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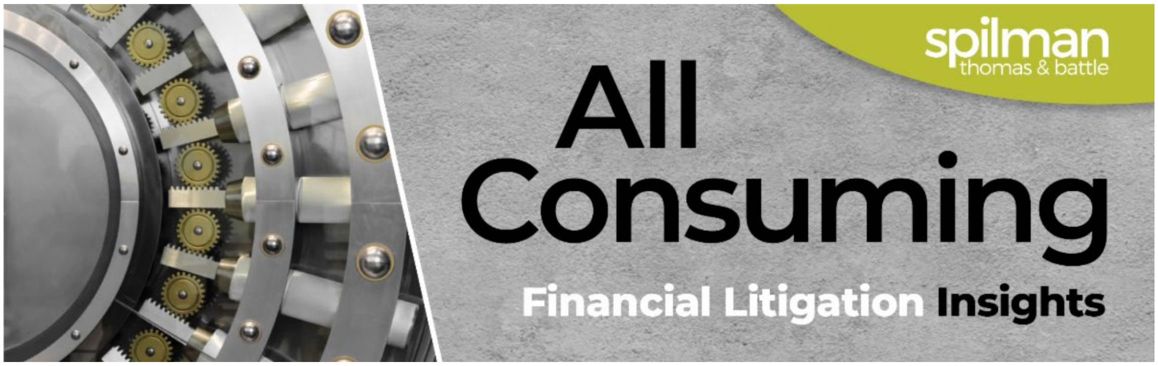

October 7, 2020

Is a Cap on Payday Loan Rates About Protecting the Poor or Eliminating a Service?

"Industry representatives say the proposed cap would drive most, if not all, payday lenders out of business and leave their customers without good alternatives when they need money."

Why this is important: There are various arguments both for and against payday loans in the context of a new Nebraska bill that would limit the interest rate on those loans. Sometimes called cash advances, check advances, or delayed deposit loans, these loans are short-term loans that when projected out over an annual basis cost the borrowers more in interest than traditional financing. Critics complain these loans prey on the poor and people in emergencies. According to a Nebraska report, in 2019 payday loan borrowers paid the equivalent of 405 percent annual interest. Even a local clergy is quoted in the article as speaking out against the loans. On the other hand, supporters of the loans claim that capping interest rates for loans would drive them out of business. With default rate ranges of 25 to 40 percent, imposing the contemplated interest rate cap would force them to close their businesses or at least dramatically restrict their operations. They claim that would leave borrowers with only costlier options, such as relying on pawnshops and overdrafting bank accounts. Indeed, the individual borrower discussed in the article only took out a payday loan after he was forced to pay a bill he had incurred and could not borrow any money from his parents as he had borrowed from them "several times" before. What is unsaid in the article is what options, if any, that individual had if a payday loan hadn't been available. --- Nicholas P. Mooney II

The Slow Demise of Recent Collection Letter Overshadowing Claims

"The courts have been ruling on these claims over recent months, and there seems to be a consensus: the claim fails."

Why this is important: Overshadowing claims are claims relating to compliance with the FDCPA. A recent article by insideARM analyzed cases filed by a plaintiffs' firm in the northeast and found that courts are consistently and routinely finding that overshadowing claims fail as a matter of law, either at the initial stage or at summary judgment. These cases may provide persuasive authority for arguments in other jurisdictions. In light of the recent apparent consensus that the claims fail, new theories may soon be espoused by the plaintiffs' bar in support of these claims. --- Angela L. Beblo

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Consumers Remain Resilient Despite Broader Economic Challenges

"Since the start of the pandemic in March 2020, consumer performance has been mostly positive with continued month-over-month improvements for many of these products."

Why this is important: Seven months into the pandemic recession, consumer credit delinquencies are decreasing across a wide range of credit including auto loans, mortgages, credit cards, and personal loans. With the exception of auto loans, delinquency rates were lower in August 2020 than they were in

August 2019. Part of the reason for the drop is accommodations that credit providers gave consumers during the pandemic, as well as government grants given to consumers in April. Although signs of a recovery across credit markets are positive, without further government intervention, delinquency rates may increase in the future. --- Bryan S. Neft

Share of Mortgages in Forbearance Drops to Lowest Level Since April

"The decline brings the total number of homeowners enrolled in forbearance plans to approximately 3.4 million, a level not seen since mid-April."

Why this is important: While fewer American homeowners are in forbearance, these recent improvements are not an indication that borrowers are out of the woods yet. Foreclosure forecasts show signs of deterioration. Foreclosures in the U.S. declined through July, but likely because of the moratoria that many states and the federal government had in effect. --- Bryce J. Hunter

WebRecon Stats for Aug 2020: CFPB, FDCPA, TCPA and FCRA Show Declines

"CFPB complaints and FDCPA, TCPA and FCRA complaints were all down from July; all but FCRA were all down from August 2019; and CFPB complaints and FCPA complaints are both down YTD. FCRA and TCPA are still up for the year, continuing long term trends."

Why this is important: There is a trend in new lawsuits being filed by borrowers under some of the most ubiquitous federal consumer statutes. Approximately 33 percent of the plaintiffs who filed suit during August 2020 had previously filed at least one other lawsuit. These findings confirm defendants' belief that consumer actions often are filed by "professional plaintiffs" who, rather than being consumers who truly were harmed, are consumers looking to take advantage of any technical error. There also has been a month-to-month general decline in lawsuit filings, but a monthly increase in 2020 in FCRA and TCPA filings. Interestingly, the article ranks the "most active consumer attorneys" and the top courts where consumer lawsuits were filed during the surveyed period. --- Nicholas P. Mooney II

Fewer Waiters, No Menus: Is Square's New Service the Future of Dining?

"While many restaurants have used the codes since the start of the pandemic to let customers see a menu, the Square tool takes it a step further by integrating with a restaurant's kitchen printers and payment systems."

Why this is important: The Square service uses QR codes placed at tables to send food orders directly to the kitchen. Orders can then be paid using a cell phone, with the service connecting to the restaurant's payment systems. It also lets restaurants obtain customers' contact information. While the Square service does not completely eliminate the need for traditional servers (a food runner is still required to bring meals and beverages), it does cut down on face-to-face contact with restaurant employees, and potentially could reduce or eliminate the need for certain staffing positions. Furthermore, the Square system allows restaurants to collect personal information about their patrons that was previously unavailable, adding a new marketing opportunity for these businesses but also opening up new opportunities to run afoul of laws prohibiting certain customer communications. --- Tai Shadrick Kluemper

Arcus Lending Creates Mortgage Industry's First Digital Human

"Rachel is an AI-powered digital human trained to answer questions that borrowers may have about the mortgage process."

Why this is important: There is a continued evolution of artificial intelligence in the mortgage process. If you're working with Arcus Lending, a San Jose mortgage lender, to originate a mortgage loan and you have questions, hold down on your electronic device's space bar. A young female named Rachel appears, and she can help you with your questions. But, Rachel isn't biological (should I say "real"?). She's what Arcus calls the mortgage industry's first digital human. Her job is to, "supplement[] the work done by human employees." And, she's prepared to learn through experience and analytics as she "evolves" to provide more and more help to the company's borrowers. --- Nicholas P. Mooney II

California Governor Gavin Newsom Signs Legislation Establishing Nation’s Strongest State Consumer Financial Protection Watchdog

"AB 1864 establishes the Department of Financial Protection and Innovation – modeled directly after the federal agency championed by President Obama and Senator Warren – to fight financial predators and cultivate consumer-serving innovation."

Why this is important: California’s governor recently signed a dozen bills that were enacted to protect consumers and establish California’s Department of Financial Protection and Innovation. Over the next three years, the agency will hire numerous investigators and attorneys for enforcement and create teams for education/outreach, technology, and monitoring. The new laws address many facets of consumer finance, including, but not limited to, student loan servicing, advertising, debt collection, utility service, and personal information. The interplay between these new state laws and existing federal law, particularly in the areas of debt collection and student loans, certainly will be areas to watch in the future. --- Angela L. Beblo

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The New Normal of Mortgage Lending

"The great thing about mortgage lenders is their ability to transition to what is ahead and still make the member experience amazing."

Why this is important: Mortgage lending in the era of the coronavirus has changed in some ways and remained the same in others. Mortgage lenders continue to utilize digital platforms for loan applications and processing. On the other hand, some changes have been subtle. Property appraisal became challenging given the inability of appraisers to risk exposure in someone’s home. Most significant was the risk that lenders were willing to take given daily changes in employment markets and the ability of consumers to take on new obligations. Despite these risks, mortgage rates have remained historically low, allowing consumers the ability to refinance. Mortgage lending will remain a necessary form of lending, and the market can be characterized by adaption rather than disruption. --- Bryan S. Neft

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What’s a Loan Servicer to Do About Compliance?

"But then the current economic climate adds levels of complexity, with loan modifications, forbearances and confusion about compliance."

Why this is important: There are a myriad of struggles loan servicers face in attempting to comply with the CARES Act while also providing high-quality service to customers. The CARES Act introduced new forbearance requirements, which injected a new level of complexity into a servicer's multiple duties of providing customers notice of options, modifying loans, remaining compliant, and providing best-in-class service. Some servicers have struggled, as the article discusses. A J.D. Power survey revealed that customers originating or refinancing a loan with one of the nation's largest servicers during the March and April 2020 timeframe reported long wait times and little proactive communication. These issues are compounded by conflicting information about repayment options, confusion about making up deferred payments, and a lack of knowledge about borrowers' rights. --- Nicholas P. Mooney II

Featured Attorney Spilman Profile

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Wesley Shumway is an associate in our Charleston, West Virginia office. His primary focus is litigation. In addition to his work in our Consumer Finance Practice Group, Wes recently was part of a litigation team representing a coal producer in a multi-million dollar coal lease dispute, where he helped secure several pre-trial victories. Wes currently assists in all phases of pre-trial litigation, including drafting pleadings, drafting dispositive and evidentiary motions, conducting discovery, participating in pre-trial motions hearings, and conducting trial preparation.

He received his B.A. from West Virginia University and his J.D. from The Pennsylvania State University, Penn State Law. He is admitted to the West Virginia State Bar.

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