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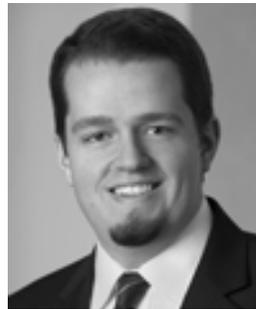


REPORT

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COMPLETION GUARANTIES

Worth the Paper They're Written on? Completion Guaranties Tough to Enforce



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Many, if not most, lawyers have in the deep recesses of their minds, at least vague recollections of three competing principles that were taught to every first-year law student: first, courts will enforce unambiguous contracts as written; second, specific performance is rarely available in contract cases involving personal services or performance of some

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task; and, third, that specific performance is typically available in cases involving real property, because of the unique nature of real property. These three doctrines typically co-exist without incident with one notable exception: the completion guaranty.

Completion guaranties are typically included in most significant construction-finance transactions and on their face appear to provide that the borrower will complete the project on time and within the construction budget. If the borrower fails to complete the project, however, and the lender holding the completion guaranty attempts to enforce it, these three doctrines are called into conflict. The lender is asking the court to strictly enforce the unambiguous terms of the completion guaranty by forcing the borrower to perform personal services—construction—to improve unique real property. Courts, cognizant of this conflict, tend not to order the specific performance sought: that the de-

faulted borrower immediately complete the project at its own expense. Instead, courts tend to be more inclined to attempt to quantify the injury, if any, suffered by the lender as a result of the incomplete construction. This damage may be difficult, if not impossible, to separate from the injury suffered by a lender as a result of a payment default on related building, acquisition, or project loans. And, in any event the remedy for the breach of a completion guaranty is unlikely to be a court order that a project be completed.

Given the current market, with a significant number of aborted construction projects and a significant number of defaulted, underwater loans, both borrowers and lenders would be well served to create the next generation of agreements to provide both sides with the certainty and predictability they desire when they seek to obtain or provide financing for construction projects. This article examines the attributes of typical completion guaranties, looks at the small universe of cases interpreting completion guaranties, and proposes a new approach to achieving the goal of providing assurances that a project will be completed or that a lender has adequate protection in the event that it is not.

I. Completion Guaranties Generally. Although there are numerous types of completion guaranties in current use, which vary in form and language, they tend to share certain common attributes. As a general proposition, a completion guaranty, which likely will have been executed as part of the original package of loan documents, typically guarantees to the lender that the collateral for the loan will be finished.

The typical completion guaranty will contain language like: “The Guarantor hereby irrevocably and unconditionally, guarantees to Lender the lien-free completion of the Improvements and Renovation Work prior to the Completion Date.” If the building is not finished, as an alternative to the guarantor completing the building, the completion guaranty appears to offer to the lender the ability to collect the cost of finishing the building: “if Lender exercises its rights to complete any of the Work pursuant to the Loan Agreement, this Guaranty, or any of the other Loan Documents, the Guarantor guarantees to pay or reimburse Lender for any and all costs and expenses incurred by Lender, in completing the Work.”

II. Sparse Completion Guaranty Case Law. Unfortunately for lenders seeking to enforce their guaranties in New York, there is little precedent to guide them. The slim existing precedent is discouraging—awarding “make-whole” damages (recouping the difference between the foreclosure price and the principal amount of the loan) instead of the costs to complete the building. It would be a mistake for a lender to assume that a judicially enforced completion guaranty will automatically result in a completed building, or even the costs to finish. The courts have not treated the issue fully, so there is no pattern available to make a reliable prediction.

As a general proposition, New York courts enforce contracts as written, and favor the swift enforcement of payment guaranties. While we cannot predict with certainty how courts will react to enforcement actions of completion guaranties, well-established principles of contract law can be used as a guide to urging courts to enforce these completion guaranties according to their

terms. Because of the lack of case law, there is ample room to break new ground in this area.

At the outset, it should be noted that very little case law exists in New York that decides whether, or how, to enforce traditional completion guaranties. The *Real Estate Law Journal* noted in 1994 that case law on this issue was “surprisingly rare and leads one to the supposition that their enforcement has been underutilized by lenders.”¹ A more recent study shows that little has changed since the *Law Journal’s* assessment 16 years ago.² At least two recent New York cases have involved completion guaranties, but the courts declined to enforce them, citing procedural reasons.³

In *1633 Associates v. Uris Building Corporation*,⁴ decided in 1979, the borrower defaulted on its building loan with the building near completion. The lender elected to foreclose on the mortgage securing that loan.⁵ The plaintiff/lender also brought a proceeding based on the completion guaranty (executed by the parent company of the borrower), alleging it was owed the \$1.2 million it spent to complete the building, and the \$800,000 it spent to clear mechanics liens.⁶ The court, however, viewed the completion guaranty’s primary purpose as insurance for the principal of the underlying loan.⁷ The court found that the lender had suffered no damages, because the unfinished building constituted sufficient collateral (by virtue of the foreclosure sale) to satisfy the underlying loan.⁸ Further, the court made it clear that if the make-whole cost—the cost of returning the lender to the position it would have been in had the

¹ Kymson F. Desjardins, *Completion Guaranties: A Review of the Concept and the Execution*, 23 REAL EST. L.J. 141, 141 (1994). Indeed, he later notes the dearth leaves one “to assume that either completion guaranties are not enforced judicially or that disputes relative thereto are settled before trial. In either case, . . . a lender’s rights thereunder are not sufficiently reliable to warrant the risk and expense of judicial enforcement.” *Id.* at 152, n.5.

² Robert S. Ladd, *Enforcement of Completion Guaranties*, presented at 43rd Annual William W. Gibson, Jr. Mortgage Lending Institute, UNIV. OF TEX. SCH. OF LAW, at *1 (Sept. 24, 2009) (“There is virtually no case law or court interpretations involving completion guaranties and the manner of their enforcement, and the case law that exists is often conflicting and unhelpful”).

³ See *Broadway Houston Mack Development LLC v. Kohl*, 22 Misc.3d 1001, 1010, 870 N.Y.S.2d 748, 755 (Sup. Ct. Suffolk County 2008) (refusing to rule on completion guaranty issue because guarantor was not a party to the action); and *225 Fifth Avenue Retail LLC v. 225 5th LLC*, No. 601659/07, 2009 WL 2208336 at * 11 (Sup. Ct. NY County, July 7, 2009) (refusing to address completion issue because plaintiff failed to provide contractually required ten day notice prior to commencing action).

⁴ *1633 Associates v. Uris Building Corporation*, 66 A.D.2d 237, 414 N.Y.S.2d 125 (1st Dep’t 1979).

⁵ *Id.* at 238.

⁶ *Id.* at 239.

⁷ *Id.* at 241-242 (“Patently, the original building loan agreement and the guarantee are to be read together.”)

⁸ *Id.* at 242 (“Insofar as the defendant’s liability under the guarantee is concerned, in regard to the 1969 building loan agreement, the lender was made whole and obtained the benefit of the \$2,000,000 in excess of the indebtedness under that building loan agreement. As this amount is sufficient to cover the sums expended to complete the building and to pay off liens, it is clear that insofar as defendant’s liability under the guarantee is concerned, the lender and its assignee, plaintiff herein, have been made whole.”)

building been completed on time—had been less expensive than the cost of completion, the lender would only have been entitled to make-whole damages.⁹ The court's reasoning was to prevent a windfall to the lender.¹⁰

Very few other jurisdictions have directly addressed completion guaranties,¹¹ and those that have tended to follow the New York formula—the “measure of damages is the loss of value that results from failure to complete construction, not the lender's cost of completing construction.”¹² In the limited case law available, both Maryland¹³ and California¹⁴ have subscribed to this view.

This does not mean, however, that completion guaranties are not enforceable. The available New York case law is over 30 years old, and the market conditions were much different then than they are today. Today, there are substantially larger, sophisticated entities bargaining at arms length over substantially more complex transactions. The real estate market has also suffered its largest set-back in decades, turning valuations upside-down. Since New York courts have traditionally enforced contracts as they are written, completion guaranties should be no different.

III. Reasons Completion Guaranties Should Be Enforced.

A. New York Courts Enforce Contracts as Written. It is an axiomatic principle of New York law that contracts are enforced according to their terms.¹⁵ The intentions of contracting parties “may be gathered from the four corners of the instrument” and the contract “should be enforced according to its terms.”¹⁶ Courts are in-

structed to “construe the agreements so as to give full meaning and effect to the material provisions,” and no provision should be rendered “meaningless” in reading the contract.¹⁷ This rule is deemed particularly important “in the context of real property transactions, where commercial certainty is a paramount concern, and where . . . the instrument was negotiated between sophisticated, counseled business people negotiating at arm's length.”¹⁸ In *Vermont Teddy Bear Co. v. 538 Madison Realty Co.*, the Court of Appeals refused to read a notice requirement into an unambiguous lease agreement where the written contract, by its express terms, only required notice to be given by the tenant and not the landlord.¹⁹

These basic rules of contract construction and interpretation are also applied to other guaranties.²⁰ “Yet another consideration in interpreting the guaranty is the reasonable expectations of the parties and the business purpose to be served by their contract. [. . .] [T]he expectations and purposes of the parties in view of the factual context in which the agreement was made must be considered in interpreting a contract term, with due regard to the parties' sophistication.”²¹ In *Madison Avenue Leasehold, LLC v. Madison Bentley Assocs., LLC*, the Appellate Division, First Department interpreted the ambiguous term “default” to encompass only a material default (lack of payment) rather than a technical default (late payment within the grace period), as the accepted payment of rent from month to month a few days late without complaint by the landlord would not constitute a “default” under the reasonable expectation of the parties.²²

B. Courts Regularly Enforce Payment Guaranties. In New York, guaranties for the payment of money are easy to enforce, whether for amounts owed on accounts payable²³ or for the balance of a defaulted loan.²⁴ New York courts regularly grant motions for summary judgment for payment guaranty actions,²⁵ and the New

⁹ *Id.* at 240-41 (citing *Prudence Co. v. Fidelity & Deposit Co.*, 297 U.S. 198 (1936) and *Westcott v. Fidelity & Deposit Co.*, 87 App.Div. 497, 84 N.Y.S. 731 (1st Dep't 1903) (“The [lender] should be placed in the same position it would have occupied if the building had been completed on [time].”).

¹⁰ *Id.* at 242 (“The guarantee was simply intended to secure the lender, that is, to assure that it be made whole, not to assure that it be made more than whole or to enable it to experience a windfall profit.”)

¹¹ See Ladd, *Enforcement of Completion Guaranties*, *supra* n. 2.

¹² See Robert E. Williams, *The Role of Completion Guaranties in Construction Lending*, Los Angeles Lawyer, at *15-16 (November 31, 2008).

¹³ See *Ellerin v. Fairfax Savings*, 337 Md. 216, 225 (1995) (upholding trial court's award of “loan balance” against completion guarantors instead of awarding remaining construction costs).

¹⁴ See *Glendale Federal Savings and Loan Ass'n v. Marina View Heights Dev. Co.*, 66 Cal. App. 3d 101, 123-25 (Cal. App. Div. 4th Dist. 1977) (upholding trial court's award of “loss of security” damages, refusing to award construction costs as plaintiff “should not be awarded more than the benefit which he would have received had the promisor performed”); *Bridge Financial Corp. v. B.J. Bird*, 2006 WL 515529 (Cal. App. Div. 4th Dist. 2006) (dismissing action based upon completion guaranty where value of unfinished property was worth more than outstanding balance due upon loan, citing *Glendale*).

¹⁵ See *Griggs v. Day*, 46 N.Y. St. Rptr. 967, 18 N.Y.S. 796, 797 (Superior Ct. N.Y.C. 1892) (“good morals would appear to require that it, like other contracts, be enforced according to its terms”); and *In re Smith*, 85 Misc. 2d 849, 850 380 N.Y.S.2d 888, 890 (Sup. Ct. N.Y. County 1976) (“[f]or it is axiomatic that contracts must be enforced as they are written”).

¹⁶ *Beal Sav. Bank v. Sommer*, 8 N.Y.3d 318, 324-25, 834 N.Y.S.2d 44, 47-48 (2007) (citing *Vermont Teddy Bear Co. v. 538 Madison Realty Co.*, 1 N.Y.3d 470, 475 (2004); *WWW Assoc., v. Giancontieri*, 77 N.Y.2d 157, 162 (1990)).

¹⁷ *Id.* (citing *Excess Ins. Co. Ltd. v. FactoryMut. Ins. Co.*, 3 N.Y.3d 577, 582 (2004); *God's Battalion of Prayer Pentecostal Church, Inc. v. MieleAssoc., LLP*, 6 N.Y.3d 371, 374 (2006)).

¹⁸ *Vermont Teddy Bear Co. Inc. v. 538 Madison Realty Co.*, 1 N.Y.3d 470, 475, 775 N.Y.S.2d 765, 767-68 (2004) (quoting *Wallace v. 600 Partners Co.*, 86 N.Y.2d 543, 548 (1995)) (“Hence, ‘courts may not by construction add or excise terms, nor distort the meaning of those used and thereby make a new contract for the parties under the guise of interpreting the writing’”).

¹⁹ *Id.* at 475-76.

²⁰ See *Glen Banks, New York Contract Law*, West New York Practice Series, § 25:10; *Lehman Bros. Holdings v. Matt*, 34 A.D.3d 290, 291, 824 N.Y.S.2d 78, 79-80 (1st Dep't 2006) (“Wherever possible, a court will not construe a guaranty in such a way as to render it meaningless”).

²¹ *Madison Ave. Leasehold, LLC v. Madison Bentley Assocs., LLC*, 30 A.D.3d 1, 8, 811 N.Y.S.2d 47, 53 (1st Dep't 2006).

²² *Id.* at 8-9.

²³ See *James Talcott, Inc. v. Bloom*, 29 A.D.2d 390, 391, 288 N.Y.S.2d 398 (1st Dep't 1968) (granting summary judgment on a guaranty for payment of debts of Milard Clothes, Inc.).

²⁴ See *Overseas Private Inv. Corp. v. Nam Koo Kim*, 69 A.D.3d 1185, 895 N.Y.S.2d 217 (3d Dep't 2010) (granting summary judgment on a guaranty of a promissory note).

²⁵ See, e.g., *id.*; *James Talcott Inc., supra*; *Bank of Am., N.A. v. Tatham*, 305 A.D.2d 183, 757 N.Y.S.2d 855 (1st Dep't 2003) (affirming summary judgment on guaranty in excess of \$10 million); *City of New York v. Clarose Cinema Corp.*, 256 A.D.2d 69, 70-71, 681 N.Y.S.2d 251 (1st Dep't 1998) (granting

York C.P.L.R. even provides an expedited method for doing so—the motion for summary judgment in lieu of a complaint.²⁶ In either normal or expedited actions, “[a] party is entitled to a judgment on a guaranty of a note if it proves that there has been a default on the payment of a promissory note [and a guarantor] has executed a valid guaranty warranting the payment of the amount due under that note.”²⁷

The complexity of the loan arrangements alone is not sufficient to defeat a summary judgment motion based on a clear and unambiguous guaranty document.²⁸ Further, if the parties expressly disclaimed reliance on oral representations (through a “merger” clause), so that the document must stand on its own, then there is almost no defense to a summary judgment action on a payment guaranty,²⁹ except for actual payment.³⁰ New York courts will strike a fraudulent inducement defense—the claim that the defending party was “duped” into signing the contract—in the presence of a valid disclaimer clause.³¹ Similarly, defendants will be unable to rely upon a defense based upon an inability to understand English³² or a failure to read the contract.³³

summary judgment on guaranty in amount over \$1 million); *Kensington House Co. v. Oram*, 293 A.D.2d 304, 304-305, 739 N.Y.S.2d 572 (1st Dep’t 2002) (granting summary judgment on guaranty that provided for payment of “rent, late charges, water and sewer charges, costs, disbursements and attorney’s fees”).

²⁶ See New York C.P.L.R. § 3213; *UBS AG, Stamford Branch v. HealthSouth Corp.*, 645 F. Supp. 2d 135, 148 (S.D.N.Y. 2008) (“New York public policy favor(s) the enforcement of loan agreements swiftly and according to their express terms. The CPLR gives ‘greater presumptive merit’ to two categories of claims – actions based on instruments for the payment of money, and actions based on judgments – allowing them to be brought on by ‘motion-action’ for summary judgment, bypassing pleading, motion and discovery delays”).

²⁷ *Overseas Private Inv.*, 69 A.D.3d at 1185, *2. The standards are similar for other types of default; see the cases referenced in note 3, *supra*.

²⁸ *Clarose Cinema*, 256 A.D.2d at 71.

²⁹ See *Citibank N.A. v. Plapinger*, 66 N.Y.2d 90, 94-95, 495 N.Y.S.2d 309 (1985).

³⁰ *Red Tulip, LLC v. Neiva*, 44 A.D.3d 204, 205, 842 N.Y.S.2d 1 (1st Dep’t 2007) (“the guaranty signed by Neiva waived all defenses except ‘actual payment’”).

³¹ See *Plapinger*, 66 N.Y.2d at 94-95; *BNY Financial Corp. v. Clare*, 172 A.D.2d 203, 205, 568 N.Y.S.2d 65 (1st Dep’t 1991) (“[T]he guaranty specifically provided that it was absolute, unconditional, unlimited and could not be altered or discharged orally. Consequently, fraud in the inducement is not a valid defense. . . .” (citing *Plapinger, supra*)).

³² See *Maines Paper and Food Service Inc. v. Adel*, 256 A.D.2d 760, 761, 681 N.Y.S.2d 390 (3d Dep’t 1998) (“defendant’s alleged ‘difficulty’ with the English language is irrelevant as he candidly admitted at his examination before trial that he made no attempt to read the document before signing it nor did he attempt to have someone else read or explain it to him”).

³³ See *Marine Midland Bank, N.A. v. Embassy East, Inc.*, 160 A.D.2d 420, 422-423, 553 N.Y.S.2d 767 (1st Dep’t 1990) (“It is no defense that respondents did not read the note or the guarantees, for the law presumes that one who is capable of reading has read the document which he has executed and he is conclusively bound by the terms contained therein”); *National Westminster Bank USA v. Sardi’s Inc.*, 174 A.D.2d 470, 471, 571 N.Y.S.2d 712 (1st Dep’t 1991) (finding the lower court “incorrectly denied plaintiff summary judgment based upon defendant’s conclusory allegations that he was unaware that it was a personal guaranty”).

Unfortunately, completion guaranties do not get the same ready treatment as payment guaranties.³⁴ Completion guaranties will not “qualify as instruments for the payment of money only,” because completion guaranties guarantee “both payment and performance of all of the borrower’s obligations, including the completion of the construction on the Property.”³⁵ Therefore, a lender cannot use New York’s expedited summary judgment process to enforce a completion guaranty. As shown below, this perceived “performance” element could be an obstacle to enforcement of completion guaranties in general.

IV. Guaranties May Not Be Enforced as Written. A. Courts Typically Refuse to Require Specific Performance. Generally speaking, New York courts are reluctant to order specific performance, due to the ‘extreme’ nature of the remedy and will refuse to order it if other remedies will suffice. “[S]pecific performance will not be ordered where money damages ‘would be adequate to protect the expectation interest of the injured party.’”³⁶ When determining whether money damages will be adequate, courts consider “the difficulty of proving damages with reasonable certainty and of procuring a suitable substitute performance with a damage award.”³⁷ Specific performance is only appropriate where “the subject matter of the particular contract is unique and has no established market value.”³⁸

Since buildings can typically be reliably appraised, actions seeking construction-related specific performance, including guaranty enforcement, are unlikely to succeed. The court can more easily reduce the problem to money damages, and avoid the need to utilize its ‘extraordinary’ power. Therefore, lenders must point out that completion guaranties, while appearing to guarantee specific performance, actually are designed to ensure the full value of the collateral for the lender.

B. Rebuttal: Completion Guaranties Do Not Guarantee Specific Performance. While the terms of a typical completion guaranty may make it appear that the only way to enforce that guaranty is to make the guarantor finish the building, all the lender is usually seeking is a guarantee that overrun costs will be paid by the guarantor. This intent is made clear by the terms previously mentioned above: “if Lender exercises its rights to complete any of the Work pursuant to the Loan Agreement, this Guaranty or any of the other Loan Documents, the Guarantor guarantees to pay or reimburse Lender for any and all costs and expenses incurred by Lender, in completing the Work.”

The completion guaranty will usually go further, and define the type of guarantee it is, using language such as the following: “This Guaranty is an irrevocable, absolute, continuing guaranty of payment and performance and not a guaranty of collection.” Clearly the performance element is present, in the nature of guaranteeing a “lien-free completion.” The guaranty, how-

³⁴ See *U.S. Bank N.A. v. Jeremias*, 2010 N.Y. Slip Op. 31585 at *4, 2010 BL 148514 (Sup. Ct. N.Y. County June 21, 2010).

³⁵ *Id.*

³⁶ *Sokoloff v. Harriman Estates Dev. Corp.*, 96 N.Y.2d 409, 415, 729 N.Y.S.2d 425, 429 (2001) (citing Restatement [Second] of Contracts § 359 [1]; *Van Wagner Adv. Corp. v. S & M Enters.*, 67 N.Y.2d 186, 191-194 (1986)).

³⁷ BANKS, NEW YORK CONTRACT LAW § 18:20.

³⁸ *Sokoloff*, 96 N.Y.2d at 415.

ever, also clearly contemplates payment as an acceptable alternative to completion. In fact, payment is likely preferred by most lenders, as they may not feel comfortable letting the company or related entity that just defaulted on their loan to handle the completion of their collateral.

Therefore, it is the payment aspect of the completion guaranty that lenders should focus on when seeking enforcement. Asking for specific performance in New York will surely draw harsher criticism from the judge than requesting simple payment of expenses.

V. Strategies for Enforcing the Completion Guaranty. As seen in Section III above, asking for payment of expenses in addition to foreclosure on collateral that is already sufficient to satisfy the debt is unlikely to succeed. If the value of the property, unfinished, has increased enough since the origination of the loan to cover any monetary damages, the court will not give the lender both the property and the cost to complete it, in order to avoid giving the lender a “windfall.” However, in the current real estate market, it is highly unlikely that any collateral, completed or not, will cover the level of ambitious financing that took place before bubble burst. In this environment, courts might be more sympathetic to lenders who lost out in the economic collapse. Therefore, a lender seeking to enforce a completion guaranty should consider using a “damages-oriented” strategy.

To do so, a lender should point out that it is seeking to recover costs and expenses to complete the building and protect its collateral—and not force the guarantor to complete the building itself. Second, the lender should analogize between the payments it seeks under the completion guaranty and the payment guaranties that are regularly and readily enforced by New York courts. Third, the lender should show that in a down economy, awarding monetary damages equal to the cost difference between the maximum funding of the loan and the amount needed to complete the building cannot possibly be a windfall to the lender, because even fully completed, the building is not worth as much now as it was contemplated to be at origination. Finally, the lender should remind the court that, if the court does not give full weight to the contractual terms arrived at through extensive negotiation by sophisticated parties, the court will be turning its back on the centuries-old precedent that contracts are enforced according to their terms.

VI. Alternatives Going Forward. Just as today’s “new market” lenders are talking about a return to fundamentals in underwriting, so too must lenders return to fundamentals in loan administration. While there are alternatives to the use of a completion guaranty, many construction lenders could avoid following their borrowers into a tailspin of cost overruns and the uncertain enforcement of a completion guaranty by more closely

monitoring the loan during pre-development and critical early stages of construction.

First, lenders should consider shying away from closing construction loans before the construction budget and schedule have been fully tested. In addition to full approval of plans and specifications by applicable government authorities, the execution of fully bid construction contracts will be critical in determining the accuracy of a developer’s budget. Early delays related to plan approval could signal the death knell for a project’s budget and ultimate success even before ground has been broken.

Lenders must also be vigilant in their examination of construction budget spending and enforcement of loan balancing provisions. Instead of waiting until a construction loan has been fully advanced and the principal has tapped out all equity sources, the call for payment of a shortfall balance in the early going is likely to be more successful than a protracted completion guaranty litigation. Successful construction lenders rely upon seasoned professionals to monitor a construction project on their behalf, completing regular site visits and budget review as a matter of course to avoid later surprises.

Finally, prudent loan administration also extends to monitoring of construction timing. Projects that suffer delays will quickly run through reserves for construction carrying expenses and pose additional threats to the ultimate lien-free completion of the project. Loan provisions that require the achievement of construction milestones as a pre-condition to additional loan funding should be included in all loan documentation and enforced with vigilance. Further, guaranties of construction carrying expenses may be more easily enforced than a completion guaranty and should be considered essential during the underwriting of all construction loans.

In addition to prudent loan administration, lenders may be willing to sacrifice the open-ended nature of a completion guaranty, whereby the guarantor remains primarily liable for the full scope of any cost overruns, for the more certain enforceability of a cash deposit, a letter of credit or other relatively liquid collateral. The deposit, for instance, of 10 percent of the total construction budget may provide a reasonable cushion for a project and give lenders better certainty of execution.

While this article has focused largely on the enforceability of completion guaranties, payment and performance bonds may provide additional comfort for lenders, though at no small expense and, perhaps, without necessarily marked improvement in enforceability. While lenders should not give up on the completion guaranty, given the uncertainty in the case law, and the new nature of the real estate market after a worldwide economic collapse, lenders and their counsel should strategize creative ways to adapt to the changing conditions and acquire the security they are looking for.