HUNTON

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Business Email Compromises and Misdirected Wires: What Does It Mean to Be in the Best Position to Prevent Fraud?

A common cybersecurity threat faced by organizations is a business email compromise (BEC), a cybercrime where an attacker gains access to an organization's email system and then uses it to perpetrate fraud, such as to obtain sensitive personal or financial data or to access and then drain an organization's financial accounts.

One type of fraud associated with a BEC scam relates to wire transfers. Consider this scenario: a heavy equipment dealer agrees to buy trucks from a seller. The seller sends the buyer an invoice that includes wire instructions. The buyer thereafter receives an email with allegedly updated wire instructions. Unbeknownst to the buyer or seller, the seller's email has been hacked by a third party. The updated wire instructions are sent from the seller's email account by the hacker and instruct the buyer to send the purchase funds to an account controlled by the hacker. The buyer wires the money as instructed in the updated set of instructions. The seller never receives the funds (which went to the hacker's account instead) and refuses to deliver the trucks to the buyer.

This fact pattern comes from *Arrow Truck Sales Inc. v. Top Quality Truck & Equip.*, 2015 WL 4936272 (M.D. Fla. 2015). It seems like an unusual scenario. A hacker must identify an email account associated with someone who sends wire instructions in the normal course of their business, monitor that person's email traffic, introduce an email with fraudulent wire instructions when the time is right (i.e., likely in the latter stages of a deal), monitor and respond to any efforts to verify the instructions via email, and also cover their tracks. But the scenario occurs repeatedly, touches nearly every industry, and can result in significant losses for the party left holding the bag. So who is most commonly left holding the bag—the party whose email was hacked and therefore allowed its email to be used by a hacker to send fraudulent wire instructions or the party that inadvertently wired the funds to the wrong account?

Arrow Trucks, one of the earliest decisions to consider the question, allocated the loss to the buyer, who the court found was in the best position to prevent the fraudulent transfer but failed to call and verify the updated wire instructions. Many courts since *Arrow Truck* similarly have allocated the loss to the wire transferor as the party best able to prevent the fraudulent transfer. Is this standard the correct one?

The Law

Litigants have asserted several theories (e.g., mutual mistake, apparent authority) in seeking to shift responsibility to the other party for misdirected wire transfers. Analysis of those claims generally collapses into application of the "impostor rule," a rule derived from UCC Article 3. Though the rule applies to negotiable instruments (e.g., checks) and not wire transfers,[1] this court-made synthesis of concepts from an analogous UCC section is (at least for now) the most common body of law under which claims are evaluated for misdirected wire transfers caused by compromised email.[2]

UCC Section 3-404(a) provides that, if an "impostor…induces the issuer of an instrument to issue the instrument to the impostor…an indorsement of the instrument by any person in the name of the payee is effective as the indorsement of the payee in favor of a person who, in good faith, pays the instrument or takes it for value." A simple example is an impostor who causes a corporation to issue a check to a fictitious payee. The impostor then cashes the check. Section 3-404(a) makes the corporation as drawer of the check liable for the loss. The reason, according to the official commentaries, is that "the drawer is in the best position to avoid the fraud and thus should take the loss" (perhaps, for example, by having better control of its check issuing processes). Section 3-404 continues: "if a person paying the instrument or taking it for value or for collection fails to exercise ordinary care in paying or taking the instrument and that failure substantially contributes to loss resulting from payment of the instrument, the person bearing the loss may recover from the person failing to exercise ordinary care to the extent the failure to exercise ordinary care contributed to the loss." UCC § 3-404(d). Subsection (d) thus recognizes that, "in some cases, the person taking the check might have detected the fraud and thus have prevented the loss by the exercise of ordinary care. In those cases, if that person failed to exercise ordinary care, it is reasonable that that person bear loss to the extent the failure contributed to the loss." UCC § 3-404 Official Comm. pt. 3. When we put the two sections together and apply them to our fraudulent check example, a drawer generally bears the loss for a check induced to be issued by an impostor, except if the entity taking the check (e.g., a bank) fails to exercise ordinary care that substantially contributes to the loss, in which case the person bearing the loss may recover from the person taking the check "to the extent the failure to exercise ordinary care contributed to the loss."

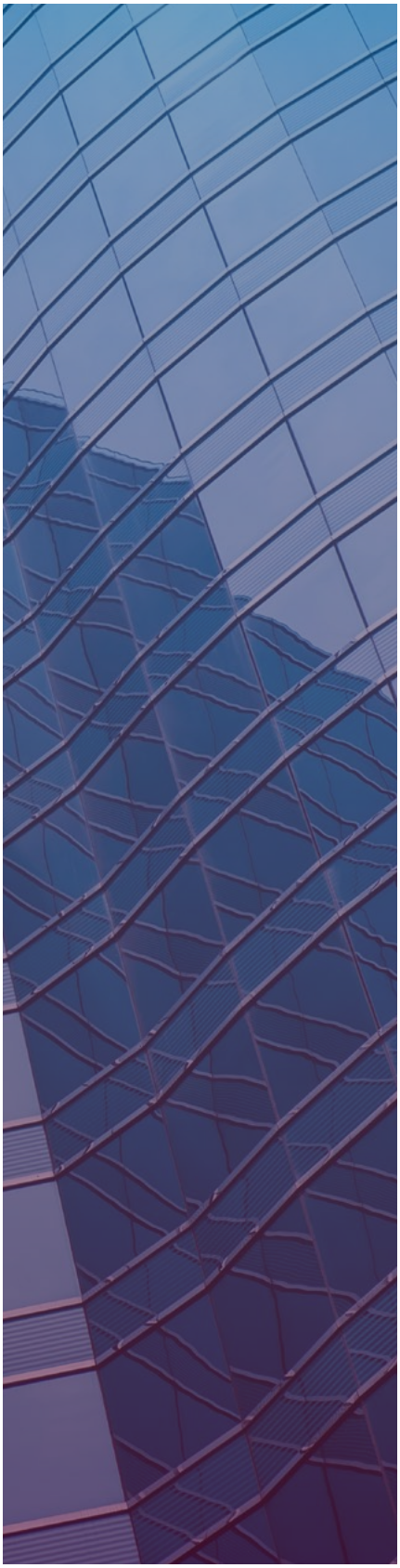
Application of the Impostor Rule in BEC Cases

UCC Article 3 thus seems to contemplate a comparative standard in allocating loss for fraudulent checks involving an impostor. In misdirected wire cases, however, some courts have adopted a standard which allocates the risk of loss to the wire transferor, with minimal consideration of how the hacked party's own acts or negligence may have contributed to the loss.

Arrow Truck is an example. Citing UCC Section 3-404(d), the court there held that "[u]nder the 'impostor rule,' the party who was in the best position to prevent the forgery by exercising reasonable care suffers the loss." 2015 WL 4396272 at *5. The court then found that the wire transferor (the buyer of the trucks) was "in the best position to prevent the fraud" and allocated the entirety of the loss to the transferor because the transferor did not question the conflicting wire instructions, "which differed from past instructions and identified a different bank, location and even a different beneficiary." *Id.* at *6. The *Marriott* court similarly held that the applicable standard "requires the Court to look at which party is in the best position to prevent the fraud" and allocated the entirety of the loss to the transferor because it could have "reached out to [transferee] to confirm the changes in banks or account information" but never did so. 2023 WL 7130802 at *4-5.

1 Article 4A of the UCC covers wire transfers but has no provisions that are directly applicable or analogous to the impostor rule.

2 Not all courts agree that the impostor rule applies in these cases. In *Marriott Int'l, Inc. v. National Supermarket Ass'n, Inc.*, 2023 WL 7130802, *4 (Sup. Ct. N.Y. Cty. 2023), the court specifically declined "to expand the reach of the UCC under these facts," though it then went on essentially to apply the rule to hold the defendant (the wire transferor) liable as the party in the best position to avoid the fraud. In *Peeples v. Carolina Container, LLC*, 2021 WL 4224009 (N.D. Ga. 2021), the court held that applying the impostor rule for negotiable instruments to cases involving a misdirected wire transfer was "straying into the realm of judicial law-making." The court there evaluated the claim under basic contract principles and held that the wire transferor breached the contract because it made payment to a third party, not the counterparty it was obligated to pay. *Id.* at *4.



This interpretation of the impostor rule is somewhat akin to the "last clear chance rule," a principle of contributory negligence whereby a plaintiff can recover from a defendant if, notwithstanding the plaintiff's own negligence, the defendant had the last clear chance to avoid the injury or damage. In cases like *Arrow Truck* and *Marriott*, the wire transferor had the last clear chance to avoid the fraud by calling and verifying wire instructions that had changed since they had originally been provided by the wire transferee, and, because the parties had not done so, they were stuck with the loss.

Consider though whether the apparent emphasis on who had the "last clear chance" of avoiding the misdirected wire is a faithful interpretation of UCC Article 3 and the impostor rule. As a logistical matter, the wire transferor is the party that fills in the wire information and so will almost always be the party with the "last chance" of not sending a wire to the wrong party. This formulation imposes on the wire transferor the obligation to verify all of the payment details rather than relying on what it has received from the wire transferee, thus making the wire transferor nearly strictly liable for a misdirected wire, even though the fraud originated with the transferee. *See, e.g., Jetcrete North Am. LP v. Austin Truck Equipment, Ltd.*, 484 F. Supp. 3d 915, 920 (D. Nev. 2020) (finding that wire transferor "was in the best position to prevent the loss by taking the reasonable precaution of verifying the wiring instructions by phone" even though "[t]he hack of [transferee's] email account created the scenario for the loss"). Perhaps it is not a significant burden in one case, but it could be quite burdensome for entities regularly sending wires in the normal course of their business.

The rationale for UCC Section 3-404(a) also seems important. In a typical case, that section allocates loss to the party that allows fraud to enter the payment system, e.g., a party that, through lax internal policies, allows an impostor to write a check to a fictitious party. In a BEC case involving a misdirected wire, the party allowing fraud to enter the payment system is the hacked party, whose e-mail is used to send fraudulent wire instructions. Framed in this way, the impostor rule would seem to put the risk of loss on that party (with loss possibly then apportioned according to the comparative principles of UCC Section 3-404(d)).

Some courts have applied the more comparative-based standard seemingly contemplated by UCC Article 3. In *Beau Townsend Ford Lincoln, Inc. v. Don Hinds Ford, Inc.*, 759 Fed. Appx. 348 (2018), the Sixth Circuit reversed the district court's summary judgment ruling in favor of the hacked party and held that proper application of the impostor rule requires a court "to determine whether [either party's] failure to exercise ordinary care contributed to the hacker's success," and then "to apportion the loss according to their comparative fault." *Id.* at 358. The court in *J.F. Nut Co., S.A. v. San Saba Pecan, LP* similarly denied cross-motions for summary judgment and held that liability at trial for the misdirected payment "will be determined based on an allocation of fault" between the parties. 2018 WL 7286493, at *3 (W.D. Tex. Jul. 23, 2018). Even in those cases though, the formulation of the impostor rule remains the same: "losses attributable to fraud should be borne by the party in the best position to prevent the fraud." *Beau Townsend*, 759 Appx. at 356.

So, who is in the best position to prevent the fraud in a misdirected wire case? The differing outcomes in the case law discussed above appear to be based in part on the scope of the conduct being reviewed. The courts in *Arrow Truck* and *Marriott* appear

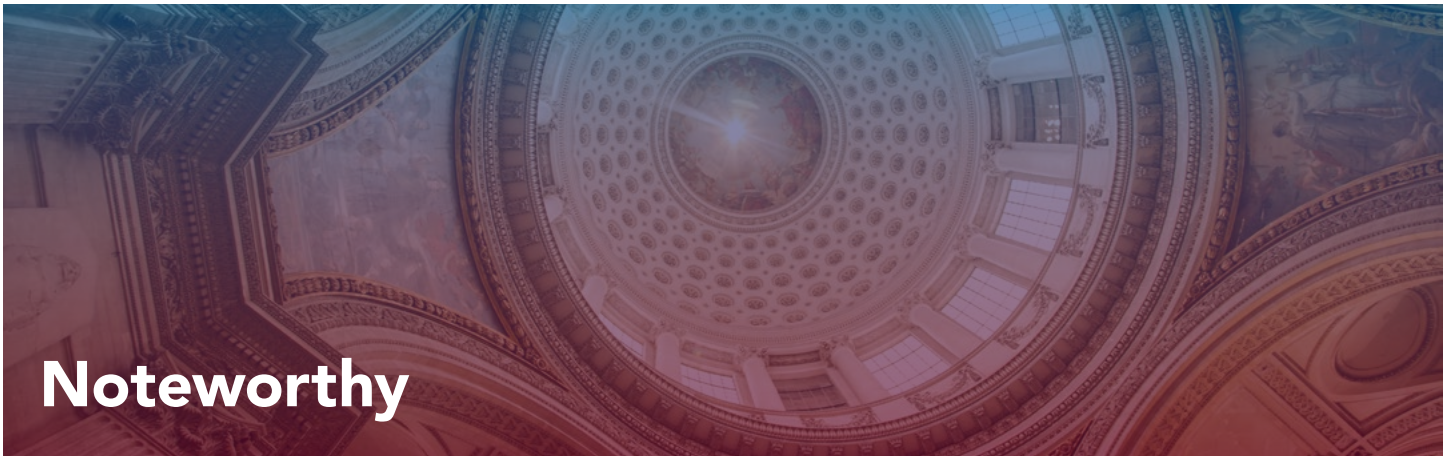
to have taken a relatively narrow view of causality.[3] Framed in that more limited way, the wire transferor seems usually to be in the best position to avoid the fraud because it can confirm the wire instructions (and comparatively, the transferee may not even know of the hack and so not have any reason to act to prevent the wire transfer). The *Beau Townsend* and *J.F. Nut* courts by contrast appear to view causality more broadly, starting with the hack that ultimately led to the wire going to the wrong recipient. Framing the issue in that way, starting with an event involving the hacked party's conduct, takes account of a greater variety of conduct in the causality analysis that is then evaluated comparatively.

Conclusion

The broader approach to assessing which party is in the "best position to prevent the fraud" is consistent with UCC Section 3-404's comparative fault framework. It takes a holistic view of the parties' conduct and the transaction as a whole, rather than focusing only on the mechanics of sending the misdirected wire. This means that, for lawyers representing parties in a misdirected wire case, the scope of conduct at issue in discovery, depending on the facts, is likely to be broader than inquiries relating to the wire specifically. It could, for example, require expert testimony regarding the nature of the hack, either to show the hacked party bore no fault or that the hacked party allowed fraud to enter the transaction by failing to exercise ordinary care.

For entities sending wires, the safest policy would be to confirm all wire instructions (verbally, of course, in light of the hack) shortly before the wire is sent. This could be a burden on entities that send wires regularly in the normal course of their business, and the law presently does not seem to impose that requirement. But prudent policy would require close attention to all wire instructions. For example, does the payee name match the name of the counterparty? Is the payee bank located in the United States? If the parties have done business before, do the wire details match the details of previous successful wires? Do the wire instructions originate from what appears to be a correct e-mail address (i.e., an address associated with the entity, not a Gmail or Yahoo address that can be opened by anybody)? If wire instructions do change during the course of the transaction, the party transmitting the wire should in every instance require detailed verbal confirmation from the counterparty of the revised wire instructions and insist on a satisfactory explanation for the revisions prior to transmitting the wire.

3 To be sure, the *Arrow Truck* decision came after a bench trial that resulted in findings of fact by the court. The subject of the hack was addressed, with the court finding that "neither [party] was negligent in the manner that they maintained their e-mail accounts. They were both victims of a sophisticated third-party fraudster or fraudsters…." 2015 WL 4936272 at *4. The record supporting these findings is thin, but it may explain the court's focus on the wire transferor's conduct in not confirming the wire instructions: the court simply had little other fault to evaluate. And neither party may have had much incentive to develop evidence regarding the hack because costs for a forensic examination likely were not justified in light of the invoiced amount at issue ($570,000).



Noteworthy

Second Circuit: Imperfect but Reasonable Investigation Under FCRA Upheld Where No Different Result Likely

In *Suluki v. Credit One Bank, N.A.*, No. 23-721-cv, 2025 BL 182005 (2d Cir. May 28, 2025), the Second Circuit upheld summary judgment in favor of a furnisher of consumer information to credit reporting agencies (CRAs). The court's ruling underscored that the investigation standard for the furnisher's claims is reasonableness, not perfection, and that the plaintiff must show that any alleged deficiencies in the investigation would have changed the outcome. Because the plaintiff failed to meet her burden in this case, the decision offers valuable guidance for financial institutions dealing with identity theft claims by illustrating what may suffice as a reasonable investigation under the FCRA.

Suluki alleged that her mother had opened a credit card account in her name without authorization. Upon discovering the account on her credit report, Suluki disputed the debt with the consumer reporting agencies. Credit One Bank received an Automated Consumer Dispute Verification (ACDV) and initiated an investigation under 15 U.S.C. § 1681s-2(b). Suluki submitted an identity theft affidavit, but had only partially filled out the form, did not affirmatively name her mother as the identity thief in the designated field, and omitted supporting documentation such as a police report/identity theft report.

Credit One concluded that Suluki was responsible for the account and continued reporting the debt. Suluki sued, alleging that the bank failed to conduct a reasonable investigation and violated the FCRA by failing to delete the account from her credit file.

The record showed that Credit One followed its standard investigative protocols, which included:

- review of the ACDV submitted by the CRA,
- review of Suluki's affidavit and other correspondence,
- verification using LexisNexis and other third-party data sources,
- analysis of the application data, which listed Suluki's correct Social Security number and address,
- internal fraud screening, which showed no red flags,

- examination of transaction and payment history, including timely payments made from a bank account shared by Suluki and her mother,
- confirmation from Suluki's mother by phone that the account was not fraudulent, and
- association of the account with contact details linked to Suluki, including a shared email and phone number. Credit One determined that the account appeared to be legitimately hers and verified it to the credit bureaus. *See Suluki v. Credit One Bank, N.A.*, No. 23-721-cv, 2025 BL 182005, at *10 (2d Cir. May 28, 2025).

The Second Circuit upheld the summary judgment, affirming that even if the investigation was not perfect it was reasonable, and the dispositive issue was that no additional reasonable steps would have changed the outcome. The court found that Suluki failed to offer sufficient evidence that a more robust investigation would have led Credit One to a different conclusion. *Id.* at *10–11.

The court emphasized that liability requires both an unreasonable investigation and a showing that the investigation's shortcomings caused an inaccurate outcome that would otherwise have been avoided. In this case, the court found that plaintiff had failed to meet either requirement—the undisputed data linking Suluki to the account—including application information, identifiers, and the shared payment source—provided ample basis for Credit One's determination, and there was no showing that additional reasonable steps would have changed the result of the investigation.

Further undermining any claim for damages and unsurprisingly given that the court determined the investigation to have been reasonable, the court also rejected Suluki's argument that Credit One's conduct was willful or negligent. Applying *Safeco Ins. Co. of Am. v. Burr*, 551 U.S. 47, 69–70 (2007), the panel concluded that Credit One's interpretation of its FCRA obligations was not objectively unreasonable. *Suluki*, 2025 BL 182005, at *13.

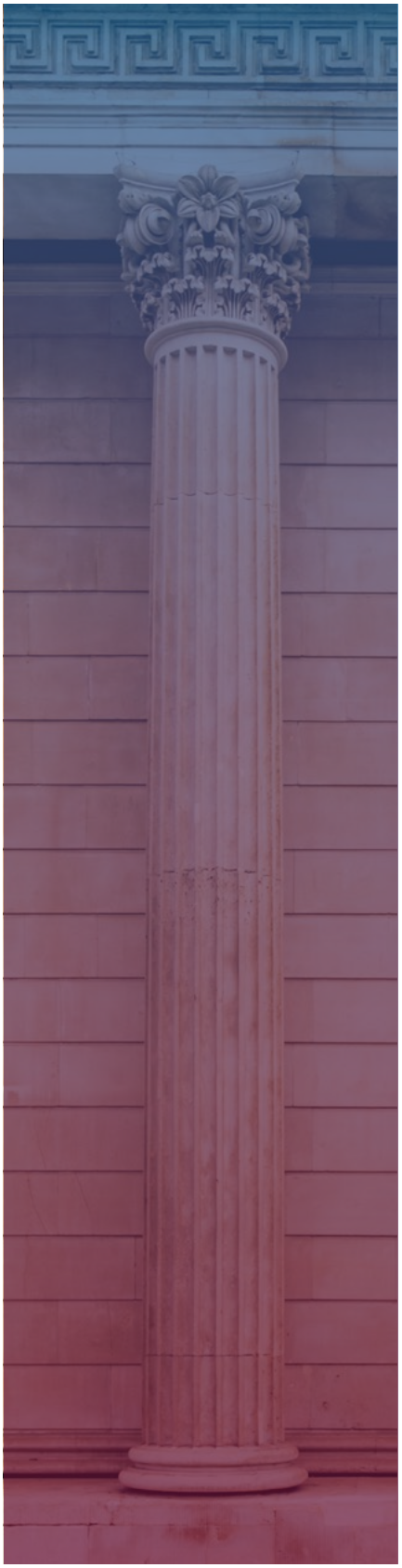
Suluki confirms that a well-documented, methodical investigation—especially one that relies on objective data sources and fraud screening tools—can support summary judgment, even where identity theft is alleged. When furnishers document what they have reviewed, apply internal protocols, and reasonably conclude that the debt is valid, courts may find no triable issue under the FCRA—even if the consumer disagrees with the result.

Fourth Circuit Reaffirms Its Rejection of Two-Step Sham Litigation Test

In *Navient Solutions, LLC v. Lohman*, 136 F.4th 518 (4th Cir. 2025), the Fourth Circuit affirmed its long-held rejection of a two-step test to determine whether a lawsuit constitutes sham litigation, requiring courts to holistically assess both the subjective intent of the litigant and objective merits of the lawsuit when making such a determination.

Navient Solutions, LLC (Navient) sued 18 defendants, consisting of a group of lawyers, marketers, and debt-relief businesses, alleging they lured dozens of student loan borrowers into filing lawsuits against Navient under the Telephone Consumer Protection Act (TCPA). More specifically, Navient alleged that the defendants devised a mail and wire fraud scheme, wherein student borrowers ceased making loan payments and filed illegitimate TCPA actions against Navient in violation of the Racketeer Influenced and Corrupt Organizations Act (RICO). Navient also brought a RICO conspiracy claim under 18 U.S.C. § 1962(d), a tortious interference with contract claim, and a fraud claim.

While a jury found in Navient's favor, the district court granted the defendants' renewed motions for judgment as a matter of law pursuant to Federal Rule of Civil Procedure 50(b). In granting the motions, the trial court found that the defendants' TCPA lawsuits were not "sham litigation" and that "because the only



damages Navient argued at trial…were directly a result of the TCPA litigation…the jury's verdicts must be set aside."

The primary issue addressed by the Fourth Circuit on appeal was whether the TCPA lawsuits brought by the defendants were "sham lawsuits." Throughout the underlying lawsuit, the defendants asserted that their TCPA claims were immunized by the *Noerr–Pennington* Doctrine, which safeguards the First Amendment's right to petition the government for redress of grievances, including petitioning the courts. Importantly, this immunity does not extend to sham litigation.

In its analysis regarding whether the TCPA suits constituted shams, the Fourth Circuit recognized that the circuits are divided on the appropriate test to make such a determination. *See U.S. Futures Exch., L.L.C. v. Bd. of Trade of the City of Chic., Inc.*, 953 F.3d 955, 964 & n.10 (7th Cir. 2020) (outlining circuit split). However, the Fourth Circuit applied the test set out in *California Motor*, establishing that sham litigation is "a pattern of baseless, repetitive claims…which leads the factfinder to conclude that the administrative and judicial processes have been abused." *See California Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 513 (1972); *see also Waugh Chapel S., LLC v. United Food & Com. Workers Union Loc. 27*, 728 F.3d 354, at 364 (4th Cir. 2013) (establishing that the *California Motor* standard governs the determination of sham litigation in the Fourth Circuit).

The Fourth Circuit declined to apply the two-step test set out in *Pro. Real Estate Invs., Inc. v. Colombia Pictures Indus., Inc.*, 508 U.S. 49 (1993), which only permits evaluating the litigant's subjective motivation in filing suit if the litigation is objectively meritless. Instead, the Fourth Circuit applied the *Waugh Chapel* test to the TCPA actions, which requires a holistic evaluation of the subjective motive of the litigants and objective merits of the suit in asking whether the defendants "indiscriminately filed (or directed) a series of legal proceedings without regard for the merits and for the purpose of violating [the] law." *Waugh Chapel*, 728 F.3d at 364. The court concluded that, although certain aspects of the TCPA suits may have exhibited bad faith, "each action ultimately centered on defendants' investment in a single and legitimate question of statutory interpretation[,]" meaning that the defendants were subjectively motivated to bring actions with objective merit. Thus, "because defendants pursued a contested issue of TCPA interpretation, they did not engage in sham litigation, and their petitioning activity [was] immunized under *Noerr–Pennington*."

Ninth Circuit: No RESPA Liability for Servicer for Failure to Disclose All Post-Forbearance Repayment Options

In *Calcut v. Paramount Residential Mortg. Grp., Inc.*, the Ninth Circuit addressed whether a loan servicer is required by RESPA to inform borrowers of all repayment options on modified loans. No. 24-764, 2025 WL 1341672 (9th Cir. May 8, 2025).

The dispute concerned a VA loan obtained by the plaintiffs from Paramount. Cenlar FSB serviced the loan. The Calcuts alleged that, as their loan exited forbearance, Cenlar violated RESPA by failing to fully inform them of their repayment options. They also alleged RESPA violations flowing from asserted violations of VA loan guidelines and Consumer Financial Protection Bureau (CFPB) regulations. The Ninth Circuit affirmed the district court's grant of summary judgment to the defendants on the RESPA claim.

Section 2605(k)(1) of RESPA provides that a servicer of a federally regulated mortgage shall not:

> (C) fail to take timely action to respond to a borrower's requests to correct errors relating to allocation of payments, final balances for purposes of paying off the loan, or avoiding foreclosure, or other standard servicer's duties;
>
> (E) fail to comply with any other obligation found by the Bureau of Consumer Financial Protection, by regulation, to be appropriate to carry out the consumer protection purposes of this chapter.

12 U.S.C. § 2605(k)(1)(C), (E). The Calcuts asserted violations of provisions (C) and (E) based on the defendants' alleged failure to "take timely action" in response to the plaintiffs' requests to correct errors regarding their loan modification. Specifically, the Calcuts asserted that Cenlar had a duty to provide accurate information about *all* loss mitigation options available under the CARES Act and the VA guidelines. Instead, the Calcuts argued, Cenlar offered only a single option, without reviewing or discussing other repayment options it knew were available. *Id.*

Much of the Ninth Circuit's analysis turned on construing the reference to "servicing" in RESPA. The court adopted the Fourth Circuit's reasoning that "errors relating to the allocation of payments are not the same as errors relating to how those payment obligations arose." *Id.* (citing *Morgan v. Caliber Home Loans, Inc.*, 26 F.4th 643, 651 (4th Cir. 2022)). The court held that the term "servicing" is meant to "encompass *only* 'receiving any scheduled periodic payments from a borrower pursuant to the terms of any loan... and making the payments of principal and interest and such other payments[,]'" and that "[s]ervicing" (and by extension "other standard servicer's duties") does not concern "transactions and circumstances surrounding a loan's origination" or "request[s] for modification of a loan agreement." Thus construed, the court held that the plaintiffs' claims regarding conduct concerning their loan modification application were not cognizable under RESPA's servicing provisions.

The court disagreed that the defendants violated the "other standard servicer duties" provision of § 2605(k)(1)(C) by failing to adhere to VA guidelines because "Section 2605(k)(1)(C)'s cause of action does not extend to a servicer's asserted failure to offer certain payment plan options or adhere to a particular standard in a loan's modification." *Id.* at *2. (quoting *Medrano*, 704 F.3d at 666-68). Further, the "VA Circulars d[id] not give rise to liability under Section 2605(k)(1)(E) because that provision concerns the CFPB's regulations, not the VA's." *Id.*

The court also affirmed summary judgment against the Calcuts' claims based on violations of CFPB regulations. First, the court reasoned that the CFPB regulation that requires servicers to evaluate borrowers for "all loss mitigation options" available was not violated, because the programs identified by the plaintiffs were not offered at the time of their loan modification. Further, the Calcuts' claim arising under 12 C.F.R. § 1024.38, a provision regulating a servicer's failure to maintain policies, was inapplicable to their claims.

In the end, *Calcut* is a rebuke to claimants and counsel seeking to expand servicer duties by leveraging non-regulatory administrative "guidelines" and "guidance" into actionable claims. However, servicers should note that while the court declined to broaden the definition of "servicing" under RESPA, CFPB regulations *will* of course be considered in regulating servicer duties in loan origination and modification scenarios.

Unweaving *Weaver*: Fifth Circuit Reverses Course on 45 Years of Precedent to Find That Waiver-Based Remand Orders Are Reviewable on Appeal

In *Abraham Watkins Nichols Agosto Aziz & Stogner v. Festeryga*, No. 23-20337, the Fifth Circuit, sitting *en banc*, considered whether a federal appellate court has jurisdiction to review a remand order based solely on an alleged waiver of the right to remove a case to federal court. The underlying dispute began when a law firm sued its former attorney in Texas state court, alleging that he had taken firm case files and clients when he left the firm. The defendant-attorney then filed a motion to dismiss in state court but later removed the case to the United States District Court for the Southern District of Texas. Despite the timely removal, the federal district court remanded the case, finding that defendant had waived his removal right by seeking affirmative relief in state court—namely, by filing the motion to dismiss before removal.

A panel of the Fifth Circuit initially dismissed defendant's appeal, relying on the circuit's long-standing precedent in *In re Weaver*, 610 F.2d 335 (5th Cir. 1980), that a remand order based on waiver is not reviewable under 28 U.S.C. § 1447(d). That statute bars appellate review of remand orders based on lack of subject-matter jurisdiction or procedural defects under § 1447(c). However, when the full court reviewed the case, it overruled *Weaver*, holding that "[a] remand based on waiver is not jurisdictional" or procedural under § 1447(c). Rather, waiver is a common-law doctrine concerning a party's conduct, not the court's jurisdictional power to hear a case. As such, the Fifth Circuit concluded that remand orders based solely on waiver are not shielded from appellate review by § 1447(d). The court then reinstated the appeal and returned the case to the original panel to address the unresolved questions of whether federal jurisdiction existed and whether defendant, in fact, had waived his right to remove.

This opinion is legally significant because it overrules nearly 45 years of Fifth Circuit precedent. The decision narrows the scope of § 1447(d)'s bar on appellate review, clarifies the limits of judicial authority in remand situations, and reaffirms the importance of distinguishing between jurisdictional and non-jurisdictional grounds in appellate practice. By treating waiver as a reviewable issue, the opinion strengthens the rights of defendants seeking federal subject-matter jurisdiction and offers a more textually faithful interpretation of removal statutes, with implications for procedural strategy in both state and federal litigation.

Tenth Circuit Construes TCPA Emergency Purposes Exception

In *Silver v. City of Albuquerque*, the Tenth Circuit held that pre-recorded calls by the City of Albuquerque (City) inviting residents to virtual town hall meetings during the COVID-19 pandemic did not violate the Telephone Consumer Protection Act (TCPA). 134 F.4th 1130 (10th Cir. 2025).

The TCPA states that "it shall be unlawful for any person within the United States…to make any call (other than a call made for emergency purposes or made with the prior express consent of the called party) using any automatic telephone dialing system or an artificial or prerecorded voice…unless such call is made solely to collect a debt owed to or guaranteed by the United States." 47 U.S.C. § 227(b)(1)(A)(iii). The law excepts from coverage "calls made necessary in any situation affecting the health and safety of consumers." 47 C.F.R. § 64.1200(f)(4).

While the TCPA does not define "emergency," the FCC has opined that "emergency" includes "situations in which it is in the public interest to convey information to consumers concerning health or safety." *In the Matter of the Telephone Consumer Protection Act of 1991*, 7 F.C.C. Rcd. 2736, 2738 (1992). The FCC also advised in 2020 that "hospitals, health care providers, state and local health officials, and other government officials may lawfully communicate information about the novel coronavirus as well as mitigation measures without violating federal law." *In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 35 F.C.C. Rcd. 2840, 2840 (2020).

Against that backdrop, in *Silver*, the Tenth Circuit employed a two-step inquiry to determine whether the calls at issue met the TCPA's emergency purposes exception: (1) context and (2) content. 134 F.4th at 1134. The court concluded that the "context" prong of the emergency-purposes-exception inquiry was satisfied because the caller was a local government official. *Id.* The court also concluded the "content" prong of the inquiry was satisfied because each of the City's calls were informational and directly related to the COVID-19 outbreak and pandemic. *Id.*

The court rebutted three arguments from Silver. First, Silver argued that the calls did not meet the emergency purposes exception because they were made "without regard to whether they were relevant to the called parties." The court concluded that the pandemic—along with any associated mitigation measures—was relevant to all City residents. *Id.* at 1135. Second, Silver argued that there were less intrusive means for the City to inform residents about the town halls, or, in the alternative, that the City's calls could not have related to COVID-19 because they did not explicitly mention COVID-19. The court noted that the TCPA does not require calls to use specific words to invoke the protection of the emergency purposes exception. *Id.* at 1136. Nor does the TCPA instruct that a caller must use the least intrusive means available. *Id.* The calls informed recipients of a measure taken in response to an emergency—even if the calls did not always explicitly mention the pandemic. *Id.* Third, Silver argued that the calls violated the TCPA because the content of the virtual town halls did not always concern COVID-19. The court concluded that, because "the content of the calls relayed a mitigation measure in response to the pandemic" (virtual town halls instead of in-person), the content of those town halls was irrelevant. *Id.*

The Tenth Circuit affirmed the district court's dismissal of Silver's claim, concluding that the pre-recorded calls fit the TCPA emergency purposes exception because they were informational, made by a government official, and directly related to the risks associated with the pandemic. *Id.* at 1131. The Tenth Circuit's decision in *Silver* underscores the broad scope of the TCPA's emergency purposes exception, highlighting that government-initiated information calls related to public health emergencies, like the COVID-19 pandemic, are permissible even if they do not explicitly mention the emergency, provided they serve the public interest in health and safety.

Ninth Circuit Clarifies Conditions Waiving Right to Jury Trial and Distinction Between Equitable and Legal Restitution

In *Consumer Fin. Prot. Bureau v. CashCall, Inc.*, 135 F.4th 683 (9th Cir. 2025), the Ninth Circuit affirmed a district court's order that CashCall pay more than $134 million in legal restitution to the Consumer Financial Protection Bureau (CFPB) over alleged unfair loan collection practices, rejecting CashCall's argument that the order triggered CashCall's Seventh Amendment right to a jury trial.

The Ninth Circuit rejected CashCall's primary contention that the district court's order of legal restitution triggered its Seventh Amendment right to a jury trial, holding that CashCall waived that right during the initial district court proceedings in 2016, when it voluntarily participated in a bench trial. In so holding, the Ninth Circuit rejected CashCall's argument that it didn't have any known right to a jury trial until 2020, when the US Supreme Court held in *Liu v. SEC*, 688 591 U.S. 71 (2020), that equitable monetary relief—which the CFPB initially pursued—could not exceed net profits, while legal restitution or monetary relief could exceed net profits and triggered the Seventh Amendment right to a jury trial.

The court explained that even on remand, post-*Liu*, and after the CFPB denied it sought equitable relief, CashCall still did not demand a jury trial. Like other constitutional rights, the Seventh Amendment right to a jury trial can be waived, held the court. Indeed, even after a party makes a demand for a jury trial in writing, its knowing participation in a bench trial without objection is sufficient to constitute waiver of a jury trial. Here, CashCall made an express, knowing, and voluntary waiver of its right to trial by jury, thereby losing the ability to enforce its Seventh Amendment rights.

Further, while the CFPB initially characterized the remedy it sought as "equitable," that characterization was immaterial, as the relief sought depends on the nature of underlying remedies sought. "And here, the nature of the remedy is—and has always been—legal restitution: a money judgment to compensate borrowers for the money that CashCall collected but borrowers did not owe." *CashCall*, 135 F.4th at 692–93.

Expanding on the differences between equitable and legal restitution, the Ninth Circuit explained that equitable remedies must be capped at net profits—i.e., courts must deduct a defendant's legitimate expenses from an award of equitable restitution—but the same is not true of legal restitution, in which a plaintiff seeks to recover for defendant's unjust gains. Thus, legal restitution for a defendant's violations of the Consumer Financial Protection Act was measured by the full amount lost by consumers, and damages were not limited to CashCall's profits. As explained by the court, "one of the purposes of the statute is to ensure that consumers are protected from unfair, deceptive, or abusive acts and practices," and "the reduction in award sought by CashCall would frustrate that purpose by ensuring that borrowers who paid CashCall more than they received are not made whole." *CashCall*, 135 F.4th at 694 (internal citations omitted). Further, the doctrine of judicial estoppel did not prevent the CFPB from pursuing legal restitution.

In sum, *CashCall* stands for the proposition that a party that waives its Seventh Amendment right to a jury trial cannot revive that right, even if an opposing party mischaracterizes the remedy it seeks as "equitable restitution."

Ninth Circuit: Personal Jurisdiction Dismissal Reversed as E-Commerce Platform Defendant Knew Plaintiff's Electronic Device Was Located in California When It Installed Cookies on It

In *Briskin v. Shopify, Inc.*, the United States Court of Appeals for the Ninth Circuit addressed significant issues of data privacy and jurisdictional authority in the context of e-commerce. 135 F.4th 739 (9th Cir. 2025). Brandon Briskin filed a class action lawsuit in the federal district court for the Northern District of California against Shopify, Inc., a Canadian e-commerce platform, and two of its wholly owned US subsidiaries that are incorporated in Delaware and have their principal places of business in New York and Delaware, respectively.

Briskin accused Shopify of engaging in deceptive business practices by collecting and utilizing consumer data without adequate disclosure. The complaint outlined various privacy violations, including the interception of communications, placement of tracking cookies on his device, collection of sensitive information, and unauthorized sharing of consumer data with third parties. These actions were alleged to violate California data privacy and access laws and constitute unfair and deceptive practices.

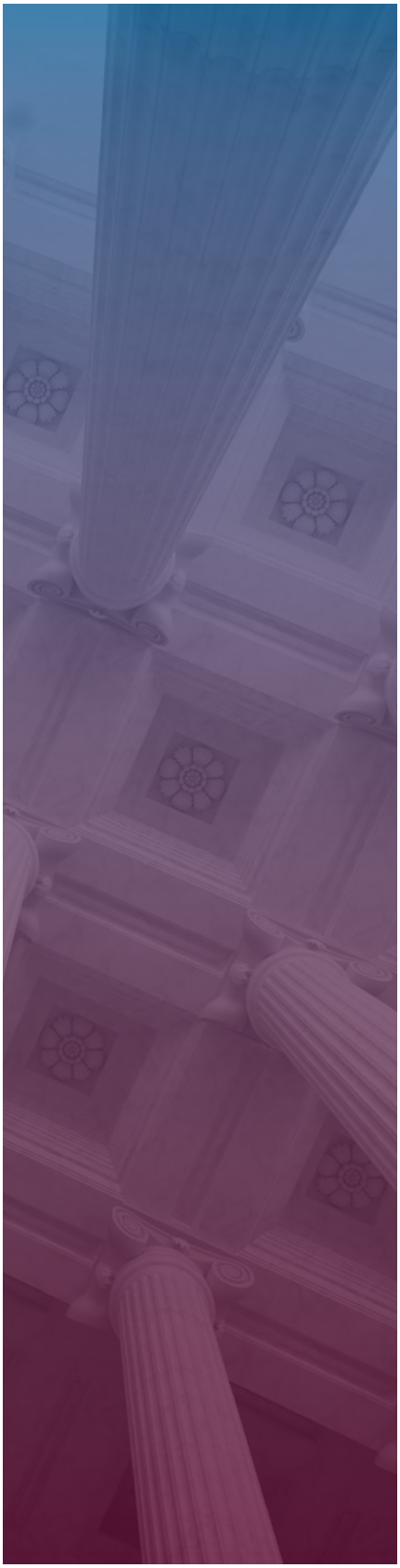
Initially, the district court dismissed Briskin's complaint, citing a lack of specific personal jurisdiction over the Shopify entities. The lower court concluded that Shopify did not have sufficient contact with California to justify jurisdiction. On appeal, a three-judge panel upheld the district court's ruling, but the case was later reheard *en banc*. The *en banc* Ninth Circuit reversed the district court's judgment, concluding that specific personal jurisdiction over Shopify was warranted due to its targeted actions toward California consumers.

The central issue in the appellate decision was whether California courts could exercise specific personal jurisdiction over Shopify based on its data-mining activities directed at California consumers. The court applied a three-part test for specific personal jurisdiction, which requires that the defendant purposefully direct activities toward the forum state, that the claim arises from those activities, and that the exercise of jurisdiction is reasonable.

The court determined that Shopify's conduct, including the installation of cookies and data extraction, was not incidental or "mere happenstance" arising from the California consumers' choice to do business with a merchant that had contracted with Shopify. Instead, Shopify's conduct was intentionally aimed at California through its extraction, maintenance, and commercial distribution of the California consumers' personal data in violation of California laws. Shopify tracked Briskin's location and shopping activities, creating consumer profiles for marketing purposes. This intentional targeting of California consumers established sufficient grounds for jurisdiction, countering Shopify's arguments that it lacked meaningful contact with the state.

The court went further and rejected Shopify's argument that, because it operates nationwide, it is agnostic as to the location in which it data-mines the consumers' personal identifying information; thus, Shopify does not aim its conduct at California. The Ninth Circuit used the opportunity to clarify that even if a platform cultivates a nationwide audience for commercial gain, an interactive platform "expressly aims" its wrongful conduct toward a forum state when its contacts are its "own choice and not 'random, isolated, or fortuitous.'"

The Ninth Circuit's decision to reverse the district court's dismissal is an important development in the legal treatment of privacy issues in e-commerce. The court highlighted that a company's digital presence and data collection practices could establish adequate contact for jurisdiction, illustrating the evolving nature of commerce and privacy in the digital era. This case underscores the necessity for transparency in data practices for companies operating online, especially those handling consumer data across state boundaries.



Second Circuit Reaffirms Primacy of a Defendant's Contacts with the Forum When Deciding Specific Personal Jurisdiction

In *Raad v. Bank Audi S.A.L.*, 2025 WL 1214139 (2d Cir. Apr. 28, 2025), plaintiffs entered into agreements with defendant Bank Audi S.A.L. while in Lebanon, including account-opening agreements and external transfer forms. Bank Audi thereafter refused to transfer more than $17 million from the plaintiffs' bank accounts in Lebanon to their US accounts through Bank Audi's New York correspondent banks and the Raads sued. The district court dismissed the action, finding that it lacked specific personal jurisdiction over Bank Audi under New York's long-arm statute, which allows a court to exercise personal jurisdiction over a non-domiciliary that "transacts any business within the state or contracts anywhere to supply goods or services in the state."

The Second Circuit affirmed, largely relying on *Daou v. BLC Bank, S.A.L.*, 42 F.4th 120 (2d Cir. 2022). The *Daou* court had explained that "[a] claim may arise from the use of a correspondent bank account for purposes of [New York's long-arm statute] where an alleged actual transaction made through such an account formed part of the alleged unlawful course of conduct underlying the cause of action set out in the complaint." *Daou*, 42 F.4th at 130. In *Raad*, plaintiffs could not point to any transaction that actually involved Bank Audi's New York correspondent bank accounts because the entire premise of their claim was that Bank Audi had refused to transfer funds in the first place.

The Second Circuit rejected the Raads' numerous attempts to distinguish *Daou*. It first noted that it was immaterial that the Raads were residents of New York with bank accounts located there—the specific personal jurisdiction inquiry focuses on a *defendant's* contacts with the forum and Bank Audi did not engage in any transaction with an "articulable nexus" to the Raads' breach of contract claim. *Raad*, 2025 WL 1214139, at *2. The Second Circuit then found unavailing the Raads' argument that their case was different from *Daou* because Bank Audi had reneged on a contractual obligation—as opposed to the express representation that was made in *Daou*—to transfer the Raads' money from Lebanon to New York, seeing "no meaningful distinction" between express representation and contractual obligation. *Id.* The court further explained that because all of the material events underlying the Raads' breach theory took place in Lebanon and the bank transfer undisputedly did not occur, any transaction identified or relied upon by the Raads never crossed over into New York. *Id.*

Finally, the court disagreed with the Raads' contention that "by allegedly agreeing to transfer money from Lebanon to New York, Bank Audi contracted to supply services in New York" and therefore should be subject to personal jurisdiction under N.Y. CPLR 302(a)(1). The Second Circuit recognized that acceptance of such a theory would "allow *any* customer of a foreign bank to haul that bank into New York court by merely requesting or directing that the bank transfer funds to New York." *Id.* at *3 (emphasis in original).

Raad reaffirms the outer limits of New York's long-arm statute and offers reassurance to financial services companies domiciled outside of New York that a theoretical transaction which could result in an effect felt in New York—like a fund transfer to a correspondent bank located in New York—is not enough to confer specific personal jurisdiction.

Sixth Circuit: Treble Damages Are Not "Statutory Damages"

In a recent opinion by Judge Sutton, the Sixth Circuit clarified that discretionary damages provided by statute do not constitute "statutory damages" that trial judges must award automatically. In *McPherson v. Suburban Ann Arbor, LLC*, McPherson alleged that her local car dealership subjected her to a "yo-yo financing" scheme in violation of the Michigan Regulation of Collection Practices Act and other consumer protection laws. 135 F.4th 419, 422–23 (6th Cir. 2025). The alleged scheme involved 1) Suburban telling McPherson that she had been approved for financing even though it never submitted a loan application; 2) Suburban claiming, after McPherson paid loan fees and took title to the car, that the non-existent loan had fallen through and that McPherson would either have to accept worse financing terms or surrender the vehicle; and 3) repossessing the vehicle after McPherson rejected the new terms. *Id.* at 423.

McPherson prevailed at trial. The court awarded $824,641, consisting of $15,000 in actual damages, $23,000 in damages for the converted vehicle, $350,000 in punitive damages and over $560,000 in attorneys' fees, costs, and prejudgment interest. McPherson also moved for treble damages, which the trial court denied. *Id.*

On appeal, McPherson argued that the trial court should have awarded treble damages: $45,000 (3x the actual damages) under the Regulation of Collection Practices Act and $46,000 (2x the value of the car) under Michigan's conversion statute. The Sixth Circuit noted that, while both statutes permit treble damages, neither requires that they be awarded automatically. Rather, the statutes grant trial judge's discretion to determine whether treble damages are necessary to achieve a just result. The court therefore proceeded to review the trial judge's decision for abuse of discretion. *Id.*

The Sixth Circuit determined that the lower court acted within its discretion in denying treble damages, because a $91,000 treble damages award would only serve punishment and deterrence objectives that the $350,000 punitive damages award already addressed. *Id.* at 423–24. Judge Sutton noted that the trial judge's decision was especially sensible given the Supreme Court's teaching in *State Farm Mut. Auto. Ins. v. Campbell* (2003), that "few [punitive damages] awards exceeding a single-digit ratio between punitive and [actual] damages, to a significant degree, will satisfy due process." *Id.* at 424 (quoting *State Farm*, 538 U.S. at 425). Judge Sutton explained that an award consisting of $350,000 in punitive damages and actual damages of $38,000 generates a 9.2-to-1 punitive-to-actual ratio, which increases to 11.6-to-1 by adding the $91,000 in treble damages. Given this due process concern and the marginal deterrence and punishment benefits, Judge Sutton explained, "the [lower] court's decision to deny treble damages amounted to a reasoned use, not an abuse, of its discretion." *Id.*

McPherson argued on appeal that a more permissive standard for statutory damages should apply, because the treble damages she sought were provided by statute. The court rejected this argument, explaining that the phrase "statutory damages…refers only to damages fixed by statute, either in a set amount or range, when actual damages are difficult to calculate or too small to meaningfully deter." *Id.* The court pointed to the federal Copyright Act, under which copyright owners may choose to recover "statutory damages" between $750 and $30,000 per non-willful infringement as an alternative to "actual damages," as an example. *Id.* at 425. The court distinguished such "statutory damages" from the treble damages provisions under the Michigan statutes, which "[assume] that the court can calculate actual damages and [require] it to do so." *Id.*

The Sixth Circuit therefore held that the lower court did not abuse its discretion in denying the punitive damages award. In doing so, the court clarified the distinction between "statutory damages" and treble damages provided by statute and reaffirmed the constitutional limits on punitive damages awards.

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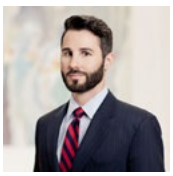

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