Consumer Finance Monitor (Season 4, Episode 40): Preparing for the End of COVID-19 Related Hardship Assistance Programs

Speakers: Alan Kaplinsky and Chris Willis

Alan Kaplinsky:

Welcome to Consumer Finance Monitor Podcast, where we explore important new developments in the field of consumer financial services. I'm Alan Kaplinsky, Senior counsel of Ballard Spahr, and the former immediately preceding chair of the Consumer Financial Services Group. I'm very happy to have as my guest today, the existing co-chair of the Consumer Financial Services Group. So let me first introduce, Chris Willis. Chris, it's been a while since you've been on the program and I'm really delighted you're able to join me today.

Chris Willis:

I am too. I remember it fondly and I'm glad to be back.

Alan Kaplinsky:

Terrific. So what we want to talk about today relates to COVID-19, specifically debt collection and servicing activities during the existence of the pandemic and then after the pandemic is over, whenever that will occur, and we still don't know what's going to happen there. But nevertheless, we still see regulators continuously expressing concern about post-COVID debt collection and servicing activities. Why are we even talking about that, Chris, since COVID is, as I just indicated, doesn't seem to really be over from a public health standpoint.

Chris Willis:

Sure. Really, what the regulators are concerned about is less the public health aspect of it, which I'm sure is of concern to them, but the thing that they're really focused on and what they've been talking publicly about a lot is really the end of COVID-related hardship programs, both those offered by individual creditors and those offered at a national level, like for example, with mortgages and student loans.

Chris Willis:

So the regulators are worried that those assistance programs will cease or run out and that consumers will start having to make payments again, and that they may still be experiencing economic hardship as a result of the pandemic and, or have other problems and they'll have the shock of being reintroduced to having to make regular monthly payments on various obligations and that they'll be unable to do so and may suffer negative consequences of delinquency and whatever follows from that, given the credit product involved. So what they're worried about is sort of the end of those assistance or hardship programs and the impact that it will have on consumers who suddenly have to make payments again. They're worried about whether lots of consumers will be left behind and left to suffer the consequences of delinquency when that occurs. That's the thing that's really driving them at the moment.

Alan Kaplinsky:

Yeah. Chris, for the sake of our listeners who may not be all that familiar or as familiar as you and I are with the various kinds of programs that were either mandated by the federal government or where creditors voluntarily offered various kinds of assistance, could you briefly describe the nature of these programs? You mentioned, for example, that in the area of mortgages and student lending, those are, at least you implied that they're mandated.

Chris Willis:

Correct. So they were for a large segment of both of those markets. So there was a national essential forbearance on all federal student loans that started near the beginning of the pandemic and still hasn't been lifted. So people are not making payments on federal student loans. Likewise there was a long-term federally-insured mortgage forbearance, where for a very long time, there were people who had federally-insured mortgages, who weren't required to make payments on them. Those were the nationally mandated ones. Then at individual creditor levels, you had relaxed deferment and extension programs where people could go longer times without making a payment. You had greater availability of reduced interest rates or payment plans, modifications of loans to make them easier to repay and a variety of things like that that were implemented at the individual private level by creditors.

Alan Kaplinsky:

Okay. The programs that exist at the federal level and the ones that were privately implemented by creditors for non-mortgage and non-federal student loans, all the kinds of credit, did those programs exist only as long as the borrower was unemployed or did these programs once somebody is employed and can afford to make the payment again, that point, does the assistance end? Do they have to make the payments?

Chris Willis:

The federal ones like the student loan one, I think, was across the board and didn't involve whether the borrower was unemployed or underemployed or not. Obviously, borrowers were free to make payments if they wanted to, but they were not required to for a long time. At the private level, generally the hardships programs were available to consumers who requested them and they had to state like, "Well, I'm unemployed because of COVID," or, "I'm having some other impact because of COVID." At least certainly in the later time period, they were only open to people who at least could articulate that they'd been affected by COVID by being unemployed or something like that. They were generally much shorter term. They didn't go indefinitely. They went for a month or two months or three months rather than the federal programs, which lasted quite a bit longer.

Alan Kaplinsky:

Right. So as creditors and debt collectors start thinking about how to handle a world after COVID-related assistance and relief has expired, what should their areas of focus be?

Chris Willis:

Sure. Well, there's two things that I think that creditors and debt collectors should look for. One is going to be very obvious to them, which is what are you doing with your internal hardship programs? If you expanded the accessibility of them or expanded the hardship offerings during COVID, are you going to change those, withdraw them, go back to business as usual as it was in the beginning of 2020? So that would be a focus on your internal hardship programs. That's area number one and the most intuitively obvious one. But the second focus that I think is really important for everybody is to think about how the expiration of some of these larger national programs might affect the payment behavior of your borrowers. Over the past year-and-a-half, the industry data shows that we've had record payment rates on consumer credit obligations.

Chris Willis:

People have been paying their balances. They're not getting delinquent as often. They're even bringing delinquent balances current at record levels. The reason for that is a combination of the federal hardship programs, where people weren't having to make payments on things like student loans and mortgages, and the very free availability of expanded unemployment, stimulus checks, and other things that directly put money into consumers' pockets and consumers managed their finances well. They managed their debt down during that time with the resources that were given to them. But the question is, when those things are no longer true, when we no longer have more generous unemployment stimulus checks being sent out, people have to start paying their mortgages and student loans again, how will that affect their payment behavior on things like credit cards or personal loans or auto loans or whatever other credit product we may have? So I think creditors and debt collectors need to anticipate that something like that may happen. Then how are you going to handle it from a collection standpoint if and when that does happen? That's the second dimension.

Alan Kaplinsky:

Yeah. So Chris, thinking about internal treatment of loss mitigation options that are expiring, what are the considerations?

Chris Willis:

There's really two considerations associated with internal loss mitigation programs or hardship programs that have been applied to people affected by COVID. One of them is how long are you going to continue them? And when will you cut them off? And when you cut them off, are you going to leave someone behind who is still affected and how many people will be like that? That's a strategic question for the creditor or a debt collector potentially to make. But the second thing is for people who have been, or currently are on some kind of hardship program with you, that is your internal program, how are you going to transition them off back into, "Okay. I expect you to make your regular payment again." So there, it's really a consideration of how you design that process because it's your own program. You can probably design it however you like.

Chris Willis:

Also then, how you describe and disclose it to consumers who are going to be terminating their involvement in those programs. Keeping in mind that the regulators' worry is the abrupt and sudden transition from not paying to paying and how do you assist consumers in understanding that that is going to happen, when it's going to happen, and how they can deal with it, I think is really the primary internal focus that we need to have. Then the other question, as I said, about how long are you going to continue the program and will you be leaving lots of people behind who are still unemployed because of COVID or having other economic problems because of COVID maybe caused by medical bills or things like that, and then dooming them to play out the cycle of delinquency all the way through charge off. Those, to me, are the primary internal considerations.

Alan Kaplinsky:

Okay. So Chris, if we see a return to higher delinquency and default rates in consumer portfolios, more generally, what should creditors and debt collectors be doing now to plan for that kind of a situation?

Chris Willis:

I think what we can do is we can learn a lot from the relatively recent lesson when we had a spike in delinquencies and consumer portfolios as part of the 2008 recession. We had a very big spike in consumer delinquency during that time. Remember that the problem that creditors had during that time was they just weren't ready from a systems or a manpower standpoint to handle and deal with the giant volume of collection and servicing activity that they were required to deal with because so many people got into difficulty in paying their bills. Now, I don't think that this situation will be nearly of that scale, but it will be a departure from creditors' and debt collectors' experience over the past year-and-a-half. So I think the point is we need to first prepare ourselves from an operational standpoint to deal with increased demand on our systems and on our personnel.

Chris Willis:

So we need to look at staffing and systems issues, assuming that another 20% of people are in collections or whatever the metric may be. We can watch economic intake and watch our own portfolios to see that happening, but we don't want to be caught flat-footed in thinking that the current high payment rates are going to persist forever because they're unusual. These are record high payment rates that didn't exist right before COVID. So even if things went back to business as usual as of January, 2020, we'd have significantly more delinquency than we do today, so having the staffing and systems in place to handle that. But then the other thing is if you have a greater volume of collection activity, as we would anticipate would happen when these sorts of assistance programs run out, then it raises and gets regulators interested in all the same old collection issues that we've always seen.

Chris Willis:

It's not going to be anything new. It's going to be things like call frequency, respecting do not call and cease and desist requests, making representations about the benefits or consequences of paying a debt that don't turn out to be true, your basic blocking and tackling in terms of collections. But what it means is if you're doing collections on a higher volume, so you have more interactions with consumers, more phone calls, more of everything that it means that we need to ensure that our training of our employees is fresh and that our capability to monitor that increased volume of activity is in place so that we don't have a situation where a lot of those problems start to occur and it starts to look systemic to a regulator because they get tons of the same consumer complaint or something.

Chris Willis:

We keep it under control by virtue of both our frontline, monitoring and quality assurance, and then our monitoring through compliance as well. That, to me, is what I think creditors and debt collectors should be thinking about. It's just thinking holistically about all the potential trouble spots in the collection operation of which there are many and thinking, "Okay, if I scale up my operation, if I scale up my demand for collection by X percent, will I be ready to do it and monitor it and keep myself out of the same kinds of regulatory criticisms that we've always seen and that we especially saw following the 2008 recession?"

Alan Kaplinsky:

Isn't there something going on now that is considerably different than what you had in 2008? It's a real concern of mine, but maybe you can tell me I'm off base here, and that is a staffing. It seems like every company in the United States is clamoring for employees. Nobody has enough people. I worry that it's going to be the same thing with respect to servicers, mortgage, student lending, what have you, that they don't have enough staffing. Am I off base here, Chris?

Chris Willis:

No, you're right. You're right on. We hear it from clients all the time that they're experiencing the same staffing issues that the whole economy is, so to speak. The thing is, it bears a frightening resemblance to what happened 2008, when particularly in the mortgage industry, you had this big surge of mortgage delinquency and the mortgage servicers in general didn't have the staffing to deal with all those people. That led to, of course, all those huge regulatory settlements, like the $25 billion one with the top five mortgage servicers. So there's every reason to believe that that could replay, I think, on a smaller scale under these circumstances as well. But I also don't think that the fact that there's an economy-wide staffing shortage is going to cause regulators to go any easier on creditors, servicers, or debt collectors when it comes to handling these basic collections issues. I think that the standard applied will not vary.

Alan Kaplinsky:

Really? So there'll be no sympathy and it's not going to carry any weight when the regulator comes to you and says, "You're really dropping the ball, we're seeing the trend here where. We're getting a lot of complaints that things are not being handled, telephone calls that are being made to your company are not being returned, they lose documents." You say to them, the government, "What do you want me to do? Do you have any employees you want to give me to help out? I can't hire. I've increased the compensation I'm willing to pay and there's just not enough people around. What am I supposed to do?"

Chris Willis:

Unfortunately, I think that will help with some regulators. But I think with the more aggressive ones, my belief is that they're going to view that as your problem and not their problem and that having difficulty hiring is no excuse for not towing the line on these various collection compliance issues that they've been interested in for years or even decades. I'm sorry to say it, but I think that's the case.

Alan Kaplinsky:

Yeah. I'm wondering whether you might end up seeing a lot of consolidation in the servicing area as some of the smaller servicers aren't able to compete with the big ones and aren't able to pay the same kind of compensation. I'm wondering if a lot of the servicing is going to be sold to the servicers that are able to respond to consumers the way the regulators want to.

Chris Willis:

It's quite possible that that will happen. It would mirror the consolidation that we've seen in the debt collection industry that was brought about by greater regulatory scrutiny by the CFPB. The smaller ones didn't have the wherewithal to invest in compliance infrastructure as the larger ones did. So they got gobbled up or they went out of business. The other thing that could happen, and that might be a partial solution to the problem, is greater use of technology in the sense of communicating with consumers through live web chat or chat bots or IVRs, through emails, text messages, and things like that. There's been a little bit of opening given to that for debt collectors by the CFPB's new debt collection rules. A lot of creditors have been doing it already anyway, and they may intensify their efforts to try to deal with consumers in less labor-intensive ways in response to the fact that they have difficulty hiring, as you noted.

Alan Kaplinsky:

Yeah. Now in terms of, we've been talking generally about regulators, but let's be more specific here. I assume you're referring principally to the CFPB and to a lesser extent, State Attorneys General, maybe state departments of banking. What about the Federal Trade Commission?

Chris Willis:

All of those could be on the playing field here. The CFPB and the more active State Attorneys General were the ones that I was primarily thinking about through our conversation, because each of them has a pretty significant track record of doing collection-related enforcement against both debt collectors and creditors starting all the way back to the previous recession in 2008. The Federal Trade Commission certainly has jurisdiction over non-bank creditors and all debt collectors. So there could be scrutiny from the commission, but I don't remember the volume of collection-related enforcement from the Federal Trade Commission, as I remember from the CFPB and the very active State Attorneys General.

Alan Kaplinsky:

Yeah. Of course, the FTC is a little hamstrung now by virtue of that US Supreme Court opinion saying that for certain kinds of actions, they're unable to get restitution. So they don't have the arsenal of weapons that the CFPB has and the State Attorneys General have. I'm wondering, and really the final question I have for you, Chris, relates to the kinds of errors that are going to cause CFPB or state AGs or the FTC could result in them wanting to initiate enforcement activity.

Chris Willis:

Yeah. A lot of people immediately assume that the real area of regulatory friction is going to be the level of generosity in their hardship programs. In the sense of, I need to be really generous and really helpful to consumers, or I'm going to get an enforcement action, but really that has not been the experience either with COVID or even prior with the 2008 recession. When we've seen enforcement activity dealing with hardship or lost mitigation type of programs, it's almost always been around the disclosure about the terms and conditions of the program to consumers so that they understand, for example, if I get a deferment or extension, "Yes, I don't have to make my payment, but at the same time, interest keeps accruing and therefore I'll pay more interest over the life of my loan and I'll pay my principal down more slowly."

Chris Willis:

Likewise, here, when we're talking about end of COVID sorts of situations, the level of disclosure and description of, "Hey, here's what's happening to you and here's what you need to do," I think if that communication is carried off poorly and consumers are able to complain and in fact do complain of, "Hey, I got thrown into delinquency and I didn't know what was happening and I didn't know what to do," that's the kind of disclosure error that I think is most likely to result in enforcement activity by our interested regulators, rather than the enforcement action that says, "Well, you should have made 20% more extensions and deferments than you made," because the disclosure issue naturally lends itself to a UDAP claim because it has to do with unfairness or deception and how you handled the relationship with the customer.

Chris Willis:

Whereas it's a pretty tough row to hoe, I think, for a regulator to say, "Well, it's unfair for you not to be more generous with your program," because there's not really any precedent for that. There's tons of precedent for making false, misleading, or incomplete statements to consumers about their situation and how to handle it. So I really think the focus should be on accurate, prominent, appropriate, and easy to understand disclosure. That, to me, is the primary trouble spot for potential enforcement in this area.

Alan Kaplinsky:

Yeah. Yeah, no, I would agree with you on that. Although, with new people in charge of the CFPB, new chair of the FTC, we didn't talk about the federal banking regulators. They also often have a role to play. If professor Amoroso gets confirmed by the Senate to head the OCC, all bets might be off, right?

Chris Willis:

No kidding. No kidding.

Alan Kaplinsky:

Yeah. They may say, "You weren't generous enough. You've got to do more."

Chris Willis:

It is definitely possible. The question is if the OCC or the CFPB or FTSE or fed is going to exert pressure in that regard, will they do it via enforcement or will they do it through confidential supervisory interactions? I think there's a decent chance that they might do the latter rather than the former.

Alan Kaplinsky:

Yeah. Yeah. Before we bring our podcast to a close today, is there any question I didn't ask you that I should have, that would shed further light on the subject we've been talking about today?

Chris Willis:

The only thing that I would mention is that the same considerations that apply to renewed collection when delinquency rates start to rise, in some instances may also apply to credit reporting. There are creditors who suspended negative credit reporting or who just didn't have a lot of negative credit reporting during the pandemic because of these very high payment rates, and there wasn't a lot of delinquency going on. The same resource and personnel resources that we need to have in order to handle collection activity is also true of handling credit reporting disputes, which should be expected to rise if you start doing negative credit reporting again, either caused by more delinquents in your portfolio, or you just turn it back on again. That's also a very heavily focused on area by the CFPB and other regulators. So I would give the same caution in terms of being ready for credit reporting disputes to increase in volume just as I was talking about with respect to general collection activity.

Alan Kaplinsky:

Yeah. Okay. Well, Chris, I want to thank you very much for sharing your thoughts with our audience today. I want to thank all of our listeners who downloaded our podcast show today. Let me just remind everybody that our show gets... A new show is released every Thursday, except for two weeks during December where we take a very short holiday. You can find our show either on the Ballard Spahr website or wherever you regularly get your podcast show, whatever platform you may use. Consumer Finance Monitor is on all of them. The other reminder for you is that if you want to explore topics in more detail than we had an opportunity to explore them today, and this is the case with every topic we cover, you should consult our blog also called Consumer Finance Monitor. We've been doing the blog for over 10 years and there is a tremendous amount of content on there. So Chris, thank you again. Until next time.

Chris Willis:

Thanks very much.