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Practice Pointer: When is an Agreement Enforceable Against a Bank?

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The short answer is that an agreement is enforceable against a bank when the agreement is in writing and signed by the bank. But, the answer really depends on the jurisdiction involved.

Many states have enacted special statutes of frauds to protect banks. These statutes require the existence of a written agreement signed by a bank before suit can be brought against the bank. These statutes exist in many states, including California, Illinois, Indiana, Michigan, Ohio and Texas. In some of these states, such as Michigan (M.C.L. 566.132), Illinois (through its Credit Agreements Act, 815 I.L.C.S. 160/2), and Indiana (Ind. Code § 26-2-9-4), the debtor can assert a defense to a claim brought by a bank to enforce a loan agreement only if the defense is based on an agreement signed by the bank. Some states, such as Indiana, protect more creditors than just financial institutions, while other states, such as Michigan and Ohio (O.R.C. § 1335.02), only protect financial institutions. In Texas, to have the full protection of the statute of frauds, an additional notice is needed. Tex. Bus. & Com. Conde §26.02(e). The California statute of frauds is rather limited in its scope, but still provides a layer of protection for banks. Cal. Civ. Code §1624(a)(7).

These statutes address oral communication, like a phone call or a meeting. However, in our hi-tech world, particularly in the time of COVID-19, many of the communications between a lender and a borrower are by email. An email is a writing, but is it signed by the bank? That answer depends on what is meant by a signature. Article Nine of the Uniform Commercial Code uses the term "authenticate," which means more than a signature. The broad definition of "authenticate" may well include an email. See U.C.C. 9-102(7)(B) [Note: Cal. Civ. Code § 1633.3(b)(3) expressly carves out secured transactions under Article 9 in respect to transactions within the scope of the Uniform Electronic Transaction Act in California.] The answer to these questions, including which law governs, are technical in nature and beyond the scope of this email.

To avoid making an unintended commitment or offer, take care in the words that are used in any written communication with a borrower or a guarantor. If a bank desires to make a proposal for discussion purposes, the loan officer should clearly state that. In addition, disclaimer language to the effect that the communication is neither an offer nor a commitment, and that any forbearance, amendment or waiver is subject to final review and approval of the bank, and documentation acceptable to bank's counsel, may provide an additional layer of protection. If not recently done, we recommend reviewing your standard disclaimer language with your counsel.

This e-alert is the first in a series of practice pointers on lending related issues, with a particular focus on distressed credits. If you have questions, or would like further information, please do not hesitate to call one of the authors or your Miller Canfield attorney.