COMMERCIAL LAW
IDC Defense UPDATE
OCTOBER 2012
VOL. 13 NO. 6
A publication generated by the Illinois Association of Defense Trial Counsel Commercial Law Committee

Now Condominium Owners May Assert Inadequate Services as a Defense to a Condominium Association's Forcible Entry and Detainer Act Proceeding

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Historically, condominium owners behind on their assessments have been told to pay up, regardless of whether the condominium association took care of common property. But in a case of first impression, the Second District of the Illinois Court of Appeals issued a ruling that could dramatically change the course of association collection proceedings.

In *Spanish Court Two Condominium Association v. Carlson*, 2012 Ill. App. LEXIS 544, 2012 Ill. App. 2d 110473 (2nd Dist. 2012), the condominium association brought an action against the unit owner under the *Forcible Entry and Detainer Act*, 735 ILCS 5/9-111 (West 2010) (the "Forcible Entry Act"). The condominium association sought possession of the condominium unit and an award of unpaid general and special assessments, late fees, court costs, and attorneys' fees. The unit owner admitted to not paying the assessments, but asserted two affirmative defenses. *Id.* at ¶ 10. She argued that the association's alleged failure to maintain the roof and brick façade of the building estopped the condominium association from recovering past-due assessments and associated late fees, costs, and attorneys' fees. *Id.* Alternatively, she maintained that any monetary award against her should be reduced by the cost of repairing the damage to her unit caused by the association's failure to maintain these common elements along with allegedly faulty repairs made to the toilet in her unit. *Id.* The unit owner also asserted a counterclaim against the association for monetary damages resulting from the water infiltration to her unit. *Id.* at ¶ 11.

The condominium association moved to strike the unit owner's affirmative defenses and to sever her counterclaim. *Id.* at ¶ 12. The trial court struck the affirmative defenses and reassigned the counterclaim to another division of the circuit court without explanation. *Id*. The appellate court held that the trial court was correct in severing the counterclaim, but that the unit owner may assert the condominium association's failure to maintain the common elements as an affirmative defense.

The appellate court, after examining the Condominium Property Act and the condominium association's Declaration and Bylaws, ruled that the condominium association was duty-bound to repair and maintain the common elements, and in exchange, the unit owner was obligated to pay assessments to the association. *Id.* at ¶ 26. If the association is not providing the requested services, said the court,

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the owner can assert that failure as a defense to her non-payment of assessments. *Id.* at ¶ 27. The court also analyzed the Forcible Entry Act as it applies to cases for nonpayment of rent. After reviewing the relevant case law, the court noted that a tenant may challenge the amount of rent or late fees claimed by asserting:

> (1) that the lease did not actually call for rent or late fees in the amount claimed . . . , (2) that the rent charged was unconstitutional or otherwise illegal . . ., or (3) that a setoff was due because of a provision in the lease for rent credits . . . or because the landlord breached an express or implied duty to repair. . . .

Id. at ¶ 23. Comparing the relationships between landlords and tenants to condominium associations and unit owners, the court noted that "just as the contract principle of mutually exchanged promises can justify a tenant's refusal to pay rent, so that principle can justify a condominium unit owner's refusal to pay assessments. . . ." *Id.* at ¶ 42.

The appellate court's ruling was limited in two significant respects. First, a unit owner may not withhold assessments based on a failure to maintain or repair the individual's unit. The owner in *Spanish Court* asserted, as a part of her affirmative defense, water damage to her unit. The court concluded that the unit owner's duty to pay assessments was not contingent upon the association making repairs to her unit. Consequently, these damages had "no relevance to the issue of possession" and were not properly the basis of an affirmative defense. *Id.* at ¶ 43. Second, the court also limited the unit owner's affirmative defense by finding that she could not counterclaim against the association for monetary damages to her unit in the Forcible Entry Act proceedings because these damages were not "germane." While the unit owner claimed monetary damages for water infiltration and problems with her toilet that were allegedly caused by the association's faulty repairs, these claims had no bearing on whether the unit owner was entitled to possession of her unit. The reasoning, said the court, is that the promise to pay assessments does not include the promise that no harm will be done to the unit itself or the personal property inside. *Id*. The condo owner, said the court, would need to raise those damages in a separate lawsuit.

The appellate court also recognized a distinction between regular monthly assessments and special assessments. *Id.* at ¶ 25, n.5. In dictum, the court noted that an association could potentially advance a claim for unpaid special assessments, despite a unit owner's affirmative defense against payment of the regular monthly assessments. The court reasoned that the regular monthly assessments are paid so that the association can maintain the common elements. *Id.* On the other hand, special assessments can have no relation to the maintenance of the common elements of the building. *Id.* In such circumstances, a failure to maintain common elements may not be a ground for withholding payment of special assessments.

This case has the potential to significantly change association collection proceedings. Forcible Entry Act proceedings are meant to be quick. But in light of this decision, more owners will likely assert inadequate services as a defense to non-payment of assessments. This defense may lead to more discovery regarding the association's services of the common elements. In the end, however, the owner still bears the burden of proving that the defense applies.

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Court Upholds Limitation of Liability in IRA Agreement

by Bruce H. Schoumacher
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In a recent case, the Illinois Appellate Court used the limitation of liability provisions of an IRA agreement to deny recovery to IRA investors who lost money on their purchases of certain limited partnerships and participation agreements. *Tucker v. Soy Capital Bank and Trust Co.,* 2012 IL App (1st) 103303, 2012 Ill. App. LEXIS 526 (1st Dist. 2012). The plaintiffs alleged that the IRA custodian had breached its "fiduciary duty" to accurately report the value of the plaintiffs' IRAs.

The plaintiffs desired to purchase certain limited partnership interests and participation agreements from an investment fund. *Id.* at *2. The investment fund directed all investors that they could make investments in the fund only through the defendant bank. *Id.* at *3. The plaintiffs each opened IRA accounts with the bank for their investments in the fund. *Id.*

Each plaintiff executed an IRA application, an investment direction, and a financial disclosure form with the bank. These documents contained limitation of liability provisions, stating that the account holder: (1) was solely responsible for his or her actions, (2) would hold the custodian bank harmless against his or her losses, (3) acknowledged that the value of the IRA could not be projected, (4) agreed that the custodian bank was not responsible for his or her losses in the IRA, and (5) would direct investments in the IRA. *Id.* at *6.

Subsequently, the U.S. Securities and Exchange filed a civil complaint against the investment fund and its principal, contending that they had defrauded the fund's investors as a result of a "Ponzi" scheme. *Id.* at * 3. The plaintiffs then sued the custodian bank to recoup the loss of their investments, claiming: (1) breach of fiduciary duties; (2) breach of the Illinois Trust and Trustees Act (760 ILCSA 5/1 *et. seq.* (West 2008)); (3) professional negligence; (4) breach of the Illinois Consumer Fraud and Deceptive Business Practices Act (815 ILCS 505/1 *et. seq*. (West 2008)); (5) breach of contract; (6) civil conspiracy for aiding and abetting a fraudulent scheme; (7) breach of duty under a bailment; and (8) willful and wanton misconduct. *Id.* at *9.

> Under Illinois law, the fiduciary duties between a bank and its customer are contained in the contract between them. According to the appellate court, Illinois courts have not placed any other fiduciary duties upon banks, even if the bank is a fiduciary.

The Bank moved to dismiss the complaint for failure to state a cause of action. The trial court granted the motion and the plaintiffs appealed. The appellate court noted that "the central issue in this case is whether the defendant bank owed plaintiffs the duty to investigate and verify the true value of the IRAs." *Id.* at *10. The appellate court decided that it did not and affirmed the dismissal.

Under Illinois law, the fiduciary duties between a bank and its customer are contained in the contract between them. According to the appellate court, Illinois courts have not placed any other fiduciary duties upon banks, even if the bank is a fiduciary. *First Midwest Bank/Joliet v. Dempsey,* 157 Ill. App. 3d 307, 313, 509 N.E.2d 791 (1987). Thus, the appellate court concluded that the limitation of liability provisions of the documents signed by

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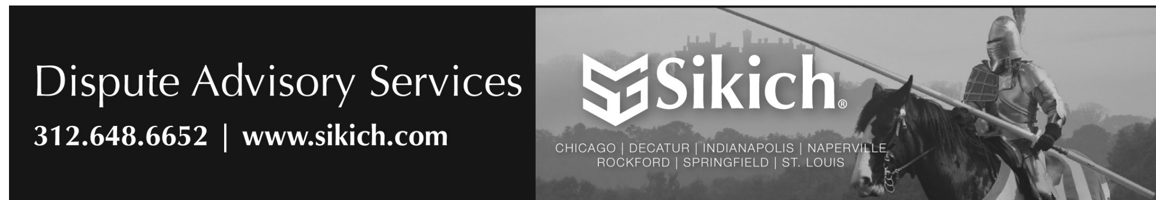
each of the plaintiffs could only be interpreted to show that the bank had no duty to verify the value of plaintiffs' investments. *Id.* at 18.

The plaintiffs also argued that certain oral representations of the bank's agents showed a breach of the bank's fiduciary duty. The appellate court rejected this argument, citing *Nilsson v. NBO Bank of Illinois,* 313 Ill. App. 3d 751 (1999). The court exclaimed that the plaintiffs had a duty to review the agreement and that they could not rely on alleged oral statements which countered the clear language of the agreement. *Id.* at 19.

The appellate court also found that the bank did not violate the Illinois Trusts and Trustees Act because the agreement clearly showed that the parties agreed to establish a custodial account, not a trust. *Id*. at *22. The court also held the bank could not be liable for professional negligence, because banks are not professionals. *Id.* at 29. Finally, the appellate court upheld dismissal of the remaining counts, because each failed to allege at least one essential element required for each of those counts to state a cause of action.

Although the plaintiffs tried several paths to recover their losses from the custodial bank, the appellate court recognized that the documents established custodial accounts and clearly limited the duties and liability of the bank. ■



Two New Cases on Tortious Interference Analyze the Parties' Burdens of Proof and Extend the Conditional Privilege of Corporate Officers to an LLC

by William Seth Howard
O'Hagan Spencer, LLC

In *Nation v. Am. Capital, Ltd.,* 682 F.3d 648, 2012 U.S. App. LEXIS 11214 (7th Cir. 2012), the Seventh Circuit analyzed the law in Illinois that grants a privilege to certain persons to interfere with a business entity's contracts, and found that once a privilege is established it is plaintiff's burden to put forth some evidence to rebut the presumption, which the plaintiff, Nation, failed to do.

American Capital financed HIG's acquisition of The Spring Air Company ("Spring Air") and as a result acquired a minority interest in Spring Air as well as a seat on Spring Air's seven-member board of directors. *Id.* at 650. As part of the acquisition, Nation, the CEO of Spring Air, was terminated with a severance package entitling him to $1.2 million in payments spread over 15 months. Shortly after the acquisition, Spring Air incurred significant financial problems and American Capital provided a series of capital infusions that resulted in American Capital becoming the majority equity holder and controlling four of the seven seats on the Spring Air board. In August 2008, Spring Air's board, which was controlled by American Capital, voted to cease making payments to the plaintiff and three other terminated executives due to serious liquidity problems. Nation sued Spring Air for the balance of his severance package, but in May 2009 Spring Air filed for bankruptcy under Chapter 7. Realizing recovery from Spring Air was a dead end, Nation brought this suit against American Capital alleging that American Capital tortiously interfered with his severance contract. *Id.* at 650.

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Plaintiff's theory was that American Capital used its majority position on Spring Air's board of directors to induce Spring Air to breach his severance agreement. The trial court held that American Capital was conditionally privileged to interfere with the severance agreement based on its status as Spring Air's majority shareholder and that Nation had not presented sufficient evidence to overcome the privilege. *Id.* at 649.

A claim for tortious interference with a contract requires proof of the following elements: (1) that the plaintiff had a valid and enforceable contract with a third party; (2) that the defendant was aware of the contractual relationship; (3) that the defendant intentionally and without justification induced the third party to breach the contract; (4) that the subsequent breach was caused by the defendant; and (5) that the plaintiff sustained damages. *Williams v. Shell Oil Co.,* 18 F.3d 396, 402 (7th Cir. 1994) (applying Illinois law). The third element of the test requires proof that the interference was "without justification." However, Illinois recognizes a conditional privilege to interfere with contracts "where the defendant was acting to protect an interest which the law deems to be of equal or greater value than the plaintiff's contractual rights." *Id.* at 652, quoting *HPI Health Care Servs., Inc. v. Mt. Vernon Hosp., Inc.*, 131 Ill. 2d 145, 545 N.E.2d 672, 677 (Ill. 1989). One interest the law deems to be equal or greater value than a plaintiff's contractual interest with a corporation is that of the corporation's officer, director or shareholder to act in the best interest of the corporation, even if such action induces the breach of the plaintiff's contract. Thus a corporation's directors, officers, and shareholders are conditionally privileged to interfere with the corporation's contracts. See, e.g., *Swager v. Couri,* 77 Ill. 2d 173, 395 N.E.2d 921, 928 (Ill. 1979). This conditional privilege is derived from the Business-Judgment Rule, which is a presumption that corporate officers and directors act in the interest of the corporation when making decisions for the corporation.

Once it is established that the defendant has a legal conditional privilege to interfere with a contract, the plaintiff has the opportunity to rebut this presumption by providing any evidence that the defendant unjustifiably induced the breach of contract: (1) for the specific purpose of injuring the plaintiff, or (2) to further its own personal goals thus acting against the best interests of the corporation.

The Seventh Circuit held that American Capital was conditionally privileged because: (1) it controlled a majority of Spring Air's board of directors and in that role had a conditional privilege to interfere with the company's contracts, and (2) American Capital's majority equity interest in Spring Air gave it the right to lawfully influence the actions of the company in pursuit of the company's affairs. *Id.,* citing *Langer v. Becker,* 176 Ill. App. 3d 745, 531 N.E.2d 830, 833 (Ill. App. Ct. 1988). Furthermore, the Seventh Circuit argued, in *dicta,* that American Capital's actions may also have been privileged based on its status as a creditor of Spring Air. *Id.* at 653, quoting *Connaughton v. Gertz*, 94 Ill. App. 3d 265, 418 N.E.2d 858, 862 (Ill. App. Ct. 1981).

Once it is established that the defendant has a legal conditional privilege to interfere with a contract, the plaintiff has the opportunity to rebut this presumption by providing any evidence that the defendant unjustifiably induced the breach of contract: (1) for the specific purpose of injuring the plaintiff, or (2) to further its own personal goals thus acting against the best interests of the corporation. *Von Der Ruhr v. Immtech Int'l, Inc.,* 570 F.3d 858, 866-67 (7th Cir. 2009). The Seventh Circuit pointed out in a footnote that Illinois courts are still unclear about who bears the burden of pleading and proving whether actions are unjustified. *Id* at 652, fn 2. However, once the

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conditional privilege is established, either in face of the complaint or via an affirmative defense, it is the plaintiff's burden to present some evidence to rebut the privilege. *HPI Health Care,* 545 N.E.2d at 677. Nation simply failed to offer any evidence that would rebut the presumption.

The court underscored that Nation's counsel was unable to point to any decision made by American Capital that was contrary to Spring Air's financial interests. *Id.* at 654. In fact American Capital had suspended the severance payments to a number of ex-employees and took additional measures to halt the company's cash-flow problems, such as deferring payments to vendors and renegotiating terms with suppliers. *Id.* Nation also attempted to argue that there was evidence that American Capital was acting for the specific purpose of hurting plaintiff because, although Spring Air had suspended severance payments to three other former executives, Spring Air eventually resumed severance payments to the other executives. *Id.* The court did not buy this argument because the resumption of payments to the other executives occurred after Nation began working at a competitor, while the others did not. *Id.* Therefore, the reason Nation's severance payments were not resumed were because he breached the severance agreement by working for a competitor, not because American Capital was specifically trying to injure plaintiff.

> The lesson of American Capital is that once the defendant establishes his conditional privilege it is not defendant's burden to prove its actions were justified. Plaintiff must put forth some evidence that the tortious interference was done solely to harm plaintiff or to further the corporate officer's own personal goals.

Finally, Nation argued that American Capital's effective control of Spring Air was "fatal" to its claim of privilege because American Capital was enmeshed in Spring Air's affairs, and thus its alter ego. The court pointed out that such a theory defeats the plaintiff's tortious-interference claim because "a party cannot tortiously interfere with his own contract; the tortfeasor must be a third party to the contractual relationship." *Id.* at 652. Furthermore, if this were the plaintiff's theory he should have brought a veil piercing claim.

The lesson of American Capital is that once the defendant establishes his conditional privilege it is not defendant's burden to prove its actions were justified. Plaintiff must put forth some evidence that the tortious interference was done solely to harm plaintiff or to further the corporate officer's own personal goals. If the plaintiff fails to do so the case should be dismissed.

Another recent Illinois Case, *6030 Sheridan Rd., LLC v. Wright*, 2011 IL App (1st) 93282U, 2011 Ill. App. Unpub. LEXIS 2401 (1st Dist 2011), expanded the conditional privilege of officers of a corporation to an "officer" of an LLC. The plaintiff, 6030 Sheridan Road, LLC filed a complaint against the defendant Andrew Wright ("*Wright*") and Wright Management, LLC alleging tortious interference with a business relationship and seeking injunctive relief and an accounting. *Id.* at ¶ 2. The parties agreed on appeal that Andrew Wright was the principal owner and officer of Wright Management, LLC.

Wright Management, LLC owned a residential apartment building located at 6030 Sheridan Road in Chicago and agreed to sell the building to the plaintiff which would convert the apartment units into condominium units to be sold to the public. *Id.* at. ¶ 8. A number of business disputes soon arose between Wright and 6030 Sheridan

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Road, LLC which eventually culminated in Wright changing the locks on the building at 6030 Sheridan Road and terminating the real estate development agreement between Wright Management, LLC and 6030 Sheridan Road, LLC. *Id.* at ¶ 16.

6030 Sheridan Road, LLC alleged that that Wright tortiously interfered with the business relationship between 6030 Sheridan Road, LLC and Wright Management, LLC. Wright brought a motion for summary judgment and first argued that he could not tortiously interfere with the contract because he was a party to the contract as the manager of Wright Management, LLC. The appellate court affirmed the trail court which held that Wright was not a party to the contract because Wright Management, LLC was a legal entity distinct from Wright pursuant to 805 ILCS 180/5-1(c) (West 2002). *Id.* at ¶ 36.

Wright next argued that his interference with the contract was conditionally privileged as an officer of Wright Management, LLC. The Illinois First Appellate Court pointed out that the Illinois Supreme Court had not had cause to consider whether officers of an LLC are privileged to interfere with their company's contracts, and that the issue was one of first impression. *Id.* at ¶ 83. The court held:

> as an owner and officer of Wright Management, LLC with managerial authority, Andrew Wright owed fiduciary duties of care and loyalty to his company that are similar to the fiduciary duties owed by a corporate officer and director. See 805 ILCS 180/15-3 (West 2002). The fiduciary duty of care necessarily requires the officer of an LLC to exercise sound business judgment on behalf of his company, just like a corporate officer must exercise sound business judgment on behalf of his corporation.

Id. at ¶ 38.

Once the court established that Wright owed the LLC certain fiduciary duties, it then held that "the fiduciary duties owed by Andrew Wright to Wright Management, LLC, which include the exercise of sound business judgment on behalf of the company, are at least of equal value to plaintiffs' contractual rights and, as such, he was conditionally privileged to interfere with those contracts in order to further the company's interests in accordance with his fiduciary duties." *Id*. at ¶ 38.

After finding Wright was conditionally privileged to interfere with the contract between 6030 Sheridan Road, LLC and Wright Management, LLC, the court also found that the plaintiff failed to rebut the privilege. Plaintiff did not put forth any evidence that Wright's actions were unjustified, *i.e.,* that Wright's intent was to act solely for his own gain or for the purpose of harming the plaintiff. *Id.* at ¶ 43. Thus the court affirmed the grant of summary judgment. *Id.* at ¶ 45.

The Illinois Supreme court has never ruled on this issue, and it is interesting to note that the record does not mention whether Wright was a member of a member-managed LLC, a manager of a manager-managed LLC or a member of a manager-managed LLC, and if the latter, whether he was exercising "managerial authority" under 805 ILCS 180/15-3(g)(3) (West 2002). It is very possible that a member of a manager-managed LLC who was not exercising "managerial authority" would not qualify for the conditional privilege to tortiously interfere with the LLC's contracts and so each case should be treated distinctly. ■

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A Reminder to Read All of What You Sign. A Continuing Guaranty Trumps a Line of Credit for a Specific Amount

by John J. O'Malley
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In *TH Davidson & Co. Inc. v. Eidola Concrete, LLC*, 2012 IL App (3d) 110641, 972 N.E.2d 823 (3rd Dist. 2012), Eidola Concrete, LLC ("Eidola Concrete") wanted to purchase ready-mix concrete and other materials from TH Davidson & Co. Inc. ("Davidson"). The co-manager of Eidola Concrete filled out a "Credit Application/Sales Contract" and requested a $1,000 line of credit from Davidson. *Id.* at ¶ 3. The co-manager also signed a personal guaranty on the "Terms and Conditions" page of the credit application. *Id.* at ¶ 6. He thought his guaranty was limited to the requested $1,000 line of credit. He was wrong.

Eidola Concrete ended up owing Davidson $5,600.80. When Eidola Concrete didn't pay, Davidson sued both Eidola Concrete and Thomas Kilbride, the co-manager. Eidola Concrete stipulated that it owed Davidson $5,600.80. *Id.* at ¶ 4. However, Kilbride, pointing to the written Credit Application/Sales Contract, argued that he was personally liable for only $1,000 — the amount of the requested line of credit. The trial court found that Kilbride's personal guaranty was not limited by the amount of the requested line of credit and found in favor of Davidson against Kilbride for the full $5,600.80. *Id.* at ¶ 7. Kilbride appealed arguing that he personally guaranteed only $1,000.

Although the parties apparently did not focus on it in their briefs, the appellate court found that the "dispositive issue in this case invokes the law on continuing guaranties."

According to the Restatement (Third) of Suretyship and Guaranty:

> A continuing guaranty is a contract pursuant to which a person agrees to be a secondary obligor for all future obligations of the principal obligor to the obligee.

Restatement (Third) of Suretyship and Guaranty § 16 (1996). When is a guaranty a continuing guaranty? When the parties look to a future course of dealing or a succession of credits, it is generally considered a continuing guaranty. *Id.* at ¶ 11.

> The law on "continuing guaranties" in Illinois is of long standing. It is interesting to note that, with one exception, the most recent case cited by the *Davidson* court on the continuing guaranty issues was a 1930 case.

In *Davidson*, the court found there was no question but that the parties contemplated a future course of dealing through the contract. Davidson agreed to supply materials to Eidola Concrete on credit and the contract referred to separate purchase orders. Most importantly, the guaranty language Kilbride had signed provided:

> By signing below, the undersigned acknowledges that, as a principal of the Contractor, the undersigned will benefit financially by Davidson extending credit to the Contractor and that, in consideration of Davidson's extending credit to the Contractor under the terms hereof, and for other good and valuable consideration, the receipt and sufficiency of which are hereby

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> acknowledged, and to induce Davidson to extend credit to the Contractor, the undersigned hereby agrees to guarantee the payment in full of any amount owing to Davidson by the Contractor at any time.

Id. at ¶ 6. The court found that language was evidence that Kilbride's personal liability was continuing, specifically the language, "undersigned hereby agrees to guarantee payment in full of any amount owing to Davidson by the Contractor [Eidola Concrete] at any time. *Id.* at ¶ 12.

The court rejected Kilbride's argument that his liability was limited to the $1,000 amount listed in the line of credit application by noting that for "over a century Illinois law has been clear" that:

> In the absence of an expressed intention in the contract that the maximum amount of credit specified is to be a limitation on the amount of credit to be extended and an absolute condition of the guarantor's undertaking, the extension of credit beyond that amount does not discharge or release the guarantor of liability on the specified amount.

Id. at ¶ 13. The law on "continuing guaranties" in Illinois is of long standing. It is interesting to note that, with one exception, the most recent case cited by the *Davidson* court on the continuing guaranty issues was a 1930 case. Although the result might seem a bit harsh, the court did note that a continuing guaranty can be terminated by the continuing guarantor giving notice to the obligee. Unfortunately for Kilbride there was no evidence that he ever attempted to terminate the continuing guaranty. *Id.*

The lesson is simple but clear. If you sign a personal guaranty for "any amount" owed to the obligee "at any time," your liability is not limited to any specific amount requested or agreed to. ■

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