

## WHAT'S IN A NAME?

By Jack Burch July 20, 2018

Every once in a while a bond may be issued which does not precisely identify the obligee by its formal name. For example, it may identify the obligee as Big Contractor Company, when that is a trade name and the correct name of the obligee is ABC, Inc., d/b/a/ Big Contractor Company. Sometimes a bond may state that the principal is Electrical Contracting when in fact the correct name is Electrical Contracting of Georgia, Inc.

More rare, but once in a blue moon, the surety may not be precisely identified. For example, it may recite the name as Surety Casualty, when in fact it is really Surety Casualty Insurance Company of Massachusetts. Since bonds are subject to the Statute of Frauds, the question then becomes whether parole evidence can be introduced to correct a misnomer.

In the recent case *Colonial Oil Indus., Inc. v. Lynchar, Inc.*, S17G1788, 2018 WL 3014466 (Ga. June 18, 2018), the Georgia Supreme Court held that testimony could be used to fix a misnomer caused by the use of a trade name in a guaranty, and that the Statute of Frauds did not bar a witness from testifying as to the identity of the real parties. Since there is no distinction in Georgia between suretyship and guaranty, under O.C.G.A. § 10-7-1, this holding applies to bonds.

The *Colonial Oil* case involved an account agreement where a guaranty provided that the guarantor unconditionally and absolutely guaranteed the creditor full and prompt payment of all account obligations. There was ambiguity as to the correct legal name of the original corporate debtor. The Court of Appeals held that the guaranty was unenforceable because it did not reference the legal name of the debtor (Lynchar, Inc.) but instead referenced only the trade name (T&W Oil, Inc.). There was no such entity as T&W, but rather it was a trade name for Lynchar, Inc. d/b/a/ T&W Oil, Inc.

The Court of Appeals had followed its precedent of *Playnation Pay Systems, Inc. v. Jackson*, 312 Ga. App. 340, 718 SE2d 568 (2011), where it held that a guaranty which used a tradename to identify the principal debtor was unenforceable because the Statute of Frauds barred testimony to identify the real party. The Supreme Court rejected this line of reasoning, since a corporation conducting business in a trade name may sue or be sued in the trade name, and so nothing in the Statute of Frauds barred enforcement of a guaranty of a party known by its trade name.

The Court also held that testimony was admissible to show that the clear intent of the guarantor was to obligate himself for the debts owed by Lynchar, and he understood that T&W was merely a trade name for Lynchar. This oral testimony was found not to violate the Statute of Frauds.

*Colonial Oil* is important for another reason. The Court began its opinion by stating that in Georgia guaranty agreements are to be strictly construed, and the surety's liability will not be extended by

implication or interpretation. O.C.G.A. § 10-7-3.

It is terrifically important to note the exact language contained in a guaranty in determining whether the Statute of Frauds is applicable in the first place. In *Colonial Oil*, the obligation of the guarantor was essentially to pay to the creditor/obligee all of the debts of the principal. That is, the guarantor's promise ran directly to the creditor. Because of this, the guaranty was subject to the Statute of Frauds.

We recently wrote about *Zambetti v. Cheelay Investments, L.P.*, 343 Ga. App. 637, 808 S.E.2d 41 (2017), holding an indemnity agreement was not subject to the Statute of Frauds. The difference is this: in an indemnity agreement, the indemnitor promises that he will indemnify the surety from any loss. The promise does not run directly to the obligee and is not determined by the principal's liability to the obligee, so the indemnity is not subject to the Statute of Frauds. However, where the promise is to pay the full indebtedness of the principal, the obligation is subject to the Statute of Frauds.