IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 04-35394

DOUGLAS ASHBY,
Plaintiff - Appellant,

CAROL PORTO, and GRANT WENZLICK,
Plaintiffs,

v.

FARMERS GROUP, INC.,
Defendant,

FARMERS INSURANCE COMPANY OF OREGON,
Defendant - Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

BRIEF OF THE FEDERAL TRADE COMMISSION AS *AMICUS CURIAE* SUPPORTING APPELLANTS AND URGING REVERSAL

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INTEREST OF THE FEDERAL TRADE COMMISSION

The Fair Credit Reporting Act ("FCRA" or "Act"), 15 U.S.C. § 1681 *et seq*., seeks to ensure the "[a]ccuracy and fairness of credit reporting," § 1681(a), which Congress recognized as important not only to the interests of individual consumers but also to the efficient functioning of the banking system. Congress has entrusted the Federal Trade Commission ("FTC" or "the Commission") with primary responsibility for governmental enforcement of the FCRA, while also affording consumers the right to bring private actions under the Act. §§ 1681n, 1681o, 1681s. The Commission regularly brings enforcement actions pursuant to this authority.[1] It has issued interpretive guidance regarding various aspects of the Act's requirements, 16 C.F.R. Part 600, and as directed by the Act, promulgated a Summary of Consumer Rights, Notice of User Responsibilities, and Notice of Furnisher Responsibilities, 16 C.F.R. Part 601. In addition, Congress recently passed the Fair and Accurate Credit

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[1] *See, e.g., United States v. Imperial Palace, Inc.*, No. CV-S-04-0963-RLH-PAL (D. Nev. July 16, 2004) (employer failed to provide adverse action notices to job applicants who were denied employment based on information in consumer reports); *FTC v. Associates First Capital Corp.*, No. 1:01-CV-00606 JTC (N.D. Ga. May 2003) (lender obtained consumer reports for impermissible purpose); *United States v. Equifax Credit Information Servs., Inc.*, No. 1:00-CV-00087 (N.D. Ga. Jan. 26, 2000) (failure to provide adequate consumer access for inquiries regarding consumer report errors); *United States v. NCO Group, Inc.*, No. 04-02041-TON (E.D. Pa. May 20, 2004) (debt collection company violated FCRA by furnishing consumer reporting agencies with inaccurate delinquency dates).

Transactions Act of 2003 ("FACTA"), P.L. 108-159, 117 Stat. 1952. This law adds numerous provisions to the FCRA

[2] Consumer reporting agencies are commonly known as "credit bureaus," and consumer reports are commonly known as "credit reports," although, as demonstrated by this case, the reports are used not only by creditors, but by employers, insurers, and others. *See* § 1681b (setting forth those persons who have a "permissible purpose" for receiving a consumer report from a consumer reporting agency).

thus provide them an opportunity to take steps to correct any such information.

In the present case, a district court has improperly dismissed a private lawsuit based on its conclusion that an insurance company does not violate the FCRA when it fails to inform the consumer that, based on information in a consumer report, the insurance company has set the initial price of that consumer's insurance higher than the price it would have offered if the information in the report had been more favorable. This holding flies in the face of the Act and its legislative history. It is also at odds with the Commission's Notice of User Responsibilities, which states that the term "adverse action" is defined "very broadly" by the FCRA to include all business actions "that can be considered to have a negative impact" on the consumer. 16 C.F.R. Part 601, App. C. The district court's decision will, if upheld, seriously weaken the enforcement of the Act and significantly undermine its protections in connection with the underwriting of insurance. Because the decision conflicts with the decision of another district court (*Scharpf v. AIG Marketing, Inc.*, 242 F. Supp. 2d 455 (W.D. Ky. 2003)), and because there is no appellate precedent with respect to this issue, the outcome of this case is of great importance to the Commission. The Commission has also filed briefs as *amicus curiae* supporting the appellants in three other cases in which the same issue arises (*Rausch v. The Hartford Financial Services Group, Inc.*, No. 03-35695 (9th Cir.), *Willes v. State Farm Fire and Casualty Co.*, No.

03-35848 (9th Cir.), *Spano v. SAFECO Insurance Co. of America*, No. 04-35313 (9th Cir.)).

S. Rep. No. 91-517 at 3 (1969).

The FCRA addresses this problem by requiring that, when any "person" (which includes an insurance company, *see* § 1681a(b)) takes any "adverse action" with respect to a consumer based even in part on information in a consumer report, that person must notify the consumer that adverse action was taken, and must furnish the consumer with the name and address of the consumer reporting agency that was the source of the report. § 1681m. The person must also inform the consumer that the FCRA allows the consumer to dispute the accuracy or completeness of information in the consumer report. *Id.* The Act further requires a consumer reporting agency, upon request, to provide a consumer with a copy of the report, § 1681g(a), and to provide that report free of charge, if the consumer makes the request within 60 days of receiving a notice of adverse action, § 1681j(b). The Act also requires the agency to reinvest4000 01200 0.000ET1.000atice

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to inform onsumeto . and

even learn that adverse action has occurred.

2. Factual Background

The relevant facts as found by the district court are as follows:

[3] Documents on the district court's docket are referred to as "D.xx."

the FCRA.[4] On March 17, 2004, the United States District Court for the District of Oregon (per Judge Brown) issued its Opinion and Order granting FICO's summary judgment motion with respect to the claims of plaintiff Ashby, and dismissing his claims(, o4compl)28to9.4000 120.2400is

[4] In an earlier version of the complaint, the plaintiffs had alleged that Farmers Group, Inc., which provides management services to FICO, had violated the FCRA in connection with insurance policies issued to them. The district court dismissed the complaint. It held that, because FICO, not Farmers Group, issued the insurance policies, Farmers Group could not, as a matter of law, take adverse action under the FCRA. *Ashby v. Farmers Group, Inc.*, 261 F. Supp. 2d 1213 (D. Ore. 2003). Plaintiffs have appealed that decision (No. 03-35673 (9th Cir.)). We take no position as to that appeal.

SUMMARY OF ARGUMENT

When an insurance company uses information in a consumer report to set the initialWhen

coverage. To the contrary, that history shows that Congress wanted to expand the range of situations in which unfavorable action based in whole or in part on a consumer report would lead to an adverse action notice. (Part B, *infra*.)

ARGUMENT

AN INSURANCE COMPANY THAT, BASED ON INFORMATION IN A CONSUMER REPORT, CHARGES A CONSUMER A HIGHER PRICE THAN IT WOULD HAVE CHARGED HAD THE INFORMATION BEEN MORE FAVORABLE, HAS TAKEN "ADVERSE ACTION" WITH RESPECT TO THAT CONSUMER

When an insurance company sets a higher initial price for insurance based on information in a consumer report, it takes an "adverse action," as that term is defined in § 1681a(k)(1)(B)(i) of the Act. The district court relied on its decision in *Mark v. Valley Ins. Co.*, *supra*, and misinterpreted this subpart. As a result, its opinion is at odds with the most natural reading of the statutory language, as well as with both the central purpose and legislative history of the FCRA.[5] This Court should reverse the district court's decision on this issue, a decision that, if upheld, would derail the FCRA's primary mechanism for promoting the accuracy and completeness of consumer reports.

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[5] The district court's opinion also conflicts with dicta in *Scharpf v. AIG Marketing, Inc.*, 242 F. Supp. 2d 455, 467 (W.D. Ky. 2003), where the court held that the term "adverse action" "should be read broadly" and should apply to any action whenever a consumer report is obtained for a permissible purpose and the user takes an action that is adverse to the consumer's interests.

A. The district court misinterpreted § 1681a(k)(1)(B)(i)

The district court misinterpreted § 1681a(k)(1)(B)(i). That section states:

> (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 * * *.

According to the court, FICO did not take adverse action, as defined by § 1681a(k)(1)(B)(i), because, even though it charged Mr. Ashby a higher price for his insurance based on information in his consumer report, FICO did not "increase" any charge. In the court's view, "an insurer does not increase a charge for insurance unless the insurer charges an insured one price for insurance and then subsequently increases that charge based on information in the insured's consumer credit report." D.135 at 5, *quoting Mark v. Valley Ins. Co.*, 275 F. Supp. 2d at 1317.[6] In *Mark v.*

[6] Pursuant to the court's reasoning, although an insurance company would have to provide a consumer with an adverse action notice if, based on a consumer report, it denied an application for insurance (because § 1681a(k)(1)(B)(i) specifically states that a denial of an application constitutes adverse action), the company would not have to provide a notice if it effectively achieved the same result by offering insurance to the consumer at a prohibitively high price.

Valley Ins. Co., the court observed that the dictionary definition of "increase" is "to make something greater or larger." 275 F. Supp. 2d at 1316. It then concluded that "[a]n insurer cannot 'make greater' something that did not exist previously." 275 F. Supp. 2d at 1316. In the court's view, its interpretation of this section comported with "the plain meaning of the language Congress chose to employ." *Id.*

In fact, the meaning of this section is not nearly so "plain." Although the court focused on the fact that "[a]n insurer cannot 'make greater' something that did not exist previously," it ignored that the insurance company's more favorable rates *did* exist at the time Mr. Ashby applied for insurance, and, presumably, FICO would have offered a lower rate if certain factors, including the information in Mr. Ashby's consumer report, had been more favorable. The unsupported premise of the district court's opinion is that the word "increase" refers only to an enlargement of a price previously offered to the specific consumer. But the district court was incorrect in supposing that reference to an "increased" price "plainly" refers only tET.21ice "plt

because she and other credit customers were quoted a higher base price for automobiles than cash customers, without any reference to such premium in TILA disclosures. In discussing the issues, the court of appeals consistently referred to the allegations of "increased" prices, even though there was no alleged *change* in prices over time. *See, e.g.*, 272 F.3d at 327 ("An increase in the base price of an automobile that is not charged to a cash customer, but is charged to a credit customer, *solely because he is a credit customer*, triggers TILA's disclosure requirements" (emphasis in original)). Similarly, if an insurance company charges higher rates than it would charge if the consumer's credit report had contained more favorable information (in other words, a higher price than the company offers consumers with better credit ratings), that higher price would be an "increase" over more favorable treatment. Such an increase should trigger an adverse action notice under the FCRA.

The district court's analysis artificially cabins the term "adverse action," and leads to a completely illogical result. In particular, § 1681a(k)(1)(B)(i) provides that "adverse action" encompasses "an increase in any charge for * * * any insurance * * * *applied for* * * *." (Emphasis added.) To avoid reading "applied for" out of the statute entirely, the court was forced to create a hypothetical sequence of events that defies common sense. Thus, it held that an insurance company increases the price of insurance "applied for" when it offers insurance "at one price and then

raise[s] that price after it review[s]" the consumer report. *Mark v. Valley Ins. Co.*, 275 F. Supp. 2d at 1317. The sequence of events hypothesized by the court is absurd because it assumes that an insurer would make a formal offer of insurance to a consumer and then, *after* making that offer, would evaluate the consumer's insurability. But when interpreting a statutory provision, a court should "not assume that Congress intended a statute to create odd or absurd results." *Rucker v. Davis*, 237 F.3d 1113, 1119 (9th C

Corp., 529 U.S. 120, 132-33 (2000)). The district court improperly ignored that maxim of statutory construction.

Even if the foregoing considerations do not themselves dictate adoption of plaintiffs' interpretation of the statute, they certainly show that the district court's restrictive approach is not the only plausible reading of the statute's text. Accordingly, the court should have gone beyond its truncated "plain meaning" analy

companies when, based in whole or in part on information in a consumer report, they charge a higher initial price for insurance. However, the requirements did not apply when consumer reports were used in connection with transactions that did *not* involve credit, insurance, or employment. The bills and committee reports leading up to the 1996 amendments (which added the definition of adverse action) show that the purpose of the amendments was to expand the adverse action notice requirements, not to contract them. However, just as the court misunderstood the relevant provisions of the FCRA, it also misunderstood the Act's legislative history.

For the first 26 years of its existence, the FCRA applied to the conduct that is at issue in this case. As originally enacted, the FCRA contained no definition of "adverse action" e

"increase"

[9] As originally proposed, the Senate's version required the consumer, upon learning of adverse action, to request the name of the consumer reporting agency. When it adopted the FCRA, Congress made it mandatory for a user of a consumer report to notify the consumer of the name of the consumer reporting agency. This was the only change that was made to the Senate version. *See* H.R. Conf. Rep. 91-1587 (1970), *reprinted at* 1970 U.S.C.C.A.N. 4411, 4416.

insurance companies use consumer reports to set initial prices, they did not apply in every situation in which a report user makes a decision unfavorable to the consumer. This was made clear by the Commission's Commentary on the Fair Credit Reporting Act. 55 Fed. Reg. 18804 (May 4, 1990, codified at 16 C.F.R. Part 600). This Commentary consolidated the Commission's interpretations with respect to each section of the FCRA and serves as guidance for consumer reporting agencies, users of consumer reports, and consumers. *See* 55 Fed. Reg. 18804. In the Commentary section discussing the obligations imposed by the Act on users of consumer reports, § 1681m, the Commission stated that:

> The Act does not require that a [consumer] report user provide any notice to consumers when taking adverse action not relating to credit, insurance or employment. For example, a landlord who refuses to rent an apartment to a consumer based on credit or other information in a consumer report need not provide the [adverse action] notice. Similarly, a party that uses credit or other information in a consumer report as a basis for refusing to accept payment by check need not comply with this section. Checks have historically been treated as cash items, and thus such refusal does not involve a denial of credit, insurance or employment.s6n ft1.00a0 0.00 TD0.000 TD(.sD(ent by c)Tj42.2.0000 0.001.0 .

were unfavorable to consumers.

The definition of "adverse action," which was added to the FCRA by the Consumer Credit Reporting Reform Act of 1996, P.L. 104-208, Title II, Subtitle D, Chap. 1, 110 Stat. 3009-426 - 3009-454 ("CCRRA"), was Congress's response to the statutory deficiencies pointed out by the Commission's 1990 Commentary. Although there were no committee reports issued in conjunction with enactment of the CCRRA, reports were issued in connection with several earlier versions of the statute,[10] and these make clear that the definition was added to the FCRA to expand the coverage of § 1681m. The first relevant committee report was issued in connection with the Consumer Reporting Reform Act of 1992. H.R. 3596, 102d Cong (1992). That bill proposed the following:

> The term "adverse action" -- * * *
>
> > (2) includes --
> >
> > > (A) any denial of, increase in any charge for, or reduction in the amount of, insurance for personal, family, or household purposes made

[10] Because the earlier versions were similar to the CCRRA, it is appropriate for this Court to consider those reports. *See Exxon Mobil*, 217 F.3d at 1251-53.

> an extension of credit; (II) a report for the cashing of a check drawn by the consumer; * * * (IV) an application for the leasing of real estate; and
>
> (ii) which is adverse to the interest of the consumer.

H.R. 3596, § 102(a). The report accompanying

(A) any denial of, increase in any charge for, or reduction in the amount of, insurance for personal, family, or household purposes made in connection with the underwriting of

> (3) Insurance -- A denial or cancellation of, or an increase in any charge for, or 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.

S.783, § 101(1994). Although this version contained introductory language that is not in the vers

the definition was intended to overturn the Commission's Commentary. S. Rep. 104-185, at 31-32 (1995). It further explained that it intended for adverse action to:

> include[]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 any amount of, any insurance, in connection with the underwriting of insurance. This portion of the definition applies to adverse determinations with respect to existing insurance or applications for new insurance.

Id. at 32. Again, there is no indication that S.650 was intended to narrow the coverage of the Act's adverse action requirements.

The district court made two errors in its analysis of the legislative history. *See Mark v. Valley Ins. Co.*, 275 F. Supp. 2d at 1317-18 (setting forth that analysis). First, it ignored the fact that, under the FCRA as it was originally enacted, an insurance company's decision, based on information in a consumer report, to charge a higher price would clearly have constituted adverse action, triggering the notice requirement of § 1681m. *See id.* Thus, the court's analysis failed to take into account that, when, in 1996, Congress added a definition of "adverse action" to the FCRA, it was not writing on a clean slate. The original version of the Act states that an adverse action notice is triggered when "the charge for such * * * insurance is increased." That version mandated an adverse action notice whenever an insurer charged a higher rate based on information in a consumer report. S. Rep. 91-517, at 7. The current

version states that adverse action means "an increase in any charge for * * * any insurance." There is no indication in any of the legislative history of the 1996 amendments of the FCRA that Congress intended to narrow the range of actions that would trigger the adverse action notice requirement. To the contrary, there is every indication that Congress intended the addition of a definition of "adverse action" to expand the range of actions triggering the notice requirement and to fill any gaps that the earlier version may have left. Thus, the current version, like the original one, applies to the actions taken by FICO with respect to Mr. Ashby.

The district court also erred by concluding that, because the definition of "adverse action" uses the verb "means," Congress intended the definition to be a narrow one. *Mark v. Valley Ins. Co.*, 275 F. Supp. 2d at 1318. According to the court, "[e]ach of the prior versions of the bill defined adverse action more broadly to 'include' specifically enumerated actions." Thus, the court held that the committee reports from 1992 through 1994 "do[] not clearly indicate that Congress meant something other than the plain meaning of the statutory language in § 1681a(k)(1)." *Id.*[11] In fact, although in the 103d Congress, the Senate's bill, S.783, used expansive language in the introductory portion of its definition, it did not use the verb "include"

[11] The court's opinion in *Mark v. Valley Ins. Co.* does not mention S.650 or S. Rep. 104-185.

[12] The district court gave no weight to the Commission's March 1, 2000, informal staff opinion letter, which explained that, based on the Act's legislative history, the term "adverse action" should be interpreted broadly. In particular, the court stated that the letter was contrary to the "plain meaning" of the Act. *Mark v. Valley Ins. Co.*, 275 F. Supp. 2d at 1318. As explained above, the court misinterpreted the Act. The court also rejected the letter because it was a staff opinion, not the product of formal agency action. *Id*. However, the staff opinion letter is in complete accord with the Commission's Notice of User Responsibilities, 16 C.F.R. Part 601, App. C, which is the product of formal agency action (*i.e.*, notice and comment rulemaking, *see* 62 Fed. Reg. 35586 (July 1, 1997)), and which states the Commission's view that the term "adverse action" is defined "very broadly" by the FCRA. In any event, the present brief has, in accordance with standard Commission practice regarding *amicus*

[13] Section 311 of FACTA, which Congress passed in 2003, amends § 615 of the FCRA (15 U.S.C. § 1681m) to require that, when, based on information in a consumer

CONCLUSION

For the reasons set forth above, this Court should hold that, when an insurance company charges a consumer a higher price for insurance based in whole or in part on information in a consumer report, that insurer has taken "adverse action," as that term is defined in § 1681a(k) of the FCRA, and § 1681m requires that insurer to provide a consumer with an adverse action notice.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

As required by Fed. R. App. P. 32(a)(7)(C), I certify that this brief is proportionally spaced and contains 6768 words. I relied on my word processor and its WordPerfect 10 software to obtain this count. I certify that the information on this form is true and correct to the best of my knowledge and belief formed after a reasonable inquiry.

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CERTIFICATE OF SERVICE

I hereby certify that on September 7, 2004, I served two copies of a copy of the Brief of the Federal Trade Commission as *Amicus Curiae* Supporting Appellants and Urging Reversal on appellants and appellees by express overnight delivery directed to:

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