

# Real Estate Components of Corporate Acquisitions: Analysis, Diligence, Negotiation

By

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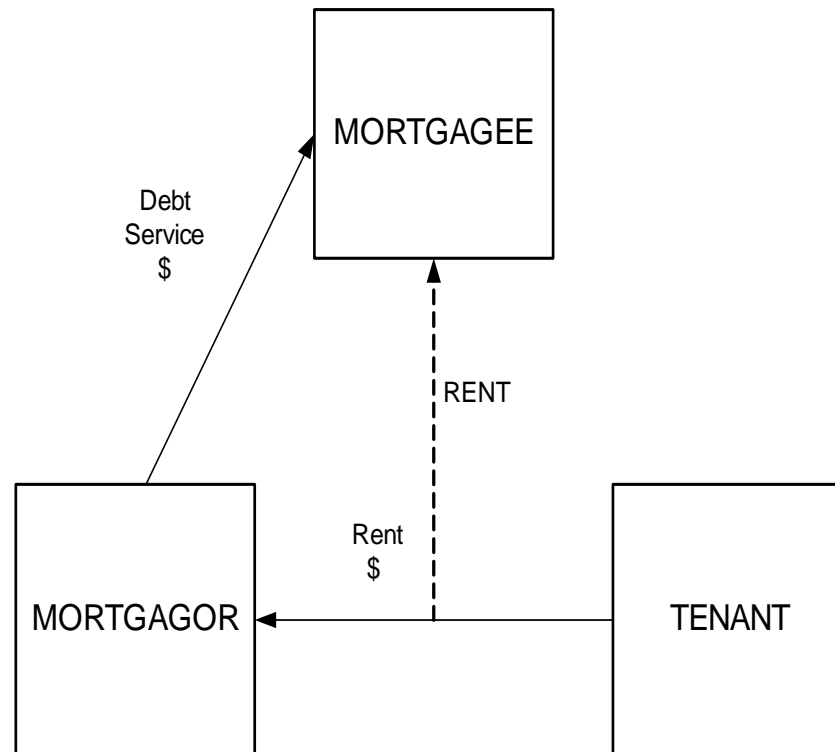
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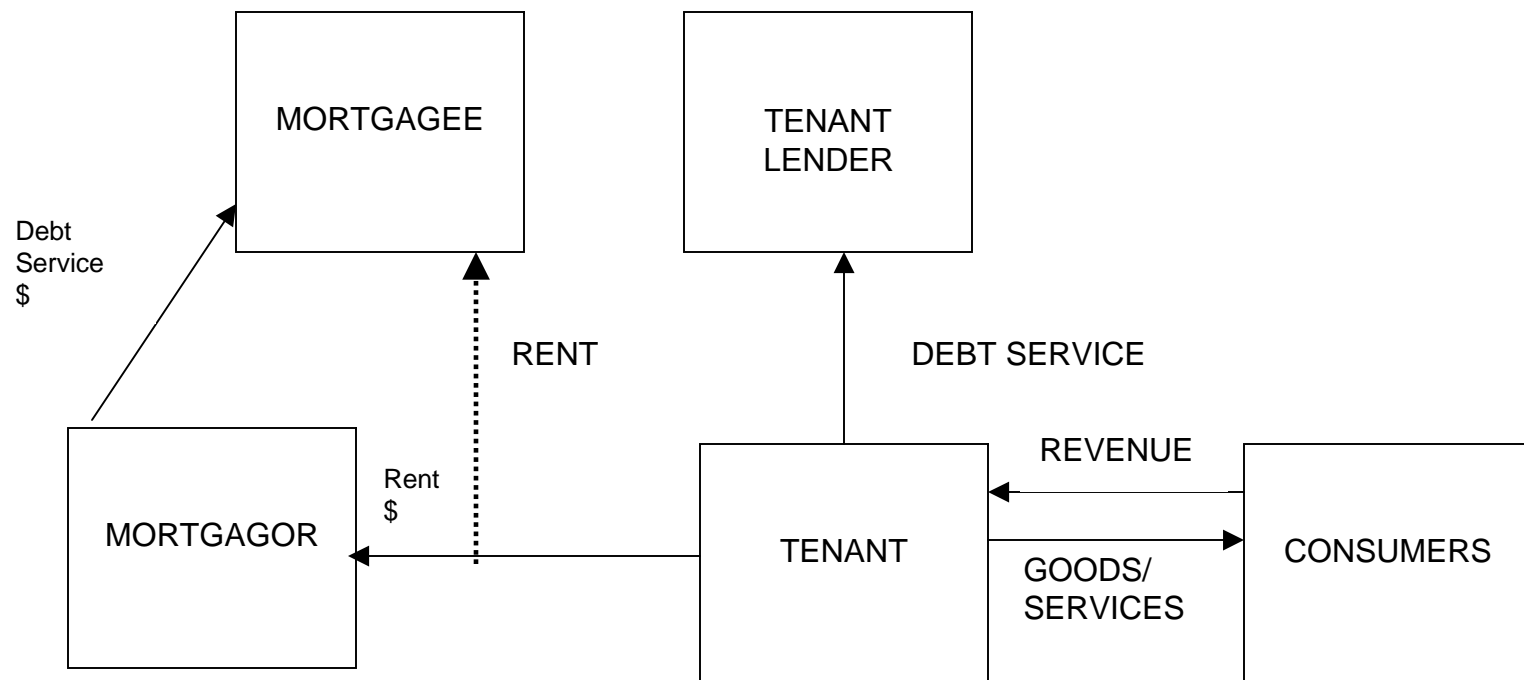
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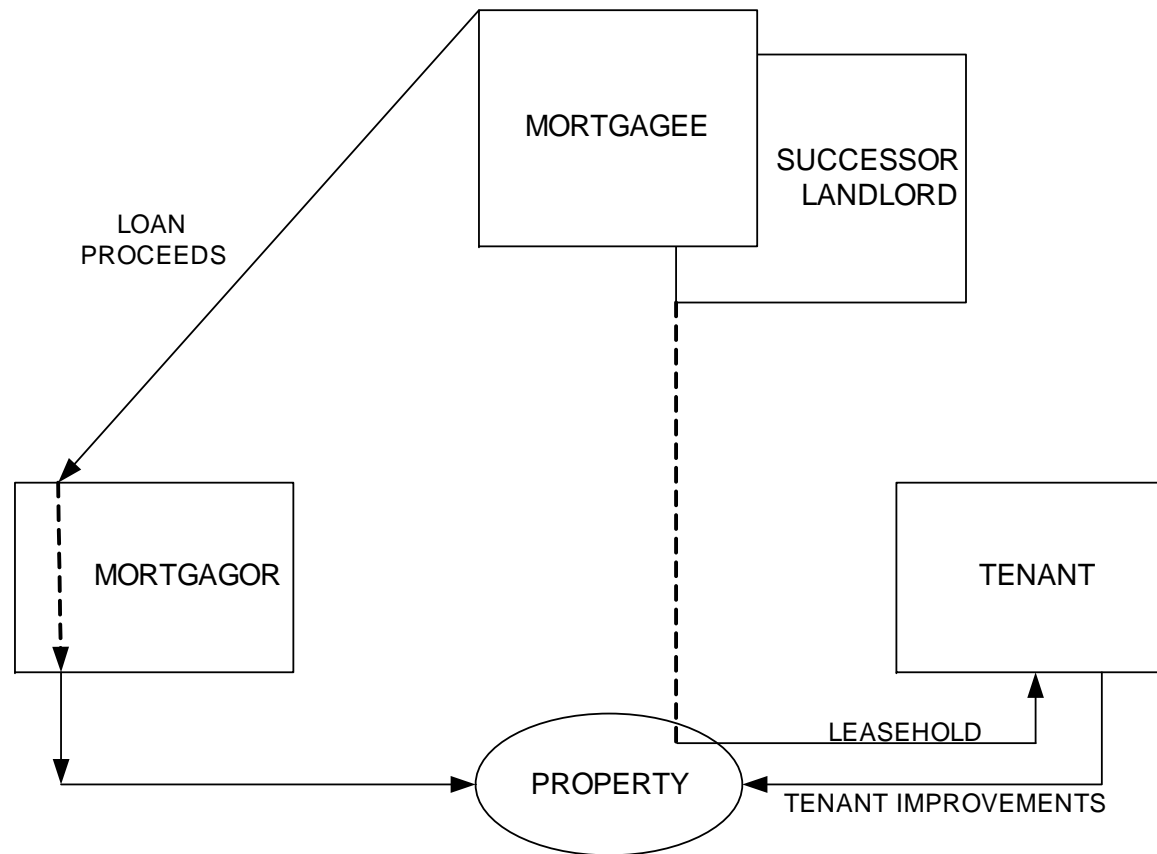
# Cash Flow Valuation: Debt Service to Rent Coverage Ratio



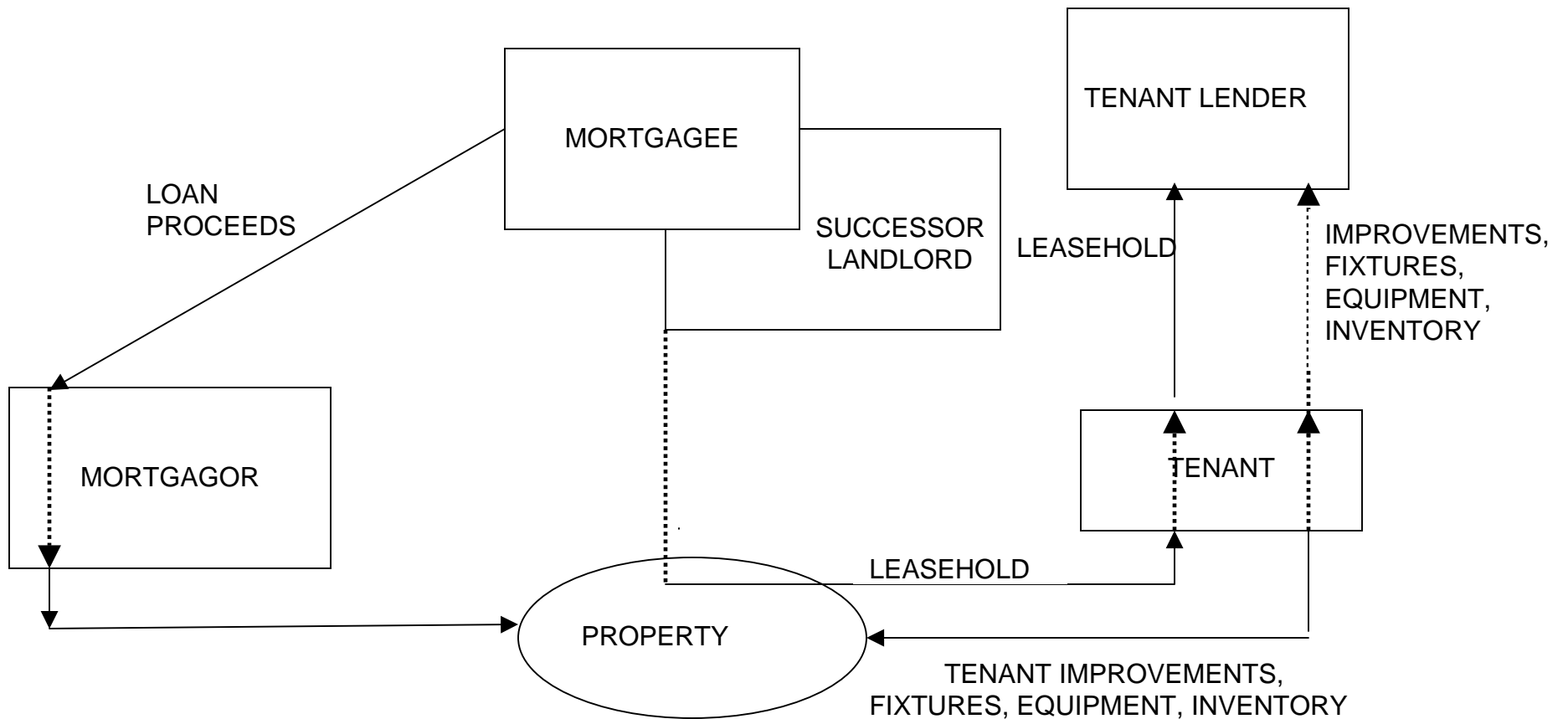
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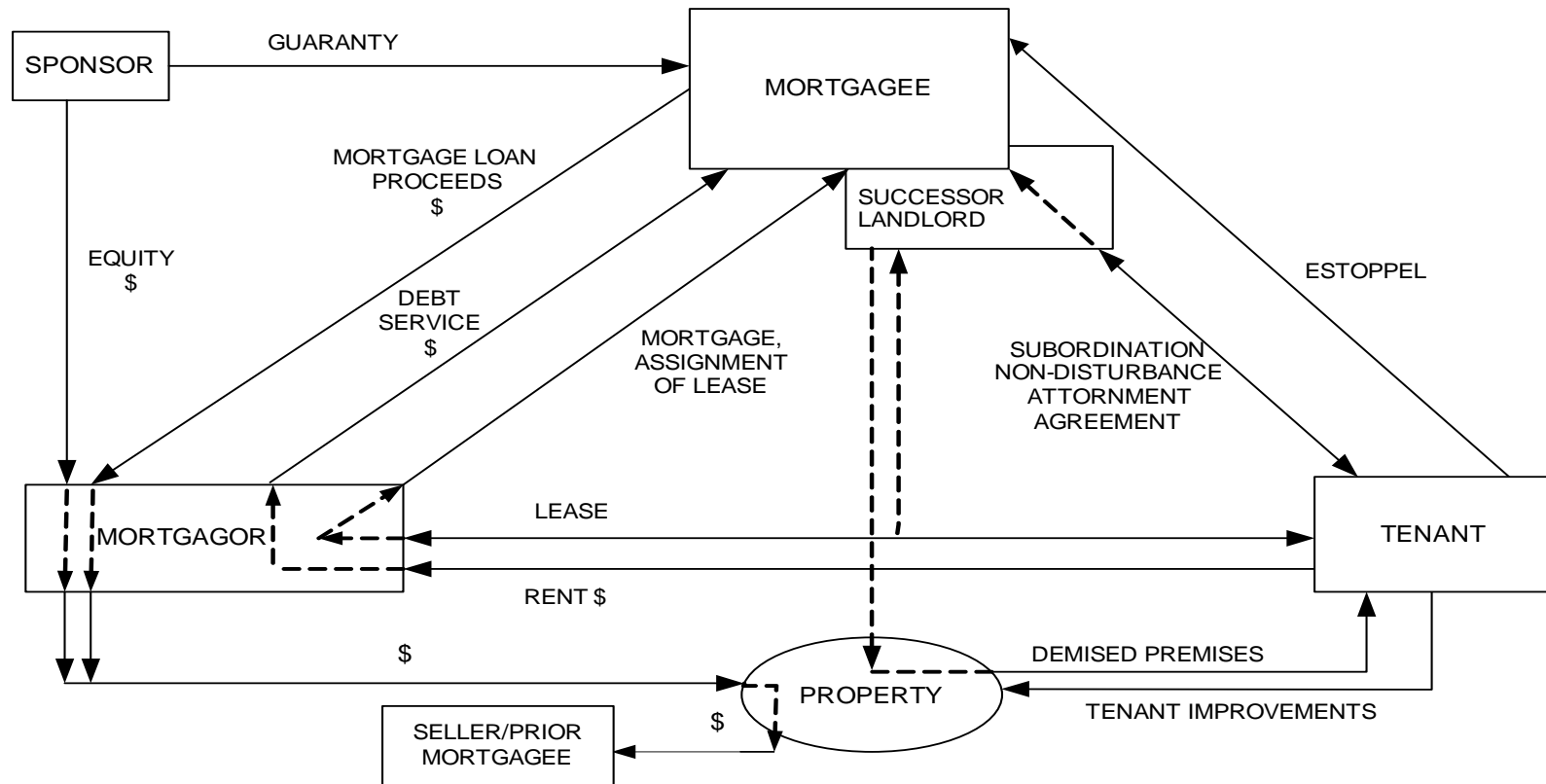
# Capital Valuation: Loan to Property Value Ratio



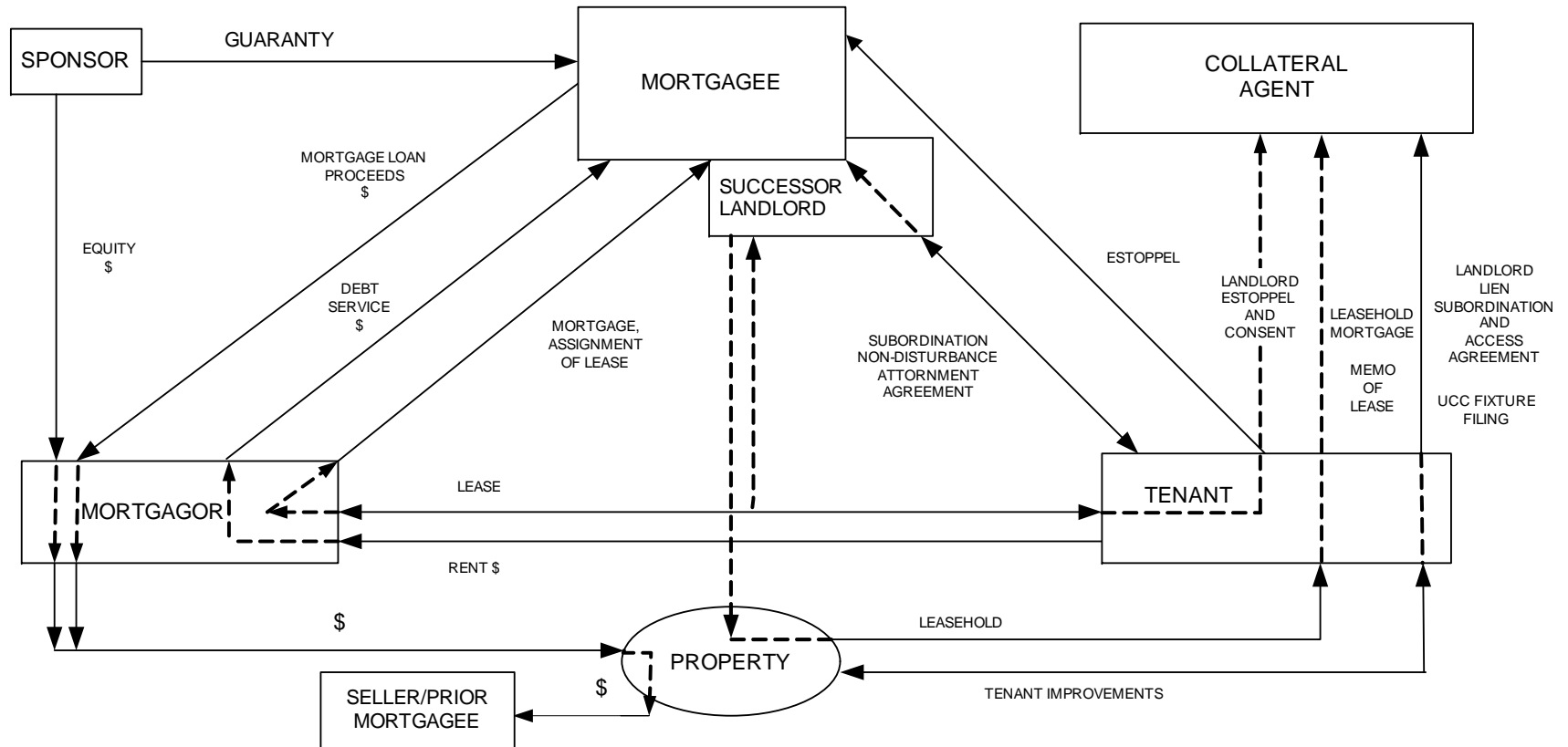
# Capital Valuation: Loan to Property Value Ratio



# Landlord view of Documentation



# Tenant view of Documentation



# Physical Site Issues: Third Party Reports

- Access – Title, Survey, Environmental, Engineering
- Deferred Maintenance – Physical Condition Report



# Physical Site Issues: Third Party Reports

- Environmental Risk – Environmental Audit (Phase I or II)
- Zoning Report

# Documents and Duration

- Lease, Easement, etc. establishing rights
- Guaranty, Letter of Credit, Credit Enhancement
- Leasehold Mortgagee Rights

# Documents and Duration

- Early Termination Rights by paramount parties: landlord, mortgagee, option (or ROFR) holder
- Termination of Extension Options: default, assignment, breach of financial covenant

# Fee Interests

- Title/Survey/Zoning/Environmental
- Government Permits and Taxes
- Third Party Consents: Covenants, Conditions, Restrictions, Easements Reservations and Purchase Options

# Fee Interests

- Contests/Claims/Litigation: Taxes, Insurance, Environmental, Zoning, Neighbors
- Realty/Personalty: UST
- Transfer Taxes

# Parties:

## Identify and Engage Timely

- Landlord
- Tenant
- Guarantor
- Prime Landlord
- Landlord Mortgagee
- Leasehold Mortgagee

# Rent and Other Charges: Accountant Report

- Rent and Percentage Rent
- Operating Expenses, Taxes, Insurance
- Base Year, Expense Stop
- Proportional Share and calculation

# Rent and Other Charges:

- Post-closing Adjustments
- Security Deposit
- Insurance Deductible



# Tenant Extra Payment Obligations

- Capital Items and Reserves
- Unamortized Tenant Improvements - recapture
- Special Services
- Periodic Refurbishments

# Tenant Uses

- Tenant Uses  
(permitted/required/exclusive/prohibited:  
remedies)
- Trade Name
- Landlord Remedies

# Tenant Remedies

- Tenant Remedies for Breach of Exclusive Use
- Other Landlord Defaults: Set-off, after judgment, only for maintaining or improving value

# Third Parties

- Mortgage Subordination Non-Disturber: possession or contract
- Prime Lessor Recognition and Nondisturbance: privity of lease (whose lease?)
- Leasehold Mortgagee
- Subtenant

# Tenant Property

- Tenant Property
- Tenant Improvements
- Tenant Removal
- Landlord Lien Waiver
- Lender Access Agreement
- Leasehold Financing Recognition
- Landlord Estoppel

# Lease Assignment/Change of Control

- Assignment Prohibition in Lease, Guaranty, Estoppel, SNDA, Leasehold Mortgage, Sublease
- Exclusions: affiliates, change of control
- Exemptions: qualified assignments

# Lease Assignment/Change of Control

- Consent Standards: reasonableness and safe harbors
- Alternatives Prohibited: management contract, license

# Lease Assignment Consequences

- Fee Charged
- Share of “Profit”
- Landlord Rights Upon Notice: recapture
- Notice and Cure for Breach: reinstate



# Lease Assignment Consequences

- Landlord Remedy for Breach of Assignment: termination, damages
- Tenant Remedy for Landlord's withholding of consent where subject to reasonableness standard

# Environmental Liability

- Pre-existing conditions
- Acts of third parties
- Limitation of Tenant Response  
Rights/Obligations

# Contract Provisions

- PROPERTIES
  - “All or None”; “Min/Max”; Cherry Picking
  - Right to Withdraw and Kick Out
  - Right of Substitution

# Contract Provisions

- PROPERTIES
  - Linked Properties
  - Personalty
  - JV Bidders
  - “Material Contracts”

# Contract Provisions

- PURCHASE PRICE
  - Minimum
  - Allocated Values: transfer tax, property insurance, title insurance

# Contract Provisions

- CASUALTY/TAKING
  - “Material” and “Material Adverse Effect”
  - Property v. Portfolio Considerations
  - Standards and Walk-Away Rights
  - Termination Rights
  - Responsibility for Repair

# Contract Provisions

- REPRESENTATIONS AND WARRANTIES
  - Entity
  - Property Level
    - Reasonably Discoverable v. Known  
v. Should have Known
    - Public Record

# Contract Provisions

- REPRESENTATIONS AND WARRANTIES
  - Liens, Encumbrances, Permitted Encumbrances
  - Leasing Commissions
    - » Market Rate
    - » Who's Responsible?
- Knowledge Qualifier; Defining Knowledge



# Contract Provisions

- REPRESENTATIONS AND WARRANTIES
  - Survival
  - Baskets and Caps
  - Relevance, Utility and Application of Representations and Warranties in Public v. Private Deals; No survival
  - Anti-Sandbagging

# Contract Provisions

- CONDITION OF CLOSING
  - Casualty/Taking
    - Material or MAE
  - Change in Occupancy Levels
    - Tenant Termination Rights
  - Delivery of Estoppels and SNDAs
  - Permitted Encumbrances – Title/Survey
  - Compliance with Laws and Contracts

# Contract Provisions

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

# Contract Provisions

- AS-IS
  - Release
  - Indemnity
  - Implications in Lease-back for future representations to Buyer

# Contract Provisions

- OFAC PATRIOT ACT
- CLOSING ADJUSTMENTS