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able commercial standards, prevailing in the area in which the person is located, with respect to the business in which the person is engaged. There was some evidence supporting the jury's finding that the Bank acted in good faith because the check was processed through a widely-used automated system of the federal reserve and there was no evidence to suggest that anyone at Bank was aware of any problem with the check prior to VR's request. As to the second element, the court upheld the jury's determination that VR was 15% responsible because it left the check out unattended. VR did not appeal this finding.

The court addressed whether Bank was liable under §3.406(b) for failing to exercise ordinary care. The court stated Bank had no procedures to guide its employees on when the sig-

nature of a check should be manually verified, and the procedures used to process checks and review signatures must be reasonably related to the detection of unauthorized signatures to be in accordance with reasonable commercial banking standards. Here, Bank's policy was to review signatures only on checks 100 times that of the average check processed. Based on this evidence, the court stated that the jury could find that Bank's verbal policy was not reasonably related to the detection of unauthorized signatures, which would be a failure to exercise ordinary care. The consequence of this determination was that the loss was allocated between the person precluded and the person asserting the preclusion based on the extent to which the failure to exercise ordinary care contributed to the loss.

MISCELLANEOUS

PURCHASER OF A PICKUP TRUCK CANNOT SUE UNDER THE FEDERAL ODOMETER DISCLOSURE STATUTE FOR THE SELLER'S ALLEGED FAILURE TO REVEAL THE VEHICLE'S ACCIDENT HISTORY

Bodine v. Graco, Inc., 533 F.3d 1145 (9th Cir. 2008).

FACTS: Maybe Bodine purchased a used vehicle from Graco, Inc. Graco provided Bodine with an accurate odometer statement, but did not provide a copy of the vehicle's title. Graco assured Bodine that the vehicle was in good condition, but the title would have revealed the vehicle's titled was branded "Restored Salvage" in accordance with Arizona law. Bodine claimed Graco deliberately withheld the title in order to conceal the fact that the vehicle had been severely damaged in an earlier collision.

Bodine discovered the vehicle's branding after she received a copy of the vehicle's registration. Bodine claimed that she would not have bought the vehicle had she known the status of the vehicle's title. She also discovered the vehicle had mechanical problems rendering it dangerous to drive. She requested that Graco take the vehicle back, but Graco refused and denied any knowledge of its branded status, even though Graco in fact knew about the status when he sold the vehicle.

Bodine filed a complaint in district court, alleging violations of the Motor Vehicle Information and Cost Savings Act, commonly referred to as the Odometer Act ("Act"), a federal law prohibiting vehicle odometer tampering. The parties agreed to have a federal magistrate judge hear the case. Graco filed a motion to dismiss for lack of jurisdiction, and the magistrate judge granted the motion. Bodine appealed.

HOLDING: Affirmed.

REASONING: The court stated that although Graco incorrectly filed a motion to dismiss for lack of jurisdiction, Bodine's more general argument, regarding the Act's "with intent to defraud" provision was not necessarily flawed. The Act prohibits odometer tampering with intent to change the mileage registered by the odometer, and creates a private right of action. The court adopted a narrow reading of the Act as pertaining only to the tampering with the odometer itself, and excluding any private right of action for withholding title information from the consumer. Under the narrow construction, Graco did not tamper with the odometer, thus it did not violate the Act. Graco did not alter the vehicle's

mileage on the title. Graco only failed to reveal the status of the vehicle before the transaction was completed, which under the court's adopted reasoning, was not enough to trigger a violation of the Act. The court analyzed the legislative intent of the Act. The words "with intent to defraud" were interpreted to encompass fraud only in context under the Act, and not for fraud outside of tampering with a vehicle's odometer. The court stated that a broader reading of the phrase could lead to results inconsistent with the Act's purpose.

The legislative intent and the Act's plain language led the court to determine that the Act should be narrowly construed and pertain only to tampering with a vehicle's odometer. A private right of action should not extend to areas broader than that. Congress intentionally left out collision history fraud because it believed that state regulation and state-law remedies were adequate. Even though court did not condone the activities Bodine alleged, her claim fell outside the Act's protections and thus, could not survive.

ATTORNEY FEE AGREEMENT NOT SUBJECT TO ORAL MODIFICATION

David J. Sacks, P.C. v. Haden, ____ S.W.3d ____ (Tex. 2008).

FACTS: Haden & Co. hired David Sacks as their appellate counsel. Haden and Sacks executed an agreement that called for Sacks's services at an hourly rate, subject to a \$5,000 retainer (modified and approved in writing from the originally drafted \$10,000). After Haden paid the retainer Sacks drafted an appellate brief for the court and billed Haden \$35,304.71. This represented the amount due less the amount paid in retainer. Haden paid Sacks an additional \$5,000. Sacks then spent the next two years attempting to collect payment on the remaining balance. Haden argued that Sacks was contracted to review the appellate brief, not draft a new one. Haden further argued that Sacks had agreed to an oral modification of the contract that capped Haden's expenses at \$10,000. Sacks filed suit to recover the remaining balance due on his services.

The trial court granted summary judgment in Sacks's favor, awarding him the balance due plus interest. The court also awarded reimbursement for attorney's fee accrued in pursuing his contract claim. The court of appeals reversed and held that a fact question existed with respect to whether there was a meeting

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of the minds between the parties when they entered into the fee agreement. The court of appeals decided the agreement did not explicitly state whether the parties had agreed to an open account or a flat, maximum fee. Haden's evidence of an oral agreement to cap the attorney's fees at \$10,000 was admissible as a defense to Sacks's claim under the collateral and consistent exception to the parol evidence rule.

HOLDING: Reversed and remanded.

REASONING: The Texas Supreme Court determined that the parol evidence rule precluded Haden's evidence of an oral agreement. Under the plain language of the engagement letter, the

A previous or simultaneous agreement to alter the fee agreed upon in a written contract is in conflict with the written contract and not merely collateral to it.

agreement called for an hourly fee and made no mention of a cap on fees. The court held that the absence of such language was irrelevant so long as the contract could reasonably be interpreted one way. The court refused to hold that an open-ended hourly fee agreement would be upheld only if it explicitly stated there was no cap on fees. The court held that the contract was unambiguous, and the parol evidence rule

precluded consideration of evidence of prior or contemporaneous agreements unless an exception to the parol evidence rule applied.

The court also determined that the collateral and consistent exception to the parol evidence rule did not apply. Under this exception, parol evidence can be used to demonstrate a prior or contemporaneous agreement that is both collateral to and consistent with a binding agreement, and that does not vary or contradict the agreement's express or implied terms or obligations. But a previous or simultaneous agreement to alter the fee agreed upon in a written contract is in conflict with the written contract and not merely collateral to it. The court held that the evidence offered by Haden would alter the written agreement, and was therefore not admissible under the exception.

BANK CAN BE SUED FOR IDENTITY THEFT PROSECUTION

Brunson v. Affinity Fed. Credit Union, 402 N.J. Super. 430, 954 A.2d 550 (App. Div. 2008).

FACTS: Howard Brunson's identity was used to cash fraudulent checks through Affinity Federal Credit Union. Brunson was charged based on an investigation conducted by Wilcox, a certified fraud examiner. Brunson was indicted, arrested, and incarcerated after his identity was stolen. Affinity hired Wilcox to investigate the fraudulent activity on Brunson's account. As a result, Wilcox identified Brunson as the imposter who opened the account. Wilcox looked at surveillance tapes and photographs without ever looking at Brunson's actual photos provided by the police. A fraudulent identification card used to open the account listed Brunson as six inches shorter than his actual height and misspelled Brunson's hometown. Wilcox failed to review the in-

formation before he signed criminal complaints against Brunson, which in turn resulted in Brunson's indictment and incarceration. After charges against Brunson were dismissed, Brunson pursued an action against Affinity and Wilcox for malicious prosecution, and negligence. The trial court agreed with Affinity that the indictment showed probable cause, and thus precluded Brunson's claim. The trial court granted Affinity's summary judgment and dismissed Brunson's complaint. Brunson appealed.

HOLDING: Reversed and remanded.

REASONING: The court held that equity and public policy require financial institutions to be held accountable when they put individuals at risk by failing to exercise reasonable care in fraud claim investigations. When a bank institutes criminal proceedings without any reasonable basis, the bank should be responsible for their actions.

In determining whether Affinity, through Wilcox, exercised reasonable care in pursuing fraud prosecution against Brunson, the court looked to see if reasonable foresight was exercised. Reasonable foresight is determined by whether one acted reasonably or recklessly in light of all the circumstances. The court noted that one who recklessly institutes criminal proceedings without any reasonable basis may be found to have acted with malice, and thus, liable in an action for malicious prosecution. Therefore, Affinity, through vicarious liability, may be vulnerable to damages if the jury finds that Wilcox acted recklessly.

Next, the court addressed whether Affinity and Wilcox owed a duty of reasonable care to investigate fraud claims against Brunson. Generally, a bank owes no duty of care to third parties who are not bank customers. Although not determinative, the court considered foreseeability of significant harm to a potential plaintiff as a heavy factor in determining whether a bank owed a duty of care. In opening a bank account in Brunson's name with Brunson's personal information, the resulting injury from identity theft and the subsequent fraudulent scheme was foreseeable. Based on the foreseeability of injury to Brunson, Affinity had a relationship with Brunson. Because a relationship existed between Brunson and Affinity, Affinity may be held liable for pursuing criminal complaints against Brunson based upon unreasonable or reckless investigation. The trial court's summary judgment was reversed, and Brunson's claim was remanded for further proceedings.

FEDERAL LAW DOES NOT PREEMPT PERSONAL INJURY CLAIMS BASED ON MERCURY POISONING FROM CANNED TUNA

Fellner v. Tri-Union Seafoods, L.L.C., 539 F.3d 237 (3d Cir. 2008).

FACTS: Deborah Fellner consumed Tri-Union Seafoods, L.L.C.'s canned tuna fish. Her diet consisted almost exclusively of tuna fish products for about a five-year period. Fellner alleged Tri-Union's products contained mercury and gave her mercury poisoning, resulting in extreme physical and emotional injuries. Fellner filed suit against Tri-Union in state court, seeking damages for harm sustained resulting from mercury consumption contained in Tri-Union's tuna fish, and based on Tri-Union's failure to warn of the risks. After the case was removed to federal court, Tri-Union filed a motion to dismiss based on federal law preemption by the Food and Drug Administration ("FDA"). The court granted the mo-

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tion and Fellner appealed, claiming federal law did not preempt the state personal injury claim.

HOLDING: Reversed and remanded.

REASONING: The court recognized preemption exists when: (1) Congress states federal law preempts state law; (2) Congress intends preemption may be inferred; and (3) state law conflicts with federal law. Tri-Union argued that state law conflicted with federal law such that state law created an obstacle to fulfill Congress' full purposes and objectives. Tri-Union contended that state law conflicted with a federal regulatory scheme. The court found Tri-Union's argument invalid because FDA had not promulgated a legal standard or a risk warning regarding risks posed by mercury contained in fish. Tri-Union argued FDA rejected warning label usage because FDA did not regulate label usage. After the court reviewed the FDA commissioner's opinion letter, the court declined to permit agencies to promulgate express decisions through an informal letter. The commissioner's letter did not purport to declare a new preemption policy. The letter merely explained what FDA determined to do in the past. The court stated that FDA's past actions did not indicate that FDA made an authoritative federal determination warning labels were best left unregulated. Tri-Union's third argument alleged that FDA would deny Fellner's proposed warning label as misbranding. Tri-Union failed to cite a regulatory action identifying warning labels as misbranding under federal law. The court found that FDA didn't promulgate warning label regulation concerning risks posed by mercury in fish. The court reversed the district court's judgment and remanded for further proceedings.

CLASS CERTIFICATION OF TELEPHONE CONSUMER PROTECTION ACT CLAIM WAS IMPROPER

DISTRICT COURT HAD SUBJECT-MATTER JURISDICTION OF CLAIM UNDER TELEPHONE CONSUMER PROTECTION ACT

Gene & Gene L.L.C. v. BioPay L.L.C., 541 F.3d 318 (5th Cir. 2008).

FACTS: BioPay L.L.C. sent approximately four thousand faxes soliciting its services to potential clients. Gene & Gene L.L.C. received one of BioPay's solicitous faxes. Gene filed a class action suit against BioPay in federal court, alleging BioPay violated the Telephone Consumer Protection Act ("TCPA") by sending unsolicited fax advertisements to Gene and to an unidentified number of class members. After preliminary discovery, Gene moved for class certification. BioPay asserted that determining whether each recipient consented to the transmissions would require a series of individual factual determinations, or mini-trials, rendering the class certification improper. BioPay admitted to purchasing databases with potential customers' contact information from which it culled fax numbers, but BioPay also produced evidence showing it periodically culled fax numbers from other sources, including from merchants entering information on BioPay's website, from information submitted at trade shows BioPay attended, and from lists provided by companies in a business relationship with BioPay. BioPay asserted that the consent determination could not be done on a class-wide basis and would require hundreds of mini-trials. Gene argued that class certification was proper because

BioPay sent the fax advertisements as part of a common course of conduct, and whether BioPay culled the fax numbers was irrelevant. The district court certified the class. BioPay appealed.

HOLDING: Reversed and remanded.

REASONING: The court held that the district court had subject-matter jurisdiction over the case according to the Class Action Fairness Act ("CAFA"). CAFA provides the federal courts with original jurisdiction over class actions when there is minimal diversity, and the aggregated amount in controversy exceeds \$5 million, exclusive of interest and costs. The court found that minimal diversity was present because Gene was domiciled in Louisiana, and BioPay in Virginia.

The court also held that the amount-in-controversy requirement was satisfied because Gene's complaint held open the possibility of treble damages, depending on the state of proof. TCPA provides recovery of the greater of actual damages or \$500 for each violation. The monetary award may be trebled if the court finds that a violation was willful or knowingly. The court reasoned that given the possibility of treble damages under TCPA, and given that BioPay allegedly sent over 4,000 unsolicited faxes, the aggregate amount-in-controversy exceeded \$5 million. Because the court found minimal diversity present and the amount-in-controversy requirement satisfied, the district court had subject-matter jurisdiction.

To obtain class certification, a party must satisfy the requirements of Rule 23 of the Federal Rules of Civil Procedure. The court emphasized that the party seeking certification bears the burden to establish the requirements are met. Before the class may be certified, the district courts must conduct a rigorous analysis of the four threshold requirements: numerosity, commonality, typicality, and adequacy of representation. The court assumed the commonality and typicality requirements were satisfied because the thresholds are not high. Far more demanding is the predominance requirement because it tests whether the proposed class is sufficiently cohesive to warrant adjudication by representation. The court concluded that Gene's proposed class did not satisfy the predominance requirement, and the district court abused its discretion determining otherwise.

The predominance inquiry requires a court to consider how a trial on the merits would be conducted if a class were certified, which entails identifying the substantive issues that will predominate, and then determining whether the issues are common to the class. The process ultimately prevents the class from degenerating into a series of individual trials. The court concluded the district court's assertion that the class would not degenerate into a series of individual trials was largely unsupported and mistaken. Gene failed to advance a viable theory of generalized proof to identify those persons, if any, who consented to BioPay's fax solicitations. The court noted that it does not hold as a matter of law that the consent requirement defeated the possibility of class certification. The court merely held that Gene failed to advance any viable theory employing generalized proof concerning the lack of consent with respect to the proposed class, which lead the court to conclude that myriad mini-trials could not be avoided. Thus, the district court abused its discretion in certifying the class. The court reversed the district court's class certification, and remanded the case for further proceedings not inconsistent with the court's opinion.

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BANKRUPTCY COURT DID NOT ABUSE ITS DISCRETION IN IMPOSING SANCTIONS

In re Yorkshire, L.L.C., 540 F.3d 328 (5th Cir. 2008).

FACTS: Terry and George Luedtke, and Tracy Knight started a custom slaughterhouse in Houston, Texas. Luedtkes and Knight organized Yorkshire, LCC to operate the slaughterhouse. Knight served as Yorkshire's president and a manager. Knight provided some initial capital for the business, but Luedtkes made all further capital infusions. Knight provided only his labor, and eventually insisted he be paid a salary. Luedtkes were unwilling to provide more capital to pay Knight a salary, and Knight refused to work and distanced himself from the daily operations. These disagreements caused significant discord between Knight and Luedtkes, but at no time was Yorkshire insolvent.

Knight filed suit against Luedtkes and Yorkshire in state court. Defendants moved to transfer venue, and the court scheduled a venue hearing. Luedtkes called a meeting and sent Knight

a proper notice, indicating the date the meeting would be held and that during the meeting, they would consider removing Knight from any position of authority at Yorkshire. Knight requested that the meeting be postponed and Luedtkes agreed. Less than a week before the meeting and the venue hearing, Knight filed for bankruptcy on behalf of Yorkshire. Knight

A federal court has inherent authority to impose sanctions against litigants or attorneys appearing before the court so long as the court finds they engaged in bad faith conduct.

hired an attorney as bankruptcy counsel for Yorkshire. Knight informed the attorney he was Yorkshire's president and sole manager. Knight and his attorney prepared for the bankruptcy in secret. They did not consult with or inform any other owner, officer, employee, or creditor. Luedtkes held the meeting and removed Knight from any position of authority. Knight did not attend.

In bankruptcy court, Luedtkes moved for sanctions against Knight and his attorney, alleging Knight filed the bankruptcy petition in bad faith. The bankruptcy court agreed with Luedtkes, and imposed sanctions against Knight and his attorney. The district court affirmed the sanctions. Knight appealed, claiming he filed to comply with federal law requiring reporting of felonies, and also contended that the Bankruptcy Court's order rested on two erroneous legal conclusions.

HOLDING: Affirmed.

REASONING: The court reviewed the grant of sanctions under an abuse of discretion standard. A federal court has inherent authority to impose sanctions against litigants or attorneys appearing before the court so long as the court finds they engaged in bad faith conduct. The appeals court reasoned that the bankruptcy court saw Knight's arguments for what they were, after-the-fact attempts to cloak bad faith conduct with legal arguments. Knight filed for bankruptcy with the subjective intent to harm Luedtkes, and actively concealed his efforts

from the company and creditors.

The appellate court found it telling that in Knight's brief, one purported justification was noticeably absent: that he filed the cases in the best interest of the company. After an extensive hearing, the bankruptcy court found the case was filed with a bad motive and with no meaningful thought being given to the actual purposes of Chapter 11 bankruptcy. The appeals court decided that the bankruptcy court did not impose sanctions lightly. It acted only after a hearing and after making the specific findings required by law. Therefore, the bankruptcy court did not abuse its discretion in imposing sanctions against Knight.

POSTAL SERVICE MAY BE LIABLE FOR MAIL-ORDER LOSSES

MB Fin. Group, Inc. v. U.S. Postal Serv., ____ F.3d ____ (9th Cir. 2008).

FACTS: MB Financial Group, Inc. sold mail-order mortgage loans, and its business depended on receiving mailed-in responses to its solicitations. It rented a post office box ("box") in a U.S. States Post Office ("USPS") branch office and paid for six months of usage. After MB realized it was not receiving mail, it contacted the USPS branch office. In a letter, USPS apologized and acknowledged that it may have been at fault for the premature closing of the box due to improper handling of fees. MB filed suit against USPS, alleged two claims of relief: a negligence claim and a claim for breach of contract. The negligence claim, alleged USPS negligently denied MB use of the box for which MB had paid rental fees. The breach of contract claim, alleged USPS failed to credit MB's payment, and wrongfully failed to make the box available for MB's use. MB alleged profits lost as a result of MB's not receiving responses to its direct-mail solicitations of prospective customers.

The district court granted the USPS's motion to dismiss, holding that the Federal Torts Claim Act ("FTCA") barred relief on the tort claim and the breach of contract claim, on the ground that they were essentially claims for negligent mail transmissions. As an alternative ground, the district court held that the Postal Reorganization Act ("PRA") did not provide subject matter jurisdiction over the contract claim. The court held that PRA's sue and be sued clause did not provide any substantive basis for a claim against the Postal Service. Because the district court dismissed the action on the pleadings, the parties never engaged in any discovery. MB appealed.

HOLDING: Reversed.

REASONING: FTCA applies to tort claims arising out of post service activities and a sovereign immunity waiver applies to any claim arising out of the loss, miscarriage, or negligent transmission of letters or postal matter. The issue was whether wrongful failure to provide a box at USPS arises out of the negligent transmission of the mail. The court noted that the phrase negligent transmission could not be interpreted broadly enough to cover all negligent acts occurring in the course of mail delivery, and the government should be liable for its employees' negligence in the same manner as private entities in similar circumstances.

The court stated USPS's alleged negligence was not in transmitting the mail to the proper place of delivery, but rather, the admittedly improper handling of MB's payment for its box,

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due to the failure to process the renewal. FTCA policy supports the principle that USPS should be liable on the same basis that a private provider of mail box services would be liable under state law for failing to exercise reasonable care to see the box remained open to receive responses to MB's solicitations. USPS conceded that MB could not have purchased insurance to protect itself from the negligent record keeping, which resulted in MB not receiving responses to its direct mail solicitations. The court held that neither the tort nor the contract claim was barred. The court noted that because the case was dismissed at the pleading stage, the court did not know the precise contours of the agreement. The court held that a substantive law foundation existed for both of MB's claims, and reversed the lower court's decision to dismiss the claim.

UNDER TELEPHONE CONSUMER PROTECTION ACT CONSUMER CAN RECOVER \$500 PER FAX

Meyer v. Howard S. Bixenholtz Constr., 402 N.J. Super. 1, 952 A.2d 507 (App. Div. 2008).

FACTS: Gary Meyer received unsolicited fax advertisements from six different companies, which were owned by Howard Bixenholtz, a stucco contractor. Bixenholtz acknowledged using fax advertisements to solicit business from general contractors. He stated he took the people off the list who do not want to receive faxes, and didn't know the conduct was illegal. He operated under different names and entities. The faxes in the names of the various entities were dispatched from the same number with the same header. Meyer testified, he telephoned Bixenholtz and requested to stop sending the faxes. According to Meyer, Bixenholtz continued to send the faxes, even after he was served with the complaint. Meyer alleged that each fax transmission he received from Bixenholtz violated the Telephone Consumer Protection Act ("TCPA").

Meyer sued Bixenholtz for TCPA violations. The lower court judge found that because Meyer could not prove actual monetary loss, \$500 would be the total award for the violation. Meyer asserted he was entitled to \$500 per fax because each fax was a separate violation. The lower court entered judgment only against Construction Services and Supply, Inc. for \$500. After reviewing the statute, the lower court concluded that because Meyer could not prove actual monetary loss, \$500 would be the total award for Bixenholtz's violation. The judge did not find each fax as a separate violation. Instead, the judge found the sending of the faxes, generally, as a single violation. On appeal from the lower court's judgment, Meyer argued he was entitled to \$500 per fax because each fax was a separate violation according to the TCPA.

HOLDING: Reversed and remanded.

REASONING: The court held that Meyer was entitled to damages for each unsolicited fax sent which violated TCPA. TCPA prohibits unsolicited fax advertisements, and provides for damages in the amount of actual monetary loss, or \$500 per violation, whichever is greater, and permits up to treble damages for knowing and willful violations. TCPA expressly states that a plaintiff may bring a private suit against a violator in state courts if permitted by the state's laws. The court determined that Meyer did not have a private right of action for Bixenholtz's technical or proce-

dural standard violations, which included sending of anonymous fax messages through the imposition of a heading requirement on all fax messages. So even though Bixenholtz violated the fax heading requirements prescribed in TCPA, Meyer did not have a private right of action. The court concluded that Meyer possibly had a private right of action if Bixenholtz violated either the restrictions on use of automated telephone equipment provision, or the protection of subscriber privacy rights provision. The court agreed with Meyer that his state court private cause of action may go forward, vacated the lower court's judgment, and remanded for a new trial. The court instructed on remand that the judge shall determine the number of unsolicited faxes, if any, that were sent in violation of TCPA, and the amount of damages to be assessed against Stucco Services, Inc., including whether treble damages are warranted. The lower court shall also consider the personal liability of defendant Bixenholtz.

DISCHARGED ATTORNEY ENTITLED TO CONTINGENCY FEE

Reynolds v. Nagely, 262 S.W.3d 521 (Tex. App.—Dallas 2008).

FACTS: Karen Reynolds retained Neal Nagely, an attorney, to represent her for personal injuries she sustained in a hit-and-run accident. The terms of the representation were contained in a contingent fee contract, which authorized Nagely to retain one-third of any recovery. Over the next eight months, Nagely worked with Reynolds's automobile insurer USAA Casualty Insurance Company to secure personal injury benefits for Reynolds. However, before any uninsured motorist ("UIM") benefits could be secured, Reynolds terminated Nagely for not taking care of her properly and not doing his job. Twenty months later, USAA offered to settle Reynolds's claim. USAA, having been informed by Nagely that he retained a lien on the claim, informed Reynolds that the settlement check would be payable to both her and Nagely. Reynolds did not accept the UIM proceeds, because she refused to pay Nagely his one-third contingent fee. USAA filed an interpleader action and deposited the UIM proceeds into the court's registry.

Nagely answered the suit and counterclaimed against Reynolds for declaratory relief, breach of contract and attorney's fees. Nagely's breach of contract claim was tried and a jury found that Reynolds had failed to comply with the contract and her breach was not excused. The trial court signed a final judgment on the jury's verdict and ordered that Nagely's damages and fees be satisfied from the interpleaded funds, with any remaining funds to be distributed to Reynolds. On appeal, Reynolds challenged the sufficiency of the evidence to support the jury's award of contingency fees to Nagely.

HOLDING: Affirmed as modified.

REASONING: The question in a legal sufficiency challenge is whether the evidence before the court would allow a reasonable and fair-minded person to reach the verdict under review. All evidence is viewed in light most favorable to the verdict, and anything more than a scintilla is legally sufficient. The court analyzed whether Nagely performed his contract obligations with respect to the UIM proceeds. Because the UIM funds were placed in the court's registry, there had been a recovery even if Reynolds did not accept the check from USAA. The court concluded that

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there was sufficient evidence that Reynolds failed to perform her contract obligations because she failed to accept the check when it was made out to her and Nagely. Finding the evidence sufficiently established Reynolds failed to perform her obligations, the court next addressed whether Reynolds was excused from performing. There was testimony that this was a complex claim and the twenty-month gap could have been caused by Reynolds not providing information timely. Nagely testified he was confident that the claim would have been resolved favorably had he not been terminated. The court found that any failure of Nagely to further perform was excused by Reynolds's discharging Nagely without cause. Reynolds did not dispute that she discharged Nagely without cause. The court held Nagely was entitled to recover the contingency fee in the amount to which he would have been entitled had Reynolds not discharged him because Nagely was hired on a contingency-fee basis, and was discharged without cause.

DEFENDANT CAN'T BE CONVICTED OF IDENTITY THEFT FOR MERELY USING STOLEN IDENTITY

U.S. v. Miranda-Lopez, 532 F.3d 1034 (9th Cir. 2008).

FACTS: Roberto Miranda-Lopez, a citizen of El Salvador, was indicted for trying to enter the U.S. using a lawful permanent resident card in another person's name. Miranda-Lopez was charged in violation of aggravated identity theft. A customs officer testified that Miranda-Lopez and two other men arrived at a border inspection booth, and attempted to enter the U.S. The officer noticed the men did not resemble the photos on the identification cards. At the close of the government's evidence, Miranda-Lopez made a motion for judgment of acquittal, arguing the government failed to meet its burden. Miranda-Lopez testified that the night before, as he was leaving a bar in Mexico, he accepted a man's offer to drive him home. After Miranda-Lopez entered the car, he fell asleep and did not wake up until the officer grabbed his hand to examine his fingerprint. He testified he never saw the identification cards the driver gave to the officer.

After the district court denied Miranda-Lopez's third motion to dismiss, the court stated the issue was waived, and that on the merits, proof that Miranda-Lopez actually knew the identification belonged to another person was not required to sustain a conviction. The district judge expressed doubt about whether the government proved that Miranda-Lopez knew the identification

belonged to someone else, but did not entertain argument on the subject and deemed such proof immaterial. Miranda-Lopez appealed.

HOLDING: Reversed and remanded.

REASONING: The aggravated identity theft statute states that whoever, during and in relation to any felony violation enumerated, knowingly transfers, possesses, or uses without lawful authority, a means of identification of another person shall, in addition to the punishment provided for such felony, be sentenced to a term of imprisonment of two years. The issue was whether the term knowing modified "of another person", or merely "transfers, possesses or uses."

The court held the statute was ambiguous, and recognized the legislative history did not definitely resolve the question of what knowingly was meant to modify. The rule of lenity required the court to resolve any ambiguity in a criminal statute in defendant's favor. Although the rule of lenity does not apply when it would require an interpretation that conflicts with the implied

or express intent of Congress, the court determined that Miranda-Lopez's interpretation did not pose such a conflict. Construing the statute in defendant's favor, the court held that the government was required to prove that Miranda-Lopez knew that the identification belonged to another person. The court noted that imposing the proof requirement on the government was not an insurmountable burden, especially in a case where the identification document contained someone else's photo and did not appear to be fake. The district judge operated on the premise that the statute did not require proof of defendant's knowledge that the identification belonged to someone else. The court found the district court's premise was incorrect. The court suggested the district court go back and reconsider Miranda-Lopez's final motion, giving both sides the opportunity to argue whether the evidence sufficiently proved that Miranda-Lopez knew that the identification belonged to another person.

Although the rule of lenity does not apply when it would require an interpretation that conflicts with the implied or express intent of Congress, the court determined that Miranda-Lopez's interpretation did not pose such a conflict.