



BURR ALERT

“This old waiver? I’ve had it for years”

Georgia Supreme Court Holds Guaranty’s Boilerplate Clause Waives the Requirements of State’s Confirmation Statute

By Erich N. Durlacher

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The Georgia Supreme Court has further eroded the viability of the Georgia confirmation statute with its recent decision in *York v. RES-GA LJI, LLC*.¹ In *York*, the Supreme Court affirmed the lower court’s application of last year’s *PNC Bank*² decision to a guaranty’s boilerplate waiver clause that broadly waived “any and all rights or defenses based on suretyship or impairment of collateral, including, but not limited to, any rights or defenses arising by reason of . . . any ‘one action’ or ‘anti-deficiency’ law or any other law which may prevent Lender from bringing any action, including a claim for deficiency, against Guarantor, before or after Lender’s commencement or completion of any foreclosure sale action, either judicially or by exercise of a power of sale[.]”³

Specifically, the Supreme Court held that the defense offered by Georgia’s confirmation statute⁴ is a defense “based on suretyship” and is expressly included in the waiver of rights and defenses under “one action” and “anti-deficiency” laws.⁵ Furthermore, the Supreme Court held that the denial of confirmation of the foreclosure sale was not a bar to the subsequent deficiency action, either under theories of collateral estoppel or election of remedies, because the guarantors had contractually waived any defense based on the failure to obtain confirmation.⁶ In dicta, the Court did not note, however, that factual findings in the order denying confirmation may be relevant to the calculation of damages in the deficiency action.⁷

With its *York* decision, the Georgia Supreme Court has confirmed the efficacy of boilerplate waiver clauses to avoid the requirements of Georgia’s confirmation statute -- even where confirmation of a foreclosure sale has been previously denied by a lower court. Given the prevalence of these boilerplate waivers in lenders’ guaranty forms, we recommend revisiting prior matters where confirmation was denied or not pursued, but a substantial deficiency balance remains outstanding, to assess whether the *PNC Bank* and *York* decisions have opened the door to new avenues of recovery.

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¹ 300 Ga. 869, 799 S.E.2d 235 (2017).

² 2016 WL 690406, *1 (Feb. 22, 2016).

³ 799 S.E.2d at 237.

⁴ O.C.G.A. § 44-14-161(a).

⁵ 799 at S.E.2d 239-40.

⁶ *Id.* at 241.

⁷ *Id.* at 242.

If you would like more information, please contact:

[Erich N. Durlacher](#) in Atlanta at (404) 685-4313 or edurlacher@burr.com

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