

# Clients & Friends Memo

## Marketplace Lending Update #5: The Very Long Arm of Colorado Law

April 24, 2019

Recently a state court in Colorado ruled that securitization trusts that acquire marketplace lender loans originated to Colorado consumers are subject to Colorado jurisdiction. The court's ruling derailed the attempt by the securitization trusts to escape the ongoing battle between the State of Colorado and marketplace lenders over rates and fees that can be charged to Colorado residents.

As discussed in our earlier Clients & Friends Memos "[Another Rocky Mountain Remand](#)" (Mar. 29, 2018) and "[Litigation Mounts to New Highs in Colorado—Securitized Loans under Attack](#)" (Jan. 2, 2019), in 2017 the Administrator of the Colorado Uniform Consumer Credit Code (the "UCCC")<sup>1</sup> sued Avant and Marlette in separate actions, alleging that they made loans to Colorado consumers and charged interest rates above the maximum rate allowed by the UCCC. The Administrator later amended the complaints to name the securitization trusts holding the Avant and Marlette Colorado loans (the "Trusts"), as well as the two trustees of the trusts, Wilmington Trust, N.A. and Wilmington Savings Fund Society, FSB, as co-defendants. The Administrator contends that the Trusts violated the UCCC by collecting impermissible finance charges and late fees. The Administrator argues that the loans were in fact originated by Avant or Marlette (rather than by their partner banks, Cross River Bank and WebBank) and imposed rates and fees not permissible for nonbank lenders, and that even if the loans had been originated by their partner banks, the Trusts would still be unable to collect the same rate of interest and fees as the originating partner banks under a Second Circuit decision in *Madden v. Midland Funding, LLC*.<sup>2</sup> The Trusts moved to dismiss for lack of personal jurisdiction.

Although the Colorado UCCC purports to subject any "creditor" to the enforcement jurisdiction of the Administrator—and for these purposes, a "creditor" includes an assignee of a loan originated under the UCCC—the Trusts argued that they never purposefully availed themselves of the benefits and protections of Colorado and that their only link to the forum was a small amount of income based on Colorado loans. Such a limited connection, the Trusts argued, could not support jurisdiction, especially when the Trusts received income from similar loans in almost every state in

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<sup>1</sup> The Administrator of the UCCC is an employee within the Colorado Office of the Attorney General.

<sup>2</sup> *Madden v. Midland Funding, LLC*, 786 F.3d 246 (2d Cir. 2015), cert. denied, 136 S. Ct. 2505 (2016).

the country. The Trusts offered an array of case law from around the country in support of their stance.

On April 10, 2019, Judge David H. Goldberg of the Denver District Court denied the Trusts' motions to dismiss for lack of personal jurisdiction. The court ruled that by acquiring Colorado consumer loans, the Trusts qualify as a "creditor" under Colorado's UCCC because they "receive payments collected by others from Colorado consumer credit transactions." While the court could not find a Colorado case allowing for personal jurisdiction over non-resident creditors, the court noted that Colorado courts had found personal jurisdiction under state statutes with long-arm provisions like those of the UCCC. And the court ruled that by acquiring the loans at issue and collecting payments under those loans, the Trusts had "purposefully established 'minimum contacts'" with Colorado sufficient to satisfy due process.

Thus, under the court's ruling, secondary market purchasers who acquire even a small amount of Colorado consumer loans can be dragged into Colorado courts and face actions that seek disgorgement of charges and fees and other civil penalties over any loan that allegedly does not comply with the UCCC.<sup>3</sup> Secondary market purchasers should continue to approach with caution marketplace loans involving consumers residing in Colorado and other states where the bank origination model is under attack.

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If you have any questions, please feel free to contact any of the following Cadwalader attorneys.

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<sup>3</sup> What is more, while the opinion was issued in the context of a denial of a motion to dismiss on personal jurisdiction grounds, language in the opinion suggests that the court believed that because the underlying loans do not comply with the UCCC, the Trusts' collection and retention of fees and charges on the loans "violat[es] Colorado law."