



Keeping Current on Small-Dollar Lending Compliance

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Eric T. Mitzenmacher
Partner

Mayer Brown LLP
Washington, DC

emitzenmacher@mayerbrown.com

(202) 263-3317



H. Blake Sims
Partner

Hudson Cook LLP
Ooltewah, TN

bsims@hudco.com

(423) 490-7563



Jeffrey P. Taft
Partner

Mayer Brown LLP
Washington, DC

jtaft@mayerbrown.com

(202) 263-3293

Agenda

- What is a Small-Dollar Loan and How are They Offered?
- Direct Lending Developments
- Bank Partnership Developments
- Tribal Lending Developments
- CFPB's Rule on Payday, Vehicle Title, and Certain High-Cost Installment Loans (the "Small-Dollar Lending Rule")
- CFPB's Junk Fee Campaign
- CFPB's BNPL Guidance
- Other Regulatory Developments
- Questions?

What is a Small-Dollar Loan?

- Traditional Payday and Payday Alternative Loans
 - Typically very small (frequently measured in \$100s)
 - Typically very short-term (frequently measured in days or weeks)
 - Often involve execution of a payment instrument for presentation in the future
- Loans Regulated (Fairly) Comprehensively at the State-Level
 - Regulated size varies widely by state (frequently from \$1,000s to \$10,000s)
 - Often paired with other scoping criteria, such as APR
- Loans Subject to CFPB's Small-Dollar Lending Rule
 - Notwithstanding popular name...based on payment characteristics, security interests, and rate

Common Origination Models

- **Direct Lending**
 - A non-bank serves as the lender as authorized (or exempt) under state lender licensing laws
- **Bank Partnership**
 - A non-bank platform or program manager provides origination assistance services to a bank, after which the bank makes a loan and the non-bank or another investor may acquire the loan or an interest therein
- **Tribal Lending**
 - An entity provides origination assistance to an arm of a federally recognized Indian Tribe, after which the tribal arm makes a loan and the entity or another investor may acquire the loan or an interest therein

Direct Lending Developments

- Increases in covered loan sizes
- Adoption of more restrictive rate caps
 - Lower values
 - Adoption of MAPR or other more inclusive all-in cost of credit measures
- Simultaneous:
 - Rethinking and abandonment of payday alternative structures in some states
 - Consideration or roll-out of such structures and/or sandboxes in others
- Focus on products that avoid or evade treatment under comprehensive state credit regulatory regimes (incl. non-credit advance products)
- Focus on alternative monetization approaches, such as subscription models

Bank Partnership Developments

- True lender challenges and anti-evasion laws
- State licensing and legislation (including anti-evasion laws)
- *California DFPI v. Opportunity Financial*

Bank Partnership Developments

- Interest rate exportation and OCC/FDIC *Madden* rules
- DIDMCA opt-out legislation considered by various states
- Colorado litigation challenging impact of DIDMCA opt-out
 - FDIC's amicus brief and prior interpretations
 - Temporary injunction and next steps

Bank Partnership Developments

- Federal banking agencies increased scrutiny of bank partner programs
- Recent enforcement actions from the federal banking agencies
 - Evolve Bank and Trust, Thread Bank, Blue Ridge
 - Common themes and concerns
- Implications for existing and future bank partner programs

➤ Tribal Lending Developments

- 4th Circuit Nightmare: *Martorello/Big Picture, Blackburn, Hengle, Fitzgerald, etc.* (Will other circuits follow?)

Typical claims:

- ✓ (1) the lending enterprise occurred **off the tribal reservation**;
- ✓ (2) the lending operation is at interest rates that greatly **exceed the legal rates of interest** in the consumers' states of residence;
- ✓ (3) the lending at usurious rates of interest are **violations of state law and RICO**; and
- ✓ (4) the attempt to collect such debts are **violations of the FDCPA**.



➤ “New” tactics:

- (1) naming individuals including tribal members,
- (2) successful attacks on arbitration (“prospective waiver” doctrine), and
- (3) pitting lenders against servicers



➤ Arbitration

- ✓ Does clause specifically preserve federal substantive rights and remedies?
- ✓ What about state law claims?
- ✓ Is tribal dispute resolution procedure fair, reasonable, or even available?



➤ *Hengle*

“The arbitration provision’s delegation clause and the provision as a whole are unenforceable under our precedent because they ***prospectively waive Plaintiffs’ substantive federal statutory rights.*** Tribal ***sovereign immunity does not shield the Tribal Officials from Plaintiffs’ claims to enjoin violations of state law.*** Under Virginia law, the district court cannot enforce the loan agreement’s choice of tribal law to govern these loans because tribal law’s authorization of triple-digit interest rates on low-dollar, short-term loans violates Virginia’s ***compelling public policy*** against unregulated usurious lending.”



➤ *Fitzgerald*

“The Court agrees, in part, concluding that the delegation clause and the entire Arbitration Provision here violate public policy because the loan agreements **prospectively waive the vindication of any state substantive remedies and rights in arbitration, including Plaintiffs’ rights to pursue state usury claims.** Therefore, they are unenforceable.”

“ ... Defendants seek to compel arbitration as “a calculated attempt to avoid the application of” any liability under state usury laws. See Dillon, 856 F.3d at 337. For these reasons, **the entire Arbitration Provision is unenforceable for violating public policy.**”

Small Dollar Rule – Payments Provisions



- The Decision
- The Timeline

➤ “Covered Loans”

- *Short-term* – 45 days or less
- *Longer-term* – single payment and balloon
- *Longer-term* – exceeds 36% plus leveraged payment mechanism



- “Leveraged payment mechanism”
 - right to initiate transfer of money through any means from a “consumer account”



➤ What is “UDAAP”

- *Another payment attempt after two consecutive attempts have failed due to a “lack of sufficient funds”, without obtaining a new and specific authorization*



- Notices, notices, notices!!!
 - *First Payment Withdrawal Notice*
 - *Unusual Payment Withdrawal Notice*
 - *Consumer Rights Notice*



➤ New and Specific Authorization

■ *Timing*

- ✓ *Request after sent consumer rights notice
(but can do it in same communication)*
- ✓ *Get after consumer received rights notice*

■ *Content*

- ✓ *Specificity of dates and payment channel
(amount can be less but not more)*

NEW

➤ Single Immediate Payment Transfer

- A payment transfer initiated by a one-time electronic fund transfer within one business day after the lender obtains the consumer's authorization for the one-time electronic fund transfer; or
- A payment transfer initiated by means of processing the consumer's signature check through the check system or through the ACH system within one business day after the consumer provides the check to the lender.
- **Timing:** A consumer may not authorize the single immediate payment transfer before the date on which the lender provides the consumer the consumer rights notice, UNLESS the consumer affirmatively contacts the Company to discuss repayment options.

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ONE

➤ Policy and Record Retention

- Required to have a Policy
- A lender must retain evidence of compliance with the Rule for 36 months after covered loan ceases to be an outstanding loan.
 - ✓ Must retain electronic records in tabular format of payment history including: (A) date of receipt of payment or attempted transfer; (B) Amount of payment due; (C) Amount of attempted payment transfer; (D) Amount of payment received or transferred; and (E) Payment channel used for attempted payment transfer; and
 - ✓ If attempt to transfer funds from a consumer's account is subject to the prohibition against additional transfers, whether the lender or service provider obtained authorization to initiate a payment transfer.



CFPB's "Junk" Fee Campaign

- Combination of rulemaking and investigation/enforcement approaches
- Targets a broad spectrum of fees
 - Service fees for access to basic account information
 - Expedited payment fees (particularly where no expediting occurs)
 - NSF fees for real-time rejections
 - "Excessive" overdraft fees
 - "Excessive" credit report fees
 - Credit card late fees

CFPB's BNPL Interpretive Rule

- “Use of Digital User Accounts to Access Buy Now, Pay Later Loans”
- Key Interpretation: BNPL programs that permit consumers to obtain credit from time to time by using a “digital user account” to purchase goods and services involve the use of “credit cards” for Regulation Z purposes.
- Key Dates
 - Issued: May 22, 2024
 - Effective: July 30, 2024
 - Comments Due: August 1, 2024

CFPB's BNPL Interpretive Rule

- Issued as an Interpretive Rule
 - Not subject to Notice and Comment Rulemaking
 - CFPB's position is that the rule does not affect industry participants' obligations
 - Essentially, it is a statement of what the law is and always has been
- Not issued as Official Staff Commentary
- Effective date (7/31)
 - Likely means the CFPB itself does not intend to enforce as though a product accessible via a digital user account involved a "credit card" prior to that date
 - Likely is not binding on private litigants, other agencies, or courts
- Comments accepted through 8/1 may lead to further clarification

Other Regulatory Developments

- State and federal enforcement actions impacting small dollar lending
- State legislative and regulatory developments
- CFPB's supervisory highlights
- Potential impact of *Chevron* reversal by US Supreme Court

Other Regulatory Developments

- *CFPB v. National Collegiate*
 - Current status of the case
 - “Covered Person” status for SPVs
 - Implications for secondary market purchasers of consumer loans
- Potential impacts of the upcoming election cycle
 - CFPB
 - Federal banking agencies

Questions?

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