



bankers' compliance group®

## California Court Deals Blow to DFPI's True Lender Theory\*

As previously reported by BCG, since 2022 the Delaware-based limited liability company, Opportunity Financial, LLC ("OppFi"), has been involved in litigation with the California Department of Financial Protection and Innovation ("DFPI") due to the DFPI's threatened enforcement of California's Fair Access to Credit Act (AB 539) against OppFi. *Opportunity Financial, LLC v. DFPI*, Case No. 22STCV08163, (Cal. Sup. Ct. L.A. Cty. filed Mar. 7, 2022).

AB 539 placed limits on the interest rate a California Financing Law ("CFL") licensee may charge on consumer loans between \$2,500 and \$10,000. After AB 539's passage in 2019, the DFPI began investigating what it deemed to be "rent-a-charter" relationships between CFL licensees and depository institutions because of the state agency's view that these relationships may have been formed to avoid California's usury law.

Initially, OppFi sued the DFPI arguing that California's CFL does not apply to OppFi's loans because they are originated by FinWise Bank, an FDIC-insured state chartered bank located in Utah, which is exempt from California's usury law. OppFi argued that it only provides technology and other services to FinWise under a contractual arrangement related to loans that are made by FinWise Bank. In its cross-complaint, the DFPI argued that OppFi originates the consumer installment loans, as opposed to FinWise Bank, and that OppFi is subject to the CFL. The state referred to the OppFi-FinWise Bank partnership as a "rent-a-bank ruse" that was being used to avoid California's usury limits. Essentially, the DFPI's position was that OppFi, not FinWise Bank, was the "true lender" of these loans.

While the case has not made its way to trial, the DFPI filed a motion for a preliminary injunction to prevent OppFi from continuing to engage in activities related to loans involving FinWise in California. On October 30, 2023, the court denied the DFPI's motion holding that the DFPI "has not established a reasonable probability of prevailing on the merits." *Opportunity Financial, LLC v. Clothilde Hewlett, Comm'r*, No. 22STCV08163 (Super Ct. L.A. filed Oct. 30, 2023) (the "Opinion").

According to the Opinion, there were three reasons the court denied the DFPI's motion: (i) the DFPI did not sufficiently show that the loans involving FinWise were usurious at inception; (ii) the DFPI did not sufficiently support a reasonable probability that OppFi was the "true lender" of the loans in question; and (iii) the DFPI's true lender theory as applied to the loans in question may stand as an obstacle to the full purposes and objectives of the U.S. Congress set forth in Section 27

Copyright © 2023  
Aldrich & Bonnefin, PLC  
All Rights Reserved

**\*Advertisement. This information is not, nor is it intended to be, legal advice. You should consult an attorney for advice regarding your individual situation. Contacting Aldrich & Bonnefin PLC does not create an attorney-client relationship. Please do not send any confidential information to us until such time as an attorney-client relationship has been established. Janet Bonnefin is retired from the practice of law with the firm.**

of the Federal Deposit Insurance Act (FDIA) and its implementing regulation (12 CFR Section 331.4).

Although the court's ruling on the motion for the preliminary injunction is not a ruling on the case's merits, the fact that the court ruled against the DFPI's position on a motion for a preliminary injunction is a big setback for the DFPI. As the court notes in the Opinion, a "reasonable probability" merely means a reasonable chance that is more than an abstract possibility (it does not mean more likely than not). Thus, the fact that the DFPI's argument could not overcome this legal standard at this stage in the proceedings suggests the court is not viewing the DFPI's position favorably.

If this case ultimately goes in OppFi's favor, then this would deal a serious blow to the DFPI's true lender theory and their ability to enforce AB 539 against entities that implement programs that are similar to OppFi's loan program. Institutions should continue to monitor for developments in this area as the ultimate outcome of this case will have an impact on these types of third party relationships.

If you have additional questions on this case please reach out to John Davis at [jdavis@ablawyers](mailto:jdavis@ablawyers) or Joel Cook at [jcook@ablawyers.com](mailto:jcook@ablawyers.com) at the law firm.