A Guarantee or Not a Guarantee, That Is the Question

by Anthony L. Leccese, Esq.

Tony Leccese

As a general rule in Massachusetts, an action may not be brought against a person on a promise to answer for (that is, to guarantee) the debt of another unless "the promise, contract or agreement upon which [the] action is brought . . . is in writing and signed by the party to be charged therewith." Mass. Gen. Laws Chapter 259, Section 1. This statute, known as the Statute of Frauds, also applies to alleged contracts involving the sale of real estate, an agreement upon consideration of marriage, and an agreement that is not to be performed within one year. The Statute of Frauds reflects the intent and policy of preventing misunderstandings based upon unrealized expectations or surmise and avoiding the often considerable problem of proving the actual terms of an oral agreement, with the attendant potential for fraud and perjury. The parties should always know and understand the terms of the deal and the extent of their binding obligations, especially with the type of agreements covered by the Statute of Frauds, which, if not embodied in a sufficient writing, will generally not be enforceable.

But what if a person relies to his or her detriment on an oral promise made by another? In such a situation, it may be appropriate to pierce the Statute of Frauds shield. Such was the situation presented to the Massachusetts Appeals Court in *Barrie-Chivian v. Lepler*, 87 Mass. App. Ct. 683 (2015), a case involving an oral agreement to guarantee a loan that was held enforceable under the doctrine of promissory estoppel.

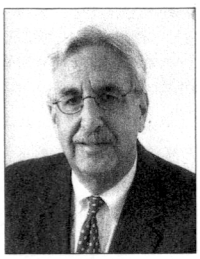
In *Barrie-Chivian*, the defendant approached his in-laws shortly after marrying their daughter about investing in his real estate company. Over the next year or so, the defendant solicited a number of loans from his in-laws, who eventually loaned the real estate company up to $300,000.00 or more. During the years that followed, no payments were made on the loans and the plaintiffs, then former in-laws as it appears their daughter and the defendant divorced, brought suit against the defendant to collect on the loans. At trial, the defendant admitted that he had orally agreed to guarantee the loans and the plaintiffs testified that they would not have agreed to make the loans if the defendant had not promised to provide a written guaranty. Apparently, the plaintiffs repeatedly asked the defendant to execute a written guaranty, but he never did despite having agreed so to do.

To overcome the lack of a written guaranty and the Statute of Frauds defense, the plaintiffs asserted that the defendant was liable for the loans on a theory of promissory estoppel, that is, an "estoppel" occasioned by detrimental reliance. Estoppel prevents a person from showing the truth contrary to a representation of fact made by the person after another has relied on the representation, and so-called promissory estoppel extends that concept to promises. There was some question about the scope of promissory estoppel in Massachusetts and the defendant argued that for the plaintiffs to prevail upon such theory there had to be either a partial writing or evidence of fraud—evidence that at the time the defendant made the promise relied upon, he did not intend to perform it. The Appeals Court disagreed and found that the plaintiffs had established the elements of promissory estoppel and that the defendant's oral guaranty was enforceable.

Accordingly, a promise which a person should reasonably expect to induce conduct of another and which does induce such conduct is enforceable notwithstanding the Statute of Frauds if injustice can be avoided only by enforcement of the promise. Significant factors in making such determination include the strength of the evidence of the promise, the reasonableness of the conduct and the reliance upon the promise, and the extent to which the conduct was foreseeable by the promisor.

Can an Employee's Severance Pay Be Cut Off Based on After-Acquired Information?

by James S. Singer, Esq.



Jim Singer

Unfortunately, the Massachusetts appellate courts have not directly decided the issue whether an employer can re-characterize an employee's termination from "without cause" to "for cause" based on information learned after an employee's termination. While the Massachusetts courts have had the opportunity to consider the issue, they have neither adopted nor rejected the doctrine.

Most recently, the Supreme Judicial Court was again asked to address the doctrine, but did not do so.

After a vice president of a company, EventMonitor, Inc., was terminated "without cause" based on his proposed restructuring plan that the president believed would undermine the future of the company, the company conducted a forensic examination of the vice president's laptop computer. It was discovered that he had copied – to a backup and storage service he personally purchased – certain proprietary information of the company. The employee's employment agreement required him to return all such information upon termination.

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Can an Employee's Severance Pay Be Cut Off Based on After-Acquired Information? *(continued from page 2)*

EventMonitor deemed the vice president/employee's actions to be defalcation of company assets, which was one of the only reasons the employee could be terminated "for cause," in which case the employer would not be required to pay the contractual severance pay.

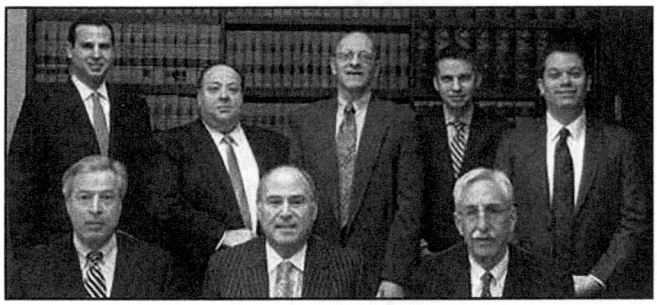
About five weeks after the employee's departure, EventMonitor retroactively re-characterized the employee's termination as being "for cause."

The lower court, as affirmed on appeal, held that the employee did not engage in defalcation and the mere failure to return copies of EventMonitor's proprietary information, although a breach of the employment contract, was not "knowing disclosure" or "knowing use" of the proprietary information, and EventMonitor was not entitled to stop the severance payments.

While the courts of the Commonwealth have not adopted or rejected the "after-acquired evidence doctrine," it will be interesting to see how they decide the issue when the right facts are presented where the employer discovers after termination that the employee did in fact commit a material breach of the employment contract, which if initially known, would have precluded the employee from the right to collect severance.

Firm News

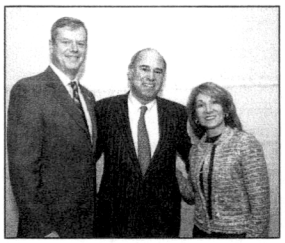
Six Rudolph Friedmann Attorneys Selected as Massachusetts Super Lawyers and Four Attorneys as Rising Stars



Front row left to right: Jon Friedmann, Jim Rudolph, Jim Singer. Back row left to right: Robert Rudolph, Will Korman, Tony Leccese, Joe Merlino, Adam Shafran; not pictured are Bob Shaer and Zachary Tuck.

Rudolph Friedmann LLP is proud to announce that six attorneys in the firm have been selected as Massachusetts Super Lawyers and four attorneys as Rising Stars. Super Lawyers is a rating service of outstanding lawyers from more than 70 practice areas who have attained a high degree of peer recognition and professional achievement. Rising Stars are attorneys under the age of 40 who have received similar recognition. The selection process includes independent research, peer nominations and peer evaluations.

Rudolph Friedmann Partner James Rudolph Named Chairman of the Board of the Associated Builders and Contractors of Massachusetts



Jim is photographed above at ABC's Installation of Officers and Directors event on February 2 with Massachusetts Governor Charlie Baker and Lieutenant Governor Karyn Polito.

Rudolph Friedmann managing partner **James Rudolph** has been elected Chairman of the Board of the Associated Builders and Contractors of Massachusetts (ABC). A longtime, active member of the organization, Rudolph previously served as ABC's Chairman from 2001 to 2002 and was the first attorney in the country to hold this position. Rudolph has served as ABC's General Counsel since 2002.

Rudolph Friedmann's $6.5 million settlement in the class action case involving 450 employees of Allied Waste Services of Massachusetts appeared in *Massachusetts Lawyers Weekly*'s list of the "Largest Verdicts & Settlements of 2015." The case, *Swiderski v. Allied Waste Services of Massachusetts*, was the sixth-largest settlement of 2015 and the largest employment settlement of the year.

Rudolph Friedmann recently filed a federal class action lawsuit against Pepperidge Farm alleging that the company has misclassified many of its workers as independent contractors.

The case involves an Illinois worker and alleges that Pepperidge Farm exploited its sales development associates (SDAs) by improperly classifying them as independent contractors. The potential class includes all SDAs in Illinois who were under contract with Pepperidge Farm between February 12, 2006, and February 12, 2016. The case is being handled by Associate **Adam Shafran** and Partner **Jonathon Friedmann**. The firm has also filed similar lawsuits against Pepperidge Farm in Massachusetts and California.

Rebecca Castegner is our new receptionist. She is a graduate of Syracuse University (2014) and now attends Suffolk Law School as a member of the Class of 2019. In her free time, she enjoys listening to podcasts and walking with her Chihuahua, Leo.

Adam Shafran married Andrea Tyler in Paris on January 2. Andrea is a Senior Compliance Analyst at Financial Engines. The couple will reside in Needham, MA.