

# PUBLICATION

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## Lenders Beware: Future Hurdles to Foreclosure Deficiency Actions May Lie Ahead

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**The District Court for the Northern District of Georgia recently posed inquiries seeking to possibly reverse the precedent that preserved post-foreclosure liability of personal guarantors. In *PNC Bank, N.A. v. Kenneth D. Smith, et. al*, Judge Eleanor Ross asks the Supreme Court of Georgia the precise limitations and conditions precedent of O.C.G.A. § 44-14-161 as it impacts the necessity of confirming a foreclosure sale prior to seeking a deficiency judgment against obligors, despite the existence of affirmative case law on the topic.**

The pertinent statute at hand states that, "[w]hen 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." O.C.G.A. § 44-14-161(a). Previously, in *HWA Prop., Inc. v. Cmty. & S. Bank*, 322 Ga. App. 877 (2013), the Georgia Court of Appeals found that confirming a foreclosure sale was not a condition precedent to seeking a deficiency judgment against the personal guarantor of a loan. The *HWA* court found that pursuant to O.C.G.A. § 44-14-161, it was generally permissible for creditors to seek a deficiency judgment on a note in absence of a confirmation of the foreclosure sale, *if* a previous post-default judgment on the note had been obtained. Seemingly striking a distinction based on the underlying principles of the guaranty agreement, the Court in contrast found that in regards to a personal guaranty, "liability on the note is . . . unconditional," such that "an express and comprehensive waiver of any and all defenses to his liability on the entire balance due on the note" was enforceable. Indeed, the *HWA* Court found that because the personal guarantor had promised to pay any deficiency amounts regardless of the applicability of sales proceeds and without repercussion to his liability, the creditor was not required under Georgia law to confirm the foreclosure sale in the absence of a pre-foreclosure judgment. *See also Cmty. & S. Bank v. DCB. Inv., LLC*, 328 Ga. App. 605 (2014).

With similar facts present in *PNC*, the Northern District has asked the Georgia Supreme Court if a lender must strictly comply with O.C.G.A. § 44-14-161 as a condition precedent to pursue a deficiency judgment against a borrower or guarantor following a foreclosure, and, if so, can borrowers or lenders waive the requirements of the statute in the underlying loan documents. The basis for its inquiry lies in the always-sticky topic of subject matter jurisdiction: can the court entertain a suit questioning validity of an unconfirmed foreclosure sale if the petitioner waived the requirement for such confirmation in the underlying loan documents? The *PNC* Court asks that the Georgia Supreme Court not limit itself to the specifics of the question in resolving the purported issues present, but asks for clarification of what legal professionals would argue Georgia courts have already confirmed: that the unique nature of personal guarantees negates the general principle under the law that to seek a deficiency judgment, an approval of the amounts owed or confirmation of the reasonableness of the sale is necessary. In light of a contradictory forthcoming decision, lenders must be prepared for a decision that strips all borrowers of the right to bargain with their state-law rights via confirmation waiver provisions and requires all creditors to seek approval of the sale within thirty days of a non-judicial foreclosure. Lenders currently in the midst of a foreclosure process should seek to confirm the sale in anticipation of a possible change in the law, to protect their rights to seek a deficiency balance.

