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KEVIN F. JURSINSKI, ESQ.
COMMERCIAL LEASE NEWSLETTER

DEBT OBLIGATIONS AND PERSONAL LIABILITY ON GUARANTIES WITH INARTFULLY DRAWN LEASES

Currently there is a significant increase in the amount of commercial lease litigation that is taking place due to many tenants defaulting on commercial leases. In commercial leases unlike residential, the lease is generally written so that the tenant is identified as an entity rather than an individual's name. This is done for a number of reasons which include insulation of the individual owners from liability for actions in regard to the underlying business operation, ease of transference of the business, tax reasons as well as reasons related to potential exposure of the business for tort claims as a result of injuries, etc.

In most instances however, when a landlord enters into a lease agreement with an LLC or entity, barring the entity being a significant national tenant or being substantially solvent, the landlord will require on such commercial lease that the tenant provide for a personal guaranty of one or more of the principals of the company to guarantee the payment of the debt obligations and any and all other obligations of the tenant under the lease.

We have recently had an article written on lease guaranties and formatting which appeared in my March, 2010 newsletter.

I want to focus now on issues that arise in many commercial leases which are inartfully drawn or executed improperly.

The specific instance I want to address is the example of a lease for premises to a certain identified entity (a Florida LLC, a Florida Corporation, etc.). This reference appears in the initial heading of the lease, but the signature block is not formatted in the same way and as such, the signature block contains either of these variations as the signature block:

1. The signature block shows the actual name of the entity with the signature designating the individual signing it as either the President, Managing Member or other authorized agency. In this particular scenario the lease (assuming there are two (2) witnesses for a lease in excess of one year), is enforceable against the entity.

2. A situation wherein the lease is structured in the name of an entity, but the signature block has no designation for the person signing. In such situation, the person signing it may sign either in its capacity (President, Managing Member, Authorized Agent), and designates same (signing with designation such as "John Smith as Managing Member"), or alternatively, signs the document without such designation. If it is the former, then in such event (and barring any additional lease language), the tenant would have signed in the specific identifiable capacity and would not be individually liable.

If however, the tenant simply signs the lease without designating how the tenant is signing ("John Smith"), the tenant in fact simply signs the lease individually. This may create an ambiguity in the lease, but would lead to the initial position that without any designation as to a capacity of an individual to sign and without any indication of the authority to sign for the company, the individual simply executed the lease in their own name.

The last scenario would be a situation where although the lease is with an individual rather than have a separate individual guaranty, the lease would indicate, for example in one of the paragraphs that notwithstanding the fact that the lease is being entered into between landlord and tenant, the individual who actually executed the lease agreement on behalf of the tenant would also, by execution of this lease agreement be signing in not only capacity of the company, but also obligating that person individually to guarantee the performance of the lease.

This scenario came up in the case of Onderko vs. Advanced Auto Insurance, Inc., 477 So. 2d 1026 (2DCA 1985),

> **"Here, paragraph nineteen of each auto lease clearly states that the person signing on behalf of the corporation not only warrants his authority to do so but also accepts any joint and several liability with the corporation for rent and other amounts du the lessor. Although Capitano's name does not appear in the body of the leases, its provisions refer to him. When he signed in his representative capacity, as evidenced by his signature located below the typewritten name "Advanced Auto Insurance, Inc.," and after the word "by," he also became bound in his individual capacity under the terms of the leases. It would have made no difference had he added any *descriptio personae* beside his signature."**

Signing a lease guarantee for the entity and then indicating that the signature was in a representative capacity may still lead to liability on the guaranty; Malt vs. Carpet World Distributors, Inc., 763 So. 2d 508 (4DCA 2000).

Further, reference is made back to our March, 2010 newsletter, identifying the scope and substance of guaranties (unconditional or guarantee of payment). Again, this has become significant due to the enforcement rights now undertaken by landlords as to tenants and the efforts of landlords to pursue viable recovery methods which include pursuing rights against those persons personally obligating themselves on leases.