Supreme Court Ruling on the Fair Credit Reporting Act and Auto Insurers' Use of Insurance Scores to Set Premiums

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ON June 4, 2007, the United States Supreme Court resolved several questions of first impression presented in consolidated cases about how the "adverse action" notification provisions in the federal Fair Credit Reporting Act (FCRA)[2] apply to personal lines insurance underwriting. In *Safeco Insurance Co. v. Burr/GEICO Insurance Co. v. Edo*,[3] the Court resolved a question that presented a split in the United States Circuit Courts – the standard for "willful" noncompliance under the Act. The determination of the correct standard for a willful violation under the FCRA is a ruling significant not just to insurers, but to any business using or furnishing consumer credit information. The *Burr* opinion, authored by Justice Souter, declared that a willful failure to comply with the FCRA covers not only knowing violations, but also violations made in "reckless disregard" of

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[2]15 U.S.C. §§ 1681 et seq. (2000).

[3]127 S. Ct. 2201 (2007).

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the law. Additionally, the Court clarified that initial rates charged for new insurance policies where credit information is considered can constitute "adverse actions" thereby triggering FCRA notice provisions, and importantly, the Court set the benchmarks from which insurance adverse actions should be measured thus giving insurance companies needed clarity regarding when the FCRA's notice provisions are implicated.

I. Background

Since the late 1990's, many insurance companies, including GEICO and Safeco, have used information in consumer credit reports as one factor in setting insurance premiums. The FCRA permits insurers to use credit reports and expressly endorses insurers' use of credit reports to achieve differentiated pricing schemes.[4].

In 2001 and 2002, a group of consumers initiated eight putative nationwide class actions in Oregon federal district court, including the two lawsuits consolidated in *Burr*, alleging that GEICO and other auto insurers' adverse-action notice practices contravened the FCRA.[5] In the two consolidated cases in *Burr*, the putative class action plaintiffs alleged that the insurance companies had violated the FCRA by failing to send them (new insurance applicants) adverse-action notices after the companies used their consumer credit report information in setting their premium and offering them insurance at rates less than the insurers' lowest possible (best) rates. According to the plaintiffs, the failure to send them an adverse-action notice was a willful violation of the FCRA, requiring the companies to pay statutory damages of $100 to $1,000, per class member.

The FCRA requires notice to any consumer who is subjected to "adverse action . . . based in whole or in part on any information contained in a consumer [credit] report."[6] With respect to insurance companies, § 1681a(k)(1)(B)(i) of the FCRA describes an adverse action 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." A negligent failure to provide the statutory notice can result in liability for actual damages; a "willful" failure can give rise to liability for actual damages or statutory damages ranging from

[4]*See, e.g.*, 15 U.S.C. §§ 1681a(l), 1681b(a)(3)(C) and (F), 1681b(c), 1681m(d) and 16 CFR 600, app. C, section V (Prescribed Notice of User Responsibilities) (authorizing use of information contained in consumer reports for insurance underwriting, including use in insurance prescreened offers and account reviews, and providing procedures for such use).

[5]*See* Spano v. Safeco Ins. Co. of Or., CV 01-1464-BR (filed Oct. 2, 2001); Sams, et al. v. GEICO Cas. Co., et al, CV 02-678-BR (filed May 24, 2002); Ashby v. FICO, CV 01-1446-BR (filed Sept. 28, 2001); Willes v. State Farm Fire & Cas., CV 01-1457-BR (filed Oct. 1, 2001); Dikeman v. Progressive Corp., CV 01-01465-BR (filed Oct. 2, 2001); Razilov v. AMCO Ins. Co., CV 01-1466-BR (filed Oct. 3, 2001); Rausch v. Hartford Fin. Servs. Group, CV 01-1529-BR (filed Oct. 16, 2001); and Mark v. Valley Ins. Co., No. CV 01-1575-BR (filed Oct. 24, 2001).

[6]15 U.S.C. § 1681m(a).

$100 to $1,000 per violation, as well as punitive damages.[7]

The United States District Court for the District of Oregon granted summary judgment in favor of the insurance companies.[8] On appeal, the United States Court of Appeals for the Ninth Circuit held that an adverse action has occurred and a notice is required in all circumstances where a consumer would have received a lower rate if the consumer had a better credit score.[9] The Ninth Circuit also held that an insurer "willfully" fails to comply with FCRA where it acts with "reckless disregard" for the rights of a consumer. According to the Ninth Circuit, "reckless disregard" includes a "deliberate failure to determine the extent of [a company's] obligations," "reliance on creative lawyering that provides indefensible answers," or reliance on "implausible interpretations."[10] In adopting a "reckless disregard" standard, the court split with several other circuit courts that had defined "willful" as a "knowing" violation.

Both Safeco and GEICO sought certiorari in the Supreme Court in two separate cases: *Safeco Ins. Co. of America v. Burr*, No. 06-84 and *GEICO Gen. Ins. Co. v. Edo*, No. 06-100. The Court granted the Petitions for Writ of Certiorari and consolidated the cases. In the Ninth Circuit, after briefing, GEICO's appeal was consolidated for disposition with a similar case brought against another insurer, Hartford Financial Services Group, Inc., resulting in the Ninth Circuit's opinion, *Reynolds v. Hartford Financial Services Group, Inc.*[11]

II. The *Burr* Decision – The Main Holdings

Three main questions were decided in *Burr*: (1) whether there can be an insurance "adverse action" when credit information is used in setting the initial premium for a new insurance policy; (2) what is the "benchmark" from which an adverse action is measured thereby triggering the FCRA notice provisions; and (3) what is the standard for determining "willfulness" under the FCRA—does it encompass only knowing violations or does it include violations made in "reckless disregard" of the statute?

A. An "Adverse Action" in Determining Insurance Premiums Includes Setting First-Time Insurance Rates: New Policyholders are Entitled to Notification Under the FCRA.

Before determining whether the companies acted recklessly, the Court had to answer the antecedent question of whether either company violated the adverse-action notice requirement at all. Because the plaintiffs' claims in both cases were premised on initial rates charged for new insurance policies, there could be no adverse action unless quoting or charging a first-time premium is "an increase in any charge for . . . any insurance, existing or applied for."[12] In the *Safeco* case, Safeco had not given the plaintiff an adverse-action notice on the basis that the adverse-action notice provisions of the FCRA did not apply to initial applications for insurance.[13] In Safeco's case, the District Court had held that the initial rate for a new insurance policy cannot be an "increase" because there was no prior dealing between the insured and the insurer. As *amicus curiae* before the Supreme Court, the United States Government argued that the regular use of

[7] 15 U.S.C. §§ 1681o(a), 1681n(a).

[8] *See* Spano v. Safeco Ins. Co. of America, 215 F.R.D. 601 (D. Or. 2003), and Edo v. GEICO Cas. Co., No. 02-678, 2004 WL 3639689 (D. Or. Feb. 23, 2004).

[9] *See* Reynolds v. Hartford Fin. Servs. Group, Inc., 435 F.3d 1081 (9th Cir. 2006); Spano v. Safeco Corp., No. 04-35313, 2005 WL 1865971 (9th Cir. Aug. 4, 2005).

[10] Reynolds, 435 F.3d at 1099.

[11] 435 F.3d 1081.

[12] 15 U.S.C. § 1681a(k)(1)(B)(i).

[13] This was not an issue urged by GEICO on appeal.

the term "increase" was broader than the District Court had held and that new business customers could suffer an "increase" in their insurance premium based on the consideration of credit information even though there were no prior dealings (no previous premium) between the insured and insurer.

The Supreme Court held that the Government's reading "better fit with the ambitious objective set out in the Act's statement of purpose, which uses expansive terms to describe the adverse effects of unfair and inaccurate credit reporting and the responsibilities of consumer reporting agencies."[14] The Court pointed out that "the newly insured who gets charged more owing to an erroneous report is in the same boat with the renewal applicant."[15] "[T]he 'increase' required for 'adverse action,' 15 U.S.C. § 1681a(k)(1)(B)(i), speaks to a disadvantageous rate even with no prior dealing; the term reaches initial rates for new applicants."[16] Thus, because Safeco did not give the plaintiffs (initial applicants) an adverse-action notice, this would be a violation of the statute *if* the plaintiffs received higher rates "based in whole or in part" on their credit reports.[17] The Court concluded, however, that in this particular case, even if Safeco had violated the statute, such violation was not in reckless disregard of the statute.[18] Thus, the insurance adverse-action provisions of the FCRA do apply to new insurance applicants, and insurers must now confirm that their adverse-action notice procedures comport with this clarification of the law.

In one of two partial concurrences, Justice Clarence Thomas, joined by Justice Samuel A. Alito Jr., did not join this part of the Court's opinion that resolved the merits of Safeco's reading of § 1681a(k)(1)(B)(i) because, he said, regardless of the merits of their interpretation, it was not an unreasonable one, and Safeco did not act willfully. Thus, deciding this issue was "not necessary to the Court's conclusion."[19]

B. An Insurer's Review of Credit Information Must Be The Cause of an Increased Rate Charged to a Consumer in Order for There to be an Adverse Action: With Respect to Initial Policies, the Adverse-Action Notification Requirement is Triggered if the Quoted Rate Exceeds the Rate that Would Have Been Quoted Had Credit Not Been Considered.

Section 1681m(a) of the FCRA calls for an adverse-action notice only when the adverse action is "based in whole or in part on" a credit report. GEICO argued at every step in the lawsuit, that in order to have an adverse action "based on" a credit report, consideration of the report must have been a necessary condition for the increased rate. That is, if consideration of the insured's credit information did not impact his company and tier placement or rate, then there was no "adverse action" entitling the insured to a notice under the FCRA. The District Court agreed with GEICO, granting summary judgment in its favor, because the undisputed evidence showed that when GEICO compared the plaintiff's company and tier placement considering his credit information with the company and tier placement he would have been placed in had GEICO not considered his credit information, there was no effect on his insurance or his premium.

The Ninth Circuit adopted a "best-possible rate" benchmark for determining when an insured had been impacted adversely. That is, the court required notification whenever the quoted rate was higher than the best rate quoted to any

[14]Burr, 127 S.Ct. at 2211.
[15]*Id.*
[16]*Id.* at 2212.
[17]As the Court noted, the record did not indicate what rates the Safeco plaintiffs would have obtained if their credit reports had not been considered.
[18]*Id.* at 2215. *See also* discussion *infra* Part II.C.
[19]*Id.* at 2217-18.

customer of any of the affiliated companies. The circuit court held that because the GEICO plaintiff 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.[20]

The Supreme Court first held that a natural reading of the phrase "based on" in the FCRA requires a "but-for causal relationship" and that therefore, consideration of credit information had to be a necessary condition for any increased rate. The "duty to report arises from some practical consequence of reading the report, not merely some subsequent adverse occurrence that would have happened anyway. If the credit report has no identifiable effect on the rate, the consumer has no immediately practical reason to worry about it . . . both the company and the consumer are just where they would have been if the company had never seen the report."[21] Thus, consideration of the credit report must be a necessary condition for any increase in premium.

Next, the Court addressed the proper benchmark for determining when a first-time rate is a disadvantageous increase. The Court refused to apply the "best possible rate" standard urged by the plaintiffs and adopted by the Ninth Circuit. The Government and the plaintiffs argued that the baseline should be the rate that the applicant would have received with the best possible credit score, while GEICO contended it is what the applicant would have had if the company had not taken his credit score into account. In determining whether there is an "adverse action" under the FCRA, GEICO "neutralizes" an applicant's credit score by comparing the applicant's company and tier placement considering credit, with those that the applicant would have been assigned if credit history had not been considered. If under this comparison, the applicant's company and tier placement and rate do not change, i.e., there is no increase in premium, then there is no adverse action requiring a notice under the FCRA.

The Supreme Court adopted GEICO's position because that interpretation of the "increase" baseline fit better with the concept of causation, that notice is only required "when the effect of the credit report on the initial rate offered is necessary to put the consumer in a worse position than other relevant facts would have decreed anyway."[22] Thus, for *initial applicants*, the proper benchmark to determine whether an adverse action has occurred (thereby triggering notice) is a comparison of a customer's insurance and premium considering the insured's actual credit history as compared to the insurance and premium the applicant might receive when credit history has been neutralized.

The Court acknowledged, what it believed is, a "loophole" that the more-or-less "average" neutral-score baseline or benchmark creates, leaving some customers (those who have better-than-neutral credit scores) without a notice even where errors in their credit reports might be impacting their rates. But the Court found that there is a more demonstrable and serious disadvantage by adopting the plaintiffs' and Government's position: slews of adverse-action notices—akin to "junk mail"—which would likely be ignored by consumers. Because the best rates would "presumably go only to a minority of consumers," adopting the Government's benchmark would require insurers to send "slews of adverse-action notices; every young applicant who had yet to establish a gilt-edged credit report, for example, would get a notice that his charge had been 'increased' based on his credit report."[23] In the court's view, such a notice effort would "undercut the obvious policy behind the notice

[20]Reynolds v. Hartford Fin. Servs. Group, Inc., 435 F.3d 1081, 1093 (9th Cir. 2006).
[21]Burr, 127 S.Ct. at 2212.

[22]*Id.* at 2213.
[23]*Id.* at 2214.

requirement," and the cost of "closing the loophole" is too high.[24]

With regard to the proper baseline once a buyer and seller have begun a course of dealing, the Court established another benchmark for renewal insurance policies: "the baseline for 'increase' is the previous rate or charge, not the 'neutral' baseline that applies at the start."[25] Thus, after the initial dealing between the consumer and insurer where the baseline for increase is a comparison with a neutral credit score, on renewals the comparison point for whether there has been an increase is the previous rate charged to that customer.[26] Regarding additional adverse-action notices on renewal policies, the Supreme Court held that the FCRA does not require "hypernotification." Therefore, once a consumer has learned that his credit report led the insurer to charge more initially (and presumably, the customer has received one adverse-action notice), he has no need to be given such notice again with each renewal, as long as the rate charged remains the same and is not increased due to consideration of credit information.

Additionally, although not specifically briefed by Petitioners in the Supreme Court briefs, but an issue determined by the Ninth Circuit Court of Appeals, the Supreme Court also determined that GEICO's offer to the plaintiff of a standard insurance policy with GEICO Indemnity instead of an insurance policy with its lower cost "preferred" policy affiliate, GEICO General, was not an adverse action requiring notice under the FCRA because such action was not a "denial."

Under the FCRA, an insurance adverse action includes not just an "increase" in a charge for insurance but also a "denial" of insurance. The Ninth Circuit had ruled that GEICO's offer of a GEICO Indemnity policy to the plaintiff was at the same time a "denial" of a policy with GEICO General, thus also triggering the FCRA notice requirement. The Supreme Court disagreed, noting that the way GEICO did business, by having an applicant call a sales representative that acts for all the companies and who denies the insurance or offers the customer insurance with one of the companies willing to provide it, is "clearly outside the natural meaning of 'denial' of insurance."[27] This ruling in *Burr* dovetails with the provisions in certain state laws that define "adverse action" similar to the FCRA, that expressly provide that "placement" of a consumer with an affiliate is not a "denial."[28] This ruling should provide some clarity to insurers who utilize

[24]*Id.*
[25]*Id.* at 2214.
[26]*Id.*

[27]*Id.* at 2214 n.17.
[28]*See, e.g.*, TENN. CODE. ANN § 56-4-401(1) ("An offer of placement with an affiliate insurer does not constitute adverse action, a refusal to insure, cancellation or nonrenewal of coverage."); OR. REV. STAT. § 746.661(1)(b) ("An offer of placement with an affiliate insurer does not constitute a declination of insurance coverage."); WASH REV. CODE (ARCW) § 48.18.545 ("An insurer may use credit history to deny personal insurance only in combination with other substantive underwriting factors. For the purposes of this subsection: (a) "Deny" means an insurer refuses to offer insurance coverage to a consumer; (b) An offer of placement with an affiliate insurer does not constitute denial of coverage . . . ."); MO. REV. STAT.§ 375.918(1)(1) ("An offer by an insurer to write a contract through an affiliated insurer does not constitute an adverse action."); N.Y. CLS INS. § 2802(b) ("An insurer doing business in this state that uses credit information to underwrite or rate risks for personal lines insurance, shall not . . . (b) deny a policy of personal lines insurance solely on the basis of credit information, without consideration of any other applicable underwriting factor independent of credit information, provided that an offer by an insurer to provide coverage by writing a policy through an affiliate insurer or a tier within the insurer shall not constitute a denial of a policy."); ALASKA STAT. § 21.36.460(c) ("An insurer may use credit history to cancel, deny, underwrite, or rate personal insurance only in combination with other substantive underwriting factors. For the purposes of this subsection, (1) refusal to offer personal insurance coverage to a consumer constitutes denial of personal insurance; and (2) an offer of placement with an affiliate insurer does not constitute denial of coverage.").

a central underwriting system for affiliated companies, indicating that the placement of an insured with one company does not, at the same time, amount to the "denial" of insurance with another company, triggering FCRA notice provisions for such "denial."

Justice John Paul Stevens, joined by Justice Ruth Bader Ginsburg, concurred with the result in *Burr* but disagreed with the reasoning in three sections of the opinion dealing with the proper benchmark to measure "increase" under § 1681a(k)(1)(B)(i) and whether GEICO's use of the neutral procedure resulted in an adverse action. Stevens stated: "I find it difficult to believe that Congress could have intended for a company's unrestrained adoption of a 'neutral' score to keep many (if not most) consumers from ever hearing that their credit reports are costing them money."[29] Noting that as a matter of federal law, companies are free to adopt whatever "neutral" credit scores they want, Stevens opined that the neutral score probably will not reflect the "median consumer credit score" but "more likely" will reflect a "company's assessment of the creditworthiness of a run-of-the-mill applicant who lacks a credit report."[30]

According to Stevens and Ginsburg, an insurance adverse action under the FCRA occurs whenever the quoted rate is higher than the best rate quoted to any customer of any of the affiliated companies and that inferentially, GEICO violated the statute. However, because they concurred in the reversal of the Ninth Circuit's opinion, they agreed that in any event, GEICO's actions could not have been willful regardless of how an adverse action is measured.

C. "Willful" Noncompliance Under § 1681n(a) Includes Acts in "Reckless Disregard" of the FCRA.

The FCRA has two separate civil damages provisions. Under § 1681o of the Act, if a consumer proves that a user's failure to comply with any requirement of the Act was negligent, the consumer is entitled to recover actual damages.[31] But § 1681n(a) addresses violations committed with greater mens rea. It provides that if the consumer makes a higher showing of "willful" noncompliance, the consumer is entitled to recover statutory damages between $100 and $1,000 (in lieu of actual damages) and punitive damages.[32] Because the plaintiffs in *Burr*'s two consolidated cases did not seek actual damages, their suits relied entirely on § 1681n and thus required proof not only that the insurers' notice practices violated the Act's adverse-action-notification requirements, but also that the insurers' violations were willful.

The Ninth Circuit held that "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 pursuant to the FCRA or in reckless disregard of whether the policy or action contravened those rights."[33] Further defining its "reckless disregard" standard, the Ninth Circuit stated that a company may be found to have acted recklessly unless it (1) has "diligently and in good faith" attempted to determine its obligations and (2) "has thereby come" to a "reasonable," "plausible," non-"creative," and "tenable" interpretation of FCRA.[34]

Before the Supreme Court, the insurers argued that the term "willfully" in § 1681n(a) should require an intentional violation of a known legal duty in part

[29] Burr, 127 S.Ct. at 2217.
[30] *Id.*

[31] 15 U.S.C. § 1681o(a).
[32] 15 U.S.C. § 1681n(a).
[33] Reynolds v. Hartford Fin. Servs. Group, Inc., 435 F.3d 1081, 1098 (9th Cir. 2006) (internal quotations omitted).
[34] *Id.* at 1099.

because the language, structure, and legislative history of the FCRA confirm that Congress intended "willfully" in § 1681n(a) to require proof of actual knowledge. GEICO also argued that the Ninth Circuit's purported "reckless disregard" standard blurred the distinction between negligence and willfulness, given the Ninth Circuit's suggestion that a merely "unreasonable" interpretation of the law—whether by a company or its expert counsel—indicates willful noncompliance. In any event, both GEICO and Safeco argued that under any construction of the term "willfully," they could not be deemed to have willfully violated the FCRA in part because the Act's notice requirements were not clearly defined, and the district court agreed with the insurers' interpretations of the law.

The Supreme Court agreed with the Ninth Circuit that liability under § 1681n(a) for "willfully fail[ing] to comply" with the FCRA includes acts committed in reckless disregard of a statutory duty.[35] The Court reasoned that "where willfulness is a statutory condition of civil liability, we have generally taken it to cover not only knowing violations of a standard, but reckless ones as well."[36] And the Court believed that this construction was consistent with common-law usage of the term "willfully."[37] The Court rejected the insurers' arguments that the language, structure, and legislative history of the FCRA confirm that "willfully" should require actual knowledge.[38]

Perhaps the most interesting part of the Supreme Court's willfulness holding was its application of the reckless-disregard standard to Safeco's potential violation of the FCRA. After all, as the Court itself acknowledged, the term "recklessness" is not self defining.[39] Thus, to determine whether Safeco willfully violated the FCRA, the Court had to define what it meant by "reckless disregard."

The Court recognized, as the Ninth Circuit arguably failed to do, that reckless disregard of the law in the civil context necessitates proof of an "unjustifiably high risk of harm that is either known or so obvious that it should be known."[40] And the risk required for reckless disregard is "substantially greater than that which is necessary to make [] conduct negligent."[41] Thus, for a willful violation of the FCRA, the evidence must show that the company's action "*is not only a violation under a reasonable reading of the statute's terms, but shows that the company ran a risk of violating the law substantially greater than the risk associated with a reading that was merely careless*."[42] Under this standard, if a company's interpretation of the FCRA is objectively reasonable, it is improper to inquire or focus on a company's subjective intent.[43] And even where a company's interpretation of the FCRA is objectively unreasonable, the company might still be immune to a willfulness claim.[44]

While the Court felt "no need to pinpoint the negligence/recklessness line," it was clear to the Court that Safeco's interpretation of the statute, "albeit erroneous, was not objectively unreasonable," and therefore was not reckless.[45] The Court noted that the statute was silent on the point from which to measure "increase" and Safeco's reasoning that an "increase" can arise only after prior dealing "has a foundation in the statutory

[35]Burr, 127 S. Ct. at 2208.
[36]*Id.*
[37]*Id.* at 2208-09.
[38]*Id.* at 2209.
[39]*Id.* at 2215.

[40]*Id.* (quotations omitted).
[41]*Id.* (quoting with approval RESTATEMENT (SECOND) OF TORTS § 500, at 587 (1963-1964)).
[42]Burr, 127 S. Ct. at 2215 (emphasis added).
[43]*See Id.* at 2216 n.20 ("To the extent that [respondents] argue that evidence of subjective bad faith can support a willfulness finding even when the company's reading of the statute is objectively reasonable, their argument is unsound.").
[44]*See Id.* (refusing to foreclose the possibility that a company might be immune to claims raised under § 1681n(a) where the company relies in good faith on the advice of counsel).
[45]*Id.* at 2215.

text," and a "sufficiently convincing justification to have persuaded the District Court to adopt it and rule in Safeco's favor."[46] The Court noted insurers had no authoritative guidance from the Federal Trade Commission or from any court of appeals. Given the "dearth of guidance and the less-than-pellucid statutory text" the Court held that Safeco's reading was not "objectively unreasonable" thus falling short of reckless disregard.[47]

III. Implications

Although the Court adopted a more lenient standard of "willful" conduct under the FCRA than advocated by the insurance companies, the *Burr* case is a victory for GEICO and Safeco, who faced unforeseen potential liability in these putative nationwide class actions. By setting the benchmark for "increase" under § 1681a(k)(1)(B)(i) to require a comparison with a neutral credit score, the Supreme Court's decision validated a procedure already in use by many insurers and sanctioned by statutes and regulations in many states. The decision provides added clarity in an area of the law that, as the Supreme Court noted, lacked authoritative federal guidance. Some plaintiffs and consumer groups see the opinion as a victory also in that the Court ruled that an adverse action can occur with respect to initial insurance applicants and by the Court's adoption of a reckless-disregard standard under the FCRA.

As reflected in the Stevens/Ginsburg concurrence, there will probably continue to be consumer advocates extolling the virtues of the plaintiffs' and the Government's position that it is better to send adverse-action notices to more, if not almost all, insurance applicants rather than to less, in order to further the FCRA's purpose of informing consumers about potential errors in their credit reports. Regardless of the arguments in favor of such an approach, after the *Burr* decision, it appears any such future requirement will need to come through legislation.

Insurers writing personal lines coverage, and perhaps other businesses who consider consumer credit information and who issue adverse-action notices, will need to review *Burr* and may need to adjust their practices with regard to the use of credit history or insurance scores and adverse-action notices to conform to the new opinion.

While the outcomes in *Burr* were good for both Safeco and GEICO, the less-stringent standard for "willful" behavior under the FCRA may not be good for future FCRA defendants. However, while the reckless-disregard standard could encourage more FCRA class actions, because of the enactment of the Fair and Accurate Credit Transactions Act of 2003 (the "FACTA"), the number of private actions under § 1681m of the FCRA should decrease as a growing number of courts have recently held that the FACTA eliminated all private rights of action for alleged violations of § 1681m.[48]

IV. Recent Congressional and Agency Activity

The use of credit scores in setting automobile insurance premiums continues to be studied and discussed both by Congress and the Federal Trade Commission ("FTC"). The FTC was directed by Congress, under the FACTA, to study whether credit-based insurance scores affect the availability and affordability of insurance, specifically focusing on the effects the use of scores has on racial and ethnic minority groups. On October 2,

[46] *Id.* at 2215-16.

[47] *Id.* at 2216.

[48] *See, e.g.*, Murray v. GMAC Mortgage Corp., 434 F.3d 948 (7th Cir. 2006). Section 311(a) of the FACTA added subsection (h) to § 1681m, which states in relevant part: "(8) Enforcement. (A) No civil actions. Sections 616 and 617 [15 U.S.C. §§ 1681n and 1681o] shall not apply to any failure by any person to comply with this section."

2007, the FTC presented its study to the Subcommittee on Oversight and Investigations of the U.S. House Financial Services Committee. The title of the study is "Credit-based Insurance Scores: Are They Fair?" According to the FTC's press release on the study, "the study found that these scores are effective predictors of the claims that consumers will file and that, on average, African-Americans and Hispanics tend to have lower scores than non-Hispanic whites and Asians, and so the use of scores is likely to increase the amount they pay for automobile insurance relative to the amount that non-Hispanic whites and Asians pay."

In testimony for the FTC, Commissioner J. Thomas Rosch told the Subcommittee the FTC intends to conduct a similar study of the impact of credit-based insurance scores on the availability and affordability of homeowners insurance. The FTC's press release states that "Commissioner Rosch noted that concerns had been raised that insurance companies voluntarily provided the information used in the automobile insurance study. He said that to increase public confidence in its homeowner insurance study, the agency intends to use its authority under Section 6(b) of the FTC Act to compel insurance companies to provide homeowners policy information to the Commission."

The October 2, 2007 FTC press release concludes that with regard to auto insurance, insurance scores are an effective predictor of auto insurance risk:

> Although the study found that scores predict both the number of claims that consumers are likely to file and the total cost of those claims to the insurance company, it is not clear why scores are effective predictors of automobile insurance risk, according to the testimony. The study found that scores predict risk within racial and ethnic groups, e.g., African-Americans with higher scores file fewer claims than African-Americans with lower scores, and that scores have a relatively small effect as a statistical proxy for race and ethnicity. Despite substantial efforts, the testimony noted, the FTC was not able to develop a credit-based insurance score model that effectively predicted risk and narrowed the differences in scores among racial and ethnic minority groups.[49]

The FTC vote authorizing the presentation of the testimony and its inclusion inthe formal record was 5-0. A copy of the Commissioner's testimony to the Subcommittee and the FTC's press release regarding the study and report, can be found on the FTC's Web site at http://www.ftc.gov.

[49] The FTC's October 2, 2007 press release, *FTC Testifies Before U.S. House Subcommittee on Credit-Based Insurance Scores Study* is available on the FTC website at http://www.ftc.gov/opa/2007/10/creditins.shtm.