Consumer Finance Monitor (Season 3, Episode 43): A Close Look at the OCC's "True Lender" Proposal

Speakers: Alan Kaplinsky, Jeremy Rosenblum, and Mindy Harris

Alan Kaplinsky:

Welcome to the Consumer Finance Monitor podcast where we explore important new developments in the world of consumer finance, what they mean for your business, your customers, and the industry. I'm your host today, Alan Kaplinsky. I chair the Consumer Financial Services Group at Ballard Spahr. I'm going to be moderating today's program.

Alan Kaplinsky:

Just a couple of words about our podcast show before we get to the topic that we're going to explore today. For those of you that want even more information, don't forget about our blog, Consumer Finance Monitor.com. Actually shares the same name as our podcast show. We've hosted our blog since 2011. There's a lot of relevant industry content there dealing exclusively with consumer finance. We also regularly host webinars on subjects of interest to those in the industry. So subscribe to our blog, or get on the list for our webinars. You can do that ... The blog, you just go right on our blog and subscribe for our webinars. Visit us at BallardSpahr.com.

Alan Kaplinsky:

Now, let me mention to you something that many of you should be very interested in. In the last remaining three months of this year, we are launching a series of webinars. Actually, they're going to be webcasts in which, for the first time, we're going to be providing COE credit, and there will be a video component to it. We're going to cover the waterfront. We have something like 23 topics where we're going to talk about current developments, what's happened this year, what we anticipate happening in the future as a result of what we're going through in terms of the pandemic. It's titled The Consumer Financial Services Industry in Turbulent Times. Turning to our podcast, you can find our weekly show, which gets released each Thursday, either on our website or wherever you get your podcasts, be it Apple, or Google, or Spotify, or whatever.

Alan Kaplinsky:

Now, turning to our program today, before I introduce our guests, I want to give you just a little bit of background, enough so that you will fully understand some of the very insightful remarks that two of my colleagues are going to be making. We're going to be dealing with the federal usury laws that apply to federally insured depository institutions. National banks, federal thrifts, and state thrift institutions whose deposits are insured by the FDIC. The federal usury law, in very broad terms, says that a bank may charge the interest rate permitted by the law of the state where it's located. That got interpreted back in the late 70s to permit the exportation of interest rates. That is, to permit a bank located in, let's say, the state of Delaware, to export from Delaware whatever rate is permitted under Delaware law throughout the country, and to ignore all state usury laws that might otherwise apply in the borrower's state. That's been the law now for decades.

Alan Kaplinsky:

However, almost since the Marquette opinion came down, there has been an issue as to when is the bank the true lender. Is it enough that the promissory note is payable to the bank? Is that the beginning and the end of the inquiry? What happens if the bank only holds the note for a nanosecond and then transfers it to a non bank? What happens then? Is the non bank able to cloak itself in the same federal usury authority and take advantage of the same federal preemption that the bank itself could take advantage of?

Alan Kaplinsky:

There are two issues that have really gotten very hot, and have gotten so hot that it's resulted in the comptroller of the currency and the FDIC weighing in with, in one instance, a final regulation, and in another instance, a proposed regulation by the comptroller. I'm referring, first of all, to a regulation that's been referred to colloquially as the anti Madden rule, or the Madden fix rule, or the valid when made rule. It's known by any one of those three ways.

Alan Kaplinsky:

Basically, it attempts to undo, to, in a sense, override a second circuit opinion in the Madden vs. Midland credit case. In that case, the second circuit, in what everybody considered it to be, at least people in the industry, considered to be a bizarre opinion that was clearly wrong, they ruled that when a national bank sold a charged off credit card account to a debt buyer, that the debt buyer at that point was limited to whatever the usury rate was that existed in the state of New York, even though the credit card receivable had been originated ... and the account had been originated by a bank in Delaware where rates were deregulated. So, that's one issue we're going to talk about.

Alan Kaplinsky:

Second issue it deals with ... and probably an issue that's percolated for a longer period of time ... Frankly, nobody really considered this Madden problem until the Madden opinion came down. But true lender, we dealt with ... and I'm thinking of one of my colleagues who I'm going to introduce in a minute, probably for about 30 years in a number of different contexts in connection with tax revenue anticipation loans, in connection with payday loans, in connection with private label credit card accounts, and even credit card securitizations. I could go on, and on, and on. The issue boils down to, is the bank in the first instance the real lender, or is some other third party that's not a bank, and not entitled to take advantage of the federal usury law, is that entity the true lender.

Alan Kaplinsky:

With that as background, I'm going to introduce our two guests today, both of whom are truly experts in this area that have counseled many banks over the years on these issues. In one instance, one of my colleagues drafted what I consider to be the comment letter that's been submitted to the OCC in connection with the true lender rule making. I'm referring to nobody less than Jeremy Rosenblum. Jeremy is a partner in our Philadelphia office. I've practiced with Jeremy for, I'd say over 30 years. His practice focuses on federal and state lending, and consumer practices laws, with emphasis on the inner play between federal and state laws, joint ventures between banks and non bank financial services providers, the development and documentation of new financial services products, and compliance with federal and state consumer protection, and usury laws.

Alan Kaplinsky:

Jeremy's practice involves regular dealings with industry trade groups and regulators. In this regard, he's drafted a number of [inaudible 00:09:39] briefs to the U.S. Supreme Court and other courts. There is actually an OCC comment letter dealing with this exportation doctrine that I've described in the context of where a bank has got a home office in one state, and branch offices in another state. Jeremy wrote a letter on behalf of a client to the OCC to get a favorable ruling on exportation. It's called the Rosenblum Letter. That's how I know it. I know it has an OCC letter number. Maybe Jeremy remembers.

Alan Kaplinsky:

I want to also introduce Mindy Harris, also a colleague of mine, and the most recent lawyer to have joined our Consumer Financial Services group. She's had decades of experience as in house counsel in the consumer finance industry, including roles as General Counsel of Nordstrom Bank, and of Auriemma Roundtables. Mindy advises clients on federal and state consumer finance laws, including those governing fair lending, fair credit billing, payments, UDAP, and on, and on, and on. She also focuses on marketplace or online lending programs, new developments pertaining to bank charters, and laws and regs enabling nationwide lending, exportation of interest rates, which is really what we're talking about today, and other laws affecting bank

powers. Mindy resides in Colorado, and when we return to our offices at some point, and I know it will happen, she will be working out of our Denver office.

Alan Kaplinsky:

The way we're going to proceed today is, I've got a lot of questions for Jeremy and Mindy. I'm first going to start with Jeremy, and we're going to try to get through these questions as quickly as we can, and try to give you as much knowledge as we have about this topic so that if you're counseling your client on how to do it, you'll know how to proceed. Jeremy, let's start with you, and we're going to really focus on true lender. We'll refer to the Madden fix regulation from time to time, but let's talk about true lender today. Tell us, what is the OCC proposing to do here?

Jeremy Rosenblum:

Thank you, Alan, and thanks for the intro. I'm almost done blushing, but I'll-

Alan Kaplinsky:

Nobody can see you blushing. This is a podcast, so you're okay.

Jeremy Rosenblum:

I get that. Okay. The OCC really proposed a very simple and clear bright line rule that would establish when a bank involved in a program involving a non bank agent should be regarded as the true lender, and hence entitled to export interest rates throughout the country. The rule that the OCC has proposed essentially says that if at the time of origination the bank is named as the lender on the loan documents, or provides the funds for the loan, then the bank is the true lender and entitled to the benefits of the federal statute in question.

Alan Kaplinsky:

Pretty simple the way you've articulated it. How could this be controversial? It's as simple as can be, right? What's the problem?

Jeremy Rosenblum:

Well, it's simple but it's liberal. The Marquette decision that you referenced in your intro has been very controversial. State regulators in New York Department of Financial Services, other states, are very protective of their usury laws, which are effectively overridden by the federal statutes in question and the Supreme Court's decision in Marquette. That's the original sin in the view of these regulators, and others who believe that restrictive usury laws are essential to protect consumers and businesses. And so, the OCC has clearly weighed in on the side of making credit widely available without undue restriction on interest charges. What we have here is a very strong clash of philosophies between those who are favoring his as widespread credit as possible, and those are favoring a more paternalistic view that they feel better protects borrowers.

Alan Kaplinsky:

So, Jeremy, after this true lender proposed regulation came out, how did you end up writing a comment letter? How did that come about? Then I'd want to find out what you said in the comment letter.

Jeremy Rosenblum:

Alan, the short answer is that I was contacted by one of our clients, and then actually by a number of other clients, all of whom felt it very important to express their viewpoints with respect to the proposed rule. I know that they contacted me because they knew that I'd been involved in issues of this type for the better part of our time together, Alan, which is well over 30 years, closer to 35 or so, and probably dating back to the first program where a bank and a non affiliated agent partnered to provide credit to consumers. That was a refund anticipation loan program between Beneficial National Bank, our client at the

time, and the tax prep firm of H&R Block. That program initiated in the 1980s. We helped structure it. We helped defend the program against legal attack.

Jeremy Rosenblum:

Then over the decades since then, we've been involved in helping banks and non bank providers structure programs of this type. We defended a series of legal attacks by various states and private parties against a program involving a payday lender and a national bank located in California, and have been involved in representing marketplace lenders who typically restrict the rates on their loans to APRs of 36% or less, and their bank partners. As you pointed out in your intro, there are a wide variety of programs that rely upon the exportation rights of the bank partner, and we've been involved in many, many of these programs over the years.

Alan Kaplinsky:

Yeah, so let's now get to the nitty gritty. I know you comment letter is quite lengthy.

Jeremy Rosenblum:

Not so long, Alan. I think Mindy will tell you that she had to slog through comment letters written by other parties that were far longer-

Alan Kaplinsky:

Right.

Jeremy Rosenblum:

And far tougher than mine.

Alan Kaplinsky:

Yeah, okay.

Jeremy Rosenblum:

To read through.

Alan Kaplinsky:

All right. Well, let's ... We don't have time for you to read your comment letter in full, even though it's short. But tell our listening audience what are the main points that you made.

Jeremy Rosenblum:

Okay. The letter begins with basically a description of the federal usury law that's similar to what you came up with, Alan. It talks about a number of the cases that address this issue. An Eighth Circuit decision called Crispen, a decision by an Indiana district court called Hudson. Actually, that was a case that we litigated successfully. Then another case, a federal case, called Sawyer. In each of these cases, the court basically said that ... rejected an attempt to substitute the supposed substance of a transaction for its form as a bank loan. The courts relied heavily on Marquette, and heavily on the policies articulated in Marquette, that it was essential to the national banking system for banks to have clarity in the laws that apply to their operations. The OCC letter manifestly supports this need for clarity in national bank operations.

Jeremy Rosenblum:

We talked about the policy also articulated in Marquette, or the point made in Marquette, that if changes need to be made in the federal usury laws, that they ought to be made by Congress, and implicitly, possibly, by the comptroller. But that case

by

case adjudication of these issues was not the right way to go, that it was not a proper function for the courts to try gradually to establish lines. When is a loan made by the bank, when is it not made by the bank? In our comment letter, we articulated some of the ambiguities that were created by this case by case development. There's something called the predominant economic interest test that many of the cases that are hostile to bank exportation try to lay out. They use the words predominate economic interest, but they really don't define exactly what's meant by that, and it leaves considerable ambiguity in the law. Does predominant economic interest apply to the loans, who has more of the receivables, or does it apply to the revenues generated under the loans?

Jeremy Rosenblum:

In any event, the test, we say in our comment letter, really makes no sense. Are you saying that a bank that is listed on the loan documents makes a loan, and then maybe receives 49% of the revenues on the loan, where it's partner may receive the other 51%, that that banks role as the lender should be disregarded and overridden? We point out that while there's a variable line of cases, old cases, and several that talk about usury not permitting shams and subterfuges, that the role of the bank in these programs is anything but a sham or subterfuge. When a bank puts its name on the loan documents and takes responsibility for the loans, it's subject to a wide variety of laws and regs. It's subject to oversight by the federal banking regulators. Basically, it is assuming responsibility for the loans vis-a-vis the public and borrowers. That's a very serious undertaking by the bank, and we point that out. And that we add that the role is clearly within the authority of the OCC. It's directed by Congress in the National Bank Act to adopt rules that promote the availability of credit in safe and sound banking operations. That's exactly what it did, and its views on the subject are entitled to deference from the courts.

Alan Kaplinsky:

Okay. Let me now turn to you, Mindy. Jeremy wasn't the only person who commented. Am I right? There were quite a few comment letters.

Mindy Harris:

He was not the only person who commented.

Alan Kaplinsky:

How many were there?

Mindy Harris:

As of today, over 700 comments were submitted on the proposed rule.

Alan Kaplinsky:

Wow.

Mindy Harris:

That's what's being reported on the Regulations.gov website, and if you think about it, we're ... Almost a month and a half after the comment period closed, that number, for a long time, has continued to change. 548 of these have been posted so far.

Alan Kaplinsky:

Wow. Now, there was this other rule making I referred to, the Madden fix rule, that had many fewer comments. It was nothing like this.

Mindy Harris:

No, that's really interesting in contrast. If anyone wants to guess, I'll pause here. Only 63 comments were filed on the valid when made rule when it was proposed last year. We've talked about this contrast, and we think the high number of comments on the proposed true lender rule is attributable to a couple of major drivers, which is that there were a lot of campaigns encouraging people to submit form emails. That's probably a couple hundred of what's out there. But also-

Alan Kaplinsky:

Were the form emails on the consumer side, or the industry side?

Mindy Harris:

No, they're ... I'm going to talk about those in a little bit more detail in a minute, and they are all driven by supposedly consumer interest groups, although in many cases, unfortunately, it really would not be in the consumer's interest not to have this rule and not to be able to have access to credit. But also, we think it's the greater importance and complexity of the true lender issues because there are many different views among different industry participants, and that's what you see when you read the comment letters, very different from the Madden issue.

Alan Kaplinsky:

Okay. If you would, Mindy, and I know we clearly ... We didn't have enough time for Jeremy to read his one letter. We certainly aren't going to be able to have you read the 700 or so letters. But if you could, can you summarize, and maybe by lumping some of these letters together-

Mindy Harris:

Sure. Let-

Alan Kaplinsky:

The positions that were taken.

Mindy Harris:

Sure. Let me talk about some of the trends. And of course, Jeremy's letter was the best letter, so we don't-

Alan Kaplinsky:

No question about that.

Mindy Harris:

We know that one.

Alan Kaplinsky:

Yeah.

Mindy Harris:

But-

Alan Kaplinsky:

He's blushing again, by the way.

Jeremy Rosenblum:

You took the words right out of my mouth, Alan.

Mindy Harris:

But in looking at the comments submitted on the true lender rule, hundreds of them are identical or similar form comments and emails disparaging the proposed rule. As I said, they seem to be attributable to campaigns orchestrated by special interest groups, and in many cases, the same individuals submitted the same email or variations multiple times. I saw one instance where over 45 emails are sent by the same person. Some of them are different, some of them are the same. The sad thing is that most of these form emails evidence a complete lack of understanding of elements such as what you pointed out at the beginning of this podcast, which is that currently, under the National Bank Act, and under the Federal Deposit Insurance Act, national and state banks, and thrifts, have rate exportation powers.

Alan Kaplinsky:

Absolutely [inaudible 00:26:48], right?

Mindy Harris:

And that is not understood in the context of these form emails. Lack of understanding of the operation, the proposed rule, the OCC's enforcement and supervisory powers, but they just make unsupported assertions, saying that they think the proposed rule will enable triple digit interest rates, encourage predatory lending, and result in discrimination. I think a lot of the senders don't understand the difference between payday lending and bank partner programs. But, I must say that many, many other ... In contrast, many earnest and thoughtfully written comments and letters on both sides of the issues were submitted. I could go through some of the trends if you'd like.

Alan Kaplinsky:

Yeah, that-

Mindy Harris:

And please-

Alan Kaplinsky:

That would be ... Yeah. I'd like to hear ... Were there a lot of letters that agreed with the ... basically said take that proposed rule, Brian Brooks, who's the acting comptroller, and publish it as a final rule, which is more or less what Jeremy's comment letter said with a couple of nuances that I don't think we'll get into today.

Mindy Harris:

Sure. Let me speak about that. Jeremy's letter did make one important suggestion, to make sure that the comptroller ... to make it clear that the comptroller didn't imply that the OCC has the authority to set an interest rate ceiling. Right, Jeremy? Comments supporting the proposed rule were filed by trade associations, banks, marketplace lenders, and many strongly just supported the bright line rule, which is the rule as you and Jeremy described it. Others were supportive, but they provided suggestions for additional structure. Then I'll get to the ones that were lengthy letters that adamantly opposed the proposed rule as it is.

Mindy Harris:

Comments supporting the proposed rule recognized that, coupled with the Madden fix rule, the true lender rule would eliminate confusion, uncertainty, and significant legal risk for banks and their counter parties, increase financial inclusion across the population, and the availability of credit on reasonable terms for consumers nationwide. They cited the importance of access to affordable credit, particularly now in the face of the economic crisis caused by COVID-19. Many supporters

pointed out that the proposed rule would result in strong and consistent supervision of bank/fintech partnerships by the OCC across the country to ensure fairness and compliance with applicable laws. Many people along those lines say the proposed rule would keep the cost of credit down, and would encourage innovation because the banks, of course, partner with fintechs in order to get those cutting edge innovations into their products. Many just like the clear, unambiguous standard articulated in the proposed rule.

Alan Kaplinsky:

Mindy, in many respects, isn't it similar to the test used under the Truth in Lending Act to determine who's the creditor for purposes of who needs to make disclosures in compliance with the whole Truth in Lending Act, right?

Mindy Harris:

It absolutely aligns with the Truth in Lending Act in that regard. You're absolutely right, Alan.

Alan Kaplinsky:

Yeah. Nice, simple test. That's been on the books for decades, really. Right?

Mindy Harris:

Absolutely. A lot of the commenters wanted to make sure that they talked about the OCC's authority to adopt the rule in anticipation of a tax on that authority and the alignment of the proposed rule with the OCC's mission, congressionally established responsibilities not only to assure the safety and soundness of banks, but also compliance with laws and regulations.

Alan Kaplinsky:

Yeah. I really don't get, Mindy, how anybody with a straight face could argue that the OCC doesn't have authority to issue a regulation defining, really, the quintessential question of who's ... is the lender the national bank. You'll recall back in ... I guess it was the late ... I'm trying to think of exactly the year. I guess it was in early 90s, late 80s. There was this big issue about what constituted interest. Everybody knew you could export the periodic rate of interest from Delaware, or South Dakota, everywhere else in the country. That was established law. But then the issue then was what about late fees, what about annual fees, what about other fees and charges? That got litigated for many, many years.

Alan Kaplinsky:

It ultimately ended up in the Supreme Court of the United States. And while the case was pending before the Supreme Court, the Supreme Court issued a final regulation defining interest to encompass virtually all elements of the pricing package on a loan transaction. In the Supreme Court, a plaintiff's attorney in a case called Smiley V. Citibank argued in his briefs and oral argument that they should be disregarded, that no deference should be given to the OCC, particularly since they adopted this regulation in response to the litigation, and virtually at the 11th hour. It looked almost like the fix was it. That was how I viewed the argument at the time. The Supreme Court gave pretty short shrift to that, didn't they, Mindy?

Mindy Harris:

That's right, Alan, and what you said, which was how could anybody with a straight face contest that the OCC has the right to adopt a rule on this topic, plenty of people do. That is definitely the gravamen in many of the opposing comments, saying that the OCC lacks the authority to adopt the proposed rule, and which there are efforts to support that. Then also, there's references to Dodd-Frank, trying to say that this is an end run around the preemption language in Dodd-Frank. Then there's also allegations that the proposed rule adoption process violates the APA, the Administrative Procedures Act.

Mindy Harris:

But I'm getting ahead of myself there because I do want to point out that in addition to the out and out supportive letters, there are lots of letters from the industry and from trade groups that want to have a true lender rule. But they think there should be more substance for a bunch of reasons. They think that the bright line test might be too broad. Organizations, banks that recently settled litigation, for example, where an attorney general attacked a bank/fintech partnership, and ended up with some structural agreements about the program structure in their settlement. Those banks and organizations suggested the OCC take a page from their book and use that kind of structure, or at least refer to it.

Mindy Harris:

Then there's many in the industry, again, trade associations that support the rule but want carve outs. For example, they want carve outs for warehouse lending and things ... warehouse financing, and indirect auto lending, and that kind of lending. So let me get-

Alan Kaplinsky:

The latter are credit sales. They're not loans in any event.

Mindy Harris:

Well, yes, and again, that actually gets to a point that I think is important, which is that both of these rules really just clarify existing law. There's nothing that changes the law in these rules, I would submit. Now, the opposing letters filed by banks, a lot of state authorities, state banking authorities, special interest groups, academics, and others, have some common themes. As I said, that the OCC lacks the authority to adopt the rule, that the rule would deprive states of authority that they have now to regulate non bank lenders, and then a variety of other objections along the lines of the proposed rule is arbitrary and capricious, the adoption process violates the Administrative Procedure Act, that the proposed rule would support predatory lending, and might have an anti competitive impact on other state licensed non bank lenders. So, lots and lots of reasons for objections.

Mindy Harris:

Then a lot of the comments opposing the rule took the opportunity to advocate for positions beyond the scope of the rule, proposing, for example, that the OCC adopt a national interest cap, or asking the OCC to completely reconsider and revoke the previously adopted Madden fix rule. Alan and Jeremy, there's one more thing I want to mention that I think our listeners might find interesting, and that is how the comments fell along political lines.

Alan Kaplinsky:

Sure. Go ahead.

Mindy Harris:

A letter highly critical of the proposed rule was signed by 24 democratic state attorneys general, and no republic attorney generals.

Alan Kaplinsky:

State of Delaware, I'm proud to say, did not join in that letter.

Mindy Harris:

That's true. I do not see the state of Delaware on that letter.

Alan Kaplinsky:

Well, I'm not surprised. It's the home of a lot of the banks that are involved in exporting interest rates, so makes sense to me.

Mindy Harris:

Excellent comment. Good point, Alan. Thank you. Anyway, this letter asks that the rule be withdrawn in its entirety. Then there was another letter opposing the proposed rule that was sent two weeks after the close of the comment period by eight democratic senators, seven of which serve on the Senate Banking, Housing and Urban Affairs Committee, and criticizing the OCC for taking a pre financial crisis approach, and also saying they think the proposed rule doesn't meet the preemption requirements of Dodd-Frank, and things like that.

Mindy Harris:

By contrast, a letter to the OCC and the FDIC, signed by all 26 House Financial Services Committee republicans supports the rule making and expresses concern that if the rule is not adopted, the uncertainty surrounding the issue cast down on loans made under the bank/fintech partnership. So, definitely a split along political lines, except for Delaware, as you pointed out, Alan.

Alan Kaplinsky:

Yeah. I'm going to go back to you, Jeremy, so you can tell us why is it that the FDIC did not join in, in the comment letter.

Jeremy Rosenblum:

I think the answer, Alan, is that ... or what I hear, is that the FDIC has adopted something of a wait and see attitude. You may recall with respect to the Madden fix rule, the OCC went first, and the FDIC published its own rule, proposed and then published its own rule at a later point, not too far after the OCC. I've heard that ... and suspect, that there is a desire on the part of the FDIC to digest the comment letters that are submitted with respect to the OCC proposal before deciding exactly what it wishes to do at this point.

Alan Kaplinsky:

Let's talk about what comes next. Where do we go from here? I know the OCC, I'm sure, is going to be reading all the comment letters, and I'm assuming that they're going to issue a final rule at some point. But either Jeremy or ... Well, let's go with you, Jeremy, since Mindy has been talking quite a bit. What do you think happens?

Jeremy Rosenblum:

Well, the norm, of course, under the Administrative Procedures Act, is that the agency is expected to review all of the submissions that it's received during the comment phase to determine whether comments have merit and should be factored into the final rule, and they're required to address all the comments, basically, and explain why they're adopting or not adopting the proposals made by the comments. With the kind of volume of letters that Mindy is talking about, and some of them being quite elaborate and lengthy, that takes time. Typically, you would expect at least a couple months, maybe three, maybe longer.

Jeremy Rosenblum:

We, of course, are at a pivotal point in our country's history. The election is coming up, and the comptroller may or may not decide that it wishes to release the final rule before the election, or conversely, that the comptroller wants to wait until after the election, and perhaps read the political wins a bit. It's not clear whether the final rule, if any, will be adopted before or after the election. What I think is quite clear is that the election's going to have a major impact on whether the rule ever goes into effect.

Alan Kaplinsky:

Assuming that there's a blue wave, right? The democrats ... Joe Biden wins, and the dems take control of the Senate.

Jeremy Rosenblum:

No, no, no.

Alan Kaplinsky:

And the House.

Jeremy Rosenblum:

I'm saying whoever wins, that's going to have a major impact. If there is a blue wave, if the democrats take over both houses of Congress and the presidency, then this rule will likely be consigned to the dust bins of history. Conversely, if election goes in a different direction, a rule may or may not be adopted, and may or may not go into effect. But certainly, I think, if the democrats sweep, it's very unlikely that anything like the proposed rule will become effective.

Alan Kaplinsky:

Well, except that it might already be finalized by then. Right? If I'm the acting comptroller [inaudible 00:42:57], with all this uncertainty, of course, he'll know, or may know the outcome by November 3rd. Probably not. But in any event, he's going to be in office at least until January 20th, right, or 21st. Wouldn't you think if you were him you'd publish that final rule, and at that point, it's the rule unless it gets overridden under the Congressional Review Act, or it's challenged in court and thrown out.

Jeremy Rosenblum:

Well, that was a huge unless, Alan. My supposition is that if a rule like the proposal is adopted, and the democrats sweep, it will almost certainly be overridden under the Congressional Review Act. That is a statute that allows repeal of government regs without any possibility of a filibuster in the Senate. So, 51 senators, and a majority of Congress people, with the consent of the president, can override a rule and effectively prevent the agency from readopting a similar rule. And there will be plenty of time to do that after the election. It does not need to be done prior to the election. That, of course, assumes that the filibuster remains a vehicle for any legislation, and that, too, is very much in doubt under a democrat Congress and a democratic Senate.

Alan Kaplinsky:

So, you don't think I should take ... Well, one person said to me the other day, where I was having a discussion about this, they said ... The person said, "Well, don't forget Joe Biden is a democrat, but he's from Delaware, and in general, he's been very supportive of the banks in Delaware, most notably in connection with amendments to the Bankruptcy Code." It's the bread and butter of ... The banking industry is very important in Delaware.

Mindy Harris:

That's a really good point, and so what I ... I would like to ask both of you what you think of this. Without this rule, the law is still as is right now. When you see outcomes in court like the two recent decisions dismissing Cohen vs. Capital One Funding, and Peterson vs. Chase Card Funding, whether the rule survives or fails, there's still pretty strong authority that the bank is the true lender. Now, yes, there's still going to be a lot of controversy about it, but I have to say, you guys, look at the enormous amount of scholarship that has been generated on the topic, and that's sitting there in the repository of Regulations.gov. It's still the law in many jurisdictions that the true lender is the bank.

Jeremy Rosenblum:

What I would say, though, is that the law is not as clear as I would like it to be. I think that's why we need a rule from the comptroller, hopefully from the FDIC. Those rules are entitled to deference in the courts, at least under current Supreme Court guidance. Right now, there are a number of well-reasoned cases that do provide broadly that the bank should be treated as the true lender when named in the loan documents. But there are a number of other cases that go the other way, which is,

frankly, why we're constantly retained in these programs to provide guidance to help support the argument that the bank should be treated as the true lender.

Jeremy Rosenblum:

So I, frankly, regard whether this rule goes into effect as being very important. If it doesn't, there will be litigation for years in various jurisdictions. If it does go into effect, there will be a spate of litigation. There will be, I think, an attack on the rule, a frontal attack. And then there will be litigation where courts are asked to determine whether the OCC's views, and perhaps the FDIC's views down the road, should be given deference. But I don't think we should minimize the importance of this development, and the importance, frankly, of the comptroller weighing in on this subject. To me, it really would help eliminate confusion and uncertainty that exists under the current state of the law.

Alan Kaplinsky:

Yeah. The thing I would say, Mindy, in response to your comments, that securitization cases, the two of them that you mentioned, that is a much easier case to decide that the bank is the true lender than some of these other cases because there, it's very clear that you are dealing with credit card accounts that were still owned by the bank, and only the receivables underlying the accounts were securitized. In that case, the two courts that were looking at that issue basically didn't even mention the fact that the OCC had a proposed rule dealing with this subject. They basically said that's irrelevant because the bank has always been the account holder.

Jeremy Rosenblum:

Alan, and more fundamentally, those cases really tried to make a Madden argument that the securitization vehicles should not be treated as the lender after the sale end of the securitization. They didn't even make the true lender argument in those cases. Unfortunately, those cases don't resolve the issue even in the courts where they were decided.

Alan Kaplinsky:

Well, I think we've drawn to the end of our show today. This is a subject I can almost assure our listeners is not going away any time soon. So we'll be blogging about it, we'll certainly be doing other podcasts on the subject, and I would just basically say to everybody stay tuned. With that, I want to thank Jeremy and Mindy for terrific explanation of the true lender doctrine, and the proposed reg, and Jeremy's comment letter, and the other comment letters that were submitted. I want to thank all of our listeners today for taking the time to listen to our program. Let me remind you again that our podcasts are released every Thursday, except for a couple of days during the year where Thursday falls on a holiday. We very recently hit the 100 podcast milestone, and we're going strong, so make sure that you stay tuned to our show. With that, I hope everybody stays well.