



## PERSONAL GUARANTEES: ENFORCEABLE OR NOT?

By Michael P. Weiner

Personal guarantees: Clients ask their customers to sign them; clients are asked to sign them by their vendors. In most cases, not much thought is given to the structure or language of the personal guaranty. A recent Massachusetts decision, however, highlights the possibility that personal guarantees may be subject to attack if they are not structured appropriately.

In *Yellow Book, Inc. v. Tocci* (2014 Mass. App. Div. 20), the Massachusetts district court appellate division held that personal liability would not be imposed upon the signer of an advertising contract even though the form of contract used by the vendor, Yellow Book, included clear language as to a guaranty. Yellow Book had entered into a series of advertising contracts with its customer, JSCS, Inc. Lisa Tocci, the customer's office manager, had signed each of the contracts, which included form language providing that she was personally liable for the payments due. JSCS went out of business before paying the full amount due, and Yellow Book sued Tocci for the balance owing.

After several years of litigation, likely driven in large part by the fact that Yellow Book had doubtlessly utilized this same form of contract and guaranty on countless other occasions, the court denied Yellow Book's claims and dismissed the suit, substantially on the basis that the guaranty was not supported by consideration.

Tocci, the court concluded, was a "mere employee" and, notwithstanding the fact that she did indeed sign the contracts with the guaranty language in place, she did not receive a sufficient benefit from the contract to support her commitment to be personally liable for JSCS' obligations.

The court's review of the underlying facts and structure of the documentation is instructive as to the particular elements to be addressed in seeking to ensure the enforceability of a guaranty. First is the issue of "consideration." Ordinarily, a vendor's agreement to render services or provide credit for payment for such services constitutes the necessary consideration to support a guaranty. However, in this case, the court noted that the text of the guaranty provision in the agreement did not include any recitation as to consideration, which placed the guaranty outside of the parameters of Restatement (Second) of Contracts Section 88, which states that a written, signed guaranty is enforceable so long as it recites the purported consideration (which could be as simple as "in consideration of the services rendered and one dollar paid to me as guarantor").

A second element is the manner in which the guaranty is set forth within the contract. Here, Yellow Book's guaranty was set out in small print on the reverse side of the agreement, and was

not accompanied by a signature line separate and apart from the signature line for the overall agreement. Tocci testified she had never read or discussed the guaranty with any Yellow Book representative. The court concluded that while misreading or failing to read an agreement is no defense to enforceability against the reader, Tocci received no compensation, whether from Yellow Book or from her employer, to support the enforcement of the guaranty.

As a third element, the Massachusetts court stated that Tocci, as a salaried employee and not an owner or principal of JSCS, did not receive a sufficient benefit from the transaction contemplated by the advertising contract to serve as consideration, and further noted that had the situation been different, the court's holding may have also been different. In order to better ensure the enforceability of the guaranty, the signatory should have a more significant relationship to the customer in order to support the argument that the signatory is receiving some tangible or intangible benefit from the fulfillment of the contract in exchange for his or her agreement to be personally liable.

Drawing practical advice from the court's holding:

- (1) Clearly recite the consideration for the guaranty in the text of the agreement;
- (2) Separate the guaranty from the remainder of the agreement and have it separately acknowledged; and
- (3) Insist that an owner or principal sign the guaranty.

A fourth element, although not directly considered in the *Yellow Book* case, is the possibility that a signatory might seek to invalidate the guaranty by attacking the enforceability of the underlying agreement. In order to minimize this defense, the personal guaranty should be drafted so as to be unconditional and expressly waive all legal and equitable defenses.

For more information about this alert or if you have any questions or concerns, please contact Michael P. Weiner at 609.844.3032 or [mweiner@foxrothschild.com](mailto:mweiner@foxrothschild.com) or any member of Fox Rothschild's Corporate Department.



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