

## **B8332 REAL ESTATE TRANSACTIONS:**

**Professors Jennifer Morgan and Rick Wolfe**

**Fall 2017**

**Monday/Wednesday 9:00 – 10:30 am**

**Uris 142**

Real estate is a transaction business, and a thorough understanding of legal structure and transaction documentation is essential to successfully execution of all types of business strategies in real estate: Ask any seasoned investor! Decisions about the most effective structure for owning real estate, layering debt, and structuring equity investments all involve legal considerations that shape the risk and return profile of real estate investments as well as control and decision making.

Our goal in the course is to provide you with an understanding of the institutional framework of commercial real estate transactions: business law, taxation, investment partnerships, and deal structures. It is the essential complement to the analytics of finance and investment. Real estate transactions draw upon a vast array of laws and regulations – property law, contract law, land-use law, environmental law, securities law, constitutional law, corporate law, bankruptcy law, insurance law, and riparian law. Tax considerations similarly play a significant role in driving deal structure as real estate is highly sensitive to taxation at all levels of government and across all stages of property ownership. And investment structures shape who bears what type of risk.

How and why do transactions come out the way they do? This is the practical question underlying the structure of this course. You should finish the course knowing how the terms and conditions spelled out in a term sheet find their way into particular sections and provisions of a transaction's legal documentation. To succeed in this business, you will need to be savvy consumers of legal expertise, notwithstanding the knowledge and expertise of your attorney.

The course is designed to address a broad range of considerations that arise as a real estate transaction moves from term sheet to legal documentation. This process typically involves the following tasks:

- creating and describing real estate interests,
- protecting real estate interests,
- defining default,
- assuring remedies,
- aligning economic interests,
- allocating financial risk and return,
- assuring financing feasibility,
- creating exit flexibility,
- providing for condemnation and casualty,
- establishing dispute-resolution mechanisms,
- establishing governance structure and decision making, and
- structuring to increase certainty of execution.

As a means of integrating theory and practice, the course links business strategy and legal structure. It draws heavily on cases and other materials specially designed for this course. Leading attorneys and

investors bring their expertise and insights to class to discuss the legal risks, rights, and remedies underlying contract transactions, financial structures for debt and equity, distress and restructuring strategies, and M&A transactions in today's real estate markets.

The course is divided into four sections:

**Part I: Tax and Financing**

**Part II: Property Interests and Agreements**

**Part III: Capital Structure Transactions**

**Part IV: Distress and Disputes**

Each topic is addressed through a mix of formats: mini-lectures, case analysis, document review, and class discussion. Careful and diligent preparation for each session is imperative for thorough understanding and take-away learning from the skilled professionals who are giving their high-priced time and preparation for your education. You will learn from actual transaction documents the key issues necessary for successful negotiations and closings. It's essential to do the required reading.

**REQUIRED PREREQUISITES AND CONNECTION TO THE CORE (For Electives)**

The learning in this course will utilize, build on and extend concepts covered in the following core courses:

Core Course	Connection with Core
Corporate Finance	<ol style="list-style-type: none"><li>1. Time value of money</li><li>2. Opportunity cost of capital</li><li>3. Risk</li></ol>
Strategy Formulation	<ol style="list-style-type: none"><li>1. Creation of value vs. value capture</li><li>2. Trade-offs</li></ol>
Leadership Development	<ol style="list-style-type: none"><li>1. Ethics</li><li>2. Decision making</li><li>3. Influence &amp; Persuasion</li><li>4. Negotiations</li></ol>
Global Economic Environment	<ol style="list-style-type: none"><li>1. Inflation and the business cycle</li><li>2. Fiscal policy</li><li>3. Role of financial markets in the economy</li></ol>

Students will be expected to have mastered these concepts and be able to apply them in the course.

**Class Expectations**

Attendance is required at all sessions and for the duration of the session. If for some reason, you are not able to attend or have to leave early, please notify us as such. Missing more than two classes (other than for religious holidays) is likely to adversely affect your grade.

Class starts at 9am. Arriving late disrupts the class and is disrespectful to everyone who has arrived on time, especially our guests.

No Cell Phones, Laptops, iPads. Please place these items in a safe place where they cannot be touched in class. If you intend to take class notes on a computer during the semester, please let us know at the start of the course. Our guest speakers are volunteering their time and warrant your undivided attention; it is highly distracting—and quite obvious—to your fellow students, your professor, and guest speakers to use these devices in class to conduct your other business and personal relationships.

Preparation. Students must be prepared for all classes. Convenient as it might be, you cannot learn all you need to learn just from listening in class, and the questions you ask will not be as informed as they could be with preparation. Class discussion will be based on the assumption that you have thoroughly read these materials and are prepared to answer questions as well as pose questions in class. Sometimes students will be cold called.

Readings for the course are posted on the course website and the required readings for each session are clearly identified on the syllabus. ***We have been selective in the assigned readings, mindful of the fact they you are all taking other courses, yet there is more reading than is customary in MBA classes. Keep in mind that this is a business law course, and substantial reading rather than intense numerical calculations are the norm.***

For long-term reference, you might want to consider purchasing or borrowing **George Lefcoe, Real Estate Transactions, Sixth Edition (Newark, NJ: LexisNexis, 2009).**

**Grading Assessment:**

Four (4) of Five (5) case assignments (we will take the highest 4 grades if all 5 are prepared)	55%
Take-Home final (ASSIGNMENT TYPE C)	30%
Class participation	15%
(preparation of all 5 case assignments will also be weighed in class participation assessment)	

**Submitting Assignments:**

**All assignments are individual work unless otherwise specified.** All assignments are to be submitted hard copy or email at the start of class on the due date. If you are late, do not disrupt class to hand in your assignment. Assignments submitted after the specified time will be marked “late” and will be given partial credit. For group assignments, one submission from each group should be submitted with the names of the group’s members clearly stated on the first page. PLEASE E-MAIL ALL ASSIGNMENTS TO THE PROFESSORS **AND** THE TAs.

**Key Dates:**

**Case Assignments: Submit four (4) of five (5):**

September 27	Case Assignment #1: <i>The Note for Pacific Tower</i> <b>ASSIGNMENT TYPE C</b>
October 4	Case Assignment #2: Legal Structure of the Capital Stack. <b>ASSIGNMENT TYPE [B]</b>
October 11	Case Assignment #3: <i>Zenith Center</i> . <b>ASSIGNMENT TYPE C</b>
November 1	Case Assignment #4: <i>Soho Loft Building</i> . <b>ASSIGNMENT TYPE C</b>
November 13	Case Assignment #5: <i>Burnswell JV</i> – REQUIRED OF ALL. <b>ASSIGNMENT TYPE A / GROUP OF 2 ONLY; NO DISCUSSION ACROSS GROUPS</b>

## Class Syllabus

Sept 6 Course Overview and Themes

Sept 11 Due Diligence

### **Part I: TAX AND FINANCING**

Sept 13 Transaction Tax Strategies I

Sept 18 Transaction Tax Strategies II

Sept 20 Transaction Tax Strategies III

Sept 25 Transaction Tax Strategies IV

Sept 27 Mortgage Financing Transactions I

Topics: Security Interests, Lien Priorities, Lender Rights, Foreclosure

**Required Preparation:**

Lynne B. Sagalyn, "Note on the Mortgage as a Security Interest," CaseWorks, fall 2009.

Jennifer Morgan, *The Note for Pacific Tower, (case exhibits in separate link)*, CaseWorks, Spring 2014.

**Case Assignment #1 (Type C):**

**Understanding the full content and import of the legal documentation of a mortgage financing is crucial for any borrower (mortgagor). With nonrecourse financing, the mortgage lender (mortgagee) clearly has a big stake in using documents that safeguard its security interest.**

Assume you are a newly hired associate at a real estate private equity firm and have been asked to draft an abstract of the mortgage documentation in preparation for the firm's bid on the Pacific Tower note. Using case materials and any other materials readily available, address the following questions in your one-to-two page abstract of the mortgage document:

- Which features of the mortgage documents evidence protection of the mortgagee's security interest in Pacific Tower? Please identify specific provisions in the different documents and – in your own language – explain how these provisions act as protections for the lender.
- In the case, the master lease is an agreement between related parties. Is this affiliated transaction a problem for the lender – why or why not? In what way(s) does the master lease appear to be tailored to the mortgagee's needs? The mortgagor's?
- The rider to the master lease provides for a guaranty (see Exhibit E). What is the difference between a guaranty of payment and performance and a guaranty of collection?

- What is the difference between a payment default and a technical default? What actions can the Pacific Tower lender take in the case of a payment default? What actions can a lender take (or not) if the mortgagor is in violation of one or more of the loan covenants?
- REOF is being asked to bid on the Note with a minimum of due diligence. What provisions should REOF expect to find in the legal documents that will ensure its rights and remedies as the successor note holder of the \$80-million mortgage?
- Are defaults in the Loan Agreement and the Deed of Trust the same? These documents are supposed to work together; do they?
- What is a strategic default?
- What type of foreclosure procedure prevails in California? Why is this of potential importance to REOF

Oct 2 Mortgage Financing II and Buying Notes

**Required Preparation:**

Jennifer M. Morgan, "Common Loan Categories," Kirkland & Ellis, Fall 2012.

Mark S. Fawer and Michael J. Waters, "Purchasing Loan Participations: The Devil is in the Details," *Real Estate Finance Journal*, winter 2009: 38-46.

3 Columbus Circle Materials:

Zeke Turner, "The King of Columbus Circle Has Plans," *The New York Observer*, December 6, 2010, p. 22.

"Plaintiff German American Capital Corporation's Memorandum of Law in Opposition to Devash LLC's Motion for Consolidation, Cancellation and Discharge of Mortgage, Dismissal and Related Relief Pursuant to CPLR 3219." **See Point III, pages 9-14.**

Oct 4 Legal Structure of the Capital Stack – In Normal Times and In Distress

Guests: Steven Plavin, Blackstone and Rick Jones, Dechert, LLC, Deborah Ginsberg

**CASE ASSIGNMENT #2 (Type B): Crowne Plaza Times Square Case**

Assume you need to brief a new MD in your department on this loan structure and its troubles. In a concise two page business memo, address the follow issues:

**Origination of the loan in 2006:** How do you think Morgan Stanly got paid for originating this financing? What do you think some of Morgan Stanley's biggest concerns were at origination?

**The original capital stack:** Why do you think Morgan Stanley divided the financing into so many components: (i) a senior mortgage participation, or A-Note, that was pooled with other A-Notes in the Morgan Stanley 2007-XLF CMBS transaction; (II) a junior participation, or B-Note, that was secured by the mortgage, but was not securitized; and (iii) mezzanine loans A, B and C that are three separate loans not secured by the mortgage but by the sponsor's equity in the mortgaged asset.

**The VCP purchase:** Why did VCP buy both positions? Were the purchase prices fair? Why do you think VCP appointed a new mortgage special servicer? What were the

primary risks to VCP's strategy? Why did VCP sell the B-Note post-closing of the restructure? Under what potential set of circumstances would VCP be better off retaining the B-Note?

**The restructure:** Who are the biggest winners and losers in this restructure and why? Should VCP have been permitted to make all of its investments? What potential conflicts could have arisen? What other approach could CIF have taken as an alternative to the VCP JV?

**Required Preparation:**

The following Capital Trust documents:

- Crowne Plaza Time Square Restructuring chart (one page)
- Special Servicing Business Plan Mortgage (6 pages)
- Special Servicing Business Plan Mezzanine A&B (1 page supplement to Mortgage Plan)
- Modification Term Sheets: Mortgage, Mezzanine A&B, Mezzanine C (6 pages total)

Essential reference material:

- Richard D. Jones, "Working Out Mortgage Loans and B Notes Outline." (29 pages).
- Richard D. Jones, "Mezzanine Loan Workouts Outline." (27 pages)
- Standard & Poors, "Criteria on A/B Structures in CMBS Transactions," May 15, 2000.(4 pages)
- Terry Buquicchio and Jenny Story, "Evaluating Additional Debt in Commercial Mortgage Transactions," *CMSA World*, spring 2002. (6 pages)
- Richard D. Jones and William C. Stefko, "The Securitized Loan in Troubled Times: A Cautionary Tale," Dechert LLP, 2002.
- D.M. Glosbank, G.G. Menna, M.S. Opper, and S.L. Richardson, "CMBS Bankruptcy Remote Structuring and the Recession: Revisiting the Benefits," *Real Estate Law & Industry Report*, Vol. 2, No. 11 (June 2, 2009), pp. 613-621.

**PART II: PROPERTY INTERESTS AND AGREEMENTS**

Oct 9

Acquiring and Transferring Title

Guests: Jon Mechanic and Ross Silver, Fried, Frank, Harris, Shriver & Jacobson LLP

**Required Preparation:**

Jonathan L. Mechanic, Esq. and Ross Z. Silver, Esq. "Negotiating Purchase and Sale Contracts for Commercial Real Estate," September 2014.

Jonathan L. Mechanic, Esq. and Ross Z. Silver, Esq., "Seller's Representations and Warranties in Purchase Agreements." (This is attached to "Negotiating Purchase and Sale Contracts...")

Oct 11

Acquisition Opportunity

Guests: Jon Mechanic and Ross Silver, Fried, Frank, Harris, Shriver & Jacobson LLP

Case Assignment #3: Zenith Center

Case: Lynne Sagalyn, *Zenith Center*, CaseWorks, fall 2009.

**CASE ASSIGNMENT #3 (Type C):** Assume you are an acquisitions officer for a pension fund interested in bidding on Zenith Center. In a short (one-page max) business memo, identify the transaction and due diligence issues you must consider and note any particular issues you want your lawyer to resolve; please explain your reasoning. (*For this assignment, you are not expected to work through financials*)

Oct 16      Ground Leases and Leasehold Transactions  
Guest: Rob Sorin, Fried, Frank, Harris, Shriver & Jacobson LLP

**Required Preparation:**

Emanuel B. Helper, "Don't Confuse A Ground Lease With A Ground Lease," *Real Estate Review*, fall 1998 (vol 28, no. 3) (4 pages).

Howard Peskoe and David Schumeister, "Is That Ground Lease Financeable?" *New York Law Journal*, October 3, 2006 (2 pages).

**Of Further Interest—will be discussed in class:**

Meredith J. Kane, "Negotiating the Mega-Rebuilding Deal at the World Trade Center: The Investors' Perspective," *Transactions: The Tennessee Journal of Business Law*, fall 2008 (5 pages).

**Reference:**

Joshua Stein, "How Much Protection Does a Leasehold Mortgagee Need?" *The Real Estate Finance Journal*, spring 2003 (9 pages).

Oct 25      Space Leases as Transaction Drivers  
Guest: Glen Weiss, Vornado Realty Trust

**Required Case Preparation:** 1290 Avenue of the Americas  
(2007 purchase and property transformation; term sheet to be distributed week prior)

David L. Hoffman, Jr. "Loss factors in New York City commercial market, *Real Estate Weekly*, August 2, 2006 (3 pages).

**Background Reference:**

Arthur I. Segel, "Tenant and Landlord Rights, HBS 9-804-161. Rev. July 12, 2005.

"Calculating Square-Footage Space: Three Different Approaches Applied in the Manhattan Office.

Lynne B. Sagalyn, "Note on Lease Revenues," Columbia Business School MBA Real Estate Program, spring 2008.

Oct 30      Property Management and Development Agreements  
Guest: Mark Thigpen, King & Spalding

- Nov 1                    Rezoning and Value Creation  
Case: *SoHo Loft Building*  
Guest: Lynne B. Sagalyn, Columbia Business School
- Case Assignment #4 (Type C):** Class discussion will be based on this preparation.  
Address the following questions in a concise (no more than two pages) business memo:
- Why is Devilla interested in purchasing this mortgage note?
  - What are the key decisions Devilla must make and the skills needed to execute on the opportunity?
  - What are the transactions risks of the business plan?
  - Devilla is pursuing two regulatory options in order to complete the conversion to condominiums. What is the significance of securing a rezoning versus a special permit? What is the legal basis of each appeal? How will these approvals shape the acquisition opportunity?

*Note: You do not need to work through detailed DCF financials to address the issues in the case for the assignment for Real Estate Transactions, though you might want to rough out some numbers to get a handle on the financial implications of Devilla's business plan. To ballpark an acquisition price, back-of-the-envelope valuation calculations will suffice.*

**Required Preparation:**

Eric Hadar and Lynne Sagalyn, *SoHo Loft Building: Assessing the Entrepreneur's Development Risk*, 2012.

Lynne B. Sagalyn, "Note on Zoning Regulation (with a focus on New York City)," 2008.

**Reference:**

New York City Department of City Planning, *New York City Zoning Handbook*, January 2006. Read pages 1-9, 51, 67, 97-99, 123-128.

Gerald Lebovitz and Linda Rzesniowiecki, "The New York Loft Law," forthcoming, *New York Real Property Law Journal*, accessed via SSRN.com/abstract=1539285. Reading useful for future reference.

### **PART III: CAPITAL STRUCTURE TRANSACTIONS**

- Nov 8 Joint Ventures Part I
- Nov 13 Allocating Risk and Reward in a Joint Venture  
**CASE ASSIGNMENT #5 (Type A): REQUIRED OF ALL. For this assignment, you may work as a team of two.** See The Burnswell JV case for detailed assignment.
- Required Preparation:**  
Lynne B. Sagalyn, *The Burnswell JV*, CaseWorks. Fall 2009. Revised fall 2010.
- Nov 15 Joint Ventures Part III
- Nov 17 Coming to Terms – Negotiating Joint Ventures Event
- Nov 20 Real Estate Funds/Private Equity Waterfall Structures  
Guest: David Sherman, Metropolitan Real Estate Equity Management, LLC
- Required Preparation:**  
Joseph L. Pagliari, Jr., “An Overview of Fee Structures in Real Estate Funds and Their Implications for Investors,” PREA, 2013.
- Nov 27 REITs/ Workouts [Stuy Town Case]  
Guest: Nadeem Meghji, Blackstone and Jean Celestin, Jr. Eastdil Secured

### **PART IV: DISTRESS AND DISPUTES**

- Nov 29 REITs  
Guest: Matthew Lustig, Lazard
- Dec 4 Underwater Real Estate
- Dec 6 Litigation/Arbitration  
Guest: Janice Mac Avoy, Fried, Frank, Harris, Shriver & Jacobson LLP
- Dec 11 Final Class/Summation