

# The Implications of *Madden v. Midland* for Online Lending

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# Overview

- *Madden v. Midland* Background
- District Court Decision
- Second Circuit Decision
- Comparing *Krispin* and *Phipps*
- Will Supreme Court Grant Cert?
- Obvious Threats to Sales/Securitizations
- Risk Reduction Strategies

# Madden v. Midland – Background

- NY resident Madden obtained credit card from Bank of America
- Account transferred to FIA, choice of law changed to DE
- FIA charged off \$5,000 debt then sold debt to Midland
- Midland sent collection letter seeking 27% interest post-assignment (NY limit 25%)
- Madden sued and alleged usury and abusive and unfair debt collection practices under the FDCPA (usury claim is limited to interest above NY rate ceiling post-assignment)

# District Court Decision

- District court denies summary judgment and class certification based on factual disputes
  - Whether Madden's account had been assigned
  - Whether Madden received the change-in-terms notice
- District court subsequently finds preemption, assuming account had been assigned (stipulated facts)

# Second Circuit Decision

- Applying state law to non-bank assignee “would not significantly interfere with any national bank’s ability to exercise its powers under the NBA”
  - Post-assignment, only non-bank assignee is affected
  - No affiliation between national bank and non-bank assignee
- Policy statements
  - Decrease in what national bank could charge for its loans “would not ‘significantly interfere’ with exercise of its powers”
  - Extending federal preemption to unaffiliated parties “would create an end-run around usury laws for non-national bank entities that are not acting on behalf of a national bank”

# Comparing *Krispin* and *Phipps*

- *Krispin v May Department Stores*, 218 F.3d 919 (8<sup>th</sup> Cir. 2000) (bank sold credit card receivables to an affiliate, retaining the accounts and the servicing; limited analysis)
- *Phipps v. FDIC*, 417 F.3d 1006 (8<sup>th</sup> Cir. 2005) (fee charged by national bank before assignment but agency relationship between bank and fee earner)

# Will Supreme Court Grant Cert?

- August: Petition for rehearing denied by Second Circuit
- November: Midland files cert petition with SCOTUS
- March: SCOTUS asks Solicitor General to file brief
- Fall 2016: Cert decision expected

# Obvious Threats to Sales/Securitizations

- Madden threatens to significantly restrict the universe of potential purchasers for loans made by banks and savings institutions
- Reduction in market would seem to impair the ability of these entities to sell their loans, both to affiliates and unrelated parties as well as to securitization vehicles



# Risk Reduction Strategies

- Arbitration (for the time being)
- Conduct programs through a national bank or federal savings institution and not a state-chartered entity
- Buy and sell participation interests rather than whole loans
- Where possible, sell loans as pre-computed obligations rather than simple interest obligations
- Separate marketing and servicing entity from entity purchasing loans or participation interests
- Use a national bank or federal savings institution as trustee

# Questions?

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