

Indemnitors: Not A Surety's Sureties

By David A. Harris February 21, 2018

When a surety sues to enforce its indemnity agreement, it is not uncommon for the indemnitors to argue they are the surety's "sureties" and so entitled to all the same legal protections of a surety.

On its face, the argument might seem plausible. After all, according to Black's Law Dictionary, a surety is "[s]omeone who is primarily liable for paying another's debt or performing another's obligation." And aren't the indemnitors being asked by the surety to pay for the principal's debt? Or so the argument goes.

A recent Georgia Court of Appeals case shot down this argument. *Zambetti v. Cheeley Investments, L.P.*, 343 Ga. App. 637, 808 S.E.2d 41 (2017). The plaintiff sued to enforce the defendant's oral agreement to pay the plaintiff's attorneys' fees. The defendant argued the statute of frauds precluded the enforcement of his oral agreement. The court held that the statute of frauds did not apply and distinguished a contract of indemnity from a guaranty.

A guaranty or surety relationship is created when "one party promise[s] *the original creditor* that he would pay the debt of the original debtor if that debtor fail[s] to pay." This is contrasted with a contract for indemnity, where "the indemnitor, for a consideration, promises to indemnify and save harmless the indemnitee against liability of the indemnitee to a third person, or against loss resulting from such liability." *Id.*

The key difference between the two relationships is that the surety's obligation is to the original obligee. The indemnitors' obligations are to reimburse the surety. Under Georgia law, this distinction determines whether or not the statute of frauds and other protections enjoyed by the surety apply.

In fact, this distinction is also seen in Black's Law Dictionary. After the first sentence of the definition quoted above, the dictionary goes on to state that a surety is "a person who becomes a joint obligor, the terms of the undertaking being identical with the other obligor's, and the circumstances under which the joint obligation is assumed being such that, if the joint obligor becomes required to pay anything, he or she will be entitled to complete reimbursement."

This underscores the value a surety provides to the principal and its indemnitors. The surety, but not the indemnitors, becomes a joint obligor on the principal's obligation. The indemnity agreement allows the indemnitors to distance themselves from the principal's obligations and receive the value of surety credit required by an obligee looking for assurance that the principal will meet its obligations.

So no, personal indemnitors are not the surety's sureties. They are not jointly obligated on the underlying debt. That is the obligation the surety has undertaken and for which it has been granted certain legal protections not warranted for those merely subject to a contract of indemnity.