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The Decline Of The "Bullet Proof" Guaranty

by C. Joseph Greene

I can remember in law school when I studied Contracts I read about what was known as "the iron clad, bullet proof guaranty." When I began representing creditors from all around the country, I became very familiar with the form that this document took.

The guarantor signing such a document guaranteed "any and all indebtedness of the debtor of whatever kind or nature, whether presently incurred or hereinafter arising, without limitation as to amount, etc." The obligation would also be an ongoing, continuing one without any set termination date.

Creditors across the country are used to using these full page documents as provided by their local counsel in the belief that they are enforceable nationwide. Routinely they provide that those who sign waive all defenses available to the guarantor at common law, such as lack of notice, lack of presentment, etc.

Creditors in the Commonwealth of Kentucky learned three years ago that such long form, formerly bullet-proof guaranties would no longer be enforceable in their state. Unfortunately, many creditors outside of Kentucky who nonetheless loan money or extend credit here are ignorant of the fact that such contracts are unenforceable in the Bluegrass State.

KRS 371.065, which became effective July 15, 1986, provides that no guaranty document which is separate from the original debt instrument shall be valid or enforceable unless it is signed by the guarantor, and contains provisions specifying the amount of the maximum aggregate liability of the guarantor thereunder, and the date on which the guaranty terminates.

This means that the unlimited, continuing guaranty is no longer enforceable in Kentucky. However, if your guaranty predates July 15, 1986, and you have not taken any new guaranty from the same party thereafter, then your contract is still enforceable according to its terms. If you have taken a guaranty which you intend to enforce in Kentucky after the effective date of the statute, it must contain a stated maximum amount of liability and a definite termination date or you will be unable to hold your guarantor liable through the judicial system, despite the clear contractual intent of the parties to the instrument.

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Obviously, this is an unfortunate law from the point of view of creditors. First of all, such paternalistic meddling in the rights of individuals to contract with each other creates yet another obstacle to forming a binding contract enforceable according to the intent of the contracting parties and the clear language used therein. More importantly in this case, the certainty the commercial world has long sought to establish through such statutes as the Uniform Commercial Code is undermined by such non-uniform statutes. Creditors in this day of rapid transit and even more rapid communication should be able to extend credit across state boundaries without encountering such idiosyncratic barriers to the free flow of commerce and credit.

As a practical matter, local creditors have placed twenty to thirty year duration periods in their long form guaranties, as well as very large maximum amounts of liability. It is not unusual, for example, to see a liability limit of $5,000,000 when the underlying debt being guaranteed is only $100,000 or less. It is not very hard for a creditor familiar with the statute to protect the enforceability of its paper.

The statute still remains a rather nasty booby trap for the ignorant, and creditors in the other 49 states should not have to suffer seeing their formerly bullet-proof guaranties blown to pieces by a non-uniform, anti-creditor statute.

On a personal note, I hate to be the bearer of bad news, as I have been to so many of our out-of-state clients in recent times when I am compelled to inform them that I cannot file suit against their guarantors. Perhaps this article will serve to at least warn some of you who have not yet learned of the statute in time to shore up the language of your guaranties before having to enforce them.