April 4, 2016

By email
Mr. Charles Yi
General Counsel
Federal Deposit Insurance Corporation
550 17th Street, NW
Washington, D.C. 20429

Re: *Midland Funding LLC v. Madden*, No. 15-610

Dear Mr. Yi:

We, the undersigned groups, regularly advocate on behalf of American consumers on matters relating to debt collection and debt buyers. By this letter we respectfully request that your agency encourage the Solicitor General to recommend that the U.S. Supreme Court deny the petition for a writ of certiorari in *Midland Funding LLC v. Madden*, 786 F.3d 246 (2d Cir. 2015).

In this case, the debt buyer, which had purchased charged-off debt from a national bank, subsequently charged additional interest above that permitted by state usury laws. The court held that, although the credit had been originated by a national bank that was not subject to New York's usury law, an unaffiliated debt-buyer of that debt, after the bank had charged it off, could not avoid the state limit on interest rates. To reach this holding, the court considered whether applying state law to a non-bank buyer of defaulted debt would significantly interfere with a national bank's exercise of its powers. The court found that limiting the debt buyer to state limits on interest rates would not interfere with the business of national banks and, therefore, that the National Bank Act did not preempt the state law.

Based on our experience in this area, we believe that the Second Circuit applied a settled and correct rule of law—one that appropriately balances protection for consumers and deference to the legitimate interests of national banks.

Congress has partially exempted national banks from state regulation of their banking business. As the Supreme Court has recognized, federal law preempts state regulations that "forbid, or … impair significantly, the exercise of a power that Congress explicitly granted" to national banks.[1] When Congress passed the Dodd-Frank legislation in 2010, it incorporated this test into the statute.[2] Neither the Supreme Court nor Congress has ever extended National Bank Act preemption to benefit a third party that has no affiliation with a national bank—such as the debt buyer-petitioners in this case. Such entities, including debt collectors, have always been subject to state-law enforcement actions.

Against this backdrop, the rule the Second Circuit applied in this case was eminently reasonable. The court asked the debt buyer to meet the same standard applicable to a bank affiliate

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[1] *Barnett Bank of Marion County, N.A. v. Nelson* 517 U.S. 25, 33 (1996).

[2] *See* OCC Interpretive Letter 1132 (May 12, 2011); *see* 12 U.S.C. §§ 25b(d), (h)(2).

asserting preemption of state law, *i.e.*, that the application of New York usury law would significantly interfere with the power of national banks to sell defaulted loans. But the petitioners failed to make that showing.

The Second Circuit's holding also preserves state-law remedies that have been critical to protecting consumers from unscrupulous debt collectors who would exploit and harass Americans, and from unscrupulous creditors who would exploit bank charters in order to issue usurious consumer loans. Indeed, converting federal preemption into a saleable asset as Midland urges would likely invite an array of troubling practices not limited to lending or the National Bank Act. If the Second Circuit's decision is reversed as the petitioner-debt buyers request, consumers will undoubtedly suffer as a result.

We are aware of no evidence that denying federal preemption to non-bank debt buyers will negatively impact the price received by the banks for the types of debt portfolios at issue in this case. Applying state usury caps to post-assignment balances in this context does not impact the price paid to the banks. Thus, banks lose nothing from the denial of preemption to the petitioners, and they would gain nothing from the opposite result.

In fact, the availability of state-law remedies likely benefits banks in the long run. As the OCC has recognized, there are "significant risks associated with debt-sale arrangements, including operational, compliance, reputation, and strategic risks," and so banks that sell their debts "should do so in a safe and sound manner and in compliance with applicable laws—including consumer protection laws."[3] By deterring violations and encouraging debt collectors to deal honestly with consumers, state-law remedies lessen the banks' oversight burden, as well as their compliance and reputational risks.

Finally, we agree with the respondent that nothing in the Second Circuit's decision has direct application to securitization of performing debt, marketplace lending, or other types of bank activities not at issue in this case. Many of those settings involve continuing bank involvement that places them entirely outside the scope of the Second Circuit's decision, which was explicitly based on the absence of any such involvement after assignment to the debt buyer. In other settings (particularly involving sale of performing assets), the debt buyer may be able to demonstrate significant interference. The petitioners have not done so here.

For all these reasons, as well as those explained by the respondent, we hope that you will recommend denial of the petition in this case. For further information about our views, please contact Margot Saunders of the National Consumer Law Center, 202 452 6252, extension 104, (msaunders@nclc.org). Thank you for your attention.

Sincerely,

National Consumer Law Center, on behalf of its low-income clients
Center for Responsible Lending
Consumer Action
Consumer Federation of America
Leadership Conference on Civil and Human Rights
NAACP
National Association of Consumer Advocates
Public Citizen
Public Justice
U.S. PIRG

[3] OCC, Consumer Debt Sales, Bulletin 2014-37 (Aug. 4, 2014).