



COMMERCIAL LENDING ALERT

Lender-Friendly Missouri Laws – How to Utilize Them

March 2007

2007 Update

Missouri statutes and case law continue to be friendly to the commercial lender. This *Alert* is a periodic update on the status of certain statutes and cases affecting commercial lenders. We report that, in 2007, those cases and statutes remain well established.

Updated No-Oral-Loan-Agreement Statute

In 2004 (with some assistance from us through our work with the Missouri Bankers Association), the Missouri General Assembly passed an updated no-oral-loan-agreement statute (§432.047) in response to a 2003 Missouri appellate case that interpreted the old statute (§432.045) as not protecting lenders against “fraudulent inducement” and similar claims. The new statute expressly states that a debtor in a commercial loan arrangement may not maintain any action on or defense to a credit agreement “... regardless of legal theory on which it is based, that in any way related to a credit agreement unless the credit agreement is in writing... .” The old statute remains in place to cover consumer credit arrangements and commercial credit arrangements that do not meet the new statute’s requirements.

Both the old and new statutes require that a conspicuous notice of the effect of the statutes be included in all promissory notes and other credit agreements. The new statute, however, requires additional language, consistent with the broad language quoted above, to be included in the notice. We continue to see from some commercial lenders loan commitment letters, notes and credit agreements (often of the pre-printed kind) that do not include the newly required notice language. Failure to include the new language could negate the benefit of the new statute against a claim of fraudulent inducement or other tort claim.

Jury Trial Waivers

In 1997, the Missouri Supreme Court held that a jury trial waiver in a commercial transaction is enforceable. *Malen Realty Investors, Inc. v. Harris*, 953 S.W. 2d 624 (Mo. banc 1997). Later cases clearly and expressly have followed that holding (e.g., *Savannah Place, Ltd. v. Heidelberg*, 122 S.W. 3d 74, 79 (Mo. App. S.D. 2003)). In order, however, for a jury trial waiver to be enforced, it must be prominently displayed in the contract document and the language of the waiver must be clear, unambiguous and unmistakable. The *Savannah* case emphasized that a party in an arms-length transaction is charged with the obligation of reading what that party signs and, in the absence of a showing of trickery, that party cannot avoid the consequences of what is signed on the ground that the party did not read what was signed.

Enforceability of One-Way Arbitration

Some commercial and consumer lenders and sellers of big ticket items such as homes have required borrowers and buyers to sign agreements requiring mandatory arbitration of “all claims,” while reserving only for the lender or the seller access to the courts to foreclose upon collateral or obtain other relief. The Missouri Supreme Court (in *State ex rel. Vincent v. Schneider*, 194 S.W. 3d 853 (Mo. banc 2006) recently validated use of a one-way arbitration clause in a dispute between purchasers of new homes and their builder.

In that case, the pre-printed home purchase contracts gave the builder the unilateral right to require the buyers to submit to binding arbitration any claim arising out of the contract or the purchased home but reserved to the builder the right to seek judicial relief. The Missouri Supreme Court held that the legal requirement of “mutuality” of contract was satisfied

because there was consideration flowing to both parties in the contract as a whole, regardless of whether the arbitration clause was one-sided. The court also emphasized the preference under Missouri statutes and case law for the arbitration of disputes.

In order, however, to assure that a one-way arbitration clause will be enforced, parties should:

- Make the clause conspicuous and consider requiring the parties to initial the clause;
- Provide an unbiased process for selection of the arbitrator; and
- Require each party to pay its own arbitration fees or require the arbitrator to determine who should pay.

Lender Indemnification

Commercial lenders typically require borrowers to indemnify lenders for losses and liabilities arising out of a commercial loan, including environmental liabilities. Missouri courts continue to hold that indemnification clauses in commercial contracts are enforceable against sophisticated businesses that contract at arms-length even if the clause requires indemnification for losses suffered because of the indemnified party's own negligence.

A recent example is Utility Service Maintenance, Inc. v. Noranda Aluminum, Inc., 163 S.W. 3d 910 (Mo. banc 2005), in which Noranda negotiated a contract for another company to do some industrial painting at Noranda's facility. The contract stated that the other party would indemnify Noranda against all claims, damages, liabilities or obligations of whatever kind. The court enforced this provision in connection with a painter becoming severely injured while working at Noranda's plant under the contract even though

Noranda's negligence contributed to the damages. The court also held that the fact that Noranda and the other party did not expressly bargain for the indemnification clause was irrelevant and that courts should enforce the objective terms of contracts between sophisticated businesses without regard to a party's subjective intent.

Subjective "Good Faith" is Law in Missouri

All contracts, including credit agreements, include an unwritten legal requirement that the parties act in "good faith." Unlike statutes and case law in many, if not most, other states, Missouri generally limits the definition of "good faith" to the subjective test of "honesty in fact." Many other states add to the definition "the observance of reasonable commercial standards of fair dealing," which is an objective negligence test. For example, Missouri General Assembly rewrote the uniform versions of Article 3 (covering negotiable instruments) and Article 9 (covering secured transactions) of the Uniform Commercial Code to eliminate the objective negligence test from the definition of good faith. Likewise, the Missouri courts define "good faith" subjectively. An extensive discussion of how the Missouri courts approach this doctrine is included in Schell v. Lifemark Hospitals of Missouri, 92 S.W. 3d 222 (Mo. App. W. D. 2002).

Conclusion

Missouri law continues to be friendly to the commercial lender. This approach is an outgrowth of the tendency of Missouri courts to enforce commercial contracts between commercial businesses as written. For those reasons, to the extent there is a relationship between a lender, a lending transaction or a borrower and the State of Missouri, lenders can take advantage of lender-friendly laws by requiring that Missouri law govern the transaction.

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