DREHER TOMKIES LLP

ALERT

FOR CLIENTS AND FRIENDS OF DREHER TOMKIES LLP

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COURT DISMISSES CLASS ACTION COMPLAINT RAISING "TRUE LENDER" CHALLENGES

The United States District Court for the District of Utah dismissed a class action complaint filed against Bill Me Later, Inc. and others alleging breach of contract and violations of various California laws, including the California Consumer Legal Remedies Act ("CLRA") and the California Constitution's usury provision. *Sawyer v. Bill Me Later, Inc.,* No. 2:11-cv-00988, 2014 WL 2159044 (D. Utah May, 23, 2014). In *Sawyer*, the consumer financed the purchase of a computer online by obtaining an extension of credit from CIT Bank via the Bill Me Later program. CIT Bank is a federally insured bank chartered in Utah. The credit contract provided that the consumer was accepting the loan in Utah, credit was being extended from Utah and provided for a 19.99% interest rate and late fees. CIT Bank financed the consumer's purchase by paying the merchant on the consumer's behalf. CIT Bank held the receivables arising under the account for at least two days before selling them to Bill Me Later. Bill Me Later acted as a servicer by processing credit applications on behalf of CIT Bank. The consumer's account and other consumers' accounts were sold to WebBank, which became the sole issuer of new accounts under the Bill Me Later program. WebBank also is a federally insured bank chartered in Utah.

The court held that the claims in the class action complaint were preempted by Section 27 of the Federal Deposit Insurance Act ("FDIA"), which authorizes state-chartered, federally insured banks to impose finance charges and late fees pursuant to the usury laws of the state where the bank is located. 12 U.S.C. § 1831d. The court indicated that prior precedent required the court to find the claims preempted by Section 27 of the FDIA even if Bill Me Later (and not the state-chartered banks) was the "true lender" as alleged in the complaint. *See Hudson v. ACE Cash Express, Inc.* No. 01-1336-C, 2002 WL 1205060 (S.D. Ind. May 30, 2002) (finding claims preempted by Section 85 of the National Bank Act despite accepting as true plaintiff's claims that a state-chartered bank played an "insignificant" role in a lending program that a nonbank had "designed for the sole purpose of circumventing Indiana usury law"); *Krispin v. May Dep't Stores Co.,* 218 F.3d 919 (8th Cir. 2000) (providing that state usury laws should not apply to receivables purchased from a bank on a daily basis by a non-bank participant in a credit program as the status of the originating entity [the bank] in the arrangement and not the ongoing assignee controls).

The court also cited Section 1876(c) of the Bank Service Company Act ("BSCA") in support of its holding. Section 1876(c) applies when a depository institution that is regularly examined by an appropriate federal banking agency causes to be performed for itself, by contract or otherwise, any services authorized under the BSCA whether on or off its premises. *See* 12 U.S.C. § 1876(c). Under Section 1867(c), when such a depositary institution contracts with a third-party service provider for such services, the performance is subject to regulation and examination by the federal agency to the same extent as if such services were being performed by the depository institution itself on its own premises. According to the court, based on this provision, loans serviced through contracts with third parties such as Bill Me Later are included within the definition of "any loan" under Section 27 of the FDIA and are therefore subject to the express preemption provided by federal law.

The court indicated that the consumer's claims that the banks in the Bill Me Later program were not the "true lender" could not overcome the preemptive effect of Section 27 of the FDIA because the consumer did not allege facts to plausibly suggest that the banks were not the real party in interest to the loans. The court found it determinative that the banks (i) were parties to the credit agreements under which the loans were made, (ii) funded the loans at issue and owned the credit accounts, (iii) held the credit receivables for two days and (iv) continued to own the accounts and share in the financial upside of the program based on the amount of interest collected.

Although the court indicated that it was not determinative to its holding, the court also indicated that the claim for violating the California Consumer Legal Remedies Act must be dismissed. The CLRA prohibits unfair methods of competition and unfair or deceptive acts or practices undertaken by any person in a transaction intended to result or which results in the sale or lease of goods or services to any consumer. Cal. Civ. Code § 1770(a). The court indicated that the CLRA does not apply generally to extensions of credit as California courts have refused to extend the CLRA to transactions when an entity other than a seller of retail goods extends the credit or to consider the mere extension of credit as a covered "service."

Darrell L. Dreher
ddreher@dltlaw.com

Judith M. Scheiderer
jscheiderer@dltlaw.com

Elizabeth L. Anstaett
eanstaett@dltlaw.com

Charles V. Gall
cgall@dltlaw.com

2750 HUNTINGTON CENTER
41 S. HIGH STREET
COLUMBUS, OHIO 43215
TELEPHONE: (614) 628-8000 FACSIMILE: (614) 628-1600
WWW.DLTLAW.COM

Michael C. Tomkies
mtomkies@dltlaw.com

Margaret M. Stolar
mstolar@dltlaw.com

Robin R. De Leo
robin@dreher-la.com

Susan L. Ostrander
sostrander@dltlaw.com

Susan M. Manship
smanship@dltlaw.com

The *Sawyer* case illustrates that national banks and federally insured state-chartered banks can make loans pursuant to the laws of their home states without being subject to other states' interest rate and interest-like fee restrictions even if a third party services the loans for the bank and/or purchases an interest in the loans or the loan receivables after origination. In order for such state law restrictions to be preempted, however, the parties must structure such a program so that the bank is identified and operates as the "true lender." ❑

✧ *Darrell Dreher and Chuck Gall*