

## Reaffirmation of Guarantee by Guarantor Undercuts Defense Based on Change in Course of Dealing

By: Michael Weissman, Holland & Knight LLP

A series of reaffirmations by guarantors and appropriate language in the earlier-executed guarantee prevented guarantors from arguing that a change in the course of dealing between the debtor and the guarantied party discharged the guarantors.

In *Chicago Exhibitors Corporation v. Jeepers! of Illinois*, 2007 WL 2458500 (Ill.App. 4th Dist. August 30, 2007) Harvey and Cherry Swento guarantied the rent obligations owed to Chicago Exhibitors Corporation (“CEC”). When the rental obligations were not satisfied, they were sued on their guarantee. The Swentos contended they had been discharged based on changes in the lease terms that materially altered the obligation they had assumed.

CEC owned a shopping center in Des Plaines, Illinois and in July 1991 entered into a lease with Swento & Company, Inc. that Harvey and Cherry personally guarantied. The guarantee also stated that the liability of the guarantors would not be affected by any “extensions of time, indulgences or modifications which Landlord may extend with Tenant”.

The lease was amended in October, 1991 to extend the term and the Swentos reaffirmed their guaranty. In January 1992 the lease was changed to reduce the size of the rented area and to change the basis for payment of rent with

the Swentos against signing a reaffirmation. At that time the leasehold interest was transferred to a new lessee with the transferee assuming all liability under the lease. In February 1992 another lease amendment was executed that extended the date for commencement and completion of the tenant’s work. It included a reaffirmation by the Swentos.

In December 1997 Jeepers Illinois assumed all obligations under the lease. And in February 2000 Jeepers Illinois and CEC executed a fourth amendment acknowledging a lease default and again the Swentos reaffirmed in writing their obligation under the original guarantee.

The pattern continued when another agreement was signed giving the lessee additional time to pay past due rent and making certain lease modifications dealing with a) notice, b) the execution of an estoppel certificate, c) delivery of financial statements, d) a jury trial waiver, and e) a waiver of any defenses to enforcement of the lease.

In June 2002 the lease expired and Jeepers Illinois vacated the premises but failed to deliver the premises as called for in the lease.

When sued on their guaranty the Swentos claimed that they had been discharged of all liability because the various changes in the lease

terms materially increased their risk. The court rejected the Swentos' defense.

The court said that none of the changes in the lease constituted so material a change that would discharge the Swentos. The court said "none of the clauses altered the performance required by the tenant".

The court also pointed to the language of the guarantee that allowed the lessor to modify the terms of the lease without affecting the vitality of the guarantee.

*What's the point?* A well-drafted guarantee will always provide that the lender may modify the terms and/or conditions of the underlying debt without affecting the liability of the guarantor. This preserves the ability of the lender to freely deal with the borrower without being concerned about releasing the guarantor. But as a further precaution reaffirmations should be obtained from the guarantor whenever the underlying obligation is modified.