

THE DANGERS IN LOSING TRACK OF PERSONAL GUARANTIES

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Did you know that most loans require the death of a borrower or guarantor be reported within 30 days? If you die, will your Successor Trustee have all of the information that he or she needs to prevent a default under loans that you personally guaranteed (or for which you may be an individual borrower)? Did you know that your Successor Trustee could have personal liability if he or she distributes trust assets and later learns of guaranteed obligations? Asking these questions is a very important part of the estate planning process and one that is often overlooked. If you are not tracking your loans and personal guaranties, it is likely that your Successor Trustee will not timely have the information he or she needs to prevent a default under your loan(s) or from taking actions that could cause your Successor Trustee to incur significant personal liability.

As an example, assume that you are one of three guarantors on a \$20 million loan, and the guaranty negotiated with the lender requires the guarantors to collectively maintain \$6 million in liquidity, and collectively with your other two guarantors maintain \$35 million in net worth. What happens when one of you dies? Will your Successor Trustee know how quickly your death needs to be reported to the lender, or whether your death constitutes a default of the loan? Does the loan allow for a replacement guarantor to be provided in your place? If you don't have the answers to these questions readily available, your Successor Trustee won't know and may not even think to ask. Failing to timely address the death of a borrower or guarantor with lenders can thwart the efficient administration of a trust and could decrease the overall value of the trust estate.

In light of the foregoing concerns, the following steps may help avoid several problems in administering a trust estate following a borrower's or guarantor's death:

1. Discuss with estate planning counsel all loans that have been personally guaranteed and consider attaching a Schedule of Loans to the trust that lists all loans for which you have

personal liability. This Schedule of Loans can be updated by the borrower or guarantor when additional loans involving personal liability are made. By having a Schedule attached to the trust that identifies personally guaranteed loans (or loans for which the borrower is an individual), the Successor Trustee will be able to efficiently address the borrower's or guarantor's death with lenders to avoid a potential default and to provide an acceptable substitute guarantor, if necessary. The Schedule of Loans should, at a minimum, identify the name of the borrower, the address of the property securing the loan, the name of the lender, the amount of each personal guaranty and the time limit to notify a lender upon the death of the guarantor.

2. Be proactive with estate planning and real estate counsel when obtaining loans and guaranties. Discuss any loans for which you may have personal liability in the future. Estate planning counsel may include language in the estate planning documents that allows a Successor Trustee to retain trust assets until issues of loan guaranties are resolved. Also, real estate counsel may review language in the loan documents and include language in loan documents that will address the death of an individual borrower or guarantor. Real estate counsel may also be able to negotiate with the lender to allow for a replacement guarantor and to address other estate planning issues.

By working with your estate planning and real estate counsel in advance, you can make your trust administration easier for your Successor Trustee. Simply preparing and attaching a Schedule of Loans (similar to the one attached) will provide your Successor Trustee with an easy reference guide for all of your lenders' requirements when reporting your death. In addition, by proactively working with your real estate counsel when negotiating loan documents, you can ensure that requirements imposed by lenders are feasible and work within your overall estate or succession plan.

Our firm can assist you in negotiating loan documents and creating an effective estate plan with a clear procedure for your Successor Trustee to understand the consequences of personal guaranties and how to properly administer these very technical issues.

Please contact William H. Davis, the head of our Estate Planning Department, or Heather C. Johnston, a member of our Transactional Real Estate Department, if you would like us to assist you with these needs.