What Do You Mean You Won’t be a Good Guy (Guarantee)?
Overview

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Bottom Line... To paraphrase a line from an old Grateful Dead tune, hopefully I’ve helped you find some direction around some corner where it’s been waiting to meet you!!!
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- Larry Haber is Managing Partner of the Commercial Real Estate Department of Abrams Garfinkel Margolis Bergson, LLP and the Chief Executive Officer and founder of Colgate Real Estate Advisors LLC. Larry represents both tenants and landlords, primarily focusing on commercial lease negotiations, restructurings, reviews and audits in addition to real estate acquisitions, dispositions, construction contracts and due diligence advisory services. Larry takes great pride in providing his clients with the power to make knowledgeable decisions concerning their business and individual needs. Combining decades of commercial real estate ownership with a professional background in law, accounting, commercial brokerage, property management, planning and development, Larry and his team can be the difference in helping you navigate the challenging times that lie ahead in your life or business. Having sat on all sides of the negotiating table, Larry firmly believes that he and his team of real estate professionals have an increased business understanding of the mindset of all parties to a transaction, and consequently, a competitive edge that will only enhance his client’s bargaining position.

- In addition to maintaining a law practice for nearly 25 years, Larry was a co-founding partner of a full service commercial real estate firm specializing in the development, ownership, management and leasing of commercial and high-rise residential properties. As General Counsel and Chief Administrative Officer, Larry’s primary responsibilities were the review, preparation, negotiation and analysis of commercial leases, construction, purchase, sale, operating, acquisition, AIA and employment agreements as well as loan documents and other related commercial agreements. Ancillary to the aforesaid legal responsibilities, Larry was intimately involved-on the business side-in the acquisition, renovation, leasing and management of the firm's portfolio, including the upgrading and repositioning of the properties in the then emerging markets of Newark and Harlem (including the building where Former President Bill Clinton maintains his offices).

- Larry lives on Long Island with his wife and their four sons. In addition to his passion for them, his work, sports and music, Larry devotes a significant portion of his energy co-chairing and actively participating in charities focused on raising awareness, tolerance, acceptance and sorely needed funds for children with autism and other disabilities. Please refer to www.facebook.com/BraveGoals4Autism or www.ayabany.org or the trailer to the short film “Making a Difference” for more information (2010 New York International Independent Film and Video Festival Best Educational Documentary - Trailer to Film: www.youtube.com/user/AYABANY).
This Chapters rants & raves will focus on good guy guarantees and how, like many a baseball player during the steroid era, they have grown and matured overnight right before our very eyes.

Before we go off though on how Landlords have fed the once standard good guy guaranty a healthy dose of growth hormones, a few basics as to what a good guy guaranty is intended to accomplish and why the inclusion of it in many lease transactions is essential at least from a Landlord’s point of view.
For starters, a *good guy guaranty* in its simple form is not intended to be a straight personal guaranty. To most, the generally understood meaning is that one or more of the principals of a corporate or LLC tenant will guarantee to the Landlord that it pay all base and additional rent payments provided for under the lease up until the day the space is surrendered to the Landlord-whether or not prior to the expiration of the lease term.

Once the space is given to the Landlord broom clean and vacant with all rent paid through the date of surrender, an event that the principals unilaterally control—there no longer will there be a personal guarantee.

*To paraphrase Hall of Fame baseball announcer Bob Price though, as to a Tenant’s security deposit, you can kiss that baby goodbye! Furthermore, the Landlord will still retain the option of going after the assets of the named Tenant, although that could be an exercise in futility given the circumstances.*
Chapter 2
Why You Should Include a Good Guy Guarantee in Your Lease

From a Landlord’s perspective, when the principals of a Tenant hesitate to give a good guy guaranty, it sends off a message up front that you intend on being a “bad guy” if things go “south” for your business by not being a “good guy” and paying the Landlord its rent while the corporate entity you own and control occupies its space.

Remember, it will be difficult for a Landlord to give a Tenant the “love” it seeks in the form of free rent, tenant improvement allowances and other concessions then being negotiated if the Tenant doesn't return some love to Landlord in the form of what many perceive as merely giving the Landlord "ice in winter."
Getting back to the aforementioned muscle bound nature of many current forms of a good guy guaranty, the following are a few examples of how many Landlords, when it comes to securing as much protection as possible in securing both its rental stream and recovery of initial lease concessions in the event its relationship with its Tenant becomes a case of good loving gone bad, keep on strengthening the grasp of their good guy guaranty’s hold on the personal assets of a Tenant’s principals.

1) The good guy guaranty becoming a guarantee of not only payment but performance as well. In simple English, the guarantor’s obligations would also extend to non-monetary covenants contained in the lease as well. Ouch! If representing a Tenant, fight long and hard on this point.
2) Instead of the obligation being to merely deliver the space at surrender “broom clean and vacant”, clever Landlord attorneys insert “in the condition required under the lease” instead-which in many instances will include language requiring the removal of alterations and repair/restoration obligations if not properly negotiated. This can truly bite a Tenant on the butt twice as hard given the aforementioned “guaranty of performance”.

3) The requirement of having to give a Landlord somewhere between 3-12 months notice before exercising a guarantor’s rights under the good guy guaranty. This effectively creates a back door limited personal guaranty based on the length of the notice period.
4) To quote 60’s surf rockers the Beach Boys, yet another example of a lack of good vibrations coming Tenant’s way is exemplified by good guy guarantees which also contain language providing that in order to unilaterally terminate it, the landlord must be reimbursed for its unamortized free rent concessions, tenant improvement allowances, brokerage commission, legal fee and Landlord’s work costs! Talk about a buzz kill! Please negotiate to have this language deleted, or alternatively, applicable only during the first few years of the lease term!
Ok... enough doom & gloom & cautionary caveats ... time for us to be part of the cure and not just the problem!!!

So here are a few additional pointers:

~During the negotiation of a letter of intent while a Tenant is still being seduced by a Landlord, the time is never more appropriate to clearly define exactly what is to be contained in a good guy guaranty

Example: “Tenant may unilaterally terminate the GGG on the date of surrender by delivering (i) the Premises and the keys thereto to Landlord broom clean and vacant and (ii) all base and additional rent paid through the date of surrender”. Also try and limit the definition of “additional rent” to tenant’s share of electricity inclusion, real estate tax and CAM charges through the date of surrender!
The last two tips center around providing flexibility to a Tenant, as over the term of a long term lease a lot can change! Keep in mind that virtually all guarantees contain language requiring the guarantor to remain on the hook when a lease is assigned.

➢ With that said, it is imperative that when negotiating a good guy guaranty, a Tenant’s attorney and broker include provisions allowing for the release of the guarantors if a sale of its business occurs and/or an assignment of lease occurs, subject to a guaranty being executed by at least one of the principals of the assignee.

➢ Along similar lines, also try to include language providing that where more than one principal will be signing as a guarantor, if one of those principals later withdraws from the corporate tenant, the obligations of the withdrawn member under the guaranty may be terminated unilaterally by that withdrawn provided that the remaining guarantor(s) remain as guarantors.
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