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ALERT

Defending the Valid-When-Made Doctrine: District Court Victories for OCC and FDIC Regulations Signal Appeals and Amicus Opportunities

March 15, 2022

On February 8, 2022, the U.S. District Court for the Northern District of California handed the Office of the Comptroller of the Currency (OCC) a victory in its effort to codify the valid-when-made doctrine in response to the Second Circuit's controversial decision in *Madden v. Midland Funding*, 786 F.3d 246 (2d Cir. 2015).

Although this opinion represents a key milestone for lawful agency action and legal certainty, the plaintiffs in the case—a coalition of states—will almost certainly appeal to the U.S. Court of Appeals for the Ninth Circuit. Given the OCC's tempered response to the victories, it is unclear the extent to which the agency will robustly defend the decision. As a result, it will be critical for proponents of the rule to consider intervention or at least amicus support.[1]

Background

To address the fallout from the *Madden* decision, the OCC promulgated a rule (the "Final Rule") to codify the valid-when-made doctrine—the principle that a loan not subject to a state's usury law when it was made cannot become subject to that law when the loan is subsequently transferred or assigned. In so doing, the OCC explicitly confirmed that under the National Bank Act (NBA), a permissible loan interest rate does not become impermissible if the loan is subsequently sold, assigned, or otherwise transferred. *See* Stephen J. Obermeier et al., *Resolving* Madden, Wiley alert (Jan. 9, 2020). The OCC enacted the Final Rule in such a way that it was well-

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positioned to receive judicial deference, adhering to precedent and providing a reasonable interpretation of statutory silence consistent with its delegated authority and principles of administrative law. *See* Stephen J. Obermeier et al., *New OCC Regulations Clarifying the Enforceability of Interest Terms Should Be Entitled to Judicial Deference*, Wiley alert (June 4, 2020).

Opinion Analysis

The District Court held that the OCC was entitled to deference in enacting the Final Rule because the NBA was ambiguous with respect to the valid-when-made doctrine and because the OCC's policy choices with respect to the filling of the NBA's ambiguities were reasonable. *See California v. OCC*, No. 20-cv-5200 (N.D. Cal. Feb. 8, 2022), ECF No. 80. As this reasoning shows, the Court relied heavily on the administrative law principle that is commonly called "*Chevron* deference."

One of the key issues in the OCC case that is likely to factor in any appeal was whether the agency was eligible for *Chevron* deference given the Second Circuit's decision in *Madden*. The District Court held that because the *Madden* court "did not clearly hold that the terms of the [NBA] were unambiguous," the OCC remained able to gap-fill portions of the NBA with regulations on this issue. Although this aspect of the decision was a straightforward application of administrative law, and in particular the Supreme Court's decision in *National Cable & Telecommunications Association v. Brand X Internet Services*, 545 U.S. 967 (2005), it will need to be robustly defended on appeal because some judges have expressed discomfort with this precedent.

Some of the other issues in the case that will require an energetic defense on appeal concern the OCC's policy choices. When a court finds that a statute under review contains an ambiguity that the agency is permitted to clarify through regulation, *Chevron* teaches that the agency must exercise its discretion in a reasonable manner. In this case, the District Court found that the OCC exercised its discretion reasonably. Specifically, the court found "it was not unreasonable for the OCC to determine greater certainty regarding the transfer of interest rates, and a larger market for transfers, would serve to promote the safety and soundness of the national banking system."[2] In any appeal, the states are likely to mount a vigorous challenge to the court's adoption of the OCC's policy reasoning.

Agency Response

The OCC has sent mixed signals about its commitment to defending the Final Rule on appeal. Specifically, Michael Hsu, the Acting Comptroller of the OCC, released a tempered statement that repeated the District Court's holding but cautioned that "this legal certainty should be used to the benefit of consumers and not be abused." He also announced that "[t]he OCC is committed to strong supervision that expands financial inclusion and ensures banks are not used as a vehicle for 'rent-a-charter' arrangements."

These careful statements from the OCC may indicate that the new Administration is less enthusiastic about mounting a robust defense of the regulations in any appeal. While that would be unfortunate, these circumstances create an opportunity for high-impact intervenor or amicus briefing at the appellate level. And

even if the government does decide to mount a strong defense, industry briefing in support of the rule may play an important role in demonstrating the propriety of the agencies' regulations.

Appeal Timing and Intervention

Notices of appeal are due in early April and may be filed sooner. Once any notices of appeal have been filed and the cases transferred to the Ninth Circuit, interested non-parties may attempt to participate in the appeal as either an amicus curiae or an intervenor.

Proponents of the rules should consider providing support to the agencies' defense of the rules through intervention or at least amicus support. The District Court opinions extensively cited outside briefing from industry parties, and such briefing may play an even more important role at the appellate level given the Ninth Circuit's need to more closely consider the potential implications of its decision as the likely court of last resort. Where, as here, an agency rule is challenged following a change in presidential administrations, the additional rights afforded intervenors often make the difference in preserving a beneficial rule in the face of a lukewarm agency defense.

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[1] On the same day, the same District Court also ruled in favor of the Federal Deposit Insurance Corporation's (FDIC) valid-when-made regulation. *See California v. FDIC*, No. 20-cv-5860 (N.D. Cal. Feb. 8, 2022), ECF No. 84. The analysis herein regarding the OCC rule applies generally to the FDIC rule.

[2] In the FDIC case, the court found that "it was not unreasonable for the FDIC to conclude its interpretation of [the statute] would protect the parties' expectations and reliance interests at the time when a loan is made."