

COA Opinion: Guaranty enforceable against guarantor without foreclosing on underlying collateral

4. December 2010 By Sarah Lindsey

In *Comerica Bank v. Cohen*, No. 293327 (approved for publication on Dec. 2, 2010 after release on Oct. 21, 2010), the Court of Appeals held that an unambiguous, limited guaranty was enforceable against the guarantor without foreclosing on the underlying collateral or providing notice to the guarantor's attorney under a term of the loan agreement.

Defendant was the guarantor of a loan agreement and note plaintiff signed with 21 Century. Under the terms of the guaranty, defendant was liable for 30 percent of the indebtedness outstanding under the note when payment became due. Plaintiff sued defendant under the guaranty, claiming 21 Century defaulted on the terms of the loan and that defendant owed 30 percent of the outstanding indebtedness. Defendant asserted that he was not liable on the guaranty because plaintiff failed to mitigate damages by not approving a proposed sale of the property, failed to give proper notice of default to defendant's attorney under the terms of the loan agreement, and that his obligation would be satisfied by the sale and proceeds of the real estate collateral.

Before the close of discovery, the trial court rejected defendants arguments and granted plaintiff's motion for summary disposition. The trial court held that the note was due and payable, the guaranty was an obligation owed by defendant to plaintiff independent of the underlying loan agreement and note, and the guaranty clearly and unambiguously required plaintiff to pay 30 percent of the outstanding debt.

The Court of Appeals agreed, noting that the guaranty was not only unambiguous, but also that plaintiff was not required to foreclose on the real estate collateral before collecting on the guaranty. Unlike a suretyship, which requires a creditor to proceed against the collateral to protect the rights of an accommodation endorser, the guaranty is an independent obligation, and a creditor can collect under the guaranty without foreclosing on the underlying collateral. The Court also concluded that although the loan agreement required plaintiff to send notice of default to defendant's attorney, the failure to give notice of default did not discharge the guarantor from liability or bar recovery on the guaranty.