Mercer Law Review

Volume 65
Number 4 *Eleventh Circuit Survey*

Article 19

7-2014

Confirming the Enforceability of the Guaranty Agreement After Non-Judicial Foreclosure in Georgia

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Comment

Confirming the Enforceability of the Guaranty Agreement After Non-Judicial Foreclosure in Georgia

I. INTRODUCTION

Between 2008 and 2011, Georgia experienced seventy-four bank failures, the highest number of failures in the nation.[1] Of these seventy-four banks, sixty-nine were small banks (banks with less than $1 billion in assets), five were "medium-size" banks (banks with assets between $1 billion and $10 billion), and none were large banks (banks with more than $10 billion in assets).[2] The majority of bank failures in Georgia were therefore comprised of small banks with less than $1 billion in assets. Unfortunately, the failures of these community banks

1. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-13-71, FINANCIAL INSTITUTIONS: CAUSES AND CONSEQUENCES OF RECENT BANK FAILURES 7 (2013) [hereinafter GAO REPORT], *available at* http://www.gao.gov/assets/660/651154.pdf. According to the Government Accountability Office (GAO), Georgia had seventy-four bank failures between 2008 and 2011 and is one of ten states that experienced ten or more bank failures within that time period. *Id.* Out of the banks experiencing failures in these ten states, 86% had less than $1 billion in assets, 52% had less than $250 million in assets, 12% had between $1-$10 billion in assets, and 2% had more than $10 billion in assets. *Id.*

2. *Id.* at 8.

"were largely driven by credit losses on commercial real estate . . . loans."[3]

Problems associated with Georgia's anti-deficiency statute,[4] also known as the confirmation statute, may have contributed to the high number of failed lending institutions in the state. Georgia courts have broadly construed the confirmation statute to apply to both the borrower and guarantor, essentially extinguishing the enforceability of a guaranty agreement, and therefore precluding the lender's ability to recover.[5]

Under Georgia's confirmation statute, a lender is required first to obtain court approval, or "confirmation," of a non-judicial foreclosure sale before pursuing a deficiency judgment against a debtor.[6] In theory, the confirmation hearing is a simple proceeding wherein the court examines the procedural fairness of the foreclosure sale and ensures that the property is sold for at least its fair market value.[7] However, in a depressed economy, judicial and legislative concern for the "plight of distressed borrowers, many of whom have suffered devastating losses brought on by the burst of the housing bubble and ensuing recession,"[8] has transformed the simple confirmation proceeding into a "critical battle that gives borrowers and guarantors the opportunity to eradicate their deficiencies."[9] Particularly troubling is the fact that confirmation proceedings have increasingly been utilized "by commercial property owners who rely on technical arguments to overturn a confirmation in which they fully participated."[10]

Although a valid concern exists for the plight of distressed borrowers in a depressed economy, lenders should also be included within the scope of judicial and legislative concern. When one thinks of a "lender," attention has largely focused on financial institutions that are "too big to fail."[11] However, most American banks do not fall within this category, as small, community banks constitute approximately 98% of all

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3. *Id.* (introductory summary).

4. O.C.G.A. § 44-14-161 (2002).

5. *See infra* Part II.C.

6. O.C.G.A. § 44-14-161(a).

7. *See* O.C.G.A. § 44-14-161(b).

8. You v. JP Morgan Chase Bank, N.A., 293 Ga. 67, 75, 743 S.E.2d 428, 434 (2013).

9. Stephanie A. Everett & Ariel Denbo Zion, Representing Borrowers: Tips and Tools for Your Defense 7; Institute of Continuing Legal Education in Georgia, Real Property Foreclosure Program Materials 128078 (2012).

10. Ameribank, N.A. v. Quattlebaum, 269 Ga. 857, 860, 505 S.E.2d 476, 479 (1998) (Fletcher, J., dissenting).

11. Tanya D. Marsh, *Too Big to Fail vs. Too Small to Notice: Addressing the Commercial Real Estate Debt Crisis*, 63 ALA. L. REV. 321, 371 (2012).

financial institutions in the United States.[12] As one commentator noted,

> [s]ome of the buzz[]words surrounding the economic climate in the fall of 2008 were "systemic risk" and "too big to fail," but community banks, which do not pose systemic risk and are not too big to fail, face different challenges and opportunities as a result of the financial crisis.[13]

Smaller banks engage in a different banking model than larger financial institutions, and smaller banks are more likely to engage in a model that "involves more one-on-one interaction with customers."[14] Under this model, banks consider both the borrower's quantifiable, "hard" information with the "soft" information that is "acquired primarily by working with the banking customer."[15] As a result, these smaller banks are the major source of credit for small businesses,[16] as they "may be able to extend credit to customers such as small business owners who might not be considered for a loan from a larger bank."[17] Community banks are therefore "a small—but vital—sector in the overall health of our economy" because they "foster economic growth and serve their communities, boost small businesses, and help increase individual savings."[18]

These small banks have experienced difficulty in enforcing commercial guarantors' obligations under their guaranty agreements after extending credit to commercial borrowers who may otherwise not have been able to obtain a loan.[19] The Georgia Court of Appeals, in *HWA Properties, Inc. v. Community & Southern Bank*,[20] however, recently upheld the enforcement of the guarantor's obligations to the lender regardless of the confirmation statute's effect on the borrower's liability.[21] Although the guarantor in *HWA Properties* appealed this decision, the Georgia

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12. *Id.* The Federal Deposit Insurance Corporation (FDIC) stated that, as of 2011, community banks made up 92% of FDIC-insured banks and 95% of all U.S. banking organizations. FDIC COMMUNITY BANKING STUDY, 1 (2012).

13. Patrick D. Craig, Note, *Citizens South: Innovative Use of TARP Funds Creates Value for Customers, Community, and the Bank*, 14 N.C. BANKING INST. 361, 362 (2010).

14. GAO REPORT, *supra* note 1, at 8.

15. *Id.*

16. Marsh, *supra* note 11, at 371.

17. GAO REPORT, *supra* note 1, at 8.

18. 155 CONG. REC. E677 (statement of Rep. Ruben Hinojosa).

19. *See* GAO REPORT, *supra* note 1, at 52.

20. 322 Ga. App. 877, 746 S.E.2d 609 (2013), *cert. denied*, No. S13C1731, 2013 Ga. LEXIS 980 (2013).

21. *Id.* at 887-88, 746 S.E.2d at 617.

Supreme Court denied certiorari, and the court of appeals decision currently remains intact.[22]

Part I of this Comment will provide a general overview of Georgia's confirmation statute and its application to guarantors. Part I further advocates that such an application with respect to commercial guarantors is inconsistent with the purpose of the statute, which has remained relatively unchanged from its original enactment in 1935. Part II will discuss the decision of the Georgia Court of Appeals in *HWA Properties,* which upheld the enforceability of the guaranty agreement despite the bank's failure to comply with the terms of the confirmation statute. Part III proposes that the Georgia legislature codify the court's decision in *HWA Properties* and explicitly include a provision in the confirmation statute allowing guarantors to waive protection of the statute. In the alternative, the legislature could substantially amend the confirmation statute to replace confirmation proceedings with a "true market value defense" available for debtors—both principal borrowers and guarantors—to assert in a deficiency action.

II. THE CONFIRMATION STATUTE

A lender has two primary options to pursue foreclosure in Georgia: judicial foreclosure and non-judicial foreclosure.[23] Under judicial foreclosure, the lender must first receive court authorization to conduct a foreclosure sale; under non-judicial foreclosure, the lender can obtain power of sale from a security deed that contains language granting that power to the lender.[24] Judicial foreclosures are expensive and time-consuming and are therefore less popular than a non-judicial foreclosure, which is considered a "streamlined more efficient version of judicial foreclosure."[25] To facilitate such streamlining, "Georgia courts have long held that non-judicial foreclosure is governed primarily by contract law."[26]

A forced sale of real estate in foreclosure, whether judicial or non-judicial, will result in a deficiency if the sale of the property does not fully satisfy the outstanding debt.[27] Historically, "it was the law of Georgia that the holder [of a security deed] might exercise the power of

22. HWA Props., Inc. v. Cmty. & S. Bank, No. S13C1731, 2013 Ga. LEXIS 980 (2013).

23. Ann M. Saegert, *Commercial Lending Issues in the United States*, 15 PROB. & PROP. 37, 38 (2001).

24. *Id.*

25. Pamela Giss, Comment, *An Efficient and Equitable Approach to Real Estate Foreclosure Sales: A Look at the New Hampshire Rule*, 40 ST. LOUIS U. L.J. 929, 939 (1996).

26. *You*, 293 Ga. at 69, 743 S.E.2d at 430.

27. *See* O.C.G.A. § 44-14-161(1).

sale contained therein, unimpeded by any such conditions as were later embodied in [the confirmation statute]."[28] If the sale of the property "did not bring an amount sufficient to satisfy the debt, the grantor would be liable for the remainder and subject to a judgment therefor in a proper action."[29]

In Georgia, a lender does not automatically gain the right to seek a deficiency judgment after a non-judicial foreclosure; instead, this right is subject to the requirements of the confirmation statute.[30]

A. Purpose of the Confirmation Statute

In the 1920s and 1930s, the shortcomings of non-judicial foreclosure proceedings became readily apparent as the frequency of foreclosures increased during the Great Depression.[31] With property values dramatically declining, the resulting revenue from the sale of foreclosed property was nominal.[32] At times when the economy was healthy, competitive bidding provided reasonable assurance to the borrower that the foreclosure sale would not yield a "grossly inadequate sale price."[33] However, during the Depression, this type of borrower protection no longer existed.[34] Instead, a lender could receive a "double recovery

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28. Atl. Loan Co. v. Peterson, 181 Ga. 266, 272, 182 S.E. 15, 18 (1935) (citing Nat'l Mortg. Corp. v. Bullard, 178 Ga. 451, 454-55, 173 S.E. 401, 403 (1934)).

29. *Id.* A lender also has the option to sue the borrower directly on the promissory note without foreclosure proceedings, and

> [a] creditor who holds a promissory note secured by a deed is not put to an election of remedies as to whether he shall sue upon the note or exercise a power of sale contained in the deed, but he may do either, or "pursue both remedies concurrently until the debt is satisfied."

Taylor v. Thompson, 158 Ga. App. 671, 672, 282 S.E.2d 157, 158 (1981) (quoting Oliver v. Slack, 192 Ga. 7, 8, 14 S.E.2d 593, 594 (1941)).

A lender is therefore not required to mitigate its damages by exercising the power of sale contained in the deed but may instead choose to sue directly on the promissory note without foreclosing on the property. REL Dev., Inc. v. Branch Banking & Trust Co., 305 Ga. App. 429, 431, 699 S.E.2d 779, 781 (2010). If, however, a lender chooses to pursue a suit on the promissory note, the borrower is put in "the precarious position of being sued for the full amount owed under the loan (rather than the full amount less any credit given for the foreclosure sale of collateral)." Everett & Zion, *supra* note 9, at 23-24.

30. *See, e.g.*, Vlass v. Sec. Pac. Nat'l Bank, 263 Ga. 296, 297, 430 S.E.2d 732, 734 (1993); *see also* O.C.G.A. § 44-14-161.

31. Giss, *supra* note 25, at 944.

32. *Id.*

33. John W. Brabner-Smith, Comment, *Economic Aspects of the Deficiency Judgment*, 20 VA. L. REV. 719, 725 (1934) (quoting Suring State Bank v. Giese, 246 N.W. 556 (Wis. 1933)).

34. *See* Maxwell M. Freeman & Elizabeth Freeman Gurev, *An Overview of Defenses Available to Guarantors of Real Property Secured Transactions Under California Law*, 38

because the lender got both the land (with value greater than the bid price) *and* the deficiency proceeds."[35] As a result, "many mortgagors were forced into bankruptcy by the deficiency judgments which were sought and obtained against them after mortgagees had acquired the property at non-judicial foreclosure sales for nominal or reduced prices."[36]

In response, many states, including Georgia, enacted anti-deficiency statutes to protect mortgage debtors from inflated deficiency judgments after a foreclosure sale of their property.[37] Georgia's anti-deficiency confirmation statute is still in effect and largely unchanged from its original version.[38] The statute in its current form reads as follows:

> (a) When any real estate is sold on foreclosure, without legal process, and under powers contained in security deeds, mortgages, or other lien contracts and at the sale the real estate does not bring the amount of the debt secured by the deed, mortgage, or contract, no action may be taken to obtain a deficiency judgment unless the person instituting the foreclosure proceedings shall, within 30 days after the sale, report the sale to the judge of the superior court of the county in which the land is located for confirmation and approval and shall obtain an order of confirmation and approval thereon.
> (b) The court shall require evidence to show the true market value of the property sold under the powers and shall not confirm the sale unless it is satisfied that the property so sold brought its true market value on such foreclosure sale.
> (c) The court shall direct that a notice of the hearing shall be given to the debtor at least five days prior thereto; and at the hearing the court shall also pass upon the legality of the notice, advertisement, and regularity of the sale. The court may order a resale of the property for good cause shown.[39]

Unlike other types of anti-deficiency legislation, Georgia's confirmation statute is characterized as a "fair market value" statute.[40] This type of anti-deficiency statute allows a lender to pursue a deficiency judgment only after the lender presents sufficient evidence that the property was

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SANTA CLARA L. REV. 329, 333 (1998) (describing secured property transactions in California during the Depression).

35. *Id.* at 334.

36. Presidential Fin. Corp. v. Snead (*In re* Snead), 231 B.R. 823, 825 (Bankr. N.D. Ga. 1999).

37. Brian Henderson, Comment, *Commercial Transactions: Waiver of Guarantor's Rights in Mortgage Transactions Under Oklahoma Law*, 51 OKLA. L. REV. 325, 341 (1998).

38. O.C.G.A. § 44-14-161.

39. *Id.*

40. Giss, *supra* note 25, at 946.

sold for at least its fair market value.[41] The statute did not abolish the lender's right to collect a deficiency judgment but instead "subject[ed] it to the condition that the foreclosure sale under power be given judicial approval."[42] Notably, in 1933, two years before the confirmation statute was enacted, a bill was introduced in the Georgia House of Representatives to completely abolish the lender's right to seek a judgment for a deficiency after foreclosure.[43] However, the Georgia legislature rejected this version, ultimately choosing to uphold the lender's common law right to seek a deficiency judgment, but limited that right by requiring the lender first to comply with the requirements of the statute.[44]

The confirmation statute limits the lender's common law right to seek a deficiency by requiring the lender first to present evidence that the property sold for at least its true market value at the foreclosure sale.[45] In addition, the court must approve the notice, advertisement, and regularity of the foreclosure sale before issuing a confirmation order approving the sale.[46] If a lender presents evidence to the court's satisfaction, that lender is then permitted to seek the deficiency against the borrower.[47]

A lender must strictly comply with the confirmation statute's requirements.[48] For example, the statute requires that the lender "report the sale to the judge of the superior court of the county in which the land is located."[49] Because this requirement is explicit and not subject to more than one interpretation, a report given to the *clerk* of the superior court does not comply with the terms of the statute because a lender is explicitly required to "report the sale to the *judge* of the

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41. *See id.*

42. First Nat'l Bank & Trust Co. v. Kunes, 230 Ga. 888, 890, 199 S.E.2d 776, 778 (1973).

43. 1933 GA. H. JOURNAL 311.

44. *See Kunes*, 230 Ga. at 890-91, 199 S.E.2d at 778 (citing 1935 GA. H. JOURNAL at 1759).

45. Atreus Cmtys. of Am., LLC v. KeyBank Nat'l Ass'n, 307 Ga. App. 716, 717, 706 S.E.2d 107, 108 (2011); *see also* O.C.G.A. § 44-14-161.

46. *See* Nicholson Hills Dev., LLC v. Branch Banking & Trust Co., 316 Ga. App. 857, 860, 730 S.E.2d 572, 575 (2012). One of the primary objectives of requiring proper advertisement is to "attract buyers who will compete against one another so as to yield the highest price." *Id.* (quoting Dan Woodley Cmtys., Inc. v. SunTrust Bank, 310 Ga. App. 656, 657, 714 S.E.2d 145, 146 (2011)).

47. *See* Martin v. Fed. Land Bank of Columbia, 173 Ga. App. 142, 144, 325 S.E.2d 787, 789 (1984) (Beasley, J., dissenting).

48. *See, e.g.*, Goodman v. Vinson, 142 Ga. App. 420, 421, 236 S.E.2d 153, 154 (1977) (noting that the confirmation statute's terms must be strictly construed).

49. O.C.G.A. § 44-14-161(a).

superior court of the county in which the land is located."[50] If a lender fails to abide by this explicit requirement, it will not be permitted to obtain confirmation.[51] Theoretically, this process appears simple—a lender should carefully read the statute and comply with its exact requirements. However, not all terms in the statute are so explicit, leaving some essential requirements open to interpretation.[52] In

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50. *Id.* (emphasis added); *see also* Bentley v. N. Ga. Prod. Credit Ass'n, 170 Ga. App. 361, 362, 317 S.E.2d 339, 339 (1984) ("The judge himself, not the clerk of court, is the one to whose attention the report of sale and its particulars must be brought."); Cornelia Bank v. Brown, 166 Ga. App. 68, 69, 303 S.E.2d 171, 172 (1983).

51. *See* Kennedy v. Gwinnett Commercial Bank, 155 Ga. App. 327, 330, 270 S.E.2d 867, 871-72 (1980).

52. For example, the confirmation statute requires that the lender provide "evidence to show the true market value of the property sold under the powers." O.C.G.A. § 44-14-161(b). Under the terms of the statute, a court "shall not confirm the sale unless it is satisfied that the property so sold brought its true market value on such foreclosure sale." *Id.* Courts in Georgia have interpreted "true market value" to be "the price that the property will bring when it is offered for sale by one who is not obligated, but has the desire to sell it, and is bought by one who wishes to buy it, but is not under a necessity to do so." Jimmy Britt Builders, Inc. v. SunTrust Bank, 307 Ga. App. 663, 665 n.4, 706 S.E.2d 665, 667 n.4 (2011) (quoting REL & Assocs., LLC v. FDIC, 304 Ga. App. 33, 34, 695 S.E.2d 370, 371-72 (2010)).

However, in the context of a foreclosure sale, selling the property for at least its "true market value" in a depressed economy is inherently difficult to achieve, even for a scrupulous lender:

> Foreclosure sales are unlikely to bring "fair market value," first, because of the time pressure involved between the decision to foreclose and the actual sale. Often advertising is only conducted for a period of three to five weeks. The uniqueness of real estate demands that enough time be given to find a purchaser who is both willing and able to pay the asking price. Further, purchasers are typically apprised of the lender's desire to sell; thereby reducing the amount the purchaser is willing to put forward. Finally, title is rarely as stable in foreclosure sales, reducing the marginal benefit to the purchaser of bidding on the property.

Giss, *supra* note 25, at 947 (citations omitted). Furthermore, Georgia courts require that the lender put forth evidence establishing the value of the property when the sale was made. *Id.*

How, then, does a lender establish the property's true market value? The current version of the statute provides no guidance. "As a general rule the price brought at a public sale, after proper and lawful advertisement, is prima facie the market value of the property." Peachtree Mortg. Corp. v. First Nat'l Bank, 143 Ga. App. 17, 18, 237 S.E.2d 416, 418 (1977) (quoting Thompson v. Maslia, 127 Ga. App. 758, 764, 195 S.E.2d 238, 243 (1972)). Lenders and borrowers therefore typically present competing appraisals of the property as evidence of true market value. Although courts accept such expert appraisals as evidence of true market value, appraisals of real estate value are far from a precise science. *Id.*; *see also* La Ronde, Ltd. v. Amsouth Bank of Fla., 203 Ga. App. 400, 416 S.E.2d 881 (1992).

> Substituting an appraiser's opinion as to reasonably equivalent value merely results in the court looking to find what an imaginary buyer will pay an imaginary

particular, the statute does not state whether guarantors are protected under the statute.[53]

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seller under unreal conditions, rather than finding what a real buyer and seller do in real circumstances. While being as "well informed as possible," an appraiser's opinion of value is, after all, merely a guess.

Alan S. Gover & Glenn D. West, *The Texas Nonjudicial Foreclosure Process—A Proposal to Reconcile the Procedures Mandated by State Law sith the Fraudulent Conveyance Principles of the Bankruptcy Code*, 43 Sw. L.J. 1061, 1080 (1990).

Therefore, an appraisal purportedly evidencing the "true market value" of property will vary based on a particular appraiser's chosen method of calculation and analysis, and is essentially nothing more than a "guess" of the property's value. The three dominant appraisal methods typically used to determine the market value of commercial real estate are: "(1) the cost approach, (2) the sales comparison approach, and (3) the income capitalization approach." Marsh, *supra* note 11, at 358. Each of these appraisal methods uses different techniques and methods and therefore "normally arrive at different estimates of market value." *Id.*

Because the confirmation statute "does not preclude any specific method of property appraisal," both the lender and borrower submit their respective appraisals to the court with the hope that the presiding judge will find their appraiser's guess to be more reflective of "true market value" than the other. *See* Boring v. State Bank & Trust Co., 307 Ga. App. 93, 97, 704 S.E.2d 207, 210 (2010). For example, in *River Forest, Inc. v. United Bank*, 320 Ga. App. 115, 739 S.E.2d 403 (2013), the lender submitted an appraisal valuing the property at $105,000, while the borrower submitted a competing appraisal valuing the property at $265,000. *Id.* at 118-19, 739 S.E.2d at 406. Both appraisers utilized the sales comparison approach, but the lender's appraiser discounted the initial retail value determination of $255,000 to $105,000 after applying a discount cash-flow method to account for depressed market conditions. *Id.* In some cases, the judge finds the lender's appraisal to be reflective of true market value. *See id.* at 119, 739 S.E.2d at 407. In other cases, although the lender relied in good faith on its appraiser's opinion as to value, the judge finds that the appraisal is faulty and will deny confirmation. This occurred in *Gutherie v. Ford Equipment Leasing Co.*, 206 Ga. App. 258, 424 S.E.2d 889 (1992), when the Georgia Court of Appeals reversed confirmation because the trial court inappropriately relied on the "quick sale" value of the property. *Id.* at 261, 424 S.E.2d at 892. The court of appeals held that such valuation "[did] not reflect the price that would be obtained in a sale under the usual market conditions." *Id.* The court found that the statute, in using the terms "true market value," could not be "construed to mean 'market value under quick sale conditions.'" *Id.* Moreover, an appellate court will generally defer to the trial court's determination as to which appraisal was more reflective of true market value: So long as "the appraiser's opinion was not based on sheer speculation, [the appellate court] will not second guess any methodology utilized to reach the opinion." Mundy Mill Dev., LLC v. ACR Prop. Servs., LP, 306 Ga. App. 730, 734, 703 S.E.2d 137, 140 (2010) (quoting *REL & Assocs.*, 304 Ga. App. at 35, 695 S.E.2d at 372).

53. *See* O.C.G.A. § 44-14-161(c) (requiring notice to the "debtor").

B. *Extending Protection to Guarantors: First National Bank & Trust Co. v. Kunes*

The seminal case extending protection to guarantors is *First National Bank & Trust Co. v. Kunes*,[54] when the Georgia Court of Appeals allowed a commercial guarantor to escape his contractual obligations based on deficient notice.[55] The confirmation statute requires the court to "direct that a notice of the hearing . . . be given to the debtor at least five days prior thereto."[56] Contrary to the strict construction purportedly required by the statute, however, in *Kunes* the Georgia Court of Appeals broadly interpreted the undefined, ambiguous term "debtor" against the lender by extending the term to include guarantors.[57]

In *Kunes*, the lender applied for confirmation of a foreclosure sale in the appropriate court and named the corporate-borrower as the sole defendant. The Superior Court of Tift County directed notice of the proceedings to the corporate-borrower in accordance with the confirmation statute and subsequently confirmed the sale.[58] With confirmation of the sale in hand, the lender instituted a deficiency action against the corporate-borrower and the two guarantors of the loan (who were also officers of the corporate-borrower). All three defendants filed a motion to dismiss, arguing that the guarantors failed to receive notice of the confirmation proceedings. The court granted the motion to dismiss, and the lender appealed.[59]

On appeal, the lender argued that the guarantors were not "debtors" entitled to notice under the terms of the confirmation statute.[60] The court of appeals rejected this argument and concluded that the term "included all who were presently subject to payment of the debt, or who might be subjected to payment thereof."[61] Further, the court noted that "[i]t would only be under the principle of reductio ad absurdum to say the General Assembly wished to protect the principal debtor from double

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54. 128 Ga. App. 565, 197 S.E.2d 446, *aff'd*, 230 Ga. 888, 199 S.E.2d 776 (1973).

55. *Id.* at 569, 197 S.E.2d at 449.

56. O.C.G.A. § 44-14-161(c).

57. *Kunes*, 128 Ga. App. at 567-69, 197 S.E.2d at 448-49; *compare Bentley*, 170 Ga. App. at 362, 317 S.E.2d at 339 ("The judge himself, not the clerk of court, is the one to whose attention the report of sale and its particulars must be brought.") *with Kunes*, 128 Ga. App. at 568, 197 S.E.2d at 448 ("The statute, by using the word 'debtor,' included all who were presently subject to payment of the debt, or who might be subjected to payment thereof, if within the knowledge of the payee of the note.").

58. *Kunes*, 128 Ga. App. at 565-66, 197 S.E.2d at 447.

59. *Id.* at 565-66, 197 S.E.2d at 447-48.

60. *Id.* at 567, 197 S.E.2d at 448.

61. *Id.* at 568, 197 S.E.2d at 448.

payment, but did not have any concern whatever for endorsers and guarantors."[62] Interestingly, the court did not reference any legislative history of the statute to reach this conclusion but rather turned to the language of a different court of appeals opinion to "reinforce[]" its interpretation.[63]

Under the holding in *Kunes*, a lender cannot pursue a deficiency judgment against the guarantor if the guarantor does not receive proper notice of the confirmation proceedings.[64] Notably, in contrast to the court's theory of legislative intent, a prior version of the confirmation statute included more specific terms with regard to the required recipients of notice; notice of the hearing was to be given to the "mortgagor, grantor, their heirs, legal representatives, successors or assignees of grantor or mortgagor."[65] Although this language was consolidated to the single term "debtor" in the final version of the statute, which was approved and enacted just twenty-two days after this prior version was proposed,[66] the legislature's exclusion of guarantors in its list is notable. Arguably, based on this exclusion, the legislature, when using the term "debtor" in the enacted version of the statute, did not intend for a "debtor" to include guarantors.[67]

Although the holding in *Kunes* was based on the statute's notice requirement, other courts have broadly applied the holding to mean that "guarantors and sureties enjoy the protection of the confirmation statute."[68] Therefore, a failure to obtain confirmation, for whatever reason, not only bars a lender's recovery from the principal borrower, but also bars any recovery from a guarantor of the loan.[69]

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62. *Id.* at 567-68, 197 S.E.2d at 448 (emphasis omitted).

63. *Id.* at 567, 197 S.E.2d at 448 (citing Goodman v. Nadler, 113 Ga. App. 493, 496, 148 S.E.2d 480, 483 (1966)). In *Goodman*, however, the Georgia Court of Appeals did not refer to legislative intent, but only noted that the "strongest ground of public policy" in enforcing the confirmation statute was to protect the debtor from double payment. *Goodman*, 113 Ga. App. at 496, 148 S.E.2d at 483.

64. *See Kunes*, 128 Ga. App. at 569, 197 S.E.2d at 449.

65. 1935 GA. H. JOURNAL 1759.

66. *Id.* The Georgia House of Representatives proposed this version on March 6, 1935, and the statute was enacted on March 28, 1935. *Id.*

67. Under the interpretive canon of *expressio unius est exclusio alterius*, "when the legislature includes some circumstances explicitly, then the legislature intentionally omitted other similar circumstances that would logically have been included. In other words, the canon presumes that the legislature considered and rejected every related possibility." LINDA D. JELLUM, MASTERING STATUTORY INTERPRETATION 111 (2008).

68. Redman Indus., Inc. v. Tower Props., Inc., 517 F. Supp. 144, 150 (N.D. Ga. 1981).

69. *See, e.g.*, Chastain Place, Inc. v. Bank S., N.A., 185 Ga. App. 178, 180, 363 S.E.2d 616, 617 (1987).

C. Examining Guarantor Liability Under the Confirmation Statute

Arguably, the confirmation statute does not protect the guarantor, but courts, based on the holding in *Kunes*, have improperly applied the statute to allow guarantors to escape their contractual obligations. The confirmation statute simply states that "no action may be taken to obtain a deficiency judgment" unless the lender first obtains judicial confirmation.[70] Because "deficiency judgment" is not defined in the statute, courts interpreting the confirmation statute have had difficulty in defining what actions constitute a deficiency judgment, which is barred if a lender fails to obtain confirmation.[71]

For example, the United States District Court for the Middle District of Georgia held that the confirmation statute "applies to both primary debtors and guarantors; an action for the balance remaining on a note following a foreclosure sale against a guarantor rather than the primary debtor is still an action for a deficiency judgment under the statute and is barred if no confirmation was obtained."[72] Similarly, another court, citing to *Kunes*, concluded that "it would not matter for purposes of [the confirmation] statute whether the debtors were primarily or secondarily liable on the debt as they would still have to be notified of the confirmation proceedings to be held accountable for the deficiency, or balance due on the indebtedness."[73] Therefore, "deficiency judgment" has been equated to the "balance due on the indebtedness" regardless of whether the obligations to pay that balance were separate and independent.[74] Under this line of reasoning, it is a "commonsensical view that a deficiency judgment is one for the balance due on an indebtedness and that a statute aimed at providing debtor relief . . . did not discriminate among debtors."[75] In contrast, the United States Court of Appeals for the Seventh Circuit, interpreting Georgia's confirmation statute, held that a lender's action against the guarantor was not a deficiency judgment, but instead a "suit . . . on the guaranty, not on the confirmation; and in that suit the value of the land, as distinct from what [the lender] paid for it, is irrelevant."[76]

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70. O.C.G.A. § 44-14-161(a).

71. *See e.g.*, United States v. Yates, 774 F. Supp. 1368, 1372 (M.D. Ga. 1991).

72. *Id.*

73. United States v. Dismuke, 616 F.2d 755, 758 (5th Cir. 1980) (quoting *Kunes*, 230 Ga. at 890, 199 S.E.2d at 778).

74. *Id.*

75. *Id.*

76. Inland Mortg. Capital Corp. v. Chivas Retail Partners, LLC, 740 F.3d 1146, 1150 (7th Cir. 2014).

Arguably, the Seventh Circuit's interpretation is correct, and an action against a guarantor should not be construed as a deficiency judgment under the terms of the confirmation statute. Although courts have broadly defined "deficiency judgment" and included other contractual obligations in their definitions, these other obligations were always secured by the same property that was sold in the foreclosure sale.[77] For example, in *Iwan Renovations, Inc. v. North Atlanta National Bank*,[78] the Georgia Court of Appeals noted that "[a] deficiency judgment is the imposition of personal liability on *mortgagor* for unpaid balance of mortgage debt after foreclosure has failed to yield [the] full amount of due debt."[79] Under this definition, an action against the *mortgagor* of the property to recover a separate "debt[] that [is] incurred for the same purpose, secured by the same property, held by the same creditor and owed by the same debtor" constitutes an action to obtain a deficiency judgment.[80]

In *Bank of North Georgia v. Windermere Development, Inc.*,[81] the Georgia Court of Appeals defined "deficiency judgment" as including a lender's suit for reimbursement from a borrower.[82] In *Windermere Development*, the borrower, a commercial real-estate development company, had its sights on investing in the development of a residential subdivision.[83] To facilitate the venture, the borrower obtained a commercial loan from the lender and executed a promissory note, which was secured by a deed to secure debt. The borrower also obtained four letters of credit from the same lender, which named the Douglas County Board of Commissioners as the beneficiary. The borrower simultaneously executed reimbursement agreements in favor of the lender and secured their reimbursement obligations with the same property used to secure the promissory note.[84]

When the borrowers defaulted on their obligations to the lender, the lender foreclosed upon and sold the encumbered property at public auction but did not pursue judicial confirmation of the sale. After foreclosure, the Board of Commissioners demanded payment from the

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77. *See, e.g.*, Iwan Renovations, Inc. v. N. Atlanta Nat'l Bank, 296 Ga. App. 125, 127, 673 S.E.2d 632, 634 (2009).

78. 296 Ga. App. 125, 673 S.E.2d 632 (2009).

79. *Id.* at 127, 673 S.E.2d at 634-35 (emphasis added) (quoting C.K.C., Inc. v. Free, 196 Ga. App. 280, 282, 395 S.E.2d 666, 667 (1990)).

80. Oakvale Rd. Assocs., Ltd. v. Mortg. Recovery Fund-Atlanta Pools, L.P., 231 Ga. App. 414, 416, 499 S.E.2d 404, 406 (1998).

81. 316 Ga. App. 33, 728 S.E.2d 714 (2012).

82. *Id.* at 39, 728 S.E.2d at 718.

83. *Id.* at 34, 728 S.E.2d at 715.

84. *Id.* at 34-36, 728 S.E.2d at 715-16.

lender on all four letters of credit, and the lender honored its contractual obligations by making payment to the Board. Pursuant to the reimbursement agreements, the lender subsequently sued the borrower for reimbursement of the payments made to the Board.[85]

The court of appeals held that the lender's suits for reimbursement "must be considered suits to recover deficiency judgments" because "the debts were incurred for the same purpose, secured by the same property, held by the same creditor, and owed by the same debtor, they were inextricably intertwined."[86] The court noted that including inextricably intertwined debts within the definition of a deficiency judgment "prevent[s] creditors from circumventing the [confirmation] statute's mandates by making successive loans against the security of the same property."[87] Although the suits for reimbursement were separate obligations, those obligations were secured by the same property that was foreclosed upon and therefore fell within the scope of the confirmation statute's protection.[88]

In contrast to these contractual obligations that are secured by the same property, guaranty agreements (assuming that they are not similarly secured) are completely independent and separate contracts.[89] Under Georgia law, a guaranty agreement is a contract whereby "a person obligates himself to pay the debt of another in consideration of a benefit flowing to the surety or in consideration of credit . . . given to his principal."[90] Further, the contract of guaranty creates an obligation "which is separate and distinct from that of the principal debtor, and where [the guarantor] renders himself secondarily or collaterally liable on account of any inability of the principal to perform his own contract."[91] Georgia has historically emphasized the importance of

85. *Id.* at 36-37, 728 S.E.2d at 716-17.

86. *Id.* at 39, 728 S.E.2d at 718.

87. *Id.* at 38, 728 S.E.2d at 718 (quoting *Iwan Renovations, Inc.*, 296 Ga. App. at 128, 673 S.E.2d at 635).

88. *See id.*

89. *Compare Iwan Renovations, Inc.*, 296 Ga. App. at 129, 673 S.E.2d at 636 (noting that the lender's action was "not to recover on an independent, separate, unsecured obligation.") *with* William Goldberg & Co. v. Cohen, 219 Ga. App. 628, 638, 466 S.E.2d 872, 882 (1995) ("A guaranty is a contract separate and distinct from the obligation it guarantees.").

90. O.C.G.A. § 10-7-1 (2009). Although Georgia law previously distinguished a guaranty from a suretyship, this distinction has since been abolished by statute. *Id.* ("There shall be no distinction between contracts of suretyship and guaranty."). For purposes of this Comment, a guaranty and surety will be used interchangeably.

91. Etheridge v. Rawleigh Co., 29 Ga. App. 698, 702, 116 S.E. 903, 905 (1923).

freedom of contract in the exercise of purely contractual rights.[92] In fact, such contractual rights are the underlying rationale of the lender's right to conduct a non-judicial foreclosure sale, as such a procedure results from a "purely contractual matter between two parties in the exercise of private property rights."[93] If courts were regularly to interfere with the exercise of such contractual rights, the Georgia Supreme Court has noted that the "wheels of trade and commerce would grind to a halt and already congested court dockets would become completely unmanageable."[94] The Georgia legislature, recognizing the importance of freedom of contract, decided that judicial supervision of a foreclosure and subsequent sale was unnecessary (excepting, of course, the confirmation requirement).[95]

In contrast to Georgia's application of the confirmation statute to guarantors, other states explicitly deny guarantors any protection under anti-deficiency legislation.[96] For example, the North Dakota Supreme Court in *Alerus Financial, N.A. v. Marcil Group Inc.*,[97] held that North Dakota's anti-deficiency statute did not apply to guarantors.[98] The court noted that "a guarantor's liability is premised on a separate and distinct contract of guaranty rather than on any obligations imposed by the notes and mortgages subject to a foreclosure action."[99] Further, North Dakota's anti-deficiency statute, like Georgia's confirmation statute, does not clearly include guarantors within the scope of the

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92. *E.g.*, Coffey Enters. Realty & Dev. Co. v. Holmes, 233 Ga. 937, 938, 213 S.E.2d 882, 884 (1975).

93. *Id.*

94. *Id.* at 938-39, 213 S.E.2d at 884 ("It would be an insult to the public intelligence to require the government, through its courts, to become involved in all private affairs and require court approval for the exercise of rights under a private contract involving consenting adults as if they were minors or lunatics. Of course, the courts are always open to an aggrieved party to correct an injustice caused by fraud.").

95. *See id.* at 945, 213 S.E.2d at 888 (Gunter, J., concurring specially). The authority to conduct a non-judicial foreclosure sale can also be contained in a mortgage or other lien contract, but this Comment will focus on the authority under a deed to secure debt. This "sale under power" is permitted without the supervision or approval of the court, and is consequently referred to as a *non-judicial* foreclosure sale. *See id.* at 938, 213 S.E.2d at 884.

96. *See, e.g.*, Talbott v. Hustwit, 78 Cal. Rptr. 3d 703, 706 (Cal. Ct. App. 2008) ("[C]ase law is uniform in holding [that the anti-deficiency statute] does not apply to guarantors . . . ."); First Nat'l Bank & Trust Co. of Williston v. Anseth, 503 N.W.2d 568, 572 (N.D. 1993) (quoting Bank of Kirkwood Plaza v. Mueller, 294 N.W.2d 640, 643 (N.D. 1980)) ("[I]t is not clear that guarantors were also meant to be covered. We will not extend the scope of the anti-deficiency statutes beyond that which is clear from the statute.").

97. 806 N.W.2d 160 (N.D. 2011).

98. *Id.* at 167.

99. *Id.* (citing *Anseth*, 503 N.W.2d at 572-73).

statute.[100] However, in contrast to Georgia courts, North Dakota courts refuse to "extend the scope of the anti-deficiency statutes beyond that which is clear from the statute."[101] In fact, "a majority of state courts considering the issue [of guarantor protection] have declined to expand the coverage of the [anti-deficiency] statute to those not covered by the statute."[102] These courts have determined that "the liability of the guarantor[] derives wholly from the guaranty agreement," and such liability should remain unaffected by application of the anti-deficiency statute.[103]

Although Georgia courts have construed the confirmation statute to apply to guarantors, they have also recognized that "[t]he failure to obtain confirmation of a sale does not operate to extinguish the remaining debt; rather, it simply precludes the person exercising the power of sale from instituting suit to obtain a deficiency judgment."[104] Further, courts have stated that a failure to obtain confirmation "simply renders it impossible for the holder to sue on it, just as would a discharge in bankruptcy of the maker."[105] Notably, "[a] discharge in bankruptcy does not extinguish the debt itself[] but merely releases the debtor from personal liability for the debt."[106] Under bankruptcy, the debtor's personal liability is extinguished but "the debt still exists and can be collected from any other entity that might be liable," which includes a guarantor.[107] In contrast, Georgia's current application of the confirmation statute to a guarantor invalidates the guarantor's contractual obligations to the lender.

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100. *See id.*

101. *Id.* (quoting *Mueller*, 294 N.W.2d at 643).

102. First Sec. Bank of Idaho, N.A. v. Gaige, 765 P.2d 683, 685-86 (Idaho 1988).

103. *Mueller*, 294 N.W.2d at 643-44.

104. Worth v. First Nat'l Bank of Alma, 175 Ga. App. 297, 298, 333 S.E.2d 173, 174 (1985); *see also* Turpin v. N. Am. Acceptance Corp., 119 Ga. App. 212, 217, 166 S.E.2d 588, 592 (1969); Powers v. Wren, 198 Ga. 316, 321, 31 S.E.2d 713, 716 (1944).

105. *Turpin*, 119 Ga. App. at 217; *see also Taylor*, 158 Ga. App. at 672, 282 S.E.2d at 158-59; *Powers*, 198 Ga. at 321, 31 S.E.2d at 716; Marler v. Rockmart Bank, 146 Ga. App. 548, 549, 246 S.E.2d 731, 733 (1978).

106. *In re* Hayden, 477 B.R. 260, 264 (Bankr. N.D. Ga. 2012) (quoting Houston v. Edgeworth (*In re* Edgeworth), 993 F.2d 51, 53 (5th Cir. 1993)).

107. *Id.* at 264 (quoting *In re Edgeworth*, 993 F.2d at 53).

III. ENFORCING THE GUARANTY AGREEMENT AFTER NON-JUDICIAL FORECLOSURE

A guaranty agreement is utilized as a "traditional method of protecting a bank's capital investment."[108] Under Georgia law, a "contract of guaranty or suretyship is primarily one to pay the debt of another which may be due and payable by the principal debtor to the creditor upon default."[109] A guarantor therefore "obligates himself to pay the debt of another in consideration of a benefit flowing to the surety or in consideration of credit . . . given to his principal."[110] In other words, when executing a guaranty, the guarantor promises the lender that he will pay if the principal borrower is unable to do so. The enforceability of this promise is an important concern for lenders, as the lender views the guaranty as "an effective means to lessen a bank's risk when a loan becomes unrecoverable from a borrower,"[111] as the guarantor "renders himself secondarily or collaterally liable on account of any inability of the principal to perform his own contract."[112]

Simply put, a guaranty agreement is a contract and is to be interpreted as such.[113] Under traditional contract principles, when interpreting a contract of guaranty, a court must first "decide if the language is clear and unambiguous, and, if it is, no construction is required."[114] Therefore, if "the language of the contract is plain, unambiguous, and capable of only one reasonable interpretation, no other construction is permissible."[115]

Of course, "[a]s with any contract, a party to an agreement may attempt to evade the reasonably incurred obligation, if the contract has become economically or otherwise unfavorable to the evading party," and will "challenge every aspect of the loan documentation in the hope of finding some deficiency that will release them from their obligations

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108. Raymer McQuiston, *Drafting an Enforceable Guaranty in an International Financing Transaction: A Lender's Perspective*, 10 INT'L TAX & BUS. LAW. 138, 139 (1993).

109. Roswell Festival, LLLP v. Athens Int'l, Inc., 259 Ga. App. 445, 448, 576 S.E.2d 908, 911 (2003).

110. O.C.G.A. § 10-7-1.

111. McQuiston, *supra* note 108, at 138.

112. *Etheridge*, 29 Ga. App. at 702, 116 S.E. at 905.

113. *See* Citrus Tower Blvd. Imaging Ctr., LLC v. Owens, 325 Ga. App. 1, 11, 752 S.E.2d 74, 79 (2013).

114. *Id.* at 14, 752 S.E.2d at 81.

115. Highwoods Realty L.P. v. Cmty. Loans of Am., Inc., 288 Ga. App. 226, 229, 653 S.E.2d 807, 809 (2007) (quoting Barranco v. Welcome Years, Inc., 260 Ga. App. 456, 460, 579 S.E.2d. 866, 870 (2003)).

under the guaranty."[116] On the other hand, the lender simply wants what it bargained for—namely, the enforcement of the guarantor's promise that induced the lender to make the loan in the first place.[117]

To curtail a guarantor's attempts to discharge his contractual promise to the lender, typical commercial guaranty agreements include a broad waiver provision, which is arguably the "lender's paramount protective clause."[118] The waiver provision provides the lender with the assurance that *someone* will pay the debt, regardless of the lender's ability to recover from the principal borrower.[119] Until recently, no Georgia court had explicitly addressed the enforceability of a guarantor's waiver of the protection otherwise afforded to him by the confirmation statute.[120]

A. HWA Properties, Inc. v. Community & Southern Bank

In July 2013, the Georgia Court of Appeals held that a guarantor's waiver of protection was enforceable.[121] In *HWA Properties, Inc.*,[122] the court of appeals, focusing on the guarantor's contractual waiver, upheld a lender's right to pursue a deficiency judgment against a guarantor without confirmation of sale.[123] The specific procedural history of the case is not essential to this analysis.[124] Essentially, the court had to determine whether the lender's failure to confirm a nonjudicial foreclosure sale invalidated the obligations of the principal borrower and the guarantor.[125] Based on the lender's failure to have

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116. McQuiston, *supra* note 108, at 139.

117. *Id.*

118. *Id.* at 157.

119. *See id.*

120. *See generally HWA Props, Inc.* 322 Ga. App. at 887, 746 S.E.2d at 617.

121. *See id.*

122. *Id.* at 877, 746 S.E.2d at 609.

123. *Id.* at 887-88, 746 S.E.2d at 617.

124. That history is as follows: In June 2008, Community & Southern Bank (the Bank) extended a loan to HWA Properties (HWA) for approximately $4 million. The promissory note was secured by real property, as well as a contemporaneous, unconditional, personal guaranty executed by Harry Albright. Upon HWA's default, the Bank sued HWA and Mr. Albright on the promissory note and guaranty respectively for $2,683,534. While those suits were pending, the Bank sold the encumbered property for $1.59 million in a nonjudicial foreclosure sale, leaving a deficiency of $1,093,534. The Bank obtained judicial confirmation of the sale, which HWA and Albright appealed. *Id.* at 878-80, 746 S.E.2d at 611-12.

125. *Id.* at 884, 746 S.E.2d at 615. While the confirmation appeal was pending, the Bank moved for summary judgment against both HWA and Albright for the deficiency. The Superior Court of Fulton County granted summary judgment against both parties, noting that Albright was liable alongside HWA as a result of his unconditional personal guaranty of the note. HWA and Albright appealed the grant of summary judgment. While

the sale validly confirmed, the court of appeals held that the lender could not pursue a deficiency judgment against the principal borrower.[126] The court, however, held that the lender's failure did not affect the guarantor's liability.[127]

Notably, the court also held that the lender's "failure to obtain a valid confirmation of the foreclosure sale, pursuant to the confirmation statute, does not impair its authority to collect the difference between the amount due on the note and the foreclosure sale proceeds from [the guarantor] based upon his personal guaranty."[128] Therefore, the lender was permitted to proceed against the guarantor because the guarantor's "liability on the note [was] based upon his unconditional personal guaranty."[129] In so holding, the court paid particular attention to the provisions contained in the unconditional guaranty.[130]

B. Examining the Guaranty

The guaranty agreement at issue in *HWA Properties* stated: "No act or thing need occur to establish the liability of [the guarantor], and no act or thing, except full payment and discharge of all indebtedness, shall in any way exonerate [the guarantor] or modify, reduce, limit or release the liability of [the guarantor] . . . ."[131] In other words, the guarantor promised the lender that he would remain liable for the debt until the lender received full payment of the outstanding debt. This type of promise is sometimes called a "hell-or-high-water guaranty," because the guarantor promises the lender that "the guarantor will pay all the obligations of the debtor, no matter how or when they arise, and without conditions."[132]

The guaranty further stated:

> [The guarantor] expressly agrees that [he] shall be and remain liable, to the fullest extent permitted by applicable law, *for any deficiency remaining after foreclosure of any mortgage or security interest securing [the indebtedness], whether or not the liability of [the principal*

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the summary judgment appeal was pending, the court of appeals reversed the order of confirmation. Given the reversal of confirmation, both HWA and Albright argued that summary judgment for the deficiency should be reversed. *Id.* at 879, 880, 746 S.E.2d at 612.

126. *Id.* at 884, 746 S.E.2d at 615.

127. *Id.* at 888, 746 S.E.2d at 617.

128. *Id.* at 887-88, 746 S.E.2d at 617.

129. *Id.* at 885, 746 S.E.2d at 616.

130. *See generally id.* at 885-87, 746 S.E.2d at 616-17.

131. *Id.* at 885, 746 S.E.2d at 616 (emphasis omitted).

132. Rick L. Knuth, *The Commercial Loan Guaranty—Types & Techniques*, 21 UTAH B.J. 14, 17 (2008).

> *borrower] or any other obligor for such deficiency is discharged pursuant to statute or judicial decision.* [The guarantor] shall remain obligated, to the fullest extent permitted by law, to pay such amounts as though the [principal borrower's] obligations had not been discharged.[133]

Therefore, the guarantor promised the lender that he would remain liable for *any deficiency*, regardless of whether the principal borrower's liability was extinguished pursuant to "statute or judicial decision."[134] The confirmation statute can certainly act to extinguish the principal borrower's liability if a lender fails to confirm the sale.[135] The court, noting that "the guaranty specifically provide[d] that [the guarantor] shall remain liable for any deficiency remaining after the foreclosure of any property securing the note" regardless of the borrower's discharge by statute, held that the lender's failure to confirm the sale did not affect the guarantor's liability.[136]

The court therefore upheld the enforceability of the guarantor's waiver of the protection otherwise afforded to him under the confirmation statute.[137] Georgia law permits a guarantor to "waive or renounce what the law has established in his favor when he does not thereby injure others or affect the public interest."[138] By waiving protection of the confirmation statute, a guarantor can hardly be said to injure others by doing so. Further, such a waiver generally does not violate public policy. For example, California courts have "recognized that the protections afforded to debtors under the antideficiency legislation do not directly protect guarantors from liability for deficiency judgments."[139] Although the debtor, or principal borrower, is not permitted to waive protection of California's anti-deficiency legislation, "if a guarantor expressly waives the protections of the antideficiency laws, a lender may recover the deficiency judgment against the guarantor even though the antideficiency laws would bar the lender from collecting that same deficiency from the primary obligor."[140] Although "antideficiency legislation was established for a public reason and cannot be contravened by a private agreement" by the principal borrower, no such public

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133. *HWA Properties, Inc.*, 322 Ga. App. at 886-87, 746 S.E.2d at 617 (second alteration in original) (emphasis omitted).

134. *Id.* (emphasis omitted).

135. *See, e.g.*, Ward v. Pembroke State Bank, 212 Ga. App. 322, 323, 441 S.E.2d 691, 692 (1994); *C.K.C., Inc.*, 196 Ga. App. at 282, 395 S.E.2d at 667.

136. *HWA Properties, Inc.*, 322 Ga. App. at 887-88, 746 S.E.2d at 617.

137. *See id.*

138. O.C.G.A. § 1-3-7 (2000).

139. Cadle Co. II v. Harvey, 100 Cal. Rptr. 2d 150, 154 (Cal. Ct. App. 2000).

140. *Id.*

reason exists to prevent a guarantor from waiving protection.[141] Similarly, a guarantor's waiver of protection under the Texas anti-deficiency statute has been held not to violate the public policy of Texas.[142] Although Texas courts recognize that the purpose of the state's anti-deficiency statute was "to prevent mortgagees from recovering more than their due at the guarantor's expense," this purpose "does not necessarily translate into a policy so fundamental to Texas jurisprudence that it cannot be waived contractually."[143] Therefore, it appears that under Georgia law, like California and Texas, a guarantor's waiver of protection under the confirmation statute is permitted.[144]

Further, Georgia law permits a guarantor to "consent in advance to a course of conduct which would otherwise result in his discharge."[145] For example, a guarantor may waive in advance a novation[146] or an increase in risk,[147] which would otherwise result in the guarantor's discharge.[148] So long as the waiver provisions in the guaranty are clear and unambiguous, the court's role is to apply the provisions of the guaranty as written.[149] Therefore, a guaranty containing a waiver of protection under the confirmation statute, so long as it is "plain, unambiguous, and capable of only one reasonable interpretation," should be enforced against the guarantor.[150]

C. *Inland Mortgage Capital Corp. v. Chivas Retail Partners, LLC*

Although *HWA Properties* was the first occasion for a Georgia court to address explicitly the enforceability of a guaranty agreement in the

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141. *See id.*

142. Segal v. Emmes Capital, L.L.C., 155 S.W.3d 267, 278 (Tex. App. 2004).

143. *Id.*

144. *See* O.C.G.A. § 1-3-7.

145. Bobbitt v. Firestone Tire & Rubber Co., 158 Ga. App. 580, 581-82, 281 S.E.2d 324, 325 (1981) (quoting Dunlap v. Citizens & S. DeKalb Bank, 134 Ga. App. 893, 896, 216 S.E.2d 651, 653 (1975)).

146. *See* Staten v. Beaulieu Grp., LLC, 278 Ga. App. 179, 180, 628 S.E.2d 614, 615 (2006) (citing O.C.G.A. § 10-7-21 (2009)).

147. *See* Builders Dev. Corp. v. Hughes Supply, Inc., 242 Ga. App. 244, 245, 529 S.E.2d 388, 389 (2000) (citing O.C.G.A. § 10-7-22 (2009)).

148. *See* Wooden v. Synovus Bank, 323 Ga. App. 794, 796, 748 S.E.2d 275, 277 (2013) quoting Underwood v. Nationsbanc Real Estate Serv., Inc., 221 Ga. App. 351, 353, 471 S.E.2d 291, 293 (1996)) ("A guarantor can consent to a novation, and such 'consent can be given in advance, even at the time the guaranty is signed.'"); *see also Builders Dev. Corp.*, 242 Ga. App. at 245, 529 S.E.2d at 389 ("The guarantor's liability is not extinguished where the change is done with his knowledge and consent.").

149. Core LaVista, LLC v. Cumming, 308 Ga. App. 791, 794, 709 S.E.2d 336, 340 (2011).

150. *Id.* at 795, 709 S.E.2d at 340.

context of confirmation, it was not the first court to apply Georgia law to that question. In *Inland Mortgage Capital Corp. v. Chivas Retail Partners, LLC*,[151] the United States District Court for the Northern District of Illinois, interpreting Georgia's confirmation statute, reached a similar decision with regard to the enforceability of a guaranty agreement.[152] Inland Mortgage Capital Corporation (the Lender) extended a commercial loan to Harbins Crossing (Harbins) in the amount of $59,670,000 to build a retail shopping center in metro Atlanta. The Lender failed to obtain confirmation of the non-judicial foreclosure sale in any Georgia superior court and therefore was precluded from pursuing a deficiency judgment against Harbins, the principal borrower. Instead, the Lender brought suit against the guarantors for breach of their respective guaranty agreements.[153] The court rejected the guarantors' argument that the failure to obtain confirmation "erased the deficiency" or otherwise precluded the Lender from recovering against them.[154] By looking at the language of the confirmation statute, the court held that a Georgia court's refusal to grant confirmation did not equate to a finding that a deficiency did not exist.[155] The court noted that the only conclusion to draw from a denial of confirmation was a judicial holding that "the sale was not properly conducted."[156]

Alternatively, the guarantors argued that, even if the failure to obtain confirmation only extinguished Harbins's liability as to the deficiency, the guarantors' liability was also extinguished because "if there's no underlying debt there's nothing to guarantee."[157] Although the district court noted that Illinois law applied when interpreting the effect of the guaranty agreement, the guarantors did not point to any Illinois or Georgia law that barred a waiver of the confirmation requirement or a

151. 884 F. Supp. 2d 702 (N.D. Ill. 2012). Choice of law principles requires the guaranty agreement to be construed under Illinois law, and the confirmation proceeding to be construed under Georgia law. *Id.* at 704.

152. *See id.* at 707.

153. *Id.* at 703-04.

154. *Id.* at 704, 705.

155. *Id.* at 705 ("There is no finding that a deficiency does not exist or that [the Lender] can't pursue one.").

156. *Id.*

157. *Id.* at 706. Relying on *Gilbert v. Arneson*, 142 Ga. App. 205, 235 S.E.2d 647 (1977), the court rejected the guarantor's argument. *Inland Mortg. Capital Corp.*, 884 F. Supp. 2d at 706. *Gilbert* states: "The obligation of the surety is accessory to that of his principal, and if the latter from any cause becomes extinct, the former shall cease. . . ." 142 Ga. App. at 206, 235 S.E.2d at 648.

waiver of the general rule that the guarantor's obligation be contingent on the borrower's obligation.[158]

In the guaranty agreement, the guarantors expressly agreed to pay any deficiency, even if the Lender lost its right to collect the deficiency from Harbins, the principal borrower.[159] The language of this waiver provision stated: "[T]he Guarantor hereby waives any defense to the recovery by Lender . . . against the Guarantor of any deficiency after such action, *notwithstanding any impairment or loss of any right of deficiency or other right or remedy against . . . [Harbins].*"[160] This contractual waiver kept intact the guarantors' obligations to the Lender, regardless of any effect the confirmation proceeding had on Harbins's liability for the deficiency.[161] Essentially, the court, like the court in *HWA Properties*, determined that the guarantors had contractually agreed that their obligations under the guaranty were independent from the principal borrower's liability, noting that the guarantors "deliberately placed themselves on the hook whether or not [the Lender] could collect from Harbins—that was their bargain in reliance on which [the Lender] paid out nearly $60 million."[162]

Like the analysis in *HWA Properties*, the court's analysis in *Inland* is consistent with Georgia law. As the court in *Inland* noted, Georgia law does not bar a guarantor from waiving protection under the confirmation statute.[163] If "[c]ompetent parties are free to choose, insert, and agree to whatever provisions they desire in a contract unless prohibited by statute or public policy," a guarantor, assuming that he is a competent party, should be permitted to waive protection of the confirmation statute.[164]

IV. LEGISLATIVE PROPOSALS

As noted previously, it is evident that guarantors are increasingly "rely[ing] on technical [procedural] arguments to overturn a confirmation in which they fully participated," thereby preventing the lender from being made whole.[165] To "enhance the probability of the lender being

158. *Inland Mortg. Capital Corp.*, 884 F. Supp. 2d at 707.
159. *Id.* at 706.
160. *Id.* (first and last alterations in original) (citations omitted).
161. *Id.*
162. *Id.*
163. *See id.* at 707.
164. *Core LaVista, LLC*, 308 Ga. App. at 795, 709 S.E.2d at 341 (alteration in original) (quoting Brookside Cmtys., LLC v. Lake Dow N. Corp., 268 Ga. App. 785, 786, 603 S.E.2d 31, 33 (2004)).
165. *Quattlebaum*, 269 Ga. at 860, 505 S.E.2d at 479 (Fletcher, J., dissenting).

made whole" and prevent "reluctant guarantors [from] attempt[ing] to extricate themselves from their third-party obligations," the legislature could consider the following suggested solutions.[166]

A. Commercial Real Estate v. Residential Real Estate Guarantors

First, the decision of *HWA Properties* should be codified, and a waiver of protection under the confirmation statute should expressly be permitted by statute. The availability of this waiver, however, need not be extended to principal borrowers or mortgagors, as they are the parties the Georgia General Assembly intended to protect when first enacting the statute.[167] To allow these parties to waive the statute would defeat its purpose, as the statute was intended to protect the party *owning* the encumbered property.[168]

Instead, focus should be directed to the enforceability of a waiver of protection by commercial guarantors, as the General Assembly likely did not intend to include them within the scope of protection under the statute. Although the original enactment of Georgia's confirmation statute "contains no reference to the financial depression," because Georgia enacted the confirmation statute in 1935 (during the same time period that other states enacted similar anti-deficiency statutes) it can be inferred that the Georgia legislature enacted the statute for similar reasons.[169] Anti-deficiency statutes enacted during the 1920s and 1930s served to protect the borrower after a foreclosure sale of the borrower's property, wherein the borrower suffered two ill effects:

> First, he suffered the financial loss of having [his] property sold by, or on behalf of, the lender to pay the borrower's defaulted indebtedness. Then, to compound his woes, he was faced with the possibility that the lender would obtain a deficiency judgment, representing the unsatisfied portion of the indebtedness. Thus, after losing title to his property, all of his remaining assets were potentially exposed to sale or levy to satisfy the deficiency judgment.[170]

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166. McQuiston, *supra* note 108, at 139.

167. *See* 1935 GA. H. JOURNAL 1759. Notice, as required under the confirmation statute, was originally to be given to the "mortgagor, grantor, their heirs, legal representatives, [and the] successors or assignees of [the] grantor or mortgagor." *Id.*

168. *Iwan Renovations, Inc.*, 296 Ga. App. at 128, 673 S.E.2d at 635 (noting that "the very purpose of the confirmation statute [is] to protect debtors from deficiency judgments when their property is sold at [a] foreclosure sale for less than its market value." (first alteration in original) (quoting *Ward*, 212 Ga. App. at 324, 441 S.E.2d at 693).

169. *See* Atl. Loan Co. v. Peterson, 181 Ga. 266, 273, 182 S.E. 15, 19 (1935); *see also* 1935 GA. H. JOURNAL 1759.

170. James B. Hughes, Jr., *Taking Personal Responsibility: A Different View of Mortgage Anti-Deficiency and Redemption Statutes*, 39 ARIZ. L. REV. 117, 126 (1997).

However, state legislatures did not intend to protect all debtors with anti-deficiency legislation, but instead intended "to protect the homeowner and farmer against exaggerated deficiency judgments that resulted from foreclosure sales of their properties at unreasonable prices."[171] Legislatures were "striving to preserve the life savings of homeowners and farmers as embodied by the equity they possessed in their property."[172] Concern for the individual homeowner or farmer during the Depression was undeniably warranted, as "property rights in one's home are so inextricably intertwined with the individual's sense of self and well-being that they are deserving of special protection."[173] The home, like other personal property, "is much more highly valued by the owner than money is valued by the lender, and because the home is in fact irreplaceable, the homeowner should not easily lose his home to repay the lender."[174] Because "homebuyers do not typically purchase real estate for the purpose of making a profit," some state legislatures explicitly limited protection under anti-deficiency legislation to residential property.[175]

In contrast to residential mortgagors, commercial mortgagors "purchase real estate [for the purpose of making a profit] and, therefore, are better equipped to take the risks of deficiency judgments."[176] Commercial borrowers do not have an intimate connection with their property, as they "purchase real estate for the purpose of taking risks in order to turn a profit."[177]

> If the commercial borrower defaults, it is typically because the project itself was ill-conceived or incompetently carried out, with the result that the investment is not worth saving. In contrast, default by the residential purchaser is more likely to result from his personal problems, rather than from decline in the intrinsic worth of the property itself.[178]

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171. Benjamin Gruberg, Note, *When is a Mortgage Guarantee Not Worth the Price of a Notary?—The Incongruent Judicial Application of New York's Deficiency Judgment Statute*, 18 CARDOZO L. REV. 2053, 2099 (1997).

172. *Id.*

173. Hughes, *supra* note 170, at 138.

174. *Id.*

175. Georgina W. Kwan, Comment, *Mortgagor Protection Laws: A Proposal for Mortgage Foreclosure Reform in Hawai'i*, 24 U. HAW. L. REV. 245, 259 (2001).

176. *Id.*

177. G. Stephen Diab, Note, *North Carolina Extends Its Anti-Deficiency Statute*: Merritt v. Edwards Ridge, 67 N.C. L. REV. 1446, 1456 (1989).

178. David A. Leipziger, *Deficiency Judgments in California: The Supreme Court Tries Again*, 22 UCLA L. REV. 753, 774 (1975).

One commentator noted that the New York legislature, when enacting the state's anti-deficiency statute, was "not protecting individuals from a losing business gamble or a deal gone sour, but from a national economy in free-fall. The drafters of the 1933 legislation almost certainly did not have commercial debtors in mind."[179] Assuming that the Georgia legislature enacted the confirmation statute for similar reasons, it follows that Georgia's legislature did not actually intend to protect commercial borrowers and certainly did not intend to protect commercial guarantors; the primary concern of most anti-deficiency legislation was the protection of homeowners and farmers from inflated deficiency judgments.

Because it is now applied to protect commercial guarantors, the confirmation statute has "disrupt[ed] traditional allocation of risk concepts in commercial real estate transactions."[180] For example, R. Chris Belans, a commercial real estate developer, guaranteed a number of commercial real estate loans throughout the years; many of the loans were extended to a borrower-corporation of which Belans was either an officer or president.[181] Belans, therefore, was not a detached third-party when guaranteeing the loans. Belans, like other guarantors often are, was "reluctant to perform under the guaranty."[182] Under protection of the confirmation statute, Belans was successfully able to extinguish his contractual obligations under the guaranty. For example, in one case, the lender was forced to retain two special process servers in an attempt to provide him with notice; one process server attempted to serve notice at least twelve times at four different locations, while the other server spent over sixty-five hours in an attempt to locate Belans, which included seven visits and hours of surveillance at the home believed to be his residence.[183] The lender, who simply wanted to

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179. Gruberg, *supra* note 171, at 2099.

180. Joel M. Craig, Note, *Mortgages and Deeds of Trust*—Ross Realty Co. v. First Citizens Bank & Trust Co.: *North Carolina Anti-Deficiency Judgment Statute Bars Personal Actions Against Purchase Money Mortgagors*, 58 N.C. L. REV. 855, 865 (1980).

181. *See* 129 Acres, Inc. v. Atlanta Bus. Bank, 311 Ga. App. 462, 462-63, 716 S.E.2d 536, 536 (2011); Belans v. Bank of Am., N.A., 309 Ga. App. 208, 208, 709 S.E.2d 853, 854-55 (2011); Winstar Dev., Inc. v. SunTrust Bank, 308 Ga. App. 655, 655-56, 708 S.E.2d 604, 605-06 (2011); Pine Grove Builders, Inc. v. SunTrust Bank, 307 Ga. App. 764, 764-65, 706 S.E.2d 129, 130 (2011); Belans v. Bank of Am., N.A., 306 Ga. App. 252, 252-53, 701 S.E.2d 889, 889-90 (2010); Belans v. Bank of Am., N.A., 303 Ga. App. 654, 654, 694 S.E.2d 725, 726-27 (2010); Belans v. Bank of Am., N.A., 303 Ga. App. 35, 35-36, 692 S.E.2d 694, 695 (2010).

182. *See* McQuiston, *supra* note 108, at 139.

183. *Belans*, 303 Ga. App. at 37-38, 692 S.E.2d at 696.

recover the money extended to the borrower, had to resort to such expensive means just to enforce Belans's contractual obligations.[184]

The extension of the confirmation statute to guarantors can perhaps be explained by judicial sympathy, as "[m]any of us are emotionally attracted to the notion that because most lenders are big and powerful institutions, they should not be permitted to assert their rights at the expense of the average consumer."[185] However, a commercial-real-estate guarantor (like Belans) is far from the "average consumer." In fact, Georgia courts characterize the commercial guaranty as "a negotiated arm's length business transaction between sophisticated commercial parties."[186] Like most guarantors of commercial real estate loans, Belans was a real estate developer who was an officer of the principal borrower. Guarantors like Belans can therefore be presumed to be sufficiently sophisticated to understand that, when executing a guaranty agreement, he was agreeing to be "legally bound to pay back the loan if the borrower cannot or will not pay."[187] This is precisely the reason lenders require a guaranty prior to approving a loan,[188] as "[t]he guarantor is required to perform only in the event of nonperformance by the debtor."[189]

Outside of the context of confirmation, Georgia courts typically enforce the contractual guaranty as long as the "language employed by the parties in the guaranty is plain, unambiguous, and capable of only one reasonable interpretation."[190] Commercial guarantors, as "educated, successful businessperson[s],"[191] are therefore "free to obligate themselves in this manner as an inducement to lenders to make commercial loans to them for use in the operation of their businesses."[192] By executing the guaranty, the guarantor "promises to pay the debt or perform the obligations of another person."[193] A guaranty agreement

184. *See generally* McQuiston, *supra* note 108, at 139.

185. Hughes, *supra* note 170, at 136.

186. Interstate Sec. Police, Inc. v. Citizens & S. Emory Bank, 237 Ga. 37, 38, 226 S.E.2d 583, 584 (1976).

187. Ndidi Onyebuchukwu, Note, *Runaway Guarantors: Reevaluating the Scope of the Sham Guaranty Defense*, 45 LOY. L.A. L. REV. 1391, 1412 (2012).

188. *Id.* at 413.

189. George A. Nation III, *Guaranty Agreements: Recent Cases Illustrate Common Risks*, 24 COM. LENDING REV. 31, 31 (2009).

190. Hanna v. First Citizens Bank & Trust Co., 323 Ga. App. 321, 327-28, 744 S.E.2d 894, 899 (2013).

191. *Id.* at 328, 744 S.E.2d at 899.

192. *Interstate Sec. Police, Inc.*, 237 Ga. at 39, 226 S.E.2d at 585.

193. McQuiston, *supra* note 108, at 138.

can help a real estate developer, who "may otherwise lack access to commercial funding sources, to obtain a loan,"[194] as the guaranty helps

> to ensure that the lender will receive prompt payment of amounts owed to it under the underlying loan, even if the borrowing [obligor] encounters financial difficulties and fails to pay when due an amount owed under the primary obligation agreement. The more confident the [lender] is that it will be repaid, the more likely it is to make the loan, and on better terms.[195]

Therefore, a guaranty provides the principal borrower with access to capital that the borrower may not otherwise be able to obtain.

As the Georgia Supreme Court noted, "[o]ne who signs a written document without reading it, unless prevented from doing so by some fraud or artifice . . . is chargeable with knowledge of its contents"[196] and therefore "must be held to know the terms of the guaranties they had signed."[197] The lender often relies on the guaranty as "an effective means to lessen a bank's risk when a loan becomes unrecoverable from a borrower."[198] If a guarantor (such as Belans) is free to obligate himself in this manner in order to induce the lender to extend a loan for a commercial real estate investment, it is unclear why courts have paternalistically allowed the commercial guarantor to evade his otherwise enforceable contractual obligations.

Before the enactment of the confirmation statute,

> the mortgagor bore the entire risk of a decline in the value of property and the mortgagee often became unjustly enriched. Upon default by the mortgagor, the seller-mortgagee retained the mortgagor's downpayment, any regular payments made by the mortgagor, clear title to the land, and a judgment enforceable against the mortgagor's other assets.[199]

The enactment of Georgia's confirmation statute "reallocated the risk between the parties, placing the risk of a decline in property values on

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194. SANDRA M. ROCKS, CONSULTATIVE GROUP TO ASSIST THE POOR, THE WORLD BANK & GRAMEEN FOUNDATION USA, PROVISIONS OF STANDARD COMMERCIAL GUARANTEE AGREEMENTS, at 2, *available at* http://www.microrate.com/media/docs/tools/GuaranteeAgreements_TG.pdf.

195. *Id.* at 3.

196. Musgrove v. Musgrove, 213 Ga. 610, 612, 100 S.E.2d 577, 579 (1957).

197. Citizens & S. Nat'l Bank v. Yeager Enters., 247 Ga. 797, 799, 279 S.E.2d 674, 676 (1981).

198. McQuiston, *supra* note 108, at 138.

199. Stacey D. Cowley, Note, *Real Property—North Carolina's Anti-Deficiency Statute: Is Suing on the Note a Lost Option?*—Barnaby v. Boardman, 22 WAKE FOREST L. REV. 389, 394 (1987).

the seller-mortgagee."[200] With regard to this reallocation of risk, one commentator notes:

> Property owners whose property is fully leveraged would have little economic incentive to continue servicing the debt or expending money to maintain and repair the property. In addition, anti-deficiency legislation inappropriately shifts the risk of market fluctuations from the owner to the lender, who must absorb losses but forego gains in the value of the property. Efficiency and fairness dictate that the fluctuation of value must remain with the borrower as owner.[201]

As evidenced by Belans's abuse of the confirmation statute to escape his contractual obligations, "anti-deficiency statutes [have served as] legislatively provided real estate finance 'mulligans' which permit mortgagors to avoid some of the negative consequences of bad luck, their own faulty decision making, or irresponsibility."[202]

By shifting the risk of real estate ventures to the lender, particularly with respect to commercial guarantors, smaller lending institutions became overburdened with the inability to recover on commercial real estate loans.[203] Within the past decade, larger institutions "increased their market share for consumer loans, credit cards, and residential mortgages," while smaller banks have "increasingly moved toward providing commercial real estate . . . loans."[204] According to the United States Government Accountability Office's study on bank failures, the "failures of small and medium-size banks were largely associated with high concentrations of [commercial real estate] loans."[205] These smaller banks are the major source of credit for small businesses,[206] and "in the wake of the bank failures, underwriting standards had tightened, making it harder for some borrowers who may have been able to obtain loans prior to the bank failures . . . to obtain [loans] afterward."[207] Therefore, the inability of a lender to recover from a guarantor of a commercial real estate loan not only negatively impacts the lender, but also makes it more difficult for other borrowers to obtain loans.[208] Given the fact that Georgia has experienced the

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200. *Cf. id.* (describing the effect of North Carolina's anti-deficiency statute).

201. Basil H. Mattingly, *The Shift From Power to Process: A Functional Approach to Foreclosure Law*, 80 MARQ. L. REV. 77, 105-06 (1996).

202. Hughes, *supra* note 170, at 123 (citations omitted).

203. *See* GAO REPORT, *supra* note 1, at 9.

204. *Id.*

205. *Id.* at 17.

206. Marsh, *supra* note 11, at 371.

207. GAO REPORT, *supra* note 1, at 52.

208. *See* Mattingly, *supra* note 201, at 106.

highest number of bank failures in the nation, serious consideration should be given before allowing courts to continue broadly applying the confirmation statute, particularly to guarantors of commercial real estate loans.

B. True Market Value Defense

The legislature could also consider providing the debtor with a true market value defense, similar to that available to debtors in North Carolina. Georgia's confirmation statute was "designed 'to protect debtors from deficiency judgments when the forced sale of their property brings less than the fair market value [and] is limited to determining whether the sale was properly advertised and brought the fair market value of the land.'"[209] The Georgia Supreme Court has readily recognized that the statute fulfills its purpose "by requiring speedy judicial review of the notice, advertisement, and regularity of the sale; insuring that the property sold for a fair value; and protecting debtors from deficiency judgments when the forced sale brings a price lower than fair market value."[210] In other words, the confirmation hearing "provides debtors with formidable protection against gross deficiency judgments,"[211] but at the same time, it should be an efficient process. Given the ambiguities in the confirmation statute, which are left to various interpretations by the courts, confirmation proceedings are anything but efficient.

As the Georgia Supreme Court has noted, "[t]he only purpose of the confirmation statute is to subject the creditor's potential deficiency claim to the condition that the foreclosure sale under power be given judicial approval.'"[212] Therefore, confirmation proceedings "merely invoke[] the superior court's supervisory authority over non-judicial foreclosure sales,"[213] and act "as a condition precedent to an action for a deficiency judgment."[214] Further, a confirmation proceeding does not result in "a personal judgment and it does not adjudicate the title of the property sold[, e]xcept as to the confirmed amount of the sale, it does not

209. Hudson Trio, LLC v. Buckhead Cmty. Bank, 304 Ga. App. 324, 332, 696 S.E.2d 372, 378-79 (2010) (alteration in original) (quoting Dorsey v. Mancuso, 249 Ga. App. 259, 261, 547 S.E.2d 787, 789 (2001)).

210. Alliance Partners v. Harris Trust & Sav. Bank, 266 Ga. 514, 514, 467 S.E.2d 531, 532 (1996).

211. Friedman v. Regions Bank, 288 Ga. App. 57, 58, 653 S.E.2d 507, 509 (2007).

212. *Vlass*, 263 Ga. at 297, 430 S.E.2d at 734 (quoting *Kunes*, 230 Ga. at 890, 199 S.E.2d at 778).

213. *Id.*

214. Commercial Exch. Bank v. Johnson, 197 Ga. App. 529, 530, 398 S.E.2d 817, 819 (1990) (citing Windland Co. v. FDIC, 151 Ga. App. 742, 743, 261 S.E.2d 407, 408 (1979)).

establish the liability of any party with regards to the indebtedness."[215] If the ultimate purpose of confirmation proceedings is to merely trigger the lender's right to pursue a deficiency judgment, the two can arguably be consolidated into one.

In North Carolina, a state with fewer bank failures than Georgia, debtors are provided essentially the same protection from liability for gross judgments, as debtors are permitted to assert a defense of true market value if sued for a deficiency after foreclosure. The North Carolina statute states:

> When any sale of real estate has been made by a mortgagee, trustee, or other person authorized to make the same, at which the mortgagee, payee or other holder of the obligation thereby secured becomes the purchaser and takes title either directly or indirectly, and thereafter such mortgagee, payee or other holder of the secured obligation, as aforesaid, shall sue for and undertake to recover a deficiency judgment against the mortgagor, trustor or other maker of any such obligation whose property has been so purchased, it shall be competent and lawful for the defendant against whom such deficiency judgment is sought to allege and show as matter of defense and offset, but not by way of counterclaim, that the property sold was fairly worth the amount of the debt secured by it at the time and place of sale or that the amount bid was substantially less than its true value, and, upon such showing, to defeat or offset any deficiency judgment against him, either in whole or in part: Provided, this section shall not affect nor apply to the rights of other purchasers or of innocent third parties, nor shall it be held to affect or defeat the negotiability of any note, bond or other obligation secured by such mortgage, deed of trust or other instrument: Provided, further, this section shall not apply to foreclosure sales made pursuant to an order or decree of court nor to any judgment sought or rendered in any foreclosure suit nor to any sale made and confirmed prior to [the effective date of the act].[216]

Therefore, a "mortgagor, trustor or other maker of any such obligation whose property has been so purchased" can raise the defense to "defeat or offset any deficiency judgment against him, either in whole or in part."[217] Further, the defense is limited to situations wherein the lender "becomes the purchaser" of the property and thereafter sues to "recover a deficiency judgment against the mortgagor, trustor or other maker of any such obligation."[218] To raise the defense, the debtor must

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215. Harris & Tilley, Inc. v. First Nat'l Bank of Cartersville, 157 Ga. App. 88, 91, 276 S.E.2d 137, 141 (1981) (internal citations omitted).

216. N.C. GEN. STAT. § 45-21.36 (2011).

217. *Id.*

218. *Id.*

allege that "the property sold was fairly worth the amount of the debt secured by it at the time and place of sale or that the amount bid was substantially less than its true value."[219]

The true market value defense accomplishes the same objective as the confirmation statute, as the statute was intended "to protect debtors from deficiency judgments when their property is sold at foreclosure sale for less than its market value."[220] Allowing the debtor to raise the defense in an action for a deficiency is likely the most equitable solution to the problems associated with the confirmation statute. Under the current application of the confirmation statute, if a court determines that the true market value of property is more than the purchase price of the property at the foreclosure sale, the lender is absolutely barred from pursuing a deficiency.[221] Georgia courts are currently not permitted to "adjust the amount that would be due on the primary debt by seeking and obtaining the bank's agreement to credit the debtor's account with the true market value as determined by the superior court."[222] Therefore, under the current statute, if a court's determination of true market value is greater than the lender's determination of such value, the lender is absolutely precluded from obtaining any recovery.

Under North Carolina law, guarantors who do not hold a property interest in the encumbered property are not entitled to assert the defense of true market value. For example, in a recent North Carolina Court of Appeals case, *Wells Fargo Bank, N.A. v. Arlington Hills of Mint Hill, LLC*,[223] the court of appeals held that a guarantor was not entitled to assert a true market value defense in the deficiency action.[224] This case involved a typical commercial loan transaction. The borrower, Arlington Hills of Mint Hill, LLC (Arlington Hills), obtained a loan from Wells Fargo (the Bank) to acquire and develop a

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219. *Id.* In North Carolina, this defense is inapplicable to "purchase money mortgage transactions wherein the seller of the property finances the buyer's purchase." Synovus Bank v. Coleman, 887 F. Supp. 2d 659, 674 (W.D.N.C. 2012); *see generally* N.C. GEN. STAT. § 45-21.38 (2011). In such seller-financed transactions, the seller is not permitted to pursue a deficiency judgment after a non-judicial foreclosure sale of the property. N.C. GEN. STAT. § 45-21.38. Deficiency judgments are, however, permitted in transactions "in which a buyer receives financing from a third-party lender." *Synovus Bank*, 887 F. Supp. 2d at 674. Smaller lending institutions likely will not be the seller-financier of property but rather will be a third-party lender entitled to pursue a deficiency judgment.

220. *Ward*, 212 Ga. at 324, 441 S.E.2d at 693.

221. *See generally Iwan Renovations Inc.*, 296 Ga. App. at 125, 673 S.E.2d at 632.

222. Rooster Youngblood Constr., Inc. v. Bank of Hiawassee, 320 Ga. App. 338, 338, 739 S.E.2d 788, 789 (2013).

223. 742 S.E.2d 201 (N.C. Ct. App. 2013).

224. *Id.* at 205.

residential subdivision. The guarantor executed an unconditional guaranty in favor of the Bank for the "timely payment and performance of all liabilities and obligations of [Arlington Hills] to [the] Bank."[225] Although the guarantor argued that he was entitled to assert the true market defense to offset the deficiency, the court, pointing to the language of the statute, noted that the "statute explicitly limits the defense to situations in which the mortgagee sues 'to recover a deficiency judgment against the mortgagor, trustor, or other maker of any such obligation whose property has been so purchased.'"[226] Therefore, under the express terms of the statute, only "persons who hold a property interest in the mortgaged property" are entitled to assert the defense, and guarantors are not permitted to assert the defense.[227]

Similarly, in *Poughkeepsie Savings Bank, FSB v. Harris*,[228] the United States District Court for the Western District of North Carolina held that the anti-deficiency statute was unavailable to a guarantor in a lender's action to enforce the guaranty agreement.[229] In that case, the guarantors claimed that they were entitled to raise the defense because they owned the encumbered property as partners of the borrower corporation, and "the manner in which they . . . are being sued is a distinction without a difference."[230] The district court rejected this argument by noting that "[w]hile Defendants were partners who owned the property, they were also both guarantors of the note."[231] Although the guarantors were indeed owners of the property as partners, they were not sued by the lender as property owners on the note but instead were "sued to enforce their duties as a guarantor" under the separate guaranty agreement.[232]

The district court reasoned: "To permit Defendants to raise a defense only available to them in their capacity as owners, when they are being sued for their duties as guarantors, would erase their duty as guarantors."[233] When deciding to act as a guarantor for a loan that would benefit them as partners of the borrower-entity, "they thought the distinction they made between their role as owners and guarantors was at least important enough to warrant [the lender's] decision to loan them

225. *Id.* at 202.
226. *Id.* at 204 (quoting Raleigh Fed. Sav. Bank v. Godwin, 394 S.E.2d 294, 296 (N.C. Ct. App. 1990)).
227. *Raleigh Fed. Sav. Bank*, 394 S.E.2d at 296.
228. 833 F. Supp. 551 (W.D.N.C. 1993).
229. *Id.* at 555.
230. *Id.* at 553-54 (quoting Defs.' Br.).
231. *Id.* at 553.
232. *Id.* at 554.
233. *Id.*

$3,900,000."[234] Because the guarantors willingly chose to distinguish their roles as property owners from their role as guarantors as an inducement to obtain the loan, they were estopped from denying this distinction in a suit to enforce the separate obligation.[235]

Nevertheless, guarantors undeniably have an interest in ensuring that the property sold for at least its true market value, as the guarantor remains liable for the debt.[236] For that reason, Nevada allows guarantors to contest the true market value of the property. In Nevada, "[b]efore awarding a deficiency judgment," a court must conduct a hearing and "take evidence presented by either party concerning the fair market value of the property sold as of the date of foreclosure sale."[237] Unlike the problems associated with Georgia's confirmation statute, which not only allows guarantors to contest true market value in confirmation proceedings but also absolutely bars recovery from the guarantor if that guarantor prevails, Nevada allows a court to "ascertain the fair and reasonable market value of the encumbered premises at the date of sale and to deduct said sum from the amount due on the deficiency in order to ascertain the correct amount of the deficiency."[238] Although Nevada's anti-deficiency legislation requires a hearing similar to that required under Georgia's confirmation statute, the result of that hearing does not affect the lender's *right* to pursue a deficiency but rather affects the *amount* of recovery.[239]

"[A]ll parties against whom the creditor may seek a deficiency judgment" have an interest in determining the true market value of encumbered property, as such value determines the value of the deficiency.[240] If guarantors are not entitled to assert the true market value defense, the potential exists for "an unscrupulous lender to bid an insignificant price for real property of a true and sufficient value to satisfy the debt it secured[] and then pursue a second essentially full satisfaction from a financially responsible guarantor."[241] Such a situation would "unfairly enrich the lender at the expense of the guarantor."[242]

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234. *Id.*

235. *Id.*

236. Because guarantors are liable for the outstanding balance, which is reduced by the amount the property brought at the foreclosure sale, they have an interest in the property bringing at least its fair market value at the sale.

237. NEV. REV. STAT. ANN. § 40.457(1) (Lexis-Nexis 2002).

238. Holloway v. Barrett, 487 P.2d 501, 504 (Nev. 1971).

239. *See* NEV. REV. STAT. ANN. § 40.457(1).

240. First Interstate Bank of Nev. v. Shields, 730 P.2d 429, 431 (Nev. 1986).

241. *Id.*

242. *Id.*

Allowing the guarantor to assert the defense is different from allowing the guarantor to be protected under Georgia's current confirmation statute. Under the current statute, guarantors have the ability to completely eradicate their contractual obligations to the lender. If allowed to assert a true market value defense, a guarantor likely will be unable to walk away financially unharmed from his obligations. Instead, the guarantor will simply be permitted to contest the *amount* of his obligations. Further, this solution would not unfairly enrich the guarantor at the expense of the lender as the current confirmation statute enables guarantors to do. By amending the anti-deficiency protections, the contractual obligations of all the parties can be upheld, as the true market value defense would allow parties to limit, but not eradicate, those obligations. Doing so will lessen lenders' burdens from commercial real estate loans and therefore has the potential to reduce the number of failures among lending institutions.

V. CONCLUSION

Given the broad application of the confirmation statute by Georgia courts, lenders have found it increasingly difficult to enforce their contractual securities, in particular, guaranty agreements. This difficulty in recovery negatively impacted a number of Georgia lenders, especially smaller community banks, leading to Georgia experiencing the highest number of bank failures in the nation during the recent recession. Instead of subjecting the lender's right to a deficiency to a confirmation hearing, it may be wise to consider explicitly codifying the decision in *HWA Properties*, at least with respect to commercial guarantors, to allow lenders to obtain the benefit they bargained for. In the alternative, the confirmation hearing could be replaced with the more equitable alternative of a true market value defense. This defense would be available for the debtor (including both the principal borrower and the guarantor) to assert during the deficiency action. This would serve to protect debtors from potential abuse by the lender, as the court would limit the deficiency judgment to the difference between the court's determination of true market value and the remaining obligation. Further, unlike the confirmation statute, the defense would also protect the lender's interests, as an action for a deficiency would not be barred if a court determines the property did not sell for true market value. Instead, the lender's deficiency judgment would simply be limited by the court's determination of true market value. As it currently stands, the confirmation statute is being abused by borrowers, particularly commercial guarantors, and is utilized unfairly to force the traditional risks associated with real estate ventures on the lender. Smaller lenders have been unable to shoulder the burden of such risks, and as a result,

a number of them have failed within recent years. The Georgia legislature should consider reformulating Georgia's anti-deficiency legislation, keeping both the debtor and the lender's interests in mind, as inequitably favoring the debtor over the lender may limit lenders' ability to "foster economic growth and serve their communities, boost small businesses, and help increase individual savings."[243]

The requirement that a confirmation hearing act as a condition precedent to an action for a deficiency should be altered to consolidate the confirmation hearing with the action for the deficiency, wherein the court hears evidence of true market value and determines the amount of the deficiency judgment from its determination of the property's true market value. If the true market value defense is adopted, the foreclosure sale will still be subject to judicial scrutiny, and the debtor will be protected from a "gross deficiency judgment,"which was the Georgia Assembly's exact intent when enacting the confirmation statute in 1935.

DIANNA LEE

243. 155 CONG. REC. 677 (statement of Rep. Ruben Hinojosa).