

Foreword

Anyone remotely familiar with the law of guaranty knows that the Restatement (Third) of the Law of Suretyship and Guaranty (ALI 1996) is an indispensable text. It provides a wonderful summary of what the law is generally, along with the reasons underlying each rule. Unfortunately, no area of law is truly as uniform as any restatement makes it seem, and that is certainly true with respect to the law of guaranty. Hence the need for this book.

In the pages that follow, the reader will learn about the key cases, statutes, and nuances of the law of guaranty in each jurisdiction within the United States and Canada. That makes this book an essential tool for both transactional lawyers and litigators. The former can use it when drafting or negotiating a guaranty, particularly one that may be governed by the law of a jurisdiction with which the lawyer is not intimately familiar. For as this book ably demonstrates, choice of law matters. Litigators will find this book useful in preparing to enforce or escape liability under a guaranty. By organizing the material by jurisdiction, and providing what is in essence a basic law review article about the law in that locality, this book refers users to what they need to know, even if they were unaware they needed to know it.

That is something of a Herculean task. Yet the editors have obtained the assistance of notable and experienced practitioners in each jurisdiction. These authors have produced a work that belongs on the shelf of every commercial lawyer. That is evidenced most clearly by the highlights and practice pointers in each section. Those highlights and practice pointers reveal how varied – and occasionally surprising – the law of guaranty is. For example,

Anti-deficiency statutes. In Nebraska, guarantors do not get the benefit of the three-month statute of limitations applicable to an action for a deficiency against a principal obligor following a non-judicial foreclosure of real property. In Utah, they do.

Attorney's fees. In Nebraska, a contractual provision providing for attorney's fees in connection with a lawsuit to enforce a contract is void as against public policy. The same is true in the Dakotas.

Community property. The rules vary widely about whether the community property of a guarantor can be reached if the guarantor's spouse has not signed the guaranty. In Arizona, the guarantor has no recourse to community property. In Idaho, the guarantor does. In Washington, it depends on whether the guaranteed obligation benefitted the community. And in New Mexico, the law is unclear on this point. Of course, the federal Equal Credit Opportunity Act and Regulation B (detailed in the chapter on federal law) limit a creditor's ability to simply require both spouses to sign the guaranty, so an understanding of the marital property laws of the applicable jurisdiction are critical when the guarantor is an individual.

Continuing guaranties. Kentucky apparently restricts the use of continuing guaranties because it requires that a guaranty agreement either expressly reference the instrument being guaranteed or specify both a maximum liability and a termination date. In Alabama, in contrast, a clause in a guaranty agreement requiring the express

written consent of the obligee before the guarantor may revoke a continuing guaranty is enforceable.

Secured transactions. Washington State has non-uniform versions of U.C.C. §§ 9-602 and 9-624, which allow secondary guarantors to waive several otherwise non-waivable rights under Article 9.

This brief glimpse should be sufficient to show that this book will appeal to novices and experts alike.

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