

NUTS & BOLTS OF PERSONAL GUARANTIES

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THE PARTIES:

A **creditor** is a party (e.g. person, organization, company, or government) that has a claim on the services of a second party. It is a person or entity to which money is owed.¹

A **borrower** (aka debtor) is a person or an entity that owes a debt to another person or entity. An entity may be an individual, a firm, a government, a company or other legal person.

A **guarantor** is a person or entity providing a promise to assume responsibility for the debt obligation of a borrower if that borrower defaults.

WHAT IS A PERSONAL GUARANTY

It's a contract between guarantor and a creditor that obligates guarantor to pay the debt of the borrower if that borrower defaults. The guarantor may not be otherwise involved in the loan between the creditor and the borrower , but under the terms of a guaranty, the guarantor will be obligated to repay the loan. Creditors know that guarantors will make re-payment of business loans a priority if the guarantors' personal assets and income are at risk. Generally, creditors require one or more owners or managers of a small or closely-held business to personally guaranty payment of business debt. A personal guaranty is not a substitute for borrower creditworthiness; the business remains the primary source of repayment. The guaranty is a contract separate from the underlying obligation that requires the guarantor to perform only in the event the business defaults. A personal guaranty provides the creditor with additional security for the loan. It also ensures

that management has as much of a financial stake in the business as the creditor.

Example: Your business needs money to grow; a creditor agrees to give your company a loan if you sign a personal guaranty. The guaranty pledges your personal assets for the repayment of your company's loan in the event your company defaults.

While the terms guaranty and surety are commonly substituted for one another, a guaranty is an identifiable subset of surety. Thus, the broad application of surety law applies to personal guaranties.

NORTH CAROLINA'S STATUTE OF FRAUDS

Generally the law requires written evidence of the promise to answer for the debt of another.² However, this general rule of law is subject to the following two exceptions:

- (1) Main Purpose Rule: If the promisor's main purpose (i.e. motivation) is to benefit himself, an oral promise is enforceable even though the promise is in the form of a suretyship undertaking.

As applied to promises by stockholders, officers, or directors, to pay a debt of the corporation, it may be said that the promise is original where the promisor's primary object was to secure some direct and personal benefit from the performance by the promisee of his contract with the corporation, or from the latter's refraining from exercising against the corporation some right existing in him by virtue of the contract. The benefit to the promisor is to be distinguished from the indirect benefit which would accrue to him merely by virtue of his position as a

stockholder, officer, or director. If the benefit accruing is direct and personal, then the promise is original within the rule above discussed, and the validity thereof is not affected by the statute of frauds.³

Where an oral promise by a stockholder, officer, or director of a corporation is collateral in form and effect, and the consideration was not intended to secure or promote some personal object or advantage of the promisor-as distinguished from the benefit accruing to a person from the mere fact of his being a stockholder, officer, or director-, the promise is collateral and within the statute of frauds.⁴

Example: Manufacturing LLC seeks to buy needed manufacturing equipment on credit from Seller but Seller refuses to sell the equipment on the strength of Manufacturing LLC's credit alone. The principal member and manager of Manufacturing LLC orally promises Seller that he will pay for the machines in the event that Manufacturing LLC does not. In North Carolina, the principal member and manager's oral promise is enforceable because his main purpose is said to be to benefit himself as the principal member of Manufacturing LLC.

- (2) Direct Undertakings: The Statute of Frauds applies only where there are two promisors: a principal borrower (who arranged the underlying contract) and a guarantor (who agrees to be liable on the principal borrower's debt). The Statute of Frauds does not apply to a case in which a party has agreed to accept an obligation as his own.

Example: Manufacturing LLC seeks to buy needed manufacturing equipment from Seller. The principal member and manager of Manufacturing LLC orally promises Seller that he will pay for the machines (accepting the debt as his own). In North Carolina, the principal member and manager's oral promise is enforceable because he is the direct obligor.

The writing need not always be complete to be enforceable.

Wife executed a guaranty in consideration of a line of credit extended by Bank to Husband, which contained this provision: "The amount of principal at any one time outstanding for which the undersigned shall be liable as herein set forth shall not exceed the sum of \$ ____." Wife did not insert an amount in the blank space. Specifically, Wife guaranteed to Bank the due and punctual payment of any and all notes, drafts, obligations, and indebtednesses of Husband at any time, now or hereafter incurred with, or held by Bank with interest. The North Carolina Supreme Court said that the wording and blank space gave Wife an opportunity to limit her liability. Having executed the agreement without inserting a limitation, she could not, thereafter, ex parte, alter the terms.⁵

THE SCOPE OF PERSONAL GUARANTEES

The scope of a guarantor's liability under a personal guaranty can vary. It is important to read and understand the scope of the personal guaranty before signing it. Most guarantees are drafted by the creditor and are written in terms very favorable to the creditor and not so favorable to the guarantor. Two common guarantees are:

Continuing Guaranty or Unlimited Guaranty:

- A continuing guaranty means that the guarantor will be liable for all of the borrower's obligations to the creditor, including current debts, future debts, and the renewal or extension of such debts.
 - For example, a guaranty may state that the indebtedness guaranteed under the agreement includes all of the principal amount outstanding from time to time and at any one or more times, accrued unpaid interest thereon and all collection costs and reasonable attorneys' fees arising from any and all debts, liabilities, and obligations of every nature or form, now existing or hereafter arising or acquired that borrower individually or collectively or interchangeably with others, owes or will owe creditor.
- Such language makes the guarantor liable for: (i) the borrower's debts which existed prior to his guaranty, (ii) the borrower's loan which he is in the process of obtaining, and (iii) any future loans or debts between the borrower and the creditor.
- There is no termination date for a continuing guaranty unless the guarantor is prepared to pay the creditor the full outstanding balance of the borrower's obligations to the creditor.
- The guarantor can give the creditor written notice to terminate the guaranty for additional obligations of the borrower arising after the termination, but will remain liable to the creditor for the full outstanding balance of the then existing obligations including all interest and fees.
- In the absence of termination of the guaranty, even upon full payment of all obligations at issue, it will continue to serve as a guaranty of additional future debts.

Limited Guarantees:

- In contrast, a limited guaranty limits the guarantor's obligation to debts incurred only over a certain period of time, to a stated maximum amount, or to only specified loans.
- For example, a limited guaranty may limit the guarantor's liability to a percentage of the borrower's obligations equal to the percentage of the ownership interest of the guarantor in the borrower, or the limitation can be as simple as a limitation to "no more than \$____" (a stated amount).
- Such language allows the guarantor to limit its obligations to the creditor; however, as noted above the amount should be filled in at the time of execution or the guarantor may find themselves unwittingly agreeing to an unlimited guaranty.

Because a personal guaranty is a contract, a guarantor may negotiate the inclusion of additional terms for protections. Examples include:

- A requirement for notice by the creditor to the guarantor before any modifications, renewals or extensions of the debt guaranteed
- A requirement for approval by the guarantor before any modifications, renewals or extensions of the debt guaranteed
- A requirement for notice by the creditor to the guarantor of any default by the borrower
- A requirement that the creditor exhaust all its remedies against the borrower before it has a right to recover from guarantor

CONTRACTUAL NATURE OF GUARANTIES

A personal guaranty is contractual in nature. Thus, it must be supported by consideration. Who receives the consideration from the creditor may affect how strictly the courts will construe the language of the guaranty.

The creditor extending credit to the borrower may serve as considerations for the third party's guaranty. If there is not separate consideration flowing to the guarantor, the guaranty is referred to as gratuitous.

If the guarantor receives separate consideration, he is referred to as a compensated or commercial guarantor. An example of this is a bonding company charging a fee to serve as a guarantor or surety for a building contractor.

The enforcement of a gratuitous guaranty will be strictly construed against the creditor. On the other hand a compensated guaranty may not be given the benefit of this approach. In *Fayetteville Investors v. Commercial Guilders, Inc.*, the court resolved the ambiguous language against the surety.⁶

Two rules of contract construction guide our court's review of personal guaranties. The first rule requires any ambiguity in a written contract to be construed against the party who drafted the instrument.⁷ The second rule states the liability of a guarantor must not be enlarged beyond the strict terms of the contract.⁸

Generally, the statute of limitations for a breach of contract claim must be brought within three years. When a guarantor is liable under a continuing guaranty, which can only be revoked in writing, the time for bringing an action for payment is not limited by the three-year statute of limitations. A guarantor's liability arises at the time of the default of the principal debtor on the obligations which the guaranty covers.⁹

JOINT AND SEVERAL LIABILITY

A borrower's debts may be guaranteed by more than one guarantor. This does not mean, however, that each guarantor will be liable for only that guarantor's pro-rata share of the overall debt. Most guaranties provide that the guarantor's liability for the debt is "joint and several," which means that each co-guarantor is liable up to the full amount of the guaranteed debt and the creditor can opt to pursue only one guarantor for the full amount of the guaranteed debt and ignore the other guarantors. If a co-guarantor dies or disappears or declares bankruptcy, the remaining guarantor will remain fully liable for the entire amount of the guaranteed debt.

WHAT HAPPENS WHEN THE BORROWER DEFAULTS

If the borrower makes its loan payments as required under the loan, there is no reason for the creditor to pursue enforcement of the guaranty. However, if the borrower does not pay its debt, the creditor can enforce the guaranty to proceed against the guarantor's personal assets and income for payment.

Again, it will depend on the terms of your guaranty agreement. But, absent a specific provision to the contrary, a creditor may choose to pursue collection first from the assets of the principal debtor, or from your personal assets, or from both, either sequentially or simultaneously. In other words, creditor does not have to wait for the borrower to default or demand that the borrower pay before going after the guarantor. The creditor can just pursue the guarantor directly.

RIGHTS OF THE GUARANTOR

Against the Creditor:

- When a guarantor is sued by the creditor, the court on motion of the guarantor may join the principal as an additional party defendant, provided the principal is found to be, or can be, made subject to the court's jurisdiction.¹⁰
 - This right has recently been re-iterated by the North Carolina Supreme Court in *High Point Bank and Trust Co., v. Highmark Properties, LLC*. High Point Bank argued that joinder of Highmark Properties by the guarantors was improper because N.C. Gen. Stat. § 26–12 did not apply to guarantors in that case. Upon review of section 26–12, the court concluded that the statute allows permissive or discretionary joinder. The court noted that Section 26–12 states that “[w]hen any surety is sued by the holder of the obligation, *the court, on motion of the surety may join the principal* as an additional party defendant” and that a “‘surety’ includes guarantors.” The court found Plaintiff’s argument unpersuasive, because section 26–12 allows joinder for the explicit purpose of giving the surety access to all defenses available to the primary borrower.¹¹
- Statutory right to compel the creditor to proceed against the borrower or the security.¹²
 - For example: Where the borrower is insolvent but the creditor is holding blue chip stocks as security, the guarantor can compel the creditor to sell the stocks and apply the proceeds to reduce the outstanding obligations

- In limited circumstances the guarantor can compel the creditor to apply funds it receives from the borrower against the obligations the guarantor is liable.
 - For example: The borrower owes several obligations to the creditor but only one is guaranteed by the guarantor. The creditor knows that money paid by the borrower originated with the guarantor for the express purpose of reducing the debt on which the guarantor is obligated. The guarantor can compel the creditor to apply the funds to the account he has guaranteed, preventing the bank from applying it to other obligations of the borrower.
- Guarantor may be able to raise defenses that would be available to the insolvent borrower such as fraudulent inducement by the creditor; duress; illegality; or non-performance by the creditor.
 - However if the fraud, misrepresentation or duress was by the borrower to induce the guarantor it is not a defense against the innocent creditor.

Against the Borrower:

- If the borrower does not perform, the guarantor may bring suit to compel him to pay the creditor. This is referred to as a “suit for exoneration.”
- After having paid the borrower's obligation, the guarantor may enforce any right that the creditor had against the borrower, including enforcement of any security and any priority in bankruptcy that the creditor possessed. This is referred to as the right of subrogation.
- The guarantor is entitled to reimbursement from the borrower for any amount paid by reason of the guaranty. This is referred to as the right to indemnification.

- Anti-deficiency statute (*see infra High Point Bank and Trust Co. v. Highmark Properties, LLC*)
- Equal Credit Opportunity Act (*see infra RL Regi North Carolina, LLC v. Lighthouse Cove, LLC*)

Against Co-Guarantors:

- When there is a default by the borrower to the creditor and demand is made on the guarantor, the guarantor may compel his co-guarantors to pay their pro rata share of the debt.¹³ This is referred to as exoneration.
- When on guarantor pays the creditor after default by the borrower, he is subrogated the rights of the creditor against his co-guarantors to the extent his payment exceeds his pro rata share of the obligation.
- When on guarantor pays the creditor after default by the borrower, he is entitled to contribution from his co-guarantors on their share of the payment.
 - Example: X, Y and Z guaranteed a loan by creditor to borrower. Borrower is insolvent. X pays the outstanding balance of \$15,000 to creditor. X may bring suit against Y and Z for \$5,000 each.
 - Example: Same as above but Y, like borrower, is insolvent. X may bring suit against Z for \$7,500.

Beware, many, if not most, personal guaranties drafted by creditors will include a waiver of one or more of the aforementioned rights and/or defenses.

CREDITOR'S RIGHT TO SET-OFF

A guaranty agreement that includes provisions for a creditor's right to "set-off" allows the creditor to take funds from any other account of the guarantor

(with the exception of certain IRS or trust accounts for which set-off is prohibited) to satisfy the guarantor's obligations under the guaranty. For example, the guaranty may state that creditor reserves a right of set-off in all of guarantor's accounts with creditor including all accounts guarantor may open in the future. Guarantor authorizes creditor to hold these funds if there is a default and apply the funds in these accounts to pay what guarantor owes under the terms of this guaranty. The effect of such a provision is that the creditor can demand repayment of the full amount of the guaranty upon default by the borrower and then set-off (that is, directly and unilaterally take) the guarantor's personal funds to pay the debt by withdrawing them from the guarantor's accounts and crediting the withdrawn funds to the creditor's accounts.

BANKRUPTCY OF THE BORROWER

The bankruptcy of the borrower is not a defense of the guarantor even though it discharges the rights of both the creditor and the guarantor against the borrower. One of the advantages to a creditor of obtaining personal guaranties is that even when a borrower files for bankruptcy and the automatic stay of the Bankruptcy Code prohibits collection actions against the borrower, the creditor can still pursue actions against the individual guarantors.

LIABILITY SURVIVES DEATH OF THE GUARANTOR

Most guaranties will survive the death of the guarantor and continue to be a liability of the guarantor's estate until the guaranteed obligations are paid in full or until the guaranty is released by the creditor. The creditor has no obligation to release a guarantor's estate from liability. Generally, a creditor

will do so only if a new guarantor, satisfactory to the lender, is willing to take the place of the deceased guarantor.

***RL Regi North Carolina, LLC v. Lighthouse Cove, LLC* (North Carolina Supreme Court August 20, 2014)**

The Facts:

- Regions Bank provided over \$4 million in financing for the acquisition and development of approximately 57 acres of real property by Lighthouse Cove, LLC (“Lighthouse”).
- The loan was secured by the real property and personal guaranties of the borrowers’ members and the member’s spouses.
- Three years after the initial funding of the loan and execution of the guaranties, Lighthouse defaulted on the loan, and the parties entered into a forbearance agreement.
- The forbearance provided that Regions Bank would forgo exercising its remedies under the loan documents for a defined time period in exchange for certain agreements from Lighthouse and guarantors, including a “Waiver of Claims” section, whereby Lighthouse and guarantors specifically waived and released any claims that Regions Bank failed to act in good faith or conduct itself in a reasonable manner, and generally released Regions Bank from “any and all claims, defenses and causes of action” that occurred prior to the date of the forbearance agreement.
- The loan was later purchased by RL REGI North Carolina, LLC (“REGI”).
- After the expiration of the forbearance period, Lighthouse again defaulted on the loan.

- REGI filed a lawsuit against Lighthouse and guarantors seeking recovery of the outstanding indebtedness under the loan.
- One of the spousal guarantors asserted as an affirmative defense to collection on the grounds that her guaranty was obtained in violation of the federal Equal Credit Opportunity Act (“ECOA”).
- ECOA is a set of federal guidelines prohibiting lenders from requiring a spousal guaranty without first finding that the applicant spouse is not independently creditworthy.¹⁴
- The trial court found that the guaranty violated the ECOA and denied recovery.
- The N.C. Court of Appeals affirmed the trial court, finding that the waiver of claims contained in the forbearance agreement could not waive the defense that the guaranty was obtained in violation of the ECOA.
- REGI appealed to the North Carolina Supreme Court.

The Law:

- The ECOA prohibits lending institutions from discriminating against applicants in credit transactions “on the basis of race, color, religion, national origin, sex or marital status, or age.”¹⁵
- The Federal Reserve system to prescribe rules lending institutions must follow in procuring spousal guarantees.¹⁶
- While a creditor may not automatically require that a spouse be a party to a loan, it can do so if it first finds the applicant is not independently creditworthy.¹⁷
- The Supreme Court did not evaluate the ECOA defense because it found the trial court improperly allowed the spousal guarantor to assert a defense that she waived under the forbearance agreement,

thus depriving the lender of its rights under the forbearance agreement.

- Specifically, the Supreme Court held that parties are free to waive various rights, including those arising under statutes.
- Although the spousal guarantor did not specifically waive the ECOA defense in the forbearance agreement, the Court found the “comprehensive language contained in the agreement” and “overall expansive language of the waiver” to be sufficient to include any potential claim or defense.
- Ultimately, the Court stated that “a waiver of potential defenses to the guaranty, including a potential defense for a violation of the ECOA, was a part of defendant’s decision to accept the benefits of the forbearance agreement.”

HIGH POINT BANK AND TRUST CO v. HIGHMARK PROPERTIES, LLC (North Carolina Supreme Court September 25, 2015)

The Facts:

- High Point Bank (the “Bank”) issued two loans (\$4.7 million and \$1.75 million) to Highmark Properties, LLC (“Highmark”): one for \$4,700,000 (the first promissory note) and the other for \$1,750,000 (the second promissory note)
- The promissory notes were secured by deeds of trust on two parcels of real estate owned by Highmark.
- Also the promissory notes were guaranteed by the principals of the Highmark (the “Guarantors”).
- Subsequently, Highmark defaulted on the promissory notes, leaving an indebtedness of \$3,541,356 on the first note and \$1,336,556 on the second note.

- The Bank filed a lawsuit against the Highmark and the Guarantors.
- Contemporaneously, the Bank instituted foreclosure proceedings on the two parcels of real estate.
- At the foreclosure sale, the Bank was the only bidder, paying \$2,578,000 for one property and \$720,000 for the other property.
- The Bank filed a motion for summary judgment seeking to recover the deficiencies from the Guarantors.
- Three weeks later, the Bank voluntarily dismissed without prejudice all claims against Highmark.
- The Bank brought a motion seeking a ruling that the Guarantors were not entitled to raise any defense based upon the fair market value of the collateral properties pursuant to N.C. Gen. Stat. § 45-21.36.¹⁸
- The trial court denied the Bank's request and held that a jury needed to decide the value of the properties.
- The jury determined the fair market value of the first parcel as \$3,723,000 and that of the second parcel as \$1,034,000.
- Accordingly, the trial court ruled that Highmark's indebtedness on the First Note was reduced to \$0.00, because the jury had determined that the fair market value of the first parcel was greater than Highmark's remaining debt of \$3,541,356.
- Next, the trial court ruled that Highmark's indebtedness on the Second Note was reduced to \$302,556—the difference between the jury's determination of the fair market value of the second parcel and Highmark's remaining debt of \$1,336,556.
- The trial court ruled that Highmark and the Guarantors were jointly and severally liable and ordered payment to the Bank in the amount of \$302,556 for the remaining uncollected debt, plus attorney's fees and interest.
- The Bank appealed.

The Law:

- N.C.G.S. § 45-21.36 permits a person whose property has been purchased by the lender at foreclosure sale to assert that the property was worth more than the amount bid by the lender.
- If a jury finds that lender bid less than fair market value, the deficiency amount can be reduced or eliminated.
- Given that most foreclosure sales end with the lender taking title to the property and a deficiency owed, defenses under N.C.G.S. § 45-21.36 are frequently raised and tried before a jury.
- Since 1979, the North Carolina Court of Appeals has held that N.C.G.S. § 45-21.36 does not apply to guarantors and that the statute was limited “to those persons who held a property interest in the mortgaged property.”
- This distinction became crucial for lenders since it meant pursuing a post-foreclosure deficiency judgment against a guarantor was often much easier than pursuing that same judgment against a borrower.
- In *High Point Bank*, the North Carolina Supreme Court rejected the prior decisions from the Court of Appeals, and held that because N.C.G.S. § 45-21.36 was passed in 1933 as part of depression era laws designed to protect debtors, it must be construed “more broadly.”
- Noticeably, the Supreme Court also held that:
 - (a) N.C.G.S. § 45-21.36 is not really a defense but “an equitable method of calculating the indebtedness;” and
 - (b) the protections of the statute are “not subject to waiver.”

How the Supreme Court Reconciled its prior decision in *Lighthouse Cove* with its holding in *High Point Bank*:

In contrast, we held in *RL Regi N.C., LLC v. Lighthouse Cove, LLC*, 367 N.C. 425, 426–27, 762

S.E.2d 188–89 (2014) that a group of guarantors waived prospective claims and defenses to a guaranty in a subsequent forbearance agreement, including claims arising from the lender’s alleged violation of the Equal Credit Opportunity Act that potentially served as affirmative defenses to the agreement. The defense at issue there was in the form of a claim against the lender for a statutory violation, whereas here section 45–21.36 simply allows guarantors the right to a judicial method of debt calculation that accounts for the fair market value of the property at the time of a foreclosure sale. Accordingly, notwithstanding the waiver language contained in the guaranty agreements, guarantors did not waive their right to the protection of section 45–21.36.

Post *High Point Bank* Expectations:

- N.C.G.S. § 45-21.36 will now be raised in every post-foreclosure deficiency case in which the lender takes title, whether the action is against borrowers or guarantors.
- Jury trials in post-foreclosure deficiency actions will become the norm because the value of real estate is almost always a question of “material fact” to be determined by a jury not a judge.
- Lenders will most likely obtain judgments on the note/guaranty *prior to* foreclosing on the real property securing the note.
- Lenders may start pursuing judicial foreclosures rather than power of sale foreclosures because N.C.G.S. § 45-21.36 does not apply to judicial foreclosures.

TAKE AWAYS :

- As with any contract, read and understand each and every provision of a person guaranty contract.

- Request that creditor limit the amount, extent, or duration of your liability under the personal guaranty contract.
- Avoid signing a personal guaranty contract with a “waiver of defenses” clause.
- Consult a lawyer if you do not understand the amount, extent or duration of your liability.

¹ Sullivan, arthur; Steven M. Sheffrin (2003). *Economics: Principles in action*. Upper Saddle River, New Jersey 07458: Pearson Prentice Hall. p. 264.

² No action shall be brought whereby to charge an executor, administrator or collector upon a special promise to answer damages out of his own estate or to charge any defendant upon a special promise to answer the debt, default or miscarriage of another person, unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party charged therewith or some other person thereunto by him lawfully authorized. N.C. Gen. Stat. § 22-1.

³ *Burlington Industries Inc. v. Foil*, 284 N.C. 740, 749-50, 202 S.E.2d 598 (1974).

⁴ *Id.*

⁵ *North Carolina Nat. Bank. v. Corbett*, 271 N.C. 444, 156 S.E.2d 835 (1967).

⁶ 936 F.2d 1462 (4th Cir. 1991) (stating that “since the performance bond was prepared or adopted by the surety, any ambiguities in the interpretation of the performance bond must be construed against the party drafting or adopting the document—in this case, the surety”).

⁷ *Adder v. Holman & Moody, Inc.*, 288 N.C. 484, 219 S.E.2d 190 (1975); *Contracting Co. v. Ports Authority*, 284 N.C. 732, 202 S.E.2d 473 (1974).

⁸ *O'Grady v. Bank*, 296 N.C. 212, 250 S.E.2d 587 (1978); *Jones v. Realty Co.*, 226 N.C. 303, 37 S.E.2d 906 (1946).

⁹ *Hudson v. Game World, Inc.*, 126 N.C. App. 139, 484 S.E.2d 435, 32 U.C.C. Rep. Serv. 2d 857 (1997).

¹⁰ “When any surety is sued by the holder of the obligation, the court, on motion of the surety may join the principal as an additional party defendant, provided the principal is found to be or can be made subject to the jurisdiction of the court. Upon such joinder the surety shall have all rights, defenses, counterclaims, and setoffs which would have been available to him if the

principal and surety had been originally sued together.” N.C. Gen. Stat. § 26-12(b).

¹¹ *High Point Bank and Trust Co. v. Highmark Properties, LLC*, __ N.C. ___, 776 S.E.2d 838 (2015)

¹² When an execution, indorsed as aforesaid, shall come to the hands of any officer for collection, he shall levy on all the property of the principal, or so much thereof as shall be necessary to satisfy the execution, and, for want of sufficient property of the principal, also on the property of the surety, and make sale of all the property of the principal levied on before that of the surety. N.C. Gen. Stat. § 26-2.

¹³ N.C. Gen. Stat. § 26-5 (Contribution Among Sureties) provides: Where there are two or more sureties for the performance of a contract, and one or more of them may have been compelled to perform and satisfy the same, or any part thereof, such surety may have and maintain an action against every other surety for a just and ratable proportion of the same which may have been paid as aforesaid, whether of principal, interest or cost.

¹⁴ 15 U.S.C. §§ 1691, *et seq.* Section 1691 (Scope of Prohibition) provides:

(a) Activities constituting discrimination

It shall be unlawful for any creditor to discriminate against any applicant, with respect to any aspect of a credit transaction--

(1) on the basis of race, color, religion, national origin, sex or marital status, or age (provided the applicant has the capacity to contract);

(2) because all or part of the applicant's income derives from any public assistance program; or

(3) because the applicant has in good faith exercised any right under this chapter.

(b) Activities not constituting discrimination

It shall not constitute discrimination for purposes of this subchapter for a creditor--

(1) to make an inquiry of marital status if such inquiry is for the purpose of ascertaining the creditor's rights and remedies applicable to the particular extension of credit and not to discriminate in a determination of credit-worthiness;

(2) to make an inquiry of the applicant's age or of whether the applicant's income derives from any public assistance program if such inquiry is for the purpose of determining the amount and probable continuance of income levels, credit history, or other pertinent element of credit-

worthiness as provided in regulations of the Bureau;

(3) to use any empirically derived credit system which considers age if such system is demonstrably and statistically sound in accordance with regulations of the Bureau, except that in the operation of such system the age of an elderly applicant may not be assigned a negative factor or value;

(4) to make an inquiry or to consider the age of an elderly applicant when the age of such applicant is to be used by the creditor in the extension of credit in favor of such applicant; or

(5) to make an inquiry under section 1691c-2 of this title, in accordance with the requirements of that section.

(c) Additional activities not constituting discrimination

It is not a violation of this section for a creditor to refuse to extend credit offered pursuant to--

(1) any credit assistance program expressly authorized by law for an economically disadvantaged class of persons;

(2) any credit assistance program administered by a nonprofit organization for its members or an economically disadvantaged class of persons; or

(3) any special purpose credit program offered by a profit-making organization to meet special social needs which meets standards prescribed in regulations by the Bureau; if such refusal is required by or made pursuant to such program.

(d) Reason for adverse action; procedure applicable; "adverse action" defined

(1) Within thirty days (or such longer reasonable time as specified in regulations of the Bureau for any class of credit transaction) after receipt of a completed application for credit, a creditor shall notify the applicant of its action on the application.

(2) Each applicant against whom adverse action is taken shall be entitled to a statement of reasons for such action from the creditor. A creditor satisfies this obligation by--

(A) providing statements of reasons in writing as a matter of course to applicants against whom adverse action is taken; or

(B) giving written notification of adverse action which discloses (i) the applicant's right to a statement of reasons within thirty days after receipt by the creditor of a request made within sixty days after such notification, and (ii) the identity of the person or office from which such statement may be obtained. Such statement may be given orally if the written notification advises the applicant of his right to have the statement of reasons confirmed in writing on written request.

(3) A statement of reasons meets the requirements of this section only if it contains the specific reasons for the adverse action taken.

(4) Where a creditor has been requested by a third party to make a specific extension of credit directly or indirectly to an applicant, the notification and statement of reasons required by this subsection may be made directly by such creditor, or indirectly through the third party, provided in either case that the identity of the creditor is disclosed.

(5) The requirements of paragraph (2), (3), or (4) may be satisfied by verbal statements or notifications in the case of any creditor who did not act on more than one hundred and fifty applications during the calendar year preceding the calendar year in which the adverse action is taken, as determined under regulations of the Bureau.

(6) For purposes of this subsection, the term "adverse action" means a denial or revocation of credit, a change in the terms of an existing credit arrangement, or a refusal to grant credit in substantially the amount or on substantially the terms requested. Such term does not include a refusal to extend additional credit under an existing credit arrangement where the applicant is delinquent or otherwise in default, or where

such additional credit would exceed a previously established credit limit.

(e) Copies furnished to applicants

(1) In general

Each creditor shall furnish to an applicant a copy of any and all written appraisals and valuations developed in connection with the applicant's application for a loan that is secured or would have been secured by a first lien on a dwelling promptly upon completion, but in no case later than 3 days prior to the closing of the loan, whether the creditor grants or denies the applicant's request for credit or the application is incomplete or withdrawn.

(2) Waiver

The applicant may waive the 3 day requirement provided for in paragraph (1), except where otherwise required in law.

(3) Reimbursement

The applicant may be required to pay a reasonable fee to reimburse the creditor for the cost of the appraisal, except where otherwise required in law.

(4) Free copy

Notwithstanding paragraph (3), the creditor shall provide a copy of each written appraisal or valuation at no additional cost to the applicant.

(5) Notification to applicants

At the time of application, the creditor shall notify an applicant in writing of the right to receive a copy of each written appraisal and valuation under this subsection.

(6) Valuation defined

For purposes of this subsection, the term “valuation” shall include any estimate of the value of a dwelling developed in connection with a creditor's decision to provide credit, including those values developed pursuant to a policy of a government sponsored enterprise or by an automated valuation model, a broker price opinion, or other methodology or mechanism.

¹⁵ *Id.*

¹⁶ *High Point Bank citing Equal Credit Opportunity Act (Regulation B)*, 12 C.F.R. Pt. 202 (2014), Supp. I to Pt. 202—Official Staff Interpretations, para.

7(d)(6), cmt. 2; FDIC, Financial Institution Letter NO. FIL6–04, Guidance on Regulation B Spousal Signature Requirements, 2004 WL 61154, at *5 (Jan. 13, 2004).

¹⁷ *High Point Bank citing* FDIC, Financial Institution Letter NO. FIL6–04, 2004 WL 61154, at *5.

¹⁸ N.C. Gen. Stat. § 45-21.36. (Right of mortgagor to prove in deficiency suits reasonable value of property by way of defense) provides:

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 April 18, 1933.