

## Exploitative Contracts and Incarcerated Persons

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### Consumer Law Section Publication Award

The Consumer Law Section is pleased to announce a new annual publication award for the best articles submitted to, and published by, the Consumer Law Section. The Section Council will vote on the three best publications and the awards will be presented at the annual meeting. This award is open to any person with an interest in consumer law, excluding members of the Section Council. The awards for the articles shall be: \$300 for best article; \$200 for second best article; and \$100 for third best article. For questions or submissions, please contact Paul Matouka at [pmatouka@oliverlawgroup.com](mailto:pmatouka@oliverlawgroup.com).

The average consumer has a dizzying array of products from which to choose. In just about any category of product, from cars to snow shovels to groceries, there are numerous companies ready to satisfy consumers wants and needs. In the realm internet communications, for example, there is a wide variety of cell phones, computers and tablets that consumers can buy to access the internet so they can communicate with other people whether they are at the other side of the house, the other side of the state or the other side of the world. This is not the case with incarcerated individuals. They not only lose their personal freedom they also lose their freedom of choice as consumers regarding the way they will access the internet. This article will examine how a single company, JPay, as the sole provider, has exploited incarcerated peoples' by limiting their access to the internet while charging exorbitant prices.

There is no question that incarcerated persons are among some of the most exploited and exploitable people in the United States. The Constitution explicitly permits utilizing incarcerated persons as slaves<sup>1</sup> and both private and public institutions take full advantage of this.<sup>2</sup> This article addresses the exploitation of prisoners by only a single private company, JPay, through a combination of a state sanctioned monopoly, exorbitant fees, and abusive contracts. This is not the first article to address these issues,<sup>3</sup> and it is unlikely to be the last.<sup>4</sup> The issue of prisoner exploitation stands at the crossroads of civil rights and consumer protection and this article solely focuses on the consumer protection aspect. However, as most readers will understand, no area of law operates in a vacuum, many legal principles operate equally on all areas of law. Furthermore, a rising tide lifts all boats – thus, ensuring that incarcerated persons are protected from abusive commercial practices fosters an environment intolerant to abusive practices against any person in our country.

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Just over three decades ago, we entered the information age. The advent of the internet caused a sea change in every aspect of American life. Companies such as Amazon, Apple, Microsoft, Google (or Alphabet), Facebook (or Meta), and many more created vast fortunes providing goods and services to consumers. This new information age has affected us all in a myriad of ways.

Today, it is difficult for many of us to imagine a life without the internet or our electronic devices. Having a computer and internet is an absolute necessity for students in both primary and secondary schools. Elections can be won, or lost, through social media. For newer attorneys – including the author of this article – it is difficult to imagine practicing law without access to Westlaw, Lexis, or one of the other online research services. Many courts have adopted electronic filing systems that permit instantaneous filing and service of pleadings. Powerful data services assist in discovery by Communicating with other counsel and clients has never been easier and less burdensome with the ubiquity of electronic mail. Considering the historically conservative approach of the legal field to changes in process or procedure, the changes in the legal field alone serve to underscore the dramatic shift in American culture caused by the widespread availability of access to the internet.

### JPAY and Incarcerated Persons in Michigan

The information age is also seen in prisons across the country. Prisoners in most states can send messages electronically to their loved ones and attorneys. In Michigan, a single company, JPay, manages most prisoners electronic messaging. JPay provides goods and services to correctional facilities and the prisoners who live there. Prisoners where JPay operates can send unsecured messages at kiosks located in their housing units or through tablets purchased directly from JPay for an undisclosed sum. These tablets permit prisoners to send messages, purchase and read e-books, purchase and listen to music, and purchase and play games. Clearly, this represents an improvement in the resources available to incarcerated prisoners who have the money to access them. For people who spend every moment of every day in a cage – be that a cell or the prison compound generally – the mental health benefits must be immeasurable. The carceral system likely benefits from a reduction in violent incidents. My father used to say: “Idle hands are the Devil’s workshop” and empirical research bears this out. Studies have found that prisoners who had increased communication with family had reduced recidivism rates and were less likely to receive misconducts while incarcerated.<sup>5</sup>

Unfortunately, the fact that prisoners are comprise “captive” market creates the opportunity for predatory business practices. In Michigan, JPay has an exclusive contract with the Michigan Department of Corrections to provide electronic communication to prisoners and to sell prisoners tablets with an estimated aggregate contract value of nearly \$40 million over the course of a five-year contract.<sup>6</sup>JPay presents prisoners with a take it or leave it choice. Either

they can send electronic messages through JPay, or they cannot send electronic messages at all. And in Michigan, each “stamp” what us a stamp? necessary to send a message – which is effectively a text message – costs \$.25.<sup>7</sup> Either prisoners can purchase the JPay tablet for access to downloadable music or they can go without. Individual songs purchased through JPay cost between \$1.06 and \$1.99, “mini albums” cost between \$1.99 and \$9.99, and albums cost between \$9.99 and Either prisoners play games on the JPay tablets, or they do not play those games at all. Games for the JPay Players cost between \$1.99 and \$19.99.<sup>8</sup> Considering the role that electronic communications, games, and music play in American society today it is understandable that most prisoners want the goods and services provided by JPay.

A quick check of the Better Business Bureau reveals a 1.1-star rating (out of five) for JPay from 121 reviews.<sup>9</sup> Excerpts from complaints about JPay on the Better Business Bureau include:

Jpay has no competition, and they know it. That is why they, and their customer service, act the way they do. You can't possibly take your business elsewhere.

\*\*\*\*\*

Took mo[n]ey out of my bank account and my brother never got it, called and they said nothing they can do about on their end.

\*\*\*\*\*

Same review as everybody else! Really awful. They have a monopoly in the prison system if you order something that you can only order through them, you never get it, and the keep your money.

\*\*\*\*\*

This company never answers their calls or emails. And refuses to refund inmates money to inmates on their inmate account. No, they keep it on their account but inmates shave broken tablets that they cannot use. So Jpay keeps the money which is a rip off for inmates. One inmate sent money in July for a refurbished tablet but was

just notified that there are not more used tablets, [s]o they kept his money. If he wants a new one it will cost a lot more money he does not have. Where is the justice for inmates who tablets they constantly have problems with but Jpay will not do anything for them.

The Better Business Bureau gives JPay a rating of “F” for JPay’s failure to respond to 722 complaints, failed to resolve 128 complaints, has a total of 3244 complaints filed against them, and “Government action(s) against the business”.<sup>10</sup> In October of 2021, the Consumer Financial Protection Bureau (“CFPB”) obtained a consent order which required JPay to change how and when it charged inmates “fees to access their own money on prepaid debit cards that consumers were forced to use.”<sup>11</sup> In a statement about the enforcement action CFPB Director Rohit Chopra said, “JPay exploited its captive customer base to charge unfair fees that harmed the newly released and their families.”<sup>12</sup>

A recent JPay “Player Purchase Terms and Conditions and Warranty Policy” obtained by the author demonstrates how JPay can avoid liability for its abusive practices. First, the contract provides that “All Player sales are nonrefundable.” The contract then provides that “A Player’s functionality and performance may be different from what is described in a specification sheet or catalog accompanying such Player.” The contract provides a virtually useless 90 day limited warranty<sup>13</sup> and then proceeds to disclaim all other warranties unless the relevant state law provides otherwise.<sup>14</sup> Finally, JPay includes catch 22 binding arbitration clause for all disputes related to the contract which provides that “Any Dispute must be filed in arbitration or small claims court (as appropriate) within (12) months of your constructive knowledge that the issue underlying the Dispute first occurred.” This is a catch 22 because the agreement makes access to small claims court contingent on the “small claims court permit[ting] representation by counsel which is not the case in Michigan.”<sup>15</sup>

The arbitration provision also requires prisoners for participate in a pre-arbitration informal dispute process,<sup>16</sup> and should a prisoner elect to proceed with arbitration, the prisoner must pay the initial arbitration filing fee which JPay may reimburse later.<sup>17</sup> It is not entirely clear if the

filing fee is determined by the AAA fee schedule or by Resolute, the arbitration company designated for claims less than \$50,000. However, for example, the AAA filing fee for an is \$925.<sup>18</sup> Thus, to even participate in arbitration, a prisoner must obtain several hundred dollars to even begin the arbitration process and prisoners may be liable for additional costs as arbitration proceeds. This may result in fees grossly in excess of the value of the Player itself, rendering it more economically feasible for a prisoner to simply purchase another Player rather than pursue arbitration. Of course, the agreement also prohibits class action lawsuits or arbitration, preventing prisoners from achieving an economy of scale.

### Challenging the Enforceability of JPay's Contracts

There are two ways to attack a JPay's adhesion contracts--, challenging the formation of the contract or enforceability of the contract as unconscionable. Prisoners may have colorable theories under both approaches. However, even when a prisoner has a valid challenge to the formation or enforceability of their contract with JPay, as will be discussed later, it likely does not matter.

#### 1. Challenging The Formation Of Contracts With JPay

Michigan law requires five elements to be present to create a valid contract – “(1) parties competent to contract, (2) a proper subject matter, (3) legal consideration, (4) mutuality of agreement, and (5) mutuality of obligation.”<sup>19</sup>

As an initial matter, it seems unlikely that JPay ensures that all prisoners who enter the contract have the capacity to contract. Under Michigan law, a person has the capacity to enter a contract when “the person in question possesses sufficient mind to understand in a reasonable manner the nature and effect of the act in which the person is engaged.” A person is mentally unsound to contract if ‘the person had no reasonable perception of the nature or terms of the contract.’”<sup>20</sup> It is highly likely that at least some incarcerated persons have a viable claim of incapacity to enter into a contract.

Beyond challenging their capacity to form a contract, incarcerated persons are unlikely to have other viable theories for challenging the formation of a contract with JPay. Providing tablets, entertainment, and communication

services is certainly a proper subject matter and there is *technically* a mutuality of agreement and obligation under Michigan law. Finally, while JPay's obligations are limited and an incarcerated person's ability to enforce JPay's compliance are largely unavailable, JPay's contracts likely meet the legal requirements for valid consideration.<sup>21</sup>

#### 2. Challenging The Jpay Contract As Unconscionable

In Michigan, the Court of Appeals has explained the requirements for demonstrating unconscionability sufficient to warrant rendering a contract unenforceable as:

In order for a contract or contract provision to be considered unconscionable, both procedural and substantive unconscionability must be present. Procedural unconscionability exists where the weaker party had no realistic alternative to acceptance of the term. If, under a fair appraisal of the circumstances, the weaker party was free to accept or reject the term, there was no procedural unconscionability. Substantive unconscionability exists where the challenged term is not substantively reasonable. However, a contract or contract provision is not invariably unconscionable simply because it is foolish for one party and very advantageous to the other. Instead, a term is substantively unreasonable where the inequity of the term is so extreme as to shock the conscience.<sup>22</sup>

An exhaustive analysis of the application of this standard is beyond the scope of this article. However, facially, it appears as though there are colorable arguments for prisoners to claim that the agreements are unconscionable because: (1) Prisoners do not have any alternative choice to JPay's products and services; (2) the warranty is effectively non-existent; and (3) the binding arbitration agreement essentially denies prisoners access to any remedy in the event that JPay fails to uphold its end of the agreements.<sup>23</sup>

### Potential Consumer Protection Remedies

If an incarcerated person has the ability to pursue a claim against JPay, there are several options under Michigan's laws available to consumers.. A primary option is the Michigan Consumer Protection Act (MCPA)<sup>24</sup>– which provides for

attorney fees.<sup>25</sup> An incarcerated person could claim that JPay violated several sections of violation of MCPA:

1. Represented to them “that the subject of a consumer transaction will be provided promptly, or at a specified time, or within a reasonable time, if the merchant knows or has reason to know it will not be so provided.”<sup>26</sup>
2. Took “advantage of the consumer’s inability reasonably to protect his or her interests by reason of disability, illiteracy, or inability to understand the language of an agreement presented by the other party to the transaction who knows or reasonably should know of the consumer’s inability.”<sup>27</sup>
3. Charged them a price “grossly in excess of the price at which similar property or services are sold.”<sup>28</sup>

Incarcerated persons may also be entitled to pursue common law claims of breach of warranty, fraud or misrepresentation, or other torts depending on the facts of each case.

### Conclusion

In our modern world access to the internet and the use of communication devices has become a part of everyday life. Freedom of choice of products in that area abound. That is not the case with incarcerated individuals. If prisoners want to participate in this communication arena, they are at the mercy on one company--JPay. In sum, the terms of JPay’s “take it or leave it” contracts contain an arbitration provision which creates a highly effective mechanism allowing JPay to avoid all accountability for their products. Given it lack of accountability, JPay is able to provide poor service and products that leave prisoners without any real remedies.

There may be causes of action available to prisoners against Jpay. To date, Prisoners, as consumers, have been unable to obtain representation given the costs involved, the generally low amount in controversy, the procedural complexity of the litigation, and the uncertainty of awards of attorney fees and expenses. With monetary reward so uncertain, hopefully, attorneys will step up to develop and litigate cases against JPay, if not from anticipation of a potential windfall, but from sense of duty and fairness.

### Endnotes

- 1 U.S. CONST. amend XIII.
- 2 See ACLU, *Captive Labor Exploitation of Incarcerated Workers*, pp. 37–46 (June 2022) (describing precisely how federal, state, and private actors benefit from the labor of incarcerated persons) available at [https://www.aclu.org/sites/default/files/field\\_document/2022-06-15-captivelaborresearchreport.pdf](https://www.aclu.org/sites/default/files/field_document/2022-06-15-captivelaborresearchreport.pdf).
- 3 See, e.g., Tommaso Bardelli, *et al.*, *How Corporations Turned Prison Tablets Into a Predatory Scheme*, DISSENT (Mar. 7, 2022), [https://www.dissentmagazine.org/online\\_articles/corporations-prison-tablets-predatory-scheme#:~:text=By%20squeezing%20more%20money%20out,lawmakers%20are%20finally%20catching%20on](https://www.dissentmagazine.org/online_articles/corporations-prison-tablets-predatory-scheme#:~:text=By%20squeezing%20more%20money%20out,lawmakers%20are%20finally%20catching%20on).
- 4 See, e.g., ACLU & GHRC, *Captive Labor Exploitation of Incarcerated Workers* (2022), [https://www.aclu.org/sites/default/files/field\\_document/2022-06-15-captivelaborresearchreport.pdf](https://www.aclu.org/sites/default/files/field_document/2022-06-15-captivelaborresearchreport.pdf); Prison Policy Initiative, *Exploitation* (collecting studies about exploitative practices in prisons including phone calls, video calls, and commissary), <https://www.prisonpolicy.org/exploitation.html>; Dani Anguiano, *US Prison Workers Produce \$11bn Worth of Goods and Services a Year for Pittance*, THE GUARDIAN (Jun. 15, 2022) (reporting on the ACLU study previously cited), <https://www.theguardian.com/us-news/2022/jun/15/us-prison-workers-low-wages-exploited>.
- 5 See Leah Wang, *Research Roundup: The Positive Impacts of Family Contact for Incarcerated People and Their Families*, PRISON POLICY INITIATIVE (Dec. 21, 2021) [https://www.prisonpolicy.org/blog/2021/12/21/family\\_contact/](https://www.prisonpolicy.org/blog/2021/12/21/family_contact/) (collecting studies).
- 6 MDOC JPay Contract, p. 1, <https://www.michigan.gov/-/media/Project/Websites/dtmb/Procurement/Contracts/MiDEAL-Media/holding/Folder2/7700058.pdf?rev=f3fde3735d4941349d1f42bf19d13292> (last accessed Aug. 23, 2022).
- 7 MDOC JPay Contract, p. 66, <https://www.michigan.gov/-/media/Project/Websites/dtmb/Procurement/Contracts/MiDEAL-Media/holding/Folder2/7700058.pdf?rev=f3fde3735d4941349d1f42bf19d13292> (last accessed Aug. 23, 2022).
- 8 MDOC JPay Contract, p. 67, <https://www.michigan.gov/-/media/Project/Websites/dtmb/Procurement/Contracts/MiDEAL-Media/holding/Folder2/7700058.pdf?rev=f3fde3735d4941349d1f42bf19d13292> (last accessed Aug. 23, 2022).
- 9 <https://www.bbb.org/us/fl/north-miami/profile/financial-services/jpay-llc-0633-92006200/customer-reviews>.
- 10 <https://www.bbb.org/us/fl/north-miami/profile/financial-services/jpay-llc-0633-92006200/overview-of-bbb-ratings>.
- 11 <https://www.consumerfinance.gov/about-us/newsroom/cfpb-penalizes-jpay-for-siphoning-taxpayer-funded-benefits-intended-to-help-people-re-enter-society-after-incarceration/#:~:text=WASHINGTON%2C%20D.C.%20%E2%80%93%20The%20Consumer%20Financial,consumers%20were%20forced%20to%20use>.
- 12 <https://www.consumerfinance.gov/about-us/newsroom/cfpb-penalizes-jpay-for-siphoning-taxpayer-funded>

benefits-intended-to-help-people-re-enter-society-after-incarceration/#:~:text=WASHINGTON%2C%20-D.C.%20%E2%80%93%20The%20Consumer%20Financial,consumers%20were%20forced%20to%20use.

13 The warranty provides:

**5. PLAYER LIMITED WARRANTY.** JPay warrants that the Player will be free from material defects in design and manufacture and will substantially conform to the published specifications under normal use for a period of ninety (90) days following the date on which the Recipient first connects the Player to the kiosk.

\*\*\*

JPay does not warrant, and shall not be responsible for, any lost content or data contained in the Player regardless of the cause of that loss. JPay's products are not warranted to operate without failure. This warranty gives you specific legal rights, and you may also have other rights which vary by jurisdiction.

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14 In full, the disclaimer provides:

**6. DISCLAIMER OF WARRANTIES.** Except as set forth in the Agreement, JPay disclaims all other warranties, express or implied, including, without limitation, warranties of quiet enjoyment and non-infringement, merchantability for computer programs, and implied warranties of merchantability, fitness for a particular purpose and informational content. Some states limit or disallow certain disclaimers of warranties, so certain portions or all of the above disclaimers may not apply to you.

15 MCL 600.8408(1).

16 To avail themselves arbitration, a prisoner must first send a letter or email to JPay that begins with "Notice of Informal Dispute Resolution Attempt" JPay then has thirty days to respond. The arbitration clause continues with:

Both you and JPay agree that this dispute resolution procedure is a condition precedent which must be satisfied before either party initiates any arbitration or small claims court action against the other party. For purposes of clarification, your submission of a complaint to JPay, or any other notice that doesn't strictly comply with the notice requirements above, is not considered a good faith effort to resolve the dispute in accordance with this paragraph.

17 The contract provision provides:

JPay will reimburse you for the arbitration filing fees that exceed the cost of filing a claim in court if, after the informal dispute resolution process laid out above fails, you file an arbitration that JPay or the Arbitrator determine is not frivolous. All other costs of arbitration are to be assessed as required by the AAA Commercial Rules and applicable fee schedule.

18 [https://www.adr.org/sites/default/files/Commercial\\_Arbitration\\_Fee\\_Schedule\\_1.pdf](https://www.adr.org/sites/default/files/Commercial_Arbitration_Fee_Schedule_1.pdf).

19 *Innovation Ventures, LLC v. Liquid Mfg., LLC*, 499 Mich. 491, 508 (2016) (citation and internal quotation omitted).

20 *Menhennick Family Trust v. Menhennick*, 326 Mich. App. 504, 510 (2018) (citation omitted).

21 However, there may be issues with frustration of purpose or failure of consideration that permit rescission of the contract.

22 *Clark v. DaimlerChrysler Corp.*, 268 Mich. App. 138, 143 (2005).

23 Federal law makes challenging arbitration exceedingly difficult in most cases. While a discussion of this issue alone could fill a textbook, a brief summary is provided here. The Federal Arbitration Act ("FAA") permits a party to an arbitration agreement to seek an order compelling arbitration. 9 U.S.C. § 4. Unfortunately for incarcerated persons, challenges to the enforceability of the contracts are unlikely to be determined by a judge due to the FAA as defenses to contract enforcement must be specifically directed toward the arbitration provision itself, rather than the entire contract as a whole. *See, e.g., Kensu v. JPay, Inc.*, 2018 U.S. Dist. LEXIS 222496, at \*11 (E.D. Mich. Oct. 22, 2018). Thus, even a prisoner with a valid claim that an agreement with JPay is unenforceable will almost certainly be forced into arbitration to have that issue resolved requiring the prisoner to pay the fees and costs associated with arbitration that likely make it unobtainable in the first place.

24 MCL 445.901 *et seq.*

25 MCL 445.911(2).

26 MCL 445.9031(1)(q).

27 MCL 445.9031(x).

28 MCL 445.903(1)(z).

# March 2023 Case Summary

***Rodriguez v. Hirschberg Acceptance and Modern Financial Servs. Corp.***,  
No. 20-K-34471, COA No. 356368, MSC No. 164454  
(application for leave to appeal to the Michigan Supreme Court filed May 31, 2022)

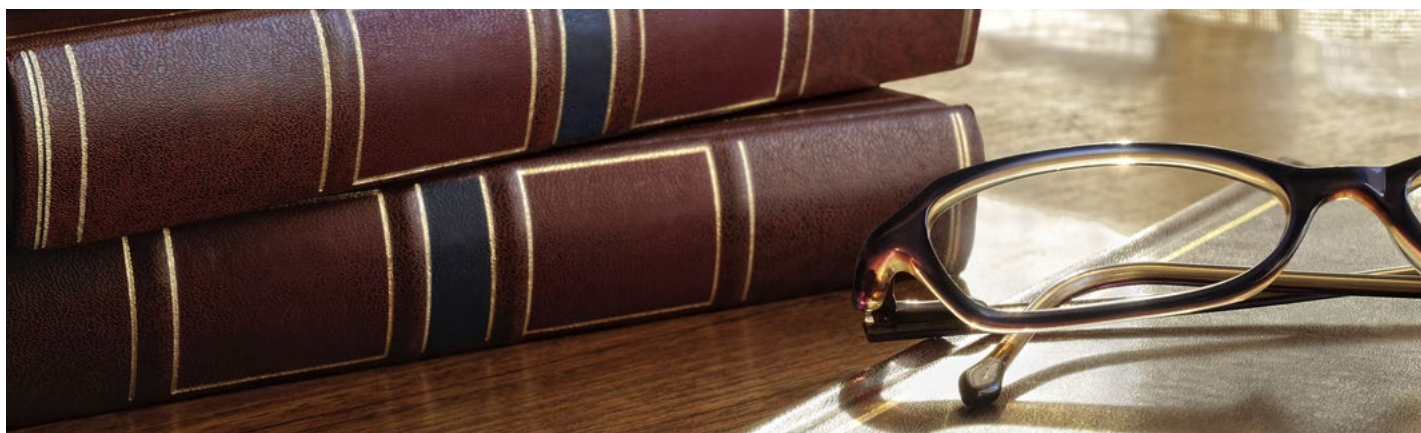
Currently pending before the Michigan Supreme Court, the *Rodriguez* case concerns the interpretation and application of MCR 3.501(A)(5). As many readers will be aware, MCR 3.501 governs class actions in Michigan's courts. MCR 3.501(A)(5) excludes certain types of actions from being litigated as class actions. In full, MCR 3.501(A)(5) provides:

An action for a penalty or minimum amount of recovery without regard to actual damages imposed or authorized by statute may not be maintained as a class action unless the statute specifically authorizes its recovery in a class action.

In 2018, Plaintiff Kathryn Rodriguez filed her putative class action lawsuit in the Ionia Circuit Court against Defendants, Hirschberg Acceptance Corporation and Modern Financial Services Corporation. Plaintiff's complaint alleged violations of the Fair Debt Collection Practices Act ("FDCPA"), 15 U.S.C. § 1692 *et seq.*, the Michigan Regulation of Collection Practices Act ("RCPA"), MCL 445.251 *et seq.*, and the Michigan Occupational Code, MCL 339.101 *et seq.* The complaint sought injunctive relief, declaratory relief, actual damages, and statutory damages. The Defendants removed the case to federal

Court which dismissed the FDCPA claims and remanded back to the Circuit Court to resolve the State law claims. In the Circuit Court, the Defendants moved to dismiss Plaintiff's the complaint arguing that MCR 3.501(A)(5) prohibited class actions brought under the RCPA and Occupational Code because both statutes had minimum damages provisions and did not explicitly authorize class actions. The Circuit Court accepted Defendants' reasoning and dismissed the complaint which was subsequently affirmed by the Court of Appeals. Currently, the Michigan Supreme Court is considering the application for leave to appeal.

The *Rodriguez* case presents an important, and apparently novel, question about the application of MCR 3.501(A)(5). There is no doubt that MCR 3.501(A)(5) prohibits maintaining class actions seeking statutory damages, unless the statute explicitly authorizes such an action. However, the question being addressed now is whether MCR 3.501(A)(5) prohibits all class actions brought under a statute with a statutory damages provision even if the action does not seek statutory or minimum damages. The answer to this question is important both to consumers and their attorneys because – as Seventh Circuit Judge Posner famously opined – “the *realistic* alternative to a class-action is not 17 million individual suits, but zero individual suits, as only a lunatic or a fanatic sues for \$30.” *Carnegie v. Household Int'l, Inc.*, 376 F.3d 656, 661 (7th Cir. 2004) (emphasis original).



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