No, Really: Missouri Commercial Credit Agreements Must be in Writing

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In recent years, there has been a great deal of uncertainty surrounding a debtor's right to maintain or defend an action related to a commercial credit agreement under § 432.047 – Missouri's specialized statute of frauds for credit agreements. This uncertainty has largely resulted in unfavorable rulings for commercial lenders, particularly where the debtor has asserted the existence of oral credit agreements with the lender. The Missouri legislature's most recent amendment to § 432.047 is aimed at increasing the predictability of the statute's application and interpretation as it relates to required elements of credit agreements and the scope of agreements that the statute is meant to encompass. As a result, it is certainly within the best interest of all commercial lenders to adhere to the new statutory requirements, which became effective August 28, 2013.

Section 432.047 applies to all credit agreements. When it was first introduced in 2004, the purpose of the statute was to provide commercial lenders with a means of protection against claims or defenses based on allegations of oral credit agreements. At a summary level, the statute sought to achieve this end by requiring credit agreements to be in writing and executed pursuant to certain other formalities. The initial version of the statute did not fully effectuate the intent of the legislature as illustrated by *Bailey v. Hawthorn Bank*, 382 S.W.3d 84 (Mo.Ct.App. W.D. 2012).

In *Bailey*, the restaurant-borrower sued a commercial lender for breach of an alleged credit agreement as evidenced by a loan commitment letter that it received from the commercial lender. The lender argued that the loan commitment letter did not satisfy all of the requirements and formalities required by § 432.047 and that, as a result, the borrower did not possess the right to maintain an action on the commitment letter. Although the court agreed that the commitment letter did not satisfy the statutory requirements of § 432.047, it nevertheless ruled in favor of the borrower based on its interpretation of the statute as it then existed. The court interpreted § 432.047 to allow the borrower to combine the terms of the commitment letter with the contents of the lender's internal loan summaries despite the borrower never having seen those summaries prior to the litigation. In doing so, the *Bailey* court interpreted the statute to allow for internal, unexecuted writings related to the loan commitment letter to be combined with, and evaluated as part of, a single 'credit agreement' under the statute. Naturally, the ability of a debtor to rely on such documents introduced a great deal of uncertainty for commercial lenders.

The most recent iteration of § 432.047 has added two key components that serve to eliminate the uncertainty following *Bailey*. First, the amendment has added the additional requirement that for any debtor to maintain an action or defense related to a credit agreement, the credit agreement must be "executed by the debtor and the lender." Second, for a lender to receive protection under the statute, the mandatory language of the credit agreement must now explicitly embrace "unexecuted agreements" as well. Specifically, lenders must include the following language in 10 point bold face type:

Accordingly, that language should be inserted in all commercial credit agreements, whether renewals, extensions, modifications, or new credit agreements from and after August 28, 2013.

To discuss this alert, please contact your Lathrop Gage attorney or one of the attorneys listed above.