Guaranty Enforcement in a Time of Rent Deferrals and Other Economic Accommodations

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Due to the ongoing COVID-19 pandemic, lessees and lessors across many industries are attempting to ease economic tensions by agreeing to certain accommodations in respect of lessees’ obligations. In the aviation industry, this is commonly taking the form of rent deferrals granted to the airlines by their lessors. Such modifications alter the obligations of the primary transaction parties—the airline and the lessor—but they may also affect the obligations of any third-party obligors involved, such as a guarantor. This article explores the implications of modifying underlying transaction documentation on the enforceability of a guaranty under New York law, including the nature of guaranteed obligations, the importance of material modifications to such obligations, the effect of a guarantor’s consent to these modifications and the implications for creditors.

I. Nature and Modification of Guaranteed Obligations

A guaranty is a contractual relationship evidencing a secondary and contingent obligation, wherein the rights and obligations of the parties depend upon the performance by a third party under another contractual relationship.¹ As a general rule, a guaranty is to be interpreted in the strictest manner, and any material alteration of the guarantor’s obligations without the guarantor’s consent will
discharge the guarantor.² Notably, if the principal obligor alters the guarantor’s undertaking to cover a different obligation by modifying the underlying transaction documents that are the subject of the guaranteed obligations without the guarantor’s consent, then the guarantor will be discharged of its obligation under the guaranty.³ Williston on Contracts summarizes the general rule as follows: “[i]f the terms of the agreement between the creditor and the principal are varied, thereby changing the rights and duties of the principal, a [guarantor] who has contracted to answer only for the performance of the original contract will be discharged from liability for the principal’s failure to perform the altered contract.”⁴ However, a guarantor may consent to the material modification of the underlying obligations in which case the guarantor will remain fully liable for the modified obligations.⁵ Such consent is commonly contained in a provision of the guaranty contract itself, but may be evidenced independently as well.⁶

In order to discharge a guarantor from its obligations under a guaranty contract, a modification to the primary obligations must be material. A mere indulgence toward the principal obligor under the primary transaction documents will not discharge a guarantor from its obligations under the related guaranty contract.⁷ Accordingly, when attempting to enforce a guaranty in the event that the primary transaction documents have been modified, creditors commonly assert either (i) that the modification to the primary obligations was immaterial in respect of the guaranteed obligations or (ii) that the guarantor consented to such modification.

II. Materiality of a Modification

In determining whether a modification to a guaranteed primary obligation is material, courts analyze whether the modification places the altered primary transactions outside of the original contract such that the primary obligation is no longer the one upon which the guarantor agreed to be bound.⁸ Generally, courts will look to see if the modification injures the guarantor, increases the guarantor’s risk, or otherwise exposes the guarantor to greater liability.⁹ Further, in its discussion of the materiality of a modification to a primary obligation, the Restatement (Third) of Suretyship and Guaranty distinguishes¹⁰ between extensions of time for performance and other modifications.¹¹ The Restatement provides that, where a creditor grants an extension of time for performance of the primary obligations, “to the extent that the [guarantor] has not performed its duties pursuant to the [guaranty], it is discharged from those duties to the extent that the extension would otherwise cause the [guarantor] a loss.”¹²

This principle is demonstrated in Becker v. Faber, where the guarantor of a loan secured by a real estate mortgage contended that the terms of the mortgage were modified without its knowledge or consent, and it was therefore discharged from its obligations under the guaranty contract.¹³ The loan in question had a term of three years, with interest payable every six months. While the principal was not paid on the maturity date, interest was paid every six months through the maturity date.¹⁴ Despite no written agreement to extend the time of payment, the mortgagor continued to pay, and the mortgagee continued to accept, interest every six months for six years beyond the original maturity date of the loan.¹⁵ The court held that these concessions made by the mortgagee did not serve to discharge the guarantor
from its obligations. In its analysis, the court distinguished between the
“leniency” shown by the mortgagee in the case at hand, and a situation in which a
creditor and debtor agree to preclude the creditor from enforcing for a period of
time:

“Leniency shown to a debtor in default and delay permitted by the creditor without
change in the time when payment of the debt might be demanded, does not, however,
constitute an extension of the time for payment. That requires a binding contract
which precludes the creditor from enforcing payment according to the terms of the
original contract and confers upon the debtor the right to withhold payment after the
original debt has become due.”

The court in Becker noted that, in respect of the latter situation outlined above,
“[t]he doctrine that extension of time for payment of the principal debt even for a
few days discharges the surety, has been established by a long line of
decisions.” This scenario is comparable to that of a rent deferral or other similar
economic accommodation in the context of an aircraft lease or related loan. The
purpose of these agreements is to assure the lessee or debtor, as the case may be,
that the creditor will not enforce at least a portion of its rights for an agreed period
of time under the original agreement. The court in Becker insinuates that, in such a
scenario, a guarantor that does not consent to such an agreement would be
discharged from its obligations if the effect of the deferral is to legally alter the
original primary obligation such that only the new obligation is enforceable.

The Restatement (Third) of Suretyship and Guaranty further explains that if an
extension of time for performance of the underlying obligations increases the risk of
loss to the guarantor, the guarantor is discharged of all liability under the guaranty
contract. Such an increase in risk commonly occurs when the principal obligor
becomes insolvent during the extended term of the principal obligations, and due to
the inability of the guarantor to enforce its rights against the principal obligor on
the originally agreed-upon date, the guarantor has suffered a loss. The majority of
cases hold that any extension of time beyond that originally provided for in the
underlying primary documentation completely discharges the secondary obligation,
as that extension inherently materially changes the obligations of the guarantor.

Similarly, to the extent it causes additional risk or would otherwise cause the
guarantor a loss, a modification of the underlying obligations other than an
extension of time for performance, such as an increase in the amount due to the
creditor, fully discharges the guarantor from its obligations absent the guarantor’s
consent or ratification. In Flexi-Van Leasing, Inc. v. Isaias, for example, the court
held that the underlying lease obligations were materially modified and thus the
guarantor was discharged. Flexi-Van Leasing, Inc., a lessor of marine chassis
equipment, brought suit against a guarantor, who had an ownership stake in the
lessee entity, to enforce guaranteed obligations of the lessee under a lease covering
a number of chassis. At the lessee’s request, but without the consent of the
guarantor, the guaranteed lease had been consolidated with several other leases
after the guaranty was executed. In doing so, the daily rental charges were
reduced, the time of payment of the principal sum was lengthened, liquidated
damages provisions were included, and the number of chassis subject to the lease was increased from 25 to 28. While the court noted that the decreased rent might be considered a mere “indulgence,” as discussed in Becker above, when taken together with the other modifications made to the lease, including the extension of time and the increase in the number of chassis subject to the lease, these modifications were sufficient to discharge the guarantor from its obligations.

The court in Flexi-Van Leasing also highlighted the fact that other guaranties recently entered into by the same parties contained provisions granting advanced consent to modification of the underlying leases, while the guaranty in question was notably missing such provisions. The analysis in Flexi-Van Leasing underscores the importance of obtaining a guarantor’s consent to modification of the relevant primary obligations.

III. Guarantor’s Consent to Modification

The general rule calling for the discharge of a guarantor’s obligations under a guaranty upon modification of the primary guaranteed obligations does not apply where the guarantor has consented to the modification or otherwise waived its rights. A common implementation of granting such consent is in the guaranty contract itself. Courts consistently hold that provisions in guaranty contracts contemplating and consenting to potential extensions of the primary obligations are valid, and that liability under such extensions can be enforceable against the guarantor. In CrossLand Federal Savings Bank by FDIC, the District Court for the Eastern District of New York held that “[a]ny changes or modifications that fall within [the consent provision of the Guaranty] cannot release the guarantors from their obligations under the Guaranty because the guarantors consented to such alterations when they executed the Guaranty.” If a guaranty contains a consent provision, the court’s analysis will turn on whether the consent provision covers the modification. Such analysis is conducted in accordance with standard contract interpretation analysis.

This principle is illustrated in Lo-Ho LLC v. Batista. In that case, a commercial landlord brought suit for breach of lease against tenant and guarantor. The guaranty in respect of the lessee’s obligations provided, in relevant part, that the guarantor was guaranteeing “the full performance and observance of all the agreements to be performed and observed by the Tenant in the attached Lease,” and that it would “remain and continue in full force and effect as to any renewal, change or extension of the Lease.” The court’s analysis turned on whether a modification of the original lease could be categorized as a “renewal, change or extension” of the original lease, or if such modification should be considered a new lease, and thus not within the scope of the guarantor’s consent.

The lessee and the lessor agreed, one month after the initial lease term had expired, to enter into a subsequent lease agreement. The subsequent lease purported to extend the initial lease for an additional five-year term;
However the subsequent lease provided that the rent increased by $200 annually, tax installments were to be paid on a monthly basis, and certain renovations were to be undertaken by the lessee. The lessor argued that the subsequent lease should be considered an extension of the original lease because the subsequent lease purported on its face to be an extension of the original lease, many of the terms were substantially the same as the original lease, and the lessee remained in possession of the property throughout the period between the lease terms. Therefore, the lessor argued that the terms of the advance consent clause in the guaranty were broad enough to apply to the subsequent lease, and the guarantor should be held liable for the lessee’s default. The court, however, disagreed, noting that, “[w]here a guaranty obligates a guarantor as to any ‘renewal, change or extension of the lease,’ upon the expiration of the lease, the guaranty lapses and can no longer bind defendant.” Here, the original lease term expired one month prior to the execution of the second lease, at which point the guarantor was discharged from its liability.

Having found that the consent clause did not apply to the second lease, the court turned its analysis to whether the underlying obligations were modified absent the guarantor’s consent. The court held that “[t]he increased rent would have substantially and impermissibly changed the guarantor’s obligations under the original agreement and thus, impermissibly increased defendant’s risk without his consent. Hence, the second lease did not obligate the guarantor.” As demonstrated by this case, it is important for a creditor and debtor to determine whether a guaranty’s advance consent clause is sufficiently broad to cover any proposed modifications to the underlying obligations.

A guarantor may also impliedly consent to modification of the primary obligations through its actions and course of dealings, although this method of consent is uncommon and difficult to assert in court. This concept is demonstrated in *Excelsior Capital, LLC v. Superior Broadcasting Co., Inc.* In this case, a lender issued five loans to the borrower, each of which was evidenced by a promissory note and three of which were guaranteed by a majority owner of the borrower. The guarantor subsequently, in his capacity as owner of the borrower but not in his capacity as guarantor, requested an extension of the maturity date on the guaranteed notes, to which the lender agreed. When the lender moved to enforce the guaranties, the guarantor argued that these extensions had discharged his obligations because as the guaranties did not contain advance consent clauses and he had not otherwise consented to the extensions in his capacity as guarantor. The Appellate Division disagreed, and upheld the jury’s finding that the guarantor had impliedly consented to the modification of the underlying obligations, through his actions and course of dealing with the lender.

Although the guarantor was held liable in *Excelsior Capital*, this type of implied consent to modification of the underlying obligations is rarely found and highly fact-specific. As such, a creditor is better protected if it ensures that a broad advance consent provision is included in a guaranty, thereby providing express consent to modification of the underlying documents.
In the unlikely event that a primary obligation is modified without the guarantor’s consent and the guarantor is not discharged by the modification, the guarantor may perform its secondary obligations as though either (i) the secondary obligation is correspondingly modified or (ii) there had been no modification to the primary obligation. This may arise in a scenario similar to Becker v. Faber, discussed above, where the performance of the principal obligations was partially remitted without the parties formalizing an agreement regarding the forbearance of enforcement.

Alternatively, if a guarantor is discharged due to a material modification of the underlying obligations without its consent, the guarantor will be fully discharged and cannot be held liable even for the unmodified guaranteed obligation. A guarantor will be held liable, however, for liability for an installment of a contract that has accrued prior to the modifications that discharged the guarantor from future liability. Therefore, if an airline and its lessor agree to a rent deferral without the consent of the airline’s guarantor, the guarantor may be held liable for any past due rent payments or other obligations as of the date of the deferral agreement, but may be fully discharged from any future obligations in respect of that lease agreement.

IV. Considerations for Lessors and other Creditors

In the current climate, creditors and primary obligors are seeking to make economic accommodations in order to maintain relationships and avoid further economic strain in the coming months. In doing so, the parties must be aware of the impact such modifications may have on any related secondary obligations, such as guaranties. Lessors and other creditors should review existing guaranty contracts to determine the extent of the guaranteed obligations. If the guaranteed obligations are being modified, the creditors should then determine whether the guaranty itself consents to, or otherwise contemplates, such modifications. If the guaranty contains a consent provision, and the proposed modifications are covered by that provision, the guaranty will be enforceable to the full extent of the modified contract. If, however, the guaranty contract does not contain a consent provision, or the consent provision does not contemplate the modifications currently being proposed, the creditors should obtain the guarantor’s express consent to such modification in order to ensure that the modified obligation remains covered by the guaranty.

1. Frank W. Daykin, Guarantor Distinguished from Surety, 1 W. Res. L. Rev. 75, 75 (1949).


3. Bier Pension Plan Trust v. Estate of Schneierson, 74 N.Y.2d 312, 315 (1989) (holding that a guarantor’s obligation cannot be altered without its consent; if the original note is modified without its consent, a guarantor is relieved of its obligation).


6. *Compagnie Financiere de CIC et de L’union Europeenne v. Merrill Lynch, Pierce, Fenner & Smith Incorporated*, 188 F.3d 31, 35 (2d Cir. 1999) (citing *Indianapolis Morris Plan Corp. v. Karlen*, 28 N.Y.2d 30 (1971)) (“Consent may be given in advance, and is commonly incorporated in the instrument; or it may be given afterward. It requires no consideration, and operates as a waiver of the consenting party’s right to claim his own discharge.”).


8. *Banco Portugues do Atlantico v. Asland, S.A.*, 745 F. Supp. 962, 969-70 (S.D.N.Y. 1990) (“[D]eviations by the principal debtor and the creditor from the terms of the guaranteed contract, which have the effect of altering the surety’s obligation, place the altered transactions “outside” the original contract, thereby discharging the surety.”).


10. Although it purports to distinguish between extensions of time and other modifications, the analysis of the effect of each on secondary obligations remains substantially similar.

11. *RESTATEMENT (THIRD) OF SURETYSHIP AND GUAR. § 41 (AM. LAW INST. 1996).*

12. *Id.* at § 40.


14. *Id.* at 148.

15. *Id.*

16. *Id.* at 152.

17. *Id.* at 151.

18. *Id.*

19. *Id.*

20. *RESTATEMENT (THIRD) OF SURETYSHIP AND GUAR. § 40 (AM. LAW INST. 1996).*

21. *Id.* at cmt. e.

22. *Id.* at Rep.’s Note.

23. *RESTATEMENT (THIRD) OF SURETYSHIP AND GUAR. § 41.*

25. Id. at 421.
26. Id. at 421-22.
27. Id. at 425.
28. Id. (citing Becker v. Faber, 280 N.Y. 146, 150 (1939)).
29. Id. ("Notably, the guaranties signed by defendant in 1984, and his brother in 1979, expressly stated that they 'shall remain and continue in full force and effect upon any renewal, modification or extension of the leases.' However, Flexi-Van removed the language regarding modifications from the 1987 guaranty.").
30. Id.
32. See, e.g., id. at 200.
33. See, e.g., id.
34. Id. at 200.
35. Id.
36. Id.
38. Id.
39. Id. at 560.
40. Id.
41. Id.
42. Id.
43. Id. at 559.
44. Id.
45. Id.
46. Id. at 561 (citing Elite Gold, Inc. v. TT Jewelry Outlet Corp., 31 A.D.3d 338, 340 (N.Y. App. Div. 2006)).
47. Id. ("[T]he usual rule is that the guarant[y] lapses at the end of a lease term, or where a change is made that in-creases the guarantor's risk ... There is no legal support or authority for making an exception
to the “usual rule” in this case.

48. Id.

49. Id. (internal citations omitted).


52. Id. at 697.

53. Id.

54. Id. at 698.

55. Id. at 699.

56. Id.; cf. U.S. Fidelity and Guar. Co. v. Braspetro Oil Services Co., 369 F.3d 34 (2d Cir. 2004) (holding that Guarantor impliedly assented to extension of guaranteed obligations to co-obligee on underlying contract by naming them as a defendant in action seeking relief from guaranteed obligations).


58. RESTATEMENT (THIRD) OF SURETYSHIP AND GUAR. § 40, 41.

59. Id.

60. 280 N.Y. 146, 147-48 (1939).


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