

Chapman Client Alert

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Current Issues Relevant to Our Clients

Colorado Ups the Ante—Sues SPV and Securitization Trusts

In 2017, the state of Colorado initiated two lawsuits against online lending platforms. The suits alleged that the platforms had violated the state's Uniform Consumer Credit Code ("UCCC") by charging interest and some fees in excess of those allowed under Colorado law and that the consumer loan agreements utilized a non-Colorado governing law provision, also in violation of the law. In each situation, the loans were made by out-of-state FDIC insured banks to Colorado residents. The state claimed that the online platforms were the "true lender" of the loans and that any ability to utilize the rate and fee structure of the banks could not be utilized by the platforms as assignees of the loans under the doctrine enumerated by the Second Circuit Court of Appeals in the case of *Madden v. Midland Funding, Inc.*, 786 F.3d 246 (2d Cir. 2015), cert. denied, 136 S.Ct. 2505 (2016).

These suits led to a year of procedural machinations. The online platforms removed the cases from state court to federal court. In early 2018, the federal court remanded the cases back to state court. Meanwhile, the two funding banks for the two platforms filed declaratory judgment actions against the state on the basis that federal law preempted the application of state law to the loans. The declaratory judgment actions were dismissed, although one is on appeal to the Ninth Circuit Court of Appeals. The funding banks intervened in the two state court actions.

On November 30, 2018, Colorado through its interim UCCC administrator filed a Second Amended Complaint in both state court actions. In addition to making the same claims against the online lending platforms, the state also sued trustees (not in their individual capacities) for the trusts into which Colorado loans made through the online lending platforms had been securitized and the special purpose entities used to transfer the loans into the securitization trusts.

While the state recognizes in its filing that "banks may, pursuant to federal law, lawfully lend in Colorado and other states at rates that exceed the interest and other finance charge limits imposed by state law" the state alleges that non-banks cannot enforce a bank's federal interest rate exportation rights when they purchase loans from banks (including loan receivables) "because banks cannot validly assign such rights to non-banks" under the *Madden* case.

The state alleges that the trusts and the special purpose vehicles have taken assignment of payments under the loans and are charging and collecting amounts in excess of what is allowed under the Colorado UCCC. Colorado is seeking 1) a permanent injunction against the platforms, the special purpose entities and the securitization trusts from violating the UCCC, 2) refunds to consumers of the excess charges, 3) a civil penalty of the greater of the amount of the finance charge or 10 times the excess charge for each loan, 4) a civil penalty as determined by the Court and 5) interest and costs including attorneys fees.

This pleading implicates purchasers of marketplace loans made through an online lending platform and is attempting to subject them to penalties under the Colorado UCCC. The ultimate determination of the theories involved in these two cases could have significant impacts on the financing of loans made through online platforms.

Already some financings have excluded Colorado loans due to litigation risk which could negatively impact the ability of Colorado residents to obtain loans.

All participants in the online lending space should carefully watch these cases and also be careful in structuring loan programs in conjunction with funding banks. In particular, as a number of states beyond Colorado have enacted a version of the UCCC, the decisions ultimately rendered in these cases could have implications for online lending in multiple jurisdictions.

[For More Information](#)

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