DREHER TOMKIES LLP

ALERT

FOR CLIENTS AND FRIENDS OF DREHER TOMKIES LLP

**October30, 2015**

## REJECT THE *MADDEN*-ING CROWD

The U.S. Court of Appeals for the Second Circuit's opinion in *Madden v. Midland Funding* has caused unrest throughout the financial services industry from program managers to institutional investors. *See* our Alerts on June 9, 2014, June 29, 2015 and August 14, 2015 for details on the Second Circuit's ruling and Midland Funding's petition for rehearing. Many fear that *Madden* has invalidated the long-standing valid-when–made doctrine (VWM) and will limit the interest rate nonbank assignees of bank loans may charge. If accepted, such an interpretation could (i) chill the secondary market for bank loans and (ii) limit the availability of credit for borrowers. Fears have already affected the secondary market and many existing programs and relationships. Previously pending lawsuits have had *Madden* counts added to them.

We do not believe that *Madden* should be interpreted so broadly. The Second Circuit addressed whether the National Bank Act (NBA) preempts state usury claims against nonbank assignees of bank loans that act independently of a national bank. The Second Circuit answered this question in the negative by clarifying the limited scope of direct NBA preemption under Sections 85 and 86. Fairly considered, *Madden* should not be read to overturn centuries of case law recognizing VWM. Had that been the Second Circuit's intent, then more should have been said to address VWM directly, and less said regarding conflict preemption.

Courts that do not understand the relationship between national bank preemption (and by extension, state bank preemption) and VWM could interpret *Madden* to limit the interest rate that nonbank assignees of bank loans may charge. The financial services industry should aggressively counter such an interpretation to avoid potential damage from *Madden* by vigorously re-asserting the primacy of VWM. VWM has been successfully asserted in substantially similar circumstances. We are happy to assist with crafting the argument and laying out the necessary reasoning.

*Status update:* The defendants in *Madden* anticipate filing their appeal to the U.S. Supreme Court by the November 11, 2015, deadline. A number of *amici* have been lined up. Subject to action on the part of the U.S. Supreme Court, re-briefing for the district court is expected to be completed by next March.❑

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