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Non-Recourse Carve Outs, Bad-Boy Guaranties, and Personal Liability: Latest Developments

Avoiding or Resolving Lender and Guarantor Disputes in and Outside of Bankruptcy

THURSDAY, OCTOBER 4, 2018

1pm Eastern | 12pm Central | 11am Mountain | 10am Pacific

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Non-Recourse Carve Outs, Bad-Boy Guaranties and Personal Liability

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Purpose of Presentation

- The setting for litigating bad boy guaranties usually follows the following fact pattern.
- *After foreclosing on property securing the loan, the lender brings an action against the borrower and the guarantor to recover the deficiency between the balance owed on the loan and the value of the foreclosed property.*
- The more difficult situation for attorneys arises in the following fact pattern:
- *On the advice of its legal counsel, the borrower on a \$4.1 million mortgage loan files for bankruptcy, exposing the guarantors to \$100 million in personal liability. The attorney for the borrower advised the director/guarantor he had a fiduciary duty to file for bankruptcy even though it would trigger personal liability. The guarantors then sue the attorney for legal malpractice. Who wins?*

Case Summaries Relating to Bad Boy Guaranties Cases Supporting Enforcement

51382 Gratiot Avenue Holdings, LLC v. Chesterfield Development Co., 835 F. Supp. 2d 384 (E.D. Mich. 2011) – After default by defendant on commercial mortgage, plaintiff foreclosed on shopping center. Plaintiff then filed suit against guarantor to recover the deficiency in the amount of \$12,000,000. Promissory Note contained carve-out if borrower became insolvent or failed to pay its debts and liabilities. Nonpayment by the borrower triggered guarantors' personal liability. Court found no equitable reasons to deny personal liability. Guarantors were sophisticated parties who had the benefit of counsel. Defendant incurred full recourse liability when it violated a covenant contained in the mortgage. Plaintiff's agreement not to pursue recourse liability is rendered null and void.

Case Summaries Relating to Bad Boy Guaranties Cases Supporting Enforcement

Heller Financial, Inc. v. Lee, 2002 WL 1888591 (N.D. Ill., August 16, 2002) – Nonrecourse loan contained several carve-outs implicating personal liability of guarantors. Plaintiff Heller contended that any lien placed on the property would cause guarantors to be personally liable on otherwise nonrecourse loan if additional encumbrances placed on property without consent of lender. Six liens (mechanic’s liens and tax liens) were filed against the collateral. Defendants argued that springing guaranty is an invalid liquidated damages provision because it is an unenforceable penalty. Court ruled the carve-outs were not liquidated damages because it provided only for recovery of actual damages.

Case Summaries Relating to Bad Boy Guaranties Cases Supporting Enforcement

CSFB 2001-CP-4 Princeton Park Corporate Center, LLC v. SB Rental 1, LLC, 980 A. 2d 1 (N.J. Super. Ct. App. Div. 2009) – Court dealt with whether a non-recourse carve-out for failure to obtain lender’s prior consent to subordinate financing encumbrances is a liquidated damages provision, and, if so, whether it constitutes an unenforceable penalty. Borrower argued an unenforceable penalty/liquidated damages because the first mortgagee was not harmed by second mortgage. Court ruled: not liquidated damages because it did not fix the damage amount but merely defined the terms and conditions of personal liability, and because it provides only actual damages. *The later cure of the breach did not matter!*

Case Summaries Relating to Bad Boy Guaranties Cases Supporting Enforcement

Wells Fargo Bank, N.A. v. Cherryland Mall Ltd. Partnership, 812 N.W. 2d 799 (Mich. Ct. App. 2011) – Securitized commercial real estate loan required borrower to maintain Single Purpose Entity (“SPE”) status. Court ruled lender was entitled to enforce the SPE provision under which one covenant required the borrower to remain solvent even though no cases have held that insolvency is a violation of SPE status. Court applied strict construction principles and noted the loan documents were drafted by experienced and sophisticated parties.

Case Summaries Relating to Bad Boy Guaranties Cases Supporting Enforcement

Cherryland II, 493 Mich. 859 (2012) – Court remanded case for reconsideration in light of Michigan’s new Nonrecourse Mortgage Loan Act, which prohibits nonrecourse lenders from triggering carve-out guaranties based on borrower’s mere insolvency. Supreme Court of Michigan did not think it wise to review balance of questions raised on appeal.

Case Summaries Relating to Bad Boy Guaranties Cases Supporting Enforcement

Bank of America v. Freed, 983 N.E. 2d 509 (Ill. App. Ct. 2012) – Agreements contained a carve-out if the borrower/guarantors contested, delayed or hindered foreclosure. Defendants contested the foreclosure and appointment of a receiver. This triggered personal liability. Court rejected arguments this was a vague or ambiguous contract provision, an unenforceable penalty, liquidated damages, and a violation of due process rights. Guarantors could oppose the appointment of a receiver, but by taking those actions they forfeited their exemption from liability for full repayment of the loan.

Case Summaries Relating to Bad Boy Guaranties Cases Supporting Enforcement

BrookhavenRealty Assocs., 637 N.Y.S. 2d 418 (1996) – A carve-out if borrower filed for bankruptcy and failed to dismiss his case within 90 days was upheld. Bankruptcy Code §365(e) does not apply because not a mortgage is not an executory contract. Case has good language regarding what actions a lender can take in the bankruptcy of borrower, which does not defeat the springing provisions in a guarantee.

Case Summaries Relating to Bad Boy Guaranties

Cases Supporting Enforcement

FDIC v. Prince George Corp., 58 F.2d 1041 (4th Cir. 1995) – FDIC is entitled to a deficiency judgment against defendant if a) it voluntarily becomes part of a case, action suit or proceeding which suspends, reduces or impairs FDIC’s recourse rights to the collateral or if defendant engaged in any act, omission or misrepresentation that has the same effect. Court applied fundamental contract interpretations principles to determine whether filing bankruptcy and resisting foreclosure proceedings fell within the reach of those provisions. The borrower was not improperly prevented from filing for bankruptcy, but filing triggered personal liability.

172 Madison (N.Y.) LLC v. NMP-Group, LLC, 650087/2010, 2013 WL 550141 (N.Y. Sup. Ct. Oct. 3, 2013) – Borrower filed a voluntary bankruptcy petition to stop a foreclosure. Filing bankruptcy triggered the guarantors’ personal liability even though original foreclosure petition had not sought to hold guarantor’s personally liable.

UBS Commercial Mortgage Trust 2007-FLI v. Garrison Special Opportunities Fund L.P., 2011 WL 4552404 (N.Y. Sup. Ct. Mar. 8, 2013) – Court rejected argument the carve-out was against public policy, finding “if there is a need to address the present situation, it is the operation of a legislative or executive function.”

J.E. Robert Co. v. Signature Properties, LLC, 2010 WL 796774, at *13 (Conn. Super. Ct. Feb. 3, 2010) – Borrower breached the terms of a mortgage by transferring collateral without the lender’s consent when it terminated a parking agreement. The borrower was required to enter into the parking agreement as part of loan transaction and forbidden to transfer any property without lender’s consent. Case involved the viability of the carve-out for “unpermitted transfer of any part of the property without the lender’s consent.” Mortgagor terminated the parking agreement. The term “transfer” broadly construed to include ancillary agreements such as the parking agreement.

Steven Weinreb v. Fannie Mae, 993 N.E.2d 223 (2013) –Defendant argued he did not read the guaranty because too long and complex, loan documents were ambiguous, carve-outs were unenforceable penalties, and agreement was “unconscionable.” Court rejected all arguments and also enforced the prepayment penalty applied when the lender accelerated after default.

Case Summaries Relating to Bad Boy Guaranties Cases Finding No Liability for Guarantor

ING Real Estate Finance (USA) LLC v. Park Avenue Hotel Acquisition, LLC, 2010 WL 653972 (N.Y. Sup. Ct. Feb. 24, 2010) - Carve-out on a \$90 million loan for failure to timely pay property taxes (less than \$300,000). Taxes were paid 6 days late. Court found 30-day cure period in credit agreement applied. Court applied liquidated damage analysis: immediate liability for the entire debt is not a reasonable measure of any probable loss associated with the delinquent payment of a relatively small amount of taxes.

Case Summaries Relating to Bad Boy Guaranties Cases Finding No Liability for Guarantor

GECCMC 2005-C1 Plummer Street Office Ltd. Partnership v. NFC NNN Holdings, LLC, 204 Cal. Rptr. 3d 251 (Cal. Ct. App. 2012) - \$44 million mortgage secured by two commercial properties subject to two leases to a single tenant. Carve-out if either lease cancelled without prior written consent. Tenant abandoned the property and ceased paying rent. Court ruled carve-out not triggered because the borrower did not terminate leases. Landlord termination did not occur because the landlord never gave notice of termination to the tenant. The tenant's failure to pay rent and abandonment of the property did not terminate the lease

Case Summaries Relating to Bad Boy Guaranties Cases Finding No Liability for Guarantor

Wells Fargo Bank v. Palm Beach Mall, LLC, 2013 WL 6511651 (Fla. Cir. Ct. 2013), *affirmed*, 177 So.3d 37 (Fla. 4th Dist., Sept. 30, 2015) – Lender argued SPE covenants required borrower to remain solvent, prohibited borrower from accepting capital contributions from the guarantor in order to pay debt service, and gross negligence or willful misconduct by failing to renew leases and implement plan to redevelop the mall. Ct. rejected motion for summary judgment, finding factual disputes and also finding the terms “single” and “separate” in the SPE covenants, do not mean the same thing. Court of Appeals affirmed. The mortgagor is not automatically insolvent whenever its liabilities exceed its assets; covenant requiring borrower to pay its own liabilities and expenses was not violated because funds contributed by guarantor, once contributed, belonged to the borrower; and gross negligence or willful misconduct requires finding a deliberate act by the parties beyond acting out of their own economic self-interest.

Case Summaries Relating to Bad Boy Guaranties Cases Finding No Liability for Guarantor

CP III Rincon Towers, Inc. v. Richard Cohen, 13 F.Supp.3d 307 (S.D.N.Y., April 7, 2014 – Mechanic’s liens, judgment liens and owners’ association liens totaled over \$250,000. Lender claimed these were impermissible transfers, unpermitted indebtedness and voluntary liens. Definitions of “transfer” and “lien” were internally inconsistent within the loan documents and created ambiguity. Extrinsic evidence showed these were not the types of liens intended to trigger full loan liability. Not “voluntary” because the borrower disputed quality of work and the amount owed. Construction loan contemplated incurring construction costs, and loan documents did not expressly require lender consent to incur those costs.

Malpractice Issues Arising from Bad Boy Guaranties

Lichtenstein v. Willkie Farr & Gallagher, LLP, 120 A.D.3d 1095, 992 N.Y.S.2d 242 (2014 N.Y. Slip Op. 06242) – On the advice of its legal counsel, the borrower on a \$4.1 million mortgage loan filed for bankruptcy, exposing the guarantors to \$100 million in personal liability. The attorney for the borrower advised the director/guarantor he had a fiduciary duty to file for bankruptcy even though it would trigger personal liability. The guarantors sued the attorney for legal malpractice, arguing the director would have been protected from a breach of fiduciary duty claim because he was exercising his business judgment. They also argued the attorney overlooked the defenses to be raised against the lenders.

The court found no legal malpractice: the business judgment rule only protects disinterested directors, and the lenders committed no wrongdoing in negotiating the guarantees in the course of an arms length transaction.



Specific Arguments and Defenses in Bad Boy Guarantie Cases

Argument No. 1

- Which state's substantive law applies ?
- Usually in a diversity action, the substantive law of the forum state.
- Which state's law governs the interpretation and enforcement of the loan agreement?
- Look to the contract to determine which law to apply
- Courts usually run through its standard for contract interpretation: Construed as a whole, is the contract language ambiguous? Then interpret contract as written. But if ambiguous, permit introduction of parol evidence.

Argument No. 2

- Is it clear on the face of the agreement that if defendant did not comply with a covenant, then plaintiff's agreement not to pursue recourse liability is rendered null and void?
- Defendants contend that the recourse liability must first be established before the guarantor can violate such covenant. *51382 Gratiot Ave., 835 F. Supp. 384.*
- Whose reading of the the contract is consistent with the contract's plain meaning? *Id. at 394.* Plaintiff's interpretation is overly broad. Allowing full recourse liability makes superfluous other springing obligations within the agreement. Plaintiff's interpretation leads to absurd results.

Argument No. 3

- Does public policy void the springing guarantee?
- *51382 Gratiot*: “When those agreements provide that the occurrence of a springing recourse event makes a borrower or its guarantor personally liable for a commercial mortgage debt that would have otherwise been nonrecourse, the court will hold those parties to their bargain.” *Id.* at 401.

Argument No. 4

- Carve-outs alleged by lender are actually liquidated damages but are unenforceable as penalties. *Heller Financial*.
- Lenders are usually seeking the amount left on the loan at the time of the breach. “This amount is the actual damages to Heller based on Lee and Van Why’s breach. Since Section 11(b) involves actual damages it cannot be a liquidated damages provision” *Heller Financial*.
- Bad boy guarantee is also enforceable because such clause fixes liability rather than damages. *CSFB 2001-CP-4 Princeton Park*.

Argument No. 5

- Bad boy guarantee is unenforceable because guarantor exercised his statutory right to file bankruptcy.
- “ . . . the carve-out provisions did not waive, or even compromise, the borrower’s right to file bankruptcy, but merely imposed a consequence in the event the borrower exercised that right.” CSFB 2001-CP-4 Princeton Park.

Argument No. 6

- Curing the breach that triggered personal liability eliminates the springing guarantee. *CSFB 2001-CP-4 Princeton Park*.
- Even though a default is cured, the subsequent cure is ineffective to avoid recourse liability for the partnership and its partners. *Id. at 123-124*.
- For example, payoff of subordinate loan (which was obtained in violation of a covenant) even though paid off well before the default on the principal loan does not alter the breach of the loan and agreement by the guarantors. *Id. at 124*. Failure to have bankruptcy dismissed within 90 days triggered recourse liability, and, could not be cured by dismissal after the 90 days. *Id. at 124*.

Argument No. 7

- Mortgage containing springing guarantee was extinguished upon foreclosure thereby barring plaintiff's claim because the mortgage was eliminated after the foreclosure sale, at which time the mortgage-no longer existed. *Cherryland*.
- Lower court concluded that the the terms of the mortgage had not been extinguished by foreclosure because the mortgage provided for indemnification for losses based on the failure of the mortgagor to comply survived foreclosure.
- Court of Appeals said it is unnecessary to determine whether mortgage had been extinguished because the basis for deficiency lawsuit is the note. *Id. at 806*.

Argument No. 8

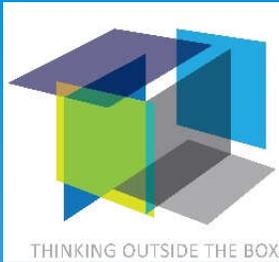
- The springing guarantees violate public policy. *Cherryland*.
- “. . . making social policy is a job for the Legislature, not the courts.” *Id.* at 816.
- “. . . the mortgage, as incorporated into the note, unambiguously required *Cherryland* to remain solvent in order to maintain its SPE status. Having admittedly become insolvent, *Cherryland* violated the SPE requirements, resulting in the loan becoming fully recourse.” *Id.* at 816.

Argument No. 9

- The carve-out provision is vague, ambiguous, overly broad and unenforceable penalty provision. *Freed.*
- “*If a court can ascertain its meaning from the plain language of the contract, there is no ambiguity.*”

Argument 10

- Lender waived its right to seek recourse against Brookhaven (borrower) and its partners (guarantors) by entering into a Cash Collateral Stipulation. *First Nationwide Bank*.
- The Stipulation in First Nationwide a) did not dismiss or otherwise resolve the bankruptcy proceeding within 90 days as required by the non-recourse agreement; b) did not permit the lender to enforce its security interest; and c) lender was not required to enforce its rights against guarantor during the pendency of the the bankruptcy. *Id. at 621*.



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Non-Recourse Carve Outs, Bad-Boy Guaranties, and Personal Liability: Latest Developments October 4, 2018

“Non-Recourse Carve Outs from A-Z from the Borrower’s and Lender’s Perspective”

Presented by:

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GENERAL CHARACTER OF NON-RECOURSE LOANS AND ORIGINAL FOCUS OF CARVE OUTS

- Background and evolution of non-recourse loans.
- Original focus of carve outs in non-recourse loans: The borrower's "bad conduct."
 - ◆ Fraud.
 - ◆ Misapplication of insurance proceeds or condemnation awards.
 - ◆ Waste of the real property collateral.
 - ◆ Environmental matters.

GENERAL EXPANSION OF NON-RECOURSE CARVE OUTS

- The focus of non-recourse carve outs has expanded to address:
 - ◆ Matters diminishing or eroding the value of the collateral.
 - ◆ Destruction of the collateral.
 - ◆ External risks affecting the collateral.
 - ◆ Controls over behavior of the borrower which may adversely affect the collateral or the lender.
 - ◆ Protecting the lender against the need for additional investment in the collateral.

DISTINCTION BETWEEN CATEGORIES OF NON-RECOURSE CARVE OUTS

- “Springing recourse events” which result in the loan becoming full recourse to the borrower and guarantor (“Full Liability Carve Outs”).
- Violations of the loan documents and events which result in the borrower and guarantor becoming liable for damages and losses suffered by the lender (“Loss Liability Carve Outs”).

FULL LIABILITY CAREVOUTS IN NON-RECURSE LOANS

- Filing of a voluntary bankruptcy or similar proceeding by the borrower.

Sample Provision:

“The Loan shall be fully recourse to Borrower and any Guarantors if any one or more of the following occur:

The occurrence of any Bankruptcy Event (other than an acknowledgement in writing as described in clause (b) of the definition of “Bankruptcy Event” [i.e., an acknowledgement of insolvency]).

FULL LIABILITY CAREVOUTS IN NON-RECURSE LOANS

- Filing of an involuntary bankruptcy against the borrower (1) with “collusion” by the borrower or its principals; or (2) which is not dismissed within specified time period.

Sample Provision:

The Loan shall be fully recourse to Borrower and any Guarantors if any one or more of the following occur:

The occurrence of any Bankruptcy Event . . .; provided, however, in the event of an involuntary Bankruptcy Event, Borrower shall only be personally liable if such involuntary Bankruptcy Event occurs with the consent, encouragement, or active participation of (A) Borrower, Guarantor, or Key Principal, (B) any Person Controlling Borrower, Guarantor, or Key Principal, or (C) any Person Controlled by or under common Control with Borrower, Guarantor, or Key Principal [an “involuntary Bankruptcy Event excludes an involuntary Bankruptcy Event that is dismissed within 90 days].

”
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FULL LIABILITY CAREVOUTS IN NON-RECOURSE LOANS

- Admission of insolvency by borrower.

Sample Provision:

“The Loan shall be full recourse to Borrower and any Guarantors if any one or more of the following occur:

The acknowledgment in writing by Borrower that it is insolvent or unable to pay its debts generally as they mature.

FULL LIABILITY CAREVOUTS IN **NON-RECOURSE LOANS**

- Transfers of collateral by borrower not permitted by loan documents.

Sample Provision:

Loan shall be full recourse to Borrower and any Guarantors if any one or more of the following occur:

Any Transfer other than a Permitted Transfer.

[NOTE: The term “Transfer” includes voluntary and involuntary transfers (including certain leases), pledges or hypothecations of collateral, issuance of indirect ownership interests, and resignations of managers or control parties.]

(a) failure by Borrower to comply with the single-asset entity requirements of Section 4.02(d) of this Loan /
(a) failure by Borrower to comply with the single-asset entity requirements of Section 4.02(d) of this Loa
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FULL LIABILITY CAREVOUTS IN NON-RECOURSE LOANS

- Failure to comply with single asset entity requirements under loan documents.

Sample Provision:

Loan shall be full recourse to Borrower and any Guarantors if any one or more of the following occur:

Any failure by Borrower to comply with any of the single asset entity requirements of Section ____ of this Loan Agreement.

FULL LIABILITY CAREVOUTS IN NON-RECOURSE LOANS

- Fraud or intentional misrepresentation in connection with the origination of the loan.

Sample Provision:

Loan shall be full recourse to Borrower and any Guarantors if any one or more of the following occur:

Fraud, written material misrepresentation, or material omission by Borrower, Guarantor, Key Principal, or any officer, director, partner, manager, member, shareholder, or trustee of Borrower, Guarantor, or Key Principal in connection with any application for or creation of the Indebtedness.

FULL LIABILITY CAREVOUTS IN NON-RECURSE LOANS

- Fraud or intentional misrepresentation in connection with the administration or servicing of the loan.

Sample Provision:

Loan shall be full recourse to Borrower and any Guarantors if any one or more of the following occur:

Fraud, written intentional material misrepresentation, or intentional material omission by Borrower, Guarantor, Key Principal, or any officer, director, partner, manager, member, shareholder, or trustee of Borrower, Guarantor, or Key Principal in connection with on-going financial or other reporting required by the Loan Documents, or any request for action or consent by Lender.

LOSS LIABILITY CAREVOUTS IN **NON-RECOURSE LOANS**

- Opposition to lender's foreclosure or other Lender enforcement action.

Sample Provision:

The Loan shall be fully recourse to Borrower to the extent of any actual losses, costs, claims, expenses and damages incurred by Lender arising out of or in connection with the following:

In connection with any enforcement action or exercise or assertion of any right or remedy by or on behalf of the Lender, under or in connection with its loan documents, seeks a defense, judicial intervention or injunctive or other equitable relief of any kind, or asserts in a pleading filed in connection with a judicial proceeding any defense against Lender or any right in connection with any security for the Loan, and a court of competent jurisdiction issues a final order (for which the appeal period expires without appeal or which is affirmed on appeal) finding that Borrower asserted such defense or sought judicial intervention or injective or equitable relief in each case in bad faith, on the basis of a frivolous position and with the intention and primary purpose of delaying the exercise of Lender's remedies.

LOSS LIABILITY CAREVOUTS IN **NON-RECOURSE LOANS**

- Misappropriation of rents by borrower.

Sample Provision:

The Loan shall be fully recourse to Borrower to the extent of any actual losses, costs, claims, expenses and damages incurred by Lender arising out of or in connection with the following:

Failure to pay as directed by Lender upon demand after an Event of Default (to the extent actually received by Borrower):

- (A) All Rents to which Lender is entitled under the Loan Documents; and
- (B) The amount of all security deposits then held or thereafter collected by Borrower from tenants and not properly applied pursuant to the applicable Leases;

LOSS LIABILITY CAREVOUTS IN **NON-RECOURSE LOANS**

- Failure to comply with obligations with respect to insurance or condemnation.

Sample Provision:

The Loan shall be fully recourse to Borrower to the extent of any actual losses, costs, claims, expenses and damages incurred by Lender arising out of or in connection with the following:

- (1) Failure to maintain all insurance policies required by the Loan Documents, except to the extent Lender has the obligation to pay the premiums pursuant to Section ____; or
- (2) Failure to apply all insurance proceeds received by Borrower or any amounts received by Borrower in connection with a Condemnation Action, as required by the Loan Documents.

LOSS LIABILITY CAREVOUTS IN **NON-RECOURSE LOANS**

- Failure to comply with obligations with respect to books and records or inspections by the lender.

Sample Provision:

The Loan shall be fully recourse to Borrower to the extent of any actual losses, costs, claims, expenses and damages incurred by Lender arising out of or in connection with the following:

Failure to comply with any provision of this Loan Agreement or any other Loan Document relating to the delivery of books and records, statements, schedules, and reports or inspections of the collateral by the Lender.

LOSS LIABILITY CAREVOUTS IN **NON-RECOURSE LOANS**

- Failure to comply with obligations with respect to rents and profits.

Sample Provision:

The Loan shall be fully recourse to Borrower to the extent of any actual losses, costs, claims, expenses and damages incurred by Lender arising out of or in connection with the following:

Except to the extent directed otherwise by Lender pursuant to Section _____, failure to apply Rents to the ordinary and necessary expenses of owning and operating the Mortgaged Property and Debt Service Amounts, as and when each is due and payable, except that Borrower will not be personally liable with respect to Rents that are distributed by Borrower in any calendar year if Borrower has paid all ordinary and necessary expenses of owning and operating the Mortgaged Property and Debt Service Amounts for such calendar year.

LOSS LIABILITY CAREVOUTS IN NON-RECOURSE LOANS

- Waste by the borrower with respect to the collateral.

Sample Provision:

The Loan shall be fully recourse to Borrower to the extent of any actual losses, costs, claims, expenses and damages incurred by Lender arising out of or in connection with the following:

Waste or abandonment of the Mortgaged Property.

LOSS LIABILITY CAREVOUTS IN NON-RECURSE LOANS

- Negligent misrepresentation by borrower.

Sample Provision:

The Loan shall be fully recourse to Borrower to the extent of any actual losses, costs, claims, expenses and damages incurred by Lender arising out of or in connection with the following:

Grossly negligent or reckless unintentional material misrepresentation or omission by Borrower, Guarantor, Key Principal, or any officer, director, partner, manager, member, shareholder, or trustee of Borrower, Guarantor, or Key Principal in connection with on-going financial or other reporting required by the Loan Documents, or any request for action or consent by Lender.

LOSS LIABILITY CAREVOUTS IN **NON-RECOURSE LOANS**

- Environmental liabilities under loan documents, including environmental indemnities.

Sample Provision:

The Loan shall be fully recourse to Borrower to the extent of any actual losses, costs, claims, expenses and damages incurred by Lender arising out of or in connection with the following:

Liability under environmental covenants, conditions and indemnities contained in the Mortgage and in any separate environmental indemnity agreements.

Environmental Indemnities

- Scope of environmental indemnification.
- Beneficiaries of environmental indemnities.
- Interaction with state law “one action” rules and legislative clarifications.
- Exceptions to borrower’s indemnification obligations.
- Termination of environmental indemnification.

LOSS LIABILITY CAREVOUTS IN **NON-RECOURSE LOANS**

- Removal of personal property collateral by borrower.

Sample Provision:

The Loan shall be fully recourse to Borrower to the extent of any actual losses, costs, claims, expenses and damages incurred by Lender arising out of or in connection with the following:

Personalty or fixtures removed or allowed to be removed by or on behalf of Borrower and not replaced by items of equal or greater value or functionality than the personalty or fixtures so removed.

LOSS LIABILITY CAREVOUTS IN NON-RECOURSE LOANS

- Borrower's failure to pay taxes or other impositions.

Sample Provision:

The Loan shall be fully recourse to Borrower to the extent of any actual losses, costs, claims, expenses and damages incurred by Lender arising out of or in connection with the following:

Failure to pay taxes, assessments or ground rents prior to delinquency, or to pay charges for labor, materials or other charges which can create liens on any portion of the Mortgaged Property.

LOSS LIABILITY CAREVOUTS IN NON-RECOURSE LOANS

- Borrower's violation of anti-money laundering provisions.

Sample Provision:

The Loan shall be fully recourse to Borrower to the extent of any actual losses, costs, claims, expenses and damages incurred by Lender arising out of or in connection with the following:

Any violation of the provisions of Section ____ of the Mortgage [anti-money laundering provisions].

LOSS LIABILITY CAREVOUTS IN NON-RECOURSE LOANS

- Borrower's commission of a criminal act.

Sample Provision:

The Loan shall be fully recourse to Borrower to the extent of any actual losses, costs, claims, expenses and damages incurred by Lender arising out of or in connection with the following:

Borrower's commission of a criminal act.

LOSS LIABILITY CAREVOUTS IN **NON-RECOURSE LOANS**

- Borrower's failure to timely renew letter of credit.

Sample Provision:

The Loan shall be fully recourse to Borrower to the extent of any actual losses, costs, claims, expenses and damages incurred by Lender arising out of or in connection with the following:

Borrowers' failure to timely renew any letter of credit issued in connection with the Loan

LOSS LIABILITY CAREVOUTS IN NON-RECOURSE LOANS

- Borrower's failure to pay commissions.

Sample Provision:

The Loan shall be fully recourse to Borrower to the extent of any actual losses, costs, claims, expenses and damages incurred by Lender arising out of or in connection with the following:

Any brokerage commission or finder's fees claimed in connection with the transactions contemplated by the Loan Documents arising out of any agreement by the Borrower.

LOSS LIABILITY CAREVOUTS IN **NON-RECOURSE LOANS**

- Uninsured damage to the collateral resulting from acts of terrorism.

Sample Provision:

The Loan shall be fully recourse to Borrower to the extent of any actual losses, costs, claims, expenses and damages incurred by Lender arising out of or in connection with the following:

Uninsured damage to any Project resulting from acts of terrorism.

LOSS LIABILITY CAREVOUTS IN NON-RECOURSE LOANS

- Borrower's failure to appoint new property manager.

Sample Provision:

The Loan shall be fully recourse to Borrower to the extent of any actual losses, costs, claims, expenses and damages incurred by Lender arising out of or in connection with the following:

Any failure by Borrower to appoint anew property manager upon the request of the Lender as required by the terms of the Loan Documents.

Selected Recent Case Developments Regarding Enforceability of Non-Recourse Carve Outs