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Creative Solutions

Creative Solutions is a bi-monthly feature. Send your creative solutions to the Editor-In-Chief at smcevily@icsc.org.

MINIMIZING LIABILITY RISKS IN TERMINATING EMPLOYEES

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Job performance is the mantra for most jobs—that is, to keep a job, one must demonstrate continued good job performance. But what happens when an employee's job performance starts to slip?

Many employers have counseling programs. Some are formal, such as a Performance Improvement Plan that lays out what is expected, goals and deadlines.

If, after due counseling and warnings, the employee does not improve, can the employee then be fired? Are there any liability risks at that stage?

Well, the answer is not quite clear. Whether there is a liability risk depends on a lot of factors, including how consistently those performance expectations have been applied, how well those Performance Improvement Plans have been written, and whether the performance expectations are job-related.

Consider, for example, a situation that occurred a few weeks back. My favorite client, ABC Wonderland Stores, called me. The

Continued on Page 2

INSIDE:

Creative Solutions 1
Retail Space 1
Advoiding Pitfalls 3
Communication Facility 4
Case Briefs 7
Legislative Update 8

RETAIL SPACE FOR LEASE? CHAIN STORES NEED NOT APPLY—PART 1

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After learning that Hollywood Video™ planned to open a store next door to a locally- owned, independent video store, a concerned group of Port Townsend, Wash., residents banded together to oppose the company's plan to locate in the town. The Port Townsend City Council ultimately responded to the group's concerns by adopting a zoning ordinance that limits all "formula businesses" and "formula restaurants" to a single zoning district and prohibits them from locating in any other area of town, including its historic town center. A similar scenario recently played out in Nantucket, Mass., where residents of the island resort voted to ban formula businesses from the downtown area. Although many reports depicted the chain-store ban as a reaction to the opening of a Ralph Lauren store on Main Street, the author of the citizen initiative—an independent book seller—explained that her motivation was more philosophical, stemming from a desire to preserve Nantucket's quaint, small-town character.

Port Townsend and Nantucket are just two examples of a small but growing collection of cities and towns that are relying on their zoning authority to regulate and, in some cases, prohibit the existence of national retailers and restaurant chains within their borders.

Commonly referred to as "formula business ordinances," these types of regulations can have far-reaching implications— not only on businesses attempting to locate within an affected marketplace, but also for those already in place. This two-part article provides a discussion of the various ways in which localities regulate formula businesses, and examines the rationales espoused by decision makers for doing so. It also discusses the problems posed by these regulations and highlights potential legal issues raised by formula business ordinances generally.

What Is a Formula Business?

Formula businesses generally include retail stores, restaurants, lodging and other establishments that are required by contract to operate in accordance with a standardized business formula. Although precise definitions vary, most ordinances define "formula business" by cataloging their common features and declaring that a formula business is any establishment that exhibits a certain number of those features. For example, at its 2006 annual town meeting, the Town of Nantucket, Mass., adopted an amendment to its zoning by-law that defines formula business as a type of retail sales establishment, restaurant, tavern, bar or take-out food establishment which, along with 14 or more other establishments, maintains two or more of the following features:

1. Standardized menu or standardized array of merchandise with 50% or more of in-stock merchandise from a single distributor bearing uniform markings;
2. Trademark or service mark, defined as a word, phrase, symbol or design, or a combination or words, phrases, symbols or designs that identifies and distinguishes the source of the goods from one party from those of others, on products or as part of store design;
3. Standardized interior décor including, but not limited to, style of furniture, wall-coverings or permanent fixtures;
4. Standardized color scheme used throughout the interior or exterior of the establishment;
5. Standardized uniform including, but not limited to, aprons, pants, shirts, smocks or dresses, hat and pins (other than name tags).

Continued on Page 2

Creative Solutions

Continued From Page 1

company operates a group of retail stores that sells magical games to children. Apparently, one of their Pricing Analysts had some performance problems. Tom, its Vice-President of Human Resources, called. This was our ensuing conversation.

Performance Issues

Author: Good morning, Tom, how are things in California?

Tom: Things are not so great. I have a situation that is brewing, and we need some quick turnaround on this.

Author: What seems to be the issue?

Tom: Well, for starters, I have a Pricing Analyst we need to let go. We've talked to him and talked to him, but he doesn't seem to get it. He's experienced and knowledgeable. But he isn't fast enough. His response time is slow. We have memos on this. It is all documented. Look, I will have our West Coast Manager e-mail the Performance Improvement Plans we have given him. Take a look at them, and give me a call back to let me know what you think.

Author: Okay, okay, but I have a few questions.

Tom: Go ahead, I'll try to answer them, but our West Coast Manager is the one who is most familiar with this.

Author: What's the Pricing Analyst's name?

Tom: Richard Smith.

Author: How long has he been with you?

Tom: Let's see. I think, 17 or 18 years.

Author: And how old is Mr. Smith?

Tom: Ah, he must be 64 or 65.

Author: And when do you need an answer?

Tom: Today! You know our sales month ends on Friday, but just give me a call back this afternoon.

Questionable Language

When I received the documents, sure enough, there were plenty of Performance Improvement Plans. In fact, Mr. Smith had been given three of them over the past six months. They were clearly written. They spelled out the expectations. They spelled out the goals. In fact, they spelled out a bit too much.

It seemed that Mr. Smith's performance issues focused on the way he interacted with customers calling for quotes. From the three Performance Improvement Plans I read, Mr. Smith was not responsive. He was too slow. The West Coast Manager described Mr. Smith as being "too slow, practically lethargic. We need our Pricing Analysts to step up to the plate. There needs to be a sense of urgency. Richard is moving at quarter-pace speed. Richard is ossified in the past. We need someone who is quick and not glued to the plate."

Then, as I read on, there were comments about Mr. Smith's inability to change. Apparently, although he was knowledgeable about pricing Wonderland's products, he was, as one memo described it, "too set in his old ways." Another memo described how Mr. Smith was "set in his old habits, unwilling to change and stuck in the old way of doing things." That theme and that language about "old habits" and "old ways" were repeated in several spots on the Performance Improvement Plans.

Too Slow, Too Set in His Old Habits

I called Tom back, and told him my concerns. "Tom," I said, "your memos and those Performance Improvement Plans are beautifully written. You gave him three. He's had plenty of warnings. He's had plenty of time to improve. I have, however, some concerns about some of the language referring to being "too slow," "ossified in the past," "lethargic" and "set in his old habits."

"What about that?" Tom responded. "I know what our West Coast Manager meant by that. They are all job-related considerations. Any nitwit can understand what he was driving at."

"That's part of the problem," I interjected. "Those words are now in concrete. A jury of Mr. Smith's peers might interpret those words in a different way as part of a mind-set to discharge Mr. Smith because of his age. This is particularly true if your West Coast Manager spoke to Mr. Smith the same way he writes and made other disparaging comments about his

Continued on Page 7

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AVOIDING PITFALLS AND MISCUES THAT RENDER LEASE GUARANTIES OF LITTLE VALUE

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A guaranty by a creditworthy person or company provides a valuable, and sometimes necessary, credit enhancement to convince a landlord to enter into a lease with a single- purpose entity or other tenant without sufficient financial strength to justify the contemplated lease terms. However, unless carefully crafted, a guaranty will not supply a landlord with the security it was meant to provide.

Some of the major pitfalls in drafting guaranties involve the following questions:

- Are all of the intended obligations being guaranteed?
- Are the limitations on the guaranty as contemplated?
- What notices must be sent to the guarantor?
- Must the guarantor consent to changes in the lease terms?
- What happens if the lease is assigned?
- Must the landlord first exhaust its collection remedies with the tenant?
- May the guarantor demand possession if required to pay under its guaranty?
- What happens if the tenant declares bankruptcy?
- What happens if the guarantor declares bankruptcy?

This article will focus on these issues, as well as other miscues and pitfalls that can limit the value of a guaranty and possibly render it useless.

Obligations

The first issue to be addressed when drafting a guaranty: What obligations are being guaranteed? Will the sole obligations be the minimum and additional rent installments paid monthly under the lease? Or, do the guarantor's obligations also include percentage rent and annual reconciliation payments for common area maintenance and taxes? What about failure of the tenant to construct required improvements to the leased premises? What if the tenant causes a hazardous waste violation? What if that violation is first discovered after surrender of the leased premises?

In addition to clarifying the foregoing, a guaranty should provide for its continued vitality in the event of a holdover or failure to surrender the leased premises in the required condition. The easiest solution from the landlord's perspective is for the guaranty to cover all obligations of the tenant under the lease, whenever they arise.

Limitations

The second issue a guaranty must address: What limitations are placed on the guaranty? If the guaranty is limited to the obligations arising during a certain period of time, such as the first five years of the lease term, and the tenant defaults during the second year, will the accelerated rent for the entire term be included in the obligations being guaranteed? Or will only those obligations expected to accrue during the first five years be included? To avoid the pitfall of carving out unintended exclusions to the guaranty's coverage, a landlord should consider carefully whether the scope of time for which a guarantor's obligations exist has been limited.

Moreover, guaranties can be limited as to a maximum amount as well, regardless of damages suffered by the landlord. If limited by amount, a landlord should consider if the last dollars or first dollars of the tenant's obligations are being guaranteed. Keep in mind that a guaranty with such limits places a burden on the landlord to monitor exactly when the tenant failed in its obligations and whether the damages caused by such failure have reached the predetermined cap.

Notices

The third issue to be addressed: A guaranty must specify the notices to be sent to the guarantor. It is imperative that all notices required under the terms of the guaranty be sent to the guarantor. However, even if not required by the terms of the guaranty, it is good practice to send the guarantor copies of default notices and termination notices sent to the tenant contemporaneously. Furthermore, a landlord should consider other situations where additional persons ought to receive notice, such as whether a parent entity should receive a duplicative default notice sent to its subsidiary, or whether all general partners involving a limited partnership guarantor should receive notice (if the general partners' liability is not already limited under the guaranty). Early evaluation of this issue can prevent the miscue of failing to provide notice to the true deep-pocket member of the guarantor where notice is not imputed by the terms of the guaranty.

Consent

The fourth issue to be addressed: Should the guarantor consent to all changes in the lease terms? A well-drafted guaranty will provide that it remain in effect, notwithstanding the modification, renewal, termination or extension of the term of the lease. Without such a provision, a guarantor may have a defense against any modification, renewal, extension or termination of the lease (with or without releasing the tenant) of which the guarantor was unaware or to which it did not consent. If litigation occurs, the defense of failure to obtain the guarantor's consent is likely to be raised if there is any reason to assert that consent was required. Be aware that these and other "suretyship defenses" (i.e., defenses based on the tenant and landlord's post-execution conduct) may be codified into statutes—and in such jurisdictions, express citation to the applicable statute may be necessary to waive the suretyship defenses.

Assignment

The fifth issue to be addressed: A guaranty must address what happens to the guarantor's obligations upon a lease assignment. The original tenant, if not released, remains primarily liable as a quasi-guarantor. Often the lease provides for the continuing obligation by the tenant; however, what if the landlord is nonetheless willing to release the initial tenant, but not the guarantor, upon a lease assignment? In such case, the guaranty should contain language expressly providing that the guarantor's obligations survive an assignment of the tenant's interest in the lease. Alternatively, the landlord could obtain a separate agreement from the guarantor to remain liable on the guaranty as a condition of the partial or full release of the tenant. Such measures will also preserve the credit enhancement provided by a parent company where an assignment occurs upon a change in the ownership of a single purpose entity or limited purpose entity upon a sale by the parent, as the parent/guarantor will remain liable to provide lease security.

Continued on Page 6

COMMUNICATIONS FACILITY LEASES—REWARDS FOR RETAIL OWNERS AND CARRIERS

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Due to the explosion of cell phones and similar technology in the past several years, great demand has been placed upon cell carriers to satisfy the increased needs of the public. This demand is prominent in urban and suburban areas because the ranks of cell phone- using soccer moms, dads and kids have swelled throughout the country. This presents an opportunity for savvy owners of retail space to maximize their profits due to the fact that retail spaces (i.e., malls and shopping centers) are located in close proximity to urban and suburban housing markets. Homeowners generally do not want the sites, quite literally, in their backyard, so it is up to retail owners to fill the void.

Leasing space to cell carriers has several advantages for retail owners: (i) the space leased to the carrier is usually not marketable for any purpose other than storage, parking or utilities, none of which offer much in the way of income to the owner; (ii) since the wireless industry is so competitive, the carrier is often willing to offer top dollar to lease space; and (iii) once installed, the carrier is generally absent from the premises (excluding regular visits to keep the site on-air) and remains low-maintenance throughout the term. However, before entering into a lease with any carrier, owners should be aware of certain issues or concerns facing both the owners and carriers.
Most owners of retail space are accustomed to using their own forms to lease space to "minor" tenants at their property (i.e., tenants not leasing a significant amount of square footage or paying significant rent). There are, however, only a few major players in the cell business, and all of those players consider themselves "major" tenants, regardless of square footage leased or rent paid. With this in mind, an owner can expect to be presented with the carrier's lease at the outset of the transaction, or can expect negotiation of the owner's form to address specific concerns of the various carriers. During negotiations with carriers, owners can expect to discuss the following topics:

Term

The location of a cell site is not chosen lightly. A specific location is selected in order to provide a specific need (or needs) within a network, which includes providing initial service to an area, filling a gap in coverage or lessening the load in an overburdened market. Further, cell sites are expensive to build. An initial investment in a site can easily be several hundred thousand dollars. Needless to say, once in place, carriers are reluctant to move or relocate sites. As a result, carriers often request extended lease terms of at least 15, 20 or 25 years. While this may seem unpalatable to an owner, a long-term lease is not uncommon in the industry, and, as argued by the carrier, is essential to realize a profit on its initial investment in a site and maintain a stable network.

Termination

Carriers prefer that owners not have any right to terminate the lease, unless such termination is for cause. If an owner requires a termination right without cause, carriers will often insist that such a right not arise until after a significant number of years have passed, and may require that the owner give considerable notice prior to termination. Again, this is to ensure that the site turns a profit and the network remains stable. If the carrier is given enough notice prior to termination, it may be able to find an alternative site without disruption to its service.

Furthermore, many carriers require a unilateral right to terminate the lease if the site is no longer compatible with their network. This may seem illogical to an owner (especially if it is unable to obtain a reciprocal right), but to a carrier, it makes perfect sense. A drastic swing in technology may require less (or no) sites in the future, and the carrier does not want to be saddled with thousands of rent payments 20 years after the new technology makes a site worthless. As with owner termination rights, a reasonable compromise can often be made with regard to carrier termination rights. Perhaps the carrier can be prevented from terminating a lease until after a certain number of years have passed or perhaps the carrier can pay a reasonable fee to terminate the lease.

Payment of Costs for Common Areas

An owner can expect resistance on certain items that are typically agreed to by retail tenants, such as payment of common area maintenance ("CAM") charges, because, once built, a cell site does not require much, or any, use of the common areas. No parking is required for customers. No water is required to service the site. Carriers generally maintain their own equipment at no cost to the owner. Obviously, electricity will be required to power the site and air conditioning may be required to cool the equipment, but it is not uncommon for carriers to install their own air conditioning, monitor their power use by a separate meter and pay the bill directly to the service provider. In most instances, the carriers simply prefer to pay the monthly rent check and avoid the trouble of trying to account for CAM charges on thousands of sites throughout the country.

Use and Control of Design

One of the primary concerns of any owner is maintaining a certain amount of control over a tenant's activities on the property. This concept is generally acceptable to carriers because all they want to do at the property is transmit their signal and provide uninterrupted service to their customers. It is typical for carrier leases to limit the carrier's use to a "communications facility and appurtenances related thereto." At the very least, a knowledgeable landlord should require the ability to review and approve of site design and equipment located on the property. Carriers are willing to cooperate with most landlord requests, provided that their service objectives can still be met.

Given that technological developments in the communications industry occur constantly, however, carriers generally require a certain amount of flexibility with the equipment installed at their sites. For instance, carriers often require the ability to exchange like-kind antennas or other equipment after the commencement of the lease term, provided that such equipment does not materially affect or modify the carrier's use of the premises. Whether an owner is willing to accommodate a carrier on this point of discussion varies. However, owners can maximize rent from a site by requiring owner approval prior to any material changes to the equipment located at the site.

RedevelopmentOne issue often overlooked by owners of retail space is their ability to redevelop the property and potentially relocate the site if the need arises. Once constructed, a carrier does not have to relocate its site to accommodate changes to the property, unless the owner specifically negotiates this language in the lease. Carriers are receptive to relocation provisions, provided that adequate notice is given; there is no material interference with service to and from the property; and, of course, the owner bears the cost of such reloca-

tion. As mentioned above, the cost to construct a cell site can be significant; therefore, it stands to reason that relocating a site will be expensive as well. When going into negotiations , owners should be aware of this issue and be ready to resolve who will pay for all or part of the cost to relocate a site at the outset of the lease.

Interference

As with any tenant, carriers want to be left alone during the term of their leases, provided they are paying rent and not causing problems with the owner or other tenants. Since carriers are absentee tenants for the most part, interference with use is rarely a problem. Nevertheless, carriers are particularly sensitive to any interference with their service or equipment. As indicated by the myriad commercials on television, radio and Internet, uninterrupted service is the bread and butter of the wireless industry, and it is taken very seriously. Owners should expect to see a provision in a carrier lease that establishes a first-in-time, first-in-right policy for the carrier tenant and all other users of the property. This policy will establish that the carrier tenant will not interfere with any existing equipment on the property— provided that, if the owner or other tenants on the property install any equipment in the future, such equipment will not interfere with the carrier's use. Obviously, this language is primarily meant to capture interference from competing uses (i.e., other carriers), but owners should be aware that it is broad enough to prohibit any future interfering use by the owner or any tenant at the property. Owners may desire to limit this provision to reserve any uses that they foresee as essential to the property, including those uses of existing or future tenants.

If interference to or from the carrier's facility occurs at the property, the parties should be willing to cooperate with one another to remedy any interference. It is common for both carriers and owners to require reasonable periods (i.e., 30 days) in which to cure interference with the carrier's service or other tenants. If the owner has an issue with the carrier continuing operations after interference, it may request that the carrier power down the site until after the interference issues are resolved. Major carriers are generally aware of potential interference with one another prior to any complaint by the owner, and work well together to resolve any such issues.

Assignment and Sublease

As evidenced by the various mergers between cell companies in the past couple of years, the wireless industry is an ever-changing and evolving business. Consequently, carriers generally require the right to assign their interests under a lease without the owner's prior written consent to the following: entities that buy all of that carrier's assets in a given market, entities that are a product of merger or consolidation, and/or entities that are controlled or are under common control of a parent or subsidiary. Given the shifting nature of the business, this seems to be a reasonable requirement, provided that owner should receive notice prior to any such transfer and the carrier should obtain owner's consent prior to any other assignment.

While limited assignment rights are appropriate in certain circumstances, strict control of subtenants is reasonable and can be a boon to the owner's bottom line if handled correctly. An owner should require that a carrier obtain the owner's consent prior to any sublease of the site. Additionally, an owner may require a fee for any such approval or a share of the subtenant's rent to the carrier tenant. The owner may also require that any subtenant of the carrier's equipment (i.e., the tower) should enter into a separate ground lease with the owner. Most carriers do not object too strenuously to such control because the income they generate from subleasing space is not significant in comparison to the income generated by their customers' use of the network. However, there are companies in the market that specialize in building towers and making money from the sublease of such towers. The tower companies will resist any significant fees charged by owners or profit sharing with owners.

Liability

As with any commercial lease, owners entering into a carrier lease are interested in reducing their potential liability at the property. How much liability a given carrier is willing to accept is subject to each carrier's internal policies and risk tolerance. Nevertheless, a good rule of thumb is that a carrier will be willing to take on responsibility for its own actions, as long as the landowner is willing to do the same in return.

Conclusion

As more cell sites are constructed to meet consumer demand, more retail owners will find themselves entertaining the thought of leasing space to carriers. This arrangement can be quite beneficial to owners because it allows them to maximize profit on their property with a low-maintenance tenant. Owners need to understand, though, that carriers have certain expectations that must be addressed in any communications facility lease. If the owners are aware of some of these expectations prior to entering into a relationship with the carriers, the lease negotiation and rental process will be painless and both parties will reap the rewards of the site. ■

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Retail Space

Continued From Page 1

The numerical thresholds that determine whether a business meets this definition—specifically the minimum number of establishments operating under the same formula and the qualifying number of features exhibited by formula businesses—also vary from one jurisdiction to the next. Some municipalities, such as the town of Calistoga, Calif., omit the quantitative establishment threshold altogether, relying solely on their lists of operational factors to identify formula businesses.

Formula Business Ordinances

In general, a formula business ordinance is any local law that regulates the existence, location, or operation of formula businesses within the locality. Because formula business ordinances are predominantly enacted for the purpose of regulating where such establishments can locate within a city or town, they are invariably enacted pursuant to the local government's zoning authority.

Formula Restaurants

Rather than regulating formula businesses generally, some cities have directed their ordinances at specific types of formula businesses, such as formula restaurants or formula retail establishments. These subgroups are typically defined in a manner similar to the broader formula business land use group described above. The city of Arcata, Calif., for example, defines "formula restaurant" to mean: a retail establishment primarily devoted to the on-site preparation and offering of food and

Continued on Page 7

Advoiding Pitfallls

Continued From Page 3

Enforcement Issues

Several pitfalls in a landlord's enforcement of a lease guaranty can be avoided by careful drafting of the guaranty. Where a tenant does not have sufficient funds or property to protect the landlord's interests in the lease, a guaranty should allow the landlord to enforce the guaranty without first asserting claims against the original tenant. Thus, the landlord is not expending time and resources pursuing an undercapitalized tenant where true satisfaction of the landlord's debts lies with the guarantor.

Additionally, a guaranty may provide that the guarantor delay pursuing subrogation claims against the tenant until the landlord has received full satisfaction of its debt from the tenant. Otherwise, the guarantor could be subrogated to the rights of the landlord if it made payment under the guaranty.

Bankruptcy Issues

If a tenant rejects the lease after filing for bankruptcy, the guaranty may prove to be a valuable asset. 11 U.S.C. § 524(e) provides that the discharge of a debtor does not affect the liability of any other entity or person on the debt. Moreover, as long as the guarantor is not in bankruptcy, the damage claim of the landlord against the guarantor is limited by 11 U.S.C. § 502(b)(6), which, in simplified terms, provides for damages to the landlord in the greater amount of one year's rent or fifteen percent (15%) (not to exceed three years) of the rent due over the remainder of the lease term. See, In re Modern Textile, Inc., 900 F.2d 1184 (8th Cir. 1990).

A guarantor who is liable for the lease obligations, but does not hold a right to gain possession of the premises, will likely be a bidder at a bankruptcy auction of the lease in order to recover some of the expense. This risk has caused some guarantors, and even some assignees of lease interests, to require, as a condition to their liability, that the lease mandate that the landlord offer the premises to the guarantor/assignee for the remainder of the lease term under the same terms as the lease. Such a requirement has been called the "snap-back," as possession must be given in order for the landlord to assert the liability.

Some caution, however, must be used in commencing an action against a guarantor when the tenant is in bankruptcy, as the guarantor may have an indemnification claim against the debtor implicating the automatic stay. A prudent course is to have the automatic stay modified so that the landlord may proceed against the guarantor, notwithstanding this indemnification claim. Finally, although 11 U.S.C. § 524(e) would seemingly protect an action against a guarantor, any plan of reorganization that might include a discharge of third parties should be carefully reviewed.

If it is the guarantor, on the other hand, who is the subject of a bankruptcy filing, the guaranty may potentially be discharged. Where a lease involves a shopping center, however, a landlord deprived of a guaranty as lease security is not compelled to have the lease remain in force unless substitute lease security is given. The Bankruptcy Code provides extra requirements for "adequate assurances" in 11 U.S.C. §365(b)(3), as follows:

(3) For the purposes of paragraph (1) of this subsection and paragraph (2)(B) of subsection (f), adequate assurance of future performance of a lease of real property in a shopping center includes adequate assurance—

(A) of the source of rent and other consideration due under such lease, and in the case of an assignment, that the financial condition and operating performance of the proposed assignee and its guarantors, if any, shall be similar to the financial condition and operating performance of the debtor and its guarantors, if any, as of the time the debtor became the lessee under the lease;

Therefore, a guaranty must be carefully drafted to avoid the pitfalls and miscues that can arise where ambiguous terms, sloppy drafting or hurried negotiations prevent a landlord from achieving the security the guaranty was meant to provide.

A simple lease guaranty form is provided below.

SAMPLE GUARANTY

The undersigned hereby jointly and severally request Landlord to enter into the foregoing lease, and as an inducement to Landlord to do so, and additional consideration therefor, the undersigned hereby jointly and severally (a) guarantee unconditionally to Landlord the full, faithful and punctual performance, fulfillment and observance of all of the obligations and liabilities of Tenant under said lease, and all other obligations and liabilities of Tenant to Landlord whenever arising; (b) waive notice of and consent to any and all amendments, extensions and renewals of said lease, any and all assignments, subleases and other action that may be permitted thereunder by Tenant or Landlord, any and all other amendments, extensions and renewals, any and all advances, extensions, settlements, compromises, favors and indulgences, any and all receipts, substitutions, additions and releases of persons primarily or secondarily liable, and any and all acceptances by Landlord of negotiable instruments, commercial paper and other property, and agree that none of the foregoing, should there be any, shall discharge or affect in any way the liability of the undersigned hereunder; (c) agree that all rights and remedies of Landlord under said lease and hereunder shall survive any discharge, moratorium or other relief granted any person primarily or secondarily liable in any proceeding under federal or state law relating to bankruptcy, insolvency or the relief or rehabilitation of debtors, and any consent by Landlord to, or participation by Landlord in the proceeds of, any assignment, trust or mortgage for the benefit of creditors, or any composition or arrangement of debts, may be made without the undersigned being discharged or affected in any way thereby; (d) waive any right to require marshalling or exhaustion of any right or remedy against any person, collateral or other property; (e) waive presentment, demand, protest and notice of default, non-payment and protest and all demands, notices and suretyship defenses generally; (f) waive any right to subrogation against Tenant either (i) so long as any obligations and/or liabilities of Tenant under said lease, and/or any other obligations and liabilities of Tenant to Landlord exist or (ii) if Tenant has filed a voluntary bankruptcy action or is subject to an involuntary bankruptcy action that is not dismissed, and (g) agree to pay to Landlord on demand any and all reasonable costs and expenses paid or incurred by Landlord, including reasonable attorney fees and disbursements in connection with the collection or enforcements of the undersigned's obligations under this Guaranty and until paid such sums shall bear interest at the default rate set forth in the lease.

WITNESS the execution hereof as an instrument under seal as of the ___ day of ____________ 200_

SEAL ■

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Retail Space

Continued From Page 5

beverage for sale to the public for consumption either on or off the premises and which is required by contractual or other arrangement to offer any of the following: standardized menus, ingredients, food preparation, decor, uniforms, architecture, signs or similar standardized features and which causes it to be substantially identical to more than eleven (11) other restaurants regardless of ownership or location.

Complete and Partial Prohibitions

Some ordinances may take the form of a city-wide prohibition against formula business (or specific types such as formula restaurants), while others ban them only from certain zoning districts or specific geographical locations, such as a historic downtown. A formula business ordinance also may impose a cap on the number of formula businesses allowed within its boundaries. Arcata, for example, limits the number of formula restaurants allowed in the city to nine, the same number that existed on the date its formula business ordinance was adopted. A new formula restaurant is allowed in Arcata only it if replaces an existing one within certain enumerated business districts.

Dimensional Restrictions

The regulatory reach of formula business ordinances, however, often extends beyond geographic limitations. Formula business ordinances can also impose specific dimensional restrictions and separation requirements on affected establishments. For instance, in Port Townsend, formula restaurants and formula retail establishments cannot have more than 50 linear feet of street frontage and are limited to a maximum of 3,000 square feet of net total floor area. Port Townsend's ordinance also prohibits formula restaurants and retail stores from opening in any stand-alone building, requiring that they locate in a building that is shared with at least one other business that is not a formula business of any type. Similarly, Port Townsend also prohibits more than one formula retail business on any lot.

Special Permitting Requirements

Special permitting requirements and/or public hearing processes may also be required for affected businesses. Coronado, Calif., for example, does not prohibit formula retail establishments, but instead requires that they obtain a special permit and participate in a public hearing process before the planning commission and city council. In San Francisco, on the other hand, formula businesses are subject to specific, heightened neighborhood noticing requirements and a separate design review process prior to permitting. While regulations such as these generally may not act as a barrier against entry into the local marketplace, applicants should anticipate a costly and lengthier permit review period.

The conclusion of this article will discuss practice tips for retailers to consider when a local government is contemplating adopting a formula business ordinance. ■

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CASE BRIEFS

Subrogation

Where both parties are covered by insurance, and a subrogation waiver clause exists in the lease, the tenant may not recover money from the landlord and must look to its insurance company. St. Paul Fire and Marine Insurance Co., et al. v. JEMB Realty Corp et al., 05 Civ. 1958 (RMB), United States District Court for the Southern District of New York, July 20, 2006.

IGC occupied a portion of the premises pursuant to a lease entered into with JEMB (the landlord). The lease provided that the tenant was not relieved from liability as a result of damage from fire or other casualty. The insurance policies obtained by both the landlord and the tenant contained waivers of subrogation. A flood caused damage to the space rented by IGC. IGC submitted a claim to its insurance company, St. Paul. St. Paul notified the landlord that the landlord's negligence caused the flood. Thereafter, the tenant commenced an action to recover monies paid by its insurance company, arguing that because the flood was caused by an area in the control of the landlord, the subrogation clause did not apply. The court disagreed. It held that subrogation is an equitable doctrine and contracting parties may freely waive their respective subrogation rights because they prefer to look to their insurers for recovery of losses.

Creative Solutions

Continued From Page 2

"being too old, or too slow, or too lethargic and ossified."

"No way," Tom responded, "Those are innocent comments. I don't see it."

What Does Age Have to Do With It?

Author: Are you replacing Mr. Smith?

Tom: Yes, yes, sure we are. We need someone to fill that job.

Author: And how old is Mr. Smith's replacement?

Tom: Oh, I think they were going to move up Perry. He must be in his early 30s. He is a real go-getter.

Author: And, by the way, who is the decision maker on this?

Tom: Our West Coast Manager, of course. He's in charge. He's a real go-getter, too.

Author: And how old is he?

Tom: Oh, ah, I bet he is around 33.

Author: You know, the average California jury has been awarding about $450,000 when these cases go to trial. Maybe we ought to rethink how we approach these issues.

Tom: $450,000 you say?

Author: That's right, $450,000, and that was a few years back, to say nothing of your own attorney fees and the time and resources of your management team.

When Tom finally caught his breath, he said, "Okay, I get the point. Let's get a conference call going with our West Coast Manager and we'll look at this again."

Tom got the point. What about you? How do you write your Performance Improvement Plans? Do you have your memos checked out by counsel before you take the ultimate step to terminate an employee? What safeguards do you have in place to minimize these liability risks? What litigation risks in this employment context do you have? ■

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LEGISLATIVE UPDATE

AROUND THE NATION...

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