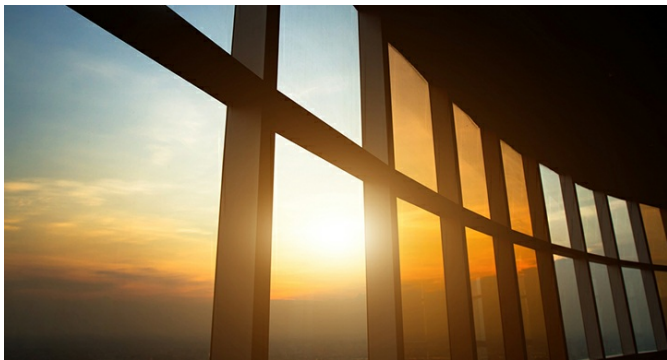


# North Carolina Supreme Court Adopts 'Substantial Competent Evidence' Requirement for Borrowers Asserting 'True Value' Defense in Foreclosure Deficiency Actions

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On Friday, May 5, 2017, in a major victory for lenders, the North Carolina Supreme Court reversed the North Carolina Court of Appeals's decision in United Community Bank v. Wolfe. In July 2015, the Court of Appeals decided in favor of United Community Bank and effectively eliminated the ability of lenders to obtain post-foreclosure deficiency judgments without committing to a full-blown jury trial. The Court of Appeals held that a borrower's opinion of the value of foreclosed property, standing alone, was evidence of the property's value sufficient to create a fact issue and

avoid summary judgment. The Supreme Court rejected this standard, replacing it with a requirement that a borrower present "substantial competent evidence" of the property's value. A borrower's own unsupported opinion, standing alone, cannot defeat summary judgment.

United Community Bank involved the application of Section 45-21.36 of the North Carolina General Statutes—the so-called "offset defense"—which allows certain loan obligors a defense in post-foreclosure deficiency actions. Section 45-21.36 provides that when the lender acquires the property at foreclosure for less than the total of the outstanding loan amount plus expenses and then sues to collect the deficiency, certain obligors may defeat the action by showing that the property was worth the debt plus expenses during the foreclosure sale or that the lender bid substantially less than the property's true value.

In United Community Bank, the bank loaned the defendants \$350,000 to purchase real property and secured the loan with a deed of trust. When the defendants defaulted, the bank foreclosed. The bank was the high bidder at the foreclosure sale with a credit bid of \$275,000. The bank applied the net proceeds of the sale to the debt (\$275,000 minus expenses), leaving a deficiency of over \$50,000.

The bank sued the defendants for the deficiency. The bank then moved for summary judgment, which is a procedure allowing a trial court to dispose of a case before trial if "there is no genuine issue of material fact" and a party is entitled to judgment "as a matter of law." To avoid summary judgment, the party against whom summary judgment is sought must forecast evidence of a genuine dispute about a material fact.

In United Community Bank, the defendants, relying upon the "offset defense," attempted to show the trial court there was a genuine dispute about the true value of the property at the foreclosure sale. The defendants filed a joint affidavit stating that they believed the property was "fairly worth the amount of the

debt it secured" at the foreclosure sale. The affidavit did not state the basis for this opinion, indicated no appraisal or other expertise held by the defendants to support their value claim, and did not opine on a specific dollar amount or minimum dollar amount for the property's value. The trial court disregarded the affidavit and granted the bank's motion for summary judgment, which was supported by an opinion from the bank's licensed appraiser.

The North Carolina Court of Appeals reversed the trial court and held that the defendants' opinion of value, standing alone, was evidence of the property's value. The Court also held that the defendants' sworn statement that the property was "worth the amount of the debt" should be interpreted as stating a specific value, and the affidavit created a genuine issue of material fact—that is, the value of the property at the time of the foreclosure sale—that a jury had to decide.

The ramifications of the decision were immediately clear. To prevent a lender from obtaining a deficiency judgment on summary judgment, a borrower had only to file an affidavit opposing summary judgment that, in the borrower's opinion, the property was worth the debt at the foreclosure sale. With summary judgment off the table, lenders had to consider the cost of a possible jury trial before pursuing a deficiency action. In our experience, the decision led to fewer deficiency actions and more claims being resolved by discounted settlement.

In reversing the Court of Appeals, the Supreme Court created a heightened standard for borrowers. A borrower opposing summary judgment must forecast "substantial competent evidence" by way of specific facts to show the property's "true value" is genuinely at issue. A conclusory statement by the borrower that the property is worth the debt is insufficient. The borrower must support its opinion by specific facts and objective criteria, not speculation.

The Supreme Court did not define "substantial competent evidence," but the holding likely will require a borrower to retain a licensed appraiser to opine on the property's true value. If a borrower is unable or unwilling to incur this expense, then the lender once again will have a clear path to summary judgment.

If you have any pending foreclosure deficiency actions, please contact our Creditors' Rights Practice Group for more information on how best to advocate your position in light of this decision.

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