


Connecticut State Law of Guaranties

Michael F. Maglio, James C. Schulwolf, R. Jeffrey Smith, and Thomas J. Welsh

excerpted from



THE LAW OF GUARANTIES **A Jurisdiction-by-Jurisdiction Guide** **to U.S. and Canadian Law**

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Commercial Finance Committee
Uniform Commercial Code Committee

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Preface

We are pleased to present the first edition of *The Law of Guaranties, A Jurisdiction-by-Jurisdiction Guide to U.S. and Canadian Law*. This book is the product of a joint task force of the Commercial Finance Committee and the Uniform Commercial Code Committee of the ABA's Business Law Section.

The Law of Guaranties is a unique resource for commercial lenders and their lawyers. It collects detailed information about the laws of guaranty of all 50 states, the District of Columbia, Puerto Rico, Canada and applicable Federal statutes updated as of late 2012. *The Law of Guaranties* represents a tremendous effort on the part of many experienced and devoted lawyers over an extended period of time, often by individuals who are leaders of the bar.

Our sincere gratitude is due to each of our authors and to the American Bar Association's talented and committed staff members, who brought the project to fruition.

Special thanks are in order for Penelope L. Christophorou of Cleary Gottlieb Steen & Hamilton LLP. Penny was the original inspiration for this project when she was the chair of the Uniform Commercial Code Committee of the ABA's Business Law Section. Penny was responsible for the first draft of the template used to create the chapters in this book.

We hope you find *The Law of Guaranties* to be useful and welcome your input and suggestions for future editions.

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Foreword

Anyone remotely familiar with the law of guaranty knows that the Restatement (Third) of the Law of Suretyship and Guaranty (ALI 1996) is an indispensable text. It provides a wonderful summary of what the law is generally, along with the reasons underlying each rule. Unfortunately, no area of law is truly as uniform as any restatement makes it seem, and that is certainly true with respect to the law of guaranty. Hence the need for this book.

In the pages that follow, the reader will learn about the key cases, statutes, and nuances of the law of guaranty in each jurisdiction within the United States and Canada. That makes this book an essential tool for both transactional lawyers and litigators. The former can use it when drafting or negotiating a guaranty, particularly one that may be governed by the law of a jurisdiction with which the lawyer is not intimately familiar. For as this book ably demonstrates, choice of law matters. Litigators will find this book useful in preparing to enforce or escape liability under a guaranty. By organizing the material by jurisdiction, and providing what is in essence a basic law review article about the law in that locality, this book refers users to what they need to know, even if they were unaware they needed to know it.

That is something of a Herculean task. Yet the editors have obtained the assistance of notable and experienced practitioners in each jurisdiction. These authors have produced a work that belongs on the shelf of every commercial lawyer. That is evidenced most clearly by the highlights and practice pointers in each section. Those highlights and practice pointers reveal how varied – and occasionally surprising – the law of guaranty is. For example,

Anti-deficiency statutes. In Nebraska, guarantors do not get the benefit of the three-month statute of limitations applicable to an action for a deficiency against a principal obligor following a non-judicial foreclosure of real property. In Utah, they do.

Attorney's fees. In Nebraska, a contractual provision providing for attorney's fees in connection with a lawsuit to enforce a contract is void as against public policy. The same is true in the Dakotas.

Community property. The rules vary widely about whether the community property of a guarantor can be reached if the guarantor's spouse has not signed the guaranty. In Arizona, the guarantor has no recourse to community property. In Idaho, the guarantor does. In Washington, it depends on whether the guaranteed obligation benefitted the community. And in New Mexico, the law is unclear on this point. Of course, the federal Equal Credit Opportunity Act and Regulation B (detailed in the chapter on federal law) limit a creditor's ability to simply require both spouses to sign the guaranty, so an understanding of the marital property laws of the applicable jurisdiction are critical when the guarantor is an individual.

Continuing guaranties. Kentucky apparently restricts the use of continuing guaranties because it requires that a guaranty agreement either expressly reference the instrument being guaranteed or specify both a maximum liability and a termination date. In Alabama, in contrast, a clause in a guaranty agreement requiring the express

written consent of the obligee before the guarantor may revoke a continuing guaranty is enforceable.

Secured transactions. Washington State has non-uniform versions of U.C.C. §§ 9-602 and 9-624, which allow secondary guarantors to waive several otherwise non-waivable rights under Article 9.

This brief glimpse should be sufficient to show that this book will appeal to novices and experts alike.

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Contents

§ 1	Nature of the Guaranty Arrangement	144
	1.1 Guaranty Relationships	144
	1.2 Other Suretyship Relationships	145

§ 2	State Law Requirements for an Entity to Enter a Guaranty	145
2.1	Corporations	146
2.2	Partnerships and Limited Liability Partnerships	146
2.3	Limited Liability Companies	146
2.4	Statutory Trusts	147
2.5	Banks and Trust Companies	147
2.6	Individuals	147
§ 3	Signatory’s Authority to Execute a Guaranty	147
3.1	Corporations	148
3.2	Partnerships and Limited Liability Partnerships	148
3.3	Limited Liability Companies	149
3.4	Statutory Trusts	149
3.5	Banks and Trust Companies	150
§ 4	Consideration; Sufficiency of Past Consideration	150
§ 5	Notice of Acceptance	151
§ 6	Interpretation of Guaranties	151
6.1	General Principles	152
6.2	Guaranty of Payment versus Guaranty of Collection	152
6.3	“Continuing”	153
6.4	Language Regarding the Revocation of Guaranties	153
6.5	“Absolute” and “Unconditional”	154
§ 7	Defenses of the Guarantor	154
7.1	Defenses or Discharge of the Principal Obligor	154
7.1.1	General	154
7.1.2	Defenses that may not be raised by Guarantor	154
7.2	“Suretyship” Defenses	155
7.2.1	Modification of the Underlying Obligation, including Release	155
7.2.2	Release or Impairment of Security for the Underlying Obligation	155
7.2.3	Discharge of Coguarantor, including Release	155
7.3	Other Defenses	156
7.3.1	Good Faith and Fair Dealing	156
7.3.2	Failure to pursue Principal Obligor	156
7.3.3	Statute of Limitations	156
7.3.4	Statute of Frauds	157
7.3.5	Commercially Reasonable Collateral Disposition	158
§ 8	Waiver of Defenses by the Guarantor	158
8.1	Waiver of Impairment of Collateral Claim	159
§ 9	Third-party Pledgors—Defenses and Waiver Thereof	159
§ 10	Jointly and Severally Liable Guarantors	160
10.1	Contribution	160
§ 11	Reliance	161
§ 12	Subrogation	161
12.1	Partial Subrogation	162
12.2	Payment and Performance Bonds	162

§ 13	Triangular Set-off in Bankruptcy	162
§ 14	Indemnification—Whether the Principal Obligor has a Duty	163
§ 15	Enforcement of Guaranties	163
	15.1 Limitations on Recovery	163
	15.2 Exercising Rights under a Guaranty Where the Underlying Obligation is also Secured by a Mortgage	164
	15.3 Litigating Guaranty Claims: Procedural Considerations	164
	15.4 Choice of Law and Venue	165
§ 16	Revival and Reinstatement of Guaranties	166

Connecticut State Law of Guaranties¹

Practice Pointer: Both the **Restatement (Third) of Suretyship and Guaranty** and the **Restatement (Third) of Contracts** have been cited by Connecticut courts as authority with approval. See *Lestorti v. DeLeo*, 298 Conn. 466, 475 (fn 8) (Conn. Supreme Ct. 2010) (“[w]e have previously relied on the Restatement (Third) of Suretyship and Guaranty to fill gaps in and support our common law (citations omitted)”... [w]e also frequently have relied on the Restatement (Second) of Contracts (citations omitted)”). Introductory Note: In order to standardize our discussion of the law of guaranties, we use the following vocabulary to refer to the various parties to a guaranty and their obligations.

“Guarantor” means a person who, by contract, agrees to satisfy an underlying obligation of a principal obligor to an obligee upon the principal obligor’s default on that underlying obligation. We do not draw a distinction between guarantors and sureties, as the distinction in Connecticut between the two is often unclear and not helpful.²

“Guaranty” means the contract by which the guarantor agrees to satisfy the underlying obligation of a principal obligor to an obligee in the event the principal obligor defaults on the underlying obligation.

“Obligee” means the person to whom the underlying obligation is owed. For example, the lender under a loan agreement would be an obligee with respect to the borrower.

“Principal Obligor” means the person who incurs the underlying obligation to the obligee. For example, the borrower under a loan agreement would be a principal obligor.

“Underlying Obligation” means the obligation or obligations incurred by the principal obligor and owed to the obligee. For example, the borrower’s obligation to make payments to a lender of principal and interest on a loan constitutes an underlying obligation.

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 2. See, e.g., *Bronx Derrick Tool Co. v. Porcupine Co.*, 117 Conn. 314, 167 A. 829 (1933) in which an agreement was construed as an “agreement to indemnify” and not a “conditional guaranty,” allowing recovery by a creditor without exhausting remedies against the steel erection company that failed to pay for the use of equipment; and *Regency Savings Bank v. Westmark Partners*, 59 Conn. App. 160, 164, 756 A.2d 299 (2000) stating that a guaranty “is simply a species of contract”; see also *RESTATEMENT (THIRD) OF SURETYSHIP & GUAR.* § 1 cmt. c (1996) [. . . Although there are important differences between the two mechanisms that should not be obscured, these differences relate to the duties contractually imposed on the secondary obligor by the secondary obligation and not to the nature of the rights inherent in suretyship status. . . .]. The Connecticut Uniform Commercial Code provides that the term “surety” includes the term guarantor in Conn. Gen. Stat. § 42a-1-201(39).

§ 1 Nature of the Guaranty Arrangement

Connecticut law of guaranty and suretyship is largely case law extending over a century, with many cited cases dating from the mid-1800s. Under Connecticut law, a contract of guaranty is a promise to answer for the debt, default, or miscarriage of another and is a collateral undertaking and presupposes some contract or transaction to which it is collateral.³ Suretyship, in general, including a guaranty, is a three-party relationship where the surety undertakes to perform to an obligee if the principal obligor fails to do so.⁴ It is a three-party separate engagement for the performance of an undertaking of another and there exist two different obligations—one obligation is that of the principal obligor, and the other that of the guarantor. The principal obligor is not a party to the guaranty, and the guarantor is not a party to the underlying obligation. The undertaking of the principal obligor is independent of the promise of the guarantor, and the responsibility imposed by the contract of guaranty differs from that which is created by the contract to which the guaranty is collateral. The fact that both contracts are written on the same paper or instrument does not affect the independence or separateness of the one from the other.

1.1 Guaranty Relationships

A guaranty is a contract of secondary liability. The contract of a guarantor is his own separate contract; it is in the nature of a contract by him that the thing guaranteed to be done by the principal shall be done, and is not merely an engagement jointly with the principal to do the thing.⁵ A guarantor, not being a joint contractor with his principal, is not bound to do what the principal has contracted to do; rather, the guarantor has to answer for the consequences of his principal obligor's default pursuant to the guaranty agreement. Since, however, the guarantor's contract is ancillary to that of the principal obligor, suretyship law will permit the guarantor to assert defenses or discharge of the principal obligor unless the very purpose of that guaranty was to shift the risk of the particular event from the obligee to the guarantor.⁶ The principal obligor, however, has an obligation under law to perform its underlying agree-

3. *Regency Sav. Bank v. Westmark Partners*, 59 Conn. App. 160, 756 A.2d 299 (2000), on remand 2001 WL 399921, affirmed in part, reversed in part 70 Conn. App. 341, 798 A.2d 476 (2001). *Wolthausen v. Trimpert*, 93 Conn. 260, 105 A. 687 (1919) (need for underlying contract for guaranty) and *Star Contracting Corp v. Manway Const. Co., Inc.*, 32 Conn. Sup. 64, 337 A.2d 669 (Conn. Super. 1973) (need for underlying obligation for surety contract).

4. *Elm Haven Const. Ltd. Partnership v. Neri Const., LLC*, 281 F. Supp.2d 406, (D. Conn, 2003) affirmed 376 F.3d 96 (2nd Cir., 2004).

5. The undertaking of the parties is a matter of agreement and the court will not rewrite commercially sophisticated agreements. *Bank of Boston Connecticut v. Schlesinger*, 220 Conn. 152, 159, 595 A.2d 872 (1991). In *Monroe Ready Mix Concrete, Inc. v. Westcor Development Corp.*, 183 Conn. 348, 439 A.2d 362 (1981) the Connecticut Supreme Court pointed out that, in discussing continuing guaranties, the New York Court of Appeals lamented that “[p]recedents do not help much in the construction of such instruments” and that “[t]he interpretation of continuing guaranties, as of other contracts, is principally a question of the intention of the contracting parties . . . to be determined by the trier of facts.” (citations omitted)

6. *American Oil Company v. Valenti et al*, 179 Conn. 349 (1979); *Cadle Company of Connecticut, Inc. v. C.F.D. Development Corporation*, 44 Conn. App. 409, certification granted in part 241 Conn. 901, 693 A.2d 303, appeal dismissed, 243 Conn. 667, 706 A.2d 975 (1997).

ment with the obligee and to reimburse the guarantor that pays the obligee pursuant to a guaranty.⁷

Although, under Connecticut law, no “technical words” are needed to create a guaranty obligation, a court will look to the substance of the agreement of the parties to determine whether sufficient facts exist to fairly presume the intent of the parties to create guarantor liability.⁸ Indefinite agreements showing no intent to constitute an enforceable contract will not be sufficient to constitute an enforceable guaranty.⁹

1.2 Other Suretyship Relationships

While not the focus of this survey, we note that a suretyship relationship may also arise because of the pledge of collateral.¹⁰ As such, a guaranty-type relationship arises, to the extent of the collateral pledged, when a person supplies collateral for a loan in order to induce the obligee to lend to the principal obligor or where one party mortgages property to an obligee to secure the debt of another.¹¹

§ 2 State Law Requirements for an Entity to Enter a Guaranty¹²

Partnerships, limited liability companies, and corporations can all grant guaranties in furtherance of their business activities. Such grants are generally permitted by the appropriate Connecticut statute.¹³

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7. Note the principal obligor’s duty of performance and reimbursement to the guarantor under RESTATEMENT (THIRD) OF SURETYSHIP & GUAR. §§ 21 and 22. *Also see, for example,* In re Metal Center, Inc., 31 B.R. 458 (Bankr. D. CT 1983) (reimbursement of guarantor) and Smith v. Mitsubishi Motors Credit of America, 247 Conn. 342, 721 A.2d 1197 (1998) (surety’s right of reimbursement from principal obligor).
 8. *Finnican v. Feigenspan*, 81 Conn. 378, 71 A. 497 (1908) and later cases. In fact, in *Associated Catalog Merchandisers, Inc. v. Chagnon*, 210 Conn. 734, 557 A.2d 525, appeal after remand 212 Conn. 322, 561 A.2d 436 (1989), the court found an installment promissory note evidenced a continuing guaranty when viewed with the course of performance by the parties over years.
 9. *See Glazer v. Dress Barn, Inc.*, 274 Conn. 33, 873 A.2d 929 (2005).
 10. *See Rowan v. Sharps’ Rifle Mfg. Co.*, 33 Conn. 1 (1865); RESTATEMENT (THIRD) OF SURETYSHIP AND GUARANTY § 1 (noting that a person is a surety when “pursuant to contract . . . an obligee has recourse against [that] person . . . or against that person’s property with respect to an obligation . . . of another person . . . to the obligee” (emphasis added)). *See also* § 9 *infra*.
 11. Under RESTATEMENT (THIRD) OF SURETYSHIP & GUAR. § 2(c) the secondary obligation may be created by “contract granting the obligee a security interest in property of the secondary obligor to secure the underlying obligation.”
 12. For the purposes of this survey, we assume that a guaranty will not constitute “financial guaranty insurance” within the meaning of Part IIb. of Chapter 698 of the Connecticut General Statutes (§ 38a-*et seq.*) (the “Insurance Law”). *See* Conn. Gen. Stat. § 38a-92a (defining financial guaranty insurance). Under the Insurance Law, “[e]ach financial guaranty insurance corporation may transaction financial guaranty insurance business in this state if licensed to do so . . .” Conn. Gen. Stat. § 38a-92b. In addition, the Insurance Law limits the underlying obligations for which even a licensed corporation may issue financial guaranty insurance. *See* Conn. Gen. Stat. § 38a-92g.
 13. This article does not consider whether such a guaranty would be considered an obligation that would be considered the incurring of an obligation that would be a fraudulent transfer under Chapter 923a of the Connecticut General Statutes. While no Connecticut case has been found stating that a guaranty was in violation of this statute, counsel should be aware to check for such cases in the future.

2.1 Corporations

Under the Connecticut Business Corporation Act, a Connecticut business corporation may, within the scope of its general corporate powers, make contracts or guaranties, unless its certificate of incorporation provides otherwise.¹⁴ A Connecticut business corporation is also expressly authorized by this statute to secure any of its obligations by mortgage or pledge of any of its property.

Transactions by corporations, or any subsidiary or other entity in which the corporation has a controlling interest, including guaranty transactions, with directors (or their relatives or entities in which they have an interest) may be challenged as directors' conflicting interest transactions unless they either (a) are disclosed and approved by disinterested directors or stockholders of the corporation or (b) the transaction is found to have been fair to the corporation.¹⁵

The statutes governing Connecticut nonstock corporations have similar statutory provisions.¹⁶

2.2 Partnerships and Limited Liability Partnerships

Connecticut has adopted the Uniform Partnership Act¹⁷ which neither expressly empowers a partnership to issue a guaranty nor expressly regulates or prohibits such activity. An act of a partner that is not apparently for carrying on in the ordinary course the partnership business binds the partnership only if the act was authorized by the other partners.¹⁸

Connecticut limited partnerships, under Chapter 610 of the Connecticut General Statutes (Conn. Gen. Stat. §34-9 *et seq.*), and Connecticut limited liability partnerships, under Part XI of Chapter 614 of the Connecticut General Statutes (Conn. Gen. Stat. §34-406, *et seq.*), have the same general authorization provisions and limitation to actions in the ordinary course of the entity's business as for Connecticut general partnerships.

2.3 Limited Liability Companies

The Connecticut Limited Liability Company Act¹⁹ generally permits limited liability companies to issue guaranties unless the articles of organization of a particular company provide otherwise.²⁰

14. Conn. Gen. Stat. § 33-647(7). Application of Conn. Gen. Stat. § 33-649 would also limit challenges to a guaranty to a third party on the grounds that a corporation did not have the power to act.

15. Part VIII(F) of Chapter 601 of the Connecticut General Statutes (Conn. Gen. Stat. § 33-781 *et seq.*).

16. *See* Conn. Gen. Stat. § 33-1036(7) (power to guaranty), § 33-1038 (Ultra Vires transactions) and Part VII(F) of Chapter 602 of the Connecticut General Statutes (Directors' conflicting interest transactions).

17. Chapter 614 of the Connecticut General Statutes (Conn. Gen. Stat. § 34-300 *et seq.*).

18. Conn. Gen. Stat. § 34-322(2). Obligees are advised to obtain the consent of all general partners to guaranty or loan transactions unless clearly to the partnership or for its benefit.

19. Chapter 613 of the Connecticut General Statutes (Conn. Gen. Stat. § 34-100 *et seq.*).

20. Conn. Gen. Stat. § 34-124(d)(3).

2.4 Statutory Trusts

Statutory trusts were adopted in Connecticut in 1996.²¹ No specific authorization is provided in the governing statutes for guarantes by statutory trusts. However, Conn. Gen Stat. §34-502b provides that “. . . a statutory trust may be sued for debts and other obligations or liabilities contracted or incurred by the trustees . . . in the performance of their . . . duties under the governing instrument of the statutory trust . . . ”

2.5 Banks and Trust Companies

Under Chapter 665 of the Connecticut General Statutes, a Connecticut state-chartered bank has no authority to issue guarantes. The situations under which a national bank may become a guarantor are governed by federal law. *See* National Bank as Guarantor or Surety on Indemnity Bond, 12 C.F.R. § 7.1017 (2010).

2.6 Individuals

Confusion can sometimes arise in the case of corporate officers or directors signing guaranties in closely held corporations or other organizations. In such instances, a case-by-case inquiry determines whether an individual intended to be personally bound or, instead, only issued a guaranty on behalf of a partnership or corporation and thus only in an official employment capacity.

While a business corporation must have “authority” to execute a guaranty, an individual guarantor must have the “capacity” to enter into the guaranty. Incapacity can be a defense against the enforcement of a guaranty issued by an individual.²²

Another consideration with individual guaranties is marital property. Connecticut is not a community property state and under Conn. Gen. Stat. §46b-36 each spouse can enter into contracts and deal with their property to the same extent as if he or she were unmarried. Under this statute, a spouse’s earnings in Connecticut are treated as the individual property of that spouse. Aside from the duty of mutual support, neither spouse has any interest in the property of the other. Put another way, a creditor does not have recourse to the property of a nonsigning spouse under a guaranty signed by the other spouse.

§ 3 Signatory’s Authority to Execute a Guaranty

Generally, the obligee has a duty of reasonable inquiry when it has some notice that the signor of the guaranty does not have authority to bind the guarantor.

21. *See* Chapter 615 of the Connecticut General Statutes (Conn. Gen. Stat. § 34-501 *et. seq.*).

22. *See* RESTATEMENT (THIRD) OF SURETYSHIP & GUAR. (1996) § 10 (Capacity).

3.1 Corporations

For an obligee to rely on a guaranty, the guaranty must be signed by an officer with actual or apparent authority to act in such capacity.²³ An obligee cannot enforce a guaranty if the obligee had notice that the officer who signed for the corporation lacked authority to do so. Where an obligee-plaintiff invokes the doctrine of apparent authority, that obligee bears a duty to demonstrate that it acted in good faith based on the actions or inadvertences of the principal.²⁴

Corporate officers do not have inherent authority to commit the corporation by virtue of their office *per se*. The corporation is generally only liable if it is shown that the acts are so related to the duties of the office that they may reasonably be held to have been done in the prosecution of the business of the corporation and while acting in the course of their employment.²⁵ If a corporation's guaranty bears some reasonable relationship to the corporation's business, evidence that a signing officer was charged with the general management of the corporation's business can provide apparent authority to execute a guaranty.²⁶ However, under Connecticut law, apparent authority is not limitless; the potential obligee dealing with an agent and seeking to impose liability on the principal has the burden to "demonstrate that it acted in good faith based on the actions or inadvertences of the principal."²⁷ For this reason, obligees are advised to make reasonable inquiry of the actual authority of a corporate officer to execute a guaranty on behalf of a corporation.

3.2 Partnerships and Limited Liability Partnerships

Under the Uniform Partnership Act as adopted in Connecticut, an act of a partner that is not apparently for carrying on the partnership business in the ordinary course binds the partnership only if the act was authorized by the other partners.²⁸ When carrying out the business of the partnership, however, it is settled law that a general partner has the authority to bind the partnership.²⁹

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23. One dealing with a person known to be an agent of a corporation is "put on inquiry as to the scope of his authority" and the corporation will not be obligated as principal, unless the agent . . . was acting within the scope of the authority expressly or impliedly conferred upon him . . . , or unless the corporation is estopped from denying that the agent was so acting, or unless there has been a subsequent ratification of the agent's act." *Adams v. Herald Pub. Co.*, 82 Conn. 448 at 451, 74 A. 755 (1909).
 24. *Newtown Associates v. Northeast Structures*, 15 Conn. App. 633 at 638-639, 546 A.2d 310 (1988) and cases cited therein.
 25. *Lettieri v. American Savings Bank*, 182 Conn. 1 at 7, 437 A.2d 822 (mortgage loan not authorized by corporation but upheld due to apparent authority conferred on president of corporation by past conduct of the corporation relied upon in good faith by lender).
 26. *See, e.g., Host America Corp. v. Ramsey*, 107 Conn. App. 849, 947 A.2d 957, certification denied 289 Conn. 904, 957 A.2d 870 (2008) (corporate president had apparent authority to execute employment agreements) in which the two elements of apparent authority are recited, namely (1) acts or inadvertences of the principal (not of the agent) that causes or allows third persons to believe the agent possesses this authority and (2) the third party dealing with the agent must have, acting in good faith, reasonably believed under all of the circumstances that the agent had the necessary authority to bind the principal. *See also Lettieri v. American Savings Bank, supra*.
 27. *See Newtown Associates v. Northeast Structures, Inc.*, 15 Conn. App. 633 at 638-639, 546 A.2d 310 (1988) and cases cited therein.
 28. Conn. Gen. Stat. § 34-322(2). Obligees are advised to obtain the consent of all general partners to guaranty or loan transactions unless clearly to the partnership or for its benefit.
 29. *Hirschfeld v. Hirschfeld*, 50 Conn. App. 280, 719 A.2d 41, certification denied 247 Conn. 929, 719 A.2d 1168 (1998) and cases cited therein. [The specific statute section cited in this case and prior cited cases was repealed but was enacted as part of the Uniform Partnership Act adopted by Connecticut in Conn. Gen. Stat. § 34-322.]

Actual authority may also be provided in the partnership agreement.³⁰ Under the same principles of agency noted above in the discussion of agents of corporations, those dealing with partners are advised to inquire as to whether a signatory has the appropriate authority to bind the partnership.³¹ The consequence of finding that the general partner had no authority and that the obligee was aware of that fact is that the action of the general partner does not bind the partnership or its property.

Under the Uniform Limited Partnership Act as adopted in Connecticut, a general partner has the same powers as a partner in a general partnership.³² Therefore, the foregoing principles are also applicable to the authority of the general partner of a Connecticut limited partnership.

3.3 Limited Liability Companies

The Connecticut Limited Liability Company Act provides that, in the case of a member-managed LLC, every member is an agent of that company and can sign instruments pursuant to carrying on in the usual way of business unless that person has no actual authority to act in such way and his counterparty has knowledge of that fact.³³ In the case of a manager-managed LLC, no member has authority to bind the LLC. Each manager of a manager-managed LLC can bind the LLC if such guaranty is “for apparently carrying on in the usual way the business of the [LLC]” unless the manager has no actual authority and the counterparty knows of this lack of authority.³⁴ Note, however, that any act of a member or a manager that is *not* “apparently carrying on in the usual way the business of the [LLC]” does not bind the LLC or its property unless actually authorized pursuant to the operating agreement.³⁵ Therefore, practitioners dealing with Connecticut limited liability companies are advised to investigate and determine whether guaranties are expressly authorized in the operating agreement or if additional approvals are needed to give the manager(s) and/or members(s) executing such guaranties the express authority to do so.

3.4 Statutory Trusts

The Connecticut Statutory Trust Act provides that the statutory trust may be sued and its property is subject to attachment and execution for debts and other obligations or liabilities contracted or incurred by the trustees in the performance of their duties under the governing instrument.³⁶ Conn. Gen. Stat. §34-517 provides that the business and affairs of a statutory trust shall

30. See *Standish v. Sotavento Corp.*, 58 Conn. App. 789, 755 A.2d 910, certification denied 254 Conn. 935, 761 A.2d 762 (2000) (upholding revolving credit agreement and mortgage).

31. Although no cases have been noted where the issue of whether a guaranty is “for apparently carrying on in the ordinary course the partnership business,” it is likely that a guaranty would not be considered in the “ordinary course.”

32. Conn. Gen. Stat. § 34-17(a).

33. Conn. Gen. Stat. § 34-130(a).

34. Conn. Gen. Stat. § 34-130(b).

35. Conn. Gen. Stat. § 34-130(c). Although no case has been found on this point, it might be argued that guaranties of third-party obligations are not “usual” in the business of most LLCs.

36. Conn. Gen. Stat. § 34-502b.

be managed “by or under the direction of” its trustees. Wide latitude is provided in this statute for the governing instrument of a statutory trust to alter the “rights, duties and obligations” of the trustees. Although no case has been found relating to this statute, parties dealing with Connecticut statutory trusts are advised to review the governing instruments of these statutory trusts to determine whether guaranties are permitted and any conditions or necessary authorizations to allow the trustees to execute them.³⁷ Connecticut’s adoption of Uniform Commercial Code (UCC) Article 9 was amended in 2003 to specifically permit security interests to be granted in deposit accounts of statutory trusts (other than a payroll or trust account labeled as such).³⁸

3.5 Banks and Trust Companies

A case-by-case inquiry of the powers provided for in a bank’s or trust company’s corporate governance documents is necessary to determine who may validly execute a guaranty on behalf of a bank or trust company.

§ 4 Consideration; Sufficiency of Past Consideration

Standard contract principles apply to the analysis of consideration for a contract of guaranty. The principal agreement is sufficient consideration for an accompanying guaranty.³⁹

Consideration is required to create a valid contract of guaranty.⁴⁰ The inquiry into sufficient consideration is based on standard contract law principles. The benefit or obligation that forms the consideration need not flow directly to the guarantor from the obligee; the consideration flowing from the obligee to the principal obligor is sufficient to support a contemporaneous guaranty.⁴¹ Note that some cases have indicated that some length of time between consideration of the underlying obligation and a guaranty does not necessarily render them noncontemporaneous.⁴² Where, however, a guaranty

37. Since the only restriction appears to be whether the action is performed by the trustees “in the performance of their duties under the governing instrument,” review of the governing instruments and any and all amendments is advisable.

38. Conn. Gen. Stat. § 42a-9-109(d)(16).

39. *Murphy v. Schwaner*, 84 Conn. 420, 80 A. 295 (1911) (guaranty lease payments). However, *see* *Superior Wire and Paper Products, Ltd. v. Talcott Tool and Mach., Inc.*, 184 Conn. 10 at 20, 441 A.2d 43 (1981), in which the Supreme Court noted that “the modern law of contracts . . . makes guaranties enforceable on the basis of reliance” citing *Restatement (Second) of Contracts* § 89C (Tent. Ed. 1973).

40. *Allen v. Rundle*, 45 Conn. 528 (1878).

41. *Superior Wire and Paper Products, Ltd. v. Talcott Tool and Mach., Inc.*, 184 Conn. 10, 441 A.2d 43 (1981) (shipments of steel goods after or contemporaneously with execution of guaranty was consideration for guaranty to induce further shipments). The court held that whether the further shipments were made contemporaneously with the execution of the guaranty or at some time thereafter is “legally irrelevant to the issue of inducement.”

42. *See, e.g.*, *Garland v. Gaines*, 73 Conn. 662, 49 A. 19, 84 Am. St. Rep. 182 (1901) (guaranty of lease not signed until after lease executed, but landlord did not allow tenant to occupy the premises until the guaranty was executed); *Connecticut Bank & Trust Co. v. Wilcox*, 201 Conn. 570 at 575, 518 A.2d 928 (1986) (“Both our case law and the modern law of contract eschew any requirement of contemporaneity between a continuing guaranty and the obligations secured thereby” where notes evidencing the guaranteed debt were executed several months after the continuing guaranty agreements were executed.).

is given after the execution of the principal contract, a new consideration is necessary to support the guaranty.⁴³

It is a long-standing rule in Connecticut that forbearance in requiring immediate payment or filing suit or otherwise exercising remedies is sufficient consideration to support a guaranty of the prior debt.⁴⁴

§ 5 Notice of Acceptance

Notice of acceptance is not required if the guaranty is absolute.

A mere offer to guaranty payment of a prospective debt the incurrence of which is dependent upon future executory acts by the obligee of which the guarantor would have no knowledge is not binding until notice of acceptance is communicated by the obligee to the guarantor.⁴⁵ Notice of acceptance is not required where the guaranty is “absolute”⁴⁶ or is given in exchange for the consideration given by the obligee in a simultaneous transaction.⁴⁷ Commonly, a guarantor waives notice of acceptance in its guaranty agreement. Under Connecticut law, such a waiver is enforceable.⁴⁸

§ 6 Interpretation of Guaranties

In Connecticut, a guaranty is “a species of contract”⁴⁹ and, accordingly, courts will interpret a guaranty in the same manner by which they would interpret the language of any other contract.

43. *Cowles v. Peck*, 55 Conn. 251, 10 A. 569, 3 Am. St. Rep. 44 (1887).

44. *Barnard v. Norton*, 1 Kirby 193 (1786) (forbearance from immediately suing and attaching property); *Sage v. Wilcox*, 6 Conn. 81 (1826) (forbearance to sue maker of note for one year); *Breed v. Hillhouse*, 7 Conn. 522 (1829) (delay in payment of a note); *Swift v. Lundin*, 98 Conn. 78, 118 A. 444 (1922) (forbearance to require payment on delivery); *Matter of Autoworld Enterprises*, 131 B.R. 1 (Bankr. D. Conn. 1991) (forbearance on collection of payment of notes, although no specified time period of forbearance).

45. *See* *Craft v. Isham*, 13 Conn. 28 (1838); *The New-Haven County Bank v. Mitchell*, 15 Conn. 206 (1842).

46. *Craft v. Isham*, 13 Conn. 28 (1838) (“the undertaking of the defendant was absolute, that the note should be paid within the time limited; and it was correctly held, that no notice [of acceptance] was necessary.” (citations omitted)).

47. *See, e.g.*, *The New-Haven County Bank v. Mitchell*, 15 Conn. 206, at 219 (1842) (notice of acceptable not required where “delivery of the guaranty in question was not an incipient step in the formation of the contract, but the result of a previous negotiation and agreement, and constituted the very consummation of the contract”); *White v. Reed*, 15 Conn. 457, 463 (1843) (“where the guaranty and the acceptance of it are simultaneous, and parts of the same transaction, no subsequent notice of acceptance is necessary” (citing *The New-Haven County Bank v. Mitchell*, 15 Conn. 206)); *Hartford-Aetna National Bank v. Anderson*, 92 Conn. 643 at 647 (1918) (no notice of acceptance required where guaranty “was delivered to the bank, not as an offer originating with the guarantor, but in answer to the requirement of the bank that [the debtor] should procure [the guaranty] to be signed by a responsible guarantor”).

48. *See* § 8 *infra*.

49. *JSA Financial Corporation v. Quality Kitchen Corporation of Delaware, et al*, 113 Conn. App. 52 at 47 (2009); *Garofalo v. Squillante*, 60 Conn. App. 687,694 (2000), cert. denied 255 Conn. 929 (2001).

6.1 General Principles

Like any other contract, Connecticut courts will construe a guaranty to give effect to the intent of the parties,⁵⁰ ascertaining such intent by a “fair and reasonable construction of the written words”⁵¹ that are given their “common, natural and ordinary meaning and usage.”⁵² To that end, Connecticut courts give effect to terms that are clear and unambiguous as a matter of law and will not “torture words to import ambiguity when the ordinary meaning leaves no room for ambiguity.”⁵³ Ambiguity must arise from the contract itself and not simply from one party’s subjective interpretation of the disputed language.⁵⁴ A presumption that the language used in a guaranty is definitive arises when the guaranty is between sophisticated parties and is commercial in nature.⁵⁵

6.2 Guaranty of Payment versus Guaranty of Collection

A guaranty of the payment of a debt is distinguished from a guaranty of the collection of a debt. A guaranty of payment is an absolute unconditional promise to satisfy the underlying obligation while a guaranty of collection is a mere promise to satisfy the underlying obligation only if payment cannot by reasonable diligence be obtained from the principal obligor.⁵⁶

Under a guaranty of payment, the liability of the guarantor to satisfy the underlying obligation becomes absolute upon default and without any requirement on the part of the obligee to demand payment from or otherwise proceed against the principal obligor.⁵⁷

Under a guaranty of collection, the liability of the guarantor to satisfy the underlying obligation is not determined upon default, but rather is conditioned upon the obligee having first used every reasonable effort to collect the underlying debt from the principal obligor.⁵⁸ Since a guaranty of collection is, in essence, a guaranty of the principal obligor’s solvency,⁵⁹ the requirement to use reasonable efforts does not impose an obligation on an obligee to sue an insolvent debtor or file a proof of claim in the bankruptcy case involving such debtor’s estate.⁶⁰

50. See, e.g., *Tallmadge Bros., Inc. v. Iroquois Gas Transmission System, L.P.*, 252 Conn. 479 at 498 (2000) (“A contract must be construed to effectuate the intent of the parties, which is determined from the language used interpreted in the light of the situation of the parties and the circumstances connected with the transaction.”).

51. *Id.*

52. *United Illuminating Co. v. Wisvest-Connecticut, LLP*, 259 Conn. 665, 670 (2002).

53. *Id.*

54. See, e.g., *United Illuminating Co. v. Wisvest-Connecticut, LLP*, 259 Conn. 665, 671 (2002) (“if the language of the contract is susceptible to more than one reasonable interpretation, the contract is ambiguous”).

55. *Id.* at 670.

56. *Cowles v. Peck*, 55 Conn. 251 (1887); *Beardsley v. Hawes et al*, 71 Conn. 39 (1898).

57. See *Perry v. Cohen*, 126 Conn. 457 (1940); *TD Bank, N.A. v. School Street Plaza, LLC et al*, 2012 Conn. Super. LEXIS 154 (2012).

58. *Beitler et al v. Rudkin*, 104 Conn. 404 (1926) (citing *Cowles v. Peck*, 55 Conn. 251 (1887)).

59. *Id.* at 408-409.

60. *Id.*

A court will look to the intent of the parties as expressed in the plain language of the guaranty to determine whether it is one of payment or one of collection.⁶¹

6.3 “Continuing”

A continuing guaranty is one that contemplates a future course of action during an indefinite period of time or is intended to cover a series of transactions or a succession of credits, or if its purpose is to give the principal obligor a standing credit to be used by him from time to time.⁶² While the use of the word “continuing” helps to make clear that a guaranty is meant to be continuing,⁶³ courts in Connecticut have interpreted a guaranty as continuing even where the word “continuing” has not been used, as long as the language of the guaranty clearly indicates that a continuing guaranty was intended by the parties.⁶⁴

6.4 Language Regarding the Revocation of Guaranties

A continuing guaranty is ordinarily effective until revoked by the guarantor or extinguished by operation of law.⁶⁵ In order to revoke a continuing guaranty, the guarantor must usually give notice of revocation to the obligee.⁶⁶ However, although Connecticut case law “eschews any requirement of contemporaneity between a continuing guaranty and the obligations secured thereby,”⁶⁷ a continuing guaranty imposes liability on the guarantor only for a period of time that is “reasonable in light of all the circumstances of the particular case”⁶⁸ even if unlimited in duration by its terms.

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61. See, e.g., *Heritage Bank v. Southbury Lighting, et al*, 1992 Conn. Super LEXIS 1538 (1992) (holding that a statement in a guaranty that the guarantor “unconditionally and absolute guarantees . . . payment” was sufficient alone to impose “primary liability on the guarantor”); *Cowles v. Peck*, 55 Conn. 457 (1997) (holding that the words “I guarantee the within note good till paid” was not an absolute guaranty).
 62. *Associated Catalog Merchandisers, Inc. v. Chagnon et al.*, 210 Conn. 734 (1989); *Connecticut Bank and Trust v. Wilcox*, 201 Conn. 570 (1986); *White v. Reed*, 15 Conn. 457 (1843).
 63. See, e.g., *L. Suzio Concrete Company, Inc. v. Birmingham Construction Services Company, Inc., et al*, 79 Conn. App. 211 (2003).
 64. Compare *Connecticut National Bank v. Foley et al.*, 188 Conn. App. 667 (1989) (holding that a guaranty stating that the guarantor was “responsible for everything the borrower owes [the Bank] *now and in the future*” was a continuing guaranty) with *White v. Reed*, 15 Conn. 457 (1843) (holding that a writing stating that “for any sum that my son George Reed may become indebted to you . . . I will hold myself accountable” was not a continuing guaranty).
 65. *Associated Catalog Merchandisers, Inc. v. Chagnon et al.*, 210 Conn. 734 (1989).
 66. *Id.*
 67. *Connecticut Bank and Trust v. Wilcox*, 201 Conn. 570 at 575 (1986).
 68. *Monroe Ready Mix Concrete, Inc. v. Westcor Development Corporation*, 183 Conn. 348 at 351 (1981). As to what constitutes a reasonable period of time for a continuing guaranty to remain effective, compare *Connecticut National Bank v. Foley et al.*, 188 Conn. App. 667 (1989) (upholding trial court’s finding that 14 months between the execution of the guaranty and the execution of a note by the obligor was not unreasonable); with *Monroe Ready Mix Concrete, Inc. v. Westcor Development Corporation*, 183 Conn. 348 (1981) (upholding trial court’s finding that a nearly three-year delay between the execution of the guaranty and the extension of credit was unreasonable); and *L. Suzio Concrete Company, Inc. v. Birmingham Construction Services Company, Inc., et al*, 79 Conn. App. 211 (2003) (upholding the trial court’s finding that it was not unreasonable to impose liability for a guaranty executed seven years prior to the initial extension of credit since credit was extended continuously through such period).

6.5 “Absolute” and “Unconditional”

An “absolute” guaranty is a contract by which the guarantor promises to pay or perform the underlying obligation subject to no condition other than the default of the principal obligor.⁶⁹ Guaranties of payment are considered as absolute and unconditional in nature while guaranties of collection are considered as conditional in nature.⁷⁰ Guaranties that are “given absolutely and unconditionally” are frequently discussed by Connecticut courts in the context of determining the nature and extent of suretyship waiver clauses.

§ 7 Defenses of the Guarantor

7.1 Defenses or Discharge of the Principal Obligor

7.1.1 General

Connecticut courts follow the general rules of suretyship law that permit a guarantor, absent an effective waiver,⁷¹ to assert the defenses or the discharge of the principal obligor as a defense to liability unless the very purpose of the guaranty is to “shift the risk of this event from the creditor to the surety,”⁷² as in the event of bankruptcy or infancy of the principal obligor.⁷³ In determining such purpose, Connecticut courts inquire whether the conduct of the obligee “unreasonably and without authorization materially altered the risk”⁷⁴ that the guarantor can properly be understood to have assumed by virtue of its guaranty. The test “weighs heavily against automatic discharge”⁷⁵ of a guarantor under an absolute guaranty.

7.1.2 Defenses that may not be raised by Guarantor

The insolvency of the principal obligor is not a defense that the guarantor may raise unless the guaranty is conditioned on the solvency of the principal obligor.⁷⁶ A guarantor also may not raise the principal obligor’s incapacity as a defense to liability under the guaranty.⁷⁷

69. See *Perry v. Cohen*, 126 Conn. 457 (1940); *TD Bank, N.A. v. School Street Plaza, LLC et al.*, 2012 Conn. Super. LEXIS 154 (2012).

70. See § 6.2 *supra*.

71. See § 8 *infra*. Under Connecticut law, a party to a contract may waive any defenses or rights it has against another party to the contract and such waiver will be enforced if it is clear and unambiguous. See, e.g., *Terracino et al v. Gordon and Hiller et al*, 121 Conn. App. 795, 803 (2010) (“a guarantor expressly may waive his rights to the protection that the common law or statutory law presumptively affords him.”); *Connecticut National Bank v. Douglas*, 221 Conn. 530 at 545 (1992) (“[b]oth the common law and the Uniform Commercial Code recognize that a guarantor may expressly waive his rights with respect to collateral that secures the debt that he has guaranteed.”).

72. *American Oil Company v. Valenti et al*, 179 Conn. 349, 353 (1979); *Cadle Company of Connecticut, Inc. v. C.F.D. Development Corporation*, 44 Conn. App. 409, 414 (1997).

73. *Id.*

74. *American Oil Company v. Valenti et al*, 179 Conn. 349, 354 (1979).

75. *Id.*

76. *Id.* at 353.

77. *Id.*

7.2 “Suretyship” Defenses

In general, absent an effective waiver,⁷⁸ if an obligee acts in such a manner as to increase a guarantor’s risk of loss by increasing its potential cost of performance or decreasing its potential ability to cause the principal obligor to bear the cost of performance, such guarantor’s duties are discharged to the extent of the impairment.⁷⁹

7.2.1 *Modification of the Underlying Obligation, including Release*

Under Connecticut law, modifications to the underlying obligation may permit the guarantor to raise a defense to liability. The relevant inquiry focuses on whether “the modification creates a substituted contract or imposes risks on the secondary obligor fundamentally different from those imposed pursuant to the transaction prior to modification.”⁸⁰ However, a guarantor will not be permitted to raise such a defense if it had consented in advance to the modification in question.⁸¹

7.2.2 *Release or Impairment of Security for the Underlying Obligation*

When an obligee has a security interest in collateral to secure an underlying obligation that is guaranteed by a guarantor, the liability of the guarantor can be reduced to the extent that the security interest is impaired.⁸² A guarantor may, however, waive in advance its defense based on the release or impairment of collateral, both under the common law and under Section 42a-3-605(i) of Connecticut’s Uniform Commercial Code.⁸³

7.2.3 *Discharge of Coguarantor, including Release*

The discharge or release of a coguarantor does not impair or release the obligations of any other guarantor, even if the rights of the coguarantor to recourse

78. See § 8 *infra*.

79. See *Lestorti v. Deleo, et al*, 298 Conn. 466, 479 (2010) (citing provisions of The Restatement (Third) of Suretyship and Guaranty).

80. *Freidman v. Millpit Corporation et al*, 49 Conn. App. 354, 358 n.3 (1998).

81. See *JSA Financial Corporation v. Quality Kitchen Corporation of Delaware et al.*, 113 Conn. App. 52 at 60 (2009) (holder of guaranteed note was free to modify the terms of its repayment without the consent or knowledge of the guarantor where the express terms of the guaranty at issue provided that any such modification would not “in any way release the [guarantor] from or reduce [his] liability” thereunder.).

82. *Connecticut National Bank v. Douglas*, 221 Conn. 530 (1992); *TD Bank, N.A. v. ARS Partners Poplar Plains, LLC*, 2010 Conn. Super. LEXIS 232 (2010); *Vigil v. Timoney*, 1994 Conn. Super. LEXIS 10 (1994).

83. *Connecticut National Bank v. Douglas*, 221 Conn. 530 (1992). See also § 8.1 *infra*.

against the released guarantor are not expressly preserved.⁸⁴ In addition, a guarantor will not be permitted to raise such a defense if it had consented in advance to such release or discharge.⁸⁵

7.3 Other Defenses

7.3.1 *Good Faith and Fair Dealing*

A guarantor may raise as a defense to its liability under its guaranty the obligee's breach of its duty of good faith and fair dealing to the principal obligor.⁸⁶ Reasoning that the duty of good faith and fair dealing is implicit in every contract, the Connecticut Appellate Court has held that shifting the risk of loss that might result from an obligee's breach of such duty could not reasonably be "the very purpose" of a guaranty.⁸⁷

7.3.2 *Failure to pursue Principal Obligor*

Only when the underlying guaranty is a guaranty of collection and the principal obligor is solvent is an obligee required to first pursue the principal obligor.⁸⁸ Thus, the running of the statute of limitations against the principal obligor or an obligee's decision to allow a disciplinary nonsuit to stand against a principal obligor is no defense to a guarantor's liability under a guaranty of payment.⁸⁹

7.3.3 *Statute of Limitations*

Connecticut General Statutes § 52-576 imposes, with certain exceptions, a six-year statute of limitations on contractual obligations.⁹⁰ One such exception applies to contracts for the sale of goods that are governed by Article 2

84. See *Lestorti v. Deleo, et al*, 298 Conn. 466, 479 at 481 (2010) ("a guarantor's duties are not discharged when the creditor releases a coguarantor or allows the statute of limitations to expire as to a coguarantor"). Under Connecticut law, a "secondary obligor's right of recourse against the principal obligor is automatically preserved" under an implied contract theory to the right of contribution. *Id.* See also, § 10.1 *infra*. Thus, under Connecticut law, contrary to the rules set forth in §§ 38 and 39 of the RESTATEMENT (THIRD) OF SURETYSHIP & GUARANTY which require the express preservation of such rights, an obligee's failure to preserve the rights of a guarantor to recourse against a coguarantor does not relieve such guarantor from liability under its guaranty. *Lestorti v. Deleo, et al*, 298 Conn. 466 at 482 (2010).

85. *Id.* at 482-483 (guarantor contractually agreed to a release of a coguarantor where its guaranty provided that the creditor "could, 'without impairing or releasing the obligations of [any] [g]uarantor [a]dd, release, settle, modify or discharge the obligation of any ... guarantor ... for any of the [l]iabilities' or '[t]ake any other action which might constitute a defense available to, or a discharge of ... any other ... guarantor'...").

86. See *Cadle Company of Connecticut, Inc. v. C.F.D. Development Corporation*, 44 Conn. App. 409 at 414 (1997), appeal dismissed *Cadle Company of Connecticut, Inc. v. C.F.D. Development Corporation*, 243 Conn. 667 (1998).

87. *Id.* The holding in the Connecticut Appellate Court case may be of questionable value in the context of an absolute and unconditional guaranty. On appeal, the Connecticut Supreme Court refused to "reexamine the thorny relationship between a guarantor's broadly phrased undertaking to ensure payment of a debt and such guarantor's access to suretyship defenses" because of "procedural irregularities at trial." *Cadle Company of Connecticut, Inc. v. C.F.D. Development Corporation*, 243 Conn. 667 at 669 (1998).

88. See § 6.2 *supra*.

89. *American Oil Company v. Valenti et al*, 179 Conn. 349 at 354 (1979).

90. C.G.S.A. § 52-576 (2012).

of the Connecticut Uniform Commercial Code, which imposes a four-year statute of limitations.⁹¹

However, even where the underlying obligation is a contract for the sale of goods governed by the Uniform Commercial Code, the six-year statute of limitations applicable to contracts generally applies to the guaranty.⁹² While in many cases the statutes of limitations for the guaranty and the underlying obligation may lapse concurrently, the running of the statute of limitations against the principal obligor is no defense to a guarantor's liability under a guaranty of payment.⁹³

In the case of a continuing guaranty, the statute of limitations does not commence to run in favor of a guarantor until a default has occurred in the payment by the principal obligor and a cause of action has accrued against the guarantor.⁹⁴ A statute of limitations defense to payment on a guaranty is lost if the guarantor unequivocally acknowledges his debt or, under certain circumstances, makes a partial payment.⁹⁵ Although, as a general rule, a payment made by a principal obligor that tolls the statute of limitations is ineffective as to a guarantor if the payment is made without the guarantor's knowledge or consent,⁹⁶ such knowledge or consent is not necessary if the terms of the guaranty disclaim any requirement for the same.⁹⁷

7.3.4 Statute of Frauds

The statute of frauds⁹⁸ guaranty provision bars an action to enforce any agreement "against any person upon any special promise to answer for the debt, default or miscarriage of another"⁹⁹ unless the agreement or a memorandum of the agreement is made in writing and signed by the party to be charged therewith or his agent. Thus, a guaranty which does not satisfy the requirements of the statute of frauds is not enforceable unless the undertaking is an original undertaking rather than a collateral one.¹⁰⁰ A guaranty is an original undertaking "if . . . there is a benefit to the promisor which he did not before, and would not otherwise, enjoy and in addition the act is done upon his request

91. See C.G.S.A. § 42a-2-725 (2012).

92. Associated Catalog Merchandisers, Inc. v. Chagnon et al, 210 Conn. 734 (1989).

93. American Oil Company v. Valenti et al, 179 Conn. 349 at 354-355 (1979).

94. Associated Catalog Merchandisers, Inc. v. Chagnon et al, 210 Conn. 734 at 745-46 (1989).

95. See Zapolsky v. Sacks et al, 191 Conn. 194 (1983); JSA Financial Corporation v. Quality Kitchen Corporation of Delaware et al., 113 Conn. App. 52 (2009).

96. JSA Financial Corporation v. Quality Kitchen Corporation of Delaware et al., 113 Conn. App. 52 at 59 (2009).

97. *Id.*

98. C.G.S.A. § 52-550 (2012).

99. C.G.S.A. § 52-550(a)(2) (2012).

100. See Otto Contracting Company, Inc. v. S. Schinella & Son, Inc., et al, 179 Conn. 704 at 710 (1980); Kerin Agency, Inc. v. West Haven Painting and Decorating, Inc., et al, 38 Conn. App. 329 at 331 (1995). In *Otto*, the Connecticut Supreme Court noted that "the 'main purpose' or 'leading object' rule, which defines when an undertaking is original rather than collateral, is an exception of long standing to the statute of frauds' guaranty provision." *Id.* See, also, Bartolotta v. Calvo, 112 Conn. 385 at 389 (1930) ("the distinction between a contract that falls with the condemnation of the statute of frauds and one which does not is that the former is a collateral undertaking to answer in case of a default on the part of the obligor in the contract, upon which still rests primary liability to perform, whereas in the latter the obligation assumed is a primary one that the contract shall be performed").

and credit.”¹⁰¹ Whether a guaranty falls under the statute of frauds is a question of fact.¹⁰² In order to be in compliance with the statute of frauds, the essential terms of a guaranty must be clear and unambiguous.¹⁰³

7.3.5 *Commercially Reasonable Collateral Disposition*

While a waiver of suretyship defenses may waive the guarantor’s right to challenge the impairment of collateral before a default,¹⁰⁴ the waiver does not apply in the post-default context, where Article 9’s provisions on commercial reasonableness apply. Thus, a guarantor may raise as a defense to its liability under its guaranty the obligee’s failure to act in a commercially reasonable manner with respect to the disposition of collateral governed by Article 9 of the UCC.¹⁰⁵

§ 8 Waiver of Defenses by the Guarantor

A guarantor may waive defenses based on a section 42a-3-605 discharge of liability.¹⁰⁶ A guarantor may also expressly waive common law defenses to its liability¹⁰⁷ and its right to assert any defenses that the principal obligor could have asserted against the obligee.¹⁰⁸ In general, a waiver in a guaranty waives defenses that would, absent the waiver, discharge the secondary obligation in actions by an obligee against the guarantor.¹⁰⁹

A guarantor may not waive its defense of lack of commercial reasonableness by a secured obligee in disposing and redeeming secured collateral, and accounting for its proceeds.¹¹⁰

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101. *Otto Contracting Company, Inc. v. S. Schinella & Son, Inc., et al*, 179 Conn. 704 at 711 (1980). *See also* *Kerin Agency, Inc. v. West Haven Painting and Decorating, Inc., et al*, 38 Conn. App. 329 at 333 (1995) (“it is not necessary . . . that the promisor receive any benefit from his promise. It is enough that the promise induced the extension of credit (citations omitted).”).
 102. *Otto Contracting Company, Inc. v. S. Schinella & Son, Inc., et al*, 179 Conn. 704 at 711 (1980).
 103. *See* *Yellow Book Sales and Distribution Company, Inc. v. Valle*, 133 Conn. App. 75 (2012).
 104. *See* § 7.2.2 *supra*.
 105. *See* *Connecticut Nat’l Bank v. Douglas*, 221 Conn. 530 at 546-47, 606 A.2d 684 at 692 (1992); *Morris et al v. Shawmut Bank*, 1997 Conn. Super. LEXIS 3247 (1997).
 106. “A party is not discharged . . . if . . . the instrument or a separate agreement of the party provides for waiver of discharge under this section either specifically or by general language indicating that parties waive defenses based on suretyship or impairment of collateral.” Conn. Gen. Stat. § 42a-3-605(i); *see also* *Merrill Lynch Bus. Fin. Services, Inc. v. Psychiatric Services Inst., LLC*, CV010457220S, 2002 WL 31460439 (Conn. Super. Ct. Oct. 11, 2002) (upholding a waiver of defenses in a guaranty). The term “surety” includes a guarantor. Conn. Gen. Stat. § 42a-1-201(39).
 107. *Connecticut Nat’l Bank v. Douglas*, 221 Conn. 530, 544-45, 606 A.2d 684, 691 (1992); *Terracino v. Gordon & Hiller*, 121 Conn. App. 795, 796 (2010). *American Oil Company v. Valenti et al*, 179 Conn. 349, 353 (1979); *Cadle Company of Connecticut, Inc. v. C.F.D. Development Corporation*, 44 Conn. App. 409, 414 (1997).
 108. *Barclays Bus. Credit, Inc. v. Freyer*, CV 960152347S, 1997 WL 255248, at *3 (Conn. Super. Ct. May 6, 1997). A guarantor may assert any defenses that the principal obligor can rightfully assert against the obligee. RESTATEMENT (THIRD), SURETYSHIP AND GUARANTY § 34 (1996).
 109. *Barclays Bus. Credit, Inc. v. Freyer*, CV 960152347S, 1997 WL 255248, at *3 (Conn. Super. Ct. May 6, 1997) (citing RESTATEMENT (THIRD), SURETYSHIP AND GUARANTY § 48 (1996)).
 110. Conn. Gen. Stat. § 42a-9-501(3); *Connecticut Nat’l Bank v. Douglas*, 221 Conn. 530, 546-47, 606 A.2d 684, 692 (1992).

Under Connecticut law, jury trial waivers are presumptively enforceable.¹¹¹ To rebut this presumption, the party seeking to avoid the waiver must show, by a preponderance of the evidence, that it clearly did not intend to waive the right to a jury trial.¹¹² The evidence may be apparent on the face of the agreement if the waiver is in fine print or buried in a large document.¹¹³ The evidence may also be of an “inequality of bargaining power, that the party was not represented by counsel, or other evidence indicating a lack of intent to be bound by the waiver provision.”¹¹⁴

8.1 Waiver of Impairment of Collateral Claim

A waiver of a claim for impairment of collateral must be sufficiently specific and broad.¹¹⁵ An unspecific waiver will not be enforced. In *TD Bank, N.A. v. ARS Partners Poplar Plains, LLC*, CV095026521, 2010 WL 745757 (Conn. Super. Ct. Feb. 2, 2010), the court did not enforce a waiver provision regarding impairment of collateral, finding that [u]nlike the waiver provisions in *Connecticut National Bank [v. Douglas]*, 221 Conn. 530, there is no reference to the collateral underlying the subject loans, to the protection or collection of the collateral, or to a waiver of a claim that the collateral has been impaired to the detriment of the defendant guarantors. In fact, the language at issue wholly fails to discuss the defendant guarantors’ waiver of any rights they may have to challenge the plaintiff’s conduct concerning the secured collateral.¹¹⁶

§ 9 Third-party Pledgors—Defenses and Waiver Thereof

Collateral pledged by a third party as a security for an underlying obligation stands in the position of a guarantor.¹¹⁷ Any defenses that would discharge a guarantor would discharge such collateral.¹¹⁸ It would seem to follow, given the state of the law, that a third-party pledgor may waive these defenses.

111. *L & R Realty v. Connecticut Nat’l Bank*, 246 Conn. 1, 14, 715 A.2d 748, 755 (1998).

112. *Id.*

113. *Id.* Obligees are advised to make such jury trial waivers conspicuous, or separately consented to or acknowledged, in order to avoid such defenses.

114. *Id.*

115. *See Connecticut Nat’l Bank v. Douglas*, 221 Conn. 530, 545, 606 A.2d 684, 691 (1992) (enforcing a guarantor’s waiver of claims relating to a secured obligee’s alleged impairment of collateral because the language of guaranty was sufficiently specific).

116. *TD Bank, N.A. v. ARS Partners Poplar Plains, LLC*, CV095026521, 2010 WL 745757, at *4 (Conn. Super. Ct. Feb. 2, 2010).

117. *See Rowan v. Sharps’ Rifle Mfg. Co.*, 33 Conn. 1 (1865).

118. *See Id.*

§ 10 Jointly and Severally Liable Guarantors

Two or more persons with the same liability on an instrument are jointly and severally liable unless otherwise provided in the instrument.¹¹⁹

A guarantor who pays a debt is entitled to reimbursement from the principal obligor and is entitled to enforce the instrument against the principal obligor.¹²⁰ A principal obligor who pays a debt, however, has no right of recourse against, and is not entitled to contribution from, a guarantor of the debt.¹²¹

A jointly and severally liable coguarantor who pays a debt is entitled to receive contribution from the other coguarantors of the same debt.¹²²

10.1 Contribution

As between guarantors, each coguarantor of the same debt is liable to the other guarantors only for a contributive share of the total outstanding debt owed.¹²³ The right of contribution between coguarantors is based on the theory of implied contract.¹²⁴ Coguarantors impliedly promise to contribute their share, if necessary, to meet the common obligation.¹²⁵

The discharge of one coguarantor's direct liability by the obligee will not relieve that coguarantor from its liability to contribute to the other coguarantors.¹²⁶ The coguarantors are the only parties to the implied contract.¹²⁷ The obligee is not a party.¹²⁸ The obligee has nothing to do with the right of contribution and cannot impair it.¹²⁹

The right of contribution is an existing obligation running from the inception of the relationship.¹³⁰ Enforcement of the right of contribution does not accrue until the actual payment in full of the common debt to the obligee.¹³¹

A coguarantor is not entitled to contribution unless it pays more than its contributive share.¹³² Each coguarantor is a principal obligor to the extent of its contributive share, and a secondary obligor as to the remainder.¹³³

A coguarantor is also not entitled to contribution if it voluntarily pays more than its share¹³⁴—the payment must be compulsory.¹³⁵ Payment is compulsory

119. "Except as otherwise provided in the instrument, two or more persons who have the same liability on an instrument as makers, drawers, acceptors, endorsers who endorse as joint payees, or anomalous endorsers are jointly and severally liable in the capacity in which they sign." Conn. Gen. Stat. § 42a-3-116(a).

120. Conn. Gen. Stat. § 42a-3-419(e).

121. *Id.*

122. Conn. Gen. Stat. § 42a-3-116(b).

123. *Terracino v. Gordon & Hiller*, 121 Conn. App. 795, 796 (2010) (citing RESTATEMENT (THIRD), SURETYSHIP AND GUARANTY §§ 55-57 (1996)).

124. *Lestorti v. DeLeo*, 298 Conn. 466, 473 (2010).

125. *Id.*

126. Conn. Gen. Stat. § 42a-3-116(c); *Lestorti v. DeLeo*, 298 Conn. 466, 473 (2010).

127. *Lestorti v. DeLeo*, 298 Conn. 466, 473 (2010).

128. *Id.*

129. *Id.*

130. *Id.*

131. *Id.*

132. *Id.* at 475.

133. *Id.*

134. *Gay v. Ward*, 67 Conn. 147, 34 A. 1025, 1028 (1895).

135. *Waters v. Waters*, 110 Conn. 342, 148 A. 326, 328 (1930).

if it can be “shown that the payment was one which was demanded and could have been enforced by suit, the [co-guarantor] being legally liable.”¹³⁶ A coguarantor against whom judgment is recovered may compel contribution from the other coguarantors after paying the obligee.¹³⁷

§ 11 Reliance

In Connecticut, the modern law of contracts can make guaranties enforceable on the basis of reliance.¹³⁸ However, it is arguable that a lack of consideration may remain a viable defense to an action on a guaranty.¹³⁹

§ 12 Subrogation

Subrogation allows a guarantor who pays a debt to “step into the shoes” of an obligee and “assume [the obligee’s] legal rights against a third party to prevent that party’s unjust enrichment.”¹⁴⁰ The guarantor will have no rights beyond those possessed by the obligee.¹⁴¹

When a guarantor pays a debt, the guarantor is subrogated to all the rights and remedies of the obligee, including the right to the debt itself, even without a formal assignment of the debt.¹⁴² The guarantor will also have the same priority with respect to the perfected security interest as that of the obligee.¹⁴³

Subrogation is an equitable remedy used to enforce a legal right and “compel the ultimate discharge of a debt or obligation by one who in good conscience ought to pay it.”¹⁴⁴ The right of subrogation arises at the time of payment by the guarantor.¹⁴⁵

The right of subrogation does not extend to bringing a legal malpractice action against the obligee’s attorney.¹⁴⁶

136. *Id.*

137. *Lestorti v. DeLeo*, 298 Conn. 466, 473 (2010).

138. *Superior Wire & Paper Products, Ltd. v. Talcott Tool & Mach., Inc.*, 184 Conn. 10, 20, 441 A.2d 43, 48 (1981) (citing RESTATEMENT (SECOND), CONTRACTS § 89C (1973)).

139. In the unreported case of *Connecticut Nat. Bank v. Ealahan Elec. Co.*, the court stated that the “*Superior Wire* court did not adopt the ‘modern law of contracts’ interpretation it referred to, but, instead, based its holding on the ground that there was consideration to support the guaranty at issue.” *Connecticut Nat’l Bank v. Ealahan Elec. Co.*, 519422, 1992 WL 335729, at * 2 (Conn. Super. Ct. Nov. 6, 1992) (denying the plaintiff’s motion to strike on the basis of lack of consideration). In the later case of *Martin Printing, Inc. v. Andres J. Sone et. al.*, 89 Conn App 336 at 348 (2005), the court concluded that a guaranty may be enforceable if it is supported by consideration.

140. *Rathbun v. Health Net of the Northeast., Inc.*, 133 Conn. App. 202, 211 (2012).

141. *Connecticut Sav. Bank v. First Nat’l Bank & Trust Co.*, 138 Conn. 298, 305, 84 A.2d 267, 270 (1951).

142. *In re Mr. R’s Prepared Foods, Inc.*, 251 B.R. 24, 29 (Bankr. D. Conn. 2000).

143. *Id.*

144. *Balboa Ins. Co. v. Bank of Boston Connecticut*, 702 F. Supp. 34, 36 (D. Conn. 1988) (quoting *Hartford Accid. and Indem. Co. v. Chung*, 37 Conn.Supp. 587, 594, 429 A.2d 158, 162 (Appell. Sess. 1981)).

145. *In re William P. Bray Co.*, 127 F. Supp. 627, 628 (D. Conn. 1954).

146. *Cont’l Cas. Co. v. Pullman, Comley, Bradley & Reeves*, 929 F.2d 103, 107 (2d Cir. 1991) (“[W]e are persuaded that the Connecticut Supreme Court would not permit a subrogee excess insurer to file legal malpractice claims against the insured’s attorney.”); *W. Sur. Co. v. Peitrzkiewicz*, FSTCV106007722S, 2011 WL 4447242, at *5 (Conn. Super. Ct. Sept. 6, 2011).

12.1 Partial Subrogation

As a general rule, subrogation can be used only after full payment of the debt to the obligee.¹⁴⁷ This rule against partial subrogation does not apply if the obligee acquiesces in the subrogation.¹⁴⁸ The rule against partial subrogation also does not apply if an obligee objects to partial subrogation but subrogation would not work to the detriment of the obligee.¹⁴⁹ An obligee must object to partial subrogation and the objection must be made to protect the obligee's interests for the rule against partial subrogation to apply.

12.2 Payment and Performance Bonds

Subrogation applies to guaranties of payment and performance bonds. Under Connecticut law, a surety¹⁵⁰ has priority to undisbursed contract proceeds when the surety becomes subrogated to the rights of a contractor.¹⁵¹ A surety seeking reimbursement for a debt paid under a performance and payment bond also has priority over an assignee obligee¹⁵²: “When a surety performs its obligations under a performance and payment bond, it stands in the shoes of the contractor. Thus, if the contractor has the right to the retained funds, the surety accedes to those rights when it meets its obligations under the bonds.”¹⁵³

§ 13 Triangular Set-off in Bankruptcy

Triangular set-off may be permissible in Connecticut.

Where a principal obligor has a claim against the obligee unrelated to the underlying obligation, which could be set-off against the underlying obligation, the guarantor may use that claim to reduce its duty to the obligee, either by consent of the principal obligor, to the extent that the claim is uncontested by the obligee, or if the principal obligor is made a party to the obligee's action to enforce the guaranty.¹⁵⁴

147. *Grant Thornton v. Syracuse Sav. Bank*, 961 F.2d 1042, 1047 (2d Cir. 1992) (citing *Sav. Bank of Manchester v. Kane*, 35 Conn. Supp. 82, 84, 396 A.2d 952, 953 (Com. Pl. 1978) and affirming denial of partial subrogation).

148. *Id.*

149. *See Id.*

150. Under Connecticut law, the term “surety” includes a guarantor. Conn. Gen. Stat. § 42a-1-201(39).

151. *Amwest Sur. Ins. Co. v. United States*, CIV. 3:92CV221(PCD), 1995 WL 452992, at *1 (D. Conn. May 10, 1995) (citing *Employers' Liab. Assur. Corp. v. Crandall*, 22 Conn. Supp. 404, 173 A.2d 926 (Com. Pl. 1961) and *Balboa Ins. Co. v. Bank of Boston Connecticut*, 702 F. Supp. 34, 36 (D. Conn. 1988)).

152. *Balboa Ins. Co. v. Bank of Boston Connecticut*, 702 F. Supp. 34, 36 (D. Conn. 1988).

153. *Id.* at 37.

154. *See* RESTATEMENT (THIRD) OF SURETYSHIP & GUARANTY, § 35 (1996). In matters of suretyship and guaranty the Connecticut Supreme Court “is likely to follow the Restatement, at least in the absence of authority to the contrary. *See, e.g., Cadle Co. of Connecticut, Inc. v. C.F.D. Development Corp.*, 243 Conn. 667, 706 A.2d 975 (Conn. 1998); *see also Southington v. Commercial Union Ins. Co.*, 71 Conn. App. 715, 805 A.2d 76 (Conn. App. 2002).” *See Lestorti v. DeLeo*, 298 Conn. 466 (2010), 968 A.2d 941, 945 (Conn. App. 2009), reversed on other grounds by *Lestorti v. DeLeo*, 4 A.3d 269, 276 (Conn. 2010).

§ 14 Indemnification—Whether the Principal Obligor has a Duty

The principal obligor with notice of the guaranty generally has a duty of reimbursement to the guarantor once the underlying obligation is discharged.

A guarantor is entitled to reimbursement from a principal obligor who has notice of the guaranty.¹⁵⁵ The principal obligor has a duty of reimbursement to the extent that the guarantor performs on the guaranty or makes a settlement with the obligee that discharges the principal obligor's obligation.¹⁵⁶ The duty to reimburse does not arise in certain situations: where bankruptcy law relieves the principal obligor of this duty; where the principal obligor lacked capacity to enter a contractual obligation; where a defense available to the principal obligor is not available to the guarantor; where the obligee's release of the principal obligor discharges the duty; or if at the time of performance or settlement the guarantor had notice of a defense, unless it was a reasonable business decision to perform or settle despite this defense.¹⁵⁷

The scope of the indemnification can be altered by contract.¹⁵⁸ Where the guarantor makes a voluntary payment on a debt that the principal obligor objects to, there may not be a duty of indemnification.¹⁵⁹ However, where an obligee obtains a judgment against a guarantor, "the issue of the validity of the underlying debt must be litigated and established before the imposition of such liability, and would have a binding effect upon the principal obligor in a claim over by the guarantor."¹⁶⁰

§ 15 Enforcement of Guaranties

15.1 Limitations on Recovery

The enforcement of some guaranties is subject to the Statute of Frauds, and additional limits in certain cases.

In order to recover on a guaranty there must be a written agreement in compliance with the Statute of Frauds.¹⁶¹ However, "[t]he suretyship provision [of the Statute of Frauds] does not apply to a promise unless the promisee is

155. See *Smith v. Mitsubishi Motors Credit Corp.*, 721 A.2d 1187, 1190 (Conn. 1998).

156. See RESTATEMENT (THIRD) OF SURETYSHIP & GUARANTY, § 22(1). The Connecticut courts have relied on this section of the Restatement to fill in gaps and support the state's common law. *Lestorti*, 4 A.3d at 276.

157. See RESTATEMENT (THIRD) OF SURETYSHIP & GUARANTY, § 24. See also *Lestorti*, 968 A.2d at 945.

158. See *Bentz v. Halsey*, 736 A.2d 931, 937 (Conn. App. 1999).

159. See *In re Metal Center, Inc.*, 31 B.R. 458, 462 (Bankr. D. Conn. 1983). ("While it might be argued that voluntary payment by a guarantor does not bind the principal debtor where the principal debtor has objected to the underlying debt, the result is different where the creditor obtains a judgment against the guarantor. Under those circumstances, the issue of the validity of the underlying debt must be litigated and established before the imposition of such liability, and would have a binding effect upon the principal debtor in a claim over by the guarantor.")

160. *Id.*

161. See *73-75 Main Ave., LLC v. PP Door Enterprise, Inc.*, 991 A.2d 650, 660 (Conn. App. 2010). See also Conn. Gen. Stat. § 52-550(a)(2) (1991). See also § 7.3.4 *supra*.

the obligee. Moreover, the obligee-promissee must know or have reason to know of the secondary obligor's suretyship status."¹⁶² A guaranty is voidable by the guarantor if the guarantor's assent is induced by a justifiably relied upon fraudulent or material misrepresentation by the obligee, or by the principal obligor or a third person as long as the obligee did not materially rely on the guaranty in good faith and with no knowledge of the misrepresentation.¹⁶³

The amount an obligee can recover may be limited in certain circumstances. For example, where the underlying obligation was covered by an uninsured motorist policy, the obligee's potential recovery from a state guaranty fund was reduced by the full amount of the policy limit, even if the actual amount recovered was below that limit.¹⁶⁴

15.2 Exercising Rights under a Guaranty Where the Underlying Obligation is also Secured by a Mortgage

Foreclosure on a mortgage securing an underlying obligation does not prevent enforcement of a deficiency judgment against the guarantor where the contract didn't explicitly shield the guarantor from this risk.

In the case of a foreclosure on a mortgage securing a promissory note, a subsequent deficiency judgment was enforceable against the guarantors of the note, where the note and mortgage deed protected the borrower against a deficiency judgment, but the language of the guarantee did not afford the guarantors such protection.¹⁶⁵

15.3 Litigating Guaranty Claims: Procedural Considerations

To enforce a deficiency claim against a guarantor of a mortgage loan, the foreclosure complaint must name and be served upon the guarantor, assuming the guarantor can be served in Connecticut; open-end mortgages securing open-end loans or letters of credit must meet certain requirements.

The foreclosure of a mortgage must name and be served upon all parties who could have been served in Connecticut at the commencement of the foreclosure in order to preserve the right to enforce deficiency judgments against potentially liable parties.¹⁶⁶ Connecticut General Statutes § 49-1 "prohibits the foreclosing mortgagee from maintaining a separate action on the underlying mortgage debt, note or obligation against any person liable except those upon whom personal service could not have been made at the outset of the foreclosure."¹⁶⁷

162. See RESTATEMENT (THIRD) OF SURETYSHIP & GUARANTY, cmt. (g). See also *id.* at § 11(1), 3(a); Lestorti, 968 A.2d at 945.

163. See RESTATEMENT (THIRD) OF SURETYSHIP & GUARANTY, § 12. See also Lestorti, 968 A.2d at 945.

164. See *Robinson v. Gailno*, 880 A.2d 127, 137 (Conn. 2005).

165. See *Regency Savings Bank v. Westmark Partners*, 756 A.2d 299, 303 (Conn. App. 2000).

166. See Conn. Gen. Stat. § 49-1 (1957).

167. See, e.g., *TD Bank N.A. v. Northern Expansion*, No. CV 09-6001534 S, 2010 Ct. Sup. 22614, 22619 (Conn. Super. Ct. Nov. 22, 2010).

An open-end mortgage securing a guaranty of an open-end loan or reimbursement obligations in respect of a letter of credit must meet the requirements of Connecticut General Statutes § 49-4b, which include entitling the deed “Open-End Mortgage” and stating in the deed the name and address of the principal obligor, the full amount authorized and maximum term of the loan, and certain additional information.¹⁶⁸

15.4 Choice of Law and Venue

Under Connecticut law, courts will generally give effect to an express choice of law chosen by the parties to a contract, including a guaranty.¹⁶⁹ The Connecticut Supreme Court, adopting the approach set out in the Restatement (Second) of Conflict of Laws § 187, has enunciated Connecticut’s rule for enforcement of contractual choice of law provisions as follows: the law of the state chosen by the parties to govern their contractual rights and duties will be applied, even if the particular issue is one that the parties could not have resolved by an explicit provision in their agreement directed to that issue, unless either (a) the chosen state has no substantial relationship to the parties or the transaction, and there is no other reasonable basis for the parties’ choice, or (b) application of the law of the chosen state would be contrary to a fundamental policy of a state that has a materially greater interest than the chosen state in the determination of the particular issue and that, under the rule of § 188 [of the Restatement (Second) of Conflict of Laws (1971)], would be the state of the applicable law in the absence of an effective choice of law by the parties.¹⁷⁰

In the absence of an effective choice of law by the parties to a contract, the Connecticut Supreme Court has adopted the “most significant relationship” approach taken in the Restatement (Second) of Conflict of Laws § 188.¹⁷¹ It should be noted, however, that an effective choice of law provision in a contract which designates the laws of a state other than Connecticut may not preclude the assertion of Connecticut law-based tort claims arising out of or relating to the contract.¹⁷²

Under Connecticut law, courts will also uphold forum selection clauses unless enforcement would be “unreasonable, unfair, unjust.”¹⁷³

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168. See Conn. Gen. Stat. § 49-4b (1997). See also *Mundaca Investment Corporation v. Homespun, et al.*, No. 31 99 46, 1996 Ct. Sup. 5325-VVV, 5325-WWW - 5235-XXX (Conn. Super. Ct. Sept. 18, 1996).
169. See *Wells Fargo Bank, N.A. v. Lambot*, 2009 Conn. Super. LEXIS 1085 (2009).
170. See *Elgar v. Elgar*, 238 Conn. 839, 679 A.2d 937 (1996).
171. See *Reichhold Chemicals, Inc. v. Hartford Accident and Indem. Co.*, 252 Conn. 774, 750 A.2d. 1051 (2000).
172. Compare *Travel Servs. Network, Inc. v. Presidential Fin. Corp. of Massachusetts*, 959 F. Supp. 135, 146-47 (D. Conn. 1997) (holding that “broadly-worded choice-of-law provisions in a contract may govern not only interpretation of the contract in which it is contained, but also tort claims arising out of or relating to the contract”) with *Blakesee Arpaia Chapman, Inc. v. Helmsman Mgmt Servs, Inc.*, 31 Conn. L. Rptr. 214 (Conn. Super. 2002) (holding that a provision in a contract stating that “this Agreement shall be construed under and governed by the law of the State of Massachusetts” is “narrowly worded and does not govern tort as well as contract disputes”).
173. See *Reiner, Reiner and Bendett, P.C v. The Cadle Company*, 278 Conn. 92 (2006) (citing with approval the holding of the U.S. Supreme Court in *Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972)); *Royal Bank of Scotland, PLC v. Lexham Farmington I, LLC*, 2011 Conn. Super. LEXIS 510 (2011).

§ 16 Revival and Reinstatement of Guaranties

Guaranties may be revived to the extent that the obligee later surrenders the performance or collateral pursuant to a legal duty to do so.

A guarantor's obligation may be revived to the extent that the obligee surrenders the performance or collateral pursuant to a legal duty to do so, such as in a preference action.¹⁷⁴ Where the obligee returns the performance voluntarily, however, the guaranty is not revived.¹⁷⁵

174. See *North American Bank & Trust Co. v. Biebel*, No. CV 03-0522575S, 2005 Ct. Sup. 11952-r, 11952-s (Conn. Super. Ct. Aug. 16, 2005); See also RESTATEMENT (THIRD) OF SURETYSHIP & GUARANTY, § 70; Lestorti, 968 A.2d at 945.

175. See RESTATEMENT (THIRD) OF SURETYSHIP & GUARANTY, § 70, cmt. c. See also Lestorti, 968 A.2d at 945.



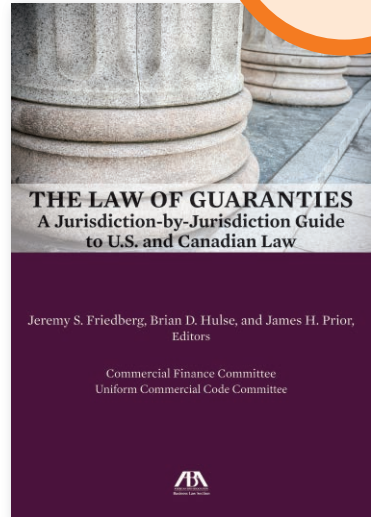
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