

Paid More Than Your Fair Share?

The Right of Contribution Among Guarantors

Commercial Real Estate | Loans

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Forms Of Liability

“Joint and several liability” is a key legal concept that plays a role in many lender-borrower relationships. Where a guarantor is jointly and severally liable with the borrower or any other number of guarantors, a lender can recover the full amount of the debt from any single party, regardless of how small that party's share of the debt is. Typically, loan documents will allow the lender to pursue any single party it chooses.

In contrast, “joint liability” means the lender must pursue each of the responsible parties together as a collective unit, and “several liability” means each party is only responsible for their own share of that obligation, and there is no shared risk.

The Question

A client recently asked me to draft a mutual indemnity into a limited partnership agreement to cover all payments made to the project's lender by any one guarantor. Meaning, if the lender collects from one limited partner by virtue of a joint and several guarantee given by each limited partner and/or their third-party covenantors, the paying guarantor or covenantor should be indemnified by the other limited partners and covenantors. A well-drafted contractual indemnity should make it more efficient to collect from the other limited partners, but as set out in this research, it is not strictly necessary to enforce contribution from the others.

In simpler terms, if A and B give a joint and several guarantee for \$1,000,000, and the creditor calls on the guarantee only from A for the full \$1,000,000, can A pursue B for \$500,000?

The Right Of Contribution

Yes. The paying guarantor may seek contribution from the other (solvent) joint and several guarantors as a matter of equitable law, even absent a contractual indemnity.[1] In fact, the Right of Contribution applies whether the guarantors are bound jointly and severally, jointly or severally.[2]

This principle is based on the law of unjust enrichment. If one guarantor pays more than their proportionate share of the debt obligations, the non-paying guarantor would be unjustly enriched by avoiding their share of that liability.

How Much Contribution Can I Claim?

In the absence of any agreement to the contrary, all guarantors are bound to share equally in the claimed amount (including interest thereon).[3] A paying guarantor claiming a Right of Contribution may also claim legal costs incurred in making their defence against the lender's claim regardless of its success, provided the defence was reasonable and would have also benefited the other guarantors if it was successful.[4]

Exceptions arise where the guarantors have varied their liability as guarantors by express or implied agreement. For example, if the guarantors have provided limited guarantees for different amounts, each is only liable to contribute in proportion to the amount for which they have accepted liability.[5] Simply put, a

Gardiner Roberts

Bay Adelaide Centre — East Tower
22 Adelaide Street West, Suite 3600
Toronto, ON M5H 4E3

Phone: 416.865.6600
Fax: 416.865.6636
contactGR@grllp.com

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guarantor can contract out of the Right of Contribution, in whole or in part.

Is an Indemnity Duplicative?

Not exactly. A contractual indemnity should assist a paying guarantor to collect from the other guarantors. It makes the liability abundantly clear as a primary obligation, and, where each guarantor's liability is limited by their interest in the limited partnership or project, the language can ensure each guarantor must only contribute their proportionate share.

Limitation Period To Collect From Co-Guarantor

The *Limitations Act, 2002* (Ontario) provides a basic limitation period of two years from “the date on which the claim was discovered”. [6] In short, a claim is “discovered” on the day on which the person with the claim first knew the loss occurred or ought to have known the loss occurred.[7] Section 5(2) of the *Limitations Act, 2002* (Ontario) puts an onus on the claimant to prove they were not aware of the loss on the day it actually took place.[8]

However, when it comes to claiming contribution from a co-guarantor, Section 18 of the *Limitations Act, 2002* (Ontario) provides that the limitation period begins to run on the day the claiming guarantor was served with a claim.[9] Meaning, if a lender claims against any one guarantor for more than that guarantor's fair share, that guarantor has two years from receiving the lender's claim to claim contribution from the other guarantor(s).[10]

Rights Against Principal Debtor

Similar to the Right of Contribution against other guarantors, a paying guarantor has a Right of Indemnification against the principal debtor.[11] While this does not limit the guarantor's obligation to pay the lender under their guarantee, it does allow the guarantor to make itself whole. However, a well-drafted assignment and postponement of claim may prevent the guarantor from seeking relief from the principal debtor before the lender is paid in full.

[1] *Rawlings v. Galibert*, 1919 CarswellQue 13, 59 SCR 611 [Rawlings]; *Bater Estate v. Kare*, 1964 CarswellMan 99, [1964] SCR 206.

[2] Halsbury's Laws of Canada – Guarantee and Indemnity (2026 Reissue), HGI-248.

[3] *Rawlings, supra*, para 39, citing *Dering v. Earl of Winchelsea*, 1 Cox Eq. 318.

[4] Canadian Encyclopedic Digest – Guarantee, Indemnity and Standby Letters of Credit § 86, citing *Williams v. Buchanan* (1891), 7 T.L.R. 226 (Eng. C.A.) and *Womershausen v. Gullick*, [1893] 2 Ch. 514 (Eng. Ch. Div.) and *Broom v. Hall* (1859), 141 E.R. 911 (C.P.).

[5] *Wong v. Field*, 2012 BCSC 1141, [2012] BCJ No 1843 (QL) para 22 [Wong], citing *Ostrander v. Jarvis* (1909), 18 O.L.R. 17 (HC-J (Div.Ct)).

[6] *Limitations Act, 2002*, S.O. 2002, c. 24, Sched. B, s. 4.

[7] *Ibid*, s. 5(1).

[8] *Ibid*, s. 5(2).

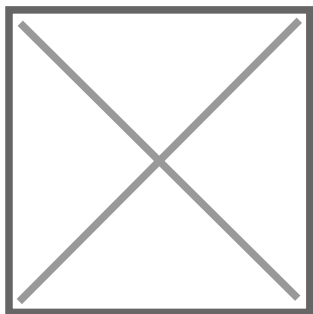
[9] *Ibid*, s. 18(1).

[10] Note that the *Real Property Limitations Act*, R.S.O. 1990, c. L.15 may apply to lengthen the basic two-year limitation period where the claim relates to land.

[11] *Wong, supra*, para 18, citing K.P. McGuinness, *The Law of Guarantee* (Scarborough: Carswell, 1996) at para 8.2.

(This blog is provided for educational purposes only, and does not necessarily reflect the views of Gardiner Roberts LLP).

Author



Daniel Kuhnreich

Associate

416.865.6649

dkuhnreich@grllp.com

Gardiner Roberts

Bay Adelaide Centre — East Tower
22 Adelaide Street West, Suite 3600
Toronto, ON M5H 4E3

Phone: 416.865.6600
Fax: 416.865.6636
contactGR@grllp.com