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UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

Case No. 04-13306-BB

APPEAL FROM ENTRY OF SUMMARY FINAL JUDGMENT

Appeal from the United States District Court for the
Southern District of Florida
Case No. 03-80593-CIV-HURLEY/LYNCH

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

Plaintiff/Appellant,

v.

FIDELITY FEDERAL BANK AND TRUST

Defendant/Appellee.

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**U.S. DISTRICT COURT OF APPEALS FOR THE ELEVENTH CIRCUIT
CERTIFICATE OF INTERESTED PERSONS AND
CORPORATE DISCLOSURE STATEMENT**

Trial Judge: Daniel T.K. Hurley

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Plaintiff/Appellant: James Kehoe

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STATEMENT REGARDING ORAL ARGUMENT

Pursuant to 11th Cir. R. 28-1(c), Kehoe respectfully requests that oral argument be heard on this appeal. The principal arguments raised on this appeal involve consideration of core issues relating to whether actual damages must be pled and proven by a plaintiff seeking relief under a federal privacy statute. Routinely, Courts have held that it is not necessary to plead and prove actual damages under Federal Privacy statutes. The issues pending on this appeal are of first impression in the Eleventh Circuit, and concern the application of the Supreme Court's recent decision in *Doe v. Chao* to federal privacy statutes other than the specific statute at issue in *Chao*. A robust discussion of such issues at oral argument will substantially assist the Court in its consideration of this appeal.

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STATEMENT OF JURISDICTION

The District Court had jurisdiction over the subject matter of this litigation pursuant to 28 U.S.C. §1331 because this action was brought under the Federal Driver's Privacy Protection Act, 18 U.S.C. §2724. This Court has jurisdiction over this direct appeal arising from litigation commenced in the United States District Court, Southern District of Florida by Appellant James Kehoe ("Kehoe") against Fidelity Federal Bank & Trust ("Fidelity"), in which the District Court (Hurley, J.) entered Summary Final Judgment against Kehoe dismissing his claims. 28 U.S.C. §1291.

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STATEMENT OF THE ISSUES

1. Whether a plaintiff who files a lawsuit under the Federal Driver's Privacy Protection Act, which provides for a liquidated damages remedy for those aggrieved by a violation of the Act, is required to prove that he suffered actual damages.

2. Whether the District Court erred when it entered Summary Final Judgment for Fidelity without considering Kehoe's prayer for injunctive relief.

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STATEMENT OF THE CASE

A. Statement of Facts and Procedural History

In 1993, Congress enacted the Federal Driver's Privacy Protection Act, 18 U.S.C. §2721, *et. seq.* ("DPPA"), in response to growing concerns regarding the actual and potential misuse of personal information contained in the drivers license records of State motor vehicle bureaus. (Complaint at 2) [DE#1]. Prior to the DPPA's enactment, individuals with little or no justifiable purpose could obtain the home address of any licensed driver simply by name or by providing the tag/license plate number to a local motor vehicle bureau. Congress enacted the DPPA to prevent the potential misuse of this information by individuals who did not have a legitimate need for it. *Id.* at 3.

Senator Barbara Boxer (D-CA), during a November 16, 1993 Senate Committee hearing, described the reasons that the DPPA was enacted by Congress:

> Mr. President, today I join the Senator from Virginia [Mr. Warner] and 26 other cosponsors, to offer an amendment to protect the privacy of all Americans.
>
> In California, actress Rebecca Schaeffer was brutally murdered in the doorway of her Los Angeles apartment by a man who had obtained her home address from my State's DMV.
>
> In Iowa, a gang of teenagers copied down the license plate numbers of expensive cars, obtained the home addresses of the owners from the Department of Transportation, and then robbed them at night.

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In Tempe, AZ, a woman was murdered by a man who had obtained her home address from that State's DMV.

And, in California, a 31-year-old man copied down the license plate numbers of five women in their early twenties, obtained their home address from the DMV and then sent them threatening letters at home. I want to briefly read from two of those letters.

> *I'm lonely and so I thought of you. I'll give you one week to respond or I will come looking for you.*

Another one read:

> *I looked for you though all I knew about you was your license plate. Now I know more and yet nothing. I know you're a Libra, but I don't know what it's like to smell your hair while I'm kissing your neck and holding you in my arms.*

When they apprehended him, they found in his possession a book entitled "You Can Find Anyone" which spelled out how to do just that using someone's license plate.

In 34 States, someone can walk into a State Motor Vehicle Department with your license plate number and a few dollars and walk out with your name and home address. Think about this. You might have an unlisted phone number and address. But, someone can find your name or see your car, go to the DMV and obtain the very personal information that you may have taken painful steps to restrict.

Mr. President, the American people think that this is wrong. In a recent Lou Harris survey, 80 percent of the people were uncomfortable with one person obtaining this type of information about another.

Can we afford to wait until every State has their own tragedy? That is not the way to legislate. Our Representatives are

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> elected to lead, to think ahead and-at every turn-to find ways to protect the people they represent. In many States, police officers, public figures and other victims of these privacy abuses have been allowed to request that the DMV keep their home addresses confidential. Of course, these people deserve privacy and protection. But, so do all of our people[1].

139 CONG. REC. S15745-01, S15762 (daily ed. Nov. 13, 1993) (Statement of Sen. Boxer).

Accordingly, Congress enacted the DPPA, which provides, in relevant part, as follows:

> (a) **In general.--**A State department of motor vehicles, and any officer, employee, or contractor thereof, shall not knowingly disclose or otherwise make available to any person or entity:
>
> (1) personal information, as defined in 18 U.S.C. 2725(3), about any individual obtained by the department in connection with a motor vehicle record, except as provided in subsection (b) of this section; or
>
> (2) highly restricted personal information, as defined in 18 U.S.C. 2725(4), about any individual obtained by the department in connection with a motor vehicle record, without the express consent of the person to whom such information applies ….

18 U.S.C. §2721(a).

***

[1] Upon information and belief, the driver's license information of all Federal judges in Florida was blocked on the database of the Florida Department of Highway Safety and Motor Vehicles by the United States' Marshall's Service more than ten years ago.

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> A person who knowingly obtains, discloses or uses personal information from a motor vehicle record, for purpose not permitted under this Chapter shall be liable to the individual to whom the information pertains, who may bring a civil action in the United States District Court.

18 U.S.C. §2724(a).

After passage of the DPPA, 49 out of 50 states followed the DPPA by restricting the dissemination of driver's license information to the public. Florida – through the Florida Department of Highway Safety and Motor Vehicles ("FDHSMV") – is the only state in the Union that did not do so, until it enacted an amendment to its public records statute on May 13, 2004. *See* §119.07, Florida Statutes (2004); 2004 Fla. Sess. Law Serv. 2004-62 (West). This amendment will take effect in October 2004. *See* Fla. H.B. No. 1737 (2004). In fact, until approximately April 22, 2004, Florida continued to disseminate this information in violation of federal law to anyone who requested it even though it was well aware that its conduct was violative of the DPPA [2] and was aware of Federal court litigation spawned by the State of Florida's

[2] Kehoe has taken the position throughout this lawsuit that the Supremacy Clause of the United States Constitution mandated compliance with the DPPA by the State of Florida – regardless of whether Florida passed specific legislation on this issue. Article VI of the United States Constitution provides that federal law "shall be the Supreme Law of the Land; . . . anything in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. CONST. art. VI, cl. 2. As a result, "any state law, however clearly within a State's acknowledged power, which interferes with or is contrary to federal law, must yield." *Gade v. Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 108, 112 S. Ct. 2374, 2388, 120 L. Ed. 2d 73 (1992). The doctrine of

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conduct.[3] (Deposition Transcript of Dennis J. Casey ("Casey Dep."), at 73-77) [DE#74].

This lawsuit was filed as a putative class action by Kehoe against Fidelity on July 1, 2003. (Complaint at 1) [DE#1]. Fidelity is a federally chartered banking institution which maintains branches located in the State of Florida, particularly in Broward, Palm Beach, St. Lucie and Martin Counties. (Fidelity's Statement of Material Facts Submitted in Support of its Motion to Dismiss, or, in the Alternative, Motion for Summary Judgment, ¶ 1) [DE#11]. In or about 2000, Fidelity began to solicit Florida drivers to refinance their automobile loans with Fidelity. (*Id.* ¶ 2). However, in order to determine who to solicit, Fidelity made requests on a monthly basis to receive the names and addresses of Florida vehicle owners or title registrants to the FDHSMV. *Id.* Fidelity sought the individual names and addresses of Florida drivers in three counties who had purchased automobiles within the preceding month.

---

preemption, which is based on the Supremacy Clause of the United States Constitution, provides that a state law is invalid to the extent that it conflicts with federal legislation. *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516, 112 S. Ct. 2608, 2618, 120 L. Ed. 2d 407 (1992); *Hillsborough County v. Automated Medical Labs., Inc.*, 471 U.S. 707, 713, 105 S. Ct. 2371, 2375, 85 L. Ed. 2d 714 (1985); *Pacific Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190, 204, 52 P.U.R. 4th 169, 1035 S. Ct. 1713, 1722, 75 L. Ed. 2d 752 (1983).

[3] *Thomas v. George, Hartz, Lundeen, Fulmer, Johnstone, King & Stevens, P.A., et al.*, Case No. 03-21759-CIV-MARTINEZ (S.D. Fla.); *Brooks v. Auto Data Direct, et al.*, Case No. 03-61063-CIV-MARTINEZ (S.D. Fla.) (currently captioned *Fresco v. Automotive Directions, et al.*); *Collier v. Dickenson, et al.*, Case No. 04-21351-CIV-GRAHAM (S.D. Fla.)[this lawsuit was brought against FDHSMV]; *Russell v.*

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Id.. The FDHSMV transmitted the information that Fidelity requested to a company called The Bureau, Inc. ("The Bureau") which was an entity engaged by Fidelity to prepare mass mailings of Fidelity advertisements/solicitations of automobile loans to the Florida drivers whose names were on the list. The information was transmitted by the FHDMSV electronically (*i.e.*, over the internet) to The Bureau. Kehoe's personal information was included among the information transmitted by FHDMSV to The Bureau. Kehoe's information was transmitted to Fidelity (or its agent, The Bureau) by the FDHSMV on January 17, 2003. (Deposition of David Perryman ("Perryman Dep."), at 57-58) [DE#86]; (Plaintiff's Statement of Material Facts Submitted in Opposition to Fidelity's Supplemented Statement of Material Fact, ¶ 14) [DE#89].

Sometime well after the FDHSMV disseminated Kehoe's information to Fidelity, Kehoe accessed the FDHSMV web site (which had just then been modified to perform this function) and blocked his information from being released to anyone else. (Declaration of James Kehoe ("Kehoe Decl."), ¶ 3) [DE#86]; (Deposition of Becky Scott ("Scott Dep."), at 8-10) [DE#86] (recognizing that the website block did not become available until *after* Fidelity received Kehoe's DPPA protected information).

Kehoe's Complaint asserted one count for liability under the DPPA and sought statutory liquidated damages in the amount of $2,500 as provided for by the DPPA

Choicepoint, et al., Case No. 03-1994 (E.D. La.).

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based upon the fact that his personal information had been improperly obtained by Fidelity in connection with its marketing/advertising campaign. (Complaint at 1, 5, 9) [DE#1]. Kehoe also sought equitable relief in the form of an order requiring Fidelity to destroy any personal information illegally obtained from motor vehicle records, and for "such other relief as the Court deems appropriate." *Id.* at 9. Kehoe's Complaint also sought to certify this action as a class action and defined the class as:

> Each and every individual in the State of Florida whose name, address, driver identification number, race, date of birth, sex and/or social security number are contained in motor vehicle records obtained by the Defendant from the State of Florida's Department of Highway Safety and Motor Vehicles, without the express consent of such individuals, from June 1, 2000, through the date of judgment herein (the "Class").

Id. at 6-7.

Fidelity acknowledged at deposition that, after this lawsuit was filed, it discontinued its practice of obtaining DPPA protected information from the FHDMSV as a result of the filing of the Complaint in this action. (Casey Dep. at 73-77) [DE#74].

On or about August 22, 2003, Fidelity filed a Motion to Dismiss Kehoe's complaint. [DE#9]. The basis for the Motion to Dismiss was substantially the same grounds upon which Fidelity later based its Renewed Motion for Summary Final Judgment that is the subject of this appeal. *Id.* The District Court denied Fidelity's Motion to Dismiss, [DE#50], and allowed Plaintiff to take discovery from Fidelity and

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other non-parties. [DE#45].

On October 30, 2004, Kehoe filed a Motion for Class Certification. [DE#26]. That motion was assigned by Judge Hurley to United States Magistrate Judge Frank J. Lynch for resolution. [DE# 27]. Several days before the Motion for Class Certification was scheduled to be heard, Fidelity filed a Motion to Defer Ruling on Class Certification. [DE#69]. Before Kehoe responded to the motion, the District Court entered an Order deferring the hearing and any ruling on class certification pending the outcome of the pending Renewed Motion for Summary Judgment. [DE#81].

In the interim, the United States Supreme Court issued its opinion in *Doe v. Chao*, 540 U.S. 614, 124 S. Ct. 1204, 157 L. Ed. 2d 1122 (2004). On June 14, 2004, the District Court issued its Order Granting Defendant's Renewed Motion for Summary Final Judgment (the "Order" or "Opinion") in this case based, in large part, on the Supreme Court's decision in *Chao*. (Order at 6-8, 11) [DE#107].

THE ORDER OF THE DISTRICT COURT

In its Opinion, the District Court recognized that the DPPA prohibits individuals and/or businesses from knowingly obtaining, disclosing or using personal information obtained from FDHSMV for a purpose not permitted under the DPPA. (Order at 4-5). The District Court also recognized that the statute created liability on behalf of the individual to whom the information pertains who is permitted to bring a

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civil action in a United States District Court. *Id.* at 4. The District Court understood that, at the time its Opinion was issued "Florida is not in compliance with the DPPA because it still allows drivers license information to be purchased for bulk distribution for surveys, marketing or solicitations when then [sic] the Department has implemented methods and procedures to ensure that: (a) **individuals are provided an opportunity, in a clear and conspicuous manner, to prohibit such uses**." *Id.* at 4 (citing § 119.07(3)(a)(12), Florida Statutes (2003)).[4] The District Court's opinion analyzed *Fitzpatrick v. IRS*, 665 F.2d 327, 330-31 (11th Cir. 1982) regarding whether liability could attach under the DPPA when a Plaintiff brings a lawsuit without having suffered actual damages. (Order at 6). The District Court further recognized that: "in the 11th Circuit, it was not necessary for a Plaintiff to prove actual damages before being entitled to receive the minimum statutory award under the Privacy Act." *Id.*

The District Court noted that the Fourth Circuit rendered a conflicting opinion with respect to the Privacy Act in *Doe v. Chao*, 306 F.3d 170, 177 (4th Cir. 2002). *Id.* at 176-7. The District Court relied upon the Supreme Court's grant of certiorari in *Doe v. Chao* as evidence that the Supreme Court intended to resolve the conflict among the circuits concerning whether proof of actual damages was required in lawsuits brought under the Privacy Act. *Id.*

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[4] Citations and footnotes are omitted, and emphasis is added, unless otherwise noted.

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The District Court recognized that Kehoe had argued that there was a clear distinction between the Privacy Act and the DPPA with respect to the text of each statute. (Order at 8). Specifically, Kehoe argued that the limiting language in the Privacy Act distinguished it from the DPPA, which contains no such language. *Id.* In the Privacy Act, recovery of statutory damages was specifically limited to "persons entitled to recovery." The District Court recognized that this language was not included in the DPPA. *Id.* The District Court recognized that "the issue for this Court to decide is whether the DPPA's failure to include any language limiting recovery to 'persons entitled to recovery' means that a Plaintiff lacking actual damages may still collect the $2,500.00 minimum statutory award." *Id.*

The District Court found that, under certain principles of statutory construction, Fidelity's reading of the DPPA should be applied. (Order at 8). Specifically, the District Court purported to apply a rule of statutory constriction known as the rule of the "last antecedent" which provides:

> When construing statutes – qualifying words, phrases and clauses are to be applied to the words or phrase immediately precedent, are not to be construed as extending to and including others more remote.

Id.

The District Court then drew an analogy between the DPPA and the remedies section of the Electronic Communications Privacy Act of 1986 ("ECPA"), 18 USC

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§2520. (Order at 8). The District Court analyzed the language of the ECPA and found that Congress had intended to create a statutory minimum in that statute. *Id.* at 8-9. The Court distinguished the language of the DPPA and stated that Congress "could have drafted the DPPA's damages provision to read:

> The Court may award – the greater of actual damages or statutory damages in the amount of $2,500.00.

Id. at 9. The District Court then went on to distinguish the DPPA's language citing its differences with the ECPA. The District Court found that

> [T]he plain language of the ECPA and Section 7341 established that Congress knew how to draft a statute providing minimum statutory damages for violations of the DPPA. Congressional unwillingness to adopt this language when drafting the DPPA shows that Congress did not intend to allow Plaintiffs without actual damages to receive the $2,500.00 liquidated damages award.

Id. at 10.

Finally, the District Court treated the obvious implications behind a decision requiring actual damages before filing a DPPA lawsuit. The District Court cited the Supreme Court's decision in *Chao*, where the Court noted that "[i]t is easy enough to imagine pecuniary expenses that might turn out to be reasonable in particular cases but fall well short of [the statutory minimum amount of actual damages]." (Order at 11) (citing *Chao*, 124 S. Ct. at 1211). The District Court found that these statutory minimum amounts were designed to encourage people with "minor actual damages"

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to file complaints against defending parties, and were "not designed to allow those suffering no actual damages to file claims." *Id.*

This appeal followed.

A. Statement or Standard of Scope of Review

On appeal, the standard of review for the granting of Summary Final Judgment is *de novo*. *Carter v. Galloway*, 352 F.3d 1346, 1348-49 (11th Cir. 2003)("We review the district court's rulings on motion for summary judgment *de novo*, applying the same legal standards that bound the district court."); *National Fire Ins. Co. of Hartford v. Fortune Constr. Co.*, 320 F.3d 1260, 1267 (11th Cir. 2003)(same).

SUMMARY OF ARGUMENT

In its Opinion, the KEHOE Court distances itself from an entire history of American Jurisprudence which provides that statutory liquidated damage provisions are an appropriate remedy for an invasion of privacy. This concept originates from an 1890 Law Review Article authored by Samuel Warren and Louis Brandeis. Subsequent commentators have recognized the importance of liquidated damage provisions in privacy statutes which were conceived by Legislatures in order to, among other things, relieve juries from making difficult and, indeed, highly discretionary damage calculations.

In addition to the DPPA, which is at issue here, there are numerous Federal statutes which contain similar provisions and invoke virtually identical language.

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Those statutes include the Video Privacy Protection Act, the Electronic Communications Privacy Act, the Cable Communications Policy Act and the Telephone Consumer Protection Act. The District Court's decision in KEHOE stands alone in its analysis of the liquidated damage provision of the DPPA, particularly with respect to its imposition of a requirement that actual damages be shown before a party may be compensated for an invasion of privacy.

The District Court in KEHOE misinterpreted the DPPA by utilizing tools of statutory construction - - such as the last antecedent rule - - when a more appropriate inquiry would have focused simply upon the plain language of the statute. The District Court's interpretation of the DPPA eviscerates its impact. KEHOE interprets the DPPA as providing for mandatory minimum statutory liability of $2,500.00 without proof of actual damages. KEHOE believes that the mandatory minimum statutory liability stems from, among other things, Congress' use of the words "shall be liable." However, under the District Court's Opinion, no one is liable.

Moreover, the District Court's reading of the DPPA absolutely defeats its very purpose as expressed by Congress - - to provide a deterrent against would be DPPA violators. Now those who violate the DPPA can take solace in the fact that, unless a prospective Plaintiff can show "actual damages," a DPPA violator will get off scot-free.

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The District Court inappropriately relied upon *Chao.* The statute at issue in *Chao* - - The Federal Privacy Act - - specifically contains a provision that provides that the Government is liable for "actual damages sustained by the individual. . ., but in no case shall a **person entitled to recovery** receive less than $1,000.00." 5 U.S.C. §522(a)(g)(4)(a) (emphasis added). There is no doubt that *Chao* rests primarily upon the Court's analysis of the language, "persons entitled to recovery," to arrive at its conclusion that actual damages are required before a recovery may be made under the Privacy Act. There is no such language in the DPPA, making the statute wholly distinguishable from the Federal Privacy Act.

Additionally, the distinctions accorded to lawsuits against the Government and those against private parties, such as in this case, creates another important distinction between the DPPA and the Privacy Act and, therefore, between this case and *Chao*. Congress was obviously concerned about the public fisc when it enacted the Privacy Act and that is why it included the words "persons entitled to recovery."

Finally, in this case, KEHOE requested injunctive relief requiring that FIDELITY destroy all of the personal information which it obtained regarding Florida title registrants and specifically requested, in the wherefore clause of the Complaint, "such other preliminary and equitable relief as the Court deems to be appropriate." KEHOE requested the certification of a class action. Although KEHOE timely filed his Motion for Class Certification, the Court deferred ruling on that pending motion

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and, instead, granted Summary Judgment dismissing all of his claims. That was error.

The District Court should not have dismissed KEHOE'S Motion for Class Certification merely because FIDELITY ceased its practice of unlawfully obtaining protected information on Florida title registrants. Numerous Courts have certified classes under Fed.R.Civ.P. 23(b)(2) where the Defendants have taken steps following the filing of the lawsuit to effectively remove the need for injunctive relief. In sum, the District Court should have certified a Rule 23(b)(2) Class before granting Summary Judgment.

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ARGUMENT

THE ORDER OF THE DISTRICT COURT GRANTING FIDELITY'S RENEWED MOTION FOR SUMMARY JUDGMENT MUST BE REVERSED

I. Liquidated Damage Provisions Are Long-Standing Remedies for Privacy Violations

In order for this Court to properly understand the potential impact of the District Court's Order in this case, it is important for this Court to consider the evolution of privacy law in America based upon common law principles and Federal legislation. Violation of privacy is such an intangible harm that it has become increasingly significant in tort law. A central problem in privacy cases is the difficulty of the injured party to demonstrate economic or special damages. *See, e.g.*, Frederick Lodge, *Damages Under the Privacy Act of 1974: Compensation and Deterrence*, 52 Fordham L. Rev. 611, 612 (1984). This problem was well understood by Samuel Warren and Louis Brandeis, the authors of the famous article that provided the basis for the tort now known as invasion of privacy. Samuel Warren and Louis D. Brandeis, *The Right to Privacy*, 4 Harv. L. Rev. 193, 219 (1890) ("Even in the absence of special damages, substantial compensation could be allowed for injury to feelings as in the action of slander and libel.").

Thus, in order to compensate the victim and recognize that a harm was committed, though it may be difficult to quantify, privacy statutes have historically

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included liquidated damages provisions.[5] Where there is an intentional violation of a privacy statute, awards of such damages ensure compensation for the victim, deter future violations, and promote judicial economy by reducing the need for a difficult determination of harm.

A. Privacy Scholars Recognize the Critical Role of Liquidated Damage Provisions in Privacy Statutes

Scholars have argued that the purpose of liquidated damages in privacy statutes is not only to compensate the victim for an intangible harm, but also to provide enforcement of such statutes. Mark E. Budnitz, *Privacy Protection For Consumer Transactions in Electronic Commerce: Why Self-Regulation is Inadequate*, 49 S.C.L. Rev. 847, 883 (1998). Professor Jay Weiser has written that federal privacy statutes attempt to resolve the difficulty in calculating damages through liquidated damages provisions, which in turn saves enforcement costs. Jay Weiser, *Measure of Damages for Violation of Property Rules: Breach of Confidentiality*, 9 U. Chi. L. Sch. Roundtable 75, 100 (2002). Liquidated damage provisions also relieve juries of difficult damages determinations. Thus, highly discretionary calculations of damages are unnecessary. The purpose of statutory damages is both to encourage a victim to pursue a case under a privacy statute and to serve as a deterrent to would-be violators.

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[5] KEHOE expects Amicus Curiae to treat the meaning of the phrase "liquidated damages" in depth.

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Frank P. Anderano, *The Evolution of Federal Computer Crime Policy,* 27 Am. J. Crim. L. 81, 98 (1999).

B. Liquidated Damage Provisions Are Routinely Included in Statutory Privacy Laws

1. The Video Privacy Protection Act

Numerous privacy statutes contain liquidated damages provisions to both compensate the victim and deter future violations. For example, the Video Privacy Protection Act of 1988 ("VPPA") provides for a statutory damage award where intentional violations of the VPPA occur. 18 U.S.C. §2710. The VPPA provides that: "the court may award actual damages but not less than liquidated damages in an amount of $2,500.00." 18 U.S.C. §2710(c)(2)(A). *See, e.g., Dirkes v. Borough of Runnemede*, 936 F. Supp. 235, 239 n.4 (D.N.J. 1996) (under the plain language of the VPPA, the court found that plaintiffs could show that they were "aggrieved" by showing a violation of the Act without proof of additional harm). Notably, utilizing what is essentially the same language, the DPPA provides that the court may award: "(1) actual damages, but not less than liquidated damages in the amount of $2,500.00" against "[a] person who knowingly obtains, discloses or uses personal information, from a motor vehicle record, for a purpose not permitted under this chapter[.]" 18 U.S.C. §2724(b)(1).

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2. The Electronic Communications Privacy Act

Similarly, the ECPA establishes statutory damage awards, depending on the type of violation. For example, in relation to the interception of electronic communications, the ECPA provides that:

> [I]f the person who engaged in that conduct was not previously enjoined under section 2511(5) and has not been found liable in a prior civil action under this section, the court shall assess the greater of the sum of actual damages suffered by the plaintiff, or statutory damages of not less than $50 and no more than $500.

18 U.S.C. §2520(c)(1)(A). The court is required to award statutory damages of no less than $100 and no more than $1,000 for victims of those who have violated ECPA on a previous occasion. 18 U.S.C. §2520(c)(1)(B). For more than two violations of ECPA, the statute provides that:

> [I]n any other action under this section the court may assess as damages whichever is the greater of (A) the sum of the actual damages suffered by the plaintiff and any profits made by the violator as a result of the violation; or (B) statutory damages of whichever is the greater of $100 a day for each day of violation or $10,000.00.

18 U.S.C. §2520(c)(2)(B).

Furthermore, regarding unlawful access to stored communications, the ECPA provides that the court may assess actual damages suffered by the plaintiff and profits made by the violator as a result of the violation, "but in no case shall a person entitled to recover receive less than the sum of $1,000." 18 U.S.C. §2707(c).

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The courts have held that proof of actual damages is not necessary under the ECPA. *See, e.g., Halperin v. Kissinger*, 606 F.2d 1192 (D.C. Cir. 1979) *cert. granted*, 446 U.S. 951 (1980) *aff'd in part*, 452 U.S. 713 (even if constitutional violation inflicts only intangible injury, monetary compensation is still appropriate).

3. The Cable Communications Policy Act

The Cable Communications Policy Act ("CCPA"), which protects the privacy of cable television subscribers, provides that "the court may award actual damages but not less than liquidated damages computed at the rate of $100 a day for each day of violation of $1,000, whichever is higher." 47 U.S.C. §551(f)(2)(A). *Metrovision of Livonia, Inc. v. Wood*, 864 F. Supp. 675 (E.D. Mich. 1994) (cable customers entitled to recovery of statutory, liquidated damages even in absence of actual damages); *Warner v. Am. Cablevision of Kansas City, Inc.*, 699 F. Supp. 851 (D. Kan. 1988) (subscriber whose cable operator failed to comply with the CCPA when it failed to give him required disclosures at time of installation and subsequently gave him incomplete disclosure was entitled to recover statutory liquidated damages for $1000 for ***each*** of the two violations, together with reasonable attorney's fees and costs).

4. The Telephone Consumer Protection Act

The Telephone Consumer Protection Act ("TCPA"), a privacy statute that protects individuals from constant telemarketing and unsolicited facsimile advertisements, also provides for statutory damages: "for actual monetary loss from

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such violation, or to receive $500 in damages for each such violation. . ." 47 U.S.C. §227(b)(3). *Forman v. Data Transfer, Inc.*, 164 F.R.D. 400 (E.D. Pa. 1995)(TCPA provision that allows recipients of unsolicited advertisements by facsimile machine to recover greater of actual monetary loss or $500 in damages for each violation was designed to provide adequate incentive for individual plaintiff to bring suit on his own behalf).

5. The Right to Financial Privacy Act

Additionally, under the Right to Financial Privacy Act of 1974 ("RFPA"), now, a successful plaintiff may collect $100 per RFPA violation from the defendant. 12 U.S.C. §3417(a)(1). As the drafters of the DPPA and other privacy statutes enacted understood, liquidated damage provisions are an essential requirement for meaningful privacy protection. As demonstrated below, the District Court ignored the entire history of both privacy litigation and legislation in the United States in granting summary judgment for Fidelity.

The District Court interpreted the language of the DPPA in a manner that is truly unique, not only to the history of the DPPA itself, but to the history of Federal Privacy Statutes in the United States. This was error.

II. The District Court Misinterpreted the DPPA

The District Court's results oriented approach to statutory interpretation should be rejected. In interpreting a statute, Courts must begin with the statute's plain

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language. *Snapp v. Unlimited Concepts, Inc.*, 208 F.3d 928, 933 (11th Cir. 2000); *Senator Linie Gmbh & Co. Kg v. Sunway Line, Inc.*, 291 F.3d 145, 154 (2d Cir. 2002).

The relevant DPPA provision at issue provides:

> **(a) Cause of action**. -- 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, who may bring a civil action in the United States District Court.
>
> **(a) Remedies.** -- The Court may award
>
> **(1)** actual damages, but not less than liquidated damages in the amount of $2,500.00; …

18 U.S.C. §2724(a) (emphasis added).

Like the legion of Federal cases interpreting virtually identical Federal privacy statutes, Kehoe interprets the DPPA as providing for a mandatory minimum statutory liability of $2,500.00 without proof of actual damages. *See, e.g., Margan v. Niles*, 250 F. Supp. 2d 63, 70 (N.D.N.Y. 2003)(Defendant liable for recording license plate number and unlawfully conducting motor vehicle records search for name and address); *Luparello v. Garden City*, 290 F. Supp. 2d 341 (E.D.N.Y. 2003)(Plaintiff must only plead and prove two things in a DPPA case – "That Defendants caused a DPPA search to be made as to each Plaintiff; and that the search was not permitted by any exception of the DPPA"); *Cowan v. Codelia*, 2001 WL 856606, 8 (S.D.N.Y. 2001), *aff'd* 2002 WL 31478922 (2d Cir. 2002)(To establish a claim under the DPPA,

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the Plaintiffs must establish: (1) the defendants caused a DMV search to be made as to each plaintiff; and (2) that the search was not permitted by any exception to the DPPA). KEHOE respectfully submits that, in effect, it is this District Court's ruling that this is the incorrect exception rather than the correct rule.

The best way to read the statute is simply to read the plain language. Extrinsic aids to construction, such as that "last antecedent rule" should be used only when the plain statutory language is otherwise vague and unclear. *Allapattah Servs. v. Exxon Corp.*, 333 F.3d 1248, 1254 (11th Cir. 2003) ("when construing a statute [the court] must begin, and often should end as well, with the language of the statute itself ... because [the court] must presume that a legislature says in a statute what it means and means in a statute what it says there."); *In re Paschen*, 296 F.3d 1203, 1209 (11th Cir. 2002) ("[t]he plain meaning of legislation should be conclusive, except in rare cases [in which] the literal application of a statute will produce a result demonstrably at odds with the intentions of its drafters.") (quoting *United States v. Ron Pair Enters., Inc.* 489 U.S. 235, 242, 109 S. Ct. 1026, 1031, 103 L. Ed. 2d 290 (1989)) (alteration in original) (internal quotation marks omitted).

The District Court's interpretation of the DPPA substantially removes its teeth and renders the words "shall be liable" nugatory. Section 2724(a) of the DPPA provides for what is essentially strict liability to those who violate the statute provided that the violator does not fall within any of the enumerated exceptions. *Cf.* 18 U.S.C.

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§2721(b) (listing statutory exceptions). This reading of the statute comports with Senator Boxer's imprimatur which was voiced during the November 16, 1993 committee hearings regarding the DPPA: "Can we afford to wait until every state has their own tragedy? That is not the way to legislate." Kehoe submits that Senator Boxer's comments at the November 16, 1993 Committee hearing, among other things, obliterates the District Court's rationale for requiring proof of actual harm before liability is assessed for a DPPA violation. In fact, the District Court's decision makes clear that, even though Fidelity violated the DPPA both as to Kehoe and potential members of the class, and admitted doing so, Fidelity was found not to be liable to anyone, unless individuals can prove that they suffered actual damages. At a minimum, the District Court could have determined that Fidelity was liable to Kehoe even if it also determined that Kehoe must prove actual damages in order to recover. The question of liability is certainly important in order for the parties to make an analysis of who the prevailing party is in this case which has a direct bearing on whether Kehoe will recover his attorneys' fees. *See* 18 U.S.C. §2724(b)(3).

The District Court's Opinion does not address the statutory language in Section 2724(a) that a person who violates the DPPA "shall be liable." It is well settled that "shall", in the context of the statute, means "must". *See e.g., Alabama v. Bozeman*, 533 U.S. 146, 153, 121 S. Ct. 2079, 2085, 150 L. Ed. 2d 188 (2001)(As used in statutes, the word "shall" is ordinarily the language of command); *Lexecon Inc. v.*

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Milberg Weiss Bershad Hynes & Lerach, 523 U.S. 26, 35, 118 S. Ct. 956, 962, 140 L. Ed. 2d 62 (1998)(statute's use of the mandatory term "shall" normally creates an obligation impervious to judicial discretion); *Shenago Inc. v. Apfel*, 307 F.3d 174, 193 (3rd Cir. 2002)(the term "shall" is generally mandatory when used in a statute).

Moreover, sound principles of statutory construction mandate that courts should not read the words of a statute to render any portion of the statute's language superfluous or meaningless. *Alaska Dep't of Envtl. Conservation v. EPA,* 540 U.S. 461, 124 S. Ct. 983, 1002 n.13, 157 L. Ed. 2d 967 (2004)(It is a cardinal principle of statutory construction that statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant). In this case, the District Court's analysis of the DPPA has rendered the words "shall be liable" meaningless. Specifically, the District Court's Opinion suggests that, even though Fidelity violated the DPPA, no one is liable to Kehoe (or any of the potential class members) as a result.

Further, the District Court's reading of the DPPA also eviscerates the language "but not less than" regarding liquidated damages. It is well settled that a Court must give effect to every word contained within a statute. *TRW, Inc. v. Andrews*, 534 U.S. 19, 31, 122 S. Ct. 441,449, 151 L. Ed. 2d 339 (2001).

Generally, courts should apply statutes as written, not as they should have been written with the benefit of hindsight. *In Re Gardenhire*, 209 F.3d 1145, 1152 (9th Cir.

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2000). However, in construing the DPPA, the District Court apparently read the statute as it wished it had been written, rather than as it actually was written. Engaging in statutory gymnastics in order to avoid what it may perceive as, potentially, an unfair result, is not a court's function. Moreover, words of a statute are not to be disregarded in search of equity or congressional intent. *In re Parffrey,* 264 B.R. 409, 414 (Bankr. S.D. Tex. 2001)(citing *Ron Pair Enters., Inc.*, 489 U.S. 235)(Statute provides that when payments made in Chapter 13 bankruptcy are complete, court *shall* grant discharge, giving no discretion to court).

Moreover, the District Court inappropriately relied upon *Spurlock v. Postmaster Gen.*, 19 Fed. Appx. 338, 340 (6th Cir. 2001) to come to the unjustified conclusion that liquidated damages may only be awarded upon a showing of economic damages. First, *Spurlock* was not a privacy case making it wholly inapposite for that reason alone. As demonstrated *infra*, there is an entire body of Federal jurisprudence and scholarly commentary which isolates the invasion of privacy as unique and provides ample reasoning, based upon substantial historical precedent, as to why statutory damage remedies for privacy violations have always provided for liquidated damages, in the absence of actual damages. *See supra* at §§I(A), (B).

Spurlock involved the interpretation of the Family Medical Leave Act of 1993, 29 U.S.C. §2601 *et. seq.* ("FMLA"), which statutorily defined the fact that a FMLA plaintiff is not entitled to damages unless a plaintiff could show actual monetary

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damages. The FMLA is a far cry from the DPPA that specifically provides for such a remedy.

Finally, the District Court' s reading of the definition of actual damages set forth in Black's Law Dictionary has been taken out of context. That definition analyzes contractual liquidated damages provisions as: "a reasonable estimation of actual damages." However, there is a vast difference between parties to a contract who negotiate a liquidated damages penalty in anticipation of actual monetary loss in, for example, a real property lease, and a statutorily created civil damages remedy in connection with the tort of invasion of privacy which has long been considered a species of harm which can be difficult, if not impossible, to quantify.

Simply put, everyone recognizes that a liquidated damages clause in a real property lease is more often than not based upon the lost rental value of the property at issue. In this case, as in all privacy torts, there is no comparable measuring stick.

A. The Supreme Court's Decision in *Chao* Supports Appellant's Position

The District Court placed undue emphasis upon the United States' Supreme Court's Opinion in *Chao*, 124 S. Ct. at 1204, in order to buttress its analysis that this action could not proceed in the absence of actual damages. However, there are vast differences between this case and *Chao* and, as demonstrated below, the entire history of Federal privacy litigation remains undisturbed by *Chao*.

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In *Chao*, the Supreme Court held that, under the Privacy Act of 1974, 5 U.S.C. § 552a (the "Privacy Act"), a Plaintiff in a putative class action was not entitled to statutory, liquidated damages in the absence of actual damages. In *Chao*, the Supreme Court granted certiorari to resolve a conflict in the Federal Circuits concerning the meaning and application of the Privacy Act.[6]

The *Chao* Court recognized that: ***"[t]raditionally, the common law has provided… victims [of privacy invasions] with a claim for 'general' damages, which for privacy and defamation torts are…presumed damages: a monetary award calculated without reference to specific harm."*** *Chao*, 124 S. Ct. at 1209 (emphasis added; footnote omitted). In fact, the Supreme Court also recognized this basic proposition of law at oral argument when it stated: "…that's because the invasion of privacy or the infringement of privacy is regarded simply as – as injury per se." *See* Transcript of Oral Argument for *Doe v. Chao* ("*Chao* Tr.") at 21. [DE#44]. The *Chao* Court went on to find that this general principle would not pass muster under the Privacy Act, not because it is not a correct statement of the law, but because the

[6] In *Chao*, the following created a conflict with the Fourth Circuit's opinion in *Chao* and were ultimately overruled: *Orekoya v. Mooney*, 330 F.3d 1, 7-8 (1st Cir. 2003); *Wilborn v. Dep't of Health & Human Servs.*, 49 F.3d 597, 603 (9th Cir. 1995); *Waters v. Thornburgh*, 888 F.2d 870, 872 (D.C. Cir. 1989); *Johnson v. Dep't of Treasury, IRS*, 700 F.2d 971, 977 & n.2 (5th Cir. 1983); *Fitzpatrick*, 665 F.2d at 330-31. These were all cases relating to the Privacy Act., 5 U.S.C. §552, *et seq.* (2003). None of the cases cited on pages 20 through 45 of this Brief, based upon other privacy statutes, were overruled.

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Privacy Act, by its terms, does not authorize statutory liquidated damages. *Chao*, 124 S. Ct. at 1209.

Moreover, the *Chao* Court recognized that the legislative history of the Privacy Act reflected that Congress "cut out the very language in the bill that would have authorized any presumed damages." *Id*. at 1209-10. The Supreme Court determined that the omission of presumed damages from the final bill version of the Privacy Act was a "deliberate elimination of any possibility of imputing harm and awarding presumed damages." *Id*. The Court found that the deletion of this language "precludes" any hope of a sound interpretation of entitlement to recovery without reference to actual damages. *Id*.

Additionally, as the Solicitor General pointed out in his Brief to the Supreme Court on this issue: "draft bills that expressly provided for liquidated damages and did not use the phrase 'person entitled to recovery' were considered and rejected in both the House and Senate." *See* Brief for the Respondent Secretary of Labor at 40, *Doe v. Chao*, 124 S. Ct. 1204 (2004) (No. 02-1377)[DE #44, Tab 1 at 40] available at http://www.abanet.org/publiced/preview/briefs/dec03.html#doe (the "SG Brief"). The language, "persons entitled to recovery," was obviously included by Congress in the Privacy Act as a means to limit potential damages that could be awarded against the U.S. Government.

In order for this Court to understand the profound differences between the

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Privacy Act and the DPPA, the Court should begin with a comparison and analysis of the language of the two statutes. This analysis will make clear the conclusion that the two statutes are completely different, and that the District Court's reliance on *Chao* was misplaced.

The Privacy Act provides that, once liability is shown, the government is liable for "actual damages sustained by the individual..., but in no case shall ***a person entitled to recovery*** receive less than... $1000." 5 U.S.C. §522a(g)(4)(A). Justice Souter, writing for the majority, based his holding – that only persons who are "entitled to recovery" by showing actual damages are entitled to the $1000 minimum – on a strict dissection of the statute. The Privacy Act, according to Justice Souter, limits the $1,000 minimum to persons "entitled to recovery," and persons "entitled to recovery" are, in turn, limited to persons who first demonstrate actual damages:

> [T]he Government's position is supported by a ***straightforward textual analysis***. When the statute gets to the point of guaranteeing the $1,000 minimum, it not only has confined any eligibility to victims of adverse effects caused by intentional or willful actions, but has provided expressly for liability to such victims for "actual damages sustained." It has made specific provision, in other words, for what a victim within the limited class may recover. When the very next clause of the sentence containing the explicit provision guarantees $1,000 to a "person entitled to recovery," the simplest reading of that phrase looks back to the immediately preceding provision for recovering actual damages, which is also the Act's sole provision for recovering anything (as distinct from equitable relief). ***With such an obvious referent for "person entitled to recovery" in the plaintiff who sustains "actual damages,"*** Doe's theory is immediately

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> questionable in ignoring the "actual damages" language so directly at hand....

Id. at 1208.

Importantly, Justice Souter pointed out that plaintiff Doe's efforts to read the statute as providing aggrieved parties actual damages "but in no case ... less than the sum of $1000," is overly broad because it "leaves the reference to 'entitlement to recovery' with no job to do." *Id.* at 1210. Thus, it is clear that the "person entitled to recovery" limitation that immediately follows the actual damages clause formed the primary basis of the majority opinion. Thus, there simply can be no dispute that the *Chao* holding rests squarely on the shoulders of the phrase "entitled to recovery." *Id.* at 1208-09. If that "limiting phrase" were not in the Privacy Act, the holding would be different. That limiting phrase does not appear in the DPPA.

Additionally, the differences accorded to lawsuits against the government and those against private parties creates another important distinction between the DPPA and the Privacy Act, and, therefore, between this case and *Chao*. At the oral argument of *Chao*, the Court recognized that: "Congress did not want to bankrupt the Treasury, destroying Medicare, social security and every other programs [sic] we give $1 trillion in damages and people…" *Chao* Tr. at 32-33; (in which the Solicitor General recognizes that there are several other privacy based statutes with provisions similar to the Privacy Act but that "most of these don't apply to suits against the United

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States…"); *Chao* Tr. at 46; (recognizing that Congress crafted different language in the Privacy Act than in other federal privacy statutes because "it may be that most of these statutes are not dealing with suits against the United States, and Congress may be more protective of the public fisc."). *Chao* Tr. at 47.

In fact, Justice Souter actually makes reference to other statutes that are very similar to the DPPA, such as the Tax Reform Act of 1976, 26 U.S.C. §6110, and the ECPA. *Chao*, 124 S. Ct. at 1212. Justice Souter found that "as to §1201(i)(2)(A) of the Tax Reform Act, the text is too far different from the language of the Privacy Act to serve as any sound basis for analogy; it does not include the critical limiting phrase 'entitled to recovery.'"[7] *Id.* Justice Souter's analysis would equally apply to the DPPA. Simply put, Justice Souter himself articulates the inapplicability of *Chao* to the instant action. *Id.* *Chao* cannot be extrapolated to create new federal legislation that would overrule all liquidated damages remedies of the Privacy Statutes. *See*, *e.g.,* *Sherman v. United States*, 356 U.S. 369, 373, 78 S. Ct. 819, 822-23, 2 L. Ed. 2d 848 (1958) (The Supreme Court does not ordinarily decide issues not presented by the parties); *Tyler v. Judges of the Court of Registration*, 179 U.S. 405, 408-09, 21 S. Ct. 206, 208, 45 L. Ed. 252 (1900) (The Court is not empowered to decide abstract propositions, or to declare, for the government of future cases, principles or rules of

[7] The particular Tax Reform Act provision that Justice Souter refers to reads: "actual damages sustained by the person but in no case shall a person be entitled to

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law which cannot affect the result as to the ruling in issue in the case before it). Even the Solicitor General of the United States recognized, in his Brief filed in *Chao*, that damages under the DPPA do *not* depend upon proof of actual damages. *See* S.G. Brief at 30-32, [DE #44, Tab 1, at 30-32].

Like the "far different" statutes referenced by Justice Souter, the DPPA provides a true liquidated damages remedy, because it ***does not include*** any "limiting phrase" like "a person entitled to recovery." To the contrary, the DPPA provides relief to anyone whose protected information was obtained or used in violation of the DPPA by providing that the violator "shall be liable to the individual to whom the information pertains." A contrary interpretation of *Chao* would turn the liability determining element "shall be liable" into "may be liable depending on whether the aggrieved party can prove damages." Of course, such a tortured analysis of the statute would erroneously fail to give effect to the plain words Congress wrote. *United States v. Menasche*, 348 U.S. 528, 538-39, 75 S. Ct. 513, 519-20, 99 L. Ed. 615 (1955).

Liability in this case should not depend on actual harm. Moreover, the DPPA provides that any aggrieved person – not just those that are "entitled to recovery" like in the Privacy Act – shall receive "not less than liquidated damages in the amount of $2500." 18 U.S.C. §2724(b)(1)(2003). In fact, Justice Souter has already opined that you cannot analogize the Privacy Act with language akin to the DPPA. *Chao*, 124 S.

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receive less than the sum of $1,000". 26 U.S.C. §6110(j)(2)(A).

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Ct. at 1212. Finally, as Justice Ginsburg observed in her dissenting opinion in *Chao*, "the remedy of minimum statutory damages is a fairly common feature of federal legislation." *Id.* at 1220. Although the inclusion of the limiting phrase "a person entitled to recovery" following a clause tying liability to actual damages made the issue a close call in *Chao* (indeed, it led to a majority opinion by Justice Souter and dissents by Justices Ginsburg and Breyer), there is no such limiting phrase in the DPPA, and the issue here, accordingly, is not a close call. Persons whose information is obtained from the DMV without their consent are entitled to a minimum award of $2,500 under the clear wording of the DPPA.

B. The District Court's Decision Ignores the DPPA's Legislative History

Kehoe does not believe that the language of the DPPA is ambiguous. However, Kehoe recognizes that the District Court's interpretation of the DPPA, advanced by Fidelity, certainly differs from Kehoe's analysis. Thus, under circumstances where parties are advancing differing interpretations of the meaning of a statute, it may be appropriate for this Court to analyze the DPPA's legislative history. *Garcia v. United States*, 469 U.S. 70, 76 n.3, 105 S. Ct. 479, 483, 83 L. Ed. 2d 472 (1984) ("'Resort to legislative history is only justified where the face of the Act is inescapably ambiguous....'").

The reason for the DPPA's enactment makes it unmistakably clear that if

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Congress had intended that a private cause of action under the DPPA be limited to those individuals who suffered actual damages, it would not have needed to establish a minimum statutory recovery for those persons "entitled to recovery". This Court should think for a moment about the consequences that an affirmance of the District Court's opinion will have. Any Florida resident can now obtain DPPA protected information and, unless a prospective Plaintiff can show "actual damages," there is nothing anyone can do about it. The problem is that by the time the victim suffers actual damages, it is too late and the DPPA's deterrent effects have been lost.

III. The District Court Erred When It Entered Summary Final Judgment for Defendant Without Considering Plaintiff's Prayer for Both Class Certification and Injunctive Relief

Finally, in its Opinion, the District Court failed to address Kehoe's request for injunctive relief. Kehoe, on behalf of himself, and the class, sought the destruction of all information obtained by Fidelity from the FDHSMV, as well as all other applicable equitable relief, including the cessation of Fidelity's practice of obtaining such personal information from FDHSMV, in violation of the Drivers Privacy Protection Act. 18 U.S.C. §2721 et. seq. ("DPPA"). Kehoe's prayer for relief in the complaint (Complaint, [DE # 1)], included, *inter alia*, the following:

> WHEREFORE, Plaintiff demands judgment on his behalf and on behalf of the other members of the Class to the following effect:
>
> …
>
> f. such other relief as the Court deems appropriate.

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Kehoe's prayer for relief tracks the language of the DPPA, which provides:

> (b) Remedies. – The court may award –
>
> …
>
> (4) such other preliminary and equitable relief as the court determines to be appropriate.

18 U.S.C. § 2724(b).

Moreover, Kehoe also requested certification of the class pursuant to Fed. R. Civ. P. 23(b)(2), and requested equitable relief thereunder. Specifically, Kehoe asserted:

> EQUITABLE RELIEF IS APPROPRIATE TO ALL CLASS MEMBERS
>
> Plaintiff has alleged in his Complaint that Defendant has engaged in acts and practices in violation of the DPPA by knowingly obtaining, disclosing, or using personal information pertaining to the Plaintiff and each class member. If Plaintiff's allegations are proven, equitable relief would be appropriate under 18 U.S.C. § 2724(4) for the entire class as against the Defendants. This renders certification of a "(b)(2)" class appropriate in this case. Fed. R. Civ. P. 23(b)(2).

(Motion for Class Certification at 17) [DE#27].

In addition, Fidelity acknowledged that it had ceased the unlawful practice of obtaining personal information of Florida Title Registrants from FDHSMV, for advertising purposes, without their prior express consent, as required by the DPPA. (Deposition of Jaqueline Larish ("Larish Dep"), at 25-28) [DE#73]. Kehoe's claim for injunctive relief in both the complaint and the motion for class certification as well

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as Fidelity's acknowledgement that it had discontinued the practice reflects that this matter was pending before the District Court when it entered its Final Judgment. The District Court therefore committed error when it failed to address the injunctive relief sought by Kehoe in its Order.

This Court has found that language similar to that found in Kehoe's complaint and the motion for class certification is broad enough to include injunctive relief prohibiting Fidelity from obtaining personal information of Florida Title Registrants from FDHSMV, for advertising purposes, without their prior express consent, as required by the DPPA. *Covad Communs. Co. v. BellSouth Corp.*, 314 F.3d 1282, 1285 n. 13 (11th Cir. 2002). In *Covad Communs.*, this Court held that:

> In the "prayer for relief" at the end of the complaint, Covad asks for treble damages on its antitrust claims, … and "such other and further relief as the Court deems just and proper." One must assume that the latter relief would include injunctive orders necessary to ensure BellSouth's compliance with the antitrust laws, the 1996 Act, and the parties' interconnection agreement.

Covad Cummuns., 314 F. 3d at 1285 n.13.

Since the District Court neglected to address the injunctive relief sought by Kehoe, the District Court does not have a basis to either enter a final judgment, or to render the class certification moot. (Order) [DE#108]. In *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs.,* 528 U.S. 167, 120 S. Ct. 693, 145 L. Ed. 2d 610 (2000), the Supreme Court held that neither a permit holder's substantial compliance with its

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permit nor its subsequent shutdown of the hazardous waste incinerator facility from which it discharged pollutants rendered moot environmental groups' citizen suit, under Clean Water Act, absent a clear showing that the violations could not reasonably be expected to recur. 528 U.S. at 189. Specifically, the Supreme Court held:

> The only conceivable basis for a finding of mootness in this case is Laidlaw's voluntary conduct--either its achievement by August 1992 of substantial compliance with its NPDES permit or its more recent shutdown of the Roebuck facility. It is well settled that "a defendant's voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice." *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 289, 102 S. Ct. 1070, 71 L. Ed. 2d 152 (1983). "[I]f it did, the courts would be compelled to leave '[t]he defendant ... free to return to his old ways.'" *Id.* at 289, n. 10, 102 S. Ct. 1070 (citing *United States v. W.T. Grant Co.*, 345 U.S. 629, 632, 73 S. Ct. 894, 97 L. Ed. 1303 (1953)). In accordance with this principle, the standard we have announced for determining whether a case has been mooted by the defendant's voluntary conduct is stringent: "A case might become moot if subsequent events made it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." *United States v. Concentrated Phosphate Export Ass'n*, 393 U.S. 199, 203, 89 S. Ct. 361, 21 L. Ed. 2d 344 (1968). The "heavy burden of persua[ding]" the court that the challenged conduct cannot reasonably be expected to start up again lies with the party asserting mootness.

Id.

Moreover, Fidelity acknowledged that it had ceased the unlawful practice of obtaining personal information of Florida title registrants from FDHSMV, for advertising purposes, without their prior express consent, as required by the DPPA.

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See Deposition of Jaqueline Larish, D.E. # 73, pp. 25-28. Kehoe's claim for injunctive relief in both the complaint and the motion for class certification as well as Fidelity's acknowledgement that it had discontinued the practice reflects that this matter was pending before the District Court when it entered its Final Judgment. The District Court therefore committed error when it failed to address the injunctive relief sought by Kehoe in its Final Order.

This Court has found that language similar to that found in Kehoe's complaint and the motion for class certification is broad enough to include injunctive relief prohibiting Fidelity from obtaining personal information of Florida Title Registrants from FDHSMV, for advertising purposes, without their prior express consent, as required by the DPPA. *Covad Communs. Co.*, 314 F. 3d at 1285. Fidelity may have stated that it had ceased the contested practice; however, Fidelity never raised this issue in its Motion for Summary Judgment, let alone met its "heavy burden" to show that it would not engage in this practice in the future.

The District Court should not have dismissed Kehoe's Motion for Class Certification merely because Fidelity has ceased its practice of unlawfully obtaining protected information on Florida title registrants from the FDHSMV. Courts have certified classes under Fed. R. Civ. P. 23(b)(2) where the defendants have taken steps following the filing of a lawsuit that attempt to effectively moot the requested injunctive relief. *Friends of the Earth, Inc.,* 528 U.S. at 189; *Buchanan v. Consol.*

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Stores Corp., 217 F.R.D. 178, 189 (D. Md. 2003)(African-American customers' request for class injunction prohibiting owner of retail stores from accepting checks was not rendered moot by owner's subsequent voluntary conduct of abolishing disputed policy after action was instituted); *Arnold v. United Artists Theater Circuit,* 158 F.R.D. 439, 456 (N.D. Cal. 1994)(Subsequent remedy of non-compliant design features in movie theaters which did render claim brought under ADA moot); *Mack v. Suffolk County*, 191 F.R.D. 16, 21 (D. Mass. 2000)(Action alleging county policy of subjecting all female pre-arraignment detainees to strip searches without individualized reasonable suspicion was not rendered moot merely because county amended policy to require individualized reasonable suspicion).

Accordingly, the District Court erred in entering the final judgment because it did not address all the claims asserted in the case. *Indiana H. B. R. Co. v. American Cyanamid Co.*, 860 F.2d 1441, 1446 (7th Cir. 1988)(District court order entering summary judgment against defendant on a strict liability count was not a "final judgment" where claim was only partially adjudicated because negligence count remained unresolved); *Acme Painting Ink Co. v. Menard, Inc.*, 891 F. Supp. 1289, 1304 (E.D. Wis. 1995)(District court could not enter final judgment in favor of building supply company after granting it summary judgment on CERCLA liability claim, in light of closely related unadjudicated claim under Resource Conservation

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and Recovery Act of 1976, 42 U.S.C. §6901, *et seq.* ("RCRA") also involving company's waste disposal activities).

CONCLUSION

For the foregoing reasons, this Court should reverse the Summary Final Judgment entered by the District Court.

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Dated: October ___, 2004

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CERTIFICATE OF COMPLIANCE WITH FRAP 32(a)(7)(B)

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 9,517 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 97 SR-2 in Times New Roman 14.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and six copies of the "Initial Brief of Appellant James Kehoe" were dispatched for filing via Federal Express Overnight Delivery to L. Louis Mrachek, Esq. and Roy Fitzgerald, Esq.; Page, Mrachek, Fitzgerald & Rose, P.A., 505 S. Flagler Drive, Suite 600, West Palm Beach, Florida 33401 on this ______ day of October, 2004.

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