

Failing to Invest in Cybersecurity Could Lead to FTC Action

Poor cybersecurity is not only bad for business, but it may also be a violation of the Federal Trade Commission Act, according to a federal Court of Appeals. The opinion, filed in August 2015, held that the Federal Trade Commission (FTC) has the authority to regulate cybersecurity, and it enabled the FTC to pursue Wyndham Hotels for failing to maintain minimal cybersecurity practices. **This opinion should serve as a warning to businesses of all sizes, which now may be subject to FTC claims, if the FTC finds that a business' cybersecurity is not minimally adequate to protect customers and their data.**

The FTC cited several deficiencies in the

cybersecurity practices of Wyndham Hotels. The company allegedly allowed its hotels to store payment card information in clear, readable text and use overtly easy passwords to access computer management systems. It did not use firewalls, had inadequate security procedures to access the computer network, and let vendors access its servers. Also, the business could not detect or prevent unauthorized access to its computer network, nor did it follow proper incident response procedures after hacks occurred.



The lack of cybersecurity resulted in three separate hacking attacks over two years that were not discovered for months and ultimately compromised credit card information of 619,000 Wyndham customers, with fraud loss of at least \$10.6 million.

The FTC also alleged that Wyndham violated the FTC Act by falsely claiming on its website that it had adequate cybersecurity practices in place. The court held that a total lack of security measures to guard personal

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EPA's Proposed New Rule Under Clean Water Act Halted in Arizona and 12 Other States

The federal Clean Water Act deals with the nation's surface waters. The act allows for regulation of the discharge of any pollutants—including dirt and sand—into “navigable waters,” defined as “the waters of the United States.” The interpretation of those words is key to the breadth of the act.

The Environmental Protection Agency (EPA) recently proposed a change in the definition of “waters of the United States” to include small and intermittent streams, ponds and wetlands that may be tributaries to larger, navigable bodies of water—the so-called “Clean Water Rule.”

Some farmers, landowners and development business interests contend that the rule goes beyond the scope of



the act and earlier court decisions, requiring them to comply with the act's costly and time-consuming regulations and restrictions on nearly every stream and ditch.

In Arizona, the rule could apply to dry washes and ephemeral streams that rarely flow, including a small feature such as a man-made drainage ditch, increasing the costs associated with obtaining permits for development in areas seemingly remote from navigable waters.

The EPA states that the rule merely clarifies which smaller waterways fall under federal protection in light of the court rulings and better protects the nation's surface waters from the hazards from run-off and pollutants.

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Knock, knock. Who's there? Department of Labor: Managing a DOL Wage and Hour Audit

A Department of Labor (DOL) wage and hour audit can occur at any time. Typically, the audit will cover the prior two to three years. These procedures may focus on compliance with minimum wage, overtime, exempt status, employee or independent contractor status, child labor, wage deductions and record-keeping. Notice of at least 72 hours is required. Investigators may inspect the company's premises and records, interview employees, determine whether the law has been violated and whether or not the company owes money to employees.

Employers in industries such as agriculture, day care, health care, hospitality, restaurants, and temporary staffing agencies have been especially prone to audits. The following checklist details recommended employer considerations and actions in the event of an audit.

Upon receipt of a Notice of Audit:

- Do not provide immediate access or answers to questions.
- Consider communicating through your attorney.
- Gather requested employee and wage records for review.
- Identify areas of concern.
- Ensure that all required labor law posters are visible and up-to-date.

Before the Opening Conference with the Investigator:

- Review job descriptions and duties to ensure proper classification of exempt employees.
- Identify any instances where a full week's salary is not paid to salaried employees.
- Review whether overtime has been documented and paid.
- Identify circumstances under which non-exempt employees are (i) required to be on the premises while off the clock, or (ii) restricted in their activities while off the premises.
- Meet with potential witnesses to review matters covered by the audit.

The DOL's Opening Conference:

- Clarify the scope of the investigation.
- Establish a location to review records and how employee interviews will occur. Remember that the investigator may not interfere with normal business operations.
- Provide only those records of groups of employees specifically under investigation.
- Arrange for daily close-out meetings with the Investigator to learn about any concerns.

Document Production:

- Assign tracking numbers to each document, label all documents with the words "Confidential and Proprietary," and note them on a production log.
- Keep duplicates of every record given to the DOL. Do not produce originals.

On-Site Inspection Activities:

- Escort the Investigator at ALL times while on-site (unless the Investigator is interviewing a non-management employee). The escort should be a manager.
- Take detailed notes on everything that the Investigator says, does or asks.

Employer's Role in the Employee Interview Process:

- The company cannot retaliate against employees for agreeing to speak or for what is said to the DOL during an interview.
- Schedule interviews of employees. The company can object to an impromptu interview if it would interfere with business operations.
- Prepare all employees for their interviews.

Closing Conference (if back wages are due):

- Listen carefully and take detailed notes.
- Avoid agreeing with any observations of violations or making damaging admissions.
- List corrective measures that have been taken.
- Ask the Investigator about characterizations and penalty amounts.
- Request time to provide supplemental information to correct any factual errors that form the basis of a proposed finding of violation.

Post-Audit Considerations (if back wages are due):

- Pay the amount without question and accept the DOL's findings.
- Resolve disputed findings and negotiate reduced amounts at an informal settlement conference with the Investigator or his or her supervisors.

Robert D. Haws | 602.257.7976
rhaws@gustlaw.com

Rob concentrates his practice on employment law and education law.

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Arizona and 12 other states sued in North Dakota federal district court to block this alleged expansion of federal water protection under the rule. The court recently granted a preliminary injunction blocking the implementation of the rule, at least in those particular states. The non-final ruling does not definitively decide that case, nor does it prevent the rule from going into effect in the remaining states as of August 28, 2015. Other states and business groups across the country have also pushed back against the rule, but courts in some actions denied relief based on a lack of jurisdiction.

This issue will continue to percolate in the courts and perhaps in Congress, so stay tuned.

Barbara U. Rodriguez-Pashkowski | 602.257.7494
bpashkowski@gustlaw.com
Barbara practices in the area of environmental law, air quality and water quality.

Christopher M. McNichol | 602.257.7496
mcnichol@gustlaw.com
Chris practices in the area of real estate transactions and litigation.

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consumer information is in itself a violation of the FTC Act, no matter what the business claims or doesn't claim.

Neither the court nor the FTC has said what level of cybersecurity is required to avoid violation of the FTC Act. The courts will apply a cost-benefit analysis, including the likelihood of unavoidable harm and the costs to consumers of investment in stronger cybersecurity. In 2007, the FTC issued a guidebook, *Protecting Personal Information: A Guide for Business*, which sets forth some practices that it believes form a sound security plan, although none is required. The Wyndham case shows that some cybersecurity is required, and businesses must stay vigilant to protect customers.

Every business that collects data from its customers and then stores that data on a server or in the cloud should regularly review its computer security practices. Security measures should align with potential damage from stolen data, and businesses must notify customers of any theft or fraud.

John L. Hay | 602.257.7468 | jhay@gustlaw.com
John focuses his practice on representing small- and medium-sized businesses, including insurance companies, banks, franchisors and franchisees.

Christina M. Noyes | 602.257.7488 | cmnoyes@gustlaw.com
Christina focuses her practice on franchise, corporate, and intellectual property law.

U.S. Supreme Court Rules Against Lien Stripping

On June 1, 2015, the U.S. Supreme Court in *Bank of America v. Caulkett* ruled that a Chapter 7 debtor may not avoid an under-secured junior lien under section 506(d) of the Bankruptcy Code. The Court was asked to construe section 506(a) language that "an allowed claim of a creditor secured by a lien on property . . . is a secured claim to the extent of the value of such creditor's interest in . . . such property" and "is an unsecured claim to the extent that the value of such creditor's interest . . . is less than the amount of such allowed claim." Section 506(d) of the code provides that "to the extent that a lien secures a claim against the Debtor that is not an allowed secured claim, such lien is void."

In *Caulkett*, Bank of America held a junior lien against a residence owned by the debtor. The fair market value of the home was less than the debt owed to the senior



lienholder. As a result, there was no equity left for Bank of America's junior lien. The Court ultimately held that Bank of America had valid claims that were properly secured against the debtor's residence. Therefore, section 506(d) prohibits the avoidance, stripping or removal of Bank of America's lien, irrespective of the underlying value of the collateral (the residence).

This ruling is limited to cases filed under Chapter 7, and the result may not be the same under Chapter 13.

John A. Nasr | 602.257.7986 | jnasr@gustlaw.com

John practices in the areas of bankruptcy, restructuring, creditors' rights, and related litigation and appeals.

NEW FACES



LAURA R. CURRY

Laura R. Curry joined the Gust Rosenfeld team in August 2015. Laura is known primarily for her top-notch eminent domain work. She represents condemning authorities, acquiring or condemning property for the expansion of roads, parkways, and utilities. Laura represents

clients in all aspects of litigation, including motion practice, discovery, trial and appeals.

After graduating from the Sandra Day O'Connor College of Law at Arizona State University, Laura clerked for Judge Diane Johnson at Division One of the Arizona Court of Appeals. There, she researched diverse civil and criminal appellate issues and drafted decisions.



JOHN J. KASTNER, JR.

John J. Kastner, Jr. joined Gust Rosenfeld in August 2015. John's practice focuses on insurance coverage, premises liability, defense of governmental entities, civil rights defense, bodily injury, wrongful death, defamation, and discrimination.

John represents insurance carriers in first-party claims. He also represents self-insured businesses and individuals. John's experience working with insureds and insurers provides him with a unique perspective, which is further diversified by his tenure as Judge Pro Tem for the Pima County Superior Court.

John is AV® Preeminent™ Peer Review Rated by Martindale-Hubbell®, representing the highest rating in legal ability and ethical standards.



CHRIS KRAMER

Chris Kramer joined the firm in July 2015. Eminent domain and condemnation litigation form the bedrock of Chris's litigation practice. As project and condemnation counsel, he represents public and private clients in eminent domain litigation, right-of-way, real property

acquisition, valuation and public infrastructure.

Chris has spoken at dozens of programs on eminent domain and related topics. He has presented at the National Eminent Domain Conference, the Arizona Eminent Domain Conference (co-chair, 2007-2009), the International Right of Way Association, the Transportation Research Board of the National Academies, and the American Council of

Engineering Companies. He has served as co-chair of the bi-annual Arizona Condemnation Summit since 2009.



HEATHER A. NEAL

Heather A. Neal joined Gust Rosenfeld in April 2015. Heather concentrates her practice in medical malpractice litigation, administrative law, and catastrophic injury defense. She possesses extensive experience defending physicians in various specialties as well as hospitals, long-term care facilities, assisted living facilities, group homes and home health care groups.

After graduating from law school, Heather practiced general litigation, personal injury, employment law, collections and premises liability in South Carolina. After several years representing plaintiffs in a variety of litigation, she moved to Phoenix, where her primary focus of practice shifted to health care and catastrophic injury defense.

Heather has been recognized as a Southwest Super Lawyer® for three consecutive years and has also been awarded the title of "Rising Star."

ET·Y·MOL·O·GY COR·NER



ROAMING CYBERSPACE

"Cyber" is a prefix taken from "cybernetics" from the Greek "kybernetes," meaning to guide or govern. "Cybernetics" has come to mean the analysis and management of the flow of data. As a prefix, "cyber" seems to have no limit, including "cyberattack", "cybersecurity", "cybercafé" and "cyberpunk" —apparently a genre of science fiction—all of which has led to my present chronic and possibly untreatable condition known as "cyberphobia."

Richard B. Hood | 602.257.7470 | rbhood@gustlaw.com
Rick, our etymologist, practices in the areas of commercial law and litigation.

PERSONAL NOTES



Christina M. Noyes spoke before a national franchisee group in Las Vegas, Nevada. She presented on significant franchise policy changes within the industry.

Chas W. Wirken was selected for inclusion in AZ Business magazine's Top 100 Lawyers in Arizona for litigation in the areas of practice law, appellate law, commercial law, franchise law and real estate litigation. Chas was also inducted into the Maricopa County Bar Association's Hall of Fame in October.

Christopher M. McNichol volunteers as a Big Brother with the Big Brothers Big Sisters of Central Arizona.

For the State Bar of Arizona, Chris has updated the chapter in the Arizona Civil Remedies Manual on real property lien enforcement.

Richard H. Whitney has been elected to the board of the Phoenix Chamber Music Society, a 50-year-old society bringing the world's finest chamber groups to Arizona. He and Mrs. Whitney established a scholarship program at the society providing for eight middle and high school students, their teachers and their parents to attend eight performances each year.

Timothy A. Stratton was appointed by the National Association of Bond Lawyers as an editor of the Federal Securities Laws of Municipal Bonds, published by Lexis-Nexis. Tim has previously served as a contributing author for the fifth and sixth editions of the publication. The deskbook is used by bond professionals nationally.

James W. Kaucher, Kelli K. Williams, and Danielle J.K. Constant presented a seminar on vulnerable abuse and financial exploitation for the Pima County and Graham County Public Fiduciaries in April.

Scott A. Malm recently argued a real estate case before the Arizona Supreme Court. He also spoke at a National Business Institute seminar on Boundary Issues and Easement Law.

James W. Kaucher finished his annual update to the employment law chapters of the Arizona Business Law Deskbook. For the last three years, Jim has authored the chapters analyzing the following topics: 1. Employers, Employees and Independent Contractors; 2. Employment-at-will and Employment Contracts; 3. Discrimination and Sexual Harassment; and 4. Miscellaneous Employment Law Issues.

Jim was also part of a seminar panel on "Vulnerable Adult Abuse Litigation," which was presented by the Pima County Bar Association in March. He also gave a presentation to the Tucson Defense Bar in September titled "Escaping Neverland: Defending Pressure Ulcer Cases."

Barbara U. Rodriguez-Pashkowski presented at the Arizona State Bar Convention in June on "Environmental Law Fundamentals, Water Quality, UST/LUST Regulations." In August, Barbara spoke at the Government Attorneys CLE Series on "Protecting Development from What Lies Beneath – WQARF and Superfund Sites."

Barbara also spoke at the Arizona Hydrological Society Symposium in September on "The History and Demise of the State Assurance Fund."

Thomas M. Murphy and wife **Chris Murphy** hosted the U.S. Air Force Chief of Staff, General Mark A. Welsh III, at their home during his visit to Tucson last March. Gen. Welsh is the highest ranking officer in the USAF. He was visiting Davis-Monthan Air Force Base and Tucson.

Tom is a member and past president of the DM50, a community support group for Davis-Monthan Air Force Base. The DM50 arranged a dinner with the Mayor of Tucson, members of the City Council, the Pima County Board of Supervisors and other area leaders, to show local support for Davis-Monthan to Gen. Welsh.

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Best Lawyers in America® Names Gust Rosenfeld and Attorneys

The Best Lawyers in America® has selected the entire Gust Rosenfeld firm and fifteen attorneys for its 22nd edition.

Tom Chauncey II was recognized for his work in Corporate Law.

Mark Collins was selected for his work in the practice areas of Litigation (Real Estate) and Real Estate Law.

Peter Collins, Jr. received recognition for his work in Commercial Litigation, Insurance Law and Litigation (Plaintiffs).

Robert D. Haws received recognition for his work in Education Law, Employment Law (Management) and Litigation (Labor and Employment).

John L. Hay was recognized for his Franchise Law practice.

Gerald L. Jacobs has been selected for his Real Estate Law.

James W. Kaucher has been selected for his work in Professional Malpractice Law (Defendants).

Jennifer MacLennan received recognition for her Education Law practice.

Christina M. Noyes was recognized for the practice area of Franchise Law.

Séan P. O'Brien has been recognized for his work in Bankruptcy and Creditor Debtor Rights/Insolvency and Reorganization Law.

Gerard R. O'Meara was recognized for his Litigation (Banking and Finance) practice.

Fred H. Rosenfeld earned recognition for his work in Corporate Law, Municipal Law and Public Finance Law.

Scott Ruby has received recognition for his Corporate Law and Public Finance Law practices.

Richard H. Whitney has been selected for his work in Trusts and Estates.

Chas W. Wirken was recognized for the practice areas of Appellate Practice and Franchise Law. Chas was also recognized as Best Lawyers' 2016 Franchise Law "Lawyer of the Year" for Phoenix.

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PHOENIX OFFICE

One E. Washington St., Ste. 1600
Phoenix, Arizona 85004-2553
Telephone: 602.257.7422
Facsimile: 602.254.4878

WICKENBURG OFFICE

579 West Wickenburg Way, Ste. 4
Wickenburg, Arizona 85390-4300
Telephone: 928.684.7833
Facsimile: 602.254.4878

TUCSON OFFICE

One S. Church Ave., Ste. 1900
Tucson, Arizona 85701-1627
Telephone: 520.628.7070
Facsimile: 520.624.3849

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