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## The Sole Maker of A Promissory Note Is an Accommodation Party for Payee When Notes Executed for Sole Purpose of Allowing Payee to Obtain Credit.

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Thus, an implied agreement should be alleged in any suit factually similar to *Cooper*, Mrs. Cooper was presumably aware of Dr. Cooper's suit involving the real estate at issue; she affirmatively acknowledged this fact by cosigning a termination of management contract with her husband and Texas Gulf Industries.<sup>60</sup> That termination was a part of the relief sought by Mr. Cooper in the first suit. Therefore, an agreement allowing Dr. Cooper to litigate the suit involving the joint management community property could be implied by her conduct. Both spouses consequently would be bound by the dismissal in the first action.

The *Cooper* decision should also be viewed in light of the additional costly litigation which the courts and Texas Gulf Industries will incur in a second suit on the same issue. As a result of *Cooper* both spouses should, in the future, be joined in any action involving their joint management community property in order to avoid such multiple litigation.

Since it must be presumed that the court intended to abide by the constitutional provisions regarding the proper method of partitioning community property during marriage, there should be little difficulty in determining the proper result of this suit on remand. Ultimately the Texas Supreme Court has succeeded in following the legislature's mandate requiring equality of the spouses regarding power to manage joint management community property. As a result of *Cooper* there is no doubt that both spouses are now equal in this regard. The court has concluded what the reform movements and legislature intended—the abolition of the husband's sole right to manage the joint management community property.

*J. Brian Sokolik*

**UNIFORM COMMERCIAL CODE—ACCOMMODATION PARTY  
—The Sole Maker Of A Promissory Note Is An Accommodation  
Party For Payee When Notes Executed For Sole Purpose  
Of Allowing Payee To Obtain Credit**

*Darden v. Harrison*, 511 S.W.2d 925 (Tex. 1974).

Plaintiff Peggy Harrison, sole devisee and surviving widow of Frank Tirey, brought suit on two promissory notes executed by defendant, D. M. Darden, in favor of Tirey. Tirey was the holder and payee on the notes.

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60. *Cooper v. Texas Gulf Indus., Inc.*, 495 S.W.2d 273, 274 (Tex. Civ. App.—Waco 1973), *rev'd*, 513 S.W.2d 200 (Tex. 1974).

Tirey had asked Darden to execute the notes so that Tirey could list them on a financial statement in order to procure a loan which was to be used for the purpose of settling accounts between the parties. The understanding between Darden and Tirey was that the notes would not represent any obligation between them. The notes were never negotiated, nor was there any evidence that the notes were ever listed on a financial statement or that a loan was actually received.

Darden's defenses were that there was no consideration for his execution of the notes, and that he was an accommodation party for Tirey's benefit and was therefore not liable to the party accommodated. Judgment was rendered for the plaintiff, and the court of civil appeals affirmed.<sup>1</sup> Held—*Reversed*. The test for determining the existence of accommodation status is not whether the alleged accommodation party received no consideration for his signature, but is whether the alleged party accommodated received the signature of the surety for the sole purpose of obtaining credit.<sup>2</sup>

The concept of the accommodation party stems from the generic concept of suretyship, an ancient institution dating from biblical times.<sup>3</sup> Suretyship has been defined in various ways;<sup>4</sup> one workable definition is that the surety is a person who assumes responsibility for the performance of some act by another.<sup>5</sup> This responsibility is contractual in nature,<sup>6</sup> involving a tripartite agreement among creditor, debtor and surety.<sup>7</sup>

1. *Darden v. Harrison*, 495 S.W.2d 49, 52 (Tex. Civ. App.—Waco 1973), *rev'd*, 511 S.W.2d 925 (Tex. 1974).

2. *Darden v. Harrison*, 511 S.W.2d 925, 928 (Tex. 1974).

3. Clark, *Suretyship In The Uniform Commercial Code*, 46 TEXAS L. REV. 453 (1968); see Loyd, *The Surety*, 66 U. PA. L. REV. 40 (1917).

The aspects of suretyship which have been incorporated into commercial law took form in the law merchant, from which the common law was developed. Farnsworth, *A General Survey of Article 3 And An Examination Of Two Aspects of Codification*, 44 TEXAS L. REV. 645 (1966).

4. RESTATEMENT OF SECURITY § 82 (1941) defines suretyship:

Suretyship is the relation which exists where one person has undertaken an obligation and another person is also under an obligation or other duty to the obligee, who is entitled to but one performance, and as between the two who are bound, one rather than the other should perform.

TEX. BUS. & COMM. CODE ANN. § 34.01 (1967) offers a different definition: "[S]urety' includes endorser, guarantor, drawer of drafts which have been accepted, and every other form of suretyship . . ." See Clark, *Suretyship In The Uniform Commercial Code*, 46 TEXAS L. REV. 453, 454 (1968).

5. *Madison County Farmers Ass'n v. American Employers' Ins. Co.*, 209 F.2d 581, 585-86 (8th Cir. 1954); *Magill v. Brown*, 50 S.W. 642 (Tex. Civ. App. 1899, writ denied); see Peters, *Suretyship Under Article 3 Of The Uniform Commercial Code*, 77 YALE L.J. 833, 836 (1968).

6. *United States v. Price*, 50 U.S. (9 How.) 83, 91 (1850); *Durham v. McDowell*, 265 S.W. 425, 426 (Tex. Civ. App.—El Paso 1924, no writ).

7. *E.g.*, *Stabs v. City of Tower*, 40 N.W.2d 362, 370 (Minn. 1949); *Toibert v. Standard Accident Ins. Co.*, 148 Tex. 235, 241, 223 S.W.2d 617, 620 (1949); Clark, *Suretyship In The Uniform Commercial Code*, 46 TEXAS L. REV. 453, 454 (1968); J. WHITE & R. SUMMERS, *HANDBOOK OF THE LAW UNDER THE UNIFORM COMMERCIAL CODE* § 13-12, at 426 (1972).

The more restricted concept of accommodation party is derived from the general concept of surety. An accommodation party is, therefore, generally described as a surety of negotiable paper.<sup>8</sup> The law of negotiable paper is embodied in the Uniform Commercial Code (UCC), which has been enacted in all of the states, except Louisiana.<sup>9</sup> Article 3 of the Code has not adopted the language of suretyship, but speaks rather of an accommodation party, who acts as a surety for the party accommodated, the principal debtor.<sup>10</sup> The relationship between the surety and the accommodation party is shown only in the official comments to the Code.<sup>11</sup>

Under the Code, the accommodation party can sign the instrument in any capacity.<sup>12</sup> The distinction between him and an ordinary signator of negotiable paper is that he signs for the purpose of lending the benefit of his name to another party to the instrument.<sup>13</sup> If the instrument is acquired subsequent to its execution by a taker who has given value for the instrument before it was due, the accommodation party is liable to the taker in the capacity in which he has signed.<sup>14</sup> If the accommodation party signs as a maker of a note, he is primarily liable to the taker or holder,<sup>15</sup> and secondarily liable if he has signed in the capacity of indorser.<sup>16</sup>

Accommodation status is a desirable position in certain circumstances because of the various defenses and rights attached to it. The accommoda-

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8. The courts and legal writers have treated the proposition that an accommodation party is a surety as axiomatic. See *Rose v. Homsey*, 197 N.E.2d 603, 606 (Mass. 1964); *First Nat'l Bank v. Hargrove*, 503 S.W.2d 856, 859 (Tex. Civ. App.—Texarkana 1973, no writ); *First State Bank v. Hare*, 152 S.W. 501, 502 (Tex. Civ. App.—Austin 1912, no writ); *Putney Credit Union v. King*, 286 A.2d 282, 284 (Vt. 1971); UNIFORM COMMERCIAL CODE § 3-415, Comments; Clark, *Suretyship In The Uniform Commercial Code*, 46 TEXAS L. REV. 453, 455 (1968); Murray, *Accommodation Parties: A Potpourri of Problems*, 22 U. MIAMI L. REV. 814 (1968).

9. J. WHITE & R. SUMMERS, HANDBOOK OF THE LAW UNDER THE UNIFORM COMMERCIAL CODE § 1, at 4 (1972).

10. UNIFORM COMMERCIAL CODE § 3-415. "Surety" and "Accommodation Party" are used interchangeably by the authorities. J. WHITE & R. SUMMERS, HANDBOOK OF THE LAW UNDER THE UNIFORM COMMERCIAL CODE § 13-12, at 426 n.1 (1972); Peters, *Suretyship Under Article 3 Of The Uniform Commercial Code*, 77 YALE L.J. 833, 837 (1968).

11. UNIFORM COMMERCIAL CODE §§ 3-415, 3-606, Comments; see Clark, *Suretyship In The Uniform Commercial Code*, 46 TEXAS L. REV. 453 (1968).

12. UNIFORM COMMERCIAL CODE § 3-415(1). This section states: "An accommodation party is one who signs the instrument in any capacity for the purpose of lending his name to another party to it."

13. *Id.*

14. UNIFORM COMMERCIAL CODE § 3-415(2); *Wheless v. Eudora Bank*, 509 S.W.2d 532, 535 (Ark. 1974); *Seaboard Fin. Co. v. Dorman*, 227 A.2d 441, 442 (Conn. Cir. Ct. 1966).

15. *Jamaica Tobacco & Sales Corp. v. Ortner*, 333 N.Y.S. 2d 669, 677 (Cir. Ct. 1972); *Musey v. Dickinson Social Club*, 466 S.W.2d 84, 87 (Tex. Civ. App.—Houston [1st Dist.] 1971, no writ); *Trabue v. Cook*, 124 S.W. 455, 457 (Tex. Civ. App. 1910, no writ).

16. *Artistic Greetings, Inc. v. Sholom Greeting Card Co.*, 318 N.Y.S.2d 623, 625 (Sup. Ct. 1971).

tion party is never liable to the party who has been accommodated,<sup>17</sup> and he has the benefit of certain discharges if the party accommodated and the creditor alter the nature of the obligation without the consent of the accommodation party.<sup>18</sup>

Prior to the enactment of the UCC a party claiming accommodation status had to show that he had signed "without receiving value therefore" for the purpose of lending the benefit of his name to some other person.<sup>19</sup> The receipt of consideration directly by the party claiming accommodation status was fatal to the claim.<sup>20</sup> The Code does not retain these requirements, and cases which have dealt with the question have held that the receipt of consideration directly by the accommodation party is no longer controlling.<sup>21</sup>

The most frequent means by which accommodation is accomplished is by the party signing as a maker.<sup>22</sup> In this connection special problems arise

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17. UNIFORM COMMERCIAL CODE § 3-415(5); *Fairfield County Trust Co. v. Steinbrecher*, 255 A.2d 144, 149 (Conn. Cir. Ct. 1968); *Amodeo v. Allen*, 54 A.2d 363 (N.H. 1947) (not liable at common law or under Negotiable Instruments Law); *Northern Plumbing Supply, Inc. v. Gates*, 196 N.W.2d 70, 72 (N.D. 1972); *King v. Wise*, 282 S.W. 570, 572 (Tex. Comm'n App. 1926, jdgmt adopted). The right of recourse an accommodation party has against the party accommodated explains why this is the case. UNIFORM COMMERCIAL CODE § 3-415, Comment 4. Even if the party accommodated reacquires the instrument from a holder in due course, he cannot recover from the accommodation party. *Ward v. Vaughn*, 298 S.W.2d 862, 865-66 (Tex. Civ. App.—Galveston 1957, no writ).

18. UNIFORM COMMERCIAL CODE § 3-606. For a discussion of these discharges, see Clark, *Suretyship In The Uniform Commercial Code*, 46 TEXAS L. REV. 453, 457 (1968).

19. Tex. Laws 1919, ch. 123, § 29, at 194, reads:

An accommodation party is one who has signed the instrument as maker, drawer, acceptor, or indorser, without receiving value therefor, and for the purpose of lending his name to some other person. Such a person is liable on the instrument to a holder for value, notwithstanding such holder at the time of taking the instrument knew him to be only an accommodation party.

Like any contract, the contract of accommodation must be supported by consideration, but the consideration moving to the party accommodated is deemed sufficient to support the promise of the accommodation party. *Gilbreath v. Cage & Crow*, 198 S.W. 972 (Tex. Civ. App.—El Paso 1917, no writ); *Central Bank & Trust Co. v. Ford*, 152 S.W. 700, 703-704 (Tex. Civ. App.—El Paso 1912, writ ref'd). This requirement is more meaningful in light of the fact that the traditional purpose of the accommodation party is to lend his name to another party, not to receive any direct benefit himself. The connotation of the word "accommodation" is an act performed gratuitously. *William D. Seymour & Co. v. Castell*, 107 So. 143, 145 (La. 1926); *Robertson v. City Nat'l Bank*, 36 S.W.2d 481, 483 (Tex. Comm'n App. 1931, opinion adopted); *Vitkovitch v. Kleinecke*, 75 S.W. 544, 546 (Tex. Civ. App. 1903, no writ) (pre-N.I.L.).

20. *Sutton v. Schoellkopf*, 62 S.W.2d 318, 321 (Tex. Civ. App.—El Paso 1933, writ ref'd).

21. *Franklin Nat'l Bank v. Eurez Constr. Corp.*, 301 N.Y.S.2d 845, 848 (Sup. Ct. 1969); *Jeffrey v. Bond*, 498 S.W.2d 31, 34 (Tex. Civ. App.—Austin 1973), *rev'd on other grounds*, 509 S.W.2d 563 (Tex. 1974). The comments to the Code indicate that the drafters intentionally excluded this requirement, and the cases have followed their direction. UNIFORM COMMERCIAL CODE § 3-415, Comment 2; see Note, *Suretyship In Article 3 Of The Uniform Commercial Code*, 17 W. RES. L. REV. 318, 328 (1965).

22. *United Refrigerator Co. v. Applebaum*, 189 A.2d 253, 255 (Pa. 1963); Clark, *Suretyship In The Uniform Commercial Code*, 46 TEXAS L. REV. 453, 455 (1968). To

when the payee on an instrument is alleged to be the party accommodated. The relationship of the parties as shown on the face of the instrument evidences prima facie liability of the maker or indorser, according to the capacity in which his signature is given.<sup>23</sup> Therefore, pre-Code law placed an additional burden of proof on a party alleging that the payee was the party accommodated. This additional element of proof was first announced in *Brinker v. First National Bank*,<sup>24</sup> where it was held that the payee can also be the party accommodated only if the instrument was executed "for the sole purpose of negotiation by the payee in order to obtain credit thereby" and where the payee has agreed to indemnify the maker.<sup>25</sup> The payee could not be the party accommodated even if the maker had received no consideration for his signature, and the payee was in some way benefited or accommodated.<sup>26</sup> Although it was not explained in the opinion, the reason for this is that the question of who was actually accommodated is critical where it is the payee who is claimed to be the party accommodated.<sup>27</sup> The effect of *Brinker* was to make the intent of the maker the determinative factor in finding the payee to be the party accommodated. If the purpose of the maker was negotiation of the instrument by the payee, only then would the payee be accommodated by the maker.<sup>28</sup>

There is authority, however, which is in conflict with the "sole purpose of negotiation" test announced in *Brinker*. In *Central National Bank v.*

illustrate, A signs as a co-maker with B on a promissory note, so that C, the payee on the instrument, will accept it in return for extending credit or a loan to B. A is an accommodation party for B, and has the primary liability of a maker, the capacity in which he has signed, in the event B does not perform according to the tenor of the note. See, for example, *Deems v. Wilson*, 151 S.E.2d 230 (Ga. Ct. App. 1966) (a mother signed a promissory note along with her minor son so that he could purchase a car).

23. UNIFORM COMMERCIAL CODE § 3-415(2); *Schreiber v. Jones*, 278 S.W.2d 902, 904 (Tex. Civ. App.—Galveston 1955, no writ).

24. 16 S.W.2d 965 (Tex. Civ. App.—Austin 1929), *rev'd on other grounds*, 37 S.W.2d 136 (Tex. Comm'n App. 1931, jdgmt adopted).

25. *Id.* at 967 (emphasis added).

26. *Id.* at 967.

27. It was determined that the party accommodated was actually a co-maker of *Brinker's*, and not the payee bank. This finding is common where there is an allegation that the payee is a party accommodated. It is either a party not on the instrument that is accommodated, or one signing as a co-maker or indorser, and not the payee. See, e.g., *Bank of America Nat'l Trust & Sav. Ass'n v. Superior Court*, 84 Cal. Rptr. 421 (Ct. App. 1970); *Deems v. Wilson*, 151 S.E.2d 230 (Ga. Ct. App. 1966); *McIntosh v. White*, 447 S.W.2d 75, 78 (Mo. Ct. App. 1969).

28. *Brinker v. First Nat'l Bank*, 16 S.W.2d 965, 967 (Tex. Civ. App.—Austin 1929), *aff'd in part, rev'd in part*, 37 S.W.2d 136 (Tex. Comm'n App. 1931, jdgmt adopted). In at least two cases, each involving an indorser, the intent of the signator was that the payee negotiate the instrument, although this was never done. *United Refrigerator Co. v. Applebaum*, 189 A.2d 253, 254 (Pa. 1963) (Code decision); *McKeever v. Brooks-Davis Chevrolet Co.*, 74 S.W.2d 311, 312 (Tex. Civ. App.—Eastland 1934, writ dism'd). In both cases, accommodation status was successfully invoked. Thus, it appears intent is the controlling factor.

*Lawson*<sup>29</sup> and in *Whitesboro National Bank v. Wells*<sup>30</sup> accommodation party status was successfully invoked by a maker where there was no negotiation of the note by the payee, nor was negotiation of the note contemplated by the maker.<sup>31</sup> Neither case referred to the *Brinker* decision.<sup>32</sup>

In *Darden v. Harrison*,<sup>33</sup> the maker of two promissory notes was held to be an accommodation party for the plaintiff's decedent, the payee.<sup>34</sup> No evidence was introduced that the notes had been listed as collateral by the payee in order to procure a loan, although this was what the parties had contemplated when the notes were executed. The notes were not negotiated.

Darden's allegation that he had received no consideration for signing was rejected by the district and civil appeals courts as not supported by the evidence.<sup>35</sup> Relying on the official comments for guidance, the supreme court decided that it is now immaterial whether consideration was received by a party claiming accommodation status.<sup>36</sup> "The essential characteristic is that the accommodation party is a surety, and not that he has signed gratuitously."<sup>37</sup> Clearly it was the intention of the drafters of the Code to dispense with the element of consideration as a determinative factor in finding accommodation status,<sup>38</sup> and the courts have followed the intent of the drafters whenever the question has been presented.<sup>39</sup>

29. 27 S.W.2d 125 (Tex. Comm'n App. 1930, jdgmt adopted).

30. 143 Tex. 232, 184 S.W.2d 276 (1944).

31. *Whitesboro Nat'l Bank v. Wells*, 143 Tex. 232, 235, 184 S.W.2d 276, 277 (1944); *Central Nat'l Bank v. Lawson*, 27 S.W.2d 125, 127 (Tex. Comm'n App. 1930, jdgmt adopted). In both of these cases banks secured promissory notes for the purpose of showing sufficient assets when a bank examiner was due to make an inspection.

32. This problem has not been uniformly treated in other jurisdictions. In one Missouri case prior to the enactment of the Code, *Morrison v. Painter*, 170 S.W.2d 965, 971 (Mo. Ct. App. 1943) and one under the Code, *McIntosh v. White*, 447 S.W.2d 75, 78 (Mo. Ct. App. 1969) the maker was not allowed to assert accommodation status against the payee where there was no intent by the maker that the payee negotiate the instrument. The California decisions all involve facts similar to *Whitesboro*, and adopt the same line of reasoning. *First Nat'l Bank v. Reed*, 244 P. 368, 370 (Cal. 1926); *Bank of America Nat'l Trust & Sav. Ass'n v. Superior Court*, 84 Cal. Rptr. 421, 423 (Ct. App. 1970) (Code decision); *Lepori v. Hilson*, 293 P. 86, 88 (Cal. Ct. App. 1930). The Georgia court, in a decision under the Code, where there had been no negotiation of the note, the maker's intent was given great weight, although it was shown that the party accommodated was actually a co-maker and not the payee, as the maker contended. *Deems v. Wilson*, 151 S.E.2d 230, 231 (Ga. Ct. App. 1966).

33. 495 S.W.2d 49 (Tex. Civ. App.—Waco 1973), *rev'd*, 511 S.W.2d 925 (Tex. 1974).

34. *Darden v. Harrison*, 511 S.W.2d 925, 928 (Tex. 1974).

35. *Id.* at 926.

36. *Id.* at 925.

37. TEX. BUS. & COMM. CODE § 3.415, Comment 2 (1968).

38. TEX. BUS. & COMM. CODE § 3.415, Comment 2 (1968) reads in part:

[S]ubsection (a) eliminates the language of the old Section 29 [of the Uniform Negotiable Instruments Law] requiring that the accommodation party sign the instrument 'without receiving value therefor.'

39. In *Jeffrey v. Bond*, 498 S.W.2d 31, 34 (Tex. Civ. App.—Austin 1973), *rev'd on other grounds*, 509 S.W.2d 563 (Tex. 1974), the receipt by the accommodation maker

The court also gave attention to Harrison's allegation that the payee may be a party accommodated only when the instrument has been negotiated, disavowing any language in *Brinker* which would have required actual negotiation of the instrument by the payee.<sup>40</sup> The interpretation given *Brinker* by the plaintiff is particularly dubious, since the test in that case was whether "the sole purpose [was] of negotiation," rather than whether the instrument in question had been negotiated.<sup>41</sup> Citing *Whitesboro* and *Lawson* the court stated that "[t]he essential element that the party claiming accommodation status must prove is that the party claimed to be accommodated received the signature of the surety for the sole purpose of obtaining credit thereby . . . ."<sup>42</sup> Thus, the "sole purpose of negotiation" test promulgated by the *Brinker* decision was expanded to a test of "sole purpose of obtaining credit thereby." It was reasoned that while negotiation is the usual route a payee will take in order to obtain credit, the act of negotiation is not controlling on the question of whether or not there was an accommodation of the payee.<sup>43</sup> It is not made clear in *Darden* whether the credit must be obtained, but it seems to be a fair inference that it need not. They did not utilize the notes in any way; yet *Darden* was found to be an accommodation party. Therefore, the maker's intent alone was held to be sufficient. The court has attempted to reconcile the two lines of reasoning represented by *Whitesboro* and *Brinker*. While negotiation is the most direct means of allowing the payee to obtain credit, the use of negotiable instruments to show solvency is an equally useful means of lending credit. Limiting the finding of accommodation status only to situations where negotiation is contemplated is, therefore, too narrow.

If the court in *Darden* intends, as it appears to, that a third party need not extend credit to the payee for him to be a party accommodated, a difficult question is raised—though not addressed—by plaintiff's allegation that an accommodation party must be a surety.<sup>44</sup> The evidence failed to show that the fundamental tripartite structure of suretyship came into existence. As

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of some benefit for his signature did not preclude the finding of accommodation status. In another jurisdiction where the defense of no consideration has been asserted, it has been held insufficient once accommodation status is established. *Franklin Nat'l Bank v. Eurez Constr. Corp.*, 301 N.Y.S.2d 845, 848 (Sup. Ct. 1969) (against taker for value before note due); *Abby Fin. Corp. v. Weydig Auto Supplies, Inc.*, 4 U.C.C. Rep. Serv. 858, 859 (N.Y. Sup. Ct. 1967) (by indorser); *Shulman v. Steve Lynn, Inc.*, 2 U.C.C. Rep. Serv. 1046, 1047 (N.Y. Sup. Ct. 1965).

40. *Darden v. Harrison*, 511 S.W.2d 925, 927, 928 (Tex. 1974).

41. *Brinker v. First Nat'l Bank*, 37 S.W.2d 136 (Tex. Comm'n App. 1931, jdgmt adopted). Also cited in support of the proposition that negotiation is not essential to finding accommodation status were *Lepori v. Hilson*, 293 P. 86, 88 (Cal. Dist. Ct. App. 1930), and *First Nat'l Bank v. Reed*, 244 P. 368, 370 (Cal. 1926), which are factually similar to *Whitesboro*.

42. *Darden v. Harrison*, 511 S.W.2d 925, 928 (Tex. 1974).

43. *Id.* at 928.

44. *Id.* at 927.



the dissent in *Darden* vigorously points out, "[a]n accommodation party must be a *surety*. *Darden* was never a surety and there was no intent that he become such."<sup>45</sup>

The official comments to the UCC clarify the drafters' position on the interrelationship of suretyship and accommodation parties:

[A]n accommodation party is always a surety . . . and it is his only distinguishing feature. He differs from other sureties only in that his liability is on the instrument and he is a surety for another party to it.<sup>46</sup>

While no state has legislatively adopted the official comments to the UCC,<sup>47</sup> they are frequently utilized in interpretations of the Code.<sup>48</sup> Although some courts have declined to follow the comments,<sup>49</sup> cases so holding are the exception.<sup>50</sup> There is no mention of the term surety in the provisions of the Code, nor is there language making suretyship a prerequisite for accommodation status.<sup>51</sup> There can be no doubt, however, that such was the intent of the drafters,<sup>52</sup> and cases involving such relationships have been consistently decided on the judicial assumption that an accommodation party is also always a surety.<sup>53</sup>

The position of the Supreme Court of Texas on this point is further obscured by the use of term "surety" in the *Darden* opinion where it is clear that reference is being made to an accommodation party.<sup>54</sup> On the issue of consideration the court adopted the position of the official comments

45. *Id.* at 928.

46. TEX. BUS. & COMM. CODE ANN. § 3.415, Comment 1 (1968).

47. J. WHITE & R. SUMMERS, HANDBOOK OF THE LAW UNDER THE UNIFORM COMMERCIAL CODE § 4, at 11 (1972).

48. *E.g.*, *United States v. First Nat'l Bank*, 470 F.2d 944, 947 (8th Cir. 1973); *In re Varney Wood Prods., Inc.*, 458 F.2d 435, 437 (4th Cir. 1972); *Thompson v. United States*, 408 F.2d 1075, 1084 (8th Cir. 1969); *In re Yale Express Sys. Inc.*, 370 F.2d 433, 437 (2d Cir. 1966); *Fidelity & Deposit Co. v. Chemical Bank New York Trust Co.*, 309 N.Y.S.2d 266, 267 (Civ. Ct. 1970), *rev'd on other grounds*, 318 N.Y.S.2d 957 (Sup. Ct. 1970).

49. *Wright v. Bank of Cal., N.A.*, 81 Cal. Rptr. 11, 14 (Ct. App. 1969) ("the plain language of the statute cannot be varied by reference to the comments"); *Zinni v. One Township Line Corp.*, 3 U.C.C. Rep. Serv. 305, 307 (Pa. 1965) (the comments are "not controlling").

50. J. WHITE & R. SUMMERS, HANDBOOK OF THE LAW UNDER THE UNIFORM COMMERCIAL CODE § 4, at 12 (1968).

51. UNIFORM COMMERCIAL CODE § 3-415. The only place the word surety is used in the text of the UCC is in section 1-201(40).

52. UNIFORM COMMERCIAL CODE § 3-415, Comments 1, 2, 4.

53. *E.g.*, *First Nat'l Bank v. Hargrove*, 503 S.W.2d 856, 859 (Tex. Civ. App.—Texas 1973, no writ); *First State Bank v. Hare*, 152 S.W. 501, 502 (Tex. Civ. App.—Austin 1912, no writ); *accord*, *Rose v. Homsey*, 197 N.E.2d 603, 606 (Mass. 1964); *Putney Credit Union v. King*, 286 A.2d 282, 284 (Vt. 1971).

54. For example, "the party claimed to be accommodated [must have] received the signature of the *surety* for the sole purpose of obtaining credit thereby. . . ." *Darden v. Harrison*, 511 S.W.2d 925, 928 (Tex. 1974) (emphasis added).

that receipt of no consideration by the accommodation party is immaterial, but the repeated statements in the comments that the accommodation party is always a surety were ignored.

It can be inferred from the language of the opinion that the payee may now be a party accommodated by the maker of an instrument if the *intent* of the maker was to lend his name to the payee by his signature. It appears to be enough that the maker is a *potential* surety for the party accommodated, and will become a surety in fact only when the payee makes use of the instrument, by negotiation or some other means, in order to obtain credit.<sup>55</sup>

Since the court in *Darden* has decided, without expressly stating, that an accommodation party need not always be a surety, the case appears to be unique in that respect. While decisions under the UCC have tacitly assumed that an accommodation party is a surety,<sup>56</sup> only one such case has approximately involved the question. In *Gibbs Oil Co. v. Collentro & Collentro, Inc.*,<sup>57</sup> the plaintiff unsuccessfully attempted to circumvent the rule that the accommodation party is not liable to the party accommodated.<sup>58</sup> It was argued that the defendant indorser who had signed as an accommodation for the payee *was* a surety, and could then assume liability as a surety to the payee when the maker failed to pay on the note.<sup>59</sup> While not deciding whether an accommodation party is always a surety, the court did say that the payee's contention was a misinterpretation of the intent of the drafters of the Code.<sup>60</sup>

The same result could have been reached by other means in *Darden v. Harrison*.<sup>61</sup> First, the defendant's claim to accommodation status could have been dismissed on the grounds that *Darden* never was a surety, and could not therefore have been an accommodation party. This would not have been unreasonable, especially since the court did utilize the comments on the issue of consideration in *Darden*.<sup>62</sup> It could then have been found that *Darden's* promise, as contained in the notes, was dependent upon *Tirey's* promise to

55. The test in *Darden* is the "sole purpose of obtaining credit thereby," and not that the credit must be obtained. *Id.* at 928.

56. *Rose v. Homsey*, 197 N.E.2d 603, 606 (Mass. 1964); *First Nat'l Bank v. Hargrove*, 503 S.W.2d 856, 859 (Tex. Civ. App.—Texarkana 1973, no writ); *Putney Credit Union v. King*, 286 A.2d 282, 284 (Vt. 1971).

57. 6 U.C.C. Rep. Serv. 361 (Mass. App. Div. 1968).

58. This provision is stated in Section 3-415(5) of the Code.

59. *Gibbs Oil Co. v. Collentro & Collentro, Inc.*, 6 U.C.C. Rep. Serv. 361, 362-63 (Mass. App. Div. 1968).

60. The court implied that the official comments were not meant to negate the provision in the statute that the accommodation party is not liable to the party accommodated. *Id.* at 363.

61. 511 S.W.2d 925 (Tex. 1974).

62. TEX. BUS. & COMM. CODE § 3.415, Comments 1, 2, 4 (1968); *see Darden v. Harrison*, 511 S.W.2d 925, 927 (Tex. 1974).

use the proceeds of the contemplated loan to settle with Darden.<sup>63</sup> Since Tirey failed to procure the loan, there was a failure of consideration for Darden's promise.<sup>64</sup> Thus, the most favorable status that plaintiff could have occupied would have been that of a holder.<sup>65</sup> Since the claims of a holder are subject to the defense of want of consideration,<sup>66</sup> Darden would not have been liable in that situation.

Whether the Texas Supreme Court has abolished the suretyship requirement in the UCC will largely depend on how *Darden* is interpreted.<sup>67</sup> At the least, *Darden* creates an exception in those cases where the payee is the party accommodated. To the extent that the circumstances under which a payee may be a party accommodated are broadened, it is a positive step. On the other hand, the question raised by *Darden* concerning the status of the suretyship requirement is an important one. Since intent is an elusive element, the potential for fraud against either the payee or the maker will be enhanced if the suretyship requirement has actually been abandoned.

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63. *Price v. Appalachian Resources Co.*, 496 S.W.2d 137, 138 (Tex. Civ. App.—Tyler 1973, no writ).

64. *Town & Country Shoes Fed. Credit Union v. Cramer*, 350 S.W.2d 281, 284 (Mo. Ct. App. 1961) indicates that as long as no other party has become involved, the accommodation maker may set up want of consideration as a defense to an action by the accommodated party, since there is no consideration *as between them*.

65. TEX. BUS. & COMM. CODE ANN. § 3.606 (1968). Neither the plaintiff nor plaintiff's decedent gave value for the notes.

66. TEX. BUS. & COMM. CODE ANN. § 3.408 (1968).

67. If the suretyship requirement is disallowed by the supreme court, it would seem that the purpose of the UCC, uniformity, would be defeated.