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CHICAGO-KENT LAW REVIEW

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FINTECH'S PROMISES AND PERILS

SYMPOSIUM EDITOR

MATTHEW ADAM BRUCKNER

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LENDERS' USE OF BIG DATA *Matthew Adam Bruckner* 3

Tens of millions of Americans lack access to traditional forms of credit and must rely on payday and pawn loans instead. "Algorithmic lending 2.0" promises to enable fintech companies to lend to those excluded from traditional forms of credit. Version 2.0 algorithmic lenders claim to use Big Data and machine learning to increase credit access by making better predictions about prospective borrowers' creditworthiness and decreasing the cost of credit. Supporters also claim that algorithmic lending 2.0 removes human bias from the financial services sector. Detractors have cast doubt on both claims, arguing that there is scant evidence that algorithmic lending 2.0 expands credit access in non-predatory ways or that substituting algorithms for loan officers reduces discrimination. This Article evaluates the existing regulatory framework to determine if regulation can support the promise of algorithmic lending 2.0 without imperiling the vulnerable.

- FINTECH'S DOUBLE EDGES *Christopher G. Bradley* 61

This symposium essay examines the double-edged nature of financial technologies in financial transactions, especially transactions involving consumers. There are both benefits and risks—often undiscovered or hidden at first—in each new round of financial technologies. A FinTech tool may benefit consumers and then, applied later or in a different context, threaten consumer interests; a tool that harms consumer interests may then lead to development of a tool that favors them. This double-edged nature is an important but unappreciated structural feature of financial technologies. From the perspective of consumer protection, then, FinTech can neither be fully embraced as friend nor restricted as foe. Rather, it must be regulated with sensitivity to various competing goals: fostering innovation, policing abuse, and protecting access to markets, to financial services, and to the legal system. This essay cautiously endorses several strategies: the use of purposive and compliance-driven regulatory frameworks; regulatory "sandboxes" and other experimentalist and stakeholder-participatory approaches to FinTech governance; and the development of consumer-protective and consumer-enabling FinTech. It also calls attention to the issues of distributive justice and equity that arise when there are prohibitive financial or cognitive barriers to effective use of FinTech; in other words, it calls attention to the fact that access to fair participation in the markets and access to justice may increasingly rely on access to FinTech.

THE RISE OF AUTOMATED INVESTMENT ADVICE:
CAN ROBO-ADVISERS RESCUE THE
RETAIL MARKET?

Benjamin P. Edwards 97

Different types of financial advisers serve the massive and widely dispersed retail investment market. In a market riddled with conflicts of interests, many advisers exploit retail customers by pitching suboptimal products, leading to lower investment returns and lower overall growth—but also to greater profits for the financial advisers collecting kickback-style commissions. New financial technology firms, commonly known as Robo-Advisers, may disrupt this market and these exploitative practices. Still, these potentially disruptive automated investment advice firms face significant regulatory risks.

NEW ART FOR THE PEOPLE:
ART FUNDS & FINANCIAL TECHNOLOGY

Brian L. Frye 113

Fine art sales have reached record levels, with the global art market achieving annual sales of over \$60 billion. However, the art market is extremely risky and the most lucrative investment opportunities are typically at the high end of the market. In recent years, financial industry professionals with an interest in the art world have increasingly formed art investment funds, intended to enable smaller investors to take advantage of the opportunity to invest in the art world and diversify their portfolios. Some art funds also allow art investors to borrow against certain assets. About 45 art investment funds currently exist, taking many different forms.

The art market is notoriously opaque and insular. On the primary market, only insiders have access to desirable works, and even basic information like price is typically confidential. And even on the secondary market, access is limited, and information remains scarce and unreliable. This cartelization and inefficiency often provides lucrative arbitrage opportunities to insiders with access and reliable information, even as they make it difficult for outsiders to profitably invest in the secondary market.

Financial technology (“fintech”) promises to transform the art market by providing access and information to retail investors. In theory, art funds could provide access to the art market by using crowdfunding platforms to sell shares in art portfolios, and use data analytics to identify promising art investments. Perhaps they could even create an “art index fund,” and enable retail investors to invest in the art market as a whole, rather than a particular artist or portfolio.

But in practice, fintech is unlikely to make art funds a wise choice for retail investors or most institutional investors. The promise of access and information is a chimera. Art world insiders typically have no incentive to give art funds access to the primary market, because plenty of private capital is available. Data analytics are useless without accurate information. And an “art index fund” would be like investing in lottery tickets, because only a vanishingly small number of works have any value on the secondary market, and even fewer increase in value. Unless the art market becomes more transparent, fintech probably has little to offer potential art fund investors.

COMPUTER AS CONFIDANT:
DIGITAL INVESTMENT ADVICE
AND THE FIDUCIARY STANDARD

Nicole G. Iannarone 141

Digital investment advisers are the fastest growing segment of financial technology (fintech) and are disrupting traditional investment advisory delivery models. The computer-led investment advisory service model may be growing particularly quickly due to a confluence of social and political factors. Politicians and regulators have increasingly focused on the standards of care applicable to investment advice providers. Fewer Americans are ready for retirement and many lack access to affordable investment advice. At the same time, comfort with digital platforms have increased, with some preferring electronic interaction over human interaction. Claiming that they can democratize retirement service by pro-

viding advice meeting a fiduciary standard at a fraction of the traditional pricing model, robo-advisers hope to capitalize on these social movements and argue that they provide a solution: conflict-free advice to investors with portfolios of all sizes. Though they have voluntarily subjected themselves to the requirements of the Investment Advisers Act of 1940 (1940 Act), questions remain as to how robo-advisers will meet the fiduciary standard required by such registration. The essay recommends a two-pronged approach for the regulation of robo-advisers in the near term. First, existing regulatory tools such as examination, enforcement, and disclosure should be deployed to robustly explore the sufficiency and malleability of their existing parameters before crafting any new regulatory schemes. Second, the disclosure device should be studied to determine whether the intended beneficiary of the disclosure, retail consumers, comprehend the information being disclosed to them and whether changes to the format, delivery, and/or content of disclosures would better protect consumer investors.

FINTECH: ANTIDOTE TO RENT-SEEKING? *Jeremy Kidd* 165

Innovations in financial technology, or Fintech, has been ongoing for decades but has recently begun to accelerate. Some observers have argued that it will soon begin to outstrip the ability of regulators to keep pace. If those predictions are accurate, what would the world look like with a financial sector that cannot be effectively regulated? One possibility—drawn from public choice economics—is that rent-seeking will be inhibited or eliminated. Rent-seeking is the distortion of law and regulation for the benefit of special interests, who expend resources to guarantee those distortions in their favor. Rent-seeking is inefficient and inhibits growth and innovation, yet it continues so long as the government has the power to intervene and play favorites in markets. As innovation accelerates, the power of regulators to effectively interfere will be significantly reduced, making rent-seeking an unprofitable venture and advancing the cause of markets and consumers.

REGTECH, COMPLIANCE AND TECHNOLOGY
JUDGMENT RULE *Nizan Geslevich Packin* 193

This Article focuses on the rise of Financial Technology, which revolutionized consumer financial service products, and challenged policymakers with regulating the rapidly evolving financial industry. In particular, it explores Regulatory Technology, also known as RegTech, which is the finance industry's use of technology, especially information technology, in the context of regulatory monitoring, reporting and compliance. RegTech is designed to solve industry needs for a more effective and efficient way to automate corporate governance and compliance processes. Not only has FinTech proven to be a vital revenue source, especially in connection with lending or money transmission services, but it also helps entities cut costs, promotes good corporate practice in compliance management and enhances desired regulatory compliance outcomes. In particular, RegTech does this by enabling businesses to: automate ordinary compliance tasks, reduce operational risks associated with compliance obligations, enable compliance functions to make informed risk choices based on data provided insight, and create cost-effective solutions to problems. Those solutions ensure that companies are up to date with the latest regulatory changes, minimize the likelihood of human error, and increase the overall governance process. Additionally, RegTech can prove valuable especially in identity management, risk management, and security, including from a corporate governance perspective, such as in cyber whistleblower or Bug Bounty programs.

Nevertheless, this article argues that RegTech is not a panacea for all corporate governance challenges. First, there are certain barriers to the adoption of RegTech. Second, RegTech alone cannot extirpate undesired and unethical business practices, or resolve ethical issues resulting from corporate culture. Moreover, technology can be used by businesses to evade regulations and frustrate regulators, a phenomenon referred to as anti-RegTech. Third, technology can hinder good judgment and human input in the governance and risk management decision processes, which operate based on opaque programmed reasoning that is often biased and reflects altered interpretations of the law. Fourth, given the high stakes, financial institutions must be careful when partnering with third party

firms, and include regulators in the conversation before entering into such partnerships, especially given the increasing cyber risks. Lastly, many of the RegTech's automation and efficiency gains have been offset by the costs of expanded regulatory requirements, such as the increasing number of information requests from regulators.

THE PIPER LECTURE

SURVEY OF (MOSTLY OUTDATED AND OFTEN INEFFECTIVE) LAWS AFFECTING WORK-RELATED MONITORING

Robert Sprague 221

This article reviews various laws that affect work-related monitoring. It reveals that most of our privacy laws were adopted well before smartphones and the Internet became ubiquitous; they still hunt for physical secluded locations; and, because they are based on reasonable expectations of privacy, they can easily be circumvented by employer policies that eliminate that expectation by informing workers they have no right to privacy in the workplace. This article concludes that the future—indeed the present—does not bode well for worker privacy.

STUDENT NOTES

TIME BANDITS: THE SEVENTH CIRCUIT GETS IT WRONG BY ALLOWING DEBT PURCHASERS TO ESCAPE FDCPA LIABILITY FOR FILING TIME-BARRED PROOFS OF CLAIM IN CHAPTER 13 BANKRUPTCIES

Jeffrey Michalik 257

Debt purchasers can use debtors' bankruptcies to profit from stale, otherwise unenforceable debt. Although state statutes of limitations bar legal enforcement of this debt, predictable breakdowns of the bankruptcy process mean that the debtor might be forced to pay anyway. Courts have determined that this scheme does not violate the Fair Debt Collection Practices Act, allowing debt purchasers to continue this scheme without repercussion.

SICK AND TIRED OF HEARING ABOUT THE DAMN BATHROOMS

Colin Pochie 281

Gavin Grimm's struggle to access restrooms which align with his gender identity brought the plight of transgender students to the fore of national consciousness. With it came scrutiny of the judiciary's historical failure to understand transgender individuals' place in the law. The trend in cases like *G.G. ex rel. Grimm v. Gloucester County School Board* and *Whitaker ex rel. Whitaker v. Kenosha Unified School District No. 1 Board of Education* is reliance on equality theory and the law of sex stereotyping. And yet sex-stereotyping law does not mesh soundly with equality theory. Equality theory eradicates gendered difference—but the law of sex stereotyping values and proscribes difference and stereotype in equal measure.

This Note argues instead for a synthesized burdens test to accommodate transgender students both in school facilities and in doctrine. In doing so, it harmonizes the doctrinal inconsistency of sex-stereotyping law with the everyday reality of transgender students.

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