Consumer Finance Monitor (Season 3, Episode 30): The OCC and FDIC "Madden fix" Final Rules and Related Recent Developments

Speakers: Alan Kaplinsky, Glen Trudel, and Mindy Harris

Alan Kaplinsky:

Welcome to The Consumer Finance Monitor Podcast, where we explore important new developments in the world of consumer financial services, and what they mean for your business, your customers and the industry. I'm your host, Alan Kaplinsky. I'm the Chair of The Consumer Financial Services Group at Ballard Spahr, and I'll be moderating today's program.

Alan Kaplinsky:

For those of you who want even more information about consumer finance or the topic we're talking about today, don't forget to frequently consult our blog, which is also known by the same moniker. We call it ConsumerFinanceMonitor.com. We've been doing our blog ever since the CFPP became operation in 2011 so there is a ton of information there. We also regularly host webinars on subjects of interest to those of us that are in the industry so to subscribe to our blog or to get on the list for our webinars visit us at BallardSpahr.com. You can obtain our podcast on our website or on Apple Podcast, Google Play, Spotify or whatever podcast platform you like to use.

Alan Kaplinsky:

So, today I am joined by two guests, both of who hail from Ballard Spahr and let me introduce them. I'll start with Glen Trudel. Glen is a consumer financial services banking and business attorney who consults financial institutions, marketplace lenders, Fintech entities and others on both regulatory and transactional matters. Glen has significant experience with bank sponsorship and marketplace lender platforms and structures and a wide variety of vendor outsourcing and other partnership arrangements. And with the acquisition and the divestiture of consumer and business credit card and other loan portfolios. He advises financial institutions and other entities on a variety of vendor outsourcing matters, debt sell agreements, and other regulatory issues. Finally, Glen has extensive experience in representing card issuers and partners in the negotiation, structure and creation, and administration of joint marketing, co-brand, reward program and enhancement agreements.

Alan Kaplinsky:

Second, Mindy Harris. Mindy has only recently joined our firm and we're really thrilled and delighted Mindy is now part of our team largely because Mindy came to us with decades of experience as a consumer finance attorney. With a background of working as general counsel to financial services companies, she's proficient in analysis application of laws and regulations while maintaining a focus on the achievement of business goals. Prior to joining us, Mindy was managing director and general counsel for Auriemma Round Table and Auriemma Group and then prior to that, senior vice president and general counsel for Nordstrom Bank, a federal savings bank that's owned by the luxury retailer, Nordstrom.

Alan Kaplinsky:

First of all, let me welcome both Glen and Mindy to our show. The topic we're going to talk about today is extremely important, and let me just lay a little bit of the ground work for it and then I'm going to turn to Mindy and Glen to flesh it out for you somewhat. What we're going to be talking about principally is Second Circuit opinion in the Madden versus Midland Funding case. Very briefly, what happened in that case is that a national bank in Delaware, namely Bank of America sold charged off credit cards to a third-party debt buyer that was not, obviously, a bank, a non-banking debt buyer, bought charged off credit card receivables, and the issue that the court needed to deal with, the principle issue was whether or not the interest rate that was being charged by Bank of America on the credit cards could continue to be charged by Midland Funding as a

debt buyer or whether once that transfer got made, Midland was limited to charging only whatever the interest rate limitation might be in general in the state of New York.

Alan Kaplinsky:

Now, just to make sure all of our listeners understand this, there are two federal statutes that are involved here, Section 85 of the National Bank Act and Section 27A of the Federal Deposit Insurance Act. They both authorize, in one case the National Bank, and another case, the State Charter Bank, they authorize a bank to charge interest at the rate allowed by the laws of the state where the bank is located. So if you've got a bank in Delaware where the interest rate on credit cards is totally deregulated, that rate under Section 85 or Section 27A along with a US Supreme Court case in the Marquette National Bank opinion, allows that credit card issuer to export the interest rate throughout the country, regardless of what state usury limits exist. In the Second Circuit, Madden was presented with the question of, for how long can that last. Certainly Bank of America could charge the deregulated rate, but once the receivables got transferred to Midland, no longer. They were subject to the regular usury limit.

Alan Kaplinsky:

Let's start with you, Mindy, and why don't you give us, first of all, our listeners want to know the outcome before we get into any more detail. What happened in the Second Circuit?

Mindy Harris:

Thank you, Alan, and good morning everyone, or good afternoon. Before I answer that question, Alan, I am going to go back in history a little bit and talk a little bit about the preemption and exportation rights that have been enjoyed by national banks and state banks. The concept of preemption, meaning a federal law will override a state law in certain circumstances derives from the supremacy clause of the Constitution and as interpreted by the National Bank Act and the FDIA, the federal laws and regulations can explicitly preempt the state laws that, if the state law prevents or in some cases conflicts with or interferes with a national bank, a federal savings association or a state bank's ability to conduct its business as permitted under state or federal law.

Mindy Harris:

There is a long, strong history under the National Bank Act and the Homeowners Loan Act that allows national banks and federal savings associations and then more recently under the FDIA, state banks, to charge the rate of interest at the maximum rate permitted by the state where the bank is located regardless of where the borrower lives and there are decades of federal agency, primarily OCC, interpretation that support this right and explain why it's important for the business of banking, for the financial marketplace and to the benefit of consumers and the economy alike. When, in 2010, when Dodd-Frank started working its way through Congress there was an attempt to narrow preemption by adding a subsection that required preemption determinations to be made according to certain standards or on a case-by-case basis. However, savings language ended up being included in Dodd-Frank to preserve rate exportation rights. Since that time, however, there have been lots of cases calling into question the ability to export rates on various theories.

Mindy Harris:

One of them is erosion of something called the valid when made doctrine, which we're going to talk about and calling into question the identity of the bank as the true lender. What we're going to get to today after Glen talks a little bit more about Madden versus Midland Funding is two rules, just recently rolled out by the OCC and the FDIC addressing this issue. Glen, if you wanted to talk about Madden versus Midland Funding for a moment.

Glen Trudel:

Thanks, Mindy. As Alan had indicated, the Madden case in the Second Circuit ultimately held that the non-bank entity, Midland Funding, that had purchased the charged off loans could not charge the same rate of interest that Bank of America

had been charging based under its authority under Section 85 of the National Bank Act. The case request for cert was made to the US Supreme Court. That cert was ultimately denied, in fact the Solicitor General was in favor of denying cert mainly for the fact that they thought that this wasn't essentially the best case to try to test these legal theories. The results of Madden have been pretty wide spread particularly in the marketplace lending and in bank sponsorship relationships, but not exclusively. As a Second Circuit decision, it's binding law only in the Second Circuit, New York, Vermont, Connecticut, but beyond that, the courts have been looking to use this and other state AGs and consumer groups and state regulators are using this as an argument to attack the bank sponsorship programs or marketplace lender programs [inaudible 00:12:04], programs where an online provider will market the given loan product.

Glen Trudel:

The customer applies for that loan, a sponsor bank approves that loan, and then typically will hold it for a limited period of time, some as short as a day, particularly in the early days of the industry and then at some point, sell it either to the provider, the online provider, or perhaps through them to some third-party or marketplace institutional lending facility. Because the effect of that is that those online providers have been, on the theory that they could take the loans from the bank and continue to charge these rates, each state's AGs, consumer groups, particularly, and some bank regulators in particularly active states, have been looking to use the Madden decision as a sword for attacking this. Now, it's also close consternation in other areas as well because this whole concept of valid when made has been a bedrock principle and certainly the very least, an assumption, upon which the entire securitization world and marketplaces are dependent. A bank makes mortgages then packages those mortgages and sells them into the institutional marketplace. It is priced under the assumption that those rates that are charged can be charged by the new owners of that loan or the owners of the participations of those loans.

Glen Trudel:

That could really call into question all of those deals, both the existing and in the future, which could have a depressive effect on the pricing of those loans if now the institutional buyer now has to worry about 50 different state usury laws and so forth. That's been an area of concern as well and as I had alluded to earlier, this has turned up in a number of cases and I think Mindy is going to be talking about a few of those.

Alan Kaplinsky:

What I'd like to do right now is turn to you, Mindy, and let's get right into the OCC rule which was the first of the two rules that was finalized. I just want to make one quick observation before you dig into the rule. Glen had mentioned that when the Second Circuit opinion in Madden came before the Supreme Court on a petition for certiorari that the Solicitor General urged the court not to take the case, but at the same time they wrote in their written brief that they thought the Madden opinion was wrong, which is very strange, of course, and very welcome to see that, but it was only in a brief and a lot of courts don't put a lot of weight or don't give a lot of deference to the position of an agency stated in a brief. What we all want is a final regulation. Finally, we got what we wanted. Mindy, tell us what's in it.

Mindy Harris:

At the very end of May, in response to this uncertainty that has been created by the Madden decision and then it's progeny, subsequent cases that we'll talk about later. In November 2019, both the Comptroller of the Currency and the FDIC floated proposed rules on the topic of interest that can be caused on loans that are sold, assigned, or otherwise transferred, in other words, the valid when made question. If a loan is valid, not usurious when it’s made, can it be transferred and can the interest rates still apply and both of the agencies proposed rules answered this question in the affirmative. I'm going to talk about the OCC rule and then Glen is going to talk about the FDIC rule.

Mindy Harris:

The OCC rule came out right at the end of this May and clarifies, in other words, doesn't make new law, but clarifies that when a bank transfers a loan, the interest permissible before the transfer is permissible after the transfer. The OCC goes back to Section 85 of the National Bank Act in the final rule and affirms as that section says, a national bank or a federal savings

association may charge interest on a loan at the maximum rate permitted in the state where the bank is located. Separately the OCC also cites statutory authority to say banks have the authority to transfer loans and assign contracts to make loans and those two go together to enable banks to conduct the business of banking. The OCC then cites Supreme Court precedent for the third prong saying that when a loan is non-usurious, IE, valid when it is made, it remains valid after it is sold, transferred, or assigned, the valid when made doctrine and the Comptroller concludes in its final rule, therefore although Section 85 of the National Bank Act is silent on that third prong, the OCC has the authority to fill in and conclude that when a bank transfers a loan, the interest rate that was permissible before the transfer continues to be permissible after the transfer. And it's just that simple.

Mindy Harris:

Supporting points that the OCC cites in the rule are, "This analysis is consistent with the purpose of Section 85, which is to facilitate operation of nationwide lending by national banks. This analysis promotes safe and sound operations because banks ability to transfer loans is a very important tool to manage liquidity, access alternative funding sources, manage concentrations of assets, and better meet customer needs and be able to lend." The OCC addresses the numerous comments it received on the notice of proposed rule making indicating that this rule is not subject to the preemption determination requirements that were established under Dodd-Frank. In other words, it's not a preemption determination, it's an interpretation of federal law. And the OCC answered the question, does this support predatory lending with a very strong statement that the OCC does not approve of predatory lending and this does not support predatory lending and consumers are well protected by a number of mechanisms that the OCC cites. That's the OCC rule in a nutshell.

Alan Kaplinsky:

Okay. Let's go to Glen now to tell us about what the FDIC did.

Glen Trudel:

Sure thing, Alan. The FDIC rule was just issued five days ago so it's very fresh indeed. It is intended, according to them, to mirror the OCC's final rule. The two final rules are not identical in every respect. The FDIC had posited that Section 27 of the Federal Deposit Insurance Act, which, along with Section 24 of that Act sets up the statutory framework for the ability of state chartered insured depository institutions to enjoy parallel interest rate preemption and most favored lender benefits that are permitted for national banks under the National Bank Act. And they posited that their law contained a couple of statutory gaps, as they refer to them.

Glen Trudel:

First, Section 27 doesn't explicitly state at what point in time the validity and enforceability of the interest rate of a bank's loan should be determined for purposes of that section. The other gap that they perceived was that Section 27, while expressly gives state banks the right to make loans at the rates permitted by their home states, the section doesn't explicitly list all the components of that right, like the right to assign the loans made under the preemptive authority of Section 27. So one of the rules that the FDIC put out really addresses both of those points. Part 331 of Title XII provides that whether interest on a loan is permissible under Section 27 of the FDIA is determined as of the date the loan was made and then interest on a loan that is permissible under Section 27 would not be affected by a change in state law, a change in the relevant commercial paper rate after the loan was made and that language is put in because one of the permissible interest rates that can be charged is based on a margin above the commercial paper rate and so that language carries through or the sale assignment or other transfer of the loan in whole or in part.

Glen Trudel:

The FDIC determined to add that last phrase, in whole or in part, to support securitizations and the sales of participations and to alleviate the issue of whether the transfer of a loan, full stop, would contemplate the sale or transfer of a partial, if you will, interest in the loan or part of the bundle of rights that a creditor has under the loan. Again, their rationale for doing so is very similar to that of the OCC. One of the concerns that they ... first they were careful to say that they were codifying longstanding

guidance in this area, like the OCC had. Again, we were discussing some of the market uncertainties that the current state of affairs had with respect to valid when made, it was really intended to address that marketplace uncertainty and to quell it. They also had a concern that, in the event the FDIC would have take a bank into receivership and would be in the position of having to sell assets, they wanted to be sure that they would be able to price those assets at the traditional valuation of those assets and not have to be discounted because of concern over a valid when made. And then finally, in terms of supporting this ability of the financial system, the FDIC recognized that, in addition to its duties as a conservator, that there was the other to provide assurance to the marketplace regarding a buyer's ability to charge that same interest rate.

Glen Trudel:

Those were some of the main rationales and the main points of the rule. I will point out that the FDIC rule went beyond this most important change and that it provided other provisions in Part 331 mainly to codify existing law with respect to interest rate parity between state bank and national bank branches that are located in other states. That had long been the law, there hadn't been any implementing reg, they took the opportunity to do that, again, to further strengthen the parity between exportation and interest rate preemption that has typically been seen between state charter banks under the FDIC and national banks under the National Bank Act.

Alan Kaplinsky:

Okay. Let's turn now to the so-called true lender doctrine and I'm going to go back to you, Glen, on that. Could you describe what that doctrine is all about and how does it differ from the so-called Madden Doctrine.

Glen Trudel:

The true lender doctrine is the other arrow in the quiver, if you will, of the state regulators and AGs and consumer groups that seek to attack the bank model, bank sponsorship programs that we've been discussing. The concept generally is that in the scenario that I had described earlier, the bank is really not the true lender, they are approving the loan and then immediately selling it off to say, the online provider and the online provider is typically providing the servicing and the marketing and all of the other aspects of this product that, in fact, it's a sham. That, in fact, it is not the lender. The bank is not really the "true lender" but rather, it's the online provider.

Glen Trudel:

And why are they making that argument, because by switching out who the actual lender is, the provider can no longer rely on the fact that it was a national bank or a state bank that had made the loan and therefore can't rely on the preemption authority that those banks have therefore they are then left with whatever state they are operating in and the usury laws that may be in effect in those states and can find that the loans that have been created, because they are not, in fact "bank loans" are now subject to those usury standards and may well be in excess of the usury, which is probably why the case was brought in the first place.

Glen Trudel:

That's the doctrine and different, obviously, from valid when made, because the fight isn't about what the interest rate should be, whether the original rate should apply or not, but rather, in fact, who the actual lender is. Each argument is trying to say that the original rate doesn't apply, but that's where the commonality ends because it's different approaches. One is attacking the ability of the party to charge that rate that was originally a bank loan and whether they can still charge that rate, the valid when made doctrine, whereas the true lender is just saying, look, this is form over substance and the substance of the matter is, the bank really has no real role here and so we should disregard the [inaudible 00:26:53] that they have. So it's an end run around preemption as an argument.

Alan Kaplinsky:

Glen, the two rules adopted by the OCC and FDIC, am I right, they did not address the true lender doctrine, am I right?

Glen Trudel:

Yes, you are. That's correct. They were careful to say that the true lender doctrine was really not part of what they were trying to do with the rules. Speaking for the FDC, they included language where they thought that that issue needed to be looked at. They did not believe that what they were doing with this rule was going to eliminate discussion or the viability of potential liability of true lender. And also they said they continue to look disfavorably on these sorts of arrangements where the sole intention was to evade state usury law protections. But they were careful to say we don't need to really talk about true lender for purposes of what we're doing, this is codification or filling in statutory gaps as it relates to the validity of the interest rates, not whether the loan is a true bank loan or is not a true bank loan. They saw that as a separate matter and something for another day.

Alan Kaplinsky:

And as I understand it, Glen, although we haven't seen anything official come out of either the Comptroller or the FDIC about what position it's going to take on true lender, the new acting Comptroller of the Currency, Brian Brooks, who I happen to know and is an exceptionally smart and talented individual who has held many government jobs and been in private industry and a law firm for quite some time. He gave a speech before some group where he said they were going to tackle true lender and other rule making and I'm wondering what either of you think about that, either Glen or Mindy.

Glen Trudel:

You're right. It was in front of the Online Policy Lending Institute back on June 11, is when Acting Comptroller Brooks made that statement and that he expects the FDIC to follow suit and to partner with them, in fact, in getting it done. I do recall from that that beyond the thing that was interesting to me about that was that he was saying not only that they were going to create this guidance, but also that it was going to be a bright line, clear, non-subjective determination of what is a true lender and what is a rent-a-charter of scheme even to the point of talking about if X, you have X factors then you are a true lender and if it's Y then you're not a true lender, not necessarily a rent-a-bank scheme, but he was talking about making something with that level of objectivity and the idea was that to avoid litigation over looking at various factors to determine who is the true lender in this.

Mindy Harris:

Alan and Glen, I would look forward to see what kind of a rule the OCC and the FDIC propose. There have been a number of cases decided and some very thoughtful analysis over the past 10 years out of some courts that have looked at factors to determine who indeed is the true lender, not only who has financial interest, but also who is making the lending determination, where the lending determination is made, and a lot of factors that were used in the past to determine when there was a question of whether or not a multi-branch organization was making loans out of a particular location. I do think it's doable and I look forward to seeing whether the agencies can inject some stability and finality to help with this argument.

Alan Kaplinsky:

Here is a quick and important update to the podcast. It was recorded shortly before the Comptroller of the Currency actually issued a proposed rule making defining when a national bank is a true lender. It's no longer just comments of the Acting Comptroller, Brian Brooks, about his intent to deal with the true lender issue on a regulatory basis, but we actually now have an official document or proposed reg. I would commend to all of you listening to this podcast that you should take a look at the blog on our consumerfinancemonitor.com blog that got published on July 22. We go into a lot of detail about what the Comptroller of the Currency did on July 20 by issuing a proposed rule.

Alan Kaplinsky:

In short, for those of you that can't even wait to get to your computer to log in and take a look at our blog, what the Comptroller did is very simple to explain. They said the national bank is the true lender under two alternative circumstances. One, when the loan obligation at the time of origination is payable to the national bank, they are the true lender regardless of

what happens after that point. Or second, if the national bank funds the loan. If they fund the loan, then even the obligation doesn't need to be payable to the national bank for them to be the true lender. We are likely in the future to do a future webcast or a podcast on this topic, but in the meantime, you should consult our blog.

Alan Kaplinsky:

This could be a good thing for the banking industry or companies that have partnered with banks to do marketplace lending or it could turn out not to be such a good thing. If for example, the Comptroller and the FDIC were to say the true lender is the entity with the predominant economic interest, that's not a very good test to use and that would be bad, at least from the standpoint of the industry. My guess is consumer advocates will probably be making that point. They will be advocating that that ought to be the test or something like it.

Alan Kaplinsky:

My own feeling, which I expressed in an op-ed that I wrote for the American Banker several years ago when Tom Curry was Comptroller of the Currency. I said in order to create certainty here, which has absolutely got to the paramount consideration, the two, the OCC and the FDIC, ought to take a look at what the Federal Reserve Board did many decades ago when there was a lot of uncertainty as to who was the creditor in a transaction for truth in lending purposes and ultimately where the Fed came down was the creditor is the entity to whom the obligation is initially payable. It doesn't matter what happens after the loan is originated. That's what I'd like to see the OCC do, that would remove a lot of this uncertainty that we have.

Alan Kaplinsky:

Let's talk about, I'm going to circle back, Mindy, as I promised that I would to the case law that's developed involving, after Madden came down, and some of the cases involve both Madden and true lender. The both of them are in the cases. Why don't we start with what's going on in Colorado, that seems to be an area that has been percolating for a long time and so far the results have not been so good.

Mindy Harris:

Sure, Alan, I'm happy to speak about that. Even before Madden, as I mentioned earlier, there were a variety of cases, some of which followed along the lines closer to what you just said in your op-ed and then others that for a variety of reasons including bad facts indicated that the true lender ended up being not the originating bank but another entity that was involved in the transaction. In 2017, the Attorney General of Colorado brought cases against two fintech structures involving fintechs that were partnering with banks and the banks were the lenders and the fintechs were the marketing arm and servicing arm. One of the fintechs was called Avant and its bank partner was Web Bank, a Utah ILC. The other one was Marlette Lending and its bank partner was Cross River Bank, a New Jersey state chartered bank.

Mindy Harris:

The fintechs partnered with these banks to make consumer loans, the loans were originated by the banks and serviced and marketed by the fintechs. The AG originally brought cases against the fintechs and did not name the banks claiming that the fintechs were the true lenders and that the interest rate charged was in excess of what Colorado usury laws permitted and that the bank partners were not the true lenders and therefore the rates that the bank partners were permitted to charge could not be exported to the borrowers in Colorado.

Mindy Harris:

The case was removed to federal court and remanded to state court and then something brand new happened. In November of 2018, the Colorado Attorney General amended the complaints in these two cases and brought in the securitization trusts and the securitization SPEs. They said in addition to the fintechs, we think we may have some other lenders here. We think that when these loans were sold by the fintech to a securitization trust in order to fund these transactions on the secondary market that those securitization trusts became the true lenders. And again, they are not banks and they cannot export the rates.

Mindy Harris:

As you can imagine, this would set, as Glen alluded to earlier, the entire securitization mechanism for credit card lending on its ear and it was of great concern. These cases percolated in the Colorado courts and only once an order on a motion for determination of law came out of the Marlette case and that court held that it agreed with the AG. It found that the fintech was the true lender and that the banks were not the lenders and it also rejected valid when made and followed Madden. That decision came down and the interesting thing about that decision was, it was issued after the OCC issued its final rule that we were just talking about that for some reason in this decision the court said neither the FDIC nor the OCC had issued a final rule and therefore the court didn't feel itself bound to consider or follow any of these rules. Sort of an anomaly.

Mindy Harris:

The other case, the Avant case, has not been decided yet. Those cases are hanging there and we're going to see what happens and the other thing that's interesting is, in the Marlette case that I just mentioned where an order came out on plaintiff's motion for determination of law, subsequently a joint motion to vacate a trial date in that case that was set for July 7th was submitted and granted by the court and the parties said that they are in settlement negotiations. We don't know how this is going to come out, but the alarming thing about the Colorado cases was bringing in the securitization trustees and trusts as parties. Subsequently, after that happened there were some class actions filed, not AG cases, but class actions filed in New York. Cohen versus Capital One Funding and Petersen versus Chase Card Funding claiming along the same lines that a live credit card securitization resulted in a defeat of the ability of the originating bank to export the interest rates and those cases are pending.

Alan Kaplinsky:

Has there been, Mindy, any dispositive ruling yet in either of those credit card securitization cases?

Mindy Harris:

It's my understanding that one of them went to a federal magistrate and the magistrate recommended dismissal. I think that was the Chase case, Petersen versus Chase. However, that has not occurred yet.

Alan Kaplinsky:

Now are you saying the determination of the magistrate is being reviewed by the District Court judge to decide the outcome?

Mindy Harris:

Yes. And as you might imagine, there is lots of controversy and people chiming in on one side or the other of that case based on whether they think it should continue or whether they think that the magistrate was correct.

Alan Kaplinsky:

Okay. I understand recently the DC Attorney General has gotten into the fray. He's filed another lawsuit, right?

Mindy Harris:

Yes, that's right. Later in June, just a couple of weeks ago, the Attorney General for the District of Columbia filed a complaint against Elevate Credit, another fintech claim, and it's a true lender attack claiming that the originating bank of loans that Elevate was marketing was not the true lender and, again, piggybacking on the Madden approach and the approach followed in the Colorado cases.

Alan Kaplinsky:

Okay. We've got these two rules, final rules that purport to override Madden. We've got the OCC saying, at least the Comptroller is saying they next want to initiate a rule making with respect to true lender, but I have some concerns here.

There is still some obstacles remaining and I'm going to turn back to you now, Glen. These rules can get overturned by Congress under the Congressional Review Act?

Glen Trudel:

Yes, that's right. There is that possibility and in fact I think that possibility was recognized by Acting Comptroller Brooks during that Online Policy Lending Institute event that we were talking about earlier. The likelihood is hard to predict. For Congressional Review Act to function it has to happen within 60 legislative days from the publication of the rule. I believe the OCC rule has been published, the FDIC rule has not, but it has to be done within 60 legislative days. There has to be a resolution, both houses of Congress and the President has to sign that. Whether that can happen-

Alan Kaplinsky:

Well, they probably have got it through the House, don't you think, Glen, with the House being very much controlled by the Dems. Uncertain whether they will get it through the Senate and I guess uncertain of what Trump would do. I would assume that if it's got heavy Republican support, Trump would end up signing the resolution, at least that's what he's done in prior instances that I can think of.

Alan Kaplinsky:

There's also a likelihood that these rules, even if they are not overridden by Congress, that there will be some legal challenge to them so that consumer advocates are not at all happy with what's going on and one would think sooner or later, it's going to get challenged in court, right?

Glen Trudel:

Yes, I think you're right, Alan. Unlike the position the regulators have taken, that they are codifying existing law or filling in statutory gaps, others may see it as an abuse of power or overstepping authority that they may have and some consumer groups have come out and said that these could be subject to legal challenge as well so that's a possibility. I think the more interesting situation might be with respect to the true lender regulation that the Acting Comptroller was talking about. If that comes out, whether that would be subject to Congressional Review Act or being overturned by that, or depending on the timing, if the presidential election results in a Biden presidency, we may well see that the now present Comptroller and the directors of the FDIC may end up being different people or following different priorities or maybe taking a different view of the true lender issue as a stance that's different from what the current leadership is doing. That may end up making material change there because once the final rule is out, for example, with the rules that have just come out, it may be a little harder for another administration to go back and say, we really didn't mean what we said.

Glen Trudel:

Not that we haven't seen those sorts of turn arounds during this administration, but at least it may be a little harder to do when there's a final rule on the books as opposed to a proposed rule that is subject to comment and revision.

Alan Kaplinsky:

I think if there is that kind of a challenge, I think it's very helpful to the industry and to the FDIC and the Comptroller to look to another US Supreme Court case called Smiley v Citibank. The issue in that case also involved Section 85 of the National Bank Act and the question was whether or not late fees on credit card accounts would be considered to be interest within the meaning of Section 85 and therefore exportable throughout the country. And there have been lots of litigation, class action lawsuits, attorney general lawsuits where that had been challenged and literally at the 11th hour the OCC finalized a regulation under Section 85 defining the term interest to encompass not only the periodic rate of interest that people think about but essentially most other charges that are part of the pricing package for a loan and including late fees.

Alan Kaplinsky:

The plaintiff's bar in that case, or the plaintiffs in Smiley said, this is terrible. The OCC comes in in the dark of night, at the 11th hour, comes out with this regulation in favor of the industry. Supreme Court, you ought to ignore that. And the Supreme Court essentially said, we don't care about the timing and what we care about is that the Comptroller is the expert in this area when it comes to Section 85, and in that case, what's interest. That's going to be a very difficult case, I think, to distinguish.

Alan Kaplinsky:

What do you think, Mindy?

Mindy Harris:

I agree. Interesting, Alan, the Comptroller cites Smiley and the authority that the Comptroller has to interpret Section 85 in the rule. They definitely are cognizant and thinking about this exact argument and your exact point and they use that to bolster their ability to interpret Section 85. You can see it right there in footnote 18 and then later on in the rule, the Comptroller goes to great lengths to talk about ... I think their anticipating these challenges and they are anticipating courts maybe refusing to give the kind of difference that the court ought to give to the OCC or the OCC would think the court ought to give to the OCC and so they have spent some time in this rule explaining why under Section 25B, this is not a preemption determination, it's not subject to a lesser different standard. And then, as I said, your point about 85, they definitely cite it.

Alan Kaplinsky:

Okay. I think we've drawn to the end of our podcast for today. We've covered a lot of territory today dealing with some extremely important issues and not sure the final shoe, second shoe has dropped yet. We'll need to follow these events very carefully and closely and I'm sure we will be doing other podcasts and probably another webinar on the subject. I want to thank Glen and thank Mindy for being guests today on our show and remind all of you that have downloaded the podcast to visit our website where you can subscribe to the show and you can also subscribe on Apple podcast, Google Play, Spotify or whatever your favorite platform may be. We release a new show generally every Thursday of the week except in the case of certain holidays, we might take one week off. But generally, it's a weekly podcast and we've been doing the podcast now for almost two years. There is a lot of content and I encourage you to take a look at the index of prior podcasts that we have done and there are probably several that you want to listen to.

Alan Kaplinsky:

With that, I want to thank all of you who downloaded and listen to our podcast today.