



# THE BRIEF

*FINANCIAL SERVICES  
LITIGATION QUARTERLY*



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HUNTON  
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legacy” contracts to add a fallback provision, or a legislative “fix” that automatically adds such a fallback provision to those contracts, there would likely be enormous disruptions when LIBOR—a material term in those contracts that the parties likely presumed would always be available—simply disappears.

Such disruptions, warned the New York Fed’s general counsel in 2019, would “invite litigation ... on a massive scale,” and constitute a “DEFCON 1 litigation event.”<sup>1</sup> Without the consensual modification of enormous numbers of contracts or a general legislative fix to rewrite those contracts, courts could be flooded with claims that raise difficult questions, such as whether those contracts are enforceable in a post-LIBOR world, what the parties intended to happen if LIBOR was unavailable (indeed, if they even had such intentions), and

whether trustees, issuers, lenders, and calculation agents should be allowed to use their discretion to act unilaterally to replace LIBOR with some other benchmarks, absent any express contractual grant of authority.

Courts would also have to decide whether parties should be required to live with the unintended consequences of the end of LIBOR, or if judges have the authority to rewrite those contracts to realize the parties’ intent. For example, many contracts require using the “last LIBOR value” when LIBOR is unavailable. While that provision is a reasonable fix if LIBOR is temporarily unavailable (if, say, the computer terminal is down), once LIBOR is no longer published, that provision would, if enforced, transform a floating rate to a fixed rate the parties hadn’t settled on in advance—which was surely not the parties’ intent.

To prevent that “DEFCON 1 litigation event,” legislatures and regulators in the United States and elsewhere have not just encouraged parties voluntarily to modify their agreements well in advance of the end of LIBOR, but have instituted measures like the LIBOR Act to address existing contracts by automatically replacing references to LIBOR with an alternative benchmark. With the last US dollar LIBOR tenors scheduled to be published on June 30, 2023, the world will soon see how successful those efforts have been.

## BACKGROUND TO THE LIBOR ACT AND PROPOSED LIBOR REPLACEMENT REGULATION

In July 2017, the FCA announced that the ICE Benchmark Administration Limited (“IBA”) would not publish LIBOR beyond 2021, with the expectation that that would provide adequate time for the market to transition to a new benchmark. In May 2021, FCA extended the publication of overnight, one-, three-, six-, and twelve-month tenors of US dollar LIBOR until June 30, 2023, to allow additional time for a transition from those benchmarks to alternative indices.

In the United States, that transition has been managed by the Alternative Reference Rates Committee (“ARRC”), a body originally consisting of the Federal Reserve Board and the New York Fed that was created in 2014 to begin exploring alternatives to LIBOR. In 2018, the ARRC was expanded and tasked with overseeing the transition from US dollar LIBOR. The ARRC eventually settled on the New York Fed’s Secured Overnight



<sup>1</sup> New York Fed Executive VP and General Counsel Michael Held, “SOFR and the Transition from LIBOR,” Feb. 26, 2019.

Funding Rate (“SOFR”), which is based on approximately \$1 trillion in daily transactions that has been published daily since April 2018 and provides a measure of the cost of borrowing cash overnight, backed by US Treasury securities. The ARRC also recommended developing SOFR-based rates for one-, three-, six-, and twelve-month tenors. Because SOFR is nearly risk-free, it (unlike LIBOR) does not reflect credit risk. For that reason, the ARRC also recommended developing tenor-specific spread adjustments to SOFR to bring it into line with LIBOR.

On March 15, 2022, President Biden signed into law the LIBOR Act, which was intended to smooth the transition away from LIBOR and to mitigate the risk of litigation arising from the transition. Under the Act, Congress charged the Board with selecting alternative benchmark rates based on SOFR to replace LIBOR. The statute further requires that, once LIBOR is discontinued after June 30, 2023 (or is found by the Board before then to be unrepresentative of the market), those Board-selected SOFR-based benchmarks will automatically replace references to LIBOR in contracts that lack fallback provisions or whose fallback provisions do not “provide for the use of a clearly defined and practicable replacement rate” or identify a “determining person” with the “authority, right, or obligation” to select a replacement benchmark.

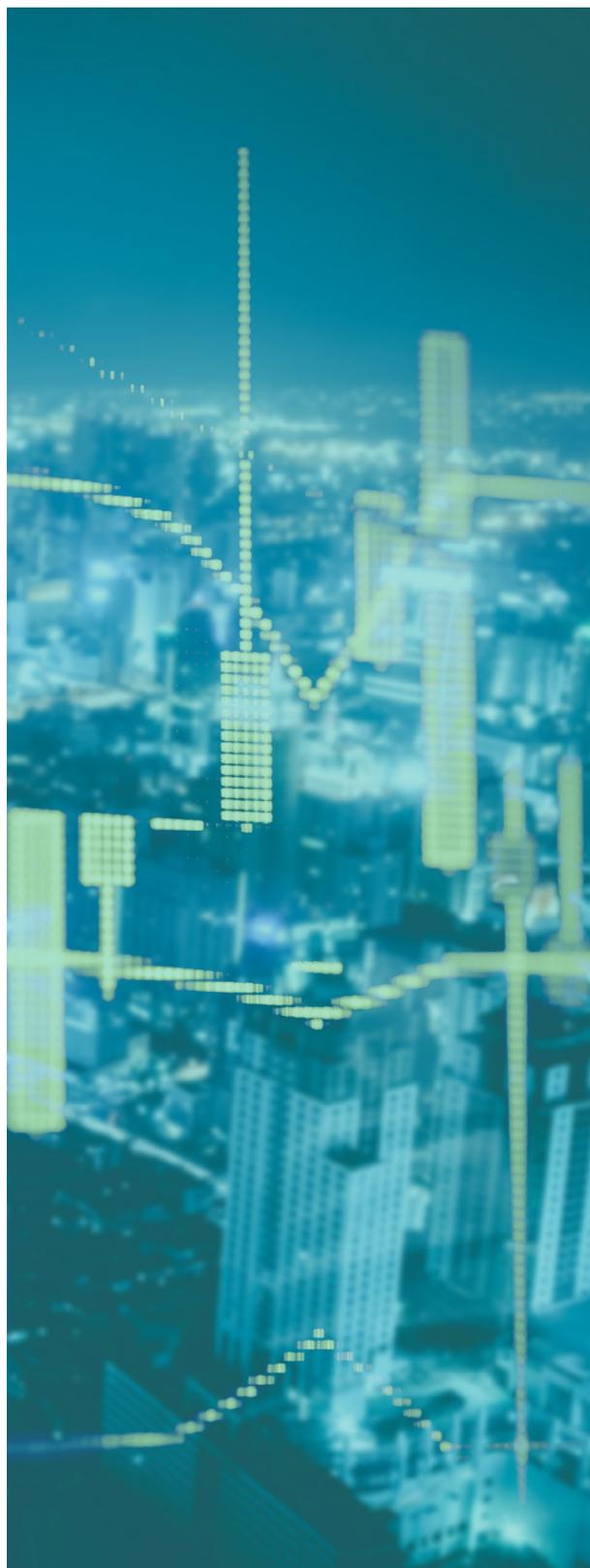
The LIBOR Act further established that any references in a fallback provision to LIBOR or to any

requirement that a person conduct a poll or survey of interbank lending to determine a rate (a common means of addressing cases in which LIBOR is temporarily unavailable) will be deemed null and void after LIBOR is discontinued. Congress also created a “safe harbor” to shield the parties from any liability or claim based on their deciding to replace LIBOR-based rates with those selected by the Board, and provided that the LIBOR Act, and any regulations promulgated under it, will preempt any state or local law or regulations concerning the selection or use of benchmark replacements.

On July 19, 2022, the Board released its proposed regulation implementing the LIBOR Act.<sup>2</sup> For most contracts that include references to LIBOR, the Board selected SOFR, plus a spread adjustment of 0.644 bps set in the LIBOR Act, as the benchmark replacement for overnight LIBOR, and selected forward-looking one-, three-, six-, and twelve-month tenors of SOFR administered by CME Group Benchmark Administration, Ltd. (“CME Term SOFR”), plus the tenor-specific spread adjustments identified in the LIBOR Act, as the benchmark replacements for corresponding tenors of LIBOR.

While the proposed regulation establishes SOFR and CME Term SOFR (along with tenor-specific spread adjustments) as the generally applicable LIBOR replacements, the proposed regulation requires different SOFR-based benchmark replacements for certain types of transactions:

<sup>2</sup> In December 2021 the CFPB issued its own regulations relating to the transition away from LIBOR. Its Final Rule amending Regulation Z of the Truth In Lending Act, which became effective April 1, 2022, provides, among other things, examples of LIBOR replacements that are consistent with Regulation Z requirements (including SOFR), and amends Regulation Z to allow qualifying HELOC and credit-card issuers to switch LIBOR benchmarks to an alternative rate on or after April 1, 2022 and to address how Regulation Z’s rate reevaluation provisions are affected by the transition from LIBOR. See [Federal Register](#) 2021, 86 FR 69716 Facilitating the LIBOR Transition (Regulation Z) (Dec. 8, 2021).





- For derivative transactions, the Board selected the “Fallback Rate (SOFR)” identified in the protocols developed by the International Swaps and Derivatives Association (“ISDA”). The ISDA protocols call for use of compounded SOFR in arrears (i.e., a rate based on the average of SOFR over the current interest period, rather than on SOFR futures contracts), plus the applicable statutory spread adjustment.
- For contracts to which a government-sponsored enterprise (“GSE”) like Freddie Mac or Fannie Mae is identified as a party in the transaction documents and that is a commercial or multifamily mortgage loan, a commercial or multifamily mortgage-backed security, a collateralized mortgage obligation, a credit risk transfer transaction, or a Federal Home Loan Bank advance, the Board proposed replacing each of the one-, three-, six-, or twelve-month tenors of US dollar LIBOR with a single rate—the 30-date Average SOFR—plus a tenor-specific spread adjustment. References to overnight LIBOR in covered GSE contracts will be replaced by SOFR with the same 0.644 bps spread adjustment applicable to other non-derivative and non-GSE contracts.

- For consumer loans, the proposed regulation requires that the benchmark replacement as of the LIBOR replacement date remain the LIBOR benchmark, but that over the following year, that benchmark will transition linearly to account for the difference between that LIBOR benchmark and the corresponding SOFR-based benchmark replacement as of the day immediately before the LIBOR replacement date.

### THE LIBOR ACT’S PROVISIONS FOR LIMITING LITIGATION RISK ARISING FROM LIBOR TRANSITION

The overarching objective of the LIBOR Act and the regulations enacted pursuant to it is to limit the potentially catastrophic effect of the end of LIBOR on trillions of dollars in existing loans, contracts, and other agreements that were negotiated and executed in reliance on the continuing publication of LIBOR. To that end, the LIBOR Act requires that, on the LIBOR replacement date, the Board’s SOFR-based replacement automatically replace the LIBOR-based benchmark in any agreement that does not contain a fallback provision that either specifies an alternative non-LIBOR based benchmark or identifies

a “determining person,” i.e., an individual with the “authority, right, or obligation” to select a replacement benchmark.

Recognizing that parties should have the right to negotiate whatever mutually agreeable replacement for LIBOR they might want, Congress and the Board allow parties to opt out of the LIBOR Act and its associated regulation. If, however, the parties do not expressly exclude their contract from the statute and fail to agree on how to replace the references to LIBOR in their contracts, once LIBOR is no longer available, the LIBOR Act will be triggered and essentially rewrite those contracts, replacing their references to LIBOR with a Board-selected, SOFR-based replacement.

Finally, the LIBOR Act includes provisions to prevent litigation arising from the transition from LIBOR to SOFR. In addition to deeming the selection or use of the Board’s SOFR-based replacement for LIBOR a “commercially reasonable” and “substantially equivalent” replacement for LIBOR that qualifies as substantial performance of any LIBOR-related obligation, the LIBOR Act bars any person from using the selection or use of the Board’s SOFR-based replacement to claim

that any right to receive a payment has been “impaired or affected,” to assert a breach-of-contract claim, or to terminate, void, or withhold performance with respect to any contract. Congress also expressly created a “safe harbor” for parties to contracts that fall within the scope of the LIBOR Act and its associated regulations, stating that “[n]o person shall be subject to any claim or cause of action in law or equity or request for equitable relief, or have liability for damages” arising from the use of the Board’s SOFR-based replacement benchmark.

### CRISIS AVERTED?

While the passage of the LIBOR Act significantly reduces the risk of the feared “DEFCON 1 litigation event” arising from the end of LIBOR, it does not entirely eliminate litigation risk. The effect of the LIBOR Act is to rewrite material terms in existing contracts worth trillions of dollars, which will invariably create winners and losers—and so create conflict and potential litigation.

At the most general level, the fact that those contracts will be modified by statutory and regulatory fiat, rather than the consent of the parties, may prompt a challenge to the LIBOR Act as a violation of the Fifth Amendment, which prohibits the United States from depriving any person of a property interest—including contractual rights—without due process of law. Given that such federal economic regulations need only satisfy a rational-basis test, the likelihood that any challenge of this sort will be successful appears to be low.

A more likely source of litigation that might arise with the end of LIBOR are contracts that fall outside the scope of current legislative and regulatory fixes. For example, the International Capital Markets Association estimates that 40 percent of US dollar instruments in the bond market are governed by English law, not US law or that of any state, commonwealth, territory, or possession of the United States, and so would not be covered by the LIBOR Act. Assuming the parties to those contracts cannot reach an agreement on an acceptable replacement after US dollar LIBOR is no longer available after June 2023—and assuming there is no further legislative or regulatory fix for such contracts—the parties to such contracts will likely face all the uncertainty and risk of litigation that the LIBOR Act was intended to prevent.

One potential solution for the problem of legacy contracts that refer to US dollar LIBOR but are not governed by US law would be to publish a “synthetic” US dollar LIBOR, which is a benchmark that would be published by IBA and would be called LIBOR, but is based on a risk-free rate (such as SOFR) instead of the survey of banks

originally used by the IBA to derive LIBOR. In fact, in the UK, the FCA is, as of August 2022, considering whether to direct IBA to create a synthetic US dollar LIBOR as a stopgap for this type of contract.<sup>3</sup>

While the publication of synthetic US dollar LIBOR may address the problem of contracts that are not governed by US law, it may have unintended consequences that create new problems for a far broader range of LIBOR contracts. Under the Board’s proposed regulation, for instance, if a contract identifies a non-LIBOR based benchmark replacement (e.g., prime rate or one of the Board’s SOFR-based replacements) that should be used when LIBOR is not available, the contract will be enforced according to its terms and not be affected by the LIBOR Act or the regulation. If, however, IBA publishes a synthetic US dollar LIBOR, then that fallback provision might *never* be triggered as long as synthetic LIBOR is available. If the differences between synthetic LIBOR and the designated fallback benchmark are significant enough, that might be sufficient to set off litigation over which benchmark should be used.



<sup>3</sup> The IBA already publishes one-, three-, and six-month synthetic sterling and yen LIBOR.

Another example of potential uncertainty arising under the LIBOR Act concerns who qualifies as a “determining person” under the contract, which in turn affects whether a given contract is covered by the statute. Under the LIBOR Act, any contract that identifies a person with the “authority, right, or obligation ... as identified by the LIBOR contract or by the governing law of the LIBOR contract” to determine a benchmark replacement will be enforced according to its terms as long as that person selects a benchmark replacement—whether it is the Board’s SOFR-based one or not. For some contracts, the only plausible candidate for selecting an alternative benchmark (e.g., an issuer, trustee, lender, or calculation agent) may not have clearly been granted the “authority, right, or obligation” to select an alternative rate. In such cases, it may not be clear if that person qualifies as a

“determining person” under the statute, in which case it would not be clear which replacement benchmark should be used: If that person is a determining person, then his or her choice of benchmark should be honored; if not, the statute will be triggered and the Board’s SOFR-based replacement will automatically apply. If the difference between the two benchmarks is sufficiently large, parties may well have an incentive to litigate the issue.

Legislatures and regulators have made great progress in addressing the thorny technical and legal challenges posed by the transition away from LIBOR, and in the United States, the LIBOR Act has done much to head off the potential catastrophe that regulators anticipated just a few years ago. As described above, however, there remain significant sources of uncertainty about exactly what will happen once traditional,

non-synthetic LIBOR is no longer published. The Board’s LIBOR regulation, which is still being finalized, may address some of those issues and further mitigate litigation risk. Other potential sources of litigation risk, such as contracts referring to US dollar LIBOR but not governed by US law discussed above, may be affected by actions taken by regulators outside of the United States. Given the vast array of contracts that rely on LIBOR, it is likely that even if the efforts to mitigate uncertainty and litigation risk prevent the widespread disruptions once feared, there could be plenty of unanticipated issues and challenges that will become apparent only in the post-LIBOR world.





# NOTEWORTHY

## THIRD CIRCUIT SAYS RULE 23(A) TYPICALITY DOES NOT LIMIT AN ERISA CLASS TO THOSE WHO PARTICIPATED IN THE SAME INVESTMENT OPTIONS AS THE NAMED PLAINTIFFS

Many employer-sponsored retirement plans offer various investment options to plan participants. Can an ERISA breach of fiduciary duty plaintiff represent *all* plan participants, or only those that chose the same investment options as the named plaintiff?

The Third Circuit addressed this question in *Boley v. Universal Health Services, Inc.*, No. 21-2014 (3d Cir. June 1, 2022). The employer sponsored a defined contribution plan (the Plan), with investment options consisting of 37 funds. Three current and former Plan participants filed suit against the Plan’s fiduciaries and administrators, alleging ERISA claims for breach of fiduciary duty based upon: (1) including excessively expensive funds in the Plan, (2) charging excessive

recordkeeping and administrative fees, and (3) employing a flawed process for selecting and monitoring the Plan’s investment options.

The three named plaintiffs moved to certify a class of all Plan participants under Rule 23(b)(1). However, between the three, they had only invested in seven of the Plan’s 37 investment options. Defendants moved for dismissal based upon lack of Article III standing regarding the 30 other Plan investment options, and opposed class certification due to a lack of typicality. The district court certified a class of all Plan participants.

On appeal, the Third Circuit found that the named plaintiffs had standing, because they had shown an actual injury flowing from the breaches alleged. The Court also explained that its ruling on standing was consistent with the Supreme Court’s 2020 decision in *Thole v. U.S. Bank N.A.*, 140 S. Ct. 1615 (2020), which held that an abstract breach of duty without a personal loss to the plaintiff’s account is insufficient to confer standing.

Regarding typicality, the Third Circuit explained that “typicality is imposed to prevent certification when the legal theories of the named plaintiffs potentially conflict with those of the class absentees.” Evaluating the named plaintiffs’ legal theories, the Third Circuit found that the breaches of fiduciary duty alleged (such as a failed selection process for funds or failure to monitor expense ratios) would be the same claims for participants across all of the Plan’s 37 funds. In short, “[t]he nature of these claims makes intra-class conflicts unlikely—it is difficult to imagine class members who have benefited from, or are content to pay, pointless fees.” The Third Circuit upheld the class certification.

The Third Circuit’s decision in *Boley* shows that a successful challenge to typicality will need to focus on the nature of the named plaintiff’s legal theories, and highlight the potential for intra-class conflict resulting from such theories.

### THIRD CIRCUIT CONTINUES GIVING NUMEROSITY REQUIREMENT “REAL TEETH”

Rule 23(a)'s numerosity requirement—that “the class is so numerous that joinder of all members is impracticable”—is sometimes overlooked. Forty class members is generally used as a guidepost, and so challenges to numerosity are less common than other Rule 23(a) challenges. But as the Third Circuit recently made clear, numerosity is still an evidentiary hurdle, and a numerosity finding must be supported by “evidence specific to the products, problems, parties, and geographic areas actually covered by the class definition.”

In *Allen v. Ollie's Bargain Outlet, Inc.*, Case No. 21-2121 (3d Cir. 2022), each of the two named plaintiffs was disabled and required a wheelchair to move about. While shopping at an Ollie's Bargain Outlet (which has over 400 retail locations), each experienced obstacles such as boxes or clothing racks placed in the aisles, blocking their way. Plaintiffs filed a putative class action under Title III of the Americans with Disabilities Act, seeking to certify a class of “all persons with qualified mobility disabilities” who have experienced “access barriers” in Ollie's stores.

To support their argument for numerosity, Plaintiffs relied on three pieces of evidence: (1) “data from the US Census Bureau's 2018 American Community Survey, estimating the number of people with ambulatory disabilities—meaning serious difficulty walking or climbing stairs—for each zip code with an Ollie's store”; (2) “twelve emails received by Ollie's customer service over three years from or on behalf of patrons that use wheelchairs or have a mobility disability,” and (3) “a declaration stating that over seven days, sixteen persons using wheelchairs or scooters were recorded by video at the two Ollie's locations” where Plaintiffs shopped. The District Court certified the class.

In evaluating the District Court's numerosity finding, the Third Circuit addressed each of Plaintiffs' three pieces of numerosity evidence. First, the Court recognized that even if the disability survey data was accurate, “we would still be left with no basis to determine what portion of those [disabled persons] are customers of Ollie's, let alone what portion have suffered a common ADA injury.” Regarding the declaration and video of 16 persons using wheelchairs or scooters at two Ollie's locations over a seven-day period, the Court noted that “the number of disabled customers observed in the video could range from zero to sixteen”,

and, in any event, “[t]he declaration does not suggest that the wheelchair-using customers observed in the video *suffered an ADA violation in common with the class.*” Finally, regarding the 12 “customer complaints,” the Court found them to be “far too few,” with at least one of the 12 showing that the consumer actually experienced clear aisles, and was not a member of the putative class.

On the whole, the Third Circuit found the Plaintiffs' numerosity evidence “far too speculative,” and remanded.

The Third Circuit also found that the district court had erred in finding the commonality requirement satisfied, by: (1) certifying a nationwide class without evidence that Ollie's corporate practices had in fact caused discrimination in stores outside of Pennsylvania, and (2) using the overbroad term “access barriers” in the class definition.

The Third Circuit's opinion in *Allen* shows that Rule 23's numerosity requirement should not be overlooked. Evidence of numerosity must connect a class of persons to a common injury; simply presenting evidence of a large group of persons who *may* have suffered a common injury is insufficient.



## THIRD CIRCUIT ADOPTS UNIQUELY EXPANSIVE DEFINITION OF ATDS UNDER THE TCPA

The plaintiffs in *Panzarella v. Navient Solutions, Inc.*, 37 F.4th 867 (3d Cir. 2022), alleged that the defendant, a student loan servicer, violated the Telephone Consumer Protection Act, 47 U.S.C. § 227(b)(1)(A), by using an automated telephone dialing system (“ATDS”) to dial their cell phones without their consent. The TCPA defines an ATDS as “equipment which has the capacity (A) to store or produce telephone numbers to be called, using a random or sequential number generator; and (B) to dial such numbers.” *Id.* at §227(a)(1).

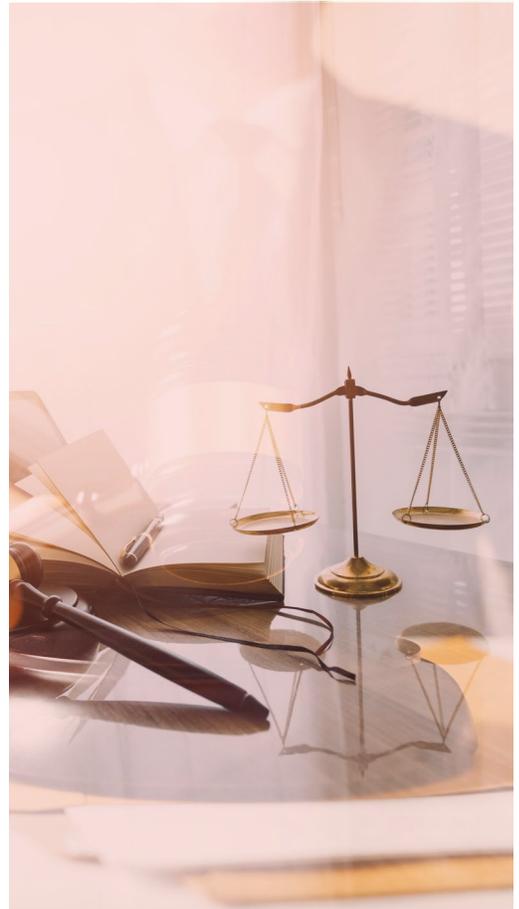
Defendant’s dialing system consisted of two parts: an SQL server, which stored borrowers’ phone numbers, and an Interaction Dialer, which dialed phone numbers stored in the SQL server. Plaintiffs alleged that, because the SQL server could generate random or sequential numbers (as can most computers) and was connected to the Interaction Dialer, the defendant’s system qualified as an ATDS, even though plaintiffs’ phone numbers were not dialed at random or in sequence. The defendant argued that the pertinent “equipment” for purposes of the TCPA is limited to the dialer itself, and does not include servers that feed data to the dialer. Hence, because the Interaction Dialer itself lacked the capacity to generate numbers randomly or in sequence, the defendant did not violate the TCPA because its system was not an ATDS.

The district court granted summary judgment to the defendant because plaintiffs had adduced “no evidence to suggest that the [Interaction

Dialer] on its own is an ATDS.” *Panzarella*, 37 F.4th at 872. The Third Circuit affirmed, but on alternate grounds and by adopting a unique interpretation of the TCPA. The court held that “an ATDS may include several devices that when combined have the capacity to store or produce telephone numbers using a random or sequential number generator and to dial those numbers.” *Id.* at 874. The court also rejected a limited interpretation of “capacity” and held that the Supreme Court’s decision in *Facebook, Inc. v. Duguid*, 141 S.Ct. 1163 (2021), “does not stand for the proposition that a dialing system will constitute an ATDS only if it actually generates random or sequential numbers.” *Panzarella*, 37 F.4th at 875.

The Third Circuit ultimately though affirmed the district’s court grant of summary judgment on the grounds that defendant’s system did not “use[] a random or sequential number generator” to place calls to plaintiffs. *Id.* at 877-82. The numbers the defendant dialed were from lists that “contained contact information drawn from [defendant’s] database of account information rather than computer-generated number tables.” *Id.* There was no evidence that defendant used the Interaction Dialer to randomly or sequentially dial plaintiffs’ numbers, and so no evidence that defendant “made a telephone call *using* an ATDS in violation of the TCPA.” *Id.* (emphasis original).

The Third Circuit is the only circuit court to hold that database servers connected to a dialer constitute part of the “equipment” for determining what constitutes an ATDS. Many dialing systems, particularly those used by banks and servicers to contact their customers, include



a server that provides contact information to the equipment that actually dials the telephone numbers. The Third Circuit’s expansive interpretation potentially brings those systems within the scope of the ATDS definition, regardless of the fact that the systems are not actually used to dial numbers at random or in sequence. The ultimate holding—no TCPA liability because the defendant did not use the random and sequential number generating functions of an ATDS to place the calls—is of course a good development for financial services providers. But the Third Circuit’s unique ATDS interpretation will continue to sow uncertainty over the types of dialing systems regulated by the TCPA.



## FIRST CIRCUIT REJECTS FCRA WILLFULNESS CLAIM BASED ON CFPB SUPERVISORY REPORT

The Fair Credit Reporting Act requires consumer reporting agencies (“CRAs”) to follow reasonable procedures to assure maximum possible accuracy of information in consumer reports, and provides a private cause of action for willful noncompliance if a CRA fails to adopt such procedures. In *Safeco Ins. Co. of Am. v. Burr*, 551 U.S. 47, 57-58 (2007), the Supreme Court held that “willfulness” under the FCRA encompasses violations that are knowing, intentional or reckless. Reckless conduct in turn entails disregard for “an unjustifiably high

risk of harm that is either known or so obvious that it should be known.” *Id.* at 68. Does a CRA’s conduct meet this standard for recklessness (and therefore willfulness) when its allegedly deficient procedures are similar to those of other CRAs that were found deficient by the CFPB and published in its quarterly Supervisory Highlights publication?

The plaintiff in *McIntyre v. RentGrow*, 34 F.4th 87 (1st Cir. 2022), claimed that RentGrow, a provider of tenant-screening reports to landlords, violated FCRA when it sent to a prospective landlord a report that contained inaccuracies about the plaintiff’s prior litigation history. The litigation information was provided by a third-party (a TransUnion subsidiary), and failed among other things to report that a prior complaint had been withdrawn, and that a civil judgment had been paid and was not still outstanding. *Id.* at 97. Plaintiff alleged that RentGrow willfully had failed to follow reasonable procedures to identify and correct errors in the reporting information from the third-party prior to providing it to the landlord.

The willfulness component of plaintiff’s claim was grounded in the summer 2015 edition of the CFPB’s Supervisory Highlights, where the CFPB reported on examination and supervision actions against certain CRAs that relied on third-parties to provide public record information. The CFPB there reported on “weaknesses” in certain CRAs’ processes relating to information from third-parties, including failing to conduct an audit of the third-party providers and not having defined processes in place to verify the accuracy of provided information. *Id.* at 100. The plaintiff in *McIntyre* argued that the CFPB’s commentary

put RentGrow on notice that its procedures were unreasonable, and thus that it recklessly failed to follow reasonable procedures to assure the maximum possible accuracy of information in consumer reports.

The district court granted summary judgment to RentGrow on the grounds that plaintiff had not adduced sufficient evidence to establish willfulness, and the First Circuit affirmed. Both courts found that RentGrow had failed to adopt reasonable procedures to ensure maximum possible accuracy. Plaintiff’s claim failed though because the CFPB’s commentary in Supervisory Highlights was insufficient to put RentGrow on notice that RentGrow’s procedures may be inadequate. The CFPB’s guidance—described by the First Circuit as a “sparse and cryptic four paragraphs”—did “little more than restate factors that the CFPB considers in assessing compliance.” *Id.* at 100-01. The “weaknesses” that the CFPB identified were not “clear indications that any single deficiency would render a CRA’s procedures, as a whole, unreasonable,” and so no reasonable jury could find that the Supervisory Highlights commentary put RentGrow on “clear notice” that its procedures were inadequate. *Id.*

*McIntyre* does not go so far as to say that the CFPB’s Supervisory Highlights can never put a CRA on notice that its FCRA procedures may be inadequate. Judge Lynch, in a concurring opinion, would have so held, because the “CFPB itself states that the Supervisory Highlights is not authoritative or binding.” *Id.* at 102 (Lynch, J., concurring). The majority opinion for now leaves open the possibility that some future CFPB pronouncement in Supervisory Highlights could be sufficient to

put a CRA on notice that its FCRA procedures are inadequate. The takeaway from *McIntyre* though is that general CFPB reports on other examinations and supervisory actions that lack substance and detail are insufficient to put a CRA on notice regarding potentially inadequate compliance procedures.

## **NINTH CIRCUIT SAYS IN UNPUBLISHED OPINION THAT CIPA APPLIES TO “INTERNET COMMUNICATIONS,” RETROACTIVE CONSENT TO RECORDING IS INSUFFICIENT**

Many websites record information about website visits (e.g., IP address, date and time of visits) and track a user’s interactions with a website. Does recording and tracking this information constitute a wiretap and therefore require a consumer’s consent in two-party consent states?

The plaintiff in *Javier v. Assurance IQ, LLC*, No. 21-16351 (9th Cir. May 31, 2022) (unpublished) went online to request a life insurance quote from Assurance. Assurance’s website uses a product by ActiveProspect called TrustedForm to record a user’s interactions with the site, and creates a unique certificate for each user that certifies that the user agreed to be contacted. After providing demographic information and answering questions about his medical history (all of which was tracked and recorded by the TrustedForm product), the plaintiff viewed a screen stating that clicking the “View My Quote” button constituted agreement to Assurance’s privacy policy (which included consent to the recording of communications). The plaintiff

clicked on the button and agreed to the policy, but then brought suit against Assurance, alleging that the recording of his information (notwithstanding his later consent to the recording) violated the California Invasion of Privacy Act.

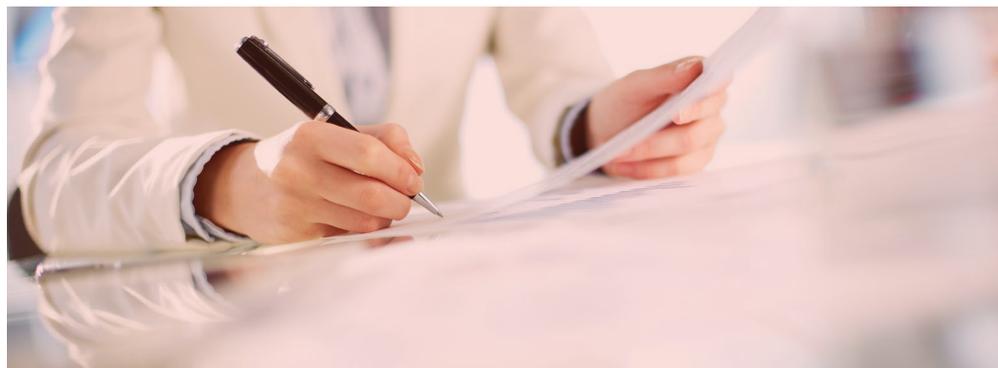
CIPA makes it illegal to record communications without the consent of all parties. Ca. Penal Code §631. The district court granted Assurance’s motion to dismiss on the grounds that plaintiff’s agreement to Assurance’s privacy policy, even though it came after the recording at issue, constituted valid consent to the recording. The Ninth Circuit, in an unpublished opinion, reversed the district court, with two holdings of note.

First, the court held that “[t]hough written in terms of wiretapping, Section 631(a) applies to Internet communications.” *Id.* at \*3. Other courts have held that CIPA and analogous federal wiretap laws apply to online communications, but have limited the scope to intercepting the contents of a message and not incidental information generated as part of the message. *See, e.g., In re Zynga Priv. Litig.*, 750 F.3d 1098, 1106 (9th Cir. 2014) (“contents” of an online communication “refers to the intended message conveyed by the communication, and does not include record information regarding

the characteristics of the message that is generated in the course of the communication”). The *Javier* court though goes farther. The opinion does not include any analysis of the issue or cite any support, so it’s not entirely clear what the court means by an “Internet communication.” But in the context of the case it possibly extends the scope of “contents” (and therefore CIPA) to incidental information tracked by websites (e.g., IP address, date and time of visit).

Second, the court held that the plaintiff’s agreement to Assurance’s privacy policy after the tracking at issue did not constitute consent under CIPA. The California Supreme Court has not directly addressed the issue, so after briefly analyzing other state court cases the Ninth Circuit predicted that the state Supreme Court “would interpret Section 631(a) to require prior consent to all parties to a communication.” *Id.* at \*5.

After *Javier*, website owners possibly can no longer track and record any data about website interactions with California consumers without consent, without risking violating CIPA. Post-facto consent is not sufficient, according to the *Javier* court, so recording the initial moments of a website interaction may violate CIPA, even if the user only seconds later agrees to a



privacy policy consenting to the recording. We note that the opinion was unpublished, and the court denied plaintiff's request (to which defendant objected) to publish the opinion. The case therefore is of limited precedential value, and in any event is not binding on California state courts. But with CIPA providing for penalties of \$5,000 per violation, the court's expansive view of CIPA's applicability is nearly certain to generate significant additional litigation against website owners.

### ELEVENTH CIRCUIT DENIES FEES TO COUNSEL WHO PLACED THEIR INTERESTS ABOVE CLIENTS'

Based on an unsolicited fax, Dr. Steven Arkin and his counsel Anderson + Wanca ("Wanca") sued medical device manufacturer Smith Medical Partners ("Smith") under the Telephone Consumer Protection Act of 1991 ("TCPA") in the United States

District Court for the Middle District of Florida. *Arkin v. Pressman, Inc.*, 38 F.4th 1001, 1004 (11th Cir. 2022). The parties entered into a settlement ("the *Arkin Settlement*") providing that any party could "terminate the settlement, for any reason or no reason at all," prior to final court approval. The *Arkin Settlement* also created a \$21 million common fund, from which Wanca was to receive \$7 million in fees, or \$10,417.44 per billable hour. The *Arkin Settlement* further provided that any remaining funds would revert to Smith after payment of valid claims and Wanca's \$7 million fee award.

But Eleventh Circuit precedent generally allows a fee award to class counsel of only 25% of the common fund. So Arkin and Smith agreed to voluntarily dismiss the case ("*Arkin I*") and refile in Illinois state court ("*Arkin II*") where Wanca presumably could request a higher fee percentage. *Id.* at 1006. The Illinois state court preliminarily

approved the settlement, but an *Arkin II* class member, Pressman, Inc., filed a wide-ranging objection. Rather than address the objection, Smith terminated the settlement, and the case returned to the Middle District of Florida.

Back in Florida Pressman and Smith filed a new proposed settlement agreement ("the *Pressman Settlement*"), which was markedly different from the *Arkin Settlement*. In relevant part, the *Pressman Settlement*: (1) provided for a non-reversionary \$4.5 million common fund for pro rata claim distributions; (2) class counsel could only receive up to 25% of the common fund as a fee award (or \$1.125 million); and (3) the settlement could only be terminated if it was not approved by the court or too many class members opted out. *Id.*

The court ultimately approved the *Pressman Settlement* and appointed Pressman's attorneys—not Wanca—as class counsel. Because the trial court found that "Wanca had not conferred a substantial benefit to the class," it rejected Dr. Arkin and Wanca's request for a portion of the fee award, instead granting Pressman's counsel the full \$1.125 million fee. *Id.* Dr. Arkin and Wanca appealed the fee award denial. *Id.*

On appeal, the Eleventh Circuit did find that Wanca provided one substantial and independent benefit to the class: "Wanca identified Smith's TCPA violations and the potential for a class action." *Id.* at 1011. This ordinarily would entitle Wanca to some fee award, but this was "not an ordinary case" because Wanca put its own interest ahead of its class clients. *Id.*



For example, Wanca professed that refiling in Illinois was “for the convenience of the parties,” as Wanca and Smith were based in Illinois. But the Eleventh Circuit found it was instead for the convenience of Wanca and Smith. Most troubling to the court was that the refiling in Illinois put many of the class’ claims at serious risk by potentially impairing 75% of the fees at issue under the statute of limitations. *Id.* at 1012. “Subordinating the interests of the class for the convenience of the attorneys is as much an ethical violation as selling the class out for attorneys’ fees.” *Id.* (emphasis added).

The Eleventh Circuit also criticized the *Arkin* Settlement’s reversion and termination provisions. These provisions “ensured that Smith would never have to pay anything close to the \$21 million nominally provided for by the settlement agreement, as Smith would simply terminate the settlement had too many claimants filed.” *Id.* This also would disincentivize Wanca from seeking out class members for recovery. In other words, \$21 million was merely “a legal fiction created to maximize Wanca’s attorneys’ fees.” *Id.* Having “put the class at serious risk of harm with the *Arkin* Settlement for the sake of inflated attorneys’ fees and convenience[,] Wanca . . . thus closed the doors of equity on its claim for attorneys’ fees under the *Pressman* Settlement. *Id.*

At its core, the Eleventh Circuit has reaffirmed that a court’s only consideration in determining attorneys’ fee awards in the class context must be whether the attorney’s work benefitted the class. It should further remind attorneys of the obvious: their clients’ interests are paramount.

## ELEVENTH CIRCUIT: FDCPA APPLIES TO MONTHLY STATEMENTS

The Truth in Lending Act (“TILA”), 15 U.S.C. § 1638, requires lenders and loan servicers to issue monthly mortgage statements to borrowers containing items such as the monthly payment amount, the total sum of any fees charged since the last statement, and information about any delinquency. In *Daniels v. Select Portfolio Servicing, Inc.*, 34 F.4th 1260 (11th Cir. 2022), the Eleventh Circuit held, 2-1, in a case of first impression in that circuit, that those required monthly statements can constitute communications in connection with the collection of a debt under the Fair Debt Collection Practices Act (“FDCPA”), and so may violate that statute if they stray from the content required under TILA.

In *Daniels*, the mortgage statements the defendant-servicer sent the plaintiff included a “delinquency notice” box that listed overdue payments and a “monthly payment coupon” that included the late fee that would be charged if the payment was not made on time. The statement also said that “This is an attempt to collect a debt. All information obtained will be used for that purpose.” The plaintiff alleged that the defendant had violated the FDCPA because her mortgage statements included incorrect information about her debt. The defendant argued that, because the mortgage statements were required by TILA, they could not constitute communications “in connection with the collection of a debt” (as required under the FDCPA). The district court dismissed the complaint and the plaintiff appealed.

The Eleventh Circuit reversed. The court first held that the mortgage statements could constitute a communication about the collection of a debt under the FDCPA, noting that while such statements may have an informational purpose, they may at the same time have the dual purpose of demanding payment on a debt. The court then held that while a mortgage statement that contained only information required by TILA does not demand payment of a debt, “a TILA-mandated mortgage statement can contain additional language that makes it a debt-collection communication.” *Id.* at 1270 (emphasis added). It then held that the inclusion of the statement “This is an attempt to collect a debt”—which is not required under TILA—was sufficient to make the mortgage statements “debt collection communications.” *Id.* at 1271.

The dissent in *Daniels* argued that the single sentence seized on by the majority—“This is an attempt to collect a debt”—should not be treated as “magic words” that automatically convert a monthly statement into an attempt to collect a debt, and that the court should instead look at the entire context of the communication. The dissent further noted that the majority’s position is at odds with the 3rd, 4th, 6th, 7th, 8th, and 10th Circuits—every other circuit to consider the issue. *Daniels* creates a circuit split and uncertainty that may have to be resolved by the Supreme Court. Until then, mortgage lenders and servicers may limit their risk by including only TILA-required language in mortgage statements.

## NINTH CIRCUIT CLARIFIES FURNISHERS' "REASONABLE INVESTIGATION" OBLIGATIONS UNDER FCRA

The Fair Credit Reporting Act ("FCRA"), 15 U.S.C. §§ 1681, *et seq.*, requires that "furnishers"—i.e., entities that provide credit information about consumers' debts to credit reporting agencies—who are notified of inaccuracies in the information they provided must correct or delete inaccurate information after conducting an "investigation with respect to the disputed information" that is "reasonable" and "non-cursory." In *Gross v. CitiMortgage, Inc.*, 33 F.4th 1246 (9th Cir. 2022), the Ninth Circuit clarified the difference between a furnisher's obligation to investigate and the similar obligation of a credit reporting agency to investigate alleged inaccuracies.

In *Gross*, the trial court granted the defendant, CitiMortgage, summary judgment on plaintiff's claim that CitiMortgage had furnished inaccurate information about the plaintiff's debts to reporting agencies, holding that the information furnished to reporting agencies was, as a matter of law, accurate, and that CitiMortgage had reasonably investigated the plaintiff's allegation that the information was inaccurate.

The Ninth Circuit reversed and remanded. The court held first that, in a FCRA action against a furnisher, the plaintiff must initially make a "prima facie showing" that the information furnished was inaccurate and then must further show that, had the furnisher conducted a reasonable investigation, the furnisher would

have discovered the inaccuracy. 33 F.4th at 1251. A similar two-step process has been required for FCRA actions against credit reporting agencies. In *Gross*, the Ninth Circuit joined the First and Eleventh Circuits in extending the logic to claims against furnishers. *Id.* at 1251 (citing *Chiang v. Verizon New Eng. Inc.*, 595 F.3d 26, 37 (1st Cir. 2010), and *Felts v. Wells Fargo Bank, N.A.*, 893 F.3d 1305, 1313 (11th Cir. 2018)).

The court then found that the plaintiff had made a prima facie case that CitiMortgage had furnished patently inaccurate information to the reporting agencies by telling those agencies that the plaintiff still owed a debt with an outstanding balance that was accruing interest even though the plaintiff's liability for that debt had been extinguished by the Arizona Anti-Deficiency Statute.

The court went on to analyze furnishers' duties to investigate disputes, holding that, because furnishers are closer to the debtor than credit agencies, furnishers "stand[] in a far better position to make a thorough investigation of a disputed debt," and so FCRA will sometimes require furnishers to conduct more detailed and in-depth investigations than credit agencies. *Id.* at 1253 (quoting *Gorman v. Wolpoff & Abramson, LLP*, 584 F.3d 1147, 1156 (9th Cir. 2009)). In particular, the court held that furnishers may be required to

investigate legal as well as factual issues affecting the accuracy of the credit information being reported. The court noted that, were it to limit furnishers' obligations to investigating factual issues, furnishers might use the vagueness of the distinction between factual and legal issues to "evade their investigation obligation by construing the relevant dispute as a 'legal' one." *Id.* at 1253.

While the court thus broadened the potential scope of furnishers' obligations under FCRA, it declined to provide further guidance as to what is required to satisfy that obligation in any particular case, and instead noted a range of factors relevant to the reasonableness inquiry, including the "nature, size, complexity, and scope of each furnisher's activities," and "the furnisher's relationship to the debt and to the consumer; the level of detail in the credit reporting agency's notice of dispute; and the feasibility of implementing investigatory procedures, including training staff." *Id.* at 1253; accord *McIntyre v. Rentgrow, Inc.*, 34 F.4th 87, 100 (1st Cir. 2022) (endorsing broad standard for "reasonable inquiry"); *Daugherty v. Equifax Info. Servs., LLC*, 701 F. App'x 246, 253 (4th Cir. 2017) (same). The adoption of such a fact-intensive set of considerations seems likely to make it very difficult for furnishers to win FCRA cases in the Ninth Circuit without proceeding to trial.



## EIGHTH CIRCUIT: “SPECIFIC FACTS” ALLEGING HARM ARE REQUIRED IN FCRA CASES

Since the Supreme Court’s decision in *Spokeo, Inc. v. Robins*, 578 U.S. 330 (2016), federal courts have struggled to develop a consistent understanding of when a statutory violation constitutes an injury that confers Article III standing. In *Schumacher v. SC Data Ctr., Inc.*, 33 F.4th 504 (8th Cir. 2022), the Eighth Circuit addressed that question in the context of a class-action settlement involving alleged violations of the Fair Credit Reporting Act (“FCRA”), 15 U.S.C. §§ 1681, *et seq.* regarding a criminal background report obtained by a prospective employer. The court held that while the criminal background report fell within FCRA’s broad definition of “consumer report,” the alleged FCRA violations were merely procedural violations, and so the district court did not have subject-matter jurisdiction to approve the class settlement.

The case arose when the defendant withdrew a job offer to the plaintiff after obtaining a criminal background report showing the plaintiff had misrepresented her criminal history. The plaintiff sued, alleging that the “Authorization for Release of Information” she signed authorized the defendant to obtain only criminal records, not a consumer report, and that the Authorization did not “clearly and conspicuously” disclose that a consumer report would be obtained, as required by the FCRA. She also alleged that the defendant violated the FCRA by failing to provide her with the report before withdrawing the offer. The defendant’s motion to dismiss for lack of standing was overruled.

The Eighth Circuit vacated and remanded. The court held that, even though neither the Authorization nor the criminal background report used the term “consumer report,” and the report did not contain any information about the plaintiff’s “credit history or worthiness” or other information “typically included in a comprehensive consumer report,” the criminal background report fell within FCRA’s broad definition of “consumer report.” By signing the Authorization for a criminal background search, the plaintiff consented to the defendant’s obtaining a consumer report, and so could not allege an injury sufficient to confer standing for her claim that the report was not properly authorized. 33 F.4th at 513.

The court also held that the Authorization’s alleged failure to comply with FCRA’s disclosure requirements did not confer standing. The court held that to have standing for a “technical violation” of FCRA’s disclosure requirements, a plaintiff must “specifically plead facts” showing that but for the violation, the plaintiff would not have given consent, e.g., that the disclosure “caused confusion as to the consent being given,” or “was so lacking in clarity that the employee was unaware that a consumer report would be procured.” The plaintiff alleged no such “specific facts,” and so the court held she lacked standing for her improper-disclosure claim. *Id.*

The court also held the plaintiff lacked standing for her claim that the defendant failed to provide her with the consumer report before taking the adverse employment action. The court held that FCRA does not entitle a plaintiff to dispute a consumer report with an employer. *Id.* at 511-12 (citing *Walker v. Fred*

*Meyer, Inc.*, 953 F.3d 1082 (9th Cir. 2020)). The plaintiff thus had no right under FCRA to explain negative but accurate information to a prospective employer, and so had no standing for that claim. *Id.* at 512.

Under *Schumacher*’s reading of FCRA’s definition of “consumer report,” FCRA liability extends well beyond just credit reports, and may attach to a wide variety of communications about a consumer’s background and personal history. It thus runs counter to decisions that have in various ways narrowed the definition of “consumer report.” *E.g.*, *Rivera v. Allstate Ins. Co.*, 913 F.3d 603, 614 (7th Cir. 2018) (report procured in connection with an investigation into employee misconduct is not a consumer report); *DiGianni v. Stern*’s, 26 F.3d 346, 349 (2d Cir. 1994) (excluding reports from retailers about their experience with consumers). While the court clarified what it described as *Spokeo*’s “amorphous guidance” regarding Article III standing for FCRA claims, in the process it may have introduced uncertainty as to FCRA’s scope.

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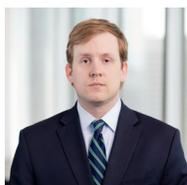
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