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Consumer Finance Litigation

U.S. Supreme Court Declines to Hear National Bank Act Preemption Case

Action Item: The United States Supreme Court declined to review a Second Circuit ruling that non-national bank assignees of debt are not entitled to preemption of state usury laws under the National Bank Act. The Supreme Court's decision to deny *certiorari* in *Midland Funding, et al. v. Madden* essentially reinforces the applicability of state consumer protection laws in the Second Circuit.

On June 27, 2016, the United States Supreme Court denied *certiorari* in *Midland Funding, et al. v. Madden,* ____S. Ct. ___ (2016), letting stand a Second Circuit opinion holding that the National Bank Act ("NBA"), 12 U.S.C. § 85, did not preempt state law usury claims against third-party debt buyers even if the originator of the debt is a national bank.

FIA Card Services ("FIA"), a national bank located in Delaware, sold $5,000 of credit card debt, owed by Saliha Madden, to Midland Funding, LLC. *See Madden v. Midland Funding, LLC,* 786 F.3d 246, 248 (2d Cir. 2015). In November, 2010, Midland Funding, through its servicer Midland Credit Management, Inc. sent Madden a letter stating that Madden's debt was accruing interest at a rate of 27% per year.

Madden commenced a class action against Midland Funding and Midland Credit (collectively "Midland") alleging that the interest rate on her credit card account violated New York's usury laws (N.Y. Gen. Bus. Law § 349; N.Y. Gen. Oblig. Law § 5-501; N.Y. Penal Law § 190.40) and the Fair Debt Collection Practices Act ("FDCPA") (15 U.S.C. §§ 1692e, 1692f).

The District Court denied Madden's motion for class certification on the basis that the NBA preempts state law usury claims if the debt was assigned by a national bank. *Id.* at 248. Under the NBA, the usury laws of the state in which the national bank is located apply. *Id.* at 250. Since FIA and the credit card issuer are located in Delaware, New York State usury laws are preempted by Delaware's more lenient usury laws. *Id.* at 250. Accordingly, the District Court reasoned that a class action would be inappropriate because each class member's claims would turn on whether that particular class member's debt was actually assigned to Midland. *Id.* at 249.

Madden appealed the District Court's holding, and the Second Circuit overturned the District Court. The Second Circuit held that NBA state law preemption may only apply to non-national bank entities if "application of state law to that action [] significantly interfere[s] with a national bank's ability to exercise its power under the NBA." *Id.* at 251 (*citing Barnett Bank of Marion Cnty., N.A. v. Nelson,* 517 U.S. 25, 33 (1996)). Thus, the Second Circuit found that while state usury laws "might decrease the amount a national bank could charge for its consumer debt in certain states," such an effect would not "significantly interfere" with the exercise of a national bank's power. *Id.*

Midland filed a petition for *certiorari* arguing that the Second Circuit's decision conflicted with decisions in the Eighth and Fifth Circuits.[1] Specifically, Midland cited *Krispin v. May Department Stores Co.,* 218 F.3d 919 (8th Cir. 2000), in which the Eighth Circuit held that the NBA preempted state law usury claims against department stores that purchased a national bank's receivables (such as interest and late fees) on credit card debt originated by a national bank. *Id.* at 922–923. Midland also cited *FDIC v. Lattimore Land Corp.,* 656 F. 2d 139 (5th Cir. 1981) in which the Fifth Circuit held that the usury laws of the state where a non-national bank originating entity is located should be applied after the debt was assigned to a national bank in another state. *Id.* at 146–150.

More generally, Midland argued that the Second Circuit's decision should be reversed because it abrogates the "valid-when-made" principle, which is essential to a national bank's ability to set interest rates. Under the Second Circuit's ruling, according to Midland, national banks would be forced to either alter the terms of their loans in order to satisfy the numerous state laws that could conceivably apply, or forgo selling their credit products in the secondary market.

The Solicitor General, in conjunction with the Office of the Comptroller of the Currency, filed an *amicus* brief[2] stating that the Second Circuit's decision was incorrect because a national bank's federal right to charge interest up to the rate allowed by the NBA would be significantly impaired if the national bank's assignee could not continue to charge that rate. Nevertheless, the United States took the position that no further review of the Second Circuit's decision was needed because there is no current conflict among the circuits.

The U.S. Supreme Court denied *certiorari.* As a result, Madden's putative class action will be remanded back to the District Court, where that court will revisit class certification.

Ultimately, the U.S. Supreme Court's refusal to grant *certiorari* gives a second life to Madden's FDCPA and New York State law usury claims. *Id.* at 254. The decision not to hear *Midland* clarifies that NBA preemption of state usury laws does not apply to non-national bank third-party debt buyers in the Second Circuit.

Mr. Streibich would like to thank Diana M. Eng and Alexander J. Franchilli for their assistance in developing this Alert.

1. Midland Funding's petition for *certiorari* is available on Westlaw at 2015 WL 7008804.
2. The United States' Amicus Brief can be accessed on Westlaw at 2016 WL 2997343.

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