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Aiavolasiti: A Conflict Resolved, a Conflict Ignored

J. P. Hebert

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NOTES

Aiavolasiti: A CONFLICT RESOLVED, A CONFLICT IGNORED

To facilitate corporate financing by a bank, five stockholders, including the plaintiff and four of the defendants, each executed a continuing guaranty,¹ making each of them liable in solido with the corporation for any indebtedness the latter might incur. The corporation issued two promissory notes to the bank,² the first one signed only by the maker. The five guarantors and a sixth stockholder, also a defendant, signed the second note as accommodation endorsers. To avoid suit when the corporation defaulted on its obligations, the plaintiff purchased both notes which were then endorsed to him by the bank. The plaintiff, claiming that he was a holder in due course, then brought two suits, later consolidated,³ against the corporation and the other five stockholders, seeking full recovery of the amounts expended to discharge the debts. The Fourth Circuit

1. Each continuing guaranty provided in part:

"I hereby give this continuing guaranty to the [bank], its transferees or assigns, for the payment in full, together with all interest, fees and charges . . . of any indebtedness or liability . . . of said debtor . . . ; I hereby bind and obligate myself, my heirs and assigns, in solido with said debtor, for payment of any such indebtedness or liability precisely as if the same had been contracted and was due or owing by me in person, hereby agreeing to, and binding myself, my heirs and assigns, by all the terms and conditions contained in any note or notes . . . to be signed by [a] debtor, making myself a party thereto and, waiving all notice and pleas of discussion and division, I agree to pay to [the bank], its transferees or assigns, upon demand at any time, the full amount of any indebtedness . . . together with interest, fees and charges, . . . becoming subrogated, in the event of payment by me, to the claim of [the bank] . . . together with whatever security . . . it . . . may hold against said indebtedness . . . ; it being understood and agreed that this continuing guaranty . . . is exclusive of and in addition to any other endorsements, guaranties or obligations, with respect to [the corporation], signed by me or any other guarantor or guarantors separate and apart from this instrument"

Aiavolasiti v. Versailles Gardens Land Dev. Co., 371 So. 2d 755, 757 n.2 (La. 1979).

2. The six stockholders, as co-makers, executed a *third* note in favor of another bank. The corporation was not a party to this instrument. The plaintiff provided funds to his son to purchase the note. The son then sued the five defendants on the note. The Louisiana Supreme Court concluded, however, that the plaintiff was the true party in interest. The court limited the plaintiff's recovery to *one-sixth* of the total amount from each of the defendants, holding that the plaintiff was entitled to contribution from the defendants as co-debtors bound in solido, LA. CIV. CODE art. 3058, rather than as co-sureties, LA. CIV. CODE art. 3058. 371 So. 2d at 760. The court's treatment of this third note appears sound and will not be discussed further.

3. The trial court consolidated three cases. The third is described in note 2, *supra*.

Court of Appeal reasoned that the plaintiff, as a *solidary* debtor, must be limited to contribution from each co-debtor, as provided by the law of solidary obligations. The appellate court thus included the corporation as a debtor in calculating the virile share due from each defendant.⁴ Amending the lower court's judgments as to the two notes, the Louisiana Supreme Court *held* that the legal relationship among "solidary sureties" is governed by the Civil Code's rules of suretyship. Excluding the corporation from the computation of virile shares, the court awarded the plaintiff judgments of one-fifth of the amount he had paid against each of the remaining four guarantors on the first note and one-sixth against each of his five co-endorsers on the second note. *Aiavolasiti v. Versailles Gardens Land Development Co.*, 371 So. 2d 755 (La. 1979).

The Louisiana Civil Code defines suretyship as "an accessory promise by which a person binds himself for another already bound, and agrees with the creditor to satisfy the obligation, if the debtor does not."⁵ Being an *accessory* contract to the underlying agreement between the debtor and the creditor,⁶ suretyship gives rise to three additional legal relationships: (1) surety-creditor;⁷ (2) surety-debtor;⁸ and, if there are multiple sureties, (3) surety-surety.⁹ The surety's liability and aspects thereof vary depending upon the nature of the suretyship agreement.¹⁰

The creation of suretyship in the context of negotiable instru-

4. *Aiavolasiti v. Kurtz*, 361 So. 2d 964, 967-68 (La. App. 4th Cir. 1978), *amended sub nom.*, *Aiavolasiti v. Versailles Gardens Land Dev. Co.*, 371 So. 2d 755 (La. 1979). According to the reasoning of the court of appeal, the plaintiff should have been awarded judgment against each defendant on the first note for *one-sixth* of the sum he had paid and *one-seventh* against each defendant on the second note. However, though the court of appeal concluded that a sixth stockholder had not signed a continuing guaranty and thus was not bound on the first note, the court inexplicably included that defendant in the calculation of virile shares; the court held that the plaintiff was therefore entitled to recovery of a *one-seventh* virile share from each defendant on the first note.

5. LA. CIV. CODE art. 3035.

6. LA. CIV. CODE art. 3035. If the principal obligation ceases to exist, the surety is discharged. LA. CIV. CODE art. 2205. "[T]here must be an underlying contract to support an obligation of suretyship." *Parish of East Baton Rouge v. Travelers Ins. Co.*, 342 So. 2d 226, 228 (La. App. 1st Cir. 1976).

Louisiana Civil Code articles 3035-44 specify the nature and extent of suretyship. Articles 3059-63 deal with the extinction of suretyship.

7. Civil Code articles 3045-51 provide the rules governing the effects of suretyship between the creditor and the surety.

8. This relationship is regulated by Civil Code articles 3052-57.

9. The effects of suretyship among the sureties are stipulated by article 3058. *Cf. W. HAWKLAND, COMMERCIAL PAPER AND BANK DEPOSITS AND COLLECTIONS* 127-47 (1967) (relationships under common law suretyship).

10. See text at notes 18 & 29, *infra*.

ments may greatly affect the rights and obligations of the surety.¹¹ The surety may be bound for the debt itself, which is evidenced by a negotiable instrument.¹² However, the typical surety for such a debt is an "accommodation party," "one who signs the instrument for the purpose of lending his name to another party to it."¹³ Official Comment 1 to U.C.C. section 3-415(1) states that "an accommodation party is always a surety (which includes a guarantor) . . . He differs from other sureties only in that his liability is on the instrument and he is a surety for another party to it."¹⁴ His rights and liabilities vary depending on whether he is an accommodation maker, drawer, or endorser.¹⁵

While the official comments to the U.C.C. imply that suretyship and the accommodation contract are identical in their legal effects, there are some practical differences between the two. Typically, the accommodation party simply attaches his signature to the negotiable instrument; his rights and obligations are thus determined according to the provisions of the U.C.C. On the other hand, the surety often executes a detailed agreement with the creditor, necessitating contractual interpretation by the courts.¹⁶ Moreover, negotiable in-

11. See, e.g., F. HART & W. WILLIER, *COMMERCIAL PAPER* § 13.04, in 2 BENDER'S *UNIFORM COMMERCIAL CODE SERVICE* (1976); W. HAWKLAND, *COMMERCIAL PAPER* 92-93 (1979). See generally Peters, *Suretyship Under Article 3 of the Uniform Commercial Code*, 77 *YALE L.J.* 833, 836-37 (1968).

Louisiana's laws governing negotiable instruments are codified as title 10 of the Revised Statutes and are known simply as Commercial Laws—Commercial Paper. LA. R.S. 10:3-101 to -807 (Supp. 1974). The Louisiana legislature adopted substantially all of the Uniform Commercial Code (U.C.C.) provisions on commercial paper. Prior to January 1, 1975, the effective date of the Commercial Laws, the Negotiable Instruments Law (N.I.L.), codified as Title 7 of the Revised Statutes, regulated commercial paper. Because the Commercial Laws and the U.C.C. are virtually identical, reference hereinafter primarily will be to the U.C.C.

12. In this situation, the surety binds himself by the execution of a written contract, such as a continuing guaranty, which is separate and apart from the debt instrument. A continuing guaranty is considered to be a contract of suretyship in Louisiana. *Brock v. First State Bank*, 187 La. 766, 175 So. 569 (1939); *Ball Marketing Enterprise v. Rainbow Tomato Co.*, 340 So. 2d 700 (La. App. 3d Cir. 1976); *Livingston State Bank & Trust Co. v. Steel-Tek, Inc.*, 335 So. 2d 482 (La. App. 1st Cir. 1976); *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).

13. U.C.C. § 3-415(1). *Accord*, LA. R.S. 10:3-415(1) (Supp. 1974).

14. As previously mentioned in note 11, *supra*, the U.C.C. served as the model act for the Louisiana Commercial Laws. The Official Comments to the U.C.C. were not adopted by the Louisiana legislature. However, these comments do provide insight into interpretation of the Louisiana Commercial Laws.

15. U.C.C. § 3-415(2) provides: "When the instrument is taken for value before it is due the accommodation party is liable in the capacity in which he has signed even though the taker knows of the accommodation." The liabilities of makers, drawers, and endorsers are stipulated in U.C.C. sections 3-413 and 3-414.

16. W. HAWKLAND, *supra* note 11, at 95.

struments law may provide different rules for the accommodation contract from those applicable to suretyship transactions not involving commercial paper.¹⁷

Regardless of the effect of the U.C.C. upon suretyship, the nature of the suretyship agreement itself modifies the rights and liabilities of the surety. A *simple* surety is one who is not bound in solido with the principal debtor. The simple surety may assert the rights of discussion,¹⁸ division,¹⁹ and reimbursement²⁰ against the creditor. The surety may also raise various defenses that negate or lessen his liability toward the creditor, such as impairment of subrogation,²¹ extension of time to pay,²² release of the principal

17. The U.C.C. includes substantive and procedural rules different from those of suretyship. An example of a substantive difference is the U.C.C.'s requirement that the accommodated party (principal debtor) actually be a party to the instrument in order to make accommodation status possible. U.C.C. § 3-415(1). However, suretyship law does *not* stipulate that the principal debtor must be bound with the surety on the same written instrument for the latter's liability to exist. *See, e.g.,* Queen Ins. Co. of America v. Bloomenstiel, 184 La. 1070, 168 So. 302 (1936). A procedural difference is that the burden of establishing the liability of an accommodation party is much easier than proving its existence in a suretyship situation. Under U.C.C. section 3-307, a holder of an instrument need merely produce the instrument to be entitled to recover unless the defendant establishes a defense. The holder may, in some cases, then show "holder in due course" status, cutting off many of the defenses which a defendant may raise in a typical contract suit. U.C.C. §§ 3-302 & 3-305. *See also* Peters, *supra*, note 11; Comment, *Suretyship Law and Negotiable Instruments Law: The Liability of an Accommodation Party to a Negotiable Instrument in Louisiana*, 24 LOY. L. REV. 251 (1978).

18. 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 or, if the obligation is a legal or judicial mortgage, against other property affected thereby, before enforcing it against the property of the secondary obligor." LA. CODE CIV. P. art. 5151. *See, e.g.,* State v. Cousin, 31 La. Ann. 297 (1879); Stinson v. Hill, 21 La. Ann. 560 (1869); Bernard v. Curtis, 4 Mart. (O.S.) 214 (La. 1816); Nichols v. Pipes, 353 So. 2d 1086 (La. App. 2d Cir. 1977).

For procedural aspects of the right of discussion, *see* LA. CODE CIV. P. arts. 5152-56.

19. The right of division, which exists only where there are multiple sureties, allows a surety to force the creditor to (1) reduce his demand against the former to only the surety's virile share and (2) seek the remainder from the other co-sureties. LA. CIV. CODE arts. 3049-50. *See, e.g.,* John M. Parker & Co. v. Guillot, 118 La. 223, 42 So. 782 (1907); Pecquet v. Pecquet's Executor, 17 La. Ann. 204 (1865); McCausland v. Lyons, 4 La. Ann. 273 (1849); Filhiol v. Jones, 8 Mart. (O.S.) 635 (La. 1820).

20. The right of reimbursement provides for recovery by the surety from the creditor if the principal debtor has paid a second time without knowledge that the surety had previously discharged the debt. LA. CIV. CODE art. 3055.

21. Impairment of the surety's right of subrogation results in a pro tanto discharge. LA. CIV. CODE art. 3061. *See, e.g.,* Dennis v. Graham, 159 La. 24, 105 So. 87 (1925); Interstate Trust & Banking Co. v. Young, 135 La. 465, 65 So. 611 (1914); Saulet v. Trepagnier, 2 La. Ann. 427 (1847).

22. LA. CIV. CODE art. 3063. *See, e.g.,* Calliham v. Tanner, 3 Rob. 299 (La. 1842);

debtor,²³ non-personal defenses of the debtor,²⁴ and bankruptcy.²⁵ Additionally, the simple surety may claim the rights of subrogation²⁶ and indemnity²⁷ against the principal debtor. Finally, if several persons are sureties for the same debt, the surety who discharges the obligation may seek contribution from the remaining co-sureties for their virile shares.²⁸

A second kind of surety, the so-called "solidary surety," binds himself in *solido* with the principal debtor. By obligating himself in this manner, the solidary surety waives the right of discussion.²⁹ He also waives the right of division if he binds himself in *solido* with his co-sureties.³⁰ Thus, solidary suretyship allows a creditor immediate recourse against the surety for the entire obligation.³¹

A major problem of solidary suretyship is that, because of its solidary nature and the language of Louisiana Civil Code article

Nolte v. Their Creditors, 7 Mart. (N.S.) 9 (La. 1828); Millaudon v. Arnous, 3 Mart. (N.S.) 596 (La. 1825).

23. LA. CIV. CODE arts. 2205-06 & 3035. See, e.g., Williams v. De Soto Bank & Trust Co., 192 La. 848, 189 So. 451 (1939); Dickason v. Bell, 13 La. Ann. 249 (1858).

24. LA. CIV. CODE art. 3060. See, e.g., Satterfield v. Compton, 6 Rob. 120 (La. 1843); Johnson v. Marshall, 4 Rob. 157 (La. 1843); Fort v. Cortes, 14 La. 180 (1839); Baldwin v. Gordon, 12 Mart. (O.S.) 378 (La. 1822).

25. LA. CIV. CODE arts. 3043 & 3049.

26. LA. CIV. CODE arts. 2161 & 3052-56. See, e.g., Martel v. Rovira, 164 La. 1099, 115 So. 283 (1927); Barnes v. Crandell, 11 La. Ann. 119 (1856).

27. LA. CIV. CODE art. 3057. See, e.g., Thompson v. Wilson's Executor, 13 La. 138 (1839); Singer Lumber Co. v. Globe Indem. Co., 161 So. 327 (La. App. Orl. Cir. 1935).

28. LA. CIV. CODE art. 3058. See, e.g., Palmer v. Oscar Dowling Food Products, Inc., 174 La. 923, 142 So. 127 (1932); Stockmeyer v. Oertling, 35 La. Ann. 467 (1883); Phillips v. Pedarre, 5 Pelt. 741 (La. App. Orl. Cir. 1922).

29. LA. CIV. CODE art. 3045; Hibernia Bank & Trust Co. v. Succession of Cancienne, 140 La. 969, 74 So. 267 (1917); New Orleans Canal & Banking Co. v. Escoffie, 2 La. Ann. 830 (1847); Smith v. Scott, 3 Rob. 258 (La. 1842); Thibodeau v. Patin, 1 Mart. (N.S.) 478 (La. 1823); Etzberger v. Menard, 11 Mart. (O.S.) 434 (La. 1822); Aston v. Morgan, 2 Mart. (O.S.) 336 (La. 1812).

30. LA. CIV. CODE art. 2091-94 & 3049. Edward B. Bruce Co. v. Lambour, 123 La. 969, 49 So. 659 (1909); McCausland v. Lyons, 4 La. Ann. 273 (1849); Central Bank v. Winn Farmers Co-op, 299 So. 2d 442 (La. App. 2d Cir.), *cert. denied*, 302 So. 2d 310 (La. 1974).

31. LA. CIV. CODE art. 3045 states:

The obligation of the surety towards the creditor is to pay him in case the debtor should not himself satisfy the debt; and the 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*.

Since the solidary surety waives discussion and division, he is, in essence, "primarily" liable together with the principal debtor for the entire debt. Civil Code article 2094 gives the creditor the right to sue any one of the co-debtors bound in *solido*.

3045,³² it is possible that either the rules of solidary obligations³³ or those of suretyship³⁴ may govern the rights and liabilities of the surety. Application of these two sets of principles results in substantially different solutions in suretyship problems. For example, remission of the debt as to one solidary obligor completely releases the other obligors unless the creditor reserves his rights against them; in that event, the creditor is nevertheless bound to reduce his claim against the remaining co-debtors by the part of the debtor who has been released.³⁵ Alternatively, if the creditor releases the principal obligor, the surety is discharged; but the remission of the surety's obligation has no effect upon the liability of the principal debtor.³⁶ A creditor releases a surety by granting to the principal debtor a modification of the terms of the indebtedness;³⁷ however, a similar modification as to a co-debtor bound in *solido* does not release the other solidary obligors.³⁸ A paying surety may seek complete indemnity from the principal debtor,³⁹ but a solidary obligor who pays the whole debt may claim only a *virile* share from each co-debtor.⁴⁰ The rights of subrogation for a solidary obligor and a surety are also significantly different.⁴¹

Louisiana jurisprudence appears to be settled with respect to which set of rules applies to the *surety-creditor* relationship.⁴² In a

32. See note 31, *supra*.

33. LA. CIV. CODE arts. 2091-107 & 2203. For an overview of how the courts have applied these principles to solidary suretyship, see Note, *Rights of the Solidary Surety: Louisiana Bank & Trust Co. v. Boutte*, 36 LA. L. REV. 279 (1975); Note, *Security Rights—Suretyship—Release of the Principal Debtor Does Not Discharge Solidary Surety*, 49 TUL. L. REV. 1187 (1975).

34. See notes 7, 8, and 9, *supra*. Cf. *The Work of the Louisiana Appellate Courts for the 1974-1975 Term—Suretyship*, 36 LA. L. REV. 437, 443-44 (1976) (suretyship rules apply when the surety merely waives discussion but not when he is bound in *solido* with the debtor).

35. LA. CIV. CODE art. 2203.

36. LA. CIV. CODE art. 2205.

37. LA. CIV. CODE art. 3063.

38. See LA. CIV. CODE arts. 2092, 2095, 2098 & 2100-01.

39. LA. CIV. CODE arts. 2106 & 3057.

40. LA. CIV. CODE art. 2104; *Jobe v. Hodge*, 253 La. 483, 218 So. 2d 566 (1969); *Wunderlich v. Palmisano*, 177 So. 843 (La. App. Or. Cir. 1938). *But cf.* LA. CIV. CODE art. 2106 (seemingly allows solidary surety to seek indemnification from principal debtor).

41. A solidary debtor is subrogated to the rights of the creditor against the other co-obligors only for their proportionate part of the debt. *Shropshire v. His Creditors*, 15 La. Ann. 705 (1860); *Harvey v. Travelers Ins. Co.*, 163 So. 2d 915 (La. App. 3d Cir. 1964). A surety can seek the entire debt from the principal debtor through subrogation. LA. CIV. CODE arts. 2161 & 3052-53.

42. Previously, there had been two sets of conflicting cases. The first set, an early line of decisions, rejected an expansive interpretation of the language, contained in Civil Code article 3045 and its predecessors, which stipulates that the rules of solidary

recent case, *Louisiana Bank and Trust Co., Crowley v. Boutte*,⁴³ the Louisiana Supreme Court held that the release of the principal debtor, when accompanied by the creditor's reservation of rights, does not discharge the solidary surety, the latter having waived his right to complain of the release.⁴⁴ *Boutte* was significant because the court for the first time expressly stated that the rules of solidary obligations apply to the relationship between the creditor and the surety if solidary language is present.⁴⁵

With respect to the *surety-surety* relationship, the applicability of the law of solidary obligations or that of suretyship has been less certain. An early case, *Leigh v. Wright*,⁴⁶ suggested that the rules of suretyship govern the relationship even if the sureties are bound in *solido* with the debtor.⁴⁷ Dictum in *Boutte* indicated that "among the co-obligors . . . bound *in solido*, the legal relationships may be governed by the rules of suretyship,"⁴⁸ with certain exceptions.⁴⁹

obligations govern solidary suretyship. These opinions generally held that the solidary surety was discharged if, without the consent of the surety, the creditor extended the terms of payment, renewed the debtor's note, sold the debtor's mortgaged property at a private sale, or, through confusion, became the principal debtor. *Brewer v. Foshee*, 189 La. 220, 179 So. 87 (1938); *Alter v. Zunts*, 27 La. Ann. 317 (1875); *Jones v. Fleming*, 15 La. Ann. 522 (1860); *Ade v. Metoyer*, 1 La. Ann. 254 (1846).

A later set of cases restricted the suretyship defenses available to a solidary surety, usually denying him the benefits of Civil Code articles 3061-63. Most of these decisions focused on the explicit wording of article 3045, ignoring the fact that only the plea of discussion is mentioned. *Bonart v. Rabito*, 141 La. 970, 76 So. 166 (1917); *Union Nat'l Bank v. Legendre*, 35 La. Ann. 787 (1883); *American Bank & Trust Co. v. Blue Bird Restaurant & Lounge, Inc.*, 279 So. 2d 720 (La. App. 1st Cir. 1973); *Central Sav. Bank & Trust Co. v. Oil Field Supply & Scrap Material Co.*, 12 So. 2d 815 (La. App. 2d Cir. 1942); *Elmer Candy Co. v. Bauman*, 150 So. 427 (La. App. 2d Cir. 1933).

For a general discussion of Louisiana Civil Code articles 3061-63, see Comment, *The Extinction of the Surety's Obligation*, 23 LOY. L. REV. 539, 550-61 (1977).

43. 309 So. 2d 274 (La. 1975).

44. *Id.* at 278. For an excellent criticism of this case, see *The Work of the Louisiana Appellate Courts for the 1974-1975 Term—Suretyship*, 36 LA. L. REV. 437 (1976).

45. 309 So. 2d at 278.

46. 183 La. 765, 164 So. 794 (1935). In *Leigh*, the Louisiana Supreme Court indicated that a solidary surety was entitled to contribution from his co-sureties if he could prove that payment to the creditor prior to the bringing of a lawsuit was made with the knowledge, concurrence, and consent of the other co-sureties. On remand, it was determined that the co-sureties had known of, but had not consented to, the payment; thus, the plaintiff was denied recovery. *Leigh v. Wright*, 192 La. 224, 187 So. 649 (1939).

47. 183 La. at 770-71, 164 So. at 795-96.

48. 309 So. 2d at 278.

49. The court noted that sometimes the relationships among solidary sureties are not governed by the rules of suretyship. 309 So. 2d at 279. A solidary surety may pay the debt before being sued and still preserve his right of contribution. *Bond v. Bishop*, 18 La. Ann. 549 (1866); *Ferriday v. Purnell*, 2 La. Ann. 334 (1847). A simple surety must wait until he has paid "in consequence of a lawsuit instituted against him." LA. CIV. CODE art. 3058.

However, in a recent decision, *Gauthier v. Scott*,⁵⁰ the first circuit, ignoring *Leigh* and the dictum in *Boutte*, held that a solidary surety could seek contribution from his co-surety only under the principles of solidary obligations, not those of suretyship.⁵¹ *Gauthier* thus implied that, in the case of solidary suretyship, the rules of solidary obligations apply to all three relationships: surety-creditor, surety-debtor, and surety-surety. In effect, the holding extinguished the solidary surety's right of indemnity from the debtor, as provided by Civil Code articles 2106 and 3057.⁵²

In the instant case, the Louisiana Supreme Court expanded on the *Boutte* dictum and expressly ruled that the surety-creditor and surety-surety relationships created by solidary suretyship are governed by different codal principles, thereby restricting the effect of article 3045 to the surety-creditor relationship.⁵³ With respect to the first promissory note, the court of appeal, recognizing that the guarantors had bound themselves in *solido* with the debtor, relied on article 2104 in concluding that the plaintiff's recovery must be limited to the virile share of each co-debtor (including the corporation).⁵⁴ The supreme court stated, however, that it was an oversimplification of the relationship between the principal debtor and the individual guarantors to view them as co-debtors in *solido* for all purposes.⁵⁵ Pointing out the accessory nature of the contract of suretyship⁵⁶ and applying Louisiana Civil Code article 3058,⁵⁷ the court awarded judgment against the co-sureties for contribution of

50. 327 So. 2d 702 (La. App. 1st Cir.), *cert. denied*, 330 So. 2d 314 (La. 1976).

51. In *Gauthier*, the plaintiff, a solidary surety by reason of his execution of a continuing guaranty, sued his co-surety for contribution under Civil Code article 3058 for one-half of the amount he had paid in discharging a corporate note. The first circuit awarded the plaintiff recovery of a one-third virile share each from the co-surety and the corporate debtor. The court reasoned that the benefits of article 3058 were not available to a *solidary* surety, permitting the plaintiff to seek contribution only under article 2104, applicable to solidary debtors.

52. Logically, if the plaintiff was allowed to collect only one-third from his co-obligor, the corporation, in contribution, it does not seem that at the same time he would be entitled to full recovery from the corporation. The *Gauthier* holding thus runs contrary to Louisiana Civil Code articles 2106 and 3057.

53. See note 31, *supra*. Louisiana Civil Code article 3045 is contained in the section entitled "Of The Effects of Suretyship Between The Creditor And The Surety" and mentions only those two parties.

54. 361 So. 2d at 967.

55. 371 So. 2d at 758.

56. LA. CIV. CODE art. 3035.

57. LA. CIV. CODE art. 3058 provides:

When several persons have been sureties for the same debtor and for the same debt, the surety who has satisfied the debt, has his remedy against the other sureties in proportion to the share of each; but this remedy takes place only, when such person has paid in consequence of a lawsuit instituted against him.

their one-fifth virile shares (excluding the corporation from the calculation of the virile shares).⁵⁸ This remedy did not affect the plaintiff's right of indemnity from the principal debtor.⁵⁹

As to the second note, the appellate court, as did the *Gauthier* court, again applied the rules of solidary obligations to the surety-surety relationship.⁶⁰ The supreme court amended the lower court's decision, holding that the rules of suretyship govern this situation.⁶¹ Accordingly, the plaintiff was awarded judgment against the five co-sureties for contribution of their one-sixth virile shares; as with the first note, the corporation was excluded from the computation of the virile shares. The *Aiavolasiti* court imposed liability on the four defendant-guarantors by reason of their execution of the guaranty agreements, while casting in judgment the fifth co-surety, who was not a guarantor, because he had signed the note as an accommodation endorser.⁶² The note was not discharged by the plaintiff's payment to the creditor,⁶³ thereby creating the possibility that the fifth defendant might be liable as a prior endorser to the plaintiff.⁶⁴ However, the court concluded that the presumption of Louisiana Revised Statutes 7:68, that the endorsers are liable in the order in which they endorse, was rebutted by the evidence.⁶⁵ The court also evidently disallowed recovery of the note's stipulated rate of interest and attorney's fees.⁶⁶

58. 371 So. 2d at 758-58. Generally, attorney's fees are not awarded except where authorized by statute or contract. *Nassau Realty Co. v. Brown*, 332 So. 2d 206 (La. 1976); *Hernandez v. Harson*, 237 La. 389, 111 So. 2d 320 (1959); *Moses v. American Security Bank of Ville Platte*, 222 So. 2d 899 (La. App. 3d Cir. 1969). Likewise, interest is awarded only at the legal rate if it is not stipulated in the contract. LA. CIV. CODE arts. 1936, 1938 & 1940. But since the continuing guaranties (contracts) were assigned to the plaintiff, the interest and attorney's fees stipulated in those agreements should have been awarded.

59. 371 So. 2d at 758-59.

60. 361 So. 2d at 967-68.

61. 371 So. 2d at 760.

62. *Id.* at 759.

63. LA. R.S. 7:119-21 (1950, repealed 1974). The court examined the N.I.L. to determine the liability of the sixth stockholder (who did not sign a continuing guaranty).

64. LA. R.S. 7:68 (1950, repealed 1974) provided: "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. Joint payees or joint indorsees who indorse are deemed to indorse jointly and severally." Cf. LA. R.S. 10:3-414 (Supp. 1974) and U.C.C. § 3-414 which are to the same effect.

65. 371 So. 2d at 760. For an example of the type of evidence needed to rebut the presumption, see *Gulf Nat'l Bank of Lake Charles v. Computer Analysis, Inc.*, 278 So. 2d 827 (La. App. 3d Cir. 1973).

66. If the note was not discharged, the plaintiff should have been able to collect the note rate of interest and attorney's fees. See *Rothschild v. Bowers*, 2 Rob. 380 (La. 1842); LA. R.S. 7:121 (1950, repealed 1974). *Accord*, U.C.C. §§ 3-601(3) & 3-603(2).

Aiavolasiti thus allows a surety the benefits of the Civil Code articles on suretyship in his claims against the principal debtor and his co-sureties despite the solidary nature of his obligation toward the creditor. In this respect, *Gauthier*⁶⁷ is implicitly overruled. It is submitted that the *Aiavolasiti* court correctly perceived the accessory nature of suretyship⁶⁸ and the varying effect of solidarity among debtors and sureties upon the three separate legal relationships. Had the supreme court accepted the rationale of the court of appeal and the *Gauthier* court, the paying surety would be at a distinct disadvantage.⁶⁹ First, if the surety were considered solely a co-debtor in solido, entitled to recover only the principal debtor's virile share, the basic notion that suretyship is an accessory obligation would be severely undermined.⁷⁰ Denial of the right of indemnity to the surety is inimical to the idea that the principal debtor ought to pay the creditor, since the surety incurs his obligation for the benefit of the debtor.⁷¹ Second, the solvency of the principal debtor would be of extreme importance in the calculation of virile shares due from the co-sureties in contribution.⁷² Third, the co-sureties would benefit by a reduction of the amount for which they are liable to the paying surety.⁷³

Aiavolasiti also greatly expands *Leigh's* interpretation⁷⁴ of Civil Code article 3058.⁷⁵ The solidary surety now seemingly possesses the

67. See text at note 50 *supra*, and note 51, *supra*.

68. See LA. CIV. CODE art. 3035.

69. The courts should not interpret the law so that sureties will find it beneficial to delay in performing their obligations. To the contrary, the law should encourage sureties to promptly pay the debt to the creditor, if no valid defense exists to payment. *Aiavolasiti* rewards the surety who is willing to pay by allowing him contribution under Civil Code article 3058.

70. Obviously, a *principal* debtor who is required only to pay a virile share to a surety is, in reality, merely a co-debtor with the latter. See notes 51-52, *supra*.

71. LA. CIV. CODE arts. 2106, 3035 & 3057.

72. If contribution is only available under article 2104, then all solidary co-debtors, including the corporation, have to be included in the calculation of virile shares. An important exception to this general rule is that the loss occasioned by the insolvency of one solidary debtor must be equally shared by the remaining solvent co-debtors. Thus, the solvency of the corporation in *Aiavolasiti* would greatly affect the size of the sureties' virile shares, if the reasoning of the court of appeal was accepted. However, in contribution under the law of suretyship (article 3058), the principal debtor is *not* included in the calculation of virile shares and thus the solvency of the corporation is irrelevant.

73. If treated as solidary co-debtors, the co-sureties would be responsible only for their virile shares as co-obligors under Civil Code article 2104, not as sureties under article 3058. To illustrate, utilization of the rules of solidary obligations would allow the plaintiff to recover only *one-sixth* virile shares from each co-surety, instead of the *one-fifth* shares as awarded by the *Aiavolasiti* court with respect to the first note.

74. See notes 46-47, *supra*, and accompanying text.

75. See note 57, *supra*.

right of contribution from his co-sureties even if they did not consent to his discharge of the debt.⁷⁶

The most significant aspect of *Aiavolasiti* is the court's failure to indicate the proper resolution of the conflicts between the Civil Code articles on suretyship and the Negotiable Instruments Law (N.I.L.)⁷⁷ that arose in its deliberation as to the second note.⁷⁸ In particular, the Louisiana Supreme Court offered no explanation of its unusual treatment of the five defendants. No justification appears to exist for imposing liability on four defendants as sureties, rather than as accommodation endorsers.⁷⁹

When the underlying obligation is evidenced by a negotiable instrument which the "sureties" have signed as "accommodation endorsers," analysis of the surety-surety relationship varies depending on whether the Louisiana Civil Code or the U.C.C. is utilized. Differences are possible in the following instances: (1) a co-surety's liability based on the order of endorsement of the instrument, (2) a paying surety's right of subrogation against his co-sureties, (3) the possibility of deficiency judgments against co-sureties, and (4) a paying surety's recovery of attorney's fees and note interest in an action for contribution.

Assume for the purposes of illustration that three "sureties," *A*, *B*, and *C*, sign in that order, as accommodation endorsers, a typical promissory note,⁸⁰ binding themselves in solido with the debtor, *D*.

Aiavolasiti's treatment of the sixth accommodation endorser on the second note (the only defendant who did *not* sign a continuing guaranty) as a surety⁸¹ implies that *A*, *B*, and *C* are all sureties. Thus, if *B* paid the debt of *D* upon the latter's default, and *B* sues *A* and *C*, an application of the rules set forth in the instant case

76. 371 So. 2d at 758-59 n.7.

77. Since the second note was executed prior to 1975, the N.I.L. was the applicable statutory law. See note 11, *supra*.

78. The court understandably did not consider the N.I.L. applicable to the first note since none of the defendants had signed it. See LA. R.S. 7:18 (1950, repealed 1974) which states: "No person is liable on the instrument whose signature does not appear thereon." Cf. U.C.C. § 3-401(1) which is to the same effect. With respect to the issues involved in the instant case, no substantive differences exist between the N.I.L. and the U.C.C.; thus, future discussion will employ the latter.

79. As previously mentioned, the *Aiavolasiti* court treated the four defendants who were accommodation endorsers on the second note as *guarantors* (i.e., sureties) by virtue of their execution of continuing guaranty agreements. It is contended that the defendants should have been considered accommodation endorsers for the reasons listed in the text starting at note 105, *infra*.

80. A typical commercial note includes language providing for (1) solidary liability among the makers, endorsers, guarantors and sureties; (2) waiver of presentment for payment, demand, division and discussion; and (3) stipulated attorney's fees.

81. 371 So. 2d at 759.

results in *A* and *C* being liable in contribution for their one-third virile shares.

If the U.C.C. is applied, however, any surety who signs the instrument must first be considered an accommodation endorser. Thus, the above solution is only correct if the presumption that endorsers are liable to one another in the order in which they endorse⁸² is rebutted. Since *B* could pay off the creditor without discharging the note,⁸³ it appears that if *A* did not present parol evidence to rebut the presumption, *B* could collect the full amount he paid from *A*.⁸⁴ Moreover, *C* would be entirely discharged from his liability on the instrument by virtue of the rule of reacquisition.⁸⁵ Therefore, depending on which law is applied, an accommodation endorser can obtain either contribution (under Civil Code article 3058)⁸⁶ or full reimbursement from previous endorsers (under the U.C.C.).⁸⁷

Suppose that in addition to signing the promissory note, *A*, *B*, and *C* also execute continuing guaranty agreements in favor of the creditor. Upon payment to the creditor, *B* becomes subrogated to the rights of the creditor.⁸⁸ Thus, if *A* and *C* are treated as "sureties" because of their status as *guarantors*, it would appear that *B* is only subrogated to the rights of the creditor on the guaranty instruments.⁸⁹ To the contrary, if *A* and *C* are considered accommodation endorsers, *B* would seemingly be subrogated to the creditor's

82. U.C.C. § 3-414(2) specifies: "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."

83. U.C.C. § 3-601(3) stipulates:

The liability of all parties is discharged when any party who has himself no right of action or recourse on the instrument

(a) reacquires the instrument in his own right; or

(b) is discharged under any provision of this Article, except as otherwise provided with respect to discharge for impairment of recourse or of collateral.

But an accommodation party has a right of recourse on the instrument against the party accommodated and any prior endorser. U.C.C. §§ 3-415(5) & 3-414. Therefore, the note is not discharged. *Cf. Gleason v. Barrilleaux*, 292 So. 2d 804 (La. App. 1st Cir. 1974); *Cook v. Crow*, 194 So. 455 (La. App. 2d Cir. 1939) (same result under the N.I.L.).

84. See note 82, *supra*. See also *Redden v. Lambert*, 112 La. 740, 36 So. 668 (1904); *Prestenbach v. Mansur*, 14 La. App. 429, 125 So. 310 (1st Cir. 1929).

85. U.C.C. § 3-208. The rule is that when an instrument is reacquired by a prior party, any intervening party is discharged as against the reacquiring party and subsequent holders not in due course; he is also discharged against holders in due course with notice (*e.g.*, cancelled endorsement).

86. See note 57, *supra*.

87. See note 82, *supra*.

88. LA. CIV. CODE arts. 2134, 2161-62 & 3053.

89. Typical guaranty agreements provide for this right. See note 1, *supra*. However, the surety also has a right of subrogation by law. LA. CIV. CODE art. 2161(3).

rights on the note itself.⁹⁰ This analytical difference substantially affects the procedural requirements by which *B* may impose liability on *A* and *C*.⁹¹ The ability to collect from the co-sureties may therefore depend greatly upon the court's use of either the codal rules of suretyship or the U.C.C.⁹²

Another problem not addressed by *Aiavolasiti* is that of the liability of accommodation endorsers for deficiency judgments. Louisiana's deficiency judgment statute⁹³ provides that when a creditor provokes a judicial or private sale upon foreclosure on the debtor's encumbered property without appraisal, he thereby loses any further remedy against the debtor for a deficiency judgment, even if there exists a contractual waiver of appraisal.⁹⁴ The statute specifically states that in such a situation "the debt . . . shall stand fully satisfied and discharged."⁹⁵ Upon paying the debt to the creditor, *B* would be subrogated to the former's rights against the debtor, *D*. *B* could foreclose upon any mortgage without an appraisal, but this action would bar any further remedy against *D*.⁹⁶ Applying the rules of suretyship,⁹⁷ it appears that a surety might also be discharged by a foreclosure without appraisal, a conclusion reached by the first circuit in *Simmons v. Clark*.⁹⁸ However, despite the recognition that "an accommodation party is always a surety,"⁹⁹ the Louisiana courts have consistently held that accommodation parties are not entitled to protection from deficiency judgments,¹⁰⁰ even if the debtor is dis-

90. See note 83, *supra*. If endorsers *A* and *C* have not been discharged and they have waived presentment and notice of dishonor, the note may be enforced against them by holder *B*. U.C.C. § 3-414(1).

91. See note 17, *supra*.

92. See note 17, *supra*. Both sets of laws may apply in some circumstances (but not necessarily with equal force). Section 1-103 of the U.C.C. stipulates that general principles of law (e.g., suretyship law) shall supplement the U.C.C. unless displaced by its particular provisions. *Accord*, LA. R.S. 10:1-103 (Supp. 1974) (provides that the "other laws of Louisiana" shall supplement the Louisiana Commercial Laws).

93. LA. R.S. 13:4106 (1950 & Supp. 1952); 13:4107 (1950).

94. LA. R.S. 13:4106 (1950 & Supp. 1952); 13:4107 (1950).

95. LA. R.S. 13:4106 (1950 & Supp. 1952).

96. See text at note 94, *supra*.

97. See note 6, *supra*.

98. 64 So. 2d 520 (La. App. 1st Cir. 1953). A reasonable contrary view is that the defense provided by the deficiency judgment statute is merely a *personal* defense of the debtor. If so, the surety could not raise the defense in a suit for a deficiency judgment. See LA. CIV. CODE art. 3036.

99. U.C.C. § 3-415, comment 1.

100. *Southland Inv. Co. v. Motor Sales Co.*, 198 La. 1028, 5 So. 2d 324 (1941); *Ford Motor Credit Co. v. Soileau*, 323 So. 2d 221 (La. App. 3d Cir. 1975); *Commercial Credit Equip. Corp. v. Larry Parrott of Gueydan, Inc.*, 212 So. 2d 860 (La. App. 3d Cir.), *cert. denied*, 252 La. 895, 214 So. 2d 719 (La. 1968); *Gumina v. Dupas*, 178 So. 2d 291 (La. App. 4th Cir.), *cert. denied*, 248 La. 442, 179 So. 2d 430 (La. 1965); *The Farmerville Bank v. Scheen*, 76 So. 2d 581 (La. App. 2d Cir. 1954).

charged by virtue of the deficiency judgment statute. Therefore, in a suit for contribution, *B* could obtain deficiency judgments against *A* and *C* if they were considered accommodation endorsers.¹⁰¹

Finally, application of the provisions of the U.C.C. would allow *B* to recover the note's stipulated rate of interest and attorney's fees from his co-sureties.¹⁰² However, if the accommodation endorsers, *A* and *C*, are treated as mere sureties, *B*'s action for recovery would be based on law, as provided by the suretyship rules, and not on contract; therefore, he would be entitled only to legal interest.¹⁰³

As the above discussion indicates, serious conflicts exist between the rules of suretyship and the U.C.C. as to the liability of a solidary surety on a negotiable instrument. One writer has advocated that the courts "harmonize" the two bodies of law in light of the intent of the parties in each individual contract.¹⁰⁴ It is submitted that such a subjective approach to a confusing area of the law will only provoke inconsistent decisions.

A preferable solution would be to recognize the U.C.C. as the paramount law governing the rights and liabilities of accommodation parties. Any codal rules of suretyship which are not inconsistent with the U.C.C. should be consulted in appropriate cases.¹⁰⁵ This approach can be justified for a number of reasons. First, according to civil law theory, the latest expression of the legislative will should predominate.¹⁰⁶ Second, Louisiana Revised Statutes 10:1-103¹⁰⁷ implies that the legislature intended a preemptive application of the U.C.C. provisions. Third, the law governing negotiable instruments

101. See note 100, *supra*.

102. A note is *not* discharged when a surety pays off the underlying debt. See note 83, *supra*.

103. 371 So. 2d at 758. As previously mentioned, this conclusion of the court appears incorrect. See note 66, *supra*.

104. Comment, *supra* note 17, at 273.

105. One writer has concluded that the U.C.C. is a true code and that civil law methods and techniques should be used to decide doubtful cases. Thus, reference to laws outside the U.C.C. should be made only where the U.C.C. indicates that those laws should apply. Hawkland, *Uniform Commercial "Code" Methodology*, 1962 U. ILL. L.F. 291. For a survey of the possible methods of reconciling the U.C.C. with other state laws, see Nickles, *Problems of Sources of Law Relationships Under the Uniform Commercial Code—Part I: The Methodological Problem and the Civil Law Approach; Part II: The English Approach and a Solution to the Methodological Problem*, 31 ARK. L. REV. 1, 171 (1977).

106. The suretyship articles date at least from their incorporation into the Civil Code of 1870. The Commercial Laws (*i.e.*, the U.C.C.) were adopted in 1974.

107. LA. R.S. 10:1-103 (Supp. 1974) provides: "Unless displaced by the particular provisions of this title, the other laws of Louisiana shall apply." The comment to this section states in part: "The thrust of this section is that the rest of Louisiana law implements the Commercial Law if a situation is not covered by the Commercial Law."

is one of specialized application and, thus, ought to be the primary guide to decision making in this area. Fourth, despite the admirable desire of Louisiana to preserve its civil law heritage, uniformity of decisions in the area of negotiable instruments will serve to stabilize interstate business transactions involving commercial paper.¹⁰⁸ Indeed, the legislature's adoption of U.C.C. section 1-102¹⁰⁹ compels this conclusion.

While *Aiavolasiti* correctly settles the question of which Civil Code provisions apply to the relationship between solidary sureties, it leaves unresolved the proper utilization of negotiable instruments law in regard to suretyship. It is hoped that the Louisiana Supreme Court will clarify this troublesome area in its future opinions.

J.P. Hebert

THE CLASS ACTION AS A CONSUMER PROTECTION DEVICE:
State v. General Motors Corp.

The defendant sold over 1,400 Oldsmobiles with substituted Chevrolet engines to Louisiana consumers, allegedly without disclosing the substitution. Claiming violation of the Unfair Trade Prac-

108. Adoption of Article 3 [of the U.C.C.] by preserving a core of uniformity for Louisiana should facilitate the multi-state transactions in which these instruments function. . . .

. . . .
. . . . Louisiana, at long last, [is brought] into a position of sharing with her sister states a useful portion of the major benefits of the Uniform Commercial Code.

. . . .
. . . . On balance there is much that may be pointed to in Louisiana [sic] new Commercial laws as representative of progress in the quest for certainty and uniformity.

Message from Paul M. Hebert, Dean, LSU Law School, in R. HERSBERGEN, COMMERCIAL PAPER AND BANK DEPOSITS AND COLLECTIONS IN LOUISIANA: THE COMMERCIAL LAWS v to vii (1974).

109. LA. R.S. 10:1-102 (Supp. 1974) provides:

- (1) This Title shall be liberally construed and applied to promote its purposes and policies.
- (2) The purposes and policies of this Title are
 -
 - (b) to permit the continued expansion of commercial practices through custom, usage and agreement of the parties;
 - (c) to promote uniformity of the law among the various jurisdictions.