

June 26, 2014

To: Our Clients

From: Gray Reed & McGraw, P.C.

Re: Language Changes for Borrowers and Guarantors of Secured Real Estate Loans

In an important development this month, the Supreme Court of Texas has handed down an opinion that will affect borrowers and guarantors of secured real estate loans.

In *Moayed v. Interstate 35/Chisam Road, LP*, the Court has held that general waiver language will be effective to waive guarantor defenses, including the anti-deficiency defense under the property code.

A bit of background: In 1991, the Texas Legislature passed the borrower and guarantor protection legislation commonly known as the anti-deficiency statute, Texas Property Code section 51.003. This statute allows a borrower or guarantor to file a motion under 51.003 and provides that if the court or jury determines that the fair market value of a property is greater than the foreclosure price, the borrower or guarantor can obtain an offset for the difference between the determined fair market value and the foreclosure sales price. However, until now, the courts have been undecided as to whether this offset defense could be waived by the general waiver language used in most guaranty agreements.

This month's new holding by the Texas Supreme Court marks a notable change. The Court held that the general waiver language which is found in almost all institutional guaranty agreements, was sufficient to waive this special statutory defense – as long as the waiver was “clear and specific.”

The Court further held that the waiver language (“any” and “each” and “every”) in the guaranty agreement in this case, was sufficiently broad so as to waive **any** defense, **including the statutory defense for offset for fair market value under the property code**.

As a borrower or guarantor, what is the takeaway for you? All guaranty agreements should now be carefully reviewed to ensure that common law and statutory protections, including the very important anti-deficiency right, are not inadvertently waived by the “usual” general waiver language of most institutional contracts.

We invite you to contact your attorney or Ralph Perry-Miller at rperry-miller@grayreed.com if you have questions or concerns regarding your specific situation.

Ralph Perry-Miller assists clients in business and real estate litigation and transactions, including litigation of guaranty agreements. He successfully argued the Texas Supreme Court guaranty case of *Vastine v. Bank of Dallas* 808 S.W. 2d 463 (Tex.1991) which significantly expanded the rights of guarantors.



DALLAS

1601 Elm Street, Suite 4600
Dallas, TX 75201
T: 214.954.4135 F: 214.953.1332

HOUSTON

1300 Post Oak Blvd., Suite 2000
Houston, TX 77056
T: 713.986.7000 F: 713.986.7100

TYLER

100 E. Ferguson Street, Suite 614
Tyler, TX 75702
T: 903.594.4381 F: 903.594.4382