

Vinson & Elkins

JUNE 27, 2019

# THE TROUBLE WITH EMOJIS: EMERGING LEGAL ISSUES AND BUSINESS RESPONSES

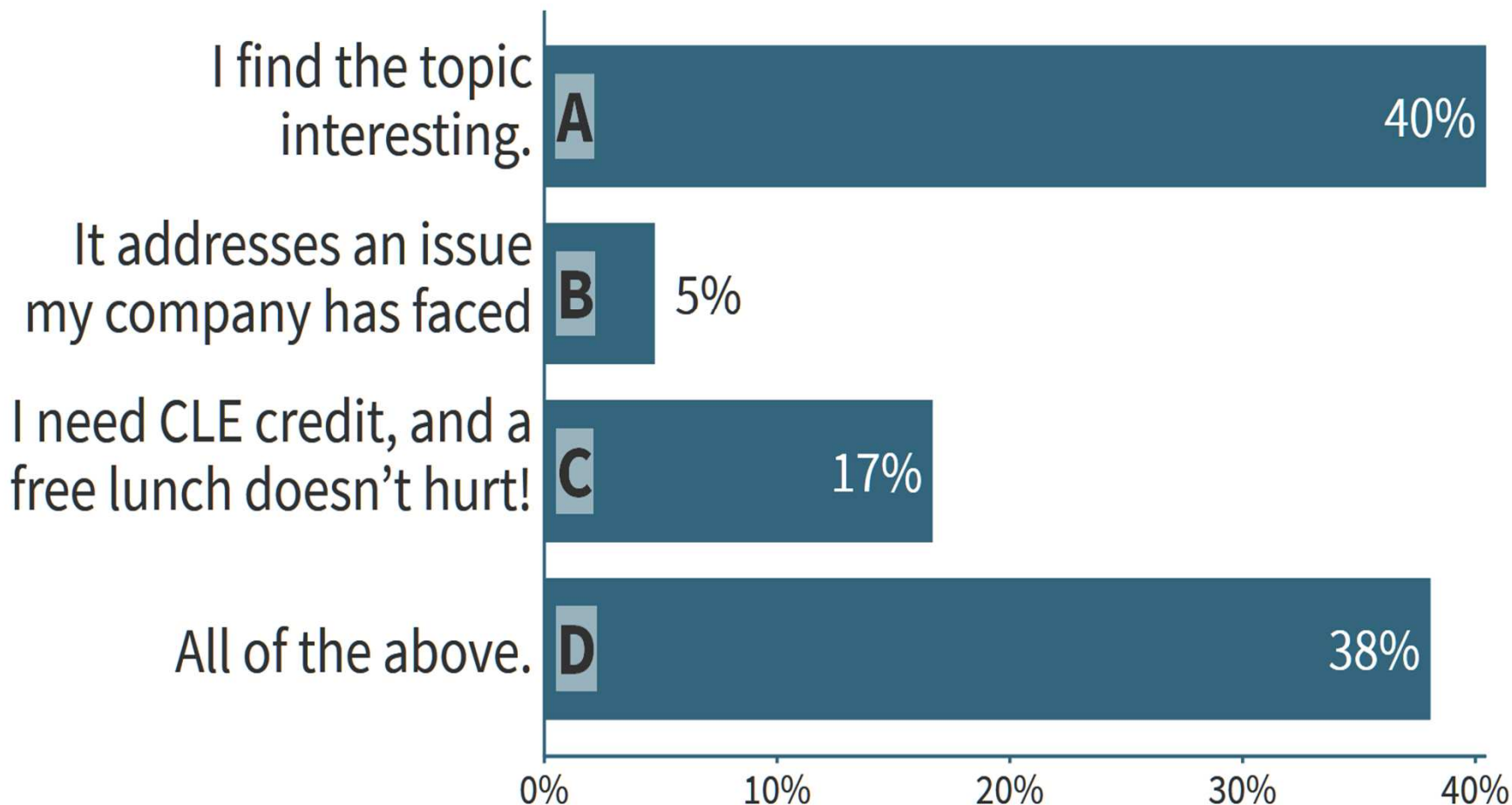
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# Why are you attending this presentation today?

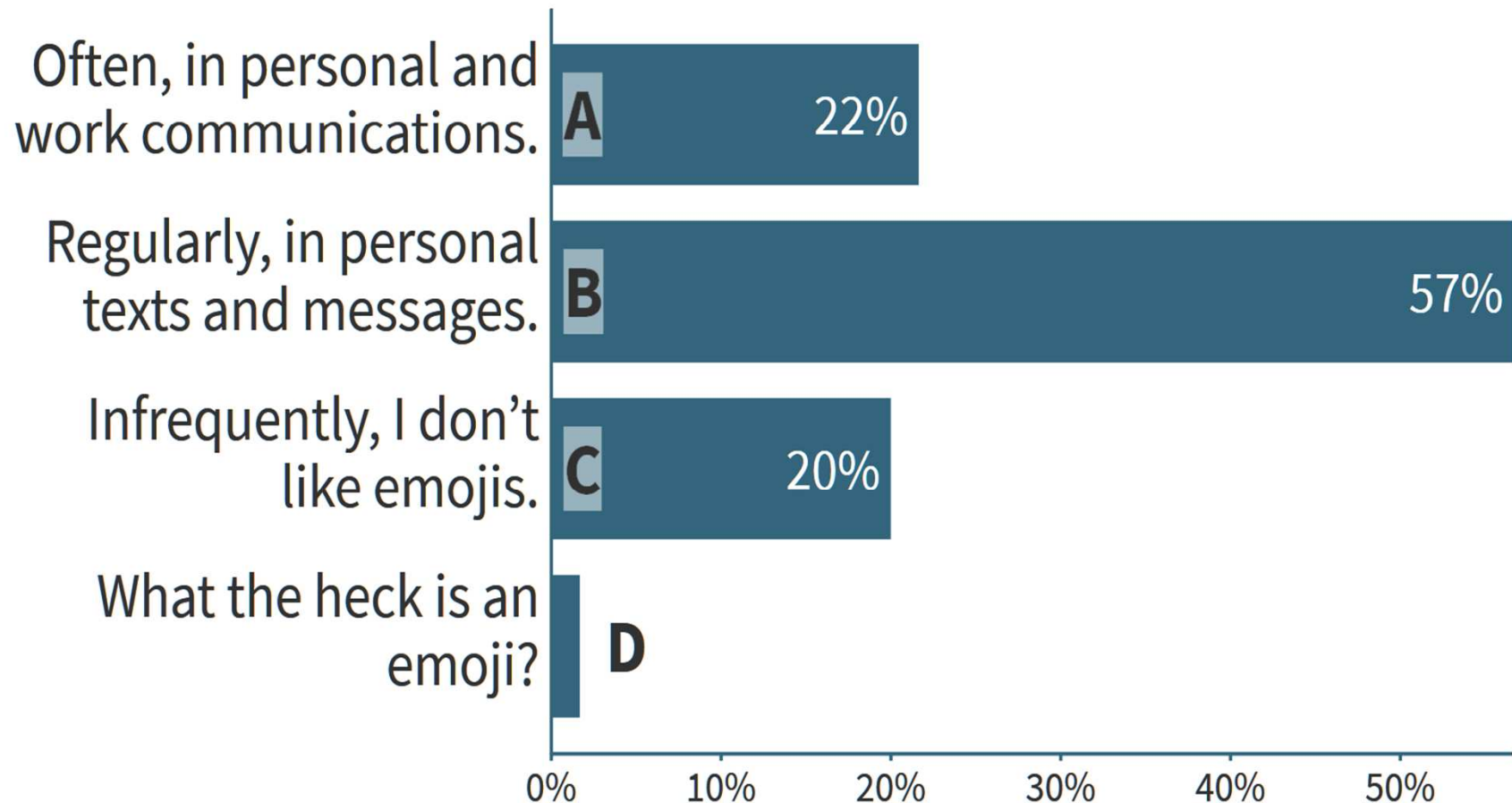
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# How often do you use emojis?

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# Background on Emojis

## EMOJI? WHAT'S AN EMOJI?

A “small digital image or icon used to express an idea, emotion, etc., in electronic communication”

*Oxford English Dictionary Online* (June 2018)

Definition adopted by most courts

*Murgia v. Commonwealth*, 2017 Va. App. LEXIS 141, at \*12 n.12 (Va. Ct. App. 2017); *Graham v. Prince*, 265 F. Supp. 3d 366, 372 n.3 (S.D.N.Y. 2013)

Origin is Japanese; means “picture character”

Emojis are effectively a new universal language, grafted onto existing alphabets

Unicode organization seeks to standardize emojis

Only standardizes codes, not depictions

## EMOJIS ARE NUMEROUS AND UBIQUITOUS

Over 2,800 Unicode-coded emojis as of June 2018  
Countless others are specific to messaging platforms

Facebook Messenger – 5 billion emojis used **daily**

Instagram

Snapchat

Twitter



Also emoticons like :- ) and :- ( and “bitmoji” avatars

92% of online participants use emojis

**2.3 trillion** mobile messages include them annually

2015 & 2016 *Emoji Reports*, EMOGI (Sept. 2015 & 2016)

## EMOJIS SERVE MANY PURPOSES

Emojis can provide “non-verbal cues” akin to those in face-to-face conversations

*Vyvyan Evans, The Emoji Code: The Linguistics Behind Smiley Faces and Scaredy Cats 102 (2017)*

Function	Face-to-Face Example	Emoji Example
Substitution	Head nod, thumbs-up	Smiley instead of “yes”
Reinforcement	Thumbs-up plus “yes”	Heart emoji plus “love”
Mixed Message	“Sure” said sarcastically	Eye roll emoji
Complement	Finger motion to show amount of liquid to pour	Smile after “tough day” for emotional qualification
Emphasis	Gesture or vocal pitch	Repeating emojis like hearts
Discourse Management	Nods to show attention	Conversation meta-comment, or punctuation

# The Trouble With Emojis



## TRIBBLES: AN APT ANALOGY



## WHAT DO EMOJIS MEAN?

“A picture is worth a thousand words”

Fred R. Barnard (1927)

No fixed meanings – subject to interpretation

<https://emojipedia.org>

“Unamused Face”

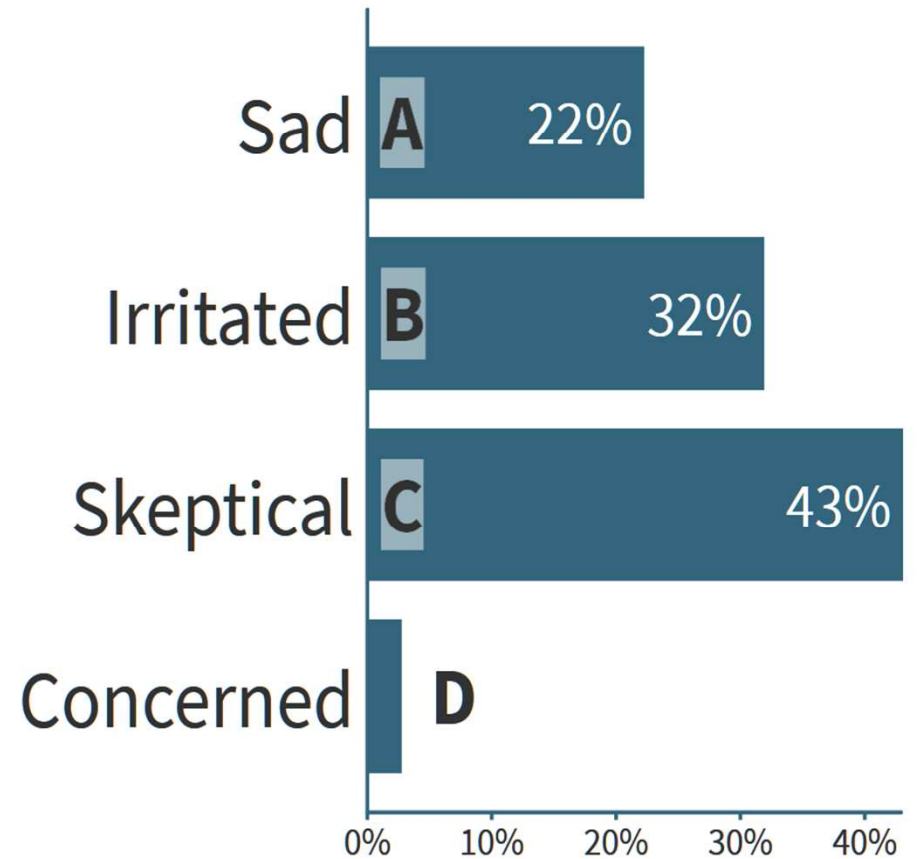
“Folded Hands”



Causes misunderstandings – the *trouble* with emojis

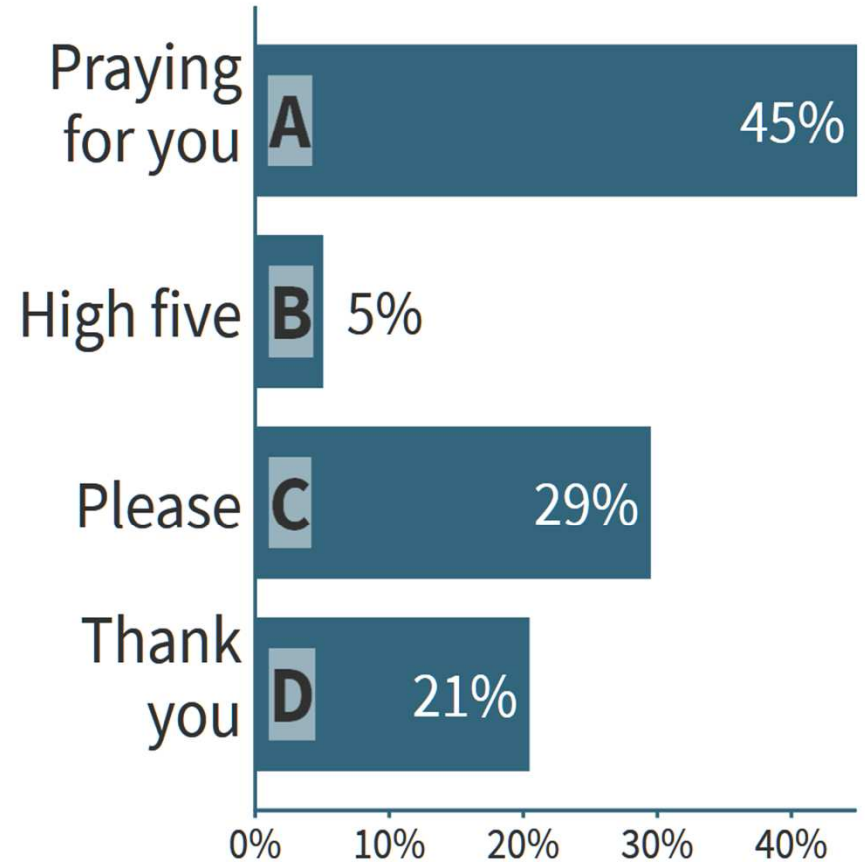
# "Unamused Face"

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# "Folded Hands"

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## TECHNOLOGICAL MISUNDERSTANDINGS

Platforms translate and depict emojis differently

iPhone ≠ Android ≠ Outlook ≠ Messenger

Same for different versions of operating systems

iOS 6.0 ≠ iOS 10.0

Compounded by sender-receiver disconnect

Lack of information about platform and fact that emojis may look different to recipient



## TRANSLATION EXAMPLES (HAT TIP: PROF. ERIC GOLDMAN)



## SEMANTIC MISUNDERSTANDINGS

Emojis often have *multiple* meanings

A preference in Unicode Technical Standard #51

Worsened by absence of standard emoji dictionary

<https://emojipedia.org>

<https://emojidictionary.emojifoundation.com>

Both are crowd-sourced; multiple meanings provided

Different readings by different user groups also

Industry-specific, generational, regional

No clear emoji grammar when used in series

Meanings can change over time

## SENDER-RECIPIENT DISCONNECT CASE STUDY

Survey of 710 Twitter users who sent tweets with emojis

710 tweets used 538 unique emojis

25%-47% (depending on how question was phrased) did not know emojis could look different to followers

After being shown other platform renderings, 40% said the meaning was at least somewhat different than their intent

20% would have edited or not sent the tweet if they knew

Translates to **millions** of potentially regretful tweets per day

Hannah M. Hillberg *et al.*, *What I See Is What You Don't Get: The Effect of (Not) Seeing Emoji Rendering Differences Across Platforms*, [http://www.brenthecht.com/publications/cscw2018\\_emojiimpact.pdf](http://www.brenthecht.com/publications/cscw2018_emojiimpact.pdf) (2018)

# Caselaw Involving Emojis

## LITIGATION INVOLVING EMOJIS IS INCREASING

171 reported U.S. cases through 2018 involving emojis and emoticons in emails or texts

First reported case in 2004; 33 in 2017; 53 in 2018

Smiley face – 46 cases

Winky face – 16 cases

Sad face – 9 cases

Gun – 7 cases



Breach of contract, employment discrimination, sexual harassment, sexual predation, defamation, murder, criminal threat

Emojis/emoticons were key evidence in all



## EMOJI CASELAW EXAMPLES

*Commonwealth v. Castano*, 82 N.E.2d 974, 982 (Mass. 2017) (emoji face with X's for eyes taken as evidence that a murder had occurred)

*United States v. Christensen*, 2013 U.S. Dist. LEXIS 52464, at \*5 (D. Mont. 2013) (smiley emoticon converted text into a joke, so it meant the opposite of what it said – email offer to “stipulate that my client is guilty :)” was not serious)

*Apatoff v. Munich Re Am. Servs.*, 2014 U.S. Dist. LEXIS 106665, at \*9 (D.N.J. 2014) (smiley emoticons between managers shows they were happy to terminate plaintiff, contrary to testimony; summary judgment denied)

## EMOJI LITIGATION CASE STUDY

Text messages between landlord and possible tenant

Tenant message:

Good morning 🥰 Interested in the house 🧑🏻‍🔧 🐱 🐱 🙌 🌊 🦫 🍾  
Just need to discuss the details. . . When's a good time for you?

Landlord believe tenant would rent; removed listing

Tenant did not rent; landlord sued for damages

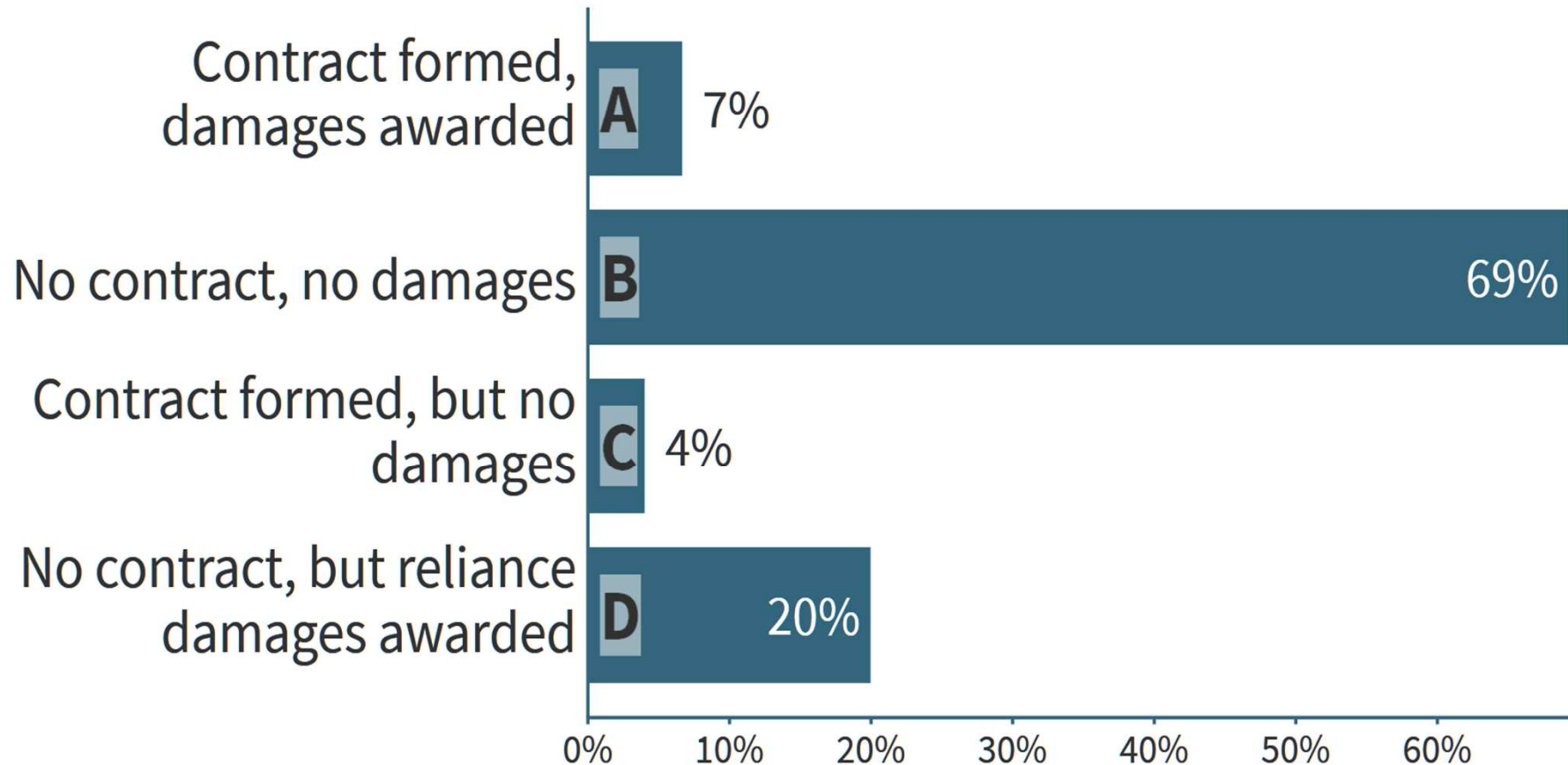
What outcome?

*Dahan v. Shacaroff*, Sm. Claims Ct. (Herzliya) (2017)

Eric Goldman, *Emojis and the Law*, 93 Wash. L. Rev. 1227, 1266 (2018)

# What was the outcome of the case study?

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# Emoji Business Proposals

## POSSIBLE “CONTRACT BY EMOJI” LEGAL FRAMEWORK

### Look to *Restatement 2d of Contracts* § 20

No contract if parties attach “materially different meanings” to their attempted “manifestation of mutual assent” *and* neither party knows or has reason to know the meaning attached by the other

*but*

If one party has an information advantage and *does* know the counterparty’s meaning, that meaning will govern and form basis of a contract

Requires evidence of each party’s actual knowledge

Prevents either party from taking advantage of a one-sided misunderstanding

Not widespread among courts; still grappling with issue



## PROPOSED EMOJI BUSINESS PRACTICES

1. Prudent to *prohibit* emojis in business communications
  - Possible limited exceptions for purely social communication with colleagues and customers
  - Even this could lead to harassment/discrimination issues
2. Add email disclaimer pertaining to emojis to help prevent accidental contracts
  - “Emojis and other picture symbols may form no part of any offer, acceptance, or agreement”
  - Can also expressly limit contracting authority to managers
  - Require formal written agreements for binding contracts

Not magic bullets, but can help reduce liability risk

## PROPOSED EMOJI BUSINESS PRACTICES (CONT'D)

3. Train employees on emoji-related protocols
4. Audit emails and texts over company systems for compliance

Policies may cut down employee spontaneity, but must weigh against real possibility of inadvertent contract or other legal consequences of emoji use

Like Tribbles – are emojis more trouble than they are worth, in a business setting?

**Questions?**

## SPEAKER BIOGRAPHY



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### Education

Harvard Law School, J.D., *cum laude*, 1994 (Editor-in-Chief, *Harvard Journal of Law & Public Policy*)

Brandeis University, B.A., *summa cum laude*, 1991 (Phi Beta Kappa)

### Recognition

Selected to the Washington, D.C. Super Lawyers list, *Super Lawyers*® (Thomson Reuters), 2012–2019

*Euromoney's Benchmark Litigation*, "Future Star" in District of Columbia, 2012–2019

"Recommended" by *Global Competition Review* (2015-2016)

A versatile first-chair trial and courtroom lawyer for over 20 years, Jason has spent his career litigating high-stakes and often multidistrict business disputes. He excels in complicated cases for large corporate clients that are thorny enough to present strong potential to go to trial. Jason's tenacity and trial-readiness have also yielded his clients "eve of trial" settlements that exceeded their expectations. He has tried 14 complex trials and arbitrations across the country, briefed and argued precedent-setting appeals, and led the defense against nationwide class actions.

Jason is particularly experienced with commercial and government breach of contract claims, disputes between prime and subcontractors, business torts including fraud, and antitrust MDL class-action defense. He regularly litigates against or in contexts involving the U.S. government. Known for his responsiveness and efficiency, he also often advises and represents clients in exigent matters involving injunctive relief. Jason also writes often on litigation issues arising from technology, and he edits the Firm's Hi-Tech Law & Litigation Update series.

- (AAA/ICDR) — As lead counsel, tried international arbitration of breach of contract claim involving \$2 billion construction contract for warships; on behalf of shipbuilder client, prevented prime contractor from awarding shipbuilding subcontract to client's competitor, and enabled client to obtain subcontract
- (AAA/ICDR) — Tried international arbitration of \$12 million breach of contract claim filed against shipbuilder client by a multi-national defense contractor
- (SMA) — Tried arbitration of \$55 million breach of contract claim filed by shipbuilder client against global defense contractor
- (N.D. Cal.) — Lead defense counsel to major Japanese technology companies in two separate antitrust class action MDL's alleging price-fixing of the global optical disk drive and lithium ion battery markets and claiming over \$3 billion in single damages apiece; resolved all component cases, including four class actions and eight direct-action lawsuits, for nuisance-value payments of less than 1% of potential liability
- (CBCA) — Tried a \$40 million breach of contract case against the U.S. State Department involving the U.S. Embassy building in Panama in two separate week-long trials, including one week-long session in Panama
- (E.D. Pa.) — Tried to a jury a \$70 million breach of contract case filed against his client, an international trading and investment company; after a two-week trial, won a full defense verdict against the claim and won a counterclaim filed by his client under the same contract; later defeated an appeal by adversary on briefs alone
- (Fed. Cl.) — Lead counsel to a large private debt collection firm in defending its award of a massive student loan contract by the U.S. Department of Education against challenges from disappointed competitors; won a motion to dismiss the challenges as first-chair for five contract awardees at oral argument in the U.S. Court of Federal Claims; led Federal Circuit briefing on appeal; co-led winning effort to prevent the Government from revoking the same contract