Notice Requirements of Guaranty Contracts

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There are three types of notice which a creditor-offeree may be required to give a guarantor-offeror: (1) notice of intention to accept the offer of guaranty, (2) notice of transactions in reliance on the offer of guaranty, and (3) notice of the principal's failure to perform the obligation guaranteed. Litigation has been rife with regard to these notice requirements. Corbin has stated:

"The question of notice as a condition precedent has been litigated more extensively in connection with contracts of suretyship than in any other field. A superficial examination of hundreds of cases may seem to indicate a tremendous conflict of authority. It is believed, however, that a careful analysis and classification of the cases will bring order out of chaos and will show that the courts have been acting with a reasonable degree of uniformity and consistency." 1

Corbin, however, did not attempt to analyze and classify the cases. The following is an attempt to verify Corbin's educated guess through the application of factual analysis. If significant facts can be isolated which produce the same result regardless of the theory applied by the court, no real conflict can be said to exist. An initial exploration of the problems involved is a prerequisite to delineating the area in which factual analysis must be used.

I. Survey of the Problem

Contractual guaranties arise from dealings between the guarantor and the creditor. They may exist without the consent, or even the knowledge, of the principal. 2 Although the creditor frequently requests a guaranty, 3 his solicitation seldom amounts to an offer. The contract commonly results from acceptance by the creditor of

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1 3A CORBIN, CONTRACTS § 726, at 393-94 (1960) [hereinafter cited as CORBIN; Vol. 1 (1950); Vol. 3A (1960)].
2 See RESTATEMENT, SECURITY § 83, comment b (1941).
3 See Campbell, Notice Due a Guarantor, 35 Mich. L. Rev. 529, 535 (1937) [hereinafter cited as Campbell].
an offer made by the guarantor.\textsuperscript{4} It may be bilateral or unilateral, though bilateral contracts of guaranty are rare.\textsuperscript{5}

An offer for a bilateral contract of guaranty may request the creditor to promise the guarantor that he will or will not act with respect to the principal. For example, the creditor may be asked to promise not to press the principal on a debt. The creditor may be expressly directed by the offer to give notice to the guarantor as a condition precedent to formation of a bilateral contract or as a condition subsequent to its existence. On the other hand, such notice may be expressly dispensed with by the offer. When the offer does not refer to notice, principles relating to the formation and discharge of contracts provide a solution. Communication of the creditor's promise to the guarantor is ordinarily necessary to form a bilateral contract of guaranty.\textsuperscript{6} Notice of the creditor's performance of his promise or of the principal's failure to pay him is not needed to prevent discharge of the contract.

Similarly, an offer for a unilateral contract of guaranty may specify as consideration action or inaction by the creditor or a promise by the creditor running to the principal. For example, the creditor may be asked to extend credit to the principal or to promise the principal that he will do so. The creditor may be expressly charged by the offer to send notice to the guarantor as a condition precedent to formation of a unilateral contract or as a condition subsequent to its existence. Conversely, such notice may be expressly negatived by the offer. When the offer does not mention notice, principles relating to the formation and discharge of contracts furnish an answer. The creditor need not communicate to the guarantor his intention to perform the requested act in order to create a unilateral contract of guaranty.\textsuperscript{7} Neither notice of the creditor's performance nor notice of the principal's default is essential to forestall the contract's discharge.

When the offer is silent concerning notice, conventional principles have not always been followed. At times the creditor has been compelled to give the guarantor notice in order to bind him to his promise. At other times no notice has been required.

\begin{itemize}
\item \textsuperscript{4} See 1 CORBIN § 68, at 215.
\item \textsuperscript{5} See 1 WILLISTON, CONTRACTS § 69A, at 221-22 (3d ed. 1957) [hereinafter cited as WILLISTON].
\item \textsuperscript{6} See 1 WILLISTON § 70.
\item \textsuperscript{7} See id. § 68.
\end{itemize}
A. Nature of the Notice Requirements

All three notice requirements are conditions of the guarantor’s liability. They are not promises creating a legal duty in the creditor and a right in the guarantor. They are operative facts which must exist for certain contracts of guaranty to be enforceable.\(^8\) Conditions may be express, implied, or constructive. The guarantor creates an express condition when he uses definite language in the offer to limit his liability.\(^9\) An implied condition is based on a mutual understanding of the parties that is not expressed in definite language.\(^10\) In contrast, a constructive condition is a circumstance which is treated as a condition on grounds of fairness and justice although the parties have manifested no intention whatever with regard to it.\(^11\)

The distinctions between the various types of conditions are clear; but in specific cases it is not always easy to classify the particular condition involved. Literal classification aside, in a sense all facts stated to be conditions by courts are constructive conditions unless the parties expressly and explicitly made them conditions. Considerations of fairness and reasonableness, the essence of constructive conditions, are given considerable weight in interpreting the words and actions of the parties.\(^12\) The subsequent analysis will treat notice as a constructive condition in this broader sense.

B. Distinctions Between the Notice Requirements

Notice of intention to accept is notice to the guarantor by the creditor that the latter intends to extend credit in reliance on the guaranty.\(^13\) Its purpose is to enable the guarantor to plan his affairs intelligently.\(^14\) Notice of transactions is notice to the guarantor by the creditor of the total balance due on the principal’s account,\(^15\) and, according to some authorities, notice of the terms of payment as well.\(^16\) Notice of transactions, like notice of intention to accept, aids the guarantor in the organization of his affairs.\(^17\) Notice of default is notice to the guarantor by the creditor that the principal

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\(^8\) See 3A CORBIN § 627.
\(^9\) See id. § 631.
\(^10\) See ibid.
\(^11\) See id. § 632.
\(^12\) See id., § 639, at 58.
\(^13\) Lowe v. Beckwith, 53 Ky. (14 B. Mon.) 150 (1853).
\(^16\) E.g., Craft v. Isham, 13 Conn. 28, 40 (1838).
\(^17\) See 1 STORY, CONTRACTS 360 (1st ed. 1844).
has failed to perform the obligation guaranteed.\textsuperscript{18} The object of
notice of default is to safeguard the guarantor's rights of recourse.\textsuperscript{29}

Notice of intention to accept, notice of transactions, and notice
of default all constitute requirements which must be met in some,
but not all, contracts of guaranty. They are imposed by the courts
as constructive conditions of the guarantor's liability on certain
contracts unless negatived by express terms.\textsuperscript{20} Notice of intention
to accept, however, is the only type of notice that is necessarily con­
tractual in theory. It is considered either a condition precedent to
formation of a contract\textsuperscript{24} or a condition precedent to the guaran­
tor's duty of performance.\textsuperscript{23} Although notice of transactions and
notice of default are also referred to as constructive conditions of
the guarantor's liability,\textsuperscript{28} failure to dispatch these notices actually
operates as a suretyship defense, \textit{i.e.}, the guarantor is permitted
to offset against his contractual liability the amount of pecuniary
loss that he can link to the failure to receive notice.\textsuperscript{24}

In theory, the notice requirements are due at different times.
Precise delineation may be more difficult as a practical matter.
Notice of intention to accept is due within a reasonable time after
commencement of performance by the creditor;\textsuperscript{25} notice of trans­

\textsuperscript{18} Douglass v. Reynolds, Byrne & Co., 32 U.S. (7 Pet.) 113 (1833). The notice of default
to which a guarantor of payment may be entitled should be distinguished from notice of
inability to collect, which a creditor may be required to give a guarantor of collection. See
text accompanying notes 240-41 infra.

\textsuperscript{19} See Douglass v. Reynolds, supra note 18. If the principal has defaulted, the guarantor
can sue to require him to pay the creditor. See \textsc{Simpson, Suretyship } § 46 (1950) [hereinafter
cited as \textsc{Simpson}]. Alternatively, the guarantor can pay the creditor and become subrogated
to the latter's rights and remedies as well as his security. Upon fulfillment of the principal's
obligation the guarantor also has a right to seek full reimbursement from the principal
and contribution from co-guarantors if he has paid more than his proportionate share of
the obligation guaranteed. See \textit{id. } §§ 47-49. The guarantor assumes the risk of the insolvency
of the principal and his co-guarantors during the interim between default and exercise
of his rights of recourse. Notice of default limits the time during which the guarantor bears
this risk because of ignorance.

The notice of the creditor's inability to collect from the principal that may be due a
guarantor of collection serves a distinct function. Since the creditor's failure to collect
from the principal indicates that the guarantor's rights of recourse are already impaired,
this notice requirement is principally designed to avoid unnecessary litigation, \textit{i.e.}, to
enable the guarantor of collection to meet his obligation on demand and thereby obviate
legal proceedings by the creditor. See \textsc{Restatement, Security, Explanatory Notes } § 134
(Tent. Draft No. 4, 1940).

\textsuperscript{20} See Patterson, \textit{Constructive Conditions in Contracts}, 42 \textsc{Colum. L. Rev.} 905 (1942).

\textsuperscript{21} Davis v. Wells, 104 U.S. 159 (1881).

\textsuperscript{22} Bishop v. Eaton, 161 Mass. 496, 500, 37 N.E. 665, 667-68 (1894) (dictum).

\textsuperscript{23} See, \textit{e.g.}, 3A \textsc{Corbin } § 726.

\textsuperscript{24} Louisville Mfg. Co. v. Welch, 51 U.S. (10 How.) 461, 474-75 (1850) (dictum).

\textsuperscript{25} Douglass v. Reynolds, Byrne & Co., 32 U.S. (7 Pet.) 113 (1833), as explained in
actions, within a reasonable time after the close of transactions; and notice of default, within a reasonable time after the principal’s default.

II. Notice of Intention To Accept

A. The English Rule

Lord Ellenborough inaugurated the concept of notice of intention to accept in 1813 when he held that it was a constructive condition of the following offer:

"Gentlemen, as I understand Messrs. David Anderson and Co., of Quebec, have given you an order for rigging, &c., which will amount to about four thousand pounds, I can assure you, from what I know of D. A.'s honor and probity, you will be perfectly safe in crediting them to that amount; indeed I have no objection to guaranty you against any loss from giving them this credit."

The subsequent elaboration of this concept bears a striking similarity to the pattern of the American cases analyzed below. Notice is a constructive condition in English and Commonwealth law whenever the phrasing of the guaranty should indicate to the creditor that the guarantor expects notice or needs it in order to make his plans.

Notice will be required when the offer indicates a willingness to guaranty only if the creditor signifies his intention to accept. Notice was required, for instance, when the guaranty stated: "If you can arrange matters to your mutual satisfaction, I am sure that Mr. Hugill will prove a very reliable person to deal with. I will myself, with pleasure, become security for anything he may be disposed to give an order for." Notice is also necessary when the offer is extended to two or more prospective creditors and the guarantor does not know which one will accept, and when the offer indicates

26 Douglass v. Reynolds, Byrne & Co., 32 U.S. (7 Pet.) 113 (1833). Notice of transactions is due only once, regardless of whether a temporary or a continuing guaranty is involved. Ibid. The former usually secures a single transaction; the latter, multiple transactions. See STEARNS, SURETYSHIP § 4.7 (5th ed. 1951) [hereinafter cited as STEARNS].
29 See text accompanying notes 98-180 infra.
that the guarantor is unsure that he is a suitable guarantor, e.g., when the offer names a reference who can vouch for the guarantor's credit standing.32

Notice of intention to accept will not be demanded if the wording of the offer or the circumstances of the making of the offer should indicate to the creditor that the guarantor does not expect or need it. Thus, notice is unnecessary when the guarantor uses positive words of guaranty even though he does not expressly waive notice, for example: "Please pay to my tenant Imam Din whatever money he requires and settle your account every harvest, because he would require money for agricultural and seed purposes. I am responsible for the amount borrowed by Imam Din."33 Circumstances which should lead the guarantor to anticipate acceptance are numerous. Illustrations include a request by the creditor to the guarantor for the guaranty,34 and knowledge by the guarantor that he is an acceptable guarantor and that his offer was taken by the principal to a meeting at which it was expected that credit would be extended.35 A request by the principal for the guaranty, however, does not affect the guarantor's expectations of acceptance unless he knows that the proposal originated with the creditor.36

Notice of intention to accept can be waived by failure to object when the creditor tardily informs the guarantor that he intends to hold him liable.37 The guarantor's seasonable knowledge of acceptance, although acquired from a source other than the creditor, is the equivalent of notice of intention to accept.38

B. The Division of the American Authorities

The apparent conflict in the cases involves unilateral contracts of guaranty, since it is accepted that the creditor's promise must be communicated to the guarantor to form a bilateral contract of guaranty.39 Treatise writers have attempted to mitigate the confusion concerning notice of intention to accept by isolating distinct

33 Ranga Ram-Thakar Das v. Raghbir Singh, 1928 Lah. 938, 113 Indian Cas. 780 (India 1928); accord, Manning v. Mills, 12 U.C.Q.B. 515 (Can. 1855).
38 Jays Ltd. v. Sala, 14 T.L.R. 461 (Q.B. 1890).
39 See 1 WILLISTON § 69A, at 213.
bodies of authority which support different legal principles or “rules.” It has been suggested that there is (1) a “federal rule” requiring notice of intention to accept to form a unilateral contract of guaranty; (2) a “Massachusetts rule” treating notice as a condition precedent to the guarantor’s duty to perform; (3) an “English rule” dispensing with notice of intention to accept altogether; and (4) a “majority rule” exacting notice only when the language of the offer or the surrounding circumstances should have led the creditor to believe that the guarantor expected it. 40

The labels given certain of these purported rules are misleading. The “federal rule,” for instance, developed in the federal courts when they applied general principles of law in diversity cases. 41 Today, of course, state substantive law governs. 42 Since the use of this rule in federal diversity cases now depends on its adoption as state substantive law, it is deceptive to denominate it the “federal rule.” The “Massachusetts rule” presents similar problems; it is no longer followed in Massachusetts. 43 The “English rule” bears an even more unfortunate name. It does not promote clarity to refer to a rule which repudiates the concept of notice of intention to accept as the “English rule” when the concept of such notice originated in English law. 44 Because of the inaccuracies of these designations, the “federal rule” will be referred to as the condition precedent theory and the “Massachusetts rule” as the condition subsequent theory. The “English rule” will not be alluded to at all.

The rules discerned by the treatise writers deal with two distinct issues: (1) when notice of intention to accept is necessary, and, (2) if notice is necessary, the effect of failure to send it. The rules pertaining to each question must be considered separately for the true state of the authorities to be understood.

1. When Notice Is Necessary

Simpson correctly indicated that the majority of American jurisdictions will consider both the terms of the offer and the

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40 See ARANT, SURETYSHIP § 26 (1931) [hereinafter cited as ARANT]; SIMPSON § 25. Williston was content to note that some cases required notice and others did not. See 1 WILLISTON § 69A, at 219-21. This statement appears in all three editions of Williston. Whenever this is the case reference will be made to Williston and citation will be to the third edition (1957).
43 See Campbell 550-51.
44 See note 30 supra.
surrounding circumstances in determining whether notice of intention to accept is necessary. If either should suggest to the creditor that the guarantor is uncertain whether his offer will be accepted, most jurisdictions make notice of intention to accept a constructive condition of the guarantor's liability. However, no treatise writer has identified the minority rule as to when notice is necessary. Simpson did not attempt to do so. Arant erroneously stated that some American jurisdictions never made notice a constructive condition. His cases merely indicated that neither the majority nor the true minority rule made notice a constructive condition of all unilateral contracts of guaranty.

The true minority rule has been adopted at common law by Minnesota, Nebraska, New York, Ohio, and Tennessee. This rule limits the courts to the terms of the offer in determining whether notice is requisite. If the wording should intimate to the creditor that the guarantor is uncertain whether his offer will be accepted, notice will be required. Otherwise, it is unnecessary. Other circumstances are not taken into account.

Virtually every American jurisdiction, including those with statutes on the subject, adheres to either the majority or minority rule outlined above. The theoretical disagreement indicated by these two rules, however, has seldom led to varying results in practice. There are significant facts in almost every decision requiring or dispensing with notice which satisfactorily explain the result, regardless of the theory enunciated by the court. This reduces the actual area of disagreement between the majority and the minority rule to a few minority rule cases which allow positive and unqualified words of guaranty to relieve the creditor of the duty to send

45 SIMPSON § 25.
47 SIMPSON § 25.
48 ARANT § 26, at 64.
49 Id. at 67 n.1.
50 Midland Nat'l Bank v. Security Elevator Co., 161 Minn. 30, 200 N.W. 851 (1924); see RESTATEMENT, CONTRACTS, MINN. ANNOT. § 56 (1924).
51 Wilcox v. Draper, 12 Neb. 138, 10 N.W. 579 (1881); see RESTATEMENT, CONTRACTS, NEB. ANNOT. § 56 (1933).
52 Union Bank v. Coster's Ex'rs, 3 N.Y. 203 (1850); see RESTATEMENT, CONTRACTS, N.Y. ANNOT. § 56 (1833).
53 Powers & Weightman v. Bumcratz, 12 Ohio St. 278 (1861); see RESTATEMENT, CONTRACTS, OHIO ANNOT. § 56 (1861).
54 Bright v. McKnight, 33 Tenn. 158 (1833).
55 E.g., Smith & Crittenden v. Dann, 6 Hill 543 (N.Y. Sup. Ct. 1844).
56 See text accompanying notes 181-87 infra.
notice, although there are no other significant facts which justify this result.\textsuperscript{57} Factual analysis of the American decisions will be undertaken below. The "rules" concerning the effect of failure to give notice will first be examined for other areas of disagreement.

2. \textit{Effect of Failure To Give Notice}

There are two theories on the effect of failure to give notice in situations where notice is required: the condition precedent theory and the condition subsequent theory. The former holds that when notice is necessary\textsuperscript{58} it is a condition precedent to formation of a contract.\textsuperscript{59} If it is not given when essential, no contract exists between the guarantor and the creditor although the creditor has performed the requested act. The condition subsequent theory originated with the Massachusetts case of \textit{Bishop v. Eaton}\textsuperscript{60} and has proved extremely attractive to academic writers.\textsuperscript{61} Under this theory, performance of the requested act by the creditor effects a unilateral contract of guaranty, but the guarantor is under no obligation to perform his promise unless he receives seasonable notice of acceptance. Notice is needed to prevent the occurrence of a condition subsequent which terminates the contract created by the creditor's performance of the requested act.

Since an offer can be revoked before acceptance, the guarantor would appear to possess the power of revocation for a longer time under the condition precedent theory. It requires both performance of the requested act and notice of intention to accept for an effective acceptance. Performance of the requested act alone is

\textsuperscript{57} A guaranty in the form of a bond in penal sum is a historical example. These bonds were phrased so as to create a present indebtedness of definite amount subject to a condition subsequent. See Klosterman v. Olcott, 25 Neb. 382, 41 N.W. 290, \textit{rev'd on other grounds}, 27 Neb. 685, 43 N.W. 422 (1899); Rochford v. Rothschild, 16 Ohio C.C.R. 287, 9 Ohio C.C. Dec. 47 (1896); \textit{accord}, Snyder v. Hufdley-Pierce-Anderson Co., 23 Ohio C.C.R. (n.s.) 599, 34 Ohio C.C. Dec. 424 (1912), \textit{aff'd}, 91 Ohio St. 375, 110 N.E. 1068 (1914) (mem.). When no other significant facts warrant dispensing with notice the majority rule does not allow positive and unqualified words of guaranty to have that effect. See, \textit{e.g.}, Standard Sewing Mach. Co. v. Church, 11 N.D. 420, 92 N.W. 895 (1902).

\textsuperscript{58} The majority rule determines whether notice is necessary by examining both the terms of the offer and the surrounding circumstances. See text accompanying notes 45-46 \textit{supra}. The minority rule considers only the terms of the offer. See text accompanying notes 50-55 \textit{supra}.

\textsuperscript{59} Majority rule: see \textit{Abant} \textsuperscript{\textcopyright} 26; \textit{Simpson} \textsuperscript{\textcopyright} 25; \textit{Stearns} \textsuperscript{\textcopyright} 4.16. Minority rule: Beekman v. Hale, 17 Johns. Cas. 134 (N.Y. Sup. Ct. 1819); Stafford v. Lowe, 16 Johns. Cas. 67 (N.Y. Sup. Ct. 1819); Irving Trust Co. v. Tourkoff, 18 Ohio L. Abs. 663 (Ohio App. 1939); M'Tier v. Richardson, 1 M. & S. 557, 105 Eng. Rep. 208 (1813).

\textsuperscript{60} 161 Mass. 496, 500, 37 N.E. 665, 667-68 (1894) (dictum).

\textsuperscript{61} See, \textit{e.g.}, 1 \textit{Corin} \textsuperscript{\textcopyright} 68; 1 \textit{Williston} \textsuperscript{\textcopyright} 69AA; \textit{Llewellyn, On Our Case-Law of Contract: Offer and Acceptance} 1, 48 \textit{Yale L.J.} 1, 15 n.50 (1938).
sufficient according to the condition subsequent theory. Williston championed the latter theory for this reason. He stressed the injustice in permitting the guarantor to revoke his offer after performance by the creditor merely because notice of intention to accept had not been dispatched.\(^{62}\)

Jurisdictions following the condition precedent theory are not, however, as Draconian as the logical consequences of their theory suggest. While their courts refer to notice as essential to the formation of a contract, they also undoubtedly consider that commencement of performance by the creditor renders the offer irrevocable for a reasonable time.\(^{63}\) The condition precedent and condition subsequent theories are thus indistinguishable apart from verbal formulation:

“When notice of acceptance is necessary it makes little practical difference whether the doing of the acts called for is said to complete a contract giving rise to a duty subject to notice as a condition precedent, or is conceived of as merely depriving the offeror of his normal power of revocation. Under either analysis the offeror cannot prevent imposition of a duty to pay and it is clear that the offeree cannot recover unless notice is given.”\(^{64}\)

Nonetheless, strong objection has been taken to the theoretical implications of the condition precedent theory. It has been criticized as confusing unilateral contracts with bilateral contracts,\(^{65}\) and as inconsistent with other propositions concerning notice of intention to accept.\(^{66}\) These propositions include: (1) notice of intention to accept can be waived in the offer or by the guarantor’s subsequent conduct; (2) knowledge of acceptance by the guarantor dispenses with notice of intention to accept; (3) in the case of a continuing guaranty, notice may be given within a reasonable time after the close of all transactions; (4) the guarantor is not discharged by lack of notice when he is not injured by its absence; (5) notice of intention to accept is not a counter-promise and does not bind the creditor; and (6) the guarantor can revoke his promise.

\(^{62}\) Kincheloe v. Holmes, Sturgeon & Co., 46 Ky. (7 B. Mon.) 5 (1846); 1 WILLISTON § 69, at 218. Protection of the offeree’s reliance on an offer is a basic policy of contract law. See 1 RESTATEMENT, CONTRACTS § 90 (1932); Fuller & Perdue, Reliance Interest in Contract Damages, 46 YALE L.J. 52, 273 (1936).


\(^{64}\) ARANT § 26, at 69.

\(^{65}\) See 1 WILLISTON § 69A, at 221.

\(^{66}\) See Campbell 585.
between notification and act. It is submitted, however, that these propositions are all reconcilable with the view that notice of intention to accept is integral to certain unilateral contracts of guaranty.

Notice of intention to accept can be waived in the offer of guaranty. Williston suggested that this indicated that the creditor's performance completed the contract, and notice, if necessary at all, was only a condition precedent to enforcement of the contract against the guarantor. The parties, he pointed out, could not waive an element required by law for formation of a contract. This argument is based on a misunderstanding of the notice requirement. The requirement is not a mandatory rule of law applicable to all guaranties. Notice of intention to accept is a constructive condition of some unilateral contracts of guaranty when the parties have not provided otherwise. Notice is requisite when the terms of the offer or the surrounding circumstances indicate that the guarantor reasonably expects or needs it. If the offer expressly waives notice it is clearly consonant with the rationale of the notice requirement to respect this manifestation of intent.

Sending of notice of intention to accept can also be waived by the subsequent conduct of the guarantor, e.g., by a subsequent promise to pay. Williston considered this inconsistent with the idea that notice is a condition precedent to creation of a contract. He maintained that a "gratuitous promise" could not form a contract that had previously failed to come into being. Williston's argument is apparently based on the doctrine of consideration. The subsequent promise by the guarantor is typically made after credit is extended in reliance on the offer of guaranty and after the time for giving notice of intention to accept has elapsed. No contract exists, since the condition precedent theory makes timely notice a prerequisite to formation of a contract. In this situation, Williston inferentially dismisses the reliance of the creditor on the previous offer of guaranty as consideration for the subsequent promise. He invokes the proposition that past events are insufficient

68 1 WILLISTON § 69AA, at 223-24.
69 In Hughes v. Roberts, Johnson & Rand Shoe Co., 24 Ky. L. Rep. 2003, 72 S.W. 799 (1903) the court noted that, the defendant being sui juris, there was no legal reason why he could not waive notice of acceptance.
70 Farwell & Co. v. Sully, 38 Iowa 387 (1874).
71 1 WILLISTON § 69AA, at 223-24.
consideration for present promises. This rule, however, is subject to exceptions. One exception furnishes analogous support for the view that the creditor's reliance on the previous offer of guaranty constitutes consideration for the subsequent promise to pay:

"In the early history of the common law action of assumpsit, there were a good many cases in which this action was sustained upon an express promise to pay for a past service that had been rendered by the plaintiff at the defendant's request. There is some, but not very much, modern authority to the same effect." 73

Williston's criticism can also be met on other grounds. The subsequent conduct of the guarantor which constitutes a waiver of notice of intention to accept includes an acknowledgment of liability as well as a subsequent promise. This suggests that the guarantor's conduct perfects the original arrangement between the parties and does not form a new contract. The subsequent behavior of the guarantor can be interpreted as a waiver of the defect in acceptance resulting from the creditor's failure to dispatch timely notice of intention to accept.

Williston objected to contract formation through the offeror's waiver of a flaw in acceptance. He believed that it was unfair to permit the offeror to waive a defective acceptance since it allowed him to speculate at the expense of the offeree. If market conditions changed in his favor, he could assert the defect in acceptance and make a more advantageous contract elsewhere. If market conditions changed so that the offeree had made a bad bargain, the offeror could waive the defect in acceptance and hold him to it. However, this line of argument is not relevant to the unilateral contract of guaranty situation. There is no question of binding the creditor-offeree. He is not asked for a promise. The courts are concerned with protecting the creditor's reliance on the offer of guaranty. The creditor has typically extended credit to the principal in the belief that he is secured by a guaranty, but he has lost this security because he failed to give due notice of intention to accept. When the guarantor indicates by his subsequent conduct that he does not claim the release from liability afforded him by the notice

72 See I WILLISTON § 142, at 620-21.
73 1 CORBIN § 238, at 764.
75 1 WILLISTON § 82, at 336.
requirement, it is reasonable to hold that he has waived the omission in the creditor’s acceptance. 76

Seasonable knowledge of acceptance is equivalent to receipt of notice of intention to accept. 77 Professor Campbell questioned whether this was consistent with the condition precedent theory. 78 The answer is in the affirmative when the offer does not specify a particular mode of acceptance. 79

Williston maintained that the condition precedent theory was based on an inept analogy to the principles governing acceptance of offers for bilateral contracts. 80 The analogy was noticeably strained, he pointed out, since notice of acceptance of a continuing guaranty may be given within a reasonable time after the close of transactions. The proper time for communication of acceptance of an offer for a bilateral contract is at the outset of transactions, not at their close. 81 This criticism is directed at a straw man. Acceptance analogous to that of offers for bilateral contracts is not attempted or required. Notice of intention to accept is not a promise. Belated notice, however, would not give the guarantor the opportunity to protect himself which is the true foundation of the notice requirement. Thus, it is notice of transactions under a continuing guaranty which must be given within a reasonable time after the close of transactions. 82 Notice of intention to accept must be given earlier. 83

Williston stated that lack of notice of acceptance discharged the guarantor only when he suffered consequent loss. 84 He then made the point that if notice were a condition precedent to formation of a contract the fact of injury would be immaterial. 85 The point is well taken, but Williston misreads the cases. If notice of intention to accept is necessary, failure to receive it does unconditionally

76 See 3A Corbin § 759, at 513.
78 Campbell § 535.
79 See 1 CORBIN § 67, at 210.
80 1 WILLISTON § 69A, at 221.
81 Id. § 69AA, at 224.
82 The cases cited by Williston make this point with regard to notice of transactions, not notice of intention to accept. See 1 WILLISTON § 69AA, at 224 n.20.
83 Douglass v. Reynolds, Byrne & Co., 32 U.S. (7 Pet.) 113 (1833) held that notice of intention to accept must be given within a reasonable time after acceptance. This was clarified by the statement of Mr. Justice Nelson in Louisville Mfg. Co. v. Welch, 51 U.S. (10 How.) 461, 475 (1850) (dictum), that notice of intention to accept should be dispatched prior to notice of transactions at a time when the defendant’s liabilities are still accruing.
84 1 WILLISTON § 69A, at 222.
85 Ibid.
discharge the guarantor. Actual loss only limits the consequences of failure to dispatch notice of transactions or notice of default.

Notice of intention to accept is not a promise. Campbell suggested it was therefore inconsistent to treat it as a condition precedent to formation of a contract. This, however, is a non sequitur. The guarantor can make notice a condition of acceptance by express stipulation, and the courts can achieve the same result through the device of constructive condition.

The guarantor may revoke his offer after receipt of notice of intention to accept as long as performance of the requested act has not begun. Campbell thought this was also inharmonious with the concept of notice as a condition precedent to contract formation. There is no incompatibility if it is borne in mind that notice is required, not a promise. Notice is a condition of acceptance, but it is the requested performance that is the consideration for the guarantor’s promise. His offer remains revocable if notice alone is given. On the other hand, if the requested performance occurs without notice, the offer is supported by consideration and becomes irrevocable for a reasonable time.

The preceding analysis suggests that there is nothing unorthodox in treating notice of intention to accept as a condition precedent to the formation of certain unilateral contracts of guaranty. The American Law Institute, however, has rejected this approach because of its alleged deficiencies and has approved the condition subsequent theory. The virtual identity of the condition precedent and condition subsequent theories makes the ALI position of little substantive importance except as a source of confusion.

Because the ALI action can be construed as treating the verbal difference between the two rules as a real difference, several of the annotations to the Restatement of Contracts indicated that the jurisdiction surveyed adopted the condition precedent theory.

86 E.g., Davis Sewing Mach. Co. v. Richards, 115 U.S. 524 (1885).
88 See Campbell 535.
89 Ibid.
90 The English, for instance, do not question this. See SALMOND & WILLIAMS, CONTRACTS 83 (2d ed. 1945).
91 See Campbell 535.
92 Ibid.
94 1 RESTATEMENT, CONTRACTS § 56 (1932); RESTATEMENT, SECURITY § 86 (1941).
and did not follow the restatement. The Montana annotation, for instance, suggested that the apparent espousal by the Montana code of the condition precedent theory rejected the restatement approach. The Oklahoma annotation, on the other hand, interpreted an identical statute as probably in accord with the restatement. The fog caused by the ALI position is unfortunate. There are two theories concerning the effect of failure to give notice, but they both lead to the same result.

C. Factual Comparison of the American Authorities

The only substantial conflict of authority with regard to notice of intention to accept relates to the method of determining whether notice is necessary. Courts following the majority rule consider both the terms of the offer and the circumstances surrounding the offer in making this judgment. Courts adopting the minority rule regard only the face of the offer. The following is an analysis of what is believed to be the majority of American decisions on this question. Significant facts in these decisions are emphasized. It is submitted that these facts justify the result reached by the court as to the exigency of notice in the particular case. If this is true, the theoretical distinction between the majority and minority rule is relatively unimportant in practice. The greater number of the cases analyzed are reconcilable by means of the factual approach.

1. When Notice Is Necessary

Notice is required by either rule whenever the language in the offer should indicate to the creditor that the guarantor is uncertain whether his offer will be accepted. An offer "to whom it may concern," for instance, shows on its face that the guarantor has no reasonable expectation that it will be accepted by a particular creditor or by anyone at all. Other examples include the following language:

See, e.g., Restatement, Contracts, Ala. Annot. § 56 (1937); Restatement, Contracts, Conn. Annot. § 56 (1933); Restatement, Contracts, Iowa Annot. § 56 (1934); Restatement, Contracts, Mo. Annot. 23 (1933); Restatement, Contracts, S.D. Annot. § 55 (1937).

Restatement, Contracts, Mont. Annot. § 56 (1940).

Restatement, Contracts, Okla. Annot. § 56 (1939).

"I will, if you please, stand responsible for the payment of it, at the time you and James may agree on." 99

"I would be willing to guarantee payment of Mr. Tourkoff's drafts providing you would grant him ninety day terms, as it was my understanding he requested this of you previously." 100

On the other hand, only the majority rule considers the circumstances surrounding the offer in assessing the utility of notice. The following are typical resolutions of the question.

**Unsolicited Offer.** When the offer is unsolicited by the creditor, the guarantor, absent other circumstances, has no indication that it will be accepted. 101 A classic example of an unsolicited guaranty is provided by the case of *Tuckerman v. French*, 102 in which the offer of guaranty was made on the initiative of the guarantor without the knowledge of the principal. An offer of guaranty contained in a letter introducing the principal is more typical. 103 But notice is usually found necessary whenever an unsolicited offer is involved. 104

Solicitation of the guaranty by the principal does not affect the necessity of notice. 105 The principal's request gives the guarantor little indication whether his offer is acceptable to the creditor. Nor does the fact that the principal requests the guarantor to execute one of the creditor's forms dispense with notice when the creditor did not authorize him to do so. 106 If the guarantor knows that the creditor asked the principal to obtain his guaranty, however, the guarantor should reasonably anticipate acceptance, and notice is unnecessary. 107

**Principal Transaction Incomplete.** It is not uncommon for an

101 See text accompanying notes 124-26 infra.
offer of guaranty to be made before the transaction between the creditor and the principal has been agreed upon. Indeed, if the consideration for the guaranty is the creditor's promise to the principal, the guaranty must be given before this promise is made. Otherwise the creditor's promise will be a past event and insufficient consideration for the guaranty. The guarantor cannot be sure that his offer will be accepted if he knows that a contemplated contract between the creditor and the principal has not been executed. Notice is requisite unless other circumstances should lead the guarantor to anticipate or to learn of acceptance. \(^{108}\) *Asmussen v. Post Printing & Publishing Co.*, \(^{110}\) for instance, held notice necessary to obligate guarantors who had signed a guaranty on an application for a newspaper agency submitted by the principal to the creditor. There are a number of cases in accord with *Asmussen*, especially if an application or order sent by the principal provides that it is binding when accepted at the creditor's place of business. \(^{111}\) This provision should put the creditor on notice that the guarantor is not likely to obtain prompt knowledge of acceptance.

Receipt of consideration from the creditor should also lead the guarantor to anticipate acceptance. \(^{112}\) Thus, *McConnon & Co. v. Laursen* \(^{113}\) held that an acknowledgment of receipt of consideration in the guaranty precluded the guarantor from introducing evidence that the contract between the creditor and principal had not been agreed upon when the offer of guaranty was made. \(^{114}\)

**Intimation of Rejection.** An intimation to the guarantor by the creditor or his agent that the guaranty may not be acceptable

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\(^{108}\) Tomihiro v. United Hotel Corp., 145 Ore. 629, 28 P.2d 880 (1934).


\(^{110}\) 26 Colo. App. 416, 143 Pac. 396 (1914). See also Snyder v. Click, 112 Ind. 293, 13 N.E. 581 (1887); United States Fid. & Guar. Co. v. Riefler, 239 U.S. 17 (1915) (contract of indemnity).


\(^{112}\) See text accompanying note 146 infra.

\(^{113}\) 22 N.D. 604, 135 N.W. 213 (1912).

\(^{114}\) See text accompanying notes 147-54 infra for further discussion of acknowledgment of receipt of consideration.
is enough to require notice of intention to accept.\textsuperscript{115} But an intimation to the principal which is not communicated to the guarantor does not have this effect.\textsuperscript{116} The intimation of rejection must decrease the guarantor's expectations of acceptance, but it cannot constitute a categorical objection to his offer.\textsuperscript{117} If it does, the creditor's power of acceptance will be terminated,\textsuperscript{118} and the question of notice of intention to accept will not arise. In \textit{J. E. Taylor & Co. v. Empire Lighting Fixture Co.},\textsuperscript{119} for instance, the creditor requested the guarantor to indorse a promissory note executed by the principal after receipt of the offer of guaranty. The guarantor declined. It was held that the creditor could not thereafter hold the guarantor on the guaranty without notice of intention to accept. On the other hand, \textit{American Woolen Co. v. Moskowitz}\textsuperscript{120} did not require notice. The creditor's overture for a more formal guaranty was not considered to destroy the guarantor's expectations of acceptance when the original guaranty was retained and credit later extended in reliance on it. It is significant that the formal guaranty sought did not alter the material terms of the original offer.

\textbf{Geographical Separation.} When the guarantor lives a considerable distance from the creditor and the principal, notice of intention to accept is requisite provided no other significant facts are present.\textsuperscript{121} Conversely, if the creditor knows that the guarantor and the principal are in close proximity, notice is not necessary.\textsuperscript{122}

\section*{2. When Notice Is Not Necessary}

\textbf{Guarantor's Anticipation of Acceptance.} Circumstances which should raise a reasonable expectation of acceptance in the mind of

\textsuperscript{115} See, \textit{e.g.}, M. E. Smith & Co. v. Kimble, 31 S.D. 18, 139 N.W. 348 (1913) (alternative holding).

\textsuperscript{116} \textit{Caton v. Shaw & Tiffany}, 2 Har. & Gill 13 (Md. 1827).

\textsuperscript{117} See 1 \textit{Corbin} § 84.

\textsuperscript{118} See 1 \textit{Restatement, Contracts} §§ 35, 38 (1932). The courts are unlikely to reach this conclusion if the creditor subsequently relies on the original offer of guaranty and the guarantor does not change his position in reliance on the intimation of rejection. See cases cited note 120 infra.

\textsuperscript{119} 273 Fed. 739 (D.C. Cir. 1921).


\textsuperscript{122} Lascelles v. Clark, 204 Mass. 362, 90 N.E. 875 (1910); see \textit{Standard Oil Co. v. Hoese}, 57 Neb. 695, 78 N.W. 292 (1899) (minority rule) (guaranty indicated that both guarantor and principal were located in Hartington, Nebraska).
the guarantor enable him to plan for the future. The raison d’être for making notice a constructive condition thus disappears.

Notice is patently non-functional when the guarantor knows that his personal guaranty is both acceptable and in proper form. This situation occurred in Schuman v. Arsht, where the guarantor offered to furnish security and the creditor thereupon prepared a guaranty which he executed. Direct solicitation of the guaranty by the creditor has the same effect in most jurisdictions as long as the guaranty is responsive to the request. So does a request to the principal by the creditor for a particular person’s guaranty when the desired individual furnishes a guaranty with knowledge of the request.

Newman v. Streator Coal Co. underscores the key element in the cases involving a request to the principal for a particular guaranty. Notice was required in Newman although the creditor specified an acceptable guarantor and furnished an appropriate form. This was because the principal did not inform the guarantor that the creditor had requested his personal guaranty, and the guarantor was consequently uncertain whether his offer would be accepted. The principal’s knowledge that the offer would be accepted did not affect the result. The guarantor’s reasonable expectations, not the principal’s, are material.

When the creditor requests the principal to obtain a guaranty but does not specify an acceptable guarantor, a different situation is presented. Although the guarantor may know that a guaranty is required, he does not know that his is acceptable. A number of

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126 19 Ill. App. 594 (1886); see Balfour, Guthrie & Co. v. Knight, 86 Ore. 165, 167 Pac. 484 (1917); cf. Taylor v. Shouse, 73 Mo. 361 (1881).
cases hold notice of intention to accept essential for this reason.128 Another group of cases dispenses with notice when the guarantor executes the creditor’s form with knowledge that the creditor requested the principal to obtain a guaranty.129 Since the guarantor knows his financial condition and knows that the creditor will extend credit when a satisfactory guaranty is given, these cases apparently reason that the guarantor should be able to estimate whether his guaranty will suffice.

Other facts may dispense with notice when the creditor requests the principal to obtain a guaranty but does not designate a guarantor. In *Niles Tool-Works Co. v. Reynolds*,130 for instance, the offer of guaranty was made on a purchase order for a single machine at a definite price. Most jurisdictions dispense with notice when a sum certain is guaranteed.131 Since the guarantor knows the extent of his potential liability, it is not considered unreasonable to require him to discover the fact of it. It is also the general rule that notice is unnecessary when the guarantor has led the creditor to believe that he will receive prompt knowledge of acceptance from the principal.132 Thus, in *Lascelles v. Clark*133 notice was not essential because the guarantor had informed the creditor that he expected to go into business with the principal. The fact that he did not do so was unimportant.

Dealings between the creditor and the guarantor, such as a direct request by the creditor to the guarantor, can render notice superfluous. Dealings which involve an understanding relating to the transaction guaranteed naturally have this effect;134 but prior

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131 See text accompanying notes 169-76 infra.
132 See text accompanying notes 141-45 infra.
133 204 Mass. 362, 90 N.E. 875 (1910).
dealing alone may be enough. In *J.R. Watkins Medical Co. v. McCall*, for example, the guarantors had guaranteed three successive contracts between the creditor and the principal; the court rejected the contention that the third offer of guaranty stood in need of notice of intention to accept.

**Guaranty as Acceptance.** Judges sometimes state that notice of intention to accept is unnecessary when the creditor has asked the guarantor for a guaranty, because the request constitutes an offer which is accepted by the promise to guaranty. They reason that a creditor-offeror has no obligation to notify a guarantor-offeree of receipt of his acceptance. This explanation is fallacious with regard to the typical unilateral contract of guaranty. The creditor is not the offeror in the ordinary situation, so that the guarantor's response to his request cannot be an acceptance. Notice is dispensed with because the creditor's request should make the guarantor anticipate acceptance.

It is likewise erroneous to justify dispensing with notice on the ground that the guaranty is an "acceptance," when the guaranty was sought by the creditor as partial consideration for a promise to the principal. While the guaranty does constitute a partial acceptance of the creditor's proposal, the offer of a guaranty must itself be accepted in accordance with its terms. Thus notice of intention to accept could be required. It is not essential only because the creditor's offer should cause the guarantor to expect acceptance.

It is, of course, possible for a creditor to propose a unilateral contract of guaranty in which he would be the promisor. The guarantor's accomplishment of the requested act, e.g., pledging a chattel, would constitute an acceptance in this case, and, since the guarantor is the offeree, the creditor would not be obliged to send him notice. However, the guaranty is more likely to be an acceptance when a bilateral contract of guaranty is involved. If the creditor promises the guarantor to extend credit in return for a

Bumcratz, 12 Ohio St. 273 (1861) (semble) (guaranty named the parties in definite terms) (minority rule).


136 See Campbell 558.


138 See 1 CORBIN § 68, at 215.

promise to guarantee, the guaranty is an acceptance which forms a bilateral contract.\footnote{Cf. Shows v. Steiner, Lobman & Frank, 175 Ala. 363, 57 So. 700 (1911), for an example of the relatively rare bilateral contract of guaranty.}

Guarantor's Knowledge of Acceptance. Prompt knowledge of acceptance enables the guarantor to know where he stands; there is no occasion for notice of intention to accept.

Receipt of notice of transactions\footnote{Straight v. Wight, 60 Minn. 515, 65 N.W. 105 (1895).} or notice of default within a reasonable time after the creditor has entered upon performance furnishes this knowledge. So does knowledge that the creditor has done the requested act.\footnote{Rich v. Clayton Mark & Co., 250 F.2d 622 (8th Cir. 1957); Powell v. Chicago Carpet Co., 22 Ill. App. 409 (1887); First Nat'l Bank v. Carpenter, Stibbs & Co., 41 Iowa 518 (1875); R. F. Grace Printing & Mfg. Co. v. Arnaud's Drug Stores, Inc., 10 La. App. 298, 121 So. 359 (1929); Menard v. Scudder, 7 La. Ann. 385 (1852); Train & Co. v. Jones, 11 Vt. 444 (1839); see Harvey v. First Nat'l Bank, 56 Neb. 320, 76 N.W. 870 (1898).} makes it clear, however, that the latter type of knowledge must be coupled with reasonable grounds to believe the act was performed with intention to accept the guaranty.

If the guarantor is present at the time that the creditor performs, notice is obviously unnecessary. The guarantor, for example, might be looking on when the creditor sells the principal goods in reliance on the guaranty\footnote{Mitchell & Bro. v. Raitton, 45 Mo. App. 273 (1894).} or signs a contract with the principal which the guaranty secures.\footnote{Closson v. Billman, 161 Ind. 610, 69 N.E. 449 (1904). When the offer of guaranty is appended to the contract between the principal and the creditor and bears an even date, it is presumed that they were executed contemporaneously. Siegel & Co. v. Baily, 252 Pa. 231, 97 Atl. 401 (1916); see Beeson v. LaVaque, 144 Ark. 522, 228 S.W. 355 (1920); Davenport v. Stratton, 24 Cal. 2d 282, 149 P.2d 4 (1944); Times-Picayune Pub. Co. v. Badon, 17 La. App. 114, 135 So. 631 (1931); Steinberg v. Gonzales, 215 Md. 100, 135 A.2d 631 (1957); Davis Sewing Mach. Co. v. Jones, 61 Mo. 409 (1875); Douglass v. Howlind, 24 Wend. 35 (N.Y. Sup. Ct. 1840) (minority rule). But see American Agricultural Chem. Co. v. Ellsworth, 109 Mo. 155, 83 Atl. 546 (1892).} Consideration moving from the creditor to the guarantor provides knowledge of intention to accept. In Barker v. Scudder,\footnote{56 Mo. 272 (1874); see International Supply Co. v. Chem. Process Co., 190 Okla 56, 5 Atl. 20 (1895).} for instance, the creditor sold land to the guarantor in return for cash and the notes of a third party guaranteed as to collectibility. Notice was not required. Transfer of the land by the creditor manifested his intention to accept the guaranty.

Acknowledgment of receipt of consideration in the guaranty is evidence that the guarantor has knowledge of intention to
accept\(^\text{147}\) if the acknowledgment affirmatively indicates that the consideration was paid to the guarantor by the creditor.\(^\text{148}\) The mere words “for value received” are not adequate.\(^\text{149}\) On the other hand, a proper acknowledgment of consideration will be ignored when it is fictitious. In *American Agricultural Chem. Co. v. Ellsworth*,\(^\text{150}\) for instance, the court disregarded an acknowledgment of consideration with these words: “The real consideration lay in the contract between the creditor and Berry [the principal].”\(^\text{151}\) Since this contract had not been executed when guaranty was given, notice of intention to accept was required. There is language in some opinions which, contrary to the *Ellsworth* case, suggests that a recital of consideration conclusively dispenses with notice.\(^\text{152}\) It is submitted, however, that this conclusion is seldom necessary to the result. There are other significant facts in these decisions which explain why notice was not required. In *Davis v. Wells*,\(^\text{153}\) for example, the guaranty was given primarily to secure the existing indebtedness of the principal.\(^\text{154}\)

**The Insider Rule.** If the guarantor has a close relationship with the principal which enables him to obtain inside information, he will ordinarily be treated as though he anticipated acceptance or gained prompt knowledge of it. This is true when the principal is a small corporation and the guarantors are stockholders, officers or directors,\(^\text{155}\) or where the principal is a partnership and the


\(^{151}\) 109 Me. 195, 198, 83 Atl. 546, 547 (1912).

\(^{152}\) See, e.g., *Davis v. Wells*, 104 U.S. 159, 167 (1881).

\(^{153}\) 104 U.S. 159 (1881).

\(^{154}\) *Wells, Fargo & Co. v. Davis*, 2 Utah 411 (1878), aff’d on other grounds, sub nom. *Davis v. Wells*, 104 U.S. 159, 167 (1881); see text accompanying notes 169-72 infra.

guarantor is a partner. It is sufficient if the guarantor has a personal interest in acceptance plus an opportunity to obtain inside information. These individuals include: a salesman who guarantees payment of a customer's order on which he receives a commission; a landlord who guarantees his tenant's debt to forestall collection proceedings which would deprive the tenant of the ability to pay rent; and the exclusive brokers or sales agents of the principal who guarantee payment to his suppliers.

**Waiver.** The offer may expressly or impliedly waive notice. The most common form of implied waiver is a provision in the offer which deals with notice but does not specifically mention notice of intention to accept. For instance, notice has been dispensed with when the following provisions were present:

“I also waive my rights to notice of any and all transactions with said L. E. McKinnon and his failure to pay his indebtedness to you.”

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159 See Hassell-Hughes Lumber Co. v. Jackson, 33 Tenn. App. 477, 232 S.W.2d 325 (1949) (minority rule). The insider rule is also applicable to the owner of a lot on which a building is being constructed who guarantees his contractor's suppliers. See Wehle v. Baker, 97 Ga. App. 111, 102 S.E.2d 661 (1958); Squires v. Hoffman, 278 S.W. 808 (Mo. App. 1925); Wilcox v. Draper, 12 Neb. 136, 10 N.W. 579 (1881) (minority rule). It is also applicable to an individual who guarantees payment by a principal with whom he has a profit-sharing agreement. Pittsburgh Plate Glass Co. v. Cassidy, 194 Ky. 81, 238 S.W. 172 (1922).


161 If notice is lacking when required and there is no waiver, the guarantor is released from liability on his guaranty. Texas Co. v. Stanberry, 165 S.W.2d 696 (Mo. App. 1942) (per curiam).

"[W]e hereby hold ourselves accountable to you for the payment of the same, in case Mr. Daniel Totty should not be able so to do, or should make default; of which default you are required to give us reasonable and proper notice." 163

"I reserve the right to terminate my liability on this guarantee by written notice thereof to the bank, except as to obligations and indebtedness incurred by the debtor prior to such notice; but I agree nothing shall affect my liability on this guarantee except such notice, or the surrender or cancellation of this guarantee by the bank." 164

It appears that if the offer shows that the guarantor was notice-conscious it must expressly provide for notice of intention to accept or it will be waived. Notice is also impliedly waived when the guaranty states that it is unconditional 165 or that the guarantor is jointly or jointly and severally liable with the principal. 166

_Farwell & Co. v. Sully_167 signifies that a subsequent waiver is as efficacious as a waiver in the offer. When the creditor in _Sully_ informed the guarantor that the principal was bankrupt, the guarantor replied: "Prove up your claim in bankruptcy and draw dividends. I will make my guarantee good." The court held that this subsequent promise to pay put the question of notice of intention to accept out of the case. A subsequent acknowledgment of liability is given the same effect. 168

_Definite Principal Performance._ An offer to guaranty a single specified transaction of definite amount does not normally require notice of intention to accept. _Smith & Crittenden v. Dann_, for


165 Jones v. McConn & Co., 100 Fla. 1158, 130 So. 760 (1930); McConn & Co. v. Prince, 128 Miss. 92, 90 So. 730 (1922).

166 Dayton Rubber Mfg. Co. v. Sabra, 31 F.2d 9 (9th Cir. 1929). This result has been justified both on the theory that a joint or joint and several promise is not a guaranty and thus does not require notice, see Campbell 532 n.12, and on the theory that the joint relationship between the principal and the guarantor entitles the creditor to assume that the guarantor will be apprised of acceptance, see RESTATEMENT, SECURITY § 8, comment e (1941).

167 38 Iowa 387 (1874); _accord_, Swisher v. Deering, 104 Ill. App. 572 (1902) (alternative holding), _aff'd on other grounds_, 204 Ill. 205, 65 N.E. 517 (1902).

instance, concerned a guaranty of a single sale in the amount of one hundred dollars.\textsuperscript{169} Other examples include: guaranties of notes;\textsuperscript{170} guaranties of payment for a specified amount of goods;\textsuperscript{171} and guaranties of payment of existing debt.\textsuperscript{172} Since the guarantor can plan on the extent of his liability, most jurisdictions have found that it is not unreasonable to require him to discover whether the transaction has been consummated. Pennsylvania, however, seems to require notice. \textit{T. G. Evans & Co. v. McCormick}\textsuperscript{173} held that notice was necessary despite the guarantor’s knowledge that the principal’s obligation amounted to “about seven hundred dollars.”

Countervailing circumstances may make notice vital although a definite principal performance is the subject of the guaranty. If the guaranty is made “to whom it may concern,”\textsuperscript{174} or contains qualified language,\textsuperscript{175} or the offeror is particularly uncertain as to whether he is an acceptable guarantor,\textsuperscript{176} notice may be required.

\textbf{Presence of a Seal.} Campbell has suggested that notice of intention to accept is unnecessary when the offer of guaranty is under seal.\textsuperscript{177} This is an over-generalization even aside from statutory modification of the effect of the seal.\textsuperscript{178} Although a sealed document is effective on delivery rather than on acceptance, delivery may be constructively conditioned on receipt of notice of intention to accept.\textsuperscript{179} The guaranty in \textit{Farmer’s Bank v. Tatnall},\textsuperscript{180} for instance, was sealed and contained a witnessing clause. The court neverthe-

\textsuperscript{169} See Hays v. Smith, 65 Okla. 113, 164 Pac. 470 (1916).
\textsuperscript{171} See Pressed Radiator Co. v. Hughes, 155 Ill. App. 80 (1910); Kline v. Raymond, 70 Ind. 271 (1880); see Bank of Plant City v. Canal-Commercial Trust & Sav. Bank, 270 Fed. 477 (9th Cir. 1921); Murphy v. Continental Supply Co., 198 Ark. 183, 65 S.W.2d 25 (1933).
\textsuperscript{172} Winnebago Paper Mills v. Travis, 56 Minn. 480, 58 N.W. 56 (1894); Wells, Fargo & Co. v. Davis, 2 Utah 411 (1878), aff’d on other grounds, sub nom. Davis v. Wells, 104 U.S. 159 (1881); see Klein v. Kern, 94 Tenn. 34, 37, 28 S.W. 295, 296 (1894) (dictum) (minority rule).
\textsuperscript{173} 167 Pa. 247, 31 Atl. 563 (1895) (per curiam).
\textsuperscript{174} See Adams, Cunningham & Co. v. Jones, 37 U.S. (12 Pet.) 207 (1838).
\textsuperscript{175} See Meyer v. Ruhstadt, 66 Ill. App. 346 (1896).
\textsuperscript{176} See Dondero v. Standard Emblem Co., 45 R.I. 529, 532-33, 121 Atl. 401, 402 (1923) (dictum).
\textsuperscript{177} Campbell 549-44; see United States Fid. & Guar. Co. v. Riefler, 239 U.S. 17 (1915) (contract of indemnity).
\textsuperscript{178} Over half of the states no longer recognize the seal as a substitution for consideration. See Braucher, \textit{Status of the Seal Today}, 9 Prac. Law. 97 (1965).
\textsuperscript{179} See 1 Corbin § 245, at 812.
less held that notice was essential, stressing that the guarantor had no assurance that his offer would be accepted.

3. Statutes

Four states currently have in effect a version of section 1539 of David Dudley Field's Draft New York Civil Code:

"A mere offer to guaranty is not binding until notice of its acceptance is communicated by the guarantee to the guarantor; but an absolute guaranty is binding upon the guarantor without notice of acceptance." 181

Although this statute was drafted to express New York's version of the minority rule, it has been construed in accord with the majority rule. 182

California has amended the section as follows:

"Unless notice of acceptance is expressly required, an offer to become surety may be accepted by acting upon it, or by acceptance upon other consideration. An absolute suretyship obligation is binding upon the surety without notice of acceptance." 183

No cases construing the California amendment have been found. On its face, however, it appears to adopt the minority rule that the exigency of notice turns on the wording of the offer. Two New York minority rule cases suggest that implication of a need for notice from the terms of the offer would constitute an express requirement for notice within the statute. 184

North Dakota has a unique statute requiring notice of intention to accept unless the benefit of the statute is specifically renounced: 185

"In every case in which a manufacturer, wholesaler or distributor hereafter requires a present or prospective agent, salesman, or dealer to secure the signature of a surety or guarantor to a bond or guaranty for the purpose of delivery of merchandise

to such agent, salesman or dealer, such manufacturer, wholesaler or distributor shall furnish such surety or guarantor a correct copy of the bond or obligation, together with notice of acceptance by the manufacturer, wholesaler or distributor, and setting forth to such surety or guarantor his right to withdraw as herein provided, either by registered or certified mail or personal delivery prior to the first shipment of any merchandise for which such surety or guarantor might become liable."

A related North Dakota statute gives a statutory right of revocation to the guarantor:

"Each surety or guarantor to any such bond or obligation shall have ten days time after his receipt of such copy and notice during which he may give notice either by mail or personal delivery to the manufacturer, wholesaler or distributor of his withdrawal from any such bond or obligation, and shall in the event of his giving such notice of withdrawal as herein provided incur no liability under any such bond or obligation to such manufacturer, wholesaler or distributor."

4. Conclusion

There is substantial uniformity among the American decisions regarding notice of intention to accept. The principal theoretical disagreement concerns the method of determining when notice is necessary. Factual comparison of the authorities, however, indicates that this disagreement has seldom led to varying results.

III. Notice of Transactions

Notice of transactions was first considered a constructive condition of unilateral contracts of guaranty by Justice Story in Douglass v. Reynolds, Byrne & Co. Notice of transactions was not requisite under English law unless called for by express and explicit language. Story later emphasized that the American departure from the English position was limited to exceptional situations.

188 32 U.S. (7 Pet.) 113, 126 (1833) (dictum).
The existence of the concept of notice of transactions has not been generally recognized. Arant, Simpson, Stearns, and Williston do not mention it.\footnote{ARANT § 26; SIMPSON § 25; STEARNS §§ 4.15-.17; 1 WILLISTON §§ 69A-69AA.} The last three authors actually confused notice of transactions with notice of intention to accept. In referring to “notice of acceptance” they stated that failure to receive notice discharged the guarantor only when he suffered loss. The cases they cited, however, made this point with regard to notice of transactions, not notice of intention to accept.\footnote{See SIMPSON § 25, at 68 n.5; STEARNS at 81 n.9; 1 WILLISTON § 69A, at 22 n.14.} Professor Campbell, on the other hand, found three strands of authority concerned with notice of transactions: (1) jurisdictions which sometimes required notice of transactions; (2) jurisdictions which never did; and (3) Massachusetts, which, under Bishop v. Eaton,\footnote{161 Mass. 496, 500, 37 N.E. 665, 667-68 (1894) (dictum).} demanded notice when the creditor should have known that the guarantor would not receive prompt information concerning the creditor’s performance.\footnote{Campbell 545-551.}

It is submitted that Professor Campbell was substantially correct in his analysis except for the weight that he gave to Bishop v. Eaton as a distinctive approach. Although the case has enjoyed academic approval,\footnote{See authorities cited note 61 supra.} Bishop v. Eaton has not been widely followed. Furthermore, subsequent Massachusetts decisions have treated it as in accord with cases in other jurisdictions,\footnote{See, e.g., Black, Starr & Frost v. Grabow, 216 Mass. 516, 104 N.E. 346 (1914).} as Professor Campbell was forced to concede.\footnote{See Campbell 550.}

The principal theoretical division of authority consists of (1) a rule which makes notice a constructive condition when the offer leaves indefinite the amount of credit which may be extended; and (2) a rule which refuses to make notice of transactions a constructive condition. There are also a few cases which indicate that notice of transactions can be only a constructive condition of guaranties of collection.\footnote{See text accompanying notes 216-17 infra for the distinction between a guaranty of collection and guaranty of payment.}

A. Notice as a Constructive Condition:

The Old Majority Rule

It is doubtful whether the ensuing discussion of notice of transactions as a constructive condition deals with living law. The
basic principles were laid down in old cases that have not been reaffirmed. Nevertheless, analysis of notice of transactions is more than empty scholarship, for inadvertent confusion of notice of transactions and notice of intention to accept has produced unfortunate conclusions.

The majority of American jurisdictions made notice of transactions a constructive condition when it would aid the guarantor in planning his affairs. If the offer of guaranty left indefinite the amount of credit for which the guarantor might ultimately become liable within a reasonable time, notice of transactions was considered essential unless other circumstances rebutted this inference. Notice of transactions was demanded when the guaranty was not expressly limited either as to duration or as to the amount of credit guaranteed; when it was limited in amount of credit but not in duration; and when it was limited in duration but not in amount of credit. If the guaranty was for both a limited duration and a limited amount of credit, notice of transactions was not exacted.

The significant facts which rendered notice of intention to accept redundant had the same effect on notice of transactions. Thus, if the guarantor should have anticipated the transactions guaranteed, notice was not a constructive condition. In Caton v. Shaw & Tiffany, for example, notice was not required when the principal had informed the guarantor that the creditor desired his personal guaranty. Notice was also unnecessary when the guarantor received prompt knowledge of transactions. If he had a close relationship with the principal which would enable him to obtain inside information, e.g., he was an officer, director, or stockholder of the principal, the guarantor was usually treated as though he had anticipated the transactions guaranteed or had gained prompt

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199 See Campbell 548.
204 2 Har. & Gll 15 (Md. 1827).
knowledge of them. The offer of guaranty could expressly or impliedly waive notice of transactions. A provision that the guaranty was in force until revoked by written notice was one form of implied waiver. Receipt of notice of default or notice of intention to accept affected the utility of notice of transactions. If notice of default was given within the time that notice of transactions was due, the latter was rendered superfluous. Notice of intention to accept usually had the same effect because it should have led the guarantor to anticipate transactions in reliance on the guaranty.

The guarantor was discharged to the extent that loss followed from delayed notice of transactions. If lack of notice prevented him from protecting his rights of recourse against the principal, he was totally discharged. If it misled him into allowing special damage to occur, he was discharged pro tanto.

In Cremer v. Higginson the principal passed from a solvent to an insolvent condition between the time when notice should have been received and the time that it actually was received. The court held that the guarantor was wholly discharged. Cremer involved a situation in which courts have presumed that the guarantor was irreparably injured by tardy notice of transactions. Timely notice would have alerted him to the extent of his possible liability before it accrued. He could then have endeavored to protect himself from deterioration in the principal’s financial condition. He could have demanded security and been prepared to assert his rights of subrogation, exoneration, contribution, and reimbursement immediately upon default. Because the actual amount of loss


212 See Campbell 548-49.


that the guarantor might thus have avoided was not capable of precise determination, his interests were safeguarded by the assumption that he could have fully protected his rights of recourse and was irreparably damaged when deprived of the opportunity to do so. Later cases like *German Sav. Bank v. Drake Roofing Co.*\(^{215}\) established that the time at which the principal became insolvent was crucial. In the *German Sav. Bank* case the principal was insolvent at the time at which notice of transactions was due. Since the prior insolvency of the principal precluded the guarantor from taking effective steps to protect his rights of recourse, the court held that failure to receive prompt notice did not discharge the guarantor. Even in this situation, however, dilatory notice of transactions could cause the guarantor to incur special damage and obtain a *pro tanto* discharge. For example, he might be misled into surrendering security in the belief that the debt had been paid by the principal.

**B. Notice as a Constructive Condition of Guaranties of Collection: A Questionable Rule**

The typical guaranty is a guaranty of payment. The guarantor undertakes to pay if the principal does not.\(^{216}\) But the guarantor may restrict his undertaking to the solvency of the principal debtor. If he promises to pay only if payment can not be procured from the principal by legal proceedings, his guaranty is called a guaranty of collection.\(^{217}\) The Supreme Court of Kentucky declared in *McGowan v. Wells' Trustee*\(^{218}\) that notice of transactions might be a constructive condition of a guaranty of collection but not of a guaranty of payment. Alabama can also be deemed to have adopted this view. *Walker v. Forbes*\(^{219}\) stated that a creditor might have to give notice of transactions to a guarantor of collection. *Cahuzac & Co. v. Samini*\(^{220}\) found notice unnecessary with regard to a guarantor of payment.

The "rule" of the above cases is more fiction than fact. Each would have been decided the same way under the former majority rule. *McGowan v. Wells' Trustee* dispensed with notice when the

\(^{215}\) **Iowa** 184, 83 N.W. 960 (1900) (alternative holding); see Beebe v. Dudley, 26 N.H. 249 (1855).

\(^{216}\) See **Stearns** § 1.5, at 5.

\(^{217}\) See id. at 6.

\(^{218}\) 184 Ky. 772, 780-81, 214 S.W. 578 (1919) (dictum).

\(^{219}\) 25 Ala. 139, 147-48 (1854) (dictum).

\(^{220}\) 29 Ala. 288 (1856).
guarantors were officers and directors of the principal. Cahuzac & Co. v. Samini did likewise when notice of intention to accept had been received. On the other hand, Walker v. Forbes demanded notice for a guaranty unlimited in duration.

C. Notice as an Express Condition:
The New Majority Rule

Jurisdictions which do not readily require notice of intention to accept should take a similar position with regard to notice of transactions. Although all these jurisdictions do not have authority on point, this seems to be the case. Notice of transactions is not called for unless the offer expressly and explicitly provides for it. The atrophy of the old majority rule has made this the prevailing opinion. A recent Florida case, for example, approves it.

D. Statutes

Five states have enacted substantially the following statute: "A suretyship obligation is to be deemed unconditional unless its terms import some condition precedent to the liability of the guarantor." Although the provision seems relevant to notice of transactions, it has been neglected by the courts.

North Dakota has supplemented this section with a unique provision requiring notice in certain situations unless the application of the statute is explicitly waived:

"In every case in which the manufacturer, wholesaler or distributor is furnishing merchandise to any agent, salesman or dealer whose execution of bond or obligation to such manufacturer, wholesaler or distributor has been joined in by any surety or guarantor, such manufacturer, wholesaler or distributor shall each month during the life of such bond or obligation furnish each such surety or guarantor either by mail

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221 Minnesota, Nebraska, New York, Ohio, and Tennessee imply a requirement of notice of intention to accept only from a term of the offer. The majority of American jurisdictions also imply a requirement from circumstances surrounding the making of the offer.


224 CAL. CIV. CODE § 2806; MONT. REV. CODES ANN. § 50-201 (1947); N.D. CENT. CODE § 22-01-09 (1960); OKLA. STAT. tit. 15, § 331 (1937); S.D. REV. CODE § 25-0109 (1939).

225 See, e.g., RESTATEMENT, CONTRACTS, MONT. ANNOT. 28 (1949).

or personal delivery a statement showing the debit and credit items incurred and made in the account between the manufacturer, wholesaler or distributor and such agent, salesman or dealer during the immediately preceding month and the exact balance owing from the agent, salesman or dealer thereon at date of such notice.”

E. Position of the American Law Institute

Section fifty-six of the Restatement of Contracts provides:

“Where forbearance or an act other than a promise is the consideration for a promise, no notification that the act or forbearance has been given is necessary to complete the contract. But if the offeror has no adequate means of ascertaining with reasonable promptness and certainty that the act or forbearance has been given, and the offeree should know this, the contract is discharged unless within a reasonable time after performance of the act or forbearance, the offeree exercises reasonable diligence to notify the offeror thereof.”

Williston, the reporter for this section of the Restatement of Contracts, patterned it after a dictum in the celebrated Massachusetts case of Bishop v. Eaton. The cases cited by the Massachusetts court in support of the dictum dealt with notice of transactions; but the court seemed to be referring to notice of intention to accept when it stated that “notice of acceptance” should be received within a reasonable time after performance by the creditor in order to forestall the guarantor’s discharge. The significance of the resultant

227 N.D. CENT. CODE § 22-01-063. See text accompanying notes 188-87 supra for two companion North Dakota statutes requiring notice of intention to accept and permitting revocation of the offer of guaranty within ten days of its receipt.

228 1 RESTATEMENT, CONTRACTS § 56 (1932). RESTATEMENT, SECURITY § 85 (1941) is similar.


230 Whiting v. Stacy, 81 Mass. (15 Gray) 270 (1860); Babcock v. Bryant, 29 Mass. (12 Pick.) 133 (1831); Schlessinger v. Dickinson, 87 Mass. (5 Allen) 47 (1862) (alternative holding). Although there was language in the above opinions suggesting that the guarantor would be wholly discharged by tardy notice, the context generally made it clear that the court was assuming that the principal had become insolvent after the creditor’s failure to send notice. The loss presumed to have been incurred by the guarantor, not mere lack of notice, was the reason that these cases referred to total discharge.

Whiting v. Stacy is an exception. The Whiting court referred solely to the laches of the creditor in giving notice as the reason for full discharge. The cases it relied on, however, all required injury to the guarantor plus belated notice for unconditional release of the guarantor. See Bickford v. Gibbs, 62 Mass. (8 Cush.) 154 (1851) (notice of default); Clark v. Remington, 82 Mass. (11 Met.) 361 (1846) (alternative holding); Courtis v. Dennis, 48 Mass. (7 Met.) 510 (1844); Babcock v. Bryant, 29 Mass. (12 Pick.) 133 (1832).
ambiguity differs depending on whether a temporary or a continuing guaranty is considered.

The time at which the dictum obliges the creditor to give notice is unobjectionable in the case of a temporary guaranty. Notice of intention to accept is due within a reasonable time after commencement of performance by the creditor; notice of transactions, within a reasonable time after conclusion of the transaction.\textsuperscript{231} The two coalesce under a “one-shot” guaranty so that a single notice given after completion of the transaction is sufficient.\textsuperscript{232} But if the dictum refers to notice of transactions under a temporary guaranty, it is incorrect in stating that failure to receive notice completely discharges the guarantor. As the cases cited by the \textit{Bishop v. Eaton} dictum indicate, belated notice of transactions discharges the guarantor to the extent of resultant prejudice. Unconditional discharge only follows from inadequate notice of intention to accept.\textsuperscript{233}

The \textit{Bishop v. Eaton} dictum can be criticized for both the time at which it declares that notice is requisite and the effect that it attributes to failure to receive notice with reference to a continuing guaranty. If the dictum deals with notice of intention to accept, it permits this notice after completion of the creditor’s performance. This is a departure from the precept that notice of intention to accept should be given within a reasonable time after initiation of performance by the creditor. If the dictum refers to notice of transactions, it states that failure to receive this notice wholly discharges the guarantor. The accepted rule is that failure to dispatch notice of transactions releases the guarantor to the extent of resultant loss.

When Williston wrote the \textit{Bishop v. Eaton} dictum into the \textit{Restatement of Contracts}, he incorporated its vices as well as its virtues. Section fifty-six, like the dictum, does not specify whether it refers to notice of intention to accept or notice of transactions. Section fifty-six, like the dictum, is more appropriate to “one-shot” guaranties than continuing guaranties. Williston’s treatise is more helpful. The text indicates that Williston favored the dictum largely for its espousal of the condition subsequent theory concerning notice of intention to accept.\textsuperscript{234} Williston evidently meant to endorse this theory in section fifty-six; he was not concerned with notice of transactions.

\textsuperscript{231} See text accompanying notes 25-26 supra.
\textsuperscript{233} See text accompanying notes 21-24 supra.
\textsuperscript{234} See 1 Williston § 69A-AA, at 221-24.
F. Conclusion

There was once a division of the American authorities with regard to notice of transactions. Time seems to have blurred, if not erased, its mark. The prevailing view now is that notice of transactions is not a constructive condition of contracts of guaranty.

IV. Notice of Default

An American court first considered notice of default a constructive condition of contracts of guaranty in 1833.\(^2^{235}\) English law recognized notice of default only as an express condition.\(^2^{236}\) The subsequent conflict in the American decisions relates to unilateral contracts of guaranty; but notice of default may also be an issue with respect to bilateral contracts of guaranty.

There is more recognized agreement concerning notice of default than the other notice requirements. Historically, notice of default was not made a constructive condition of guaranties of payment if the principal's obligation was certain in amount and due at a certain time. There was a fairly even split of authority when the guaranteed performance was uncertain in either respect.\(^2^{237}\) The modern trend dispenses with notice unless it is expressly and explicitly requested. When the collection of a negotiable bill or note is guaranteed, the Uniform Commercial Code takes a similar position.\(^2^{238}\) Previously, there was general agreement at common law that notice of the creditor's inability to collect from the principal was a constructive condition of guaranties of collection.\(^2^{239}\)

Guaranties of Collection. When a guarantor offers a guaranty he promises to pay if payment cannot be procured from the principal by legal proceedings.\(^2^{240}\) Thus, it is notice of continuance of default after the creditor has attempted to enforce performance, not notice of the principal's original failure to pay, which may be a constructive condition.\(^2^{241}\) Lack of due notice has been said


\(^2^{237}\) See SIMPSON § 41; 4 WILLISTON, CONTRACTS § 1237, at 3542-44 (rev. ed. 1936); RESTATEMENT, SECURITY §§ 87-88 (Tent. Draft No. 4, 1940).

\(^2^{238}\) UNIFORM COMMERCIAL CODE §§ 3-416(2), (5).

\(^2^{239}\) See SIMPSON § 41.

\(^2^{240}\) See text accompanying note 217 supra.

\(^2^{241}\) Becker v. Saunders, 28 N.C. (6 Ired.) 380 (1846) (per curiam) (semble); Bashford v. Shaw, 4 Ohio St. 263 (1854); Woodson v. Moody, 23 Tenn. 504 (1845); Sylvester v. Downer, 18 Vt. 92 (1845); Brown v. Curtiss, 2 N.Y. 225, 228 (1849) (dictum).
to release the guarantor to the extent that he suffers consequent loss.\footnote{See Campbell 559.} It is relatively unlikely that such loss will occur, however, for the creditor's inability to collect from the principal indicates that the guarantor's rights of recourse are already impaired.\footnote{A guarantor could, of course, surrender security in blissful ignorance of the creditor's failure to collect.} A principal function of the notice due a guarantor of collection is to permit him to meet his obligation without unnecessary legal proceedings by the creditor.\footnote{See Restatement, Security, Explanatory Notes § 134 (Tent. Draft. No. 4, 1940).}

A number of the cases which required notice of inability to enforce performance involved guaranties of bills and notes.\footnote{This is true of all the cases cited in note 250 supra, with the exception of Brown v. Curtis, which involved a guaranty of payment.} The Uniform Commercial Code overturns these cases when the guaranty appears on a negotiable instrument or on a piece of paper firmly attached to it. The guarantor of collection is then regarded as an indorser who waives formal presentment, notice of dishonor, and protest. The Uniform Negotiable Instruments Law did not contain a similar provision.\footnote{See Anderson, Uniform Commercial Code 688-689 (1961).}

**Guaranties of Payment.** The need for dispatching notice of default to the guarantor turns on the nature of the principal's obligation. If this involves a sum certain and is due at a certain time, notice of default is not generally requisite.\footnote{See Stearns § 4.18.} The guarantor has ample information to be able to protect himself. For instance, notice of default is virtually never required when the guarantor secures payment of a bill or note for a sum certain with a fixed maturity date.\footnote{See O'Neal v. Peaden, 228 Ala. 21, 151 So. 877 (1933); Gammell v. Parramore, 58 Ga. 54 (1877); Peterson v. Swanson, 259 Ill. App. 80 (1930); Allen v. Rightmere, 20 Johns. Cas. 365 (N.Y. Sup. Ct. 1825); Taylor & Williams v. Ross, 11 Tenn. 330 (1832); Woodstock Bank v. Downer, 27 Vt. 492 (1854); accord, Ray v. Spencer, 208 S.W.2d 103 (Tex. Civ. App. 1947) (negotiable bonds). But see Oxford Bank v. Haynes, 25 Mass. (8 Pick.) 423 (1829) (guarantor discharged when injured by lack of notice).} On the other hand, notice of default may be called for when either a negotiable or non-negotiable demand instrument is guaranteed, since neither has a definite maturity date.\footnote{Cf. Whiton v. Mears, 32 Mass. (11 Met.) 505 (1846).}

The Uniform Commercial Code abrogates the foregoing principles. Under the Uniform Negotiable Instruments Law, a guarantor of payment was treated as either a guarantor alone or as both a guarantor and an unqualified indorser.\footnote{See Britton, Bills and Notes § 59 (2d ed. 1961).} In either event, surety-
ship rules were relevant to his liability. The Code adopts a different approach. A guarantor of payment is considered an indorser who waives presentment, notice of dishonor, protest, and demand on the maker or drawee. His liability appears to be governed exclusively by the Code and not by common-law principles of suretyship.

Certainty as to the amount and time of the guaranteed performance has also dispensed with notice of default in the following circumstances: guaranty of payment of a judgment at a certain time; guaranty of payments required by a lease or bailment contract; guaranty of payment for services rendered or goods sold; and guaranty of delivery at a fixed time of goods having an ascertained value.

If the principal's obligation is uncertain in either time or amount some jurisdictions make notice of default a constructive condition of the guarantor's liability. The creditor is excused from giving notice when the guarantor obtains prompt information; when the guarantor has a close relationship with the principal (e.g., is a director or officer of the principal) which permits him to procure inside information; and when the guaranty expressly or impliedly negatives the guarantor's desire for notice.

If notice is required but not given, the guarantor may be re-

251 Uniform Commercial Code § 3-416(1), (5) and related comments; see Anderson, op. cit. supra note 246, at 668-69.
252 See Frash v. Polk, 67 Ind. 55 (1879).
253 Welch v. Walsh, 177 Mass. 555, 59 N.E. 440 (1901); Kratz v. Rally, 47 S.W.2d 221 (Mo. App. 1932); Weiler v. Henarie, 15 Ore. 28, 15 Pac. 614 (1887); Shore v. Lawrence, 80 W. Va. 493, 92 S.E. 729 (1917); see Dixon v. Schwartz, 205 Ill. App. 349 (1917).
255 Sherman, Clay & Co. v. Turner, 164 Wash. 257, 2 P.2d 688 (1931); see Stewart v. Sharp County Bank, 71 Ark. 585, 76 S.W. 1064 (1903); International Accountants' Soc'y, Inc. v. Fell, 144 S.C. 64, 142 S.E. 34 (1928); Smith v. Ide, 3 Vt. 290 (1831).
256 Heyman v. Dooley, 77 Md. 162, 25 Atl. 117 (1893); see Hunter v. Dickinson, 29 Tenn. 37 (1849); Mallory v. Lyman, 3 Pn. 445 (Wis. 1852).
257 Douglas v. Reynolds, Byrne & Co., 32 U.S. (7 Pet.) 115 (1833); Cahuzac & Co. v. Samini, 29 Ala. 283 (1856); Taussig v. Reid, 145 Ill. 488, 50 N.E. 1092 (1898); Rankin & Rankin v. Childs, 9 Mo. 685 (1846); McCollum v. Cushing, 22 Ark. 540 (1861) (alternative holding); Milroy v. Quinn, 69 Ind. 400 (1875) (alternative holding); Howe v. Nickels, 22 Me. 175 (1845) (alternative holding).
leased from liability.\textsuperscript{261} If the absence of notice of default debar
the guarantor from effectively exercising his rights of recourse
against the principal, he is completely discharged. This generally
occurs when the principal is solvent at the time that notice should
have been given but becomes insolvent before it is sent.\textsuperscript{262} On the
other hand, if the principal is insolvent at the time when notice
should have been sent\textsuperscript{263} or is solvent and remains so until notice
is dispatched,\textsuperscript{264} the guarantor's recourse is not affected by the
tardy notice. Absent special damage, he is not discharged. Special
damage, which results in a \textit{pro tanto} discharge of the guarantor,
includes: depreciation of security;\textsuperscript{265} surrender of security;\textsuperscript{266} failure
to obtain available security;\textsuperscript{267} and wasting or disposal of assets by
the principal which the guarantor could have seized.\textsuperscript{268}

The trend of authority requires notice of default only if the
guarantor expressly requests it.\textsuperscript{269} If a non-compensated surety so
stipulates he is totally discharged by lack of notice.\textsuperscript{270} A compen-
sated surety, however, may have to show both failure to receive
notice and actual prejudice to obtain discharge.\textsuperscript{271}

\textbf{Statutes.} Five states have enacted substantially identical versions
of the following provisions:

“A surety who has assumed liability for payment or perform-

\textsuperscript{261} See Campbell 561-64.
\textsuperscript{263} Reynolds, Byrne & Co. v. Douglass, 57 U.S. (12 Pet.) 497 (1838); Beebe v. Dudley,
26 N.H. 249 (1855); Sullivan Drew & Co. v. Field, 118 N.C. 355, 24 S.E. 785 (1896).
\textsuperscript{264} Salisbury v. Hale, 29 Mass. (12 Pick.) 416 (1852); Montgomery v. Kellogg & Sandusky,
43 Miss. 486 (1870).
\textsuperscript{265} Detroit Trust Co. v. Lange, 167 Mich. 69, 255 N.W. 320 (1934).
\textsuperscript{266} Cf. Detroit Steel Prods. Co. v. Daily Tct. Printing Co., 85 W. Va. 530, 102 S.E. 189
(1920).
\textsuperscript{268} Mamerow v. National Lead Co., 206 Ill. 626, 637-40, 69 N.E. 504, 508-09 (1903)
(dictum).
\textsuperscript{269} Stewart v. Knight & Jillson Co., 165 Ind. 498, 76 N.E. 743 (1900); Booth v. Irving
Nat'l Exch. Bank, 116 Md. 668, 82 Atl. 652 (1911); Douglass v. Howland, 24 Wend. 35
(N.Y. Sup. Ct. 1840); Noyes & Co. v. Nichols, 28 Vt. 159 (1855); Yancey v. Brown & Apple-
ton, 35 Tenn. 89, 95-97 (1855) (dictum).
\textsuperscript{270} Yama v. Sigman, 114 Colo. 323, 165 P.2d 191 (1945); Pergament v. Herrick Credit
\textsuperscript{271} School Dist. v. McCurley, 62 Kan. 53, 142 Pac. 1077 (1914); accord, Rose v. Ramm,
N.E. 970 (1909); see Wilhoit v. Furnish, 295Ky. 556, 174 S.W.2d 515 (1943). See generally
Annot., Effect of Failure to Give Notice, or Delay in Giving Notice or Filing of Proofs of
Loss, Upon Fidelity Bond or Insurance, 23 A.L.R.2d 1065 (1952); Annot., Liability of a
Surety Company as Distinguished From That of a Gratuitous Surety, 12 A.L.R. 382 (1921).
ance is liable to the guarantee immediately upon the default of the principal, and without demand or notice."

"Where one assumes liability as a surety upon a conditional obligation, his liability is commensurate with that of the principal, and he is not entitled to notice of default of the principal, unless he is unable, by the exercise of reasonable diligence, to acquire information of such default, and the creditor has actual notice thereof."

When a guaranty of collection is involved, this statute restricts the necessity for notice to a greater degree than the common-law rule. In the case of guaranties of payment, the statute adopts the modern rule.

Position of the American Law Institute. The Restatement of Security provides:

"Subject to the rules pertaining to negotiable instruments, the surety's obligation to the creditor is not affected by the creditor's failure to notify him of the principal's default unless such notification is required by the terms of the surety's contract."

"Where a surety has guaranteed the collectibility of a principal's debt, the creditor has the duty of giving the surety reasonable notice of his inability to enforce performance, and if such notice is not given, the surety is discharged to the extent of resulting prejudice."

The restatement approves the modern rule with regard to guaranties of payment. It reflects the general common-law rule concerning guaranties of collection.

274 No cases applying the statute were found.
275 The cases relying on the statutory discard of the requirement of notice to a guarantor of payment would have been decided the same way in jurisdictions which recognized notice as a constructive condition. See Kierulf & Ravenscroft v. Koping, 94 Cal. App. 473, 271 Pac. 353 (1928) (guarantor wife of principal); McConnon & Co. v. Laursen, 22 N.D. 604, 135 N.W. 213 (1912) (alternative holding) (no damage from lack of notice); Masters v. Boyes, 44 Okla. 526, 145 Pac. 363 (1914) (alternative holding) (guarantors officers of principal); Bloom v. Bender, 48 Cal. 2d 793, 799, 313 P.2d 568, 572 (1957) (dictum) (express waiver of notice of default).
276 Restatement, Security § 130 (1941).
277 Id., § 137.
Conclusion. The previous scope of agreement concerning notice of default has perceptibly broadened in recent years. Since the new consensus regards notice as unnecessary unless expressly and explicitly required, notice of default appears destined to join notice of transactions among the curiosa of legal history.

V. Assessment of the Notice Requirements

A. What Are the Notice Requirements?

The foregoing discussion has compared academic treatment of the notice requirements with the cases. It has been suggested that writers have failed to perceive the underlying agreement with reference to notice of intention to accept and have failed to recognize notice of transactions as a distinct, if disappearing, concept. On the other hand, the essence of notice of default has been fairly captured by text and treatise.

The shortcomings of the academic authorities have found their way into the Restatement of Contracts and Restatement of Security sections dealing with notice of intention to accept. This has impeded recognition of these restatements as "prima facie a correct statement of what may be termed the general common law of the United States." The following indicates one way in which section fifty-six of the Restatement of Contracts might be redrafted to restate the law more lucidly:

"Where forbearance or an act other than a promise is the consideration for a promise, no notification that the act or forbearance (has been) will be given is necessary to complete the contract. But if the offeror has no adequate means of ascertaining with reasonable promptness and certainty that the act or forbearance has been given, and the offeree should know this, the contract is discharged unless within a reasonable time after commencement of performance of the act or forbearance, the offeree exercises reasonable diligence to notify the offeror (thereof) of his intention to accept the offer.

270 Although § 56 of the Restatement of Contracts applies to all unilateral contracts, it is derived from guaranty cases. See Llewellyn, Our Case-Law of Contract: Offer and Acceptance, 48 YALE L.J. 779, 796 n.24 (1939). Section 86 of the Restatement of Security is exclusively devoted to unilateral contracts of guaranty.

“Comment a. In the formation of a unilateral contract where the offeror is the party making the promise, as is almost invariably the case, a compliance with the request in the offer fulfills the double function of a manifestation of acceptance and of giving consideration. It is only in the exceptional case where the offeror has no convenient means of ascertaining whether the requested act has been done that notification is requisite. [Remainder omitted.]

“Comment b. Notice to Guarantor. This section has an important application in the field of suretyship. Although many of the earlier guaranty cases requiring notice state that notice is essential to the inception of a contract, they also recognize that initiation of performance by the offeree causes the offer to become irrevocable for a reasonable time. This approach produces the same result as the second sentence of § 56. Once the offeree begins performance under either analysis the offeror cannot avoid imposition of a duty to pay if notice is received and the offeree cannot recover unless notice is given.

“Comment c. Waiver. § 56 does not apply if the parties manifest contrary intent.

“Caveat: § 56 takes no position respecting notice of performance of the requested act or forbearance.” [Matter in parentheses deleted. Matter in italics supplied.]

B. What Is the Relative Significance of the Notice Requirements?

If notice of intention to accept is required but lacking, the guarantor is unconditionally discharged. Notice of transactions and notice of default only insulate the guarantor from actual loss. The rationale of this distinction lies in the function which notice of intention to accept is intended to fulfill. Justice Story found the following reasons for requiring it: (1) notice enables the guarantor to be vigilant with regard to the principal; (2) it aids the guarantor in determining whether to revoke his offer; and (3) it assists the guarantor in gauging his ability to undertake other commitments and in regulating his financial affairs.281 In other words, notice of intention to accept is intended to allow the guarantor to take steps to protect himself. If notice is not sent and the guarantor does not take such steps, it is difficult for him to establish the resulting loss. Damages should be proved to a reasonable certainty; yet it verges on guesswork for the guarantor to attempt to demonstrate that he would have revoked his offer if he had received notice and if so,

when, or that he would have avoided specific commitments if he had obtained prompt information. This problem of proof is circumvented by a presumption of total loss—an unconditional discharge of the guarantor.\textsuperscript{282}

Notice of transactions and notice of default do not have as great utility as notice of intention to accept. By the time these notices are due it is too late for the guarantor to revoke his offer. It is in all likelihood too late for him to alter his other commitments materially. His principal courses of action are to obtain further security, to hold on to the security that he has, and to seek recourse without delay. The limited usefulness of notice of transactions and notice of default reduces the probability that the guarantor will incur substantial unprovable loss if they are not received. This justifies releasing the guarantor only if he can establish that he has sustained actual damage.

\section*{C. What Interests Do the Notice Requirements Protect?}

Notice of intention to accept and notice of transactions protect the interest of the guarantor in being able to plan his affairs. Notice of intention to accept is more important in this respect. If the guarantor knows that his offer will be accepted he can usually provide adequately for the future. The interest of the guarantor in being able to plan his affairs derives, in part, from the commercial nature of many guaranties. Businessmen have to be able to balance their books to know where they stand.\textsuperscript{283} The interest also derives from traditional judicial concern for the uncompensated surety.\textsuperscript{284} Guaranties are frequently given by sanguine friends of the principal in favor of seasoned businessmen. A reminder to the former by the latter that they have undertaken serious obligations may make them more aware of their legal rights and liabilities. The courts are cognizant of the Biblical adage: "He who gives surety for a stranger will smart for it; and he who hates suretyship is secure."\textsuperscript{285}

Notice of default protects the legal and equitable rights of the guarantor. His rights of exoneration, subrogation, contribution,

\textsuperscript{282} Professor Fuller has analogously suggested that measuring the damages caused by breach of commercial contracts by the value of the expectancy reflects the difficulty in computing reliance losses. Fuller & Perdue, \textit{Reliance Interest in Contract Damages}, 46 \textit{Yale L.J.} 52, 60 (1936).


\textsuperscript{284} Stone-Ordean-Wells Co. v. Helmer, 142 Minn. 263, 265-66, 171 N.W. 924, 925, (1919) (dictum); see \textit{Stearns} § 1.2.

\textsuperscript{285} \textit{Proverbs} 11:15.
and reimbursement are operative upon default. Prompt notice enables him to bring them into play without injurious delay. But the importance of this notice is greatly reduced by the relative ease with which the guarantor can obtain expeditious information about default.

On the other hand, the creditor has almost invariably relied on the offer of guaranty. His reliance interest is of a high order. It is closely tied to basic policies in the enforcement of promises. Yet the courts have often supported the competing interests of the guarantor. One reason is the ease with which the notice requirements can be waived. Since the creditor can ask that the notice requirements be expressly excluded, he may be said to assume the risk of possible hardship when he does not do so. Inasmuch as many creditors exact the use of form guaranties which they have prepared, judicial insistence on notice requirements which are not waived by the forms is buttressed by the contra proferentem rule of construction.

D. Are the Notice Requirements Theoretically Justifiable?

Contractual theory helps to explain judicial preference for the interests of the guarantor when the guaranty does not mention notice. Although the notice requirements seem to be exceptions to generally accepted principles concerning formation and discharge of contracts, they reflect other recognized principles.

The traditional approach is that an offer for a bilateral contract requires communication of intention to accept by the offeree, but that an offer for a unilateral contract does not. The argument has been made that requiring notice of intention to accept exemplifies "modern tendencies toward obliterating the distinction between unilateral and bilateral contracts." While notice of intention to accept does modify a legal incident of the traditional unilateral contract, it is submitted that it is not of the same order as other modifications.

A unilateral contract is based on the exchange of a promise for an act. Its traditional legal incidents are (1) the offeror can withdraw his offer at any time before the requested act has been completely performed; (2) the offeree has the option of performing or

286 See 2 PATON, DIGEST 1945 (2d ed. 1942).
refusing to perform the requested act; and (3) communication of acceptance is unnecessary. These incidents have come under searching criticism in recent years.

The traditional unilateral contract did not protect an offeree who had commenced performance against revocation by the offeror. The modern tendency is to safeguard the offeree by making an offer for a unilateral contract irrevocable after part performance.

The traditional unilateral contract gave an offeree who had begun performance the opportunity to speculate at the expense of the offeror. If market conditions became favorable, he could complete performance. If they turned unfavorable, he could abandon it. This occasion for speculation is enhanced by the modern tendency to consider an offer for a unilateral contract irrevocable after part performance by the offeree. Under this view part performance by the offeree deprives the offeror of the power to revoke while the offeree retains unfettered freedom to forsake performance.

The Sales Article of the Uniform Commercial Code contains a provision designed to correct this imbalance by limiting the time for speculation by the offeree. Subsection 2-206(2) provides:

"Where the beginning of a requested performance is a reasonable mode of acceptance an offeror who is not notified of acceptance within a reasonable time may treat the offer as having lapsed before acceptance."

This subsection leaves an offeree who has given seasonable notice free to abandon performance. But if he elects to complete performance and has not given due notice the offeror has the option of treating the offer as rejected.

The traditional unilateral contract did not stand in need of notice of acceptance. The offeror had no use for it since he customarily received, or could obtain, prompt knowledge of acceptance. This was not true of a unilateral contract of guaranty. Since the creditor accepted by dealing with the principal, a third party, there was no assurance that the guarantor would learn of acceptance in time to plan his affairs. Thus the concept of notice of intention to accept was conceived in order to aid the guarantor.

All three modifications of the traditional unilateral contract can:

288 See id. at 34.
289 See 1 Restatement, Contracts § 45 (1932).
290 See Hawkland, Sales and Bulk Sales 8 (AlI & ABA pamphlet 1958).
292 See 1 Restatement, Contracts § 56, comment a (1932).
be dispensed with by express agreement. Notice of intention to accept, however, is materially different from the other two.

The tendency to make an offer for a unilateral contract irrevocable after part performance by the offeree is an innovation which applies to all offers for unilateral contracts. Subsection 2-206(2) of the Uniform Commercial Code is a variation which embraces all offers within the scope of the Sales Article of the Code. On the other hand, notice of intention to accept is neither a novelty nor a concept of across-the-board latitude. It can be satisfactorily explained as an application of the following generally accepted principles concerning notice to certain unilateral contracts of guaranty.

"Notice need not be given to a promisor who has the same or substantially equivalent sources of information with respect to the facts or events . . . as those that are available to the promisee. If the promisor can find out the facts for himself as easily as the promisee can find them out and give notice of them, the giving of notice will not be a condition precedent to the promisor's duty of performance, unless he has clearly so specified in . . . [his offer]. If, on the other hand, the sources of information available to the two parties are not equivalent and it is much more difficult for the promisor to find out facts for himself than it is for the promisee to find out and give notice, it should usually be held that the giving of notice to the promisor is, by construction of law, a condition precedent to his duty to perform. It is obvious that this latter rule involves questions of degree." 293

The significant facts examined in the sections dealing with the specific notice requirements relate in part to the adequacy of the guarantor's sources of information concerning acceptance. Certain of these facts should indicate to the creditor whether, in the light of his sources of information, the guarantor can speedily ascertain whether his offer has been accepted. For example, when the guarantor is a director or an officer of the principal, or a stockholder who has the legal right 294 as well as the factual power to inspect the books, his sources of information obviously suffice. On the other hand, if the guarantor is in the West Indies and the principal and the creditor are in New York, the guarantor's sources of information may well be inadequate. 295 There exists an area between such extremes in which a policy decision must be made concerning the

293 3A CORBIN § 724, at 386.
294 See HENN, CORPORATIONS § 201 (1961).
necessity of notice of intention to accept. The Restatement of Contracts states that it should be required only in an "exceptional case." It has been suggested that this restricts the notice requirement to situations in which the creditor knows that the guarantor cannot obtain information from the principal. If the creditor knows, for instance, that the principal himself has not learned about performance of the requested act or, although he does know of it, has concealed this information from the guarantor, notice is essential.

While notice should be required in these situations, it may be desirable in others as well. The significant facts discussed above also relate to the creditor's reasonable expectations concerning the guarantor's anticipation of acceptance. Notice of intention to accept, unless expressly or impliedly waived, has historically been requisite when the creditor should know that the guarantor is unsure that his offer will be accepted, as well as when the creditor should know that the guarantor cannot promptly obtain data concerning acceptance from the principal. The crucial question is not whether the principal has and is willing to divulge information, but whether the guarantor both stands ready to and can secure the news quickly.

To the extent that the necessity of notice of intention to accept turns on the information readily available to the guarantor, it is not surprising that the concept developed and flourished in the nineteenth century, when communications were relatively undeveloped. In 1825, when a guarantor in Charleston, South Carolina, gave the principal a guaranty which was to be used in Havana, Cuba, the creditor should have known that the guarantor could not obtain adequate information regarding acceptance. The highly developed communications of today unquestionably alter the situation. In the vast majority of situations the guarantor should be able to contact the principal without undue delay. The revolution in communications also minimizes the importance of the guarantor's uncertainty as to whether his offer will be accepted. His lack of assurance can often be dissipated by the simple expedient of picking up a telephone or sending a telegram. The improvement in communications may explain why most of the cases dealing with notice of intention to accept are old ones. A plausible argument can be made that the significance of the concept vanished with the clipper ship and the pony express.

296 1 Restatement, Contracts § 56, comment a (1932).
297 See Campbell 547.
The limited modern importance of notice of intention to accept raises the question whether the *Restatement of Contracts Second* should contain the present section fifty-six even in recast form. Perhaps the Biblical admonition to put new wine into new wineskins\(^{299}\) should be followed. Deletion of section fifty-six and the addition of an appropriate illustration to the section of the *Restatement of Contracts* which defines "constructive condition" should suffice. If this is done, section eighty-six should likewise be excised from the *Restatement of Security Second*.

Notice of transactions and notice of default are also explainable in terms of notice theory. Their continued utility, however, is even more doubtful.\(^{300}\) Once notice of intention to accept is required or dispensed with, there would appear little need for other constructive conditions. The guarantor should ordinarily be able to find out whatever else he needs to know.

\(^{299}\) *Matthew* 9:17.

\(^{300}\) This contention has been disputed. An early writer, for instance, rated notice of transactions as more important than notice of intention to accept. Rogers, *Notice of Acceptance in Contracts of Guaranty*, 5 *COLUM. L. REV.* 215, 224 (1905). Simpson has suggested that notice of default should be given all guarantors in order to facilitate payment of claims without unnecessary litigation. *Simpson* 168-69. Such proposals deserve consideration; but the historical common-law concepts of notice of transactions and notice of default should not be revitalized. Their wane is a genuine reflection of the notice theory upon which they are based. If novel uses of notice of transactions or notice of default are found desirable they should be enacted in statutes devoid of the labyrinthine characteristics of the common-law notice requirements. See N.D. *CENT. CODE* §§ 22-01-06.1 to 22-01-06.3 (1960); *Uniform Commercial Code* § 2-206(2).