**CHECKLIST – GUARANTY PROVISIONS**

\_\_\_\_1.Include complete and accurate identification of all of the parties.

\_\_\_\_2.Include some recitals that indicate, for example, that the lender or provider of goods and services refuses to lend the money or provide the goods and services unless the guaranty is executed.

\_\_\_\_3.Include a provision that clarifies the basic obligation of the guarantor. For example, if there is more than one guarantor, is the obligation joint and several? If so, it probably should be.

\_\_\_\_4.Include a provision stating whether the guaranty is to be conditional or unconditional. Note that most guaranties are conditional, but the conditions are very limited.

\_\_\_\_5.Enumerate the conditions of the guaranty. In most guaranties, presentment, demand, protest, notice of protest, and dishonor are all waived, but there are often some additional conditions. For example, in a guaranty for payment of goods and services, the creditor may be required to keep the guarantor abreast of the outstanding balance. In a loan guaranty, the lender may be required to collect any outstanding balance through the courts. The lender may also be required to have the judgment returned unsatisfied or otherwise demonstrate that the buyer has become insolvent. The key is to be sure to spell out any condition that is relevant to the guaranty.

\_\_\_\_6.Consent or waiver provisions should be included. In this paragraph, you should put in all of the provisions that will prevent the guarantor from escaping liability under the guaranty. Following are the illustrative examples of things that are often expressly allowed or waived by the guarantor. In general, any provision that is not clearly illegal is acceptable.

The provision usually starts out by stating that the guarantors agree that, without affecting the liability of the guarantors under the guaranty, the creditor may take the following actions without notice to or further consent of the guarantors:

\_\_\_\_modify or otherwise change any terms of the debt or the rate of interest on the loan;

\_\_\_\_release, compromise, or settle the loan;

\_\_\_\_forbear from collecting all or part of the indebtedness under the loan;

\_\_\_\_forbear from calling for additional collateral;

\_\_\_\_consent to the substitution, exchange, or release of any or all of the collateral (even if the collateral is of a different character or value than the collateral surrendered by the lender);

\_\_\_\_foreclose or sell any collateral at public or private sale for cash or credit for future delivery;

\_\_\_\_sell the collateral without having to make any demand, advertise the sale, or provide notice of the time or place of the sale;

\_\_\_\_purchase the collateral for its own account;

\_\_\_\_release, surrender, exchange, subordinate, or consent to the loss of any security;

\_\_\_\_give any partial releases;

\_\_\_\_if there is more than one guarantor, release one of the guarantors without affecting the obligations of the other(s);

\_\_\_\_renew, extend, or modify the credit arrangement;

Some other consent and waiver provisions would include the following:

\_\_\_\_The guarantor waives any defect, delay, omission, failure, or refusal of the creditor to take or prosecute any action for the collection of the indebtedness or to foreclose on any of the security, or to perfect any security interest in the collateral or the security.

\_\_\_\_A provision should state that the guaranty is for the benefit of the creditor, its successors, and assigns.

\_\_\_\_The guarantor should represent and warrant that it had no knowledge that would prevent it from executing the guaranty or that would make the guaranty unenforceable against it. (In the case of a corporation, this might include representations that the guaranty is not ultra vires and that the individuals who are executing the guaranty have authority to do so. Depending upon the amount of paperwork involved, you may ask for copies of corporate resolutions authorizing the execution of a guaranty.)

\_\_\_\_7.Include a provision clarifying the extent of the guaranty. For example, does the guaranty extend to principal and interest or just principal? Are attorneys' fees or other expenses of collection covered? (Note that some state laws restrict the ability to add attorneys' fees and other collection expenses to guaranties.)

If a parent is giving a guaranty to its subsidiary corporation, you should include a recitation that the parent is the owner of all of the shares of the subsidiary (or if not all, state what percentage) and that the parent company agrees that the consideration received for the guaranty is at least as valuable as the obligation of the guaranty. (The idea is to avoid any fraudulent conveyance allegations or any failure of consideration problems.)

You should clearly state in the agreement if there is a maximum value of the guaranty (for example, in a guaranty of an open account).

\_\_\_\_8.In order to avoid problems with consideration, if all of the original transactions relating to the guaranty and the guaranty itself are supposed to be executed contemporaneously, try to make sure that actually happens. If it is in fact a subsequent guaranty, we should provide additional consideration of some type.

If the guaranty relates to a specific note or a specific contract, that note or contract should be identified very clearly.

\_\_\_\_9.The final step should be to have counsel look over the guaranty one last time to make sure it is clear and unambiguous. Although there are no cases that have refused to enforce a guaranty for lack of clarity, at least in the business-to-business context, counsel will not want to have to explain what was meant when a dispute occurs if the problem could be prevented in the drafting stage. As with all legal documents, guaranties should be written in plain language.