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COURT MAY RULE ON VALIDITY OF VIRGINIA CHOICE OF LAW IN COMMERCIAL LOAN AGREEMENT

The United States District Court for the Eastern District of Virginia may rule on the validity of a Virginia choice of law in a commercial loan agreement in *Power Up Lending Group, Ltd. v. AMD Management, LLC*, No. 3:15-cv-639-JAG (filed Oct. 26, 2015). In June 2015, Power Up Lending Group, Ltd allegedly loaned AMD Management, LLC (a Michigan limited liability company) \$100,000 with the loan being guaranteed by two individuals residing in Michigan. The loan agreement included a Virginia choice of law and a Virginia forum selection clause. A little more than a week after the loan was funded, AMD allegedly failed to make the required daily payments on the loan. Power Up subsequently sued AMD and the guarantors in the Eastern District of New York to collect the unpaid loan. After AMD and the guarantors objected to jurisdiction in New York, Power Up refiled in the Eastern District of Virginia in accordance with the loan agreement's forum selection clause.

The next day, AMD and the guarantors sued Power Up in Michigan state court seeking declaratory relief that the loan agreement was not enforceable because it allegedly provided for an effective annual interest rate of 113% in violation of Michigan's criminal usury law. Power Up removed the case to federal court in the Eastern District of Michigan based on diversity jurisdiction and moved to have the case transferred to federal court in the Eastern District of Virginia. The Eastern District of Michigan granted Power Up's motion to transfer the case because the loan agreement contained a valid and enforceable forum selection clause requiring suits to be brought in Virginia upon Power Up's election. According to the Eastern District of Michigan, forum selection clauses generally are enforced by modern courts unless, for example, the selected forum would be unjustly inconvenient for the plaintiff. The Eastern District of Michigan held that AMD and the guarantors failed to show that litigating in Virginia would be inconvenient for AMD or the guarantors. Although the Eastern District of Michigan recognized that it would be more convenient for AMD and the guarantors to litigate in Michigan, the Eastern District of Michigan could not say that litigating in Virginia would be unjustly inconvenient.

After the transfer, the Eastern District of Virginia dismissed AMD's and the guarantors' case and directed them to assert their arguments regarding the enforceability of the loan in the Power Up

collection lawsuit that was pending before the court. As a consequence, AMD and the guarantors filed an answer to Power Up's complaint, raising certain affirmative defenses, including defenses that (i) the loan agreement includes a criminally usurious interest rate and is therefore unenforceable and (ii) enforcement of the loan agreement is barred as against public policy.

Currently pending before the court is a partial motion for summary judgment in which Power Up is seeking to establish AMD's and the guarantor's liability for breach of the loan agreement as a result of the missed payments. AMD and the guarantors have not yet filed their response, but when they do they may well reiterate their claim that the loan agreement is usurious and unenforceable under Michigan law. However, AMD and the guarantors may have a difficult time convincing the court that Michigan's criminal usury law applies given the Virginia choice of law, especially because courts often enforce choice of law provisions in commercial loan agreements to the extent that, for example, the chosen state has a substantial relationship to the parties or the transaction or there is another reasonable basis for the parties' choice. Power Up has alleged in certain pleadings that Power Up is a Virginia corporation that has its principal place of business in New York. It is unclear what other contacts with Virginia might support the choice of law.

The case is worth monitoring as it might result in additional case law supporting private parties' right to choose the law applicable to their commercial loan agreement. □

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