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BRITT & BROWNE LLP

Adventures of the Missouri No-Oral-Credit-Agreement Statute; Governor Signs Corrective Amendment in SB 100

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John P. Walsh

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The Missouri credit agreement statute of frauds has had uneven interpretations by the courts. It has been amended twice to overrule appellate court decisions that limited its obvious intent, which is to eliminate all claims by borrowers and guarantors(or lenders) that oral promises or commitments had been made or breached or that there were representations at variance with written loan agreements, promissory notes, guaranties or similar documents. It was originally adopted as § 432.045, R.S.Mo., in 1990.

In 1997 federal courts predicted that Missouri appellate courts would interpret the statute broadly to exclude all claims, including those claims or defenses based on fraud.But in 2003 the Missouri Court of Appeals in Mika v. Central Bank of Kansas City, 112 S.W. 3d 82 (Mo. Ct. App. 2003), limited the scope of the statute to contract-law claims and excluded claims or defenses based on allegations of fraud or equitable claims or defenses.

In 2004, taking the guidance by the court in the Mika opinion, the Missouri General Assembly adopted a revised statute, § 432.047, applicable only to commercial transactions, that precluded a "debtor" (borrower, guarantor, mortgagor) from maintaining "… an action upon or a defense, *regardless of legal theory in which it is based, in any way related* to a credit agreement unless the credit agreement is in writing…." [emphasis shows new language].

In 2011, a federal court again predicted that Missouri courts would hold that the revised statute would bar all tort as well as contract claims and defenses asserted by guarantors, who in that case claimed that a lender had made oral promises to overlook the guaranteed borrower's default, to negotiate existing loans and to extend loan maturity dates. U.S. Bank National Association v. Canny (Case No. 4:10CV421, E.D.Mo. January 24, 2011).

Eventually, a Missouri appellate court addressed the revised statute and held that it was effective to negate all claims and defenses based upon allegations or oral promises, including those based on fraud or any other equitable doctrine. BancorpSouth Bank v. Paramont Properties, L.L.C., 349 S.W. 3d 363 (Mo. Ct. App., E.D. 2011).

The assault on § 432.047, however, continued and, in mid-2012, § 432.047 was the subject of a limiting interpretation in Bailey v. Hawthorn Bank, 382 S.W. 3d 84 (Mo. Ct. App. W.D. 2012). In that case, the court of appeals held that a combination of a vague commitment letter, which did not contain basic terms such as interest rate and installment payment amounts, and an internal written loan summary, which did contain the relevant terms, together constituted a written "credit agreement," as the term is used in the statute, even though internal loan summary was never delivered to the borrower.

In response to that opinion, Senate Bill 100 revises §432.047 to make it clear that a credit agreement must not only be in writing, must provide for the payment of interest or other consideration and must set forth the relevant terms and conditions, but also must be "… executed by the debtor and the lender." §432.047-2.

Senate Bill 100 also adds the words "or unexecuted" to the first line of the language required to be inserted in commercial credit agreements giving notice of the statute. As revised, the language reads as follows (must be in 10 point bold face type):

> ORAL OR UNEXECUTED AGREEMENTS OR COMMITMENTS TO LOAN MONEY, EXTEND CREDIT OR TO FORBEAR FROM ENFORCING REPAYMENT OF A DEBT INCLUDING PROMISES TO EXTEND OR

> RENEW SUCH DEBT ARE NOT ENFORCEABLE, REGARDLESS OF THE LEGAL THEORY UPON WHICH IT IS BASED THAT IS IN ANY WAY RELATED TO THE CREDIT AGREEMENT. TO PROTECT YOU (BORROWER(S)) AND US (CREDITOR) FROM MISUNDERSTANDING OR DISAPPOINTMENT, ANY AGREEMENTS WE REACH COVERING SUCH MATTERS ARE CONTAINED IN THIS WRITING, WHICH IS THE COMPLETE AND EXCLUSIVE STATEMENT OF THE AGREEMENT BETWEEN US, EXCEPT AS WE MAY LATER AGREE IN WRITING TO MODIFY IT.

The revised language should be used in all commercial credit agreements and notes after August 28, 2013.

This amendment may not be the end of the adventures of the Missouri no-oral-credit-agreement statute. It appears that for every amendment to the statute there is a court challenge attempting to limit the clear intent of the statute.

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