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FDIC FINDS UDAP IN COMMERCIAL COLLECTIONS

On May 6th, the Federal Deposit Insurance Corporation ("FDIC") ordered a federally insured state bank to pay a \$1.8 million civil penalty after determining that the bank engaged in unfair or deceptive acts or practices ("UDAP") in violation of Section 5 of the Federal Trade Commission Act ("FTCA") in connection with commercial equipment financing and leasing products issued through its wholly owned nonbank subsidiary.

According to the FDIC, the bank engaged in UDAP when its wholly owned subsidiary took the following actions to collect amounts owed under the commercial financing and leasing products:

- Charging past due borrowers various undisclosed collection fees like collection call and letter fees and third-party collection fees;
- Engaging in excessive and sequential collection calls to customers including customers who asked not to be called;
- Disclosing information about customers' debts to third parties; and
- Threatening to report delinquencies on commercial debts to consumer reporting agencies when the subsidiary's policy and practice was not to report such delinquencies.

Two aspects of the FDIC's order are particularly noteworthy:

First, the FDIC (and the Office of the Comptroller of the Currency ("OCC")) rarely issue public enforcement actions with UDAP or unfair, deceptive or abusive acts or practices ("UDAAP") claims. The Consumer Financial Protection Bureau and the Federal Trade Commission issue the majority of the public federal UDAP/UDAAP enforcement actions. Nonetheless, the FDIC and OCC have regularly reminded banks of their UDAP/UDAAP authority from time to time. This order is a reminder of the FDIC's authority (and willingness) to enforce prohibition on UDAP/UDAAP.

In June 2020, the OCC published a new booklet to the Comptroller's Handbook to give bank examiners guidance on how to evaluate UDAP and UDAAP risks presented by banks and third parties – a reminder to national banks and federal savings banks of the OCC's UDAP/UDAAP authority.

Second, the FDIC's order is an example of how regulators may allege that certain collection practices are unfair, deceptive or abusive even if the collection practices are not specifically restricted under a federal or state law. Based on the limited details in the press release and the FDIC's order, this action appears to involve parties and debts that are not subject to the federal Fair Debt Collection Practices Act ("FDCPA"). Nonetheless, the FDIC concluded that these collection practices, which likely would have violated the FDCPA, were prohibited UDAP.

The Federal Trade Commission has on numerous occasions charged creditors under its jurisdiction with unfair or deceptive debt collection practices under Section 5 of the FTCA, asserting standards of conduct substantially similar to those set forth in debt collection statutes. *See, e.g., Federal Trade Commission Annual Report 2007: Fair Debt Collection Practices Act at 7 (April 2007)* (expressing the FTC's willingness to enforce FDCPA standards against creditors who are not subject to the FDCPA pursuant to the FTC's authority under the FTCA). Notably the language of FTC consent orders issued against creditors in many cases tracks identically the language of the federal FDCPA. *See, e.g., In the Matter of Aldens, Inc., 98 F.T.C. 790 (1981)*. State laws similarly can be used as bases for enforcement against parties not subject to the FDCPA.

Whether this FDIC order will be categorized as a rare public UDAP enforcement action by the FDIC or as the start of more aggressive and public exercise of the FDIC's UDAP/UDAAP authority remains to be seen. Stay tuned. ☐

✧ *Mike Tomkies and Susan Seaman*

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Darrell L. Dreher
ddreher@dtlaw.com

Elizabeth L. Anstaett
eansaett@dtlaw.com

Emily C. Cellier
ecellier@dtlaw.com

Susan L. Ostrander
sostrander@dtlaw.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@dtlaw.com

Susan M. Seaman
sseaman@dtlaw.com

Lindsay P. Valentine
lvalentine@dtlaw.com

Judith M. Scheiderer
jscheiderer@dtlaw.com

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