UNITED STATE DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 03-80593-Civ-HURLEY/LYNCH

JAMES KEHOE, on behalf of himself and all others similarly situated,

Plaintiff,

v.

FIDELITY FEDERAL BANK AND TRUST,

Defendant.
_____/

DEFENDANT, FIDELITY FEDERAL BANK AND TRUST'S, MEMORANDUM IN SUPPORT OF ITS MOTION TO DISMISS AND/OR, IN THE ALTERNATIVE, MOTION FOR SUMMARY JUDGMENT

Defendant, Fidelity Federal Bank and Trust ("Fidelity"), files this Memorandum in Support of its Motion to Dismiss and/or, in the Alternative, Motion for Summary Judgment.

I. Introduction

James Kehoe, on behalf of himself and all others similarly situated (the "Plaintiff") has filed a putative class action Complaint against Fidelity alleging violations of the Driver Privacy Protection Act, 18 U.S.C. §§ 2721- 2724 (the "DPPA"). The Plaintiff brings this action on his own behalf and on the behalf of all similarly situated individuals whose "personal information" is contained in any "motor vehicle record" maintained by the State of Florida and who have not provided "express consent" to the State of Florida for distribution of their "personal information" and "whose personal information" has been knowingly obtained and used by Fidelity within the meaning of the DPPA.

Since it was amended effective June 1, 2000, the DPPA has required that before a State's Department of Motor Vehicles may disclose personal information derived from motor vehicle records, the individual whose information is to be disclosed must have expressly consented to such disclosure. However, contrary to the DPPA, and even after the DPPA was amended effective June 1, 2000, the State of Florida continued to disclose personal information even if the individual involved did not so consent. The State of Florida kept such information private only if the individual involved had affirmatively indicated to the State that the personal information be kept confidential. This was the requirement under the DPPA as it existed prior to its amendment effective June 1, 2000. The Plaintiff alleges that Fidelity has violated the DPPA by obtaining personal information from the State, when the State itself has violated the DPPA in selling that information to Fidelity. The Plaintiff implicitly alleges by omission that Fidelity is liable under the DPPA, even if Fidelity did not know, which it did not, that the State of Florida had not obtained the express consent required by DPPA since June 1, 2000. Further, the Plaintiff does not allege any actual damages and instead alleges that he is seeking "the liquidated sum of $2,500" for each member ot the class.

From June 1, 2000 to June 20, 2003, Fidelity purchased personal information from the State of Florida, specifically the names and addresses of individuals registering new and used automobiles in Palm Beach, Martin and Broward Counties. Affidavit of Dennis J. Casey ¶ 3 ("Casey aff. ¶__") attached hereto as Exhibit "A." Fidelity mailed to these individuals solicitations for car loans. Fidelity purchased such information relating to approximately 565,600 individuals. Casey aff. ¶ 4. Therefore, if the Plaintiff's reading of the DPPA is correct, Fidelity's damages could be approximately $1.4 billion. This potential damages award is approximately eight times greater than Fidelity's net worth of $178 million. Casey aff. ¶¶ 2 and 4.

This case must be dismissed because the Plaintiff has not alleged (1) that he has suffered actual damages and (2) that Fidelity knew that the State had not obtained the express consent of the individuals whose information was released (the "knowingly" requirement of § 2724(a)). In resolving these issues of statutory construction, we have relied upon standard rules of statutory construction set out at length in the beginning of Section III of this memorandum, upon cases dealing with similarly constructed statutes, and upon common sense. We are limited to these sources of guidance because there are no cases under the DPPA dealing specifically with these issues and because there is little relevant legislative history.

However, that does not mean that the right interpretation of the DPAA is not clear. One's intellect and common sense commands the result. Congress could never have intended to draft a statute, and did not draft a statute, that would impose liability in the billions of dollars on a local, community-serving bank when there were no actual damages suffered by anyone and where the bank did not even know that its use of personal information was not a permitted use because it did not know and had no reason to know that the State was not following Federal law.

II. Standard of Review.

Rule 8(a)(2) of the Federal Rules of Civil Procedure provides that a complaint need only be "a short and plain statement of the claim." Fed. R. Civ. P. 8(a)(2). As long as the pleadings "give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests," notice pleading has been satisfied. *Conley v. Gibson*, 355 U.S. 41, 47, 78 S. Ct. 99, 103 (1957). A complaint should not be dismissed for failure to state a claim upon which relief can be granted "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Id.* at 45-46, 78 S. Ct. at 102. When considering a motion to

dismiss, the court must accept all the plaintiff's allegations as true. *Scheuer v. Rhodes*, 416 U.S. 232, 236, 94 S. Ct. 1683, 1686 (1974). However, the "court need not accept facts that are internally inconsistent, facts that run counter to facts which the court may take judicial notice of, conclusory allegations, unwarranted deductions, or mere legal conclusions." *U.S., ex rel. Carroll v. JFK Med. Ctr.*, No. 01-8158-CIV, 2002 WL 31941007, at *2 (S.D. Fla. Nov. 15, 2002) (Ryskamp, J).

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories and admissions of file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). The moving party bears the initial burden of showing, by reference to materials on record, that there are no genuine issues of material fact to be decided at trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S. Ct. 2548, 2552 (1986). A moving party may discharge this burden by showing that there is no dispute of material fact, or by showing that the nonmoving party has failed to present evidence in support of some element of its case on which it bears the ultimate burden of proof. *Id.* at 322-23, 106 S. Ct. at 2552-53. There is no requirement, however, "that the moving party support its motion with affidavits or other similar materials *negating* the opponent's claim." *Id.* at 323, 106 S. Ct. at 2553 (emphasis in original).

Once a moving party satisfies this burden, the nonmoving party must then "go beyond the pleadings," and by its own affidavits, or by "depositions, answers to interrogatories, and admissions of file", establish that a genuine issue of fact remains for trial. *Id.* at 324, 106 S. Ct. at 2553. A "genuine" dispute as to a material fact exists if the "evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S. Ct. 2505, 2510 (1986).

III. The Plaintiff Has Failed to State a Cause of Action.

A. The Plaintiff Has Failed to State a Cause of Action for the Liquidated Minimum Damages under the DPPA Because He Has Not Alleged Actual Harm or Injury.

The Complaint in this case contains no allegation of actual harm or injury.[1] The Complaint alleges only a violation of the DPPA and in paragraph 20 (b) the Plaintiff alleges that "[a] remedy available under the DPPA is the liquidated sum of $2,500, which Plaintiff intends to seek for all members of the class. . ."(Complaint, ¶ 20) In the absence of any allegation of actual harm, the Plaintiff's claim for liquidated damages under the DPPA cannot stand.

1. A Claim for Liquidated Minimum Damages Under the DPPA is Dependent Upon a Base Allegation of Actual Damages as a Matter of Statutory Construction.

The DPPA permits a minimum award of $2,500 only where a plaintiff has a base claim for actual damages. 18 U.S.C. § 2724(b)(1) ("The court may award - - actual damages, but not less than liquidated damages in the amount of $2,500"). This construction of the statute is supported by binding rules of statutory construction.[2]

It is well-accepted that "[i]n construing a statute [courts] must begin, and often should end as well, with the language of the statute itself." *Allapattah Servs., Inc. v. Exxon Corp.*, 333 F.3d 1248, 1254 (11th Cir. 2003) (quoting *Merritt v. Dillard Paper Co.*, 120 F.3d 1181, 1185 (11th Cir. 1997)). "The plain meaning of legislation should be conclusive, except in the rare cases [in which] the literal application of a statute will produce a result demonstrably at odds with the intentions of

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[1]Such omission is certainly deliberate because it is impossible to imagine how the receipt by mail of an automobile loan solicitation could ever cause actual damage.

[2] The issue of whether an award of liquidated damages is independent of or dependent on a claim for actual damages under the DPPA is one of first impression.

its drafters." *In re Paschen*, 296 F.3d 1203, 1209 (11th Cir. 2002) (quoting *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 242 (1989)) (alteration in original) (internal quotation marks omitted).[3]

To construe the meaning of a statute, courts look to the placement of the terms in the statute, taking into account the rules of grammar. *Miller's Apple Valley Chevrolet Olds-Geo, Inc. v. Goodwin*, 177 F.3d 232, 234 (4th Cir. 1999). Courts also delve into the "structure of a statute and the context in which different provisions are written." *Tennessee Valley Auth. v. Whitman*, No. 00-15936, 00-16234, 00-16236, 2003 WL 21452521, at *9 (11th Cir. June 24, 2003). "Statutory construction is a holistic endeavor, and, at a minimum, must account for a statute's full text, language as well as punctuation, structure, and subject matter." *United States Nat'l Bank of Oregon v. Independent Ins. Agents of America, Inc.*, 508 U.S. 439, 455 (1993) (internal citations and quotation marks omitted).

Notably, the Supreme Court has cautioned that where a statute provides a particular set of remedies, a court must not read others into the statute. *Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11, 19-20, 100 S. Ct. 242, 246-47 (1979) ("[w]here a statute expressly provides a particular remedy or remedies, a court must be chary of reading others into it."); *Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n*, 453 U.S. 1, 15,101 S. Ct. 2615, 2623 (1981) ("In

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[3] Because the text of a statute controls, courts "may not 'consider legislative history when the statutory language is unambiguous.' " *Allapattah Servs.*, 333 F.3d at 1255 n.6 (quoting *Valdivieso v. Atlas Air, Inc.*, 305 F.3d 1283, 1287 (11th Cir. 2002) (*per curiam*)); *Harry v. Marchant*, 291 F.3d 767, 772 (11th Cir. 2002) (*en banc*) ("Even if a statute's legislative history evinces an intent contrary to its straightforward statutory command, 'we do not resort to legislative history to cloud a statutory text that is clear'"). Even if the legislative history of the DPPA was the object of appropriate consideration, that legislative history is silent as to the nature and purpose of the liquidated damages provision and as to the interrelationship between the remedy of actual damages and its liquidated damage floor.

the absence of strong indicia of contrary congressional intent, we are compelled to conclude that Congress provided precisely the remedies it considered appropriate.").

Applying these rules of statutory construction to the case at bar, the plain language of the DPPA is the starting point, if not the ending point, of this statutory construction analysis. The DPPA creates a private cause of action against "[a] person who knowingly obtains, discloses, or uses personal information, from a motor vehicle record, for a purpose not permitted under [the Act] . . . ." 18 U.S.C. § 2724(a). The private cause of action is only one of three enforcement mechanisms under the DPPA, the other two being a civil penalty imposed against states in substantial noncompliance with the Act[4] and a criminal penalty against persons in knowing violation of the DPPA, 18 U.S.C. § 2723.

Although the DPPA creates a private right of action, the statute does not grant courts unbridled power to award *any* remedies. The DPPA specifies the remedies which a court may award. 18 U.S.C. § 2724(b). The "Remedies" subsection in its entirety provides as follows:

> (b) Remedies. - - The court may award - -
> (1) actual damages, but not less than liquidated damages in the amount of $2,500;
> (2) punitive damages upon proof of willful or reckless disregard of the law;
> (3) attorneys' fees and other litigation costs reasonably incurred; and
> (4) such other preliminary and equitable relief as the court determines to be appropriate.

18 U.S.C. § 2724(b).

The relevant language is contained in the first subsection above: "The court may award – actual damages, but not less than liquidated damages in the amount of $2,500." 18 U.S.C.

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[4] The DPPA provides that "[a]ny state department of motor vehicles that has a policy or practice of substantial noncompliance with this chapter shall be subject to a civil penalty of not more than $5,000 a day for each day of substantial noncompliance." 18 U.S.C. § 2723(b).

§ 2724(b)(1). Notably, this provision is found in the "Remedies" section of the Act and not the section of the Act entitled "Penalties." 18 U.S.C. § 2723.

Returning to the relevant provision, it is apparent from a review of the language that this provision, first and foremost, vests the court with the discretion to award "actual damages." 18 U.S.C. § 2724(b)(1). However, as signaled by the intervening word "but," the court's discretion to award actual damages is not absolute. *See The American Heritage College Dictionary*, 191 (3d ed. 1997) (the word "but" means "with the exception that" and is "used to introduce a dependent clause"). In the dependent clause introduced by the word "but," Congress limits the court's discretion by providing that a court may not award "less than liquidated damages in the amount of $2,500." 18 U.S.C. § 2724(b)(1). This language establishes a base floor or threshold amount of $2,500 if actual damages are proved. 18 U.S.C. § 2724(b)(1).

Under a well-established rule of statutory construction, the threshold amount is to be applied to the immediately preceding terms in the statute. *In re Paschen*, 296 at 1209 (the rule of the last antecedent, which is a well-established cannon of statutory construction, provides that "qualifying words, phrases, and clauses are to be applied to the words or phrase immediately preceding, and are not to be construed as extending to and including others more remote.") (quoting *United States v. Correa*, 750 F.2d 1475, 1481 n.10 (11th Cir. 1985)) (internal quotation marks and citations omitted). Thus, the liquidated threshold amount of $2,500 qualifies the court's discretion in awarding "actual damages." Mirroring its placement in a dependent clause, the liquidated damages amount is hence not an independent remedy, but is dependent upon a demonstration of actual damages.[5]

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[5] While the case of *Watkins v. L.M. Berry & Co.*, 704 F.2d 577 (11th Cir. 1983) might seem apposite at first glance, the court's brief discussion of statutory damages in that case was with respect to a different statute, was in dicta, and, most importantly, was not based upon a statutory construction

The structure of the "Remedies" section, where the liquidated threshold amount is found, supports this construction of the statute. In the remedies section, each of the four numbered subsections begins by setting forth a particular remedy and concludes with language qualifying that remedy. For example, a court may award punitive damages, but only upon proof of willfulness. 18 U.S.C. § 2724(b)(2). A court may award attorneys' fees and costs, but only those that are reasonably incurred. 18 U.S.C. § 2724(b)(3). A court may award preliminary and equitable relief, but only as the court deems appropriate. 18 U.S.C. § 2724(b)(4). Similarly and most notably, a court may award "actual damages, but not less than liquidated damages in the amount of $2,500." 18 U.S.C. § 2724(b)(1). Thus, as is apparent from the structure of the remedies provision itself, the liquidated damages amount is not an independent remedy, but merely the minimum amount of actual damages recoverable.

Just as proof of willfulness is not at issue unless the plaintiff seeks punitive damages, by analogy, the liquidated sum of $2,500 is not at issue or available unless the Plaintiff proves some actual damages in the first place. Once actual damages are shown and if the court decides to award damages, then the liquidated damages provision is triggered, providing the plaintiff with a minimum liquidated amount of $2,500.

In summary, because the DPPA does not establish a remedy for liquidated damages independent of actual damages, and in keeping within the bounds of its jurisdictional authority, this Court may not award liquidated damages under the DPPA unless the Plaintiff proves actual damages. *See, Farley v. Nationwide Mutual Ins. Co.*, 197 F.3d 1322, 1340 (11th Cir. 1999) (refusing to award liquidated damages when the request was outside the terms of the statute); *see also Drez v. E.R.*

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analysis of any depth. *Watkins*, 704 F.2d at 584.

Squibb & Sons, Inc., 674 F. Supp. 1432, 1444 (D. Kan. 1987) ("liquidated damages are purely a creature of statute."); *Paolitto v. John Brown E. & C., Inc.*, 953 F. Supp. 17, 21 (D. Conn. 1997) (same); *Chambers v. Weinberger*, 591 F. Supp. 1554, 1557 (N.D. Ga. 1984) (same); *Wilkes v. U.S. Postal Service*, 548 F. Supp. 642, 642 (N.D. Ill. 1982) (same).

2. The Conditional Nature of Liquidated Damages Under the DPPA is Not Unique.

The conditional nature of the minimum liquidated damages under the DPPA is not unique. Both the Age Discrimination in Employment Act (the "ADEA") and the Fair Labor Standards Act (the "FLSA") condition an award of liquidated damages on proof of actual damages. 29 U.S.C. § 626(b); 29 U.S.C. § 216(b); *Myers v. Copper Cellar Corp.*, 192 F.3d 546, 552 (6th Cir. 1999); *Farley v. Nationwide Mut. Ins. Co.*, 197 F.3d 1322, 1340 (11th Cir. 1999). Under the ADEA and the FLSA, liquidated damages are calculated by doubling the amount of actual pecuniary damages. 29 U.S.C. § 626(b); 29 U.S.C. § 216(b).

For example, the Sixth Circuit Court of Appeal has held that a plaintiff who proves no actual damages from the defendant's violations under the FLSA is not entitled to a liquidated damages award. *Myers*, 192 F.3d at 552 ("[B]ecause the plaintiffs have proved no actual damages, their dependent claim for statutory liquidated damages is moot").

Similarly, the Eleventh Circuit Court of Appeal has refused to calculate a liquidated damages award under the ADEA based upon the plaintiff's non-pecuniary damages. *Farley*, 197 F.3d at 1340 (finding no error in trial court's refusal to calculate liquidated damages based upon frontpay, which was a form of equitable relief, because "the express terms of the ADEA limit the calculation of liquidated damages to double the amount of lost pecuniary wages").

One federal district court explained the importance of the requirement of actual damages as a precondition to an award of liquidated damages under the ADEA, as follows:

> this court does not believe that it would further the purpose of the ADEA to permit a plaintiff to come into court and receive a large judgment when he has suffered no measurable injury. If this were allowed, then liquidated damages would be transformed into the equivalent of a *purely punitive form of relief*. . . . Permitting recovery of liquidated damages without the established base of actual damage would . . .[also] introduce too much uncertainty in preparing for and litigating an ADEA lawsuit.

Drez, 674 F. Supp. 1432 at 1444 (emphasis added). Notably, there was evidence in *Drez* that the plaintiff suffered personal humiliation as a result of the defendant's discrimination, and the court even noted that an award of liquidated damages in light of that evidence would effectuate the purpose of a liquidated damages remedy which was to compensate a plaintiff's losses which were difficult to prove. *Id.* Nevertheless, because there was no proof of actual damages, the *Drez* court declined "plaintiff's invitation to penalize [the] defendant with an award of damages that ha[d] no basis in law or fact." *Id.* at 1445.

The liquidated damages provision in the Privacy Act, 5 U.S.C.§ 552a (the "Privacy Act"), has also been said to be conditioned upon proof of actual damages. *Doe v. Chao*, 306 F.3d 170, 177 (4th Cir. 2002). In *Doe*, the Fourth Circuit construed the liquidated damages provision under the Privacy Act which mandates an award of "actual damages sustained by the individual as a result of the refusal or failure [of the agency], but in no case shall a person entitled to recovery receive less than the sum of $1,000." *Doe*, 306 F.3d at 177 (construing 5 U.S.C.§ 552a(g)(4)). Based upon a thorough statutory construction analysis, the court held that a plaintiff must prove actual damages to be entitled to the statutory minimum damages award. *Doe*, 306 F.3d at 177. The *Doe* court reasoned, in part, that:

> It would be odd, to say the least, for Congress to have limited the liability of the United States to actual damages, and, in the very same sentence, to have authorized, for a plaintiff to whom the United States is found liable, recovery not merely beyond actual damages, but in the complete absence of such damages. . . By contrast, reading the section to require actual damages gives effect to the eminently reasonable (and generally to be expected) presumption that ***the legislature correlated the plaintiff's recovery entitlement with the defendant's liability by limiting the plaintiff's recovery to actual damages and by providing, by way of incentive to suit, for at least a minimum recovery even where actual damages are minimal.***

Doe, 306 F.3d at 177 (emphasis added). For this reason, among others, the *Doe* court concluded that an award of liquidated damages under the Privacy Act requires a showing of actual damages. *Id.* Notably, pre-*Doe,* no court had performed such a detailed statutory construction analysis of the liquidated damages provision in the Privacy Act. *Id.* at 179 n.3 ("Nor has any court examined closely the question we consider today, and none has analyzed the text of the statute at all.")[6]

In summary, just as courts have found that recovery of liquidated damages are conditioned upon proof of actual damages under the ADEA, the FLSA, and the Privacy Act, this Court should construe the liquidated damages provision in the DPPA as conditioned upon proof of actual damages.

3. The Requirement of Proof of Actual Damages is Supported by the Common Law.

Another recognized rule of statutory construction provides that a court may presume that Congress has legislated with an expectation that the common law rules will apply. *See, Astoria Fed.*

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[6] As noted in *Doe*, the Eleventh Circuit has not analyzed the text of the Privacy Act to determine whether as a matter of statutory construction the recovery of liquidated damages requires proof of actual damages. *Doe*, 306 F.3d at179 n.3. The Eleventh Circuit explicitly considered the meaning of the term "actual damages" under the Privacy Act, and concluded that "actual damages" requires proof of pecuniary loss. The court noted that proof of general mental injury may suffice for the statutory minimum under the Privacy Act. *Fitzpatrick v. Internal Revenue Service*, 665 F.2d 327, 330 (11th Cir. 1982).

Sav. and Loan Ass'n v. Solimino, 501 U.S. 104, 108, 111 S. Ct. 2166, 2170 (1991) ("Thus, where a common-law principle is well-established . . . the courts may take it as given that Congress has legislated with an expectation that the principle will apply except when a statutory purpose to the contrary is evident.") (internal citations and quotation marks omitted).

Based upon this rule of construction, this Court may presume that Congress' provision of damages for a violation of the DPPA conforms to common-law rules on damages in privacy actions, unless a contrary intent is evident. Under the traditional rule on damages in privacy actions, a plaintiff not only has "the burden of proving that the disclosure was the proximate cause of his injury, but must also show the nature and extent of the injuries and damages claimed to have been suffered." 43 Am. Jur. Proof of Facts 2d 449, *Invasion of Privacy By Public Disclosure of Private Facts*, § 13; 62A Am. Jur. 2d *Privacy* § 254; *Restatement (Second) of Torts* Section 652H (1977) (a plaintiff is entitled to recover damages for "his mental distress proved to have been suffered if it is of a kind that normally results from such an invasion"). "In most jurisdictions, the plaintiff is required to show some general damages, even though he is not required to prove either the amount or that there were special damages. Without a showing of general damages, he is entitled to recover only nominal damages." 43 Am. Jur. Proof of Facts 2d 449, *Invasion of Privacy By Public Disclosure of Private Facts*, § 13. Thus, under any construction of the liquidated damages provision, this Court may safely presume that a claim for liquidated damages under the DPPA requires, at a minimum, a showing of "some general damages, even though [the plaintiff] is not required to prove either the amount or that there were special damages." 43 Am. Jur. Proof of Facts 2d 449, *Invasion of Privacy By Public Disclosure of Private Facts*, § 13. A minimum amount of proof is necessary to ensure that imposition of liquidated damages on a defendant would be reasonable in light of the

actual loss sustained by the plaintiff. *See* Restatement (Second) of Contracts § 356 (1981) (requiring under principles of contract law that the liquidated damages amount be reasonable in light of anticipated or actual loss caused by the breach and the difficulties of proof of loss).

4. Without Actual Damages, Fidelity's Potential Damages Would Be Grossly Out of Proportion to Any Harm Suffered by the Plaintiff Class.

In a recent case, the Eleventh Circuit held that a showing of actual harm may be required to maintain a class action, even where the cause of action does not require a showing of actual harm, where "the defendants' potential liability would be enormous and completely out of proportion to any harm suffered by the plaintiff." *London v. Wal-Mart Stores, Inc.*, No. 02-12257, 2003 WL 21805304 (11th Cir. Aug. 7, 2003) (citing to several cases wherein the courts found that the aggregate of statutory damages would be grossly disproportionate to any actual harm suffered by the plaintiffs).

In this case, the Plaintiff seeks liquidated damages of $2,500 for himself and for all members of a loosely defined class whose personal information contained in motor vehicle records was allegedly obtained by Fidelity, without their consent, since June 1, 2000. Such a recovery would result in damages of approximately $1.4 billion, obviously grossly disproportionate to the actual harm suffered, given that (i) the Plaintiff has not alleged any actual harm to himself or *any* other class member; and (ii) that common sense tells us that there could be no actual damages resulting from the mere receipt by mail of an envelope containing an automobile loan solicitation. Such an award would be punitive and violative of due process. The DPPA should not be interpreted to permit, in the absence of actual damages, an extraordinarily large award. Such an award would be grossly disproportionate to the harm, if any, caused by Fidelity and such an award would be financially devastating to Fidelity.

"[I]f an otherwise acceptable construction of a statute would raise serious constitutional problems, and where an alternative interpretation of the statute is fairly possible, we are obligated to construe the statute in favor of the alternative interpretation to avoid such [constitutional] problems." *I.N.S. v. St. Cyr*, 533 U.S. 289, 299-300 & n.12, S. Ct. 2271, 2279 & n.12 (2001) (internal citations and quotation marks omitted). Any construction of the DPPA that would permit a class of members who have not suffered any actual damages to recover aggregate liquidated damages grossly disproportionate to any actual harm and financially devastating to Fidelity would raise serious due process concerns. Such a construction should be avoided in favor of an interpretation of the DPPA that requires actual harm. *In re Trans Union Corp. Privacy Litig.*, 211 F.R.D. 328, 350-51 (N.D. Ill. 2002) (recognizing due process concerns where statutory damages would be "grossly disproportionate" to any actual damage suffered by plaintiffs). Fidelity's net worth is $178 million, only approximately 13% of the potential award in this case if the Plaintiff's reading of the DPPA is followed. Casey aff. ¶¶ 2 and 4. Therefore, the Plaintiff's reading of the DPPA to permit an extraordinarily large damages award, in the complete absence of actual damages, cannot stand.

In a slightly different but analogous context, the Supreme Court in *State Farm Mutual Automobile Ins. Co. v. Campbell*, 123 S. Ct. 1513, 1519 (2003) held that the due process clause of the Fourteenth Amendment prohibits grossly excessive or arbitrary punishments on a tortfeasor. Specifically, the Supreme Court held that, to "the extent an award is grossly excessive, it furthers no legitimate purpose and constitutes an arbitrary deprivation of property." [Citations omitted.] *Id.* at 1520. The Supreme Court went on to observe that except in rare circumstances single digit multipliers, that is the amount of the compensatory damage as multiplied by a number of 9 or less,

are "more likely to comport with due process ... than awards with ratios in the range of 500 to 1." *Id.* at 1524. [Citations omitted.]

In the case at hand, there are no compensatory damages alleged. Therefore, by definition, if this case were dealing with punitive damages, the result sought by the Plaintiff would be clearly unconstitutional. Nevertheless, the broad based constitutional principles of *Campbell* apply to make unconstitutional the construction of the DPPA advanced by the Plaintiff.

The DPPA is more reasonably construed as correlating a plaintiff's entitlement to the liquidated damages amount to the actual harm suffered by the plaintiff, with the liquidated damages provision merely providing to persons with nominal actual damages the certainty of a minimum recovery and thus an incentive to sue.

5. The Relevant Legislative History.

There is little relevant legislative history on point. However, two points should be made.

First, there is nothing in the legislative history that would indicate that Congress ever intended that institutions, such as Fidelity, should be exposed to billions of dollars of damages when their conduct was perfectly innocent. Further, there is nothing in the legislative history that indicates that actual damages are not required, and nothing that indicates nominal damages are permitted, absent actual damages. Finally, there is nothing in the legislative history to indicate that Congress intended to bankrupt financial institutions, such as Fidelity, for relying upon the State's Department of Motor Vehicles to comply with federal law.

Secondly, in paragraph 5 of the Complaint, the Plaintiff enumerates the type of incidents that gave rise to the passage of the DPPA. Paragraph 5 reads as follows:

> The DPPA was included as part of omnibus crime legislation passed by Congress in 1993, known as the Violent Crime Control and Law Enforcement Act of 1993. Senator Boxer, one of DPPA's Senate sponsors, described several well-publicized incidents in which criminals had used publicly available motor vehicle records to identify and stalk their victims. Those incidents included:
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> a. the murder of actress Rebecca Schaeffer in California by a man who had obtained Schaeffer's address from California's Department of Motor Vehicles;
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> b. home invasion robberies by a gang of Iowa teenagers who identified their victims by copying the license numbers of expensive automobiles and used those license numbers to obtain the addresses of the vehicle owners from the Iowa Department of Transportation; and
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> c. the Arizona murder of a woman whose home address was identified from the Arizona Department of Motor Vehicles.
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> Senator Boxer also explained the ease with which a California stalker had obtained the addresses of young women by copying their license numbers and requesting their addresses from the California Department of Motor Vehicles.

Each of these three incidents involved serious and actual harm. Murders and home invasion robberies are entirely different than the mailing of automobile loan solicitations involved in this case.

6. <u>The Plaintiff Has Failed to Allege Any Actual Harm, Rendering his Dependent Claim for Liquidated Damages Subject to Dismissal.</u>

In summary, as dictated by the language of the relevant provision, its grammatical structure, and the overall structure of the remedies provision, and as supported by the common law, prior interpretations of similar statutory provisions and the application of due process standards, the DPPA requires proof of actual damages as a precondition to recovery of the minimum liquidated damages of $2,500. In this case, the Plaintiff has failed to allege that he suffered any actual damages as a result of Fidelity's alleged receipt or use of the Plaintiff's personal information. The Plaintiff does not even allege that he has suffered any non-pecuniary loss. To permit the Plaintiff to maintain an

action for liquidated damages based upon the allegations in the Complaint would transform the liquidated damages provision of the DPPA into a purely punitive form of relief, a result clearly not intended by the statute. Because the Plaintiff has alleged no injury, the Plaintiff has failed to state a claim under the DPPA.

B. The Plaintiff Cannot Prevail Because He Has Not Alleged and Cannot Prove that Fidelity Knew, or Had Reason to Know, the State Had Not Obtained Express Consent.

The Plaintiff has failed to state a cause of action under the DPPA because the Plaintiff has not alleged, nor can he prove, that Fidelity knew, or had reason to know, that the State of Florida had not obtained the express consent of the persons whose personal information was disclosed by the State to Fidelity.

1. The Allegations of the Complaint.

In paragraph 11 of the Complaint the Plaintiff alleges that "under the DPAA, a 'person' who ***knowingly*** obtains or discloses 'personal information' concerning another from a 'motor vehicle record . . . shall be liable to the individuals to whom the information pertains." (emphasis added.)

In paragraph 19 (b) of the Complaint, the Plaintiff alleges that one of the common questions included in this class action is "whether Defendant's obtaining and use of 'personal information' from the 'motor vehicle records' of members of the class was done ***knowingly***, within the meaning of the DPPA . . ."(emphasis added).

In paragraph 22 of the Complaint, Plaintiff alleges that "Defendant ***knowingly*** obtained 'personal information,' pertaining to Plaintiff and the members of the Class from 'motor vehicle records' maintained by the State of Florida DHSMV, in violation of the DPPA."(emphasis added).

In paragraph 23 of the Complaint, Plaintiff alleges that "Pursuant to the DPPA . . ., Defendant is liable for ***knowingly*** obtaining 'personal information' pertaining to Plaintiff and the members of the Class from 'motor vehicle records,' in violation of the DPPA."(emphasis added).

Finally, and most importantly, in paragraph 15, the Plaintiff alleges:

> Defendant's violations of the DPPA have been committed "***knowingly***," within the meaning of the DPPA 18 U.S.C. § 2724(b). In the context of the DPPA, to act knowingly is to act with knowledge of the facts that constitute the offense. *See, e.g.*, *Bryan v. United States*, 524 U.S. 184, 193, 118 S.Ct. 1939, 1946 (1998) (***"[U]nless the text of the statute dictates a different result, the term 'knowingly' merely requires proof of knowledge of the facts that constitute the offense."***). Defendant knows that it obtained personal information pertaining to individuals from Florida motor vehicle records. (emphasis added)

2. <u>The Clear and Unambiguous Language of the DPPA Requires that Before the Plaintiff Can Prevail, He Must Plead and Prove that Fidelity Knew that the State had not Obtained the Express Consent of the Persons Whose Personal Information was Disclosed to Fidelity by the State.</u>

a. <u>The Language of the Statute</u>.

The DPPA contains in § 2724 a private cause of action. In relevant part the language specifically reads:

> A person who knowingly obtains, discloses, or uses personal information, from a motor vehicle record, for a purpose not permitted under this Chapter shall be liable to the individual to whom the information pertains . . . .

Id. at § 2724(a). Section 2721(b) enumerates a number of permissible uses. Section 2721(b)(12) is one of the enumerated permitted uses and provides that personal information may be disclosed:

> For bulk distribution for surveys, marketing or solicitations if the State has obtained the express consent of the persons to whom such personal information pertains.

Id. at § 2721(b)(12).

b. To Prevail Under the DPPA the Plaintiff Must Plead and Prove that Fidelity Knew that the State had not Obtained the Express Consent of the Persons Whose Personal Information was Disclosed to Fidelity by the State.

In paragraph 15 of the Complaint, the Plaintiff cites the case of *Bryan v. United States*, 524 U.S. 184, 193 (1998) for the proposition that unless "the text of the statute dictates a different result, the term 'knowingly' merely requires proof and knowledge of the facts that constitute the offense."[7] Applying this rule of law to the facts at hand, it is clear that in order for Fidelity to be liable under the DPPA, it must have had "knowledge of the facts that constitute the offense."

What are those facts? First, as required by § 2724(a), Fidelity must have knowingly obtained, disclosed or used personal information. Second, Fidelity must have known that personal information came from a motor vehicle record. Third, Fidelity must have known that the State had not obtained the express consent of the person to whom such personal information pertains. only if Fidelity knew that the State had not obtained express consent would there be a violation of the DPPA. It is that simple.

To summarize, the facts that Fidelity must have known before it can be liable for a violation of the DPPA are:

(a) Fidelity obtained, disclosed or used personal information;
(b) That information came from a motor vehicle record; and
(c) The State had not obtained the express consent of the person to whom such personal information pertains.

In this case there appears to be no question that since June 1, 2000, the State has not obtained the express consent of the person to whom such personal information pertains and has routinely and

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[7]In *Bryan*, the Supreme Court was interpreting 18 U.S.C. § 924, which specifies the penalties for certain unlawful acts involving firearms. *Bryan*, 524 U.S. at 186-93, 118 S.Ct. at 1943-46.

regularly disclosed such information in violation of the DPPA, to Fidelity (and many others for that matter). However, the Plaintiff nowhere alleges that Fidelity had knowledge, or had reason to know, of the fact that the State had not obtained the express consent of the person whose personal information was disclosed. The Plaintiff does not make this allegation even though the Plaintiff concedes in paragraph 15 of the Complaint that Fidelity must have knowledge of "the facts that constitute the offense." In this case, the most critical fact constituting the offense is that the State had not obtained express consent of the person to whom such personal information pertained. It is undisputed that Fidelity did not have knowledge or reason to know of that critical fact. Casey aff. ¶ 5.

3. The Majority of the Relevant Case Law Supports the Plaintiff's Allegation in Paragraph 15 that "The Term 'Knowingly' Requires Proof and Knowledge of the Facts that Constitute the Offense."

a. The DPAA Cases.

There is no case interpreting the DPPA which speaks directly to whether the person alleged to have violated the DPPA in the context of § 2721(b)(12) must have known that the State had not obtained express consent. In *Mattivi v. Russell*, 2002 WL 31949898 (D. Colo.), the court granted defendant's motion for summary Judgment and denied its motion to dismiss as moot because the court interpreted the conduct in question not to be violative of the DPPA because a "motor vehicle record" as defined by the DPPA was not involved. The court noted that interpretation of the DPPA is a matter of federal law and then discussed at some length the rules of statutory interpretation as established by the Tenth Circuit, noting that "the literal language of the statute controls its construction, absent 'ambiguity or irrational result.'" *Id.* at *2.

The only other DPPA case with some relevance is *Morgan v. Niles*, 250 F. Supp.2d 63 (N.D.N.Y. 2003). In that case, in noting that there was no independent cause of action for conspiracy to violate the DPPA, the court pointed out that such a holding did not mean that plaintiffs may not offer proof of a conspiracy to violate the DPPA.

> Evidence of a conspiracy may be used to connect the actions of the various defendants with a violation of the DPPA. In the instant case, the extent to which McKenna knew of, and participated in, Niles and Johnston's conduct or scheme is relevant to the issue of whether McKenna knowingly obtained, disclosed, or used personal information from a motor vehicle record "for a purpose not permitted" by the DPPA. [Citations omitted.]

Id. at 76.

In other words, the court was willing to permit evidence of a conspiracy, even though there was no cause of action for it, to show whether McKenna knew that personal information had knowingly been obtained, disclosed or used "for a purpose not permitted" by the DPPA. Therefore, the court impliedly recognized that in order for McKenna to be liable for a violation of the DPPA, he must have known that the information was to be obtained, disclosed or used "for a purpose not permitted" by the DPPA.

b. <u>The Resource, Conservation and Recovery Act (the "RCRA") cases</u>.

There are a line of cases which have interpreted the "knowing" requirement in the context of the RCRA, 42 U.S.C. § 6928(b)(2). That section provides:

> (d) Criminal penalties
> Any person who–
> ...
> (2) ***knowingly*** treats, stores, or disposes of any hazardous waste identified or listed under this subchapter either–
> (A) without having obtained a permit under § 6925 of this title . . .; or

> (B) in ***knowing*** violation of any material condition or requirement of such permit; or
> ...
> shall, upon conviction, be subject to [fines, imprisonment or both]. (emphasis added).

The Third Circuit in *United States v. Johnson & Towers, Inc.*, 741 F.2d 662, 667, 669 (3rd Cir. 1984), interpreted this language to require the government to prove the defendant knew that the waste was hazardous and knew that there was no permit before there could be a violation of § 6928(b)(2)(A).

As to the first point, the application of knowingly to "hazardous waste," the Third Circuit held:

> If the word "knowingly" in § 6928(d)(2) referred exclusively to the acts of treating, storing or disposing, as the government contends, it would be an almost meaningless addition since it is not likely that one would treat, store or dispose of waste without knowledge of that action. At a minimum, the word "knowingly," which introduces subsection (A), must also encompass knowledge that the waste material is hazardous. Certainly, "[a] person thinking in good faith that he was [disposing of] distilled water when in fact he was [disposing of] some dangerous acid would not be covered." [Citations omitted.]

Id. at 668. Moreover, even though that subsection contains no mention of the word "knowing" the *Johnson & Towers* court concluded that even absent the phrase in that subsection, the government still had to prove that the wrongdoer had actual knowledge that a permit had not been obtained before liability under RCRA could be imposed.

Applying this holding to § 2724(a) of the DPPA, the functional equivalent of "hazardous waste," as to which the knowing requirement is applied, is "personal information, from a motor vehicle record, for a purpose not permitted under this Chapter." The knowing requirement must work its way all the way down through a "purpose not permitted," because there is nothing per se wrong with disclosing personal information or disclosing personal information from a motor vehicle

record or from disclosing personal information from a motor vehicle record for a purpose permitted under the Chapter. There is only an offense if the purpose is not permitted. For Fidelity to be liable for a not permitted purpose, Fidelity must have known the fact that the State of Florida had not obtained the express consent of the individuals whose personal information was disclosed.

In *United States v. Hayes International Corp.*, 786 F.2d 1499 (11th Cir. 1986), the Eleventh Circuit considered two issues. First, it considered whether knowledge of the regulations was required under § 6928(a)(d)(1). The court determined that it would be no defense to claim no knowledge that the paint waste was a hazardous waste "within the meaning of the regulations." *Id.* at 1503. This is simply another way of saying that ignorance of the law is no defense. The Eleventh Circuit did not say that one did not have to know the material was hazardous waste before he would be liable. As held in *Johnson & Towers, supra.*, a person thinking in good faith that he was disposing of distilled water when, in fact, he was disposing of some dangerous acid, would not be liable for a violation of the statute. *Id.* at 668.

More importantly, the Eleventh Circuit then went on to hold that the alleged wrongdoer must know that there was no permit. Otherwise, the wrongdoer would have liability under the statute even "if the defendant reasonably believed that the site had a permit, but, in fact, [the defendant] had been misled by the people at the site." The court noted that if Congress wanted to intend such a strict statute, it could have dropped the term "knowingly" altogether.

Applying this logic to the DPPA, if the "knowing" requirement is read to apply only to "obtains, discloses, or uses personal information" that term has little or no content and is nothing but surplusage because it is almost unimaginable how one could obtain, disclose or use personal information in an unknowing capacity. Therefore, to give substance and content to the term

knowingly, it must apply to the rest of the clause including the requirement that the information come from a motor vehicle record and the requirement that the personal information be used "for a purpose not permitted under this Chapter." That is the most common sensical reading of the statute.

c. The Food Stamp Act Cases.

In *United States v. Marvin*, 687 F.2d 1221 (8th Cir. 1982), the court considered the interpretation of the Food Stamp Act which reads in § 2024(b) of Title 7 of the United States Code:

> (W)hoever knowingly uses, transfers, acquires . . . or possesses (food) coupons . . . in any manner not authorized by this chapter or the regulations issued pursuant to this chapter shall, if such coupons are of a value of $100 or more, be guilty of a felony . . . .

The defendant contended that the government was required to prove that he knew his actions were in violation of the law, and the Eighth Circuit agreed. The specific question was whether the word "knowingly" applied to not only "uses, transfer, acquires" but also to "in any manner not authorized by this Chapter." The government pointed out that the adverb, "knowingly" immediately precedes the verbs "uses, transfers, acquires" and was some distance away from the crucial clause "in any manner not authorized by this Chapter." However, the court held that:

> [P]urely as a verbal matter, the word "knowingly" in subsection (b) may naturally be read to modify the entire remainder of the clause in which it appears, including the phrase, "in any manner not authorized," etc. To read "knowingly" as having nothing to do with the phrase, "in any manner not authorized," is, we suppose, verbally tenable, but it is not the only meaning the words will bear, nor even, we think, the more natural one.

Id. at 1226.

Accordingly, the Eighth Circuit held that the government had to prove that the alleged wrongdoer knew that his conduct was "not authorized by this Chapter." An important point should be made here. Unlike the Food Stamp Act, the DPPA does not require that one know that he is

breaking the law. Certain statutes require such allegations and proof but the general principal is that ignorance of the law is no defense. But that is not to say that Fidelity need not have knowledge of the underlying facts before it can be liable for a violation of the DPPA. It could not be the intent of Congress and it would be fundamentally unfair if Fidelity could be liable for violation of the DPPA if it did not know that the State had not obtained express consent. The DPPA clearly requires that the alleged wrongdoer knowingly obtain, disclose, or use the personal information for a purpose not permitted under the Chapter. Thus, to be liable under the DPPA, Fidelity must have known that the State had not obtained express consent, a fact Fidelity did not know. Casey aff. ¶ 5.

4. Before Fidelity May be Liable, the Plaintiff Must Plead and Prove That Fidelity Knew of the Facts Giving Rise to Liability Under the DPAA.

In summary, as the Plaintiff has conceded in paragraph 15 of the Complaint, before Fidelity may be liable for a violation of the DPPA, it must have "knowledge of the facts that constitute the offense."

This requirement is supported by a textual analysis of the DPPA. In order to give any meaning and content to the "knowingly" requirement of § 2724(a), that requirement must modify the entire clause which is the object of the verbs "obtains, discloses or uses." That entire clause is "from a motor vehicle record, for a purpose not permitted under this Chapter...." Therefore, before Fidelity to be liable under the DPPA, Fidelity must have known that its purpose in acquiring the information was not permitted. To learn this fact, Fidelity would have to have known that the State did not obtain express consent as required by § 2721(b)(12). That has not been alleged or proved.

This reading of § 2724(a) is supported by standard rules of statutory construction and the interpretation courts have made of similarly constructed statutes. This reading is the only reading

that requires the alleged wrongdoer to have knowledge of the facts (but not the law) giving rise to his liability.

V. Conclusion.

For the reasons set forth above, the Complaint should be dismissed for failure to state a cause of action and/or, in the alternative, summary judgment should be entered in favor of Fidelity.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to all parties on the attached service list, by [X] U.S. Mail, [X] Facsimile, [ ] Hand Delivery, [ ] overnight delivery, this 25th day of August, 2003.

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UNITED STATE DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 03-80593-Civ-HURLEY/LYNCH

JAMES KEHOE, on behalf of himself and all others similarly situated,

Plaintiff,

v.

FIDELITY FEDERAL BANK AND TRUST,

Defendant.
_____/

AFFIDAVIT OF DENNIS J. CASEY, SUBMITTED BY DEFENDANT, FIDELITY FEDERAL BANK AND TRUST, IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT

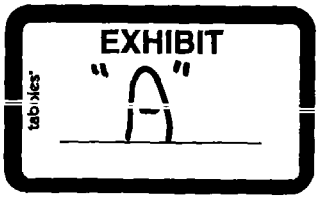
STATE OF FLORIDA

COUNTY OF PALM BEACH

BEFORE ME , the undersigned authority, personally appeared Dennis J. Casey, who upon being duly sworn, deposes and says:

1. I am over the age of 18 years and have personal knowledge of the facts and circumstances described herein by virtue of my involvement in them and by review of the records kept in the normal course of regularly conducted business by Fidelity Federal Bank and Trust ("Fidelity").

2. I serve as the Vice President/Director of Marketing of Fidelity. Fidelity is a publicly owned and locally operated federal savings bank that provides personal and business deposits, lending, insurance and trust services, within Palm Beach, Broward, St. Lucie, Indian River and Martin Counties. It has been in business for fifty-one years. It employs approximately 750 employees and has approximately 5,600 shareholders. Its net worth is approximately $177.8 million.



3. From June 1, 2000, to June 20, 2003, Fidelity purchased on a monthly basis from the State of Florida's Department of Highway Safety and Motor Vehicles, the name and addresses of individuals in a three county area (Palm Beach, Martin and Broward Counties) who, within the preceding thirty days, had registered new motor vehicles and used motor vehicles less than three years old. Fidelity Federal paid the State for that information. The payment was one cent for each name and address provided. The State would forward the information electronically to a mass mailing service provider retained by Fidelity. The mailing went to the names and addresses provided to Fidelity by the State and contained solicitations to refinance automobile loans.

4. During the period in question, that is from June 1, 2000 to June 20, 2003, Fidelity paid the State approximately $5,656 for the names and addresses of approximately 565,600 individuals.

5 At no point until the filing of the Complaint herein did Fidelity know, or have reason to know, that the State had not complied with the amendment to the Driver Privacy Protection Act (the "DPPA") which went into effect on June 1, 2000 requiring the State to obtain express consent of the involved individual before the State could release personal information as defined in the DPPA relating to that individual.

FURTHER AFFIANT SAYETH NAUGHT

FIDELITY FEDERAL BANK AND TRUST

By: _____
DENNIS J. CASEY, Vice President
Director of Marketing

BEFORE ME, the undersigned authority, this 21ST day of AUGUST, 2003, personally appeared DENNIS J. CASEY, Vice President/Director of Marketing of Fidelity Federal Bank and Trust. The above-named individual ☑ is personally known to me or ☐ ~~has produced~~ __

_____ as identification which is current or has been issued within the past five years and bears a serial or other identifying number and who did (did not) take an oath:

Print Name: LUCY A CARR
NOTARY PUBLIC - STATE OF FLORIDA
Commission Number: _____
My commission expires: _____