

**SUFFICIENCY OF NOTICE TO GUARANTORS:
BANK OF BURWELL v. KELLEY**

INTRODUCTION

"Friends, Romans, countrymen, lend me your ears; I offer my chariot as collateral."¹ No, that's not exactly how it goes. But, the basic idea is that creditors often require the pledging of collateral when lending funds (or ears).² As evidenced by section 9-504(3) of the Nebraska Uniform Commercial Code, debtors require protection too, specifically the protection provided through notice of any sale of collateral.³

The Nebraska Supreme Court has extended this protection to guarantors as well.⁴ However, guarantors have received special treat-

1. W. SHAKESPEARE, JULIUS CAESAR, act 3, sc. 2, l. 75 (1623). In deference to William Shakespeare, Mark Antony's soliloquy actually reads: "Friends, Romans, countrymen, lend me your ears: I come to bury Caesar, not to praise him. The evil that men do lives after them, The good is oft interred with their bones; So let it be with Caesar." *Id.* at act 3, sc. 2, l. 75-79.

2. See *infra* notes 23-27 and accompanying text.

3. NEB. REV. STAT. U.C.C. § 9-504(3) (Reissue 1980). The section states:

Disposition of the collateral may be by public or private proceedings and may be made by way of one or more contracts. Sale or other disposition may be as a unit or in parcels and at any time and place and on any terms but every aspect of the disposition including the method, manner, time, place and terms must be commercially reasonable. Unless collateral is perishable or threatens to decline speedily in value or is of a type customarily sold on a recognized market, reasonable notification of the time and place of any public sale or reasonable notification of the time after which any private sale or other intended disposition is to be made shall be sent by the secured party to the debtor, if he has not signed after default a statement renouncing or modifying his right to notification of sale. In the case of consumer goods no other notification need be sent. In other cases notification shall be sent to any other secured party from whom the secured party has received (before sending his notification to the debtor or before the debtor's renunciation of his rights) written notice of a claim of an interest in the collateral. The secured party may buy at any public sale and if the collateral is of a type customarily sold in a recognized market or is of a type which is the subject of widely distributed standard price quotations he may buy at private sale.

Id.

4. See *infra* note 64 and accompanying text. See also *Chiles, Heider & Co. v. Pawnee Meadows, Inc.*, 217 Neb. 315, 319, 350 N.W.2d 1, 4 (1984) (citing *In re Estate of Williams*, 148 Neb. 208, 215-16, 26 N.W.2d 847, 851 (1947)). The court adopted the definition of a guaranty as:

'A collateral undertaking by one person to answer for the payment of a debt or the performance of some contract or duty in case of the default of another person who is liable for such payment or performance in the first instance.'

'A guaranty . . . is collateral to, and made independently of, the principal contract which is guaranteed; and the guarantor's liability is secondary rather than primary or original.'

Id.

ment by the Nebraska Supreme Court.⁵ Specifically, as developed in *First National Bank and Trust Company of Fremont v. Hughes*,⁶ the Nebraska Supreme Court concluded that a notice of sale of collateral given to a guarantor, who is also the debtor on the underlying loan, should be unambiguous as to whether the individual receives the notice as a guarantor or as a debtor.⁷ Additionally, in *Hughes*, the Nebraska Supreme Court required the creditor to inform the guarantor of the guarantor's possible liability for any deficiency.⁸

Often, the individual guaranteeing the loan will be the debtor.⁹ As some recent Nebraska cases indicate, the guarantor may serve as an officer of the corporate debtor, thus creating confusion and ambiguity as to the status in which the individual receives the notice — as debtor or as guarantor.¹⁰

This Comment discusses the evolution of Nebraska case law regarding the issue of notices to guarantors in the period since the *Hughes* case.¹¹ Also, this Comment discusses *Bank of Burwell v. Kelley*¹² which authorized the use of the parol evidence rule to address ambiguities within a notice of sale sent to a guarantor who also was an officer of the corporate debtor.¹³ The *Kelley* case represents the culmination of the line of Nebraska cases regarding this issue.¹⁴ This Comment provides an in depth look at *Kelley*, as well as previous Nebraska cases addressing similar issues.¹⁵ Furthermore, this Comment analyzes *Kelley* and concludes that *Kelley* remains consistent with *Hughes* and similar Nebraska cases.¹⁶ However, this Comment argues that the court in *Kelley* achieves this consistency by using the

5. See *infra* notes 80-82, 92-94, 103-06, 111-16, 157-64 and accompanying text.

6. 214 Neb. 42, 332 N.W.2d 674 (1983).

7. *Hughes*, 214 Neb. at 46, 332 N.W.2d at 677.

8. *Id.* A deficiency occurs when the proceeds from the sale of the collateral are less than the amount of the outstanding debt. J. WHITE & R. SUMMERS, UNIFORM COMMERCIAL CODE § 25-9, at 1214 (3rd ed. 1988). See also NEB. REV. STAT. U.C.C. § 9-504(2) (Reissue 1980) which states that:

if the security interest secured an indebtedness, the secured party must account to the debtor for any surplus, and unless otherwise agreed, the debtor is liable for any deficiency. But if the underlying transaction was a sale of accounts or chattel paper, the debtor is entitled to any surplus or is liable for any deficiency only if the security agreement so provides.

Id. The guarantor's liability on the deficiency would then be secondary to the debtor's primary liability. See *Chiles, Heider & Co. v. Pawnee Meadows, Inc.*, 217 Neb. 315, 319, 350 N.W.2d 1, 4 (1984).

9. See *infra* notes 71-79, 83-86, 107-10, 121-51 and accompanying text.

10. See *infra* notes 71-79, 83-86, 107-10, 123-27 and accompanying text.

11. See *infra* notes 80-82, 92-94, 103-06, 111-16, 157-64 and accompanying text.

12. 233 Neb. 396, 445 N.W.2d 871 (1989).

13. See *infra* notes 121-64 and accompanying text.

14. See *infra* notes 121-64 and accompanying text.

15. See *infra* notes 71-116, 121-64 and accompanying text.

16. See *infra* notes 73-116, 121-64 and accompanying text.

parol evidence rule improperly.¹⁷ Finally, this Comment suggests the need for a strict rule to address the issue of an ambiguous notice sent to a guarantor.¹⁸ A strict rule would determine the sufficiency of a notice of sale by looking only to the notice itself, requiring certain elements to be included within the four corners of the notice.¹⁹

BACKGROUND

ARTICLE NINE AND THE NEBRASKA TREATMENT OF THE NOTICE PROVISION

Draftsmen created article nine of the Uniform Commercial Code ("U.C.C.") to simplify terminology that had been used prior to the development of the Code.²⁰ Section 9-102(1) of the Nebraska U.C.C. indicates the scope of article nine, stating that: "this article applies . . . to any transaction . . . which is intended to create a security interest in personal property or fixtures . . . and also . . . [this article applies] to any sale of accounts or chattel paper."²¹ Section 1-201(37) defines a security interest as "an interest in personal property or fixtures which secures payment or performance of an obligation."²²

Every security interest requires a secured party, debtor, and collateral.²³ Upon attachment of the security interest to the collateral, the security interest becomes enforceable against the debtor.²⁴ In order for attachment to occur, the parties must execute a security agreement, unless the collateral is in the possession of the secured party.²⁵ Also, the debtor must have rights in the collateral²⁶ and the

17. See *infra* notes 121-64 and accompanying text.

18. See *infra* notes 71-116, 121-64, 173-74 and accompanying text.

19. See *infra* notes 71-116, 121-64, 173-74 and accompanying text.

20. J. WHITE & R. SUMMERS, *supra* note 8, § 21-1, at 925.

21. NEB. REV. STAT. U.C.C. § 9-102(1) (Reissue 1980).

22. NEB. REV. STAT. U.C.C. § 1-201(37) (Reissue 1980).

23. J. WHITE & R. SUMMERS, *supra* note 8, § 21-1, at 925. See also NEB. REV. STAT. U.C.C. § 9-105(1)(m) (Reissue 1980) which defines a secured party as "a lender, seller or other person in whose favor there is a security interest." *Id.* The statute also defines a debtor as:

the person who owes payment or other performance of the obligation secured, whether or not he owns or has rights in the collateral, and includes the seller of accounts or chattel paper. Where the debtor and the owner of the collateral are not the same person, the term "debtor" means the owner of the collateral in any provision of the article dealing with the collateral, the obligor in any provision dealing with the obligation, and may include both where the context so requires.

NEB. REV. STAT. U.C.C. § 9-105(1)(d) (Reissue 1980). See also section 9-105(1)(c) which states that "'collateral' means the property subject to a security interest, and includes accounts and chattel paper which have been sold." NEB. REV. STAT. U.C.C. § 9-105(1)(c) (Reissue 1980).

24. NEB. REV. STAT. U.C.C. § 9-203(2) (Reissue 1980). See also J. WHITE & R. SUMMERS, *supra* note 20, § 22-1, at 964.

25. NEB. REV. STAT. U.C.C. § 9-203(1)(a) (Reissue 1980).

secured party must give value.²⁷

By perfecting the security interest, a secured party can obtain maximum protection against third parties, including the trustee in bankruptcy.²⁸ The most common method of perfection is by filing a financing statement.²⁹ Perfection also can occur automatically upon attachment, or in some instances, through possession of the collateral by the secured creditor.³⁰

The parties usually define the terms of default in the security agreement.³¹ Once a default occurs, the secured creditor may repossess and sell the collateral to satisfy the claim under the security agreement.³² Section 9-504(1) of the Nebraska U.C.C. provides that the secured party may "sell, lease or otherwise dispose of any or all of the collateral in its then condition or following any commercially reasonable preparation or processing."³³ Section 9-504(1) provides the hierarchy of interests for which the funds received from the sale of the collateral will be applied.³⁴ The price received at the collateral sale also determines if a deficiency exists.³⁵ A deficiency results when the proceeds of the collateral sale are less than the outstanding

26. NEB. REV. STAT. U.C.C. § 9-203(1)(c) (Reissue 1980).

27. NEB. REV. STAT. U.C.C. § 9-203(1)(b) (Reissue 1980). See also NEB. REV. STAT. U.C.C. § 1-201(44) (Reissue 1980) which defines "value." It states:

a person gives "value" for rights if he acquires them (a) in return for a binding commitment to extend credit or for the extension of immediately available credit whether or not drawn upon and whether or not a charge back is provided for in the event of difficulties in collection; or (b) as security for or in total or partial satisfaction of a preexisting claim; or (c) by accepting delivery pursuant to a preexisting contract for purchase; or (d) generally, in return for any consideration sufficient to support a simple contract.

Id.

28. J. WHITE & R. SUMMERS, *supra* note 8, § 22-1, at 964.

29. *Id.* at § 22-7, at 991.

30. *Id.*

31. J. WHITE & R. SUMMERS, *supra* note 8, § 25-2, at 1189.

32. *Id.* at § 25-9, at 1213.

33. NEB. REV. STAT. U.C.C. § 9-504(1) (Reissue 1980).

34. *Id.* Section 9-504(1) notes that:

The proceeds of disposition shall be applied in the order following to

(a) the reasonable expenses of retaking, holding, preparing for sale or lease, selling, leasing, and the like and, to the extent provided for in the agreement, the reasonable attorney's fees and legal expenses incurred by the secured party;

(b) the satisfaction of indebtedness secured by the security interest under which the disposition is made;

(c) the satisfaction of indebtedness secured by any subordinate security interest in the collateral if written notification of demand therefor is received before distribution of the proceeds is completed. If requested by the secured party, the holder of a subordinate security interest must seasonably furnish reasonable proof of his interest, and unless he does so, the secured party need not comply with his demand.

Id.

35. J. WHITE & R. SUMMERS, *supra* note 8, § 25-9, at 1214.

debt.³⁶ As noted in section 9-504(2), "unless otherwise agreed, the debtor is liable for any deficiency."³⁷

But before any sale of collateral, the secured party must send to the debtor "reasonable notification of the time and place of any public sale or reasonable notification of the time after which any private sale or other intended disposition is to be made."³⁸ In Nebraska, the creditor must execute this notice in writing.³⁹ As noted in *DeLay First National Bank & Trust Company v. Jacobson Appliance Co.*,⁴⁰ an oral communication does not provide sufficient notification.⁴¹ In *DeLay*, the secured party had brought an action for a deficiency judgment against the guarantor of a loan.⁴² The guarantor was also the sole stockholder and chief executive officer of the corporate debtor, Jacobson Appliance.⁴³

The Nebraska Supreme Court divided the transaction into five separate collateral sales, each one of which required a notice of sale.⁴⁴ One collateral sale involved an oral communication of notice.⁴⁵ In determining that the orally communicated notice was inappropriate, the court stated that "an oral communication of notice of either public or private sale is not the method provided by the Uniform Commercial Code."⁴⁶ The court then emphasized the wording within section 9-504(3) of the U.C.C., which states that "reasonable notification shall be *sent*."⁴⁷ The court noted that the definition of "send" adopted by the legislature states in part that:

in connection with any writing or notice, [send] means to deposit in the mail or deliver for transmission by any other usual means of communication with postage or cost of transmission provided for and properly addressed and in the case of an instrument to an address specified thereon or otherwise agreed, or if there be none to any address reasonable under the circumstances.⁴⁸

36. *Id.*

37. NEB. REV. STAT. U.C.C. § 9-504(2) (Reissue 1980).

38. NEB. REV. STAT. U.C.C. § 9-504(3) (Reissue 1980).

39. See *infra* notes 40-49 and accompanying text.

40. 196 Neb. 398, 243 N.W.2d 745 (1976).

41. *Id.* at 404, 243 N.W.2d at 749. *But see*, First Bank and Trust Company of Ithaca v. Mitchell, 123 Misc. 2d 386, —, 473 N.Y.S.2d 697, 701 (1984) (stating that an oral notification was sufficient given the closely held nature of the corporation and the individual's position as president).

42. *DeLay*, 196 Neb. at 399-400, 243 N.W.2d at 747.

43. *Id.* at 400, 243 N.W.2d at 747.

44. *Id.* at 404, 243 N.W.2d at 749.

45. *Id.*

46. *Id.*

47. *Id.* (emphasis added) (paraphrasing NEB. REV. STAT. U.C.C. § 9-504(3)).

48. *DeLay*, 196 Neb. at 404-05, 243 N.W.2d at 749 (quoting NEB. REV. STAT. U.C.C. § 1-201(38)).

The Nebraska Supreme Court, in *DeLay*, held that sections 1-201(38) and 9-504(3), construed together, required a written notice because of the necessity of something having to be "sent" through the mail.⁴⁹

In addition to requiring that the notice of sale be in writing, the Nebraska Supreme Court has required that the notice of sale be sent as a condition precedent to the recovery of a deficiency judgment.⁵⁰ In *Bank of Gering v. Glover*,⁵¹ the Nebraska Supreme Court considered the issue of a secured party's right to a deficiency judgment after the secured party failed to notify the accommodation maker of a note of the impending collateral sale.⁵² The court concluded that the accommodation maker, as one who had signed the obligation enabling the debtor to secure the loan, was a debtor within the meaning of section 9-105(1)(d).⁵³ The court then determined that the notice provision was "intended for the benefit and protection of the debtor."⁵⁴ The court continued: "if [the debtor] is given notice, [the debtor] will have at least an opportunity to protect his interests by redemption, finding prospective purchasers for the property, or otherwise."⁵⁵

The court in *Glover* determined that the wording of the statute itself dictated the mandatory nature of sending notice.⁵⁶ Specifically, the statute stated that "reasonable notification . . . shall be sent," indicating an obligation on the part of the secured creditor.⁵⁷ Consequently, the court deduced that the sending of notice was a condition precedent to the secured party's right to a deficiency judgment.⁵⁸ Additionally, the court emphasized the minimal requirements imposed upon the creditor in the disposition of the collateral.⁵⁹ The court stated that:

The burden on the secured creditor is to comply with the law. The act is framed in his interest. It is not onerous to

49. *DeLay*, 196 Neb. at 404-05, 243 N.W.2d at 749.

50. *Bank of Gering v. Glover*, 192 Neb. 575, 579, 223 N.W.2d 56, 59 (1974).

51. 192 Neb. 575, 223 N.W.2d 56 (1974).

52. *Id.* at 575, 223 N.W.2d at 57. An accommodation maker is one who signs his or her name to an instrument, thereby providing security for a party to the instrument. *Pioneer Insurance Co. v. Gelt*, 558 F.2d 1303, 1311 (1977) (holding that because the maker of a note did not "lend his name" to any party to the instrument, the maker of the note was not an "accommodation maker"). In addition, the accommodation maker does not take consideration for the lending of his or her name. *Id.* See also section 3-415 of the Nebraska U.C.C. which indicates that "an accommodation party is one who signs the instrument in any capacity for the purpose of lending his name to another party to it." NEB. REV. STAT. U.C.C. § 3-415(1) (Reissue 1980).

53. *Id.* at 578, 223 N.W.2d at 58. See also *supra* note 23.

54. *Glover*, 192 Neb. at 578, 223 N.W.2d at 58.

55. *Id.*

56. *Id.*

57. See NEB. REV. STAT. U.C.C. § 9-504(3) (emphasis added).

58. *Glover*, 192 Neb. at 579, 223 N.W.2d at 59.

59. *Id.*

require him to give notice of the time and place of sale. In some instances it will be to the creditor's advantage to do so. On the other hand, to permit him to proceed otherwise does place an onerous burden on the debtor. . . . If the creditor wishes a deficiency judgment, he must obey the law. If he does not obey the law he cannot secure a deficiency judgment.⁶⁰

Besides requiring the giving of notice as a condition precedent to obtaining a deficiency judgment, the *Glover* case also exemplified the broad interpretation of the term "debtor."⁶¹ As defined by section 9-105(1)(d) of the Nebraska U.C.C., a "debtor" is:

the person who owes payment or other performance of the obligation secured, whether or not he owns or has rights in the collateral, and includes the seller of accounts or chattel paper. Where the debtor and the owner of the collateral are not the same person, the term "debtor" means the owner of the collateral in any provision of the article dealing with the collateral, the obligor in any provision dealing with the obligation, and may include both where the context so requires.⁶²

The court in *Glover* concluded that as defined in the Nebraska U.C.C., the term "debtor" encompassed the term "accommodation maker," entitling the accommodation maker to notice.⁶³

Similarly, the Nebraska Supreme Court has included guarantors within the definition of "debtor," thus requiring that guarantors receive notice of sale.⁶⁴ In fact, a majority of courts have considered a guarantor to be within the meaning of the term debtor.⁶⁵ Therefore,

60. *Id.* at 579-80, 223 N.W.2d at 59.

61. *See Glover*, 192 Neb. at 578, 223 N.W.2d at 58.

62. NEB. REV. STAT. U.C.C. § 9-105(1)(d).

63. *Glover*, 192 Neb. at 578, 223 N.W.2d at 58.

64. *See, e.g., Allis-Chalmers Corp. v. Haumont*, 220 Neb. 509, 512, 371 N.W.2d 97, 99 (1985) (stating that a guarantor who owes payment or other performance of secured obligations was a debtor entitled to notice); *Borg-Warner v. Watton*, 215 Neb. 318, 323, 338 N.W.2d 612, 615 (1983) (maintaining that a guarantor on a guarantee of secured debt contemplating future secured debts was a debtor entitled to notice); *Butte State Bank v. Williamson*, 215 Neb. 296, 298, 338 N.W.2d 598, 600 (1983) (finding that a guarantor of his son's past-due promissory notes was within the meaning of the term debtor, entitling the guarantor to notice); *First National Bank and Trust Company of Fremont v. Hughes*, 214 Neb. 42, 46, 332 N.W.2d 674, 677 (1983) (holding that a guarantor on a corporate debt was within the statutory meaning of the term debtor, therefore the guarantor was entitled to notice).

65. *Connolly v. Bank of Sonoma County*, 184 Cal. App. 3d 1119, 1124, 229 Cal. Rptr. 396, 399 (Ct. App. 1986) (finding that given the guarantors' position as shareholders of the debtor-corporation and guarantors' potential liability on the principal debt, the guarantors should be considered as debtors entitled to protective measures such as notice and a disallowance of any waivers prior to default). *See, e.g., First Alabama Bank of Montgomery v. Parsons*, 390 So. 2d 640, 642-43 (Ala. Civ. App. 1980) (following the reasoning that because of potential liability for a deficiency, the guarantor has as

most courts have held that guarantors, as well as debtors, deserve notice.⁶⁶

Typically, a guaranty has been defined as "a collateral undertaking by one person to answer for the payment of a debt or the performance of some contract or duty."⁶⁷ The guaranty is independent of "the principal contract which is guaranteed" with the guarantor's liability being "secondary rather than primary."⁶⁸ Because upon default the guarantor becomes the primary debtor and is liable for any deficiency, the guarantor has as much interest in a beneficial disposition of the collateral as does the primary debtor.⁶⁹ Thus, notice is proper.⁷⁰

THE HUGHES CASE

Recently, several cases in Nebraska have focused on the propriety of certain notices of sale as related to guarantors.⁷¹ Yet, the Nebraska Supreme Court has treated the issue of notice of sale to guarantors in a unique manner.⁷² In 1983, the Nebraska Supreme

much stake in the sale of collateral as does a debtor. Therefore, the guarantor is a debtor within the meaning of the statute, entitling the guarantor to notice); *First Nat'l Bank of Denver v. Cillessen*, 662 P.2d 598, 600 (Colo. Ct. App. 1980) (electing to follow the majority of jurisdictions holding that accommodation co-makers and others who will be called upon to pay deficiencies are considered debtors); *Hepworth v. Orlando Bank & Trust*, 323 So. 2d 41, 42 (Fla. Dist. Ct. App. 1975) (stating that the guarantors of a promissory note were within the statutory meaning of the term debtors entitling them to reasonable notification prior to disposition of the collateral); *Liberty Bank v. Honolulu Providoring, Inc.*, 65 Haw. 273, —, 650 P.2d 576, 580 (1982) (finding the guarantor to be a borrower or debtor, entitling the guarantor to five days notice prior to the selling of collateral as dictated within a notice agreement stating "Notice to Borrower"); *McEntire v. Indiana Nat'l Bank*, 471 N.E.2d 1216, 1223 (Ind. Ct. App. 1985) (holding that because a guarantor becomes primarily liable on the debt, the guarantor becomes a person who "owes payment or other performance of the obligation secured," within the statutory definition of the term debtor); *Chemlease Worldwide Inc. v. Brace, Inc.*, 338 N.W.2d 428, 433 (Minn. 1983) (finding that a guarantor of a leasing agreement was considered to be a debtor within the statutory definition); *Adams v. B & D Builders & Developers*, 144 Vt. 353, —, 477 A.2d 628, 630 (1984) (stating that the guarantors of the debtor corporations obligation were debtors within the meaning of the statute, entitling the guarantors to notice); *Rhoten v. United Virginia Bank*, 221 Va. 222, —, 269 S.E.2d 781, 785 (1980) (reasoning that the context within which the term debtor was used in the statute required that a guarantor be included within the meaning of the term).

66. *Connolly v. Bank of Sonoma County*, 184 Cal. App. 3d at 1124, 229 Cal. Rptr. at 399.

67. *Chiles, Heider & Co. v. Pawnee Meadows, Inc.*, 217 Neb. 315, 319, 350 N.W.2d 1, 4 (1984) (citing *In re Estate of Williams*, 148 Neb. 208, 215-16, 26 N.W.2d 847, 851 (1947)).

68. *Id.*

69. *Connolly*, 184 Cal. App. 3d at 1124, 229 Cal. Rptr. at 399.

70. *Id.*

71. *Wright, "Traps and Pitfalls: The Nebraska Supreme Court's Rule on Notices of Sale to Guarantors*, 21 CREIGHTON L. REV. 557, 558 (1988).

72. *Id.* at 564.

Court, in *First National Bank and Trust Company of Fremont v. Hughes*,⁷³ affirmed the dismissal of a creditor's petition for a deficiency because of insufficiency of notice of sale to a guarantor.⁷⁴ The notice in question in *Hughes* was sent to one guarantor, Vernor Hughes, as "Mr. Venor [sic] Hughes, President Central Auto & Truck Supply."⁷⁵ It described the collateral as "Collateral: Financing Statement 5-9-74."⁷⁶ The notice indicated that "Local, State and Federal laws permitting, you will be held liable for any deficiency declared owing after disposal of this collateral."⁷⁷ The court stated that the notice did not refer to the guaranty agreement executed by Vernor Hughes, instead it referred only to "Financing Statement: 5-9-74."⁷⁸ In fact, the security agreement was dated May 24, 1974 and was not signed by Hughes.⁷⁹

The Nebraska Supreme Court determined that the notice had failed to inform the guarantor of possible deficiency liability on the corporate debt.⁸⁰ In addition, the notice was ambiguous as to whom it was sent — Central Auto as the debtor, or Vernor Hughes as the guarantor — and consequently, provided little clarity as to whether Mr. Hughes, as guarantor, was the "you" who "will be liable for any deficiency."⁸¹ The court considered the notice to be ambiguous and therefore construed the vague language against the drafter.⁸²

73. 214 Neb. 42, 332 N.W.2d 674 (1983).

74. *Id.* at 47, 332 N.W.2d at 678.

75. *Id.* at 44-45, 332 N.W.2d at 676. The notice stated:

Mr. Venor [sic] Hughes, President
Central Auto & Truck Supply
1558 East 5th
Fremont, NE 68025
RE: Loan #869930

Collateral: Financing Statement 5-9-74

Dear Mr. Hughes:

This is to notify you that, in connection with the repossession of the above collateral involved in the abovee [sic] account, you may redeem said collateral and terminate the contract relating thereto by payment of \$51,417.90 plus interest and expenses any time prior to the sale of said collateral on the date designated below. It is possible for this sum to increase should further expenses of any nature be incurred by our bank.

In the event you are not able to fully redeem the collateral or make suitable arrangements for redemption, the collateral will be sold at private sale on or after April 10, 1981 at the present place of storage which is 245 East 5th St., and First National Bank & Trust Company of Fremont.

Local, State and Federal laws permitting, you will be held liable for any deficiency declared owing after disposal of this collateral.

Id.

76. *Id.* at 44, 332 N.W.2d at 676.

77. *Id.* at 45, 332 N.W.2d at 676.

78. *Id.* at 46, 332 N.W.2d at 677.

79. *Id.*

80. *Id.*

81. *Id.*

82. *Id.* at 46-47, 332 N.W.2d at 677.

THE HI-BO FARMS CASE

In 1987, the Nebraska Supreme Court, in *Deutsche Credit Corp. v. Hi-Bo Farms, Inc.*,⁸³ confronted a similar issue regarding proper notice of sale to guarantors who were also officers of the corporate debtor.⁸⁴ After Hi-Bo Farms had defaulted and surrendered the collateral, Deutsche Credit Corp. sent a notice of private sale to Hi-Bo Farms, Inc., as well as separate notices to each of the guarantors.⁸⁵ After a sale of the collateral, a deficiency remained, fostering an action for a deficiency judgment by the secured creditor, Deutsche Credit Corporation.⁸⁶

The secured creditor attempted to distinguish this case from *Hughes* because more than one notice was sent to the guarantors.⁸⁷ As noted by the secured creditor, each guarantor of the Hi-Bo Farms debt received a notice.⁸⁸ Also, each guarantor had been addressed individually, unlike in *Hughes*, where the notice was addressed to "Mr. Venor [sic] Hughes, President Central Auto & Truck Supply."⁸⁹ Finally, the secured creditor contended that the notices focused attention on the entire Hi-Bo Farms transaction, while in *Hughes*, the notice referred only to "Collateral: Financing Statement 5-9-74."⁹⁰ According to the secured creditor, reference to the entire agreement included the guaranty, while reference to "Financing Statement 5-9-74" focused attention on only the security arrangement and the individual's status as a debtor.⁹¹

83. 224 Neb. 463, 398 N.W.2d 693 (1987).

84. *Id.* at 464, 398 N.W.2d at 695. The notice stated:

RE: HI-BO FARMS INC.

You are hereby notified by and on behalf of the undersigned secured party that by virtue of the default under the terms and provisions of a security agreement executed by the captioned Debtor dated 06-28-81, the undersigned secured party, holder of the aforesaid agreement and the indebtedness represented thereby [sic] will, on or after 08-18-84 make one or more private sales or other dispositions of our right, title and interest in and to the goods described in said agreement, which goods may be described as follows:

ONE WHITE 9700 COMBINE S/N 97-20218

W/CORNHEAD S/N A90065, AND

KWICK CUT

HEAD S/N 912118

The net proceeds of sale (less expenses incurred) shall be, in accordance with said agreement, applied to the reduction of total obligation due and owing by Debtor to the undersigned secured party. Dated this 7TH day of AUGUST 1984. Deutsche Credit Corporation.

Id. at 465, 398 N.W.2d at 695.

85. *Id.* at 465, 398 N.W.2d at 695.

86. *Id.*

87. *Id.* at 468, 398 N.W.2d at 696-97.

88. *Id.* at 468, 398 N.W.2d at 697.

89. *Id.*

90. *Id.*

91. See *supra* notes 76-79 and accompanying text.

The Nebraska Supreme Court concluded that the notices, as construed against the drafter, were ambiguous as a matter of law.⁹² The notices referred to a single debtor and that debtor's security agreement, without referring to the guaranties.⁹³ The court held that it was as if no notice had been given at all.⁹⁴

In his dissenting opinion, Judge Boslaugh commented that the intent of the U.C.C. was to simplify commercial transactions.⁹⁵ Further, he stated that:

Our decisions run contrary to that purpose by creating numerous traps and pitfalls for the unwary creditor. The majority opinion seems to indicate that the notice must include legal advice to the debtor as to why he may be liable for a deficiency. What ought to be a simple procedure has become a highly technical matter in which skilled legal advice is necessary to avoid disaster.⁹⁶

THE LEWIS AND BENNETT CASES

In 1988, the Nebraska Supreme Court examined yet another case involving a notice of sale to a guarantor, *General Electric Credit Corp. v. Lewis*.⁹⁷ Unlike the previous cases, *Lewis* involved non-corporate debtors and their guarantor.⁹⁸ In *Lewis*, William Thompson III and Donna Ahrens, the debtors, entered into a security agreement with General Electric Credit Corp. ("GECC"), the secured creditor.⁹⁹ Gerald B. Lewis, the guarantor, who did not participate in the security agreement, executed a guaranty covering all of Thompson's and Ahrens's debts to GECC.¹⁰⁰ Then, after a default on the security agreement, GECC repossessed the collateral, mailed a notice of sale to Lewis, and thereafter sold the collateral.¹⁰¹ Because the sale did

92. *Hughes*, 214 Neb. at 468, 398 N.W.2d at 697.

93. *Id.*

94. *Id.*

95. *Id.* at 471, 332 N.W.2d at 698 (Boslaugh, J., dissenting).

96. *Id.*

97. 230 Neb. 429, 432 N.W.2d 27 (1988).

98. *Id.* at 430, 432 N.W.2d at 28.

99. *Id.*

100. *Id.*

101. *Id.* The notice involved stated:

TO: Gerald B. Lewis
C/O Lewis Service Center
4101 West "O" Street
Lincoln, NB 68528

PLEASE TAKE NOTICE that the following described collateral of which we have taken possession pursuant to Chattel Mortgage dated August 10, 1983 in which William Thompson III and Donna Ahrens is the Debtor [sic] and we are the Secured Party, will be sold by: . . . Private Sale on or after November 30, 1983 at 2333 Waukegan Road, Bannockburn, Illinois 60015

DESCRIPTION OF COLLATERAL: One (1) 1981 Mack Truck Tractor.

not cover the full amount of the debt GECC brought an action for a deficiency judgment against Lewis as guarantor of the debt.¹⁰²

Once again, however, the Nebraska Supreme Court rejected the secured creditor's claim for a deficiency judgment against a guarantor because of the insufficiency of the notice provided.¹⁰³ In interpreting section 9-504(3), the court reasoned that the notice provision was intended to protect the guarantor's interest.¹⁰⁴ The court determined that in order to be able to protect the guarantor's interest, the creditor must inform the guarantor of the potential liability for a deficiency judgment.¹⁰⁵ The court rejected the creditor's deficiency petition because the notice did not inform the guarantor of his potential liability for a deficiency judgment or refer to the guaranty that he had executed.¹⁰⁶

In the 1989 case *American Honda Finance Corp. v. Bennett*,¹⁰⁷ the Nebraska Supreme Court examined another notice of sale sent to guarantors who were officers of the corporate debtor, Bennett Gun & Cycle, Inc.¹⁰⁸ The creditor had mailed a notice to Bennett Gun & Cycle, with an identical notice sent the same day to the guarantors, Ron and Shirley Bennett.¹⁰⁹ The notices had been sent in the same envelope and differed only as to the first line of the inside address.¹¹⁰

The court in *Bennett* acknowledged that separate notices were sent to the primary debtors as well as the guarantors.¹¹¹ However, the court emphasized that the notice did not mention the guaranty.¹¹² Secondly, the court rejected the notice because it did not mention the Bennetts' potential liability as guarantors for a deficiency.¹¹³ Finally, the notice stated that it was sent "pursuant to the security agreement between you and American Honda Finance Cor-

Id. at 430-31, 432 N.W.2d at 28.

102. *Id.* at 431, 432 N.W.2d at 28-29.

103. *Id.* at 434, 432 N.W.2d at 30.

104. *Id.* See also NEB. REV. STAT. U.C.C. § 9-504(3) (Reissue 1980).

105. *Lewis*, 230 Neb. at 434, 432 N.W.2d at 30.

106. *Id.*

107. 232 Neb. 21, 439 N.W.2d 459 (1989).

108. *Id.* at 22, 439 N.W.2d at 461.

109. *Id.* The notice said:

RE: Repossessed Motorcycles and Power Equipment

Dear *Ronald and Shirley Bennett*:

Please [sic] be advised that on or after 8:00 AM, on *October 24, 1986*, American Honda Finance Corporation will sell at private sale the collateral heretofore repossessed from you by American Honda Finance Corporation pursuant to the Security Agreement between you and American Honda Finance Corporation. Such collateral consist[s] of *Motorcycles and Power Equipment*.

Id.

110. *Id.*

111. *Id.* at 24, 439 N.W.2d at 462.

112. *Id.*

113. *Id.* at 25, 439 N.W.2d at 462.

poration" as well as referred to collateral and equipment repossessed from "you."¹¹⁴ From the notice, the court deduced that the "you" clearly referred to Bennett's Gun & Cycle as debtors and not Ron and Shirley Bennett as guarantors.¹¹⁵ Thus, a deficiency judgment against a guarantor was once again foreclosed by insufficient notice of sale.¹¹⁶

BANK OF BURWELL V. KELLEY: USE OF PAROL EVIDENCE

In *Hughes, Hi-Bo Farms, Lewis, and Bennett* the Nebraska Supreme Court did not resort to the parol evidence rule when addressing the issue of ambiguous notices of sale sent to a guarantor under section 9-504(3).¹¹⁷ After *Bennett*, it seemed evident that proper notice to a guarantor must avoid confusion as to whether the notice was being sent to an individual as debtor or as guarantor, inform the guarantor of the possible liability for any deficiency, and specifically refer to the guaranty.¹¹⁸ Then, in 1989, the decision in *Bank of Burwell v. Kelley*¹¹⁹ allowed the use of the parol evidence rule to resolve ambiguities within the notice of sale.¹²⁰

In *Kelley*, the plaintiff, Bank of Burwell ("Bank"), appealed from a summary judgment which was entered in favor of the defendant-appellees, Rex Kelley, Roger Kelley, and Florence Kelley White.¹²¹ The appeal stemmed from the district court's holding that the notices of a collateral sale pursuant to section 9-504(3) of the Nebraska U.C.C. were unreasonable as a matter of law, and thus barred a deficiency judgment under section 9-504(2).¹²²

In 1976, Max Kelley, formed a corporation known as Kelley Irrigation Inc. and sold shares of stock in the corporation to his mother, Florence Kelley White, and to his brothers, Rex and Roger Kelley.¹²³ Max and Roger Kelley served as president and vice-president respectively.¹²⁴ Apparently, Florence Kelley White served as secretary while Rex Kelley served as treasurer.¹²⁵ Rex Kelley later became

114. *Id.* at 24-25, 439 N.W.2d at 462.

115. *Id.* at 25, 439 N.W.2d at 462.

116. *Id.* at 25, 439 N.W.2d at 463.

117. *See supra* notes 71-116 and accompanying text. *See also supra* note 3 and accompanying text.

118. *See supra* notes 71-116 and accompanying text.

119. 233 Neb. 396, 445 N.W.2d 871 (1989).

120. *Id.* at 410, 445 N.W.2d at 879.

121. *Id.* at 397, 445 N.W.2d at 872.

122. *Kelley*, 233 Neb. at 397, 445 N.W.2d at 872. *See also supra* notes 3 and 37 and accompanying text.

123. 233 Neb. at 397, 445 N.W.2d at 872.

124. *Id.*

125. Brief of Appellees at 4, *Bank of Burwell v. Kelley*, 233 Neb. 396, 445 N.W.2d 871 (1989) (No. 87-880). The court indicated that the facts were unclear as to the offi-

second vice-president.¹²⁶

On June 17, 1976, the Bank executed a \$170,000 loan to Kelley Irrigation, and Max Kelley, Rex Kelley, Roger Kelley, and Florence Kelley White individually signed a guaranty agreement.¹²⁷ Bank records indicated that the original \$170,000 loan was considered paid on August 26, 1976.¹²⁸ Later, on April 3, 1978, after apparently repaying their previous indebtedness, the Kelleys received another loan from the Bank.¹²⁹ The loan arrangements between the parties culminated in a \$290,000 note, signed only by Max Kelley, on March 20, 1985.¹³⁰ This note was due September 16, 1985.¹³¹ The March 20th note indicated that the guaranty of June 17, 1976 was security for the present loan.¹³²

The Bank soon became concerned about the loan.¹³³ Several letters followed expressing the concern over the debt of the corporation.¹³⁴ A September 28, 1984, letter sent to each guarantor from Bank president Robert McEvoy, warned that the Kelleys' notes were ninety days past due.¹³⁵ The September 28th letters also reminded the Kelleys of their status as guarantors.¹³⁶

In the fall of 1984, McEvoy wrote another letter to each of the

cial titles of Florence Kelley White and Rex Kelley. *Kelley*, 233 Neb. at 397, 445 N.W.2d at 872.

126. Brief of Appellees at 4.

127. Brief for Appellants at 6, *Bank of Burwell v. Kelley*, 233 Neb. 396, 445 N.W.2d 871 (1989) (No. 87-880).

128. *Kelley*, 233 Neb. at 397, 445 N.W.2d at 872.

129. *Id.* at 397-98, 445 N.W.2d at 872.

130. *Id.* at 398, 445 N.W.2d at 872.

131. *Id.*

132. *Id.*

133. *Id.*

134. *See id.* at 398-99, 445 N.W.2d 872-73.

135. Brief for Appellants at Appendix B. The letter stated:

Folks:

It is necessary for me to advise you, as guarantors, that the notes for the above captioned corporation will be ninety (90) days past due on October 1, 1984. These notes have a principle sum of \$285,028.41 plus interest to that date of \$31,383.59 for a total obligation of \$316,412.00. According to the regulation under which we are required to comply it will then become a "non-performing loan" and we must take any necessary action to effect collection.

As each of you has entered into an agreement to guaranty this line of credit, lets [sic] get something worked out so that this will not be necessary. However, if the interest is not paid, a reduction in principle acceptable to this bank made, and a reasonable plan of repayment presented for our approval, I will have to place this in the hands of our attorneys for whatever action they deem necessary.

Very truly yours,

Robert K. McEvoy
President

Id.

136. *Kelley*, 233 Neb. at 398, 445 N.W.2d at 872.

Kelleys advising them as to their status as guarantors and that a deficiency judgment could be brought against the Kelleys' personal assets.¹³⁷ A March 20, 1985, letter on Bank letterhead also indicated that the Kelleys' guaranties were partial security for the loan.¹³⁸ More letters from McEvoy followed on March 22, 1985, advising the Kelleys that the Bank was "still relying heavily on your personal guarantee."¹³⁹ On September 10, 1985, McEvoy, in a letter sent to each of the Kelleys, referred to the "company and personal obliga-

137. *Id.* at 398, 445 N.W.2d at 872-73; Brief for Appellants at Appendix C. This letter stated:

This is to advise you as an officer as well as a personal guarantor on the above captioned line of credit, that the severely past due note of your corporation must be brought current no later than [sic] December 3, 1984.

If this second letter is also ignored we will take legal action in this matter. Further, be advised that if the total liquidation of this corporation does not pay the entire principle plus interest [sic] on this loan, we will then move for a deficiency judgement [sic] against your personal assets to the extent necessary to pay the total remaining balance due.

Very truly yours,

Robert K. McEvoy
President

Brief for Appellants at Appendix C.

138. *Kelley*, 233 Neb. at 398, 445 N.W.2d at 873. The March 20, 1985, letter was also sent to each of the guarantors. *Id.* See also Brief for Appellants at Appendix D. The letter read:

Dear Stockholder and Guarantor:

This letter is to inform you that on March 20, 1985, I have renewed the Kelley Irrigation, Inc., note at the Bank of Burwell, in the amount of \$290,000.00. The note is at 14.5% interest and matures September 16, 1985.

The renewal is secured by a Real Estate Mortgage on Kelley Irrigation, Inc., property, titled vehicles, a financing statement security agreement covering all present and future; accounts receivable, equipment, contract rights, inventory and guarantees from stockholders.

This letter is to keep you fully informed of actions taken by me as president.

Sincerely,

Kelley Irrigation, Inc.
Max W. Kelley, President

Brief for Appellants at Appendix D.

139. *Kelley*, at 398-99, 445 N.W.2d at 873. See also Brief for Appellants at Appendix E. The letter stated:

Dear Roger:

I know you have received a letter from Max outlining the arrangement he and this bank arrived at last Wednesday concerning the obligations of the above captioned corporation [Kelley Irrigation, Inc.].

This letter is to confirm that we have acquired additional supporting collateral from the corporation including the real estate and titled vehicles. However, with these stressful conditions we feel you should be advised that we are still relying heavily on your personal guarantee as a very important part of this new arrangement with the corporation.

I have enclosed a photo copy of this personal guarantee in case you need to refer to it.

Very truly yours,

Robert K. McEvoy
President

Brief for Appellants at Appendix E.

tion[s]" of the Kelleys.¹⁴⁰ Then, on March 31, 1986, the attorney for the Bank sent letters to each guarantor reminding the Kelleys "that on June 17, 1976 you executed a Guaranty to the Bank of Burwell to induce the Bank of Burwell to lend money to Kelley Irrigation, Inc."¹⁴¹ Additionally, the letter mentioned that the Bank would seek legal recourse if the notes were not paid by April 15, 1986, stating that if full payment did not occur, "[the Bank] will be looking for payment from you under the terms of the Guaranty agreement."¹⁴² Furthermore, the letter emphasized that "[the Bank] would like your cooperation in helping to achieve a workout of this matter so that we can maximize the proceeds of the liquidation and thereby reduce the amount of your liability under the Guaranty."¹⁴³

When no payment occurred, an action to recover possession of

140. *Kelley*, 233 Neb. at 399, 445 N.W.2d at 873. See also Brief for Appellants at Appendix F. The September 10, 1985 letter provided:

Dear Stockholders and Guarantors:

This is to remind you, and each of you, that the notes of Kelley Irrigation, Inc., Burwell, Nebraska in the amount of \$290,000.00 will be due and payable on September 16, 1985. This note will have earned interest in the amount of \$20,736.98 on that due date, making a total amount due and payable of \$310,736.98.

Pleas [sic] make arrangements to meet this company and personal obligation on or before that date.

Very truly yours,

Robert K. McEvoy
President

Brief for Appellants at Appendix F.

141. *Kelley*, 233 Neb. at 399, 445 N.W.2d at 873. See also Brief for Appellants at Appendix G. The March 31, 1986 letter stated:

Dear Guarantors:

You will recall that on June 17, 1976 you executed a Guaranty to the Bank of Burwell to induce the Bank of Burwell to lend money to Kelley Irrigation, Inc., Burwell, Nebraska. Pursuant to that Guaranty, and in reliance thereon, the Bank did lend monies to Kelley Irrigation, Inc. Presently, the corporation owes to the Bank the amount of \$290,000.00 plus interest, and that amount has been past due since September 16, 1985. From that time the bank has worked with the corporation in an attempt to effect an orderly liquidation of the assets. However, to date the corporation has been unable to achieve that goal. We have notified the corporation that if the notes are not paid by April 15, 1986, the Bank will seek legal recourse for the recovery of the amount of the Note and interest. If the amount is not paid by that time, we will be looking for payment from you under the terms of the Guaranty agreement. We would like your cooperation in helping to achieve a workout of this matter so that we can maximize the proceeds of the liquidation and thereby reduce the amount of your liability under the Guaranty. Please contact this office within ten (10) days from the date of this letter so that we can arrange a meeting of the corporation officials and the Guarantors so that the matter can be amicably worked out in the best interests of all parties.

Sincerely,

Robert E. Wheeler

Brief for Appellants at Appendix G.

142. *Kelley*, 233 Neb. at 399, 445 N.W.2d at 873.

143. *Id.*

the collateral and to obtain a judgment against Kelley Irrigation, Inc. on the \$290,000 note was filed on April 17.¹⁴⁴ On May 1, 1986, the Bank sent a letter indicating that the Bank had no alternative but to bring suit against the "corporation and its Guarantors."¹⁴⁵ In addition, the letter stated that assistance from the guarantors in liquidating the assets of the corporation would bring a higher price and "when one considers that each of you are personally liable for the indebtedness of the corporation it would seem to be an advantage to you that the corporation obtain liquidation at the highest possible prices."¹⁴⁶

On June 18, 1986, the Bank obtained a judgment on the \$290,000 note and was awarded possession of the collateral.¹⁴⁷ Soon thereafter, notices of the sale of collateral were sent.¹⁴⁸ The notices were

144. Brief for Appellants at 8.

145. *Kelley*, 233 Neb. at 399, 445 N.W.2d at 873. See also Brief for Appellants at Appendix H. The May 1, 1986 letters read:

Dear Sirs and Madams:

You will recall that I wrote to you as Guarantors on March 31, 1986. At that time, I attempted to set up a meeting between us so that the corporation officials and the Guarantors could amicably work out the matter of the corporation debt. I received no response from you. That left the bank with no alternative except to bring suit, which it now has done against both the corporation and its Guarantors. In principle, the bank would rather work these things out amicably than to proceed through litigation. As a practical matter, if the bank can solicit your help in liquidating the assets of the corporation, such a voluntary liquidation almost always will bring a greater price than would a forced sale. When one considers that each of you are personally liable for the indebtedness of the corporation, it would seem to be an advantage to you that the corporation obtain liquidation at the highest possible prices. The bank intends to proceed in each of the matters of litigation to judgment and collection, unless an earlier amicable resolution can be reached. Of course, the chances of negotiating an amicable resolution tends to diminish as the litigation progresses. Therefore, if you have any interest in resolving this matter short of full litigation, an early response is imperative.

Sincerely,

Robert E. Wheeler

Brief for Appellants at Appendix H.

146. *Kelley*, 233 Neb. at 400, 445 N.W.2d at 873-74.

147. Brief for Appellants at 9.

148. *Kelley*, 233 Neb. at 400, 445 N.W.2d at 874. The notice provided:

NOTICE OF PRIVATE SALE OF COLLATERAL ON DEFAULT

TO: Rex Kelley [or Roger Kelley or Max Kelley or Florence Kelley]
Burwell, Nebraska 68823

Please take Notice that pursuant to a security agreement dated *March 20, 1985*, between *Kelley Irrigation, Inc.* and the *Bank of Burwell*, Burwell, NE., county of Garfield, which was filed in the office of the *Clerk* of the County of Garfield, State of Nebraska, the undersigned shall sell at private sale your *1972 Ford F650 truck with 10T Smeal, S/N F61CCM4609*, which was the collateral pledged to the security agreement executed above, *due to the default of the Note*. The collateral shall be offered for sale at *Kelley Irrigation, Inc. building* in Burwell, County of Garfield, State of Nebraska, on *Oct. 6, 1986* after 12:00 p.m. The above collateral items are listed with the offered price from the following individual. You will be liable for any deficiency resulting from the sale of the collateral. You may redeem the collateral by paying the

sent to each guarantor as "Mr. Max Kelley, President of Kelley Irrigation, Inc.," "Florence Kelley White," "Rex Kelley," and "Roger Kelley."¹⁴⁹ At their depositions, Florence Kelley White, Roger Kelley and Rex Kelley indicated their ignorance of the contents of the various letters and notices sent by the Bank to them.¹⁵⁰ While acknowledging receipt of the letters and notices, the Kelleys ignored the documents, mistakenly believing that their guaranty agreement of June 17, 1976 only covered the initial \$170,000 loan.¹⁵¹

The district court held that the Kelleys were corporate officers and directors entitled to notices of sale.¹⁵² The district court granted the Kelleys' motion for summary judgment, holding that the notices of sale of collateral were ambiguous as a matter of law.¹⁵³ This decision barred the Bank's recovery of a deficiency judgment.¹⁵⁴ On appeal, the Bank insisted that the district court had erred in holding as a matter of law that the notices of sale were ambiguous and therefore insufficient under Nebraska U.C.C. 9-504(3).¹⁵⁵ Also, the bank stated that the district court had erred in holding that there were no questions of material fact remaining to be decided in the case.¹⁵⁶

The Nebraska Supreme Court concluded that confusion existed as to whether the notices were sent to the Kelleys in their corporate

amount due on the obligation secured by the security agreement at any time prior to the date of the sale. This notice is given pursuant to UCC 9-504(3).

Offer to Purchase From: Mr. Kent Glenn
dba Glenn's Electric
Logan, Utah
(801) 752-4178

Respectfully submitted by:
/s/ Paul E. Rainbolt, SVP
THE BANK OF BURWELL
P.O. Box 610
Burwell, Ne. 68823

Brief for Appellants at 10.

149. *Kelley*, 233 Neb. at 400, 445 N.W.2d at 874.

150. Brief for Appellants at 10. Typically, the questions and answers proceeded as the following did with Roger Kelley:

Q: Did you also understand in each of those letters that I [Robert Wheeler] was asking you to contact me or the bank to try to work out something that would be mutually satisfactory for the corporation, bank, and the guarantors?

A: I didn't consider myself a guarantor.

Q: Well did you understand that this letter was addressed to you as though you were a guarantor?

A: I didn't understand that.

Id. at 11.

151. *Kelley*, 233 Neb. at 400, 445 N.W.2d at 874.

152. Brief of Appellees at 2.

153. *Id.*

154. *Id.*

155. Brief for Appellants at 2.

156. *Id.*

or individual capacities.¹⁵⁷ As noted by the court, the notice referred to the sale of "your" collateral, indicating reference to the Kelleys as debtors under the security agreement.¹⁵⁸ Furthermore, the court determined that the statement "you will be liable for any deficiency" was also ambiguous as to whether the corporation or the Kelleys individually were liable.¹⁵⁹ Additionally, the court acknowledged that the notices omitted any reference to the guaranty signed by the Kelleys.¹⁶⁰ Still, the court reasoned that summary judgment was inappropriate because genuine issues of material fact existed as to the propriety of the notices.¹⁶¹ The court observed that, unlike in previous Nebraska cases discussing the same issue, the notices in *Kelley* did not represent the creditor's only communications with the guarantors.¹⁶² The court held that the previous letters to the Kelleys had clarified the ambiguities within the notices.¹⁶³ The court considered the correspondence as parol evidence to explain the vague and ambiguous language of the notices.¹⁶⁴

The *Kelley* case depended upon the construction of who the "you" referred to, as in "you will be liable for any deficiency."¹⁶⁵ In *Kelley*, the court cited *Olds v. Jamison*,¹⁶⁶ a 1976 Nebraska case involving the interpretation of the word "lessor" within a lease agreement.¹⁶⁷ In *Olds*, the Nebraska Supreme Court had concluded that the word "lessor" was ambiguous.¹⁶⁸ Thus, the court resorted to parol evidence to resolve the ambiguities of the word.¹⁶⁹

In *Kelley*, once again the Nebraska Supreme Court resorted to the use of the parol evidence rule.¹⁷⁰ This time the court used the rule to resolve the ambiguities of the word "you."¹⁷¹ The court in *Kelley* concluded that the propriety of the notices under section 9-

157. *Kelley*, 233 Neb. at 409, 445 N.W.2d at 878.

158. *Id.*

159. *Id.* at 409, 445 N.W.2d at 878-79.

160. *Id.* at 409, 445 N.W.2d at 879.

161. *Id.* at 411, 445 N.W.2d at 879.

162. *Id.* at 409, 445 N.W.2d at 879.

163. *Id.* at 409-10, 445 N.W.2d at 879.

164. *Id.* at 410, 445 N.W.2d at 879. "The parol evidence rule renders ineffective proof of a prior or contemporaneous oral agreement which alters, varies, or contradicts the terms of a written agreement." *Five Points Bank v. White*, 231 Neb. 568, 571, 437 N.W.2d 460, 462 (1989) (finding that the parol evidence rule barred the admission of oral negotiations which would have changed the unambiguous terms of a chattel mortgage note). The rule will not apply unless either ambiguity, fraud, or mistake is present in the written agreement. *Id.*

165. See *supra* notes 157-59 and accompanying text.

166. 195 Neb. 388, 238 N.W.2d 459 (1976).

167. *Id.* at 392-93, 238 N.W.2d at 462-63.

168. *Id.*

169. *Id.*

170. *Kelley*, 233 Neb. at 410, 445 N.W.2d at 879.

171. See *supra* notes 158-64 and accompanying text.

504(3) must be determined "in light of the entire conduct of the parties."¹⁷²

Judge White, in a dissenting opinion, contended that the decision departed from the "bright line . . . notice requirements" previously adopted by the Nebraska Supreme Court.¹⁷³ Judge Fahrnbruch, in his dissent, also considered the decision problematic in creating uncertainty for creditors, while encouraging increased litigation.¹⁷⁴

ANALYSIS

The Nebraska Supreme Court, in *Bank of Burwell v. Kelley*,¹⁷⁵ held that genuine issues of material fact existed as to whether a notice of sale to a guarantor was ambiguous.¹⁷⁶ The court remained consistent with its previous decisions addressing similar issues, still needing to develop a strict rule which would clarify the necessary elements of proper notice within the four corners of the notice itself.¹⁷⁷ The feature distinguishing *Kelley* from previous cases is the court's willingness to use parol evidence to clarify ambiguities within the notice.¹⁷⁸ The parol evidence created a question of fact as to whether the creditor had abided by the notice requirements of section 9-504(3) of the Nebraska Uniform Commercial Code ("U.C.C.").¹⁷⁹

As in *Olds v. Jamison*,¹⁸⁰ the court in *Kelley* specifically interpreted a singular word, the interpreted word in *Kelley* being "you," as in "you will be liable for any deficiency."¹⁸¹ For the court, the ambiguity of who the "you" could have been, was clarified by the several letters of correspondence received by the Kelleys.¹⁸² The letters indicated that the Kelleys as guarantors could be liable.¹⁸³ Unlike in previous Nebraska cases addressing similar issues, for example *First National Bank and Trust Company of Fremont v. Hughes*,¹⁸⁴ the am-

172. *Kelley*, 233 Neb. at 410, 445 N.W.2d at 879.

173. *Id.* at 411, 445 N.W.2d at 880 (White, J., dissenting).

174. *Id.* at 411-12, 445 N.W.2d at 880 (Fahrnbruch, J., dissenting).

175. 233 Neb. 396, 445 N.W.2d 871 (1989).

176. *See supra* notes 157-63 and accompanying text.

177. *See e.g.*, *American Honda Finance Corp. v. Bennett*, 232 Neb. 21, 439 N.W.2d 459 (1989); *General Electric Credit Corp. v. Lewis*, 230 Neb. 429, 432 N.W.2d 27 (1988); *Deutsche Credit Corp. v. Hi-Bo Farms, Inc.*, 224 Neb. 463, 398 N.W.2d 693 (1987); *First National Bank and Trust Co. of Fremont v. Hughes*, 214 Neb. 42, 332 N.W.2d 674 (1983); *see supra* notes 157-60 and accompanying text.

178. *See supra* notes 80-82, 92-96, 111-16, 157-64 and accompanying text.

179. *Kelley*, 233 Neb. at 411, 445 N.W.2d at 879.

180. 195 Neb. 388, 238 N.W.2d 459 (1976).

181. *Kelley*, 233 Neb. at 409, 445 N.W.2d at 878. *See supra* notes 157-63 and accompanying text.

182. *See supra* notes 157-63 and accompanying text.

183. *See supra* notes 157-63 and accompanying text.

184. 214 Neb. 42, 332 N.W.2d 674 (1983).

biguities did not need to be resolved against the drafter of the notices because the application of the parol evidence rule alleviated the ambiguities.¹⁸⁵ Similarly, the Nebraska Supreme Court in *Kelley* relied on precedent, holding that "a written instrument is open to explanation by parol evidence when its terms are susceptible to two constructions or where the language employed is vague or ambiguous."¹⁸⁶

Nevertheless, the *Kelley* case remains consistent with the previous Nebraska cases.¹⁸⁷ Unlike in *Hughes, Deutsche Credit Corp. v. Hi-Bo Farms, Inc.*,¹⁸⁸ *General Electric Credit Corp. v. Lewis*,¹⁸⁹ and *American Honda Finance Corp. v. Bennett*¹⁹⁰ the creditor's correspondence to the guarantor distinguish the *Kelley* case.¹⁹¹ With the inclusion of the information within that correspondence, the notice appraises the guarantor of the potential liability for a deficiency and can be considered unambiguous as to who is being notified.¹⁹² Unlike the previous cases, the notice involved in *Kelley* was sent directly to the guarantor, individually, without reference to the guarantor's corporate capacity.¹⁹³ Also, the notice referred to the security agreement which gave the bank rights in the collateral and the notice specifically described the property being sold, as well as provided the time and place of the sale.¹⁹⁴ In reality, the Nebraska Supreme Court's decision in the *Kelley* case differs from previous Nebraska cases only in that it allows a notice to be adequate even though that notice does not expressly mention the guaranty.¹⁹⁵

The distinguishing characteristic of *Kelley* is the use of the parol evidence rule to clarify the capacity in which the person receives the notice.¹⁹⁶ Generally, parol evidence is a concept associated with the

185. See, e.g., *Hughes*, 214 Neb. 42, 332 N.W.2d 674 (1983). See *supra* notes 73-82 and accompanying text.

186. *Kelley*, 233 Neb. at 410, 445 N.W.2d at 879 (citing *Olds v. Jamison*, 195 Neb. 391-92, 238 N.W.2d at 462).

187. See, e.g., *American Honda Finance Corp. v. Bennett*, 232 Neb. 21, 439 N.W.2d 459 (1989); *General Electric Credit Corp. v. Lewis*, 230 Neb. 429, 432 N.W.2d 27 (1988); *Deutsche Credit Corp. v. Hi-Bo Farms, Inc.*, 224 Neb. 463, 398 N.W.2d 693 (1987); *First National Bank and Trust Co. of Fremont v. Hughes*, 214 Neb. 42, 332 N.W.2d 674 (1983); see *supra* notes 73-116 and accompanying text.

188. 224 Neb. 463, 398 N.W.2d 674 (1983).

189. 230 Neb. 429, 432 N.W.2d 27 (1988).

190. 232 Neb. 21, 439 N.W.2d 459 (1989).

191. *Kelley*, 233 Neb. at 409, 445 N.W.2d at 879.

192. See *supra* notes 157-63 and accompanying text. See also Brief for Appellants at 16-18, *Bank of Burwell v. Kelley*, 233 Neb. 396, 445 N.W.2d 871 (1989) (No. 87-880).

193. See *supra* notes 148-49 and accompanying text. See also Brief for Appellants at 16.

194. *Kelley*, 233 Neb. at 401-02, 445 N.W.2d at 874.

195. See *supra* note 160 and accompanying text. See also Brief for Appellants at 16; Brief of Appellees at 16.

196. See *supra* notes 162-64 and accompanying text.

law of contracts.¹⁹⁷ But, as opposed to the law of contracts, a U.C.C. notice of sale does not constitute a contract.¹⁹⁸ Instead, the U.C.C. notice, as exemplified in *Kelley*, was drafted by the creditor, with no involvement from the debtor or guarantor as to the information present in the notice.¹⁹⁹ Technically, the debtor or guarantor is at the mercy of the creditor's desires.²⁰⁰

For the guarantor, the *Kelley* decision means that a notice of sale, even though at times confusing, can still be considered unambiguous if previous correspondence to the guarantor has apparently resolved the ambiguity.²⁰¹ If this is truly the meaning of the case, the guarantor may be required to be attentive not only to the U.C.C. 9-504(3) notice of sale requirements, but also to any other document providing information about the status of the guarantor and dispelling vagueness within the notice.²⁰²

In addition, because parol evidence encompasses oral statements as well as written ones, oral evidence could also be used to resolve ambiguities.²⁰³ As noted in *DeLay First National Bank & Trust Co. v. Jacobson Appliance Co.*,²⁰⁴ "the requirement of a written notice eliminates all possibility of dispute as to whether a notice was actually given. It also establishes what notice was given."²⁰⁵ Furthermore, as interpreted by the court in *DeLay*, the Uniform Commercial Code indicates that written notice is required.²⁰⁶ With the inclusion of oral statements assisting in the provision of notice, the rule of *DeLay* is eviscerated.²⁰⁷

The court should evaluate the notice within the four corners of the instrument.²⁰⁸ Instead, the *Kelley* decision creates the possibility that a notice can still be considered proper, even though the notice on its face does not contain the notice requirements previously outlined by the Nebraska Supreme Court.²⁰⁹ For example, as noted in *First*

197. See *Doelle v. Ireco Chemicals*, 391 F.2d 6, 9 (1968) (holding that the parol evidence rule is applicable only where the dispute is of a contractual nature and does not apply to a tort action for inducing a party into entering a writing). See also Brief in Support of Appellees Motion for Rehearing at 9-10, *Bank of Burwell v. Kelley*, 233 Neb. 396, 445 N.W.2d 871 (1989) (No. 87-880).

198. Brief in Support of Appellees Motion for Rehearing at 9-10.

199. See *supra* note 148 and accompanying text. See also Brief in Support of Appellees Motion for Rehearing at 7-10.

200. Brief in Support of Appellees Motion for Rehearing at 7-8.

201. *Kelley*, 233 Neb. at 410, 445 N.W.2d at 879.

202. Brief for Appellees at 21.

203. Brief in Support of Appellees Motion for Rehearing at 13.

204. 196 Neb. 398, 243 N.W.2d 745 (1976).

205. *Id.* at 405, 243 N.W.2d at 749.

206. See *supra* notes 46-49 and accompanying text.

207. See *supra* notes 46-49 and accompanying text.

208. See Brief in Support of Appellees Motion for Rehearing at 14.

209. See *supra* notes 73-164 and accompanying text.

National Bank and Trust Company of Fremont v. Hughes, General Electric Credit Corp. v. Lewis, and American Honda Finance Corp. v. Bennett, the notice must advise the guarantor of the potential personal liability for a deficiency.²¹⁰ But the notice in *Kelley, on its face*, states only that "you will be liable for any deficiency," not mentioning that the *guarantor* will be liable for a deficiency.²¹¹ With the inclusion of parol evidence, the propriety of the notice is not evaluated from the four corners of the paper itself.²¹²

For more clarity, the Nebraska Supreme Court should adopt a strict rule for what is or is not an ambiguous notice to a guarantor.²¹³ A strict rule might provide that the notice must contain: (1) a reference to the security agreement, (2) a notation concerning the time and place of the sale with a description of the property serving as collateral, and (3) a statement clearly indicating that the person receiving the notice receives it as a guarantor.²¹⁴

The court's previous holdings in *Hughes, Hi-Bo Farms, Lewis, and Bennett* also represented an unclarified position regarding what must be included in a notice to a guarantor.²¹⁵ As indicated in Judge Boslaugh's dissent in *Hi-Bo Farms*, prior to *Kelley* the court had adopted a stance creating technical "traps and pitfalls" which the creditor must avoid.²¹⁶ Previously, a creditor had to be versed in the workings of the law to provide appropriate notice to a guarantor.²¹⁷ Now, the guarantor must be skilled at handling paperwork because correspondence might merge into the notice as parol evidence.²¹⁸ The guarantor joins the creditor in having to step carefully around the "traps and pitfalls" set by the Nebraska Supreme Court.²¹⁹

CONCLUSION

The Nebraska Supreme Court has adopted a unique treatment for notices to guarantors.²²⁰ In addition to requiring reference to the time and place of a sale, requirements afforded most recipients of notices of sale, the Nebraska Supreme has mandated further informa-

210. See *supra* notes 80, 105, 113 and accompanying text.

211. See *supra* note 148 and accompanying text.

212. See *supra* notes 148, 161-64 and accompanying text. See also Brief in Support of Appellees Motion for Rehearing at 12.

213. See *supra* notes 173-74 and accompanying text.

214. See *supra* notes 80-82, 92-96, 103-06, 111-16, 157-64 and accompanying text.

215. See *supra* notes 73-116 and accompanying text.

216. See *supra* note 96 and accompanying text.

217. See *supra* note 96 and accompanying text.

218. See *supra* notes 164 and 202 and accompanying text.

219. See *supra* note 96 and accompanying text.

220. See *supra* notes 71-72 and accompanying text.

tion to be sent to guarantors.²²¹ This information often includes (1) a reference to the guaranty, (2) a warning to the guarantor of personal liability for a deficiency, and (3) an unambiguous statement as to the capacity in which the person receives the notice — as debtor or as guarantor.²²² Because of ambiguities within such notices, the Nebraska Supreme Court in *Bank of Burwell v. Kelley*²²³ improperly resorted to the use of the parol evidence rule in an attempt to resolve vagueness within a notice.²²⁴

Unfortunately, *Bank of Burwell v. Kelley* only furthers the confusion surrounding notice to a guarantor.²²⁵ A clear rule should be developed. Without a clear rule, both creditors and guarantors remain unsure. Creditors are unsure of what their notice to a guarantor must include. Guarantors are unsure of what parol evidence will be used to resolve ambiguous language within the notice. The Nebraska line of cases has not created protections for either creditors or guarantors. Instead, as Judge Boslaugh proclaimed in *Deutsche Credit Corp. v. Hi-Bo Farms, Inc.*,²²⁶ the Nebraska decisions lead to "traps and pitfalls." Only now, both creditors and guarantors must watch their step.

Charles W. Johnson—'91

221. See *supra* notes 71-164 and accompanying text.

222. See *supra* notes 71-164 and accompanying text.

223. 233 Neb. 396, 445 N.W.2d 879 (1989).

224. See *supra* note 164 and accompanying text.

225. See *supra* notes 95-96 and accompanying text.

226. 224 Neb. 463, 398 N.W.2d 693 (1987).