

FINANCIAL SERVICES LITIGATION

ALERT

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2012PA SUPREME COURT TO ADDRESS CONFUSION
CONCERNING THE STATUTE OF LIMITATIONS
GOVERNING GUARANTIES*By Benjamin D. Wanger*

On November 21, 2011, the Pennsylvania Superior Court filed an opinion in *Osprey Portfolio, LLC v. Izett*, 2011 Pa. Super. 248, holding that a suit to enforce a guaranty is subject to the 20 year statute of limitations applicable to “instruments under seal,” rather than the four year statute of limitations applicable to “actions upon a contract.” The decision was subsequently appealed to the Pennsylvania Supreme Court, which granted allocatur on August 13, 2012. At the present, the appeal has been fully briefed for the Supreme Court, and oral argument is scheduled for November 28, 2012.

This action arises from a 1999 commercial loan transaction between First Union National Bank (“First Union”) and Izett Manufacturing, Inc. (“the Business”), whereby First Union agreed to lend the Business up to \$50,000 in return for a promissory note, which George Izett (“Izett”) signed in his capacity as vice-president of the Business. Izett also signed a guaranty under seal (“the Guaranty”), in which he agreed to unconditionally guarantee timely payment of all sums due under the loan to First Union and its successors or assigns. In 2001, First Union sold the loan and assigned the Guaranty to Osprey Portfolio, LLC (“Osprey”), and, in 2005, Osprey notified Izett that he was in default. In 2010, Osprey confessed judgment against Izett, who argued that the judgment should be stricken because Osprey failed to file its complaint within Pennsylvania’s four year statute of limitations applicable to contract actions. See 42 Pa.C.S.A. § 5525. The trial court disagreed with Izett, however, instead holding that the applicable statute of limitations was the 20 year statute governing “instruments under seal,” as set forth at 42 Pa.C.S.A. § 5529(b)(1). Izett appealed to the Pennsylvania Superior Court, arguing that, although the Guaranty was indeed signed under seal, it did not constitute an “instrument.”

Observing that the Judicial Code does not define the word “instrument,” the Superior Court relied on the word’s “or-

dinary meaning,” in concluding that the Guaranty was, in fact, an “instrument,” and affirming the trial court’s application of the 20 year statute of limitations set forth in 42 Pa.C.S.A. § 5529(b)(1). Notably, the Superior Court opined that when interpreting sections 5525 and 5529, the court “shall apply the *dictionary definition* of the term ‘instrument,’ not the definition of ‘instrument’ as set forth in the UCC.”

In his appellate brief to the Pennsylvania Supreme Court, Izett argues that the Superior Court erred in its decision to apply the 20 year statute of limitations set forth in section 5529 rather than section 5525’s four year statute of limitation. Izett’s first argument is that an action on a written agreement under seal is only subject to section 5529’s 20 year statute of limitations if the agreement is a “negotiable instrument.” In support of that argument, Izett relies on Pennsylvania’s Uniform Commercial Code (“UCC”), which defines an “instrument” as a “negotiable instrument.” Pennsylvania’s UCC goes on to define a “negotiable instrument” as an “unconditional promise or order to pay a fixed amount of money, with or without interest or other charges described in the promise or order.” Izett argues that, under this definition, the Guaranty does not qualify as an “instrument” because: (a) it was conditional in that Osprey could not look to Izett for payment unless the Business had defaulted; and (b) the Guaranty was not for a “fixed amount of money” because the amount of costs, fees and expenses collectable by Osprey could vary.

Because the Guaranty does not constitute an “instrument,” Izett argues, section 5529’s 20 year statute of limitations does not govern this dispute. Instead, a dispute arising from the Guaranty should be subject to section 5525’s four year statute of limitations applicable to “a contract, obligation or liability ... under seal or otherwise.” Izett also con-

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tends that the trial court's holding that any sealed contract is subject to a 20 year statute of limitations would render meaningless the four year statute of limitations set forth in section 5525(a)(8) for certain documents "under seal or otherwise."

In Osprey's appellate brief, it argues that, even though "Pennsylvania courts have consistently referred to guaranties as 'instruments' over the last century," the Uniform Commercial Code does not control whether the Guaranty is an "instrument" under section 5529. Osprey reasons that Izett's reliance on the definition ascribed to "instrument" in Article III of the UCC is misguided because Article III only deals with a very narrow subset of commercial documents — negotiable documents. On its face, however, section 5525 refers to both negotiable *and* non-negotiable instruments. Consequently, Osprey argues, "to accept Izett's statutory construction would render half of second 5525 meaningless by omitting non-negotiable instruments from that section despite the fact that the legislature saw fit to specifically include them." Osprey adds that the fact that both section 5525 and section 5529 predate Pennsylvania's enactment of the UCC by several decades is further evidence that the UCC's definitional section has no applicability to the statutes at issue. Accordingly, Osprey contends that there is simply no basis to conclude that the legislature intended the definition of "instrument," in Article III of the UCC to "supersede every other statute in the Commonwealth."

The Supreme Court's decision in this action could have far-reaching effects. If the Supreme Court reverses the Supe-

rior Court and holds that personal guaranties like the one at issue here are subject to section 5525's four year statute of limitation, countless lenders could lose the ability to collect on guaranties or will need to act quickly to preserve any claims that may be approaching the four year mark. ♦

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