DREHER TOMKIES LLP ALERT

FOR CLIENTS AND FRIENDS OF DREHER TOMKIES LLP

October 3, 2014

COURT UPHOLDS FORUM SELECTION CLAUSE IN COMMERCIAL LOAN AGREEMENT

A California court of appeals recently upheld an Arizona forum selection clause in a commercial loan agreement entered into between an Arizona lender and a California borrower. *Green Horizon Mfg. LLC v. Meridian Working Capital*, No. A138781, 2014 WL 4594507, at *5 (Cal. Ct. App. Sept. 16, 2014). In *Green Horizon,* an Arizona lender and a California limited liability company entered into an agreement whereby the lender would provide financing to enable the borrower to obtain inventory from its suppliers. The loan agreement provided for an interest rate of .225% per day, to be increased to 200% of that rate after a default. The loan agreement also contained an Arizona choice-of-law provision and an Arizona forum selection clause providing for any suit, action or proceeding arising out of the agreement to be instituted in a district court in Arizona. The borrower sued the lender in California claiming fraud and usury. The lender filed a motion to dismiss or stay the action on the grounds that the loan agreement required the action to be brought in Arizona rather than California. The trial court granted the lender's motion and stayed the California action.

On appeal the borrower challenged the forum selection clause. The court of appeals indicated that forum selection clauses are valid and may be given effect in the court's discretion without any analysis of convenience absent a showing that enforcement of such a clause would be unfair or unreasonable or would bring about a result contrary to the public policy of the forum. The court of appeals concluded that it would not be unfair or unreasonable to enforce the Arizona forum selection clause nor would enforcing the clause violate California's purported strong public policy against usury. According to the court of appeals, the purpose of the usury law is to protect the necessitous, impecunious borrower who is unable to acquire credit from the usual sources and is forced by his economic circumstances to resort to excessively costly funds to meet his financial needs. However, the court of appeals indicated that California has no strong public policy against a particular rate of interest so long as the charging of that rate is permitted by law to the specific lender. The court of appeals also indicated that courts have treated commercial loan transactions in a special manner and have enforced contracts that are valid in the state of making and performance although they are usurious in the state of the forum. In addition, the court of appeals reasoned that California public policy would not be violated even if Arizona did not limit the rate of interest on the loan agreement under consideration because California's usury limitation exempts loans made by banks and numerous other types of lenders. According to the court of appeals, "[a] strong public policy, based on a settled concept of justice or morality would not be meshed with such alterable rates as the Legislature might choose to impose." For these reasons, the court of appeals upheld the parties' Arizona forum selection clause and affirmed the trial court's order staying the action in California.

Interestingly, the court of appeals refused to consider the borrower's argument that the lender violated the public policy of California by not being licensed to make loans in California because the borrower's complaint did not include a cause of action for violating the California Finance Lenders Law. In addition, the court of appeals refused to rule on the validity of the Arizona choice-of-law provision in the loan agreement because that issue was not raised by the trial court and was not briefed by the parties. It is questionable whether the court of appeals would have ruled that the California Finance Lenders Law did not apply if presented with the issue given that at least one other California court has ruled that a choice-of-law provision cannot be relied on to avoid licensing, at least in connection with a consumer loan transaction. *See Brack v. Omni Loan Co., Ltd,* 80 Cal. Rptr. 3d 275, 284 (Cal. Ct. App. 2008) (holding that a Nevada choice-of-law provision should not be enforced in a suit under the Finance Lenders Law brought against a Nevada lender by nonresident members of the military living in California).

Other courts have similarly declined to override provisions in commercial loan agreements on public policy grounds. *See, e.g., Continental Mortgage Investors v. Sailboat Key, Inc.,* 395 So. 2d 507, 512 (Fla. 1981) (providing that usury laws are not so distinctive a part of a forum's public policy to justify invalidating a choice-of-law provision in a commercial loan agreement). Accordingly, these cases support the validity of commercial loan agreement forum selection clauses and, at least in those states that do not require licensing, choice-of-law provisions.

Please feel free to contact us if you need assistance with your commercial loan program. ❑

✧ *Darrell Dreher and Charles Gall*

Darrell L. Dreher
ddreher@dltlaw.com

Judith M. Scheiderer
jscheiderer@dltlaw.com

Elizabeth L. Anstaett
eanstaett@dltlaw.com

Charles V. Gall
cgall@dltlaw.com

Emily Barlage
ebarlage@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