BERG HILL GREENLEAF RUSCITTI LLP

Legal Spotlight

The Colorado Credit Agreement Act

A Potent Tool for Financial Institutions and Debtors

By: Mark D. Changaris, Partner
Berg, Hill, Greenleaf & Ruscitti, LLP
mdc@bhgrlaw.com

For institutional lenders, dealing with debtors who are attempting to avoid their financial obligations can be time consuming and expensive. Common theories asserted by debtors challenging financial transactions include fraud in the inducement, negligent misrepresentation, and promissory estoppel. One potential tool to help reduce litigation costs and efficiently deal with these types of claims is the Colorado Credit Agreement Act, C.R.S. § 38-10-124 (the "**CCA**").

In a nutshell, the CCA is a broadly written statute of frauds that provides "…no debtor or creditor may file or maintain an action or a claim relating to a credit agreement involving a principal amount in excess of twenty-five thousand dollars unless the credit agreement is in writing and is signed by the party against whom enforcement is sought." C.R.S. § 38-10-124.

This statute has serious implications for both financial institutions and debtors. On its face, it not only bars claims that a credit agreement has been orally modified, but also any claims *relating to* the credit agreement. Thus, if the claim relates to: 1) a credit agreement; 2) that is in excess of $25,000; and 3) that has been issued by a financial institution, the CCA will provide a broad defense that should be taken into account.

What is a Credit Agreement?

The term "credit agreement" is defined broadly to apply to almost any type of loan document (including loan agreements, promissory notes, and security agreements), any amendment or modification of a loan document, or any representations or warranties made in connection with the negotiation of a loan document.

Specifically, the CCA defines the term 'Credit Agreement' as follows:

> (I) A contract, promise, undertaking, offer, or commitment to lend, borrow, repay, or forbear repayment of money, to otherwise extend or receive credit, or to make any other financial accommodation;
>
> (II) Any amendment of, cancellation of, waiver of, or substitution for any or all of the terms or provisions of any of the credit agreements defined in subparagraphs (I) and (III) of this paragraph (a); and
>
> (III) Any representations and warranties made or omissions in connection with the negotiation, execution, administration, or performance of, or collection of sums due under, any of the credit agreements defined in subparagraphs (I) and (II) of this paragraph (a).

Id.

Given this broad statutory definition, most traditional types of financing arrangements with financial institutions would fall within the CCA's scope.

What Creditors and Debtors are Covered by the CCA?

The CCA's protections only extend if the creditor is a bank, savings and loan association, savings bank, credit union, or mortgage or finance company. Thus, it will not apply to non-institutional lenders that do not meet this statutory definition.

Conversely, the term "debtor" is broadly defined as "person who or entity which obtains credit or seeks a credit agreement with a creditor or who owes money to a creditor." *Id.*

Based on these statutory definitions, the CCA's protections will apply to most types of institutional lending transactions.

What Protections does the CCA Provide?

The CCA offers broad protections to both lenders and creditors. By the statute's plain language, the CCA applies not only "…to claims involving transactions that are characterized exclusively as credit agreements, but also…to claims which merely relate to credit agreements…." *Premier Farm Credit, PCA v. W-Cattle, LLC*, 155 P.3d 504, 514 (Colo. App. 2006); *Norwest Bank Lakewood v. GCC Partnership*, 886 P.2d 299, 301 (Colo. App. 1994).

Under these principles, the CCA "…has been interpreted broadly to apply to a wide variety of claims..." and defenses. *Premier Farm Credit, PCA*, 155 P.3d at 514-515. The types of claims and defenses barred by the CCA include:

- **Fraud and Unjust Enrichment.** *Lang v. Bank of Durango*, 78 P.3d 1121, 1123-24 (Colo. App. 2003) (barring fraud claims seeking to void credit agreement and unjust enrichment claim).

- **Breach of Fiduciary Duty.** *Hewitt v. Pitkin County Bank & Trust Co.*, 931 P.2d 456, 459 (Colo. App. 1995) (barring all claims for breach of fiduciary duty, negligent misrepresentation, outrageous conduct, and interference with prospective business advantage).

- **Negligent Misrepresentation.** *Norwest Bank Lakewood,* 886 P.2d at 301-02 (barring breach of fiduciary duty and negligent misrepresentation claims).

- **Oral Agreements.** *Pima Fin. Serv. Corp. v. Selby*, 820 P.2d 1124, 1127-28 (Colo. App. 1991) (barring oral settlement agreement which would have substituted for credit agreement).

- **Promissory estoppel.** *PayoutOne v. Coral Mortg. Bankers*, 602 F.Supp.2d 1219 (D.Colo.) (party may not avoid application of CCA by asserting promissory estoppel).

In practice, this means that debtors cannot escape their obligations to financial institutions by arguing pre-contractual fraud, promissory estoppel, or some other legal theory. Such claims would likely be barred by the CCA.

In addition, the statute protects debtors from creditors unilaterally amending or modifying the parties' loan documents without a writing signed by the debtor. Any such claims, including those premised on equitable principles like unjust enrichment, would likely be barred by the CCA.