



Challenges to Bank-Fintech Partnerships: A Legal Landscape and Potential Solutions

Mark Dabertin,
Pepper Hamilton, LLP

Blake Sims,
Hudson Cook, LLP



The Regulatory Landscape

FDIC Draft Third-Party Lending Guidance

“[C]ourts are divided on whether third-parties may avail themselves of such preemption. See e.g., *CashCall, Inc v Morrissey*, Mo 12-1274, 2014 WL 2404300 (W Va. May 30, 2014).”

FDIC Draft Third-Party Lending Guidance (footnote 3)

FDIC Draft Third-Party Lending Guidance

- **Strategic Risk**
- **Operational Risk**
- **Transaction Risk**
- **Pipeline and Liquidity Risk**
- **Safeguarding Customer Info**
- **Model Risk**
- **Credit Risk**
- **Consumer Compliance Risk**
- **AML/OFAC Risk**
- **Limits as a percent of total capital for each third-party**

The OCC Does Not Favor Certain Bank Sponsor Lending

“Of primary concern was the inability of small banks to properly oversee the third parties who were making loans in their names. . . The OCC took a series of enforcement actions that eliminated these relationships from the national banking system.” OCC Website - Payday Lending Tab”

“The OCC views unfavorably an entity that partners with a bank with the sole goal of evading a lower interest rate established under the law of the entity's licensing state(s).” OCC Bulletin 2018-14

Relevant New State Legislation

Effective January 1, 2020, the anti-evasion provisions of Nevada's licensing statute for consumer installment lending will include the following—

(b) Using any agents, affiliates or subsidiaries in an attempt to avoid the application of the provisions of this chapter; or

(c) Having any affiliation or other business arrangement with an entity that is exempt from the provisions of this chapter pursuant to subsection 1 of NRS 675.040, the effect of which is to evade the provisions of this chapter, including, without limitation, making a loan while purporting to be the agent of such an exempt entity where the purported agent holds, acquires or maintains a material economic interest in the revenues generated by the loan.

Existing OCC and FDIC Guidance Re: When a Loan is “Made” for Usury

- “[I]n the context of nationwide interstate branching, it is the office of the bank or branch making the loan that determines which State law applies.” OCC Interpretive Letter 822
- The letter established a three-part test for determining when a loan is “made”
- “The decision to use the credit-scoring system or other non-discretionary underwriting standard requires the exercise of skill and judgment and may have a significant effect on the credit quality of a loan portfolio. This action simply must be viewed as non-ministerial. Once that decision is made, however, the other steps in the underwriting process -- that is, the entry of the application data into a computerized or mechanistic underwriting formula -- are, to use Sen. Roth’s term, ministerial, since the mere application of the particular facts to the predetermined and automatic criteria cannot alter the pre-ordained credit decision.”

Potential Federal Legislation Clarifying When a Loan is “Made”

- “Any [national] association may take, receive, reserve, and charge on any loan or discount made . . .” 12 U.S.C. 85
- “. . . such State bank or such insured branch of a foreign bank may . . . take, receive, reserve, and charge on any loan or discount made” 12 U.S.C. 1831d(a)



The Legal Landscape

Bank Model Basics

- *Madden v. Midland Funding LLC*, 786 F.3d 246 (2nd Cir. 2015)
 - valid when made NOT true lender case
 - bank sold accounts and receivables
 - settled but still good law in the 2nd Cir.
 - *Krispin v. May Department Stores*, 218 F.3d 919 (8th Cir. 2000) (bank only sold receivables)
- *Ubaldi v. SLM Corp.*, 852 F.Supp. 2d 1190 (N.D. Cal. 2012)
 - true lender case
 - bank retained 5% stake in loans
- *Beechum v. Navient Solutions Inc.*, 2016 WL 5340454 (C.D. Ca. Sept. 20, 2016)
 - looked to face of transaction, not substance

First Generation Cases

- *Long v. Ace Cash Express, Inc.*, 2001 WL 34106904 (M.D. Fla. 2001)
 - Plaintiff only sued Ace under state law claims
 - NBA did not apply to Ace and did not preempt state law claims

- *Hudson v. Ace Cash Express, Inc.*, 2002 WL 1205060 (S.D. Ind., May 30, 2002)
 - Plaintiff sued Ace and Goleta National Bank; Bank held 5% participation
 - Relied on *Krispin* and granted MTD

First Generation Cases

- BankWest v. Baker, 324 F. Supp. 2d 1333 (N.D. Ga. 2004);
 - Move to enjoin enforcement of new Georgia payday lending law
- Georgia v. Cash America, 734 S.E. 2d 67 (2012)
 - Denied MSJ; was a jury issue whether “de facto” lender
- *Spitzer v. County of Rehoboth Beach*, 45 A.D. 3d 1136 (N.Y. App. Div. 2007)
 - “must look to reality of the arrangement and not the written characterization”
 - “who had the predominant economic interest”

The Transition Cases

- *West Virginia v. CashCall, Inc.*, Case No. 08-c-1964 (Sept. 10, 2012), affirmed on appeal May 30, 2014
 - Court applied “predominant economic interest” argument;
 - Cited footnote in an OCC regulation

- *Maryland v. CashCall, Inc.*, Court of Appeals, No. 80, September Term 2015 (June 23, 2016), affirming Court of Special Appeals, No. 1477, September Term 2013 (October 27, 2015)
 - *non-bank partner must have CSO license; can only broker loans permitted under Maryland law*

The Transition Cases

- CFPB v. CashCall, Inc., 15-cv-7522-JFW-RAOx, 2016 WL 4820635 (C.D. Cal. Aug. 31, 2016)
 - Tribal lending case; court relied on “predominant economic interest”

- *Pennsylvania v. Think Finance, Inc.*, No. 14-cv-7139, 2016 WL 183289 (E.D. Pa. Jan. 14, 2016)
 - Bank not sued; found case distinguishable from Krispin
 - Settled in July 2019 as part of bankruptcy plan

The Colorado Conundrum

- *Meade v. Marlette Funding LLC*, No. 1:17-cv-00575-MJW (D. Colo. Mar. 3, 2017)
- *Meade v. Avant of Colorado, LLC*, No. 1:17-cv-00620-WJM-STV (D. Colo. Mar. 9, 2017)
 - CO Uniform Consumer Credit Code Administrator brings suit against non-bank partner
 - Claim non-bank partner is true lender based on “predominant economic interest”
 - Court held no complete preemption for claims against non-bank partner
- *Cross River Bank v. Meade*, No. 1:7-cv-00832 (D. Colo. Apr. 3, 2017)
- *WebBank v. Meade*, No. 1:17-cv-00786-PAB (D. Colo. Mar. 28, 2017)
 - Filed suit claiming enforcement action against non-bank partner unlawfully restricted bank’s lending business and caused irreparable financial loss

The Commercial Cases

- *NRO Boston, LLC & Indelicto v. Kabbage, Inc.*, No. 17-11976, 2017 WL 4569540 (D. Mass. Oct. 12, 2017); and *Barnabas Clothing v. Kabbage, Inc.*, No. BC699166, 2018 WL 1608431 (Cal. Super. Ct. Mar. 22, 2018)
 - Commercial borrowers sued Kabbage and Celtic Bank
 - Allege Kabbage is “true lender”
 - Wins in arbitration

The FDIC/OCC Amicus

- In Re Rent-Rite SuperKegs West, Ltd., 2019 WL 2179688 (Bankr. Colo. May 20, 2019)
 - Interest rate in the Note was valid and enforceable when made;
“not seriously in dispute”
 - The Note remained valid and enforceable after assignment;
“compelled by well-settled law”



Potential Solutions



QUESTIONS?

CONTACT INFORMATION

Mark T. Dabertin

Pepper Hamilton LLP

400 Berwyn Park, 899 Cassatt Road

Berwyn, PA 19312-1183

 **610.640.7841**

 **dabertim@peperlaw.com**

H. Blake Sims

Hudson Cook, LLP

9431 Bradmore Lane, Suite 201

Ooltewah, TN 37363

 **423.490.7563**

 **bsims@hudco.com**