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Volume 3, Issue 5

Welcome!

Welcome to the fifth issue of *All Consuming* for 2022.

We are very pleased to announce our practice group is growing! Please help us welcome Brian H. Richardson, an Associate in our Roanoke office. Brian's primary areas of practice are commercial disputes, workouts, and related litigation, with an emphasis in corporate restructuring, bankruptcy, creditors' rights, and health care finance matters. He received his B.S. from Brigham Young University and his J.D. (with a Certificate in Law, Science, & Technology) from Arizona State University Sandra Day O'Connor College of Law, where he also served on the Executive Board for Jurimetrics: The Journal of Law, Science & Technology. He is admitted to the Virginia Bar, the United States District Courts for the Eastern and Western Districts of Virginia, the United States Bankruptcy Courts for the Eastern and Western Districts of Virginia, and the United States Court of Appeals for the Fourth Circuit. Brian is also fluent in Spanish.

We also have added a new feature to this e-newsletter. At the bottom of every issue, we will be highlighting any U.S. House and Senate committee meetings that pertain to this industry. If there are no upcoming meetings scheduled, we will provide links to where those are typically published so you can check it out personally until our next issue. We hope this helps searching for this information and gives you a good idea what is on the horizon from a national policy viewpoint.

Thanks for reading.

Angela L. Beblo, Co-editor of *All Consuming*

Nicholas P. Mooney II, Co-editor of *All Consuming*

Bruce M. Jacobs, Chair, Spilman Consumer Finance Litigation Practice Group

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CFPB

CFPB Invokes Dormant Authority to Examine Nonbank Companies Posing Risks to Consumers and CFPB Claims Oversight Over More Entities Including Fintechs; Says It Will Publish Supervisory Determinations

"The CFPB is also issuing a procedural rule today to increase the transparency of the risk-determination process."

"The CFPB will determine if a company poses a risk to consumers by looking at CFPB complaints, judicial opinions, administrative decisions, whistleblower complaints, state partners, federal partners, or news reports."

Why this is important: The Dodd-Frank Act authorized the CFPB to exercise authority over several categories of entities. Traditionally, banks and credit unions have been subject to federal supervision. The CFPB supervises large depository institutions that have more than $10 billion in assets. However, nonbanks -- many of whom are financial technology, or fintech, companies -- now may be subject to oversight by the CFPB. If the CFPB determines that the nonbank poses a risk to consumers, it may exercise authority over them. The determination of whether a nonbank poses a risk to consumers may be a smoky, amorphous decision. The CFPB advises in the article that the risky conduct may include "potentially unfair, deceptive, or abusive acts or practices" ("UDAAP"), which is another amorphous concept. The article reports that the CFPB may decide that a nonbank is engaged in UDAAP from many sources, including news reports and "information from other sources." **At bottom, the CFPB has decided to invoke its UDAAP authority to supervise fintechs and other nonbanks. Keep in mind that this new supervision isn't limited to fintechs. It potentially could include any entity that interacts with consumers and impacts their financial status. This could include many other types of entities, such as Buy Now Pay Later entities. We hope that the CFPB's decision to introduce some transparency into its determination that risky conduct and UDAAP are taking place will inject some certainty into what looks like a nebulous and vague process. Any entity that questions whether it will come under the CFPB's new supervision should ensure it has a strong compliance department.** --- Nicholas P. Mooney II

Debt Collection

CFPB Reports Flood of Medical Debt-Collection Complaints Last Year

"The Consumer Financial Protection Bureau issued the complaint bulletin 'Medical Billing and Collection Issues Described in Consumer Complaints' detailing the scope and complexity of the problem."

Why this is important: Is it time to reclassify and formally distinguish "medical debt" from other types of consumer debt? The CFPB has issued its complaint bulletin report with findings from 2021 data on more than 750,000 consumer complaints. These data reveal just how wide the gap is between medical debt and other consumer debt. Should collections and reporting requirements and regulations adapt to reflect that distinction? After all, medical debt is the primary reason given for individual bankruptcy filings. This report reveals several factors contributing to unpaid and defaulted accounts. **With a reported $88 billion in medical debt on the books in the United States last year, it's time to pay closer attention to what is working and what is not.** --- Brian H. Richardson

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Digital Cures Solve Key Problems in the Face of Mounting Healthcare Collections

"Features to focus on are those that help providers offer flexible payment options, provide estimates before or during the time of care and identify the correct medical insurance claim information so they can bill payers correctly the first time around, Considine said."

Why this is important: What's more difficult than collecting medical debt from a current patient? Trying to collect from a former patient. Consumers are rapidly jumping ship from medical practices who fail to keep up with finance technology for billing. There are digital solutions to help providers keep their patients happy and healthy and get paid on time. The key is to reduce the points of frustration and disconnect across the entire experience, from intake to collection. It's not just about patient conveniences, though. **These digital solutions also help providers (and debt collectors) navigate compliance with updated legislation like the No Surprises Act and the Medical Debt Relief Act. The old model of healthcare may not survive 2022...and maybe it shouldn't.** --- Brian H. Richardson

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Mortgages

Crypto-Backed Mortgages on the Rise Despite Crypto Market Pullback

"Homebuyers can avoid capital gains tax by placing crypto as collateral for home loans."

Why this is important: This articles provides the beginning of the discussion around crypto-backed mortgages and what their future might look like. Simply put, these mortgages allow a borrower to pledge cryptocurrency as collateral for a home loan. Some lenders are accepting crypto as collateral, and some cities, like Miami, are becoming crypto innovators. However, crypto prices have fallen recently. Bitcoin is down about 50 percent from its highest price. **This drop may be a draw for investors, but it may leave some lenders undersecuritized.** --- Nicholas P. Mooney II

Student Loans

Student Debt Ticks Higher as the Future of Loan Forgiveness Remains Uncertain

"This year's incoming freshman class can expect to borrow nearly $40,000 to help cover the cost of a bachelor's degree, according to a report."

Why this is important: As inflation soars and numerous goods and services become more expensive, college is no exception. The average cost for tuition and fees in 2021-2022 for an in-state four-year institution was $10,740, and the average cost at a private four-year institution was $38,070. For students who lack sufficient funds to pay higher education costs outright, many students – and parents – turn to loans to bridge the gap. "This year's incoming freshman class can expect to borrow nearly $40,000 to help cover the cost of a bachelor's degree, according to a report." Many people are worried about being able to afford the cost of higher education. "Experts say reducing the amount you borrow at the outset will go a long way to easing your long-term debt burden." Three ways to ease the burden include: (1) for students to complete the FAFSA, which drives need-based aid; (2) apply for private scholarships as even small awards can add up quickly; and (3) contact schools financial aid offices once the initial award letter is received for possible additional assistance. **As college costs increase and more information becomes known about the long-term impact of student debt, both students and families will be looking for ways to reduce the financial burden for higher education for students who continue to pursue traditional college degrees.** --- Angela L. Beblo

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Student Loan Forgiveness Program for Military Borrowers Slowly Improves

"Some veterans are getting their loans canceled, but others report being mired in red tape."

Why this is important: The idea behind the 2007 Public Service Loan Forgiveness Program ("PLSF") was, broadly, to encourage individuals to enter certain critical, lower-paying career fields in public service areas by promising tax-free forgiveness of student loan debt after 10 years of service. However, the approval rate for forgiveness has been historically low – it was just 2 percent from 2017 through the beginning of the pandemic. "And among the huge number of applications denied or lost in the bureaucracy were many from Americans who perform perhaps the ultimate public service: joining the armed forces." Indeed, 92 percent of applicants with military service were denied forgiveness prior to the pandemic by the Department of Education. The potential for forgiveness has a significant impact on both current and previous military members as there are more than 175,000 current and former military members with federal student loan debt. Indeed, in "a survey of military lawyers, 94 percent said they would be more likely to quit the service if the program were eliminated." Borrowers applying for forgiveness have been mired in red tape and frustrated by the lack of consistent, clear direction for forgiveness applications. "The Department of Education is now working with the Department of Defense to automatically match data across the two agencies, said a department spokesperson — which could end borrowers' struggle to get signatures. And it's collaborating with advocates on permanent regulations that could help more borrowers qualify after the waiver expires in October." **Servicers and borrowers should monitor how the collaboration will impact the PSLF Program and the potential for the process to become easier on both borrowers and servicers.** --- Angela L. Beblo

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Banking & Energy

West Virginia Senate Bill 262

"A bill to amend the Code of West Virginia, 1931, as amended, by adding thereto a new section, designated §12-1-15, relating generally to financial institutions engaged in boycotts of energy companies.

Why this is important: This bill, which passed into law without the West Virginia Governor's signature, is another step in the tug-of-war between those who want to promote the fossil fuel industry and those who want to cripple it. The Biden administration has made no secret of the fact that it wants rid of fossil fuels. Last year, a dispute arose as U.S. climate envoy John Kerry was accused of pressuring banks to stop making loans to fossil fuel companies. In response, officials in 15 states warned that they would withdraw assets from any bank that reduced loans to those companies. West Virginia was one of those states. West Virginia's new law directs the state treasurer to prepare a list of financial institutions that divest themselves of coal and other fossil fuel companies for a reason other than an ordinary business purpose. The state treasurer is permitted to disqualify those institutions from bidding on state contracts. --- Nicholas P. Mooney II

TCPA

Is Express Revocation Necessary?

"District Court finds genuine dispute of material fact regarding TCPA consent, absent evidence of Express Revocation."

Why this is important: The federal Telephone Consumer Protection Act ("TCPA") bans certain communications, including telemarketing calls, to cellular phones without permission of the person being called. Even if a person provides consent for calls, this consent may be revoked in the future with a request to cease calls. Such was the scenario facing the Western District of Kentucky recently. The plaintiff obtained a credit card and provided his cell phone number as contact information for the account. Eventually, plaintiff could not afford his monthly payments and the issuers began calling plaintiff's cell phone about the missed payments. "At some point, the plaintiff requested the defendant to mail him his billing statements and started hanging up the phone on defendant's representatives." Plaintiff never expressly requested that the calls to his cell phone cease. Plaintiff then filed suit alleging violations of the TCPA and state law based upon revocation of consent. The district court granted in part and denied in part a motion for summary judgment. "The court held that the plaintiff's request to have information sent to him via the mail instead of over the phone, along with the plaintiff's refusal to talk to a collector when the defendant called after choosing mailed delivery, gave rise to a genuine issue of fact as to whether the plaintiff revoked consent to be contacted, even without explicit revocation." **As courts navigate the post-*Facebook v. Duguid* world, this recent decision provides insight on how courts may approach implied revocation of consent under the "totality of the circumstances" test set forth by the Western District of Kentucky.** --- Angela L. Beblo

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U.S. House of Representatives and U.S. Senate Committee Meetings

We have included a listing of pertinent U.S. House and Senate Committee meetings for your reference.

These are events scheduled at press time for the month of May 2022.

U.S. House Committee on Financial Services

- May 11: A Notch Above? Examining the Bond Rating Industry
- May 12: The Annual Report of the Financial Stability Oversight Council
- May 13: Keeping Up with the Codes – Using AI for Effective RegTech
- May 17: Hybrid Markup - Full Committee Markup of Various Measures
- May 24: Diversity Includes Disability - Exploring Inequities in Financial Services for Persons with Disabilities, Including Those Newly Disabled Due to Long-Term COVID
- May 25: Reauthorization and Reform of the National Flood Insurance Program
- May 26: Digital Assets and the Future of Finance - Examining the Benefits and Risks of a U.S. Central Bank Digital Currency

U.S. House Committee on Small Business

- May 11: Hybrid Markup of Legislation to Amend the Small Business Act
- May 12: Moving Upwards and Onwards - The Workforce and Innovation Needs of the Aviation and Aerospace Industry

U.S. Senate Committee on Banking, Housing, and Urban Affairs

- No May events scheduled at this time

U.S. Senate Committee on Finance

- No May events scheduled at this time

U.S. Senate Committee on Small Business & Entrepreneurship

- No May events scheduled at this time
