

# SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: Ellen M. Coin  
Justice

PART 63

Index Number : 653024/2013  
NAVIGATORS INSURANCE COMPANY  
vs  
STERLING INFOSYSTEMS, INC.  
Sequence Number : 002  
SUMMARY JUDGMENT

INDEX NO. \_\_\_\_\_  
MOTION DATE 7/28/15  
MOTION SEQ. NO. \_\_\_\_\_

The following papers, numbered 1 to \_\_\_\_\_, were read on this motion to/for \_\_\_\_\_

Notice of Motion/Order to Show Cause — Affidavits — Exhibits \_\_\_\_\_ | No(s). \_\_\_\_\_

Answering Affidavits — Exhibits \_\_\_\_\_ | No(s). \_\_\_\_\_

Replying Affidavits \_\_\_\_\_ | No(s). \_\_\_\_\_

Upon the foregoing papers, it is ordered that this motion is *granted in accordance with the attached memorandum decision.*

*has constituted the decision, order and judgment of the Court.*

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: 7/28/15

EM, J.S.C.

HON. ELLEN M. COIN

- 1. CHECK ONE: .....  CASE DISPOSED  NON-FINAL DISPOSITION
- 2. CHECK AS APPROPRIATE: ..... MOTION IS:  GRANTED  DENIED  GRANTED IN PART  OTHER
- 3. CHECK IF APPROPRIATE: .....  SETTLE ORDER  SUBMIT ORDER
- DO NOT POST  FIDUCIARY APPOINTMENT  REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 63

-----X  
NAVIGATORS INSURANCE COMPANY,

Plaintiff,

-against-

Index No. 653024/2013  
Subm. Date: 1/28/2015  
Mot. Seqs.: 001 and 002

**DECISION, ORDER,  
and JUDGMENT**

STERLING INFOSYSTEMS, INC. and  
STERLING INFOSYSTEMS-OHIO, INC.,

Defendants.

-----X  
Appearances:

For Plaintiff:  
Lowenstein Sandler LLP  
1251 Avenue of the Americas  
New York, New York 10020  
212-262-6700

For Defendants:  
Mound Cotton Wollan & Greengrass  
One Battery Park Plaza  
New York, New York 10004  
212-804-4200

Papers Considered on the Motions and Cross-Motion for Summary Judgment:

**seq001**

Notice of Motion and Affirm. in Support with Attached Exhs .....	1
Memorandum of Law in Support of Motion .....	2
Notice of Cross-Motion and Affirm. in Support with Attached Exhs .....	3
Memorandum in Opposition to Motion and in Support of Cross-Motion .....	4
Memorandum of Law in Opposition to Cross-Motion and in Further Support of Motion .....	5
Memorandum of Law in Reply .....	6

**seq002**

Notice of Motion and Affirm. in Support with Attached Exhs.....	1
Memorandum of Law in Opposition and Affirm. in Opposition with Attached Exhs .....	2
Memorandum of Law in Reply .....	3

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**Ellen M. Coin, J.:**

In motion sequence 001, Plaintiff Navigators Insurance Company (Navigators) moves for summary judgment declaring that it is not obligated to defend or indemnify defendants Sterling Infosystems, Inc. (Sterling) and Sterling Infosystems-Ohio, Inc. (Sterling Ohio) in two underlying actions: 1) *Scott Ernst v Dish Network, LLC, et al.*, Case No. 12-CV-8794, United

States District Court for the Southern District of New York (the Ernst action) and 2) *Joshua J. Eisner v Teletech Services Corporation*, Case No. 6:13-CV-03273, United States District Court for the Western District of Missouri (the Teletech action) (collectively, underlying actions).<sup>1</sup> Plaintiff also moves for summary judgment dismissing defendants' counterclaims. Defendants cross-move for partial summary judgment declaring that 1) plaintiff has a duty to defend defendants in the underlying actions and 2) statutory damages and attorneys' fees awardable under the Fair Credit Reporting Act (FCRA) constitute "damages" as covered by defendants' insurance policy. In motion sequence 002, defendant Sterling Infosystems, Inc. moves for summary judgment requiring plaintiff to indemnify Sterling for the settlement reached in the Ernst action.

#### *Underlying Actions*

In the primary underlying action, Scott Ernst, the named plaintiff, brought a putative class action complaint against defendants Dish Network LLC and Dish Network Service LLC (collectively, Dish) and Sterling. Ernst was a satellite dish technician employed by non-party Superior Satellite Services, Inc. (Superior) that was a contractor for Dish. Ernst alleged that Sterling violated the Fair Credit Reporting Act (FCRA), 15 USC § 1681 *et seq.*, by providing Dish with outdated information that Superior then relied upon in its decision to terminate Ernst's employment. Ernst further alleged that both Dish and Sterling failed to provide Ernst with the source(s) of that outdated information.

The Teletech action is substantially similar to the Ernst action in that it arises from an alleged willful violation of FCRA for which the plaintiff is seeking only statutory damages,

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<sup>1</sup> Plaintiff's first through third causes of action, regarding a third underlying action, entitled *Tyrone Henderson, et al. v Acxiom Risk Mitigation, Inc., et al.*, No. 3:12-CV-589, United States District Court for the Eastern District of Virginia, which has since been resolved, are now moot.

punitive damages, and attorneys' fees. Sterling is not a party to the Teletech action but has agreed to provide Teletech with a defense and Sterling seeks indemnification from Navigators on that basis.

*The Fair Credit Reporting Act*

The FCRA, a consumer protection statute, was enacted in 1970 to ensure "that consumer reporting agencies adopt reasonable procedures for meeting the needs of commerce for consumer credit, personnel, insurance, and other information in a manner which is fair and equitable to the consumer, with regard to the confidentiality, accuracy, relevancy, and proper utilization of such information" (15 USC § 1681b). The FCRA provides a remedy for both willful and negligent violations of the statute (15 USC § 1681n; 15 USC § 1681o). In 1996 Congress amended the FCRA section regarding willful violations to include an option for statutory damages between \$100 and \$1000 (Omnibus Consolidated Appropriations Act, 1997, 1996 Enacted H.R. 3610, 104 Enacted H.R. 3610, 110 Stat. 3009, 3009-446). The plaintiffs in the underlying actions seek only those statutory damages available in instances of willful FCRA violations.

*Sterling's Insurance Policy*

Sterling obtained from Navigators an errors and omissions insurance policy (the policy) for the period of August 12, 2012 to October 12, 2013. The policy specifies a \$5,000,000 liability limit and a \$50,000 per claim deductible and provides for payment on behalf of the insured all sums in excess of the deductible that the insured becomes legally obligated to pay as damages (Policy, Endorsement No. 1 at 1). The policy defines "damages" as "any compensatory sum" including "a judgement, award, or settlement, provided any settlement is negotiated with the Company's written consent," including punitive amounts "to the extent such amounts are insurable under applicable law." Notably, the policy excludes from coverage "Fines, penalties,

forfeitures or sanctions”<sup>2</sup> (Bennett aff, exhibit A, endorsement 1, ¶¶ 4, 6).

### Analysis

Plaintiff moves for summary judgment declaring that it has no obligation to defend or indemnify defendants on the grounds that the policy clearly excludes penalties from coverage, and the underlying claims involve only penalties. Defendants 1) cross-move for summary judgment requiring plaintiff to defend defendants in the underlying actions and 2) move for summary judgment requiring plaintiff to indemnify Sterling for the settlement reached in the Ernst action. Both of defendants’ motions are predicated on their contention that the underlying claims constitute compensatory damages, clearly covered by the policy. In the alternative, defendants urge that any ambiguity regarding whether the underlying claims constitute damages or penalties should be construed in favor of the insureds. In light of the foregoing, the primary question before the Court is whether the FCRA statutory damages sought in the underlying actions constitute a penalty or a compensatory sum.

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issue of fact from the case (*Meridian Mgt. Corp v Cristi Cleaning Serv. Corp.*, 70 AD3d 508, 510 [1<sup>st</sup> Dept 2010], quoting *Winegrad v New York Univ. Med. Cir.*, 64 NY2d 851, 853 [1985]). Once this burden has been met, the party opposing such motion must produce evidentiary proof in admissible form sufficient to establish the existence of a material issue of

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<sup>2</sup> Under the policy terms, this exclusion does not apply to “privacy regulatory fines & penalties,” but privacy fines and penalties, in contrast to general fines and penalties, are limited by definition to those that result from civil charges or a hearing brought by a local, state, or federal government for violations of statutes or regulations promulgated pursuant to specifically enumerated laws, with no express reference to FCRA (Bennett aff, exhibit A, endorsement 1, ¶ 4-6).

fact that requires a trial (*Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]; *Grossman v Amalgamated Hous. Corp.*, 298 AD2d 224, 226 [1<sup>st</sup> Dept 2002]). On a summary judgment motion which involves an insurance claim, the insured first has the burden of proving that the alleged loss is covered under the policy (*see Il Cambio, Inc. v U.S. Fid. & Guar. Co.*, 82 AD3d 650, 651 [1<sup>st</sup> Dept 2011]). Where, as here, it is the insurer that seeks summary judgment, it must first provide evidence that there are no triable issues of fact as to noncoverage.

An insurer's duty to defend is broader than the duty to indemnify and is determined from the allegations of the complaint and the terms of the policy (*Technicon Elec. Corp. v American Home Assur. Co.*, 74 NY2d 66, 73 [1989]). "If the complaint contains any facts or allegations which bring the claim even potentially within the protection purchased, the insurer is obligated to defend" (*id.*, citing *Ruder & Finn, Inc. v Seaboard Sur. Co.*, 52 NY2d 663, 669-670 [1981]). When "as a matter of law, there is no possible factual or legal basis upon which the insurer might eventually be held to be obligated to indemnify the claimant under any provision of the insurance policy," the duty to defend is not triggered (*Greenwich Ins. Co. v City of New York*, 122 AD3d 470, 471 [1<sup>st</sup> Dept 2014] [internal quotation marks omitted]). When the only interpretation of the allegations against the insured is that the factual predicate for the claim falls wholly within a policy exclusion, the duty to defend is also not triggered (*Global Constr. Co., LLC v Essex Ins. Co.*, 52 AD3d 655, 656 [2<sup>nd</sup> Dept 2008]).

Plaintiff argues that the underlying actions are based solely on penalties, and that since the policy excludes penalties from coverage, it has no possible duty to defend or indemnify defendants. Defendants argue that the statutory damages in the underlying claims do not constitute penalties. Defendants also argue that because there is controversy regarding whether such damages constitute penalties, the issue must be resolved in their favor.

In examining insurance contracts, courts bear the responsibility of determining the rights or obligations of parties based on the specific language of the policies, and unambiguous provisions must be given their plain and ordinary meaning (*Sanabria v American Home Assur. Co.*, 68 NY2d 866, 868 [1986]). The interpretation of such provisions is a question of law for the court (*Vigilant Ins. Co. v Bear Stearns Cos., Inc.*, 10 NY3d 170, 177 [2008], quoting *White v Continental Cas. Co.*, 9 NY3d 264, 267 [2007]). Generally, insurance policies should be enforced as written (see *White v Continental Cas. Co.*, 9 NY3d at 264). An exclusion in an insurance policy must be specific and clear in order to be enforced (*Seaboard Sur. Co. v Gillette Co.*, 64 NY2d 304, 311 [1984]; see also *Richner Dev. LLC v Burlington Ins. Co.*, 81 AD3d 705, 706 [2d Dept 2011]). Once the insured establishes that it is covered by a policy of insurance, the insurer bears the burden of establishing that the exclusions or exemptions apply in the particular case, and that those exemptions are subject to no other reasonable interpretation (*Seaboard Sur. Co. v Gillette Co.*, 64 NY2d at 311) (interior citations omitted).

In the instant case, the policy explicitly excludes penalties from coverage, and the language is neither ambiguous nor vague (Bennett aff, exhibit A, ¶ 3). If the statutory damages in the underlying claims are deemed penalties, then the plain and ordinary meaning of the insurance contract excludes those damages from coverage. Although the policy does purport to cover punitive damages “to the extent such amounts are insurable under applicable law” (*id.*), insurance coverage for punitive damages is deemed void in New York as against public policy (see *Public Serv. Mut. Ins. Co. v Goldfarb*, 53 NY2d 392, 400 [1981]; *Hartford Acci. & Indem. Co. v Hempstead*, 48 NY2d 218, 228 [1979]). That is true even as to out-of-state punitive damage awards for which the insured seeks New York coverage (*Zurich Ins. Co. v Shearson Lehman Hutton, Inc.*, 84 NY2d 309, 321 [1994]).

Resolution of this case depends solely upon interpretation of the statute relevant to the underlying actions.

The Fair Credit Reporting Act provides in pertinent part:

- (a) In general. Any person who willfully fails to comply with any requirement imposed under this title with respect to any consumer is liable to that consumer in an amount equal to the sum of—
  - (1)(A) any actual damages sustained by the consumer as a result of the failure *or damages of not less than \$100 and not more than \$1,000* (italics added);
  - (2) such amount of punitive damages as the court may allow; and
  - (3) in the case of any successful action to enforce any liability under this section, the costs of the action together with reasonable attorney’s fees as determined by the court.

15 USC § 1681n.

The statute was amended in 1996 to include the statutory damages italicized above.

While the FCRA provides remedies for both willful and negligent violations, the 1996 amendment applies only to cases of willful violations.<sup>3</sup> Plaintiff argues that the fact that Congress added the statutory damages only for instances of willful violation suggests that those damages are intended to be punitive in nature.

Black’s Law Dictionary defines “compensatory damages” and “penalty” respectively as:

Compensatory damages: 1. Damages sufficient in amount to indemnify the injured person for the loss suffered.

Penalty: 1. Punishment imposed on a wrongdoer, usu. in the form of imprisonment or fine; esp., a sum of money exacted as punishment for either a wrong to the state or a civil wrong (as distinguished from compensation for the injured party's loss).

Black’s Law Dictionary [14<sup>th</sup> ed 2014] [online version].

Categorization of damages, however, is not always so clear cut. Justice Cardozo wrote that “‘penalty’ is a term of varying and uncertain meaning,” and that penalties may serve as

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<sup>3</sup> As defendants note, the United States Supreme Court has held that willfulness in the context of civil liability under the FCRA includes not only knowing violations of a standard, but reckless ones as well (*Safeco Ins. Co. of Am. v Burr*, 551 US 47, 57 [2007]). The subject policy does not exclude coverage for reckless conduct.



reparations in some cases and as punishment in others (*see Life & Cas. Ins. Co. v McCray*, 291 US 566, 574 [1934]). Indeed, statutory damages will often be simultaneously both compensatory and punitive (*Cox v Lykes Bros.*, 237 NY 376, 380 [1924]). In the case of the FCRA, the Court finds that the statutory damages function primarily as compensation.

First, as actual damages are compensatory, statutory damages that substitute only for those actual damages are also compensatory (*see Bateman v Am. Multi-Cinema, Inc.*, 623 F3d 708, 718 [9th Cir 2010] [“That Congress provided a consumer the option of recovering either actual or statutory damages, but not both, supports the presumption that they serve the same purpose”]; *Harris v Mexican Specialty Foods, Inc.*, 564 F3d 1301, 1313 [11th Cir 2009] [“Because the FCRA already contains a punitive damages provision and specifies that statutory damages may only be awarded in lieu of actual damages, the district court erred in concluding that the statutory damages provision is tantamount to a punitive damages provision”]; *Ramirez v Midwest Airlines, Inc.*, 537 F Supp 2d 1161, 1168 [D Kan 2008] [the statutory damages in 15 USC § 1681n(a)(1) are in the nature of compensatory damages]; *In re Trans Union Corp. Privacy Litig.*, 211 FRD 328, 342 [ND Ill 2002] [same]).

Secondly, FCRA statutory damages serve to facilitate litigation in instances in which actual damages are difficult or impossible to calculate (*see Dreher v Experian Info. Solutions, Inc.*, 2014 U.S. Dist. LEXIS 85951 [E.D. Va. June 19, 2014] [where “the plaintiff cannot or chooses not to plead actual damages, the FCRA offers a second, tightly constrained remedy”]). Even if a plaintiff is able to show some actual damages, a statutory remedy is necessary for statutes like the FCRA that primarily concern the privacy and accuracy of consumer credit information because violations of such statutes result in minimal actual damages [*see Stillmock v Weis Mkts., Inc.*, 385 Fed Appx 267, 274 [4th Cir 2010] [“While some violations of FACTA,” a

2003 amendment to the FCRA, “will lead to easily quantifiable harms, other violations may lead to less tangible ones, such as a loss of privacy, heightened risk and anxiety over identity theft, or increased time spent monitoring one's financial security. In order to help a jury place a value on these intangible harms, FACTA provides for statutory damages between \$100 and \$1,000”]; *Murray v GMAC Mortg. Corp.*, 434 F3d 948, 953 [7th Cir 2006] [“That actual loss is small and hard to quantify is why statutes such as the [FCRA] provide for modest damages without proof of injury”]; *cf. Std. Mut. Ins. Co. v Lay*, 371 Ill Dec 1, 989 NE2d 591 [2013] [interpreting statutory damages as added incentives for parties to bring suit in instances where actual damages were small with respect to violations of the Telephone Consumer Protection Act [TCPA]]. When selecting the appropriate compensation within the statutory range, courts may consider the nature and seriousness of the FCRA violation (*see In re Croft*, 500 BR 823, 848 [Bankr WD Tex 2013] [“Where the quantifiable injury to the Plaintiff is difficult to prove yet the violation is so egregious and malicious, the maximum award of statutory damages is appropriate to *compensate* [italics added] the Plaintiff for harm to her reputation, her security, and her loss of time”]).

Thirdly, the FCRA separately provides for punitive damages (15 USC § 1681n[a][2]). Interpreting the FCRA statutory damages as punitive forces the Court to reconcile the illogical result in which punitive damages may be added to the punitive statutory damages, but actual damages may not be added to those same punitive statutory damages. Interpreting the statutory damages as compensatory results in a more harmonious reading of the FCRA's overall damages structure.

The Court has considered all other arguments and considers them unavailing or mooted by the grant of summary judgment.

Accordingly, it is hereby

ORDERED that the motion of Navigators Insurance Company, motion sequence 001, for summary judgment pursuant to CPLR 3212 as against defendants Sterling Infosystems, Inc. and Sterling Infosystems-Ohio, Inc. is denied, and defendants' cross-motion for partial summary judgment is granted; and it is further

ORDERED that the motion of Sterling Infosystems, Inc., motion sequence 002, for summary judgment requiring plaintiff to indemnify it for the settlement reached in the action entitled *Scott Ernst v Dish Network, LLC, Dish Network Service, LLC, et al.*, Case No. 12-CV-8794, United States District Court for the Southern District of New York, is granted; and it is further

ADJUDGED and DECLARED that Navigators Insurance Company is obligated to indemnify defendant Sterling Infosystems, Inc. for the settlement reached in the action entitled *Scott Ernst v Dish Network, LLC, Dish Network, LLC, et al.*, Case No. 12-CV-8794, United States District Court for the Southern District of New York; and it is further

ADJUDGED and DECLARED that plaintiff Navigators Insurance Company is obligated to defend defendant Sterling Infosystems, Inc. in connection with the action entitled *Joshua J. Eisner v Teletech Services Corporation*, Case No. 6:13-CV-03273, United States District Court for the Western District of Missouri; and it is further

ORDERED that the balance of the action seeking declaratory relief that plaintiff is obligated to indemnify defendant Sterling Infosystems, Inc. in the *Eisner* action is severed and continued.

**This constitutes the decision and order of the Court.**

Dated: July 28, 2015

ENTER:



Ellen M. Coin, A.J.S.C.