

**GOOD GUY
GUARANTIES:
WHAT YOU SHOULD KNOW!**

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Guaranties, Good Guy Guaranties and How to Use Them In Lease Negotiations and Litigation

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I. **WHAT IS A GUARANTY?**

A Guaranty is a promise by a third-party (guarantor), to be liable for the contractual obligations of an obligor to an obligee.

In the context of a lease, a guaranty is a promise to the landlord by a third-party, typically the principal of a tenant-business, that it will remain liable for the tenant's obligations in the event the tenant is unable to perform.

A. **VOCABULARY**

Some necessary vocabulary follows:

The “guarantor” is the party that signs the guaranty. The party may be an individual or a corporate entity.

There are three types of guaranties:

Complete Guaranty: A guarantor promises to remain liable for all of the tenant's obligations under the lease for the entire term.

Limited Guaranty: A guarantor promises to remain liable for a fixed portion of the term (e.g. 6 months' rent), or, up until the surrender of the premises.

Good Guy Guaranty: A type of limited guaranty that typically cuts off the guarantor's liability upon the tenant's surrender of the premises (*i.e.* vacatur and turning in the keys), and, as has increasingly become standard practice, upon the tenant's satisfaction of additional conditions, such as notice and being current on all rent, which will be discussed later in the course.

This course focuses on the Good Guy Guaranty (“GG Guaranty”). It will first introduce you to the simplest form of a GG Guaranty, *i.e.* the kind that extinguishes the guarantor's liability upon the tenant's surrender of the premises to Landlord.

Next, using samples of actual GG Guaranties from the authors' practice as well as related case law, the course will illustrate the variety of additional conditions a GG Guaranty can impose on the tenant.

These conditions have the aggregate effect of increasing uncertainty or risk for the guarantor seeking to avoid or minimize liability on the one hand, and, on the other hand, giving the landlord significant bargaining

leverage during both lease negotiations and when faced with a tenant who is behind on rent and looking for a way out.

But first, before diving into the samples, we will cover the basic elements of a GG Guaranty.

Note: this course primarily draws upon the authors' New York State practice and will occasionally refer to New York specific procedural law that governs actions in real property. However, the substantive discussion about the GG Guaranty that implicates principles of contract, corporate law, and lease interpretation are broadly applicable across states.

B. WHY A GUARANTY?

Entering into a contract of any kind is like entering into a marriage. If things go well, both parties are better off for having coming together. On the other hand, if the relationship becomes too costly for one party or ceases being mutually beneficial for both, the endgame becomes trying to unravel the relationship in the most cost effective manner.

In a marriage, spouses often enter into prenuptial agreements to account for this contingency and to avoid costly divorce litigation in the event they decide to part ways.

You can think of a guaranty in the same manner. It is an agreement made at the outset of a relationship to account for the grim possibility that things may not turn out so well—an insurance policy to account for the likelihood that somebody will not perform what they promise.

C. THE ANATOMY OF A GUARANTY

1. WHO IS THE GUARANTOR?

This is the most important question to answer before you begin drafting a Guaranty and the question has both formal and pragmatic concerns:

a. Formal

Who are the parties to the underlying contract? If the contract is signed by an individual(s) or a person “doing business as” (*i.e.* d/b/a), then STOP! *You already have a complete guaranty!*

Remember, the point of a guaranty is to avoid a party charged with certain obligations from abusing the trust of the obligee by imposing certain consequences on the guarantor, namely personal liability, for breaching the underlying agreement.

In the case of a lease, if you already have the individual(s) on the lease, you SHOULD NOT ask them to sign a GG Guaranty. Why? Because you would, in effect, be entering a new contract with the same individual that turns the complete guaranty into a limited guaranty. How? By signing the lease as an individual, the person is already promising to be *personally* liable for all of its enumerated obligations. If this same person then signs a GG Guaranty that terminates the individual's liability upon surrender of the premises, you just gave the tenant a free pass to walk away from the lease before its natural expiration without any consequences! The GG Guaranty becomes the subsequent agreement by the same parties that takes precedence over the prior conflicting lease agreement.

b. Pragmatic

Is the Guarantor a corporation or an individual? Is it credit-worthy? *A Guaranty is only as good as the Guarantor.*

This may seem obvious but it is an all too often neglected, but vital step in the process—checking the Guarantor's bona fides.

(1) Individual Guarantor

Individual Guarantors Are Generally Better. Having the principal of a company face personal liability in the event of a default is generally better provided the individual has reachable assets. Once again, the fundamental value-added by a Guaranty is the ability to bypass the formal obstacles that get in the way of recovering against a corporate entity. On the other hand, if you have a blue-chip corporation, for example McDonalds Inc., willing to sign a guaranty, then there is good reason to go with the corporate guarantor because collectability becomes a non-issue.

(2) **Due Diligence**

Do the Due Diligence. Before entering into a lease and GG Guaranty with anyone, do your homework. This may include:

- (1) internet searches on the principal(s) such as google, facebook, etc.
- (2) running credit-checks using Transunion or other credit reporting services, and an Accurint search to obtain records on the principal(s)' assets.

ATTACHMENT 1

PRACTICE TIP: Note that obtaining credit reports is governed by federal law 15 U.S.C. § 1681b which outlines the “permissible purposes” for a consumer reporting agency to disclose credit reports. The permissible purposes in the case of landlords obtaining credit reports on guarantors are when the report will be used in connection with a collection involving a “credit transaction”, *i.e.* the guaranty (§1681b(a)(C)); or, under §1681b(a)(F) a “legitimate business purpose” concerning a transaction that the consumer, *i.e.* the guarantor, has initiated.

Essentially, in the context of a lease, this means that counsel can only run credit reports when either the guarantor owes landlord money or, at the outset of the relationship when landlord is evaluating a guarantor's creditworthiness.

- (3) Obtaining bank statements, tax returns and other financial documentation indicating the principals' solvency. Just because a guarantor has assets at the outset of a lease deal, that does not mean those assets may not dissipate over time.

(3) **Entity Guarantor**

If Your Guarantor Is An Entity: The due diligence should be even more rigorous and should examine the entity's balance sheets, annual financial reports, tax returns and prior litigation history.

2. **GUARANTOR'S IDENTIFYING INFORMATION**

It is essential that the Guaranty include the following personal information of the guarantor(s):

Social Security Number

Why? You will need this to initially, and periodically, check on the guarantor's solvency. Someone who seemed to be a solid guarantor at the inception of a lease may later fall into insolvency for any number of reasons. Remember, *the guaranty is only as good as the guarantor!* E.g. halfway through a five year contract term, if the guarantor faces litigation and is subject to a \$1.5 million money judgment that wipes out its assets, obligee will be left holding the bag if the guarantor's business is the next thing to fold. In that case, you may decide that you will only continue the relationship if the guarantor posts additional security or obtains a letter of credit from a bank. The Social Security Number will also be crucial during the judgment enforcement phase when you will need it to locate and attach assets of the guarantor such as bank accounts, wages, and personal and/or real property.

Home Address

Be sure to include the guarantor(s)' home address in the signature block of the GG Guaranty. This will aid in running credit reports and will also be the address you will use to effectuate service of papers in the event of litigation.

3. **PERSONAL JURISDICTION CONCERNS**

You may wonder why we are discussing a litigation topic like personal jurisdiction (*i.e.* service of papers) in the middle of a section about what language to include in a contract. The answer goes back to our earlier point about why get a guaranty? If a lawsuit against the guarantor becomes necessary, the obligee does not want to spend valuable time and resources attempting to perfect personal service on a hard-to-locate guarantor. For example,

maybe the guarantor maintains two residences and is almost always in the one out of state, or maybe the guarantor lives on the 6th floor of a doorman building and rarely ever comes out.

Keeping with the theme of streamlining the process that the landlord needs to follow to enforce the terms of the GG Guaranty, most well drafted GG Guaranties now include personal service waiver clauses like the example below providing for service by certified mail. This will save landlord the trouble of complying with personal service and the cost of paying for a process server. Courts routinely uphold these provisions.¹

ATTACHMENT 2

4. **COUNSEL FEES**

Every GG Guaranty should contain a provision allowing the Landlord to recover counsel fees from the guarantor that may be incurred in the enforcement of its terms.

5. **SURVIVAL CLAUSE**

Every GG Guaranty should contain a provision that clearly states that the guaranty “shall remain and continue in full force and effect as to any renewal, change or extension of the [underlying agreement]”. We will discuss this issue in detail later in the course. However, the basic idea is to make sure that the guarantor remains liable for obligor’s obligations under the Guaranty in spite of subsequent agreements between the obligee and obligor.

6. **SIGNATURES**

It is essential that the obligee obtain the guarantor’s signature on the guaranty, as an individual, and obtain be sure to obtain signatures on the underlying agreement from the obligor’s corporate officers. See *30 Broad, LLC v. Lawrence*, 12 Misc.3d 1179(A), 2006 WL 1882410 *2 (N.Y. Sup. Ct. 2006) (“Officers of a corporation are not liable on its contracts, unless they purport to bind themselves in their personal capacities”) . TIP: Get signatures notarized or get a copy of guarantor(s)’ driver’s license to avoid authentication issues in the event of litigation.

¹ See *Credit Car Leasing Corp. v. Elan Group Corp.*, 185 A.D.2d 109, 109 (1st Dept. 1992) (holding that service was proper when effectuated in accordance with substituted method in the lease); *Marine Midland Bank, N.A. v. United Missouri Bank, N.A.*, 223 A.D.2d 119, 124 (1st Dept. 1996) (personal service waiver enforceable where defendant “clearly consented to personal jurisdiction in New York and to service [in the manner specified in the agreement]”).

II. THE BASIC GOOD GUY GUARANTY

As we have already mentioned, the simplest and earliest iteration of the GG Guaranty provided that the tenant's principal would remain liable for the tenant's obligations under the Lease through the date that the tenant vacated the premises and delivered possession to the Landlord.

ATTACHMENT 3

The language appears clear and unequivocal. After the tenant, or anyone claiming through the tenant (*i.e.* subtenants), vacates the premises, removes all personal property, and offers to deliver possession to the landlord, the guarantor is in the clear.

However, even this simply phrased guaranty could be simpler. For instance, what does it mean to "offer" to deliver possession? When will "delivery" be complete? What if tenant slides the keys under landlord's office or leaves them with a doorman and landlord does not find out that the keys were returned until weeks after the "delivery"?

Query: What if the tenant surrenders the premises in writing and the landlord accepts the keys without saying a word, only to find out later that tenant has abandoned all of its personal property in the premises? Now the landlord wants to pursue a claim for future rent owed under the lease given tenant's failure to comply with the terms of the guaranty.

If landlord accepts tenant's surrender without reserving its rights under the lease and the guaranty, landlord waives any claims to future rent absent an agreement to the contrary because such acceptance terminates the leasehold. See *Freeman Foursome v. Cabana Carioca*, Index No. 100289/94 (Sup. Ct. N.Y. Cty. Jan. 30, 2001) *aff'd* 293 A.D.2d 964 (1st Dept. 2002) (holding that landlord's failure to reserve rights under the lease and guaranty defeated claim for future rent because acceptance of surrender constitutes termination of the leasehold).

GG Guaranties are "commonly understood to apply to obligations which accrue *prior to the surrender of the lease premises.*" *Russo v. Heller*, 80 A.D.3d 531, 531 (1st Dept. 2011) (emphasis added). If there is a basis to hold guarantor personally liable for future rent given tenant's failure to surrender the premises in the manner prescribed by the lease and GG Guaranty, Landlord must reserve all of its rights under the GG Guaranty to pursue those claims against guarantor.

III. **GG GUARANTIES THAT REFER BACK TO THE LEASE**

In current practice, most GG Guaranties require the tenant to surrender the premises in the same condition prescribed under the lease, or, in “broom clean condition”, and many require that the tenant be current in all rent and additional rent due and owing at the time of surrender.

The interplay between a GG Guaranty and provisions of a lease can lead to a whole host of issues for the tenant seeking to terminate the leasehold.

ATTACHMENT 4

The operative language from the above GG Guaranty is the following clause:

“...this Guaranty shall not extend to any obligations incurred by Tenant under the Lease after the date (the “Surrender Date”) on which Tenant and everyone claiming under or through the Tenant (a) vacate the Premises *and surrender the same in the condition required under the Lease* and (b) deliver all keys for the Premises to Landlord.”

When interpreting the guaranty in conjunction with the lease, the first step is to find the surrender provision in the lease which will typically prescribe the condition in which tenant should leave the premises.

A. **END OF TERM**

In the Standard Form of Store Lease prepared by the Real Estate Board of New York (“Standard Board Lease”), Article 21, End of Term, is the relevant provision and it reads:

“Upon expiration or other termination of the term of this lease, Tenant shall quit and surrender to Owner the demised premises, broom clean, in good order and condition, ordinary wear excepted, and Tenant shall remove all its property.”

Standard Real Estate Board Lease, Article 21.

Straightforward right? Think again. Tenant may ask its counsel:

What does “broom clean” mean?

What does in “good order and condition” mean? There’s a hole in one of the walls. Will that be a problem?

I removed all my merchandise and furniture. Is that enough to satisfy “Tenant shall remove all its property”?

Each of these questions, to varying degrees, adds a level of uncertainty that the tenant must reckon with.

“*broom clean*” is probably the easiest and least risky condition to comply with. Counsel may advise tenant to simply sweep the floors and clean off any surfaces before vacating. A landlord is also unlikely to pursue litigation based on a breach of this condition alone unless the premises is left in such a bad state that it requires significant expenditures to clean up.

“*good order and condition*” leaves a lot of room for interpretation. If we take the example above of the hole in the wall, counsel may ask tenant, “well how big is the hole?” Depending on the size, what the premises was used for and how the hole got there to begin with, tenant may well be on the hook for the cost of repairing the hole. A more salient question for our discussion, however, is, *has the tenant satisfied the terms of the GG Guaranty by surrendering a premises that is arguably not in “good order and condition?”*

In this scenario, the answer may well be ‘no’, in which case, the guarantor is not only also on the hook for repairing the hole, but is also on the hook for all future rent for failure to comply with the termination clause of the guaranty!

In other words, the landlord could argue that it has a complete guaranty for all future rent because of tenant’s failure to surrender the premises in “good order and condition” as required by the lease and the guaranty.

WAIVER ALERT! Remember the *Freeman Foursome* case we discussed earlier: landlord can only keep guarantor on the hook for the default and future rent if, at the time of surrender, it expressly states to tenant that “I accept your surrender but reserve my rights under the Guaranty.”

“*Tenant shall remove all its property*” – Counsel learns that Tenant has removed its merchandise, furniture and otherwise disposed of all other waste in the premises. Is counsel’s work finished? Not necessarily. “Property” is a term of art and needs to be interpreted in conjunction with the lease’s definition of what constitutes “tenant’s property”.

B. ALTERATIONS AND FIXTURES

Under a Standard Real Estate Board Lease, if tenant is surrendering the premises, Article 3-Alterations, is implicated. It reads in pertinent part:

“All fixtures and all paneling, partitions, railings and like installations, installed in the premises at any time, either by Tenant or by Owner on Tenant’s behalf, shall, upon installation, become the property of Owner and shall remain upon and be surrendered with the demised premises unless Owner, by notice to Tenant no later than twenty days prior to the date fixed as termination of the lease, elects to relinquish Owner’s rights thereto and to have them removed by Tenant, in which event, the same shall be removed from the premises by Tenant prior to the expiration of the lease, at Tenant’s expense.

Standard Real Estate Board Lease, Article 3 (emphasis added).

Assume, for our purposes that Tenant notifies Landlord that it will be terminating the lease early and vacating the premises in twenty days. Landlord accepts, reserving its rights under the guaranty against the guarantor, and also relinquishes title in certain fixtures and installations made by the Tenant and requires their removal at Tenant’s expense. If the tenant then vacates without removing the fixtures and installations, the guarantor has not complied with the guaranty’s terms and once again could be liable for all future rent!

Depending on the Tenant’s business, Article 3 can become a quagmire to navigate because the following clause draws a distinction between the fixtures just described, and “trade fixtures”. Under Article 3, the Landlord cannot take title to “trade fixtures” and Tenant must remove them from the premises at surrender, restoring the premises to the condition existing prior to the installation. A typical scenario where this comes up is a tenant who runs a restaurant business. We will explore this distinction further when we discuss liens & encumbrances. For the time being, it is simply worth highlighting “trade fixtures” as another issue that tenant’s counsel should consider when its clients are planning an early termination of the lease.

IV. **IMPORTANCE OF LANGUAGE AND NOTICE REQUIREMENTS**

ATTACHMENT 5

The structure of this GG Guaranty may seem convoluted but it is, in essence, as simple as the basic GG Guaranty discussed earlier, *i.e.* the guarantor's liability is terminated upon surrender of the premises in the condition required pursuant to the terms of the Lease, plus one additional wrinkle:

...and confirms its surrender of the Premises pursuant to a (Blumberg form of) surrender agreement via fax...

Read in its entirety, ¶ 2 of this guaranty essentially states that the guarantor shall remain liable for the tenant's obligations under the Lease until the date that tenant surrenders the premises in the condition required by the Lease AND confirms the surrender pursuant to a Blumberg form of surrender via fax.

Query: What if Tenant terminates the lease early, surrenders the premises and confirms the surrender by certified mail? Does the guarantor avoid liability?

Technically, no. Terms of a guaranty are strictly construed by the court. *Wooster 76 LLC v. Ghatanfard*, 68 A.D.3d 480 (1st Dep't 2009).

Where the guaranty provides for a method of notice, guarantors who fail to comply with such provisions have been held liable for future rent under the lease. *Id.*

Of course, it is worth reiterating that landlord should always expressly reserve its rights under the GG Guaranty at the time of surrender if it hopes to prosecute claims arising from a failure to comply with its terms! See *Freeman Foursome supra* at p. 7.

A. **ADVANCE NOTICE REQUIREMENTS**

Nowadays, many GG Guaranties require, among a host of other conditions, advance notice of a tenant's intent to terminate the lease early and surrender the premises, in order to terminate the guarantor's liability.

ATTACHMENT 6

In the above example, subsection (ii) lists as one of the required conditions that:

Landlord has received at least sixty (60) days written notice from Tenant of Tenant's intent to vacate the Premises and Tenant has vacated the Premises on or before the date of delivery of possession to Landlord set forth by Tenant in such notice...

This clause has a dual effect. First, if Tenant fails to give at least 60 days written notice by either giving less than 60 days notice, *or* gives sufficient notice but orally rather than in writing, then the condition is left unsatisfied and guarantor remains liable under the lease for past and future rent owed. Second, the effect of requiring 60 days advance notice of a tenant's intent to surrender the premises functions as an additional two months of security! If the notice period was 180 days, it would be an additional 6 months of security. Why?

Remember, in a basic GG Guaranty, guarantor's liability is cut off at the time of surrender. Here, the advance notice requirement must be read in conjunction with the surrender provision, subsection (i):

...at the time of such surrender, all Fixed and Annual and Monetary Additional Rental [...] due under the Lease have been paid to Landlord up to the later of (a) the time of surrender, or (b) the end of the (60 day period set forth in subsection (ii) below. . .

By requiring the advance notice and also requiring that all fixed annual and additional rental be paid through the date of surrender or the end of the 60 day period, landlord has effectively tacked on two months that the guarantor will be liable for one way or another. Imagine two scenarios.

(1) Tenant gives 60 days written notice of its intent to surrender. Landlord accepts, reserving its rights under the GG Guaranty. Tenant occupies the premises for the duration of the 60 days and vacates on the 60th day as per the notice. If guarantor wants to walk away from this with no personal liability for all obligations past and future, it must pay the rent due and owing for those two months in addition to any other arrearage.

Tenant gives 60 days written notice of its intent to surrender. Landlord accepts, reserving its rights under the GG Guaranty, but tells Tenant that it can vacate and surrender even earlier than the 60th day. Any difference in what needs to happen for guarantor to satisfy the termination clause of the GG Guaranty? No! Read the language of subsection (i) carefully. It reads that all Fixed Annual and Monetary Additional Rental due under the lease must be paid to Landlord *up to the later of* (a) the time of surrender, or (b) the end of the sixty (60) day period...

B. LANDLORD'S ACCEPTANCE OF SURRENDER

Landlord's Acceptance of Surrender – in case we haven't made it abundantly clear, it is absolutely critical that landlord reserves its rights under the guaranty even if it may seem that the tenant has complied with the advance notice requirement.

ATTACHMENT 7

In this case, the crucial fact became the managing agent's letter, even though the tenant had not complied with the guaranty given that it still owed rental charges prior to the surrender date.

Had the managing agent inserted the simple language that it was reserving its rights under the GG Guaranty, Landlord could have recovered all arrears and future rent against the guarantor!

ATTACHMENT 8

V. LIENS AND ENCUMBRANCES

ATTACHMENT 9

By way of review, we first note that this GG Guaranty features a 180-day notice provision.

Query: What does this mean?

Answer: Notice must be given at least 180 days before the intended date of surrender and landlord effectively has 6 months of additional security as a result.

In addition to the notice period, the termination clause of this GG Guaranty requires tenant to *deliver possession of the Premises [...] free from all liens and encumbrances . . .*

A. MECHANICS' LIENS

One of the most common liens that may attach to a property is a mechanic's lien. A mechanic's lien is a security interest in the property belonging to someone who provided labor and/or materials to the tenant/landlord to improve the property.

A common scenario that gives rise to a mechanic's lien is when tenant contracts to have alterations made to the premises for its business purposes.

ATTACHMENT 10

Assume a dispute arises between tenant and the contractor resulting in tenant refusing to pay the entire amount invoiced by the contractor. Contractor feels it is entitled to the funds having completed the alteration and files a mechanic's lien with the County Clerk's office against the demised premises.

Only months into its lease, tenant's business suffers and it seeks to terminate the tenancy and absolve the guarantor of liability. If tenant notifies landlord of its intention to surrender the premises complying with the notice period, but does nothing to discharge the lien, the GG Guaranty stays in effect and keeps guarantor on the hook for the entire term of the lease!

B. UCC LIENS

UCC liens are filed by vendors of equipment/merchandise and, are typically a security interest in the items that are leased or sold. This may lull tenants into a false sense of comfort that a UCC lien on, for example, a set of computers and sales equipment for a store, does not implicate the leased premises, and therefore need not be discharged prior to surrender. **WRONG!**

The author of these materials recently handled a case in which a restaurant leased space from the landlord and performed certain alterations to the space that included installation of kitchen equipment, sales systems and an HVAC system.

Months after the restaurant opened its doors, it fell into financial turmoil, eventually falling behind on rent and seeking bankruptcy protection (we will discuss the effect of declaring bankruptcy later in this course using the same case study. This discussion will focus on the lien dimension of the case).

The principal of the restaurant had financed the improvements to the premises using a loan from his sibling. The sibling secured the loan by filing a UCC lien against *“all assets and personal property and fixtures of Debtor, of every description, whether now or hereafter existing or now or hereafter owned or acquired, wherever located”*

This is what is known as a *blanket lien* because it can be construed to include among other things, fixtures that, by the lease’s terms, belong to the landlord.

Recall our discussion about Article 3 of the Standard Board Lease. Earlier, we alluded to the distinction between those alterations that the landlord can elect to assume ownership of, and those characterized as “trade fixtures” which the tenant must remove at the expiration of a lease. Article 3 reads, in pertinent part:

Nothing in this article shall be construed to give Owner title to, or to prevent Tenant’s removal of, trade fixtures, moveable office furniture and equipment, but upon removal of same from the demised premises or upon removal of other installations as may be required by Owner, Tenant shall immediately and at its expense, repair and restore the demised premises to the condition existing prior to any such

installations, and repair any damage to the demised premises or the building due to such removal.

The natural follow-up question is, “what are trade fixtures?” There is no simple answer and you may have guessed by now that there is a whole body of case law interpreting this term in different contexts. For our purposes, it is enough to note that the distinction between those installations that the landlord may elect to assume ownership of, and those that are “trade fixtures” is vague enough to add to the uncertainty facing a tenant who wants to terminate the lease early and surrender the premises.

In this particular case, in addition to Article 3, the lease also had the following provision included in a Rider to the Lease:

At the expiration or sooner termination of the term of this Lease, except with respect to furniture, movable fixtures and equipment, and except as Landlord may elect otherwise under Article 3 hereof, all such installations and equipment made or installed by or for Tenant, including, without limitation, kitchen and HVAC equipment and duct work, shall be and become the property of Landlord and shall remain upon and be surrendered with the Demised Premises.

Reading these provisions together, a blanket UCC lien that purports to have a security interest in “*all assets and personal property and fixtures of Debtor, of every description*”, can cast enough of a cloud over the title to the premises to cause the tenant to be in default of a GG Guaranty’s provision requiring that the premises be free and clear of all liens or other encumbrances upon surrender, thus leaving the guarantor potentially liable for all future rent.

VI. **GG GUARANTIES, RENT ABATEMENT AND CLAWBACK PROVISIONS**

ATTACHMENT 11

First, it is important to note that this GG Guaranty appears in the lease itself and names the guarantors in a schedule annexed to the lease. Query: Does this alter the legal effect of the GG Guaranty? Simply put, no. Think Shakespeare: “A rose by any other name would smell as sweet”. If drafting a GG Guaranty clause within a lease and listing guarantors in an attached schedule, just go over our handy checklist discussed at the top of the lesson and make sure you include all the guarantor(s)’ vital information that will be necessary to conduct due diligence on their credit worthiness or to enforce a judgment. And, of course, do not forget signatures (for each guarantor in their individual capacity)!

Second, by way of review, note that this is also a basic GG Guaranty where the guarantors’ liability cuts off once the tenant perfects surrender of the premises to landlord, i.e. the last day that tenant vacates the premises, removes its property from the premises, and delivers the key to the landlord.

A. **RENT ABATEMENTS**

We’ve included this example in the lesson to highlight the interplay between a GG Guaranty and provisions in a lease that entitle tenant to rent abatements conditioned on the tenant’s good standing.

It is not uncommon for leases to include incentives such as rent reductions or months of free rent, to encourage tenants to stay in good standing and remain current on payments.

In this particular case, the tenant had negotiated rent abatement via an amendment to the lease, for the month of January 2011 and two months’ free rent for the months of February and March 2011, *i.e.* the last two months of the lease. The amendment read in pertinent part:

Notwithstanding anything contained in the Lease to the contrary, provided Tenant has made all payments required under this Lease no later than fifteen (15) days after such sums were due: (a) Tenant’s monthly rent for the month of January, 2011 shall be reduced by \$6,666.66, provided Tenant is not in default of a monetary obligation under the Lease and not in default of a nonmonetary obligation under the Lease beyond the expiration of any applicable notice and grace period as of January 1, 2011; (b) Tenant’s monthly rent for the month of February, 2011 shall be reduced by \$31,666.67, provided Tenant is not in default of a monetary obligation under the Lease and not in default of a nonmonetary obligation under the Lease beyond the expiration of any applicable notice and grace period as of February 1, 2011; and (c) Tenant’s monthly rent for the month

of March, 2011 shall be reduced by \$31,666.67, provided Tenant is not in default of a monetary obligation under the Lease and not in default of a nonmonetary obligation under the Lease beyond the expiration of any applicable notice and grace period as of March 1, 2011.

As the language clearly indicates, tenant was only entitled to the rent abatement in January if it had made *all payments* required by the lease within 15 days after such payments were due. Then, each month of free rent for February and March were also contingent on the tenant being current on monetary obligations and, not in default of nonmonetary obligations under the lease.

In this case, the tenant made a payment for January 2011 of \$25,000 on January 10, 2011, citing the rent abatement as the reason for deducting \$6,666.66 from the base rent of \$31,666.67.

Landlord notified tenant that it was not entitled to the rent abatement as it had consistently made late rental payments beyond the prescribed 15th day of each month. It further noted that, for the same reason, tenant was also not entitled to the free rent in February and March of 2011.

Tenant failed to make its February payment and Landlord sued the guarantors under the guaranty clause of the lease.

Eventually, landlord was able to use the leverage of having the guarantors on the hook for a little over \$70,000 in back-rent and electric charges, to file a summary judgment in lieu of a complaint under CPLR § 3213, and extract a favorable settlement without ever going to trial.

NY Practice Tip CPLR § 3213: The purpose of CPLR § 3213 is to “provide a speedy and effective means for resolving presumptively meritorious claims.” *Banco Popular North America v. Victory Taxi Management, Inc.*, 1 N.Y.3d 381, 383 (2004) (quotation marks and citations omitted).

The benefit of having a simple GG Guaranty clause in the lease itself is that, upon tenant’s default, the lease becomes an “instrument for the payment of money only”, the predicate for filing a motion for summary judgment in lieu of a complaint. See, e.g., *First Interstate Credit Alliance, Inc. v. Sokol*, 179 A.D.2d 583 (1st Dep’t 1992).

Here, the effect of the GG Guaranty was to leave the landlord in a better position at the end of the tenancy than it may have originally predicted. Although tenant may have been current on all payments up through December 31, 2010, the fact that the payments were made chronically late, in violation of the rent abatement provision, was enough to trigger

landlord's right to "clawback" the rent reduction in January and the free rent for February and March 2011. Moreover, landlord was able to accomplish this efficiently through use of a procedural shortcut that capitalized on the GG Guaranty's leverage against the principals.

ATTACHMENT 12

In the preceding example, tenant received the free rent concession in the final two months of the term, *if* it had not made late payments up until that time. In other words, this was a condition precedent to receiving the rent concession at all. Landlord, up until that time, had not foregone any rent and could demand full payment of the two months if the tenant failed to comply with the condition and, as we learned, hold the guarantor liable.

B. CLAWBACKS

In this example, the rent concession comes at the beginning of the lease term and it lasts for five months, totaling almost \$78,000.

Assume that tenant's principal has signed a simple GG Guaranty guarantying the tenant's obligations up until the time of surrender.

Query: If tenant becomes unable to carry the lease to its full term and is forced to surrender, can the guarantor be held liable for the abatement amount in light of the following language in the lease?

Tenant acknowledges that the consideration for the aforesaid abatement of minimum rent is Tenant's agreement to perform all of the terms, covenants and conditions of this Lease on its part to be performed. *Therefore, if Tenant shall be in default under any of the terms, covenants and conditions at any time, during the term hereof, the aggregate amount of all minimum rent that was abated shall immediately become due and payable by Tenant to Landlord.*

The answer is yes. Recall that guarantors are liable to the full extent of tenant's obligations. If the tenant breaches the lease by terminating early, that default triggers the "clawback" of the rent concession given at the beginning of the term making tenant liable for the concession amount under the lease. Thus, landlord may pursue the guarantor for the concession amount.

VII. **LEASE RENEWALS, EXTENSIONS AND MODIFICATIONS**

By now, it should be abundantly clear that the language used in drafting GG Guaranties is extremely important.

This is especially true in the context of lease renewals, extensions, and modifications.

The scenario we examine in this section is the following: Landlord, tenant, and guarantor have already entered into a lease and a GG Guaranty, respectively. Subsequently the parties agree to another set of terms embodied in either a lease renewal or extension at the expiration of the term, or a lease modification, amending certain rights and obligations of the parties.

Query: Does the GG Guaranty still bind the guarantor? It depends.

The Presumption: Courts construe guaranties strictly in favor of private guarantors. *Levine v. Segal*, 256 A.D.2d 199, 200 (1st Dept. 1998). If a guaranty is silent as to its effect in light of a renewal or other subsequent agreement between the landlord and tenant, courts will not extend the guaranty's enforceability beyond the original agreement. *Trump Management Inc. v. Tuberman*, 163 Misc.2d 921 (Kings Co. Civ. Ct. 1995) citing *Gulf Oil Corp. v. Buram Realty Co.*, 11 N.Y. 2d 223 (1962).

A. **SURVIVAL CLAUSES**

One way to ensure that the GG Guaranty still binds the guarantor after a subsequent agreement between the landlord and the tenant is to include a survival clause in the original GG Guaranty. We previewed this clause at the top of the course when we covered the anatomy of a GG Guaranty. The following is sample language for a survival clause in its entirety:

This Guaranty shall be a continuing Guaranty, and the liability of Guarantor hereunder shall in no way be affected, modified or diminished by reason of (a) any assignment, renewal, modification, amendment or extension of the Lease, or (b) any modification or waiver of or change in any terms, covenants and conditions of the Lease, or (c) any extension of time that may be granted by Landlord to Tenant, (d) any consent, release, indulgence or other action, inaction or omission under or in respect of the Lease, or (e) any dealings or transactions or matter or thing occurring between Landlord and Tenant, or (f) any bankruptcy, insolvency, reorganization, liquidation, arrangement, assignment for the benefit of creditors, receivership, trusteeship or similar proceeding affecting Tenant, whether or not notice thereof or of any thereof is given to Guarantor.

See Attachment 9.

First, note that this is a harsh example of a survival clause because the guaranty *even survives an assignment*. From the guarantor's perspective, it does not want to be on the hook even after a new business (and presumably new principals), have taken over. Guarantor should negotiate that upon assignment, a suitable guarantor of equal or greater financial net worth assume the guaranty and release the original guarantor.

This survival clause errs on the safe side to say the least. The draftsman of this clause was clearly aware of the situations that can arise which may well defeat a GG Guaranty's survival clause because its language fails to contemplate the contingency at hand.

The following are cases illustrate how (1) a survival clause can fail to keep the guarantor on the hook, and (2) how changes to material terms of a lease may require a showing that guarantor consented to the changes.

1. **NEW AGREEMENT**

In these cases, the operative fact was that the guaranty's survival clause did not contemplate the kind of arrangement that the landlord and tenant's subsequent agreement embodied, i.e. the guaranty was inextricably tied to the original lease and its terms.

Where a guaranty executed in 2000 stated that it would "remain and continue in full force and effect as to any renewal, change or extension of the Lease," the language was held not to cover an "extension agreement" between landlord and tenant that, *inter alia*, (1) specifically referred to the 2000 lease as "expired" and, (2) materially altered the terms of the 2000 lease by increasing rent for the tenant, and thus, increasing the risk for the guarantor without his consent. *Lo-Ho LLC v. Batista*, 62 A.D.3d 558 (1st Dept. 2009).

Where a guaranty stated that it would "remain and continue in full force and effect as to any renewal, change or extension of the Lease", and tenant stayed on as a month-to-month tenant after the expiration of the term, the court held that the guaranty no longer applied, because there hadn't been a renewal or extension of the lease. *665-75 Eleventh Ave. Realty Corp. v. Schlanger*, 265 A.D.2d 270 (1st Dep't 1999).

2. **MATERIAL TERMS OF THE ORIGINAL LEASE HAVE CHANGED**

These cases stand for a principle borrowed from surety law—namely that a creditor (landlord) and debtor (tenant) cannot materially alter the terms of an agreement that a surety (guarantor) is bound to without the surety's (guarantor's) consent.

Where a modification agreement increased rent, a material term, but guarantor could not make a *prima facie* showing that it did not consent to modification, summary judgment dismissing counts against guarantor was not warranted. *Arlona Ltd. Partnership v. The 8th of January Corp.*, 50 A.D.3d 933 (2d. Dep't 2008); *cf. 404 Park Partners, L.P. v. Lerner*, 75 A.D.3d 481 (1st Dep't 2010) (reversing trial court's grant of summary judgment to plaintiff and remanding for trial, where a guarantor did not sign the second guaranty executed with a lease extension and issue of fact remained as to whether he consented).

Where a lease renewal agreement changed a material term of the lease by granting landlord a right to terminate the lease unilaterally, without qualification, in the event of a use violation placed on the premises, the guarantors were discharged of their obligation because they had not consented to the change in their individual capacity. *Mangold v. Keip*, 177 Misc.2d 953 (1st Dep't 1998).

B. **WAIVER OF NOTICE OR RATIFICATION**

There are two ways to avoid the issue of showing that a guarantor consented to a "material" change in a lease modification, renewal, or extension.

1. **GUARANTOR WAIVES NOTICE**

Where the original guaranty includes a provision in which guarantor expressly waives his right to receive notice of changes to the lease, the guaranty is not extinguished simply because material changes to the lease were made without giving notice to the guarantor. *Pamela Equities Corp. v. The Law Suite, L.P.*, 14 Misc.3d 1217(A) (N.Y. Sup. Ct. 2005).

2. **RATIFICATION OF GUARANTY**

Where guarantors execute a ratification or reaffirmation of the guaranty and acknowledge their assent to any material changes in the terms of the original contract, courts will hold guarantors liable. See e.g., *N. Hill Funding of New York, LLC v. Maiden & Madison Holdings, LLC*, 27 Misc. 3d 1232(A) (N.Y. Sup. Ct. N.Y York County 2010)

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Practice Point

The best practice is to have the guarantor(s) sign a ratification of the guaranty anytime the underlying agreement is in anyway modified, renewed, or extended irrespective of whether you may consider the change to be a “material” term.

VIII. **BANKRUPTCY & GG GUARANTIES**

This section focuses on the effect bankruptcy has on a landlord's ability to proceed against the guarantor to recover rent and other damages arising from the tenant's default under the lease.

Specifically, we are examining the scenario where a business/tenant files a petition in federal bankruptcy court, thereby invoking the protection of the "automatic stay" under the Bankruptcy Code that stays all pending actions against the debtor-business, and the debtor proceeds, either with liquidation under Chapter 7, or reorganization under Chapter 11.

Query: Can the landlord proceed directly against the guarantor/principal of the business who guaranteed the tenant's obligations under the lease?

A. **THE AUTOMATIC STAY**

Title 11 of the United States Code ("Bankruptcy Code") governs proceedings in federal bankruptcy court.

Bankruptcy Code § 362 provides that a bankruptcy petition "operates as a stay, applicable to all entities," of the commencement or continuation of judicial proceedings against the debtor. See 11 U.S.C. § 362(a)(1).

Thus, under § 362 of the code, a landlord SHOULD NOT attempt to evict, or otherwise pursue judicial relief against, a tenant who has filed for bankruptcy.

Query: How will the landlord know that a tenant has filed for bankruptcy?

When the debtor files for bankruptcy, creditors who are listed by the debtor on its schedules, receive notice of the filing. However, under § 362 of the Code, the petition's filing itself triggers the automatic stay and Landlord is immediately restrained from pursuing ANY claims against the tenant, including seeking eviction, and would be well advised to consult with its attorney before serving any kind of notice or correspondence on the tenant in connection with defaults under the lease.

Query: What is the penalty for violating the automatic stay and proceeding against the tenant?

Section 362 of the Bankruptcy Code imposes an automatic stay upon the filing of a bankruptcy petition, prohibiting, *inter alia*, "any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate." 11 U.S.C. § 362(a)(3).

Section 362 further provides that “an individual injured by any willful violation of a stay provided by this section shall recover actual damages, including costs and attorneys' fees, and, in appropriate circumstances, may recover punitive damages.” *Id.* § 362(k)(1).

For the purposes of § 362(k), “willful” means “any deliberate act taken in violation of a stay, which the violator knows to be in existence.” *In re Crysen/Montenay Energy Co.*, 902 F.2d 1098, 1105 (2d Cir.1990).

In other words, specific intent to violate the stay is not required; instead, “general intent in taking actions which have the effect of violating the automatic stay” is sufficient to warrant damages. *In re Dominguez*, 312 B.R. 499, 508 (Bankr.S.D.N.Y.2004) (internal quotation marks and citations omitted).

In re Sturman, 10 CIV. 6725 RJS, 2011 WL 4472412 (S.D.N.Y. Sept. 27, 2011)

Query: Who is the debtor?

In a typical landlord-tenant scenario, the debtor is usually a business, *i.e.* a corporate entity. The debtor’s “estate” is comprised of the debtor’s assets, including, among other things, real and personal property.

Thus, formally speaking, the guarantor is distinct from the debtor and the debtor’s estate. However, given the state of the law, merely relying on a formal distinction to go after the guarantor for tenant’s defaults under the lease would be ill advised.

Landlord’s counsel should instead recommend to the client that a safer way of pursuing the guarantor may be to file a motion in bankruptcy court seeking a declaration that the guarantor is not protected by the stay, or, in the alternative, a lift of the automatic stay to go after the guarantor if landlord’s interest is not “adequately protected”.

B. KNOW THE STANDARDS

As with any motion, you should know the court's standards and consider the likelihood of success in light of the associated litigation costs and potential recovery for the client.

1. THE STANDARD FOR PROCEEDING AGAINST GUARANTOR

The black letter law is straightforward and suggests that you should be able to proceed against the guarantor notwithstanding an automatic stay protecting the debtor under the bankruptcy code.

It is axiomatic that stays pursuant to sec. 362(a) "are limited to debtors and do not encompass non-bankrupt co-defendants." *Teachers Ins. and Annuity Ass'n of America v. Butler*, 803 F.2d 61, 65 (2d Cir. 1986) (declining to extend stay to non-bankrupt general partners); see also *Fortier v. Dona Anna Plaza Partners*, 747 F.2d 1324, 1329-30 (10th Cir. 1984) ("the language of [sec. 362] extends stay proceedings only to actions 'against the debtor'").

Thus, a plenary action against a good-guy guarantor of a bankrupt entity falls outside the protection of the stay. *Live Nation Worldwide, Inc. v. GTA, Inc.*, Civ. No. 07-483 (CM), 2007 WL 1489761, at *4 (Bankr. S.D.N.Y. 2007) ("Notwithstanding the initiation of a primary obligor's bankruptcy proceeding and the resulting automatic stay, a creditor may bring a debt collection against a guarantor in accordance with the guaranty's venue provision"); *Conti v. Blau*, 234 B.R. 627, 628 (S.D.N.Y. 1999) (holding that stay did not prevent hearing to proceed against general partners to determine whether employees committed malpractice).

The rationale behind this prohibition is that creditors obtain "the protection they sought and received when they required a third party to guaranty the debt." *Credit Alliance Corp. v. Williams*, 851 F.2d 119, 121 (4th Cir. 1988).

However, a Court can extend the stay to a non-bankrupt party such as a guarantor in certain limited circumstances where it can be shown that such party is essential to any reorganizational effort. See *In re Lazarus Burman Associates*, 161 B.R. 891, 899-900 (Bankr. E.D.N.Y. 1993) (enjoining guaranty actions against non-debtor principals of debtor partnerships because principals were the only persons who could effectively formulate, fund, and carry out debtors' plans of reorganization); *Clain v. Int'l Steel Group*, No.

04 Civ. 173 (KNF), 2005 WL 273015 (S.D.N.Y. 2005); *but see In re Shirns Pontiac GMC, Inc.*, Bankr. No. 5-08-bk-53252, 2010 WL 3928532, at *2 (Bankr. M.D. Pa. 2010) (declining to extend stay to landlord and a corporation owned by debtor's principal where it could not be shown that debtor's rented property was essential for its continued operations).

Courts have also extended the stay to non-debtor parties in "unusual circumstances" where, by operation of law, "there is such identity between debtor and the third-party defendant that the debtor may be said to be the real party defendant and that a judgment against the third-party defendant will in effect be a judgment against the debtor". *A.H. Robins Co., Inc. v. Piccinin*, 788 F.2d 994, 999 (4th Cir. 1986) (finding basis for extending stay to non-debtor parties where insurance coverage of debtor and non-debtor parties were at risk of depletion absent the stay); *In re Johns Manville Corp.*, 33 B.R. 254, 261 (Bankr. S.D.N.Y. 1983) (noting insurance as important asset of estate and extending stay to non-debtor third-parties).

In most cases involving small businesses like restaurants or retail outfits involving one or two principals, this exception may apply and extend the stay to the principal-guarantors.

Practice Points

On the one hand, the presumption is guarantor/non-debtors are fair game as far as the Bankruptcy Code is concerned. The creditor bargained for a security blanket in the form of a GG Guaranty, and bankruptcy law honors that agreement.

On the other hand, assume for argument's sake, that you do go after the guarantor(s), confident that no bankruptcy court would extend the stay to protect them. Maybe, after taking this course, you decide to file a motion for summary judgment in lieu of a complaint pursuant to CPLR § 3213, against the guarantor in New York Supreme Court. What next?

Assuming the guarantor/tenant is represented by competent counsel, you would not be surprised that he or she might file a motion in bankruptcy court seeking to extend the stay to the guarantor by trying to fit the facts into one of the two described exceptions:

- guarantor is essential to any reorganizational effort; or,

- there is such an identity between debtor and the guarantor that a judgment against guarantor would be like a judgment against the debtor.

If counsel is particularly aggressive, they may even seek a declaratory judgment finding that landlord violated the automatic stay and is now liable for attorneys' fees associated with the motion. However, given the presumption in favor of limiting the stay to cover the debtor, a bankruptcy court is unlikely to grant the relief.

In any case, you see where we ended up?—right back in bankruptcy court while our clever motion for summary judgment in lieu of complaint is stalled by the pending bankruptcy motion. So instead of a shortcut, this tactic ended up being a detour which resulted in the client having to pay for both the state court § 3213 papers AND the briefing associated with defending against the guarantor's bankruptcy motion.

You will also have a very disgruntled client on your hands after you explain why you were bounced back to bankruptcy court. Therefore, the most prudent course that would be beyond reproach would be to file a motion in bankruptcy court seeking a declaration that the stay does not apply to the guarantor in order to allow an action on the guaranty to proceed in state court uninhibited.

2. THE STANDARD FOR GETTING RELIEF FROM THE STAY

Whether landlord's counsel opts for the aggressive tack we just played out or decides to file a motion in bankruptcy court seeking its blessing to go after the guarantor, there is a possibility that the court will find that the automatic stay should apply to the guarantor for one of the two limited exceptions developed in the case law we discussed; namely—

- guarantor is essential to any reorganizational effort; or,
- there is such an identity between debtor and the guarantor that a judgment against guarantor would be like a judgment against the debtor.

Should this happen, landlord's counsel has one last resort—Bankruptcy Code § 362(d). It reads, in pertinent part:

On request of a party in interest and after notice and a hearing, the court shall grant relief from the stay provided under subsection (a)

of this section, such as by terminating, annulling, modifying, or conditioning such stay—

(1) for cause, including the lack of adequate protection of an interest in property of such party in interest....

11 U.S.C. § 362(d)(1).

Under this provision the court has broad discretion to tailor a remedy that protects landlord's interest while allowing the debtor to reorganize.

Indicative of the court's inherent discretion is the fact that Congress did not provide any guidance as to what constitutes "cause" under the statute. Thus, the courts developed their own methodology examining a variety of factors to arrive at what may constitute adequate "cause" to lift the stay. The test adopted by the Second Circuit originates from *In re Sonnax*, 907 F.2d 1280, 1285 (2d. Cir. 1990). Other circuits follow similar tests but counsel should always conform the analysis to the appropriate jurisdiction's methodology.

In *Sonnax*, the Court identified twelve factors that bankruptcy courts in the Second Circuit have come to use as guideposts in determining whether sufficient cause exists to grant relief from the automatic stay:

- (1) whether relief would result in a partial or complete resolution of the issues;
- (2) lack of any connection with or interference with the bankruptcy case;
- (3) whether the other proceeding involves the debtor as a fiduciary;
- (4) whether a specialized tribunal with the necessary expertise has been established to hear the cause of action;
- (5) whether the debtor's insurer has assumed full responsibility for defending it;
- (6) whether the action primarily involves third parties;
- (7) whether litigation in another forum would prejudice the interests of other creditors;

(8) whether the judgment claim arising from the other action is subject to equitable subordination;

(9) whether movant's success in the other proceeding would result in a judicial lien avoidable by the debtor;

(10) the interests of judicial economy and the expeditious and economical resolution of litigation;

(11) whether the parties are ready for trial in the other proceeding; and

(12) the impact of the stay on the parties and the balance of harms.

In re Sonnax, 907 F.2d at 1286.

In the landlord-tenant context, bankruptcy courts have weighed the above factors and found sufficient cause to lift the automatic stay when:

- the debtor has filed a bankruptcy petition on the eve of trial or an eviction;
- remained delinquent in its obligations to pay rent;
- failed to provide adequate assurances to landlord, and
- paid no post-petition rent or otherwise indicated that it can make the landlord whole.

See, e.g., In re Burger Boys, Inc., 183 B.R. 682, 688 (S.D.N.Y. 1994) (affirming bankruptcy court's lift of the automatic stay where Chapter 11 petition was filed by tenant on the eve of a civil court summary eviction proceeding and where the bankruptcy court found that the issues would be more expeditiously resolved in the state forum)

Zagata Fabricators, Inc. v. Superior Air Products, 893 F.2d 624, 628 (3d Cir. 1990) (holding that bankruptcy court erred in denying landlord relief under Section 362(d) and allowing it to pursue state law remedies where debtor remained in possession of landlord's premises but failed to pay rent, stating that "no authority of which this court is aware provides support for the extraordinary remedy granted here, namely, possession free of charge")

In re Rocchio, 125 B.R. 345, 347 (Bankr. D. R. I. 1991) ("[t]he Debtor's failure to pay post-petition rent, together with a total absence of evidence that they [*sic*] will: (1) cure the default, (2)

provide adequate protection, or (3) give adequate assurance of future performance, all violate clear requirements of § 365(d)(3), and we hold that said violations (individually and cumulatively) constitute 'cause' under § 362(d)(1) to lift the stay. . .")

IX. **RECAP WITH TWO CLOSING EXAMPLES**

To highlight the major themes that guided our discussion during this course, we offer two final GG Guaranty examples.

The first is extremely tenant-friendly, to a fault, if you are the landlord. Any idea why?

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Subparagraph 1 looks standard. Read together with the preamble, this means the guarantor will be relieved of liability upon vacatur (including removal of personal property) and surrender of the premises.

The next clause, however, is troubling if you are landlord. It reads that the guaranty shall not extend to obligations incurred if,

Upon tenant assigning this lease or subletting the premises, provided however that the principal officer and such assignee or subtenant assumes the responsibility of the Guarantor hereunder.

Sounds reasonable right? NO! Under this clause, a tenant-guarantor could literally assign the lease or sublet it to any old Joe who would sign a piece of paper irrespective of whether he is a creditworthy Joe who would actually have the assets to collect against in the event of a default. There might as well not be a guaranty!

This example highlights, by way of contrast, the primary concern of landlord- to make it as difficult as possible for tenant and the guarantor to walk away from the lease by ensuring a level of security in terms of cash and uncertainty for tenant in terms of how to terminate early while relieving guarantor of personal liability.

The Seaport Jewelry example does the exact opposite. Tenant and guarantor can walk away scot-free by executing an assignment to anyone at all, without the landlord's consent!

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This GG Guaranty piles on the protection for the landlord and leaves a lot for tenant and guarantor to worry about before they can terminate the relationship. The protections break out into the themes we have highlighted throughout this course:

Additional Security for Landlord

This guaranty provides for a generous 9 months prior written notice which, as we discussed earlier, functions as 9 months' additional security on top of the security deposit.

Under subparagraph (ii) It also has a *minimum rent clause*. That is, tenant and guarantor cannot even consider terminating the lease early before tenant has paid 12 consecutive months of minimum rent if guarantor hopes to walk away with zero liability.

Finally, it explicitly states that if the tenant does choose to serve a notice indicating its intent to surrender the premises before expiration, landlord has an absolute right to retain the entire security deposit without being required to apply it towards minimum rent or any other charges.

In sum, landlord has secured at least as much as 21 months of rent from the tenant in addition to the amount it holds as a security deposit!

Additional Uncertainty for Tenant

On top of the significant cushion this landlord was able to negotiate, this GG Guaranty also has all the elements we discussed that could trip up a tenant who is trying to terminate early:

- that written notice be provided at least 9 months prior to the surrender date.
- that surrender of the premises must be lien free with respect to tenant's work that was conducted to prepare the premises for its occupancy.
- that surrender of the premises should be in "vacant broom-clean condition" and "in accordance with the terms and conditions of the Lease".