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Harold L. Levy

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# FDIC V. COLEMAN AND THE DUTY OF GOOD FAITH: LET THE BORROWERS BEWARE OR LET THEM EAT ACREAGE?

by Harold L. Levy

ON or about December 8, 1981, Judico Enterprises, Inc. gave its one-year \$460,000 promissory note to the First National Bank of Midland in Midland, Texas. Willie R. Coleman and W. Dwayne Powell, officers and controlling principals in Judico, guaranteed payment of the note<sup>1</sup> secured by a deed of trust lien on real property. Powell arranged the note and guaranties<sup>2</sup> and executed the note and deed of trust for Judico.

On October 26, 1982, Judico filed for protection from its creditors under chapter eleven of the federal bankruptcy code.<sup>3</sup> Six months later, the Midland bank filed suit against Coleman and Powell as guarantors, then moved in the bankruptcy court to foreclose its lien on the underlying real property. Shortly thereafter, the bank became insolvent, and on October 14, 1983, the Federal Deposit Insurance Corporation (FDIC)<sup>4</sup> assumed control of the

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1. A guarantor promises to pay any unpaid amount due under the specific terms of a matured instrument without requiring the holder of the instrument to pursue any other party for payment. TEX. BUS. & COM. CODE ANN. § 3.416(a) (Vernon 1968).

A note is a distinct and separate commitment from a guaranty of payment such that the guarantor may be sued separately from the maker. *Hopkins v. First Nat'l Bank*, 551 S.W.2d 343, 345 (Tex. 1977). A guarantor assumes primary liability for payment; the holder of a note need not sue the maker as a condition precedent to hold the guarantor liable. *Id.*

2. The guaranties stated in part:

Guarantors expressly waive diligence on the part of the said Creditor in the collection of any and all [of Judico's indebtedness]. . . . The Creditor shall not be required to pursue any other remedies before invoking the benefits of this guaranty, especially it shall not be required to exhaust its remedies against endorsers, collateral and other security. . . . [S]hould the Debtor execute in favor of said Creditor any collateral agreement, the exercise by the Creditor of any right conferred upon it in said agreement shall be wholly discretionary with the Creditor, and such exercise of, or failure to exercise, such right shall in no wise impair or diminish the obligations of the Guarantors hereunder.

FDIC v. Coleman, 33 Tex. Sup. Ct. J. 557, 557-58 (June 13, 1990).

3. In general, 11 U.S.C. §§ 1101-74 (1988) provides for the reorganization of a financially troubled debtor in order to avoid foreclosure on the debtor's property by creditors, prevent liquidation of the debtor, and discharge debt owed to creditors.

4. As a governmental agency, the FDIC insures deposits in national banks and state chartered banks; when an insured bank fails, FDIC regulators temporarily assume its management. See generally Ebke & Griffin, *Lender Liability to Debtors: Toward a Conceptual Frame-*

bank. As the bank's receiver, the FDIC purchased the note and its security.<sup>5</sup> Ten months later, on August 15, 1984, the bankruptcy court entered an agreed order permitting the FDIC to foreclose on the property securing the note.

On June 7, 1985, the FDIC's foreclosure sale of the property for \$357,000 left a balance due on the note of approximately \$486,000.<sup>6</sup> The FDIC then brought suit against Coleman and Powell for the deficiency. The guarantors argued that the FDIC had breached its duty to act in good faith in its protection of the collateral, by delaying the foreclosure and sale of the property during a period when the property's market value declined.<sup>7</sup>

The FDIC moved for summary judgment, and the trial court granted its motion.<sup>8</sup> The court of appeals in El Paso reversed the judgment and remanded the cause for trial. The El Paso court agreed with the guarantors that the duty of good faith arose in the case and presented a material question of fact regarding a possible breach of such duty.<sup>9</sup> The Texas Supreme Court granted the FDIC's writ of error to review the case.<sup>10</sup> *Held, for the FDIC, reversing the judgment of the court of appeals and affirming the judgment of the trial court: A secured creditor's failure to foreclose its lien promptly after the debtor's default on the note is not a breach of any duty of good faith and fair dealing. FDIC v. Coleman*, 33 Tex. Sup. Ct. J. 557 (June 13, 1990).

## I. THE DUTY OF GOOD FAITH AND FAIR DEALING

### A. *In General*

The Texas Supreme Court has refused to impose a covenant of good faith

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*work*, 40 Sw. L.J. 775, 804-05 & nn.170-72 (1986) (historical background of the FDIC and its development).

Texas real estate values declined severely during the past decade, which resulted in negative effects on the state and national banking and savings and loan industries. See The Dallas Morning News, July 27, 1990, at 2D, col. 2 (discussing the decline in real estate since the 1980s, the golden age of the industry). The city of Midland sits in west Texas, once a booming center of oil and gas production. The west Texas region also declined economically during the past decade and impacted the overall Texas economy. See The Dallas Morning News, July 28, 1990, at 1F, col. 4 (discussing the severe decline in Texas oil and gas production and revenues since the early 1980s).

5. *Coleman v. FDIC*, 762 S.W.2d 243, 244 (Tex. App.—El Paso 1988), *rev'd*, 33 Tex. Sup. Ct. J. 557 (June 13, 1990).

6. Neither the supreme court opinion in *FDIC v. Coleman*, 33 Tex. Sup. Ct. J. at 557-58, nor the appeals court opinion in *Coleman v. FDIC*, 762 S.W.2d at 243-44 detailed the calculation of the balance due, but apparently it included accrued interest from December 8, 1981. The trial court rendered judgment against the guarantors for only \$450,475.42, an amount less than the deficiency established by the FDIC's summary judgment evidence. *FDIC v. Coleman*, 33 Tex. Sup. Ct. J. at 558 n.1. The supreme court noted that the FDIC nonsuited its claim for attorney fees. *Id.*

7. Over a period of one year, the various appraised values of the property ranged as follows: March 30, 1984 — \$550,000; May 1, 1984 — \$568,000; January 28, 1985 — \$450,000; March 6, 1985 — \$390,000. *FDIC v. Coleman*, 33 Tex. Sup. Ct. J. at 559 n.2.

8. *Id.* at 557, 558.

9. *Coleman v. FDIC*, 762 S.W.2d 243, 245 (Tex. App.—El Paso 1988), *rev'd*, 33 Tex. Sup. Ct. J. 557 (June 13, 1990).

10. *FDIC v. Coleman*, 32 Tex. Sup. Ct. J. 343 (April 26, 1989).

and fair dealing into the business affairs of its citizens, rejecting the theory of law that in every contract there is an implied covenant that neither party will do anything which injures the right of the other party to receive the benefits of the agreement.<sup>11</sup> Furthermore, Texas courts will not impose an implied covenant on a party regarding a matter specifically addressed by the contract.<sup>12</sup> Additionally, courts will not alter the agreement of the parties found in the contract itself by an implied good faith and fair dealing covenant.<sup>13</sup> Instead, Texas courts have read a duty of good faith and fair dealing into many types of contractually-based transactions by finding a special relationship between the parties to the contract.<sup>14</sup> The special relationship arises either from the element of trust necessary to accomplish the ends of the contract or an imbalance of bargaining power among the contracting parties.<sup>15</sup> Texas public policy requires that courts must recognize this duty of good faith and fair dealing which springs from such a special relationship.<sup>16</sup> Due to the special relationship arising out of the parties' unequal bargaining power and the one-sided nature of insurance contracts, Texas courts have found a duty of good faith and fair dealing between an insurance company and its insured customer.<sup>17</sup> Finally, because breaches of a covenant are con-

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11. See *English v. Fischer*, 660 S.W.2d 521, 522 (Tex. 1983), *rev'd*, 649 S.W.2d 83 (Tex. App.—Corpus Christi 1982). In this dispute between a mortgagor and a mortgagee over the disposition of fire insurance proceeds, the court of appeals, citing two California appellate cases, discussed the implied covenant theory that the supreme court subsequently rejected. *English v. Fischer*, 649 S.W.2d at 89. See also *Manges v. Guerra*, 673 S.W.2d 180, 183 (Tex. 1984) (fiduciary duty in a mineral co-tenancy arises from the parties' relationship, not from the contract).

In the Texas Supreme Court opinion in *English*, Justice Kilgarlin dissented, citing the RESTATEMENT (SECOND) OF CONTRACTS § 205 (1979), "Every contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement." *English*, 660 S.W.2d at 525. Observing the firm establishment of the implied covenant of good faith and fair dealing in American law, he concluded Texas should adopt the modern and majority view by implying such a covenant under Texas law. *Id.* at 527-28. One commentator suggested that Justice Kilgarlin's dissent in *English* might represent the majority opinion if the supreme court decided the case today. See Tyler, *Emerging Theories of Lender Liability in Texas*, 24 HOUS. L. REV. 411, 422 (1987).

12. *Exxon Corp. v. Atlantic Richfield Co.*, 678 S.W.2d 944, 947 (Tex. 1984) (where all parties to a series of contracts governing production of oil and gas agreed to a termination clause which expressly and unambiguously set out the terms for termination of the contracts, no implied covenant to the contrary could vary the agreement to defeat the termination).

13. *Id.* (citing *English v. Fischer*, 660 S.W.2d at 522).

14. *English*, 660 S.W.2d at 524 (Spears, J., concurring).

15. *Id.*

16. *Id.* at 525.

17. See *Aranda v. Insurance Co. of N. Am.*, 748 S.W.2d 210, 212-13 (Tex. 1988) (workers' compensation carriers have duty to deal fairly and in good faith when processing the compensation claims of injured employees); *Arnold v. National County Mut. Fire Ins. Co.*, 725 S.W.2d 165, 167 (Tex. 1987) (insurance company held to "that degree of care and diligence which a man of ordinary care and prudence would exercise in the management of his own business") (quoting *G.A. Stowers Furniture Co. v. American Indem. Co.*, 15 S.W.2d 544, 548 (Tex. Comm'n App. 1929, holding approved)). *But cf. Lovell v. Western Nat'l Life Ins. Co.*, 754 S.W.2d 298, 302-03 (Tex. App.—Amarillo 1988, writ denied) (no implied duty of good faith and fair dealing where life insurance company held assigned indebtedness of borrower; court found neither an element of trust between mortgagor and mortgagee nor an imbalance of bargaining power to create a special relationship); *Cantu v. Western Fire and Casualty Ins. Co.*, 716 S.W.2d 737, 739-40 (Tex. App.—Corpus Christi 1986), *writ ref'd*, 723 S.W.2d 668 (Tex. 1987) (per curiam) (no evidence of an explicit covenant to act in good faith

tractual in nature, the breach of the duty of good faith and fair dealing is not a breach of contract, but of a legal duty.<sup>18</sup>

The Uniform Commercial Code, as adopted in Texas, imposes an obligation of good faith in the performance of every contract or duty within the Code.<sup>19</sup> "Good faith" demands honesty in fact in a party's actions or dealings.<sup>20</sup> The standard for good faith relies upon the concerned party's actual beliefs, and not the reasonableness of that party's belief.<sup>21</sup> The test does not utilize a diligence or negligence standard.<sup>22</sup>

### B. Lending Cases

Texas law does not impose a general fiduciary obligation between a lender and a borrower or between business parties.<sup>23</sup> Prior to 1988, no Texas court had ruled directly on the existence of a fiduciary relationship between a mortgagor and a mortgagee.<sup>24</sup> Under Texas case law, however, a trustee of a

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in property insurance claim; supreme court did not approve appellate court language regarding the duty of good faith and fair dealing, but found no reversible error in denying the application for writ of error).

18. *Chitsey v. National Lloyds Ins. Co.*, 738 S.W.2d 641, 643 n.1 (Tex. 1987).

19. TEX. BUS. & COM. CODE ANN. § 1.203 (Vernon 1968).

20. *Id.* at § 1.201(19). Article 1 of the Uniform Commercial Code deals with general provisions of the Code, while Article 2 deals with sales law. "'Good faith' in the case of a merchant means honesty in fact and the observance of reasonable commercial standards of fair dealing in the trade." *Id.* at § 2.103(a)(2). Throughout the *FDIC v. Coleman* opinion, the Texas Supreme Court refers to both a "duty of good faith and fair dealing" and a "duty of good faith." The opinion, however, specifically and appropriately refers to § 1.201(19) for its definition of the duty of good faith since a loan, not a sale, constituted the underlying transaction at issue.

21. *La Sara Grain Co. v. First Nat'l Bank*, 673 S.W.2d 558, 563 (Tex. 1984) (citing *Riley v. First State Bank*, 469 S.W.2d 812, 816 (Tex. Civ. App.—Amarillo 1971, writ ref'd n.r.e.)).

22. *Quanah, A. & P. Ry. v. Wichita State Bank & Trust Co.*, 127 Tex. 407, 93 S.W.2d 701, 704 (1936); *First State Bank & Trust Co. v. George*, 519 S.W.2d 198, 203 (Tex. Civ. App.—Corpus Christi 1974, writ ref'd n.r.e.); *Richardson Co. v. First Nat'l Bank*, 504 S.W.2d 812, 816 (Tex. Civ. App.—Tyler 1974, writ ref'd n.r.e.); *Riley v. First State Bank*, 469 S.W.2d 812, 816 (Tex. Civ. App.—Amarillo 1971, writ ref'd n.r.e.).

23. *In Re Letterman Bros. Energy Sec. Litig.*, 799 F.2d 967, 975 (5th Cir. 1986) (bank which financed participation interests in oil and gas leases held by its customer had no fiduciary duty to the lease investors). *But cf.* TEX. BUS. & COM. CODE ANN. § 1.208 (Vernon 1968) (an insecure creditor or his successor in interest may accelerate payment or performance, or require collateral or additional collateral, only with a good faith belief in the impairment of the prospect of payment or performance). *See, e.g.*, *Jack M. Finley, Inc. v. Longview Bank & Trust Co.*, 705 S.W.2d 206, 208-09 (Tex. App.—Texarkana 1985, writ ref'd n.r.e.) (uncontroverted evidence that promisor had threatened bankruptcy sufficiently established bank's good faith in accelerating promissory note); *Ford Motor Credit Co. v. Powers*, 613 S.W.2d 30, 34 (Tex. Civ. App.—Corpus Christi 1981, no writ) (courts must determine good faith acceleration on a case by case analysis, after the occurrence of acceleration); *Sparkman v. Peoples Nat'l Bank*, 580 S.W.2d 868, 869 (Tex. Civ. App.—Texarkana 1979, writ ref'd n.r.e.) (borrower did not establish lender's lack of good faith so as to overcome summary judgment on the issue). *Cf.* *First Nat'l Bank v. Twombly*, 213 Mont. 66, 689 P.2d 1226, 1229-30 (1984) (Montana bank breached its statutory obligation under UCC § 1-208 to exercise good faith in dealings with borrower).

24. *Lovell v. Western Nat'l Life Ins. Co.*, 754 S.W.2d 298, 303 (Tex. App.—Amarillo 1988, writ denied) (no special relationship exists between mortgagor and mortgagee). The Amarillo court noted that "although the relationship between a mortgagor and a mortgagee was often described as one of trust, technically it was not a fiduciary relationship." *Id.* The Amarillo court decided *Lovell* before the El Paso court of appeals decision in *Coleman v.*

deed of trust becomes a special agent for both the mortgagor and the mortgagee.<sup>25</sup> The trustee in the deed of trust has a separate capacity and a particular responsibility to act with total, unbiased neutrality and fairness to the grantor in performing his appointed powers under the deed of trust.<sup>26</sup>

A mortgagee has an obligation to conduct a foreclosure sale fairly and not to deter bidding by action or comments made prior to or during the sale.<sup>27</sup> Texas courts consider the mortgagee's goals to be immaterial; the mortgagee is judged by the actual results.<sup>28</sup> Thus, a sale properly executed by the mortgagee will sustain an attack based on inadequacy of the sale price.<sup>29</sup>

In general, only the mortgagor or a party in privity with the mortgagor can challenge the validity of a foreclosure sale under the deed of trust.<sup>30</sup> A guarantor, who is in broad terms a type of surety,<sup>31</sup> possesses a beneficial interest in the property held by the creditor as security for the debt.<sup>32</sup> The creditor must abide by a standard of good faith in maintenance and disposition of the collateral and its sale proceeds, both for the sake of the collateral

FDIC, 762 S.W.2d 243, 245 (Tex. App.—El Paso 1988) (duty of good faith exists between mortgagor and mortgagee), *rev'd on same grounds*, 33 Tex. Sup. Ct. J. 557 (June 13, 1990).

25. First Fed. Sav. & Loan Ass'n v. Sharp, 359 S.W.2d 902, 904 (Tex. 1962) (citing *Hampshire v. Greeves*, 104 Tex. 620, 143 S.W. 147, 151 (1912); *Zeiss v. First State Bank*, 189 S.W. 524, 525 (Tex. Civ. App.—Beaumont 1916, writ ref'd)).

26. *Hammonds v. Holmes*, 559 S.W.2d 345, 347 (Tex. 1977) (citing First Fed. Sav. & Loan Ass'n v. Sharp, 359 S.W.2d 902, 904 (Tex. 1962); *Fuller v. O'Neal*, 69 Tex. 349, 6 S.W. 181, 181-82 (1887)).

27. *Biddle v. National Old Line Ins. Co.*, 513 S.W.2d 135, 138 (Tex. Civ. App.—Dallas 1974, writ ref'd n.r.e.).

28. *Id.*

29. *Id.* (citing *Jones v. Pratt*, 77 Tex. 210, 13 S.W. 887, 888 (1890) (alleged irregularities regarding the foreclosure sale must be proved in order to set aside the sale); *Tarrant Sav. Ass'n v. Lucky Homes, Inc.*, 390 S.W.2d 473, 475 (Tex. 1965) (inadequacy of sales price will not invalidate a foreclosure sale if the sale was properly held)). *Accord Savers Fed. Sav. & Loan Ass'n v. Reetz*, 888 F.2d 1497, 1503 (5th Cir. 1989) (inadequacy of sales price received will not invalidate a real estate foreclosure; invalidation also requires some impropriety in foreclosure which led to an extremely insufficient price); *Greater S.W. Office Park, Ltd. v. Texas Commerce Bank Nat'l Ass'n* 786 S.W.2d 386, 390 (Tex. App.—Houston [1st Dist.] 1990, n.w.h.) (inadequacy of price will not rescind a trustee's sale, absent impropriety in the transaction leading to the inadequate price for the property).

*But cf.* *Olney Sav. & Loan Ass'n v. Farmers Market*, 764 S.W.2d 869, 871 (Tex. App.—El Paso 1989, writ denied) (lender's bid price at foreclosure sale must be "fair and reasonable"); *Halter v. Allied Merchants Bank*, 751 S.W.2d 286, 288 (Tex. App.—Beaumont 1988, writ denied) (court noted in dictum that if evidence in deficiency action indicated that lender purchased collateral at foreclosure sale for grossly inadequate price, then the evidence presented a question of fact regarding lender's right to any deficiency after foreclosure); *Lee v. Sabine Bank*, 708 S.W.2d 582, 584 (Tex. App.—Beaumont 1986, writ ref'd n.r.e.) (court noted in dictum that creditor with secured collateral has a trust arrangement with debtor such that in a foreclosure sale lender must make legitimate effort to decrease debt by obtaining a just price for the security).

30. *Goswami v. Metropolitan Sav. & Loan Ass'n*, 751 S.W.2d 487, 489 (Tex. 1988) (citing *Estelle v. Hart*, 55 S.W.2d 510, 513 (Tex. Comm'n App. 1932, opinion adopted); *Mercer v. Bludworth*, 715 S.W.2d 693, 698 (Tex. App.—Houston [1st Dist.] 1986, writ ref'd n.r.e.)). A third party, however, possesses the necessary standing to challenge a foreclosure sale when such third party has either a legal or equitable property interest that will be affected by the sale. *Goswami*, 751 S.W.2d at 489 (citing *American Sav. & Loan Ass'n v. Musick*, 531 S.W.2d 581, 586 (Tex. 1975); *Estelle v. Hart*, 55 S.W.2d at 513).

31. A surety is one who contractually agrees to answer for the debt of another party, the surety's principal. *Crimmins v. Lowry*, 691 S.W.2d 582, 585 (Tex. 1985).

32. *Frederick v. United States*, 386 F.2d 481, 486 (5th Cir. 1967).

itself and in deference to the guarantor's responsibility.<sup>33</sup> The terms of the contract establish the guarantors' rights.<sup>34</sup> A guarantor, however, faces a problem when asserting his rights against a lender because Texas courts do not consider a guarantor to be a party to the guaranteed note.<sup>35</sup> Furthermore, a guaranty is not an "instrument" under the Texas Business and Commerce Code.<sup>36</sup>

## II. FDIC v. COLEMAN

### A. Majority Opinion and Reasoning

As guarantors, Coleman and Powell contended that a secured creditor owes a duty of good faith to a guarantor of the indebtedness.<sup>37</sup> This duty would require the creditor to liquidate the security promptly after the debtor's default in order to lessen the guarantor's liability for any deficiency.<sup>38</sup> Coleman and Powell argued that the duty of good faith arose from three sources, which the majority, in its five to three opinion,<sup>39</sup> examined and dismissed in turn.<sup>40</sup>

Addressing the first source, section 1.203 of the Texas Uniform Commercial Code (UCC),<sup>41</sup> the court questioned whether the statute would treat a guaranty agreement, executed separately and apart from a promissory note secured by a lien on real property, as a contract subject to the good faith standard.<sup>42</sup> Furthermore, even if the UCC provision applied to the guaran-

33. *Id.*

34. *Mid-States Gen. Agency, Inc. v. Bank of Tex.*, 450 S.W.2d 428, 431 (Tex. Civ. App.—Houston [1st Dist.] 1970, writ ref'd n.r.e.) (citing *Roseborough v. Phillips*, 389 S.W.2d 593, 596 (Tex. Civ. App.—Dallas 1965, no writ)). The court noted that it must give consideration to all of the terms of the contract of guaranty, if possible. *Id.*

35. *Simpson v. MBank Dallas, N.A.*, 724 S.W.2d 102, 105 (Tex. App.—Dallas 1987, writ ref'd n.r.e.) (purchaser of interest in a corporation, who guaranteed the corporation's previously funded debts, was not a party to such corporation's debts, even after the lender consolidated the debts into a single note). *But cf. United States v. Vahlco Corp.*, 800 F.2d 462, 465 (5th Cir. 1986) (under Texas law, a guaranty agreement is strictly construed in the guarantor's favor; thus, any modification to the underlying debt discharges the guarantor's obligation because it alters the terms of the debt and unfairly modifies the risks assumed by the guarantor).

36. "Instrument" means a negotiable instrument." TEX. BUS. & COM. CODE ANN. § 3.102(a)(5) (Vernon 1968). In summary, the statute provides that for a writing to be a negotiable instrument within the UCC, the maker must sign the writing; the writing must include an unconditional promise to pay a specified amount of money; the writing must be payable on demand or at a fixed time; and the writing must be payable to order or to bearer. *Id.* § 3.104(a). *Accord Simpson v. MBank Dallas, N.A.*, 724 S.W.2d at 105 (guarantor is not a party to guaranteed debt and guaranty is not an instrument under the UCC).

37. *FDIC v. Coleman*, 33 Tex. Sup. Ct. J. 557, 558 (June 13, 1990).

38. *Id.*

39. Justice Doggett did not participate in the decision. *Id.* at 560.

40. *Id.*

41. *See supra* notes 19-22 and accompanying text.

42. *FDIC v. Coleman*, 33 Tex. Sup. Ct. J. at 558 (citing *FDIC v. Attayi*, 745 S.W.2d 939, 948 (Tex. App.—Houston [1st Dist.] 1988, no writ) (guaranty of a promissory note secured by real property may differ from guaranty of a promissory note secured by personal property); *Simpson v. MBank Dallas, N.A.*, 724 S.W.2d 102, 105-06 (Tex. App.—Dallas 1987, writ ref'd n.r.e.) (guaranty is a contract, not an instrument); *Crown Life Ins. Co. v. LaBonte*, 111 Wis. 2d 26, 330 N.W.2d 201, 207-09 (1983) (guaranty given detached from and unconnected to an instrument is not within the UCC)).

ties at issue, the definition of good faith, "honesty in fact," would not sustain the guarantors' position because the guarantors complained not of the FDIC's dishonesty, but of the FDIC's lack of diligence.<sup>43</sup> The UCC does not demand diligence in its test for good faith.<sup>44</sup>

The second source of the duty of good faith, state common law, hinged on the presence or absence of either a special relationship marked by shared trust or an imbalance in bargaining power.<sup>45</sup> The court found that neither a mortgagor-mortgagee relationship, nor a creditor-guarantor relationship, gave rise to a duty of good faith.<sup>46</sup> The supreme court denied this second argument, noting that Coleman and Powell did not even assert the existence of a special relationship leading to a recognized duty of good faith and fair dealing.<sup>47</sup>

Finally, the guarantors cited *Frederick v. United States*<sup>48</sup> to argue that federal common law imposed a duty of good faith on the FDIC.<sup>49</sup> Disagreeing with this argument, the supreme court found that *Frederick* dealt with the misapplication of collateralized security, whereas Coleman and Powell complained of the FDIC's complacency in foreclosing its lien.<sup>50</sup> Furthermore, the court stated that a guarantor could not direct the creditor to pursue the collateral when a debtor defaulted.<sup>51</sup>

Besides the lack of case law to support the guarantors' position, the supreme court found other reasons to deny the claim that the creditor owed a duty of good faith in a foreclosure.<sup>52</sup> The court noted that Coleman and Powell could have protected themselves from exposure to greater liability on their guaranties resulting from a declining real estate market.<sup>53</sup> Furthermore, Coleman and Powell could not force the bank and the FDIC to pro-

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43. *FDIC v. Coleman*, 33 Tex. Sup. Ct. J. at 559 (citing *First State Bank & Trust Co. v. George*, 519 S.W.2d 198, 203 (Tex. Civ. App.—Corpus Christi 1974, writ ref'd n.r.e.); *Richardson Co. v. First Nat'l Bank*, 504 S.W.2d 812, 816 (Tex. Civ. App.—Tyler 1974, writ ref'd n.r.e.); *Riley v. First State Bank*, 469 S.W.2d 812, 816 (Tex. Civ. App.—Amarillo 1971, writ ref'd n.r.e.)).

44. *FDIC v. Coleman*, 33 Tex. Sup. Ct. J. at 559. See *supra* notes 19-22 and accompanying text.

45. *FDIC v. Coleman*, 33 Tex. Sup. Ct. J. at 559. The court cited four cases for the test of special relationship or imbalance of bargaining power: *Aranda v. Insurance Co. of N. Am.*, 748 S.W.2d 210, 212-13 (Tex. 1988); *Arnold v. National County Mut. Fire Ins. Co.*, 725 S.W.2d 165, 167 (Tex. 1987); *Manges v. Guerra*, 673 S.W.2d 180, 183 (Tex. 1984); and *English v. Fischer*, 660 S.W.2d 521, 524-25 (Tex. 1983) (Spears, J., concurring). *FDIC v. Coleman*, 33 Tex. Sup. Ct. J. at 559.

46. *FDIC v. Coleman*, 33 Tex. Sup. Ct. J. at 559.

47. *Id.*

48. 386 F.2d 481 (5th Cir. 1967). The Fifth Circuit in *Frederick* cited only two cases for its good faith theory: a 1914 decision from the Sixth Circuit Court of Appeals regarding a diversity action under Louisiana law, and an 1897 decision from the Alabama Supreme Court. *Id.* at 486-87. Therefore, it seems odd that the Texas Supreme Court in *FDIC v. Coleman* referred to the *Frederick* decision as a source of federal common law.

49. *FDIC v. Coleman*, 33 Tex. Sup. Ct. J. at 559.

50. *Id.*

51. *Id.* (citing *Frederick v. United States*, 386 F.2d 481, 486 (5th Cir. 1967)).

52. *Id.*

53. *Id.* The court suggested that Coleman and Powell could have purchased the property from Judico, paid the debt (if possible), then retained any future profit. *Id.*



tect their interests, as guarantors.<sup>54</sup> The court then noted the impossible burden placed on the creditor.<sup>55</sup> Recalling the increase in the secured real property's value during 1984,<sup>56</sup> the court reasoned that requiring a lender to accelerate liquidation of collateral in a falling market would logically require the lender to delay liquidation in a rising market.<sup>57</sup>

The court also found the guarantors' express waiver of any duty of good faith within the guaranties themselves.<sup>58</sup> Because the waivers relieved the creditor from looking to the security to satisfy the debt, the FDIC as successor in interest could proceed directly against the guarantors for the full liability.<sup>59</sup> The court ruled that the FDIC's freedom to foreclose on the property at will necessarily included the right to decide when to foreclose on the property.<sup>60</sup> Finally, the court addressed the procedural problems created by recognizing a duty of good faith. Imposing the duty on a creditor for the benefit of the guarantor and presumably, the debtor, would raise a question of fact in virtually every dispute on this issue, preclude the use of summary judgment, and require a full trial on the merits.<sup>61</sup> As the court noted, "commercial transactions require more predictability and certainty" than a duty of good faith would contemplate.<sup>62</sup>

The majority's final discussion centered on the applicability of Texas law concerning impairment of recourse or of collateral.<sup>63</sup> In relevant part, the statute provides for the holder's discharge of any party to an instrument to the extent that without such party's consent, the holder suspends the right to enforce against such person the instrument or collateral.<sup>64</sup> An express reservation of rights by the holder negates this defense to the party.<sup>65</sup> The court reiterated its points that the guaranties were not negotiable instruments and that the guarantors were not parties to Judico's note.<sup>66</sup> Rejecting the guarantors' impairment of collateral defense under the statute, the court found that the terms of the guaranties allowed the creditor absolute discretion in pursuing its interest in the security.<sup>67</sup>

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54. *Id.* The court reminded the guarantors of their right of subrogation against Judico, the corporation which they principally controlled, if the guarantors paid Judico's debt to the FDIC. *Id.* (citing *Crimmins v. Lowry*, 691 S.W.2d 582, 585 (Tex. 1985) (describing the equitable duties and rights of a surety)).

55. *Id.* at 559-60.

56. *See supra* note 7.

57. *FDIC v. Coleman*, 33 Tex. Sup. Ct. J. at 560.

58. *Id.*; *see supra* note 2.

59. *FDIC v. Coleman*, 33 Tex. Sup. Ct. J. at 560.

60. *Id.*

61. *Id.*

62. *Id.* *See also* *Ebke & Griffin*, *supra* note 4, at 798 (conceptual nature of the duty of good faith does not prescribe distinct parameters regarding the bounds of legally permissible conduct).

63. *FDIC v. Coleman*, 33 Tex. Sup. Ct. J. at 560 (citing *TEX. BUS. & COM. CODE ANN.* § 3.606 (Vernon 1968)).

64. *TEX. BUS. & COM. CODE ANN.* § 3.606(a)(1) (Vernon 1968).

65. *See id.* § 3.606(b).

66. *FDIC v. Coleman*, 33 Tex. Sup. Ct. J. at 560.

67. *Id.*

### B. *Dissenting Opinion*

Justice Mauzy dissented,<sup>68</sup> focusing on three points: (1) commercial reasonableness; (2) the remedies of a guarantor; and (3) the majority's finding that the guarantors could protect themselves from greater exposure on their guaranties.<sup>69</sup> First, Mauzy argued that by focusing on the imposition of a duty of good faith, the majority failed to consider the true issue presented by Coleman and Powell.<sup>70</sup> Mauzy contended that the guarantors pled a theory of commercial reasonableness,<sup>71</sup> rather than the theory of good faith and fair dealing recognized in insurance cases.<sup>72</sup> Citing the appellate court decision,<sup>73</sup> Justice Mauzy pointed out the FDIC's growing awareness of the declining value of the property securing Judico's loan based on the FDIC's response to interrogatories.<sup>74</sup> In the same interrogatories, the FDIC admitted that its loan credit manual recommended a grace period of four months on a loan prior to foreclosure, lacking any extraordinary circumstances.<sup>75</sup> Although the FDIC took the property subject to the stay of bankruptcy on October 4, 1983, it obtained an agreed order for relief from the stay on August 15, 1984, but did not sell the property until June 7, 1985.<sup>76</sup> Noting that the guarantors' attorney had sent a letter to the FDIC on November 16, 1983, urging settlement of the lawsuit and quick foreclosure, Justice Mauzy agreed with the appellate court that the case presented a material question of fact regarding the existence of a duty of commercial reasonableness.<sup>77</sup>

Justice Mauzy then observed that although the guaranty contract relieved the creditor from proceeding against the collateral before exercising its rights against the guarantors,<sup>78</sup> the FDIC proceeded against the real property after obtaining the agreed order on August 15, 1984.<sup>79</sup> At that point, Mauzy would impose on the FDIC a duty to act in a commercially reasonable

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68. *Id.* at 561. Justices Spears and Ray joined in the dissenting opinion. Justice Spears, who wrote the concurring opinion in *English v. Fischer*, noted that a special relationship between parties to a contract imposes a duty of good faith and fair dealing upon the parties. *English v. Fischer*, 660 S.W.2d 521, 524-25 (Tex. 1983). See *supra* note 11 and accompanying text.

69. *FDIC v. Coleman*, 33 Tex. Sup. Ct. J. at 560-61.

70. *Id.* at 560.

71. *Id.* (citing *Frederick v. United States*, 386 F.2d 481, 486-87 (5th Cir. 1967) (negligence or irregularity of creditor in selling security, which results in realization of less than the security's full value, allows claim by guarantor against creditor for improper preservation or application of collateral or relieves guarantor of his liability to the extent of collateral's value); *Mack Fin. Corp. v. Scott*, 100 Idaho 889, 606 P.2d 993, 996 (1980) (creditor's disposition of repossessed security after the debtor's default must be commercially reasonable)).

72. In particular, Justice Mauzy cited *Aranda v. Insurance Co. of N. Am.*, 748 S.W.2d 210, 212-13 (Tex. 1988); *Arnold v. National County Mut. Fire Ins. Co.*, 725 S.W.2d 165, 167 (Tex. 1987). *FDIC v. Coleman*, 33 Tex. Sup. Ct. J. at 560.

73. *Coleman v. FDIC*, 762 S.W.2d 243, 244 (Tex. App.—El Paso 1988), *rev'd*, 33 Tex. Sup. Ct. J. 557 (June 13, 1990).

74. *FDIC v. Coleman*, 33 Tex. Sup. Ct. J. at 560-61.

75. *Id.* at 561.

76. *Id.*

77. *Id.*

78. See *supra* note 2.

79. *FDIC v. Coleman*, 33 Tex. Sup. Ct. J. at 561.

manner.<sup>80</sup>

Finally, Justice Mauzy considered the majority's observation regarding the guarantors' ability to protect themselves from increased liability due to a decline in the collateral's market value.<sup>81</sup> He would have instructed the FDIC to pursue this matter and present it to a jury in determining the commercial reasonableness issue.<sup>82</sup>

### III. CONCLUSION

The majority opinion in *FDIC v. Coleman* traced lines of cases to affirm the trial court's summary judgment in favor of the FDIC and dismiss a fact question regarding the breach of a duty of good faith or fair dealing in commercial lending. The Texas Supreme Court held that no such duty existed, and it found practical obstacles to imposing such an obligation on a lender. The decision effectively held guarantors to a standard of conduct in loan transactions, a standard requiring guarantors to faithfully honor their own obligations. The decision may show debtors considering defaulting on their loans that Texas courts will not release faltering debtors from their obligations. Yet, a trial on an appropriate dispute testing the commercial reasonableness standard might also demonstrate that Texas will impose a legal burden on commercial parties whose misconduct led to financial loss. Perhaps a Texas court will consider this standard in the next lender liability claim.

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80. *Id.* (citing L. SIMPSON, HANDBOOK ON THE LAW OF SURETYSHIP § 75, at 382-83 (1950) (creditor's failure to use ordinary diligence discharges the surety to the extent that the creditor's action causes unnecessary loss)).

81. *Id.*

82. *Id.*