

Colorado's DIDMCA Opt-Out Challenged by Trade Associations in Federal Court

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On March 26, 2024, the National Association of Industrial Bankers (NAIB), American Financial Services Association (AFSA), and American Fintech Council (AFC) (collectively, "Trade Associations") filed a complaint in the United States District Court for the District of Colorado on behalf of their members. The Trade Associations seek declaratory judgment and preliminary and permanent injunctive relief against the Colorado Attorney General and Administrator of the Colorado Uniform Consumer Credit Code. The complaint challenges the recently codified Colo. Rev. Stat. § 5-13-106, which opts Colorado out of Section 521 of the Depository Institutions Deregulation and Monetary Control Act of 1980 (DIDMCA). Colorado's DIDMCA opt-out is set to go into effect on July 1, 2024.

Federal vs. State Authority Under DIDMCA

Sections 521-523 of DIDMCA granted federal authority to insured, state-chartered banks and credit unions, permitting them to contract for the interest rate permitted by the state where the bank is located and export that interest rate into other states. Colorado exercised its right under Section 525 to opt out of DIDMCA, which it believes will require state-chartered banks and credit unions to adhere to Colorado laws regarding interest rate and fee limitations.

Constitutional Challenges to Colorado's DIDMCA Opt-Out

The Trade Associations assert that Colorado's DIDMCA opt-out violates the Supremacy Clause and the Commerce Clause of the United States Constitution. The Trade Associations claim that Colorado's opt-out is overly broad and facially invalid because Colorado's definition of where a loan is "made" for purposes of its DIDMCA opt-out goes "far beyond" what is permitted by federal law. The Trade Associations noted that Congress allowed states to opt out with respect to loans "made in" a particular state as defined under federal law but did not intend to permit each state to independently define that term and where a particular loan is "made."

Does Federal or State Law Govern Where a Loan is Made?

Under federal law and long-standing prudential regulator commentary, a loan is "made" in the state where all key functions associated with originating or "making" the loan occur. These include the following non-ministerial

functions of the bank: the decision to lend, the communication of loan approval, and the disbursement of loan proceeds. Colorado seeks to define a loan as one that is “made” in Colorado whenever the loan is made to a Colorado resident, regardless of where the non-ministerial functions occur.

The Trade Associations’ Arguments Against the Opt-Out

The Trade Associations outline a series of arguments:

- Colorado’s DIDMCA opt-out is disregarding the plain terms of DIDMCA, usurping federal authority, and intruding on the ability of other states to regulate loans made within their borders.
- The opt-out violates the Commerce Clause because it impedes the flow of interstate commerce by subjecting state-chartered banks to inconsistent obligations across different states and, as a result, creates a significant burden on interstate commerce.
- Although intended to combat high-cost payday lending, the opt-out actually has the converse effect because Colorado consumers will be harmed by the decreased range and availability of credit products.
- Members of the Trade Associations are not payday lenders but rather mainstream, household names that offer a wide variety of useful and familiar credit products such as installment loans, store-branded credit cards, and point-of-sale loans offered by retailers (i.e., buy now, pay later loans). These members often fill the gap for a population that cannot be served by a traditional bank model due to credit risk and other factors.
- Colorado’s DIDMCA opt-out’s intention to prevent high-cost lending and protect consumers is undermined as the same types of products will still be available to Colorado consumers through the national banks, due to the inability for states to opt out of the National Bank Act. This outcome will have a perverse effect on the very consumers Colorado insists it is trying to protect with the opt-out.

The Takeaway for Colorado’s DIDMCA Opt-Out

As [more states](#) have introduced and continue to introduce DIDMCA opt-out legislation, Colorado’s DIDMCA opt-out case will be significant in the regulatory landscape across the country for the financial services industry. McGlinchey will continue to monitor for updates and the progression of the litigation and provide subsequent updates as Colorado submits responsive filings and the case develops.

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