

Safeco Insurance Co. of America v Burr
FCRA Lessons for Banks

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On June 4, 2007, the United States Supreme Court (the Court) ruled on a case the results of which creditors and all companies that must comply with the requirements of the Fair Credit Reporting Act (FCRA) awaited anxiously. From a compliance perspective the case provides clarification regarding some aspects of the adverse action notice requirements of the FCRA. However, the ruling may cause increased confusion about when such notices are required. The possible confusion notwithstanding, given the lack of guidance in this area, the ruling provides useful direction. While the decision addresses the actions of insurance companies, banks and other creditors are required to deliver adverse actions notices and comply with the requirements of the FCRA and the lessons of the case can be applied to the issue of when banks are required to give adverse actions notices. The Court also addressed the standard of willfulness for alleged violations of the FCRA.

In an opinion issued in the consolidation of two cases, both on appeal from the United States Court of Appeals for the Ninth Circuit, *Safeco Insurance Co. of America v Burr and GEICO General Insurance Co v. Edo*, the Court took up two issues under the FCRA:

- Whether an insurer who considers an applicant's "consumer report" when setting the applicant's rate has the obligation to send an adverse action notice pursuant to section 1681m(a) of the FCRA if the applicant does not qualify for the best possible rate the insurer offers to its customers; and
- Whether a plaintiff must prove a "knowing and intentional" violation of the FCRA in order to establish "willful" conduct under 12 USC 1681o, or whether proof of a defendant's "reckless disregard" for its statutory obligations is sufficient to meet this standard.

The Court ruled:

- An adverse action can occur at the time of the initial application for insurance, not just at the time of renewal of an existing policy.
- The failure to offer the consumer the insurer's best premium rate, even if that decision is based on a consumer report, is not necessarily an adverse action triggering the need to provide an adverse action notice.
- At renewal time, only an increase over the prior premium rate class, not an increase over the neutral score, would trigger the adverse action notice requirement.
- "Willful" conduct for purposes of FCRA includes reckless disregard and does not require proof of a knowing or intentional violation.

- While Safeco failed to comply with the adverse action notice requirements, such failure was not “willful” and thus Safeco is not liable for statutory damages to the consumers involved, given the lack of clarity in the FCRA.

The Court was not as clear on how to determine whether the rate actually offered to the consumer adversely affects the consumer. Rather than comparing what the consumer was offered to the insurer’s best premium rate class to determine whether the consumer is adversely affected, the ruling directs insurers to compare what was offered to what the premium rate class would be if the consumer had had a neutral score or what the baseline rate would be in the absence of consumer reports used to rate the consumer.

The FCRA was enacted in 1970 and has been amended several times since then. Among other things, the statute requires that any person who takes adverse action with respect to any consumer that is based in whole or in part on any information in a consumer report must notify the consumer. The notice must contain information regarding how to contact the agency that reported the consumer’s credit, must tell the consumer that he or she may receive a free copy of the credit report and dispute its accuracy with the agency.¹ In the context of insurance, adverse action is a denial or cancellation of, an increase in any charge for, or a reduction or other adverse or unfavorable change in the terms of coverage or amount of any insurance, existing or applied for.

The Court states that the drafters of the FCRA intended to require notice and prompt challenge by the consumer only when the consumer would gain something if the challenge succeeded. The Ninth Circuit found that notification to the consumer was required if the consumer would have received a lower rate if his or her credit report was more favorable. The Court reversed and found that the approach taken by GEICO which was to first determine the consumer’s neutral score rate was acceptable. This was accomplished by determining the applicable rate without considering the consumer’s credit report. Then the insurer would consider the consumer’s credit report and if the resulting rate was higher than the neutral score rate, an adverse action notice would be sent to the consumer. This approach is to be used for new and existing customers.

The benchmark to determine whether a consumer is adversely affected by the insurer’s use of a consumer report in the underwriting process is whether the premium rate class would be offered if either a consumer report with a neutral score had been received or no consumer report had been received. Insurers, banks and creditors may run into obstacles as they establish neutral score rates.

The other significant issue addressed by the Court in this case is that of willful violations of the FCRA. The statute allows consumers the right to seek recovery against creditors for both negligent and willful violations of the FCRA. In order for a consumer to prevail for a negligent FCRA violation, the consumer is required to prove that actual damages are sustained.

The insurance companies argued that the liability under FCRA for willful violations reaches only those actions which may be said to have been carried out in reckless disregard of the company’s statutory duties. They argued that their interpretation of when an increase in rate occurs is

¹ 15 USC 1681m(a)

reasonable and, based on that interpretation, their actions were not a willful violation of the statute. The question of whether a willful violation requires a knowing or conscious wrongdoing or whether it only requires a showing of reckless disregard has been the subject of debate among parties involved in FCRA litigation and the result is a split among the circuits.

The Court concluded that “willful” for purposes of FCRA includes reckless disregard and does not require proof of a knowing or intentional violation. The Court based this determination on common law usage of reckless disregard and reasoned that common law has treated actions in reckless disregard of the law as willful violations. The Court then defined reckless disregard as requiring a high risk of harm, objectively assessed. Further, the Court found that a company has not acted in reckless disregard of the FCRA unless the action is not only a violation under a reasonable reading of the statute, but shows that the company ran a risk of violating the law substantially greater than the risk associated with a reading that was merely careless.

The objective reasonable test is a high bar to overcome. The consumer must show that the company’s interpretation was not only unreasonable but it was so unreasonable as to create an unjustifiably high risk that the company adopting it would be in violation of the law.

In the *Safeco* case, the Court’s finding that the insurer’s violation was not objectively unreasonable was aided by the lack of guidance on the issue in the statute, from the Federal Trade Commission and the split in the circuits. Because of all of these factors, the Court found that the company’s interpretation of the FCRA was not objectively unreasonable and fell short of raising the unjustifiably high risk of violating the statute necessary for reckless liability.

For all companies subject to the FCRA and its requirements, this opinion effectively means that compliance decisions reached in good faith, concerning unsettled areas of law, should not give rise to willful liability under FCRA so long as those decisions are not objectively unreasonable.