

## THE LONG AND WINDING ROAD: When A Tenant Files For Bankruptcy

**W**hen a commercial or residential tenant files for bankruptcy, an owner should take steps to (a) ensure that rent arrears, ongoing rent and additional rent is paid, (b) preserve the right to collect unpaid rent arrears, and (c) enforce certain rights, including, where appropriate, the right to seek the eviction of the bankrupt tenant.

After being notified that a tenant has filed for bankruptcy, the owner should file a Notice of Appearance with the Bankruptcy Court. The Notice entitles the owner to receive copies of all documents filed in connection with the bankruptcy proceeding, including all notices and motions made by other creditors, the trustee, or the Court. The Notice is also required in order to file any motions in the proceeding.

By filing for bankruptcy, the tenant has become a debtor ("Debtor"), as defined by the U.S. Bankruptcy Code. Generally, the Debtor is protected from its creditors by an automatic stay ("Stay"). The Stay bars any collection action against the Debtor, the Debtor's property, or the property of the Debtor's bankruptcy estate. The public policy behind the Stay is that Debtors should be protected from creditors while the bankruptcy proceeding is administered.

Although the Stay protects the Debtor, bankruptcy law protects creditors as well. For example, landlord-creditors must be paid post-petition rent (rent due after the Debtor has filed a bankruptcy petition). Debtors in pos-

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## EIGHT DAYS A WEEK The Timing of the Sublet Script

**A** residential tenant occupying an apartment pursuant to a lease in a building with four or more apartments has the right to request permission to sublet, which, pursuant to Real Property Law §226-b, the owner may not unreasonably deny.

The procedure itself contains a series of discrete steps for both owner and tenant, each of which has its own statutory time frame. The "sublet script" is as follows:

- Tenant submits a written request to sublet; the statute says this request must be submitted by certified mail – *BBW&G recommends that you deal with all sublet*

*requests in a timely fashion, even if not submitted via the proper form of mailing;*

- Owner must either request additional information pertaining to the request within ten days or consent or reject the request within 30 days (the failure to respond in 30 days is deemed to constitute consent) – *Unless the request is so meritorious on its face that you feel compelled to consent, or so defective that you have grounds to reject, BBW&G recommends sending a detailed questionnaire to*

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### Special Points of Interest:

- Obtaining possession from deceased tenant's estate.
- Check US Government list for alleged terrorists before executing real estate transactions.
- If you have not complied with New York City's new Carbon Monoxide Detector Law, you may be entitled to an extension.

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session of non-residential property must pay rent and additional rent. If a Debtor fails to pay post-petition rent, the landlord may file a Motion to Compel the Debtor to Pay Post-Petition Rent and Additional Rent. Alternatively, the creditor may file a Motion Seeking Relief from the Automatic Stay. This motion requests that the U.S. Bankruptcy Court demand that arrears be paid by a date certain, and/or permits the landlord to seek the Debtor's eviction from the property.

BBW&G has often been successful in obtaining relief from the automatic stay in both residential and commercial bankruptcy proceedings. For example, the firm recently obtained relief in two Chapter 7 bankruptcy proceedings in which individual Debtors filed for bankruptcy after the landlord had obtained warrants of eviction against them. BBW&G argued that each Debtor had filed its

bankruptcy proceeding frivolously in that neither Debtor had any intention of liquidating assets, but instead sought time to repay old debts. The Bankruptcy Court agreed with the landlord and granted both of the landlord's motions.

In other circumstances, such as where the Debtor is paying post-petition rent, BBW&G recommends that the landlord take certain steps to preserve its rights to collect old debts. Depending on the Debtor's assets, its creditors may be paid a high or low percentage of what they are owed. The Bankruptcy Court, however, will only recognize creditors who have filed a Proof of Claim with the Court.

BBW&G recommends that landlords file two Proofs of Claim with the Bankruptcy Court. One Proof of Claim should be filed pertaining to the arrears the Debtor owed at the time the bankruptcy proceeding was filed. The other Claim should reflect all arrears

due since the Debtor filed its bankruptcy petition. Two claims are necessary because the Court will pay post-petition debts before any pre-petition arrears.

By taking these steps, a landlord will preserve its right to collect arrears, keep track of the Debtor's progress and ensure that the bankruptcy proceeding is administered fairly.

*This article was written by BBW&G associate, Joshua G. Losardo. For questions pertaining to bankruptcy matters, please contact Mr. Losardo or BBW&G partner Daniel Altman.*



Joshua Losardo

## HELP! Carbon Monoxide Law Compliance Extension

**A**s reported in our September 2004 *UPDATE*, New York City's Carbon Monoxide Detector Law takes effect on November 1<sup>st</sup>, requiring all owners of buildings with fossil fuel burning furnaces or boilers to install carbon monoxide detectors in every apartment, within fifteen (15) feet of each bedroom. In addition, owners must give occupants written information on how to test and maintain the carbon monoxide detectors. (Owners may be reimbursed \$25 by the apartment occupant for each newly installed detector.)

If you require additional time to comply with the new law, BBW&G strongly recommends that you apply for an extension of

time as soon as possible, but certainly by December 1, 2004. According to the New York City Department of Housing Preservation and Development ("HPD"), which administers the new law, the Department of Buildings' borough offices may grant time extensions through June 30, 2005 for building owners to install the carbon monoxide detectors.

Requests for time extensions (Form LL-7 at the DOB), are available at BBW&G or online at <http://home.nyc.gov/html/dob/html/pdfinst.html#113>. According to the instructions available on the DOB's website, forms must be submitted in triplicate prior to December 1, 2004, be signed by

the building owner or manager and notarized prior to submission. On the form, the basis for the request for additional time must be included, as well as a signed contract for the purchase or installation of the carbon monoxide detectors. The form must be filed at the Department of Buildings' Borough Commissioner's Office in the respective borough office.

*This article was written by BBW&G associate Joshua G. Losardo. If you have any questions about complying with the Carbon Monoxide Law, please contact BBW&G partner Kara Rakowski or Mr. Losardo.*

## NOWHERE MAN: Check Terrorist List Before Transaction

**A**s part of a series of actions designed to combat terrorism on the economic front, Presidential Executive Order 132224, titled "Blocking Property and Prohibiting Transactions with Persons Who Commit, Threaten to Commit, or Support Terrorism," bars persons or entities from doing business with anyone on a US Government list of alleged terrorists.

To comply with this Order, owners must screen prospective tenants against a growing list of persons or organizations. Although penalties for noncompliance are not stated in the Executive Order, an owner signing a lease with a person or entity on the list may face criminal and civil penalties (as well as adverse media coverage).

The Executive Order applies to every real property owner, tenant, property manager, broker, real estate attorney, guarantor, agent, and any other party to a commercial real estate transaction, who is a so-called "United States person." The Executive Order applies to any U.S. organization, US citizen, any organization doing business in the US and any foreign branch of a US corporation.

The US Treasury's Office of Foreign Assets Control (OFAC) has promulgated a list, which is constantly updated, of more than

4,000 specially designated nations and blocked persons ("SDN's). The list can be found on OFAC's website at: <http://www.treas.gov/offices/eotffc/ofac/sdn/index.html>. There is a search engine for the list which can be found at: <http://www.nasdr.com/ofac/>.

In the event of a match, false positives can be checked at <http://www.treas.gov/offices/>

that criminal penalties are higher and range from \$50,000 to \$1 million, plus 10 to 14 years in prison. It is reported that even inadvertent violations can result in civil penalties.

Software programs are available to search the OFAC / SDN list electronically. Those renting or managing real estate should establish compliance procedures to avoid

doing business with anyone on the list. While there is debate over whether the PATRIOT Act's anti-money laundering provisions apply to property owners, this Executive Order does apply.

**The Executive Order applies to every real property owner, tenant, property manager, broker, real estate attorney guarantor, agent, and any other party to a commercial real estate transaction, who is a so-called "United States person."**

[eotffc/ofac/faq/one\\_page.html](http://www.treas.gov/offices/eotffc/ofac/faq/one_page.html). This site provides steps to follow to eliminate a possible match. If those steps are inconclusive, the site also provides a telephone number or e-mail address to verify if you have found a false positive; although a response may take weeks. The OFAC's hotline number is 1-800-540-6322.

While the chances of getting involved with a terrorist may be slim, the consequences of not complying with the Executive Order may be steep. It is reported that civil penalties range from \$11,000 to \$275,000 for each violation. It is reported

*This article was written by Robert Jacobs. For questions or concerns about compliance with this Executive Order, please consult one of the partners in our Transactional Department.*



Robert Jacobs

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the tenant fleshing out the details of the request. Our firm has developed its own questionnaire that is tailored to the specific requirements of RPL § 226-b, as well as the additional requirements imposed upon the requesting tenant by the Rent Stabilization Code. Because of the strict time frame for a response (whether a rejection or a request for more information), always save the envelope in which the request is made because the post mark can be critical!

- The tenant responds to the request for additional information – There is no time frame within which this must occur. Until the tenant responds to the request for more information, the process is frozen and the tenant can-

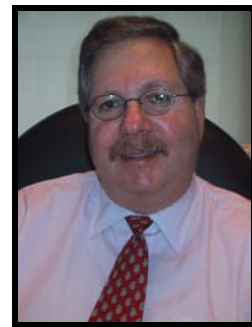
not proceed with the sublet.

- Within 30 days from the tenant's response to the request for additional information, the owner must consent or reject the request within 30 days (again, the failure to respond in 30 days is deemed to constitute consent) – If the owner elects to reject the request, the owner should set forth its reasons in detail. If the tenant challenges this denial as unreasonable or proceeds to sublet despite the rejection, it is the rejection letter itself that the court will review in determining the reasonableness of the owner's rejection. Therefore, this rejection letter must carefully create a nexus between the defective elements of the request and the statutory and code requirements.

The failure by an owner to

follow these strict time requirements can transform a defective request into a deemed consent. Therefore, in order to maintain control over who occupies your property, an owner must not only take all of the requisite steps, but must also take each step within the brief time frames permitted by law.

This article was written by Sherwin Belkin. For any questions pertaining to residential sublet or assignment requests, please contact Mr. Belkin.



Sherwin Belkin

## **A DAY IN THE [AFTER] LIFE Where There's No Will, There's A Way**

**W**hen a leasehold tenant dies intestate (without a will), how does the owner-landlord obtain legal possession of the apartment? The normal means to start an eviction proceeding (nonpayment or holdover) no longer apply after the tenant dies. Since there is no legal person to sue, a court case may not be brought (*please note – the rules discussed in this article do not apply to a deceased rent controlled tenant since that tenant occupies pursuant to statute and not pursuant to a lease*). After a tenant dies without a will, we must take off our landlord-tenant hat and put on our surrogate's court chapeau.

To obtain legal possession of an apartment when a leasehold

tenant dies without a will, it is the Public Administrator of the county in which the apartment is located that can surrender the property to the owner. The owner must apply to the Surrogate's Court to have the Public Administrator appointed. Since the owner has an interest in the apartment the owner has the right to participate in this process.

Before the Surrogate's Court will consider the Petition to have the Public Administrator appointed, a few preliminary steps must be taken by the landlord to expedite the appointment. First, BBW&G can obtain a certified copy of the death certificate from the Department of Vital Statistics. The decedent's date of death, name, social security number and

address are needed in order to get the death certificate. The landlord is also required to make diligent efforts to contact any known relatives and ascertain whether any other distributees exist. This can be accomplished by reviewing the information in the death certificate, as well as the information the owner may have in its tenant file. Under NYCRR 207.16, the landlord must verify by sworn statement the efforts made by it to ascertain whether any distributees of the deceased exist. Additionally, proof of attempts to contact known relatives must be provided to the Surrogate's Court. Third, the Surrogate's Court requires the landlord to search the

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Surrogate's Court records to determine if there are any other known living relatives and to verify that no other executor has been appointed.

After the preliminary steps have been taken, the landlord may petition the Surrogate's Court for the appointment of the Public Administrator as the executor of the estate (the estate's legal representative). A court date will be scheduled to appoint the Public Administrator. Once the Petition has been filed the landlord must serve the known relatives (or obtain waiver of service from such relatives) and serve the Public Administrator and inform all persons served of the court date. Once the Public Administrator is appointed, there is now a person with legal author-

ity to act on behalf of the estate.

There are several further steps that must be done in order to deliver possession back to the owner. The Public Administrator conducts a search of the apartment, looking for information about relatives, bank accounts, bearer bonds, and for other valuables such as antiques, cash, art work and so on. After conducting an inventory and removing the items the Public Administrator deems of value, the Public Administrator then prepares an affidavit of possession indicating that the estate has no further interest in the apartment. After delivery of the affidavit to the landlord, the landlord is free to re-let or, sell the apartment if it is a condominium or cooperative apartment.

Even after a tenant dies, rules and regulations impact the

landlord-tenant relationship. Compliance with those requirements can expedite recovery of your valuable property.

*This article was written by Martin Meltzer and Jordi Fernandez who are a partner and an associate in BBW&G's Litigation Department. If you have any questions relating to this article, please contact Mr. Meltzer or Mr. Fernandez.*



Jordi Fernandez & Martin Meltzer

## BBW&G News

**Howard Wenig** was named to **Hudson Valley Bank's** Business Development Board. As a member of the Bank's Business Development Board, Mr. Wenig will assist Hudson Valley in its future growth and expansion and help the Bank successfully compete in today's market. In announcing Mr. Wenig's appointment, **James J. Landy**, Bank Vice President noted that "members of the Business Development Board are valuable members of the Hudson Valley Team."

**Joseph Burden** was a featured speaker at the Rent Stabilization Association's October 28<sup>th</sup> seminar. Mr. Burden addressed the various grounds on which a holdover proceeding may be predicated.

**Matthew Brett** was the program co-chairperson of the Association of the Bar of the City of New York's seminar entitled "How to Successfully Navigate, Litigate and Resolve Mold Issues." This November 1<sup>st</sup> Continuing Legal Education program was specifically geared towards Housing Court practice.

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**PLEASE NOTE:** This newsletter is intended for informational purposes only and should not be construed as providing legal advice. This newsletter provides only a brief summary of complex legal issues. The applicability of all or any of the issues described in this newsletter is dependent upon your particular facts and circumstances. Accordingly, it is suggested that prior to attempting to utilize or implement any of the suggestions provided in this newsletter, you should make sure to consult with your attorney.

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