

**VALIDITY OF CONTRACTUAL WAIVERS ALLOWS LENDERS
TO AVOID CONFIRMATION AS CONDITION PRECEDENT TO
DEFICIENCY ACTIONS AGAINST GUARANTORS.**

In what might be viewed as the last nail in the coffin for Georgia's confirmation statute, the Georgia Supreme Court's recent opinion in *PNC Bank, National Association v. Smith*¹ affirms that a lender may contract around the statutory requirement of confirming the results of a prior foreclosure sale before pursuing a deficiency action – at least with respect to the pursuit of guarantors.² In responding to two certified questions from the federal district court in a deficiency action where the lender foreclosed first, but did not confirm the results of the prior foreclosure sale, the Supreme Court held that (1) a lender's compliance with the requirements of the Georgia confirmation statute is a condition precedent to the lender's ability to pursue a guarantor for a deficiency after a foreclosure sale has been conducted; and (2) a guarantor can waive the condition precedent requirement of the foreclosure confirmation statute by virtue of waiver clauses in its loan documents.³

The Supreme Court first reviewed the record, which showed PNC Bank, National Association ("PNC") made a loan to Hoschton Town Center, LLC, which was guaranteed by several individuals and secured by property in Jackson County, Georgia.⁴ The borrower was not a party to the action.⁵ In the security deed encumbering the Jackson County property, the borrower granted PNC the right to exercise its power of sale in the event of a default and also the ability to pursue other collateral, including "contracts of guaranty."⁶ The borrower also agreed to a choice of remedy clause granting PNC "the right to exhaust its remedies 'either concurrently or independently, and in such order as [PNC] may determine.'"⁷ In separate guaranty agreements, each guarantor pledged to remain unconditionally liable on the indebtedness, irrespective of the borrower's liability (or discharge of same).⁸ Moreover, the guarantors also waived "any and all rights or defenses ... based on any "one action" or "antideficiency" law or any law which prevents [PNC] from bringing any action, including claim for deficiency against [the guarantors], before or after [PNC]'s completion of any foreclosure action...."⁹ Perhaps more importantly, the guarantors "also acknowledged PNC's right of foreclosure and agreed to remain liable for the indebtedness" even if PNC did not confirm the foreclosure sale.¹⁰

Following the borrower's default under the loan, PNC sent the borrower and guarantors a notice of default and acceleration of the debt.¹¹ PNC then notified the obligors of its intended foreclosure sale and the property was ultimately foreclosed.¹² PNC elected not to seek confirmation of the foreclosure sale and instead filed an action against only the guarantors for the deficiency balance remaining on the note, arguing that the guarantors had waived "any and all defenses" to the action.¹³

This case marks the first time the Georgia Supreme Court has addressed the issue of whether a guarantor's contractual waivers can relieve a lender from the necessity of confirming the results of a foreclosure sale before pursuing a deficiency action against a guarantor, but this argument found a solid toehold a little over two years ago when the Georgia Court of Appeals issued its opinion in *HWA Properties, Inc. v. Community and Southern Bank* ("HWA")¹⁴. In *HWA*, a case on appeal from the trial court's grant of summary judgment to the plaintiff mortgage lender, the Court of Appeals ruled that, on the basis of the waiver of defenses in the guaranty agreement at issue, the failure of the mortgage lender to obtain confirmation of the foreclosure sale¹⁵ did not bar an action against the guarantor for the deficiency.¹⁶ The Court found that by signing the guaranty agreement, the guarantor had waived his right to *all* defenses to his liability on the indebtedness, apart from the defense of payment in full.¹⁷ After an examination of the waiver provisions in the guarantor's personal guaranty agreement¹⁸, the Court concluded that the lender's failure to obtain confirmation of the foreclosure sale did not prohibit the lender from collecting on the deficiency from the guarantor personally.

HWA affirmed a guarantor's ability to contractually waive the requirements of the Georgia confirmation statute; however, without controlling precedent in the form of a Supreme Court opinion, the decision's reach remained uncertain. The obligors on the loan at issue in *HWA* petitioned the Georgia Supreme Court for a writ of certiorari to review the Court of Appeals' decision, but the Supreme Court denied cert., leaving room for lower courts to distinguish *HWA*. Some courts distinguished *HWA* by finding that the specific guaranty waivers in the cases before them were not as "clear and express" as the guaranty waivers in *HWA* and therefore did not waive the requirements of Georgia's confirmation statute.

Not long after its decision in *HWA*, the Court of Appeals again reached the same result in *Community & Southern Bank v. DCB Investments, LLC*¹⁹,

finding that the guarantor had waived its rights under the confirmation statute based on the language of the guaranty agreement. Specifically, the Court of Appeals noted its result was consistent with the “fundamental principle” that freedom of contract is sacrosanct and should not be limited absent an important policy reason.²⁰

The *PNC Bank* decision cites with approval both *HWA* and *Community & Southern Bank*, and heartily agreed with the Court of Appeals’ reliance on the sanctity of contractual rights in *Community & Southern Bank*, stating, “[t]his result creates an appropriate balance between the statutory protections of the confirmation statute and the freedom of a guarantor to enter contracts deemed beneficial.”²¹ Based on its interpretation of the case law and the guarantees at issue, the Supreme Court found that “*a lender’s compliance with the requirements contained in [Georgia’s confirmation statute] is a condition precedent to the lender’s ability to pursue a guarantor for a deficiency after a foreclosure has been conducted, but a guarantor retains the contractual ability to waive the condition precedent requirement.*”²²

The Georgia Supreme Court has now provided clear guidance to lenders, and more importantly to lower courts, on what types of contractual waivers are “clear and express” for purposes of avoiding the requirements of the Georgia confirmation statute: contractual provisions that (1) waive all defenses to liability on the entire balance due on the note; (2) consent for the lender to collect other collateral and apply the proceeds to the amount due on the note; (3) agree that the collection of other collateral will not reduce, affect, or impair the guarantor’s liability; (4) agree that the guarantor will remain liable for any deficiency even after foreclosure of the property and release of the borrower; and (5) acknowledge the lender’s right of foreclosure and agrees to remain liable for the indebtedness even if post-foreclosure confirmation does not occur.²³

Unless and until the General Assembly takes legislative action, the *PNC Bank* decision provides a roadmap for lenders who wish to avoid the requirements of the Georgia confirmation statute. Lenders who did not re-draft their guaranty forms after the *HWA* and *Community & Southern Bank* decisions may wish to consult with their internal and external counsel about doing so now in order to take advantage of the *PNC Bank* decision. For limited recourse or carve-out guaranty agreements, this should include a springing recourse event for guarantors asserting application of the Georgia confirmation statute in addition to the *PNC Bank*-style contractual waivers.

Lenders may also wish to revisit prior matters where confirmation was denied or not pursued, but a substantial deficiency balance remains outstanding, to assess whether the *PNC Bank* decision has breathed new life into previously abandoned recovery actions.

As suggested by Justice Nahmias in his concurring opinion, lenders may wish to place these same contractual waivers and acknowledgments in their security deeds since the PNC Bank decision may apply with equal weight to borrowers in light of the Supreme Court's prior *First National Bank & Trust Co. v. Kunes*²⁴ decision that equated guarantors and borrowers under the Georgia confirmation statute.²⁵ For the prudent lender who incorporates *PNC Bank*-style waivers into both guaranty agreements and security deeds, the Georgia confirmation statute may be a "dead letter" that no longer presents a procedural hurdle to lenders who wish to foreclose upon real property collateral prior to pursuing a deficiency action.²⁶

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