
Structuring Commercial Real Estate Lease Guaranties: Good Guy Guaranties and Guarantor Waivers and Limitations

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**Structuring Commercial Real Estate Lease Guaranties:
Good Guy Guaranties and Guarantor Waivers and Limitations**

Jeffrey A. Margolis, Esq.

The Margolis Law Firm

Table of Contents

Introduction

Guaranty-- Generally

The “Good Guy” Guaranty

Introduction

Is it “Y” or “EE”?

Lexicographers say “guaranty” is a noun and “guarantee” a verb form.

Landlords need to secure Tenant's obligations

Guaranty defined: A tri-partite agreement whereby one party undertakes to secure payment or performance or both of another

Parties: tripartite--creditor, obligor and guarantor

Guaranty: General

Guaranty defined: to find collateral undertaking to answer for the payment or performance of another.

38 Am Jur2d Guaranty Sec.1(1991)

“A fool with a pen.”

Anonymous

Types of Guaranties:

Full or Limited

Covering

Payment and/or performance and/or collection

Who needs a Guaranty, anyway?

Is a guaranty necessary?

The search for a decent guarantor--due diligence

Alternatives to a guaranty:

Credit worthy Tenant (hard to come by!)

Substantial Letter of Credit

Substantial security deposit

Thank you for attending (read no further)

Key issues

Guarantor--corporate or individual

Duration--time limits--keyed into certain events

Scope-

payment==fixed sum

performance--an event, such as achieving certain sales goals

collection

Extent of liability

Either open or limited to a fixed sum

Release by death or disability--successors and assigns

The Landlord's Balancing Act

- Landlord must offer favorable terms to attract Tenants
- At the same time, they need to secure their Tenant's performance
 - Balance changes with the market
- Tenant/Guarantor: clout or clout challenged?

Limited Guaranties

To ameliorate the extremely broad scope of liability which is the hallmark of the full guaranty, Tenants brokers and lawyers advocate for the limited guaranty.

Limited Guaranties: continued

Varieties of limitations:

Specific dollar cap

Duration

Step-up/down liabilities

Tie the guaranty to Tenant's net worth or income

Limited Guaranties: continued

What parameters are negotiated?

Payment only

No joint and several: must go after Tenant first

Cap total liability

Base rent plus reimbursement for certain costs

Base rent + taxes + operating expenses

plus expenses incurred in initiating the lease

Limited Guaranties: continued

- Outside date for guaranty to end
- Burn off liability
 - Makes sense as Landlord is amortizing these amounts each year
 - Diminished exposure
 - from Landlord's POV, add as prerequisite: "provided the Tenant is not in default"
- Release of guarantor
 - Death, Disability, or Resignation.
 - provided a certain minimum number of shareholders or partners or members with collective minimum net worth of \$X remain on the hook

Guaranty: General

It's a contract so to be enforceable:

In writing and signed (to comply with statutes of frauds)

supported by consideration (here, the lease)

Practice note:

Include guaranty as part and parcel of lease

Have guarantor acknowledge that it is giving the guaranty as inducement to action by Landlord

Guaranty: Formalities

Due care to be given as to signing:

Have the document notarized

Ask for guarantor's social security number

Take care that guarantor signs in his or her personal capacity only

Problems with corporate titles

Guaranty: Formalities

Who should sign?

Majority owners, partners, and shareholders

Joint and Several Liability:

Sorry to disappoint, but you cannot collect more than one debt

- Sign guaranty when lease is signed

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Landlord

Drafting Guaranty Language

A guarantor is only bound by the precise words in his contract.

G.F. Bus Equipment 7 Ohio 3RD at 221

General Guaranty: Fixing Guarantor's Liability

Make duration of guarantee long enough to cover amortized expenses or guarantor pays a lump sum to reimburse

Note: If representing the Tenant make sure that the Landlord's expenses are amortized

Strict Construction of Guaranties

Blockbuster case:

Guarantee said that guarantor guaranteed the obligations of Tenant;
Lease was assigned and assignee defaulted; Georgia Court of Appeals said
guarantor was not liable as guaranty did not extend liability to successors and
assignees

Blockbuster Investors vs. Cox Enterprises, 724 S.E.2d 813 (2012);314 Ga. App. 506

General Guaranty: Special Advisories

Caution: A material alteration of a guaranteed lease made without the guarantor's consent will operate to release the guarantor from liability under the guaranty.

In New York, the rule extends to modifications made between the Landlord and Tenant or between an assignee of either or both parties without the guarantor's consent.

Then guarantor's obligations are then discharged completely.

even a non-material modification of the lease may be sufficient to discharge the guarantor from liability

Guarantor's Defenses

Mainly based on post execution conduct that alters guarantor's obligations

Suretyship defences

Add explicit waiver of suretyship defenses

Traps for the unwary Landlord: Defenses to guaranties

The Landlord's strategy would be to get guarantor to prospectively consent to all changes and modifications

Drafting Tips For Landlord's Counsel

Put no title after signature in order to avoid a later claim that document was signed in a corporate capacity

Include waiver of personal service of process-- mail (service on agent) will suffice

to find the right guarantor obtain the list of shareholders, partners, etc

Have the list of percentages of ownership confirmed by the CFO

Practice Note: If the Landlord is required to keep confidential guarantor's financial documents, add an exception for litigation

Drafting Hints

Be specific

Be sure any money is exclusive of costs of collection and attorney's fees

Scenario where Landlord spends more on collection than guarantor is obligated to pay under guarantee

Drafting Issues

Concerning duration--extensions and renewals

Where guaranty is not limited to a stated term does it extend to renewals and extensions

Possible discharge of guarantor

Best to be explicit: guaranty extends to all

Formalities of Execution

Especially if corporate guarantor

Check due formation of guarantor and board resolution authorizing signing

Negotiating Points

Waiver of trial by jury

 favored by Landlords because of delay cost and potentially sympathetic jury

Joint and Several Liability Issues

Due Diligence on Credit Worthiness of Guarantor

Good Guy Guaranty (Who wants to be known as a bad guy, anyways?)

Old days: general (full) guaranty, payment and performance and collection morphed into the good guy guaranty, which motivates the troubled Tenant to be a “good guy” by promptly vacating and surrendering possession

The basic “good guy”

“Ok, four months security deposit and we’ll need the ‘standard’ good guy from Joe.”

Q: Who and what is the “standard” “good-guy” ? A: It depends.

The “good guy” a form of limited guaranty designed to assure the Landlord a dependable cash flow

“and we’ll add payment and performance”

Through the completion of certain negotiated limitations: Get the space back to Landlord vacant, clean and with all amounts due paid by Tenant up to expiration/surrender.

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**Structuring Commercial Real Estate Lease Guaranties:
Good Guy Issues**

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Attorneys at Law

A. What is the scope of the Good Guy Guaranty?

- Good Guy Guaranty is a limited personal guarantee that enables Landlord to pursue Guarantor personally to recover damages for Tenant defaults until the time that Tenant delivers vacant possession to Landlord.

1. Fixed Rent Only?
2. Additional Rent?

Note: Non-waiver provisions in leases may allow a Landlord to “surprise” a Good Guy Guarantor by presenting bills for unpaid CAM or Taxes dating back several and the good guy guaranty might include such “surprises”. How does good guy concept apply to rent acceleration upon a Tenant default?

3. Recurrent Additional Rent (Taxes and CAM vs. other lease reimbursements)
4. Reimbursement to Landlords for Tenant defaults where Landlord used self -help to cure default and seeks reimbursement? What if a Landlord claims that the Tenant did not make alterations to comply with law? Is Good Guy Guarantor liable?
5. Compliance with Law, Repairs, Maintenance issues.

B. Drafting Issues-From a Landlord/Beneficiary perspective, make sure that Good Guy Guarantor is liable for:

1. Cost of evicting Tenant?
2. Damage caused when Tenant does vacate?
3. Restoration obligations required by the Lease?

Drafting tip-make sure that costs of enforcing Good Guy Guaranty are not capped by the good guy language. Litigation costs can wipe out any benefit of the Good Guy Guaranty.

C. Drafting Issues-From a Tenant/Guarantor perspective, make sure that the release provisions are not conditioned upon Tenant not being in default under the Lease. Otherwise, Landlord can keep Good Guy Guarantor on the hook until even minor non-monetary defaults are cured.

D. Conditions for Release of Guarantor

1. Deliver of keys and vacant possession.
2. Broom clean?
3. Is Premises in condition required under the lease at end of term?
(Some leases require that HVAC equipment and other mechanical systems be in working order)
4. Free of subtenants.
5. Payment or rent (additional rent) through such surrender date.
Note: If Tenant satisfies all conditions but Guarantor needs extra time to pay entire amount of rent owed, its liability will keep growing until full payment is made.
6. Certification

- E. Notice Requirement. This is a hotly contested issue. An obligation for rent for a certain period of time after the Tenant vacates is usually referred to as a “tail”.
1. Protects Landlord from downtime while it finds a new tenant.
 2. Notice can range from nothing to two years.
 3. Many tenants see the notice requirement as a Landlord’s attempt to "back-door" coverage for rent damages by requiring Tenant to give long notice periods.

F. Assignment/Sublet Issues

1. Good Guy Guarantor can be liable for acts of a tenant entity which Good Guy Guarantor has no control over.
2. From a Guarantor's perspective, it is critical to get the right to substitute a new Good Guy Guarantor.
 - Net Worth Test.

“Good guy” continued

Why the “good guy” ?

Hybrid nature

Appeals to the Landlord by motivating the Tenant to vacate and avoid protracted L&T litigation

The space can be shown to a new Tenants, thus limiting the Landlord’s losses

In response to inherent limitations of security deposits and general guarantees:

Do not prevent the Tenant from engaging in drawn out litigation

No true incentive for Tenants to vacate asap once they determine it is not economical for them to stay in the space

“Good guy” continued

How does a Landlord protect himself after such a significant financial investment?

The amount and degree of security

Scope

Payment

Performance\\broom clean

Conditional requirements under the lease could mean removing initial alterations

Restoring the premises

Origin of the “Good Guy” Guaranty

The “Blue Meanie” Tenant that stayed on without paying rent

“Good guy” continued

Basics:

Defined: a limited guaranty covering rent and performance of Tenant's obligations thru the date Tenant surrenders the premises vacant, broom clean (in the condition required by the lease), with the keys also turned over to Landlord's agent. Upon surrender guarantor's liability ends.

“Bad guy” is a Tenant/guarantor who refused to be a good-guy.

What makes “Good Guy” unique?

Guarantor can control his liability

Liability ceases to accrue when Tenant has vacated and surrendered in accordance with guaranty

Good Guy Tenant defined: A Tenant who vacates rather than stays in possession without paying rent and the principal who has guaranteed his company's lease

It's really two good guys (Tenant and guarantor)

Evolution of the Good Guy

Ever increasing requirements and restrictions

Scope of liability

Fixed rent

Fixed rent, operating expenses and taxes

“Good guy” continued

As the market goes up and down negotiating positions change

As today’s economy is booming Landlords have more leverage, which leads to imposing more conditions on the due exercise of the good guy.

Relationship between Good Guy and Tenant

The good guy guarantee is not a clause in the lease, but rather a distinct agreement

The defaulting Tenant receives no benefit

Typically the security deposit is taken by the Landlord (post-surrender) so no credit is given to the guarantor

Scope of GG Guarantee

Landlord: broadest possible” payment and performance--rent and additional rent items

Frequent Compromise: base rent plus taxes and operating

Further compromise: the above plus other defaults that have been converted to a dollar amount

The Landlord's Point of View

Minimum: Tenant to pay rent to date vacates/surrenders

Minimum plus:

All forms of additional rent such as taxes and operating expenses

Upfront expenses

- Cost of buildout

- Tenant Improvement Allowance

- Brokerage commissions

- Legal fees—Restoration--Cost of reletting

“Good guy” continued

Landlord's add ons

Compliance with laws

Repairs

Maintenance

“Good guy” continued

Basics

Expansion of the good guy guaranty to include many more obligations

Good Guy on steroids

Items: Money and performance

Rent

Additional rent: operating expenses and taxes

Performance: repairs and maintenance

End of term (restoration)

Various Landlord expenses

The Good Guy--all pumped up!

Brokerage

Legal

Tenant Improvement \$

Unwound rent concessions (becomes form of additional rent)

Accelerated rent payments triggered by Tenant default

Advance notice

Compensate Landlord for vacancy while looking for new Tenant

“Good Guy” continued

Issue:

Where lease contains free rent to be recouped if the Tenant defaults

Queries:

Is that part of guarantor’s obligations?

When does lease terminate?

When is the Tenant in default?

Workouts: (temporary rent reduction)

Is the guarantor liable for full rent?

End of Term Obligations

Condition of premises

Restoration work

- Removal of Tenant's property and leasehold improvements

- Restoration to condition at commencement of term

Notice

3 to 12 months

Landlord needs time to show space and get a new Tenant

Practical effect is that Landlord gets a full guaranty for this notice period

Surrender Agreement

Document that surrenders what has taken place in accordance with guarantor requirements

Note: releases guarantor, but not Tenant

Additional Landlord Considerations: Drafting

Add a provision that the guarantor has to subordinate seeking money from Tenant until Landlord has been paid in full

Additional Practice Tips: Guarantor

Where you have multiple co-owners but only one signs the guaranty, obtain an agreement from the co-owners to reimburse the guarantor pro-rata with the ownership interest of each

Add a provision for notice before suit

Limit the guarantor's exposure in connection with assignment and subletting

Get right of substitution

Surrender-- Condition

The Landlord cannot use “hypertechnical interpretation” of the surrender date requirements

However, the Tenant is required to follow the conditions specified in the guaranty to end further guarantor liability

150 Broadway v. Shandell, 27 <isc. 3rd 1234

Security Deposit

Can the Landlord go after it?

Landlord sees as an asset of Tenant which the Landlord can seize in the case of a default

Selected Issues: Security Deposit

Credited to guarantor?

Goes to reduce Tenants debt?

Put something specific in the guaranty

Landlord point of view: Retain security deposit for Tenant's other obligations

Landlord seeks damages and argues the security deposit should be his to apply against unpaid future rents

Selected Issues--Rent Acceleration; Post termination charges

If representing guarantor, resist

Also, reletting expenses and restoration

Good guy guaranty resists

“Good guy” continued

The Good Guy guaranty does not get the Tenant off the hook, if business has multiple locations and is viable you must do more to protect the Tenant

Negotiating Process

Where will the matter end up? Reasonable compromises:

Scope of GG Guarantee

Landlord: Broadest possible” payment and performance--rent and additional rent items

Frequent Compromise: base rent plus taxes and operating

Further compromise: the above plus other defaults that have been converted to a dollar amount

EXHIBITS--FORMS

Ex. 1--Full Guaranty--long form

Ex. 2-- Full Guaranty--shorter version

Ex. 3--Guaranty Good Guy--Short - Medium

Ex. 4--Guaranty Good Guy--Long form

Ex. 5--Guaranty Good Guy--Long form with pro-guarantor changes

Ex. 6--Surrender Declaration

Feel free to use me as a resource:

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