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M E M O R A N D U M

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To Our Clients and Friends

Re: U.S. Supreme Court Decision on Fair Credit Reporting Act

The U.S. Supreme Court today ruled that the Fair Credit Reporting Act (“FCRA”) requires an insurance company to provide an adverse action notice to an applicant for insurance if the premium to be charged is increased above a base rate after taking into account information contained in the applicant’s consumer report.¹ The Court also held that under the FCRA, an action is willful not only if it is a knowing violation, but also if it constitutes reckless disregard of a statutory duty.

ADVERSE ACTION

Under the FCRA, if a person takes an adverse action with respect to a consumer that is based in whole or in part on information contained in a consumer report, the person must provide an adverse action notice to the consumer. An adverse action includes a denial or cancellation of, or increase in any charge for, insurance. GEICO Insurance quoted an applicant an insurance premium at the same rate that would have been offered had the company not considered the applicant’s credit score (consumer report). However, the insurer did not inform the applicant that this rate was higher than the company’s most favorable rate, and that the rate quoted might have been lower had the applicant’s credit score been higher. In contrast, after reviewing applicants’ credit scores, Safeco quoted applicants rates that were higher than the rates that might have applied had the applicants’ credit scores not been considered.

The Court held that because GEICO offered the applicant a rate that would have been offered even if it did not take into account the consumer’s credit score, there was no adverse action and therefore no violation of the FCRA. The fact that GEICO did not inform the applicant that a lower rate may have been quoted if the consumer’s credit score

¹ *Safeco Insurance Company of America v. Burr* (No. 06-84); *GEICO General Insurance Company v. Edo* (No. 06-100).

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had been higher did not, in the Court's estimation, constitute an adverse action because the applicant was no worse off than he would have been had the insurer not considered the applicant's credit score.

However, the Court took a different position with respect to Safeco's actions. The Court concluded that an initial rate quote for new insurance can constitute an increase in the charge for insurance, and hence an adverse action, if the rate is higher than the rate that would have been charged if the applicant's credit score had not been taken into account. Accordingly, the Court held that an adverse action can occur in connection with initial rates for new applicants.

WILLFUL VIOLATIONS

Under the FCRA, a consumer has a private right of action against a person for violations of the act. If the person's violation is negligent, the consumer is entitled to recover actual damages. However, if the action is willful, then the consumer may also recover statutory damages ranging from \$100 to \$1,000, as well as possibly punitive damages. After reviewing the legislative history of the FCRA, the Court concluded that the term "willful" includes a person's actions that represent a reckless disregard of the law. The Court indicated that the term "recklessness" is generally understood as action entailing an unjustifiably high risk of harm that is either known or so obvious that it should have been known. The Court held that while Safeco's reading of the statute was erroneous, it was not objectively unreasonable. Accordingly, it concluded that Safeco had not willfully violated the FCRA.

A copy of the Court's opinion can be found on our web site at http://www.schwartzandballen.com/whats_new.html.

If you have any questions, please call Gilbert Schwartz, Robert Ballen, Tom Fox or Heidi Wicker at (202) 776-0700.