No. 12-2797

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

JAREK CHARVAT, individually and on behalf of all others similarly situated,
Plaintiffs-Appellants,

v.

FIRST NATIONAL BANK OF WAHOO,
Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

BRIEF FOR *AMICUS* UNITED STATES IN SUPPORT OF APPELLANTS

STUART F. DELERY
Principal Dep. Assistant Attorney General

DEBORAH K. R. GILG
United States Attorney

MICHAEL JAY SINGER
(202) 514-5432
CHRISTINE N. KOHL
(202) 514-4027
Attorneys
U.S. Department of Justice
Civil Division, Appellate Staff
950 Pennsylvania Avenue NW
Washington, DC 20530

TABLE OF CONTENTS

Page

INTEREST OF THE UNITED STATES 1

STATEMENT OF THE ISSUE 2

STATEMENT OF THE CASE 3

A. Statutory And Regulatory Background 3

B. The Facts Of This Case 8

SUMMARY OF ARGUMENT 10

ARGUMENT 12

Charvat Has Article III Standing To Pursue The Claims Alleged In His Complaint 12

A. The Unlawful Fees That Charvat Was Charged Constitute Injury-In-Fact 13

B. Assuming That The Court Chooses To Reach The Issue, Charvat Also Suffered An Informational Injury – The Invasion Of A Legal Right Created By EFTA 16

CONCLUSION 29

CERTIFICATE OF COMPLIANCE

VIRUS-SCAN CERTIFCATE

CERTIFICATE OF SERVICE

STATUTES and REGULATIONS ADDENDUM

TABLE OF AUTHORITIES

Cases:

Alston v. Countrywide Fin. Corp., 585 F.3d 753 (3d Cir. 2009) 29

Beaudry v. Telecheck Servs., Inc., 579 F.3d 702 (6th Cir. 2009), *cert. denied,* 130 S. Ct. 2379 (2010) 27, 28

Belles v. Schweiker, 720 F.2d 509 (8th Cir. 1983) 14

Carey v. Piphus, 435 U.S. 247 (1978) 18

Carter v. Welles-Bowen Realty, Inc., 553 F.3d 979 (6th Cir. 2009) 29

Clemmer v. Key Bank Nat'l Ass'n, 539 F.3d 349 (6th Cir. 2008) 16

Dep't of the Army v. Blue Fox, Inc., 525 U.S. 255 (1999) 19

Edwards v. First Am. Fin. Corp., 610 F.3d 514 (9th Cir. 2010), *pet. for cert. dismissed*, 132 S. Ct. 2536 (2012) 28

Farrar v. Hobby, 506 U.S. 103 (1992) 18

FEC v. Akins, 524 U.S. 11 (1998) 3, 21, 22, 24, 25

First Am. Fin. Corp. v. Edwards, 131 S. Ct. 3022 (2011) 10

First Am. Fin. Corp. v. Edwards, 132 S. Ct. 2536 (2012) 10

Havens Realty Corp. v. Coleman, 455 U.S. 363 (1982) 2, 19, 20, 21, 22, 24, 25

Linda R. S. v. Richard D., 410 U.S. 614 (1973) 17, 26

Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992) 12, 14, 17, 22, 24, 26

Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803) 19

Mass. v. EPA, 549 U.S. 497 (2007) 17

Public Citizen v. Dep't of Justice, 491 U.S. 440 (1989) 22

Public Citizen v. FTC, 869 F.2d 1541 (D.C. Cir. 1989) 28

Sierra Club v. U.S. Army Corps of Eng'rs, 645 F.3d 978 (8th Cir. 2011) 2, 14

Sprint Commc'ns Co. v. APCC Servs., Inc., 554 U.S. 269 (2008) 17

Summers v. Earth Island Inst., 555 U.S. 488 (2009) 12

United States v. SCRAP, 412 U.S. 669 (1973) 2, 14

Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748 (1976) 22, 25

Voeks v. Pilot Travel Ctrs., 560 F. Supp. 2d 718 (E.D. Wis. 2008) 16

Warth v. Seldin, 422 U.S. 490 (1975) 17, 22

Webb v. Portland Mfg. Co., 29 F. Cas. 506 (C.C. Me. 1838) 19

White v. Arlen Realty & Dev. Corp., 540 F.2d 645 (4th Cir. 1976) 26, 27

Wilcox v. Plummer's Ex'rs, 29 U.S. (4 Pet.) 172 (1830) 19

United States Constitution:

Art. III, § 2 ..... 2, 8, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 24, 28

Statutes:

ATM Fee Reform Act of 1999, Pub. L. No. 106-102,
tit. VII, 113 Stat. 1338 3

Comprehensive Smokeless Tobacco Health Education Act:

15 U.S.C. § 4402(a)(1) 28
15 U.S.C. § 4402(a)(2) 28

Dodd-Frank Wall Street Reform and Consumer
Protection Act, Pub. L. No. 111-203,
124 Stat. 1376 (2010) 5

Electronic Fund Transfer Act, Pub. L. No. 95-630,
92 Stat. 3641 (1978) 3, 5

15 U.S.C. § 1693 ..... 1, A-1
15 U.S.C. § 1693(a) 3, 6, A-1
15 U.S.C. § 1693(b) 2, 3, 6, A-1
15 U.S.C. § 1693b(a) 5
15 U.S.C. § 1693b(a)(1) 2, 4, 6
15 U.S.C. § 1693b(d) 16
15 U.S.C. § 1693b(d)(1) 2
15 U.S.C. § 1693b(d)(3) 1, 7, 23, A-2
15 U.S.C. § 1693b(d)(3)(A) 2, 3, 4, 6, 15, A-2
15 U.S.C. § 1693b(d)(3)(B) 4, 13, 15, 23, 24, A-2
15 U.S.C. § 1693b(d)(3)(B)(i) 13, 15, A-2
15 U.S.C. § 1693b(d)(3)(C) 1, 4, 23, A-3
15 U.S.C. § 1693b(d)(3)(C)(i) 13, 15, A-3
15 U.S.C. § 1693b(d)(3)(D)(ii) 4
15 U.S.C. § 1693b(d)(3)(D)(iii) 4
15 U.S.C. § 1693m 8, A-4
15 U.S.C. § 1693m(a) 2, 4, 6, 7, 13, 23, 24, A-4
15 U.S.C. § 1693n 7
15 U.S.C. § 1693*o*(a) 7

Fair Credit Reporting Act:

15 U.S.C. § 1681e(b) 27

Fair Housing Act:

42 U.S.C. § 3604.....25
42 U.S.C. § 3604(d).....20

False Claims Act:

31 U.S.C. § 3730(b).....9

Real Estate Settlement Procedures Act:

12 U.S.C. § 2607(d).....28

Truth in Lending Act:

15 U.S.C. § 1637.....26

Regulations:

12 C.F.R. § 205 (2010) 5
12 C.F.R. pt. 1005 5
12 C.F.R. § 1005.16 .....1-2, 5, 13, 23, A-5
12 C.F.R. § 1005.16(c).....13, A-5
12 C.F.R. § 1005.16(d) 2, 13, A-6

76 Fed. Reg. 81,020 (Dec. 27, 2011).....5

Legislative Materials:

ATM Surcharges: Hearings Before the Subcomm. on Fin. Insts. & Consumer Credit of the H. Comm. on Banking & Fin. Servs., 104th Cong. (1996).....5

Fair ATM Fees for Consumers Act, S. 1800: Hearing Before the S. Comm. on Banking, Hous., & Urban Affairs, 104th Cong. (1996).....5, 6

H.R. Rep. No. 95-1315 (1978).....7

Congressional Budget Office, Competition in ATM Markets: Are ATMs Money Machines? (July 1998), http://www.cbo.gov/sites/default/files/cbofiles/ftpdocs/6xx/doc666/atmcomp.pdf 6

Miscellaneous:

3 William Blackstone, *Commentaries on the Laws of England* (1768) 19

Dan B. Dobbs, *Handbook on the Law of Remedies* (1st ed. 1973) 18

Restatement (First) of Contracts (1932).....19

Restatement (First) of Torts (1934-1939).....18

Restatement (Second) of Torts (1979) 18

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 12-2797

JAREK CHARVAT, individually and on behalf of all others similarly situated,
Plaintiffs-Appellants,

v.

FIRST NATIONAL BANK OF WAHOO,
Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

BRIEF FOR *AMICUS* UNITED STATES IN SUPPORT OF APPELLANTS

INTEREST OF THE UNITED STATES

This case involves requirements imposed by the Electronic Fund Transfer Act ("EFTA" or "the Act"), 15 U.S.C. § 1693b(d)(3), and implementing regulations issued by the Consumer Financial Protection Bureau ("the Bureau"), on operators of automated teller machines (commonly known as ATMs). Under the statute and regulations, ATMs must provide consumers with an "on the machine" notice of any fee that will be imposed for the use of the ATM, as well as an "on the screen" notice of that fact and the amount of such fee. Unless both notices are provided, no fee may be charged to the consumer. *Id*. § 1693b(d)(3)(C); 12 C.F.R.

§ 1005.16(d).[1] EFTA authorizes consumers to bring suit for statutory damages for violation of the statute's requirements. 15 U.S.C. § 1693m(a). That private right of action complements the federal government's enforcement authority under EFTA and is an important tool to ensure that Congress's "primary objective" of providing "individual consumer rights" is achieved. *Id*. § 1693(b). Because many federal consumer protection statutes contain similar provisions, authorizing persons whose rights under those statutes have been violated to sue for statutory damages, the United States has a substantial interest in the Article III standing question presented in this appeal.

STATEMENT OF THE ISSUE

Whether a consumer has Article III standing to seek statutory damages when a bank violates EFTA by failing to post the "on the machine" notice that a fee will be imposed for an ATM transaction and charging him a fee for using that ATM.

United States v. SCRAP, 412 U.S. 669 (1973);

Sierra Club v. U.S. Army Corps of Eng'rs, 645 F.3d 978 (8th Cir. 2011);

Havens Realty Corp. v. Coleman, 455 U.S. 363 (1982);

---

[1] EFTA directs the Bureau to promulgate regulations implementing the notice requirements imposed upon ATM operators. See 15 U.S.C. § 1693b(a)(1), (d)(1), (3)(A). Congress thus anticipated that the Bureau, through rulemaking, would clarify the scope and contours of the notice requirements to which ATM operators are subject. The Bureau has promulgated a regulation stating that an ATM operator may not charge a fee unless both the "on the machine" and "on the screen" notices are provided. 12 C.F.R. § 1005.16(d).

FEC v. Akins, 524 U.S. 11 (1998).

STATEMENT OF THE CASE

A. Statutory And Regulatory Background[2]

1. Congress enacted EFTA in 1978. While it recognized that "the use of electronic systems to transfer funds provides the potential for substantial benefits to consumers," Congress found that existing consumer protection legislation did not clearly establish "the rights and liabilities of consumers, financial institutions, and intermediaries in electronic fund transfers." Pub. L. No. 95-630, § 2000, 92 Stat. 3641, 3728 (1978) (codified as 15 U.S.C. § 1693(a)). Thus, EFTA is intended "to provide a basic framework establishing the rights, liabilities, and responsibilities of participants in electronic fund transfer systems," with "[t]he primary objective" of providing "individual consumer rights." *Ibid*. (codified as 15 U.S.C. § 1693(b)).

Congress amended EFTA when it enacted the ATM Fee Reform Act of 1999, Pub. L. No. 106-102, tit. VII, 113 Stat. 1338, 1463. Those amendments require an ATM operator "who imposes a fee on any consumer for providing host transfer services to such consumer" to give certain notices to the consumer "at the time the service is provided." 15 U.S.C. § 1693b(d)(3)(A). A "host transfer

[2] The statutory provisions and regulations most pertinent to this appeal are included in the Addendum to this brief.

service" is defined as "any electronic fund transfer made by an [ATM] operator in connection with a transaction initiated by a consumer." *Id*. § 1693b(d)(3)(D)(iii). An "electronic fund transfer," or EFT, includes "a balance inquiry initiated by a consumer," whether or not there is "a transfer of funds in the course of the transaction." *Id*. § 1693b(d)(3)(D)(ii).

Notice must be given to a consumer of "the fact that a fee is imposed by such operator for providing the [ATM] service," and "the amount of any such fee." *Id*. § 1693b(d)(3)(A). Moreover, the notice must be provided in two locations – "[o]n the machine" and "[o]n the screen" – and at different times: (1) notice that a fee will be imposed must be posted "on or at" the ATM used by the consumer; and (2) notice of both the fee imposition and the amount must appear "on the screen of the [ATM], or on a paper notice issued from such machine, after the transaction is initiated and before the consumer is irrevocably committed to completing the transaction." *Id*. § 1693b(d)(3)(B). No ATM fee may be imposed "unless – (i) the consumer receives such notice in accordance with subparagraph (B); and (ii) the consumer elects to continue in the manner necessary to effect the transaction after receiving such notice." *Id*. § 1693b(d)(3)(C).

As noted above, EFTA directs the Bureau to prescribe regulations implementing the statute, *id*. § 1693b(a)(1), (d)(3)(A), and the Bureau has done so,

see 12 C.F.R. pt. 1005.[3] The regulations addressed to the ATM fee disclosure requirements closely follow the statutory language. See 12 C.F.R. § 1005.16.

In hearings before the ATM Fee Reform Act was enacted, industry groups testified before Congress that the prevailing industry standards required both on-machine and on-screen disclosures like those later enacted into law. See, e.g., *ATM Surcharges: Hearings Before the Subcomm. on Fin. Insts. & Consumer Credit of the H. Comm. on Banking & Fin. Servs.*, 104th Cong. 37, 110-12, 122-24, 132-33, 136, 146 (1996); *Fair ATM Fees for Consumers Act, S. 1800: Hearing Before the S. Comm. on Banking, Hous., & Urban Affairs* ("Senate Hearing"), 104th Cong. 51, 104, 108, 113-14, 146 (1996). One Senator explained why both notices are necessary:

> When someone walks in to use an ATM, and up on a little screen goes a sign that says, you will be charged an additional fee, it's too late. How many people do you think are then going to go to another ATM if it's the middle of the day or in the evening, et cetera, if they find themselves going to an ATM out of necessity because it is close by? It is not realistic.

[3] As originally enacted, EFTA authorized the Federal Reserve Board to issue implementing regulations. Pub. L. No. 95-630, § 2000, 92 Stat. 3730 (codified as 15 U.S.C. § 1693b(a)). See 12 C.F.R. pt. 205 (2010). The Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 1084(3)(A), 124 Stat. 1376, 2081-82 (2010), generally transferred rulemaking authority under EFTA to the Bureau, which republished and recodified the Board's EFTA regulations with some nonsubstantive amendments. See 76 Fed. Reg. 81,020 (Dec. 27, 2011).

Senate Hearing at 3 (statement of Sen. D'Amato).

Despite the testimony about industry practice, a 1998 Congressional Budget Office ("CBO") report to Congress found that ATM fees "are not readily revealed" and "are usually revealed only after the cardholder has initiated the transaction." Congressional Budget Office, *Competition in ATM Markets: Are ATMs Money Machines?* 51 (July 1998).[4] The CBO concluded that the failure to make that information more readily available to consumers "inhibit[ed] price competition among bank ATM owners." *Ibid*. The report took note of the then-pending legislation that would require both "on the machine" and "on the screen" notices, and it concluded that "disclosure of ATM surcharges should increase competition among ATM owners because it allows cardholders to shop for the lowest price." *Id*. at 72. Congress enacted the ATM Fee Reform Act the following year, requiring both notices.

2. Consistent with its "primary objective" of providing "individual consumer rights," 15 U.S.C. § 1693(b), EFTA creates a private right of action for consumers. Anyone "who fails to comply with any provision of [EFTA] with respect to any consumer * * * is liable to such consumer." *Id*. § 1693m(a). The amount of damages to which the consumer is entitled is "equal to the sum of" –

[4] See http://www.cbo.gov/sites/default/files/cbofiles/ftpdocs/6xx/doc666/atmcomp.pdf.

> (1) any actual damage sustained by such consumer as a result of such failure;
>
> (2)(A) in the case of an individual action, an amount not less than $100 nor greater than $1,000; or
>
> (B) in the case of a class action, such amount as the court may allow, * * *

subject to certain limitations. *Ibid*.

Congress described EFTA's private right of action as similar to that in other consumer protection laws and intended that the right of action serve as "the backbone of enforcement of this legislation." H.R. Rep. No. 95-1315, at 14 (1978). The legislative history also recognizes the importance of class action suits in "persuad[ing] financial institutions * * * to comply with the spirit and letter of the law. Without a class-action suit an institution could violate the [statute] with respect to thousands of consumers without their knowledge, if its financial impact was small enough or hard to discover." *Id*. at 15.

In addition to civil suits brought by consumers, there are criminal penalties for violation of EFTA. 15 U.S.C. § 1693n. Moreover, the Bureau (along with the Federal Reserve Board, Federal Deposit Insurance Corporation, Comptroller of the Currency, and National Credit Union Administration, among others) has administrative enforcement authority under EFTA. See 15 U.S.C. § 1693*o*(a).

B. The Facts Of This Case

Plaintiff Jarek Charvat states in his class action complaint that, on two occasions in 2012, he made a cash withdrawal from an ATM operated by defendant First National Bank of Wahoo ("the Bank") and was charged a $2.00 fee for each transaction. Joint Appendix ("JA") 25. He claims that, at the time of those transactions, there was "no notice posted 'on or at' the ATM operated by [the Bank]," advising him and other consumers that a fee would be charged for their use of the ATM. JA 25. Charvat alleges that the Bank therefore violated EFTA by failing to post one of the two notices required by 15 U.S.C. § 1693b(d)(3), and by charging him transaction fees. JA 30. He seeks certification of a class defined as all persons who, within the 12 months preceding the filing of his complaint, used the same ATM that he used and "were charged a 'terminal owner fee' in connection with the transaction." JA 27. Charvat requests statutory damages under 15 U.S.C. § 1693m, as well as costs and attorneys' fees. JA 31.

The Bank moved to dismiss on the ground that Charvat has suffered no injury-in-fact and thus has no standing to bring this action under Article III of the Constitution. The district court agreed. It concluded that Charvat has alleged "only a statutory violation of the EFTA because [the Bank] failed to provide an exterior fee notice on the ATM"; "Charvat has not alleged an injury in fact caused by [the Bank's] failure to provide notice of the fee on the exterior of its ATM."

Addendum ("A") 11, 12. In the court's view, Charvat alleged a "mere injury in *law*," but the Constitution requires that "[a] plaintiff must allege an injury in *fact* that was caused by the lack of an exterior fee notice on the ATM." A 11.

The court distinguished cases in which "testers" were found to have standing, even though they "did not personally allege an injury that operated to their detriment." A 13. In those cases, the testers claimed that they were discriminated against in housing (and other areas) and brought suit even though they did not intend to purchase property and were not misled by the false information that the realty companies provided them. A 12. The district court found those cases to be distinguishable because the information presented to the testers was "deficient in that it was false, misleading, or delayed," whereas Charvat has not alleged that the Bank's failure to provide the required "on the machine" notice "was in any way false or misleading." A 13.

The district court also rejected Charvat's argument that the federal government has assigned its interest in enforcing EFTA's notice requirements to private parties. The court explained that EFTA is not a *qui tam* statute like the False Claims Act, see 31 U.S.C. § 3730(b), under which a private individual may sue on the government's behalf and can share in the damages award. Moreover, the court found that EFTA's purpose is to protect consumer interests, and there are no federal interests to assign to private entities. A 14-15.

At the time the district court rendered its decision, a related standing issue was pending before the Supreme Court in *First Am. Fin. Corp. v. Edwards*, 131 S. Ct. 3022 (2011) (*granting pet. for cert. in part*). The district court therefore did not finalize its ruling and stayed further proceedings pending the outcome of that case. A 17. On June 28, 2012, the Supreme Court dismissed the writ of *certiorari* in *Edwards* as improvidently granted. *First Am. Fin. Corp. v. Edwards*, 132 S. Ct. 2536 (2012). Shortly thereafter, the district court issued an order granting the Bank's motion to dismiss for lack of subject matter jurisdiction and dismissed Charvat's complaint with prejudice. A 21. Charvat has appealed.[5]

SUMMARY OF ARGUMENT

Here at issue is whether plaintiff Charvat established his standing to sue by alleging an injury-in-fact – i.e., a concrete and particularized invasion of a legally protected interest – as a result of the Bank's violations of EFTA's ATM fee disclosure requirements. Charvat has alleged that, on two occasions, he used one of the Bank's ATMs; it bore no "on the machine" notice that a fee would be charged; and he was charged a usage fee for the transactions he completed at those ATMs. By alleging those violations of his legally protected rights, Charvat has

[5] Charvat does not challenge the district court's ruling respecting his assignment-of-federal-interests argument, and, accordingly, this brief does not address that issue.

alleged a concrete and particularized injury-in-fact for purposes of establishing his standing under Article III to bring suit against the Bank for statutory damages.

First, Charvat's alleged out-of-pocket loss – the fees he was unlawfully charged – is a typical economic injury-in-fact. The fact that the loss was small is of no consequence, for both the Supreme Court and this Court have recognized that "'an identifiable trifle'" is sufficient injury for purposes of Article III standing. Charvat may therefore pursue the claims alleged in his complaint, and the Court need not, and should not, consider any other basis for his standing.

Assuming, however, that the Court chooses to address Charvat's alleged "informational injury" – the lack of the required "on the machine" notice – that, too, is a cognizable injury-in-fact sufficient for Article III purposes. It is well established that Congress can enact statutes that create legal rights, the invasion of which constitutes injury-in-fact. Moreover, the Supreme Court has held that some statutes confer a right to certain information, so that a person deprived of that information to which he is legally entitled has suffered an injury for purposes of standing to bring suit to challenge that violation of law.

EFTA is such a statute, insofar as it (i) gives a consumer who initiates an ATM transaction for which he will be charged a fee a legal right to notice of that fact "on the machine" itself, and (ii) provides a right of action for the consumer to vindicate that right to notice. The Bank's failure to provide that required notice

here deprived Charvat of information to which he was legally entitled. Charvat has therefore suffered an informational injury-in-fact under EFTA, allowing him to sue for statutory damages to remedy that alleged violation of the statute.

ARGUMENT

Charvat Has Article III Standing To Pursue The Claims Alleged In His Complaint

Article III of the Constitution confers authority on federal courts only over "Cases" and "Controversies." U.S. CONST. art. III, § 2. In order to invoke a federal court's jurisdiction, a party must establish his standing under Article III by demonstrating (i) injury-in-fact – i.e., "an invasion of a legally protected interest" that is "concrete and particularized" and "actual or imminent, not conjectural or hypothetical"; (ii) "a causal connection between the injury and the [challenged] conduct"; and (iii) a likelihood that "the injury will be redressed by a favorable decision." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992) (internal quotation marks omitted).

Only injury-in-fact – "a hard floor of Article III jurisdiction that cannot be removed by statute," *Summers v. Earth Island Inst.*, 555 U.S. 488, 497 (2009) – is at issue here. Charvat's complaint alleges a traditional economic injury-in-fact, i.e., the fees that he and members of the putative class were unlawfully charged under EFTA. See JA 27, 30. That injury alone is sufficient to establish his Article III standing to pursue the alleged claims. Charvat has also alleged an

informational injury in conjunction with the prohibited fee – the lack of the "on the machine" notice required by EFTA – which would support his standing as well under that statute. However, because it is not presented on the facts as alleged here, the Court need not, and should not, reach the more complicated constitutional question whether the failure to provide the "on the machine" notice *alone*, without the imposition of any prohibited fee, is an Article III injury-in-fact.[6]

A. The Unlawful Fees That Charvat Was Charged Constitute Injury-In-Fact

1. As Charvat's complaint plainly alleges, on two occasions he was charged a $2.00 fee for using the Bank's ATM, even though that ATM did not bear the required "on the machine" notice. JA 25; see 15 U.S.C. § 1693b(d)(3)(B)(i); 12 C.F.R. § 1005.16. As discussed above, the statute provides that "[n]o fee may be imposed by any [ATM] operator in connection with any electronic fund transfer initiated by a consumer for which a notice is required under subparagraph (A), unless * * * the consumer receives such notice in accordance with subparagraph (B)." 15 U.S.C. § 1693b(d)(3)(C)(i). Subparagraph (B), in turn, requires *both* the "on the machine" and "on the screen" notices. *Id*. § 1693b(d)(3)(B); see 12 C.F.R. § 1005.16(c), (d). Charvat accordingly alleged that the Bank "was prohibited from

[6] There appears to be no dispute in this case that EFTA creates a private right of action for plaintiffs such as Charvat. See 15 U.S.C. § 1693m(a).

imposing any usage fee or similar fee for providing host transfer services because it failed to comply with EFTA's notice requirements." JA 30.

Charvat's out-of-pocket loss as a result of the unlawful usage fees he was charged is a paradigmatic Article III injury-in-fact. See, e.g., *Belles v. Schweiker*, 720 F.2d 509, 513-14 (8th Cir. 1983) (reduction in Social Security benefits was "an injury sufficient to confer standing"). Moreover, the amount of the economic loss does not matter. The Supreme Court has explained that "important interests [may] be vindicated by plaintiffs with no more at stake in the outcome of an action than * * * a $5 fine and costs." *United States v. SCRAP*, 412 U.S. 669, 689 n.14 (1973). "'[A]n identifiable trifle is enough for standing to fight out a question of principle.'" *Ibid*. (citation omitted). See also *Sierra Club v. U.S. Army Corps of Eng'rs*, 645 F.3d 978, 988 (8th Cir. 2011) (same).

Charvat has also alleged that *he* was charged the prohibited fees, thus satisfying the requirement that his injury is "particularized." *Defenders of Wildlife*, 504 U.S. at 560. See also *id*. at 563 (injury-in-fact test "requires that the party seeking review be himself among the injured"). Thus, by alleging that he was charged ATM usage fees prohibited by EFTA and its implementing regulations, Charvat has alleged sufficient economic injury-in-fact for Article III purposes. This Court should therefore set aside the district court's judgment.

2. Because Charvat alleged that he was charged the prohibited fees, this Court need not and should not address the hypothetical constitutional question whether an individual who suffers a violation of EFTA's notice requirements, but does *not* incur any economic loss, can establish Article III injury-in-fact. It would be particularly inappropriate for the Court to address that question here because it is unclear whether such an individual would *ever* be a proper plaintiff under the terms of EFTA itself. Resolving an Article III question that is not actually presented here and may never arise would be an especially serious departure from the bedrock principle that courts should not decide constitutional issues unnecessarily.

As a matter of statutory construction, it could plausibly be argued that the only consumers who can bring suit for an EFTA notice violation are those (like Charvat) who have suffered economic injury in the form of a prohibited charge. The statute requires that the two notices be given "to the consumer" when an ATM operator "imposes a fee on any consumer for providing host transfer services to such consumer." 15 U.S.C. § 1693b(d)(3)(A). Further, the notices are to be given "at the time the service is provided." *Ibid.* See also *id.* § 1693b(d)(3)(B)(i) (referring to EFT "initiated by the consumer"). Some courts have concluded that EFTA requires notice only if an electronic fund transfer service is "initiated" by, and "provided" to, a consumer, *and* a fee is imposed on that consumer. See, e.g.,

Clemmer v. Key Bank Nat'l Ass'n, 539 F.3d 349, 354 n.1 (6th Cir. 2008) ("The imposition of a fee appears to be a precondition for a violation of § 1693b(d)'s notice requirements.") (*dictum*); *Voeks v. Pilot Travel Ctrs.*, 560 F. Supp. 2d 718, 723 (E.D. Wis. 2008) ("Failure to provide proper notice does not, of itself, give rise to the failure or violation under the statute. Failure to provide proper notice and then assessing a fee for the [EFT] service is the violation contemplated by the statute, which, in turn, gives rise to liability for damages.").

Under that reading of the statute, the only consumers who could pursue a claim for an EFTA notice violation are those who have initiated a transaction and have been charged fees prohibited because of the lack of notice. And, because such consumers would have suffered an economic injury, they would also have Article III standing to bring suit. Because Charvat has alleged that he was charged the prohibited fees, this case provides no occasion for the Court to decide whether that reading of the statute is correct. But the uncertainty on that issue of statutory construction provides an additional reason for the Court to decide this appeal based on Charvat's alleged economic loss.

B. Assuming That The Court Chooses To Reach The Issue, Charvat Also Suffered An Informational Injury – The Invasion Of A Legal Right Created By EFTA

Because Charvat has alleged a traditional economic injury-in-fact and, thus, has Article III standing to pursue his claims, the Court need not address whether

his alleged "informational injury" *alone* would suffice for purposes of Article III standing; the latter issue is not presented on the facts alleged in Charvat's complaint. Nevertheless, the focus of the district court's decision and holding was Charvat's argument that the Bank's failure to provide the "on the machine" notice that he would be charged a fee for using that ATM constitutes a cognizable informational injury. Assuming that this Court chooses to address that issue, the district court erred in its analysis and rejection of Charvat's standing to pursue his informational injury claim.

1. It is well established that the "injury required by Art. III may exist solely by virtue of 'statutes creating legal rights, the invasion of which creates standing.'" *Defenders of Wildlife*, 504 U.S. at 578 (quoting *Warth v. Seldin*, 422 U.S. 490, 500 (1975), which, in turn, quotes *Linda R. S. v. Richard D.*, 410 U.S. 614, 617 n.3 (1973)). Express congressional authorization of a particular category of suits "is of critical importance to the standing inquiry," because "Congress has the power to define injuries and articulate chains of causation that will give rise to a case or controversy where none existed before." *Mass. v. EPA*, 549 U.S. 497, 516-17 (2007) (quoting *Defenders of Wildlife*, 504 U.S. at 580 (Kennedy, J., concurring in part and concurring in the judgment)).

That understanding of Article III is consistent with traditional judicial practice. See *Sprint Commc'ns Co. v. APCC Servs., Inc.*, 554 U.S. 269, 274 (2008)

("[H]istory and tradition offer a meaningful guide to the types of cases that Article III empowers federal courts to consider."). For example, in tort law, an "injury" is understood to mean "an invasion of a legally protected interest." *Restatement (First) of Torts* § 7 cmt. a (1934-1939). Although "[t]he most usual form of injury is tangible harm," a plaintiff can have an "injury" sufficient to "maintain an action" even when "no harm is done." *Ibid*.; see also *id*. § 902 cmt. a.

Common law courts have thus long entertained suits and awarded "nominal" damages against "a wrongdoer who has caused no harm" if he "has invaded an interest of the plaintiff protected against non-harmful conduct." *Id*. § 907 cmts. a, b. Accord *Restatement (Second) of Torts* § 907 cmt. b (1979); Dan B. Dobbs, *Handbook on the Law of Remedies* § 3.8, at 191 (1st ed. 1973) ("Nominal damages are sometimes awarded to vindicate and judicially establish a right * * * even if no harm is done."). "By making the deprivation of such rights actionable for nominal damages without proof of actual injury, the law recognizes the importance to organized society that those rights be scrupulously observed * * *." *Carey v. Piphus*, 435 U.S. 247, 266 (1978). See also *Farrar v. Hobby*, 506 U.S. 103, 112 (1992).

Thus, a property owner can bring a trespass action for nominal damages, even if the trespass caused no actual harm. *Restatement (First) of Torts* §§ 158, 163, 907 cmt. b. As Justice Story explained, "the common law * * * tolerates no

farther inquiry than whether there has been the violation of a right," because "the party injured is entitled to maintain his action for nominal damages, in vindication of his right." *Webb v. Portland Mfg. Co.*, 29 F. Cas. 506, 507-08 (C.C. Me. 1838) (No. 17,322). The same holds true in contract. "A breach of contract always creates a right of action," and when "no harm was caused by the breach * * * judgment will be given for nominal damages." *Restatement (First) of Contracts* § 328 & cmt. a (1932). See, e.g., *Wilcox v. Plummer's Ex'rs*, 29 U.S. (4 Pet.) 172, 181-12 (1830). Thus, early in the Nation's history, Chief Justice Marshall echoed Blackstone's comment that "'it is a general and indisputable rule, that where there is a legal right, there is also a legal remedy by suit or action at law, whenever that right is invaded.'" *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803) (quoting 3 William Blackstone, *Commentaries on the Laws of England* 23 (1768)).[7]

Several more recent Supreme Court decisions illustrate Congress's power to create rights – in particular, rights to certain information – that, if invaded, can confer standing. For example, in *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982), the Court considered whether "testers" – i.e., "individuals who, without an

[7] That "general" rule, however, is subject to exceptions. For instance, a plaintiff who has Article III standing nevertheless will lack a judicial remedy against the United States unless Congress has enacted a statutory waiver of sovereign immunity. See, e.g., *Dep't of the Army v. Blue Fox, Inc.*, 525 U.S. 255, 260-61 (1999).

intent to rent or purchase a home or apartment, pose as renters or purchasers for the purpose of collecting evidence of unlawful steering practices" – had Article III standing to sue when they were falsely told that particular housing was unavailable. *Id*. at 373. The Court explained that Section 804(d) of the Fair Housing Act, 42 U.S.C. § 3604(d), "conferred on all 'persons' a legal right to truthful information about available housing." *Havens*, 455 U.S. at 373. Because an Article III injury can exist "solely" by virtue of "'statutes creating legal rights, the invasion of which creates standing,'" "[a] tester who has been the object of a misrepresentation made unlawful under § 804(d) has suffered injury in precisely the form the statute was intended to guard against." *Ibid*. Thus, a tester who alleged injury to her "statutorily created right to truthful housing information" satisfied the Article III injury-in-fact requirement. *Id*. at 374.

In concluding that "[a] tester who has been the object of a misrepresentation made unlawful under § 804(d)" had Article III standing, *id*. at 373, the Court in *Havens* did not suggest that Congress could authorize one plaintiff to sue regarding the provision of false information to another. To the contrary, the Court held that a plaintiff, who had received *truthful* information concerning the availability of apartments, did *not* have "standing to sue in his capacity as a tester." *Id*. at 375. The Court thus limited "tester" standing to specific victims of the deceptive practices that Section 804(d) forbade – i.e., persons who alleged that their *own*

rights to truthful information had been violated. The Court's analysis made clear, however, that, so long as the plaintiff adequately alleged a deprivation of *his* Section 804(d) right to truthful information, Article III did not require him to allege any further consequential harm resulting from that deprivation.

Similarly, in *FEC v. Akins*, 524 U.S. 11, 24-25 (1998), the Court confirmed that "informational injury" alone can be "sufficiently concrete and specific" so as to constitute injury-in-fact for purposes of Article III standing. In that case, the Federal Election Commission ("FEC") refused to require the American Israel Public Affairs Committee ("AIPAC") "to make disclosures regarding its membership, contributions, and expenditures that the [Federal Election Campaign Act] would otherwise require." *Id*. at 13. The Supreme Court held that a group of voters had standing to challenge that FEC determination, concluding that the voters suffered injury-in-fact as a consequence of "their inability to obtain information – lists of AIPAC donors * * * and campaign-related contributions and expenditures," to which the voters asserted they were entitled under federal law. *Id*. at 13-14, 21.

The Court in *Akins* explained that there was "no reason to doubt [the voters'] claim that the information would help them * * * to evaluate candidates for public office, especially candidates who received assistance from AIPAC, and to evaluate the role that AIPAC's financial assistance might play in a specific election." *Id*. at 21. Citing, *inter alia*, *Havens*, 455 U.S. at 373-74, the Court found that the voters'

injury was "consequently * * * concrete and particular." *Akins*, 524 U.S. at 21. See also *Public Citizen v. Dep't of Justice*, 491 U.S. 440, 449 (1989) (failure to obtain information subject to disclosure under federal law was a distinct injury that provided standing); *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 756-57 (1976) (consumers who sought information about prescription drug prices had standing to challenge constitutionality of state statute that prohibited pharmacists from advertising drug prices).

Article III, of course, places meaningful limits on the types of interests Congress may define as judicially enforceable rights. In particular, the general public interest in compliance with (and proper enforcement of) federal law cannot "be converted into an individual right by a statute that denominates it as such." *Defenders of Wildlife*, 504 U.S. at 576. That principle is one aspect of the requirement that a plaintiff must allege and prove a "concrete and particularized" injury. *Id*. at 560 n.1 ("particularized" means that "the injury must affect plaintiff in a personal and individualized way"). See also *Warth*, 422 U.S. at 499 (a particularized injury is not "a 'generalized grievance' shared in substantially equal measure by all or a large class of citizens").

2. Like the statutes at issue in *Havens* and *Akins*, EFTA has created a legal right to certain information – one notice on the ATM itself, informing the consumer that a usage fee will be charged; and a second notice on the ATM screen,

provided after the transaction is initiated but before it is irrevocably completed, informing the consumer again that a fee will be charged and that the fee is a specified amount. 15 U.S.C. § 1693b(d)(3)(B). The plain terms of the statute and the implementing regulation "require[]" *both* notices when an ATM operator imposes a usage fee on a consumer. *Ibid*.; see 12 C.F.R. § 1005.16. Thus, the failure to provide either notice deprives a consumer of the information required by EFTA, and, unless both notices required by the statute are provided, "[n]o fee may be imposed" on the consumer. 15 U.S.C. § 1693b(d)(3)(C).

Moreover, EFTA makes the right to the information provided in the notices enforceable by the consumer who uses that ATM and who therefore suffers the informational injury. An ATM operator "who fails to comply with any provision of [EFTA] with respect to any consumer * * * is liable to such consumer" for actual and statutory damages. *Id*. § 1693m(a).

3. In his complaint, Charvat alleges two instances, approximately six weeks apart, in which he made cash withdrawals from one of the Bank's ATMs. According to the complaint, in each instance, Charvat observed that there was no "on the machine" notice posted on the ATM, advising consumers that a fee would be charged for using that ATM. Yet in each instance, Charvat was charged a $2.00 fee for the transaction. JA 25. He alleges that (i) "the notice required by 15 U.S.C. § 1693(d)(3) [*sic*: § 1693b(d)(3)] and 12 C.F.R. § [1005.16] was not posted at [the

Bank's] ATM" that Charvat used; (ii) the Bank "violated the notice requirements of EFTA in connection with providing host transfer services to [Charvat] and the Class"; and (iii) the Bank "was prohibited from imposing any usage fee or similar fee for providing host transfer services because it failed to comply with EFTA's notice requirements." JA 30.

Charvat has therefore alleged violations of his statutory right under EFTA to notice that a fee would be charged for using that ATM. Moreover, he has alleged not only that the Bank violated EFTA's notice requirements, he has also alleged that *he* was the victim of the violation. See *Defenders of Wildlife*, 504 U.S. at 563 (injury-in-fact test "requires that the party seeking review be himself among the injured"). In claiming that the Bank violated his right under EFTA to "on the machine" notice that he would be charged a fee for using that ATM, Charvat has alleged a privately enforceable informational injury like that in *Havens* and *Akins*. See 15 U.S.C. § 1693m(a). Article III's injury-in-fact requirement is therefore satisfied.

4. The district court's attempt to distinguish *Havens* and other "tester" cases, see A 12-13, fails. The court reasoned that "[t]he information presented to the 'testers' * * * was deficient in that it was false, misleading or delayed," whereas "Charvat does not allege that [the Bank's] failure to provide a fee notice 'on or at' the ATM was in any way false or misleading." A 13. However, the district court

overlooked the fact that the statute at issue in *Havens*, Section 804(d) of the Fair Housing Act, 42 U.S.C. § 3604, conferred "a legal right" on all persons "to truthful information about available housing." *Havens*, 455 U.S. at 373. Thus, whether the information was false or misleading was directly relevant to the particular statutory right at issue. Nothing in *Havens* suggests that the Supreme Court's informational standing holding is limited to cases in which the plaintiff alleges that she has received false or misleading information.

Indeed, in *Akins* – as here – the issue was not whether information was truthful, but rather whether it was provided at all. "The 'injury in fact' that respondents have suffered consists of their inability to obtain [certain] information * * * that, on respondents' view of the law, the statute requires [to be made] public." 524 U.S. at 21. Similarly, the injury-in-fact that Charvat has allegedly suffered is the deprivation of certain information – i.e., a notice on the ATM that he would be charged a usage fee, which EFTA and the Bureau's regulations require the Bank to provide to Charvat and other consumers.[8]

[8] The fact that Charvat received notice that a fee would be charged for his ATM transactions in the "on the screen" notice he received after he initiated the transaction is irrelevant to the standing inquiry. The Supreme Court has ruled that persons seeking to vindicate a legal right to information have standing even if they could obtain the information "by some other means." *Va. State Bd. of Pharmacy*, 425 U.S. at 757 n.15. Moreover, the "on the machine" notice serves the distinct purposes of alerting consumers to the ATM fee before they invest time in initiating a transaction, entering their PIN numbers, etc. See *supra* pp. 5-6.

The district court's effort to distinguish *White v. Arlen Realty & Dev. Corp.*, 540 F.2d 645 (4th Cir. 1976), is also unpersuasive. See A 11-12. Plaintiff in that case alleged that a department store violated the Truth in Lending Act ("TILA"), 15 U.S.C. § 1637, by failing to identify the goods or services listed on his monthly billing statement, and he sought statutory damages. *White*, 540 F.2d at 646-48. The district court dismissed the action on the ground that plaintiff lacked standing because he "'faced no actual or threatened injury as a result of defendant's billing practices.'" *Id*. at 648. However, the Fourth Circuit reversed, holding that,

> in the disclosure requirements of the [TILA,] Congress created precisely the type of statutory right discussed in *Linda R. S.*, [410 U.S. at 617 n.3]. * * * Congress gave the debtor a right to specific information and therefore defined "injury in fact" as the failure to disclose such information. * * * [N]either the absence of any service charges nor the failure of [defendant's] practices to deceive [plaintiff] * * * deny [him] standing to sue under the Act.

540 F.2d at 649-50.

The district court here distinguished *White* on the ground that plaintiff in that case "suffered injury in fact * * * because he did not know what the creditor *claimed* to be his purchases." A 12. The court also found that *White* "demonstrates the constitutional requirement that an injury in fact, which may be caused by a statutory violation, must be *alleged*," which, in the court's view, Charvat did not do. A 12. The district court is mistaken. The plaintiff in *White*

"neither alleged nor proved that he ever failed to identify the goods for which he was billed," nor did he allege or prove "his need for pertinent information from defendant to permit him to compare the cost of credit terms offered by defendant with those offered by other discount stores." 540 F.2d at 648. Moreover, "[t]he fact that there was no finance charge at the time of the omission is of no consequence." *Id*. at 649. Instead, the Fourth Circuit held that plaintiff's injury-in-fact was simply the store's failure to disclose the information to which plaintiff had a right under TILA. *Ibid*. As the court pointed out, TILA is "a 'disclosure law' intended to protect the public from false and fictitious charges and to thus avoid 'the uninformed use of credit.'" *Id*. at 650. *White* is therefore on all fours with this case.

5. Other circuits, as well, have held that plaintiffs who alleged only statutory violations have suffered injury-in-fact so as to confer standing to bring suit for statutory damages under similar consumer protection statutes. For example, in *Beaudry v. Telecheck Servs., Inc.*, 579 F.3d 702, 703-04 (6th Cir. 2009), *cert. denied*, 130 S. Ct. 2379 (2010), plaintiff brought suit against a check-verification services company, alleging that it violated the Fair Credit Reporting Act, 15 U.S.C. § 1681e(b), when it failed to take reasonable measures to assure that the credit information it provided about plaintiff and other consumers was accurate. Plaintiff alleged only the statutory violation as her injury and did not

allege any consequential harm. *Beaudry*, 579 F.3d at 705. The Sixth Circuit held that neither the statute nor Article III requires more. *Id*. at 705, 707.

In *Public Citizen v. FTC*, 869 F.2d 1541, 1545-53 (D.C. Cir. 1989), the District of Columbia Circuit held that an organization had standing, on behalf of its members, to challenge Federal Trade Commission regulations that exempted certain items from the health warning label requirements imposed by the Comprehensive Smokeless Tobacco Health Education Act, 15 U.S.C. § 4402(a)(1), (2). The court concluded that the alleged violation of the parties' statutory right to receive information – labels warning about the dangers of smokeless tobacco – constituted injury-in-fact to establish standing. 869 F.2d at 1548-53.

Finally, several cases involving another consumer protection statute, the Real Estate Settlement Procedures Act ("RESPA"), have likewise concluded that consumers who allege only a statutory injury have Article III standing to bring suit under RESPA's private right of action, 12 U.S.C. § 2607(d). In fact, every circuit that has addressed that issue has held that a consumer, who claims that a settlement service provider has violated RESPA's anti-kickback provision in connection with her settlement, has alleged an injury-in-fact for purposes of Article III, even in the absence of any allegation that the RESPA violation affected the price or quality of the service for which she was charged. See *Edwards v. First Am. Fin. Corp.*, 610 F.3d 514, 516-18 (9th Cir. 2010), *pet. for cert. dismissed*, 132 S. Ct. 2536 (2012);

Alston v. Countrywide Fin. Corp., 585 F.3d 753, 762-63 (3d Cir. 2009); *Carter v. Welles-Bowen Realty, Inc.*, 553 F.3d 979, 988-89 (6th Cir. 2009).

CONCLUSION

For the foregoing reasons, the judgment of the district court should be reversed.

Respectfully submitted,

STUART F. DELERY
Principal Dep. Assistant Attorney General

DEBORAH K. R. GILG
United States Attorney

MICHAEL JAY SINGER
(202) 514-5432
CHRISTINE N. KOHL
(202) 514-4027
Attorneys
U.S. Department of Justice
Civil Division, Appellate Staff
950 Pennsylvania Avenue NW
Washington, DC 20530

NOVEMBER 2012

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitations of Fed. R. App. P. 29(d), 32(a)(5)(A), (6), and (7)(B) because it was prepared using Microsoft Word 2010, Times New Roman proportional font, 14-point, and it contains 6,877 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

s/ *Christine N. Kohl*
CHRISTINE N. KOHL
Counsel for *Amicus* United States

VIRUS-SCAN CERTIFICATE

Pursuant to Cir. R. 28A(h)(2), I certify that this brief has been scanned by the Microsoft Forefront Endpoint Protection 2010 program, version 1.141.523.0 (updated on November 27, 2012), which has indicated that the brief is virus-free.

s/ *Christine N. Kohl*
CHRISTINE N. KOHL
Counsel for *Amicus* United States

CERTIFICATE OF SERVICE

I certify that on November 27, 2012, I electronically filed the foregoing "Brief for *Amicus* United States in Support of Appellants" with the Clerk of the U.S. Court of Appeals for the Eighth Circuit by using the CM/ECF system. I also certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

s/ *Christine N. Kohl*
CHRISTINE N. KOHL
Counsel for *Amicus* United States

STATUTES and REGULATIONS ADDENDUM

TABLE OF CONTENTS

Page

Electronic Fund Transfer Act:

15 U.S.C. § 1693 ..... A-1

15 U.S.C. § 1693b(d)(3) A-2

15 U.S.C. § 1693m(a) A-4

Consumer Financial Protection Bureau Regulation:

12 C.F.R. § 1005.16 ..... A-5

15 U.S.C. § 1693

§ 1693. Congressional findings and declaration of purpose

(a) Rights and liabilities undefined

The Congress finds that the use of electronic systems to transfer funds provides the potential for substantial benefits to consumers. However, due to the unique characteristics of such systems, the application of existing consumer protection legislation is unclear, leaving the rights and liabilities of consumers, financial institutions, and intermediaries in electronic fund transfers undefined.

(b) Purposes

It is the purpose of this subchapter to provide a basic framework establishing the rights, liabilities, and responsibilities of participants in electronic fund and remittance transfer systems. The primary objective of this subchapter, however, is the provision of individual consumer rights.

15 U.S.C. § 1693b(d)(3)

§ 1693b. Regulations

* * *

(3) Fee disclosures at automated teller machines

(A) In general

The regulations prescribed under paragraph (1) shall require any automated teller machine operator who imposes a fee on any consumer for providing host transfer services to such consumer to provide notice in accordance with subparagraph (B) to the consumer (at the time the service is provided) of –

(i) the fact that a fee is imposed by such operator for providing the service; and

(ii) the amount of any such fee.

(B) Notice requirements

(i) On the machine

The notice required under clause (i) of subparagraph (A) with respect to any fee described in such subparagraph shall be posted in a prominent and conspicuous location on or at the automated teller machine at which the electronic fund transfer is initiated by the consumer.

(ii) On the screen

The notice required under clauses (i) and (ii) of subparagraph (A) with respect to any fee described in such subparagraph shall appear on the screen of the automated teller machine, or on a paper notice issued from such machine, after the transaction is initiated and before the consumer is irrevocably committed to completing the transaction, except that during the period beginning on November 12, 1999, and ending on December 31, 2004, this clause shall not apply to any automated teller machine that lacks the technical capability to disclose the notice on the screen or to issue a paper notice after the transaction is initiated and before the consumer is irrevocably committed to completing the transaction.

(C) Prohibition on fees not properly disclosed and explicitly assumed by consumer

No fee may be imposed by any automated teller machine operator in connection with any electronic fund transfer initiated by a consumer for which a notice is required under subparagraph (A), unless –

(i) the consumer receives such notice in accordance with subparagraph (B); and

(ii) the consumer elects to continue in the manner necessary to effect the transaction after receiving such notice.

* * *

15 U.S.C. § 1693m(a)

§ 1693m. Civil liability

(a) Individual or class action for damages; amount of award

Except as otherwise provided by this section and section 1693h of this title, any person who fails to comply with any provision of this subchapter with respect to any consumer, except for an error resolved in accordance with section 1693f of this title, is liable to such consumer in an amount equal to the sum of –

(1) any actual damage sustained by such consumer as a result of such failure;

(2)(A) in the case of an individual action, an amount not less than $100 nor greater than $1,000; or

(B) in the case of a class action, such amount as the court may allow, except that (i) as to each member of the class no minimum recovery shall be applicable, and (ii) the total recovery under this subparagraph in any class action or series of class actions arising out of the same failure to comply by the same person shall not be more than the lesser of $500,000 or 1 per centum of the net worth of the defendant; and

(3) in the case of any successful action to enforce the foregoing liability, the costs of the action, together with a reasonable attorney's fee as determined by the court.

§ 1005.16 Disclosures at automated teller machines.

(a) *Definition*. "Automated teller machine operator" means any person that operates an automated teller machine at which a consumer initiates an electronic fund transfer or a balance inquiry and that does not hold the account to or from which the transfer is made, or about which an inquiry is made.

(b) *General*. An automated teller machine operator that imposes a fee on a consumer for initiating an electronic fund transfer or a balance inquiry shall:

(1) Provide notice that a fee will be imposed for providing electronic fund transfer services or a balance inquiry; and

(2) Disclose the amount of the fee.

(c) *Notice requirement*. To meet the requirements of paragraph (b) of this section, an automated teller machine operator must comply with the following:

(1) *On the machine*. Post in a prominent and conspicuous location on or at the automated teller machine a notice that:

(i) A fee will be imposed for providing electronic fund transfer services or for a balance inquiry; or

(ii) A fee may be imposed for providing electronic fund transfer services or for a balance inquiry, but the notice in this paragraph (c)(1)(ii) may be substituted for the notice in paragraph (c)(1)(i) of this section only if there are circumstances under which a fee will not be imposed for such services; and

(2) *Screen or paper notice*. Provide the notice required by paragraphs (b)(1) and (2) of this section either by showing it on the screen of the automated teller machine or by providing it on paper, before the consumer is committed to paying a fee.

(d) *Imposition of fee*. An automated teller machine operator may impose a fee on a consumer for initiating an electronic fund transfer or a balance inquiry only if

(1) The consumer is provided the notices required under paragraph (c) of this section, and

(2) The consumer elects to continue the transaction or inquiry after receiving such notices.