

Acosta, J.P., Renwick, Andrias, Saxe, Gische, JJ.

2555 Navigators Insurance Company, Index 653024/13
Plaintiff-Appellant,

-against-

Sterling Infosystems, Inc., et al.,
Defendants-Respondents.

Goldberg Segalla LLP, Garden City (Brendan T. Fitzpatrick of
counsel), for appellant.

Lowenstein Sandler LLP, New York (Lynda A. Bennett of counsel),
for respondents.

Order and judgment (one paper), Supreme Court, New York
County (Ellen M. Coin, J.), entered July 28, 2015, to the extent
appealed from as limited by the briefs, declaring that plaintiff
is obligated to indemnify defendants for the settlement reached
in an action in the U.S. District Court for the Southern District
of New York titled *Ernst v Dish Network, LLC*, unanimously
affirmed, with costs.

Pursuant to an errors and omissions insurance policy,
plaintiff is obligated to pay all damages arising in connection
with defendants' performance of their professional services. The
policy defines damages as "any compensatory sum," including a
settlement, and excludes coverage for, inter alia, penalties.
With the requisite consent of plaintiff, defendants entered into

a settlement with the plaintiffs in the putative class action *Ernst v Dish Network, LLC*, which alleged that defendants' business practices violated provisions of the Fair Credit Reporting Act (FCRA), causing the class members injury, including, in certain instances, termination from employment.

Plaintiff argues that the statutory damages that defendants paid to settle the *Ernst* action constitute a penalty, rather than compensatory damages, and are therefore excluded from their insurance coverage. The motion court correctly rejected this argument.

To make out a claim under the FCRA (15 USC § 1681 *et seq.*), the complaint must allege, *inter alia*, injury in fact, a "concrete and particularized" and "actual or imminent" "invasion of a legally protected interest," *i.e.*, the statutory right to the fair handling of the plaintiff consumer's credit information (*see Spokeo, Inc. v Robins*, ___ US ___, 136 S Ct 1540, 1547-1548 [2016] [internal quotation marks omitted]). The remedy for "willful" failure to comply with a requirement of the statute is "any actual damages sustained by the consumer by the failure or damages of not less than \$100 and not more than \$1,000," and "such amount of punitive damages as the court may allow," as well as costs and reasonable attorneys' fees (15 USC § 1681n[a][1A],

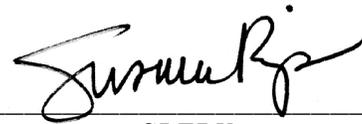
[2], [3]). Since the consumer must elect the option of either actual or statutory damages, and may also recover punitive damages, it is reasonable to infer, as the motion court did, that the actual and the statutory damages serve the same purpose (see *Bateman v American Multi-Cinema, Inc.*, 623 F3d 708, 718 [9th Cir 2010]). Moreover, the statute provides separately for a civil penalty (recoverable by the Federal Trade Commission) (see 15 USC § 1681s[a][2]). Plaintiff argues that the limitation of damages to a "willful" violation of the statute evinces a legislative intent to penalize intentional misconduct, rather than compensate for actual damages sustained, but this is not so, since willfulness as a statutory condition of civil liability "cover[s] not only knowing violations of a standard, but reckless ones as well" (*Safeco Ins. Co. of Am. v GEICO Gen. Ins. Co.*, 551 US 47, 57 [2007]). Thus, it is clear that Congress intended the statutory damages provided for by the FCRA to be compensatory and

not a penalty.

We have considered plaintiff's remaining contentions and find them unavailing.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: DECEMBER 29, 2016

A handwritten signature in black ink, appearing to read "Susan R. [unclear]", written over a horizontal line.

CLERK