

# CLIENT ALERT

ATTORNEYS AT LAW | 437 MADISON AVENUE | NEW YORK, NY 10022 | 212 907 7300 | WWW.GOLENBOCK.COM

## Good Guy Guaranties: Beware of the Pitfalls!

To Our Clients and Friends:

April 5, 2016

There are certain contracts that lawyers quickly review without the usual, careful analysis because they are boiler plate, Blumberg forms or other documents that lull the attorney into a dangerous sense of familiarity and disinterest.

The good guy guaranty is just one of those documents that, if not carefully negotiated can sink the unsuspecting guarantor.

A more formal name for a good guy guaranty is a holdover guaranty, because the intent of a good guy guaranty is to prevent a tenant from remaining in its premises long after the tenant has stopped paying rent, i.e. holding over.

A landlord looks for a solvent entity or person to have some real liability when a tenant remains in place without paying rent and the good guy guarantor is just that person. The good guy guarantor acts as a good guy: he either causes the tenant to pay the rent or to surrender the premises.

The good guy guaranty is similar in nature to the 'bad boy guaranty', both commonly found when dealing with entities that have little net worth. The guarantor in each case has responsibility to insure that the tenant or borrower adheres to the terms of the lease or the agreement.

Interestingly, the real estate world refers to a limited personal guaranty as a good guy guaranty, while the more genteel financial markets refer to the correlative document as a "bad boy guaranty", perhaps reflecting

the more tough, street wise nature of the real estate industry.

But the good guy guaranty is fraught with tremendous downside and a signatory who thinks she is signing a guaranty for a fixed sum may be very unpleasantly surprised when her liability far exceeds her expectations: Here are some of the pitfalls:

**1. The Guarantor Loses Control of the Tenant:** Liability under a good guy guaranty ends only when the terms and conditions of the guaranty are met. Usually a guarantor owns a controlling interest in the tenant, but not always, and not forever. If a guarantor loses the ability to control the actions of the tenant, she cannot control the extent of her liability, because she will have no easy way to cause the tenant to surrender the premises to the landlord; and, thus, the guarantor may be watching hopelessly as her liability grows.

*Response:* The good guy should ensure through some corporate documents that as long as she is the good guy guarantor, she has the authority and ability to cause the tenant to surrender possession of the premises and to pay the obligations under the lease sufficient to release the good guy from her guaranty.

**2. Conditions of Surrender are too Onerous:** One of the battles in negotiating good guy guaranties is to define as clearly as possible

the conditions required to be met to secure a release under the guaranty. Often, a lease says that the rent and additional rent have to be paid to the date of surrender. But, additional rent can include any expense that the landlord may suffer by reason of the tenant's occupancy, including construction liens, real estate taxes, operating expenses, and, even third party slip and fall claims.

*Response:* Limit the guaranty to base rent only; and if that is not possible, limit the guarantor's liability to additional rent that is readily quantifiable, such as real estate taxes or operating expense. Exclude third party claims, construction liens and casualty caused by the tenant.

**3. Waiver of Defenses:** What is most amazing about many good guy guaranties is that they have a common clause: "Guarantor waives any defense to or limitation on the liability or obligations of Tenant under the Lease or any validity or unenforceability, in whole or in part, of any obligation of tenant under the lease."

*Response:* What! Why should the good guy guarantor waive all defenses? The good guy guarantor is there only to protect against a tenant insolvency, but when the good guy waives all defenses, she may become liable even when the tenant, whose financial obligations she is guarantying, is no longer liable. For example, the tenant should have the benefit of the statute of limitations, the covenant of quiet enjoyment, and, most obviously, payment, but the guarantor, if she waives all defenses, has no such defenses available to her.

**4. Unusual Expenses and Notice:** Landlords like to push the envelope and include in a guaranty as much as possible. First, a landlord will demand that the guarantor guaranty the rent for a notice period, perhaps three or six months or, even, more. Then the landlord will try to include in the liability the free rent afforded the tenant or the brokerage fees or other transactions costs. Suddenly, the guaranteed sum is far greater than the guarantor

had anticipated.

*Resolution:* Push back against any notice period under a good guy guaranty, but, if that is not possible, then, at least, make sure that the tenant does not have to vacate before the clock on the notice period starts to tic. At least the tenant can remain in operation while the notice period winds down, as opposed to surrendering, paying rent to the date of surrender and then paying rent for an additional period the tenant is not in occupancy.

And with regard to paying a share of transaction cost, usually the unamortized amount, follow the words of our recently departed and endeared First Lady, Nancy Reagan: "Just say no!"

---

**GOLENBOCK EISEMAN**  
**ASSOR BELL & PESKOE** LLP

---

**For more information on Good Guy Guaranties, please contact:**

**David M. Rubin:** 212.907.7371

**Email:** [drubin@golenbock.com](mailto:drubin@golenbock.com)

*Golenbock Eiseman Assor Bell & Peskoe LLP uses Client Alerts to inform clients and other interested parties of noteworthy issues, decisions and legislation which may affect them or their businesses. A Client Alert should not be construed or relied upon as legal advice. This Client Alert may be considered advertising under applicable state laws. © Copyright 2016.*

***As Published in Real Estate Weekly  
on March 18, 2016***