Leadership Message

Dear CFSC Members:
This is my inaugural "Leadership Message" as Chair of the ABA Business Law Section's Consumer Financial Services Committee. Since I became Chair two months ago, I have learned that we are one of the biggest and most active committees in the ABA with:

- three meetings a year, including our upcoming stand-alone meeting, to be held January 9-12 in Park City, Utah;
- the annual National Institute on Consumer Financial Services Basics;
- monthly webinars on the latest and greatest developments in consumer financial services law;
- an active policy agenda, including participation in ongoing ALI Restatement projects and Uniform Law Commission model law projects;
- a quarterly newsletter (which you have the good fortune to be reading now);
- a website chock-full of interesting and worthwhile content;
- regular consumer finance "mini-themes" in Business Law Today;
- the Annual Survey of Consumer Finance Law in The Business Lawyer;
- a widely read and regularly updated treatise on consumer financial laws and rules; and
- an active pro bono committee and financial education initiative.

What does this mean for you? It means a constant flow of opportunities to get involved in the CFSC, whether speaking, writing, administration, event sponsorship or just networking. It also means the most timely and sophisticated programming, and the most targeted and cost-effective educational opportunities available to consumer financial services lawyers anywhere.

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Pro Bono Article

I Came, I Saw, I Made a Difference: Pragmatic Pro Bono Programs for the Twenty-First Century
By Mark T. Andrus; edited by Cynthia Thaxton

According to recent studies, in approximately 70 to 98 percent of cases in America's civil courts today, one or both parties are not represented by a lawyer. The market,
Coverage of the TCPA. Immediate reaction to the Order is widely considered lawsuits challenging the FCC's authority. The 138-page Order, its impact on TCPA litigation, and the subsequent 2015 Rulings on TCPA Litigation regarding the application of the Telephone Consumer Protection Act (TCPA).

At the Winter Meeting, the Subcommittee will explore the provision’s impact on consumer protection, regulatory trends, and the implications for practitioners. The Subcommittee has concentrated on identifying emerging issues and providing a robust discussion of these topics.

During the Winter Meeting, the Subcommittee will explore the FCC's recent Declaratory Ruling and Order (the “Order”) regarding the application of the Telephone Consumer Protection Act (the “TCPA”). The Subcommittee has assembled a presentation entitled “Impact of the FCC's 2015 Rulings on TCPA Litigation” which will explore the Order, its impact on TCPA litigation, and the subsequent lawsuits challenging the FCC's authority. The 138-page Order is widely considered to have expanded the coverage of the TCPA. Immediate reaction to the Order is presumed.

Institutions pursuant to federal preemption of state law usury limits. The court's decision reaches much further than the court appears to have contemplated and potentially threatens business models ranging from debt purchasers to marketplace lenders.

This article is the first of a two part series. This article explains the Madden decision, the state of the law prior to Madden, and discusses the impact of the Madden decision moving forward. The second article in this series discusses potential ways to mitigate the impacts of the Madden decision.

Options for Debt Buyers Waiting for the Final Word in Madden

By Sabrina A. Neff, Hughes Watters Askanase, LLP

In the May 22, 2015 decision in Madden v. Midland Funding, LLC, the Second Circuit Court of Appeals addressed whether a nonbank assignee of debts originated by a national bank is entitled to protection from state usury claims under the National Bank Act. See 786 F.3d 246 (2d Cir. 2015). The Second Circuit held that, once a consumer debt is transferred to a nonbank assignee, the preemption under the National Bank Act no longer applies and that nonbank assignees are subject to state usury limits. The Second Circuit vacated the District Court's order denying class certification and remanded the case in part to address whether the consumer contract's choice-of-law provision applying Delaware law precluded consumer's New York usury claims.

Compliance Management Subcommittee Spotlight: Shining a light on UDAAP

By Adam Maarec and John Morton

One of the most vexing compliance challenges facing financial institutions and their service providers is the risk posed by potential unfair, deceptive, or abusive acts or practices (UDAAP). Our subcommittee has two great resources for practitioners managing these risks: 1) semi-annual surveys that summarize recent UDAAP activity; and 2) an upcoming panel on compliance management tools to mitigate UDAAP risks at the winter CFSC meeting in Park City, Utah.

Debt Collection and Bankruptcy Subcommittee

By Caren D. Enloe

The Debt Collection and Bankruptcy Subcommittee focuses on consumer protection regulatory trends and litigation. As focus has increased on consumer protection, the committee has concentrated on identifying emerging issues arising from increased regulation and litigation and providing a robust discussion of these issues.

At the Winter Meeting, the Subcommittee will explore the FCC’s recent Declaratory Ruling and Order (the “Order”) regarding the application of the Telephone Consumer Protection Act (the “TCPA”). The Subcommittee has assembled a presentation entitled “Impact of the FCC’s 2015 Rulings on TCPA Litigation” which will explore the Order, its impact on TCPA litigation, and the subsequent lawsuits challenging the FCC’s authority. The 138-page Order is widely considered to have expanded the coverage of the TCPA. Immediate reaction to the Order is presumed.

Meeting Highlights

National Institute for Consumer Financial Services Basics

By Webb McArthur and Katie Hawkins

On October 8 and 9, 2015, the Consumer Financial Services Committee, along with the Baltimore County Bar Association and the Women’s Bar Association of Maryland, sponsored the Sixth Annual National Institute on Consumer Financial Services Basics (the "Institute") in Arlington, Virginia.

The Institute included panel discussions on a range of topics under the consumer financial services umbrella, including fair lending, credit reporting, consumer communications, asset accounts, UDAAP, mortgage origination, and others. The panelists are experts in each area, including practitioners, government representatives, and advocates. It was beneficial to develop greater understanding in unfamiliar areas while also hearing about updates and hot topics in our practice areas.

The Institute was also a valuable opportunity for attendees to connect with others involved in consumer financial services. During a reception on the first evening, the attendees, who ranged in background and experience, had the opportunity to network with fellow attendees and Institute faculty while enjoying beautiful views of Washington, DC.
included the filing of a number of lawsuits asserting the Order exceeded the FCC's authority. The presentation will feature a balanced presentation from the consumer's viewpoint (Abbas Kazerounian) and the financial service's viewpoint (Daniel JT McKenna).

At the Spring Meeting, the Subcommittee will turn its focus to the increased litigation and conflicting decisions which are arising in mortgage foreclosure, servicing and subsequent debt collection. The subcommittee's presentation will explore recent conflicting rulings involving the running of limitations periods, credit reporting following a mortgagee's bankruptcy discharge and the debt collection and UDAAP liability arising from servicing notices.
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Our Committee has had a very successful last three months:

- We had another successful Annual Meeting of the Business Law Section (held in Chicago, September 17-19, 2015), thanks to all of you.
  o We had ten CLE’s in all, and captured three of the top five slots for attendance – for our programs on vendor management, cryptocurrencies, and mandated disclosures. We also initiated a very successful collaboration with the Banking Law Committee.
  o On Saturday, September 19, members of our Pro Bono Subcommittee went into the field to assist our nation’s first responders with preparing essential legal documents, as a part of the Wills for Heroes program. (See the photo below.)
- In addition, the Sixth Annual Consumer Financial Services Institute, held in Arlington, Virginia on October 8-9, was a great success, with another over-capacity crowd.
  o The Institute featured many speakers from our Committee, including the keynote speaker, Patrice Alexander-Ficklin, the CFPB’s Assistant Director for the Office of Fair Lending. We were thrilled to have other high level executives from the
CFPB, FTC, OCC, and other federal and state agencies, as well as many attorneys in private practice to participate on the panels.

- Although the Institute is intended for less experienced practitioners, even “more seasoned” lawyers took away nuggets of great information. Stay tuned for the dates and location of next year’s Institute.

Now, it’s time to register for our Winter Meeting, January 9-12, 2016 in Park City, Utah. We will begin at 4:30 PM on Saturday, January 9, 2016, with our regular “CFSC Basics” (featuring traditional beverages), followed by a Welcome Reception. Our committee dinner will be held on the evening of Sunday, January 10, 2016. (The registration for the dinner event will be posted separately when it is available.) And, we will be winding up on Tuesday, January 12, 2016, at 12:00 noon.

We have several excellent programs planned, including:

- Integrating UDAAAP Considerations Into Compliance Management Programs
- Developing Online Privacy Notices: Key Challenges and Practical Solutions
- Fair Lending and UDAAAP Issues in Marketing and Credit Models
- Remedies and Fines in Government Enforcement Actions
- Impact of the FCC’s 2015 Rulings on TCPA Litigation
- Payment wallets and tokenization, with a focus on practical issues a card issuer should consider
- Update on restatement of consumer contracts
- Introduction to restatement of virtual currency

We are also trying something new. In response to demand for specialized mortgage programming, we will have a separate "track" on Monday, January 11, 2016, for programming devoted to mortgages. This will be in addition to our regular programming. The mortgage programs will focus on:

- Bankruptcy Trustee investigations into mortgage servicing
- The final HMDA rule
- TRID: The View from Non-Lenders (Real Estate Agents, Settlement Agents and Mortgage Brokers)
- E-mortgages
- RESPA update: Lighthouse, PHH, MSAs and other issues

Our subcommittee chairs are hard at work lining up distinguished speakers from the CFPB, FTC, in-house and academia.

We will look forward to seeing you in Park City, if not before. Have a terrific holiday season!
I Came, I Saw, I Made a Difference: Pragmatic Pro Bono Programs for the Twenty-First Century

By: Mark T. Andrus; edited by Cynthia Thaxton

According to recent studies, in approximately 70 to 98 percent of cases in America’s civil courts today, one or both parties are not represented by a lawyer.¹ The market, however, is arguably more saturated with attorneys than ever before. While there remains a vigorous debate on how to best address the legal needs of pro se litigants, it is clear that a significant percentage of cases are brought by individuals who either cannot afford an attorney or feel that they are fit to handle their own case. Regardless of the reason, pro se litigants often lack the expertise and know-how to adequately litigate their case thus delaying justice while simultaneously decreasing judicial efficiency. Ultimately, an increase in pro se litigants is a decrease in access to justice.

Even as fire requires three central elements to occur (i.e., oxygen, heat, and fuel) so access to justice is broadly composed of three core elements (i.e., judicial accommodation, competent volunteer attorneys, and informed client consent). Without any one of these elements, access to justice will be extinguished. Consequently, many local bar associations, courts, justice institutions, academics, and practitioners are searching for solutions on how to increase their respective communities’ access to justice. The equations often include the following factors: (1) an accessible justice institution; (2) due process/fair procedure; (3) judicial efficiency; (4) the allocation of limited resources (i.e., time, services, money); (5) effective conflict checks; (6) the reduction of potential liability; (7) enforceable limits on the scope of representation; (8) access to competent counsel; (9) a convenient forum; and (10) an enforceable solution. The first three elements are general concerns of the court; the following four are general concerns of practitioners; and the final three are general concerns of the pro se litigant.

Some Western State Bar Associations, courts, and practitioners are jointly developing pragmatic approaches to alleviate the pressure on the judiciary caused by heavy pro se filled calendars while increasing access to justice. Although the means may differ, the solution is largely based on the judicial accommodation of limited scope pro bono representation.

Utah State Bar Creditor-Debtor Pro Bono Signature Project

The Utah State Bar has recently developed a creditor-debtor pro bono signature project that consists of a designated calendar consisting of pro se debtors in collection actions involving less than $20,000.00. The calendar generally rotates between two or three judges. Charles A. Stormont, currently a managing shareholder at Stormont Billings, PLLC, took the lead on administering the program while working as an attorney in the Utah Office of the Attorney General and continues to manage it. In speaking with Mr. Stormont recently, he explained that the success of the program is due in large part to judicial accommodation of the limited scope nature of the representation.

The program operates primarily through judicial accommodation and competent volunteer attorneys from the Utah Office of the Attorney General, a partner firm, Callister, Nebeaker & McCullough, or other interested attorneys. The Utah courts have accommodated this program by creating the pro se calendar to ensure an available forum, by limiting an attorney’s conflict check to known conflicts,² by allowing the attorney to provide notice of appearance and withdrawal orally by stating on the record that he or she is

¹Jessica K. Steinberg, Demand Side Reform in the Poor People’s Court, 47 CONN. L. REV. 741, 750-52 (2015).
²Utah Rules of Prof’l Conduct R. 6.5(a).
appearing on a limited scope basis,\textsuperscript{3} and by being flexible during the calendar as attorneys work with pro se litigants. The limited scope representation is further articulated in a one-page client information sheet and representation agreement signed by the client. In addition, the Utah State Bar provides malpractice insurance to all volunteer attorneys of the program either as a primary or secondary insurer.

During the limited scope representation, competent attorneys often counsel the client regarding the desirability and suitability of settlement offers while negotiating with the opposing party. If negotiations fail, then the client is often counseled on any legitimate defenses or bankruptcy eligibility. According to Mr. Stormont, many clients walk away with an enforceable resolution to a difficult problem.

When asked regarding the overall success of the program, Mr. Stormont explained that the program has been “incredibly successful.” The initiative has been so successful, in fact, that the Utah Judicial Council awarded Mr. Stormont with its 2015 Service to the Courts Award jointly with local attorney J.D. Lyons and the program’s volunteers for their service on the creditor-debtor pro bono signature project. The program has also served as a model for other limited scope representation programs in both litigation and transactional settings.

**Colorado State Bar Bankruptcy Pro Bono Project**

The Colorado State Bar has also increased access to justice by recognizing the Bankruptcy Pro Bono Project administered by the Faculty of Federal Advocates (“FFA”). This program is designed to provide competent legal counsel on a pro bono basis to qualified indigent defendants, often pro se debtors, in adversary proceedings within bankruptcy cases involving discharge or dischargeability claims. These claims are often not included as part of the original legal representation for the filing of the bankruptcy petition and a pro se debtor’s failure to adequately respond in the adversary proceeding may undermine the purpose of the bankruptcy filing. The FFA works jointly with the Bankruptcy Court to ensure that pro se debtors are provided with a notice to litigants that informs pro se debtors of the potential representation by an attorney. All out-of-pocket costs are borne either by the defendant, a volunteer provider, or the FFA. The program maintains liability insurance for the protection of its volunteer attorneys.

The Utah State Bar Pro Bono Committee for the Third District is currently investigating methods to adopt the Colorado Bankruptcy Pro Bono Project.

As the number of pro se litigants increases across the nation, state bar associations, courts, justice institutions, academics, and practitioners must find improved methods to ensure each individual’s access to justice. Access to justice inherently implies access to competent counsel. With an increasing pool of attorneys entering the legal market, avenues must be opened to allow these attorneys a feasible opportunity to assist while simultaneously minimizing potential liability for conflict checks, malpractice, and inestimable lengths of time associated with the litigation often involved in handling pro bono cases. As some Western State Bar Associations, courts, and practitioners have found, the judicial accommodation of limited scope pro bono programs are a pragmatic approach to balancing these interests while increasing access to justice. How will you help expand your community’s access to justice?

\textsuperscript{3} \textit{UTAH R. CIV. P. 74-75.}
Madden v. Midland Funding: A Sea Change in Secondary Lending Markets

By Robert Savoie, McGlinchey Stafford PLLC

The Second Circuit’s decision in Madden v. Midland Funding, LLC limits the ability of non-depository institutions to acquire debts originated by depository institutions pursuant to federal preemption of state law usury limits. The court’s decision reaches much further than the court appears to have contemplated and potentially threatens business models ranging from debt purchasers to marketplace lenders.

This article is the first of a two part series. This article explains the Madden decision, the state of the law prior to Madden, and discusses the impact of the Madden decision moving forward. The second article in this series discusses potential ways to mitigate the impacts of the Madden decision.

The Decision

In Madden, Saliha Madden (“Madden”) opened a credit card account with Bank of America (“BoA”), a national bank, in 2005. A year later BoA’s credit card program was consolidated into another national bank, FIA Card Services, N.A. (“FIA”). In 2008, FIA charged off Madden’s account as uncollectable and sold the debt to Midland Funding, LLC (“Midland Funding”). Midland Funding utilized its affiliate, Midland Credit Management, Inc. (“Midland Credit”) as the servicer to collect Madden’s debt. Neither Midland Funding nor Midland Credit is a national bank. In late 2010, Midland Credit sent Madden a letter seeking payment of the debt and informing her that an interest rate of 27% per year applied pursuant to the agreement creating the debt.

Madden filed suit against Midland Funding and Midland Credit asserting a violation of the Fair Debt Collection Practices Act (“FDCPA”) and a violation of New York’s usury law, which imposed a maximum interest rate of 25%. The district court held that the National Bank Act’s (“NBA”) preemption of state usury limits applied to the debt effectively preempted Madden’s state law usury claim. The Second Circuit reversed the district court’s decision and held that the NBA did not preempt Madden’s state law usury claim because Midland Funding and Midland Credit are not national banks, or a subsidiary or agent of a national bank, were not acting on behalf of a national bank, and thus were not entitled to NBA preemption. The court concluded that NBA preemption did not apply because the application of New York’s usury law

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1 Madden v. Midland Funding, LLC, 786 F.3d 246 (2nd Cir. 2015).
2 Id. at 247.
3 Id. at 248.
4 Id.
5 Id.
6 Id.
7 Id.
8 Id.
9 Id.
10 Id. at 249.
to Midland Funding and Midland Credit would not significantly interfere with either BoA or FIA’s ability to exercise their powers as a national bank under the NBA.\textsuperscript{11}

In the course of its decision, the Second Circuit distinguished the Eighth Circuit’s decision in \textit{Krispin v. May Dept. Stores}.\textsuperscript{12} In \textit{Krispin}, May Department Stores Company (“May Stores”) issued credit cards to the plaintiffs, the underlying agreements of which expressly contracted for the application of Missouri law and therefore limited the permitted delinquency fees to $10.\textsuperscript{13} May Stores then notified the plaintiffs that their accounts had been transferred to May National Bank of Arizona (“May Bank”) and that May Bank would now charge delinquency fees of $15.\textsuperscript{14} May Stores subsequently acquired May Bank’s receivables and maintained a role in account collection, but did transfer all authority over the terms and operations of the accounts to May Bank.\textsuperscript{15} The plaintiffs asserted that the assessment of a delinquency charge in excess of $10 violated Missouri law.\textsuperscript{16} May Stores responded that the state law claims were preempted by the NBA because the accounts had been transferred to May Bank.\textsuperscript{17} The Eighth Circuit agreed, noting that the bank is now the entity that issues credit to the plaintiffs and the entity that processes and services customer accounts.\textsuperscript{18} The Second Circuit distinguished \textit{Krispin} by noting that neither BoA nor FIA retained any interest in Madden’s account.\textsuperscript{19} As a result, the Second Circuit concluded that, unlike in \textit{Krispin}, the decision to not extend federal preemption to Midland Funding or Midland Credit would not significantly interfere with a national bank’s ability to exercise its powers.\textsuperscript{20}

The State of the Law Before \textit{Madden}

Debt purchaser and bank partnership models were traditionally constructed in reliance upon the “valid when made” doctrine. The valid when made doctrine is based upon longstanding federal court precedent holding that a transaction that is not usurious when consummated may not become usurious based upon subsequent events.\textsuperscript{21} The \textit{Madden} decision failed to acknowledge, much less analyze, this longstanding precedent. The fact that the Second Circuit did not address the valid when made doctrine means that it remains unclear what impact, if any, the \textit{Madden} decision has on the future of the valid when made doctrine.

Prior to the \textit{Madden} decision, the challenges posed to the valid when made doctrine typically came from so called “true creditor” cases.\textsuperscript{22} Bank partnership programs that have

\textsuperscript{11} Id.
\textsuperscript{12} Id. at 252 (citing \textit{Krispin v. May Dept. Stores}, 218 F.3d 919 (8\textsuperscript{th} Cir. 2000)).
\textsuperscript{13} Id.
\textsuperscript{14} Id.
\textsuperscript{15} Id.
\textsuperscript{16} Id.
\textsuperscript{17} Id.
\textsuperscript{18} Id.
\textsuperscript{19} Id.
\textsuperscript{20} Id. at 249.
\textsuperscript{21} \textit{Nicholas v. Fearson}, 32 U.S. 103, 109 (1833); see also \textit{FDIC v. Lattimore Land Corp.}, 656 F.2d 139, 148-49 (observing that the “non-usurious character of a note should not change when the note changes hands”) (citations omitted).
\textsuperscript{22} See \textit{People of the State of N.Y., et al. v. County Bank of Rehoboth Beach, et al.}, No. 6046-03; 01-04-080549 (N.Y.).
endured true creditor challenges typically involve a non-bank partner that acts as marketer for the loan program and facilitates the making of the loans. The non-bank partner may also purchase the loans after they are made or act as servicer, or both. A true creditor challenge asserts that the non-bank partner involved in a bank partnership model is actually the true creditor to the loan, notwithstanding the fact that a depository institution is the actual creditor on the loan documents and is the party extending credit. Under the true creditor challenge, the non-bank partner is alleged to have violated state and/or federal law because the loans were not made in the manner required of a non-bank lender authorized to lend money in the state at issue. Thus far, true creditor challenges have not seen wide acceptance. This is likely due to the fact that any attempt to argue that loans made by a depository institution are invalid due to the depository institution’s relationship with a third party would necessarily interfere with the depository institution’s ability to operate and make loans as authorized by federal law.

The Impact of Madden

The Madden decision has the potential to impact far more than just debt purchasers. The impact on depository institutions will be significant even if the application of the Madden decision is limited to third parties that purchase charged off debts. Depository institutions will likely see a reduction in their ability to sell loans originated in the Second Circuit due to significant pricing adjustments in the secondary market. To the extent that the Madden decision is extended nationwide, secondary markets will also likely reflect a dramatic reduction in the price that purchasers are willing to pay for loans originated by depository institutions nationwide. Debt purchasers will have to reduce the price that they pay due to the reduced interest rates that they may assess and increased state law compliance concerns, and some may leave the market. These concerns will only increase if Madden is extended to market participants other than purchasers of defaulted debt.

The Madden decision also threatens the ability of bank partner companies to facilitate the extension of credit by depository institutions. The Treasury Department issued a request for information seeking to determine how best to support the expanding online marketplace lending industry. The request for information notes the great potential for this industry to expand access to credit, particularly to the underserved. The Madden decision threatens to destabilize this industry due to the high number of participants that operate through a bank partnership model. Marketplace lenders, and other bank partnership program participants, could see their ability to acquire loans originated by depository institutions limited due to their inability to collect the interest permitted by the underlying credit agreements. Borrowers would also see their access to marketplace lenders and other bank partnership programs cut off, denying them their choice of lender.

Concluding Thoughts

The primary specter raised by the Madden decision is the impact of state laws on an extension of credit not subject to them at the time of consummation. In many states, the usury

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24 Id.
limits and licensing requirements will pose new compliance challenges to market participants to the extent they are impacted by the Madden decision. In some cases, however, state law may provide a safe harbor from the Madden decision and allow such programs to continue.\textsuperscript{25} It is doubtful that debt purchasers and participants in bank partnership programs may use choice of law clauses to apply the law of a particular state, given the fact that many regulators take the position that such clauses do not prevent state regulators or attorneys’ general from seeking to enforce the laws of the state where the borrower resides. In other words, many regulators take the position that the parties to a contract may not contract away the power of the regulator to regulate an extension of credit, or the power of the attorney general to enforce violations of state law. None of the federal regulatory agencies have issued any type of opinion on the Madden decision and its potential impact as of this writing. As a result, it appears that the future impact of Madden outside the Second Circuit will depend upon whether the Supreme Court decides to hear the appeal, which is expected to be filed shortly.

As noted above, the second article in this series will discuss potential ways to mitigate the impacts of the Madden decision and outline some options as to how market participants may proceed in the future.

\textsuperscript{25} For example, the California Strike doctrine distinguishes loan purchasers from originating lenders. See Strike v. Trans-W. Disc. Corp., 92 Cal. App. 3d 735, 745 (Ct. App. 1979) (noting that “a contract, not usurious in its inception, does not become usurious by subsequent events”) (citations omitted).
Options for Debt Buyers Waiting for the Final Word in *Madden*

By Sabrina A. Neff, Hughes Watters Askanase, LLP

In the May 22, 2015 decision in *Madden v. Midland Funding, LLC*, the Second Circuit Court of Appeals addressed whether a nonbank assignee of debts originated by a national bank is entitled to protection from state usury claims under the National Bank Act. See 786 F.3d 246 (2d Cir. 2015). The Second Circuit held that, once a consumer debt is transferred to a nonbank assignee, the preemption under the National Bank Act no longer applies and that nonbank assignees are subject to state usury limits. The Second Circuit vacated the District Court’s order denying class certification and remanded the case in part to address whether the consumer contract’s choice-of-law provision applying Delaware law precluded consumer’s New York usury claims.

This article is the second of a two part series and discusses the potential ways to mitigate the impacts of the *Madden* decision. The first article in the series explains the *Madden* decision, the state of the law prior to *Madden* and the impact of the *Madden* decision moving forward. This article addresses the decision’s impact on secondary market participants and the options for debt buyers attempting to mitigate their risk while awaiting the final word in *Madden*.

In addition to an increase in new consumer suits asserting usury claims and violations of the Fair Debt Collection Practices Act, the *Madden* decision has ignited a debate within the industry regarding the rights of nonbank assignees. National banks rely upon the secondary market for liquidity and additional capital for their lending activities. National banks also depend on the secondary market to sell delinquent and charged off debt. Consumer financial service providers on both sides of secondary market transactions rely upon the availability and post-assignment validity of loans and accounts originated by national banks. In particular, these marketplace participants rely upon the “Valid-When-Made Doctrine”—essentially, nonusurious terms of a loan agreement do not become usurious by the mere act of assignment. While the *Madden* opinion contains no analysis of this doctrine, the decision appears to undermine the ability of nonbank debt buyers to enforce contract interest rates, which has the potential to significantly disrupt secondary markets.

Until the Second Circuit’s holding in *Madden* is either affirmed or reversed by the United States Supreme Court, or until the case otherwise reaches finality, debt buyers are left with limited options which may help them to defend against and mitigate exposure to anticipated consumer litigation. While it is by no means exhaustive, the following options may be useful for debt buyers waiting for the final say in *Madden*.

1. **Rely upon choice-of-law provisions.**

Consumer contracts often contain choice-of-law provisions, stating that the law of a specified jurisdiction governs the agreement. Not surprisingly, choice-of-law provisions frequently apply the law of states with more developed creditors’ rights jurisprudence or higher usury limits. The Second Circuit remanded the *Madden* decision in part to address whether the Delaware choice-of-law provision in consumer’s contract precluded her New York usury claims.
As noted in the opinion, if the District Court determines on remand that Delaware law applies, then the interest charged to the consumer was less than the Delaware usury limit and was therefore permissible. See 786 F.3d at 253. Similarly, debt buyers may choose to rely on choice-of-law provisions within their debt contracts to apply a more favorable jurisdiction’s usury limits.

2. Rely upon savings clauses.

It is unclear whether the contract in Madden had a savings clause and the opinion does not analyze the impact a savings clause might have. Most consumer contracts include savings clauses that, depending on their wording, support a presumption that the parties intended to enter into an enforceable, nonusurious contract. Additionally, many consumer contracts include specific usury savings clauses, expressly providing that if the stated interest rate is found to be usurious then the contract interest rates will automatically be reduced to the maximum legal rate. If a contract’s interest rate is determined to be usurious because of assignment, debt buyers may choose to rely upon the savings clause as evidence that the parties intended for the interest rate to be lowered to the legal limit.

3. Build risk into marketplace pricing.

Secondary market debt buyers generally fall into one of two categories, both of whom may be able to structure the pricing to account for the risk of potential usury claims. The first category of debt buyers includes entities that purchase the debt in connection with securitizations. The average overcollateralization on these securities, coupled with the excess spread between the interest rate paid by the consumer and the interest paid by the issuer to the bondholder, may permit the usury risk to be priced in without material effect on either rates or liquidity. The second category is debt buyers purchasing debt at discounted rates in the hope of collecting some portion thereof. In many jurisdictions, a consumer will be entitled to damages that are the difference between interest collected and the legal limit. Debt buyers may mitigate this risk by insisting upon further reduction in the price of already discounted consumer debt.

4. Reserve a portion of the national bank’s interest in the security.

The Madden opinion makes reference to the proper application of National Bank Act preemption when the nonbank assignee is a subsidiary of a national bank or acting as its agent. See 786 F.3d at 250-251. The Second Circuit’s analysis is that preemption of state usury laws applies when the nonbank entity is exercising the powers of a national bank or acting on its behalf. See 786 F.3d at 251. By extension, if the national bank retains an interest in the security, then National Bank Act preemption may apply, even if a nonbank entity is the party charging interest. This option may be available for those engaged in purchase of debt in connection with securitization, but will not likely provide relief for debt buyers buying charged off accounts.

5. Subject the accounts to a “Madden reset.”

Debt purchasers have an interest in maintaining the interest income on these consumer debts while the Madden decision is on appeal. An option for nonbank debt buyers is to submit
the accounts to what some purchasers are calling a “Madden reset,” which involves reducing the interest rates on consumer accounts from the contract rate to the legal limit in each jurisdiction. While this option reduces the amount of cash flow created from the interest on these accounts, it significantly reduces the exposure of a debt buyer in the event that the Second Circuit’s holding is affirmed.

6. **Refrain from charging interest at all.**

While this option is the least desirable in that it completely eliminates the cash flow generated from interest on the debts, it is also the option most likely to mitigate a debt buyer’s risk. A consumer has difficulty prevailing on a claim for usurious interest when no interest was charged by a nonbank debt buyer. The decision to refrain from charging interest will no doubt negatively affect the price debt buyers are willing to pay for consumer accounts.

*Madden* isn’t over yet. The Second Circuit reversed in part with regard to the application of National Bank Act preemption to nonbanks. If Midland Funding, LLC chooses to appeal, then its certiorari petition is not due until November. The Second Circuit also remanded in part for the District Court to decide whether the contract’s choice of law provisions precludes consumer’s usury claim and whether to certify the putative class. The District Court recently set the deadline for consumer’s motion for class certification for November and the deadlines for Defendants’ motion for summary judgment, consumer’s response and Defendants’ reply through March 2016. The appeal in *Madden* will not likely reach finality for another year. In the meantime, debt buyers must develop a comprehensive strategy from secondary market acquisition through servicing and potential litigation in order to mitigate risk with regard to consumer usury claims.
Compliance Management Subcommittee Spotlight: Shining a light on UDAAP

Adam Maarec and John Morton

One of the most vexing compliance challenges facing financial institutions and their service providers is the risk posed by potential unfair, deceptive, or abusive acts or practices (UDAAP). Our subcommittee has two great resources for practitioners managing these risks: 1) semi-annual surveys that summarize recent UDAAP activity; and 2) an upcoming panel on compliance management tools to mitigate UDAAP risks at the winter CFSC meeting in Park City, Utah.

Background. The power to prevent unfair and deceptive acts and practices has long been enforced by federal banking regulators and the Federal Trade Commission, along with the 50 states. The Dodd-Frank Act established a new Federal UDAAP standard in 2010 that gives the Consumer Financial Protection Bureau (CFPB), state attorneys general, and state banking regulators the power to prevent unfair, deceptive, and abusive acts and practices. While the legal doctrines underlying unfairness and deception claims have been developed over time, the abusiveness standard is new and its meaning is uncertain. Moreover, the CFPB’s active use of its UDAAP powers in enforcement actions over the last several years has heightened its importance.

Identifying UDAAPs: the Semi-Annual Survey. Since each UDAAP case sheds light on the meaning of this new Federal UDAAP standard, we embarked on a project in 2013 to chronicle every statement interpreting this new standard. These statements of potential UDAAP violations have come in many forms:

- Public enforcement actions filed by the following:
  - The CFPB, either administratively or in courts;
  - State attorneys general; and
  - State banking regulators;

- Nonpublic enforcement actions described by the CFPB on an anonymized basis in its supervisory highlights reports; and

- CFPB bulletins describing specific problems identified in certain markets, e.g., credit card promotional offers and debt collection practices.

We hope our summaries of these UDAAP actions will aid practitioners in interpreting and applying this standard in the future. The surveys can be found here:

- September 10, 2014 Survey – covering January to June 2014
• January 2, 2015 Survey – covering July to December 2014
• September 17, 2015 Survey – covering January to June 2015
• January 2016 Survey (Coming soon – pick up a copy at the Park City meeting) – covering July to December 2015

**UDAAP Update in Park City.** Finally, we hope you’ll join us in Park City for a Compliance Management Subcommittees panel focused on UDAAP issues. The panel will provide a year-in-review of the most significant UDAAP developments and draw on the significant body of actions to identify enforcement trends. The panel will also focus on compliance management tools that can be implemented to analyze and avoid potential UDAAP violations.
National Institute for Consumer Financial Services Basics

Webb McArthur and Katie Hawkins

On October 8 and 9, 2015, the Consumer Financial Services Committee, along with the Baltimore County Bar Association and the Women’s Bar Association of Maryland, sponsored the Sixth Annual National Institute on Consumer Financial Services Basics (the “Institute”) in Arlington, Virginia.

The Institute included panel discussions on a range of topics under the consumer financial services umbrella, including fair lending, credit reporting, consumer communications, asset accounts, UDA(A)P, mortgage origination, and others. The panelists are experts in each area, including practitioners, government representatives, and advocates. It was beneficial to develop greater understanding in unfamiliar areas while also hearing about updates and hot topics in our practice areas.

The Institute was also a valuable opportunity for attendees to connect with others involved in consumer financial services. During a reception on the first evening, the attendees, who ranged in background and experience, had the opportunity to network with fellow attendees and Institute faculty while enjoying beautiful views of Washington, DC.

While each panel was valuable, a few specific panels stood out to us.

First, Kathleen Keest of the FDIC and Jim Brown from the University of Wisconsin laid the groundwork for the institute by providing a history lesson on the development of consumer financial services regulation. Keest and Brown explained that the industry has, for years, been highly regulated for three primary reasons: because financial products are a means for consumers, not an end in themselves; because financial products are essential for daily life (important microeconomically); and because money is the ultimate commodity (important macroeconomically). They also discussed other concerns of consumer financial services regulation, particularly the issues of nondiscrimination, disclosure, complexity, and business concerns and how our laws attempt to balance these concerns. Finally, Keest and Brown walked through the history of consumer financial regulation, giving special attention to the issue of preemption. They ended their session by explaining the preemption landscape after Dodd-Frank, providing context to the discussion of federal laws to follow.

Second, Katrina Christakis of Pilgrim Christakis and David Thompson of McGlinchey Stafford gave an extremely well-organized and informative presentation on consumer communications. They covered laws such as the Telephone Consumer Protection Act (“TCPA”), the Telemarketing Sales Rule (“TSR”), the Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003 Act (“CAN-SPAM”), and the Fair Debt Collection Practices Act (“FDCPA”). The presentation was methodical and explained the laws in relation to one another. They discussed what kind of entities are regulated by each law, the types of communications regulated by each law, exceptions from coverage of each law, how each law regulates consumer communications, and how consent works with regards to communicating with consumers. Christakis and Thompson gave particular attention to the interplay between the TCPA and the TSR, noting differences between the two with regard the entities to which they apply as well as the type of consent needed to communicate with a consumer.
Third, the annual “Meet the Regulators” panel offered attendees the opportunity to develop or further an understanding about how each regulatory body operates, and how those regulatory bodies work together. This year, we heard from the Federal Trade Commission (James Reilly Dolan), FDIC (Kathleen Keest), Federal Reserve Board (Ducie Le), Conference of State Bank Supervisors (Margaret Liu), Office of the Comptroller of the Currency (Donna Murphy), and the Customer Financial Protection Bureau (Christopher Young) in a panel moderated by Nikki Munro of Hudson Cook. The panelists explained where their agency fits in the regulatory process, the tools used by their agency, what differentiates their agency from the others, and the focus of their agency for the next year.

Finally, we heard a presentation over lunch from the Director of the CFPB’s Office of Fair Lending, Patrice Ficklin. The presentation followed a session on credit discrimination laws by Jean Noonan of Hudson Cook, which focused on the ECOA. Ficklin used her time to discuss the priorities of the Office of Fair Lending. She explained that the Office’s current priorities are mortgage lending, auto lending, and credit card lending. Fourth on the list was small business lending, a new area for the Office. She talked about the Office’s rulemaking under section 1071 of the Dodd-Frank Act, which grants the CFPB the right to require business lenders to collect demographic data for their customers, particularly with regard to women- and minority-owned businesses. Ficklin also explained that the Office was preparing to begin examinations of business lenders on fair lending issues, focusing particularly on underwriting criteria used by the industry. It will be very interesting to see how the CFPB enters the world of business lending.

The Institute was a huge success, as it is each year. Participants provided positive feedback and many commented that they wished the Institute was longer because of the volume and value of the information provided. Plans are already underway for the Seventh Annual National Institute on Consumer Financial Basics, which will take place in 2016.