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## Volume 3, Issue 9

### Welcome!

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

We are very pleased to announce that 60 of the firm's attorneys were selected by their peers for inclusion on the 2023 Best Lawyers list, 10 were selected as Best Lawyers "Lawyers of the Year," and nine others were selected as Best Lawyers "Ones to Watch." Many of the attorneys recognized practice consumer finance law and in related fields.

Recognition by Best Lawyers is based entirely on peer review. Its methodology is designed to capture the consensus opinion of leading lawyers about the professional abilities of their colleagues within the same geographical area and legal practice area. Congratulations to all nominated!

Thanks for reading.

Nicholas P. Mooney II, Editor of *All Consuming*

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

### *Mortgages*

### Mortgage Lenders are Starting to Go Broke Amid Rate Spike and US Mortgage Lenders are Starting to Go Bankrupt — How This One Factor Could be Triggering the Worst Surge of Failures Since 2008

*"Last year, two-thirds of the top 20 lenders were non-bank lenders."*

*"Most housing market watchers believe today's conditions — led by stricter lending rules — mean the U.S. is likely to avoid a 2008-style housing market meltdown."*

**Why this is important:** The U.S. mortgage industry is seeing its first lenders go out of business after a sudden spike in lending rates, and the wave of failures that may be coming could be the worst since the housing bubble burst about 15 years ago. Sprout Mortgage and First Guaranty Mortgage Corp. specialized in riskier lending that is not eligible for government backing and are two non-qualified mortgage ("NQM") lenders that recently filed bankruptcy petitions. NQMs use non-traditional methods of income verification and are frequently used by those with unusual income scenarios, are self-employed or have credit issues that make it difficult to get a qualified mortgage loan.

Market watchers say that there is unlikely to be a systemic meltdown as there was in 1998 because there has not been the same level of lending excesses and because many of the biggest banks pulled back from mortgages after the financial crisis. However, a string of bankruptcies could be broad enough to trigger a spike in layoffs in an industry that employs hundreds of thousands of workers, and potentially an increase in some lending rates. In recent years, the NQM share of the total first mortgage market rose: NQMs made up about 4 percent of the market during the first quarter of 2022, doubling from its 2 percent low in 2020, according to CoreLogic, a data analysis firm specializing in the housing market. **As rates rise and the housing market tightens, failures among non-bank lenders could have a significant impact on the overall economy.** --- Bryce J. Hunter

## *FTC Actions*

### FTC Takes Action to Stop Credit Karma from Tricking Consumers with Allegedly False “Pre-Approved” Credit Offers

*"Nearly one-third of some 'pre-approved' offers resulted in denials."*

**Why this is important:** The FTC alleges that Credit Karma’s practice of tricking consumers into taking actions in the company’s interest deceived consumers about whether they were approved, costing consumers time and harming their credit scores. This is the latest in the FTC’s crackdown on digital “Dark Patterns,” a term used to describe potentially manipulative user interface designs on websites and mobile apps. The FTC held a public workshop on Dark Patterns last year, explaining that Dark Patterns can include sneaking extra items into a consumer’s online shopping cart or requiring users to navigate a maze of screens and confusing questions to avoid charges for unwanted products or services. **The FTC alleges that Credit Karma’s Dark Pattern included designing a user interface that advised consumers they were “pre-approved” for certain offers rather than saying they had “excellent” approval odds because consumers were more likely to click on pre-approved offers. The FTC’s proposed order would require Credit Karma to pay $3 million in consumer redress.** --- Tai Shadrick Kluemper

## *Sandbox Programs*

### How Sandbox Programs Can Help Promote Innovation and Consumer Welfare

*"Technological innovation is spurring startups and financial companies to make consumer transactions more accessible, faster and more affordable."*

**Why this is important:** This article discusses how sandbox programs help promote innovation in consumer financial products and services. If you aren’t familiar with sandbox programs, they are programs where technology companies are able to develop and experiment with new and innovative financial products and services with regulators temporarily pausing certain statutory and regulatory requirements that otherwise would apply. The thinking is, if those requirements applied, the companies behind the new products and services wouldn’t be willing to test them if there’s a possibility of violating the law and being held liable. By temporarily pausing the requirements (or making other allowances), the new products and services can be tested and possibly brought to market full-scale. These programs started in the U.K. in 2016 and have since expanded to many jurisdictions. There are 11 states in the U.S. with sandbox programs. **As the article points out, enacting regulatory sandbox programs is an important tool in enabling innovation to bring more products and services (in other**

**words, more choices for consumers) to market. However, the programs should be one part of an overall market-friendly regulatory scheme.** --- Nicholas P. Mooney II

## *Medical Debt*

## Medical Debt Mounts in Rural Maryland, Virginia and West Virginia

*"The US Consumer Financial Protection Bureau said nearly one in four people living in rural Appalachia have medical debt in collections."*

**Why this is important:** The most recent report on medical debt from the Consumer Financial Protection Bureau ("CFPB") reveals an alarming state of affairs for the rural Appalachian region. It is well known that nationwide, medical debt is commonplace, and one-third of all Americans carry some level of medical debt. After all, medical debt continues to be a leading factor contributing to consumer bankruptcy filings in the United States. The data for the Appalachian region indicate that nearly 25 percent of adults in this region currently have medical debt in collections. Medical debt can be a heavy burden on consumers, and has an impact that spreads widely across the overall economic market in a region. A June 2022 report from the Kaiser Family Foundation revealed that as many as 63 percent of adults will cut back on basic needs like food and household items (e.g., cleaning supplies) as a means to pay down their medical debt. Unfortunately, cutting back on these items can result in an adverse impact on physical health, creating a debt cycle. This can spread to other indicators, also reflected in the CFPB report. For example, the CFPB report also indicates that consumers in the rural Appalachian region were denied mortgage applications at nearly double the national rate in 2021. **Consumers, providers, and collectors should familiarize themselves with alternative options available in the region, through state-run programs, charitable organizations, or provider payment options, to alleviate the medical debt burden and avoid defaulted obligations.** --- Brian H. Richardson

## *Auto Loans*

## Capital One, Other Lenders Tap the Brakes on Auto Loans

*"Alternatively, credit unions have seen success with auto loans, according to an industry leader."*

**Why this is important:** Supply side issues and rising interest rates are impacting the auto loan markets. Used car financing is driving much of the loan origination volume – roughly three quarters of all cars financed through the Credit Union Direct Lending ("CUDL") system year-to-date were used cars. Several lenders, including Capital One Financial and Citizens Financial Group, have announced plans to curtail their auto financing business, citing a more challenging market environment led by the end of stimulus and supplemental unemployment benefits, and inflation.

On the other hand, data shows that credit unions are gaining market share in the auto lending marketplace. As of May 2022, more than 611,000 auto loans were funded through credit unions in the CUDL network, a 20.8 percent annual increase, according to data from AutoCount. The CUDL network is collectively the largest auto lender in the nation and includes 16,000 auto dealers in the U.S. **This data demonstrates that use of technology and direct touches with the consumer continue to benefit those lenders willing to embrace it.** --- Bryce J. Hunter

## *Instant Payment Systems*

## The US Government Just Teased Its Instant Payment System for 2023

*"The Federal Reserve announced it expects its FedNow Service, a new online system facilitating instant, digital monetary transactions between people and businesses, to come online sometime between May and July 2023."*

**Why this is important:** We now have a proposed timeline for the roll-out of the proposed digital transaction service from the Federal Reserve. Some analysts see the announcement of the forthcoming FedNow Service as another positive step toward advancing a Central Bank Digital Currency ("CBDC"). Third party digital transaction platforms certainly have their challenges. Consumers frequently cite balance minimums and transaction fees as a barrier to entry for digital transactions and banking. Supporters of the proposed FedNow Service are suggesting that because the service would be centralized, with direct access to the Federal Reserve, the service could eliminate those barriers and fees for consumers. Critics are cautioning that there are many privacy and access concerns yet to be addressed. **It is clear that the implementation of the service is quickly becoming a matter of "when" and not "if" it will be deployed, and the market would do well to prepare for that moment.** --- Brian H. Richardson

### *Date Security*

## Financial Firms Liable for Consumer Financial Protection Violations with Lax Data Protection, Agency Warns

*"The bureau said the circular does not suggest that particular security practices are specifically required under the Consumer Financial Protection Act (CFPA)."*

**Why this is important:** The Consumer Financial Protection Bureau ("CFPB") recently jumped into the data security pool. Pursuant to a circular published by the CFPB, financial companies may be in violation of the Consumer Financial Protection Act ("CFPA") if they fail to take adequate measures to safeguard consumers' data. While the CFPB did not specifically require any particular actions financial companies need to take to protect consumers' data, it did offer a few suggested actions. **These suggested actions included the implementation of multi-factor authentication, adequate password management, and timely software updates. The CFPB went on to state that a financial company's failure to implement these simple suggestions could trigger liability under the CFPA.** --- Alexander L. Turner

### *Bankruptcies*

## Summer Ends Amid Rising Bankruptcies

*"According to Epiq, total filings also show a 15% increase month-over-month compared to the July 2021 total of 30,854 filings."*

**Why this is important:** Ask any bankruptcy practitioner how their second and third quarters of 2022 have been, and they'll all respond the same way: "Slow." Across the country, bankruptcy filings remain at historic lows. Looking toward the fourth quarter, filings are trending upward. Much of the upward trend is being driven by small businesses who are taking advantage of the unique provisions of subchapter V of Chapter 11 to address the challenges of expanding debt loads, rising interest rates, inflation, and supply chain complications that are having an adverse impact on their ability to get ahead as the nation emerges from the effects of the pandemic. This updated data report stems from a joint initiative of Epiq Bankruptcy and the American Bankruptcy Institute with the goal of providing "the most current bankruptcy filing data for analysts, researchers, and members of the news media." When a bankruptcy is filed, certain obligations (and deadlines) are triggered for debtors and creditors. **Lenders, creditors, debt collectors, and borrowers should be aware of the impact that a bankruptcy filing can have on their portfolios, and periodically review their accounts for bankruptcy filings to protect their respective interests.** --- Brian H. Richardson

### *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 months of September and October 2022.

**U.S. House Committee on Financial Services**

- September 20: Alternative Payment Systems and the National Security Impacts of Their Growth
- September 21: Holding Megabanks Accountable: Oversight of America's Largest Consumer Facing Banks

**U.S. House Committee on Small Business**

- No pertinent September or October events are scheduled at this time.

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

- No pertinent September of October events are scheduled at this time.

**U.S. Senate Committee on Finance**

- No September or October events are scheduled at this time.

**U.S. Senate Committee on Small Business & Entrepreneurship**

- No September or October events are scheduled at this time.

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