

Wagner, Falconer & Judd, Ltd.

WCA Lunch and Learn Series:

IS THIS PERSONAL GUARANTEE I HAVE WORTH ANYTHING?

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January 16, 2007
Milwaukee, Wisconsin

Presenter Biographies

■ **Nelson S. Martell**

- Nelson is an associate with Wagner, Falconer & Judd, Ltd. Nelson started with the firm in 2003, and his areas of focus are civil litigation and collection actions. Nelson was admitted to the Wisconsin Bar in 2003. He is also admitted into the Eastern District Court of Wisconsin. Nelson graduated from St. Norbert College in 2000 prior to attending the Northern Illinois University, where he received his law degree in 2003. Nelson can be reached at (262) 792-1818 or by e-mail at nmartell@wfltd.com.

■ **Daniel J. Reich**

- Daniel is the managing attorney of the Brookfield office of Wagner, Falconer & Judd, Ltd. Dan is a 1997 graduate of the University of Wisconsin-Madison, and received his law degree from Indiana University-Bloomington in 2001. Dan was admitted to the Wisconsin Bar in 2001 and the Eastern District Court of Wisconsin in 2002. Dan can be reached by phone at (262) 792-1818 or by e-mail at dreich@wfltd.com.

WFJ: Three Offices and 50 State Capability

- Started in 1932 in Minneapolis, MN
- Today we have offices in Minneapolis, Brookfield and La Crosse with 30 lawyers and 40 support staff
- US network of collection and defense attorneys
- Commercial collection anywhere in US and in Canada, Mexico and US possessions
- Business Services (software licensing, contract drafting and negotiation, business litigation, employment law)

General Overview

- What is a Personal Guarantee
- When to Ask for a Personal Guarantee (**Red Flags**)
- How to Execute a Personal Guarantee
- Advantages of a Personal Guarantee (Why personal guarantees increase collection success)
- Strategies for Obtaining a Personal Guarantee



What is a Personal Guarantee?

- **“A pledge, by someone other than the named borrower, that he or she promises to pay any deficiencies on a specific loan or obligation”**
- **Goal: recovery of outstanding accounts**
- **One piece of the Cash Flow Management Puzzle**
 - Account Receivables Management
 - Guarantee Agreements
 - Promissory Notes
 - Mortgages
 - Bond and Lien Notices
 - Leases
 - Terms and Conditions of Sale (invoices, contracts, proposals)

Having a good overall process matters!

Personal Guarantee (cont.)

- A promise by a business owner to hand over the owner's personal assets to a creditor if the business cannot pay its debt and its assets are not worth enough to cover the debt
- Different from, but similar to, a co-signer
- Another option for collection of bad debt; can be used as leverage
- Useful when the customer's credit is insufficient by itself, insures accountability of business owners
- Can be incorporated into credit application
- Varying degrees of complexity depending on situation

Personal Guarantee (cont.)

- Unambiguous document
- Terms
 - Existing debt, future advances
 - Payment of interest, collection costs, attorney fees
- Name/authority of person signing
 - Individual capacity and not capacity as officer of corporation
 - Requiring signature of spouse can violate federal credit laws if spouse has no involvement in ownership/management of business
- Express provisions relating to termination of guarantee
 - E.g. notice in writing, certified mail

When to Ask for a Personal Guarantee

- Necessity?
- Extension of credit
- New or existing accounts
- Loans
- Commercial lease signing
- Delivery of products or services
- Forbearance of debt
- Especially with business entities
 - If sole proprietor or general partnership, business and individual are one in the same (individual is personally responsible for the debts of the business)
 - Corporations and LLC's: force business owners to give up their right to limited personal liability by executing a personal guarantee
 - Check CCAP, Wisconsin Department of Financial Institutions, Dun and Bradstreet, etc.

Red Flags

■ **Indications the Customer May Not Be Able to Pay**

- Late payment on account (to you or others)
- NSF checks (to you or others)
- Death, divorce or disability of owner
- Sickness, retirement or other loss of key employees
- Customer sells business or is talking about selling business
- Loss of line of credit
- Allegations or rumors of theft or embezzlement
- Dismissal of key financial personnel

Red Flags (cont.)

- Problems covering payroll
- Principal or third party revokes personal guarantee
- Secured party repossesses customer's equipment or other collateral
- Lawsuits or judgments
- Federal or state tax liens
- Project owner not paying general contractor or having financial problems
- General contractor not paying your customer or having financial problems
- Customer not returning phone calls, answering machine always on
- Customer not paying on time or paying in irregular amounts

How to Execute a Personal Guarantee

- **Exhibits A and B**
- **Proper Execution of Credit Application**
 - Name of person signing
 - Title (authority to bind business)
- **Reviewing the Credit Application**
 - Fully Completed?
 - Consistent with business registration information (WDFI)?
 - Properly signed by person with authority to bind business?
 - Is the information contained in the credit application consistent with the information contained in proposals, purchase orders, invoices, etc.?

Executing a Personal Guarantee (cont.)

- **Terms and Conditions**
 - Payment terms (e.g. Net 30)
 - Interest/late fees
 - Obligation to pay collection costs, including attorney fees
 - Ongoing obligation to provide notice of changes in information contained in credit application

Executing a Personal Guarantee (cont.)

- **Nature of Business**
- **Gather Information**
- **History of Business**
- **Owners/Officers (names and addresses)**
 - Possible Guarantors (*others – don't limit yourself*)
- **Banking Relationships**
- **Credit References**
- **Authority to Obtain Credit History**
 - Compare information in credit report to information provided in credit application

Advantages of a Personal Guarantee

- **Now you have it – so what?**
- **Protection against business bankruptcy (not personal)**
- **Additional sources for payment of debt**
- **Leverage for collection of debt**
- **Our clients' collection rates have substantially gone up as a result of having a personal guarantee**
- **Business decision**

Advantages of a Personal Guarantee (cont.)

- When will a court enforce a personal guarantee and why they refuse:
- Case Law
 - State by state
 - WI Cases

Strategies to Obtain a Personal Guarantee

- No misrepresentations
- Mandated by accounting department
- Customary in our business
- Sales vs. credit department
- Negotiate terms and conditions
 - Installments, lump sum or combination
 - Due date
 - Interest, collection costs and attorney fees
 - Default provisions
 - Acceleration upon written notice of default
- Name and authority of person signing
 - Individual capacity and not capacity as officer

Strategies (cont.)

- Periodic review of accounts
- Formulate plan to monitor accounts:
 - 0-30 days: Typically within terms
 - 31-60 days: Internal review (calls, letters)
 - 61-90 days: Problem area
 - Prompt follow up
 - Schedule meeting with debtor to resolve large past due balance
 - Consider involving an attorney
 - 91-180 days: Construction industry
 - Review lien and bond rights

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Records Retention

- Good records are necessary to prevail in the event that litigation is used to collect the debt
- Remember credit files are open to a subpoena!
- When do you need an updated guarantee:
 - Change of address
 - Change of business name
 - Sale of business or change in ownership/control

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In closing ...

- Questions?
- We are a full service firm with significant expertise in helping businesses be successful
- We strive to build long-term relationships
- We work together to provide sound cost-effective legal advice and services
- For more information please contact us:

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