

10/25/02

SUPREME COURT OF LOUISIANA

No. 2002-CQ-0057

JESCO CONSTRUCTION CORPORATION

VERSUS

**NATIONSBANK CORPORATION, NATIONSCREDIT, AND
NATIONSCREDIT COMMERCIAL CORPORATION**

**AMERICAN INTERNATIONAL SPECIALTY LINES INSURANCE
COMPANY, CONTINENT CASUALTY COMPANY, UNDERWRITERS
AT LLOYD'S OF LONDON**

VERSUS

**BANK OF AMERICA COMMERCIAL FINANCE CORPORATION;
FORMERLY KNOWN AS NATIONSCREDIT COMMERCIAL FINANCE
CORPORATION**

**ON CERTIFIED QUESTION
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

CALOGERO, Chief Justice, dissents and assigns the following reasons:

I respectfully disagree with the majority's conclusion that the Louisiana Credit Agreement Statute precludes all actions for damages arising from oral credit agreements, regardless of the legal theory of recovery. As this court noted in *Whitney National Bank v. Rockwell*, 94-3049, p. 11 (La. 10/16/95), 661 So. 2d 1325, 1331, "[t]he Louisiana statute does not address, one way or the other, any protection of unsophisticated borrowers or any exemption based on fraud, misrepresentation, promissory estoppel or other equitable theory." Nevertheless, for the following reasons, the language chosen by the legislature, "[a] debtor shall not maintain an action **on a credit agreement** unless the agreement is in writing," indicates that the only cause of action on an oral credit agreement the statute precludes is breach of contract. (Emphasis added).

The federal district court in this case correctly held that the Louisiana Credit Agreement Statute barred Jesco's breach of contract claim against BACF because the parties did not execute a written contract. The statute does not, however, preclude Jesco's alternative theories of recovery, such as detrimental reliance, negligent misrepresentation, violation of the Unfair Trade Practices Act, and fraud, because these actions are not based "on a credit agreement."

As the majority notes, BACF allegedly led Jesco to believe that appraisals had been completed, terms negotiated, and closing documents circulated for the loan. Jesco further contends that BACF informed it that the loan had been approved and that the transaction would be completed within a matter of days. BACF's actions indicate that the alleged wrongful conduct occurred during the negotiation phase preceding the execution of any oral credit agreement between the two parties. As Jesco aptly noted in its brief to this court, "[a] representation of fact is not an 'agreement,' and a misrepresentation of a lender's capacity or willingness to close a loan is not a credit agreement." Plaintiff's alternative causes of action, therefore, are not based "on a credit agreement," but on pre-agreement behavior, and are not barred by the statute.

Jesco's alternative theories of recovery against BACF include fraud and negligent misrepresentation. A noteworthy commentary cited by this court in *Whitney Bank v. Rockwell*, specifically observed that no state has gone so far as to preclude actions on an oral agreement to lend based on negligent misrepresentation or fraud. John L. Culhane, Jr. & Dean C. Gramlich, *Lender Liability Limitation Amendments to State Statutes of Fraud*, 45 Bus. Law. 1779, 1791 (1991) (analyzing the 25 state credit agreement statutes passed at the time of the writing, including Louisiana's). Louisiana's statute contains the same language as the credit agreement

statutes of many other states, that an action cannot be brought on an oral credit agreement. *See* Fla. Stat. 687.0304 (1989); Minn. Stat. 513.33 (1985). As this court has noted, “the primary legislative purpose in enacting credit agreement statutes was to establish certainty as to the *contractual* liability of financial institutions.” *Whitney Bank*, 661 So. 2d at 1330. The language of the statute is, therefore, insufficient to indicate a legislative intent to preclude theories of recovery other than breach of contract. *See* Culhane & Gramlich, *supra*.

In 1989, the same year our legislature adopted the Louisiana Credit Agreement Statute, the American Bankers Association (“ABA”) drafted a model credit agreement statute. The drafters of this statute recognized that borrowers under an oral credit agreement often pursue theories of recovery other than breach of contract. Culhane & Gramlich, *supra*. Accordingly, the model statute specifically precludes actions on oral credit contracts based on the following legal or equitable theories:

- (a) An implied agreement based on course of dealing or performance or on a fiduciary relationship;
- (b) promissory or equitable estoppel;
- (c) part performance . . .; or
- (d) negligent misrepresentation.

Our legislature did not have the opportunity to review the ABA model statute before drafting the Louisiana Credit Agreement statute because the two statutes were enacted at approximately the same time. Nonetheless, the language of this model statute illustrates that the legislature could have easily phrased our statute to foreclose multiple theories of recovery. Other states have included more restrictive language in their credit agreement statutes. *See, e.g.*, 815 Ill. Comp. Stat. 160/2 (1989) (“a debtor may not maintain an action on or in any way related to a[n oral] credit agreement. . . .”); Colo. Rev. Stat. 38-10-124(3) (precluding actions on oral credit agreements based on fiduciary duty, partial performance, and promissory estoppel).

Our legislature often enacts statutes that preclude all legal theories of recovery. *See, e.g.*, La. Rev. Stat. 9:2800.52 (“this chapter establishes the exclusive theories of liability for manufacturers for damage caused by their product”); La. Rev. Stat. 23:1032 (“the rights and remedies herein granted to an employee. . . shall be exclusive of all other rights, remedies, and claims for damages. . . .”); La. Rev. Stat. 9:3150 (“This chapter provides the exclusive remedies, warranties, and prescriptive periods as between builder and owner relative to home construction, and no other provisions of law relative to warranties of redhibitory vices and defects shall apply.”). Therefore, when the legislature intends to preclude all theories of recovery in a statute, it consistently does so expressly and unequivocally, and there is no reason for this court to infer such an intent from this statute, which is silent regarding alternative theories of recovery.

The majority opinion will allow lenders to freely defraud unsophisticated borrowers. Lending institutions like BACF should not be allowed to commit misrepresentation and fraud, and engage in unfair trade practices to the detriment of innocent borrowers who sustain damage because of their good faith. Such a result surely extends the reach of the Louisiana Credit Agreement Statute beyond its plain language. Accordingly, I would hold that the Louisiana Credit Agreement Statute forecloses only a borrower’s breach of contract action on an oral credit agreement.