Limiting Lender Liability: The Trend Toward Written Credit Agreement Statutes

Todd C. Pearson
Note

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In 1979, Daniel and Marialys McClellan purchased Hybrid Seeds, Inc.1 Banc Midwest loaned the McClellans a large percentage of the purchase price and subsequently advanced additional funds for operations.2 In 1985, the bank decided not to extend any further credit to the McClellans and called all outstanding loans.3 The McClellans sued Banc Midwest for breach of contract4 and fraud,5 alleging that the bank orally agreed to finance the operation of Hybrid Seeds until the business became profitable.6 This case typifies lender liability litigation.7

2. Id. at 765.
3. Id. at 766.
4. Id. at 764.
5. Id. at 765.
6. Id. at 764-65. The court stated that a borrower could maintain a valid cause of action for breach of an oral contract to lend money, id. at 764, but dismissed the claim because the McClellans failed sufficiently to allege the intended duration of the future line of credit, id. at 765. The court also upheld the trial court's dismissal of the fraudulent misrepresentation claim because of a failure to allege damages properly. Id. at 766.
7. The concept of lender liability has existed for many years. See, e.g., Stewart v. Phoenix Nat’l Bank, 64 P.2d 101, 105-106 (Ariz. 1937) (finding confidential relationship existed when bank had served as customer’s financial advisor for 23 years and had represented that mortgage was for record keeping and the bank would not foreclose); Earl Park State Bank v. Lowmon, 161 N.E. 675, 679 (Ind. Ct. App. 1928) (holding that bank breached its fiduciary duty by persuading depositor to permit bank to loan his deposits to a third party without revealing that the third party was insolvent and deeply indebted to bank). However, lender liability litigation has increased dramatically in recent years, largely because borrowers have been successful in obtaining large verdicts. See, e.g., Landes Constr. Co. v. Royal Bank of Canada, 833 F.2d 1355, 1357 (9th Cir. 1987) (awarding $18.5 million judgment); K.M.C. Co. v. Irving Trust Co., 787 F.2d 752, 755 (6th Cir. 1986) (awarding $7.5 million judgment); State Nat’l Bank of El Paso v. Farah Mfg. Co., 678 S.W.2d 661, 699 (Tex. Ct. App. 1984) (awarding $18.6 million judgment); see also Pappone on the Lender Liability Explosion, 1 BANKING L. REV. 12, 12 (1988) (interview with Michael J. Papp-
A majority of states have recently added credit agreements to their respective Statutes of Frauds in an attempt to preclude borrowers from asserting claims similar to those the McClellans pursued. This legislation, adopted in some form by a majority of states within the past six years, requires that

8. The term “credit agreement” is used here generically and generally. Many statutes define “credit agreement” explicitly. The Washington statute’s definition is one of the most detailed. It defines a “credit agreement” as:

- an agreement, promise, or commitment to lend money, to otherwise extend credit, to forbear with respect to the repayment of any debt or the exercise of any remedy, to modify or amend the terms under which the creditor has lent money or otherwise extended credit, to release any guarantor or consignee [cosigner], or to make any other financial accommodation pertaining to a debt or other extension of credit.

WASH. REV. CODE ANN. § 19.36.100 (West Supp. 1991). In some states, the statutes do not utilize the term “credit agreement,” yet they cover similar types of agreements. For example, California’s statute applies to a “contract, promise, undertaking, or commitment to loan money or to grant or extend credit.” CAL. CIV. CODE § 1624(g) (West Supp. 1991).


The Uniform Commercial Code also contains a Statute of Frauds for the sale of goods. U.C.C. § 2-201. Section 2-201 of the UCC differs from the traditional Statute of Frauds, however, in many important ways. Most importantly, § 2-201 clearly relaxes the writing requirement. Under § 2-201, in order to be valid, the writing must only “indicate that a contract for sale has been made between the parties,” be “signed by the party against whom enforcement is sought,” and indicate the quantity of goods sold. U.C.C. § 2-201; see also Michael B. Metzger & Michael J. Phillips, Promissory Estoppel and Section 2-201 of the Uniform Commercial Code, 26 VILL. L. REV. 63, 70-71 (1980) (describing the relaxation of the writing requirement).

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credit agreements be in writing to be enforceable. The remarkable speed with which state legislatures have moved to enact these statutes is a direct response to the dramatic increase in the number of lender liability lawsuits during the past decade.11

This Note provides an introduction to written credit agreement statutes and explores the limited case law interpreting these statutes. Part I examines the general rationale for adopting a writing requirement for credit agreements. Part II surveys the various state approaches and then focuses on the Minnesota credit agreement statute and cases decided under the Minnesota statute. Finally, Part III discusses the future for credit agreement statutes and explains how courts can benefit from the cases decided under the Minnesota statute. This Note concludes that courts should strictly apply the writing requirements these statutes adopt, but should realize that the statutes should not affect some lender liability claims, such as fraud.

1. See, e.g., Colorado Adopts Bill to Limit Liability on Credit Agreements, Rejects Branching, 52 BANKING REP. (BNA) No. 9, at 481 (Feb. 27, 1989) [hereinafter Colorado Limits Liability] ("The Colorado Bankers Association sought the legislation in response to the increased incidence of lender liability claims based on oral agreements.").
This approach is faithful to the general goal of credit agreement statutes, namely to increase certainty in contractual liability as long as it is not at the expense of unwary borrowers.12

I. THE PURPOSES BEHIND WRITTEN CREDIT AGREEMENT STATUTES

The purpose behind the original Statute of Frauds was to prevent fraud.13 Despite critics’ claims that the Statute of Frauds is outdated14 and the fact that credit agreements tradi-

12. See infra notes 18, 28 and accompanying text.
13. The English Parliament enacted the original Statute of Frauds to combat “many fraudulent practices, which are commonly endeavored to be upheld by perjury and subornation of perjury.” An Act for Prevention of Frauds and Perjuries, 1677, 29 Car. 2, ch. 3 (Eng.). In 1677 the potential for perjury and fraud was considerably greater than it is today. In jury trials there were no rules of evidence, and jurors were witnesses who often decided the facts based on their own observations, not the evidence presented. See Hugh E. Willis, The Statute of Frauds—A Legal Anachronism, 3 IND. L.J. 427, 429 (1928). Moreover, parties to the case were not allowed to testify. Id.; see also William S. Holdsworth, A History of English Law 388-90 (3d ed. 1924). Written evidence of a contract was extremely important under these circumstances, given that a plaintiff could march into court and have a friend testify to a feigned contract, which a defendant would be powerless to disprove by his own testimony. See Lionel M. Summers, The Doctrine of Estoppel Applied to the Statute of Frauds, 79 U. PA. L. REV. 440, 441 (1931).

The drafters of the Uniform Commercial Code had a similar anti-fraud purpose in mind when they adopted a writing requirement for the sale of goods. James J. White & Robert S. Summers, Uniform Commercial Code § 2-1, at 67 (3d ed. 1988) (“The Code draftsmen kept this writing requirement largely because they saw it as a means to the end of combatting perjured testimony in contract cases.”).

14. Critics of the Statute of Frauds maintain that it promotes as much fraud as it prevents. See, e.g., 2 Arthur L. Corbin, Corbin on Contracts § 275 (1950); White & Summers, supra note 13, § 2-8, at 92-94 (opinions of Summers). This type of criticism of the Statute of Frauds is not a recent phenomenon. See, e.g., Francis M. Burdick, A Statute for Promoting Fraud, 16 COLUM. L. REV. 273, 274 (1916) (arguing that the Statute of Frauds is rarely invoked except to enable “a man to escape from the discussion of the question of whether he has or has not been guilty of a deliberate fraud by breaking his word”); Willis, supra note 13, at 429, 432 (arguing that the original reasons for the Statute of Frauds no longer exist and no new reasons have developed).


Modern Statute of Frauds’ defenders include some of the most respected
tionally have not been subject to the Statute of Frauds, a majority of states recently have enacted statutes that require credit agreements be in writing to be enforceable. This trend is motivated by a desire to stem what legislatures perceive as a destructive increase in lender liability litigation. Unlike the figures in commercial law. Professor Llewellyn argued that the degree of reliance certain types of agreements induce justifies writing requirements in order to provide predictable security about contractual liability. Karl N. Llewellyn, What Price Contract?—An Essay in Perspective, 40 Yale L.J. 704, 747 (1931). Professor Llewellyn also asserted that the Statute of Frauds has encouraged the idea that all contracts should be reduced to a writing. Id. He maintained that, because of the sophistication of modern business practices, the Statute’s utility has actually increased over time. Id. ("[T]he statute stands, in essence better adapted to our needs than when it first was passed."). Professor White defends the Statute on the basis that it continues to prevent fraud. White & Summers, supra note 13, § 2-8, at 94. In short, the defenders assert that the Statute of Frauds reduces uncertainty in contractual liability, in addition to preventing wholesale fraud. Llewellyn, supra, at 746-47.

Not surprisingly, opinions are not limited to total support for or opposition to the Statute of Frauds. Some commentators advocate an intermediate position. For example, one alternative is to require that the existence of an agreement within the Statute meet a higher burden of proof. See Joseph M. Perillo, The Statute of Frauds in the Light of the Functions and Dysfunctions of Form, 43 Fordham L. Rev. 39, 74-77 (1974) (advocating a “clear and convincing standard” rather than the traditional “preponderance of evidence” standard); Summers, supra note 13, at 464 (suggesting application of a “beyond a reasonable doubt” standard). The ultimate issue then becomes whether it is quite clear a contract was made, and not whether the technical requirements of the Statute were met. Perillo, supra, at 75. Of course, a writing would go a long way toward meeting that burden, and is therefore encouraged, but not absolutely required. Id. at 75-76.

Another alternative is to allow estoppel to be used to circumvent the Statute, but to limit any damage award to reliance damages. See Michael M. Carlson, Note, Promissory Estoppel and the Statute of Frauds in California, 66 Calif. L. Rev. 1219, 1242-55 (1978). The compromisers admit that the Statute of Frauds continues to serve a useful function, but are troubled by the Statute’s ability to create, rather than to remedy, injustice. They advocate a balancing of interests to allow equitable relief if justice demands it. Perillo, supra, at 81-82.

15. The traditional Statute of Frauds, however, does require certain types of loan documents be in writing. For example, some courts have held that loan commitments secured by real estate fall within the Statute. See, e.g., Southern Indus. Banking Corp. v. Delta Properties, Inc., 542 S.W.2d 815, 817 (Tenn. 1976). Many states also include contracts “to answer for the debt of another” within their Statute of Frauds. See, e.g., Calif. Civ. Code § 1624(b) (West 1990). Moreover, the Uniform Commercial Code requires that personal property security agreements be in writing. U.C.C. § 9-203(1)(a).

16. See supra note 10 and accompanying text.
17. The Florida legislature detailed the problem:

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
anti-fraud purpose of the original Statute of Frauds, the general goal behind these credit agreement statutes is to increase certainty in contractual liability in order to reduce lender liability litigation.\textsuperscript{18}

\begin{quote}
\begin{itemize}
\item First, bank deregulation has resulted in increased competitive pressures which has [sic] 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.
\end{itemize}
\end{quote}

\begin{quote}
\begin{itemize}
\item 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 [sic] on a debt.
\end{itemize}
\end{quote}

\textit{Florida H.R. Comm. on Commerce, Staff Analysis & Economic Impact Statement} 1-3 (Apr. 9, 1989).

18. For example, the Iowa statute states that its purpose is "to ensure that contract actions and defenses on credit agreements are supported by clear and certain written proof of the terms of such agreements to protect against fraud and to enhance the clear and predictable understanding of rights and duties under credit agreements."\textit{Iowa Code Ann.} § 535.17(6) (West Supp. 1991). The Nebraska statute requires the lender to give the borrower notice of the statute and inform the borrower that the purpose of the writing requirement is "[t]o protect you and us from any misunderstandings or disappointments."\textit{Neb. Rev. Stat.} § 45-1,113(2) (Supp. 1990). The Missouri statute contains a similar admonition.\textit{See Mo. Ann. Stat.} 432.045(3) (Vernon Supp. 1991).

Most statutes do not contain a similar explicit statement of purpose. However, the respective legislative histories make clear that increased certainty in contractual liability is the general purpose. The Florida House of Representatives Committee on Commerce described the situation this way:

\begin{quote}
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.\ldots
\end{quote}

\begin{quote}
\begin{itemize}
\item This bill will benefit both the creditor and debtor by giving certainty to the terms of a credit transaction.
\end{itemize}
\end{quote}

\textit{Florida H.R. Comm. on Commerce, Staff Analysis & Economic Impact Statement} 1-3 (Apr. 9, 1989). The Arkansas Bank Commissioner indicated a similar purpose:

\begin{quote}
The loan files provide the only objective means to determine the extent of banks' exposure.\ldots [A]ny oral understandings or agreements are subject to misinterpretation by banks' customers who may unduly rely on such statements to their detriment. Therefore, we believe it is in the best interest of all involved to amend our Statue [sic] of Frauds
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The underlying rationale supporting efforts to reduce lender liability litigation rests on economics. The argument may be stated very simply: The highly unpredictable nature of lender liability law interferes with the lenders' important economic role. Lenders serve as the cardiovascular system of a free-market economy. They gather capital from investors and pump it to areas where it is needed to further economic growth. Without lending, growth would be impossible. Lender liability judgments increase the lenders' costs, forcing them either to increase the cost of credit or to reduce incen-

to make it clear that such oral statements may not be relied upon and are not enforceable.

MEMORANDUM TO MEMBERS OF THE ARKANSAS LEGISLATURE FROM BILL FORD, STATE BANK COMMISSIONER REGARDING CERTAIN AMENDMENTS TO THE ARKANSAS STATUTE OF FRAUDS (Feb. 8, 1989).

Other state legislatures indicated the same purpose. See, e.g., CALIFORNIA SENATE RULES COMM., REPORT OF OFFICE OF SENATE FLOOR ANALYSES 2 (Aug. 29, 1988) ("The purpose of this bill is to decrease the number of disputes between lenders and borrowers involving oral commitments to lend money or extend credit. . . . Passage of SB 2789 will reduce lawsuits because both parties will clearly understand the process involved in making a loan commitment."); HAWAII CONF. COMM. REP. NO. 17, at 2 (Apr. 21, 1990) ("[T]his bill will add certainty in deciding when the borrower can consider the lender committed."); MINNESOTA H.R. COMMERCE & ECON. DEVELOPMENT COMM. (Apr. 19, 1985) (stating that the statute "provides greater certainty in lending transactions for both the borrower and the lender") (audiotaped statement of Rep. Dempsey); OREGON LEGISLATURE'S STATEMENT OF LEGISLATIVE INTENT ON SENATE BILL 548 (June 22, 1989) ("It is the intent of SB 548: to prevent unfounded litigation against lenders based on oral agreements [and] to reduce misunderstandings about the terms of lending agreements."); see also Robert D. Rowe, Special Project Note, Written Agreements in the Lender-Borrower Context: The Illusion of Certainty, 42 VAND. L. REV. 917, 946 (1989) ("An amendment to the Statute of Frauds . . . would balance lender-borrower concerns and bring greater certainty to the lending process.").


20. See Borders, supra note 19, at 743.

tives for depositors.\textsuperscript{22} Thus, legislatures have responded to the lenders' desire\textsuperscript{23} for a more reliable and objective means to determine the extent of their contractual liability.\textsuperscript{24}

Credit agreement statutes, however, do not provide lenders with a defense to all claims by borrowers. First, the statutes' principle aim is to eliminate breach of oral contract claims.\textsuperscript{25} Thus, the statutes should not affect claims alleging either breach of a written credit agreement or tortious conduct.\textsuperscript{26} Second, most states have provided protections for unsophisticated borrowers that will allow them, in some instances, to assert breach of oral contract claims. These protections, which are discussed in Part II,\textsuperscript{27} include exemptions from the writing requirement for non-business loans. These protections point to a second general policy choice embodied within these statutes, that of shielding unsophisticated borrowers by refusing to allow lenders to use the statute as a blanket defense to all claims.\textsuperscript{28}

\begin{itemize}
\item \textsuperscript{22} The Arkansas State Bank Commissioner warned that these judgments may render banks insolvent overnight. \textsc{Memorandum from Bill Ford, Arkansas State Bank Commissioner, to Members of the Arkansas Legislature} (Feb. 8, 1989).
\item \textsuperscript{23} State bankers associations have been the general proponents of this legislation. \textit{See}, e.g., \textsc{Colorado Limits Liability, supra note 11, at 481; Califonia Legislature Approves Limits on Liability for Oral Promises, 51 Banking Rep. (BNA) No. 10, at 435 (Sept. 12, 1988); Testimony of Phil Goldsmith Regarding Oregon Senate Bill 548, at 1 (June 20, 1989) (discussing negotiations over language “the Oregon Bankers Association considered to be acceptable”).}
\item \textsuperscript{24} \textit{See supra} note 18 and accompanying text.
\item \textsuperscript{25} \textit{See, e.g., Oregon Legislature’s Statement of Legislative Intent on Senate Bill 548} (June 22, 1989) (stating that the goal is to prevent litigation “based on oral agreements”); \textsc{California Senate Rules Comm., Report of Office of Senate Floor Analyses 2} (Aug. 29, 1988) (“The purpose of this bill is to decrease the number of disputes between lenders and borrowers involving oral commitments to lend money or extend credit.”).
\item \textsuperscript{26} \textit{See Florida H.R. Comm. on Commerce, Staff Analysis & Economic Impact Statement 2} (Apr. 9, 1989) (“[I]t should be noted that statutes such as the one proposed impact only one area of lender liability and will not eliminate lender liability suits.”).
\item \textsuperscript{27} \textit{See infra} notes 40-53 and accompanying text.
\item \textsuperscript{28} \textit{See Oregon Statement of Legislative Intent on Senate Bill 548} (June 22, 1989) (“It is the intent of SB 548 . . . to not eliminate legitimate claims on oral contracts, where contracts in fact have occurred, and undue hardship may result.”).
\end{itemize}
II. THE STATES’ VARIOUS APPROACHES

A. APPROACHES IN GENERAL

There is no “uniform” credit agreement statute. The only basic aspect common to all of the statutes is a requirement that the writing be at least as detailed as that required for any other contract within the traditional Statute of Frauds. Beyond this similarity, little uniformity exists. Nevertheless, some general observations and comparisons are possible.

29. A task force of the ABA has produced a “model” statute, the text of which can be found in John L. Culhane, Jr. & Dean C. Gramlich, Lender Liability Limitation Amendments to State Statutes of Frauds, 45 Bus. LAW. 1779, 1782 (1990).


31. In general, the legislation creating a writing requirement for credit agreements has taken one of two forms. The first involves amending the state’s existing Statute of Frauds to include credit agreements. Georgia’s statute is the simplest example of this type. It merely adds the phrase “any commitment to lend money” to the existing Statute. GA. CODE ANN. § 13-5-30(7) (Michie Supp. 1991); see also ALA. CODE ANN. § 8-9-2(7) (Supp. 1991); CONN. GEN. STAT. ANN. § 52-550(a)(6) (West Supp. 1991); S.D. CODIFIED LAWS § 53-8-2(4) (1990). The second type involves enacting an entirely independent statutory section. Minnesota’s statute was the first and is typical. See MINN. STAT. § 513.33 (1990); see also infra note 58 (providing the text of the Minnesota statute). The differences in form may prove significant as courts begin to interpret the statutes. An enactment that does no more than include credit agreements within a state’s Statute of Frauds provision seems to instruct courts to apply a traditional Statute of Frauds analysis. See infra notes 150-56 and accompanying text. At the opposite extreme, an independent provision seems to instruct courts to disregard the traditional analysis. See infra notes 136-43 and accompanying text.

Between the extremes lie areas where legislative intent is less definitive. For example, a state may have attached detailed credit agreement provisions to an otherwise undetailed traditional Statute of Frauds. See, e.g., UTAH CODE ANN. § 25-5-4 (Supp. 1991). This type of statute gives a court little guidance as to the legislature’s intent regarding the displacement of traditional Statute of Frauds rules.
1. Protections for Lenders

Some statutes apply to more lending transactions than others. Although this Note discusses these statutes as covering "credit agreements," some statutes are arguably rather narrow. For example, some statutes cover only "agreements to lend." Other statutes, however, are much broader. These statutes explicitly extend coverage to "credit agreements" and then broadly define a "credit agreement." In addition, some of the statutes give lenders special advantages. Although some statutes operate to preclude actions by both borrowers and lenders, others operate to preclude actions by borrowers only. In other words, a borrower must produce written evidence to stay in court, but a lender need not. This intent to preclude only borrower's actions may be either explicit or implicit.

32. See supra note 8 and accompanying text (generally defining the term "credit agreement").

Commentators explain the limited scope as follows:
A state which perceives the problem as being limited to litigation regarding preclosing commitments to lend will, as the Georgia legislature has done, specifically limit the scope of its statute to commitments. . . . Georgia . . . [and other states] have all chosen not to have their statutes explicitly applicable to changes or modifications to the underlying agreement.


34. See, e.g., FLA. STAT. ANN. § 687.0304(1)(a) (West 1990); LA. REV. STAT. ANN. § 6:1121(1) (West Supp. 1991); WASH. REV. CODE ANN. § 19.36.100 (West Supp. 1991); see also supra note 8.


38. A statute covering agreements to lend is of no use to a borrower de-
To provide additional protection to lenders, several states forbid the use of alternative theories of recovery, such as breach of fiduciary or other duty, if the other theories would require proof of the same facts necessary to prove an oral agreement.\textsuperscript{39} These provisions prevent innovative attorneys from pleading around the statute's limitations.

2. Protections for Borrowers

Several features of the credit agreement statutes provide protection for borrowers.\textsuperscript{40} Some states require the lender to provide special notice\textsuperscript{41} informing borrowers of the writing requirement in or with the agreement,\textsuperscript{42} in separate brochures,\textsuperscript{43} fending a lender's claim that the parties orally agreed to accelerate repayment. See, e.g., \textit{CONN. GEN. STAT. ANN.} § 52-550(a)(6) (West Supp. 1991).

39. For example, the Louisiana statute provides that "[a] credit agreement shall not be implied from the relationship, fiduciary, or otherwise, of the creditor and the debtor." \textit{LA. REV. STAT. ANN.} § 6:1123(B) (West Supp. 1991). Also, the model credit agreement statute proposed by the A.B.A. Task Force on Lender Liability Limitation Amendments to State Statutes of Frauds recommends that states adopt similar language "to foreclose 'end runs'" around the writing requirement. Culhane & Gramlich, \textit{supra} note 29, at 1797.

40. The Oregon statute especially protects borrowers' interests. After stating the general rule that a credit agreement must be in writing, \textit{OR. REV. STAT. ANN.} § 41.580(1)(h) (Butterworth Supp. 1990), the statute dedicates eleven paragraphs to exceptions which limit the general rule's effect. Id. §§ 41.580(1)(h)(A)-(C), 41.580(2)-(3); see \textit{also FLORIDA H.R. COMM. ON COMMERCE, STAFF ANALYSIS & ECONOMIC IMPACT STATEMENT 3} (Apr. 4, 1989) ("While the bill would restrict the ability of the borrower to bring a suit upon oral credit agreements, this bill . . . will provide several benefits to borrowers as well.").

41. See, e.g., \textit{IOWA CODE ANN.} § 535.17(2) (West Supp. 1991); \textit{KAN. STAT. ANN.} § 16-118(b) (Supp. 1990); \textit{MO. ANN. STAT.} § 432.045(3) (Vernon Supp. 1991); \textit{NEB. REV. STAT.} § 45-1,113(2)(c) (Supp. 1990); \textit{N.M. STAT. ANN.} § 58-6-5B (Michie 1991); \textit{OR. REV. STAT. ANN.} § 41.580(1)(h) (Butterworth Supp. 1990); \textit{TEX. BUS. & COM. CODE ANN.} §§ 26.02(e)-(g) (West Supp. 1991); \textit{UTAH CODE ANN.} § 25-5-4(6)(d) (Supp. 1991); \textit{WASH. REV. CODE ANN.} §§ 19.36.130 to 140 (West Supp. 1991); see also Culhane & Gramlich, \textit{supra} note 29, at 1789 ("As a means of protecting unsophisticated borrowers, a state legislature may also wish to consider whether to require the lender to include in or with the agreement a special notice informing borrowers of the effect of the signed writing requirement.").

42. Oregon requires notice to be included in the loan document and to be underlined or in at least 10-point bold type to the effect that "[u]nder Oregon law, most agreements, promises and commitments made by us . . . concerning loans and other credit extensions . . . must be in writing, express consideration and be signed by us to be enforceable." \textit{OR. REV. STAT. ANN.} § 41.580(3)(a) (Butterworth Supp. 1990); see \textit{also IOWA CODE ANN.} § 535.17 (West Supp. 1991); \textit{KAN. STAT. ANN.} § 16-118(b) (Supp. 1990); \textit{MO. ANN. STAT.} § 432.045(3) (Vernon Supp. 1991).

or in a conspicuous public posting within the lending institution. These provisions protect the borrower by requiring the lender to share information about the statute.

Additionally, most statutes exempt some types of transactions. For example, many states provide a dollar threshold, ranging from $10,000 to $250,000, below which a borrower may still allege an oral agreement. The majority of states also exempt transactions for personal, family, or household purposes. These limitations tend to protect unsophisticated borrowers.

Finally, although some statutes explicitly displace the common law, most statutes, either explicitly or implicitly, refer to the Statute of Frauds. The Iowa statute's recommended notice attempts to alert unwary borrowers. It reads:

IMPORTANT: READ BEFORE SIGNING. THE TERMS OF THIS AGREEMENT SHOULD BE READ CAREFULLY BECAUSE ONLY THOSE TERMS IN WRITING ARE ENFORCEABLE. NO OTHER TERMS OR ORAL PROMISES NOT CONTAINED IN THIS WRITTEN CONTRACT MAY BE LEGALLY ENFORCED. YOU MAY CHANGE THE TERMS OF THIS AGREEMENT ONLY BY ANOTHER WRITTEN AGREEMENT.


Moreover, several states exempt certain transactions to avoid interference with common consumer and commercial practices and to avoid conflicts with the existing Statute of Frauds. The most common exclusions are credit cards, see, e.g., ILL. ANN. STAT. ANN. ch. 17, para. 7101(1) (Smith-Hurd Supp. 1991); TEX. BUS. & COM. CODE ANN. § 26.02(a)(2)(A) (West Supp. 1991), and real estate mortgages, see, e.g., OR. REV. STAT. ANN. §§ 41.580(1)(h)(B)-(C) (Butterworth Supp. 1990). Kansas has the most exhaustive list of exclusions, specifically excluding promissory notes, real estate mortgages, security agreements, guaranty agreements, letters of credit, student loans, and credit cards. KAN. STAT. ANN. § 16-117(a) (Supp. 1990).

The distinction between sophisticated and unsophisticated borrowers is supported by the argument that a credit agreement statute's goal: should be to protect the lender against claims raised by sophisticated borrowers who were or could have been represented by counsel and who could have had any agreements reduced to written form. At the same time, the state legislature must also be sensitive to the interests of less sophisticated borrowers who were not or could not have been represented by counsel and who may not, because of their lack of bargaining power, have been in a position to insist upon having their full agreements reduced to written form.

Culhane & Gramlich, supra note 29, at 1786.

See, e.g., IOWA CODE ANN. § 535.17(7) (West Supp. 1991) (displacing...
cognize at least some common law protections for the borrower. Of particular importance is the continued viability of the promissory estoppel doctrine, which prevents lenders from using the writing requirement as a blanket defense in cases where doing so would produce inequitable results.

B. MINNESOTA’S CREDIT AGREEMENT STATUTE

Although sweeping generalizations are impossible given the diversity among state statutes, the Minnesota statute provides some useful lessons and insights. Minnesota’s credit agreement statute, passed in 1985, was one of the first in the country. Several states have patterned their credit agreement statutes after the Minnesota statute, and some have adopted almost identical language. Moreover, almost all of the case law to date has been decided under the Minnesota statute.

51. See, e.g., OR. REV. STAT. ANN. § 41.580(2)(a) (Butterworth Supp. 1990) (providing that “all defenses and exceptions to [the Statute of Frauds] recognized by the courts of this state shall also apply to [the credit agreement statute]”).

52. A provision adding credit agreements to the traditional Statute of Frauds, see, e.g., HAW. REV. STAT. § 656-1(8) (Supp. 1991), seems to indicate the continued validity of traditional defenses and exceptions. See HAWAII COMM. REP. NO. 17, at 2 (April 21, 1990) (“Traditional common law remedies will continue to apply.”).


A promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce the action or forbearance is enforceable notwithstanding the Statute of Frauds if injustice can be avoided only by enforcement of the promise. The remedy granted for breach is to be limited as justice requires.


54. 1985 Minn. Laws 784.

55. See, e.g., FLORIDA H.R. COMM. ON COMMERCE, STAFF ANALYSIS & ECONOMIC IMPACT STATEMENT 4 (Apr. 9, 1989) (“The language of HB 878 has been patterned after the Minnesota credit agreement statute.”).


57. There have been very few cases outside of Minnesota. See Commercial Bank of Korea, Ltd. v. Charone, Inc., No. 90-C-260, 1990 WL 115790 (N.D. Ill. Aug. 3, 1990) (holding that the Illinois credit agreement statute will not be
The Minnesota statute operates in a straightforward manner.\textsuperscript{58} It provides that a borrower "may not maintain an action on a credit agreement"\textsuperscript{59} unless that credit agreement is in writing, includes the "relevant terms and conditions,"\textsuperscript{60} and is signed by both parties.\textsuperscript{61} The statute broadly defines a "credit agreement"\textsuperscript{62} and also identifies specific actions, such as a course of dealing, that will not lead to an enforceable modification of a credit agreement.\textsuperscript{63} The legislative history makes clear that the purpose of the Minnesota statute is to increase certainty regarding the binding effect as well as the terms of a

\textsuperscript{58} The Minnesota statute reads:

\textbf{MINN. STAT. § 513.33 (1990).}

\textbf{513.33 CREDIT AGREEMENTS}

Subdivision 1. Definitions. For the purpose of this section, the following terms have the meanings given them:

(1) "credit agreement" means an agreement to lend or forbear repayment of money, goods, or things in action, to otherwise extend credit, or to make any other financial accommodation;

(2) "creditor" means a person who extends credit under a credit agreement with a debtor; and

(3) "debtor" means a person who obtains credit or seeks a credit agreement with a creditor or who owes money to a creditor.

Subd. 2. Credit agreements to be in writing. 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.

Subd. 3. Actions not considered agreements. (a) The following actions do not give rise to a claim that a new credit agreement is created, unless the agreement satisfies the requirements of subdivision 2:

(1) the rendering of financial advice by a creditor to a debtor;

(2) the consultation by a creditor with a debtor; or

(3) 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.

(b) A credit agreement may not be implied from the relationship, fiduciary, or otherwise, of the creditor and the debtor.
Unfortunately, Minnesota courts have struggled to interpret the statute consistently.

C. MINNESOTA CASE LAW

Although the case law under the Minnesota credit agreement statute is limited, cases interpreting the statutes of other states are virtually non-existent. Thus, a look at the Minnesota case law is necessary when attempting to assess the impact of credit agreement statutes. The Minnesota cases have raised issues about what must be in writing, the role of the parol evidence rule, and the statute's effect on fraud claims.

64. The purpose of the Minnesota credit agreement statute is to:

   improve communication and avoid the misunderstanding and the potential litigation that can occur if [the credit agreement statute] is not in place. It provides greater certainty in lending transactions for both the borrower and the lender so when a person is in a position of needing a loan he will know that he has a firm and forceful contractual commitment from the lender when the loan commitment has been reduced to writing. Right now that is open to litigation and question because not only is there a question of whether the commitment is made, but also the terms and conditions of the commitment itself, so this removes all those uncertainties and should benefit both lender and borrower.

65. See supra note 57 and accompanying text.

66. See infra notes 69-80 and accompanying text.

67. See infra notes 81-114 and accompanying text.

68. See infra notes 115-30 and accompanying text. Additionally, a Minnesota court held that retroactive application of the statute is constitutional. Drewes v. First Nat'l Bank of Detroit Lakes, 461 N.W.2d 389, 391 (Minn. Ct. App. 1990) (holding that the application of the statute to bar a claim on an al-
1. What Must Be in Writing

Litigation under the Minnesota statute has focused on determining what constitutes a "credit agreement" and what elements of a "credit agreement" must be in writing. Generally, borrowers have alleged either that the parties orally modified a prior written agreement or that a lender made an oral promise before or contemporaneously with the execution of a written agreement.

a. Modifications

Minnesota courts have dismissed borrowers' claims that alleged a lender's oral promise or conduct, in effect, modified a written credit agreement. In one case, Becker v. First American State Bank of Redwood Falls, the borrowers alleged that a bank with which they had done business for more than ten years orally agreed to continue financing the borrowers' business if they reduced their indebtedness. The borrowers claimed that they reduced their indebtedness, but, two years later, the lender refused the borrowers' request for an additional loan. The borrowers sued for damages under the oral agreement. The court, however, held that the alleged agreement was a "credit agreement" that needed to be in writing. Thus, the court determined that the credit agreement statute required a ruling for the lender as a matter of law.

In another case, Fronning v. Blume, the written credit agreement made clear that the lender retained complete discretion over additional advances. Nevertheless, the borrower alleged that his course of dealing with the lender entitled him to

69. 420 N.W.2d 239 (Minn. Ct. App. 1988).
70. Id. at 239.
71. Specifically, the borrowers claimed that in reliance on the oral agreement, they sold several parcels of real estate for less than market value and used the proceeds to reduce their indebtedness to the lender. Id.
72. Id. at 240.
73. Id.
74. Id.
75. Id. at 241.
76. 429 N.W.2d 310 (Minn. Ct. App. 1988).
77. Id. at 311. The relevant clause read: "However, each individual loan or advance will always be at the sole discretion of our officers, based on whatever information the bank then has with respect to your financial condition. Nothing herein should be interpreted as being a promise to make any one or more loans." Id.
further credit or a warning that no additional credit would be forthcoming.\(^78\) In dismissing the borrower's claim, the court noted that the statute clearly provides that no credit agreement will be "implied from the relationship."\(^79\)

In short, the Minnesota courts have consistently relied on the credit agreement statute to dismiss borrowers' claims that a lender's oral promise or conduct altered a prior written credit agreement.\(^80\)

b. \textit{Contemporaneous Oral Promises or Conditions and the Parol Evidence Rule}

In several cases, borrowers have claimed that a lender made an oral promise at the time the parties executed a written credit agreement. Inconsistent methods of analysis by the courts, particularly when addressing the parol evidence rule,\(^81\)

\(^78\) \textit{Id.} at 314.
\(^79\) \textit{Id.;} see also \textit{Rural Am. Bank of Greenwald v. Herickhoff, 473 N.W.2d 361, 363 (Minn. Ct. App. 1991)} (concluding that the Legislature's primary goal was "to prevent borrowers from using an ongoing lending relationship with a lender to enforce unwritten agreements for future loans").
\(^80\) One non-Minnesota case has also addressed the issue of whether an alleged agreement was a "credit agreement" and thus within the terms of a credit agreement statute. \textit{Pima Fin. Serv. Corp. v. Selby, No. 90-CA0722, 1991 WL 64156 (Colo. Ct. App. Apr. 25, 1991)}. This case involved a purported settlement agreement. Pima Financial had foreclosed on property securing repayment of a promissory note and brought an action to recover a deficiency judgment. \textit{Id.} at *1. During the litigation, the parties entered into settlement negotiations. \textit{Id.} When the borrower-defendant tendered to Pima Financial a written settlement agreement, Pima did not sign it. \textit{Id.} The borrower later brought a "motion to enforce settlement agreement." \textit{Id.} The trial court concluded that the purported settlement agreement constituted a "credit agreement" within the meaning of the Colorado statute. \textit{Id.} The Court of Appeals affirmed. \textit{Id.} at *3. The court noted that under the Colorado statute, a "credit agreement" includes any "amendment of, cancellation or waiver of, or substitution for any and all terms or provisions" of any credit agreement. \textit{Id.} The court held that the alleged settlement agreement would have canceled or waived the original credit agreement, and therefore was itself a "credit agreement." \textit{Id.} at *4. Thus, the Colorado credit agreement statute prohibited enforcement of the alleged settlement. \textit{Id.}

\(^81\) The parol evidence rule provides that evidence of prior or contemporaneous agreements or negotiations is not admissible to contradict a term of an integrated writing. \textit{Restatement (Second) of Contracts} § 215 (1979); see also \textit{John D. Calamari & Joseph M. Perillo, The Law of Contracts} § 3-2, at 135-36 (3d ed. 1987). The \textit{Restatement (Second) of Contracts} states: "An integrated agreement is a writing or writings constituting a final expression of one or more terms of an agreement." \textit{Restatement (Second) of Contracts} § 209(1) (1979). Moreover, an additional oral term which does not contradict a written agreement is inadmissible if the written agreement is a completely integrated writing. \textit{Id.} § 216. To be completely integrated, a writing must be "a complete and exclusive statement of the terms of the agreement." \textit{Id.} § 210(1).
has led to disparate results in these cases.

In *Pako Corp. v. Citytrust,* a borrower alleged that an oral promise made in connection with a written loan agreement permitted the borrower to compel the lender to assign the loan to a third party lender chosen by the borrower. The court held that the "broad language" of the credit agreement statute extended to the alleged oral condition. Without mentioning the parol evidence rule, the court found that the statute's writing requirement prevents enforcement of an oral condition of an underlying written agreement.

In other cases, however, Minnesota courts have been more sympathetic to borrowers' claims that a lender made an oral promise in connection with a written credit agreement. For example, in *Rural American Bank of Greenwald v. Herickhoff,* the defendant borrowed money to finance his son's farming operation after his son had exhausted his own credit limit. The defendant alleged that bank officials told him that the farming operation's proceeds would be used to pay off the defendant's loan first. In fact, the bank applied the proceeds to pay off the son's loan, after which the bank sued the defendant on the note. The court questioned whether the oral agreement to apply farm proceeds to one loan before another was a separate credit agreement within the meaning of the statute. The court held that the oral agreement was not a separate credit agreement and thus, without further explanation, concluded that the credit agreement statute had no application to these facts. Because neither party raised a parol evidence issue, the

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82. 109 B.R. 368 (D. Minn. 1989).
83. Id. at 370.
84. Id. at 377.
85. Id.
87. Id. at 361.
88. Id. at 361-62.
89. Id. at 362.
90. Id.
91. The court's opinion does not address whether this alleged oral condition of the written agreement needed to be in writing. See id. at 363.
92. Id. In support of its conclusion, the court stated that the legislative purpose behind the statute was to prevent borrowers from using an ongoing lending relationship to enforce unwritten agreements for future loans, not to address the obligations of parties under a written loan agreement. Id. The court also noted the statute prevents a debtor from "‘maintain[ing] an action,’” but not necessarily from asserting an oral agreement as a defense to an action by a lender. Id. (citing MINN. STAT. § 513.33-2 (1990)). In comparison, some credit agreement statutes explicitly provide that a "credit agreement is not enforceable by way of action or defense." MD. CTS. & JUD. PROC. CODE
court declined to address it.\textsuperscript{93}

Other courts have framed the issue similarly. In two cases, borrowers executed mortgages and later alleged that the lenders orally promised not to record those mortgages.\textsuperscript{94} In both cases the courts found that the alleged promise to refrain from recording the mortgage was not a separate credit agreement and, therefore, did not necessarily need to be in writing.

In one case, \textit{Carlson v. Estes},\textsuperscript{95} the parties executed a mortgage, a promissory note, and a mortgage collateral agreement.\textsuperscript{96} At the time the parties executed these documents, the lender allegedly assured the borrower that the mortgage would be recorded only if the lender later paid off a second mortgage for the borrower.\textsuperscript{97} The borrower paid the second mortgage himself, but the lender recorded the first mortgage nevertheless.\textsuperscript{98} The court concluded that the three documents taken together constituted a credit agreement.\textsuperscript{99} Moreover, the court found that the alleged oral promise not to record the mortgage was not a separate credit agreement automatically precluded by the statute.\textsuperscript{100} The court then addressed the parol evidence rule. The court noted that parol evidence is admissible when the written agreement is ambiguous.\textsuperscript{101} The court remanded the case for a determination whether the documents were ambiguous as to the parties' intent to record the mortgage.\textsuperscript{102} If no ambiguity existed, the court directed that the parol evidence rule bars evidence of the alleged oral promise.\textsuperscript{103} If the documents were ambiguous, evidence of the alleged oral promise would be admissible.\textsuperscript{104}

\begin{footnotesize}
\begin{itemize}
  \item \textsuperscript{93} 473 N.W.2d at 363 n.2.
  \item \textsuperscript{95} 458 N.W.2d 123 (Minn. Ct. App. 1990).
  \item Id. at 127.
  \item Id. at 125.
  \item Id.
  \item Id. at 127.
  \item Id.
  \item Id.
  \item Id.
  \item Id.
  \item Id.
  \item Id.
  \item Id.
\end{itemize}
\end{footnotesize}
In the other case, *Ingvalson v. Habberstad*, the borrowers executed a mortgage on their farm to secure a line of credit. The borrowers claimed that the bank later told them that it expected a bank examination by regulators and "as a favor the bank wanted additional mortgages" which would be temporary and unrecorded. The borrowers executed the additional mortgages, but when they requested that the bank return the mortgages, it refused. In an attempt to prevent foreclosure, the borrowers sought to prove the alleged oral promise to return the mortgages. The trial court granted summary judgment for the lender, holding that the parol evidence rule and the credit agreement statute barred evidence of the oral agreement. The court of appeals reversed both conclusions. The court held that the alleged promise to return the mortgages was not a separate credit agreement and thus a writing was not required. The court also stated that the parol evidence rule did not exclude evidence of fraudulent oral representations to induce another to enter into a written agreement. The court did not explain the parol evidence rule's relationship to the credit agreement statute.

Thus, in most cases where a borrower has alleged an oral promise made prior to or contemporaneously with the execution of a written agreement, the courts have allowed evidence of that promise. The parol evidence rule has generally not barred the evidence.

2. Fraud Claims

Although the litigation has focused on what agreements and terms must be in writing, the Minnesota courts have also addressed the credit agreement statute's effect on allegations of fraud. Fraud may serve both as a defense to a suit on a con-

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106. Id. at *1.
107. Id. at *3. The apparent purpose of the additional mortgages would be to deceive regulators about the extent to which the bank's loans were secured. See id.
108. Id.
109. Id. at *4.
110. Id.
111. Id. at *6, *9.
112. Id. at *9. Unlike in *Carlson*, however, the court did not analyze whether the parol evidence rule barred evidence of the alleged oral promise.
113. Id. at *5-6.
114. See id.
tract and as an independent tort.115 Most often borrowers have alleged fraudulent inducement, contending that they would never have entered into an agreement had it not been for a lender's intentional misrepresentations.116 Here, too, the courts' approaches seem inconsistent.

The courts have allowed fraudulent inducement claims in two cases. In Ingvalson v. Habberstad,117 the borrowers alleged that the bank's representation that their mortgages would be used only to satisfy regulators, and then would be returned, induced the borrowers to execute the mortgages and constituted fraud.118 As noted earlier,119 the court allowed evidence showing that the bank fraudulently induced the borrowers to execute the mortgages.120 The court concluded that neither the parol evidence rule nor the credit agreement statute barred such a claim.121

In Fronning v. Blume,122 also mentioned above, the borrower alleged that he refused to sign a mortgage until the lender convinced him it was merely a description of his farm and that the document would stay in the loan officer's desk.123 The court allowed a claim that the lender fraudulently obtained the mortgage.124 Here, too, the court held that neither the parol evidence rule nor the credit agreement statute barred

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115. CALAMARI & PERILLO, supra note 81, § 9-13, at 356.
116. Not all borrowers who allege fraud, however, argue that they would never have entered into the agreement absent fraud. For example, when the lender in Capital Bank v. Sorenson, No. C4-90-1122, 1990 Minn. App. LEXIS 1267 (Minn. Ct. App. Dec. 24, 1990), sued on certain promissory notes as they became due, the borrower counterclaimed for fraudulent misrepresentation, alleging an oral agreement to roll over the notes. Id. at *4. The court held that the counterclaims failed as a matter of law because of the credit agreement statute. Id. The court stated that under the parol evidence rule, evidence of fraudulent misrepresentation is admissible only to show that no enforceable contract was made, not to vary the terms of the admitted contract. Id. at *4-5. ("[R]eliance on an oral representation is unjustifiable as a matter of law if the written contract provision explicitly contradicts the misrepresentation.").
118. Id. at *3-4.
119. See supra note 113 and accompanying text.
120. Ingvalson, 1989 Minn. App. LEXIS 854, at *5-6. The court held that the parol evidence rule did not bar such evidence. Id.
121. Id. at *9.
122. 429 N.W.2d 310 (Minn. Ct. App. 1988).
123. Id. at 312.
124. Id. at 313. The court held that the parol evidence rule did not bar evidence of fraudulent inducement. Id. The court distinguished between evidence of oral terms offered to show that no contract was ever made and evidence to contradict, vary, or add to terms of the written contract. Id.
the claim.\textsuperscript{125}

In another case, however, decided after \textit{Ingvalson} and \textit{Fronning}, a court summarily dismissed a borrower's fraudulent inducement claim. In \textit{Norwest Bank Montevideo v. General Dryer Corp.},\textsuperscript{126} the borrower alleged that Norwest orally agreed to continue extending credit if the borrower received a disaster loan and applied the proceeds to reduce his indebtedness to the bank.\textsuperscript{127} The borrower received the disaster loan and turned over the proceeds, but Norwest denied additional credit.\textsuperscript{128} The borrower claimed fraudulent inducement.\textsuperscript{129} The court held that because the alleged fraud arose from the credit agreement, the statute precluded the borrower from maintaining the action.\textsuperscript{130}

In sum, borrowers' claims of fraudulent inducement have had a mixed reception by the courts. The court in \textit{General Dryer} held that the credit agreement statute precluded a fraudulent inducement claim, while in \textit{Ingvalson} and \textit{Fronning} the courts allowed fraudulent inducement claims to proceed.

IV. THE FUTURE FOR WRITTEN CREDIT AGREEMENT STATUTES

A. LESSONS FROM THE MINNESOTA CASE LAW

The Minnesota case law provides several lessons for other courts interpreting credit agreement statutes. First, the case law offers insight on how courts should analyze what must be in writing.\textsuperscript{131} This issue involves not only which agreements must be in writing, but which elements of the agreement must be in writing. Second, and relatedly, the case law highlights the need for a consistent approach when analyzing parol evidence.\textsuperscript{132} Finally, the case law indicates that courts will be forced to consider the impact of credit agreement statutes on fraud claims.\textsuperscript{133}

\textsuperscript{125} \textit{Id.}
\textsuperscript{127} \textit{Id.} at *1-2.
\textsuperscript{128} \textit{Id.} at *2.
\textsuperscript{129} \textit{Id.}
\textsuperscript{130} \textit{Id.} at *4-5.
\textsuperscript{131} See infra notes 134-43 and accompanying text.
\textsuperscript{132} See infra notes 144-56 and accompanying text.
\textsuperscript{133} See infra notes 157-70 and accompanying text.
1. What Must Be in Writing

In making this determination, courts should first analyze whether the credit agreement statute covers the disputed oral promise. The statute may apply either because the alleged oral promise is itself a credit agreement, or because it is a term of a written credit agreement which the statute requires to be in writing. Unfortunately, the Minnesota courts have not been precise when addressing the issue of what must be in writing.

Although it is clear that no modification of a written agreement is enforceable unless the modification is itself in writing, borrowers' allegations that the complete original credit agreement was not in writing has confused the Minnesota courts. In these types of cases borrowers are alleging, in essence, an oral promise made prior to or contemporaneously with the written agreement. Courts have frequently framed the issue as whether the alleged oral promise made prior to or contemporaneously with a written agreement constitutes a separate credit agreement. Such an approach is misguided. The plain language of the Minnesota statute indicates that the courts should analyze whether the alleged oral promise is a term of the parties' credit agreement rather than a separate credit agreement. The Minnesota statute requires that the “rel-

134. The statute clearly precludes claims where a borrower alleges an oral or conduct-based modification to an existing contract. For example, in Becker v. First Am. State Bank of Redwood Falls, 420 N.W.2d 239 (Minn. Ct. App. 1988), the borrowers' claim that the lender orally agreed to loan them additional funds in the future clearly amounted to an alleged oral modification of a written credit agreement and the statute precluded enforcement. Id. at 240. Similarly, in Fronning v. Blume, 429 N.W.2d 310 (Minn. Ct. App. 1988), the court correctly concluded that a course of dealing could not create an enforceable modification of a written credit agreement. Id. at 314; see also Pima Fin. Serv. Corp. v. Selby, No. 90-CA0722, 1991 WL 64156 (Colo. Ct. App. Apr. 25, 1991) (finding that an alleged settlement agreement that would have canceled the original credit agreement was itself a credit agreement and needed to be in writing to be enforceable).

135. For example, in Rural Am. Bank of Greenwald v. Herickhoff, 473 N.W.2d 361 (Minn. Ct. App. 1991), the court decided that the statute did not prevent evidence of an oral promise to apply the farm proceeds to one loan before the other because this promise would not create a separate credit agreement. Id. at 362-63. Similarly, in both Carlson v. Estes, 458 N.W.2d 123 (Minn. Ct. App. 1990), and Ingvalson v. Habberstad, No. C8-89-46, 1989 Minn. App. LEXIS 854 (Minn. Ct. App. Aug. 1, 1989), the courts found that alleged oral promises made in connection with the execution of mortgages were not separate credit agreements and thus the statute did not preclude evidence of these promises. For a discussion of Carlson and Ingvalson, see supra notes 95-114 and accompanying text.
relevant terms and conditions" be in writing. This differs from 
the traditional Statute of Frauds requirement that only the "es-
sential terms" must be in writing. "Essential" indicates 
something that is fundamental or indispensable. Thus, a 
writing that contains all "essential terms" need not even be a 
final expression of the parties' agreement. By contrast, a re-
quirement that the "relevant terms and conditions" be in writ-
ing implies a more stringent requirement. By permitting 
only "irrelevant" terms to be omitted from the writing, the 
Legislature has directed that courts view each written credit 
agreement as the complete agreement. Thus, the logical con-
clusion is that a writing which contains all "relevant terms" 
must be the final and total expression of the parties' 
agreement.

137. See Culhane & Gramlich, supra note 29, at 1789 ("Minnesota [has] 
abandoned the approach of the 1677 Statute.").
A writing satisfies the traditional Statute of Frauds if it reasonably identi-
ifies the subject of the contract, indicates that a contract has been made be-
tween the parties, states with reasonable certainty the essential terms of the 
contract, and is signed by or on behalf of the party to be charged. RESTATE-
MENT (SECOND) OF CONTRACTS § 131 (1979). There is no standard formula for 
determining the "essential terms" that must be listed in the writing. See, e.g., 
1981) (stating the general rule in New Jersey that the writing must contain 
the essential terms expressed with such certainty that they may be ascertained 
from the writing itself).
138. AMERICAN HERITAGE DICTIONARY 465 (2d College ed. 1982).
139. CALAMARI & PERILLO, supra note 81, § 19-27, at 817.
140. "Relevant" means any term "[r]elated to the matter at hand; pertinent." 
AMERICAN HERITAGE DICTIONARY 1044 (2d College ed. 1982).
A critic of the Oregon statute recognized the effect of this type of lan-
guage when the Oregon legislature was considering a requirement that the 
written agreement set "forth the terms and any conditions of the promise or 
commitment." TESTIMONY OF PHIL GOLDSMITH REGARDING SENATE BILL 548, 
at 4 (June 1, 1989). He argued that such language "would not simply require 
written confirmation that an agreement had been made, but also would limit 
the terms enforceable against the lender to those contained in the writing." 
Id. This language "would mandate that every conceivable promise a lender 
could make during the course of a loan be in writing," id. at 5, and "would bar 
introduction of . . . evidence to supplement the written agreement," id. at 10. 
Significantly, the Oregon legislature amended the proposed language and the 
Oregon credit agreement statute now only requires some evidence that a con-
tract was formed. See OR. REV. STAT. ANN. § 41.580(1)(h) (Butterworth Supp. 
1990).
141. The Missouri legislature made this clear. The Missouri statute re-
quires "the relevant terms and conditions" be in writing. MO. ANN. STAT. 
§ 432.045(2) (Vernon Supp. 1991). The statute then requires the lender to pro-
vide notice to the borrower that the writing "is the complete and exclusive 
statement of the agreement between us." Id. § 432.045(3).
LENDER LIABILITY

The central purpose behind the credit agreement statutes also supports a strict requirement that the complete agreement be in writing. Although a minimal writing is some evidence that the parties made an agreement, and therefore prevents fraud, that concern was not the primary motivating factor behind these statutes. Rather, the goal is to allow a complete and objective understanding of the agreement.\(^{142}\) To allow borrowers to assert, as they did in Herickoff, Carlson, and Ingvalson, that an alleged oral aspect of the agreement does not by itself fit within the definition of a credit agreement, and therefore does not need to be in writing, defeats this purpose.\(^{143}\)

2. The Parol Evidence Rule

Given that the Minnesota statute’s requirement that all “relevant terms” be in writing directs that the written credit agreement be the complete agreement,\(^ {144}\) the parol evidence rule should prevent attempts to introduce evidence of additional oral terms, even if those terms do not necessarily contradict the written agreement.\(^ {145}\) Unfortunately, Minnesota courts have failed to recognize the statute’s requirement that all “relevant terms” be in writing.\(^ {146}\)

The appropriate analytical approach for statutes similar to Minnesota’s is first to determine whether the dispute involves a credit agreement at all. If the dispute involves a credit agreement, the court must determine whether the alleged additional oral term is “relevant.” The logical definition of a “relevant term” is one which would naturally be included in the writ-

\(^{142}\) See supra note 18 and accompanying text.

\(^{143}\) Pako Corp. v Citytrust, 109 B.R. 368 (D. Minn. 1989), is the only case decided under the Minnesota statute that adopts this approach, at least implicitly. In Pako Corp., the court decided that an alleged oral promise to allow the borrower unilaterally to assign the loan was an oral term of a written agreement and the statute required it to be in writing. Id. at 377.

\(^{144}\) See supra notes 136-41 and accompanying text.

\(^{145}\) CALAMARI & PERILLO, supra note 81, § 3-4, at 145.

\(^{146}\) For example, in Rural Am. Bank of Greenwald v. Herickoff, 473 N.W.2d 361 (Minn. Ct. App. 1991), the court did not address whether the alleged promise to apply farm proceeds to one loan before the other was a “relevant term” even though the borrower in that case indicated he would not have signed the loan agreement without that assurance. Id. at 362-63. Similarly, in both Carlson v. Estes, 458 N.W.2d 123 (Minn. Ct. App. 1990), and Ingvalson v. Habberstad, No. C6-89-46, 1989 Minn. App. LEXIS 854 (Minn. Ct. App. Aug. 1, 1989), the courts ruled that the alleged oral promises to refrain from recording the mortgages were not separate credit agreements but rather were possible terms of the written agreement. Carlson, 458 N.W.2d at 127; Ingvalson, 1989 Minn. App. LEXIS 854, at *9.
If the alleged oral term is one which the parties would naturally include in the written agreement, the parol evidence rule should effectively bar evidence of that term. Unfortunately, Minnesota courts have thus far not utilized this approach.

Many credit agreement statutes do not require that all "relevant terms" be in writing. Thus, a similar parol evidence analysis will not be required under all credit agreement statutes. Some states have merely added the writing requirement to their existing Statute of Frauds. In those states only the "essential" terms must be in writing, and thus a court cannot presume the written agreement is a complete integration. Although requiring only a minimal writing before a party can then allege additional oral terms contradicts the central purpose of these statutes, in these states courts may have no alternative but to allow such claims.

Other states have dealt with the parol evidence rule directly. Under several statutes a credit agreement is conclusively presumed to be a complete integration and evidence of oral terms is inadmissible. Thus, these statutes explicitly

147. See Restatement (Second) of Contracts § 216(2)(b) (1979).
148. See supra note 81.
149. For example, in Carlson, after recognizing that a oral promise not to record a mortgage would be "an integral part of the entire credit agreement," Carlson, 458 N.W.2d at 127, the court avoided analyzing whether such a term was "relevant." The court then held that parol evidence would be admissible if the written credit agreement was not the complete agreement. Id.

In Pako Corp. v. Citytrust, 109 B.R. 368 (D. Minn. 1989), however, the court reached the logical result, although it failed to discuss explicitly whether the disputed term was a "relevant term." Addressing the borrower's allegation that an oral condition of the written loan agreement permitted the borrower to assign the loan unilaterally, the court ruled that the statute precluded the claim. Id. at 377-78. The court presumably found, but did not explicitly state, that such a term was "relevant."

150. See supra note 31 (discussing generally the forms of credit agreement statutes).
151. See supra notes 137-39 and accompanying text.
152. See supra note 18 and accompanying text (discussing the general purpose of credit agreement statutes to increase certainty in contractual liability).
153. For example, the Texas statute provides that:

The rights and obligations of the parties . . . shall be determined solely from the written loan agreement, and any prior oral agreements between the parties are superseded by and merged into the loan agreement. . . . An agreement . . . may not be varied by any oral agreements or discussions that occur before or contemporaneously with the execution of the agreement.

TEX. BUS. & COMM. CODE ANN. §§ 26.02(c)-(d) (West Supp. 1991); see also WASH. REV. CODE ANN. § 19.36.110 (West Supp. 1991) ("The rights and obligations of the parties to a credit agreement shall be determined solely from the
dictate that courts should conduct the same type of analysis the Minnesota statute logically requires.

In sum, whether the basic agreement needs to be in writing will depend on how broadly courts believe the legislatures intended their respective statutes to apply. Once a court determines that the statute applies, the court must then decide what terms need to be in writing.\textsuperscript{154} If a legislature has not given explicit instructions regarding parol evidence, a court should look to whether only "essential terms" need to be in the written agreement, or whether the written agreement must contain all "relevant terms."\textsuperscript{155} Unlike "essential," "relevant" is an inclusive term and should be broadly construed to mean any term that would naturally be included in the written agreement.\textsuperscript{156}

3. Fraud

Litigation under the Minnesota statute also indicates that borrowers will continue to assert fraud claims. In general, courts have consistently refused to allow a writing requirement to become a vehicle for fraud,\textsuperscript{157} and courts should apply this policy to credit agreement statutes as well.\textsuperscript{158} Nevertheless, courts will need to analyze fraud claims carefully.

Although commentators have noted that it is difficult to reduce the law of fraud to firm rules,\textsuperscript{159} it is clear that fraud re-

\textsuperscript{154} See supra notes 147-53 and accompanying text.
\textsuperscript{155} See supra notes 138-41 and accompanying text.
\textsuperscript{156} See supra notes 138-41 and accompanying text.
\textsuperscript{157} See supra note 53 and accompanying text (discussing promissory estoppel as a defense to the writing requirement of the Statute of Frauds).
\textsuperscript{158} The Hawaii Conference Committee "emphasize[d] that there is nothing in [the Hawaii statute] which will prevent a successful action against a lender that commits fraud." HAWAII CONF. COMM. REP. NO. 17, at 2 (APR. 21, 1990); see also Culhane & Gramlich, supra note 29, at 1791, 1797 ("None of the states, however, have gone so far as to preclude actions based on . . . fraud. . . . The Task Force believes it unnecessary to prohibit allegations of fraud.").
\textsuperscript{159} CALAMARI & PERILLO, supra note 81, § 9-24, at 377-78. The specific elements of fraud vary from state to state, but generally, a party must show that the speaker knowingly or recklessly made a false, material representation on which the party relied and, as a consequence, was injured. RESTATEMENT (SECOND) OF TORTS §§ 525-27, 537-38 (1977). The Restatement states:

One who fraudulently makes a misrepresentation of fact, opinion, intention or law for the purpose of inducing another to act or to refrain
quires a misrepresentation of fact.\textsuperscript{160} Fronning v. Blume,\textsuperscript{161} in which the lender allegedly told the borrower that a mortgage was merely a description of his farm and had no legal effect,\textsuperscript{162} represents an easy case. If true, this was a clear misrepresentation of fact.

A case in which the lender does not perform an alleged oral promise presents a much harder issue for the courts. Black letter law states that a broken promise is a misrepresentation of fact only if the promise was made with an intent not to perform.\textsuperscript{163} Otherwise, every breach of contract would amount to fraud.\textsuperscript{164} The courts that have reviewed Minnesota's credit agreement statute have sometimes allowed and sometimes disallowed this type of fraud claim.\textsuperscript{165} The most noteworthy of these cases is Norwest Bank Montevideo v. General Dryer Corp.,\textsuperscript{166} where the borrower alleged that the lender orally agreed to continue financing if the borrower turned over proceeds from a disaster loan.\textsuperscript{167} The court summarily dismissed the fraud claim, concluding that the statute precluded it.\textsuperscript{168}

The court's analysis in General Dryer was incomplete. On the surface this situation may be hard to distinguish from a promise which the lender later decides not to perform. However, in General Dryer, the borrower alleged intentional deceit, not only as a defense to enforcement of the contract, but also as

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\textsuperscript{160} \text{CALAMARI \& PERILLO, supra note 81, § 9-17, at 361; RESTATEMENT (SECOND) OF CONTRACTS § 162(1)(a) (1979).}
\textsuperscript{161} \text{429 N.W.2d 310 (Minn. Ct. App. 1988).}
\textsuperscript{162} \text{Id. at 312.}
\textsuperscript{163} \text{CALAMARI \& PERILLO, supra note 81, § 9-19, at 365; see also Capital Bank v. Sorenson, No. C4-90-1122, 1990 WL 211991 (Minn. Ct. App. Dec. 24, 1990). In Capital Bank, the borrower claimed fraud when the lender refused to honor an alleged oral agreement to roll over the notes. \textit{Id.} at *2. However, unless the lender never intended to honor the alleged agreement, there could be no fraud, only a breach of contract. Moreover, there could be no breach of contract without a writing because of the credit agreement statute.}
\textsuperscript{164} \text{W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 109, at 764 (5th ed. 1984).}
\textsuperscript{165} \text{For example, in Ingvalson v. Habberstad, No. C5-89-46, 1989 WL 84165 (Minn. Ct. App. Aug. 1, 1989), where the borrower alleged that the lender promised to return the mortgages after a regulatory examination, the court allowed the fraud claim to proceed. \textit{Id.} at *4.}
\textsuperscript{166} \text{No. C4-89-1986, 1990 WL 48553 (Minn. Ct. App. Apr. 24, 1990).}
\textsuperscript{167} \text{\textit{Id.} at *1.}
\textsuperscript{168} \text{\textit{Id.} at *2.}
an independent tort. Thus, the borrower necessarily alleged a misrepresentation of fact, i.e., the lender never intended to perform the promise to extend additional credit. As such, the court incorrectly found the statute precluded the claim.

Credit agreement statutes should not protect fraud. However, courts analyzing fraud claims should determine whether the borrower is alleging a misrepresentation of fact. A broken promise is only a misrepresentation of fact if there was no intention to perform at the time the promise was made. If the borrower alleges a misrepresentation of fact, the court should allow the claim to stand, either as a defense on the contract or for an action in tort. This may appear to place a premium on creative pleading, but the difficulty in proving fraud, not the credit agreement statute, should provide the deterrent to frivolous claims.

B. UNRESOLVED ISSUES

Minnesota courts have not had an opportunity to address all of the important questions that credit agreement statutes produce. Moreover, statutes that deviate from the Minnesota model will raise additional issues. At least one of these issues is foreseeable: the recognition and interpretation of exceptions to credit agreement statutes.

The viability of promissory estoppel claims will be of particular importance in litigation involving the credit agreement statutes. Some credit agreement statutes instruct courts in this regard, while others do not. Absent explicit statutory in-

169. Id. at *1-2. The majority rule is that a writing requirement in no way affects the validity of a tort action. George N. Stepaniuk, Note, The Statute of Frauds as a Bar to an Action in Tort for Fraud, 53 FORDHAM L. REV. 1231, 1234 n.22 (1985) (citing cases).
170. See CALAMARI & PERILLO, supra note 81, § 9-13, at 356.
171. The doctrines of part performance and in-court admissions are other common law exceptions which may be important also. The Iowa statute, for example, dictates:

a credit agreement or modification of a credit agreement which is not in writing, but which is valid in other respects, is enforceable if the party against whom enforcement is sought admits in court that the agreement or modification was made, but no agreement or modification is enforceable . . . beyond the terms admitted.

172. See, e.g., COLO. REV. STAT. § 38-10-124(3) (Supp. 1991) (prohibiting part performance and promissory estoppel claims); IOWA CODE ANN. § 535.17(7) (West Supp. 1991) ("This section entirely displaces principles of common law and equity that would make or recognize exceptions to or otherwise limit or dilute the force and effect of its provisions."); OR. REV. STAT. ANN.
The purpose of the statutes indicates that courts should entertain, but also carefully scrutinize, estoppel claims.

Promissory estoppel requires justifiable reliance. Reliance on an oral promise will not be justifiable if the lender can show that the borrower knew that only written promises are enforceable. A sophisticated borrower will undoubtedly be aware of the statute's general writing requirement. The unsophisticated borrowers covered by these statutes may learn of the writing requirement from the lender, either because the statute requires notice or the lender voluntarily provides it. Therefore, even without an explicit estoppel preclusion, the writing requirement implicitly limits such actions. Nevertheless, if the borrower is unaware of the writing requirement and reasonably relies on the lender's oral assurances, some courts may permit promissory estoppel claims to proceed. This, too, is consistent with one purpose of the credit agreement statutes—protection for unwary borrowers. In short, in the absence of specific statutory instructions, courts should recognize promissory estoppel as an exception to credit agreement statutes but should also carefully analyze whether the alleged reliance was justifiable.

C. GENERAL CONCLUSIONS

Minnesota's credit agreement statute was one of the first in the country, and several states have emulated its language. Currently, more cases have been decided under the Minnesota statute than all other credit agreement statutes combined. Therefore, it is likely that other states, particularly those with statutes similar to Minnesota's, will look to the Minnesota case law for some guidance. Courts looking to the Minnesota opinions need to do so with a critical eye. Many of the decisions, although arguably reaching the proper result, lack a well-reasoned analysis.

§ 41.580(2)(a) (Butterworth Supp. 1990) (recognizing all traditional Statute of Frauds exceptions). The model credit agreement statute proposed by the ABA Task Force on Lender Liability Limitation Amendments to State Statutes of Frauds recommended that states preclude promissory estoppel actions. Culhane & Gramlich, supra note 29, at 1792.

173. CALAMARI & PERILLO, supra note 81, § 6-1, at 272.

174. Unsophisticated borrowers are often totally excluded from the statutes' coverage. See supra notes 40-49 and accompanying text.

175. Cf. Midland Nat'l Bank of Minneapolis v. Perrasoski, 299 N.W.2d 404, 413 (Minn. 1980) (holding that reliance on oral representations that contradict a partnership agreement would be unreasonable).

176. See supra notes 27-28 and accompanying text.

177. See supra notes 54-56 and accompanying text.
soned approach. Principally important, Minnesota courts have avoided addressing the question of what is a "relevant term" and have inconsistently analyzed borrowers' allegations of fraud. Ironically, Minnesota courts have been relatively sympathetic toward borrowers in determining what terms need to be in writing, and relatively sympathetic toward lenders in analyzing fraud claims. An opposite approach is more appropriate. A lender acting in good faith should be secure in the knowledge that the written credit agreement contains all legal obligations. Conversely, a lender acting in bad faith should not be able to hide behind a credit agreement statute.

CONCLUSION

The proliferation of credit agreement statutes is a positive development in business law. Professor Llewellyn's fifty-year-old assessment is more true now than ever—the sophistication of modern business confirms the need for greater predictability in contractual liability, and a writing requirement is an effective device. Courts have a responsibility to interpret these statutes in a way that will carry out the dual purposes of increasing certainty in contractual relations while also protecting unwary borrowers.

178. See supra notes 134-36 and accompanying text.
179. See supra notes 161-69 and accompanying text.
180. Llewellyn, supra note 14, at 747.