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WERE THERE UNDERWRITING REQUIREMENTS FOR PPP LOANS AFTER ALL? THE SOUND-VALUE REQUIREMENT MAY POSE RISK FOR PPP LENDERS

The Paycheck Protection Program (“PPP”), enacted in the early days of the pandemic as part of the CARES Act, had a simple purpose: to keep the US economy afloat by getting enormous amounts of money (in the form of federally guaranteed, forgivable loans) into the hands of employees of businesses affected by COVID-19.

To expedite the flow of funds, Congress grafted PPP onto the Small Business Administration’s (“SBA”) existing Section 7(a) loan program, which eventually allowed the SBA to delegate to nearly 5,500 private lenders the authority to make PPP loans.

To speed the flow of funds even more, Congress broadened the

eligibility criteria for PPP loans beyond those for traditional Section 7(a) loans and created a stripped-down set of “borrower requirements” that demanded eligible recipients merely certify that the loan was necessary for the borrower’s operation, that the funds would be used for specific purposes, and that the recipient

did not already have a PPP loan or a pending application for such a loan.¹ Recognizing that the intent of the PPP was to “provide relief to America’s small businesses expeditiously,” the SBA issued various rules implementing the PPP and expressly exempting those loans from its normal loan underwriting standards.

¹ See Pub. L. 116-136 § 1102(a)(2)(D), (F), and (G).

However, now that the flurry of emergency lending is over—and as the degree of fraud in PPP lending has become more apparent—courts and regulators have (perhaps belatedly) concluded that standards for creditworthiness still apply to PPP loans. Indeed, courts are now generally agreed that the “sound-value” requirement for Section 7(a) loans written into the Small Business Act (“Act”) has *always* applied to PPP loans, albeit in forms modified by the SBA to conform to Congress’s objective of providing PPP relief expeditiously.

The risk for lenders who relied on broad statements from the SBA in the early days of the pandemic exempting PPP loans

from *all* underwriting is that they may now have to answer for making loans that did not meet the sound-value standard. Given the ill-defined contours of the sound-value standard, it is hard to gauge the present risk posed to PPP lenders. However, federal agencies have indicated that they may be turning their attention toward the practices of lenders in the hope of more efficiently recovering an estimated \$200 billion in fraudulent PPP loans. In that case, lenders who, in good faith, may have assumed that PPP loans were exempt from normal underwriting standards may be unpleasantly surprised to find their PPP lending practices held to more rigorous standards when scrutinized by courts and regulators.

BACKGROUND ON SBA TRADITIONAL UNDERWRITING STANDARDS

The SBA is authorized under the Act to delegate authority to qualified lenders to make SBA-guaranteed loans only if those loans are (with limited exceptions) “of such sound value or so secured as reasonably to assure repayment.” 15 U.S.C. § 636(a)(6).²

The SBA has codified its interpretation of that “sound-value” requirement in 13 C.F.R. § 120.150, entitled “What are SBA’s lending criteria?” When PPP loans were made (from April 2020 to May 2021), § 120.150 stated that:

The applicant...must be creditworthy. Loans must be so sound as to reasonably assure repayment. SBA will consider:

- a. Character, reputation, and credit history of the applicant (and the Operating Company, if applicable), its Associates, and guarantors;
- b. Experience and depth of management;
- c. Strength of the business;
- d. Past earnings, projected cash flow, and future prospects;
- e. Ability to repay the loan with earnings from the business;
- f. Sufficient invested equity to operate on a sound financial basis;
- g. Potential for long-term success;



² The only statutory exceptions to this are for loans for “any public or private organization for the handicapped or to assist any handicapped individual, including service-disabled veterans,” 15 U.S.C. § 636(a)(10), and for “any small business concern, including start up, to enable such concern to design architecturally or engineer, manufacture, distribute, market, install, or service energy measures,” *id.* § 636(a)(12).

- h. Nature and value of collateral (although inadequate collateral will not be the sole reason for denial of a loan request); and
- i. The effect any affiliates... may have on the ultimate repayment ability of the applicant.³

The SBA has also defined its "Creditworthiness/Credit Underwriting" standards for Section 7(a) loans in its Standard Operating Procedures ("SOPs"). While PPP loans were being made, that section of the relevant SOPs stated that:

The policies that make up SBA's credit standards begin with the requirements outlined in 13 C.F.R. §§ 120.101⁴ and 120.150. This section provides procedural guidance as to what the Lender should or must consider when analyzing any request for financial assistance that will be guaranteed by SBA.

*A Lender must analyze each application in a commercially reasonable manner, consistent with prudent lending standards. The cash flow of the Applicant is the primary source of repayment, not the liquidation of collateral. Thus, if the Lender's financial analysis demonstrates that the Applicant lacks reasonable assurance of repayment in a timely manner from the cash flow of the business, the loan request must be declined, regardless of the collateral available or outside sources of cash.*⁵

The SOPs also required a "Lender's Credit Analysis" that includes, among other things, a "Financial analysis of repayment ability" and "equity requirements" based on those described in 13 C.F.R. § 120.150(f)⁶ for loans greater than \$350,000 and loans of \$350,000 or less that did not meet SBA's minimum credit score requirement. Loans of \$350,000

or less were also subject to other requirements, including an "Abbreviated Credit Analysis" providing (among other things) a description of the business and its management, an explanation why the loan is appropriate and not available elsewhere, and a description of collateral.⁷

Precisely what the sound-value requirement demands is not well defined, and is a matter of the SBA's discretion.⁸ Applications of that discretion have been affirmed when the SBA has required there be multiple guarantors for a loan,⁹ has subjected the borrower's application to a "careful review" and documented the criteria of "loanworthiness" it considered¹⁰ and has exercised a "diligent, bankerlike analysis and judgment" in making the loan.¹¹ The SBA has also generally required that lenders to whom it has delegated the authority to make SBA-guaranteed loans perform "individual credit reviews"¹² and consider the

³ 13 C.F.R. § 120.150 (emphasis added).

⁴ 13 C.F.R. § 120.101 states that "SBA provides business loan assistance only to applicants for whom the desired credit is not otherwise available on reasonable terms from non-Federal, non-State, and non-local government sources..."

⁵ SOP 50 10 5(K) at 177 (emphasis added); see also SOP 50 10 6 at 246 (same).

⁶ "The Lender must determine if the equity position, any required equity injection and the pro forma debt-to-worth are acceptable based on the factors related to the type of business, experience of management and the level of competition in the market area. The Lender must include a detailed discussion of the equity position (net worth) and any required equity injection." SOP 50 10(K) at 181; see also SOP 50 10 6 at 250.

⁷ SOP 50 10(K) at 182-185; see also SOP 50 10 6 at 252-55.

⁸ E.g., *Copake Lake Development Corp. v. United States*, 490 F. Supp. 386, 389 (E.D.N.Y. 1980) ("Decisions regarding loanworthiness are left to the sound discretion of SBA and are unreviewable under the agency discretion exception to court review under the APA."); see also *Palmer v. Weaver*, 512 F. Supp. 281, 286 (E.D. Pa. 1981) ("[T]he applicable standard of review of a loan denial by SBA, clearly and consistently applied by the courts, is whether the agency action was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."); *Capital Refrigeration Inc. v. United States*, 375 F. Supp. 462, 464 (M.D. Pa. 1973) ("[T]he Administrator has discretionary authority to determine the nature and extent of the collateral required.")

⁹ *United States v. Basil's Fam. Supermarket, Inc.*, 259 F. Supp. 139, 141 (S.D.N.Y. 1966) (holding that the sound-value requirement "does not require that loans be so secured as to absolutely, but only to reasonably assure repayment," and that "[t]he requirement of the SBA that four persons guarantee the payment of the note would appear to be more than sufficient to comply with the statute."); see also *Rister v. Cmty. Bank of Rowan*, 2015 WL 5585572, at *4 (E.D. Pa. Sept. 22, 2015) ("A common method that the SBA uses to determine compliance with [the sound-value] requirement is to have personal guarantors execute guaranty agreements.") (quoting Peter A. Alces, *The Law of Suretyship and Guaranty* § 9:32).

¹⁰ *Palmer v. Weaver*, 512 F. Supp. 281, 288 (E.D. Pa. 1981) (sound-value requirement was met when "[P]laintiff's applications were given careful review...the SBA considered appropriate criteria of loanworthiness, and...adequate reasons for the denial were communicated to the plaintiff").

¹¹ *In the Matter of: Greater Providence Deposit Corporation*, SBA No. 702 (S.B.A.), SBA No. 702, 1986 WL 224541 ("SBA has a right to expect...diligent, bankerlike analysis and judgment to be applied by the lenders with which it participates when they make loan recommendations, so that the loans will be of 'sound value' with a 'reasonable assurance [of repayment] from the earnings of the business.'").

¹² *In re Dancor Transit, Inc.*, No. 2:20-AP-07024, 2020 WL 4730896, at *9 (Bankr. W.D. Ark. June 22, 2020) ("[U]nder normal circumstances, the SBA fulfills [its] statutory mandate to ensure that Section 7(a) loans are of sound value by performing individual credit reviews.") (quoting *Diocese of Rochester v. U.S. Small Bus. Admin.*, 466 F. Supp. 3d 363, 378 (W.D.N.Y. 2020)) (emphasis added).



bankruptcy and criminal history status of borrowers.¹³ The SBA has also applied the sound-value requirement so as to require those lenders to look beyond information provided by the borrower and to consider other available information relevant to the borrower's creditworthiness. For instance, in a 2011 audit of twelve SBA loans, the SBA's Office of Inspector General found that the lender had not satisfied the sound-value requirement when it had accepted "unrealistic projected annual revenue figures" at face value when assessing the borrowers' ability to repay their debts and disregarded "relevant and available data" indicating that the borrowers' revenue projections were "unreasonable."¹⁴

THE CARES ACT'S EFFECT ON THE SBA'S UNDERWRITING REQUIREMENTS

When Congress enacted the PPP in 2020, it clearly had the intent of minimizing the time required to distribute the emergency funds. To that end, it established borrower requirements that would not require any time-consuming analysis of the borrower's creditworthiness by the lender, but stated that the lender "shall consider"

whether the borrower-(aa) was in operation on February 15, 2020; and (bb) (AA) had employees for whom the borrower paid salaries and payroll taxes; or (BB) paid independent contractors, as reported on a Form 1099-MISC.¹⁵

Congress also excused PPP lenders from the requirement that Section 7(a) borrowers be unable to obtain credit elsewhere¹⁶—which presumably would require the lender to investigate each individual borrower's creditworthiness—and also severed the tie between borrowers' creditworthiness and lenders' capital requirements by allowing lenders to treat PPP loans as zero-risk, regardless of the borrowers' capacity to repay their loans.¹⁷

In implementing the PPP, the SBA followed Congress's lead by explicitly exempting PPP loans from its tests for creditworthiness. The SBA's April 15, 2020 Interim Final Rule stated that "for loans made under the PPP, SBA will not require the lenders to comply with section 120.150 'What are SBA's lending criteria?'"¹⁸ The SBA further stated that the Interim Final Rule would "temporarily supersede" any conflicting provisions of SOP 50 10 5(K), thus underscoring the fact that the SBA would not apply the underwriting standards derived from 13 C.F.R. § 120.150 that served as the basis for its standard underwriting procedures.¹⁹

¹³ *Bros. Petroleum, LLC v. United States*, 569 F. Supp. 3d 405, 411 (E.D. La. 2021) ("The bankruptcy and criminal history status of borrowers seeking small business loans has been held to be relevant to the soundness of the loan.") (appeal filed Jan. 1, 2023).

¹⁴ Office of Inspector General, US Small Business Administration, Report Number: 11-16 (July 13, 2011).

¹⁵ 15 U.S.C. § 636(a)(36)(F)(ii)(II).

¹⁶ 15 U.S.C. § 636(a)(36)(I) (exempting PPP borrower from 13 C.F.R. § 120.101: "During the covered period, the requirement that a small business concern is unable to obtain credit elsewhere... shall not apply to a covered loan."). Consistent with 15 U.S.C. § 636(a)(36)(I), the SBA's April 15, 2020 Interim Final Rule stated that "When evaluating an applicant's eligibility lenders will not be required to apply the 'credit elsewhere test'...." Business Loan Program Temporary Changes; Paycheck Protection Program, 85 Fed. Reg. 20811, 20816 (Apr. 15, 2020); see also Business Loan Program Temporary Changes; Paycheck Protection Program as Amended by Economic Aid Act, 86 Fed. Reg. 3692, 3709 (Mar. 22, 2021) (same).

¹⁷ 15 U.S.C. § 636(a)(36)(O)(i) ("With respect to the appropriate Federal banking agencies or the National Credit Union Administration Board applying capital requirements under their respective risk-based capital requirements, a covered loan shall receive a risk weight of zero percent.").

¹⁸ Business Loan Program Temporary Changes; Paycheck Protection Program, 85 Fed. Reg. at 20812 (emphasis added).

¹⁹ *Id.* ("The program requirements of the PPP identified in this rule temporarily supersede any conflicting Loan Program Requirement (as defined in 13 C.F.R. 120.10.); 13 C.F.R. § 120.10 (defining "Loan Program Requirement" as requirements imposed on lenders by, among other things, "SBA Standard Operating Procedures").

In its April 20, 2020 Interim Final Rule, the SBA again stated that its usual underwriting requirements would not apply to PPP loans: “The Administrator recognizes that, unlike other SBA loan programs, the financial terms for PPP Loans are uniform for all borrowers, and the *standard underwriting process does not apply because no creditworthiness assessment is required for PPP Loans.*”²⁰

NOTWITHSTANDING THE SBA’S STATEMENTS, COURTS HAVE GENERALLY HELD THAT THE SOUND-VALUE REQUIREMENT STILL APPLIES TO PPP LOANS

The SBA’s statements in its interim final rules highlight a tension between the statutory requirements of the Act and the SBA’s implementation of the PPP. On the one hand, the Act mandates that Section 7(a) loans—which include PPP loans—satisfy the sound-value requirement. On the other hand, Congress’s requirements for PPP borrowers make no mention of the sound-value requirement or creditworthiness, and the SBA’s rules, which expressly exempted PPP loans from any “creditworthiness assessment” that would otherwise apply to Section 7(a) loans, would appear to exempt PPP loans from the sound-value requirement.

This tension raises a question for PPP lenders concerning the standard to which their PPP lending practices might one day be held—a concern that may become more urgent as federal regulators attempt to recover some of the estimated \$200 billion in fraudulent PPP loans. Will it be the sound-value requirement to PPP loans that applies generally to Section 7(a) loans? Or will it be some less rigorous version of that requirement tailored by the SBA to satisfy Congress’s intent in enacting the PPP?

Nothing in the CARES Act speaks to how the sound-value requirement should be applied to PPP loans, which suggests that the statute is ambiguous concerning the application of that requirement. *E.g., SBA v. Roman Catholic Church of Archdiocese of Santa Fe*, 632 B.R. 816, 839 (D.N.M. 2021) (noting the CARES Act’s silence regarding the sound-value requirement “supports two inferences” concerning the SBA’s authority to determine how that requirement should be applied in the context of PPP loans and stating that “[c]ontrasting inferences like these are the definition of ambiguity”).

The consensus among courts that have addressed this question is that Congress chose to retain the sound-value requirement for PPP loans, but delegated to the



²⁰ Business Loan Program Temporary Changes; Paycheck Protection Program-Additional Eligibility Criteria and Requirements for Certain Pledges of Loans, 85 Fed. Reg. 21747, 21750 (Apr. 20, 2020) (emphasis added).



SBA the authority to determine precisely how to apply that requirement to PPP loans. In *USF Fed. Credit Union v. Gateway Radiology Consultants, P.A.* (*In re Gateway Radiology Consultants, P.A.*), 983 F.3d 1239 (11th Cir. 2020), for instance, the court held that the sound-value requirement clearly applies to PPP loans, since Congress grafted the PPP onto an existing loan program—the SBA’s Section 7(a) loan program—that requires all loans to be of sound value. *Id.* at 1256.²¹ That conclusion was buttressed by the fact that, while Congress did not mention the sound-value requirement in the CARES Act, it modified *other* requirements for Section 7(a) loans, which the court said demonstrated that “Congress knew how to suspend or render inapplicable to PPP loans the traditional § 7(a) requirements when it wanted to do so.” *Id.* at 1257.

Courts have also rejected the argument that PPP loans are exempt from the sound-value requirement because Congress’s streamlined PPP “borrower requirements” do not refer to the borrower’s creditworthiness. Those courts have noted that the certifications Congress requires of PPP borrowers cannot be read as determining whether they are *eligible* for the loan, since those certifications must be made by “an eligible recipient.” *Id.* at 1259 (“The text and structure of the statute distinguish ‘certifications’ from discussions of ‘eligibility.’”).²²

Courts are also in agreement that the SBA has reasonably interpreted the Act’s sound-value requirement in the context of its PPP rules. The SBA has argued that its various bright-line exclusions from eligibility for PPP loans—including the bar

on debtors in bankruptcy from receiving PPP loans, introduced in the SBA’s April 28, 2020 Interim Final Rule²³—are reasonable means of promoting the Act’s mandate that PPP loans be of sound value while at the same time promoting Congress’s aim of making PPP loans “expeditiously.”²⁴

Several courts have adopted this view, agreeing that, while traditional standards of loan underwriting are not applicable to PPP loans, the SBA has the authority to bar applicants from receiving PPP loans because of their bankruptcy status or criminal history as a means of implementing the sound-value requirement:

- *SBA v. Roman Cath. Church of Archdiocese of Santa Fe*, 632 B.R. 816, 842 (D.N.M. 2021): “Faced with conflicting needs to accommodate [the

²¹ See also *Roman Catholic Church of Archdiocese of Santa Fe*, 632 B.R. at 838.

²² See also *Deja Vu-San Francisco LLC v. United States Small Bus. Admin.*, No. 20-CV-03982-LB, 2020 WL 6260010, at *7 (N.D. Cal. Sept. 11, 2020) (“Congress did not intend CARES Act criteria to be the exclusive criteria for the disaster loans, did not eliminate long-standing eligibility criteria, and instead temporarily expanded eligibility regarding size for disaster loans.”); *Roman Catholic Church of Archdiocese of Santa Fe*, 632 B.R. at 839 (“The eligibility criteria in 15 U.S.C. §§ 636(a)(36)(D)(i) and (F)(i)(II) should not be interpreted as exclusive. To do so would render other provisions of the CARES Act that exempt PPP applicants from certain SBA or Section 7(a) requirements superfluous.”).

²³ Business Loan Program Temporary Changes; Paycheck Protection Program-Requirements-Promissory Notes, Authorizations, Affiliation, and Eligibility, 85 Fed. Reg. 23450, 23451 (Apr. 28, 2020) (“If the applicant or the owner of the applicant is the debtor in a bankruptcy proceeding, either at the time it submits the application or at any time before the loan is disbursed, the applicant is ineligible to receive a PPP loan.... The Administrator, in consultation with the Secretary [of the Treasury], determined that providing PPP loans to debtors in bankruptcy would present an unacceptably high risk of an unauthorized use of funds or non-repayment of unforgiven loans.”).

²⁴ See, e.g., SBA’s Reply to Plaintiff/Appellee’s Opposition to Cross-Motion for Summary Judgment, in *Alaska Urological Inst., P.C. v. SBA*, Case No. 3:20cv170-TMB (DE 16), at 16–17 (“[T]he sound value rule remained, and so while underwriting did not apply to the PPP, some requirements were necessary to ensure that loan proceeds were used properly and would be repaid if not. Thus, as the Fourth Interim Final Rule explained: ‘The Administrator, in consultation with the Secretary, determined that providing PPP loans to debtors in bankruptcy would present an unacceptably high risk of an unauthorized use of funds or nonrepayment of unforgiven loans.’”).

sound-value] requirement and get PPP funds to employers as soon as possible, the SBA promulgated a bright-line rule that barred bankruptcy debtors from receiving PPP loans.”

- *In re Vestavia Hills, Ltd.*, 630 B.R. 816, 847 (S.D. Cal. 2021): “The SBA’s explanation that it decided to adopt the bright-line rule to maintain some of its sound-value requirements while allowing for efficient administration is not implausible or contrary to the evidence.”²⁵
- *Diocese of Rochester v. SBA*, 466 F. Supp. 3d 363, 378 (W.D.N.Y. 2020): “The SBA explained...that it had adopted this bright line rule [barring debtors from PPP loans] because it had determined that ‘providing PPP loans to debtors in bankruptcy would present an unacceptably high risk of an unauthorized use of funds or non-repayment of unforgiven loans.’”
- *Bros. Petroleum, LLC v. United States*, 569 F. Supp. 3d 405 (E.D. La. 2021): Rejecting argument that the SBA’s exclusion of PPP applicants with criminal records exceeded its authority, holding that “Congress presumed that other eligibility restrictions would apply, and the SBA normally restricts Section 7(a) eligibility based on criminal history,”

which is based on the sound-value requirement. *Id.* at 414 & 414 (quoting *Defy Ventures, Inc. v. SBA*, 469 F. Supp. 3d 459, 474 (D. Md. 2020)).

FUTURE APPLICATIONS OF THE SOUND-VALUE REQUIREMENT

There is little doubt, under the current consensus, that some form of the sound-value requirement will apply to PPP lenders—notwithstanding the SBA’s apparently unambiguous statements that “no creditworthiness assessment is required for PPP Loans.”²⁶ The question for PPP lenders concerns how, precisely, that requirement might be applied in the future. Courts thus far have limited their consideration of the sound-value requirement to validate the SBA’s bankruptcy and criminal-history exclusions. However, there is no particular reason to think that creative federal regulators attempting to recover fraudulent PPP loan proceeds would not attempt to hold PPP lenders to the sound-value requirement.



²⁵ See also *In re Vestavia Hills, Ltd U.S. Small Bus. Admin.*, No. 20-CV-01308-GPC-LL, 2021 WL 1165038, at *13 (S.D. Cal. Mar. 26, 2021). (“[T]he SBA adopted eligibility requirements that, it contends, seek to ensure the collectability of the loan while recognizing Congress’s intent to have the funds disbursed quickly.”)

²⁶ Business Loan Program Temporary Changes; Paycheck Protection Program-Additional Eligibility Criteria and Requirements for Certain Pledges of Loans, 85 Fed. Reg. at 21750.



NOTEWORTHY

DISTRICT COURT UPHOLDS NEW ERISA RULES ON ESG INVESTING

A district judge in the Northern District of Texas has upheld the Department of Labor's new ERISA regulations on environmental, social and governance (ESG) investing.¹ The case, *State of Utah v. Walsh*, Case No. 2:23-cv-00016-Z (2023), had been brought by 26 state attorneys general and private plaintiffs who alleged that the new rules, which took effect on February 1, 2023 (the "New Rules"), violated ERISA and were arbitrary and capricious under the Administrative Procedures Act. The decision by Judge Matthew J. Kacsmaryk upholds the Labor Department's interpretations under ERISA that

plan fiduciaries may consider ESG factors when evaluating the risk-weighted returns of investment options but should not give extra weight to ESG factors in choosing investments.

We had written about the New Rules in the Spring 2023 edition of *The Brief*.² We concluded that, after stripping away the rhetoric that has become associated with ESG investing, the New Rules were largely a continuation of the Labor Department's longstanding approach to fiduciary duties under ERISA, which requires fiduciaries to maximize employee pension and welfare benefits by focusing on a plan's financial returns and risks. Judge Kacsmaryk's

decision is consistent with that conclusion and affirms the Labor Department's longstanding focus on risk-weighted financial returns as the touchstone for compliance with ERISA fiduciary duties.

The New Rules made two changes to the ERISA rules pertaining to a fiduciary's consideration of ESG factors in making plan investments. First, the New Rules eliminated language in rules adopted in 2020 that required fiduciaries to base investment decisions "only on pecuniary factors."³ In place of the pecuniary/non-pecuniary distinction, the New Rules provide that the choice of an investment "must be based on factors

¹ Prudence and Loyalty in Selecting Plan Investments and Exercising Shareholder Rights, 87 Fed. Reg. 73822 (Dec. 1, 2022) (amending 29 C.F.R. Part 2550)

² "Much Ado About...Very Little," *The Brief*, Spring 2023, at 3-9.

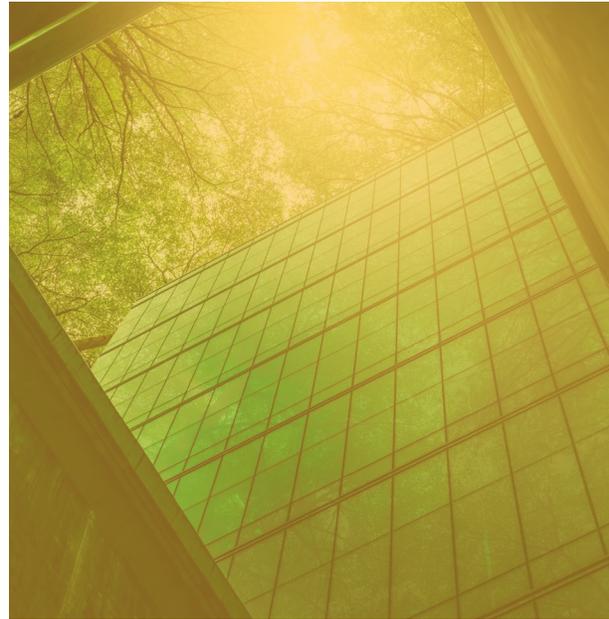
³ See 85 Fed. Reg. 72884.

that the fiduciary reasonably determines are relevant to a risk and return analysis... Risk and return factors may include the economic effects of climate change and other environmental, social or governance factors on the particular investment or investment course of action.”⁴ Second, the New Rules permit fiduciaries to consider collateral benefits (such as ESG factors) as a tiebreaker if competing investments “equally serve the financial interests of the plan over the appropriate time horizon,”⁵ rather than requiring that the competing investments be economically indistinguishable as under the rule promulgated in 2020.

The primary concern by plaintiffs in *Walsh* was that the New Rules promoted ESG investing at the literal expense of retirement plan beneficiaries by allowing fiduciaries to choose an investment based on “collateral benefits,” rather than requiring fiduciaries to act “with the sole motive of promoting the financial interests of plan participants and their beneficiaries” under ERISA Section 404(a)(1)(A).⁶ Plaintiffs also alleged that the New Rules were arbitrary and capricious under the APA because, among other things, the Labor Department ignored relevant

considerations and failed to consider alternatives.⁷

The court analyzed the New Rules under the *Chevron* framework applicable to administrative rulemaking and held that the New Rules were consistent with ERISA and a reasonable exercise of the Labor Department’s rulemaking authority. The court’s primary reasoning for upholding the New Rules was that they are supported by the Labor Department’s prior rulemakings.⁸ The New Rules “change little in substance” with respect to a fiduciary’s duties. Under the prior rules, “an ESG factor could be worth consideration if it ‘is expected to have a material effect on the risk/return of an investment.’ 85 Fed. Reg. 72884. Similarly the [New Rules] state that risk and return factors may include ESG factors under some circumstances, but those factors must still reflect ‘a reasonable assessment of its impact on risk-return.’”⁹ The court held likewise that there was “little meaningful daylight” between the old and new tiebreaker provisions: “Where the 2020 Rule explained that collateral factors may be considered when a fiduciary is ‘unable to distinguish’ between two investment options based on financial factors alone, the 2022 Rule allows the same when



the two options ‘equally serve the financial interests of the plan.’”¹⁰ The “little meaningful daylight” between the rules was of particular import to the court’s decision because plaintiffs had “approvingly” held out the 2020 rules as properly reflecting “ERISA’s focus on *financial* benefits.”¹¹

The court also held that the Department of Labor’s rulemaking was not arbitrary and capricious. The court found that the Department had adequately explained the reasons for its rule changes (including the purported chilling effect that the 2020 rules had on fiduciaries’ consideration of pertinent information when making investments).¹² The

⁴ 29 C.F.R. § 2550.404a-1(b)(1)(4).

⁵ 29 C.F.R. § 2550.404a-1(c)(2).

⁶ *Walsh*, Case No. 2:23-cv-00016-Z (N.D. Tex. 2023), DE-1, at ¶¶135-137.

⁷ *Id.* at ¶¶150-173.

⁸ *Walsh*, DE-109, at 6.

⁹ *Id.* at 9, citing 29 C.F.R. §2550.404a-1(b)(4).

¹⁰ *Id.* at 7.

¹¹ *Id.*; see also *id.* at 11 (“Plaintiffs again fail to distinguish the [New Rules] from the 2020 Rule.”).

¹² *Id.* at 11.

Department also had fulfilled its duties to “consider the alternative of issuing sub-regulatory guidance instead of amending the regulation itself.”¹³

The *Walsh* opinion does not itself turn over any new ground on interpretation of ERISA or the New Rules. But the fact that a conservative federal judge upheld the Biden Labor Department’s rulemaking on a hot-button issue (though the opinion is still subject to appeal) suggests that the New Rules may stay in their current form for the foreseeable future. The opinion makes clear that, after stripping away the rhetoric, the New Rules are merely a continuation of longstanding Labor Department policy. As the Labor Department said, “the final rule makes unambiguous that it is not establishing a mandate that ESG factors are relevant under every circumstance, nor is it creating a thumb on the scale in favor of ESG factors.”¹⁴ Fiduciaries, in other words, should evaluate ESG factors just like any other potential factor in their risk-return analysis.

FOURTH CIRCUIT HOLDS THAT CLASS-ACTION WAIVERS MUST BE ADDRESSED BEFORE CLASS CERTIFICATION

Marriott International, Inc., announced in late 2018 that cybercriminals hacked a guest reservation database, affecting roughly 133.7 million US guest records. The resulting lawsuits were consolidated into multidistrict litigation in the United States District Court for the District of Maryland. Plaintiffs sought to certify multiple classes against Marriott and Accenture LLP, its IT service provider.

The district court certified Rule 23(b)(3) damages classes against Marriott on contract and consumer-protection claims. It also certified Rule 23(c)(4) “issue” classes against Marriott and Accenture, limited to a subset of issues pertaining to negligence liability. Both Marriott and Accenture appealed the class certification decisions to the Fourth Circuit under Rule 23(f), challenging various aspects

of the certification order: that membership in the damages classes against Marriott was not sufficiently “ascertainable”; that plaintiffs’ model for class-wide calculation of overpayment damages was improper; and, on several different grounds, that the trial court incorrectly created negligence “issue” classes limited to the elements of duty and breach.

However, in *In re Marriott Int’l, Inc.*, 78 F.4th 677, 687 (4th Cir. 2023), the Fourth Circuit declined to address these issues because it agreed with Marriott on one threshold and overarching argument, namely that “[t]he district court erred when it declined to consider, before certifying class actions against Marriott, the import of a purported class-action waiver signed by every putative class member.” It emphasized that “the time to address a contractual class waiver is before, not after, a class is certified. Although it seems no court has had occasion to expressly hold as much, that is the consensus practice.” The Fourth Circuit explained that class certification is a sharp demarcation “between an individual action seeking to become a class action and an actual class action.” However, “by signing a valid and enforceable class waiver...a plaintiff promises not to cross that line—to give up, in exchange for some contractual benefit, the right to proceed” in a class action. Further, whether a

¹³ *Id.* at 13.

¹⁴ 87 Fed. Reg. 73831 (italics original).





plaintiff may proceed via a class action “does not speak to the underlying merits of his claim; it speaks to the process available in pursuit of that claim.”

The trial court’s analytical sequencing error also infected the certification of the Rule 23(b)(4) issue classes against Accenture given that the certification of the Marriott damages classes was the linchpin and critical predicate of the trial court’s Rule 23(b)(3) superiority analysis. In other words, the improper analysis affected the entire class certification order.

On remand, the district court will have to address issues that the Fourth Circuit declined to analyze regarding the class-action waiver’s validity and scope, and whether Marriott had waived reliance on the class waiver based on its litigation strategy.

NINTH CIRCUIT: FEES FOR CLAIMS-MADE SETTLEMENTS MUST BE BASED ON ACTUAL RECOVERY

Rule 23(h) of the Federal Rules of Civil Procedure requires a district court evaluating the fairness of a class settlement to determine whether class counsel’s requested fees are reasonable. Courts generally employ two methods when considering the reasonableness of fee requests: the lodestar method and the percentage-of-recovery method. The lodestar method multiplies the number of hours reasonably spent on the matter by a reasonable hourly rate, whereas the percentage-of-recovery method calculates fees by applying a reasonable percentage to the recovery available to class members. The two methods are often used in tandem to cross-check the reasonableness of fee requests.

The percentage-of-recovery method seems straightforward, but applying it can be difficult in claims-made settlements, i.e., settlements in which only those funds actually claimed by class members are paid out by settling defendants. When the amount ultimately recovered depends on the claims actually made by class members, what is the appropriate denominator when considering fees under the percentage-of-recovery method: the amount theoretically available to class members if all of them make claims or the amount of recovery actually paid out to claiming class members? A recent Ninth Circuit opinion says it’s the latter.

The owners of copyrights to musical compositions sued Rhapsody International (now rebranded as Napster) for allegedly infringing on their copyrights by reproducing and distributing their musical compositions without a license. The parties reached a settlement with a claims-made structure: Rhapsody would pay

the claims of all class members who submitted a claim, up to a maximum of \$20 million. Class counsel requested \$6.027 million in fees. The district judge referred the issue to a magistrate judge, who found (using the lodestar method) that class counsel's fee award should be \$1.7 million. The magistrate judge then applied a negative 0.5 multiplier (-0.5) to that amount, on the grounds that relief to the class—which totaled only \$52,841.05 in actual paid claims—justified a lower amount. The district judge accepted the magistrate judge's lodestar calculation of \$1.7 million but concluded that no negative multiplier should have been applied, resulting in an award of \$1.7 million in attorneys' fees.

Rhapsody appealed, and the Ninth Circuit reversed.¹⁵ The court held that, in assessing the value of a class action settlement for purposes of calculating attorneys' fees, "courts must consider the actual or realistically anticipated benefit to the class—not the maximum or hypothetical amount."¹⁶ The court obviously was troubled by what turned out to be the "illusory" nature of the \$20 million benefit claimed by class counsel. The National Musical Publishers Association ("NMPA"), together with Rhapsody and other companies, had previously entered into a

settlement in which claimants to that settlement had to waive their rights to make claims against Rhapsody and others. Approximately 97 to 98 percent of the class members in *Lowery* made such claims in the NMPA settlement, meaning that only two to three percent of the *Lowery* class members could make claims to the \$20 million fund negotiated by class counsel.¹⁷ The claims submitted to the \$20 million fund in the end totaled \$52,481.05. On remand, the district court was instructed to "disregard the illusory \$20 million settlement cap and focus instead on the approximately \$50,000 paid to class members, along with any other benefits to the class."¹⁸

The court further held that "a fee award should not exceed the value that the litigation provided to the class," except in extraordinary cases.¹⁹ "It does not matter that class action attorneys may have devoted hundreds or even thousands of hours to a case. The key factor in assessing the reasonableness of attorneys' fees is the benefit to the class members."²⁰ The fact that the lodestar calculation suggested that \$1.7 million in fees was reasonable mattered little because that amount was "not proportional" to the "meager" benefit received by the class.²¹

The takeaway from *Lowery* is that, in the Ninth Circuit, attorneys' fees in claims-made settlements must be based on the value of claims made, not the total fund made available. This rule is at odds with the holdings in other circuits, which allow fees to be based on the total fund made available to the class. See, e.g., *Masters v. Wilhelmina Model Agency, Inc.*, 473 F.3d 423 (2d Cir. 2007) (reversing district court that had awarded fees based on only amount claimed: "An allocation of fees by percentage should therefore be awarded on the basis of the total funds made available, whether claimed or not"); *Water v. Int'l Precious Metals Corp.*, 190 F.3d 1291, 1295-97 (11th Cir. 1999) (holding that award based on total common fund, rather than value of claims made, was not abuse of discretion where the "total fund amount... was not illusory or meaningless"). Claims-made structures where unclaimed funds revert to a defendant already are disfavored in the Ninth Circuit because of the appearance that class counsel may have colluded with defense counsel when negotiating the settlement. See *Allen v. Bedolla*, 787 F.3d 1218, 1224 (9th Cir. 2015). *Lowery* seemingly would make claims-made structures even less attractive to plaintiffs' attorneys in the Ninth Circuit.

¹⁵ *Lowery v. Rhapsody Int'l*, No. 22-15162, as amended (Aug. 2, 2023).

¹⁶ *Id.* at 6.

¹⁷ *Id.* at 4-6.

¹⁸ *Id.* at 5.

¹⁹ *Id.* at 7.

²⁰ *Id.* at 8.

²¹ *Id.*

SECOND CIRCUIT SAYS NO BANKRUPTCY CLASS ACTION TO ENFORCE DISCHARGE INJUNCTION VIOLATIONS

A creditor allegedly violates the bankruptcy discharge injunction by failing to update the trade lines of borrowers' credit reports to indicate that the debts were discharged. Does a bankruptcy court have jurisdiction to entertain a nationwide class action seeking redress for all affected borrowers? The Second Circuit says no.

The plaintiff in *Bruce v. Citigroup Inc.*, 75 F.4th 297 (2d Cir. Aug. 2, 2023), stopped paying her credit card bill. Shortly thereafter, the defendant reported to credit reporting agencies that she had a balance due that had been "charged off." Plaintiff later filed for bankruptcy. After receiving a discharge, she discovered that the trade line on her credit report had not been updated. According to Plaintiff, the "charged off" notation that remained was part of a willful policy to coerce borrowers to pay off discharged debt, *id.* at 300, and "charged off" debts had higher value in the debt collection market than debt properly labeled as discharged in bankruptcy. Plaintiff successfully re-opened her bankruptcy case and brought an adversary proceeding in which she sought a declaration, on behalf of herself and a class of borrowers for

whom the defendant similarly refused post-discharge requests, that the defendant was in contempt of the discharge injunction entered in her case and the cases of the other class members. *Id.*

The bankruptcy court denied the defendant's motion to strike the class allegations on the grounds that Bankruptcy Code Section 105, which allows a court to "issue any order, process, or judgment that is necessary or appropriate to carry out" the Code, allowed the court to enforce other bankruptcy courts' discharge injunctions. The district court certified the bankruptcy court's order for direct appeal.

The Second Circuit unanimously reversed on the issue of the bankruptcy court's jurisdiction to enforce the discharge

injunctions of other courts.²² The court's holding was based on two principles. First, a bankruptcy court's authority to issue injunctions is "coextensive with—not greater than—the civil contempt authority wielded by courts outside of bankruptcy." *Id.* at 303. The equity principles that govern civil contempt authority include the idea that "civil contempt proceedings leave the offended judge *solely* responsible for identifying, prosecuting, adjudicating, and sanctioning the contumacious conduct. *Id.*, (citing *Int'l Union United Mine Workers of Am. v. Bagwell*, 512 U.S. 821, 831 (1994)). The bankruptcy code does not give bankruptcy judges greater injunctive powers than those traditionally recognized in equity. It was, in other words, up to the bankruptcy judge in plaintiff's case (and



²² Defendant also appealed the bankruptcy court's order denying its motion to dismiss for failure to state a claim. The Second Circuit affirmed that ruling, holding that the plaintiff had adequately pled that the defendant's alleged policy of pressuring borrowers to pay off discharged debts left "no fair ground of doubt," under *Taggart v. Lorenzen*, 139 S.Ct. 1795, 1799 (2019), that the defendant's acts as pled violated the discharge.



the bankruptcy judges in the cases of other class members) to adjudicate any contempt proceeding. Second, each bankruptcy court has “unique expertise in interpreting its own injunctions and determining whether they have been violated.” *Id.* at 304 (quoting *In re Anderson*, 884 F.3d 382, 390-91 (2d Cir. 2018)). Whether a discharge injunction has been violated, and the appropriateness and form of any sanctions, “are considerations that can still benefit from the unique insight a bankruptcy court can gain in presiding over a proceeding.” *Id.* at 305.

It is important to note that the decision does not necessarily mean that conduct in contravention of a discharge injunction can never be the subject of a class action, e.g., perhaps for violation of a consumer protection statute. The decision considered only whether the relief sought by plaintiff—a finding of contempt—could be adjudicated and remedied on a class-wide basis. The answer to that is clear: “A bankruptcy court’s civil contempt authority does not extend to other bankruptcy courts’ discharge orders in a nationwide class action.” *Id.* at 306. The decision thus aligns the Second Circuit with other circuit courts that have considered the issue. See *In re Crocker*, 941 F.3d 206 (5th Cir. 2019); *Alderwoods Grp., Inc. v. Garcia*, 682 F.3d 958 (11th Cir. 2012).

SECOND CIRCUIT EXPANDS CREDIT REPORTING AGENCIES’ LIABILITY UNDER FCRA § 1681E(B)

Plaintiff Sessa leased a vehicle with the option to purchase it at the end of the term for the residual value of \$19,444.07. Although the lease’s plain language did not require Sessa to make a “balloon payment,” Hudson Valley Federal Credit Union furnished inaccurate information to TransUnion that Sessa in fact owed a “balloon payment” at the end of the term. TransUnion then reported this inaccurate obligation as a debt on Sessa’s credit report. Sessa sued TransUnion under FCRA § 1681e(b), which requires credit reporting agencies (“CRAs”) to “follow reasonable procedures to assure maximum possible accuracy of the information” in a consumer’s credit report.

The United States District Court for the Southern District of New York granted summary judgment to TransUnion, holding that Sessa’s credit report was not “inaccurate” under § 1681e(b). The trial court reasoned that whether Sessa owed a balloon payment was a “legal” issue requiring contract interpretation as opposed to a factual issue and that CRAs are not required by FCRA to make legal determinations regarding the debts reported to them.

Sessa appealed to the Second Circuit. The CFPB and FTC filed a joint amicus brief in support of Sessa. The agencies argued that CRAs should be held to the same standards as furnishers, and thus should not be exempt from following reasonable procedures when dealing with inaccuracies, even if such inaccuracies could be characterized as legal.

In *Sessa v. TransUnion, LLC*, 74 F.4th 38 (2d Cir. 2023), the Second Circuit vacated the District Court's summary judgment order. It found that "there is no bright-line rule... that only purely factual or transcription errors are actionable under the [FCRA]." The Court explained that "[i]n holding that CRAs can be held liable only 'when the information reported does not match the information furnished,' the District Court improperly narrowed the scope of section 1681e(b) to cases involving transcription errors." The court further concluded that statutory accuracy instead turns on "objectively and readily verifiable information." Such information may require CRAs "to accurately report information derived from the readily verifiable and straightforward application of law to facts."

The court further distinguished the facts in *Sessa* from its prior decision in *Mader v. Experian Info. Sols., Inc.*, 56 F.4th 264, 270 (2d Cir. 2023). *Mader* stated that "[t]he bespoke attention and legal reasoning required to

determine the post-bankruptcy validity of [the] debt [in question] means that its status is not sufficiently objectively verifiable to render [a] credit report 'inaccurate' under the FCRA." On this point, the Second Circuit stated in *Mader* that "[e]very other circuit to have considered an analogous question has agreed: inaccuracies that turn on legal disputes are not cognizable under the FCRA." In contrast, the court in *Sessa* found that "there does not appear to be any legitimate legal dispute regarding the inaccuracy of the reported balloon payment." The court explained that "[t]here simply was no balloon payment due—as a matter of fact. The lease provided for an option to purchase, not a required balloon payment," a point that *TransUnion's* counsel conceded at oral argument.

This decision is a win for consumers, at least in the Second Circuit. *Sessa* seems to require CRAs to look past the information furnished to them and to develop processes for considering the validity of reported debts, at least to the extent that "objectively and readily verifiable information" would tend to call the validity of the debt into question. Of course, how "objectively and readily verifiable" a debt is will be in the eye of the beholder, and it remains to be seen whether the decision will lead to a wave of claims seeking to hold CRAs liable for reporting debts that are disputed by borrowers.



FOURTH CIRCUIT: STATE-LAW CLAIMS REQUIRING PROOF OF VIOLATION OF A DISCHARGE INJUNCTION ARE NOT PREEMPTED BY THE BANKRUPTCY CODE

Under the Bankruptcy Code ("Code"), once a debtor has satisfied their obligations, the bankruptcy court will discharge their debts and enjoin any attempts to collect the discharged debt, 11 U.S.C. § 524(a)(2). The Code prescribes specific remedies for violation of the discharge injunction, including contempt damages and attorneys' fees. Debtors can also bring state-law claims against a party attempting to collect discharged debt, raising the question whether state-law claims that require proof of violation of the discharge injunction are preempted by the federal bankruptcy law scheme. In *Guthrie v. PHH Mortg. Corp.*, 79 F.4th 328 (4th Cir. 2023), the Fourth Circuit became the first federal Court of Appeals to consider this question and held, 2–1, that such claims are not preempted by the Code.



The court's summary indicates that the plaintiff filed for Chapter 13 bankruptcy in 2009. After his Chapter 13 plan was confirmed, he began making payments on his mortgage loan. Beginning in 2013, after it was assigned the plaintiff's mortgage, Ocwen Loan Servicing—which subsequently merged with PHH—began contacting the plaintiff for repayment of the loan. These efforts continued until 2020, despite the bankruptcy court's sending a copy of the discharge order to Ocwen. The plaintiff sued, asserting, among other things, state-law claims for negligent and intentional infliction of emotional distress and violations of the North Carolina Debt Collection Act. The district court granted PHH's motion for summary judgment in its entirety, holding that the plaintiff's state-law claims based on alleged violations of the discharge injunction were preempted by the Code.

On appeal, the Fourth Circuit first analyzed preemption. Noting that courts should not seek out conflict where none exists, the panel found that the plaintiff's state-law claims were neither expressly nor impliedly preempted by the Code. *Id.* at 337. The court first observed that there was no direct conflict preemption because a "creditor can comply with both the discharge injunction and the state law on which Guthrie's claims are based." *Id.* It then rejected the argument that the plaintiff's state-law claims were barred under obstacle preemption—where compliance with a state law would frustrate the purposes and objectives of Congressional action—concluding that allowing the state-law remedies sought by the plaintiff would, if anything, further the central goal of the Code, "to grant a 'fresh start' to the 'honest but unfortunate debtor.'" *Id.* at 338 (quoting *Marrama v. Citizens Bank of Mass.*, 549 U.S. 365, 367 (2007)).

The court also disagreed with PHH that the plaintiff's state-law claims interfered with the "ease or centrality with which the federal bankruptcy system operates" because "Guthrie's claims are almost exclusively based on events which took place after the bankruptcy case was closed." *Id.* at 339. Finally, the Fourth Circuit rejected arguments that the Code creates a comprehensive scheme for violations of the discharge injunction and that the Bankruptcy Clause of the US Constitution necessitates uniformity among every state law that merely happens to touch upon an issue covered by the Code. *Id.* at 339-41.

The Fourth Circuit is the first federal appellate court to rule on the preemption issues. *Id.* at 337. However, as noted by the dissent, *Guthrie* is at odds with opinions in other Courts of Appeals which have held that state-law claims based on violations of provisions of the Code governing the *automatic stay* are preempted. *Id.* at 349-50; see, e.g., *E. Equip. & Servs. Corp. v. Factory Point Nat'l Bank*, 236 F.3d 117, 121 (2d Cir. 2001); *Pertuso v. Ford Motor Credit Co.*, 233 F.3d 417, 425-26 (6th Cir. 2000); *MSR Exploration, Ltd. v. Meridian Oil, Inc.*, 74 F.3d 910, 911 (9th Cir. 1996). This area of law thus remains unclear, and creditors will have to wait to see if other circuits follow *Guthrie*.

**ELEVENTH AND SIXTH
CIRCUITS JOIN MAJORITY
IN HOLDING THAT A
SINGLE UNWANTED TEXT
MESSAGE OR VOICEMAIL
IS A SUFFICIENTLY
CONCRETE INJURY TO
CONFER STANDING FOR
TCPA CLAIMS.**

Challenging the “concrete injury” prong of Article III standing is a staple of defending class actions where the harm at issue is intangible (rather than physical injury or financial loss). In *Spokeo, Inc. v. Robins*, 136 S.Ct. 1540 (2016) and *TransUnion LLC v. Ramirez*, 141 S.Ct. 2190 (2021), the Supreme Court made clear that a statutory violation is itself not necessarily a concrete injury. In the context of intangible harms, the Court must look behind the statutory violation and assess whether the harm “has a close relationship to a harm that has traditionally been regarded as providing a basis for a lawsuit in English or American Courts.” *Spokeo*, 136 S.Ct. at 1549. Under these principles, TCPA defendants often argue that a plaintiff’s receipt of a *single* unwanted text message or call is insufficient to establish a concrete injury.

The Sixth Circuit recently addressed this issue in its June 1, 2023 decision, *Dickson v. Direct Energy, LP*, 69 F.4th 338 (6th Cir. 2023). *Dickson* received one prerecorded voicemail advertisement from Direct Energy to his cell phone in 2017 and filed a TCPA class action. Direct Energy moved to dismiss the

complaint for lack of standing, arguing that *Dickson* had suffered no concrete injury. The district court dismissed the case, citing the Eleventh Circuit’s opinion in *Salcedo v. Hanna*, 936 F.3d 1162, 1165 (11th Cir. 2019), for the proposition that a single text message is insufficient to establish a concrete injury.

The Sixth Circuit reversed, referring to the Eleventh Circuit’s *Salcedo* opinion as a misapplication of *Spokeo* and *TransUnion*. Instead, the Sixth Circuit adopted as instructive the reasoning of then-Judge Barrett’s opinion in *Gadelhak v. AT&T Services, Inc.*, 950 F.3d 458 (7th Cir. 2020), which explained that the key question is whether the harm suffered by the plaintiff bears a close relation *in kind, not in degree*, to a harm recognized at common law. Because the harm of one unwanted voicemail was the same *kind of harm* that has been traditionally protected by the tort of intrusion upon seclusion, it did not matter whether there was one or twenty voicemails (a difference of *degree*). Thus, the Sixth Circuit held that one voicemail was sufficient to satisfy the concrete injury requirement of Article III standing.

Two months later, on July 24, 2023, the Eleventh Circuit revisited its *Salcedo* opinion via an *en banc* rehearing in *Drazen v. Pinto*, 74 F.4th 1336 (11th Cir. 2023). *Drazen* was a TCPA class action in which one of the named plaintiffs, as well as about seven percent of the entire

proposed settlement class, had received only one text message. The district court applied *Salcedo* in dismissing the claim of that one named plaintiff but otherwise approved the settlement. On appeal, a three-judge panel of the Eleventh Circuit applied *Salcedo* to invalidate the entire proposed settlement class. The Eleventh Circuit then granted *en banc* rehearing to reevaluate its opinion in *Salcedo*.

The Eleventh Circuit first reiterated the Article III standing requirements explained in *Spokeo* and *TransUnion*. After recounting how other circuit courts address whether a harm has “a close relationship” to a harm at common law, the court stated that “[w]e think that asking whether the harms are similar *in kind* but *not degree* makes sense.” The court then held that, because the harm of a single unwanted text message is similar in kind to the harm underlying the tort of intrusion upon seclusion, it is a sufficient concrete injury under Article III.

Dickson and *Drazen* demonstrate that circuit courts continue to adopt the “in kind, not in degree” standard of analyzing whether an intangible harm bears a “close relationship” to a harm at common law and therefore is a concrete injury under Article III standing.

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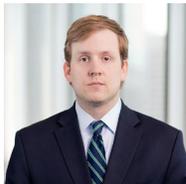
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