Nos. 06-84 & 06-100

In The
Supreme Court of the United States

SAFECO INSURANCE COMPANY OF AMERICA, *et al.*,

Petitioners,

v.

CHARLES BURR,

Respondent.

GEICO GENERAL INSURANCE COMPANY, *et al.*,

Petitioners,

v.

AJENE EDO,

Respondent.

On Writs Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF *AMICUS CURIAE* CONSUMER DATA INDUSTRY ASSOCIATION IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICUS CURIAE*

With the consent of all parties,[1] *amicus curiae*, the Consumer Data Industry Association ("CDIA"), submits its brief in support of petitioners Safeco Insurance Company of America, *et al*. and GEICO General Insurance Company, *et al*.

CDIA is an international trade association, founded in 1906, and headquartered in Washington, D.C. As part of its mission to support companies offering consumer information reporting services, CDIA establishes industry standards, provides business and professional education for its members, and produces educational materials for consumers describing consumer credit rights and the role of consumer reporting agencies in the marketplace. CDIA is the largest trade association of its kind in the world. Its membership includes more than 500 consumer credit and other specialized consumer reporting agencies operating in the United States and throughout the world.

In its more than ninety-year existence, CDIA has worked with the United States Congress and various state legislatures to develop laws and regulations governing the collection, use, maintenance, and dissemination of consumer-related information, including credit reports. In this role, CDIA was a key participant in the legislative efforts that led to the enactment of the Fair Credit Reporting Act ("FCRA") in 1970 and its subsequent amendments, including the 2003 amendments under the Fair and Accurate Credit Transactions Act. CDIA has also published, maintained and updated a manual entitled *How to Comply with the Fair Credit Reporting Act*, which is used by its members and their clients.

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[1] No counsel for a party authored any part of this brief. No person or entity, other than CDIA, made any monetary contribution to the preparation or submission of this brief. Letters memorializing the consent of all parties to the filing of *amicus* briefs are on file with the Clerk of the Court.

CDIA is vitally interested in the outcome of this case because the court of appeals' misstatement of the "willfulness" standard subjects CDIA's members, and the members' clients, to unforeseen, staggering liability. In addition, the court of appeals' error in defining "adverse action" in the insurance context subjects CDIA's members and their clients to exponentially increased administrative costs in preparing to respond to consumer inquiries that will result if the "adverse action" notice provisions apply to millions of consumers who were not subject to any negative action because of consumer report information.

Because CDIA has been involved in the consumer reporting industry for more than ninety years, representing a variety of consumer reporting entities, CDIA believes that its experience provides a unique perspective on the issues presented that will aid the Court in its decision.

THE CONSUMER REPORTING INDUSTRY

In enacting the FCRA, the U.S. Congress recognized that the efficient functioning of the consumer reporting industry was vital to the U.S. economy.[2] Today, billions of items of consumer data are voluntarily furnished to consumer reporting agencies each month by 30,000 data furnishers, resulting in the creation and maintenance of files on nearly 200 million consumers, with more than 1.5 billion consumer reports issued annually.[3]

Because consumer reports are compiled over the course of years, based on information obtained from different types of furnishers, and updated on a periodic, sometimes daily, basis; insurers, creditors, landlords and employers can obtain a far more detailed picture of the

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[2] 15 U.S.C. § 1681(a)(1); *TRW Inc. v. Andrews*, 534 U.S. 19, 23 (2001).

[3] Federal Trade Commission, *Report to Congress Under Sections 318 and 319 of the Fair and Accurate Credit Transactions Act of 2003* (2004) at 8-9 (hereinafter "*FTC Accuracy Report to Congress*"), http://www.ftc.gov/reports/facta/ 041209factarpt.pdf.

risk presented by a particular consumer. The availability of such information allows users of consumer reports to make fast, reliable decisions about a prospective applicant.[4] By making reliable data available to insurers, creditors, employers, landlords, law enforcement and counter-terrorist agencies, consumer reporting agencies provide the information infrastructure that contributes to the soundness, safety and efficiency of employment, housing, insurance, banking, finance, retail credit and law enforcement systems in the United States.

The availability of consumer report information enables the consumer spending that accounts for over two-thirds of U.S. gross domestic product.[5] U.S. consumers have greater and more rapid access to credit, at a lower cost, than any other consumers in the world.[6] Moreover, the availability of standardized, reliable consumer report information makes it possible for creditors to bundle consumer credit portfolios and sell them to investors. A recent study concluded that U.S. mortgage rates are a full two percentage points lower than those in Europe because creditors are able to securitize and sell their mortgage loan portfolios.[7] As a result, U.S. consumers save as much as $100 billion each year due to the efficiency and liquidity made possible by the consumer reporting industry.[8]

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[4] Michael E. Staten and Fred H. Cate, *The Impact of National Credit Reporting Under the Fair Credit Reporting Act: The Risk of New Restrictions and State Regulation*, at vi (May 2003), http://www.ftc.gov/bcp/workshops/infoflows/statements/cate02.pdf (hereinafter "Staten and Cate, *The Impact of National Credit Reporting*"); *Id.*

[5] Staten and Cate, *The Impact of National Credit Reporting* at ii.

[6] *See* Walter F. Kitchenman, *U.S. Credit Reporting: Perceived Benefits Outweigh Privacy Concerns*, The Tower Group, at 5 (Jan. 1999) (hereinafter "Kitchenman, *U.S. Credit Reporting*").

[7] Kitchenman, *U.S. Credit Reporting*, at 7.

[8] Staten and Cate, *The Impact of National Credit Reporting* at 7; *see also,* Fred H. Cate and Richard J. Varn, *The Public Record: Information Privacy and Access – A New Framework for Finding the Balance*, at 11 (1999) http://it.ojp.gov/initiatives/files/Public_Record.pdf.

Credit scores and insurance scores are often provided to creditors and insurers, either as part of a more detailed consumer report or alone to assist the creditor or insurer in making risk determinations. Credit scores are based on an analysis of several factors including the consumer's payment history; the amount owed by the consumer; the length of the consumer's credit history; the consumer's recent applications for credit as well as other factors.[9] Insurance scores are developed using similar consumer report information. Credit scores predict the likelihood of credit default; insurance scores predict the likelihood that an insured will make a claim for a covered event during the policy period.[10]

The U.S. consumer reporting system evolved and operates on a purely voluntary basis. There is no legal requirement that any entity furnish information to a consumer reporting agency. If the providers of consumer reports and the furnishers of consumer report information must face company-crippling liability for the good-faith compliance decisions they make on a daily basis, there will be little incentive to participate in the consumer reporting process. If consumer reports become less complete and, consequently, less accurate, they will be less predictive. The result will be increased transaction costs whenever a creditor or insurer makes a risk determination, and thus increased costs to the consumer. Such an outcome would effectively undo the thirty-five years of progress in the consumer credit and insurance industries since the 1970 enactment of the FCRA.

SUMMARY OF ARGUMENT

This Court should reverse the court of appeals' decision to correct a fundamental misstatement of the law that

[9] *See,* MyFICO, *What's In Your Score?*, http://www.myfico.com/CreditEducation/WhatsInYourScore.aspx; Vantagescore.com at http://www.vantagescore.com/consumerinfo.html.

[10] *Id.* at 1.

will subject consumer reporting agencies, users of consumer report information, and furnishers of information to virtually unlimited liability for their compliance decisions, most notably when struggling with novel interpretive issues arising from the FCRA's often ambiguous statutory language.

The FCRA is a complex statute, based on unique definitions, creating an intricate framework for regulating all aspects of consumer reporting. Select FCRA requirements are implemented by rules promulgated by the Federal Trade Commission ("FTC"), the federal banking agencies and the National Credit Union Administration ("NCUA").[11] However, for most FCRA provisions, there has been no rulemaking, leaving consumer reporting agencies, users of consumer reports and furnishers of consumer report information to interpret ambiguous language without definitive, authoritative guidance from any agency or court.

Consumer reporting agencies and users and furnishers of consumer report information are subject to civil liability, including statutory damages of up to $1,000 and punitive damages if they "willfully fail[] to comply with any requirement" imposed by the FCRA.[12] Because the FCRA does not limit damages in class actions, the potential liability is limited only by the number of consumers (200 million) on whom consumer reporting agencies maintain file information. The potential liability is, literally, in the hundreds of billions of dollars, often for alleged violations where there are no actual damages. This exposure coupled with the uncertainty regarding the legal obligations imposed by the Act create an environment

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[11] 15 U.S.C. § 1681a(s) (defining "Federal banking agency" by reference to section 3 of the Federal Deposit Insurance Act); *See,* 12 U.S.C. § 1813(z) ("The term 'Federal banking agency' means the Comptroller of the Currency, the Director of the Office of Thrift Supervision, the Board of Governors of the Federal Reserve System, or the Federal Deposit Insurance Corporation.").

[12] 15 U.S.C. § 1681n(a).

where consumer reporting agencies, users and furnishers are frequently required to defend frivolous claims where there has been no willful violation.

The court of appeals' decision effectively eliminates one of the principal defenses available to any consumer reporting agency or user or furnisher of consumer report information when the law is unsettled but the company has made a good-faith effort to comply. Under the court of appeals' novel willfulness standard, a company can be held liable for willfully violating the Act when:

(i) The compliance issue is one of first impression;

(ii) The statutory provision creating the compliance obligation is ambiguous;

(iii) The company obtains and follows the advice of counsel in developing its compliance approach; and

(iv) The district court holds, as a matter of law, that the interpretation adopted and followed by the company complies with the FCRA.

The court of appeals incorrectly held that, in order to establish a willful violation under the FCRA, the plaintiff need not show that the defendant *knew* that its actions violated any statutory obligation or requirement, but only that its compliance solution was implausible, untenable or the result of creative lawyering.[13] As demonstrated in the very case before this Court, such slippery standards lead to results that cannot and should not be sustained. The court of appeals itself, in attempting to apply its willfulness standard, issued two prior opinions,[14] twice errantly holding as a matter of law that all of the defendants willfully violated the FCRA, before withdrawing those

[13] *Reynolds v. Hartford Financial Services Group, Inc.*, 435 F.3d 1081, 1099 (9th Cir. 2006).

[14] *See, Reynolds v. Hartford Financial Services Group, Inc.*, 426 F.3d 1020 (9th Cir. 2005); *Reynolds v. Hartford Financial Services Group, Inc.*, 416 F.3d 1097 (9th Cir. 2005).

opinions and issuing the opinion now before the Court.[15] Although the court of appeals ultimately withdrew its liability determination, its willfulness standard remained; that standard cannot be applied in a manner that comports with the language of the FCRA or the expressed intent of Congress.

If uncorrected, the court of appeals' decision leaves consumer reporting agencies, users of consumer report information, and furnishers of consumer report information to negotiate the FCRA's numerous compliance obstacles with the guillotine of willfulness poised to drop if a reviewing court determines that a particular decision, even in a case of first impression, is sufficiently "creative" or "unreasonable" that it rises to the level of "implausibility."

Finally, the court of appeals incorrectly interpreted the substantive adverse action notice requirement in a manner that is inconsistent with the language of the statute and that imposes compliance burdens upon consumer reporting agencies, users of consumer reports, and furnishers of consumer report information that could not have been intended by Congress.

ARGUMENT

I. THE COURT OF APPEALS' DECISION THREATENS THE CONSUMER REPORTING INDUSTRY WITH UNLIMITED LIABILITY.

The court of appeals held that:

> [A]s used in the FCRA, "willfully" entails a "conscious disregard" of the law, which means "either knowing that policy [or action] to be in contravention of the rights possessed by consumers

[15] In its original opinion, the majority found "[b]ecause the district judge has already ruled that the companies' positions on all of the principal issues were correct as a matter of law, she has also held, *a fortiori*, that the companies' positions were not unreasonable." *Reynolds*, 416 F.3d at 116 n.18.

> pursuant to the FCRA or in reckless disregard of whether the policy [or action] contravened those rights."[16]

The court of appeals then explained that, in its view, "conscious disregard" can mean arriving at an "implausible" compliance determination or a determination that is the result of "creative lawyering."[17] In doing so, the court of appeals merged the FCRA's negligent liability standard with the willfulness liability standard. That is, according to the court, "[w]hether or not there is a willful disregard in a particular case may depend in part on the obviousness or *unreasonableness* of the erroneous interpretation."[18]

Civil liability for the negligent failure to comply with the FCRA is expressly limited to the recovery of actual damages and attorneys' fees.[19] The court of appeals' decision ignores this limitation. In the court of appeals' view, *unreasonable* compliance decisions can provide the basis for a claim that the FCRA has been willfully violated, thereby subjecting a defendant to statutory damages of up to $1,000 per violation; damages that are unlimited in the class action context, as well as punitive damages.

Consumer reporting agencies are sued literally hundreds of times each year.[20] Because of the availability of statutory damages without any need to establish actual harm, virtually all of these complaints allege that the consumer reporting agencies *willfully* violated the FCRA. Left uncorrected, the court of appeals' decision subjects consumer reporting agencies to potentially billions of dollars of liability for FCRA compliance determinations that are, at worst, *negligent* (*i.e.*, unreasonable) even when

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[16] *Id.* (citations omitted).

[17] *Reynolds*, 435 F.3d at 1099.

[18] *Id.* (emphasis added).

[19] 15 U.S.C. § 1681o.

[20] The number of lawsuits filed against consumer reporting agencies arise from fewer than 1/100,000th of the 1.5 billion consumer reports produced annually.

the compliance decision is endorsed by a U.S. District Court. For consumer reporting agencies, the result will be increased costs to account for the ever-present risk of staggering liability when making their compliance determinations, costs that will ultimately be borne by consumers.

A. The FCRA is a complex, often unclear, statutory regime.

The FCRA governs all aspects of consumer reporting. The FCRA contains 31 separate sections, 145 subsections, and approximately 34,000 words. Portions of the FCRA have been explained in an FTC Commentary that is now more than sixteen years old and which does not address any of the amendments added to the FCRA in 1996 or 2003.[21] The FTC staff has issued more than 100 staff attorney opinion letters attempting to explain various compliance obligations.[22] The 2003 amendments alone have been the subject of more than sixteen separate rulemakings by six different federal agencies, with more rulemaking scheduled.[23]

Since the 2003 amendments, some agencies have even failed to meet their statutory rulemaking deadlines. For example, when Congress amended the FCRA, it added a new notice requirement, applicable only to creditors.[24] The amendment creating the obligation required the FRB and the FTC to jointly issue implementing rules by December

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[21] 16 C.F.R. Pt. 600, App.

[22] *See*, http://www.ftc.gov/os/statutes/fcra/index.html.

[23] The Federal banking agencies are required to promulgate regulations "as necessary to carry out the purposes of the" FCRA. *See,* 15 U.S.C. § 1681s(e). In addition, in limited circumstances, the FTC and NCUA are also authorized to promulgate regulations implementing select portions of the FCRA. *See, e.g.,* 15 U.S.C. § 1681e(d)(2); 15 U.S.C. § 1681g(c)(3); 15 U.S.C. § 1681j(f)(2); *see also,* 15 U.S.C. § 1681b(g)(5); 15 U.S.C. § 1681c(h)(2)(A); 15 U.S.C. § 1681m(e)(1).

[24] 15 U.S.C. § 1681m(h).

1, 2004.[25] To date, almost two years after the initial rulemaking deadline, the rules have yet to be promulgated, or even proposed. When the rulemaking process is complete, creditors will be required to provide notice to consumers if the use of a credit report results in treatment that is less favorable than that received by other consumers. The subsection adding this risk-based pricing notice obligation contains language such as "material terms," "materially less favorable," "most favorable terms," and "substantial proportion of consumers."[26] The agencies' continued delay in rulemaking is just one of many indications of the FCRA's complexity and the inability of the federal agencies to define or explain many of the FCRA's terms.

In rulemaking under the FCRA, the agencies have defined, in detail, seemingly common terms such as "company,"[27] "consumer,"[28] "dispose,"[29] "disposing,"[30] "disposal,"[31] "file disclosure,"[32] "identifying information,"[33] "medical information,"[34] and "simple and easy to understand."[35] For other provisions, the agencies have remained silent. In the absence of guidance, consumer reporting agencies and users and furnishers of consumer report information must attempt to discern their obligations from the uncertain language of the FCRA, the smattering of

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25 15 U.S.C. § 1681m(h)(6).

26 15 U.S.C. § 1681m(h)(1).

27 12 C.F.R. § 41.3(d); 12 C.F.R. § 222.3(d); 12 C.F.R. § 334.3(d); 12 C.F.R. § 571.3(d); 12 C.F.R. § 717.3(d).

28 12 C.F.R. § 41.3(e); 12 C.F.R. § 222.3(e); 12 C.F.R. § 334.3(e); 12 C.F.R. § 571.3(e); 12 C.F.R. § 717.3(e).

29 16 C.F.R. § 682.1(c).

30 *Id.*

31 *Id.*

32 16 C.F.R. § 610.1(b)(7).

33 16 C.F.R. § 603.2(b).

34 12 C.F.R. § 41.3(k); 12 C.F.R. § 222.3(k); 12 C.F.R. § 232.1(c)(5); 12 C.F.R. § 334.3(k); 12 C.F.R. § 571.3(k); 12 C.F.R. § 717.3(k).

35 15 U.S.C. § 1681m(d)(2)(B); 16 C.F.R. § 642.2(a).

case law and a patchwork of informal agency pronouncements to the extent that they are helpful.

B. The FCRA includes terms that often have inconsistent or contradictory definitions or no definitions at all.

In the FCRA, even seemingly simple terms are not simply defined. Not only are the definitions often internally inconsistent, but courts interpreting the definitions often do so in a manner that imposes obligations upon consumer reporting agencies, users of consumer reports and furnishers of consumer report information that are not found in the language of the FCRA itself. Under the court of appeals' willfulness standard, misinterpreting such terms can result in unlimited liability.

For example, the term "firm offer of credit or insurance" is defined to mean "any offer of credit or insurance that will be honored. . . . "[36] The definition is then qualified. The offer, it turns out, is not so "firm" and it need not always be "honored."[37] Moreover, although the statutory language does not indicate that the offered credit must be of any particular value, the term "firm offer of credit" was interpreted by the Seventh Circuit Court of Appeals in November 2004 to require that the offer have "sufficient value."[38] The "sufficient value" standard is found nowhere in the FCRA or in any implementing rule and was not part of the firm offer of credit definition when the definition was added to the FCRA or when the Seventh Circuit rendered its decision. Nonetheless, following the decision, more than 250 putative class actions were filed against users of consumer report information alleging willful violations of the FCRA for having failed to make a firm

[36] 15 U.S.C. § 1681a(l).

[37] 15 U.S.C. § 1681a(l); *see also, Kennedy v. Chase Manhattan Bank, USA, N.A.*, 369 F.3d 833, 840 (5th Cir. 2004) (explaining the additional conditions that may apply to a firm offer of credit).

[38] *Cole v. U.S. Capital*, 389 F.3d 719, 726 (7th Cir. 2004).

offer of credit of sufficient value. Now, in addition to the statutory definition, CDIA's members' clients, the users of consumer report information, must read into the definition of "firm offer of credit" a "sufficient value" concept found nowhere in the statute. If the firm offer of credit will not be of sufficient value, the user does not have a permissible purpose to obtain the consumer report and the consumer reporting agency may not furnish the consumer report to the user. The absence of a permissible purpose can give rise to a class action claim that the FCRA was willfully violated.

The "adverse action" definition, which is the subject of the appeal before this Court, also presents numerous inconsistencies and opportunities for misinterpretation. Adverse action means something different in the credit context than it means in the insurance or employment contexts.[39] In a credit transaction, a consumer report user would not take adverse action by failing to provide credit at an interest rate that was equal to the rate it would charge a hypothetical consumer with the top potential credit score.[40] In the insurance context, at least according to the court of appeals, the failure to offer insurance to a consumer at a premium rate equal to that which would be offered to a consumer with the top potential insurance score is adverse action.

Other provisions impose compliance obligations using terms that are undefined. For example, the FCRA requires that furnishers of consumer report information provide

[39] In the credit context, the FCRA defines "adverse action" by incorporating the definition found in the Equal Credit Opportunity Act. 15 U.S.C. § 1681a(k)(1)(A). Adverse action in the credit context does not, however, include a counteroffer by a creditor that the consumer accepts. 12 C.F.R. § 202.2(c). In the employment context, "adverse action" means "a denial of employment or any other decision for employment purposes that adversely affects any current or prospective employee. . . . " 15 U.S.C. § 1681a(k)(1)(B)(ii).

[40] *See*, 15 U.S.C. § 1681a(k)(1)(A); 15 U.S.C. § 1691(d)(6); 12 C.F.R. § 202.2(c)(1).

"accurate" information to consumer reporting agencies.[41] The FCRA also requires that consumer reporting agencies maintain "reasonable procedures" to assure "maximum possible accuracy"[42] when preparing a consumer report and imposes upon furnishers the obligation to investigate when a consumer disputes the "completeness" or "accuracy" of consumer report information.[43] The FCRA fails to define any of these critical terms, leaving consumer reporting agencies and furnishers to reach their own conclusions about the meaning of terms that are anything but clear. According to the FTC, "accuracy is a complex issue and presents challenges in defining and identifying errors."[44]

In the 2003 amendments to the FCRA, Congress required the FTC to study the accuracy and completeness of consumer reports and report to Congress.[45] In responding, the FTC reasoned that it must first study the "feasibility of a methodology" that will be used to assess accuracy and completeness.[46] In effect, although the accuracy and completeness requirements had been part of the FCRA for more than twenty-three years, as of 2004, the FTC did not know how to measure compliance with the requirement. Given the complexity of the credit reporting process under the FCRA, this was no surprise to the consumer reporting agencies who had struggled with this obligation for years.

Similarly, the meaning of "complete" for consumer reporting purposes remains unclear. As the FTC has

[41] 15 U.S.C. § 1681s-2(a)(1)(A).

[42] 15 U.S.C. § 1681e(b).

[43] 15 U.S.C. § 1681s-2(b)(1)(D)-(E).

[44] *FTC Accuracy Report to Congress* at 22.

[45] *Id.; see also*, Federal Trade Commission, *Notice of Roundtable To Aid Federal Trade Commission Staff in Conducting a Study of the Accuracy and Completeness of Consumer Reports, Pursuant to Section 319 of the Fair and Accurate Credit Transactions Act of 2003*, 69 Fed. Reg. 32549, 32550 (Jun. 10, 2004).

[46] *FTC Accuracy Report to Congress* at 32.

recognized, the FCRA itself and its amending legislation do not even agree on the meaning of "completeness."[47] A consumer may believe that a consumer report is "incomplete" because account information is not reported for every account the consumer has opened. The FCRA does not require any creditor or insurer to provide transaction and experience information to any consumer reporting agency. Because the consumer reporting system is voluntary,[48] it is possible that not all of the consumer's account information will be reflected in a consumer report.[49] For a consumer with a good payment history on a particular account, the absence of that information – *i.e.*, the report's incompleteness – may result in the consumer having a lower credit score. For a consumer who has missed a number of payments, the absence of this information will benefit the consumer and may result in the consumer having a higher credit score than would otherwise be the case if the report were complete. In both instances, the report is arguably "incomplete" because it does not contain all of the information regarding the consumer's credit history for every account the consumer has opened. The report, however, would be "complete" for FCRA purposes because the missing information was never reported to the consumer reporting agency.

Reflecting the difficulty in defining accuracy and completeness, courts have applied different tests to determine whether consumer report information is accurate or

[47] *FTC Accuracy Report to Congress* at 5 n. 10.

[48] *See*, *Interagency Advance Notice of Proposed Rulemaking to Enhance the Accuracy and Integrity of Information Furnished to Consumer Reporting Agencies Under Section 312 of the Fair and Accurate Credit Transactions Act*, 71 Fed. Reg. 14419, 14421 ("Most of the information that consumer reporting agencies collect and maintain is provided voluntarily by furnishers.").

[49] Some creditors do not furnish transaction and experience information at all while others only furnish such information to one or two of the nationwide consumer reporting agencies. *FTC Accuracy Report to Congress* at 12.

complete under the FCRA.[50] When courts have examined the issue under a standard of reasonableness, they have often applied a balancing test, pursuant to which the court weighs the potential that the information in a consumer report will create a misleading impression against the availability of more accurate or complete information and the burden of providing such information.[51] The consumer reporting agencies' obligation to follow reasonable procedures to assure the accuracy of consumer report information is appropriately examined under traditional tests for negligence.[52] Increasingly, however, plaintiffs allege that a consumer reporting agency's failure to follow reasonable procedures to assure accuracy constitutes a "willful" violation of the FCRA, not just a negligent violation.

If the court of appeals' decision is not reversed, other courts may conclude that a consumer reporting agency's negligence in preparing an "inaccurate" consumer report gives rise to a willful violation, even absent any actual damages. At the very least, the litigation risk would create serious disincentives for consumer reporting agencies to provide the robust consumer report information upon which the nation's economy has come to depend.

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[50] *Compare, e.g., Sepulvado v. CSC Credit Services, Inc.*, 158 F.3d 890, 896 (5th Cir. 1998), *cert. denied*, 526 U.S. 1044 (1999) (report is inaccurate when it is patently incorrect or misleading) *with Koropoulos v. Credit Bureau, Inc*., 734 F.2d 37, (D.C. Cir. 1984) (factual inaccuracy exists if information that is technically correct is misleading; and incomplete information is a type of inaccuracy distinct from misleading information); and *Dalton v. Capital Associated Industrie*s, 257 F.3d 409 (4th Cir. 2001) (reporting agency may be liable if a third party vendor reports information that is inaccurate because it is misleading).

[51] *Koropoulos,* 734 F.2d at 42; *Alexander v. Moore & Associates,* 553 F. Supp. 948 (D. Haw. 1982).

[52] *E.g., Stewart v. Credit Bureau, Inc.*, 734 F.2d 47 (D.C. Cir. 1984); *Podell v. Citicorp Diners Club, Inc.*, 112 F.3d 98 (2d Cir. 1997).

C. The official guidance concerning FCRA compliance has been inconsistent, incomplete and, at times, rejected by the courts.

Because the FTC enforces the FCRA with respect to insurers and other users and furnishers of consumer report information, counsel for these companies have sought guidance from the FTC. They have obtained conflicting and often unhelpful advice. Courts that have considered the informal guidance provided by the FTC staff have sometimes rejected it as unpersuasive.[53] One district court, considering the FTC staff's opinion concerning the meaning of "increase" in the definition of adverse action for insurance purposes (one of the issues before this Court) rejected the FTC staff's views, in part, because the FTC's interpretation relied upon legislative history for previous proposed amendments to the definition of "adverse action" that were never enacted and that were substantially different from the enacted definition.[54]

The Federal banking agencies have also disagreed with the FTC's staff interpretation of the FCRA's provisions. For example, in July 2000, the FTC staff opined that a lender does not have a permissible purpose under the FCRA to obtain a consumer report on an individual who is the principal, owner, or officer of a commercial

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[53] *Scharpf v. AIG Marketing, Inc.,* 242 F. Supp. 2d 455, 465 (W.D.Ky. 2003) ("the [FTC] position should be followed to the extent persuasive." (citing *United States v. Mead Corp.,* 533 U.S. 218, 228 (2001)). . . . however, the Court does not find the FTC's position to be persuasive."); *Milbauer v. TRW, Inc.*, 707 F.Supp. 92 (E.D.N.Y. 1989) ("the Court rejects the [Federal Trade] Commission's bright line approach to determine whether or not a consumer credit agency must respond to a consumer's inquiry.").

[54] *Mark v. Valley Ins. Co.*, 275 F. Supp. 2d 1307, 1318 (D.Or. 2003) ("As a result, the Court concludes the legislative history relied on by [Plaintiff] does not indicate clearly that Congress meant something other than the plain meaning of the statutory language in § 1681a(k)(1) or that the Court's literal interpretation of that plain meaning is contrary to Congressional intent."), *abrogated by*, *Reynolds v. Hartford Financial Services Group, Inc.*, 435 F.3d 1081, 1099 (9th Cir. 2006).

loan applicant.[55] In response to the staff attorney opinion letter, the Federal banking agencies wrote to the FTC,[56] expressing their belief:

> [T]hat a contrary view, as implied in the [FTC staff's] Tatelbaum Letter, raises concerns regarding safe and sound lending practices, operational efficiencies, and credit availability. Our interpretation of the FCRA, by contrast, would resolve those concerns in a manner that is fully consistent with the terms and purposes of the FCRA and that promotes prudent lending practices.[57]

Eleven months later, the FTC reversed itself, concluding that the FCRA permits a lender to obtain a consumer report in connection with a business credit transaction if the consumer will be personally liable.[58]

Given the court of appeals' willfulness standard, one must ask whether the court of appeals would have concluded, during the time between the two staff attorney opinion letters, or before the federal banking agencies objected, that a lender who obtained a consumer report on an individual who guaranteed a commercial loan had willfully violated the FCRA? If the lender relied on the advice of counsel to determine that it could obtain such a report, would the court of appeals have not only disagreed but concluded that the decision was unreasonable? These questions demonstrate the risk now faced by those who

[55] FTC Staff Opinion Letter from David Medine to Charles Tatelbaum, p. 3-4, (Jul. 26, 2000).

[56] Office of the Comptroller of the Currency, Board of Governors of the Federal Reserve System, Federal Deposit Insurance Corporation and Office of Thrift Supervision General Counsels' Letter to Federal Trade Commission, p. 2 (May 31, 2001), *available at* http://www.occ.treas.gov/ftp/advisory/2001-6a.pdf.

[57] *Id.*

[58] FTC Staff Opinion Letter from Joel Winston to Federal Banking Agency Counsels (Jun. 22, 2001).

must comply with the FCRA in the wake of the court of appeals' decision.

When attempting to comply with unclear provisions not explained in the FCRA's Commentary, case law, or other authoritative guidance, consumer reporting agencies and users and furnishers of consumer report information have often turned to the FTC for informal guidance in understanding their compliance obligations. In fact, one of the FTC's most senior staff attorneys responsible for FCRA enforcement recently testified in a pending case involving risk-based pricing that the FTC staff recognized that the insurance industry had a "difficult problem" drafting adverse action notices based on the FTC's informal interpretations, but that it was up to the "insurance lawyers to figure out what to do."[59]

The point here is not to highlight the FTC's change of position, or that courts have rejected its informal compliance determinations, or even to illustrate that the FTC has left those parties who seek its guidance to their own devices; but rather to demonstrate the complexity of the FCRA and the compliance challenges facing consumer reporting agencies and their clients.

D. The court of appeals' decision eliminates the protections provided by the FCRA's reasonableness standard.

The court of appeals' holding that "willfulness" can be established without conscious wrongdoing is inconsistent with the text and structure of the FCRA, the Act's balancing of the rights of consumers against the needs of the economy, and the legislative history of the Act.

Although the Act contains no express definition of the word "willful," the intended definition is illuminated by the other appearance of the word "willful" in the FCRA, in

[59] Deposition of Clarke Brinckerhoff, *Ashby v. Farmers Insurance Company of Oregon et al.*, U.S. District Court for the District of Oregon, Case Number CV 01-1446 BR, Sept. 6, 2006, p. 91:3-91:16.

section 1681h(e). As this Court has repeatedly observed, "identical words used in different parts of the same act are intended to have the same meaning."[60] This maxim is especially applicable here, since section 1681h(e) makes explicit reference to section 1681n. Specifically, it provides that:

> Except as provided in sections . . . [U.S.C. §§ 1681n and 1681o], no consumer may bring any action . . . in the nature of defamation, invasion of privacy, or negligence against any consumer reporting agency, . . . user . . . , or any . . . furnishe[r] . . . except as to false information furnished *with malice or willful intent to injure* such consumer.[61]

The use of "willful" in § 1681h(e) is clearly inconsistent with the court of appeals' definition of willful as including mere recklessness. A "willful intent to injure" necessarily connotes *actual* intent, as it is impossible to see how a defendant may be in reckless disregard of its own "intent to injure."

Moreover, the court of appeals' watered-down standard of "willfulness" under which a legal judgment as to a "previously undecided question" can be a willful violation if it does not conform to "an answer . . . [that] is objectively apparent,"[62] is dangerously inconsistent with the nature of the obligations set forth in the FCRA. The Act is designed to encourage consumer reporting agencies to make "reasonable" judgments that protect consumers without unduly limiting the flow of (or raising the price of) information that Congress understood to be critical to the proper functioning of American commerce. The court of appeals' willfulness standard, which threatens the

[60] *IBP, Inc. v. Alvarez,* 546 U.S. 21, 23 (2005); *Sullivan v. Stroop*, 496 U.S. 478, 484 (1990) (applying the "normal rule of statutory construction that 'identical words used in different parts of the same act are intended to have the same meaning' ") (citations omitted).

[61] 15 U.S.C. § 1681h(e) (emphasis added).

[62] *Reynolds*, 435 F.3d 1099.

imposition of unlimited financial penalties based on standardless, *post hoc* determinations, upsets that balance by creating overwhelming incentives for consumer reporting agencies to err on the side of adopting procedures far more restrictive than what reasonableness would require.

Congress made a considered decision to avoid bright-line rules in many of the key provisions of the FCRA.[63] Instead it adopted a reasonableness-based approach designed to protect consumers while not unduly interfering with the important commercial purposes of credit reporting.[64] This approach cannot coexist with the imposition of punitive liability on the basis of a "willfulness" standard that does not require conscious wrongdoing. A reasonableness standard necessarily requires the exercise of judgment and discretion as to what the statute requires, and a jury or reviewing court, like the court of appeals in this case, may find even a good-faith interpretation of the requirements of the statute "implausible" and therefore (under the court of appeals' approach) potentially worthy of punishment. In particular, because reasonableness is often in the eye of the beholder, any consumer reporting agency that makes a decision that is not *maximally* protective of consumer rights necessarily "disregards" a risk that its actions will later be deemed "unreasonable"

[63] *See, e.g.*, 15 U.S.C. § 1681(b); 15 U.S.C. § 1681e(a); 15 U.S.C. § 1681i(a)(1)(A); *see also*, 15 U.S.C. § 1681i(a)(5)(C); 15 U.S.C. § 1681s-2(a)(1)(A); 15 U.S.C. § 1681d(c); 15 U.S.C. § 1681m. Other provisions of the Act set forth obligations that depend on similarly generalized terms and/or require discretionary judgments. *E.g.,* 15 U.S.C. § 1681k(a)(2); 15 U.S.C. § 1681i(a)(5).

[64] The legislative history confirms that Congress sought to craft a regulatory regime that can "prevent consumers from being unjustly damaged by inaccurate credit reports" while avoiding "undue burdens on legitimate credit bureaus" that play a "vital role" in the nation's economy. *See* 115 Cong. Rec. 33412 (Nov. 6, 1969) (statement of Sen. Williams); *see also* 115 Cong. Rec. 33410 (Nov. 6, 1969) (statement of Sen. Proxmire) (observing that "I think we have a bill that will work . . . for the consumer and will protect the very important interests of a vital industry.").

and therefore "in contravention of the rights possessed by consumers pursuant to the FCRA."[65]

Under the court of appeals' approach, the only thing protecting such a consumer reporting agency from potentially unlimited punitive liability is the hope that a jury will later find that its disregard of that risk was not "reckless." The flimsiness of such protection necessarily imposes tremendous pressure on consumer reporting agencies to flee from the "reasonableness" standard Congress intended toward the most consumer-protective approach without regard to the effects on commerce or the increased costs passed on to all consumers.

These concerns about potential liability, moreover, are by no means hypothetical. The volume of FCRA litigation is large. There is an organized plaintiffs' bar and consumer reporting agencies, users and furnishers of consumer report information are sued hundreds of times each year, including in numerous class actions. Because consumer reporting agencies generate over 1.5 billion consumer reports per year relating to 200 million consumers, even a relatively minor or technical violation can expose consumer reporting agencies to crushing liability.[66] By removing the requirement that plaintiffs produce objective proof of conscious wrongdoing, the court of appeals' standard dramatically expands the potential liability of consumer reporting agencies, users and furnishers of consumer report information and increases the costs of defense for any case in which willfulness is alleged and class certification is sought.

This Court should reverse the court of appeals' decision and make clear that any finding of willfulness in the context of a claimed FCRA violation requires a showing

[65] *Reynolds*, 435 F.3d at 1098.

[66] *See, e.g., Trans Union LLC v. Federal Trade Comm'n*, 536 U.S. 915 (2002) (Kennedy, J. dissenting from denial of certiorari) ("Because the FCRA provides for statutory damages of between $100 and $1,000 for each willful violation, petitioner faces potential liability approaching $190 billion.").

that the consumer reporting agency, user or furnisher engaged in conscious wrongdoing and did not simply reach an incorrect and unreasonable conclusion as to the interpretation to be given to a not-yet-judicially-construed statutory obligation.

II. THE COURT OF APPEALS' INTERPRETATION OF "ADVERSE ACTION" WILL IMPOSE EXTRAORDINARY BURDENS UPON CONSUMER REPORTING AGENCIES THAT CONGRESS DID NOT INTEND.

The court of appeals held that any consumer who, based in whole or in part on consumer report information, does not receive the insurance premium rate that would be charged to a hypothetical consumer with the top potential insurance score has suffered adverse action.[67] The court's decision improperly defines "adverse action" in the insurance context in a manner that fails to achieve the policy objectives purportedly underlying the court's decision, and imposes enormous, counterproductive compliance burdens upon consumer reporting agencies, consumer report users and furnishers of consumer report information.

The court based its interpretation of "adverse action" on its belief that it "best comports with the stated purpose of the FCRA: to ensure the '[a]ccuracy and fairness' of credit reporting."[68] The court believed that its decision advanced this purpose by: (i) allowing consumers to check the accuracy of their consumer report information; and (ii) even when the information is accurate, giving consumers important information about the benefits of improving their credit report information.[69] The court's speculative basis for its decision does not comport with the manner in which insurers use insurance scores in setting premiums. As a result, the court's policy reasons for its interpretation

[67] *Reynolds,* 435 F.3d at 1092.

[68] *Id.*

[69] *Id.*

are invalid and are inconsistent with the real effect on consumers.

Because insurance scores are very accurate predictors of loss, they are widely used in insurance underwriting.[70] As a result, insurers are able to offer as many as 70% of their customers lower premiums.[71] Thus, for the vast majority of consumers, the charge for insurance is *decreased* from the premium that the insurer would have charged without the use of insurance scores. However, very few consumers are charged the lowest possible insurance premium when an insurance company bases the premium in whole or in part on consumer report information including an insurance score.[72] Because these scores are comprised of many different factors, even a consumer with an unblemished credit history can have an insurance score that is less than the top potential score. For example, a consumer may have no delinquent payments in his credit history, but because payment history accounts for only one-third of the score; other factors such as the amount of outstanding credit or the length of the consumer's credit history may cause the consumer to have a reduced insurance score.[73] In this way, a consumer report

[70] Insurance Information Institute, *The Use of Credit Information in Personal Lines of Insurance Underwriting*, p. 3 (June 2004), *available at*, http://www.iii.org/media/hottopics/insurance/creditscoring/credit_paper/.

[71] Frank M. Fitzgerald, Commissioner Office of Financial and Insurance Services, *The Use of Insurance Credit Scoring in Automobile and Homeowners Insurance* at 7 (2002), *available at* http://www.michigan.gov/documents/cis_ofis_credit_scoring_report_52885_7.pdf; National Association of Independent Insurers, *Statement to the Commissioner of Financial and Insurance Services Regarding the Use of Credit Information by Personal Lines Insurers*, p. 4 (June 16, 2002), *available at* http://www.michigan.gov/documents/cis_ofis_naii_statement_31885_7.pdf.

[72] *The Use of Credit Information in Personal Lines of Insurance Underwriting*, at 10 (only 11% of consumers have a FICO credit score of 800 or higher).

[73] Consumer Federation of America and Fair Isaac Corporation, *Your Credit Scores*, at 2 (2005), http://www.myfico.com/Downloads/Files/myFICO_CFA%20pamphlet.pdf; Vantage Score Solutions, LLC,

(Continued on following page)

that is accurate and complete, with no derogatory information, may cause a consumer to pay an insurance premium that is higher than the lowest premium available to a consumer with the top potential score. Because most consumers do not have the top potential score, according to the court of appeals' interpretation, the vast majority of insurance company customers suffer adverse action when they apply for insurance or renew an existing insurance policy, even when their insurance score actually reduces the premium they would otherwise be charged.[74] For consumer reporting agencies, such an outcome is not a mere academic exercise.

Millions of consumers obtain insurance from, or renew insurance with, insurers who use insurance scores to set initial premiums, or renew existing policies.[75] As a result of the court of appeals' decision, almost everyone who applies for insurance, or renews an existing policy, will receive an adverse action notice because they will be charged more than the lowest possible premium rate charged to those consumers with the top potential insurance score even when their credit or insurance score resulted in a lower premium. If uncorrected, the court of appeals' decision will result in the sending of tens of millions of adverse action notices each year to consumers who will be told they are the subjects of adverse action but whose consumer report information was accurate and contained no derogatory information.[76]

Consumer Information (2006), http://www.vantagescore.com/consumer info.html.

[74] *Reynolds*, 435 F.3d at 1092.

[75] *The Use of Credit Information in Personal Lines of Insurance Underwriting*, at 3 ("Because it has been shown to be such an accurate predictor of loss, some 90 percent of insurers use credit data in new business underwriting.").

[76] According to Fair Isaac, only 13% of the population has a credit score of 800 or higher on the FICO score range of 300 to 850. *MyFICO, Understanding Your Credit Score*, p. 7 (July 2005), available at http://www.myfico.com/Downloads/Files/myFICO_UYFS_Booklet.pdf. If

(Continued on following page)

For consumer reporting agencies and furnishers of consumer report information, the provision of these millions of additional adverse action notices means exponentially higher administrative costs to respond to consumer inquiries and disputes. Every consumer who receives an adverse action notice must be informed of their right to dispute the accuracy or completeness of their consumer report information with the consumer reporting agency.[77] After being informed that they are the subject of adverse action, the consumers may dispute any part of the report. Even if the dispute is unwarranted, the consumer reporting agency must conduct a "reasonable investigation," notify the furnisher of the information in dispute and include "all relevant information" regarding the dispute that the consumer reporting agency receives from the consumer.[78] The furnisher who receives the dispute from the consumer reporting agency must conduct its own investigation with respect to the disputed information and report the results of the investigation to the consumer reporting agency.[79] The consumer reporting agency must then report the results of its investigation, including the furnisher's response, in writing, to the consumer.[80] The response may include yet another free consumer report.[81]

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insurance companies base their best premiums in part on a credit score of 800 or higher, about 174 million consumers are eligible for an adverse action notice according to the court of appeals' decision.

[77] 15 U.S.C. § 1681m(a)(3)(B). In addition, as part of the 2003 amendments to the FCRA, the consumer is now permitted to dispute the accuracy of the consumer report information directly with the furnisher and need not go through the consumer reporting agency. 15 U.S.C. § 1681s-2(a)(8). The furnisher who receives the dispute must conduct an investigation of the disputed information, review all of the relevant information provided by the consumer and report the results of the investigation to the consumer. *Id.*

[78] 15 U.S.C. § 1681i(a)(1)-(2).

[79] 15 U.S.C. § 1681s-2(b).

[80] 15 U.S.C. § 1681i(a)(6)(A).

[81] 15 U.S.C. § 1681i(a)(6)(B)(ii).

In addition to the cost of providing free consumer reports to consumers who were not the subject of true "adverse action" because their premiums actually were lower than they otherwise would have been, the court of appeals' decision will require consumer reporting agencies to hire hundreds of employees to respond to thousands of consumer calls inquiring as to the consumer report information that caused them to be the subject of "adverse action" notices.

The structure of the FCRA, particularly as amended in 2003, demonstrates that Congress could not have intended to impose so significant a burden on the consumer reporting agencies. In 2003, the FCRA was amended to permit consumers to obtain, free of charge, a copy of all consumer report information on the consumer maintained by each nationwide consumer reporting agency and each nationwide specialty consumer reporting agency.[82] This information may be obtained each year. Thus, consumers may obtain at least three consumer reports each year at no cost. If the court of appeals' interpretation is correct, then, knowing that the vast majority of all consumers would be entitled to obtain a free copy of their consumer report because they would suffer insurance adverse action,[83] Congress nonetheless amended the FCRA to provide yet more free copies of the same consumer report information to the same consumers. Such a result is demonstrably absurd and should be avoided.

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[82] 15 U.S.C. § 1681j(a)(1)(A).

[83] When insurance companies use insurance scores to set premiums at the time of policy renewal (usually annually), under the court of appeals' interpretation, consumers who are charged a premium other than the premium charged to the potential best customer based on consumer report information would be entitled to an adverse action notice.

III. THE COURT OF APPEALS' INTERPRETATION OF ADVERSE ACTION IGNORES THE FCRA'S ACTUAL LANGUAGE AND THE DRAFTING PROCESS LEADING TO THE 2003 AMENDMENTS.

In holding that adverse action includes those instances in which a consumer is not charged the same insurance premium rate that would be charged to another consumer with the top potential insurance score, the court of appeals ignores Congress' actual legislative determinations when amending the FCRA to add a risk-based pricing notice requirement in the credit context.[84]

When Congress wanted to add a requirement that consumer report users inform consumers when the consumers were being charged less favorable rates than other consumers, it did so expressly, in a separate subsection, requiring such notice whenever credit was offered "on material terms that are materially less favorable than the most favorable terms available to a substantial proportion of consumers from or through" the consumer report user, "based in whole or in part on a consumer report."[85]

If the court of appeals is correct, then an even more onerous obligation was imposed upon insurers by negative implication. That is, because Congress *did not* amend the definition of "adverse action" in the insurance context,[86] the existing definition of adverse action means that each consumer who did not receive the lowest possible premium rate based on consumer report information – a rate offered only to the small fraction of insureds who have the top potential insurance score – was the subject of adverse action. The definition of adverse action in the insurance context says nothing about "top potential score" or "lowest possible premium," but the court of appeals reads these

[84] 15 U.S.C. § 1681m(h).

[85] 15 U.S.C. § 1681m(h)(1).

[86] 15 U.S.C. § 1681a(k)(B)(i).

terms into the definition, despite Congress' demonstrated ability to make such distinctions when it so chooses.

The court of appeals' decision also ignores the legislative drafting process that led to the risk-based pricing notice in the credit context. Prior to the enactment of the 2003 amendments to the FCRA, in October 2003, the U.S. Senate Banking Committee staff circulated a draft amendment to the FCRA that would create a "risk-based pricing" notice for creditors *and insurers*.[87] Under this proposal, a consumer notice would be required "if any person uses a consumer report in connection with a grant, extension or other provision of credit *or insurance* on material terms that are materially less favorable than the most favorable terms available to a substantial proportion of consumers from the person."[88] The notice would say, in pertinent part, that the "terms offered to the consumer were set based on information from a consumer report."[89]

The FTC wanted Congress to adopt the risk-based pricing amendment that included the reference to insurance and insurers.[90] To this end, the FTC met with insurance industry representatives to gain their support.[91] In return for the industry's support, the FTC was "willing to prepare [Senate Committee] report language to clarify the definition of adverse action" including a "move away from" the position previously articulated by the FTC staff in a staff opinion letter.[92]

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[87] October 14, 2003 email from Catherine Paolino to the Credit Task Force. A copy of the email and attached Senate Banking Committee fax appear at Appendix at A1-A5.

[88] Appendix at A3.

[89] Appendix at A4.

[90] *See* October 17, 2003 and October 20, 2003 emails from Catherine Paolina. A copy of the emails are attached at Appendix at A6-A11.

[91] Appendix at A6-A7.

[92] October 20, 2003 email. Appendix at A10-A11. The FTC's offer to "clarify" the FCRA's definition of "adverse action" in legislative history is inconsistent with the FTC's statements to the Ninth Circuit Court of Appeals that the FCRA was clear in the application of its adverse action

(Continued on following page)

The Senate Banking Committee staff decided to remove insurance from the scope of the risk-based pricing amendment, and the version Congress enacted as part of the 2003 amendments applied only to creditors.[93] If Congress had wanted to impose a risk-based pricing notice obligation upon insurers, the FTC would have written, and presumably Congress would have adopted, legislative history to that effect.[94]

This history reveals that a definition of "adverse action" in the insurance context that includes the *implicit* risk-based pricing component found by the court of appeals cannot be reconciled with Congress' demonstrated ability to impose such requirements expressly and the drafting history establishing that Congress considered such an explicit amendment and elected *not* to include it.

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notice requirements to insurance risk-based pricing based on credit reports and that any contrary interpretation was "absurd."

Brief of the Federal Trade Commission As *Amicus Curiae* Supporting Appellants and Urging Reversal, filed in *Reynolds v. Hartford Financial Services Group, Inc.*, Case No. 03-35695, pp. 13, 14, *available at* http://www.ftc.gov/ogc/briefs/fcrahartford.pdf. The audio recording of this Oral Argument is available at http://www.ca9.uscourts.gov/ca9/media.nsf/Media%20Search?OpenForm&Seq=2 (enter Case No. 03-35695).

[93] *See* 15 U.S.C. § 1681m(h). The risk-based notice provision is still not effective because, almost three years after its enactment, the FTC and the Federal Reserve Board have yet to promulgate rules to implement its requirements.

[94] The FTC's negotiations related to the risk-based pricing amendments also revealed that, despite the arguments contained in its *amicus* briefs filed in the appeals in *Reynolds v. Hartford* and the other cases appealed to the Ninth Circuit Court of Appeals, the FTC recognized that interpretations applying the FCRA's adverse action notice requirements to risk-based pricing insurance transactions created significant new compliance burdens, and that its policy concerns were satisfied in the form of adverse action notice given by insurers.

CONCLUSION

This Court should reverse the decision of the court of appeals because, if left uncorrected, the decision subjects consumer reporting agencies, users and furnishers of consumer report information to unlimited liability that is inconsistent with the language and structure of the FCRA. In correcting the court of appeals' error, this Court should hold that a willful violation of the FCRA can only be established by a showing that includes conscious wrongdoing. This Court should further hold that adverse action under the FCRA does not include the failure to charge the consumer the lowest possible insurance premium that would be charged to another consumer with the top potential insurance score.

Respectfully submitted,

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November 13, 2006

From: Paolino, Catherine [CPaolino@aiadc.org]
Sent: Tuesday, October 14, 2003 8:28 AM
To: Credit Task Force; Baldini, Don; McNamara, Glenn
Cc: Snyder, David; McManamy, Sean; Unnewehr, David; Zielezienski, Stephen; Roeberg, Nicole; Cantor, Drew; Mercado, Moses; Bouchard, Francis; Callanan, Susan
Subject: FCRA – New Notice
Importance: High

Risk Based Pricing Notice.pdf

Though without much notice, please draw your attention to the attached before today's Credit Task Force call.

The Senate Banking Committee is reviewing this language presently. It would add a notice requirement "if any person uses a consumer report in connection with a grant, extension, or other provision of credit or insurance on material terms that are materially less favorable than the most favorable terms available to a substantial proportion of consumers from the person, based in whole or in part on a consumer report, the person shall provide a notice to the consumer in the form and manner required by rules prescribed in accordance with this Subsection (e)." It has an exception if an adverse action notice was provided under Sec. 615(a) and it would require the FTC to make rules. Given the use of "material" and "substantial" the rules would be especially important.

<<Risk Based Pricing Notice.pdf>>

We seem to be hearing that the FTC is advocating this approach. Interestingly, it may imply a different approach to adverse action from the Ball informal opinion letter:

<http://www.ftc.gov/os/statutes/fcra/ball.htm>
http://www.ftc.gov/os/statutes/fcra/ball.htm

Here is a link to the FCRA as it presently stands:
<http://www.aiadc.org/dochandler.asp?file=/Files/Public/FairCreditAct.pdf>
http://www.aiadc.org/dochandler.asp?file=/Files/Public/FairCreditAct.pdf

Risk-Based Pricing Notice

§ 603

(u) Credit and Creditor – The terms 'credit' and 'creditor' have the same meanings as in Section 702 of the Equal Credit Opportunity Act (15 U.S.C. 1691a).

****

§ 615

(e) Duties of users in certain credit and insurance transactions.

(1) Subject to rules as provided in paragraph (5), if any person uses a consumer report in connection with a grant, extension or other provision of credit or insurance on material terms that are materially less favorable than the most favorable terms available to a substantial proportion of consumers from the person, based in whole or in part on a consumer report, the person shall provide a notice to the consumer in the form and manner required by rules prescribed in accordance with this Subsection (e).

(2) Exceptions. No notice shall be required under this Subsection (e) if:

(A) The consumer applied for specific material terms and was granted those terms, UNLESS those terms were initially specified by the person after the transaction was initiated by the consumer and after it obtained a consumer report; or

(B) The person has provided or will provide a notice to the consumer under Subsection (a) of this Section in connection with the transaction.

(3) A person that is obligated to provide a notice under Subsection (a) of this Section cannot meet that obligation by providing a notice under this Subsection (e).

(4) Content and Delivery of Notice. A notice under this Subsection (e) shall include at least the following information –

(A) That the terms offered to the consumer were set based on information from a consumer report;

(B) Identification of the consumer reporting agency that furnished that report;

(C) That the consumer can obtain a copy of a consumer report from that consumer reporting agency without charge; and

(D) The contact information specified by that consumer reporting agency for obtaining such consumer reports (including a toll-free telephone number established by the agency if the agency compiles and maintains files on consumers on a nationwide basis).

(5) Rulemaking. The Federal Trade Commission and the Board of Governors of the Federal Reserve System shall jointly prescribe rules, in accordance with Section 553 of Title 5, United States Code, to carry out the purposes of this Subsection (e). These rules may address but are not limited to:

(A) The form, content, time, and manner of delivery of any notice under this Subsection (e);

(B) Clarification of the meaning of terms used in this Subsection (e), including what terms are material and when terms are materially less favorable;

(C) Exceptions to the notice requirement under this Subsection (e) for classes of persons or transactions regarding which the agencies determine that notice would not significantly benefit consumers; and

(D) A model notice that may be used to comply with this Subsection (e).

****

Also, the bill must specify that:

Rulemaking. Regulations required by Section 615(e)(5) of the Fair Credit Reporting Act, as added by this Section, shall be issued in final form not later than one year after the enactment of this Act.

Effective Date. The amendments made by Subsection ___ shall become effective on the effective date of regulations prescribed in accordance with Subsection ___.

From: Paolino, Catherine [CPaolino@aiadc.org]
Sent: Friday, October 17, 2003 5:30 AM
To: Credit Task Force; McNamara, Glenn
Cc: Snyder, David; McManamy, Sean; Unnewehr, David; Zielezienski, Stephen; Mercado, Moses; Roeberg, Nicole; Cantor, Drew; Bouchard, Francis; Callanan, Susan; Karr, Gary
Subject: FCRA – New Notice

Importance: High

FCRA – AIA Review Notes on Ris . . .
Risk Based Pricing Notice.pdf

AIA met with the FTC yesterday. While interested in learning more about our industry, they were adamant about not removing insurance from this new risk based pricing notice, (e), and that they would not consider an exception that would allow an alternative initial notice. (The group we met with states that they believe they would be fair in rulemaking and that the existence of (e) helps them to back away from the Ball opinion letter interpreting adverse action in (a).) They seem to be under the impression that they can make (e)(1) reasonable and understandable for insurers through the rulemaking process. While perhaps this may be possible (at best) with respect to "material terms" and "materially less favorable," I do not understand how "available to a substantial proportion of consumers" could be quantifiable and workable in the insurance context. They said for example, if x% [some threshold amount] of your policyholders don't receive a particular specific rate, then the notice would be required. I hope you can help, either by explaining how this concept makes sense or by working with me to develop real examples of why this is impracticable. They indicated that they would be willing to consider an alternative to the "substantial proportion" approach, but I do not know the degree of their receptivity. In any event, if we are going to respond with suggested language it will need to be asap today.

Lastly, the group we met with indicated that they will be looking for guidance as to how to accomplish the study.

Thanks once again.

-----Original Message-----
From: Paolino, Catherine
Sent: Wednesday, October 15, 2003 4:18 PM
To: Credit Task Force; Baldini, Don; McNamara, Glenn
Cc: Snyder, David; McManamy, Sean; Unnewehr, David; Zielezienski, Stephen; Mercado, Moses; Roeberg, Nicole; Cantor, Drew; Bouchard, Francis; Callanan, Susan

Subject: FCRA – New Notice
Importance: High

Kindly review my attached notes on this issue asap; they are mostly based on the Credit Task Force call yesterday afternoon. Please let me know your suggestions overall as well as your specific thoughts on advocating an initial notice requirement. Thank you for your help.

<<FCRA – AIA Review Notes on RiskBased Pricing Notice – 101503.doc>>

-----Original Message-----
From: Paolino, Catherine
Sent: Tuesday, October 14, 2003 11:28 AM

To: Credit Task Force; Baldini, Don; McNamara, Glenn
Cc: Snyder, David; McManamy, Sean; Unnewehr, David; Zielezienski, Stephen; Roeberg, Nicole; Cantor, Drew; Mercado, Moses; Bouchard, Francis; Callanan, Susan

Subject: FCRA – New Notice
Importance: High

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<<Risk Based Pricing Notice.pdf>>

We seem to be hearing that the FTC is advocating this approach. Interestingly, it may imply a different approach to adverse action from the Ball informal opinion letter:

<http://www.ftc.gov/os/statutes/fcra/ball.htm> http://www.ftc.gov/os/statutes/fcra/ball.htm

Here is a link to the FCRA as it presently stands:

<http://www.aiadc.org/dochandler.asp?file=/Files/Public/FairCreditAct.pdf>
http://www.aiadc.org/dochandler.asp?file=/Files/Public/FairCreditAct.pdf

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From: Paolino, Catherine [CPaolino@aiadc.org]
Sent: Monday, October 20, 2003 11:29 AM
To: Credit Task Force; McNamara, Glenn; Callanan, Susan; Bouchard, Francis
Cc: Snyder, David; Cantor, Drew; Roeberg, Nicole; Mercado, Moses; Unnewehr, David; McManamy, Sean; Karr, Gary; Zielezienski, Stephen; Goldberg, Eric
Subject: FCRA – FTC – New Notice

Risk Based Pricing Notice – 10. . .
FCRA – AIA Review Notes on Ris. . .

Drew Cantor and I spoke again with Andrew Smith of the FTC this morning. We reviewed a number of issues, as outlined below.

SCOPE – He remains firm in his belief that all kinds of consumer reports should be subject to the notice requirement, not just those that relate to credit.

"TERMS OFFERED" INTERPRETATION – His thought with respect to (e)(4)(A) is that no further detail would be required for this item, only a simple statement that the consumer report was used to set the terms of the offer. He says that he understands that it would be an operational burden to itemize the ways that terms might differ and he recognizes that an adverse action notice puts people on the defensive and he pictures that this notice would [sic] neutral in nature. He indicated that he is willing to put together report language to this effect.

AMBIGUITIES, PRACTICAL PROBLEMS AND TRIGGER – He indicates that he is more concerned with over notification for adverse action than for this risked based pricing notice; he thinks it would be fine if everyone who does not get an adverse action notice gets this general notice. If that is acceptable, the ambiguity in (e)(1) is not important and the issue turns on line between the adverse action notice and the risk based pricing notice (not the line between the risk based pricing notice and no notice). He indicated that he thinks this notice would be beneficial to insurers as there has been litigation both when adverse action notices are and are not provided. He stated that he would be willing to prepare report language to clarify the definition of “adverse action” (though it would be a move away from the Ball opinion letter, I do not know how he would propose to define the term).

Let’s plan to discuss this on tomorrow’s Credit Task Force call. Are there both pros and cons to this moving forward?

FYI – Attached are the draft and our notes.

<<Risk Based Pricing Notice – 101403.pdf>> <<FCRA – AIA Review Notes on RiskBased Pricing Notice – 101703.doc>>