DREHER TOMKIES LLP ALERT

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TENTH CIRCUIT REVERSES PRELIMINARY INJUNCTION IN COLORADO DIDMCA CASE

The United States District Court for the Tenth Circuit Court of Appeals, using a narrowly grammatical interpretation, reversed the lower court and concluded that the plain language of Section 1831d's opt-out provision is "unambiguous" and that "loans made in such State" refers to any loan in which either the lender or the borrower is located in the opt-out state. The decision was adopted by two of the three judges on the case, with the third judge filing a dissent.

The case focuses on the meaning of the phrase "loans made in such State" as used in Section 1831d's opt-out provision. By way of background, federally insured state chartered banks have usury preemption based on Section 27 of the Federal Deposit Insurance Act also referred to as Section 521 of the Depository Institutions Deregulation and Monetary Control Act of 1980 ("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.

In June of 2024 the Colorado District Court granted a motion for a preliminary injunction in regard to the Colorado law that revived Colorado's explicit rejection of federal usury preemption under DIDMCA. 2023 Colo. Legis. Serv. Ch. 375 (H.B. 23-1229); see our Alert of June 19, 2024. The Colorado 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. The state appealed the district court's order granting the preliminary injunction. This decision, will allow the Colorado law to go into effect.

The district court found 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, and granted the preliminary injunction.

The Tenth Circuit noted that whether Section 1831d's opt-out provision includes loans from out-of-state banks to borrowers in the opt-out state is an issue of first impression. In reaching its conclusion, the Tenth Circuit found that the plain language of the statute shows that a state's decision to opt out of Section 1831d for "loans made in such State" encompasses loans in which either the lender or the borrower is located in the opt-out state.

The Tenth Circuit found it important that Colorado's decision to opt out of Section 1831d and enforce its interest-rate caps implicates two areas which are within the ambit of the states' historic powers—banking and consumer protection. The Tenth Circuit decline to read Section 1831d as continuing to preempt the laws of an opt-out state after opting out absent clear intent from Congress to intrude on these police powers.

The Tenth Circuit found no need to review agency interpretations addressed by the district court and declined to defer to the agency interpretations. The Tenth Circuit also found the Eighth Circuit's decision in *Jessup,* cited by the banks, unpersuasive. The Tenth Circuit concluded that the district court abused its discretion in granting the preliminary injunction and reversed the decision.

The dissenting judge wrote that the best meaning of Section 1831d (Section 521 of DIDMCA) and its corresponding opt-out provision (Section 525 of DIDMCA) is the one advanced by the banks and endorsed by the district court. The dissent respectfully noted that the majority's semantic precision yielded little interpretive insight because it was divorced from the stated statutory purpose of Section 1831d. The dissent found that the relevant regulatory history supported the district court's interpretation of Section 525 and that agency interpretations closer to the time of enactment have the "power to persuade, if lacking the power to control."

The Tenth Circuit's decision is unlikely to end the debate over the meaning of Section 1831d opt-out as other states consider whether or not to opt-out of DIDMCA. The decision is likely to increase such action at the state level based on the view that opting-out will prevent out of state banks from exporting rates into their state.

The battle over DIDMCA opt-out is part of the larger war concerning the proper division of state and federal authority and that against fintechs and bank partnerships, which also includes battles over the scope of anti evasion provisions and traditional "true lender" analysis. See our Alert of Mar. 4, 2024. This decision underscores how critically important it remains 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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