1989

**Session Law 89-130**

Florida Senate & House of Representatives

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H 878 GENERAL BILL by L. Diaz-Balart (Identical S 830)

Credit Agreements; provides definitions; requires credit agreements be in writing; provides that certain actions are not considered agreements. Effective Date: 10/01/89.

03/16/89 HOUSE Prefiled
03/23/89 HOUSE Referred to Commerce
04/04/89 HOUSEIntroduced, referred to Commerce -HJ 85
04/06/89 HOUSE Subreferred to Subcommittee on Banking and Commerce;
On subcommittee agenda—Commerce, 04/10/89, 1:15 pm,
24-HOB
04/10/89 HOUSE Subcommittee Recommendation: Favorable; On Commit­
tee agenda—Commerce, 04/12/89, 3:30 pm, 21-HOB
04/12/89 HOUSE Preliminary Committee Action by Commerce: Favorable
04/13/89 HOUSE Comm. Report: Favorable by Commerce, placed on Calen­
dar —HJ 225
04/25/89 HOUSE Placed on Special Order Calendar; Read second time
—HJ 271
04/27/89 HOUSE Read third time; Passed; YEAS 113 NAYS 0 —HJ 285
04/28/89 SENATE In Messages
05/05/89 SENATE Received, referred to Commerce; Judiciary—Civil —SJ 270
06/12/89 SENATE Extension of time granted Committee Commerce
05/28/89 SENATE Extension of time granted Committee Commerce
05/29/89 SENATE Withdrawn from Commerce; Judiciary—Civil; Substituted
for SB 830; Passed; YEAS 38 NAYS 0 —SJ 508
06/29/89 Ordered enrolled
06/13/89 Signed by Officers and presented to Governor
06/26/89 Approved by Governor; Chapter No. 89-130

NOTES: Above bill history from Division of Legislative Information's FINAL LEGISLATIVE BILL INFORMATION, 1989 SESSIONS. Staff Analyses for bills amended beyond final committee action may not be in accordance with the enacted law. Journal page numbers (HJ & SJ) refer to daily Journals and may not be the same as final bound Journals.
I. SUMMARY:

House Bill 878 provides that a debtor may not maintain an action on a credit agreement unless such agreement is reduced to writing, expresses consideration, sets forth relevant terms and conditions, and is signed by the creditor and debtor. Additionally, the bill describes actions between a creditor and debtor which do not create a new credit agreement unless the agreement is in writing. Definitions are provided.

A. PRESENT SITUATION:

In the past, courts rarely witnessed cases in which a borrower, guarantor or other third party sought damages from a commercial lender as a result of a lending transaction which experienced serious problems. Today, major changes have occurred in the area of lender liability, due primarily to two reasons. First, bank deregulation has resulted in increased competitive pressures which has caused lenders to restructure various traditional methods of financing. This has had the impact of greatly increasing the potential liability of lenders. Second, new theories of liability have been constructed by the courts, and these theories are gaining wider acceptance.

The lender's relationship with a borrower or a prospective borrower involves working closely with the customer to assist the individual in determining the needs of the individual and the soundness of the financial plans. During the course of discussion, the lender may counsel, suggest, and voice opinions as to the feasibility of the financing plan or loan request.
Because of the danger of misunderstanding, and the fear of subsequent potential liability, lenders sometimes hesitate to be open and frank with the borrower.

In an effort to avoid misunderstandings, to facilitate open communications, and to improve an additional element of certainty and stability in a transaction for both the lender and the borrower, several states have enacted statutes regulating credit agreements. However, it should be noted that statutes such as the one proposed impact only one area of lender liability and will not eliminate lender liability suits.

B. EFFECT OF PROPOSED CHANGES:

The bill defines the term "credit agreement" to mean any agreement to lend or forbear repayment of money, goods, or things in action, to otherwise extend credit, or to make any other financial accommodation. Anyone who extends credit under a credit agreement is defined as a "creditor". A debtor is a person who obtains credit or seeks a credit agreement with a creditor or who owes money to a creditor.

A debtor may not maintain an action on a credit agreement unless the agreement is in writing, expresses consideration, sets forth the relevant terms and conditions, and is signed by the creditor and the debtor.

Certain activities between creditors and debtors are specified which require a written agreement before a claim can be made that a new credit agreement has been created. These actions are: the rendering of financial advice by the creditor to the debtor, consultation by a creditor with a debtor, or the agreement by a creditor to take certain actions, such as entering into a new credit agreement, forbearing from exercising remedies under prior credit agreements, or extending installments due under prior credit agreements. Additionally, a credit agreement may not be implied from the relationship, fiduciary, or otherwise, of the creditor and the debtor.

C. SECTION-BY-SECTION ANALYSIS:

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT:

A. FISCAL IMPACT ON STATE AGENCIES/STATE FUNDS:

1. Non-recurring or First Year Start-Up Effects:
   None

2. Recurring or Annualized Continuation Effects:
   None
3. **Long Run Effects Other Than Normal Growth:**
   None

4. **Appropriations Consequences:**
   None

**B. FISCAL IMPACT ON LOCAL GOVERNMENTS AS A WHOLE:**

1. **Non-recurring or First Year Start-Up Effects:**
   None

2. **Recurring or Annualized Continuation Effects:**
   None

3. **Long Run Effects Other Than Normal Growth:**
   None

**C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:**

1. **Direct Private Sector Costs:**
   None

2. **Direct Private Sector Benefits:**

   HB 878 will positively impact lenders by providing protection from debtor's claims that promises have been made to lend money or forebear on a debt. While the bill would restrict the ability of the borrower to bring a suit upon oral credit agreements, this bill, according to members of the banking industry, will provide several benefits to borrowers as well. First, it will benefit both the creditor and debtor by giving certainty to the terms of a credit transaction. The debtor will know precisely where the lender stands regarding a loan transaction because they will be required to be reduced to writing. Additionally, the bill assists the legal system from unnecessary expenses by reducing potential litigation arising out of attempts to prove or disprove the existence of an oral or implied commitment to lend money or forebear on a debt.

3. **Effects on Competition, Private Enterprise, and Employment Markets:**
   None

**D. FISCAL COMMENTS:**
III. LONG RANGE CONSEQUENCES:

This bill has no significant impact on the State Comprehensive Plan.

IV. COMMENTS:

The language of HB 878 has been patterned after the Minnesota credit agreement statute (Minnesota Statutes, section 513.33). Minnesota enacted their legislation in 1985, and it was upheld in 1988. Becker v. First American State Bank of Redwood Falls, 420 N.W.2nd 239 (Minn. Ct. App. 1988).

Presently, several states have enacted legislation regulating credit agreements or are in the processing of considering such legislation. California, Minnesota, North Dakota, and South Dakota are examples of such states.

The bill might be seen as strengthening financial institutions in a manner consistent with the Mission Statement and House Policy Statement.

V. LEGISLATIVE HISTORY:

ENACTED BILL:

House Bill 878 was prefiled by Representative Lincoln Diaz-Balart on March 16, 1989, and referred to the Committee on Commerce. It was considered by the Commerce Committee on April 14, 1989, which reported it favorably. The bill was place on the Special Order Calendar on April 24, 1989 (HJ 00271). On April 27, 1989, the bill passed the House by a vote of 113-0 (HJ 00285). The Senate substituted the House bill for its Senate companion and passed it unanimously on May 29, 1989 (SJ 00508). On June 13, the bill was presented to the Governor and on June 26 became law, Chapter 89-130.

DISPOSITION OF COMPANION:

Senate Bill 830 was prefiled by Senator Forman and others on March 30, 1989 and referred to the Committees on Commerce and Judiciary-Civil. The Commerce Committee reported the bill favorably on May 2, 1989. On May 22, 1989, the Judiciary-Civil Committee reported the bill favorably, and it was placed on the calendar (SJ 00403). The bill was placed on the Special Order Calendar on May 29, 1989, and the identical House bill was substituted for the Senate companion which was laid on the table.
VI. SIGNATURES:

SUBSTANTIVE COMMITTEE:
Prepared by:  
Beryl D. Burke  
Staff Director:  
William Leary

SECOND COMMITTEE OF REFERENCE:
Prepared by:  

APPROPRIATIONS:
Prepared by:  

Staff Director:  

(76)
I. SUMMARY:

A. Present Situation:

Changes have occurred in the area of lender liability, due primarily to two reasons. First, bank deregulation has resulted in increased competition which has caused lenders to restructure various traditional methods of financing. Secondly, theories of liability have been expanded by the courts in response to changing circumstances.

The lender's relationship with a borrower or prospective borrower involves working closely with the customer to assist the individual in determining the needs of the individual and the soundness of the financial plans. During the course of discussion, the lender may counsel, suggest, and voice opinions as to the feasibility of the financing plan or loan request. The lender may, in fact, make verbal commitments to lend, forbear, or take other actions which constitute a legally binding contract. Sometimes these discussions may result in confusion over whether a contractual relationship has been established or whether a previous written contract has been altered by a subsequent oral agreement. Since, absent a countervailing common law or statutory provision, an oral contract is as valid as a written contract, the question of whether such discussions constitute a contract is an issue of litigation. A number of states have attempted to alleviate this situation by regulating credit agreements.

B. Effect of Proposed Changes:

The bill would define the term "credit agreement" to mean any agreement to lend or forbear repayment of money, goods, or things in action, to otherwise extend credit, or to make any other financial accommodation. Anyone who extended credit under a credit agreement is defined as a "creditor". A "debtor" would be a person who obtains credit or seeks a credit agreement with a creditor or who owes money to a creditor.

The bill would provide that a debtor may not maintain an action on a credit agreement unless the agreement: is in writing; expresses consideration; sets forth the relevant terms and conditions; and is signed by the creditor and the debtor.

Certain activities between creditors and debtors are specified which would require a written agreement before a claim could be made that a new credit agreement has been created. These actions are: the rendering of financial advice by the creditor to the debtor; consultation by a creditor with a debtor; or the agreement by a creditor to take certain actions, such as entering into a new credit agreement, forbearing from exercising remedies under prior credit agreements, or extending installments due under prior credit agreements. Additionally,
a credit agreement could not be implied from the relationship, fiduciary, or otherwise, of the creditor and the debtor.

II. ECONOMIC IMPACT AND FISCAL NOTE:

A. Public:

The bill will positively impact lenders by providing protection from debtors' claims that promises have been made to lend money or forbear on a debt.

B. Government:

None.

III. COMMENTS:

The bill would apply to all credit transactions whether they are between private parties, banks, savings and loan associations or any other parties who meet the definition of "debtor" or "creditor".

The bill would provide that, "A debtor may not maintain an action on a credit agreement . . .". It is not clear whether the bill would prohibit an affirmative defense based upon an alleged oral agreement. Florida Rules of Civil Procedure Rule 1.110(d) lists the Statute of Frauds as an affirmative defense.

The language of SB 830 has been patterned after the Minnesota credit agreement statute (Minnesota Statutes, section 513.33). Minnesota enacted its legislation in 1985, and it was upheld in 1988. Becker v. First American State Bank of Redwood Falls, 420 N.W.2nd 239 (Minn. Ct. App. 1988).

Presently, several states have enacted legislation regulating credit agreements -although not identical to that enacted in Minnesota- or are in the processing of considering such legislation. California, Georgia, and Kansas are examples of such states.

Finally, it should be noted that SB 830 would not eliminate all lender liability suits, since the legislation impacts only one area of lender liability. Other related causes of action would still be available (i.e. fraud).

IV. AMENDMENTS:

None.