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All is Not Lost: Mitigating the Risk of Loss of a Delinquent Collateral Asset in the Era of Autonomous Zones

By Alexander L. Turner and Wesley A. Shumway

The birth of autonomous zones has led to uncertainty regarding the protection of a lienholder's collateral assets, and raises new considerations that lienholders never had to consider in the past.

Alex Turner and Wesley Shumway discuss considerations lenders should take into account if they are contemplating targeted lending policies to mitigate the risk that their collateral assets will be encompassed within an autonomous zone. Additionally, they discuss the recourse lienholders have if their rights are damaged due to the existence of an autonomous zone that results in the loss of a delinquent collateral asset.

Click **here** to read the entire article.

Paypal Wins Bid to Strike Down CFPB Prepaid Card Regulations

"A federal judge in Washington, D.C., has invalidated part of a U.S. Consumer Financial Protection Bureau rule governing prepaid cards and digital wallets, emphatically agreeing with fintech giant PayPal that the agency overstepped its authority."

Why this is important: The CFPB previously issued a rule governing prepaid cards that, among other things, required card providers to send customers a specific disclosure form listing any fees associated with the card and restricted customers from linking credit cards associated with their prepaid card providers for 30 days after a new prepaid account was opened. PayPal challenged this rule, arguing that it caused customer confusion when applied to PayPal, which doesn't charge fees, and blocked customers from linking cards issued by other companies that already had business dealings with PayPal. The CFPB opposed PayPal, and the dispute found its way into federal court in Washington, D.C. In a decision that was not short on exclamation points, the federal court noted that the CFPB had broad authority "[b]ut it is not without limitations!" In response to some of the CFPB's arguments, the court responded "Please!"

and "That dog won't hunt!" In the end, PayPal was successful in its challenge, and the court invalidated part of the CFPB's prepaid card rule. The court's emphasis aside, the decision recognizes that the CFPB's broad grant of authority (which it received when it was created in the wake of the 2008 financial crisis) certainly isn't unlimited and must be compatible with other financial laws and regulations. --- Nicholas P. Mooney II

U.S. Bankruptcy Filings Hit 35-Year Low Thanks to Government Pandemic Aid

"The firm's compilation of bankruptcy cases showed the Chapter 11 filings used to reorganize larger businesses still jumped 29 per cent in 2020 to 7,128, compared to 5,158 in 2019, a tally that included major retailers like J.C. Penney driven under by the biggest economic downturn in a century."

Why this is important: Epiq AACER, which tracks and compiles information about bankruptcy filings across the United States, recently released its 2020 report. The report shows that large Chapter 11 filings increased 29 percent from 2019 to 2020. Yet overall filings were down. In 2020, only 529,068 bankruptcies were filed. This is significantly lower than the average 800,000 bankruptcies filed per year in recent history and is the lowest number of bankruptcies filed since 1986. The low number of overall filings in 2020 seem to indicate that the various government assistance programs for individuals and businesses provided sufficient assistance to prevent financial disasters that typically precipitate an individual or business filing for bankruptcy protection. It is too early to conclusively determine the impact of the programs, but the expectation is that bankruptcy filings in 2021 will increase. Businesses and institutions worried about repayment of outstanding financial health should pay close attention to their accounts receivable to identify potential issues in 2021 sooner rather than later in an attempt to minimize or prevent any issues from dramatically impacting their own financial solvency. --- Angela L. Beblo

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What's Ahead for Regulated Industries in 2021? Increased Scrutiny on Consumer Protections

"However, no sector is bracing more than the banking and financial arenas, where compliance changes could come more swiftly."

Why this is important: President-elect Biden could replace the current CFPB director Kathleen Kraninger with a more aggressive consumer watchdog. Secondly, a Biden administration is expected to increase scrutiny of how lenders have responded during the pandemic. For instance, an expected focus is likely to be discriminatory lending practices, especially due to the uneven impact of COVID-19. Fair lending practices will be highlighted as the pandemic impacts hardest on low-income and nonwhite workers. As poor and racially diverse communities feel uneven effects from the pandemic, the new administration is expected to inhibit unfair lending practices in these communities by expanding the CFPB's enforcement powers. Finally, a Biden administration likely will coordinate with state regulators to enforce federal and state regulations in efforts to expand consumer protections among lenders including Fintech firms. --- Bryce J. Hunter

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Blockchain Based Stable Coin Payments are an Evolution of Payment Systems; Chartered Banks Can Run Full Nodes, Says OCC

"The OCC released an interpretive letter clarifying that banks they regulate can participate in an independent node verification network."

Why this is important: Last week, the OCC stated that national banks and federal savings associations may participate in "independent node verification networks" ("INVN"). Without trying to decipher the legal and technical definitions of INVN, it appears the OCC was clarifying that these banks and associations can participate in distributed ledger technologies (ledgers that record transactions on nodes simultaneously running the same ledger at various places geographically). The letter advises that banks and associations can validate, store, and record payment transactions by serving as a node on an INVN. Further, they can use INVNs and related stablecoins to carry out other permissible payment activities. (Stablecoins are, as the name implies, cryptocurrencies that are designed to minimize the price volatility often experienced with some cryptocurrencies.) What does all of this mean? The OCC is clarifying that banks and associations under its jurisdiction can participate in distributed ledger technologies (like a blockchain) to conduct certain payment activities using stablecoins (digital currencies). This letter may signal another step toward adoption by banks of digital assets to perform some payment-related activities. --- Nicholas P. Mooney II

Dept. of Education Empowered Loan Servicers to Mislead Public Service Borrowers

"The Department of Education's newer statistics indicate only marginal improvement, with a current approval rate of just over 2%."

Why this is important: The Public Service Loan Forgiveness program ("PSLF") provides incentive for intelligent people to forgo the private sector in favor of public service. The PSLF allows federal student loan borrowers to have their loans forgiven after working several years in the public sector and making "120 'qualifying' monthly payments." However, only 1 to 2 percent of applicants are actually approved. In addition to other requirements, a borrower must have a direct federal student loan and not a "Family Federal Education Loan" ("FFEL") to qualify. One of the reasons for the low approval rating is that nobody is telling the borrowers about this requirement. A recent report found that the U.S. Department of Education has not been providing guidance to borrowers and student loan servicers have been intentionally misleading borrowers. Due to a lack of oversight by the Department of Education and a financial incentive to prevent borrowers from having their loans forgiven, loan servicers have "engaged in a 'years-long pattern of abuse' towards public service borrowers." This abuse includes "affirmatively misrepresenting borrowers' eligibility for PSLF, even though FFEL loans do not qualify; withholding information about the existence of PSLF altogether; and interfering with the consolidation process for borrowers looking to convert their FFEL loans into a direct loan to qualify for loan forgiveness." While Congress has attempted to fix some issues with the PSLF, there is still a long way to go. Considering that this is not the first allegation of student loan servicer malfeasance, perhaps the best place to start is to provide loan servicers with an incentive not to take advantage of borrowers. --- Kellen M. Shearin

The Big Student Debt Questions That Biden Will Have to Answer

"A big write-off could stimulate the U.S. economy—or maybe just reward those who don't need any financial assistance."

Why this is important: Currently, there are roughly 44 million individuals with federal student loans owed to the U.S. government totaling nearly $1.7 trillion dollars. Student loan debt has risen dramatically over the past few decades, in part because of the increasing cost to attending institutions of higher education and the increase in for-profit colleges. While the CARES Act provided a temporary reprieve by suspending payments, ceasing collections, and waiving interest on certain federal student loans, those provisions are set to expire in 2021. President-elect Biden has discussed numerous times the potential for changes to the student loan programs and aid for those individuals with outstanding student loans, including a $10,000 across-the-board reduction for all borrowers and additional debt waivers/reductions for other individuals. Some believe that the $10,000 is not enough and prefer that the amount be increased to up to $50,000 to provide assistance to those that struggle the most with payment of student loans. Others are diametrically opposed to any waiver of student loan debt, arguing that the waiver will not stimulate the economy or provide the economic relief claimed. President-elect Biden has stated that he will not take unilateral executive action on this issue. That means the 117th Congress will be tasked with deciding the issue: enrolling, voting, and enacting law on student debt waiver. How such action is accomplished will set precedent for decades in the future. --- Angela L. Beblo

Mortgage Demand from Homebuyers Pulled Back Sharply, Even as Rates Ended 2020 Near Record Low

"Mortgage applications to purchase a home fell 0.8% in the two weeks ended Jan. 1, compared with the second week of December, according to the Mortgage Bankers Association."

Why this is important: The surge in home buying, partially brought on by the coronavirus pandemic, is showing signs of easing. While mortgage rates remain at record lows, the overheated housing market with home price increases is causing buyers to pull back on demand. Lenders expected refinancings to keep pace but even applications to refinance a home loan at year end fell 6 percent from two weeks earlier. --- Bryce J. Hunter

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Consumer Financial Protection Bureau Issues Approval Order to Facilitate the Use of Dual Usage Credit Cards

"The card is designed for consumers with a limited or damaged credit history as a tool that can be used to establish or reestablish a favorable credit history."

Why this is important: The CFPB recently issued a Compliance Assistance Sandbox ("CAS") approval order to a lender regarding its proposal to create a "dual-feature credit card." A CAS order provides an entity a safe harbor from liability under certain conditions when that entity is confronting a situation in which the law is uncertain. The lender here is working to develop a credit card that would start as a secured credit card with a lower interest. A secured credit card requires the borrower to secure the extension of credit by pledging collateral or depositing a certain amount of money with the lender. They are designed to help borrowers who have little or damaged credit. This proposed credit card would allow borrowers to possibly "graduate" to increase credit limits and unsecured credit after a period of favorable payments. The CFPB's issuance of the CAS order facilitates the development of the dual-feature card, and that may result in increasing extensions of credit to people who otherwise may have difficulty in obtaining credit. --- Nicholas P. Mooney II

Featured Attorney Spilman Profile

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Lee Denton's primary area of practice is litigation, with an emphasis on complex business cases. He represents clients in litigation as primary counsel before the North Carolina Business Court, Superior Court, District Court and federal courts, determining strategy, drafting pleadings and briefs, taking depositions of parties and key witnesses, conducting mediation and arguing dispositive motions. He is a Board Member of the Antitrust & Complex Business Disputes Section of the North Carolina Bar Association. Lee has been named to the North Carolina Super Lawyers "Rising Stars" list. He is a graduate of Appalachian State University and received his J.D. from Wake Forest University School of Law.
