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Colorado's Credit Agreement Statute of Frauds: Are You in Compliance?

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Although an obligation need not be put into writing to be enforceable against a party as a contractual obligation, the cardinal rule for ensuring performance by an obligee is to make sure its responsibilities are written down. Not only does reducing an obligation to writing help to avoid confusion between the parties to the agreement with regard to what must be done, but it helps a wronged party enforce the breaching party's obligations through a legal proceeding.

This is particularly true when it comes to a contract to lend money or an agreement to make certain lending concessions (i.e., credit agreements).

In 1989, the Colorado General Assembly enacted the Credit Agreement Statute of Frauds, located at § 38-10-124, C.R.S., in an effort to discourage lender liability litigation and to promote certainty in credit agreements involving a principal amount in excess of $25,000.00 (in which the creditor is a financial institution).

Specifically, by enacting the Credit Agreement Statute of Frauds, Colorado's legislature hoped to curtail suits against lenders based upon representations allegedly made by members of the credit industry. The act broadly defines a "credit agreement" as "a contract, promise, undertaking, offer, or commitment to lend, borrow, repay or forbear repayment of money, to otherwise extend or receive credit, or to make any other financial accommodation" and "any representations and warranties made or omissions in connection with the negotiation, execution, administration, or performance of, or collection of sums due under" a credit agreement.

The act specifically requires all such credit agreements to be written and signed by the party against whom enforcement is sought.

Colorado's legislative history shows that the Credit Agreement Statute of Frauds was intended to be broadly applied and Colorado's jurisprudence shows that the statute bars not only contractual claims, but also claims in tort arising from an alleged oral credit agreement (e.g., misrepresentation claims). In addition to barring affirmative claims relating to unwritten and unexecuted credit agreements involving amounts in excess of $25,000, the Credit Agreement Statute of Frauds also bars a party from asserting defenses relating to same.

Furthermore, it is clear that the statute bars credit agreements allegedly implied under the circumstances by the parties' relationship or conduct (e.g., claims that a past course of dealing resulted in a credit agreement).

What does all of this mean? If you are a borrower seeking a loan from a financial institution or modification of loan terms, you MUST obtain a written commitment from the lender for same, otherwise you will likely be unable to prove that unfulfilled promises were made. If you are a lender, you MUST be careful what you put in writing. If you believe you are negotiating credit terms rather than agreeing to terms, make that intent clear to the borrower (preferably face-to-face). The last thing a lender wants to do is provide a defaulting borrower with a defense where none should exist.