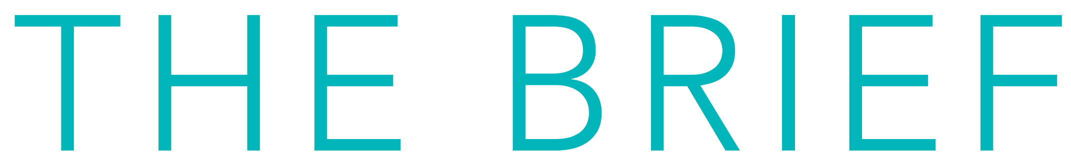

FINANCIAL SERVICES LITIGATION QUARTERLY

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HUNTON
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E-SIGN CONSENT: THE NEW FRONTIER OF TCPA LITIGATION?

Following a wave of rulemaking from the Federal Communications Commission (FCC), Telephone Consumer Protection Act (TCPA) litigation is likely to increase over the next several years. Businesses that call or text their customers – even business to business – should review their TCPA policies and procedures to ensure compliance with the flurry of new rules. And those who interact regularly with consumers should be aware of potential pitfalls where the TCPA intersects with the E-SIGN Act.

REGULATION OF TELEMARKETING

Today more than ever, businesses communicate with existing and potential customers through text messages and phone calls. Calls and text messages placed using an automated telephone dialing system (ATDS), artificial or prerecorded voice, and/or for a marketing purpose are subject to strict requirements under federal and state law. The primary relevant federal statute is the TCPA.

Among other requirements, the TCPA requires that there be prior consent from the recipient for calls or text messages that are placed to residential lines or cell phones using an ATDS or artificial or prerecorded voice. Marketing and promotional calls and texts are subject to a heightened level of consent – "prior express written consent" – and callers must scrub against federal and relevant state Do Not Call lists. Customers can also revoke prior consent (*i.e.*, opt out) by any reasonable means. Therefore, it is imperative for businesses to have robust and up-to-date policies and procedures in place before engaging in any outreach by phone or text, particularly before any telemarketing campaigns.

FREQUENT TCPA LITIGATION

During the early 2010s there was a wave of TCPA litigation. Those cases focused mostly on defendants who were using telephony systems to make phone calls to customers. The plaintiffs argued that the telephony systems were ATDSs as defined by FCC regulations implementing the TCPA. The Supreme Court's 2019 *Facebook, Inc. v. Duguid* decision was a major win for calling parties that clarified what elements are required for a dialer to constitute an ATDS (one of the triggering

criteria to require prior consent). 592 U.S. 395 (2021). While calling parties may have enjoyed a decrease in TCPA litigation following *Facebook*, litigation on theories of liability that do not involve ATDS use have increased and are likely to continue to increase following recent FCC rulemaking proceedings.

The TCPA is generally considered a strict liability statute because a caller need only intend to place the call or text at issue in order to be liable for a violation. A good-faith belief that the call is placed with consent is *not* a defense to liability. Civil damages in a TCPA case are $500 or $1,500 per call or text per instance, with no cap on damages, no matter the volume of calls or text messages. Given the ubiquity of text and telephone communications and the potential for astronomical damages, it should come as no surprise that there is a very active plaintiff's TCPA bar.

RECENT FCC RULEMAKING

Earlier this year, the FCC implemented two final rules that make various changes to TCPA compliance obligations. The new rules promise to create compliance challenges for many (if not most) businesses.

First among the changes is a new set of requirements regarding recipients' ability to opt out of covered communications. Callers must now ensure that opt-out decisions are honored within 10 business days (down from 30 days). Called parties can opt out by using all reasonable opt-out keywords – including but not limited to "stop," "quit," "end," "revoke," "opt out," "cancel," or "unsubscribe." And texting protocols that do not allow reply texts must now provide: 1) a clear and conspicuous disclosure on *each* text to the consumer that two-way texting is not available, and 2) reasonable alternative ways to revoke consent.

More significantly, effective January 27, 2025, "prior express written consent" for telemarketing calls and texts must be obtained *separately* for each seller. "Prior express written consent" is currently required for telemarketing calls, and the consent must meet specific disclosure requirements and be signed by the consumer. In response to the so-called "lead generation loophole," the FCC has now clarified that "prior express written consent" must be obtained for each specific seller, and forms that purport to provide consent for numerous, unnamed "partners" or "affiliates" are not sufficient. However, the rulemaking does not prohibit calling/texting parties from obtaining consent for multiple sellers on the same webpage or form, provided that the customer consents to *each seller separately*. *In the Matter of Targeting and Eliminating Unlawful Text Messages*, FCC 23-107 (2024) at ¶ 33. The FCC has taken the view that "websites can provide additional information about sellers or a list of sellers that a consumer can affirmatively select in order to be contacted." *Id.* The one-to-one consent must be "logically and topically" related to the calls/texts that the customer will receive and "must come after a clear and conspicuous disclosure to the consenting consumer that they will get robotexts and/or robocalls from the seller." *Id.* at 35. Calling parties that obtain consent through lead generation, or even directly if consent is obtained for multiple sellers at once, must ensure that their consent forms are updated to meet these requirements, including for consent to each seller by name.

TCPA AND E-SIGN REQUIREMENTS

Although not addressed in the amendments, another topic that may get swept into and become a focal point of the anticipated increase in TCPA litigation is E-Sign compliant consent – particularly for callers that obtain "prior express written consent" via voice recording.

The "prior express written consent" that the TCPA requires for telemarketing efforts must be "an agreement, in writing, bearing the signature of the person called," and that "written agreement" must include "a clear and conspicuous disclosure informing the person signing" of specific terms (*e.g.*, consent is not a condition of purchase). 47 C.F.R. § 64.1200(a)(9)(i).

"Signature," as used in the definition of prior express written consent, "include[s] an electronic or digital form of signature, *to*

the extent that such form of signature is recognized as a valid signature under applicable federal law or state contract law." 47 C.F.R. § 64.1200(a)(9)(ii).

In turn, Section 7001(c) of the E-Sign Act provides that specific consumer disclosures must be provided to the consumer prior to consenting *if* the underlying statute or regulation (*i.e.*, the TCPA) "requires that information relating to a transaction or transactions in or affecting interstate or foreign commerce be provided or made available to a consumer in writing." 15 U.S.C.A. § 7001(c).

The FCC's recent lead generator rule reminds callers that "all the elements of E-Sign must be present" when compliance with the E-Sign Act is required for the customer's signature. This leads to the question of which elements of the E-Sign Act are implicated by the TCPA "prior express written consent" standard. Reference to E-Sign in the recent rulemaking may also suggest that electronically signed "prior express written consent" agreements may be subject to heightened scrutiny.

RECENT LITIGATION DEVELOPMENTS

The applicability of E-Sign consent to the TCPA was raised in a district court decision earlier this year. In *Bradley v. Dentalplans.com et al.*, No. CV 20-1094-BAH, 2024 WL 2865075, at *7 (D. Md. June 6, 2024), the district court held that the E-Sign Act's Section 7001(c) consumer disclosures are required for an electronic signature to be used to obtain "prior express written consent" under the TCPA. At issue were numerous telemarketing calls seeking to encourage the plaintiff to renew her then-expired dental insurance coverage. The plaintiff did agree to re-enroll during one of the calls, and during that call the defendant's representative read aloud the required "prior express written consent" disclosures to the consumer. The disclosures were not provided in writing.

In analyzing whether the plaintiff had provided prior express written consent, the court framed the primary issue as whether the "additional E-Sign Act's 'consumer disclosures'" apply to TCPA "prior express written consent." Therefore, the "relevant question is [ ] whether the TCPA requires any information relating to the underlying transaction to be provided to the consumer in writing. If so, then the E-SIGN Act will not permit those disclosures required by the TCPA to be provided via voice recording."

Defendants argued that the TCPA does not require any information to be provided to the consumer in writing. However, the court determined that "a plain reading of these admittedly complex statutes and regulations make clear that the TCPA does, indeed, 'require[ ] that information relating to a transaction or transactions in or affecting interstate or foreign commerce be provided or made available to a consumer in writing.'" *Id.* at *8. The court concluded with a clear rule:

"As such, the 'consumer disclosure' section of the E-SIGN Act applies, and the required written disclosures outlined in § 64.1200(f)(9)(i) of the TCPA cannot be provided via voice recording." 2024 WL 2865075 at *9 (emphasis added).

CONCLUSION

We expect to see several new theories of TCPA liability raised in the coming months following *Bradley* and the FCC's adoption of new regulations. Because even inadvertent errors can lead to staggering damages under the TCPA, companies using text messages to reach customers – particularly for promotion and marketing – should take care to update their TCPA policies and procedures to ensure compliance with the recent amendments and with the E-SIGN requirements that come along with them.

NOTEWORTHY

FOURTH CIRCUIT REQUIRES THIRD PARTY TO READ AND UNDERSTAND DEFAMATORY INFORMATION FOR ARTICLE III STANDING TO ASSERT A FCRA CLAIM

In *TransUnion LLC v. Ramirez*, 594 U.S. 413 (2021), the Supreme Court held that individuals who have had false information about them "disseminated to third parties suffer[ ] a concrete injury in fact under Article III" and therefore have standing to sue. A recent case from the Fourth Circuit Court of Appeals, *Fernandez v. RentGrow, Inc.*, 116 F.4th 288 (4th Cir. 2024), illustrates, however, that in order for the rule of *TransUnion* to apply in a case for damages, the plaintiff must establish that the false information was brought to the attention of a third party who understood its defamatory significance. Absent such a showing, the plaintiff fails to demonstrate a concrete injury sufficient for Article III standing.

The factual context of *Fernandez* is similar to that of *TransUnion*; both cases involved the dissemination of an erroneous Office of Foreign Assets Control (OFAC) report. In *Fernandez*, the plaintiff, Marcus Fernandez, applied to rent an apartment. The defendant, RentGrow, Inc., sent the property owner a tenant screening report about him. The report inaccurately stated that Fernandez has "1 Possible Match in OFAC Name Search." The property manager who read the report, however, did not read the section of the screening report with the OFAC information and it did not factor into the property manager's decision to rent the apartment to Fernandez. Nonetheless, Fernandez sued RentGrow for violating the Fair Credit Reporting Act (FCRA), 15 U.S.C. § 1681 *et seq.*, and brought an individual and class claim alleging RentGrow willfully failed to "follow reasonable procedures to assure maximum possible accuracy" of OFAC information included in tenant screening reports. Fernandez sought statutory and punitive damages. The district court certified a class of individuals who were the subject of a consumer report with a misleading "possible OFAC match"

furnished by RentGrow to a third party. In certifying the class, the district court rejected RentGrow's argument that the class members had failed to demonstrate a concrete injury sufficient to establish Article III standing. The district court held that it did not matter whether the recipient of the misleading report read and understood it; the dissemination of the report alone was sufficient to show a concrete injury in fact.

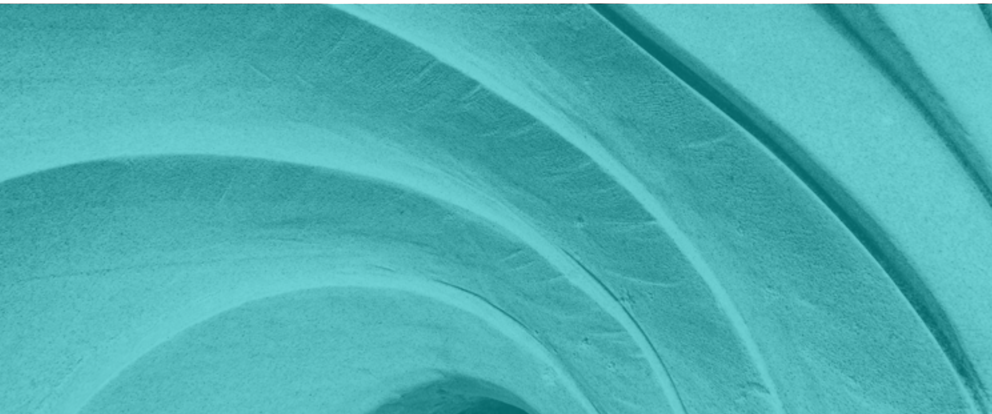
On appeal, the Fourth Circuit Court of Appeals disagreed and held that where a plaintiff asserts a concrete injury based on dissemination of misleading information, the plaintiff must establish that the third party read the misleading information and understood its defamatory significance. The key difference between the cases with respect to the standing analysis is that in *TransUnion*, the unchallenged record before the Supreme Court indicated that the OFAC report was in fact read by third parties, thus inflicting injury on the plaintiff. In contrast, in *Fernandez*, the record before the Fourth Circuit Court of Appeals did not support an inference that the OFAC information the defendant had disseminated had been read and understood, or been otherwise considered, by the third-party recipient. In fact the evidence suggested to the contrary that the third-party recipient had neither read nor understood the erroneous OFAC information. Under those circumstances, the Fourth Circuit Court of Appeals held that the plaintiff failed to demonstrate concrete injury sufficient for Article III standing and vacated the trial court's certification order and remanded for further proceedings. In remanding the case, the Fourth Circuit was careful to point out that it had not addressed the risk of future harm from the misleading reports because Fernandez and the other class members had not sought "forward-looking, injunctive relief" but only statutory and punitive damages. *Fernandez,* 116 F.4th at 298-99 (citing *TransUnion*, 594 U.S. at 435). The court stated that "[w]hile a substantial and imminent risk of future harm may satisfy the concreteness requirement when a plaintiff seeks injunctive relief, it does not in a suit for damages." *Id*. at 299.

ELEVENTH CIRCUIT HOLDS THAT MILITARY LENDING ACT TRUMPS FEDERAL ARBITRATION ACT

In *Steines v. Westgate Palace, L.L.C.*, 113 F.4th 1335 (11th Cir. 2024), the Eleventh Circuit held that even an agreement to arbitrate arbitrability is overridden by the Military Lending Act's proscription against arbitration clauses in loan contracts with servicemembers. The court affirmed the trial court's ruling, stating that the "MLA entirely displaces the FAA."

In *Steines*, the class-action plaintiffs had financed the purchase of a timeshare from the defendant. The plaintiffs sought to rescind their timeshare agreement and the related financing, based on violations of the MLA. The Steines alleged that the financing documents misrepresented the interest rate on the loan and contained arbitration provisions that violated the MLA's prohibition on such clauses.

Westgate argued below and on appeal that the delegation clause the plaintiffs had agreed to required that even the issue of arbitrability was to be decided by an arbitrator, rather than in the courts. In rejecting that position, the court first held that



whether the FAA applied to the transaction in light of a conflict with the MLA was a threshold issue that was necessarily antecedent to any further consideration of arbitrability. The court put it succinctly: "Put simply, the question of whether the FAA has been overridden by another Act of Congress cannot be delegated to an arbitrator." *Id.* at 1342–43.

Upon considering whether the MLA did override the FAA, the Eleventh Circuit found that the MLA "entirely displaces" it, such that agreements within the scope of the MLA are not subject to the FAA at all. *Id.* at 1343. The court observed that the language of Section 987(e)(3) of the MLA intentionally supersedes the FAA and any mandatory arbitration agreement for a servicemember by unambiguously stating that a creditor may not extend consumer credit to a servicemember if that creditor is requiring the servicemember to submit to arbitration. The court additionally reasoned that, under Section 987(f)(4), when the MLA applies to a consumer credit contract, the district court cannot enforce any arbitration provision within that contract because any such provision is unenforceable against a servicemember. *Id.* at 1343-45. The court concluded its analysis by holding that Westgate's extension of credit to the Steines' purchase of a timeshare did not fall into the MLA's exception for residential mortgages. *Id.* at 1345–48.

Following *Steines*, financial service providers must be aware that, except for mortgages, arbitration clauses are not permissible contracts that extend credit to servicemembers.

EIGHTH CIRCUIT DECERTIFIES CLASS, DEFINES ECONOMIC LOSS IN § 10(B) "BEST EXECUTION" CASE

In 2014, retail investors brought a putative class action against TD Ameritrade, alleging that the firm's order-routing practices violate the duty of best execution imposed under § 10(b) of the Securities Exchange Act of 1934 and the Securities and Exchange Commission's Rule 10b-5. Like many brokerage services, TD does not execute customer orders itself but instead routes orders to trading venues for fulfillment. For some transactions, this practice supplies TD with two sources of revenue: The customer pays TD a commission for routing the order, while the trading venue offers liquidity rebates and payments for order flow. *Ford v. TD Ameritrade Holding Corp.,* 115 F.4th 854, 858–59 (8th Cir. 2024).

The investors allege that TD sends customer orders to the venues most lucrative for TD, rather than to venues that provide the best outcome for customers. The investors claim this violates TD's "duty of best execution," which requires brokers to "use reasonable efforts to maximize the economic benefit to the client in each transaction." *Id.* at 858 (quoting *Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 259 F.3d 154, 173 (3d Cir. 2001)). "Best execution" cases are a species of securities fraud, and require proof of economic loss, among other elements. *Id.* at 859.

In 2018, the district court hearing the case certified a class, finding that the plaintiffs had satisfied all the Rule 23 requirements with respect to the alleged fraud. The Eighth Circuit reversed, holding that individual issues predominated with respect to the economic loss element, including "the circumstances surrounding each trade, the available alternative prices, and the state of mind of each investor at the time the trade was requested." *Ford v. TD Ameritrade Holding Corp.*, 995 F.3d 616, 621 (8th Cir. 2021) (quoting *Newton*, 259 F.3d at 187).

On remand, the investors advanced a new theory of economic loss intended to solve the predominance problem—this time focused on the commissions investors paid TD. They argued that because TD breached its duty of best execution, the investors did not receive the brokerage services they paid for with their commissions. *Ford*, 115 F.4th at 859. Therefore, common issues predominated, because the loss suffered by every class member could be calculated from the number of trades they submitted, multiplied by the commission paid for each trade. *Id.* at 859. Persuaded, the district court recertified the class.

TD appealed the recertification, arguing that the investors' theory of loss was both novel and incorrect. The Eighth Circuit agreed, relying on its prior decertification ruling and Third Circuit precedent defining economic loss in best execution cases as the difference between the price at which customers' trades were executed and the "better" price allegedly available from an alternative trading source. *Id.*

Commissions are irrelevant, the court explained, because the claim in a best execution case "is that the broker's misconduct resulted in a sub-optimal result on the trades themselves, regardless of the commissions." *Id.* at 860. The court also noted that, even if the commissions could satisfy the economic loss element, individual issues would still predominate, because "[w]hether a flat-rate commission fee resulted in economic loss would still require analysis of individualized questions, such as the existence of alternative brokers, the commission fees of other brokers, and the prices that other brokers could have obtained for each trade." *Id.*

The court therefore decertified the class and remanded the case back to the district court, where it is currently stayed pending arbitration. Given the Eighth Circuit's definition of economic loss and its relation to Rule 23's predominance requirement, brokerage services like TD have a strong defense against class certification in best execution cases.

EIGHTH CIRCUIT LATEST TO MAINTAIN *AMERICAN PIPE* TOLLING FOR AMBIGUOUSLY EXCLUDED ABSENT CLASS MEMBERS

In our previous issue, we discussed *Defries v. Union Pac. R.R. Co.*, 104 F.4th 1091 (9th Cir. 2024), where the Ninth Circuit addressed for the first time the "narrowed class" tolling issue in class action lawsuits, and in its decision aligned itself with the Fourth and Tenth Circuits in holding that absent (or bystander) members remain entitled to *American Pipe* tolling until a court accepts a revised class definition that unambiguously excludes them. Two months later, the Fifth Circuit aligned itself with *Defries* in another case against Union Pacific. *See Zaragoza v. Union Pac. R.R. Co.*, 112 F.4th

313 (5th Cir. 2024) (holding that *American Pipe* tolling has not ended because the class definition did not unambiguously exclude the plaintiff). Now, in yet another case against Union Pacific, the Eighth Circuit has become the latest circuit court to align itself with *Defries* in *DeGeer v. Union Pac. R.R.*, 113 F.4th 1035 (8th Cir. 2024)

The relevant set of facts at issue in *DeGeer* are nearly identical to those that were at issue in *Defries*. Like the plaintiff in *Defries*, DeGeer worked as a conductor for Union Pacific until, in 2017, he failed a routine color-vision test in the railroad's fitness-for-duty program and, as a result, Union Pacific removed him from service.

At that time, a putative class action had already been filed by a group of employees, claiming that Union Pacific's fitness-for-duty program violated the Americans with Disabilities Act. *Harris v. Union Pacific Railroad Co.*, 329 F.R.D. 616, 628 (D. Neb. 2019). There is no dispute that DeGeer was a member of the class originally pled in *Harris*.

When class certification was reversed in *Harris*, DeGeer filed an EEOC charge and then filed suit alleging violations of the ADA and seeking a declaration that he was a member of the *Harris* class. Like *Defries*, at issue before the court was whether DeGeer's claims were timely, which required the court to determine whether his claims were tolled under *American Pipe* during the pendency of the *Harris* class.

Citing to the Ninth Circuit's decision in *Defries*, and the Fifth Circuit's decision in *Zaragoza*, the Eighth Circuit held that a plaintiff's individual interests are not considered abandoned unless there is a class certification decision that "definitively excludes" him and that "anything short of unambiguous narrowing" would undermine the balance contemplated by the Supreme Court in *American Pipe* and is, therefore, insufficient to exclude a plaintiff from a class for tolling purposes. *DeGeer*, 113 F.4th at 1039. In doing so, the Eighth Circuit joined its sister circuits in adopting the ambiguity rule which continues to gain momentum.

SEVENTH CIRCUIT CONFIRMS RIGOROUS STANDING REQUIREMENTS FOR FDCPA CLAIMS

In *Freeman v. Ocwen Loan Servicing, LLC*, 113 F.4th 701 (7th Cir. 2024), the Seventh Circuit recently rejected a plaintiff's attempt to establish standing under the Fair Debt Collection Practices Act (FDCPA) by analogizing to intangible common law injuries such as defamation, false light, invasion of privacy and abuse of process. The Seventh Circuit's decision offers guidance on how defendants in consumer debt and reporting actions can mount an early standing challenge to FDCPA claims.

Facing a foreclosure action, Freeman filed for bankruptcy and cured her mortgage default by completing the payments required under her bankruptcy plan. However, she alleged that her mortgage servicer had inaccurately reported her mortgage loan as delinquent, which resulted in her facing a second foreclosure proceeding. Freeman sued under the Fair Credit Reporting Act and Fair Debt Collection Practices Act, but the FCRA claim was dismissed. The trial court granted summary judgment to the defendant on Freeman's FDCPA claim, for lack of Article III standing.

The Seventh Circuit affirmed, holding first that Freeman's assertion of monetary harm as

an injury in fact failed because her proof regarding the precise amount of fees spent litigating the second foreclosure had been excluded from evidence, as a result of her failure to make timely discovery.

The Seventh Circuit then analyzed Freeman's theories of injury in fact based on intangible harms recognized as remediable in traditional causes of action. In claiming reputational harm, Freeman argued that the dissemination of inaccurate credit information to third-party credit reporting agencies such as TransUnion damaged her credit and discouraged her from seeking additional credit out of embarrassment. Freeman cited both *TransUnion LLC v. Ramirez*, 594 US. 413 (2021), and the Seventh Circuit's decision applying *Ramirez, Ewing v. Med-1 Solutions, LLC*, 24 F.4th 1146 (7th Cir. 2020), in support of her position. The Seventh Circuit distinguished both cases, noting that Ewing held that, to establish the "publication" element of a defamation-type claim, "the third party [recipient of the communication] must understand the defamatory nature of the communication." The court held that, because Freeman failed to establish that TransUnion or any other third party reviewing her credit report had assessed her creditworthiness based on the inaccurate information regarding her mortgage delinquency, injury in fact did not exist under a defamation theory.

The court also rejected Freeman's analogy to false-light claims, by which she argued that the second set of foreclosure filings had created an "adverse public record" that would result in embarrassing explanations about her record for the rest of her life. Citing *Wadsworth v. Kross, Liebman & Stone, Inc.*, 12 F.4th 665, 667 (7th Cir. 2021), the Seventh Circuit explained that anxiety, stress and embarrassment are not concrete injuries in fact for purposes of establishing standing in FDCPA suits. In addition, a false-light claim requires that the tortfeasor had knowledge of or acted in reckless disregard as to the falsity of the publicized matter, which Freeman did not allege.

With respect to Freeman's analogy to invasion of privacy or intrusion upon seclusion, the Seventh Circuit rejected her assertion that the mortgage servicer's frequent phone calls (over 12 in 1 month) and repeated "door knocks" over approximately 3 years made her fear that she would lose her home. The court again cited *Wadsworth*, explaining that annoyance or intimidation are not enough to constitute a concrete harm from an FDCPA violation. The Seventh Circuit likewise rejected Freeman's claim that she suffered psychological pressure from defending against foreclosure, making her injury akin to abuse of process. As with her claim of "fear," this claim failed because psychological harm, by itself, cannot amount to injury in fact for purposes of Article III standing.

The Seventh Circuit's rejection of each of Freeman's multiple standing arguments demonstrates its skepticism of FDCPA (and perhaps FCRA) claims where the plaintiff cannot point to a specific, documented adverse effect flowing from the conduct of the defendant, such as a loss of credit or a medically recognized physical or mental manifestation of harm.

ELEVENTH CIRCUIT HOLDS BLOG POSTS CAN QUALIFY AS "NEWS MEDIA" UNDER THE FCA'S PUBLIC DISCLOSURE BAR

In *United States ex rel. Jacobs v. JP Morgan Chase Bank, N.A.*, 113 F.4th 1294 (11th Cir. 2024), the Eleventh Circuit addressed whether a False Claims Act *qui tam* case may proceed when the allegations in the case overlap significantly with publicly available blog posts. Plaintiff's complaint alleged that the defendant violated the FCA by forging signatures on mortgage loan documents and submitting false reimbursement claims to Fannie Mae and Freddie Mac for loan servicing costs.

Plaintiff's case was a *qui tam* action, which is a type of whistleblower suit. It allows a private citizen to sue on behalf of the government to recover money lost to fraud, with the opportunity to keep some of the recovered funds. The FCA, however, has a public disclosure bar that requires dismissal "if substantially the same allegations . . . as alleged in the action or claim were publicly disclosed . . . *from the news media*." 31 U.S.C. § 3730(e)(4)(A) (emphasis supplied). The bar does not apply if "the person bringing the action is an original source of the information." *Id.* Without the public disclosure bar, opportunistic plaintiffs with nothing new to contribute could exploit the FCA's *qui tam* provisions for personal benefit. The trial court held that the public disclosure bar applied to Jacobs' *qui tam* claims because information regarding the defendant's challenged practices had been disclosed on various blogs and Jacobs was not an original source of that information. Jacobs appealed.

The Eleventh Circuit applied a three-part test to determine the public disclosure bar's applicability: (1) whether the allegations made by the plaintiff had been publicly disclosed; (2) if "yes," whether the complaint's allegations were substantially the same as allegations or transactions contained in public disclosures; and (3) if "yes," whether the plaintiff was an original source of that information.

Under the first factor, the Eleventh Circuit agreed that the blogs were publicly disclosed from the "news media." Notably, the court found that because the blogs were "publicly available" and "intended to disseminate information," they qualified as "news media" under the Eleventh's Circuit's prior broad interpretation of that phrase. The court, however, explicitly declined to decide "whether the term 'news media' under the FCA covers a private or personal social media page" because there was nothing either private or personal about the blogs at issue. Under the second factor, the court also agreed that the allegations had significant overlap with the blog articles, and specifically clarified that "substantial similarity" does not mean "identical." For the third factor, the court found that plaintiff had failed to establish that he was an "original source of the information" given that his allegations neither supplied any independent information nor materially added to the core claims or detailed information in the blog posts.

In an age when a growing number of Americans are turning to social and alternative media for their news, the *Jacobs* decision may portend a wave of jurisprudence focused on making sure that *qui tam* relators are serving a legitimate public purpose in bringing fraud to light, rather than seeking to cash in when others have blown the whistle.

NINTH CIRCUIT'S CONSTRUCTION OF THE CALIFORNIA HOME SOLICITATION SALES ACT HAS WIDE-REACHING IMPLICATIONS FOR TELEPHONE AND INTERNET SELLERS

In *Fuentes v. Dish Network LLC*, 2024 WL 4234486 (9th Cir. Sept. 19, 2024), the Ninth Circuit recently examined the California Home Solicitation Sales Act (HSSA), holding that contracts consummated over the telephone were made outside of "appropriate trade premises," and were thus subject to the HSSA.

The case arose from a dispute concerning a contract for satellite television services. Dish appealed the district court's grant of summary judgment in Fuentes' favor on his HSSA claim, arguing the contract was not within the scope of the HSSA. The Ninth Circuit disagreed, explaining that the HSSA applies to "[h]ome solicitation contract[s] or offer[s]," which are defined as "any contract, whether single or multiple, or any offer which is subject to approval, for the sale, lease, or rental of goods or services or both, made at *other than appropriate trade premises* in an amount of twenty-five dollars ($25) or more, including any interest or service charges." Cal. Civ. Code § 1689.5(a) (emphasis added).

Specifically, the parties disputed whether the contract—which was consummated over the telephone in a call initiated by Fuentes—was "made at other than appropriate trade premises." The Ninth Circuit pointed to the statutory definition of "appropriate trade premises" as a "premises where either the owner or seller normally carries on a business, or where goods are normally offered or exposed for sale in the course of a business carried on at those premises." *Id.* § 1689.5(b). Thus, as the Ninth Circuit held, "any contract made anywhere other than Dish's places of business is a contract made outside of appropriate trade premises." 2024 WL 4234486, at *1. In holding that the HSSA applied, the Ninth Circuit applied the *Travelers* rule, under which an oral contract consummated over the telephone is deemed made where the offeree utters the words of acceptance. *Id.* (citing *Travelers Ins. Co. v. Workmen's Comp. Appeals Bd.*, 68 Cal.2d 7, 14 (1967)). As such, the contract was deemed made at Fuentes' home—putting it squarely within the HSSA.

This decision has wide-reaching implications for sellers in telephone and internet transactions. Although the purpose of the HSSA was to protect against high-pressure door-to-door sales techniques, the HSSA could apply to nearly all simple product purchases, including one-time internet sales, under the Ninth Circuit's interpretation.

Indeed, courts following this Ninth Circuit precedent will need to analyze transactions individually under the HSSA to determine who proposed which terms and where offers were made and accepted. Under *Fuentes*, any merchant conducting business in California by phone or internet could be subject to the HSSA, making it imperative that sellers familiarize themselves with the statutory requirements, including providing agreements in languages principally used by buyers and including conspicuous statements informing buyers of their rights to cancel contracts.

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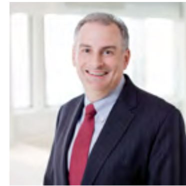

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