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Protecting Written Loan Terms in an Evolving Environment

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The last three years have seen a tremendous increase in defaulted loans and the litigation that typically ensues in the loan enforcement process. In many cases, borrowers and guarantors allege that their lender informally agreed to modify written loan terms and use that alleged modification as a defense to the lender's enforcement of the loan documents.

Washington lenders have enjoyed protection against these types of claims under Washington's Credit Agreement Statute of Frauds, which provides that "agreements to lend, forbear or modify a commercial loan are unenforceable unless the agreement is in writing and signed by the creditor." RCW 19.36.110. But, at a time when the rapid-fire exchange of e-mail has supplanted oral discourse to a substantial degree, questions have arisen concerning the effect of informal e-mail discussions and/or agreements between a borrower and lender.

In one recent decision, the United States District Court for the Western District of Washington held that e-mails between a borrower and loan officer may suffice to establish an enforceable agreement to modify written loan documents. The guarantor-plaintiffs relied, in part, on an alleged series of purported e-mails between the borrower and the bank's loan officer to argue that the bank had capped the plaintiffs' guaranties in a dollar amount far less than the actual loan deficiency. The lender sought to dismiss the claim as a matter of law on the basis that mere e-mail exchanges could not create a written agreement, as required by Washington's Credit Agreement

Statute of Frauds. The court denied the lender's motion to dismiss, stating that "[a] categorical rule that e-mail communications cannot satisfy the statute of frauds would be oblivious to the nature of modern business communication."

In another unreported Western District of Washington decision, the court examined whether a series of e-mails constituted a "written agreement" for purposes of Washington's standard statute of frauds. Although the court found that the e-mails by their terms did not form an agreement, the court stopped shy of saying that a written agreement could not have been made via e-mail. The court emphasized the importance of the parties' intent as evidenced by the contents of the e-mails in declining to enforce an agreement based upon those e-mails.

Courts in other states are split on whether e-mails satisfy the "writing" requirement of the statute of frauds in each of those states. A Colorado court, for example, found that a series of e-mails satisfied the signed writing requirement, stating simply that e-mails are "writings" and the requisite "writing" may be evidenced by a series of documents. In other cases, however, courts have declared e-mails insufficient to meet statutory writing requirements when the e-mails clearly reflected

that the terms of the purported agreement had not been agreed upon.

Although there has not been a seismic shift in judicial thinking as of yet, the danger of e-mail communications to the sanctity of written loan terms is clear. Judicial opinion of the changing ways in which we do business appears to be evolving faster than the mechanism through which certainty has traditionally been afforded to the relationship between lender and borrower. In light of this, lenders should take care to unequivocally demonstrate the non-binding and non-final intent of e-mail communications. E-mail proposals should include the statutory safe harbor language and express statements that any proposal is subject to written credit approval and the execution of formal written loan documents by an authorized officer of the bank. Loan documents should reinforce this concept and provide that e-mail communications, like oral agreements, shall not modify the parties' written loan documents. In addition, bank officers should continue to utilize formal written workout and/or modification agreements to clarify the scope and terms of the credit agreement for the sake of borrowers, judges, and, ultimately, lenders. 



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