Consumer Finance Monitor (Season 3, Episode 16): The COVID-19 Crisis: A Look at the Consumer Financial Regulatory and Litigation Fallout

Speakers: Alan Kaplinsky, Chris Willis, Richard Cordray, and John Roddy

Alan Kaplinsky:

Welcome to the Consumer Finance Monitor Podcast, where we explore important new developments in the world of consumer financial services and what they mean for your business, your customers, and the industry. I'm your host today, Alan Kaplinsky and I'll be moderating today's program. I chair the Consumer Financial Services Group at Ballard Spahr. For those of you who want even more information, don't forget our blog, which is also called consumerfinancemonitor.com. We've been doing our blogs since 2011, and there is a lot of content there. We also regularly host webinars on subjects of interest to those of you in the industry. So to subscribe to our blog, you need to just go on our blog and you can self-subscribe, or if you want to get on our list for webinars, visit us at ballardspahr.com. And if you'd like our podcast today, please leave us a review on either Apple Podcasts, Google Play, or wherever you might get your podcast.

Alan Kaplinsky:

So we have a very special podcast today. I'm joined by three guests. Let me introduce our guests and then I will describe for you what we're going to be talking about today. First of all, I'm pleased to be joined by my partner, Chris Willis. Chris is the Practice Leader of our Consumer Financial Services Litigation Group at Ballard Spahr. And Chris pertinent to the topic today has had many years of experience handling both government enforcement actions and plaintiff's consumer class actions. And you'll find out in a moment why that background is so important today. And then I'm joined by a very special guest Richard Cordray. Rich is a lawyer and a former public official who's the author of the recently published book, Watchdog. We did a podcast where I interviewed Rich not too long ago.

Alan Kaplinsky:

And I interviewed him about his book, which chronicles his six years as the Head of the Consumer Financial Protection Bureau. He served as the first director of the CFPB from 2012 to 2017. And he has many... Prior to that, he was Ohio Attorney General and he's received many awards over the years, which are too numerous to mention. And then finally, I'm pleased to be joined by a colleague of mine John Roddy, who is a partner at the firm of Bailey & Glasser. I've known John for probably more than two decades. John represents consumers in class actions, challenging, unfair, and deceptive business practices. In the last two decades alone, the settlements in cases he has litigated have returned more than 950 million to consumers who had been harmed by marketplace misconduct. He also, like myself, has co-chaired the POI Annual Consumer Financial Services Institute.

Alan Kaplinsky:

I founded that program 25 years ago, John joined our program five years after that. And it's been a pleasure to have worked with John during that period of time. Now, let's talk about our program today. The title of the program is Consumer Financial Regulatory and Litigation Fall-out from the COVID-19 Crisis. There's been a lot written and talked about the public health implications of COVID-19. There's also been a great deal of focus on the impact that the virus has had on businesses with many, many businesses closing and of course still closed indefinitely with no particular end in sight although the hope is it won't go on for too much longer.

Alan Kaplinsky:

So in today's webinar, we're going to be focusing on what I'm going to call the third leg of the stool, the impact on consumers and the impact has been monumental. And there will be a lot of consumer losses. And courts will be trying to figure out who will end up bearing the losses. And they'll be looking for deep pockets both the government and private litigators like our guests today, John Roddy. So that is the focus that we're going to have today during our podcasts. And so let's get into the detail.

Alan Kaplinsky:

So now we have a lot to run through during the next hour and we're going to move very quickly. And the way we're going to operate is certain people will take the lead on answering or responding to the issues that are on the slides. So the first slide talks about regulatory agency reactions to the current crisis. And we mentioned that a number of states have been very proactive, most notably, Massachusetts and New York. But there's really very little, if anything that... I won't say, if anything, they have done some things that the CFPB has done so far and really we're going to give them some ideas today on some things that they should be doing. So going to the next slide we talk about fraudulent schemes related to COVID-19.

Alan Kaplinsky:

And maybe that's probably the one area where the CFPB has come out with an advisory warning consumers about the need to be very careful because the scam artists, they're probably the only ones that view what's going on now as actually an opportunity for them. And it's a sad state of affairs that they are out there in full force and they there's no end to the scams that they are trying to perpetrate. And both the FTC and the CFPB and the states have been warning about that. So let's move onto the next slide. And I'm going to ask John to talk about this because I would say Massachusetts and the Massachusetts attorney general is really been the most active in dealing with debt collection. They've already issued emergency debt collection BREGs. And so John, why don't you tell our audience what's going on there?

John Roddy:

Yeah, sure. Thanks, Alan. And we highlight Massachusetts here both because I'm located here in Boston, so I'm much more conversant with what the Mass AG is doing versus California or Illinois, other proactive attorneys general, but essentially I expect that the other AGs, particularly those of places like Chicago and San Francisco are going to pursue very similar regulatory approaches because as slide two highlighted what we're going to see, I believe, is a repeat of what happened in 2008 during the great recession, foreclosure rescue scams, debt relief scams, credit repair scams and violations of various UDAP statutes as well as federal laws by debt collectors and others who are in the consumer financial services industry.

Alan Kaplinsky:

Okay. So let's move on to industry practices or borrower harms that will interest regulators because there may not be an immediate reaction by the regulators right now, but you can be sure when the smoke clears that the regulators are going to be looking for situations where they think a company acted improperly. So Rich, I wonder if you are really well-suited to comment on that question of what are some of the things that the regulators are going to be concerned about. And in fact, let me back up a slide. I went too far. There you go.

Richard Cordray:

Okay. Thanks, Alan. First of all, let me go back to the slide that talked about frauds and scams, because what we basically said was everybody's going to be very concerned, they are going to proliferate. They are proliferating. They proliferate around every crisis. Every time there's money available for people or every time people are desperate for whatever it may be right now, it may be testing or treatment, you're going to see these scams. And the advice you can give to clients and to consumers and customers is if they're getting unsolicited offers from anyone over the internet, over the phone, through the mail, and those offers involve them giving up money for banking or financial information, they should be very suspicious of those offers. They should make sure they know who they're with and they often don't in any of those settings. So that's the first point.

Richard Cordray:

Coming to this slide, which builds on the prior slide, we are in an emergency situation now. This is not business as usual, it is business in an extraordinary time. Think about it this way, some of you may be chasing at some of these orders that are coming down from governors and attorneys general but this is the way things are going to be for at least a small period of time here. Hopefully, not too long a period of time. Emergency orders are given a lot of latitude and they can be quite draconian. For example, my brother is a dentist in Ohio. His business has been shut down. He cannot pursue his business now. He's done nothing wrong. It's merely a health precaution, but it's a draconian step. If they can do that, then they can do things like, say, that you cannot pursue debt collection in the normal ways, they can cut off your ability to garnish wages or file actions in court.

Richard Cordray:

Many courts are actually closed right now. And so what I would say to people as a matter of practical advice right now is you are going to have to, even if you're a national business, pay very close attention to updated events in state by state situations. The governor's may be issuing orders, mayors may be issuing orders, other officials may be issuing orders. I've urged the CFPB to act as a clearing house of information so that you can go there as a one-stop shop. I don't know if they will take me up on that or not, but I think it's difficult for businesses right now to follow what guidance is available or even to know what it is. But you can understand that if you do not follow that guidance, you could be subject to enforcement, actions, and penalties.

Richard Cordray:

They are arresting people in some places right now for going out of their homes and violating stay in place orders. They certainly can bring enforcement actions against you if as a condition of an emergency order, you have violated that in the way you do your business. So you need to be very careful right now.

Alan Kaplinsky:

Okay. Well now, thanks Rich. Before we move along to the next slide, Chris do you have any comment on anything so far that Rich and John have said?

Chris Willis:

Yeah. What I would say is from the standpoint of financial institutions, you know after the 2008 crisis, that the regulators, both federal and state thought there needed to be a reckoning for practices on the part of the industry that the regulators found offensive during the 2008 crisis. And there's no reason to believe that we won't have another reckoning after this one. So when we think about our operations and we need to do so, not just from the standpoint of what do we need to do to keep the doors open and keep the business going, fulfill our regulatory and other requirements, but how are we positioning ourselves to either be a target or not for that regulatory reckoning that will follow the crisis.

Chris Willis:

And that I think means doing as much as we possibly can to try to assist borrowers or account holders or whoever it may be with the situation that they find themselves in. And I think those companies that do a poor job of that and who do continue to act as though business is as usual, will be the ones who are most likely to be targeted in this reckoning that I think pro-lifer.

Alan Kaplinsky:

Right. Julie and I wonder if you could push the slides, I'm having difficulty at my end. So we could go to the next slide. And this is the CFPBs, Bailey with mortgage lending, debt collection and credit reporting. They were really the three things, Rich, that you identified in your letter to Kathy Kraninger and to Maxine Waters as areas where you thought the CFPB could be much more proactive than they've been, could you explain to our audience what you mean by that? What do you think they should be doing right now?

Richard Cordray:

Sure. The CFPB is a great source of information about violations of law and compliance with law. And they have so far kind of viewed this crisis as an educational opportunity to inform companies and consumers once again of what their requirements are and to encourage them to meet them. I have said today in this white paper which is available linked in the Vox story, and it's also posted on medium that the Consumer Bureau has to right now step up and be more active as not just a talking agency, but a doing agency to enforce these protections for the public. Mortgage servicing foreclosure moratoriums are in place right now for the government backed mortgages, there will be efforts made to put them in place across the entire range of mortgages. But if mortgage servicers don't act in response to people's requests or people can't get through long wait times on calls, then they will not get this relief.

Richard Cordray:

And my point is that the CFPB needs to be monitoring closely right now to make sure that what has been promised is being delivered. And for mortgage servicers, that's going to be hard. This is the bottom of the cycle that's always the hardest time, but they have to have built their models to be able to handle the bottom of this cycle and they have to be held to account if they don't. The same thing goes for debt collectors. They are going to be under a lot of pressure. They typically collect based on making a margin on the collections they make and they go on commission and if they don't collect, they don't get paid. It will be harder to get paid right now. That's, they're going to be harder to collect. People have less money. People are behind. They're going to be trying to do things like garnish stimulus checks and the like, and my guess is the federal government will quickly come out with guidance that says, "Do not do that."

Richard Cordray:

I think you need to be very careful right now about what you're doing with your businesses. And I think the CFPB has to be very active at making sure that the new parameters are being observed. And remember as Chris said about the reckoning, there were enforcement actions brought against companies years after the financial crisis hit to total up for misdeeds and violations that had occurred. And the same thing will happen again. So you should not think that just because a lot of people are doing something that you should as well. If you know it's in direct contravention of orders or guidance or whatever it may be, you need to be very, very careful right now and think about going the extra mile to be consumer friendly.

Alan Kaplinsky:

Hey Rich, you also commented on credit reporting as another area where companies ought to be very careful on what they're reporting, what do you have in mind there?

Richard Cordray:

Yeah. Thinking about this from the standpoint of consumers, there's going to be a lot of potential adverse information reported on into their credit files, but information that is reported during this pandemic when we're under emergency orders nationally and state by state should be rated with the code that indicates that people are not held at fault for not being able to pay their debts during a time when they're subject to a national emergency, this is a little like Hurricane Katrina for the state of Louisiana. At that time, it wasn't a fair indicator of people's credit worthiness that they couldn't pay their debts for a period of time when they were trying to recover from that hurricane.

Richard Cordray:

Right now, it's a national hurricane and the credit reporting companies are going to have to be on the job and the furnishers to make sure that they're reporting things accurately and not putting adverse credit into people's files at a time when that is not the proper way to assess them. And there was already language in the Cares Act. By the way, it looks like there's going to be another congressional action may be also major and have other provisions in it and credit reporting companies in furnishers need to be very careful right now about whether they handle those things properly so as to benefit consumers.

Alan Kaplinsky:

Chris, I'm wondering if you could comment very briefly on Rich's three areas where he is suggesting that the CFPB ought to be a lot more proactive. Do you have any concerns as to how far the authority goes in that area? I mean, could they mandate, come up with an emergency reg saying that everybody has got a grant, a forbearance for the next two or three months whether they like it or not. I'm just wondering what you think of that as an industry lawyer.

Chris Willis:

Yeah. I mean, I think something that goes as far as that and saying you have to give everyone a forbearance for two or three months, it would be a stretch, I think, to say that the Bureau has the authority to do that, because it would have to essentially say that the failure to give a forbearance is always in all cases an unfair or deceptive or abusive practice. And then there's also safety and soundness considerations if the targets of that order happen to include federally insured banks, which it would because then you're directly impacting the terms of credit and the collection of bets that are necessary to keep the banks going as they're going concern. I think that would be a surprising thing for the Bureau to do. And I haven't heard any indications that it is considering doing anything like that, but there's certainly a need for financial institutions to treat consumers gently during this crisis.

Chris Willis:

And there's a good business reason in addition to a regulatory reasons for that. Because if you treat consumers more gently and give them an opportunity to get back on their feet, many of them will show the ability to get back on their feet and become current on whatever obligation they may have. But if you continue to impose late fees and engage in collection activity, that could be disruptive to the consumer's ability to actually get on their feet again and we could drive more accounts into ultimate charge off by not being sensitive enough to people's circumstances.

Alan Kaplinsky:

Okay.

Richard Cordray:

Let me add a question to what Chris just said. There's no question that it would be surprising to see the Consumer Bureau say that there still will be a moratorium on all mortgage payments during this crisis. There's a lot of surprising things happening right now though. Would it be as surprising if the president, as part of an executive order pursuant to his emergency authority in this time of declared emergency, to say the same thing, would it be surprising for Congress to say if they've already said it about government back mortgages. A week in this crisis is a lifetime. And what is being said today will not necessarily be the same thing that's said next week. At the same time, governors and some mayors have imposed more times in their state or attempted to under their own emergency powers against foreclosures and against evictions, even evictions for rent, which is clearly outside of the CFPB normal authority. And you can try to battle those orders in court for their legality for years to come, but it's not at all clear they won't be upheld as proper emergency powers during a time of distress and crisis.

Alan Kaplinsky:

Yeah. That's cool.

Chris Willis:

And Rich, just to add to that even if you have an order from a governor, a president, an attorney general, whatever, that you may think is questionable in terms of legality or preemption or anything like that, there's still a pretty significant reputational issue for financial institutions to address in deciding whether it's a fight about it or not.

Richard Cordray:

That's too little.

Chris Willis:

And I think there'll be a lot of latitude given to orders for that reason.

Alan Kaplinsky:

Yeah. Good points. Okay. Moving on. So John, let me go to you right now. And the issue we've raised on the next slide and that is what about businesses that are deemed to be essential or those that end up defying closing orders. I know we're getting inundated with calls from clients who are seeking advice and I guess it's sort of a combination of labor law device and healthcare law, et cetera. But while they want to know what do they do if one of their people is diagnosed positive with the virus, do they have to let everybody not only fellow employees know about it but also let customers who may have come into contact with that individual, they have to let them know about it as well. There's going to be a lot of litigation. Don't you think, John?

John Roddy:

Yeah, I think there'll be a tidal wave. And I won't speak to the labor law issues, but certainly from the consumer standpoint, this is just an extension of sort of the bedrock principle under most mini FTC acts that the number one duty that sellers have is to fully disclose all of the material considerations that a reasonable consumer would be thinking about and deciding whether to enter into a transaction. And if I want to enter into your store, I certainly would want to know in advance if there's somebody in there who tested positive, or if there's any kind of risk to my health. And I think that there's an obvious economic tension between keeping your business as a going concern and making enough money to keep the lights on and making sure that you tell people what risks may exist and making sure that you've taken enough prophylactic measures to ensure that if as a business person you do get sued for a health-related concern or otherwise, that you've done everything reasonably possible to ensure the safety and health of your customers.

Alan Kaplinsky:

Right. You have that and then there's the other tension created by the perceived need to protect the privacy of your employees that have come down or who have tested positive and probably aren't real keen about that information being widely circulated. So that's another concern. So let me go to you, Chris, on this next slide, and that is, can state law require changes that impact the terms of credit, like waiving late fees, waving over the limit fees, changing the due dates, the payments, stopping the accrual of interest. And I guess I could go on and on, what's your reaction there?

Chris Willis:

Yeah, sure. I mean, if we're talking about state chartered entities, let's leave national banks and federal savings associations aside for a minute, there's obviously no preemption reason why a state couldn't do that. The legal reasons I could think of in opposition to a state trying to do that would be more like sort of due process or taking these clause or that sort of restriction on state action. But then again, as Rich pointed out a few minutes ago, these are extraordinary times where it's possible that courts will give state officials, legislatures, governors, attorneys general or whoever very expansive authority to do things like that. And so I don't think it is beyond the realm of possibility for a state to do that through some sort of regulation or legislation. It could be subject to challenge in court. But then again, the person who decides or the company that wants to challenge the court has to be the poster child for resisting a measure that was designed for the welfare of the system state during a pretty intensified history.

Alan Kaplinsky:

Yeah. So what if national banks and federal thrifts, they don't have to worry about things like that because they get federal preemption?

Chris Willis:

Well, I think legally, they may not have to worry about it because if we look at the OCC preemption regulations for national banks and federal savings associations, one of the things that the OCC says is presumptively preempted when acted upon by state law for one of these national chartered organizations is "the terms of credit". And keep in mind that as regards to late fees, those are considered interest under section 85 of the National Bank Act. So it would be subject to interest rate preemption.

Chris Willis:

And so I think there's every reason to believe in my mind that a state pronouncement of that nature would be preempted by federal law as it relates to national banks. But that doesn't mean I think that national banks don't have to worry about it because it goes back to the reputational thing that you've heard me and Rich talking about a minute ago, which is if you have a state that says, "Hey, I don't want you to charging late fees to my citizens for the next two months," is a national bank that has a reputation for tech wanting to buck that order. So I think the concern for nationally chartered organizations is more reputational than legal, but still it's the big concern. That's my view on it.

Alan Kaplinsky:

Yeah. Okay.

Richard Cordray:

I would agree with what Chris just said although I would say this, the legal standards for preemption were changed in the Dodd-Frank Act in ways that are somewhat uncertain. They have not been fully tested in court yet. And the regulations of the OCC and what their application is now is also not clear, probably the worst setting in which a national bank would want to test preemption would be this setting of the national emergency with the declaration by the president and by many governors and the kind of things we're seeing happening such as closing of businesses all together that probably would be the worst place to try to test the bounds of preemption. And it might make some bad law for national banks that wouldn't be applied in a normal situation.

Alan Kaplinsky:

I certainly agree with that observation Rich. So John, let's go to the issue that we've raised on the next slide about... Do you foresee here an avalanche of foreclosures like we saw in 08 and 09 during the last recession. And what's all that going to mean?

John Roddy:

Well, I don't think it takes much insight to foresee that. I guess the real question is incorporating the whole idea of reputational risk and the unique nature of the challenge we all face right now is to what extent do the remedies, the relief provided in the Cares Act and some state regulations and in the marketplace with lenders understanding that to the extent that this pandemic creates a situation that is reflective of what happened to the national economy during the 2008 recession with the foreclosure crisis, the ramifications are overwhelming for everyone. And once the avalanche begins, it's awful hard to slow it down. So I think that there's likely to be a more reasoned and thoughtful approach by lenders to foreclosure issues and presumably maybe to some debt collection issues as well. But I also think the courts are going to be so overwhelmed with litigation that it will take another decade for all this stuff to finally pan out.

Alan Kaplinsky:

Yeah. Okay. So well Rich, let me go back to you for the next issue and that is housing and wrongful foreclosures by lenders and services and lack of awareness or failure to comply with state moratorium and emergency restrictions. I wonder if you could comment on that.

Richard Cordray:

Yeah. I do think from the last slide that we will see ports clogged with foreclosure cases as we come through this. It's not clear by the way under the Cares Act even when forbearance is being given on mortgage payments, how that's going to be handled yet on the backend, whether that's simply going to be tacked onto the back of the loan and you keep paying your normal amount per month, or whether they're going to say it's all due all of a sudden at the end of this period, which would be cataclysmic for a lot of homeowners. And there will be a lot of foreclosures. What I would say here is the paperwork that is required to get a foreclosure deferral under the Cares Act is much simplified. We've learned some lessons from the 2008 crisis. You remember many mortgage servicers got totally tangled up in the paperwork at that time.

Richard Cordray:

They would lose it repeatedly. It would not be completed. It would be somewhat complete, partially complete, homeowners were confused. This is much simpler. Basically, all you're required to do is contact your loan servicer and let them know that you're having some sort of pandemic related hardship, which is not difficult to do, millions and millions of Americans clearly are filing for unemployment or have lost their jobs or are losing hours, even if they haven't lost their job. And that should be much simpler to process. By the way, I think it's going to be an issue for services if they are not providing reasonable access to simply be contacted, to let them know and put in the file that you are a forbearance customer. If they block you because the access is unreasonable such as it's taking days and days to get through on the phone, it may be the courts will grant that the consumers made a reasonable effort and the forbearance should have been granted.

Richard Cordray:

That's not an inconceivable legal holding in these situations. So the services need to be on their metal. They need to make themselves available. They need to boost their call centers even if they have to do it through remote operations. And they need to allow consumers to get to them easily. They don't have to provide any paperwork, any detail. So this should be much easier to process. That's what Congress clearly intended. That's what the services need to now carry out. And by the way, the other thing is evictions. Evictions are not, of course, a credit situation. It's a rent situation, but at least several governors, many governors have issued emergency orders. Some of them are restricting evictions or declaring that the courts should not be available for evictions, or that there should be extra procedures in place. Again, you're going to need to keep up with this on a state by state, maybe even city by city basis. That's going to be hard on business, no question. But that is part of the reality of what's happening out there. And people are going to need to be kept up to date on it.

Alan Kaplinsky:

Yeah. Thanks Rich. And just by way of clarification, the reference that you made to the Cares Act and the mortgage payment moratorium, we're talking about federally related mortgages, it covers certainly a majority of the mortgages in the country, but doesn't cover all of them. Am I right?

Richard Cordray:

At this point, correct. But any GSC backed mortgage... And by the way, typically the consumer may not even be sure whether that's true or not, but it's easy for the mortgage services to tell whether that's the case. But I also wouldn't think it's at all unlikely that within another week or two, it may be broadened beyond that. And I think some state governors are trying to do that right now. So again, people are going to have to need to keep up to date on fast moving events.

Alan Kaplinsky:

Right. For sure. Now on the next slide, we talk about the CFPB loss mitigation, BREG Acts, and Rich I'm wondering if you could comment on how they come into play here?

Richard Cordray:

Well, it's going to be interesting because those BREGs were put in place to boost the way mortgage services do handle these situations. And of course, in a normal cycle and by the way, we've been in not a normal cycle, but a very strong economic cycle for several years now, that has been a fairly easy job. Now, suddenly it is going to become a very difficult job, but again, because the Cares Act has simplified the paperwork on this for all government backed mortgages, it should be easy enough for servicers to handle it as long as they make themselves accessible to their customers. As for the other mortgages again, we'll see if the landscape changes on those, but the mortgage services are going to have a lot of work to do. They are used to complying with these rules now, so they should be able to do it, but the volume is going to be a very great challenge. There's no question about that.

Richard Cordray:

And my point to the CFPB is they need to keep the pressure on to make sure the servicers perform because this is an area where if they don't perform, it's consumers who will be hurt and our communities will be hurt and we will have many needless foreclosures of other people where six houses are foreclosed in the subdivision and my price drops dramatically. That's what happened in the last crisis. And we should try our best to keep it from happening here.

Alan Kaplinsky:

Yeah. Chris, do you have any comments before we move along on this slide?

Chris Willis:

Yeah. Just recently... To me, one of the biggest lessons of what happened in 2008 was that you saw a dramatic amount of regulatory enforcement activity arising from mortgage servicing that wasn't scaled up to deal with the amount of foreclosure and loss mitigation demand that was occasioned by the recession that occurred then. And so echoing what Rich just said, the volume will be higher now. And so I think dealing with that volume will be one of the principle important challenges for mortgage servicers to do. And the Reg X requirements are ones that the CFPB put in place as a response to the 2008 crisis. And I don't believe it is likely that the Bureau will do anything but stringently impose those requirements, even though the volume has increased. I don't perceive there are likely to be any wiggle room there.

Chris Willis:

And in fact, I think both supervision and enforcement in this area will be intensified in the aftermath of what we're going through right now. So making sure that there's adequate staffing and resources for those loss mitigation and other mortgage servicing related issues when servicing becomes difficult as it is about to right now is something that institutions would wisely take note of in order to avoid more $50 billion consent orders like we saw after the 2008 crisis.

Alan Kaplinsky:

Okay. Yeah, thanks.

Richard Cordray:

And let me say another point about mortgage servicers is that the effect of their performance tends to be concentrated in local areas. You'll have the same mortgage servicer have a presence in a particular subdivision because of the way it's financed and the like, and if they perform poorly, you will have numerous foreclosures and it will affect innocent homeowners in that same area as well. I talk in my book Watchdog about a couple of Paul and Beth who could not move because their home was underwater because of other foreclosures in their subdivision, even though they had a perfectly reasonable mortgage that they had paid on steadily. That will happen to people if the services aren't functioning properly.

Alan Kaplinsky:

Okay. Rich, I'm wondering if you could comment on this next slide predatory lenders targeting people who've been laid off or terminated or furloughed.

Richard Cordray:

Well, that's certainly will be happening. The availability of high cost loans, especially over the internet, but also in not all but many states is ubiquitous now. And people are going to be desperately in need of money. And so it's not just scams, but there will be very high cost loans being offered to people. Then they will also try to scam the programs that are getting money to people. They'll try to insert themselves as middleman and say, "If you're going to get your money, you have to pay us, or you have to give us your bank account information or to get it faster you have to do that." These are all concerns.

Richard Cordray:

They're going to pollute the intended government efforts. There are going to be websites out there that are fictitious and fraudulent that will confuse people about the legitimate places to go to get this help. It's going to be a mess. And it's important for scams and frauds to be policed vigorously but at the same time we need to make sure consumers understand that predatory lending is not necessarily going to improve their situation even though it's hard to make that case when people are desperate.

Alan Kaplinsky:

Okay. So John, we haven't heard from you for a while, but I know this is a subject near and dear to your heart, student lending and which has been a problem area for probably more than a decade. I'm wondering what you think the impact of the pandemic is going to have in this area.

John Roddy:

Well, similar to the distinction in the Cares Act as it currently exists between government sponsored loans and privately held loans, student loans are basically divided in about a 70, 30 ratio as well, between those that are owned by DOE and including those that are in default that become technically privately owned. And so although a lot of students for whoever the payers might be of those student loans, will get a break for the 180 days on payments and interest under the Cares Act. Those 30% of loans roughly that aren't government owned do not have any of those remedies or options for relief available.

John Roddy:

And so those borrowers are facing obviously an incredibly difficult situation as well as the lenders facing an incredibly difficult situation because the income streams of however many student loans we might be talking about 30 million student loans with very big numbers attached to them as anybody who's paid off college tuition in the last few years knows, that's going to create essentially the tsunami wave in the middle of the ocean that's only three feet high is now about to hit the shore. And it's going to rise up to be about a 50 to 100 feet high. And it's anybody's guess as to how much damage that wave is going to cause when it crashes the shore.

Alan Kaplinsky:

Okay. And Rich moving along, we're still talking about student lending here, but could you comment on the next slide?

Richard Cordray:

And this is actually a piece that was omitted from our white paper out this morning. But it's going to be addressed by the Student Loan Borrowers Protection Group very shortly and maybe already has been today. You're going to have the same kind of servicing problems on student loans that you have on mortgages. The government has declared that there will be interest relief on student loans but that needs to be delivered upon and call centers are going to have to be available to the customers so that the servicers can process what are going to be heavy volumes because people will be behind and we need to make sure that the promises that have been made about how they're going to be treated during this crisis are actually carried out by the companies and that scenario where the CFPB's surveillance and the Department of Education’s surveillance, and that of a growing number of states that are looking at student loan servicing very carefully and providing oversight will be critically important.

Alan Kaplinsky:

Okay. And let's move along to the next slide also related to student lending adding to the problem.

Richard Cordray:

Yeah. I think it clearly does add to the problem. And that is the problem, which is that all borrowers will be more behind. This is disrupting education in ways that it's hard to know exactly how that may affect the problem or whether people will graduate as they were intended and be getting their credit and so forth. But this is going to be a very difficult time for servicers, no question. And the job they have to do is much harder. I'm sorry. Somebody else was trying to get in, maybe John.

Alan Kaplinsky:

Yeah, I think John.

John Roddy:

I was just going to add and I didn't mean to interrupt. I'm sorry, Rich. But the factoid that Navient stock price dropped 75% in the space of about eight and a half days is really frightening. As you know, there's really three big student lending institutions entities Navient being one of them and that's one of the linchpins of the entire program. So it's great to try as best we can to provide some relief to student lending, to student borrowers, but without that income stream both the stock price and the ability to keep the lights on of institutions like Navient are certainly at risk. So there's a very delicate balancing act that I think the regulators have to perform here in order to keep everything on an even keel.

Alan Kaplinsky:

Okay. And then I guess going back to you Rich at 1:00 AM on Friday night, the Department of Education issued some additional COVID related guidance, can you comment on that?

Richard Cordray:

Well, I think we're going to get more and more used to things happening at 1:00 AM, whether it's by Congress or whether it's by the SBA or in this case, the Department of Education. And again people are going to have to be on their toes to be on the alert for new changes, unexpected changes all the time. But this guidance again, shows the extreme nature of the situation. This Department of Education has not been all that responsive to student loan problems, but the problems are undeniably large right now. Exactly what to make of this guidance and how it's going to play through the marketplace, I think is difficult to say those for I think we're all still digesting it.

Alan Kaplinsky:

Yeah. Okay. So now moving back to the area of debt collection and I'd like to ask you Chris to comment on the next slide, which basically makes the point that there's likely to be a lot of fair debt collection practices act litigation in the aftermath of the pandemic.

Chris Willis:

Yeah, for sure. I mean obviously when people start to have trouble paying their bills, they become subject to more collection activity. They get into more conflicts with their lenders, servicers, debt collectors, et cetera. And so there's going to be more litigation, more complaints, more regulatory activity. And I think we talked earlier in the webinar about the necessity of taking a looser approach with debt collection right now. And I think companies that fail to do so are going to be the ones sort of at the top of the list for the regulators to pay a visit to when the crisis starts to resolve.

Alan Kaplinsky:

John, do you have any comment on what Chris said?

John Roddy:

No, only that I would add that as you know, we do a lot of work with the National Consumer Law Center and they have been at the forefront of trying to be proactive on this score. And hopefully the CFPB could take its cues from them as well as the government with respect to the stimulus payments because I'm sure that some debt collectors, because they're facing issues of collecting on their income streams, which keeps them in business, they're going to have to make a decision between following the law or going to court to try to garner stimulus payments, for example, because it's an awful lot of money that's going into the economy in a large cash infusion. So there'll be, I think, huge amounts of litigation over that as well as reputational risk blow back. Again, the ramifications are just too dizzying to really comprehend.

Alan Kaplinsky:

And then of course layered on top of that is the CFPB is right now in the midst of working on a final debt collection regulation. I have no idea when that's going to be finalized, but the rules of the game could change very significantly. Okay. Chris, I'd like to go to you to talk about some of these operational areas that can be impacted by working remotely and how that could lead to more litigation.

Chris Willis:

Sure. And so what I did when I created this list was I was thinking not just to state the obvious, which is that there are operational areas of financial institutions that are impacted by working remotely, but to think about well, what kind of problems might working remotely cause later the financial institutions can be on the lookout for, and try to solve for as best as possible during the time that working remotely is going to be required. So I listed a number of areas here, and you can think about how each of those areas, if it's not functioning correctly, may lead to either regulatory problems or litigation down the line, like call centers and customer service. You heard Rich make the point earlier that the regulators may expect that servicers will be easy to contact to request foreclosure assistance or forbearance or anything like that with respect to their mortgage.

Chris Willis:

Well, that doesn't work if your call center is not functioning because people are working remotely. Collections, if you have people who are working remotely, how do you supervise them and makes sure that they're delivering the gentler message that you want to deliver and not taking a hard line with consumers. The supervision of them becomes more difficult. We talked about loss mitigation in the mortgage area already. So I won't talk about that again, but let's think about investigation of disputes. There's lots of kinds of disputes that regulated entities get under the Fair Credit Reporting Act, under the Fair Credit Billing Act and the Fair Debt Collection Practices Act. If people are working remotely, will they be able to investigate those disputes and resolve them. And if they don't, how will regulators look at that later. The CFPB has made a comment about Fair Credit Reporting Act disputes, and that it will not take action against companies who failed to meet the 30-day timeline there.

Chris Willis:

But nevertheless, if disputes are not able to be attended to, it can cause a variety of problems down the road in terms of further activity on the accounts, potential sale of the account, et cetera. So just by virtue of the CFPB saying, "Well, relax the time requirement a bit," even if that works to apply to ordinary private civil litigation, which I doubt that it does, it still creates a problem down the road. We have to think about compliance, monitoring and auditing, that requires people to talk to one another and review records and being able to do that job cannot be done effectively working remotely. And we all know how important that kind of monitoring is to both the federal banking regulators and to the CFPB and to state regulators too. And then finally I've mentioned bank branch operations and other things dealing with in-person interactions with consumers.

Chris Willis:

Bank branches are generally open, but there's this issue of are people going to get sick, either the employees or customers coming in and then finally fraud investigations. When you're originating a credit accounts, a new credit card account, making a new loan, et cetera, there are a certain number of applications that need to be investigated for potential fraud and contact needs to be made sometimes with the consumer to verify the consumer's identity, to make sure it's not a case of identity theft or a synthetic identity or something like that. And so will those employees be able to do their jobs effectively working remotely.

Chris Willis:

If they can't, then not only do we have a credit loss problem as a financial institution, but we also have potential problems under factor, which requires us to look for red flags and do everything that we can to prevent identity theft. So my point in this list is to say that when we plan for working at home, we have to think about sort of how will these work from home arrangements be viewed by a regulator in three months or six months and design them to the best of our ability in a way that will withstand that script.

Alan Kaplinsky:

Well, and the only other thing I might add at least from the CFPB standpoint, there may be a different director in next year at this time, it may not be Kathy Kraninger it may be well, Rich, are you interested in going back there?

Richard Cordray:

Not interested at the moment.

Alan Kaplinsky:

I'm hearing silence, but my point is that that could change on a dime and whatever you've seen from the current administration may not be what exists in January of next year. So let me go to you John right now. And that is you handle a lot of private litigation, including class actions, and what do you think the impact of the pandemic is going to mean for cases that you're handling where the financial viability of defendants may be in serious question?

John Roddy:

Well, most of what we've been talking about has been forward looking, projecting a week, a month, a year into the future, and ruminating on how this is going to all pan out. In this particular instance, I'm pretty sure I know how it's going to pan out, because we went through this in 2008. When everything virtually shut down, cases in the pipeline just stopped dead in their tracks, a number of defendants because of the impact of the recession on their income streams were unable to fund large settlements. And that took years to work out. I think this is likely to have a much greater long-term impact because the likely economic consequences here are much greater even than what happened during the recession of 2008. So it's kind of the wild West and that's already begun with fielded a number of calls from Defense Counsel regarding cases in the pipeline, as well as some cases that have already been settled. So this is a fast developing story. So I think everybody has to just keep their eyes peeled for what comes next.

Alan Kaplinsky:

Yeah. And I'm wondering John if you could comment on the next couple of slides, because they're really related to the issues that you've raised, that a lot of companies perhaps that you or other plaintiff's attorneys have saddled with or that the government has saddled with their financial situation could have changed very dramatically in a matter of a couple of weeks.

John Roddy:

At least from our standpoint, we're kind of in the position as plaintiff's lawyers with settlements that are in the pipeline are already executing as lenders are with borrowers who suddenly are faced with the inability to make payments, we need to be flexible and creative to make sure that we don't just stand on ceremony and say, well the ink is dry so you have this obligation because having an obligation written down on paper without a defendant that can satisfy it, doesn't do anybody any good. So I think we're going to see a lot of creative solutions and a lot of confusion in the courts with respect to procedural mechanisms that are designed to work in a certain timeline but are now suspended like final approval hearings or even preliminary approval hearings. So again, it's the kind of thing that everybody's relatively making up as they go along and trying to do so in a cooperative way, at least so far.

Alan Kaplinsky:

Okay. So Chris as an industry lawyer, I'm wondering if you would share with our audience certain steps that the industry ought to be taking right now to reduce their exposure to litigation and government enforcement initiatives.

Chris Willis:

Yeah. I mean, what I would say here is rather than tackling each of these individual categories, the overall message from my standpoint is this, financial institutions are in a crisis too. They're having problems with working from home, interruptions to their business and their cash flow, et cetera. And everybody's hair is on fire trying to just make everything work while the crisis is going on. But if we can at least take a breath and stop for a second and think about each process that we're setting up or trying to adapt to the new prices and make sure that we're not thinking just in the moment, but thinking ahead about how whatever we're doing will impact consumers, or will be viewed by regulators three months or six months down the road, we'll do ourselves a huge favor.

Chris Willis:

And so we need to make sure that we don't take a band-aid approach to our own operations and just put band-aids on things, or put our finger in the diets to prevent the flood from happening, we have to be more forward-looking and consider sort of the long-term repercussions to ourselves and to our customers of whatever we're doing right now. And so I think that analysis is the thing that will keep financial institutions in good standing, not just today, but in three months, in six months. And the failure to do that is what will lead institutions into error that will potentially cause the effects of the crisis to outlive the crisis itself in the form of the regulatory reckoning that you heard Rich and me talk about earlier.

Alan Kaplinsky:

Yeah. On this next slide Chris, I think we probably have already covered UDAP a little bit earlier, but I'm wondering if you have any comment on fair lending issues arising out of the crisis.

Chris Willis:

Yeah. And so a number of us in our practice group who do fair lending work believe that there'll be a surge in fair lending enforcement and supervision following the crisis, not because necessarily coronavirus is a protected characteristic. It certainly isn't under a COA, but in the efforts to try to roll out accommodations or deal with consumers who have issues, there can be programs, proposals and operationalization of those that's done hastily that may end up causing disparities between people based on a protected characteristic under either a COA or the Fair Housing Act or a state law. And so we think there'll be opportunities for financial institutions to make an error in the sense of not considering fair lending issues because of the rush to get something done. And so even with the best of intentions in mind, institutions may wonder into a fair lending problem by not adequately paying attention to that as they roll some of these borrower aid or forbearance or loss mitigation programs out.

Alan Kaplinsky:

Okay. And then on this next slide, is there anything you want to add there, we've talked a lot about the moratorium on foreclosures, maybe not so much on other kinds of lending, a lot lending, vehicle repossessions, anything you want to add there?

Chris Willis:

All I would say is that next to foreclosures regulators believe that vehicle repossessions are one of the most impactful things that a financial services company can do to a consumer. And I think aggressive pursuit of repossessions during this time and especially as to people who say that they were impacted by the virus, they may even be sick with it, but they certainly may have lost their job as a result of it are likely to garner a lot of very negative regulatory attention.

Alan Kaplinsky:

Right.

Richard Cordray:

I think that's right. And also reputational risk and being someone who lives in Ohio, not on either of the Coasts, this is critical for people's lives here. That's how they get to work if they're working at all, it's how they get to the store or get food from the food bank. And it also is their ability to get any kind of medical treatment, especially emergency treatment. People need to be able to transport themselves in this part of the area where we don't rely on mass transit.

Alan Kaplinsky:

Right. So John, this slide is one that you created and wondering... Explain what you mean by this.

John Roddy:

Well, essentially what's good for the goose is good for the gander. There are likely to be some defendants who are seeking some leeway with respect to their commercial obligations, but at the same time not giving that same way to consumers who are as a corollary in a similar position to them. And I think that's a likely to be a UDAP violation as well as a UDAAP violation. Again, something within the CFPB's jurisdiction that I think for reputational risk reasons, for economic good sense, and various other business acumen reasons, institutions should consider carefully before they engage in sort of non-reciprocal behavior.

Alan Kaplinsky:

Okay. And then our last slide and then I'm just going to go around the horn to see if anybody's got any final comments or observations, but this one dealing with credit reporting and Chris will tell about that.

Chris Willis:

Well, we had some guidance come out from the consumer data industry association, which of course writes the Metro 2 standard, to provide codes for furnishers to use, to code accounts that are of consumers affected by the coronavirus pandemic. And then of course the Cares Act had a provision that essentially says if a furnisher grants some sort of accommodation like a forbearance or deferment or something like that to a consumer during the period of the crisis, then the furnisher is required to report the consumer as current. During that time if the consumer was current before the accommodation was provided and if the consumer was delinquent before that, then the delinquency status basically stays the same, it doesn't get worse as a result of the accommodation during the crisis.

Chris Willis:

So there's been limited sort of impact there. On April 1st, the CFPB made an announcement, which I alluded to earlier, basically saying that it wouldn't strictly hold furnishers to the 30-day time requirement in the Fair Credit Reporting Act of adjudicating disputes, both direct and indirect disputes under the FCRA of furnished information. But I had a question here and I alluded to it earlier of, well, what does that do in private litigation? Because there is a private right of action to the Fair Credit Reporting Act and I don't view the CFPB as having the authority to change that or amend it, Congress hasn't demanded it.

Chris Willis:

And so even if the CFPB may not take action against the furnisher for failing to meet the deadline, I don't know that that relieves the furniture of the consequences of that time deadline in the statute itself, which is if you don't resolve a dispute within the 30 days, you have to delete the trade line. So I mean, that's the question that I think is something for furnishers to consider because the private litigation may be there even if the regulatory enforcement is not. And you've heard Rich talk about other credit reporting issues associated with the crisis system and I'd sort of go back to his comments earlier in the webinar of that.

Alan Kaplinsky:

Right. So well-

Richard Cordray:

That's an excellent point about the private liability. It also applies of course in debt collection as well, where private rights of action can be pursued and are and that's another reason for debt collectors to be very careful right now, even if they think that there's going to be many people doing the same things and the regulators won't be able to get to the mall, anybody can sue you and they will.

Alan Kaplinsky:

Right. So Rich, wondering if you have any final observations that you'd like to make. Well, we've drawn to the end of our webinar and I'd just would like to give you John and Chris a final opportunity to weigh in.

Richard Cordray:

First of all, this was an excellent presentation of issues in a very fast moving environment. I think everybody can begin to see more risks and bigger risks than perhaps they were seeing last week. And my point is that it's best to err on the side of the consumer right now and I'm also pushing on not just the CFPB, but the state banking regulators and the state attorneys general to make sure that the companies are being consumer friendly and that they're observing all of these different fast moving orders in terms of giving forbearance and complying with different strictures that are coming down. It's tough on companies because of the volume and the magnitude and the distress. It's also tough because some of it is state by state, but everybody's got to step up and do their very best right now.

Alan Kaplinsky:

Okay. And John, how about you?

John Roddy:

Just two comments Alan. The one law that I think is the most stringent in the universe is the law of unintended consequences. And when you combine that with the inevitable conspiracy of ineptitude, I think you're going to find that all kinds of fallout that we can't even imagine will be occurring over the next six months to a year. And we just have to be intelligent and thoughtful about how we go about navigating that territory going forward.

Alan Kaplinsky:

Yeah. And Chris.

Chris Willis:

My sort of closing comment is what I said earlier, which is for financial institutions to take a deep breath, consider what they're doing, try to measure twice and cut once with respect to things that they do during the crisis and keep those long-term consequences in view rather than just living in the moment, because living in the moment, I think, will cause us to make errors that will cause us problems later.

Alan Kaplinsky:

So that concludes our podcast today. And I want to thank everybody who downloaded the podcast today. And I in particular want to thank our guest, Rich Cordray and make sure you download Rich's new book Watchdog on Amazon. It's a great read and it's got a lot of insight that is relevant to today's situation. I also want to thank my colleague, John Roddy, and my partner, Chris Willis. Make sure you visit our website, www.ballardspahr.com, where you can subscribe to the show, or you can subscribe to the show in Apple Podcasts, Google Play, Spotify or whatever your favorite podcast platform may be. And don't forget to check out our blog, Consumer Finance Monitor for daily insights about the consumer finance industry. And if you have any questions or suggestions for the show, please email them to us at podcast@ballardspahr.com and stay tuned each Thursday for a new episode of our show.