

# Clients & Friends Memo

## Marketplace Lending Update #7: This and That

October 23, 2019

There have been a handful of recent marketplace lending developments that indicate that the legal uncertainties in the post-*Madden* world are not going away anytime soon.

### No Deposits? No Deal

On October 21, 2019, Judge Victor Marrero of the Southern District of New York set aside the OCC's regulation that would have allowed national bank charters to be issued to non-depository lenders. Section 5.20(e)(1) of the OCC regulations authorizes the OCC to grant special purpose charters to an entity that "limits its activities to fiduciary activities or to any other activity within the business of banking." In July 2018, the OCC had announced it would rely on Section 5.20(e)(1) to issue national bank charters to nondepository fintech lenders. In striking down the OCC's interpretation of Section 5.20(e)(1), Judge Marrero reasoned that the National Bank Act "unambiguously requires that, absent a statutory provision to the contrary, only depository institutions are eligible to receive national bank charters from the OCC." While the ruling comes as no surprise, given his May 2, 2019 order rejecting the OCC's motion to dismiss on a similar basis, it represents a significant setback to the OCC's fintech initiative.<sup>1</sup>

### Kabbage Heads to Court (Again)

Non-bank marketplace lender Kabbage joins the growing number of online lenders who are defending *Madden* and "true lender" claims in New York's federal courts. Unlike prior lawsuits, such as those recently filed against Capital One and Chase Bank,<sup>2</sup> the putative class action against Kabbage targets small business loans, not credit card or other consumer loans. And the plaintiffs in *Kabbage* break new ground by bringing RICO and RICO-conspiracy claims against Kabbage's officers.

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<sup>1</sup> For further analysis of Judge Marrero's reasoning, see our prior Clients & Friends memo "Is the Fintech Charter the Solution? Don't Bank on It" (May 9, 2019).

<sup>2</sup> Other lenders include Capital One and Chase Bank. For further analysis of the lawsuits they face, see our prior Clients & Friends memo "Cardholders Seek to Capital-ize on Madden" (June 18, 2019).

**OCC and FDIC Criticize *Madden***

The OCC and the FDIC recently asserted that *Madden v. Midland Funding*<sup>3</sup> was wrongly decided, the first clear statement on the matter by the FDIC and the first by the OCC since 2016, when it called *Madden* “incorrect” at the *certiorari* stage but nevertheless recommended against the Supreme Court taking the case. The District of Colorado, in *In re: Rent-Rite Super Kegs West Ltd.*,<sup>4</sup> is passing judgment on whether the bankruptcy court below properly upheld the valid-when-made doctrine, and in so doing “respectfully disagree[d] with *Madden*.”<sup>5</sup> The OCC and FDIC filed an amicus brief in support of affirming the bankruptcy court’s decision, arguing that “*Madden*’s disregard of two centuries of established law—without even addressing such law—is not just wrong: it is unfathomable.”<sup>6</sup>

We will continue to monitor these marketplace lending issues and provide further updates as appropriate.

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<sup>3</sup> *Madden v. Midland Funding, LLC*, 786 F.3d 246 (2d Cir. 2015), *cert. denied*, 136 S. Ct. 2505 (2016).

<sup>4</sup> No: 1:19-cv-01552-RBJ (D. Colo.).

<sup>5</sup> [Corrected Memorandum and Order Denying All Claims](#), p. 22 n. 57 (D. Colo. Br. May 20, 2019).

<sup>6</sup> [Amicus Brief of the Federal Deposit Insurance Corporation and the Office of the Comptroller of the Currency](#), p. 23, September 10, 2019. The OCC reiterated this stance again in a letter to Congress, and signaled that a possible regulatory interpretation may be under consideration to address *Madden*. When Representative Barry Loudermilk of the Committee on Financial Services recently wrote to the OCC to inquire about possible administrative solutions to mitigate *Madden*’s consequences, Comptroller of the Currency Joseph M. Otting replied that the OCC continued to believe that *Madden* was wrongly decided and that the OCC would “consider all options, including providing regulatory clarity, to provide more certainty to the banks we regulate.” [Letter to Representative Loudermilk](#) from Comptroller of the Currency Joseph M. Otting, October 9, 2019.