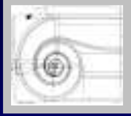

DREHER TOMKIES LLP

ALERT

FOR CLIENTS AND FRIENDS OF DREHER TOMKIES LLP

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A POTENTIAL REVIVAL OF SECTION 525 STATE OPT-OUT FROM FEDERAL PREEMPTION?

Colorado appears to want a second bite at the state opt-out apple. A bill introduced to limit charges on smaller consumer loans includes a provision that would revive Colorado's explicit rejection of federal usury preemption by way of Section 525 of the Depository Institutions Deregulation and Monetary Control Act of 1980 ("DIDMCA"). *See* Colorado HB 1229 (passed house on third reading without further amendment on April 11; introduced in Senate on April 12; enacting a new Colo. Rev. Stat. § 5-13-106.). Colorado already opted out of federal preemption once before and previously repealed its opt-out. *See* Colo. Rev. Stat. § 5-13-104; repealed in 1994 by Colo. Sess. Laws ch. 272, § 12 (eff. July 1, 1994). Colorado is one of a number of states that have adopted some version of the Uniform Consumer Credit Code, which can repudiate contractual choice-of-law and venue provisions that do not choose a borrower's state of residence and often contain broad territorial provisions that can deem transactions with state residents to have been "made" in the adoptive state.

Federal usury preemption for national banks (also known as federal "exportation authority") comes directly from the National Bank Act. *See* 12 U.S.C. §§ 85-86. Federal usury preemption for other institutions, particularly federally insured state banks, is derivative of the National Bank Act provisions and subject to potential state opt-out under Section 525 of DIDMCA. *See* 12 U.S.C. § 1831d note. Section 525 provides that states may override DIDMCA rate preemption as to loans "made" in an opt-out state. Accordingly, a Section 525 opt-out can (i) prevent a federally insured state bank from exporting interest rates to *other* states if the loan is made in its home state and its home state has opted out of federal preemption under DIDMCA, and (ii) may prevent the bank from exporting rates from a non-opt-out state into an opt-out state, depending on where loan is "made" for Section 525 purposes. The Federal Deposit Insurance Corporation (FDIC), the primary federal regulator for federally insured state bank usury preemption authority, has opined that (i) the fact that a state has opted out of federal interest rate preemption under the Section 525 "countermand" should not affect the usury preemption of Section 521 for a bank not located in that state, so long as the loan is not made in the state that has countermanded, (ii) the determination of where a loan is made should be based upon an analysis of the facts surrounding the extension of credit and (iii) relevant factors in the analysis of where loans are made may include factors identified in the Restatement (Second) of Conflict of Laws Sections 188, 195. *See* FDIC Letter No. 88-45 from Douglas H. Jones, Deputy Gen. Counsel (June 29, 1988), *reprinted in* [1988-1989 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 81,110; *see also* 12 C.F.R. Part 331 (federal interest rate authority).

Historically, seven states and Puerto Rico opted out and six states (all except Iowa) have repealed their opt-out: Colorado (Colo. Rev. Stat. § 5-13-104; repealed in 1994 Colo. Sess. Laws ch. 272, § 12); Iowa (1980 Iowa Acts. ch. 1156, § 32 (not codified)); Massachusetts (1981 Mass. Acts ch. 231, § 2 (codified at Mass. Gen. Laws Ann. ch. 183, § 63); repealed in 1986 Mass. Acts ch. 177); Maine (Me. Rev. Stat. Ann. tit. 9A, § 1-110; repealed in 1995 Me. Laws ch. 137, §§ 1, 3); Nebraska (Neb. Rev. Stat. § 45-1,104; repealed by amendment in 1988 Neb. Laws 913); North Carolina (N.C. Gen. Stat. § 24-2.3; repealed in 1995 N.C. Sess. Laws ch. 387, § 1); Wisconsin (1981 Wis. Laws ch. 45, § 50 (not codified) (repealed in 1998 Wis. Laws ch. 142); Puerto Rico (P.R. Laws Ann. tit. 10, § 9981(c)). Even Iowa and Puerto Rico have since deregulated relevant portions of their laws. The fact that so many states have effectively repealed their opt-outs may attest to the limited efficacy of state opt-out, although it may be good politics.

Recently, the Iowa Attorney General did enter into an Assurance of Discontinuance ("AOD") with Transportation Alliance Bank ("TAB"), a federally insured Utah-chartered state bank, including the bank's service provider Duvera Billing Services, LLC d/b/a EasyPay Finance ("EasyPay") in the AOD, but only with respect to EasyPay's services to the bank. *See* https://www.iowaattorneygeneral.gov/media/cms/TAB_Bank__SOI_Assurance_of_Disconti_92D5556A9591B.pdf. The particular facts of TAB's program (i.e., in-state contacts and installment loans) may explain the genesis of the AOD. TAB chose to leave Iowa.

A Colorado court of appeals has determined that effective August 9, 1989, Congress repealed DIDMCA § 525, concluding that even if Colorado's opt-out remained effective, such opt-out was ineffective with respect to the loans in question in the case because Colorado could opt out only with respect to loans made in Colorado, where the lending bank in question was located in and making loans

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from Delaware. *Stoorman v. Greenwood Trust Co*, 888 P.2d 289 (Colo. App. 1994), *aff'd*, 908 P.2d 133 (Colo. 1995).

Whether Colorado will re-enact its opt-out and whether the Colorado Attorney General may try to enforce such opt-out under the Colorado Consumer Credit Code remains to be seen. Given Section 525's historical track record, the provision may have limited effect for out-of-state banks if properly challenged under favorable facts. There is, of course, more to the Section 525 story for lenders and servicers to lender that are interested in carefully managing their risks in light of recent state AODs and licensing efforts. We are happy to help you navigate the landscape. ❑

✧ *Mike Tomkies and Mercedes Ramsay*