Adverse Action Notices under the FCRA: The Supreme Court Provides Guidance

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I. INTRODUCTION

It took Steve Millet ten years to discover that his identity had been stolen.¹ During that time, the thief managed to obtain a dozen credit cards, buy a car, and even purchase a house using the stolen number and his own name.² "You can’t find out except by accident," Millet’s wife, Melody, said.³ "They are not required to notify us. No one is required to notify you. The way it sits now, our lives [are] ruined."⁴ We will never have again a normal financial life."⁵

Millet is now suing the credit reporting agencies for the manner in which they handled his identity theft.⁶ Interestingly, Millet applied for a credit card during those ten years and his application was denied.⁷ If the credit company with whom Millet applied had denied him because of the information in his credit report, the Fair Credit Reporting Act (FCRA) entitled Millet to receive a notice from the company informing him of the adverse action taken against him.⁸ Therefore, Millet might have a cause of action against the credit company, as well.⁹

Until very recently, companies that used consumer credit reports were unclear as to when and under what circumstances an

2. Id.
3. Id.
4. Id.
5. Id.
6. Id.
7. Sullivan, supra note 1.
9. See generally § 1681n-o (providing a private right of action for consumers against anyone who fails to comply with the provisions of the Fair Credit Reporting Act).
adverse action notice was required. Further, consumers who failed to receive these notices did not have a clear understanding of when a company violated the FCRA. The Supreme Court case of *Safeco Insurance Co. of America v. Burr* helped to clarify some of these ambiguities as they relate to insurance companies and consumers. The decision, however, stops short of completely resolving every ambiguity of the FCRA, making the possibility of future litigation a near certainty.

Part II of this Comment will describe the world of credit reports, including credit reporting agencies, the use of credit reports by the insurance industry, and the FCRA. Part III of this Comment will detail the recent *Burr* case, mentioned above, and explain the important facets of its holdings. Part IV will explain the effects of those holdings on consumers and the insurance industry, with a particular emphasis on consumer protection risks and the likelihood of future litigation.

II. THE WORLD OF CREDIT REPORTS

A. Consumer Credit Reports

A consumer credit report is any communication of information by a consumer reporting agency regarding a
consumer's "credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living."\(^{19}\) The information in the credit report is used to establish the consumer's eligibility for credit, insurance, employment, or other purposes.\(^{20}\)

Credit reports are integral in credit scoring.\(^{21}\) Credit scoring is the system that creditors use to help determine whether to extend credit to a consumer and to determine the rate that the consumer will pay for the insurance or loan.\(^{22}\) Information about a consumer's credit experiences, such as "bill-paying history," "the number and type of accounts" a consumer has, timely payment of bills, any "outstanding debts," and whether there are any collection actions out against the consumer are gleaned from the credit report.\(^{23}\) Creditors then use a statistical program to calculate a credit score, which determines the "creditworthiness" of the consumer.\(^{24}\) In other words, the credit score determines the likelihood that a consumer will "repay a loan" and make timely payments.\(^{25}\)

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\(^{20}\) Id.


\(^{22}\) See id.

\(^{23}\) Id.

\(^{24}\) Id.

\(^{25}\) Id.
Insurance companies use credit reports and credit scores to help predict the likelihood that a consumer will file an insurance claim, commit insurance fraud, or commit arson. Insurance companies might consider a consumer's credit report and credit score when deciding "whether to grant [the consumer] insurance and the amount of the premium" to be charged. The credit scores used by insurance companies are also known as "insurance scores" or "credit-based insurance scores."  

B. Fair Credit Reporting Act

The Fair Credit Reporting Act is a federal law that regulates the collection, distribution, and use of consumer credit information. Enacted in 1970, the purpose of the FCRA is to ensure the accuracy and fairness of credit reporting, "promote efficiency in the banking system, and protect consumer privacy." The FCRA states that "any person [who] takes any adverse action with respect to any consumer that is based in whole or in part on any information contained in a consumer report" must notify the affected consumer. As it applies to insurance companies, an "adverse action" is a "denial or cancellation of coverage," an "increase in any charge," or any "reduction or other adverse or unfavorable change in . . . coverage or the amount of . . . insurance."  

The adverse action notice must tell the consumer that an adverse action has been taken against him and what that adverse

26. The Truth Behind Insurance Credit Scoring, supra note 18; Facts for Consumers, supra note 21.
27. Facts for Consumers, supra note 21. Insurance companies use the term "claims consciousness" to describe their rationale for this policy. The Truth Behind Insurance Credit Scoring, supra note 18. "Claims Consciousness" means that a person with the good credit score is "more likely to settle the accident without the insurance company, the person who scored poorly is more inclined to file a claim and expect to be compensated for the loss." Id.
28. Id.
32. § 1681m(a) (emphasis added).
33. § 1681a(k)(1)(b)(i).
The notice must also provide the name, address, and phone number of the consumer reporting agency furnishing the credit report so the consumer can dispute the report. Finally, the notice must tell the consumer how he can get a free copy of his credit report. The FCRA prescribes other requirements for the adverse action notice.

The FCRA also provides a private right of action against businesses that use consumer credit reports but fail to comply with the notice requirements. A negligent violation of the adverse action notice requirement entitles the consumer to actual damages. If the violation is willful, however, the consumer may be entitled to actual damages, statutory damages ranging from $100 to $1,000, and even punitive damages. To properly request relief in the form of these damages, the plaintiff must have a clear understanding of what constitutes a violation. Similarly, insurance companies must also have a clear understanding of the FCRA’s provisions in order to avoid liability for actual, statutory, and punitive damages. The issue of when an adverse action notice is required, however, was a very murky issue until the recent decision of the United States Supreme Court in *Safeco Insurance Co of America v. Burr*.

How the FCRA applied to the insurance industry, before *Burr*, was an issue that was “far from transparent.” Conflicts had

34. *See Burr*, 127 S. Ct. at 2201.
38. § 1681o.
39. § 1681o(a).
40. § 1681n(a).
arisen in the circuit courts over the various provisions of the FCRA.\textsuperscript{45} For example, circuits treated certain provisions, such as what conduct by an insurance company constitutes a willful violation, differently.\textsuperscript{46} Ambiguities in the FCRA included (1) the meaning of the word “increase,” (2) whether reliance on a credit report is a necessary condition for the notice, and (3) what constitutes a willful violation of the FCRA.\textsuperscript{47}

1. “Increase”

An adverse action is defined as “an increase in any charge for . . . any insurance, existing or applied for.”\textsuperscript{48} There are several ambiguities regarding the term “increase.” First, does the FCRA’s adverse action notice requirement apply to an initial rate charged to a new customer, or “is it limited to an increase in a rate that the consumer has previously been charged?”\textsuperscript{49}

Insurance companies construed the word “increase” very narrowly and argued that initial rates for a new insurance policy were not included in this provision.\textsuperscript{50} Initial rates offered to first-time customers, they argued, cannot be an “increase” because there was “no prior dealing” between the consumer and the company.\textsuperscript{51} The statutory phrase “increase in any charge for . . . insurance,”\textsuperscript{52} implies a change in treatment.\textsuperscript{53} Therefore, insurance companies asserted that there must be a previous charge for comparison.\textsuperscript{54}

Consumers, on the other hand, argued that “increase” included a first-time rate.\textsuperscript{55} For instance, suppose a gas station

\textsuperscript{45} See infra notes 101-04 and accompanying text.
\textsuperscript{46} See id.
\textsuperscript{47} See infra notes 48–81 and accompanying text.
\textsuperscript{49} Reynolds v. Hartford Fin. Servs. Group, Inc., 435 F.3d 1081, 1090 (9th Cir. 2006).
\textsuperscript{50} Safeco Ins. Co. of Am. v. Burr, 127 S. Ct. 2201, 2210 (2007).
\textsuperscript{51} Id.
\textsuperscript{52} § 1681a(k)(1)(b)(i).
\textsuperscript{53} See Burr, 127 S. Ct. at 2210-11.
\textsuperscript{54} See id.
\textsuperscript{55} Id. at 2211.
owner charges a customer that he does not like a higher price for gas than the price posted outside of the gas station.\textsuperscript{56} Although this is the first time the gas station owner has dealt with the consumer, the owner is still charging the consumer an increased price.\textsuperscript{57} Because the owner increased the price despite the absence of prior dealing of the two parties, the consumers analogize this to initial insurance rates.\textsuperscript{58}

Another issue is which benchmark or baseline rate is appropriate for determining whether a first-time rate is an increase.\textsuperscript{59} Consumers argued that the baseline rate for comparison should be “the rate that the applicant would have received with the best possible credit score.”\textsuperscript{60} This reading was arguably more consistent with the purpose of the FCRA’s notice requirements.\textsuperscript{61}

Insurance companies, on the other hand, contended that a consumer’s rate has not been “increased” simply because he would have received a lower rate if he had a better credit score.\textsuperscript{62} Instead, the baseline score is “what the applicant would have had if the company had not taken his credit score into account.”\textsuperscript{63} This rate is termed the “neutral score rate.”\textsuperscript{64}

The final issue regarding the “increase” provision is that of policy renewals.\textsuperscript{65} It was unclear if the same baseline was to apply if the quoted rate remained the same over a course of dealing.\textsuperscript{66} If

\textsuperscript{56} See id.
\textsuperscript{57} See id.
\textsuperscript{58} See id.
\textsuperscript{60} Id.; see Brief for United States Government as Amicus Curiae Supporting Respondents, Safeco Ins. Co. of Am. v. Burr, 127 S. Ct. 2201 (2007) (No. 06-84, 100), 2006 WL 3336481, at *26 [hereinafter United States Government].
\textsuperscript{61} See Brief for State of Oregon et al. as Amici Curiae Supporting Respondents, Safeco Ins. Co. of Am. v. Burr, 127 S. Ct. 2201 (2007) (No. 06-84, 100), 2006 WL 3747725, at *5 (“Congress enacted the Fair Credit Reporting Act to protect consumers from flaws in the credit reporting system and to improve the integrity and reliability of credit reports.”).
\textsuperscript{63} Burr, 127 S. Ct. at 2213.
\textsuperscript{64} Id.
\textsuperscript{65} See infra notes 56-58 and accompanying text.
\textsuperscript{66} See Burr, 127 S. Ct. at 2214.
not, was an adverse action notice required at each renewal date? Once a consumer had learned that his credit report led the insurer to charge more, and his rate had not changed, it was unclear whether he needed to be given notice with each renewal.

2. “Based in Whole or in Part”

Notice of an adverse action is only required when the adverse action is “based in whole or in part” on a credit report. Before *Burr*, it was uncertain if this provision meant that notice was required if the credit report was merely *consulted*, or if notice was only required if the increase would not have occurred *but for* the consulting of the credit report. Insurers argued that “in order to have adverse action ‘based on’ a credit report, consideration of the report must be a necessary condition for the increased rate.”

The statutory language “in part,” however, suggested that the statute could mean that an adverse action is “based on” a credit report whenever the report was “considered in the rate-setting process.” If this interpretation was correct, simply consulting the report would require an adverse action notice.

3. “Willful”

The FCRA allows a consumer to recover statutory damages and punitive damages if an insurer “willfully fail[s] to comply” with the Act. The issue regarding this provision was whether “willful” encompassed intentional violations, or included the lesser mental state of reckless. Insurers argued that only

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67. See id.
68. See id.
70. See DiMugno & Quinn, *supra* note 10 (emphasis added).
72. § 1681 m(a).
73. *Burr*, 127 S. Ct. at 2212.
74. *Id*.
76. See *Brief for National Association of Mutual Insurance Companies as Amicus Curiae Supporting Petitioners, Safeco Ins. Co. of Am. v. Burr*, 127 S. Ct. 2201
willful violations of the statute justified such damages.\textsuperscript{77} Construing the statute to include reckless violations placed an "excessive and potentially crushing burden of liability on users and providers of credit information," increasing their susceptibility to litigation.\textsuperscript{78}

Consumers, however, looked at the term "willful" in other statutory contexts and argued that "willful" includes a "conscious disregard of the law."\textsuperscript{79} Further, the civil construction of "willful" can be distinguished from the criminal construction.\textsuperscript{80} Because this was a civil matter, consumers argued that a willful violation was one that was in reckless disregard of the FCRA.\textsuperscript{81}

C. Insurance Industry

Prescreened offers are frequently used by companies offering to sell insurance policies to consumers.\textsuperscript{82} These offers inform consumers that they have been prequalified for an insurance rate or product.\textsuperscript{83} Prescreened offers are sometimes called "preapproved" offers and are based on information in a consumer’s credit report indicating that he met certain criteria.\textsuperscript{84} These solicitations usually reach the consumer by mail, but can also be received by phone or in an email.\textsuperscript{85}

Insurance companies are able to make prescreened offers because of the ability of consumer reporting agencies to "disclose consumer information to various public and private entities."\textsuperscript{86} This information has enabled "credit grantors and others to make more expeditious and accurate decisions, to the benefit of

\textsuperscript{77} Joint Brief of Respondents, \textit{supra} note 30, at *17.
\textsuperscript{78} \textit{Id.}
\textsuperscript{79} Reynolds v. Hartford Fin. Servs. Group, 435 F.3d 1081, 1098 (9th Cir. 2006).
\textsuperscript{80} See \textit{id.} (stating that in criminal cases, actual knowledge of illegality is required for a willful violation of a criminal statute).
\textsuperscript{81} See \textit{id.}
\textsuperscript{82} See Facts for Consumers, \textit{supra} note 21.
\textsuperscript{83} See \textit{id.}
\textsuperscript{84} \textit{Id.}
\textsuperscript{85} See \textit{id.}
\textsuperscript{86} See Mortgage Insurance Companies of America, \textit{supra} note 18, at *6.
Consumers. Consumers have saved as much as $100 billion annually because of this information. Approximately fifty-one percent of auto insurance companies use credit scoring to set policy discounts, according to one Michigan survey.

Prescreened offers are subject to the FCRA’s adverse action notice requirement. If the company offering a consumer the preapproved offer takes adverse action against a consumer, it must provide the consumer with notice. As a result of such widespread use of prescreened offers, "insurers have devised strategies to circumvent the FCRA’s notice requirements." Otherwise, insurance companies would have to send large volumes of adverse action notices to consumers. Such strategies include "challenging the applicability of the FCRA to the initial sale of insurance" and "attempting to 'neutralize' the effect of an applicant’s credit score.

The ambiguities in the FCRA, combined with the contentious strategies of the insurance industry, have resulted in litigation. As of June 2007, prescreened offers were the subject of 253 federal lawsuits. Consumers alleged that once they applied for the policy, the insurance or credit company increased the initial terms of the offer. The reason for the change was the
consumer's specific credit history. Consumers alleged a violation of the FCRA because they did not receive adverse action notices once their initial rates were increased.

D. The Road to the Supreme Court

Prior to the Supreme Court granting certiorari in the Burr case, the federal courts of appeals were divided on the meanings of the provisions of the FCRA, especially the "willful failure to comply" section. The Seventh and Eighth Circuits, for example, had ruled that the adverse action notice requirement only applied where the company was "‘conscious’ that its actions had impinged on consumer’s rights under the FCRA.” The Third and Ninth Circuits, on the other hand, held that notice was required only in circumstances where an entity "may not have been intentionally violating the statute, but acted in reckless disregard of consumers’ rights.” The Supreme Court granted certiorari to resolve this conflict in "the circuits on an issue of crucial importance to all entities, including lenders facing actions, especially class actions, for purported violations of the FCRA.”

Two cases in the Ninth Circuit raised these issues and were consolidated for review by the Supreme Court. In one case, Ajene Edo filed suit against GEICO General Insurance Company (GEICO) for violating the adverse action notice requirement. Edo argued that he applied for auto insurance with GEICO and, once GEICO obtained Edo's credit score, he was offered a

99. See id.
100. See id.
102. Rist & Sipe, supra note 41 (citing Wantz v. Experian Info. Solutions, 386 F.3d 829, 835 (7th Cir. 2004) and Phillips v. Grendahl, 312 F.3d 357, 368 (8th Cir. 2002)).
103. Rist & Sipe, supra note 41 (citing Cushman v. Trans Union Corp., 115 F.3d 220, 227 (3rd Cir. 1997) and Reynolds v. Hartford Fin. Servs. Group, 435 F.3d 1081, 1093 (9th Cir. 2006)).
104. Rist & Sipe, supra note 41.
standard policy. Edo claimed that because GEICO did not offer Edo the "most favorable" rate and did not provide Edo with an adverse action notice, GEICO was in violation of the FCRA. Edo claimed no "actual harm, but sought statutory and punitive damages under the FCRA." The district court for the District of Oregon granted summary judgment for GEICO, finding that GEICO did not take adverse action against Edo because the rate that Edo was charged "would have been the same even if GEICO Indemnity did not consider information in [his] consumer credit history."

In the second case, Charles Burr and Shannon Massey filed suit against Safeco Insurance Company of America (Safeco) for a violation of the adverse action notice requirement. Burr and Massey were offered higher insurance premium rates than the "best rates possible" and were not sent adverse action notices. Burr and Massey alleged a willful violation of the FCRA's notice requirement and sought statutory and punitive damages under the adverse action notice requirement. The district court for the District of Oregon granted summary judgment for Safeco, holding that a single, initial rate for insurance could not constitute an adverse action.

The Court of Appeals for the Ninth Circuit reversed both

107. See Spano, 140 Fed. Appx. at 747. GEICO provided auto insurance through four subsidiaries: "GEICO General, which sold 'preferred' policies at low rates to low-risk customers; Government Employees, which also sells 'preferred' policies, but only to government employees, GEICO Indemnity, which sells standard policies to moderate-risk customers; and GEICO Casualty, which sells nonstandard policies at higher rates to high-risk customers." Safeco Ins. Co. of Am. v. Burr, 127 S. Ct. 2201, 2207 (2007). An agent takes a potential customer's information and obtains his credit score. See id. The information is processed by the GEICO computer, which selects the appropriate GEICO subsidiary and the particular rate of the policy to be issued. See id. Petitioner Edo received a standard policy from GEICO Indemnity. See id.
112. Burr, 127 S. Ct. at 2207.
judgments. In *GEICO*, the court held that whenever 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." In *Safeco*, the court rejected the reasoning that an initial rate was not an adverse action. Further, the Ninth Circuit held that "willfully fail[ing] to comply" with the FCRA includes a reckless disregard of a consumer's rights. The Supreme Court consolidated the two matters and granted certiorari to resolve the conflict in the circuit courts. The U.S. Government supported the consumers as amicus curiae.

III. EXPLANATION OF THE CASE

The Supreme Court's unanimous opinion in *Burr* clarified several ambiguities in the FCRA. The most important holdings were that (1) there is no prior dealing requirement to have an increase in rates, (2) the rate offered to trigger the adverse action requirement is an increase in regards to what the applicant would have been charged if the company had not taken

115. See *Burr*, 127 S. Ct. at 2207.


118. 1681n(a).

119. See *Reynolds*, 435 F.3d at 1099.

120. See *Burr*, 127 S. Ct. at 2208.

121. See United States Government, supra note 60.

122. See *Burr*, 127 S. Ct. at 2217-18. There were two concurring opinions in the case. See *id*. One was written by Justice Stevens, with whom Justice Ginsburg joined. See *id.* at 2217. Stevens disagreed with the majority's decision that "based in whole or in part" meant that consulting a credit report was a necessary condition for the adverse action. *Id.* at 2217. Stevens thought that reviewing a report should only be a sufficient condition. See *id.* at 2217-18. Also, Stevens worried that the neutral score adopted by the majority would permit insurance companies to use the credit score of a below-average consumer as the "neutral" score. *Id.* at 2217. The second concurring opinion was written by Justice Thomas and was joined by Justice Alito. See *id.* at 2217-18. Thomas disagreed with the Court's resolution that the term "increase" meant that "no prior dealing" is required. See *id.* This issue, he said, was not "necessary to the court's conclusion and not briefed or argued by the parties." *Id.* at 2218.

123. See DiMugno & Quinn, supra note 10.

124. See *Burr*, 127 S. Ct. at 2210-11.
his credit score into account, (3) no notice is required for the renewal applicant, (4) a credit report is a necessary condition for an increase in rates, and (5) "willful" is a broader standard than "knowing," and encompasses recklessness.

A. Establishing an "Increase"

1. No prior dealing requirement

The Court accepted the Government's argument that "increase" includes a first-time rate, holding that this definition was a "better fit" than determining an increase from a previous rate. An increase requires no prior dealing. Therefore, an adverse action notice was required for "initial rates for new applicants."

2. Benchmark

If the customer is a first-time customer, the Court held that insurance companies are permitted to use the "neutral rate test" to determine the baseline score. GEICO had the "better position" on this issue because it was likely that Congress, when proposing the FCRA, was "more ... concerned with the practical question whether the consumer's rate actually suffered when the company took his credit report into account than ... whether the consumer would have gotten a better rate with perfect credit."

The Court recognized that this reading of the statute leaves a loophole. For example, a first-time applicant might have a

125. See id. at 2213.
126. See id. at 2214.
127. Id. at 2212.
128. Id. at 2205.
129. See id. at 2211.
130. See Reynolds v. Hartford Fin. Servs. Group, 435 F.3d 1081, 1088 (9th Cir. 2006).
132. Id. at 2213.
133. Id.
134. Id. at 2213-14.
credit report that contains an error.\textsuperscript{135} Even with this error, the applicant might still have a "better-than-neutral" credit score.\textsuperscript{136} Because of this "better-than-neutral" credit score, the applicant would not receive an adverse action notice.\textsuperscript{137}

The Court reasoned that because it is unknown how often these cases will occur, a more "demonstrable and serious disadvantage" would occur if they adhered to the consumers' and the Government's position.\textsuperscript{138} This disadvantage would occur through excessive notifications or "hypernotification,"\textsuperscript{139} as the consumers' view would require insurers to send "slews of adverse action notices" and would undercut the "obvious policy" behind the notice requirement.\textsuperscript{140} The Court, however, did not offer any legal support for this view.\textsuperscript{141}

3. Renewals

The Court held that if the consumer is an existing customer, the baseline rate at the time of renewal would be the prior rate given to the customer.\textsuperscript{142} The prior rate replaces the neutral rate as the baseline.\textsuperscript{143} As long as the renewal rate is not higher than the previous rate given to the customer, an adverse action notice is not required.\textsuperscript{144} Thus, once a consumer has learned that his credit report led the insurer to increase his rates, he does not need to be given subsequent adverse action notices as long as his rates are not subsequently increased.\textsuperscript{145}

\begin{itemize}
\item \textsuperscript{135} See id. at 2213.
\item \textsuperscript{136} Id.
\item \textsuperscript{137} Safeco Ins. Co. of Am. v. Burr, 127 S. Ct. 2201, 2213 (2007).
\item \textsuperscript{138} Id. at 2214.
\item \textsuperscript{139} Id.
\item \textsuperscript{140} Id. (stating that the "obvious policy" was to notify the consumer that his rates suffered when the company took his credit report into account).
\item \textsuperscript{141} See id.
\item \textsuperscript{142} See id.
\item \textsuperscript{143} Safeco Ins. Co. of Am. v. Burr, 127 S. Ct. 2201, 2214 (2007).
\item \textsuperscript{144} See id.
\item \textsuperscript{145} See Nancy C. Dreher, \textit{Supreme Court Holds that Reckless Conduct Suffices as "Willful" Under the FCRA and Further Holds that Initial Rates Charged for New Insurance Policies can Constitute "Adverse Actions"}, BANKR. SERVICE CURRENT AWARENESS ALERT, Aug. 2007, at 7, available at 2007 NO. 8 BSV-BCA 7 [hereinafter \textit{Reckless Conduct}].
\end{itemize}
B. Credit Report a Necessary Condition

The Court held that consideration of the credit report is a "necessary condition" for the increased rate.\textsuperscript{146} Based on the purpose and history of the FCRA, § 1681m(a) does not require giving notice if the company merely consults the report.\textsuperscript{147} "If [a consumer's] credit report has no identifiable effect on the rate," the Court stated, there is no "immediately practical reason [for the consumer] to worry about it."\textsuperscript{148} Therefore, "it makes more sense" to require that consideration of the report be a necessary condition of the adverse action notice.\textsuperscript{149} "To the extent there is any disagreement on this issue," the Court said that it would accept GEICO's reading that reviewing the credit report must cause the adverse action notice.\textsuperscript{150}

C. Defining a Willful Violation

The Supreme Court also addressed the issue of what conduct constitutes willful failure to comply with the FCRA.\textsuperscript{151} GEICO and Safeco argued that "willfully fail[ing] to comply"\textsuperscript{152} with the FCRA only applies to knowingly violating the FCRA.\textsuperscript{153} The Court disagreed, and held that the "the standard civil usage" of the word "willful" includes "reckless FCRA violations."\textsuperscript{154} Thus, a company is not in violation of the FCRA unless it acted in reckless disregard of its provisions.\textsuperscript{155} The Court defined

\textsuperscript{146} Burr, 127 S. Ct. at 2212.

\textsuperscript{147} See id. ("The originally enacted version of the notice requirement stated: 'Whenever . . . the charge for . . . insurance is increased either wholly or partly because of information contained in a consumer report . . . , the user of the consumer report shall so advise the consumer...." Id. (citing Fair Credit Reporting Act § 615, 15 U.S.C. § 1681m(a) (1976 ed.).) "The 'because of' language in the original statute emphasized that the consumer report must actually have caused the adverse action for the notice requirement to apply." Burr, 127 S. Ct. at 2212. When amending the FCRA in 1996, Congress wanted to define "adverse action" more specifically and therefore decided to "split" the adverse action notice provision into two separate subsections. Id. "In the revised version of § 1681m(a), the original 'because of' phrasing changed to 'based on,' but there was no indication that this change was meant to be a substantive alteration of the statute's scope." Id.)

\textsuperscript{148} Burr, 127 S. Ct. at 2212.

\textsuperscript{149} Id.

\textsuperscript{150} Id.
recklessness as “a risk of violating the law substantially greater than the risk associated with a reading that was merely careless.”

D. Holding of Burr

The Court used these clarifications to arrive at its holding. In the GEICO matter, the Court held that because the initial rate offered to Edo was one that he “would have received [had] his credit score not been taken into account,” GEICO did not owe him an adverse action notice. In the Safeco matter, the Court found that although Safeco mistakenly thought that § 1681m(a) did not apply to initial applications, it was “clear enough” that the company’s conduct was not reckless. The Court acknowledged the ambiguity of the statute, stating that:

[b]efore these cases, no court of appeals had spoken on the issue, and no authoritative guidance has yet come from the FTC . . . . Given this dearth of guidance . . . . 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.

The Supreme Court upheld the Court of Appeals finding that a reckless disregard of the adverse action notice requirement would qualify as a willful violation within the meaning of the adverse action notice requirement of the FCRA. The Court reversed the judgments of the Ninth Circuit in both cases, however, because

151. See id. at 2208-10.
153. See Burr, 127 S. Ct. at 2208.
154. Id. at 2209 (emphasis added).
155. See id. at 2215.
156. Id.
157. See infra notes 158-62 and accompanying text.
158. See Burr, 127 S. Ct. at 2214.
159. Id. at 2215.
160. Id. at 2216.
161. See id. at 2215.
GEICO did not owe Edo an adverse action notice and Safeco’s misreading of the statute was not reckless.162

IV. EFFECTS OF THE DECISION

The Burr holding produced interesting and complicated effects on the parties involved.163 Consumer advocates called the holding an “incomplete victory.”164 Justice Stevens, in his concurring opinion, was not so optimistic and warned of the potential negative effects on consumers.165

A. “Increase”

Insurance companies may benefit from certain aspects of the Burr holding. The “neutral rate test” adopted by the Court is more favorable to insurance companies, requiring them to send out fewer adverse action notices than if they were required to apply the “best possible rate” test.166 The latter would have required companies to send an adverse action notice if the increased rate was higher than the rate the applicant would have received if he had the “best possible credit score.”167 Consequently, insurance companies would have been required to send “slews” of adverse action notices.168

Furthermore, the Burr opinion does not require insurance companies to use the “median consumer credit score.”169 Instead, the baseline score that insurance companies must apply is merely the credit score the applicant would have had if his credit score

162. See id. at 2216.
163. Hopkins, supra note 97 (noting that the Burr decision could save banks and other companies millions of dollars): see generally Patrikis & Cuccinello, supra note 14 (stating that the holding of Burr will be particularly interesting to counsel for insurance companies).
166. See Reckless Conduct, supra note 145.
167. Id.
168. Burr, 127 S. Ct. at 2214.
169. Id. at 2217 (Stevens, J., concurring) (stating that the “score need not (and probably will not) reflect the median consumer credit score”).
had not been considered by the insurance company. Therefore, the likely result is that insurance companies will "adopt whatever 'neutral' scores they want," and use "the creditworthiness of a run-of-the-mill applicant who lacks a credit report" as the neutral rate. Obviously, this score will be lower than the median consumer score. Because this "run-of-the-mill" baseline credit score will inevitably be subject to high insurance rates, it is less likely that the applicant's rate will be higher than this baseline rate. Thus, the adverse action notice requirement will not be triggered and insurance companies will not be required to send out nearly as many adverse action notices than if they had used the median consumer credit score.

Further, insurance companies will not need to send adverse action notices for renewal policies. The Court addressed the renewal issue as a matter of practicality, stating that hypernotification would thwart Congress' intention of making sure consumers know the accuracy of their credit reports. Justice Souter explained that once a consumer knows that his credit report caused the insurance company to charge him a rate that is higher than the initial rate offered, there is no reason for the consumer to be "told that over again with each renewal" that his rate has increased. The baseline rate now becomes the rate that was previously charged to the consumer and not the neutral baseline. Therefore, after an "initial dealing" between the

170. See id. at 2214 (majority opinion) (emphasis added).
171. Id. at 2217 (Stevens, J., concurring).
172. Id.
173. See id; see also supra notes 170-72 and accompanying text.
174. See DiMugno & Quinn, supra note 10.
175. See id.
176. Safeco Ins. Co. of Am. v. Burr, 127 S. Ct. 2201, 2214 (2007). The Court posed the following question: "did Congress intend the same baseline to apply if the quoted rate remains the same over a course of dealing, being repeated at each renewal date?" Id. As one critic put it: "given the Court's concerns about hypernotification, it not surprisingly answered [the renewal question] with an emphatic 'no.'" DiMugno & Quinn, supra note 10.
177. See Burr, 127 S. Ct. at 2214.
178. Id.
179. See id. (referencing the gas station metaphor again. "Once the gas station owner had charged the customer the above-market price," the Court reasoned, "it would be strange to speak of the same price as an increase every time the customer pulled in.")
company and the consumer, in order for an increase to trigger the notice requirement, it must be an increase over the previous rate charged to the consumer. Insurance companies can avoid sending adverse action notices by simply not raising an existing customer's rate with each renewal term.

One example of the renewal strategy is a consumer who initially had a perfect credit score and obtained the best insurance rate. When the consumer renewed his policy, he was charged a higher rate because his credit score had fallen during the interim. The new rate was still lower, though, than the rate he would have received had his credit report not been taking into account.

B. "Based in Whole or in Part"

The Burr holding indicated that insurance companies can continue to employ the multi-factor system. The based on requirement of the adverse action provision was ambiguous until the Burr opinion, which clarified that the term meant that "consideration of the report," must have been a "necessary condition" for the adverse action. The necessary condition requirement provides a possible avenue for insurance companies to circumvent the FCRA's notice requirement by allowing them to consider several facts about a consumer, including his credit report, and still not be obliged to send an adverse action notice.

GEICO is an example of an insurance company that

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180. Id.  
181. See supra notes 176-80 and accompanying text.  
182. Burr, 127 S. Ct. at 2214 n.16.  
183. See id.  
184. See id.  
185. See id.  
186. See infra notes 187-98 and accompanying text.  
187. Fair Credit Reporting Act § 615, 15 U.S.C.A. § 1681m(a) (West 2000 & Supp. 2007) ("[A]ny person [who] takes any adverse action with respect to any consumer that is based in whole or in part on any information contained in a consumer report" must provide the consumer with notice of the adverse action. (emphasis added)).  
188. Burr, 127 S. Ct. at 2212.  
189. See DiMugno & Quinn, supra note 10.
successfully exploited this reading of the statute. GEICO’s policy was to use a consumer’s credit score as just one “weighted factor . . . along with 14 others,” such as age and accident history, to select a rate at which the insurance policy was to be issued. GEICO did not determine the insurance rate until the fourteen factors, only one of which was the consumer’s credit score, were analyzed.

Under the multi-factor system, if an insurance company charges the consumer a higher rate notwithstanding his credit score, for a reason such as an extremely poor driving history, there is no need for an adverse action notice. This suggests that the duty to give an adverse action notice “arises from some practical consequence of reading the report,” and not just a “subsequent adverse occurrence” that would have caused the higher rate anyway.

The Supreme Court’s interpretation of the based on provision indicates that insurance companies should continue to structure their rate calculations around various factors, including a consumer’s credit report. The more factors that a company considers, the less likely that the driver’s poor credit history will be the sole factor to negatively affect his insurance rates. If the company is able to point to some other factor besides credit history to justify the higher rate, an adverse action notice will not be necessary.

C. “Willful”

1. An Amorphous Standard

Interestingly, the American Insurance Association

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190. See infra notes 191-93 and accompanying text.
192. DiMugno & Quinn, supra note 10.
193. See id.
195. Reckless Conduct, supra note 145.
196. See supra notes 186-96 and accompanying text.
197. See id.
198. See Burr, 127 S. Ct. at 2212.
“applauded the decision” in the Burr case. A statement issued by one of the association’s lawyers, Dave Snyder, stated that “the Court’s ruling provides guidance moving forward and makes clear that good faith efforts by insurers to comply with the law will not be punished as willful violations.” The statement went on to say that unfortunately the Burr opinion may not do much to stem the tide of consumer class action litigation in light of the adoption of an ambiguous standard for establishing willful violation of FCRA. On the other hand, the now “high bar for proving recklessness” makes various arguments available to assist companies in defending against this type of lawsuit. Similarly, because of the “high standard,” corporate defense lawyers say they will be “shocked [if] plaintiffs are going to be able to come up with reckless conduct.”

Actually, the ostensibly lower standard placed on “willfully fail[ing] to comply” with the FCRA was both helpful and harmful for insurance companies. The Court interpreted “willfully fail[ing] to comply” as “reaching reckless . . . violations.” Recklessness requires that the plaintiff show “that the company ran a risk of violating the law substantially greater than the risk associated with a reading that was merely careless.” In other words, recklessness is “an unjustifiably high risk of harm that is either known or so obvious that it should be known.” The standard is objectively assessed.

200. Dave Synder is assistant general counsel for the American Insurance Association.
201. Mentzer, supra note 199.
203. Id.
204. Joyce E. Cutler, Credit Policy: Supreme Court’s SAFECO Ruling Seen as Affecting Credit Card Class Actions, 88 B.B.R. 1130 (June 25, 2007).
206. § 1681n(a).
208. Id. at 2215.
209. Id.
210. See id. (stating that “there is no need to pinpoint the negligence/recklessness
Although recklessness is technically a lower standard of
mens rea than knowing, the standard still requires a great deal of
interpretation.\textsuperscript{211} Thus, the holding is burdensome for insurance
companies.\textsuperscript{212} The Court did not define what constitutes a reckless
disregard of the FCRA, and “essentially punted,” on this issue.\textsuperscript{213}
The Court only stated that recklessness is “on the continuum
between intentional and negligent violations of the statutes.”\textsuperscript{214}
Because Safeco’s conduct, in the Court’s view, “[fell] well short”\textsuperscript{215}
of recklessness, the Court unfortunately failed to “pinpoint the
line between recklessness and negligence.”\textsuperscript{216} Therefore, there was
no imminent need for the Court to address this issue.\textsuperscript{217}

A recklessness standard “makes it easier” for consumers to
allege a violation of § 1681n(a), which will increase the risk of
lawsuits filed by consumers.\textsuperscript{218} Further, the ability of a defendant
to “estimate accurately the risk of litigation” will be diminished
because of the “amorphous [recklessness] standard.”\textsuperscript{219} The
Financial Services Roundtable gave as an example a company that
made a good faith determination that it acted non-willfully in
regards to violating the statute.\textsuperscript{220} Before \textit{Burr}, this company
would likely be willing to litigate the case.\textsuperscript{221} After \textit{Burr}, however,
the company would be under “increased pressure to settle the
case” because of the ambiguity of the standard.\textsuperscript{222} In a case very
similar to \textit{Burr}, the insurance companies settled a class action suit
for $280 per person for a class of more than 67,000 members.\textsuperscript{223}
Plaintiffs never had to prove actual damages sustained by a class
member, yet the settlement totaled around $20 million. The Federal Trade Commission (FTC) has not provided any commentary on the FCRA since 1990, but is “working on an update.”226 Unfortunately, the FTC, although it has “enforcement responsibility” over the FCRA, is the only one of “all the federal agencies” that does not have “rulemaking authority.”227 Therefore, it would be more useful for the Federal Reserve Board, or the Office of Comptroller of the Currency to “issue interpretations pursuant to that rulemaking authority.”228 According to Helen Foster, a former FTC lawyer who briefly worked on the agency’s previous commentary, the rulemaking authorities need to “put out guidance that would be more helpful to their regulated financial institutions.”229 “The FTC guidance is very useful,” she said, “but what would be more useful would be for the bank agencies to also opine.”230

2. Reliance on Legal Counsel

The reasonable objective standard leaves insurance companies with many unanswered questions, as future litigants are left “the task of propounding a formulation of the reckless disregard standard.”232 This will require insurance companies to consult the advice of legal counsel to avoid future violations.233

225. See Hopkins, supra note 97.
226. Id. (according to Joel Winston, associate director of the agency’s division of privacy and identity protection).
227. Id.
228. Id.
229. Id. Helen Foster is an attorney at Manatt, Phelps & Phillips LLP. Id.
230. Id.
231. See Safeco Ins. Co. of Am. v. Burr, 127 S. Ct. 2201, 2215 (2007). The Court held that Safeco’s reading “was not objectively unreasonable” although it was “erroneous.” Id.
233. See Hopkins, supra note 97.
Advice of counsel, however, will only be relevant if a court “cannot find that an insurer’s refusal to send an adverse action notice was objectively reckless based on judicial guidance and the language of the statute.” Objective recklessness will therefore be for the courts to decide.

The Court’s silence on this matter still raises the issue of “how unreasonable an insurer’s interpretation of the FCRA must be to rise to the level of a reckless disregard of the insurer’s duties.” The Court failed to address the Ninth Circuit’s position that “tenable, albeit erroneous, interpretation” may be in reckless disregard of the FCRA, “even when those interpretations are based on the advice of counsel.” The Court also did not rule on whether a company’s “good faith reliance on legal counsel” would protect the company from liability for willful violation of the FCRA. The Court “seemed to suggest,” however, that it would. Therefore, it will likely take another case to discern whether or not companies may rely on legal counsel’s interpretation and avoid a willful failure to comply with § 1681n(a).

The Burr holding has already affected pending lawsuits against credit and insurance companies. In both the Third and the Ninth Circuit, two cases have been remanded for a further determination of whether the defendant’s conduct was “reckless.” In State Farm Mutual Automobile Insurance Co. v. Willes, the Supreme Court remanded the case to the Ninth Circuit to “reconsider” its reversal of the district court’s finding that the insurance company had willfully violated the FCRA. In

234. DiMugno & Quinn, supra note 10.
235. See id.
236. Id.
238. DiMugno & Quinn, supra note 10 (emphasis added).
241. See DiMugno & Quinn, supra note 10.
242. See infra notes 243-44 and accompanying text.
244. Vacates, Remands, supra note 243.
Whitfield v. Radian Guaranty, Inc., the Third Circuit remanded the case to the district court for the same reasons and asked the parties to file briefs on “how the case might be affected” by the Burr holding.\textsuperscript{245}

3. Consumer Remedies

The FCRA depends on consumer self-help for its enforcement.\textsuperscript{246} Often, the § 1681n(a) damages are the only effective remedy against a reporting agency or company.\textsuperscript{247} The reckless standard for a willful violation makes it easier for consumers to bring a class action lawsuit against these actors.\textsuperscript{248} Burr has increased the likelihood that an adverse action notice claim will be “brought and certified as a damages class action under the Federal Rules of Civil Procedure 23(b)(3)”\textsuperscript{249} In order to bring a claim under the FCRA, a plaintiff need not establish any actual damages as long as he alleges that the defendant “willfully” violated the FCRA.\textsuperscript{250} Consequently, a recklessness standard for a willful violation makes it easier for consumers to bring such a claim, as a plaintiff will only be required to show a reckless disregard of the statute instead of an intentional violation.\textsuperscript{251} The common defense of “‘we didn’t know’” is going to be “less useful to the defendants now” that the Court has applied a reckless standard.\textsuperscript{252}

It is unclear what effect Burr will have on the damages awarded to plaintiffs in these cases. Currently, many laws authorizing statutory damages, similar to the FCRA, also contain a provision limiting the aggregate award to a class.\textsuperscript{253} Congress has

\textsuperscript{245} Id. (citing Whitfield v. Radian Guaranty Inc., 2007 U.S. App. LEXIS 20732 (3rd Cir. 2007)).
\textsuperscript{246} See DiMugno & Quinn, supra note 10.
\textsuperscript{247} See National Consumer Law Center, supra note 18, at *27-8 (stating that tort claims are not effective because Congress has granted immunity to most agencies, users and furnishers. Similarly, criminal liability is “virtually nonexistent”).
\textsuperscript{248} See Financial Services Roundtable, supra note 42, at *20.
\textsuperscript{249} Id.
\textsuperscript{250} Id.
\textsuperscript{251} See id.
\textsuperscript{252} Cutler, supra note 204.
\textsuperscript{253} See Joint Brief of Respondents, supra note 30, at *31.
the ability to limit the availability of class actions under a federal statute, but has not chosen to do so in the FCRA.\textsuperscript{254} It is possible, however, that Congress will amend the FCRA to limit such damages because of lawsuits like \textit{Burr}.\textsuperscript{255} Also, the judge in the class action suit has the power to limit damages considered to be "unconstitutionally excessive."\textsuperscript{256} After a class has been certified, the judge may evaluate the defendant's conduct and limit its exposure.\textsuperscript{257}

There is evidence that judges have taken other measures to protect defendants.\textsuperscript{258} For example, some judges have started to reject class certification in FCRA cases.\textsuperscript{259} U.S. District Judge John F. Walter "refused" to certify a class action filed against Cost Plus, Inc.\textsuperscript{260} "In this case, if a class is certified and Plaintiff prevails, even the minimum statutory damages would be ruinous to Defendant," Walter said.\textsuperscript{261} If the plaintiff had been able to prove a willful violation, the court said that the "statutory damages alone would range from a minimum of $340 million to a maximum of $3.4 billion."\textsuperscript{262} A judgment in this amount would have bankrupted the defendants, even though there was no evidence that the plaintiffs in the case were actually harmed.\textsuperscript{263} Denial of class certification, however, does not prevent potential plaintiffs who have "suffered actual damages as a result of [the] Defendant's conduct" from pursuing their individual cases.\textsuperscript{264}

Insurance companies warn that the application of a reckless standard will ultimately be disadvantageous for consumers.\textsuperscript{265} They claim that "'gigantic consumer class actions'" seeking "damages for millions of transactions" will have "ruinous effect on

\begin{footnotes}
\footnotetext{254}{See id.}
\footnotetext{255}{See id. at *32.}
\footnotetext{256}{Id.}
\footnotetext{257}{See id.}
\footnotetext{258}{See Cutler, \textit{supra} note 204 (citing Spikings v. Cost Plus Inc., No. 2:06-cv-08125, C.D. Cal. May 25, 2007); see also Joint Brief of Respondents, \textit{supra} note 30, at *32.}
\footnotetext{259}{See Cutler (citing Spikings), \textit{supra} note 204.}
\footnotetext{260}{Id.}
\footnotetext{261}{Id.}
\footnotetext{262}{Id.}
\footnotetext{263}{Id.}
\footnotetext{264}{Id.}
\footnotetext{265}{See Joint Brief of Respondents, \textit{supra} note 30, at *29.}
\end{footnotes}
small businesses in particular" and ultimately the costs will be "paid by consumers."266 If consumers will be charged more by insurance companies as a result of the damages and legal fees incurred in defense of their rates and policies, then perhaps the victory for consumers is a hollow one.267

D. Consumer Protection Risks

The purpose of the FCRA is, among other things, to protect consumers.268 Consumer protection is at risk when consumers are no longer alerted to potential problems with their credit reports.269 Infrequent credit applicants may not even realize that their credit is in jeopardy.270 According to the National Consumer Law Center, a "significant number" of Americans do not apply for credit on an active basis.271 Many of these individuals, however, periodically purchase insurance.272 For these consumers, the adverse action notice "may be the only alert they ever receive that their credit profile is compromised."273

A low credit score could result from inaccurate reporting or even identity theft.274 Because of the thief's ability to conceal the fraud,275 victims do not usually discover identity theft until fifteen months after it has occurred;276 at least twenty percent will not learn of the theft until two years later.277

Information received by credit reporting agencies "almost always shows early evidence of obvious errors and indicia of

266. Id. (citing Reiter v. Sonotone Corp., 442 U.S. 330, 344-45 (1979)).
267. See Gupta, supra note 164.
269. See National Consumer Law Center, supra note 18, at *26.
270. See id. at *27.
271. See id.
272. Id.
274. See id; see also National Consumer Law Center, supra note 18, at *23 (stating that identity theft occurs when "an imposter poses as someone else and applies for and receives credit on the basis of another's good credit standing").
275. See National Consumer Law Center, supra note 18, at *23.
276. See id. at *24.
277. See id.
fraud.” Failure by insurance companies to send consumers adverse action notices would “completely eliminate” this early warning system. The Burr holding, in effect, allows insurance companies to send out fewer adverse action notices, which might prevent early detection of some identity thefts.

Informing consumers about the “inaccuracies in their credit reports is the linchpin of the entire credit reporting regulatory scheme embodied in the FCRA. Mistakes in a consumer’s credit report, “if corrected, would qualify the applicant for a more favorable [insurance] rate.” Therefore, it is difficult to “reconcile” the purpose of the FCRA with a holding that “relieves insurers of their duty” to provide consumers with a notice that an adverse action has been taken against them because of their credit report.

V. CONCLUSION

The Burr holding was both advantageous and disadvantageous for the parties involved in the case: insurance companies and consumers. Burr identifies a loophole in the FCRA, allowing companies to use a neutral rate as the baseline for an increase. Therefore, insurance companies are required to send out fewer adverse action notices than they would if the baseline was the best possible rate. Moreover, insurance companies can consult various aspects of a consumer’s identity, such as age and driving record. If these factors, exclusive of credit score, result in an increased rate, no adverse action notice is required. The Burr holding, however, is also disadvantageous to insurance companies, as the “willful” standard is still vague and

278. Id.
279. Id. at *27-28.
280. See id. at *27.
281. DiMugno & Quinn, supra note 10.
282. Id.
283. Id.
284. See supra notes 163-282 and accompanying text.
286. See id. at 2214.
287. See id. at 2212.
288. See id.
will require companies to consult legal counsel in the course of interpreting their conduct. 289

Despite the lower standard of proof required for a willful violation of the FCRA, the holding is most disadvantageous to consumers. 290 The holding requires only the minimal adverse action notices to be distributed to consumers, even when identity theft or errors in the report might jeopardize the consumer’s credit score. 291 Nevertheless, with the still ambiguous standard of “willful,” the Burr holding increases the likelihood of future litigation. 292 Fortunately, the Burr holding has affirmed the right of a consumer to bring a private action against a company that fails to adhere to the ambiguous provisions of the FCRA. 293

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289. See DiMugno & Quinn, supra note 10.
290. See id.
291. See National Consumer Law Center, supra note 18, at *27.
292. See Financial Services Roundtable, supra note 42, at *20.
293. See Burr, 127 S. Ct. at 2206.