

2001

# Westinghouse Credit Corporation v. HydrosSwift Corporation : Brief of Respondent

Utah Supreme Court

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IN THE SUPREME COURT  
OF THE STATE OF UTAH

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WESTINGHOUSE CREDIT  
CORPORATION,

*Plaintiff and Respondent,*

vs.

HYDROSWIFT CORPORATION,

*Defendant and Appellant.*

BRIGHAM YOUNG UNIVERSITY  
J. Reuben Clark Law School

Case No.  
13533

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BRIEF OF RESPONDENT

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ANSWER TO APPELLANT'S BRIEF APPEALING  
FROM THE JUDGMENT OF THE  
THIRD JUDICIAL DISTRICT COURT  
OF SALT LAKE COUNTY, STATE OF UTAH.  
HONORABLE STEWART H. HANSON, JUDGE.

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Clark, Supreme Court, Utah

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# IN THE SUPREME COURT OF THE STATE OF UTAH

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WESTINGHOUSE CREDIT  
CORPORATION,

*Plaintiff and Respondent,*

vs.

HYDROSWIFT CORPORATION,

*Defendant and Appellant.*

} Case No.  
13533

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## BRIEF OF RESPONDENT

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### STATEMENT OF THE KIND OF CASE

This is an action commenced by the Plaintiff to recover Judgment under a written guaranty agreement executed by the defendant which guaranteed the payment of the floor planning account of a boat dealer purchasing boats from the defendant.

### DISPOSITION IN LOWER COURT

This case was tried to the Court. From a judgment for the Plaintiff, Defendant appeals.

### RELIEF SOUGHT ON APPEAL

The Defendant seeks a reversal of the judgment and the entry of a judgment in favor of the Defendant of no cause of action, or that failing, a new trial.

## STATEMENT OF FACTS

The Plaintiff is a corporation engaged in the business of financing the purchase by trust receipts and floor planning of various commodities by retailers.

The Defendant is engaged in the manufacture and sale of boats, the sales being to retail dealers and outlets.

In early 1972, a retail dealer of the Defendant by the name of L & S Boats, Great Falls, Montana, desired to purchase boats from the Defendant for retail sale and to finance them under a floor plan account. The Plaintiff did not service the Great Falls, Montana, area. However, at the request of the Defendant and upon its agreement to guaranty the account (Exhibit 1-P), the Plaintiff entered into a financing contract with L & S Boats (Exhibit 4-P). L & S Boats purchased the boats it desired from the Defendant and when the Defendant shipped them the Defendant invoiced the Plaintiff for payment (Exhibits 5-P, 6-P, 7-P, 8-P and R 46 L 19-25). The boats were to be held in trust as security and upon sale the trust amount was to be remitted to the Plaintiff. These agreements were entered into in March, 1972. Roy S. Ludlow was the President of the Defendant (R 43 L 25) and executed the written guaranty on behalf of the Defendant (R 45 L 12-14). It was further agreed by the Plaintiff and Defendant that monthly floor checks of the inventory of L & S Boats would be conducted by a retail credit company in the Great Falls, Montana, area, at the expense of L & S Boats and in addition the Defendant would make such a floor check each ninety (90) days. The limitation on credit to L & S Boats was \$25,000.00.

Contrary to the Appellants statement of facts, L & S Boats sold boats for some months and remitted the trust amount to the Plaintiff (R 70 L 19-24). However, on or about December 20, 1972, the Plaintiff was advised by the retail credit company that a floor check showed L & S Boats was out of trust for two (2) boats and two (2) trailers, totaling \$4,255.37 and was not able to make payment. The Plaintiff immediately notified Roy S. Ludlow, President of the Defendant, by telephone, and made demand upon the Defendant for payment of the balance owing on the L & S Boat account in accordance with the unconditional guaranty. Plaintiff also made written demand for payment of the Defendant on December 27, 1972 (Exhibit 2-P). The Plaintiff offered to assign its security position to the Defendant upon receiving payment (R 5 L 14-29). The Defendant refused payment and requested that the Plaintiff pick up the remaining merchandise. The Plaintiff refused and renewed its demand under the unconditional guaranty and made repeated requests for payment during the months of January, February and March, 1973 (R 47 L 16-18). In the meantime L & S Boats disposed of the remaining merchandise.

The Plaintiff, through its district manager, Norman Kent Moyes, offered testimony that a financing statement and UCC Form 1 were filed with the State of Montana (R 56 L 1-3, R 80, 81). No contrary evidence was introduced.

At the time of trial, the Plaintiff maintained that the Defendant had an unequivocal duty to make payment under the unconditional guaranty. The Defendant defended the action on the grounds the Plaintiff had the duty to first repossess the unsold merchandise still

in trust; further the unconditional guaranty was null and void as not being the legal act of the Defendant corporation and the Plaintiff failed to perfect its security agreement. The Trial Court resolved the issues in favor of the Plaintiff and granted the Plaintiff judgment, which is being appealed by the Defendant.

## ARGUMENT

### POINT I

#### DEFENDANT'S GUARANTY WAS A VALID DOCUMENT AND WAS NOT VOIDED BY ANY CONDUCT OF THE PLAINTIFF.

The cogent provisions of the unconditional guaranty (Exhibit 1-P), on the reverse side, in the third paragraph, are as follows:

“Until the indebtedness is fully paid, the guarantor waives all notices and formalities, all debtor relief protection, all rights to interpose defenses of the obligor, and all subrogation to collateral. The creditor shall have unlimited freedom to deal with the obligor and others concerning the indebtedness and collateral without reducing guarantor's liability. The creditor has no duty to enforce the creditor's rights (1) against the obligor or others, (2) in any collateral, or (3) under this guaranty, in any particular sequence or combination. . . .”

In 38 Am Jud 2d 1116, Guaranty Section 110, it is stated:

“The nature of the guarantor's promise controls the need for the creditor to pursue the debtor or his property before commencing an action against the guarantor. Where the contract

promise of the guarantor is absolute—that is, subject to no condition except the default of the principal debtor—or where the promise has become absolute by the occurrence of the named conditions, the guarantor is obligated to pay the debt of the principal debtor. In such a situation, the creditor may maintain an action against the guarantor immediately upon default of the debtor, without demand upon the debtor for payment and without first having proceeded against the debtor. The creditor need not show that an action against the debtor would be unavailing because of the latter's insolvency. The question as to whether the debt or any part thereof is collectible from the debtor does not affect the liability of the guarantor, the latter being unconditionally bound to satisfy the obligation. Further, if the guaranty is absolute, the creditor need not pursue any claim which he might have against the debtor's property before proceeding against the guarantor."

Even a cursory examination of the wording of the guaranty readily discloses that it is unconditional and absolute. There are no conditions precedent for action on the part of the Plaintiff before the Defendant becomes legally obligated to make payment other than a notice of default and demand for payment. *Wall v. Eccles*, 61 Utah 247, 211 P. 702, 145 A.L.R. 924.

The references on page 5 of the Defendants Brief to Suretyship and its legal argument based upon them are not applicable to the instant case. No fraud was present, the Plaintiff released no property rights or security interests and was entitled to immediate payment under the terms of the unconditional guaranty. The Plaintiff offered to immediately assign its security interest and position to the Defendant upon receiving payment. The Plaintiff was under no duty whatsoever

to first proceed against the trust property or L & S Boats.

Neither is the Defendant's reference to the Uniform Commercial Code applicable and none of its provisions change the Plaintiff's rights under the unconditional guaranty. The Defendant specifically refers to 70A-3-606, UCC, dealing with commercial paper and specifically releases, agreements not to sue and impairment of collateral, has no application in the instant case. The Defendant mistakenly concluded it had the right to withhold payment until the Plaintiff picked up the trust merchandise and must now bear its own loss resulting from such erroneous conclusion.

The Defendant, in closing its argument under this point, claims the Plaintiff failed to perfect its security interest. The Defendant introduced no evidence that a security interest had not been perfected and the testimony of the Plaintiff was to the effect a UCC Form 1 blanket filing had been made in the State of Montana. The Trial Court was correct in its conclusion that such was the case. However, it would seem moot whether a security interest was perfected or not since the Defendant refused to make payment, received no assignment of the Plaintiff's position nor made any attempt to exercise the rights of the security holder.

## POINT II

PLAINTIFF PROVED THE GUARANTY WAS VALID AND THE OFFICIAL ACT OF THE DEFENDANT AND THE COURT DID NOT ERR IN GRANTING JUDGMENT IN FAVOR OF THE PLAINTIFF BASED ON THE GUARANTY.

Roy S. Ludlow, the signator for the Defendant on the unconditional guaranty (Exhibit 1-P), testified he was the President of the Defendant (R 43 L 25) and that he signed on behalf of the Defendant corporation (R 45 L 8-14). This is consistent with his signature following the typed name and address of the Defendant corporation. At no time during his testimony did Roy S. Ludlow deny his authority to sign for and on behalf of and to legally bind the Defendant. Further, no evidence whatsoever was introduced by the Defendant that its President had no authority to execute the unconditional guaranty. Therefore, the execution of the document and the testimony of its President stands and the document remains as the uncontroverted act and contract of the Defendant, binding it to all of the terms of the unconditional guaranty.

Furthermore, the Defendant, having been advised that credit would be extended L & S Boats only upon a written guaranty and having executed and delivered the same and having sold and shipped boats to L & S Boats and billed the Plaintiff and having received payment would be estopped from now contending that the guaranty lacked proper corporate authority. 19 Am Jur 2d 451, Corporations Section 974. Union Trust Co. v Illinois Midland R. Co. 117 US 434, 29 L ed 963, 6 S Ct 809; 809; Long v Georgia P. R. Co. 91 Ala 519, 8 So 706; Dillon V Myers, 58 Colo 492, 146 P 268; Marshall v Webster, 287 Ky 692, 155 SW2d 13; Shoemaker v Mechanics' Nat. Bank, 31 Md 396; Benson Lumber Co v Thornton, 185 Minn 230, 240 NW 651, 81 ALR 981; Whitney Arms Co. v Barlow, 63 NY 62; Williston v Ludowese, 53 ND 797, 208 NW 82; Crowder State Bank v Aetna Power Co. 41 Okla 394, 138 P 392; Dexter v First Guaranty State Bank (Tex Civ App) 180 SW 1172; Creditor's Claim &

Adjustment Co. v Northwest Loan & T. Co. 81 Wash 247, 142 P 670.

The authorities quoted by the Defendant on pages 10 and 11 of its Brief all relate to situations where the corporation has denied its authority to execute the document. No such denial was made in the instant case and such authorities are therefore not in point.

Also, the failure of the Defendant to furnish a certified copy of a board resolution or by-law, although desirable, does not void the unconditional guaranty and particularly so where the parties treated the same as a valid and binding document. The Trial Court properly found that the guaranty was executed by the Defendant, through its President, Roy S. Ludlow, and based upon the President's testimony the guaranty was properly executed on behalf of the Defendant corporation.

### CONCLUSION

The Plaintiff respectfully submits that the Trial Court properly resolved the issues in the Plaintiff's favor and did not err in any of the particulars claimed by the Defendant.

The Defendant's appeal should be dismissed and the Plaintiff awarded his costs of Court.

Respectfully submitted,

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