Supreme Court of New Jersey

Docket No. 089939

SCOTT DIANA, on behalf of himself and those similarly situated,	:	CIVIL ACTION
Plaintiff-Appellant-Petitioner,	:	ON CERTIFICATION FROM A FINAL JUDGMENT OF THE SUPERIOR COURT
vs.	:	OF NEW JERSEY, APPELLATE DIVISION
LVNV FUNDING LLC, MHC RECEIVABLES, LLC, FNBM, LLC, SHERMAN ORIGINATOR III LLC, SHERMAN ORIGINATOR LLC and JOHN DOES 1 to 10,	:	Docket No.: A-001000-23
	:	Sat Below:
	:	HON. CHRISTINE M. VANEK, J.A.D.
Defendants-Appellees-Respondents.	:	HON. MARK K. CHASE J.A.D.
	:	Date of Appellate Judgment: September 26, 2024

DEFENDANTS-APPELLEES-RESPONDENTS' BRIEF IN RESPONSE TO THE BRIEF OF AMICUS CURIAE LEGAL SERVICES OF NEW JERSEY

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PRELIMINARY STATEMENT

The text, structure, and legislative history of the NJCFLA[1] demonstrate that it does not provide a private right of action. See generally Supplemental Brief of Defendants-Appellees-Respondents ("SC Dsb"). Legal Services of New Jersey's ("LSNJ's") arguments to the contrary notably differ from the arguments advanced by Appellants below and thus far in this Court. LSNJ also omits key context, misreads precedent, and at times departs from the issues before the Court.

First, while LSNJ advances biased policy arguments about the consumer credit industry and objects to the laws governing how consumer credit is extended, those criticisms are irrelevant here. They have no bearing on whether the Legislature conferred a private right of action under the NJCFLA. And in any event, none of the Respondents here extended consumer credit in the first place, and the federally chartered bank that did so is not subject to Petitioner's claims.

Second, on the merits, LSNJ misstates the development of the law. While LSNJ frames the certified question before this Court as one that was settled until

[1] This Brief adopts the definition of capitalized terms not otherwise defined herein, by reference, as they are defined in Respondents' Supplemental Brief.

the United States District Court for the District of New Jersey's decision in Veras v. LVNV Funding LLC, No. 13-1745 (RBK/JS), 2014 U.S. LEXIS 34176 (D.N.J. Mar. 17, 2014) [Dsa132],[2] in reality the question of whether the 1997 NJLLA and successor NJCFLA confer a private right of action traces back to the Legislature's complete overhaul of New Jersey's lending laws in 1997. LSNJ repeatedly suggests that the 1997 overhaul was meaningless, but it has no substantive response to the incontrovertible fact that those amendments took a statute with an express private right of action and amended it to remove that private right of action.

With respect to monetary relief, LSNJ (1) mischaracterizes the 1997 statutory changes, (2) misreads the treble forfeiture provision, (3) improperly relies on out-of-state case law concerning different statutes, and (4) incorrectly elevates one factor of the Cort v. Ash test over other, more important factors.

LSNJ's arguments with respect to declaratory and injunctive relief are likewise incorrect. LSNJ contends that the NJCFLA affords consumers a private right of action to declare certain consumer loan contracts void and that this provision has been in place since long before the 1997 amendments. But this

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[2] Respondents are submitting an appendix with this motion. Citations to this appendix are cited as "Daa." Respondents will also cite to the supplemental appendix submitted with their Supplemental Brief as "Dsa."

argument conflates two very different voidness provisions.

The 1914 NJSLL featured a single provision rendering any violative contract void and affording consumers an express right of action to recover damages. 1914 NJSLL, P.L. 1914, c. 49 § 6 [Dsa146]. In 1932, however, the 1932 NJSLA replaced the 1914 NJSLL. Unlike the 1914 statute, the 1932 version included two distinct voidness provisions. The first was limited to voiding contracts that charged excessive interest or other charges and gave consumers a private right of action to recover damages. 1932 NJSLA, P.L. 1932, c. 62 § 13 [Dsa157]. This voidness provision never reached licensing violations. The second appeared within a criminal misdemeanor clause covering a wider array of violations, including those concerning licensing and the charging of excess interest or fees, but omitting a private enforcement mechanism. Id. § 19 [Dsa158].

These parallel provisions remained in the statute until 1997. See 1989 NJCLA, 1991 N.J. Stat. Ann. § 17:10-14 [Dsa194]. The 1997 NJLLA repealed the first voidness provision affording consumers an express private right of action, such that a private consumer could no longer void an entire contract if excess interest or fees had been charged. At the same time, the Legislature added a new provision stating that in the event a lender charged or collected excess

interest or fees, the excess charges would be unenforceable against a consumer but the principal would remain collectible by the lender. Thus, the statute provided consumers a defense to the collection of unlawful interest and fees, but no longer provided a private right of action to void a violative contract entirely. See 1997 NJLLA, 1998 N.J. Stat. Ann. § 17:11C-33(b) [Dsa415]; see also NJCFLA, N.J. Stat. Ann. § 17:11C-33(b). The history of the statute leaves no question that this was a deliberate decision.

Under the 1997 NJLLA, the Commissioner, however, retained the ability to void an entire contract for specified criminal violations, including in cases of unlawful interests or fees or, for example, licensing violations. This continues to be the case today under the NJCFLA. In other words, the current NJCFLA permits the Commissioner to offensively void a contract entirely for specific criminal violations, including licensing violations or the charging of unlawful interest or fees, but a consumer can only defensively contest the obligation to pay unlawful charges. No provision gives a consumer the right to challenge companies' licensure under the NJCFLA. That is reserved to the Commissioner. The statute thus reflects a very reasonable balancing of public and private enforcement mechanisms.

If the NJCFLA's current voidness provision were interpreted to include a

private right of action as LSNJ suggests, not only would the 1997 elimination of the separate voidness provision be of no effect, but the new provision permitting lenders to collect principal in cases of excess interest or fees (referred to hereinafter as the "excess-interest provision") would also be inoperative. That is so because if a private consumer could void an entire contract, then no principal would be collectible by the lender at all. See N.J. Stat. Ann. § 17:11C-33(b). Precedent is clear that courts should not interpret statutes in a way that renders any part inoperative or superfluous. See, e.g., State v. Gomes, 253 N.J. 6, 15 (2023); Matter of Diguglielmo, 252 N.J. 350, 360 (2022).

Finally, LSNJ's request that the Court decide whether the NJCFLA provides a defense to collection attempts affected by allegedly unlicensed activity is beyond the scope of the question this Court certified, was not argued or raised below, and should be denied. In any event, LSNJ's arguments are also incorrect. As to the treble forfeiture provision, seeking a statutory monetary penalty is not "defensive" by any understanding of that word, and declaratory relief does not include the authority to enforce penalty provisions. See In re Resol. of State Comm'n of Investigation, 108 N.J. 35, 46 (1987) (declaratory judgment limited by the bounds of the judiciary's equitable powers); Marshall v. Vicksburg, 82 U.S. (15 Wall.) 146, 149 (1872) ("Equity never, under any

circumstances, lends its aid to enforce a forfeiture or penalty, or anything in the nature of either.").

As to the criminal voidness provision, LSNJ's declaratory judgment and defensive use arguments would similarly render meaningless the NJCFLA's excess-interest provision preventing the enforcement of unlawful interest and fees but permitting enforcement of lawful principal. In addition, declaratory judgment is unavailable to enforce penal provisions and is inappropriate under this Court's precedent where in conflict with a statutory scheme. See Halsted v. State, 41 N.J.L. 552, 565 (1879) ("Courts will not give an equitable construction to a penal law, even for the purpose of embracing cases clearly within the mischief intended to be remedied."); In re Resol., 108 N.J. at 46 (declaratory judgment must not be available where its availability "would frustrate the Legislature's" purpose or statutory design).

In sum, the private remedies that Petitioner and Amici seek to recognize—whether for damages or declaratory relief—are simply unavailable.

ARGUMENT

I. LSNJ's Policy Arguments Are Irrelevant And Its Recitation Of The Facts Is Incorrect.

LSNJ has numerous criticisms of national banks' subprime credit card lending practices. But their one-sided criticisms are irrelevant to whether the

New Jersey Legislature intended to confer a private right of action in the NJCFLA. In addition, they have nothing to do with any of the Respondents in this case, none of whom had any role in the initial extension of credit to Petitioner or any other consumer.

Credit One Bank—a federally chartered banking institution—issued the credit card at issue here. In the context of credit cards issued by national banking institutions like Credit One Bank, most details of credit offerings are regulated by federal law, not state law. Ben. Nat'l Bank v. Anderson, 539 U.S. 1, 10–11 (2003) (interest rates charged by federally chartered banks are exclusively the domain of federal law); Smiley v. Citibank (S.D.), N.A., 517 U.S. 735, 744–46 (1996) (late payment fees charged by federally chartered banks are exclusively governed by federal law); Watters v. Wachovia Bank, N.A., 550 U.S. 1, 7 (2007) (federally chartered banks and their operating subsidiaries not subject to the "licensing, reporting, and visitorial regimes of the several States") (citing 12 U.S.C. § 484(a)). LSNJ's argument that the allegedly "predatory" nature of certain lending practices requires consumers to assist the Department of Banking and Insurance ("DOBI") in "identify[ing] and regulat[ing] entities participating in the secondary market for credit card accounts," SC LSNJab 7, ignores that the challenged lending practices are not subject to New Jersey law in the first

place. It also ignores the benefits to subprime borrowers of the availability of credit on terms that reflect the significantly higher risk that lenders undertake when they extend it.

LSNJ also misstates what this lawsuit is about. It is not the case that "[t]he debt buyer defendants here don't contest that at all relevant times they were required to be licensed by the Department of Banking & Insurance." SC LSNJab 1. Respondents emphatically do contest that they required a license, and the question of licensure was heavily disputed below. See generally AD Pb. New Jersey, unlike some other states, does not require licenses for "debt buyers" or "debt collectors." It requires "consumer lenders" and "sales finance companies" to be licensed, and Respondents are neither of those things. See Woo-Padva v. Midland Funding LLC, 2022 N.J Super. Unpub. LEXIS 96, at *6 (N.J. Super. Ct. Law Div. Jan. 21, 2022) (holding a debt buyer is not a consumer lender because "[d]efendant does not provide loans" or "extend credit" and instead "buys debts") [Daa23]; N.J. Stat. Ann. § 17:16C-1(f). Nor, again contrary to LSNJ's assertion, did Respondents all bring lawsuits to collect Petitioner's debt. Only LVNV ever brought such a suit, and there is no dispute that LVNV was licensed at the time of bringing that lawsuit; meanwhile, the other Respondents had no interaction whatsoever with Petitioner prior to being sued by him in this

litigation. Cf. Petitioner's Complaint in Diana v. LVNV Funding LLC, HUD-L-000013-23 (N.J. Super. Ct. Law Div. Jan. 3, 2023) [Pa1].

II. The NJCFLA Does Not Authorize Private Suits For Damages.

As outlined throughout the Record and in Respondents' Supplemental Brief, the NJCFLA does not confer a private right of action for damages, either expressly or implicitly. SC Dsb 15–36. LSNJ's responses on that point are unavailing.

First, contrary to LSNJ's argument, the 1997 NJLLA abolished the private right of action for damages that existed prior to 1997, and the NJCFLA carries that change forward. See SC LSNJab 19–20. Under pre-1997 statutes, borrowers were explicitly "entitled to recover from" lenders—from 1914 to 1932 for "[t]he violation of any provision," 1914 NJSLL, P.L. 1914, c. 49, § 6 [Dsa146], and from 1932 to 1997 for the "charg[ing], contract[ing] for, or recei[pt]" of "any interest, consideration or charges in excess of those permitted," 1932 NJSLA, P.L. 1932, c. 62, § 13 [Dsa157]; 1989 NJCLA, 1991 N.J. Stat. Ann. § 17:10-14 [Dsa194]. The 1997 NJLLA changed that language to instead state that "a consumer lender who knowingly and willfully violates any provision of this act shall also forfeit to the borrower three times any amount of the interest, costs or other charges collected in excess of that authorized by law." N.J. Stat. Ann. § 17:11C-33(b). This change is not "consistent with an intent" to retain

private rights of action. See SC LSNJab 20. The pre-1997 language explicitly authorized direct recovery by consumers, but the current language does not expressly say consumers can enforce it. See Hon. Stephen L. Petrillo, No. A-3643-24, Amplification Letter Re: April Eggers & Gerald Gregor, on behalf of themselves and those similarly situated v. Sherman Originator III, LLC, Sherman Originator, LLC, and LVNV Funding, LLC, at *4–5 (Sep. 8, 2025) ("In total, there have been five iterations of the Act including the NJCFLA. In prior iterations, the Acts provided a private right of action, while the NJCFLA does not.") [Daa1].

This Court's precedent makes clear that absent an express statement, courts must look to other indicators of legislative intent in assessing whether a statute confers a private right of action. See In re Resol., 108 N.J. at 41; R.J. Gaydos Ins. Agency, Inc. v. Nat'l Consumer Ins. Co., 168 N.J. 255, 272–73 (2001). Under that standard, and as outlined in Respondents' Supplemental Brief, the NJCFLA's robust administrative enforcement mechanisms and legislative history, especially the affirmative deletion of a clear and unambiguous private cause of action, reflect an intent to discontinue private causes of action. This necessarily precludes any inference of a private right of action under the statute. See SC Dsb 21–32.

As discussed in Respondents' Supplemental Brief, numerous other statutory schemes provide for forfeiture to affected persons while placing the pursuit of that forfeiture solely in the hands of an administrative agency. SC Dsb 19–20 (citing, e.g., N.J. Stat. Ann. § 17:33A-5(c) (authorizing DOBI "to order restitution to any insurance company or other person who has suffered a loss as a result of a violation" of the Insurance and Fraud Prevention Act, without creating a private right of action); 15 U.S.C. § 7246 (Sarbanes-Oxley Act, enabling the SEC to require disgorgement of certain ill-gotten profits and create a "Fair Fund" to disburse the disgorged money to harmed investors, without creating a private cause of action); 12 U.S.C. § 5564 (enabling the Consumer Financial Protection Bureau to "seek all appropriate legal and equitable relief," which includes restitution, without providing a private right of action)).

Second, LSNJ is simply wrong that the NJCFLA does not empower the Commissioner "to obtain section 33(b) remedies." See SC LSNJab 21. LSNJ emphasizes N.J. Stat. Ann. § 17:11C-18's supposed lack of explicit cross-reference to Section 33(b), but Section 18(h) empowers the Commissioner to seek injunctive relief in response to any "practice or transaction in violation of" any provision of "sections 1 through 49" of the statute, necessarily including Section 33(b). Injunctive relief could include an injunction compelling a lender

acting unlawfully to comply with Section 33(b)'s forfeiture order.

Further, LSNJ's assertion that borrowers are not "afforded any sort of avenue to initiate an administrative proceeding to adjudicate claims that a loan is void, or to determine a borrower's entitlement to treble recovery of unauthorized charges," is false. See SC LSNJab 21. The Department has a robust complaint mechanism through which consumers can make formal complaints online, by phone, by mail, and by fax. See N.J. Dep't of Banking & Ins., Consumer Info., https://www.nj.gov/dobi/consumer.htm (last visited Sep. 17, 2025); N.J. Dep't of Banking & Ins., Online Complaint Servs., https://www-dobi.nj.gov/DOBI_UIC/servlet/Servlet.idxServlet?div=%27BNK%27 (last visited Sep. 17, 2025).

The NJCFLA permits only the Commissioner to conduct investigations, including by issuing subpoenas for documents and witness testimony, and to initiate summary actions in the event of suspected noncompliance with the NJCFLA. N.J. Stat. Ann. § 17:11C-18. And demonstrating that the public interest is protected even in the absence of a private right of action, DOBI has indeed used those powers to pursue unlicensed lenders in the past. See, e.g., N.J. Dep't of Banking & Ins., Off. of Consumer Fin., Enforcement Action E18-018834 (2018) (DOBI consent order by which unlicensed consumer lender

agreed to cease all lending activities without first obtaining a license and to pay administrative penalties) [Daa27]; N.J. Dep't of Banking & Ins., Off. of Consumer Fin., Enforcement Action E15-016329 (2015) (DOBI consent order by which unlicensed mortgage lender agreed to cease all lending activities without first obtaining a license and to pay administrative penalties) [Daa30]; N.J. Dep't of Banking & Ins., Division of Banking, Enforcement Actions (2012), https://www.nj.gov/dobi/division_banking/bankdivenforce_2012.html (last visited Sep. 17, 2025) (summarizing cease and desist orders E11-011529 and E11-011483 issued in relation to unlicensed consumer lenders charging interest in excess of that authorized by law).

The statute does not, however, force DOBI to initiate, or the courts to entertain, actions that DOBI does not deem meritorious. This is a reasonable policy choice by the Legislature in balancing the need for relief with other policy goals, such as avoiding frivolous litigation and putting regulatory enforcement of lenders in the hands of the State and not individual consumers.

Third, LSNJ cites other statutes that use the "shall forfeit" language and that provide for a private right of action to argue that the words "shall forfeit" do not operate "to preclude recovery by borrowers." SC LSNJab 21. But this is beside the point. The law is not that a statute must preclude a private right of

action, but rather that it must evince a legislative "inten[t] to create the private right of action asserted." See Ziglar v. Abbasi, 582 U.S. 120, 133 (2017) (quoting Touche Ross & Co. v. Redington, 442 U.S. 560, 568 (1979)); see also R.J. Gaydos Ins. Agency, Inc., 168 N.J. at 272–73 ("the primary goal [is] . . . a search for the underlying legislative intent" (internal quotes and citation omitted)).

LSNJ cites other statutes that include "shall forfeit" or similar language, but each of those statutes also explicitly authorizes direct recovery by use of clear and unambiguous language akin to the language in the pre-1997 statutes at issue here. See N.Y. Banking Law § 351(6)(b) ("[the borrower] may recover from the licensee"); N.C. Gen. Stat. § 24-2 ("[the borrower] may recover . . . in an action in the nature of action for debt . . . [including] as a counterclaim"); Miss. Code Ann. § 75-17-3 ("interest . . . may be recovered by suit."); 12 U.S.C. § 86 ("[the borrower] may recover back, in an action in the nature of an action of debt"). While LSNJ cites these statutes for the proposition that the words, "shall forfeit" confer a private right of action, the statutes actually demonstrate that "when [a] [l]egislature intend[s] that a borrower should have a right to recover any payments made respecting an unlawful loan, it [knows] precisely how to use clear and unambiguous language to say so." Connell v. Am. Funding,

Ltd., 231 N.J. Super. 409, 422 (Ch. Div. 1987). New Jersey did so prior to 1997 and changed it post 1997. Other states have done so in their own statutes. But current New Jersey law does not confer a private right of action.

LSNJ cites three cases to argue that the words "shall forfeit to the borrower' . . . give rise to an affirmative claim without the need for further statutory language," but none of them considered and assessed whether those words alone afford a private right of action. See SC LSNJab 22 (citing Kelker v. Geneva-Roth Ventures, Inc., 369 Mont. 254 (2013), Household Realty Corp. v. Dowling, 40 Ohio Misc. 2d 4 (Mun. 1988), Moran v. Am. Funding, Ltd., 238 N.J. Super. 263, 278 (Ch. Div. 1989)). First, in Kelker, the Montana Supreme Court merely declined to enforce a contract's arbitration provision for reasons unrelated to private rights of action. See generally Kelker, 369 Mont 254. And while Montana lower courts have recognized an implied private right of action under the state's consumer loan law, they have relied on the fact that the statute, unlike the NJCFLA, specifically provides for attorney's fees in private suits. See Boyer v. Assocs. Fin. Servs. Co. of Mont., Inc., DV 91-483, 1993 Mont. Dist. LEXIS 634, at *20 (Mont. Dist. Ct. 1993) ("The legislature implicitly provided for a private right of action because the Consumer Loan Act provides for the recovery of attorney fees.") [Daa13]. Second, in Household Realty, an

Ohio municipal court permitted a borrower to recover under a statute using similar "shall forfeit" language, but the question of whether the statute provided for a private right of action was unaddressed by the court and apparently uncontested by the parties.[3] Realty Corp, 40 Ohio Misc. 2d at 4. Likewise, in Moran, although the court explained that a trial would proceed under a treble forfeiture provision, the question of whether there was a private right of action under the statute was again uncontested and not before the court. Moran, 238 N.J. Super. at 278.

Finally, LSNJ's remaining arguments concerning the application of the In re Resol. three-prong test to the NJCFLA's treble forfeiture provision do not alter the above analysis. A statute only implies a private right of action when three factors are met: (1) "the plaintiff is 'one of the class for whose especial benefit the statute was enacted'"; (2) there is "evidence that the Legislature intended to create a private cause of action under the statute"; and (3) "implication of a private cause of action . . . would be 'consistent with the underlying purposes of the legislative scheme.'" In re Resol., 108 N.J. at 41 (quoting and adopting the standard established in Cort v. Ash, 422 U.S. 66, 78

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[3] Respondents have not identified any case assessing whether a private right of action is rightfully implied in Ohio's small loan law under the Cort v. Ash three-prong test adopted by this Court in In re Resol.

(1975)). This Court has cautioned that the second factor is the most important. See R.J. Gaydos Ins. Agency, Inc., 168 N.J. at 272–73 (explaining "the primary goal" is "a search for the underlying legislative intent").

LSNJ principally focuses on the first factor, arguing that "it is clear that the remedies enumerated in section 33(b) were enacted for the benefit of borrowers." See SC LSNJab 24. But satisfaction of this factor alone is not enough. "[T]he mere fact that [a law] was designed to protect [a class of persons] does not require the implication of a private cause of action for damages on their behalf." Transamerica Mortg. Advisors v. Lewis, 444 U.S. 11, 12 (1979); see also California v. Sierra Club, 451 U.S. 287, 294 (1981) ("The question is not simply who would benefit from the Act, but whether [the Legislature] intended to confer [private] rights [of enforcement] upon those beneficiaries.").

This is especially the case here where the second factor weighs heavily against finding an implied private right of action. First, as discussed above, the Legislature affirmatively removed an unambiguous private right of action when passing the 1997 NJLLA (the NJCFLA's predecessor), strongly suggesting there was no intent to afford a private right of action. See Castro v. NYT Television, 370 N.J. Super. 282, 292–93 (App. Div. 2004) (where revised statute "deleted" predecessor statute's express authorization of private causes of action, court was

"obligated to respect that legislative choice" (citing Munoz v. N.J. Auto. Full Ins. Underwriting Ass'n, 145 N.J. 377, 387–89 (1996)); Hon. Stephen L. Petrillo, No. A-3643-24, Amplification Letter Re: April Eggers & Gerald Gregor, on behalf of themselves and those similarly situated v. Sherman Originator III, LLC, Sherman Originator, LLC, and LVNV Funding, LLC, at *4–5 (Sep. 8, 2025) (that the Legislature removed an express private right of action "shows that there was no intent to grant a private right of action" under the NJCFLA) [Daa1]. Second, Section 33(b) is primarily a penal provision, prescribing penalties for conduct qualifying as crimes in the fourth degree. Absent strong indicia of contrary intent, New Jersey courts do not interpret penal statutes without express private rights of action to "allow private plaintiffs to . . . enforce the[m]." In re Resol., 108 N.J. at 41; see also ibid. ("[v]iolations of these laws" instead "left to the agencies charged with the enforcement of the criminal laws") (internal quotation omitted).

In this context, LSNJ's assertion that "a private cause of action would be consistent with the underlying purposes of the legislative scheme," SC LSNJab 27, does not hold water. Injecting private rights of action into a statute expressly delineating a comprehensive administrative enforcement system would necessarily disrupt the scheme devised by the Legislature, as this Court has

repeatedly recognized. See, e.g., Campione v. Adamar of N.J., Inc., 155 N.J. 245, 265–66 (1998); R.J. Gaydos Ins. Agency, Inc., 168 N.J. at 273–74; Jarrell v. Kaul, 223 N.J. 294, 307–10 (2015); see also SC Dsb 22–27. So while LSNJ is correct that "statutes can enable both governmental and private entities to "exercise[e] [sic] different forms of remedial power," SC LSNJab 27 (emphasis added) (quoting Lemelledo v. Benefit Mgmt. Corp., 150 N.J. 255, 269 (1997) (addressing the NJCFA, which contains an express private right of action)), it is the role of the Legislature, not the judiciary, to craft such dual-enforcement systems. The Legislature declined to do so here.

III. The NJCFLA Does Not Confer A Private Right Of Action To Void Loan Agreements.

Perhaps recognizing the futility of its arguments concerning the NJCFLA's forfeiture provision, LSNJ argues the statute's voidness provision provides a distinct pathway to private remedies. But this argument fails too. The NJCFLA provides that a "contract of a loan not invalid for any other reason, in the making or collection of which any act shall have been done which constitutes a crime of the fourth degree under this section, shall be void." N.J. Stat. Ann. § 17:11C-33(b). This criminal voidness provision does not imply a private right of action; indeed, it speaks exclusively in terms of penalties for criminal conduct. It is also distinct from the since-rescinded civil voidness provision that expressly

provided for a private right of action. LSNJ is therefore categorically incorrect when it asserts that the "voiding remedy" in the NJCFLA remains substantively "unchanged" in all iterations of New Jersey's consumer lending statutes, such that, to the extent voidness was recognized as a remedy before, it must be recognized as one today. SC LSNJab 15–18. LSNJ overlooked the prior existence of two separate voidness provisions before the passage of the 1997 NJLLA.

A. From 1932 To 1997, New Jersey Consumer Lending Laws Contained Both A Civil And A Criminal Voidness Provision, But The 1997 NJLLA Retained Only The Criminal Provision.

Despite LSNJ's claim that the voiding provisions in New Jersey's consumer lending laws have remained stable for over a hundred years, SC LSNJab 3, those provisions in fact have undergone considerable change.

Prior to the passage of the 1997 NJLLA, New Jersey's consumer lending law contained two distinct voidness provisions. The first was civil in nature, and applied only to cases where excessive interest or fees had been charged. See 1932 NJSLA, P.L. 1932, c. 62 § 13 ("If any interest, consideration or charges in excess of those permitted by this act are charged, contracted for, or received the contract of loan shall be void and the licensee shall have no right to collect or receive any principal, interest, or charges whatsoever, and the borrower shall be entitled to recover from the lender any or all sums paid or returned to the lender

by the borrower on account of or in connection with such loan") [Dsa157]; 1989 NJCLA, 1991 N.J. Stat. Ann. § 17:10-14 (similar, with the addition of a good faith exception) [Dsa178].

The second provision applied to a broader range of violations, including excessive interest and fees, but was criminal rather than civil in nature. See 1932 NJSLA, P.L. 1932, c. 62 § 19 (titled "Violation a misdemeanor") (lacking an express private right of action and stating that "violation of any of the provisions of [various sections, including Section 13] of this act, shall [constitute] a misdemeanor" and "[a]ny contract or loan . . . which constitutes a misdemeanor under this section, shall be void and the lender shall have no right to collect or receive any principal, interest, or charges whatsoever") [Dsa158]; 1989 NJCLA, 1991 N.J. Stat. Ann. § 17:10-21 (same, other than adding a "good faith error exception") [Dsa216].[4]

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[4] The first iteration of New Jersey's consumer loan laws, the 1914 NJSLL, did not contain two voiding provisions. 1914 NJSLL, P.L. 1914, c. 49 § 6 ("The violation of any provision of this act shall be a misdemeanor, and if such violation be by a corporation, then such violation shall be a misdemeanor on the part of any person participating therein as a representative or agent of said corporation. Every loan in connection with which such violation shall have occurred shall be absolutely null and void, and the borrower shall be entitled to recover from the lender any or all sums paid or returned on account of or in connection with such loan.") [Dsa146]. However, unlike the criminal voidness provisions in the 1932 and later statutes, the voidness clause in this provision was general to all statutory violations and contained an express private right of

Against this backdrop, LSNJ's assertion that statutory language concerning voidness "did not change in 1997," SC LSNJab 3, is incomplete. In fact, the 1997 NJLLA removed the civil voidness provision that existed in prior iterations of New Jersey's consumer lending laws but retained the criminal voidness provision from the 1989 NJCLA without substantial modification. See 1997 NJLLA, 1998 N.J. Stat. Ann. § 17:11C-33(b) [Dsa415] (containing only the following voidness provision: "A consumer lender who violates or participates in the violation of any provision of [various sections] shall be guilty of a crime of the fourth degree. A contract of loan not invalid for any other reason, in the making or collection of which any act shall have been done which constitutes a crime of the fourth degree under this section, shall be void and the lender shall have no right to collect or receive any principal, interest or charges unless the act was the result of a good faith error. . . ."); NJCFLA, N.J. Stat. Ann. § 17:11C-33(b) (same).

B. In The Pre-1997 NJLLA, The Civil Voidness Provision, Not The Criminal Voidness Provision, Permitted Private Suits.

Contrary to LSNJ's argument, it was the civil voidness provision, not the

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action. As discussed, the 1932–1997 statutes instead handled civil voidness under a separate section. LSNJ's reliance on pre-1932 decisions applying the 1914 NJSLL's general voidness provision, SC LSNJab 29, is therefore unpersuasive.

criminal voidness provision, that authorized private suits for voidness prior to the passage of the 1997 NJLLA. See Lemelledo, 150 N.J. at 272 (citing N.J. Stat. Ann. § 17:10-14, the civil voidness provision in the 1989 NJCLA, for the proposition that "[i]f a violation of the CLA is proven, the typical remedy, obtainable by the Department of Banking and Insurance or by individual consumers, is voiding of the contract, subject to a defense based on good faith on the part of the lender.")[5]; see also Connell, 231 N.J. Super. at 420 (citing N.J. Stat. Ann. § 17:10-14, the civil voidness provision in the 1932 NJSLA, for the proposition that borrowers could initiate actions to void and seek recovery of sums paid under loan contracts).

A handful of cases immediately following the passage of the 1932 NJSLA relied on the criminal voidness provision in assessing claims seeking the voiding of contracts that allegedly violated the 1932 NJSLA. See SC LSNJab 29. These cases not only pre-date (and fail) the more modern Cort v. Ash test but are silent on whether a private right of action attached to the criminal voidness provision. See, e.g., Union Loan Ass'n v. Woodie, 13 N.J. Misc. 214 (1935); Morris Plan Corp. v. Leschinsky, 12 N.J. Misc. 1 (1933); Indep. Loan Co. v. Tyson, 117 N.J.L.

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[5] While Lemelledo outlines in detail the enforcement mechanisms available under the 1989 NJCLA, its passing mentions of the 1997 NJLLA are not authoritative or persuasive here. See SC Dsb 37–39.

259 (1936) (holding courts can make preponderance-of-the-evidence determinations of whether a defendant committed a criminal act in assessing civil liability without independently assessing the statutory grounds for a private right of action permitting the court to do so). The same courts in other cases either relied on the civil voidness provision or did not specify the provision on which they relied. See, e.g., Langer v. Morris Plan Corp., 10 N.J. Misc. 128 (1932); Richmond v. Conservative Credit Sys., 110 N.J.L. 73 (1933).

The reasons for this lack of clarity or consistency are difficult to ascertain a century later, but it is notable that until 1932, the 1914 NJSLL housed its criminal and civil voidness provisions in the same subsection, see supra n.3, and that none of those cases considered the effect of the 1932 NJSLA's split of the 1914 NJSLL's voidness section into separate civil and criminal provisions.

Regardless, by the 1940s, New Jersey courts exclusively considered the civil voidness provision containing an express private right of action—not the criminal voidness provision without one—in assessing or discussing civil suits seeking to void violative loan agreements. See, e.g., Ryan v. Motor Credit Co., 130 N.J. Eq. 531, 536 (1941); Maellaro v. Madison Fin. Co., 130 N.J.L. 140, 142 (1943); Edelstein v. Hub Loan Co., 130 N.J.L. 511, 513 (1943); Jefferson Loan Co. v. Livesay, 175 N.J. Super. 470, 476 (Dist. Ct. 1980); Connell, 231 N.J.

Super. at 420; Lemelledo, 150 N.J. at 272. It is against that backdrop that the Legislature removed the civil voidness provision in 1997 and left only the criminal provision intact.

Further, the shift to exclusive reliance on the civil voidness provision was made necessary by the statutory text. Any reading of the pre-1997 criminal voidness provision to imply a private right of action would have run contrary to core principles of statutory interpretation—namely, the rule against surplusage. If the criminal voidness provision, which provided for voidness in the same circumstances as the civil voidness provision (among others), provided for a private right of action, the civil voidness provision would have been entirely "inoperative, superfluous, void, or insignificant," directly contrary to this Court's statutory interpretation precedents. See Diguglielmo, 252 N.J. at 360 ("This Court strives for an interpretation that gives effect to all of the statutory provisions and does not render any language inoperative, superfluous, void, or insignificant.") (cleaned up) (collecting cases); Edelstein, 130 N.J.L. at 513 ("[A] violation of R.S. 17:10-14 [is] also, under R.S. 17:10-21, a misdemeanor . . . ."); 1932 NJSLA, P.L. 1932, c. 62 § 19 [Dsa158]; 1991 N.J. Stat. Ann. § 17:10-21 [Dsa216]. Accordingly, LSNJ's implication that the removal of the civil voidness provision did not "substantively [ ]change" the statute, SC LSNJab 16,

does not withstand scrutiny.

C. By Removing The Civil Voidness Provision, The Legislature Revoked Authorization For Private Suits.

The pre-1997 civil voidness provision that authorized private lawsuits was removed from the statute with the passage of the 1997 NJLLA, and does not exist under the current NJCFLA. What remains is only the criminal voidness provision—a provision that never authorized private suits, expressly or implicitly. LSNJ would have the Court read the criminal voidness provision—which is substantially unmodified compared to its pre-1997 predecessor—as the current basis for a private civil voidness remedy. This would be an error. The same text that did not confer a private right of action in the 1989 NJCLA cannot be made to confer such a right now, particularly when the only material change in law between then and now was the Legislature's decision in the 1997 NJLLA to remove a provision that actually did provide the civil voidness remedy that LSNJ advocates.

As LSNJ acknowledges, the Legislature "is presumed to have been familiar with existing New Jersey case law holding that . . . voiding remedies [were] enforceable by way of a private right of action" under the civil voiding provision. SC LSNJab 18. Faced with two provisions, then, one of which authorized private suits and one of which did not, the Legislature repealed the

former and retained the latter. That action necessarily revoked any private right of action to seek voidness as a remedy under the 1997 NJLLA and its successor, the NJCFLA. See Munoz, 145 N.J. at 387–89 ("It is not the role of a court to supply what the Legislature has omitted, and we decline to do so here."); Castro, 370 N.J. Super. at 292–93 (where revised statute "deleted" predecessor statute's express private cause of action, court was "obligated to respect that legislative choice" (citing Munoz, 145 N.J. at 387–89)).

D. The Text Of The NJCFLA Precludes Authorization For Private Suits Seeking Voidness As A Remedy.

Like the pre-1997 statutes, New Jersey's post-1997 consumer lending statutes also have separate clauses prescribing the consequences for charging excess "interest, consideration or other charges" and statutory violations amounting to criminal conduct. The rule against surplusage similarly forecloses LSNJ's argument that the criminal voidness provision implies a private right of action. On the one hand, N.J. Stat. Ann. § 17:11C-33(b) states that "[a] consumer lender who violates or participates in the violation of" Section 32(b)-(c) (governing interest rates) or Section 33(a) (governing other charges and consideration) "shall be guilty of a crime of the fourth degree." N.J. Stat. Ann. § 17:11C-32(b)–(c), 33(b). It further provides:

> A contract of a loan . . . which constitutes a crime of the fourth degree under this section, shall be void and the lender shall have no

> right to collect or receive ***any principal, interest or charges*** unless the act was the result of a good faith error.

N.J. Stat. Ann. § 17:11C-33(b) (emphasis added) (the "criminal voidness provision"). In other words, if a contract is void, the lender cannot collect any principal, interest or other charges.

Separately Section 33(b) also provides:

> If any interest, consideration or charges in excess of those permitted are charged, contracted for or received, except as the result of a good faith error, the consumer lender ***may collect only the principal amount of the loan, and may not collect interest, costs or other charges with respect to the loan***.

Ibid. (emphasis added) (the "excess-interest provision"). Under this provision, the charging of excess "interests, costs or other charges" does not preclude the lender from recovering the principal amount of the loan, but it does prevent the lender from collecting such interest, costs, or other charges.

These provisions must be read in harmony with each other. See Gomes, 253 N.J. at 15 ("When interpreting different statutory provisions, we are obligated to make every effort to harmonize them, even if they are in apparent conflict.") (internal quotes and citation omitted); Diguglielmo, 252 N.J. at 360. Under the criminal voidness provision, the penalty for excessive interest or charges is voidness of the entire contract—whereby the lender must forego collection of not only interest, costs, or other charges, but also the principal on

the loan. Under the excess-interest provision, the penalty for the same conduct is different, requiring lenders to forego interest, costs, or other charges, but permitting them to retain the principal.

Accepting LSNJ's view that the criminal voidness provision permits both consumers and DOBI to sue for voidness would negate and render superfluous the excess-interest provision permitting lenders to recoup the principal in cases where unlawful interest or fees have been charged. That interpretation simply cannot stand. See Diguglielmo, 252 N.J. at 360 (rule against surplusage); In re Resol., 108 N.J. at 43 (explaining that New Jersey courts do not infer private causes of action where doing so is inconsistent with "the underlying legislative scheme").

E. The Cases Cited By LSNJ Do Not Support A Contrary Result.

LSNJ does not cite a single case relying on the 1997 NJLLA or the NJCFLA as a basis to void a consumer loan contract at the request of a private litigant. This is because they cannot. Further, the cases they do cite are inapposite and do not alter the above analysis.

LSNJ cites three New Jersey cases for their argument that the NJCFLA's criminal voidness provision expressly confers a private right of action—Westervelt v. Gateway Fin. Serv., 190 N.J. Super. 615, 620 (Ch. Div. 1983); Stubbs v. Sec. Consumer Disc. Co., 85 N.J. 353, 359, 362 (1981); and Lemelledo,

150 N.J. at 272—but all three are readily distinguished. As discussed above, see supra Sec. II.B, Lemelledo states only that the 1989 NJCLA's civil voidness provision authorized private suits seeking that remedy, see Lemelledo, 150 N.J. at 272, and cannot be read to support the same conclusion as to the NJCFLA, see SC Dsb 36–40.

Meanwhile, Westervelt and Stubbs both concerned the now defunct Secondary Mortgage Act, which provided, "[a]ny obligation on the part of the borrower arising out of a secondary mortgage loan shall be void and unenforceable unless such secondary mortgage was executed in full compliance with the provisions of this act." Westervelt, 190 N.J. Super. at 619–20; Stubbs, 85 N.J. at 359; see also P.L. 1970, c. 205 § 25 [Daa34]. But this provision is explicitly framed in terms of the borrower's obligation—rather than imposing an obligation on the lender—and reading the provision to permit borrowers to avoid loan payments would not contradict any other portion of the Secondary Mortgage Loan Act, in significant contrast to the NJCFLA's criminal voidness provision. Compare P.L. 1970, c. 205 § 25 [Daa34], with N.J. Stat. Ann. § 17:11C-33(b). Furthermore, neither case addressed the availability of a private right of action directly under the statute. Rather, they addressed declaratory relief. See Westervelt, 190 N.J. Super. at 619 (concerning a declaratory

judgment action); Stubbs v. Sec. Consumer Disc. Co., 171 N.J. Super. 67, 69–70 (App. Div. 1979) (discussing the availability of declaratory relief without any analysis of whether a private right of action existed). Although Westervelt and Stubbs permitted declaratory relief without a clear private right of action directly under the statute, for the reasons discussed infra Sec. IV, the NJCFLA's criminal voidness provision cannot form the basis for declaratory relief due to the particularities of the NJCFLA).[6]

LSNJ also relies upon Transamerica, 444 U.S. at 19, to argue that the word "void" must imply a private right of action, but Transamerica is inapposite in

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[6] LSNJ further asserts that "[w]here other states have enacted similar licensing laws that include voiding remedies . . . , courts have allowed borrowers to bring those suits." SC LSNJab 18–19. But the out-of-state cases LSNJ cites are inapplicable because they (a) involved statutes with express private rights of action, see Fund Recovery Servs., LLC v. Kitchen, 652 F. Supp. 3d 942, 945 (N.D. Ill. 2023); (b) involved declaratory judgment rather than a statutory right of action, in a context where the statute did not provide for criminal enforcement, see Currier v. Tuck, 112 N.H. 10, 11–12 (1972) (as discussed infra, declaratory judgment is not available to enforce the NJCFLA's criminal voidness provision); (c) were decided in the 1930s or 1940s without any discussion of private rights of action at all, see Angleton v. Franklin Fin. Co., 295 P. 797, 797–98 (Colo. 1931); McGoldrick v. Family Fin. Corp., 41 N.E.2d 86, 88 (N.Y. 1942); (d) were decided in a jurisdiction where consumer loan obligations are "part of the loan contract by operation of law" and thus enforceable under common law contract law, see Transamerica Fin. Corp. v. Superior Court in and for the Cnty. of Maricopa, 158 Ariz. 115, 118 (1988), a proposition with no support under New Jersey law; or (e) involved claims brought by an enforcement agency, see Consumer Fin. Prot. Bureau v. CashCall, Inc., 35 F.4th 734, 740 (9th Cir. 2022).

this context. See SC LSNJab 23. First, the Transamerica Court held that Congress necessarily intended to authorize private litigation because it clearly intended that "the issue of voidness . . . be litigated somewhere" and the SEC lacked the requisite authority. Transamerica, 444 U.S. at 18. Here, however, the Commissioner has express authority to bring summary actions to enjoin enforcement of void loan contracts under N.J. Stat. Ann. § 17:11C-18(h). Express administrative enforcement provisions make it "highly improbable that [the Legislature] absent mindedly forgot to mention an intended private action." Transamerica, 444 U.S. at 20 (internal quotation omitted). Second, while Transamerica emphasized that federal law traditionally allows affected parties to seek judicial rescission and restitution for void contracts, New Jersey has rejected this approach. See Connell, 231 N.J. Super. at 421–22 (reading the word "void" to permit "recover[y] [of] payments from the lender . . . is not called for by any decision of our courts"). Finally, unlike in Transamerica, the legislative history here demonstrates clear intent to replace private causes of action with administrative enforcement. See Transamerica, 444 U.S. at 18–19; supra Sec. II.

In sum, none of the cases LSNJ points to support their argument that the NJCFLA implies a private right of action—for voidness, damages, or otherwise.

IV. LSNJ's Arguments Concerning Declaratory Judgment And The Use Of The NJCFLA As An Affirmative Defense Are Not Before The Court And Incorrect.

Although the Court certified only the limited question of whether the NJCFLA directly confers a private right of action, LSNJ nonetheless asks it to hold that the forfeiture and criminal voidness provisions in Section 33(b) may form the basis for declaratory judgment actions and defenses in collection actions. SC LSNJab 3. The Court should not consider that request because it is beyond the scope of what was certified or raised below. In any event, LSNJ's arguments are also wrong.

A. The NJCFLA's Treble Forfeiture Provision Cannot Form The Basis For A Declaratory Judgment Action Or The Defense To A Collection Action.

LSNJ attempts to circumvent the lack of a private right of action for monetary remedies under N.J. Stat. Ann. § 17:11C-33(b) by insisting that the provision may be used both in declaratory judgment actions and as a shield. This Court's longstanding precedents foreclose that argument entirely.

First, the NJCFLA's treble forfeiture provision is not enforceable by way of declaratory judgment action because it is punitive in nature. Declaratory judgment is a "form[ ] of equitable relief" and subject to the bounds and limits of a court's equitable powers. In re Resol., 108 N.J. at 46 (citing Eccles v. Peoples Bank of Lakewood Vill., 333 U.S. 426, 431 (1948) (declaratory

judgment is nonetheless "like other forms of equitable relief, . . . granted only as a matter of judicial discretion, [and] exercised in the public interest.")); New Jersey Tpk. Auth. v. Parsons, 3 N.J. 235, 239 (1949) ("The [Declaratory Judgment] Act merely broadens the rationale of remedies long cognizable in equity," rather than enlarging the equitable remedies a court may provide); Stop & Shop Supermarket Co., LLC v. County of Bergen, 450 N.J. Super. 286, 294 (App. Div. 2017) ("[T]he right to relief under the [Declaratory Judgment Act] is procedural in nature; it does not create substantive rights to relief" beyond rights to relief that already exist (cleaned up)).

A court's equitable powers do not include remedies that go beyond making the plaintiff whole or depriving the defendant of ill-gotten gains; in other words, equity does not include the power to penalize, for any purpose. See Liu v. SEC, 591 U.S. 71, 82–83 (2020) (enforcing a "penalty" is "outside . . . equitable powers," such that while disgorgement and restitution are traditional forms of equitable relief, they may not exceed "the net profits from wrongdoing, that is, 'the gain made upon [an unlawful activity], when both the receipts and payments are taken into the account'") (quoting Rubber Co. v. Goodyear, 76 U.S. (9 Wall.) 788, 804 (1870)); Int'l Silver Co. v. Rogers, 71 N.J. Eq. 560, 562 (1906) (explaining that "[i]t is not the function of a court of equity to punish").

Here, the NJCFLA's treble forfeiture provision is undoubtedly penal in nature, taking from the lender three times that which has been collected in excess of law, well beyond what would be required to deprive a lender of ill-gotten profit. See N.J. Stat. Ann. § 17:11C-33(b). Accordingly, longtime axioms of equitable jurisprudence dictate that the provision lies outside of the judiciary's equitable powers and may not be enforced by way of a declaratory judgment action. See Marshall, 82 U.S. at 149 ("Equity never, under any circumstances, lends its aid to enforce a forfeiture or penalty, or anything in the nature of either"); Siegman v. Maloney, 63 N.J. Eq. 422, 441 (1902) ("except when necessary to pay debts, the enforcement of [an] act that is penal in nature is "not to be favored by a court of equity").

Second, while LSNJ requests that this Court "clarify that the . . . damages provisions in section 33(b) [are] available defensively," SC LSNJab 3, a claim affirmatively seeking payment of money is not defensive, and LSNJ cites no support for the contrary position. Nor can Respondents locate any. Indeed, if a defendant could use a statute with no private right of action as a "shield" to seek affirmative remedies, the lack of a private right of action would be meaningless.

B. The NJCFLA's Criminal Voidness Provision Likewise Cannot Form The Basis For A Declaratory Judgment Actions Or The Defense To A Collection Action.

As with Section 33(b)'s treble forfeiture provision, LSNJ attempts to

bypass the lack of a private right of action under the NJCFLA's criminal voidness provision by arguing that the provision is available in declaratory judgment actions and as a shield. That is incorrect, though equitable relief under the NJCFLA's general excess-interest provision is arguably available.

First, the NJCFLA's criminal voidness provision may not form the basis for a declaratory judgment action because the provision is criminal in nature, and, therefore, may not be the basis for equitable relief. See N.J. Stat. Ann. § 17:11C-33(b) (dictating that voidness is a penalty for crimes of the fourth degree); Halsted, 41 N.J.L. at 565 ("Courts will not give an equitable construction to a penal law, even for the purpose of embracing cases clearly within the mischief intended to be remedied.").

Second, "a declaratory judgment, like other forms of equitable relief, 'should be granted only as a matter of judicial discretion, exercised in the public interest.'" In re Resol., 108 N.J. at 46 (quoting Proprietary Ass'n v. Board of Pharmacy, 16 N.J. 62, 71 (1954)) (modification in original). And under that limitation, declaratory judgment is unavailable where it "would frustrate the Legislature's" purpose or statutory design. Ibid. Here, the Legislature precluded private suits seeking voidness when passing the 1997 NJLLA. See supra Sec. II.C. In that context, permitting private litigants nonetheless to seek

voidness and rescission by way of the judiciary's equitable powers would be inappropriate. See Impink ex rel. Baldi v. Reynes, 396 N.J. Super. 553, 561 (App. Div. 2007) ("[I]t is well-established that 'equity follows the law,' particularly where a statute is involved."); see also Farmers Mut. Fire Ins. Co. of Salem v. N.J. Prop.-Liab. Ins. Guar. Ass'n, 215 N.J. 522, 527 (2013) ("Legislative enactments are never subservient to the common law when the two are in conflict with each other. The saying "equity follows the law" is a recognition that the common law must bow to statutory law. Any other notion is inconsistent with the most basic principles of America's democratic form of government.").

Third, the rule against surplusage requires a reading of the NJCFLA that precludes private enforcement of the criminal voidness provision defensively or by way of declaratory judgment actions for the same reasons that it precludes reading the criminal voidness provision to confer a private right of action. Namely, any reading of the NJCFLA that does not foreclose all avenues for private enforcement of the criminal voidness provision would necessarily negate the excess-interest provision permitting the recovery of principal, but not unlawful "interest, consideration or charges," in cases where such charges are "charged, contracted for or received." N.J. Stat. Ann. § 17:11C-33(b); see supra

Sec. II.D. The only way to read the two provisions in harmony is to read the excess-interest provision permitting recovery of principal, but not the criminal voidness provision, as enforceable defensively by consumers.[7] See Gomes, 253 N.J. at 15 ("When interpreting different statutory provisions, we are obligated to make every effort to harmonize them, even if they are in apparent conflict.") (internal quotes and citation omitted). This reading also reflects the pre-1997 reality in which a private right of action was created only by a civil voidness provision applicable to the charging of interest or fees in excess of law, but not to other violations (such as those related to licensing) under a criminal voidness provision. See supra Sec. II.A–C.[8]

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[7] By extension, because declaratory judgment, unless otherwise foreclosed, is generally available to "declare rights, status and other legal relations, whether or not further relief is or could be claimed," see N.J. Stat. Ann. § 2A:16-52, this provision could also likely be used as the basis for a declaratory judgment action seeking a declaration as to whether interest, consideration, or other charges are in excess of law and therefore unenforceable. This is in line with the treatment of the analogous Secondary Mortgage Act provision in the cases cited by LSNJ. See Westervelt, 190 N.J. Super. at 620; Stubbs, 85 N.J. at 359; supra n. 6.

[8] However, while the general-interest provision may be available defensively, it may not be used to claw back payments already made. The Legislature actively foreclosed that remedy by erasing the statutory authorization for borrowers to "recover from the lender" sums that had already been paid. While the factors precluding declaratory judgment and defensive use of the criminal voidness provision do not more broadly apply to the general excess-interest provision, it remains the case that statutes may not be used defensively to seek affirmative compensation and that declaratory judgment is

CONCLUSION

For the forgoing reasons, the NJCFLA does not confer a private right of action.

unavailable where contrary to statute and legislative design. See supra Sec. III.D; see also Connell, 231 N.J. Super. at 419–21 & n.6 (contrasting Westervelt and Stubbs, in which "plaintiffs did not seek return of payments they had made before institution of [their lawsuits]," in holding that borrowers could not use the Secondary Mortgage Loan Act to affirmatively seek repayment of sums already paid to the lender, even if the statute was available as a shield in a collection action, absent language expressly providing for such a right).

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