

Colorado Federal District Court Issues Remand Ruling in Closely Watched Bank Partner Litigation

March 12, 2018

In litigation that has been closely monitored by the online lending industry, the U.S. District Court for the District of Colorado recently issued a ruling remanding a complaint filed by the Administrator of the Colorado Uniform Consumer Credit Code (the Administrator) against Avant of Colorado, LLC and Avant, Inc. (Avant). See [*Meade v. Avant of Colorado, LLC, et al.*](#), U.S. District Court for the District of Colorado, Civil Action No. 17-cv-0620 (March 1, 2018).

The Administrator originally sued Avant in Colorado state court, alleging that Avant violated Colorado's limits on excessive finance and delinquency charges as to certain consumer loans serviced by Avant. The Administrator also alleged that the loans contained an unlawful choice of law clause in violation of Colorado law.

Avant removed the case to federal district court, arguing that there was federal jurisdiction under the complete preemption principle through Section 27 of the Federal Deposit Insurance Act, as the loans at issue were originated by WebBank, a federally insured, state-chartered industrial bank.

The Administrator filed a motion to remand the case back to state court, which was fully briefed by the parties along with various *amici* from the financial services industry. The motion was referred to a magistrate judge who issued a report recommending that the motion be granted and that the case be remanded back to state court.

On March 1, 2018, the district court (Judge William J. Martinez) adopted the magistrate judge's recommendation, ruling that complete preemption is not a basis for a non-bank (such as Avant) to invoke federal court jurisdiction even if its bank partner (WebBank) could arguably raise complete preemption. As noted by the Court, complete preemption is a jurisdictional concept that allows certain cases to be removed to federal court; it is not to be confused with the defense of federal preemption to the merits of a particular claim.

In short, according to the Court, because the Administrator did not file suit against WebBank, the Court ruled that complete preemption could not be asserted by Avant as a basis for removal. Accordingly, the case was remanded to Colorado state court, where Avant will still be able to raise a defense that the Administrator's claims are preempted by federal banking law, namely that the Administrator's interpretation of Colorado law would interfere with WebBank's ability to engage in the business of banking (i.e., by originating and selling loans).

Although the Colorado district court did remand the Administrator's suit against Avant back to state court, it is worth noting that this ruling will likely be the first of many decisions in this litigation.

For one thing, while remand orders are generally not appealable, it is possible that Avant may seek discretionary review of this remand ruling and attempt to immediately appeal to the Tenth Circuit. Moreover, the Administrator has filed a nearly identical suit against Marlette Funding, which was also removed to federal court. A similar remand motion was filed in the Marlette case, although no ruling has been issued.

In addition, Avant's and Marlette's bank partners (WebBank and Cross River Bank) filed their own declaratory judgment suits in Colorado federal district court against the Administrator, alleging that the Administrator's actions against Avant and Marlette are preempted by federal law. The Administrator has filed motions to dismiss in the two bank lawsuits, and those motions are still pending with the district court.

Stay tuned for further developments in this significant bank partner litigation.

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