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MACUMA Annual Leadership Conference

The turning tide...The HEROES Act, the CFPB,
the Courts and Consumer Collections in 2020
and under a new administration

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Congressional Action and Proposed Action Post 2020 Election

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US Legislative Action - Health and Economic Recovery Omnibus Emergency Solutions (“HEROES”) Act – Generally

MAY 15TH HOUSE PASSES Health and Economic Recovery Omnibus Emergency Solutions (HEROES) Act

- House lawmakers approved a Democratic proposal to provide \$3 trillion in coronavirus relief that would include a new wave of funding for state and local governments, workers and families highlighted as follows:
 - extending emergency family and medical leave until the end of 2021
 - adding another round of direct cash payments to Americans (including an expansion of the IRS payment program where Americans will receive up to \$6,000.00 in stimulus payments)
 - extending federal unemployment benefits to the end of January (\$600.00 per week in addition to State unemployment benefits)
 - adding hazard pay for front-line workers and also expanding virus-testing efforts, contact tracing and treatment
 - directing nearly \$1 trillion to state, local and tribal governments, including \$500 billion in direct, flexible aid for state governments and an additional \$357 billion for local governments and counties

SENATE MAJORITY AND WHITE HOUSE REACTION: Senate Majority Leader Mitch McConnell (R-Ky.) caked the bill a "seasonal catalog of left-wing oddities" and an “unserious effort.”, and the President has signaled that the House legislation, in its current form, would be vetoed



US Legislative Action - Health and Economic Recovery Omnibus Emergency Solutions (“HEROES”) Act - Consumer Collections

U.S. Rep. Maxine Waters, D-Calif., said in her opening statement at the hearing “The HEROES Act provides critical relief and protections for all: renters, homeowners, people experiencing homelessness, consumers, students, small businesses, minority-owned businesses and non-profits, community financial institutions, and state, territory, tribal and local governments.”

As noted most recently by the ACA the HEROES Act would further constrain the debt collection and credit reporting industries, to the detriment of consumers and here are the specifics:

- the legislation would place additional restrictions on the ability of debt collectors to service accounts, essentially placing a temporary moratorium on debt collection
- the HEROES act broadens the emergency restrictions under the Fair Debt Collection Practices Act (FDCPA) to prevent collectors from repossessing or foreclosing on any personal property or from garnishing wages or other income
- **Violations of these emergency restrictions would result in a fine 10 times normal FDCPA fines (fines would increase to \$10,000 per violation)**
- these restrictions would only come into play during the ‘covered period’—from the date of enactment of the bill to a date 120 days after the COVID-19 pandemic ends—there is always the chance that Congress chooses to make the restrictions permanent
- **the restrictions under FDCPA have historically applied to third-party debt collectors, the HEROES Act would change that to also cover creditors—the banks, credit unions, and finance companies that originate loans (this would effectively bar lenders themselves from collecting on what they are owed which will increase losses and lead to higher prices and less access to credit for consumers)**
- With a change to the current administration and both houses of Congress expect the HEROES Act or some version of the HEROES act revived and brought to the floor of both houses of Congress and sent to the President for signature



US Legislative Action - CFPB Action Under Current Administration

– Reporting Challenges

- March 27, 2020, CARES Act amends FCRA to impose new credit reporting requirement
 - If an accommodation is made between a lender and a borrower to modify payment terms, the debt modification must be reported as “current” or as the last status reported prior to the accommodation
 - Accommodation means any agreement to defer one or more payments during the pandemic
 - Accommodations must be in writing and this FCRA amendment shall be in place from 01/31/20 through 120 days after the end of the declared national emergency
 - Expect these CARES Act amendments to potentially continue with a new administration and post pandemic
- April 1, 2020, CFPB releases a Policy Statement regarding the CARES Act FCRA amendment
 - Recognizes operational disruptions may preclude furnishers from responding within 30 days (or 45 days if additional information provided by consumer)
 - CFPB pledges to consider individual circumstances and acknowledge furnisher’s good faith efforts to investigate disputes as quickly as possible
 - Mentions that dispute investigations may take longer than statutory requirements
 - Reminds that disputes need not be investigated if they are determined to be frivolous or irrelevant
 - Policy statement is a non-binding document exempt from notice and comment requirements under The Administrative Procedures Act



US Legislative Action - Current CFPB Action and States Attorney General - Tension Between the Federal and State Governments

- April 28, 2020, letter From 20 state attorneys general
 - Stresses States will continue to enforce all federal laws
 - States will monitor furnishers to ensure proper credit reporting and timely investigation of disputes “we will not hesitate to hold CRAs accountable if they failed to meet these obligations”
- Tension between the federal and states position:
 - States are authorized to bring actions for violations of FCRA
 - Federal preemption addresses conflicting state laws in private enforcement actions only
 - Federal law exempts Massachusetts and California statutes from preemption



US Legislative Action - Where is the CFPB Headed in 2021 Under a Potential New Administration

- The Supreme Court was recently considering whether the CFPB's structure of a single director and removable only "for cause" violates Article II of the Constitution
- The Supreme Court recently ruled on the viability and structure of the CFPB and the upshot of the ruling is the CFPB emerges with its authority:
 - to regulate payday lending
 - debt collection
 - Mortgages
 - other pocketbook issues
- CFPB leadership is now somewhat more subject to the winds of politics, which is not what Congress had in mind, or what the current White House had in mind when it attempted to dismantle the CFPB
- As he has vowed, expect a President Biden to immediately replace the current acting director of the CFPB
- As he has vowed, expect active enforcement under a new CFPB director



US Court Action - Potential Bankruptcy Changes Post 2020 Election

Senator Elizabeth Warren has long been a champion of Bankruptcy Reform and with a change in the administration could realize the reforms she has long sought, as outlined below:

- A relatively streamlined filing process — you disclose all your assets, debts, and income to the courts — to save people the arduous paperwork and often costly legal fees associated with the current system
- Then, according to her Medium post outlining the plan, filers would “choose from a menu of options for addressing their debts”
- In one option, you surrender all your property (with a few specific exemptions laid out in law) to your creditors and in exchange you walk away free and clear of all your debts; alternatively, there would be options for declaring bankruptcy on *some* debts (a home mortgage, for example) while simply committing to remain current on your other payments
- Last, a debtor would have the option of filing a proposed payment plan to discharge debts without surrendering assets, and then petition the court to accept that plan, halting collections to the extent needed to execute it
- **Warren would end the current situation in which student loans are almost always non-dischargeable even in bankruptcy**
- **She would allow people who opt for a payment plan option to “spend a reasonable amount on toys and books and basic recreational activities for their kids during the bankruptcy process”**
- **Warren would allow bankruptcy filers who want to hold onto their car (perhaps they need it to go to work) to pay their auto lender cash equal to the current value of the car, rolling back a 2005 change that made them liable for the full value of the loan even if it exceeds the value of the car**
- **Last but by no means least, Warren wants to create a standardized way to modify mortgages through the bankruptcy process, something that’s typically not allowed under current law**



US Court Action – The Supreme Court and the Current Vacancy

- The death of Ruth Bader Ginsburg on September 18, 2020, created a vacancy on the US Supreme Court, and her death has created the possibility of a nomination just weeks before the presidential election (**REMEMBER COURT PACKING DISCUSSION**)
- Ginsburg was the third Supreme Court justice since 2000 to die in office, after William Rehnquist in September 2005 and Antonin Scalia in February 2016
- The process of replacing Ginsburg is expected to be controversial, in part as a result of the acrimonious process of replacing Justice Scalia which was delayed by the Senate Republican majority that would not consider the nominee of President Obama until after the 2016 presidential election and Donald Trump's subsequent inauguration
- In US history there has been an open Supreme Court vacancy in a presidential election year 29 times, and the President made a nomination in all twenty-nine cases, and here's what happened:
 - 19 times between 1796 and 1968, Presidents have sought to fill a Supreme Court vacancy in a presidential election year while their party controlled the Senate
 - Ten of those nominations came before the election and nine of the 10 were successful
 - By contrast, when the President and Senate were from opposite parties, there have been 10 vacancies resulting in a presidential election year or post election nomination
 - In six of the 10 cases, the president made a nomination before Election Day, but only one of those was confirmed by the Senate controlled by the opposite party (that was President Grover Cleveland's nomination of Chief Justice Melville W. Fuller in 1888)
- The current consideration and confirmation of a nominee could shift the current conservative Court from 5-4 to 6-3 for decades and effect rulings relating to the FDICPA and other Federal collection and lending statutes, the FTC and the CFPB, and States laws concerning the same issues; a concern for liberals and Democrats seeking to stall the nomination until after the next President is inaugurated

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EAST COAST ACTION

Pennsylvania, Maryland, D.C., Virginia,
North Carolina and Florida

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§ Maryland State and Local Action

Maryland:

- No repossessions or foreclosure until the State of Emergency and Catastrophic Health Emergency is lifted
 - last renewed September 8th
- Certain jurisdictions have begun sending letters to pro se defendants in collection matters suggesting they obtain counsel
- Maryland Courts are limiting hearings and Montgomery County is moving towards Zoom hearings



District of Columbia Council Action

District of Columbia:

- Public Health Emergency extended to October 9, 2020
 - Collection prohibition in place for 60 days after the Emergency ends
 - Currently expires December 8, 2020, but has already been extended several times
 - Prohibition does not apply to original creditors – You can still call and send letters on your accounts
- DC has also banned repossessions and garnishments through at least December 8, 2020



Maryland, D.C. and Virginia Court Action

MD:

- Phased reopening
- Currently in **Phase IV** – August 31st to October 4th - Non-Jury trials have resumed
- **Phase V** - Final Phase begins October 5th – Full Court Reopening

DC:

- Despite moratorium on collections, Courts are currently open
- Social Distancing Guidelines are in place

VA:

- Courts are open
- Re-opening decisions/guidelines made at local level
 - Limits on the number of cases that can be heard in a day
 - Limits on the number of individuals allowed in court houses

A more comprehensive list of State and Local action can be found at:
<https://docs.google.com/spreadsheets/d/1fGU1H2HPd4miayKBil-NeXnta4sB95gUoxPjjAThERY/edit#gid=1273627032>



Pennsylvania and North Carolina Court Action

PA:

- Courts have been open since June 1st
- Many Courts have begun setting up telephonic hearings when possible
- Courts must allow for social distancing when scheduling cases

NC:

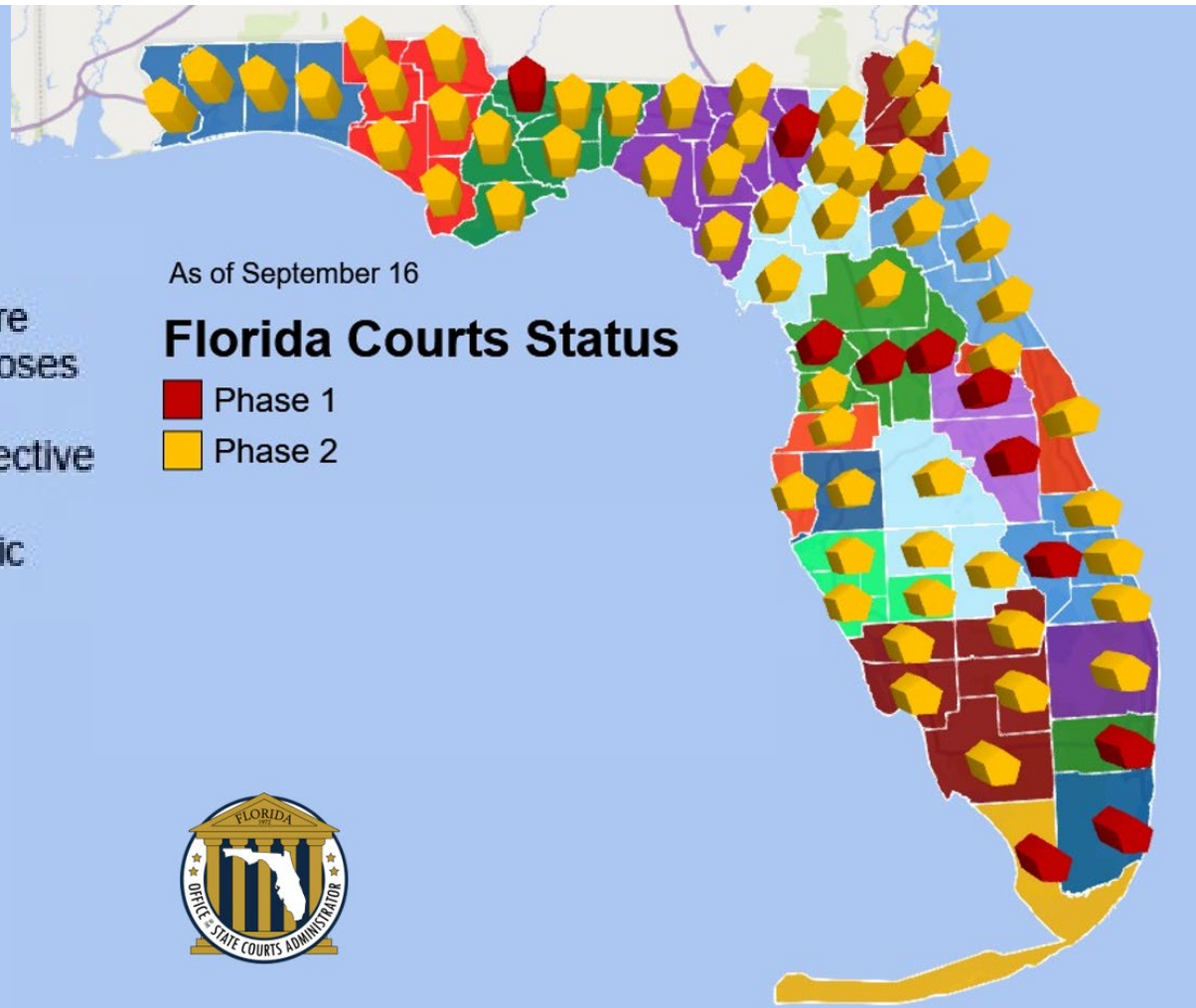
- Courts have been open since June 1st
- No jury trials will be held before October 1st
- Courts must allow for social distancing when scheduling cases
- Many hearings can now be conducted online by teleconference
- Documents that ordinarily require a notary can be submitted with a signed statement under penalty of perjury
- Some documents can be served on another party or attorney by email
- Filings submitted by mail will be timely if received within 5 days of the due date
- Clerks may require appointments and limit the hours that public records are available



Florida Court Action

FL:

- Phase 1 – in-person contact is inadvisable, court facilities are effectively closed to the public, and in-person proceedings are rare
- Phase 2 – limited in-person contact is authorized for certain purposes and/or requires use of protective measures;
- Phase 3 – in-person contact is more broadly authorized and protective measures are relaxed
- Phase 4 – COVID-19 no longer presents a significant risk to public health and safety





Overall Effect in Maryland, Virginia, D.C., Pennsylvania, North Carolina and Florida (expect delays well into 2021 and beyond))

- Current Cases

- MD

- Re-scheduled affidavit trial dates are being set, with many matters being rescheduled to next Spring

- VA

- Courts are putting strict limits on the number of cases to be heard each day

- DC

- No new civil collection filings
 - Small claims hearings cancelled and have not been re-scheduled
 - Large civil claims that are already filed are proceeding remotely

- Future Cases (all jurisdictions)**

- Delay in processing new lawsuits
 - Delay in scheduling trials
 - Delays in the timelines to obtain judgments
 - In D.C., depending on when collection actions will be permitted to go forward, the backlogs will likely exceed one year

- PA

- Courts are accepting new filings and generally have limited docket interruptions

- NC

- Limited docket sizes have forced many cases to be continued for months

- FL

- Courts have toughest restrictions to operations, but Florida was already conducting many remote hearings prior to COVID, so they have not experienced significant interruptions in most counties

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WEST COAST ACTION

California and Washington

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California State and Local Action

California

- On March 4, 2020, Governor Gavin Newsom proclaimed a state of emergency in response to the COVID-19 pandemic. Measures necessary to contain the spread of COVID-19 have brought about widespread economic and societal disruption, placing the state in unprecedented circumstances
- Judicial Council's Emergency Rule 1, effective April 6, 2020, temporarily halted evictions and stabilized housing for distressed Californians in furtherance of public health goals, the Judicial Council voted on August 14, 2020, to extend these protections through September 1, 2020, to allow the Legislature time to act before the end of the 2019-20 Legislative Session
- AB 3088- Effective September 1, 2020
 - 1) The COVID-19 Tenant Relief Act of 2020 – enacts protections for small landlords and tenants; and
 - 2) The COVID-19 Small Landlord and Homeowner Relief Act of 2020 – enacts protections for small landlords and impacts mortgages secured by 1-4 unit residential real property (both owner-occupied and non-owner-occupied)
 - Temporarily extends the reach of the anti-foreclosure provisions of the Homeowner's Bill of Rights until January 1, 2023
 - Credit unions should be thrilled that it does not include any language on mortgage foreclosure moratoriums, mandatory forbearance, or long-term eviction moratoriums
- Assembly Bill ("AB") 2501-Defeated and AB 1436 -Pending
 - AB 1436 is a near repeat of the mortgage forbearance requirements that credit unions defeated in AB 2501 back in late June. The situation in Sacramento can always change rapidly at the end of session
 - AB 1436 would harm credit unions and hinder their ability to help members truly needing assistance. The bill's one-size-fits-all approach allows borrowers to pause their home payments for up to one year, regardless of need

San Francisco and Los Angeles (Samples)

- San Francisco stopped the following actions for the duration of the COVID-19 pandemic: post-judgment collections, small courts claims filings, summary judgments, citation issuance, and property tax actions
- Los Angeles City Counsel introduced a Moratorium on Debt Collection that requests that the Mayor amend his "Safer at Home" Emergency Order to specifically declare collection agencies and credit agencies as "non-essential" business during the emergency and further impose a moratorium during this time on all debt collection efforts. It is generally thought that the mayor will not sign the ordinance

Washington State and Local Action

Washington

- Washington Gov. Jay Inslee issued a proclamation action on April 14, 2020 to regulate debt collection activities in the wake of the coronavirus pandemic
- State of Emergency
 - For the credit and collection industry, the order that is most relevant is one that suspends a number of state statutes that permit collection of consumer debt judgments, including bank account and wage garnishments and waives accrual of post-judgment interest on consumer debt judgments during the period of the order (The order has repeatedly been extended, gradually “weakening” as only specific provisions of the order are being extended)
 - Current Extension: through October 1, 2020, or the end of the COVID-19 State of Emergency, whichever occurs first. Extension 49.8 affirms consumer’s right to claim state garnishment exemptions and challenge garnishment proceedings. (PROCLAMATION BY THE GOVERNOR AMENDING AND EXTENDING PROCLAMATIONS 20-05, and 20-49, et seq. 20-49.8 Garnishments)
- Enforcement By WA AG
 - Filed a consumer protection lawsuit against the national debt collection corporation for pushing consumers into “settlements” to resolve old debts that were past the statute of limitations for a collection lawsuit
 - Filed a lawsuit against an Idaho property management company for violating Gov. Jay Inslee’s Emergency Evictions Proclamation. Inslee’s proclamation establishes a temporary moratorium on evictions for the inability to pay rent as Washingtonians deal with the COVID-19 pandemic
 - Judge recently ordered \$10 million in penalties for robocall lawsuit, violations of Consumer Protection Act



California and Washington Court Action

- California

- Decentralized re-opening strategy – Re-opening decisions made at local level
- All of the California courts have gradually re-opened and have implemented guidelines to address challenges related to facilities, personnel, jury management, case management and processing, and communications
- Courts had previously continued most or all matters on the docket due to COVID-19. Most courts are hearing non-emergency/regular matters via telephonic or web based system; Trials both jury and non-jury are disfavored and simply continued. Courts, like Los Angeles Superior Court, have issued General Orders continuing civil trials in order to prioritize available jurors and jury trials to criminal cases
- CA Courts were/are halting the processing and serving of evictions by not issuing court summons. Attorneys have continued to file them through the pandemic but cannot “start” their case until summons is issued and served. In the event the CA Courts are tasked to enforce future prohibition, similar actions are anticipated

- Washington

- Civil jury trials were previously suspended until July 6th (Washington Courts has issued a guideline detailing requirements for resuming jury trials in Washington state)
- Non-emergency civil matters were continued until after June 1st
- Priority given to all emergency civil matters that can be heard by telephone, video, or other remote means
- Washington Courts have recently announced the Implementation of an eviction resolution program for litigants to participate in prior to the filing of an unlawful detainer action in court along with a new system that will bring electronic filing, modern case management to District and Municipal Courts



Overall Effect in California and Washington (expect delays well into 2021 and beyond)

- Collections:
 - CA: CARES act funds exempt from levy. Retroactive executive order signed 4/23 that provides that stimulus payments and any other federal-state, or local-government financial assistance made available in response to COVID-19 is exempt from attachment, levy, execution or garnishment.
 - WA: Garnishments were previously suspended for consumer debts; Currently, are not applicable to bank account funds other than CARES Act stimulus payments and state and federal unemployment payments
- Bankruptcy:
 - CA: : No in-person hearings will be held in any matter, until further notice. Judges will continue to hear matters remotely through telephonic or video service. Previously issued guidance regarding face coverings in Court facilities, mediations, and judges' or courtesy copies remains in place. (Central District)
 - WA: The District Court has entered General Order 13-20 extending the closure of the courthouses through October 4, 2020. Accordingly, the Bankruptcy Court presently expects that limited in-court evidentiary proceedings and trials will not commence until October 5, 2020, or potentially later, depending on the public health situation
- Foreclosures:
 - CA: AB 3088 extended some foreclosure protections to owners of rental property of four dwellings or fewer that also meet "certain criteria, including that a tenant occupying the property is unable to pay rent due to a reduction in income resulting from the novel coronavirus"
 - "WA: Proceeding now. Moratorium on residential evictions until October 15, 2020 (In addition, the Seattle City Council passed a set of rules restricting evictions for six months after the mayor's order expires)
- Repossessions:
 - CA: No prohibition
 - WA: No prohibition

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Conclusion

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Rethinking Your Overall Approach to Collections

Credit Union's to "Re-Think" their approach to lending and collections:

- Beyond what's been in place to date, Credit Unions need to create new policies to deal with members and their hardships given the potential change in the administration such as:
- Provide new guidance concerning settlement and extending payment plans (***facts to consider: most Americans used stimulus checks to pay down debt, only 15% of funds being used for necessities, mid-Atlantic unemployment is well below the national average at 7½%***)
- ***Balance the optics referring accounts, filing lawsuits, attending court hearings and taking judgments currently against allowing accounts to sit and potentially accruing large losses if collections efforts are stopped by legislation***
- Need to start thinking about POST ELECTION and PANDEMIC collections and customer care to deal with member unemployment and the potential exponential rise in bankruptcy filings
- Prepare for the coming wave - POST ELECTION and PANDEMIC bad debt portfolio - new policies, more flexibility, additional staffing (collections vs. customer service reps)



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