LEGAL UPDATES

PUBLISHED: JUNE 24, 2024

Colorado's DIDMCA Opt Opt Paused for Bank Loans Made Out of State

Services

Banking & Finance

Consumer Financial Services

Industry

Financial Services & Capital Markets

Professional

SUSAN M. SEAMAN
MADISON:
608.255.4440
SUSAN.SEAMAN@
HUSCHBLACKWELL.COM

The financial services industry has (finally) received some good news. Last week, a federal court granted a preliminary injunction to stop Colorado from enforcing interest and certain fee limitations under the Colorado Consumer Credit Code on consumer loans made by state banks from an out-of-state location. In June 2023, Colorado passed legislation to exercise its right under Section 525 of the federal Depository Institutions Deregulation and Monetary Control Act (DIDMCA) to opt out of federal interest rate preemption for loans "made in" Colorado by federally insured state banks. A group of trade associations challenged Colorado's DIDMCA opt out, arguing that Colorado exceeded its authority under Section 525 by taking the position that a loan is "made in" Colorado if the borrower is located in Colorado.

The issue in this case focuses on what it means for a loan to be "made in" a state for purposes of Section 525 of DIDMCA. The court determined that where a loan is made under Section 525 depends on where the lender is located and where the lender performs loan-making functions. The borrower's location (in Colorado) does not determine where a loan is made. In other words, loans made by out-of-state state banks from a location outside of Colorado are not subject to Colorado's DIDMCA opt out and may continue to rely on federal interest rate preemption to charge Colorado borrowers interest and certain fees on loans. Ultimately, the federal court concluded that the trade associations are likely to succeed on the merits of their case and granted a preliminary injunction pausing Colorado's DIDMCA opt out for certain loans.

Below are four quick thoughts on the court's critical decision.

The court's conclusion relied primarily on a statutory analysis. The court supported its conclusion that where a loan is made depends on the

location of the lender's loan-making functions by looking both at the ordinary meaning of who "makes" loans and how the terms "make" or "made" are used in federal banking laws. According to the court, the statutory text and larger statutory scheme support a conclusion that banks make loans, not borrowers. Therefore, where a lender is located when engaging in loan-making functions determines whether a loan is "made in" a state and is subject to a state's DIDMCA opt out. The court did not give much weight to policy arguments and other authorities like bank agency interpretations because they were not helpful and did not override the plain language of the statute.

This case is a case of first impression. As noted in the opinion, no court has previously determined the effect of the DIDMCA opt out or where a loan is made for purposes of Section 525 of DIDMCA. There has been ambiguity in Section 525 since its inception. The federal court's well-reasoned decision could set an important precedent for future courts addressing similar questions regarding the scope of a state's DIDMCA opt out. This decision provides a critical interpretation of a previously ambiguous federal banking law.

The court showed no deference to the FDIC. In support of the state of Colorado, the Federal Deposit Insurance Corporation (FDIC) filed an amicus brief in this case arguing that a loan could be deemed made in a state for purposes of Section 525 based on the borrower's location because a loan is made by both a lender and the borrower. The FDIC cited a string of Dormant Commerce Clause cases to support its decision. The court rejected the FDIC's argument, noting that Dormant Commerce Clause cases "are of little value to the statutory construction issue in this case." The court also characterized most of the existing FDIC and other bank agency interpretations and opinions in the record as "inconclusive" and noted that they "do not contain any statutory interpretation [for the court] to defer to; they are persuasive at best." On the eve of the U.S. Supreme Court's decision on *Chevron* deference, the federal court's treatment of the FDIC's amicus brief and prior bank opinions is notable.

The Colorado DIDMCA opt out still becomes effective on July 1, 2024. The court's decision does not invalidate Colorado's DIDMCA opt out. As of July 1, the Colorado DIDMCA opt out will apply to consumer loans by state banks that are "made in" Colorado (as interpreted by the court) unless an exception applies. State banks and their partners should continue to be mindful of the scope of Colorado's DIDMCA opt-out and the court's decision when lending to Colorado borrowers. In

addition, the court noted that injunctive relief reaches only loans made by members of the trade associations named in this case. Until the case is ultimately decided, state banks should weigh the risk of the Colorado DIDMCA opt out if they make loans from a location outside of the state and are not a member of one of the named trade associations.

Contact us

The court's favorable decision on Colorado's DIDMCA opt out provides a critical interpretation of an ambiguous federal banking law. The decision comes at a time when a handful of states have proposed DIDMCA opt outs. While proceedings in this Colorado case are not done, the court's well-reasoned decision provides helpful guidance for state banks and their Fintech partners on the reach of a state's right to opt out of federal interest rate preemption.

If you have questions about this case or about federal interest rate preemption, please contact Susan Seaman or your Husch Blackwell attorney.