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# ***MAKING GUARANTEES WORK: IMPROVING DOCUMENTATION***

John L. Hosack, Esq., Jason E. Goldstein, Esq., Mr. Rick Rodriguez and Mr. Joffrey Long

12:00 Noon

October 20, 2016

Webinar

Buchalter Nemer

1000 Wilshire Boulevard, Suite 1500

Los Angeles, California 90017

## I. INTRODUCTION

### A. What Is A Guaranty?

### B. Wall Street Approach (Only *Bad Boy* Carve Outs).

### C. Why Would a Lender Want One Or More Guarantees?

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*Save The Date!*

**THE 7 MOST COMMON LENDER MISTAKES  
RELATIVE TO ESCROW INSTRUCTIONS AND  
TITLE INSURANCE**

John L. Hosack, Esq., Jason E. Goldstein, Esq., Mr. Rick Rodriguez and Mr. Joffrey Long

12:00 Noon PST  
December 8, 2016  
Webinar

Buchalter Nemer  
1000 Wilshire Boulevard, Suite 1500  
Los Angeles, California 90017

## II. DIFFERENT TYPES OF GUARANTEES (1 of 2)

1. Absolute Express Guaranty/General Continuing Guaranty
2. Co-Obligor
3. Third Party Security
4. Loan Purchase Agreement
5. Master Lease On A Property
6. Unreleased Seller/Trustor Of An Encumbered Property
7. Conditional Guaranty
8. Payment Guaranty
9. Collection Guaranty

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## II. DIFFERENT TYPES OF GUARANTEES (2 of 2)

**10. Performance Guaranty**

**11. Continuing Guaranty**

**12. Restricted Guaranty**

**13. Downstream Guaranty**

**14. Upstream Guaranty**

**15. Cross-Stream Guaranty**

**16. Completion Guaranty**

**17. Non-Recourse Carve Out & Springing Recourse Guarantees**

**18. “Exploding” Guarantees**

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## **III. The Guarantor's Basic Defenses (1 of 4)**

- 1. Lack of An Enforceable Guaranty**
- 2. No Consideration**
- 3. Statute of Frauds**
- 4. Statute of Limitations**
- 5. Conditions Precedent To Liability**
- 6. Express Limits on Scope of Guaranty**
- 7. Revocation of Continuing Guaranty**
- 8. Failure to Notify Guarantor of Debt**

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## **III. The Guarantor's Basic Defenses (2 of 4)**

**9. Failure to Notify Guarantor of Borrower's Default**

**10. Failure to notify Guarantor of Adverse Matters**

**11. Special Disclosures to Consumer Guarantors**

**12. Material Alteration of Underlying Debt**

**13. Impairment of Collateral**

**14. Failure to Notify Guarantor of Foreclosure Sale**

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## **III. The Guarantor's Basic Defenses (3 of 4)**

**15. Failure to Hold Commercially Reasonable Foreclosure Sale**

**16. Release of Co-Guarantors**

**17. Negligent Loan Administration**

**18. Other Increases in Scope of Risk**

**19. Duty to Pursue Borrower First**

**20. Absence of Borrower Default**

**21. Borrower Defenses on Underlying Debt**

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## **III. The Guarantor's Basic Defenses (4 of 4)**

### **22. Intercorporate Guaranty As Fraudulent Transfer**

### **23. Recovery of Preferences**

### **24. Automatic Stay**

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### **IV. LSREF2 Clover Property 4, LLC v. Festival Retail Fund I LP (10/4/16)**

#### ***LSREF2 Clover Property 4 LLC v. Festival Retail Fund 1 LP, 2016 Cal.App.Lexis 824***

**Facts:** The Guarantor itself structured the transaction and determined that its affiliate – *a Separate Legal Entity* – would take out the loan and take title to the property to be encumbered.

#### **The Court of Appeal held:**

- The borrower and the guarantor were separate legal entities formed before any involvement with the Lender.
- The guarantor could not invoke the alter ego or “unity of interest” doctrine because it “. . . would promote an inequitable result, exactly what the doctrine is designed to avoid”

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### **V. DRAFTING TIP NUMBER 1:**

**THE GUARANTY AND ALL OF THE OTHER LOAN DOCUMENTS SHOULD MAKE CLEAR THE EXACT CAPACITY IN WHICH IT IS SIGNED.**

***Example: Mary Smith, an individual, not as President of Smith Corporation***

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### **VI. DRAFTING TIP NUMBER 2:**

## **CLEARLY DOCUMENT THAT THE GUARANTOR IS RECEIVING ADEQUATE CONSIDERATION.**

***Example: Whose name is on the check?***

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## **VII. DRAFTING TIP NUMBER 3:**

# **CONSIDER HAVING THE GUARANTOR PROVIDE AN OPINION OF COUNSEL.**

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## VIII. POTENTIAL GUARANTORS TO BE ALERT TO:

### 1. Partners of a General Partnership

- *The Moral Guarantee*

### 2. The General Partner of a Limited Partnership

### 3. A Limited Partner of a Limited Partnership

- *How do you know if a limited partner changes its status to a general partner after providing a guaranty?*

### 4. Corporate Officers

### 5. Corporate Shareholders

### 6. Guarantor Of The Debt Of A Limited Liability Company

- By statute a member or manager of a limited liability company can separately guaranty the debt of the limited liability company. Corporations Code §17703.04(c) (“Nothing in this section shall . . . affect the liability of a member . . . to third parties . . . Pursuant to . . . a written guarantee . . .”).

- It should be anticipated that the guarantor will assert an alter ego or a “sham” guaranty defense.

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## **IX. DRAFTING TIP NUMBER 4:**

### **WHEN THE TERMS OF THE LOAN ARE TO BE CHANGED, MODIFIED OR WAIVED . . .**

- A. Obtain a Reaffirmation Agreement From All Guarantors.**
- B. Avoid Using Words Such As “Supersede” Or “Replace.”**
- C. Use “Amended And Restated.”**
- D. If Real Property Collateral Obtain A Modification Endorsement (Also Make Your Exclusion 3(a) and *Insurance Code § 332* Disclosures).**

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### **IX. DRAFTING TIP NUMBER 5:**

**IF THE GUARANTOR IS TO PROVIDE REAL PROPERTY SECURITY TO SUPPORT THE GUARANTY, THEN A COPY OF THE PROPOSED GUARANTY SHOULD BE PROVIDED TO THE TITLE INSURER BEFORE THE GUARANTY IS EXECUTED BY THE GUARANTOR.**

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### **X. IN THEORY, CALIFORNIA'S ANTI-DEFICIENCY RULES DO NOT APPLY TO GUARANTORS, BUT . . .**

#### **A. There Are Arguments That The One Action Rule And The Anti-Deficiency Rules Should (Or Do) Apply To Guarantors.**

Bernhardt, California Mortgages, Deeds of Trust and Foreclosure Litigation (Calif. Cont. Ed of the Bar, Fourth Edition) Section 9:126 et seq., “Arguments for Direct Protection of Guarantors”

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## **XI. RIGHTS AND DEFENSES GUARANTORS WHICH CANNOT BE WAIVED**

### **A. Usury And Other Illegality**

*WRI Opportunity Loans II, LLC v. Cooper* (2007) 154 Cal. App. 4<sup>th</sup> 525

### **B. Equitable Defenses (i.e., unclean hands)**

*California Bank & Trust v. Del Ponti* (2014) 232 Cal. App. 4<sup>th</sup> 162

### **C. Lender's Lack Of Disclosure To A Guarantor**

*Sumitomo Bank v. Iwasaki* (1968) 70 Cal. 2d 81, 85

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## **XII. RELEASE OF SECURITY**

- A. Why Do It?**
- B. Construction Loans In Subdivisions.**
- C. Unanticipated Consequences With Junior Lienholders?**

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### **XIII. RELEASE OF AN OBLIGOR OR GUARANTOR**

**A. Why Do it? Voluntary Or Involuntary?**

**B. Inform All Obligors/Guarantors Of Change In Circumstances.**

**C. Death, Bankruptcy, Workout**

**D. Obtain The Prior Written Consent Of All Obligors And Guarantors.**

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## **XIV. THE “SHAM GUARANTY” DEFENSE**

**Question.**

**What is it?**

**Answer:**

**When Lender, effectively, considered the guarantor to be the primary obligor.**

**Question:**

**How *Might* You Obtain A “Waiver” Of The “Sham Guaranty” Defense (In Conjunction With An Opinion Of Guarantor’s Counsel)?**

Waiver “Sham Guaranty” Defense. Guarantor acknowledges, agrees, and represents and warrants to Lender that (i) Lender was not involved with, participated in, or advised Borrower or Guarantor with respect to the ownership and/or management structure of Borrower and that such structure was previously and independently created by Borrower and/or Guarantor based upon their own decisions and otherwise based on independent advice obtained by them from their own counsel and consultants, which reasons included separating Guarantor from any liability that may be incurred by Borrower in . . .

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### **XV. STRATEGIES FOR RECOVERY ON A GUARANTY**

**A. A Single Action Against the Borrower and All Guarantors (no security for the loan).**

**B. A Single Action Against One or More Guarantors (no security for the loan).**

**C. A Single Action Against the Borrower, All Guarantors and All Security.**

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## **XVI. CONCLUSION**

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# Conclusion



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