

New Wisconsin Law Raises Bar on Certain Claims Against Lenders

The Wisconsin legislature last week enacted a law designed to limit lawsuits against lenders based on a borrower's contract claim that the lender made an oral promise to lend money or alter the terms of an existing loan. In situations where the law applies, the law prohibits such an action against the lender unless the offer, promise, agreement, or commitment is in writing signed by an authorized agent of the lender. This law is important to lenders who previously worried that a discussion, term sheet, or other communication with a borrower could later be deemed an enforceable contract to extend or alter a loan. The requirement that the promise be in writing and signed by an authorized agent protects against a scenario where a borrower may succeed in a claim against a lender by simply alleging that the lender made a promise in a prior communication.

The new law applies to financial accommodations by banks, savings banks, savings and loan associations, credit unions, and farm credit institutions, and affiliates of such entities. However, the law does not apply to transactions subject to the Wisconsin Consumer Act or credit card transactions.

Importantly, the new law states clearly that it does not prevent a borrower from pursuing a tort claim for fraudulent misrepresentation or a statutory claim for fraudulent representation under Wis. Stats. §100.18. The fact that a borrower must prove a misrepresentation and cannot pursue a contract claim based on an alleged oral promise to lend means that in certain factual situations the bar will be higher for a borrower wishing to bring a claim. However, the fact that a borrower who is blocked from pursuing a claim based on an oral promise may instead choose to pursue the claim as a misrepresentation means that lenders must continue to be concerned about managing the risk of claims. Lenders should continue to use care in communications with borrowers about potential loans or amendments to existing loans. Lenders should continue to avoid communications that may result in misunderstandings by a borrower and avoid communications that a borrower may point to as evidence that the borrower was entitled to rely on the lender's statements.

The new law is a welcome tool for lenders to defend against unjustified claims based on alleged oral contracts to make loans or enter into loan amendments. The new law doesn't prevent a borrower from alleging a misrepresentation, and this means lenders should continue to use care in

communications with borrowers and maintain records that serve as evidence of the nature of their communications.