



June 29, 2015

PETITION FOR REHEARING FILED IN *MADDEN V. MIDLAND FUNDING LLC*

On June 19, the defendants in *Madden v. Midland Funding LLC*, No. 14-2131 (2d Cir. May 22, 2015), filed a petition asking the U.S. Court of Appeals for the Second Circuit to rehear their case. In *Madden*, the Second Circuit held that the National Bank Act (NBA) did not preempt the plaintiff's state usury claims against a third-party nonbank assignee of a loan originated by a national bank. See our ALERT of June 9, 2014 for details on the Second Circuit's ruling.

The defendants set forth three arguments for why the Second Circuit should grant a rehearing. First, the *Madden* decision misapplied fundamental principles of preemption under the NBA. The *Madden* decision ignored the broad preemptive effect of Section 85 of the NBA, which courts have found preempts any state law that interferes with a national bank's power to set interest rates. By ignoring the long-standing principle that the terms of a loan are valid when made and limiting the interest rate nonbank assignees may charge, the *Madden* decision hollows out the authority granted under Section 85 because individual state laws could influence the interest rate that a national bank charges.

The *Madden* court also erred in rejecting another source of preemption: state regulations that significant interference with a national bank's powers granted under the NBA. The *Madden* decision offered no support for the conclusion that state regulation of banks' assignees will not significantly interfere with a bank's ability to originate and sell loans. If the *Madden* decision were to stand, the defendants argue that (i) the severe penalties for usury and (ii) the uncertainty of which law applies to assignees of bank loans, would freeze secondary markets for national banks.

Second, the *Madden* decision conflicts with other courts of appeal cases that (i) adopt the principle that a loan is valid when made and (ii) conclude that regulation of the secondary market for national-bank-issued loans constitute an indirect regulation of the bank's ability to issue loans on certain terms.

Third, whether assignees of national banks are subject to state usury laws is a question of exceptional importance. If the *Madden* decision were allowed to stand, state law could deeply impair a bank's ability to sell loans because state law may make the loan worthless in the hands of the subsequent purchaser. The *Madden* decision could force banks (i) to alter the terms of their loans to

satisfy individual state laws despite the authority granted in Section 85 or (ii) not to rely on securitization as a source of liquidity.

Since the defendants' filing, several trade associations, including the Clearing House Association, Financial Services Roundtable, Consumer Bankers Association and the Loan Syndications and Trading Associations, have taken steps to file *amicus curiae* briefs in the case. We will continue to monitor *Madden* and provide updates. □

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