

North Carolina Supreme Court Upholds Boilerplate Waiver and Release Language to Defeat Lender Liability

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Recently, in [Ussery v. BB&T](#), the North Carolina Supreme Court issued an opinion that provides a powerful weapon for lenders. The North Carolina Supreme Court held that standard language in a loan modification agreement that the borrower reaffirmed his obligations and waived all defenses against the bank was enforceable. The lender was then able to use this language to defeat the borrower's claims at the summary judgment stage—thereby prevailing without having to go to trial. This decision is welcome news for lenders seeking a silver bullet when facing lender liability claims or other affirmative defenses from their borrowers.

In [Ussery](#), the borrower approached the defendant bank for a small business, government-backed loan. The borrower contended that bank's loan officer assured the borrower that he would qualify for a Small Business Administration ("SBA") loan. The borrower claimed that the loan officer never took the steps to apply for the loan with the SBA before later informing the borrower that no government-backed loan was available.

Between 1999 and 2001, and after he learned that the SBA loan was not available, the borrower obtained three commercial, non-government-backed loans from the bank. In 2002, attempting to consolidate his debt, the borrower obtained a new commercial non-government-backed loan from the bank. He subsequently executed a series of modification agreements with the bank. Each modification agreement extended the loan's maturity date.

One year later, while current on the new loan, the borrower sued the bank for alleged misrepresentations and failure to use reasonable efforts to obtain the government-backed loan. The complaint stated claims for negligence, breach of contract, and breach of fiduciary duty. The crux of the claim was that the borrower considered the new loan a "bridge loan" that would be repaid with funds from the SBA loan. The borrower claimed that since it was the bank's fault that he did not obtain the SBA loan, he should not have to repay the loan he actually received.

The bank countered the claims by pointing out that in multiple loan modification agreements, including one executed before he filed suit, the borrower had repeatedly reaffirmed his obligations under the commercial loan and expressly waived any offsets or defenses to the loan and against the bank. The modification agreements contained standard language that the loan and all obligations and covenants remained "in full force and effect." The modification agreements also contained a standard waiver clause in which the borrower agreed to "consent to the terms of the Agreement, waive any objection thereto, affirm any and all obligations to Bank and certify that there are no defenses or offsets against said obligations or the Bank."

The trial court granted summary judgment for the bank, but in a divided opinion, the North Carolina Court of Appeals reversed the trial court. The North Carolina Supreme Court then reversed the Court of Appeals.

In reaching its decision, the North Carolina Supreme Court referred to its 2014 unanimous opinion where it

held that a blanket waiver of defenses contained in a forbearance agreement executed by the borrowers and guarantors was sufficient to defeat Equal Credit Opportunity Act defenses based on spousal guaranties. In Ussery, the North Carolina Supreme Court doubled-down on its earlier decision, stating that parties are generally free to waive rights and that the courts should enforce waivers that are made intentionally and with knowledge of the right. In other words, the North Carolina Supreme Court made it clear that its 2014 decision was not limited to forbearance agreements or the Equal Credit Opportunity Act.

In this case, the North Carolina Supreme Court found that the borrower accepted the terms of the modification agreements, which benefitted him, in exchange for reaffirming his loan obligation and waiving his offsets and defenses against the bank. The court then concluded that the language in the agreements was "clear and unambiguous," so the court's job was merely to determine the intent of the parties based on the "four corners" of the agreement. Thus, the borrower was bound by what the agreements actually said.

The upshot for lenders is that they now can rely upon two cases from the North Carolina Supreme Court—one in the forbearance agreement context and one in the loan modification context—that enforce standard waiver language to defeat borrowers' lender liability claims. If properly enforced by the trial courts, these decisions should help lenders resolve borrower claims short of a full-blown trial.

Ward and Smith's Creditors' Rights Practice Group is available to provide you with additional information and answer any questions you have about the Ussery decision and how it may affect you.

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