NEW JERSEY CIVIL JUSTICE INSTITUTE'S

FALL LEGAL REFORM CONFERENCE

OUTSOURCING ENFORCEMENT?

THE DEBATE OVER PRIVATIZING THE ROLE OF PUBLIC ENFORCEMENT

September 18, 2015
Hotel Woodbridge at Metropark

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Assemblyman Michael Patrick Carroll (R-Morris)
Steve C. Lee, the Acting Director of the New Jersey Division of Consumer Affairs
Shalom Stone, of Brown, Moskowitz & Kallen
Moderated by Alida Kass of NJCJI

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10:30 - 11:30 - Responding to the Regulatory Class Action
Jim Cecchi of Carella Byrne
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WI-FI Network Name: Hotel Woodbridge Passcode: welcome1

REGULATING BUSINESS: DO THE ENDS JUSTIFY THE MEANS?

REGULATING BUSINESS: DO THE ENDS JUSTIFY THE MEANS?

Senator Peter Barnes (D-Middlesex)

Senator Peter J. Barnes III was elected on November 5, 2013 to New Jersey's State Senate to represent the 18th Legislative District, which is comprised of East Brunswick, Edison, Helmetta, Highland Park, Metuchen, South Plainfield and South River in Middlesex County.

A lifelong resident of Edison, Senator Barnes graduated from J.P. Stevens High School, where he has been inducted as a member of the school's Hall of Honor. Senator Barnes earned a varsity letter as a member of two Centennial Conference Track and Field championship teams at Gettysburg College while earning a Bachelor's degree in political science. He also holds a Master's in Business Administration from Farleigh Dickinson University and law degree from Widener University School of Law, where he served as a member of the Law Review.

In the Senate, Barnes serves as the Vice Chairman of the Law and Public Safety Committee. He also serves as a member of the Senate Budget and Appropriations Committee and the Senate State Government, Wagering, Tourism and Historic Preservation Committee.

REGULATING BUSINESS: DO THE ENDS JUSTIFY THE MEANS?

Assemblyman Michael Patrick Carroll (R-Morris)

Michael Patrick Carroll was first elected to the Assembly in 1995. Carroll's primary legislative emphasis is on the structure of government, ensuring political responsibility, and reaffirming the appropriate separation of powers. Toward that end, he has proposed constitutional amendments to reverse judicially imposed public policy determinations in abortion, land use, and education; proposed reforming local tax policy by eliminating the state income tax; proposed that Supreme Court justices face retention elections; and proposed the convening of a constitutional convention to address reformation of the structure of government.

In 1980, Carroll graduated from Johns Hopkins University with a degree in social and behavioral sciences. While at the university, he served as president of the school's Republican Club and was a regional co-director of the College Republican National Committee. He earned a J.D. degree from Rutgers School of Law and was admitted to the New Jersey bar in 1983. He is a member of the Federalist Society, an organization of lawyers devoted to traditional judicial standards. He practices law in Morristown.

REGULATING BUSINESS: DO THE ENDS JUSTIFY THE MEANS?

Steve C. Lee, the Acting Director of the New Jersey Division of Consumer Affairs

Steve C. Lee was appointed by the New Jersey Attorney General to serve as the Acting Director of the New Jersey Division of Consumer Affairs in April 2014. As Acting Director, Lee is responsible for managing and overseeing the approximately 550 Division employees who staff the Division's Office of Consumer Protection, Bureau of Securities, Office of Weights and Measures, and 47 State professional licensing boards which regulate more than 80 professions and occupations. The Division's broad mission is to protect the people of New Jersey from fraud, deceit, and misrepresentation in the sale of goods and services. Acting Director Lee reports directly to the State Attorney General.

Prior to his appointment as Acting Director, Lee worked for almost nine years as an Assistant United States Attorney for the Southern District of New York, prosecuting and trying various federal criminal cases. These included cases involving securities and commodities fraud, international telemarketing fraud, and violence and racketeering offenses committed by members of La Cosa Nostra and Asian organized crime.

Acting Director Lee earned his law degree at Harvard Law School and his undergraduate degree at Bowdoin College.

Acting Director Lee lives with his wife and son in Bergen County, New Jersey.

REGULATING BUSINESS: DO THE ENDS JUSTIFY THE MEANS?

Shalom Stone, Brown, Moskowitz & Kallen

Shalom Stone is an experienced trial attorney, representing a broad spectrum of business interests in both state and federal courts. His litigation practice regularly includes RICO, securities, franchises, real estate, and insurance claims. He has also defended a wide variety of white-collar criminal cases. Shalom represents lawyers and law firms in legal ethics proceedings and related matters, and he is General Counsel to Brown, Moskowitz & Kallen.

Shalom has also handled numerous appeals in both state and federal courts. In 2007, he was nominated by President George W. Bush to the Third Circuit Court of Appeals.

Prior to BMK, Shalom was a partner in the law firm of Walder Hayden, P.A., and before that, he practiced in the litigation department at Sills Cummis.

REGULATING BUSINESS: DO THE ENDS JUSTIFY THE MEANS?

Alida Kass, New Jersey Civil Justice Institute

Alida Kass is chief counsel of the New Jersey Civil Justice Institute. Kass is the voice of the Institute in the State House and head of the organization's litigation efforts. Kass's legal expertise has allowed the Institute to engage on issues at a foundational level. By focusing on incentives and looking for the root cause of problems, NJCJI has become much more proactive in its efforts to improve the state's legal system.

The Institute has also expanded its work in the courts under Kass's influence. In 2015, NJCJI filed its first amicus brief to the United States Supreme Court in an important case impacting arbitration law.

Prior to joining the Institute, Kass taught as an adjunct professor at the Georgetown University Law Center. She also worked on Capitol Hill as a Legislative Assistant for Representative Christopher Cox, where she handled commerce and judicial issues.

Kass graduated from Duke University with a degree in history, and earned her J.D. from the Georgetown University Law Center. A member of the New Jersey bar, she resides with her family in Chatham, where she serves on the Borough Council.

Truth-in-Consumer Contract, Warranty and Notice Act (TCCWNA), N.J.S.A. 56:12-15 to -18

56:12-15. Consumer contract, warranty, notice or sign; violation of legal right of consumer or responsibility of seller, lessor, etc.; prohibition; exemptions

No seller, lessor, creditor, lender or bailee shall in the course of his business offer to any consumer or prospective consumer or enter into any written consumer contract or give or display any written consumer warranty, notice or sign after the effective date of this act which includes any provision that violates any clearly established legal right of a consumer or responsibility of a seller, lessor, creditor, lender or bailee as established by State or Federal law at the time the offer is made or the consumer contract is signed or the warranty, notice or sign is given or displayed. Consumer means any individual who buys, leases, borrows, or bails any money, property or service which is primarily for personal, family or household purposes. The provisions of this act shall not apply to residential leases or to the sale of real estate, whether improved or not, or to the construction of new homes subject to "The New Home Warranty and Builders' Registration Act," P.L.1977, c. 467 (C. 46:3B-1 et seq.).

56:12-16. Provision for waiver of rights under act; nullity; statement of provisions void, unenforceable or inapplicable in New Jersey

No consumer contract, warranty, notice or sign, as provided for in this act, shall contain any provision by which the consumer waives his rights under this act. Any such provision shall be null and void. No consumer contract, notice or sign shall state that any of its provisions is or may be void, unenforceable or inapplicable in some jurisdictions without specifying which provisions are or are not void, unenforceable or inapplicable within the State of New Jersey; provided, however, that this shall not apply to warranties.

56:12-17. Violations; civil liability to aggrieved consumer; action; termination of contract

Any person who violates the provisions of this act shall be liable to the aggrieved consumer for a civil penalty of not less than $100.00 or for actual damages, or both at the election of the consumer, together with reasonable attorney's fees and court costs. This may be recoverable by the consumer in a civil action in a court of competent jurisdiction or as part of a counterclaim by the consumer against the seller, lessor, creditor, lender or bailee or assignee of any of the aforesaid, who aggrieved him. A consumer also shall have the right to petition the court to terminate a contract which violates the provisions of section 2 of this act and the court in its discretion may void the contract.

56:12-18. Act as additional to other rights, remedies and prohibitions

The rights, remedies and prohibitions accorded by the provisions of this act are hereby declared to be in addition to and cumulative of any other right, remedy or prohibition accorded by common law, Federal law or statutes of this State, and nothing contained herein shall be construed to deny, abrogate or impair any such common law or statutory right, remedy or prohibition.

New Jersey Consumer Fraud Act (CFA) Penalty Section, N.J.S.A. 56:8-19

N.J.S.A. 56:8-19 Action or counterclaim by injured person; recovery of treble damages and costs

Any person who suffers any ascertainable loss of moneys or property, real or personal, as a result of the use or employment by another person of any method, act, or practice declared unlawful under this act or the act hereby amended and supplemented may bring an action or assert a counterclaim therefor in any court of competent jurisdiction. In any action under this section the court shall, in addition to any other appropriate legal or equitable relief, award threefold the damages sustained by any person in interest. In all actions under this section, including those brought by the Attorney General, the court shall also award reasonable attorneys' fees, filing fees and reasonable costs of suit.

ASSEMBLY, No. 1892

STATE OF NEW JERSEY

216th LEGISLATURE

PRE-FILED FOR INTRODUCTION IN THE 2014 SESSION

Sponsored by:
Assemblyman JOHN J. BURZICHELLI
District 3 (Cumberland, Gloucester and Salem)
Assemblyman RAJ MUKHERJI
District 33 (Hudson)

SYNOPSIS

Provides that rental companies cannot rent, lease or sell unrepaired motor vehicles which are subject to safety recall.

CURRENT VERSION OF TEXT

Introduced Pending Technical Review by Legislative Counsel

(Sponsorship Updated As Of: 10/24/2014)

AN ACT concerning motor vehicle rentals and supplementing P.L.1960, c.39 (C.56:8-1 et seq.).

BE IT ENACTED *by the Senate and General Assembly of the State of New Jersey:*

1. This act shall be known and may be cited as the "Safe Motor Vehicle Rental Act."

2. As used in this act:

"Rental motor vehicle" means a motor vehicle owned by a rental company and rented to the general public on an hourly, daily, trip, or other short-term basis.

"Rental company" means a person engaged in the business of renting vehicles to the general public.

3. a. It shall be unlawful for a rental company to rent, lease, or sell a rental motor vehicle which contains a defect related to motor vehicle safety or does not comply with an applicable motor vehicle safety standard, unless the defect or noncompliance has been remedied prior to rental, lease, or sale.

b. If, during the rental or lease period of a rental motor vehicle, the rental company receives notification that the vehicle contains a defect related to motor vehicle safety or does not comply with an applicable motor vehicle safety standard, the rental company shall immediately:

(1) contact the renter or lessee and any authorized driver for whom the rental company has immediate contact information to inform such renter, lessee and authorized driver of the defect or noncompliance; and

(2) offer to provide such renter, lessee, or authorized driver a comparable alternative vehicle, which has no defect and is in compliance, at no additional cost to the renter, lessee or authorized driver, until the defect or noncompliance has been remedied.

4. A violation of the provisions of this act shall be an unlawful practice and a violation of P.L.1960, c.39 (C.56:8-1 et seq.).

5. This act shall take effect on the first day of the fourth month following enactment.

STATEMENT

This bill, the "Safe Motor Vehicle Rental Act" provides that rental companies cannot rent, lease or sell unrepaired motor vehicles which are subject to safety recall.

Under the provisions of the bill, it is an unlawful practice under P.L.1960, c.39 (C.56:8-1 et seq.), the Consumer Fraud Act, for a rental company to rent, lease, or sell a rental motor vehicle which contains a defect related to motor vehicle safety or does not comply with an applicable motor vehicle safety standard, unless the defect or noncompliance has been remedied prior to rental, lease or sale. "Rental motor vehicle" is defined in the bill to include all motor vehicles rented to the general public, including trucks.

The bill also provides that, if during the rental or lease period the rental company receives notification that the vehicle becomes subject to a safety recall, the rental company will immediately:

(1) contact the renter or lessee and any authorized driver for whom the rental company has immediate contact information to inform them of the noncompliance; and

(2) offer to provide the renter, lessee, or authorized driver a comparable alternative vehicle, at no additional cost to the renter, lessee or authorized driver, until the defect or noncompliance has been remedied.

An unlawful practice under the Consumer Fraud Act is punishable by a monetary penalty of not more than $10,000 for a first offense and not more than $20,000 for any subsequent offense. In addition, violations can result in cease and desist orders issued by the Attorney General, the assessment of punitive damages, and the awarding of treble damages and costs to the injured party.

RESPONDING TO THE REGULATORY CLASS ACTION

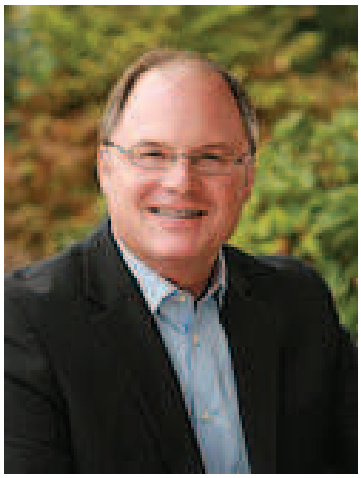
RESPONDING TO THE REGULATORY CLASS ACTION

Jim Cecchi, Carella Byrne

James E. Cecchi, is a partner in the Carella Byrne's Litigation Department. He specializes in complex civil and chancery litigation in both federal and state courts including class action and multidistrict litigation. Mr. Cecchi joined the firm in 1994 after serving in the United States Department of Justice as an Assistant United States Attorney for the District of New Jersey. In that capacity, Mr. Cecchi participated in significant criminal prosecutions involving money laundering, narcotics smuggling and violations of federal firearms laws. Prior to his entry to the Department Justice, from 1989-1991, Mr. Cecchi served as a law clerk to the Honorable Nicholas H. Politan in the United States District Court, District of New Jersey.

Among Mr. Cecchi's successes are representative matters including: *Marvin Simon, et. al v. KPMG LLP, et. al,* a class action suit where Carella Byrne, serving as co-counsel for the class achieved a settlement of $200,000,000; *In re Vytorin/Zetia Marketing, Sales Practices and Products Liability Litigation*, a multidistrict litigation where Carella Byrne, serving as Co-Lead Counsel, achieved a settlement of $41,500,000; and *Sampang, et. al v. AT&T Mobility LLC, et. al,* a class action where Carella Byrne, serving as co-class counsel, achieved a settlement of $18,000,000.

RESPONDING TO THE REGULATORY CLASS ACTION



Gavin Rooney, Lowenstein Sandler

Gavin Rooney represents large corporate and institutional clients such as Bristol-Myers Squibb, Merck, Verizon and Unitil in complex commercial litigation matters. Gavin's interest in military history has served him well in successfully defending corporate clients in securities, shareholder derivative, class action, consumer fraud, mass tort and RICO claims in venues across the U.S. He approaches his clients' matters as a strategist – surveying the state of play, marshalling facts, determining tactics and deploying a clear-sighted grand strategy. His ability to synthesize massive claims and supervise large teams of lawyers while remaining the client's central point of contact is the key to his winning formula.

Gavin has handled numerous jury and non-jury cases in New Jersey, New York, California, Massachusetts and Florida, and has argued before the appellate courts of each of those states and before several federal circuit courts of appeal. He also handles non-class securities claims, shareholder disputes, environmental and real estate matters, and other types of commercial litigation.

RESPONDING TO THE REGULATORY CLASS ACTION

Shalom Stone, Brown, Moskowitz & Kallen

Shalom Stone is an experienced trial attorney, representing a broad spectrum of business interests in both state and federal courts. His litigation practice regularly includes RICO, securities, franchises, real estate, and insurance claims. He has also defended a wide variety of white-collar criminal cases. Shalom represents lawyers and law firms in legal ethics proceedings and related matters, and he is General Counsel to Brown, Moskowitz & Kallen.

Shalom has also handled numerous appeals in both state and federal courts. In 2007, he was nominated by President George W. Bush to the Third Circuit Court of Appeals.

Prior to BMK, Shalom was a partner in the law firm of Walder Hayden, P.A., and before that, he practiced in the litigation department at Sills Cummis.

RESPONDING TO THE REGULATORY CLASS ACTION

Leigh Schachter, Verizion

Leigh Schachter is an Assistant General Counsel for Verizon Communications in Basking Ridge, NJ. His practice covers all aspects of general civil litigation, with a particular focus on class action, arbitration and false claims act cases. He also is responsible for appellate and legal policy issues and serves on two advisory committees for the National Chamber Litigation Center.

Mr. Schachter has been with the Verizon companies since 2003. Before that, he was an associate with Debevoise & Plimpton in New York. He received his JD from Yale Law School in 1993, where he was a senior editor of the Yale Law Journal. He received his BA from Yeshiva University in 1990.

99 A.3d 306 (2014)
219 N.J. 430

Patricia ATALESE, Plaintiff-Appellant,
v.
U.S. LEGAL SERVICES GROUP, L.P., Defendant-Respondent.

A-64 September Term 2012, 072314

Supreme Court of New Jersey.

Argued April 9, 2014.
Decided September 23, 2014.

308 *308 William D. Wright argued the cause for appellant.

Thomas M. Barron Moorestown, argued the cause for respondent.

Jed L. Marcus, Florham Park, submitted a brief on behalf of amicus curiae Pacific Legal Foundation (Bressler, Amery & Ross, attorneys; Mr. Marcus and Deborah J. La Fetra, a member of the California and Arizona bars, on the brief).

309 *309 Justice ALBIN delivered the opinion of the Court.

Arbitration provisions are now commonplace in consumer contracts. Consumers can choose to pursue arbitration and waive their right to sue in court, but should know that they are making that choice. An arbitration clause, like any contractual clause providing for the waiver of a constitutional or statutory right, must state its purpose clearly and unambiguously. In choosing arbitration, consumers must have a basic understanding that they are giving up their right to seek relief in a judicial forum.

Here, plaintiff, Patricia Atalese, contracted with defendant, U.S. Legal Services Group, L.P. (USLSG), for debt-adjustment services. The contract contained an arbitration provision for the resolution of any dispute between the parties, but the provision made no mention that plaintiff waived her right to seek relief in court. Plaintiff brought a lawsuit against USLSG in the Special Civil Part alleging violations of two consumer-protection statutes.

The trial court granted USLSG's motion to compel arbitration pursuant to the service contract. The Appellate Division affirmed, finding that "the lack of express reference to a waiver of the right to sue in court" did not bar enforcement of the arbitration clause.

We now reverse. The absence of *any* language in the arbitration provision that plaintiff was waiving her statutory right to seek relief in a court of law renders the provision unenforceable. An arbitration provision — like any comparable contractual provision that provides for the surrendering of a constitutional or statutory right — must be sufficiently clear to a reasonable consumer. The provision here does not pass that test. We therefore vacate the judgment of the Appellate Division and remand to the Special Civil Part for proceedings consistent with this opinion.

I.

A.

This case arises from a civil complaint filed in the Special Civil Part. Plaintiff alleged that defendant violated the Consumer Fraud Act (CFA), *N.J.S.A.* 56:8-1 to -20, and the Truth-in-Consumer Contract, Warranty and Notice Act (TCCWNA), *N.J.S.A.* 56:12-14 to -18. She sought treble damages, statutory penalties, and attorney's fees.

The trial court's decision to compel arbitration was based on the pleadings. *See R.* 4:46-2(c). We briefly review those pleadings.

B.

Plaintiff entered into a service contract with USLSG, which promised to provide debt-adjustment services. For those services, she paid USLSG approximately $5000, which included $4083.55 in legal fees, $940 in supplemental legal fees, and $107.50 in other fees. Plaintiff alleged that USLSG misrepresented that the monies were spent on numerous attorneys negotiating with creditors on her behalf. She maintained that the only work done by an attorney was the preparation of a single one-page answer for a collection action in which she represented herself. Plaintiff also alleged that USLSG settled only a single debt for her and "knowingly omitted" that it was not a licensed debt adjuster in New Jersey. Last, plaintiff contended that USLSG violated New Jersey's usury law.

USLSG denied the allegations in the complaint.

310 *310 **C.**

USLSG moved to compel arbitration based on an arbitration provision in the twenty-three-page service contract. The arbitration provision is located on page nine, paragraph sixteen, of the contract and states:

> Arbitration: In the event of any claim or dispute between Client and the USLSG related to this Agreement or related to any performance of any services related to this Agreement, the claim or dispute shall be submitted to binding arbitration upon the request of either party upon the service of that request on the other party. The parties shall agree on a single arbitrator to resolve the dispute. The matter may be arbitrated either by the Judicial Arbitration Mediation Service or American Arbitration Association, as mutually agreed upon by the parties or selected by the party filing the claim. The arbitration shall be conducted in either the county in which Client resides, or the closest metropolitan county. Any decision of the arbitrator shall be final and may be entered into any judgment in any court of competent jurisdiction. The conduct of the arbitration shall be subject to the then current rules of the arbitration service. The costs of arbitration, excluding legal fees, will be split equally or be born by the losing party, as determined by the arbitrator. The parties shall bear their own legal fees.

The trial court granted USLSG's motion to compel arbitration and dismissed the complaint without prejudice. The court found the arbitration clause to be "minimally, barely ... sufficient to put the [plaintiff] on notice that if [the parties] have any sort of dispute arising out of [the] agreement, it's going to be heard in [a]rbitration." The court also believed that the arbitration clause met the criteria outlined in *Curtis v. Cellco Partnership*, 413 *N.J.Super.* 26, 33-37, 992 *A.*2d 795 (App.Div.), *certif. denied,* 203 *N.J.* 94, 999 *A.*2d 462 (2010). There, the Appellate Division held that an arbitration provision will be enforced so long as it is "sufficiently clear, unambiguously worded, satisfactorily distinguished from the other [a]greement terms, and ... provide[s] a consumer with reasonable notice of the requirement to arbitrate." *Id.* at 33, 992 *A.*2d 795. The trial court concluded that although upholding the arbitration provision was not "a slam dunk," the policy favoring arbitration compelled the outcome.

Plaintiff appealed.

II.

In an unpublished opinion, the Appellate Division affirmed the trial court's order compelling arbitration, relying heavily on language in *Curtis, supra*, 413 *N.J.Super.* at 33, 992 *A.*2d 795, in reaching that conclusion. The panel held that "the lack of express reference to a waiver of the right to sue in court or to arbitration as the `exclusive' remedy" did not bar enforcement of the arbitration clause. The panel stated that while the arbitration clause "did not explicitly state that

plaintiff agreed to waive her right to try her dispute in court, it clearly and unambiguously stated that ... *any* dispute relating to the underlying agreement *shall* be submitted to arbitration and the resolution of that forum shall be *binding* and *final*." It noted that other appellate panels had upheld arbitration provisions that did not have explicit waiver-of-rights language. (Citing *Griffin v. Burlington Volkswagen, Inc.*, 411 *N.J.Super.* 515, 518, 988 *A.*2d 101 (App.Div.2010); *EPIX Holdings Corp. v. Marsh & McLennan Cos.*, 410 *N.J.Super.* 453, 476, 982 *A.*2d 1194 (App.Div.2009), *overruled*
311 *in part on other grounds by* *311 *Hirsch v. Amper Fin. Servs., LLC*, 215 *N.J.* 174, 192-93, 71 *A.*3d 849 (2013)).

The panel concluded that the language of the arbitration clause gave the "parties reasonable notice of the requirement to arbitrate all claims under the contract," and that "a reasonable person, by signing the agreement, [would have understood] that arbitration is the sole means of resolving contractual disputes."

We granted plaintiff's petition for certification. *Atalese v. U.S. Legal Servs. Grp., L.P.*, 214 *N.J.* 117, 67 *A.*3d 1191 (2013). We also granted Pacific Legal Foundation's request to participate as amicus curiae, limited to the filing of a brief.

III.

A.

Plaintiff contends that the arbitration clause does not comply with New Jersey law, specifically *Curtis* and our decision in *Marchak v. Claridge Commons, Inc.*, 134 *N.J.* 275, 281, 633 *A.*2d 531 (1993), because it "does not clearly and unequivocally state its purpose in depriving [plaintiff] of her time-honored right to sue." She asserts that New Jersey courts do not uphold "arbitration provisions that fail to: (1) indicate that the parties waive their right to sue; or (2) indicate that arbitration is the parties' exclusive remedy." Plaintiff does not suggest that an incantation of "magic words" is necessary for a waiver of rights but does assert that the language for such a waiver must be clear and unequivocal.

B.

USLSG contends that the term "arbitration" is universally understood and that "[n]o reasonable consumer could have any doubt that arbitration is different than litigation." USLSG emphasizes that the Federal Arbitration Act (FAA) reflects a "liberal federal policy favoring arbitration" and requires courts to "place arbitration agreements on an equal footing with other contracts and enforce them according to their terms." (Citations and internal quotation marks omitted) (quoting *AT & T Mobility LLC v. Concepcion*, 563 *U.S.* ___, ___, 131 *S.Ct.* 1740, 1745-46, 179 *L.Ed.*2d 742, 751 (2011)). It argues that the language in *Marchak, supra* — that an arbitration "clause depriving a citizen of access to the courts should clearly state its purpose," 134 *N.J.* at 282, 633 *A.*2d 531 — as construed by plaintiff, is in conflict with *Concepcion* and New Jersey case law. Last, USLSG submits that the arbitration clause is sufficiently clear and "adequately advised" plaintiff that her lawsuit would be resolved "in an arbitral forum."

C.

Pacific Legal Foundation, participating as amicus curiae, urges this Court to affirm the Appellate Division and enforce the arbitration agreement. Amicus emphasizes that arbitration provisions in contracts must be viewed with favor, consistent with the dictates of federal and state law, and not with "suspicion or hostility." Amicus maintains that consumers entering into contracts with arbitration clauses are "presumed" to be sufficiently competent to understand what they are signing and that "the law does not require invocation of particular terms of art to create an enforceable arbitration contract." In short, amicus insists that plaintiff signed an arbitration agreement "written in standard form and simple language" and should be bound by it.

IV.

A.

312 The Federal Arbitration Act (FAA), 9 *U.S.C.A.* §§ 1-16, and the nearly *312 identical New Jersey Arbitration Act, *N.J.S.A.* 2A:23B-1 to -32, enunciate federal and state policies favoring arbitration. *Concepcion, supra,* 563 *U.S.* at ___, 131 *S.Ct.* at 1745, 179 *L.Ed.*2d at 751 (describing Section 2 of FAA as reflecting "a `liberal federal policy favoring arbitration'" (quoting *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 *U.S.* 1, 24, 103 *S.Ct.* 927, 941, 74 *L.Ed.*2d 765, 785 (1983))); *Hojnowski v. Vans Skate Park*, 187 *N.J.* 323, 342, 901 *A.*2d 381 (2006) (noting that Legislature, in enacting New Jersey's Arbitration Act, codified existing judicial policy favoring arbitration as "means of dispute resolution"); *Martindale v. Sandvik, Inc.*, 173 *N.J.* 76, 92, 800 *A.*2d 872 (2002) ("[T]he affirmative policy of this State, both legislative and judicial, favors arbitration as a mechanism of resolving disputes.").

Section 2 of the FAA provides that

> [a] written provision in ... a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction ... shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.
>
> [9 *U.S.C.A.* § 2.]

The FAA requires courts to "place arbitration agreements on an equal footing with other contracts and enforce them according to their terms." *Concepcion, supra,* 563 *U.S.* at ___, 131 *S.Ct.* at 1745-46, 179 *L.Ed.*2d at 751 (citations omitted). Thus, "a state cannot subject an arbitration agreement to more burdensome requirements than" other contractual provisions. *Leodori v. CIGNA Corp.*, 175 *N.J.* 293, 302, 814 *A.*2d 1098, *cert. denied,* 540 *U.S.* 938, 124 *S.Ct.* 74, 157 *L.Ed.*2d 250 (2003). An arbitration clause cannot be invalidated by state-law "defenses that apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue." *Concepcion, supra*, 563 *U.S.* at ___, 131 *S.Ct.* at 1746, 179 *L.Ed.*2d at 751.

Arbitration's favored status does not mean that every arbitration clause, however phrased, will be enforceable. *See Hirsch, supra,* 215 *N.J.* at 187, 71 *A.*3d 849 ("[T]he preference for arbitration `is not without limits.'" (quoting *Garfinkel v. Morristown Obstetrics & Gynecology Assocs.*, 168 *N.J.* 124, 132, 773 *A.*2d 665 (2001))). Section 2 of the FAA "permits agreements to arbitrate to be invalidated by `*generally* applicable contract defenses.'" *Concepcion, supra,* 563 *U.S.* at ___, 131 *S.Ct.* at 1746, 179 *L.Ed.*2d at 751 (emphasis added) (quoting *Doctor's Assocs., Inc. v. Casarotto,* 517 *U.S.* 681, 687, 116 *S.Ct.* 1652, 1656, 134 *L.Ed.*2d 902, 909 (1996)). Accordingly, the FAA "permits states to regulate ... arbitration agreements under general contract principles," and a court may invalidate an arbitration clause "`upon such grounds as exist at law or in equity for the revocation of any contract.'" *Martindale, supra,* 173 *N.J.* at 85, 800 *A.*2d 872 (quoting 9 *U.S.C.A.* § 2); *see First Options of Chi., Inc. v. Kaplan,* 514 *U.S.* 938, 944, 115 *S.Ct.* 1920, 1924, 131 *L.Ed.*2d 985, 993 (1995) ("When deciding whether the parties agreed to arbitrate a certain matter ..., courts generally ... should apply ordinary state-law principles that govern the formation of contracts."); *Hojnowski, supra,* 187 *N.J.* at 342, 901 *A.*2d 381 ("[S]tate contract-law principles generally govern a determination whether a valid agreement to arbitrate exists." (citing *First Options, supra,* 514 *U.S.* at 944, 115 *S.Ct.* at 1924, 131 *L.Ed.*2d at 993)).

B.

313 An agreement to arbitrate, like any other contract, "must be the product *313 of mutual assent, as determined under customary principles of contract law." *NAACP of Camden Cnty. E. v. Foulke Mgmt.*, 421 *N.J.Super.* 404, 424, 24 *A.*3d 777 (App.Div.), *certif. granted,* 209 *N.J.* 96, 35 *A.*3d 679 (2011), *and appeal dismissed,* 213 *N.J.* 47, 59 *A.*3d 1083 (2013). A legally enforceable agreement requires "a meeting of the minds." *Morton v. 4 Orchard Land Trust,* 180 *N.J.* 118, 120, 849 *A.*2d 164 (2004). Parties are not required "to arbitrate when they have not agreed to do so." *Volt Info.*

Scis. v. Bd. of Trs. of Leland Stanford Jr. Univ., 489 *U.S.* 468, 478, 109 *S.Ct.* 1248, 1255, 103 *L.Ed.*2d 488, 499 (1989); *see Garfinkel, supra*, 168 *N.J.* at 132, 773 *A.*2d 665 ("`[O]nly those issues may be arbitrated which the parties have agreed shall be.'" (quoting *In re Arbitration Between Grover & Universal Underwriters Ins. Co.*, 80 *N.J.* 221, 228, 403 *A.*2d 448 (1979))).

Mutual assent requires that the parties have an understanding of the terms to which they have agreed. "An effective waiver requires a party to have full knowledge of his legal rights and intent to surrender those rights." *Knorr v. Smeal*, 178 *N.J.* 169, 177, 836 *A.*2d 794 (2003) (citing *W. Jersey Title & Guar. Co. v. Indus. Trust Co.*, 27 *N.J.* 144, 153, 141 *A.*2d 782 (1958)). "By its very nature, an agreement to arbitrate involves a waiver of a party's right to have her claims and defenses litigated in court." *Foulke, supra*, 421 *N.J.Super.* at 425, 24 *A.*3d 777. But an average member of the public may not know — without some explanatory comment — that arbitration is a substitute for the right to have one's claim adjudicated in a court of law.

Moreover, because arbitration involves a waiver of the right to pursue a case in a judicial forum, "courts take particular care in assuring the knowing assent of both parties to arbitrate, and a clear mutual understanding of the ramifications of that assent." *Ibid.*

The requirement that a contractual provision be sufficiently clear to place a consumer on notice that he or she is waiving a constitutional or statutory right is not specific to arbitration provisions. Rather, under New Jersey law, any contractual "waiver-of-rights provision must reflect that [the party] has agreed clearly and unambiguously" to its terms. *Leodori, supra*, 175 *N.J.* at 302, 814 *A.*2d 1098; *see, e.g., Dixon v. Rutgers, the State Univ. of N.J.*, 110 *N.J.* 432, 460-61, 541 *A.*2d 1046 (1988) (holding that collective bargaining agreement cannot deprive one of statutory rights to evidentiary materials in anti-discrimination case because "[u]nder New Jersey law[,] for a waiver of rights to be effective it must be plainly expressed"); *Red Bank Reg'l Educ. Ass'n v. Red Bank Reg'l High Sch. Bd. of Educ.*, 78 *N.J.* 122, 140, 393 *A.*2d 267 (1978) (explaining, in public-employment labor-relations context, that any waiver of statutory right to file grievances "must be clearly and unmistakably established"); *W. Jersey Title & Guar. Co., supra*, 27 *N.J.* at 152-53, 141 *A.*2d 782 ("It is requisite to waiver of a legal right that there be a clear, unequivocal, and decisive act of the party.... Waiver presupposes a full knowledge of the right and an intentional surrender...." (citations and internal quotation marks omitted)); *Christ Hosp. v. Dep't of Health & Senior Servs.*, 330 *N.J.Super.* 55, 63-64, 748 *A.*2d 1156 (App.Div.2000) (requiring "clear and unmistakable waiver" of statutory right to hearing following refusal to renew license); *Franklin Twp. Bd. of Educ. v. Quakertown Educ. Ass'n*, 274 *N.J.Super.* 47, 53, 643 *A.*2d 34 (App.Div. 1994) (holding that waiver of court-ordered, strike-related expenses must be "clear and unmistakable" (citation and internal
314 quotation marks omitted)); *Otis* *314 *Elevator Co. v. Stafford*, 95 *N.J.L.* 79, 82, 111 *A.* 695 (Sup.Ct.1920) ("Clear and unmistakable evidence is necessary to hold that the right to file a [mechanics'] lien has been waived."); *Amir v. D'Agostino*, 328 *N.J.Super.* 141, 160, 744 *A.*2d 1233 (Ch. Div.1998) (holding that waiver of statutory rights under Condominium Act requires that party "kn[ow] that there [i]s a statutory protection available and then elect[] to waive it" because "conduct that purports to constitute a waiver must be clear and unmistakable"), *aff'd o.b.*, 328 *N.J.Super.* 103, 105, 744 *A.*2d 1212 (App.Div. 2000); *cf. Wright v. Universal Mar. Serv. Corp.*, 525 *U.S.* 70, 80, 119 *S.Ct.* 391, 396, 142 *L.Ed.*2d 361, 371 (1998) (holding that "union-negotiated waiver of employees' statutory right to a judicial forum for claims of employment discrimination" must be "clear and unmistakable").

Arbitration clauses are not singled out for more burdensome treatment than other waiver-of-rights clauses under state law. Our jurisprudence has stressed that when a contract contains a waiver of rights — whether in an arbitration or other clause — the waiver "must be clearly and unmistakably established." *Garfinkel, supra*, 168 *N.J.* at 132, 773 *A.*2d 665 (citation and internal quotation marks omitted). Thus, a "clause depriving a citizen of access to the courts should clearly state its purpose." *Ibid.* (quoting *Marchak, supra*, 134 *N.J.* at 282, 633 *A.*2d 531). We have repeatedly stated that "[t]he point is to assure that the parties know that in electing arbitration as the exclusive remedy, they are waiving their time-honored right to sue." *Ibid.* (quoting *Marchak, supra*, 134 *N.J.* at 282, 633 *A.*2d 531); *Hirsch, supra*, 215 *N.J.* at 187, 71 *A.*3d 849 (same).

No particular form of words is necessary to accomplish a clear and unambiguous waiver of rights. It is worth remembering, however, that every "consumer contract" in New Jersey must "be written in a simple, clear,

understandable and easily readable way." *N.J.S.A.* 56:12-2. Arbitration clauses — and other contractual clauses — will pass muster when phrased in plain language that is understandable to the reasonable consumer.

Our courts have upheld arbitration clauses phrased in various ways when those clauses have explained that arbitration is a waiver of the right to bring suit in a judicial forum. For example, in *Martindale, supra,* we upheld an arbitration clause because it explained that the plaintiff agreed "to waive [her] right to a jury trial" and that "all disputes relating to [her] employment ... shall be decided by an arbitrator." 173 *N.J.* at 81-82, 96, 800 *A.*2d 872 (stating that "arbitration agreement not only was clear and unambiguous, it was also sufficiently broad to encompass reasonably plaintiff's statutory causes of action"). In *Griffin, supra,* the Appellate Division upheld an arbitration clause, which expressed that "[b]y agreeing to arbitration, the parties understand and agree that they are waiving their rights to maintain other available resolution processes, such as a court action or administrative proceeding, to settle their disputes." 411 *N.J.Super.* at 518, 988 *A.*2d 101. In *Curtis, supra,* the Appellate Division found the arbitration provisions were "sufficiently clear, unambiguously worded, satisfactorily distinguished from the other [a]greement terms, and drawn in suitably broad language to provide a consumer with reasonable notice of the requirement to arbitrate." 413 *N.J.Super.* at 33, 992 *A.*2d 795. The arbitration agreement in *Curtis* stated:

> Instead of suing in court, we each agree to settle disputes (except certain small claims) only by
> 315 arbitration. The rules in arbitration are different. There's no *315 judge or jury, and review is limited, but an arbitrator can award the same damages and relief, and must honor the same limitations stated in the agreement as a court would.
>
> [*Id.* at 31, 992 *A.*2d 795 (emphasis omitted).]

Martindale, Griffin, and *Curtis* show that, without difficulty and in different ways, the point can be made that by choosing arbitration one gives up the "time-honored right to sue." *See Garfinkel, supra,* 168 *N.J.* at 135, 773 *A.*2d 665 (declining to "suggest that a party need refer specifically to the [Law Against Discrimination] or list every imaginable statute by name to effectuate a knowing and voluntary waiver of rights"). The waiver-of-rights language, however, must be clear and unambiguous — that is, the parties must know that there is a distinction between resolving a dispute in arbitration and in a judicial forum.

With those principles in mind, we turn to the arbitration provision before us.

V.

Our review of a contract, generally, is de novo, and therefore we owe no special deference to the trial court's or Appellate Division's interpretation. *Kieffer v. Best Buy,* 205 *N.J.* 213, 222-23, 14 *A.*3d 737 (2011). Our approach in construing an arbitration provision of a contract is governed by the same de novo standard of review. *Hirsch, supra,* 215 *N.J.* at 186, 71 *A.*3d 849.

The arbitration clause at issue appears on page nine of a twenty-three-page contract between plaintiff and USLSG. Under the terms of the agreement, USLSG promised to provide plaintiff with debt-adjustment services. In her civil complaint, plaintiff alleged that USLSG failed to deliver the services promised, misrepresented that various attorneys were working on her case, and knowingly omitted that it was not a licensed debt adjuster in this State. Plaintiff asserted that USLSG violated two consumer-protection statutes, the CFA and the TCCWNA, both of which explicitly provide remedies in a court of law. *See N.J.S.A.* 56:8-19 ("Any person who suffers any ascertainable loss ... may bring an action or assert a counterclaim therefor in any court of competent jurisdiction."); *N.J.S.A.* 56:12-17 ("A consumer also shall have the right to petition the court to terminate a contract which violates the provisions of section 2 of [the TCCWNA] and the court in its discretion may void the contract.").

Nowhere in the arbitration clause is there any explanation that plaintiff is waiving her right to seek relief in court for a breach of her statutory rights. The contract states that either party may submit any dispute to "binding arbitration," that "[t]he parties shall agree on a single arbitrator to resolve the dispute," and that the arbitrator's decision "shall be final

and may be entered into judgment in any court of competent jurisdiction." The provision does not explain what arbitration is, nor does it indicate how arbitration is different from a proceeding in a court of law. Nor is it written in plain language that would be clear and understandable to the average consumer that she is waiving statutory rights. The clause here has none of the language our courts have found satisfactory in upholding arbitration provisions — clear and unambiguous language that the plaintiff is waiving her right to sue or go to court to secure relief. We do not suggest that the arbitration clause has to identify the specific constitutional or statutory right guaranteeing a citizen access to the courts that is waived by agreeing to arbitration. But the clause, at least in some general and sufficiently
316 broad way, must explain that the plaintiff is giving up her right to bring her claims *316 in court or have a jury resolve the dispute.[1] Mutual assent to an agreement requires mutual understanding of its terms. After all, "[a]n effective waiver requires a [consumer] to have full knowledge of [her] legal rights" before she relinquishes them. *See Knorr, supra,* 178 *N.J.* at 177, 836 *A.*2d 794.

In the employment setting, we have stated that we would "not assume that employees intend to waive [their rights under the Law Against Discrimination] unless their agreements so provide in unambiguous terms." *Garfinkel, supra,* 168 *N.J.* at 135, 773 *A.*2d 665. We indicated that although a waiver-of-rights provision need not "list every imaginable statute by name to effectuate a knowing and voluntary waiver of rights," employees should at least know that they have "agree[d] to arbitrate all statutory claims arising out of the employment relationship or its termination." *Ibid.*

We emphasize that no prescribed set of words must be included in an arbitration clause to accomplish a waiver of rights. Whatever words compose an arbitration agreement, they must be clear and unambiguous that a consumer is choosing to arbitrate disputes rather than have them resolved in a court of law.[2] In this way, the agreement will assure reasonable notice to the consumer. To be clear, under our state contract law, we impose no greater burden on an arbitration agreement than on any other agreement waiving constitutional or statutory rights.

In the matter before us, the wording of the service agreement did not clearly and unambiguously signal to plaintiff that she was surrendering her right to pursue her statutory claims in court. That deficiency renders the arbitration agreement unenforceable.[3]

VI.

317 The judgment of the Appellate Division is reversed. We remand to the trial court *317 for proceedings consistent with this opinion.

For reversal and remandment — Chief Justice RABNER and Justices LaVECCHIA, ALBIN, PATTERSON, and FERNANDEZ-VINA and Judges RODRÍGUEZ (temporarily assigned) and CUFF (temporarily assigned) — 7.

Opposed — None.

[1] Article I, Paragraph 9 of the 1947 New Jersey Constitution guarantees that "[t]he right of trial by jury shall remain inviolate." That guarantee has appeared in every New Jersey Constitution. *See N.J. Const. of 1776* art. XXII; *N.J. Const. of 1844* art. I, § 7.

[2] Both plaintiff and USLSG reference *EPIX Holdings, supra,* 410 *N.J.Super.* 453, 982 *A.*2d 1194, in their briefs. There, a panel of the Appellate Division enforced an arbitration provision that stated that "[a]ny other unresolved dispute arising out of this Agreement must be submitted to arbitration," and that "the arbitrators would have `exclusive jurisdiction over the entire matter in dispute, including any question as to arbitrability.'" *Id.* at 461, 482, 982 *A.*2d 1194. The parties in *EPIX Holdings* did not challenge whether that language satisfied the standard for a waiver of rights. We find that the language there is not sufficient to constitute a clear and unambiguous waiver of a consumer's right to sue in court.

[3] Our opinion should not be read to approve that part of the arbitration clause that states: "The costs of arbitration, excluding legal fees, will be split equally or born by the losing party, as determined by the arbitrator. The parties shall bear their own legal fees." *See Delta Funding Corp. v. Harris,* 189 *N.J.* 28, 44, 912 *A.*2d 104 (2006) (stating that "defendant [] may not limit a consumer's ability to pursue the statutory remedy of attorney's fees and costs when it is available to prevailing parties" and explaining that "[b]y agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral[,] rather than a judicial forum.") (internal quotation marks omitted); *see also N.J.S.A.* 56:12-16 (stating that under TCCWNA

"[n]o consumer contract ... shall contain any provision by which the consumer waives his rights under this act"); *N.J.S.A.* 56:8-19 ("In all actions under [the CFA], ... the court shall also award reasonable attorneys' fees, filing fees and reasonable costs of suit.").

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No. 14-882

In the Supreme Court of the United States

U.S. LEGAL SERVICES GROUP, L.P.,

Petitioner,

v.

PATRICIA ATALESE,

Respondent.

On Petition for a Writ of Certiorari to the New Jersey Supreme Court

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND THE NEW JERSEY CIVIL JUSTICE INSTITUTE AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND THE NEW JERSEY CIVIL JUSTICE INSTITUTE AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

INTEREST OF THE *AMICI CURIAE*

The Chamber of Commerce of the United States of America is the world's largest federation of businesses and associations. The Chamber represents three hundred thousand direct members and indirectly represents an underlying membership of more than three million U.S. businesses and professional organizations of every size and in every economic sector and geographic region of the country. An important function of the Chamber is to represent the interests of its members in matters before the courts, Congress, and the Executive Branch.[1]

To that end, the Chamber regularly files *amicus curiae* briefs in cases that raise issues of vital concern to the Nation's business community, including cases involving the enforceability of arbitration agreements. See, *e.g.*, *American Express Co.* v. *Italian Colors Restaurant*, 133 S. Ct. 2304 (2013); *Oxford Health Plans LLC* v. *Sutter*, 133 S. Ct. 2064 (2013); *AT&T Mobility LLC* v. *Concepcion*, 131 S. Ct. 1740 (2011).

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[1] Pursuant to Rule 37.6, *amici* affirm that no counsel for a party authored this brief in whole or in part and that no person other than *amici*, their members, or their counsel made a monetary contribution to its preparation or submission. Counsel of record for all parties received notice at least 10 days prior to the due date of the intention to file this brief. The parties' letters consenting to the filing of this brief have been filed with the Clerk's office.

The New Jersey Civil Justice Institute ("NJCJI," or "The Institute") has a strong interest in the clear, predictable, and fair application of the law. NJCJI is a statewide, nonpartisan association of over 100 individuals, businesses, and trade and professional organizations dedicated to improving New Jersey's civil justice system. The Institute believes that a balanced civil justice system and the enforcement of agreements to engage in alternative dispute resolution fosters public trust and motivates professionals, sole proprietors, and businesses to provide safe and reliable products and services, while ensuring that injured people are compensated fairly for their losses. Such a system is critical to ensuring fair resolution of conflicts, maintaining and attracting jobs, and fostering economic growth in New Jersey.

For these reasons, many of *amici*'s members and affiliates regularly employ arbitration agreements in their contracts. Arbitration allows them to resolve disputes promptly and efficiently while avoiding the costs associated with traditional litigation. Arbitration is speedy, fair, inexpensive, and less adversarial than litigation in court. Based on the legislative policy reflected in the Federal Arbitration Act ("FAA") and this Court's consistent endorsement of arbitration, *amici*'s members have structured millions of contractual relationships around arbitration agreements.

The benefits of these agreements are threatened by state-law rules like the one announced below, which conditions the enforcement of arbitration agreements on disclosure requirements that do not apply uniformly to all contracts. Although this Court has consistently condemned discriminatory rules of

this sort, some state courts continue to resist. Accordingly, *amici* have a strong interest in advocating for summary reversal of rulings, like the one here, that represent outright defiance of this Court's FAA precedents.

INTRODUCTION AND SUMMARY OF ARGUMENT

As this Court has observed, "the judicial hostility towards arbitration that prompted the FAA had manifested itself in 'a great variety' of 'devices and formulas.'" *Concepcion*, 131 S. Ct. at 1747 (citation omitted). The New Jersey Supreme Court's decision in this case represents one such device; indeed, it is one that this Court already has denounced.

Specifically, the court below held that a clear and unambiguous contract clause requiring that 'any dispute relating to the underlying agreement shall be submitted to arbitration and the resolution of that forum shall be binding and final" cannot be enforced unless it includes additional language warning that "consumers * * * are giving up their right to seek relief in a judicial forum." Pet. App. 1a, 5a (internal quotation marks and emphasis omitted). In the absence of this extra warning, the New Jersey court held, there cannot be "mutual assent" to arbitration, thus "render[ing] the arbitration [provision] unenforceable." *Id.* at 16a–17a.

The New Jersey rule requiring a warning of the consequences of one contract term (arbitration) in exhaustive detail is not a rule that applies to all other contract terms. Rather, the ordinary rules governing contracts in New Jersey provide that "[a] party who enters into a contract in writing, without any

fraud or imposition being practiced upon him, is *conclusively presumed* to understand and assent to its terms and legal effect." *Rudbart* v. *New Jersey Dist. Water Supply Comm'n*, 605 A.2d 681, 685 (N.J. 1992) (per curiam) (emphasis added; internal quotation marks omitted). This rule, moreover, is necessitated by common sense and practical experience. If special warnings were required regarding the implications of all aspects of a contract, the use of form contracts—a necessity in the modern economy—could grind to a halt. In fact, however, the sweep of the New Jersey court's ruling is limited almost entirely to arbitration provisions rather than other contract terms.

That court's insistence that the implications of a term requiring arbitration of disputes be explained to the post hoc satisfaction of the courts directly contradicts the FAA and this Court's precedents—most notably *Doctors' Associates, Inc.* v. *Casarotto*, 517 U.S. 681 (1996). Indeed, the New Jersey court's rule is just another version of the "special notice requirement[s]" for arbitration that the FAA held to be preempted in *Casarotto*. *Id.* at 687. Because the conflict between the New Jersey court's decision and *Casarotto* is so palpable, and because the New Jersey court's decision has already invited intermediate appellate courts to disregard the FAA, the Court should summarily reverse the decision below, as it has done in several other recent cases of state-court resistance to this Court's FAA precedents.

ARGUMENT

A. The Decision Below Conflicts With This Court's Precedents Interpreting The FAA.

1. Congress enacted the FAA to "reverse the longstanding judicial hostility to arbitration agreements," "to place [these] agreements upon the same footing as other contracts," and to "manifest a liberal federal policy favoring arbitration agreements." *EEOC* v. *Waffle House, Inc.*, 534 U.S. 279, 289 (2002) (internal quotation marks omitted); see also *American Express*, 133 S. Ct. at 2308-2309 ("Congress enacted the FAA in response to widespread judicial hostility to arbitration.") (citing *Concepcion*, 131 S. Ct. at 1745).

At the heart of the FAA is Section 2, which "embodies a clear federal policy of requiring arbitration unless the agreement to arbitrate * * * is revocable 'upon such grounds as exist at law or in equity for the revocation of *any* contract.'" *Perry* v. *Thomas*, 482 U.S. 483, 489 (1987) (emphasis added) (quoting 9 U.S.C. § 2; emphasis added by the Court). "By enacting § 2, * * * Congress precluded States from singling out arbitration provisions for suspect status, requiring instead that such provisions be placed 'upon the same footing as other contracts.'" *Casarotto*, 517 U.S. at 687 (quoting *Scherk* v. *Alberto-Culver Co.*, 417 U. S. 506, 511 (1974)).[2]

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[2] See also, *e.g.*, *Marmet Health Care Ctr., Inc.* v. *Brown*, 132 S. Ct. 1201, 1204 (2012) (per curiam); *Concepcion*, 131 S. Ct. at 1745; *Rent-A-Center, West, Inc.* v. *Jackson*, 561 U.S. 63, 67-68 (2010); *Arthur Andersen LLP* v. *Carlisle*, 556 U.S. 624, 630 (2009); *Preston* v. *Ferrer*, 552 U.S. 346, 356 (2008); *Buckeye*

In other words, Section 2's savings clause "permits agreements to arbitrate to be invalidated by 'generally applicable contract defenses, such as fraud, duress, or unconscionability,' but not by defenses that apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue." *Concepcion*, 131 S. Ct. at 1746 (quoting *Casarotto,* 517 U.S. at 687). More broadly, Section 2 prohibits States from "impos[ing] prerequisites to enforcement of an arbitration agreement that are not applicable to contracts generally." *Preston* v. *Ferrer*, 552 U.S. 346, 356 (2008).

Applying these principles, this Court held in *Casarotto* that the FAA preempts any rule of state law that imposes on arbitration provisions notice requirements that do not apply to all other contract clauses. *Casarotto* involved an arbitration provision—virtually identical to the provision considered by the New Jersey court in this case—that required that "[a]ny controversy or claim arising out of or relating to this contract or the breach thereof shall be settled by Arbitration." 517 U.S. at 683 (internal quotation marks omitted).[3] The Montana Supreme

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Check Cashing, Inc. v. *Cardegna*, 546 U.S. 440, 443 (2006); *Allied-Bruce Terminix Cos.* v. *Dobson*, 513 U.S. 265, 270-271 (1995); *Volt Info. Scis., Inc.* v. *Bd. of Trs. of Leland Stanford Jr. Univ.*, 489 U.S. 468, 474 (1989); *Perry*, 482 U.S. at 492 n.9; *Southland Corp.* v. *Keating*, 465 U.S. 1, 10-11 & 16 n.11 (1984).

[3] The full text of the arbitration provision in *Casarotto* states:

> Any controversy or claim arising out of or relating to this contract or the breach thereof shall be settled by Arbitration in accordance with the Commercial Arbitration Rules of the American Arbitration Association at a hearing to be held in Bridgeport, Connecticut and judgment upon an award rendered by the Arbitra-

Court refused to enforce this agreement based on a Montana statute that required contracts containing arbitration clauses to declare that fact in "underlined capital letters on the first page of the contract." *Ibid.* (internal quotation marks omitted). That requirement, the Court held, "directly conflict[ed] with § 2 of the FAA because the State's law conditions the enforceability of arbitration agreements on compliance with a *special notice requirement not applicable to contracts generally*." *Id.* at 687 (emphasis added).

2. The New Jersey Supreme Court's holding in this case similarly conditions the enforceability of arbitration agreements on compliance with special notice requirements—and is therefore every bit as preempted as the Montana statute at issue in *Casarotto*. The court below ruled that, to be enforceable, the arbitration "clause, at least in some general and sufficiently broad way, *must explain* that the plaintiff is giving up her right to bring her claims in court or have a jury resolve the dispute." Pet. App. 15a–16a (emphasis added). The contract in this case, as the intermediate appellate court concluded and the New Jersey Supreme Court acknowledged, "'clearly and unambiguously stated that any dispute relating to the underlying agreement shall be submitted to arbitration and the resolution of that forum

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> tor(s) may be entered in any court having jurisdiction thereof. The commencement of arbitration proceedings by an aggrieved party to settle disputes arising out of or relating to this contract is a condition precedent to the commencement of legal action by either party. The cost of such a proceeding will be borne equally by the parties.

J.A. 75, *Doctor's Associates.* v. *Casarotto*, 517 U.S. 681 (1996) (No. 95-559), *available at* 1996 WL 33414128.

shall be binding and final.'" *Id.* at 5a (emphasis and ellipsis omitted). Indeed, this contractual language is materially indistinguishable from the language of the arbitration provision involved in *Casarotto*. But the New Jersey Supreme Court nonetheless declared that "clear[]" and "unambiguous[]" statement insufficient, because "an average member of the public may not know—without some explanatory comment—that arbitration is a substitute for the right to have one's claim adjudicated in a court of law." *Id.* at 10a.

The court denied that it had "prescribed [a] set of words" needed to form an arbitration agreement. Pet. App. 16a. But it nonetheless declared that "[w]hatever words compose an arbitration agreement, they must be clear and unambiguous that a consumer is choosing to arbitrate disputes rather than have them resolved in a court of law." *Ibid.* The court concluded that the absence of "wording" that "clearly and unambiguously signal[s] to [a] plaintiff that she was surrendering her right to pursue her statutory claims in court * * * renders the arbitration agreement unenforceable." *Id.* at 17a; see also *id.* at 2a.

Not surprisingly, the New Jersey Appellate Division has taken the New Jersey Supreme Court's decision at face value and has begun imposing a special notice requirement on arbitration agreements. Indeed, in the several months since the decision below, the Appellate Division has already issued three decisions refusing to enforce clear and unambiguous arbitration agreements because they failed to include a special warning regarding the waiver of rights associated with litigation in court. See *Dispenziere* v. *Kushner Cos.*, 101 A.3d 1126, 1128, 1131 (N.J. Super.

Ct. App. Div. 2014) (relying on lack of special warning to refuse to enforce contract stating that "[a]ny disputes arising in connection with this Agreement [with certain exceptions] * * * shall be heard and determined by arbitration before a single arbitrator * * * [and] [t]he decision of the arbitrator shall be final and binding") (internal quotation marks omitted); *Rosenthal* v. *Rosenblatt*, 2014 WL 5393243, at *5, *6 (N.J. Super Ct. App. Div. Oct. 24, 2014) (refusing to enforce arbitration agreement providing that "all disputes, claims and controversies between the parties hereto * * * shall be exclusively resolved as provided herein through mediation and arbitration" because, among other reasons, the agreement "fails to include the language our Supreme Court has deemed crucial to an effective waiver of the right to litigate in court") (internal quotation marks omitted); *Kelly* v. *Beverage Works NY Inc.*, 2014 WL 6675261, at *2-3 (N.J. Super. Ct. App. Div. Nov. 26, 2014) (denying enforcement of arbitration provision in collective bargaining agreement that does not contain special warning required by decision below).

This rule of New Jersey law—that arbitration provisions cannot be enforced unless they expressly state that their consequence is to waive litigation in court—runs directly afoul of *Casarotto*, which held that "'state legislation requiring *greater information or choice* in the making of agreements to arbitrate than in other contracts is preempted.'" 517 U.S. at 687 (emphasis added) (quoting 2 Ian R. Macneil *et*

to an arbitration provision. As the Court has said in a related context, "[w]hat States may not do is decide that a contract is fair enough to enforce all its basic terms (price, service, credit), but not fair enough to enforce its arbitration clause. * * * [T]hat kind of policy would place arbitration clauses on an unequal 'footing,' directly contrary to the [FAA's] language and Congress' intent." *Allied-Bruce Terminix Cos.* v. *Dobson*, 513 U.S. 265, 281 (1995).

The New Jersey Supreme Court asserted that "under our state contract law, we impose no greater burden on an arbitration agreement than on any other agreement waiving constitutional or statutory rights." Pet. App. 17a. Yet a rule that is limited to provisions that waive statutory or constitutional rights—especially ones that by their nature cannot coexist with arbitration (such as jury trials or litigation in court)—is not a rule of general applicability. See Alan Scott Rau, *Arbitral Power and the Limits of Contract: The New Trilogy*, 22 AM. REV. OF INT'L ARB. 435, 537 n.340 (2011) ("[I]t would be sensible to recognize that any heightened standard for 'jury waiver,' as it would disproportionately affect agreements to arbitrate, should be preempted on that ground alone.").

To the contrary, the New Jersey Supreme Court's rule that special warning must be given that arbitration displaces jury trials necessarily rests on "the tired assertion that arbitration should be disparaged as second-class adjudication." *Carbajal* v. *H&R Block Tax Servs., Inc.*, 372 F.3d 903, 906 (7th Cir. 2004). But as this Court explained nearly three decades ago, "we are well past the time when judicial suspicion of the desirability of arbitration and of the

competence of arbitral tribunals inhibited the development of arbitration as an alternative means of dispute resolution." *Mitsubishi Motors Corp.* v. *Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 626-627 (1985). The "mistrust of the arbitral process" reflected in the conditions imposed by the court below on the enforceability of arbitration agreements long "has been undermined by" this Court's "arbitration decisions." *Gilmer* v. *Interstate/Johnson Lane Corp.*, 500 U.S. 20, 34 n.5 (1991).

3. If the decision below were allowed to stand, the injury to the federal policy favoring the enforcement of arbitration agreements would be significant. As noted above (at 8-9), New Jersey courts already are refusing to uphold arbitration agreements that "fail[] to include the language [that the New Jersey] Supreme Court has deemed crucial." *Rosenthal*, 2014 WL 5393243, at *6. Courts in other States have imposed similarly impermissible special notice requirements. *E.g.*, *Harris* v. *Bingham McCutchen LLP*, 154 Cal. Rptr. 3d 843, 844, 847, 849 (Ct. App. 2013) (holding under Massachusetts law that "plaintiff was not required to arbitrate her antidiscrimination claims" because agreement to arbitrate "'any legal disputes'" did "not state in clear and unmistakable terms that plaintiff was waiving or limiting any statutory antidiscrimination rights"), cert. denied, 134 S. Ct. 903 (2014).

Reversal of the decision below is therefore necessary to ensure that other States do not follow New Jersey's lead by erecting one set of rules governing the formation of arbitration agreements while maintaining a different set of rules for all other contracts. At the same time, however, courts will remain free to

police arbitration agreements for substantive fairness by applying established contract-law principles, including unconscionability, so long as those principles apply evenhandedly to all contracts. See *Marmet Health Care Ctr., Inc.* v. *Brown*, 132 S. Ct. 1201, 1204 (2012) (per curiam) ("On remand, the West Virginia court must consider whether, absent that general public policy, the arbitration clauses * * * are unenforceable under state common law principles that are not specific to arbitration and preempted by the FAA.").

B. Summary Reversal Is Warranted.

For the reasons discussed above, the New Jersey court's decision flouts this Court's precedents—especially *Casarotto*. Under such circumstances, this Court has not hesitated to summarily reverse, doing so on at least four occasions. See *Nitro-Lift Techs., LLC* v. *Howard*, 133 S. Ct. 500, 501, 503 (2012) (per curiam) (reversing Oklahoma Supreme Court's decision that "disregard[ed] this Court's precedents on the FAA" and severability); *Marmet*, 132 S. Ct. at 1204 (reversing West Virginia Supreme Court of Appeals' holding that personal injury and wrongful death claims were not subject to arbitration); *KPMG LLP* v. *Cocchi*, 132 S. Ct. 23, 26 (2011) (per curiam) (reversing Florida appellate court ruling that "failed to give effect to the plain meaning of the [FAA] and to [this Court's] holding in" *Dean Witter Reynolds Inc.* v. *Byrd*, 470 U.S. 213 (1985)); *Citizens Bank* v. *Alafabco, Inc.*, 539 U.S. 52, 56-58 (2003) (per curiam) (reversing Alabama Supreme Court's "misguided" approach to FAA's "involving commerce" requirement in light of this Court's decision in *Allied-Bruce*).

As this Court has explained, "[s]tate courts rather than federal courts are most frequently called upon to apply the [FAA], including the Act's national policy favoring arbitration. It is a matter of great importance, therefore, that state supreme courts adhere to a correct interpretation of the legislation." *Nitro-Lift Techs.*, 133 S. Ct. at 501. Unfortunately, however, the history of the FAA shows that this Court's continued vigilance is necessary to prevent state courts from reincarnating "a great variety" of purportedly neutral "devices and formulas" for undermining arbitration agreements. *Concepcion*, 131 S. Ct. at 1747 (internal quotation marks omitted).

The Supremacy Clause demands as much: "When this Court has fulfilled its duty to interpret federal law, a state court may not contradict or fail to implement the rule so established. See U.S. Const., Art. VI, cl. 2." *Marmet*, 132 S. Ct. at 1202.

In this case, the New Jersey Supreme Court fashioned a rule that cannot be reconciled with this Court's holding in *Casarotto*. Because the decision below so clearly conflicts with this Court's precedents and, if left unchecked, would serve as an invitation for state courts to circumvent the FAA, the Court should summarily reverse that decision.

CONCLUSION

The petition for a writ of certiorari should be granted, and the judgment of the New Jersey Supreme Court should be reversed.

Respectfully submitted.

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FEBRUARY 23, 2015

***Morgan v. Sanford Brown Inst.*, N.J. Supreme Court Docket No. 075074.**
Under the terms of this arbitration agreement, can plaintiffs be compelled to arbitrate all claims related to their enrollment agreements, including their Consumer Fraud Act claims?
Certification granted: 1/23/15

410 N.J.Super. 280
Superior Court of New Jersey,
Appellate Division.

UNITED CONSUMER FINANCIAL SERVICES COMPANY,
Plaintiff–Appellant/Cross–Respondent,
v.
William CARBO, individually, and on behalf of all others similarly situated, Defendant/Third–Party Plaintiff–Respondent/Cross–Appellant,
v.
A & M Merchandising, Inc.; J & N Distributing Co., Inc.; FDR Ent., Inc./Tri County Kirby; Xcel Enterprises, L.L.C.; AKVAC, L.L.C.; Union County Kirby Co.; A & C Distributing Co., Inc.; Omega Trading, Inc.; Advance Kirby; N.J. Easy–VAC. Co.; MSB Marketing; BCK Distributors, Inc.; Omni Concepts, Inc.; J and N Distributing Co.; J.W. Marketing & Dist., Inc.; JMC Generation System, L.L.C.; Prestige Merchandising Co., Inc.; K Quality Corp.; BES Assoc., Inc.; All City Vacuum, Inc.; Pocono Kirby; TPR Enterprises; RAS Management, Inc.; Generation Three; Brookdale Merchandising; Brooklyn/Queens Merchandising; R–W Merchandising; LBA Distributors; MGM Distributors; K.Q. Systems; Kirby Center of Orange County; and K & M Distributing Company, Third–Party Defendants–Respondents/Cross–Appellants,
and
Northern Marketing Group, Inc.; Sulco Industries, Inc.; Interstate Marketing, Inc.; A & B International; E.C.M.A., Inc.; D & M Home Care Products Ent.; Kirby of Newburg; Vini Merchandising, Inc.; Aaaction Kirby, Inc.; A & H Merchandising, Inc.; D. Wood Merchandising, inc.; MB Merchandising, Inc.; Kirby of Rockland; F.Y.F. Ent. d/b/a Berlin Kirby; NKA Enterprises; JBK Kirby Distributing; A & T International, Inc.; LBS Enterprises; Hudson Valley Kirby; Anecsa Success Corp.; Premiere II Series, Inc.; Intercity Marketing, Inc.; RHM Marketing, Inc.; K & J Associates; D.M.C. Enterprises, Inc.; D.J. Enterprises; J.D.K. Distributors; AVKKO Enterprises; South Bay Distributing; D.C. Distributors; K.D.C. Associate Kirby, Inc.; JDF & Associates, Inc.; Domestic Technologies; E.J. Lim Enterprises, Inc.; P.M.C. Enterprises; and A.V. Associates, Third–Party Defendants.

Argued May 19, 2009. | Decided Oct. 22, 2009.

Synopsis
Background: Finance company brought action against consumer to collect unpaid amounts on retail installment contract to purchase a vacuum cleaner. Consumer counterclaimed, and filed third party complaint against vacuum cleaner distributors. The Superior Court, Law Division, Hudson County, granted consumer's motion to certify a class action, and, after ruling on various motions, entered judgment for consumers. Finance company appealed, and distributors and consumers cross-appealed.

Holdings: The Superior Court, Appellate Division, Grall, J.A.D., held that:

[1] trial court did not abuse its discretion by certifying class action;

[2] duration of cooling-off period and certified mail requirement to rescind a contract under Door-to-Door Retail Installment Sales Act (DDRISA) were preempted by Federal Trade Commission (FTC) regulation on door-to-door sales;

[3] notice of cancellation provided by finance company violated DDRISA;

[4] form contract allowed sellers to charge unauthorized check return charges in violation of Retail Installment Sales Act (RISA);

[5] inclusion of check return charge prohibited by RISA violated a clearly established legal right of consumers, for purposes of a civil penalty under the Truth-in-Consumer Contract, Warranty and Notice Act (TCCWNA);

[6] finance company and distributors were not entitled to decertification because of the aggregate size of the civil penalties awarded to consumers; and

[7] award of aggregate civil penalty in the amount of $1,684,500 was not so disproportionate to the wrong as to amount to a denial of due process.

Affirmed in part, reversed in part, and remanded.

West Codenotes

Preempted

N.J.S.A. 17:16C–61.5(a)(1)N.J.S.A. 17:16C–61.6(b)N.J.S.A. 17:16C–61.6(e)

Attorneys and Law Firms

****13** Jeremiah L. O'Leary, argued the cause for appellant/cross-respondent (Finazzo Cossolini O'Leary Meola & Hager, attorneys; Mr. O'Leary and David J. DiSabato, Short Hills, of counsel and on the brief).

Andrew R. Wolf, North Brunswick, argued the cause for respondent/cross-appellant William Carbo (Galex Wolf, attorneys; Mr. Wolf, Henry P. Wolfe, Lora B. Glick and Jonathan A. Kipnis, Brunswick, on the brief).

William H. Trousdale, Newark, argued the cause for respondents/cross-appellants A & M Merchandising, Inc., et al. (Tompkins, McGuire, Wachenfeld & Barry, attorneys; Mr. Trousdale, of counsel; Brian M. English, on the brief).

Before Judges SKILLMAN, GRAVES and GRALL.

Opinion

The opinion of the court was delivered by

GRALL, J.A.D.

***291** This appeal is from orders entered on claims pursued by a certified class consisting of consumers who entered into substantially similar retail installment sales contracts with distributors who sell Kirby vacuum cleaners door-to-door.[1] The trial court's ***292** rulings on class certification, liability, injunctive relief, damages, counsel fees and pre-and post-judgment interest were made on a series of motions decided between May 21, 2004 and June 6, 2007. None of the issues were tried.

****14** Plaintiff United Consumer Financial Services Company (UCFSC), which accepts assignments of retail installment contracts obtained by door-to-door sellers of Kirbys, commenced the litigation to collect the amount defendant William Carbo owed on his retail installment contract with door-to-door seller A & M Merchandising, Inc. (A & M). Carbo filed a counterclaim against UCFSC and a third-party complaint against A & M, and he obtained class certification authorizing the identification of additional Kirby distributors who used similar contracts and the consumers who accepted them.

The class prevailed on claims alleging violations of the Door–to–Door Retail Installment Sales Act, *N.J.S.A.* 17:16C–61.1 to –61.9; the Retail Installment Sales Act, *N.J.S.A.* 17:16C–1 to –61; and the Truth–in–Consumer Contract, Warranty and Notice Act, *N.J.S.A.* 56:12–14 to –18. Pursuant to *N.J.S.A.* 56:12–17, each of the 16,845 class members was awarded a civil penalty of $100, without pre-or post-judgment interest, and is exempt from payment of interest due during the three-year period of a preliminary injunction that restrained enforcement of the contracts. UCFSC and the distributors are jointly and severally liable for the civil penalty. In addition, they must pay class counsel $25,852.10 for costs and a fee of $1,008,583.20, which includes fifty-percent enhancement of the lodestar. Injunctive relief was also awarded; the permanent injunction bars use of the contract in its present form.[2] An order implementing the judgment was entered on June 6, 2007.

Class claims alleging violations of the Consumer Fraud Act, *N.J.S.A.* 56:8–1 to –20, and the Licensed Lenders Act, ***293** *N.J.S.A.* 17:11C–1 to –50; fraud; breach of contract; violation of the covenant of good faith and fair dealing; and unjust enrichment were dismissed. UCFSC's claim against Carbo was settled and dismissed after the class claims were resolved.

UCFSC appeals and the third-party defendant distributors cross-appeal; both challenge rulings in favor of the class. Carbo cross-appeals claiming error based on the dismissal of class claims and the denial of rescission and pre-and post-judgment interest.

The facts material to the class claims are not in dispute. The retail installment sales contracts entered into by the members of the class and their respective distributors are substantially the same, and the consumers were given substantially similar notices and forms relating to their right to cancel the contract within three business days of the purchase.

The contracts are in a form prescribed by UCFSC for use by the distributors from whom it accepts assignments. They permit "assignment to [UCFSC]" which is then "considered a creditor" of the consumer. Each contract reserves the distributor's right to cancel the sale if it is "not assigned to [UCFSC], or any other creditor." UCFSC also gives the distributor a manual that includes guidance on completion of the form contracts and notices.

Carbo purchased his Kirby and signed his retail installment sales contract with A & M through a door-to-door seller on September 16, 2000. The price of his Kirby, excluding sales tax, was $1600; with the interest chargeable under the retail installment sales contract, a total of $2259 was due if all payments were made timely and without penalty. The contract authorizes

a $20 charge if a check submitted as payment **15 "is dishonored for any reason" and a $10 penalty for late payments.

Carbo's first language is Spanish, and both of the salesmen who visited Carbo's home spoke Spanish. The form contract they entered into was printed in Spanish, and Carbo received one copy of that contract printed in that language.

*294 The contract Carbo signed advises that he may cancel the transaction at any time prior to midnight of the third business day. That advice is printed in capital letters and ten-point bold type directly below the space provided for his signature. In addition, immediately below, there are two identical "notice[s] of cancellation," one which Carbo could use if he opted to cancel and one he could retain. These "notices of cancellation" describe what Carbo had to do to cancel and the seller's obligation to accept, refund the payment and terminate any security interest.

The "notice of cancellation" provides no information identifying the contract or the sale other than the name and address of the buyer and seller. The product and price are stated only in the contract.

As noted above, the contracts and "notices of cancellation" given to the 16,845 class members are substantially similar to Carbo's in all material respects. When the contracts and "notices of cancellation" were printed in a language other than English, that language was used throughout.

UCFSC designed its contracts and "notices of cancellation" to conform with rules adopted by the Federal Trade Commission (FTC), 16 *C.F.R.* §§ 429.1 to 429.3. UCFSC's manual for distributors advises that "individual state law applies when it is more favorable to the consumer," but the UCFSC forms prepared for use in New Jersey include no special terms, notices or cancellation forms.

There is no evidence that any consumer was dissatisfied with the Kirby purchased, attempted to exercise and was denied the right to rescind or was charged a fee for submitting a check or other instrument for payment that was subsequently dishonored.

I

We first consider the challenge to class certification. The distributors, other than A & M, contend that the trial court erred in authorizing Carbo to maintain a class action against them *295 because they were not involved in his transaction in any way. We reject that argument substantially for the reasons stated in written opinions filed with orders dated May 21, 2004, June 23, 2005 and March 9 and May 30, 2007.[3]

[1] [2] Class certification is a matter committed to the sound exercise of the trial court's discretion. *See Muise v. GPU, Inc.*, 371 *N.J.Super.* 13, 29, 851 *A.*2d 799 (App.Div.2004) (noting that the Supreme Court applied this standard of review to a ruling on class certification in *In re Cadillac V8–6–4 Class Action*, 93 *N.J.* 412, 436–37, 461 *A.*2d 736 (1983)). *Rule* 4:32–1 must be liberally construed, and a class action is the favored means of adjudicating numerous claims involving a common nucleus of facts for which each individual's recovery will be small. *Iliadis v. Wal–Mart Stores, Inc.*, 191 *N.J.* 88, 103–06, 922 *A.*2d 710 (2007).

[3] The common nucleus of fact in this class action is the content and form of the contract and notices prepared by UCFSC **16 and used in each transaction. The distributors are each joined in the action based on their use of the UCFSC-approved documents in one or more separate transactions with one or more members of the class. The link that each distributor has with a member of the class is the UCFSC-approved documents that are the source of the class claims. Courts of other states considering class claims based on a single business protocol established by one co-defendant have permitted the class claims to proceed against multiple defendants who have used the co-defendant's protocol in separate transactions with different members of the class. *See, e.g., Weld v. Glaxo Wellcome, Inc.*, 434 *Mass.* 81, 746 *N.E.*2d 522, 529–31 (2001) (finding "juridical links" adequate to permit a plaintiff who dealt with only one drug manufacturer that participated in a protocol developed by CVS to pursue class claims against other drug manufacturers who participated in the same CVS protocol in *296 dealing with other members of the class). The trial court relied on that precedent, and given this State's liberal rules governing class actions, *Iliadis, supra*, 191 *N.J.* at 103–06, 922 *A.*2d 710, and standing, *James v. Arms Tech., Inc.*, 359 *N.J.Super.* 291, 320–21, 820 *A.*2d 27 (App.Div.2003), we cannot conclude that the trial court abused its discretion. The argument presented by the distributors to the contrary requires no additional discussion beyond that provided by the trial court. *R.* 2:11–3(e)(1)(E).

II

UCFSC and the distributors object to the trial court's grant of summary judgment in favor of the class on various violations of the Door–to–Door Retail Installment Sales Act (DDRISA), *N.J.S.A.* 17:16C–61.1 to –61.9. In accordance with *Brill v. Guardian Life Ins. Co. of Am.*, 142 *N.J.* 520, 666 *A.*2d 146 (1995), we consider whether the class was entitled to judgment as a matter of law. In this case, that determination depends not only upon whether UCFSC and the distributors violated DDRISA but also whether the provisions of DDRISA at issue can be enforced or are preempted by regulations adopted by the FTC, 16 *C.F.R.* §§ 429.1 to 429.3.

A

The Legislature enacted DDRISA in recognition of "often unethical persuasion of certain door-to-door sellers" and to enable all consumers who make a purchase in that circumstance "to reconsider ... within a reasonable period." *N.J.S.A.* 17:16C–61.3. Thus, DDRISA mandates a "cooling-off period" during which the consumer has a statutory right to rescind the transaction. *Ibid.* The protection is prophylactic; it applies to all covered sales regardless of the quality of the product or the tactics employed. *N.J.S.A.* 17:16C–61.5. To give effect to the right, DDRISA requires the seller to give the buyer notice of the right and how it can be exercised, in a specified form, at the time of the transaction. *N.J.S.A.* 17:16C–61.6.

***297** Four years after the enactment of DDRISA in 1968, *L.* 1968, *c.* 223, the FTC, in the exercise of its authority pursuant to 15 *U.S.C.A.* § 45, adopted rules mandating a similar "cooling-off period" and similarly obligating sellers to give consumers notice of their rights to cancel. 16 *C.F.R.* §§ 429.0 to 429.2; 37 *Fed.Reg.* No. 22934 (Oct. 26, 1972); *see generally Am. Fin. Servs. Ass'n v. FTC*, 767 *F.*2d 957, 966 (D.C.Cir.1985) (discussing the authority delegated to the FTC), *cert. denied*, 475 *U.S.* 1011, 106 *S.Ct.* 1185, 89 *L.Ed.*2d 301 (1986); *Crystal v. West & Callahan, Inc.*, 328 *Md.* 318, 614 *A.*2d 560, 564–65 (1992) (discussing the history of the FTC's action to regulate door-to-door sales and its impact upon state law).

****17** The New Jersey Legislature has not opted to revise DDRISA to mirror the FTC rule. While the FTC rules and DDRISA are similar, they are not identical, and where there are differences, preemption is a preliminary question.

[4] [5] By force of the Supremacy Clause of the United States Constitution, *U.S. Const.* art. VI, cl. 2; *Fid. Fed. Sav. & Loan Ass'n v. de la Cuesta*, 458 *U.S.* 141, 152, 102 *S.Ct.* 3014, 3022, 73 *L.Ed.*2d 664, 674 (1982), Congress and federal agencies acting within the scope of their authority may supersede or "preempt" state laws regulating the same conduct. *Dewey v. R.J. Reynolds Tobacco Co.*, 121 *N.J.* 69, 77, 577 *A.*2d 1239 (1990); *see La. Pub. Serv. Comm'n v. FCC*, 476 *U.S.* 355, 369, 106 *S.Ct.* 1890, 1898–99, 90 *L.Ed.*2d 369, 382 (1986); *R.F. v. Abbott Labs.*, 162 *N.J.* 596, 619, 745 *A.*2d 1174 (2000). Or, the federal government may share regulation of the field, allowing the states to act. *See Rice v. Santa Fe Elevator Corp.*, 331 *U.S.* 218, 230, 67 *S.Ct.* 1146, 1152, 91 *L.Ed.* 1447, 1459 (1947). The intent of Congress or the federal agency is determinative on the question of preemption. *Dewey, supra*, 121 *N.J.* at 77, 577 *A.*2d 1239.

In adopting its "cooling-off period" rules, the FTC elected to share the field. The FTC reached that decision after recognizing that thirty-three states, including New Jersey, had adopted "cooling-off legislation" and noting the difficulties inherent in permitting ***298** differences in "essential provisions," such as the duration of the period, and the mechanics involved, such as "forms of notices." 37 *Fed.Reg.* at 22935 & n. 6, 22960. Nonetheless, the FTC opted to seek uniformity by encouraging rather than compelling "the various States to eliminate or change those requirements of their respective laws which are inconsistent with [its] rule." *Ibid.; see id.* at 22957–60 (discussing the competing views expressed during the rulemaking process).

The present FTC rule includes an explicit statement on preemption. 16 *C.F.R.* § 429.2(b) provides:

> This part will not be construed to annul, or exempt any seller from complying with, the laws of any State or the ordinances of a political subdivision thereof that regulate door-to-door sales, except to the extent that such laws or ordinances, if they permit door-to-door selling, are directly inconsistent with the provisions of this part. Such laws or ordinances which do not accord the buyer, with respect to the particular transaction, a right to cancel a door-to-door sale that is substantially the same or greater than that provided in this part, which permit the imposition of any

> fee or penalty on the buyer for the exercise of such right, or which do not provide for giving the buyer a notice of the right to cancel the transaction in substantially the same form and manner provided for in this part, are among those which will be considered directly inconsistent.

Under this rule, a state-mandated deviation from the FTC rule is not preempted if it favors the consumer and does not preclude compliance with the FTC rule. FTC, ADVISORY OPINION: *Possible conflict, as to notice requirements, between State law and FTC's Trade Regulation Rule Concerning A Cooling–Off Period for Door–to–Door Sales (16 C.F.R. 429*) (May 20, 1975), 85 *F.T.C.* 1215 (1975).[4] "[L]anguage in a State notice, the effect of which is to misrepresent in any manner the buyer's right to cancel under the [FTC's] Rule, must be omitted or stricken because ****18** directly inconsistent," but "language in a State notice which informs buyers of State-created rights in addition to those conferred upon them by the Rule, or informs them how to be entitled to those rights, may be included in a new contract or receipt forms...." ***299** *Ibid.* The FTC has no objection to a "composite notice containing elements of both the [FTC] notice and the State notice, provided that the composite notice expresse[s] no restrictions or limitations upon the buyer's right" under the FTC rule and "inform[s] the buyer of a right to cancel at least as extensive as that" stated in the FTC notice.

[6] [7] The FTC's rule and statements on the preemptive effect of its regulation are consistent with the general principle that when a federal entity elects to share the field, state law is preempted if "it is impossible for a private party to comply with both" the federal rule and state law. *Crosby v. Nat'l Foreign Trade Council,* 530 *U.S.* 363, 372, 120 *S.Ct.* 2288, 2294, 147 *L.Ed.*2d 352, 361 (2000). While a state law that interferes with the accomplishment of a federal objective is also preempted, *see Fid. Fed. Sav. & Loan Ass'n, supra,* 458 *U.S.* at 153, 102 *S.Ct.* at 3022, 73 *L.Ed.*2d at 675, it is apparent that a state law requiring additional notice of additional consumer rights in connection with the "cooling-off period" does not so interfere. As noted above, the FTC has acknowledged that forms drafted to comply with its rule and a state law that affords greater protection are not objectionable on that ground.

B

[8] Application of the foregoing standards of preemption to DDRISA leaves no question that the duration of DDRISA's "cooling-off period" and DDRISA's requirement for cancellation by certified mail are preempted by the FTC rule.

The "reasonable period" for "cooling-off" specified in DDRISA ends at "5 p.m. of the third business day following the day on which the retail installment sale or retail installment contract is executed." *N.J.S.A.* 17:16C–61.5(a)(1); *N.J.S.A.* 17:16C–61.6(b). And, to exercise the statutory right to rescind within that period, the consumer must provide "notice of intent to rescind ... by certified mail, return receipt requested, postmarked not later than ***300** 5 p.m." on the final day of the period. *N.J.S.A.* 17:16C–61.5(a)(1); *N.J.S.A.* 17:16C–61.6(b).

The FTC rule is more favorable to the consumer in both respects. Pursuant to 16 *C.F.R.* § 429.1(a), a seller at any door-to-door sale commits "an unfair and deceptive act or practice" if the seller does not inform the buyer of his or her right to "cancel th[e] transaction at any time prior to midnight of the third business day after the date of this transaction." The consumer may cancel by "mail[ing] or deliver[ing] a signed and dated copy of [the FTC] Cancellation Notice or any other written notice, or send[ing] a telegram" to the seller at its place of business. 16 *C.F.R.* § 429.1(b).

DDRISA's shorter "cooling-off period" and more burdensome method of cancellation do not afford New Jersey consumers protection "substantially the same or greater than that provided" in 16 *C.F.R.* § 429.1. 16 *C.F.R.* § 429.2. Accordingly, those provisions are preempted. As the retail installment contracts given to the members of this class complied with the FTC rule in both respects, the trial court quite properly recognized the preemption and did not find a violation of DDRISA on either of those grounds.

****19 C**

The violations of DDRISA the trial court addressed were based on UCFSC's and the distributors' failure to: (1) include notice of additional consumer rights not addressed by the FTC rule, *N.J.S.A.* 17:16C–61.6(b); (2) identify the product purchased and its price, *N.J.S.A.* 17:16C–61.6(a)(1)–(3); (3) comply with DDRISA's specifications for typeface, *N.J.S.A.* 17:16C–61.6(e); and (4) provide a copy of the notice printed in the English language to class members whose contracts were otherwise printed in a language other than English,

N.J.S.A. 17:16C–61.6(d). We conclude that *N.J.S.A.* 17:16C–61.6(e) is preempted and reverse the court's finding of a violation of that provision. Nonetheless, we hold that the "notice of cancellation" prepared by UCFSC and utilized by the distributors must be revised to include the additional information ***301** required by DDRISA and that the distributor must give a copy of the notice printed in the English language to a buyer whose notices are otherwise printed in a different language.

(1)

Notices given to the consumer at the time of a retail installment sales contract are important to achieving the goal of the "cooling-off period," which is to allow consumers to avoid improvident purchases made from door-to-door sellers. These notices, which must be given in duplicate under both schemes, *N.J.S.A.* 17:16C–61.6(a); 16 *C.F.R.* § 429.1(a), serve two functions. One, the notice describes the consumer's rights and obligations, and two, it is the form the consumer can use to cancel the sale. DDRISA uses the term "receipt" to refer to these critical forms and directs use of prominent introductory language, "NOTICE TO BUYER." *N.J.S.A.* 17:16C–61.6. The FTC rule allows the seller to select one of two labels for the form—"NOTICE OF RIGHT TO CANCEL" or "NOTICE OF CANCELLATION." 16 *C.F.R.* § 429.1(b).

The text of the duplicate "NOTICE OF CANCELLATION" appended to the contracts given to Carbo and the members of the class did not include a statement of all of the buyer's rights required by DDRISA. *N.J.S.A.* 17:16C–61.6(b) requires the notice to include, among other things, the following information: "FAILURE TO EXERCISE THIS OPTION [to rescind within the cooling-off period], HOWEVER, WILL NOT INTERFERE WITH ANY OTHER REMEDIES AGAINST THE RETAIL SELLER YOU MAY POSSESS." That information is not required by the FTC rule, which is silent on the question of rights other than those related to the "cooling-off period." 16 *C.F.R.* § 429.1.

[9] The trial court concluded that the omission of information about retention of other remedies violated DDRISA. The court determined that the omitted information "is a significant explanation of consumer rights in New Jersey and clearly serves the legislative purpose" of providing, through DDRISA, "rights and remedies" that are "cumulative" of and do not "abrogate or ***302** impair" existing rights or remedies. *N.J.S.A.* 17:16C–61.9. We agree. Moreover, because the FTC rule does not address rights and remedies of the consumer other than those incidental to cancellation during the "cooling-off period," in this aspect DDRISA is more favorable to the consumer and not inconsistent with the FTC rule. Thus, this provision of DDRISA is not preempted, and the trial court properly found a violation.

(2)

Additional information required by DDRISA but not required by ****20** 16 *C.F.R.* § 429.1 is omitted from the text of the duplicate "notice of cancellation" appended to the UCFSC contracts. The duplicate "receipt" required by DDRISA must include the "seller's name and place of business," a "description of the goods sold" and "[t]he amount of money paid." *N.J.S.A.* 17:16C–61.6(a)(1)–(3). The UCFSC's "notice of cancellation" does not include that description of the transaction; there is no identification of the product purchased or the price. The trial court concluded that information identifying the product and price is a practical measure that facilitates cancellation by identifying the transaction. This is a reasonable interpretation of DDRISA that is consistent with the Legislature's purpose in adopting the law.

[10] Nonetheless, the trial court did not find a violation of *N.J.S.A.* 17:16C–61.6(a)(2)–(3). Instead, as urged by UCFSC and the distributors, the court read the contract and the appended duplicate "notice of cancellation" together, i.e., as one document comprising the "receipt" required by DDRISA. Based upon that reading, the court determined that the information was provided.

[11] The difficulty with this holistic view of the contract and receipt is that the consumer is given a "receipt," to be used to cancel the contract that does not identify the transaction. Accordingly, we conclude that to the extent that this duplicate "notice of cancellation" does not state the product or price, it does not comply with *N.J.S.A.* 17:16C–61.6(a)(2)–(3). Because the FTC rule does not address the issue, this information required by ***303** DDRISA can be included in the "notice of cancellation" without violating the FTC rule.

(3)

UCFSC and the distributors contend the trial court erred in finding a violation of DDRISA based upon typeface

included in the retail installment sales contract. We agree.

DDRISA limits the use of certain typeface. *N.J.S.A.* 17:16C–61.6(e) provides: "The receipt required to be delivered to the retail buyer [other than the specified notice of the buyer's rights] ... shall be in a type-size less than 10 points high and in type other than bold." The violation the trial court found was based on use of the restricted typeface in the text of the contract, not in the "notice of cancellation," which is the "receipt."

[12] [13] This was error. By its unambiguous terms, this limitation applies to the "receipt" not to the retail installment sales contract. There is no reason for a court to give this provision broader reach than its terms permit and its narrow purpose allows. *See Bd. of Educ. of Sea Isle City v. Kennedy,* 196 *N.J.* 1, 12–13, 951 *A.*2d 987 (2008). DDRISA was adopted to supplement the Retail Installment Sales Act (RISA), *N.J.S.A.* 17:16C–1 to –61, in order to address a specific issue in a narrow context—a "cooling-off period" after retail installment sales made door-to-door. *L.* 1968, *c.* 223. Moreover, application of the typeface limitation imposed in *N.J.S.A.* 17:16C–61.6(e) to the text of a retail installment sales contract would create a direct conflict with *N.J.S.A.* 17:16C–24, a provision of RISA that requires a statutorily mandated term of every retail installment sales contract to be printed in bold type of at least ten points. General rules of statutory construction require courts to interpret statutes addressing the same subject so as to minimize not generate conflicts.[5] *See* ****21** *Sea Isle City, supra,* 196 *N.J.* at 12–17, 951 *A.*2d 987. ***304** Accordingly, we hold that *N.J.S.A.* 17:16C–61.6(e) does not apply to limit the print used in the contract.

[14] We further conclude that DDRISA's limitation on ten-point bold type in the "receipt" cannot be applied to the receipt because that limitation is in direct conflict with federal regulation. The FTC rule, like DDRISA, requires notice of the buyer's rights in type that is ten point and bold. *N.J.S.A.* 17:16C–61.6(b); 16 *C.F.R.* § 429.1(b). But, the FTC notice includes information not required by DDRISA—advice about the buyer's right to a refund and obligation to return the goods purchased. *Ibid.* Thus, it would be impossible for a seller to prepare a receipt that complies with *N.J.S.A.* 17:16C–61.6(e) and with 16 *C.F.R.* § 429.1(b). For that reason *N.J.S.A.* 17:16C–61.6(e) is preempted.

Accordingly, we reverse the trial court's finding of a violation of DDRISA based upon *N.J.S.A.* 17:16C–61.6(e).

(4)

[15] The trial court found an additional violation of DDRISA limited to "notice[s] of cancellation" printed in a language other than English. When a DDRISA "receipt" is printed in a language other than English, DDRISA requires delivery of one copy printed in that language and one copy printed in English. *N.J.S.A.* 17:16C–61.6(d). Although the FTC rule requires delivery of two copies of the "notice of cancellation" printed in the same language, 16 *C.F.R.* § 429.1, a seller can comply with both DDRISA and the FTC rule by providing a third copy. Thus, *N.J.S.A.* 17:16C–61.6(d) is not preempted, and we affirm the violation found by the trial court.

(5)

As a consequence of our determinations, the permanent injunction restricting use of contracts like the one at issue here must be modified in conformity with this opinion. The violations of DDRISA with respect to the form of the "notice of cancellation" that may be enjoined are: (1) the omission of advice that a decision not ***305** to cancel will not interfere with any other remedies available against the retail seller; (2) the seller's failure to include a description of the product and the price paid on the "receipt" or "notice of cancellation"; and (3) the failure to deliver a third copy of the "notice of cancellation," printed in the English language, when the duplicate notices are printed in a different language.

In conclusion, we recognize that compliance with DDRISA and the FTC imposes an additional burden on the sellers. Nonetheless, courts must acknowledge that the relative weight of the benefit to consumers and the burdens on sellers obligated to modify forms that comply with the FTC rule is a question for the Legislature and the FTC to resolve.

III

[16] UCFSC contends that the court erred in concluding that the UCFSC form contract violates the Retail Installment Sales Act (RISA), *N.J.S.A.* 17:16C–1 to –61, because it permits the seller to charge a fee of $20 if a check is "dishonored for any reason." We agree with the trial court's interpretation.

N.J.S.A. 17:16C–42(e) states: "The retail installment

contract or retail charge account may provide for a return check fee **22 not to exceed $20 which the holder of the contract may charge the buyer if a check of the buyer is returned to the holder uncollected due to insufficient funds in the buyer's account." RISA further provides that "[n]o retail seller, sales finance company, or holder shall ... *contract for,* collect or receive from any retail buyer, directly or indirectly, any ... amount for costs, charges, ... fees, fines, penalties or other things of value in connection with retail installment contracts ... other than the charges permitted by [RISA]...." *N.J.S.A.* 17:16C–50 (emphasis added). The charge specified in this contract, which can be charged "for any reason," violates *N.J.S.A.* 17:16C–50 because it is not authorized by *N.J.S.A.* 17:16C–42(e) or any other provision of RISA.

It is not material that an unauthorized fee for a returned check was neither assessed against nor collected from a member of the *306 class. *N.J.S.A.* 17:16C–50 was violated by "contract[ing] for" the right to assess a check fee not authorized by *N.J.S.A.* 17:16C–42(e).

IV

The trial court found that the violation of *N.J.S.A.* 17:16C–61.6(e) and RISA gave rise to a private right of action warranting imposition of a $100 civil penalty pursuant to the Truth–in–Consumer Contract, Warranty and Notice Act (TCCWNA), *N.J.S.A.* 56:12–14 to –18. We affirm that determination only with respect to the violation of RISA.

TCCWNA provides:

> No seller, lessor, creditor, lender or bailee shall in the course of his business offer to any consumer or prospective consumer or *enter into any written consumer contract* ... which includes any provision that violates *any clearly established legal right of a consumer or responsibility of a seller, lessor, creditor,* lender or bailee as *established by State or Federal law* at the time the ... consumer contract is signed....
>
> [*N.J.S.A.* 56:12–15 (emphasis added).]

[17] This court has held that the act of offering a consumer contract that violates a legal right of a consumer under the law is sufficient to establish a violation of this statute. *Bosland v. Warnock Dodge, Inc.,* 396 *N.J.Super.* 267, 278, 933 *A.*2d 942 (App.Div.2007), *aff'd on other grounds,* 197 *N.J.* 543, 964 *A.*2d 741 (2009). Here, we have affirmed the trial court's determination that these contracts include a check fee prohibited by RISA and thereby violate *N.J.S.A.* 17:16C–50. Based upon that violation of RISA, the trial court found these contracts violated a clearly established "legal right" of the members of the class within the meaning of TCCWNA. Again, we agree.

Thus, TCCWNA warranted an award of a civil penalty in favor of the consumers who are members of this class. TCCWNA provides a private cause of action and a remedy for a violation of *N.J.S.A.* 56:12–15. Pursuant to *N.J.S.A.* 56:12–17:

> Any person who violates the provisions of this act shall be liable to the aggrieved consumer for a civil penalty of not less than $100.00 or for actual damages, or both *307 at the election of the consumer, together with reasonable attorney's fees and court costs. This may be recoverable by the consumer in a civil action in a court of competent jurisdiction or as part of a counterclaim by the consumer against the seller, lessor, creditor, lender or bailee or assignee of any of the aforesaid, who aggrieved him. A consumer also shall have the right to petition the court to terminate a contract which violates the provisions of section 2 of this act and the court in its discretion may void the contract.

**23 Here, the trial court imposed the minimum civil penalty authorized and declined to exercise its discretion to rescind the contracts. Thus, although we cannot affirm a violation of TCCWNA based upon *N.J.S.A.* 17:16C–61.6(e), elimination of that violation does not warrant a reduction of the civil penalty, which the court fixed at the minimum amount for a single violation.

[18] UCFSC claims that *N.J.S.A.* 56:12–15 is void for vagueness, which is an argument that UCFSC did not raise before the trial court. Because of the significance of the issue, we address it despite the fact that it was not raised in the trial court and although it lacks sufficient merit to warrant more than brief discussion. *See Nieder v. Royal Indem. Ins. Co.,* 62 *N.J.* 229, 234, 300 *A.*2d 142 (1973); *R.* 2:11–3(e)(1)(E).

TCCWNA's applicability to the RISA violation at issue here is clear. "[A]ny reasonable person would recognize"

that a retail installment sales contract that gives the holder a right to charge a fee not authorized by RISA violates the consumer's "clearly established" right to be free from a contract that permits such a charge. *See Maynard v. Cartwright,* 486 *U.S.* 356, 361, 108 *S.Ct.* 1853, 1857, 100 *L.Ed.*2d 372, 380 (1988). Accordingly, because TCCWNA can be applied in this circumstance, it is not unconstitutionally vague in all of its applications. *See ibid.* Furthermore, because the statute clearly applies to UCFSC's conduct, UCFSC is not in a position to assert a challenge based on the statute's application in other circumstances. *Parker v. Levy,* 417 *U.S.* 733, 756, 94 *S.Ct.* 2547, 2562, 41 *L.Ed.*2d 439, 458 (1974); *State v. Emmons,* 397 *N.J.Super.* 112, 124–25, 936 *A.*2d 459 (App.Div.2007), *certif. denied,* 195 *N.J.* 421, 949 *A.*2d 849 (2008).

***308 V**

UCFSC and the distributors raise two arguments based on the magnitude of the aggregate civil penalty, $1,684,500. We reject them both.

A

[19] UCFSC and the distributors argue that where, as here, the common, typical and predominant claim of the class members is a statutory violation for which a statutory civil penalty will be awarded, a class action is not superior to individual private actions. On that ground they claim error in the denial of their application to decertify the class when its numerosity became clear.

The precedents upon which they rely do not provide persuasive support for their position. In *Forman v. Data Transfer,* 164 *F.R.D.* 400, 402–05 (E.D.Pa.1995), the court considered the propriety of a class action as the method for establishing violations of the Telephone Consumer Protection Act (TCPA), 47 *U.S.C.A.* § 227, and obtaining for each member of the class the statutory civil penalty. The court concluded that the individual claims, which required proof that the defendant transmitted an advertisement without the individual recipient's "prior express invitation or permission," did not have the "common nucleus of operative facts" required for a class action. *Forman, supra,* 164 *F.R.D.* at 402, 404. Nevertheless, the court went on to observe that authorization of a class action where statutory civil penalties available to many individuals could be aggregated "would be inconsistent with the specific and personal remedy provided by Congress to address the minor nuisance of unsolicited facsimile advertisements." *Id.* at 405.

In support of that observation, the *Forman* court cited *Ratner v. Chemical Bank* ****24** *N.Y. Trust Co.,* 54 *F.R.D.* 412, 416 (S.D.N.Y.1972), a case in which the district court denied class certification on the ground that awarding a statutory civil penalty of $100 to each of the 130,000 class members could result in a "horrendous, ***309** possibly annihilating punishment, unrelated to any damage to the purported class or to any benefit to defendant."

Other courts have followed the rationale of *Ratner. See Katz v. Carte Blanche Corp.,* 496 *F.*2d 747, 770 (3d Cir.) (Aldisert, C.J., dissenting) (discussing frequent application of *Ratner* in unpublished decisions, criticizing the majority's decision to avoid addressing the issue decided in *Ratner* and disagreeing with *Ratner*), *cert. denied,* 419 *U.S.* 885, 95 *S.Ct.* 152, 42 *L.Ed.*2d 125 (1974). But, the Federal Court of Appeals for the Second Circuit has taken a different approach and concluded that the problem of enormous awards in class actions based upon aggregation of individual statutory civil penalties should be addressed as a question of excessive damages at the time the penalty is fixed, not at the time of class certification. *Parker v. Time Warner Entm't Co., L.P.,* 331 *F.*3d 13, 22 (2d Cir.2003); *see also id.* at 26–27 n. 4 (Newman, C.J., concurring) (expressly disapproving *Ratner*).

The Court of Appeals for the Seventh Circuit has disapproved denial of class certification based on the potential for a large award based upon aggregated civil penalties. *Murray v. GMAC Mortgage Corp.,* 434 *F.*3d 948, 953 (7th Cir.2006). In reversing the denial of class certification on that ground, the court explained that the "reason that damages can be substantial" in class actions to recover civil penalties lies not in the impropriety of a class action but "in the legislative decision to authorize awards as high as $1,000 per person combined with [the civil offender's] decision to" deal with a multitude of persons. *Ibid.* (citation omitted). The court concluded: "While a statute remains on the books, however, it must be enforced rather than subverted." *Id.* at 954.

We find that reasoning persuasive. Accordingly, for that reason as well as those stated by the trial court in its decisions of June 23, 2005 and May 30, 2007, we affirm.

B

[20] The second challenge based upon the magnitude of the civil penalty is that it is so disproportionate to the wrong as to ***310** amount to a denial of due process. As discussed above, federal courts have recognized that in some cases principles of due process might warrant reduction of a civil penalty on that basis. *Ibid.; Parker, supra,* 331 *F.*3d at 22.

The parties do not refer us to any decision in which a court has deemed it appropriate to reduce an award consisting of a multitude of statutory civil penalties entered in a class action. Moreover, in our view the facts of this case do not raise a serious question of unconstitutional excessiveness.

[21] The distributors and UCFSC were in the business of profiting from sales and retail installment sale contracts with consumers, an area of enterprise that is highly regulated. The violation that gave rise to the civil penalty was a contract provision allowing a $20 fee for returned checks clearly prohibited by RISA. The potential to reap a benefit from the unauthorized fee is apparent, and the $100 civil penalty is not unreasonably disproportionate when viewed in that context, whether it is considered with respect to an individual consumer or the 16,845 consumers whose contracts included the prohibited fee. We note that when assessing the constitutional reasonableness of punitive damage awards, courts are directed to consider ****25** and give "substantial deference" to judgments made by the Legislature in fixing civil penalties. *BMW of N. Am., Inc. v. Gore,* 517 *U.S.* 559, 583, 116 *S.Ct.* 1589, 1603, 134 *L.Ed.*2d 809, 831 (1996); *Baker v. Nat'l State Bank,* 353 *N.J.Super.* 145, 161–62, 801 *A.*2d 1158 (App.Div.2002). Nothing about the facts of this case or the numerosity of this class warrants a more searching evaluation of the reasonableness of awarding the civil penalty selected by the Legislature to each member of this class.

VI

Having prevailed on a claim prosecuted on behalf of the class pursuant to TCCWNA, class counsel was entitled to a "reasonable" fee and court costs. *N.J.S.A.* 56:12–17. Recognizing that fee determinations are disturbed only when there is a clear abuse ***311** of discretion, *Packard–Bamberger & Co. v. Collier,* 167 *N.J.* 427, 444, 771 *A.*2d 1194 (2001), we conclude that it is appropriate to reverse the counsel fee awarded and remand for reconsideration in light of this decision.

[22] [23] Reconsideration is essential because we have modified the injunctive relief and reversed the trial court's findings of liability on one of the TCCWNA violations. "Under ... state fee-shifting statutes, the first step in the fee-setting process is to determine the 'lodestar': the number of hours reasonably expended multiplied by a reasonable hourly rate." *Rendine v. Pantzer,* 141 *N.J.* 292, 334–35, 661 *A.*2d 1202 (1995). The results obtained are relevant, and reductions based upon the relative significance of successful and unsuccessful claims are appropriate. *New Jerseyans for a Death Penalty Moratorium v. N.J. Dep't of Corr.,* 185 *N.J.* 137, 154, 883 *A.*2d 329 (2005); *Kellam Assocs. v. Angel Projects,* 357 *N.J.Super.* 132, 142, 814 *A.*2d 642 (App.Div.2003); *Silva v. Autos of Amboy, Inc.,* 267 *N.J.Super.* 546, 556–57, 632 *A.*2d 291 (App.Div.1993). In fixing the lodestar, the trial court considered class counsel's overall success, but this decision alters that analysis.

[24] [25] [26] In addition, we cannot affirm the fifty-percent enhancement of the lodestar awarded by the trial court. Under the guidelines established by the Supreme Court in *Rendine,* a fee enhancement "ordinarily should range between five and fifty-percent of the lodestar fee, with the enhancement in typical contingency cases ranging between twenty and thirty-five percent of the lodestar." 141 *N.J.* at 343, 661 *A.*2d 1202. The "justification for enhancement is ... [that] the lodestar amount is not a *reasonable* fee to be charged to the non-prevailing party because it does not reflect the risk of nonpayment." *Id.* at 341, 661 *A.*2d 1202. The significance of the public interest in pursuit of the claims is also relevant to the enhancement, *id.* at 343, 661 *A.*2d 1202, because a statutory fee and the enhancement are "provided, as a policy matter in specific types of cases, to remedy the ***312** problem of unequal access to the courts." *Baker, supra,* 353 *N.J.Super.* at 161, 801 *A.*2d 1158.

[27] Consideration of those factors does not warrant a fee beyond the "typical" and at the top of the ordinary range. As UCFSC notes, the legal risk of continued representation of the class on these claims was virtually non-existent after May 21, 2004, the date on which summary judgment in favor of Carbo on his individual claims under RISA, DDRISA and TCCWNA and the preliminary injunction were entered. Furthermore, from that point forward it appears that little time was spent on claims that were successful. Ultimately, the additional efforts failed not because of the novelty of issues implicating important matters of public interest but ****26** because no member of the class suffered an ascertainable loss required for imposition of liability under the Consumer Fraud Act (CFA), *N.J.S.A.* 56:8–1 to –20.

Relevant to the importance of the public's interest in pursuit of the claims established, the DDRISA violations demonstrated were not of a nature that had the capacity to seriously undermine the central purpose of DDRISA's "cooling-off period."

For the foregoing reasons, we reverse the fee and remand for reconsideration in conformity with this decision. Because the award of fees on appeal should abide those determinations by the trial court, we also refer the determination of fees on appeal to that court in accordance with *Rule* 2:11–4.

VII

We conclude by identifying several issues we have not addressed and indicating our reasons for rejecting the arguments presented.

Substantially for the reasons stated in the trial court's written decision of May 30, 2007, we affirm the dismissal of the class claims for relief based upon alleged violations of the CFA, breach of contract and breach of the covenant of good faith and fair dealing, as well as the denial of a class-wide rescission remedy and ***313** a permanent injunction against enforcement of these contracts. The arguments presented to establish error in those determinations lack sufficient merit to warrant discussion. *R.* 2:11–3(e)(1)(E).

[28] We also reject the class's claim that the trial court erred in denying pre-judgment interest on the civil penalty. Because the award is for a civil penalty based on the content of the contract, pre-judgment interest was not mandated pursuant to *Rule* 4:42–11(b), and there is no basis for concluding that the trial court abused its discretion in denying that relief. *See County of Essex v. First Union Nat'l Bank,* 186 *N.J.* 46, 61, 891 *A.*2d 600 (2006); *In re Estate of Lash,* 169 *N.J.* 20, 34, 776 *A.*2d 765 (2001). In its argument on the equities relevant to pre-judgment interest, the class overlooks the fact that during the life of the preliminary injunction its members had use of the Kirbys they purchased, and under the judgment the class members will not be required to pay the interest due on those contracts while that injunction was in place.

[29] The trial court's decision to deny post-judgment interest is in a different posture. Post-judgment interest is generally available pursuant to *Rule* 4:42–11(a). *See Bd. of Educ. of City of Newark, Essex County v. Levitt,* 197 *N.J.Super.* 239, 244–45, 484 *A.*2d 723 (App.Div.1984). Because the basis for the court's decision to deny post-judgment interest is not sufficiently explained to permit our review, *R.* 1:7–4, we reverse and remand for reconsideration. Moreover, it is not entirely clear to us whether the court intended to revisit that issue. *See Baker, supra,* 353 *N.J.Super.* at 176–77, 801 *A.*2d 1158 (discussing a court's discretion to stay accrual of post-judgment interest in some circumstances).

We also reject the claim that the court erred in foreclosing the collection of interest by UCFSC and the distributors during the period of the preliminary injunction restraining enforcement of the contracts. That order is affirmed substantially for the reasons stated in the trial court's written opinion of May 30, 2007. The other arguments presented by UCFSC and the distributors to ***314** establish error in the trial court's determinations warrant no discussion. *R.* 2:11–3(e)(1)(E).

Affirmed in part; reversed in part and remanded for further proceedings in conformity with this decision.

All Citations

410 N.J.Super. 280, 982 A.2d 7

Footnotes

1 The class, as finally defined by the trial court, includes those who entered into these contracts with the various distributors between June 16, 1996 and December 23, 2004.

2 As a consequence of orders of this court dated August 2, 2007, the orders of March 9, May 30 and June 6, 2007 are stayed pending appeal.

3 The "second amended decision" of May 30, 2007, includes revisions to the court's opinions issued on March 9 and March 19, 2007 that were made following motions for reconsideration.

4 This view on preemption was initially stated by agency decision in the Advisory Opinion cited above. 16 *C.F.R.* § 429.2 was adopted effective in 1995. 60 *Fed.Reg.* at 54180.

5 Moreover, as the trial court observed in its opinion of May 30, 2007, application of N.J.S.A. *17:16C–61.6(e) to the entire contract also creates a conflict with 16* C.F.R. *§ 433.2(a)*.

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421 N.J.Super. 268
Superior Court of New Jersey,
Appellate Division.

LOCAL BAKING PRODUCTS,
INC., Plaintiff–Appellant,
v.
KOSHER BAGEL MUNCH,
INC., Defendant–Respondent.

Argued March 1, 2011. | Decided July 19, 2011.

Synopsis
Background: Recipient of unsolicited fax brought class action against sender under the Telephone Consumer Protection Act (TCPA) and a separate claim for conversion. The Superior Court, Law Division, Essex County, dismissed the class action allegations as well as the claim for conversion. Recipient appealed.

Holdings: The Superior Court, Appellate Division, Carchman, P.J.A.D., held that:

[1] a class action suit was not a superior means of adjudicating a TCPA claim, and thus recipient could not maintain a class action to enforce the private cause of action under the TCPA, and

[2] recipient could not maintain conversion claim based on the cost of the paper and ink used to receive the unsolicited fax.

Affirmed.

West Headnotes (6)

[1] Parties
Antitrust or trade regulation cases

A class action suit was not a superior means of adjudicating a Telephone Consumer Protection Act claim, and thus recipient of unsolicited fax could not maintain a class action to enforce the private cause of action under the Act; given the statutory award of $500, a sum considerably in excess of any real or sustained damages, and the procedures employed by State, the cost of litigating for an individual was significantly less than the potential recovery. Telephone Consumer Protection Act of 1991, § 3(a), 47 U.S.C.A. § 227(b)(3).

10 Cases that cite this headnote

[2] Telecommunications
Damages Resulting

Telecommunications
Actions

A private action remedy was incorporated in the Telephone Consumer Protection Act with the purpose of permitting, in states willing to allow such actions, a consumer to appear without an attorney in a small claims court to recover not merely actual damages but a minimum of $500 for each violation. Telephone Consumer Protection Act of 1991, § 3(a), 47 U.S.C.A. § 227(b)(3).

2 Cases that cite this headnote

[3] Parties
Hearing and determination

In determining whether a proposed class meets the commonality, predomination, and superiority requirements of rule governing class action certification, the analysis must be rigorous and look beyond the pleadings to understand the claims, defenses, relevant facts, and applicable substantive law. R. 4:32–1.

5 Cases that cite this headnote

[4] Parties
Superiority, manageability, and need

A superiority analysis for purposes of class certification necessarily implies a comparison with alternative procedures, and mandates assessment of the advantages and disadvantages of using the class-action device in relation to other methods of litigation. R. 4:32–1.

1 Cases that cite this headnote

[5] Parties

Representative and Class Actions

Class actions are generally appropriate where individual plaintiffs have small claims which are, in isolation, too small to warrant recourse to litigation.

4 Cases that cite this headnote

[6] Conversion and Civil Theft

Use or disposition of property

Recipient of unsolicited fax could not maintain conversion claim against sender based on the cost of the paper and ink used to receive the unsolicited fax.

1 Cases that cite this headnote

Attorneys and Law Firms

****470** Phillip A. Bock (Bock & Hatch) of the Illinois bar, admitted pro hac vice, argued the cause for appellant (Herten, Burstein, Sheridan, Cevasco, Bottinelli, Litt & Harz, L.L.C. and Mr. Bock, attorneys; Terry Paul Bottinelli, of counsel; Christopher T. Karounos, Hackensack, of counsel and on the brief).

Jay M. Green argued the cause for respondent (Bodell, Bove, Grace & Van Horn, P.C., attorneys; Louis A. Bove and Mr. Green, on the brief).

Before Judges CARCHMAN, GRAVES and MESSANO.

Opinion

The opinion of the court was delivered by

CARCHMAN, P.J.A.D.

***270** The Telephone Consumer Protection Act (TCPA or the Act), 47 *U.S.C.A.* § 227, enacted by Congress in 1991, prohibits the use of "any telephone facsimile machine, computer, or other device to send, to a telephone facsimile machine, an unsolicited advertisement...." 47 *U.S.C.A.* § 227(b)(1)(C). The Act provides for, among other remedies, a "[p]rivate right of action" and fixes the damages for each violation at $500 or actual damages, whichever is greater. 47 *U.S.C.A.* § 227(b)(3).

***271** The narrow issue raised on this appeal is whether a plaintiff may maintain a class action to enforce the private cause of action. On defendant's motion to dismiss for failure to state a cause of action, *Rule* ****471** 4:6–2(e) and *Rule* 4:6–3, the motion judge concluded that no class action could be brought and dismissed all class action claims as well as a separate claim for conversion. Thereafter, judgment was entered in plaintiff's favor for the $500 statutory damages. We affirm and conclude that plaintiff may not maintain a class action.

The facts are not complex. According to plaintiff Local Baking Products, Inc., on May 19, 2006, it received an unsolicited one-page fax in its fax machine from defendant Kosher Bagel Munch, Inc., touting the services of defendant, a local restaurant in Passaic. Apparently, defendant had hired an entity known as Business to Business Solutions to transmit a "blast fax," advertising defendant's food services to approximately 4649 [1] fax machines.

In response, plaintiff filed a complaint under the TCPA on its behalf and on behalf of:

> All persons who (1) on or after four years prior to the filing of this action, (2) were sent telephone facsimile messages of material advertising the commercial availability of any property, goods, or services by or on behalf of Defendant, (3) with respect to whom Defendant did not have prior express permission or invitation for the sending of such faxes, and (4) with whom Defendant did not have an established business relationship.

Defendant thereafter moved to dismiss the class action allegations for failure to state a cause of action. The motion judge concluded that a class action could not be maintained under the TCPA. She dismissed the class action allegations as well as the claim for conversion.

This appeal followed.

***272** **[1]** On appeal, plaintiff asserts that the judge erred in dismissing the complaint's class allegations. It claims that New Jersey authorities support a class action under the TCPA, and the TCPA does not expressly preclude class

actions. Finally, it claims that the judge erroneously dismissed plaintiff's conversion claim.

In response, defendant claims that the complaint, on its face, does not support a class action. Specifically, it alludes to typicality and superiority as appropriate bases for denying relief. It also argues that the judge properly dismissed the conversion cause of action.

The motion judge relied on two unreported opinions that had previously held that no class action could be maintained under the TCPA. She noted that in one instance, no certifiable class had been identified even after full discovery. The judge concluded that New Jersey's easily accessible small claims courts, the expressed statutory intent, the minimal harm involved, and the relatively high statutory damages supported the view that individual claims were "a far superior method to vindication of any rights and protection of the public than any certification or class action." *See N.J.S.A.* 4:32–1(b)(3). Finally, she indicated that because she ruled "on a substantive level" and not on "procedural [grounds] that could be fixed later on," all class claims were dismissed with prejudice.

In addressing the issues involved, we first consider the provisions of the Act. In 1991, Congress enacted the TCPA, providing, among other things, federally recognized relief from unwanted commercial advertising solicitations by means of telephone facsimile (fax) machines.

The provisions of the TCPA are not complex. As we previously noted, ****472** section 227(b)(1)(C) makes it unlawful for any person within the United States "to use any telephone facsimile machine, computer, or other device to send, to a telephone facsimile machine, an unsolicited advertisement...." The Act also provides for a three-pronged exception: (1) if a prior business relationship exists between the parties; (2) if the recipient voluntarily makes its fax number ***273** available for "public distribution"; or (3) if the advertisement contains a notice informing the recipient of the ability and means to avoid future unsolicited advertisements. 47 *U.S.C.A.* § 227(b)(1)(C).

An unsolicited advertisement is defined as "any material advertising the commercial availability or quality of any property, goods, or services which is transmitted to any person without that person's express invitation or permission, in writing or otherwise." 47 *U.S.C.A.* § 227(a)(5).

The TCPA provides three avenues for enforcement: (1) regulatory and court action by the Federal Communications Commission (FCC) for violation of regulations promulgated under the Act, 47 *U.S.C.A.* § 227(b)(2); (2) civil action by the Attorney General of a state, or an official or agency designated by a state, on behalf of its residents, to recover for the greater of actual monetary loss or $500 for each violation, trebled in the court's discretion for willful or knowing violations, 47 *U.S.C.A.* § 227(g); (3) a private action brought by a private person or entity, not in federal court but if "otherwise permitted by the laws or rules of court of a State," in an "appropriate court of that State" for injunctive relief and for recovery of the greater of actual monetary loss or $500 in damages for each violation, 47 *U.S.C.A.* § 227(b)(3).

[2] The private action remedy, which is the focus of this appeal, was incorporated in a late amendment to Senate Bill S. 1462, with the purpose of permitting, in states willing to allow such actions, a consumer to appear without an attorney in a small claims court to recover not merely actual damages but a minimum of $500 for each violation. *See Int'l Sci. & Tech. Inst. v. Inacom Commc'ns, Inc.,* 106 *F.*3d 1146, 1152–53 (4th Cir.1997). The drafters recognized that damages from a single violation would ordinarily amount to only a few pennies worth of ink and paper usage, and so believed that the $500 minimum damage award would be sufficient to motivate private redress of a consumer's grievance through a relatively simple small claims court proceeding, without an attorney. *See* ***274** 137 *Cong. Rec.* S16205–06 (daily ed. Nov. 7, 1991) (statement of Sen. Hollings) ("[I]t would defeat the purposes of the bill if the attorneys' costs to consumers of bringing an action were greater than the potential damages.").

Here, plaintiff seeks to pursue the private action remedy not simply on its own behalf, but as a class action. Class action certification is governed by *Rule* 4:32–1. That *Rule* includes both general, *Rule* 4:32–1(a), and specific, *see Rule* 4:32–1(b), requirements. *Iliadis v. Wal–Mart Stores, Inc.,* 191 *N.J.* 88, 106, 922 *A.*2d 710 (2007). Class certification is appropriate only if:

> (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.
>
> [*R.* 4:32–1(a).]

[3] The issues in this case are whether the proposed class raises "questions of law or fact common to the members of the class [that] predominate over any questions ****473** affecting only individual members [(commonality and predomination)], and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy [(superiority)]." *R.* 4:32–1(b)(3). The analysis must be "rigorous" and "look beyond the pleadings to understand the claims, defenses, relevant facts, and applicable substantive law." *Iliadis, supra,* 191 *N.J.* at 106–07, 922 *A.*2d 710 (internal quotations and alterations omitted).

> The factors pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability in concentrating the litigation of the claims in the particular forum; and (D) the difficulties likely to be encountered in the management of a class action.
>
> [*R.* 4:32–1(b)(3).]

Defendant argues that the motion judge's decision was contrary to our holding in *United Consumer Financial Services Co. v. Carbo,* 410 *N.J.Super.* 280, 982 *A.*2d 7 (App.Div.2009). In *Carbo,* we considered whether the superiority requirement is fulfilled when "the common, typical and predominant claim of the class members is a statutory violation for which a statutory civil penalty ***275** will be awarded...." *Id.* at 308, 982 *A.*2d 7. The statute at issue was "the Truth–in–Consumer Contract, Warranty and Notice Act, *N.J.S.A.* 56:12–14 to –18." *Id.* at 292, 982 *A.*2d 7. The trial judge had certified a class of 16,845 individuals and awarded each the statutory penalty of $100. *Ibid.*

In upholding the award, we considered a prior TCPA decision, which concluded that "the individual claims, which required proof that the defendant transmitted an advertisement without the individual recipient's 'prior express invitation or permission,' did not have the 'common nucleus of operative facts' required for a class action." *Id.* at 308, 982 *A.*2d 7 (quoting *Forman v. Data Transfer,* 164 *F.R.D.* 400, 402–05 (E.D.Pa.1995)). We did not dispute the holding in *Forman* but took issue with the view that the "authorization of a class action where statutory civil penalties available to many individuals could be aggregated 'would be inconsistent with the specific and personal remedy provided by Congress to address the minor nuisance of unsolicited facsimile advertisements.' " *Ibid.* (quoting *Forman, supra,* 164 *F.R.D.* at 405). *Forman* was unpersuasive because problems with "enormous awards" which were "based upon aggregation of individual statutory civil penalties should be addressed as a question of excessive damages at the time the penalty is fixed, not at the time of class certification." *Id.* at 309, 982 *A.*2d 7 (citing *Parker v. Time Warner Entm't Co., L.P.,* 331 *F.*3d 13, 22 (2d Cir.2003)).

[4] Defendant argues that "[t]he Superior Court's reasoning was indistinguishable from the defendants' argument that was rejected in *Carbo.*" We disagree. *Carbo* rejected the out-of-hand denial of class certification "based on the potential for a large award based upon aggregated civil penalties." *Carbo, supra,* 410 *N.J.Super.* at 309, 982 *A.*2d 7 (citing *Murray v. GMAC Mortgage Corp.,* 434 *F.*3d 948, 953 (7th Cir.2006)). This narrow ruling is distinguishable from the superiority concerns addressed by the motion judge. A superiority analysis "necessarily implies a comparison with alternative procedures, and mandates assessment of the advantages and disadvantages of using the class-action device ***276** in relation to other methods of litigation." ****474** *Iliadis, supra,* 191 *N.J.* at 114, 922 *A.*2d 710 (internal citations and quotations omitted) (citing *In re Cadillac,* 93 *N.J.* 412, 436, 461 *A.*2d 736 (1983)). The trial judge did just that, noting that a plaintiff simply must "come to the small claims court, file your complaint, have your $500, you don't need an attorney; ... that's a far superior method of vindication ... than any certification or class action." This view reflected the view of Senator Hollings, the sponsor of the TCPA. The trial judge's recognition of the viability of individual claims as compared to a class action was not only proper but required, and such analysis does not bespeak a generalized policy against large awards.

While no New Jersey case has been reported on the issue,[2] the issue of TCPA class actions has been the subject of reported decisions in other jurisdictions. A survey of these cases reveals a lack of uniformity as to approach and result.

Seven states have reported decisions[3] allowing class certification for TCPA claims: Arizona, California, Florida, Indiana, Missouri, North Carolina[4] and Oklahoma. *See ESI Ergonomic Solutions,* ***277** *LLC v. United Artists Theatre Circuit, Inc.,* 203 *Ariz.* 94, 50 *P.*3d 844 (App.2002) (reversing trial court's conclusion that lack of other TCPA claims weighed against class action's superiority), *review denied,* No. CV–02–0285–PR (Ariz. Jan. 8, 2003); *Kaufman v. ACS Sys., Inc.,* 110 *Cal.App.4th* 886, 2 *Cal.Rptr.*3d 296,

328 (2003) (agreeing with the trial court that a TCPA class action suit was proper, but noting the division of the courts on the issue, and restraining certification to a "case-by-case basis"), *review denied,* No. S118705 (Cal. Oct. 15, 2003); *Hypertouch, Inc. v. Superior Court,* 128 *Cal.App.4th* 1527, 27 *Cal.Rptr.*3d 839 (2005) (vacating class certification which required members to "opt-in," shifting burden of identification and notification of class members to sender); *Guy's World, Inc. v. Condon,* 1 *So.*3d 240, 241 (Fla.Dist.Ct.App.2008) (affirming certification due to the limited record, but noting that "[t]he legal question of whether the TCPA bars class actions calls for an answer"); *Core Funding Group, LLC v. Young,* 792 *N.E.*2d 547, 552 (Ind.Ct.App.) (finding ex parte certification appropriate because plaintiff "alleged common questions of law and fact that predominated over any questions affecting individual class members" and "[t]he trial court's analysis of the class certification question was as thorough as it could be without [defendant]'s participation"), *transfer denied,* 804 *N.E.*2d 759 (Ind.2003); *Karen S. Little, LLC v. Drury Inns, Inc.,* 306 *S.W.*3d 577, 584 (Mo.Ct.App.2010) (holding that class certification was appropriate because "there was a simple set of facts common to all class members applying the ****475** same legal theory under a uniform federal law"); *Blitz v. Agean, Inc.,* 197 *N.C.App.* 296, 677 *S.E.*2d 1, 10 (2009) (noting that certification was appropriate, in part, because "[s]mall claims court cannot, per se, be a superior venue in this State for violations of the TCPA, because it does not possess the authority to grant injunctions"), *cert. denied,* 363 *N.C.* 800, 690 *S.E.*2d 530 (2010); *Lampkin v. GGH, Inc.,* 146 *P.*3d 847, 855 (Okla.Civ.App.2006) (finding that class action was superior because the "action involves so many relatively small claims that if the class members pursued their claims individually, it would unduly and unnecessarily clog the judicial system" of Oklahoma).

***278** Five states have denied certification[5]: Colorado, Connecticut, New York, Ohio[6] and Texas. *See Livingston v. U.S. Bank, N.A.,* 58 *P.*3d 1088, 1091 (Colo.App.) ("[B]ecause individual issues predominated over common issues, the court did not err in denying class certification."), *cert. denied,* No. 02SC417 (Colo. Dec. 16, 2002); *Weber v. U.S. Sterling Sec., Inc.,* 282 *Conn.* 722, 924 *A.*2d 816, 827 (2007) (noting that under New York law a "plaintiff may bring a class action only if the statute on which the action is based specifically authorizes the action to be brought as a class action," which the TCPA does not); *J.A. Weitzman, Inc. v. Lerner, Cumbo & Assocs., Inc.,* 46 *A.D.*3d 755, 847 *N.Y.S.*2d 679, 680 (2007) (noting that "[a] class action to recover a penalty, or minimum measure of recovery pursuant to the Telephone Consumer Protection Act cannot be maintained in light of" applicable state law requiring statutory authorization for class action suits); *Intercontinental Hotels Corp. v. Girards,* 217 *S.W.*3d 736, 738 (Tex.App.2007) (denying certification because "the individual issues [including consent], not the common ones, will predominate in this case").

Federal courts have addressed the issue[7], and are also split. *See Gene & Gene, LLC v. BioPay, LLC,* 624 *F.*3d 698 (5th Cir.2010) (reversing the recertification of the class after an interlocutory appeal determined that consent could not be established by class-wide proof and certification was not appropriate); *CE Design Ltd. v. King Architectural Metals, Inc.,* 271 *F.R.D.* 595 (N.D.Ill.2010) (noting that class action was superior because consent was not established, but was later remanded by the 7th Circuit to determinewhether ***279** consent made named plaintiff improper class representative), *vacated and remanded,* 637 *F.*3d 721 (7th Cir.2011); *Kavu, Inc. v. Omnipak Corp.,* 246 *F.R.D.* 642, 650 (W.D.Wash.2007) (certifying under the TCPA a narrower class than requested and stating that the class size was "a direct result of defendant's large number of violations, for which it should not be rewarded"); *Kenro, Inc. v. Fax Daily, Inc.,* 962 *F.Supp.* 1162, 1169 (S.D.Ind.1997) (denying certification "[b]ecause [plaintiff]'s class definition would require the court to conduct individual inquiries with regard to each potential class member in order to determine whether each potential class member had invited or given permission ****476** for transmission of the challenged fax advertisements"); *Forman, supra,* 164 *F.R.D.* at 405 (denying certification because a class action "would not avoid duplicative lawsuits with potentially inconsistent results where, as here, liability is determined by facts that are individual as to each plaintiff" and "would be inconsistent with the specific and personal remedy provided by Congress to address the minor nuisance of unsolicited facsimile advertisements").

In addition, both Georgia and Louisiana have decisions from different courts within the jurisdiction reaching different results.[8] *Compare Carnett's, Inc. v. Hammond,* 279 *Ga.* 125, 610 *S.E.*2d 529 (2005) (recognizing that a class action may be an appropriate mechanism for pursuing claims but denying certification), *with Am. Home Servs. Inc. v. A Fast Sign Co.,* 287 *Ga.App.* 161, 651 *S.E.*2d 119, 120 (2007) (affirming certification because "the proposed class explicitly excluded all parties" with whom plaintiff had "an established business relationship"); *compare Display South,*

Inc. v. Graphics House Sports Promotions, Inc., 992 *So.*2d 510, 523 (La.Ct.App.) (affirming certification despite "[t]he fact that, following certification, some putative members of the class will eventually be found to have consented to the receipt" of the faxes), *writ dismissed,* 993 *So.*2d 1274 (La.2008), *with* ***280** *Party Paradise v. Al Copeland Invs., Inc.,* 22 *So.*3d 1018, 1022, 1024 (La.Ct.App.2009) (denying certification because class defined as "any recipients of any faxed advertisements" did not "establish the actual identity of the putative class" as required).

While we have doubts as to whether plaintiff could meet the commonality and typicality requirements of *Rule* 4:32–1(a), we conclude that it cannot meet "the more demanding criteria" of predominance and superiority. *Wal–Mart Stores, Inc. v. Dukes,* 564 *U.S.* ——, 131 *S.Ct.* 2541, 2565, *L.Ed.*2d 374, 405 (2011), (Ginsburg, J., dissenting).

[5] We conclude that a class action suit is not a superior means of adjudicating a TCPA suit. Class actions are generally appropriate where individual plaintiffs have "small claims" which "are, in isolation, too small ... to warrant recourse to litigation...." *Iliadis, supra,* 191 *N.J.* at 104, 922 *A.*2d 710 (internal quotation marks omitted). In such instances, "the class-action device equalizes the claimants' ability to zealously advocate their positions." *Ibid.* That equalization principle remedies the incentive problem facing litigants who seek only a small recovery. "In short, the class action's equalization function opens the courthouse doors for those who cannot enter alone." *Ibid.*

Here, by imposing a statutory award of $500, a sum considerably in excess of any real or sustained damages, Congress has presented an aggrieved party with an incentive to act in his or her own interest without the necessity of class action relief. As the motion judge observed, "the nature of the harm ... as near as I can tell, is about two cents worth of paper and maybe a little ink and toner." The judge also noted that in New Jersey, "pro se individuals and consumers [are] allowed to file a small claims complaint, [and] they do not need a lawyer. They are quickly before a Judge. I believe at the present time the standard is 30 to 45 days. An answer doesn't even have to be filed." The combination of the TCPA's design and New Jersey's procedures suggests that the benefit ****477** of a class action has been conferred on a litigant by the very nature of the procedures employed and relief obtained. ***281** The cost of litigating for an individual is significantly less than the potential recovery.

Ultimately, we note that the same facts required to prevail on an individual TCPA claim—an unsolicited fax was received from a sender with whom the recipient had no prior business relationship—are identical to the facts that would have to be proven to merely identify a single class member. *See Kenro, supra,* 962 *F.Supp.* at 1169. We discern no superiority in such a situation. In sum, the class action cannot meet the superiority test and is inappropriate here.

[6] Finally, plaintiff appeals from the dismissal of its conversion claim based, in part, on the cost of the paper and ink used to receive the unsolicited fax. We discern no merit to its argument, and the issue does not require further discussion. *R.* 2:11–3(e)(1)(E).

Affirmed.

Parallel Citations

23 A.3d 469

Footnotes

1 The transmission was to 6637 phone numbers. 4649 faxes were actually received.

2 The trial judge expressly relied on two unpublished New Jersey cases. While they are not of precedential value, *Rule* 1:36–3, for the sake of completeness we list them here. *Freedman v. Advanced Wireless Cellular Commc'ns, Inc.,* No. SOM–L–611–02, 2005 *WL* 2122304 (Law Div. June 24, 2005); *Levine v. 9 Net Ave., Inc.,* No. A–1107–00, 2001 *WL* 34013297 (App.Div. June 7, 2001). *See also R. Howard & Co. v. 395 Bloomfield Ave. Corp.,* No. L–3360–10 (Law Div. Dec. 17, 2010) (all denying class certification for TCPA claims). *But see Goodrich Mgmt. Corp. v. Afgo Mech. Servs., Inc.,* No. 09–00043, 2009 *WL* 2602200 (D.N.J. Aug. 24, 2009) (finding that class action was not appropriate), *vacated sub nom., Landsman & Funk PC v. Skinder–Strauss Assocs.,* 640 *F.*3d 72 (2011) (noting that the district court's holding on certification was premature and remanding for discovery to allow a rigorous analysis).

3 Six other states (Alabama, Kansas, Massachusetts, South Carolina, Washington and West Virginia) have permitted class actions, but those decisions are unreported opinions.

4 At least one unreported decision in North Carolina has also denied class certification.

5 One state, Maryland, has also denied certification in an unreported opinion.

6 Ohio has adopted a public domain citation format, rendering the published/unpublished dichotomy unclear. In any case, the Ohio Court of Appeals noted that "plaintiff's proposed class failed to meet its burden on the requirements of identifiability, numerosity, commonality, fair and adequate representation, and predominance and superiority." *Boehm v. Interstate Ins. Servs. Agency, Inc.*, 2010-Ohio-5432, 2010 *WL* 4514255 (Ohio Ct.App.2010).

7 In addition, an unreported case from the District of Maryland denied class certification.

8 Additionally, Illinois has unpublished cases both granting and denying class action certification for TCPA claims.

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38 F.Supp.3d 500
United States District Court,
D. New Jersey.

Jackeline MARTINEZ–SANTIAGO, on behalf of herself and other persons similarly situated,
Plaintiff,
v.
PUBLIC STORAGE, Defendant.

Civil Action No. 14–302 (JBS/AMD). | Signed Aug. 14, 2014.

Synopsis
Background: Lessee of storage space brought putative class action against lessor under the New Jersey Truth in Consumer Contract, Warranty and Notice Act (TCCWNA), and New Jersey Consumer Fraud Act (CFA), alleging that the standard form contract used by lessor for the lease of personal storage space was unconscionable and unenforceable because of its exculpatory and indemnification provisions, as well as a provision limiting the lessee's opportunity to challenge such provisions to one year after signing the lease. The lessor moved to dismiss.

Holdings: The District Court, Simandle, Chief Judge, held that:

[1] provision requiring that a claim be brought within 12 months of signing lease was unreasonable;

[2] lessee alleged that the lease limited her ability to raise a defense;

[3] lessee sufficiently alleged that exculpatory provision was misleading; and

[4] lessee stated claim for violation of CFA.

Motion granted in part and denied in part.

Attorneys and Law Firms

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Joshua A. Zielinski, Esq., McElroy Deutsch Mulvaney & Carpenter LLP, Morristown NJ, Jamie D. Taylor, Esq., Robert P. Donovan, Esq., McElroy Deutsch Mulvaney & Carpenter LLP, Newark NJ, for Defendant.

OPINION

SIMANDLE, Chief Judge:

I. Introduction
Plaintiff Jackeline Martinez–Santiago brings this putative class action against ***503** Defendant Public Storage for violations of the New Jersey Truth in Consumer Contract, Warranty and Notice Act ("TCCWNA"), N.J.S.A. 56:12–14 *et seq.,* and the New Jersey Consumer Fraud Act ("CFA"), N.J.S.A. 56:8–1 *et seq.* She claims that the standard form contract used by Defendant for the lease of personal storage space is unconscionable and unenforceable because of its exculpatory and indemnification provisions, as well as a provision that limits the consumer's opportunity to challenge such provisions to one year after signing the lease. Before the Court is Defendant's motion to dismiss the First Amended Complaint. [Docket Item 13.]

As explained below, the Court finds that the one-year limit to bring claims arising from the lease, as written and as interpreted by Defendant, would be unreasonable, and that under a reasonable interpretation the Court finds that this action is timely. Substantively, Plaintiff states a claim under the TCCWNA and the CFA, and Defendant's motion to dismiss will accordingly be denied in large part and granted in part.

II. Background
On February 7, 2012, Plaintiff Jackeline Martinez–Santiago entered into a lease agreement with Defendant Public Storage for storage space at Defendant's Sicklerville, N.J., facility for $63 per month. (Am. Compl. [Docket Item 10] ¶ 19.) Plaintiff simultaneously elected to purchase $2,000 of insurance coverage for her property, for an additional premium of $9 per month. (Am. Compl. Ex. B [Docket Item 10–2].)

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The lease agreement contains three provisions challenged in this litigation. The first ("Paragraph 4") limits the time in which Plaintiff may bring a claim arising out of the lease agreement to one year after "the date of the act, omission, inaction or other event that gave rise to such a claim...." (Am. Compl. Ex. A ("Lease Agreement") [Docket Item 10–1] at 2.) This provision also purports to extend the one-year limit to any defenses Plaintiff may seek to raise in any suit against her arising out of the lease agreement. (*Id.*) The second provision ("Paragraph 7") caps Defendant's liability at $5,000[1] and disclaims all liability for property damage or injury to Plaintiff or other persons from any cause, including Defendant's own negligence, however the liability limitation does *not* extend to losses "directly caused by Owner's [Defendant's] fraud, willful injury or willful violation of law." (*Id.*) The third contested provision, also in Paragraph 7, requires Plaintiff to indemnify Defendant "from any loss incurred by Owner [Defendant] and Owner's Agents in any way arising out of Occupant's [Plaintiff's] use of the Premises or the Property, including, but not limited to, claims of injury or loss by Occupant's visitors or invitees." (*Id.*)

These provisions, in full, read as follows:

> 4. APPLICABLE LAW; JURISDICTION; VENUE; TIME TO BRING CLAIMS. This Lease/Rental Agreement shall be governed and construed in accordance with the laws of the state in which the Premises are located. If any provision of this Lease/Rental Agreement shall be invalid or prohibited under such law, such provision shall be ineffective only to the extent of such prohibition or invalidity, without invalidating the remainder of such provision or the remaining provisions of the Lease/Rental Agreement. The parties agree that in ***504** view of the limitations of value of the stored goods as provided in paragraph 5 below and the limitations as to Owner's liability as provided in paragraph 7 below, the value of any claim hereunder is limited to $5000 and, accordingly, any action for adjudication of a claim shall be heard in a court of limited jurisdiction such as a small claims court. Any claim, demand, or right of Occupant, and any defense to a suit against Occupant, that arises out of this Lease/Rental Agreement, or the storage of property hereunder (including, without limitation, claims for loss or damage to stored property) shall be barred unless Occupant commences an action (or, in the case of a defense, interposes such defense in a legal proceeding) within twelve (12) months after the date of the act, omission, inaction or other event that gave rise to such claim, demand, right or defense. By INITIALING HERE ___, Occupant acknowledges that he understands and agrees to the provisions of this paragraph.
>
> ... 7. LIMITATION OF OWNER'S LIABILITY; INDEMNITY. Owner and Owner's Agents will have no responsibility to Occupant or to any other person for any loss, liability, claim, expense, damage to property or injury to persons ("Loss") from any cause, including without limitation, Owner's and Owner's Agents active or passive acts, omissions, negligence or conversion, unless the Loss is directly caused by Owner's fraud, willful injury or willful violation of law. Occupant shall indemnify and hold Owner and Owner's Agents harmless from any loss incurred by Owner and Owner's Agents in any way arising out of Occupant's use of the Premises or the Property including, but not limited to, claims of injury or loss by Occupant's visitors or invitees. Occupant agrees that Owner's and Owner's Agents' total responsibility for any Loss from any cause whatsoever will not exceed a total of $5,000. By INITIALING HERE ___, Occupant acknowledges that he understands and agrees to the provisions of this paragraph.

(*Id.*)

Plaintiff listed Mr. Orlando Colon as an "Alternate Contact Name" on her lease agreement. (*Id.* at 1.) On February 12, 2012, Colon slipped on a patch of ice on a walkway directly in front of Plaintiff's storage unit. (Am. Compl. ¶ 23; Lease Agreement at 1 (listing Plaintiff's unit as No. B034); Ex. C [Docket Item 10–3] ¶ 8 (asserting that Colon fell on the walkway in front of unit No. B034).) Colon sued Public Storage for his injuries in New Jersey Superior Court, alleging negligence. (Am. Compl. ¶ 24.) On October 1, 2012, Public Storage filed an amended answer and third-party complaint naming Martinez–Santiago as a third-party defendant in Colon's lawsuit. (*Id.* ¶ 26.) Public Storage sought indemnification from Martinez–Santiago because Public Storage's potential liability arose from Colon's use of the premises, which brought the matter within the scope of the indemnification provision in Martinez–Santiago's lease agreement. (*Id.* ¶ 27.) Martinez–Santiago did not respond to the lawsuit, and no attorney entered an appearance on her behalf. Public Storage obtained a default judgment against her on February 8, 2013. [Docket Item 10–7 (Am. Compl. Ex. G) at 40–41.] On September 24, 2013, Martinez–Santiago, with the aid of counsel, filed a motion to vacate default judgment and sought permission to file a third-party answer and class-action counterclaim out of time, along with a proposed third-party answer and class-action counterclaim. [*Id.* at 3.] In the supporting brief, Martinez–Santiago argued:

> ***505** [T]here is a meritorious defense in this case, as alleged in the proposed Third Party Answer and Class–Action Counterclaim. (*See* Proposed Answer and Class–Action Counterclaim, attached as Exhibit E.) As alleged in the attached pleading, the contractual language relied upon by the Defendant as forming the basis for its Third–Party Complaint, and the practices utilized in selling consumer contracts containing said clauses violates the New Jersey Truth in Consumer Contract, Warranty and Notice Act ("TCCWNA"), N.J.S.A. § 56:12–14 *et seq.* and is therefore unenforceable. Specifically, the clause violates the TCCWNA in that it (1) impermissibly shortens the Statute of Limitations for actions under the N.J. Consumer Fraud Act; (2) fails to disclose to consumers that specific portions of the contract are not enforceable under New Jersey law; and (3) wrongfully disclaims liability for Third Party Plaintiff's own negligence, and requiring consumers to hold harmless and indemnify Third Party Plaintiff for losses resulting from Third Party Plaintiff's own negligence.

[*Id.* at 8–9.] The class-action counterclaim [*id.* at 54–64], sets forth the same causes of action in the Amended Complaint here. Some passages of the Amended Complaint are identical to the proposed class-action counterclaim submitted to the state court.

Public Storage settled Colon's suit and, before the Superior Court could rule on Martinez–Santiago's motion to vacate the default judgment against her, on September 27, 2013, Public Storage voluntarily dismissed the third-party complaint against Martinez–Santiago. (Am. Compl. ¶¶ 28, 30, 32–33.) The Amended Complaint does not state whether Martinez–Santiago ever indemnified Public Storage for any loss.

On December 3, 2013, Plaintiff filed this action in the Superior Court of New Jersey, Camden County, and Defendants removed the action to this Court.[2] [Docket Items 1 & 1–2.] Count One of the Amended Complaint alleges a violation of the TCCWNA. (Am. Compl. ¶¶ 57–61.) Count Two alleges a violation of the CFA. (*Id.* ¶¶ 62–70.) Count Three requests declaratory and injunctive relief, specifically an order: (1) declaring that Defendant "is estopped from requiring Plaintiff and class members to bring claims or defenses within twelve mo[n]ths of an event giving rise to such claim or defense," (2) declaring that Defendant "is estopped from requiring Plaintiff and class members to indemnify and hold Defendant harmless ... for losses resulting from the negligence of Defendant and/or its agents," (3) prohibiting Defendant from offering or entering into contracts with illegal provisions, (4) requiring Defendant to provide notice to all class members that certain clauses in the ***506** lease agreements are "void and unenforceable" and that class members may sue Defendant on or before the statutory limitations period, and (5) requiring Defendant to notify all class members who may have indemnified Defendant that such indemnification is illegal. (*Id.* ¶ 72.) Plaintiff defines the putative class as:

> All persons, since September 7, 2007 (or such date as discovery may disclose), to whom form contracts, the preprinted portions of which were identical or substantially similar to the Agreement (Exhibit A), have been given, displayed, offered, signed and/or entered into, in New Jersey presented by or on behalf of Defendant or its agents.
> (*Id.* ¶ 45.)

Defendant now moves to dismiss all claims. No issues of class certification are addressed in this motion.

III. Standard of review

Under Fed.R.Civ.P. 12(b)(6), the court must "accept all factual allegations as true, construe the complaint in the light most favorable to the plaintiff, and determine whether, under any reasonable reading of the complaint, the plaintiff may be entitled to relief." *Fleisher v. Standard Ins. Co.,* 679 F.3d 116, 120 (3d Cir.2012).

IV. Discussion

Defendant seeks dismissal of this action on the grounds that (1) the provisions of the lease agreement are lawful and enforceable and (2) Plaintiff has failed to allege that Defendant engaged in unlawful conduct under the CFA and, even if she did, she fails to allege a causal link between the unlawful conduct and her alleged injury. Defendant also argues that Plaintiff's claims are time-barred under the lease agreement, because they were filed more than one year after she entered into the

agreement.

A. Timeliness of the action

[1] The Court begins with the contention that Plaintiff's claims are untimely. Defendant contends that the terms of the lease agreement require Plaintiff to bring all claims arising from the contract within one year of "the act, omission, inaction or other event that gave rise to such a claim...." (Def. Mot. at 24, citing Docket Item 10–1 ¶ 4.) Defendant argues that because Plaintiff's claims arise from the language of the contract itself, the claims arose "when she signed and initialed the Contract on February 7, 2012." (*Id.*) Because Plaintiff did not file this lawsuit until December 3, 2013, or 22 months after the she signed the agreement, Defendant concludes that the action is time-barred. (*Id.*)

Defendant acknowledges that N.J.S.A. 2A:14–1 establishes a default six-year statute of limitations for these TCCWNA and CFA claims, but argues that nothing in those statutes prohibits parties from contracting for a shorter limitations period, provided that the shorter period is reasonable. (*Id.* at 19–20.) Indeed, New Jersey courts, including courts in this District, have upheld reasonable contractual limitations provisions of one year or less when the applicable statutes of limitations exceeded those time frames. *See Eagle Fire Protection Corp. v. First Indem. of Am. Ins. Co.,* 145 N.J. 345, 354, 678 A.2d 699 (1996) (upholding a one-year limitation provision in a surety bond when the claim otherwise would have been subject to a six-year statute of limitations); *A.J. Tenwood Assocs. v. Orange Sr. Citizens Hous. Co.,* 200 N.J.Super. 515, 523–25, 491 A.2d 1280 (App.Div.1985) (stating that the six-year limitations period in N.J.S.A. 2A:14–1 "may be waived by express agreement of the parties," and upholding a one-year limitation provision); ***507** *Winograd v. Carnival Corp.,* No. L–3680–08, 2011 WL 9318, at *2–*3 (N.J.Super.Ct.App.Div. May 28, 2010) (upholding a one-year limitations provision in a ticket contract and affirming the grant of summary judgment in favor of the defendant); *Mirra v. Holland Am. Line,* 331 N.J.Super. 86, 90, 92, 751 A.2d 138 (App.Div.2000) (stating that N.J.S.A. 2A:14–1 "does not prohibit parties to a contract from stipulating to a shorter time period" and upholding a limitations provision of 180 days); *see also New Skies Satellites, B.V. v. Home2US Commc'ns, Inc.,* 9 F.Supp.3d 459, 466, No. 13–200, 2014 WL 1292218, at *6 (D.N.J. Mar. 28, 2014) ("It is well settled that parties may contractually limit the time for bringing claims, despite a statute of limitations to the contrary") (citing *Eagle Fire, A.J. Tenwood,* and *Order of United Comm. Travelers of Am. v. Wolfe,* 331 U.S. 586, 608, 67 S.Ct. 1355, 91 L.Ed. 1687 (1947)).

[2] Contract provisions limiting the period of time in which parties may bring suit are enforceable if reasonable. *Eagle Fire,* 145 N.J. at 354, 678 A.2d 699; *Mirra,* 331 N.J.Super. at 91, 751 A.2d 138. The New Jersey Supreme Court, in discussing reasonableness of limitations, has favorably quoted language from the Michigan Supreme Court explaining the inquiry:

> The boundaries of what is reasonable under the general rule require that the claimant have sufficient opportunity to investigate and file an action, that the time not be so short as to work a practical abrogation of the right of action, and that the action not be barred before the loss or damage can be ascertained.

Eagle Fire, 145 N.J. at 359, 678 A.2d 699 (quoting *Camelot Excavating Co., Inc. v. St. Paul Fire & Marine Ins. Co.,* 410 Mich. 118, 301 N.W.2d 275, 277 (1981)).

Here, Defendant's own argument in favor of barring these claims actually counsels in favor of finding the provision unreasonable, not because the period of time is too short, per se, but because meritorious actions very easily could be barred by the limitation even before losses are incurred or damage sustained.

As Defendant would have it, a consumer who stored property at a Public Storage location might have to bring suit before he or she had any reason to invalidate the lease agreement. A consumer would have to decide to consult a lawyer upon signing the contract and proactively challenge the agreement on the off chance that, at some point 12 months or more into the future, he or she might be sued by, or need to sue, Public Storage and would need to attack the enforceability of the lease agreement. In reality, only consumers who were injured by Public Storage or sued by Public Storage within a year of signing a lease, as Plaintiff was—or clairvoyants—would choose to challenge to the agreement. Those who remained satisfied Public Storage customers for one year would have little or no incentive to file a lawsuit, and if they later found themselves sued by Public Storage, and wanted to argue in defense that provisions of the lease were unenforceable, they would be out of luck.

It is plainly unreasonable to start the limitations clock before the ink dries on the lease agreement and to force consumers to retain lawyers to review the fine print of a standard consumer contract as a matter of course before

the consumer has suffered any ascertainable loss. Under the interpretation advanced by Defendant, a consumer potentially would have to challenge the indemnification provision, for example, before Public Storage ever sought indemnification from her. The New Jersey Supreme Court would not endorse such an interpretation or such a provision. *See Eagle Fire,* 145 N.J. at 359, 678 A.2d 699 ("a contractual limitation period would be unreasonable and, therefore, unenforceable if the 'provision [had] been constructed ***508** in such a way that plaintiff could not have reasonably discovered its loss prior to the point at which the limitation period ran' ") (quoting *Camelot,* 301 N.W.2d at 282).

Therefore, the Court holds that the limitations provision does not render this action untimely; Defendant's interpretation would be unreasonable because the time to bring suit challenging clauses for the tenant's liability and indemnification for Public Service's negligence could expire before a tangible loss is suffered. Because TCCWNA and CFA claims are governed by a six-year statute of limitations, *see* N.J.S.A. 2A:14–1, Plaintiff's claims are timely.

[3] [4] Even if the one-year limitations provision were preserved by a more reasonable interpretation, Plaintiff's claims still would be timely. Paragraph 4 of the lease agreement provides that "[a]ny claim ... shall be barred unless Occupant commences an action ... within twelve (12) months after the date of the ... event that gave rise to such claim...." (Lease Agreement ¶ 4) (emphasis added). Here, Plaintiff raised these claims in response to the indemnification action by Public Storage in state court within one year of being named a third-party defendant. Although Defendant urges the Court to start the limitations clock from the signing of the lease agreement, contracts in New Jersey are to be given "a reasonable interpretation." *Borough of W. Caldwell v. Borough of Caldwell,* 26 N.J. 9, 25, 138 A.2d 402 (1958). For the reasons explained above, Defendant's interpretation of the relevant contractual language—"after the date of the act, omission, inaction or other event that gave rise to such claim"—to mean that Plaintiff's claim accrued the moment she signed her lease, is unreasonable. The only way to reasonably interpret this provision is to say that the limitations period began to run when Public Storage asserted a third-party complaint for indemnification against Martinez–Santiago, on October 1, 2012. In other words, when Public Storage sought to use the lease agreement against Martinez–Santiago, she had one year to bring claims challenging those provisions. She did. Plaintiff first raised these claims on September 24, 2013, in her proposed class-action counterclaim, attached to the motion to vacate default judgment—within one year of Public Storage bringing its third-party complaint. The state court would have ruled on Plaintiff's motion but for Defendant's voluntary withdrawal of the third-party complaint, which was a defense tactic outside Plaintiff's control. In the end, Plaintiff never had the opportunity to file the class-action counterclaim in the prior proceeding. On December 3, 2013, 67 days after the withdrawal, Plaintiff filed this putative class action in state court.

[5] [6] Statutes of limitations are subject to the "doctrine of substantial compliance, [which] allows for the flexible application of a statute in appropriate circumstances." *Negron v. Llarena,* 156 N.J. 296, 304, 716 A.2d 1158 (1998). To successfully invoke the doctrine of substantial compliance to " 'avoid technical defeats of valid claims,' " *id.* (quoting *Cornblatt v. Barow,* 153 N.J. 218, 239, 708 A.2d 401 (1998)), a party must show:

> (1) the lack of prejudice to the defending party; (2) a series of steps taken to comply with the statute involved; (3) a general compliance with the purpose of the statute; (4) a reasonable notice of petitioner's claim[;] and (5) a reasonable explanation why there was not a strict compliance with the statute.

Negron, 156 N.J. at 305, 716 A.2d 1158. Although the limitation at issue here is contractual, and not statutory, the doctrine of substantial compliance informs the ***509** Court's analysis of whether to bar these claims on technical grounds. *See Miller v. N.J. State Dep't of Corr.,* 145 F.3d 616, 617 (3d Cir.1998) ("Time limitations analogous to a statute of limitations are subject to equitable modifications"). The one-year contractual limitation must be given "a reasonable interpretation," *Borough of W. Caldwell,* 26 N.J. at 25, 138 A.2d 402, as explained above.

[7] Relatedly, courts apply "equitable tolling" when the "rigid application" of a limitations period is "unfair." *Miller,* 145 F.3d at 618. A party seeking the benefit of equitable tolling "must show that he or she 'exercised reasonable diligence in investigating and bringing [the] claims.' " *Id.* (quoting *New Castle Cnty. v. Halliburton NUS Corp.,* 111 F.3d 1116, 1126 (3d Cir.1997)). "Mere excusable neglect is not sufficient." *Id.*

Here, both analyses point toward permitting Plaintiff's claims to move forward. Plaintiff took steps to comply with the limitations provision, as interpreted herein, thereby serving the general purposes of the limitation

provision. The timing of this action does not prejudice Defendant, because Plaintiff put Defendant on notice of the claims and filed the proposed defense and counterclaim within the limitations period and then commenced this action with reasonable diligence after Defendant withdrew the third-party complaint. If not for Defendant's withdrawal, the state court may have permitted the class-action counterclaim to be filed, and Plaintiff's claims likely would have proceeded to an adjudication on the merits. One reasonable explanation why there was not strict compliance with the limitation provision is that Public Storage deprived her of the opportunity to prosecute her defense of contractual invalidity when it withdrew its demand for indemnification. She and her attorneys were then left to pursue the option of recasting her counterclaim as a complaint and refiling it. The period of two months to do so, after giving Public Storage notice of the claims, was reasonable, and therefore Plaintiff's claims are timely.

In summary, the one-year limitations provision that requires Plaintiff to bring all claims within one year of their accrual is unreasonable as interpreted by Defendant and does not bar this action; a consumer would have to be clairvoyant to challenge contractual fine print addressed to circumstances (like indemnification) that did not themselves arise when the contract was signed. Plaintiff's claims are governed by a six-year statute of limitations, N.J.S.A. 2A:14–1, and are timely. Even if the limitations provision is enforceable, the claims are timely because Plaintiff asserted the claims in state court within one year of the filing of the third-party complaint seeking indemnification from the consumer, which substantially complies with the terms of the limitation, and she was reasonably diligent in refiling this action promptly after Public Storage voluntarily dismissed its third-party complaint.

B. Limitation on raising defenses

Plaintiff argues that the limitations provision in the contract violates the TCCWNA because it limits her ability to raise a defense in any lawsuit arising from the agreement:

> ... any defense to a suit against Occupant, that arises out of this Lease/Rental Agreement, or the storage of property hereunder ... shall be barred unless Occupant ... interposes such defense in a legal proceeding ... within twelve (12) months after the date of the act, omission, inaction or other event that gave rise to such ... defense.

***510** (Lease Agreement ¶ 4.) Plaintiff argues that because Defendant is not bound by the one-year limitations period to bring suit, and thus may bring suit more than a year after the cause of action accrues, the lease agreement potentially requires Plaintiff to "interpose" a defense in a lawsuit before that suit has been filed. Plaintiff contends that such a provision is unconscionable. (Pl. Opp'n at 24–27.)

Defendant argues that the Court should not consider the limitation on defenses as a claim, because the Amended Complaint discusses only the limitation on bringing a claim within one year and does not specifically discuss the defenses aspect of that term, although the Amended Complaint quotes the provision in full, including the defenses language. (Reply at 9.) For support, Defendant cites *In re Samsung Elecs. Am., Inc. Blu–Ray Class Action Litig.,* No. 08–0663, 2008 WL 5451024, at *3 n. 3 (D.N.J. Dec. 31, 2008) (declining to consider an argument raised in response to the defendant's motion to dismiss, because "[n]o allegation to that effect appears in the Complaint"). In that case, the court permitted the plaintiffs to "clarify" their Consumer Fraud Act claim related to compatibility and playability problems associated with Blu-ray players, but denied the plaintiffs' attempt to insert a new basis for the CFA claim on the grounds that the user manuals contained misleading and deceptive information. *Id.*

It is true that Plaintiff does not focus on the limitation on defenses in the Amended Complaint, but Plaintiff argues that the provision waives Plaintiff's rights and Plaintiff names the TCCWNA and quotes the full provision. Although Plaintiff's opposition focuses on a different part of the sentence than that highlighted in the Amended Complaint, Plaintiff is not injecting a new theory for a TCCWNA violation; she always challenged the enforceability of the limitation provision. Plaintiff is clarifying the TCCWNA claim based on the language of the agreement. Plaintiff's arguments in opposition will be considered in deciding the motion.

[8] The TCCWNA provides in relevant part:

> No seller, lessor, creditor, lender or bailee shall in the course of his business offer to any consumer ... or enter into any written consumer contract ... which includes any provision that violates any clearly established legal right of a consumer or responsibility of a

> seller, lessor, creditor, lender or bailee as established by State or Federal law at the time the offer is made or the consumer contract is signed....

N.J.S.A. 56:12–15.

Plaintiff has stated a claim for a violation of the TCCWNA. The Federal Rules of Civil Procedure and the New Jersey Court Rules clearly establish legal rights and responsibilities of litigants and dictate the timing to interpose or waive defenses. These rules continue to govern civil litigation even beyond 12 months from the incident giving rise to the cause of action or the defense. An action might not even be brought within one year of "the date of the act, omission, inaction or other event that gave rise to such ... defense," (Lease Agreement ¶ 4), and thus this provision, on its face, would appear to block the right to raise defenses beyond 12 months. It is further plausible that a complaint filed within one year of the act giving rise to the cause of action or defense could be amended multiple times, and, after one year, defenses to the amended complaint would appear to be barred by the limitation provision. For those reasons, the Amended Complaint states a claim that this limitation on raising defenses is overbroad and would violate a clearly established legal ***511** right of a consumer in the litigation process.

Defendant's motion to dismiss this claim is denied.

C. N.J.S.A. 56:12–16

[9] Plaintiff alleges that the lease agreement violates N.J.S.A. 56:12–16, because the agreement states that some provisions may be invalid under state law without specifying which provisions are enforceable. This provision of the TCCWNA provides:

> No consumer contract, notice or sign shall state that any of its provisions is or may be void, unenforceable or inapplicable in some jurisdictions without specifying which provisions are or are not void, unenforceable or inapplicable within the State of New Jersey[.]

N.J.S.A. 56:12–16. Defendant contends that the claim is meritless because "the TCCWNA can only be violated if a contract contains a provision prohibited by state or federal law, and that violation must be of a right independent from the TCCWNA." (Def. Mot. at 23) (quotation marks omitted). Here, the agreement provides:

> Lease/Rental Agreements shall be governed and construed in accordance with the laws of the state in which the Premises are located. If any provision of this Lease/Rental Agreement shall be invalid or prohibited under such law, such provision shall be ineffective only to the extent of such prohibition or invalidity, without invalidating the remainder of such provision or the remaining provisions of the Lease/Rental Agreement.

(Lease Agreement ¶ 4.) Defendant argues: "[c]ontrary to the First Amended Complaint, this provision does not contain the language expressly prohibited under N.J.S.A. 56:12–16 'that any of its provisions is or may be void, unenforceable or inapplicable in some jurisdictions.' " (Def. Mot. at 24.) Defendant also argues that because no provisions of the agreement violate state or federal law, there can be no violation of N.J.S.A. 56:12–16.

Defendant's arguments are not persuasive. Plaintiff has independently stated a claim under the TCCWNA, as discussed above, Part IV.B, and so Defendant's argument fails to the extent it relies on the wholesale enforceability of the lease agreement. The Court also disagrees with Defendant that the savings clause here does not use the magic words of N.J.S.A. 56:12–16. The provision in the lease agreement plainly communicates that some terms of the agreement may be invalid or prohibited in the state in which the premises are located, in which case the enforceable provisions of the agreement will remain in force. Although Defendant is technically correct that the language does not expressly state, in a simple, declarative sentence, that some provisions may be invalid under state law, the savings clause necessarily implies that assertion by describing the consequences of that reality. Defendant cannot escape the dictates of N.J.S.A. 56:12–16 by drafting a conditional sentence rather than a declarative one about the validity or enforceability of certain terms and proceeding directly to the implications of that circumstance. *See Vaz v. Sweet Ventures, Inc.*, No. UNN–L–004619–10, 2011 WL 11545781, 2011 N.J.Super.Unpub. LEXIS 3189 (Super.Ct. Law Div. July 14, 2011) (denying a motion to dismiss a claim based on N.J.S.A. 56:12–16 because the contract contained an unenforceable limitation on the defendant's liability and

did not state which provisions are or are not void).

[10] If N.J.S.A. 56:12–16 means anything, it must mean that the lease agreement needs to specify which provisions are unenforceable under New Jersey law. Because ***512** Plaintiff alleges that a provision of the lease agreement is unenforceable under the TCCWNA—as explained above, Plaintiff states a claim that a provision of the agreement violates federal and/or state law—Plaintiff also has stated a claim under N.J.S.A. 56:12–16 in the absence of any indication of which provisions are enforceable and which are not under New Jersey law.

D. Liability for negligence

[11] Plaintiff alleges in the Complaint that the exculpatory provision in Paragraph 7 violates the TCCWNA. (Am. Compl. ¶ 41.) The provision holds Defendant harmless for injuries or damage to property for any reason, including, but not limited to, Defendant's own negligence, but excluding fraudulent or willful conduct by Defendant:

> Agents will have no responsibility to Occupant or to any other person for any loss, liability, claim, expense, damage to property or injury to persons ("Loss") from any cause, including without limitation, Owner's and Owner's Agents active or passive acts, omissions, negligence or conversion, unless the Loss is directly caused by Owner's fraud, willful injury or willful violation of law.

(Lease Agreement ¶ 7.)

Defendant moves to dismiss this claim because exculpatory provisions for the defendant's own negligence have been upheld in New Jersey. The exculpatory provision at issue in this case was upheld by a judge in New Jersey Superior Court, Special Civil Part, in a proceeding with a pro se plaintiff. *See Paruta v. Public Storage,* No. SOM–DC–001704–2013 (Super. Ct. Law Div. Special Civ. Pt. June 19, 2013). Although not binding on this Court, Defendant offers the unpublished opinion as persuasive authority.

In *Paruta,* the pro se lessee brought suit against Public Storage after a pipe burst in his storage unit and damaged his personal property. In considering the exculpatory provision of the lease agreement, the court conducted a four-part inquiry outlined in *Gershon v. Regency Diving Ctr., Inc.,* 368 N.J.Super. 237, 248, 845 A.2d 720 (App.Div.2004),[3] and concluded that the exculpatory provision was enforceable. The court found that Public Storage was not a public utility, that it had no legal duty to perform (because Public Storage took no form of title to the plaintiff's property), and that the bargaining power was not so unequal as to make enforceable of the contract inequitable (because consumers could shop around, and could purchase insurance). *Paruta,* at *4–*5. The court also concluded that the contract did not adversely affect the public interest because the exculpatory provision offered a "counteracting benefit for the public" by allowing storage units to be rented at more affordable prices than if Public Storage were fully liable for any loss. Because Public Storage was not liable for losses caused by fraudulent or willful behavior, and because consumers were offered insurance, the court found that the *Gershon* factors were met, and that Public Storage was "not liable for any acts of ordinary negligence by itself or its agents."

[12] Exculpatory provisions are disfavored by New Jersey law because they undermine one purpose of tort law, which is to deter careless behavior by a party in ***513** the best position to prevent injuries in the first place. *Marcinczyk v. State of N.J. Police Training Comm'n,* 203 N.J. 586, 593, 5 A.3d 785 (2010). However, the New Jersey Supreme Court upheld an exculpatory provision that eliminated liability for a fitness center's own negligence if the consumer was injured in the course of using the amenities or equipment of the facility, or under the instruction or training or supervision of the staff. *Stelluti v. Casapenn Enters., LLC,* 203 N.J. 286, 293, 1 A.3d 678 (2010). The exculpatory provision in *Stelluti* also covered "slipping and/or falling while in the club, or on the club premises," but the plaintiff in that case was injured when equipment malfunctioned, and the New Jersey Supreme Court expressly did not address the disclaimer of liability for injuries on the premises. *Id.* at 293, 313, 1 A.3d 678. The court stated:

> Although there is public interest in holding a health club to its general common law duty to business invitees—to maintain its premises in a condition safe from defects that the business is charged with knowing or discovering—it need not ensure the safety of its patrons who voluntarily assume some risk by engaging in strenuous physical activities that have a potential to result in injuries.

Id. at 311, 1 A.3d 678. Key to the *Stelluti* court analysis was the fact that the plaintiff had assumed risk in engaging in strenuous physical activity, where injuries were foreseeable. *Id.* at 310–11, 1 A.3d 678. The *Stelluti* court upheld the provision, but stated that the fitness center could not escape liability for reckless conduct or gross negligence.

Defendant also points to this Court's opinion in *Sauro v. L.A. Fitness,* No. 12–3682, 2013 WL 978807 (D.N.J. Feb. 13, 2013). There, the exculpatory provision itself was qualified as releasing the defendant from liability for active or passive negligence "to the fullest extent permitted by law." Defendant here argues that its exculpatory clause must be read in conjunction with the statement that the agreement "shall be governed and construed in accordance with the laws of the state in which the Premises are located," which appears in an entirely different provision. (Lease Agreement ¶ 4.)

Defendants also rely on *Kane v. U–Haul,* 218 Fed.Appx. 163 (3d Cir.2007), in which the Third Circuit upheld an exculpatory clause in the context of a personal storage context, which provided that the consumer bore the risk of loss for the property, including for U–Haul's own negligence. *Kane,* 218 Fed.Appx. at 165. The court likened the lease to that for "commercial property" and therefore found that there was no unequal bargaining power, stating that the consumer had the option to purchase insurance for the value of the property and could have contracted with other storage facilities. *Id.* at 166–67. The court also held the clause was not unconscionable, because, among other reasons, bargaining power was not unequal, there was no economic compulsion to sign the contract (no evidence suggested that storage facilities were a necessity), and no public interest was affected by the contract between private parties when the consumer had the option to purchase insurance. *Id.* at 167. The Third Circuit held the provision was enforceable. *Id.* Here, in response, Plaintiff rightly observes that *Kane* concerned damage to property, not personal injury on the business premises. No insurance was offered to Plaintiff for personal injury in this case, and therefore *Kane* is inapposite on these facts.

Contrary to Defendant's argument, the cited New Jersey cases do not answer the question of whether the standard duty of ***514** care owed to business invitees may be waived in consumer contracts. Plaintiff argues that the duty cannot be waived, that a business is under a legal duty to perform up to the standard of care required by common law. The *Paruta* opinion is the least persuasive on this point, because New Jersey common law and dicta in *Stelluti* suggest that businesses *are* under a legal duty "to guard against any dangerous conditions on his or her property that the owner either knows about or should have discovered," *Maisonave v. Newark Bears Prof'l Baseball Club, Inc.,* 185 N.J. 70, 85, 881 A.2d 700 (2005), particularly when the invitee is *not* engaged in risky conduct.[4] *See Stelluti,* 203 N.J. at 311, 1 A.3d 678 (stating there is a public interest in holding a business to its general common law duty to business invitees, while distinguishing the need to "ensure the safety of its patrons who voluntarily assume some risk by engaging in strenuous physical activities that have a potential to result in injuries").

Turning to the *Gershon* analysis, 368 N.J.Super. at 248, 845 A.2d 720, the Court holds that Plaintiff sufficiently pleads that the exculpatory release cannot be enforced. Although Public Storage is not a public utility or common carrier, and even assuming that the contract does not grow out of unequal bargaining power or is otherwise unconscionable, here Public Storage is under a legal duty to maintain its premises for business invitees. This duty was clearly established at the time that Plaintiff signed her lease. The exculpatory provision, on its face, provides that Public Storage is not liable for its own negligence, gross negligence or recklessness, even though, under common law, Public Storage has a duty to guard against any known dangerous conditions on its property or conditions that should have been discovered. The lease agreement only exposes Public Storage to potential liability when a loss is "directly caused by [Public Storage's] fraud, willful injury or willful violation of law." (Lease Agreement ¶ 7.) Walking outside of a storage unit is not a particularly risky or strenuous activity, which may be the subject of lawful exculpatory clauses, as was the case in *Stelluti.* Moreover, "there is a public interest in holding a [business] to its general common law duty to business invitees—to maintain its premises in a condition safe from defects that the business is charged with knowing or discovering...." *Stelluti,* 203 N.J. at 311, 1 A.3d 678. Businesses are in the best position to maintain their premises for the safe use of customers, and enforcing the exculpatory provision would give Public Storage permission to be careless—negligent, reckless—in the maintenance of its property. Accordingly, the Court holds that the Amended Complaint states a plausible claim that the exculpatory provision is not enforceable, because Defendant has a legal duty to maintain its premises, and relieving businesses from that duty to business invitees allegedly adversely affects the public interest.

The general statement in Paragraph 4 of the lease agreement—that the agreement "shall be governed and construed in accordance with the laws of the state in which ***515** the Premises are located"—does not warrant

dismissal of this claim. In *Sauro,* the waiver provision itself was limited to the extent permitted by law. *Sauro,* 2013 WL 978807, at *7. Here, the exculpatory provision is not so circumscribed. Although Paragraph 4 names New Jersey law as the "APPLICABLE LAW" that "govern[s]" the lease agreement and by which the lease is to be "construed" (Lease Agreement ¶ 4), Paragraph 4 does not purport to limit the reach of any specific provisions in the lease agreement. Therefore, the outcome reached in *Sauro* is not compelled here.

"[T]he TCCWNA is a remedial statute, entitled to a broad interpretation to facilitate its stated purpose." *Shelton v. Restaurant.com,* 214 N.J. 419, 442, 70 A.3d 544 (2013). The New Jersey Supreme Court, discussing the act's legislative history, observed that one of the wrongs that the TCCWNA sought to address was the inclusion of provisions in consumer contracts that are not enforceable but appear to be so, thereby discouraging consumers from enforcing their rights:

> Far too many consumer contracts, warranties, notices and signs contain provisions [that] clearly violate the rights of consumers. Even though these provisions are legally invalid or unenforceable, their very inclusion in a contract, warranty, notice or sign deceives a consumer into thinking that they are enforceable and for this reason the consumer often fails to enforce his rights.

Id. at 431, 70 A.3d 544 (quoting Sponsors' Statement, *Statement to Assembly Bill No. 1660* (May 1, 1980)). Here, the exculpatory provision purports to hold Public Storage harmless for most losses incurred by consumers, except those that are the direct result of Public Storage's fraud or willful conduct. Although Plaintiff plausibly pleads that such a broad exculpatory provision is not permitted under New Jersey law, the provision purports to be enforceable in the lease agreement. Plaintiff states a valid claim that this is the kind of provision that TCCWNA was designed to address.

Defendant's motion to dismiss on this ground is denied.

E. Initialing provisions of the agreement

Plaintiff also appears to argue that requiring "consumers to specifically acknowledge and initial" provisions of the agreement violates the TCCWNA because it "deceive[s] Plaintiff and members of the Class into thinking such illegal provisions were valid" and persuades consumers "not even to try to enforce their rights." (Am. Compl. ¶ 42.) Defendants correctly point out that Plaintiff offers no legal support for this claim. Plaintiff does not defend it in her opposition brief. To the extent this is a claim in the Amended Complaint, it is dismissed.

F. Indemnity provision

[13] Plaintiff claims that the indemnification provision in the contract is void and unenforceable under the TCCWNA. (Am. Compl. ¶ 41.) The indemnification provision reads:

> Occupant shall indemnify and hold Owner and Owner's Agents harmless from any loss incurred by Owner and Owner's Agents in any way arising out of Occupant's use of the Premises or the Property including, but not limited to, claims of injury or loss by Occupant's visitors or invitees.

(Lease Agreement ¶ 7.)

Defendant's motion to dismiss does not discuss the indemnification provision in depth. However, Plaintiff, in her opposition, defends her position that the provision ***516** is unenforceable. (Pl. Opp'n at 11–13.) Plaintiff argues that the provision is too broad, because it requires indemnification for *any* loss arising in any way out of her (or her invitees') use of the public storage facility. (*Id.* at 11–12.) Plaintiff observes that the exception to the exculpatory provision—which states that Defendant remains liable for its own willful or fraudulent conduct—does not apply to the indemnification provision, and therefore Plaintiff must indemnify Defendant for any loss, even if it arises out of a claim for injury caused by Defendant's negligent, reckless or intentional conduct. (*Id.* at 12.)

Defendant argues in reply that (1) Plaintiff's claim is raised for the first time in the opposition brief and should be disregarded, (2) the indemnification provision is triggered by the consumer's use of the premises, not by "Public Storage's willful, intentional, grossly negligent, or fraudulent acts," (3) no adjudication of liability was made in state court, and (4) Public Storage was not seeking indemnity for its own negligence. (Reply at 5–7.) These arguments are not persuasive.

First, Plaintiff alleges in the Amended Complaint that the indemnification provision is void and unenforceable under the TCCWNA. There is no reason to disregard this argument.

[14] Second, it is clearly established that "a contract will not be construed to indemnify the indemnitee against losses resulting from its own negligence unless such an intention is expressed in unequivocal terms." *Ramos v. Browning Ferris Indus. of S. Jersey, Inc.,* 103 N.J. 177, 191, 510 A.2d 1152 (1986); *Azurak v. Corporate Prop. Investors,* 175 N.J. 110, 112–13, 814 A.2d 600 (2003) (reaffirming *Ramos* and *Mantilla v. NC Mall Assocs.,* 167 N.J. 262, 770 A.2d 1144 (2001)). Defendant argues that it "was not seeking indemnity for its own negligence," but rather "filed a Third Party Complaint for contractual indemnification to recover any loss it may have incurred as a result of Plaintiff's or her guest's negligence." (Reply at 7.) Defendant's position is unsupportable. Colon sued Public Storage for negligence. [Docket Item 10–3 ¶¶ 11–30.] Public Storage then filed an amended answer and third-party complaint alleging that "Santiago is required to indemnify Public Storage in an amount to be proven at trial." [Docket Item 10–4 at 13–14.] Contrary to Defendant's current contention, nothing in the third-party complaint expressly seeks indemnification for Colon's or Plaintiff's own negligence; Defendant appears to have sought indemnification for Colon's claims arising from *Defendant's* alleged negligence.[5] Defendant does not explain why Defendant would be liable for Colon's or Plaintiff's negligence in the first place, necessitating indemnification. Because New Jersey law does not permit a party to indemnify against losses resulting from its own negligence "unless such an intention is expressed in unequivocal terms," *Ramos,* 103 N.J. at 191, 510 A.2d 1152, and because ***517** the provision here does not unequivocally express an intention for such indemnification, Plaintiff states a claim that the indemnification provision is unenforceable against her.[6]

G. Consumer Fraud Act claims

[15] [16] To state a claim under the CFA, a plaintiff must allege (1) unlawful conduct by the defendants, (2) an ascertainable loss on the part of the plaintiff, and (3) a causal relationship between the defendants' unlawful conduct and the plaintiff's ascertainable loss. *Gonzalez v. Wilshire Credit Corp.,* 207 N.J. 557, 576, 25 A.3d 1103 (2011). An unlawful act is "any unconscionable commercial practice, deception, fraud, false pretense, false promise, misrepresentation," among other practices not relevant here. N.J.S.A. 56:8–2. Plaintiff claims the unlawful acts are the exculpatory, limitation and indemnification provisions in the contract. (Pl. Opp'n at 21–22.) Plaintiff claims in the Amended Complaint that her ascertainable losses are "additional attorneys' fees and costs associated with filing pleadings and defending the Third Party Complaint brought by Defendant...." (Am. Compl. ¶ 43.) Plaintiff does not mention attorneys' fees in her opposition to the motion to dismiss but rather argues that her ascertainable loss is the entire amount paid under the contract. (Pl. Opp'n at 22.) At oral argument, counsel for Plaintiff confirmed that Plaintiff was not abandoning her argument that her attorneys' fees constitute an ascertainable loss.

Plaintiff states a claim under the CFA. The challenged indemnification provision, which permits Defendant to seek indemnification, even for its own negligence, related to incidents arising from a consumer's use (or the consumer's invitee's use) of the property, is allegedly unlawful conduct that is claimed to be misleading and unconscionable. *See Turf Lawnmower Repair, Inc. v. Bergen Record Corp.,* 139 N.J. 392, 416, 655 A.2d 417 (1995) ("To constitute consumer fraud ..., the business practice in question must be 'misleading' and stand outside the norm of reasonable business practice in that it will victimize the average consumer, and thus most clearly and directly involve a matter of legitimate public concern."). The provision plausibly has the capacity to mislead the average consumer, because the average consumer may believe that such a provision in a standard form contract is enforceable under New Jersey law. That Public Storage would seek to make Martinez–Santiago responsible for money Defendant owed to Colon based on Defendant's alleged failure to clear snow and ice in front of its own storage unit stands outside the norm of reasonable business practice. The costs that Martinez–Santiago incurred defending against the indemnification action plausibly constitute an ascertainable loss directly attributable to the allegedly unlawful conduct.

Defendant's motion to dismiss the CFA claim is denied.

V. Conclusion

For the reasons explained above, this action is timely. Defendant's motion to dismiss the Amended Complaint is granted to the extent Plaintiff claims a violation of the TCCWNA based on the initialing of provisions of the lease agreement. In all other respects, Defendant's motion is denied. ***518** An accompanying Order will be entered.

Footnotes

1 Paragraph 5 of the agreement dictates that Plaintiff will not store more than $5,000 worth of personal property in the storage unit at any time. (*Id.*)

2 Defendant asserts that this Court has jurisdiction over this putative class action under 28 U.S.C. § 1332(d)(2) because minimal diversity exists among the hundred-plus class members and the amount in controversy exceeds $5 million. (Notice of Removal [Docket Item 1] ¶ 12.) Neither party pleads Plaintiff's state of citizenship, but Plaintiff lists her address on the lease agreement as being in Sewell, N.J. (Lease Agreement at 1.) In a supplemental letter after oral argument, Plaintiff represented to the Court that she has lived in New Jersey since 2008, after moving from Pennsylvania, to support the existence of jurisdiction here. [Docket Item 21 at 1.] Defendant is a "real estate investment trust organized under the laws of the state of Maryland" with its principal place of business in Glendale, California. (Notice of Removal ¶ 14.) The Court construes the Amended Complaint as asserting that Plaintiff is a citizen of New Jersey, and that putative class members who signed contracts in New Jersey are also citizens of New Jersey. Therefore, jurisdiction is proper under § 1332(d).

3 "In New Jersey, an exculpatory release will be enforced if (1) it does not adversely affect the public interest; (2) the exculpated party is not under a legal duty to perform; (3) it does not involve a public utility or common carrier; or (4) the contract does not grow out of unequal bargaining power or is otherwise unconscionable." *Gershon,* 368 N.J.Super. at 248, 845 A.2d 720.

4 Although the exculpatory provision was upheld in *Paruta,* that case involved damage to personal property in storage. *Paruta,* No. SOM–DC–001704–2013, at *1. The court held that Public Storage was not under a duty to perform with respect to that property, because the only "legal duty that could possibly apply for defendant in the present matter is the higher standard of care created by a bailment." *Id.* at *5. The court found that no bailment had been created. *Id.* Because the facts of that case did not involve personal injury on the premises, the court in *Paruta* had no occasion to hold that Public Storage has no legal duty to maintain its premises. Therefore, *Paruta* is not to the contrary.

5 The third-party complaint states:

> On or about July 30, 2012, Plaintiff [Colon] filed this lawsuit, purporting to assert a claim against Public Storage for negligence.... Plaintiff was at the Public Storage Facility on February 12, 2012, allegedly for the purpose of accessing the storage unit Santiago rented from Public Storage. Pursuant to Paragraph 7 of the Agreement, Santiago is obligated to indemnify and hold Public Storage and its agents harmless from Plaintiff's claims and to reimburse Public Storage for any attorneys' fees and costs incurred in defending against Plaintiff's claims.

Third Party Complaint, *Colon v. Public Storage Props.,* No. CAML–3353–12 ¶¶ 5–7 (Sept. 25, 2012) [Docket Item 10–4] (paragraph numbers and formatting omitted).

6 It is unclear what significance Defendant places on the fact that "no adjudication of liability was made in the State Court Action." (Def. Reply at 6.) Defendant asserted a claim against Plaintiff for indemnification in the state-court proceeding, which required her response.

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NO. 13-1339

IN THE

Supreme Court of the United States

SPOKEO, INC.,

Petitioner,

v.

THOMAS ROBINS, ON BEHALF OF HIMSELF AND ALL OTHERS SIMILARLY SITUATED,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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INTRODUCTION

According to the petition, this case raises the question whether Congress can confer Article III standing "in the absence of any allegation of concrete and particularized injury." Pet. 2. But that question is not presented here. Respondent *has* alleged concrete and particularized injuries—economic, reputational, and emotional injuries caused by the publication of false information about him, and no one else. Under the law of defamation, these kinds of allegations have been enough for suits in common-law courts since the seventeenth century.

These concrete allegations make this case a far worse vehicle than either *First American Financial Corporation v. Edwards*, No. 10-708, or *First National Bank of Wahoo v. Charvat*, No. 13-679—both of which claimed to raise the same question. Petitioner never denies that respondent alleges these injuries, but relegates them to a two-paragraph argument on an entirely different element of standing: causation. Pet. 24. That the Court would have to confront petitioner's factbound, case-specific causation argument before even reaching the petition's question belies the assertion that this case "cleanly presents" that question. Pet. 23.

Instead of addressing the allegations, petitioner and its amici raise hypothetical class-action horror stories—some copied nearly verbatim from the briefs in *Charvat*. But their concerns are exaggerated: Damages for the invasion of legal rights have long been a mainstay of our legal system, for everything from contract to copyright. Using Article III to bar these claims, by contrast, would have significant consequences—including a shift of many class actions to state courts, in tension with recent congressional policy. Petitioner and its amici have invited this Court to take this bad vehicle to hear an unnecessary question. The Court should decline.

STATEMENT

1. Before 1970, if a consumer was injured by the dissemination of false credit information, actions for redress "could be brought only under state defamation law." Virginia G. Maurer, *Common Law Defamation and the Fair Credit Reporting Act*, 72 Geo. L.J. 95, 98 (1983). In that year, Congress responded to the "need to insure that consumer reporting agencies exercise their grave responsibilities with fairness, impartiality, and a respect for the consumer's right to privacy" by enacting the Fair Credit Reporting Act. 15 U.S.C. § 1681(a). Senator Proxmire, the bill's lead sponsor, noted that among the issues the FCRA was designed to combat "[p]erhaps the most serious problem in the credit reporting industry is the problem of inaccurate or misleading information." 115 Cong. Rec. 2411 (1969).

The FCRA, "to a great extent, incorporated common law defamation principles" into a federal cause of action that consumers can bring against agencies who, among other things, publish false information about them as a result of careless procedures. Maurer, *supra*, at 126; 15 U.S.C. § 1681e(b). To protect consumers, Congress specified several procedures that credit reporting agencies must follow—such as providing the furnishers and users of consumer information with notices of their legal obligations and publicizing a telephone number through which consumers can access free reports. 15 U.S.C. § 1681e; *id.* § 1681j. In addition to these specific provisions, the FCRA requires credit reporting agencies to "follow reasonable procedures to assure maximum possible accuracy" of their information. 15 U.S.C. § 1681e(b). In 1996, responding to "horror stories about inaccurate credit information and the inability of consumers to get the information corrected," 141 Cong. Rec. 5419 (1995),

Congress amended the FCRA to include a damages provision granting "not less than $100 and not more than $1,000" to consumers who are the victims of willful violations of the Act. 15 U.S.C. § 1681n.

2. Petitioner Spokeo, Inc. publishes reports on individual consumers' economic health, occupation, wealth, and more. Am. Compl. ¶ 2. Spokeo has published and maintains a report on respondent Thomas Robins that contains a significant amount of inaccurate information. *Id.* at ¶¶ 30-32. Spokeo's report initially misrepresented Robins's age, wealth, employment status, and education level, in addition to incorrectly stating that Robins is married and has children. *Id.* Although some of the report's false material has been modified, Spokeo continues to misrepresent Robins's education, wealth, and economic health. *Id.* Spokeo has marketed its reports to businesses and human resource professionals as a way to research potential new hires. *Id.* at ¶ 15, ¶ 28. Robins is currently unemployed and seeking work. *Id.* at ¶ 34.

3. Robins sued Spokeo in federal court, alleging that false information published by Spokeo has injured his employment prospects, causing him both financial and emotional harm. *Id.* at ¶¶ 35-37. In addition, Robins alleges that Spokeo has violated five different FCRA requirements by not making required disclosures and not following procedures that are designed to ensure the accuracy of its information. *Id.* at ¶¶ 61-74. Robins seeks statutory damages under 15 U.S.C. § 1681n. Am. Compl. 16 ¶ C.

After the district court initially dismissed Robins's complaint without prejudice, Pet. App. 14a, Robins developed his complaint to include descriptions of how Spokeo has marketed its information to employers. *See* Am. Compl. The district court then found that Robins

had alleged an injury sufficient to confer Article III standing: Spokeo's marketing of inaccurate information about him, which was "fairly traceable" to Spokeo's conduct and "likely to be redressed by a favorable decision from this court." Pet. App. 18a. Spokeo objected to this decision, and the district court reversed itself—dismissing the case for lack of standing in a single-paragraph opinion four months later. *Id.* at 23a.

In a unanimous opinion authored by Judge O'Scannlain, the court of appeals rejected Spokeo's argument that Robins had not sufficiently alleged willful violations of the FCRA. Instead, the court found that "[t]he facts that Robins pled make it plausible that Spokeo acted in reckless disregard of [its] statutory duty" to ensure the accuracy of the information it published. *Id.* at 4a n.1. The court held that Spokeo's alleged violations of the FCRA were sufficient to confer standing on Robins, *id.* at 8a, and therefore declined to further evaluate the concrete economic, reputational, and emotional injuries that Robins alleged. *Id.* at 9a n.3.

REASONS FOR DENYING THE PETITION

I. Because this case involves allegations of concrete and particularized injuries, it does not present Spokeo's question.

Spokeo asserts that this case raises the question whether there can be "Article III standing in the absence of any allegation of concrete and particularized injury." Pet. 2. But Robins has clearly alleged concrete and particularized injuries: economic harm to his employment prospects, Am. Compl. ¶¶ 35-36; informational injury from Spokeo's failure to provide legally mandated disclosures, *id.* at ¶ 74; and emotional injury, *id.* at ¶ 37. The kinds of injuries Robins alleges are well established. As a result, this case is a poor vehicle for Spokeo's ques-

tion, which by its own terms applies only where a plaintiff "suffers no concrete harm." Pet. i.

A. Allegations of injury based on the publication of false information have a long pedigree in the common law, and would have been familiar to the Framers of Article III. Claimants who allege such injuries have had standing in common-law courts since at least the seventeenth century. Dan B. Dobbs et al., *The Law of Torts* § 517 (2d ed. 2013). Tort law recognizes a variety of ways in which publishing falsehoods or private information creates a cognizable injury. *See, e.g.*, Restatement (Second) of Torts § 559 (1977) (defamatory communications), *id.* § 623A (publication of injurious falsehood), *id.* § 652D (publicizing private life), *id.* § 652E (publicizing someone in a false light). An individual's allegation that he was harmed by published falsehoods—falsehoods that specifically concern him and no one else—is a claim "of the sort traditionally amenable to, and resolved by, the judicial process." *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 102 (1998). Indeed, this Court has held that even "a risk of injury to [one's] reputation," without more, is a sufficient injury for Article III standing. *Meese v. Keene*, 481 U.S. 465, 475 (1987).

In addition to this reputational harm, Robins also alleges a specific economic injury—the harm to his employment prospects by Spokeo's marketing of false information about him. Am. Compl. ¶¶ 35-36. Such "palpable economic injuries have long been recognized as sufficient to lay the basis for standing, with or without a specific statutory provision for judicial review." *Sierra Club v. Morton*, 405 U.S. 727, 733 (1972). With the FCRA, Congress endorsed claims like Robins's—Spokeo cannot argue that the statute makes him somehow *less* worthy of standing.

The FCRA's cause of action, analogous to common-law claims designed to vindicate reputational injury, does not detract from Robins's standing in any way. Legislatures have long built upon the common-law claim of defamation per se by passing statutes that proscribe particular kinds of behavior. Alaska, for instance, prohibits defamatory statements that are "critical of or derogatory to the financial condition of a person in the insurance business," while Louisiana prohibits defamatory statements that are critical of certain financial institutions. Alaska Stat. § 21.36.070; La. Rev. Stat. Ann. § 6:930. The FCRA is the same type of law passed at the federal level to protect consumers. "[T]he FCRA, to a great extent, incorporated common law defamation principles" when it created a federal cause of action "to redress injuries that prior to the FCRA could be brought only under state defamation law." Maurer, *supra*, at 126, 98. This action is thus a federal statutory analog to traditional state common-law claims that have always been sufficient for standing. Spokeo's question presented applies only to "a plaintiff who suffers no concrete harm," pet. i, but actual injury has been alleged here. This case could be decided on the merits of the statutory questions under the FCRA without ever reaching Spokeo's question—making the question unworthy of this Court's review.

Spokeo is wrong to argue that the FCRA's statutory-damages provision somehow changes the standing inquiry. Statutory-damages under the FCRA reflect a facet of reputational-injury law that this Court has recognized: "the experience and judgment of history that proof of actual damage will be impossible in a great many cases" despite "the character of the defamatory words and the circumstances of publication." *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S.

749, 760 (1985) (internal quotation marks omitted). In light of this reality, the law must specify what is "generally considered defamatory [p]er se, and actionable without proof of special damages." *Paul v. Davis*, 424 U.S. 693, 697 (1976). The FCRA's "clear analogs in our common-law tradition" demonstrate that it does not raise the question whether Congress may create "a case or controversy where none existed before." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 580 (1992) (Kennedy, J., concurring).

B. Robins's concrete, particularized allegations make this case a much worse vehicle for Spokeo's question than the two cases that this Court has already declined to decide. Spokeo's petition is a slightly updated version of the petition in *First Nat. Bank of Wahoo v. Charvat*, No. 13-679. But this Court did not grant certiorari in *Charvat*, and should not do so here. The claim in *Charvat* hinged on allegations that two banks' ATMs did not comply with federal notice requirements. *See Charvat v. Mut. First Fed. Credit Union*, 725 F.3d 819 (8th Cir. 2013). That claim would have given standing to any person who walked off the street to use one of either bank's ATMs, even someone who visited the bank solely for the purpose of obtaining a basis to file a lawsuit. In contrast, Spokeo has posted false information about Robins in particular, and Spokeo is liable only to Robins for this wrong under the FCRA. 15 U.S.C. § 1681n(a). *Charvat* was a bad vehicle; this case is worse.

Spokeo also asserts that this case raises the same issues as *First American Financial Corporation v. Edwards*, 132 S. Ct. 2536 (2012). Pet. 2. But in *First American*, the plaintiff explicitly argued that she need not allege *any* injury beyond the bare statutory violation. *See* Br. for Respondent 35-36, *First American Fin. Corp. v.*

Edwards, No. 10-708. She could not have alleged economic injury from the illegal kickbacks she challenged, because the price of the services she received was set by law. *Edwards v. First American Fin. Corp.*, 610 F.3d 514, 516 (9th Cir. 2010). In contrast, this case involves allegations of concrete, particularized injury—that Spokeo has harmed and continues to harm Robins by publishing false information *about him*. Am. Compl. ¶ 35. This case thus involves alleged injuries that are more concrete than those in *First American* and more particularized than those in *Charvat*, making it a poor vehicle for addressing the question Spokeo claims is presented here.

C. Nevertheless, Spokeo contends that this case "cleanly presents" its question for two reasons. Pet. 23-24. First, Spokeo argues that there is no commercial relationship between it and Robins. *Id.* Second, Spokeo argues that there is a causation problem with the injuries Robins alleges. Neither of these points is persuasive.

First, Spokeo points out that, in contrast to *First American*, Robins has not entered into a commercial transaction with Spokeo. *Id.* But Spokeo does not cite any authority—because none exists—for the notion that a commercial transaction is somehow a prerequisite to an injury-in-fact. *See, e.g.*, *Susan B. Anthony List v. Driehaus*, 134 S. Ct. 2334 (2014) (finding injury-in-fact in the threatened enforcement of a law); *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167 (2000) (finding injury-in-fact due to damage to aesthetic and recreational interests). A great many cases—including many, if not most, tort cases—unquestionably involve an injury-in-fact in the complete absence of commercial transactions.

Second, unable to deny that Robins has alleged actual injuries, Spokeo instead makes a causation argument based on *Clapper v. Amnesty International USA*, 133 S. Ct. 1138 (2013). Pet. 24. But this is a non sequitur—the question whether Robins has sufficiently pled causation is a completely distinct question from the one Spokeo claims this case "cleanly" presents. Spokeo's question presumes that Robins has "suffer[ed] no concrete harm," Pet. i. But as its *Clapper* argument illustrates, what Spokeo really is arguing is that Robins has insufficiently proved causation. Such a logically "prior question" would necessitate a case-specific, fact-bound inquiry that this Court would have to undertake without the benefit of a clear ruling on the causation issue by the court below. *Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 381-82 (1995). There is thus a serious risk that Spokeo's presumption that Robins has not suffered harm will later be proved wrong—"a risk that ought to be avoided." *Id.* at 382.

D. Finally, Spokeo completely ignores several of Robins's allegations that also could serve as grounds for standing. In addition to alleging that Spokeo violated the FCRA by failing to adopt procedures that prevented the publication of false information, Robins also alleges that Spokeo violated four of the FCRA's disclosure requirements: § 1681e(d)(1); § 1681e(d)(2); § 1681b(b); and § 1681j(a)(1)(C). Am. Compl. ¶¶ 61-74. Spokeo simply fails to address these claims, even though they remain in the case as it comes to this Court and entail different forms of cognizable injury. For instance, Robins alleges that Spokeo has failed to disclose information about how consumers can request free access to its reports about them, in violation of 15 U.S.C. § 1681j(a)(1)(C). Am. Compl. ¶ 74. This Court's precedent firmly establishes that Article III standing may rest entirely on this kind of informa-

tional injury. *See, e.g.*, *Fed. Election Comm'n v. Akins*, 524 U.S. 11, 21 (1998); *Pub. Citizen v. U.S. Dep't of Justice*, 491 U.S. 440, 449 (1989); *see generally* Cass R. Sunstein, *Informational Regulation and Informational Standing:* Akins *and Beyond*, 147 U. Penn. L. Rev. 613 (1999).

This injury is distinct from the economic injuries that Robins alleges, and is not addressed even by Spokeo's causation argument. Spokeo did not respond to this claim in the court below, *see* Br. of Appellee, *Robins v. Spokeo*, 2012 WL 4665532, and does not address it in its petition. But Robins has maintained this argument throughout the appeal, Appellant's Opening Br. 40, *Robins v. Spokeo*, 2012 WL 2132528, and it remains an independent basis for his standing. Like the causation issue, the sufficiency of Robins's informational injury is "predicate to an intelligent resolution of the question" Spokeo raises in its petition. *Ohio v. Robinette*, 519 U.S. 33, 38 (1996). While this case can be resolved without reaching Spokeo's question, Spokeo's question cannot be resolved without reaching fact-specific issues in this case. As such, this case is a poor vehicle for Spokeo's question.

II. There is no circuit split.

Even if this were a suitable vehicle for addressing the question presented, there is no need to do so because the lower courts are in harmony. Indeed, Spokeo does not offer any cases—not even a district court case—holding that a plaintiff who brings suit under the FCRA alleging a particularized injury does not have Article III standing.

Instead, Spokeo cites two ERISA cases: *David v. Alphin,* 704 F.3d 327 (4th Cir. 2013), and *Kendall v. Employees Retirement Plan of Avon Prods.*, 561 F.3d 112 (2d Cir. 2009). But the ERISA claims in these two cases

were different from the FCRA claims here in a fundamental way: They involve suits by plan members who sue "on behalf of the Pension Plan," and "are not permitted to recover individually." *David v. Alphin*, 704 F.3d at 332. They do not address the question whether an individual has standing when he brings a suit on his own behalf alleging that an illegal action has caused him a personal injury. The answer to that question is uncontroversial: yes.

In addition to not implicating the actual question presented by this case, these cases are not evidence of a circuit split on the question Spokeo claims is presented. The two ERISA cases that Spokeo cites deal only with a private cause of action, which is distinct from a "legal right[], the invasion of which creates standing." *Warth v. Seldin*, 422 U.S. 490, 500 (1975). When someone violates the fiduciary requirements of ERISA, they are liable to the retirement plan itself—not to the individual members of the plan. 29 U.S.C. §1109. The private cause of action is merely an enforcement mechanism. In contrast, the FCRA creates both a cause of action and an individualized right—when someone violates the FCRA with respect to a particular consumer, they are "liable to that consumer." 15 U.S.C. §1681n.

This means that these ERISA cases do not implicate the question whether Article III standing can be predicated solely on "statutes creating legal rights, the invasion of which creates standing." *Warth v. Seldin*, 422 U.S. at 500. The Second Circuit in *Kendall* itself cited that very statement in *Warth v. Seldin* with approval, accepting the notion that a right could be "statutorily created." *Kendall*, 561 F.3d at 119. But the court held that it was "a clear misstatement of the law" for the plaintiff to claim that the alleged ERISA violation was a

violation of an individual right bestowed on her by the statute. *Id.* As a result, Spokeo has cited no circuit case disagreeing with the decision below. The circuits that have addressed the question agree: "the actual-injury requirement may be satisfied *solely* by the invasion of a legal right that Congress *created.* This is not a novel principle within the law of standing." *Hammer v. Sam's E., Inc.*, 2014 WL 2524534 (8th Cir. 2014) (emphasis in original). *See Edwards v. First American Fin. Corp.*, 610 F.3d 514 (9th Cir. 2010), *cert. dismissed as improvidently granted*, 132 S. Ct. 2536; *Robey v. Shapiro, Marianos & Cejda, L.L.C.,* 434 F.3d 1208, 1211 (10th Cir. 2006); *Murray v. GMAC Mortgage Corp.*, 434 F.3d 948, 952 (7th Cir. 2006); *Beaudry v. TeleCheck Servs., Inc.*, 579 F.3d 702 (6th Cir. 2009); *Shaw v. Marriott Int'l, Inc.*, 605 F.3d 1039, 1042 (D.C. Cir. 2010). On any understanding of the question presented by this case no circuit split is implicated.

III. Robins has Article III standing.

The court of appeals correctly decided that Robins has standing. As explained above, Robins has alleged economic, reputational, and emotional injuries that affected him alone, by virtue of false information that was specifically published about him. Robins's alleged harm is the kind of actual, concrete, and particularized harm that is the *sine qua non* of Article III's injury-in-fact inquiry. *See Lujan*, 504 U.S. at 560. This case does not raise the question Spokeo presents, and Robins has standing under Article III.

Even if Robins had alleged that the only harm he suffered was the violation of his statutory rights under the FCRA, there would be nothing unusual about such an injury conferring standing as well. Because "legal injury is by definition no more than the violation of a legal

right; and legal rights can be created by the legislature," "standing['s]. . . existence in a given case is largely within the control of Congress." Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 Suffolk U. L. Rev. 881, 885 (1983). This Court has routinely noted that "[t]he actual or threatened injury required by Art. III may exist solely by virtue of 'statutes creating legal rights, the invasion of which creates standing." *Warth v. Seldin*, 422 U.S. at 500; *see also Massachusetts v. E.P.A.*, 549 U.S. 497, 516 (2007) ("Congress has the power to define injuries and articulate chains of causation that will give rise to a case or controversy where none existed before."); *Lujan*, 504 U.S. at 578 ("[T]he injury required by Art[icle] III may exist solely by virtue of statutes creating legal rights. . . ."); *Hardin v. Kentucky Utilities Co.*, 390 U.S. 1, 6 (1968); *Linda R.S. v. Richard D.*, 410 U.S. 614, 617 n.3 (1973). The statutory violations that Robins alleges would be an entirely legitimate basis for standing in this case in addition to his other alleged injuries.

Spokeo's question tries to distinguish between the violations of Robins's legal rights and the economic and reputational injuries he alleges, but such a distinction cannot be made consistent with centuries of case law. For hundreds of years, common-law courts have construed the violation of a legal right to be an injury that per se demands a remedy: "Every violation of a right imports some damage, and if none other be proved, the law allows a nominal damage." *Whittemore v. Cutter*, 29 F. Cas. 1120 (C.C.D. Mass. 1813) (Story, J.). The kind of injury Spokeo calls a "bare violation" of a legal right has been essential to many customary claims, including those surrounding violations of constitutional rights or con-

tractual rights, defamation, patent infringement, and more.[1] Entire statutory schemes are based on the premise that individuals can sue for violations of their legal rights without proving other injury: The Copyright Act, for instance, has provided for over one hundred years that infringement of copyright is itself a violation that gives rise to a claim for statutory damages without proof of other injury. *See* 17 U.S.C. § 504(c); *Feltner v. Columbia Pictures Television, Inc.*, 523 U.S. 340, 347-352 (1998) (reviewing history of statutory damages under state and federal copyright statutes). "Even for uninjurious and unprofitable invasions of copyright the court may, if it deems it just, impose a liability within statutory limits to sanction and vindicate the statutory policy." *F.W. Woolworth Co. v. Contemporary Arts, Inc.*, 344 U.S. 228, 233 (1952).

Nothing distinguishes this case from the many others that rest on the violation of a legal right per se (aside from the fact that the plaintiff here also alleges additional concrete harm). Whether the injured right comes from the Constitution, statute, or common law, this Court has stated that "there is absolutely no basis for making the Article III inquiry turn on the source of the asserted right." *Lujan*, 504 U.S. at 576. Nor does the fact that

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[1] *See, e.g., Carey v. Piphus*, 435 U.S. 247, 266 (1978) (holding that "denial of procedural due process [is] actionable for nominal damages without proof of actual injury"); *Wilcox v. Plummer's Ex'rs*, 29 U.S. 172, 181-82 (1830) (holding that nominal damages are available "immediately" upon breach of contract, before any other damages are proven); *Pollard v. Lyon*, 91 U.S. 225, 227 (1876) (upholding presumed damages for defamation per se); *Whittenmore*, 29 F. Cas. 1120 (1813) (holding that a patent owner could recover nominal damages from a defendant who made, but never used or sold, an infringing machine).

Robins has brought his claim as a putative class action alter the standing inquiry, as the fact "[t]hat a suit may be a class action . . . adds nothing to the question of standing. . . ." *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 40 n.20 (1976). This Court should be hesitant to grant a question whose very premise cannot be made consistent with the case law, particularly when no split between the circuits has ventilated the issue or created a need to address it.

IV. Spokeo and its amici have greatly exaggerated the implications of this case.

Robins alleges the kind of concrete, particularized injury that courts have recognized for centuries. As a result, this case does not present the question that Spokeo raises, which by its own description involves cases where there is the "absence of any allegation of concrete and particularized injury." Pet. 2. And as for whether a plaintiff has standing when he alleges personal injury from the publication of false material about him, there is no unresolved question—the answer is clearly yes.

Spokeo's arguments about the importance of its question presented are exaggerated and ultimately counsel against hearing this case. Spokeo asserts that there will be "drastic and absurd" consequences if the lower court's decision is not overturned. Pet. 15. It is joined by several amici, some of whose briefs are nearly carbon copies of their past briefs in *Charvat*.[2] Their ar-

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[2] *Compare* Brief of ACA International as Amicus Curiae in Support of Petitioner, *Spokeo, Inc. v. Thomas Robins*, (No. 13-1339), *with* Brief of ACA International as Amicus Curiae in Support of Petitioners, *Mut. First Fed. Credit Union v. Charvat*, 134 S.Ct. 1515 (2014) (No. 13-679), 2014 WL 69413; *compare also* Brief of the Chamber of Commerce of The United States of America and the

(continued …)

guments rest on three claims: that this question arises under a number of statutes, that it is particularly important in the class action context, and that it is raised by an increasing number of cases. Spokeo and its amici exaggerate the significance of each of these claims, and any argument that Spokeo's question arises frequently counsels against this Court taking a case with as many vehicle problems as this one.

First, Spokeo argues that its question presented arises under several federal laws, and deciding the question in this case would therefore resolve the "broad range" of cases that Spokeo claims raise the question as well. Pet. 19. But Spokeo gives no reason to believe that the answer to its question will be the same for all statutes. The FCRA has strong "analogs in our common-law tradition," a statute-specific consideration that is clearly relevant to the standing inquiry. *Lujan*, 504 U.S. at 580 (Kennedy, J., concurring). In *First American*, for instance, much of the argument centered around the common-law analogs to the anti-kickback provisions of the Real Estate Settlement Procedures Act, one of the statutes that Spokeo cites. Transcript of Oral Argument at 17-22, *First American Fin. Corp. v. Edwards*, 132 S. Ct. 2536 (2012) (No. 10-708); Pet. 17. The fact-specific, law-specific issues in this case are not a panacea for all of the statutory claims Spokeo and its amici would like to resolve.

International Association of Defense Counsel as Amici Curiae in Support of Petitioner at 13, *Spokeo, Inc. v. Thomas Robins*, (No. 13-1339), *with* Brief of the Chamber of Commerce of the United States of America as Amicus Curiae in Support of Petitioners at 10, *Mut. First Fed. Credit Union v. Charvat*, 134 S.Ct. 1515 (2014) (No. 13-679), 2014 WL 47112, 10.

Second, Spokeo argues that its question is particularly important in the context of class actions. But again, the fact "[t]hat a suit may be a class action . . . adds nothing to the question of standing. . . ." *Simon v. E. Ky. Welfare Rights Org.*, 426 at 40 n.20. Especially in this case, in which the putative class has not even been certified, it would be inappropriate to grant certiorari based on the downstream implications of what might happen if a class ever were to come into existence.

If Spokeo were to prevail, it would have significant consequences for class actions. "[T]he constraints of Article III do not apply to state courts," *ASARCO Inc. v. Kadish*, 490 U.S. 605, 617 (1989). For this reason, the decision that Article III courts lack jurisdiction to hear entire categories of class actions would apply to federal courts only. Congress has recently found that state and local courts are "keeping cases of national importance out of federal courts," and implemented procedures for the removal of class actions from state to federal court. Class Action Fairness Act of 2005, Pub. L. No. 109-2, 119 Stat. 4 (2005). Spokeo's theory, that federal courts cannot constitutionally exercise jurisdiction in the large numbers of class actions that Spokeo claims would be affected, reverses this process. *See, e.g.*, *Nat'l Consumers League v. Gen. Mills, Inc.*, 680 F. Supp. 2d 132, 136 (D.D.C. 2010) (remanding case from federal court because the plaintiff lacked Article III standing). The likely result of a victory for Spokeo would be a shift of class actions from federal courts, which have limited jurisdiction, to state courts of general jurisdiction. This Court should hesitate to grant certiorari on the basis of a theory that has not been adopted in any circuit and is in such tension with Congressional policy.

Finally, Spokeo argues that its question is important because this kind of litigation under the FCRA has "skyrocketed." Pet. 12. It is hard to reconcile Spokeo's claims about the "great frequency" of these FCRA cases, *id.*, with its failure to find an FCRA case as evidence of its purported circuit split. And if the number of cases raising Spokeo's question is really so voluminous, the Court should wait until a case arrives that serves as a better vehicle. Because Robins alleges concrete, particularized harms, this case does not even raise Spokeo's question. And because Robins's allegations are "predicate to an intelligent resolution of the question" Spokeo raises, *Robinette*, 519 U.S. at 38, the Court would have to wade through a fact-bound, case-specific inquiry to reach Spokeo's question—without the benefit of the lower court having done the same. This Court should not engage in such an exercise, and should not hear this case.

CONCLUSION

The petition for certiorari should be denied.

Respectfully submitted,

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August 6, 2014

No. 13-1339

In the Supreme Court of the United States

SPOKEO, INC.,

Petitioner,

v.

THOMAS ROBINS, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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REPLY BRIEF FOR THE PETITIONER

The exceptional importance of the question presented—whether a mere statutory violation, without more, satisfies the constitutional requirement of an injury-in-fact—is underscored by the ten *amicus* briefs (on behalf of 17 individual companies, trade associations, and other organizations) urging the Court to grant review. It is difficult to imagine a more suitable case, given the Ninth Circuit's stark holding that "alleged violations of [a plaintiff's] statutory rights are sufficient to satisfy the injury-in-fact requirement of Article III." Pet. App. 8a.

Respondent tries mightily to obfuscate the court of appeals' ruling, devoting most of his brief in opposition to a series of imaginative injury-in-fact arguments. But the court of appeals specifically disavowed reliance on those grounds: having "determine[d] that [respondent] has standing by virtue of the alleged violations of his statutory rights," the court of appeals did "*not* decide whether harm to his employment prospects or related anxiety could be sufficient injuries in fact." Pet. App. 9a & n.3 (emphasis added). And for good reason—respondent's claim of hypothetical harm to indistinct future "prospects" and his speculative "subjective fear" are not cognizable injuries-in-fact. *Clapper* v. *Amnesty Int'l USA*, 133 S. Ct. 1138, 1150, 1153 (2013).

Equally misguided is respondent's argument—made for the first time in this Court—that he suffered "reputational" injury from information that inaccurately portrayed him as more educated and wealthier than he apparently is. Because respondent did not raise this argument below, the court of appeals did not address it. In any event, such favorable

information falls well outside the narrow category of falsehoods for which injury is presumed.

Respondent's claim that there is no conflict among the lower courts is equally unavailing. This case would have been dismissed if it had been filed in the Second or Fourth Circuits. And the Federal Circuit has now adopted the same rule. See *Consumer Watchdog* v. *Wis. Alumni Research Found.*, 753 F.3d 1258, 1262 (Fed. Cir. 2014).

When it comes to the significance of the Ninth Circuit's actual holding, respondent does not dispute that allowing injury-in-law to substitute for injury-in-fact effectively replaces the three-part standing test with a single question: whether the plaintiff has *alleged* a statutory violation. See Pet. 7–8, 22 & Pet. App. 9a. Respondent also does not dispute the dramatic expansion in the availability of class certification (and massive damages exposure) that results from eliminating the actual injury requirement. See Pet. 14.

Review by this Court is plainly warranted.

A. This Case Squarely Presents The Article III Question.

The question presented is whether the court of appeals' express holding—that "alleged violations" of a plaintiff's "statutory rights" automatically "satisfy the injury-in-fact requirement of Article III" (Pet. App. 8a)—is correct. Respondent studiously ignores this holding for the bulk of his argument (Opp. 4-18), urging this Court to deny review because the decision supposedly could have rested on other grounds.

Even if those other grounds were potentially meritorious, that argument would provide no reason to deny review of the legal issue that the court of ap-

peals indisputably *did* decide—particularly when, as here, the court of appeals expressly declined to address these alternative arguments. Pet. App. 9a n.3. Respondent would be free to raise those contentions on remand if this Court reverses the judgment below.

But it is not surprising that the Ninth Circuit declined to rest its holding on respondent's claims of actual injury. They are entirely meritless.

Respondent first asserts that information retrieved by Spokeo's search engine caused him concrete and particularized injury by (1) portraying him as more educated and wealthier than he is, and (2) making him worry that some potential employer might hold that favorable information against him. Opp. 3. Those contentions are foreclosed by this Court's rejection of "standing theories that rest on speculation about the decisions of independent actors" or on "subjective fear" about the same speculation. *Clapper*, 133 S. Ct. at 1150, 1153.[1]

And respondent's brand-new theory, not raised in the court of appeals—that nonderogatory information about his education, wealth, and marital status caused reputational injury merely because the information was inaccurate—is similarly flawed. Respondent points to the presumption of injury in defamation law, but that presumption applies only to false statements that ineluctably expose one "to hatred, contempt, or ridicule," *Milkovich* v. *Lorain*

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[1] Respondent is wrong to relabel as a "causation" analysis (Opp. 9) the holding in *Clapper*, which makes clear that "injury in fact" (133 S. Ct. at 1148) cannot arise from speculation about third-party responses to a defendant's activity or from subjective fear about those hypothetical responses. See *id.* at 1150, 1153.

Journal Co., 497 U.S. 1, 13 (1990); *White* v. *Nicholls*, 44 U.S. 266, 286 (1845), and that consequently are so "virtually certain to cause *serious* injury to reputation" that the law presumes an injury without demanding additional proof that it occurred. *Carey* v. *Piphus*, 435 U.S. 247, 262 & n.18 (1978) (emphasis added); see also *Dun & Bradstreet, Inc.* v. *Greenmoss Builders, Inc.*, 472 U.S. 749, 760 (1985) (quoting William Prosser, Law of Torts § 112, p. 765 (4th ed. 1971)).

Respondent's allegations here thus fall far short of what is needed to trigger presumed injury at common law. He argues instead for a much more expansive theory of presumed injury under which *any* factual error would be sufficient: injury-in-fact would exist whenever search results reflected transposed digits on an address or a misspelled middle name. Article III's injury-in-fact requirement bars litigation over such trifles. See also TransUnion Br. 15-17 (noting First Amendment concerns).

Respondent seems to contend that the mere fact that the complaint asserts "actual injury"—even though the court of appeals refused to rest its decision on that ground and even though the complaint's allegations do not satisfy the Article III standard set forth in this Court's decisions—makes this case a less attractive vehicle for resolving the issue presented than *First American Financial Corp.* v. *Edwards*, 132 S. Ct. 2536 (2012), or *First National Bank of Wahoo* v. *Charvat*, 134 S. Ct. 1515 (2014). See Opp. 7–9. But that would mean that any plaintiff could insulate an erroneous legal argument from review by this Court by including in the complaint allegations supporting multiple, legally deficient "fall-

back" contentions, even if those contentions are never addressed by any court.

Moreover, respondent cannot explain away the key distinctions favoring this case. The plaintiffs in *First American* had a direct relationship with the defendant that involved the payment of money and, the plaintiffs claimed, the equivalent of a transaction tainted by a breach of trust actionable at common law without proof of monetary injury. See Pet. 23–24; Tr. of Oral Arg. 41–45, *First American*, 132 S. Ct. 2536 (No. 10–708). The plaintiffs in *Charvat* claimed injury based on a fee charged by the defendants, alleging violation of a statute that had been repealed. *Charvat* v. *Mut. First Fed. Credit Union,* 725 F.3d 819, 821 (8th Cir. 2013), cert. denied, 134 S. Ct. 1515 (2014).

Respondent here, by contrast, had no commercial relationship of any sort with petitioner and paid no money to petitioner, and the FCRA is alive and well, generating dozens of new class actions every year. See Pet. 12–13 & n.5.

Finally, respondent mentions the other statutory violations alleged in the complaint (see Opp. 9–10; Pet. App. 4a–5a), but the complaint just asserts that Spokeo violated the cited statutes (Am. Compl. ¶¶ 61–74) without indicating whether or how respondent was injured; respondent told the Ninth Circuit only that his "personal statutory rights" were violated. C.A. Br. 39.

Under the holding below, the alleged failures to issue proper notices to providers and users of information (15 U.S.C. § 1681e(d)), or to post toll-free telephone numbers to allow consumers to request consumer reports (*id.* § 1681j(a)), arguably provide

standing to anyone who ventured on Spokeo's website without any further claim of harm. Respondent's reliance on these allegations confirms that his standing claim rests only on allegations of statutory violations without any actual injury.

B. The Conflict Among The Lower Courts Is Genuine And Deepening.

Respondent contends (Opp. 10–12) that there is no conflict because the holdings of the Ninth and Sixth Circuits, on one hand, and the Second or Fourth Circuits, on the other, did not all involve FCRA claims.

But respondent offers no way to reconcile the holding in this case (and *Beaudry* v. *TeleCheck Services, Inc.,* 579 F.3d 702 (6th Cir. 2009)) that "alleged violations of [a plaintiff's] statutory rights are sufficient to satisfy the injury-in-fact requirement of Article III" (Pet. App. 8a) with the Fourth Circuit's diametrically opposite constitutional holding that the mere "deprivation of [a] statutory right" cannot be "sufficient to constitute an injury-in-fact for Article III standing" (*David* v. *Alphin*, 704 F.3d 327, 338–39 (4th Cir. 2013)), because that "theory of Article III standing * * * conflates statutory standing with constitutional standing." *Ibid.*

There can be no doubt that, if this case had arisen in the Fourth Circuit, that court of appeals would apply *David* to reject respondent's claim of standing based on injury-in-law—the bare fact of a statutory violation without any proof of factual injury. Or that the Second Circuit would have rejected respondent's argument based on *Kendall* v. *Employees Retirement Plan of Avon Products*, 561 F.3d 112, 121 (2d Cir. 2009). See also *Doe* v. *Nat'l Bd. of Med. Exam'rs*, 199 F.3d 146, 153 (3d Cir. 1999) (Becker, C.J., joined by

Scirica and Alito, JJ.) ("Congress * * * cannot confer standing by statute alone."); *Joint Stock Soc'y* v. *UDV N. Am., Inc.*, 266 F.3d 164, 176 (3d Cir. 2001) (Alito, J.). Indeed, the Sixth and Ninth Circuits followed that precise approach, applying to FCRA claims their prior non-FCRA decisions holding that injury-in-law suffices to establish Article III standing. Pet. 10–11.

This conflict has deepened since we filed the petition. The Federal Circuit rejected the argument that a party's statutory right to judicial review of agency action sufficed to confer Article III jurisdiction over an appeal from a patent reexamination proceeding. The court acknowledged that "Congress may enact statutes creating legal rights, the invasion of which creates standing, even though no injury would exist without the statute," but—in square conflict with the decision in the present case—held that Congress's creation of a statutory right "does not eliminate the requirement that [the plaintiff] have a particularized, concrete stake in the outcome" of the case. *Consumer Watchdog*, 753 F.3d at 1262. Determining that the party invoking the statutory right lacked "an injury in fact for Article III purposes" (*ibid.*), the Federal Circuit dismissed the case for lack of standing.

Meanwhile, another court of appeals has joined the other side of the conflict: a divided panel of the Eighth Circuit followed the decision below. See *Hammer* v. *Sam's East, Inc.*, 754 F.3d 492, 500 (8th Cir. 2014).

Respondent does not dispute the ability of plaintiffs' counsel to prevent development of a conflict regarding the FCRA itself by choosing a favorable forum for nationwide class actions. See Pet. 11–12; DRI Br. 18–19; Experian Br. 11–12. Nevertheless, it is unmistakably clear that some courts of appeals

discern a difference between statutory violations and constitutional standing, that others do not, and that the ruling in this case would have differed based on where the lawsuit was filed.

C. As The Ten *Amicus* Briefs Explain, The Petition Presents A Question Of Very Substantial Importance.

Respondent claims (Opp. 15–18) that all seventeen *amici* misstate the importance of the question presented by this case. But there is a reason these parties expended the time and resources to file *amicus* briefs: The Ninth Circuit's holding has "great practical significance" because businesses are subject to a vast array of "technical legal duties" under myriad federal laws. Chamber of Commerce Br. 6.

As *amici* eBay, Facebook, Google, and Yahoo! explain, the decision below "implicates a broad swath of federal statutes that contain private rights of action and provide for statutory damages," and "invit[es] abusive and costly * * * class actions seeking millions or even billions of dollars in statutory damages under FCRA and similar statutes," including "numerous state statutes." eBay Br. 5, 11; see also Chamber of Commerce Br. 17–18 (providing examples); ACA Int'l Br. 16-17.

Specifically, "'aggregated statutory damages claims can result in absurd liability exposure in the hundreds of millions—or even billions—of dollars on behalf of a class whose actual damages are often nonexistent.'" DRI Br. 17–18 (citation omitted); see also eBay Br. 13–14 (noting $150 billion claim); Experian Br. 11–12 (exposure in another case reached "trillions"). "Under the Ninth Circuit rule, all it takes is one technical mistake to bankrupt a company."

Nat'l Ass'n of Prof'l Background Screeners Br. 12; see also Consumer Data Indus. Ass'n Br. 15, 18.

Respondent's arguments serve only to confirm the very substantial importance of this frequently recurring question.

1. Respondent scoffs (Opp. 18) at our description of the frequency with which FCRA class actions are filed (see Pet. 12–14 & nn.4–6), but the flood of lawsuits continues.[2]

That is not surprising given the impact of the decision below. Class certification is easier when injury-in-law can establish standing, because otherwise-disparate claims of causation and damages are transformed into class-wide common issues. See Pet. 15–16; *Ramirez* v. *Trans Union LLC*, 2014 WL 3734525, at *9-11, *14 (N.D. Cal. July 24, 2014) (certifying class because decision below rendered irrelevant "individualized question" whether class members were "actually injured"). Indeed, almost any FCRA class action could be recast in terms of an abstract, purely statutory harm. See Pet. 14–15.

2. Respondent also contends (Opp. 16) that the question here whether injury-in-law satisfies Article III standing for claims under the FCRA differs from whether a bare violation of other statutes satisfies Article III. But respondent does not explain why the same constitutional standard would apply differently, and cannot identify any material differences in the respective statutory formulations. See also Pet. 16–19.

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[2] Since the petition was filed, 46 additional putative class actions seeking statutory damages under the FCRA have been filed.

In fact, recent decisions demonstrate that courts embracing the injury-in-law theory apply it broadly to claims under different statutes. Thus, the Ninth Circuit has applied the very same theory to the Electronic Communications Privacy Act. See *In re Zynga Privacy Litig.*, 750 F.3d 1098, 1105 n.5 (9th Cir. 2014) ("Because the plaintiffs allege that Facebook and Zynga are violating statutes that grant persons in the plaintiffs' position the right to judicial relief, we conclude they have standing to bring this claim.").

The Ninth Circuit also relied on the decision below to find standing in a Fair Debt Collection Practices Act class action where the named plaintiff "could not have suffered any pecuniary loss or mental distress as the result of a letter that he did not encounter until months after it was sent—when related litigation was already underway." *Tourgeman* v. *Collins Fin. Servs., Inc.*, 2014 WL 2870174, at *5 (9th Cir. June 25, 2014). It was sufficient for Article III purposes, the court concluded, that the plaintiff asserted a "violation of his right not to be the target of misleading debt collection communications." *Ibid.* See also *Lea* v. *Buy Direct L.L.C.*, 755 F.3d 250, 254 (5th Cir. 2014) (court did "not perceive any harm here," but concluded, without addressing Article III, that "harm is not a prerequisite for relief" under the Truth in Lending Act); *Opperman* v. *Path, Inc.*, 2014 WL 1973378 (N.D. Cal. May 14, 2014) (applying decision below to find standing for several federal and state statutory claims).

3. Respondent maintains (Opp. 17) that reversing the decision below would simply displace no-injury class actions from federal to state court. That possibility provides no basis to disregard the limits of Article III, and is unlikely for several reasons, among

them that many state courts apply standing principles that restrict access to the courts by uninjured parties and nationwide class actions in state court would often violate constitutional limits on state court authority.

D. The Ninth Circuit's Holding Is Wrong.

Respondent offers only a cursory defense of the actual holding below. See Opp. 12–15. That effort chiefly consists of repackaging this Court's observation that "[t]he actual or threatened injury required by Art. III may exist solely by virtue of 'statutes creating legal rights, the invasion of which creates standing.'" *Warth* v. *Seldin*, 422 U.S. 490, 500 (1975) (quoting *Linda R.S.* v. *Richard D.*, 410 U.S. 614, 617 n.3 (1973)).

But respondent never mentions, let alone explains, this Court's more recent clarification "that Congress cannot erase Article III's standing requirements by statutorily granting the right to sue to a plaintiff who would not otherwise have standing." *Raines* v. *Byrd*, 521 U.S. 811, 820 n.3 (1997). Respondent instead assumes a contrary conclusion: that, by providing a statutory cause of action without explicitly requiring proof of harm, Congress can confer constitutional standing on parties who have no injury-in-fact. And he does not dispute that the Ninth Circuit's circular approach to injury-in-fact would mean that the causation and redressability requirements were automatically met in such cases (see Pet. 7–8, 21–22), and that as a result Congress could massively expand the jurisdiction of the federal courts whenever it authorized statutory damages (see Pet. 22).

Respondent also advances a strained analogy to copyright (Opp. 14), but copyright confers a "property" interest—"the right to exclude others"—upon which an infringer trespasses. *Fox Film Corp.* v. *Doyal,* 286 U.S. 123, 127 (1932). Nothing remotely similar is at issue under FCRA (or other statutes with similar private-action provisions).

Ultimately, respondent is reduced to relying on the chestnut that every wrong has a remedy. Opp. 13. But respondent has not in fact been injured by any "wrong" here. And Article III limits the federal courts to claims involving an actual injury.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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RETHINKING PREEMPTION FROM THE GROUND UP

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