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Can We Save Time By Using A Negotiated Document From Another Deal?

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I write about commercial real estate negotiations, deals and legal issues.

SLOVYANSK, UKRAINE - MAY 11: An election official sorts through a pile of "yes" votes for independence for eastern Ukraine, next to a short stack of ballots marked "no" at a polling station following voting on May 11, 2014 in Slovyansk, Ukraine. Pro-Russian communities in eastern Ukraine staged a sovereignty vote in defiance of federal and international pressure. (Photo by John Moore/Getty Images) [-] GETTY IMAGES

Real estate negotiations often involve multiple drafts and rounds of comments on complex documents. Clients become impatient with the process. Perhaps counterintuitively, so do their lawyers. The lawyers have other things to do. And they know that too much legal work on a matter will more likely lead to billing complaints and lost clients than to a huge financial windfall.

If two parties (e.g., a national owner of shopping malls and a chain store) conclude a series of transactions together, they can short-circuit much of the document negotiation process by agreeing on a standard form for all their leases, subject only to variations specific to a particular site or deal.

For a recent ground lease development transaction, we tried something similar. We represented the tenant. But we had previously represented the landlord in another similar ground lease transaction involving the same counsel – who had represented the tenant in the earlier transaction. In an effort to simplify negotiations this time around, the lawyers and the clients agreed to use the fully negotiated lease from that earlier deal, minus identifying details and economics, as the starting point.

Did it work? Mostly.

Both sides spared themselves a good volume of generic lease negotiations: fine-tuning the tenant's maintenance and repair obligations, insurance requirements, flexibility on construction, leasehold mortgagee protections, allocation of condemnation proceeds, and other issues that don't vary too much from deal to deal. And no one spent much time sprinkling words like "reasonable" and "material" throughout the document. This had already been accomplished, assuming that is the right verb choice.

We ran into trouble in other areas, though. Even though both transactions involved ground leases for development, each one was full of its own nuances and deal-specific elements. Once you have a few of those in a deal, they tend to ripple through the documents.

It's easy to identify and remove most deal-specific elements. But where do the deal-specific elements end and the generic elements begin?

For example, the earlier deal involved a relatively small and weak developer. Therefore, in that earlier deal the landlord (represented by us) was concerned about the developer's credit and assurances of completion. That led to a long list of conditions the developer needed to satisfy before starting development. In the more recent deal, though, the developer (represented by us) was stronger, with better financial backing. So now as the developer's counsel, we wanted to delete many of the conditions that we had insisted upon when we represented the landlord in the previous deal.

The counsel to today's landlord challenged us as being inconsistent. We argued that the strength of the developer was a deal-specific difference that justified varying from the earlier document.

In the earlier deal, our landlord client owned billboards near the development site. Wanting to preserve the visibility of those billboards, the landlord wrote detailed provisions into the lease to limit upward lighting, control other signs, and prohibit certain construction.

An ordinary generic ground lease wouldn't have included all that language. But this one did, because of what we considered deal-specific characteristics of the earlier site. As it happened, in today's deal, the landlord liked some of the language to protect views, because it too owned other sites nearby. So, as a result of the deal-specific language from the earlier deal, we ended up with restrictions (to protect views) that today's landlord might not otherwise have thought of. But they're tolerable.

Now we're nearly done with lease negotiations. Although there were a few bumps in the road, some of them summarized above, we have had remarkably few drafts and iterations as we approach a final agreed document. In the process, we were able to focus on issues specific to this particular transaction, rather than on generic issues that arise in every ground lease negotiation.

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I help buyers, sellers, borrowers, lenders, tenants, property owners, and other commercial real estate market participants identify and achieve their business goals. To do that, I need to understand risk, security, numbers, value, financeability, flexibility, and exit strategy. Some legal issues matter a lot and many don't. It's important to know the difference. I write extensively on commercial real estate law and practice – over 300 articles and five books on leasing, lending, and other areas, with some emphasis on ground leases. I occasionally serve as an arbitrator or expert witness in complex real estate disputes. That lets me see how transactions go wrong. Often, the problems

could have been avoided by keeping it simple and following the money, but everyone got sidetracked. As a Forbes contributor, I try to tell stories that teach worthwhile lessons for real estate deals. **Read Less**

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