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Supreme Court decides questions of first impression in FCRA class action cases

By Stuart D. Jones

The United States Supreme Court issued an important ruling in *Safeco Insurance Company of America v. Burr* on Monday, June 4, 2007, which favorably interpreted the Fair Credit Reporting Act (FCRA's) notice requirements. Bullivant Houser Bailey PC represented State Farm, Safeco, The Hartford, Unitrin, and The Progressive Companies. GEICO, Nationwide, and Farmers Insurance Group were also named as defendants in eight separate lawsuits filed in the United States District Court for the District of Oregon. Each lawsuit was alleged as a national class action.

The FCRA requires lenders, insurance companies and employers to provide an "adverse action" notice when a consumer's credit information negatively affects credit terms, insurance terms and rates or employment he or she is offered. In *Burr* and in each of the other lawsuits, the Plaintiffs claimed that these insurance companies willfully violated federal law by failing to notify consumers that their credit score resulted in a higher premium for insurance coverage.

The Act did not clearly define "adverse action," and, until the Court's decision in *Burr*, the insurance companies did not have the benefit of guidance from the courts of appeals or the Federal Trade Commission (FTC). In *Burr*, the Supreme Court adopted a definition of the term "adverse action" clarifying for the insurance industry when notice to consumers is required. The Court also determined that under these circumstances, a reasonable, albeit erroneous, reading of the Act was not "willful" or "reckless," which would subject any insurance company that violated the FCRA based on a good faith interpretation to statutory and punitive damages.

The Background

Six years ago, a group of plaintiffs sought certification of nationwide class actions against eight personal lines insurers (auto, homeowners, renters) based upon alleged willful violations of the FCRA. The FCRA requires insurance companies to send a notice to a consumer when the consumer's credit information is used to take "adverse action" in underwriting placement decisions and/or establishing premiums.

The statute provides for imposition of damages of $100 to $1,000 for willful violations — either willfully failing to send a notice when one was required, or willfully sending a notice that did not provide information required by the statute. If national classes were certified over the multi-year periods alleged by the plaintiffs, this created potential claims in each of the cases for substantial statutory damages and punitive damages:

- if the insurance companies were held to have willfully violated the statute, and
- if nationwide classes were certified.

The cases were assigned to Federal District Court Judge Anna Brown. Before reaching the question of class certification, Judge Brown granted summary judgments in favor of each of the insurers – finding the undisputed facts did not create a duty (that is, no "adverse action" occurred) to send a notice to the consumers.

The Ninth Circuit then overturned the District Court. State Farm, Safeco, GEICO and The

Hartford each filed interlocutory petitions for a writ of *certiorari* with the United States Supreme Court to request that the Court review the Ninth Circuit's decision. The Supreme Court took the unusual step of accepting review before final judgments were entered in any of these four cases.

The manner in which each of the insurance companies used credit information and the circumstances when they did or did not send "adverse action" notices varied in some respects. In the *Burr* decision, the Court disagreed with some of the rulings in the District Court (for example, whether premium rates could be said to have been "increased" where the consumer had not been insured by the company in the past) and with some of the positions advanced by the insurance companies on the circumstances where "adverse action" occurs (triggering the obligation to send a notice to the consumer).

In *Burr*, the Court addressed the particulars of GEICO's, and to a lesser extent, Safeco's use of credit information or scoring to set premium rates. The plaintiffs urged the Court to find the statute required sending "adverse action" notices with the argument that:

"the baseline [for determining whether adverse action occurred] should be the rate that the applicant would have received with the best possible credit score, while GEICO contends it is what the applicant would have had if the company had not taken his credit score into account * * *. We think GEICO has the better position * * *. Congress was * * * more likely concerned with the practical question whether the consumer's rate actually suffered when the company took his credit report into account than the theoretical question whether the consumer would have gotten a better rate with perfect credit."

Safeco Ins. Co. of America v. Burr, ___ U.S. ___, 127 S. Ct. 2201, 2213 (June 4, 2007).

The plaintiffs' interpretation would have required insurers to send "slews of adverse action notices." The Supreme Court adopted the reasonable, pragmatic reading of the intended meaning of the statute. Where "the initial rate offered to [the consumer] was the one he [or she] would have received if his [or her] credit score had not been taken into account, * * * [the insurance company] owed [the consumer] no adverse action notice under [the FCRA]." 127 S. Ct. at 2214.

The Plaintiffs' claims alleged "willful" violations of the statute. It is worthy of mention, therefore, that the Supreme Court noted that District Court Judge Brown and the insurance companies reached the same conclusions that no adverse actions were taken based upon the "plain meaning" of the language of the statute that governed when the duty to send notices applied. The Court went further and ruled that in the absence of prior judicial rulings or administrative guidance, Safeco's (and other insurance companies') reading of the statute, if erroneous, was not objectively unreasonable where the insurance company's reading had a "foundation in the statutory text" and "a sufficiently convincing justification to have persuaded the District Court to adopt it and rule in Safeco's favor." 127 S. Ct. at 2216.

The Supreme Court issued its rulings in *Safeco Ins. Co. v. Burr*, 551 US ___, 127 S. Ct. 2201 (June 4, 2007) and in *State Farm Mutual, et al. v. Willes*, ___ U.S. ___, 2007 WL 1660968 (U.S.), 75 USLW 3035 (June 11, 2007).