

SB582_FAV_Hettleman.pdf

Uploaded by: Hettleman, Shelly

Position: FAV



The Senate of Maryland
ANNAPOLIS, MARYLAND 21401

TESTIMONY OF SENATOR SHELLY HETTLEMAN
SB 582 – COMMERCIAL TENANTS – PERSONAL LIABILITY CLAUSES – ENFORCEABILITY

Many small businesses across the country are suffering because of COVID-19 and we're all aware of businesspeople in Maryland who are struggling because of the restrictions that have been placed on them, through the Governor's Executive Orders (as well as County Executives' and the Mayor's orders) as part of an effort to control the virus. Restaurants and bars and nonessential services were forced to be shuttered for quite some time, first statewide, and more recently subject to the restrictions of each particular jurisdiction. Businesses have lost millions of dollars, many have been forced to close, and many are behind in rent and owe substantially for a variety of financial liabilities.

It is pretty standard business practice for commercial leases to have personal guarantees in them, enabling a landlord to pursue the personal assets of the borrower if there's an inability to pay. I believe, in the midst of a pandemic, when through no fault of their own, a business is forced to close and there's a forced loss of ability to pay, that government should step in to provide assistance and to help manage that process. This bill is one such way to approach that.

The bill says that for a set period of time – from March 23, 2020 to September 30, 2020 – a personal liability clause is unenforceable, if as a result of the Governor declaring a state of emergency on March 5th, the commercial tenant was required to: 1) cease serving patrons food or beverage for on-premises consumption or 2) close to the public due to its status as a nonessential business.

It doesn't say that the tenant isn't responsible for the debt and it doesn't say that the landlord cannot go after the debt in another way – through repossession or late fees, or any variety of actions – but it does say that the personal liability clause is unenforceable.

This bill is based on [action that was taken in New York](#) in response to the COVID-restrictions on business there, and the city council enacted a bill quite similar to this one. The bill was challenged in court and [was upheld](#) in November.

We believe it is narrowly drawn and is good public policy to help our small business community during these very challenging times.

SB 582.pdf

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Position: UNF



Senate Bill 582 - Commercial Tenants - Personal Liability Clauses - Enforceability

Position: Oppose

The Maryland REALTORS® appreciates efforts to assist small and struggling businesses which have been forced to temporarily close due to the COVID pandemic. However, SB 582 will negatively impact other Maryland small businesses by altering private contracts between commercial landlords and tenants.

Though SB 582 allows a landlord to recover rents due from the tenant, the likelihood of that happening without a personal guarantee is slim. When the property is leased to an LLC, that entity often has very few assets for the landlord to collect. In that case, there is little incentive for a tenant to provide any rent payment to their landlord.

Many of Maryland's commercial landlords are themselves small entities. They often need these personal guarantees from their tenants to obtain their own financing for the property from lenders. By making personal liability clauses unenforceable, a commercial landlord may be in technical default on their loan for the building. This harms the landlord and the lender, and makes it harder for businesses to obtain commercial financing in the future.

Finally, SB 582 does not account for a tenant's existing assets or ability to make full or partial rent payments in spite of the closure. In some circumstances, the commercial tenant is a larger entity and has more capital than their landlord. This bill could provide the larger tenant relief while providing less to the smaller landlord.

Most landlords are proactively working with their tenants and making whatever accommodations they can, because the likelihood of filling vacant commercial properties in the current environment is very uncertain. REALTORS® support more balanced proposals which provide relief to both landlords and tenants who have been harmed during the past year. SB 582 helps only one of those parties at the expense of the other.

We ask for an unfavorable report.

**For more information contact bill.castelli@mdrealtor.org,
susan.mitchell@mdrealtor.org or lisa.may@mdrealtor.org**

SB 582 - BOMA - UNF.pdf

Uploaded by: Popham, Bryson

Position: UNF

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February 16, 2021

The Honorable William C. Smith, Chairman
Senate Judicial Proceedings Committee
2 East, Miller Senate Office Building
Annapolis, Maryland 21401

RE: Senate Bill 582 - Commercial Tenants - Personal Liability Clauses – Enforceability - UNF

Dear Chairman Smith and Members of the Committee,

I am writing on behalf of the Building Owners and Managers Association of Maryland (BOMA), to respectfully request an unfavorable report on Senate Bill 582.

BOMA, through its nearly 300 members, represents owners and managers of all types of commercial property, comprising 143 million square feet of office space in Baltimore and Central Maryland. Our members' facilities support over 19,000 jobs and contribute \$2.5 billion to the Maryland economy each year.

Provisions in commercial leases imposing personal liability represent important security for landlords to guarantee the performance of tenants under such leases. Although not found in every commercial lease, these provisions often represent the difference for a landlord, in deciding to offer the leased premises to a prospective tenant or declining to do so. Senate Bill 582 would make the use of personal liability provisions impracticable.

There are a number of defects with Senate Bill 582, beginning with the question whether the proposed law would be constitutional in its application. The bill clearly changes the terms of all existing commercial leases coming within its scope. It would therefore apply retroactively, and would impair many existing lease agreements and also any personal guaranties of such leases.

Additionally, the term "commercial lease" as defined in the bill is so ambiguous that it may, in the judgement of a court, be found unconstitutionally vague and therefore unenforceable. We note that the definition found in lines 16-18 on page 1 of the bill includes the intention of the tenant to use the premises for a "nonresidential use" - without further definition of that term. This "intention" would apply whether or not the lease itself refers to such a use.

Also on page 1, the bill defines a "commercial tenant" and, in the definition of "personal liability clause" refers to an individual who is not a commercial tenant. The interaction of those two defined terms invites the question whether an individual who owns a corporation that will become a commercial tenant can personally guarantee performance under a lease. Although logical reasons abound for a personal guarantee, such a practice would apparently make the personal liability clause unenforceable if Senate Bill 582 is enacted.

There are other defects with the language of Senate Bill 582 as well. Although the ostensible purpose of the bill is to protect individuals from obligations under commercial leases if they are unable to perform as a result of a declaration by the Governor of a state of emergency, the unenforceability provisions in the bill are not tied to that act. On page 2, lines 13-15, the triggering of an unenforceable personal liability clause occurs exclusively if the tenant's default took place between March 23, 2020 and September 30, 2020, irrespective of whether such default had any connection to the Governor's declaration of a state of emergency. There could be many reasons for a tenant's default which have nothing to do with the effects of the Governor's declaration, but the bill makes no distinction and applies the penalty against commercial landlords too broadly.

Furthermore, lines 16-18 on page 2 prohibit a commercial landlord from attempting to enforce a personal liability clause if the landlord "knows or reasonably should know" that the provision is unenforceable. This places the burden on the commercial landlord of making a legal judgement with regard to enforceability that the landlord is likely unqualified to render. Making this dilemma even more hazardous for the landlord, lines 19-21 on page 2 would subject the commercial landlord to payment of attorney's fees and court costs for seeking to enforce a personal liability clause in violation of the above language.

For these and other reasons, BOMA respectfully requests an unfavorable report on Senate Bill 582.

Very truly yours,

A handwritten signature in black ink that reads "Bryson Popham". The signature is written in a cursive style with a long, sweeping tail on the final letter.

Bryson F. Popham

cc: Kevin Bauer
Joan Smith