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In their article, *Steering Loan Modifications Post-Pandemic*, Foohey, Jimenez, and Odinet ("FJO") supplement their writing last summer on the Coronavirus Aid, Relief, and Economic Security Act ("CARES Act") and related initiatives.[1] Here, FJO look to solve a brewing "crisis of modification" and propose that the Consumer Financial Protection Bureau ("CFPB") issue a compliance bulletin to quell this crisis.[2] With this comment, I support FJO's proposal by digging deeper into their proposals and asking: First, what supports regulation of modification agreements regarding defaulted consumer debt obligations? Second, if regulation is needed, should it occur through bankruptcy or non-bankruptcy consumer financial protection ("CFP") regulation? Third, if non-bankruptcy CFP regulation should supplement bankruptcy law, why should an ability-to-repay ("ATRP") regulatory format be preferred?

A. Why Regulate at All?

FJO think regulation of post-default modification agreements ("PDMAs") is justified since consumers' vulnerabilities create incentives for advantage-taking. Such vulnerabilities include consumers' naivete and lack of representation; their over-optimism as to repayment; and the shame and stigmatization as to default.

Consumer lenders and their servicers might argue that regulation is unnecessary. First, if lenders are known to offer borrowers-in-default modification agreements on terms less onerous than the original debt obligations, borrowers may default strategically to seek modification (moral hazard problems). Second, borrowers may know more than lenders about whether the original or the modified debt obligations are affordable (asymmetries in

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1. *See, e.g.*, Pamela Foohey, Dalié Jiménez & Christopher K. Odinet, *The Folly of Credit as Pandemic Relief*, 68 UCLA L. REV. DISCOURSE 126 (2020) (discussing the shortcomings of temporary financial relief); Pamela Foohey, Dalié Jiménez & Christopher K. Odinet, *The Debt Collection Pandemic*, 11 CALIF. L. REV. ONLINE 222 (2020) (discussing the role of the COVID-19 pandemic in increasing financial anxiety, particularly regarding debt collection); Pamela Foohey, Dalié Jiménez & Christopher K. Odinet, *CARES Act Gimmick: How Not to Give People Money During a Pandemic and What To Do Instead*, 2020 U. ILL. L. REV. ONLINE 81 (suggesting alternatives outside of directly giving people money in response to the COVID-19 pandemic).

2. Pamela Foohey, Dalié Jiménez & Christopher K. Odinet, *Steering Loan Modifications Post-Pandemic*, 85 LAW & CONTEMP. PROBS. NO. 2, 2022, at 201.

information). Third, context specific arguments might arise. For example, secured lenders may argue that regulation is unnecessary given preferences for collection over modification, especially when fully secured.

These arguments, however, pertain more to regulatory design than the need for regulation. Moreover, current market circumstances undermine lenders' arguments and support FJO's call for regulation.

First, moral hazard arguments are inapt in the wake of a pandemic. What consumer acts on predictions of future pandemic-related disaster relief? Indeed, post-pandemic economic activity is as likely to be irrationally risk averse than irrationally risk preferring. Second, the secured lenders FJO direct their regulatory proposal to—used car lenders, in particular—may well prefer modification over collection remedies, especially if the lender is not a bank (and car loans are increasingly lent through non-bank lenders). Sweat-box lending strategies abound here, too.[3] Third, informational asymmetries are diminishing in today's consumer lending markets. New fintech applications offer organizational tools to bank and credit union customers but may also provide access to detailed information that could facilitate bespoke offers for a PDMA.

All this suggests that FJO are right to focus on post-COVID pressures for modification of defaulted car loans, and generally on the practices of servicers and debt buyers in the wake of the pandemic. It also suggests that incentives for abusive PDMAs are not limited to unwinding debt moratoria imposed under the CARES Act and other laws.

B. Why Not Simply Rely on Bankruptcy Regulation?

If regulation of PDMAs is desirable, why regulate through CFP regulation? FJO agree their proposal may increase the number of bankruptcy filings and express comfort with this result.[4] But if bankruptcy is preferable to a "sweat-box" PDMA, why regulate modifications outside bankruptcy law at all? Why not regulate modifications solely through consumer bankruptcy law? Bankruptcy regulation of PDMAs is flawed for several reasons, and not merely those set out by FJO.

FJO argue that non-bankruptcy regulation of PDMAs is necessary because risk-averse consumers resist bankruptcy to avoid the stigma of public declarations of failure.[5] Whether risk-averse or risk-preferring, consumer-borrowers also avoid bankruptcy because: (1) it presents a blunt all-or-nothing instrument that is too powerful when seeking relief from some but not all debt-obligations; (2) it may be more expensive than consumers-in-default can afford;

3. For discussion of sweat-box lending in credit card markets, see Ronald J. Mann, *Bankruptcy Reform and the Sweat Box of Credit Card Debt*, 2007 U. ILL. L. REV. 375.

4. *See* Foohey, Jiménez & Odinet, *supra* note 2, at 222 ("A regulatory structure that pushes people toward bankruptcy has the potential to mitigate overall losses, while allowing those who can pay their modified debts to do so.").

5. *Id.* ("A desire to work with lenders to make good on their obligations, bankruptcy's stigma, lack of access to attorneys, and fears about bankruptcy's impact on credit scores may deter people from filing.").

and (3) it often does not provide the debtor with a discharge at the end of the bankruptcy. Above-median income Chapter 7 filers may find their petition dismissed under the means test; Chapter 13 may be easier to access but "study after study . . . found that only about one-third of consumers who enter Chapter 13 complete their repayment plans and therefore receive a discharge of remaining unsecured debts."[6] (4) Moreover, Chapter 13 may provide unsatisfactory results for the above-median income debtor that completes plan payments and succeeds in modifying debt to save a home or car.[7] Under current law, bankruptcy regulates post-default modification of consumer debts by permitting modification in only limited instances (i.e., as set out in standards for confirmation of a Chapter 13 debt adjustment plan) and sometimes disallowing modification altogether. Modification of new car loans is nearly impossible in Chapter 13 debt adjustment plans, for example.[8]

Because bankruptcy is an important but flawed source of regulation for modification of defaulted consumer debt, FJO's proposal for added non-bankruptcy regulation makes sense. Both sources of regulation have their pitfalls. Layered regulation—belt and suspenders—is a time-honored solution to regulatory imperfection.[9]

C. Why Prefer ATRP Regulation?

Non-bankruptcy CFP regulation of PDMAs could take various forms. Why prefer regulation requiring assessment of borrowers' abilities to repay refinancing agreements, as FJO suggest?

Existing law mostly does not regulate PDMAs. Even if the scope of this law were extended, it would provide only limited relief for consumer borrowers in default.

Under the Consumer Financial Protection Act ("CFPA"), for example, the CFPB acquired regulatory jurisdiction to implement provisions of the Fair Debt Collection Practices Act ("FDCPA"). FDCPA regulates certain collection practices, but not all modification of defaulted consumer debt. The CFPB could extend regulation implementing the FDCPA to practices surrounding modification agreements, especially deceptive practices.[10] But FJO have an entire modification industry in their crosshairs. They look to reform the substance of

6. Sara S. Greene, Parina Patel & Katherine Porter, *Cracking the Code: An Empirical Analysis of Consumer Bankruptcy Outcomes*, 101 MINN. L. REV. 1031, 1032 (2017).

7. *See* 11 U.S.C. § 1322(b)(2) (precluding modification of "a claim secured only by a security interest in real property that is the debtor's principal residence"); 11 U.S.C. § 1325(a)(5)(*) (limiting modification of certain purchase money security interests, including where the collateral consists of a motor vehicle). Bankruptcy law could be reformed, of course. For congressional proposals for such reform, see Consumer Bankruptcy Reform Act of 2020, S. 4991, 116th Cong. (2020).

8. *See* § 1325(a)(5)(*) (disallowing the bifurcation of an underwater purchase money security interest incurred within a short time before the Chapter 13 filing).

9. So is regulatory reform. For proposals for consumer bankruptcy law reform, see Consumer Bankruptcy Reform Act of 2020, S. 4991.

10. Fair Debt Collection Practices Act (Regulation F), 12 C.F.R. 1006.18 (2021).

PDMAs, not just whether they are procured through unfair, deceptive, or abusive practices. Further, FJO aim to reform servicing agreements and fintech applications, neither of which is easily described as “practices” within the scope of FDCPA. Finally, ATRP regulation presents a novel implementation of FDCPA potentially subject to judicial upset.

None of these potential problems exist under CFPA, however. The CFPA covers a wider range of financial services than FDCPA, including CFPB’s inherent jurisdiction to prohibit unfair, deceptive, and abusive acts and practices (what FJO might refer to as “UDAAP violations”). The market for modification fits squarely within CFPB’s jurisdiction, which includes rulemaking authority, as well as supervisory and enforcement jurisdiction, over all “covered persons.” Importantly, CFPB previously brought enforcement actions alleging that certain debt settlement practices were deceptive and abusive and thus violative of CFPA. Service providers are on notice that subsequent enforcement actions may focus on related practices—but which practices? Rulemaking and supervisory memoranda (such as compliance bulletins) provide enhanced predictability to all financial service providers in the modification market. They also ease CFPB’s evidentiary burdens in subsequent enforcement actions.

Structuring rulemaking and supervisory assessments to require attention to consumers’ ATRP would provide greater clarity than open-ended prohibition of unfair, deceptive, and abusive practices. Unsustainable PDMAs as to which servicers or lenders did nothing to assess borrowers’ abilities to repay are precisely the unfair, deceptive, and abusive practices CFPB raised in earlier enforcement actions. FJO’s proposed compliance bulletin would clarify regulators’ specific concerns.

Promulgation of ATRP regulation sits squarely within CFPB’s competence. CFPA and other federal legislation within CFPB’s jurisdiction already contain examples of ATRP regulation related to residential mortgages[11] and credit card credit.[12] The CFPB possesses rulemaking authority under these statutory provisions. It also sought to constrain small-dollar, short-term consumer loans, such as pay-day loans, through ATRP regulation. Although this aspect of CFPB pay-day regulation was revised in 2020 during the Trump Administration, these revisions were not premised on a claim that the CFPB lacked authority to promulgate ATRP regulations but rather only on policy grounds.[13]

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11. *See* Dodd-Frank Wall Street Reform and Consumer Protection Act: Title XIV—Mortgage Reform and Anti-Predatory Lending Act, Pub. L. No. 111-203, 124 Stat. 2136 (codified as amended in scattered sections of 12 and 15 U.S.C.) (observe also its implementation through Reg QM).

12. *See* Credit Card Accountability Responsibility and Disclosure Act of 2009, 111 Pub. L. No. 24, 123 Stat. 1734 (codified as amended in scattered sections of 15 U.S.C.) (observe also its implementation through revisions to Reg Z).

13. *See* Payday, Vehicle Title, and Certain High-Cost Installment Loans, 85 Fed. Reg. 44382 (2020) (“The Bureau is making these changes to the regulations based on a re-evaluation of the legal and evidentiary bases for these provisions.”).

FJO's idea for a bulletin is both substantive and procedural. Substantively, it would presume unsustainable PDMAs to violate CFPA and, thus, fair game for CFPB enforcement actions. Procedurally, it would fall short of full rulemaking but may facilitate future rulemaking. The CFPB should follow FJO's substantive and procedural advice.