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Supreme Court defines “willful” violation of FCRA to include reckless disregard

On June 4, 2007, the United States Supreme Court explained what acts will entitle a Plaintiff to statutory damages under the Fair Credit Reporting Act, 15 U.S.C. § 1681n (FCRA). *Safeco Insurance Company v. Burr*, No. 06-84 (decided June 4, 2007). Specifically, it defined the term “willful” as used in the statute.

In a unanimous decision authored by Justice Souter (several Justices concurred), the Court held that the definition of willful includes both knowing violations and actions which are taken with reckless disregard of a statutory duty. Although the case involved adverse actions taken by insurers, the case is important to all

the customer.

Statutory Framework

Under FCRA, if a “user” of consumer reports takes an “adverse action” based on information contained therein, the user must provide the consumer with an “adverse action” notice containing specified information. 15 U.S.C. § 1681m. In the insurance context, an “adverse action” triggering FCRA’s notice requirement is defined as “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, in connection

“[R]eckless disregard of a requirement of FCRA would qualify as a willful violation within the meaning of § 1681n(a).”

users of consumer reports, including lenders, landlords, utilities companies, and many employers who use credit reports when making hiring decisions. It will also be of great importance to retailers sued in the recent spate of lawsuits under a recent amendment to FCRA, the Fair and Accurate Credit Transactions Act (FACTA), 15 U.S.C. § 1681c(g), which requires the truncation of credit card information on receipts provided to

with the underwriting of insurance.” *Id.* § 1681a(k)(1)(B)(i). FCRA permits recovery of actual damages, but also provides for statutory damages of between \$100 and \$1,000, and punitive damages, upon the showing that a person “willfully fail[ed] to comply” with FCRA. 15 U.S.C. § 1681n(a). Importantly, Congress did not cap this liability for statutory and punitive damages, as it had in other similar statutes.

Most circuit courts confronted with the issue had determined that to demonstrate willfulness, a plaintiff had to prove intentional conduct. However, the Ninth Circuit held that a plaintiff could satisfy the requirement by proving that a defendant acted “either knowing that the action violates the rights of consumers or in reckless disregard of those rights. . . .”

The Supreme Court had not previously defined the term “willful” in the context of FCRA. In fact, Supreme Court precedent had held that the specific definition of the term “willful” depended upon its statutory context. In some contexts, the Court had construed the term to mean a “voluntary, intentional violation of a known legal duty.”

However, in other contexts, specifically the Age Discrimination in Employment Act and the Fair Labor Standards Act of 1938, the Court had held that willfulness is satisfied by a lower “reckless disregard” standard relied upon by the Ninth Circuit.

GEICO had urged the Court to define willfulness as “the intentional violation of a known legal duty.” (GEICO Brief at 13.) Safeco added another requirement when it asked the Court to define it as the “voluntary, intentional violation of a known legal duty.” (Safeco Brief at 18.)

Factual Background

The Safeco case involved two separate cases consolidated by the Court on appeal from



the Ninth Circuit, which involved putative class action cases brought by insureds against two different insurance companies, Safeco and GEICO. The plaintiffs in both cases alleged they suffered adverse actions but were not provided FCRA adverse action notices.

The Safeco case. The Safeco case involved three different plaintiffs. Plaintiff Spano had her insurance policy cancelled four different times for non-payment. The fifth time it was cancelled, Safeco declined to renew it, based in part on information contained in a consumer credit report. Plaintiff Burr purchased a high risk policy issued by a Safeco company. His consumer credit information was consulted in connection with his tier placement, but he would have had the same placement, and the same premium, with the highest credit rating. When his policy was cancelled for non-payment, he purchased a new policy from another Safeco entity. Plaintiff Massey applied for renters insurance. Safeco relied on a consumer credit report and placed her in a tier with a higher premium. None of the three plaintiffs were issued adverse-action notices.

The GEICO case. The GEICO family of insurance companies consists of several different companies, each of which insures different levels of risk. Each company charges different premiums. Mr. Edo called GEICO Indemnity for a rate quote. With his permission, the sales counselor obtained a credit score. This score, along with fourteen other factors, was used for underwriting purposes, and the plaintiff was assigned to one of the GEICO companies.

GEICO then employed an automated system to compare the plaintiff's company and tier placement with the company and tier placement he would have received if GEICO had not considered his credit score and had relied solely on the other fourteen factors. The system automatically generated an adverse action notice whenever GEICO's consideration of the actual credit score resulted in placement with a company or tier with higher premiums than would have been the case for a hypothetical consumer with the same factors but with a neutral or average credit score.

However, if the system recognized that the plaintiff would have paid the same premium regardless of his credit score, it would not issue an adverse action notice. The plaintiff was offered a policy with GEICO Indemnity, which he accepted. He was not issued an adverse-action notice. He did not claim any actual damages, but instead sought statutory damages under FCRA of between \$100 and \$1,000 for himself and other putative class members.

The Holding

There were two issues before the Court. The first was the definition of the term "willfully." The second was whether the insurers' actions constituted an adverse action requiring notice under FCRA.

The Court first held that the term "willfully" includes not only knowing violations, but also reckless disregard of a statutory duty.

The Court then noted that a first-time

premium can be a rate "increase." The Court held that GEICO's actions were not a violation of FCRA because Edo's rate and placement would have been the same if GEICO had not reviewed his credit report. The Court found that the baseline against which the alleged "increase" should be measured was "what the applicant would have had if the company had not taken his credit score into account...." It found that the initial rate offered to Edo was the one he would have received if his credit score had not been taken into account, and so GEICO owed him no adverse action notice.

Safeco, on the other hand, had concluded that no adverse action notice was necessary for a first-time insurance applicant, because there had been no "increase." While the Supreme Court disagreed with Safeco, it also held that Safeco was not reckless, because there had not been any prior appellate court or FTC guidance on the issue.

Significance

The Court's broad interpretation of "willfully" will significantly increase the potential liability of businesses that use consumer credit information. Those businesses must act quickly and vigilantly to bring their practices into compliance with FCRA.

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