The Marin Lawyer

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Past President Matt White tunes up his swing! (Photo from last year.)

GENERAL MEMBERSHIP MEETING

THE MCBA AND THE FAMILY LAW SECTION CELEBRATE SUMMER TOGETHER

Join us For Food, Softball and Fun!

Have you been biding your time all year, waiting to find yourself in a setting in which it is appropriate to throw something at the lawyer on the other side of your case? Now is your chance! For our July general membership meeting we will be celebrating summer with music by our local attorney talent and playing softball at Piper Park in Larkspur on **SUNDAY, July 15.** There will be good company, great food, burgers –veggie and beef, hot dogs, salads, and all of the fixings, and plenty of refreshments, including beer and wine. This free event is co-sponsored by the MCBA and the family law section. The festivities start at 12:30 and will go until 4:00 P.M. Please RSVP so we have enough food, see page 2. The MCBA softball game and picnic was a very fun event last year; you definitely don't want to miss this one!

Todd Hedin, Deborah Breiner, and Past Presidents Matt White and Peter Mitchell get ready for the big game! (Photo from last year.)

Calendar of Events

July 15th
Annual Picnic/Softball Game
Piper Park, Larkspur
12:30 – 4 pm

July 18th
Probate & Estate Planning
Section Meeting
12 – 1:30 pm

July 19th
Real Property Section Meeting
12 – 1:30 pm

July 23rd
Probate & Trusts Mentor Group
12 - 1:30 pm

Look for details each month in *The Marin Lawyer*

In This Issue

Jordan A. Lavinsky was guest editor of this issue of *The Marin Lawyer*. Philip R. Diamond is Series Editor for 2007.

TENANT BANKRUPTCIES:
A FEW THINGS LANDLORDS SHOULD KNOW

*By Jordan A. Lavinsky, Esq.**

Landlords have special issues when tenants file for bankruptcy, and also special rights. Understanding the basics of how a tenant bankruptcy affects a landlord's rights under a lease can help protect vital real estate interests, and obtain the protections the law has provided for landlords.

The Automatic Stay

The automatic stay takes effect upon the filing of a bankruptcy petition to freeze the status quo as of that date. The scope of the stay is very broad; it

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applies to stop all litigation against the debtor or property of the estate. The stay also applies to ban notices, demands, or other actions that a creditor might take to pursue collection of pre-bankruptcy debts. Do not violate the stay. Actions in violation of stay are void or voidable. Intentional violations can be punished by sanctions or contempt. Landlords or creditors can ask the bankruptcy court for "relief from the stay" to allow some kinds of actions to proceed. If a tenant is in default and appears to be teetering on bankruptcy, then default the tenant and file an unlawful detainer action to terminate the lease before the bankruptcy petition is filed. By doing so, the landlord may argue that the lease was already terminated before the bankruptcy and the lease should therefore not be held up in the bankruptcy and subject to lengthy periods for assumption and assignment of leases (although the landlord's claim based on debtor's breach must still be filed in the bankruptcy).

Right to Post-Petition Rent

Even in bankruptcy, tenant/debtors cannot remain in possession of premises for free. Under 11 USC §365(d)(3) debtors must remain current on post-petition obligations until the lease is assumed or rejected. Hence, the Ninth Circuit has held that 11 USC §365(d)(3) gives landlords an administrative claim for the full amount of lease rent due for the post-petition, pre-rejection period. If a debtor-tenant fails to keep post-petition rent current, a request for payment of administrative expenses and, if necessary, a motion to compel payment should be made. In addition, if permitted under applicable state law, a landlord may claim attorney fees incurred in making the motion, which may be recoverable to compensate the landlord for "actual pecuniary loss" resulting from the debtor's failure to pay the post-petition rent as required under 11 USC §365(d)(3).

Assumption and Assignment

Generally, the assumption of a contract involves its reaffirmation by the debtor or trustee. The entire contract must be assumed or rejected. Its provisions cannot be "cherry picked." Following assumption, it becomes a post-bankruptcy obligation that can be enforced against the bankruptcy estate and damages for breach are accorded priority status. To assume a lease, the debtor must: (i) cure or provide adequate assurance of a prompt cure; (ii) compensate, or provide adequate assurance of prompt compensation, for "actual pecuniary loss" resulting from default; and (iii) provide "adequate assurance of future performance." The entire lease must be assumed – both burdensome and beneficial provisions unless agreed upon modification. If the debtor assumes a lease, the debtor is obligated to perform post-petition. Breach of the lease after assumption results in the lessor's administrative claim, meaning it would be paid in full before any general unsecured debt.

Special Provisions for Shopping Center Leases

With respect to assumption of a lease in a shopping center under 11 USC §365(b)(3), adequate assurance of future performance is specifically defined to mean that: (a) the source of rent and financial condition 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, when the debtor became the lessee; (b) the percentage rent due under the lease will not substantially decline; (c) assumption or assignment is subject to all the terms of the lease, including radius, use, location, and exclusivity provisions, and will not breach any such provisions; and (d) assumption or assignment will not disrupt the tenant mix or balance in the shopping center.

Rejection of Unexpired Leases

Rejection of an executory contract or unexpired lease terminates both parties' obligations going forward, but does not result in an unraveling of the executed portion of the contract. Most courts follow a business judgment rule in deciding whether to permit rejection. The issue is whether the debtor's business judgment indicates rejection will benefit the bankruptcy estate. Rejection is a pre-petition breach, notwithstanding the rejection happens after the bankruptcy is filed. The landlord will have a pre-petition damage claim for breach. For rejection damages and all amounts owed before the bankruptcy, file a general unsecured claim. A post-rejection claim may include the sum of (1) amounts owed pre-petition (i.e., before the bankruptcy) and (2) the capped amount of rejection damages. The "cap" of Bankruptcy Code § 502(b)(6) limits landlord claims for rejection damages to the greater of one years' rent or 15% of the rent reserved, not to exceed three years' rent.

Time for Assumption and Rejection of Unexpired Leases

Under Section 365(a) a debtor or a trustee may elect whether to assume or reject any unexpired lease. The election has to be made within 120 days or the lease is deemed rejected. The debtor's time to assume an unexpired lease is subject to one 90 day extension. After that, no extensions will be granted without the landlord's written consent. The debtor must perform its obligations under the lease until the lease is assumed or rejected.

Proof of Claim

To collect money in a bankruptcy proceeding, file a proof of claim before the claims bar date. In chapter 11,

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debtors set deadlines (with court approval) for filing the claims. Claims not filed by the bar date are disallowed. In chapters 7 and 13, the deadline is statutory: 90 days from the date first set for the meeting of creditors.

Attorneys' Fees

A recent decision from the United States Supreme Court, originating in San Francisco, has made it easier to seek recovery of contractual attorney's fees incurred in bankruptcy litigation. In Travelers Casualty and Surety Company of America v. Pacific Gas & Electric Company (US Supreme Court, March 20, 2007), the Supreme Court held that contract-based attorneys' fees could be recovered in a bankruptcy case, even if the fees were incurred litigating issues under bankruptcy law. Before this decision, the law on recovery of fees was murky at best: some cases allowed recovery if the fees were incurred enforcing contract rights under state law and the contract provided for such recovery, while several cases, including a 1991 9th Circuit decision noted that there was no federal right to attorneys' fees so fees incurred litigating "issues peculiar to federal bankruptcy law" could not be recovered.

Monitor Developments in the Case

Promptly file a request for notice and inclusion on the mailing/email list. Review everything at least briefly to identify issues that may affect your interests. Be sure to object on time to motions and proposed actions that you oppose. After filing a claim, monitor the case for any distributions under a plan, or to respond on time to any objection to your claim. Watch for "omnibus objections" where many claims are disallowed unless a timely response is filed.

Scream or Die

Finally, it is critical to understand the concept of Scream or Die. Bankruptcy is not two-party litigation – it involves multiple constituencies. Debtors make motions that affect rights of whole groups of constituencies, not just one party. Parties are given a finite – usually short – time to object or the relief is granted – hence: scream or die. A scream or die calendar means the motion is not even set for a hearing – it will just be granted by default unless a party files a timely objection and asks for a hearing.

**Jordan A. Lavinsky is an attorney in the Litigation Section of Hanson Bridgett Marcus Vlahos & Rudy LLP, specializing in commercial and real estate litigation. Jordan represents commercial creditors, shopping centers, real estate owners, managers, and developers. He has experience in trial and appellate litigation in state and federal courts and administrative forums in the areas of commercial, construction, real estate, and bankruptcy law.*