DREHER TOMKIES LLP ALERT

FOR CLIENTS AND FRIENDS OF DREHER TOMKIES LLP

August 20, 2020

COLORADO TRUE LENDER LITIGATION SETTLED

On August 18, 2020 Colorado Attorney General Phil Weiser announced a settlement in two pieces of related litigation. Assurance of Discontinuance ("AOD") in the matters of Avant of Colorado, LLC and Marlette Funding, LLC (Aug. 7, 2020); see *Fulford v. Avant of Colorado, LLC*, No. 17CV30377, and *Fulford v. Marlette Funding, LLC*, No. 17CV30376 ("Marlette") (both filed in Colo. Dist. Ct. Denver County). The comprehensive settlement addresses not only the specific programs at issue, but established a "safe harbor" for all future loans made through any programs operated by the banks involved in the AOD (the "banks"), provided that such a program complies with the terms of the safe harbor. With the exception of the licensing criteria, the AOD is limited to closed–end loans made to consumers via online platforms and includes special provisions for "specified loans", defined as loans that are originated (i) to an individual who is, at the time of origination of the loan, a Colorado resident, (ii) through a program whereby loans are offered by one of the banks in conjunction with a nonbank fintech and involve the origination of closed-end consumer loans through an online platform and (iii) with an APR, as determined by the Truth in Lending Act and Regulation Z, that exceeds, at the time of origination, the maximum finance charge permitted under the Colorado Consumer Credit Code for a supervised loan (currently, 21%).

The AOD follows a recent decision in the Marlette litigation in which the court ruled that even if the bank was the "true lender", a nonbank assignee of the loan could not take advantage of the federal usury preemption enjoyed by the bank, nor could an assignee fully stand in the shoes of the bank with respect to the loan's other terms. Order Regarding Plaintiff's Motion for Determination of Law, Marlette, supra (filed June 9, 20202). The Marlette court's decision did not consider recently finalized federal banking regulations establishing that the terms of a bank loan at the time of origination, if valid when made, do not change when the loan is sold, transferred, or assigned. *See* 85 Fed. Reg. 33530 (June 2, 2020) (Office of the Comptroller of the Currency ("OCC") final rule); 85 Fed. Reg. 44146 (July 22, 2020) (Federal Deposit Insurance Corporation ("FDIC") final rule); *see* our Alert of June 26, 2020.

To qualify for safe harbor treatment, programs must adhere to certain requirements. *See* AOD Section III (including oversight criteria, disclosure and funding criteria, licensing criteria, consumer terms criteria and structural criteria for specified loans). Specific areas of bank and federal and state regulatory oversight over the program are detailed, including bank review and approval of origination, marketing, website content, credit terms, credit models and approval or denial of all applicants. The bank must be the named lender, fund loans from its own funds and approve major third-party subcontractors, consistent with federal bank regulatory guidance for third party arrangements. Provisions for regular audits and corrective action are also required. The nonbank fintech platform partners must maintain acceptable compliance management systems and consumer complaint management processes. Higher rate loans made to Colorado residents (certain "specified loans" described above) are subject to special "structural criteria" regarding their sales that ensure bank credit exposure. Various conditions apply to the safe harbor terms. The AOD contemplates a potential future FDIC "true lender" regulation, subject to certain contingencies, and potential settlements with other states.

The defendants together will pay $1,050,000 to the State of Colorado for consumer protection efforts consistent with the AOD, make a $500,000 contribution to the MoneyWi$er program, a partnership between the Colorado Attorney General's Office and the Colorado Department of Education to supports K-12 financial education in Colorado, and provide a COVID-19-specific hardship program for consumer borrowers.

While the AOD brings the closely watched Colorado litigation to an end and provides potentially helpful guidance on program structuring (at least as far as Colorado is concerned), more developments regarding the core issues involved are anticipated. *See, e.g.*, *California v. OCC*, No. 4:20-cv-05200 (N.D. Cal. Filed July 29, 2020 and our Alerts of July 23, July 29 and Aug. 18, 2020.

We regularly monitor and report on emerging *Madden*/valid-when-made and true creditor case law and provide advice on structuring fintech and other bank partnership programs to minimize the risks associated with *Madden* or "true lender" challenges. Let us help you! ❑

✧ *Elizabeth Anstaett, Mike Tomkies and Lindsay Valentine*

Darrell L. Dreher
ddreher@dltlaw.com

Elizabeth L. Anstaett
eanstaett@dltlaw.com

Emily C. Cellier
ecellier@dltlaw.com

Susan L. Ostrander
sostrander@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

Susan M. Seaman
sseaman@dltlaw.com

Lindsay P. Valentine
lvalentine@dltlaw.com

Judith M. Scheiderer
jscheiderer@dltlaw.com

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