

Summary of Case

The issue in this case was whether the adverse action notice provisions of the Fair Credit Reporting Act ("FCRA"), 15 U.S.C. § 1681m(a) (2007), apply to a company providing mortgage guaranty insurance to a mortgage lender when it sets a high premium rate that is determined, in part, by information in the mortgage borrower's credit report. The district court had said *No*, but the Circuit Court said *Yes*.

Facts. Whitney and Celeste Whitfield (the "Whitfields") contracted to buy a new home. They financed most of it through Countrywide Home Mortgage. It agreed to lend them 98% of the purchase price on the condition that the Whitfields pay for mortgage guaranty insurance. After the mortgage papers were signed, Countrywide sought the insurance from Radian Guaranty, Inc., and Radian agreed to provide it for a monthly charge of \$900+ per month. This adds up to a shade more than \$10,800 per year. Radian based price on the value ratio of the mortgage and on Whitfield's credit score, which Countrywide had obtained from his consumer credit report. Countrywide provided Whitfield's with the credit report it had used.

The evidence was that state law and standard procedures were all followed. Radian's rate schedule had been approved by the Virginia Bureau of Insurance. The insurance issued insured Countrywide against some losses. Countrywide bought the insurance on-line. By this means, Countrywide provided Radian with the borrower's credit score. Radian accepted the deal, and Countrywide passed the cost along to the Whitfields, an arrangement to which they had explicitly agreed. An escrow account was established by means of which the Whitfield's could pay the Radian premiums. They did precisely this, and—in the end—it received a refund of unearned premiums directly from Radian.

Radian conceded that had Whitney's credit score been better, Countrywide would have been charged the lower premium, and consequently, the Whitfields would have paid a lower premium. (Why the credit score of Celeste was not involved is not stated.) We arrive now at the crucial point. Radian also admitted that the Whitfields were not provided with an "adverse action notice" by Radian (or anyone else for that matter). "Indeed, it [was] Radian's standard policy not to send adverse action notices to borrowers

Underwriting

Federal Fair Credit Reporting Act Applies to Mortgage Guaranty Insurers User of Borrowers' Credit Information in Pricing Lenders's Policies

Lack of Privity between Insurer and Borrower Does Not Exempt Insurer from FCRA's Requirements

Whitfield v. Radian Guaranty, Inc., ___ F.3d ___, 2007 WL 2452641 (3rd Cir. 2007)

Case at a Glance

The Whitfields borrowed a substantial sum to finance a new house. The lender required them to pay for mortgage guaranty insurance. Radian Guaranty, the insurer, charged them an extraordinary high price, based on credit history information it received from the lender. The Fair Credit Reporting Act ("FCRA") requires that any insurer taking an adverse action against an individual must notify the individual of the adverse action. Radian failed to notify the Whitfield's of its increased price. The Third Circuit held that Radian's pricing was adverse, that it was based on credit information, and that Radian was obligated to provide the Whitfield's an adverse action notice. Therefore, the circuit court reversed summary judgment and returned the case to the district court. The decision of the circuit court was based upon *Safeco Ins. Co. v. Burr*, ___ U.S. ___ (2007).

when the lenders application for mortgage insurance is approved.”

Statute. The FCRA is the applicable statute. It requires if a person who is a permissible user of information from a credit report (a/k/a “consumer report”) takes any adverse action against an individual, that person shall notify the individual of the adverse action. The meaning of the phrase “adverse action” is obviously crucial. It is a defined term in the FCRA, and the definition includes an insurance prong, along with credit prong and a catch-all provision. In relevant part, the insurance prong states as follows: “The term ‘adverse action’ means an *increase* in any charge for . . . any insurance . . . applied for, in connection with the underwriting of insurance[.]” 15 U.S.C. § 1681a(k)(1)(B)(i). (Emphasis added.) FCRA’s notification of any adverse action section requires that if there is an adverse insurance action based upon information from a consumer reporting agency which bears on the customer’s credit worthiness, credit standing, or credit capacity, the insurer must provide with notice of the adverse action, and that notice must contain specific concrete information. 15 U.S.C. § 1681m(a).

The Safeco Decision. Most significantly, in its *Safeco* decision, the Supreme Court of the United States decided that the word “increase” in § 1681a(k)(1)(B)(i) encompasses the initial rates for new applications. They also determined that a rate is “based on” a credit report if there is even a thread of a causal relationship between information in the credit report and the adverse decision. Significantly, the High Court held that the baseline for deciding the extent of adversity in the insurer’s decision is what the applicant would have had to pay if the insurer had not taken credit score into account. Finally, the court held that a *willful failure to comply* with FCRA includes a reckless violation, as well as a deliberate violation.

Procedural History. The *Safeco* decision was made while this case was pending before the circuit court, where the Whitfields appealed after the district court granted summary judgment to the insurer. *Whitfield v. Radian Guaranty, Inc.*, 395 F.Supp.2d 234 (E.D. Pa. 2005). Consequently, the panel asked for supplementary briefing. The parties, the amici, and the Federal Trade Commission all provided supplementary letters. The panel reviewed them in its opinion, but guessing what they say is obvious

enough, and need not be recounted here.

The Whitfields had sought recovery and the establishment of a class action. Since the district court denied their right to recovery, the class action issue became moot. The Whitfields appealed, and circuit court panel reversed the district court, and sent it back for trial.

The Circuit Court’s Analysis. The circuit court followed *Safeco* in important respects. First, it held that Radian Guaranty had increased the price to be paid by the Whitfield’s, and so there was an adverse action under FCRA. In addition, Radian had relied upon the credit report. It did not matter that it did not get the credit report itself and that it did not get what it got from a credit reporting agency. It got the credit score and history information from the lender, and it relied upon it. The lender—the insured-to-be—got it from the credit bureau. Thus, “there is no doubt that Radian’s premium for the mortgage insurance that the Whitfields were required to pay was ‘based on’ information in the credit report, albeit information supplied to Radian from Countrywide.” So far, so simple.

The crux of the district court holding was that FCRA and its notice requirement were inapplicable in this case because there was no privity between the Whitfields, who were the ultimate consumers, and Radian. After all, Radian issued insurance to Countrywide, not the Whitfields. The Whitfields were the risk or the sources of risk, and it was Countrywide that bore the dangers of the Whitfields not paying. The circuit court panel rejected the “No Privity Argument” and its conclusion. This statute says nothing about privity, and its purpose is to protect consumers, not parties to contracts. Hence, the privity requirement is not integral to the statute, and it is not necessary for its purpose. In addition, the Whitfields either were or could have been injured by means avoidable had there been an adverse action notice. For example, they could have avoided inaccurate information in the credit report. In addition, they might have been able to find better and cheaper mortgage insurance.

Interestingly, the Circuit Judges, led by Judge Sloviter, found precedent for their decision. One of the cases was the Ninth Circuit decision in *Reynolds v. Hartford Fin. Ins. Servs.*, 435 F.3d 1081, 1095 (9th Cir. 2006). Although this case became part of *Safeco*, and was reversed under another name, the reversal

was upon other grounds. Hence, the *Reynold's* decision is authoritative on this point and relevant. In addition, there was a district court decision on almost exactly the same facts as this case, and the Third Circuit panel followed the reasoning in that case. *Brossel v. Triad Guar. Ins. Corp.*, No. Civ. A. 1:04CV-4M, 2005 WL 2260498 (W.D.Ky. 2005). That case even involved Countrywide as the mortgagee.

There was one case going in the opposite direction, *Hinton v. Federal Nat'l Mortgage Ass'n*, 945 F.Supp. 1052, 1055, 1058 (S.D.Tx. 1996). The district court had relied upon this decision. In that case, facts were substantially similar to *Whitfield*, and the district court held that the borrower was merely an incidental beneficiary of the insurance policy and therefore had no cause of action. The Circuit Court panel implies that *Hinton* is no longer worth remembering, at least on this point, since *Safeco* has now been decided.

Given the importance of willfulness in FCRA, it now becomes appropriate to consider whether Radian was willful in failing to send the *Whitfield's* an adverse action notification. The panel does not reach that issue, however, since it follows that it is a question of fact, and should be decided in a trial court, by whomever it is that is deciding issues of fact. Since it is a fact issue, obviously enough, it is not a question of law.

Comment

Potentially, this case is of more interest than it might appear. "Why?" one might ask. It's nothing but a very technical interpretation of a complex federal statute which has a little to do with insurance underwriting.

What's important about this case is that it creates a situation in which a non-insured can sue an insurer for damages arising out of a procedural foul up in the underwriting process. Heretofore, it has been almost a universal truth that a non-insured, i.e., someone who is not a party to the insurance contract, could not sue an insurer on underwriting, coverage, or adjustment issues. Usually, in cases arising out of contracts, only parties to the contract can sue each other under the contract. So it has been with insurance policies, which are—please remember—nothing more than a type of contract.

But there have always been exceptions. One of them was the intended beneficiary. This type of person could sue under the contract. On the other hand, *unintended* beneficiaries did not have that right. This is why the reasoning of the district court was what it was. Now the Third Circuit has moved a step closer to change that old rule. Of course, a statute is involved and that makes a difference. It gives some the chance of saying that this shift has nothing to do with contract law, and is generated by statute only. What a narrow and reactionary view! // Quinn