LAWFLASH

SUPREME COURT DENIES CERTIORARI PETITION IN *MADDEN* CASE

June 27, 2016

Although it is reasonably unlikely that other circuit courts will follow the Second Circuit decision, it is uncertain whether application of the *Madden* case in the Second Circuit will be confined to its facts.

On June 27, the US Supreme Court denied the petition for certiorari in *Madden v. Midland Funding*, a case closely watched by the financial industry. In *Madden*, the US Court of Appeals for the Second Circuit held that a loan originated by a national bank ceased to have preemptive effect under the National Bank Act once it was assigned to a nonbank debt collector because the assignee was not a nationally chartered bank and it was collecting on behalf of itself and not a national bank.[1] Without preemption, the loan—only when held by a nonbank assignee—would be subject to applicable state law, which, depending on which state's law applies, could create potential liability under state statutes, such as usury and consumer protection statutes. Given the active secondary market for consumer loans, the Second Circuit decision has created uncertainty and affected the willingness of certain market participants to acquire or finance loans.

WHAT COMES NEXT?

Now that the Supreme Court has declined to take the case, the Second Circuit's decision remains good law on the issue of federal preemption under the National Bank Act or, more precisely, the lack thereof, where the named defendant is a party that is neither a national or state chartered bank nor collecting on behalf of such a bank. The Second Circuit decision is binding precedent only on federal courts that sit within the Second Circuit (New York, Connecticut, and Vermont). The decision will continue to be binding in the Second Circuit until such time that the Second Circuit has occasion to address the issue in another case.[2]

In the specific case of *Madden*, the parties will return to the district court where several important issues remain, including whether New

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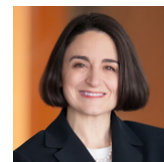
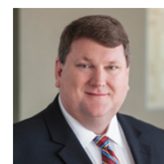


SUSAN F. DICICCO
PARTNER
New York



DAVID B. SALMONS
PARTNER
Washington, DC

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York or Delaware law applies to the underlying agreement relating to the customer's debt.

WILL THE *MADDEN* DECISION BE ADOPTED BY OTHER CIRCUIT COURTS?

The Second Circuit is an influential court, particularly in matters relating to complex financial issues. Nonetheless, certain factors suggest that it is reasonably unlikely that other circuit courts will follow the Second Circuit's *Madden* decision on the preemption issue:

- At least two other circuits (the Fifth and Eighth Circuits) have previously rendered decisions that lend support to the "valid when made" doctrine, which provides that a loan does not become invalid if it was valid when it was made.[3] These two circuits include 10 states.
- There are now well-written and reasoned briefs that were prepared in connection with the *Madden* appeals that litigants may use to frame the arguments appropriately in any other lower courts where these issues are raised.
- The US solicitor general's brief, on which the Office of the Comptroller of the Currency joined, in response to the petition for certiorari unequivocally expressed the view of the United States that the Second Circuit's decision was incorrect in several respects. Importantly, the solicitor general endorsed both the "valid when made" doctrine and the distinct argument that application of state usury laws that "prevent or significantly interfere" with a national bank's right to charge the maximum interest allowed by the bank's home state are preempted.[4] Litigants will cite the solicitor general's brief for support of finding preemption and distinguishing the Second Circuit's decision.

CONTACTS

If you have any questions or would like more information on the issues discussed in this LawFlash, please contact any of the following Morgan Lewis lawyers:

New York
Susan F. DiCicco
Reed D. Auerbach
Matthew P. Joseph
Steve Levitan

Washington, DC
David B. Salmons
John Arnholz
Charles M. Horn
Melissa R. H. Hall

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[1] 786 F.3d 246 (2d Cir. 2015).

[2] Litigants appearing before federal courts sitting in the Second Circuit, including the Second Circuit itself, will likely cite the solicitor general's brief (*see below*) for its support that preemption applies for assignees and as a means to distinguish the Second Circuit's *Madden* decision.

[3] *Krispin v. May Department Stores,* 218 F.3d 919 (8th Circ. 2000); *see also FDIC v. Lattimore Land Corp.*, 656 F.2d 139 (5th Cir. 1981)

(dealing with a loan originated by a nonbank assigned to a national bank).

[4] *See Barnett Bank of Marion County N.A. v. Nelson*, 517 U.S. 25, 33 (1996).

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