



In Georgia, Public Policy Limits Freedom of Contract, but Just How Much Is Not Entirely Clear

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By statute, the Georgia legislature has established that “[a] contract which is against the policy of the law cannot be enforced.” However, this statutory proscription has to be balanced against Georgia’s strong public policy that parties may contract with one another on whatever terms they wish, and the written contract between the parties will define the full extent of their rights and duties. In the exercise of their fundamental freedom to contract, parties may waive numerous and substantial rights in the absence of a limiting statute or controlling public policy. The difficulty in determining whether a contract that includes any such attempted waiver will be enforced where a dispute arises is illustrated by a recent decision of the Supreme Court of Georgia. In *PNC Bank, N.A. v. Smith*, Case No. S15Q1445, decided in April 2016, what appeared to be clear public policy was avoided and a contractual waiver of statutory defenses by the guarantor of obligations of a borrower arising under loan documents was upheld. Essentially, the appellate court found that, even where a statute exists to impose duties and obligations on parties as a public policy of the state, that public policy will not be found to place limits on parties’ freedom to contract except where an injury to the public interest clearly and convincingly appears. In applying that standard, the Justices differed over whether the public policy expressed in the statute under consideration involved a public interest that would make the guarantor’s waiver void and unenforceable.

In *PNC Bank*, the Supreme Court of Georgia held that a lender could avoid the requirements of Georgia’s foreclosure sale confirmation statute by including language in the loan documents requiring a guarantor of the loan obligations of a borrower to waive that statutory protection. In doing so, the Court noted that the foreclosure confirmation statute was designed for the benefit of borrowers to assure that they receive full credit against their debts for the value of their foreclosed properties before lenders bring post-foreclosure lawsuits to recover any deficiency remaining on the borrower’s debt. The majority of the Justices concluded that guarantors should be treated differently from borrowers, and that a waiver of the statutory protection by a guarantor did not clearly affect the public interest as it would for a borrower. Interestingly, in their opinion concurring with the majority decision, Justices Nahmias and Blackwell reasoned that, because guarantors and borrowers have been equated under the law in prior decisions of the Supreme Court, it would seem that borrowers can also waive the protections of the confirmation statute if guarantors can.

As these two Justices concluded, the foreclosure confirmation statute may be found to serve a public interest in protecting anyone obligated to satisfy the borrower’s loan obligations and not just the borrower itself. Their questioning of the majority decision would appear to exemplify why the power of the courts in determining whether to declare a contractual waiver provision void as against sound public policy is very undefined. It would also explain why courts are usually extremely cautious in exercising the power to supervise private contracts the lawmaking power has not expressly declared to be unlawful. While it has been decided that the evidence of public policy is a state’s constitution, laws, and judicial decisions, the mere existence of public policy in the law does not answer the question of whether it is designed to protect some public interest that goes beyond the rights and obligations of private parties. Even where a public policy is expressed by statute, contracts will not be voided by the courts as against public policy except where the case is free from doubt and where an injury to the public interest clearly and convincingly appears. For this reason, it would appear that the limits on a party’s right to include waiver language in a contract that is inconsistent with the law will continue to be unclear in many instances.

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