DREHER TOMKIES LLP

ALERT

FOR CLIENTS AND FRIENDS OF DREHER TOMKIES LLP

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MADDEN CORRECTION BILL PASSES U.S. HOUSE

On Wednesday, the U.S. House of Representatives passed the Protecting Consumer's Access to Credit Act of 2017 (H.R. 3299), a bill that codifies the common law "valid-when-made" doctrine for loans made under the National Bank Act, the Home Owners' Loan Act, the Federal Credit Union Act and the Federal Deposit Insurance Act. Codifying the "valid-when-made" doctrine would address the uncertainty and unrest caused by the U.S. Court of Appeals for the Second Circuit's opinion in *Madden v. Midland Funding* by affirming the doctrine's long-recognized validity. The bill heads to the U.S. Senate next, where it will need 60 votes to pass.

We have written extensively on the Second Circuit's *Madden* ruling. Many feared that *Madden* invalidated the "valid-when-made doctrine" and limited the interest rate nonbank assignees of bank loans may charge. If accepted, such an interpretation of the ruling could (i) chill the secondary market for bank loans and (ii) limit the availability of credit for borrowers.

Fairly considered, we interpret the Second Circuit's opinion to narrowly address the scope of direct NBA preemption. *Madden* should not be read to overturn centuries of case law recognizing the "valid-when-made" doctrine. Had it been the Second Circuit's intent to invalidate the "valid-when-made" doctrine, then more should have been said to address the "valid-when-made" doctrine directly, and less said regarding conflict preemption. The danger with *Madden* is that other courts (and state regulators) will misinterpret the Second Circuit's ruling to invalidate the "valid-when-made" doctrine creating bad case law. *See e.g.*, Complaint, *Meade v. Avant of Colorado, LLC,* No. 17-30377 (Ct. Dist. Ct. Mar. 9, 2017).

If the Senate does not pass a bill to "correct" *Madden*, then the financial services industry will need to aggressively counter miss-interpretations of *Madden* in court and vigorously re-assert the primacy of the "valid-when-made" doctrine.

Case status update: In February 2017, a New York district court certified a class of consumer credit card debtors residing in New York that were sent letters by Midland Funding 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. See our ALERT of March 13, 2017. The case remains open. In November 2017, the plaintiffs filed a second amended complaint to conform the requested class to the court's February order. ❑

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