INTEREST EXPORTATION AND PREEMPTION: *MADDEN*'S IMPACT ON NATIONAL BANKS, THE SECONDARY CREDIT MARKET, AND P2P LENDING

*Michael Marvin**

The Supreme Court's denial of certiorari in Madden v. Midland Funding, LLC *leaves a dangerous precedent standing in the Second Circuit that poses a significant risk to the consumer-credit market writ large. This Note highlights the dangers that the* Madden *ruling presents and in so doing cautions against the adoption of the ruling by other circuits. Moreover, given the centrality of New York in the financial economy of the United States, it presents strategies for credit originators in the Second Circuit to protect themselves from* Madden.

INTRODUCTION

On May 22, 2015, the Second Circuit ruled in *Madden v. Midland Funding, LLC* that federal preemption of state usury laws under the National Banking Act does not extend to certain entities holding debt originated by national banks.[1] This ruling upends nearly a century of established Supreme Court precedent on federal preemption under the National Banking Act, creates a clear circuit split, and more generally, undermines fundamental principles of contract law. On June 27, 2016, the Supreme Court denied Midland Funding's petition for certiorari.[2] This Note approaches the denial of certiorari from two perspectives: First, it argues that other jurisdictions should not adopt the Second Circuit's ruling. It advances this argument by considering the implications of the court's ruling for a wide variety of actors in the consumer-credit space.[3] It argues that the *Madden* ruling will increase the cost of consumer credit and reduce the availability of credit for high-risk borrowers. This Note also considers the impact of the ruling on outstanding loan agreements and the securitizations of those agreements and argues that *Madden* potentially undermines the entire secondary credit market.[4] It additionally argues the ruling will have drastic negative consequences for the emergent peer-to-peer lending market.[5] Second, this Note also views the Supreme Court's decision from a pragmatic perspective and suggests several strategies credit originators and debt

---

* J.D. Candidate 2017, Columbia Law School.

1. 786 F.3d 246, 249 (2d Cir. 2015), cert. denied, 136 S. Ct. 2505 (2016).
2. *Madden*, 136 S. Ct. 2505.
3. Infra section III.A.
4. Infra section III.B.
5. Infra section III.C.

repurchasers operating in the Second Circuit may consider adopting to avoid the most damaging implications of *Madden*.[6]

I. THE HISTORY OF THE NATIONAL BANKING ACT AND FEDERAL PREEMPTION OF STATE USURY LAWS

Part I of this Note discusses the history of the National Banking Act (NBA) and federal preemption of state usury laws. Section I.A gives an overview of the history of the National Banking Act. Section I.B analyzes precedent on federal preemption as pertaining to the Act. Section I.C discusses what entities are entitled to preemption under the NBA and describes how Congress, the judiciary, and the Office of the Comptroller of the Currency have expansively interpreted the scope of NBA preemption. The legislative history of the NBA and the historical treatment of preemption it provides for reveal that the Second Circuit's ruling in *Madden* marked a significant deviation from existing precedent.

A. *The History of the National Banking Act*

Exploring the history of the NBA and the legislative goals it was designed to address is critical to understanding the broad scope of federal preemption for which the Act provides. Such an exploration also reveals that the Second Circuit's ruling in *Madden* was a significant departure from established precedent. The history of the NBA begins with the passage of the National Currency Act of 1863, which provided for the creation of national banks with authority to issue bank notes secured by government bonds.[7] The immediate purpose of the Act was to enable the Union's financing of the Civil War by allowing the federal government to control issuance of a national currency.[8] To regulate the newly created national banks, the Act also created a bureau in the Treasury Department charged with executing all laws "respecting the issue and regulation of a national currency secured by United States bonds."[9] The "comptroller of the currency" was to head this bureau.[10]

The Act placed very few limitations on the powers of the newly established national banks. The most significant restriction was a reserve requirement, which obligated any national bank to maintain in reserve an amount "in lawful money of the United States equal to at least twenty-

---

6. Infra section III.D.

7. Act of Feb. 25, 1863, ch. 58, § 11, 12 Stat. 665, 668 (repealed 1864) (stating national banks "shall have power to carry on the business of banking by obtaining and issuing circulating notes in accordance with the provisions of this act").

8. Howard H. Hackley, Our Baffling Banking System, 52 Va. L. Rev. 565, 570 & n.22 (1966) [hereinafter Hackley, Our Baffling Banking System] (detailing how President Lincoln, on January 17, 1863, urged Congress to establish "uniform currency" to be provided by banking associations).

9. Act of Feb. 25, 1863, § 1, 12 Stat. at 665.

10. Id.

five per centum of the aggregate amount of its outstanding notes of circulation and its deposits."[11]

One year later, the Act of June 3, 1864, which would subsequently come to be known as the "National Banking Act," replaced the National Currency Act.[12] Congress designed the act, entitled "An Act to Provide a National Currency, Secured by a Pledge of United States Bonds, and to Provide for the Circulation and Redemption Thereof," to foster the conversion of state-chartered banks to federal banks in order to help develop a national currency, establish a market for government bonds, and grant control over the monetary supply to the federal government.[13] On June 20, 1874, Congress retrospectively entitled the act "The National Bank Act."[14]

The NBA provides for the formation of "national banking associations" and grants them the legal authority to engage in specific enumerated activities.[15] Section 24 (Seventh) of the NBA states that national banks have authority to exercise "all such incidental powers as shall be necessary to carry on the business of banking."[16] The NBA also retains the enforcement structure laid out in the National Currency Act: The Office of the Comptroller of the Currency (OCC) has the legal

---

11. Id. § 41, 12 Stat. at 677. Notably, clearing-house certificates constituted "lawful money" under the Act. Id. ("[C]learing-house certificates, representing specie or lawful money specifically deposited for the purpose of any clearing-house association, shall be deemed to be lawful money in the possession of any association belonging to such clearing-house holding and owning such certificates . . . ."). A clearing-house association is an institution that facilitates clearing and settlement services. The Act also prohibited a national bank from buying stock and becoming indebted, with certain exceptions, in an amount exceeding its capital stock and set a cap on the amount a bank could lend to a single borrower. Hackley, Our Baffling Banking System, supra note 8, at 571–72 (citing Act of Feb. 25, 1863, §§ 42, 47, 51, 12 Stat. at 677, 679).

12. Act of June 3, 1864, ch. 106, 13 Stat. 99 (codified as amended in scattered sections of 12 U.S.C. (2012)).

13. See Bray Hammond, Banks and Politics in America: From the Revolution to the Civil War 727–28 (1991); see also Cong. Globe, 38th Cong., 2d Sess. 1139 (1865) (noting that Senator William Tecumseh Sherman, chairman of the Finance Committee, declared "national banks were intended to supersede the State banks").

14. Act of June 20, 1874, ch. 343, § 1, 18 Stat. 123, 123. See generally Hackley, Our Baffling Banking System, supra note 8 (discussing the history of the National Banking Act); Jonathan L. Levin, In Search of the National Bank Act, 97 Banking L.J. 741 (1980) (providing background information on passage of National Banking Act). Earlier that same day, Congress passed another law, which enacted the Revised Statutes of the United States, a codification and consolidation of all statutes then in force undertaken by the "Commission on Revised Statutes." Act of June 20, 1874, ch. 333, 18 Stat. 113, 113. Therefore, somewhat confusingly, Congress enacted the new version of the June 3, 1864 Act through the Revised Statutes of the United States and then immediately renamed the predecessor statute, rather than the new statute, "The National Banking Act." See Levin, supra, at 743 ("Thus, Congress first encapsulated the 1864 Act in the Revised Statutes, officially rearranging its format, and then, almost immediately, undertook to title not the new statute, but the preexisting one.").

15. See 12 U.S.C. §§ 21–24 (2012).

16. See id. § 24 (Seventh).

authority to execute the NBA itself and "all other laws that may be passed by [C]ongress respecting the issue and regulation of a national currency secured by United States bonds."[17]

If the National Banking Act set out to convert state-chartered banks to federal banks, it was a manifest success. The number of state-chartered banks dropped from 1,492 in 1862 to 247 in 1868.[18] Indeed, the legislative history of the Act shows that federalization of the state-chartered banking system was a major goal of the NBA.[19] The text of the NBA itself and subsequent legislation further bolsters this conclusion.[20] Indeed, the NBA ushered in the demise of state-chartered banks. Figure 1 illustrates the rise and fall, respectively, of state banks and national banks during the period.[21]

---

17. See Act of June 3, 1864, § 1, 13 Stat. at 99–100.

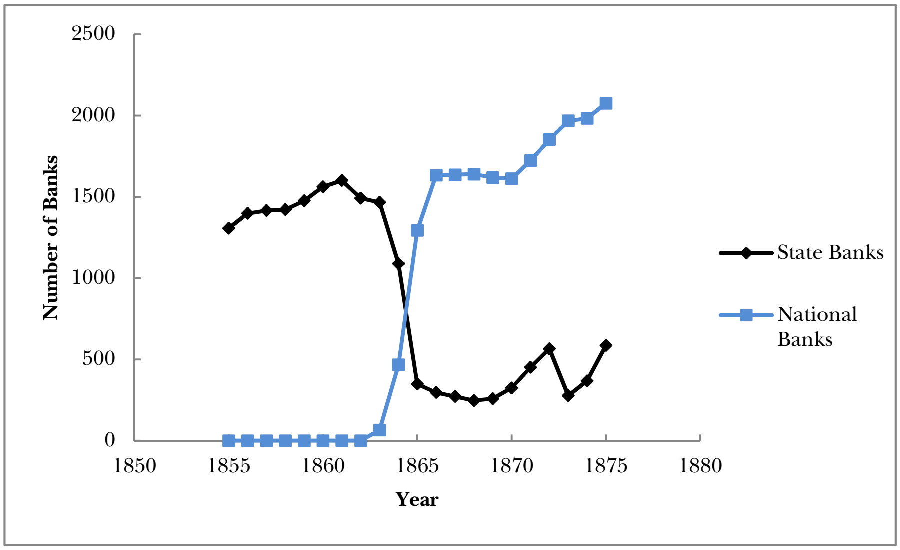
18. Bray Hammond, Historical Introduction, *in* Banking Studies 5, 15, 418 tbl.2 (E.A. Goldenweiser, Elliott Thurston & Bray Hammond eds., 1941).

19. See supra note 13 and accompanying text.

20. For example, the Act made it exceedingly easy for state-chartered banks to convert to national banks. See Act of June 3, 1864, § 44, 13 Stat. at 112 ("And be it further enacted, [t]hat any bank incorporated by special law, or any banking institution organized under a general law of any state, may, by authority of this act, become a national association under its provisions, by the name prescribed in its organization certificate . . . ."). It also indirectly levied fines on state banks that failed to convert to national banks. See Act of Mar. 3, 1865, ch. 78, § 6, 13 Stat. 469, 484 (imposing a 10% tax on state bank notes paid out by a national or state bank after July 1, 1866).

21. Christine E. Blair & Rose M. Kushmeider, Challenges to the Dual Banking System: The Funding of Bank Supervision, FDIC, http://www.fdic.gov/bank/analytical/banking/2006mar/article1/ [http://perma.cc/2386-4NYB] (last updated Mar. 31, 2016) (providing data on the number of national banks and state banks).

FIGURE 1: STATE BANKS VERSUS NATIONAL BANKS, 1855–1875



B. *The Preemptive Effect of the National Banking Act*

It is well established that under the NBA, federal provisions relating to national banks preempt conflicting state banking laws.[22] The preemp-

22. See Watters v. Wachovia Bank, 550 U.S. 1, 11 (2007) ("Federally chartered banks are subject to state laws of general application in their daily business to the extent such laws do not conflict with the letter or the general purposes of the NBA." (citing Davis v. Elmira Sav. Bank, 161 U.S. 275, 290 (1896))); Jaldin v. ReconTrust Co., 539 F. App'x 97, 101–02 (4th Cir. 2013) (holding a Virginia law granting state banks, but not national banks without principal offices in Virginia, the power to serve as trustees of security trusts was preempted by the NBA, on grounds of conflict preemption), cert. denied, 134 S. Ct. 2293 (2014); JPMorgan Chase Bank v. Johnson, 719 F.3d 1010, 1017 (8th Cir. 2013) ("Although national banks are subject to state laws of general application that do not conflict with the NBA, the grants of enumerated and incidental powers are not limited by—and in fact preempt—contrary state law." (citation omitted)); Nat'l City Bank of Ind. v. Turnbaugh, 463 F.3d 325, 328 (4th Cir. 2006) (holding the NBA preempts "Maryland laws requiring the state's Commissioner of Financial Regulation . . . to exercise certain powers over operating subsidiaries of a national bank"). Regulations promulgated by the OCC are entitled to the same preemptive effect as federal provisions under the NBA. See Aguayo v. U.S. Bank, 653 F.3d 912, 919 (9th Cir. 2011) (stating the OCC's "regulatory authority, which carries the same weight as federal statutes, includes interpretation of state law preemption under the NBA"), cert. denied, 133 S. Ct. 106 (2012); Baptista v. JPMorgan Chase Bank, 640 F.3d 1194, 1198 (11th Cir. 2011) (holding regulations promulgated by the OCC pursuant to the NBA preempted Florida regulation on the ground that a clear conflict existed and "Congress clearly intended that the OCC be empowered to regulate banking and banking-related activities"), cert. denied, 132 S. Ct. 253 (2011); Martinez v. Wells Fargo Home Mortg., Inc., 598 F.3d 549, 555 (9th Cir. 2010) ("OCC regulations possess the same preemptive effect as the [NBA] itself."); see also Fidelity Fed. Sav. & Loan Ass'n v. de la Cuesta, 458 U.S. 141, 153–54 (1982) ("Federal regulations have no less pre-emptive effect than federal statutes. Where Congress has directed an administration to

tive power of the NBA is grounded in the Supremacy Clause of the Constitution.[23] Generally, preemption arises in one of three ways: through express preemption, field preemption, or conflict preemption.[24] Express preemption applies when Congress states that the regulation preempts state law.[25] Field preemption applies when "the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject."[26] Finally, conflict preemption applies when state law conflicts with federal law such that "compliance with both federal and state regulations is a physical impossibility"[27] or the state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."[28]

Preemption under the NBA is multifold, but in general the NBA preempts state law in one of two ways:[29] under section 85 of the Act[30] or under section 24 (Seventh) of the Act.[31] Section 85 preempts price-related state laws by imposing the laws of the state in which a national bank is chartered.[32] The preemptive effect of section 85 operates through conflict preemption.[33] In contrast, section 24 (Seventh) operates through field preemption.[34] State laws limiting the interest that a national bank may charge on a loan—the issue taken up by the *Madden* court—are preempted under section 85 of the NBA as price-related state laws.[35] This

---

exercise his discretion, his judgments are subject to judicial review only to determine whether he has exceeded his statutory authority or acted arbitrarily." (citing United States v. Shimer, 367 U.S. 374, 381–82 (1961))).

23. See U.S. Const. art. VI, cl. 2.

24. Mich. Canners & Freezers Ass'n v. Agric. Mktg. & Bargaining Bd., 467 U.S. 461, 469 (1984).

25. See Hillsborough County v. Automated Med. Labs., 471 U.S. 707, 713 (1985) ("Congress is empowered to pre-empt state law by so stating in express terms.").

26. See id. (quoting Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947)).

27. Fla. Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142–43 (1963).

28. Hines v. Davidowitz, 312 U.S. 52, 67 (1941).

29. See Mark Furletti, The Debate over the National Bank Act and the Preemption of State Efforts to Regulate Credit Cards, 77 Temp. L. Rev. 425, 429 (2004).

30. 12 U.S.C. § 85 (2012).

31. Id. § 24 (Seventh).

32. See Marquette Nat'l Bank of Minneapolis v. First of Omaha Serv. Corp., 439 U.S. 299, 308 (1978) ("Section 85 thus plainly provides that a national bank may charge interest 'on any loan' at the rate allowed by the laws of the State in which the bank is 'located.'" (quoting 12 U.S.C. § 85 (1976))).

33. See, e.g., SPGGC, LLC v. Ayotte, 488 F.3d 525, 530–31 (1st Cir. 2007) (applying conflict-preemption analysis to an NBA preemption claim).

34. See Furletti, supra note 29, at 430, 436–40 ("Recently, the NBA has been read to preempt state laws in a second way. Section 24 (Seventh) has been interpreted as preempting all state laws involving *non-price-related* consumer protection regulation (e.g., disclosure requirements).").

35. See infra notes 36–48 and accompanying text (outlining the preemption of state usury claims under the NBA).

Note accordingly constrains its discussion of federal preemption to the section 85 mechanism.

Section 85 of the NBA regulates, inter alia, the interest rate that national banks may charge on loans. Specifically, section 85 of the NBA preempts state lending laws by imposing the laws of the state in which the national bank is chartered.[36] It provides that a national bank may charge on any loan "interest at the rate allowed by the laws of the State . . . where the bank is located, or at a rate of 1 per centum in excess of the discount rate on ninety-day commercial paper in effect at the Federal reserve bank" in which the bank is located, whichever is greater.[37]

States typically cap the interest that national banks may legally charge on a loan by enabling a cause of action called a usury claim.[38] A usury claim is brought by a borrower[39] and alleges that the rate of interest on a loan exceeds the legal maximum interest rate. The vast majority of states limit the rate of interest that can be charged on a loan by statute.[40] In *Madden*, the Second Circuit considered New York's anti-usury statute,[41] which provides that the maximum rate of interest that a bank may charge is 16% per annum[42] and criminalizes charging a rate over 25% per annum as a felony.[43] Important to the subject of this Note, there is wide variation across states in what constitutes usurious interest on consumer credit: Whereas in Utah there is no interest rate cap on consumer loans in writing,[44] in Alabama interest rates above 8% are usurious.[45] Moreover, in a significant number of states, different usury caps apply to different loans based on a variety of factors, including the

---

36. See, e.g., *Marquette Nat'l Bank of Minneapolis*, 439 U.S. at 308 (holding that under section 85 a national bank is governed by the usury laws of the state where it is located).

37. See 12 U.S.C. § 85 (2012).

38. The American colonies adopted usury statutes prior to independence by importing English law. See Kathleen E. Keest & Elizabeth Renuart, Nat'l Consumer Law Ctr., The Cost of Credit: Regulation, Preemption, and Industry Abuses 17 (4th ed. 2009).

39. Some statutes refer to the borrower as the "obligor." See, e.g., Tex. Fin. Code Ann. § 305.001 (West 2006) (stating that one who has violated the state's usury law is "liable to the obligor").

40. See infra note 182 (listing states with usury limits).

41. Madden v. Midland Funding, LLC, 786 F.3d 246, 248 (2d Cir. 2015), cert. denied, 136 S. Ct. 2505 (2016).

42. See N.Y. Banking Law § 14-a (McKinney 2013); N.Y. Gen. Oblig. Law § 5-501 (McKinney 2012).

43. See N.Y. Penal Law § 190.40 (McKinney 2010). However, specific exemptions are available for particular instruments or particular borrowers. See, e.g., N.Y. Gen. Oblig. Law § 5-501(6)(b) (exempting loans over $2.5 million from usury laws).

44. Utah Code Ann. § 15-1-1(1) (LexisNexis 2013) ("The parties to a lawful contract may agree upon any rate of interest for the loan or forbearance of any money, goods, or chose in action that is the subject of their contract.").

45. Ala. Code § 8-8-1 (LexisNexis 2002) ("[T]he rate of interest by written contract is not to exceed $8 upon $100 for one year and at that rate for a greater or less sum for a longer or shorter time.").

nature of the institution extending credit, the structure of the loan, or the use of the proceeds of the loan.[46]

The high level of variation between states in how they regulate issuance of credit underscores one of the principal benefits conferred by the NBA. Preemption under the NBA allows lenders and borrowers to avoid time-consuming investigation of each state's usury laws by ensuring that a lender generally need only consider the usury law that governs in the state listed on its charter.[47] As this Note will argue, one of the reasons the *Madden* ruling is so destructive is that it removes this benefit of NBA preemption for particular holders of debt originated by national banks and, in so doing, imposes high transaction costs on would-be debt repurchasers.[48]

These new transaction costs imposed by *Madden* are particularly high because remedies for usury law violations also vary among states. Courts generally embrace two remedies for credit agreements with interest rates that violate a state usury cap. Some courts hold that transactions that violate anti-usury laws are void as a matter of law, whereas other courts hold they have the inherent power in equity to reform the violating contract to comply with the governing usury statute.[49] Those courts that reform

46. In Delaware, for instance, interest charged on consumer loans that exceeds the Federal Reserve discount rate by 5% is generally usurious. Del. Code Ann. tit. 6, § 2301(a) (2016) ("Any lender may charge and collect from a borrower interest at any rate agreed upon in writing not in excess of 5% over the Federal Reserve discount rate including any surcharge thereon."). But the state has no interest rate cap on revolving credit plans on outstanding unpaid indebtedness. Del. Code Ann. tit. 5, § 943 (2016) ("A bank may charge and collect periodic interest under a revolving credit plan on outstanding unpaid indebtedness . . . at such daily, weekly, monthly, annual or other periodic percentage rate . . . as the agreement governing the plan provides or as established in the manner provided in the agreement governing the plan."); see also Alaska Stat. § 45.45.010(b) (2014) (exempting contracts for which the principal exceeds $25,000 from usury claims); Ga. Code Ann. § 7-3-14 (2015 & Supp. 2016) (exempting small industrial loans from usury claims); Iowa Code Ann. § 535.2(2) (West 2011 & Supp. 2016) (exempting loans for real property, business, or agricultural loans from usury claims). See generally Gale Publishers, 50 State Statutory Surveys: Business Organizations: Consumer Protection: Interest Rates (2007) (summarizing state statutes' "myriad exceptions to the legal interest rate, which may be tied to the character of the lender, borrower, loan amount, the nature of the contract, or the matter that is the subject of the contract").

47. See infra notes 184–186 and accompanying text (arguing that, under *Madden*, an individual determination of state usury law compliance for each purchased loan is necessary).

48. See infra notes 184–186 and accompanying text.

49. Compare In re Venture Mortg. Fund, L.P., 282 F.3d 185, 189 (2d Cir. 2002) (noting that loans in violation of New York's civil usury statute are void but also mentioning that it is not resolved whether loans that only violate the criminal usury statute, and not the civil usury statute, are void), and Duderwicz v. Sweetwater Sav. Ass'n, 595 F.2d 1008, 1015 (5th Cir. 1979) ("In order to purge a contract of usury the contract must be wholly abandoned or cancelled, and a new obligation undertaken containing no part of the usury." (citing Winecoff v. Atl. Tile & Tr. Co., 192 S.E. 29 (Ga. 1937))), with Pitcairn Enters. v. Universal Comput. Consulting, Inc., No. 01-2917, 2002 WL 2005440, at *2 (3d Cir. June 14, 2002) ("Under applicable Texas law, usury is not a defense to the enforceability of the underlying contract. Rather, the usurious interest is forfeited, a

the instrument to comply with the relevant state usury law typically also assess the offending party a penalty, which is reduced by the legal interest and principal outstanding on the loan at issue.[50] Penalties vary between states but tend to be high. Texas's and California's laws providing for treble damages are representative,[51] although other statutory schemes exist.[52] Table 1 illustrates the wide variation between states' usury regimes.

penalty is imposed upon the usurer, and that amount is then set-off against any principal owed plus any interest below the relevant usurious rate." (citation omitted) (citing Tex. Rev. Civ. Stat. Ann. art. 5069-1.06, § 6(a) (West 1991))), and Wakefield v. Goldstein, 644 F.2d 707, 709 (8th Cir. 1981) ("[U]nder Arkansas law usurious contracts are voidable because the applicable statute specifies that such contracts 'may be canceled and annulled at the suit of the maker . . . .'" (quoting Ark. Code Ann. § 68-609 (1979))).

50. See *Pitcairn Enters.*, 2002 WL 2005440, at *2 (stating "usury is not a defense to the enforceability of the underlying contract. Rather, the usurious interest is forfeited, a penalty is imposed upon the usurer, and that amount is then set-off against any principal owed plus any interest below the relevant usurious rate." (citing Tex. Rev. Civ. Stat. Ann. art. 5069-1.06, § 6(a); Steves Sash & Door Co., Inc. v. Ceco Corp. 751 S.W.2d 473, 476 (Tex. 1988))).

51. See Cal. Civ. Code § 1916-3 (West 2016) ("Every person, company, association or corporation, who for any loan or forbearance of money . . . shall have paid or delivered any greater sum or value than is allowed to be received . . . [may recover] treble the amount of the money so paid or value delivered in violation of said sections . . . ."); Tex. Fin. Code. Ann. § 305.001 (West 2006) (stating that any creditor who charges over the amount authorized by the usury statute is liable for the greater of: (1) three times the amount of money paid in violation of the usury statute or (2) $2,000 or 20% of the principal, whichever is less). Note, however, that courts are not obliged to award treble damages. In California, the availability of treble damages hinges on the guiltiness of the offending party. See Fox v. Peck Iron & Metal Co., 25 B.R. 674, 692 (Bankr. S.D. Cal. 1982) ("However, the award of treble damages depends on the relative guilt of the parties initiating the transaction, and is always within the trial court's wide discretion." (citing Burr v. Capital Reserve Corp. 458 P.2d 185, 185 (Cal. 1969) (en banc); Buck v. Dahlgren, 100 Cal. Rptr. 462, 468 (Ct. App. 1972); Golden State Lanes v. Fox, 42 Cal. Rptr. 568, 572 (Dist. Ct. App. 1965))).

52. See, e.g., Ala. Code § 8-8-12 (LexisNexis 2002) (providing that the penalty for usury is forfeiture of all interest and return of principal and that interest paid is deducted from the returned principal); Alaska Stat. § 45.45.030 (2014) (providing that one paying usurious interest may recover double damages).

TABLE 1: VARIATION BETWEEN STATE USURY REGIMES

State	Interest Rate Cap	Usury Cap	Remedy for Usury	Penalty	Exemptions
New York	16%[53]	25%[54]	Principal and future interest forfeited; return of any interest received in excess of the legal rate.[55]	No independent penalty.	Loans over $2.5 million, loans over $250,000 unless secured by an interest in a one- or two-family residence,[56] etc.[57]
California	7% or 12% if in writing.[58]	N/A[59]	Future interest above cap forfeited; principal not returned until maturity.[60]	Treble of money paid over usury rate,[61] or imprisonment if lender intentionally violated cap.[62]	Loans for personal, family, or household purposes,[63] loan made by a building and loan association,[64] etc.
Utah	No cap if in writing.[65]	N/A	N/A	N/A	N/A
West Virginia	8%[66]	N/A[67]	Forfeiture of future interest payments.[68]	Four times all interest to be paid.[69]	Life insurers,[70] consumer credit sales,[71] installment sales, or business loans.[72]

53. See N.Y. Banking Law § 14-a (McKinney 2013); N.Y. Gen. Oblig. Law § 5-501 (McKinney 2012).

54. See N.Y. Penal Law § 190.40 (McKinney 2010).

55. N.Y. Gen. Oblig. Law § 5-511(2); see Seidel v. 18 E. 17th St. Owners, Inc., 79 N.Y.2d 735, 740 (App. Div. 1992) ("The consequences to the lender of a usurious transaction can be harsh: the borrower is relieved of all further payment . . . and any mortgages securing payment are cancelled. In effect, the borrower can simply keep the borrowed funds and walk away from the agreement."); see also In re Venture Mortg. Fund, L.P., 282 F.3d 185, 188 (2d Cir. 2002) (citing *Seidel*, 79 N.Y.2d at 735, favorably). If the loan was issued by a savings bank, a savings and loan association, or a federal savings and loan association, however, only the interest is forfeited. N.Y. Gen. Oblig. Law § 5-511(1).

56. N.Y. Gen. Oblig. Law § 5-501(6).

57. Id. § 5-525.

58. Cal. Const. art. XV, § 1 (providing that the general interest rate cap is 7%); Cal. Civ. Code § 1916-1 (West 2010 & Supp. 2016) (stating the rate of interest on loans for "money, goods or things" shall not exceed 12% if the rate is "clearly expressed in writing").

59. The California usury scheme does not differentiate between illegal interest and usurious interest. See Cal. Const. art. XV, § 1; Cal. Civ. Code § 1916-1.

60. Cal. Civ. Code § 1916-2.

61. Id. § 1916-3.

62. Id. § 1916-3(b).

63. Cal. Const. art. XV, § 1(1). Such loans are subject to a 10% interest rate cap.

64. Id. § 1(2).

65. Utah Code Ann. § 15-1-1(1) (LexisNexis 2013).

66. W. Va. Code Ann. § 47-6-5 (LexisNexis 2015).

67. All interest rates over the legal interest rate cap are deemed usurious. See id. § 47-6-6.

68. Id.

69. See id.

The NBA states that it preempts state usury laws by applying the usury law of the state in which the allegedly infringing bank is "located,"[73] but until the Supreme Court issued its opinion in *Marquette National Bank of Minneapolis v. First Omaha Service Corp.*, ambiguity remained regarding the mechanics of NBA preemption.[74] While section 85 is explicit that a national bank can charge interest as high as allowed by the laws of the state in which the bank is "located,"[75] the NBA does not specify how to determine a bank's location for purposes of preemption under section 85. In *Marquette*, the Court held that for purposes of NBA preemption, a bank is located in the state listed on its "organization certificate," or certificate of incorporation.[76] The Court made clear that it does not matter whether a bank solicits customers from other states for purposes of federal preemption under the NBA.[77] Accordingly, *Marquette* clarified that under the NBA a national bank is governed by the interest rate cap applicable in the state listed on its certificate of incorporation, even when engaging in interstate lending with residents of other states.[78] The

70. See id. § 33-13-8a.

71. See id. § 46A-3-101(1).

72. See id. § 47-6-11.

73. 12 U.S.C. § 85 (2012).

74. 439 U.S. 299, 301 (1978) (holding that the NBA "authorizes a national bank based in one State to charge its out-of-state credit-card customers an interest rate on unpaid balances allowed by its home State, when that rate is greater than that permitted by the State of the bank's nonresident customers"). It is worth noting, however, that some courts had previously held that a national bank was governed by either the interest rate cap applicable in the bank's state of incorporation or the customer's state of residence. See, e.g. Fisher v. First Nat'l Bank of Omaha, 548 F.2d 255, 258 (8th Cir. 1977) (holding a national credit-card bank in Nebraska could charge a customer in Iowa the highest rate allowed by either state); Fisher v. First Nat'l Bank of Chi., 538 F.2d 1284, 1291 (7th Cir. 1976) (holding a bank in Illinois could charge a customer in Iowa the highest rate allowed by either state).

75. 12 U.S.C. § 85.

76. *Marquette*, 439 U.S. at 309–10.

77. Id. at 310 ("The congressional debates . . . were conducted on the assumption that a national bank was 'located' for purposes of the section in the State named in its organization certificate. Omaha Bank cannot be deprived of this location merely because it is extending credit to residents of a foreign State." (citation omitted) (citing Cong. Globe, 38th Cong., 1st Sess. 2123–27 (1864))). Section 85 of the NBA was originally enacted as section 30 of the National Currency Act of 1864. Section 85 and section 30 are virtually identical. See *Marquette*, 439 U.S. at 310 n.23 ("Section 30 was, in its pertinent parts, virtually identical with the current § 85.").

78. See, e.g., Darrell L. Dreher & Deborah Freye, Continuing Challenges to Interstate Lending by Depository Institutions, 57 Bus. Law. 1297, 1297 (2002) (stating that in *Marquette* "[t]he Supreme Court unequivocally held that under the National Bank Act, a national bank could charge an interest rate authorized in the bank's home state in interstate lending transactions with residents of other states"). Although the Supreme Court has not had occasion to address the issue of whether fees that national banks charge on outstanding lands are entitled to federal preemption under the NBA after *Marquette*, the emergent rule appears to be that fees are all entitled to federal preemption as "interest" under the NBA. See Smiley v. Citibank (S.D.), 517 U.S. 735, 747 (1996) (holding

Marquette ruling allowed for the emergence of interest rate exportation: A national bank incorporated in a state with a high interest rate cap could now extend credit to borrowers in states with lower interest rate caps.[79]

C. *Preemptive Scope of the National Banking Act*

The NBA sets out specific criteria that an institution must satisfy to be considered a national bank. The Act principally requires that the number of persons forming the national banking association be more than five and that the association submit formal documentation of its existence.[80] The Act of June 3, 1864 also set certain capitalization requirements.[81] Associations that meet these qualifications are unquestionably entitled to federal preemption under the NBA.[82] However, NBA preemption is not limited to national banks themselves. The following subsections analyze the ways in which Congress, the judiciary, and the OCC have expanded the scope of NBA preemption.

1. *The Congressional Expansion of Preemption from State Usury Laws.* — Following *Marquette*, Congress passed the Depository Institutions Deregulation and Monetary Control Act of 1980 (DIDMCA), which expanded the pool of institutions that could validly claim entitlement to federal preemption from state usury laws under the NBA and engage in interest rate exportation.[83] The Act addressed two risks that Congress perceived faced state-chartered banks. First, the Act responded to concerns that *Marquette* had put state-chartered banks at a comparative disadvantage relative to national banks by allowing them to engage in interest rate exportation.[84] Second, it defensively positioned state-chartered banks such that they could respond to the anticipated credit

---

credit-card late fees are entitled to federal preemption as interest under the NBA); Bank of Am. v. City of San Francisco, 309 F.3d 551, 561 (9th Cir. 2002) (holding ATM fees imposed by a national bank are entitled to federal preemption under the NBA).

79. See Furletti, supra note 29, at 432–33 ("[M]arquette cleared the way for the exportation of the highest interest rate allowed by the laws of an issuer's home state . . . .").

80. Act of June 3, 1864, ch. 106, §§ 5–6, 13 Stat. 99, 100–01. Specifically, the NBA requires that a would-be national bank file an organization certificate specifying: (1) the name of the bank, (2) its place of business, (3) the amount of its capital stock and shares, (4) the names and places of residence of its shareholders and their share holdings, and (5) a declaration that said certificate "is made to enable such persons to avail themselves of the advantages of this act." Id. § 6, 13 Stat. at 101.

81. Id. § 7, 13 Stat. at 101.

82. See *Marquette*, 439 U.S. at 308 ("The interest rate that Omaha Bank may charge in its BankAmericard program is thus governed by federal law." (citing Farmers' & Mechs.' Nat'l Bank v. Dearing, 91 U.S. 29, 34 (1875))).

83. Depository Institutions Deregulation and Monetary Control Act (DIDMCA) of 1980, Pub. L. No. 96-221, §§ 521–523, 94 Stat. 132, 164–66 (codified at 12 U.S.C. §§ 1463(g), 1831d, 1785(g) (2012)); see also supra note 79 and accompanying text (noting *Marquette* ruling enabled national banks to engage in interest rate exportation).

84. See DIDMCA § 521 (stating the Act's purpose is "to prevent discrimination against State-charted insured banks . . . with respect to interest rates").

crunch brought on by the confluence of rising inflation and fixed state interest rates.[85]

The Act expanded federal preemption under the NBA to all federally insured banks, insured savings and loan associations, and insured credit unions.[86] The impact of the DIDMCA was far reaching: Over 90% of all banks in the United States are federally insured, and thus the DIDMCA effectuated a remarkable increase in the number of institutions that could legitimately claim entitlement to the NBA's preemption from state usury laws.[87] Moreover, courts have construed the DIDMCA as extending the full scope of preemptory benefits available to national banks under section 85 of the NBA to federally insured state banks.[88] Accordingly, the DIDMCA vastly expanded the pool of entities that could claim entitlement to preemption from state usury laws.

Congress also expanded the ability of entities entitled to NBA preemption to engage in interest rate exportation by lowering the cost of rechartering in states with bank-friendly usury caps. In 1994, Congress passed the Riegle-Neal Interstate Banking and Branching Efficiency Act (Riegle-Neal Act), which allowed institutions entitled to preemption under the NBA or the DIDMCA to open branches across states line.[89] Prior to Riegle-Neal, state law determined whether banks could open

85. See Keest & Renuart, supra note 38, at 123 (claiming the DIDMCA was "driven primarily by congressional concerns about the solvency of the savings and loan industry caused, in part, by the spike in interest rates that occurred in 1979 to 1982" (citing S. Rep. No. 96-368, at 3–4 (1979), reprinted in 1980 U.S.C.C.A.N. 236, 238–40)). For a detailed description of the legislative history and purpose of DIDMCA's passage, see Cathy Lesser Mansfield, The Road to Subprime "HEL" Was Paved with Good Congressional Intentions: Usury Deregulation and the Subprime Home Equity Market, 51 S.C. L. Rev. 473, 476 (2000).

86. See DIDMCA §§ 521–523 (allowing certain federally insured institutions to charge interest at "not more than 1 per centum in excess of the discount rate on ninety-day commercial paper . . . or at the rate allowed by the laws . . . where such credit union is located, whichever may be greater").

87. See Benjamin J. Klebaner, American Commercial Banking: A History 142 (1990) (stating that by 1935 over 90% of banks were federally insured).

88. See Greenwood Tr. Co. v. Massachusetts, 971 F.2d 818, 827 (1st Cir. 1992) ("The historical record clearly requires a court to read the parallel provisions of [the DIDMCA] and the Bank Act *in pari materia*."); Robert C. Eager & C.F. Muckenfuss, III, Federal Preemption and the Challenge to Maintain Balance in the Dual Banking System, 8 N.C. Banking Inst. 21, 41–42 (2004) (noting the *Greenwood* ruling and stating that "[s]ection 27 restored balance to the dual banking system and provided an express Congressional validation of a national policy favoring uniform rules in interstate banking").

89. Riegle-Neal Interstate Banking and Branching Efficiency Act of 1994, 12 U.S.C. § 1828(d)(4)(A) (2012) ("Subject to [limitations], the [FDIC] may approve an application by an insured State nonmember bank to establish and operate a de novo branch in a State (other than the bank's home State) in which the bank does not maintain a branch . . . ."); see also Eager & Muckenfuss, supra note 88, at 44 (arguing Riegle-Neal "reversed national policy dating from the Jackson era that the states should determine where banks may establish branches").

branches within their borders.[90] This heavily circumscribed the ability of national banks to engage in interest rate exportation for two reasons. First, since a national bank could not open branches in other states to offer loans at rates allowed by its state of chartering, the size of a national bank's interest-rate-exportation business was limited to the number of customers it could solicit and contract with through mail. The second reason rests on the fact that under the *Marquette* Court's interpretation of section 85 of the NBA, a national bank is "located" in the state in which it is incorporated.[91] Consequently, due to the general prohibition national banks faced on opening branches in other states, they were forced to reincorporate in states with bank-friendly usury laws in order to benefit from NBA preemption and the interest-rate-exportation business model it enabled. Therefore, national banks faced a much higher entry cost to taking advantage of federal preemption under the NBA than would otherwise be the case.

Riegle-Neal changed this by allowing a bank to change its state of incorporation by simply opening a branch in another state.[92] Banks were no longer required to move all of their operations and reincorporate in a new state in order to gain access to that state's interest rate for purposes of NBA preemption. The enactment of Riegle-Neal therefore gave national banks a significantly increased ability to take advantage of interest rate exportation: It simultaneously expanded the manner in which banks could attract potential borrowers from other states and allowed banks to more cheaply incorporate in states with bank-friendly usury laws through the use of branches.

Thus although the *Marquette* decision drastically altered the banking landscape in the United States, it was the legislature that subsequently magnified its effect. Congress greatly increased the impact of preemption under the NBA by (1) passing the DIDMCA and expanding the group of entities that could claim entitlement to preemption under the NBA and (2) passing the Riegle-Neal Act and thereby increasing the ability of national banks to target out-of-state borrowers and lowering the cost to national banks of rechartering in states with bank-friendly usury laws.

2. *Expansion of the Scope of NBA Preemption by the Judiciary.* — The Supreme Court has long recognized that the preemptive scope of the NBA extends beyond national banks themselves.[93] Rather than focusing

---

90. See Eager & Muckenfuss, supra note 88, at 44 (noting that policy prior to Riegle-Neal was that "states should determine where banks may establish branches" (citing 12 U.S.C. §§ 36(g), 1828(d)(4)(A), 1831u(a)(4)(A), 1831u(g)(6) (2001))).

91. See Marquette Nat'l Bank of Minneapolis v. First of Omaha Serv. Corp., 439 U.S. 299, 309–10 (1978) (holding that a national bank is located for purposes of section 85 in the "State named in its organization certificate").

92. See supra note 89 (noting Riegle-Neal allowed banks to open branches in other states).

93. Watters v. Wachovia Bank, 550 U.S. 1, 18 (2007) ("We have never held that the preemptive reach of the NBA extends only to a national bank itself.").

on the classification of the association and whether it is a national bank, the scope of federal preemption under the NBA as applied to non-national-bank entities is determined by an inquiry into a national bank's *powers*.[94] As a result, non-national-bank institutions, such as operating subsidiaries of banks, are entitled to NBA preemption in regard to specific activities that inhere to the exercise of a national bank's powers.[95]

The rationale for extending NBA preemption from state usury laws to non-national-bank entities is grounded in conflict preemption.[96] In general, the argument is that failing to extend NBA preemption to a non-national-bank entity would hinder the ability of Congress, acting through the NBA and the authority delegated to the OCC, to achieve its full purpose and objectives.[97] Crucially, this inquiry focuses not only on the powers a national bank is explicitly authorized to exercise under the NBA but also considers the incidental powers that 12 U.S.C. § 24 (Seventh) conferred upon national banks.[98] The preemptive scope of the

94. See id. ("[I]n analyzing whether state law hampers the federally permitted activities of a national bank, we have focused on the exercise of a national bank's *powers* . . . ." (citing Barnett Bank of Marion Cty. v. Nelson, 517 U.S. 25, 32 (1997))).

95. See 12 U.S.C. § 24(g)(3)(A) (2012) ("The term 'financial subsidiary' means any company that is controlled by 1 or more insured depository institutions other than a subsidiary that—(A) engages solely in activities that national banks are permitted to engage in directly and are conducted subject to the same terms and conditions . . . ."); 12 C.F.R. § 5.34(e)(3) (2015) ("An operating subsidiary conducts activities authorized under this section pursuant to the same authorization, terms and conditions that apply to the conduct of such activities by its parent national bank . . . ."); see also *Watters*, 550 U.S. at 19 ("[S]ecurity should adhere whether the business is conducted by the bank itself or is assigned to an operating subsidiary licensed by OCC whose authority to carry on the business coincides completely with that of the bank."); Clarke v. Sec. Indus. Ass'n, 479 U.S. 388, 406–08 (1987) (holding the NBA governs subsidiaries of national banks); Wells Fargo Bank v. Boutris, 419 F.3d 949, 960 (9th Cir. 2005) ("The determination whether to conduct business through operating subsidiaries or, instead, through subdivisions of the bank itself is thus essentially one of internal organization, so long as the operating subsidiary form of organization cannot be used to evade the rules that apply to national banks.").

96. See, e.g., SPGGC, LLC v. Blumenthal, 505 F.3d 183, 188 (2d Cir. 2007) ("At issue here is conflict preemption, which 'occurs when compliance with both state and federal law is impossible, or when the state law stands as an obstacle to the accomplishment and execution of the full purposes and objective of Congress.'" (quoting United States v. Locke, 529 U.S. 89, 109 (2000))). See generally Hillsborough County v. Automated Med. Labs., 471 U.S. 707, 713 (1985) (detailing federal preemption generally).

97. See *Blumenthal*, 505 F.3d at 189 (noting the petitioner's argument that "applying the Connecticut Gift Card Law to Simon Giftcards would frustrate the purposes of the National Bank Act ('NBA') and OCC regulations").

98. 12 U.S.C. § 24 (Seventh). For an overview of the powers conferred upon national banks by 12 U.S.C. § 24 (Seventh), see supra note 16 and accompanying text; see also Franklin Nat'l Bank v. New York, 347 U.S. 373, 377–79 (1954) (holding the NBA preempted local restrictions on advertisement because they burdened exercise of national banks' incidental power to advertise); Bank of Am. v. City of San Francisco, 309 F.3d 551, 561 (9th Cir. 2002) ("State attempts to control the conduct of national banks are void if they conflict with federal law, frustrate the purposes of the National Bank Act, or impair the efficiency of national banks to discharge their duties.").

NBA is broader still, as a state law may be preempted even when it only indirectly interferes with a national bank's exercise of its powers.[99]

The emergent rule is that federal preemption extends to non-national-bank entities if the entities act as the "equivalent to national banks with respect to powers exercised under federal law."[100] Although this language is somewhat vague, courts have clarified that at a minimum NBA preemption extends to non-national-bank entities when application of state law to that entity would interfere with a national bank's ability to exercise one of its inherent or incidental powers under the NBA.[101] In fact, in some circuits, including the Second Circuit, federal preemption under the NBA has been extended to entities with no corporate parentage ties to a national bank.[102]

Determining whether a state law is preempted focuses not only on a national bank's inherent powers but on its incidental powers as well. Under the NBA, a bank's "incidental powers" include those activities that are "necessary to carry on the business of banking."[103] While 12 U.S.C. § 24 (Seventh) lays out specific powers that are considered "incidental" for a national bank, the Supreme Court has held that "the 'business of banking' is not limited to the incidental powers enumerated in § 24

99. See *Franklin Nat'l Bank*, 347 U.S. at 377–78; see also Monroe Retail, Inc. v. RBS Citizens, N.A., 589 F.3d 274, 283 (6th Cir. 2009) (noting that "the level of 'interference' giving rise to NBA preemption is not very high" (quoting Ass'n of Banks in Ins. v. Duryee, 270 F.3d 397, 409 (6th Cir. 2001))).

100. *Watters*, 550 U.S. at 18.

101. Barnett Bank of Marion Cty. v. Nelson, 517 U.S. 25, 33 (1995) (holding that NBA preemption extends to subsidiaries of national banks if regulation by the state "prevent[s] or significantly interfere[s] with the national bank's exercise of its powers"); Pac. Capital Bank v. Connecticut, 542 F.3d 341, 352–53 (2d Cir. 2008) ("A state statute that forbade national banks to exercise their incidental powers through agents would thus plainly be preempted. We think it equally plain that a state statute cannot be allowed to avoid preemption by imposing such a prohibition indirectly."). This rule has been codified into law. See 12 U.S.C. § 25b(b)(1).

102. See *Blumenthal*, 505 F.3d at 191 (stating nonaffiliated third parties are entitled to federal preemption under the NBA when state "regulation at issue actually affects the national bank's exercise of any authorized powers," rather than just the "activities of the third party which are otherwise subject to state control"); SPGGC, LLC v. Ayotte, 488 F.3d 525, 532 (1st Cir. 2007) ("[T]he National Bank Act authorizes national banks to engage agents to carry out some of their activities."); Cades v. H & R Block, Inc., 43 F.3d 869, 873–74 (4th Cir. 1994) (applying home state usury laws when bank used out-of-state agents to engage in "face-to-face solicitation of . . . consumers").

103. 12 U.S.C. § 24 (Seventh). This includes those powers that are "convenient or useful in connection with the performance of one of the bank's established activities pursuant to its express powers under the National Bank Act." M & M Leasing Corp. v. Seattle First Nat'l Bank, 563 F.2d 1377, 1382 (9th Cir. 1977) (internal quotation marks omitted) (quoting Arnold Tours, Inc. v. Camp, 472 F.2d 427, 432 (1st Cir. 1962)); see also *Bank of Am.*, 309 F.3d at 562 ("The incidental powers of national banks are thus not limited to activities deemed essential to the exercise of enumerated powers but include activities closely related to banking and useful in carrying out the business of banking." (citing First Nat'l Bank of E. Ark. v. Taylor, 907 F.2d 775, 778 (8th Cir. 1990))).

(Seventh) and that the Comptroller therefore has discretion to authorize activities beyond those specifically enumerated."[104]

In 2001, the OCC, which up until that point had not addressed the matter, clarified that preemption under the NBA presumptively extends to national bank subsidiaries.[105] Subsequently, in 2003, the OCC promulgated an interpretive letter that stated that operating subsidiaries are entitled to NBA preemption and, moreover, that they are accorded "most favored lender" status.[106] Congress has never explicitly addressed the extension of NBA preemption to operating subsidiaries.[107]

In the face of silence from Congress and approval by the OCC of the theory that operating subsidiaries are entitled to federal preemption, the Court in *Watters v. Wachovia Bank* made explicit that national banks have authority under the NBA to own operating subsidiaries and that those subsidiaries are entitled to federal preemption.[108]

Following *Watters*, courts further expanded the scope of NBA preemption to non-national-bank entities when application of state law to such entities would hinder the exercise of either an inherent or inci-

---

104. NationsBank of N.C. v. Variable Annuity Life Ins. Co., 513 U.S. 251, 258 n.2 (1995).

105. The OCC achieved this with a short regulation in 2001. The regulation read, "Unless otherwise provided by Federal law or OCC regulation, State laws apply to national bank operating subsidiaries to the same extent that those laws apply to the national parent bank." 12 C.F.R. § 7.4006 (2002).

106. See Office of the Comptroller of the Currency, Interpretive Letter No. 954, at 3 (Dec. 16, 2002), reprinted in [2003–2004 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 81-479.

107. See Keest & Renuart, supra note 38, at 97 (noting Congress has never addressed the extension of national bank preemption to operating subsidiaries). There is an argument, however, that Congress has implicitly endorsed the extension of NBA preemption to operating subsidiaries by acceding to the OCC's longstanding approval of banks owning operating subsidiaries, recognizing the role of operating subsidiaries in the Gramm-Leach-Bliley Act, and acceding to the Office of Thrift Supervision's extension of federal preemption to operating subsidiaries of federal savings associations in 1996. See Pub. L. No. 106-102, § 121, 113 Stat. 1338, 1378 (1999) (codified as amended at 12 U.S.C. § 24(a)(g)(3)) (acknowledging implicitly the ability of national banks to own operating subsidiaries in defining "financial subsidiaries"); 66 Fed. Reg. 34,784, 34,789 (July 2, 2001) (codified at 12 C.F.R. pts. 1, 7, 23) (extending preemption rights to operating subsidiaries of federal savings associations). Nevertheless, the counterargument is that allowing a national bank to operate a subsidiary and granting that subsidiary federal preemption rights are very different things. See Watters v. Wachovia Bank, 550 U.S. 1, 39 (2007) (Stevens, J., dissenting) ("For there is a vast and obvious difference between rules authorizing or regulating conduct and rules granting immunity from regulation."). But see Wells Fargo Bank v. Boutris, 419 F.3d 949, 962 (9th Cir. 2005) ("The connection between the OCC's substantive determinations regarding the authority of national banks to conduct their business through operating subsidiaries and the preemption regulation is thus close and logical.").

108. *Watters*, 550 U.S. at 7 (majority opinion) ("[W]e hold that Wachovia's mortgage business, whether conducted by the bank itself or through the bank's operating subsidiary, is subject to OCC's superintendence, and not to the licensing, reporting, and visitorial regimes of the several States in which the subsidiary operates.").

dental national bank power; moreover, neither of these inquiries are constrained by the text of the NBA.[109] Along this line of reasoning, the judiciary has extended NBA preemption to a wide assortment of entities that indirectly enable national banks to exercise their powers under the NBA. This group of entities includes, inter alia, sellers of prepaid gift cards,[110] non-national-bank coordinators of national bank loans,[111] and subsidiaries of national banks.[112]

Of specific importance to this Note and the Second Circuit's ruling in *Madden*, courts have extended federal preemption of state usury laws under the NBA to third-party assignees of debt originated by national banks on the theory that, despite the assignment, the bank underwrote the loan and set terms such as applicable interest rates and late fees.[113]

The rationale for extending NBA preemption to non-national-bank assignees of debt originated by national banks, as illustrated by the Eighth Circuit in *Krispin v. May Department Stores*, is that when a national bank assigns a loan it nevertheless remains as the "real party in interest" in any action claiming usury.[114] This conclusion follows from the insight

---

109. SPGGC, LLC v. Blumenthal, 505 F.3d 183, 191 (2d Cir. 2007) (stating the inquiry focuses on whether state law or the regulation at issue "actually affects the national bank's exercise of any authorized powers or whether it limits only activities of the third party which are otherwise subject to state control").

110. Id. (extending NBA preemption from Connecticut Gift Card Law's prohibition on expiration dates to prepaid gift card issuers on grounds that "an expiration date is necessary to implement Visa fraud prevention and card maintenance requirements applicable to all prepaid cards bearing the VISA logo" (internal quotation marks omitted) (quoting Verified Complaint for Declaratory and Injunctive Relief at para. 20, SPGGC, Inc. v. Blumenthal, 408 F. Supp. 2d 87 (D. Conn. 2007) (No. 04CV01919), 2004 WL 3043495)).

111. Phipps v. FDIC, 417 F.3d 1006, 1013 (8th Cir. 2005) (finding the NBA preempted the plaintiff's claim on the grounds that the real originating entity was a national bank, despite the fact that it was a non-national bank that had signed loan documents and coordinated with the plaintiff).

112. *Watters*, 550 U.S. at 7 (extending NBA preemption to a subsidiary of a national bank engaged in real estate lending).

113. Krispin v. May Dep't Stores Co., 218 F.3d 919, 924 (8th Cir. 2000) ("Thus, although we recognize that the NBA governs only national banks, in these circumstances we agree with the district court that it makes sense to look to the originating entity (the bank), and not the ongoing assignee (the store), in determining whether the NBA applies." (citation omitted)); Cades v. H & R Block, Inc., 43 F.3d 869, 874 (4th Cir. 1994) (extending NBA preemption to Refund Anticipation Loan lenders); FDIC v. Lattimore Land Corp., 656 F.2d 139, 147–49 (5th Cir. Unit B Sept. 1981) (stating, in determining whether preemption under the NBA extends to an assignee of a national bank, that "[t]he non-usurious character of a note should not change when the note changes hands"); see also Diane Hellwig, Exposing the Loansharks in Sheep's Clothing: Why Re-Regulating the Consumer Credit Market Makes Economic Sense, 80 Notre Dame L. Rev. 1567, 1605 (2005) (explaining the facts in *Krispin* and describing how the case enabled "charter renting," or interest rate exportation by nonbanks).

114. See *Krispin*, 218 F.3d at 924. Although the plaintiffs in *Krispin* challenged the late fees associated with a credit agreement, the court concluded that interest as defined under 12 U.S.C. § 85 included late-payment fees. See Smiley v. Citibank (S.D.), 517 U.S. 735,

that, generally speaking, when a national bank originates a loan and assigns that loan to a third party, the bank remains as the entity that "issues credit, processes and services customer accounts, and sets such terms as interest and late fees."[115] Subsequent court decisions embrace the *Krispin* conclusion that a determination of whether the national bank remains the "real party in interest" should govern the inquiry as to whether NBA preemption extends to non-national-bank assignees of debt originated by national banks.[116]

Under this rationale, courts have approved a particular arrangement between a third-party assignee of debt originated by a national bank and a national bank that involves the purchase of a bank's receivables on a nightly basis.[117] In this business model, a national bank typically originates a loan for the benefit of a non-national-bank third party; the third party contracts for access to the income stream from the loan, but the loan technically still belongs to the bank.[118] The loan remains on the bank's balance sheet, thus ensuring access to NBA preemption, but all the risk and reward of the loan is transferred to the third party by requiring the third party to purchase the entirety of the bank's receivables in connection with the loan on a nightly basis. This was the scheme approved in *Krispin*.[119]

As courts continue to note, principles of contract also motivate the extension of NBA preemption to third-party assignees of debt originated by national banks.[120] As a general rule, contractual rights are freely assignable unless the contract at issue or a relevant statute precludes such assignment or, alternatively, if the assignment exposes the counterparty

---

744–47 (1996). Accordingly, the court's analysis rested on interpreting the scope of preemption from state usury laws under § 85 of the NBA.

115. See *Krispin*, 218 F.3d at 924.

116. See In re Cmty. Bank of N. Va., 418 F.3d 277, 297 (3d Cir. 2005); *Phipps*, 417 F.3d at 1013 ("Courts must look at 'the originating entity (the bank), and not the ongoing assignee . . . in determining whether the NBA applies.'" (alteration in original) (quoting *Krispin*, 218 F.3d at 924)). The court in *Phipps* also relied upon 12 C.F.R. § 7.1004(a), which states that "'[a] national bank may use the services of, and compensate persons not employed by, the bank for originating loans.'" 417 F.3d at 1013 (quoting 12 C.F.R. § 7.1004(a) (2005)).

The Fourth Circuit held similarly in the context of preemption under the Federal Deposit Insurance Act (FDIA) by relying upon its interpretation of NBA preemption. See Discover Bank v. Vaden, 489 F.3d 594, 608 (4th Cir. 2007) (holding, on the basis of the court's determination that the national bank was the "real party in interest," that the FDIA completely preempted the state law cause of action), rev'd on other grounds, 556 U.S. 49 (2008); see also Flowers v. EZPawn Okla., Inc., 307 F. Supp. 2d 1191, 1996 (N.D. Okla. 2003); Goleta Nat'l Bank v. Lingerfelt, 211 F. Supp. 2d 711, 718–19 (E.D.N.C. 2002).

117. This arrangement is somewhat derogatorily called "charter renting." See Hellwig, supra note 113, at 1606–07.

118. Id.

119. See *Krispin*, 218 F.3d at 923.

120. See, e.g., id. ("In general, unless the original contract or a relevant statute specifies otherwise, a party may assign contractual rights without notice.").

to a higher degree of risk or impairs the counterparty's chance of obtaining return value.[121] If federal preemption did not extend to national bank debt purchased by third-party non-bank institutions, this would inevitably lead to the peculiar result that a legal loan originated by a national bank might subsequently become illegal and unenforceable upon assignment of the right to receive payments. Such a result would run afoul of the default rule that contract rights are freely assignable. There is no independent statutory impediment to the assignment of a loan originated by a national bank.[122] Nor does it appear that any factual scenario could support the conclusion that the assignment exposes the obligor (here, the bank) to a higher degree of risk, since the assignment of the right to receive payments has no impact on the debtor's ability to make good on her debt.[123]

Courts have therefore expanded the scope of NBA preemption following *Marquette* under two rationales. First, courts have focused their inquiry on the powers of national banks, both incidental and inherent, rather than on the classification of the entity at issue, in deciding whether to extend NBA preemption.[124] As a result, preemption from state usury laws has been extended to non-national-bank assignees of debt originated by national banks when the facts support the conclusion that the national bank remains as the real party in interest. Second, courts have applied fundamental contract law principles to the assignment of loans originated by national banks to hold that, as a general matter, NBA preemption should not change upon assignment.[125]

---

121. United States v. Doe, 940 F.2d 199, 204 (7th Cir. 1991) ("In general, unless the parties have agreed otherwise, contract rights are freely assignable unless assignment would materially change the duties of the obligor, increase the obligor's risk, or impair the obligor's chance of obtaining return performance."); Restatement (Second) of Contracts § 317 (Am. Law Inst. 1979); 15 Joseph M. Perillo, Corbin on Contracts § 87.1 (rev. 3d ed. 2003); see also Overseas Dev. Disc Corp. v. Sangamo Constr. Co., 686 F.2d 498, 504 n.10 (7th Cir. 1982) ("As a general proposition, rights to receive compensation are freely assignable."); Charles L. Bowman & Co. v. Erwin, 468 F.2d 1293, 1297–98 (5th Cir. 1972) (surveying treatises stating that the right to recover compensation under a contract may be assigned); Collins Co. v. Carboline Co., 532 N.E.2d 834, 840 (Ill. 1988) (stating the "[a]ssignability of contract rights is freely recognized by the UCC" and listing exceptions, including when assignment materially changes the duty of the other party, increases the burden to the other party, impairs the chance of performance, or is contrary to the parties' agreement).

122. It goes without saying that loans originated by national banks that are subsequently sold off to non-national-bank third parties also do not contain provisions preventing assignees from collecting payments.

123. Moreover, the obligor here seems to exert considerable bargaining power, and the need to protect the obligor's interest when it is the party assigning the income stream seems negligible.

124. See supra notes 93–104 and accompanying text (noting courts focus on a bank's powers in determining issues of NBA preemption).

125. See supra notes 120–123 and accompanying text (noting courts have extended NBA preemption to non-national-bank assignees of national bank debt under the principle that contracts are generally freely assignable).

3. *The OCC's Expansion of the Scope of NBA Preemption.* — Judicial opinions interpreting section 85 also rely on interpretations issued by the OCC regarding its own regulations.[126] In *Clarke v. Securities Industry Association* the Court noted:

> [C]ourts should give great weight to any reasonable construction of a regulatory statute adopted by the agency charged with the enforcement of that statute. The Comptroller of the Currency is charged with the enforcement of banking laws to an extent that warrants the invocation of this principle with respect to his deliberative conclusions as to the meaning of these laws.[127]

Historically, as a general matter, the interpretations issued by the Comptroller of the Currency have broadly construed the scope of preemption under the NBA.[128]

Following passage of the Riegle-Neal Act, it was not clear how the rule laid out in *Marquette* applied to the new *interstate* banks that the Act enabled.[129] The OCC addressed this ambiguity in interpretive letters issued in 1996 and 1997 by determining that for purposes of section 85 an eligible bank is located both in its "home state"—in other words, the

---

126. The OCC's interpretations of statutes that they administer are entitled to *Chevron* deference, while OCC interpretations regarding the agency's own regulations are entitled to more deference and control unless they are "plainly erroneous or inconsistent with the regulation." Bowles v. Seminole Rock & Sand Co., 325 U.S. 410, 414 (1945). Compare Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 842–43 (1984) ("If the intent of Congress is clear, that is the end of the matter . . . . [I]f the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute."), with Auer v. Robbins, 519 U.S. 452, 461 (1997) (announcing a different standard of review when a court reviews agency interpretations of an agency's "own regulations" and holding such interpretations are "controlling unless plainly erroneous or inconsistent with the regulation" (internal quotation marks omitted) (quoting Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 359 (1989))).

127. Clarke v. Sec. Indus. Ass'n, 479 U.S. 388, 403–04 (1987) (internal quotation marks omitted) (quoting Inv. Co. Inst. v. Camp, 401 U.S. 617, 626–27 (1971) (citing First Nat'l Bank v. Missouri, 263 U.S. 640, 658 (1924))); see also, e.g., United States v. Riverside Bayview Homes, Inc., 474 U.S. 121, 131 (1985) ("An agency's construction of a statute it is charged with enforcing is entitled to deference if it is reasonable and not in conflict with the expressed intent of Congress."); Chem. Mfrs. Ass'n v. Nat. Res. Def. Council, Inc., 470 U.S. 116, 125 (1985) ("[The] view of the agency charged with administering the statute is entitled to considerable deference; and to sustain it, we need not find that it is the only permissible construction . . . but only that EPA's understanding . . . is a sufficiently rational one . . . ."); *Chevron*, 467 U.S. at 844 ("We have long recognized that considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer . . . .").

128. See infra notes 130–134 and accompanying text (surveying interpretations issued by the OCC regarding NBA preemption).

129. Office of the Comptroller of the Currency, Interpretive Letter No. 822 (Feb. 17, 1998), at 2 [hereinafter Interpretive Letter No. 822] ("*Marquette*, *Cades*, and *Wiseman* did not address the issue of the rates that may be charged by an *interstate* national bank."), reprinted in [1997–1998 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 81-265.

state in which it is chartered—and any state in which it maintains branches.[130]

This interpretation necessarily raised the question of when an eligible bank's home state usury cap governed and, conversely, when the usury cap from the state in which a branch is located (the "branch state") governed. The OCC, limiting to some extent the flexibility of its definition of "location" in the context of section 85, holds that when all three loan functions—approval, extension of credit, and disbursement of funds—occur in a single branch office, the national bank is governed by the usury law of the branch state.[131] Nevertheless, this rule still gives eligible banks a wide degree of latitude in determining which state's usury laws will apply to their loans. So long as one of the three functions of making a loan occurs out of the branch state, the bank may apply its home state usury law, or that of a branch involved in the loan, provided there exists a "clear nexus" between the loan at issue and the branch state.[132] Indeed, even when all three loan-making functions occur in a branch state, a bank may still choose to be governed by its home state usury laws if the process of loan approval is completed by application of "non-discretionary criteria that will be applied mechanically," as long as those criteria were designed within the home state.[133]

In addition, a bank's entitlement to section 85 preemption does not stop at interest rates but also extends to fees that fit within the OCC's broad definition of "interest," which includes all manner of fees, such as late fees, overlimit fees, and annual fees.[134] The Court in *Smiley v. Citi*

---

130. See Office of the Comptroller of the Currency, Interpretive Letter No. 782 (May 21, 1997) (reaffirming Interpretive Letter No. 686), reprinted in [1997 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 81-209; Office of the Comptroller of the Currency, Interpretive Letter No. 686 (Sept. 11, 1995) (relying on Citizens & S. Nat'l Bank v. Bougas, 434 U.S. 35 (1977) and Seattle Tr. & Savings Bank v. Bank of Cal., 492 F.2d 48 (9th Cir. 1974)), reprinted in [1995–1996 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 81-001; Office of the Comptroller of the Currency, Interpretive Letter No. 707 (Jan. 31, 1996), reprinted in [1995–1996 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 81-022; see also *Citizens & S. Nat'l Bank*, 434 U.S. at 43–45 (1997) (holding for venue purposes of section 94 that a national bank is "located" in a city or county where it has a main or branch office); *Seattle Tr. & Sav. Bank*, 492 F.2d at 51 (holding an interstate national bank with grandfathered branches in states other than the home state is "situated" in the state of the grandfathered branches for purposes of establishing additional branches in that state).

131. See Interpretive Letter No. 822, supra note 129, at 14 ("[W]e conclude that an interstate national bank may charge interest permitted by the laws of its home state unless the loan is made—that is, the loan is approved, credit is extended and funds are disbursed—in a branch or branches of the bank in a single host state.").

132. Id. at 14 n.43 (citing to Interpretive Letters Nos. 686, 707, and 782 for examples of what the OCC has recognized as a clear nexus supporting the use of host rates); see also id. at 14 ("Moreover, if a bank is permitted to charge the rate of a particular home or host state, it may under section 85 . . . charge the most favored lender rates permitted by that state . . . .").

133. Id. at 12.

134. See 12 C.F.R. § 7.4001(a) (2004) (listing types of fees included in "interest" and explaining the term "includes any payment compensating a creditor or prospective

Bank (South Dakota) found that the definition of "interest" set forth in the NBA is ambiguous and ruled that wide deference should be given to the OCC's interpretation of "interest."[135] Consequently, eligible banks enjoy wide access to federal preemption in connection with many of the fees they assess out-of-state borrowers.

In the aftermath of *Marquette*, therefore, Congress, the judiciary, and the OCC expanded the scope of NBA preemption in ways that indicated NBA preemption extended to non-national-bank assignees of national bank debt. It was upon this richly entrenched notion of the scope of NBA preemption that national banks extended credit and third parties purchased debt originated by national banks. And indeed, the value of NBA preemption was significant: It allowed eligible associations to determine the legality of their loans by considering only a few state usury regimes, rather than the entire, diverse body of state usury laws.[136] Furthermore, the precedent *Krispin* laid out and subsequent rulings ratifying that decision seemed to make explicit that NBA preemption extended to third-party purchasers of national bank debt.[137] It is for these reasons that the Second Circuit's ruling in *Madden* proved such a shock to both the legal and financial communities.

II. THE *MADDEN* RULING

Part I of this Note laid the groundwork for understanding federal preemption of state usury laws under the NBA for non-national-bank holders of consumer debt originated by national banks. Part II investigates the Second Circuit's ruling in *Madden v. Midland Funding, LLC*, which upset the established rule on federal preemption by holding that a third-party holder of debt originated by a national bank is subject to New York's usury laws. Section II.A summarizes the court's ruling and its rationale. Section II.B argues that the court's ruling conflicts with established precedent on NBA preemption.

A. *The* Madden *Ruling*

Madden involved a putative class action brought by Saliha Madden, a New York resident who opened a credit-card account with Bank of America in 2005.[138] As the Court noted, Bank of America is a national bank.[139] The terms of Madden's account were set forth in a "Cardholder

creditor for an extension of credit, making available of a line of credit, or any default or breach by a borrower of a condition upon which credit was extended").

135. 517 U.S. 735, 739 (1996).

136. See supra notes 44–52 and accompanying text (noting the wide variation in state usury regulatory schemes).

137. See supra notes 113–119 and accompanying text (summarizing *Krispin* and its progeny).

138. See Madden v. Midland Funding, LLC, 786 F.3d 246, 247 (2d Cir. 2015).

139. Id.

Agreement."[140] The year following Madden's opening of the account, Bank of America sold off its credit-card program, which was consolidated into another national bank, FIA Card Services, N.A. (FIA); contemporaneously, a document entitled "Change In Terms" amended the account's terms and conditions to include, inter alia, a Delaware choice-of-law provision.[141] Subsequently, FIA wrote off the $5,000 in debt accrued on Madden's account as "uncollectable" and sold it to Midland Funding, LLC (Midland Funding).[142] Neither Midland Funding, nor its affiliate tasked with servicing Midland Funding's consumer debt accounts, Midland Credit Management (collectively with Midland Funding, Midland), is a national bank.[143]

In November 2010, Midland Credit sent Madden a letter notifying her that an interest rate of 27% per annum applied to her outstanding debt in accordance with the terms of her loan.[144] Notably, this rate exceeds New York's criminal usury rate by 2%.[145] One year later, Madden filed suit on behalf of herself and a putative class, alleging that Midland had charged a usurious rate of interest in violation of New York law: specifically, section 349 of the New York General Business Law, section 5-501 of the New York General Obligations Law, and section 190.40 of the New York Penal Law.[146]

Midland countered that Madden's usury claim should be dismissed on the grounds that Midland was entitled under the NBA to charge interest at the rate allowed by the originating bank's chartering state (here, Delaware), and under Delaware law interest of 27% on revolving credit plans on outstanding unpaid indebtedness did not constitute usurious interest.[147] The court disagreed with Midland's claim that it was entitled to NBA preemption. Although the court acknowledged that NBA preemption may extend to non-national-bank entities when application of state law to that entity "significantly interfere[s] with a national

140. Id. at 247–48.

141. Id. at 248.

142. Id.

143. Id.

144. Id.

145. See N.Y. Penal Law § 190.40 (McKinney 2010).

146. *Madden*, 786 F.3d at 248. Madden also claimed that both defendants had "engaged in abusive and unfair debt collection practices in violation of the FDCPA." Id.

147. Id. at 250 ("The defendants argue that, as assignees of a national bank, they too are allowed under the NBA to charge interest at the rate permitted by the state where the assignor national bank is located—here, Delaware."). Delaware does not set a cap on revolving credit plans on outstanding unpaid indebtedness. See Del. Code Ann. tit. 5, § 943 (2016) ("A bank may charge and collect periodic interest under a revolving credit plan on outstanding unpaid indebtedness in the borrower's account under the plan at such . . . rates as the agreement governing the plan provides or as established in the manner provided in the agreement governing the plan.").

bank's ability to exercise its power under the NBA,"[148] the court reasoned that here the defendants "acted solely on their own behalves, as the owners of the debt."[149] As a result, the Second Circuit held that application of state law to defendants such as Midland "would not 'significantly interfere' with the exercise of a national bank power" and that therefore application of New York state law to Midland was appropriate.[150]

The court's ruling relied considerably on its interpretation of a bulletin issued by the OCC, which the court read as establishing that the OCC viewed "third-party debt buyers [as] distinct from agents or subsidiaries of a national bank."[151] As discussed earlier in this Note, interpretations issued by the OCC are given wide deference by courts as to the meaning of the NBA.[152] The OCC issued this bulletin to advise national banks on risk management when selling consumer debt to third parties.[153] The sole support for the court's conclusion that the OCC views third-party debt buyers as distinct from agents or subsidiaries of a national bank is the fact that the bulletin, in listing how national banks may pursue collection on delinquent accounts, treats "third parties as agents" and "debt buyers" separately.[154] Although it is beyond the scope of this Note to consider in depth the proper deference courts must extend to interpretations promulgated by the OCC, it is worth noting that the sentence prior to the bulletin provisions quoted in the *Madden* opinion directly contradicts the court's holding: The bulletin states, "Although banks charge off severely delinquent accounts, the underlying debt

148. *Madden*, 786 F.3d at 250 ("In certain circumstances, NBA preemption can be extended to non-national bank entities. To apply NBA preemption to an action taken by a non-national bank entity, application of state law to that action must significantly interfere with a national bank's ability to exercise its power under the NBA." (citing Barnett Bank of Marion Cty. v. Nelson, 517 U.S. 25, 33 (1996); Pac. Capital Bank v. Connecticut, 542 F.3d 341, 353 (2d Cir. 2008))).

149. Id. at 251.

150. Id. ("Although it is possible that usury laws might decrease the amount a national bank could charge for its consumer debt in certain states (i.e., those with firm usury limits, like New York), such an effect would not 'significantly interfere' with the exercise of a national bank power.").

151. Id. at 250–51 (citing Office of the Comptroller of the Currency, OCC Bulletin No. 2014-37, Risk Management Guidance (2014), http://www.occ.treas.gov/news-issuances/bulletins/2014/bulletin-2014-37.html (on file with the *Columbia Law Review*)).

152. Supra section I.C.3.

153. See Office of the Comptroller of the Currency, OCC Bulletin No. 2014-37, Risk Management Guidance (2014), http://www.occ.treas.gov/news-issuances/bulletins/2014/bulletin-2014-37.html (on file with the *Columbia Law Review*).

154. Id. ("Banks may pursue collection of delinquent accounts by (1) handling the collections internally, (2) using third parties as agents in collecting the debt, or (3) selling the debt to debt buyers for a fee."); see *Madden*, 786 F.3d at 250–51. It is worth noting, as an aside, that the court does not offer any explanation for why a distinction between debt buyers and third-party agents in the view of the OCC—to the extent such a view exists—would impact preemption under the NBA.

obligations may remain legally valid and consumers can remain obligated to repay the debts."[155]

Nevertheless, the dispositive finding behind the *Madden* ruling is the court's conclusion that withholding NBA preemption from debt buyers would not "significantly interfere" with the exercise of a national bank power, despite the court's acknowledgment that the ruling would undermine a bank's ability to set interest rates on consumer debt in certain states.[156] The court did not offer any support for this conclusion other than its view that the Midland debt buyers here acted for their own benefit, a conclusion that the court believed was supported by both the fact that here the originating bank (Bank of America) did not retain an interest in Madden's account after it was sold and the fact that Midland, rather than Bank of America, charged the interest payments on Madden's account.[157]

Ultimately, the *Madden* court remanded the matter to the trial court.[158] Although the court ruled that NBA preemption did not extend to the Midland defendants,[159] there remained the issues of determining whether the Delaware choice-of-law provision included in the Change In Terms precluded Madden's usury claims and whether class certification was proper.[160]

B. *The Second Circuit's Ruling Conflicts with Established Precedent on NBA Preemption*

The *Madden* ruling conflicts with precedent in other circuits and ignores Supreme Court precedent on the scope of NBA preemption. As argued above, the court's dispositive finding was that applying state law to the Midland defendants would not interfere with the exercise of a national bank power.[161] The Second Circuit reached this conclusion without

155. Risk Management Guidance, supra note 153. The bulletin notes that "[m]ost debt-sale arrangements involve banks selling debt outright to debt buyers," but "[t]ypically, debt buyers obtain the right to collect the full amount of the debts." Id.

156. *Madden*, 786 F.3d at 251 ("[I]t is possible that usury laws might decrease the amount a national bank could charge for its consumer debt in certain states.").

157. Id. at 252–53 (distinguishing Krispin v. May Dep't Stores, 218 F.3d 919 (8th Cir. 2000) and Phipps v. FDIC, 417 F.3d 1006 (8th Cir. 2005)).

158. Id. at 255.

159. The court also considered the district court's dismissal of Madden's Fair Debt Collection Practices Act (FDCPA) claim. See id. at 254. The court determined that the dismissal, which was grounded on the district court's finding that the claim was preempted by the NBA and its determination that Delaware law applied under the choice-of-law provision, was erroneous. See id. The Second Circuit ruled that the NBA did not preempt the claim. Based on the same analysis applied to Madden's usury claim, the Second Circuit found that the district court's assumption that the choice-of-law provision governed was "premature" and vacated the district court's dismissal of Madden's FDCPA claim. See id.

160. Id. at 253 ("The defendants contend that the Delaware choice-of-law provision contained in the Change In Terms precludes Madden's New York usury claims.").

161. Supra text accompanying note 156.

citing to any empirical authority and despite its acknowledgment that its ruling would possibly reduce the amount that banks could charge for loans in certain states.[162] This finding conflicts with the wide deference courts have extended to claims by assignees of debt originated by national banks asserting that extending NBA preemption to those entities enables the exercise of national bank powers.[163] The Second Circuit's ruling is particularly brazen given its acknowledgment that there exists the potential for its ruling to decrease the price that national banks can charge for credit and thus decrease the ability of national banks to extend credit to consumers.[164]

The Second Circuit acknowledged *Krispin*[165] and distinguished it on the grounds that there the bank retained ownership of the accounts, whereas in *Madden* the Midland defendants had purchased the receivables originated by Bank of America.[166] But the court misconstrued the Eighth Circuit's reasoning in *Krispin*. The *Krispin* court's ruling that NBA preemption extended despite the fact that the debt had not been originated by a national bank was based on its finding that the national bank the defendants created to hold preexisting loan obligations was the "real party in interest."[167] This conclusion rested on the court's insight that the bank was the entity responsible for, inter alia, issuing credit and setting terms such as interest and late fees.[168] The *Madden* court's conclusion that the ownership of the loans was determinative for deciding the issue of preemption therefore misconstrued the Eighth Circuit's analysis. Indeed, given that on the *Madden* facts it is clear that Bank of America originated the credit and set the terms of the loan

---

162. See supra note 157 and accompanying text.

163. See supra notes 109–112 and accompanying text (surveying the scope of preemption extended by the judiciary).

164. *Madden*, 786 F.3d at 251. Constraining the ability of a national bank to charge interest on the debt it originates necessarily implies a reduction in the ability of the bank to extend credit by setting a new, lower risk threshold above which a bank cannot justify extending credit.

165. See supra notes 114–119 and accompanying text (discussing *Krispin v. May Department Stores Co.*).

166. *Madden*, 786 F.3d at 252–53 ("Unlike *Krispin*, neither BoA [Bank of America] nor FIA has retained an interest in Madden's account, which further supports the conclusion that subjecting the defendants to state regulations does not prevent or significantly interfere with the exercise of BoA's or FIA's powers.").

167. See Krispin v. May Dep't Stores Co., 218 F.3d 919, 924 (8th Cir. 2000) ("[I]n these circumstances we agree with the district court that it makes sense to look to the originating entity (the bank), and not the ongoing assignee (the store), in determining whether the NBA applies."). Although the court spoke in *Krispin* of the bank as the originating entity, the bank did not actually originate the credit at issue. See id. at 922 (noting the store assigned all its credit accounts to the national bank).

168. See id. at 924 (holding preemption extended to a non-national-bank entity because "it is now the bank, and not the store, that issues credit, processes and services customer accounts, and sets such terms as interest and late fees").

agreement, *Krispin* would appear to strongly suggest that preemption should have been extended to the Midland defendants in *Madden*.[169]

The *Madden* court also distinguished another Eighth Circuit case, *Phipps v. FDIC*, in which the Eighth Circuit extended preemption to a non-national-bank assignee of national bank debt,[170] on the grounds that in *Phipps* the national bank charged the fee, whereas in *Madden* the Midland defendants charged the fee.[171] However, in *Phipps* the court's rationale did not hinge upon whether the party receiving interest was a national bank. Rather, the inquiry as to whether NBA preemption extended to the cause of action was resolved by determining whether the party that originated the loan was a national bank.[172] Thus in *Phipps*, because the interest and fees at issue were made upon loans issued by a national bank, NBA preemption extended.[173] Accordingly, given the fact that in *Madden* a national bank originated the loan, *Phipps* also supports the conclusion that NBA preemption does extend to the Midland defendants, and the *Madden* court's attempt to distinguish *Phipps* is unavailing.[174]

The Second Circuit also ignored Fifth Circuit precedent that indicates NBA preemption extends to the Midland defendants. In *FDIC v. Lattimore Land Corp.* the Fifth Circuit considered the argument that a national bank should be subject to a state's anti-usury laws when the debt had been originated by a non-national-bank entity and subsequently assigned to a national bank.[175] Consistent with the Eighth Circuit's rulings, the Fifth Circuit held that whether an entity is entitled to claim NBA preemption is determined by looking to the entity that originated

---

169. The *Krispin* court's invocation of the *FDIC v. Lattimore Land Corp.* insight that the nonusurious nature of a note should not change when the note changes hands further supports this conclusion. See id. ("[I]n context of determining whether NBA governs loan assigned by originating entity to entity in another state . . . '[t]he non-usurious character of a note should not change when the note changes hands.'" (quoting FDIC v. Lattimore Land Corp., 656 F.2d 139, 148 (5th Cir. Unit B Sept. 1981))).

170. Phipps v. FDIC, 417 F.3d 1006, 1013 (8th Cir. 2005).

171. *Madden*, 786 F.3d at 253 ("*Phipps* is distinguishable from this case. There, the national bank was the entity that charged the interest to which the plaintiffs objected. Here, on the other hand, Madden objects only to the interest charged after her account was sold by FIA to the defendants.").

172. See *Phipps*, 417 F.3d at 1013 (noting courts "must look at 'the originating entity'" to determine whether the NBA applies (quoting *Krispin*, 218 F.3d at 924)).

173. See id. (holding NBA applied because "plaintiffs signed numerous loan documents in which they acknowledged GNBT [a national bank] was the lender that funded and made the loans").

174. It is worth noting that one district court considered a nearly identical scenario in 2007 and concluded that the NBA preempted state-law usury claims against a third-party assignee of credit-card debt originated by a national bank. See Munoz v. Pipestone Fin., LLC, 513 F. Supp. 2d 1076, 1079 (D. Minn. 2007). The Second Circuit in *Madden* dispensed with the case in a summary fashion. See *Madden*, 786 F.3d at 253 n.3 ("We are not persuaded by *Munoz v. Pipestone Financial, LLC* . . . .").

175. FDIC v. Lattimore Land Corp., 656 F.2d 139, 146–47 (5th Cir. Unit B Sept. 1981).

the debt, rather than the ongoing assignee.[176] Accordingly, the *Lattimore* court concluded that the national bank was subject to the state's anti-usury laws and was not entitled to NBA preemption, since a non-national-bank entity originated the loan at issue.[177] The Second Circuit's failure to consider the *Lattimore* decision underscores the deep conflict between the circuits that *Madden* presents.

III. IMPACT OF THE *MADDEN* RULING

The Second Circuit's ruling relied in whole on its assumption that the application of state usury laws to the assignees of national bank debt would not significantly interfere with national banks' ability to exercise their inherent and incidental powers.[178] Part III of this Note takes up the Second Circuit's assumption and in so doing argues why, in light of the Supreme Court's denial of certiorari, other jurisdictions should reject the rule laid out in *Madden*. It advances this argument by discussing the impact of the *Madden* ruling on several large sectors of the financial economy. It also sets forth several strategies credit originators and debt repurchasers may consider adopting to ensure entitlement to NBA preemption, even if *Madden* is adopted universally.

This Note assumes for sake of argument that the words of the NBA can be interpreted a priori to satisfy either the Second Circuit's ruling or the preexisting body of law that would extend preemption to assignees of debt. Starting from this generous baseline, this Note argues that because the statute has been interpreted to extend federal preemption to third-party assignees of debt[179] and because complex and sizeable financial markets have been built upon this interpretation,[180] the strong reliance interests at play here must be weighed heavily. Furthermore, to the extent the Second Circuit's ruling turned on its empirical assumption

---

176. Id. at 147–48 (holding NBA preemption only applies to usury allegations in which a national bank discounted a note upon assignment or acted as lender); see also id. at 148–49 ("The non-usurious character of a note should not change hands when the note changes hands." (citing Nichols v. Fearson, 32 U.S 103, 109–11 (1833))).

177. Id. at 147 ("Under these circumstances, the Tennessee interest limit of 10% does not apply because a transfer of a pre-existing debt to a national bank does not cause the National Bank Act to mandate the application of the usury law of the state where the national bank is located.").

178. *Madden*, 786 F.2d at 251 ("Although it is possible that usury laws might decrease the amount a national bank could charge for its consumer debt in certain states (i.e., those with firm usury limits, like New York), such an effect would not 'significantly interfere' with the exercise of a national bank power.").

179. See supra section I.C (noting how Congress, the judiciary, and the OCC have indicated NBA preemption extends to third-party assignees of debt originated by a national bank).

180. The asset-backed bond market, for instance, was sized at $1.392 trillion in the third quarter of 2015. See US Bond Market Issuance and Outstanding, Sec. Indus. Fin. Mkts. Ass'n, http://www.sifma.org/research/statistics.aspx (on file with the *Columbia Law Review*) (last updated Aug. 2, 2016).

that its ruling would not constrain the ability of national banks to exercise their inherent and incidental powers, which indeed this Note has argued is the best interpretation of the court's ruling,[181] Part III of this Note challenges the legal basis of the Second Circuit's ruling on its face.

Part III first considers three crucial segments of the American financial economy and analyzes *Madden*'s likely impact. Section III.A takes up the Second Circuit's assumption that withholding preemption from assignees of debt would not constrain national banks' ability to extend credit and considers *Madden*'s implications for national bank powers. Section III.B argues the *Madden* ruling has the potential to wreak havoc in the secondary credit market and lead to massive price confusion. Section III.C discusses how the emergent peer-to-peer lending market is threatened by the *Madden* ruling. Finally, Part III concludes with section III.D, which sets forth policies that credit originators and debt repurchasers can adopt to protect themselves from *Madden*.

A. *The* Madden *Ruling Constrains the Ability of National Banks to Issue Credit*

The Second Circuit acknowledged that its ruling would decrease the amount of interest that a national bank could charge on its consumer debt in states with firm usury limits.[182] The necessary corollary is that the ruling will decrease the ability of national banks to extend credit: Banks

181. See supra note 156 and accompanying text (arguing that the dispositive finding in *Madden* was the court's conclusion that although its ruling would decrease banks' ability to set interest rates on consumer credit such a limitation would not "significantly interfere" with a national bank power).

182. See *Madden*, 785 F.3d at 251 ("[I]t is possible that usury laws might decrease the amount a national bank could charge for its consumer debt in certain states (i.e. those with firm usury limits, like New York) . . . ."). The vast majority of states have firm usury limits. See Ark. Const. amend. LXXXIX, § 3; Okla. Const. art. XIV, § 2; Ala. Code § 8-8-1 (LexisNexis 2002); Alaska Stat. § 45.45.010 (2014); Ariz. Rev. Stat. Ann. § 6-632 (2015); Cal. Civ. Code § 1916-1 (West 2010 & Supp. 2016); Colo. Rev. Stat. Ann. § 5-12-103 (West 2015); Conn. Gen. Stat. Ann. § 37-4 (West 2016); Del. Code Ann. tit. 6, § 2301 (2016); Fla. Stat. Ann. § 687.03 (West 2016); Ga. Code Ann. § 7-4-18 (2015 & Supp. 2016); Haw. Rev. Stat. Ann. § 412:9-302 (LexisNexis 2008); Idaho Code Ann. § 28-22-104 (West 2016); 815 Ill. Comp. Stat. Ann. 205/4 (West 2016); Ind. Code Ann. § 24-4.5-3-201 (LexisNexis 2013); Iowa Code Ann. § 535.2 (West 2011 & Supp. 2016); Kan. Stat. Ann. § 16-207 (2015); Ky. Rev. Stat. Ann. § 360.010 (LexisNexis 2015); La. Stat. Ann. § 9:3519 (2009); Me. Rev. Stat. Ann. tit. 9-A, § 2-401 (2009); Md. Code Ann., Com. Law § 12-103 (LexisNexis 2015); Mass. Ann. Laws. ch. 271, § 49 (LexisNexis 2016); Mich. Comp. Laws Ann. § 438.41 (West 2016); Minn. Stat. Ann. § 334.01 (West 2016); Mo. Ann. Stat. § 408.030 (West 2016); Mont. Code Ann. § 31-1-107 (2014); Neb. Rev. Stat. § 45-101.03 (2010); N.J. Stat. Ann. § 31:1-1 (West 2016); N.Y. Banking Law § 14-a (McKinney 2013); N.C. Gen. Stat. § 24-1.1 (2015); N.D. Cent. Code § 47-14-09 (2014); Ohio Rev. Code Ann. § 1343.01 (West 2016); Or. Rev. Stat. § 82.010 (2015); 41 Pa. Stat. and Cons. Stat. Ann. § 201 (West 2016); 6 R.I. Gen. Laws § 6-26-2 (2014); S.C. Code Ann. § 37-3-201 (2015); Tenn. Code Ann. § 47-14-103 (2015); Tex. Fin. Code Ann. § 302.001 (West 2006); Vt. Stat. Ann. tit. 9, § 41a (2014); Wash. Rev. Code Ann. § 19.52.020 (West 2016); W. Va. Code Ann. § 47-6-5 (LexisNexis 2015); Wis. Stat. Ann. § 138.05 (West 2016).

will enjoy a more limited ability to charge high interest rates on credit extended to high-risk borrowers, and banks' risk appetites will accordingly fall. As a result, *Madden* will set a new, lower risk threshold above which national banks will be unwilling to extend credit. This will limit national banks' ability to extend credit to high-risk borrowers. Furthermore, limiting national banks' ability to charge interest will likely reduce their ability to manage liquidity risk through loan sales following *Madden*.[183]

The decreased price that national banks can charge for loans following *Madden* thus clearly impinges on their inherent power to set interest rates by setting a lower cap on the riskiness of borrowers to which national banks may extend credit. More critically, however, the ruling also constrains the ability of national banks to set interest rates by drastically raising the transaction costs associated with selling debt. Under *Madden*, potential purchasers of debt originated by national banks that are not themselves national banks must engage in due diligence that entails an individual determination of each purchased loan's governing usury law or laws.[184] Federal regulators have long acknowledged that forcing assignees to choose between either engaging in extremely expensive due diligence or potentially facing liability runs the risk of freezing secondary markets.[185] Additionally, loans originated by national banks are frequently securitized before being sold off, which increases the difficulty of assessing the enforceability of individual loans. This increased difficulty may further depress potential buyers' demand for loans on the

183. See Rustom M. Irani & Ralf M. Meisenzahl, Loan Sales and Bank Liquidity Risk Management: Evidence from a U.S. Credit Register 20–23 (Fed. Reserve Bd., Fin. & Econ. Discussion Series, Working Paper No. 2015-001, 2015), http://www.federalreserve.gov/econresdata/feds/2015/files/2015001pap.pdf [http://perma.cc/5LB7-P937].

184. This result follows from the rule laid out in *Madden* that a non-national-bank holder of debt originated by a national bank would be subject to the governing usury regime of the borrower's state. See *Madden*, 786 F.3d at 252 ("[E]xtending [NBA] protections to third parties would create an end-run around usury laws for non-national bank entities that are not acting on behalf of a national bank.").

185. See Review of the National Bank Preemption Rules: Hearing Before the S. Comm. on Banking, Hous. & Urban Affairs, 108th Cong. 317–19 (2004) (statement of John D. Hawke, Jr., Comptroller of the Currency) ("[T]he continuing uncertainty about the applicability of State laws has already negatively affected national banks' ability to lend in certain markets and to access the secondary market, a curtailment of their business . . . that has the potential to adversely affect credit availability."); 78 Fed. Reg. 6856, 6944–45 (Jan. 31, 2013) (codified at 12 C.F.R. pts. 1024, 1026) ("Creditors may also be reluctant to make high-cost purchase-money mortgages that they previously would have extended because of the general inability to sell high-cost mortgages in the current market, primarily because of assignee liability."); see also Congressional Review of OCC Preemption: Hearing Before the Subcomm. on Oversight & Investigations of the H. Comm. on Fin. Servs., 108th Cong. 205 (2004) (statement of Julie L. Williams, First Senior Deputy Comptroller & Chief Counsel, Office of the Comptroller of the Currency) ("State-based restrictions on loan terms substantially affect the marketability of such loans.").

secondary market.[186] National banks' ability to set interest rates and extend credit will therefore be further decreased, either because they will have to charge higher interest rates to justify the lower market-clearing price for consumer debt given the new transaction cost that debt buyers face or because they will face a reduced ability to extend loans to consumers if the market for consumer debt contracts.

Notably, the constraining effect that higher transaction costs will have on national banks' ability to set interest rates will not be limited in scope to high-risk borrowers. The process of securitization may bundle borrowers of different risk profiles together, and therefore even extending credit to the least risky borrowers will entail higher transaction costs post-*Madden* when banks try to sell off that debt in a securitization. As a result, even low-risk borrowers will witness a decrease in the availability of credit and a rise in the cost of borrowing under *Madden*.[187]

The higher transaction costs that debt buyers face has begun to play itself out in other circuits. A recent case from the Central District of California reveals how far assignee liability may extend under *Madden*'s interpretation of NBA preemption.[188] In *Blyden v. Navient Corp.*, the plaintiff brought a putative class action alleging that her student loan, which had been originated by a national bank, violated California's anti-usury law.[189] The plaintiff's complaint asserted that upon assignment of her loan to non-national-bank entities, California's usury laws came into play.[190] The plaintiff named as defendants various investment trusts that had purchased loans from the bank, even though some of those defendants had never held an interest in the plaintiff's specific loan.[191] The court ultimately dismissed the case due to pleading deficiencies, but the

186. See Kathryn Judge, Fragmentation Nodes: A Study in Financial Innovation, Complexity, and Systemic Risk, 64 Stan. L. Rev. 657, 659 (2012) (arguing securitizations contribute "to new sources of systemic risk for which we have no precedent").

187. See Efraim Benmelech & Tobias J. Moskowitz, The Political Economy of Financial Regulation: Evidence from U.S. State Usury Laws in the 19th Century, J. Fin., June 2010, at 1029, 1045–46 (showing an inverse relationship between usury limits and availability of credit); Maurice B. Goudzwaard, Price Ceilings and Credit Rationing, J. Fin., Mar. 1968, at 177, 181–83 (same); Douglas F. Greer, Rate Ceilings, Market Structure, and the Supply of Finance Company Personal Loans, J. Fin., Dec. 1974, at 1363, 1374–81 (same); Robert P. Shay, Factors Affecting Price, Volume and Credit Risk in the Consumer Finance Industry, J. Fin., May 1970, at 503, 513 (same); Michael Staten, The Impact of Credit Price and Term Regulations on Credit Supply 9–14 (Joint Ctr. for Hous. Studies of Harvard Univ., Working Paper No. UCC08-8, 2008), http://www.jchs.harvard.edu/sites/jchs.harvard.edu/files/ucc08-8_staten.pdf [http://perma.cc/MC9M-8D76] (summarizing empirical work that finds rate ceilings decrease the availability of credit).

188. Blyden v. Navient Corp., No. EDCV 14–02456–JGB (KKx), 2015 WL 4508069, at *1–2 (C.D. Cal. July 23, 2015).

189. See id.

190. See Second Amended Complaint for Damages, Accounting, Equitable & Injunctive Relief at 3–7, *Blyden*, No. 5:14-CV-2456-JGB(KKX) (claiming assignees of national bank debt are subject to California's anti-usury laws).

191. See *Blyden*, 2015 WL 4508069, at *7–8.

fact that defendants who had never held plaintiff's debt were named in the suit indicates how vastly the new transaction costs *Madden* imposes impact a national bank's ability to sell off debt and, therefore, its ability to extend credit.[192]

B. Madden *Will Undermine Secondary Credit Markets and Create Widespread Price Confusion*

In addition to *Madden*'s deleterious effect on banks' ongoing ability to originate debt and set interest rates, the decision undermines assumptions that uphold the secondary credit market. This is *Madden*'s most dangerous effect, as it poses a broader risk to the entire secondary credit market.[193] One may conservatively presume that investors in securitizations of debt originated by national banks, such as hedge funds and pension funds, could have priced in the risk of the NBA not applying to particular loans within an investment if they had anticipated *Madden*. However, because the *Madden* decision came as a shock and upset established precedent, this possibility was not priced in to the value of securitizations of debt originated by national banks.[194] As a result, if *Madden* is affirmed or left to stand in the Second Circuit, one should expect to see profound price corrections throughout the secondary credit markets as investors reassess the risk of unenforceability for the

192. See id. at *17 (granting defendant's motion to dismiss with leave to amend).

193. See Nathan Bull et al., Cadwalader, Wickersham & Taff LLP, Second Circuit Holds Application of State Usury Laws to Third-Party Debt Purchasers Not Preempted by National Bank Act, JD Supra (June 9, 2015), http://www.jdsupra.com/legalnews/second-circuit-holds-application-of-39019/ [http://perma.cc/T8KG-WR7A] ("The *Madden* decision thus calls into question the enforceability of bank- and thrift-originated loans that have subsequently been assigned to non-bank entities such as hedge funds, securitization vehicles, whole-loan purchasers, and other investors.").

194. See id. ("The Second Circuit's decision up-ends a fundamental and longstanding premise of lending law—that a fully-funded loan that is valid and enforceable when made remains valid and enforceable . . . regardless of to whom that loan is subsequently assigned."); Barkley Clark & Mike Lochmann, A Momentous Court Decision May Hurt Bank Lending Powers, BankDirector.com (July 22, 2015), http://www.bankdirector.com/issues/regulation/a-momentous-court-decision-may-hurt-bank-lending-powers/ [http://perma.cc/43CH-C29K] (stating the *Madden* decision sent "shockwaves through the banking industry"); Glob. Banking & Payment Sys. Practice, *Madden v. Midland Funding, LLC*: Potentially Far-Reaching Implications for Non-Bank Assignees of Bank-Originated Loans, Paul Hastings Insights (June 11, 2015), http://www.paulhastings.com/publications-items/details/?id=e695e469-2334-6428-811c-ff00004cbded (on file with the *Columbia Law Review*) ("[T]he *Madden* decision . . . is causing: (1) non-bank assignees of bank loans to question their rights to enforce the terms . . . [and] parties to existing loan sale agreements to review and renegotiate the terms of such agreements—and ancillary agreements—to account for the uncertainty created by *Madden*."); Peter Rudegeair, A New Tariff on 'Interest-Rate Exports?,' Wall St. J.: Moneybeat (June 30, 2015, 8:48 AM), http://blogs.wsj.com/moneybeat/2015/06/30/a-new-tariff-on-interest-rate-exports/ (on file with the *Columbia Law Review*) ("[The Madden decision] came as a shock to many in the industry and has created an atmosphere of uncertainty in the secondary market for bank loans, lawyers said.").

tranches of loan contracts they hold.[195] Prices of instruments tied to debt originated by national banks will drop, as investors realize such instruments were overpriced relative to their riskiness. Indeed, it is likely that price corrections have already occurred. Although there is no centralized trading platform for securitized consumer debt obligations, and thus a comprehensive empirical evaluation of the pricing effects caused by *Madden* is impossible, the peer-to-peer (P2P) lending market has already discounted loans backed by notes in default.[196] There is no reason to believe that instruments backed by consumer debt obligations traded on other platforms or on an ad hoc basis should behave differently. The end result of this price correction will be distorted investment decisions and concomitant inefficiencies.[197]

C. *The* Madden *Ruling Eviscerates the Emergent P2P Lending Market.*

The *Madden* ruling also undermines the emergent P2P lending market. Section III.C.1 gives an overview of how this market operates. Section III.C.2 argues *Madden* impedes the ability of P2P lenders to extend credit and will accordingly decrease the availability of credit and competition between lenders.

1. *The P2P Lending Market.* — The P2P financial market comprises a vast breadth of arrangements on a one-to-one basis between a single recipient and multiple providers. P2P lending is the direct provision of loans by a syndicate of lenders to consumers and small- to medium-sized enterprises.[198] In the basic set up of this arrangement a borrower first applies to a P2P platform; if approved, the borrower is rated by the platform and assigned an interest rate.[199] The loan is then funded by

---

195. Unenforceability appears to be the minimum risk that an investor could face. As evidenced by *Blyden*, at the most, criminal liability may also be a risk.

196. See Colleen Honigsberg, Robert J. Jackson, Jr. & Richard Squire, The Effects of Usury Laws on Higher-Risk Borrowers 18–24 (Columbia Bus. Sch., Research Paper No. 16-38, 2016), http://papers.ssrn.com/abstract_id=2780215 (on file with the *Columbia Law Review*) (noting the P2P market discounted notes backed by noncurrent loans in the wake of *Madden*).

197. Emmanuel Farhi & Stavros Panageas, The Real Effects of Stock Market Mispricing at the Aggregate: Theory and Empirical Evidence 33 (Dec. 2004) (unpublished manuscript), http://papers.ssrn.com/abstract=720462 (on file with the *Columbia Law Review*) ("[C]hanges in the extent of trading in financial markets affect profits negatively in the short-medium run, especially over a 2-3 year horizon.").

198. See J.D. Roth, Taking a Peek at Peer-to-Peer Lending, Time (Nov. 15, 2012), http://business.time.com/2012/11/15/taking-a-peek-at-peer-to-peer-lending/ [http://perma.cc/9CSR-MW6R] (describing the basic mechanics of a P2P loan).

199. Id. Alternative arrangements do exist. Most notably, Prosper—one of the largest P2P platforms in the United States—used an auction-style model to determine the interest rates on its loans. In 2010, however, Prosper switched to the LendingClub model, in which the platform determines the risk tied to the loan. See Sara Lepro, Prosper Ditches Auction Pricing for Model Like P-to-P Rival's, Am. Banker (Dec. 20, 2010), http://www.americanbanker.com/issues/175_243/prosper-lending-club-1030207-1.html (on file with the *Columbia Law Review*).

investors who can purchase portions of the loan.[200] The two largest P2P platforms in the United States are LendingClub and Prosper, which have collectively issued over $24 billion in loans.[201] Borrowers using P2P platforms tend to borrow at lower interest rates than they could have obtained through a traditional bank, as P2P platforms face lower operating costs than traditional banks.[202]

P2P platforms rely critically on NBA preemption in order to ensure the loan agreements they broker do not run afoul of state usury laws.[203] Given the national scope of P2P platforms' business, access to NBA preemption prevents P2P platforms and lenders from having to engage in costly due diligence for each borrower: Instead, all loans are subject to one interest rate.[204] The way LendingClub achieves access to NBA preemption is representative. When a prospective borrower applies to LendingClub for a loan and is approved, a national bank in Utah named WebBank issues the loan.[205] WebBank holds the loan for two days and then sells it to LendingClub, which cuts apart the loan to enable investors on its platform to fund discrete portions of the loan.[206] WebBank is incorporated in Utah, and therefore under the NBA, Utah's anti-usury laws apply to any loan it originates, including loans to borrowers in other

200. See Roth, supra note 198.

201. See Lending Club Statistics, LendingClub, http://www.lendingclub.com/info/statistics.action (on file with the *Columbia Law Review*) (stating LendingClub has issued $20.687 billion in loans as of June 30, 2016) (last visited Aug. 25, 2016); Peter Renton, Prosper Crosses $4 Billion in Total Loans Issued, $912 Million in Q2, Lend Acad. (July 9, 2015), http://www.lendacademy.com/prosper-crosses-4-billion-in-total-loans-issued-912-million-in-q2/ [http://perma.cc/M3Z8-ENLR] ("[Prosper] announced that they have crossed $4 billion in total loans issued [as of July 9, 2015]."). LendingClub is the largest P2P platform in the world. See Samantha Hurst, LendingClub Tops $13 Billion, Crowdfund Insider (Nov. 2, 2015), http://www.crowdfundinsider.com/2015/11/76690-lending-club-tops-13-billion-infographic/ [http://perma.cc/8T37-H6RU].

202. See Roth, supra note 198 ("[Borrowers] get a better interest rate than they might through a traditional bank loan or credit card"); see also Sebastian C. Moenninghoff & Axel Wieandt, The Future of Peer-to-Peer Finance 6–7 (May 20, 2012) (unpublished manuscript), http://papers.ssrn.com/abstract_id=2439088 (on file with the *Columbia Law Review*) ("[C]ost advantages of peer-to-peer finance stem from lower operational cost due to lean online platforms and lower transaction costs for the users . . . . In addition, equity capital requirements for traditional banks increase their funding costs, which is not the case for peer-to-peer finance . . . .").

203. See Sean Murray, Renaud Laplanche on *Madden v. Midland*, Debanked (Aug. 8, 2015), http://debanked.com/2015/08/renaud-laplanche-on-madden-v-midland/ [http://perma.cc/Z85F-CVZY] (acknowledging the P2P market benefits from application of one usury law).

204. See id. (admitting a P2P lender "need[s]" application of one state usury law).

205. See Noah Buhayar, Where Peer-to-Peer Loans Are Born, BloombergBusinessweek (Apr. 16, 2015, 6:00 AM), http://www.bloomberg.com/news/articles/2015-04-16/webbank-where-peer-to-peer-loans-are-born [http://perma.cc/H9UN-XG9K] ("Apply for a loan with LendingClub, the biggest of those online markets, and WebBank issues it.").

206. See id.

states.[207] Before *Madden*, the market assumed that loans originated by WebBank continued to be exclusively governed by Utah's anti-usury laws after assignment to LendingClub. Accordingly, because Utah imposes no interest rate cap on loans, LendingClub presumably faced no risk of invalidation of its loans due to violation of any other state's anti-usury laws.[208]

2. Madden*'s Impact on the P2P Lending Market.* — *Madden* cast into doubt the P2P lending market's ability to reference the laws of only one state to determine the legality of its loans. Indeed, the market began to worry about P2P lending platforms' ability to legitimately claim entitlement to NBA preemption by originating loans through national banks located in states with permissive usury laws.[209] The *Madden* ruling implies that once a loan originated by a national bank is sold to a P2P platform, the NBA ceases to apply and the loan becomes subject to the usury law of the state in which the loan was issued.[210]

This rationale implies that, following *Madden*, P2P lending platforms will lose the main source of their competitive advantage over banks, as the platforms' operating costs rise to ensure compliance with every state's anti-usury law, thereby decreasing credit availability. Indeed, P2P lending

---

207. See History, WebBank, http://www.webbank.com/history [http://perma.cc/BCY8-84P4] (last visited Aug. 23, 2016); Ryan Weeks, Reputation, Regulation, and Retail—an Interview with Renaud Laplanche, AltFi (Sept. 30, 2015), http://www.altfi.com/article/1403_reputation_regulation_and_retail_an_interview_with_renaud_laplanche [http://perma.cc/4UXQ-GK3Z] (stating that under the NBA, WebBank is "exempt from interest rate caps in other states").

208. See Utah Code Ann. § 15-1-1 (LexisNexis 2013) ("The parties to a lawful contract may agree upon any rate of interest for the loan or forbearance of any money, goods, or chose in action that is the subject of their contract.").

209. See Peter Renton, *Madden* 2015 Has Nothing to Do with Football, Lend Acad. (Aug. 10, 2015), http://www.lendacademy.com/madden-2015-has-nothing-to-do-with-football/ [http://perma.cc/S94Q-8BL6] ("If *Madden* stands for the principal [sic] that a loan purchaser cannot charge the same rate the funding bank can charge, the industry will likely have to undergo some structural changes in either how loans are funded, the rate charged borrowers or [a bank's] amount of post-sale involvement . . . ."); Matt Scully, Peer-to-Peer Lenders Face Legal Blow in Usury Ruling, Bloomberg, http://www.bloomberg.com/news/articles/2015-08-14/peer-to-peer-lenders-losing-court-battle-over-state-usury-laws [http://perma.cc/PY59-RKFX] (last updated Aug. 31, 2015, 4:12 PM); see also Jayson Derrick, Are Changes Coming to the P2P Lending Model?, Benzinga (Sept. 29, 2015, 4:20 PM), http://www.benzinga.com/analyst-ratings/analyst-color/15/09/5873715/are-changes-coming-to-the-p2p-lending-model [http://perma.cc/H2AU-UZTK].

210. Because P2P platforms holding debt originated by national banks are "third-party debt buyers" and the national bank retains no ownership in the accounts, *Madden* would imply that the P2P platforms holding the debt would be the "real party in interest." See Madden v. Midland Funding, LLC, 786 F.3d 246, 251–53 (2d Cir. 2015) (internal quotation marks omitted) (quoting Krispin v. May Dep't Stores Co., 218 F.3d 919, 924 (8th Cir. 2000)). Accordingly, NBA preemption would most likely not be available to the P2P-platform purchasers of debt under *Madden* because they would be found to have "acted solely on their own behalves, as the owners of the debt." See id. at 251 (contrasting defendants' case with that of non-national-bank entities that nonetheless received NBA preemption because they were "exercis[ing] the powers of a national bank").

platforms have already begun to decrease the availability of credit for high-risk borrowers.[211] Moreover, this development has been associated with an increase in the discount at which notes backed by noncurrent loans originated by P2P lenders trade.[212]

The response of the P2P lending platforms reveals how fundamental a change *Madden* will effect in the P2P lending market if platforms do not adapt. LendingClub's response is particularly revealing.[213] In its second quarter earnings call its Chief Executive Officer, Renaud Laplanche, was quick to argue that *Madden* would not impact LendingClub's business model.[214] Laplanche argued that the choice-of-law provisions in LendingClub's contracts, which stipulate that Utah law applies,[215] would ensure that Utah's usury laws would govern.[216] However, it is not clear that a choice of law provision would save LendingClub's contracts if they were deemed to be in violation of the applicable state usury law. The *Madden* court did not resolve this issue but noted that there was a "split in the case law."[217] Accordingly, contractual choice-of-law provisions do not necessarily provide a winning defense for LendingClub and other P2P platforms whose business models rely on NBA preemption.

---

211. See Honigsberg et al., supra note 196, at 18–24; Llewellyn Hinkes-Jones, Little Change in LendingClub Loans Since *Madden* Decision, Bloomberg Law: Banking (July 21, 2016), http://www.bna.com/little-change-lendingclub-n73014445098/ [http://perma.cc/FM74-B4K5] (noting loans originated by Prosper Marketplace, another P2P platform, have dropped by 40%). But see id. (stating volume of loans has actually increased since *Madden* and there have been no changes in "average interest rate or risk, either in the 2nd Circuit or nationwide").

212. See Honigsberg et al., supra note 196, at 24–26 (noting an increase in the spread for notes backed by noncurrent loans).

213. Further, given the size of LendingClub in the P2P lending market, its response bears independent weight.

214. Murray, supra note 203 ("'So we continue to operate in the Second Circuit district where that decision was rendered exactly as we did before and are relying on our choice of law provisions.'" (quoting LendingClub CEO and founder Renaud Laplanche)).

215. See Borrower Agreement, LendingClub (July 2016), http://www.lendingclub.com/info/consolidated-borrowerLoan-agreement.action (on file with the *Columbia Law Review*) ("We are located in the state of Utah and this Agreement is entered into in the state of Utah. The provisions of this Agreement will be governed by federal laws and the laws of the state of Utah to the extent not preempted, without regard to any principle of conflicts of laws . . . .").

216. See Murray, supra note 203 ("'The Madden case really challenged the federal preemption but did not challenge the choice of law provision . . . and we don't need both, we need one of them.'" (quoting LendingClub CEO and founder Renaud Laplanche)).

217. See Madden v. Midland Funding, LLC, 786 F.3d 246, 254 n.7 (2d Cir. 2015). The Second Circuit cited to several conflicting cases. See id. Compare Am. Equities Grp., Inc. v. Ahava Dairy Prods. Corp., No. 01 Civ. 5207(RWS), 2004 WL 870260, at *7–9 (S.D.N.Y. Apr. 23, 2004) (applying New York usury law despite choice of law clause), and Am. Express Travel Related Servs. Co. v. Assih, 893 N.Y.S.2d 438 (Civ. Ct. 2009) (same), and N. Am. Bank, Ltd. v. Schulman, 474 N.Y.S.2d 383 (Cty. Ct. 1984) (same), with RMP Capital Corp. v. Bam Brokerage, Inc., 21 F. Supp. 3d 173, 186 (E.D.N.Y. 2014) (finding choice-of-law clause precludes the application of New York's usury law). This issue will be resolved on remand to the Second Circuit.

Therefore, the market impact of *Madden* on loans sold through P2P platforms, in addition to the responses of P2P platforms themselves—as exemplified by LendingClub's response and a bevy of other unsettling developments[218]—indicate the potential risk the *Madden* ruling poses to the P2P lending market. For this reason, other jurisdictions considering adopting the Second Circuit's reasoning in *Madden* must consider the weighty consequences implicit in adopting such a rule, including not only cutting down the nascent P2P lending market but also raising borrowing costs for consumers within the relevant jurisdiction by cutting down a new low-cost form of borrowing.

It is worth noting that passing judgment on *Madden*'s effect from a normative perspective, as opposed to descriptively analyzing its most likely effects, is an empirical endeavor. While it may be useful to verify that the *Madden* ruling will indeed constrain credit availability, for example by curtailing the P2P lending market, such an endeavor would only verify that *Madden*'s intended goal of limiting the ability of non-banks to access NBA preemption was achieved, which is something that we would expect anyway.

As discussed above, *Madden* will inevitably lead to credit rationing.[219] But from a normative perspective, such credit rationing may in fact be welfare enhancing. It is of course true that for those borrowers who are credit constrained, who would increase their lifetime welfare by borrowing if they only had access to more credit, *Madden* is welfare reducing because it constrains credit availability. However, the credit rationing that *Madden* effects will also *improve* welfare for those borrowers who are myopic. Some borrowers will underappreciate the cost of borrowing because that cost is borne in the future, and these borrowers may as a result make suboptimal borrowing decisions if faced with unconstrained (or less constrained) access to credit: In short, they will overborrow.[220] Accordingly, for myopic borrowers *Madden* will improve welfare by reducing credit availability, thereby reducing overborrowing.[221]

---

218. Other developments include LendingClub's manipulation of metrics detailing its loan business, layoffs of 12% of its staff, and the ousting of LendingClub's CEO. See Max Chafkin & Noah Buhayar, How Lending Club's Biggest Fanboy Uncovered Shady Loans, BloombergBusinessweek (Aug. 18, 2016), http://www.bloomberg.com/news/features/2016-08-18/how-lending-club-s-biggest-fanboy-uncovered-shady-loans [http://perma.cc/T2BP-DD3Q] (detailing how LendingClub overstated the number of repeat borrowers that had used its platform and noting its layoff of 12% of its workforce); Peter Rudegeair & Annamaria Andriotis, Inside the Final Days of LendingClub CEO Renaud Laplanche, Wall St. J. (May 16, 2016, 8:30 PM), http://www.wsj.com/articles/inside-the-final-days-of-lendingclub-ceo-renaud-laplanche-1463419379 (on file with the *Columbia Law Review*) (detailing Laplanche's final days as LendingClub's CEO). Because LendingClub is the largest P2P platform, these developments portend negative results for the P2P lending industry as a whole. See supra note 201.

219. See supra sections III.A–.C.

220. See Richard Thaler, Some Empirical Evidence on Dynamic Inconsistency, Economics Letters 8 (1981) 201–07 (observing from survey study that implicit discount

Therefore, determining whether *Madden* is normatively good or bad for borrowers entails comparing whether the welfare gains of the ruling for myopic borrowers offset the costs of the ruling for rational borrowers or vice versa. If the welfare gains offset the welfare costs, the decision is likely welfare enhancing, not considering any second-order effects of the decrease in availability of credit. This empirical question, while beyond the scope of this Note, may be fertile ground for future research.[222]

D. *Credit Originators Can Protect Themselves from* Madden *by Restructuring Their Relationships with Debt Repurchasers*

Although *Madden* poses a risk to credit originators and debt repurchasers, they are not without tools to defend themselves against the suddenly unpredictable world of state-usury-law compliance. The Second Circuit's opinion in *Madden* itself pointed to several key ways in which credit originators can avoid applicability of *Madden*. Indeed, LendingClub and WebBank have already restructured the terms of their relationship in order to increase the probability that the loans funded on their platform are entitled to NBA preemption, *Madden* notwithstanding.[223]

The most significant step that a national bank can take to protect itself from *Madden* is to ensure that it, as the originating bank, maintains an ongoing relationship with the borrowers after the loan is sold off such

---

rates, or the rates at which people discount the future receipt or outlay of money, are "very large"); see also Oren Bar-Gill & Elizabeth Warren, Making Credit Safer, 157 U. Pa. L. Rev. 1, 7 (2008) (arguing freedom of contract is potentially not welfare enhancing when the assumption that contracting parties are informed and rational is relaxed); id. at 26–46 (surveying evidence suggesting "imperfect information and imperfect rationality pervade credit product markets"); John Y. Campbell, President, Am. Fin. Ass'n, Household Finance, *in* J. Fin., Jan. 2006, at 1553, 1554 (arguing irrationality is "central to the field of household finance").

221. Classifying a borrower as either "myopic" or "rational" is a simplification. Borrowers are likely to have diverse discount rates, so technically all borrowers are "myopic." See Thaler, supra note 220, at 204 (noting variability in discount rates). However, the question is whether a borrower's level of myopia will lead her to improperly optimize the level of her borrowing such that her borrowing, if left unconstrained, will actually reduce lifetime welfare. Accordingly, "myopic" in this context should be taken to mean someone whose implicit discount rate is such that given the cost of borrowing, she will overborrow.

222. While it is possible that the welfare benefits will outweigh the welfare costs, the evidence currently available does not support such a conclusion. The burden of proof, therefore, should lay with proving that the welfare benefits outweigh the costs. Of course, economists have long struggled with how to quantitatively assess the welfare effects of particular phenomena. One area of research that looks promising for evaluating the balance of *Madden*'s impact is the burgeoning research on the health effects of high debt loads. See, e.g., Elizabeth Sweet et al., The High Price of Debt: Household Financial Debt and Its Impact on Mental and Physical Health, 91 Soc. Sci. & Med. 94, 97 (2003) (reporting that individuals with high financial debt relative to available assets exhibit higher perceived stress and depression, worse self-reported general health, and higher diastolic blood pressure).

223. See Hinkes-Jones, supra note 211.

that it remains the "real party in interest."[224] This strategy sidesteps the question regarding the scope of the NBA altogether: The national bank remains as the party in interest to the loan, and NBA preemption unquestionably applies. The scheme approved in *Krispin*, which the *Madden* court cited favorably, lays out what terms may be sufficient to ensure the originating bank remains the real party in interest. In *Krispin* the fact that the originating bank had issued the credit, processed and serviced customer accounts, and set terms such as interest and late fees was sufficient to entitle the originating bank to classification as the real party in interest, and the NBA therefore applied.[225]

The approach LendingClub and WebBank adopted following *Madden* illustrates one potential approach that originating entities will take to avoid application of state usury laws. Under the new terms between LendingClub and WebBank, WebBank maintains ongoing accounts for the borrowers and receives regular payments from LendingClub, rather than one lump-sum payment per loan, contingent on the loan being current.[226] In other words, LendingClub and WebBank have restructured the terms of their dealings to keep more of the "ownership" of the loans in the hands of WebBank, such that it, rather than LendingClub, looks more like the real party in interest. Figure 2 illustrates this strategy in general form. LendingClub's rationale is ostensibly that because it has increased the potential economic upside to WebBank, by increasing the fees it receives, and because it has increased the sensitivity of WebBank's compensation to the value of the underlying loan, by making entitlement to fees contingent on the loan being current, WebBank is more of an "owner" of the loans and thus the real party in interest.[227]

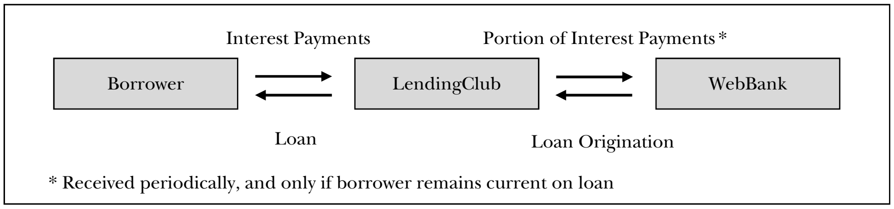
224. See Madden v. Midland Funding, LLC, 786 F.3d 246, 252 (2d Cir. 2015) (internal quotation marks omitted) (quoting Krispin v. May Dep't Stores Co., 218 F.3d 919, 924 (8th Cir. 2000)), cert. denied, 136 S. Ct. 2505 (2016).

225. *Krispin*, 218 F.3d at 924.

226. See Hinkes-Jones, supra note 211 ("Kevin Petrasic, partner with White & Case, told Bloomberg BNA that LendingClub's restructuring ensured that WebBank had 'skin in the game' and dampened the potential impact of the *Madden* decision.").

227. Peter Rudegeair & Telis Demos, LendingClub to Change Its Fee Model, Wall St. J., http://www.wsj.com/articles/fast-growing-lending-club-to-change-its-fee-model-1456488393 (on file with the *Columbia Law Review*) (last updated Feb. 26, 2015, 4:28 PM). Although a recent class action filed against LendingClub in the Southern District of New York does not challenge LendingClub's new arrangement, the court's ruling may give some further clarification of what is necessary to entitle LendingClub to NBA preemption. Tracy Alloway et al., A New Class Action Suit Wants to Treat Marketplace Lenders Like Mobsters, Bloomberg Mkts. (Apr. 19, 2016, 1:25 PM), http://www.bloomberg.com/news/articles/2016-04-19/a-new-class-action-suit-wants-to-treat-marketplace-lenders-like-mobsters [http://perma.cc/YTH9-NNZL].

FIGURE 2: LENDINGCLUB TRANSACTION STRUCTURE



Another arrangement that some P2P platform and bank partnerships have adopted to insulate themselves from *Madden* is to keep some of the loans issued by the bank on the bank's balance sheet.[228] Under this scheme, the national bank remains as the legal owner of a portion of all loans issued (or the entirety of loans issued),[229] and on this basis the national bank claims that it is the "real party in interest" and that therefore NBA preemption automatically applies. While some banks have provided for this arrangement through contractual provisions that obligate nonbank debt collectors to purchase a bank's receivables on a nightly basis, other arrangements are possible.[230]

While these two strategies for protecting against *Madden* have been adopted by P2P-platform–national-bank partnerships, they are similarly applicable to national banks writ large and the entities to which they assign loans. Other strategies will undoubtedly develop as more sophisticated institutions respond to the Supreme Court's denial of certiorari and as courts weigh in on different arrangements. Importantly, adopting new transaction structures in response to *Madden* will involve a significant level of trial and error because the Second Circuit did not give clear guidance as to what kind of transaction structure would have entitled the Midland assignees to NBA preemption.[231] Indeed, it is unclear whether any of the strategies discussed above goes far enough to satisfy the Second Circuit. This uncertainty left by *Madden* is what makes the ruling so pernicious and costly: Restructuring business relationships vis-à-vis originating banks and consumer-loan assignees to gain access to NBA preemption involves not only significant costs, as originating entities redesign transaction structures, but moreover a high degree of uncertainty, given the risk that those new transaction structures will fail to entitle assignees to NBA preemption. As a result, one should expect consumer credit to contract for the additional reason that implementing

---

228. See Rudegeair & Demos, supra note 227 ("Cross River Bank, based in New Jersey, holds some of the loans originated by online lenders via the bank on its own balance sheet.").

229. See Hellwig, supra note 113, at 1605 (describing how a nonbank debt collector purchased receivables from an originating national bank on a nightly basis to ensure access to NBA preemption).

230. Hellwig, supra note 113, at 1605.

231. See generally Madden v. Midland Funding, LLC, 786 F.3d 246 (2d Cir. 2015).

new transaction structures to mitigate the risk of invalidation of consumer loans upon assignment involves significant costs. These costs exist both as a fixed operational cost associated with implementing new transaction structures and as a variable risk liability tied to the possibility that the loans originated and assigned through the new structures will fail to entitle the assignees to NBA preemption under *Madden*.

CONCLUSION

The Second Circuit dealt in a summary fashion with the consequences of its ruling for national banks' ability to exercise their inherent and incidental powers. As this Note has pointed out, however, the consequences of the court's ruling are considerable and should be weighed heavily. As this Note has argued, the impact of the Second Circuit's novel take on NBA preemption not only undermines its legal analysis, since its rule will indeed impact the ability of national banks to extend credit, but it also runs the risk of causing significant price corrections. In addition, adopting such a rule entails a high likelihood of cutting down the nascent P2P lending market, which provides cheap credit for high-risk borrowers. While credit originators and their assignee counterparts have tools to guard against *Madden* there is a high level of ambiguity regarding whether changes in transaction structure will go far enough to ensure loans are still entitled to NBA preemption after assignment. This Note does not advance a normative argument for whether the *Madden* ruling will be net welfare enhancing or reducing.[232] Nevertheless, given the significant costs that adopting the decision would entail, any jurisdiction contemplating implementing *Madden* must seriously consider the costs that necessarily accompany such a ruling.

232. See supra text accompanying notes 219–222 (noting the difficulty of passing judgment on *Madden* as a normative matter and suggesting a possible framework for addressing this difficulty).