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SAFECO INSURANCE. CO. OF AMERICA v. BURR: DEFINING NOTIFICATION REQUIREMENTS AND WILLFULNESS UNDER THE FAIR CREDIT REPORTING ACT

TRAVIS S. SOUZA*

I. INTRODUCTION

In a recent decision, the United States Supreme Court resolved a critical dispute regarding the interpretation of the Fair Credit Reporting Act ("FCRA")[1] and its notice requirement. In *Safeco Insurance Co. of America v. Burr*,[2] the Court settled the definition of "willful" violation—a determination that will have enormous effects for insurance companies. Specifically, the Court held that willfulness not only includes knowing violations, but also includes a violation committed in reckless disregard of statutory obligations. Although both of the insurance companies in Burr were technically victorious—both were held not to have willfully violated the FCRA—the Court's interpretation of willfulness is more consumer-friendly. Still, Burr may have left the door open for insurance companies to avoid the notice requirement of the FCRA.

II. FACTS

Burr is a consolidated action involving two insurance companies, GEICO General Insurance Company ("GEICO") and Safeco Insurance Company of America ("Safeco").[3]

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* 2008 J.D. Candidate, Duke University School of Law.
1. 15 U.S.C. § 1681m(a) (2006).
2. Safeco Ins. Co. of Am. v. Burr, 127 S. Ct. 2201 (2007).
3. *Id.* at 2205.

Both cases involve interpretations of the FCRA. The relevant portion of the FCRA requires notice to a consumer subjected to "adverse action . . . based in whole or in part on any information contained in a consumer [credit] report."[4] The notice must, among other things, inform the consumer of the adverse action.[5] In terms of insurance companies, an "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."[6] Furthermore, anyone who "willfully fails" to provide notice under these provisions of the FCRA is liable to the consumer for actual, statutory and punitive damages.[7]

In the first of the consolidated cases, GEICO used an applicant's credit score as part of a variety of information to select the appropriate subsidiary insurance company, and the particular rate at which a policy was to be issued.[8] GEICO's policy was to compare a given applicant's company and credit rate tier placement with the company and tier placement that would have been assigned if it had been calculated without reliance on credit history.[9] In such cases, the applicant is provided only with an adverse-action notice if the "neutral" approach would have afforded them a lower priced tier or company. Respondent, Edo, had his credit score considered when his policy was issued.[10] However, because a neutral score would not have changed his company or tier, no adverse-action notice was sent to the applicant.[11]

In the second of the two consolidated cases, Safeco similarly utilized credit reports when determining initial insurance premiums.[12] Here, Respondents Burr and Massey were offered higher rates than the best possible rate because of their credit scores.[13] As with the first case, the applicants did not receive adverse-action notices.[14]

4. 15 U.S.C. § 1681m(a).
5. *Id.*
6. 15 U.S.C. § 1681a(k)(1)(B)(i).
7. 15 U.S.C. § 1681(n)(a).
8. *Burr*, 127 S. Ct. at 2206.
9. *Id.* at 2206–07.
10. *Id.* at 2207.
11. *Id.*
12. *Id.*
13. *Id.*
14. *Id.*

In both cases, the applicants initially brought suit, seeking statutory and punitive damages and claiming that the insurance companies were in violation of 15 U.S.C. § 1681m(a) by willfully failing to provide notice of an adverse action.[15] The district court in the first case granted summary judgment in favor of GEICO, finding that there is no adverse action when the premium charged would have been the same regardless of whether the credit report information had been considered.[16] The district court granted Safeco summary judgment as well, but on somewhat different grounds. The lower court found that an initial rate for a new insurance policy cannot be an "increase"—as required for an "adverse action"—without prior dealings.[17] In the absence of a previous rate, no comparison exists, meaning that no increase is possible, and consequently no adverse action occurred.[18]

The Ninth Circuit Court of Appeals reversed both judgments. In the case of GEICO, it held that if a consumer "would have received a lower rate for his insurance had the information in his consumer report been more favorable, an adverse action has been taken against him."[19] Because a better credit score could have assigned the applicant to a more affordable company, notice was required.[20] In addition, the Ninth Circuit interpreted willfulness to include a reckless disregard to comply with the FCRA.[21] Similarly, the appeals court reversed the district court in the action against Safeco, relying on its reasoning in GEICO's case that the notice requirement applies to an initial dealing between the insurance company and an applicant.[22]

The Supreme Court granted certiorari to address two issues. The first issue is whether willful failure under the FCRA includes a violation committed in reckless disregard of the consumer's rights. Second, if the answer to the first question is in the affirmative, then

15. *Id.* at 2206–07.
16. Edo v. GEICO Cas. Co., No. CV 02-678 BR, 2004 WL 3639689, at *4 (D. Or. Feb. 23, 2004).
17. *Burr*, 127 S. Ct. at 2206.
18. *Id.*
19. Reynolds v. Hartford Fin. Servs. Group, Inc., 435 F.3d 1081, 1093 (9th Cir. 2006).
20. *Id.*
21. *Id.* at 1099.
22. Spano v. Safeco Corp., 140 Fed. Appx. 746, 747 (9th Cir. 2005).

the Court would proceed to determine whether GEICO and Safeco committed reckless violations of the FCRA.

III. HOLDING AND REASONING

As to the first question, the Supreme Court held that willfulness does in fact include a violation committed in reckless disregard of the notice obligation.[23] Although some confusion may have existed regarding whether recklessness is determined objectively or subjectively, the Court held that reckless disregard is an objective standard. The Court reasoned that there is a difference between the use of the term "willfully" in the civil versus the criminal context.[24] Accordingly, the common-law usage in civil cases treats violations in reckless disregard as willful violations.[25] Therefore, willfulness includes action taken with "an unjustifiably high risk of harm that is either known or so obvious that it should be known."[26]

The Court then addressed the issue of whether GEICO and Safeco acted recklessly in violation of the FCRA. First, in considering this issue, the court disagreed with the district court's rationale in the action against Safeco. The Supreme Court held that initial rates charged for new insurance policies may constitute adverse actions.[27] A decrease, and thus an adverse action, does not require prior dealing between the insurance company and the applicant. Finding no policy rationale and no legislative history to support separate treatment of first-time applicants, the Court determined that such applicants are equally covered by the FCRA.[28]

Second, the Court held that for an adverse action to be "based . . . on" a credit report, the credit report must be a necessary condition for the difference in rates.[29] Because "based . . . on" suggests but-for causation, notice is only required if the applicant would have benefitted had the credit report not been examined.[30] In other words,

23. *Burr*, 127 S. Ct. at 2209.
24. *Id.*
25. *Id.*
26. *Id.* at 2215.
27. *Id.* at 2210–11.
28. *Id.*
29. *Id.* at 2212.
30. *Id.*

the use of a credit score must have been disadvantageous to the applicant.[31]

Next, to calculate whether the applicant has been disadvantaged, the issue becomes to which baseline rate the actual rate received should be compared. The Government and respondents argued that the applicant should be entitled to notice anytime his credit score was used as long as he would have received a better rate with the highest possible credit score.[32] The Court disagreed. Instead, it determined that the crucial inquiry is whether the applicant actually suffered from the use of his credit score.[33] To determine this, the applicant's actual rate should be compared to the rate he would have received if his credit score had not been used.[34] If the actual rate is not higher than this baseline rate, then the applicant has not been harmed by the use of the credit report.[35]

After establishing the legal standards, the Court addressed the two claims at hand. In the action against GEICO, it determined that GEICO was under no obligation to provide adverse-action notice when the applicant received the same initial rate that he would have received had his credit report not been considered.[36] Consequently, in the absence of a duty to provide notice, GEICO was not in violation of the FCRA.[37] Safeco, on the other hand, was in a different position. Because Safeco's use of the credit report may have led to different rates for the applicants, Safeco may have violated the FCRA by failing to give notice to the applicants. However, the insurance company did not act with the requisite recklessness. According to the Court, the common-law standard for recklessness requires "an unjustifiably high risk of harm that is either known or so obvious that it should be known."[38] Because Safeco's interpretation of the FCRA—reading that there cannot be an "increase" in the charges upon the first interaction with the applicant—was not unreasonable, it "falls well short of raising the 'unjustifiably high risk' of violating the

31. *Id.*
32. *Id.* at 2213.
33. *Id.*
34. *Id.*
35. *Id.*
36. *Id.* at 2214.
37. *Id.* at 2215–16.
38. Farmer v. Brennan, 511 U.S. 825, 836 (1994).

statute necessary for reckless liability."[39] Therefore, Safeco was not liable for statutory or punitive damages.

IV. IMPACT

Although both insurance companies avoided liability under the FCRA, the Supreme Court's decision in Burr reveals that consumers may have been victorious on several key issues. That being said, the Court seems to have drawn the roadmap for compliance with the FCRA notice requirement.

The Court made two key determinations that will make life more difficult for insurance companies going forward. First, the Court chose to adopt a more consumer-friendly standard for recovery than the insurance companies sought. GEICO and Safeco argued that the Ninth Circuit's interpretation was inconsistent with other federal appellate court decisions that held a violation of the FCRA requires that the insurance entity act with the understanding that its actions are not permitted.[40] However, by agreeing with the Ninth Circuit's interpretation that includes recklessness within the definition of willfulness, the Court adopted a consumer-friendly interpretation.

This distinction is crucial. Under the Court's holding, an insurance company is acting recklessly if its interpretation of the statute was highly unreasonable, and it should have known of the unreasonableness, even if the company subjectively believed that it was acting legally and not violating the rights of its consumers. From a practical view, consumers bringing suits will have an easier time proving a violation because they will no longer have to find evidence showing that the companies had knowledge of their risk of violating the FCRA.

Second, the Court determined that the notice requirement for adverse actions applies equally to first-time customers. The argument of the insurance companies had literal merit. As mentioned above, for a cognizable adverse action under the FCRA, the statute requires

39. *Burr*, 127 S. Ct. at 2205.

40. *See, e.g.*, Wantz v. Experian Info. Solutions, 386 F.3d 829, 834 (7th Cir. 2004) ("To act willfully, a defendant must knowingly and intentionally violate the [FCRA], and it must also be conscious that [its] act impinges on the rights of others."); Phillips v. Grendahl, 312 F.3d 357, 370 (8th Cir. 2002) (holding that a willful violation is nothing less than the "knowing and intentional commission of an act the defendant knows to violate the law").

an "increase" in the amount charged to the consumer. Again, the companies argued that for an increase to exist, there must be at least one prior quote to serve as a base of comparison. However, the Court noted—and correctly so—that there was no policy reason for this reading, and instead, "increase" simply requires that the rate is higher than it would have otherwise been, an interpretation that applies equally to first-time customers.[41] As with the interpretation of willfulness, this reading is significant. Had the Court agreed with the insurance companies, the notice obligation would leave an enormous loophole in the FCRA's notice requirement.

But, the remainder of the Court's opinion appears to offer a safe harbor for insurance companies. After setting forth a consumer-friendly standard for willfulness and broadening the base of individuals covered by the FCRA, the Court moved to the question of which baseline rate should be the standard of comparison for the actual rate when determining whether there was an increase. The Court determined that the proper comparison was what the applicant would have been charged if the credit report had not been used, as opposed to what the customer would have been charged if his credit report was better.[42]

This comparison leads to a curious result. Consider a company with a policy similar to GEICO's—that is, an insurance company that offers applicants an average rate when it does not check the applicant's credit score. Thus, if an applicant's credit score is considered, anyone with an average or above average credit score cannot by definition be harmed by the use of their credit report. This is the case even if they could have received a much better rate with a higher score.

Justice Stevens carries this point even further. What if it is the policy of an insurance company not to deal with applicants when the company does not check its credit report? The odd result that follows is that an applicant is never harmed when the credit score is part of the computation. Consequently, the insurance company is never required to give notice.

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41. *Burr*, 127 S. Ct. at 2210–11.
42. *Id.* at 2213.

V. CONCLUSION

At first glance, Burr appears to be a clear cut victory for the insurance companies. However, a deeper reading reveals that the Court has ruled against insurers on several significant issues. Still, while the ultimate result is unclear, it is quite possible that the Court has left a loophole for insurance companies to avoid the adverse-action notice requirement of the FCRA altogether.