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***Safeco Insurance Company v. Burr*: The United States Supreme Court Creates New Guidelines for the Use of Credit Reports in Underwriting**

by John K. DiMugno and Michael Sean Quinn

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The widespread use of consumer credit information within the insurance industry to underwrite a variety of coverages has placed the industry on a collision course with the federal Fair Credit Reporting Act (FCRA). The FCRA requires "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 [credit] report" to notify the consumer. 15 U.S.C. § 1681m(a). The notice must point out the adverse action, explain how to reach the agency that reported on the consumer's credit, and tell the consumer that he can get a free copy of the report and dispute its accuracy with the agency. FCRA defines "adverse action" by an insurance company 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." § 1681a(k)(1)(B)(i). Crucial to the scope of insurers' duty to provide notice under § 1681m(a) is the meaning of the phrase "based in whole or in part on" in § 1681m(a) and the word "increase" in the adverse action definition. The meaning of these words, which are not defined in the FCRA, was the source of much debate until the Supreme Court's decision last month in *Safeco Insurance Co. v. Burr*, 127 S.Ct. 2201 (2007).

Also critical to insurers' potential liability under the FCRA is the meaning "willfully" in the FCRA civil enforcement provision. While § 1681o permits recovery of actual damages and attorney's fees from an insurer who negligently fails to comply with the statute, § 1681n(a) allows for recovery of statutory damages ranging from \$100 to \$1,000 per violation,

and punitive damages, if an insurer "willfully fails" to provide required adverse action notices. Proof of "willful" failure to comply with the statute dramatically increases insurers' exposure under the statute because the liquidated damages provision eliminates individual questions of fact regarding actual damages, allowing plaintiffs' attorneys to bring FCRA cases as class actions.

How the FCRA, which originally was enacted when credit scores were used exclusively to grant or deny credit, applies to insurance industry is far from transparent. Since the emergence of modern risk-based pricing, an applicant's credit score almost never results in an outright refusal to issue a policy, or for that matter a denial of credit. Rather, it is one factor, along with many others, that determine the rate or premium the applicant must pay for a policy. Typically, insurers charge a broad range of premiums for similar if not identical coverage, with their lowest priced policies reserved for a small segment of the applicant pool that poses minimal risk of ever making a claim. Most insurers' pricing models require a very high credit score—obtained by only a small percentage of the general population—in order to qualify for the lowest-priced policy. If the FCRA requires insurers to send an "adverse action" notice to every applicant whose credit score does not qualify him or her for the lowest possible premium, a large volume of customer complaints and inquiries is inevitable. The cost of fielding and addressing these customer inquiries has the potential to outweigh the benefits of risk-based pricing models. Consequently, insurers have devised strategies to circumvent the FCRA's notice require-

ments. These strategies have ranged from challenging the applicability of the FCRA to the initial sale of insurance to attempting to “neutralize” the effect of an applicant’s credit score. The approaches of GEICO Insurance Company and Safeco Insurance Company, the two insurers before the Supreme Court in *Safeco Insurance Company of America v. Burr*, are illustrative of these approaches.

I. Insurer Strategies to Avoid or Minimize the Obligation to Send Adverse Action Notices

Safeco took the course of least resistance and staked its defense on the proposition that the FCRA does not apply to the initial premium charged a first time customer, regardless of whether the customer’s credit history affected the amount of that premium. GEICO, on the other hand, devised a procedure to “neutralize” credit scores and thereby minimize the number of first time applicants who were entitled to receive an adverse action notice. The procedure was separate from GEICO’s underwriting process and was invoked only after completion of the normal underwriting process. Under the normal underwriting process, which determines the actual price an applicant will pay for a policy, potential customers call a toll-free number answered by an agent of four affiliated GEICO companies: GEICO General, which sells “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. The agent takes pertinent underwriting information from the applicant and, with permission, gets the applicant’s credit score. The credit score is one weighted factor—along with 14 others—that GEICO uses to assign the applicant to one of the four GEICO companies and select the particular rate at which a policy may be issued. Only after the particular company and rate are determined, based in part on the applicant’s credit score, does GEICO attempt to neutralize the score. It does so by comparing the rate actually charged to the rate the applicant would have been charged if the applicant had an “average” credit score. GEICO then gave adverse action notices only to those customers who would have received a worse placement than that

of the hypothetical “average” consumer. Under GEICO’s scheme, applicants with better than average or “neutral” credit scores never received notice even though in some instances a credit score higher than the applicant’s above-average score would have qualified the applicant for placement with a preferred company at a lower rate.

GEICO’s underwriting of the plaintiff’s application illustrates how this neutralization methodology works. In December 2000, plaintiff called GEICO for a rate quote on personal automobile insurance. Using the procedure described above, GEICO considered plaintiff’s credit score along with his other underwriting characteristics, and determined that plaintiff was eligible for a policy with the standard-rate company, GEICO Indemnity. To determine whether plaintiff should receive an adverse-action notice, GEICO then compared that result with the company and tier placement plaintiff would have received with an ostensible “neutral” credit score. Plaintiff’s weighted credit score (62) was greater than the weight associated with a “neutral” or average weighted credit report (56), which was approximately one-half the top weighted credit score of 105, but not by enough to improve his company or tier placement. Accordingly, GEICO determined that no adverse action notice was required, even though GEICO’s “credit matrix” revealed that a weighted credit score near the high end of the range would have qualified plaintiff for placement with GEICO General, the preferred and least expensive company.

II. Litigation History

Consumers whose credit scores did not qualify them for the lowest possible premiums offered by GEICO and Safeco brought proposed class actions against the insurers for failure to send adverse action notices in violation of FCRA. Their complaints sought statutory and punitive damages on the ground that the insurers’ violations of the FCRA were “willful” with in the meaning of § 1681n(a). At the trial level, GEICO’s and Safeco’s strategies for avoiding the FCRA’s notice requirements worked.¹ The district court granted summary judgment in favor of both insurers. With respect to GEICO, the district court found no adverse action, and therefore no notice obligation, when “the premium charged ... would have been the same even if GEICO Indemnity did not

consider information in [his] consumer credit history.” With respect to Safeco, the court determined that the offering of a single, initial rate or premium for insurance cannot be an “adverse action.”

The United States Court of Appeals for the Ninth Circuit reversed both judgments in an opinion that caused widespread consternation in the insurance industry.² The circuit court rejected both insurers’ approaches to avoiding the FCRA’s notice requirements and interpreted the term “willful” broadly to encompass a reckless disregard of one’s obligations under the FCRA. Rejecting the insurers’ position that enhanced remedies are available only for knowing violations of the FCRA, the court equated recklessness with “reliance on creative lawyering that provides indefensible answers,” “implausible interpretations, or “creative but unlikely answers to issues of first impression.”³ The circuit court remanded the case to the district court for further proceedings regarding the conduct of both GEICO and Safeco.

GEICO and Safeco petitioned the United States Supreme Court for certiorari. The Court consolidated the two matters and granted certiorari to resolve a conflict in the circuits as to whether § 1681n(a) reaches reckless disregard of the FCRA’s obligations,³ and, if so, decide whether GEICO and Safeco committed reckless violations. On June 4, 2007, the Supreme Court issued its opinion in *Safeco Insurance Company of America v. Burr*, ___ U.S. ___, 127 S.Ct. 2201 (2007). While the Court’s opinion did not give either side everything it wanted, it is on balance a victory for the insurance industry. The Court agreed with the Ninth Circuit that willful as used in § 1681n(a) encompasses reckless disregard, but ruled as a matter of law that neither GEICO nor Safeco acted in reckless disregard of their obligations under the FCRA. Moreover, the Court ruled that GEICO did not even violate the FCRA in refusing to send adverse action notices.

Justice Souter, writing for the Court, had a solid seven member majority for every part of his opinion. Chief Justice Roberts and Justices Kennedy and Breyer joined his opinion in full. Justice Scalia joined

every part of the opinion, except two footnotes that offended his well known objection to the use of legislative intent in interpreting legislation. Although Justices Stevens, Ginsburg, Thomas, and Alito objected to portions of the majority opinion, at least two of them—Justices Stevens and Ginsburg in some cases, and Justices Thomas and Alito in others—agreed with every part the opinion.

III. The Supreme Court’s Opinion

A. When Does an Insurer’s Use of an Insurance Applicant’s Credit Score in the Underwriting Process Constitute an “Adverse Action” Requiring Notice to the Applicant?

In order to decide the insurers’ liability for statutory and punitive damages under the FCRA, the Court first had to determine whether the insurers violated the statute at all. Plaintiffs’ claims against both GEICO and Safeco were premised on initial rates charged for new policies. Thus, a threshold question was whether an insurer can “increase” the initial premium charged for an insurance policy in the absence of any prior dealing between the insurer and the applicant. The district court thought not, reasoning that “increase” necessarily connotes change and without prior dealing there can be no change.

The Supreme Court majority thought otherwise. The district court and the insurers, in Justice Souter’s view, construed the term “increase” too narrowly. Although acknowledging that “increase” measures difference, he found nothing in the statute that requires courts to measure the difference between what an insurer is charging in the challenged transaction and what the insurer charged in a previous transaction with the same insured. He reasoned that the term can just as easily be construed to measure the difference between what an insurer charges the complaining insurance applicant and what the insurer charges other applicants. To illustrate, Justice Souter used an example, taken from an amicus brief filed by

1. *Edo v. GEICO Casualty Co.*, CV 02-678-BR, 2004 WL 3639689, *4 (D.Ore., Feb. 23, 2004).

2. 435 F.3d 1081.

3. Compare, e.g., *Cushman v. Trans Union Corp.*, 115 F.3d 220, 227 (C.A.3 1997) (adopting the “reckless disregard” standard), with *Wantz v. Experian Information Solutions*, 386 F.3d 829, 834 (C.A.7 2004) (construing “willfully” to require that a user “knowingly and intentionally violate the Act”); *Phillips v. Grendahl*, 312 F.3d 357, 368 (C.A.8 2002) (same).

the United States Government, of a gas station owner who charges more than the posted price for gas to customers he does not like. “[I]t makes sense,” Justice Souter observed, “to say that the owner increases the price and that the driver pays an increased price, even if he never pulled in there for gas before.”⁴ He further noted that the broad reading of the term proposed in the Government’s brief is more consistent the expansive language used in the FCRA to describe the adverse effects of unfair and inaccurate credit reporting. Exempting first-time buyers from the notice requirement, Justice Souter observed, would open a gapping hole in the statute by eliminating notice in the circumstance where it is most likely to be needed. In this regard, he pointed out that “notice in the context of an initially offered rate may be of greater significance than notice in the context of a renewal rate.”⁵ If first-time buyers are offered on the basis of a single, long-term guaranteed rate, a consumer who is not given notice during the initial application process may never have an opportunity to learn of any adverse treatment.⁵

Having found that offering an initial rate for new insurance can be an “adverse action” triggering the FCRA’s notice requirement, the Court turned to the question of causation, i.e., the type of causal connection the FCRA requires between the insurer’s use of a credit report and the rate the customer pays. The answer to this question hinged on the meaning of FCRA’s requirement that the adverse action be “based in whole or in part on” a credit report. § 1681m(a). The Court acknowledged that § 1681m(a) is textually ambiguous. On one hand, the phrase “based on” suggests that the credit report must a “necessary logical condition” to the rate increase in that the increase would not have occurred “but for” the credit report. On the other hand, the statute speaks in terms of basing the rate increase “in part” as well as wholly on the credit report, which suggests that “adverse action is ‘based on’ a credit report whenever the report was considered in the rate-setting process, even without being a necessary condition for the rate increase.” In resolving this ambiguity, the Court focused on the practical

consequences for the consumer of ensuring that credit information is accurate. If consideration of a corrected credit report would not have changed the user’s decision—in this case, the insurers’ underwriting decisions—the Court saw no practical reason for ensuring that the consumer has information needed to correct the report. “[I]t makes more sense,” Justice Souter observed, “to suspect that Congress meant to require notice and prompt a challenge by the consumer only when the consumer would gain something if the challenge succeeded.”⁶

B. The GEICO Loophole

If Justice Souter had stopped there, the Court’s decision would have been unremarkable. A holding that the plaintiffs’ credit reports must have made a practical difference, together with a remand for a factual inquiry into that issue, would have left the lower courts significant room to apply the statute in a manner that requires insurers to send notice whenever a better credit score would have resulted in a better offer from the insurer. The Court, however, in what is destined to become known as the GEICO loophole, proceeded to rule as a matter of law that GEICO’s method of “neutralizing” credit scores effectively identified when a credit score is a “logically necessary condition” to a rate increase triggering the insurer’s obligation to send an adverse action notice. In so ruling, the Court dramatically limited the frequency with which insurers are required to send adverse action notices.

The validity of GEICO’s strategy, in the Court’s view, depended on the proper “benchmark” for determining whether a first-time rate is a disadvantageous increase. The plaintiffs, with the support of the United States Government and various State Insurance Commissioners as *amicus curiae*, had argued that the benchmark—the rate to which the rate actually charged is compared—should be the rate that the applicant would have received with the best possible credit score, while GEICO maintained that the proper benchmark should be what the applicant would have paid with an “average” credit score (GEICO’s “neutral score”). In reading GEICO’s

4. 127 S.Ct. at 2211.

5. 127 S.Ct. at 2212, n. 12.

6. 127 S.Ct. at 2212.

proposed benchmark into the statute, the Court focused *not* on the FCRA's stated purpose of giving consumers the information needed to ensure their credit reports are accurate, but on the practical implications of giving them that information. Indeed, Justice Souter admitted that his reading of the statute "leaves a loophole, since it keeps first-time applicants who actually deserve better-than-neutral credit scores from getting notice, even when errors in credit reports saddle them with unfair rates." The Court was, however, willing to live with this consequence of its holding in order to protect the efficacy of adverse action notices. Justice Souter explained that adopting the plaintiffs' view "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." Such "hypernotification" would, in Justice Souter's analysis, "undercut the obvious policy behind the notice requirement, for notices as common as these would take on the character of formalities, and formalities tend to be ignored. It would get around that new insurance usually comes with an adverse action notice, owing to some legal quirk, and instead of piquing an applicant's interest about the accuracy of his credit record, the commonplace notices would mean just about nothing and go the way of junk mail."⁷

The Court also made short work of plaintiff's alternative argument that GEICO's offer of a standard insurance policy with GEICO Indemnity was an "adverse action" requiring notice because it amounted to a "denial" of insurance through a lower cost, "preferred" policy with GEICO General.⁸ The Court pointed out that an applicant calling GEICO for insurance talks with a sales representative who acts for all the GEICO companies. Moreover, there was no indication in the record that GEICO tells applicants about its corporate structure, or that applicants request insurance from one of the several companies or even know of their separate existence. The salesperson takes information from the applicant and

obtains his credit score, then either denies any insurance or assigns him to one of the companies willing to provide it; the other companies receive no application and take no separate action. This way of accepting new business was, in the Court's view, "clearly outside the natural meaning of 'denial' of insurance."⁹

C. If the Initial Rate Exceeds the Neutral Rate, and Thus Constitutes an "Increase Based on" the Policyholder's Credit Report, the Insurer Need Not Send a New Adverse Action Notice When the Policy Is Renewed at the Same Rate

The Court's ruling that the adverse action notice requirement applies to the initial sale of an insurance policy without any prior dealing left the question of how the notice requirement applies to subsequent renewals of that policy. The Court posed the issue as follows: "Although the rate initially offered for new insurance is an 'increase' calling for notice if it exceeds the neutral rate, 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?"¹⁰ Given the Court's concerns about hypernotification, it not surprisingly answered the question with an emphatic "no." "Once a consumer has learned that his credit report led the insurer to charge more," Justice Souter explained, "he has no need to be told over again with each renewal if his rate has not changed." Moreover, he noted that "any other construction would probably stretch the word 'increase' more than it could bear." Invoking the gas station example once again, he observed: "Once the gas station owner had charged the customer the above-market price, it would be strange to speak of the same price as an increase every time the customer pulled in. Once buyer and seller have begun a course of dealing, customary usage does demand a change for 'increase' to make sense." Thus, the Court concluded, "after initial dealing between the consumer and the insurer, the baseline for 'increase' is the previous rate or charge, not the 'neutral'

7. 127 S.Ct. at 2212, n. 12.

8. See § 1681a(k)(1)(B)(i) (defining "adverse action" to include a "denial ... of ... insurance").

9. 127 S.Ct. at 2214, n. 17.

10. 127 S.Ct. at 2212.

baseline that applies at the start.”

D. Although an Insurer’s Reckless Disregard of Its Obligations under the FCRA Are “Willful” Violations Supporting Enhanced Remedies, an Insurer’s “Objectively Reasonable,” Albeit Erroneous, Interpretation of the FCRA Text Falls Well Short of Recklessness

Having established that Safeco violated the FCRA by refusing to provide notices to first time insurance buyers, the Court turned to the question of whether Safeco’s refusal constituted a willful violation of the statute justifying statutory and punitive damages. Earlier in its opinion, the Court had rejected the insurers’ contention that only intentional violations of the FCRA support imposition of enhanced remedies. The Court found that “willful” violations include recklessness, reasoning that the common law treats reckless disregard of the law as a “willful” violation for purposes of imposing civil liability and applying the rule of statutory construction that Congress intends undefined terms in civil statutes to have their common law meaning.¹¹ However, when asked to define what constitutes a reckless disregard of the FCRA, the Court essentially punted, stating only that on the continuum between intentional and negligent violations of the statutes, recklessness requires a “show[ing] that the company ran a risk of violating the law substantially greater than the risk associated with a reading that was merely careless.” The Court found it unnecessary to pinpoint the line between recklessness and negligence because Safeco’s conduct, in the Court’s view, “fell well short of raising the ‘unjustifiably high risk’ of violating the statute necessary for reckless liability.” To the contrary, the Court found that Safeco’s interpretation of the statute was “objectively reasonable” given the “less-than-pellucid statutory text” and the lack of guidance from the courts or the Federal Trade Commission regarding the meaning of that text.

IV. Implications of the GEICO Loophole

The Court raises a legitimate concern about the effect of too many adverse action notices. Requiring insurers to send adverse action notices to all but the very most credit worthy customers would undoubtedly diminish the utility of the notices, which is not in the best interests of consumers. As the FTC warned in testimony before Congress, requiring notice to every applicant who theoretically could qualify for a better rate with the highest possible credit score creates “a situation where in essence everyone is getting an adverse action notice because no one ever gets the absolute best rate.”¹²

In addition to the “white noise” that would result from a mass proliferation of notices, adverse action notices based on a best possible credit score benchmark are likely to confuse, rather than enlighten, consumers. According to the Ninth Circuit, an adverse action notice must “at a minimum” communicate that the consumer has experienced an adverse action, describe the action, and specify why the action was adverse. Essentially, the notice would have to inform at least some consumers that their credit reports had both an adverse and a positive impact on their insurance rates. One commentator has suggested the following formulation:

Dear Insurance Applicant: Due to your favorable credit history, we are able to offer you a premium that is considerably lower than the premium we would have charged had you not had such a favorable credit history. That said, your credit is not quite good enough to qualify for our very lowest rate. Therefore, our offer of a substantial premium discount based on your excellent credit history constitutes an adverse action against you by us.¹³

Having said that, I believe the Court’s adoption of a “neutral” credit score benchmark misapplies the language of and intent behind the FCRA. The problem

11. 127 S.Ct. at 2201-2210.

12. *The Fair Credit Reporting Act and Issues Presented by Reauthorization of the Expiring Preemption Provisions: Hearings Before the S. Comm. on Banking, Housing, and Urban Affairs*, 108th Cong. 529 (2003) (testimony of Joel Winston, Associate Director, Fin. Practices Div., Bureau of Consumer Protection, Federal Trade Comm’n).

13. Robert Detlefsen, *Court’s Ruling Applying Credit Act to Insurers Legally Unsupportable*, Wash. Legal Found. Backgrounder, at 3 n.3 (Jan. 27, 2006), available at <http://www.wlf.org/upload/012706LBDetlefsen.pdf>.

of “hypernotification” is a public policy issue that should be resolved by Congress, not the courts. Absent from the legislative history or the text of the statute is any evidence of Congressional concern with the number of notices the FCRA would generate. To the contrary, keeping consumers informed about inaccuracies in their credit reports is the linchpin of the entire credit reporting regulatory scheme embodied in the FCRA, which depends on consumer self-help for its enforcement. It is the adverse action notice that triggers consumers’ role in the enforcement process. In the absence of such notice, no enforcement action will be initiated and inaccuracies in credit reports will never be brought to light. It is true that active credit users may learn of the deficiencies in their credit reports from another source when they apply for credit, but for those who apply for credit infrequently, notice from their insurance company may be the only alert they ever receive that their credit profile is compromised, either through inaccurate reporting or through identity theft. It is therefore difficult to reconcile the FCRA’s stated purpose with a neutral credit score benchmark that relieves insurers of their duty to provide notice even though an applicant’s credit report might contain mistakes that, if corrected, would qualify the applicant for a more favorable rate. What the insurer would have done in the absence of a credit report may be relevant to the actual damages applicants suffer as a result of the insurer’s failure to provide notice, but it should not be relevant to the insurer’s duty to advise applicants that something is amiss with their credit reports.

But the potential loophole is even wider than the facts of the GEICO case suggest. As Justice Stevens pointed out in dissent, nothing in the majority’s opinion requires insurers to use an average score to determine the neutral rate benchmark. The Court’s baseline is not the average score used by GEICO, but “what the applicant would have had if the company had not taken his credit score into account.” Under the majority’s analysis, “companies are free to adopt whatever ‘neutral’ credit scores they want. That score need not (and probably will not) reflect the median

consumer credit score. More likely, it will reflect a company’s assessment of the creditworthiness of a run-of-the-mill applicant who lacks a credit report. Because those who have yet to develop a credit history are unlikely to be good credit risks, ‘neutral’ credit scores will in many cases be quite low.”¹⁴ Indeed, an insurer could just as easily adopt a policy of offering only its *worst* rates to applicants with no credit history. Such a company, under the Court’s reasoning, could never treat someone whose credit it checked worse than someone with neutral credit.

V. Implications of the Court’s Willfulness Analysis

The Court’s refusal to pinpoint where recklessness falls on the line between Safeco’s objectively reasonable interpretation of the statute and a knowing violation of the statute raises the question 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. Regrettably, the Supreme Court did not address the Ninth Circuit’s position that “[un]tenable,” “implausible,” or “creative” interpretations of the FCRA on questions of first impression may subject an insurer to statutory and punitive damages, *even when those interpretations are based on the advice of counsel*.¹⁵ The Court’s statement that Safeco’s position fell “well short” of reckless disregard strongly suggests that Court does not agree with the Ninth Circuit’s formulation. However, the Court left to future litigants the task of propounding a formulation of the reckless disregard standard, which, in my view, should require proof of conduct so egregious that the conduct itself serves as a proxy for proof of intentional conduct or at least merits equivalent censure. Treating reckless disregard as the functional equivalent of knowing conduct presumably would require proof that the insurer’s intransigent refusal to provide notice in the face of contrary unambiguous judicial precedent.

The Court does, however, repudiate the Ninth Circuit’s hybrid objective/subjective standard for reckless disregard, which would have invited inquiry into privileged attorney-client communications early in the litigation. The Supreme Court came down

14. Stevens, dissenting, 127 S.Ct. at 2217.

15. *Reynolds v. Hartford Financial Services Group, Inc.*, 435 F.3d 1081, 1099 (9th Cir. 2006) (“Where, as here, at least some of the interpretations are implausible, consultation with attorneys may provide evidence of lack of willfulness, but is not dispositive.”)

firmly in favor of an objective standard, defining recklessness in the sphere of civil liability as conduct “entailing ‘an unjustifiably high risk of harm that is either known or so obvious that it should be known.’”¹⁶ Under the purely objective standard, advice of counsel is relevant only 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. Only then would the court inquire into evidence of the insurers’ subjective knowledge.

Practitioners should recognize that an objective test of recklessness is not always in the insurer’s interest. Although the objective standard may have hurt plaintiffs’ case against Safeco, it is likely to help plaintiffs in other cases. This is because an objective formulation obviates the need for plaintiffs to find smoking gun evidence of the insurer’s intent to establish an insurer’s willfulness under the FCRA.

VI. Future of Federal Credit Reporting Act Litigation

Justice Souter’s opinion in *Safeco Insurance Company v. Burr* will not be the last word on the applicability of the FCRA to insurers. The Court left unaddressed the question of whether a private right of action still exists under the FCRA’s notice provisions, an issue that is likely to spawn continued private FCRA litigation. The Court refers simply to the availability of a private cause of action “against

businesses that use consumer reports but fail to comply” [with the FCRA disclosure requirements]. In 2003, Congress amended the FCRA and abolished a private right of action for violations of § 1681m on a prospective basis (which would not apply to the plaintiffs in the *Burr* case). However, there is a conflict in authority as to whether the amendments to the FCRA abolished all private rights of action under § 1681m, or whether Congress intended to limit the scope of the statutory provision eliminating private rights of action to subsection § 1681m(h), which applies to entities who use a consumer report in connection with a grant or denial of credit. Compare *Barnette v. Brook Road, Inc.*, 429 F.Supp.2d 741 (E.D.Va. 2006) (limiting the abolition to § 1681m(h) only) to *Murray v. GMAC Mortgage Corp.*, 434 F.3d 948, 950 (7th Cir.2006) (“A recent amendment to the Act abolishes private remedies for violations of the clear-disclosure requirement, which in the future will be enforced administratively, but that change does not apply to offers made before its effective date [and thus does not moot claims relating to earlier conduct].”). Because the Court references the availability of a private cause of action without any suggestion that the amendments have since limited that remedy, plaintiffs’ lawyers are likely to argue that the court’s opinion supports the conclusion that the private cause of action was foreclosed only as to subsection 1681m(h).

16. The Supreme Court defined recklessness in the sphere of civil liability as conduct “entailing ‘an unjustifiably high risk of harm that is either known or so obvious that it should be known.’” 127 S.Ct. at 2215 (citation omitted).