Commercial Transactions: Waiver of Guarantor's Right in Mortgage Transactions under Oklahoma Law

Brian Henderson
COMMENTS

Commercial Transactions: Waiver of Guarantor's Rights in Mortgage Transactions Under Oklahoma Law

Introduction

Banks and other lending institutions, as a condition to making a loan or otherwise extending credit to a debtor, often demand an obligation by a third party to pay the debt as additional security for the debtor's performance. In the mortgage lending situation, this third-party obligation is generally created through a contract of guaranty between the creditor and the third party, who is called the guarantor. A guaranty is generally defined as a promise to pay the debt of another in case the other person fails to pay. The status of guarantor gives the party guaranteeing payment rights against the principal debtor. If the creditor requests payment from the guarantor, the guarantor can force the debtor to satisfy the obligation under the guarantor's right of exoneration. In addition, if the guarantor is ultimately required to pay the debtor's obligation, the guarantor is entitled to be reimbursed by the debtor and also succeeds to the creditor's rights through the guarantor's right of subrogation. Thus, a guaranty creates a three-party relationship between the guarantor, debtor, and creditor. Essentially, the debtor is liable to the creditor on the principal debt; the guarantor is liable to the creditor on the guaranty contract; and if the creditor requests payment from the guarantor, the guarantor has the right to require the debtor to pay and the right to reimbursement from the debtor for any payment the guarantor makes to the creditor.

Because of this special "tripartite relationship," Oklahoma has adopted statutes to protect the guarantor from liability for the debtor's obligation in certain situations. For example, the obligation of the guarantor cannot be larger in amount or more burdensome than that of the principal debtor. Also, the acceptance by the creditor of anything in partial satisfaction reduces the obligation of the guarantor in the same amount as that of the principal. These two rules recognize the derivative liability of the guarantor. In addition, a guarantor is generally discharged by any act of the creditor which alters the obligation of the principal debtor or which limits the

6. See id. § 341.

325
creditor's remedies against the principal debtor. This statute recognizes that the contract between the guarantor and creditor is separate from the agreement between the debtor and the creditor; and thus, the obligation of the guarantor cannot be unilaterally changed based on the creditor's dealings with the debtor.

Because these statutes are default rules for the protection of the guarantor, a guarantor is generally entitled to contractually waive the application of these rules. Allowing waiver of these rules sometimes seems troubling, however, especially when the guarantor is allowed to waive a defense to payment when the debtor itself would not be entitled to waive that defense for public policy reasons. For example, Oklahoma courts have allowed guarantors to waive any defenses they might have to paying a deficiency judgment after foreclosure based on Oklahoma's anti-deficiency statute, even though the debtor would not be allowed to waive the protection of the anti-deficiency statute. The problem thus created is whether the guarantor is entitled to reimbursement when it waives a defense that the debtor would not be entitled to waive.

Generally, this comment considers when, under Oklahoma law, a guarantor of a mortgage loan is entitled to waive defenses it might have against paying the debt of the principal debtor and whether there are situations in which such a guarantor should not be entitled to waive certain defenses to payment. This comment first considers Oklahoma law dealing with how guarantees are created in mortgage transactions and the nature of such guarantees. Part II of this comment considers Oklahoma law concerning the ability of a guarantor to waive its statutory defenses and the effect of such waiver on the guarantor's ability to get reimbursement from the principal debtor. This part of the comment places special emphasis on Oklahoma cases dealing with the Oklahoma anti-deficiency statute. Part III of this comment analyzes Oklahoma's approach to allowing guarantors to waive defenses in light of the approach of other states and the recently promulgated Restatement (Third) of Suretyship and Guaranty. Lastly, part IV of this comment considers Oklahoma's approach of allowing waiver of any protection under Oklahoma's anti-deficiency statutes.

I. Guaranties in Mortgage Transactions Under Oklahoma Law

A. Creation of Guaranties in Mortgage Transactions

Under Oklahoma law a guaranty is "a promise to answer for the debt, default or miscarriage of another person." A guaranty is created by contract between the guarantor and the creditor. The debtor need not be, and generally is not, a party to the guaranty agreement. A contract of guaranty must generally be in writing and

---

12. See Riverside, 613 P.2d at 441; see also 15 Okla. Stat. § 322 (1991) ("A person may become guarantor even without the knowledge or the consent of the principal.").
signed by the guarantor to be enforceable. A guaranty executed contemporaneously with the creation of the underlying debt obligation between the debtor and creditor, or as a part of the same general transaction, does not require separate consideration. Often, the contract of guaranty is presented in the form of a unilateral offer made at the time an extension of credit is given to the debtor. The unilateral offer of guaranty is not binding on the guarantor until notice of its acceptance is communicated to the guarantor, unless the guaranty recites that it is an absolute guaranty of payment.

Typically, a party can become secondarily liable for the performance of another in a mortgage situation in two other ways. First, a person can assume secondary liability as an accommodation party on the note evidencing the mortgage indebtedness. A person becomes secondarily liable as an accommodation party by signing an instrument governed by article 3 of the Uniform Commercial Code for the purpose of becoming liable on the instrument without being the direct beneficiary of the value given for the instrument. The obligation of an accommodation party may be enforced notwithstanding any statute of frauds and whether or not the accommodation party receives consideration for the accommodation. Second, the mortgagor in a mortgage transaction can become secondarily liable, by operation of law, if the mortgagor transfers the mortgaged property to a party who takes the property "subject to" the mortgage or "assumes" the mortgage debt. In that case, the mortgaged property (if the transferee takes the property "subject to" the mortgage) or the transferee (if the transferee "assumes the mortgage") are the principals and the

14. See id. § 323.
16. See 15 OKLA. STAT. § 326 (1991); see also Penner v. Int'l Harvester Co. of Am., 41 P.2d 843, 844 (Okla. 1935) (noting that notice of acceptance is not required if the guaranty recites that it is an absolute guaranty of payment upon maturity).
18. See id. § 3-419(a).
19. See id. § 3-419(b). It should be noted that there is no requirement for additional consideration to support the obligation of an accommodation party even when the accommodation party signs after the instrument is delivered to the holder. See 12A OKLA. STAT. ANN. § 3-419 U.C.C. cmt. 2 (West 1998).

Note that the suretyship relationship between the mortgagor and transferee is only effective as between the two of them unless the mortgagee elects to recognize such a relationship. See Rice v. Federal Life Ins. Co., 45 P.2d 49, 51 (Okla. 1935). The mortgagee can choose to look to the original mortgagor as primarily liable because there can be no change to the legal relationship between the mortgagor and mortgagee without the mortgagee's knowledge and consent. See id. Courts have held that any act evidencing an intent to hold the grantee personally liable is sufficient to change the mortgagor's status from principal to surety. See id.
mortgagor becomes a surety.21

While different Oklahoma statutes govern the rights and liabilities of guarantors, accommodation parties, and sureties,22 each of these parties is generally referred to as a "surety" and has the same general rights against the principal and the creditor.23 Thus, the issues concerning the waiver of these suretyship rights are generally the same whether the party is specifically classified as a guarantor, accommodation party, or surety. Although this paper focuses on guarantors because that is the most common type of suretyship relationship created in mortgage transactions, this paper compares the Oklahoma statutes governing accommodation parties and sureties when appropriate.

B. Nature of the Guarantor's Liability

Under Oklahoma law, a guarantor has a collateral obligation which is independently and separately enforceable from that of the principal debtor.24 Oklahoma courts hold that the guarantor is secondarily liable; thus, the guarantor's obligation is conditioned on the default of the principal debtor.25 The guarantor's obligation is contractual; and thus, the extent of the guarantor's obligation must be determined from the terms of the guaranty agreement.26

Because the obligation of the guarantor is purely contractual,27 contracts of guaranty are to be construed under the rules applied to contracts generally.28 Because a guaranty must be in writing under Oklahoma law,29 the terms of the

21. See Sooner Federal, 790 P.2d at 530; Stalcup, 351 P.2d at 738; see also NELSON & WHITMAN, supra note 20, §§ 5.3-5.4.
22. See 15 OKLA. STAT. §§ 321-344 (1991) (governing guarantors) (the "Oklahoma guaranty statutes"); id. §§ 371-385 (governing sureties) (the "Oklahoma Surety Statutes"); 12A OKLA. STAT. §§ 3-305(d), 3-419, 3-505 (1991) (governing accommodation parties). A surety is distinguished from a guaranty on the grounds that a surety is typically jointly and severally liable with the principal obligor on an obligation to which they are both bound, while a guarantor typically contracts to fulfill the obligation of the principal only upon default. See RESTATEMENT (THIRD) OF SURETYSHIP AND GUARANTY §§ 1 cmt. c, 15 (1996). An accommodation party is distinguished from a surety and guarantor because a person becomes an accommodation party only by signing an instrument governed by article 3 of the Uniform Commercial Code. See 12A OKLA. STAT. § 3-419(a) (1991).
23. See Moore v. White, 603 P.2d 1119, 1121 (Okla. 1979) ("There exists but a technical difference between a surety and a guarantor."); RESTATEMENT (THIRD) OF SURETYSHIP AND GUARANTY § 1 cmts. c, d (1996) (recognizing that although there are differences between "sureties" and "guarantors," the rights associated with being liable for the debt of another is the same in both cases); 12A OKLA. STAT. ANN. § 3-419 U.C.C. cmt. 3 (West 1998) (stating that an accommodation party is always a surety).
24. See Riverside Nat'l Bank v. Manolakis, 613 P.2d 438, 441 (Okla. 1980); see also 15 OKLA. STAT. § 373 (1991) ("A surety cannot be held beyond the express terms of his contract. . . ."); 12A OKLA. STAT. § 3-419(b) (1991) ("An accommodation party . . . is obliged to pay the instrument in the capacity in which the accommodation party signs.").
26. See Riverside, 613 P.2d at 441.
27. See Lum, 757 P.2d at 815.
28. See INA Life Ins. Co. v. Brandywine Assocs., Ltd., 800 P.2d 1073, 1076 (Okla. Ct. App. 1990); see also 15 OKLA. STAT. § 374 (1991) ("In interpreting the terms of a contract of suretyship, the same rules are to be observed as in the case of other contracts.").
29. See 15 OKLA. STAT. § 324 (1991). While a statute of frauds is not a limit on enforcement of
guarantor's agreement govern the extent of the obligation. The intent of the parties at the time they entered the agreement controls the meaning of the written agreement. This intent is determined from the entire writing. Where the language of the guaranty contract is complete and unambiguous, the intent of the parties must be determined from the language of the writing without resort to extrinsic evidence. If the guaranty's language is ambiguous, the court may look at extrinsic evidence to determine the intent of the parties at the time of contracting.

The construction of a contract of guaranty involves two steps. First, if the language is ambiguous, the court applies the appropriate rule of construction in construing the language of the contract. Second, after the meaning of the guaranty contract has been determined, the obligations of the guarantor are construed based on the appropriate rule of construction.

Oklahoma courts have consistently held that in case of ambiguity, the language of a guaranty contract is to be construed strongly against the guarantor and in favor of the creditor. Oklahoma's rule of construing guarantees against the guarantor is based on the principle that a guaranty agreement should be construed in favor of the party who parted with property in reliance on the collateral promise. This rule of construction should be compared with the rule, applied in some states, that a guaranty should be construed strictly in favor of the guarantor.

Once the meaning of the language of the contract of guaranty is determined, the court construes the obligations of the guarantor based on one of two possible rules. If the contract is made by a guarantor for hire or a guarantor who has a personal interest in the matter out of which the obligation arose, the court must construe the obligations of the guarantor liberally and most strongly against the guarantor. If the guaranty is made without compensation or without sharing in the benefits of the principal transaction, however, the guarantor's obligations will be strictly construed

the obligation of an accommodation party, see 12A OKLA. STAT. § 3-419(b) (1991), the obligation of an accommodation party must be based on a writing based on the definition of an accommodation party, see 12A OKLA. STAT. § 3-419(a) (1991) (requiring that an accommodation party signs an "instrument"); id. § 3-104(a) (defining an "instrument" as a "promise" or "order"); id. § 3-103(a)(6), (7) (defining a "promise" or "order" as a writing).

31. See 15 OKLA. STAT. § 152 (1991); Founders, 830 P.2d at 1361.
32. See 15 OKLA. STAT. § 157 (1991); Founders, 830 P.2d at 1361.
33. See Founders, 830 P.2d at 1361; Lum, 757 P.2d at 815.
34. See Lum, 757 P.2d at 815.
36. See Riverside, 613 P.2d at 442; Lamm & Co., 98 P. at 356.
37. See, e.g., Federal Deposit Ins. Corp. v. Hulsey, 22 F.3d 1472, 1492 (10th Cir. 1994) (recognizing that under Illinois law a guaranty agreement should be construed strictly in favor of the guarantor).
38. See 18 OKLA. STAT. § 483 (1991); Lum, 757 P.2d at 816; Fuqua v. Tulsa Masonic Bldg., 263 P. 660, 662 (Okla. 1928); Chowning v. First State Bank, 225 P. 715, 716 (1924).
and the guarantor will not be held beyond the precise terms of the contract.  

A guarantor's liability can be structured in several different ways. For example, a guaranty can be unconditional. Under this type of guaranty, the guarantor has the duty to see that the obligations of the principal debtor are discharged at maturity. The guarantor is liable to the creditor immediately upon default, and the creditor does not have to give demand or notice. This type of guaranty is also called a guaranty of payment. Under Oklahoma law, a guaranty is deemed unconditional unless the terms of the guaranty contract place a condition precedent on the guarantor's liability.

The guarantor can place a condition on its liability by creating what is called a guaranty of solvency. These types of guarantees are also called guarantees of collection. Under a guaranty of solvency, the guarantor is assuring that the debtor will be solvent and that the creditor will be able to collect the debt by the usual legal proceedings, if taken with reasonable diligence. Under such a guaranty, the guarantor is not liable unless the creditor has been able to collect the debt through legal proceedings or unless the debtor is insolvent. However, the guarantor will become liable without action of the creditor if the debt is obviously uncollectible from the principal debtor.

A guarantor can create a continuing guaranty by promising to guaranty the future liability of the debtor to the creditor regarding successive transactions. A continuing guaranty can be revoked at any time by the guarantor with respect to future transactions, unless there is continuing consideration as to the future transactions. The guarantor's liability under a continuing guaranty will be deemed to continue until it has been revoked unless there is an express limitation on the guarantor's liability.

C. Rights of the Guarantor

1. Rights Against the Creditor

The obligation of a guarantor is based on the principal obligation of the debtor to

39. See Fuqua, 263 P. at 662; Lamm & Co., 98 P. at 356.
42. See 15 Okla. Stat. § 331 (1991); see also 12A Okla. Stat. § 3-419(d) (1991) (for an accommodation party to be a guarantor of collection, the accommodation party must unambiguously indicate that it is guaranteeing collection rather than payment).
50. See Rucker, 415 P.2d at 953.
51. Title 15, section 378 states that a surety has all the rights of a guarantor.
the creditor. The purpose of the guaranty is to assure the creditor the performance
to which it is entitled pursuant to the obligation of the debtor.\textsuperscript{52} Thus, as a corollary,
the guarantor's liability is limited to the liability of the debtor. Title 15, section 334
states that "[t]he obligation of a guarantor must be neither larger in amount, nor in
other respects more burdensome than that of the principal; and if, in its terms, it
exceeds it, it is reducible in proportion to the principal obligation." In addition,
consistent with the one satisfaction rule, section 341 states that "[t]he acceptance, by
a creditor, of anything in partial satisfaction of an obligation, reduces the obligation
of a guarantor thereof, in the same measure as that of a principal, but does not
otherwise affect it." It is also generally recognized that a guarantor can raise against
the creditor any defense that the debtor would have against the creditor except
infancy, lack of legal capacity, and discharge in insolvency proceedings.\textsuperscript{53} These
rules recognize the derivative nature of the guarantor's obligation to the creditor.

In addition to the rights the guarantor has based on the derivative nature of the
 guaranty obligation, the guarantor has rights based on the fact that the guaranty
agreement is separate from the agreement between the debtor and creditor. A
guarantor enters a guaranty relationship based on a risk evaluation. The guarantor
evaluates the risk of having to pay and the risk of being unable to get reimbursement
or some other remedy from the debtor if the guarantor is required to pay.\textsuperscript{54} If, after
entering the guaranty agreement based on this risk evaluation, the creditor acts in
a way that changes the guarantor's risk, the guarantor could receive unanticipated
losses.\textsuperscript{55} The law has protected the guarantor from such unanticipated loss by the
creation of what has been called the "suretyship defenses."

Oklahoma has codified the guarantor's suretyship defenses at title 15, section 338.
Section 338 states that "[a] guarantor is exonerated,\textsuperscript{56} except so far as he may be
indemnified by the principal, if by any act of the creditor, without the consent of the
guarantor, the original obligation of the principal is altered in any respect, or the
remedies or rights of the creditor against the principal, in respect thereto, in any way
impaired or suspended."\textsuperscript{57} Oklahoma has codified the suretyship defenses available

\textsuperscript{52} See Restatement (Third) of Suretyship and Guaranty § 34 cmt. a (1996).

\textsuperscript{53} See 12A Okla. Stat. § 3-305(d) (1991); Restatement (Third) of Suretyship and
Guaranty § 34(1) (1996); see also 15 Okla. Stat. § 335 (1991) (stating that a guarantor is not liable
if the contract of the principal is unlawful unless the contract is void against the principal based on a
personal disability).

\textsuperscript{54} See Restatement (Third) of Suretyship and Guaranty ch. 3, topic 3, tit. B introductory

\textsuperscript{55} See id.

\textsuperscript{56} Exoneration is the right of a surety to compel the principal debtor to pay the creditor. See
Restatement (Third) of Suretyship and Guaranty § 21 cmt. i (1996). The use of "exoneration"
in section 338 and other Oklahoma statutes dealing with guaranty and suretyship seems incorrect.
It seems that the correct term in this statute is "discharge," which refers to the extinguishment of
the surety's obligation. Consistent with current terminology, this paper will use the term "discharge" to
explain the effect of the suretyship defenses. See, e.g., 12A Okla. Stat. § 3-605 (1991); Restatement

\textsuperscript{57} This general rule discharging the guarantor is limited by the provisions of title 15, sections 339,
340, and 342-344.
to a "surety" at title 15, section 377. Section 377 states that a surety is discharged: (1) in any manner in which a guarantor is discharged; (2) to the extent the surety is prejudiced by an act of the creditor which impairs the surety's remedies or lessens his security; or (3) to the extent the surety is prejudiced by an omission of the creditor to do anything, when required by the surety, which the creditor has a duty to do. Although not settled, a guarantor may be able to use extra protections outlined in section 377. The Oklahoma Supreme Court has held that no practical differences exist between the rights of sureties and guarantors. Section 3-605 of the Oklahoma Uniform Commercial Code codifies the suretyship defenses available to accommodation parties.

Although the Oklahoma guaranty and surety statutes are stated in general terms, the suretyship defenses have been broken down into several categories of actions by the creditor. Oklahoma law has recognized that the following types of actions by creditors will constitute a suretyship defense: (1) release of the obligation of the debtor; (2) modification of the underlying obligations; (3) refusal of the tender of

---

58. Section 377(3) seems to relate to the ability of the surety to the statutory right of the surety to require the creditor to proceed against the principal debtor to satisfy the obligation. See 15 OKLA. STAT. § 379 (1991). Section 379 states that if the creditor neglects to proceed against the principal as required by the surety, the surety is discharged to the extent it is prejudiced. Section 379 essentially codifies the doctrine of Pain v. Packard, 13 Johns. 174 (N.Y. 1816) (also published at 7 Am. Dec. 369). However, Oklahoma courts have held that an oral request that the creditor sue the principal is not enough to entitle the surety to discharge. See Gregg v. Oklahoma State Bank, 179 P. 613, 614 (Okla. 1919); Palmer v. Noe, 150 P. 462, 464-65 (Okla. 1915); see also Joseph M. Cormack & Neil G. McCarroll, The Distinction Between Suretyship and Guaranty in States Having the Field Code Provisions, 10 S. CAL. L. REV. 371, 396 n.182 (1937) (discussing Oklahoma's treatment of the Pain v. Packard statute). In any event, the courts of states having statutes similar to Oklahoma's surety and guaranty statutes have held that the codification of the doctrine in Pain v. Packard does not apply to guarantors. See Cormack & McCarroll, supra, at 396 & n.132.


60. See Shuttee v. Coalgate Grain Co., 172 P. 780, 782 (Okla. 1918). But see section 3-605(b) of the Oklahoma Uniform Commercial Code, which provides that a release of the debtor accomplished through a discharge by cancellation or renunciation of the instrument under section 3-604 does not act to discharge the accommodation party. However, it should be noted that if the release is not accomplished pursuant to a discharge under section 3-604, the rights of the accommodation party would be governed by the general law of surety and guarantors. See 12A OKLA. STAT. § 1-103 (1991); 12A OKLA. STAT. ANN. § 3-605 Okla. cmt. 21 (West 1998).

61. See 12A OKLA. STAT. § 3-605(c) (1991); Sawyer v. Bahnson, 226 P. 344, 345 (Okla. 1924); Kremke v. Radamaker, 159 P. 475 (Okla. 1916); Stetler v. Boling, 152 P. 452, 454 (Okla. 1915). The court in Patty v. Price, 304 P.2d 289, 291 (Okla. 1956), when citing to Adams v. Ferguson, 147 P. 772 (Okla. 1915), recognized that the following six elements are necessary for an extension to constitute a discharge of the surety: (1) valid consideration; (2) an agreement; (3) the extension must be for a definite time; (4) lack of consent of the surety; (5) without reservation of remedy against the surety; and (6) the agreement must be with the principal debtor. In relation to accommodation parties, parts of this test have been overruled by section 3-605 because an extension can be made without consideration under section 3-605(c), and the reservation of rights is no longer recognized in relation to instruments under the Oklahoma Uniform Commercial Code. See 12A OKLA. STAT. ANN. § 3-605 Okla. cmt. 22 (West 1998).


63. See 15 OKLA. STAT. § 377(2) (1991); 12A OKLA. STAT. § 3-605(d) (Supp. 1997); Smiley v.
Although delay in enforcement of the underlying obligation can act as a suretyship defense, title 15, section 342 specifically states that delay by a creditor in enforcing the underlying obligation does not discharge the guarantor. In addition, Oklahoma courts have held that the running of the statute of limitations on the debtor's obligation does not act to discharge the guarantor's liability.

In relation to a contract of guaranty, Oklahoma seems to follow a strict discharge approach to the suretyship defenses. Under Oklahoma decisions, any material departure from the terms of the contract of guaranty completely discharges the guarantor. This approach, however, can be problematic. The strict discharge approach may result in a windfall to the guarantor when the relief provided by the total discharge exceeds any harm caused by the creditor's actions. A more equitable approach is taken in section 3-605 of the Oklahoma Uniform Commercial Code. Under section 3-605, the accommodation party is only discharged to the extent the action of the creditor causes loss to the accommodation party. The recently promulgated Restatement (Third) of Suretyship and Guaranty also takes the approach that a surety or guaranty should only be discharged to the extent of loss created by a creditor's actions. In addition, although the strict discharge approach used with guarantors can be applied to sureties under section 377(1), under subsections (2)-(3) of section 377, stating that a surety is discharged only "to the extent to which he is prejudiced," proving loss to the surety could be required.

Although the Oklahoma decisions have followed a strict discharge approach when applying section 338, the language of this section could be interpreted to allow a

Wheeler, 602 P.2d 209, 212 & n. 377(2) (Okla. 1979). But see First City Bank, N.A. v. Air Capitol Aircraft Sales, Inc., 820 P.2d 1127, 1135 (10th Cir. 1987) (holding that, under title 15, section 338 of the Oklahoma Statutes, a guarantor of payment is not discharged when the creditor impairs the debtor's collateral).

66. See also Carver v. Tinker Field Employees Credit Union, 442 P.2d 342, 344 (Okla. 1968) (holding that the delay of a creditor in foreclosing a chattel mortgage does not discharge the surety).
68. See Rabon v. Putnam, 164 F.2d 80, 83-84 (10th Cir. 1947); Apache, 529 P.2d at 986-87; Quapaw Pumping & Royalty Co. v. Camblin, 232 P. 84, 88 (Okla. 1924).
69. See RESTATEMENT (THIRD) OF SURETYSHIP AND GUARANTY § 37 cmt. a (1996).
70. It should be noted that section 3-605 of the Oklahoma Commercial Code establishes different burdens of proving loss to the accommodation party depending on what action is taken by the party entitled to enforce the instrument. If the party entitled to enforce the instrument grants an extension to the accommodation party or impairs the value of accommodated parties' collateral, the accommodation party is discharged to the extent that it proves loss based on the extension. See 12A Okla. Stat. § 3-605(c), (e) (1991). However, if the party entitled to enforce the instrument modifies the obligation of the accommodated party, the party entitled to enforce the instrument has the burden of proving that no loss was created by the amount of recourse. See id. § 3-605(d). This difference of burdens can result in problems of determining whether a discharge is appropriate in such situations where a party entitled to enforce the instrument grants an extension and modifies that obligation of the accommodated party. See PEB Commentary No. 11: Suretyship Issues Under Sections 3-116, 3-305, 3-415, 3-419, and 3-605, 3B U.L.A. 120 (1993).
guarantor to be discharged only to the extent of any loss. The language of section 338 states that a guarantor is discharged "except so far as he may be indemnified by the principal." This language does not appear to require that a guarantor has been indemnified for the discharge to be limited. That situation is covered by section 343. The language of section 338 seems to provide a limitation on the guarantor's discharge whenever there is potential for indemnification from the principal. That would be the case if the act of the creditor resulting in discharge did not completely foreclose the guarantor's ability to pass the cost of performance to the debtor. Oklahoma courts, using the term "indemnity" interchangeably with the term "reimbursement," have found an implied promise by the principal to indemnify the surety when the surety pays the principal's obligation. This finding is consistent with Oklahoma's indemnity statutes which require a contract of indemnity, but do not require the contract to be in writing. Therefore, it seems section 338 could be interpreted to discharge the guarantor only to the extent of any loss caused by the creditor's actions.

2. Rights Against the Principal

As between a surety or guarantor and the principal, the principal has the duty to perform or bear the cost of performance. Thus, the common law recognized that, by operation of law, a surety or guarantor has recourse against the principal. The Restatement (Third) of Suretyship and Guaranty recognizes that a surety or guarantor has the following types of recourse against the principal: enforcement of the principal's duty to perform through exoneration; entitlement to reimbursement from the principal; enforcement of the right to restitution; and subrogation to the rights of the creditor.

The Oklahoma surety statutes recognize a surety's right to exoneration, reimbursement, and subrogation. Title 15, section 380 recognizes the surety's right of exoneration by providing that a surety can compel the principal debtor to perform its obligation. Section 382 recognizes the surety's right of subrogation by providing that upon full satisfaction of the principal debtor's obligation, the surety can enforce every remedy which the creditor then has against the principal to the extent the surety is reimbursed for what it has expended.

Section 381 recognizes that if a surety satisfies the principal obligation, or any part

74. "A guarantor, who has been indemnified by the principal, is liable to the creditor to the extent of the indemnity . . . ." 15 Okla. Stat. § 343 (1991) (emphasis added).
75. See Sparks v. Childers, 47 S.W. 316, 318-19 (Indian Terr. 1898); see also RESTATEMENT OF SECURITY § 104 special note (1991) (stating that the term "indemnity" is often used as a synonym for "reimbursement").
77. See RESTATEMENT (THIRD) OF SURETYSHIP AND GUARANTY § 18 cmt. a (1996).
78. See id. §§ 18, 21, 22, 26, 27.
thereof, the principal debtor is bound to reimburse the surety for what it has disbursed, including necessary costs and expenses. It should be noted that under the Restatement (Third) of Suretyship and Guaranty, a surety would not be entitled to reimbursement unless the principal has notice of the obligation, based on the theory that the duty to reimburse arises out of an implied-in-law contract between the principal debtor and the surety.80 Without the notice, the Restatement (Third) does not charge the principal debtor with the implied contract.81 In the absence of notice of the surety obligation, the recourse of a surety under the Restatement (Third) lies in restitution.82 Title 15, section 381 does not impose notice as a requirement for the duty to reimburse. However, Oklahoma courts have held that the duty to reimburse is based on an implied obligation of the principal debtor.83 Thus, it is possible that Oklahoma courts would require notice as a prerequisite to the duty to reimburse. However, this would probably be irrelevant because, although the right to restitution is not provided in the Oklahoma surety statutes, a surety would likely be entitled under Oklahoma case law to the equitable remedy of restitution to prevent the unjust enrichment of the principal debtor.84

Section 3-419(e) of the Oklahoma Uniform Commercial Code provides that an accommodation party is entitled to reimbursement from the accommodated party on the instrument. Unlike the view of the Restatement (Third) of Suretyship and Guaranty, the duty of an accommodated party arises whether it has notice of the accommodation or not.85 Thus, any right of an accommodation party to restitution is superfluous.86 In addition, section 3-419(e) specifically recognizes the accommodation party's right to enforce the instrument against the accommodated party.87 Reimbursement and the right to enforce the instrument, however, are not the accommodation party's exclusive remedies. Section 1-103 provides that other state law will apply unless specifically displaced by the Oklahoma Uniform Commercial Code. Thus, any other rights of a surety under Oklahoma law, such as subrogation, would also be available to accommodation parties.88

The specific recourse available to a guarantor is unclear. The Oklahoma guaranty statutes do not provide for any recourse against the principal debtor; and, while Oklahoma cases have recognized that a guarantor has recourse against the debtor, exactly what recourse the guarantor has is not entirely clear. The Oklahoma Supreme

81. See id. § 22 cmt. a.
82. See id. § 26 & cmt. b.
86. See id.
87. See id. (recognizing that providing for the accommodation party to enforce the instrument against the accommodated party essentially codifies the accommodation parties right to subrogation).
Court in *Moore v. White*[^89] held that a guarantor was entitled to be subrogated to the rights of the creditor when it paid the principal obligation.[^90] The *Moore* court reasoned that the rights of a guarantor upon payment of the principal obligation are not distinguishable from the rights of a surety.[^91] Thus, the court concluded that the guarantor was entitled to the right of subrogation provided to sureties under section 382.[^92] Although no other courts have specifically addressed this issue, under the reasoning of *Moore* a guarantor would be entitled to all the rights of a surety under the Oklahoma surety statutes, which would include the rights of exoneration, reimbursement, and subrogation.[^93] In addition, in *Apache Lanes, Inc. v. National Educators Life Insurance Co.*,[^94] the Oklahoma Supreme Court noted in dicta that a guarantor would be entitled to protect itself by suing a debtor for restitution.[^95]

Therefore, although the rights of a guarantor against the principal debtor are not settled, it would seem that a guarantor has all the rights of a surety under the Oklahoma surety statutes along with the right to sue for restitution.

A guarantor should be entitled to the rights of exoneration, reimbursement, subrogation and restitution without requiring that the guarantor fall under the Oklahoma surety statutes. The Oklahoma guarantor statutes do not specifically foreclose these remedies; thus, those remedies should be available to the guarantor based on general rules of common law and equity. Exoneration is merely a right based on the fact that the principal debtor has the primary duty to perform its obligation.[^96] The duty to reimburse the guarantor is based on an implied in law contract between the guarantor and the principal debtor that the debtor should bear the cost of performance because the debtor has the principal duty to perform.[^97] Subrogation is an equitable doctrine which is applicable whenever a party pays the obligation of another who was primarily liable and who should have discharged the obligation.[^98] Restitution is an equitable remedy which should be available to the guarantor whenever necessary to prevent the unjust enrichment of the principal debtors.[^99] Thus, under general principles of law and equity, a guarantor should be entitled to all these rights under Oklahoma law.

---

[^89]: 603 P.2d 1119 (Okla. 1979).
[^90]: See id. at 1121.
[^91]: See id. The court noted that under section 1-201(40) of the Oklahoma Commercial Code "surety" includes guarantor.
[^92]: See Moore, 603 P.2d at 1121.
[^93]: See Cormack & McCarroll, supra note 58, at 403 (maintaining that the remedies available to sureties under Oklahoma's surety statutes should be equally applicable to guarantors).
[^94]: 529 P.2d 984 (Okla. 1975).
[^95]: See id. at 986.
[^97]: See Keyes v. Dyer, 243 P.2d 710, 712 (Okla. 1952); Sparks v. Childers, 47 S.W. 316, 318-19 (Indian Terr. 1898).
[^98]: See Maryland Cas. Co. v. King, 381 P.2d 153, 157 (Okla. 1963) (citing Fourth Nat'l Bank of Tulsa v. Board of Comm'rs of Craig County, 95 P.2d 878, 879 (Okla. 1939)).
II. Waiver of Guarantor's Rights Under Oklahoma Law

A. Waiver of Guarantor's Rights

1. Waiver and Consent

The suretyship defenses are for the protection of the guarantor.\textsuperscript{100} Accordingly, guarantors have been allowed to give up the protection of the suretyship defenses.\textsuperscript{101} Guarantors are allowed to forego the protection of the suretyship defenses either through consenting to the action of the creditor that provides the defense or, more importantly, through a waiver in the guaranty agreement.\textsuperscript{102} In addition, based on the guarantor's freedom of contract, it is generally recognized that a guarantor can waive any defense of the principal that is available to the guarantor.\textsuperscript{103} Guaranty agreements commonly contain clauses which waive defenses available to the guarantor.\textsuperscript{104} Waiver clauses commonly waive defenses such as diligence, presentment, protest, notice of dishonor, demand for payment, enforcement, extension of time for payment, notice of acceptance, enforcement without resorting to collateral, release or subordination of collateral, or partial release of liability.\textsuperscript{105}

Oklahoma courts have consistently upheld the guarantor's ability to waive the suretyship defenses and any other statutory protections given to guarantors.\textsuperscript{106} For example, the Oklahoma Supreme Court in First National Bank and Trust Co. of Vinita v. Kissee\textsuperscript{107} held that a guarantor was not entitled to discharge based on an extension of time for payment of the original obligation of the debtor because the guarantor had agreed to renewals or extensions in the guaranty agreement.\textsuperscript{108} In addition, in Ford Motor Credit Co. v. Milburn,\textsuperscript{109} the United States Court of Appeals for the Tenth Circuit held that a guarantor had waived the right to a

\textsuperscript{100} See RESTATEMENT (THIRD) OF SURETYSHIP AND GUARANTY § 48 cmt. a (1996).
\textsuperscript{101} See id.
\textsuperscript{102} See, e.g., 15 OKLA. STAT. § 338 (1991) (stating that a guarantor is discharged by any act of the creditor which changes the original obligation or changes the remedies available to the creditor unless the guarantor consents to the action of the creditor); Founders Bank & Trust Co. v. Upsher, 830 P.2d 1355, 1363-64 (Okla. 1992) (recognizing that guarantors may waive any protections given by statute); see also 12A OKLA. STAT. ANN. § 3-605(i) (West 1998) (providing that an accommodation party is not entitled to a discharge under the suretyship defense if the accommodation party consents to the conduct that is the basis of the discharge or the accommodation party waives the suretyship defense); RESTATEMENT (THIRD) OF SURETYSHIP AND GUARANTY § 48 (1996).
\textsuperscript{103} See RESTATEMENT (THIRD) OF SURETYSHIP AND GUARANTY §§ 34 cmt. a & 6 (1996).
\textsuperscript{104} See 12A OKLA. STAT. ANN. § 3-605 Okla. cmt. 31 (West 1998).
\textsuperscript{105} See id.
\textsuperscript{106} See, e.g., Founders, 830 P.2d at 1363-64 (holding that the statutory protections given to guarantor's may be relinquished by statutory waiver).
\textsuperscript{107} 859 P.2d 502 (Okla. 1993).
\textsuperscript{108} See id. at 508; see also Bennett v. Checotah State Bank of Checotah, 56 P.2d 848, 850 (Okla. 1936) (holding that a guarantor was not entitled to discharge based on extension given to the principal because the guarantor consented to any extension in the guaranty agreement); Stetler v. Boling, 152 P. 452, 454 (Okla. 1915) (recognizing that the creditor had the right to extend the principal's time of payment based on a waiver in the guaranty agreement).
\textsuperscript{109} 615 F.2d 892 (10th Cir. 1980).
discharge under section 338 of the Oklahoma guaranty statutes\textsuperscript{110} based on an alteration of the original obligation because the guarantor expressly promised to pay any existing and future debts of the principal.\textsuperscript{111} While \textit{Kissee} and \textit{Milburn} dealt with waiver of suretyship defenses, Oklahoma courts have also found waivers of statutory protections that are not suretyship defenses. In \textit{Penner v. International Harvester Co. of America},\textsuperscript{112} the court held that notice of acceptance of an offer of guaranty is not required if the notice is expressly waived in the guaranty agreement.\textsuperscript{113} These decisions clearly indicated that Oklahoma courts will uphold contractual provisions in guarantees that waive the guarantor's rights.

With regard to accommodation parties, section 3-605(i) of the Oklahoma Uniform Commercial Code provides that an accommodation party will not be discharged based on a suretyship defense if the accommodation party consents to the action giving rise to the defense, or if the instrument or a separate agreement provides for waiver of defenses considered in section 3-605. While no Oklahoma court has addressed the issue, commentators recognize that a mortgagor who becomes a surety based on the transfer of the mortgaged property can waive the suretyship defenses by consenting to the action taken by the mortgagee or by placing a waiver clause in the original mortgage or promissory note given to the mortgagee.\textsuperscript{114}

\textbf{2. The Reservation of Rights Doctrine}

In addition to consent and waiver, a guarantor or surety may be deprived of the benefit of the suretyship defenses by a reservation of rights by the creditor.\textsuperscript{115} Under the reservation of rights doctrine, a guarantor or surety is not entitled to a discharge based on the conduct of the creditor, such as an extension of time or release of the principal, where the creditor reserves its rights against the surety or guarantor.\textsuperscript{116} The creditor effects a reservation of rights by informing the principal that it is reserving its rights against the guarantor or surety at the time the creditor takes the action that would give rise to the discharge.\textsuperscript{117} The reservation must be express, clear, and definite, and cannot be inferred.\textsuperscript{118} Some courts have required the reservation to be in writing if the extension or release is in writing.\textsuperscript{119}

\begin{itemize}
  \item \textsuperscript{110} See 15 OKLA. STAT. § 338 (1991) (stating that a guarantor is discharged "if by any act of the creditor, without the consent of the guarantor, the original obligation of the principal is altered in any respect").
  \item \textsuperscript{111} See \textit{Milburn}, 615 F.2d at 899.
  \item \textsuperscript{112} 41 P.2d 843 (Okla. 1935).
  \item \textsuperscript{113} See \textit{id.} at 844.
  \item \textsuperscript{114} See \textit{Nelson & Whitman}, supra note 20, § 5.19, at 285-86.
  \item \textsuperscript{115} See 12A OKLA. STAT. ANN. § 3-605 Okla. cmt. 24 (West 1998) (noting that where a surety or guarantor does not meet the requirements of an accommodation party, the creditor may be able to reserve its rights against the guarantor or surety); \textit{Nelson & Whitman}, supra note 20, § 5.19, at 287-88 (recognizing that courts have allowed a mortgagee to reserve its rights against mortgagor who has become a surety based on transfer of the mortgaged property).
  \item \textsuperscript{116} See 12A OKLA. STAT. ANN. § 3-605 Okla. cmt. 24 (West 1998).
  \item \textsuperscript{117} See \textit{Restatement (Third) of Suretyship and Guaranty} § 38 cmt. a (1996).
  \item \textsuperscript{118} See 12A OKLA. STAT. ANN. § 3-605 Okla. cmt. 24 (West 1998).
  \item \textsuperscript{119} See \textit{Laurence P. Simpson, Handbook on the Law of Suretyship} §§ 64, 73 (1950).
\end{itemize}
creditor is not required to give notice to the guarantor or surety of the change in the principal's obligation that was accompanied by the reservation of rights.\textsuperscript{120}

Two consequences follow from the reservation of rights. First, the reservation of rights preserves the rights of the surety or guarantor against the principal as though the creditor's conduct had never occurred.\textsuperscript{121} For example, if the creditor had given the principal an extension of time and reserved rights against the guarantor, the guarantor would be entitled to pay the obligation on the original due date and immediately exercise its rights of exoneration, reimbursement, or subrogation against the principal as though the extension had not been given.\textsuperscript{122} Second, through the reservation of rights, the creditor prevented the guarantor or surety from being discharged based on the creditor's actions.\textsuperscript{123} This result was based on the theory that by preserving the right of the surety or guarantor against the principal, the surety or guarantor is protected from harm.\textsuperscript{124} The rationale is that if the surety or guarantor had the same rights as it had before the extension of time or other conduct, the surety or guarantor cannot be harmed by the creditor's conduct.

While the reservation of rights doctrine is well established at common law, official comment 3 of section 3-605 of the Oklahoma Uniform Commercial Code expressly rejects the reservation of rights doctrine in relation to accommodation parties. The Permanent Editorial Board for the Uniform Commercial Code reasons that since an accommodation party is not entitled to a discharge if the accommodated party is released under section 3-605(b) or is only discharged to the extent of loss under any of the other suretyship defenses, the person entitled to enforce the instrument does not need a reservation of rights to prevent a discharge of the accommodation party.\textsuperscript{125} However, while few Oklahoma cases address a creditor's reservation of rights,\textsuperscript{126} Oklahoma courts will likely follow the common law reservation of rights doctrine in relation to guarantors and sureties that do not fall under article 3.\textsuperscript{127} This appears consistent with the Oklahoma law giving guarantors and sureties a complete discharge under the suretyship defenses.

As evidenced by its rejection in article 3 of the Oklahoma Uniform Commercial Code, the reservation of rights doctrine has come under substantial criticism.\textsuperscript{128} The

\begin{footnotesize}
120. See Restatement (Third) of Suretyship and Guaranty § 38 cmt. a (1996).
123. See id.
124. See id.
126. See Federal Deposit Ins. Corp. v. Inhofe, 16 F.3d 371, 375-76 (10th Cir. 1994) (applying Oklahoma law to discuss the effect of a reservation of rights on an alleged accord and satisfaction between the debtor and creditor); Oil Field Gas Co. v. International Supply Co., 103 P.2d 91, 93 (Okla. 1940) (holding, without much discussion, that an endorser of notes was not discharged after a subsequent note was issued because there was a "sufficient reservation of liability").
128. See Restatement (Third) of Suretyship and Guaranty § 38 cmt. a (1996) (rejecting the reservation of rights doctrine); Nelson & Whitman, supra note 20, § 5.19, at 287-88 (criticizing the application of the reservation of rights doctrine in relation to mortgagors who become sureties after

\end{footnotesize}
drafters of the Restatement (Third) of Suretyship and Guaranty raise two objections to the reservation of rights doctrine. First, a reservation of rights may cause unfair surprise to the principal.129 For example, the principal may not realize that a release accompanied by a reservation of rights did not relieve the principal of its duty to the guarantor to perform the original obligation on its original terms.130 No valid reason warrants an unsophisticated principal to interpret the creditor's statement that "I can still sue the guarantor" to mean that "the guarantor can still sue the principal on the original obligation."131 Second, the justification for the doctrine (that the preservation of the surety's or guarantor's rights against the principal prevents any harm to the surety or guarantor) is based on the assumption that the surety or guarantor is ready and willing to perform and has been monitoring the principal's obligation.132 The reservation of rights doctrine does not require any notice to the surety or guarantor. If the guarantor is not called upon to perform at the time the obligation becomes due, it is likely to assume that the principal has performed. Thus, even if the surety or guarantor was ready and willing to perform, it may not know that it needs to do so in order to prevent any loss.133 In light of the problems with the reservation of rights doctrine, Oklahoma courts should consider adopting the modern view that "the traditional reservation of rights doctrine has outlived whatever usefulness it may have had."134

Based on these problems with the traditional reservation of rights doctrine, the Restatement (Third) of Suretyship and Guaranty has adopted a rule which allows the creditor to "preserve the secondary obligor's recourse."135 Under section 38 of the Restatement (Third), when the creditor releases a debtor from, or extends the time for performance of, an obligation to pay money, the release or extension results in a "preservation of the secondary obligor's recourse"136 in relation to that duty if the release or extension expressly provides that: (1) the creditor retains the right to seek performance from the surety or guarantor; and (2) the rights of the guarantor or surety to seek recourse from the debtor continue as though the release or extension had not been given.137 A "preservation of the secondary obligor's recourse" does not prevent a discharge of the surety or guarantor.138 Under sections 39 and 40 of the Restatement (Third), the discharge of the surety or guarantor is still determined based on the loss suffered by the surety or guarantor because of the release or extension. However, the preservation of recourse allows the creditor to minimize the loss to the

130. See id.
131. See Nelson & Whitman, supra note 20, § 5.19, at 289.
133. See id.
134. See id.
135. The Restatement (Third) of Suretyship and Guaranty refers to guarantors and sureties generically as "secondary obligers."
137. See id. § 38(a).
138. See § 38 cmt. a.
surety or guarantor by preserving the surety's or guarantor's rights against
the principal. Thus, the preservation of recourse minimizes the loss that would result to
the surety or guarantor from impairment of its right to reimbursement and
subrogation, because of a release or extension, while preventing any unfair surprise
to the principal. Notably, while section 38 does not require notice to the surety
or guarantor, notice may still be necessary to prevent any loss suffered by the surety
or guarantor caused by the passage of time between release or extension accompanied
by the preservation of the rights and when the surety or guarantor learns of release
or extension. Additionally, section 34 of the Restatement (Third) is consistent with rules relating to the suretyship defenses under section 3-605 of the Oklahoma Uniform Commercial Code.

B. Waiver of Guarantor's Rights After the Application of the Oklahoma Anti-Deficiency Statute

In mortgage transactions, the issue of a guarantor's ability to waive its rights arises
most often concerning the application of anti-deficiency statutes. Anti-deficiency
statutes may limit or bar the ability of a mortgagee to get a deficiency judgment after
foreclosure. During the 1930s—a time of a depressed economy and consequent
deflated land value—many states enacted these anti-deficiency statutes to protect mortgage
debtors from personal liability after a foreclosure. Though these statutes were
aimed at protecting mortgage debtors during the depression of the 1930s, many of
these statutes, including Oklahoma’s, survive today.

Because these statutes sometimes place significant limitations on the liability of
mortgage debtors and because mortgage debtors are not generally allowed to waive
the protection of anti-deficiency statutes, mortgagees often look to guarantors to
satisfy the mortgage debtor's obligation. However, guarantors often argue that they
should also get the protection of the anti-deficiency statutes and that they, like the
mortgage debtor, should not be able to waive these protections.

1. Oklahoma Anti-Deficiency Statutes

Oklahoma’s main anti-deficiency statute is title 12, section 686, which governs
judicial foreclosures of mortgages. The anti-deficiency provisions were added to
section 686 in 1941 and were based on the New York anti-deficiency statute.

139. See id.
140. See id. § 38 cmt. b.
142. See generally NELSON & WHITMAN, supra note 20, § 8.3; J. A. Bryant, Jr., Annotation,
Mortgages: Effect Upon Obligation of Guarantor or Surety of Statute Forbidding or Restricting
144. See NELSON & WHITMAN, supra note 20, § 8.3.
145. See Founders Bank & Trust Co. v. Upsher, 830 P.2d 1355, 1359 n.4 (Okla. 1992); see also
NELSON & WHITMAN, supra note 20, § 8.3, at 591.
147. The New York statute which provided the basis for the anti-deficiency provision of section 686
is located today at N.Y. REAL PROP. LAW § 1371 (McKinney 1979). For a discussion of the history of
Section 686 provides two protections to mortgage debtors.

First, section 686 requires that a creditor must seek a deficiency judgment within ninety days after the date of the foreclosure sale. Section 686 goes on to state that "if no motion for a deficiency judgment shall be made as herein prescribed the proceeds of the sale regardless of amount shall be deemed to be in full satisfaction of the mortgage debt and no right to recover any deficiency in any action or proceeding shall exist."\(^{148}\) While the time limitation is, arguably, a short statute of limitations, courts have interpreted the ninety-day limitation of section 686 to completely extinguish and discharge the debt.\(^{149}\)

Second, section 686 provides a set-off for the market value of the mortgage property. This set-off is provided in two provisions of section 686. First, section 686 provides a set-off of the fair market value of the property in determining the deficiency judgment. This part states that the "deficiency judgment shall be for an amount equal to the sum of the amount owing by the party liable as determined by the judgment [plus interest and costs], less the market value as determined by the court or the sale price of the property whichever shall be the higher."\(^{150}\) Second, the last part of section 586 provides a set-off for the fair market value of the mortgaged property in actions to recover for the mortgage debt that are not actions to foreclose the mortgage. The language of this last section seems most important to the issue of whether guarantors should be entitled to a set-off of fair market value of the mortgaged property. The last paragraph of section 686 provides that:

in any action . . . , other than an action to foreclose a mortgage, to recover a judgment for any indebtedness secured by a mortgage on real property and which originated simultaneously with such mortgage and which is secured solely by such mortgage, against any person or corporation directly or indirectly or contingently liable therefor, any party against whom a money judgment is demanded, shall be entitled to set off the fair and reasonable market value of the mortgaged property less the amounts owed on prior liens and encumbrances.\(^{151}\)

It seems that this section is aimed at preventing a mortgagee from evading the anti-deficiency statute by merely suing on the debt instead of foreclosing on the mortgage. However, New York courts, interpreting the statute which was the basis for this provision of section 686, have held that identical language extended to protect guarantors of mortgage loans because the guarantors were "contingently liable" under the statute.\(^{152}\)


\(^{149}\) 12 OKLA. STAT. § 686.


\(^{151}\) 12 OKLA. STAT. § 686.

\(^{152}\) Id. (emphasis added).

\(^{152}\) See Kline v. Samuels, 190 N.E. 324, 326 (N.Y. 1934). However, it seems that the fair market value statute concerning parties "indirectly or contingently liable" is no longer in effect in New York.
Additional anti-deficiency protections are located in Oklahoma's power of sale statute located at title 46, section 43. Section 43 includes three anti-deficiency protections for mortgagors: (1) mortgagors are entitled to elect against a deficiency if the power of sale is exercised against the mortgagor's homestead;\footnote{153} (2) mortgagors are entitled to credit for the fair market value of the mortgaged property if the property is not the mortgagor's homestead;\footnote{154} and (3) any action for a deficiency on non-homestead property must be commenced within 90 days of the date of the sale.\footnote{155} It seems clear, by the consistent use of the term "mortgagor" in all the anti-deficiency provisions, that the protections of section 43 are not aimed at guarantors.

2. Effect of the Oklahoma Anti-Deficiency Statute on Guarantor Liability

Oklahoma first considered the effect of section 686 on guarantor liability in \textit{Apache Lanes, Inc. v. National Educators Life Insurance Co.}\footnote{156} The \textit{Apache} court held that the guarantor was not liable for the deficiency remaining after the foreclosure of the mortgage because the creditor had failed to seek the deficiency from the mortgage debtor within the ninety-day period provided by section 686. In \textit{Apache}, the creditor attempted to collect a deficiency from the guarantors of a mortgage note approximately five years after the foreclosure sale of the property was confirmed. The creditor admitted that his failure to seek a deficiency judgment within the ninety-day period provided by section 686 barred any action to collect the deficiency from the mortgage debtor. However, the creditor argued that the limitation in section 686 was a mere statute of limitations that would not bar an action to recover the deficiency from that guarantor under Oklahoma law.

The \textit{Apache} court admitted that under Oklahoma law the running of a statute of limitations against the principal does not bar an action to collect the debt from the guarantor. The court held that the ninety-day limitation of section 686 was not a statute of limitations.\footnote{157} The court stated that the running of the ninety-day limitation period of section 686 "specifically discharges and extinguishes the debt."\footnote{158}

After deciding that the ninety-day limitation was not a statute of limitations, the \textit{Apache} court considered what effect the discharge of the mortgage debtor's obligation would have on the obligation of the guarantor. The court first noted that if a cause of action against the principal is barred by a statute of limitation, the debt is not discharged. Thus, a guarantor should be required to pay the debt because it can protect itself by suing the principal for restitution for satisfying the principal's debt.\footnote{159} In the case where the debt has been completely discharged and satisfied under section 686, however, the court concluded that the guarantor would have no

\footnotesize{\begin{itemize}
\item \textit{See} 46 \textit{OKLA. STAT.} \textsection 43(A)(2)(c) (1991).
\item \textit{See id.} \textsection 43(A)(2)(d).
\item \textit{See id.}
\item \textit{529 P.2d 984 (Okla. 1974).}
\item \textit{See id. at 986.}
\item \textit{Id.}
\item \textit{See id.}
\end{itemize}}
recourse against the principal because the principal would have a complete defense based on satisfaction of the debt.\textsuperscript{160} The court noted that a guarantor is only liable to the creditor when the debt is not satisfied.\textsuperscript{161}

The Apache court concluded by looking at the Oklahoma guaranty statutes. Relying on title 15, sections 338\textsuperscript{162} and 344\textsuperscript{163} of the Oklahoma Statutes, the court held that the guarantors were discharged because the "failure or omission of the creditor in seeking a deficiency judgment . . . altered, impaired, and led to the discharge of the debtor's obligation."

While Apache made clear that a guarantor could be discharged through application of section 686, the decision did not clearly state the basis for this protection. It was not clear whether the protection given to debtors under section 686 was extended to guarantors or whether the result in Apache was a mere application of Oklahoma's statutory "suretyship defenses." In addition, because the two sentence guaranty agreement considered in Apache had no waiver provisions, it remained unclear whether a guarantor could waive the protection given by the Apache court.

3. Guarantor's Ability to Waive Rights After Application of the Oklahoma Anti-Deficiency Statute

In Riverside National Bank v. Manolakis,\textsuperscript{164} the Supreme Court of Oklahoma took the opportunity to clarify its decision in Apache. The Riverside court addressed two issues: (1) whether the "fictional satisfaction of the mortgage debt" provided by the ninety-day limitation of section 686 gives all guarantors the same protection that is given to mortgage debtors; and (2) if not, whether the discharge of the mortgage debt by operation of section 686, discharges the guarantor because the failure to seek a timely deficiency judgment was an "intervention or omission" under title 15, section 344 of the Oklahoma statutes.\textsuperscript{165}

Concerning the first issue, the Riverside court held that the guarantor is not automatically entitled to the benefit of the discharge given mortgage debtors by section 686.\textsuperscript{166} The court reasoned that the obligation of a guarantor is a collateral

\textsuperscript{160} See id.
\textsuperscript{161} See id.
\textsuperscript{162} 15 OKLA. STAT. § 338 (1991). The section states that [a] guarantor is exonerated, except so far as he may be indemnified by the principal, if by any act of the creditor, without the consent of the guarantor, the original obligation of the principal is altered in any respect, or the remedies or rights of the creditor against the principal, in respect thereto, in any way impaired or suspended. Id.
\textsuperscript{163} 15 OKLA. STAT. § 344 (1991). The section states that "[a] guarantor is not exonerated by the discharge of his principal by operation of law, without the intervention or omission of the creditor." Id.
\textsuperscript{164} 613 P.2d 438 (Okla. 1980).
\textsuperscript{165} See id. at 439.
\textsuperscript{166} See id. at 440. In reaching this holding the Riverside court distinguished contrary New York decisions based on the fact the Oklahoma and New York took different views of the guaranty relationship. The Riverside court maintained that Oklahoma had adopted separate statutes to regulate guaranty relationships, while New York approaches a guaranty as a "related transaction." See id. at 440 n.7.
obligation that is completely independent and separate from the obligation of the principal debtor. The Riverside court maintained that the anti-deficiency provision of section 686 relates exclusively to the debtor/creditor relationship and has no application to "the more complex tri-partite relationship of guarantor/debtor/creditor or with the rights under a guaranty agreement." The court stated that the obligations involved in the guarantor/debtor/creditor relationship are regulated by the guaranty statutes located in title 15, sections 321-344 of the Oklahoma Statutes. While the court noted that a failure by the creditor may impair the guarantor's rights to proceed against the principal, the guarantor will not be discharged in every case because the guarantor's liability depends on the nature of the guarantor's contract with the creditor. The Riverside court concluded that the protection of section 686 applies only to debtors, and does not extend to automatically protect guarantors.

Upon determining that guarantors do not fall under the protection of section 686, the Riverside court considered the second issue of whether the failure to seek a deficiency judgment discharged the guarantor's obligation based on section 344 of the Oklahoma guaranty statutes. The Riverside court looked at the guarantor's obligation and held that the guarantor had waived any defenses under section 344. The court noted that "the guarantor agreed that his liability would not be 'affected or impaired' by any 'failure, neglect or omission' of the bank to protect, in any manner, the collection of the indebtedness or the security given therefor." The court held this promise was sufficient to waive any discharge that would be provided under section 344. In support of its interpretation of the guarantor's promise, the Riverside court noted that the terms of the guaranty agreement should be read in favor of the creditor and against the guarantor.

The Riverside decision seems to stand for three propositions: (1) guarantors are not automatically protected by the "fictional satisfaction" provided by the ninety-day limitation on deficiency judgments in section 686; (2) the effect of a creditor's failure to seek a deficiency judgment as required by section 686 is to be determined by the guarantor's contract and the Oklahoma guaranty statutes; and (3) a guarantor can waive any statutory guaranty defenses it may have based on the creditor's failure to seek a deficiency judgment under section 686. After Riverside, Apache apparently stands for the proposition that the failure to seek a timely deficiency judgment can

167. See id. at 441.
168. Id.
169. See id.
170. See id. at 442.
171. Id.
172. See id. As support for finding that the guarantor had waived the protections of section 344, the Riverside court cited Black v. O'Haver, 557 F.2d 361 (10th Cir. 1977), cert. denied, 435 U.S. 969 (1978). In Black, the court held that a clause stating that the guarantor had consented to liability notwithstanding "the release of the Borrower from performance or observance of any of the agreements, covenants, terms or conditions contained in (the Agreement and the Mortgage) by operation of law" was sufficient to deprive the guarantor of any defense it might have based on the "fictional satisfaction" of the principal's obligation under section 686. Id. at 372.
173. See Riverside, 613 P.2d at 442.
result in a discharge of the guarantor based solely on an application of title 15, sections 344, 338.174

While the Riverside court clarified the effect of the ninety-day limitation of section 686 on a guarantor's obligations, the issue of how the set-off provisions of section 686 affects the obligations of guarantors remained unresolved. Strong argument supports that guarantors should be entitled to a set-off for the fair market value of the mortgage property because the language of section 686 provides such set-off to persons "indirectly or contingently liable."

The Oklahoma Supreme Court was confronted with this issue in Founders Bank and Trust Co. v. Upsher.175 The Founders court held that based on the language of the guaranty agreements, the guarantors had waived any right to set-off, and thus, the court declined to decide whether the set-off provided by section 686 protected guarantors.176

In Founders, the bank lent money to a limited partnership. The bank secured the loan through a mortgage on real property and five guarantees executed by the partners. The litigation in Founders involved three limited partners who had guaranteed "the absolute, complete and punctual performance" of the partnership on the loan. The guaranty agreements executed by the three limited partners were identical except for provisions which specified a fixed percentage of the total unpaid obligation each guarantor would bear. One limited partner guaranteed twenty-five percent of the unpaid balance of the loan, while the other two limited partners each guaranteed twelve and one-half percent of the unpaid balance. In determining the issue of a set-off under section 686, the court focused on Clause 4 of the guaranty agreement. Clause 4 provided the methods in which the bank could pursue remedies upon the default of the principal.

4. Nothing herein contained will limit the Bank in exercising any rights held under any one or more of the Loan Documents. On the occurrence of any event of Default under the Loan Documents or this Agreement, the Bank will be entitled to selectively and successively enforce any one or more of the rights held by the Bank and such action will not be deemed a waiver of any other right held by the Bank. All of the remedies of the Bank under this Agreement and the Loan Documents are cumulative and not alternative. If the Bank elects to foreclose any lien created by the Loan Documents, the Bank is authorized to purchase for the account of the Bank all or any part of the collateral covered by such lien . . . and to credit the amount recovered first against that portion of


176. See Founders, 830 P.2d at 1363.
the Loan for which the Guarantor is not liable with any balance remaining to be applied in reduction of the liability of the Guarantor hereunder.\textsuperscript{177}

After the partnership defaulted on the loan, the bank sued (1) on the promissory note, (2) to enforce the mortgage, and (3) to enforce the guaranty agreements. After the trial court gave the bank judgment against the three guarantors, the guarantors argued that section 686 entitled them to an offset of the fair market value of the mortgage property and not just a credit for the actual value received at the sheriff's sale. Subsequently, the bank purchased the property at the sheriff's sale. The trial court reduced the bank's judgment by the proceeds of the sheriff's sale, but refused to credit the guarantors with the fair market value of the property.

In determining whether the guarantors got the benefit of the set-off provisions of section 686, the Founders court looked at the guaranty contracts. The court held that the guarantor's obligation is collateral to the principal obligation and the terms of the guarantor's contract will govern the extent of the guarantor's obligation.\textsuperscript{178} The court stated that the obligation of a guarantor is not dependent upon the existence of the principal's debt; rather, the guarantor's obligation is based solely on the terms of the guarantor's separate and independent contract.\textsuperscript{179} From the language of Clause 4 of the guaranty contracts, the court first determined that the parties intended that the balance owed by the guarantors was to be determined by giving credit for the sheriff's sale proceeds, and the guaranty contract did not provide for a set-off of the fair market value of the mortgaged property.\textsuperscript{180} Second, the court noted that Clause 4 provided that all of the bank's remedies were cumulative and that no action taken by the bank would waive any of the bank's other rights.\textsuperscript{181} The court held that these two sections of Clause 4 were sufficient to waive any right to a set-off the guarantors might have under section 686.\textsuperscript{182}

The Founders court noted that the application of the set-off provisions of section 686 creates a built-in loss to the creditor of the difference between the fair market value of the property and the foreclosure sale proceeds.\textsuperscript{183} Creditors are forced to protect themselves from this built-in loss by obtaining a guaranty. The Founders court maintained that guarantors should be allowed to waive any right to a set-off because lenders should be deprived of the ability to bargain against the built-in loss resulting from section 686.\textsuperscript{184} The court noted that while mortgage debtors would not be allowed to waive the benefits of section 686, persons other than mortgage

\textsuperscript{177} Id. at 1538 n.1 (emphasis added).
\textsuperscript{178} See id. at 1361.
\textsuperscript{179} See id. at 1362-63.
\textsuperscript{180} See id. at 1362.
\textsuperscript{181} See id. at 1363.
\textsuperscript{182} See id.
\textsuperscript{183} See id. at 1362 n.23.
\textsuperscript{184} See id.
debtors are allowed to waive the right to set off the fair market value of mortgaged property.\textsuperscript{185} 

The \textit{Founders} court determined that the waiver disposed of any need to determine whether the set-off provisions of section 686 protected guarantors. However, in a footnote the court seemed to adhere to its ruling in \textit{Riverside} that section 686 applied only to the debtor/creditor relationship.\textsuperscript{186}

In addition to the issues relating to whether the guarantors fell under the protection of section 686, the court considered whether the Oklahoma guaranty statutes provided the guarantors any defenses based on the reduction of the principal's obligation under set-off provisions of section 686. First, the court considered title 15, section 334, which provides that the obligation of a guarantor must be neither larger in amount nor in any respects more burdensome than the obligation of the principal. The \textit{Founders} court held that section 334 "relates to conditions at the time of the guaranty's execution."\textsuperscript{187} The court reasoned that the guaranty agreement's original obligation may be fixed to assure that the guarantor's obligation does not exceed that of the principal; however, the guarantor may agree that, upon the occurrence of a specified event, its liability will remain the same although the principal's obligation may be decreased.\textsuperscript{188} The court held that the guarantors had agreed that upon the sale of the mortgaged property, their liability would be determined based on a credit for the sale proceeds even though the liability of the principal may be reduced by the fair market value of the property.\textsuperscript{189} Thus, the \textit{Founders} court essentially determined that the guarantors had waived the protections of section 334. Second, the \textit{Founders} court considered the application of title 15, section 341, which provides that the acceptance by the creditor of partial satisfaction of the principal's obligation reduces the obligation of the guarantor in same measure. Because the guaranty agreement detailed the method for crediting the actual proceeds of the mortgage foreclosure, the court determined that the guarantors had waived any statutory right to set-off provided by section 341.\textsuperscript{190}

In \textit{Founders}, the Oklahoma Supreme Court established a strong policy in favor of allowing guarantors to waive any statutory protections they may have. The \textit{Founders} court established that even if guarantors did come under the protection of the set-off provisions of section 686, those guarantors, unlike mortgage debtors, would be allowed to waive that protection. In addition, courts following \textit{Founders} have allowed waivers of any right to set off under guaranty language much less specific than that in \textit{Founders}.\textsuperscript{191}

\begin{footnotes}
\item[185] See \textit{id.} at 1359 n.4.
\item[186] See \textit{id.} at 1359 n.31.
\item[187] \textit{Id.} at 1363 & n.27 (citing Bloom v. Bender, 313 P.2d 568, 574 (Cal. 1957)).
\item[188] See \textit{id.} at 1363.
\item[189] See \textit{id.}
\item[190] See \textit{id.} at 1364.
\item[191] In \textit{Local Federal Bank v. Jico, Inc.}, 842 P.2d 368, 370 (Okla. Ct. App. 1992), the court found a waiver of any right to set-off based on provisions of the guaranty agreement which granted the Bank the rights to (1) proceed directly against Guarantors without prior liquidation of any collateral securing the indebtedness or first proceeding against [the debtor], and (2) to sell,
\end{footnotes}
Since *Founders*, no published Oklahoma decision has squarely addressed the issue of whether guarantors are protected by the set-off provisions of section 686. 192 However, in an unpublished opinion, *Paller v. Group Limited Partnership*, 193 the Oklahoma Court of Appeals considered whether a guarantor was entitled to a set-off after mortgage foreclosure when there was no waiver of set-off. After noting that the law on this issue was "less than clear," the *Paller* court rejected a rule that guarantors fall under the protection of the set-off provisions of section 686. 194 However, the court determined that since the guarantors had not waived any right to set-off of the fair market value of the mortgage property, the guarantor was entitled to the set-off because the principal was entitled to such a set-off. The court reasoned that if the guarantor was not given the set-off, his obligation would be greater than that of the principal in violation of title 15, section 334.199

Thus, it seems that courts are going the follow the dicta in *Founders* that the set-off provisions of section 686 are not directly applicable to guarantors. The *Paller* court seemed to take the approach of *Apache* and *Riverside* that any effect on the guarantor's obligation based on the application of the anti-deficiency provisions of section 686 must be determined under an application of the Oklahoma guaranty statutes. After *Paller*, it will not matter if guarantors come directly under the protection of section 686 because, absent a waiver, the guarantor will get the benefit of the set-off based on an application of the Oklahoma guaranty statutes.

While the *Riverside* and *Founders* line of cases have established a strong policy of allowing guarantors to waive any direct or indirect protection under the application of section 686, several issues remain unresolved. First, should guarantors fall directly under the protections of section 686, especially the set-off provisions? Second, if we allow guarantors to waive the effects of section 686, will the guarantors be able to get recourse from the principal? Third, how will the Oklahoma courts treat the anti-deficiency protections located in the Oklahoma power of sale statute? Fourth, how will the Oklahoma courts treat accommodation parties and sureties under section 686? These issues will be addressed in part III of this comment.

C. Language Required to Waive Guarantor's Rights

The *Founders* court laid out the standard for determining whether contractual language is sufficient to waive a guarantor's statutory rights. The court maintained

exchange, release or surrender any and all collateral for the obligation without impairing
Guarantor's obligations to the Bank.

*Id.* In *Local Federal*, four of the guarantors involved had signed an additional guaranty agreement which contained a provision specifically waiving any right to set-off. However, one guarantor/appellant had only signed the agreement containing the above stated language. Thus, that guarantor's waiver of set-off under section 686 must have been based solely on the above stated waiver provisions.

192. Like the *Founders* court, the court in *Local Federal Bank*, 842 P.2d at 370, found it unnecessary to determine whether guarantors where entitled to a set-off under section 686 because the guarantors had waived any right to set-off.


194. See *id.* at 2579. The court stated that "the law does not specifically provide for applicability of [the set-off provisions of section 686] to guarantors." *Id.*

195. See *id.*
that "[t]o escape the incidence of general law, the agreement must not be silent as to the parties' intent vis-à-vis the applicable law." This standard, however, should not be read strictly. The result in Founders makes it clear that an expression of intent to waive guaranty statutes does not require that the statute be expressly recognized. The court will likely look at the parties' intent based on the contract language and determine whether that expression of intent is inconsistent with the applicable law. The key language used in the Founders guaranty agreement did not purport to waive any applicable law; it only described what would happen if the mortgaged property was sold. The Founders court found this expression of the parties' intent inconsistent with applicable statutory protections and thus found that the parties had waived those protections.

Oklahoma case law raises several notable issues. First, the statement that a guaranty is "absolute" and/or "unconditional" will not be effective to waive the general suretyship defenses. Under title 15, section 326, however, the statement that a guaranty is "absolute" effectively waives the requirement of notice of acceptance. Second, the waiver will clearly be effective if it expressly mentions the conduct that would have provided the basis for the discharge. However, the language need not specify the conduct that would provide the basis for the discharge if it is clear what defense is being waived. Third, if the waiver is too specific, the court may construe it strictly. For example, where the guarantor gave "consent that the time of payment be extended without notice," the court held that the waiver applied to only one extension and the guarantor was given discharge because the creditor gave the debtor more than one extension of time.

197. See supra note 171 and accompanying text.
198. See Founders, 830 P.2d at 1362, 1364.
199. See Bank of Okla. v. Welco, 898 P.2d 172, 178 (Okla. Ct. App. 1995) (finding that the guarantor was discharged based on the section 344 of the Oklahoma guaranty statutes although the guaranty agreement stated that the guaranty was "absolute" and "unconditional"); see also RESTATEMENT (THIRD) OF SURETYSHIP AND GUARANTY § 44 cmt. d (1996) (stating that a statement that a guaranty is "absolute" or "unconditional" is not effective to waive suretyship defenses); 12A OKLA. STAT. ANN. § 3-605 Okla. cmt. 31 (West 1998) (finding that the waiver must indicate the intent to waive suretyship defenses). It seems that no Oklahoma cases seriously consider the statement that a guaranty is "absolute" or "unconditional" in determining whether a guarantor has waived its right to discharge under the Oklahoma guaranty statutes.
201. See, e.g., Rivers de'Nat'l Bank v. Manolakis, 613 P.2d 438, 442 (Okla. 1980) (holding that the guarantor had waived discharge under title 15, section 344 based on the creditor's failure to timely seek a deficiency judgement where the guarantor agreed that "his liability would not be 'affected or impaired' by any 'failure, neglect or omission' of the bank to protect, in any manner, the collection of the indebtedness or the security therefor"); INA Life Ins. Co. v. Brandywine Assoc., Ltd., 800 P.2d 1073, 1074, 1077 (Okla. Ct. App. 1990) (holding that waiver of any right to set-off was effective to waive any right to the protection of the right to set-off upon foreclosure under section 686).
Section 3-605(i) of the Oklahoma Uniform Commercial Code and its accompanying comments are much more helpful in determining what is required to waive an accommodation party's suretyship defenses. Section 3-605(i) states that an accommodation party may waive its section 3-605(i) defenses "either specifically or by general language indicating that the parties waive defenses based on suretyship or impairment of collateral." While section 3-605 clearly requires an "indicat[ion] that the parties waive defenses," the Oklahoma Comments to section 3-605(i) state that waiver language need not be precise or extensive and that a simple statement in the instrument that "suretyship defenses are waived" would be sufficient to bind the accommodation party.\(^\text{202}\) This requirement of general language eliminates the need for lengthy waiver provisions that would likely not be read anyway. The Permanent Editorial Board for the Uniform Commercial Code takes the view that general language indicating a waiver of defenses will assure that "a diligent indorser or accommodation party will, at least, not be unjustly surprised when it is asserted that the terms of the instrument or agreement delete protections that would otherwise be available."\(^\text{203}\) However, the Oklahoma Comment recognizes two limitations on the effectiveness of such general waivers. First, if the waiver of defenses outside of section 3-605 is desired, the defenses should be specifically waived.\(^\text{204}\) Thus, in the context of accommodation parties in mortgage transactions, a specific waiver of an accommodation party's rights based on the application of section 686 would likely be required because the effects of section 686 probably do not fall under section 3-605.\(^\text{205}\) Second, the drafter should try to avoid specific language concerning the party that waives the defenses.\(^\text{206}\) For example, if the instrument states that the maker waives all suretyship defenses, then the waiver would apply only to an accommodation party who is a co-maker and would not extend to an indorser, surety, guarantor, or accommodation party.\(^\text{207}\)

When considering waivers in guaranty contracts, it is important to note that the traditional definition of a waiver (the intentional relinquishment of a known right) is not involved. A guarantor or surety need not know its legal rights in order to waive them. The contractual waiver of suretyship rights "is not, strictly speaking, a waiver but, rather, is simply a contract term that delineates the contours of the secondary obligation." In addition, a creditor clearly has no duty to disclose or explain to a guarantor or surety the legal effects of waiving grounds for discharge.

General rules are difficult to establish concerning what language is required to waive the rights of a guarantor or surety under Oklahoma law. The best course of action would be to draft the waiver clauses according to the Oklahoma guaranty and surety statutes. The decisions in Riverside and Founders clearly indicate that the rights of a guarantor or surety are based on these statutes. Waivers based on all the

---

204. See 12A OKLA. STAT. ANN. § 3-605 Okla. cmt. 31 (West 1998).
205. See id. § 3-605 Oklahoma cmt. 21.
206. See id. § 3-605 Oklahoma cmt. 31.
207. See id.
statutes granting a guarantor or surety "exoneration" would likely give the creditor broad protection. Under Apache and Riverside, a waiver addressing the rights of a guarantor or surety under sections 338 and 344 of the Oklahoma guaranty statutes should ensure the waiver of a discharge based on the failure of a creditor to seek a deficiency judgment under section 686. In addition, because the decisions have been unclear on whether guarantors or sureties come under the direct protection of the set-off provisions of section 686, drafters should probably include a specific provision waiving any statutory right to set-off under section 686 if such a waiver is desired. Finally, specific waivers should include any guarantor defenses that are common or important in the circumstances to prevent litigation on such defenses under broad waiver clauses.

D. Guarantor's Rights Against the Principal After Contractual Waiver

An important issue involved in the contractual waiver of a guarantor's right is whether the guarantor has recourse against the principal when it waives defenses to performance that are available to principal. While the issue could arise with a number of defenses available to the principal, this issue would most often arise in the context of mortgage transactions in relation to the guarantor's waiver of the effects of section 686 on its obligation. Thus, this issue will be analyzed based on a hypothetical in that context. Oklahoma law on this issue is scarce. Thus, the approaches taken by the Oklahoma Uniform Commercial Code and the Restatement (Third) of Suretyship and Guaranty will be considered in determining what an Oklahoma court would likely do.

Assume that Bank made a loan to Principal and took a mortgage on Black Acre as security. Bank also required a guaranty of the loan. Principal's father, Guarantor, agreed to guaranty the loan. The guaranty agreement provided that 'Guarantor's liability would not be affected by Bank's failure to seek a deficiency judgment from

208. This section will deal exclusively with waivers placed in the guaranty agreement. It should be noted that there may be different rules concerning the guarantor's right to reimbursement in different "waiver" situations. For example, where the guarantor "waived" a defense it had available by performing without knowledge of that defense, the guarantor may be entitled to reimbursement. See 12A OKLA. STAT. ANN. § 3-419(e) Okla. cmt. 3 (West 1998); RESTATEMENT (THIRD) OF SURETYSHIP AND GUARANTY § 24 & cmt. c (1996).

209. There seems to be no issue if the guarantor waived a defense, such as a "suretyship defense," that would not act as a defense to the principal's underlying obligation. For example, if the guarantor waived modification of the underlying obligation, the guarantor should still have recourse against the principal if it has to pay after the underlying obligation has been modified. Although guarantor had waived a defense it had to payment (i.e., modification of the underlying obligation), such defense would not be available to the principal, and the guarantor should be entitled to recourse through subrogation, reimbursement, or restitution. See RESTATEMENT OF SECURITY § 108(1)(a) (1941) (providing for reimbursement when a surety performs when it is entitled to a defense not available to the principal); RESTATEMENT (THIRD) OF SURETYSHIP AND GUARANTY § 27 & cmt. d (1996) (providing for subrogation when a surety performs in spite of a "suretyship defense" not affecting the principals liability on the underlying obligation); RESTATEMENT (THIRD) OF SURETYSHIP AND GUARANTY §§ 24(1)(f) cmt. c, 26 cmt. c (1996) (rejecting the view in Restatement of Security that reimbursement is proper when a surety performs in spite of a defense that is not available to the principal, but maintaining that restitution is proper in such situation to prevent unjust enrichment of the principal).
Principal upon foreclosure of the mortgage.\textsuperscript{210} Principal defaults on the loan, and Bank forecloses the mortgage. The proceeds of the sheriff's sale equal the fair market value of the property; however, the proceeds of the sale are insufficient to satisfy the loan. Bank fails to seek a timely deficiency judgment against Principal. On the other hand, Bank is successful in collecting the deficiency from Guarantor because Guarantor waived any defense it might have because of the Bank's failure to seek a deficiency judgment. Will Guarantor be entitled to recover the deficiency that it had to pay from Principal?

Guarantors generally have three methods of recourse from the principal after satisfying the principal's obligation: subrogation, restitution, and reimbursement.\textsuperscript{211} Under the equitable right to subrogation, the guarantor is substituted to the position of the creditor who received the payment.\textsuperscript{212} However, Guarantor would only have whatever rights Bank had against Principal.\textsuperscript{213} Because Bank failed to pursue a deficiency judgment under section 686, Principal's obligation to Bank is deemed to be completely satisfied by the proceeds of the foreclosure sale. Thus, under his right to subrogation, Guarantor would not be entitled to recover the deficiency from Principal because Bank would have no right to recover that deficiency.\textsuperscript{214}

Guarantors are also entitled to seek recourse from the principal in the form of restitution.\textsuperscript{215} Under Oklahoma law, a person is entitled to restitution when there is "enrichment to another coupled with resulting injustice."\textsuperscript{216} Restitution can arise from expenditures by one person that add to the property of another or save the other from loss or expense.\textsuperscript{217} In the case of Guarantor, the payment has not enriched Principal. Principal no longer owes any obligation to Bank because the underlying obligation is completely satisfied by the operation of section 686. Guarantor's satisfaction of the deficiency does not relieve Principal of any obligation; thus, Principal is not enriched. Guarantor should not, therefore, be able to recover its payment from Principal through restitution.

Finally, Guarantor could seek reimbursement from Principal. A guarantor's right to reimbursement is an implied in law obligation of the principal to reimburse the guarantor for the costs of performance.\textsuperscript{218} Policy issues arise, however, when a duty


\textsuperscript{211} \textit{See supra} notes 85-95 and accompanying text.


\textsuperscript{213} \textit{See} Moore v. White, 603 P.2d 1119, 1121 (Okla. 1979).

\textsuperscript{214} In dicta, the court in \textit{Dixon v. United States}, 68 F.3d 1253, 1255 (10th Cir. 1995) (applying Oklahoma law) reached the same result under similar facts. However, the court found that the guarantor, a federal government agency, was entitled to recover from the principal based on the government agency's "independent contractual right of indemnity." \textit{Id.}


\textsuperscript{217} \textit{See} N.C. Corff, 929 P.2d at 295.

\textsuperscript{218} \textit{See supra} notes 85-89, 93 and accompanying text; \textit{cf.} 15 \textit{Okla. Stat.} § 381 (1991) (providing
to reimburse is found where the principal has a defense to the principal obligation.\textsuperscript{219} If a duty is placed on the principal, the value of the defense is obviated. Alternatively, if the principal is not required to reimburse, the ultimate cost of performance will be borne by the guarantor rather than the principal.\textsuperscript{220} In the case of Guarantor, the policy works strongly in favor of Principal. First, requiring Principal to reimburse Guarantor would circumvent the protections of section 686. Mortgage debtors are entitled to the absolute protection of section 686 and they cannot waive that protection.\textsuperscript{221} Requiring Principal to reimburse in this situation would essentially deny Principal the protections of section 686. Second, denying reimbursement does not seem unfair to Guarantor. Guarantor waived any protections derived from the application of section 686. Thus, Guarantor essentially assumed the risk that if Bank foreclosed and failed to seek a deficiency judgment, then it would be liable for the deficiency even though Principal would not. Thus, Principal should have no duty to reimburse Guarantor.

This result concerning Guarantor's right to reimbursement seems consistent with section 3-419(e) of the Oklahoma Uniform Commercial Code and section 24 of the \textit{Restatement (Third) of Suretyship and Guaranty}. The Oklahoma Comments to section 3-419(e) consider the facts of the case to determine any conflict between the accommodation party's right to reimbursement and the accommodated party's right to raise a defense.\textsuperscript{222} This would seemingly result in no duty to reimburse Guarantor because of the strong policy in favor of allowing Principal to get the benefit of any defenses under section 686. Under section 24 of the \textit{Restatement}, Principal would have no duty to reimburse Guarantor. Section 24(1)(c) provides that the principal obligor has no duty of reimbursement when the principal obligor has a defense to the underlying obligation that is not available to the secondary obligor under the terms of the secondary obligation. Comment b and illustration 5 of section 24 clearly establish that a guarantor who waives a defense available to the principal is not entitled to reimbursement. The \textit{Restatement}'s drafters reasoned that to allow reimbursement in such a situation would make the principal's defenses illusory.\textsuperscript{223}

Guarantor must, therefore, bear the cost of Principal's deficiency without any recourse against Principal through subrogation, restitution, or reimbursement. This result is consistent with the conclusion in \textit{Apache} that the guarantor is not entitled to any recourse against the principal if the guarantor had been required to pay the deficiency.\textsuperscript{224} In \textit{Apache}, the guarantor had not waived the protections of the Oklahoma guaranty statutes and was discharged because the creditor's actions had

\begin{itemize}
\item \textsuperscript{219} See PEB Commentary No. 11: Suretyship Issues Under Sections 3-116, 3-305, 3-415, 3-419, and 3-605, 3B-U.L.A. 122 (1993).
\item \textsuperscript{220} See id.
\item \textsuperscript{221} See Founders Bank & Trust Co. v. Upsher, 830 P.2d 1355, 1359 n.4 (Okla. 1992).
\item \textsuperscript{222} See 12A OKLA. STAT. ANN. § 3-419(e) Okla. cmt. 3 (West 1998).
\item \textsuperscript{223} See \textit{RESTATEMENT (THIRD) OF SURETYSHIP AND GUARANTY} § 24 cmt. b (1996).
\end{itemize}
impaired the guarantor's remedies. A different result concerning the guarantor's right to recourse against the principal is difficult to justify when the guarantor waives its statutory protections.

If a guarantor waives any statutory right to set-off arising under section 686, such a guarantor would also not be entitled to any recourse against the principal. The guarantor would confront the same issues as those related to subrogation, restitution, and reimbursement. Allowing reimbursement in such a situation would indirectly result in an unlawful waiver of the mortgage debtor's rights under section 686.

What about situations involving defenses, other than section 686, which are available to the principal and have been waived by the guarantor? Any time the principal has a defense to the underlying obligation, the guarantor will have no apparent recourse through subrogation and restitution. The issue revolves around the principal's duty of reimbursement. Under the approach of section 24(1)(c) of the Restatement (Third) of Suretyship and Guaranty, the guarantor is seemingly not entitled to reimbursement any time the principal has a defense to the underlying obligation which was waived by the guarantor. However, the Oklahoma Comments concerning reimbursement under section 3-419(e) of the Oklahoma Commercial Code promote more flexibility in determining the accommodated party's duty of reimbursement.

While the flexible approach under the Oklahoma Uniform Commercial Code seems attractive, section 24(1)(c) of the Restatement (Third) is more appropriate for two reasons. First, the rule under section 24(1)(c) gives a clear rule that is easy to apply. This provides the parties with certainty in determining when the guarantor is entitled to reimbursement. In addition, a clear rule allows the principal and guarantor to have a background standard from which they can begin contracting. Second, the rationale behind section 24(1)(c) is sound. Comment c to section 24 states that requiring a principal to reimburse a guarantor when the principal had a defense that was waived by the guarantor makes that defense valueless to the principal. Fairness dictates that the guarantor should not be allowed to unilaterally deprive the principal of its defenses. In such a situation, the guarantor realized it might have a defense to the obligation because of a certain event and waived that defense. Through its right to reimbursement, the guarantor should not be able to indirectly force the principal to waive certain defenses based on the guarantor's waiver in its independent and separate guaranty agreement. In addition, a guarantor would not reasonably believe that it could waive defenses that would also be available to the principal and expect to be protected by collecting from the principal.

The best rule mandates that whenever a guarantor waives defenses in the guaranty agreement that are also available to the principal, the guarantor should not be entitled to reimbursement from the principal whenever the principal had a defense to the underlying obligation that the guarantor had waived in its guaranty agreement.

---

225. See id. at 986-87.
226. See First Nat'l Park Bank v. Johnson, 553 F.2d 599, 602 (9th Cir. 1977); Mutual Fin. Co. v. Politzer, 256 N.E.2d 605, 612 (Ohio 1970). But see Knight v. Cheek, 396 A.2d 601, 603-04 (D.C. Cir. 1977) (stating that a principal had a duty to reimburse a guarantor when the guarantor was required to
In addition, the guarantor in such a situation should not be entitled to recourse through restitution or subrogation. Thus, if a guarantor must perform due to a waiver of a defense that was available to the principal, then the guarantor should have no recourse against the principal.

III. Analysis of Oklahoma Law on the Waiver of Guarantor's Rights

As seen from the preceding discussion, Oklahoma courts have developed a strong policy in favor of allowing guarantors to waive their statutory protections. This part analyzes aspects of Oklahoma's waiver law. First, this part examines Oklahoma's treatment of guarantor waiver in light of modern authority, namely the Restatement (Third) of Suretyship and Guaranty. Second, this part considers possible limitations on a guarantor's ability to waive defenses.

A. Comparison of Oklahoma's Strong Policy in Favor of Allowing Waiver of Guarantor's Rights with Modern Jurisprudence

The decisions of the Oklahoma Supreme Court in Riverside and Founders have established a strong policy in Oklahoma in favor of allowing guarantors to waive their rights. These decisions clearly provide that a guaranty is an obligation collateral to the principal obligation and that the extent of a guarantor's independent obligation will be determined based on the terms of the guarantor's agreement. Under Riverside and Founders, guarantors will seemingly be allowed to waive any of their statutory rights.

While Riverside and Founders may appear broad, these decisions are consistent with the modern suretyship law. The most recent survey of American suretyship law, the Restatement (Third) of Suretyship and Guaranty, has adopted rules recognizing the freedom of guarantors and sureties to waive their rights. Section 6 of the Restatement (Third) provides that all the rules governing the rights of guarantors may be varied by the agreement of the parties. In addition, section 48 recognizes the ability of guarantors to waive their suretyship defenses. Riverside and Founders also seem consistent with the recent revisions to the Oklahoma Uniform Commercial Code. Section 3-505(i) of the Oklahoma Uniform Commercial Code clearly establishes that an accommodation party can waive its "suretyship defenses."

B. Possible Limitations on Guarantor Waiver and Construction Issues

1. Unconscionability and Good Faith

What are the limitations on the guarantor's ability to waive its rights? The freedom of contract given to guarantor's would, of course, be limited by general doctrines of...
contract law such as good faith and unconscionability. These doctrines would prevent any overreaching or abuse.

However, the waiver of any defense that would result in a discharge is not, in itself, ordinarily unconscionable, and an action taken by a creditor that would result in discharge in spite of a waiver by the guarantor is not ordinarily a breach of the duty of good faith or fair dealing. Unconscionability requires two elements: (1) lack of meaningful choice (procedural unconscionability), and (2) contract terms unreasonably favorable to the other side under the circumstances (substantive unconscionability). A guarantor is not generally making the guaranty to assure a needed benefit. Thus, the guarantor would generally have a choice in entering the contract. In addition, a guaranty is generally required to ensure the satisfaction of a loan made to a person with questionable credit. A waiver of suretyship rights, which only provides added assurance that a questionable loan is satisfied, is probably not unreasonable under the circumstances. The obligation of good faith and fair dealing requires that "neither party, because of the purposes of the contract, will act to injure the parties' reasonable expectations nor impair the rights or interests of the other . . . ." If a guaranty contract expressly provides for liability even if the creditor takes a certain action, it seems absurd to find that if the creditor takes such action, it has injured the guarantor's "reasonable expectations" or impaired the guarantor's "rights or interests."

A waiver would thus rarely be struck down based on unconscionability or breach of good faith and fair dealing. These concepts, however, would be available to protect the guarantor from egregious situations involving fraud or oppression.

2. Gratuity Guarantors and the "Strict Rule of Construction"

There is an issue concerning whether waivers should be treated differently when the guaranty is made gratuitously for a friend or relative. Arguably, a guarantor in such a situation is "a fool with a pen and thus deserving of judicial protection." However, the only apparent protections given to such gratuitous guarantors have been based on a strict rule of construction concerning the obligations of the guarantor. Oklahoma courts have held that the terms of a guaranty contract, gratuitous or otherwise, are to be determined according to the rules of construction applicable to any contract. Then, after the terms of the guaranty contract have been deter-


228. See Restatement (Third) of Suretyship and Guaranty § 24 cmt. a (1996)

229. See Barnes, 548 P.2d at 1020.


mined, the obligations of the guarantor will be construed under the strict rule of construction to protect the guarantor from being held beyond the express terms of the guaranty contract.25 Therefore, the strict rule of construction applicable in the case of gratuitous guarantors is not really helpful to the guarantor if the unambiguous terms of a guaranty contract waive the guarantor's rights.

3. Construction of the Terms of the Guaranty Agreement

Questions arise concerning the rule Oklahoma courts have applied in construing the ambiguous terms of guaranty contracts. The prevailing view is that guaranty contracts should be construed under general contract interpretation rules.256 While Oklahoma law could be interpreted to require that guaranty contracts be construed under general contract principles,257 Oklahoma courts have consistently held that the terms of a guaranty should be construed strongly against the guarantor.258 Oklahoma courts have applied this rule in almost every case; however, other rules of construction could potentially be applicable in certain situations. The approach taken by the Oklahoma Court of Appeals in Federal Deposit Ins. Corp. v. B.A.S., Inc.259 is instructive. In Federal Deposit, the guarantor executed a guaranty on a printed form supplied by the lending institution. The court held that "a printed contract will be construed most strongly against the party who prepared the document and that an uncertainty or ambiguity in a contract will be construed against the party that caused the uncertainty or ambiguity."260 Instead of relying blindly on the line of cases construing guaranty contracts strongly against the guarantor, the Federal Deposit court looked at the factual situation involved to determine the proper rule of construction. Other Oklahoma courts should follow Federal Deposit and look more closely at the facts of the particular situation in determining the proper rule of construction.

As with the strict rule of construction applied to the obligations of gratuitous guarantors, however, the rules applied in construing the terms of a guaranty contract do not actually affect the ability of guarantors to waive their rights. If the guarantor has unambiguously waived its rights under the terms of the guaranty agreement, rules of construction make no difference.

235. See Lamm, 98 P. at 356; see also Restatement (Third) of Suretyship and Guaranty § 14 (1996) (reporter's note and cases quoted therein).
240. Id. at 360-61.
4. Adhesion Contract Principles

It has been argued, mostly unsuccessfully, that a guaranty contract is a "contract of adhesion" in certain situations. The Oklahoma Supreme Court provides the following definition of an adhesion contract:

The term [adhesion contract] refers to a standardized contract prepared by one party to the transaction for the acceptance of the other; such a contract, due to the disparity in bargaining power between the draftsman and the second party, must be accepted or rejected by the second party on a "take it or leave it" basis, without opportunity for bargaining and under such conditions that the "adherer" cannot obtain the desired product or service save by acquiescing in the form agreement.

The key characteristic is that the "weaker party has no realistic choice to terms." While Oklahoma courts have been reluctant to extend adhesion contract status to a bank contract, it is possible that a guaranty could be classified as a contract of adhesion in certain situations. Most guaranty agreements entered by banks and other lending institutions are on printed forms for convenience. Also, it is probable that in certain consumer transactions the guarantor must accept the terms of the guaranty in order to get the loan for the principal, and thus has virtually no bargaining power. However, even if the situation justified a conclusion that the guaranty could be classified as a contract of adhesion, that classification would not affect the guarantor's ability to waive its rights under Oklahoma law.

Adhesion contracts are not per se illegal under Oklahoma law. Oklahoma courts have maintained that such contracts are helpful to commerce because they allow standardization and equal treatment of contractees. The result of finding an adhesion contract is that ambiguous terms of the printed contract will be construed most strongly against the drafting party. Thus, even if a guaranty was found to

---


243. Id.


246. See id.

be an adhesion contract, any waivers placed on the guaranty would be valid as long as they were unambiguous. The argument that a guaranty is an adhesion contract in a particular situation seems only to give the guarantor the benefit of having the guaranty construed strongly against the drafting party. A guarantor would have to look to concepts of unconscionability or fraud to get relief from signing a standardized guaranty contract.

5. Summary of Limitations on Waiver and Construction Issues

Very few limitations are placed on a guarantor's ability to waive its rights. Because a guaranty is a contract, the guarantor will be protected from egregious situations by such contract principles as unconscionability and good faith. In situations involving printed forms, guarantors should get the benefit of the rule that printed contracts should be construed strongly against the drafter; however, that rule only protects guarantors if the contract terms are ambiguous. Thus, if a waiver clause unambiguously waives the guarantor's basis for discharge and no facts support a finding that the waiver is avoidable based on unconscionability or other contract principles, then the guarantor will be held liable. As the Oklahoma Supreme Court stated in Founders, "even though the result may be harsh, a party will be bound by the unambiguous terms of a contract."248

IV. Oklahoma's Approach to the Ability of a Guarantor to Waive Discharge Through the Application of Oklahoma Anti-Deficiency Statute

Under Apache, a guarantor may get the benefit of the anti-deficiency provisions of section 686 through the guarantor protections of the Oklahoma guaranty statutes. Thus, while guarantors may not get the direct protection of section 686, guarantors will get the indirect protection of section 686 through the application of the Oklahoma guaranty statutes. However, Riverside and Founders clearly indicate that any protection that a guarantor might receive under section 686 can be waived in the guaranty agreement.

While Oklahoma decisions and prevailing law make it clear that guarantors should be allowed to freely waive their suretyship rights, there is an issue of whether the guarantors should be allowed to waive anti-deficiency protections. Strong policy considerations led to enactment of anti-deficiency statutes. The following analysis considers whether the policy considerations behind the anti-deficiency provisions of section 686 are impaired by allowing guarantors to waive their protections. In addition, this part of the comment considers whether there should be limitations on waiver of anti-deficiency protection when the Oklahoma power of sale statute is applicable or when the party secondarily liable is an accommodation party or surety.

A. Comparison of Oklahoma's Approach with Other Jurisdictions

The determination of whether a guarantor can waive any protections that result from the application of an anti-deficiency statute apparently turns upon whether the

guarantor comes under the direct protection of the anti-deficiency provisions. Thus, the issue of guarantor waiver is determined based on statutory language and, if the anti-deficiency statute is ambiguous, on the court's view of the public policy behind the statute.

Courts that have allowed the guarantor to waive any protection from anti-deficiency statutes have followed an approach similar to the Oklahoma courts. These courts have generally held that the guarantor did not fall under the protection of the anti-deficiency statute based on the statute's language. Those courts would then look to the guaranty agreement and the law of suretyship to determine the guarantor's obligation. If the guaranty agreement contained language waiving any applicable suretyship defenses, the courts have had no problem upholding the waiver and finding the guarantor liable on its guaranty. These decisions are a correct application of suretyship principles.

In the other line of cases, the courts have found that guarantors were directly protected by the application of the anti-deficiency statutes. Some states' legislatures have specifically provided that guarantors come under the protection of the statute. Accordingly, some courts have held that the guarantor was protected where the anti-deficiency statute protected persons "indirectly or contingently liable." However, even where the anti-deficiency statute has not specifically applied to guarantors, some courts have construed the statute to apply directly to guarantors.

These decisions finding direct guarantor protection under ambiguous statutes are derived from two rationales. First, some cases place the guarantors under the direct protection of the anti-deficiency statute under the rationale that the guaranty is essentially the same debt as the mortgage debt. While these courts recognize that a guaranty is a separate contract, they reason that the guarantor is liable on basically the same "obligation" as the mortgage debtor. Second, at least one case placed

250. See, e.g., Lundgren, 453 N.W.2d at 591-92; Mueller, 294 N.W.2d at 645; Valley Bank, 663 P.2d at 655.
251. See, e.g., Lundgren, 453 N.W.2d at 592; Mueller, 294 N.W.2d at 643-44.
252. See cases cited supra note 243.
253. See, e.g., ALASKA STAT. § 34.20.100 (Michie 1997); ARIZ. REV. STAT. ANN. § 33-814 (West 1990); PA. STAT. ANN. tit. 42, § 8103 (West 1982).
254. See Klinke v. Samuels, 190 N.E. 324, 326 (N.Y. 1934).
256. See Surety Life, 892 P.2d at 3; Kings County, 52 N.Y.S.2d at 49.
257. See Surety Life, 892 P.2d at 3; Kings County, 52 N.Y.S.2d at 49.
guarantors under the protection of the anti-deficiency statute based on public policy. In First Interstate Bank of Nevada v. Shields, the court looked at the public policy behind the Nevada statute which provided for the mortgage debtor to get a credit for the fair market value of the property sold at foreclosure. The Shields court reasoned that the rationale for the statute was to prevent the creditor from realizing an amount greater than the debt due by purchasing the property at the foreclosure sale at less than market value and seeking an inflated deficiency. In such a case, the creditor would receive a windfall in the amount of the difference in the bid price and the fair market value of the property it acquired. The Shields court concluded that the legislative policy behind the anti-deficiency statute would be circumvented by denying guarantors the protection of the set-off for fair market value.

While few have addressed the issue, the courts in jurisdictions finding that guarantors fall under the direct protection of the anti-deficiency statute have held that guarantors could not waive the anti-deficiency protections. Thus, the language and public policy rationale of section 686 should be considered to determine whether its anti-deficiency provisions should directly protect guarantors.

B. Analysis of the Language and Policy of the Anti-Deficiency Protections of Section 686

None of the Oklahoma decisions considering guarantor rights has discussed the language of section 686 or its public policy rationale. The following analysis considers the language and public policy rationale of the anti-deficiency provisions of section 686 to determine whether guarantors should get absolute protection.

1. Time Limitation for Seeking a Deficiency

Section 686 contains the following language which establishes the ninety-day limitation on seeking a deficiency judgment:

[N]o judgment shall be enforced for any residue of the debt remaining unsatisfied as prescribed by this act after the mortgaged property shall be sold, except as herein provided. Simultaneously with the making of a motion for an order confirming the sale of in any event within ninety (90) days after the date of the sale, the party to whom such residue shall be owing may make a motion in the action for leave to enter a deficiency judgment upon notice to the party against whom such judgment is

259. See id. at 431.
260. See id.
261. See id.
262. See Federal Home Loan Mortgage Corp. v. Sierra, 641 N.Y.S.2d 291, 292 (N.Y. App. Div. 1996); cf. Crowell, 731 P.2d at 248 (holding that a clause stating that "the cessation of liability of the maker, or any other person (for any reason other than full payment) . . . shall not affect in any way the liability of the undersigned under his guaranty" was not sufficient to waive the guarantor's right to set-off for fair market value of mortgage property).
sought or the attorney who shall have appeared for such party in such action.263

The key issue concerning the ninety-day limitation questions whether an action against a guarantor is for the "residue of the debt remaining unsatisfied." Courts are split on whether a guarantor is obligated for the "debt" or "obligation" of the mortgage debtor. Some courts hold that the obligation of the guarantor is completely separate from the "debt" or "obligation" of the mortgage debtor and thus conclude that the anti-deficiency statute is not applicable to the guarantor's obligation.264 New York courts, however, hold that guarantors are directly protected under a statute which applies to "a person who is liable . . . for the payment of the debt secured by the mortgage."265 In addition, courts holding that guarantors are protected under anti-deficiency statutes have placed special emphasis on the fact that the statute applied to actions "for the balance due" on the mortgage debt.266 Therefore, analyzing these decisions construing similar language, the language "residue of the debt remaining unsatisfied" is unclear at best.

The view that actions against guarantors are not actions to recover on the "debt" or obligation of the mortgage debtor provides a better approach that is most consistent with Oklahoma law. First, Oklahoma courts have consistently held that guarantees are obligations separate and distinct from the obligations of the principal debtor.267 Second, in 1986, the Oklahoma Legislature passed additional anti-deficiency provisions in the statute giving mortgagees the ability to use a power of sale.268 These anti-deficiency protections refer specifically to "mortgagors." This statute was passed after the Riverside decision. Thus, if the legislature wanted to ensure that guarantors got the direct protection of anti-deficiency provisions, the legislature could have explicitly done so in the power of sale statute.269 In addition, it would seem inconsistent to construe the ninety-day limitation of section 686 to apply directly to guarantors while the same provision of the power of sale statute did not apply to guarantors. Third, the courts which find that guarantors should be protected under language similar to that found in section 686 strain the ambiguous language of the statute. While the language of section 686 could be stretched to apply to guarantors, the language of the paragraph containing the ninety-day limitation, read as a whole, is focused on the foreclosure action against the mortgage debtor and does not deal with the collateral obligation of guarantors.

Like the language of section 686, the public policy behind the ninety-day limitation does not likely support a finding that the statute should directly apply to guarantors. New York courts have stated that the requirement that a motion be made in the foreclosure action within ninety days after the sale was designed to give the mortgagor "an opportunity to contest entry of a deficiency judgment" and to give "the court [an] opportunity to satisfy itself as to the fairness of the . . . foreclosure sale and to determine the proper amount of deficiency, if any." Further, those courts provide that the protections of the ninety-day limitation were designed to "relieve the defaulting mortgagor from an unjust deficiency judgment." The ninety-day limitation on the motion virtually ensures that the mortgagee acts promptly and does not drag out the determination of the deficiency against the mortgagor who has just had its property foreclosed. No strong argument can be made that this rationale should be extended directly to guarantors. This rationale focuses on the protection of the mortgagor who has just had its property sold at foreclosure.

Therefore, because of the unclear language of section 686 and the lack of any strong public policy justification applicable to guarantors, the ninety-day limitation of section 686 should not apply directly to guarantors. Therefore, the Riverside court's determination that the ninety-day provision only dealt with the debtor/creditor relationship seems supported by the language and policy behind section 686. The Riverside court properly focused on the guaranty agreement and the Oklahoma guaranty statutes in determining the guarantor's liability. Allowing guarantors to waive any indirect protection because of the mortgagee's failure to seek a deficiency judgment will not significantly undermine the public policy behind the ninety-day limitation. In sum, neither the language nor public policy of the ninety-day limitation of section 686 provides a basis for limiting the guarantor's freedom of contract.

2. Fair Market Value Set-off

Sound arguments support the conclusion that guarantors should get the direct protection of the set-off for fair market value of the mortgage property under section 686. The language allowing for set-off states:

In any action . . . , other than an action to foreclose a mortgage, to recover a judgment for any indebtedness secured by a mortgage on real property and which originated simultaneously with such mortgage and which is secured solely by such mortgage, against any person or corporation directly or indirectly or contingently liable therefor [shall be entitled to set-off the fair market value of the mortgaged property].

271. Merchants, 402 N.Y.S.2d at 940.
In *Klinke v. Samuels*, the Court of Appeals of New York held that language identical to the set-off provision of section 686 was applicable to guarantors. The court focused on the fact that the statute contained language referring to persons "indirectly or contingently liable." The court reasoned that this language would be rendered worthless if the statute were not interpreted to apply to guarantors. Notably, *Klinke* was decided in 1934 and the Oklahoma legislature amended section 686 to include the set-off language from the New York statute in 1941. Thus, the Oklahoma Legislature was likely aware of how the set-off language had been interpreted when they put it in section 686.

In addition, strong public policy arguments suggest that guarantors should be protected by the set-off for fair market value. It seems universally accepted that the fair value set-off is designed to prevent a mortgagee from getting a windfall by purchasing the property at less than market value at foreclosure, selling it at its fair market value, and then seeking an inflated deficiency from the mortgagor. If the protection of the set-off is not extended to guarantors, the creditor will potentially still be able to get an excess recovery, but at the expense of the guarantor instead of the mortgagor.

While the language of section 686 and the public policy behind the market value set-off are persuasive, other arguments suggest that guarantors should not fit under the language of the set-off provisions of section 686. First, the paragraph is limited to actions for "any indebtedness secured by a mortgage." The collateral obligation of the guarantor is not "secured" by the mortgage on the principal's property. The guarantor's obligation to the creditor is additional security for the principal obligation. Second, as stated above, in 1986 the Oklahoma Legislature passed a power of sale statute which included additional anti-deficiency protections. The set-off provision of the power of sale statute clearly applies only to "mortgagors." Thus, this later expression of legislative intent shows that the Oklahoma Legislature does not intend to give guarantors direct anti-deficiency protection.

Additionally, some argue that public policy should not require that the market value set-off be extended to guarantors. First, the public policy rationale should not

---

274. 190 N.E. 324 (N.Y. 1934).
275. *See id.* at 326.
276. *See id.*
277. *See Ingerton v. First Nat'l Bank & Trust Co. of Tulsa*, 291 F.2d 662, 665 (10th Cir. 1961) (recognizing that the 1941 amendments to section 686 were based on the New York statute governing deficiency judgements).
281. *See Heckes*, 40 Cal. Rptr. at 486.
apply in situations where the creditor did not purchase the property at foreclosure. In that case, if the protection of the set-off is given to the guarantor, the creditor has no chance to get full satisfaction for the mortgage debt. Second, the guarantor has means to protect itself. The guarantor can contest the confirmation of the sale if the price is grossly inadequate or the result is inequitable.\textsuperscript{284} Also, the guarantor could participate in the foreclosure to ensure the property is purchased at a reasonable price. If the guarantor had to purchase the property at foreclosure at a price less than fair market value, the guarantor would theoretically be in the same position as it would be if it had the benefit of the set-off for fair market value.\textsuperscript{285} Third, if creditors could not use guarantees to protect themselves from the difference between the foreclosure sale price and fair market price, they would be forced to purchase the property at foreclosure in order to have the best chance to receive full satisfaction. A third-party purchaser will probably never pay full market price for property sold at foreclosure, and thus, if the property is sold to a third party, the creditor would have no ability to recover for the difference between sale price and the fair market value determined by the court. If guarantors are not allowed to waive the set-off, the creditor is forced to purchase the property and hope to sell it for fair market value in order to get full satisfaction of the debt. Fourth, a court's determination of "fair market value" of the mortgage property may not correspond with the economic reality of its value. Thus, the "windfall" the creditor receives may be more fiction than reality.

While there are strong arguments that the language of the set-off provision of section 686 should apply to guarantors, Oklahoma's approach of allowing guarantors to waive any protection that section 686 might provide remains sound. In the absence of a waiver, Oklahoma courts will likely give guarantors the benefit of the set-off under section 686, either directly or through the application of the Oklahoma guaranty statutes.\textsuperscript{286} However, allowing guarantors to waive any protection they might receive seems a reasonable result. While potential for abuse by the creditor would exist, the guarantor would have the means to protect itself. Also, allowing waiver will enable creditors to get full satisfaction even if they did not purchase the property at foreclosure. The Oklahoma approach - giving guarantors the benefit of the set-off unless they contract to waive that benefit - seems a good compromise of the public policy behind the set-off protections of section 686.

\textsuperscript{284} See Founders Bank & Trust Co. v. Upsher, 830 P.2d 1355, 1364 n.33 (Okla. 1992).
\textsuperscript{285} Assume that the creditor seeks a timely deficiency judgment and thus preserves the subrogation rights of the guarantor against the principal. Also assume: (1) the debt was $100; (2) the court correctly determined the fair market value of the property was $80; and (3) the guarantor purchased the property at foreclosure for $60. Assuming no right to set-off, the guarantor would have had to pay the creditor $40 to satisfy the deficiency. The guarantor would not be hurt in this situation. It paid out a total of $100 ($60 + $40), and it would be able to collect $20 from the principal based on the right of subrogation and could recover the remaining $80 by selling the property at fair market value.
C. Will Allowing Guarantor Waiver Deny Mortgage Debtors the Protection of Section 686?

Some courts have argued that guarantors should get the protections of anti-deficiency protections because the debtor would be deprived of the benefit of the statute based on the guarantor's right to reimbursement. However, Oklahoma courts would probably not allow that result if a guarantor waived the benefits of section 686. The courts in Apache and Riverside stated that a guarantor would not likely have any recourse against the principal if the guarantor were required to satisfy a deficiency barred by section 686. As discussed above, under principles of reimbursement, a guarantor who waives a defense available to the principal should not be entitled to reimbursement. First, public policy precludes requiring the principal to reimburse the principal because that requirement would deprive the principal of the benefits of section 686. Second, it is not inequitable to make the guarantor bear the loss caused by the anti-deficiency statute because the guarantor assumed the risk of that loss by waiving its defenses.

D. Analogy to Guarantor Waiver of Section 9-504(3) of the Uniform Commercial Code

Article 9 of the Uniform Commercial Code contains provisions that are analogous to the anti-deficiency protections given to mortgage debtors. Once a secured party has taken possession of collateral upon default, section 9-504(3) of the Uniform Commercial Code requires that a secured party give reasonable notification of the sale of collateral to the "debtor" and also requires that a secured party sell or dispose of the collateral in a manner that is "commercially reasonable." If these requirements are not met, the creditor's deficiency judgment may be lost. Section 9-501(3)(b) provides that "debtor" cannot waive the protections of section 9-504(3). The majority of courts have held that a guarantor is a "debtor" for the purposes of the notice and commercial reasonableness requirements of section 9-504(3). However, a substantial split exists among the courts concerning whether a guarantor, unlike the principal debtor on the secured obligation, can waive the requirements of notice and commercial reasonableness.

289. See discussion supra Part II.D.
292. See generally 12A OKLA. STAT. ANN. § 3-605 Okla. cmt. 26 (West 1998); WHITE & SUMMERS, supra note 232, § 25-11.
The decisions allowing guarantors to waive the protections of section 9-504(3) support the Oklahoma decisions allowing guarantors to waive the anti-deficiency protections of section 686. Courts have reasoned that guarantors should be allowed to waive to facilitate the extension of credit.\textsuperscript{294} Also, courts have determined that the guarantor's freedom of contract should be protected.\textsuperscript{295} In addition, courts have noted that the obligation of a guarantor is collateral to the obligations of the principal debtor.\textsuperscript{296}

While some courts have relied solely on the Uniform Commercial Code definition of a "debtor,"\textsuperscript{297} other courts holding that guarantors should not be allowed to waive the protections of section 9-504(3) have considered public policy reasons for the protections. These courts have made two arguments. First, the courts have focused on the fact that allowing guarantors to waive would encourage the "economic waste which the Code was designed to minimize."\textsuperscript{298} Allowing waiver would negate the duties placed on secured parties concerning the disposal of collateral by enabling the secured party to collect any deficiency from the guarantor even when the secured party has grossly neglected its statutory duties in disposing of the collateral.\textsuperscript{299} Second, the courts have reasoned that upon default the guarantor is the real target of the creditor and it would be inequitable to allow the secured party to deprive the guarantor of the benefit of a reasonable return on the collateral.\textsuperscript{300}

The rationale used by courts finding that guarantors should not be able to waive the protection of section 9-504(3) is distinguishable from the rationale behind Oklahoma anti-deficiency protections. The focus of the courts addressing section 9-504(3) is that the secured party will abuse the debtor by disposing of the collateral in a way that deprives the guarantor of the full value of the collateral. The purpose of the requirements of section 9-504(3) is ensuring that the secured party will get a fair price for the collateral.

In the case of section 686, however, the same public policy concerns do not seem to be at stake. The anti-deficiency protections extend beyond ensuring that the sale of the collateral will be sold at a fair value. Both the court and the foreclosure procedures ensure that the mortgage property is sold in a reasonable manner. The focus of the anti-deficiency statutes is to protect the mortgagor from burdensome deficiency judgments, even when the property was sold in a reasonable manner. The anti-deficiency statutes focus on the fact that even if a sale of mortgage property is


\textsuperscript{295} See Chrysler, 753 F. Supp. at 616; see also Steinberg, 28 F.3d at 26 (reasoning that the guarantor should be allowed to access his own interests).

\textsuperscript{296} See H & S Realty, 837 F.2d at 3 (reasoning that a guarantor is "once removed" from the position of the principal debtor).

\textsuperscript{297} See e.g., Brannan v. Equico Lessors, Inc., 342 S.E.2d 671, 672 (Ga. 1986).

\textsuperscript{298} Ford Motor Credit Co. v. Lototsky, 549 F. Supp. 996, 1004 (E.D. Pa. 1982).


\textsuperscript{300} See Lototsky, 549 F. Supp. at 1004; Gambo, 648 A.2d at 1112-13.
E. Sham Guarantor Defense

Courts have held that "guarantors" were not allowed to waive the protections of an anti-deficiency statute when, in substance, the guarantor is the principal debtor.\textsuperscript{301} The courts reasoned that creditors should not be allowed to subvert the purpose of anti-deficiency statutes by placing the principal debtor in the position of a surety.\textsuperscript{302} The test applied by the courts is whether "the supposed guarantors [are] nothing more than principal obligors under another name."\textsuperscript{303} Courts have applied the "sham guaranty" defense in situations where the "debtor" was a partnership, corporation, or trust.\textsuperscript{304} This doctrine is soundly designed to prevent abuse and should be a valid defense to waiver of the anti-deficiency protections of section 686.

F. Guarantor Waiver of Anti-Deficiency Protections of Oklahoma Power of Sale Statute

The anti-deficiency protections included in Oklahoma's power of sale statute\textsuperscript{305} raise no novel issues. The legislature clearly intended that guarantors would not be directly protected by the anti-deficiency provisions of section 43(A)(2). For example, the legislature consistently used the term "mortgagor" in the language establishing the anti-deficiency protections.\textsuperscript{306} Therefore, under Apache and Riverside, the Oklahoma guaranty statutes and the guaranty agreement will determine the obligations of a guarantor after the application of the anti-deficiency protections of section 43.\textsuperscript{307}

G. Waiver of the Anti-Deficiency Protections to Sureties and Accommodation Parties

Parties often become secondarily liable on a mortgage debt as an accommodation party or as a surety by operation of law upon the transfer of the mortgaged property. However, no Oklahoma courts have addressed the rights of accommodation parties and sureties under the anti-deficiency protections of section 686. The language of


\textsuperscript{302} See River Bank, 45 Cal. Rptr. 2d at 803.

\textsuperscript{303} Id. at 802.

\textsuperscript{304} See NELSON & WHITMAN, supra note 20, § 8.3, at 593.


\textsuperscript{306} See Miller & Schroeder, Inc. v. Gearman, 413 N.W.2d 194, 196 (Minn. Ct. App. 1987) (holding that a statute which consistently used the term "mortgagor" clearly does not apply to guarantors).

section 686 and the distinctions between guarantors and sureties or accommodation parties raise issues concerning whether they should be able to waive the protections provided by section 586.

Accommodation parties are liable as sureties, but are also liable in the capacity in which they sign the instrument.308 Apparently, an accommodation party's duties are determined based on the capacity in which it signs, but as an accommodation party it is given additional rights. Thus, an accommodation party who signs as a maker is liable on the note. Therefore, while a guarantor is only obligated based on its separate guaranty agreement, an accommodation party who signs as a maker is jointly and severally liable on the note establishing the principal indebtedness.309 Thus, it seems that an accommodation party who was a maker could fit within the language of section 686. The anti-deficiency provisions of section 686 apply to actions for the "residue of the debt remaining unsatisfied" and to actions on "any indebtedness secured by a mortgage on real property."310 Arguably, if the accommodation party was a maker on the note secured by the mortgage, then the party would fit under the language of section 686. If the accommodation party was directly protected by section 686, it may not be allowed to waive the protections of the statute.

On the other hand, Oklahoma courts have held that section 686 only applies to the debtor/creditor relationship and does not apply to the debtor/creditor/guarantor relationship.311 Thus, an Oklahoma court could look to the substance of the accommodation party's status as essentially a guarantor and determine that it should not come under the protection of section 686. A court would be placing form over substance if the determination of whether a party came under the protections of section 686 turned on whether the party had signed the note or a separate guaranty agreement. Importantly, courts have held that indorsers of notes secured by a mortgage do not come under the protection of anti-deficiency statutes.312

Assuming that an accommodation party was not directly protected by section 686, the accommodation party's rights would not likely be any different from those of a guarantor under Oklahoma law. The discharge of the accommodated party by operation of the ninety-day limitation for seeking a deficiency judgment does not fit within the suretyship defenses of section 3-605. Section 3-605(b), which denies an accommodation party discharge based on the discharge of the obligation of the accommodated party, does not apply because it only applies to voluntary discharges under section 3-604.313 Thus, since section 3-605 does not apply, the accommodation party would be able to raise any defenses of the accommodated party under section 3-305(d).314 Therefore, the accommodation party would get a discharge because of the discharge of the accommodated party. In addition, waiver of the accommodation party's rights under section 3-305(d) is not governed by section 3-

605(i).\textsuperscript{315} Thus, the accommodation party's ability to waive would be determined according to other state law under section 1-103. Therefore, under \textit{Riverside}, the accommodation party would be entitled to waive any right to discharge through the application of section 686. The analysis concerning the right to set-off under section 686 would be similar because the set-off would not come under the suretyship defenses of section 3-605 and thus would be governed by section 3-305(d).

Issues also exist concerning whether a surety by operation of law would be entitled to the direct protection of section 686. In the situation of the mortgagor who becomes a surety out of the transfer of the mortgaged property to a party who either assumes or takes the property subject to the mortgage, a suretyship relationship arises between the mortgagor and the transferee.\textsuperscript{316} However, as to the mortgagee, the mortgagor is still primarily liable unless the mortgagee agrees to look to the mortgagor only as a surety.\textsuperscript{317} Thus, it seems that the mortgagor/surety would fit within the protections of section 686. After transferring the property and taking on the status as a surety, the mortgagor is still clearly liable on the "debt" or "indebtedness" secured by the mortgage.\textsuperscript{318} Also, a finding that the mortgagor/surety fits within the protection of section 686 is consistent with the rationale of the \textit{Riverside} court. The \textit{Riverside} court's primary rationale was that the guarantor's obligation was separate from the obligation of the principal.\textsuperscript{319} In the case of a mortgagor/surety, the mortgagor is the primary obligor in relation to the mortgagee.\textsuperscript{320} Thus, a mortgagor/surety would not be allowed to waive the protection of section 686 because it would be directly protected by the section's anti-deficiency provisions.

However, an argument could be made that if the mortgagee consented to only look to the mortgagor as a surety, the mortgagor would then not be protected by section 686 because the mortgagor would only be secondarily liable as a surety at that point. The determination of whether the mortgagor/surety should get the protection of section 686, however, should not be made based on the unilateral actions of the mortgagee.

Even if a court determined that the mortgagor/surety did not get the direct protection of section 686, the mortgagor/surety would have the same rights as a guarantor under title 15, sections 377-378. Thus, under \textit{Apache}, \textit{Riverside}, and \textit{Founders}, the mortgagor/surety would get the indirect protection of the anti-deficiency provisions of section 686 unless it had waived the protections of the guaranty and surety statutes. Few courts have addressed the application of anti-deficiency statutes to suretyships created by the transfer of mortgaged property.\textsuperscript{321} This may be because such a surety seems to fit within the protections of anti-deficiency statutes.

\textsuperscript{315} See also id. § 3-605 Oklahoma cmt. 31.
\textsuperscript{320} See Rice, 45 P.2d at 51.
\textsuperscript{321} See, e.g., Kocsorak v. Cleveland Trust Co., 85 N.E.2d 96 (Ohio 1949).
In sum, sureties and accommodation parties would at least be treated the same as guarantors in relation to the anti-deficiency protections of section 686. However, there are arguments that an accommodation party who signs an instrument as a maker would not be able to waive the protections of section 686 because the accommodation maker would get the direct protection of section 686. In addition, a mortgagor who becomes a surety based on the transfer of the mortgaged property would be directly protected by section 686 and thus would not be able to waive the anti-deficiency protections of that section.

Conclusion

Oklahoma courts have a strong policy in favor of allowing guarantors to waive their rights. This policy of allowing guarantor waiver seems consistent with modern suretyship and guaranty law. Allowing guarantors to freely waive their rights promotes freedom of contract and allows creditors, debtors, and guarantors to structure transactions which benefit all the parties.

An important issue concerning the guaranty of mortgage debts is the effect of the anti-deficiency protections of section 686 on the guarantor's liability. Oklahoma courts have taken an approach to the guarantor's rights in relation to section 686 which seems to be a good compromise of the rights of creditors and guarantors. Oklahoma courts have held that the rights of guarantors will be determined based on the guaranty agreement and the Oklahoma guaranty statutes. Thus, if a mortgage debtor is discharged by the application of the anti-deficiency provisions of section 686, the guarantor will be discharged through its rights under the Oklahoma guaranty statutes. However, Oklahoma courts have held that the guarantors can waive their statutory rights by contract. Thus, with the inclusion of carefully drafted waiver provisions in the guaranty contract, the guarantor will be liable despite the discharge of the mortgage debtor under section 686. This approach gives guarantors some protection from the effects of section 686 on the mortgage debtors liability while giving the parties flexibility in structuring mortgage transactions.

Brian Henderson