Supreme Court Decision Regarding Standard for "Willful" Violations of the FCRA

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The United States Supreme Court yesterday issued an important decision in two consolidated cases, *Safeco Insurance Co. of America et al. v. Burr et al.,* No. 06-84, and *GEICO General Insurance Company, et al., v. Edo*, No. 06-100, holding that a company did not "willfully" violate the FCRA when it acted on an interpretation of the statute that was incorrect but not "objectively unreasonable." We expect that the decision will be extremely helpful in defending claims of willful FCRA violations. A more detailed description follows, and a copy of the decision can be found here.

In *Safeco* and *GEICO*, the plaintiffs alleged that the insurance company defendants had willfully violated the FCRA by failing to send "adverse action" notices after allegedly charging the plaintiffs higher initial insurance rates based on information contained in the plaintiffs' consumer credit reports. The plaintiffs claimed that the insurers had violated 15 U. S. C. § 1681m(a), which requires notice of an "adverse action . . . based in whole or in part on any information contained in a consumer [credit] report," and that the initial rates were adverse actions under 15 U. S. C. § 1681a(k)(1)(B)(i), which defines the term to include "an increase in any charge for . . . any insurance, existing or applied for." The plaintiffs sought damages pursuant to 15 U.S.C. § 1681n(a), which provides actual damages or statutory damages of $100 to $1,000, and punitive damages, when the defendant "willfully fails" to comply with the FCRA. Both insurers argued that they had taken no adverse actions requiring notice, and that even if the Court determined otherwise, any violation was not willful.

In both cases the district courts granted summary judgment for the defendants. In *GEICO* the district court found that the rate had not been increased based on information in a consumer report, and in *Safeco* the district court held that the initial rate for a new insurance policy cannot be an "increase" because there has been no prior dealing. The Ninth Circuit reversed, holding that the insurers had taken adverse actions in both cases and, moreover, that even if the insurers had not knowingly violated the FCRA, they could nevertheless be found to have "willfully" failed to comply if they acted with "reckless disregard" of a consumer's rights under the statute. The Supreme Court granted certiorari "to clarify the notice requirement in § 1681m(a)" and to resolve "whether § 1681n(a) reaches reckless disregard of FCRA's obligations."

The Supreme Court held that GEICO had not taken any adverse action because the consumer's rate had not actually suffered when GEICO took his credit report into account. The Court rejected Safeco's argument, however, that an initial rate cannot be an "increase" under the FCRA. The Court also rejected the insurers' argument that § 1681n(a) extends only to knowing violations, holding instead that a willful violation includes acts taken in "reckless disregard" of FCRA requirements.

The decision is perhaps of most general interest for the significant limitations the Court placed on what may constitute "reckless disregard" of the statute. The Court held that "a company subject to FCRA does not act in reckless disregard of it unless the 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." Applying this objective standard, the Court held that Safeco had not willfully violated the FCRA. The Court explained, "While we disagree with Safeco's analysis [concerning what constitutes a rate "increase"], we recognize that its reading has 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." The Court also noted that there was a lack of "guidance from the courts of appeals or the Federal Trade Commission (FTC) that might have warned [Safeco] away from the view it took." The Court then concluded, "Given this dearth of guidance and the less-than-pellucid statutory text, Safeco's reading was not objectively unreasonable, and so falls well short of raising the 'unjustifiably high risk' of violating the statute necessary for reckless liability." Importantly, the Court clarified that this is an objective inquiry, not a subjective one, and therefore held that there was no need for factual development.

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