



Structuring a commercial guaranty: Part 2

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There are many different ways to structure a guaranty to minimize the potential of a costly litigation and maximize the landlord's recovery of damages. In effectuating this strategy, there is certain integral information that a landlord should obtain from the guarantor prior to the execution of the guaranty. Specifically, the guarantor should provide the landlord with its full legal name, address, telephone number and social security number. This information will enable the landlord to readily locate the guarantor and serve it with legal papers in the event the landlord must later commence an action against the guarantor for breach of the guaranty. The landlord should require the guarantor to update its personal information on an annual basis, since commercial leases are often lengthy, and it is very possible that the guarantor will change addresses during the lease term. Along these same lines, the landlord should also check the credit history and financial background of the guarantor to ensure that it has the financial wherewithal to satisfy any arrears in the event of a tenant default.

The landlord should also make certain that the guaranty contains a legal fee provision. Although this tip seems like a no-brainer, these provisions are sometimes overlooked in commercial guarantees. In New York, a landlord cannot recover legal fees from a guarantor in the absence of a legal fees provision contained within the guaranty. Thus, if the guaranty does not provide for the recovery of legal fees, the landlord will be out of luck should it seek to recover such fees from the guarantor. Along these same lines, the guaranty should also provide that the guarantor bears responsibility for all costs and disbursements incurred by the landlord in commencing an action against the guarantor and enforcing the terms of the guaranty.

The landlord may also wish to incorporate a jury waiver provision in the guaranty. The jury waiver provision enables the landlord to avoid the expense of a jury trial should the action progress to this stage, and instead simply pursue its claims at a "bench trial." A forum selection clause can also be included within the guaranty, pursuant to which the landlord and the guarantor select in advance the court that will preside over any action arising from the guaranty. In most instances, the landlord will want the forum selection clause to name a court in the state, city and county in which the property is located or where the landlord maintains its principal place of business.

Another drafting issue of note is the inclusion of an arbitration provision in the guaranty. If the guaranty contains an arbitration provision, the landlord will be compelled to pursue its claims before an arbitral panel, as opposed to in a court of law.

On a final note, the terms of the guaranty, and the guarantor's intent to guaranty payment, must be clear and explicit. Although this seems like an easy task, often guaranties are poorly drafted, ambiguous or incomplete. Assuming that the language of the guaranty is ironclad, the landlord should be able to successfully enforce its terms against a guarantor. An ambiguous guaranty, however, that raises questions or leaves room for interpretation, could cause problems and entrench a landlord in protracted litigation. The savvy landlord may wish to retain counsel to draft the

guaranty, rather than attempt to handle the drafting on its own. While some landlords may balk at having counsel draft or review a commercial guaranty, it could save the landlord thousands of dollars at some point down the road.

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