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Why You Should Care About Colorado Attempting to Opt-Out of DIDMCA

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Yesterday, a preliminary injunction hearing was held that will decide whether industry trade associations can halt aspects of Colorado's attempt to opt-out of the usury exportation provisions of the Depository Institutions Deregulation and Monetary Control Act of 1980 (DIDMCA), 94 Stat. 132, 164-65 (1980). Thanks to DIDMCA, for the last 44 years depository institutions other than national banks – including federally insured state banks, savings banks and state-chartered, federally insured credit unions – have been able to engage in interstate lending in parity with national banks. The court case being brought by the National Association of Industrial Bankers, the American Financial Services Association and the American Fintech Council (Plaintiffs) against Colorado's Attorney General, Philip J. Weiser, in the United States District Court for the District of Colorado seeks to challenge **a new law in Colorado** (with an effective date of July 1, 2024) that purports to "limit the interest rates and fees that out-of-state state-chartered banks may charge on loans they make outside Colorado's borders to Colorado residents." *See, Plaintiffs' Motion for Preliminary Injunction.* Should the new law go into effect in July, all lenders out-of-state, except national banks, will be required to limit their interest rates to Colorado's interest rate caps, placing them at a competitive disadvantage and making it "economically impracticable for Plaintiff's members to offer these products to those Colorado consumers who ... have less access to credit generally. At the same time, national banks will still offer these same products at rates above Colorado's caps ... Coloradans will lose choice but not gain the States supposed protections." *Ibid.*

While DIDMCA does allow a state to re-impose its own usury rates for loans made by depository institutions chartered in Colorado to Colorado residents (i.e., to opt-out of DIDMCA), at issue is whether a loan "made in" Colorado means loans made by the depository institutions that are physically in Colorado, or whether a loan "made in" Colorado also includes loans made to Colorado borrowers. The Colorado Attorney General and the Administrator of the Colorado Uniform Consumer Credit Code **have stated** that the new law means that loans that are "made in" Colorado do indeed include all loans made to Colorado borrowers. The industry trade associations argue otherwise.

Joining the fray, the FDIC filed an amicus brief in the case, supporting the Colorado Attorney General and Administrator on April 23, 2024, prompting the American Bankers Association (ABA) and the Consumer Bankers Association (CBA) to **file their own amicus brief** in response. Effectively, the ABA and CBA reject Colorado's interpretation of when a loan is "made in" Colorado, as well as the FDIC's endorsement of that interpretation, noting that "the FDIC has argued for the very first time" that, "loan transactions between parties in different states are made in the state where the borrower enters into the transaction just as much as they are made in the state where the lender enters the transaction." The ABA and CBA proceed to argue that because the FDIC does not point to any prior FDIC "regulation, rule, or opinion letter, their amicus brief should be given deference by the court, citing a particular on-point Supreme Court case, *U.S. v. Mead Corp*, 533 U.S. 218, 228 (2001), "near indifference" is properly accorded to an agency "interpretation advanced for the first time in a litigation brief."

Indeed, should the Colorado Attorney General's interpretation of the new Colorado law be allowed to going into effect, the ability for depository institutions that are not national banks to engage in interstate lending could quickly become limited, as other states are looking to adopt similar provisions. This could, in turn, negatively impact the amount of consumer credit being extended, in general, and also could discourage any secondary market activity in consumer credit portfolios.