

Louisiana Law Review

Volume 57 | Number 2
Winter 1997

Ruminations on Suretyship

Michael H. Rubin

Repository Citation

Michael H. Rubin, *Ruminations on Suretyship*, 57 La. L. Rev. (1997)
Available at: <https://digitalcommons.law.lsu.edu/lalrev/vol57/iss2/6>

This Article is brought to you for free and open access by the Law Reviews and Journals at LSU Law Digital Commons. It has been accepted for inclusion in Louisiana Law Review by an authorized editor of LSU Law Digital Commons. For more information, please contact kreed25@lsu.edu.

Ruminations on Suretyship

Michael H. Rubin*

TABLE OF CONTENTS

I. What Is Suretyship?	567
A. Suretyship Is an Accessory Obligation	568
B. Suretyship Is Unilateral	568
C. Suretyship May Be Gratuitous	569
D. Suretyship Is Consensual	570
E. Express Contract of Suretyship	571
II. What Language Is Sufficient for a Contract of Suretyship? . . .	571
III. What Is the Relevancy of Parol Evidence When a Suretyship Contract Is Involved?	573
A. The Creditor-Surety Relationship—No Parol Evidence Should Be Admissible	573
B. The Creditor-Debtor Relationship—Use of Parol Evidence	575
C. The Surety-Surety Relationship—Use of Parol Evidence . . .	576
D. The Debtor-Surety Relationship—Use of Parol Evidence . . .	576
E. Summary on Parol Evidence and Suretyship	577
IV. The Three Kinds of Suretyship	577
A. Commercial Suretyship	578
B. Legal Suretyship	579
1. The Requirement of a Judgment Against the Principal Obligor	579
2. Who May Be a Legal Surety	580
3. Testing a Legal Suretyship	580
4. Alternatives to Legal Suretyship	580
C. Ordinary Suretyship	581
V. The Effect of the Release of a Debtor or Surety	583
A. Example No. 1	584
B. Example No. 2	585

Copyright 1997, by LOUISIANA LAW REVIEW.

* Michael H. Rubin is a Senior Member of the regional Law Firm of McGlinchey Stafford Lang, A Professional Limited Liability Company and heads the firm's Baton Rouge office. An Adjunct Professor at the LSU Law School since 1976, Mr. Rubin has written and co-authored numerous law review articles, publications, and books and has given lectures in Louisiana and nationally. He is a member of the American Law Institute and the American College of Real Estate Lawyers, a past-President of the Baton Rouge Bar Association and a past Secretary-Treasurer of the Louisiana State Bar Association, and currently serves as Vice President of the Bar Association of the United States Court of Appeals for the Fifth Circuit.

Invaluable assistance was given in the writing of this article by Renee Gluth, an associate with McGlinchey Stafford Lang in the Baton Rouge office.

VI. "Extinction" of the Principal Obligation	586
VII. The Surety Versus the Debtor—What Are the Surety's Rights and the Debtor's Obligations?	587
A. The Right of Reimbursement	588
B. The Right to Require Security	589
VIII. The Surety-Surety Relationship—Contribution	590
A. The Old Plea of Division	590
B. Limitations on the Claim of Contribution	590
C. A Paying Surety's Right to Collect Attorney's Fees from a Co-Surety	591
IX. The Death of "Solidary Suretyship"	593
A. <i>Boutte</i> and Its Progeny	593
B. Civil Code Article 3037 Requires Courts to Look to Substance, Not Form	594
X. The Unusual Problem of <i>Green Garden</i>	596
XI. Interruption of Prescription	598
XII. Termination of Suretyship	598
XIII. Conclusion	599

Suretyship, the guaranteeing of the debt of another, is one of the oldest ways to secure a debt. One finds discussions of suretyship in the Bible¹ as well as in the writings of the Greeks² and Romans.³ Since the inception of the Civil Code in Louisiana, beginning in the Digest of Civil Laws of 1808, which became the Louisiana Civil Code of 1808, Louisiana has had codified rules relating to suretyship. Early case law looked to the Civil Code of 1825 as well as to French commentators, particularly Planiol,⁴ as sources for the interpretation of the Code.⁵

1. For an exegesis on suretyship, see the *Mishna*, Rabbinic commentaries on the Torah, the first five books of the Bible. The *Mishna* derives from the Torah rules on such matters as: what language is sufficient to form a contract of suretyship; when a creditor may collect from a surety; and rules similar to the old Louisiana concept of discussion. See the *Mishna*, Tractate Baba Bathra, Chapter 10, Portions 7-8.

2. Fritz Pringsheim, in *The Greek Law of Sale* (1950), has noted that while the Greeks "did not develop anything comparable with the Roman system and the Roman abstract conceptions of private law," they did have rules relating to suretyship. *Id.* at 1. Pringsheim discusses, in an example from the Iliad, Poseidon's guarantee of the ransom to be paid by Ares. *Id.* at 17-22.

For a discussion of the Athenian law of suretyship, see IV Ludovic Beauchet, *Histoire Du Droit Privé de la République Athénienne* Ch. II, Section III (1897) ("Garanties contre l'insolvabilité du débiteur (Sûretés personnelles).").

3. William W. Buckland, *The Main Institutions of Roman Law* 316-24 (1931). See also Reinhard Zimmermann, *The Law Of Obligations, Roman Foundations of the Civilian Tradition* Ch. 5 (1990); L.R. Caney & C.G. Forsyth, *Caney's The Law of Suretyship in South Africa* Ch. 1 (1982); and A.S. Diamond, *Primitive Law* 440-430 (1935).

4. See 2 Planiol, *Traité Élémentaire de Droit Civil*, Nos. 2323-2326 (La. St. L. Inst. trans. 1959).

5. See, e.g., *Interstate Trust and Banking Co. v. Young*, 65 So. 611, 612 (La. 1914); *Fox v. Corry*, 89 So. 410, 415 (La. 1921); *First Federal Savings Bank v. Dan Quirk Ford Co.*, 504 So. 2d

In the mid-1980s the Louisiana Law Institute formed a committee to revise the Civil Code sections on suretyship, Articles 3035-3070.⁶ This "Rumination" examines the current Civil Code articles, reviews the jurisprudence under the old Code⁷ articles to illustrate points dealt with in the current articles, and examines the practical implications of the Code's provisions and the jurisprudence.

I. WHAT IS SURETYSHIP?

Louisiana law divides "rights" into two main areas: "real rights" and "personal rights."

Unlike the common law, where the phrase "real rights" refers to rights in immovable property,⁸ Louisiana law uses the phrase "real rights" to refer to rights related, on the one hand, to ownership of any item (be it movable or immovable), and, on the other, to a right to seize and sell property (of any kind) and obtain a privilege on the proceeds of the sale.⁹ Personal rights, on the other hand, are claims against another individual or entity; it is roughly equivalent to a cause of action in the context of a lawsuit.¹⁰ Suretyship is a personal right under Louisiana law. It gives the creditor the right to sue someone or some entity in addition to the one who is principally obligated on the debt.

The distinguished French commentator of the last century, Planiol, enumerated five distinct characteristics of suretyship;¹¹ this listing is a useful checklist even today. The five characteristics that Planiol uses (accessory contract, unilateral contract, gratuitous contract, consensual relationship, and

930 (La. App. 1st Cir. 1987); *Bordelon v. Smith*, 506 So. 2d 788, 791-92 (La. App. 1st Cir.), *writ denied*, 512 So. 2d 1178 (1987), *reconsideration denied*, 514 So. 2d 122 (1987).

6. The Reporter for the Committee was Professor Thomas Harrell of the LSU Law School; the Committee Members were William D. Hawkland, Roy Blossman, Patricia Hendrix Chicoine, David Cromwell, Peter Koerber, Joseph H. Lawson, Marilyn Maloney, William H. McClendon, III, Emmett C. Sole, James A. Stuckey, George Tate, Max Nathan, Jr., Keith Vetter and Michael H. Rubin. The Louisiana Law Institute is given authority to suggest legislation to the Louisiana legislature and to write Official Comments to such legislation pursuant to Louisiana law, La. R.S. 24:201-208 (1989).

7. For a general discussion of the law and jurisprudence through the 1930s, see Leon D. Hubert, *The Nature and Essentials of Conventional Suretyship*, 13 Tul. L. Rev. 519-33 (1939).

8. See A. N. Yiannopoulos, Property § 207, in 2 Louisiana Civil Law Treatise (3d ed. 1991). See also Herbert Thorndike Tiffany, *The Law of Real Property and Other Interests In Land* § 4, at 9 (1920): "The only corporeal thing of a 'real' character is land, and whatever may be considered a part thereof." Likewise, see Christopher G. Tiedeman, *The American Law of Real Property* 1 (1924). "Real property is such as has the characteristic of immobility or permanency of location, as lands and rights issuing out of lands." *Id.*

9. For a discussion of this issue, see A. N. Yiannopoulos, Property §§ 87, 90, 97, in 2 Louisiana Civil Law Treatise (1st ed. 1967). See also La. Civ. Code art. 476; Official Law Institute Revision Comments (1976) to La. Civ. Code art. 535; Planiol, *supra* note 4, Vol. 1, Nos. 2322 *et seq.*

10. See La. Civ. Code art. 1766, which provides, in part: "An obligation is strictly personal when its performance can be enforced only by the obligee, or only against the obligor."

11. See Planiol, *supra* note 4, at No. 2324.

express contract)¹² are incorporated in the Civil Code's introductory articles on suretyship, Articles 3035 through 3040.

A. *Suretyship Is an Accessory Obligation*

Article 3035 explicitly defines suretyship as an "accessory contract."¹³ Suretyship by nature is not primary; it is secondary to the obligation of another. The principal obligation may be any lawful obligation,¹⁴ and although suretyship may be co-extensive with the principal obligation, it can be less broad than the principal obligation if the parties so agree in writing.¹⁵

B. *Suretyship Is Unilateral*

A suretyship contract is unilateral; it obligates the surety to the creditor and imposes a contractual obligation on the surety to the creditor; there is no necessary contractual obligation running from the creditor to the surety, although the parties contractually may create such an obligation. Civil Code article 3035 defines the unilateral nature of suretyship when it states that suretyship is an accessory "contract by which a person binds himself to a creditor"

It is useful to remember that there are at least three separate relationships involved in any suretyship arrangement; each is treated separately by the Civil Code.¹⁶ There is a relationship between the creditor and the debtor,¹⁷ a relationship between the creditor and the surety,¹⁸ and a relationship between

12. *Id.*

13. La. Civ. Code art. 3035: "Suretyship is an accessory contract by which a person binds himself to a creditor to fulfill the obligation of another upon the failure of the latter to do so."

14. La. Civ. Code art. 3036.

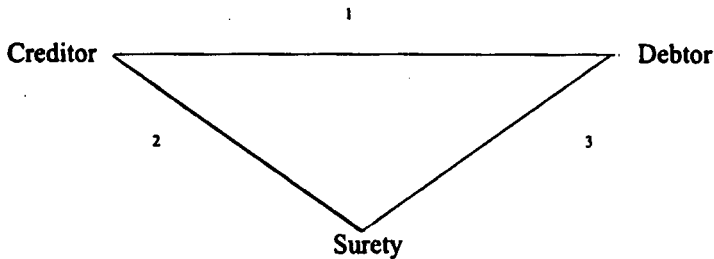
15. La. Civ. Code art. 3040. For an example of a case in which suretyship was less broad than the principal obligation, see *Texas Company v. Couvillon*, 148 So. 295 (La. App. Or. 1933), where the guaranty was only for a certain period of time and only for a certain amount. Suretyship often is limited by an amount or by other conditions that the parties contractually agree to in writing. See La. Civ. Code art. 1847 concerning the requirement of a writing.

16. For the purposes of this article the terms "creditor," "debtor," and "surety" will be used rather than the Civil Code equivalents of principal obligors, principal obligees, and other such terminology. The terms employed here are used every day by attorneys and the courts. Readers should not construe, however, the term "debtor" to be co-extensive with the definition of "debtor" in Uniform Commercial Code article 1-201. There, the term debtor does include guarantors; Louisiana's version of the U.C.C., the Louisiana Commercial Laws, La. R.S. 10:1-101-8-511 (1983 and Supp. 1996), however, contains a non-uniform provision. Under Louisiana's version, the term "debtor" does *not* include guarantors or sureties. As used in this article, the term "debtor," refers to the principal obligor, the one who has the primary relationship with the creditor and whose agreement is being secured by the contract of suretyship.

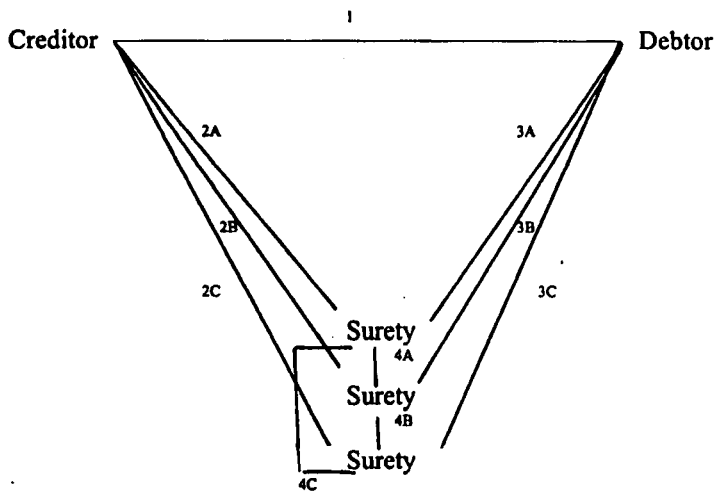
17. This relationship is regulated by the general Civil Code rules concerning contractual and other relationships. Suretyship may be for any "lawful obligation." La. Civ. Code art. 3036. For the rules regulating conventional obligations, see La. Civ. Code arts. 1756-2057.

18. This relationship is regulated by La. Civ. Code arts. 3045-3046.

the surety and the debtor.¹⁹ It is sometimes helpful, in analyzing the various rights and obligations of each of the parties, to diagram their relationships and the different rules that relate to each.²⁰



When there is more than one surety, additional relationships are added.



C. Suretyship May Be Gratuitous

Planiol notes that suretyship is “gratuitous” because “the surety alone obligates himself toward the creditor who furnishes nothing in exchange.”²¹

19. This relationship is regulated by La. Civ. Code arts. 3047-3054.

20. For a detailed description of the relationships of a creditor, debtor, and surety under the Uniform Commercial Code, see William D. Hawkland, *Cases and Materials on Commercial Paper and Bank Deposits and Collections* 128 *et seq.* (1967). Professor Hawkland, former Chancellor of the LSU Law School, uses just such diagrams in his materials and employs them in his lectures both at the Law School and at his many national speeches; attorneys throughout the country are indebted to Professor Hawkland for the clarity of his writing and thinking.

21. Planiol, *supra* note 4, at No. 2324.

There is nothing in the Civil Code that requires "consideration" for a contract of suretyship. "Consideration" is a common law concept, not a civilian one.²² The spirit of liberality that supports any donative act is a sufficient cause for a contract of suretyship.²³ This is not to say that suretyship is always gratuitous; there are many instances in which there is direct or indirect compensation given by the debtor to induce a surety to sign a contract of suretyship.²⁴

D. Suretyship Is Consensual

There are areas in which the Civil Code imposes obligations on parties regardless of their actual or even implied consent.²⁵ Suretyship, in contrast to obligations that arise by law, requires an express consent in a contractual form. Louisiana courts frequently have referred to the "contract of suretyship" or "contract of guaranty."²⁶ Because suretyship is a consensual contract, the general rules involving contractual obligations²⁷ are applicable in addition to the special rules relating to suretyship contracts, which require a writing and do not require a formal acceptance.²⁸

22. Although there is one Louisiana case that talks about the need for consideration in a suretyship contract entered into after a principal obligation has been convected, *J. R. Watkins Co. v. Jones*, 171 La. 467, 131 So. 301 (La. 1930), no later case can be located that expressly follows this holding. The better rule is set forth in *Flood v. Thomas*, 5 Mart. (n.s.) 560 (La. 1827), which speaks in terms of consideration, but which reaches a conclusion that might be at odds with then-current theories of common law consideration; the underlying rationale is consistent with the Louisiana concept of cause. The 1987 revisions to the Civil Code articles on suretyship and the 1984 revisions to the Civil Code articles on obligations make it clear that the Louisiana rule is *cause*, not consideration.

23. "Cause" is dealt with in La. Civ. Code arts. 1966-1970. The Civil Code expressly allows contracts to be gratuitous. See La. Civ. Code art. 1910. For a detailed discussion of the concept of "cause" under Louisiana law, see J. Denson Smith, *A Refresher Course in Cause*, 12 La. L. Rev. 2 (1951); also see 1 Saul Litvinoff, *Obligations* §§ 286-303, in 6 Louisiana Civil Law Treatise (1969).

24. The Civil Code expressly recognizes that a surety might have agreed to be bound because of a relationship between the surety and the debtor. See La. Civ. Code art. 3042(3) and (4). A common example of a compensated surety is the obligation of a bonding company on a construction job; the bond is put up to protect the owner from certain personal liability under the Louisiana Private Works Act. See La. R.S. 9:4812 (1991).

25. Various forms of tort liability, particularly "strict liability" without regard to fault, are examples of non-consensual obligations. See, e.g., La. Civ. Code arts. 2315-2324.2. Such obligations "arise directly from the law, regardless of a declaration of will." La. Civ. Code art. 1757.

26. See, e.g., *Louisiana Bank and Trust Co., Crowley, La. v. Boutte*, 309 So. 2d 274, 275 (La. 1975); *First National Bank of Crowley v. Green Garden Processing Co.*, 387 So. 2d 1070, 1073 (La. 1980).

27. See Louisiana Civil Code Title IV, "Conventional Obligations or Contracts," La. Civ. Code arts. 1906-1947, 1983-1985.

28. See La. Civ. Code arts. 3038 and 1847 on the requirement of a writing; see also the discussion in this article, *infra*, and La. Civ. Code art. 3039 which states, in essence, that no affirmative expression of acceptance is required and that acceptance is presumed.

E. Express Contract of Suretyship

As Planiol writes that suretyship is not "presumed"²⁹ and Civil Code article 3038 states succinctly, in its entirety: "Suretyship must be express and in writing." The requirement that suretyship be a written agreement is re-emphasized by Civil Code article 1847,³⁰ which provides that "parol evidence is inadmissible to establish . . . a promise to pay the debt of a third person." Suretyship, by definition, is a promise to pay the debt of a third person because it is a contract by which the surety is bound "to fulfill the obligation of another upon the failure of the latter to do so."³¹

II. WHAT LANGUAGE IS SUFFICIENT FOR A CONTRACT OF SURETYSHIP?

Although the Civil Code requires that suretyship be express and in writing, not every written agreement that relates to the debt of a third person is a contract of suretyship. A review of the Civil Code, as amplified by the jurisprudence, leads to an inexorable conclusion: to be a contract of suretyship, the written agreement must expressly contain a promise to pay the debt of another. Colloquially, if the agreement cannot be construed as saying "if he doesn't pay, I will," then it will not meet the requirements of suretyship. The language need not use the words "surety" or "guarantor," although Louisiana courts have held that the term "guaranty" is the equivalent of an agreement to be bound as a Civil Code surety.³² Thus, in Louisiana, the term "surety" and "guaranty" are co-extensive, unlike under the common law.³³

The cases illustrate the necessity of an express written obligation to pay the debt of another, it is not sufficient to have an agreement that merely relates to the debt of another.³⁴ For example, *Ball Marketing Enterprise v. Rainbow*

29. Planiol, *supra* note 4, at No. 2324(4).

30. La. Civ. Code art. 1847 is found in Civil Code, Book III, Title III, "Obligations in General," Section 5, in the section entitled "Proof of Obligations."

31. La. Civ. Code art. 3035.

32. See *Trefethen v. Locke*, 16 La. Ann. 19 (1861).

33. See V. William F. Elliott, *Commentaries on the Law of Contracts* § 3931 (1913); II Theophilus Parson, *Law of Contracts* Ch. VII (1873).

34. For cases holding that the language used was sufficient for a contract of suretyship, see *Amory v. Boyd*, 5 Mart. (o.s.) 414 (La. 1818); *Herries v. Canfield*, 9 Mart. (o.s.) 385 (La. 1821); *Hickey v. Dudley*, 9 Rob. 502 (La. 1845); *Trefethen v. Locke*, 16 La. Ann. 19 (1861); *Bell v. Norwood*, 7 La. 95 (1834); *Menard & Vigneaud v. Sudder & Stewart*, 7 La. Ann. 385 (1852); *Commercial Nat'l Bank v. Richardson*, 163 La. 933, 113 So. 152 (1927); *Boro Industries v. Culotta, Inc.*, 336 So. 2d 878 (La. App. 4th Cir.), *writ denied*, 339 So. 2d 24 (1976).

The following cases have found the language used was insufficient for a contract of suretyship: *Lobre v. Pointz*, 5 Mart. (n.s.) 443 (La. 1827); *Exchange Nat'l Bank v. Waldron Lumber Co.*, 177 La. 1015, 150 So. 3 (1933); *Livingston State Bank & Trust Co. v. Steel-Tek, Inc.*, 335 So. 2d 482 (La. App. 1st Cir. 1976); *Ball Mktg. Enter. v. Rainbow Tomato Co.*, 340 So. 2d 700 (La. App. 3d Cir. 1976).

*Tomato Co.*³⁵ involved an open account between Ball Marketing, as creditor, and Rainbow Tomato, as debtor. Ball Marketing sued Plant Industries, Inc. which had sent a letter to Ball concerning Rainbow's debt. Ball claimed that Plant Industries had become a surety for Rainbow's debt through the letter, which provided, in part: "This will confirm our understanding with you that Plant Industries, Inc. will take such steps as necessary to assure payment to you by Rainbow."³⁶ The Court properly found that this language was insufficient to make Plant Industries a surety for Rainbow's debts. The letter, which appears to have been carefully worded, did not obligate Plant Industries to pay if Rainbow did not; it merely indicated that Plant Industries "will take such steps as necessary to assure payment to you by Rainbow." In other words, Plant was agreeing to encourage Rainbow to pay but did not state that Plant would pay.³⁷ This is not to say that the creditor, Ball Marketing, might not have had other remedies available; however, those remedies lie not in suretyship but in other theories. For example, the French law has the concept of a *porte forte*, an agreement that a third person will perform some obligation;³⁸ it does not obligate the promissor (the purported surety) to perform if the principal obligor does not.³⁹

There are many agreements that may benefit a third person in some way that are not contracts of suretyship. Every suretyship is a form of a third party beneficiary contract, a *stipulation pour autri*, because it is a contract for the "benefit of a third person," namely the debtor.⁴⁰ On the other hand, not every *stipulation pour autri* is a suretyship; suretyship is merely a subcategory of *stipulation pour autri*. A *stipulation pour autri* is not, by necessity, an accessory agreement. It may be a primary agreement. On the other hand, suretyship is, by definition, accessory.⁴¹ Another concept to distinguish from suretyship is novation, where one obligor is substituted for another.⁴² A novation can benefit a third party,⁴³ but is not a suretyship because the new obligor is primarily liable; there is no accessory obligation.

35. 340 So. 2d 700 (La. App. 3d Cir. 1976).

36. *Id.* at 701.

37. The case on appeal apparently did not involve a claim whether Plant Industries had complied with its obligation to encourage Rainbow to pay and what the liability of Plant Industries would have been such encouragement not been undertaken.

38. See Planiol, *supra* note 4, at No. 2326.

39. For a discussion of *porte forte* see Saul Litvinoff, Obligations § 13.3, in 5 Louisiana Civil Law Treatise (1992). For a Louisiana case that appears to be *porte forte*, although the court called it a suretyship, see Louisiana & Western R.R. v. Dillard, 51 La. Ann. 1484, 26 So. 451 (1899), where the guaranty read: "We hereby guaranty that the town of Homer will furnish a free right of way" for a railroad line.

40. See La. Civ. Code art. 1978.

41. La. Civ. Code art. 3035.

42. La. Civ. Code arts. 1879-1887.

43. La. Civ. Code art. 1886.

III. WHAT IS THE RELEVANCY OF PAROL EVIDENCE WHEN A SURETYSHIP CONTRACT IS INVOLVED?

A. *The Creditor-Surety Relationship—No Parol Evidence Should Be Admissible*

There are three instances in which parties may wish to use oral testimony in connection with a suretyship agreement. The first is where the creditor wishes to delineate the surety's responsibility. The second is where the surety wishes to limit liability. The third is where one surety seeks to clarify his or her rights as against another surety. The Civil Code is clear; parol evidence is inadmissible in a creditor-surety relationship,⁴⁴ but is admissible in a surety-surety relationship.⁴⁵ Laws enacted for public order and the public interest may not be altered by a contract; any attempted alterations are "an absolute nullity."⁴⁶ Unambiguous laws must be applied as written.⁴⁷ There is no ambiguity in the Civil Code concerning the requirements of a written contract between the creditor and the surety in order to enforce a suretyship obligation.⁴⁸

The requirement that the relationship between the creditor and the surety be in writing is a rule of a public order that should not be susceptible of variance. The rationale that underlies the mandate of a written, express agreement is, in the words of Planiol, "because of the seriousness of the surety's engagements."⁴⁹ Because suretyship is unilateral and because the acceptance of the surety's offer to be bound is presumed without further action by the creditor,⁵⁰ the Civil Code provides no exception for the writing requirement; likewise, there is no rule in the Civil Code that allows parol evidence to "explain" the extent of the surety's engagement, whether the explanation is offered by the creditor or the debtor.

Prior to the 1987 revisions to the Civil Code articles on suretyship, some cases had made a distinction between "gratuitous" sureties and "compensated" sureties; the former received more lenient treatment by the courts and were more likely to have the suretyship contract read in their favor while the latter were subjected to a reading of the contract in favor of the creditor.⁵¹ Now, however,

44. See La. Civ. Code arts. 1847, 3038.

45. See La. Civ. Code art. 3045 and cmts.

46. La. Civ. Code art. 7.

47. La. Civ. Code art. 9.

48. La. Civ. Code arts. 1847, 3038.

49. Planiol, *supra* note 4, at No. 2324.

50. La. Civ. Code art. 3039.

51. Compare *Texas Co. v. Couvillion*, 148 So. 295, 296 (La. App. Orl. 1933), in which a surety who guaranteed a business debt for which he had no ostensible connection or liability was accorded a reading of the contract that was "restrained within the limits intended by the contract" with cases in which a surety was paid by the debtor to undertake the obligation of being a surety, such as in the situation with a commercial bonding company. See, e.g., *Bickham v. Wornack*, 181 La. 837, 847, 160 So. 431, 434 (1935) (quoting from *U.S. Fidelity & Guar. Co. v. United States*, 191 U.S. 416, 24 S. Ct. 142 (1903)):

the Code's requirements are unequivocal; sureties are bound solely by virtue of the language of their written contract.

The Civil Code does allow the parties to limit a suretyship agreement. Civil Code article 3040 allows suretyship to be "qualified, conditioned, or limited in any lawful manner." Therefore, the parties may make the suretyship contract less broad than the principal obligation, but the limitations of the surety's obligation must be express. The Official Law Institute Revision Comments describe this as an "imperative requirement";⁵² in other words, a Civil Code requirement that may not be altered by the parties.

One of the "imperative requirements" that the Law Institute lists in its Revision Comments is the express, written suretyship agreement rule. Civil Code article 1848 provides: "testimonial or other evidence may not be admitted to negate any vary the contents of . . . an act under private signature." The only exception is to prove error, fraud, or duress. Modification of a suretyship contract cannot be proven through oral testimony because a contract of suretyship only exists in writing and therefore any modification must be in writing.⁵³

Under the Civil Code, a creditor is prohibited from using parol evidence to alter what the written contract describes as the surety's obligation. Likewise, it follows that a surety is prohibited from using parol evidence to alter what the written contract describes as the surety's obligation to the creditor.⁵⁴

Lower Louisiana courts that have looked at the issue and that have allowed some form of oral testimony on the scope of the surety-creditor relationship have not squarely addressed the public policy that underlies the requirement of a written agreement between surety and creditor.⁵⁵ In the absence of a vice of consent sufficient to vitiate a contract,⁵⁶ parol evidence should be inadmissible

"If, with their superior means and facilities, [compensated sureties] are to be permitted to take the risks, but avoid the losses, by the rule of *strictissimi juris*, we may expect the courts to be constantly engaged in hearing their technical objections to contracts prepared by themselves."

See also *Texas & Pac. Ry. Co. v. U.S. Fidelity & Guar. Co.*, 16 So. 2d 671, 675 (La. App. 2d Cir. 1944):

The courts of this State have repeatedly held that where a bonding company issues bonds as a business for remuneration, the bond is construed liberally and in favor of the obligee therein and the strict construction provided by Revised Civil Code art. 3039 [1870] applies to accommodation sureties without pay.

52. La. Civ. Code art. 3040 cmt.

53. La. Civ. Code art. 3038.

54. La. Civ. Code art. 1847. See also La. Civ. Code art. 1832 which provides: "When the law requires a contract to be in written form, the contract may not be proved by testimony or by presumption." The Official Revision Comments to La. Civ. Code art. 1832 (1984 La. Acts No. 331, § 1) state that "[t]he dominant principle in the matter of documentary proof is that where a writing is required for the validity of an act, that act may not be proved by any other means."

55. See, e.g., *First Acadiana Bank v. Bollich*, 532 So. 2d 248 (La. App. 3d Cir. 1988).

56. If a purported surety thought that he or she was signing a receipt rather than a contract of suretyship, this error goes to the cause of the agreement, could be found to vitiate the consent, and would render the purported suretyship enforceable. See La. Civ. Code arts. 1949, 1950. If fraud is

by either a creditor or the surety to "explain" what the suretyship contract means. Because the Civil Code requires that the suretyship be "express,"⁵⁷ if the contract is so ambiguous that it cannot be determined what obligation the surety is agreeing to pay or the extent of the obligation, there should be no suretyship at all. Although the Louisiana Supreme Court has yet to directly examine the issue, it can be anticipated that the Court will hold that a suretyship contract which is clear on its face must be enforced as written and that parol evidence is inadmissible by either the creditor or the surety to explain any aspect of the contract.⁵⁸

B. The Creditor-Debtor Relationship—Use of Parol Evidence

While oral testimony should be inadmissible between creditor and surety to either expand or limit the surety's obligation beyond that which is express in the written suretyship contract, parol evidence is permitted in the three other instances: in the creditor-debtor relationship, in the surety-surety relationship; and in the surety-debtor relationship.

The creditor-debtor relationship need not be in writing. The Civil Code rules of suretyship concern an express written obligation only between the surety and the creditor. Because suretyship may secure any lawful obligation,⁵⁹ the general Civil Code obligation articles control the enforceability of the principal relationship between the creditor and the debtor.

Although the burden of proof of an obligation is upon the party seeking to enforce it,⁶⁰ only those contracts required by law to be in written form must be

involved in misrepresenting to the signer of a document what is being executed, the signer could allege a vice of consent. See La. Civ. Code arts. 1953-1958. Fraud may be difficult to prove in many instances where the surety is capable of reading and understanding the written agreement and signs it knowing it is a contract of suretyship. A surety who merely misconstrues the wording of the contract as opposed to being misled as to the type of contract being entered into should not be able to claim a vice of consent, because fraud may not be claimed when the person could have ascertained the truth of the document "without difficulty, inconvenience, or special skills." La. Civ. Code art. 1954.

57. La. Civ. Code art. 3038.

58. It is submitted that the correct result is reached in *Pat S. Todd Oil Co., Inc. v. Wall*, 581 So. 2d 333 (La. App. 3d Cir.), writ denied, 585 So. 2d 569 (1991). There, guarantors argued that a continuing guaranty which, on its face, was unlimited should in fact be restricted to secure only one debt through the use of parol evidence. The Court held the parol evidence was not admissible to vary the terms of the contract. *Id.* at 336. Compare the holding in *Wall with First Acadiana Bank v. Bollich*, 532 So. 2d 248 (La. App. 3d Cir. 1988), which held that a surety could limit his liability under a suretyship agreement through the use of parol evidence. It is questionable whether the holding in *Bollich* is an accurate depiction of the Code requirements and, in addition, it is unclear from the appellate opinion whether counsel objected to the parol evidence at the trial court level. For a critique of *Bollich*, see Michael H. Rubin, *Ruminations on Security Devices*, 56 La. L. Rev. 641, 653-54 (1996).

59. La. Civ. Code art. 3036.

60. La. Civ. Code art. 1831.

in writing;⁶¹ all other contracts may be oral and proved by parol and other evidence.⁶² Louisiana courts have had no problem in finding that although a suretyship must be in writing, the principal obligation need not be.⁶³

C. *The Surety-Surety Relationship—Use of Parol Evidence*

A surety's relationship with other sureties, particularly in the areas of virile share allocation and contribution rights, may be shown through oral testimony. While the surety's contract with the creditor must be in writing and the surety's obligation to the creditor is controlled by the writing, as among the sureties they are only "presumed to share the burden of the principal obligation in proportion to their number unless the parties agreed otherwise."⁶⁴ Although co-sureties no longer may use the plea of "division" to limit their liability to the creditor,⁶⁵ they may use parol evidence among themselves to demonstrate the extent of virile share liability. The Law Institute Comments to Civil Code article 3055 are clear on this point.⁶⁶

D. *The Debtor-Surety Relationship—Use of Parol Evidence*

When the surety is a commercial bonding company, the surety not only enters into a written agreement with the creditor, but also usually enters into a written agreement with the debtor covering such matters as repayment and additional security for the surety. Many times, however, those who sign "continuing guarantee" agreements with a creditor seldom have a written agreement with the debtor.

There is nothing in the Civil Code that requires the debtor-suretyship relationship to be evidenced by a written instrument, and thus there is nothing that prohibits a debtor and surety from using parol evidence against each other

61. La. Civ. Code art. 1832.

62. La. Civ. Code art. 1846.

63. See, e.g., *Queen Insurance Co. of America v. Bloomenstiel*, 184 La. 1070, 168 So. 302 (1936). Cf. *Parish of East Baton Rouge v. The Traveler's Insurance Co.*, 342 So. 2d 226 (La. App. 1st Cir. 1976); *Texas Co. v. Couvillon*, 148 So. 295 (La. App. Or. Cir. 1933) (where principal obligation was an open account); *Bonura v. Christiana Bros. Poultry Co. of Gretna, Inc.*, 336 So. 2d 881 (La. App. 4th Cir.), *writs refused*, 339 So. 2d 11, 26 (1976) (suit on an open account).

64. La. Civ. Code art. 3055 (emphasis added).

65. Division and discussion were abolished in the 1987 revisions to the Civil Code suretyship articles. See La. Civ. Code art. 3045. See *infra* text accompanying notes 158-162, 175-181 for an explanation of division and discussion.

66. La. Civ. Code art. 3055 cmt. b: "The presumption provided in this Article is rebuttable. Parol evidence is admissible to overcome the presumption and to show that the sureties agreed among themselves that liability would be proportionately shared or that sureties were induced to make their contract with the understanding that others would entirely bear the burden . . ." For a discussion of this issue with examples, see Michael H. Rubin and Stephen P. Strohschein, *Security Devices*, 55 La. L. Rev. 611, 653, 655 (1995).

to prove the nature of their relationship,⁶⁷ the scope of their relationship,⁶⁸ or the terms of their relationship.⁶⁹

E. Summary on Parol Evidence and Suretyship

When the debtor is a closely held business entity, with only a one or a few owners, it is often tempting for the creditor to attempt to use oral testimony to make the owner pay for the business entity's debt. Likewise, when negotiations were ongoing between a creditor and one already bound as a surety, a creditor or surety may later seek to offer parol evidence to vary the terms of the written agreement. Although there are some lower court cases that *might* be cited in support of these temptations,⁷⁰ it is submitted that such cases should not be followed. It is suggested that the confusion in the lower courts' jurisprudence results from a failure to adequately analyze the four differing relationships that are involved in any suretyship agreement: creditor-debtor, creditor-surety, surety-debtor, and surety-surety. In creditor-surety relationships, parol evidence is inadmissible in any form, because, as noted above, the Civil Code expressly mandates, as an "imperative requirement,"⁷¹ that the creditor-suretyship agreement must in writing, must be express, and no variation is permitted except in writing. On the other hand, all of the other three relationships (creditor-debtor, debtor-surety, and surety-surety) are susceptible of proof and modification through oral testimony.

IV. THE THREE KINDS OF SURETYSHIP

The 1987 revision to the Civil Code defined three different kinds of suretyship—commercial, legal, and ordinary. The obligations of a surety and how the courts are to interpret the surety's contract are dependent upon a proper classification of the type of suretyship contract.

67. *E.g.*, X, Y, and Z sign as co-makers of a note. In fact, X received all the funds and Y and Z, unbeknownst to the creditor, were merely helping X obtain the loan. If Y or Z pays the debt, nothing should prevent either of them from obtaining complete reimbursement from X. *See* the discussion of the debtor-surety relationship, *infra* text accompanying notes 193-194.

68. *E.g.*, S agrees to sign a "continuing guaranty" of unlimited duration to secure D's debt to creditor, but D orally tells S that D will get S released after one year. Nothing should prohibit S from using parol evidence in a suit against D for indemnity or security. *See* the discussion of the right of reimbursement and security, *infra* text accompanying notes 148-157.

69. *E.g.*, S claims that D agreed to pay him \$1000 if S would sign a continuing guarantee securing D's loans; S has signed and D hasn't paid S. Nothing prohibits S from using parol evidence in a suit against D for the \$1000.

70. *See* Rubin, *supra* note 58, at 653, 654, for a criticism of *First Acadiana Bank v. Bollich*, 532 So. 2d 248 (La. App. 3d Cir. 1988) and *Nesser, King & LeBlanc v. Laredo Marine Services, Inc.*, 630 So. 2d 327 (La. App. 4th Cir.), *writ denied*, 637 So. 2d 462 (1994).

71. *See* Revision Comments to La. Civ. Code art. 3040.

A. Commercial Suretyship

The 1987 Civil Code classification is not dependent upon whether a surety is paid to undertake the obligation; no distinction is created on the basis of whether the surety was absolutely gratuitous or whether the surety received some type of compensation, directly or indirectly. Under the pre-1987 jurisprudence, which did differentiate between "gratuitous" and "compensated" sureties,⁷² it was sometimes difficult to ascertain whether a contracting party was a "gratuitous" surety because there was no direct compensation to the surety, or whether the surety should have been treated as "compensated" because, for example, the surety was a minority shareholder of the debtor although not an employee of the debtor.

The 1987 Civil Code revisions abolished artificial distinctions dependent upon a definition of "compensation" and instead analyze matters on a functional basis. Commercial suretyship may arise in four separate contexts under Civil Code article 3042:

- (1) the surety is engaged in the surety business;
- (2) the principal obligor or the surety is a business corporation, partnership, or other business entity;
- (3) the principal obligation arises out of a commercial transaction of the principal obligor; or
- (4) the suretyship arises out of a commercial transaction of the surety.

Therefore, any of the following would constitute a commercial suretyship:

- A bonding company under the Private Works Act⁷³ collects a premium for putting up the bond. This would be a "surety engaged in a surety business."
- A corporation's shareholder guarantees the business' debt. Here, the principal obligor is a business entity.
- An individual with no investment in a limited liability company guarantees the debt of the entity. Here, again, the principal obligor is the business entity.
- A partnership guarantees the debt of a third person. Here, the surety is a business entity.
- An individual borrows money to start a new business and that debt is guaranteed by a third person. Here, the principal obligation arises out of a "commercial transaction of a principal obligor."
 - a. A owes money to B. A needs to buy a car so he can get a job and repay B. B agrees to guarantee A's car loan. It would seem that this can be characterized as a commercial suretyship that arises "out of a

72. See *supra* notes 21-24, 51.

73. Enacted at La. R.S. 9:4108.

commercial transaction of the surety" because there is a commercial reason why the surety has entered into the agreement.

B. Legal Suretyship

In addition to commercial and ordinary sureties, the Civil Code deals with the concept of legal suretyship.⁷⁴ A legal surety is one whose agreement is required by a judicial proceeding, by law, or by an administrative act or regulation.⁷⁵ Common examples of legal sureties include a bond for a creditor who institutes a succession proceeding;⁷⁶ a suspensive appeal bond;⁷⁷ bonds for attachment and sequestration;⁷⁸ a surety for costs in class action litigation;⁷⁹ a bond for curator of an interdict or tutor for a minor;⁸⁰ a bond for an injunction or to halt executory proceedings;⁸¹ and sureties under the Private Works Act.⁸²

When the Civil Code makes no special rule for legal sureties, the rules of commercial suretyship control.⁸³ Unlike commercial suretyship, a legal surety may not cleverly draft a contract to limit the surety's liability; however the contract is worded, the law will rewrite the contract to conform to the requirements of law⁸⁴ with one exception—the law will not change the amount of the suretyship agreement.⁸⁵ If the suretyship agreement is for the wrong amount, the dollar obligation cannot be changed without the surety's consent.⁸⁶

1. The Requirement of a Judgment Against the Principal Obligor

While a legal surety is not allowed either division or discussion,⁸⁷ the legal surety has a defense that the commercial and ordinary sureties do not possess. Commercial and ordinary sureties may be sued at any time, with or without a prior lawsuit against the debtor; however, although a legal surety may be sued,

74. La. Civ. Code arts. 3041, 3043, 3063-3070.

75. La. Civ. Code art. 3043.

76. La. Civ. Code art. 1072.

77. La. Code Civ. P. art. 2124.

78. La. Code Civ. P. arts. 3501, 3507, 3508, 3512, 3544, 3574.

79. La. Code Civ. P. art. 595.

80. La. Code Civ. P. art. 4131.

81. La. Code Civ. P. arts. 2754, 3610.

82. La. R.S. 9:4812 (1991).

83. La. Civ. Code art. 3063.

84. La. Civil Code art. 3066.

85. La. Civ. Code art. 3067.

86. See, e.g., *U.S. ex rel Landry v. National Surety Co. of New York*, 191 La. 1017, 187 So. 2d 9 (1939); *Dougherty v. Peters*, 2 Rob. 537 (1842). As Official Revision Comment to Article 3067 states: "If the bond is insufficient the remedy is to get a new bond. When the amount of the bond is left blank, however, the law will supply the amount in accordance with the statute requiring the bond."

87. La. Civ. Code art. 3045.

no judgment may be rendered against it until "the creditor obtains [a] judgment against the principal obligor ['in a specific amount.']"⁸⁸ All that is required is a judgment; Civil Code article 3069 as amended by Acts 1987, No. 409, section 1, eliminates the prior jurisprudential rule that, in addition to a judgment, the creditor must have a writ of execution issued and have it returned *nulla bona*.⁸⁹

2. *Who May Be a Legal Surety*

In court proceedings there are special rules on who may be a legal surety. The surety must be a company licensed to do business as a surety entity in Louisiana or it must supply an affidavit from both the surety and the debtor that the surety has sufficient equity in seizable property in the state to satisfy the debt.⁹⁰

3. *Testing a Legal Suretyship*

Because the placing of a legal suretyship bond can support an injunction or suspensive appeal and thereby can drastically impact litigation rights, as well as the rights of others, a testing of the legal suretyship contract is allowed. By a rule to show cause the affected party can test three items: the sufficiency of the bond (is it enough); the validity of the bond (is it in proper form); and the solvency of the surety.⁹¹ The process of testing the bond furnished as security in judicial proceedings and the debtor's right to substitute a bond is sometimes referred to colloquially as the "three strikes and you're out rule." This expression comes from the fact that the debtor gets three chances to remedy a defective bond in a judicial proceeding, but not four. The debtor first gets a chance to put up the original bond.⁹² If that bond tested and fails because it is insufficient in amount, invalid as to form, or because the surety is insolvent, the debtor gets a second opportunity to put up a new bond (the second strike).⁹³ If the new bond likewise fails because of insufficiency, invalidity, or because of insolvency of the surety, the debtor gets a chance to put up a second new bond—the third attempt or the third strike.⁹⁴ There is no additional chance to put up a bond to remedy the situation if, at this point, the bond fails the test of sufficiency, validity, or solvency.

88. La. Civ. Code art. 3069. The lawsuit against the surety and principal obligor may proceed in the same lawsuit under this article.

89. See La. Civ. Code art. 3069 cmt. b.

90. La. Code Civ. P. art. 5122.

91. La. Code Civ. P. art. 5123.

92. La. Code Civ. P. art. 5122.

93. La. Code Civ. P. art. 5124.

94. La. Code Civ. P. art. 5126.

4. *Alternatives to Legal Suretyship*

Because legal sureties are typically given by those who are in the business of collecting premiums to undertake the risk of being a legal surety, parties are given an opportunity to avoid having to pay a premium to a suretyship company by granting a security interest in funds deposited into the registry of court.⁹⁵

C. *Ordinary Suretyship*

The final category, "ordinary suretyship," is a residual one, i.e., it is a surety who is neither a commercial nor a legal surety.⁹⁶ For example a parent who guarantees the personal, nonbusiness debt of a child is an ordinary surety. It is only ordinary suretyship that must be "strictly construed in favor of the surety";⁹⁷ other sureties do not get the benefit of such a strict construction of their contracts.

Ordinary sureties not only get the benefit of a "strict" reading of their contract in their favor, but they also benefit in ways that commercial and legal sureties do not when alterations occur in the principal obligation between the creditor and the debtor. If without the consent of the surety, the principal obligation is materially modified or amended, or if there is impairment of real security held for a principal obligation (such as the release of a pledge, a security interest under the Louisiana Commercial Laws, or a mortgage), then the ordinary suretyship is completely extinguished; the parties, however, by contract may consent to be bound despite a modification.⁹⁸ An illustration assists in understanding these rules. Assume that there is a suretyship contract that makes no reference to the modification or amendment of the principal obligation; the suretyship contract is specifically limited to a single \$1000 note due one year from today. If the creditor extends the time of payment of the note from one year to two years, the ordinary surety is released because there is clearly a material amendment of the principal obligation which would extend the time of the suretyship.⁹⁹

95. La. Civ. Code art. 3068 allows the debtor "in lieu of legal suretyship [to] deposit a sum equal to the amount for which he is to furnish security to be held in pledge as security for his obligation."

96. La. Civ. Code art. 3044.

97. La. Civ. Code art. 3044.

98. La. Civ. Code art. 3062. It is beyond the scope of this article to deal with related matters of federal law which require certain notices to a debtor or surety in certain instances. Such laws include but are not limited to the Equal Opportunity Act (codified at 50 App. U.S.C. §§ 2401-2404 (1994)); the Truth-in-Lending Act (codified at 15 U.S.C. §§ 1601-1700 (1994 and Supp. 1996)); Regulation Z (codified at 12 C.F.R. § 226.1); Regulation B (codified at 12 C.F.R. § 202.2); and the Fair Debt Collection Act (codified at 15 U.S.C. § 1692 (1994)).

99. See former La. Civ. Code art. 3063 (1870) that provided "the prolongation of the terms granted to the principal debtor without the consent of the surety, operates [as] a discharge of the latter."

A different result is mandated for commercial sureties; such changes in the principal obligation extinguish the commercial suretyship only "to the extent the surety is prejudiced by the action of the creditor, unless the principal obligation is one other than for the payment of money and the surety would have contemplated that the creditor might take such action in the ordinary course of the performance of the obligation."¹⁰⁰ The creditor has the burden of proof in such an instance.¹⁰¹

A similar distinction between a commercial and ordinary surety exists when there has been an "impairment" of real security for the principal obligation.¹⁰² In such instance the ordinary surety is released completely if there is no prior contractual consent, while the commercial surety is only released "to the extent of the impairment." This rule for commercial sureties relates to the right of subrogation a surety has against the principal obligor;¹⁰³ the surety who pays the principal obligation is subrogated "by operation of law" to the rights of the creditor.¹⁰⁴ When the creditor releases real security for the debt, the surety's ability to collect from the debtor through subrogation has been impaired. Thus, the commercial surety who does not contractually consent to such actions by the creditor is released to the extent that the creditor's actions have impaired the right of subrogation.

For example, assume that a debtor owed a creditor \$100,000 and that the creditor's security consists of a \$100,000 continuing guaranty by the surety and the granting of a \$50,000 mortgage by the debtor on property that is actually worth \$50,000. Further assume that one month after the loan is made, the creditor releases the mortgage in exchange for a payment by the debtor of \$1000. In such an instance the ordinary surety would be completely released while the commercial surety could claim that the effect of the release of the mortgage reduced the surety's liability to the creditor by \$49,000, the "extent of the impairment" (because the \$50,000 worth of property had been released for \$1000).

Because an amendment or modification of the principal obligation can result in a complete (for ordinary sureties) or partial (for commercial sureties) release, most suretyship agreements contain clauses in which the surety consents, in advance, to such items as:

- (1) A modification or alteration of the principal obligation in any form, material or not.
- (2) An extension of time of the principal obligation.
- (3) A change in interest rate or payment terms of the principal obligation.

100. La. Civ. Code art. 3062.

101. *Id.*

102. *Id.*

103. La. Civ. Code arts. 1825, 1829, 3047, 3048.

104. La. Civ. Code art. 1829.

- (4) A complete or partial release of any real or personal security held by the creditor now or in the future.

Therefore, Article 3062, which expressly allows the "consent of the surety" to alter its provisions, as a practical matter is almost always dealt with in suretyship agreements drafted by a creditor.

V. THE EFFECT OF THE RELEASE OF A DEBTOR OR SURETY

Prior to the 1987 amendments to the Civil Code, the jurisprudence concerning the impact of the release of a debtor or surety was in confusion, caused in no small part to language of suretyship agreements that seemed to encourage creditors to draft contracts in which sureties and debtors were liable "in solido."¹⁰⁵ The amendments made to the Civil Code attempt to clarify the situation and provide logical and predictable outcomes.

Because suretyship is an accessory obligation,¹⁰⁶ the extinction of the principal obligation releases the surety.¹⁰⁷ As the Official Law Institute Revision Comments state, the release of a surety because of the extinction of the principal obligation is "implicit from the accessorial nature of suretyship."¹⁰⁸ Of course, if the extinction results from a payment by one surety, that surety still has contribution rights against the sureties.¹⁰⁹

There are different rules, however, relating to the release of a surety by the creditor. Because the creditor's relationship with the surety, although accessory to the principal obligation, is different than the principal obligation, the release of the surety does not release the debtor at all, although any money paid by the surety reduces the principal obligation to the extent of payment.¹¹⁰ The release of one surety, however, does have an impact on other sureties, because each surety has a right of contribution against the other sureties.¹¹¹ Therefore, the release of one surety releases the other sureties "only to the extent of the contribution the other sureties might have recovered" from the released surety.¹¹²

Remembering that a surety can collect contribution only to the extent the surety has paid in excess of that surety's virile share¹¹³ and that sureties' virile

105. For a more detailed discussion, see *infra* text accompanying notes 174 *et seq.* See also La. Civ. Code art. 3037.

106. La. Civ. Code art. 3035.

107. La. Civ. Code art. 3059.

108. La. Civ. Code art. 3059 cmt. a.

109. See La. Civ. Code arts. 3055-3057; La. Civ. Code art. 3059 cmt. b.

110. La. Civ. Code art. 1892. See also La. Civ. Code art. 3057 which provides, in part: "If a surety obtains the conventional discharge of other co-sureties by paying the creditor, any reduction in the amount owed by those released benefits them proportionately."

111. La. Civ. Code art. 3055.

112. La. Civ. Code art. 1892.

113. La. Civ. Code art. 3057.

shares are presumed to be equal,¹¹⁴ illustrations of some various possibilities may be helpful.¹¹⁵

A. *Example No. 1*

Assume that Debtor owes a \$120,000 debt to Creditor and that Sureties 1, 2, and 3 have all signed a single continuing guaranty for \$120,000. Further assume that virile shares of Sureties 1, 2, and 3 are equal.

(1) If the Creditor releases the Debtor, all the Sureties are released.¹¹⁶

(2) If the Creditor voluntarily releases all the Sureties for no payment, the Debtor still remains bound for the \$120,000 debt.¹¹⁷

(3) If the Creditor releases Surety 1 for a payment of \$40,000, the payment is imputed to the principal obligation and the Debtor is only liable for \$80,000 (\$120,000 - \$40,000).¹¹⁸ Sureties 2 and 3 benefit from the release of Surety 1; however, because the payment by Surety 1 equals Surety 1's virile share, Surety 1 has no contribution claim against Sureties 2 and 3¹¹⁹ and Sureties 2 and 3 are each liable to the Creditor for \$80,000 (although the creditor may never collect more than the outstanding balance on the principal obligation).

(4) If the Creditor releases Surety 1 for a payment of \$10,000, then the payment must be imputed to the principal obligation and the Debtor is bound for \$110,000 (\$120,000 - \$10,000). Here, however, the virile share calculation becomes important, because the release of Surety 1, under Civil Code article 1892, releases the other sureties to the extent of contribution they could have obtained. In this example, because the sureties have equal shares, the impact of the release of Surety 1 is to release a 1/3 virile share. Thus, although the Creditor can still collect \$110,000 from the Debtor, the Creditor cannot collect more than \$80,000 from Surety 2 or Surety 3 (\$120,000 - [1/3] \$120,000). This result is just, because the creditor is in control of the release of the surety and if the Creditor decides to accept less than a surety's virile share, the Creditor should bear the risk of the loss of the remaining sureties' lost contribution rights against Surety 1. Therefore, cautious creditors will want to ascertain, in advance of the release of a surety,

114. La. Civ. Code art. 3055. This presumption is rebuttable by parol evidence. For a more detailed discussion, see *supra* text accompanying notes 64-66.

115. For a further detailed illustration, see Rubin and Strohschein, *supra* note 66, at 654-55.

116. La. Civ. Code arts. 3059, 1892. Note that these articles, along with La. Civ. Code art. 3037, overrule the holding in *Louisiana Bank and Trust Co., Crowley, La. v. Boutte*, 309 So. 2d 274 (La. 1975).

117. La. Civ. Code art. 1892.

118. *Id.*

119. La. Civ. Code art. 3057.

what surety's virile share is, or at least will seek to obtain a representation from the surety as to the extent of that surety's virile share.

B. Example No. 2

Assume the same facts as in Example No. 1 *except* that the sureties now, among themselves, have unequal virile shares; Surety 1's virile share is ten (10%) percent, Surety 2's virile share is forty-five (45%) percent, and Surety 3's virile share is forty-five (45%) percent.

(1) If the Creditor releases the Debtor, the result will be the same as in Example No. 1; all the sureties are released.¹²⁰

(2) If the Creditor releases all the sureties, the result is the same as in Example No. 1; the Debtor is still bound for \$120,000.¹²¹

(3) If the Creditor releases Surety 1 for a payment of \$40,000, the Debtor is liable for \$80,000, because the payment is imputed to the debt.¹²² In this instance, Surety 1 has been released for a payment of more than that Surety's virile share; the payment also actually reduces the debt by more than that Surety's virile share; therefore, Sureties 2 and 3 are each liable for \$80,000, the extent of the principal obligation, although among themselves the virile share is forty-five (45%) percent each. Because Surety 1 paid more than Surety 1's ten (10%) percent virile share, Surety 1 is entitled to get contribution from Sureties 2 or 3 for a total \$28,000, the amount in excess of Surety 1's virile share.¹²³

(4) If Surety 1 pays \$10,000 and is released, Surety 1 now has paid less than his virile share. The Debtor is liable to the Creditor for \$110,000 (\$120,000 - \$10,000 payment).¹²⁴ Sureties 2 and 3 get the benefit of the release of Surety 1's virile share, but that is only ten (10%) percent under this Example. Therefore, although the Creditor can sue the Debtor for \$110,000, the Creditor can sue the Sureties for only \$108,000.¹²⁵

It can be seen that a creditor's rights against a debtor have to be analyzed separately from a creditor's rights against sureties, although the rights are interrelated because of the accessory nature of suretyship. Of course, in all of the examples above, the surety is entitled to collect from the debtor the amounts

120. La. Civ. Code arts. 1892, 3059.

121. La. Civ. Code art. 1892.

122. *Id.*

123. Surety 1's virile share was ten (10%) percent of \$120,000 or \$12,000. Surety 1 paid \$40,000, so the amount of contribution available to Surety 1 is \$40,000 minus \$12,000 equals \$28,000.

124. La. Civ. Code art. 1892.

125. Surety 1's virile share was ten (10%) percent of \$120,000 or \$12,000. \$120,000 debt minus \$12,000 equals \$108,000.

that the surety has paid to the creditor, whether by way of subrogation or reimbursement.¹²⁶

VI. "EXTINCTION" OF THE PRINCIPAL OBLIGATION

The "extinction" of the principal obligation may arise through release of the debtor or through complete payment.¹²⁷ "Extinction" is different from a lack of a cause of action against the debtor. For example, a creditor may not be able to pursue the debtor because the debtor is a minor. An obligation exists but the creditor has no personal cause of action against the minor; nonetheless, the suretyship is valid and the sureties are bound even though the creditor has no way to collect from the debtor.¹²⁸ Likewise, if the debtor is a corporation that has not been validly formed, the lack of corporate existence will not release the surety.¹²⁹ Similarly, the bankruptcy rule that prevents a creditor from pursuing a debtor personally or the discharge in bankruptcy that the debtor receives cannot be raised by the surety as a defense.¹³⁰ Obligations that prevent a creditor from pursuing a debtor personally but which do not extinguish completely the principal obligation cannot be raised by the surety as a defense.¹³¹ On the other hand, any defense to the obligation the principal obligor could assert (that is, a defense to the obligation as opposed to the debtor's personal liability on the obligation) can be used as a defense by the surety.¹³² Therefore, a surety can raise such matters as extinction of the principal obligation through prescription,¹³³ performance,¹³⁴ novation,¹³⁵ compensation,¹³⁶ the fact that the principal obligation is *contra bonos mores*,¹³⁷ or because of confusion between the

126. La. Civ. Code arts. 3047-3054.

127. La. Civ. Code art. 3059 provides: "The extinction of the principal obligation extinguishes the suretyship."

128. La. Civ. Code art. 3046; *see also* *Federal Schools, Inc. v. Kuntz*, 16 La. App. 289, 134 So. 118 (Orl. 1931).

129. La. Civ. Code art. 3046; *see also* *Devoe & Reynolds Co. v. Loup*, 14 La. App. 312, 129 So. 450 (Orl. 1930).

130. La. Civ. Code art. 3046; *Ludeling v. Felton*, 29 La. Ann. 719 (1877); *Katz v. Innovator of America, Inc.*, 552 So. 2d 724 (La. App. 1st Cir. 1989); 11 U.S.C. § 524(e) (1994). As the Official Revision Comments to La. Civ. Code art. 3046 state, in part: "Bankruptcy does not extinguish the debt but is simply a bar to the enforcement of it. It is at its very contingency, the insolvency of the debtor that necessitates suretyship."

131. For a discussion of suretyship and the Deficiency Judgment Act, *see* Michael H. Rubin & R. Marshall Grodner, *Recent Developments in the Law: Security Devices*, 53 La. L. Rev. 969, 982 (1993).

132. La. Civ. Code art. 3046. *See* former La. Civ. Code art. 3060 (1870) which stated that a surety could not raise a "personal defense" of the debtor.

133. La. Civ. Code art. 3046; *Michelin Tire Co. v. Delcourt*, 149 So. 313 (La. App. 1st Cir. 1933), *reh'g denied*, 150 So. 303 (La. App. 1st Cir. 1933).

134. La. Civ. Code art. 1854.

135. La. Civ. Code arts. 1879, 1884.

136. La. Civ. Code arts. 1893, 1897.

137. *Gates v. Renfroe*, 7 La. Ann. 569 (1852).

creditor and the debtor¹³⁸ (but confusion between a surety and the debtor does not extinguish the debtor's obligation).¹³⁹

VII. THE SURETY VERSUS THE DEBTOR—WHAT ARE THE SURETY'S RIGHTS AND THE DEBTOR'S OBLIGATIONS?

The Civil Code grants a surety who pays the principal obligation two separate sets of claims against the debtor: legal subrogation¹⁴⁰ and the right of reimbursement.¹⁴¹ The Civil Code also gives the surety an additional claim that is not necessarily dependent upon payment—the right to obtain security from the obligor.¹⁴²

The right of legal subrogation exists under Civil Code article 1829 when a person pays a debt "he owes . . . for others"; this aptly describes a surety's obligation. The surety obtains through legal subrogation the creditor's rights against the debtor on the principal obligation. Because subrogation occurs by operation of law, no special language is needed to grant subrogation and no contractual act of subrogation is required. Indeed, the Civil Code prohibits one who benefits from legal subrogation from obtaining an additional benefit through conventional subrogation.¹⁴³ Because a surety is entitled to legal subrogation and cannot get more through conventional subrogation, a surety can only collect the amounts that the surety has paid to the creditor.¹⁴⁴ A surety cannot attempt to "purchase" the principal obligation at a discount or have it "assigned" to him for a partial payment and then seek to collect the full amount of the principal obligation from the debtor. The Civil Code obligation articles and suretyship articles prevail and prevent the surety from bettering his position. This rule is just because the surety's contract is accessory to the principal obligation, and the surety should not be able to achieve a windfall through clever bargaining with the creditor.¹⁴⁵

138. La. Civ. Code arts. 1903, 1904.

139. La. Civ. Code art. 1904.

140. La. Civ. Code arts. 3047, 1829.

141. La. Civ. Code art. 3047.

142. La. Civ. Code arts. 3047, 3053-3054.

143. La. Civ. Code art. 1830, amended by 1984 La. Acts No. 331, § 1, changed Louisiana's law. In the words of the Official Revision Comments: "It changes the law insofar as it limits the recovery of a person substituting himself to the rights of another to the amount actually paid only when subrogation takes place by operation of law."

144. La. Civ. Code arts. 1830, 3052.

145. A problem arises when the status of the parties as principal or accessory is not carefully analyzed. For example, in *First City Bank v. 740 Esplanade Ave.*, 665 So. 2d 1190 (La. App. 4th Cir. 1995), *writ denied*, 667 So. 2d 1059 (1996), a partnership defaulted on obligations secured by a collateral mortgage package. After foreclosure, a deficiency judgment action ensued against a limited partner who had guaranteed the "negative cash flow." One of the general partners, who himself had guaranteed at least some of the notes by endorsing them, purchased the indebtedness and substituted himself as a plaintiff in the deficiency judgment suit. The court allowed the general partner to collect the full amount of the deficiency from the guarantor/limited partner without a full

An exception to the rule that a surety may not collect more than a surety has paid involves attorney's fees. If the principal obligation provides for attorney's fees and interest, then the surety may collect "such attorney's fees and interest as are owed with respect to the principal obligation" although the surety has paid less for the full amount of the principal obligation.¹⁴⁶

If a debtor had a valid defense against the creditor, the debtor may assert that defense against the surety who is suing through subrogation.¹⁴⁷

A. *The Right of Reimbursement*

A surety who pays the creditor without asking the debtor about the legal enforceability of the debt proceeds at his peril in subrogation, because the surety may find that when it comes time to sue the debtor, the debtor has a valid defense to the debt. The Civil Code addresses this situation and allows the surety the right to collect from the debtor, despite the existence of a defense to the principal obligation, if the debtor knew of the forthcoming payment and did not advise the surety of the defense.¹⁴⁸ Practically, the surety should notify the debtor prior to payment to preserve this claim, and cautious sureties' counsel should contact the debtor, usually in writing prior to payment, to inquire whether there is a defense, and to state that payment will be made within a certain period of time if the surety is not notified of a legal defense. When such actions are taken and the debtor does not act to notify the surety of a valid defense to the principal obligation, the surety who pays may collect from the debtor although the debtor might have had a valid defense against the creditor.¹⁴⁹

The right of the surety to collect from the debtor if the debtor had prior notice of payment and did not object is through an action for reimbursement, not through subrogation.¹⁵⁰ Subrogation is the substitution "of one person to the

discussion of the rights of one guarantor against another. If the court had fully examined the status of the general partner, it might have determined that, as a guarantor himself, the provisions of Civil Code article 1829 prevented him from collecting the full amount of the negative cash flow guaranty from the limited partner. The court further confused the matter by referring to the general partner as a "solidary guarantor" for this 1983 obligation without discussing the fact that, in 1979, the Louisiana Supreme Court had held that even "solidary sureties," as among themselves, must apply the suretyship articles. See the discussion of *Aiavolasiti v. Versailles Gardens Land Dev. Co.*, 317 So. 2d 755 (1979), *infra* notes 185-187 and accompanying text.

146. La. Civ. Code art. 3052. See also La. Civ. Code art. 3052 cmt. c.

147. See, e.g., *Gates v. Renfroe*, 7 La. Ann. 569 (1852), where a surety was unable to collect from a debtor through subrogation because the principal obligation was invalid under Louisiana law for reasons of public policy.

148. La. Civ. Code art. 3050. Of course, for this article to apply, the surety must not have known or had reason to know, in advance, of the defense.

149. La. Civ. Code art. 3050.

150. Subrogation arises from the surety's payment of the debtor's obligation and the surety's subsequent assertion of the creditor's rights in the creditor-debtor relationship. A debtor who had a defense to the creditor could assert that against the surety who pursues through the way of subrogation. The action of reimbursement, however, arises directly out of the debtor-surety relationship.

rights of another."¹⁵¹ Reimbursement is not dependent upon the creditor's rights against the surety but, rather, upon the surety's relationship with the debtor.¹⁵² Thus, the right of reimbursement is a separate claim against the debtor.

In some instances, the surety-debtor relationship is evidenced by a written act, as in the case of legal bonds where the debtor enters into an agreement with the surety and pays a premium. In the absence of a written contract, the surety-debtor relationship is controlled by operation of law.¹⁵³ Whether the surety-debtor relationship is written or merely legal, the surety always has the right of reimbursement; however, the right of reimbursement is limited to those instances where the surety has paid the creditor after notification to the debtor and the debtor did not prevent the surety from paying by apprising the surety of a defense.¹⁵⁴

If the surety pays the creditor without notifying the debtor, and if the debtor has a defense, then the surety may not obtain payment from the debtor, but the surety is not without recourse. "In these circumstances, the surety may recover from the creditor."¹⁵⁵ The concept that underlies the surety's right to collect from the creditor is the *actio de in rem verso*, the right to collect for payment of a thing not due.¹⁵⁶

B. The Right to Require Security

In addition to subrogation and reimbursement, the third effect of the relationship between surety and debtor is the surety's right to require security. The security that the surety obtains is to secure the surety's right of reimbursement (the surety-debtor relationship) not to secure the creditor; therefore the right to obtain security has nothing to do with subrogation.

Civil Code article 3053 states that a surety may obtain security from a debtor (before making payment) in four separate instances. The four instances in which a surety may obtain security even prior to payment include: when a suit is brought by the creditor against the surety; when the principal obligor is insolvent (such as filing bankruptcy proceedings); when the principal obligor "fails to perform an act promised in return for the suretyship"; or when the principal obligation is due according to its terms and the surety has not consented to an extension of time.

151. La. Civ. Code art. 1825.

152. See the diagrams at *supra* text accompanying notes 20-21. The reimbursement right relates to the lines marked "3" in those diagrams.

153. La. Civ. Code arts. 3047-3054.

154. La. Civ. Code art. 3050.

155. La. Civ. Code art. 3051.

156. See *E.F. Minyard v. Curtis Products, Inc.*, 251 La. 624, 205 So. 2d 422 (1967); La. Civ. Code arts. 2303, 2304.

The right to require security, unfortunately, may have little practical impact if the surety has not required security from the debtor at the inception of the suretyship. Articles 3053-3054 only grant the surety a right to file a lawsuit against the debtor to put up the security. The suit may be filed ten (10) days after delivery of a written demand upon the debtor.¹⁵⁷ In the real world, it is unlikely that the surety who is being sued by the creditor has not already third-partied the debtor into the lawsuit. Likewise, it is a remote possibility that the debtor who has not paid the creditor, thereby necessitating some action by the surety, is in a position to give real security to the surety.

VIII. THE SURETY-SURETY RELATIONSHIP—CONTRIBUTION

A. *The Old Plea of Division*

The plea of division, applicable when there were multiple sureties, was abolished by the 1987 revisions to the Civil Code articles on suretyship.¹⁵⁸ Raised procedurally through an affirmative defense,¹⁵⁹ the plea of division required that the creditor not pursue the surety for the full amount of the suretyship agreement but rather only for the surety's virile share. Prior to 1987, if there were six sureties and none of them had waived the right of division, each could force the creditor to reduce that surety's liability to one-sixth (1/6) of the whole.¹⁶⁰ Today, each surety would be liable to the full extent of the suretyship contract.

While the plea of division was a claim that forced the creditor to divide the debt among the sureties, and while the plea of division could be waived,¹⁶¹ if a surety paid, contribution could be sought from the co-sureties.¹⁶²

B. *Limitations on the Claim of Contribution*

Contribution is a subcategory of subrogation, and the Civil Code contribution articles are the specific rules that must be applied when sureties are involved.¹⁶³ There are two limitations on contribution claims. First, a surety

157. La. Civ. Code art. 3054.

158. Compare La. Civ. Code art. 3049 (1870) with La. Civ. Code art. 3045.

159. La. Code Civ. P. art. 1005.

160. Metropolitan Bank v. Muller, 50 La. Ann. 1278, 24 So. 295 (1898); cf. USX Corp. v. Tanenbaum, 868 F.2d 1455 (5th Cir. 1989). For a further discussion of division, see Ralph Slovenko, *Suretyship*, 39 Tul. L. Rev. 427 (1965).

161. La. Civ. Code art. 3049 (1870); Louisiana Bank and Trust Co., Crowley, La. v. Boutte, 309 So. 2d 274, 278 (La. 1975).

162. La. Civ. Code art. 3058 (1870); Leigh v. Wright, 183 La. 765, 164 So. 794 (1935); Aiavolasiti v. Versailles Gardens Land Dev. Co., 371 So. 2d 755 (La. 1979).

163. Legal subrogation exists in favor of those who are bound "with others." Sureties are bound with each other and fit within this definition. La. Civ. Code art. 1829(3). The general rules of subrogation, however, do not apply because the special rules of suretyship contribution control when sureties are involved. Cf. Leigh v. Wright, 183 La. 765, 770-71, 164 So. 794, 795-96 (1935):

may not collect anything from a co-surety unless the paying surety has paid more than his or her virile share.¹⁶⁴ Second, having paid more than a virile share, the surety may only collect from co-sureties the excess paid over the virile share;¹⁶⁵ the surety may *not* collect any more through conventional subrogation.¹⁶⁶ Therefore, a determination of the surety's virile share is crucially important, for it not only controls the surety's ability to collect contribution from another surety, but it also relates to the relief a surety obtains when the creditor releases one of the co-sureties.¹⁶⁷ Under the 1987 Civil Code revisions, sureties are presumed to be liable among themselves equally; however, this presumption is rebuttal and can be overcome by parol evidence.¹⁶⁸

C. *A Paying Surety's Right to Collect Attorney's Fees from a Co-Surety*

Unanswered by the 1987 Code revisions is the question of whether a surety who pays is entitled to claim attorney's fees from a co-surety. The immediate concern of a voluntarily paying surety is whether, if a lawsuit must be brought against co-sureties for contribution, the paying surety may cast the co-sureties not merely for appropriate contribution amounts, but also for the paying surety's legal fees in bringing the contribution claim.

While co-sureties may always contract among themselves about the effect of payment, where there is no written agreement among the sureties there are two differing views on what should happen. The cases prior to the 1987 revision to the Civil Code generally held that a surety who paid was not entitled to attorney's fees from a co-surety, even if the principal obligation would have allowed a creditor to collect attorney's fees from the co-surety.¹⁶⁹ Even cases

We must therefore look to the codal provisions under the general heading "Of Suretyship" and none other to ascertain what recourse one of the sureties who paid the debt has against his co-sureties. That law is written in plain and unambiguous language. Article 3058 of the Civil Code, which is found under Title 16, which has to do solely with the general subject "Of Suretyship"

164. La. Civ. Code art. 3056. The former requirement of La. Civ. Code art. 3058 (1870), that a surety could collect contribution only in the event of a lawsuit, has been legislatively overruled. La. Civ. Code art. 3056. Likewise, the cases that attempted to avoid the language of Article 3058 by holding that "solidary sureties" did not have to wait for a lawsuit before suing for contribution have been overturned when the rule of former Article 3058 was suppressed in the 1987 revisions. For an example of the former rule, see *Aiavolasiti v. Versailles Gardens Land Development Co.*, 371 So. 2d 755 (La. 1979).

165. La. Civ. Code arts. 3056, 3057.

166. La. Civ. Code art. 1830. *Cf. Aiavolasiti v. Versailles Gardens Land Development Co.*, 371 So. 2d 755 (La. 1979); *Koeniger v. Lentz*, 462 So. 2d 228 (La. App. 4th Cir. 1984).

167. La. Civ. Code art. 3057.

168. La. Civ. Code art. 3055; *see also* La. Civ. Code art. 3055 cmt. b.

169. The case usually cited as the primary authority for this proposition is *Aiavolasiti v. Versailles Gardens Land Dev. Co.*, 371 So. 2d 755 (La. 1979), although that case was decided under the Louisiana Negotiable Instruments Law, at La. R.S. 7:1, repealed effective Jan. 1, 1975, by 1974 La. Acts No. 92, enacting Commercial Laws (La. R.S. 10:1-101-8-511 (1983 and Supp. 1996)) not the Louisiana Commercial Laws (Louisiana's version of the Uniform Commercial Code).

arising after the adoption of Louisiana's version of Article 3 of the U.C.C.¹⁷⁰ resisted a surety's claim of attorney's fees from a co-surety although the principal obligation may have consisted of a note providing the payee the right to collect attorney's fees.¹⁷¹ The fact that Civil Code article 3052 specifically provides attorney's fees to a paying surety when he sues the debtor, and the fact that there is no similar article allowing a paying surety attorney's fees against co-sureties is claimed, by some, to lend continued authority to the results of these cases.

It can be urged with some force, however, that the result of these cases should be subject to reconsideration. Since suretyship contribution is a species of subrogation, and since there is nothing in the suretyship articles that prohibits one surety from getting attorney's fees and interest on the principal obligation from a co-surety, and since suretyship contribution arises by the operation of law,¹⁷² it can be argued that no provision other than the legal subrogation articles are necessary in order for a surety to collect attorney's fees from a co-surety. It also can be argued that this result is congruent with a desire for justice; if a creditor could get attorney's fees from a non-paying surety, the surety who voluntarily pays should not be in a worse position through voluntary actions. To follow the earlier line of cases would mean that sureties who are willing to pay but who would not like to be named as defendants in a lawsuit must nonetheless wait until a lawsuit is filed if they are going to try to limit their liability against a co-surety by naming that co-surety as a third party in the litigation. Further, there is nothing in the Louisiana's current version of U.C.C. article 3 that would prohibit a co-surety from obtaining attorney's fees from another co-surety. Under Louisiana Revised Statutes 10:3-116, as amended by Acts 1992, No. 133, section 3, in the absence of a contrary provision in an instrument, when "two or more persons . . . have the same liability on an instrument as . . . endorsers," they are liable "jointly and severally." The discharge of a joint and several obligor by the person entitled to enforce the instrument does not affect, under Louisiana's version of the U.C.C., the right of other joint and several obligors to receive contribution.¹⁷³

What the Louisiana Supreme Court will do with the situation is unknown. It is hoped that other courts that address this issue will give it close scrutiny. In light of the unsettled case law, cautious counsel will advise clients who are considering become sureties to enter into a written agreement with co-sureties not only on allocation of virile share liability, but also on the right of a paying surety to collect attorney's fees and interest from a co-surety.

170. Codified at La. R.S. 10:3-101. It is beyond the scope of this article to examine the relationship between sureties and accommodation parties on negotiable instruments.

171. See, e.g., *Daigle v. Chaisson*, 396 So. 2d 573 (La. App. 3d Cir. 1981). The Court there criticized a previous article by this author on this subject, Michael H. Rubin, *Security Devices*, 40 La. L. Rev. 572 (1979).

172. La. Civ. Code art. 1829.

173. La. R.S. 10:3-116(C) (1993).

IX. THE DEATH OF "SOLIDARY SURETYSHIP"

The Civil Code as it existed in 1870 granted sureties not only the right of division,¹⁷⁴ but also the right of discussion.¹⁷⁵ Raised procedurally through a dilatory exception,¹⁷⁶ discussion forced a creditor to attempt to collect from the debtor before obtaining judgment against the surety. The surety was required to point out to the creditor property in the state belonging to the debtor which was not exempt from seizure, was not in litigation, was free from encumbrances, and was worth more than the total amount owed; in addition, the surety pleading discussion had to deposit into the registry of court sums sufficient for the costs of executing against this property.¹⁷⁷ The plea of discussion, like the plea of division, could be waived by a surety.¹⁷⁸ One way to waive it was merely to state "I waive division and discussion." Another way, expressly suggested by the Code articles as they existed in 1870, was for the surety to be bound in *solido* with the debtor.¹⁷⁹ Although it appears that the Code's suggestion of the debtor and the surety being bound in *solido* was designed as a procedural waiver of the plea of discussion (just as sureties being bound in *solido* among themselves was the same as a procedural waiver of the plea of division),¹⁸⁰ the jurisprudence developed in such a way that the courts began to overlook the substance of a transaction in favor of the "magical words" of solidarity.¹⁸¹

A. *Boutte and Its Progeny*

The apex of the elevation of form over substance occurred in the holding of *Louisiana Bank and Trust Co., Crowley, La. v. Boutte*.¹⁸² There, parties signed a document entitled a "continuing guaranty," in which they stated that they bound themselves "in *solido*" with each other and the debtor. Although neither the creditor nor the court were confused about the status of sureties as accessory

174. See the discussion of division *supra* text accompanying notes 158-162.

175. La. Civ. Code arts. 3045, 3047-3048 (1870).

176. La. Code Civ. P. art. 926.

177. La. Code Civ. P. arts. 5151-5156.

178. La. Civ. Code art. 3045 (1870).

179. La. Civ. Code art. 3045 (1870) provided:

The obligation of a surety towards the creditor is to pay him in case the debtor should not himself satisfy the debt; and the property of such debtor is to be previously discussed or seized, unless the security should have renounced the plea of discussion, or should be bound *in solido* jointly with the debtor, in which case the effects of his engagement are to be regulated by the same principles which have been established for debtors *in solido*.

180. See the discussion in *USX Corp. v. Tanenbaum*, 868 F.2d 1455 (5th Cir. 1989). See also *Hibernia Bank & Trust Co. v. Succession of Cancienne*, 140 La. 969, 74 So. 267, 272 (1917); *Edward B. Bruce Co. v. Lambour*, 123 La. 969, 49 So. 659 (1909).

181. Even the French commentators had some difficulty with the concept of a solidary suretyship. See *Planiol, supra* note 4, at No. 2352.

182. 309 So. 2d 274 (La. 1975).

obligors,¹⁸³ the court held that the release of the principal obligor (and of other co-sureties) did *not* release the sole remaining surety. The Court allowed language of a contract, drafted by a creditor for the creditor's benefit, to blind it to the true relationship among the parties. *Boutte* was roundly criticized by commentators.¹⁸⁴

The Court persisted in following *Boutte* when, four years later, it again addressed the issues of "solidary suretyship" in *Aiavolasiti v. Versailles Gardens Land Development Co.*¹⁸⁵ Acknowledging that, from a creditor's viewpoint, the magical language of solidarity (drafted by the creditor) allowed the creditor to treat both the principal debtor and the sureties as solidary obligors, the *Aiavolasiti* opinion differentiated between the creditor's viewpoint and the viewpoints of the sureties and debtor. The holding of *Aiavolasiti* was that, while *Boutte* allowed a creditor who drafted the continuing guarantee to treat the sureties and the debtor as solidary obligor, the surety and the debtor had to use the rules of suretyship among themselves.¹⁸⁶ This led to the anomalous situation in which the creditor, the party usually drafting the contract of suretyship, was able to create a situation in which he knew of the true relationship of the parties but nonetheless could ignore it because of the language of his contract; yet, the debtor and the surety, who signed documents prepared by the creditor, were controlled, as among themselves, by the Civil Code articles on suretyship.¹⁸⁷

B. Civil Code Article 3037 Requires Courts to Look to Substance, Not Form

Boutte and the cases that followed it were contrary to the usual rule of judicial construction, in which courts look to the substance of an agreement rather than to its form.¹⁸⁸ The *Boutte* concept of a "solidary surety" was legislatively rejected in the 1987 revisions to the Civil Code. The clearest example of the rejection is contained in Civil Code article 3037; under that article, the substance of the transaction controls, not the form, and the creditor may not hide behind the language of the contract when the creditor knows of the true relationship among the parties.¹⁸⁹ Although the Official Revision Com-

183. The Court in *Boutte* talked about the fact that a continuing guaranty "is equivalent to a contract of suretyship," and consistently referred to the guarantors as "solidary sureties."

184. See Thomas A. Harrell, *The Work of Appellate Courts 1974-1975: Security Devices*, 36 La. L. Rev. 437 (1976). See also Peter S. Title, Note, *Security Rights—Suretyship—Release of a Principal Debtor Does Not Discharge a Solidarity Surety*, 49 Tul. L. Rev. 1187 (1975).

185. 371 So. 2d 755 (La. 1979).

186. *Aiavolasiti*, 371 So. 2d at 758.

187. *Aiavolasiti* also grafted a jurisprudential exception onto the requirements of old La. Civ. Code art. 3058 (1870); *Aiavolasiti* held that "solidary sureties" need not pay as a result of lawsuit in order to obtain contribution from a co-surety. 371 So. 2d at 755.

188. See *Liberty Farms v. Miller*, 216 La. 1023, 45 So. 2d 610 (La. 1950); *Ericksen, Krentel and Barré v. Pizzolato Ford-Lincoln-Mercury, Inc.*, 432 So. 2d 386 (La. App. 1st Cir. 1983).

189. La. Civ. Code art. 3037 provides:

ments to Article 3037 contain an example illustrating the effects of this article, several additional examples may be helpful.

Example No. 1

Creditor advances money to Debtor, a corporate entity. Four of the corporation's shareholders sign a single "continuing guaranty" in which each state that each is bound "in solido" with each other and with the Debtor. The Creditor then releases the Debtor and then attempts to hold the sureties liable.

Result: All sureties are released. The Creditor can collect nothing from any of the sureties.¹⁹⁰ Despite the solidary language in the continuing guaranty document, the fact that the document is labelled a "continuing guaranty" and the reference to a guarantee of the debt of another shows that all parties know that the "principal cause" of the contract with the Creditor is to guaranty performance of the obligation of another.¹⁹¹ The Creditor may not hide behind the language of solidarity which the Creditor has inserted into the continuing guaranty.

Example No. 2

The facts are the same as Example No. 1, except here the Creditor has transferred the principal obligation to Creditor 2. The transfer of the principal obligation carries with it all of the accessories to the principal obligation,¹⁹² including the continuing guarantees of Sureties 1 and 2.

Result: Creditor 2 may not treat the sureties as solidary obligors. The fact that the document was labelled "continuing guaranty" shows that it is accessory in nature, despite the language of solidarity contained in the document itself.

Example No. 3

The Creditor advances money on a note signed by X, Y, and Z as comakers.¹⁹³ The purpose of the loan is to put money into X's hands.

One who ostensibly binds himself as a principal obligor to satisfy the present or future obligations of another is nonetheless considered a surety if the principal cause of the contract with the creditor is to guarantee performance of such obligations.

A creditor in whose favor a surety and principal obligor are bound together as principal obligors in solido may presume they are equally concerned in the matter until he clearly knows of their true relationship.

Given the rule of La. Civ. Code art. 3037, loose language in cases after 1987 that refer to sureties as "solidary obligors" appear to be erroneous. Cf. *Commercial Nat'l Bank v. Pipe Sales of Shreveport, Inc.*, 600 So. 2d 130 (La. App. 2d Cir. 1992); *Azar v. Shilstone*, 607 So. 2d 699 (La. App. 4th Cir. 1992).

190. This example tracks the facts in *Louisiana Bank & Trust Co., Crowley, La. v. Boutte*, 309 So. 2d 274 (La. 1975); as can be seen, the results under Article 3037 differ from the result in *Boutte*.

191. La. Civ. Code art. 3037.

192. La. Civ. Code art. 2645.

193. The facts of this example are suggested by *Bourg v. Wiley*, 398 So. 2d 13 (La. App. 4th

Result: If the Creditor knows of X, Y, and Z's relationship, and the Creditor knows that X is going to use the money and not share it with Y or Z, then despite the fact that all three have signed a note as co-makers and appear to be "ostensibly" bound as principal obligors, the Creditor's knowledge of their true relationship precludes treating them as solidary obligors, notwithstanding the fact that the note may contain solidary language.¹⁹⁴ The Creditor must treat X as principal obligor and Y and Z as sureties.

Example No. 4

The facts are same as in Example No. 3, except the Creditor transfers the note to Creditor 2, who has no knowledge of the relationship among X, Y, and Z.

Result: Since the note appears on its face to contain the signatures of three co-makers, and assuming Creditor 2 has no knowledge of the relationship between X, Y, and Z, Creditor 2 may "presume" they are equally concerned in the matter "until he clearly knows of their true relationship."¹⁹⁵ Therefore, Creditor 2 may treat all three as co-makers.

X. THE UNUSUAL PROBLEM OF *GREEN GARDEN*

Boutte and *Aiavolasiti* were not the only reasons that, prior to the 1987 Civil Code revisions, the area of suretyship was in flux in Louisiana. The third of the great triumvirate of problem suretyship jurisprudence came in *First National Bank of Crowley v. Green Garden Processing Co.*¹⁹⁶ There, a creditor released several sureties and attempted to hold the remaining surety liable for 100% of the debt. Although the supreme court decided *Green Garden* only a few years after the other two cases, the majority opinion in *Green Garden* does not contain a single citation to either of the earlier decisions. Resting not upon concepts of "solidary suretyship" (as articulated by *Boutte*) or upon a surety's contribution rights against co-sureties (as discussed in *Aiavolasiti*), the court in *Green Garden* merely referred to the Civil Code obligation article and the parties' ability to enter into enforceable contracts.

The *Green Garden* holding was that a creditor who releases one surety may still hold remaining sureties liable for 100% of the outstanding principal obligation with no reduction for the virile share of the released surety.¹⁹⁷ Of course, a creditor can collect no more than the obligation owed by the debtor.

Cir. 1981).

194. La. Civ. Code art. 3037.

195. *Id.*

196. 387 So. 2d 1070 (La. 1980).

197. *Id.* at 1074.

Interestingly, a reading of the contractual provision relied upon by the court for its holding seems to raise questions about whether the court's interpretation accorded with the parties' intent, for the clause appears to allow the creditor to release other sureties without notice to the remaining surety, but it says nothing specifically about the impact of such a release.¹⁹⁸ Nonetheless, given the court's reading of the suretyship contract, the result of the case was to treat a surety as if he were at all times the sole surety, ignoring the existence of other sureties who had obligated themselves to the creditor and with whom the creditor could deal independently of and without consultation with the debtor or the remaining surety.

Perhaps in response to the decision, most commercial continuing guarantee agreements in Louisiana contain clauses that expressly incorporate the holding of the case and allow the creditor to release collateral and sureties without notice to the remaining surety without impacting the remaining sureties responsibility for 100% of the outstanding principal obligation.¹⁹⁹

The case was decided prior to the amendments to Civil Code article 1892;²⁰⁰ today, this article mandates that the release of a surety benefits the other sureties by reducing their obligation to the creditor in an amount equal to the virile share of the released party. There is no express reference to *Green Garden* in either the revisions to the obligation articles or the suretyship articles, and it is unknown at the present time whether courts will hold that legislative changes that have occurred will cause judges to reconsider the holding of the case. One view is that parties may always contract concerning their relationships if the contract does not violate public policy; under this view, since sole sureties

198. The provision in the continuing guarantee read:

The Bank may, one or more times in its judgment grant extensions, take and surrender securities, accept compositions, release or discharge indorsers, guarantors or other parties, grant releases and discharges generally, make changes of any sort whatever in the terms of the contract or manner of doing business with the debtor and with other parties and securities in relation thereto without notice to the undersigned, such notice being hereby specifically waived.

Id. at 1072 n.3. There is a distinction that could be drawn between actions that can be taken without notice, and the impact of actions. For example, under Civil Code article 3051, a surety may pay a creditor without notice to the debtor; however, if this occurs, the ability of the surety to collect from the debtor through subrogation may be nullified if the debtor had a defense to the principal obligation. See the discussion of "The Surety Versus The Debtor—What Are The Surety's Rights and the Debtor's Obligations," *supra* Part VII.

199. An example of such contractual language is: "I now waive any notice of any action by the Creditor, whether done once or more times, to: alter, increase, lessen, or change the debt in any manner; change any payment terms or due date(s); change or alter the interest rate; release, in whole or in part, any collateral, security or other parties, including but not limited to the Debtor and other guarantors and sureties; or to make any other amendments, changes, or alterations of the debt or any document or agreement relating to the debt. I agree that none of these actions by the Creditor shall in any way lessen or diminish my liability (either in absolute dollars or as a percentage) for the debt this suretyship secures."

200. As amended by 1984 La. Acts No. 331, § 1.

are always liable for the full extent of their obligation, and since a debtor or creditor may always obtain additional sureties without notice to the first surety, there is no harm in having every surety agree to be treated as if he or she were the sole surety. A contrary argument would be that the 1987 revisions to the Civil Code suretyship articles require a creditor to look to the substance of the relationships, not to their form.²⁰¹ To allow a creditor to draft a suretyship agreement in such a way that a surety is always bound for the full amount of the debt, regardless of the creditor's own actions in releasing other sureties and impairing the remaining sureties' rights of contribution, would be to allow the creditor to treat the remaining surety as the functional equivalent to the debtor, thereby elevating the form of the transaction over the substance of the surety as a secondarily liable party. No reported case has yet directly addressed this issue; how the courts deal with it in the future will be instructive.

XI. INTERRUPTION OF PRESCRIPTION

If a suretyship is co-extensive with the principal obligation—that is, if it is unlimited in time, as in the case of a “continuing guaranty”²⁰²—then the creditor's claim against the surety will depend upon interruption of prescription on the principal obligation. If the principal obligation prescribes, the accessory suretyship contract falls and is unenforceable.²⁰³

A surety who acknowledges the principal obligation can interrupt prescription on the principal obligation, thereby impacting the debtor.²⁰⁴

XII. TERMINATION OF SURETYSHIP

Since suretyship must be a written contract,²⁰⁵ parties may agree in writing concerning the method of terminating the relationship.²⁰⁶ For example, if the

201. La. Civ. Code art. 3037.

202. The law is well-settled that a continuing guaranty which has no expiration date remains in force until revoked by the guarantor, expressly or impliedly, or until its effectiveness is extinguished in some other mode recognized by law. *Bonura v. Christiana Bros. Poultry Co. of Gretna*, 336 So. 2d 881 (La. App. 4th Cir.), *writs refused*, 339 So. 2d 11, 26 (1976); *see also Magnolia Petroleum Co. v. Harley*, 13 So. 2d 84 (La. App. 2d Cir. 1943).

203. La. Civ. Code art. 3060. The new Article 3060 is based upon results in Louisiana case law such as *Gilbert v. Meriam*, 2 La. Ann. 160 (1847), and *J.R. Watkins Co. v. Lewis*, 16 So. 2d 495 (La. App. 2d Cir. 1944).

204. *See* La. Civ. Code art. 3060; La. Civ. Code art. 3060 cmt. c.

205. La. Civ. Code art. 3038.

206. La. Civ. Code art. 3061 provides that a “surety may terminate the suretyship by notice to the creditor.” Since “notice” is not defined in this article, it is certainly in furtherance of the public policy requirement of a written suretyship agreement that the parties may put in writing the form or manner of notice required. Given the fact that many suretyship agreements are given to financial institutions that are large organizations, it behooves both the creditor and the surety to know precisely how a termination is to be accomplished.

parties agree that a certain form of written notice is required to terminate the suretyship, that contractual format must be followed.²⁰⁷

If the parties have contemplated some type of continuing relationship, however, a surety may not seek cancellation of the suretyship obligation in the middle of that relationship.²⁰⁸ For example, if a surety has guaranteed funds advanced by the creditor for the construction of the debtor's house, the surety may not give notice in the midst of construction that he wishes to cease being a surety, for "[t]he termination does not affect the surety's liability for . . . obligations the creditor is bound to permit the principal obligor to incur at the time the notice is received, nor may it prejudice the creditor or principal obligor who has changed his position in reliance on the suretyship."²⁰⁹

Although suretyship is a heritable obligation, the creditor's knowledge of the surety's death is equivalent to a termination of the suretyship.²¹⁰

XIII. CONCLUSION

Now that it has been almost a decade since the January, 1988 effective date of the 1987 revisions to Civil Code articles on suretyship, it appears that the revision process has been a success. The extensive litigation that used to occur concerning suretyship agreements seems to have been reduced, the rules have been simplified and are predictable, and the Code again re-emphasizes that it is the substance of the transaction, not the form of the suretyship agreement, that is controlling. While there are many other areas related to suretyship that are not dealt with in this article,²¹¹ it is hoped that the exposition provided has been a useful overview to students and practitioners alike.

207. See *Bonura v. Christiana Bros. Poultry Co. of Gretna*, 336 So. 2d 881 (La. App. 4th Cir.), *writs refused*, 339 So. 2d 11, 26 (1976).

208. La. Civ. Code art. 3061.

209. *Id.*

210. *Id.*

211. Areas that this article does not cover in detail include: the relationship between the suretyship articles and the rules of Louisiana Commercial Laws, La. R.S. 10:1-101-8-511 (1983 and Supp. 1996); the right (or lack of right) of a surety to claim a benefit of the Deficiency Judgment Act, La. R.S. 13:4106-4108.3 (1991); the definition of "debtor" under the Louisiana Commercial Laws, La. R.S. 10:1-201 (1983); and the rights (or lack of rights) of sureties in executory process proceedings.

