DREHER TOMKIES LLP

ALERT

FOR CLIENTS AND FRIENDS OF DREHER TOMKIES LLP

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U.S. SUPREME COURT DENIES *MADDEN*

The U.S. Supreme Court has denied without explanation Midland Funding's petition to review the U.S. Court of Appeals for the Second Circuit's opinion in *Madden v. Midland Funding*. Midland Funding asked the court to address: Whether the National Bank Act (NBA), which preempts state usury laws regulating the interest a national bank may charge on a loan, continues to have preemptive effect after the national bank has sold or otherwise assigned the loan to another entity. The Supreme Court typically denies petitions without explanation.

The U.S. Solicitor General, joined by the Office of the Comptroller of the Currency (OCC), had recommended that the Supreme Court not review the case. Although the Solicitor General and OCC stated flatly that the Second Circuit's decision was incorrect and misguided, the Solicitor General argued that further review was not warranted because (i) there is no circuit split on the question presented, (ii) the parties did not adequately present key aspects of the preemption analysis to the Second Circuit and (iii) the petitioners may still prevail on remand despite the Second Circuit's decision. See ALERT of May 25, 2016 for details on the Solicitor General's amicus brief.

While the petition has been pending in the Supreme Court, the parties in *Madden* have continued to file briefs in the trial court, most recently on Madden's renewed motion for class certification and on Midland Funding's renewed motion to dismiss. The trial court has yet to resolve whether the Delaware choice-of-law provision in the credit card account's terms and conditions precludes the plaintiff's usury claim and Fair Debt Collection Practices Act claim.

The Second Circuit's ruling in *Madden* is binding in only three states – Connecticut, New York and Vermont – but it remains to be seen how courts within the Second Circuit will interpret the decision. They could, for example, seek to limit *Madden* to its facts (debt buyer), to limit the scope of the preemption analysis or to decide cases favorably to industry on other grounds in light of the Solicitor General's brief. Outside of these states, *Madden* is only persuasive authority. Thus, courts outside of the Second Circuit should not be expected to interpret *Madden* broadly to prohibit a loan assignee from charging an interest rate that was valid when the assignor made the loan to a borrower. Given the strong wording of the Solicitor General's brief and the OCC's direct involvement with the brief, courts should properly resolve state usury claims filed against assignees of bank loans based on federal bank preemption and the valid-when-made doctrine. ❑

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