

## **Commercial Loan Guaranties: Drafting and Enforcing Corporate and Personal Guaranties and Non-Recourse Carve-Outs**

Best Practices for Lenders and Guarantors In and Outside Bankruptcy

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WEDNESDAY, MARCH 20, 2019

1pm Eastern | 12pm Central | 11am Mountain | 10am Pacific

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Today's faculty features:

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# ENFORCING COMMERCIAL LOAN GUARANTIES

## DRAFTING CONSIDERATIONS FOR GUARANTY ENFORCEMENT

- I. BORROWER ENTITY TYPES and CONSTITUENT OWNER LIABILITY
  - A. Sole Proprietorship
  - B. Corporations: Shareholders and Officers
    - (i) Partnerships: Partners
    - (ii) General Partnerships
    - (iii) Limited Partnerships
    - (iv) Limited Liability Partnerships
  - C. Limited Liability Companies: Members
  - D. Trusts: Trustees and Beneficiaries
- II. ELIGIBLE GUARANTOR PARTIES
  - A. Downstream Guaranties: Guaranties by Direct and Indirect Owners of Borrower and/or subsidiaries of a parent company. See, e.g., Robert J. Rosenberg, *Intercorporate Guaranties and the Law of Fraudulent Conveyances: Lender Beware*, 125 U. Pa. L. Rev. (1976).
  - B. “Upstream” Guaranties: Guaranties by Subsidiaries of Borrower Parent.
    - (i) *In Re Touse, Inc. (Official Comm. Of Unsecured Creditors of TOUSA, INC. v. Citi Corp N. Am. Inc.)*, 444 B.R. 613 (S.D. Fla. 2011)
  - C. “Cross-Stream” Guaranty: Guaranties by subsidiaries of a parent company for other subsidiaries of the same parent company.
  - D. “Pay-for-Play” Guaranty: A third party is paid for its execution of a guaranty for a borrower’s debt. Such a guarantor should receive at least “reasonably equivalent value” for signing such a guaranty for a third party.
  - E. “Sham” Guaranties and Lack of Consideration: Courts, particularly Bankruptcy Courts, are more apt to invalidate a guaranty in order to provide more funds to be available for the unsecured creditors.
- III. TYPES OF GUARANTIES
  - A. Absolute and Conditional Guaranties
    - (i) Absolute Guaranties (Unconditional)
    - (ii) Conditional Guaranties (Conditioned upon the occurrence of a

(iii) contingent event)

B. Payment vs. Collection Guaranties

- (i) Payment Guaranties: Lender may demand recovery directly from Guarantor.
- (ii) Collection Guaranties: Lender must exhaust remedies against Borrower prior to seeking recovery from Guarantor

IV. ELEMENTS OF ENFORCEABLE PAYMENT GUARANTIES

A. Specify Type of Guaranty: (a) Payment Guaranty; (b) Collection Guaranty; (c) Conditional or Unconditional Guaranty; (d) “Bad-Boy” Carveout Guaranty; (e) Interest and Carry Guaranty or LTV Maintenance Guaranty; and/or (f) Completion Guaranty.

B. Guarantor cannot be a Primary Obligor

C. Consideration – Specificity improves enforcement of Upstream or Cross-Stream Guaranty.

D. Identify additional Guaranteed Obligations

- (i) Future Extensions of Credit
- (ii) Costs of Enforcement

E. Joint and Several Liability

- (i) Borrower and Co-Guarantors
- (ii) Effect of Release of Borrower or Co-Guarantor

F. Waivers

- (i) General Waivers (Defenses, Counterclaims and Offsets)
- (ii) Consent to Amendments
- (iii) Notice of Amendments
- (iv) Notice of Adverse Matters
- (v) Notice of Borrower Default
- (vi) Notice of Foreclosure
- (vii) State Specific Waivers (*e.g.* “Gradsky” waivers in California)

G. Guarantor Acknowledgement of Representation by Counsel

H. Express Disclaimer of Reliance on Representations

I. Recovery of Preferences

J. Merger Clause

K. Governing Law Provision

L. Spousal Consent in Community Property States

## SAMPLE CA WAIVER OF ANTI-DEFICIENCY AND ONE-ACTION RULES

**(b)** Guarantor further waives: (i) any defense to the recovery by Lender against Guarantor of any deficiency or otherwise to the enforcement of this Guaranty or any security for this Guaranty based upon the election by Lender of any remedy against Guarantor or Borrower; and, (ii) any defense or benefits that may be derived from comparable provisions of the laws of California and/or any jurisdiction and all other anti-deficiency and one form of action defenses under the laws of California and/or any other jurisdiction.

**(c)** Without limiting the foregoing or anything else contained in this Guaranty, but subject to Section 2(c), Guarantor waives all rights and defenses that Guarantor may have because the Guaranteed Obligations are secured by real property pursuant to the safe harbor waivers in favor of a lender pursuant to Civil Code Section 2856 which are incorporated herein as follows (and/or any other cases interpreting both Civil Code Section 2856 and/or the so-called "Gradsky" rule). This means, among other things:

**(i)** That Lender may collect from Guarantor without first foreclosing on any real or personal property collateral pledged by Borrower; and

**(ii)** if Lender, forecloses on any real property collateral pledged by Borrower: (A) the amount of the Guaranteed Obligations may be reduced only by the price for which that collateral is sold at the foreclosure sale, even if the collateral is worth more than the sale price; and (B) Lender may collect from Guarantor even if Lender, by foreclosing on the real property collateral, has destroyed any right Guarantor may have to collect from Borrower.

This is an unconditional and irrevocable waiver of any rights and defenses that Guarantor may have because the Guaranteed Obligations are secured by real property. Guarantor waives all rights and defenses arising out of an election of remedies by Lender, even though that election of remedies, such as a nonjudicial foreclosure with respect to security for a guaranteed obligation, has destroyed Guarantor's rights of subrogation and reimbursement against Borrower by operation of Section 580d of the California Code of Civil Procedure or otherwise.

**(f)** Guarantor waives Guarantor's rights of subrogation and reimbursement, including (i) any defenses Guarantor may have by reason of an election of remedies by Lender, and (ii) any rights or defenses Guarantor may have by reason of protection afforded to Borrower with respect to the Guaranteed Obligations pursuant to applicable laws of California and/or any other jurisdiction.

**(g)** Guarantor waives any rights, defenses and benefits that may be derived from provisions of California law and/or the laws of any other jurisdiction and further waives all other suretyship defenses Guarantor would otherwise have under the laws of California and/or any other jurisdiction.

**SPOUSAL CONSENT TO LOAN GUARANTEED BY SPOUSE**

I, \_\_\_\_\_, the spouse of \_\_\_\_\_ (“Guarantor”), hereby consent to and acknowledge each of the following:

1. The granting of the loan by [NAME OF LENDER] (“Lender”) in the maximum sum of [\$DOLLAR AMOUNT OF LOAN] (“Loan”) for and in behalf of [NAME OF BORROWER] (“Borrower”). Borrower is a business in which Guarantor has a direct or indirect interest and, thus, the success of Borrower will benefit our community estate if such Loan is made.
2. Guarantor has executed that certain Continuing Guaranty Agreement dated as of [DATE] (“Guaranty”) pursuant to which Guarantor is guaranteeing [DESCRIBE LIABILITIES UNDER THE GUARANTY]. I acknowledge that I have read and understand the Guaranty. The Loan is secured by a first lien mortgage on various assets of Borrower, but I acknowledge and agree that Lender may enforce the terms of the Guaranty against Guarantor separate and apart from any recovery Lender may pursue against the collateral pledged by Borrower for the Loan.
3. In the event of Borrower has an uncured default on the Loan, Lender may seek recovery for the repayment of the Loan pursuant to the terms of the Guaranty; and, if Lender obtains a judgment in any legal, equitable or arbitration proceeding, then Lender may seek recovery pursuant to its judgment under Guaranty against the personal and community property assets of Guarantor and myself.
4. [LIST ANY EXCLUDED ASSETS, SUCH AS A FAMILY HOME].

I understand that my consent to the foregoing, once given, cannot be revoked without the written consent of Lender.

\_\_\_\_\_  
Guarantor’s Spouse’s Signature and Signature Date

[OPTIONAL - NOTARY]

NOTARY PUBLIC:

[USE LOCAL FORM]

**EXAMPLE OF GUARANTOR CHART**

