

Louisiana Law Review

Volume 41 | Number 3

Symposium: Maritime Personal Injury

Spring 1981

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Repository Citation

Lester Joseph Zaunbrecher, *Green Garden: Short Shrift for the Solidary Surety*, 41 La. L. Rev. (1981)

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Green Garden: SHORT SHRIFT FOR THE SOLIDARY SURETY

Three stockholders signed identical continuing guaranty agreements, each limited to \$86,350, to secure a bank loan for a corporation. Each guarantor bound himself *in solido* with the corporation, waived the pleas of discussion and division, and gave the bank the right to release securities without notice.¹ One guarantor received a discharge in bankruptcy, and, after filing suit, the bank released another guarantor with a reservation of rights. The remaining guarantor contended that he was discharged by the release of his co-guarantor, which had impaired his conventional and legal rights of subrogation.² Rejecting this argument, the Louisiana Supreme Court awarded judgment to the bank and *held* that the express terms of the defendant's contract of suretyship with the bank superseded the applicable provisions of the Civil Code.³ *First National Bank of*

1. Each agreement provided in part:

I hereby give this continuing guaranty . . . for the payment in full, of any indebtedness . . . of said debtor to said Bank up to the amount of . . . (\$86,350.00), plus all interest, attorney fees, other fees . . . whether due now or to become due and whether now existing or hereinafter arising. The Bank may, one or more times in its judgment grant extensions, take and surrender securities, accept compositions, release or discharge indorsers, guarantors or other parties, grant releases and discharges generally, make changes of any sort whatever in the terms of the contract or manner of doing business with the debtor and with other parties and securities in relation thereto without notice to the undersigned, such notice being hereby specifically waived . . . I do furthermore bind and obligate myself, my heirs and assigns, in solido with said debtor, for payment of said indebtedness precisely as if the same had been contracted and was due or owing by me in person, . . . making myself a party thereto, hereby waiving all notice including . . . all pleas of discussion and division and I agree upon demand at any time, to pay to said Bank, its transferees or assigns, the full amount of said indebtedness up to the amount of this guaranty, plus all interest, attorney fees, other fees, and charges, as above set forth, becoming subrogated in the event of payment in full by me to the claim of said Bank, its transferees or assigns, together with whatever security it or they may hold against said indebtedness.

First Nat'l Bank of Crowley v. Green Garden Processing Co., Inc., 387 So. 2d 1070, 1072 n.3 (La. 1980).

2. LA. CIV. CODE art. 3061 provides: "The surety is discharged when by the act of the creditor, the subrogation to his rights, mortgages and privileges can no longer be operated in favor of the surety." While the defendant surety in *Green Garden* claimed a *complete* discharge, the jurisprudence is well settled that article 3061 allows the surety only a discharge *pro tanto*. *Barrow v. Shields*, 13 La. Ann. 57 (1868); *Provan v. Percy*, 11 La. Ann. 179 (1858); *Saulet v. Trepagnier*, 2 La. Ann. 427 (1847). See Schully, *The Extinction of the Surety's Obligation*, 23 LOY. L. REV. 539, 550 (1977). Surprisingly, the *Green Garden* court avoided any discussion of the *pro tanto* discharge doctrine. See note 18, *infra*.

3. The supreme court affirmed the circuit court's lesser award of \$70,077.10, because the bank had failed to appeal from that judgment. 387 So. 2d at 1074 n.7. The award given by the Third Circuit Court of Appeal represented principal of \$57,566.66 (2/3 of \$86,350.00) and attorney fees of \$12,510.44 (2/3 of \$18,765.66). *First Nat'l Bank of*

Crowley v. Green Garden Processing Company, Inc., 387 So. 2d 1070 (La. 1980).

The Louisiana Civil Code embodies the traditional civil law concept of suretyship as a promise that creates a liability *accessory* to that of the principal debtor.⁴ Because of the nature of the surety's obligation, often undertaken gratuitously, the Civil Code affords the surety certain rights and defenses.⁵ Accordingly, a contract of suretyship cannot be presumed; it must be evidenced by a written agreement that details the express terms of the surety's engagement.⁶ The jurisprudence is well settled that a surety is entitled to a strict construction of his contract, and all ambiguities are to be resolved in his favor.⁷ His obligation cannot be greater or more difficult to perform than the obligation of the principal debtor.⁸

Crowley v. Green Garden Processing Co., Inc., 371 So. 2d 1294, 1298 (La. App. 3d Cir. 1979). The basis of the circuit court's calculation under the laws of solidary obligations is discussed in text *infra*, at note 74.

4. LA. CIV. CODE arts. 3035-70. Civil Code article 3035 defines suretyship as "an accessory promise by which a person binds himself for another already bound, and agrees . . . to satisfy the obligation, if the debtor does not." See Hubert, *The Nature and Essentials of Conventional Suretyship*, 13 TUL. L. REV. 519, 520-21 (1939). See also LA. CIV. CODE art. 1771: "A principal contract is one entered into by both parties, on their own accounts, or in the several qualities they assume. An accessory contract is made for assuring the performance of a prior contract, either by the same parties or by others; such as suretyship, mortgage and pledge."

5. LA. CIV. CODE arts. 3035-70. Because suretyship is accessory to the principal obligation, the addition of suretyship to an existing obligation creates several new legal relationships, each governed by different provisions of the Civil Code. See LA. CIV. CODE arts. 3045-51 (surety-creditor), 3052-57 (surety-debtor), 3058 (surety-surety). The personal obligation involved in undertaking a promise to pay the debt of another historically has received special recognition. For a brief but enlightening discussion of the surety's unique position, see Slovenko, *Suretyship*, 39 TUL. L. REV. 427, 427-28 (1965). Early suretyship developed out of friendship and family loyalty. With the growth of commerce the risks became greater, giving rise to the compensated surety. Because his undertaking involves personal gain, the compensated surety is less favored by the law. See, e.g., *Basso v. Export Warranty Co.*, 194 La. 303, 193 So. 654 (1940); *State v. Preferred Accident Ins. Co. of New York*, 149 So. 2d 632 (La. App. 1st Cir. 1963).

6. LA. CIV. CODE art. 3039. See, e.g., *Succession of Moody*, 245 La. 429, 158 So. 2d 601 (1963); *Clayton Mark & Co. v. Waller*, 158 So. 2d 224 (La. App. 1st Cir. 1963); *Texas Co. v. Crais*, 155 So. 405 (La. App. Orl. Cir. 1934); *Continental Ins. Co. v. Prevost*, 154 So. 671 (La. App. 1st Cir. 1934).

7. "[T]he uncompensated or personal surety is the 'favorite of the law', and his obligations are strictly construed . . ." *Wells v. Fidelity & Deposit Co. of Maryland*, 146 La. 169, 171, 83 So. 448, 449 (1919). "Suretyship in Louisiana is 'stricti juris' . . ." *Succession of Nunez*, 335 So. 2d 778, 782 (La. App. 3d Cir. 1976). See *Bonura v. Christiana Bros. Poultry Co. of Gretna*, 336 So. 2d 881 (La. App. 4th Cir. 1976); *Southern Fleet Leasing Corp. v. Airline Builders Serv. Inc.*, 136 So. 2d 458 (La. App. 1st Cir. 1961); *Shreveport Laundries, Inc. v. Sherman*, 7 So. 2d 433 (La. App. 2d Cir. 1942); *Texas Co. v. Couvillion*, 148 So. 295 (La. App. Orl. Cir. 1933).

8. LA. CIV. CODE art. 3037.

When faced with a creditor's claim, the surety is afforded the benefit of discussion,⁹ and, if there are multiple sureties, the creditor can be forced to divide his action among them.¹⁰ The surety can escape liability because of his own insolvency¹¹ or by availing himself of the non-personal defenses of the principal debtor.¹² The surety who pays the debt can claim indemnity from the principal debtor,¹³ the right to be subrogated to the claims of the creditor,¹⁴ and contribution from co-sureties.¹⁵ Further, the surety is given a complete discharge by acts of the creditor that operate to release the principal debtor¹⁶ or to extend the term of the debt without the surety's consent.¹⁷ Impairment of the surety's subrogation rights by the creditor gives rise to a partial discharge, a *pro tanto* reduction in the surety's liability.¹⁸

9. LA. CIV. CODE arts. 3045-46. "Discussion is the right of a secondary obligor to compel the creditor to enforce the obligation against the property of the primary obligor . . . before enforcing it against the property of the secondary obligor." LA. CODE CIV. P. art. 5151. See LA. CODE CIV. P. art. 5152. The right of discussion is lost if not pleaded prior to answer or judgment by default. LA. CODE CIV. P. art. 928. See also *Trinity Universal Ins. Co. v. Good*, 202 So. 2d 379 (La. App. 4th Cir.), cert. denied, 251 La. 396, 204 So. 2d 575 (1967).

10. LA. CIV. CODE art. 3049.

11. LA. CIV. CODE arts. 3042, 3049.

12. LA. CIV. CODE art. 3060.

13. LA. CIV. CODE arts. 3052-53.

14. LA. CIV. CODE art. 3053.

When the surety or sureties pay the creditor . . . the debtor's obligation is not at an end. A new creditor is substituted for the old: the surety having paid the debt, he is subrogated to the rights of the original creditor against the debtor. . . . [T]he debtor's obligation . . . is transmitted . . . with all of its accessories to the surety. Slovenko, *supra* note 5, at 455. Article 3053 equates the surety's right of subrogation with that of the solidary obligor. Civil Code article 2161(3) provides this right "[f]or the benefit of him who, being bound with others, or for others, for the payment of the debt, had an interest in discharging it." The paying surety acquires all of the rights, remedies, and securities of the creditor. *Brown v. Staples*, 138 La. 602, 70 So. 529 (1915); *Davidson v. Carroll, Hoy & Co.*, 20 La. Ann. 199 (1868); *Curtis v. Kitchen*, 8 Mart. (O.S.) 706 (La. 1820).

15. LA. CIV. CODE art. 3058.

16. LA. CIV. CODE art. 2205.

17. LA. CIV. CODE art. 3063.

18. LA. CIV. CODE art. 3061. In a detailed comparison of the Louisiana treatment of suretyship to French authorities, one writer has noted that "[t]he surety is provided this unique benefit in both France and Louisiana because the redactors of the *code civil* reasoned that he obligated himself in consideration of the creditor's privileges and mortgages, by which he must be assured his reimbursement." Note, *Security Rights—Suretyship—Release of Principal Debtor Does Not Discharge Solidary Surety*, 49 TUL. L. REV. 1187, 1189 (1975). "Despite the literal language of the article . . .," observes another writer, "the jurisprudence is clear that the discharge allowed under article 3061 only applies *pro tanto*." Schully, *supra* note 2, at 550.

However, because suretyship is contractual in nature, its effects may be modified by the parties.¹⁹ Standard contracts of suretyship utilized today often call for the surety to bind himself *in solido* with the principal debtor and may contain other stipulations to facilitate collection by the creditor. The problem faced by the Louisiana courts in connection with these contracts is the determination of the extent to which the surety bound *in solido* has waived the benefits of his accessory status.

The surety bound *in solido* with the debtor is denied the benefit of discussion by Civil Code article 3045²⁰ and loses the benefit of division in regard to his co-sureties.²¹ Further, article 3045 states that the effects of the surety's engagement are now to be regulated by the rules of solidary obligations.²²

Solidarity, however, creates a *primary* liability, while suretyship historically and legislatively is an *accessorial* obligation.²³ Applying the rules of solidarity to the surety's obligation substantially changes the effects of his relationships with the creditor, debtor, and co-sureties. For example, while a surety is discharged by the release of the principal debtor,²⁴ a solidary debtor is not discharged by the release of his co-debtors if the creditor reserves his rights.²⁵

19. LA. CIV. CODE art. 11 provides:

Individuals can not by their conventions, derogate from the force of laws made for the preservation of public order or good morals.

But in all cases in which it is not expressly or impliedly prohibited, they can renounce what the law has established in their favor, when the renunciation does not affect the rights of others, and is not contrary to the public good.

20. LA. CIV. CODE art. 3045 provides in part:

[T]he property of such debtor is to be previously discussed or seized, unless the security should have renounced the plea of discussion, or should be bound *in solido* jointly with the debtor, in which case the effects of his engagement are to be regulated by the same principles which have been established for debtors *in solido*.

21. LA. CIV. CODE art. 2094. The creditor may seek full payment from any of the debtors bound *in solido*. Civil Code article 3045 provides that sureties also may renounce the benefit of discussion. Co-sureties bound *in solido* among themselves are considered to have made such a renunciation. *Edward B. Bruce Co. v. Lambour*, 123 La. 969, 49 So. 659 (1909); *Central Bank v. Winn Farmers Co-Operative*, 299 So. 2d 442 (La. App. 2d Cir. 1974). See *Wooten v. Wimberly*, 272 So. 2d 303 (La. 1973).

22. See note 20, *supra*.

23. "[T]he code articles on solidarity assume, at least in matter of contract, a mutuality of interest between the obligors *in solido* with respect to the engagements of each other, whereas the articles on suretyship assume the surety to be acting independently of the primary debtor." *The Work of the Louisiana Appellate Courts for the 1974-1975 Term—Security Devices*, 36 LA. L. REV. 437, 439 n.7 (1976) [hereinafter cited as *1974-1975 Term*].

24. LA. CIV. CODE art. 2206.

25. LA. CIV. CODE art. 2203.

A solidary debtor who pays the debt may recover only a virile share from each of his co-debtors;²⁶ the paying surety may seek complete indemnification from the principal debtor.²⁷ Similarly, while the subrogation rights of a solidary debtor extend only to the recovery of virile shares from his co-debtors,²⁸ the surety is subrogated to any claims the creditor may have against the principal debtor in order to obtain complete reimbursement.²⁹

Early Louisiana jurisprudence generally rejected an interpretation of article 3045 that would deny completely the rights of suretyship to a surety bound *in solido*.³⁰ Under the rationale of these older cases, the surety bound solidarily intended no more than the waiver of the benefits of discussion and division, thus allowing the creditor to proceed immediately against the surety for the full amount of the debt.³¹ In a 1975 case, *Louisiana Bank & Trust Company v. Boutte*,³²

26. LA. CIV. CODE art. 2104. See *Harvey v. Travelers Ins. Co.*, 163 So. 2d 915 (La. App. 3d Cir. 1964).

27. LA. CIV. CODE art. 3052. *But see* LA. CIV. CODE art. 2106 (allows a solidary debtor who is not interested in the debt to be indemnified by the interested debtor).

28. *Harvey v. Travelers Ins. Co.*, 163 So. 2d 915 (La. App. 3d Cir. 1964).

29. See note 14, *supra*.

30. *Alfred Hiller Co. v. Hotel Grunewald Co.*, 138 La. 305, 70 So. 234 (1915); *Alter v. Zunts*, 27 La. Ann. 317 (1875); *Adle v. Metoyer*, 1 La. Ann. 254 (1846). Other cases have relied on article 3045 as a justification for applying the rules of solidarity to specific aspects of a solidary surety's engagement. In *Elmer Candy Co. v. Baumann*, 150 So. 427 (La. App. 2d Cir. 1933), the release of one solidary surety without reservation of rights operated to discharge his co-sureties under the rules of remission as to solidary co-debtors provided by Civil Code article 2203. The court in *Bonart v. Rabito*, 141 La. 970, 979, 76 So. 166, 174 (1917), looked to Civil Code article 2106 to equate a solidary surety with a solidary debtor not interested in the debt, and concluded that "a person may be only a surety . . . and at the same time be liable primarily to the common debtor." The *Bonart* reasoning effectively denied a discharge to a solidary surety upon an extension of term to the principal debtor. See *American Bank & Trust Co. v. Blue Bird Restaurant & Lounge, Inc.*, 279 So. 2d 720 (La. App. 1st Cir.), *aff'd*, 290 So. 2d 302 (La. 1974). Several writers, pointing out the parenthetical nature of the "solidarity" called for by article 3045, have questioned the propriety of attributing such broad effects to that provision. See *1974-1975 Term, supra* note 23, at 443 n.14; Note, *Rights of the Solidary Surety: Louisiana Bank & Trust Co. v. Boutte*, 36 LA. L. REV. 279, 288 (1975). One writer, tracing the article to its source in the *Code civil*, observes that French doctrine considers the stipulation of solidarity in a surety's contract to be only a waiver of discussion and division. Note, *supra* note 18, at 1189.

31. Upon the accrual of a cause of action against the principal and surety, who bound themselves unconditionally and in solido, the surety is without right in law to force the creditor to exhaust all of his remedies against the principal before suing the surety, and the guaranty . . . gives the holder thereof the right to immediately proceed against the guarantor at the maturity or dishonor of the note. *Brock v. First State Bank & Trust Co.*, 187 La. 766, 771-72, 175 So. 569, 570 (1937). See *Hibernia Bank & Trust Co. v. Succession of Cancienne*, 140 La. 969, 74 So. 267 (1917).

32. 309 So. 2d 274 (La. 1975).

the Louisiana Supreme Court adopted a more literal approach to article 3045. The court in *Boutte* determined that the proper interpretation of that article calls for the application of the rules of solidarity to the surety bound *in solido*, but only to the relationship between the surety and the creditor.³³ In *Boutte*, a solidary surety under a continuing guaranty agreement claimed the surety's right of discharge when the creditor released the principal debtor.³⁴ The court, however, denied the surety this right and held him liable for a virile share of the debt as a solidary co-obligor.³⁵

More recent cases have followed and expanded on the *Boutte* holding; the result is that the surety bound *in solido* is considered to have waived all the benefits of suretyship in regard to the creditor.³⁶ In *Aiavolasiti v. Versailles Gardens Land Development Company*,³⁷ the Louisiana Supreme Court relied on dicta in *Boutte* to state that it is an oversimplification of the relationship between the creditor, principal debtor, and solidary sureties to view the principal debtor

33. *Id.* at 278. The *Boutte* court apparently accepted the rationale expressed in *Bonart v. Rabito*, 141 La. 970, 76 So. 166 (1917). Noting the similarity between the surety bound *in solido* and the disinterested solidary co-debtor, the court concluded that the "legal classifications . . . of surety and solidary obligor are not mutually exclusive." *Louisiana Bank & Trust Co. v. Boutte*, 309 So. 2d 274, 277 (La. 1975). Thus, despite the basic difference in the natures of these two types of obligations (primary as opposed to accessorial) the *Boutte* court reasoned that the surety bound *in solido* could be solidary as to the creditor while still a surety as to the principal debtor and co-sureties. *Id.* at 278.

34. 309 So. 2d at 274. LA. CIV. CODE art. 2205 provides in part: "The remission of even conventional discharge granted to a principal debtor, discharges the sureties . . ."

35. *Louisiana Bank & Trust Co. v. Boutte*, 309 So. 2d 274, 279 (La. 1975). Interestingly, the determination of the solidary surety's virile share was not an issue before the Louisiana Supreme Court in *Boutte*, which dealt primarily with a solidary surety's right of discharge under Civil Code article 2205. However, by holding that the rules of solidarity apply to the relationship between the creditor and a solidary surety, the supreme court in *Boutte* affirmed the virile share calculation of the Third Circuit Court of Appeals.

According to the third circuit, the existence of the principal and four solidary sureties, considered as solidary co-debtors, gave rise to five virile shares on a \$200,000 continuing guaranty agreement. Under Civil Code article 2203, a creditor who releases a solidary debtor with a reservation of rights must deduct the portion of the released debtor from the amount owed by the remaining debtors. Thus the surety's share of the debt in *Boutte* after release of the other four parties was one-fifth of the amount of his guaranty, or \$40,000. *Louisiana Bank & Trust Co. v. Boutte*, 298 So. 2d 884, 889 (La. App. 3d Cir. 1974). The defendant surety did not raise this issue before the supreme court.

36. *Aiavolasiti v. Versailles Gardens Land Dev. Co.*, 371 So. 2d 755 (La. 1979); *First Nat'l Bank of Jefferson Parish v. Louisiana Purchase Corp.*, 346 So. 2d 345 (La. App. 4th Cir. 1977).

37. 371 So. 2d 755 (La. 1979).

and sureties as co-debtors *in solido* for all purposes.³⁸ The *Aiavolasiti* court decided that the insertion of solidarity into a contract of suretyship did not alter what was essentially an accessorial obligation.³⁹ Accordingly, while the creditor-surety relationship is to be governed by the rules of solidarity called for by *Boutte*, the rules of suretyship apply to determine the legal effects of the agreement between the sureties.⁴⁰

In the instant case the Louisiana Supreme Court was confronted with a problem of solidary suretyship quite similar to the recent cases following *Boutte* that have applied the laws of solidarity to the creditor-surety relationship. Significantly, the court ignored the Civil Code in reference to both solidarity and the provisions of suretyship, choosing instead to hold the parties to the terms of their contract.⁴¹ Without citing any prior jurisprudential support for this approach, the *Green Garden* court determined that the parties had elected certain specific modifications to the basic contract of suretyship which were to control their legal relationship.⁴² Noting the solidary language of the guaranty agreement and the broad discretion given to the creditor bank to deal with sureties, the court apparently concluded that the defendant surety had waived any and all protections that the Civil Code might have afforded him, either as a surety or as a solidary obligor, against the creditor.⁴³

The *Green Garden* court placed much emphasis on the terms of the agreement that allowed the creditor to "release securities, indorsers, and guarantors without notice"⁴⁴ and considered this provision to give the bank the right to release other sureties without affecting the remaining guarantor's liability.⁴⁵ Since the bank had discretion to release sureties, the court reasoned that the bank was under no obligation to preserve them for the remaining surety's benefit.⁴⁶ The defendant guarantor thus was considered to have waived the right he claimed: to be *completely* discharged by the act of the bank that impaired the rights of subrogation he possessed as

38. *Id.* at 758.

39. *Id.*

40. *Id.*

41. *First Nat'l Bank of Crowley v. Green Garden Processing Co., Inc.*, 387 So. 2d 1070, 1073 (La. 1980).

42. *Id.* at 1073. Relevant provisions of the continuing guaranty agreement are reproduced at note 1, *supra*.

43. Justice Dixon, in a separate opinion, notes that "[t]he contract is so broad in its effort to protect the bank in any contingency that it seems to have suggested exceptions where none exist." 387 So. 2d at 1074 (Dixon, J., concurring).

44. 387 So. 2d at 1073.

45. *Id.*

46. *Id.* at 1074.

a surety. Curiously, the *Green Garden* court did not refer to the established rule that impairment of a surety's subrogation rights gives rise to only a *pro tanto* discharge.⁴⁷ As a result, the defendant guarantor could be made to pay the entire amount of his guaranty, despite partial payment of the debt by the guarantor who had been released.⁴⁸ Only the failure of the bank to appeal prevented the supreme court from increasing a lower award by the appellate court.⁴⁹

The justification given by the court for its construction of this contract of suretyship is found in Civil Code article 1901, which states in part that "agreements legally entered into have the effects of laws on those who have formed them." Thus, the *Green Garden* court considered that the provisions of the guaranty agreement constituted the law between the parties, completely superseding any positive law otherwise applicable.⁵⁰

The *Green Garden* majority opinion makes no reference to the *Boutte* decision, and no reason is given as to why the rationale of the latter case is not applicable. One possible explanation for the result in *Green Garden* is the all-or-nothing situation that developed when the Louisiana Supreme Court did not consider the established doctrine of *pro tanto* discharge. As the court perceived the question, the defendant guarantor was liable either for the full amount of his guaranty or for nothing. Presented with this hard choice, the court may have elected to give an effect to the agreement that arguably would promote the security of such common contracts rather than interpreting the contract to discourage lenders from extending credit.⁵¹

47. See notes 2, 14, & 18, *supra*.

48. The released guarantor agreed to pay a total of \$33,000. *First Nat'l Bank of Crowley v. Green Garden Processing Co., Inc.*, 387 So. 2d 1070, 1073 (La. 1980).

49. *Id.* at 1074.

50. "Where . . . the contract is not silent, the parties are bound by its contents . . ." *First Nat'l Bank of Crowley v. Green Garden Processing Co., Inc.*, 387 So. 2d 1070, 1073 (La. 1980). The case relied on for this proposition, *Louisiana Nat'l Leasing Corp. v. Family Pools, Inc.*, 345 So. 2d 480 (La. 1977), dealt with the liability of sureties bound *in solido* in the context of a lease agreement and involved an exhaustive analysis of contract provisions, in contrast to the court's focus on two separate contract terms seen in *Green Garden*. *Id.* at 483-85. Justice Dennis, who authored the *Family Pools* opinion, dissented in the instant case. 387 So. 2d at 1074 (La. 1980) (Dennis, J., dissenting).

51. The provisions of the continuing guaranty agreement in the instant case, *supra* note 1, are common to standard suretyship contracts. For a background of current financial practices under Louisiana law, see Nathan, *The Civil Code and Modern Methods of Financing*, 50 TUL. L. REV. 583, 590-91 (1976), which discusses the similarity of terms in printed forms used by lending institutions.

The court's complete reliance on contractual terms, a departure from *Boutte*, denies the surety bound *in solido* the rights of a solidary debtor and imposes upon the surety an even greater liability. Under a *Boutte* analysis the release of one guarantor, a *solidary* co-debtor, would reduce the remaining debt by the amount of that debtor's virile share.⁵² Thus, the remaining guarantor, also a *solidary* co-debtor, could not be held liable for the full amount of his guaranty. *Green Garden*, however, imposes an absolute liability upon the surety, unaffected by the creditor's dealings with other parties.

By confining its discussion solely to the creditor-surety relationship, the *Green Garden* majority offers no guidance to the paying surety who now must look to the principal debtor and co-sureties for reimbursement.⁵³ Arguably, a restriction of *Green Garden* to the creditor-surety relationship would not disturb the holding of *Aiavolasiti*, which allows even a surety bound *in solido* the benefits of suretyship in regard to the principal debtor and co-sureties.⁵⁴ Under *Aiavolasiti*, the defendant guarantor in the instant case, after paying the debt, could seek indemnification from the principal debtor corporation, as well as contribution from the released guarantor for a share of the debt.⁵⁵ The applicability of *Aiavolasiti* is questionable, however, because that case specifically recognizes *Boutte's* application of solidarity to the surety-creditor relationship when the surety is bound *in solido*.⁵⁶ The surety's engagement in *Green Garden*, however, was regulated solely by the terms of his contract, which gave rise to an absolute liability rather than a solidary obligation. The effect of this absolute liability upon the other relationships created by suretyship is not clear.⁵⁷

52. LA. CIV. CODE art. 2203.

53. See notes 13-15, *supra*.

54. *Aiavolasiti v. Versailles Gardens Land Dev. Co.*, 371 So. 2d 755, 758 (La. 1979).

55. *Id.*

56. *Id.*

57. The *Green Garden* majority did not discuss the paying surety's right to be indemnified by the principal debtor. Arguably, that remedy would not be affected by the terms of the contract between the creditor and the defendant surety. Thus, under the provisions of Civil Code article 3052, the defendant guarantor could seek reimbursement from the principal debtor for principal and interest paid, together with the costs which the surety has been sentenced to pay.

Further, because the released guarantor was not before the *Green Garden* court, the majority did not decide whether the defendant guarantor had lost the right to seek contribution by the terms of the guaranty agreement. *First Nat'l Bank of Crowley v. Green Garden Processing Co., Inc.*, 387 So. 2d 1070, 1073 (La. 1980). The argument can be made that a surety's waiver of the right to be subrogated to the creditor's claims would not affect the surety's right to contribution under Civil Code article 3058.

Assuming that the defendant guarantor could seek contribution from the released guarantor, the question arises as to what amount could be recovered. Civil Code arti-

The different results obtained by the courts in *Green Garden* and *Boutte* illustrate the problems encountered in trying to change the accessorial obligation of suretyship into something resembling a principal obligation. In each case the courts focused on particular terms of contracts and isolated provisions of the Civil Code to arrive at the conclusion that a surety bound *in solido* has waived the benefits of suretyship in regard to the creditor.⁵⁸ These decisions ignore the effects of other provisions whose application would lead to more consistent results while giving proper recognition to the accessorial nature of suretyship embodied in the Civil Code.

Article 3039 states that “[s]uretyship ought to be expressed, and is to be restrained within the limits intended by the contract.” Considering the express terms of the contract of suretyship in the instant case, this rule of construction was not applied. The contract term relied upon by the majority stated that the creditor bank was entitled to release securities without notice.⁵⁹ However, that term failed to state that such a release would have no effect on the remaining sureties’ liability. More specifically, the language of the contract did not indicate that the signing guarantor intended to waive the right to be discharged by the bank’s impairment of his rights of subrogation.⁶⁰ The supreme court concluded, however, that the waiver of notice was a waiver of the right of discharge.⁶¹ That conclusion is in direct conflict with the traditional *stricti juris* interpretation given a surety’s contract in consideration of the obligation he has undertaken.⁶²

cle 3058 allows the surety who pays the debt to seek contribution from his co-sureties “in proportion to the *share* of each . . .” (Emphasis added). Under *Aiavolasiti* a surety’s share of the debt varies, depending on which party is seeking payment. As to the creditor, the debt is divided equally among the total number of principal debtors and sureties bound *in solido* in accordance with the rules of solidary obligations. *Aiavolasiti v. Versailles Gardens Land Dev. Co.*, 371 So. 2d 755, 758 (La. 1979). For purposes of contribution between the sureties, on the other hand, *Aiavolasiti* requires that the debt be divided by the total number of sureties. *Id.* at 759. However, if each surety is considered to be *absolutely* liable for the *entire* amount of the debt (as in the instant case), any calculation of “shares” would be arbitrary, if not impossible.

58. See notes 35 & 38, *supra*.

59. See note 1, *supra*.

60. First Nat’l Bank of Crowley v. Green Garden Processing Co., Inc., 387 So. 2d 1070, 1072 n.3 (La. 1980).

61. *Id.* at 1074.

62. See note 7, *supra*. No justification has been articulated for denying this basic right to the surety bound *in solido*, whose exposure vastly exceeds that of the well protected simple surety. In the cases that follow *Boutte*, the reliance on article 3045 provides at least some basis, however shaky, for the application of the rules of solidarity. Why the *Green Garden* court chose not to apply the rule of *stricti juris* is not apparent. See text at notes 50-51, *supra*.

Furthermore, the development of suretyship as a unique institution of the civil law presents considerations of public policy that argue against the determination of the rights and liabilities of a surety solely on the basis of the specificity of standardized contractual waivers. The obligation of the gratuitous surety benefits both creditors and debtors alike, and, to further this desirable practice, the Civil Code protects the surety from unlimited financial exposure. However, modern financial practice requires a surety to submit totally to the creditor's terms in order to obtain credit for a principal debtor.⁶³ While freedom of contract is a basic legal principle, the freedom of the surety is limited severely. The individual who wishes to become the surety of another is made to sign a contract of adhesion,⁶⁴ waiving the very laws established for his protection.

The instant case illustrates the precarious position of the person who signs such a "boilerplate" contract of suretyship. Relying on the assurances of the creditor and the protective provisions of the Civil Code, the signer undertakes what he believes to be an accessory obligation, only to find that the courts will afford him no protection against the creditor. If the obligation is intended to be suretyship, however, those provisions of the underlying written agreement that operate to deny the surety's accessorial status should not be enforced.⁶⁵ In the instant case the court's construction of the standard form guaranty contract denies the defendant surety any relief if his subrogation rights are impaired, resulting in an absolute liability in no way resembling an accessory obligation. Yet, the *Green Garden* court specifically recognizes that the defendant's obligation is one of suretyship.⁶⁶ Construction of the surety's contract consistent with suretyship, however, requires that the surety's liability be reduced as a consequence of his loss of subrogation rights.⁶⁷

63. See notes 43 & 51, *supra*.

64.

Broadly defined, a contract of adhesion is a standard contract, usually in printed form, prepared by a party of superior bargaining power for adherence or rejection of the weaker party. Often in small print, these contracts sometimes raise a question as to whether or not the weaker party actually consented to the terms.

Golz v. Children's Bureau of New Orleans, Inc., 326 So. 2d 865, 869 (La. 1976).

65. LA. CIV. CODE art. 1945 provides that "courts are bound to give legal effect to all such contracts according to the *true intent* of all the parties . . ." (Emphasis added).

66. *First Nat'l Bank of Crowley v. Green Garden Processing Co., Inc.*, 387 So. 2d 1070, 1073 (La. 1980).

67. See notes 2, 14, & 18, *supra*.

Even apart from the *stricti juris* approach to suretyship contracts and considerations of public policy, the general rules of contractual interpretation call for a result substantially different from the absolute liability imposed upon the defendant surety in the instant case. Civil Code article 1957 states that in a doubtful case, an agreement is to be interpreted against the drafter,⁶⁸ in the instant case, against the creditor bank who supplied the continuing guaranty form. Accordingly, the contract must be read as a whole with all ambiguities resolved against the party who prepared it.⁶⁹ The guaranty agreement in *Green Garden* contains two arguably contradictory terms: (1) the creditor was given discretion to release securities without notice; and (2) the paying guarantor was entitled to be subrogated to the claims of the creditor.⁷⁰ Reading these terms in a light most favorable to the guarantor, one may conclude that the guarantor did not intend to be liable for amounts that would not be reimbursed; *i.e.*, the guarantor did not intend to give the creditor the right to impair the guarantor's subrogation without a corresponding decrease in the guarantor's ultimate liability.⁷¹

Thus, both the *stricti juris* approach traditionally offered sureties under article 3039 as a benefit of their accessorial status and the more general approach of article 1957 would preclude holding that the defendant guarantor in the instant case was liable for the entire amount of his guaranty. The question then arises as to the amount by which the defendant's liability should be reduced as a result of the release of his co-guarantor.⁷² Applying the rules of

68. Civil Code article 1957 provides that "[i]n a doubtful case the agreement is interpreted against him who has contracted the obligation." Article 1958 provides that "if the doubt or obscurity arise for the want of necessary explanation which one of the parties ought to have given, or from any other negligence or fault of his, the construction most favorable to the other party shall be adopted, whether he be obligor or obligee." The effect of these statutes on the instant case is discussed by Justice Calogero in dissent, noting the well settled status these provisions have achieved in Louisiana. *First Nat'l Bank of Crowley v. Green Garden Processing Co., Inc.*, 387 So. 2d at 1078 (La. 1980) (Calogero, J., dissenting).

69. *Kuhn v. Stan A. Plauche Real Estate Co.*, 249 La. 85, 185 So. 2d 210 (1966); *Ouachita Nat'l Bank in Monroe v. Williamson*, 338 So. 2d 172 (La. App. 2d Cir. 1976); *Crum v. Crum*, 330 So. 2d 925 (La. App. 1st Cir. 1976); *Sabine Constr. Co., Inc. v. Cameron Sewerage Dist. #1*, 298 So. 2d 319 (La. App. 3d Cir. 1974); *Edwards v. Terminix 57, Inc.*, 292 So. 2d 851 (La. App. 2d Cir. 1974); *Borne v. Magnolia School*, 260 So. 2d 793 (La. App. 4th Cir.), *rev'd on other grounds*, 277 So. 2d 642 (La. 1973).

70. See note 1, *supra*.

71. See the discussion of the jurisprudentially developed rule of *pro tanto* discharge at notes 2, 14, & 18, *supra*.

72. Civil Code article 2206 provides that "[w]hat the creditor has received from one of the sureties, in discharge of his suretyship, must be imputed to the debt, and goes toward the discharge of the principal debtor and the other sureties."

solidary obligations in accordance with *Boutte*,⁷³ the creditor in *Green Garden* could consider the corporation and the three solidary guarantors as four solidary co-debtors, each liable for a one-fourth virile share. The discharge of the bankrupt guarantor then would increase the virile shares of the three remaining debtors, who must bear this risk,⁷⁴ to one-third each. The negotiated release of the other guarantor then would reduce the remaining debt by one-third, under Civil Code article 2203. This approach thus would set the remaining guarantor's liability at two-thirds of the amount of his guaranty as a consequence of his solidary liability with the corporation.⁷⁵

The propriety of the *Boutte* approach is doubtful, however, when the different natures of the obligations of the principal debtor and surety are considered. The principal debtor's "share" is always the whole of the debt, for which he is primarily bound.⁷⁶ Payment of the debt by the principal debtor discharges his liability as well as the surety's.⁷⁷ The surety's liability is accessorial, arising only if the principal debtor does not pay.⁷⁸ Furthermore, payment of the debt by the surety does not terminate the liability of the principal debtor, who must now reimburse his surety.⁷⁹ These factors are present in every contract of suretyship and are not dependent on the presence of solidarity.

The application of the rules of solidarity to determine the virile shares of sureties bound *in solido* is incorrect. The principal debtor is never liable for a mere virile share to either the sureties or the creditor and, therefore, should be excluded from the determination of the liabilities among the sureties.⁸⁰ Accordingly, the three original guarantors in the instant case would give rise to three equal shares. The loss occasioned by the discharge of the bankrupt guarantor would be borne by the other two guarantors, who then would have a one-half share each in the debt. Thus, the release of the second

73. See note 35, *supra*.

74. LA. CIV. CODE art. 2104.

75. Relying specifically on *Boutte*, the appellate court reached the same result. *First Nat'l Bank of Crowley v. Green Garden Processing Co., Inc.*, 371 So. 2d 1294, 1298 (La. App. 3d Cir. 1979). See note 2, *supra*.

76. LA. CIV. CODE art. 3035.

77. LA. CIV. CODE arts. 2205, 3035, 3059.

78. LA. CIV. CODE arts. 3035, 3045.

79. LA. CIV. CODE arts. 3052-54, 3057.

80. In dissent, Justice Calogero emphasized the provisions of Civil Code article 3058, in regard to the sureties' rights among themselves, to determine the proper amount of each surety's share of the debt, thus giving proper recognition to the different legal relationships that suretyship creates. *First Nat'l Bank of Crowley v. Green Garden Processing Co., Inc.*, 387 So. 2d at 1079 (La. 1980) (Calogero, J., dissenting).

guarantor would reduce the liability of the remaining guarantor to one-half the amount of his guaranty.⁸¹

The approach suggested, while in direct conflict with *Boutte*, recognizes that a contract of suretyship can never create a principal obligation.⁸² Under Civil Code article 3045, an obligation that is not accessory cannot be suretyship.⁸³

The recognition of the different natures of the obligations of principal and surety in determining their respective liabilities, while less favorable to creditors than *Green Garden* and more burdensome to sureties than *Boutte*, has two distinct advantages. First, proper recognition of the accessorial nature of the surety's obligation preserves those benefits afforded sureties by the Civil Code, thus encouraging suretyship, a desirable institution. Second, consistent results are obtained, in contrast with the conflicting decisions seen in recent years.

While the argument may be made that the Civil Code's provisions on suretyship are inadequate to deal with every situation presented by modern financial practice, the Louisiana legislature has not seen the need to provide a more flexible system. The absolute liability imposed upon the surety in *Green Garden* is foreign to Louisiana law. Neither suretyship nor solidarity, the result is something new altogether, with no basis in the positive law. It is hoped that future decisions will reflect a return to the Civil Code provisions that express the true nature of the surety's obligation.

Lester Joseph Zaunbrecher

81. This result agrees with that of Justice Calogero, who notes the failure of the majority to respect the provisions of the Civil Code on suretyship. *Id.* at 1080 (Calogero, J., dissenting).

82. The surety who binds himself *in solido* with the principal debtor intends the stipulation of solidarity to remove only the burdensome procedural devices of discussion and division in order to facilitate the creditor's collection. See Note, *supra* note 30, at 288. Thus, it is entirely consistent with the nature of suretyship for a surety to bind himself *in solido*, while retaining the special benefits of his accessory status. A surety still may modify the terms of his contract so as to waive some of the protections afforded him by the Civil Code. An individual may intend to contract something other than suretyship. Whether such a situation exists, however, should be determined by an analysis of all relevant factors and should not be the result of implication. See 1974-1975 Term, *supra* note 23, at 442-45; Hubert, *supra* note 4, at 520-21; Slovenko, *supra* note 5, at 441-44.

83. See note 4, *supra*.