



June 19, 2024

PRELIMINARY INJUNCTION IN COLORADO DIDMCA CASE GRANTED

Yesterday the Colorado District Court granted the motion for a preliminary injunction in regard to the Colorado law that revived Colorado's explicit rejection of federal usury preemption under the Depository Institutions Deregulation and Monetary Control Act of 1980 ("DIDMCA"). 2023 Colo. Legis. Serv. Ch. 375 (H.B. 23-1229). The law was to take effect July 1, 2024, and apply to consumer credit transactions made or renewed on or after July 1, 2024. See our [Alert of April 26, 2023](#).

In granting the motion, the court stated:

For the following reasons, I agree with the plaintiffs that the determination of where a loan is "made" under Section 1831d depends on where the lender performs its loan-making functions, not the borrower's location. The plaintiffs' motion for a preliminary injunction is therefore granted, and the defendants are enjoined from enforcing the interest rates in the Colorado UCCC with respect to any loan made by the plaintiffs' members, to the extent the loan is not "made in" Colorado and the applicable interest rate in Section 1831d(a) exceeds the rate that would otherwise be permitted.

In March of this year the National Association of Industrial Bankers, American Financial Services Association, and American Fintech Council filed suit in Colorado federal court seeking a declaratory judgment regarding the impact of the Colorado opt-out and injunctive relief to stay the effective date of the opt-out.

By way of background, FDIC-insured state chartered banks have usury preemption based on Section 27 of the Federal Deposit Insurance Act also referred to as Section 521 of DIDMCA. Section 525 of DIDMCA authorizes states to override the federal usury preemption provided by Section 521 as to loans "made in" the state that has opted out under the Section 525 "countermand".

The states that have enacted or are considering to opting-out of DIDMCA, such as Colorado, are under the impression that opting-out will prevent out of state banks from exporting rates into their state. However, based on existing authority from the time DIDMCA was enacted that was presented to the Colorado court, this does not appear to be the correct interpretation.

In granting the preliminary injunction, the court stated that

pending the final determination in the case, the state may only apply the interest rates in the Colorado Uniform Consumer Credit Code to loans made by lenders in Colorado, regardless of the location or residence of the borrower.

The battle over DIDMCA opt-out is part of the larger war against fintechs and bank partnerships, which also includes battles over anti-evasion bills and traditional "true lender" analysis. See our [Alert of Mar. 4, 2024](#). While the preliminary injunction in this case represents a victory, it remains critically important that bank partnership programs are carefully and properly structured and maintained. We will continue to follow this case and other state actions related to DIDMCA, as well as other ongoing attacks on bank partnerships. □

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