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Personal Guaranties [and Their Limitations]

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Introduction

Personal guaranties are common sources of additional credit support for collateralized loans. Typically provided by individuals who are equity holders of the primary obligor, these are often, but not always, required in connection with financings for small to medium-sized businesses.

Unfortunately, given their generally formulaic nature and heavy reliance on legalese, guarantors often misunderstand the scope and terms of their guaranties, including as to whether they cover all or just a portion of the underlying debt; whether they are conditional or unconditional; whether they can be enforced immediately upon monetary default of the primary obligor or whether the creditor first needs to take other actions; and whether the guarantor has a right to consent to modifications to the underlying debt or to invoke certain defenses.

Experienced creditors have views on these issues, but it is not uncommon for the individuals providing the personal guaranties (perhaps in some cases relying on counsel that is less experienced in this area) to make assumptions that are contrary to the express or implied terms of their contracts.

The precise terms of the guaranty are, of course, crucial in answering the above questions. In that regard, it is always useful to have recent New York case law examining the scope and application of guaranties and today, we examine one such case, namely *White Oak Global Advisors LLC v. Clarke*, 2025 WL 2113436 (S.D.N.Y. July 29, 2025). This case, decided by the venerable Judge Jed S. Rakoff of the Southern District of New York, is one in which the court entered summary judgment in favor of a creditor over the objections of individual guarantors based on some of the aforementioned misconceptions. We then examine another recent case out of the state of Washington in which a court conversely declined to award summary judgment to a creditor based on some unfavorable contract language.

White Oak—Factual Background

The *White Oak* case involved an action against guarantors Thomas and Ana Clarke, both individually and as trustees for Thomas and Ana Clarke (collectively, the "Clarkes"), who were indirect owners of Epic Companies, LLC (Epic) and several of its subsidiaries (collectively, the "Epic Companies" or Borrowers). The Epic Companies provided certain support services for the energy industry, including construction, well-plugging, and inspection, maintenance and general maritime services to the offshore oil and gas industry.

In July 2018, White Oak Global Advisors LLC extended a $15 million term loan to Epic. That loan defaulted in July 2019, following which White Oak and Epic restructured the loan into three separate senior loan facilities with White Oak, as Administrative Agent; one with Epic as borrower, and the other two with, respectively, Navarro Capital Partners, LLC, and Epic Alabama Maritime Assets, both Epic subsidiaries, as borrowers.

These three facilities were guaranteed by the Clarkes. As part of that restructuring, a prior existing loan facility with Acqua Liana Capital Partners, LLC (which may have been affiliated with the Clarkes), as Administrative Agent, was also restructured into three separate junior loan facilities with the same three Epic companies as borrowers. Both the senior and junior loan facilities matured in July 2023.

White Oak and Acqua then entered into a promissory note that was subsequently amended and restated four times, resulting in the Fourth Amended Note, which was issued in December 2020 and also matured in July 2023. In April 2019, the Clarkes guaranteed the Second Amended Note. In July 2019, they signed a Reaffirmation and Consent in connection with issuance of the Third Amended Note. They allegedly did not sign any similar documents in connection with issuance of the Fourth Amended Note.

In Aug. 2019, Epic filed a petition for chapter 11 bankruptcy in the Southern District of Texas.

As of April 2025, according to White Oak, approximately $29 million was outstanding under the Navarro loan and $179 million was outstanding under the Fourth Amended Note. The parties agreed that the maximum liability of the Clarkes under their guaranties was capped $20 million each, resulting in a total of $40 million of guarantied obligations.

White Oak sued the Clarkes in New York federal court in 2024 and, following limited discovery, both parties filed motions for summary judgment in June 2025. According to the court, the parties' cross-motions focused on two "clusters" of issues. The first related to the Fourth Amended Note, namely whether the guaranties applied to that note and, if they did, whether the guaranties were unconscionable as a matter of law and whether the conditions precedent to Ana Clarke's guaranty were satisfied. The second cluster related to the sale of collateral assets, the application of proceeds of those sales and the amount remaining, if any, of the Clarkes' obligations under their guaranties.

White Oak—Case Analysis

As to the set of issues regarding the Fourth Amended Note, the Clarkes argued that their guaranties under prior iterations of the Fourth Amended Note did not apply to the Fourth Amended Note, because the guaranties did not expressly contemplate that the amount guaranteed could increase. The court disagreed.

According to the court, the Clarkes did not dispute that their guaranties applied to the Second Amended Note and that they had consented to the Third Amended Note through the Reaffirmation and Consent. The court then noted that the Reaffirmation itself defined the Third Amended Note to include any amendment "for any purpose, including, without limitation, to increase the principal amount." It therefore found, as a matter of contract interpretation, that the Clarkes had not required a consent right in respect of future amendments and increases.

It also flatly rejected the Clarkes' arguments that they only agreed to guarantee a fixed "Outstanding Amount," given that term, as defined, specifically included accrued interest and expenses in enforcing the guaranties.

Interestingly, the Clarkes pointed as support for their position to guaranty language stating that the liability of the Clarkes would "not be affected or impaired by… any modification of the interest rates, maturities, if any, or other contractual terms" relating to the obligations guaranteed, or "any amendment or modification of any of the terms [or] provisions of any loan agreements…" However, Judge Rakoff quickly disposed of that argument, stating to the contrary that "[r]ather than operating to prevent the amount of the Clarkes' personal guaranties from ever changing, Section 6 provides that whether the Clarkes are liable under the personal guaranties does not depend on, among other things, modifications of the underlying loan agreements."

With respect to the Clarkes' claim that the personal guaranties were unconscionable, the court found that the Clarkes had specifically waived any defenses of unconscionability in their guaranties, and further had not presented evidence of unequal bargaining power, or other possible indicia of unconscionability, but merely a conclusory statement that the terms were unconscionable. As to Ana Clarke's contention that conditions precedent to effectiveness set forth in the Fourth Amended Note (or in prior iterations thereof) had not been satisfied, the court found that such a determination was unnecessary because the obligations under the Navarro loan well exceeded the capped amount of Ms. Clarke's guaranty.

Turning to the second set of arguments in the Clarkes' motion, the court noted that there was a dispute over whether White Oak properly applied proceeds of the sold assets to the Fourth Amended Note and the Navarro loan, and whether the Clarkes' guaranties should be credited for the value of unsold assets.

Regarding application of proceeds, the Clarkes argued that the full amount of the asset sale proceeds should have reduced the Borrowers' debt under the Fourth Amended Note and the Navarro loan. A portion of the proceeds was applied to pay expenses, and the court found that most of those expenses were reasonable and thus the application of proceeds to pay them was permitted under Section 9-615(a)(1) of the New York Uniform Commercial Code (UCC), which authorizes a secured party to first use cash proceeds of a collateral disposition to pay "the reasonable expenses of retaking, holding, preparing for disposition, processing, and disposing, and to the extent provided for by agreement and not prohibited by law, reasonable attorney's fees and legal expenses incurred by the secured party." The Clarkes also argued that proceeds could not be used to pay taxes as they were not incurred in connection with the disposition of collateral.

But the court rejected that position as well, observing that while there did not appear to be New York case law specifically on point, New York courts generally regard tax liabilities as expenses that, for purposes of the UCC, are incurred in the ordinary course of business and are therefore reasonable disposition expenses. Notably, the court found a $300,000 success bonus to Navarro's chief executive officer in connection with an arbitration award to a Navarro affiliate was not a reasonable expense and therefore not to be deducted from sale proceeds.

The Clarkes then argued that White Oak wrongly applied certain asset sale proceeds to the payment of lesser-priority debts and to the purchase of equity. The court found that while some of the sale proceeds applied to unsecured debt should have been applied to the repayment of secured debt, the amounts of such application would not have reduced the outstanding amounts under the Fourth Amended Note and the Navarro loan below the Clarkes' maximum liability.

Next, the Clarkes argued that their guaranties should be reduced by the value of unsold assets. The court quickly dispensed with this argument, holding that the guaranties did not impose any obligation on White Oak to marshal collateral before turning to the guaranties for recovery. The court held that, to the contrary, White Oak had a "nearly unqualified right to enforce the Clarkes' personal guaranties before liquidating any collateral at all" and accordingly, "the

Clarkes' arguments that they deserved credit… are foreclosed from the outset….”

Finally, the Clarkes argued that certain assets were sold for less than their respective values and that certain legal claims were settled or abandoned for less than their respective values. The court found that White Oak had generally presented evidence of the fair value received for the asset sales and the lack of value for abandoned claims, and that the Clarkes had not offered evidence to rebut White Oak's evidence. Although the court noted that one dispute existed as to a sold asset—referred to as the “SAT System”—regarding whether the ultimate sale price, which was substantially lower than a prior valuation prepared by White Oak, was for fair value. However, the difference was immaterial since under either calculation the remaining guaranteed debt far exceeded the Clarkes' capped guaranty amounts.

Based on the above, Judge Rakoff found for White Oak and granted its summary judgment motion, ruling that the defendants' personal guaranties were enforceable as written, including their contractual limits. In granting its motion, Judge Rakoff confirmed that “guarantees are subject to ordinary principles of contract construction” (citing *20 Rewe St., Ltd. v. Zheng*, 228 A.D.3d 607, 608, 212 N.Y.S.3d 708 (2d Dep't 2024)).

Asarco Case

While the *White Oak* case represents a win for creditors, another recent case presents an example of a different result, again based on contract drafting and interpretation. In *Asarco LLC v. M. Cohen*, 2025 WL 2495062 (W.D.Wash. Aug. 29, 2025), the court did not award summary judgment to a creditor due to unsatisfied conditions to enforcement.

The creditor in this case moved for summary judgment under a guaranty, asking the court to find as a matter of law that the guaranty is due and payable. However, the guaranty included a condition that the creditor first use reasonable efforts to obtain judgment against the borrowers for breach of payment under a settlement agreement. In fact, the borrowers had entered receivership and were, according to the creditor, insolvent.

The creditor argued that this condition should be excused due to the insolvency, pointing to a similar controlling case in Washington that held when a primary obligor proved to be insolvent, the creditor need not pursue the primary obligor before enforcing a guaranty. The court in *Asarco* found that the creditor did indeed need to pursue collection before enforcing the guaranty, differentiating from the precedent because in this case the borrowers' insolvency had not in fact been proven.

Conclusion

In rejecting the defenses raised by the Clarkes, the *White Oak* case reaffirmed certain truths many creditors take for granted under New York law: namely, with a properly drafted guaranty, that they can extend additional credit and agree with a borrower to amend their loan documents, in each case without the consent of the guarantor and without altering the terms of the guaranty, and that they need not exhaust other remedies prior to enforcing a guaranty.

On the other hand, the *Asarco* case reminds us that precise drafting of guaranty documentation is also key. Together, these cases provide two obvious but helpful reminders. First, despite their seemingly overburdened legalese, the precise drafting of guaranties was and remains critical. Second, guarantors need to fully understand the terms on which they are providing such guaranties.

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