

Assignees of Past Due Loans: What You Need to Know

By ELIZABETH C. YEN

PAST-DUE AND CHARGED-OFF loans are often sold to third-parties at a discount, with the third-parties thereafter attempting to recover their investment through debt collection efforts. Recent court cases discuss the potentially important distinction between a simple sale and assignment of a debt or receivable, and a sale and assignment that includes all contract rights originally associated with the debt or receivable. For example, *Madden v. Midland Funding*, 786 F.3d 246 (2nd Cir. 2015), cert. denied, 136 S.Ct. 2505 (2016), held that the assignment by a national bank of a charged-off credit card account to an unaffiliated nonbank debt purchaser did not give the assignee the continuing right to charge interest at the rate that would have been permitted to the national bank pursuant to 12 USC Section 85 (part of the National Bank Act). Instead, the Second Circuit held that applicable state usury law would apply to the debt purchaser. The national bank assignor in *Madden* did not retain any interest in the assigned charged-off account, so that prospectively applying applicable state usury law to the assignee would not interfere with the national bank assignor's federally granted powers to lend at interest rates permitted by the National Bank Act.¹

After *Madden*, some courts have distinguished between the assignment of a charged-off credit card account, on the one hand, and the assignment of credit card receivables without an assignment of the underlying credit card accounts that generate the receivables, on the other hand. The latter scenario falls outside the scope of *Madden*, so that the applicable interest rates for the assigned receivables should continue to be governed by the usury law applicable to the underlying credit card accounts themselves.²

In addition, to protect the ability of federally chartered banks to sell, assign, and transfer their loans, the Comptroller of the Currency adopted amendments to 12 CFR Sections 7.4001 and 160.110, clarifying that the interest rate charged on a loan originated by a national bank or federally chartered savings association is not affected by the sale, assignment, or other transfer of such loan.³ The Federal Deposit Insurance Corporation issued a similar regulation to clarify that interest on a loan originated by a state-chartered FDIC-insured bank, if permitted by 12 USC Section 1831d(a), is not affected by "the sale, assignment, or other transfer of the loan, in whole or in part."⁴ The validity of these regulations is the subject of pending litigation.

The bare assignment of a receivable also may affect the assignee's ability to enforce the assignor's arbitration or other dispute resolution rights pursuant to the loan agreement relating to the receivable. For example, in *Pounds v. Portfolio Recovery Associates*, ___ S.E.2d ___, 2020 WL 6437285 (N.C. App. 2020),⁵ plaintiffs argued that a bill of sale assigning certain past due credit card account "receivables" (debt) and closed-out "accounts" did not include assignment of the arbitration clause in the underlying credit card account agreements (even though some of those arbitration clauses specifically extended the right to enforce the arbitration clauses to assignees), because "as a matter of law ... the mere sale and transfer of the ... receivable (the debt) did not transfer the right to arbitrate." In the opinion of the Court of Appeals, if the parties to the assignment agreement "had intended to transfer all of the rights and obligations of the original [credit card] agreement, those parties could have taken care to so indicate in the agreement." This Court of Appeals decision purports to apply Utah and South Dakota law, which "both require express intent to assign identified rights or subject matter."⁶ Because the bill of sale did not clearly indicate an intent to assign all of the original creditor's rights, the Court of Appeals held that the right to compel arbitration "was not implicitly assigned along with Plaintiffs' Accounts or Receivables."

In contrast, in *Peterson v. Midland Funding*, 2020 WL 6719116 (N.D. Ill. 2020), decided under Nevada law, bills of sale for certain past due credit card accounts expressly transferred all of the assignor's "right, title and interest in and to (i) the accounts



... and (iii) all claims or rights arising out of or relating to each referenced account.” The court therefore held that the bill of sale transferred to the assignee the right to enforce both the arbitration and class action waiver provisions in the credit card account agreements. The court reached the same conclusion for a bill of sale that transferred all “right, title and interest in and to the accounts,” reasoning that this constituted an assignment of “the entirety” of the accounts, “including the ability to enforce both the arbitration provision and class action waiver provision.”⁷

■ The views expressed herein are personal and not necessarily those of any employer, client, constituent, or affiliate of the author.

These and other cases indicate that stock phrases such as “all right, title and interest” may continue to have important substantive meaning and significance when rights to receive payment are assigned.⁸

Assignees of certain regulated consumer credit accounts should also consider whether applicable state statutes give them the right to continue to impose interest or finance charge at the original contract rate, as well as the right to continue to enforce other terms and conditions of such accounts. For example, nonbank assignees of certain consumer loans of \$15,000 or less made to Connecticut residents by FDIC-insured banks may enforce the original terms and conditions of such loans, provided the Annual Percentage Rates imposed by the bank lenders in connection

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with such loans is 36 percent or less and the assignees are either licensed in Connecticut as small loan companies or qualify for an exemption from the license requirement.⁹ As another example, assignees of certain Connecticut retail installment contracts and purchase-money loans that finance the purchase of (and are secured by) business equipment with a cash price of \$16,000 or less or consumer goods or motor vehicles with a cash price of \$50,000 or less may generally enforce the terms and conditions of such contracts and loans to the extent permitted by the Connecticut Retail Installment Sales Financing Act.¹⁰

Assignees of past due consumer loans should also be aware of new federal consumer debt collection practices regulations issued by the Consumer Financial Protection Bureau (CFPB) with a November 30, 2021 mandatory effective date,¹¹ including new regulations governing collection of time-barred consumer debt and new model forms consumer debt collectors may use. Applicable state consumer debt collection requirements that provide consumer debtors with greater protections than those available under federal law remain effective.¹² ■

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NOTES

1. See also *Madden v. Midland Funding*, 237 F.Supp.3d 130, 151 (S.D.N.Y. 2017) (holding that New York's 25 percent per year criminal usury ceiling applies to New York State residents' charged-off credit card balances originated by FIA Card Services, N.A. (a national bank headquartered in Delaware) and sold to Midland Funding, LLC, even though the applicable credit card agreements stated that they were subject to applicable federal laws and "the laws of the State of Delaware (without regard to its conflict of laws principles)," because enforcement of Delaware-permitted interest rates higher than 25 percent per year "would violate a fundamental public policy of the state of New York").
2. See, e.g., *Cohen v. Capital One Funding*, ___ F.Supp.3d ___, 2020 WL 5763766 (E.D.N.Y. 2020).
3. See 85 Fed. Reg. 33530 (June 2, 2020) (effective August 3, 2020). The states of California, Illinois, and New York have filed suit against the Comptroller of the Currency in the U.S. District Court for the Northern District of California, challenging the OCC's rulemaking authority. See complaint filed July 29, 2020 (Case No. 4:20-cv-05200), copy available at <https://oag.ca.gov/system/files/attachments/press-docs/OCC%20Non-bank%20Interest%20Rule%20Complaint%20%28as%20filed%29.pdf>
A hearing on the parties' cross-motions for summary judgment has been scheduled for March 19, 2021.
4. See new 12 CFR Section 331.4(e) and 85 Fed. Reg. 44146 (July 22, 2020) (effective August 21, 2020). Seven states and the District of Columbia have filed suit against the FDIC in the U.S.



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District Court for the Northern District of California, challenging the FDIC's rulemaking authority. See complaint filed August 20, 2020 (Case No. 4:20-cv-05860), copy available at <https://oag.ca.gov/system/files/attachments/press-docs/FDIC%20Complaint%20%28as%20filed%29.pdf>

The parties have agreed to extend the time for filing defendant's answer to the complaint and cross-motions for summary judgment to dates after the March 19, 2021 scheduled hearing on cross-motions for summary judgment in related litigation against the Comptroller of the Currency. (See n. 3 *supra*.)

5. See also 849 S.E.2d 877 (N.C. 2020) (mem.) (granting defendant's motion for temporary stay on November 24, 2020).
6. Courts in other jurisdictions have reached opposite conclusions. See, e.g., *Good v. Cavalry Portfolio Services*, 2019 WL 6003493 (E.D. Pa. 2019) (holding that, under South Dakota law, including UCC Section 9-404(a), the assignment of a credit card "account" includes an assignment of the amounts owed on the account and "also the rights contained in the governing contract" between the debtor and the assignor) and cases cited therein. The *Pounds* North Carolina Court of Appeals decision discounted the UCC Section 9-404(a) argument, noting that an assignor and assignee have the right to voluntarily enter into an assignment that varies the terms of Section 9-404(a).
7. In *Stratton v. Portfolio Recovery Assoc.*, 171 F. Supp.3d 585 (E.D. Ky. 2016), the court did not have to decide whether a mere assignment of charged-off credit card "receivables" included assignment of the contract rights in the related credit card agreement, because the plaintiff had alleged that the defendant assignee had attempted to "collect from Ms. Stratton interest that was neither authorized by agreement nor permitted by law." Because the plaintiff was relying on the terms of the credit card agreement for some of her claims, she was estopped from arguing that the assignee could not invoke the terms of the same credit card agreement.
8. See also *Wolcott v. Coleman*, 2 Conn. 324, 337 (1817) (indicating that "a note becomes the equitable property of the assignee by assignment") and *Dexter v. Hitchcock*, 10 Conn. 209 (1834) ("the assignee of a chose in action ... gains all the interest of the assignor and all his rights, except the right of suing in his own name"). These cases may help explain why an assignee of a note or other right to receive payment may want the assignor to specify that the assignment is of more than just the assignor's equitable rights and interests, but also of the assignor's legal rights and title to the note. (See also, e.g., Conn. Gen. Stat. Sections 42-135a(8) and 36a-556(c), which appear to distinguish between the "sale," "transfer," and "assignment" of a loan, note, or other evidence of indebtedness.)
9. See Conn. Gen. Stat. Section 36a-557(c).
10. See Conn. Gen. Stat. Sections 36a-770 and 36a-779 and Conn. Gen. Stat. Section 36a-535 *et seq.* See also *Sikorsky Financial Credit Union v. Butts*, 315 Conn. 433 (2015) and *Sikorsky Financial Credit Union v. Pineda*, 182 Conn. App. 802 (2018).
11. See 12 CFR Part 1006 (Debt Collection Practices, CFPB Regulation F), clarifying certain consumer debt collector obligations under the federal Fair Debt Collection Practices Act, 15 USC Section 1692 *et seq.*, published at 85 Fed. Reg. 76734 (November 30, 2020) and supplemental rulemaking dated December 18, 2020, published at 86 Fed. Reg. 5766 (January 19, 2021) (each presently with a November 30, 2021 mandatory effective date - see 85 Fed. Reg. at 76863 (November 30, 2020) and 86 Fed. Reg. 5766 (January 19, 2021)).
12. See, e.g., 15 USC Section 1692n, Conn. Gen. Stat. Section 36a-805, and Conn. Regs. Section 36a-809-6 *et seq.*



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