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DISTRICT COURT CERTIFIES CLASS IN *MADDEN*

The New York district court in *Madden v. Midland Funding* has added another chapter to the saga. On February 27th, the district court certified a class of consumer credit card debtors residing in New York that were sent letters by the defendants attempting to collect interest in excess of 25% per annum (*i.e.*, the New York criminal usury limit) and whose cardholder agreements (i) purport to select a governing law with no usury cap, like Delaware or (ii) select no governing law.

In its order, the district court permitted the plaintiffs to pursue their federal Fair Debt Collection Practices Act ("FDCPA") and state deceptive acts or practices claims, but dismissed the plaintiffs' New York civil and criminal usury claims because (i) the New York civil usury limit does not apply to defaulted obligations and (ii) the New York criminal usury law does not provide a private right of action. The plaintiffs' FDCPA and state claims are based on the defendants' attempt to collect interest on debts at a rate above New York's 25% criminal usury limit.

The defendants argued that the plaintiffs' claims should be dismissed because Delaware law applies to the claims pursuant to the choice-of-law provision in the cardholder agreement. The district court disagreed. Under New York law, a contractual choice-of-law provision will be enforced provided that (i) the law selected has a reasonable relationship to the agreement *and* (ii) the law chosen does not violate a fundamental public policy of New York. The district court gave little weight to the reasonable relationship prong of the choice-of-law analysis finding that the parties' Delaware choice-of-law provision should not be enforced because applying Delaware law would violate a fundamental New York public policy — New York's criminal usury statute. Delaware has no usury cap; whereas, New York has a criminal usury cap of 25%. Because the New York criminal usury law applies, the district court denied the defendants' motion to dismiss the FDCPA and state claims, which are predicated on the violation of New York criminal usury law.

The district court's latest ruling comes after the Second Circuit (i) reversed the district court's National Bank Act ("NBA") preemption determination that bank loan assignees are "entitled to the protections of the NBA if the originating bank was entitled to protections of the NBA," (ii) vacated the district court's denial of class

certification and (iii) remanded the case for further proceedings "consistent" with the Second Circuit's opinion. See our ALERTS of June 4, 2016 and June 9, 2016; Michael Tomkies and Susan Seaman, *Stay Far from the Madden-ing Crowd*, 69 CONSUMER FIN. L.Q. REP. 227 (2016). The Second Circuit did not decide whether the Delaware choice-of-law provision in the cardholder agreement precludes the plaintiffs' New York usury claims because the district court had not ruled on the issue.

The district court's ruling also follows the U.S. Supreme Court's decision to deny review of the Second Circuit's decision. See our ALERT of June 27, 2016. The U.S. Solicitor General and the Office of the Comptroller of the Currency had filed an amicus brief with the U.S. Supreme Court, which characterized the Second Circuit's decision as "incorrect" and explained the proper usury analysis if New York law applies and New York recognizes the valid-when-made doctrine. See our ALERT of May 25, 2016. The district court could have followed the Solicitor General's analysis on remand, but the court did not mention the Solicitor General's brief, the valid-when-made doctrine under New York law or the role of Section 85 of the NBA as an overriding federal choice-of-law.

The district court's conclusion that the criminal usury statute represents a fundamental public policy of New York appears questionable based on the cases cited by the court and the court's incomplete statutory analysis of the criminal usury statute.

While the financial services industry determines how to respond to the latest chapter in the *Madden* saga, one of the lessons from *Madden* is the importance of clearly explaining the proper usury analysis to courts from the onset of a case. □

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