COMMERCIAL REAL ESTATE LEASING (Law 5430)
Professor Wilson Freyermuth
Fall Semester 2011
MW 2:00-2:50
Room 5
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Course Information and Policies

COURSE DESCRIPTION: Commercial Real Estate Leasing is a two-credit-hour “practice” seminar that involves the study of selected topics involved in the negotiation, drafting, and interpretation of commercial real estate leases. The class will introduce the various parties involved in the process of commercial real estate leasing, their respective interests, and the dynamics of the negotiation and drafting process in which these parties attempt to ensure that their respective interests are memorialized in the lease.

COURSE MATERIALS: The casebook is COMMERCIAL LEASING: A TRANSACTIONAL PRIMER (2d ed. 2011), by Daniel B. Bogart (Chapman University School of Law) and Celeste Hammond (John Marshall Law School, Chicago). The book uses a typical commercial office lease form document as a basis for studying the critical provisions of the lease, the leasing transaction, and the negotiation/drafting of the lease document.

In a two-credit course, we will not have sufficient time to cover all of the subject areas covered in the casebook. At the end of this Syllabus, you will find a list of the topics that I expect to cover (and the likely order of coverage — although this may be subject to change as the semester proceeds). For the first class on Monday, August 22, we will discuss Chapter 1 (The Letter of Intent). The reading assignment and discussion questions for the first class appear also appear at the end of this Syllabus.
COURSE GRADE: The final grade in this course will be based upon the following:

A. Class Participation. I will expect students to have read the assigned materials and discussion problems and to be prepared to discuss them. Further, many of the class periods will involve review and critique of student work on the drafting problems and other written assignments. Thus, consistent class attendance and participation is expected and encouraged. At the conclusion of the seminar, I reserve the right to add up to two (2) points to a student’s grade for consistent and exceptional class participation, as well as the right to reduce a student’s grade up to four (4) points for unexcused absences, unpreparedness, or lack of sufficient cooperative effort on team assignments.

B. Negotiation and/or Drafting Problems. During the semester, we will have five short negotiation and/or drafting problems. These problems will involve drafting a discrete provision of a commercial lease, either from “whole cloth” (i.e., without starting with a basic form) or by revising an existing form lease provision. Some of these problems will be done in two-person teams; others will be individual. Some will require negotiation (either landlord v. tenant or lender v. tenant) between students on opposing sides of the proposed transaction. In some cases, your completed work product will be the basis for subsequent class discussion about the drafting process and the transactional dynamics involved in lease negotiation.

I have not yet designated specific assignment and due dates for these problems (other than the first), but will provide at least two weeks notice in class prior to handing out each problem. Collectively, these problems will constitute 1/2 of your course grade.

C. Lease Review. At the end of the course, instead of a final examination, you will review a proposed lease document (i.e., a form that is different from the one contained in the course materials). Working individually, you will evaluate the lease as if you were advising one of the parties to the proposed lease transaction, and prepare a memorandum that critiques the lease’s provisions and suggests amendments necessary to protect the client’s vital interests. I will assign the lease review problem at the beginning of the week of Thanksgiving break, and it will be due at 4:00pm on the final day of the exam period. The lease review will constitute 1/2 of your course grade.

COURSE WEB PAGE: I have established a Web page for this course. The URL for this page is http://www.law.missouri.edu/freyermuth/leasing2011/index.html and you should refer to the home page prior to each class period for any announcements regarding class discussion problems, the assignments, or other relevant information regarding the course. A copy of this syllabus is posted on the Web page, and the questions for class discussion during each class period will also be posted there.

ATTENDANCE POLICY: I expect you to be in attendance for each class session. I will record attendance during each class session. If you know that you will have to miss a scheduled class period, you should inform me in advance, in writing (an e-mail message is fine), explaining the reason you must be absent. If you have to miss a class because of emergent circumstances (i.e., an accident, death in the family, serious illness) and cannot inform me in advance, you should inform me as soon as possible after that class session and provide whatever explanation I may request. As
noted above, I retain the discretion to lower the course grade of a student for unexplained or excessive absences.

COURSE TOPICS: In the course, we will address the following topics, in roughly the following order:

Letters of Intent [Chapter 1]
Brokers [Chapter 17]
Premises [Chapter 2]
Term [Chapter 3]
Rent [Chapter 4]
Use [Chapter 5]
Assignment and Sublease [Chapter 7]
Maintenance/Repair and Building Services [Chapters 8/11]
Fire/Casualty [Chapter 13]
Insurance [Chapter 14]
Default and Remedies [Chapter 15]
Subordination and Estoppel [Chapter 16]

I will address other topics to the extent that we have time available.

ASSIGNMENT FOR FIRST CLASS, MONDAY, AUGUST 22: Read pages xv-xxi (the Introduction to the Casebook) and Chapter 1 (Letter of Intent), pages 3-10. In addition to Problems 1-1 and 1-2 (on pages 6-7 of the Casebook), consider the following two problems as well:

Problem 1-3. Landlord owns land in Stanley Beach. Tenant owns and operates a restaurant, the Stanley Beach Brewpub, on adjacent land. The current restaurant is too small, and Tenant wants to expand. Last year, Tenant wrote Landlord and suggested that Landlord lease its land to Tenant beginning on November 1, shortly before Tenant’s current lease expires. The parties executed a document entitled “Letter of Intent regarding construction and lease of premises at 120 Stanley Beach Boulevard” (LOI). In the LOI, the parties agreed on the rent to be paid, the parties’ contributions to the cost of the building the new restaurant building, and other matters. The LOI also provided that the parties “represent that each intends, in good faith, to carry out the transaction described in this letter of intent, and that subject only to [Tenant’s] obtaining the necessary [governmental] approvals, this constitutes a binding legal agreement between the parties to negotiate and execute a Definitive Lease Agreement, including the terms and conditions of this letter of intent and other provisions customarily and ordinarily included in the type of transaction contemplated herein ....” The LOI did not include a provision regarding attorneys’ fees, although fee-shifting provisions are commonly included in commercial leases.

After the LOI was executed, the parties exchanged drafts of a lease, which did contain an attorneys’ fee clause. In July, Tenant’s attorney sent Landlord a draft of a proposed Lease which had been signed by Tenant. Landlord was not satisfied with the language of the proposed Lease regarding commencement of the lease and Tenant’s liability to pay rent to Landlord in the event hazardous waste was discovered during construction; thus, Landlord refused to sign the lease. Tenant sued Landlord for specific performance of the LOI (or, alternatively, for money damages for breach of
the LOI) and sought to recover the attorneys’ fees expended by Tenant to pursue the litigation.

Should Tenant be able to obtain specific performance of the LOI? Damages for breach of the agreement? Attorneys’ fees?

**Problem 1-4.** In 2000, Landlord and Tenant entered into a lease ("Lease") pertaining to commercial property for a term ending November 31, 2010. Getty, as tenant, had the right to extend the term of its occupancy for a period of 5 years, provided that it complied with certain notice requirements as specified in § 18 of the Lease.

§ 21 of the Lease, entitled “First Refusal Option to Lease” provides as follows:

If at any time during the term of this lease, Landlord shall receive a bona fide offer to lease the demised premises for a term to begin subsequent to the present demised term, and the Landlord desires to accept such offer, Landlord shall immediately submit to Tenant a true and correct copy of such bona fide offer with a full disclosure of all terms, covenants and provisions thereof and Tenant shall have ninety (90) days after receipt thereof, in which to elect to lease said premises upon the terms and provisions contained in such offer.

On July 26, 2010, Landlord executed a “Letter of Intent” (LOI) with Exxon, a prospective future tenant for a prospective term beginning December 1, 2010. The LOI provided that it was delivered “as part of preliminary negotiations and shall not be deemed a binding contract. Final agreement, if any, between the parties will be subject not only to the terms set forth herein, but such other terms and conditions mutually agreed between the parties.” On July 27, 2010, Landlord sent Getty a copy of the LOI along with a letter stating that if Getty did not respond pursuant to § 21 of the lease by matching the terms in the LOI, Landlord expected Getty to vacate at the end of the term on November 30, 2010.

Instead, Getty responded not by indicating its intention to match the terms in the Exxon LOI, but instead by indicating its intention to extend the lease term for an additional five years (assume this complied with the notification requirements in § 18 of the Lease). Landlord has admitted receiving this notice. Getty did not vacate at the end of the term, but has continued to tender rent payments in the amount specified in its original lease. Landlord refused these rent payments, and sued Getty to recover possession of the land and damages equal to the difference between the rent in Getty’s original lease and the rental amount stated in the Exxon LOI. How should the court rule?