



Financial Industry Alert

ALERT

Case Update: *Madden v. Midland Funding*

Despite the strong petition and amici briefs, the Second Circuit denied the request to rehear the *Madden v. Midland Funding* case. With the denial of the petition on August 12 (order attached), it is now clear that *Madden* is the law of the Circuit and will remain so unless and until the Supreme Court steps in.

There are several important state law issues that the court of appeals in *Madden* left open that will be addressed by the district court on remand – such as whether the district court will honor the choice of law designation of the parties (designating Delaware law as governing the loans) and, if New York law applies, whether New York law would assess the legality of the rate by looking to whether it was lawful at the inception of the loan. The denial of the en banc petition, however, does not mean that we are likely to get those answers soon.

Under the governing rules of appellate procedure, the court of appeals issues its formal “mandate” seven days after the denial of a petition for rehearing. Thus, if the defendant-lender in *Madden* did nothing, the mandate would automatically issue on Wednesday or Thursday of this week and the case would be back on remand to the district court for it to resolve those remaining important state law questions, as well as numerous other issues. We fully expect the defendant-lender, however, to seek a stay of the issuance of the mandate under Rule 41 of the Federal Rules of Appellate Procedure, while it seeks Supreme Court review of the court of appeals ruling. The court of appeals typically grants such requests, absent any unusual circumstances, and we would expect the Second Circuit to grant such a motion if sought in *Madden*.

If the court of appeals agrees to a stay of the mandate, as we expect, the return of the case to the district court will be delayed until the Supreme Court decides whether to grant the petition for writ of certiorari (seeking review of the court of appeals ruling), and if review is granted, obviously, even longer. Midland has 90 days to seek Supreme Court review. Plaintiffs will then have 30 days to respond, but can easily extend that another 30 days. Thus, the case may not be teed up for the Court to even decide whether to grant review for at least another five months. And then there is a significant possibility that the Supreme Court, instead of deciding whether or not to grant the petition, will ask for the views of the United States. If it does, that could slow down the process at least another three to four months.

Given that process laying ahead, those hoping for quick resolution of the remaining key state law issues are likely to have to continue to wait. Even if Midland does not seek a stay of the mandate (which seems unlikely), it is highly

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probable that the district court, knowing that a request for Supreme Court review is in the offing, would generally elect to put the case on ice, in any event. Bottom line, unless Midland forgoes seeking a stay, and aggressively pushes for a quick resolution of the remaining key state law issues, those issues will remain unresolved for the time being.

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Please feel free to contact any of the authors of this Client Alert, any of the members of our Structured Finance, Banking and Finance, Supreme Court and Appellate Litigation, Public Policy or White Collar groups or other Orrick attorneys with whom you work to discuss any questions you may have with regard to the foregoing.

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