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Daniel E. Murray

ACCOMMODATION PARTIES: A POTPOURRI OF PROBLEMS

DANIEL E. MURRAY*

I. INTRODUCTION

The Uniform Commercial Code succinctly states that "an accommodation party is one who signs the instrument in any capacity for the purpose of lending his name to another party to it."[1] An accommodation party who signs as a maker (or as a co-maker) is bound on the instrument without any demand for payment being made upon the party accommodated—the principal debtor.[2] On the other hand, if the accommodation party signs the instrument as an indorser he will not be liable unless presentment for payment is made upon the maker and notice of dishonor is given to him within the proper time.[3] An accommodation party is often described as a "surety,"[4] but it must be stressed that as an accommodation party his rights and liabilities are governed first by the Uniform Commercial Code and then secondarily governed by the general suretyship rules applying to the usual surety. The accommodation party is a species of the genus suretyship.

There is not, to the knowledge of the writer, any empirical study as to why people become accommodation parties to negotiable instruments and as to their knowledge of their liability which they incur by signing. In a recent case, however, an accommodation party was asked why he signed and his answer is probably representative of the chagrin of most accommodation parties: "And I did do it for him. I don't know why, as I said before, I should have had my head examined for doing it."[5] Many

* Professor of Law, University of Miami.

1. UNIFORM COMMERCIAL CODE § 3-415(1) [Hereinafter cited as U.C.C.].
2. U.C.C. § 3-415, Comment 1.
3. *Id.*
4. *Id.*
5. Ebeling v. Lowry, 203 So.2d 506, 507 (Fla. 4th Dist. 1967).

lawyers who have permitted their clients to become accommodation parties may share this feeling.

This article is designed to develop a series of problems which might arise in typical (if there is such a thing) lending transactions; hypothetical fact patterns are used with the hope that they may aid the reader in understanding the application of the legal principles.

II. Does an Accommodation Party Warrant to a Subsequent Holder?

Assume that Don Debtor and Mary Debtor are joint payees of a promissory note. Don Debtor agrees to pledge the note as collateral for a loan. The lender, Lewis Lender, refuses to make the loan until Sam Surety indorses the note for the accommodation of Mary Debtor. Don Debtor then forges Mary's name as payee and Sam Surety innocently signs his name. Don Debtor then indorses the note and delivers it to Lewis Lender. At maturity, Don Debtor is insolvent and Mary Debtor denies liability upon the ground of forgery. Does Lewis Lender have any recourse against Sam Surety?

Under the Negotiable Instruments Law,[6] Sam Surety would warrant "that the instrument is genuine and in all respects what it purports to be." He would be liable for breach of warranty for either the amount of the loan, or the amount of what would have been received if there had not been a forgery in accordance with the damage rule of the particular jurisdiction in which suit was brought.[7] Insofar as warranty liability was concerned, the N.I.L. lumped the unqualified indorser for value and the accommodation indorser under the same rule: both classes of indorsers warranted that the instrument was genuine.

The Uniform Commercial Code adopts a diametrically opposite approach: "Any person *who transfers an instrument and receives consideration* warrants to his transferee and if the transfer is by indorsement to any subsequent holder who takes the instrument in good faith that . . . all signatures are genuine or authorized; . . ."[8] The typical "gratuitous" accommodation indorser who lends his name to another party does not receive consideration; there is consideration for lending his name (the original promise of the accommodated party to the creditor will support the additional promise of the accommodation indorser), but the accommodation indorser does not receive consideration for lending his name. However, the comments point out that an accommodation indorser may receive consideration from the creditor in certain cases, for example

6. Negotiable Instruments Law §§ 65, 66 [Hereinafter cited as N.I.L.].

7. Comment, *Warranties on the Transfer of a Negotiable Instrument—U.C.C. § 3-417(2)*, 17 Stan. L. Rev. 77, 87-91 (1964).

8. U.C.C. § 3-417 (emphasis supplied); *see* 1 W. Hawkland, A Transactional Guide to the Uniform Commercial Code 520-521 (1964).

"where A and B buy goods and it is understood that A is to pay for all of them and that B is to sign a note only as a surety for A."[9] In this latter case it would appear that *B* has received consideration and should be deemed to warrant that *A*'s signature is genuine. This example in the comments speaks about *B* receiving consideration from the payee of the note, and this would seem to fit the literal wording of Section 3-417. However, if *B* should receive consideration from *A* directly rather than from the payee, would *A* receive consideration in the sense that these words are used in 3-417? The comments are not of any great assistance in solving this problem, and the author suggests that courts may, perhaps, impose this warranty liability on accommodation indorsers in this latter situation.

If we revert back to the original example given above concerning the forgery of Mary Debtor's signature, it may be questioned whether this warranty discussion is much ado about nothing because another section of the Code states that "every indorser engages that upon dishonor . . . he will pay the instrument according to its tenor at the time of his indorsement to the holder . . . ."[10] Further, a comment to this section states that "all indorsers incur this liability, without regard to whether or not the indorser transferred the instrument for value or received consideration for his indorsement."[11] This section seems to impose liability on any indorser on a contractual basis rather than on a warranty basis, and the holder (and his attorney) is concerned with payment rather than with any particular theory of liability. If one stops at this point, it is quite true that as a general rule an unqualified indorser will be liable on his indorsement contract as well as his warranty contract; if the unqualified indorser does not receive consideration he will not be liable as a warrantor but he will still be liable on his contract of indorsement. However, this general rule is subject to the exception followed by many courts that an accommodation party will not be liable when there is no principal debt for which he is acting as a surety.[12]

A similar result can seemingly be reached under the Code. Under section 3-407 forgery of the payee's signature "discharges any party whose contract is thereby changed" and a comment notes that "The contract of any party is necessarily affected, however, by the discharge of any party against whom he has a right of recourse on the instrument."[13] Under section 3-404, the accommodation indorser would have no rights on the instrument against the payee (Mary Debtor) whose signature was forged. Finally, under section 3-415(3) oral proof would be admissible to give the accommodation party the benefit of discharges dependent on

9. U.C.C. § 3-415, Comment 2.
10. U.C.C. § 3-414(1).
11. U.C.C. § 3-414, Comment 1.
12. L. SIMPSON, SURETYSHIP 271-272 (1950).
13. U.C.C. § 3-407(2)(a); Comment 3c.

his character as such against our hypothetical Lewis Lender who took with actual notice of Sam Surety's status as an accommodation indorser.

We add a new dimension to our problem if we now assume that Lewis Lender negotiates the promissory note to a holder in due course who has no notice that Sam Surety signed the note as an accommodation party. It seems clear under the Code that Sam Surety could not introduce parol evidence to show his accommodation status in order to assert the defense of discharge as he could in the prior paragraph.[14]

We can further complicate matters by assuming that Sam Surety's indorsement preceded the forged indorsement of Mary Debtor and the true signature of Don Debtor. Sam Surety's signature would then be an irregular or anomalous indorsement. This anomalous indorsement shows that it is not in the chain of title and it gives notice to subsequent indorsees that Sam Surety is an accommodation indorser and parol evidence may then be introduced to give Sam Surety the benefit of discharge as an accommodation indorser.[15]

It seems most unfortunate that the Code eliminated any kind of warranty liability of the accommodation indorser. Lewis Lender would not have lent the money without the indorsement of Sam Surety and now this indorsement has proven to be worthless. The approach of New York in providing that an accommodation indorser warrants to any subsequent good faith holder who is not the party accommodated that signatures on the instrument are genuine, that the instrument has not been materially altered, that all prior parties had capacity to contract and that the accommodation party has no knowledge of any insolvency proceedings instituted regarding the maker, acceptor or drawer of an unaccepted instrument does give the holder the benefit of his bargain.[16]

III. Is an Accommodation Party Who Signs After Maturity of the Instrument Bound to a Holder?

Assume that Don Debtor has given a note to Lewis Lender and the note is now due. Lender now asks Don Debtor to secure the accommodation indorsement of Sam Surety. Lewis Lender at the time of this request made no statements to Don Debtor that the time of payment would be extended if this additional signature were secured. Don Debtor induces Sam Surety to indorse the note while it is in the hands of Lewis Lender. Is Sam Surety liable to Lewis Lender? Prior to the advent of the Code, the general view in the United States was that Sam Surety would not be liable because there was no consideration for his signature

14. U.C.C. § 3-415(3). *See* S. Kinyon & McClure, A Study of the Effect of the Uniform Commercial Code 562 (1964); and S. Kinyon & R. McClure, A Study of the
15. U.C.C. § 3-415(4).
16. N.Y. Uniform Commercial Code § 3-415.

on these facts.[17] However, if the original borrowing agreement between Don Debtor and Lewis Lender provided that Don would secure an accommodation party on the note, the signing after maturity would be deemed to relate back to the original agreement and the subsequent accommodation indorsement would be supported by consideration.[18] Likewise, if the original lending agreement provided that Don Debtor would furnish additional security for the payment of the note at a later date, the signature of Sam Surety, given after default, would be supported by consideration (in the view of some courts) because again it would relate back to the original lending of Lewis Lender.[19] If Lewis Lender in our hypothetical problem agreed with Don Debtor to extend the time for payment subsequent to default upon a promise that Sam Surety would indorse the note, then Sam Surety's engagement would be supported by consideration.[20]

Two Florida cases, *Conn v. Boulevard National Bank*[21] and *Ebeling v. Lowry*,[22] factually involved the question of consideration for the signature of an accommodation party after default, but neither case clearly raised the issue. In *Conn* the original note provided that the payee had the right to demand "additional securities to the satisfaction of the Payee,"[23] and the individual accommodation indorser (who was president of the corporate maker) indorsed after default. The court upheld the liability of the accommodation indorser apparently upon the basis that the indorsement was "security" under the original lending agreement, although the specific issue of consideration was not articulated. In *Ebeling* the original maker was told by the holder that he would be sued unless he produced a co-signer "to guarantee the payments."[24] The court upheld the joinder of the original maker and the accommodation co-maker accommodation party in one suit upon the authority of *Conn*. Again, the consideration issue was not discussed.

The U.C.C. provides that when an instrument has been taken for value before it is due the accommodation party is liable in the capacity in which he has signed.[25] The comments explain that this provision is designed to change some decisions which have held that there is no consideration when an accommodation party signs a note after it is in the hands of a holder who has given value. The accommodation party is liable "even though there is no extension of time or other concession."[26] Although

17. W. BRITTON, BILLS AND NOTES 255-231 (2d ed. 1961).
18. W. BRITTON, BILLS AND NOTES 222 (2d ed. 1961).
19. The cases pro and con are discussed in Annot., 167 A.L.R. 1174 (1947); 11 AM. JUR. 2d *Bills & Notes* § 240 (1963); W. BRITTON, BILLS AND NOTES 226-227 (2d ed. 1961).
20. W. BRITTON, *supra* note 18, at 226.
21. 148 So.2d 758 (Fla. 3d Dist. 1963).
22. 203 So.2d 506 (Fla. 4th Dist. 1967).
23. 148 So.2d 758 (Fla. 3d Dist. 1963).
24. 203 So.2d 506, 507 (Fla. 4th Dist. 1967).
25. U.C.C. § 3-415(2).
26. U.C.C. § 3-415, Comment 3.

this comment seems to be directed to a situation where the note is not in default, it would seem broad enough to encompass a signing after default. If consideration is not needed in the first situation it should not be necessary in the second. This construction would seem consistent with another section of the Code which provides that "no consideration is necessary for an instrument *or obligation thereon* given in payment of *or as security for an antecedent obligation of any kind*."[27] The comments note that this clause encompasses a case where an indorsement of a note is given as security for a debt already owed by a third party and that no extension of time or other concession is given by the creditor.[28]

The signing after maturity by an accommodation party may present an additional problem. If we assume that an instrument has been indorsed prior to maturity by an accommodation indorser, will he be affected by the addition of another accommodation indorser's signature *subsequent* to maturity? A number of relatively old cases have held that a surety would be discharged by the addition of another accommodation party's indorsement on the theory that the contract of the first accommodation party had been changed.[29] Of course there has been a change in the contract, but the change would in most cases be beneficial rather than detrimental.

It is believed that the U.C.C. will result in an overruling of this authority. The Code provides that any change "in . . . the number or relations of the parties" will constitute a "material" change.[30] The comments note that "the addition of a co-maker or a surety does not change in most jurisdictions the contract of one who has already signed as *maker* and should not be held material as to him."[31] Although the comment refers to "makers," by analogy the principle could be extended to accommodation indorsers. Even if a court should refuse to draw this analogy and hold that the second accommodation indorsement was a material change, it should hold that the first accommodation indorser would not be discharged unless it was further established that the change was "both fraudulent and material."[32]

IV. Rights of Contribution Between Successive Accommodation Parties

Assume that Don Debtor wishes to borrow $10,000 from Lewis Lender in return for a note signed by Don Debtor. Lewis Lender agrees to make the loan if Don Debtor can secure the indorsements of two

27. U.C.C. § 3-408.
28. U.C.C. § 3-408, Comment 2. *See* 1 W. Hawkland, A Transactional Guide to the Uniform Commercial Code 562 (1964); and S. Kinyon & R. McClure, A Study of the Effect of the Uniform Commercial Code on Minnesota Law 340-341 (1964).
29. L. Simpson, Suretyship 335-336 (1950).
30. U.C.C. § 3-407(1)(a).
31. U.C.C. § 3-407, Comment 1.
32. U.C.C. § 3-407(2)(a). *Cf.* Katski v. Boehm, 36 L.W. 2685 (Md. App. 1968).

accommodation indorses whose credit rating is satisfactory to Lewis. Don Debtor then induces Sam Surety to indorse and, on the following day, Don Debtor persuades Albert Accommodating to indorse below the signature of Sam Surety. The note is delivered and the loan is made. Don Debtor defaults and Lewis Lender makes demand upon Albert Accommodating who pays, and he, in turn, calls upon Sam Surety to pay the entire amount. Sam will assert that he is liable for only one-half of the amount paid on the basis that he is a co-surety and liable for a contributive share, rather than the entire amount. Albert Accommodating will counter that Sam Surety is not a co-surety, and he is liable for the entire amount as an indorser.

Prior to the Code, Albert Accommodating would base his argument on the N.I.L. which provided that "as respects one another, indorsers are liable *prima facie* in the order in which they indorse; but evidence is admissible to show that as between or among themselves they have agreed otherwise."[33] The majority of courts have construed this section to mean that there would not be any right of contribution between successive indorsers unless there was proof that the two accommodation indorsers in fact signed as co-sureties pursuant to an agreement between themselves.[34] The mere fact that Albert Accommodating might have been informed by Don Debtor that Sam Surety had also signed for Debtor's accommodation could not create any kind of an implied agreement between the two accommodation indorsers to share the burden under a contribution theory.[35] The U.C.C. offers even less solace to Sam Surety: "Unless they otherwise agree indorsers are liable to one another in the order in which they indorse, which is presumed to be the order in which their signatures appear on the instrument."[36] The comments note that parol evidence is admissible to show that the indorsers have indorsed in another order "or that they have otherwise agreed as to their liability to one another."[37] Except for any possible difference insofar as the words "prima facie" and "presumed" connote an increased burden of persuasion, courts which have refused to apply a contribution remedy in our hypothetical fact situation may continue to do so.

It may be interesting to note that if Sam Surety and Albert Accommodating had become sureties for Don Debtor on a contract which was not negotiable (*e.g.*, a building or sale of goods contract) the usual rules of

33. N.I.L. § 68.

34. W. BRITTON, BILLS AND NOTES 597-600 (2d ed. 1961). *Compare* 10 S. WILLISTON, CONTRACTS § 1262 (3d ed. 1967).

35. Both Britton and Williston have criticized the cases articulating this result. W. BRITTON, BILLS AND NOTES 598-600 (2d ed. 1961) and 10 S. WILLISTON, CONTRACTS § 1262 (3d ed. 1967). *Compare*, 1 W. HAWKLAND, A TRANSACTIONAL GUIDE TO THE UNIFORM COMMERCIAL CODE 565 (1964) in his discussion of U.C.C. § 3-414.

36. U.C.C. § 3-414(2). *See* S. KINYON & R. MCCLURE, A STUDY OF THE EFFECT OF THE UNIFORM COMMERCIAL CODE ON MINNESOTA LAW 355-359 (1964).

37. U.C.C. § 3-414, Comment 4.

contribution between the two sureties would apply even though they signed at different times and without agreeing among themselves as to the contribution aspect.[38] It is primarily in the negotiable instrument area that the suretyship rules are modified.

When one tries to apply the Florida law to our original hypothetical problem, the apparent "simplicity" of result under the U.C.C. seems to vanish. A recently amended Florida statute provides:[39]

> When a person executes any bond, note, draft or bill of exchange and two (2) or more persons execute it jointly with him, merely as his sureties, or endorse any note or draft or bill of exchange as sureties for the maker or drawer for his accommodation and without consideration, said persons are bound to each other for a proportional contribution of the amount of said bond, note, draft or bill of exchange. If any person is compelled to pay any part of said bond, note, draft or bill of exchange, he may sue his cosurety for contribution separately or jointly. Defendants, whether sureties, accommodation joint makers or accommodation endorsers may be sued separately or jointly.

Under the above statute it would seem clear that if two or more makers "jointly" (in the sense of acting in concert) executed a note and some of the co-makers were sureties for the principal-debtor-maker, the sureties would have a right of contribution against him. What is not clear, however, is whether the word "jointly" is limited to those persons who act in concert in one transaction as distinguished from the case where the principal-debtor-maker induces one friend to co-sign as maker on one day and induces another friend to co-sign on the following day and neither co-maker-surety has any kind of agreement with the other. This uncertainty becomes more pronounced when one looks at the words "or endorse any note . . . as sureties for the maker . . . for his accommodation and without consideration." Does the word "jointly" in the preceding clause, modify these words, or does the quoted clause operate independently to provide that consecutive accommodation indorsers are liable to each other on a contribution theory regardless of the fact that they did not "endorse" together in one setting or group? Although the answer is not free from doubt, it is suggested that successive indorsers should be liable for a "proportional contribution" even though they might not have acted "jointly." This view is supported by another recently amended statute.[40] The statute first provides that makers and sureties, who become parties "at or before the execution and delivery" of the instrument, "or are otherwise secondarily liable for payment," may be sued in the same

38. *See generally* 10 S. Williston, Contracts § 1277A (3d ed. 1967).

39. Fla. Stat. § 46.011 (1967), *as amended*, Fla. Laws 1967, ch. 67-254, S.B. 441 (1967).

40. Fla. Stat. § 46.041 (1967), *as amended*, Fla. Laws 1967, ch. 67-254, S.B. 441 (1967).

action, and it requires that the judgment specify who are secondarily liable as indorsers or sureties. Finally,

> (3) When a final judgment authorized by this section is paid by one or more defendants who are liable only as endorser, surety, guarantor, or otherwise secondarily, the holder of such judgment shall, on request, assign such judgment to the defendants paying it. Such defendants are entitled to all the rights and remedies of the original plaintiff to enforce collection from the other defendants who are liable.

The use of the word "defendants" is confusing. In the second line of the quoted material the word "defendants" includes those who are secondarily liable, and the same meaning seems to be attributed to the word "defendants" in line five. However, is the word "defendants" in line seven used with the same intention? If it is, then "proportional contribution" would seem to be the result. On the other hand, if the word "defendants" in line seven has this narrow meaning, then it would seem to imply indirectly that an accommodation party who paid the judgment would have no recourse against the principal debtor. This statute, before its recent amendment, stated that a secondarily liable person who paid the judgment would be

> entitled to all the rights and remedies of the original plaintiff in such judgment or under execution thereon to enforce the collection of the same from the defendants *who are liable as makers of the instrument sued upon.*[41]

The District Court of Appeal, Second District held under the original statute that an accommodation party who received an assignment of the original judgment from the judgment creditor could not enforce the judgment against a co-indorser and guarantor of the note.[42] The amended statute has overruled this case.

It may be possible to reconcile the various possibilities presented by this amended statute. It is submitted that this amended statute merely reiterates a right of contribution against accommodation indorsers to be enforced by means of an assignment of the original judgment. It should not be interpreted to mean that it is intended to eliminate the right of recourse which a paying accommodation party has, independently of this remedial statute, to recover against the principal debtor—the maker of the instrument. If this view of the author is correct, then the two statutes cumulatively seem, perhaps, to give a right of contribution to accommodation parties even though they have not acted in concert.

If this latter view is correct, then one additional problem remains:

41. FLA. STAT. § 46.11 (1965) (emphasis added).
42. Freed v. Giuliani, 164 So.2d 234 (Fla. 2d Dist. 1964).

the U.C.C. did not repeal these statutes[43] and are we faced with an irreconcilable conflict? It would seem that a court could say that the U.C.C. provisions are designed to apply to the ordinary indorser who has indorsed for consideration and that the two Florida statutes are designed to supplement the Code in the narrow area of accommodation parties; the rules do not conflict—the parochial Florida statutes have merely carved out an exception to the general rule.

V. THE RIGHT OF AN ACCOMMODATION PARTY TO UTILIZE SUBROGATION AGAINST A CO-ACCOMMODATION PARTY.

Assume that Don Debtor wishes to borrow $10,000 from Lewis Lender. Lewis Lender is willing to make the loan if Don Debtor can induce Sam Surety and Albert Accommodating to sign a note as co-makers with Don Debtor. The note is signed by all three parties and Lewis Lender makes the loan. Don Debtor is completely insolvent at the time of maturity, and Albert Accommodating is thrown into involuntary bankruptcy soon thereafter. Lewis Lender makes demand for payment upon Sam Surety and Sam pays the full amount owing. As we have seen,[44] Sam would have a right to a fifty percent contribution ($5,000) from his co-maker, Albert Accommodating. And if we assume that the bankrupt estate has sufficient assets to make a distribution of fifty cents on the dollar, a claim based on the contribution principle would result in Sam Surety recovering $2,500.

If, on the other hand, Sam Surety should utilize the theory of subrogation (rather than contribution) he will recover $5,000 in our problem. Under the subrogation theory, Sam Surety will step into the shoes of Lewis Lender for the full amount ($10,000) of the original debt which Sam Surety paid insofar as a claim against the bankrupt estate of Albert Accommodating is concerned.[45] The estate is able to pay fifty cents on the dollar, so Sam Surety will receive $5,000, which is the exact amount that Albert Accommodating owed him under the theory of contribution.[46] It may be objected that this subrogation approach will result in an unjustified windfall to Sam Surety if the bankrupt estate is able to pay more than fifty cents on the dollar. If the estate is able to pay seventy-five cents on the dollar, Sam Surety should receive $7,500, or $2,500 more than he is entitled to. Fortunately, the subrogation rule is subject to a countervailing principle: the dividends received from the bankrupt estate under a subrogation principle are limited to the amount due Sam

43. FLA. STAT. § 680.10-102 to 104 (1967).

44. *See* notes 33-34 *supra*.

45. FLA. STAT. § 46.041 (1967) *as amended* Fla. Laws 1967, ch. 67-254, S.B. 441 (1967), which was discussed in the text accompanying note 40 *supra*, is merely a legislative codification of this general subrogation principle.

46. Restatement of Security § 162 (1941); L. SIMPSON, SURETYSHIP 222-223 (1950); 10 S. WILLISTON, CONTRACTS § 1271 (3d ed. 1967).

Surety by means of the contribution principle. Hence, Sam Surety can never receive more than $5,000 in our hypothetical example.[47]

If we revert back to our original subrogation example wherein Sam Surety received $5,000, it may be objected that he will receive twice as much as other unsecured creditors of the bankrupt estate and that this does not seem fair. Why should money be taken from the pockets of other unsecured creditors to give a windfall to Sam Surety? The usual answer (which may not satisfy the reader) is that since Lewis Lender could have filed a claim against the bankrupt estate for the entire amount of the note ($10,000) the other unsecured creditors are not put in a worse position when this right is filed by the co-surety, Sam Surety. It is true that if Lewis Lender had filed a claim for $10,000 (the entire amount of the note) he would have received a dividend of $5,000 (fifty cents on the dollar), the same amount received by Sam Surety when he filed his subrogation claim. Lewis Lender after receiving his $5,000 from the bankrupt estate would now proceed against Sam Surety for the remainder ($5,000), and we would have the same result as if Sam Surety had originally paid the $10,000. To further "prove" our equation, if the bankrupt estate paid seventy-five cents on the dollar, the estate would pay Lewis Lender $7,500 and the trustee then would have a claim against Sam Surety for $2,500 and Lewis Lender would also have a claim against Sam Surety for the remaining $2,500. The opponents of the general rule are really saying that although subrogation is proper in most situations, it is not when one co-surety has become bankrupt.[48]

VI. RELEASE OF ACCOMMODATION PARTY BY THE HOLDER'S IMPAIRMENT OF RECOURSE OR RELEASE OF COLLATERAL: RESERVATION OF RIGHTS

If the number of reported cases is any criterion, one of the most troublesome areas in accommodation paper deals with the modification of the original loan contract and its effect upon the rights of the parties. Assume that Don Debtor induces Sam Surety and Albert Accommodating to sign a note as co-makers with him. The note is issued to Lewis Lender and it is secured by a security interest in goods (or by a real estate mortgage) given by Don Debtor. It is the general rule that if Lewis Lender should subsequently agree with Don Debtor to extend the time for payment under a "binding agreement,"[49] or should reduce the interest rate, he will be deemed to have released Sam Surety and Albert Accommodating from any liability on the note.[50] In a somewhat similar vein, a

47. RESTATEMENT OF SECURITY § 162 (1941); 10 S. WILLISTON, CONTRACTS § 1271 (3d ed. 1967).

48. 3 COLLIER ON BANKRUPTCY §§ 57.21[7] and 63.18[2] (14th ed. J. Moore 1967).

49. Cole v. Exchange Nat'l Bank, 183 So.2d 195 (Fla. 1966); N.I.L. § 120 (6); U.C.C. § 3-606(1)(a); L. SIMPSON, SURETYSHIP 351 (1950); W. BRITTON, BILLS AND NOTES § 292 (2d ed. 1961).

50. L. SIMPSON, SURETYSHIP 333-334 (1950). *But cf.* U.C.C. § 3-407, Comment 3b.

material modification of any provision of the note or the underlying security agreement will also release the two co-maker sureties.[51] Likewise, if Lewis Lender should release Albert Accommodating he will also be deemed to have released Sam Surety, and if Lewis Lender should release Don Debtor he will also inadvertently release both of the co-makers.[52] Finally, if Lewis Lender should release all of the property incumbered by the security interest he will likewise have released both Sam Surety and Albert Accommodating.[53] When Lewis Lender releases only a part of the property from the lien of the security agreement, there is a split of authority: some courts say that the release of any of the security releases the accommodation parties entirely, while other courts hold that that is a *pro tanto* discharge.[54] Under either view, Lewis Lender is adversely affected by his act of generosity.

These suretyship rules need not be traps for the unwary because the same rules which provide for the discharge of the accommodation parties also provide three means of preserving Lewis Lender's rights of recourse against accommodation parties.

It is well established that the original note may provide that the accommodation parties assent or consent to extensions of time of payment, modification of other terms of payment or enforcement of security, etc. at the option of the holder and without notice to the accommodation parties, and these provisions will permit the holder to do any of these acts without releasing or discharging the accommodation parties.[55]

In the event that the original note fails to evidence the assent or consent of the accommodation parties to actions by the holder which would discharge them in the ordinary case, they may, of course, express their consent at a later time when the holder manifests his intention to extend the time of payment, release a co-accommodation party, etc.[56] Of course, accommodation parties may be disinclined to give this consent unless they have a personal interest in seeing that the boon is extended to the principal debtor. For example, the president of a corporation who has signed for the accommodation of the corporation may be anxious to secure an extension of time for payment by the corporation and be willing to consent to an extension of his own liability in return for this boon to the corporation. It should be noted that if the holder of the instrument should enter into a binding agreement to extend the time of payment with the principal debtor without securing the consent of the accommodation party

51. L. SIMPSON, SURETYSHIP 340 (1950).
52. N.I.L. § 120(5); U.C.C. § 3-606(1)(a).
53. W. BRITTON, BILLS AND NOTES § 292 (2d ed. 1961); U.C.C. § 3-606(1)(a).
54. *Compare* W. BRITTON, BILLS AND NOTES § 292 (2d ed. 1961).
55. N.I.L. § 120(6) binding extension of time; U.C.C. § 3-606(1), Comment 2 and § 3-118(f); RESTATEMENT OF SECURITY § 122 (1941); Bleakley and Sarasota Bank, 194 So.2d 918 (Fla. 2d Dist. 1967); 10 S. WILLISTON, CONTRACTS § 1223 (3d ed. 1967).
56. U.C.C. § 3-606, Comment 2.

to remain bound, the consent may be secured afterwards and it does not require any consideration to bind the accommodation party.[57] Of course, any hope that an overlooked accommodation party may be this cooperative will be a risky thing at best.

Still a third protective device is available to the holder of the note. The holder may reserve his rights of recourse against the accommodation parties in the same instrument by which he extends the time for payment, or releases one party to the instrument, etc., provided that the accommodation party against whom recourse is reserved is notified of the fact. As a practical matter, a carbon copy of the extension agreement should be given immediately to the accommodation party.[58] It may be thought to be unjust to allow the holder of the instrument to modify the original loan agreement or to release collateral or a party to the note and, at the same time, to reserve his rights against the accommodation party. However, the apparent injustice disappears when it is noted that the accommodation party is not necessarily harmed by the unilateral act of the holder. The accommodation party may tender full payment to the holder[59] and then immediately proceed against the principal debtor on the theory of reimbursement.[60] In this case the extension of time (or other relief extended by the holder) will be of no avail to the principal debtor. The accommodation party may also immediately demand that the principal debtor exonerate the accommodation party from any possible loss. The accommodation party has an arsenal of defensive weapons—reimbursement, exoneration and contribution—which he may utilize against the principal debtor or against the collateral given to secure the instrument.[61] The real danger is not to the accommodation party but to the improvident holder who re-

57. 10 S. Williston, Contracts § 1223 (3d ed. 1967); U.C.C. § 3-606, Comment 2. *See* London Leasing Corp. v. Interfina, Inc., 53 Misc. 2d 657, 279 N.Y.S.2d 209 (Sup. Ct. 1967), *noted in* 85 Banking L.J. 258 (1968).

58. U.C.C. § 3-606, Comment 4 states that the express reservation of rights "to be effective must be accompanied by notification to any party against whom rights are so reserved." This comment does not clearly state that the reservation of rights must be in writing. Many courts have used the parol evidence rule to deny admission of any parol evidence that the creditor has reserved his rights against accommodation parties. *Compare* 10 S. Williston, Contracts § 1230 (3d ed. 1967) *with* 4 A. Corbin, Contracts 732-760 (1951). *See also* the penetrating analysis in the case of Parnes v. Celia's, Inc. (N.J. Super. Ct.) 36 U.S. L.W. 2520-2521 (1968).

> It should also be noted that it was not necessary under the Code for the obligee to give notice to the accommodation maker of the express reservation of rights against him when granting the obligor a time extension. N.J.S. 12A: 3-606(2). The section is devoid of any provision for such notice. Official Comment 4 to Section 3-606 is misleading in its allusion to a requirement of notice, referring to a supposed subsection (3). There is no subsection (3) in Section 3-606 as finally adopted by the Commissioners on Uniform State Laws and enacted in this State. There was such a subsection in the 1952 draft of the Code, which called for a diligent effort by the holder to notify the party affected as to the reservation, within ten days. But that subsection (3) was omitted from the final draft of the Code section and is of no effect, notwithstanding that Official Comment 4 was not revised concordantly. Conford, J.

59. U.C.C. § 3-604.

60. U.C.C. § 3-415(5).

61. *E.g.*, Restatement Of Security § 129, comment *d* and § 122, comment *d*.

leases the principal debtor or modifies the note without reserving his rights of recourse against the accommodation parties.

The first paragraph of this section used the phrase "binding agreement," and a further discussion of this phrase would seem to be in order. The Negotiable Instruments Law formerly provided that a person secondarily liable on the instrument was discharged "by any agreement binding upon the holder to extend the time of payment" unless the secondary party assented to the extension or the holder reserved his right of recourse against the secondary party.[62] In accordance with the word "binding," the Florida courts consistently held that any agreement between the holder and the primary debtor to extend the time of payment would not be "binding" unless it was supported by adequate consideration, such as the advance payment of interest by the debtor, or a promise to pay interest upon interest.[63] If the agreement to extend the time of payment was not supported by this adequate consideration, then the secondary party would not be discharged. This Florida position was in accordance with the pre-code majority view.[64]

The U.C.C. provides that the holder discharges any party to the instrument when he agrees with any person "to suspend the right to enforce against such person the instrument or collateral or otherwise discharges such person."[65] It is to be noted that the Code has eliminated the word "binding." The comments to this section make no reference to the intention of the draftsmen as to whether the former rule of consideration was retained. A prior section states that a holder "may even without consideration discharge any party . . . by renouncing his rights by a writing signed and delivered . . . ."[66] It would seem that if a holder may renounce his rights entirely without consideration, he ought to be able to extend the time of payment without consideration. Likewise, if an accommodation party may bind himself without consideration by agreeing to remain liable on the instrument after the creditor has extended the time of payment to the principal debtor, then any necessity for consideration in making the extension "binding" seems a bit inconsistent.[67] On the other hand, it has been stated that this Code provision was not intended to change the former rule.[68] Professor Britton has argued in favor of the

62. N.I.L. § 120(6).

63. *E.g.*, Card v. Commercial Bank, 119 So.2d 404 (Fla. 1st Dist. 1960); Fort Pierce Bank v. Sewall, 113 Fla. 811, 152 So. 617 (1934); L. & S. Enterprises v. Miami Tile & Terrazzo, Inc., 148 So.2d 299 (Fla. 3d Dist. 1963); Williams v. Peninsular Grocery Co., 73 Fla. 937, 75 So. 517 (1917).

64. W. BRITTON, BILLS AND NOTES 685-89; 10 S. WILLISTON, CONTRACTS § 1222 (3d ed. 1967).

65. U.C.C. § 3-606(1)(a).

66. U.C.C. § 3-605(1)(b).

67. *See* Note 57 *supra*.

68. R. Cosway, *Negotiable Instruments—A Comparison of Washington Law and the Uniform Commercial Code*, printed in the UNIFORM COMMERCIAL CODE IN WASHINGTON 377-378 (1967). Compare the more qualified view of Penney, *A Summary of Articles 3 and 4 and their Impact in New York*, 48 CORNELL L. J. 47,72 (1962).

rule requiring a binding agreement and the concomitant discharge of the surety because, unless the surety was discharged, the creditor could require payment from the surety who upon payment would be free to sue the principal debtor for reimbursement. "It is to avoid this anomalous result that the surety is discharged."[69] Britton admits that this "anomalous result" may occur if the creditor reserves his rights against the surety at the same time that he enters into a binding extension agreement with the principal debtor because the surety may then opt to pay the creditor and proceed immediately against the principal debtor.[70]

To summarize, if the courts follow prior authority then gratuitous extension agreements will not serve to discharge the accommodation parties while binding agreements will do so unless the holder reserves his rights against the accommodation parties. Until the courts have taken a definitive position, it would seem wise for all extension agreements ("binding" or gratitutous) to provide for a reservation of rights against accommodation parties.

VII. REQUIRED FORMALITIES OF SIGNATURES BY WIVES WHO ARE ACCOMMODATION PARTIES

The Florida Constitution provides that a wife's separate property "shall not be liable for the debts of her husband without her consent given by some instrument in writing executed according to the law respecting conveyances by married women."[71] The Supreme Court of Florida has interpreted the word "conveyance" to include the conveyance of real property as well as the "conveyance" of personal property, and that the statutes setting forth the requirements for "conveyances" at the time of any particular transaction would govern rather than the statutory definition of conveyances at the time of the adoption of the Constitution of 1885.[72] The present statutes require that a conveyance of land must be by an instrument signed by the grantor and the signature must be witnessed by two witnesses.[73] The joinder by the husband is required when the wife is conveying her separate real estate.[74] On the other hand, there are no statutes articulating specific formalities for the "conveyance" of personal property and the wife may "convey" this personal property without the joinder of her husband.[75] The question remains: "What does the word 'conveyance' really mean in this constitu-

69. W. BRITTON, BILLS AND NOTES 685 (2d ed. 1961).
70. *Id.*
71. FLA. CONST. art. 11, § 1.
72. Springfield Co. v. Ely, 44 Fla. 319, 32 So. 892 (1902).
73. FLA. STAT. § 689.01 (1967) an acknowledgment of the grantor's signature, the address of the grantee on the deed and the name and address of the party drafting the instrument are required for recording of the instrument. FLA. STAT. § 695.03-695.04, 695.21 and Fla. Laws, ch. 67-53, S.B. 201 (1967).
74. FLA. STAT. §§ 693.01 and 708.08 (1967).
75. FLA. STAT. § 708.08 (1967).

tional provision?" It seems rather clear that if the wife merely signs the note as a co-maker[76] or she merely indorses it as an accommodation indorser for the debt of her husband who has signed as maker, her signature will not bind her separate property.[77] However, it would appear that if collateral (*e.g.*, corporate stock) which is owned in whole or in part by the wife is described in the note and the note provides that the wife consents to the pledging of the collateral for the debt of her husband, this will comply with the constitutional mandate even though the wife's signature is not witnessed.[78] In a similar vein, if collateral (again corporate stock) is "attached to and made a part of the note"[79] and this collateral is owned by the wife, at least this separate property—the corporate stock—will be liable for the debts of her husband.

If we assume that the wife's separate property consists of real property or tangible personal property which may not be physically annexed to the promissory note, the problem becomes more complex. It would appear that the wife's separate property (both real and tangible personal property) must either be described in the note or in a separate instrument which is incorporated by reference into the promissory note. It would also seem advisable that the wife's signature on the note or on the incorporated instrument should be attested by two witnesses and acknowledged, and if the collateral consists of real property the husband should also join in the execution of the note or the incorporated instrument.[80]

The constitutional provision speaks of "the debts of her husband."[81] and it becomes important to determine in certain cases whether the debt of the husband or a third person is involved. For example, if the husband and wife should jointly sign an instrument guaranteeing credit purchases made by a corporation it has been held that the debt is the debt of the corporation and not that of the husband even though it would appear that the husband may have been in control of the corporation,[82] and she will be liable when she is an accommodation indorser for a corporation in which she is the owner of one-half of the corporate stock and of which her husband is president. In this latter case it would appear that the wife's other separate property would be liable also and not only the corporate stock which she pledged.[83] In a similar vein, the wife's separate property is liable when she and her husband sign as accommodation makers of a note executed by a corporation even though her husband has an interest

76. Jette v. Harbison, 158 Fla. 418, 28 So.2d 858 (1947).

77. Kovens v. Bluestone, 145 So.2d 473 (Fla. 1962).

78. Springfield Co. v. Ely, 44 Fla. 319, 32 So. 892 (1902).

79. Chisholm v. Coconut Grove Exch. Bank, 144 Fla. 770, 771, 198 So. 703 (1940).

80. Pilson v. Guillery, 168 So.2d 547 (Fla. 3d Dist. 1964); Matthews v. McCain, 125 Fla. 840, 170 So. 323 (1936).

81. FLA. CONST. art. 11, § 1.

82. Continental Can Co. v. Lee Co., 40 So.2d 783 (Fla. 1949).

83. Weinstein v. Susskind, 162 So.2d 683 (Fla. 3d Dist. 1964).

in the corporation.[84] There is a certain superficial appeal to the notion that the wife is binding her separate property for the debts of the corporation rather than for the debts of her husband, but is this notion necessarily valid? Under the U.C.C. if the words "payment guaranteed" are added to a signature, the signer promises that he will pay the instrument "without resort by the holder to any other party."[85] The comments note that when these words are added to the signature of an indorser "the liability of the indorser becomes indistinguishable from that of a co-maker."[86] Under this view, the wife who is guaranteeing payment for the corporation is also guaranteeing payment for her hubsand when the corporation fails to pay the instrument.

If we take the simple case of a husband and wife signing as accommodation makers or as accommodation indorsers for the benefit of the corporation in which the husband has an interest (a close corporation which may be owned entirely by the husband), do we not have a somewhat similar situation? It is true that the primary debt is between the corporation and the holder of the note and the husband and wife have jointly bound themselves to pay this primary debt in the event of default by the corporation. However, as between the husband and wife there is a secondary debt concept involved: the wife will be liable if the husband fails to pay when the corporation defaults and vice versa. In effect each accommodation spouse is back-stopping the other spouse's debt upon default by the primary debtor—the corporation. It should be noted that a similar argument has been raised before the Supreme Court of Florida and rejected by some non-responsive citations of authority.[87]

It would appear rather obvious that when a husband and wife embark upon some form of joint venture, and the spouses execute a promissory note, the wife is not promising to pay "the debts of her husband" and she is liable for the entire amount of the note when she is sued by an accommodation indorser who has paid the original holder.[88]

A rather unusual application of this "debt of the husband" concept

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84. Marinelli v. Weaver, 187 So.2d 690 (Fla. 2d Dist. 1966).

85. U.C.C. § 3-416(1). The pre-Code law in Florida was the same. Quarngesser v. Appliance Buyers Credit Corp., 187 So.2d 662 (Fla. 3d Dist. 1966).

86. U.C.C. § 3-416, Comment.

87. Continental Can Co. v. Lee Co., 40 So.2d 783, 784 (Fla. 1949). The court cited the Married Woman's Emancipation Act, Fla. Stat. § 708.08 (1943), as an answer to this contention upon the basis that the act removed her disabilities and enabled her to execute the "contract of guaranty by which she became liable for the debt of the corporation and that of her husband. Any other interpretation would in effect vitiate chapter 21932 [FLA. STAT. § 708.08]." It is submitted that the emancipation act is subject to the rule of FLA. CONST. art. 11, § 1, and to that extent it is vitiated. If the court had analyzed this fact pattern properly it should have seen that the emancipation act had nothing to do with the problem.

88. *Compare* Gallion v. Belk, 180 So.2d 349 (Fla. 1st Dist. 1965) *with* Matthews v. McCain, 125 Fla. 840, 170 So. 323 (1936). *See also* Delong v. Larkin, 208 So.2d 830 (Fla. 1968.)

was involved in *Singletary v. Singletary*.[89] A husband gave his promissory note, indorsed by an accommodation indorser, to a creditor. The husband died and his widow issued her promissory note, indorsed by the same accommodation indorser who indorsed her husband's note, to a lender and used the proceeds to pay her husband's note. The accommodation indorser on the widow's note paid the lender and then sued the widow. The court held that the widow was liable to her accommodation indorser on the theory that she was being sued on her own note and not for the debt of the husband. With a little ingenuity, this case principle could be used to avoid the constitutional prohibition in numerous cases.

It is submitted that a very recent case pushed the constitutional mandate to a dryly logical extreme. A wife co-signed a simple promissory note with her husband and the note was issued to a bank. The proceeds of the note were placed in the husband's separate checking account and he used these funds to purchase property as a tenancy by the entirety with the wife. The husband subsequently died and the bank was denied any recourse against the wife because of the constitutional prohibition. Obviously the bank was somewhat to blame for its own loss; however, it just does not seem proper that the wife should be able to reap the benefit of the loan and then state it is the husband's debt. The constitutional provision ought to be a shield rather than a sword.[90]

VIII. Notice of Dishonor and Discharge

In the average case, the accommodated party (principal debtor) will sign a promissory note as a maker, and the accommodation party will sign as an indorser or as a co-maker. However, there is no rule which requires this order of execution, and, in unusual cases the accommodated party may be an indorser rather than a maker. For example, assume that Don Debtor wishes to borrow money but he knows that most potential lenders in the area will look askance at a note which he offers to give as maker because of his shaky credit rating. Don Debtor then induces Sam Surety to execute a note to Albert Accommodating as payee, and Don Debtor induces Albert Accommodating to indorse the note to him. By this arrangement, Sam and Albert are accommodation parties for Don Debtor. Don Debtor then indorses the note to Lewis Lender, who subsequently indorses to a holder in due course who takes without knowledge of the status in which Sam Surety, Albert Accommodating and Don Debtor became parties to the instrument.

The holder presents the note to Sam Surety at maturity and the instrument is dishonored. The holder gives notice of dishonor to Lewis Lender and Albert Accommodating, but fails to give it to Don Debtor. The Code provides that "notice of dishonor is necessary to charge any in-

89. 130 Fla. 347, 177 So. 546 (1937).
90. American Nat'l Bank v. Brantley, 204 So.2d 251 (Fla. 1st Dist. 1967).

dorser" unless notice is excused.[91] In a similar vein, any indorser is discharged when without excuse any necessary notice of dishonor is delayed beyond the time when it is due.[92] Of course, the whole problem of lack of notice to Don Debtor may be eliminated if Sam Surety, Albert Accommodating or Lewis Lender gives notice of dishonor to Don Debtor because the Code provides that notice of dishonor may be given to any persons who may be liable on the instrument "by or on behalf of the holder or any party who has himself received notice, or any other party who can be compelled to pay the instrument."[93]

If we assume, however, that Don Debtor was not given notice by any one, is he discharged in accordance with the apparent mandates of the Code? The Code seems to have anticipated this question and prevented any unjust result by providing that notice of dishonor is entirely excused if the party (Don Debtor) "has no reason to expect or right to require that the instrument be . . . paid."[94] There would seem to be little question that as between the accommodation parties (Sam Surety and Albert Accommodating) and the principal debtor (Don Debtor), Don Debtor would have no reason to expect or right to require that the accommodation parties pay his debt. On the other hand, it may be argued that the fact that Don Debtor has no right to expect the accommodation parties to pay his debt to the holder does not affect another fact that the holder who took the note without knowledge of the arrangement failed to give notice to Don Debtor and he should be discharged from liability on the note to the holder. If this view is adopted, the accommodation parties who are forced to pay are not without recourse because the Code provides that the accommodation parties have a right of recourse on the instrument against the accommodated party.[95] This solution would result in at most a temporary discharge or victory of the accommodated party. The accommodated party is discharged as to the holder but not discharged as to the accommodation parties.

The entire presentment for payment and notice of dishonor problem may be eliminated if the body of the promissory note contains a provision to the effect that all parties waive presentment for payment, notice of dishonor and protest.[96] If the body of the note does not contain this provision, it may be added to the reverse side of the instrument above the signatures of indorsers. However, "where it is written above the signature of an indorser it binds him only."[97] It is clear that the waiver

91. U.C.C. § 3-501(2)(a).
92. U.C.C. § 3-502(1)(a).
93. U.C.C. § 3-508(1).
94. U.C.C. § 3-511(2)(b).
95. U.C.C. § 3-415(5).
96. U.C.C. § 3-511(6). The pre-code rule in Florida was to the same effect. *See* Roepke v. Kaenel, 182 So.2d 651 (Fla. 1st Dist. 1965).
97. U.C.C. § 3-511(6).

clause on the reverse side of the instrument will not bind parties whose signatures appear on the face of the instrument, but the effect of this quoted language on indorsers following the first indorser is uncertain. This Code provision was derived from section 110 of the N.I.L., and the majority of courts have held that this provision would bind only the first indorser.[98] It has been suggested by one authority that the clause should bind only the first indorser, unless the clause unambiguously refers to more than one indorser.[99]

IX. MISCELLANEOUS PROBLEMS

The law of accommodation parties may be further complicated by statutory enactments or case law which although primarily designed for problems involving usury, corporations, bankruptcy and homestead have residuary effects on the overall law of suretyship. For example, a Florida statute provides that no corporation which shall have refused to pay any of its obligations "shall transfer any of its property to any of its officers, directors or stockholders, directly or indirectly, for the payment of any debt, or upon any other consideration than the full value of the property paid in cash."[100] In *Alberts v. Schneiderman*[101] a corporation assumed payment on bonds held by the plaintiff. Subsequently, the corporation borrowed money on a promissory note which was indorsed by Alberts as an accommodation indorser. Alberts was an officer and director of the corporation. After the corporation had refused to pay the bondholder, it made payments on the note. The bondholder obtained judgment against the corporation for the failure to pay the bonds and then brought an action against Alberts under the above statute. The court held that the corporation's payments on the note were "at least an indirect benefit to him [Alberts] if not a direct benefit,"[102] and that the judgment creditor would have a cause of action against Alberts for the amount of this "benefit." It is to be noted that on these facts it would not be necessary for the judgment creditor to allege and prove that the corporation was insolvent when it made the payments to the payee of the promissory note; refusal to pay other creditors rather than insolvency of the accommodated party (the corporation) is the criterion. It would appear that this statute destroys any real right of exoneration or indemnification of a corporate officer or director who has become an accommodation party for a corporation which has failed to pay its debts.

Florida and many other states permit the charging of interest at a higher rate from corporations than from individual borrowers, and many

98. U.C.C. § 3-511, Comment 9. *See also* W. BRITTON, BILLS AND NOTES § 218 (2d ed. 1961).

99. W. BRITTON, BILLS AND NOTES § 218 (2d ed. 1961).

100. FLA. STAT. § 608.55 (1967).

101. 182 So.2d 50 (Fla. 3d Dist. 1966).

102. *Id.* at 52.

lenders insist that individuals form a corporation to appear as the borrower and for the individuals to indorse the loan instruments as accommodation parties. Under this arrangement, the lender may charge a higher rate of interest from the "thin" corporation and still have the security of the credit of the individual indorsers. The expectations of Florida lenders will be frustrated in the event that the corporation fails to pay because although a Florida statute[103] provides that a corporation may legally bind itself to pay fifteen per cent interest, another statute[104] provides that an individual secondarily "liable as endorser, guarantor, surety, or otherwise on a corporate obligation" may not be liable for interest in excess of ten percent per annum. It is submitted that this statute could not be avoided by having the individual sign as a co-maker. An accommodation co-maker may not be an "endorser" but he will be deemed to be a surety.

The Federal bankruptcy law provides that the liability of a surety for a bankrupt "shall not be altered by the discharge of such bankrupt."[105] This rule merely codifies the expectations of the lending class because the possibility of bankruptcy of the principal debtor is one problem (perhaps the most important one) which lenders intend to guard against by requiring the principal debtor to have an accommodation party or parties lend their credit to the loan instrument. If the rule were to the contrary, the concept of suretyship would soon sink into oblivion. This "simple" rule presents a trap for the unsophisticated lender which was described in the recent Florida case of *Rose v. Grable*.[106] The Federal statute speaks about a "discharge of such bankrupt," and this connotes a discharge by operation of law and not by consent of the lender-creditor. In *Rose* the principal debtor underwent an arrangement proceeding under chapter XI of the Bankruptcy Act. The bankruptcy court confirmed a plan of arrangement of twenty percent, but, for some undisclosed reason, the lender agreed to accept a fifteen percent payment in full discharge of the debt. The lender then brought suit in the state court against the alleged accommodation indorser for the unpaid remainder of the debt. The state court held that the voluntary compromise entered into between the principal debtor and the lender constituted a discharge of the surety. The court noted that a composition among creditors under the bankruptcy act would not have released the accommodation indorser while a voluntary compromise has the opposite effect.[107]

It is the view of the author that if a "voluntary compromise" in the bankruptcy court is to be equated with a "release of the principal," then

103. FLA. STAT. § 687.03 (1967).

104. FLA. STAT. § 687.11 (1967).

105. 11 U.S.C. § 34 (1964).

106. Rose v. Grable, 203 So.2d 648 (Fla. 3d Dist. 1967).

107. The *Rose* decision is in accord with the majority view. *See* 9 COLLIER ON BANKRUPTCY § 9.32[11] (14th ed. J. Moore 1964); 10 S. WILLISTON, CONTRACTS § 1215, note 3 and § 1220 (3d ed. 1967).

the lender should be able to reserve his rights against the accommodation party in the same instrument by which he manifests his release of the principal debtor, in accordance with the "reserving of recourse" principle already discussed.[108]

The law of accommodation parties becomes even more difficult when it collides with the Florida homestead laws. In *Furlong v. Leybourne*,[109] a husband and wife gave their non-purchase money note and mortgage on their homestead to a savings and loan institution. The husband used the loan proceeds to pay his own debt. The husband subsequently died. The court held that the wife was an accommodation maker as to her deceased husband, but was primarily liable to the savings and loan association. The widow, as accommodation maker, would normally have had recourse against the estate of her deceased husband. However, the time for filing claims had passed. The lineal descendants of the deceased husband claimed that the widow (their stepmother) was obligated to pay the entire indebtedness, while the widow claimed that as an accommodation maker she was entitled to the protection of the mortgaged property and that she should not be liable except for a deficiency in the event that the property sold for less than the amount of the note and mortgage. The court chose a position somewhat in between these extreme positions. The widow was held to be obligated to pay the monthly payments as they fell due. However, she could pay the entire indebtedness and would then be subrogated to the right of the savings and loan association as against the real property. If the widow chose this procedure, she could foreclose the mortgage and wipe out the remainder interests of the lineal descendants. On the other hand, the court seemed to state that if the lineal descendants chose to pay the entire indebtedness, they in turn would be subrogated to the savings and loan association's mortgage and could wipe out the widow's life estate. It would seem that the necessity for the court's deciding upon either one of these unhappy alternatives would have been obviated if the lender had filed its claim against the estate of the deceased husband, or the widow had done likewise, within the proper time.[110]

108. *See* notes 58-61 *supra*, and accompanying text.

109. 138 So.2d 352 (Fla. 3d Dist. 1962).

110. *See* Gibbons v. Crowder, 208 So.2d 296 (Fla. 2d Dist. 1968) and Phillipi Creek Homes, Inc. v. Arnold, 174 So.2d 552 (Fla. 2d Dist. 1965).