

Reconsidering Completion Guaranties



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Completion guaranties pose a variety of coverage and enforcement issues that can limit their practical benefit.

ALTHOUGH COMPLETION GUARANTIES have been used by lenders for many years in traditional construction lending, their use has increased significantly over the last 10 to 15 years. In states without unique foreclosure or anti-deficiency statutes, 20 years ago the majority of conventional bank construction loans did not require a separate completion guaranty when the loan was secured with a full payment guaranty. However, today it is a common practice for construction lenders to require a completion guaranty in addition to a full payment guaranty. Some lawyers involved in construction financing over the years have expressed concerns regarding the practical benefit of completion guaranties. The current recession will likely provide an environment in which some of those concerns are put to the test.

What Purpose Does The Completion Guaranty Serve?

A construction loan presents several risks to a lender that are not present in financing secured by a completed project. The primary goal of the completion guaranty is to provide financial support to the lender for construction risks. At a minimum, a completion guaranty should cover the lender from losses resulting from the failure of

the project to be constructed in accordance with approved plans and specifications, free of all mechanic's liens and claims, within the budget and on time. As discussed below, there are other potential costs and expenses for the project that the lender may want covered by the completion guaranty as well.

What Obligations Are Included In A Completion Guaranty?

When a lender furnishes a proposed term sheet or commitment letter for a construction loan to a borrower, the language regarding the guaranty for the loan is usually minimal and straightforward. Typically, the term sheet or commitment will state something to the effect that repayment of the loan will be fully (or sometimes partially) guaranteed by the guarantor and, in addition, the guarantor will guarantee the completion of the construction of the improvements to be financed with the proceeds of the loan. With respect to full payment guaranties, there may be subtle differences between the various forms that lenders and law firms use, but the essential terms of most payment guaranties are fairly standard. Limited payment guaranties offer a few issues which are not always uniformly addressed by lenders and their counsel, but the degree to which limited payment guaranties vary relates to the provisions regarding how the limitation on liability is calculated and what, if any, carve-outs from the limitation are to be included. With respect to completion guaranties, the "standard form" of completion guaranty used by lenders and their counsel will vary widely with substantial differences in the resulting scope of the guaranteed obligations and what rights and remedies the parties will have.

Completion Of Improvements And Payment Of Costs

In its simplest form, a completion guaranty will provide a guarantee of:

- The timely completion of the construction of the financed improvements in accordance with approved plans and specifications; and
- The payment in full of all costs and expenses arising in connection with the construction of the improvements.

In addition to those matters, a completion guaranty can include a variety of other obligations.

The Carry Component

Many lenders will include within the scope of a completion guaranty certain ownership costs that arise in connection with the project. While perhaps not technically a cost of construction, a carry provision in a completion guaranty requires the guarantor to pay certain operating expenses arising in connection with the project until a point in time established by the lender. A carry provision would typically include an obligation to pay real estate taxes, insurance premiums, utility charges, leasing commissions, maintenance and management fees, and interest on the loan. In some instances, the carry obligation continues beyond the substantial completion of construction. The lender might require the obligation to continue until the project reaches a stabilized income level.

The rationale for including a carry component in a completion guaranty is that the ownership costs of a project are incidental to the full and complete construction of the project and therefore should be included within the scope of the completion guaranty. A complete, detailed development budget for construction of an income-producing project will typically contain all ownership costs that the developer will incur through the estimated date that the income from the project reaches a stabilized level. Therefore, lenders will consider those expenses as legitimate costs to complete construction of the project.

Tenant Improvements

One negotiating point between a lender and a guarantor is the scope of tenant improvements that the guarantor is responsible for completing. From the lender's perspective, it may consider that the project is not fully completed until all tenant improvements that were contemplated in the original proposal for the project are completed. This may extend to leases that are entered into after the project is completed. It may also extend to leases entered into by the lender after a foreclosure. From the guarantor's perspective, the guarantor will want to limit its liability for tenant improvements to only work required by leases entered into by the borrower during the initial construction phase of the project. Otherwise, the guarantor may be responsible for tenant improvements that are above and beyond what was originally contemplated in the scope of the project.

Personal Property

The typical completion guaranty will refer to completing the construction of the improvements in accordance with plans and specifications and completing any tenant improvements that are required by leases entered into for the project. The lender should make sure that the completion guaranty also contemplates the purchase and installation of all personal property needed for the operation of the improvements. For example, a significant portion of the project costs for a hotel project are the beds and other personal property that is purchased for the rooms. If the guaranty does not clearly contemplate the installation of personal property, the guarantor can argue that once the structural improvements are completed, its obligation for construction has been satisfied.

Advancing Loan Proceeds To The Guarantor

Some completion guaranty forms do not obligate the lender to make the unadvanced loan pro-

ceeds available to the guarantor to fund construction if the guarantor attempts to perform under the guaranty by completing construction. It is unlikely that a guarantor would perform on a completion guaranty without the benefit of being advanced the remaining loan proceeds to cover the costs incurred for construction. In most instances, the borrower is controlled by the guarantor and if the borrower is unable to complete the construction without the use of the loan proceeds, the guarantor will be unlikely to do so as well. Another reason for the guarantor's refusal may be the simple economics of calculating damages. If the lender is not advancing the remaining loan proceeds, it may be to the guarantor's economic advantage to refuse to complete the improvements and require the lender to sue for damages.

Sophisticated guarantors will request that if the guarantor attempts to complete construction, the lender will be obligated to advance any remaining loan proceeds to finance the cost to complete. Most lenders will agree to this arrangement, but with certain conditions attached. A lender will typically require that the guarantor cure any outstanding defaults under the loan in order to obtain additional loan proceeds. Theoretically that process is workable, but, from a practical standpoint, there are reasons why a lender might prefer to avoid that arrangement.

Second Bite Out Of The Apple

In most situations when a borrower defaults, the lender does not rush out and file its foreclosure action. It is almost always in the best interest of the lender to attempt to work through problems with the borrower rather than foreclose and take the project back. If the lender has elected to accelerate the loan, the lender has probably determined that the project, or the relationship with the borrower, has deteriorated to an unacceptable level. In addition, the borrower probably has burned through any cure periods permitted under the loan docu-

ments. If the relationship between a lender and borrower has deteriorated to a point where the lender is ready to exercise its remedies against the collateral, does it really make sense to obligate the lender to give the guarantor an opportunity to cure the default and reinstate the loan after the borrower has already exhausted its cure opportunities?

Another twist in this scenario is when the default is of a nature that can only be cured by the borrower, such as a covenant default. A guarantor will argue that it should only be required to cure defaults that are within the ability of the guarantor to cure. This arrangement can lead to a result in which the lender has accelerated the loan, the loan continues to be in default, but the lender still has an obligation to make advancements to the guarantor to finance construction.

As long as the guarantor is curing the default and stepping back up to the plate, one might argue that the lender should be happy. However, what if a project is suffering from a default which is of a nature that the guarantor may be able to cure temporarily but not be able to sustain that cure for the duration of the project? Assuming the guarantor is able to cure the default and reinstate the loan, the lender probably is still dealing with the same people who control the borrower and the source of the problem that led to the default may still exist. A lender potentially could be subjected to greater risk if it is forced, due to the guaranty structure, to reinstate the loan and continue to fund into a project that has problems that are festering and have not been properly addressed. At a minimum, any obligation the lender may have to advance loan proceeds to a guarantor who is offering to complete construction of a project will impact the options and strategies a lender has for negotiating an acceptable workout arrangement.

Commonly Used, But Not Commonly Enforced

While completion guaranties have been used for many years by construction lenders, there are relatively few reported cases in which a lender has attempted to enforce a completion guaranty. The absence of significant case law surrounding completion guaranties may be coincidental or it may provide anecdotal evidence that in many instances completion guaranties do not provide significant value or adequate remedies to lenders. The lack of reported cases dealing with completion guaranties is most likely due to the fact that it is significantly more difficult to enforce a completion guaranty than it is a payment guaranty. For a variety of reasons, the nature of construction projects increases the potential challenges for a lender enforcing a completion guaranty.

Specific Performance Is Not An Option

Specific performance is generally only available when monetary damages are not an adequate remedy. However, even assuming that applicable state law would permit specific performance as a remedy for the enforcement of a completion guaranty, the administrative duties upon the court to review the status of construction and the compliance with the court's order make that option impractical. Therefore, a lender's sole remedy for enforcing a completion guaranty will be pursuing an action for damages.

Forget About Summary Judgment

In most loan foreclosure proceedings, the lender's primary goal is to obtain a judgment and realize upon the collateral as quickly as possible. While the timelines may vary from state to state, if a lender is forced to wait until a trial is held in a foreclosure action in order to obtain a judgment against the borrower and guarantor, the foreclosure process may take several years to run its course. On the other hand, if a lender can obtain a summary judgment

against the borrower and guarantor, the foreclosure process often can be completed in a matter of months. In order for a lender to be able to obtain a summary judgment in a foreclosure action, there must be no controversy over the facts surrounding the default or the measure of damages. When documenting a loan, one of the primary goals of counsel for the lender is to structure and document the loan in a manner that minimizes the ability of the borrower or guarantor to raise a question of fact that defeats the lender's summary judgment motion in a foreclosure action. Several aspects of enforcing a completion guaranty turn on factual issues that may prevent the lender from being able to obtain a summary judgment against the guarantor. Questions of fact that may preclude the granting of a summary judgment include the scope of what construction obligations are guaranteed, the scope of what ownership obligations are guaranteed, and a determination of the amount of damages the lender is entitled to recover under the completion guaranty.

Even if the scope of the obligations is not contested, the amount of the damages from the guarantor's failure to perform will most likely remain a question of fact which will preclude the lender from being able to obtain a summary judgment. This is especially the case if the lender is pursuing a claim for damages without having actually completed the construction of the project.

Changes In The Scope Of The Guaranteed Obligations

With respect to the scope of construction obligations guaranteed, a typical completion guaranty will guarantee that the improvements will be constructed in substantial accordance with plans and specifications for the project as they are approved by the lender. As a basic tenet of guaranty law, if the indebtedness and obligations which are being guaranteed are not ascertainable at the time the guaranty is entered into, the guarantor may have

a potential defense. In addition, if the obligations of the borrower are materially altered or increased after the guaranty is executed, in some instances the guarantor will be discharged from its obligation unless it consented to the modification. This right of discharge can be waived in many instances, but most of the case law involving this type of waiver deals with payment guaranties. It is uncertain how a court would address the enforceability of this type of waiver in the context of a change in the nature of the construction project.

A modification of the construction obligations covered by the completion guaranty can occur in several ways. Almost all construction projects of any significance will have change orders, some of which may increase the cost of the project. Subsequent material changes to the plans and specifications might create a defense that the final scope of the project exceeded what the guarantor agreed to complete. It is not uncommon on some construction projects that construction will commence before the completion of the plans and specifications for the project. By definition, that is the case in "fast-track" construction projects. If a completion guaranty is executed before the completion of the plans and specifications for the project, there may be an agreement on what the general project is supposed to be, but if there are too many details of the project that are outstanding at the time the loan closes, the guarantor may have a defense against the enforcement of the guaranty. At the very least, the absence of a completed set of plans and specifications for the project at the time of the closing of the loan might create a question of fact as to what was being guaranteed, which would preclude a summary judgment on that issue.

Determining The Measure Of Damages

A typical measure of damages for the failure to complete construction would be the cost to the lender to complete the construction on its own. The completion guaranty can be drafted to contemplate

that the guarantor will continue to be liable to the lender for costs incurred by the lender to complete the construction after the lender has taken title to the property at a foreclosure sale. However, as a practical matter, most lenders that take title to a defaulted project would prefer not to undertake the job of completing construction unless the extent of the work to be completed is not significant. Instead, most lenders would prefer to sell the property in its as-is condition to a third party who would then finish construction of the project. Under those circumstances, since the lender did not actually attempt to finish the construction of the improvements, unless the guaranty contains a liquidated damages provision to address this condition, the lender may have a problem establishing what its damages are. With the relatively few reported cases involving the enforcement of completion guaranties, there is no clear-cut rule as to how a court will determine the measure of damages the lender is entitled to collect if the lender does not undertake completion of construction.

In *Glendale Federal Savings and Loan Ass'n v Marina View Heights Development Co.*, 135 Cal. Rptr. 802, 815-16 (Cal. Ct. App. 1977), the court held that the true measure of damages to the lender for the guarantor's breach under a completion guaranty is the difference in the value of the lender's collateral with the improvements completed less the difference in the value of the lender's collateral without the improvements completed. In determining damages, the court looked at what the cost would be to complete the improvements that were guaranteed by the completion guaranty and the relative increase in the value of the collateral if the improvements had been completed. The evidence suggested that the cost to complete the improvements exceeded what the increase in the value of the collateral would have been had construction been completed as required by the completion guaranty. The court limited the damages award on that issue to

the amount the value of the collateral would have been increased if the improvements had been completed.

In *Black v. O'Haver*, 567 F.2d 361 (10th Cir. 1977), *cert. denied*, 435 U.S. 969 (1978) the court, ruling under Oklahoma law in an action to enforce a completion guaranty, determined that the lender was entitled to recover the costs to complete construction of the project. The court did not address the relative values of the collateral with the construction of the improvements completed versus without the construction completed.

Another potential issue exists for calculating damages if the construction loan has not been fully advanced. Under those circumstances, the guarantor can argue that it should be entitled to a reduction in the damage claim relating to the cost to complete the project in an amount equal to the unfunded portion of the loan earmarked for those construction costs. The rationale would be that the damages should be based upon what would be needed to put the lender in the same position as if the borrower had performed under the terms of the loan. If the guarantor elected to finish construction without the benefit of unadvanced loan proceeds, the lender would have a finished project as collateral with a smaller loan balance than what it initially agreed to advance. In essence, the guarantor's performance under the completion guaranty would leave the lender in a better position than if the borrower had performed under the terms of the loan. That same logic applies with respect to the damages calculation. If the guarantor pays damages in an amount equal to the cost to complete construction without a credit for the unadvanced loan proceeds and the lender then uses those funds to complete construction, the lender would have a finished project as collateral with a smaller loan balance than what it initially agreed to advance.

Additional Issues To Address In A Completion Guaranty

The ability of a guarantor to negotiate significant changes to a lender's standard form of payment guaranty is usually limited. However, with respect to completion guaranties, several material terms are routinely negotiated. When a lender requires a completion guaranty, it is not unusual for the term sheet to be silent on certain components of the guaranty structure. In many instances, issues such as whether there is a carry component and at what point the guaranty terminates are addressed for the first time in the loan documentation stage. There are other significant issues that are routinely first raised in the documentation stage as well.

Termination Date And Cutoff For Carrying Costs

If the completion guaranty requires the guarantor to pay operating expenses for the project, that requirement will continue through either the completion of the construction of the improvements or in some instances through the date that the project reaches stabilization. In either event, it is important to clearly define what constitutes the completion of the project or achieving stabilization. A guaranty which merely states that the carrying costs should continue until the construction is completed will create the potential for disputes regarding what constitutes final completion. One way of addressing this issue is to provide that construction shall be deemed complete upon the issuance of a third-party confirmation or certificate, such as a certificate of substantial completion or a certificate of occupancy. The position most favorable to the guarantor is that the obligations should cease upon the substantial completion of the improvements, while the lender may want the obligations to continue until the project achieves stabilization. If stabilization is the goal line, the terms of how that is to be calculated should be clearly defined. One common approach is to use a debt service coverage

ratio test. Achieving a specified lease-up rate at proforma rents is another approach.

Conditions For Advancing Loan Proceeds

In the event the guarantor is attempting to perform under the guaranty by completing construction of the project, the guarantor will expect the lender to advance any remaining loan funds for the purpose of paying costs and expenses incurred in connection with the construction undertaken by the guarantor. The terms and conditions under which the lender will advance those funds should be clearly addressed. In this regard, it is critical that the lender require the guarantor to satisfy all balancing obligations under the loan documents. Otherwise, the guarantor may argue that it is entitled to advancements of the loan proceeds even though the project is out of balance and would otherwise require a capital call by the borrower.

As a condition to advancements of loan proceeds to the completion guarantor, the borrower and any payment guarantors should be required to execute written consents to each advancement which also acknowledge that the borrower and payment guarantors shall be liable for the repayment of such advancement as if the funds had been advanced directly to the borrower. The borrower should also be required to execute a confirmation that the mortgage and other documents securing the loan extend to, and secure, the advancements made to the guarantor. Depending on the circumstances, another condition for advancements might include that the guarantor has obtained all appropriate consents, easements, licenses, and assignments from the borrower and contract third parties that will permit the guarantor to have legal access to the property and allow the guarantor to step into the borrower's shoes with respect to the contracts relating to the construction and development of the project.

The guaranty should also contemplate the situation in which the lender forecloses, takes title to

the project, and then presents a demand upon the guarantor to finish construction of the project. Under those circumstances, the guarantor will want the lender to advance to the guarantor an amount equal to the unadvanced principal balance of the loan that existed as of the date of foreclosure. These advancements would not be obligations of the borrower or the payment guarantors to repay but would be considered payments on account for the lender as the property owner. At first glance, some lenders might take objection to this result. However, the guarantor will argue this position is reasonable on the basis that the true purpose of the completion guaranty is to put the lender in the same position in which it would have been had the borrower fully performed on its construction obligations under the loan. In that situation, the lender would have fully advanced the loan and would have a completed project as collateral. If the lender forecloses on a project where the construction loan was not fully advanced and the guarantor subsequently finishes construction of the improvements without the benefit of undisbursed loan proceeds, then the lender ends up with a completed project without having to fully advance the loan. One objection that the lender will have with that argument is that it does not take into account the unreimbursed costs of collection the lender incurred in connection with exercising its remedies and obtaining title to the property.

Liquidated Damages For Construction Costs

The lender and the guarantor may both want to include a liquidated damages provision in the event the guarantor or lender cannot, or choose not to, complete the construction of the project. The lender may want the provision to make it easier to determine the lender's damages in a collection action. The guarantor may want the provision to limit the amount of damages the lender may claim in a collection action.

Calculating Carrying Costs Post-Default

The guarantor should be concerned about how the guarantor's obligation for carrying costs will be calculated after an event of default. If the lender is collecting income generated by the project and applying that income toward the principal balance of the loan or toward any other costs or expenses that are not included within the carry obligation, should the guarantor obtain a credit against its carry obligations for those amounts?

No Windfall To Lender

Given the uncertainty of how courts will calculate damages under a completion guaranty, a guarantor may want to address the theoretical potential that the amount recoverable under the completion guaranty could exceed the amount of the lender's deficiency on the loan after the application of all collateral. The guarantor will want to limit the lender's recovery to an amount necessary to repay in full all amounts owed to the lender in connection with the loan.

Lender Forbears From Foreclosure

In the event the guarantor is attempting to perform under the guaranty by completing construction of the project, the guarantor will probably expect the lender to forbear from foreclosing on the collateral.

Contribution Issues Among Guarantors And Equity Holders

While it is not usually addressed in the completion guaranty, an important issue for guarantor's counsel to deal with in many loan transactions is the relative contribution rights among guarantors when there are multiple guarantors of the loan. A similar concern arises in instances where less than all of the equity owners of the borrower are guaranteeing the loan. In either situation, the possibility exists where a guarantor may be required to pay on a guaranty while other guarantors or equity hold-

ers do not have any comparable payment obligations. One solution for dealing with this is setting out the relative contribution obligations for each guarantor in a guarantor contribution agreement that is entered into by all guarantors. When less than all of the equity owners of the borrower are guaranteeing the loan, the applicable organizational documents for the entity involved should address whether the relative capital accounts and equity percentages of the equity holders are to be adjusted or if capital calls are required from other equity holders if a guarantor makes a payment on a guaranty. One further complication to keep in mind is that some guaranties contain boilerplate language that purports to waive a guarantor's contribution rights with respect to other guarantors. Those types of waivers should be limited to apply only for so long as the guaranteed obligations remain unpaid.

Are Two Guaranties Better Than One?

While there are circumstances in which a completion guaranty can be a valuable part of a lender's collateral package, for loans where the guarantor under a completion guaranty is also providing a full payment guaranty, the completion guaranty probably adds little or no real value to the transaction from the lender's perspective. Instances in which a completion guaranty can provide an extra measure of financial support include the following:

- The lender does not obtain a full payment guaranty of the loan;
- The payment guarantor and the completion guarantor are different parties; or
- Local state foreclosure and anti-deficiency laws limit a lender's remedies against a payment guarantor.

Completion Guaranty Can Be Redundant With Full Payment Guaranty

As mentioned in this article, specific performance is not an available remedy to a lender under a completion guaranty. Therefore, a lender's sole

remedy for a guarantor's failure to perform is to sue for damages. How much can a lender collect if it obtains a judgment against the same guarantor under both a full payment guaranty and a completion guaranty? Assuming the lender has collected in full on its judgment under the full payment guaranty, it is unlikely that a court would allow the lender to collect anything further under the judgment for the completion guaranty. To allow the lender to recover additional sums under a completion guaranty after the loan has been paid in full would create a windfall for the lender. Unless there is some obstacle to enforcing a full payment guaranty, the amount of damages a lender can recover under a completion guaranty should not exceed the amount of damages a lender can recover under a full payment guaranty. The logical result is that the lender will end up with a judgment under the completion guaranty that will be limited to the amount which can be collected under the full payment guaranty. The lender can collect the full amount of the payment guaranty judgment, but not the full amount of both judgments. Given the additional obstacles to enforcing a completion guaranty, obtaining a judgment under a payment guaranty will be easier and quicker than obtaining a judgment under a completion guaranty and will provide the same end result for the lender.

Are Added Costs And Risks Worth The Benefit?

In instances where the lender has a full payment guaranty and a completion guaranty from the same guarantor, one could view the completion guaranty as just an additional belt and suspenders approach on the lender's part. That may be true, but the added layer of guaranty support does come with a cost and potential risk. The expense involved for lender's counsel and borrower's counsel to prepare, review, and negotiate the completion guaranty can be more than just a nominal amount. Given the costs of documenting construction loans,

if a full payment guaranty is being used, some consideration should be given to whether the benefit of the completion guaranty outweighs the costs to prepare and negotiate it. Lenders should also consider the potential that the completion guarantor may have an opportunity to cure defaults and reinstate the loan after the borrower has exhausted all of its cure rights and how that might affect the lender's options for dealing with problem loans.

Revisiting The Limited Guaranty Structure

The vast majority of conventional bank construction loans are made with a full payment guaranty from one or more parties affiliated with the borrower. Occasionally, competitive market conditions have forced banks to consider and approve limited payment guaranty structures. When a limited payment guaranty structure is approved for a construction loan, there are two common approaches lenders use. One approach is to use a limited payment guaranty in conjunction with a completion guaranty. In this scenario, a comprehensive completion guaranty is needed because until the project is completed or stabilized, the lender has a substantial construction risk that a limited payment guaranty may not adequately cover. A second ap-

proach is to require a full payment guaranty until construction is completed or the project reaches stabilization. Upon completion or stabilization, the amount recoverable under the guaranty is reduced to the limitations agreed to between the lender and guarantor. This second approach can include a completion guaranty, but, as mentioned above, in most instances the completion guaranty is redundant with a full payment guaranty. In this author's opinion, using a full payment guaranty that reduces to a partial guaranty is the safer approach for the lender. That structure accomplishes the same result that the lender is seeking when taking a limited payment guaranty together with a completion guaranty, but does not have the additional risks associated with enforcing a completion guaranty.

Postmortem

The current economic downturn may provide some construction lenders and completion guarantors with the unwanted opportunity to consider the enforcement issues discussed by this article. Those lenders will likely discover the task of enforcing a completion guaranty to be more challenging than what was originally anticipated when the loan was closed.

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PRACTICE CHECKLIST FOR Reconsidering Completion Guaranties

- At a minimum, a completion guaranty should cover the lender from losses resulting from the failure of the project to be constructed in accordance with approved plans and specifications, free of all mechanic's liens and claims, within the budget and on time.
- In its simplest form, a completion guaranty will provide a guarantee of:
 - ___ The timely completion of the construction of the financed improvements in accordance with approved plans and specifications; and
 - ___ The payment in full of all costs and expenses arising in connection with the construction of the improvements.

- A completion guaranty can include a variety of other obligations. Additional construction obligations covered by a completion guaranty may include the following:
 - ___ The costs to construct tenant improvements;
 - ___ The costs to install personal property; and
 - ___ Balancing obligations of the borrower under the loan.

- While perhaps not technically a cost of construction, a “carry” provision in a completion guaranty requires the guarantor to pay certain operating expenses arising in connection with the project until a point in time established by the lender. A carry provision would typically include an obligation to pay:
 - ___ Real estate taxes;
 - ___ Insurance premiums;
 - ___ Utility charges;
 - ___ Leasing commissions;
 - ___ Maintenance and management fees; and
 - ___ Interest on the loan.

- One negotiating point between a lender and a guarantor is the scope of tenant improvements that the guarantor is responsible for completing. From the lender’s perspective, it may consider that the project is not fully completed until all tenant improvements that were contemplated in the original proposal for the project are completed.

- With the relatively few reported cases involving the enforcement of completion guaranties, there is no clear-cut rule as to how a court will determine the measure of damages the lender is entitled to collect if the guarantor does not undertake completion of construction. See *Glendale Federal Savings and Loan Ass’n v Marina View Heights Development Co.*, 135 Cal. Rptr. 802, 815-816 (Cal. Ct. App. 1977) and *Black v. O’Haver*, 567 F.2d 361 (10th Cir. 1977). The lender may wish to include a liquidated damages provision for calculating the lender’s damages if the guarantor does not complete construction.

- Situations in which a completion guaranty can provide an extra measure of financial support include instances when:
 - ___ The lender does not obtain a full payment guaranty of the loan;
 - ___ The payment guarantor and the completion guarantor are different parties; or
 - ___ Local state foreclosure and anti-deficiency laws limit a lender’s remedies against a payment guarantor.

- Some of the negotiation points a guarantor should consider are:
 - ___ The guarantor should be permitted to use unadvanced loan proceeds to complete construction;
 - ___ The guaranty should clearly state when the guarantor’s obligations terminate for both construction costs (i.e. tenant improvements) and carry costs;
 - ___ The guarantor may wish to include a liquidated damages provision for calculating the lender’s damages if the guarantor does not complete construction;
 - ___ The guarantor should obtain a credit against carry obligations for any income from the project that is applied by the lender to the loan; and
 - ___ The lender should forbear from foreclosing if the guarantor is performing under the completion guaranty.