

# Locke Lord QuickStudy: States Sue OCC, Challenging its “True Lender” Rule

Locke Lord LLP

## WRITTEN BY

John L. Whitlock | Brandon Curtin

---

On January 5, 2021, the Attorneys General of New York, California, Colorado, the District of Columbia, Massachusetts, Minnesota, New Jersey and North Carolina (collectively, the “States”) sued the Office of the Comptroller of the Currency (the “OCC”), alleging that its “true lender” rule (the “True Lender Rule”) is invalid.<sup>1</sup> The suit represents the first legal challenge to the True Lender Rule, which became effective on December 29, 2020.<sup>2</sup>

## Background of the True Lender Rule

On June 2, 2020, the OCC published its final rule clarifying that an assignee of a national bank has the right to collect interest at the same rate as the national bank on loans made by the national bank.<sup>3</sup> In doing so, the OCC codified the common law doctrine of “valid when made,” which states that a loan that was valid when made will not be rendered usurious by a subsequent transfer. Our analysis of the OCC’s “valid when made” rule is available [here](#). At the time, the OCC declined to address the related question of whether a bank is the “true lender” in a transaction where the loan is assigned to the assignee soon after it is made pursuant to an agreement between the bank and the assignee. On October 29, 2020, the OCC answered that question when it promulgated the True Lender Rule, which provides that a bank makes a loan if, as of the date of origination, it (1) is named as a lender in the loan agreement or (2) funds the loan.<sup>4</sup> Where one bank is named as the lender in the loan agreement and a different entity funds the loan, the entity that is named as the lender in the loan agreement is the true lender of that loan.<sup>5</sup> Our analysis of the True Lender Rule is available [here](#).

## The Suit

Concerned that the True Lender Rule will facilitate predatory lending by non-bank entities, the States filed suit in the United States District Court for the Southern District of New York. In their brief, the States contend that the True Lender Rule is void under the Administrative Procedures Act (the “APA”).<sup>6</sup> Specifically, the States argue that the True Lender Rule exceeds the statutory authority granted to the OCC under federal law and in fact unreasonably interprets that federal law.<sup>7</sup> In support of their argument, the States suggest that the standard set forth in the True Lender Rule deviates substantially from the established true lender analysis applied by courts, ignores the economic realities of the lending transaction, and fails to solve the problem that it purports to remedy.<sup>8</sup> In particular, the States emphasize the apparent tension between the True Lender Rule and the OCC’s longstanding policy condemning rent-a-bank schemes in which national banks merely act as conduits for loans made by non-bank entities that would otherwise be illegal under state usury law.<sup>9</sup> From the States’ perspective,

the True Lender Rule favors these “sham arrangements” between national banks and non-bank lenders.<sup>10</sup>

The OCC has yet to file a reply brief, but when it does, it will likely expand on the arguments that it made in the release accompanying publication of the True Lender Rule. In that release, the OCC explained that the True Lender Rule interprets a statutory ambiguity in the National Bank Act of 1864 that has resulted in legal uncertainty.<sup>11</sup> The OCC noted in the release that the True Lender Rule would reduce this legal uncertainty by simplifying the analysis for courts, which had previously applied a complex balancing test, leading to divergent results on virtually identical facts.<sup>12</sup> Finally, in responding to the charge that the True Lender Rule encourages predatory lending, the OCC reasoned that the True Lender Rule actually “frustrates rent-a-bank schemes by implementing a clear and easily administrable test.”<sup>13</sup>

We will continue to monitor the suit for further developments.

For more information on the matters discussed in this Locke Lord QuickStudy, please contact the authors.

—

1. Plaintiffs’ Brief in *New York v. OCC*, No. 1:21-cv-00057 (S.D.N.Y. Jan. 5, 2021).
2. *National Banks and Federal Savings Associations as Lenders*, 85 Fed. Reg. 68,742 (Oct. 30, 2020) (codified at 12 C.F.R. § 7.1031).
3. *Permissible Interest on Loans That Are Sold, Assigned, or Otherwise Transferred*, 85 Fed. Reg. 33,530 (Jun. 2, 2020).
4. 12 C.F.R. § 7.1031(b).
5. *Id.* § 7.1031(c).
6. Plaintiffs’ Brief at 21.
7. *Id.* at 23, 25.
8. *Id.* at 25, 27.
9. *Id.* at 33.
10. *Id.* at 33.
11. 85 Fed. Reg. 68,742.
12. *Id.* at 68,743.
13. *Id.*

## RELATED INDUSTRIES + PRACTICES

- [Banking + Financial Services Regulation](#)
- [Corporate](#)
- [Debt Finance](#)
- [Financial Services Litigation](#)