No. 07-

IN THE
SUPREME COURT OF THE UNITED STATES

RADIAN GUARANTY, INC.,

Petitioner,

v.

WHITNEY WHITFIELD, ET AL.

On Petition for a Writ of Certiorari To the United States Court of Appeals For the Third Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether, under this Court's recent decision in *Safeco Insurance Co. v. Burr*, 127 S. Ct. 2201 (2007), which held that civil willfulness under the Fair Credit Reporting Act (FCRA) is an objective legal standard that should be determined as a matter of law, the court of appeals erred in holding that civil willfulness under FCRA is a factual issue that cannot be decided as a matter of law.

PARTIES TO THE PROCEEDING

The petitioner in this case is Radian Guaranty, Inc., which was the defendant-appellee below. Respondents are Whitney Whitfield and Celeste Whitfield, who were the plaintiffs-appellants below. Although the Whitfields filed suit on behalf of themselves and all others similarly situated, no class has yet been certified in the case.

CORPORATE DISCLOSURE STATEMENT

Petitioner Radian Guaranty, Inc. is a wholly owned subsidiary of Radian Group, Inc., a publicly held corporation that is traded on the New York Stock Exchange.

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PETITION FOR A WRIT OF CERTIORARI

Radian Guaranty, Inc., respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-22a) is reported at 501 F.3d 262. The opinion of the district court (App., *infra*, 23a-38a) is reported at 395 F. Supp. 2d 234.

JURISDICTION

The court of appeals entered its judgment on August 30, 2007. A petition for rehearing was denied on September 24, 2007. App., *infra*, 39a-40a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant statutory provisions are reproduced at App., *infra*, 41a-70a.

STATEMENT

Six months ago, this Court held in *Safeco Insurance Co. v. Burr*, 127 S. Ct. 2201 (June 4, 2007), that "willfulness" under the Fair Credit Reporting Act (FCRA), 15 U.S.C. § 1681n(a), is an "objective standard" that should be determined as a matter of law, rather than remanded "for factual development" in the district court, 127 S. Ct. at 2215-2216. This Court further and specifically held that a company's position that FCRA's adverse action provision does not apply to initial applications for insurance was not willful as a matter of law, and "there was no need for th[e] court [of appeals] to remand the case[] for factual development." *Id.* at 2216.

Shortly thereafter, the Third Circuit held in this case that the question of petitioner Radian Guaranty, Inc.'s willfulness in adopting the *identical* reading of FCRA (*i.e.*, that it does not apply to initial applications for insurance) could not be resolved as a matter of law and had to be "remand[ed] to consider whether the evidence in the record supports Radian's claim that it did not willfully violate the statute." App., *infra*, 19a. The court further held that the question whether Radian's two additional legal

arguments for FCRA's inapplicability amounted to willful disregard of FCRA presented a "factual issue, not a question of law" that "cannot be decided either on appeal or by the District Court as a matter of law." *Id.* at 20a.

The Third Circuit's published and precedential decision is in complete and irreconcilable conflict with this Court's recent and controlling resolution of the same question of law, under the same statute, applied in indistinguishable circumstances. The conflict could not be more direct. The court of appeals remanded for factual development the *very same* question that this Court specifically held as a matter of law does not constitute "willfulness" and must not be remanded. In addition, this Court held that questions of willfulness under FCRA's civil liability provisions must be resolved through application by the court of an "objective standard" of "objective[] reasonable[ness]," 127 S. Ct. at 2215-2216 & n.20, and this Court itself then applied that standard to reverse the judgment below. The court of appeals – in direct contrast – held that willfulness "is a factual issue, not a question of law" that "cannot be decided either on appeal or by the District Court as a matter of law," App., *infra*, 20a.

1. 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 report" to notify the consumer of the adverse action. 15 U.S.C. § 1681m(a). FCRA defines "adverse action" with respect to insurance companies 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, in connection with the underwriting of insurance." 15 U.S.C. § 1681a(k)(1)(B)(i). The Act defines "consumer report" as "any written, oral, or other communication of any information by a consumer reporting agency bearing on a consumer's credit worthiness" that is used "as a factor in establishing the consumer's eligibility for," *inter alia*, insurance. 15 U.S.C. § 1681a(d)(1).

If a company "willfully fails to comply" with FCRA's notification provision, the aggrieved party may obtain (i) either actual damages or statutory damages "of not less than $100 and not more than $1,000," (ii) "such amount of punitive damages as the court may allow," and (iii) costs and attorney's fees. 15 U.S.C. § 1681n(a)(1)(A)-(3).

2. In 2001, Whitney and Celeste Whitfield obtained a mortgage to buy a new home from Countrywide Home Mortgage. In considering the Whitfields' mortgage application, Countrywide obtained a copy of the Whitfields' credit report, which revealed a poor credit history. Countrywide provided the Whitfields with a copy of the credit report at the loan closing. App., *infra*, 3a. The Whitfields reviewed with their mortgage broker the credit report obtained by Countrywide and made a written explanation to Countrywide regarding the negative information contained in the report. *Id.* at 24a.

Because the Whitfields were borrowing nearly the entire cost of their new home, the mortgage between the Whitfields and Countrywide allowed Countrywide to buy mortgage guaranty insurance to

protect itself against the risk that the Whitfields might default and the foreclosure of the new home would not yield sufficient proceeds to pay the full amount of the mortgage loan. App., *infra*, 24a. The mortgage further provided that, if Countrywide chose to buy mortgage guaranty insurance, the Whitfields would reimburse Countrywide the cost of the insurance premium. *Id.* at 2a-3a.

The Whitfields and Countrywide signed the closing papers, Countrywide loaned the Whitfields most of the purchase price, and the Whitfields bought their new home. Three days later, Countrywide submitted an electronic order to purchase mortgage guaranty insurance for itself from Radian. App., *infra*, 3a. Countrywide chose the insurance premium rate from those provided by Radian that reflected the amount of the loan, the Whitfields' credit score, and the loan-to-value ratio. *Id.* The Whitfields paid the mortgage insurance premiums to Countrywide that they had previously committed to pay in the mortgage agreement. *Id.* at 4a.[1] Radian did not notify the Whitfields that Countrywide had purchased a mortgage guaranty insurance policy. *Id.*[2]

3. The Whitfields subsequently filed suit against Radian, alleging that Radian had willfully violated FCRA by not providing them with an

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[1] Countrywide was contractually obligated to pay the insurance premiums to Radian, regardless of whether the Whitfields made their payments. App., *infra*, 4a.

[2] As a matter of policy, Radian would have notified the Whitfields if Countrywide's application for mortgage insurance had been rejected. App., *infra*, 19a.

adverse action notice when it contracted with Countrywide to provide mortgage guaranty insurance to Countrywide. App., *infra*, 4a. The Whitfields' complaint also sought certification of a class composed of "[a]ll consumers throughout the United States for whom [Radian] made underwriting decisions for private mortgage insurance" based on a consumer report and for whom the rate was "more than the lowest available rate offered by [Radian]." Complaint at 6, ¶ 29. According to the complaint, the class would exceed several thousand members. *Id.* at ¶ 31.

The district court granted Radian's motion for summary judgment. App., *infra*, 38a. The court rejected Radian's argument that, under FCRA's insurance provisions, only an increase in the rate for an existing insurance policy, and not an initial rate for a new policy, could constitute an adverse action requiring FCRA notice. *Id.* at 33a.

The district court agreed with Radian, however, that Radian had not taken an adverse action "with respect to" the Whitfields within the meaning of 15 U.S.C. § 1681m(a) because Radian had contracted to provide insurance to Countrywide, not to the Whitfields. App., *infra*, 35a-37a. The court reasoned that "[p]rivate mortgage insurance does not protect a borrower against his own inability to pay; mortgage insurance protects the lender against a default by the borrower," *id.* at 33a, and "the contract at issue * * * is between the mortgage insurer and the lender," *id.* at 34a. While the rate is set "in part by the credit score of the borrower," the court explained, "the action is only indirectly adverse to the borrower." *Id.* at 33a. The court further explained that Radian did

not issue its insurance policy until "three days after the Whitfields settled" with Countrywide and agreed to pay the mortgage insurance premiums. Accordingly, "[n]otice from Radian after settlement would be meaningless" and, even worse, "could have the effect of interfering with a contractual relation between Countrywide and Whitfield." *Id.* at 37a.

4.a. The Whitfields appealed. Following briefing, oral argument, and submission of the case to the Third Circuit, this Court issued its decision in *Safeco Insurance Co. v. Burr*, 127 S. Ct. 2201 (June 4, 2007). In *Safeco*, this Court held that FCRA's adverse action provision applies to rates for initial applications for new insurance, and not (as Safeco had argued) only to increases in existing rates. *Id.* at 2210-2212.

The Court further held that, while Safeco's reading of the statute had been erroneous, Safeco's failure to provide an adverse action notice was not "willful" within the meaning of FCRA's civil liability provision, 15 U.S.C. § 1681n(a). In so holding, the Court concluded that FCRA's civil willfulness standard encompasses not just knowing conduct, but also conduct that is in "reckless disregard" of statutory obligations. 127 S. Ct. at 2208-2210. The Court stressed, however, that recklessness is "an objective standard" that requires a "high risk of harm, objectively assessed." *Id.* at 2215. The Court thus held that a company "does not act in reckless disregard of [FCRA] unless the action is not only a violation under a reasonable reading of the statute's terms," but also "shows that the company ran a risk of violating the law substantially greater than the

risk associated with a reading that was merely careless." *Ibid.*

This Court then concluded as a matter of law that Safeco's reading of FCRA's insurance provision as not requiring an adverse action notice for initial policies of insurance "was not objectively unreasonable." *Safeco*, 127 S. Ct. at 2215. The Court emphasized that (i) the statutory text was "silent on the point from which to measure 'increase'"; (ii) Safeco's argument "has a foundation in the statutory text"; (iii) the argument was sufficiently persuasive to have convinced the district court; (iv) there were no guiding decisions from the courts of appeals; and (v) there was no authoritative guidance from the Federal Trade Commission. *Id.* at 2215-2216. The Court accordingly concluded that, "[g]iven this dearth of guidance and the less-than-pellucid statutory text, Safeco's reading was not objectively unreasonable," and "falls well short of raising the 'unjustifiably high risk' of violating the statute necessary for reckless liability." *Id.* at 2216.

In holding that willfulness had not been established as a matter of law, this Court expressly rejected the argument that "evidence of subjective bad faith" can support a finding of willfulness. *Safeco*, 127 S. Ct. at 2216 n.20. "[W]hen the company's reading of the statute is objectively reasonable" and "the statutory text and relevant court and agency guidance allow for more than one reasonable interpretation," this Court concluded, "it would defy history and current thinking to treat a defendant who merely adopts one such interpretation as a knowing or reckless violator." *Ibid.* The Court accordingly held that "there was no need to remand

the cases for factual development," and reversed the Ninth Circuit's contrary judgment. *Id.* at 2216.

b. After receiving letters from the parties addressing *Safeco*, the court of appeals here reversed the district court's grant of summary judgment and remanded the case for a factual inquiry into Radian's alleged willfulness. App., *infra*, 20a. The court first held that, under *Safeco*, Radian's argument that FCRA's adverse action provision does not apply to initial applications for insurance was incorrect. *Id.* at 13a. The court also rejected Radian's argument that it had not taken action based on a "consumer report," reasoning that Radian's reliance on Countrywide's information sufficed. *Id.* at 14a. Further, invoking what it deemed to be FCRA's "clear purpose," *id.* at 18a, the court of appeals held that Radian was subject to FCRA's notice obligation regardless of Radian's lack of a contractual relationship or privity with the Whitfields, *id.* at 15a-18a. Relying on the Ninth Circuit's decision in *Reynolds v. Hartford Financial Services Group, Inc.*, 435 F.3d 1081 (2006), rev'd, *Safeco Ins. Co. v. Burr*, 127 S. Ct. 2201 (2007), the court of appeals held that responsibility to provide the notice required by FCRA would not be limited to the mortgagee (Countrywide), and that notice should also be provided by other entities that rely on Countrywide's assessment of loan risk. *Id.* at 17a-18a.

Finally, the court of appeals rejected the argument that, under *Safeco*, Radian's erroneous interpretation of its legal obligations was not "willful." App., *infra*, 19a-20a. The court noted that Radian had made the same argument about FCRA's inapplicability to initial applications for insurance

that Safeco had. *Id.* at 19a. The court then stated that "[t]he situations may not be analogous," and "le[ft] it to the District Court on remand to consider whether the evidence in the record supports Radian's claim that it did not willfully violate the statute because it reasonably believed an initial rate offer was not an increase for purposes of the definition of adverse action under the FCRA." *Id.*

Likewise, with respect to Radian's arguments that it reasonably construed the statute not to apply both because it relied on Countrywide's loan-risk assessment and because it lacked a contractual relationship with the Whitfields, the court of appeals remanded for a factual inquiry into the alleged recklessness of Radian's legal position. App., *infra*, 19a-20a. The court held that the question whether Radian's legal position amounted to willful disregard of FCRA's requirements "is a factual issue, not a question of law, and it therefore cannot be decided either on appeal or by the District Court as a matter of law." *Id.*

REASONS FOR GRANTING THE PETITION

The court of appeals' holding that "willfulness" under FCRA is a factual issue that cannot be decided as a matter of law by either the district court or the court of appeals and that requires the development and analysis of an evidentiary record is in irreconcilable conflict with this Court's holding just six months ago in *Safeco Insurance Co. v. Burr*, 127 S. Ct. 2201 (June 4, 2007). The court's holding opens the Third Circuit to forum-shopping by FCRA plaintiffs and purported class action representatives seeking to circumvent this Court's recent precedent and to subject any company amenable to suit within

the Third Circuit to the very resource-consuming and privilege-breaking factual inquiries into legal work product that this Court foreclosed in *Safeco*. Controlling decisions of this Court should apply equally regardless of the circuit in which plaintiffs file suit. Indeed, the business community cannot function in a legal environment where uniform rules of federal law are unraveled as quickly as this Court pronounces them. Accordingly, the court of appeals' decision should be summarily reversed or, in the alternative, the decision should be vacated and the case remanded for further consideration in light of this Court's decision in *Safeco*.

1.a. The court of appeals' decision flatly contradicts – indeed, defies – this Court's controlling precedent. This Court held in no uncertain terms that a company's position that FCRA does not apply to initial applications for insurance was not "willful" as a matter of law. 127 S. Ct. at 2215-2216. The Court further and specifically held that Safeco's reading of the statute was "objectively reasonable," and that the contention that such a position could "support a willfulness finding * * * is unsound." *Id.* at 2216 n.20. The Court emphasized that insurance companies did not "ha[ve] the benefit of guidance from the court of appeals or the Federal Trade Commission," and that the argument that FCRA did not apply to initial applications for insurance "has a foundation in the statutory text." *Id.* at 2216. Because "the statutory text and relevant court and agency guidance allow for more than one reasonable interpretation," this Court concluded that "it would defy history and current thinking to treat a defendant who merely adopts one such interpretation as a knowing or reckless violator." *Id.* at 2216 n.20.

There is no dispute that Radian took the exact same legal position in this case as Safeco, arguing that FCRA did not apply to the Whitfields' initial application for insurance. Compare *Safeco*, 127 S. Ct. at 2210-2211, with App., *infra*, 13a. Indeed, the court of appeals' opinion acknowledged that Radian's argument "follow[ed] Safeco's lead." App., *infra*, 19a. However, rather than adhere to this Court's holding that the companies' legal position was not willful, the court of appeals remanded the case and ordered the district court "to consider whether the evidence in the record supports Radian's claim that it did not willfully violate the statute." *Id.* at 19a.

That flatly ignores this Court's ruling. There is nothing to remand. This Court already has answered the question that the court of appeals remanded. This Court squarely held that Safeco's (and thus Radian's) position that FCRA did not apply to initial applications for insurance was not in willful disregard of its obligations under FCRA – and, indeed, that "it would defy history and current thinking" for a court to hold otherwise. 127 S. Ct. at 2216 n.20.

The court of appeals made no effort to distinguish this Court's decision or to reconcile its holding with *Safeco*. The court of appeals simply announced that "[t]he situations may not be analogous." App., *infra*, 19a. But, as a matter of law, the situations are identical, and the court of appeals identified nothing in the law or the record that supported its contrary ruling here. Nor could it have. Radian's and Safeco's adoption of the same "objectively reasonable" construction of FCRA, *Safeco*, 127 S. Ct. at 2216 n.20, occurred within

months of each other.[3] Like Safeco, Radian adopted its position in the absence of any guidance from the appellate courts or the Federal Trade Commission. *Id.* at 2215-2216. Indeed, the court of appeals did not dispute that Radian confronted the same "dearth of guidance and the [same] less-than-pellucid statutory text" as Safeco. *Id.* at 2216.

Instead, the court of appeals ordered the district court to examine "the evidence in the record" to determine whether Radian acted willfully. App., *infra*, 19a. But that is the precise disposition that this Court reversed in *Safeco* and held was statutorily foreclosed by FCRA's objective willfulness standard. Compare 127 S. Ct. at 2216 ("[T]here was no need for th[e] court [of appeals] to remand the cases for factual development."), with App., *infra*, 19a-20a, and *Reynolds*, 435 F.3d at 1099 (remanding because willfulness "may also depend in part on the specific evidence," and parties "should explore the issue in the district court"); see also 127 S. Ct at 2215-2216 & n.20. The whole point of this Court's disposition of the issue of Safeco's willfulness was that the standard is an "objective standard" to be "objectively assessed," regardless of the defendant's alleged "subjective intent" or any other potential "factual development." 127 S. Ct. at 2215-2216 & n.20.

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[3] Safeco sold the insurance policy to Burr on October 22, 2002. *Spano v. Safeco Ins. Co.*, No. 01-1464, slip op. at 4 (D. Or. Mar. 3, 2004), reproduced at 06-84 Pet. App. 5a, *Safeco Ins. Co. v. Burr*. Radian sold the mortgage insurance policy at issue to Countrywide just a few months later, on March 3, 2003. App., *infra*, 25a.

In short, the court of appeals' precedential holding that the district court should undertake the very fact-specific and record-based inquiry that this Court expressly foreclosed in *Safeco*, just to answer a question that this Court already resolved as a matter of law in *Safeco*, is in such irreconcilable conflict with this Court's recent precedent as to merit either summary reversal or vacatur and remand for further consideration in light of *Safeco*.

b. The court of appeals' departure from *Safeco* has even broader implications. Unlike *Safeco*, Radian had two additional legal bases (beyond the initial insurance question) for not providing an adverse action notice to the Whitfields. First, Radian contended that FCRA's notice requirement does not apply to a sale of insurance to a lending institution where the ultimate borrower is not the purchaser, insured, or beneficiary of the policy. That is because, in that situation, the seller of the insurance did not take any adverse action "with respect to" the consumer. Second, an adverse action notice is required only for decisions based on "a consumer report," 15 U.S.C. § 1681m(a), which is defined in the statute as the "communication of any information by a consumer reporting agency," 15 U.S.C. § 1681a(d)(1)(A). Radian relied upon information provided by Countrywide, and Countrywide is not a "consumer reporting agency." See 15 U.S.C. § 1681a(f). Thus, while FCRA plainly applied to Countrywide's use of the Whitfield's credit report, FCRA's adverse action obligation does not extend perpetually down the line to anyone who relies upon information that was passed on from someone who relied upon a credit report.

While the court of appeals rejected each of those arguments on the merits, App., *infra*, 13a-18a, the court did not do so on the basis of any unequivocal statutory text, controlling court of appeals authority, or definitive agency guidance. To the contrary, as in *Safeco*, Radian's arguments had "a sufficiently convincing justification to have persuaded the District Court to adopt [them] and rule in [Radian's] favor." 127 S. Ct. at 2216. Furthermore, the court of appeals' disagreement rested not on unequivocal statutory text, but on what the court considered to be the statutory "purpose," as well as an aspect of the Ninth Circuit's analysis in *Safeco* upon which this Court cast substantial doubt. Compare App., *infra*, 17a (relying upon Ninth Circuit holding that subsidiaries as well as parents must provide notice), with 127 S. Ct. at 2214 n.17 (rejecting argument that adverse actions can be attributed multiple times through different companies within a single corporate structure).

Even assuming the correctness of the court of appeals' rulings on the merits of Radian's additional arguments, the court compounded its disregard of *Safeco* by holding that the question whether Radian's legal positions reflected willful disregard of the law "is a factual issue, not a question of law, and it therefore cannot be decided either on appeal or by the District Court as a matter of law." App., *infra*, 20a. In so holding, the court of appeals has forbidden district courts within the Third Circuit to resolve questions of willfulness under FCRA "as a matter of law," and thus has commanded circuit-wide disregard of this Court's central holding in *Safeco*.

Once again, the court of appeals made no effort to reconcile its decision with *Safeco*. Rather than discuss or even cite *Safeco* in that portion of its decision, the court of appeals relied upon what it viewed as the "[t]he essential factual concession * * * that Radian was in a position to identify and notify ultimate purchasers." App., *infra*, 20a. That may be true, but it is irrelevant. The question under FCRA is not whether companies have the ability to provide notice – after all, Safeco certainly had that ability because the affected consumers were its direct customers. *Safeco*, 127 S. Ct. at 2207. Rather, the question here, as in *Safeco*, is whether the company had the legal obligation to provide notice and, more to the point, whether its mistaken reading of the law was so erroneous as to amount to the "'unjustifiably high risk' of violating the statute necessary for reckless liability." *Id.* at 2216. And that is the question that this Court's decision in *Safeco* specifically required the court of appeals to answer as a matter of law and not remand for factual development. *Ibid.*

Thus, binding Third Circuit precedent now commands that whether a company's mistaken interpretation of its legal obligations under FCRA was "willful" "is a factual issue," "is not a question of law," and "cannot be decided either on appeal or by the District Court as a matter of law." App., *infra*, 20a. That decision effectively renders this Court's holding in *Safeco* that willfulness is a question of law a dead letter within the Third Circuit, subjecting every defendant sued within that circuit to the very same record-bound model for FCRA cases that this Court specifically considered and rejected just six

months ago. Summary correction and disposition of that holding is warranted.[4]

2. The Third Circuit's repudiation of *Safeco* warrants – indeed, necessitates – this Court's review. That circuit's refusal to rehear this case en banc (App., *infra*, 39a-40a) means that this Court's intervention is the only way to reinstate *Safeco* as controlling precedent within the Third Circuit – a circuit of enormous importance to business generally and insurance companies in particular. Delaware is the corporate home of 61% of all Fortune 500 companies and half of all United States firms traded

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[4] Neither the fact that *Safeco* had already been decided by this Court prior to the court of appeals' decision nor the court of appeals' passing acknowledgment of *Safeco* (App., *infra*, 19a) immunizes the decision from summary disposition. Where, as here, a lower court's analysis and holding directly contradict controlling precedent, this Court has summarily reversed or vacated the decision notwithstanding the lower court's presumed awareness or citation of this Court's decisions. See, *e.g.*, *Gonzales v. Thomas*, 547 U.S. 183, 185-187 (2006) (summarily reversing court of appeals for failure to apply *INS v. Ventura*, 537 U.S. 12 (2002), even though court of appeals cited *Ventura* and claimed to follow it, 409 F.3d 1177, 1189 (9th Cir. 2005) (en banc)); *Klingler v. Director, Mo. Dep't of Revenue*, 545 U.S. 1111 (2005) (vacating and remanding for further consideration in light of, *inter alia*, *Tennessee v. Lane*, 541 U.S. 509 (2004), even though *Lane*'s applicability had been raised and argued to the court of appeals in the petition for rehearing); see also *Hudson v. Spisak*, No. 06-1535, 2007 WL 1479840 (Oct. 9, 2007) (vacating and remanding court of appeals' decision for further consideration in light of, *inter alia*, *Carey v. Musladin*, 127 S. Ct. 649 (2006),which was decided two months before the court of appeals denied rehearing en banc); *Haas v. Quest Recovery Servs., Inc.*, 127 S. Ct. 1121 (2007) (reversing court of appeals' decision that failed to apply precedent of this Court issued two months prior to lower court's decision).

on the New York Stock Exchange and NASDAQ, all of which are potentially subject to suit as employers under FCRA, see 15 U.S.C. §§ 1681a(h) & (k)(1)(B)(ii). See Delaware Dep't of State, Div. of Corps., *2006 Annual Report*, at 1, available at http://www.corp.delaware.gov/2006%20Annual%20Report%20with%20Signature%20_2_.pdf. There thus is substantial risk that the court of appeals' decision will promote forum shopping by FCRA plaintiffs seeking to circumvent this Court's decision in *Safeco*.

Moreover, as in *Safeco*, the companion case against GEICO, 127 S. Ct. at 2207, and this case, many FCRA plaintiffs seek to bring their claims as nationwide class actions, claiming millions of dollars in statutory and punitive damages for allegedly willful violations of the statute, see 15 U.S.C. § 1681n(a). The nationwide class action device will permit plaintiffs to bypass the law in circuits that adhere to *Safeco*, further emptying this Court's decision of practical force. What is worse, under the Third Circuit's holding that the willfulness of a mistaken legal interpretation "cannot be decided either on appeal or by the District Court as a matter of law," App., *infra*, 20a, those putative class actions will now be able to force defendant companies either to pay out massive settlements or to endure potentially privilege-breaching discovery and trials designed to probe their formulation of legal positions. Already, plaintiffs in FCRA class actions are citing the court of appeals' decision in this case in an effort

to obtain discovery into and trial of the defendant companies' formulation of legal positions.[5]

FCRA is a federal law with a single, uniform meaning. Plaintiffs should not be able to avoid this Court's controlling precedent based on nothing more than geography. Moreover, the vast majority of potential FCRA defendants like Radian are companies that operate within multiple jurisdictions, and the risk of intrusive and uncabined litigation threatening massive damages liability within any one of those jurisdictions is enough to chill and skew business decisionmaking nationwide. Businesses within the Third Circuit, as much as Safeco and GEICO, are entitled to have FCRA applied as Congress wrote it and as this Court has construed it.

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[5] See, *e.g.*, Appellee's Br. at 51, *Saunders v. Branch Banking & Trust Co.*, No. 07-1108 (4th Cir. Oct. 12, 2007) (citing *Whitfield* for proposition that "the issue of FCRA willfulness post-*Safeco* is, as it was before, a question for the trier of fact"); Appellant's Reply Br. at 12, *Bruce v. KeyBank Nat'l Ass'n.*, No. 06-4368 (7th Cir. Oct. 10, 2007) (citing *Whitfield* for proposition that "[w]hether KeyBank acted recklessly or its reading of the statute was reasonable is a question for a trier of fact. It is a factual issue, not a question of law, and cannot be decided as a matter of law."); Appellant's Reply Br. at 15, *Murray v. New Cingular Wireless Servs., Inc.*, No. 06-2477 (7th Cir. Sept. 28, 2007) (arguing, based on *Whitfield*, that willfulness is a "decision that must rest with a jury"); Pltf. Supp. Br. in Opp. to Def. Mot. for S. J'ment at 1, *Perez v. Trans Union, LLC*, No. 06-3357 (E.D. Pa. Nov. 13, 2007) (stating that "[i]n *Whitfield*, the Third Circuit . . . explained that a finding whether a defendant acted willfully in violation of the FCRA is almost never appropriate for summary judgment, and must instead be left for the jury"); Pltf. Opp. to Def. Mot. for S. J'ment at 13, *In re H&R Block Mortgage Corp.*, Prescreening Litig., No. 2:06-MD-230 (N.D. Ind. Oct. 1, 2007) (same).

They should not be forced to discovery and trial in potentially crippling class-action damages suits for having done nothing more than be amenable to suit within the Third Circuit and misunderstanding a "less-than-pellucid statutory text," 127 S. Ct. at 2216. Accordingly, this Court's intervention is warranted, and the court of appeals' judgment should be summarily reversed or, in the alternative, vacated and remanded for further consideration in light of this Court's recent decision in *Safeco*.

CONCLUSION

The petition for a writ of certiorari should be granted and the court of appeals' judgment summarily reversed or, in the alternative, the judgment should be vacated and the case remanded for further consideration in light of this Court's decision in *Safeco Insurance Co. v. Burr*, Nos. 06-84 & 06-100.

Respectfully submitted,

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December 19, 2007

APPENDIX A

PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 05-5017

WHITNEY WHITFIELD;
CELESTE WHITFIELD,
on behalf of themselves and all others similarly situated,

Appellants

v.

RADIAN GUARANTY, INC.

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. No. 04-cv-00111)
District Judge: Honorable Juan R. Sanchez

Argued January 19, 2007

Before: SLOVITER, RENDELL, and
CUDAHY,* Circuit Judges

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* Hon. Richard D. Cudahy, United States Senior Circuit Judge for the United States Court of Appeals for the Seventh Circuit, sitting by designation

(Filed: August 30, 2007)

OPINION OF THE COURT

SLOVITER, Circuit Judge.

The issue presented in this appeal is whether the adverse action notice provisions of the Fair Credit Reporting Act ("FCRA") apply to the actions of a company that provides mortgage guaranty insurance ("MI") to a mortgage lender at a premium rate that is determined, in part, by information in the mortgage borrower's credit report. Our decision is informed in part by the recent opinion of the United States Supreme Court in Safeco Insurance Co. v. Burr, 127 S. Ct. 2201 (2007).

I.

In 2001, Whitney and Celeste Whitfield (the "Whitfields") contracted to build a new home in Virginia. They wanted to finance all but 2% of the purchase price of their new home. The Whitfields, who had a poor credit history, enlisted a mortgage broker to facilitate the process and he helped them contact the eventual mortgagee, Countrywide Home Mortgage.

Countrywide agreed to provide the Whitfields with a mortgage which loaned them 98% of the purchase price on condition that the Whitfields pay for mortgage insurance. After the mortgage papers were signed, Countrywide requested appellee Radian Guaranty, Inc. to provide the mortgage insurance, which Radian agreed to do for a monthly charge of $

905.74.[1] Countrywide provided the Whitfields with a disclosure statement that informed them the cost of the mortgage insurance. Radian based the price of the mortgage insurance on the loan-to-value ratio of the mortgage and on Mr. Whitfield's credit score, which Countrywide obtained from Mr. Whitfield's consumer credit report. In the mortgage closing packet, Countrywide gave the Whitfields the credit report upon which it had relied.

In accordance with the mortgage guaranty insurance process, Radian prepares and files its rate schedule for mortgage guaranty insurance with the Virginia Bureau of Insurance. After the Bureau has approved Radian's proposed rates, lenders, including mortgagees, are free to access the MI's rate schedule and place their orders online by entering the borrower's credit score and loan-to-value ratio. If Radian accepts the lender's application for guaranty insurance, it sends a confirmation letter to the lender. On the other hand, if it rejects the application it sends an adverse action notice to the borrower. Three days after Countrywide closed the mortgage with the Whitfields, it submitted an electronic order to purchase mortgage guaranty insurance from Radian. Countrywide then passed this cost along to the Whitfields, as had been agreed upon at settlement.

The Whitfields were required to set up an escrow account to pay the cost of the premiums. Countrywide paid the premiums to Radian,

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[1] The Whitfields state that the premium was $903.58, but we need not resolve the difference.

regardless of whether the Whitfields' escrow account contained sufficient funds to pay the cost of the premium. There were, however, sufficient funds in the Whitfields' escrow account; in fact the Whitfields were due, and did receive, a refund for unearned premiums directly from Radian in the amount of $ 542.15.

Radian conceded that had Mr. Whitfield's credit score been higher, it would have charged a lower premium for the mortgage insurance, and in turn, the Whitfields would have paid a lower premium for mortgage insurance. The Whitfields were not provided with an adverse action notice by Radian. Indeed, it is Radian's standard policy not to send adverse action notices to borrowers when the lender's application for MI is approved.

The Whitfields filed suit in January 2004, alleging that Radian did not provide them with an adverse action notice as required by the FCRA, 15 U.S.C. § 1681m(a). They asked the District Court to certify a class, composed of borrowers who paid more than the lowest rate for private mortgage insurance and were not notified of the adverse action. The District Court granted Radian's motion for summary judgment, which had the effect of rendering the Whitfields' motion for class certification moot. Whitfield v. Radian Guaranty, Inc., 395 F. Supp. 2d 234 (E.D. Pa. 2005). The Whitfields filed a timely notice of appeal.

II.

The District Court had jurisdiction pursuant to 15 U.S.C. § 1681p and 28 U.S.C. § 1331. This court has jurisdiction pursuant to 28 U.S.C. § 1291.

This court exercises plenary review of the District Court's grant of Radian's motion for summary judgment. Further, this court applies the same standard in reviewing a motion for summary judgment as the District Court. MBIA Ins. Corp. v. Royal Indem. Co., 426 F.3d 204, 209 (3d Cir. 2005). A motion for summary judgment should only be granted if there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). All reasonable inferences must be drawn in favor of the non-moving party. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986).

III.

A. Relevant Statutory Provisions

The FCRA requires that if a person who is a permissible user of information from a consumer report (also known as a credit report) takes any adverse action against an individual, such person shall notify the individual of the adverse action. We set out the relevant provision:

If any person 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, the person shall –

(1) provide oral, written, or electronic notice of

the adverse action to the consumer;

(2) provide to the consumer orally, in writing, or electronically –

(A) the name, address, and telephone number of the consumer reporting agency . . . that furnished the report to the person; and

(B) a statement that the consumer reporting agency did not make the decision to take the adverse action and is unable to provide the consumer the specific reasons why the adverse action was taken; and

(3) provide to the consumer an oral, written, or electronic notice of the consumer's right -

(A) to obtain, under section 1681j of this title, a free copy of a consumer report on the consumer from the consumer reporting agency referred to in paragraph (2), which notice shall include an indication of the 60-day period under that section for obtaining such a copy; and

(B) to dispute, under section 1681i of this title, with a consumer reporting agency the accuracy or completeness of any information in a consumer report furnished by the agency.

15 U.S.C. § 1681m(a).

The definition of "adverse action" in the FCRA includes an insurance prong, a credit prong, and a catch-all provision. Section 1681a(k)(1)(A) is referred to as the credit prong, § 1681a(k)(1)(B)(I) is referred to as the insurance prong, and § 1681a(k)(1)(B)(iv) as the catch-all provision. The District Court analyzed the transaction under the insurance prong, and we agree that the transaction at issue falls within the insurance prong.

The District Court also stated that charging a higher initial rate for insurance would be an "adverse action." Whitfield, 395 F. Supp. 2d at 237. The FCRA defines the term "adverse action" as it applies to an insurance company as follows:

> (k) Adverse action. –
>
> (1) Actions included. – The term "adverse action" –
>
> . . . .
>
> (B) means –
>
> (i) 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, in connection with the underwriting of insurance[.]

15 U.S.C. § 1681a(k)(1)(B)(i).

The Act defines "consumer report," so far as relevant here, as:

> any written, oral, or other communication of any information by a consumer reporting agency bearing on a consumer's credit worthiness, credit standing, [or] credit capacity . . . which is used or expected to be used or collected in whole or in part for the purpose of serving as a factor in establishing the consumer's eligibility for . . . credit or insurance to be used primarily for personal, family, or household purposes[.]

15 U.S.C. § 1681a(d)(1)(A).

The District Court noted that the transaction at issue in this case was between Radian, the mortgage insurer, and Countrywide, the lender. It cited approvingly the decision in Hinton v. Fannie Mae, 945 F. Supp. 1052 (S.D. Tex. 1996), where the court, on facts substantially similar to those here, stated that the lender is the insured, not the borrower, because the contract is between the mortgage insurer and the lender. Id. at 1055. The Hinton court held that the borrower was an incidental beneficiary who had no cause of action. Id. at 1058. The District Court in this case granted summary judgment for Radian because it found that Radian's insurance relationship was with Countrywide and not the Whitfields.

B. The Safeco decision

The Safeco decision, 127 S. Ct. 2201, encompassed two separate cases, Safeco Insurance Co. v. Burr and GEICO General Insurance Co. v.

Edo, both of which involved challenges to the failure of the insurance company to provide the adverse action notification required under the FCRA. In the course of its opinion, the Court read the statutory language "willfully fails to comply" as reaching reckless FCRA violations and rejected the insurance companies' argument that the use of the term "willfully" limits liability under § 1681n(a) to knowing violations. Id. at 2210. The Court noted that if it were to adopt the companies' interpretation, the use of "knowingly" in § 1681n(a)(1)(B), which sets higher damages for knowing violations, would be superfluous. Id.

The Court next resolved a dispute between the courts of appeals by holding that the "increase" referred to in the statute encompasses initial rates for new applications. Id. at 2211. The Court determined that a rate is "based on" a credit report if there is a but-for causal relationship, i.e., the credit report must have been the basis for the increase. Id. at 2212. Finally, the Court rejected the Government's argument that the baseline should be the best possible premium rate. Id. at 2213. Instead, the Court held that the baseline is what the applicant would have been charged if the company had not taken the credit score into account, i.e., the neutral rate. Id. at 2213-14.

Reviewing the record in the two cases before it, the Court held that because the rate that GEICO offered to Edo was one he would have received if his credit score had not been taken into account, it had not violated the statute. Id. at 2214. There was no record evidence as to any neutral rate with respect to

Safeco, but the Court held that plaintiffs could not prevail on their claim against Safeco for willful violation of the FCRA because Safeco had not acted recklessly. Id. at 2215. Safeco had interpreted the statutory language to mean that no notice was required for its initial dealing with the insured, and the Court stated that although this was an incorrect interpretation it was not a reckless one. Id.

Following the announcement of the opinion in Safeco, this court asked the parties to comment on the effect of the Safeco decision on the issues in this case. Radian responded with essentially the same analysis applied by the District Court. It focused on the fact that it had "sold a commercial insurance product to a mortgage lender [Countrywide], not to a consumer." Letter from David Smith, counsel for Radian Guaranty Inc., to the Court, at 1 (June 14, 2007) (on record with the Court). It stated that the Whitfields were not a party to the insurance transaction, that it completed its transaction with Countrywide without ever receiving or considering the Whitfields' consumer report, that the only transaction to which the Whitfields were a party was a separate credit transaction with Countrywide that was completed three days before Countrywide ever contacted Radian about purchasing mortgage guaranty insurance for itself, and that therefore the District Court was correct in holding that because Radian sold the mortgage insurance to Countrywide and not to the Whitfields, there was no violation of the FCRA as a matter of law. See id. at 4-7.

Radian then argued that in any event it did not act willfully as a matter of law, relying on the

Supreme Court's Safeco decision that the insurance company (Safeco) had acted without "authoritative guidance" and therefore did not act recklessly. Id. at 5. It also argued that it was not required to give notice because it had not received any information contained in any consumer report about the Whitfields, and therefore it did not take any action based in whole or in part on any information contained in a consumer report. Id. at 6.

In their response to the court's inquiry, the amici, the Mortgage Insurance Companies of America, stated that under the precedent of Safeco, Radian could not have violated the FCRA willfully, thereby continuing their support for Radian's position in this case. Letter from Kirk D. Jensen, counsel for the Mortgage Insurance Companies of America, to the Court, at 2-3 (June 13, 2007) (on record with the Court).

Not surprisingly, the Whitfields view the Safeco decision differently. Emphasizing the Supreme Court's ruling that willful conduct must be shown to have been "objectively unreasonable," the Whitfields noted that whether Radian acted willfully is not an issue on appeal as the question formed no basis for the District Court's ruling and was not an issue raised on appeal by either party. Letter from Terry A. Smiljanich, counsel for the Whitfields, to the Court, at 2 (June 13, 2007) (on record with the Court). Because "the record is incomplete as to all issues involving determining whether defendant Radian's actions were or were not 'objectively unreasonable,'" the Whitfields argued that we should remand this case to the District Court. Id. They

noted the absence of evidence that Radian (unlike GEICO) had no neutral score, and "that the Whitfields were punished with extremely high mortgage insurance premiums specifically because their credit scores were judged by Radian to warrant such high premiums." Id. at 3. They also noted that nothing in the Safeco decision provides any basis for concluding that the District Court was correct in "grafting either a 'privity' requirement or a 'direct/indirect' category onto the FCRA." Id. Thus, the Whitfields argued that we should allow them to proceed with the case.

Finally, the Federal Trade Commission, which entered the case as amicus curiae on behalf of the position of the Whitfields, argued that "nothing in Safeco should have any impact on [our] decision," and agreed with the Whitfields that we should reverse the District Court's decision. Letter from Lawrence DeMille-Wagman, counsel for the Federal Trade Commission, to the Court, at 3 (June 13, 2007) (on record with the Court). It noted that nothing in the Supreme Court's Safeco decision addresses Radian's defense that it had no obligation to provide the Whitfields with an adverse action notice. Id.

C. Analysis

The Supreme Court's Safeco opinion disposes of one issue that had arisen in the District Court but was uncontested on appeal, namely whether an initial premium can be termed an increase in any charge for insurance for purposes of the FCRA's definition of adverse action. Radian had argued that its sale of mortgage guaranty insurance to

Countrywide did not fall within the FCRA's definition of "adverse action" because the Whitfields never had existing insurance with Radian. In Radian's brief, it argued that it never denied, cancelled, increased, reduced, or otherwise changed the term of any insurance with respect to the Whitfields.

As we noted above in discussing the District Court's decision, it agreed that a higher initial rate would be an adverse action. Without amplification, it relied on the decision to that effect in Broessel v. Triad Guar. Ins. Corp., No. Civ. A. 1:04CV-4M, 2005 WL 2260498, at *1 (W.D. Ky. Sept. 15, 2005). The Supreme Court's Safeco decision clarifies that issue, which had been the subject of differing views in the lower courts. The Supreme Court agreed with the government that the statutory "increase" reaches a first-time rate. It stated that "there is nothing about insurance contracts to suggest that Congress might have meant to differentiate applicants from existing customers when it set the notice requirement; the newly insured who gets charged more owing to an erroneous report is in the same boat with the renewal applicant." Safeco, 127 S. Ct. at 2211. It thus held that "the 'increase' required for 'adverse action,' 15 U.S.C. § 1681a(k)(1)(B)(i), speaks to a disadvantageous rate even with no prior dealing; the term reaches initial rates for new applicants." Id. at 2211-12.

Radian argued in its brief before us that it was not required to give notice because it did not take any action "based in whole or in part on any information contained in a consumer report." See 15

U.S.C. § 1681m. Radian argued that it never had any information from a consumer reporting agency, but that its rate was based in part on the credit score that it received from Countrywide.

We reject that technical construction of the statutory language. In discussing that statutory requirement the Supreme Court stated "[i]n common talk, the phrase 'based on' indicates a but-for causal relationship and thus a necessary logical condition." Safeco, 127 S. Ct. at 2212. Radian conceded that the Whitfields' credit score was a component of the premium that it charged Countrywide for the mortgage guaranty insurance. The statutory requirement that the adverse action must be "based . . . on" a credit report is in the passive voice. See 15 U.S.C. § 1681m. 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.

There is no reason to limit the statutory obligation to provide notice to those cases where the insurance company directly reads the credit report and exclude those cases where the insurance company indirectly is advised of the results of the credit report. The relevant fact is that the insurance company used the credit information, i.e., the credit score, in establishing the applicable premium for insurance that the borrowers were required to pay. It makes no difference to the purpose of the Act if the credit information was derived from Radian's own reading of the consumer credit report or was transmitted to it by Countrywide based on its

reading of the consumer credit report. In either event, the consumer report would have been the cause of the adverse action and thus the notice requirement applies.

Finally, we come to the crux of the District Court's holding: its determination that the FCRA notice requirement was inapplicable because there was no privity between the Whitfields (the ultimate consumers) and Radian. The privity issue did not arise in Safeco because both Safeco and GEICO had direct relationships with the borrowers. In this case, we have an intermediate party, Countrywide, the mortgagee.

This precise factual situation arose in Broessel, where Countrywide was the mortgagee and it selected Triad to provide the mortgage insurance the day after the closing. 2005 WL 2260498, at *2. In its opinion, referred to by the District Court here, the Broessel court rejected the insurance company's argument that it was not required to give notice because there was no contractual relationship between it and the consumer.

The court stated:

> Privity of contract is not a requirement under the plain language of FCRA. See 15 U.S.C. § 1681m(a). FCRA states in pertinent part "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 provide 'notice of the adverse action to the consumer.'"

> [15 U.S.C. § 1681m(a)] Triad is "any person" and the Court has held that it took an adverse action. The adverse action was with respect to a consumer. The only question remaining is whether the action was based on information contained in the consumer's credit report.

2005 WL 2260498, at *5 (certain internal citations omitted). We agree.

Triad, the insurance company in the Broessel case, argued that it took no action based on the plaintiff's credit report but relied solely on the information contained in the insurance application provided by Countrywide. Id. at *4. By coincidence, Countrywide was also the mortgagee in this case and Radian makes the same argument that the insurance company made in Broessel. The District Court in Broessel rejected that argument:

> Notwithstanding the automatic nature of the transaction, the determination of Broessel's mortgage insurance premium was based on information which Triad used to determine the premium for the mortgage insurance. Part of the information used was Broessel's credit score which was derived from her credit report. Whether that evaluation was done electronically or otherwise is immaterial. The ultimate decision as to the amount of her premium was based,

> in whole or in part, on a consumer report. 15 U.S.C. § 1681m(a).

Id. at *5.

We agree with that analysis. If we were to accept Radian's argument, responsibility to provide notice would be limited to the mortgagee. The Court of Appeals for the Ninth Circuit rejected that interpretation of the statute. As the court stated in Reynolds v. Hartford Fin. Ins. Servs., 435 F.3d 1081, 1095 (9th Cir. 2006), rev'd sub nom. on other grounds Safeco, 127 S. Ct. 2201, the definition of "any" (in the statutory provision "any person who takes an adverse action is liable") "includes the plural." Id. at 1095. Moreover, the court of appeals noted that "[w]ith regard to insurance transactions, liability attaches whenever an adverse action is taken 'in connection with the underwriting of insurance.'" Id. (quoting 15 U.S.C. § 1681a(k)(1)(B)(i)). The court noted that the broad "'in connection with' language confirms that a variety of entities may be liable." Id. It further stated that "[n]o provision in the statute nor comment in the legislative history suggests that Congress intended that only a single company be responsible under FCRA when a consumer is charged an increased rate for insurance." Id. Although Reynolds presented a parent-subsidiary relationship and was discounted by the District Court for that reason, see 395 F. Supp. 2d at 238, we see no basis to make such a distinction.

We must construe the language of the statute in light of its clear purpose. As the court stated in Treadway v. Gateway Chevrolet Oldsmobile Inc., 362

F.3d 971, 981 (7th Cir. 2004), "Congress enacted the FCRA in 1970 to address abuses in the consumer reporting industry." Those abuses were that reliance was being placed on consumer reporting agencies that were too often reporting inaccurate information. Id. The FCRA as well as the Equal Credit Opportunity Act were designed to insure that agencies report accurate information. Id. at 982.

If Radian had sent the Whitfields the required notice of adverse action, the Whitfields would have been in a position to correct any inaccurate information in their credit report and thereby lower the price they would have to pay for credit in future transactions. Indeed, the record shows that the Whitfields might even have been able to lower the mortgage guaranty insurance premium that they were obligated to pay in the present transaction with Countrywide. The mortgage papers were signed three days before Countrywide placed the request for insurance with Radian, but the record does not indicate that the Whitfields had no opportunity to adjust or correct the premium after the mortgage transaction was set. In fact, the Whitfields' obligation to pay any mortgage insurance premium was eliminated long before their responsibility under the mortgage ceased.

Finally, we turn to Radian's argument that it cannot be held liable under the FCRA because it did not act willfully, as the Supreme Court held in Safeco with respect to Safeco. The situations may not be analogous. The Supreme Court held that Safeco's reading of the statute to exclude initial rate offers for new insureds was not objectively unreasonable.

Safeco, 127 S. Ct. at 2215. Radian too, following Safeco's lead, argues that "just as was the case in Safeco, the rate for the mortgage guaranty insurance that Radian sold Countrywide was an initial rate for a new insurance policy." Letter from David Smith, counsel for Radian Guaranty Inc., to the Court (June 14, 2007) (on record with the Court). We leave it to the District Court on remand to consider whether the evidence in the record supports Radian's claim that it did not willfully violate the statute because it reasonably believed an initial rate offer was not an increase for purposes of the definition of adverse action under the FCRA. Radian also argued that it did not act willfully and thus cannot be liable under the FCRA because its reading of the statute led it to conclude that it had no responsibility for sending an adverse action notice because its relationship was with Countrywide rather than with the Whitfields.

Radian's reading would be more plausible if it could argue that it had no information with respect to the identity of the purchasers and therefore was not in a position to send the required notice. However, the record shows that Radian did in fact send notice directly to prospective purchasers when it declined to grant insurance covering their mortgages. It appears that Radian sent those notices pursuant to the credit prong of the FCRA – 15 U.S.C. § 1681a(k)(1)(A). That is a distinction without a difference. The essential factual concession is that Radian was in a position to identify and notify ultimate purchasers notwithstanding that it had no direct relationship with them.

We do not suggest that a factfinder could not or would not determine that Radian did not act willfully. Instead, we hold that whether it did so is a factual issue, not a question of law, and it therefore cannot be decided either on appeal or by the District Court as a matter of law.

IV.

For the reasons set forth above, we will reverse the summary judgment entered by the District Court and remand for further proceedings in accordance with this opinion.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 05-5017

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CELESTE WHITFIELD,
on behalf of themselves and all others similarly situated,

Appellants

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CUDAHY,* Circuit Judges

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* Hon. Richard D. Cudahy, United States Senior Circuit Judge for the United States Court of Appeals for the Seventh Circuit, sitting by designation

JUDGMENT

This cause came to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued on January 19, 2007.

On consideration whereof, it is now hereby ORDERED and ADJUDGED that the judgment of the District Court entered October 21, 2005 be and is hereby reversed. Costs taxed against Appellee. All of the above in accordance with the opinion of this Court.

Attest:

/s/ Marcia M. Waldron
Clerk

DATED: August 30, 2007

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF
PENNSYLVANIA

WHITNEY WHITFIELD and CELESTE WHITFIELD, and all others similarly situated	:	CIVIL ACTION
v.	:	NO. 04-0111
RADIAN GUARANTY, INC.	:	

MEMORANDUM AND ORDER

Juan R. Sánchez, J. **October 21, 2005**

The litigants in this case ask this Court to decide whether mortgage insurance sold by Radian Guaranty to Countrywide Home Mortgage was a consumer credit action, triggering the notice requirements of the Fair Credit Reporting Act (FCRA), 15 U.S.C. § 1681 *et seq.* Because Radian sold the mortgage insurance to Countrywide and not to Whitney and Celeste Whitfield, I find no violation of the FCRA as a matter of law and grant Radian's Motion for Summary Judgment. The Whitfields' Motion for Class Certification and Radian's motion challenging the Whitfields' standing are moot.

FACTS[1]

In this case the facts are undisputed. The Whitfields, both non-commissioned officers in the U.S. Air Force, contracted for a house to be built in Fredericksburg, Virginia, in 2001. Construction was complete in December 2002. The Whitfields needed to finance ninety-eight percent of the purchase price. The Whitfields placed their mortgage with Countrywide on the advice of a broker. Only when they missed a closing date did the Whitfields learn there were "some issues with like your credit report." Whitney Whitfield Dep., 2/9/05, p. 42. Whitfield discussed the credit report with his broker and sent a letter on February 5, 2003, to Countrywide explaining the problems on their credit report and asking for a chance to prove themselves credit-worthy. Countrywide, through its subsidiary, America's Wholesale Lender, loaned the Whitfields $ 259,400 of the $ 262,650 purchase price. The Whitfields settled on February 28, 2003.

As a condition for placing the mortgage, Countrywide required the Whitfields to pay Countrywide's cost of insuring the mortgage. Because the Whitfields had a less-than-stellar credit report and were financing such a large percentage of the purchase price, Countrywide turned to Radian Guaranty to protect its interests in case the Whitfields were to default. The communication

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[1] The court has reviewed all of the evidence in the record and draws all reasonable inferences in favor of the nonmoving party. *Matsushita Elec. Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986).

between Countrywide and Radian is electronic, without human intervention.

On March 3, 2003, Countrywide electronically asked Radian Guaranty for private mortgage insurance to cover Countrywide's loan to the Whitfields. Radian's rates are presented on a grid for each category of borrower with the loan-to-value ratio and the amount of coverage the lender wants as the X and Y axes. Radian's rate sheets are filed with the state insurance department, in this case Virginia's. The lending institution, armed with a borrower's credit score, the loan to value ratio and the amount of exposure it is willing to tolerate, selects a private mortgage insurance premium from the grid. Typically, lenders select mortgage insurers after the loan closes.

The settlement sheet listed $ 905.74 a month for mortgage insurance under the heading of "Reserves deposited with lender." The reserves also included hazard insurance and property taxes. Countrywide gave the Whitfields a five page disclosure and selection sheet on mortgage insurance two days before settlement. A later letter explained to the Whitfields their loan-to-value ratio required private mortgage insurance to "protect the lender or investor in the case of default." Countrywide letter, May 9, 2003. Countrywide told the Whitfields the loan to value ratio and their credit score determined the mortgage insurance rate of $ 903.58 a month, slightly lower than the figure shown on the settlement sheet.

Countrywide pays Radian each month in a lump sum for all of the policies it holds and includes file information on each policy. When the Whitfields refinanced their house, cancelling the Countrywide mortgage, Radian issued a pro rated refund check directly to the Whitfields. By the time the Whitfields refinanced their mortgage, the value of the house had appreciated enough that mortgage insurance was unnecessary.

The Whitfields brought this action in January 2004, alleging Radian failed to notify them of an adverse action based on their credit report in violation of Section 1681m of the FCRA. The Whitfields asked for certification of class of all others who paid more than the lowest rate for mortgage insurance and were not notified of the adverse action.

DISCUSSION

A motion for summary judgment will only be granted if there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). The moving party bears the burden of proving no genuine issue of material fact is in dispute and the court must review all of the evidence in the record and draw all reasonable inferences in favor of the nonmoving party. *Matsushita Elec. Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986); *Stephens v. Kerrigan*, 122 F.3d 171, 176-77 (3d Cir. 1997). The moving party must "bear the initial responsibility of informing the district court of the basis for its motion, and identify[] those portions of the pleadings, depositions, answers to interrogatories, and

admissions on file, together with the affidavits, if any, which it believes demonstrate the absence of a genuine issue of material fact." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986) (internal citations omitted). Once the moving party has carried its initial burden, the nonmoving party must then "come forward with specific facts showing there is a genuine issue for trial." *Matsushita*, 475 U.S. at 587 (citing Fed. R. Civ. P. 56(e)). A motion for summary judgment will not be denied because of the mere existence of some evidence in support of the nonmoving party. *Orsatti v. N.J. State Police*, 71 F.3d 480, 482 (3d Cir. 1995). The nonmoving party must present sufficient evidence for a jury to reasonably find for it on that issue. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986).

The nonmoving party cannot rest on his allegations without "any significant probative evidence tending to support the complaint." *Id.*; *see also Williams v. Borough of West Chester*, 891 F.2d 458, 460 (3d Cir. 1989) (stating that a non-moving party must "adduce more than a scintilla of evidence in its favor . . . and cannot simply reassert factually unsupported allegations contained in its pleadings"). The court must decide whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law. *Liberty Lobby*, 477 U.S. at 248. In considering a motion for summary judgment, a court does not resolve factual disputes or make credibility determinations and must view the facts and inferences in the light most favorable to the party opposing the motion. *Big Apple BMW, Inc. v.*

BMW of North America, Inc., 974 F.2d 1358, 1363 (3d Cir. 1992), *cert. denied*, 507 U.S. 912 (1993).

The FCRA requires any entity or any entity under common ownership or affiliated by common corporate control to provide a consumer with notice of any adverse action. 15 U.S.C. § 1681m(b)(2). The FCRA defines an "adverse action" 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, in connection with the underwriting of insurance . . . ." 15 U.S.C. § 1681a(k)(1)(B)(i). Radian agrees the Whitfields rate for mortgage insurance was not the lowest rate and that its increase was triggered by their credit score. Radian also agrees it did not give notice to the Whitfields. The question in this motion for summary judgment is whether Radian was obligated to give the Whitfields notice or, stated in the alternative, whether Radian's rate was an adverse action against the Whitfields.

Radian argues it did not take any adverse action under the FCRA with respect to the Whitfields when it sold mortgage insurance to Countrywide, there was no credit transaction between Radian and the Whitfields and the use of the Whitfields credit score was not an adverse action because there was no cancellation, change in coverage or premium increase.

The case law Radian cites for its argument that an initial premium is not an increase under FCRA and is, therefore, not an adverse action has been

abrogated by *Reynolds v. Hartford Financial Services Group, Inc.*, -- F.3d --, 2005 WL 2416126 (9th Cir. October 3, 2005), which held the adverse action notice requirements apply to initial rates for automobile and homeowners insurance. *Reynolds* abrogates *Razilov v. Nationwide Mutual Ins. Co.*, 242 F. Supp. 2d 977, 989 (D. Or. 2003) and *Ashby v. Farmers Group, Inc.*, 261 F. Supp. 2d 1213, 1215 (D. Or. 2003),[2] both of which held parent companies were not liable for the actions of their subsidiaries.[3] The Ninth Circuit held in the consolidated cases in *Reynolds* all three insurers acted with reckless disregard of the consumers rights under FCRA in failing to provide notice of adverse action. *Reynolds*, 2005 WL 2416126, at *14. *Reynolds* is not analogous to the case at hand because *Reynolds* involves direct

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[2] A court in this district relied on *Ashby* to find Federal Home Loan Mortgage Corporation (Freddie Mac) was not subject to the notice requirements of FCRA when it licensed Loan Prospector to approved mortgage lenders to determine if a loan, given a particular applicant's credit history, would meet Freddie Mac's requirements for purchase on the secondary market. *Weidman v. Federal Home Loan Mortg. Corp.*, 338 F. Supp. 2d 571, 573 (E.D. Pa. 2004). In a decision pre-dating *Reynolds*, the court found Freddie Mac was not subject to the FCRA because it was an agent of the lender. *Weidman*, 338 F. Supp. 2d at 575.

[3] *Reynolds* also abrogates *Mark v. Valley Ins. Co.*, 275 F. Supp. 2d 1307 (D. Or. 2003), which Radian cites for the proposition that an initial insurance premium is not an increase under the FCRA. *See also Spano v. Safeco Corp.*, 140 Fed. Appx. 746, 747 (9th Cir. 2005) (holding an initial rate is an adverse action, underwriters are liable and failing to provide notice is willful, overruling *Spano v. SAFECO Ins. Co. of America*, 215 F.R.D. 601 (D. Or. 2003), which Radian cites).

transactions between insurance companies and their customers.[4]

The Whitfields argue the relationship between a parent company and its subsidiaries is analogous to the relationship between Countrywide and Radian, triggering a notice requirement under *Reynolds*. The *Reynolds* court held "[w]ith regard to insurance transactions, liability attaches whenever an adverse action is taken in connection with the underwriting of insurance." *Reynolds*, 2005 WL 2416126, at *10 (quoting 15 U.S.C. § 1681a(k)(1)(B)(i)). Both *Ashby* and *Razilov* involved an affiliation between the insurer and the underwriter. In *Ashby*, the district court granted summary judgment to Farmers Group Inc. on grounds it acted only as an agent for Farmers Insurance Company of Oregon. *Ashby*, 261 F. Supp. 2d at 1215. In *Razilov*, the court granted summary judgment because it was a parent company which set rates for it subsidiary, which in turn wrote the policy. *Razilov*, 242 F. Supp. 2d at 983. The *Reynolds* court held "any person" included rate-setting parent companies and initial rates constitute adverse action. *Reynolds*, 2005 WL 2416126, at *10; 15 U.S.C. §

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[4] Radian also cites *Karwo v. Citimortgage, Inc.*, 2004 WL 2033445 (N.D. Ill. 2004), for the proposition privity is required to trigger the notice requirements of the FCRA. The court reconsidered its holding in Karwo that the catch-all provision governed mortgage insurance in *Karwo v. CitiMortgage, Inc.*, 2005 WL 670640 (N.D. Ill. 2005), which held the catch-all provision does not apply to private mortgage insurance, the insurance section does. *Karwo*, 2005 WL 670640, at *1. The court declined to decide whether higher rate was an adverse action because the plaintiff rejected the insurance and cancelled the loan the next day.

1681m(b)(2). The holding in *Reynolds* is not controlling here because Radian and Countrywide are not affiliated.

Three cases across the country considering whether a private mortgage insurer owes an adverse action notice to a credit-impaired borrower have denied summary judgment on facts similar to those here. I respectfully disagree with my brethren in Florida and Kentucky. In the most recent, *Broessel v. Triad Guaranty Insurance Corp.*, 2005 U.S. Dist. LEXIS 20361, 2005 WL 2260498 (W.D. Ky. 2005),[5] in facts strikingly similar to the ones at hand, Countrywide submitted Broessel's loan information to the Federal National Mortgage Association's (Fannie Mae) Desktop Underwriter which electronically tells lenders whether Fannie Mae would consider purchasing the loan on the secondary market. *Broessel* at *1. Fannie Mae informed Countrywide it would require the borrower to pay mortgage insurance. *Id.* Broessel agreed to pay $ 342.61 for the mortgage insurance premium as part of her regular mortgage payment, which Countrywide then used to pay the mortgage insurer. *Broessel* at *2. Countrywide selected Triad to provide the mortgage insurance the day after the closing at a rate that was not Triad's lowest. *Id.* Triad did not send an "adverse action" notice to Broessel. *Id.*

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[5] Also brought by the Whitfields' attorneys James, Hoyer, Newcomer & Smiljanich. The same firm also brought *Price v. United Guaranty Residential Insurance Co.*, 2005 WL 265164 (N.D. Tex. 2005), which is pending.

The *Broessel* court analyzed the claims under the insurance prong of the FCRA, not the catch-all or credit provisions and found a higher initial rate would be an adverse action. *Id.* at *3. With those two steps, I agree. My analysis diverges from that of the *Broessel* court on the question of the relationship between the consumer and the mortgage insurance issuer. The *Broessel* court looked at the question of privity of contract and rightfully found privity between the parties is not a condition precedent to triggering the notice provision of the FCRA. *Broessel* at *5. *See also* 15 U.S.C. § 1681m(a); *Treadway v. Gateway Chevrolet Oldsmobile Inc.*, 362 F.3d 971, 974 (7th Cir. 2004); *Crane v. American Home Mortgage, Corp.*, 2004 WL 1529165 (E.D. Pa. 2004).

I agree with the *Broessel* court it is disingenuous for the mortgage insurer to try to avoid responsibility under FCRA on grounds it was the receiver not the provider of the borrower's credit score. In this case, it is a distinction without a difference because the mortgage insurer's obligation would be the same whether it provided or received a credit report, if it had an obligation. The transaction in *Broessel* and in the case at hand was between the mortgage insurer and the lender, not the borrower. The *Broessel* court chose to deny summary judgment.[6]

In Florida, the court in *Glatt v. The PMI Group, Inc. et al.*, No. 03-326 (M.D. Fla. January 2, 2004), declined to grant a Motion to Dismiss under Rule 12(b)(6). On facts substantially identical to those in *Broessel* and the case at hand, the defendants argued

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[6] The case is scheduled for trial after November 1, 2005.

the complaint should be dismissed because setting a rate for mortgage insurance was not an increase for the purposes of the FCRA. Slip op. at 3. The court made short work of that argument, suggesting whether it was an increase was "a factual matter which cannot be resolved on a motion to dismiss." Slip op. at 6. The question has been resolved in the Ninth Circuit, at least, by *Reynolds*, which held a higher initial insurance premium triggers the FCRA.

The *Glatt* court relied on a decision two weeks earlier, also in the Middle District of Florida, *Preston v. Mortgage Guaranty Insurance Corp. of Milwaukee*, No. 03-111 (M.D. Fla. December 19, 2003). Again on substantially similar facts, the court denied the defendant's motion for judgment on the pleadings, finding the insurance section applicable and no statutory requirement of privity. *Preston*, slip op. at 8. The court reasoned it would be premature to determine whether the cost of mortgage insurance constituted an adverse action. *Id.*

The courts in all three cases, *Broessl*, *Glatt*, and *Preston*, moved directly to the question of whether the mortgage insurer took adverse action with respect to a consumer without considering whose risk was insured. Private mortgage insurance does not protect a borrower against his own inability to pay; mortgage insurance protects the lender against a default by the borrower. The rate is set by the degree of risk the insurer undertakes. That degree of risk is determined in part by the credit score of the borrower, but the action is only indirectly adverse to the borrower. The rate set is the rate the mortgage insurer charges the lender not the borrower.

The relationship between mortgage insurer and lender is clearer in *Hinton v. Federal National Mortgage Ass'n*, 945 F. Supp. 1052 (S.D. Tex. 1996). *Hinton* is a deceptive trade practices case, not a FCRA case, but the question is the same: whether a lender was obliged to notify the borrower it could have waived the cost of mortgage insurance. The plaintiff in *Hinton* was obligated under his mortgage to escrow taxes, insurance and mortgage insurance payments. At the time of the suit, the mortgage was held by the Federal National Mortgage Association and serviced by Magnolia Federal Bank. The *Hinton* court found "with the rise in the secondary market for mortgages, nongovernmental insurers expanded to cover other segments of the business. As a consequence of government regulations, the cost of mortgage insurance is a separate item on the loan disclosure to the borrower." *Id.* at 1055. The *Hinton* court resolved its question when it found "the terms of its payment are clearly specified in the deed of trust and other papers the borrower signs." *Id.* The court stated "although lenders 'charge' the borrower for mortgage insurance premiums, the lender is the insured, not the borrower. If the borrower defaults, he is not protected at all by the mortgage insurance because, after paying the lender's claim, the insurer may sue the borrower on the note." *Id.* The court held that, at most, the borrower was an incidental beneficiary who had no cause of action. *Id.* at 1058. I agree with the *Hinton* court that the contract at issue in these cases is between the mortgage insurer and the lender.

The Whitfields ask this Court to accept that they paid premiums to Radian because "every month,

100% of the mortgage insurance premium amount of $ 903.58 was disbursed from Plaintiffs' escrow account and went to Radian with a detailed accounting." Pls.' Resp. at 4. I agree with the Whitfields' argument that no contractual relationship is necessary to trigger the protections of the FCRA and that any analysis of the transaction at hand comes under the insurance prong and not the credit prong of the FCRA.[7] That agreement does not, however, require me to find the rate charged Countrywide for mortgage insurance was an action adverse to the Whitfields. The insurance transaction was one between Radian and Countrywide. The insurance transaction had the effect of determining what a mortgage would cost the Whitfields only to the extent Countrywide is risk averse. The premium paid allowed the Whitfields to obtain a mortgage, but the beneficiary of the insurance was Countrywide.

Under the FCRA, a user of credit information must advise the consumer of the name and address of the consumer reporting agency that provided the report when the consumer is adversely affected by the dissemination of information provided for employment purposes. 15 U.S.C. § 1681m.[8] The aim

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[7] Because of the resolution in favor of Radian on this motion for summary judgment, I need not consider the effect of a counteroffer on analysis of the notice requirement under the credit prong.

[8] 15 U.S.C. § 1681(m). **Requirements on users of consumer reports**

(a) Duties of users taking adverse actions on basis of information contained in consumer reports. If any person takes any adverse action with respect to any consumer that is based

of this notice requirement is "to enable the subject of a consumer report to request disclosure from the reporting agency of the nature and scope of the information in his file." *Fischl v. General Motors Acceptance Corp.*, 708 F.2d 143, 149 (5th Cir. 1983).

The notice requirement, while not onerous, is not insignificant. Section 1681m would require Radian to enter into correspondence with consumers with whom the company had no direct contact. Radian did not become Countrywide's mortgage insurer until three days **after** the Whitfields settled

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in whole or in part on any information contained in a consumer report, the person shall--

(1) provide oral, written, or electronic notice of the adverse action to the consumer;

(2) provide to the consumer orally, in writing, or electronically--

(A) the name, address, and telephone number of the consumer reporting agency (including a toll-free telephone number established by the agency if the agency compiles and maintains files on consumers on a nationwide basis) that furnished the report to the person; and

(B) a statement that the consumer reporting agency did not make the decision to take the adverse action and is unable to provide the consumer the specific reasons why the adverse action was taken; and

(3) provide to the consumer an oral, written, or electronic notice of the consumer's right--

(A) to obtain, under section 1681j of this title, a free copy of a consumer report on the consumer from the consumer reporting agency referred to in paragraph (2), which notice shall include an indication of the 60-day period under that section for obtaining such a copy; and

(B) to dispute, under section 1681i of this title, with a consumer reporting agency the accuracy or completeness of any information in a consumer report furnished by the agency.

on their house. An adverse action notice from Radian could have the effect of interfering with a contractual relation between Countrywide and Whitfield. If Countrywide had given the Whitfields notice before settlement (which arguably it did), the Whitfields would have had a meaningful opportunity to correct their credit report, fulfilling the purpose of the FCRA. Notice from Radian after settlement would be meaningless.

Because I find Radian's insurance relationship was with Countrywide and not the Whitfields, I will grant Radian's motion for summary judgment. The Whitfields motion for class certification and Radian's motion for summary judgment for lack of standing are moot. I will enter an appropriate order.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF
PENNSYLVANIA

WHITNEY WHITFIELD and CELESTE WHITFIELD, and all others similarly situated	:	CIVIL ACTION
v.	:	NO. 04-0111
RADIAN GUARANTY, INC.	:	

ORDER

And now this 21st day of October, 2005, Defendant's Motion for Summary Judgment (document 34) is GRANTED, Defendant's Motion for Summary Judgment for Lack of Standing (document 32) is DENIED as moot and Plaintiff's Motion to Certify Class (document 29) is DENIED as moot. Judgment is entered in favor of Defendant, Radian Guaranty, Inc. and against Plaintiffs, Whitney and Celeste Whitfield.

BY THE COURT:

/s/Juan R. Sánchez
Juan R. Sánchez, J.

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

NO. 05-5017

WHITNEY WHITFIELD;

CELESTE WHITFIELD,

on behalf of themselves and all others similarly situated,

Appellants

v.

RADIAN GUARANTY, INC.

SUR PETITION FOR REHEARING

Present: SCIRICA, Chief Judge, SLOVITER, McKEE, RENDELL, BARRY, AMBRO, FUENTES, SMITH, FISHER, CHAGARES, JORDAN, HARDIMAN and CUDAHY,* Circuit Judges

The petition for rehearing filed by Appellee Radian Guaranty, Inc. in the above-entitled case having been submitted to the judges who participated in the decision of this court and to all the other available

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* Hon. Richard D. Cudahy, United States Senior Circuit Judge for the United States Court of Appeals for the Seventh Circuit, sitting by designation, as to panel rehearing only.

circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court en banc, the petition for rehearing is denied.

By the Court,

/s/ Dolores K. Sloviter
Circuit Judge

Dated: September 24, 2007

APPENDIX D

15 U.S.C. § 1681a

§ 1681a. Definitions; rules of construction

(a) Definitions and rules of construction set forth in this section are applicable for the purposes of this title.

(b) The term "person" means any individual, partnership, corporation, trust, estate, cooperative, association, government or governmental subdivision or agency, or other entity.

(c) The term "consumer" means an individual.

(d) Consumer report.

(1) In general. The term "consumer report" means any written, oral, or other communication of any information by a consumer reporting agency bearing on a consumer's credit worthiness [creditworthiness], credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living which is used or expected to be used or collected in whole or in part for the purpose of serving as a factor in establishing the consumer's eligibility for--

(A) credit or insurance to be used primarily for personal, family, or household purposes;

(B) employment purposes; or

(C) any other purpose authorized under section 604.

(2) Exclusions. Except as provided in paragraph (3), the term "consumer report" does not include--

(A) subject to section 624, any--

(i) report containing information solely as to transactions or experiences between the consumer and the person making the report;

(ii) communication of that information among persons related by common ownership or affiliated by corporate control; or

(iii) communication of other information among persons related by common ownership or affiliated by corporate control, if it is clearly and conspicuously disclosed to the consumer that the information may be communicated among such persons and the consumer is given the opportunity, before the time that the information is initially communicated, to direct that such information not be communicated among such persons;

(B) any authorization or approval of a specific extension of credit directly or indirectly by the issuer of a credit card or similar device;

(C) any report in which a person who has been requested by a third party to make a specific extension of credit directly or indirectly to a consumer conveys his or her decision with respect to such request, if the third party advises the consumer of the name and address of the person to whom the request was made, and such person makes the disclosures to the consumer required under section 615; or

(D) a communication described in subsection (o) or (x).

(3) Restriction on sharing of medical information. Except for information or any communication of information disclosed as provided in section 604(g)(3), the exclusions in paragraph (2) shall not apply with respect to information disclosed to any person related by common ownership or affiliated by corporate control, if the information is--

(A) medical information;

(B) an individualized list or description based on the payment transactions of the consumer for medical products or services; or

(C) an aggregate list of identified consumers based on payment transactions for medical products or services.

(e) The term "investigative consumer report" means a consumer report or portion thereof in which information on a consumer's character, general reputation, personal characteristics, or mode of living is obtained through personal interviews with neighbors, friends, or associates of the consumer reported on or with others with whom he is acquainted or who may have knowledge concerning any such items of information. However, such information shall not include specific factual information on a consumer's credit record obtained directly from a creditor of the consumer or from a consumer reporting agency when such information was obtained directly from a creditor of the consumer or from the consumer.

(f) The term "consumer reporting agency" means any person which, for monetary fees, dues, or on a cooperative nonprofit basis, regularly engages in whole or in part in the practice of assembling or evaluating consumer credit information or other information on consumers for the purpose of furnishing consumer reports to third parties, and which uses any means or facility of interstate commerce for the purpose of preparing or furnishing consumer reports.

(g) The term "file", when used in connection with information on any consumer, means all of the information on that consumer recorded and retained by a consumer reporting agency regardless of how the information is stored.

(h) The term "employment purposes" when used in connection with a consumer report means a report used for the purpose of evaluating a consumer for employment, promotion, reassignment or retention as an employee.

(i) Medical information. The term "medical information"--

(1) means information or data, whether oral or recorded, in any form or medium, created by or derived from a health care provider or the consumer, that relates to--

(A) the past, present, or future physical, mental, or behavioral health or condition of an individual;

(B) the provision of health care to an individual; or

(C) the payment for the provision of health care to an individual.

(2) does not include the age or gender of a consumer, demographic information about the consumer, including a consumer's residence address or e-mail address, or any other information about a consumer that does not relate to the physical, mental, or behavioral health or condition of a consumer, including the existence or value of any insurance policy.

(j) Definitions relating to child support obligations.

(1) Overdue support. The term "overdue support" has the meaning given to such term in section 466(e) of the Social Security Act.

(2) State or local child support enforcement agency. The term "State or local child support enforcement agency" means a State or local agency which administers a State or local program for establishing and enforcing child support obligations.

(k) Adverse action.

(1) Actions included. The term "adverse action"--

(A) has the same meaning as in section 701(d)(6) of the Equal Credit Opportunity Act; and

(B) means--

(i) 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, in connection with the underwriting of insurance;

(ii) a denial of employment or any other decision for employment purposes that adversely affects any current or prospective employee;

(iii) a denial or cancellation of, an increase in any charge for, or any other adverse or unfavorable change in the terms of, any license or benefit described in section 604(a)(3)(D); and

(iv) an action taken or determination that is--

(I) made in connection with an application that was made by, or a transaction that was initiated by, any consumer, or in connection with a review of an account under section 604(a)(3)(F)(ii); and

(II) adverse to the interests of the consumer.

(2) Applicable findings, decisions, commentary, and orders. For purposes of any determination of whether an action is an adverse action under paragraph (1)(A), all appropriate final findings, decisions, commentary, and orders issued under section 701(d)(6) of the Equal Credit Opportunity Act by the Board of Governors of the Federal Reserve System or any court shall apply.

(l) Firm offer of credit or insurance. The term "firm offer of credit or insurance" means any offer of credit or insurance to a consumer that will be honored if the consumer is determined, based on

information in a consumer report on the consumer, to meet the specific criteria used to select the consumer for the offer, except that the offer may be further conditioned on one or more of the following:

(1) The consumer being determined, based on information in the consumer's application for the credit or insurance, to meet specific criteria bearing on credit worthiness [creditworthiness] or insurability, as applicable, that are established--

(A) before selection of the consumer for the offer; and

(B) for the purpose of determining whether to extend credit or insurance pursuant to the offer.

(2) Verification.

(A) that the consumer continues to meet the specific criteria used to select the consumer for the offer, by using information in a consumer report on the consumer, information in the consumer's application for the credit or insurance, or other information bearing on the credit worthiness [creditworthiness] or insurability of the consumer; or

(B) of the information in the consumer's application for the credit or insurance, to determine that the consumer meets the specific criteria bearing on credit worthiness [creditworthiness] or insurability.

(3) The consumer furnishing any collateral that is a requirement for the extension of the credit or insurance that was--

(A) established before selection of the consumer for the offer of credit or insurance; and

(B) disclosed to the consumer in the offer of credit or insurance.

(m) Credit or insurance transaction that is not initiated by the consumer. The term "credit or insurance transaction that is not initiated by the consumer" does not include the use of a consumer report by a person with which the consumer has an account or insurance policy, for purposes of--

(1) reviewing the account or insurance policy; or

(2) collecting the account.

(n) State. The term "State" means any State, the Commonwealth of Puerto Rico, the District of Columbia, and any territory or possession of the United States.

(o) Excluded communications. A communication is described in this subsection if it is a communication--

(1) that, but for subsection (d)(2)(D), would be an investigative consumer report;

(2) that is made to a prospective employer for the purpose of--

(A) procuring an employee for the employer; or

(B) procuring an opportunity for a natural person to work for the employer;

(3) that is made by a person who regularly performs such procurement;

(4) that is not used by any person for any purpose other than a purpose described in subparagraph (A) or (B) of paragraph (2); and

(5) with respect to which--

(A) the consumer who is the subject of the communication--

(i) consents orally or in writing to the nature and scope of the communication, before the collection of any information for the purpose of making the communication;

(ii) consents orally or in writing to the making of the communication to a prospective employer, before the making of the communication; and

(iii) in the case of consent under clause (i) or (ii) given orally, is provided written confirmation of that consent by the person making the communication, not later than 3 business days after the receipt of the consent by that person;

(B) the person who makes the communication does not, for the purpose of making the communication, make any inquiry that if made by a prospective employer of the consumer who is the subject of the communication would violate any applicable Federal or State equal employment opportunity law or regulation; and

(C) the person who makes the communication--

(i) discloses in writing to the consumer who is the subject of the communication, not later than 5 business days after receiving any request from the consumer for such disclosure, the nature and substance of all information in the consumer's file at the time of the request, except that the sources of any information that is acquired solely for use in making the communication and is actually used for no other purpose, need not be disclosed other than under appropriate discovery procedures in any court of competent jurisdiction in which an action is brought; and

(ii) notifies the consumer who is the subject of the communication, in writing, of the consumer's right to request the information described in clause (i).

(p) Consumer reporting agency that compiles and maintains files on consumers on a nationwide basis. The term "consumer reporting agency that compiles and maintains files on consumers on a nationwide basis" means a consumer reporting agency that regularly engages in the practice of assembling or evaluating, and maintaining, for the purpose of furnishing consumer reports to third parties bearing on a consumer's credit worthiness [creditworthiness], credit standing, or credit capacity, each of the following regarding consumers residing nationwide:

(1) Public record information.

(2) Credit account information from persons who furnish that information regularly and in the ordinary course of business.

(q) Definitions relating to fraud alerts.

(1) Active duty military consumer. The term "active duty military consumer" means a consumer in military service who--

(A) is on active duty (as defined in section 101(d)(1) of title 10, United States Code) or is a reservist performing duty under a call or order to active duty under a provision of law referred to in section 101(a)(13) of title 10, United States Code; and

(B) is assigned to service away from the usual duty station of the consumer.

(2) Fraud alert; active duty alert. The terms "fraud alert" and "active duty alert" mean a statement in the file of a consumer that--

(A) notifies all prospective users of a consumer report relating to the consumer that the consumer may be a victim of fraud, including identity theft, or is an active duty military consumer, as applicable; and

(B) is presented in a manner that facilitates a clear and conspicuous view of the statement described in subparagraph (A) by any person requesting such consumer report.

(3) Identity theft. The term "identity theft" means a fraud committed using the identifying information of another person, subject to such

further definition as the Commission may prescribe, by regulation.

(4) Identity theft report. The term "identity theft report" has the meaning given that term by rule of the Commission, and means, at a minimum, a report--

(A) that alleges an identity theft;

(B) that is a copy of an official, valid report filed by a consumer with an appropriate Federal, State, or local law enforcement agency, including the United States Postal Inspection Service, or such other government agency deemed appropriate by the Commission; and

(C) the filing of which subjects the person filing the report to criminal penalties relating to the filing of false information if, in fact, the information in the report is false.

(5) New credit plan. The term "new credit plan" means a new account under an open end credit plan (as defined in section 103(i) of the Truth in Lending Act) or a new credit transaction not under an open end credit plan.

(r) Credit and debit related terms.

(1) Card issuer. The term "card issuer" means--

(A) a credit card issuer, in the case of a credit card; and

(B) a debit card issuer, in the case of a debit card.

(2) Credit card. The term "credit card" has the same meaning as in section 103 of the Truth in Lending Act.

(3) Debit card. The term "debit card" means any card issued by a financial institution to a consumer for use in initiating an electronic fund transfer from the account of the consumer at such financial institution, for the purpose of transferring money between accounts or obtaining money, property, labor, or services.

(4) Account and electronic fund transfer. The terms "account" and "electronic fund transfer" have the same meanings as in section 903 of the Electronic Fund Transfer Act.

(5) Credit and creditor. The terms "credit" and "creditor" have the same meanings as in section 702 of the Equal Credit Opportunity Act.

(s) Federal banking agency. The term "Federal banking agency" has the same meaning as in section 3 of the Federal Deposit Insurance Act.

(t) Financial institution. The term "financial institution" means a State or National bank, a State or Federal savings and loan association, a mutual savings bank, a State or Federal credit union, or any other person that, directly or indirectly, holds a transaction account (as defined in section 19(b) of the Federal Reserve Act) belonging to a consumer.

(u) Reseller. The term "reseller" means a consumer reporting agency that--

(1) assembles and merges information contained in the database of another consumer reporting agency or multiple consumer reporting agencies concerning any consumer for purposes of furnishing such information to any third party, to the extent of such activities; and

(2) does not maintain a database of the assembled or merged information from which new consumer reports are produced.

(v) Commission. The term "Commission" means the Federal Trade Commission.

(w) Nationwide specialty consumer reporting agency. The term "nationwide specialty consumer reporting agency" means a consumer reporting agency that compiles and maintains files on consumers on a nationwide basis relating to--

(1) medical records or payments;

(2) residential or tenant history;

(3) check writing history;

(4) employment history; or

(5) insurance claims.

(x) Exclusion of certain communications for employee investigations.

(1) Communications described in this subsection. A communication is described in this subsection if--

(A) but for subsection (d)(2)(D), the communication would be a consumer report;

(B) the communication is made to an employer in connection with an investigation of--

(i) suspected misconduct relating to employment; or

(ii) compliance with Federal, State, or local laws and regulations, the rules of a self-regulatory organization, or any preexisting written policies of the employer;

(C) the communication is not made for the purpose of investigating a consumer's credit worthiness [creditworthiness], credit standing, or credit capacity; and

(D) the communication is not provided to any person except--

(i) to the employer or an agent of the employer;

(ii) to any Federal or State officer, agency, or department, or any officer, agency, or department of a unit of general local government;

(iii) to any self-regulatory organization with regulatory authority over the activities of the employer or employee;

(iv) as otherwise required by law; or

(v) pursuant to section 608.

(2) Subsequent disclosure. After taking any adverse action based in whole or in part on a communication described in paragraph (1), the employer shall disclose to the consumer a summary containing the nature and substance of the communication upon which the adverse action is based, except that the sources of information acquired solely for use in preparing what would be but for subsection (d)(2)(D) an investigative consumer report need not be disclosed.

(3) Self-regulatory organization defined. For purposes of this subsection, the term "self-regulatory organization" includes any self-regulatory organization (as defined in section 3(a)(26) of the Securities Exchange Act of 1934), any entity established under title I of the Sarbanes-Oxley Act of 2002, any board of trade designated by the Commodity Futures Trading Commission, and any futures association registered with such Commission.

15 U.S.C. § 1681m

§ 1681m. Requirements on users of consumer reports

(a) Duties of users taking adverse actions on the basis of information contained in consumer reports. If any person 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, the person shall--

(1) provide oral, written, or electronic notice of the adverse action to the consumer;

(2) provide to the consumer orally, in writing, or electronically--

(A) the name, address, and telephone number of the consumer reporting agency (including a toll-free telephone number established by the agency if the agency compiles and maintains files on consumers on a nationwide basis) that furnished the report to the person; and

(B) a statement that the consumer reporting agency did not make the decision to take the adverse action and is unable to provide the consumer the specific reasons why the adverse action was taken; and

(3) provide to the consumer an oral, written, or electronic notice of the consumer's right--

(A) to obtain, under section 612, a free copy of a consumer report on the consumer from the consumer reporting agency referred to in paragraph

(2), which notice shall include an indication of the 60-day period under that section for obtaining such a copy; and

(B) to dispute, under section 611, with a consumer reporting agency the accuracy or completeness of any information in a consumer report furnished by the agency.

(b) Adverse action based on information obtained from third parties other than consumer reporting agencies.

(1) In general. Whenever credit for personal, family, or household purposes involving a consumer is denied or the charge for such credit is increased either wholly or partly because of information obtained from a person other than a consumer reporting agency bearing upon the consumer's credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living, the user of such information shall, within a reasonable period of time, upon the consumer's written request for the reasons for such adverse action received within sixty days after learning of such adverse action, disclose the nature of the information to the consumer. The user of such information shall clearly and accurately disclose to the consumer his right to make such written request at the time such adverse action is communicated to the consumer.

(2) Duties of person taking certain actions based on information provided by affiliate.

(A) Duties, generally. If a person takes an action described in subparagraph (B) with respect to a consumer, based in whole or in part on information described in subparagraph (C), the person shall--

(i) notify the consumer of the action, including a statement that the consumer may obtain the information in accordance with clause (ii); and

(ii) upon a written request from the consumer received within 60 days after transmittal of the notice required by clause (i), disclose to the consumer the nature of the information upon which the action is based by not later than 30 days after receipt of the request.

(B) Action described. An action referred to in subparagraph (A) is an adverse action described in section 603(k)(1)(A), taken in connection with a transaction initiated by the consumer, or any adverse action described in clause (i) or (ii) of section 603(k)(1)(B).

(C) Information described. Information referred to in subparagraph (A)--

(i) except as provided in clause (ii), is information that--

(I) is furnished to the person taking the action by a person related by common ownership or affiliated by common corporate control to the person taking the action; and

(II) bears on the credit worthiness, credit standing, credit capacity, character, general

reputation, personal characteristics, or mode of living of the consumer; and

(ii) does not include--

(I) information solely as to transactions or experiences between the consumer and the person furnishing the information; or

(II) information in a consumer report.

(c) Reasonable procedures to assure compliance. No person shall be held liable for any violation of this section if he shows by a preponderance of the evidence that at the time of the alleged violation he maintained reasonable procedures to assure compliance with the provisions of this section.

(d) Duties of users making written credit or insurance solicitations on the basis of information contained in consumer files.

(1) In general. Any person who uses a consumer report on any consumer in connection with any credit or insurance transaction that is not initiated by the consumer, that is provided to that person under section 604(c)(1)(B), shall provide with each written solicitation made to the consumer regarding the transaction a clear and conspicuous statement that--

(A) information contained in the consumer's consumer report was used in connection with the transaction;

(B) the consumer received the offer of credit or insurance because the consumer satisfied the

criteria for credit worthiness [creditworthiness] or insurability under which the consumer was selected for the offer;

(C) if applicable, the credit or insurance may not be extended if, after the consumer responds to the offer, the consumer does not meet the criteria used to select the consumer for the offer or any applicable criteria bearing on credit worthiness or insurability or does not furnish any required collateral;

(D) the consumer has a right to prohibit information contained in the consumer's file with any consumer reporting agency from being used in connection with any credit or insurance transaction that is not initiated by the consumer; and

(E) the consumer may exercise the right referred to in subparagraph (D) by notifying a notification system established under section 604(e).

(2) Disclosure of address and telephone number; format. A statement under paragraph (1) shall--

(A) include the address and toll-free telephone number of the appropriate notification system established under section 604(e); and

(B) be presented in such format and in such type size and manner as to be simple and easy to understand, as established by the Commission, by rule, in consultation with the Federal banking agencies and the National Credit Union Administration.

(3) Maintaining criteria on file. A person who makes an offer of credit or insurance to a consumer under a credit or insurance transaction described in paragraph (1) shall maintain on file the criteria used to select the consumer to receive the offer, all criteria bearing on credit worthiness [creditworthiness] or insurability, as applicable, that are the basis for determining whether or not to extend credit or insurance pursuant to the offer, and any requirement for the furnishing of collateral as a condition of the extension of credit or insurance, until the expiration of the 3-year period beginning on the date on which the offer is made to the consumer.

(4) Authority of Federal agencies regarding unfair or deceptive acts or practices not affected. This section is not intended to affect the authority of any Federal or State agency to enforce a prohibition against unfair or deceptive acts or practices, including the making of false or misleading statements in connection with a credit or insurance transaction that is not initiated by the consumer.

(e) Red flag guidelines and regulations required.

(1) Guidelines. The Federal banking agencies, the National Credit Union Administration, and the Commission shall jointly, with respect to the entities that are subject to their respective enforcement authority under section 621--

(A) establish and maintain guidelines for use by each financial institution and each creditor regarding identity theft with respect to account holders at, or customers of, such entities, and update such guidelines as often as necessary;

(B) prescribe regulations requiring each financial institution and each creditor to establish reasonable policies and procedures for implementing the guidelines established pursuant to subparagraph (A), to identify possible risks to account holders or customers or to the safety and soundness of the institution or customers; and

(C) prescribe regulations applicable to card issuers to ensure that, if a card issuer receives notification of a change of address for an existing account, and within a short period of time (during at least the first 30 days after such notification is received) receives a request for an additional or replacement card for the same account, the card issuer may not issue the additional or replacement card, unless the card issuer, in accordance with reasonable policies and procedures--

(i) notifies the cardholder of the request at the former address of the cardholder and provides to the cardholder a means of promptly reporting incorrect address changes;

(ii) notifies the cardholder of the request by such other means of communication as the cardholder and the card issuer previously agreed to; or

(iii) uses other means of assessing the validity of the change of address, in accordance with reasonable policies and procedures established by the card issuer in accordance with the regulations prescribed under subparagraph (B).

(2) Criteria.

(A) In general. In developing the guidelines required by paragraph (1)(A), the agencies described in paragraph (1) shall identify patterns, practices, and specific forms of activity that indicate the possible existence of identity theft.

(B) Inactive accounts. In developing the guidelines required by paragraph (1)(A), the agencies described in paragraph (1) shall consider including reasonable guidelines providing that when a transaction occurs with respect to a credit or deposit account that has been inactive for more than 2 years, the creditor or financial institution shall follow reasonable policies and procedures that provide for notice to be given to a consumer in a manner reasonably designed to reduce the likelihood of identity theft with respect to such account.

(3) Consistency with verification requirements. Guidelines established pursuant to paragraph (1) shall not be inconsistent with the policies and procedures required under section 5318(l) of title 31, United States Code.

(f) Prohibition on sale or transfer of debt caused by identity theft.

(1) In general. No person shall sell, transfer for consideration, or place for collection a debt that such person has been notified under section 605B has resulted from identity theft.

(2) Applicability. The prohibitions of this subsection shall apply to all persons collecting a debt described in paragraph (1) after the date of a notification under paragraph (1).

(3) Rule of construction. Nothing in this subsection shall be construed to prohibit--

(A) the repurchase of a debt in any case in which the assignee of the debt requires such repurchase because the debt has resulted from identity theft;

(B) the securitization of a debt or the pledging of a portfolio of debt as collateral in connection with a borrowing; or

(C) the transfer of debt as a result of a merger, acquisition, purchase and assumption transaction, or transfer of substantially all of the assets of an entity.

(g) Debt collector communications concerning identity theft. If a person acting as a debt collector (as that term is defined in title VIII on behalf of a third party that is a creditor or other user of a consumer report is notified that any information relating to a debt that the person is attempting to collect may be fraudulent or may be the result of identity theft, that person shall--

(1) notify the third party that the information may be fraudulent or may be the result of identity theft; and

(2) upon request of the consumer to whom the debt purportedly relates, provide to the consumer all information to which the consumer would otherwise be entitled if the consumer were not a victim of identity theft, but wished to dispute the debt under provisions of law applicable to that person.

(h) Duties of users in certain credit transactions.

(1) In general. Subject to rules prescribed as provided in paragraph (6), if any person uses a consumer report in connection with an application for, or a grant, extension, or other provision of, credit on material terms that are materially less favorable than the most favorable terms available to a substantial proportion of consumers from or through that person, based in whole or in part on a consumer report, the person shall provide an oral, written, or electronic notice to the consumer in the form and manner required by regulations prescribed in accordance with this subsection.

(2) Timing. The notice required under paragraph (1) may be provided at the time of an application for, or a grant, extension, or other provision of, credit or the time of communication of an approval of an application for, or grant, extension, or other provision of, credit, except as provided in the regulations prescribed under paragraph (6).

(3) Exceptions. No notice shall be required from a person under this subsection if--

(A) the consumer applied for specific material terms and was granted those terms, unless those terms were initially specified by the person after the transaction was initiated by the consumer and after the person obtained a consumer report; or

(B) the person has provided or will provide a notice to the consumer under subsection (a) in connection with the transaction.

(4) Other notice not sufficient. A person that is required to provide a notice under subsection (a) cannot meet that requirement by providing a notice under this subsection.

(5) Content and delivery of notice. A notice under this subsection shall, at a minimum--

(A) include a statement informing the consumer that the terms offered to the consumer are set based on information from a consumer report;

(B) identify the consumer reporting agency furnishing the report;

(C) include a statement informing the consumer that the consumer may obtain a copy of a consumer report from that consumer reporting agency without charge; and

(D) include the contact information specified by that consumer reporting agency for obtaining such consumer reports (including a toll-free telephone number established by the agency in the case of a consumer reporting agency described in section 603(p)).

(6) Rulemaking.

(A) Rules required. The Commission and the Board shall jointly prescribe rules.

(B) Content. Rules required by subparagraph (A) shall address, but are not limited to--

(i) the form, content, time, and manner of delivery of any notice under this subsection;

(ii) clarification of the meaning of terms used in this subsection, including what credit terms are material, and when credit terms are materially less favorable;

(iii) exceptions to the notice requirement under this subsection for classes of persons or transactions regarding which the agencies determine that notice would not significantly benefit consumers;

(iv) a model notice that may be used to comply with this subsection; and

(v) the timing of the notice required under paragraph (1), including the circumstances under which the notice must be provided after the terms offered to the consumer were set based on information from a consumer report.

(7) Compliance. A person shall not be liable for failure to perform the duties required by this section if, at the time of the failure, the person maintained reasonable policies and procedures to comply with this section.

(8) Enforcement.

(A) No civil actions. Sections 616 and 617 shall not apply to any failure by any person to comply with this section.

(B) Administrative enforcement. This section shall be enforced exclusively under section 621 by the Federal agencies and officials identified in that section.

15 U.S.C. § 1681n

§ 1681n. Civil liability for willful noncompliance

(a) In general. Any person who willfully fails to comply with any requirement imposed under this title with respect to any consumer is liable to that consumer in an amount equal to the sum of--

(1) (A) any actual damages sustained by the consumer as a result of the failure or damages of not less than $ 100 and not more than $ 1,000; or

(B) in the case of liability of a natural person for obtaining a consumer report under false pretenses or knowingly without a permissible purpose, actual damages sustained by the consumer as a result of the failure or $ 1,000, whichever is greater;

(2) such amount of punitive damages as the court may allow; and

(3) in the case of any successful action to enforce any liability under this section, the costs of the action together with reasonable attorney's fees as determined by the court.

(b) Civil liability for knowing noncompliance. Any person who obtains a consumer report from a consumer reporting agency under false pretenses or knowingly without a permissible purpose shall be liable to the consumer reporting agency for actual damages sustained by the consumer reporting agency or $ 1,000, whichever is greater.

(c) Attorney's fees. Upon a finding by the court that an unsuccessful pleading, motion, or other paper filed in connection with an action under this section was filed in bad faith or for purposes of harassment, the court shall award to the prevailing party attorney's fees reasonable in relation to the work expended in responding to the pleading, motion, or other paper.