

Midland Funding v. Madden Update: Bank Sale of Loans

Article By:

Susan F. DiCicco

Allyson N. Ho

In an amicus curiae brief, the US Solicitor General recommends that the petition for certiorari in *Madden* be denied, but agrees that the Second Circuit's decision is incorrect and emphasizes the importance of banks being able to freely sell their loans.

On March 21, 2016, the US Supreme Court invited the Solicitor General of the United States to file a brief expressing the views of the United States on the issues presented by the petition for certiorari filed in *Midland Funding, LLC v. Madden*. In response, on May 24, 2016, the Solicitor General filed an amicus curiae brief (the "Brief") recommending that the petition for a writ of certiorari be denied, but stated that the US Court of Appeals for the Second Circuit erred in the decision on review. Importantly, the Brief agrees in all material respects with the substance of the arguments presented by the petitioners and the amici curiae in support of the petition for certiorari.

In his Brief, the Solicitor General addressed the question presented as:

Whether the National Bank Act . . . 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 Solicitor General answered with a resounding "yes," underscoring the significance of the "valid when made" doctrine, expounding on the preemption issue, and emphasizing the importance that banks must be able to freely sell their loans.

The Solicitor General's Brief states no less than five times that *Madden* was incorrectly decided. The Solicitor General summarizes his position as follows:

The court of appeals erred in holding that state usury laws may validly prohibit a national bank's assignee from enforcing the interest-rate term of a debt agreement that was valid under the law of the State in which the national bank is located. But there is no circuit split on the question presented; the parties did not present key aspects of the preemption analysis to

the courts below; and petitioners may still prevail on remand despite the error in the court of appeals' interlocutory decision. For all of those reasons, further review is not warranted.

While there may not be a direct split among the circuits, the Brief acknowledges that the Fifth Circuit in *FDIC v. Lattimore Land Corp.* applied the “valid when made” doctrine, and the Second Circuit’s *Madden* decision “overlooked that principle.” Thus, other courts of appeals, if confronted with the specific issue in this case, will undoubtedly decide the issue differently than the Second Circuit.

If the Solicitor General had recommended that the certiorari petition be granted, that would have greatly enhanced the odds that the Supreme Court would grant the petition. But the fact that the Supreme Court called for the views of the Solicitor General indicates that at least four of the Justices were interested in the case, and generally, the rate of petitions granted increases where the Supreme Court has called for the Solicitor General’s views—whether or not the Solicitor General recommends that the petition should be granted. And of course, the Supreme Court sometimes grants review even after the Solicitor General recommends against it.

Here, the Solicitor General has agreed on the merits with the petitioner and its *amici* that the decision of the Second Circuit in *Madden* is incorrect in numerous respects, and several industry groups as *amici curiae* have explained the negative impact of the *Madden* decision standing uncorrected. This current posture is helpful to the petitioner—notwithstanding the Solicitor General’s view that *Madden* is a “poor vehicle for resolution of the question presented.”

If the Supreme Court does not grant certiorari, the *Madden* case will return to district court for further proceedings, including addressing the issue on the applicable choice of law. While the Solicitor General’s brief provides ample reasons why Midland Funding should prevail in district court on other grounds, a denial of certiorari would unfortunately leave as binding law in the Second Circuit a decision the Solicitor General agrees is wrong on the issue of preemption.

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