



STATE OF KANSAS

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ATTORNEY GENERAL OPINION NO 89-19

W. Newton Male
Commissioner
Banking Department
700 Jackson, Suite 300
Topeka, Kansas 66603-3714

Re: Contracts and Promises -- General Provisions --
Credit Agreements; Required Notice

Synopsis: Promissory notes, security agreements and mortgages are not "credit agreements" within the meaning of L. 1988, ch. 55. However, the document creating the interest may become a credit agreement if, by the terms of the document, there is included a promise to lend or delay repayment of money or make some other financial accommodation. The failure to include the notice prescribed in section 2 of the act does not render a credit agreement unenforceable. However, parol evidence may be used to show that fraudulent misrepresentations were made during contract negotiations. Cited herein: K.S.A. 16-117; 16-118; 84-1-201; 84-3-104; K.S.A. 1988 Supp. 84-9-105.

* * *

Dear Commissioner Male:

You have requested our opinion concerning several issues involving credit agreements, as defined by L. 1988, ch. 55, § 1 (codified at K.S.A. 16-117) and as applied in § 2 (codified at K.S.A. 16-118). Specifically, you ask whether security agreements, mortgages and promissory notes are credit

agreements within the meaning of the act, and whether a credit agreement must include the notice specified in section 2(b) of the act to make the agreement enforceable.

Chapter 55 of the 1988 Session Laws regulates credit agreements to which a financial institution is a party. For purposes of the act, a credit agreement is defined as:

"[A]n agreement by a financial institution to lend or delay repayment of money, goods or things in action, to otherwise extend credit or to make any other financial accommodation." L. 1988, ch. 55, § 1(a).

Section 2 of the act requires that all credit agreements contain a notice that the written agreement is the final expression of the agreement, and that the agreement may not be contradicted by evidence of an oral agreement between the parties.

Your first question is partially resolved by applying the definition of credit agreement to the nature of a promissory note, security agreement, or mortgage. A promissory note is "a written promise made by one or more to pay another, or order, or bearer, at a specified time, a specific amount of money, or other articles of value." Black's Law Dictionary, 1093 (5th ed. 1979). (See also K.S.A. 84-3-104). Thus, a promissory note is not an agreement to lend money or extend credit, but is merely evidence of a debt. A security agreement is an agreement creating or providing for a security interest. See e.g. K.S.A. 1988 Supp. 84-9-105(1). A security interest is an interest in personal property securing performance of an obligation. K.S.A. 84-1-201(37). In comparison, a mortgage is a security creating a lien upon real property in the form of a conditional conveyance. Misco Industries, Inc. v. Board of Sedgwick County Comm'rs, 235 Kan. 958, 962 (1984). In their simplest form, security interests and mortgages do not fit the definition of credit agreement because, by themselves, they only grant some form of interest in the property. However, the document creating the interest may become a credit agreement if, by its terms, it announces a promise or agreement to lend or extend credit. Consequently, a promissory note, security agreement, or mortgage, which is not part of a document announcing a promise to extend credit is not a credit agreement within the meaning of L. 1988, ch. 55.

We do note that proposed 1989 Senate Bill No. 46 would amend the definition of credit agreement to exclude promissory notes, mortgages, security agreements and other agreements.

You have also asked whether failure to include the notice provisions of section 2(b) renders a credit agreement unenforceable. As previously noted, section 2(b) mandates that all credit agreements contain notice to the debtor stating that the written agreement is the final expression of the agreement, and that any prior oral agreement may not be used to contradict the writing. If notice to the debtor in the manner prescribed is clearly and conspicuously given, the terms of the agreement required by this section must be given effect.

The statute is silent, however, when notice requirements prescribed in § 2(b) have not been included. The question then becomes whether a prior oral agreement may be used to contradict the terms of the written instrument. The common law recognizes that oral contracts may be binding. In National Farmers Organization v. Kinsley Bank, 731 F.2d 1464 (10th Cir. 1984), a bank made a loan to a borrower for a down payment on lambs, but refused to loan additional amounts, even though the bank president had told NFO that the Bank would finance the entire purchase. The court held that there was sufficient evidence for a jury to find that the bank had agreed to finance the transaction and that the borrower and NFO had acted in reliance on this promise. 731 F.2d at 1469.

However, when an oral agreement is reduced to writing, there is a presumption that the parties have included every material matter. Hudson v. Riley, 104 Kan. 534, 539 (1919). An exception to this rule permits the use of parol evidence to show fraudulent representations made during contract negotiation. Temmen v. Kent-Brown Chevrolet Co., 217 Kan. 223, 230 (1975). It appears that, if the required notice is not contained in the credit agreement, the agreement is enforceable as written, but may be varied if there is evidence of misrepresentations upon which a party to the credit agreement relied.

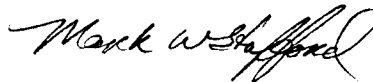
In conclusion, it is our opinion that promissory notes, security agreements and mortgages are not "credit agreements" within the meaning of L. 1988, ch. 55. However, the document creating the interest may become a credit agreement if, by the terms of the document, there is included a promise to lend or delay repayment of money or make some other

prescribed in section 2 of the act does not render a credit agreement unenforceable. However, parol evidence may be used to show that fraudulent misrepresentations were made during contract negotiations.

Very truly yours,



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