

# RECENT DEVELOPMENTS

## MISCELLANEOUS

### NOMINAL DAMAGES ARE NOT AVAILABLE WHEN THE HARM IS ENTIRELY ECONOMIC AND SUBJECT TO PROOF

### LOST PROFITS MUST BE SHOWN WITH REASONABLE CERTAINTY

Chehab v. First Serv. Credit Union, \_\_\_ S.W.3d \_\_\_, (Tex. App. 2020).  
<https://law.justia.com/cases/texas/fourteenth-court-of-appeals/2020/14-18-00969-cv.html>

**FACTS:** Plaintiff-Appellant Nasser Chehab opened a checking account with Defendant-Appellee First Service Credit Union (“First Service”). The checking account was governed by a Deposit Account Contract. On a Friday, Chehab visited the Northwest Branch of First Service and asked to withdraw \$80,000 in cash. The branch manager refused Chehab’s request because such a large cash request could only be processed with prior notice but offered alternative methods of withdrawing. Chehab agreed to accept \$20,000 in cash that day and visited the Downtown Branch on the following Monday, requesting \$60,000 in cash. Again, the branch manager refused the request and offered the same alternative choices. Chehab ended up receiving \$8,000 in cash on Tuesday and \$54,000 in cash on Wednesday from the Downtown Branch.

Chehab filed suit alleging breach of contract because the Deposit Account Contract required First Service to make Chehab’s funds available immediately, and he suffered damages from lost profits and nominal damages. First Service moved for summary judgment, and the motion was granted with respect to the claims for lost profits. Chehab appealed.

**HOLDING:** Affirmed.

**REASONING:** Chehab argued that Texas law recognized nominal damages for breach of contract, and therefore he would not be required to produce evidence of damages. The court rejected this argument by noting that Chehab had not pleaded for nominal damages for non-economic harm. Nominal damages were for cases in which there were no damages or none that could ever be proved. The rule in Texas is that nominal damages are not available when the harm is entirely economic and subject to proof, as opposed to non-economic harm to civil or property rights. Since Chehab only pleaded for monetary damages, he was not entitled to recover nominal damages.

Chehab then asserted that he produced enough evidence to create a fact issue on lost profits damages. The court rejected this argument as well, holding that Chehab had not shown competent evidence with reasonable certainty. The court stated that opinions or estimates of lost profits must be based on objective facts, figures, or data from which the amount of lost profits may be ascertained. The only evidence Chehab presented in response to First Service’s no-evidence motion were the affidavits of two used car business owners, and the affidavits only recounted the personal experiences. Because the affidavits were not evidence of opinions or estimates based on objective facts, figures, or data from which the amount of lost profits may be ascertained, they

could not support a genuine issue of fact as to whether Chehab suffered any lost profits damages.

### ELEVENTH CIRCUIT VACATES FACTA CLASS ACTION SETTLEMENT

Muransky v. Godiva Chocolatier, Inc., 979 F.3d 917 (11th Cir. 2020).  
<https://media.ca11.uscourts.gov/opinions/pub/files/201616486.enb.pdf>

**FACTS:** Plaintiff Dr. David Muransky used his credit card to purchase products at a Godiva retail store. He was handed a receipt containing the first six and last four digits of his 16-digit credit card number.

Muransky filed a class action complaint against Godiva, alleging that the receipts constituted violations of the Fair and Accurate Credit Transactions Act (“FACTA”). During the settlement period, the Supreme Court decided *Spokeo, Inc. v. Robins*. *Spokeo* held that there is no standing if there was no concrete injury suffered. Both parties pushed through the class fairness hearing and proceeded to fairness review.

**HOLDING:** Vacated and remanded.

**REASONING:** Plaintiff contended that he and the members of the class all suffered irreparable harm and an elevated risk of identity theft as a result of Godiva’s receipts.

The court rejected the Plaintiff’s arguments, holding that he was alleging a mere statutory violation, not a concrete injury, and thus had no standing. The court acknowledged that one of the primary objectives of FACTA is to prevent identity theft. In support of that goal, FACTA forbids merchants from printing more than the last five digits of the card number on receipts offered to customers. Thus, the receipt given by Godiva was in violation of FACTA.

However, under *Spokeo*, for a party to have standing to bring a lawsuit, it must have “(1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision.” *Spokeo*, 136 S. Ct. at 1547. In other words, the plaintiff needs to show that the defendant harmed him. However, even without any direct harm, a plaintiff can establish an injury in fact by showing that a statutory violation created a “real risk of harm.”

Plaintiffs can show concrete harm if they can prove the statutory violation itself caused a harm. A mere statutory violation by itself is not enough to have standing. Examples of tangible injuries are physical injury or financial loss. Muransky and the other plaintiffs did not suffer any injuries. None of them had their identity stolen or had money taken from them due to the receipts. The risk of harm was not increased by the receipts either. While there were more credit card numbers than what is allowed by FACTA, it still was not enough to substantially increase the risk of harm.

# RECENT DEVELOPMENTS

## N.J. DISTRICT COURT PERMITS INCENTIVE AWARDS FOR NAMED PLAINTIFF

Somogyi v. Freedom Mortg. Corp., \_\_\_ F. Supp. 3d \_\_\_ (D.N.J. 2020).

<https://law.justia.com/cases/federal/district-courts/new-jersey/njdce/1:2017cv06546/353695/115/>

**FACTS:** Plaintiffs Joshua and Kelly Somogyi and Stewart Sieleman separately sued Freedom Mortgage Corp. (“FMC”) for violation of the Telephone Consumer Protection Act (“TCPA”). Both cases were consolidated into a class action suit. Plaintiffs alleged that FMC made unsolicited phone calls using an automated telephone dialing system (“ATDS”) without their prior written consent, placed calls even after its customers requested the calls to stop, and instructed its managers to delete “do-not-call” requests from the system so the customers could be called again. FMC denied all liabilities or fault.

After motions, discovery, and three mediation sessions, the parties entered into a settlement agreement in 2019. The settlement terms include an incentive award to the named plaintiffs of \$5,000 each, a total of \$15,000. Plaintiffs motioned to approve of the Class Action Settlement.

**HOLDING:** Motion granted.

**REASONING:** In *Johnson v. NPAS Sols., LLC*, <https://law.justia.com/cases/federal/appellate-courts/ca11/18-12344/18-12344-2020-09-17.html>, the Eleventh Circuit invalidated the use of incentive awards for named plaintiffs in a TCPA class action as

**[U]ntil and unless the Supreme Court or Third Circuit bars incentive awards or payments to class plaintiffs, they will be approved by this Court if appropriate under the circumstances.**

inconsistent with the Federal Rules. In *Johnson*, the court held, “[a] plaintiff suing on behalf of a class can be reimbursed for attorneys’ fees and expenses incurred in carrying on the litigation, but he cannot be paid a salary or be reimbursed for his personal expenses.” Although the court noted that incentive awards are commonplace in class actions, the Eleventh Circuit found them to be unlawful and

reversed the district court’s approval of a \$6,000 payment to the class representative. District courts in the Eleventh Circuit had already rejected class settlements that include incentive payments.

In this case, the New Jersey district court rejected the holding in *Johnson*, paving the way for a circuit split. Following the Third Circuit and the district court’s precedent, the district court noted that “[u]ntil and unless the Supreme Court or Third Circuit bars incentive awards or payments to class plaintiffs, they will be approved by this Court if appropriate under the circumstances. Here the incentive payments to the class plaintiffs is appropriate given their substantial contribution to the successful settlement of the case.” Thus, the court granted the motion to approve of the Class Action Settlement.