When a Guaranty Agreement Is not.

COUNSEL'S CORNER

In early 1997 Border Patrol of Wisconsin, Inc. purchased nine Taco Bell franchises from Pepsico. In connection with financing the purchase, Scot Wederquist signed a Guaranty Agreement in favor of PFS, a division of Pepsico. At the time, Wederquist owned a 25% interest in Border Patrol and served as its Treasurer, and PFS supplied goods and services to Taco Bell franchisees.

PFS sold its assets including USA and Canadian operations to Ameriserve a few months later. And in January 2000, Ameriserve went bust and filed a Chapter 11 bankruptcy petition in Delaware. The Bankruptcy Court approved the sale of substantially all assets of Ameriserve to McLane Foodservice, Inc. in late 2000.

In June 2010 McLane contracted with Table Rock Restaurants to sell it food supplies and services. Wederquist owned 40% of Table Rock and also served as its Treasurer. Table Rock closed its doors in November 2010, owing McLane approximately $450,000.

In December 2010 McLane sued Table Rock and Wederquist to recover the delinquency. The trial court entered Judgment for McLane against Table Rock, but not against Wederquist, holding that he was not personally liable under the Guaranty Agreement he had signed 13 years before in the Border Patrol – Pepsico deal.

Probably sensing that a Judgment against Table Rock had limited collection value, McLane appealed.

It may have been a hint to the outcome of the case when the first substantive paragraph began with "A guarantor under Texas law is a so-called favorite of the law and as such, a guaranty agreement is construed strictly in [his] favor. . . Thus, where uncertainty exists as to the meaning of a contract of guaranty, its terms should be given a construction which is most favorable to the guarantor."

The Federal District Court closely examined the language of the Guaranty Agreement. Section 1 of the Guaranty stated that Wederquist unconditionally guaranteed

the punctual payment when due of the all indebtedness owing ". . . *to Creditor*" now or hereafter existing." The preamble of the Guaranty Agreement defined "*Creditor*" as PFS and all affiliates of PFS.

McLane was of course not an affiliate of PFS but rather a purchaser of its assets. As such, McLane cited a provision in the Guaranty Agreement stating the Guaranty ". . . shall inure to the benefit of and be enforceable by Creditor *and its successors, transferees and assigns*."

McLane argued that since it was a purchaser of PFS's assets, McLane was also its successor, transferee and assign. And as such, McLane was entitled to the benefits of the Guaranty Agreement.

The Federal Court did not need to decide if McLane was a successor, transferee or assign. It wasn't relevant to the decision. The definition of "*Creditor*" in the Guaranty Agreement applied only to PFS. Not McLane. If PFS and Wederquist had intended it to apply to others, then PFS and Wederquist could have easily expanded the definition, instead of limiting it to only PFS.

The US District Court Judgment is affirmed. Wederquist wins; McLane loses. The Guaranty Agreement is not binding.

See *McLane Foodservice v. Table Rock Restaurants;* No. 12-50980; U.S. Court of Appeals – 5th Circuit, November 15, 2013.

Lessons learned:

1. Sometimes Guaranty Agreements are, well, you know – Guaranty Agreements. But not always. Commercial Guaranty Agreements in the context of purchase and sale agreements, financing and leasing need to be carefully reviewed.

2. Practice Tip: In my world there are all kinds and variations of Guaranty Agreements. Some are limited by time; others by amount. Others are "backup" only – recourse must be pursued against the primary debtor first, without success. Still others expire mid-term automatically if the debtor has not defaulted, while in other iterations the Guarantor might be bound to the original debt but to no further credit or time extensions. Many are joint and several such that a creditor has 100% recourse to all Guarantors, but others are only several and limited to each Guarantor's pro-rata allocated amount.

3. Don't assume any Guaranty Agreement is lawful and binding. You might be unpleasantly surprised.

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