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Are handshake deals still good?

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Most lawyers and many non-lawyers are familiar with the statute of frauds and its requirement that agreements involving "the sale of lands" must be in writing. The statute of frauds dates back to mid-17th century England when Parliament passed "An Act for Prevention of Frauds and Perjuries." Since then, Illinois, like every other jurisdiction in the United States, has adopted its own version of the statute of frauds. See 740 ILCS 80/2. The lesson for those working to complete a purchase or sale of real estate is straightforward and clear: memorialize your agreement in writing or risk a finding that the agreement is not enforceable.

Less familiar, however, are the strict requirements of the Illinois Credit Agreements Act (the "ICAA"). 815 ILCS 160/2. Like the statute of frauds, the ICAA requires that credit agreements also be in writing. It bars all actions by a debtor based on or "in any way related" to an oral credit agreement. Id.; McAloon v. Nw. Bancorp, Inc., 274 Ill. App. 3d 758, 762 (2d Dist. 1995). The ICAA broadly defines "credit agreement" as "an agreement or commitment by a creditor to lend money or extend credit or delay or forbear repayment of money not primarily for personal, family or household purposes, and not in connection with the issuance of credit cards." Similar credit agreement acts exist in a variety of other jurisdictions. The purpose of these laws (and the ICAA) is to discourage lender-liability claims filed solely as a negotiating tactic. See Westinghouse Elec. Corp. v. McLean, 938 F. Supp. 487, 492 (N.D. Ill. 1996).

Although the statute of frauds and the ICAA require agreements to be in writing, the ICAA, which has been referred to as a "strong form" of the statute of frauds, is far more rigid and unforgiving. Harris N.A. v. Hershey, 711 F.3d 794, 799 (7th Cir. 2013); McAloon, 274 Ill. App. 3d at 762. The ICAA prohibits debtors from asserting any claim, counterclaim or defense against a creditor related to a purported oral credit agreement. The ICAA explicitly bars such claims related to the rendering of financial advice by a creditor, consultation by a creditor or an alleged agreement to modify an existing credit agreement. 815 ILCS 160/3. In fact, "there is no limitation as to the type of actions by a debtor which are barred by the Act, so long as the action is in any way related to a credit agreement." Van Pelt Const. Co. v. BMO Harris Bank, N.A., 2014 IL App (1st) 121661, ¶ 28 (quotation omitted). This includes claims that arise out of contract or tort law. Avanti Med. Grp., LLC v. BMO Harris Bank, N.A., 2014 IL App (2d) 140401, ¶ 19. Notably, this broad prohibition against borrowers does not apply to creditors. Creditors may still assert claims against debtors based on oral representations.

By contrast, the statute of frauds is more forgiving than the Act in terms of what it considers a "written" agreement. For example, in some cases, verbal acceptance of a written agreement is

acceptable under the statute of frauds. Classen v. Ripley, 343 Ill. App. 298, 303 (4th Dist. 1951). Not so under the ICAA. The ICAA strictly requires that the written credit agreement be signed by both parties. For example, in one case, real estate developers argued that their claims satisfied the ICAA's requirements because they had submitted a written proposal to the lender and the lender's directors had initialed the proposal. The court held, however, that even if the initials could be considered a "signature," the absence of the developers' signature on the proposal was fatal to their claims. McAloon, 274 Ill. App. 3d at 762. In another case, a court held that unsigned emails between a creditor and debtor did not satisfy the ICAA's writing requirement and, so, did not modify a previously existing written credit agreement. Van Pelt, 2014 IL App (1st) 121661, ¶ 35. More recently, courts have held that "the relevant terms and conditions" of the loan must be clear from the documents containing the parties' signatures; other documents that were allegedly executed at the same time are not a part of the enforceable credit agreement unless they, too, bear the signatures of both parties. Avanti Med. Grp., 2014 IL App (2d) 140401, ¶ 31.

The statute of frauds has a variety of exceptions such as the doctrines of partial performance and promissory estoppel. For example, when a party to an oral contract partially performs his part of the agreement, courts will enforce that contract on the theory that allowing the other party to invoke the statute of frauds would perpetrate a fraud upon the performing party. See, for example, Culbertson v. Carruthers, 66 Ill. App. 3d 47, 52 (5th Dist. 1978). These traditional exceptions to the statute of frauds, however, are inapplicable to the ICAA. McAloon, 274 Ill. App. 3d at 762; see also Whirlpool Fin. Corp. v. Sevaux, 96 F.3d 216, 226 (7th Cir. 1996) (collecting Illinois cases).

The conclusion to be drawn from all of the case law is that both creditors and debtors have to be sensitive when it comes to a handshake deal. That type of an agreement — long accepted among businessmen for centuries — is a thing of the past if the agreement involves a credit agreement. Accordingly, lawyers and their clients need to be acutely aware of the need to document and have both parties sign any agreement that is related in any way to a credit agreement. The consequences for failing to do so can be drastic.