy to get a lower total price. Buyers should also consider whether the additional coverage offered by certain endorsements is worth the price. If the buyer has some leverage with their lender, there may also be an opportunity to negotiate the endorsements that the lender is requiring.

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