



UNC
SCHOOL OF LAW

NORTH CAROLINA LAW REVIEW

Volume 95 | Number 3

Article 7

3-1-2017

"A Topsy-Turvy World": High Point Bank & Trust Co. v. Highmark Properties, LLC and the Modern Application of the Fair Market Value Offset Defense

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“A Topsy-Turvy World”: *High Point Bank & Trust Co. v. Highmark Properties, LLC* and the Modern Application of the Fair Market Value Offset Defense*

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INTRODUCTION

Among all the biblical wisdom, there is one lesson in particular that many business people ought, yet consistently fail, to heed. That lesson is found in Proverbs 22:26–27, which reads: “Don’t agree to guarantee another person’s debt or put up security for someone else. If you can’t pay it, even your bed will be snatched from under you.”¹ Despite the Bible’s admonitions against guaranteeing debt, guaranty contracts today are “ubiquitous[,]” or in other words, “probably as common as personal property security or real mortgages, and surely of wider application.”²

In 2014, revered Judge Richard Posner of the United States Court of Appeals for the Seventh Circuit³ penned an opinion in *Inland Mortgage Capital Corp. v. Chivas Retail Partners, LLC*⁴ that saved some guarantors, who had failed to heed that biblical warning, from suffering a fate worse than even the Bible foresaw—becoming *primarily liable* for a primary borrower’s debts.⁵ The case centered on a Georgia anti-deficiency statute that precluded deficiency judgments against borrowers whose property was sold to the lender at a nonjudicial foreclosure sale.⁶ *Chivas* involved a standard commercial lending agreement: the lender executed a promissory note with the borrower company, and the owners of the company guaranteed the repayment of the debt in a separate contract of guaranty.⁷ Upon

1. *Proverbs* 22:26–27 (New Living Translation).

2. Avery Wiener Katz, *An Economic Analysis of the Guaranty Contract*, 66 U. CHI. L. REV. 47, 47 (1999).

3. See, e.g., Elena Kagan, *Richard Posner, the Judge*, 120 HARV. L. REV. 1121, 1121 (2007) (“Richard Posner is the most important legal thinker of our time . . .”).

4. 740 F.3d 1146 (7th Cir. 2014).

5. See *id.* at 1149–50.

6. GA. CODE ANN. § 44-14-161 (2016).

7. *Chivas*, 740 F.3d at 1147–48. The language of the guaranty contract read as follows:

if Lender [that is, IMCC] forecloses on any real property collateral . . . the amount of the debt may be reduced only by the price for which that collateral is sold at the foreclosure sale, *even if the collateral is worth more than the sale price*; and Lender

subsequent default by the borrower, the lender foreclosed on the property securing the loan under power of sale.⁸ It then pursued the guarantor-defendants—in this case, a limited liability company and several individuals who were not the borrowing company—for the remaining amount because the Georgia statute prevented pursuing the borrower for the remaining deficiency.⁹ Ultimately, the district court granted the lender’s motion for summary judgment and awarded it \$17 million in damages.¹⁰ On appeal, the guarantors argued the Georgia anti-deficiency statute precluded the lenders from obtaining a judgment against them.¹¹ Writing for a unanimous three-judge panel, Judge Posner, after characterizing the defense as “a bit of Southern populism left over from the 1930s depression[,]”¹² affirmed the district court’s judgment.¹³ He noted that allowing this defense to be available to the guarantors would lead to a “topsy-turvy world” in which the lender would “sue the guarantor first, rather than the debtor, because if the [lender] lost a suit against a debtor the guaranty would (were [the defendant’s] defense accepted) be down the drain.”¹⁴

The statute in *Chivas* has a North Carolina counterpart—the Fair Market Value Offset Defense (“FMVOD”).¹⁵ While the FMVOD has not caused headaches for lenders in their pursuit of guarantors in decades, the Supreme Court of North Carolina unwittingly brought the “topsy-turvy world” envisioned by Judge Posner to reality in *High Point Bank & Trust Co. v. Highmark Properties, LLC*.¹⁶ In this case, the Supreme Court of North Carolina held that a guarantor may assert the FMVOD in its own right, thereby inviting the scenario in which “the guaranty would . . . be down the drain[,]” which could then

may collect from Guarantor [that is, Chivas] *even if Lender, by foreclosing on the real property collateral, has destroyed any rights Guarantor may have to collect from Borrower or anyone else.*

Id.

8. *See id.* at 1148.

9. *See id.*

10. *See Inland Mortg. Capital Corp. v. Chivas Retail Partners, LLC*, 901 F. Supp. 2d 1066, 1071 (N.D. Ill. 2012), *aff’d*, 740 F.3d 1146 (7th Cir. 2014).

11. *See Chivas*, 740 F.3d at 1149. The appeal was in a diversity suit, which is why the original Illinois proceeding led to discussion of the use of a Georgia statute. *See id.* at 1147.

12. *Id.* at 1148.

13. *Id.* at 1150.

14. *Id.*

15. N.C. GEN. STAT. § 45-21.36 (2016).

16. 368 N.C. 301, 776 S.E.2d 838 (2015).

induce the lender to sue a guarantor in the same respect as they would sue a primary obligor.¹⁷ Cue the “topsy-turvy world.”¹⁸

Already, readers may be asking themselves: “What is the big deal? What is the problem with extending this protection to guarantors in the first place?” For many, the interpretation this Comment proffers below may even appear facially inequitable. Why not give the “little guy” guarantors extra protections against the “big guy” banks? Can the banks not handle receiving a little less than they anticipated? Today, there is certainly little sympathy for banks. The “Too Big to Fail” era has dawned,¹⁹ and most Americans are fatigued by banks’ ability to survive the economic downturns, which average people feel the impact of most severely.²⁰ However, as banks became more adept at securing favorable contract terms, American business people did as well; many of those business people have become especially savvy at protecting their interests.²¹

The scrutiny that lenders—and their lawyers in particular—have given to this ruling highlights *High Point Bank*’s significance. One lively discussion of the impact compared the decision to football, framing the holding as analogous to “the entire offensive line [being] eligible to catch forward passes.”²² Another critic pondered whether post-foreclosure deficiency judgments were now “dead” in North Carolina.²³ Regardless of the description, lawyers aware of *High Point Bank* and its relationship to their legal practice agree: the *High Point*

17. *Chivas*, 740 F.3d at 1150. For discussion of *High Point Bank*, see *infra* Part III.

18. *Chivas*, 740 F.3d at 1150.

19. See Heather Long, *This Guy Thinks Banks Are STILL Too Big to Fail. And He’s Not Bernie Sanders*, CNN MONEY (Apr. 18, 2016, 6:26 PM), <http://money.cnn.com/2016/04/18/investing/banks-too-big-to-fail-neel-kashkari/> [<https://perma.cc/G6QN-NLX3>].

20. See generally Richard Burnett, *J.D. Power Poll Outlines Customer ‘Exodus’ from Big Banks*, ORLANDO SENTINEL (Feb. 27, 2012, 5:51 PM), http://articles.orlandosentinel.com/2012-02-27/business/os-jdpower-banks-customer-losses-20120228_1_michael-beird-debit-card-fee-community-banks [<https://perma.cc/KJ7P-B4PY>] (discussing how customers leaving big banks is a “testament to the . . . fatigue that consumers feel”).

21. See generally Divya Raghavan, *Banking Tips from Small-Business Owners*, NERDWALLET (Sept. 13, 2012), <https://www.nerdwallet.com/blog/small-business/tips-small-business-owners/> [<https://perma.cc/ZX46-Q7JM>] (suggesting tips for business people to protect their interests).

22. William L. Esser IV, *Tough News for Lenders—Major NC Supreme Court Decision on Collection of Post-Foreclosure Deficiencies*, PARKER POE (Sept. 28, 2015), <http://www.parkerpoe.com/newsevents/2015/09/tough-news-for-lenders-major-nc-supreme-court> [<https://perma.cc/3HV6-LA7T>].

23. Lance P. Martin, *Are Deficiency Actions Now Dead in North Carolina?*, WARD & SMITH, P.A. (Feb. 27, 2015), <http://www.wardandsmith.com/articles/post-foreclosure-deficiency-actions-in-north-carolina> [<https://perma.cc/VH7S-BKLS>].

Bank decision will impact how lenders pursue debts following default.²⁴

In *High Point Bank*, the Supreme Court of North Carolina overturned decades of precedent of the Court of Appeals of North Carolina that allowed lenders to pursue guarantors for deficiencies without limitation by the FMVOD.²⁵ Consequently, the highest court's interpretation of the FMVOD and its failure to appreciate the policy consequences of ruling in the guarantors' favor will have significant implications for how lenders pursue deficiency judgments in North Carolina. This Comment argues that the incentives created by *High Point Bank* could lead to more manifestly unjust consequences for guarantors and lenders going forward—consequences that lawmakers can, and should, remedy by reforming the nonjudicial foreclosure and deficiency judgment process.

This Comment proceeds in six parts. Part I briefly introduces relevant terms of art and outlines the scope of this discussion. Part II discusses the relevant historical context of the FMVOD statute and its application to guarantors since its adoption. Part III then details the pivotal *High Point Bank* case. Next, Part IV argues that a textual interpretation of the FMVOD statute makes *High Point Bank* a misguided opinion, while concurrently examining how some forgotten jurisprudence makes the *High Point Bank* decision reasonable. Part V addresses the options lenders may pursue in foreclosing and seeking deficiency judgments. Finally, Part VI analyzes different avenues for reform to prevent the unjust consequences to guarantors that will

24. See Stuart L. Pratt & David M. Schilli, *Guarantors Now Have North Carolina Anti-Deficiency Defense in Collection Actions*, ROBINSON BRADSHAW, Oct. 8, 2015, at 3, <http://www.robinsonbradshaw.com/pp/publication-NC-Anti-Deficiency-Defense-in-Collection-Actions-10-08-2015.pdf> [<https://perma.cc/98YY-KYHS>] (“*High Point Bank* cements a powerful new defense in collection actions that will likely permit a guarantor to survive summary judgment.”); Jay DeVaney & Brian T. Pearce, *Deficiency Judgment Cases in North Carolina Just Got a Lot More Complex*, NEXSEN PRUET (Sept. 25, 2015), <http://www.nexsenpruet.com/insights/centsability-deficiency-judgment-cases-in-north-carolina-just-got-a-lot-more-complex> [<https://perma.cc/9GYJ-5XH8>] (describing how guarantors might raise the FMVOD); B. Chad Ewing & Dirk Lasater, *High Point Bank v. Highmark and Guarantor Liability in North Carolina*, WOMBLE CARLYLE (Sept. 28, 2015), <http://www.wcsr.com/Insights/Articles/2015/September/High-Point-Bank-v-Highmark-and-Guarantor-Liability-in-North-Carolina#> [<https://perma.cc/74EV-VEYF>] (“*Highmark* represents a significant change in guarantor liability under North Carolina law”); Jill C. Walters, *Secured Lenders—Stay on Top of the Law or Proceed at Your Own Risk*, POYNER SPRUILL (Oct. 6, 2015), <http://client.poynerspruill.com/publications/Pages/Secured-LendersStayonTopofLaworProceedatOwnRisk.aspx> [<https://perma.cc/7KT7-XT3F>] (suggesting solutions for lenders seeking to pivot post-foreclosure strategies following *High Point Bank*).

25. See *infra* Section II.C.

follow *High Point Bank*, including rewriting the FMVOD statute and encouraging lenders to bid higher at foreclosure.

I. AN INTRODUCTION TO THE FORECLOSURE AND DEFICIENCY PROCESS

This Comment begins with a discussion of various terms of art utilized in the world of guarantors, foreclosures, and deficiency judgments. A firm understanding of these terms is essential to appreciate the analysis contained herein. In the context of commercial lending, lenders often use different tools to ensure a full repayment of the money they have loaned, including a healthy return on their investment.²⁶ One such tool, particularly used in the real estate development market, is the guaranty contract.²⁷ Guaranty contracts have three different participants: the borrower,²⁸ the lender,²⁹ and the guarantor.³⁰ Generally, a guaranty contract is an agreement between a third party other than the primary borrower to pay the debt of that borrower in the event of default on payments to the lender.³¹ This contract serves as a type of collateral for the loan;³² however, how the lender pursues this collateral agreement depends on the type of guaranty created at the origination of the loan.³³

There are a number of different types of guaranties available to lenders, but this Comment addresses only two types: the guaranty of

26. *See generally* Gary S. Gunn & Glenn P. Valentine, Commercial Real Estate Loan Documentation: Best Practices and Lessons (Hopefully) Learned During the Financial Crisis (Mar. 29–30, 2012) (unpublished manuscript), http://www.hwa.com/content/documents/Paper_Final_w_Exhibits_Publish_Quality.pdf [<https://perma.cc/3YMP-R8JW>] (presented at the Texas Bankers Ass'n, 38th Annual Legal Conference) (describing different tools utilized by commercial lenders to ensure profitable return on their investments).

27. *See id.* at 4.

28. This is also known as the “principal” or “obligor”—the primarily liable entity. *See* 5-44 DEBTOR-CREDITOR LAW § 44.03[2] (Theodore Eisenberg ed., 15th ed. 2015).

29. This is also known as the “creditor” or “obligee”—the party extending the credit. *See id.*

30. A guarantor is a separate third party who is not the main borrowing party. *See id.* § 44.03[1].

31. *See id.* (“A ‘guaranty’ is a promise to answer for the payment of some debt or the performance of some duty, in the case of the failure of another person who is primarily liable for such payment or performance.”).

32. *See* Steven L. Schwarcz, *Structured Finance: The New Way to Securitize Assets*, 11 CARDOZO L. REV. 607, 610–11 (1990) (listing guaranty agreements as a type of credit enhancement in the context of securitization and noting “[t]he goal is that a creditworthy third party assures” full repayment). By providing a third party to assure payment of a primary debt, the guaranty provides a lender with a means of recovery other than through the principal borrower. *See id.*; *supra* note 30 and accompanying text.

33. *See* 5-44 DEBTOR-CREDITOR LAW, *supra* note 28, § 44.03[1].

collection and the guaranty of payment.³⁴ The guaranty of collection is what many people likely associate with the term “guaranty”—upon exhaustion of all avenues of collection against the borrower, the lender may pursue the guarantor on the guaranty of collection for the outstanding amount due on the loan, otherwise known as the deficiency.³⁵ Guaranties of payment operate differently. Instead of exhausting all other options for satisfying the debt first, the lender may proceed directly against the guarantor at the moment of default.³⁶

Guaranty contracts benefit both the borrower and the lender in a commercial lending agreement; borrowers who have a third party sign a guaranty contract to vouch for their ability to repay benefit from lenders who are more willing to grant favorable lending terms.³⁷ Lenders, in turn, benefit by minimizing the risk of not being repaid.³⁸ If the borrower fails to repay its debt, the lender is more likely to fully recover the amount of its loan, hopefully with at least some return on investment.³⁹ When a commercial lending transaction goes right, guaranty contracts are inconsequential—the borrower pays their debts as they become due and everyone lives happily ever after; however, when a borrower defaults, the guarantor becomes a crucial party to lenders in their attempts to be paid in full.⁴⁰ Normally, when a borrower defaults, the lender will foreclose on the property securing the loan (the collateral),⁴¹ and then seek to recover the remaining

34. For those interested in other types of guaranty contracts, see Peter A. Alces, *The Efficacy of Guaranty Contracts in Sophisticated Commercial Transactions*, 61 N.C. L. REV. 655, 656–57 (1983) (“A guaranty may be absolute, conditional, general, special, continuing, unlimited, a guaranty of payment, or of collection or collectability.” (citations omitted)).

35. See 5-44 DEBTOR-CREDITOR LAW, *supra* note 28, § 44.03[3][b][ii].

36. See *id.* § 44.03[3][b][i].

37. See Katz, *supra* note 2, at 54, 64–74 (noting that intercorporate guaranties will lower the interest rate charged by a lender and providing economic analysis which demonstrates how credit is cheaper with a guarantor than without one); see also Robert J. Rosenberg, *Intercorporate Guaranties and the Law of Fraudulent Conveyances: Lender Beware*, 125 U. PA. L. REV. 235, 235–39 (1976) (explaining “upstream” and “cross-stream” guaranties, wherein a lender will require a guarantee of some business relation, whether parent-subsiary or affiliate, for less-than-creditworthy borrowers before extending credit).

38. See Katz, *supra* note 2, at 59 (“Guaranties are a response to potential moral hazard and adverse selection problems: they help protect creditors against some of the risks of debtor misbehavior or insolvency by shifting those risks to guarantors. In so doing, guaranties enlist the guarantor’s efforts in reducing or managing those risks.”).

39. See *id.* at 52–53.

40. See *id.* at 59.

41. See, e.g., N.C. GEN. STAT. § 45-21.16 (2016) (requiring notice and hearing before a clerk of court to initiate the power of sale foreclosure in North Carolina).

amount of the debt in a deficiency judgment.⁴² Thus, the first step for a lender seeking to recover an unpaid debt is to exhaust all forms of collection against the debtor—foreclosing on the borrower’s collateral.⁴³

In North Carolina, there are two possible avenues for foreclosing collateral.⁴⁴ The traditional option is judicial foreclosure, whereby a lender brings an action against a defaulting debtor to sell property securing the loan and credit the amount garnered to the remaining debt.⁴⁵ While every state has a provision for judicial foreclosure,⁴⁶ this approach is typically inefficient and expensive.⁴⁷ So as an alternative to this costly action, approximately half the states have adopted the nonjudicial, or power of sale, foreclosure.⁴⁸ In a nonjudicial foreclosure, a lender can foreclose on collateral without direct judicial oversight or the costly and time-consuming facets of judicial foreclosure.⁴⁹ North Carolina also has a nonjudicial foreclosure option, although the framework has some semblance of judicial

42. See *Carolina Bank v. Chatham Station, Inc.*, 186 N.C. App. 424, 428, 651 S.E.2d 386, 389 (2007) (“If the foreclosure sale of real property which secures a non-purchase money mortgage fails to yield the full amount of due debt, the mortgagee may sue for a deficiency judgment.” (citing *Blanton v. Sisk*, 70 N.C. App. 70, 71, 318 S.E.2d 560, 561 (1984), *abrogated by* *Paynter v. Maggiolo*, 105 N.C. App. 312, 412 S.E.2d 691 (1992))); see also *Deficiency Judgment*, BLACK’S LAW DICTIONARY (10th ed. 2014) (“A judgment against a debtor for the unpaid balance of the debt if a foreclosure sale or a sale of repossessed personal property fails to yield the full amount of the debt due.”).

43. See *supra* text accompanying notes 41–42.

44. See N.C. GEN. STAT. §§ 1-339.1 to .40 (judicial foreclosure process); see also *id.* §§ 45-21.1 to .33A (nonjudicial foreclosure process).

45. See *id.* § 1-339.1(a) (defining judicial sale in North Carolina).

46. See LEXISNEXIS, 50-STATE SURVEYS OF STATUTES & REGULATIONS: JUDICIAL FORECLOSURE (Jan. 2016) (showing that all fifty states have a judicial foreclosure provision).

47. See Grant S. Nelson, *Confronting the Mortgage Meltdown: A Brief for the Federalization of State Mortgage Foreclosure Law*, 37 PEPP. L. REV. 583, 586–88 (2010) (describing the judicial foreclosure process as “inefficient[,]” especially compared to nonjudicial foreclosure). Perhaps the greatest proof of this inefficiency is its inclusion in *Black’s Law Dictionary* under the definition of judicial foreclosure. See *Deficiency Judgment*, *supra* note 42 (referring to judicial foreclosure as “costly and time-consuming”).

48. See LEXISNEXIS, 50-STATE SURVEYS OF STATUTES & REGULATIONS: NON-JUDICIAL FORECLOSURE (Jan. 2016) (showing that thirty states have some provision for nonjudicial foreclosures).

49. See *In re Foreclosure of Deed of Tr. Recorded in Book 911, at Page 512, Catawba Cty. Registry*, 50 N.C. App. 69, 79, 272 S.E.2d 893, 899 (1980) (“The power of sale is simply a speedy and inexpensive way to obtain the equivalent results of a judicial foreclosure.”), *rev’d*, 303 N.C. 514 (1981); see also *Power-of-Sale Foreclosure*, BLACK’S LAW DICTIONARY (10th ed. 2014) (describing nonjudicial foreclosure as lacking “the stringent notice requirements, procedural burdens, or delays of a judicial foreclosure” in North Carolina). An aspect of the nonjudicial framework that suggests at least some judicial oversight is the hearing before the clerk of court. See N.C. GEN. STAT. § 45-21.16.

oversight in the form of notice and hearing before the clerk of court at the outset of a power of sale foreclosure.⁵⁰ In North Carolina, a lender may pursue a deficiency judgment to recover the remaining amount of debt (the deficiency) after the foreclosure sale.⁵¹ Anti-deficiency statutes exist to prevent lenders from taking advantage of borrowers, particularly following nonjudicial foreclosures.⁵² Some statutes expressly prohibit deficiency judgments in cases where a lender forecloses on property obtained by a purchase money mortgage.⁵³ Others, such as the FMVOD, allow all borrowers, regardless of the structure of the underlying transaction, an offset defense.⁵⁴

One of the simplest definitions of an offset defense is “[s]omething (such as an amount or claim) that balances or compensates for something else.”⁵⁵ In lender-borrower relationships, an offset is more specifically “[a] debtor’s right to reduce the amount of a debt by any sum the creditor owes the debtor; the counterbalancing sum owed by the creditor.”⁵⁶ Therefore, fair market value offset defenses prevent lenders from pursuing borrowers for a

50. See N.C. GEN. STAT. § 45-21.16(a).

51. See *id.* § 45-21.36.

52. See *infra* note 69 and accompanying text; see also *Antideficiency Legislation*, BLACK’S LAW DICTIONARY (10th ed. 2014) (“Legislation enacted to limit the rights of secured creditors to recover in excess of the security.”).

53. See, e.g., N.C. GEN. STAT. § 45-21.38. A purchase-money mortgage is a mortgage which “is made as a part of the same transaction in which the debtor purchases land, embraces the land so purchased, and secures all or part of its purchase price.” *Dobias v. White*, 239 N.C. 409, 412, 80 S.E.2d 23, 26 (1954).

Previous scholarship has discussed this statute at length, which is analogous in many ways to the statute at issue in this Comment. See, e.g., Joel M. Craig, Comment, *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) (questioning the “wisdom of permitting the statute to remain in force” because the Supreme Court of North Carolina’s “construction of the statute disrupts traditional allocation of risk concepts in commercial real estate transactions”). See generally G. Stephen Diab, Comment, *North Carolina Extends Its Anti-Deficiency Statute: Merritt v. Edwards Ridge*, 67 N.C. L. REV. 1446 (1989) (discussing the expansion of section 45-21.38’s protection after *Merritt v. Edwards Ridge*).

54. See N.C. GEN. STAT. § 45-21.36. Note that “courts use the terms ‘offset’ and ‘setoff’ interchangeably, often switching between them from sentence to sentence, supporting the conclusion that there is no substantive difference between them.” 2 ANN TAYLOR SCHWING, CALIFORNIA AFFIRMATIVE DEFENSES § 44:1 (2d ed. 1996) (citations omitted).

55. *Offset*, BLACK’S LAW DICTIONARY (10th ed. 2014).

56. *Setoff*, BLACK’S LAW DICTIONARY (10th ed. 2014).

deficiency if lenders have paid less than fair market value at a foreclosure under power of sale.⁵⁷

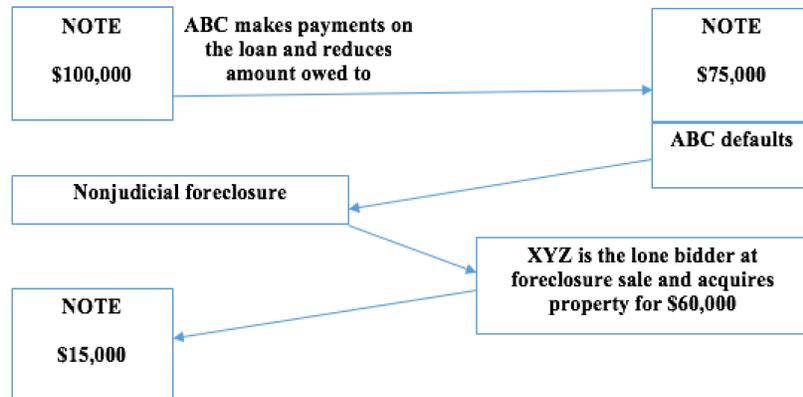
The remainder of this Part utilizes several charts to help explain how the commercial lending transaction plays out, from inception to default and deficiency. Figure 1 illustrates a typical intercorporate guaranty between a fictional entity and a fictional bank:

Figure 1: Intercorporate Guaranty



In Figure 1, ABC, LLC seeks a \$100,000 loan from a lender. XYZ Bank is willing to lend this money but wants to ensure that it will be repaid in full with interest. Accordingly, XYZ requires ABC to offer up collateral to secure the loan. ABC owns property worth \$80,000 and provides it as security by executing a promissory note and deed of trust. However, XYZ's loan is undersecured, so it also requires A, B, and C (the owners of ABC) to sign a guaranty contract as a credit enhancement to further ensure the loan will be repaid in full.

57. See, e.g., N.C. GEN. STAT. § 45-21.36. The difference between fair market value and a foreclosure bid deemed substantial enough to allow such a setoff depends on the state. Some states, such as Georgia, prevent deficiency judgments without judicial oversight. See, e.g., GA. CODE ANN. § 44-14-161(a) (2016).

Figure 2: Default and Collection

As shown in Figure 2, ABC begins paying off its loan, and is able to get the balance down to \$75,000. But ABC struggles to make its payments and ultimately defaults. XYZ then forecloses pursuant to the power of sale included in the deed of trust. After its hearing before the clerk of court, ABC's property is put up for sale, but XYZ is the only bidder who shows up and bids. XYZ purchases the collateral for \$60,000, leaving a \$15,000 balance on the note.

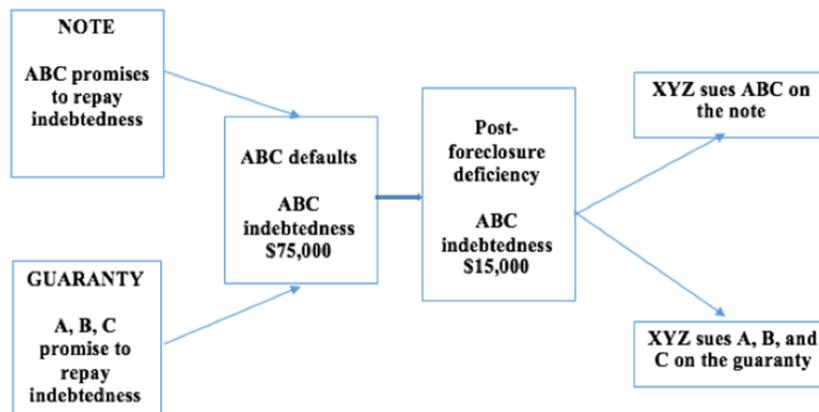
Figure 3: Deficiency Judgment

Figure 3 demonstrates how XYZ may then recover this deficiency. As discussed earlier, XYZ had ABC execute a note and A, B, and C execute separate guaranties. Following the default and

foreclosure, the guaranty becomes especially important. At this point, XYZ can sue both ABC on the note and A, B, and C on their separate guaranties. XYZ may then recover the full amount of the debt against these parties.

Since ABC is the property owner, once it is sued, it may assert the FMVOD to prevent a lender from recovering any deficient amounts outstanding, claiming that the fair market value of the property is the worth of the outstanding debt.⁵⁸ Assuming ABC would succeed in this defense, the question remains: Can the guarantors also benefit from this anti-deficiency statute? The following Part traces the history of the FMVOD statute from its adoption through the *High Point Bank* case to demonstrate the divergent trends in case law leading to that decision.

II. THE HISTORY OF THE FMVOD STATUTE AND ITS APPLICATION TO GUARANTORS

Whether guarantors can benefit from the FMVOD is the central issue of this Comment, as the *High Point Bank* case presents significant implications for guarantors and lenders alike. Having presented an understanding of relevant terminology, this Part contextualizes the *High Point Bank* decision by tracing the history of the FMVOD statute from its Depression-era adoption through the twentieth century. This history will explain how the law has evolved from a limited defense for borrowers like ABC to expansive equitable protection for guarantors like A, B, and C. The historical setting and adoption of the FMVOD statute provide context for a discussion of how courts have applied the FMVOD contained therein. Early case law, deemed “forgotten jurisprudence” by this Comment, illustrates the limited analysis given to the FMVOD statute that suggested a more expansive reading than it was given in the intervening decades. These decades between the statute’s adoption and the *High Point Bank* case largely ignored this early case law and originated a different, textual interpretation of the FMVOD statute. This historical discussion culminates in the next Part with *High Point Bank*, which represents a revival of forgotten jurisprudence while ignoring important textual analysis that developed in the decades prior to that decision.

58. See N.C. GEN. STAT. § 45-21.36.

A. *The Adoption of the FMVOD Statute*

The FMVOD was brought to life in the midst of the Great Depression.⁵⁹ When the statute was passed, the text of that statute read as follows:

When any sale of real estate or personal property 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 off-set, but not by way of counter-claim, 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 off-set any deficiency judgment against him, either in whole or in part⁶⁰

The statute has generally been limited in scope: it does not apply to nonjudicial foreclosures where the purchaser is a third party, nor does it apply to judicial foreclosures.⁶¹ Additionally, the statute underwent a minor change in 1949⁶² and then a substantive change in 1967, which removed personal property from the statute's purview due to the adoption of the Uniform Commercial Code.⁶³ But as has been noted in subsequent scholarship, there is hardly any legislative history available to inform interpretation of the statute.⁶⁴

59. See Brainerd Currie & Mark S. Lieberman, *Purchase-Money Mortgages and State Lines: A Study in Conflict-of-Laws Method*, 1960 DUKE L.J. 1, 11 (1960).

60. Act of Apr. 18, 1933, ch. 275, § 3, 1933 N.C. Sess. Laws 401, 402–03 (codified at N.C. GEN. STAT. § 45-21.36).

61. See *id.* § 3, 1933 N.C. Sess. at 403.

62. See Act of Apr. 1, 1949, ch. 720, § 3(d), 1949 N.C. Sess. Laws 788, 803 (codified as amended at N.C. GEN. STAT. § 45-21.36) (changing the location of the FMVOD by placing it in the same section as other deficiency judgment statutes).

63. See Act of May 23, 1967, ch. 562, § 2(12), 1967 N.C. Sess. Laws 603, 607 (codified as amended at N.C. GEN. STAT. § 45-21.36) (removing “or personal property” from the FMVOD). This amendment also limits the scope of this Comment, which is confined to real property transactions, and leaves all matters of interpretation of the Uniform Commercial Code to existing legal scholarship.

64. See Currie & Lieberman, *supra* note 59, at 11. Any available legislative history pertains solely to procedural matters; there are no annotations, debates, or commentary

In an article discussing the passing of the FMVOD, Professors Brainerd Currie and Mark Lieberman provide context for the flurry of anti-deficiency legislation introduced in 1933, both in North Carolina⁶⁵ and across the nation.⁶⁶ The early 1930s were arguably the most difficult years of the Great Depression.⁶⁷ At that time, the country was still reeling from the market crash in 1929, and the legislature was on the precipice of a burgeoning foreclosure crisis.⁶⁸ In North Carolina, the legislature responded by changing the nature of deficiency judgments from being granted “as a matter of course” to having significant new limitations, notably allowing the mortgagor to “prove the fair value of the land in defense to the action for the deficiency,” to afford debtors some relief.⁶⁹ This changed the

available to give researchers insight into the legislative mind. See H. JOURNAL, 1933 Sess. 186, 262, 286, 313, 320, 576, 667, 681 (N.C. 1933) (encompassing the bill’s introduction, passage in the North Carolina House of Representatives, referral to the North Carolina Senate, and ultimate passage and adoption as amended).

65. See Currie & Lieberman, *supra* note 59, at 11–12 (describing the various anti-deficiency statutes enacted in North Carolina in 1933).

66. See *id.* at 13–14, 13 n.48 (including scholarly pieces written around the time of the Great Depression that comprehensively detail legislative efforts to mitigate the impact of the economic crisis on debtors).

67. See *id.* at 11.

68. See *id.*

69. *Id.* at 13. The Currie and Lieberman version of the bill’s history has essentially become canon due to the Supreme Court of North Carolina’s reliance on it in *High Point Bank* and a previous decision regarding the purchase-money mortgage anti-deficiency statute. See *High Point Bank & Tr. Co. v. Highmark Props., LLC*, 368 N.C. 301, 305–06 n.1, 776 S.E.2d 838, 842 n.1 (2015); *Ross Realty Co. v. First Citizens Bank & Tr. Co.*, 296 N.C. 366, 370–71, 250 S.E.2d 271, 273–74 (1979); Currie & Lieberman, *supra* note 59, at 11–12. However, this narrow historical perspective may be limiting. The full history and context of the statute may be more illuminating. For example, perhaps the agricultural economy that prevailed in North Carolina at that time was a large motivator for extending protection from lenders. See RoAnn Bishop, *Difficult Days on Tar Heel Farms*, N.C. MUSEUM OF HISTORY: TAR HEEL JUNIOR HISTORIAN (Fall 2010), reprinted in *Agriculture in North Carolina During the Great Depression*, NCPEDIA.ORG (Jan. 1, 2010), <http://ncpedia.org/agriculture/great-depression?page=1> [<https://perma.cc/78S9-SGUT>] (“In the 1920s, North Carolina was still very much a rural state. Half of its total population lived on working farms. Agriculture was its largest industry.”). Consequently, policy concerns likely reflected that fact. See George M. Platt, *Deficiency Judgments in Oregon Loans Secured by Land: Growing Disparity Among Functional Equivalents*, 23 WILLAMETTE L. REV. 37, 50 (1987) (“The policy underlying the early Oregon [anti-deficiency] law probably was the protection of homeowners and farmers. This is the same policy which motivated most of the 1930s’ deficiency judgment laws around the country.”); Sarah M. Vogel, *The Law of Hard Times: Debtor and Farmer Relief Actions of the 1933 North Dakota Legislative Session*, 60 N.D. L. REV. 489, 489–90 nn.1–2 (1984) (noting how state legislatures focused on relieving the agricultural sector and citing the FMVOD as an example of such relief); *A Survey of Statutory Changes in North Carolina in 1933*, 11 N.C. L. REV. 191, 240 (1933) (“The immediate cause of this legislation was doubtless the hardship wrought upon mortgagors by having their lands sold at inadequate prices due to the depression.” (emphasis added)). This argument gains credence when considering that

collections process by placing limitations on deficiency judgments, curbing lenders who might harm borrowers whose very livelihoods may have depended on the foreclosed collateral and protecting borrowers from lender overreach.⁷⁰ However, unfortunately for anyone looking to the legislative history and historical context of this statute for guidance as to how it should be applied, there is simply not enough evidence of the 1933 North Carolina General Assembly's intent. And there certainly is not enough historical evidence to determine whether the FMVOD statute was meant to apply to guarantors. This lack of historical and legislative context proved difficult for judicial interpretation going forward, as the following sections illustrate.

B. Forgotten Jurisprudence? Richmond Mortgage and Dunlop as Depression-Era Guidance

Although the FMVOD statute was born in the context of an era of severe economic difficulties, it spawned its own set of jurisprudential challenges, specifically relating to its infringement into areas once considered outside of the legislature's purview. As is expected for laws that impact lender-borrower relationships, the FMVOD statute was challenged from its inception as an unconstitutional impairment of the freedom of contract.⁷¹ In *Richmond Mortgage & Loan Corp. v. Wachovia Bank & Trust Co.*,⁷² the Supreme Court of North Carolina upheld the constitutionality of

agricultural debtors were likely to be less educated than other debtors due to the duties of farm life. See Anita Price Davis, *Keeping the School Doors Open*, N.C. MUSEUM OF HISTORY: TAR HEEL JUNIOR HISTORIAN (Spring 2010), reprinted in *Public Schools in the Great Depression: Keeping the Doors Open*, NCPEDIA.ORG (Jan. 1, 2010), <http://ncpedia.org/public-schools-great-depression> [<https://perma.cc/NNZ3-B3ZQ>] (noting the particular difficulties encountered by rural youth in balancing the responsibilities of farm life with the demands of school). Moreover, the failure and repossession of farmland had a ripple effect on North Carolina's farm-driven economy. See Bishop, *supra*. Family farm failure left owners less able to sustain themselves, leading them and their families to turn to tenant farming, sharecropping, or migrant work, or to seek better fortunes in the city. See *id.* Farm failures also put tenant farmers and sharecroppers out of work. See *id.* Lenders suffered as a result of these failures, too—even without the FMVOD, banks failed as a result of farmers' inability to repay their debts. See David Walbert, *1.3: The Depression for Farmers*, LEARN NC, <http://www.learnnc.org/lp/editions/nchist-worldwar/5955> [<https://perma.cc/S6VH-PUTE>]. As all of this scholarship indicates, the North Carolina General Assembly, whose members largely represented rural residents of the state, appears to have taken it upon itself to provide some anti-deficiency protection for the farmers, even while banks continued failing across North Carolina.

70. See discussion *supra* note 69.

71. See, e.g., *Richmond Mortg. & Loan Corp. v. Wachovia Bank & Tr. Co.*, 210 N.C. 29, 33, 185 S.E. 482, 484 (1936), *aff'd*, 300 U.S. 124 (1937).

72. 210 N.C. 29, 185 S.E. 482 (1936).

the FMVOD statute.⁷³ The facts of the case involved a typical lending scenario: defendants borrowed money secured by a deed of trust; defendant defaulted, whereupon the bank foreclosed under the power of sale contained in said deed; a company controlled by the lending bank acquired the property; and the amount was credited to the defendant's remaining debts.⁷⁴ In a subsequent deficiency suit, the defendant asserted the FMVOD, extinguishing its liability for the debt.⁷⁵

On appeal, the bank argued that the FMVOD statute was unconstitutional pursuant to, *inter alia*, the contracts clause of the United States Constitution.⁷⁶ The Supreme Court of North Carolina held that the FMVOD statute “does not impair the obligation of contracts[,]” but instead “provides protection for debtors whose property has been sold and purchased by their creditors for a sum which was not a fair value of the property at the time of the sale” by providing for judicial oversight.⁷⁷ Because the FMVOD statute did not impair the obligation of contracts, the Supreme Court of North Carolina was “of the opinion that the statute is valid, and so h[e]ld.”⁷⁸

The Supreme Court of North Carolina was not the court of last resort in this instance; the case was appealed to the United States Supreme Court, which affirmed the case.⁷⁹ Writing for a unanimous Court, Justice Roberts noted that the obligation of contract was not impaired because the statute “recognizes the obligation of [the] contract and [the] right to its full enforcement but limits that right so as to prevent [a litigant from] obtaining more than [what is] due.”⁸⁰ Moreover, the availability of alternative methods of recovery like judicial foreclosure, combined with the decision not to entirely eradicate nonjudicial foreclosures, pushed the weight of the Court's opinion further in favor of the statute's constitutionality.⁸¹

Over a year after the United States Supreme Court's opinion in *Richmond Mortgage*, the Supreme Court of North Carolina faced a

73. *Id.* at 34, 185 S.E. at 485.

74. *See id.* at 30–31, 185 S.E. at 483.

75. *See id.* at 31–32, 185 S.E. at 483–84.

76. *See id.* at 33, 185 S.E. at 484 (citing U.S. CONST. art. I, § 10).

77. *Id.* at 35, 185 S.E. at 485.

78. *Id.* at 34, 185 S.E. at 485. In holding that the FMVOD statute was constitutional, the court utilized reasoning that it would later use to recharacterize the FMVOD statute from a legal defense into an equitable one. *See id.*; *infra* Section III.C.

79. *Richmond Mortg. & Loan Corp. v. Wachovia Bank & Tr. Co.*, 300 U.S. 124, 131 (1937).

80. *Id.* at 130.

81. *See id.* at 130–31.

soon-to-be-familiar fact pattern in *Virginia Trust Co. v. Dunlop*.⁸² In that case, the defendant was the guarantor of a loan secured by the borrower's property; the borrower defaulted, and the lender foreclosed on the property securing the loan by nonjudicial foreclosure.⁸³ When the lender pursued the guarantor for the deficient amount of almost \$4,000, the guarantor asserted the FMVOD as a defense to collection.⁸⁴ The lender challenged this assertion, arguing that the language of the statute limited its application to "the mortgagor, trustor, or other maker of any such obligation whose property has been so purchased [at foreclosure]."⁸⁵ The trial court denied the lender's motion to strike, an order from which the lender appealed.⁸⁶

The Supreme Court of North Carolina upheld the trial court's order.⁸⁷ However, the court's wavering and noncommittal language relating to the scope of the ruling has been, and continues to be, the source of much confusion.⁸⁸ The court held that the lender's motion to strike was properly denied, stating that "[i]f the defense provided in [the FMVOD statute] is available to the defendants in this case, they are entitled to introduce evidence of the facts constituting such defense on the trial."⁸⁹ Therefore, the court appeared to extend the defense to guarantors.⁹⁰ The opinion then concluded with more equivocating dicta, pondering whether the lender had a right to this appeal from a denial of a motion to strike in the first place.⁹¹ Ultimately, the court left the question temporarily undecided, concluding that the merits of the appeal dealt solely with the

82. 214 N.C. 196, 198 S.E. 645 (1938). The soon-to-be-familiar fact pattern referenced above is that of *High Point Bank & Trust Co. v. Highmark Properties, LLC*, 368 N.C. 301, 776 S.E.2d 838 (2015). See *infra* Part III.

83. *Dunlop*, 214 N.C. at 196–97, 198 S.E. at 645.

84. See *id.* at 197, 198 S.E. at 645. At this point, the guarantor had passed away, so the executors of his estate were defending the case. *Id.*

85. *Id.* at 198, 198 S.E. at 646 (citing Act of Apr. 18, 1933, ch. 275, § 3, 1933 N.C. Sess. Laws 401, 402–03 (codified at N.C. GEN. STAT. § 45-21.36 (2016))).

86. *Id.*

87. See *id.* at 199, 198 S.E. at 647.

88. See *infra* Section II.C, Part III.

89. *Dunlop*, 214 N.C. at 198, 198 S.E. at 646.

90. *Id.*

91. See *id.* at 199, 198 S.E. at 647 ("We are not sure of plaintiff's right to appeal on this matter...since the same question could have been raised on objections to the evidence and, if necessary, reviewed on appeal from the final judgment, and it does not now appear that any substantial right has been affected." (citing *Pemberton v. City of Greensboro*, 203 N.C. 514, 515, 166 S.E. 396, 396–97 (1932))).

relevancy of the guarantor's *pleading* of the FMVOD.⁹² Accordingly, the holding of this case was that, at the pleading stage of the case, a guarantor was entitled to assert the FMVOD; however, the court reserved judgment on whether the FMVOD actually applied to guarantors in equity to a later case and time—apparently to when the *High Point Bank* case arrived at the Supreme Court of North Carolina in 2015.⁹³

Dicta from *Richmond Mortgage* and *Dunlop* laid the groundwork for the interpretation of the FMVOD in the context of guarantors in North Carolina going forward. In upholding the constitutionality of the FMVOD in *Richmond Mortgage*, the Supreme Court of North Carolina posited that the borrower's assertion of the defense reduces the amount of indebtedness in future deficiency judgments.⁹⁴ *Dunlop*, in terms that seem equivocal and compromising today, seemingly “d[id] not deny” a guarantor's right to assert the FMVOD; by stating in dicta that “it would not be an unreasonable interpretation” to determine that the lender's acquisition of secured property by power of sale could extinguish the debt based on principles of equity, the court seemed to lend support to the notion that guarantors could at the very least argue that the FMVOD applied in equity.⁹⁵ Taken as precedent, these cases would have made an otherwise expedient process more difficult for lenders seeking to recover the full amount of their debt. Under this framework, *Richmond Mortgage's* dicta would apply the fair market value of the property directly to the borrower's debt,⁹⁶ and *Dunlop's* dicta

92. *See id.* (“[S]ince the holding is adverse to plaintiff's contention, and the appeal has precedent, we prefer to decide the matter upon the merits.”); *see also* Branch Banking & Tr. Co. v. Smith, 239 N.C. App. 293, 299–300, 769 S.E.2d 638, 643 (2015) (pointing to the dicta in *Dunlop* as evidence of the holding in that same case, i.e., that the guarantor's assertion of the FMVOD was not an irrelevant pleading that could be struck), *disc. review denied*, 368 N.C. 353, 777 S.E.2d 66 (2015) (mem.).

93. *Dunlop*, 214 N.C. at 198–99, 198 S.E. at 646–47. Even legal observers of this opinion at the time noted that the court failed to hold whether the FMVOD was actually available to guarantors. *See, e.g.*, Oscar Leak Tyree, Comment, *Mortgages—Statutes Modifying Deficiency Judgments—Availability to Sureties*, 17 N.C. L. REV. 179, 179 (1939) (arguing that while *Dunlop* “apparently did not find it necessary” to decide whether the FMVOD applied to guarantors beyond their right to plead the defense, the FMVOD statute should be construed to apply to guarantors based on equitable principles and the policy of the FMVOD statute).

94. *Richmond Mortg. & Loan Corp. v. Wachovia Bank & Tr. Co.*, 210 N.C. 29, 34, 185 S.E. 482, 485 (1936), *aff'd*, 300 U.S. 124 (1937).

95. *Dunlop*, 214 N.C. at 198–99, 198 S.E. at 646.

96. *See Richmond Mortgage*, 210 N.C. at 34, 185 S.E. at 485 (stating that creditor “shall not recover judgment against his debtor for any deficiency . . . without first accounting to his debtor for the fair value of the property[.]”).

supports the notion that the debt is equitably extinguished in its entirety by preventing further pursuit of the deficiency against guarantors.⁹⁷

Nevertheless, after these cases, North Carolina courts largely failed to utilize this case law as precedent in the manner that the dicta in *Richmond Mortgage* and *Dunlop* seemingly intended. In fact, in subsequent years, North Carolina appellate courts only cited *Dunlop* for the test for relevancy of a pleading.⁹⁸ Out of the numerous North Carolina appellate court decisions that cite *Dunlop* prior to *High Point Bank*, only three deal with the issue of whether guarantors can assert the FMVOD on their behalf.⁹⁹ However, even in those cases, the application of the *Dunlop* decision was not tested. For example, one holding failed to allow a guarantor the protection of the FMVOD because the foreclosure was by judicial order.¹⁰⁰ Similarly, the appellate level cases applied *Dunlop* to section 45-21.38 of the North Carolina General Statutes, which narrowly addresses purchase money mortgages.¹⁰¹

Likewise, the Supreme Court's opinion in *Richmond Mortgage* has not been applied to matters arising under the FMVOD statute at all.¹⁰² Instead, *Richmond Mortgage* is merely cited for the proposition

97. See *Dunlop*, 214 N.C. at 198–99, 198 S.E. at 646–47 (emphasizing that it could be a reasonable interpretation that the “statute . . . proceeds upon the equitable assumption” that debt is discharged upon debtor taking possession of land).

98. *Id.* at 198, 198 S.E. at 646. See, e.g., *Gamble v. Stutts*, 262 N.C. 276, 280, 136 S.E.2d 688, 690–91 (1964); *Briggs v. Dickey*, 249 N.C. 640, 641, 107 S.E.2d 85, 86 (1959); *Weant v. McCannless*, 235 N.C. 384, 386, 70 S.E.2d 196, 197 (1952); *Fleming v. Carolina Power & Light Co.*, 229 N.C. 397, 402, 50 S.E.2d 45, 48 (1948), *modified*, 230 N.C. 65, 51 S.E.2d 898 (1949). In North Carolina's jurisprudence surrounding the immediate appealability of motions to strike, *Dunlop* represents one of two divergent case law trends. One line of cases suggests that courts would not sustain motions to strike for fear of charting the path of the trial beforehand, while the other line of cases, which includes *Dunlop*, applied a test for relevancy that found pleadings irrelevant if the pleader had no right to assert the claim or defense. See Henry Brandis, Jr. & Willis C. Bumgarner, *The Motion to Strike Pleadings in North Carolina*, 29 N.C. L. REV. 3, 6–7 (1950); see also *Dunlop*, 214 N.C. at 198, 198 S.E. at 646.

99. See *Biggs v. Lassiter*, 220 N.C. 761, 772, 18 S.E.2d 419, 425 (1942); *Smith v. Childs*, 112 N.C. App. 672, 684–85, 437 S.E.2d 500, 508–09 (1993); *Chem. Bank v. Belk*, 41 N.C. App. 356, 368–69, 255 S.E.2d 421, 429 (1979).

100. See *Biggs*, 220 N.C. at 772–73, 18 S.E.2d at 425 (distinguishing *Dunlop*, which involved a nonjudicial foreclosure pursuant to the FMVOD, from this case).

101. See *Smith*, 112 N.C. App. at 684–85, 437 S.E.2d at 508–09; *Chem. Bank*, 41 N.C. App. at 368–69, 255 S.E.2d at 429.

102. See, e.g., *U.S. Tr. Co. of N.Y. v. New Jersey*, 431 U.S. 1, 19 (1977) (citing *Richmond Mortgage*, 300 U.S. 124, 128–29 (1937)) (using *Richmond Mortgage* as authority to overturn the repeal of a legislative bond program, which left no recourse for bondholders to recover the debt they were owed); *Balt. Teachers Union, Am. Fed'n of Teachers Local 340 v. Mayor & City Council of Baltimore*, 6 F.3d 1012, 1018 (4th Cir.

that certain acts of a legislature do not impair the obligation of contract so long as they leave alternative methods of recovery available to the lender.¹⁰³ Moreover, in the handful of North Carolina cases that cite to the corresponding Supreme Court of North Carolina's opinion in *Richmond Mortgage*, not a single one even mentions guarantors, let alone the application of that holding to guarantors' liability,¹⁰⁴ except in one instance.¹⁰⁵ That outlier case did mention guarantors, but the case was principally about the relationship of the lender and borrower, as the interlocutory order that was appealed was the summary judgment regarding the amount of deficiency on the loan.¹⁰⁶

C. *The Forgotten Jurisprudence's Legacy: A New Interpretation of the FMVOD Statute by the Court of Appeals of North Carolina*

After *Dunlop*, there was a dearth of appellate litigation regarding the FMVOD for several decades, but a flurry of cases involving the FMVOD began in the late 1970s that would change anti-deficiency jurisprudence substantially.¹⁰⁷ In numerous cases, in both state and federal courts, courts refused to apply the FMVOD to any party but the mortgagor and those with an interest in the property foreclosed.¹⁰⁸ Each case approved an interpretation of section 45-21.36 that limited its application solely to parties with a property interest in the foreclosed property.¹⁰⁹

1993) (“[The Court] sustained in [*Richmond Mortgage*], for example, a state law that ‘recognized the obligations of [the mortgagee’s] contract and his right to its full enforcement but limit[ed] that right so as to prevent his obtaining more than his due.’”).

103. See *U.S. Tr. Co. of N.Y.*, 431 U.S. at 19; *Balt. Teachers Union*, 6 F.3d at 1018.

104. See *Certain-Teed Prods. Corp. v. Sanders*, 264 N.C. 234, 244, 141 S.E.2d 329, 336 (1965) (dealing with an untimely attempted injunction of a nonjudicial foreclosure pursuant to section 45-21.34); *Brumley v. Baxter*, 225 N.C. 691, 698, 36 S.E.2d 281, 286 (1945) (citing *Richmond Mortgage* as one of eight cases that illustrate the rule that legislatures may alter contracts “where the motivation is for a public purpose and in the public interest, and does not confer exclusive privilege”); *Biggs*, 220 N.C. at 772, 18 S.E.2d at 425 (discussing the application of *Dunlop* and *Richmond Mortgage* to the 1939 deficiency judgment legislation); *Tarboro Bldg. & Loan Ass’n v. Bell*, 210 N.C. 35, 36, 185 S.E. 486, 486 (1936) (affirming a straightforward application of chapter 275 of the 1933 law to a borrower).

105. See *Wachovia Realty Invs. v. Hous., Inc.*, 292 N.C. 93, 111–12, 232 S.E.2d 667, 678–79 (1977).

106. See *id.* at 98–99, 232 S.E.2d at 671 (“The Superior Court was clearly in error in rendering summary judgment for a specified amount, the alleged unpaid balance due upon the note, while retaining for hearing and determination the claim of [the borrower], that it is entitled to a set-off or credit in approximately the same amount.”).

107. See *infra* notes 110–11 and accompanying text.

108. See *infra* note 126 and accompanying text.

109. See *infra* note 126 and accompanying text.

The first case to hold such a limited view of the FMVOD was *First Citizens Bank & Trust Co. v. Martin*,¹¹⁰ which began as an action to recover a deficiency after a bank foreclosed a deed of trust securing a promissory note signed by a husband and wife.¹¹¹ More specifically, the issue was whether a one-year statute of limitations for deficiency judgments¹¹² applied to the defendant couple.¹¹³ In holding that the statute of limitations did not apply to non-mortgagors, the Court of Appeals North Carolina presented the FMVOD statute as an example of how the North Carolina General Assembly intended protection of anti-deficiency statutes to apply only to mortgagors.¹¹⁴ This case marked the first real instance where a North Carolina court interpreted to whom the FMVOD applies: “[f]rom this Act it seems clear that *the General Assembly intended to limit protection to those persons who held a property interest in the mortgaged property* and that such protection was not applicable to other parties liable on the underlying debt.”¹¹⁵

Notably, the Supreme Court of North Carolina declined to review the case and therefore seemingly did not dispute the court of appeals’ interpretation of the FMVOD.¹¹⁶ Further, on several other occasions, the Supreme Court of North Carolina refused to correct the record regarding the proper application of *Dunlop*.¹¹⁷ The numerous instances in which the court declined to correct these decisions led lenders to believe that they would be able to pursue guarantors for the deficient amount post-foreclosure without being subject to the FMVOD.¹¹⁸

110. 44 N.C. App. 261, 261 S.E.2d 145 (1979), *disc. rev. denied*, 299 N.C. 741, 267 S.E.2d 661 (1980).

111. *Id.* at 261, 261 S.E.2d at 146–47.

112. N.C. GEN. STAT. § 1-54(6) (2016) (prohibiting deficiency judgments one year after the foreclosure of a security interest).

113. *First Citizens*, 44 N.C. App. at 262, 261 S.E.2d at 147.

114. *See id.* at 263–64, 261 S.E.2d at 148.

115. *Id.* at 264, 261 S.E.2d at 148 (emphasis added).

116. *See First Citizens Bank & Tr. Co. v. Martin*, 299 N.C. 741, 741, 267 S.E.2d 661, 661 (1980) (mem.).

117. *See supra* notes 98–101 and accompanying text.

118. *See, e.g.*, *Biggs v. Lassiter*, 220 N.C. 761, 772, 18 S.E.2d 419, 425 (1942); *Smith v. Childs*, 112 N.C. App. 672, 684–85, 437 S.E.2d 500, 508–09 (1993); *Chem. Bank v. Belk*, 41 N.C. App. 356, 368–69, 255 S.E.2d 421, 429 (1979); *see also supra* notes 98–101 and accompanying text. This was an argument of the North Carolina Bankers’ Association in its amicus brief filed for the *High Point Bank* case. *See Amicus Curiae Brief of the N.C. Bankers’ Ass’n to the N.C. Court of Appeals* at 15–16, *High Point Bank & Tr. Co. v. Highmark Props., LLC*, 231 N.C. App. 31, 750 S.E.2d 886 (2013) (No. COA13-331), 2013 WL 2389946, at *15–16 (arguing that changing the court of appeals line of precedent “would disturb decades of settled law regarding the freedom of contract” and would negatively impact lending practices going forward).

For example, in *American Foods, Inc. v. Goodson Farms, Inc.*,¹¹⁹ the Court of Appeals of North Carolina, applying *First Citizens*, refused to extend protection of the FMVOD to co-makers of a promissory note because they did not have an ownership interest in the property that was foreclosed.¹²⁰ Moreover, the court declined to afford them equitable protection simply because their corporation could assert the defense, as it would “pierce the corporate veil in a unique way”—by “wrap[ping] the corporate cloak of Lewis Nursery, Inc., around [the co-maker], since [defendant] financed the corporation, and conclud[ing] that he and Goodson Farms had an equitable interest in the lands[.]”¹²¹ Having lost on appeal, the defendants petitioned for discretionary review, specifically for review of the issue addressed by the North Carolina Court of Appeals’ dissenting opinion.¹²² The dissent mostly addressed whether there was a genuine issue of material fact about the impact of a joint venture agreement on a defendant’s counterclaim.¹²³ Ultimately, the Supreme Court of North Carolina limited review solely to the trial court’s dismissal of the counterclaim.¹²⁴ In a brief opinion, it affirmed the court of appeals’ ruling, holding that “its reasoning and the legal principles enunciated by it, are correct[.]” and adopted the majority opinion as its own.¹²⁵

Based on this opinion by the highest state court, most lenders (and their attorneys) seemingly concluded that the limitation of the FMVOD applying it to mortgagors only, as first enunciated in *First Citizens* and reiterated here, was adopted by the Supreme Court of North Carolina. Although the court did not set precedent itself by denying discretionary review of the entire case and limiting review to the issue raised by the dissent, it effectively did so by default. The holding of *First Citizens* remained binding precedent in North Carolina following the partial denial of review; moreover, the pattern

119. 50 N.C. App. 591, 275 S.E.2d 184 (1981), *aff’d per curiam*, 304 N.C. 386, 283 S.E.2d 517 (1981).

120. *Id.* at 596–97, 275 S.E.2d at 187–88.

121. *Id.* at 597, 275 S.E.2d at 188.

122. *See Am. Foods, Inc. v. Goodson Farms, Inc.*, 280 S.E.2d 459, 459 (N.C. 1981) (mem.).

123. *See Am. Foods*, 50 N.C. App. at 600, 275 S.E.2d at 189 (Wells, J., concurring in part and dissenting in part) (dissenting only as to the existence of a genuine issue of material fact about the impact of a joint venture agreement on a counterclaim by the defendant).

124. *See Am. Foods*, 280 S.E.2d at 459 (denying appeal of entire case, and allowing appeal based on Wells’s dissent).

125. *Am. Foods, Inc. v. Goodson Farms, Inc.*, 304 N.C. 386, 387, 283 S.E.2d 517, 517 (1981) (*per curiam*) (mem.).

of denials of review and the adoption of an opinion approving the appellate court's interpretation of the FMVOD statute clearly allowed and encouraged other North Carolina courts to apply this same interpretation. Indeed, that pattern of passive acceptance by the Supreme Court of North Carolina led the Court of Appeals North Carolina to continue applying its strict interpretation of the FMVOD statute leading up to *High Point Bank*.¹²⁶ Similarly, *First Citizens* ostensibly allowed and encouraged lenders to continue with this particular method of post-default collection, as it affirmed the practice of lenders obtaining deficiencies against guarantors without fearing the assertion of the FMVOD.

Following the decades of precedent set by North Carolina appellate courts and reiterated in decisions by federal courts,¹²⁷ the strict application of the FMVOD to those with property interests in foreclosed collateral became well-settled law.¹²⁸ And yet, the absence

126. See *NCNB Nat'l Bank of N.C. v. O'Neill*, 102 N.C. App. 313, 316, 401 S.E.2d 858, 860 (1991) ("The General Assembly clearly intended to limit the protection of [section 45-21.36] to those who hold a property interest in the mortgaged property."); *Raleigh Fed. Sav. Bank v. Godwin*, 99 N.C. App. 761, 763, 394 S.E.2d 294, 296 (1990) ("The General Assembly's intention to limit the protection of the statute to those who hold a property interest in the mortgaged property is clear; the protection of G.S. § 45-21.36 is not applicable to other parties who may be liable on the underlying debt."); *Borg-Warner Acceptance Corp. v. Johnston*, 97 N.C. App. 575, 580, 389 S.E.2d 429, 432 (1990), *disc. review denied*, 333 N.C. 254, 424 S.E.2d 918 (1993) ("Defendants, as guarantors . . . hold no property interest . . . and therefore may not assert the defense contained in G.S. § 45-21.36."); *Nw. Bank v. Weston*, 73 N.C. App. 162, 164, 325 S.E.2d 694, 696 (1985) (holding that the use of "the" rather than "an" to modify "obligation" demonstrates that the North Carolina General Assembly intended section 45-21.36 to apply to the "obligation secured by the property for sale").

Of particular interest to this Comment is *Borg-Warner Acceptance Corp. v. Johnston*—another instance in which the Supreme Court of North Carolina refused to grant discretionary review *and* writ of certiorari to set the record straight on how the FMVOD applies to guarantors. *Borg-Warner*, 333 N.C. at 254, 424 S.E.2d at 918. The Court of Appeals of North Carolina wrote an opinion that provided a straightforward application of *First Citizens* and *American Foods* to guarantors attempting to assert the FMVOD. See *Borg-Warner*, 97 N.C. App. at 575, 389 S.E.2d at 429. The opinion emphasized that the statute was intended to apply to mortgagors only, and, because the title of the foreclosed property was in the name of the guarantors' corporation, the Court of Appeals of North Carolina refused to allow them the protections contained in the FMVOD. See *id.* at 579–80, 389 S.E.2d at 432.

127. See, e.g., *Poughkeepsie Sav. Bank, FSB v. Harris*, 833 F. Supp. 551, 554–55 (W.D.N.C. 1993) (holding the FMVOD inapplicable to guarantors that had property interests since they did not own the property in their capacity as guarantors); *supra* note 126 and accompanying text.

128. See 2-13 WEBSTER'S REAL ESTATE LAW IN NORTH CAROLINA: POSSESSORY ESTATES AND PRESENT INTERESTS IN REAL PROPERTY § 13.47 (Patrick K. Hetrick, James B. McLaughlin & Michael B. Kent, Jr. eds., 6th ed. 2016) ("Based on this language, several decisions have indicated that the protections of N.C. Gen. Stat. § 45-21.36 apply only to those persons who hold a property interest in the mortgage property. For this

of references to *Dunlop* left questions seemingly forgotten by the collective legal memory: Had the court forgotten its discussion in *Dunlop*? Did it ever plan to resurrect that reasoning in light of a generation of well-reasoned, undisturbed Court of Appeals of North Carolina holdings to the contrary? The holdings of the past generation rendered the *Dunlop* dicta almost certainly forgotten reasoning with respect to its discussion of the FMVOD, in part due to the actions of the Supreme Court of North Carolina.

The court's support for the narrow interpretation of the FMVOD statute was both implicit and explicit. Not only did the Supreme Court of North Carolina implicitly accept the North Carolina Court of Appeals' restriction of the FMVOD to the express terms of the statute by its failure to address the issue upon discretionary review,¹²⁹ but the court also lent its own authority to that interpretation of the statute in affirming and adopting the opinion in *American Foods*.¹³⁰ However, the failure of North Carolina's judiciary to clarify the application of the FMVOD to guarantors beyond the pleading stage precipitated the paradigm shift that *High Point Bank* instituted.¹³¹ The following Part examines *High Point Bank*, the case that caused this change, and seeks to explain how the Supreme Court of North Carolina carried the forgotten jurisprudence of *Dunlop* and *Richmond Mortgage* forward to the modern day. This change had drastic consequences for lenders pursuing a strategy of nonjudicially foreclosing first and seeking deficiencies later.¹³²

III. HIGH POINT BANK: REVIVING FORGOTTEN JURISPRUDENCE

North Carolina's judiciary finally reached the questions raised by the conflicting histories described in Part II in *High Point Bank & Trust Co. v. Highmark Properties, LLC*.¹³³ The following discussions trace the development of this seminal case beginning with the

reason, numerous decisions also have held that a guarantor cannot claim the benefits of the statute.”).

129. See *supra* text accompanying notes 116–18.

130. See *Am. Foods, Inc. v. Goodson Farms, Inc.*, 50 N.C. App. 591, 596–97, 275 S.E.2d 184, 187–88, *aff'd per curiam*, 304 N.C. 386, 283 S.E.2d 517 (1981); see also *supra* text accompanying notes 121–26.

131. See *supra* text accompanying note 98.

132. See, e.g., *Poughkeepsie*, 833 F. Supp. at 554–55 (holding that defendants who were both guarantors and property owners could not raise the setoff defense after defaulting on their note).

133. 231 N.C. App. 31, 750 S.E.2d 886 (2013), *aff'd as modified*, 368 N.C. 301, 776 S.E.2d 838 (2015).

commercial lending transaction, the subsequent default, and the trial court proceedings. Analysis continues by introducing the Court of Appeals of North Carolina's majority and concurring opinions, which established the modern application of both *Dunlop's* and *Richmond Mortgage's* forgotten jurisprudence. Finally, this Part culminates in discussion of the Supreme Court of North Carolina's opinion that cemented the application of this forgotten jurisprudence in North Carolina law.

A. *Facts and Trial Court Proceedings*

High Point Bank involved a \$6,450,000 loan made through two promissory notes held by Highmark Properties, LLC (“the Borrower”), secured by two different properties by deeds of trust.¹³⁴ At the same time, High Point Bank also executed “commercial guaranty” agreements with the four co-owners of Highmark Properties.¹³⁵ The four co-owners formed Highmark Properties as a closely held real estate development venture—a line of business that organically grew from their collective prior experiences.¹³⁶ Together, they had over eighty years of experience in banking, construction, real estate, and business management.¹³⁷ In particular, one of the co-owners had experience as a real estate loan processor; he worked as a lending compliance officer for BB&T at the time these guaranty agreements were made.¹³⁸ Therefore, the experience that these owners brought to the table as savvy business people likely gave them the ability to fully understand and appreciate the weighty consequences of signing a commercial guaranty agreement.

The language of the guaranty agreements created a guaranty of payment,¹³⁹ allowing the bank to pursue the guarantors directly upon default of the borrower.¹⁴⁰ Additionally, the guaranties waived “any

134. *Id.* at 32, 750 S.E.2d at 887.

135. *Id.* at 32–33, 750 S.E.2d at 887.

136. See Reply Brief for Plaintiff-Appellant at 2, *High Point Bank & Tr. Co. v. Highmark Properties, LLC*, 231 N.C. App. 31, 750 S.E.2d 886 (2013) (No. COA13-331), 2013 WL 4498102, at *2.

137. See *id.*

138. *Id.*

139. See 5-44 DEBTOR-CREDITOR LAW, *supra* note 28, § 44.03[3][b][i] (defining “guaranty of payment”).

140. See Transcript of Record on Appeal at 17, 20, *High Point Bank & Tr. Co. v. Highmark Properties, LLC*, 231 N.C. App. 31, 750 S.E.2d 886 (2013) (No. COA13-331). The agreement read:

For good and valuable consideration, Guarantor absolutely and unconditionally guarantees full and punctual payment and satisfaction of the Indebtedness of Borrower to Lender This is a guaranty of payment and performance and not

rights or defenses arising by reason of . . . any . . . anti-deficiency law or any other law which may prevent [the bank] from bringing any action, including a claim for deficiency, against Guarantor, before or after” judicial or nonjudicial foreclosure.¹⁴¹ Finally, the guarantors agreed in the guaranty “not to assert or claim at any time any deductions to the amount guaranteed under [the] Guaranty for any claim of setoff . . . whether such claim, demand or right may be asserted by the Borrower, the Guarantor, or both.”¹⁴² With their signatures, the guarantors acknowledged that they were agreeing “with . . . full knowledge of [the] significance and consequences” of the guaranty.¹⁴³

After paying over \$1.5 million on the loans and receiving the benefit of an extension of the repayment period, the borrower ultimately defaulted in early fall 2010.¹⁴⁴ The bank then demanded immediate repayment and commenced a proceeding against the borrower and the guarantors to recover the \$4.5 million of outstanding debt.¹⁴⁵ While this action was pending, on February 8, 2011, the bank foreclosed on the properties securing the notes under the power of sale contained in the agreements.¹⁴⁶ As the sole bidder, the bank purchased the properties for almost \$3.3 million, leaving a remaining indebtedness on the notes worth \$1,579,842.¹⁴⁷ In arguing the deficiency owed by the parties post-foreclosure, both the borrower and the guarantor asserted the FMVOD as an affirmative defense.¹⁴⁸ The bank argued that while the borrower would be entitled to assert the FMVOD, the guarantors should not be allowed to assert it in their capacity as guarantors, nor obtain the benefit of

of collection, so Lender can enforce this Guaranty against Guarantor even when Lender has not exhausted Lender’s remedies against anyone else obligated to pay the Indebtedness or against any collateral securing the Indebtedness Guarantor will make any payments to Lender . . . in same-day funds, without set-off or deduction or counterclaim, and will otherwise perform Borrower’s obligations under the Note and Related Documents.

Id.

141. *Id.*

142. *Id.*

143. *Id.* at 18–19, 21–22.

144. *See* High Point Bank & Tr. Co. v. Highmark Props., LLC, 231 N.C. App. 31, 33, 750 S.E.2d 886, 887 (2013), *aff’d as modified*, 368 N.C. 301, 776 S.E.2d 838 (2015).

145. *See id.*

146. *Id.*

147. *See* High Point Bank & Tr. Co v. Highmark Props., LLC, 368 N.C. 301, 302–03, 776 S.E.2d 838, 840 (2015).

148. *See id.* at 303, 776 S.E.2d at 840.

the borrower's assertion.¹⁴⁹ The bank subsequently moved for summary judgment and ultimately voluntarily dismissed all claims against Highmark Properties without prejudice.¹⁵⁰

Yet, approximately a month later, the guarantors rejoined the borrowers pursuant to section 26-12 of the North Carolina General Statutes, a statute permitting "joinder of debtor by surety[.]"¹⁵¹ This joinder of Highmark Properties was due largely to the parties' dispute over whether the guarantors could benefit from the FMVOD.¹⁵² The bank filed a motion in limine arguing that the FMVOD was unavailable to guarantors because the bank voluntarily dismissed its claims against the borrower permitted to assert the FMVOD.¹⁵³ After oral argument, the trial court "[held] in its discretion" that guarantors' joinder of Highmark Properties was proper under section 26-12 of the North Carolina General Statutes, Rule 19 of the North Carolina Rules of Civil Procedure requiring joinder of necessary parties, or Rule 20 of the North Carolina Rules of Civil Procedure allowing joinder of permissive parties.¹⁵⁴ Following precedent, the trial court entered summary judgment against the guarantors with respect to their liability for the remaining debt, leaving the "value of the property securing payment of the Notes and its effect, if any, on the deficiency owed" for further determination by the jury.¹⁵⁵

At the trial on the sole remaining issue of the deficient amount, the jury heard from appraisal experts offered by both the plaintiff and the defendants.¹⁵⁶ Ultimately, the jury determined that the fair market value of the property foreclosed upon by the bank was worth far

149. See Plaintiff-Appellant's Brief at 10, *High Point Bank & Tr. Co v. Highmark Props., LLC*, 231 N.C. App. 31, 750 S.E.2d 886 (2013) (No. COA13-331), 2013 WL 2389945, at *10.

150. *High Point Bank*, 368 N.C. at 302, 776 S.E.2d at 840.

151. See *id.*; see also N.C. GEN. STAT. § 26-12 (2016).

152. See *High Point Bank*, 368 N.C. at 302-03, 776 S.E.2d at 840. The guarantors also argued that the borrower was a necessary party pursuant to Rule 19 of the North Carolina Rules of Civil Procedure or a permissive party that should be joined pursuant to Rule 20 of the same. *Id.*

153. See Plaintiff's Motion in Limine at 2, *High Point Bank & Tr. Co. v. Highmark Props., LLC*, No. 10-CVS-10910, 2011 WL 11577616 (N.C. Super. Ct. Sept. 6, 2011).

154. Order at *1, *High Point Bank & Tr. Co. v. Highmark Props., LLC*, No. 10-CVS-10910, 2011 WL 11571959 (N.C. Super. Ct. Sept. 19, 2011). See generally N.C. R. Civ. P. 19-20 (2015) (setting out rules for necessary and permissive joinder).

155. *High Point Bank*, 368 N.C. at 303, 776 S.E.2d at 840; see Order at *1, *High Point Bank & Tr. Co. v. Highmark Props., LLC*, No. 10-CVS-10910, 2011 WL 11571956 (N.C. Super. Ct. Oct. 4, 2011).

156. Record on Appeal at 99-103, *High Point Bank & Tr. Co v. Highmark Props., LLC*, 231 N.C. App. 31, 750 S.E.2d 886 (2013) (No. COA13-331) (encompassing plaintiff's and defendants' witness and exhibits lists, which respectively included appraisal experts for both parties and appraisal reports by both parties' experts).

more than the bank credit bid at the nonjudicial sale.¹⁵⁷ The jurors reduced the \$1.5 million amount of remaining indebtedness by the fair market value of the foreclosed properties—a reduction that left the borrower and guarantors “jointly and severally liable” for only \$302,556.¹⁵⁸

B. Court of Appeals of North Carolina Opinion

The bank appealed to the Court of Appeals of North Carolina; upon review the court began its analysis by considering whether “reducing the liability of Guarantors based upon [the FMVOD] was improper.”¹⁵⁹ At the outset, the court noted that guarantors are liable for the deficiency of borrowers; it stated that guarantors “stand[] in the shoes of the debtor with respect to liability[.]”¹⁶⁰ The court then examined the application of joinder pursuant to section 26-12 of the North Carolina General Statutes.¹⁶¹ It interpreted that statute as permissive with respect to joining parties and thus within the trial judge’s discretion.¹⁶² Accordingly, only a showing that the trial judge had abused his discretion would lead the court to overturn the joinder of the borrower by the guarantors.¹⁶³ The majority applied *Richmond Mortgage* to affirm the holding of the trial court, declaring that, after the borrower was joined, it “was entitled to assert” the FMVOD, and that such an assertion served to reduce the amount of overall indebtedness, rather than the personal liability of the borrower.¹⁶⁴ Based on this reasoning, the court allowed the guarantors to benefit

157. *Id.* at 104 (including jury’s finding that amount bid by plaintiff on February 8, 2011, was substantially less than the fair market value of the property). The jury found one property to be worth \$3,723,000 and the other to be worth \$1,034,000. *Id.* at 104–05.

158. *Id.* at 109; see *High Point Bank & Tr. Co. v. Highmark Props., LLC*, 231 N.C. App. 31, 34, 750 S.E.2d 886, 888 (2013), *aff’d as modified*, 368 N.C. 301, 776 S.E.2d 838 (2015).

159. *High Point Bank*, 231 N.C. App. at 35, 750 S.E.2d at 888–89. The opinion also discussed the lower court’s joinder issues, *id.* at 35–36, 750 S.E.2d at 889, which are outside the scope of this Comment.

160. *Id.* at 35, 750 S.E.2d at 889 (quoting *Gregory Poole Equip. Co. v. Murray*, 105 N.C. App. 642, 646, 414 S.E.2d 563, 566 (1992)).

161. *Id.* at 35–36, 750 S.E.2d at 889.

162. *Id.* at 35, 750 S.E.2d at 889 (“So long as Plaintiff was subject to the jurisdiction of the trial court, and that is not disputed in this case, the trial court’s joinder of Plaintiff upon Guarantors’ request was discretionary.”).

163. *Id.* (“[A] discretionary order of the trial court is conclusive on appeal absent a showing of abuse of discretion.”) (quoting *Brock & Scott Holdings, Inc. v. Stone*, 203 N.C. App. 135, 137, 691 S.E.2d 37, 38–39 (2010)).

164. *Id.* at 36, 750 S.E.2d at 889.

from the borrower's reliance on the FMVOD and reduce their liability.¹⁶⁵

Notably, the majority "quite assiduously avoided making" a determination of whether the guarantor could "*personally* assert an offset defense pursuant to [the FMVOD]."¹⁶⁶ Nevertheless, the majority proceeded to ponder whether it would be reasonable to allow a guarantor to assert the FMVOD personally and separately from the borrower's own assertion, much in the same manner the Supreme Court of North Carolina pondered the same issue in *Dunlop*.¹⁶⁷ This dicta analogized the FMVOD statute to section 45-21.38 of the North Carolina General Statutes, which prohibits deficiency suits based on purchase money mortgages, suggesting that the FMVOD could be asserted by the guarantors themselves due to the dicta in *Dunlop*, which the Court of Appeals of North Carolina had previously held to apply to that statute.¹⁶⁸ Ultimately, this dicta served as an interlude to the true focus and holding of the majority opinion in *High Point Bank*, that "once Borrower successfully obtained an offset pursuant to [the FMVOD statute], reducing Borrower's indebtedness thereby, Guarantors could only be held responsible for Borrower's indebtedness."¹⁶⁹

Judge Dillon wrote a separate opinion concurring in part.¹⁷⁰ He concurred with the majority's holding that the trial court did not abuse its discretion by permitting joinder of the borrower by the guarantors;¹⁷¹ however, he wrote separately to clarify his thoughts on what he considered to be the proper application of the FMVOD statute to guarantors.¹⁷² This concurrence can be characterized as proceeding in two parts: the former discussing Court of Appeals of North Carolina precedent and its application¹⁷³ and the latter explaining how the Supreme Court of North Carolina's opinion in *Dunlop* discredits the court of appeals' precedent.¹⁷⁴

Judge Dillon noted that the court of appeals' precedent holds that the FMVOD is not available to guarantors directly, and he laid out a syllogism by which the FMVOD statute can be understood: the

165. *See id.* at 36–37, 750 S.E.2d at 889–90.

166. *Id.* at 38, 750 S.E.2d at 890.

167. *See id.* at 38–39, 750 S.E.2d at 891.

168. *Id.*

169. *Id.* at 39, 750 S.E.2d at 891.

170. *See id.* (Dillon, J., concurring).

171. *See id.* at 40, 750 S.E.2d at 891.

172. *Id.* at 40, 750 S.E.2d at 891–92.

173. *See id.* at 40–41, 750 S.E.2d at 891–93.

174. *See id.* at 42–43, 750 S.E.2d at 893–94.

“general rule” is that indebtedness is reduced by the amount bid at foreclosure, yet, “[t]his general rule is abrogated in situations where the creditor, who commenced the foreclosure, is the high bidder at the foreclosure sale.”¹⁷⁵ The availability of the FMVOD to the guarantor, then, depends on whether the FMVOD, as the exception to the general rule, applies to the “mortgagor-borrower’s personal liability to pay the indebtedness” or to the actual indebtedness itself.¹⁷⁶ Ergo, if the FMVOD applies to the borrower’s liability, then it is unavailable to the guarantor. If the FMVOD applies to the indebtedness itself, then it is available to the guarantor after a borrower’s successful assertion. Indeed, Judge Dillon’s emphasis on the borrower’s liability in his concurrence appeared to signal two points: first, that this juxtaposition may be the exact reason why Judge Dillon wrote separately—to encourage the Supreme Court of North Carolina to clarify the case law, especially with regards to *Dunlop*; and second, to suggest that he believes the FMVOD should be personal to the borrower. In a footnote, he cited two scenarios in which a defense is personal to the borrower to the exclusion of the guarantor, including when a borrower’s discharge of the debt in bankruptcy does not benefit the guarantor and when the borrower is “an idiot or an infant[,]” or a company “acting *ultra vires*[.]”¹⁷⁷

As further evidence of the guarantor’s inability to assert the FMVOD, Judge Dillon cited four separate cases in which the Court of Appeals of North Carolina held that the FMVOD statute solely applies to parties with a property interest in the foreclosed collateral.¹⁷⁸ According to Judge Dillon, “Taken together, these holdings from our Court discussed above suggest that the defense provided by [the FMVOD statute] is *personal* to the mortgagor-borrower.”¹⁷⁹

Despite the considerable court of appeals precedent, Judge Dillon also recognized that *Dunlop* offered possible conflicting precedent that could not be overturned without a different Supreme

175. *Id.* at 40, 750 S.E.2d at 892.

176. *Id.*

177. *Id.* at 40 n.2, 750 S.E.2d at 892 n.2 (quoting *Town of Hillsborough v. Smith*, 10 N.C. App. 70, 74, 178 S.E.2d 18, 21 (1970)).

178. *See id.* at 41, 750 S.E.2d at 892–93 (citing *Wells Fargo Bank, N.A. v. Arlington Hills of Mint Hill, LLC*, 226 N.C. App. 174, 178, 742 S.E.2d 201, 204 (2013); *Raleigh Fed. Sav. Bank v. Godwin*, 99 N.C. App. 761, 763, 394 S.E.2d 294, 295 (1990); *Borg-Warner Acceptance Corp. v. Johnston*, 97 N.C. App. 575, 579, 389 S.E.2d 429, 433 (1990); *First Citizens Bank & Tr. Co. v. Martin*, 44 N.C. App. 261, 261 S.E.2d 145 (1979) *disc. rev. denied*, 299 N.C. 741, 267 S.E.2d 661 (1980)).

179. *Id.* at 41, 750 S.E.2d at 893.

Court of North Carolina opinion to the contrary.¹⁸⁰ He noted that the four Court of Appeals North Carolina cases he cited failed to reference *Dunlop* and then continued by explaining how that opinion might lend support for guarantors asserting the FMVOD beyond the pleading stage, reasoning,

If the defense was not available to a guarantor under the statute, the allegations would have been irrelevant to the resolution of the creditor's action against the guarantor; and I believe the Supreme Court would have been compelled to reverse the trial court's ruling, which would have prevented the parties from wasting time and resources at trial presenting evidence to prove irrelevant issues.¹⁸¹

In other words, because the court permitted the guarantor to assert the FMVOD at the pleading stage, the guarantor was able to take full advantage of the statute beyond the pleading because it otherwise would have been a waste of precious judicial resources.

To reiterate, both the majority opinion and the concurrence recognized that *Dunlop* signified that the Court of Appeals of North Carolina should permit the guarantor to benefit from the borrower's assertion of the FMVOD.¹⁸² Yet the concurrence highlighted the discordant case law that existed in North Carolina's jurisprudence surrounding the FMVOD statute.¹⁸³ This disharmony begged for relief by the Supreme Court of North Carolina, which eventually provided such relief when it granted discretionary review the following year.¹⁸⁴

C. *Supreme Court of North Carolina Opinion*

The desired relief was finally granted when the Supreme Court of North Carolina affirmed the majority ruling in a landmark opinion for post-foreclosure deficiency judgments, and in so doing, strengthened the FMVOD and broadened the class of obligors that it benefits.¹⁸⁵ The court's opinion has opened up the potential for the

180. *Id.* at 41–42, 750 S.E.2d at 892–93 (citing *Va. Tr. Co. v. Dunlop*, 214 N.C. 196, 198 S.E. 645 (1938)).

181. *Id.* at 42–43, 750 S.E.2d at 893–94.

182. *See supra* text accompanying notes 167–68, 180–80.

183. *See supra* text accompanying notes 173–81.

184. *See High Point Bank & Tr. Co. v. Highmark Props., LLC*, 367 N.C. 321, 321, 755 S.E.2d 627, 627 (2014) (mem.).

185. *See High Point Bank & Tr. Co. v. Highmark Props., LLC*, 368 N.C. 301, 309, 776 S.E.2d 838, 844 (2015).

topsy-turvy world wherein guarantors might become de facto primary obligors.

On de novo review, the opinion began by claiming that the court had “previously . . . addressed the essence” of the arguments presented and “held a guarantor is within the group of those who enjoy the protection of [the FMVOD].”¹⁸⁶ The court supported this previously undisclosed holding of the FMVOD’s applicability to guarantors by citing a 1977 case,¹⁸⁷ *Wachovia Realty Investments v. Housing, Inc.*¹⁸⁸ After citing this case, the court described the FMVOD as “not a ‘defense’ in the usual sense which can be waived[,]” but rather, as “an equitable method of calculating the indebtedness.”¹⁸⁹

In addition to citing its prior holdings that guarantors could “enjoy the protection” of the FMVOD, the court noted that the historical context in which the FMVOD statute was adopted “‘compelled [the court] to construe [such a] statute more broadly’ to ensure the legislative purposes are fulfilled.”¹⁹⁰ In a footnote, the court provided further insight into what exactly these legislative purposes might have been by citing the “particularly helpful” Currie and Lieberman article, which the court cited in a prior decision interpreting section 45-21.38 of the North Carolina General Statutes.¹⁹¹ The footnote quoted that article to support the notion that the FMVOD statute “was the first in a series of legislative attempts at the same session to deal with the mortgage problem[,]”¹⁹² and the court reiterated the article’s conclusion that, by enacting the FMVOD statute, the legislature “intended to protect vendees from oppression by vendors and mortgagors from oppression by mortgagees.”¹⁹³ In so doing, the court appeared to engage in its own method of statutory interpretation beyond the confines of the FMVOD statute’s text and

186. *Id.* at 304, 776 S.E.2d at 841.

187. *Id.* at 304–05, 776 S.E.2d at 841 (citing *Wachovia Realty Invs. v. Hous., Inc.*, 292 N.C. 93, 112, 232 S.E.2d 667, 679 (1977)).

188. 292 N.C. 93, 112, 232 S.E.2d 667, 679 (1977) (citing *Richmond Mortg. & Loan Corp. v. Wachovia Bank & Tr. Co.*, 210 N.C. 29, 34, 185 S.E. 482, 485 (1936), *aff’d*, 300 U.S. 124 (1937)).

189. *High Point Bank*, 368 N.C. at 305, 776 S.E.2d at 841.

190. *Id.* at 304–05, 776 S.E.2d at 841–42 (second alteration in original) (quoting *Ross Realty Co. v. First Citizens Bank & Tr. Co.*, 296 N.C. 366, 373, 250 S.E.2d 271, 275 (1979)).

191. *Id.* at 305–06 n.1, 776 S.E.2d at 842 n.1 (citing Currie & Lieberman, *supra* note 59, at 11); see *Ross Realty Co. v. First Citizens Bank & Tr. Co.*, 296 N.C. 366, 370–71, 250 S.E.2d 271, 273–74 (1979).

192. *High Point Bank*, 368 N.C. at 306 n.1, 776 S.E.2d at 842 n.1 (quoting *Ross Realty*, 296 N.C. at 370–71, 250 S.E.2d at 273–74); see Currie & Lieberman, *supra* note 59, at 11.

193. *Id.* (quoting *Ross Realty*, 296 N.C. at 371, 250 S.E.2d at 274).

based instead on the history of the statute. Perhaps because of the lack of statutory history available, the court also seemed to show it was willing to interpret the FMVOD as being much broader than the text might otherwise provide.¹⁹⁴ Simply put, the court deviated from a textual analysis of the statute in the absence of legislative history.

Those factors were not the only grounds for the court's willingness to grant the guarantors the FMVOD's protection. The court continued by discussing the forgotten jurisprudence of *Dunlop* and *Richmond Mortgage*; it distilled the *Dunlop* holding to the concept that a guarantor could raise the FMVOD in his own right, wholly quoting the equivocating language of that opinion in support.¹⁹⁵ Yet this distillation was not as pure as it might seem. Rather than addressing the equivocating language of that decision, the court merely omitted any troubling language, labeling what appeared to be dicta as the central reasoning of *Dunlop* and removing the language stating "[i]t might be contended, with reason, that . . ." from the preceding clause.¹⁹⁶ Consequently, the court mischaracterized the puzzling dicta of *Dunlop* as assured, settled precedent. Moreover, the court ignored the procedural posture of that case. Instead of describing the holding in *Dunlop* as allowing the guarantor to plead the FMVOD, the court declared that, in *Dunlop*, "we concluded that the guarantor . . . had the right to utilize the statutory protection at trial."¹⁹⁷

Building on its analysis of *Dunlop*, the court confirmed *Richmond Mortgage's* holding that the FMVOD statute was not meant to create a defense per se.¹⁹⁸ Instead, the FMVOD statute "protects a debtor by calculating the debt based upon the fair market value of the collateral" rather than the foreclosure sale bid.¹⁹⁹ This

194. See *supra* Section II.A.

195. *High Point Bank*, 368 N.C. at 306, 776 S.E.2d at 842 (citing *Va. Tr. Co. v. Dunlop*, 214 N.C. 196, 198–99, 198 S.E. 645, 646 (1938)).

196. Compare *Va. Tr. Co. v. Dunlop*, 214 N.C. 196, 198, 198 S.E. 645, 646 (1938) (using equivocating, vague language), with *High Point Bank*, 368 N.C. at 306, 776 S.E.2d at 842 (omitting equivocating language).

197. Compare *Dunlop*, 214 N.C. at 198–99, 198 S.E. at 646 ("It is not, of course, for us to say whether the defendants can make good the allegations of their further defense: We only say that at this stage of the case we do not deny their right to make it." (emphasis added)), with *High Point Bank*, 368 N.C. at 306, 776 S.E.2d at 842 ("Consequently, we concluded that the guarantor, and thus the estate, had the right to utilize the statutory protection at trial.").

198. *High Point Bank*, 368 N.C. at 307–08, 776 S.E.2d at 842–43 (citing *Richmond Mortg. & Loan Corp. v. Wachovia Bank & Tr. Co.*, 210 N.C. 29, 34–35, 185 S.E. 482, 485 (1936), *aff'd*, 300 U.S. 124 (1937)).

199. *Id.* at 307, 776 S.E.2d at 842–43.

interpretation led the court to state that the FMVOD contained therein was unwaivable.²⁰⁰ The enforcement of this precedent, in the court's opinion, was controlling, and allowed a guarantor to have the FMVOD "equitable method of debt calculation" applied as a matter of right whenever a lender foreclosed by power of sale.²⁰¹

In characterizing the FMVOD as a method of debt calculation, the court explained that the offset derived from the borrower's assertion of the FMVOD "is not the type of 'defense or offset' which is subject to waiver."²⁰² The court contrasted the opinion with another Supreme Court of North Carolina opinion decided less than a year prior, in which the court allowed waiver of Equal Credit Opportunity Act ("ECOA") claims by guarantors.²⁰³ The distinguishing difference between these cases was the "form of claim" at issue.²⁰⁴ In the other case, *RL REGI, N.C., LLC v. Lighthouse Cove, LLC*,²⁰⁵ the guarantors sought recovery against a lender's statutory violation, whereas the *High Point Bank* guarantors were "simply allow[ed] . . . the right to a judicial method of debt calculation[.]"²⁰⁶ The difference between these two cases for the court, then, appears to be that *Lighthouse Cove* dealt with a statutory violation by the lender of the ECOA, while *High Point Bank* dealt with the newly extended statutory right of guarantors to ask for a judicial debt calculation.

While the FMVOD was already deemed to be nonwaivable because it was an "equitable method of debt calculation[.]"²⁰⁷ the court took the non-waiver even further and held that although the guarantors signed a waiver of their rights under the FMVOD, any express waiver of the FMVOD is against public policy.²⁰⁸ In contrast to its former discussion of the FMVOD as broadly construed,²⁰⁹ the court somewhat ironically held that "because anti-deficiency legislation is so *narrowly* tailored to address specific instances of the public's vulnerability to lender overreach, waiver of this statutory protection as a prerequisite to receipt of a mortgage or as a condition

200. *Id.* at 307, 776 S.E.2d at 843.

201. *Id.* at 307–08, 776 S.E.2d at 843.

202. *Id.* at 308, 776 S.E.2d at 843.

203. *Id.* (citing *RL REGI N.C., LLC v. Lighthouse Cove, LLC*, 367 N.C. 425, 430, 762 S.E.2d 188, 191 (2014)).

204. *Id.*

205. 367 N.C. 425, 762 S.E.2d 188 (2014).

206. *High Point Bank*, 368 N.C. at 308, 776 S.E.2d at 843.

207. *Id.*

208. *Id.*

209. *See supra* text accompanying note 190.

of a guaranty agreement would violate public policy.”²¹⁰ In its closing lines, the opinion returned to the facts and procedure of the foregoing proceedings, and it disagreed with the lender’s argument that section 26-12 of the North Carolina General Statutes was inapplicable to the guarantors here.²¹¹ It held that joinder was entirely within the trial court’s discretion and that such discretion was not abused in this case.²¹² Accordingly, the lower court’s joinder of the borrower pursuant to section 26-12 was proper.²¹³

In light of the unsettled history of the FMVOD, this opinion is a game changer. Guarantors no longer need to wonder whether the FMVOD applies to them; in any scenario where the lender forecloses in a nonjudicial sale and purchases the property itself, the guarantors may benefit from a borrower’s assertion of the defense (or rather, the method of debt calculation) and maybe even assert the defense of their own accord. Also, lenders can no longer bargain to have guarantors waive such defenses. The FMVOD is now protected by a public policy rationale, having been granted a broad interpretation by the highest court in North Carolina, and the defense’s newfound basis in equitable principles allows guarantors to assert it as a matter of right regardless of any waivers.²¹⁴ In light of this decision, “FMVOD” is now somewhat of a misnomer. Perhaps the FMVOD is better abbreviated as the “FMVOEMODC”—the “fair market value offset equitable method of debt calculation.”²¹⁵

IV. WAS THE *HIGH POINT BANK* DECISION WRONG?

Of course, an opinion like *High Point Bank*—with such far-reaching consequences—is not without its flaws or counterarguments. The remainder of this Comment discusses the consequences of the Supreme Court of North Carolina’s opinion in *High Point Bank*. This Part attempts to explain the reasoning behind the decision in two ways: first, by explaining the overlooked textual analysis that the Supreme Court of North Carolina omitted from its opinion; and second, by attempting to explicate the reasoning of that court despite this flaw. Parts V and VI then illustrate the ways in which lenders

210. *High Point Bank*, 368 N.C. at 308, 776 S.E.2d at 843 (emphasis added).

211. *Id.* at 308–09, 776 S.E.2d at 843–44.

212. *Id.* at 309, 776 S.E.2d at 844.

213. *Id.*

214. *See id.* at 307–08, 776 S.E.2d at 843.

215. While this renaming of this Comment’s beloved FMVOD would indeed be appropriate at this juncture, this Comment will continue with the FMVOD nomenclature. Still, the point remains.

might respond to the decision and offer some legislative and judicial solutions to the consequences of *High Point Bank*.

A. *Interpreting the Language of the FMVOD Statute*

One of the weaknesses of the *High Point Bank* opinion is the court's refusal to discuss the FMVOD as it was written. The court instead extrapolated the statute's intent from its own version of the historical context of the statute²¹⁶ and the non-binding dicta of *Dunlop* and *Richmond Mortgage*.²¹⁷ The result of this analysis was the court's subjective discussion of what was equitable, apart from the intent evinced by the statute's language.²¹⁸ As noted, the Supreme Court of North Carolina has never explicitly addressed or explored how the plain meaning of the FMVOD statute makes a difference in the guaranty context.²¹⁹ Instead, the *High Point Bank* court drastically changed its approach to post-foreclosure liability based on its purported understanding of the statute's historical context.²²⁰ This Comment rejects applying the FMVOD as an equitable doctrine in favor of the North Carolina Court of Appeals' original interpretation—that guarantors cannot reap the benefits of the FMVOD.

As a reference, the language of the FMVOD statute is set forth below:

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

216. See *supra* Section III.C. Of course, the court had assistance from scholarship focusing on section 45-21.38 of the North Carolina General Statutes. See Currie & Lieberman, *supra* note 59, at 9–16.

217. See *supra* Sections II.B–C.

218. See *supra* Section III.C.

219. See *supra* Part II.

220. See *supra* text accompanying notes 190–93.

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, 1933.²²¹

To begin, the language of the FMVOD is plain and easy to decipher: when a property is sold pursuant to a power of sale, the “mortgagor, trustor, or other maker of any such obligation *whose property has been so purchased*” may “allege and show as a matter of defense and offset” that the price that the purchaser paid was “substantially less than” the fair market value of the property, and thereby “defeat or offset any deficiency judgment *against him*, either in whole or in part[.]”²²² Per the language of this statute, any party who had a lender foreclose on its property pursuant to a power of sale has a right to assert that the property was worth the amount of the debt when pursued in a deficiency judgment. This defense, then, cannot be asserted in simply *any* deficiency judgment, but rather in a deficiency judgment against an individual whose property has been foreclosed. In the context of guaranties, unless the guarantor has a property interest in the foreclosed collateral, the guarantor cannot claim the protection of the FMVOD under this reading of the statute.

Therefore, any court interpreting this statute can quite easily discern the object of this statute’s applicability because the statute itself defines the object in simple terms: as “the mortgagor, trustor, or other maker of such obligation whose property has been so purchased[.]”²²³ Moreover, the statute by its own terms is a “defense[.]”²²⁴ There is nothing to suggest that a nonjudicial foreclosure automatically triggers as an equitable method of debt calculation upon a lender’s instigation of a deficiency suit. Rather, it requires some initiative by a party seeking the protection of this statute “to *allege and show* as a matter of defense and offset” before

221. N.C. GEN. STAT. § 45-21.36 (2016).

222. *Id.* (emphasis added).

223. *Id.*

224. *Id.*

the defense is effective.²²⁵ Because the language relating to the defense is so straightforward, there is really no room for interpretation by the courts; they are obliged under standard methods of judicial interpretation to apply the express text of the law as it has been unambiguously enacted.²²⁶

Furthermore, applying standard rules of textual interpretation, the intended impact of the law could not be clearer. Pursuant to the maxim *expressio unius est exclusio alterius*, the express inclusion of certain related terms implies the inapplicability of others not mentioned.²²⁷ The FMVOD statute states that it applies to a “mortgagor, trustor, or other maker of any such obligation whose property has been” purchased by a lender pursuant to power of sale.²²⁸ Noticeably absent from this list of individuals qualified to assert the FMVOD is the guarantor or any other secondary obligor. Thus, the inclusion of certain parties eligible to assert the FMVOD operates to the exclusion of other parties, like guarantors, who might seek to assert this defense.

Similarly, the maxims *noscitur a sociis*²²⁹ and *ejusdem generis*²³⁰ limit the meaning of “other maker of any such obligation” specifically to those who make an obligation secured by collateral foreclosed at a nonjudicial foreclosure sale.²³¹ Without making explicit reference to these maxims, the Court of Appeals of North Carolina utilized these

225. *Id.* (emphasis added).

226. *See* *Caminetti v. United States*, 242 U.S. 470, 485 (1917) (“Where the language is plain and admits of no more than one meaning the duty of interpretation does not arise and the rules which are to aid doubtful meanings need no discussion.”).

227. *See* *Evans v. Diaz*, 333 N.C. 774, 779–80, 430 S.E.2d 244, 247 (1993) (“Under the doctrine of *expressio unius est exclusio alterius*, when a statute lists the situations to which it applies, it implies the exclusion of situations not contained in the list.”); *see also* *Expressio unius est exclusio alterius*, BLACK’S LAW DICTIONARY (10th ed. 2014).

228. N.C. GEN. STAT. § 45-21.36.

229. *See* *Morecock v. Hood*, 202 N.C. 321, 323, 162 S.E. 730, 731 (1932) (“The maxim is, *Noscitur a sociis*: the meaning of a doubtful word may be ascertained by reference to the meaning of words with which it is associated.”); *see also* *Noscitur a sociis*, BLACK’S LAW DICTIONARY (10th ed. 2014) (“A canon of construction holding that the meaning of an unclear word or phrase, esp. one in a list, should be determined by the words immediately surrounding it.”).

230. *See* *Liborio v. King*, 150 N.C. App. 531, 536, 564 S.E.2d 272, 275 (2002) (“Under the principle of *ejusdem generis*, when a general term follows a specific one, the general term should be understood as a reference to subjects akin to the one with specific enumeration.” (quoting *Norfolk & W.R. Co. v. Am. Train Dispatchers’ Ass’n*, 499 U.S. 117, 129 (1991))); *see also* *Ejusdem generis*, BLACK’S LAW DICTIONARY (10th ed. 2014) (“A canon of construction holding that when a general word or phrase follows a list of specifics, the general word or phrase will be interpreted to include only items of the same class as those listed.”).

231. N.C. GEN. STAT. § 45-21.36.

principles in its interpretation of the FMVOD statute to limit its application to those with a property interest in the foreclosed collateral.²³² Ultimately, this Comment argues that these traditional maxims are hardly necessary to understand the purpose and meaning of the FMVOD statute. When the statute's language clearly identifies the particular scenario in and parties to which the statute applies, there is no need for any additional analysis or input by judicial reasoning, which can become twisted when unbound from the codified words on the pages of the state's statutes.²³³ Thus, when the FMVOD statute stated that it applied to a mortgagor or other party whose property was purchased at a nonjudicial foreclosure sale, that party is exactly the party to whom it applies.

B. Explaining the Reasoning Behind the High Point Bank Opinion

Nevertheless, while a textual interpretation of the FMVOD would preclude guarantors from the benefit of the FMVOD, the *High Point Bank* court seems to have relied on the forgotten jurisprudence described in Section II.B to give guarantors the protection of the FMVOD. While the precedential effect of *Dunlop* is questionable, a closer look at the reasoning of *Richmond Mortgage* appears to offer more insight with regard to how the FMVOD might benefit guarantors.²³⁴ This Comment leaves open the possibility that the Supreme Court of North Carolina was not necessarily wrong in its interpretations of the *Dunlop* and *Richmond Mortgage* holdings. Those cases may be reasonably interpreted, as they were in *High Point Bank*, to broaden the class of persons who can assert the FMVOD to include guarantors. However, the justices of the Supreme Court of North Carolina stood on questionable ground with respect to stare decisis at the time of *High Point Bank*. They could have made a legitimate decision either by following the *Dunlop* and *Richmond Mortgage* analyses or by following the line of cases the court implicitly endorsed for decades.

This Section explores how the court's interpretation of the forgotten jurisprudence was not entirely improper. Instead, the ruling creates unjust results for lenders and perverse incentives for borrowers and guarantors going forward that may adversely impact commercial lending for years to come. First, both the Court of

232. See *supra* Section III.B.

233. See, e.g., *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393 (2010) (emphasizing, in an opinion by the late Justice Scalia, that the text of the statute should clearly dominate judicial considerations).

234. See *supra* Section II.B.

Appeals and Supreme Court of North Carolina's reliance on *Dunlop* is understandable, but not quite to the extent that these courts relied on that case. Viewed at the Supreme Court of North Carolina level, *Dunlop* appears to be binding mandatory authority.²³⁵ Yet, this mischaracterizes *Dunlop*'s true holding—that a guarantor may *plead* the FMVOD.²³⁶

Thus, *High Point Bank* treated *Dunlop* as mandatory authority. However, a more proper analysis of *Dunlop* would treat its dicta as *persuasive* authority. Truly, the power and relevance of *Dunlop* to the facts of *High Point Bank* lies within the persuasive power of that dicta, which delineates the reasoning for why a court might choose to extend the protection of the FMVOD statute to guarantors. When the *High Point Bank* court declared that *Dunlop* was “controlling[,]” it suggested that the court was bound by *Dunlop*.²³⁷ Instead, the court should have described the *Dunlop* dicta as merely persuasive and then adopted that reasoning as part of its own holding. Regardless of this (admittedly semantic) distinction, the outcome would not change. Which is why, as stated earlier in this discussion, the court's reasoning was not *entirely* improper.

Moreover, *Richmond Mortgage* also bears relevance as *persuasive* precedent but is not mandatory as the Supreme Court of North Carolina characterized it. Just as the procedural posture of *Dunlop* prevents it from controlling *High Point Bank*, so too do the facts and holding of *Richmond Mortgage* prevent it from being controlling. *Richmond Mortgage* dealt solely with the liability of primary borrowers.²³⁸ Further, the nature of the challenge of the FMVOD statute was constitutional—a challenge pursuant to the contracts clause of the United States Constitution—which made its holding relevant only as to the constitutionality of the FMVOD

235. See *High Point Bank & Tr. Co. v. Highmark Props., LLC*, 368 N.C. 301, 306–07, 776 S.E.2d 838, 842–43 (2015) (“Our holdings in *Dunlop* and *Richmond Mortgage* are controlling here.”). In contrast, the Court of Appeals of North Carolina stated it more accurately. See *High Point Bank & Tr. Co. v. Highmark Props., LLC*, 231 N.C. App. 31, 38–39, 750 S.E.2d 886, 891 (2013) (noting that “our Supreme Court has ruled the guarantor of a purchase money deed of trust is entitled to *plead* the anti-deficiency statute as a defense in an action brought on his personal guaranty” (emphasis added)), *aff'd as modified*, 368 N.C. 301, 776 S.E.2d 838 (2015).

236. See *Va. Tr. Co. v. Dunlop*, 214 N.C. 196, 198–99, 198 S.E. 645, 646 (1938).

237. *High Point Bank*, 368 N.C. at 307, 776 S.E.2d at 843; see *supra* text accompanying note 201; *supra* note 235 and accompanying text.

238. See *Richmond Mortg. & Loan Corp. v. Wachovia Bank & Tr. Co.*, 210 N.C. 29, 30–32, 185 S.E. 482, 482–84 (1936) (explaining the parties' statuses and the original facts of the proceeding), *aff'd*, 300 U.S. 124 (1937).

statute.²³⁹ In light of the factual scenario and holding of *Richmond Mortgage*, when compared to *High Point Bank*, that case could only be persuasive authority at best.

Nevertheless, like *Dunlop*, the *Richmond Mortgage* opinion's persuasiveness is what makes its use in the *High Point Bank* court's opinion reasonable. The Supreme Court of North Carolina's language in *Richmond Mortgage* could lend itself to an interpretation of the statute that would allow for the "accounting" of the fair market value to the indebtedness, rather than the borrower itself.²⁴⁰ As Judge Dillon noted in his concurrence, this distinction is crucial to the availability of the FMVOD to guarantors.²⁴¹ By treating the FMVOD as a defense based in equity rather than law, the court freed itself from being bound by the text of section 45-21.36 of the North Carolina General Statutes and instead relied on what seemed fair. It may have been the equitable nature of the FMVOD derived from the court's dicta in *Richmond Mortgage* that encouraged the court to broaden the FMVOD statute's protection to include guarantors, but regardless, the court's reliance on *Dunlop* and *Richmond Mortgage* as controlling precedent is troubling as a matter of judicial interpretation. The muddling of the holding and dicta of that forgotten jurisprudence almost certainly influenced the court's ultimate outcome and likely precluded the court from engaging in the textual analysis undertaken in Section IV.A of this Comment that would have led the court to a different result.

Despite this mischaracterization of the precedential value of the forgotten jurisprudence, the court could have applied those cases as persuasive authority. As persuasive authority, the forgotten jurisprudence of Section II.B carried the same precedential weight as the trend of case law promulgated by the Court of Appeals of North Carolina discussed in Section II.C. The fact that the court chose to revive and expand forgotten jurisprudence accordingly is a matter of judicial preference rather than judicial compulsion. There is no reason to fault the court for making the choice it did, for the persuasive value of *Dunlop* and *Richmond Mortgage* could and did lead reasonable minds to a different conclusion than a textual analysis may otherwise have led them. However, despite the *High Point Bank*

239. *See id.* at 33, 185 S.E. at 484.

240. *See id.* at 34, 185 S.E. at 485.

241. *See High Point Bank & Tr. Co. v. Highmark Props., LLC*, 231 N.C. App. 31, 40, 750 S.E.2d 886, 892 (2013) (Dillon, J., concurring), *aff'd as modified*, 368 N.C. 301, 776 S.E.2d 838 (2015).

court's best intentions, as the next Part explains, the court's ruling may end up providing inequitable results anyway.

V. THE POTENTIALLY DANGEROUS PIVOT FROM *HIGH POINT BANK*: HOW LENDERS MIGHT AVOID THE CASE'S CONSEQUENCES AND FORCE GUARANTORS TO PAY THE PRICE

How might lenders proceed in the wake of *High Point Bank*? As much as *High Point Bank* marks a victory for guarantors, well-settled North Carolina precedent has made it clear that, so long as the language of a guaranty is sufficient, guarantors still have the statutory option to waive the right granted to have the lender exhaust all collection options against the primary borrower before reaching the guarantor.²⁴² This waiver gives lenders the upper hand in how they decide to pursue collection—by either pursuing collection against the debtor through foreclosure and the newly limited deficiency judgment process or avoiding foreclosure altogether by suing on the note and seeking relief from the guarantor primarily.²⁴³ The following sections explain how a creditor could theoretically collect deficiencies with the knowledge that guarantors can assert the FMVOD.

A. *Ex Ante Solutions: Contracting in Light of High Point Bank*

Drafters of commercial guaranty contracts have options to mitigate the effect that the *High Point Bank* ruling will have on lenders' recovery from guarantors. The public policy support lent to the FMVOD in *High Point Bank* allows any express waiver of the FMVOD included in a guaranty contract to be unenforceable.²⁴⁴ This does not make obtaining a guaranty contract, however, a worthless endeavor. As the analysis of *High Point Bank* demonstrated, lenders will be able to collect any remaining deficiency following the

242. See N.C. GEN. STAT. § 26-7 (2016); see also, e.g., Resolution Tr. Corp. v. Cunningham, 14 F.3d 596 (4th Cir. 1993) (per curiam) (unpublished table decision). Lenders should note that a guaranty must contain more than language merely giving the title "guaranty of payment" to the guaranty. See Fed. Land Bank of Columbia v. Lieben, 89 N.C. App. 395, 399–400, 366 S.E.2d 592, 595–96, *aff'd*, 323N.C. 741, 373 S.E.2d 439 (1988) (mem.). Instead, to waive section 26-7 rights, the terms should expressly disclaim "any defense based on lack of due diligence by Lessor in collection, protection or realization upon any collateral securing the indebtedness[.]" Borg-Warner Acceptance Corp. v. Johnston, 97 N.C. App. 575, 580, 389 S.E.2d 429, 433 (1990). It might be argued in the future that guarantors cannot waive even the section 26-7 rights: the cases that held those rights waivable also held the FMVOD inapplicable to guarantors. See *supra* Part II. As this Comment has discussed throughout, the *High Point Bank* decision raises concerns about the applicability of this precedent. See *supra* Part III.

243. See *supra* note 242 and accompanying text.

244. See *supra* text accompanying notes 208–10.

accounting of the fair market value of foreclosed property to the borrower and guarantors.²⁴⁵ That deficiency could possibly still be substantial if the value of the collateral and the indebtedness are drastically different, and obtaining a guarantor may ensure more complete recovery in instances where the borrower's assets have been exhausted.

Nevertheless, lenders may want other ways to limit the increased costs that will accompany the *High Point Bank* ruling. First, lenders' counsel should continue to include contractual language waiving all defenses broadly. This will obviously not be effective against the FMVOD after *High Point Bank*, but the waivers will exclude other potential defenses that have not been afforded the public policy protection. Second, the inclusion of language expressly creating guaranties of payment and not of collection is likely particularly important.²⁴⁶ Guaranties of payment are essential to allow lenders more latitude in pursuing full recovery, as it gives them options against whom to seek recovery, whether the guarantor, borrower, or both.²⁴⁷ Third, lenders' counsel should consider including arbitration clauses in their guaranty contracts.²⁴⁸ This empowers post-*High Point Bank* lenders to privately and (hopefully) quickly wage the appraisal war that will ensue upon assertion of the FMVOD. Furthermore, an arbitrator may have a better understanding of the intricacies of real estate valuation and the market as a whole than a panel of jurors.

245. See *supra* Part III.

246. See PETER A. ALCES, *THE LAW OF SURETYSHIP AND GUARANTY* § 1:7(1)–(2) (2016) (stating that “payment guaranteed” or similar language is required to create a guaranty of payment, whereas “collection guaranteed” would create a guaranty of collection).

247. See 5-44 DEBTOR-CREDITOR LAW, *supra* note 28, § 44.03[3][b][i] (explaining how guaranties of payment provide more options).

248. See Amy J. Schmitz, *Refreshing Contractual Analysis of ADR Agreements by Curing Bipolar Avoidance of Modern Common Law*, 9 HARV. NEGOT. L. REV. 1, 22–23 (2004). The appraisal procedure used in insurance law is a great illustration of how this process could work in deficiency judgments. Therein, if an insurer and insured disagree on the value of damaged or destroyed property, a third party determines the value instead. *Id.* Alternatively, reforming the appraisal process is another way to mitigate the consequences of *High Point Bank* going forward. One author suggests reforming deficiency judgments by inserting a quasi-judicial determination made by a neutral appraiser in the event that the lender's and borrower's appraisers disagree on the value of the collateral to be sold. See Alan M. Weinberger, *Tools of Ignorance: An Appraisal of Deficiency Judgments*, 72 WASH. & LEE L. REV. 829, 893–94 (2015).

B. *Ex Post Solutions: Litigating to Circumvent Guarantors' Assertions of the FMVOD*

1. First Option: Stay the Course

The strategically worst (yet still available) option is to continue pursuing deficiencies as lenders did prior to *High Point Bank*. Upon default, a lender would sue the borrower and guarantors, foreclose under power of sale, dismiss the borrower, and proceed to collect the remaining deficiency against the guarantors.²⁴⁹ Lenders would next move for summary judgment as to the amount of outstanding deficiency, and of course, the guarantors would then assert the FMVOD, as they have been allowed to do pursuant to *High Point Bank*.²⁵⁰

The guarantor's burden for asserting the FMVOD as an equitable defense is extraordinarily low, especially considering the litigation that will likely follow successfully asserting the FMVOD. The Court of Appeals of North Carolina dealt with this low burden recently, in *United Community Bank (Georgia) v. Wolfe*.²⁵¹ Defendants defaulted on a \$350,000 loan, and the lender bid \$275,000 in a nonjudicial foreclosure, leaving a deficiency of approximately \$50,000.²⁵² The lender then moved for summary judgment in the deficiency action, which the trial court granted, but on appeal, the Court of Appeals of North Carolina reversed, declaring that a genuine issue of material fact exists when the property owner states that she considered the fair value of the property to be higher than the price obtained at foreclosure.²⁵³ The case came with a twist: even

249. See N.C. GEN. STAT. § 45-21.31(a)(4) (2016) (explaining that the remaining deficiency is calculated by the amount of debt at default minus amount credited from foreclosure sale). Prior to *High Point Bank*, in order to succeed on a motion for summary judgment, "[e]ssentially, all you had to do was get your math right, subtracting the bid price (less expenses) from the debt." Martin, *supra* note 23.

250. See *High Point Bank & Tr. Co. v. Highmark Props., LLC*, 368 N.C. 301, 309, 776 S.E.2d 838, 844 (2015).

251. ___ N.C. App. ___, 775 S.E.2d 677 (2015), *disc. review granted*, ___ N.C. ___, 794 S.E.2d 315 (2016) (mem.).

252. See *id.* at ___, 775 S.E.2d at 678.

253. See *id.* at ___, 775 S.E.2d at 680 ("[O]ur Supreme Court has repeatedly held that the owner's opinion of value is competent to prove the property's value."). *But see* *TD Bank, N.A. v. Williams*, ___ N.C. App. ___, 787 S.E.2d 74, 81 (2016). In *TD Bank*, the Court of Appeals of North Carolina affirmed a grant of summary judgment in the lender's favor where the defendant-borrower/guarantor attempted to prove value of foreclosed property in 2016 by showing value of property in 2011. See *id.* The difference in these cases seems to indicate a fine line for when summary judgment will be granted, which could foreshadow uncertainty for lenders in the foreclosure and deficiency judgment process.

though the fair market value of the property was demonstrably less than the amount bid by the lender at the foreclosure sale, the mere fact that the property owners believed that the property was worth more was enough to defeat summary judgment and move to trial.²⁵⁴ As simple as this burden is to meet for the borrower,²⁵⁵ this is an equally easy task for a guarantor to accomplish because the guarantors are often the owners of the entity that owns the property.²⁵⁶

To avoid having the valuation of the property become an obstacle for collecting deficiencies, lenders who wish to seek a deficiency may want to consider raising the amount that they offer at nonjudicial foreclosures.²⁵⁷ For all the strategic maneuvering that could be done to circumvent the FMVOD, raising the bid at foreclosure may be the simplest. This option protects the lender-borrower and lender-guarantor relationships merely by being more facially equitable. Borrowers and guarantors who feel that they have been treated fairly in foreclosure may be more willing to embark on mutually beneficial dealings with the same lender in the future. However, the greatest drawback to this option is that the formerly simple and efficient process of collection will now require further litigation costs, as guarantors asserting the FMVOD will change the deficiency judgment from a swift process of collection into a valuation battle.²⁵⁸ Furthermore, although this option seems simple, there are a few factors involved in determining the price offered at a foreclosure sale that would likely make the process more complicated than it appears.²⁵⁹

2. Second Option: Sue on the Note

Another option for lenders to dodge the FMVOD is to sue on the note. Lenders could sue the borrower and guarantors for breach of contract and breach of guaranty, receive a favorable judgment, and

254. See *Wolfe*, __ N.C. App. at __, 775 S.E.2d at 679–80 (holding “[d]efendants’ opinion that their property was worth the amount of the debt is substantial evidence from which a jury could conclude that Defendants’ property, indeed, was worth the amount that was owed . . . summary judgment was improper.”).

255. See *id.*

256. Importantly, this was the case in *High Point Bank*. *High Point Bank & Tr. Co. v. Highmark Props., LLC*, 368 N.C. 301, 302, 776 S.E.2d 838, 839 (2015).

257. See *infra* Section VI.B.

258. See *DeVaney & Pearce*, *supra* note 24 (“[D]eficiency cases could devolve into a trial of appraisal or value opinion experts or even the opinion of the lenders expert vs. the opinion of the property owner who the Appellate Courts have held is competent to state an opinion of value.”).

259. See *id.*

have the value of the debt serve as *res judicata* for any future adjudications of the amount of the debt. The greatest benefit of nonjudicial foreclosure is efficient recovery of debts in default.²⁶⁰ However, if the efficiency benefit (or even the recovery of debt) is diminished or eliminated because of the FMVOD, pursuing the default in personam against the borrower and guarantor rather than in rem against the collateral becomes arguably worthwhile. Further, this strategy entirely avoids the FMVOD, which only applies to certain deficiency judgments post-foreclosure.²⁶¹

As with all options, this strategy has distinct benefits and disadvantages. The greatest advantage considered here is the ability to avoid the FMVOD. Instead of running the risk that the collateral will not achieve the full fair market value asserted by borrowers and guarantors, lenders instead can recover the indebtedness in full. However, the efficacy of this strategy will differ depending on the facts. For example, when a borrower is in default, it is presumably because they no longer have liquid assets to pay the debts as they become due. In such cases, to recover against the borrower, the lender must resort to foreclosing on collateral securing the loan, especially in instances when the borrower is on the brink of bankruptcy.²⁶² This scenario is particularly relevant in situations where the guarantor has the potential to be held liable for more than she may have originally anticipated.²⁶³ Lenders press for guaranty contracts in commercial lending transactions because of the financial strength of the guarantor, *inter alia*, so a well-heeled guarantor could be liable for the entire amount of indebtedness at default if lenders pursue the “sue-on-the-note” strategy.²⁶⁴

260. See *supra* note 49 and accompanying text (emphasizing the increased efficiency that nonjudicial foreclosure affords).

261. See Esser, *supra* note 22.

262. See *supra* text accompanying notes 41–43.

263. See *supra* text accompanying note 40. As discussed, liability carries numerous possible risks. See *supra* note 38 and accompanying text.

264. See *Am. Foods, Inc. v. Goodson Farms, Inc.*, 50 N.C. App. 591, 597, 275 S.E.2d 184, 185, *aff'd per curiam*, 304 N.C. 368, 283 S.E.2d 517 (1981) (illustrating that North Carolina courts have refused to allow guarantor-owners to assert the FMVOD by nature of their ownership of the borrower-company, as it would “pierce the corporate veil in a unique way”). The practice of having the borrower-company’s owners sign guaranty contracts would end limited liability for each commercial lending transaction in which the owner participates. Of course, the continued applicability of this case law is questionable considering it is interpreting the FMVOD statute, which has been thrown into chaos by *High Point Bank*.

3. Third Option: Go “Topsy-Turvy” and Sue the Guarantor

A final option is in the same vein as suing both the borrower and the guarantor—simply sue the guarantor for breach of guaranty, without seeking recovery against the borrower. As noted above, North Carolina courts have discussed the option of a waiver of the statute, allowing lenders the choice of pursuing the guarantor before exhausting any and all options for collection against the borrower.²⁶⁵ So long as the guaranty contract contains sufficient language to create such a waiver,²⁶⁶ the lender would be able to recover from the guarantor without even suing the borrower at all.²⁶⁷ The danger here is that, if the contract does not sufficiently waive section 26-7,²⁶⁸ then section 26-9, which provides that a creditor’s lack of diligence in pursuing the debt forfeits a right to recovery against a surety or guarantor,²⁶⁹ would kick in to prevent further collection attempts by the lender against the guarantor.

However, the guarantor is not without options in this scenario. Guarantors could try to join the borrower as a party to the action.²⁷⁰ Additionally, the guarantor could pay the debt, and then, pursuant to its subrogation rights granted by section 26-3.1 of the North Carolina General Statutes, sue the primary borrower for reimbursement.²⁷¹ The upside to this strategy for lenders is that it leaves disposition of the collateral as the guarantor’s burden.²⁷²

265. See *supra* text accompanying notes 242–43 (discussing a waiver with respect to section 26-7 of the North Carolina General Statutes).

266. In other words, so long as the guaranty contract is a guaranty of payment, not of collection, a waiver could be created. For a summary of the differences, see *supra* text accompanying notes 34–36.

267. There are certainly ethical issues with this approach. The primary borrower should be pursued first for deficiencies by nature of the fact that he not only took the loan for his sole benefit, but also instituted the chain of events that ultimately leads to the guarantor being liable for the borrower’s default. However, as a pure discussion of strategic options, this should be considered, especially in light of a guarantor’s express waiver of section 26-7.

268. See N.C. GEN. STAT. § 26-7 (2016).

269. See *id.* § 26-9.

270. Although section 26-12 of the North Carolina General Statutes allows “joinder of debtor by surety,” such joinder is permissive. See *id.* § 26-12; see also *Borg-Warner Acceptance Corp. v. Johnston*, 97 N.C. App. 575, 580, 389 S.E.2d 429, 432 (1990). The Supreme Court of North Carolina has held that section 26-12 applies to guarantors. See *High Point Bank & Tr. Co. v. Highmark Props., LLC*, 368 N.C. 301, 308–09, 776 S.E.2d 838, 843–44 (2015).

271. See N.C. GEN. STAT. § 26-3.1.

272. *Id.* § 53C-5-2(i)(2). North Carolina banking regulations prohibit state-chartered banks from holding foreclosed collateral longer than five years, unless the banking commissioner grants a bank’s application for an extension; consequently, North Carolina banks generally must dispose of property bought at foreclosure sale before that time,

Of course, the availability of this option brings about the “topsy-turvy world” foreseen by Judge Posner in *Chivas*.²⁷³ The traditional notion of the guarantor as a backup for lenders is flipped on its head, since the availability of the FMVOD to guarantors likely incentivizes lenders to sue on the note and forgo foreclosure entirely. Before *High Point Bank*, it behooved lenders to seek nonjudicial foreclosure, grant the borrower the benefit of the credit bid, and seek a deficiency against guarantors for the remainder, which generally led to a full recovery upon liquidation of the purchased collateral.²⁷⁴ After *High Point Bank*, deficiency judgments are a potentially wasteful addendum to the otherwise efficient nonjudicial foreclosure process. Admittedly, lenders could almost always obtain a swift summary judgment against guarantors for the post-foreclosure deficiency.²⁷⁵ Today, however, the non-movant’s extraordinarily low burden for defeating summary judgment means that deficiency judgments could spiral into profligate appraisal battles that ultimately leave the lender unsatisfied with the recovery of the loan. In light of this risk, lenders may well choose to simplify the process: sue the guarantors first, ignore the party that caused the default in the first place, receive full repayment, and wash their hands of the whole transaction.

Similarly, one last option is to seek judicial foreclosure. Since the FMVOD applies only to certain nonjudicial foreclosures, the lender could also sue for judicial foreclosure. Ultimately, this avenue may be a better option for lenders. Considering how lengthy and expensive the post-foreclosure deficiency process will be after *High Point Bank*, the agonizing procedure of judicial foreclosure may prove to be profitable if lenders can obtain the collateral at a price similar to what they would pay at nonjudicial foreclosure.²⁷⁶ Indeed, this multitude of options available to lenders contributes to making the post-*High Point Bank* deficiency judgment process so chaotic. North Carolina’s deficiency judgment process is not topsy-turvy solely because of the incentive to pursue deficiencies from a party other than the defaulting

regardless of the prevailing economic conditions. *See id.* A prolonged economic downturn would cause banks to realize further losses by forcing them to sell in spite of a depressed housing market. *See supra* note 69 and accompanying text. Such a downturn could jeopardize the economy further due to the ripple effect caused by a failing bank. *See supra* note 69 and accompanying text. Guarantors tasked with disposing of property would be arguably better suited in this scenario, as they could hold onto the property beyond a five-year period and resell at a profit.

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

274. *See supra* text accompanying notes 44–49.

275. *See supra* note 249 and accompanying text.

276. *See supra* Section V.A.

debtor. The sheer uncertainty facing defaulting borrowers and their guarantors at an already difficult moment further unbalances the deficiency judgment process. Before *High Point Bank*, a borrower and guarantor could expect a lender to choose two options: judicial foreclosure or nonjudicial foreclosure. Now, the decision tree branching from nonjudicial foreclosure makes the guarantor in particular subject to the whims of the lender. Considering the multitude of options facing lenders and the uncertainty facing defaulting borrowers and their guarantors, the time has come for lawmakers to right the ship.

VI. LEGISLATIVE AND JUDICIAL SOLUTIONS TO *HIGH POINT BANK'S* CONSEQUENCES

Regardless of whether one considers the *High Point Bank* case rightly decided, one thing is clear: while the Supreme Court of North Carolina intended to extend the FMVOD's benefits to guarantors, new lending strategies designed to avoid this ruling could undermine *High Point Bank's* positive impact for guarantors. Lenders no longer have an incentive to foreclose collateral before seeking recovery from guarantors if the lender anticipated a deficiency post-foreclosure. Lacking that incentive, lenders will likely more frequently pursue recovery against guarantors and leave the headaches of the foreclosure process to a guarantor's subrogation rights. In light of this outcome, the time is ripe for the North Carolina legislature to revisit the anti-deficiency statutes and correct this misalignment in the nonjudicial foreclosure and deficiency suit system.²⁷⁷ North Carolina has changed enough in the past century to merit an update to this Depression-era law, and such an update would take borrowers' and lenders' increased sophistication into account, as well as allow them

277. Comprehensive reform may be useful, though this Comment finds no overarching errors in North Carolina's nonjudicial foreclosure process generally, and comprehensive reform is beyond this Comment's scope. That being said, a case could be made for uniformity in North Carolina and beyond. See generally Grant S. Nelson, *Confronting the Mortgage Meltdown: A Brief for Federalization of State Mortgage Foreclosure Law*, 37 PEPP. L. REV. 583 (2010) (detailing available models for comprehensive foreclosure reform and recommending federal legislative action pursuant to the commerce power in order to create uniformity among the states). Various alternatives are available, including adopting a "one-action" rule similar to the one exemplified in California statutes. See CAL. CIV. PROC. CODE § 726 (West, Westlaw through 2016 Reg. Sess. laws). This Comment endorses an overhaul of the power of sale foreclosure in North Carolina by adopting the Uniform Nonjudicial Foreclosure Act ("UNFA"). For an excellent discussion of the benefits of the UNFA, see generally Grant S. Nelson & Dale A. Whitman, *Reforming Foreclosure: The Uniform Nonjudicial Foreclosure Act*, 53 DUKE L.J. 1399 (2004) (analyzing the numerous benefits of the UNFA).

to bargain for contract terms without imposing paternalistic notions of fairness.²⁷⁸ This Comment posits several avenues for reform, ranging in degree and kind.

A. *A Return to Normalcy*

The simplest means of restoring normalcy for guarantors is for the legislature to take steps to clarify that the FMVOD statute is only applicable to those who have a property interest in the foreclosed collateral and is a legal *defense* that is not meant to serve as an equitable method of debt calculation. As a textual reading of the FMVOD statute demonstrates,²⁷⁹ this was likely the legislature's original intent. Importantly, the North Carolina judiciary upheld that interpretation for decades, as demonstrated by multiple appellate rulings and the fact that the Supreme Court of North Carolina has refrained from holding such an interpretation objectionable or unconscionable.²⁸⁰ A return to this system will probably not satisfy critics of the former reading of the FMVOD statute because guarantors will no longer benefit from the FMVOD. However, the benefits of returning to the previous state of the law may outweigh critics' concerns if the topsy-turvy world comes to fruition. The post-foreclosure deficiency process is a known entity under the pre-*High Point Bank* interpretation of the FMVOD statute, granting lenders, borrowers, and guarantors certainty when entering the often uncertain foreclosure process. The topsy-turvy world of seeking deficiencies from guarantors first will not obtain comparable results; a return to normalcy will not incentivize lenders to forego the foreclosure process.

Alternatively, the legislature could redraft the FMVOD statute to include the guarantor as a party that may assert the FMVOD, while expressly allowing for waiver of the defense.²⁸¹ This option allows sophisticated parties to contract with each other in the

278. Cf. Roger J. Johns & Mark S. Blodgett, *Fairness at the Expense of Commercial Certainty: The International Emergence of Unconscionability and Illegality as Exceptions to the Independence Principle of Letters of Credit and Bank Guarantees*, 31 N. ILL. U. L. REV. 297, 334 (2011) (arguing that public policy exceptions to guaranty agreements "damage . . . commercial certainty, in general, by elevating fairness-based judgments about the risk-allocation choices of the parties to the underlying contract above the certainty-dependent environment that underpins . . . [sophisticated] transactions").

279. See *supra* Section IV.A.

280. See *supra* Part II.

281. Arguably, the legislature ought to redraft the FMVOD statute to include guarantors to fit more neatly with *High Point Bank*. However, considering the fact that the *High Point Bank* interpretation is now law in North Carolina, this is not really necessary.

intended manner. While non-waiver of the FMVOD due to public policy has been pioneered by the court's determination of fairness, prohibiting waiver of such defenses by freely contracting parties removes options from the table and necessitates a reallocation of costs and benefits. The inability of parties to agree to a waiver of the FMVOD may lead to higher interest rates on commercial loans, resulting from the reduced value of the credit enhancement that the guaranty contract represents.²⁸² A legislative clarification of the waivability of this defense could maintain the value of guaranty contracts for all parties to a transaction and allow more freedom of contract.

B. Share the Wealth: Encourage Lenders to Bid Higher at Nonjudicial Foreclosure

The problems discussed in this Comment begin and end with the foreclosure bid. The analysis contained herein shows equities can tip towards lenders or borrowers with slight shifts in appraisal. As such, certain reforms may be helpful in encouraging lenders to increase their foreclosure bid so that borrowers receive a fair value for their collateral at foreclosure. This fair value should also account for the likely significant transaction costs incurred by lenders in obtaining, maintaining, and liquidating real property. In a perfect world, the lender would bid the fair market value of the property and obtain the remaining deficiency from the borrower and guarantors, leaving the lender with 100% repayment.²⁸³ In reality, the amount bid at foreclosure sale and the amount that the property finally sells for can be higher or lower than the fair market value at the time of foreclosure.²⁸⁴ Generally, this is not considered in determining deficiency costs, but the bid ultimately acts as an important factor in perceived inequities.²⁸⁵ Lenders get a bad hand when they have to liquidate property for less than they paid, and borrowers and guarantors get an unfair deal when the price bid at foreclosure is less

282. See Motion for Leave to File Amicus Curiae Brief of N.C. Bankers' Ass'n, Inc. at 2–3, *High Point Bank & Tr. Co. v. Highmark Props., LLC*, 231 N.C. App. 31, 750 S.E.2d 886 (2013) (No. COA13-331), https://www.ncappellatecourts.org/show-file.php?document_id=139735 [<https://perma.cc/46EL-8M5J>] (“If allowed to stand, the ruling would have a severe chilling effect on lenders’ ability and willingness to extend credit to individuals and businesses across the state when the security for that credit includes real estate collateral.”).

283. See *supra* Part I.

284. See *supra* Part I.

285. See *supra* note 57 and accompanying text.

than the property was worth as evidenced by a higher value at a subsequent sale by the lender.²⁸⁶

One commentator recommends the adoption of a reform called the “deficiency forfeiture sale” that may encourage lenders to increase their bids at foreclosure sales.²⁸⁷ In essence, the sale deters low foreclosure bids by punishing lenders who substantially undervalue real property at foreclosure sales.²⁸⁸ The mechanics of the deficiency forfeiture sale are as follows: (1) collateral is sold at nonjudicial foreclosure; (2) the borrower retains a “transferable call option” and seeks a third party to sell the property to at a price higher than what was bid at the foreclosure sale; and (3) if the borrower finds a buyer, the lender only receives what it bid at foreclosure, and the deficiency it may collect is reduced further as the difference between the debt at default and the value obtained by the borrower in its efforts to sell to a third party.²⁸⁹ While this reform would certainly encourage lenders to bid higher at foreclosure, the shortcomings of the deficiency forfeiture sale are serious. These disadvantages include increased incentives to fraudulently create sham transactions to the benefit of borrowers and a lengthened foreclosure process at lenders’ expense.²⁹⁰

Another option is to define what percentage of fair market value qualifies as “substantially less” in a nonjudicial sale that would trigger application of the FMVOD, as this would set a minimum bid target for lenders at nonjudicial sale and would allow them to raise the amount they might have bid otherwise.²⁹¹ The percentage of fair market value that is substantial enough to avoid the FMVOD should account for the transaction costs and potential decreases in property value that lenders will face in holding and liquidating the acquired property. At the moment, the state judiciary defines what is “substantially less” on a case-by-case basis.²⁹² The Court of Appeals

286. See Weinberger, *supra* note 248, at 840 (noting how property is sold “under the hammer” during economic depressions for drastically lower prices than the intrinsic value of the property might otherwise suggest).

287. Stephen Guynn, Note, *A Market-Based Tool to Reduce Systematic Undervaluation of Collateral in Residential Mortgage Foreclosures*, 100 VA. L. REV. 587, 590 (2014).

288. See *id.*

289. See *id.* at 610.

290. See *id.* at 623–27.

291. See N.C. GEN. STAT. § 45-21.36 (2016).

292. See *Blue Ridge Sav. Bank, Inc. v. Mitchell*, 218 N.C. App. 410, 413, 721 S.E.2d 322, 325, *aff’d*, 366 N.C. 331, 734 S.E.2d 572 (2012) (mem.). In *Blue Ridge Savings*, Judge Hunter authored the dissent; he described the difficulties of setting a bright-line rule for what is “substantially less,” noting that

of North Carolina has declared that 80% of fair market value is “substantially less” under the FMVOD statute, while 90% of fair market value is not.²⁹³ Legislative reform could provide a better solution and more certainty for lenders in determining their bids approaching fair market value at a foreclosure sale. The Uniform Nonjudicial Foreclosure Act, for example, sets the “substantially less” standard number at 90% of the fair market value, which would leave lenders a 10% cushion to pay for costs of liquidation.²⁹⁴ Of course, the problem with this method of reform (and with setting any bright-line rule) is arbitrariness—lenders may very well spend more than 10% less than fair market value on trying to sell the property, and they could lose more than 10% in subsequent value because of an enduring depression. However, given the unsettled state of the definition of “substantially less” in North Carolina, this arbitrariness could be a welcome shot of certainty in the foreclosure process for lenders and debtors alike.

Ultimately, though, this Comment argues that the simplest solution may be the best solution in the end: lenders should make efforts to present an appropriately priced bid at nonjudicial foreclosure sales, especially where they are the only bidders. By increasing their economic costs at the front end (at foreclosure), lenders can avoid both economic and time costs on the back end by decreasing the likelihood that a borrower or guarantor might assert the FMVOD and claim that the price paid at the foreclosure sale was “substantially less” than the fair market value of the property.²⁹⁵

All in all, the sea change in the foreclosure and deficiency judgment process that *High Point Bank* created could be remedied by any number of the foregoing solutions. Clearly, this area of the law requires some change—either in lenders’ collection strategies or

what is “substantially less” is also a uniquely individualized and subjective issue: where a ninety cent bid on a property worth one dollar (a ten percent less bid) may not be “substantially less” than the property’s true value, a \$900,000 bid on a property worth \$1,000,000 (also a ten percent less bid) may be.

Id. at 416, 721 S.E.2d at 326 (Hunter, J., dissenting) (quoting N.C. GEN. STAT. § 45-21.36).

293. *See id.* at 413, 721 S.E.2d at 325.

294. UNIF. NONJUDICIAL FORECLOSURE ACT § 608 cmt. (UNIF. LAW COMM’N 2002); *see also* Nelson & Whitman, *supra* note 277, at 1491–93 (clarifying the UNFA rule with examples).

295. Perhaps this view is naive. As discussed, lenders do not gratuitously underbid at foreclosures, and deficiency judgment defendants may still assert the FMVOD regardless of the price bid. But this Comment hopes that as lenders bid higher in good faith, borrowers and guarantors will also act in good faith by accepting lenders’ higher bids rather than costing both parties more in litigation costs by asserting the FMVOD.

through legislative reform—to set the topsy-turvy world created by *High Point Bank* upright once more.

CONCLUSION

Despite the statutory language and decades of contradictory holdings, rediscovered values and interpretations guide guarantors' assertions of the FMVOD today. The legal reasoning employed in reviving the forgotten jurisprudence of the 1930s may not have been wrong, considering the language of the *Richmond Mortgage* and *Dunlop* opinions, but the North Carolina courts ignored these holdings for many decades. This lapse in precedent suggests that extending the FMVOD to guarantors was not as important or necessary for equity as *High Point Bank* indicated in its qualified holding that the FMVOD is non-waivable due to public policy concerns.

Nevertheless, in so holding, the North Carolina judiciary created a significant loophole for guarantors securing collateral that may enter a nonjudicial foreclosure. This holding may also create unintended incentives for lenders, as the new framework forces them to exploit the litigation process to collect their debts in full. The preexisting case law allowing lenders to pursue guarantors first may very well mean lenders will pursue well-heeled guarantors every time a borrower defaults, making the post-default world especially topsy-turvy. Therefore, in order to remedy this disorderly result, the legislature should take a second look at the FMVOD statute and laws surrounding nonjudicial foreclosure to inject some stability into the process. There are a number of options available, and ultimately, any one of the reforms outlined above would help stabilize the chaos facing the real estate foreclosure process post-*High Point Bank*. At this point, it is distinctly important for lawmakers—both legislative and judicial—to take action. It is necessary to right the ship of the foreclosure process that *High Point Bank* made uncertain.

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** I am profoundly grateful to Justice Paul Newby for introducing me to this topic; to Professor John Coyle, Leah Neal, Troy Homesley, and the Volume 95 Board of Editors for their guidance and edits at various stages of this Comment; and to my family and friends for their constant encouragement and confidence in me throughout my law school career. Finally, thank you to Valerie—your love and support inspire me to do and be my very best.