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## COURT CITES *MADDEN* TO SUPPORT NATIONAL BANK ACT PREEMPTION

Citing *Madden v. Midland Funding*, the United States District Court for the Southern District of New York held that the National Bank Act preempted a consumer's state law claims against a national bank credit card issuer and its agent for actions taken in connection with the bank's payment protection programs. *Edwards v. Macy's Inc.*, No. 14 Civ. 8616(CM), 2016 WL 922221 (Mar. 9, 2016). In *Edwards*, a consumer residing in Massachusetts obtained a Macy's branded credit card issued by Department Stores National Bank ("DSNB") of South Dakota. The cardholder alleged that after obtaining the card, DSNB and Macy's enrolled the cardholder in a payment protection program without her consent and mislead her and other cardholders regarding the nature of the payment protection program, which the cardholder claimed was essentially worthless. Based on these allegations, the cardholder filed suit against DSNB and Macy's, claiming, among other things, that they violated South Dakota's consumer protection laws.

The defendants moved to dismiss the claims arguing that they were preempted by the National Bank Act and OCC regulations governing debt cancellation products and debt suspension agreements. See 12 C.F.R. Part 37. The district court agreed. According to the district court, the cardholder's claims were expressly preempted by OCC regulations that expressly provide that "National banks' debt cancellation contracts and debt suspension agreements are governed by this part and applicable Federal law and regulations, and not by . . . State law." 12 C.F.R. § 37.1. In addition, the district court concluded that the cardholder's claims were barred by implied preemption because the OCC regulations are sufficiently comprehensive as to crowd out state law as they (i) establish the standards for affirmative consent to enter into a debt cancellation contract, (ii) govern how national banks may screen for eligibility of program enrollees and (iii) expressly allow national banks to charge for debt cancellation contracts and debt suspension agreements without specific price controls.

The district court concluded that the cardholder's claims were preempted not only as to DSNB but also as to Macy's. In support of this conclusion, the district court cited *Madden*, in which the United States Court of Appeals for the Second Circuit noted that National Bank Act preemption may extend to an agent or subsidiary of a

national bank or a person that is otherwise acting on behalf of a national bank in carrying out the bank's business. The district court stated that even though Macy's is not a national bank or a subsidiary of a national bank, preemption applied to Macy's because it was acting on behalf of DSNB in carrying out DSNB's business. The court found it relevant that Macy's was contractually obligated to perform marketing, credit processing, collections and customer service related to DSNB's payment protection program and was compensated for doing so. For this reason, the district court held that the federal preemption that cloaked DSNB also extended to Macy's activities on behalf of DSNB.

The *Edwards* case is helpful to bank partnership programs as it supports the position that nonbank participants cannot be subject to liability for alleged violations of state law with respect to activities that are performed on behalf of a national bank and in accordance with comprehensive federal laws that are similar to the OCC's debt cancellation and debt suspension regulations. □

✧ *Mike Tomkies and Chuck Gall*

Darrell L. Dreher  
ddreher@dltlaw.com

Elizabeth L. Anstaett  
eanstaett@dltlaw.com

Margaret M. Stolar  
mstolar@dltlaw.com

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

Susan M. Seaman  
sseaman@dltlaw.com

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

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Michael C. Tomkies  
mtomkies@dltlaw.com

Charles V. Gall  
cgall@dltlaw.com

Judith M. Scheiderer  
jscheiderer@dltlaw.com

Susan L. Ostrander  
sostrander@dltlaw.com

Emily C. Barlage  
ebarlage@dltlaw.com