Consumer Finance Monitor Podcast (Season 9, Episode 15): DIDMCA Opt-Outs Resurface: Oregon Legislation and the Colorado Case Could Alter the Landscape for Interstate Lending by State Banks

Speakers: Alan Kaplinsky, Burt Rublin, and Pilar French

Alan Kaplinsky:

Hello, and welcome to the award-winning Consumer Finance Monitor Podcast, where we explore important new developments in the world of consumer financial services and what they mean for your business, your customers, and the industry. This is a weekly show brought to you by the Consumer Financial Services Group at the Ballard Spahr Law Firm. And I'm your host, Alan Kaplinsky, the founder of and former practice group leader for 25 years and now senior counsel of the Consumer Financial Services Group at Ballard Spahr. And I'll be moderating today's program.

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So today we're going to be discussing an issue that is quickly moving toward the center of the debate over bank-FinTech partnerships and the future of interstate lending by state-chartered banks. For decades, both national banks and state-chartered banks have relied on the Supreme Court's market decision and federal banking statutes to export their home state's interest rates across state lines. In the case of state-chartered banks, that authority comes from Section 27 of the Federal Deposit Insurance Act, which was enacted as part of the Depository Institutions Deregulation and Monetary Control Act of 1980, which is commonly referred to as DIDMCA, D-I-D-M-C-A, and that's how we'll refer to it throughout.

Section 27 of the Federal Deposit Insurance Act was intended to give state-chartered banks that were FDIC-insured the same federal interest authority conferred on national banks by Section 85 of the National Bank Act. Like Section 85, it allows an FDIC-insured state bank to charge interest at the rate permitted by the laws of the state where the bank is located, even when the borrower resides in another state that has a lower interest rate cap. This is commonly referred to as interest rate exportation, and it's long been a cornerstone of interstate lending by state-chartered banks.

However, DIDMCA also contains a lesser known provision, Section 525, that permits individual states to opt out of that federal framework with respect to "loans made in such state." There's an ongoing dispute as to the meaning of that phrase. Banks and bank trade associations contend that it only allows an opt-out state to limit the interest rates

charged by state banks located in its own state. However, consumer organizations and the State of Colorado and some other states have argued that it also permits an opt-out state to limit the interest rates charged by state banks in other states to borrowers who reside in the opt-out state.

In November of last year, a divided panel of the 10th Circuit Court of Appeals adopted this more expansive interpretation in a decision concerning an opt-out statute enacted by the State of Colorado. The 10th Circuit's unprecedented panel opinion has led to various blue states to consider exercising their opt-out rights, including Oregon, where an opt-out bill known as House Bill 4116 recently passed the legislature and is expected to be signed into law by the governor very soon. Oregon would join Colorado, Iowa, and Puerto Rico as the only jurisdictions that are currently opted out from DIDMCA.

In the Colorado case, a federal district court had entered a preliminary injunction in favor of the FinTech trade associations that filed suit against the State of Colorado and prohibited the Colorado Attorney General from enforcing the Colorado opt-out statutes against out-of-state FDIC-insured state banks that make loans to Colorado residents at interest rates permitted by the law of the states where the banks are located, even if those rates exceed Colorado's usury limit. However, a three-judge panel of the 10th Circuit reversed that decision in a two to one ruling holding that the Colorado statute can apply in that situation. The majority agreed with Colorado that a loan is made both in the state where the bank is located and also in the state where the borrower is located.

The plaintiff trade associations petitioned the full court 10th Circuit Court of Appeals for rehearing en banc. The rehearing petition was supported by the FDIC, OCC, many red state attorneys general and by bank trade associations that our firm, Ballard Spahr, represented as amici. On April 2nd, the 10th Circuit granted rehearing en banc. It vacated the three-judge panel decision that I mentioned a little bit earlier and established a new briefing schedule, which we will get to later in our program. The preliminary injunction granted long ago by the district court remains in full force and effect.

These developments that I've summarized for you raise important questions about the scope of federal protections for interest rate exportation by state banks and the extent to which states may limit that authority. To help unpack these developments, I'm joined today by two of my Ballard Spahr colleagues. First is Pilar French, a partner in our Consumer Financial Services Group in Portland, Oregon, who closely follows legislative and regulatory developments affecting consumer lenders and bank-FinTech partnerships. Pilar represented a trade association that engaged our firm to track Oregon House Bill 4116.

And also joining us today is Burt Rublin, a senior counsel in our group, Consumer Financial Services Group, and a nationally recognized appellate lawyer with extensive experience litigating complex federal preemption issues. Indeed, Burt and I handled a series of cases in the '90s, which dealt with the ability of FDIC-insured state banks to rely on Section 27 of the Federal Deposit Insurance Act to export late fees and other fees allowed by their home states into a number of states that prohibited or limited those fees. In the Colorado case, Burt and I filed amicus briefs. In fact, we filed more than one so far on behalf of the American Bankers Association, Consumer Bankers Association and Bank Policy Institute.

So this is how we'll proceed today. We'll start with Pilar who will discuss the Oregon legislation. And then Burt will walk us through the Colorado litigation and its implications. So let's begin with Oregon. I'm very pleased to have two experts in this area unpack these developments. And so I'm joined today by two of my Ballard Spahr partners. First is Pilar French, a partner in our Consumer Financial Services Group in Portland, Oregon, state where all this is happening right now.

Pilar closely follows legislative and regulatory developments affecting consumer lenders and bank-FinTech partnerships and is a litigator by background. And she has been involved in House Bill 4116 from the time it was introduced, representing a trade association that was very closely tracking that bill. So very warm welcome to you, Pilar.

Pilar French:

Thank you. Thank you.

Alan Kaplinsky:

So I need to introduce my other esteemed colleague, Burt Rublin. Burt is a senior counsel in our group and a nationally recognized appellate lawyer with extensive experience litigating complex federal preemption issues. Indeed, Burton and I handled a series of cases going back to the 1990s which dealt with the ability of FDIC-insured state banks to rely on Section 27 of the Federal Deposit Insurance Act in order to export late fees and other fees on credit cards that were allowed by their home states, very typically Delaware and South Dakota, into a number of other states that prohibited or limited those fees. And in the Colorado cases I mentioned earlier, Burt and I filed amicus briefs on behalf of the American Bankers Association, Consumer Bankers Association and the Bank Policy Institute. Burt, very warm welcome to you.

Burt Rublin:

Thanks, Alan. When you talk about the Greenwood Trust case back in 1992, you're showing our age.

Alan Kaplinsky:

Yeah, but the good thing is it's showing that we have good memory, Burt.

Burt Rublin:

There you go.

Alan Kaplinsky:

So that's a positive. So Pilar is going to, during this podcast, is going to talk about the Oregon legislation, and then Burt is going to walk us through the Colorado litigation and the implications of that litigation. So let's begin with Oregon. So my first question to you, Pilar, to start us off, could you explain to our audience what Oregon House Bill 4116 does and why it has generated so much attention within the financial services industry?

Pilar French:

Well, certainly, 4116 basically opts out of DIDMCA under Section 525, which you so eloquently described previously. It basically enables Oregon to reimpose its own interest rate caps on loans made within their borders by FDIC-insured state-chartered banks.

Alan Kaplinsky:

Okay. So during my introductory remarks, I explained the opt-out authority, at least I quoted that key language loans made in such state, but is there anything else you want to add to how Section 525 of DIDMCA operates? If anybody's looking for Section 525, I don't believe it's been codified in the U.S. code. I think it's like a footnote. It's definitely part of the law, but if you look at Section 27 of the Federal Deposit Insurance Act, it's not actually in Section 27.

Pilar French:

Correct.

Alan Kaplinsky:

Yeah. So is there anything you'd like to add to that?

Pilar French:

Sure. There's a few things. First of all, let's talk about two parameters. Like the Colorado law, this law expands the notion of where a loan is made. We talked about that language in DIDMCA a few minutes ago. Normally, one would think that where the lender is located would be where the loan is made because the lender is the one that makes the loan. But under this statute, the loan is made in Oregon if it's made to a consumer who resides or maintains a domicile in Oregon and the consumer negotiates, agrees to the terms of or enters into or executes a contract for a consumer finance loan of $50,000 or less by mail, by telephone, or via the internet while the consumer is physically present in this state.

Or if the consumer makes a payment on a consumer finance loan of $50,000 or less, in which a person debits an account that the consumer holds in this state, or the consumer makes a payment by means of a check drawn on a financial institution or trust company as those terms are defined under Oregon's statutes. So that's really a mouthful of legalese there, but basically where the consumer lives, if the consumer lives in Oregon, that's going to be a defining term for whether 4116 applies. And then the other piece is that this legislation only applies to consumer finance loans of $50,000 or less.

Alan Kaplinsky:

Right. Am I right? What's a little strange about what Oregon put in that bill is if you have an Oregon resident who got a credit card when the consumer was in Oregon, but then travels with the credit card, goes into Texas, California, New York, Europe, what have you, and then pays for it through a check drawn on a bank located outside of Oregon. It sounds like that's not captured, strangely enough, not covered by the statute, if I heard you correctly.

Pilar French:

Well, that could be an arguable point about why this law has some problems because people move around a lot these days, but where does your credit card come from? Is it from a national bank? Is it from a state-chartered

bank? If it's a state-chartered bank, then this law is going to apply. And then curiously, the one marker that's notable and questionable is for unknown reasons to us, the Oregon legislature did not decide to make this apply to credit unions, which it could have done.

Alan Kaplinsky:

Yeah. Let me just add one point and then I want to move on. And that is, in my own view and I think even in the view of most consumer advocates, doesn't really matter how Oregon defines how it's going to apply when you're dealing with Section 525. Section 525 is a federal statute, and it would override any sort of language in the House bill that talks about who it applies to. And it's really a federal question as to where loans are made. It's not a state law question. But anyway, let's put that aside.

So this opt-out authority, Pilar, existed beginning in 1980, and strangely enough, unlike some other usury statutes that were enacted at the same time where it gave states the right to opt out, but it put a limit of three years after the enactment of DIDMCA for the opt-out to take place, this one left it open-ended and it could very well have been a mistake by Congress rather than something that was intentional, but they left it open-ended. And early on, there were a lot of states that opted out, right?

Pilar French:

A handful of states did opt out, and then curiously, most of them opted back, in all but Iowa, which has been opted out since 1980.

Alan Kaplinsky:

Yeah. And I guess Puerto Rico, but you're right, there were a bunch of them that opted out. And I think shortly after that, it really didn't take a lot of time for them to realize how foolhardy a move that was because ... And it's hard to go back now and reconstruct what the thinking was of each legislature, but I think it probably had something to do with the fact that national banks were not affected by Section 525, and it didn't make a lot of sense to preclude state-chartered FDIC-insured banks, but not national banks, and there was nothing they could do about national banks.

Okay. So moving on, if Oregon's governor signs this legislation, as we all expect that she will, Oregon would fit within this very small group of states that have exercised the authority. I think you mentioned Colorado, of course, and Iowa and Puerto Rico. Am I right? We got them all? I know there's a bill pending in Rhode Island, but so far that hasn't gone anywhere.

Pilar French:

That's correct. It's Iowa, Colorado, maybe, Oregon, maybe, because we don't know. I mean, it's not in effect yet. And then Rhode Island has legislation pending for ... So Oregon is following Colorado and Iowa and Puerto Rico.

Alan Kaplinsky:

Speaking for Oregon itself, because I know you were involved in following the legislation very closely, what concerns or policy goals appeared to be ... What drove this legislation? What was the boogeyman? What were they worried about in Oregon?

Pilar French:

Well, it was really interesting to listen to the legislative testimony, particularly of regulators, state regulators from the division of financial regulations. Their concerns were focused on very limited sliver of loans, which are high interest rate, short-term loans. And if I recall correctly, it was something like 2% of the loans that they see is what they were really concerned about, and the advocacy was for consumer protection.

Alan Kaplinsky:

Right. And I assume they thought that there were a lot of out-of-state banks that were charging more than the 36% rate cap permitted under Colorado law.

Pilar French:

Under Oregon law, yes.

Alan Kaplinsky:

Oregon law, of course. So some commentators have suggested that the legislation is aimed at what is pejoratively referred to as the rent-a-bank phenomenon, or bank-FinTech partnerships that exist where only because of the fact that an out-of-state non-bank has no exportation authority, and they have to hook up with a bank, either a national bank or a state-chartered bank, to take advantage of that exportation authority. Do you think I've characterized that well?

Pilar French:

Well, that is the catchy soundbite that proponents of this legislation are using, but really it is an inaccurate oversimplification of how loans are funded, originated, and maintained in the United States. There are multiple contributors to our banking institution and how we make loans in this country. So we're all a product of catchy soundbites these days with social media, and that is just one that is attractive to advocates for this legislation, but unfortunately, it's not really accurate. And this kind of legislation ... Loans are not simple. You can't simplify loans that way. And it's unfortunate, at least in my opinion, that the legislature didn't take a breath and decide to study this and figure out whether this legislation would actually be good for consumers in the long run.

Alan Kaplinsky:

So Burt, let me bring you into the discussion for a moment. From a legal standpoint, Burt, when a state enacts legislation like what Oregon did, is it essentially exercising authority that Congress explicitly granted in DIDMCA?

Burt Rublin:

Well, yes and no. The answer is that yes, a state like Oregon, like Colorado does have the express right if it's so inclined to opt out of DIDMCA pursuant to Section 525. But from my perspective and that of the banks, that opt-out right only applies with respect to loans made in such state, which in our view means that Congress was allowing states to limit their own state banks to the interest rates permitted in their state. And after an opt-out, the state banks can no longer rely on Section 27 of the Federal Deposit Insurance Act to charge interest at the alternative rate of 1% above the discount rate.

Alan Kaplinsky:

So Burt, as a practical matter, our position or the industry position is that they only could have opted out with respect to state-chartered banks that are physically chartered or located in Oregon, and it would preclude those banks from exercising exportation authority that is exporting the 36% rate permitted under the Oregon usury statute into other states that have lower usury ceilings like Colorado, I guess.

Burt Rublin:

So that's absolutely right. If they want to put limits or constraints on their own state banks, that's their prerogative, and that's what Congress was allowing states to do with the opt-out right. What Congress was not allowing was for an opt-out state to limit the interest rates charged by state banks in other states.

Alan Kaplinsky:

Right, right, right. Got it. So Pilar, let me go back to you. Assuming the governor again signs the bill, what would be the practical effect on lenders making loans to Oregon residents, out-of-state lenders? I guess they have a choice, right? They could lower their rate to below 36% and comply. If they're charging above that rate, they could just stop lending in Oregon, or they could continue to lend at a rate above 36% and probably get sued by the whoever, whether it be the Oregon Attorney General or the Oregon Department of Banking, they probably end up with a lawsuit. So it looks like they've sort of got three options, right?

Pilar French:

Correct. They do have three options.

Alan Kaplinsky:

Yeah. And this law, would it only be prospective in application or could it also affect existing lending programs? How would that work?

Pilar French:

Well, the law is supposed to take effect June 4th, 2026. That's 91 days after the end of the legislative session. Arguably, it should not apply retroactively to loans made prior to that date. But you raised some questions that give me pause and I would have to think about it a little bit more, credit card loans, for example. What happens if you

amend the agreement? You would really have to dig down into what that loan agreement says. It makes sure that the effective date of the loan is when you actually sign up for that credit card. And so there are some questions about that, but I would weigh heavily in favor of the notion that it does not apply retroactively. That would raise a host of constitutional issues if it did apply retroactively.

Alan Kaplinsky:

You mentioned credit cards. Colorado's bill has an exception for credit card lending, and I take it Oregon has got no exception. This applies to all types of loans.

Pilar French:

Yes. This law applies to consumer finance loans of $50,000 or less, and that's specifically defined by Oregon statutes. That means a loan or line of credit that is unsecured or secured by a personal or real property, and that has periodic payments and terms longer than 60 days.

Alan Kaplinsky:

So I want to turn now to Colorado. And Burt, could you start by walking our listeners through the Colorado case, how it arose, what the district court did, and what the 10th Circuit panel decided. And then finally the most recent event is the 10th Circuit's grant of the plaintiff's petition for rehearing en banc, which we filed another amicus brief. So if you could walk us through that chronologically, I think that would be very helpful for our listeners.

Burt Rublin:

Sure, Alan. That's a lot of ground to cover, but I'm happy to do it. Colorado enacted its opt-out legislation nearly three years ago in June of 2023, but the effective date was not until a year later on July 1st, 2024. In March of 2024, shortly before that effective date, the National Association of Industrial Bankers, the American Financial Services Association, and the American FinTech Council filed a lawsuit in the Federal District Court in Colorado seeking a declaratory judgment and a preliminary injunction to prevent the opt-out statute from taking effect. They argued in their complaint that the opt-out law was invalid because it attempted to regulate the interest rates charged to Colorado residents by out-of-state state banks, and that the opt-out under section 525 of DIDMCA was intended to apply only to the opt-out state's own state banks.

In the district court, there was extensive briefing and oral argument on the preliminary injunction motion, and that Judge Domenico of the district court granted the plaintiff's motion for a preliminary injunction on June 18th, 2024, which was just two weeks before the opt-out statute was due to go into effect. He wrote a 28-page well-reasoned opinion that found that the key issue was the meaning of the language in Section 525 that Alan has already talked about, which is the meaning of the phrase loans made in such state. Colorado had argued that a loan is made in both the bank state and the borrower's state.

The plaintiffs, on the other hand, argued that while a borrower obtains or receives a loan, only the bank makes a loan, and therefore the loan is made in the bank's state. The court found that the plaintiff's view was more consistent with the ordinary colloquial understanding of who makes the loan, and more importantly, with how the

words make and made are used consistently throughout the text of the Federal Deposit Insurance Act, including the DIDMCA amendments, as well as the rest of Title 12 of the United States Code, which governs banks and banking.

Judge Domenico also found that the plain and ordinary answer to the question of who makes the loan is the bank, not the borrower. Thus, where a loan is made depends on the location of the bank and where the bank takes certain actions, not on the location of the borrower who obtains or receives the loan. Therefore, the judge held that Colorado could not limit the interest rates charged by out-of-state state banks, notwithstanding its opt-out from DIDMCA.

Alan Kaplinsky:

Burt, before you get to the appeal and what happened in the 10th Circuit, there were a lot of additional arguments that were made by the plaintiffs, the trade associations, and that we made in our amicus brief. And there was another, I think, amicus brief that was filed by somebody else. But the judge kept it very simple, didn't he? He didn't get into all these additional arguments. Some of which were, I thought, really quite good. He just relied on this very simple argument that only a lender makes a loan. Borrowers never say, "I'm going to make a loan." They're going to obtain a loan. Right?

Burt Rublin:

I think that's a pretty good characterization, Alan. I'm going to be talking in a couple minutes about the various arguments made by the amici when the case gets up to the 10th Circuit. But you're right that Judge Domenico, notwithstanding the fact that his opinion was 28 pages, his decision boiled down to who makes a loan and that the common parlance and common understanding is a loan is made by a bank and the borrower receives a loan or obtains a loan. So he kind of distilled it to his essence, didn't really delve into legislative history.

The closest he talked about other issues was the fact that the opt-out by Colorado had no effect on national banks. So if the purpose of Colorado's opt-out was to prevent sky-high interest rates being charged to Colorado borrowers by out-of-state state banks, that was not going to do anything. That opt-out was not going to do anything to prevent sky-high interest rates being charged by out-of-state national banks. So in effect, if that's an issue, you're not really fully addressing the issue. So he talked about that, but otherwise it was more focused narrowly on meaning of what a loan is made.

Alan Kaplinsky:

Yeah. All right. So let's go back now. He's issued his opinion, he's issued the preliminary injunction, and the State of Colorado takes an appeal, right?

Burt Rublin:

All right. So Colorado takes an appeal in July of 2024. There's briefing and there's oral argument, and then the case just sits there for quite a long time. And decision didn't come out until, I would say, about a year and a half later, November 10th, 2025. And the reason it took so long was it was a split decision, two to one, and both decisions, both the majority opinion and the dissenting opinion were rather lengthy. The majority held that the district court got it wrong and reversed. It agreed with Colorado and its amici and stated that the term loans made in such state

refers to loans in which either the lender or the borrower is located in the opt-out state. The majority found that Congress intended to preserve significant state power to regulate all loans made to their residents, notwithstanding federal rate preemption granted under Section 27.

Now, as I said earlier, there was a dissent. It was a very strong and very well-reasoned dissent by Judge Rossman, and she argued that the majority's opinion conflicted with the statutory text, the legislative history of DIDMCA, and the purpose of Section 525 opt-out provision, which she read as limiting state opt-outs only to intrastate loans originated by banks located within the state. Judge Rossman's dissent warned that the majority's approach undermined the uniformity and parity between state and national banks that Congress intended in 1980 when it enacted DIDMCA and would result in regulatory fragmentation across the 50 states of the country.

What I found very interesting was that Judge Rossman's dissent cited and quoted several times from the amicus brief that Alan and I and our partner, Ron Vaske, submitted on behalf of the American Bankers Association, the Consumer Bankers Association and the Bank Policy Institute. Now, after the 10th Circuit rendered its split decision, a petition for rehearing en banc was filed by the plaintiff trade associations on December 9th, 2015. Colorado filed an opposition to the rehearing petition on January 21, 2026, and that rehearing petition then sat there for two and a half months, and it was finally granted on April 2nd of 2026.

Now, getting a decision to grant rehearing en banc is very difficult. It requires a majority of the active non-senior judges to vote in favor of rehearing en banc. So grants of rehearing en banc are very, very rare, and some circuits grant more than others and some grant less. The 10th Circuit is one of those circuits that grants very, very few rehearing en banc. I would say fewer than 10 per year, perhaps considerably less than that. So that shows how significant they viewed this case. And I should mention that the effect of a grant of rehearing en banc is to vacate the panel decision. So that decision, notwithstanding the fact that it's been published in F.4th is now vacated, has no precedential effect.

Alan Kaplinsky:

Let's talk about the amicus brief that was submitted by our firm and the other amicus briefs, including one filed by the FDIC and another one, surprisingly, at least surprising to me, filed by the comptroller of the currency, the regulator of national banks.

Burt Rublin:

Sure. Well, this case has engendered a lot of amicus briefs both at the district court level and at the 10th Circuit. And amicus briefs were filed on both sides. You had, as Alan mentioned, a number of amicus briefs filed in support of the plaintiff banking associations, but at the same time, you also had a number of state AGs who supported Colorado and a number of consumer organizations that supported Colorado. And that's both, as I said, at the district court and at the court of appeals level. Now, as I mentioned earlier, Alan and Ron Vaske and I filed amicus briefs for the American Bankers Association, Consumer Bankers Association, Bank Policy Institute, and 52 state bankers associations. In our Amicus brief, we pointed out that just three months before the enactment of DIDMCA, the same 96th Congress had passed an amendment to the National Housing Act that preempted state usury laws, but allowed states to override preemption as to certain FHA loans, "made or executed" in such state.

So three months later, when it enacted Section 525 of DIDMCA, it used a much more lender-centric term made in such state, didn't say made or executed as they had three months earlier, but instead made in such state. So we

argued that that change in language was significant because the Supreme Court has emphasized that differences in language convey differences in meaning, and that's particularly true when the different language appears in two statutes passed by the same Congress that relate to the same subject. Here, preemption of state usury laws and potential overrides of preemption. And again, it was the same Congress as 96th Congress.

Alan Kaplinsky:

Am I right? I mean, this seems like, and I thought at the time we made the argument, a very powerful argument, statutory interpretation argument, and it was not picked up by the district court judge. And as far as I know, the majority who wrote that panel decision totally ignored it.

Burt Rublin:

Well, and in fact, Alan, apropos of your comment, the majority interpreting the phrase loans made in such state relied on a definition of made, which included the term executed. So from their perspective, the term made encompassed executed. But we raised this argument in our amicus brief in supportive rehearing en banc. And for all I know, even though the rehearing order doesn't explain why they granted rehearing, it's just a simple order saying rehearing is granted, perhaps the argument we made that I was just discussing with respect to this FHA amendment three months earlier may have resonated with some of the judges.

Our amicus brief, in addition to that argument, also talked about the legislative history of DIDMCA in 1980, and we argued that the legislative history shows that Congress was focused entirely on creating interest rate parity between state and national banks in the same state in connection with intrastate lending. And there was absolutely no discussion in the legislative history of interest rates charged on interstate loans by out-of-state state banks. In fact, the lack of any such discussion was hardly surprising because state bank credit card and other interstate lending didn't really take off until after the enactment of DIDMCA in 1980.

Finally, another argument that we made in our amicus brief was that determining where a borrower is located whenever credit is extended in a credit card or online transaction would create an unworkable morass, particularly when borrowers travel from opt-out states to non-opt-out states or vice versa. Now, as Alan mentioned a few minutes ago, there were other amicus briefs in particular briefs filed by the FDIC and the OCC. Turning first to the FDIC, FDIC has been all over the map in this litigation. First, when the case was in the district court, the FDIC filed an amicus brief in support of Colorado, and they agreed with Colorado that a loan is made both in the borrower state and in the bank state.

Alan Kaplinsky:

That was during the Biden administration.

Burt Rublin:

That was during the Biden administration is correct. Okay. So the case goes up on appeal and Biden is still president and the merits briefing gets underway and the FDIC files another amicus brief. Once again, making the same argument in support of Colorado that a loan is made both in the borrower state and the bank state. Now, after President Trump took office in January of 2026, but before the 10th Circuit has oral argument, the FDIC withdrew

that amicus brief. It didn't provide any explanation. It didn't submit a new amicus brief. It just said, "The amicus brief we filed a couple months ago is hereby withdrawn."

Now, after the 10th Circuit rendered its decision, the two to one decision we've talked about and trade groups filed for rehearing, the FDIC then filed an amicus brief in support of rehearing and supported the bank trade groups. Interestingly, that new amicus brief didn't acknowledge the prior position that they had taken both in the 10th Circuit or in the district court, but instead they simply said that Colorado's opt-out only limits the interest rates that can be charged by Colorado state-chartered banks and cannot apply to out-of-state state banks. So they supported the grant of rehearing and they supported the plaintiff bank trade groups.

Alan Kaplinsky:

Well, interestingly though, Burt, I want you to tell our audience that the FDIC ... This isn't the first time the FDIC has taken the correct position. They took the correct position in the Greenwood Trust Company case versus Commonwealth of Massachusetts case that you and I were involved in litigating quite some time ago, right?

Burt Rublin:

Yeah. Yeah. We're showing our age, Alan, but way back in 1992, as Alan mentioned, Alan and I represented the issuer of the discover card and there was litigation in the First Circuit. Massachusetts had originally opted out of DIDMCA, then opted back in, and there was some confusion in the briefing way back in 1992 as to whether Massachusetts was an opt-out state or not an opt-out state, but the FDIC did file an amicus brief way back in 1992 in the First Circuit.

And in that Amicus brief in the Greenwood Trust case, they said as follows, "Section 525 of DIDMCA clearly does not confer on states that elect to opt out of Section 521 extra territorial authority to apply their own lending laws to loans made in other states by banks chartered in other states, merely because the borrower happens to be a resident." So Alan is correct in saying that the newest position by the FDIC, that is the amicus brief in support of rehearing en banc is in fact consistent with the position they took back in 1992. So that was a long time ago, but that was obviously closer in time to DIDMCA. So the FDIC has gone back and forth, but their current position is consistent with their original position way back when.

Alan Kaplinsky:

So the good news is the FDIC has recognized that this is a position they took long ago and they've clearly staked out their position. And then what about the comptroller?

Burt Rublin:

Well, yeah, it's interesting. The FDIC obviously regulates state-chartered banks, so the fact that they would file an amicus brief either for Colorado or against Colorado is not surprising because state-chartered banks are within their purview. The OCC obviously regulates national banks, which derive their interest authority from Section 85 of the National Bank Act. But not with saying that, the OCC also filed an amicus brief and supported a petition for rehearing en banc and arguing that the majority got it wrong. And here's what they had to say. This is a statement from their brief.

They said that the panel's decision fundamentally alters the application of the federal interest rate parity framework for state banks. Such an outcome would inject uncertainty into the framework, undermine the benefits that Congress sought to provide to state banks in DIDMCA and create significant challenges for state banks that wish to lend across state lines. This outcome would also advantage national banks over state banks, which is inconsistent with Congress's expressly codified competitive equity goals. As a result, the panel decision threatens to diminish the vibrancy of the dual banking system and to harm consumers by reducing their access to credit across the country. For these reasons, the panel decision involves a question of exceptional importance.

Alan Kaplinsky:

I mean, I've never seen in all the cases we litigated that, you referred to the Greenwood Trust Company case, but we actually represented a whole bunch of state-chartered FDIC-insured banks that were litigating questions of what is the meaning of interest under Section 27 of the FDI Act. The comptroller filed briefs in the national bank cases. There were lawsuits then, class action lawsuits, attorney general lawsuits against national banks and state banks. The FDIC filed amicus briefs in the cases involving the state banks, and the OCC filed amicus briefs in the cases involving the national banks. But I never recall a comptroller ever filing an amicus brief in a case involving the state banks back then. So this is really, I think, an unprecedented situation.

Burt Rublin:

Yeah, I would agree with you. So I've now talked about the amicus brief that our firm filed for the bank trade groups. I've talked about the two bank agency amicus briefs. And also there was an amicus brief filed in support of rehearing by Utah and 19 other red states. As I mentioned earlier, there were a number of state attorneys general who filed in support of Colorado, and they were largely, if not exclusively, blue states. And at the same time, both at the merit stage and then subsequently in connection with the petition for rehearing en banc.

You had an amicus brief in support of the bank trade groups filed by Utah and 19 other states, which argued that the majority ruling was wrong and effectively allows one state to impose its interest rate regulations on every other state-chartered bank across the nation that loans money to a Colorado resident. And so that was a pretty significant brief as well.

Alan Kaplinsky:

And right, Burt, that after the State of Colorado filed its opposition to the petition for rehearing en banc, there were no amicus briefs supporting Colorado.

Burt Rublin:

I think the lack of any amicus briefs in support of Colorado and its opposition to rehearing might've been strategic. I think even though there had been, like I said, a number of amicus brief supporting Colorado at the merit stage, I think there might well have been a decision, again, this is pure speculation on my part, a decision made by Colorado and it's amici to basically tell the 10th Circuit, "This is no big deal and we don't need to have a whole lot of amici telling you that what you did was right. It's a plain vanilla statutory interpretation case." Because the more amici there are on both sides, the more significant the case appears.

Alan Kaplinsky:

Let's talk now about the order granting rehearing en banc because that basically identified for the parties the core issues that they want to have briefed.

Burt Rublin:

Yeah. As I said earlier, the order merely says that a majority of the active non-senior judges voted in favor of rehearing en banc. It doesn't give any reasons why. And it does say that the panel decision is vacated and it sets out a briefing schedule. And what's interesting is it lays out six questions that it wants the parties and their amici to address in the forthcoming briefing.

Alan Kaplinsky:

And it's encouraging amici, right?

Burt Rublin:

Well, at the very end of the order, and this is a rather unusual statement at the end of this order, it says, "Amici's participation is encouraged." Again, that is not a standard line. So let me, just for the benefit of our audience, quickly run through the six issues that the court has directed the parties and amici to address. One, does the phrase loans made in such state in Section 525 of DIDMCA refer to an executed loan and encompassed loans in which either the lender or the borrower is located in the opt-out state? Two, how, if at all, should the reference in Section 521 of DIDMCA to the state where the bank is located inform the meaning of loans made in such state in Section 525?

Three, how, if at all, is DIDMCA's enactment history instructive to interpreting the phrase, loans made in such state? Four, how, if at all, is the regulatory guidance instructive to interpreting the phrase, loans made in such state? Five is the phrase, loans made in such state ambiguous? And six, finally, does a presumption against preemption apply in this case? In the meantime, the Colorado statute still remains stayed. That is the injunction entered by Judge Domenico way back when in connection with his granted preliminary injunction. That remains in effect and it will remain in effect while this briefing continues and throughout any decision and what's likely to be a petition for cert.

Alan Kaplinsky:

Right. Okay. Well, Burt, thank you very much for really providing our audience with the detail of how this case arose and where it is right now. It often can become, after a case has been around for a couple of years, it can be very confusing, but I think you did a terrific job in clarifying things. So Pilar, let's step back and look at the bigger picture here. If Oregon moves forward with this legislation, as it seems like they will because it's going to get signed by the governor and other states begin considering similar measures, what could that mean for interstate lending by state-chartered banks?

Pilar French:

Well, you'll see a reduction of interstate lending by state-chartered banks because there will be loss in place that make it more difficult to make interstate loans. And really, it brings us full circle. It's been interesting to listen to you talk about the political end of this, which is the changing position by the FDIC. Really, it boils down to what does it mean where is a loan made? And Oregon and Colorado essentially are creating a legal fiction. They're changing the definition of that, that a loan can be made where the borrower resides, even though a lender, not a borrower, makes the loans. So you think about that, if you're the lender, you have to try to figure out where the borrower resides each time you make a loan. And that is going to have significant ramifications for lending.

As we mentioned earlier, this is a complex industry. Loans, once they're originated by a particular bank frequently don't stay with the originating bank. They're often sold. And so if you want to sell the loan, you have to tack down this definition of where the loan is made before you sell it. Otherwise, it creates a risk in purchasing that loan and whether the purchaser is then going to be subject not only to states where DIDMCA applies, but also states where DIDMCA doesn't, and they're going to have to drill down and understand what those state laws are and what their restrictions are. So it just becomes very complicated and difficult from an industry perspective.

Alan Kaplinsky:

Yeah. And as I mentioned earlier in our podcast, there are a number of state-chartered banks because we represent a number of them, they're already looking into what's involved in converting to a national bank. And I would anticipate if these laws get upheld, Colorado and Oregon, and the Supreme Court doesn't get involved, that we're going to see a lot of state banks convert to national banks. And what happens to the dual banking system? There are, of course, a number of state-chartered banks that lend locally that don't get involved in interstate lending. And from their standpoint, this litigation is probably not all that important.

but it's definitely important to those state banks that engage in interstate lending. Let's turn to what's happening at the federal level right now, Pilar, because there is some stuff going on, right? The couple of bills have been introduced, one in the House and one in the Senate, and this one's either for you, Burt or Pilar. It doesn't matter to me whoever wants to answer it. What's happening there?

Pilar French:

Well, there is federal legislation that's been introduced that basically would I take away that little language, that little footnote that allows states to opt out of DIDMCA so that DIDMCA applies to state-chartered banks and credit unions across the board. I'm sure that Burt can give you some of the nuances. And I mean, as I understand, there's some tricks and fixes that need to occur with that proposed legislation, and I'll defer to Burt on that.

Burt Rublin:

Yeah. I think from a realistic standpoint, I don't think that legislation is going to go anywhere in Congress. I think Congress has got a lot of other priorities, and frankly, Congress is really not passing much in the way of legislation on any subject right now. So A, it's not a priority, I think, for Congress, and B, I think the Democrats will be very much opposed to this proposed bill. And I don't know that there's enough of an appetite even among Republicans to push this through. So it's interesting that the bill was introduced, but I frankly don't see it passing Congress.

Alan Kaplinsky:

Yeah, I guess the only thing I think that could change the calculus, Burt, would be probably it would have to take place after the election, the November election. And there would have to be something that the Democrats absolutely needed to get passed and something that would prompt a deal to put together some legislation that would include, among other things, this bill that has the effect of repealing the ... It isn't an actual repeal of 525, but from a practical standpoint, it would solve the problem that exists right now in Colorado and Oregon. That's the only way I see that happening. Okay. I think we've come to the end of our program today. So let me close with just a few observations and takeaways from today's discussion.

First, the Oregon legislation highlights that the opt-out provision that Congress included in DIDMCA more than four decades ago is still very much alive and states may be increasingly willing to use it, particularly what I refer to as the blue trifecta states. Second, the litigation currently pending before the Court of Appeals for the 10th Circuit is likely going to provide important guidance about the limits of state authority to regulate interstate lending involving out-of-state banks.

Third observation, if additional states begin to follow Oregon's lead, the industry could face a much more complex regulatory environment, creating a patchwork of state rules governing interest rates and rules that could be very difficult for state banks to follow and to feel comfortable that they're in compliance with the law. And finally, these developments are all occurring at a time when bank-FinTech partnerships and interstate lending models are already facing heightened scrutiny from policymakers and regulators, particularly in the states.

And we haven't had time today to get into all the bank-FinTech partnership regarding the true lender doctrine as to who is the real lender when you've got a bank-FinTech partnership. And that is something, an issue that's been percolating for probably about 30 years and still hasn't been resolved. So I want to thank my Ballard Spahr colleagues, Pilar French, Burt Rublin for joining me today and sharing their insights. And I hope all of our listeners enjoy the remainder of their day. Thank you.