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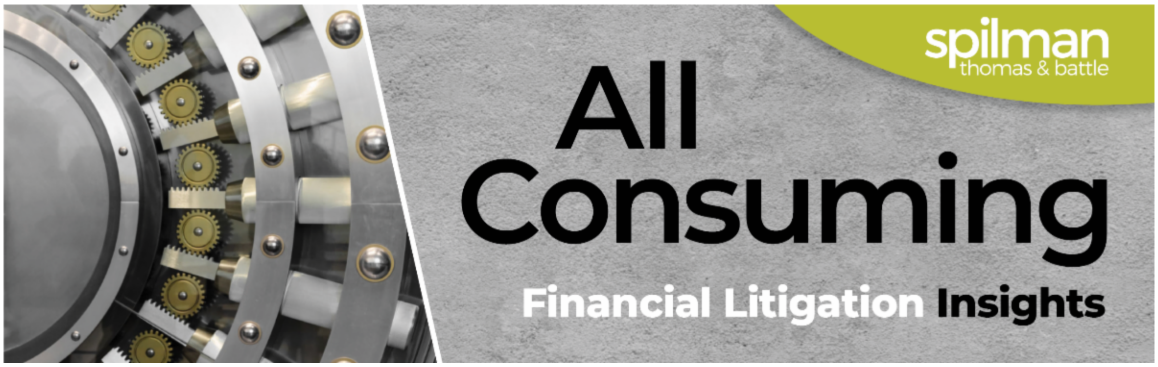

March 9, 2021

Biden Administration May Undo Certain Trump-Era Mortgage Rules

"Consumer advocates believe the rules may promote the sort of risky borrowing that led to the financial crisis in 2008."

Why this is important: The General QM ("Qualified Mortgage") Rule is designed to ensure lenders make a reasonable good faith effort to determine a borrower's ability to repay a loan prior to lending in exchange for certain protections accorded to lenders from consumer claims. In December, the Trump administration changed the General QM Rule effective July 1, 2021, by replacing Appendix Q and the 43 percent debt-to-income ratio with a price-based definition that afforded more flexibility. Further, it created a Seasoned QM Rule effective March 1, 2021, that provided a method by which a loan that did not meet the General QM Rule at its inception may nonetheless achieve Qualified Mortgage status where the borrower makes timely mortgage payments during a "seasoning" period of 36 months. Recently, Biden's Consumer Financial Protection Bureau indicated that it is considering whether to revisit these Trump era changes. The effective dates for these provisions have been pushed back in the interim. Consumer groups generally oppose the Seasoned QM Rule, arguing that it encourages risky lending, and when these "seasoned" QM loans are bundled and sold on secondary markets, we risk a repeat of the 2008-2010 subprime mortgage crisis. The Biden administration appears to be listening, and the Seasoned QM rule may be amended or scrapped. --- Lori D. Thompson

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An Industry on Auto-Drive: Car Buyers Embrace Fintech Applications

"And financial technology companies in three sectors—auto insurance, auto financing, and its best friend, credit repair—are lending a hand."

Why this is important: Financial technology (or fintech) companies have thrived in the auto industry during the COVID-19 pandemic. The reason seems to be that these companies provide convenience to the customer that is believed didn't exist in the traditional car buying experience. The article discusses three ways fintech companies are changing how we buy cars. First, in financing vehicle purchases, fintech companies are allowing customers the ease of shopping different rates and terms from the convenience of their home or smartphone. Second, in insuring the vehicles we purchase, fintech companies are again providing customers convenience and, in some instances, providing a completely digital experience. Third, in credit repair, fintech companies are taking what is usually a long process and applying A.I. to make it easier for buyers to improve their credit before the car purchase. Providing these services matters. Fintech companies are reaping the benefits, in some instances a 40 percent increase in business since the start of the pandemic. --- Nicholas P. Mooney II

President Biden’s Plan to Change Credit Reporting and Scoring

"If President Biden has his way, he will create a public credit reporting agency to compete with the three major credit bureaus and maybe one day replace them altogether."

Why this is important: The Biden administration has expressed interest in creating a public credit reporting agency in an effort to combat perceived disparities and errors in credit reporting. However, many industry leaders have met this idea with skepticism. For example, as expressed by Michael A. Turner, Ph.D, President and CEO of the Policy and Economic Research Council, “supporters of the public credit bureau approach, while well intentioned, are wafer thin on details[.]” Additionally, skeptics assert that credit errors potentially would continue, as credit bureaus largely operate as warehouses of information received by third parties. Thus, creating a public credit reporting agency would merely replace the “warehouse” of this information. Time will tell whether the Biden administration acts on the idea of creating a public credit reporting agency. --- Wesley A. Shumway

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Virginia Passes the Consumer Data Protection Act

"In doing so, Virginia became the second state to enact comprehensive privacy legislation and the first to do so on its own initiative."

Why this important: Last month, Virginia became the second state in the nation to enact a law that regulates information privacy practices. Despite being touted as a "comprehensive" privacy law, most lenders will avoid the burden of compliance and enforcement.

In Virginia, entities are subject to the CDPA if (1) they conduct business in the Commonwealth or produce products or services that target residents of the Commonwealth, and that (2a) during a calendar year, control or process personal data of at least 100,000 consumers (a natural person who is a resident of the Commonwealth acting only in an individual or household context - excludes a natural person acting in a commercial or employment context); or (2b) control or process personal data of at least 25,000 consumers and derive over 50 percent of gross revenue from the sale of personal data. The law goes into effect on January 1, 2023. Before lenders spend hours of compliance time worrying about another set of rules, the CDPA provides a “blanket exemption” from the Act for several sets of organizations, including financial institutions subject to the Gramm-Leach-Bliley Act ("GLBA"). GLBA requires financial institutions – companies that offer consumers financial products or services like loans, financial or investment advice, or insurance – to explain their information sharing practices to their customers and to safeguard sensitive data. With new rules and enhanced enforcement likely coming from the reinvigorated CFPB, lenders will avoid at least one state's new law. --- Bryce J. Hunter

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Not So Stylish: Express Hit with Massive $5MM+ TCPA Class Action Over Marketing Texts

"Express is being sued for over $5,000,000.00 in damages as a result of purportedly sending marketing texts to individuals without consent."

Why this is important: The plaintiff in this case filed a class action lawsuit after receiving 38 unwanted texts from the shopping mall staple. Importantly, the plaintiff alleges that she received these texts after texting Express back "stop." The old stomping ground of mallrats everywhere now faces federal TCPA claims under three different class theories, which could stick Express with a multimillion dollar judgment for any unwanted texts it made during the last four years. A gentle reminder that even those in the retail industry should have their shoppers' "Express" consent before sending autodialed text messages. --- Tai Shadrick Kluemper

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Servicemember Rights: Mandatory Arbitration Clauses have Affected Some Employment and Consumer Claims but the Extent of Their Effects is Unknown

"Some courts have held that claims involving mandatory arbitration clauses must be resolved with arbitrators in private proceedings rather than in court."

Why this is important: Typically, active military members have protections relating to court litigation under the current versions of the Uniformed Services Employment and Reemployment Rights Act of 1994 and the Servicemembers Civil Relief Act. These acts provide special protections for servicemembers on active military duty while civil litigation is proceeding. Similarly, mandatory arbitration clauses have become ubiquitous in consumer contracts. These clauses generally require resolution in a private arbitration proceeding with a private arbitrator instead of reaching a resolution in court during civil litigation. The Government Accountability Office has recently investigated the consequences of the arbitration clauses on military personnel "[d]ue to concerns these clauses may not afford servicemembers certain employment and consumer rights, Congress included a provision in the National Defense Authorization Act for Fiscal Year 2020 for GAO to study their effects on servicemembers' ability to file claims under USERRA and SCRA." Although such clauses have not prevented the DOJ, Department of Defense, or Department of Labor from informally resolving claims for servicemembers, businesses should pay close attention to whether potential litigation matters involve military personnel and to any proposed changes suggested to various federal laws based upon the GOA's study results. --- Angela L. Beblo

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Gary Gensler (SEC), Rohit Chopra (CFPB) Play It Safe at Confirmation Hearing

"Biden's nominees mostly validated what most observers already knew."

Why this is important: President Biden's picks to lead the Securities and Exchange Commission ("SEC") and Consumer Financial Protection Bureau ("CFPB") may help to make some big changes in the American corporate sector. President Biden has selected Gary Genseler to lead the SEC and Rohit Chopra to head up the CFPB. Both men participated in a confirmation hearing before the Senate Committee on Banking, Housing, and Urban Affairs on March 2, 2021. During the hearing, Genseler stated that he was in favor of requiring climate change, diversity, and political donation disclosures in the filings of publicly traded companies. Additionally, he stated that if he is confirmed he "will examine whether cryptocurrency needs tighter regulation" and will encourage the office to take a closer look at companies who may encourage inexperienced investors to make risky investments, i.e. Robinhood. Chopra stated that one of his goals, if he is confirmed, is to "return to [the CFPB's] previous practice of ordering firms to pay restitution to defrauded customers." While not expressly saying it, Chopra indicated that several areas could see increased enforcement actions including mortgages and student loans. Although neither has been confirmed at this time, this hearing likely has given us a glimpse of what changes may be coming for the American corporate sector. **---** Kellen M. Shearin

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Konstantin Anikeev and Nadezhda Anikeev, Petitioners v. Commissioner of Internal Revenue, Respondent

"Plan to arbitrage credit card reward points with repeated purchases of VISA gift cards that were then used to purchase money orders leads to taxes owed."

Why this is important: On February 23, 2021, the United States Tax Court issued a decision on the tax consequences from a plan to profit from the spread between the amount of credit card reward points given for purchases and the amount of fees used when those purchases were for VISA gift cards and money orders. In that case, Konstantin and Nedezhda Anikeev were American Express cardholders. Amex offered a Blue Cash Rewards Program, which would pay them 5 percent back for purchases at places like supermarkets, gas stations, and certain pharmacies. They learned that they could purchase VISA gift cards at local supermarkets and pharmacies for a charge of around 1 percent of the purchase price. The gift cards then could be used to purchase money orders for a service fee of 0.33 percent or less. The money orders then could be used to pay their AMEX bill, leaving them owing no balance on their credit card and allowing them to receive the difference of 3.67 percent as a cashback reward. The Anikeevs had an income of between approximately $150,000 to $160,000 during the two years they executed the plan. During those years, they were able to purchase about $1.2 million worth of gift cards and money orders in one year and $5.1 million the next year. This netted them about $300,000 in cashback rewards for those years. Amex didn't seem to care, but the IRS did, assessing a tax deficiency of over $100,000. The Anikeevs went to court with the IRS. In the end, the tax court ruled that the purchases of gift cards weren't taxable, but direct purchases of the money orders were taxable, leaving the Anikeevs with a $100,000 tax deficiency. --- Nicholas P. Mooney II

Amazon Expands Palm-Reading Payment System as Pandemic Drives Down Cash Use

"Amazon One, unveiled in September 2020, uses computer vision technology to create a unique palm signature that is read when a consumer holds their hand above a scanning device and enters an Amazon store."

Why this is important: Embracing the old adage that "a crisis is a terrible thing to waste," Amazon has seized on the opportunity created by the pandemic to promote use of its touchless palm reading payment system with much success. Consumers who might have otherwise rejected the use of biometrics out of privacy concerns now appear more willing to embrace the technology, which associates a person's unique palm signature with his or her credit card. The result is that a person can purchase products with a simple swipe of their hand over a scanner. Amazon has installed the technology and is testing it in certain Amazon Go retail locations, and Whole Foods Markets could be next. Early indications are that consumers (sparked by a desire to avoid contact during a pandemic) like the option of purchasing without the need of exchanging cash or credit cards, or even the scan of their smartphone. Amazon intends to market the technology to other third parties.

The increasing use of biometrics, such as Amazon's palm reading payment system, raises privacy concerns. With this technology, a consumer has his or her palm scanned upon entering the store, enabling the seller to gather data about what that individual consumer likes and does not like even if the consumer buys nothing. This information can inform marketing to that specific consumer, as well as product trends. States are trying to keep pace with the use of biometrics by passing enhanced privacy laws that mandate notice, consent and opt-out options. --- Lori D. Thompson

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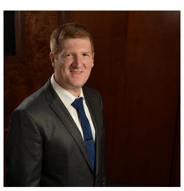

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Kellen is an associate in our Charleston office. His primary area of practice will be litigation and he will be focusing on technology law and consumer finance. Kellen currently assists in different phases of pre-trial litigation, including drafting pleadings, drafting dispositive and evidentiary motions, and conducting discovery.

He is a graduate of Arizona State University and received his J.D., *cum laude*, from the University of Richmond School of Law.

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